OVERVIEW OF SECTION 1983 LITIGATION

Basic Principles; Post-*Heck/Wallace* Cases; Local Government Liability; Post-*Deshaney* Substantive Due Process Claims and Post-*Parratt/Hudson* Procedural Due Process Claims

Karen M. Blum (kblum@suffolk.edu)
Suffolk University Law School
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Author's Note

This outline is arranged under various topic headings that indicate problem areas likely to be encountered in the litigation of section 1983 cases. **The outline is not a substitute for the excellent treatises that exist on section 1983, but is intended as a useful research tool to keep informed of very recent case law and trends in this rapidly developing area.**

Please be advised that I do not use research assistants to prepare these outlines, so that any errors are my own. Each updated outline attempts to remove cases that may no longer be good law or to indicate any negative history of a case where important. **I would advise that you check the current status of any case you intend to rely on, especially a district court opinion.**

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Karen M. Blum (kblum@suffolk.edu)
Suffolk University Law School, Boston, MA
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I. PRELIMINARY PRINCIPLES

A. Deprivation of a Federal Right

Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Note that a plaintiff must assert the violation or deprivation of a right secured by federal law. The Court has recently held that a violation of *Miranda* does not in itself violate the Constitution and does not provide the basis for a claim under section 1983. *Compare* ***Vega v. Tekoh***, 142 S. Ct. 2095, 2101, 2105-06, 2108 (2022) ("The question we must decide is whether a violation of the *Miranda* rules provides a basis for a claim under § 1983. We hold that it does not. . . . In this case, the Ninth Circuit held—and Tekoh now argues. . . that a violation of *Miranda* constitutes a violation of the Fifth Amendment right against compelled self-incrimination, but that is wrong. *Miranda* itself and our subsequent cases make clear that *Miranda* imposed a set of prophylactic rules. Those rules, to be sure, are 'constitutionally based,'. . . but they are prophylactic rules nonetheless. . . . Contrary to the decision below and Tekoh's argument here, . . . our decision in *Dickerson*, 530 U. S. 428, did not upset the firmly established prior understanding of *Miranda* as a prophylactic decision. *Dickerson* involved a federal statute, 18 U. S. C. § 3501, that effectively overruled *Miranda* by making the admissibility of a statement given during custodial interrogation turn solely on whether it was made voluntarily. . . . The Court held that Congress could not abrogate *Miranda* by statute because *Miranda* was a 'constitutional decision' that adopted a 'constitutional rule,'. . . and the Court noted that these rules could not have been made applicable to the States if it did not have that status[.] . . . At the same time, however, the Court made it clear that it was not equating a violation of the *Miranda* rules with an outright Fifth Amendment violation. For one thing, it reiterated *Miranda*'s observation that 'the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were "at least as effective in apprising accused persons"' of their rights. . . Even more to the point, the Court rejected the dissent's argument that § 3501 could not be held unconstitutional unless '*Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements.'. . The Court's

answer, in substance, was that the *Miranda* rules, though not an explication of the meaning of the Fifth Amendment right, are rules that are necessary to protect that right (at least until a better alternative is found and adopted). . . Thus, in the words of the *Dickerson* Court, the *Miranda* rules are 'constitutionally based' and have 'constitutional underpinnings.'. . But the obvious point of these formulations was to avoid saying that a *Miranda* violation is the same as a violation of the Fifth Amendment right. What all this boils down to is basically as follows. The *Miranda* rules are prophylactic rules that the Court found to be necessary to protect the Fifth Amendment right against compelled self-incrimination. In that sense, *Miranda* was a 'constitutional decision' and it adopted a 'constitutional rule' because the decision was based on the Court's judgment about what is required to safeguard that constitutional right. And when the Court adopts a constitutional prophylactic rule of this nature, *Dickerson* concluded, the rule has the status of a 'La[w] of the United States' that is binding on the States under the Supremacy Clause . . . and the rule cannot be altered by ordinary legislation. This was a bold and controversial claim of authority. . . but we do not think that *Dickerson* can be understood any other way without (1) taking the insupportable position that a *Miranda* violation is tantamount to a violation of the Fifth Amendment, (2) calling into question the prior decisions that were predicated on the proposition that a *Miranda* violation is not the same as a constitutional violation, and (3) excising from the United States Reports a mountain of statements describing the *Miranda* rules as prophylactic. . . . Because a violation of *Miranda* is not itself a violation of the Fifth Amendment, and because we see no justification for expanding *Miranda* to confer a right to sue under § 1983, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.") ***with Vega v. Tekoh***, 142 S. Ct. 2095, 2108-11 (2022) (Kagan, J., joined by Breyer and Sotomayor, JJ., dissenting) ("The Court's decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), affords well-known protections to suspects who are interrogated by police while in custody. Those protections derive from the Constitution: *Dickerson* v. *United States* tells us in no uncertain terms that *Miranda* is a 'constitutional rule.'. . And that rule grants a corresponding right: If police fail to provide the *Miranda* warnings to a suspect before interrogating him, then he is generally entitled to have any resulting confession excluded from his trial. . .From those facts, only one conclusion can follow—that *Miranda*'s protections are a 'right[ ]' 'secured by the Constitution' under the federal civil rights statute. . . Yet the Court today says otherwise. It holds that *Miranda* is not a constitutional right enforceable through a § 1983 suit. And so it prevents individuals from obtaining any redress when police violate their rights under *Miranda*. I respectfully dissent. . . . Over and over, *Dickerson* labels *Miranda* a rule stemming from the Constitution. . . . In *Dickerson*, the Court considered a federal statute whose obvious purpose was to override *Miranda*. *Dickerson* held that *Miranda* is a 'constitutional decision' that cannot be 'overruled by' any 'Act of Congress.'. . To be sure, Congress may devise 'legislative solutions that differ[ ] from the prescribed *Miranda* warnings,' but only if those solutions are '"at least as effective."'. . *Dickerson* therefore instructs (as noted above) that *Miranda* sets a 'constitutional minimum.'. . No statute may provide lesser protection than that baseline. . . . So *Dickerson* is unequivocal: *Miranda* is set in constitutional stone. . . . Today, the Court strips individuals of the ability to seek a remedy for violations of the right recognized in *Miranda*. The majority observes that defendants may still seek 'the suppression at trial of statements obtained' in violation

of *Miranda*'s procedures. . . But sometimes, such a statement will not be suppressed. And sometimes, as a result, a defendant will be wrongly convicted and spend years in prison. He may succeed, on appeal or in habeas, in getting the conviction reversed. But then, what remedy does he have for all the harm he has suffered? The point of § 1983 is to provide such redress—because a remedy 'is a vital component of any scheme for vindicating cherished constitutional guarantees.'. . The majority here, as elsewhere, injures the right by denying the remedy. See, *e.g.*, *Egbert* v. *Boule*, 596 U. S. ___ (2022). I respectfully dissent.")

See also ***Blackmon v. Jones***, No. 23-3288, 2025 WL 869045, at *3 (7th Cir. Mar. 20, 2025) ("The officers have not asked for qualified immunity with respect to the counts of Blackmon's complaint that charge them with manufacturing evidence or coercing testimony. Their appeal is limited to Blackmon's contention that an unduly suggestive photo array or lineup *by itself* entitles an accused to damages. And our answer—that it does not—is limited to that issue. Blackmon's appropriate remedy on that subject would have been exclusion of evidence at trial, not damages. We have so far looked at this suit using the framework established by *Vega* in 2022. A different perspective would ask whether, in 2002, when the police obtained these identifications, it was clearly established that investigating officers could be personally liable under § 1983 for conducting a suggestive lineup. The answer is no. Before 2002 neither this circuit, nor any other, had held that an officer could be liable for employing suggestive identification procedures. . . And it did not become clearly established in the years between 2002 and 2022 that officers could be personally liable for suggestive identification procedures. Even as late as 2022, this circuit expressed uncertainty about how the law treats these situations, *Holloway v. Milwaukee*, 43 F.4th 760, 766 (7th Cir. 2022). At least one other circuit held that damages for suggestive identification procedures would be 'unprecedented and unwarranted' unless the officer misled the prosecutor or lied to the judge. *Wray v. New York*, 490 F.3d 189, 193 (2d Cir. 2007). We agree with *Wray* that any 'violation [of the right to a fair trial] was caused by the ill-considered acts and decisions of the prosecutor and trial judge' (and, here, defense counsel too). . . Blackmon has not cited, and we have not found, any appellate decision holding police officers liable in damages when judges allowed prosecutors to introduce suggestive identifications into evidence at trial. The absence of a clearly established right entitles the defendants in this case to qualified immunity."); ***Holloway v. City of Milwaukee***, 43 F.4th 760, 766 (7th Cir. 2022) ("This case is not about *Miranda.* But at oral argument, while the Court's decision in *Tekoh* was pending, we asked the parties whether the protection against unduly suggestive identification procedures is, like *Miranda*, only a trial right, or whether it is more broadly enforceable, through either a suit under section 1983 or otherwise. This is an important question, but we conclude that it need not be resolved in this opinion. The parties paid no heed to it until we raised the issue at oral argument. And there are at least two plausible answers: perhaps the right to be free from suggestive identification procedures is a substantive right that flows from the Due Process Clauses; or perhaps, even though a constitutional right, it is just a trial right that is not violated unless there is a tainted identification at trial. As we explain below, the outcome of Holloway's case does not turn on these distinctions. We thus flag the issue and save it for another day.")

The Court has also reaffirmed that the language "and laws" means what it says. *See* ***Health & Hospital Corporation of Marion County v. Talevski***, No. 21-806, 2023 WL 3872515, at *3 (U.S. June 8, 2023) ("'Laws' means 'laws,' no less today than in the 1870s, and nothing in petitioners' appeal to Reconstruction-era contract law shows otherwise. Consequently, as we have previously held, § 1983 can presumptively be used to enforce unambiguously conferred federal individual rights, unless a private right of action under § 1983 would thwart any enforcement mechanism that the rights-creating statute contains for protection of the rights it has created. . . We hold that the two FNHRA provisions at issue here do unambiguously create § 1983-enforceable rights. And we discern no incompatibility between private enforcement under § 1983 and the statutory scheme that Congress has devised for the protection of those rights. Accordingly, we affirm the lower court's judgment that respondent's § 1983 action can proceed in court. . . . We have been asked before to narrow the scope of this express authorization, *i.e.*, to read 'laws' to mean only 'civil rights or equal protection laws.'. . We declined to do so, reasoning that a straightforward reading of the 'plain language' of § 1983 is required. . .That should have been no surprise; 'Congress attached no modifiers to the phrase ["and laws"].' Since *Thiboutot*, we have crafted a test for determining whether a particular federal law actually secures rights for § 1983 purposes. . . But we have not previously doubted that any federal law can do so. . . . We have no doubt that HHC wishes § 1983 said something else. But that is 'an appeal better directed to Congress.'. . Hewing to § 1983's text and history (not to mention our precedent and constitutional role), we reject HHC's request, and reaffirm that 'laws' in § 1983 means what it says. . . .The FNHRA *can* create § 1983-enforceable rights. But do the two FNHRA provisions at issue in this case actually do so? In that respect, our precedent sets a demanding bar: Statutory provisions must *unambiguously* confer individual federal rights. . . For the reasons explained below, we conclude that the bar has been cleared with respect to the presently contested provisions [unnecessary-restraint and predischarge-notice provisions]. And while the FNHRA itself might nevertheless evince Congress's intent to preclude the use of § 1983 to enforce these particular rights, . . . we hold further that it does not.")

The Supreme Court has made clear that an officer's violation of state law in making an arrest does not make a warrantless arrest unreasonable under the Fourth Amendment where the arrest was for a crime committed in the presence of the arresting officer. ***Virginia v. Moore***, 128 S. Ct. 1598, 1607 (2008). *See also* ***Myrick v. Fulton County, Georgia***, 69 F.4th 1277, 1303 n.28 (11th Cir. 2023) ("It is true that Officers Delacruz, Cook, Whitaker, Roache, and Jackson were disciplined for violating Fulton County Jail policy with respect to the additional restraints. But violation of a local policy or procedure does not automatically mean that May's constitutional rights were violated. . . Simply because something is in violation of a policy, or even illegal, does not make it unconstitutional."); ***Flynn v. Donnelly***, No. 18-2590, 2019 WL 6522890, at *3 (7th Cir. Dec. 4, 2019) (not reported) ("In their brief, Pirro and Flynn stated without elaboration that they allege violations of 'Constitutionally protected rights to be free from illegal stops, questioning, interrogation, detention, charging, and incarceration.' But, even when repeatedly pressed at oral argument, they pointed only to state law for the proposition that their seizures violated the Fourth Amendment. A violation of state law, however, 'is completely immaterial as

to the question of whether a violation of the federal constitution has been established.'. . The appellants could not articulate what, apart from the illegitimate nature of the SAFE unit, purportedly violated their Fourth Amendment rights. Perhaps there was an argument to be made that deputizing civilians to make traffic stops violates the Fourth Amendment's standards apart from any violations of state law, but these plaintiffs did not make it. The judgment of the district court is AFFIRMED."); ***Oglesby v. Lesan***, 929 F.3d 526, 534 (8th Cir. 2019) ("Officer Hein and Deputy Lesan did not violate the Fourth Amendment solely by arresting Oglesby outside of the Lincoln city limits."); ***Cummings v. Dean***, 913 F.3d 1227, 1243 (10th Cir. 2019) ("[T]the district court's reasoning is flawed because it equates a violation of a clear obligation under *state* law . . . with a violation of clearly-established *federal* law. Whether Director Dean violated clearly-established state law in failing to set CBA-based rates, however, is an entirely separate question from whether that failure violated clearly-established federal law. And even if Director Dean had notice that his reading of the Act was incorrect as a matter of *state* law, this would not necessarily deprive him of qualified immunity from liability under *federal* law."); ***Hoffman v. Knoebel***, 894 F.3d 836, 845 (7th Cir. 2018) ("Everyone agrees that Knoebel and Snelling lacked any semblance of state-law authority to arrest DTC [Drug Treatment Court] participants. But, as *Virginia v. Moore*, 553 U.S. 164 (2008), makes clear, that flaw does not show that there was a federal constitutional violation. As the Court held in *Moore*, an arrest based on probable cause, even if prohibited by state law, does not violate the Fourth Amendment. . . Knoebel and Snelling acted pursuant to facially valid state warrants, and so probable cause to support the arrests either existed, or they reasonably believed that it did. . . That is not to say that all was well from a broader point of view. The extent to which Knoebel and Snelling exceeded their jurisdiction is quite troubling. Snelling was a bailiff whose arrest powers did not extend past the courthouse doors, and Judge Jacobi testified that he told Snelling not to arrest people. Knoebel had no conceivable basis for arrest authority, though in fairness she did not personally handcuff any participants. Both defendants misleadingly brought with them indicia of authority—badges, guns, and in one case a call of 'police'—when they had no actual authority. But these are all matters of state law: no one argues that any other aspects of the arrest would offend the Fourth Amendment. The warrants were valid, no excessive force was used, and each plaintiff was promptly taken to the DTC. This does not add up to a Fourth Amendment violation."); ***Hurem v. Tavares***, 793 F.3d 742, 746-47 (7th Cir. 2015) ("We begin with a point that could, on its own, dispose of this argument: 'state restrictions do not alter the Fourth Amendment's protections.' [citing *Virginia v. Moore*] . . . A state may 'choose[ ] to protect privacy beyond the level that the Fourth Amendment requires,' but the Fourth Amendment requires only that an arrest be based upon probable cause, which 'serves interests that have long been seen as sufficient to justify the seizure.'. .The remedy for a violation of such a state law is in state court. We recognized in *Gordon v. Degelmann*, 29 F.3d 295, 301 (7th Cir .1994), that Illinois's forcible entry statute imposes a prior procedural requirement before a person can be removed from a particular property: there must be a judicial hearing to determine a person's entitlement to remain. We observed that this procedure went beyond what the Fourth Amendment requires and concluded that a police officer's failure to afford the plaintiff the hearing mandated by state law 'does not matter—not, at least, to a claim under the fourth amendment and § 1983,' given the plaintiff's violation of Illinois's criminal trespass law. . . So it is in Hurem's case, and

we decline his invitation to overrule *Gordon.*"); ***Bruce v. Guernsey***, 777 F.3d 872, 876 (7th Cir. 2015) ("[T]he constitutionality of a mental-health seizure does not depend on whether the officer met each requirement spelled out by Illinois state law. Whether or not an officer complied with these state law conditions may have some evidentiary value when determining whether that officer's conduct was reasonable, but a violation of the Illinois Mental Health and Developmental Disabilities Code does not constitute a *per se* violation of the Fourth Amendment. Our task instead is to see whether Harris and Guernsey had probable cause to believe that Bruce needed immediate hospitalization because she was a danger to herself or others."); ***Snider Intern. Corp. v. Town of Forest Heights, Md.***, 739 F.3d 140, 145 (4th Cir. 2014) ("A basic requirement of a 42 U.S.C. § 1983 violation is 'the depriv[ation] of a right secured by the Constitution and laws of the United States.'. . Conduct violating state law without violating federal law will not give rise to a § 1983 claim. . .We find Appellants' third challenge, which concerns whether the citations comply with the Maryland statute, misplaced in a § 1983 claim. Even if the citations violated Maryland law, the noncompliance would not violate federal law and thus cannot give rise to § 1983 relief. . . . The district court properly found that Appellants cannot pursue § 1983 relief for acts that allegedly violate only Maryland law."); ***Tebbens v. Mushol***, 692 F.3d 807, 818 (7th Cir. 2012) ("[I]t is firmly established that the Fourth Amendment permits an officer to make an arrest when he or she has probable cause to believe that an individual has committed or is committing an act which constitutes an offense under state law, *regardless* of whether state law authorizes an arrest for that particular offense."); ***Luckert v. Dodge County***, 684 F.3d 808, 819 (8th Cir. 2012) ("Failure to follow written procedures does not constitute *per se* deliberate indifference. If this were so, such a rule would create an incentive for jails to keep their policies vague, or not formalize policies at all. And the record in this case does not show any evidence, nor are we aware of any precedent, from which jail officials would know a thirty-minute suicide watch—as opposed to a twenty-minute watch—is constitutionally impermissible, or that keeping a suicide notebook is constitutionally required."); ***Johnson v. Phillips***, 664 F.3d 232, 238 (8th Cir. 2011) ("That Phillips lacked authority under state law to make an arrest does not establish that his conduct violated the Fourth Amendment. . . . The outstanding warrant gave Phillips probable cause to arrest Johnson, and that probable cause satisfied the Fourth Amendment."); ***Rieck v. Jensen***, 651 F.3d 1188, 1191, 1194 (10th Cir. 2011) ("[T]he Supreme Court has made it clear that the Fourth Amendment does not track property law. Twice the Supreme Court has held that a trespass by law-enforcement officers did not violate the Fourth Amendment. . . . [T]he end of the driveway near the gate did not fall within the curtilage of Rieck's home, and Jensen's entry into this area did not violate the Fourth Amendment."); ***Ault v. Speicher***, 634 F.3d 942, 947 (7th Cir. 2011) ("[E]ven if Plaintiff could show that Defendant violated Illinois law, failure to comply with state procedures does not demonstrate the violation of Plaintiff's clearly established constitutional due process rights."); ***Porro v. Barnes***, 624 F.3d 1322, 1329, 1330 (10th Cir. 2010) ("Policies are often prophylactic, setting standards of care higher than what the Constitution requires. And that's surely the case here. While the putative federal policy may totally forbid the use of tasers on immigration detainees, the Constitution doesn't go so far. The use of tasers in at least *some* circumstances − such as in a good faith effort to stop a detainee who is attempting to inflict harm on others – can comport with due process. . . . Simply put, the failure to enforce a prophylactic policy imposing a

standard of care well in excess of what due process requires cannot be – and we hold is not – enough by itself to create a triable question over whether county officials were deliberately indifferent to the Constitution. This isn't to say, of course, a county's failure to train its employees in a prophylactic policy is always or categorically irrelevant to the question of deliberate indifference. We need and do reject only Mr. Porro's claim that such a failure *alone* suffices to make out a claim of deliberate indifference."); ***Marksmeier v. Davie***, 622 F.3d 896, 901 (8th Cir. 2010) ("Despite Marksmeier's contention, it is unnecessary to decide whether Officer Davie was acting within his primary jurisdiction at the time he arrested Marksmeier because even if the arrest violated Nebraska law, it did not violate the Fourth Amendment. . . .Even assuming Nebraska law limited Officer Davie's geographic jurisdiction, Officer Davie had probable cause to believe Marksmeier committed a sexual assault on JP and a physical assault on SP, thus no Fourth Amendment violation occurred."); ***Edgerly v. City and County of San Francisco***, 599 F.3d 946, 956 n.14, 957 (9th Cir. 2010) ("In our previous opinion, we held that Edgerly's arrest was unconstitutional and that the Officers were not entitled to qualified immunity in light of the state law restriction on arrests for first-time offenses of this kind. . . We withdrew our opinion after the Supreme Court decided *Virginia v. Moore,* in which it held that such state arrest restrictions are irrelevant to our Fourth Amendment inquiry. . . We are now bound by *Moore,* and to the extent that *Bingham* and *Reed* are inconsistent with *Moore*, they are effectively overruled. . . . *Bull*, however, left undisturbed our line of precedent requiring reasonable suspicion to strip search arrestees charged with minor offenses who are not classified for housing in the general jail population. . . This precedent controls here because Edgerly was never placed in the general jail population, but was merely cited and released at the station."); ***Francis v. Giacomelli***, 588 F.3d 186, 195 (4th Cir. 2009) ("Commissioner Clark maintains that the Mayor did not have authority to terminate the Police Commissioner's employment, an allegation with which the Maryland Court of Appeals agreed in part. . . but that fact does not change the Fourth Amendment analysis. The fact that the Court of Appeals determined that Clark's firing was inconsistent with the Public Local Law of Baltimore City does not alone support the claim that the searches and seizures conducted in connection with the Mayor's effort to terminate Clark's employment violated the Fourth Amendment."); ***Holder v. Town Of Sandown***, 585 F.3d 500, 507, 508 (1st Cir. 2009) ("We have relied on *Moore* to hold that when a prisoner's conversation with his attorney was recorded in violation of a state regulation, that violation of state law did not operate to nullify, for purposes of Fourth Amendment analysis, the client's consent to the recording. *United States v. Novak,* 531 F.3d 99, 102 (1st Cir.2008). Our colleagues in other circuits have reached similar conclusions. In *Walker v. Prince George's County, Maryland*, 575 F.3d 426, 430 (4th Cir.2009), the Fourth Circuit, relying on *Moore,* held that, even if a county ordinance required a police officer to verify that the owner of a wolf lacked a license before seizing the wolf, breach of that requirement would not establish a violation of the Fourth Amendment. In *United States v. Brobst*, 558 F.3d 982, 989-90 (9th Cir.2009), the Ninth Circuit relied on *Moore* to reject an argument that a seizure and arrest was constitutional only if it complied with the protections from search and seizure afforded by Montana law. These cases demonstrate that *Moore* applies not only to cases where certain crimes are explicitly made unarrestable offenses, but also to cases where state procedural requirements are not followed. . . We therefore conclude that the New Hampshire statute is irrelevant to the

Fourth Amendment analysis that we must undertake to resolve the present claim. . . . From the foregoing analysis, we must conclude that, at the time he arrested Mr. Holder, the officer had sufficient information to conclude that the state offense of simple assault had taken place."); ***Bowling v. Rector***, 584 F.3d 956, 970 (10th Cir. 2009) ("We conclude that the warrant was valid under the Fourth Amendment. Whether or not Rector's alleged conduct in seeking the warrant violated Oklahoma law, it did not violate Bowling's constitutional rights."); ***Swanson v. Town of Mountain View, Colo.***, 577 F.3d 1196, 1201 (10th Cir. 2009) ("We agree with the plaintiffs that Colorado law does not permit officers to enforce traffic infractions outside their home jurisdiction. As we held in *United States v. Gonzales*, 535 F.3d 1174, 1182 (10th Cir.2008), when officers stop a suspect for a 'traffic violation outside their jurisdiction, they violate[ ] Colorado law.' But this violation of Colorado law does not necessarily mean the defendants violated the plaintiffs' federal constitutional rights."); ***Pasco ex rel. Pasco v. Knoblauch***, 566 F.3d 572, 579 (5th Cir. 2009) ("The district court concluded that Knoblauch's conduct violated clear Fourth Amendment law because Knoblauch 'was acting contrary to police department protocol' when he bumped Pasco off the road. However, the fact that Knoblauch acted contrary to his supervisor's order is constitutionally irrelevant. Violations of non-federal laws cannot form a basis for liability under § 1983, and qualified immunity is not lost because an officer violates department protocol."); ***Creusere v. Weaver***, 2009 WL 170667, at *7 (6th Cir. Jan. 26, 2009) ("Creusere alleges that KEPSB [Kentucky Education Professional Standards Board] failed to follow its own procedures because it did not give him a copy of a report in 1995 and did not hold a hearing in a timely fashion after charges were brought against Creusere. Even taking these allegations as true, it is not a constitutional violation for a state agency not to follow its own procedures. . . Therefore, KEPSB's alleged failure to give a copy of the report to Creusere is not a constitutional violation, nor is its delay in holding a hearing. . . Since no constitutional violation occurred, the KEPSB members are entitled to rely upon qualified immunity for their actions."); ***Taake v. County of Monroe***, 530 F.3d 538, 542 (7th Cir. 2008) ("Our caselaw already explains that mere breaches of contract by the government do not support substantive due process claims under the Constitution, . . . but we will explain it again, for the sake of future litigants who may think it a good idea to bring regular state-law contract claims to federal court *via* § 1983. When a state actor breaches a contract it has with a private citizen, and the subject matter of that contract does not implicate fundamental liberty or property interests, the state acts just like any other contracting private citizen . . . . [T]he proper tribunal to adjudicate issues arising from the contract (or alleged contract) is a state court . . . ."); ***Wilder v. Turner***, 490 F.3d 810, 814(10th Cir.2007) ("Of course a 'violation of state law cannot give rise to a claim under Section 1983.' *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1164 (10th Cir.2003). 'Section 1983 does not ... provide a basis for redressing violations of *state law*, but only for those violations of *federal law* done under color of state law.' *Jones v. City and County of Denver*, 854 F.2d 1206, 1209 (10th Cir.1988). 'While it is true that state law with respect to arrest is looked to for guidance as to the validity of the arrest since the officers are subject to those local standards, it does not follow that state law governs.' *Wells v. Ward*, 470 F.2d 1185, 1187 (10th Cir.1972). Nor, perhaps more importantly, are we bound by a state court's interpretation of federal law-in this case the Fourth Amendment."); ***Steen v. Myers***, 486 F.3d 1017, 1023 (7th Cir. 2007) ("The question of whether Myers's training indicated that he should stop the

pursuit likewise does not raise questions that implicate the Constitution. Various sections of the pursuit manual are quoted by both sides to support arguments about whether Myers complied with department directives. As the Court in *Lewis* noted, however, a failure to comply with departmental policy does not implicate the Constitutional protections of the Fourteenth Amendment."); ***Andujar v. Rodriguez***, 480 F.3d 1248, 1252 n.4 (11th Cir. 2007) ("Whether a government official acted in accordance with agency protocol is not relevant to the Fourteenth Amendment inquiry. . . Thus, Andujar's argument that a City of Miami Rescue Policy required Newcomb and Barea to transport Andujar to a treatment facility, even if correct, is without consequence."); ***United States v. Laville***, 480 F.3d 187, 196 (3d Cir. 2007) ("[W]e hold that the unlawfulness of an arrest under state or local law does not make the arrest unreasonable *per se* under the Fourth Amendment; at most, the unlawfulness is a factor for federal courts to consider in evaluating the totality of the circumstances surrounding the arrest."); ***Thompson v. City of Chicago***, 472 F.3d 444, 455 (7th Cir. 2006) ("Whether Officer Hespe's conduct conformed with the internal CPD General Orders concerning the use of force on an assailant was irrelevant to the jury's determination of whether his actions on December 5, 2000 were 'objectively reasonable' under the Fourth Amendment. It may be that Officer Hespe's possible violation of the CPD's General Orders is of interest to his superiors when they are making discipline, promotion or salary decisions, but that information was immaterial in the proceedings before the district court and was properly excluded. Instead, the jury in all probability properly assessed the reasonableness of Officer Hespe's split-second judgment on how much force to use by considering testimony describing a rapidly evolving scenario in which Thompson attempted to evade arrest by leading the police on a high speed chase, crashed his car, and actively resisted arrest."); ***Hannon v. Sanner***, 441 F.3d 635, 638 (8th Cir. 2006) ("Hannon's action is premised on an alleged violation of the constitutional rule announced in *Miranda* and subsequent decisions. The remedy for any such violation is suppression of evidence, which relief Hannon ultimately obtained from the Supreme Court of Minnesota. The admission of Hannon's statements in a criminal case did not cause a deprivation of any 'right' secured by the Constitution, within the meaning of 42 U.S.C. § 1983."); ***Bradley v. City of Ferndale***, 148 F. App'x 499, 2005 WL 2173780, at *6 (6th Cir. Sept. 8, 2005) ("[T]he violation of city policy is not in and of itself a constitutional violation under 42 U.S.C.§ 1983."); ***Waubanascum v. Shawano***, 416 F.3d 658, 667 (7th Cir.2005) ("Waubanascum suggests that Shawano County showed deliberate indifference by its 'long-standing custom of granting courtesy licenses without conducting investigations of the applicants.' Thus, he argues, 'Shawano County's policy was deliberately indifferent to a known risk to foster children.' Waubanascum seems to propose that state laws and regulations assume that failure to perform background checks necessarily will expose foster children to risk, thus constituting deliberate indifference. This argument misstates the legal standard, because it sidesteps the requirement that there be knowledge or suspicion of actual risk and substitutes the possibility of risk arising from the county's custom. Undoubtedly, foster children would be exposed to a heightened degree of risk if foster license applicants were subjected to no background checks at all. We may assume that it is this very concern that underlies Wisconsin's laws and regulations requiring such background checks before a foster license may be granted. But a failure to abide by a general statutory requirement for background checks cannot substitute for the requirement of actual knowledge or suspicion in the foster home context. . . . As noted, it is unclear

that Shawano County actually did violate Wisconsin law in effect at the time that the county granted Fry the courtesy foster license. But in any event, state law does not create a duty under the federal constitution, so even if Shawano County failed to abide by Wisconsin law, this would not by itself amount to a violation of Waubanascum's due process rights."); ***Tanberg v. Sholtis,*** 401 F.3d 1151, 1164, 1165 (10th Cir. 2005) ("Although plaintiffs frequently wish to use administrative standards, like the Albuquerque SOPs, to support constitutional damages claims, this could disserve the objective of protecting civil liberties. Modern police departments are able – and often willing – to use administrative measures such as reprimands, salary adjustments, and promotions to encourage a high standard of public service, in excess of the federal constitutional minima. If courts treated these administrative standards as evidence of constitutional violations in damages actions under § 1983, this would create a disincentive to adopt progressive standards. Thus, we decline Plaintiffs' invitation here to use the Albuquerque Police Department's operating procedures as evidence of the constitutional standard. The trial court's exclusion of the SOPs was particularly appropriate because Plaintiffs wished to admit not only evidence of the SOPs themselves, but also evidence demonstrating that the APD found that Officer Sholtis violated the SOPs and attempted to discipline him for it. Explaining the import of these convoluted proceedings to the jury would have been a confusing, and ultimately needless, task. The Albuquerque Chief of Police followed the recommendation of an internal affairs investigator to discipline Officer Sholtis both for making an impermissible off-duty arrest and for use of excessive force. An ad hoc committee subsequently reversed this decision. Additional testimony would have been necessary to help the jury understand the significance of these determinations and the procedures used to arrive at these contradictory results. This additional testimony explaining the procedures used at each step in the APD's investigation and decision-making would have led the jury ever further from the questions they were required to answer, and embroiled them in the dispute over whether Officer Sholtis's actions did or did not violate the SOPs. At the end of this time-consuming detour through a tangential and tendentious issue, the jury would have arrived at the conclusion that the APD itself seems to have been unable to resolve satisfactorily the question whether Plaintiffs' arrest violated the APD SOPs. . . . The similarity of the SOP addressing excessive force to the objective standard employed by state and federal law would render jury confusion even more likely, tempting the jury to conclude that if experienced police officers interpreted Officer Sholtis's actions as a violation of SOPs employing the same standards as the law, then Officer Sholtis must also have violated legal requirements. When, as here, the proffered evidence adds nothing but the substantial likelihood of jury confusion, the trial judge's exclusion of it cannot be an abuse of discretion."). *See also* ***Coleman v. Baker***, No. 3:19-CV-129 JD, 2023 WL 22126, at *4 n.3 (N.D. Ind. Jan. 3, 2023) ("Mr. Coleman also presents as evidence that Officer Baker violated the Michigan City Police use of force policy. This is not relevant to the Fourth Amendment inquiry. *Thompson v. City of Chicago*, 472 F.3d 444, 454 (7th Cir. 2006) ("[T]he violation of police regulations or even a state law is completely immaterial as to the question of whether a violation of the federal constitution has been established."). The parties did not submit a finding by the panel explaining how the policy was violated, but the Court notes a significant difference between the Michigan City Police Department policy and the constitutional standard. Policy Number 32, section V(B)(2) reads: 'Firearms shall not be discharged at a moving vehicle unless a

person in the vehicle is immediate threatening the officer or another person with deadly force by means other than the vehicle. The moving vehicle itself shall not presumptively constitute a threat that justifies an officer's use of deadly force.'. . This differs from the constitutional standard, where 'a car can be a deadly weapon.' *Brosseau v. Haugen*, 543 U.S. 194, 200 (2004).")

But see ***United States v. Proano***, 912 F.3d 431, 439-40 (7th Cir. 2019) ("Proano . . . argues that the government's evidence of his training was inadmissible, relying mostly on *Thompson v. City of Chicago*, 472 F.3d 444 (7th Cir. 2006). *Thompson* concerned 42 U.S.C. § 1983, and it held that the CPD's General Orders (essentially, formal policy statements) were not relevant to proving whether force was constitutional. . . This is because the Fourth Amendment, not departmental policy, sets the constitutional floor. . . Since *Thompson*, however, we have clarified that there is no per se rule against the admission of police policies or training. . . We explained in *Aldo Brown* that such a rule would be especially excessive in the § 242 context, where an officer's intent is at issue and the defendant has a constitutional right to present a defense. . . *Thompson* did not address whether evidence of police policy or training can be relevant to intent; § 1983, unlike § 242, is a civil statute that lacks a specific-intent requirement. . . *Thompson* therefore offers no guide here. Still, Proano presses, even if some evidence of training may be relevant, the government's evidence in this case was not because it concerned CPD-specific training. Proano seizes on language from *Aldo Brown*, which said that evidence of 'widely used standardized training or practice[s]' could be relevant to show an officer's intent in § 242 cases. . . Proano characterizes the CPD's training as 'localized' and not 'widely used,' and therefore not relevant. That characterization is suspect; the CPD is the second-largest police force in the country. . . Regardless, neither *Aldo Brown* nor common sense limits the pool of admissible training-related evidence of intent to national, model, or interdepartmental standards. Assuming those standards exist, . . . only evidence of training that the officer actually received can be relevant to his state of mind. . . Proano's remaining arguments go to the weight of the evidence, not its relevance. He asserts that the prohibition on shooting into windows and crowds was not relevant because that training did not concern cars. But as the district court reasonably concluded, four or five people in the back of a car could constitute a crowd. Proano also asserts that his firearms training was not relevant because that training occurred in a controlled environment. Yet Jamison testified that the firearms training was not training for training's sake, but rather it was intended to have real-word application. Proano's arguments were ones for the jury, not us. . . The probative value of an officer's training, like most any evidence, depends on case-specific factors. Those factors are too many to list, but no doubt included are the training's recency and nature, representativeness of reasonable practices, standardization, and applicability to the circumstances the officer faced. Whatever its ultimate strength, evidence of an officer's training can be relevant in assessing his state of mind. The district court carefully assessed the evidence and the state-of-mind inquiry in this case, and it did not abuse its discretion in admitting the evidence of Proano's training.").

See also ***Walton v. Dawson***, 752 F.3d 1109, 1122 (8th Cir. 2014) ("Here, Sheriff Dawson determined the 'best method[ ]' in this old jail, without cameras, was to lock the cell doors overnight, and he concluded that '[h]ad this policy been followed[,] it may have prevented this

very serious incident.'. . . Of course, violating an internal policy does not *ipso facto* violate the Constitution, but when that policy equates to the constitutional minimum under the totality of the circumstances, we appropriately focus on the objectively unconstitutional conduct which breaches the policy. . . Prison officials are not at liberty to violate the Constitution merely because doing so also happens to violate a prison policy.").

Compare ***McMullen v. Maple Shade Tp.***, 643 F.3d 96, 99, 100 (3d Cir. 2011) ("Although it is true that an arrest made in violation of state law does not necessarily give rise to a federal constitutional claim, . . . the issue in this appeal is whether an arrest pursuant to an allegedly *invalid* municipal ordinance directly offends the federal constitutional right to be free from unlawful arrest. . . . Thus, in certain circumstances, an arrest pursuant to a law that is unambiguously invalid for reasons based solely on state law grounds may constitute a Fourth Amendment violation actionable under § 1983. Here, however, McMullen has failed to state a viable Fourth Amendment claim because he cannot plead that the ordinance pursuant to which he was arrested is unambiguously invalid.") *with* ***McMullen v. Maple Shade Tp***. 643 F.3d 96, 101 & n.1, 102 (3d Cir. 2011) (Jordan, J., concurring) ("I join in the judgment of the Court that Maple Shade Township is not liable under 42 U.S.C. § 1983 for passing the ordinance at issue here. However, I write separately because I would not proceed on this record to create a new precedential standard making the validity of a municipal ordinance under state law relevant to a Fourth Amendment inquiry. As the Majority notes . . . Maple Shade's public drunkenness ordinance. . . has not been held invalid under New Jersey law and, to the contrary, can reasonably be read as being consistent with the state's Alcoholism Treatment and Rehabilitation Act ("ATRA"). . . . The Majority accurately states that '§ 1983 provides a remedy for violations of federal, not state or local, law.'. . Yet the Majority is creating a constitutional standard under which the Fourth Amendment reasonableness of an arrest turns on whether a local law is invalid for violating state, not federal, law. . . . [T]he question of whether the validity of a municipal ordinance under state law is relevant to a Fourth Amendment inquiry is not one we need to address to resolve this case. Because the plaintiff's fundamental premise that the Maple Shade ordinance and ATRA are necessarily in conflict is unsound, we should simply point that out and affirm the District Court in a non-precedential opinion.").

See also ***Clark v. Franklin County, Kentucky***, No. 3:21-CV-00026-GFVT-EBA, 2025 WL 942616, at *9 (E.D. Ky. Mar. 27, 2025) ("Even accepting the Plaintiffs' assertion that pursuing officers ran afoul of internal policies, . . . that fact does not save their otherwise unsuccessful constitutional case. . . Because the Court can discern no constitutional violation, it will dismiss any additional constitutional claims stemming from the chase, itself."); ***Strickland v. City of Las Cruces***, No. 23-CV-116 KG/KRS, 2025 WL 932187, at *5 (D.N.M. Mar. 27, 2025) ("Plaintiff states 'the Defendant Officers testified to being on notice that engaging in a PIT maneuver involving speeds of over 45 mph and with more than two police cars is unconstitutional.'. . However, Plaintiff provides no citation for such assertion and has not cited, nor has the Court found, caselaw establishing that an officer may not perform a PIT maneuver to stop a suspected fleeing felon who they reasonably believed was armed. While Plaintiff argues that there are guidelines for performing PIT maneuvers which Defendant Officers did not follow, this does not

equate to a violation of clearly established law. Accordingly, the Court grants Defendants' Motion for summary judgment on Count I only so far as Plaintiff alleges the PIT maneuver *alone* violated his Fourth Amendment rights."); ***Niarchos v. City of Beverly***, 831 F.Supp.2d 423, 434 & n. 13 (D. Mass. 2011) ("While this case is extraordinarily tragic on so many levels, I cannot ascribe legal responsibility to the defendants. The law is simply otherwise. I must find that the police did not restrain Danielle's 'freedom to act on h[er] own behalf,' *DeShaney*, 489 U.S. at 200, and, hence, Danielle was not in the state's custody. Therefore, Danielle had no constitutional right to the state's protection. . . .I draw this conclusion as a matter of federal constitutional law, which imposes a relatively high standard for liability. I note that there was evidence that the BPD violated their own regulations and policies which provided that family members were not to respond to incidents involving other family members. . . . The problem is that evidence of the violation of state policies is simply not enough under these circumstances to establish a violation of a federal constitutional right."); ***Mata v. City of Farmington***, 798 F.Supp.2d 1215, 1234, 1235 (D.N.M. 2011) ("Given the controlling law, the Court finds that evidence of violations of SOPs and training is irrelevant to whether Mata's and J.A.M.'s rights under the Fourth Amendment were violated. [citing *Tanberg*] Because this evidence is not relevant, the Court finds that this evidence is 'not admissible,' and the Court will exclude this evidence."); ***Taylor v. Martin***, No. 3:08 CV 2217, 2010 WL 1751991, at *2 (N.D. Ohio Apr. 30, 2010) ("[T]he fact that Taylor's arrest violated Ohio law is not determinative of whether his arrest violated the Fourth Amendment. . . Therefore, the appropriate inquiry is not simply whether Martin complied with Ohio law in arresting Taylor, but whether his conduct violated clearly-established Fourth Amendment standards."); ***Lillo v. Bruhn***, No. 3:06cv247/MCR/EMT, 2009 WL 2928774, at *4 (N.D. Fla. Sept. 9, 2009) ("Although the Baker Act establishes the substantive, state law standard for involuntary commitment, it has no effect on the Fourth Amendment. Indeed, it is irrelevant for Fourth Amendment purposes whether a seizure or an arrest violated state law, as long as it was supported by probable cause."); ***McGee v. City of Cincinnati Police Dept.***, No. 1:06-CV-726, 2007 WL 1169374, at *5 n.4 (S.D. Ohio Apr. 18, 2007) ("Plaintiff argues that the CCA's finding that Officer Rackley's use of his taser against Plaintiff violated Cincinnati Police Department procedure on use of force demonstrates that Officer Rackley used excessive force against Plaintiff. . .However, the CCA's finding is not dispositive. A city's police department may choose to hold its officers to a higher standard than that required by the Constitution without being subject to or subjecting their officers to increased liability under § 1983. Violation of a police policy or procedure does not automatically translate into a violation of a person's constitutional rights."); ***Philpot v. Warren***, No. Civ.A.1:02-CV2511JOF, 2006 WL 463169, at *7 (N.D. Ga. Feb. 24, 2006) ("As an initial matter, the court notes the fact that Cobb County ultimately terminated Defendant Warren for his actions in this case would not necessarily preclude a determination that Defendant Warren is entitled to qualified immunity. Defendant Warren's supervisors terminated him based upon an analysis of the policies of the Cobb County Police Department. Plaintiff has not argued that these policies are coextensive with the constitutional parameters of the Fourth Amendment in the search and seizure context, or that those parameters were clearly established as a matter of law at the time of the incident. The fact that the Cobb County Police Department may hold its officers to a different standard than that constitutionally mandated in the Eleventh Circuit is not before this court. The

role of the Cobb County Police Department was to determine whether Defendant Warren violated department policy and whether his actions warranted punishment. The role of this court is to determine whether Defendant Warren is entitled to qualified immunity as a matter of law. See also *Durruthy v. Pastor*, 351 F.3d 1080, 1092 (11th Cir.2003) (concluding that officer's violation of department's internal policy does not vitiate finding of probable cause based on objective facts); *Craig v. Singletary*,127 F.3d 1030, 1044 (11th Cir.1997) (probable cause involves only constitutional requirements and not any local policies)."); ***Chamberlin v. City of Albuquerque,*** No. CIV 02-0603 JB/ACT, 2005 WL 2313527, at *4 (D.N.M. July 31, 2005)(Plaintiff barred from introducing as evidence "the Albuquerque Police Department's SOP's to support its allegation that [officer] acted unreasonably in directing his police service dog to attack the [plaintiff] in violation of his Fourth Amendment rights."); ***Wilhelm v. Knox County, Ohio***, No. 2:03-CV-786, 2005 WL 1126817, at *14 (S.D. Ohio May 12, 2005) (not reported) ("[T]he Court recognizes that the Sixth Circuit has held that (1) a defendant cannot be liable under § 1983 unless he or she violated one of a plaintiff's federal constitutional rights, and (2) a state right 'as an alleged misdemeanant to be arrested only when the misdemeanor is committed in the presence of the arresting officer [is] not grounded in the federal constitution and will not support a § 1983 claim.' . . The issue is whether probable cause to arrest existed, not whether the arrest violated state law. Accordingly, because probable cause to believe that a crime had occurred existed, Bradley's § 1983 false arrest claim under the Fourth Amendment must fail.").

See also ***Graham v. Sheriff of Logan County***, 741 F.3d 1118, 1124-26 (10th Cir. 2013) ("Ms. Graham's focus on appeal is not on whether she consented as a factual matter but on whether a prisoner can *legally* consent to sex with one of her custodians. She argues that under 'evolving standards of decency' even consensual intercourse with a prisoner is cruel and unusual punishment. . . We decline to go so far. . . . [I]t is a matter of first impression in this circuit whether consent can be a defense to an Eighth Amendment claim based on sexual acts. Other courts are divided in their approach to consensual sexual intercourse between guards and inmates. The Sixth and Eighth Circuits have ruled that consensual sexual intercourse does not rise to the level of an Eighth Amendment violation. [citing cases] Some district courts have taken the opposite approach, holding that a prison guard has no consent defense in an Eighth Amendment civil-rights case alleging sexual relations. [collecting cases] More recently, the Ninth Circuit adopted a middle ground in *Wood v. Beauclair,* 692 F.3d 1041 (9th Cir.2012). . . . The court elected to create a rebuttable presumption of nonconsent. . . The state official can rebut the presumption by showing that the sexual interaction 'involved no coercive factors.'. . The court declined to provide an extensive list of factors but remarked that in addition to words or behavior showing opposition, coercive factors could include 'favors, privileges, or any type of exchange for sex.'. .In short, there is no consensus in the federal courts on whether, or to what extent, consent is a defense to an Eighth Amendment claim based on sexual contact with a prisoner. As a matter of public policy, Ms. Graham's position has force. We cannot imagine a situation in which sexual activity between a prison official and a prisoner would be anything other than highly inappropriate. But not all misbehavior by public officials, even egregious misbehavior, violates the Constitution. The Supreme Court has warned against constitutionalizing (or unconstitutionalizing, if that can be a

word) tortious conduct by government agents. . . . Absent contrary guidance from the Supreme Court, we think it proper to treat sexual abuse of prisoners as a species of excessive-force claim, requiring at least some form of coercion (not necessarily physical) by the prisoner's custodians. We agree with the Ninth Circuit that '[t]he power dynamics between prisoners and guards make it difficult to discern consent from coercion.'. . But there is no difficulty presented by the facts relied on by Ms. Graham in this case. Even were we to adopt the same presumption as the Ninth Circuit, the presumption against consent would be overcome by the overwhelming evidence of consent. Ms. Graham's rights under the Eighth Amendment were not violated."). *See also* ***Baca v. Rodriguez***, 554 F. App'x 676, 2014 WL 292453, *2 (10th Cir. Jan. 28, 2014) ("Here, Ms. Baca did not allege any facts in the amended complaint from which it could reasonably be inferred that Mr. Rodriguez coerced her into having sex with him. As a result, Ms. Baca did not state a claim for an Eighth Amendment violation against Mr. Rodriguez, and the district court properly dismissed the amended complaint as to CCA and the supervisory defendants.")

See also ***Hermiz v. Budzynowski***, No. 16-11214, 2017 WL 1245079, at *3 (E.D. Mich. Apr. 5, 2017) ("The Court finds . . . that the public interest in disclosure of the policy materials in this case is substantial. The defendants correctly point out that police policy statements do not define the constitutional standard by which their use of force must be judged. However, if the policy documents in question articulate directions for the deployment of force that are consistent with the pertinent constitutional standard, and if the defendants were made aware of the policies or received training based on them, then they may have a much harder time arguing that reasonable officers in their position would not have been aware of particular constitutional boundaries on their use of force against the plaintiff. Therefore, even though the materials may not be directly dispositive of the question whether the use of force was reasonable, they may be informative for the Court or the jury on the issue of whether the defendants are entitled to qualified immunity. The public certainly has a compelling interest in full access to information about the basis of that determination, whenever and however it is made, either at the summary judgment stage of the case or at trial."); ***Brock v. Harrison,*** No. 2:14-CV-0323, 2015 WL 7254204, at *3 (S.D. Ohio Nov. 17, 2015) ("Defendant's first motion *in limine* to exclude evidence of policy violations presents a closer call. Although the Court agrees with Defendant that, in theory, a violation of internal policies does not establish a constitutional violation, the facts surrounding the vehicle chase in this case (including Defendant's actions that may or may not have violated Gallia County policies) are too intertwined with the subsequent use of force for the Court to conclude that they are inadmissible for any purpose. It simply is premature at this stage to conclude that Plaintiff cannot present evidence of a policy violation without any context as to how Plaintiff intends to present that evidence or how that evidence ties into the circumstances leading up to the shooting. The authority Defendant cites in his motion does not alter this conclusion. The fact that courts have declined to find constitutional violations in cases in which a defendant violated internal policies does not make such evidence inadmissible for any purpose in this case."); ***McAtee v. Warkentin,*** 2007 WL 4570834, at *4 (S.D. Iowa Dec. 31, 2007) ("The court will admit evidence of the North Liberty pursuit and ramming policies. They will not be admitted to support any claim that Kyle Wasson was deprived of Fourth Amendment rights by Chief Warkentin's decision to pursue a high-speed chase. The

Scott decision makes it clear that the decision to engage in a high-speed chase alone cannot support a Fourth Amendment claim. Similarly, the plaintiff will not be permitted to argue for responsibility based on the failure of Chief Warkentin to abandon the pursuit. . . However, the pursuit is part and parcel of the events giving rise to Kyle Wasson's ultimate death. The extent to which Chief Warkentin was willing to violate internal policies crafted for the safety of the police and public may be probative of other issues concerning the chief's judgment and intent on the evening in question. An appropriate jury instruction will be given, upon request, to place this evidence in its proper context.").

Also note that compliance with state law does not mean there is no constitutional violation for purposes of liability under Section 1983. *See, e.g.,* ***Smith v. Kansas City, Missouri Police Dept.,*** 586 F.3d 576, 581 (8th Cir. 2009) (following standard operating procedure does not necessarily make officer's conduct reasonable); ***Gronowski v. Spencer***, 424 F.3d 285, 297 (2d Cir. 2005) ("[W]e conclude that appellants' civil service defense provides no basis to vacate the judgment. We do not agree that appellants could not have violated § 1983 if they complied with a state law that shares one of § 1983's purposes. The fact that City officials had discretion to lay off Gronowski and did not violate civil service law in failing to reinstate her in the Consumer Protection Office does not foreclose the possibility that retaliation for the exercise of her constitutional rights motivated these actions. If there is sufficient evidence supporting a finding of illegal retaliation, we will not overturn a verdict arriving at such finding. Regardless of the City officials' conformity with civil service law, they must still refrain from violating rights protected under the United States Constitution.").

See also ***Gandara v. Bennett***, 528 F.3d 823, 825, 826 (11th Cir. 2008) ("The question presented in this matter is whether a foreigner who has been arrested and detained in this country and alleges a violation of the consular notification provisions of the Vienna Convention on Consular Relations (the "Treaty") can maintain an action under 42 U.S.C. § 1983. The answer to this question hinges on whether or not individual rights are bestowed by the Treaty. Although we find the issue a close one with strong arguments on both sides, we ultimately conclude the answer is 'no.'. . . This Circuit has not expressly addressed the issue of whether the Vienna Convention contains private rights and remedies enforceable in our courts through § 1983 by individual foreign nationals who are arrested or detained in this country. We have previously commented, however, on the issue of private rights in the context of criminal cases and indicated that we would follow the lead of the First and Ninth Circuits. *See United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir.2000) (the First and Ninths circuits have indicated that Article 36 does not create privately enforceable rights)."); ***Mora v. People of the State of New York***, 524 F.3d 183, 203, 204 (2d Cir. 2008) ("In sum, there are a number of ways in which the drafters of the Vienna Convention, had they intended to provide for an individual right to be informed about consular access and notification that is enforceable through a damages action, could have signaled their intentions to do so. . . . That they chose not to signal any such intent counsels against our recognizing an individual right that can be vindicated here in a damages action.").

B. Under Color of State Law

In order to establish liability under § 1983, the plaintiff must prove that she has been deprived of a federal statutory or constitutional right by someone acting "under color of" state law. ***Parratt v. Taylor***, 451 U.S. 527, 535 (1981). *See also* ***Lugar v. Edmonson Oil Co.,*** 457 U.S. 922 (1982) ("state action" under Fourteenth Amendment equated with "under color of law" for Section 1983 purposes) and ***Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n***, 531 U.S. 288 (2001) (discussing different tests for determining whether conduct of private actor constitutes 'state action' and finding state action on basis of 'pervasive entwinement' of state with challenged activity); ***Blankenship v. Buenger***, 653 F. App'x 330, 336 (5th Cir. 2016) ("While the inquiry is 'necessarily fact-bound,' whether state action exists is a question of law for the court; it is not a 'fact' that can be admitted." Footnotes omitted)

In ***Monroe v. Pape***, 365 U.S. 167, 180 (1961), the Court held that acts performed by a police officer in his capacity as a police officer, even if illegal or not authorized by state law, are acts taken 'under color of' law. As the Supreme Court stated in ***United States v. Classic***, 313 U.S. 299, 326 (1941), "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken `under color of' state law."

Note that generally, a public defender does not act "under color of state law" when providing counsel to a defendant in a criminal proceeding. ***Polk County v. Dodson***, 454 U.S. 312, 325 (1981). *But see* ***Carter v. City of Montgomery***, 473 F.Supp.3d 1273, ____ (M.D. Ala. 2020), *infra.*

Examples:

SUPREME COURT

Lindke v. Freed, 144 S. Ct. 756, 762, 765-70 (2024) ("When a government official posts about job-related topics on social media, it can be difficult to tell whether the speech is official or private. We hold that such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. . . .By and large, our state-action precedents have grappled with variations of the question posed in *Griffin*: whether a nominally private person has engaged in state action for purposes of § 1983. . . Today's case, by contrast, requires us to analyze whether a *state official* engaged in state action or functioned as a private citizen. This Court has had little occasion to consider how the state-action requirement applies in this circumstance. . . . The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights. Categorizing conduct, therefore, can require a close look. . . .[O]ur precedent articulates principles that govern cases analogous to this one. For the reasons we explain below, a public official's social-

media activity constitutes state action under § 1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first. . . The first prong of this test is grounded in the bedrock requirement that 'the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*.'. . An act is not attributable to a State unless it is traceable to the State's power or authority. Private action—no matter how 'official' it looks—lacks the necessary lineage. . . . Lindke must show more than that Freed had *some* authority to communicate with residents on behalf of Port Huron. The alleged censorship must be connected to speech on a matter within Freed's bailiwick. For example, imagine that Freed posted a list of local restaurants with health-code violations and deleted snarky comments made by other users. If public health is not within the portfolio of the city manager, then neither the post nor the deletions would be traceable to Freed's state authority—because he had none. For state action to exist, the State must be 'responsible for the specific conduct of which the plaintiff complains.'. . There must be a tie between the official's authority and 'the gravamen of the plaintiff's complaint.'. . To be clear, the '[*m*]*isuse* of power, possessed by virtue of state law,' constitutes state action. . .While the state-action doctrine requires that the State have granted an official the type of authority that he used to violate rights—*e.g.*, the power to arrest—it encompasses cases where his 'particular action'—*e.g.*, an arrest made with excessive force—violated state or federal law. . . Every § 1983 suit alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right. To misuse power, however, one must possess it in the first place. . . .In sum, a defendant like Freed must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish state action. . . . Freed's page. . . was not designated either 'personal' or 'official,' raising the prospect that it was 'mixed use'—a place where he made some posts in his personal capacity and others in his capacity as city manager. Categorizing posts that appear on an ambiguous page like Freed's is a fact-specific undertaking in which the post's content and function are the most important considerations. . . . [I]t is crucial for the plaintiff to show that the official is purporting to exercise state authority in specific posts. And when there is doubt, additional factors might cast light—for example, an official who uses government staff to make a post will be hard pressed to deny that he was conducting government business. One last point: The nature of the technology matters to the state-action analysis. Freed performed two actions to which Lindke objected: He deleted Lindke's comments and blocked him from commenting again. So far as deletion goes, the only relevant posts are those from which Lindke's comments were removed. Blocking, however, is a different story. Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a 'mixed use' social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts. . . A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability. . .The

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

D.C. CIRCUIT

McGovern v. Brown, 891 F.3d 402 (D.C. Cir. 2018) (special police officers who were commissioned by the District of Columbia and employed by private university were acting under color of state law, for § 1983 purposes, when they arrested attendee who engaged in standing protest during university-sponsored event on campus).

Johnson v. Government of Dist. of Columbia, 734 F.3d 1194, 1201 (D.C. Cir. 2013) ("We agree with the district court that even assuming that the District had notice of the strip search practices and that those practices were unconstitutional, the District lacked the discretion necessary for class members to prevail. Given that Dillard was at all times acting under color of federal law, . . .the District had no authority to prevent him from conducting strip searches of arrestees upon their arrival at the Superior Court. Relying on two circuit court decisions, one by this Court and one by the Sixth Circuit, *see Warren,* 353 F.3d 36; *Deaton v. Montgomery County,* 989 F.2d 885 (6th Cir.1993), for the proposition that '[i]t does not matter if the transferor has no control over the facility in which it places its prisoners,'. . . class members believe they can prevail even if Dillard was at all times a federal official acting under color of federal law. In each of the cited cases, however, the municipality had contracted to send its prisoners to a penal facility; even though the municipality exercised no direct control over policies and practices at the facility, it retained power to cancel the contract in the event of constitutional violations. *See Warren,* 353 F.3d at 37; *Deaton,* 989 F.2d at 885. Here, by contrast, nothing in the record suggests that the District could have held presentment hearings somewhere other than the Superior Court. And although class members insist that the District had statutory authority to bypass the Superior Court Marshal and deliver pre-presentment arrestees directly to Superior Court judges, the statutory provisions class members rely on are ambiguous at best. Thus, the District's failure to embrace class members' statutory interpretation hardly demonstrates 'deliberate indifference to the rights' of arrestees.")

Williams v. United States, 396 F.3d 412, 414 (D.C. Cir. 2005) (federal police officer who arrested plaintiff for violation of D.C. law did not act under color of state law).

Fischer v. District of Columbia, No. 24-CV-00044 (CRC), 2025 WL 894445, at *12 (D.D.C. Mar. 24, 2025) ("Fischer next tries his luck with § 1983 and Bivens claims alleging the same constitutional violations against USCP and the USCP Board, as well as Deputy Chief Waldow, Deputy Chief Loyd, Chief Steven Sund, Assistant Chief Yogananda Pittman, and Speaker Emerita Nancy P. Pelosi in their official and individual capacities. . . . As noted, 1983 applies to conduct done under color of state law. Therefore, a defendant sued under § 1983 must have been exercising the authority of the state. 'Courts generally treat under color of law ... as the same thing as the state

action required under the Fourteenth Amendment.'. . Because federal officials act under federal law, they generally fall outside § 1983's reach. . . Individuals suing federal officers for constitutional violations usually must instead proceed through a *Bivens* action. However, as Fischer contends, when federal officers act together or conspire with state officials to deprive an individual of his constitutional rights, they may be considered to have acted under color of state law for § 1983 purposes. . . This principle derives from a series of Supreme Court cases recognizing that state action may be found where 'there is such a "close nexus between the State and the challenged action" that seemingly *private* behavior "may be fairly treated as that of the State itself."'. . '[A] challenged activity may be state action when it results from the State's exercise of "coercive power," when the State provides "significant encouragement, either overt or covert," or when a private actor operates as a "willful participant in joint activity with the State or its agents."'. . The exact standard for determining when a federal official, as opposed to a private party, acts under color of state law is somewhat unclear. Courts have recognized '[a] plaintiff may well need to allege a higher level of coordination to show federal officers, rather than private parties, acted under color of state law.' [collecting cases] In *Big Cats,* the Tenth Circuit explained that a higher burden may be warranted because a plaintiff attempting to assert such a theory 'must overcome the presumption[s] that [1] Congress did not intend for federal officers to be subject to § 1983 litigation' and 'that [2] where federal and state actors come together, they are acting pursuant to supreme law.'. .Without articulating an exact standard for determining whether the federal actor's conduct can 'be fairly treated as that of' the state, the D.C. Circuit has considered whether the state 'gave him the power' to act, 'exercised ... coercive power' through him, or otherwise 'provid[ed] significant encouragement.'. . Fischer's allegations do not meet these requirements. He asserts only that "the two police departments worked together, collaborated and conspired in the use of force and the indiscriminate launching of munitions into the crowd of protesters," including by "shar[ing] munitions and g[iving] each other directions on where to point their weapons for launching the munitions.". . He has not claimed that the District gave the USCP officers the power to act or exercised coercive power over them. And while he references a 'conspiracy,'. . . he has not specifically pled that the Federal and District Defendants had the requisite 'meeting of the minds' to violate his rights. . . Moreover, as noted, Fischer's complaint describes a reactive response to a chaotic situation as opposed to a coordinated 'meeting of the minds.' Accordingly, because Fischer had not pled that the USCP officers at the scene conspired with the MPD officers so that the USCP officers were acting under color of District law, he cannot assert a § 1983 claim against them.")

Brown v. Short, No. 08-1509 (RMC), 2010 WL 2989837, at *4 (D.D.C. July 30, 2010) ("The Court finds that at the time DSO Short searched Ms. Brown, she was not acting at the behest of a Superior Court judge or carrying out her courtroom duties. Therefore, to the extent that the Superior Court can be described as a 'state' court, DSO Short was not exercising power derived from state law and she was not clothed with that authority. DSO Short was following U.S. Marshal policy without regard to the order of a judicial officer. In this position, she was a federal actor analogous to the U.S. Marshall for the Superior Court, to whom Section 1983 does not apply.")

Maniaci v. Georgetown University, 510 F.Supp.2d 50, 62, 70 (D.D.C.,2007) ("[T]he Court notes that various circuits have applied Section 1983 and its limitations as set forth in *Monell* to private institutions such as Georgetown University where such private institutions employ quasi-state actors. [collecting cases] . . . . Plaintiff's Amended Complaint contains facts that, if taken as true, sufficiently raise a colorable claim that the Georgetown Public Safety Officers were acting under the color of law by exercising their state-granted authority to arrest or actions related thereto. The Public Safety Officers in this case were not merely verbally conveying a store policy (and thus functioning in a private capacity) . . . . On several occasions, Plaintiff sets forth facts that indicate that his physical liberty was restrained and that he was aware of the power asserted over him by the Public Safety Officers. . . Allegedly, he was physically grabbed and 'violently jerked ... from his seat.'. . He was 'surrounded by six campus police offers and was pushed against a glass window.'. . His exit was blocked, and he was 'told not to go anywhere.'. . . Accordingly, at this time, the Court shall not dismiss Plaintiff's Section 1983 claim on the grounds that the Public Safety Officers were not acting under color of state law, as Plaintiff has alleged facts sufficient to suggest that an arrest or actions related thereto occurred.").

FIRST CIRCUIT

Pike v. Budd, No. 23-1593, 2025 WL 942827, at *5–6 (1st Cir. Mar. 28, 2025) ("Pike has alleged that members of the treatment court team 'were expected -- and effectively required –' to attend the Nashville conference. Pike has also alleged that Budd made comments related to their work as they sat in the hotel bar after he attempted to invite himself into her room. And, again as noted, Budd allegedly told Pike that he was often sexually propositioned by women due to his role as a judge and that he hoped the TRC team did not think that he gave favorable treatment towards two of their female clients that he found particularly attractive. But we needn't go so far as to conclude that, in isolation, the complaint adequately alleges state action at the conference. That is so, because just as it was Pike's and Budd's work for the TRC that brought them to the conference in Nashville, it was their work for the TRC that brought them to the courthouse back in Maine. Critically, Pike has additionally alleged that Budd invoked his authority over her to continue his harassment when they got back to Maine. Specifically, she reasonably alleges that he summoned her individually to his chambers and made comments there that she understood to mean that he planned on leaving his wife and intended to continue pursuing Pike. Taken as a whole, these allegations are sufficient to plausibly establish that Budd was acting under color of state law to create a hostile environment for Pike.")

Jakuttis v. Town of Dracut, 95 F.4th 22, 29-30 (1st Cir. 2024) ("The determination of whether Poirier was clothed with state authority rather than federal authority at the relevant times depends on the level of government to which Poirier's allegedly unlawful conduct is 'fairly attributable. . .That determination, in turn, depends on the 'nature and circumstances' of Poirier's allegedly unconstitutional retaliatory conduct 'and the relationship of that conduct to the performance of ... official duties.'. . As we will explain, we conclude on de novo review and reading the complaint

in the light most favorable to Jakuttis. . . that the complaint fails to plausibly allege that Poirier was acting under color of state rather than federal law at the relevant times. . . .[T]he complaint alleges that Poirier learned of the police-corruption allegations while on the job as a federal TFO, investigated those allegations as a federal TFO, and allegedly retaliated against Jakuttis while working as a federal TFO and in the CBI offices. True, the complaint alleges that Poirier was a state trooper at all relevant times. But, from the face of the complaint, the 'nature and circumstances' of Poirier's alleged retaliatory conduct were related to 'the performance of his official duties' to the CBI rather than to the Massachusetts state police, . . . as the mere fact that Poirier was also employed with the Massachusetts state police when these events occurred does not in and of itself suffice on this record to provide a plausible basis for attributing his conduct to anything other than his federal role[.]")

United States v. Martinez-Mercado, 919 F.3d 91, 99-100 (1st Cir. 2019) ("Although courts have had frequent occasion to interpret section 1983's 'color of law' requirement, 'there is no bright line test for distinguishing "personal pursuits" from activities taken under color of law.'. . We have previously instructed that a state actor does not act under color of law unless his 'conduct occurs in the course of performing an actual or apparent duty of his office, or unless the conduct is such that the actor could not have behaved in that way but for the authority of his office.'. . More specifically, this court trains its attention 'on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties.'. . 'The key determinant is whether the actor ... purposes to act in an official capacity or to exercise official responsibilities pursuant to state law.'. . Martínez-Mercado argues, therefore, that the conspiracy at issue here did not involve conduct committed in the performance of any actual or pretended official duty. The facts show otherwise. The conspirators literally employed the colors of the law in the form of a marked on-duty police vehicle to do what no private individual could do -- divert private and police interlopers by creating the appearance of legitimate police involvement. The plan also addressed the risk of a citizen call to the police by exploiting López-Torres's official capacity to forestall any investigation at the scene. López-Torres and Ramos-Figueroa were part of the conspiracy and present at the scene of the heist precisely because they possessed the official authority to ensure that it would proceed uninterrupted. This was surely enough to support a jury finding that the conspirators acted under color of law.")

Jarvis v. Vill. Gun Shop, Inc., 805 F.3d 1, 13 (1st Cir. 2015) ("We summarize succinctly. In their action against the Gun Shop, the plaintiffs do not challenge either the confiscation of their firearms or the police's authority to transfer those firearms to a bonded warehouse for storage. Rather, they challenge the imposition of storage charges and the subsequent auctioning of their firearms after they failed to pay those storage charges. But the facts evidenced in the summary judgment record, even when viewed in the light most favorable to the plaintiffs, do not show that state action, as opposed to private action, produced these asserted harms. Although the activities undertaken by the Gun Shop were authorized by state law, mere compliance with the strictures of state law cannot transmogrify private action into state action. Nor is it enough that the state set in motion the subsequent actions taken by the Gun Shop: but-for causation is simply insufficient to conjure a

finding of state action. Whatever rights (if any) the plaintiffs may have against the Gun Shop, they have made out none under section 1983.")

Klunder v. Brown Univ., 778 F.3d 24, 34 (1st Cir. 2015) ("Seeing no meaningful distinction between Brown in the present case and Harvard in *Krohn,* we agree with the district court that Brown University is not a state actor subject to federal jurisdiction under § 1983. Brown's motion for partial summary judgment was properly granted.")

Santiago v. Puerto Rico, 655 F.3d 61, 70 (1st Cir. 2011) ("We are not the first court to reach the conclusion that transportation to and from school is not an exclusive state function. Considering strikingly similar facts, the Third Circuit found that a private bus company and its employees were not subject to liability under section 1983 even though, by transporting pupils to and from public schools, they 'were carrying out a state program at state expense.'. . Just as education is not exclusively a state function because it is regularly performed by private entities, . . . so too student transportation falls outside the exclusive purview of the state . . . . [F]reedom to choose alternatives removes school busing from the realm of services that are traditionally exclusively reserved to the state.")

Burke v. Town of Walpole, 405 F.3d 66, 88 (1st Cir. 2005) (private forensic odontologist who rendered bite mark opinon at request of District Attorney's Office was acting under color of law and eligible for qualified immunity).

Martinez v. Colon, 54 F.3d 980, 987 (1st Cir. 1995) (an unintended shooting of a police officer at the police station, during the course of harassment and taunting by a fellow officer who was on duty and in uniform, did not constitute conduct under color of law where the court concluded that the behavior of the harassing officer represented a "singularly personal frolic[,]" and in no way was or purported to be in furtherance of the exercise of any police power).

Vincent v. Dolan, No. 1:24-CV-155-JJM-LDA, 2024 WL 4635204, at *3 (D.R.I. Oct. 31, 2024) ("Taking Plaintiff's allegations as true, it is plausible that Mr. Dolan was acting under color of law when he followed Plaintiff's vehicle to the pizza restaurant, approached the Plaintiff's vehicle, and fired his service revolver at Mr. Vincent. Mr. Dolan purported to act in his official capacity as a police officer, despite being off-duty and on his way home because but for being a police officer, he would not have engaged in pursuing a potential 'fleeing suspect.' Therefore, it is plausible that Mr. Dolan was acting under color of law.")

Arias v. Bernard, No. 17-CV-516-SM, 2021 WL 185031, at *1 n.1 (D.N.H. Jan. 19, 2021) ("Although several of the named defendants are police officers employed by the cities of Nashua and Manchester, New Hampshire, they appear to have been 'detailed' to work on a federal drug interdiction task force. Accordingly, the parties have assumed that, for purposes of this suit, all defendants are properly treated as federal agents.")

Carr v. Metro. Law Enforcement Council, Inc., CIV.A. 13-13273-JGD, 2014 WL 4185482, *8 (D. Mass. Aug. 20, 2014) ("MetroLEC contends that since it 'consists of local police and sheriff departments, it is a municipal organization or entity.'. . Ms. Carr argues that 'MetroLEC is a private corporation performing delegated police functions normally reserved to the State[,]' and is therefore covered by § 1983. . . As detailed herein, the record is not sufficiently developed to determine the status of MetroLEC vis-à-vis the various statutes at issue in this litigation. For purposes of § 1983, however, this court concludes that MetroLEC is subject to liability, at a minimum as a private entity assuming powers traditionally exclusively reserved to the State. Moreover, as the parties seemingly agree, its liability will be assumed to be coterminous with those of a municipality under § 1983. MetroLEC is authorized by Mass. Gen. Laws ch. 40, § 4J, which provides for public safety mutual aid agreements. . . . [I]n light of the fact that MetroLEC is an entity separate from its components, it may, in fact, be considered a 'person' under § 1983. . . Moreover, since MetroLEC is a private actor which has 'assumed a traditional public function,' it qualifies as a 'state actor' which may be subject to liability under § 1983. . . Thus, MetroLEC is subject to liability under § 1983.")

Chandler v. Greater Boston Legal Services, No. 13–12979–GAO, 2013 WL 6571938, *5 n.10 (D. Mass. Dec. 10, 2013) ("Notwithstanding any dispute Chandler may have with the quality of legal services performed on his behalf by a GBLS lawyer, acts or omissions by counsel do not give rise to a cause of action under 42 U.S.C. § 1983 because counsel does not act under the color of state law in performing a lawyer's traditional function as counsel and therefore cannot be sued under § 1983 as an agent of the state. *See Polk County v. Dodson*, 454 U.S. 313, 471 (1981); *Malachowski v. City of Keene*, 787 F.2d 704, 710 (1st Cir. 1986). *See* also *Dunker v. Bissonnette*, 154 F.Supp.2d 95, 105 (D. Mass. 2001) (Stearns, J.).")

Sonia v. Town of Brookline, 914 F.Supp.2d 36, 42, 43 (D. Mass. 2012) ("A procedural irregularity is worth noting at the outset. Most challenges to the color-of-law element in § 1983 cases are raised jointly by the defendant officers and municipalities and opposed by the plaintiffs. Here, the Officers join the plaintiff in opposing the Town of Brookline's contention that they did not act under color of law. In effect, the officers 'admit' that they were acting under color of law. Whether or not the Officers are overcome by honesty or, more likely, are seeking to buttress their cross-claims against the Town of Brookline for contribution and indemnification, their admission does not control the analysis. An officer cannot consent to have acted 'under color of law.' *See Barreto–Rivera*, 168 F.3d at 46 (explaining color of law analysis depends upon totality of circumstances but particularly upon officer's purpose at time of the act). It also warrants mention at the outset that this case is in a different procedural posture than those described above. The district courts in those cases were called upon to examine the factual record to decide whether there were sufficient indicia of public action to support a jury finding in favor of the plaintiff on the color-of-law issue. This Court's task is simpler. It need not weigh the evidence or take a position on which party's version of the events is more credible. In considering a motion to dismiss, this Court must simply decide whether the facts alleged in the complaint, if proven, are sufficient to support a finding that the officers acted under color of state law. The color-of-law issue is a close one. On the one hand,

a number of factors support a finding that the Officers were not acting under color of law. The dispute was at a private residence. The Officers were off duty and out of uniform. They were highly intoxicated. They were not responding to an unruly bachelor party; they *were* the unruly bachelor party. . . Neighbors who witnessed the brawl called the police, apparently unaware that the police were the ones allegedly doing the beating. On the other hand, there are multiple indicia of state action that support a finding in favor of the plaintiff. The Officers identified themselves as police. They photographed the plaintiff's license plate, handcuffed the plaintiff during the altercation and informed him that he was under arrest, all forms of police techniques and functions. Finally, the plaintiff reasonably perceived that the Officers were acting as police officers. It is the combination of these factors that persuades the Court that it is premature to rule that none of the Officers was acting under color of law at any point during the incident. While the Officers allegedly precipitated the dispute, as did the police in *Barreto–Rivera* and *Zambrana–Marrero,* they employed a 'symbol of police authority' when they placed plaintiff under arrest. In constrast to the officer's actions in *Parilla–Burgos,* shooting someone does not project police authority as uniquely as does the act of detaining someone in the name of the sovereign. Accordingly, the Court finds that plaintiff has pled sufficient facts to claim that the Officers acted under color of law.")

Miller v. City of Boston, 586 F.Supp.2d 5, 7 (D. Mass. 2008) ("The City first argues that it is never liable for the misconduct of special officers. The only authority the City offers for this assertion is the text of the 1898 statute giving the City authority to license these special officers and virtually identical language in a corresponding police department rule.. . . The statute gives licensed special officers 'the power of police officers to preserve order and to enforce the laws and ordinances of the city.'. . The statute goes on to state that 'the corporation or person applying for an appointment under this section shall be liable for the official misconduct of the officer.' . . BPD argues that because the statute makes the special officers' employer liable for their misconduct, the City cannot be liable. . . The mere fact that the statute holds the employer of special officers liable, however, does not necessarily mean that the City may not also be held liable for the misconduct of special officers. Under the terms of the statute, special officers are granted the 'power of police officers.' Inasmuch as the statute grants special officers the authority of police officers, it seems logical to treat them as such for purposes of the City's liability. Because Plaintiff's complaint is deficient in other respects, however, this court assumes without deciding that the City may be held liable for special officer misconduct to the same extent as it may be liable for the misdeeds of other city employees.").

Shah v. Holloway, No. 07-10352-DPW, 2009 WL 2754406, at *7 (D. Mass. Aug. 20, 2009) ("After reviewing the record at the motion to dismiss stage, I found the need for further discovery to determine whether facts justified treating this case as one in which federal agents acted in concert with state agents under circumstances justifying recognition of a Section 1983 claim against them for depriving Shah of Fourth Amendment rights. Shah and the defendants agree that SA Holloway and a Boston Police officer did act in concert during the time they observed, stopped, and detained Shah. However, Shah has not offered any evidence that suggests that SA Holloway's – or any other Federal Agent's – actions were derived from state, rather than federal, authority. SA

Czellecz does state that after consulting with his Boston Police counterpart, he selected the nearby local police station as the location to which he would transport Shah. But SA Czellecz received instructions from the Secret Service supervisors at the IDCC, not from the Boston Police, to move Shah. Even viewing the evidence in the light most favorable to Shah, I find that no reasonable inference can be made that the Federal Agents conspired with or acted in concert with state officials under color of state law to deprive Shah of his civil rights. Rather, the evidence indicates that the Federal Agents acted under authority of their Secret Service chain of command and pursuant to their own judgment, albeit seeking and obtaining assistance from state actors.").

Carmack v. MBTA, 465 F.Supp.2d 18, 27 (D. Mass. 2006) ("In evaluating whether the conduct of an otherwise private actor constitutes indirect state action, courts conventionally have traveled a trio of analytic avenues, deeming a private entity to have become a state actor if (1) it assumes a traditional public function when it undertakes to perform the challenged conduct, or (2) an elaborate financial or regulatory nexus ties the challenged conduct to the State, or (3) a symbiotic relationship exists between the private entity and the State. . . The satisfaction of any one of these tests requires a finding of indirect state action. . . In addition, where '[t]he nominally private character of [an organization] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it,' the conclusion is that there is state action. . . The inquiry, under any of these theories, is necessarily fact-intensive, and the ultimate conclusion regarding state action must be based on the particular facts and circumstances of the case. . . This court finds that Mr. Carmack has alleged enough facts to support a claim that MBCR [Massachusetts Bay Commuter Railroad Company] was a state actor based on the traditional public function and symbiotic relationship theories.")

SECOND CIRCUIT

Cancel v. Amakwe, 551 F. App'x 4, *6, *7 (2d Cir. 2013) ("While we have recognized that a police officer's self-identification and use of a service pistol can constitute acting under color of state law, *see Jocks v. Tavernier,* 316 F.3d 128, 134 (2d Cir.2003), the action at issue must be 'made possible only because the wrongdoer is clothed with the authority of state law,' *West v. Atkins,* 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L.Ed.2d 40 (1988). Here, even crediting Cancel's allegation that Gibson identified himself as a police officer, Cancel's theory of the City's delegation of police powers to private businesses is insufficient by itself plausibly to allege that Gibson was acting under color of state law. Gibson was employed by a private business at the time of the alleged assault, and any authority he had over Cancel and other citizens derived solely from that role and was not made possible only because he was 'clothed with the authority of state law.' Accordingly, Cancel's claims against Gibson were properly dismissed.")

Fabrikant v. French, 691 F.3d 193, 211 (2d Cir. 2012) ("We therefore conclude that animal rescue organizations such as the SPCA—independent contractors to which, under New York law, municipalities can delegate authority to perform animal control—are state actors for purposes of

§ 1983 when they perform surgery on animals in their care while those animals are being kept from their owners by the authority of the state, following searches and seizures carried out by the agencies pursuant to warrants.")

Jocks v. Tavernier, 316 F.3d 128, 134 (2d Cir. 2003) ("[W]hen an officer identifies himself as a police officer and uses his service pistol, he acts under color of law.").

Bull for the Estate of Ingalsbe v. Howard, No. 22-CV-00766-JLS-LGF, 2024 WL 1939480, at *10 (W.D.N.Y. Apr. 11, 2024) ("In the instant case, SHC, by providing medical care to detainees at ECHC, 'performs a role traditionally within the exclusive prerogative of the state and could, in this context, be found to be 'the functional equivalent of the municipality.'. . A thorough reading of the Complaint, however, establishes the only factual allegation suggesting SHC is a state actor for purposes of § 1983 liability is found in ¶ 25 alleging '[u]pon information and belief' that SHC contracted to provide services within New York State including medical care to Decedent at ECHC. Further, Plaintiff does not allege with whom SHC contracted to provide medical services to detainees housed at ECHC. *See Smith v. Benson*, 2016 WL 11817187, at * 2 (W.D.N.Y. Mar. 21, 2016) (concluding, in considering a motion to amend, that the plaintiff detainee plausibly alleged the jail's medical provider was a state actor "by virtue of its contract with the [jail]," a copy of which was attached to the proposed amended complaint) (citing *Sykes v. McPhillips*, 412 F.Supp.2d 197, 204 n.1 (N.D.N.Y. 2006) ("If there was an express contract to provide medical care to prisoners, state actor status would be conferred."); and *Sepolveda v. Armor Corr'l Health*, 2015 WL 6550623, at * 3 n.2 (E.D.N.Y. Oct. 28, 2015) ("As the entity with which the Jail contracted to provide medical services to its prisoners, [defendant] was acting under color or state law for purposes of Section 1983 with respect to its duties in rendering such medical services to plaintiff."). Accordingly, Plaintiff has failed to sufficiently allege SHC, when providing medical care to detainees at ECHC, acted pursuant to a contract with ECHC so as to be considered a state actor for purposes of § 1983 liability and Defendant's motion should be GRANTED with regard to Plaintiff's § 1983 claims as asserted against SHC, *i.e.*, the First, Fourth, and Fifth Claims.")

Pagan v. Westchester County, No. 12 Civ. 7669(PAE)(JCF), 2014 WL 982876, *24, *25 (S.D.N.Y. Mar. 12, 2014) (adopting R & R) ("Aramark contends that all of the claims against it should be dismissed because it is an 'independent contractor' and not a state actor liable under 42 U.S.C. § 1983. The role of providing food to inmates is the responsibility of the state. . . Here, Westchester County has a duty to provide nutritionally adequate food to those incarcerated within its facility. The County has contracted with Aramark to perform this governmental function. Thus, Aramark is serving a public function in providing daily meals to inmates. . . .Here, Aramark provides food for the inmates at the Jail pursuant to a contract with the County. The Jail provides oversight for Aramark's services. Aramark's 'seemingly private behavior' can be treated as that of the state given that the challenged action, proper food service, flows directly from the obligations of the government entity and is performed under its supervision. . . .The role of Aramark as food provider is similar to that of private physicians paid to care for inmates at state and local facilities. In these cases, courts have consistently held that the physician is acting under

color of state law when providing treatment to inmates. . .Furthermore, other courts have held that Aramark is acting under color of state law for § 1983 liability when it provides food to state inmates. [collecting cases] Aramark argues repeatedly that as an independent contractor it is not acting under color of state law. While state employment, as a general rule, is sufficient to render the defendant a state actor, an employer-employee relationship is not necessary to a determination of state action or action taken under color of state law. . . It is the function of the private actor within the state system, not 'the precise terms of his employment, that determines whether his actions can fairly be attributed to the State ....'. . . As such, the Court concludes that Aramark is acting under color of state law for purposes of § 1983 liability by providing daily meals to the inmates at the Jail, a duty Westchester County ordinarily owes to the inmates.")

Rodriguez v. Winski, No. 12 Civ. 3389(NRB), 2013 WL 5379880, *9, *10 (S.D.N.Y. Sept. 26, 2013) ("[S]ummoning police or requesting that police take action to disperse OWS protestors simply does not suffice to constitute joint action or to convert the private party into a state actor. . . . [T]hese allegations demonstrate that police responding to protest sites reached independent decisions as to what action, if any, to take and how. Plaintiffs simply cannot show the substitution of private judgment for police judgment necessary to constitute joint action. Instead, plaintiffs explicitly plead the very opposite as to defendant Brookfield, which allegedly 'actually transferr[ed] discretion and authority to [the] NYPD to order OWS participants off of publicly accessible open areas.'. . In sum, plaintiffs' allegations cannot support an inference of joint action with the City or the police against Mitsui or the Brookfield defendants.")

THIRD CIRCUIT

Henry v. Essex County, 113 F.4th 355, 360 (3d Cir. 2024) ("Persons with arguably mixed federal and state authority act under color of federal law when they perform their federal duties.")

Borrell v. Bloomsburg Univ., 870 F.3d 154, 161-62 (3d Cir. 2017) ("Richer's decision was to enforce the hospital's preexisting policy requiring employees to participate in drug tests when asked, and GMC had already fired four other nurses for violating the same policy. Neither Bloomsburg nor its agreement with Geisinger played any part in creating the policy enforced in this case; the agreement merely made clear that Geisinger's employee policies would govern the behavior of clinical students while they were working at the hospital. In light of the controlling legal principles we have articulated, the question boils down to which entity—the hospital or the university—exercised the authority to terminate Borrell for a violation of Geisinger policies. . . .Notwithstanding his consultation with others, Richer made the decision to fire someone working at GMC due to her violation of a preexisting policy of the hospital, and he had the authority to do so based on his position there. '[T]he authority of state officials ... was wholly unnecessary to effectuate Borrell's dismissal from the NAP.'. . Accordingly, we must reverse the District Court's holding that GMC and Richer were state actors.")

Kach v. Hose, 589 F.3d 626, 649 & n.22 (3d Cir. 2009) ("On this particular record, no reasonable finder of fact could conclude that Pennsylvania authorities exercised control over any element of the particular conduct Kach describes. Hose was charged with supervising and maintaining a secure environment for schoolchildren. In clear violation of his mandate, Hose engaged in an impermissible relationship with one of the very schoolchildren whose safety he was supposed to ensure. Kach has not presented evidence to suggest that Hose's actions were committed on anyone's initiative but his own or with anything other than his own interests in mind. Instead, the record leaves no room for doubt that Hose 'was bent on a singularly personal frolic[,]' *Martinez v. Colon,* 54 F.3d 980, 987 (1st Cir.1995) (footnote omitted), and thus his conduct is not cognizable as state action for § 1983 purposes. . . Because Hose was not acting under color of state law when he committed the acts that form the basis of Kach's § 1983 claim against him, we need not decide if Kach's constitutional rights were violated. Accordingly, Kach's § 1983 claim against Hose fails as a matter of law. . . . We do not foreclose the possibility that, under other circumstances, a private security guard employed in a public school could qualify as a state actor.").

Marcus v. McCollum, 394 F.3d 813, 818 (3d Cir. 2004) (noting Circuit agreement that officers are not state actors during private repossession if they act only to keep the peace).

Foster v. City of Philadelphia, CIV.A. 12-5851, 2014 WL 5027067, *22 (E.D. Pa. Oct. 8, 2014) ("Even towing companies, which have less responsibility than salvors under Pennsylvania law, have been held to be state actors, albeit in other jurisdictions. . . . Since salvors engage in more conduct than towing companies under the Abandoned Vehicle Code, it follows inexorably that a salvor like Century Motors is a state actor.")

Adams v. Springmeyer, 17 F.Supp.3d 478, 506 (W.D. Pa. 2014) ("In 2008, Sciulli was assigned to work for the ATF as a federally deputized Task Force Officer. . . Local law enforcement officials working in such a capacity are generally regarded as federal agents. . . Since it is undisputed that Sciulli was attempting to execute federal arrest warrants in his capacity as a federal Task Force Officer, the Defendants' motion for summary judgment will be granted with respect to the § 1983 claims brought against him.")

Fleck v. Trustees of University of Pennsylvania, 995 F.Supp.2d 390, 401-03 (E.D. Pa. 2014) ("The Supreme Court has left open the circumstances under which private security officers may be deemed to perform public functions for purposes of § 1983 suits. While our Court of Appeals has not refined its *Henderson* holding, other federal courts have found state action where a security guard is employed by a police department, *Travers v. Meshriy,* 627 F.2d 934 (9th Cir.1980), or works jointly with a township police officer, *Padover v. Gimbel Bros., Inc.,* 412 F.Supp. 920 (E.D.Pa.1976) (Ditter, J.). On the other hand, a security guard was held not to be a state actor where no state or municipal police power was involved, see *Wade v. Byles,* 83 F.3d 902 (7th Cir.1996), or when a college security guard, despite also being a local police officer, acts solely in his college-guard capacity, *see Robinson v. Davis,* 447 F.2d 753 (4th Cir.1971). To be sure, '[w]here private security guards are endowed by law with plenary police powers such that they are

de *facto* police officers, they may qualify as state actors under the public function test,' *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629, 637 (6th Cir.2005) (citing *Henderson*). . . . The Penn Police Department's so-called patrol zone extends well beyond the borders of the University campus to encompass a large slice of West Philadelphia—roughly between Market Street and Baltimore Avenue, from 43rd Street to the Schuylkill River—an area that includes the Masjid Al Jamia Mosque at 4228 Walnut Street. . . Penn police officers are 'highly-trained in a number of specialized areas including: emergency response, crisis and hostage negotiation, dignitary protection, traffic safety, motorcycle and bicycle patrol.'. . The Department maintains a fifteen-person Detective Unit that conducts criminal investigations and crime scene analysis. *Id.* The Penn Police Department has been accredited through the Commission on the Accreditation of Law Enforcement Agencies—a standard-setting body, since March of 2001. Its officers have worked with a Drug Enforcement Administration task force, *United States v. Ford*, 618 F.Supp.2d 368 (E.D.Pa.2009) (Pollak, J.), and with FBI investigators on credit-card identity theft, *United States v. Barr*, 454 F.Supp.2d 229 (E.D.Pa.2006) (Rufe, J.). Here, Officers Cooper, Michel and Thammavong were on patrol on a street within the Penn Police Department's patrol zone, and when their efforts to maintain public order failed, they arrested two instigators of the disturbance. Accordingly, we find that Pennsylvania law endows the Penn Police Department with the plenary authority of a municipal police department in the patrol-zone territory, once the 'exclusive prerogative' of the City of Philadelphia. But the Penn Police Department is not an entity capable of being sued. Rather, the University itself, *i.e.*, the Trustees of the University of Pennsylvania, is the proper defendant for purposes of a § 1983 suit (along with the named individual officers). . . Penn's police officers therefore are state actors for Section 1983 purposes.")

Kelly v. N.J. Dept. of Corrections, No. 11–7256 (PGS), 2012 WL 6203691, *6, *7 (D.N.J. Dec. 11, 2012) ("Federal courts are split on the question whether organizations that operate halfway houses, and their employees, are state actors for purposes of § 1983. [collecting cases] In this action, in any event, Plaintiff has failed to allege any facts that would suggest that Community Education Centers functioned as a state actor. For example, Plaintiff does not describe the nature of the contractual relationship, if any, with the New Jersey Department of Corrections. He does not describe the nature of the services provided, or the nature of the population to whom those services are provided. . .Moreover, Plaintiff has failed to allege any facts that would suggest that Community Education Centers promulgated any policy or practice that encouraged the conduct he challenges here. Accordingly, Plaintiff has failed to state a claim against Community Education Centers. As the allegations made by Plaintiff are insufficient to establish that Community Education Center functioned as a 'state actor,' they similarly are insufficient to establish that counselors employed by Community Education Centers or its facilities functioned as state actors.")

FOURTH CIRCUIT

Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 118-21, 123 (4th Cir. 2022) (en banc) ("The statutory framework of the North Carolina charter school system compels the conclusion that the state has delegated to charter school operators like CDS part of the state's constitutional duty to

provide free, universal elementary and secondary education. . . . Thus, charter schools in North Carolina 'exercise[ ] power possessed by virtue of state law and made possible only because the [school] is clothed with the authority of state law.'. . The Supreme Court has held that such a delegation of a state's responsibility renders a private entity a state actor. . . . We are not aware of any case in which the Supreme Court has rejected a state's designation of an entity as a 'public' school under the unambiguous language of state law and held that the operator of such a public school was not a state actor. . . We are not prepared to do so here. . . . We reach a different conclusion with respect to RBA, the for-profit management contractor of CDS. The plaintiffs assert that RBA's 'intertwinement with CDS,' its role in daily school operations, and its responsibility for enforcing the skirts requirement renders RBA a state actor. According to the plaintiffs, RBA and CDS are essentially indistinguishable entities and, thus, both qualify as state actors. Despite the close relationship between CDS and RBA, we disagree with the plaintiffs' argument. There are several key differences between RBA, a for-profit management company, and CDS, the non-profit charter school operator authorized by the state to run a charter school. North Carolina has not chosen to delegate its constitutional duty to provide free, universal elementary and secondary education to for-profit management companies like RBA. To the contrary, RBA has no direct relationship with the state and is not a party to the charter agreement between CDS and North Carolina. Instead, RBA manages the daily functioning of the school under its management agreement with CDS. In working for CDS, rather than for the state of North Carolina, RBA's actions are more attenuated from the state than those of CDS, the entity authorized by the state to operate one of its public schools. We therefore conclude that RBA's actions implementing the skirts requirement are not 'fairly attributable' to the state.")

White Coat Waste Project v. Greater Richmond Transit Co., 35 F.th 179, ___ (4th Cir. 2022) ("While the constitutional state-action and statutory color-of-law requirements are technically distinct, courts treat them 'as the same thing.'. . 'The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question' as the state-action inquiry: 'is the alleged infringement of federal rights "fairly attributable to the State?"'. . . Often, that means asking whether there is a 'close nexus' between the government and the conduct being challenged. . . But this appeal presents a more basic question: What is the government? Often, the answer is clear. The army is the government. . . So is a municipal zoning board. . . And usually, private corporations are not the government. . . Usually, but not always. In *Lebron*, the Supreme Court noted a special class of corporate entities, 'Government-created and -controlled corporations,' that are part of the government despite their ostensibly private character. . . The Court there confronted a similar case to our own: The National Railroad Passenger Corporation, commonly known as Amtrak, refused to display a political advertisement, which prompted a First Amendment challenge. . . Amtrak argued that it was a corporation, not a government entity, so it was not bound by the First Amendment. . .The Supreme Court disagreed, holding Amtrak was a government entity. . . The government is afforded administrative flexibility to achieve its ends, but organizational creativity cannot release it from its constitutional mandates: It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form. On that thesis, *Plessy v. Ferguson* can be

resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak.'. . Instead, the Court held that where 'the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.'. . So *Lebron* establishes that a corporation is 'Government-created and –controlled' and part of the government for purposes of the First Amendment where: (1) creation of the corporation occurred by 'special law'; (2) creation was 'for the furtherance of governmental objectives'; and (3) retention by the government of 'permanent authority to appoint a majority of the directors of that corporation.'. . Richmond Transit satisfies all three elements.")

Davison v. Randall, 912 F.3d 666, 681 (4th Cir. 2019) ("Put simply, Randall clothed the Chair's Facebook Page in 'the power and prestige of h[er] state office,'. . . and created and administered the page to 'perform[ ] actual or apparent dut[ies] of h[er] office[.]'. . Additionally, the specific actions giving rise to Davison's claim—Randall's banning of Davison's Virginia SGP Page—'are linked to events which arose out of h[er] official status.'. . Randall's post to the Chair's Facebook Page that prompted Davison's comment informed the public about what happened at the Loudoun Board and Loudoun County School Board's joint meeting. And Davison's comment also dealt with an issue related to that meeting and of significant public interest—School Board members' alleged conflicts of interest in approving financial transactions. That Randall's ban of Davison amounted to an effort 'to suppress speech critical of [such members'] conduct of [their] official duties or fitness for public office' further reinforces that the ban was taken under color of state law. . . Considering the totality of these circumstances, the district court correctly held that Randall acted under color of state law in banning Davison from the Chair's Facebook Page.")

U.S. v. Day, 591 F.3d 679, 687-89 (4th Cir. 2010) (Virginia's conferral of authority on armed security officers to effect an arrest for an offense occurring in their presence did not render them de facto police officers, as would justify a finding that officers acted as government agents when they arrested and interrogated defendant, for purposes of the Fourth and Fifth Amendments, where not only was arrest power of armed security officers more circumscribed than that of police officers, who could arrest on basis of reasonable grounds or probable cause to suspect a person of having committed a felony not in their presence, but it was also essentially the same as that of any private citizen).

Philips v. Pitt County Memorial Hosp., 572 F.3d 176 (4th Cir. 2009) (discussing various tests for state action and concluding that hospital's Board of Trustees did not act under color of state law in temporarily suspending physician's practice privileges).

Rossignol v. Voorhaar, 316 F.3d 516, 523, 524, 527 (4th Cir. 2003) ("Defendants executed a systematic, carefully-organized plan to suppress the distribution of *St. Mary's Today.* And they did so to retaliate against those who questioned their fitness for public office and who challenged many of them in the conduct of their official duties. The defendants' scheme was thus a classic

example of the kind of suppression of political criticism which the First Amendment was intended to prohibit. The fact that these law enforcement officers acted after hours and after they had taken off their badges cannot immunize their efforts to shield themselves from adverse comment and to stifle public scrutiny of their performance. . . .We would thus lose sight of the entire purpose of § 1983 if we held that defendants were not acting under color of state law. Here, a local sheriff, joined by a candidate for State's Attorney, actively encouraged and sanctioned the organized censorship of his political opponents by his subordinates, contributed money to support that censorship, and placed the blanket of his protection over the perpetrators. Sheriffs who removed their uniforms and acted as members of the Klan were not immune from § 1983; the conduct here, while different, also cannot be absolved by the simple expedient of removing the badge.").

Durham v. Rapp, 64 F. Supp. 3d 740, 746-47 (D. Md. 2014) ("The Court concludes that Durham is not barred from suing Vogt under § 1983 simply because Vogt is an FBI agent. The only question is whether Vogt was acting under color of state law when he was serving as a commissioner of the MPTC [Maryland Police Training Commission]. Since it was Maryland state law that created the MPTC and bestowed upon it its powers and duties including those exercised by Vogt, it can be fairly said that Vogt must be regarded as a state actor as to the circumstances presented in this lawsuit. He has cited no federal law that required him to serve as an MPTC commissioner. Thus, he was acting under color of state law. For that reason, he is not subject to suit under *Bivens* because he was not acting under color of federal law.")

FIFTH CIRCUIT

Kallinen v. Newman, No. 22-20383, 2023 WL 2645555, at *2–3 (5th Cir. Mar. 27, 2023) ("[I]n *Campbell v. Reisch*, the Eighth Circuit concluded that a 'Missouri state senator did not act under color of state law when blocking a constituent from a Twitter page that she created to announce her candidacy for office.'. . That court determined that the senator, acting as a private individual, created the account before her election and then 'used [the account] overwhelmingly for campaign purposes.'. . Though the Eighth Circuit did not outright define 'overwhelming' in this context, we agree with its conclusion and reach a similar one here after examining Judge Newman's Facebook page. While the alleged facts here suggest that Judge Newman often used his page as a campaign tool, they do not support a claim that Judge Newman used his official position to silence Kallinen's speech, or that Judge Newman's Facebook page was a function of his official duties. At best, Kallinen has alleged enough facts to conclude that Judge Newman used his Facebook page strategically to create a favorable impression in the minds of voters. . . Further, Kallinen does not allege facts demonstrating that Judge Newman used his power as a judge to delete Kallinen's comments. . . . Because Judge Newman was not acting under the color of state law when he blocked Kallinen and deleted his comments, we hold that Kallinen has not met his burden under § 1983.")

Tyson v. Sabine, 42 F.4th 508, 522-23 (5th Cir. 2022) ("Deputy Boyd argues that he did not act under color of law because he 'was not on duty' and only Tyson's 'subjective belief' supports

otherwise. But '[w]hether an officer is acting under color of state law does not depend on his on- or off-duty status at the time of the alleged violation.'. . Critically, Tyson's 'subjective belief' that Deputy Boyd was acting under color of law was born directly from his conduct leading her to think as much. . . . Deputy Boyd argues that he did not act under color of law because 'the "real reason" for [his] visit to her house was not related to law enforcement, but rather to engage in sexual activity.' But officials who act for purely personal reasons do not 'necessarily fail to act "under color of law."'. . It is only '[i]f an officer pursues personal objectives *without* using his official power as a means to achieve his private aim[ ] [that] he has not acted under color of state law.'. .Deputy Boyd acted under color of law during the alleged sexual abuse.")

Watts v. Northside Independent School District, 37 F.4th 1094, 1097-98 (5th Cir. 2022) ("Breed's ordering players to assault the referee . . . does not fit in the state-created-danger box. Instead, it is an example of a public official's ordering private actors to engage in conduct. The law has long recognized that state action exists when a state actor commands others to commit acts as much as when the state actor commits those acts. . . Under this view of the case, which Watts also argues, it is clearly established that Breed engaged in state action when he ordered his players to assault Watts. The challenged action is Breed's order to hurt Watts. It is hard to see how that is anything other than state action. Breed was on the sidelines acting in his role as an assistant football coach at a public school. Just as a police officer cannot avoid the Fourth Amendment by ordering a private citizen to conduct an illegal search, . . . Breed cannot escape liability by ordering students to conduct the attack. . . . Because the law has long recognized that a public official remains a state actor when he orders others to carry out his objectives, any reasonable football coach would have known that he was engaged in state action when instructing his players that Friday night. Consequently, the state action in this case was clearly established and it was error to dismiss the section 1983 claim against Breed on that ground. Although we hold that Breed was engaged in state action that subjected him to the Due Process Clause, we do not opine on whether the complaint has alleged a violation of clearly established due process law.")

Gomez v. Galman, 18 F.4th 769, 776 (5th Cir. 2021) ("Viewing his complaint in the light most favorable to Gomez—as we must—we determine that he has adequately pleaded facts which establish that Galman and Sutton acted under the color of law. First, Gomez alleges that when he exited the bar, Sutton 'acting as a police officer, gave Mr. Gomez a direct order to stop and not leave the patio area of the bar.' Gomez obeyed this order. Then, when he attempted to drive away after getting violently beaten, Sutton and Galman 'ordered him to stop' and 'ordered [him] to step out of his vehicle.' Gomez claims that '[b]ecause they acted like police officers, [he] believed he was not free to leave, and did as he was ordered.' These allegations are key. A victim usually does not follow orders from someone who just attacked him without good reason to do so. He is even less likely do so when—as alleged here—the victim was in the process of escaping his attackers. The fact that Gomez stopped and exited his vehicle at his attackers' commands lends significant credence to his allegation that he believed them to be police officers, because the complaint offers no reason for Gomez to obey Galman and Sutton unless they were 'acting by virtue of state authority.'. .Gomez alleges other facts indicating that Galman and Sutton 'misused or abused their

official power.'. . For example, Gomez asserts that the officers 'forced him onto his stomach, and placed his hands behind his back in a police hold as they were trained to do during an arrest, and effected an arrest of Mr. Gomez.' This caused Gomez to 'believe[ ] he was being arrested.' The use of the police hold further indicates that Galman and Sutton were abusing their official power and exercising their authority as officers in their efforts to harm Gomez. Further, Sutton 'called for backup in continuing to make an arrest' and Defendants 'identified themselves to NOPD dispatch as NOPD officers.' Gomez concedes that by the time the officers called for backup he was unconscious. Nevertheless, Defendants' call for backup—and especially their identification of themselves as officers of the law—adds to the 'air of official authority' that pervaded the assault. . . Taken together, these allegations are sufficient to plead that the officers misused their official power. Accordingly, the district court erred in finding that Galman and Sutton did not act under color of law.")

Gomez v. Galman, 18 F.4th 769, 782-83 (5th Cir. 2021) (Ho, J., concurring) ("As a strictly doctrinal matter, this is a close case. Gomez alleges that he believed his assailants were police officers, and that for that reason, he complied with their orders, rather than flee to avoid further injury. But he never explains *why* he believed the defendants were police officers. He does not allege that they wore uniforms, displayed their badges, or otherwise presented themselves to him as police officers. And it is not Gomez's subjective beliefs, but the officers' conduct, that determines whether the defendants acted 'under color of [state law]' as required under 42 U.S.C. § 1983. . . So I can see how the district court might have concluded that this case cannot proceed under § 1983. That said, I am not prepared to dismiss all of Gomez's claims at this time. Some circuits have recognized that a plaintiff's subjective beliefs may bear 'some relevance' to the color of law determination. . . In addition, there is at least some support in our circuit precedent for the proposition that the officers here acted under color of state law because they later called for police backup. . . In light of these authorities, I am happy to reverse in part and remand for further proceedings, and therefore concur. Moreover, although reasonable minds can debate whether the misconduct alleged here is actionable under § 1983, it is unquestionably contemptible. Accepting the allegations in the complaint as true, as we must at this stage, Jorge Gomez is a U.S. citizen and decorated military veteran of Honduran descent. On the night in question, he visited a local bar, proudly wearing his military regalia. Officers Galman and Sutton ordered Gomez to approach. They called him a 'fake American' and a 'liar' and told him to 'go back' to wherever he came from. They attempted to strip off his military clothing. And then they brutally beat him until two bystanders intervened to stop the attack. They left Gomez sprawled across a patio table, bruised and bloodied. After he managed to get up, Gomez entered his car and began driving away. But the officers ordered him to stop and exit his vehicle. Believing he had no choice, Gomez complied. The officers then knocked Gomez to the ground, forced him onto his stomach, held his arms behind his back, and beat him unconscious. 'Nothing is more corrosive to public confidence in our criminal justice system than the perception that there are two different legal standards.'. . If the allegations in this case are true, the officers have not merely brutalized one man—they have badly undermined public trust in law enforcement. And unfortunately, the misconduct alleged here

is not unique. . . I agree that the district court should not have dismissed Gomez's claims against the officers at this early stage in the proceedings. Accordingly, I concur.")

Pikaluk v. Horseshoe Entertainment, LLP, 810 F. App'x 243, ___ (5th Cir. 2020) ("The district court granted summary judgment based on its conclusion that the Officers conducted an 'independent investigation' after receiving the call from Horseshoe. We disagree. As we will explain, the lack of independent investigation is a significant factor in Pikaluk's malicious prosecution claim. But even without evidence of an independent investigation, summary judgment on Pikaluk's § 1983 claim was still proper because of the lack of evidence of any 'interdependence' or 'meeting of the minds' between the state officials and the Horseshoe Defendants. We thus affirm the district court's grant of summary judgment on Pikaluk's § 1983 claim.")

Ayala-Gutierrez v. Doe, No. 16-20164, 2017 WL 3722804, at *1 (5th Cir. Aug. 28, 2017) (not reported) ("Ayala-Gutierrez argues that he has stated a claim under § 1983 because GEO is a state actor that derives its authority to operate Joe Corley Detention Facility from the state of Texas. He additionally argues that he has stated a claim under *Bivens* because GEO is a federal employee insofar as it acts under the color of federal law in operating Joe Corley Detention Facility. This court has rejected these arguments in *Eltayib v. Cornell Companies, Inc*., 533 Fed.Appx. 414, 414-15 (5th Cir. 2013). *Eltayib* held that GEO and their employees are not subject to suit as state actors under § 1983 because they manage a federal prison, and § 1983 applies to constitutional violations by state—not federal—officials. . . It additionally held that GEO and its employees cannot be liable as private actors under *Bivens*. *Id*. (citing *Minneci v. Pollard*, 565 U.S. 118, 131, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012), and *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 63-64, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001)). Ayala-Gutierrez therefore has shown no error on the part of the district court in dismissing his complaint for failure to state a claim.")

Moody v. Farrell, No. 16-60684, 2017 WL 3530156, at *4 (5th Cir. Aug. 17, 2017) ("[E]vidence that a private citizen reported criminal activity or signed a criminal complaint does not suffice to show state action on the part of the complainant in a false arrest case. . .The plaintiff must further 'show that the police in effecting the arrest acted in accordance with a "preconceived plan" to arrest a person merely because he was designated for arrest by the private party, without independent investigation.'. . .As Farrell argues, the record indisputably shows that the Lowndes County Sheriff's Department conducted an investigation and independently determined that probable cause existed to arrest Moody. . . .In light of the undisputed facts that Officer Cooper investigated Farrell's allegations for almost a year and that two state officials found probable cause, it is reasonable to infer, at most, that Farrell pressured Officer Cooper to pursue arrest. In this way, Farrell, like the defendant in *Bartholomew*, influenced the actions of the police but did not determine them. A jury could not reasonably infer that Farrell's pressure destroyed the independence of Officer Cooper's investigation.")

Doe v. United States, 831 F.3d 309, 314-17 (5th Cir. 2016) ("The plaintiffs rely on the 'nexus' test, under which the state's involvement is such that the private actor's conduct can fairly be treated as that of the state itself. . . In essence, the plaintiffs assert that CCA derived its authority to run the detention center from the subcontract with Williamson County, meaning the CCA defendants were acting under color of state law. . . .[T]he plaintiffs argue here, the fact that the plaintiffs are federal detainees is irrelevant. Whether state action exists depends 'on the nature of the defendant' and not the nature of the plaintiff. . . .As an initial matter, resolving whether an action is 'fairly attributable to the State' "begins by identifying the specific conduct of which the plaintiff complains[.]"'. . In *Cornish*, a guard at a private corrections facility that housed juveniles sued under Section 1983 after he was fired. . . Affirming dismissal, we said that the facility's '*role as an employer*' did not constitute state action. . . This is true even if the facility's role in 'providing juvenile correctional services was state action.'. . We said that it was immaterial that the facility's guards were subject to state regulations, or that a state contract authorized the facility's operations. . . Here, the specific conduct complained of is the CCA defendants' failure to follow ICE's transport policy, which the plaintiffs allege facilitated Dunn's crimes. Thus, following *Cornish*'s reasoning, the CCA defendants' relevant role on which we must focus is in detaining aliens pending a determination of their immigration status pursuant to ICE specifications. This is fundamentally a federal function. Relatedly, we once held that a CCA guard at a detention center housing federal detainees was the equivalent of a federal corrections officer. *United States v. Thomas*, 240 F.3d 445, 448 (5th Cir. 2001). Furthermore, even if we focus on the subcontract. . . . its terms support a finding that Williamson County's involvement in running the detention center was minimal. The subcontract delegated all responsibility for housing detainees pursuant to ICE standards to CCA. Williamson County is permitted to employ a representative to serve as a 'liaison,' but it has no involvement in the day-to-day operations of the detention center regardless of whether it pressured CCA to remove Hernandez. Other provisions of the subcontract merely facilitate an administrative payment between Williamson County and CCA, provide indemnification to Williamson County, and require CCA to notify county officials if there is an emergency at the detention center. This leaves the fact of the subcontract's existence as the sole connection to the state. We have said that the '[a]cts of ... private contractors do not become acts of the government by reason of their significant or even total engagement in performing in public contracts.' *See Cornish*, 402 F.3d at 550. *Henderson* and *Alvarez*, moreover, are distinguishable on their facts. The state in both cases exhibited more control over the relevant correctional facilities than Williamson County had over the detention center here. In *Henderson*, the jail was county owned and operated; it unequivocally derived its existence from the state. . . No private contractor was involved. . . *Alvarez* involved a county-owned jail, which was operated by a private contractor and housed state and federal prisoners. . . The district court said the contract with the Marshals Service to house some federal prisoners did not change the character of the private contractor's relevant function as the operator of the county jail. . . Here, again, the detention center — which houses only federal aliens detained by ICE — is owned and operated by CCA alone, not Williamson County or the state of Texas. ICE promulgates all policies and procedures by which the detention center must operate through the service agreement and subcontract. The plaintiffs'

case centers on the CCA defendants' violation of one of those policies. *Henderson* and *Alvarez* are not on point.")

Rundus v. City of Dallas, Tex., 634 F.3d 309, 315 (5th Cir. 2011) ("We hold that the facts here clearly indicate SFOT is not a state actor; it runs a private event on public property. The pervasive entwinement present in *Brentwood* is not presented in the facts before us. The City has no say in SFOT's internal decision making, and had no role in enacting or enforcing the restriction on distribution of literature. Nor are we convinced by Rundus's argument that Appellees' mutual commitment to improve Fair Park demonstrates state action, because SFOT improves only the portions of Fair Park that will attract more fairgoers. In short, the facts presented are not sufficiently analogous to *Brentwood* to conclude that SFOT is a state actor.")

Bustos v. Martini Club Inc., 599 F.3d 458, 464, 465 (5th Cir. 2010) ("Whether an officer is acting under color of state law does not depend on his on- or off-duty status at the time of the alleged violation.. . . If an officer pursues personal objectives without using his official power as a means to achieve his private aim, he has not acted under color of state law. . . . [H]ere, Bustos does not allege facts to suggest that the officers who assaulted him misused or abused their official power. His allegations suggest that, at the time of the incident, the officers were off-duty and enjoying drinks at the bar with female companions. . . . .[B]ecause he asserts no facts that would suggest that the use of force by Officers Goodwin and Cantu was a misuse of their power as state officers, he has not sufficiently alleged that their actions were under color of state law.").

Barkley v. Dillard Dept. Stores, Inc., No. 07-20482, 2008 WL 1924178, at *3 (5th Cir. May 2, 2008) (not published) ("Although Dillard's notified Wilkinson of the shoplifter, Wilkinson made an independent decision to chase after and attempt to apprehend the suspect. These facts are in contrast with those in *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93 (5th Cir.1975) (per curiam), in which we found that Brookshire was a state actor because 'the police and [Brookshire] maintained a pre-conceived policy by which shoplifters would be arrested based solely on the complaint of the merchant.'. . There is no evidence of a pre-conceived policy in this case. Therefore, based on the facts described above, we conclude that the district court did not err in deciding that Dillard's was not a state actor. Consequently, we affirm summary judgment for Dillard's.").

Cornish v. Correctional Services Corp., 402 F.3d 545, 550, 551 (5th Cir. 2005) (CSC's decision to terminate plaintiff's employment was made in its role as private prison management employer and could not be attributed to Dallas County or State of Texas).

Rosborough v. Management & Training Corporation, 350 F.3d 459, 461 (5th Cir. 2003) (agreeing with Sixth Circuit and with district courts 'that have found that private prison-management corporations and their employees may be sued under § 1983 by a prisoner who has suffered a constitutional injury.").

SIXTH CIRCUIT

Lawson v. Creely, No. 24-5649, 2025 WL 916815, at *5–6 (6th Cir. Mar. 26, 2025) (not reported) ("In this situation, the fact that Creely's and Franke's conduct 'exceed[ed] the scope' of the school policy does not preclude that conduct from being state action if 'the State has delegated the *general* "type of authority" that [Creely and Franke] exercised.'. . But nothing in the policy suggests that the state had delegated to Creely and Franke the general authority to conduct investigations or seek out potential dangers beyond what was immediately ascertainable to them. Instead, a holistic review of the school's policies suggests that employees should report concerns and suspicions to supervisors or law enforcement, who are better equipped to develop a plan of action. Further, the fact that these policies contemplate the reporting of *beliefs* and *suspicions* suggests that employees need not conclusively verify their suspicions (such as by searching through a coworker's bag) before reporting them. . . In fact, when the school's weapons policy discusses potential searches, it expressly limits that authority to the school's principal: 'In the enforcement of this policy, *principals* may authorize, if they have reasonable suspicion, searches in compliance with applicable Board policies.'. . Considering these policies as a whole, the state had not delegated even the *general* type of authority at issue here to employees like Creely and Franke. . . For the foregoing reasons, Creely and Franke did not search Lawson's bag pursuant to any state authority, and consequently, Lawson cannot satisfy the acting-under-color-of-state-law element for her § 1983 claim.")

Ermold v. Davis, 130 F.4th 553, 561-63 (6th Cir. 2025) ("This appears to be an issue of first impression. The parties have provided no case in which a government official raised a First Amendment affirmative defense to a § 1983 claim. The district court likewise noted that it found 'no example' of such a case. . . Although Davis's assertions are novel, they fail under basic constitutional principles. Under § 1983, Davis is being held liable for state action, which the First Amendment does not protect—so the Free Exercise Clause cannot shield her from liability. The First Amendment protects 'private conduct,' not 'state action.'. . To be sure, not every act taken by a public official constitutes state action unprotected by the First Amendment. . . Government officials 'have private lives and their own constitutional rights.'. . But when a public official wields the 'authority of the state,' she 'engage[s] in state action,' which, by definition, cannot be protected by the First Amendment. . . A recent Supreme Court case illustrates these principles. [discussing *Lindke v. Freed*] The First Amendment shields Davis where she 'functioned as a private citizen,' but not where she 'engaged in state action.'. . That binary is outcome-determinative here because the act for which Davis is being held liable—denying Plaintiffs a marriage license—is quintessential state action. A state official engages in state action when she 'possesse[s] state authority' and 'purport[s] to act under that authority.'. . So too where she exercises power that is 'possible only because' she is 'clothed with the authority of state law.'. . In Kentucky, marriage licenses are issued by the government; a private party has no authority to grant or deny a marriage license to anyone. And Kentucky delegated that licensing authority to county clerks, who are charged with 'issuing marriage licenses, recording marriage certificates, and reporting marriages.'. . So, when Davis denied Plaintiffs a marriage license, she was wielding the 'authority of the

State'—not 'function[ing] as a private citizen.'. . That means the license denials were 'state action,'. . . which cannot receive First Amendment protection, and Davis cannot raise a First Amendment defense to liability.")

Lindke v. Freed, 114 F.4th 812, 816-21 (6th Cir. 2024) (on remand from S. Ct.) ("Under the Supreme Court's new test, an official's social-media activity counts as state action only if the plaintiff can show that the official (1) 'possessed actual authority to speak on the State's behalf' and (2) 'purported to exercise that authority when he spoke on social media.'. . This new test differs from the one we previously applied in two ways: it's narrower in one respect and broader in another. At prong one, we previously held that actual *or* apparent authority could support a finding of state action. . . But the Supreme Court made clear that only actual authority could suffice. . . And on prong two, we focused on the appearance and administration of Freed's page as a whole. . . But the Supreme Court explained that this prong requires a post-by-post inquiry. . . For the reasons we discuss below, a limited remand is necessary to apply this revised test. . . .If Freed lacked actual authority to speak on the state's behalf, that's the end of the inquiry—there's no state action. But if Freed did have such authority, then we move to the second prong: whether Freed purported to exercise that authority when he spoke on social media. This is an objective test, although the 'appearance and function' of the social-media activity are relevant. . . For example, if a government website links to an official's social-media posts, it's likely that such posts exercised state authority. . . . Resolving this second prong requires a post-by-post analysis. . . Accounts like Freed's, which aren't clearly labeled as either personal or official, may contain some posts made in a personal capacity and others in an official capacity. . . Consequently, Lindke must identify 'specific posts' in which Freed purported to exercise authority to speak on the state's behalf. . . Moreover, it's 'crucial' that Lindke show that Freed was purporting to exercise state authority in the specific posts that Lindke identifies. . . It's not the district court's job to comb through the offending account. Of course, the posts Lindke identifies must be ones that were the subject of alleged censorship. Otherwise, Lindke wouldn't be able to allege a rights violation. Here, Lindke alleges two categories of posts that were the subject of censorship: (1) posts from which Lindke's comments were deleted, and (2) posts that Lindke couldn't access because he was 'blocked' from Freed's page. When it comes to the deletion of comments, the court's task is straightforward: look at the allegedly offending posts that Lindke identifies and determine whether any of those posts represented state action. . . For deletion, 'the only relevant posts are those from which Lindke's comments were removed.' . .But when it comes to Freed's wholesale 'blocking' of Lindke from accessing his page, Lindke need only identify one single post on Freed's account that represented state action. . . Indeed, '[b]locking' someone on Facebook is a 'blunt[ ] ... tool.'. . This means that when an official blocks someone from accessing a page on which both personal and official business is conducted, the official risks liability if the blocked user is prevented from commenting on even a single state-action post—even if the majority of the account's content is personal. . . Context is everything in analyzing this second prong. Whether each post's 'content and function' invoke personal or official authority is a 'fact-specific undertaking.'. . . Discerning whether a post exercises state authority will be a context-specific, totality-of-the-circumstances inquiry. But a few factors can guide courts undertaking this task. For instance, posts that expressly

invoke an official's legal authority will likely be exercises of that authority. As will posts that have some legal consequence in the real world, like a 'burn ban' issued on social media by our hypothetical fire marshal. Likewise, if a government official uses their staff or office funding to make a post, it's more likely the post is made pursuant to state authority. On the flip side, the mere subject matter of a post isn't enough to show that a post is state action—especially when the information contained in the post is available in other places (whether online or in-person). After all, any citizen can post about a school policy, road closure, or press conference. None of that requires authorization by state law. Indeed, when a state official posts about government happenings in a way that any other citizen could, plaintiffs will need to show that those posts were made pursuant to the official's job duties. . . Because the Supreme Court's test changes the relevant inquiries, Lindke argues that he needs to further develop the record before a court can resolve his claims. We agree. The discovery he conducted couldn't have been tailored toward satisfying a legal standard that had eluded all the parties as well as this court. Thus, we remand this case to the district court for further proceedings. We now turn to consider what the remand might look like. . . . If the district court ultimately tackles the state-action question, it must give Lindke an opportunity to establish facts that became legally relevant only after the Supreme Court articulated its test. But the district court doesn't need to re-open discovery for issues on which Lindke already had a chance to develop the record the first time around. Start with the first prong of the state-action test, which asks whether Freed had authority to speak for the state on the matters in question. . . Our prior test asked a different question: whether Freed had authority to run a Facebook page. . . So, the relevant object of authority has changed from authority to run a Facebook page to authority to speak for the state. As explained above, this authority can come from written law, custom, or usage. And permissible sources of custom could range from use of social media by Freed's predecessors to any other patterns established by Port Huron. If the district court determines that Lindke hasn't had an opportunity to show that these sources granted Freed authority to speak on the state's behalf, then discovery on this issue would be warranted. If Freed lacked actual authority to speak for the state, then there's no state action, and Freed is entitled to summary judgment. The district court would proceed to prong two only if Freed had actual authority. This prong asks whether Freed purported to exercise that authority in specific posts. . . To be sure, Lindke has already discovered a trove of Freed's Facebook posts. But on this prong, context is everything, so a fact-intensive analysis of individual posts might be necessary. . . Lindke might need additional discovery to develop facts that could be important to understanding the context of Freed's posts. Lastly, even if discovery uncovers that some of Freed's posts were state action, a host of other First Amendment issues remain: what kind of forum Freed's social-media accounts are, what level of scrutiny his deletion or block decisions receive, and whether he's entitled to qualified immunity. We leave these interesting questions for another day.")

Mackey v. Rising, 106 F.4th 552, 555, 558-64 (6th Cir. 2024) ("Rising served as a legislator, not a police officer. The City of Adrian thus did not grant him any 'authority' to use (or threaten) physical force on its behalf. . . And because the City 'did not entrust' Rising with this power, his alleged 'misuse' of the power cannot qualify as state action. . . Next, Rising accepted the City's insurance for his defense because he maintained that the insurer's duty to defend turned on

Mackey's allegations alone (which claimed that Rising had acted for the City). Because his state-action defense on the merits did not conflict with his view of the insurer's duty to defend, neither waiver nor judicial estoppel apply. We thus affirm the grant of summary judgment to Rising. . . . The Supreme Court has long interpreted these constitutional and statutory state-action requirements in an 'identical' way. . . Because States today often hire full-time public staff to carry out their functions, 'state action is easy to spot' most of the time. . . That said, courts often confront two different (yet equally 'difficult') state-action problems. . . The first arises from the States' traditional practice of hiring ostensibly private parties (such as doctors) to perform public services (such as the provision of medical care to prisoners). . . When do these private parties qualify as state actors under the Constitution and § 1983? The Supreme Court has adopted various tests (a public-function test, a state-compulsion test, and a nexus text) to answer this question. . . We need not consider any of these tests here. This case instead concerns the second state-action problem. . . . All agree that Adrian City Commissioners like Rising qualify as 'state actors.'. . But state officials have private lives. So how should we distinguish their official conduct (which falls within the Fourteenth Amendment and § 1983) from their 'personal' conduct (which falls outside those provisions)?. .The Supreme Court in *Lindke* recently addressed this question in the social-media context. . . . Ultimately, it adopted a two-part test to determine whether the manager had spoken for the city in his social-media posts. . . First, the manager must have 'possessed actual authority to speak on the State's behalf' in the social-media posts. . . Second, the manager must have 'purported to exercise that authority when he spoke on social media.'. . Outside the social-media context, our court—and the Supreme Court—have long followed a similar two-part test. When asking whether a challenged action qualified as state action, we described the 'the controlling issue' as whether an official 'possessed state authority' to take the action 'and whether [the official] purported to act under that authority' on the specific occasion. . . The Supreme Court in *Lindke* seemingly tailored this general test to the specific social-media context. . . It also cautioned that courts should apply a 'fact-intensive inquiry' when answering state-action questions and recognized the 'rapidly changing' nature of social media. . . Given this caution, we need not decide on the precise formulation that governs here. Under either formulation, Rising did not possess state authority to threaten violence against Mackey or his mother. We reach that conclusion without proceeding past the first element: Did a state statute, ordinance, regulation, custom, or usage give the defendant the 'actual' or 'state' 'authority' to engage in the relevant conduct? . . . This element requires courts to identify the 'nature of the act' that the plaintiff challenges . . . and to compare that act with the state-assigned 'responsibilities' of the official who committed it[.] . . The state official possesses the authority to take a challenged action only if the action meaningfully relates to the official's 'governmental status' or the 'performance of his duties.'. . This test produces some easy answers. Most obviously, a state employee's conduct will meet the test if a state regulation tasked the employee with engaging in the specific conduct at issue. Consider our oft-cited decision in *Stengel*. There, a police officer shot three bar patrons while attempting to end a middle-of-the-night bar fight. . . Although the officer was off-duty and out of uniform, 'police department regulations' vested him with the authority—indeed, the duty—to stop crime '24 hours a day.'. . And state officials later approved the officer's force as consistent with these regulations. . .But things are not always so simple. In some situations, an official might possess the required state

authority even if the State did *not* permit the conduct. In other situations, an official might not possess this state authority even if the State *did* permit it. Begin with the first set of situations: A state official's conduct can qualify as state action even if the 'particular action which he took' (say, a police officer's use of excessive force) 'was not authorized by state law' (say, because it violated a State's use-of-force regulations). . . . [A]s *Lindke* put it, state officials can satisfy the Court's 'actual authority test even if they go beyond (or '[*m*]*isuse*') the power that the State has entrusted them. . . Even before *Lindke*, our cases made the same point when they noted that officers can engage in state action if their conduct arose from an '*apparent* duty' of their office or '*ostensible* state authority[.]'. . We interpret these statements—consistent with *Lindke*—to cover fact patterns when an official exercises state authority but exceeds the scope of the delegation. . . So what distinguishes the *misuse* of authority from the *absence* of authority? The Supreme Court has offered little guidance on this subject. But it has clarified that we must look beyond whether the State has permitted the '*particular* action' that a plaintiff challenges. . . We must instead ask whether the State has delegated the *general* 'type of authority' that an official exercised. . . Our cases about police officers prove this point. We often hold that the police engaged in state action when they purported to exercise law-enforcement powers—without stopping to ask whether their actions violated state regulations on, say, using force. . . Turn to the second set of situations: A state official's conduct might qualify as *private* action even if the State gave the official the authority to engage in the conduct in an abstract sense. States authorize (that is, permit) public and private parties alike to do many things. They, for example, permit their residents to file defamation suits against those that make false statements about them. Yet this state 'authorization' does not transform all private citizens into state actors whenever they pursue defamation claims. . . And that rule applies even if the plaintiffs are state officials who threaten *private* defamation suits 'to safeguard their personal reputations.'. . To create state action, then, a State must do more than permit all parties (public and private alike) to engage in the conduct at issue. The State must instead entrust a party with 'state authority.'. . This distinction matters. Even if a State permits a state official (like a 'private citizen') to engage in certain conduct, the conduct will not qualify as state action if it falls outside the duties that the State has tasked the official to perform and if instead the State has permitted anyone to engage in the activity. . . .That said, we must not take any analogy to private conduct too far. If the State does assign an official a duty to engage in an action as part of the official's state job responsibilities, '[i]t is irrelevant that he might have taken the same action had he acted in a purely private capacity[.]'. . The conduct will still qualify as state action even though the official could have performed the same task as a private party. . . For example, although any private person can complain to a state bar about an attorney, a bar official engages in state action if he makes a complaint while undertaking his official bar-related duties. . . .These principles foreclose Mackey's claim. The City of Adrian did not give Rising the authority to engage in the conduct that Mackey challenges in this suit. . . .Nor can Mackey fall back on the claim that Rising's threat of violence qualifies as a 'misuse' of the power that the City allowed him to exercise on its behalf. . . Even if the divide between the misuse of power and the absence of power can be difficult to draw, we see no difficulty here. Mackey identifies no legislative power that Rising's alleged threat could conceivably fall under. Critically, Mackey agrees that Rising threatened only *physical* harm—not the types of harm that legislators might inflict. For example, Mackey does not claim

that Rising threatened to enact a harmful ordinance (or initiate a costly legislative investigation) as payback for the criticism. . . .Even if Rising lacked the power to *use force* for the City, Mackey responds, Rising had the power to *speak to residents* on the City's behalf outside official meetings. To support this claim, Mackey notes that Rising testified that he used his personal cellphone interchangeably to make both government and private calls. Rising distinguished between the two types of calls based on 'the topic of the conversation[.]'. . .Mackey's 'topic of conversation' approach to state action commits an error that the Supreme Court highlighted in *Lindke*. Mackey puts the 'focus on appearance' by asking whether Rising purported to talk about something government related. . . Yet, as *Lindke* explained in the social-media context, '[t]he appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first.'. . Here, too, Rising skips over the first crucial question: Was Rising 'possessed of state authority'? . . . Mackey does not even *attempt* to identify some 'statute, ordinance, regulation, custom, or usage' that gave Rising the authority to be the official voice of Adrian during phone calls with residents. . . He merely assumes that Adrian gave Rising the power to speak to residents on the City's behalf based on Rising's testimony that he spoke about government topics over the phone. Yet Rising cannot 'conjure the power of the State through his own efforts'; Mackey must point to a source delegating this power to him. . . .We need not consider the second element of the state-action test to reject Mackey's claim because he cannot get past its first element. Whether or not Rising purported to act in his official capacity, Adrian did not give him any authority to use (or threaten) physical force on its behalf. . . So the City 'cannot "fairly be blamed"' for Rising's alleged threat to harm Mackey.")

Nugent v. Spectrum Juvenile Justice Services, 72 F.4th 135, 140-43 & n.3 (6th Cir. 2023) ("There are three tests for determining whether a private actor may be treated as a state actor: 'the public-function test, the state-compulsion test, and the nexus test.'. . On appeal, plaintiffs argue that they pleaded sufficient facts to establish Spectrum as a state actor based on all three tests. Because we find that plaintiffs adequately allege state action under the public-function test, we address that test alone. . . . Under our precedent, detention centers are generally considered 'a public function traditionally reserved to the state.' . . . Other circuits have generally held that correctional facilities perform a traditionally exclusive public function. . . . **[fn.3:** The Fourth Circuit, however, has concluded that incarceration cannot satisfy the public function test because it was never traditionally an exclusive state function. *See Holly v. Scott*, 434 F.3d 287, 293 (4th Cir. 2006). The *Holly* court relied on dicta in *Richardson v. McKnight*, in which Justice Breyer stated, 'correctional functions have never been exclusively public.'. . But we interpret Justice Breyer's analysis to apply only to 'questions of § 1983 immunity,' not 'whether [prison officials] are liable under § 1983 even though they are employed by a private firm.'**]**. . .The mere fact that a facility has a remedial component, however, is not enough to demonstrate it exercises a traditionally exclusive public function—after all, some purely private entities may exercise that power. . . . [P]rivate actors may execute functions that are similar to—but not quite—a traditionally exclusive public function. But the key for distinguishing state action is, in part, to determine whether a private actor is '"endowed with [state] powers beyond those enjoyed" by everyone else.' In the case of incarceration, when the state grants a private actor legal authority to exercise control over inmates, there is state action.

. . . We hold that the complaint contains adequate facts to establish that Spectrum is a state actor. Plaintiffs allege Spectrum carries out the 'public function of caring for youths at the direction of the State of Michigan.'. . If the complaint's description had stopped there, then Spectrum's facility would be deemed closely analogous to the facility found to be a non-state actor in *Howell*. But here the allegations go further. Plaintiffs allege that the facility does not just care for children; the facility is 'similar to a prison setting.' They state that the 'Defendants had influence and control over how long a child was detained at the facilities.'. . According to the complaint, the children 'are under 24 hours/7 days supervision, and their movements are restricted as though they were prisoners.'. . What's more, the children 'are not free to leave the Defendant's facilities on their own volition, and their liberties are entirely restricted.'. . Plaintiffs allege that the state requires Spectrum to prevent the children from escaping and to contact local law enforcement if escape should occur. Finally, plaintiffs allege that Spectrum fulfilled 'the public function of juvenile incarceration, detainment, commitment, [and] rehabilitation.'. . These facts, taken as true and viewed in a light most favorable to the plaintiffs, suggest that the State of Michigan has endowed Spectrum with legal authority to exercise control over juveniles under court-ordered confinement. Plaintiffs allege that Quintana was court-ordered to the Spectrum facility. The facility was run like a prison, as detailed above. Quintana could obtain his release only through court order. Such a set of facts starkly contrasts with *Howell*, where the youth were not incarcerated, and the private entity served not to incarcerate but rather to facilitate youths' involvement in the community. . . . Given that our precedent has consistently held that the operation of correctional facilities is a traditionally exclusive state function, we hold that plaintiffs pleaded sufficient facts 'giving rise [to] a reasonable inference that [the function] is traditionally exclusively in the province of the State.'. . The complaint therefore plausibly alleges state action.")

Nugent v. Spectrum Juvenile Justice Services, 72 F.4th 135, 144-47 (6th Cir. 2023) (Griffin, J., dissenting) ("The sole issue in this appeal is whether plaintiffs' complaint sufficiently alleged that defendants Spectrum Juvenile Justice Services and Spectrum Human Services, Inc. (Spectrum) are state actors for purposes of liability under 42 U.S.C. § 1983. Without engaging in the requisite historical analysis of Michigan's approach to caring for juveniles, the majority opinion finds defendants, who privately own and operate a juvenile detention center, to be state actors solely because of the correctional nature of their facility. I respectfully disagree and would affirm the district court. . . . Precedent dictates our focus must not be on blanket claims of state action, but rather on the 'state specific' historical nature of the function at issue. . . Both *Street* and *Skelton* involved private prisons in Tennessee, not Michigan. . . Without an established, similar state history in Michigan, *Street* and *Skelton* cannot control. Second, the state-actor analysis in *Street* and *Skelton* is fundamentally deficient. Both cases relied on just one of the test's two components—that the adult prisons at issue there were 'performing a public function traditionally reserved to the state.'. . Like the majority today, the cursory analysis in both opinions conducted no kind of *historical* examination as to whether Tennessee also 'exclusively performed the function' of operating a prison. . . Third, the Supreme Court has cast significant doubt on the holdings of *Skelton* and *Street*. In *Richardson v. McKnight*, the Court signaled history is not on their side—in a dispute involving a private adult prison in Tennessee, nonetheless. . . The question

there was whether employees of a private prison were entitled to qualified immunity from § 1983 claims. . . History informed the Court's conclusion that immunity was unavailable due in part to the lack of a 'firmly rooted tradition of immunity applicable to privately employed prison guards.'. . To arrive at that conclusion, the Supreme Court chronicled the history of private prison systems generally, beginning in the Middle Ages in England and through the Nineteenth Century here in the United States. . . '[C]orrectional functions' in the United States, *Richardson* proclaimed, 'have never been exclusively public. Private individuals operated local jails in the 18th century, and private contractors were heavily involved in prison management during the 19th century.'. . Importantly, the Court highlighted that '[d]uring that time, some States, including southern States *like Tennessee*, leased their entire prison systems to private individuals or companies which frequently took complete control over prison management, including inmate labor and discipline.'. . This description contradicts *Street*'s and *Skelton*'s perfunctory assertions that running prisons is a 'function traditionally reserved to the state.'. . Fourth, *Skelton* and *Street* are distinguishable because they addressed the incarceration of adults. Inmates at adult facilities are institutionalized based on criminal convictions and resulting sentences. . . In equating adult incarceration with juvenile care, the majority expands the reaches of our caselaw.")

Phillips v. Tangilag, 14 F.4th 524, 532-34 (6th Cir. 2021) ("[A]n individual need not be a formal 'public employee' to qualify as a state actor because governments have long carried out their duties using private agents. . . To decide whether a seemingly private party is a 'state' actor, the Supreme Court has applied different tests in different settings. . . In this prison setting, the Court has opted for a 'public-function' test. . . It has recognized that the states can privatize most functions (like the provision of electricity or education) without turning the parties who take on these tasks into 'government' agents. . . Yet a few public functions—those the government has 'traditionally *and* exclusively' performed—cannot be delegated to private parties in this way without the Constitution's limits accompanying the delegation. . . The Court has extended this public-function logic to some doctors who care for prisoners. The Constitution does not generally impose a positive duty on states to offer medical care to those within their jurisdictions. . . When, however, a state imprisons individuals and deprives them of the liberty to care for themselves, it takes on a 'duty' through the Eighth Amendment to ensure their wellbeing. . . And states may not entirely outsource this constitutional duty to a private entity. . . The Supreme Court thus held that an orthopedic specialist became a state actor when he operated a clinic providing twice-a-week care to inmates at a prison hospital. . . Although this doctor saw many other patients, he had 'voluntarily assumed' the state's 'obligation to provide adequate medical care to' inmates by entering into a contract for that care. . . Our court likewise held that a psychiatrist who saw a pretrial detainee was a state actor because she offered her services under a formal agreement with the county. . . At the same time, private parties do not automatically become 'state' actors simply by caring for prisoners. Consider a hospital with an emergency room that generally must treat all patients who seek care for life-threatening conditions. . . Does this hospital become a state actor whenever a prisoner gets rushed there for a medical emergency? The Seventh Circuit has held to the contrary, reasoning that the hospital had not voluntarily agreed to accept the state's special responsibility' to its prisoners. . .We have likewise emphasized the lack of a contract between a

state and a doctor when finding that the doctor was not a state actor. *See Scott v. Ambani*, 577 F.3d 642, 649 (6th Cir. 2009). In *Scott*, a prison doctor referred an inmate with cancer to an outside hospital for radiation treatment. . . We found that the hospital oncologist who treated the prisoner was not a state actor because there was 'no contractual relationship' between the oncologist and the state. . . The prison doctor had referred the patient to the hospital generally, so the prisoner could have been treated by any of the staff oncologists. . . The state also had no influence over the oncologist's care of the prisoner; she decided on the proper treatment based solely on 'her own training, experience, and independent medical judgment.'. .This case falls somewhere between these decisions. On the one hand, Dr. Jefferson is a private orthopedic surgeon who saw Phillips at his private office and who spoke with Dr. Tangilag about Phillips's MRI. That was the extent of his participation in Phillips's care. Unlike the doctors in *West* and *Carl*, Jefferson had no written contract with Kentucky to provide care to its prisoners. Instead, Phillips was referred to Jefferson in the same way that any ordinary patient might be referred to him. In *West*, moreover, the Supreme Court emphasized that the doctor had performed his duties 'at the state prison,' which the Court thought would inevitably affect the doctor's care. . . Here, by contrast, no evidence suggests that Phillips's status as a prisoner affected Dr. Jefferson's care. . . . On the other hand, Dr. Tangilag referred Phillips specifically to Dr. Jefferson. This fact distinguishes Jefferson from the oncologist in *Scott*, who cared for the prisoner by happenstance because the referral had been to the hospital. . . This fact also makes this case resemble *Conner v. Donnelly*, 42 F.3d 220 (4th Cir. 1994). There, the Fourth Circuit held that an orthopedic physician was a state actor when he treated a prisoner at his private office pursuant to a prison doctor's referral. . . The court reached this result even though the state and physician had no written contract. . . Here, moreover, Jefferson knew that Phillips was a prisoner when he accepted the referral and so could be said to have in some respects assumed the state's duty to provide medical care. . .At day's end, we opt not to decide whether Dr. Jefferson qualified as a state actor. Even if he did, Phillips has not shown that he was deliberately indifferent to Phillips's serious medical needs. We thus can resolve this appeal solely on the deliberate-indifference element.")

United States v. Miller, 982 F.3d 412, 422-23 (6th Cir. 2020) ("When should a private party's actions be 'fairly attributable' to the government and trigger the Constitution's protections? . . . One approach to this constitutional 'agency' question would be to review our legal traditions and consider situations in which our laws have historically imputed one person's conduct to another. After all, 'traditional agency principles were reasonably well ensconced in the law at the time of the founding[.]'. . Yet the Supreme Court has stated that '[w]hat is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity.'. . It has adopted a fact-bound approach to this attribution question, one that uses 'different factors or tests in different contexts.'. . Sometimes, the Court uses a 'function' test that asks whether a private party performs a public function. . . Other times, the Court uses a 'compulsion' test that asks whether the government compelled a private party's action. . . Still other times, the Court uses a 'nexus' test that asks whether a private party cooperated with the government. . . As the party seeking to suppress evidence, Miller must prove that Google's actions were government actions under one of these tests. . . He has fallen short.")

Howell v. Father Maloney's Boys' Haven, Inc., 976 F.3d 750, 753-54 (6th Cir. 2020) ("Across the country, there's near uniformity that foster homes do not count as state actors. [collecting cases] Like most foster homes, the Haven houses, educates, and provides day-to-day care to the children under its roof. And like most foster homes, the Haven has no power to remove children and place them under appropriate care or in juvenile correctional facilities—the kinds of things state actors traditionally may do. All in all, Kentucky has not 'traditionally *and* exclusively' performed these functions, . . . and the Haven is not standing in its shoes when offering these eleemosynary services. . . .Howell claims that *West v. Atkins*. . . advances her cause. That's not the case. *West* held that a physician under contract to provide medical services to state inmates in a state prison qualified as a state actor under § 1983. . . In *West*, the 'state itself was directly responsible for managing' the facility in which the alleged constitutional violation occurred. . . The Haven in contrast is 'privately run.'. . *West* also involved a 'correctional setting,' a prototypical state function 'designed to remove individuals 'from the community.'. . Far from incarcerating children placed under its care, the Haven facilitates their continuing engagement and presence in the community. This is not a remotely comparable exertion of state power.")

Siefert v. Hamilton County, 951 F.3d 753, 761 (6th Cir. 2020), *cert. denied*, 141 S. Ct. ___ (2020) ("[T]he Sieferts present specific factual allegations, detailing a deep and symbiotic relationship between Children's [Hospital] and the county. From the Sieferts' perspective, it would have been hard to know who could discharge Minor Siefert—Hamilton County or Children's. And when the distinction between the state and private party breaks down to that degree, a private party becomes a state actor in § 1983 cases. . . All this means today is that the Sieferts have alleged enough facts to keep Children's in this lawsuit. . . But a 'plaintiff['s] ability to survive a motion to dismiss with respect to the state-actor question does not necessarily mean that they could survive summary judgment.'. . The Sieferts have unlocked the door to discovery, not to liability. And in the end, Children's may show that it was not a state actor. But at this point, it is too soon to know.")

Morris v. City of Detroit, 789 F. App'x 516, ___ (6th Cir. 2019) ("Taking the facts in the light most favorable to plaintiffs, we assume that Adams was on duty, even though she had clocked out at 4:00 pm before going to plaintiffs' home. She was scheduled to work until 6:00 pm that day, and the police investigation report found that she was on duty. Adams was not in uniform when she went to plaintiffs' house, but she had her badge, handcuffs and service revolver with her. The only item she used during the incident was her service revolver. Although Adams used her gun, which was state-issued equipment, she did not manifest the requisite showing of state-granted authority to act under color of law. The sole purpose for Adams being at Morris' house was to collect a personal debt of $300. Adams did not purport to be conducting police-related business, nor did she attempt to use her status as a police officer advantageously during the altercation. The fact that Adams used her department-issued weapon during a private dispute is not enough to establish she was acting under color of law.")

Winkler v. Madison County, 893 F.3d 877, 904 (6th Cir. 2018) ("A private entity, such as Healthcare, that contracts to provide medical services at a jail can be held liable under § 1983 because it is carrying out a traditional state function.")

Middaugh v. City of Three Rivers, No. 15-1140, 2017 WL 1179375, at *4-5 (6th Cir. Mar. 29, 2017) (not reported), *on remand from Piper v. Middaugh*, 136 S. Ct. 2408 (2016) (per curiam) ("To determine whether an officer's conduct transforms a private repossession into state action, our cases have looked for decades to the purpose and effect of the conduct, 'distinguish[ing] between conduct designed to keep the peace and activity fashioned to assist in the repossession.'. . . .Officers 'cross the line' into state action when they 'take an active role in a seizure or eviction,' *Cochran*, 656 F.3d at 310, and 'affirmatively intervene to aid the repossessor,'*id.* (quoting *Marcus v. McCollum*, 394 F.3d 813, 818 (10th Cir. 2004)). . . .We find that the Officers' conduct crossed the line, rendering the repossession state action. By driving Chrystal onto the Middaughs' property and enabling her to seize the car without objection, the Officers 'affirmatively intervene[d] to aid the repossessor.'. . Thus, the Officers' conduct was sufficient for state action.")

Partin v. Davis, 675 F. App'x 575, 587 (6th Cir. 2017) ("Although Franklin County and the Ikard Defendants shared a contractual relationship, no facts in the record suggest that the parties were 'pervasive [ly] entwin[ed.]'. . . During the process of executing the Writ, Deputy Tyler phoned Jason Ikard to perform a towing service. The deputy chose Jason Ikard because his company had towed seized cars for the county before, and it was the only one capable of moving tractor-trailers. Ikard then drove the Partins' trucks to a holding facility. Other than asking Ikard to drive the seized trucks, Deputy Tyler shared no information about the legal basis for the execution. As the deputy explained, the Ikard Defendants played 'no role in the seizure of the property identified in the Writ of Execution other than handling the logistics of transporting the tractor-trailers.' Accordingly, their involvement in the Writ-enforcement process falls short of demonstrating the close nexus with Franklin County necessary to expose them to § 1983 liability. We thus find the Ikard Defendants' role in the seizure insufficient to make them state actors under § 1983.")

Meadows v. Enyeart, 627 F. App'x 496, 501 (6th Cir. 2015) ("The Defendants in this case are public officials who hired a private attorney to send a cease-and-desist letter. Enyeart and Migliozzi did not act out of a state-imposed duty. Rather, they were motivated to safeguard their personal reputations. Nor did the Defendants threaten to initiate anything other than private legal action against the Meadowses. Because any person may hire a private attorney to threaten private legal action, it cannot be said that the letter was 'possible only because [the Defendants were] clothed with the authority of state law.'. . Rather, the 'nature of the act performed' was 'functionally equivalent to that of any private citizen.'. . Therefore, the Defendants did not act under color of state law in sending the cease-and-desist letter, and the Meadowses cannot recover in a § 1983 action on the basis of that letter.")

Carl v. Muskegon County, 763 F.3d 592, 595-98 (6th Cir. 2014) ("The only issue before the court is whether Dr. Jawor, a private psychiatrist, acted under color of state law. Private individuals may

be considered state actors if they exercise power 'possessed by virtue of state law' and if they are 'clothed with the authority of state law.'. . The question turns on whether the private individual's actions can be fairly attributed to the state. . . Our court has identified three tests to resolve the state-actor inquiry: the public-function test, the state-compulsion test, and the nexus test. . . The parties agree that this case implicates the public-function test, which 'requires that the private [individual] exercise powers which are traditionally exclusively reserved to the state.'. . . The Sixth Circuit has interpreted this test narrowly; rarely have we attributed private conduct to the state. . . Nevertheless, Carl argues that Dr. Jawor is a state actor under the public-function test and that *West v. Atkins,* 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), supports his position. We agree. We start from the basic premise that states must provide medical care to those in custody. . . .A state may not escape § 1983 liability by contracting out or delegating its obligation to provide medical care to inmates. . . .Dr. Jawor engaged in a public function by evaluating Carl, an individual involuntarily in custody. Attributing Dr. Jawor's conduct to the state is appropriate because Dr. Jawor performed a function that the state would typically carry out. . . It makes no difference that Carl was assessed for psychiatric treatment as opposed to medical care more generally. . . The right to both kinds of care is protected under the Eighth Amendment. True enough, Dr. Jawor did not have a direct employment relationship with Muskegon County Jail to provide psychiatric services to detainees. She was, however, under contract with the county, through its agency CMH, to administer services to pretrial detainees held at the Jail. . . Whether Dr. Jawor was employed directly by the state does not control whether she was a state actor. . . .As it stands, the district court's holding—finding no state action—would incentivize the state to contract out, piece by piece, features of its prison healthcare system. In turn, each private actor providing medical care could disclaim liability under § 1983, downplaying their role in the prison system as so nominal that they should not be considered state actors. Sanctioning a state's delegation of duties in this manner is incompatible with *West,* which admonishes that '[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody.' *West,* 487 U.S. at 56, 108 S.Ct. 2250. In the face of today's expansion of healthcare outsourcing and prison privatization, these activities, many of which are necessary and well-intentioned, do not absolve a state from adhering to constitutional precepts.")

Bishawi v. Ne. Ohio Corr. Ctr., 628 F. App'x 329, 342 (6th Cir. 2014) ("Bishawi argues that CCA, NEOCC, and its employees should be considered state actors because the prison was under contract with the City of Youngstown, Ohio, for conveyance of the land on which the prison was built and because NEOCC was subject to State of Ohio inspections. To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Federal Constitution or laws and that the violation was committed by a person acting under color of state law. . .When a defendant is a private entity, the entity can be held liable under § 1983 only if its conduct may be 'fairly attributable *to the state.*'. . At the time of the events complained of, Bishawi was incarcerated at NEOCC, a private prison owned and operated by CCA, a private corporation, to provide services for the federal government. Because NEOCC does not provide services on behalf of the state, neither NEOCC nor CCA were acting under the color of state law for the purposes of § 1983.

Further, NEOCC's employees cannot be considered state actors because they are employees of a privately operated prison, operated for the federal government. Thus, the district court correctly found that § 1983 is not applicable to this case.")

Barkovic v. Hogan, No. 11–2335, 2012 WL 5862468, *3, *4 (6th Cir. Nov. 19, 2012) (not reported) ('This case, like *Chapman,* presents a situation where there are 'unanswered questions of fact regarding the proper characterization of the actions.'. . Hogan was on duty that morning at the courthouse for official business. In fact, the business involved one of Barkovic's cases. Barkovic argues that Hogan was in the jury room, an area of the courthouse where he could only have been pursuant to his official duties. The record is unclear, however, as to the exact nature of the 'jury room' and whether this was a restricted area. Additionally, the two men had previous encounters, all involving official duties rather than personal pursuits. Hogan's anger toward Barkovic stemmed from his role as a police officer. There is evidence that the verbal dispute resulted from Barkovic's insulting comments to other police officers that morning and that the fight escalated when Hogan felt he needed to 'defend the dignity of his department.' Barkovic also claims that Hogan's status as a police officer emboldened him to assault Barkovic. On the other hand, Hogan argues that he did not assault Barkovic pursuant to a duty given to him by the state. He claims that he did not assert his authority as a police officer, and it is undisputed that Hogan was not in uniform or displaying a badge or a weapon. Hogan, however, also contends in his state immunity defense that he was acting during the course of his employment and within the scope of his authority in accordance with his department's guidelines and procedures. Thus, as in the *Chapman* case, there is a dispute of fact to be presented to the jury, and summary judgment is inappropriate.")

Barkovic v. Hogan, No. 11–2335, 2012 WL 5862468, *4, *5 (6th Cir. Nov. 19, 2012) (not reported) (McKeague, J., dissenting) ("Summary judgment is proper here because even if Barkovic's version of events be accepted as true, there is insufficient support for the conclusion that Hogan acted under color of state law. The majority pays lip service to the correct standard-a public employee acts under color of state law when he 'exercise[s] power possessed by virtue of state law and made possible only because [he or she] is clothed with the authority of state law.'. . However, the majority neglects to apply this standard. The majority opinion nowhere explains how Hogan could have been exercising state-given authority when he pushed Barkovic into the doorframe. In *Chapman,* the factfinder could reasonably have concluded that the security officer was exercising state-given power because he was dressed in uniform and engaging in activities bearing a relationship to law enforcement. Hogan, on the other hand, although present in the courthouse pursuant to a subpoena and therefore on official business, was not in uniform and was clearly not acting in a law enforcement capacity or exercising any power possessed by virtue of state law when he shoved Barkovic. The majority notes that it is unclear whether the jury room was a restricted area. So what? The altercation did not occur there; it took place in a public hallway. The majority also notes that Hogan's status as a police officer was relevant to the background relationship between the two men, but this fact is irrelevant to deciding whether Hogan was exercising state-given power when he shoved Barkovic in response to verbal insults. Finally,

although Barkovic alleges that Hogan's status as a police officer 'embolden[ed]' him to attack Barkovic, Barkovic cites no record support for this allegation nor any authority for the notion that it is relevant. In the end, the factual disputes in this case are immaterial. Even under Barkovic's version of events, Hogan's actions were not made possible only because of his state-given powers. But for his official status, Hogan could still have pushed Barkovic. In my opinion, the district court properly granted summary judgment on Barkovic's § 1983 claim for excessive force in violation of his Fourth and Fourteenth Amendment rights, and Barkovic was properly left to pursue his state law remedies for assault and battery in state court. I respectfully dissent.")

Hensley v. Gassman, 693 F.3d 681, 691, 692 (6th Cir. 2012) ("In the instant case, the Deputies' actions between the time of their arrival and the time Sheila got into the Buick were more than mere police presence and reflect circumstances other courts have found indicative of state action: (1) the Deputies arrived at the Hensley residence with, and at the request of, Gassman; (2) Deputy Scott ordered Hensley Jr., at least once, to move from between the Buick and the tow truck, as Hensley Jr. was attempting to thwart the repossession; (3) the Deputies ignored Hensley Jr.'s demands to leave the property; (4) Deputy Gilbert told Hensley Jr. that Gassman was taking the Buick; and (5) Deputy Scott ignored both Sheila's protest and her explanation and told Sheila that Gassman was still going to take the Buick. . . The circumstances of this case are somewhat unique because, rather than dissuading Sheila from objecting, the Deputies' conduct prompted her to do so. We need not dwell on these facts, however, because the Deputies concede that Deputy Scott's act of ordering Gassman to tow the Buick to the road, which the Deputies claim was necessary to resolve the situation, was state action. . . More importantly, although the Deputies do not expressly concede the point, it cannot be reasonably disputed that their conduct of breaking the car window, removing Sheila, and ordering her to remove her belongings from the car was state action. Equally clear is that this conduct was not only active participation, but was instrumental to Gassman's success in completing the repossession. Sheila asserted her right to object not only through words, but by physically taking control of the Buick. At that point, Gassman's right to pursue his self-help remedy terminated, and he was required to cease the repossession. . . Regardless, the Deputies' subsequent actions, which enabled Gassman to seize the Buick sans Sheila, resolved the stalemate in favor of Gassman—the party neither factually nor legally entitled to the Buick.")

Cochran v. Gilliam, 656 F.3d 300, 307, 308 (6th Cir. 2011) ("[I]n cases where police officers take an active role in a seizure or eviction, they are no longer mere passive observers and courts have held that the officers are not entitled to qualified immunity. . . This is particularly true when there is neither a specific court order permitting the officers' conduct nor any exigent circumstance in which the government's interest would outweigh the individual's interest in his property. . . Here, the record contains photos showing at least one of the two Gilliam brothers carrying items out of the house and helping the Landlords load Cochran's property into a pickup truck. These affirmative acts take the Gilliams beyond the acts of the deputies in *Soldal* who never entered the house or physically moved any of the property. The Gilliams' actions place them squarely within the Supreme Court's reaffirmation that a physical seizure of the property constitutes a Fourth Amendment violation. Further, the Gilliams interposed themselves between Cochran and the

Landlords to allow the Landlords to take Cochran's property. The Gilliams allegedly threatened to arrest Cochran if he interfered with the Landlords' actions, and sent away the state police officer that Cochran had called for assistance. Then, in a scenario similar to that in *Soldal*, Don Gilliam, aware of the possible questionable nature of the removal of Cochran's belongings, attempted to clarify the situation by calling the county attorney. The Gilliams then even went so far as to buy Cochran's TV from the Landlords. These acts, taken together, indicate the Gilliams' presence that day went beyond the constitutionally permissible detached keeping of the peace function and crossed over into a 'meaningful interference' with Cochran's property.")

Norris v. Premier Integrity Solutions, Inc., 641 F.3d 695, 698 (6th Cir. 2011) (private drug testing corporation acted under color of state law in using "direct observation" method of taking urine samples for analysis where company conducted the tests for the government after the Administrative Office of the Courts had approved company's policies and methods and "where judges in Kentucky viewed the direct observation testing method as 'essential.'").

Paige v. Coyner, 614 F.3d 273, 280 (6th Cir. 2010) ("The district court thus erred in applying *Blum* to the instant case and by framing the issue as whether Bunnell Hill's actions in firing Paige could be fairly attributed to the state. *Blum's* tests are limited to suits where the private party is the one allegedly responsible for taking the constitutionally impermissible action. Here, Coyner is clearly a state actor because she works on behalf of local government entities, and Paige contends that Coyner violated § 1983 when Coyner called Bunnell Hill and made false statements in retaliation for Paige's criticism of the proposed interstate project. Paige has therefore properly alleged state action.")

Powers v. Hamilton County Public Defender Com'n, 501 F.3d 592, 613, 614 (6th Cir. 2007) ("Powers alleges that the Public Defender engages in an across-the-board policy or custom of doing nothing to protect its indigent clients' constitutional rights not to be jailed as a result of their inability to pay court-ordered fines. Unlike the plaintiff in *Polk County*, Powers does not seek to recover on the basis of the failures of his individual counsel, but on the basis of an alleged agency-wide policy or custom of routinely ignoring the issue of indigency in the context of non-payment of fines. Although we acknowledge that requesting indigency hearings is within a lawyer's 'traditional functions,' the conduct complained of is nonetheless 'administrative' in character for the reasons already described: Powers maintains that the Public Defender's inaction is systemic and therefore carries the imprimatur of administrative approval. . . .He argues that the Public Defender systematically violates class members' constitutional rights by failing to represent them on the question of indigency. Given the reasoning of *Polk County*, it makes sense to treat this alleged policy or custom as state action for purposes of § 1983. The existence of such a policy, if proven, will show that the adversarial relationship between the State and the Public Defender – upon which the *Polk County* Court relied heavily in determining that the individual public defender there was not a state actor – has broken down such that the Public Defender is serving the State's interest in exacting punishment, rather than the interests of its clients, or society's interest in fair judicial proceedings.").

Lindsey v. Detroit Entertainment, L.L.C., 484 F.3d 824, 830, 831 (6th Cir. 2007) (where security personnel were not licensed by state, detention of plaintiffs could not be attributed to state action)

Swiecicki v. Delgado, 463 F.3d 489, 496, 497 (6th Cir. 2006) ("Here, we believe the record establishes that Delgado was a state actor from the beginning of the incident in question because he 'presented himself as a police officer.'. . Our conclusion is based not only on Delgado's attire, badge, and weapons, but also on the fact that Delgado told Swiecicki that '[w]e can either do this the easy way or the hard way.'. . .Rather than calmly asking Swiecicki to leave the stadium, Delgado, while wearing his uniform and carrying his official weapons, threatened Swiecicki and forcibly removed him from the bleachers. This evidence, combined with the fact that Delgado was hired by Jacobs Field to intervene 'in cases requiring police action' suggests that his warning to Swiecicki amounted to a threat of arrest. Delgado apparently believed, moreover, that the incident was one requiring 'police action' because he approached Swiecicki before Labrie had a chance to further investigate. In sum, this was more than a case in which a civilian employed by the Indians peaceably ejected an unruly fan from a baseball game – a procedure clearly contemplated by the rules and regulations of Jacobs Field. Delgado, in full police uniform, forcibly removed Swiecicki in the escort position. All of this evidence, when considered together, indicates that Delgado was acting under color of state law at the time he removed Swiecicki from the bleachers.")

Durante v. Fairlane Town Center, 201 F. App'x 338, 2006 WL 2986452, at *2, *3 (6th Cir. Oct. 18, 2006) ("The term 'public function' is a bit of a misnomer, at least in the context of private actors. As explained by the First Circuit, '[i]n order for a private actor to be deemed to have acted under color of state law, it is not enough to show that the private actor performed a public function.' *Rockwell v. Cape Cod Hosp*., 26 F.3d 254, 258 (1st Cir.1994). Rather, the private actor must perform a public function which has traditionally and exclusively been reserved to the State. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). This test is difficult to satisfy. 'While many functions have been traditionally performed by governments, very few have been exclusively reserved to the State.' . . . There are instances, however, when the performance of certain functions by a private security officer crosses the line from private action to state action. For example, the Seventh Circuit has held that private police officers licensed to make arrests could be state actors under the public function test. *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr*., 184 F.3d 623, 627-30 (7th Cir.1999). The key distinction lies in whether the private defendant's police powers delegated by the State are plenary, or merely police-like. In the latter instance, the private action is not one considered exclusively reserved to the State, and is thus not undertaken under color of law. There is no evidence before us that the FTC security guards were licensed under M.C.L. § 338.1079. The fact that the they were security guards does not, in itself, imply that they were licensed – M.C.L. § 338.1079(2) expressly provides that private security guards are not required to be licensed. Durante did not allege that they were so licensed, nor did he take any depositions or seek discovery on this issue. Accordingly, *Romanski* lends Durante no support. Nor does Durante find support elsewhere under federal or state law. First, a plaintiff who argues that a private actor acted under color of state law must offer some historical analysis on

whether the power exercised is one that is traditionally the exclusive prerogative of the state. . . Durante has offered no historical analysis of a merchant's arrest and transport powers (if any) for criminal trespass under Michigan law. . . . Moreover, even if Durante had offered some historical analysis, he has not shown that the FTC defendants exercised a power exclusively left to the State of Michigan, and delegated to them by the State. Numerous cases decline to find that a private security guard acted under color of state law based on the authority of the common law shopkeeper's privilege.").

Chapman v. Higbee Company, 319 F.3d 825, 834, 835 (6th Cir. 2003) (en banc) ("Here, the Dillard's security officer who stopped and searched Chapman was an off-duty sheriff's deputy, wearing his official sheriff's department uniform, badge, and sidearm. . . Moreover, the Dillard's security officer was obligated to obey Dillard's policies and regulations while on-duty at the store. Although the state played no part in the promulgation of these policies, their strip searching provision directly implicates the state: 'Strip searches are prohibited. If you suspect that stolen objects are hidden on [the shopper's] person, call the police.' During the incident at issue, the Dillard's security officer did not represent himself as a police officer, threaten to arrest Chapman, wave his badge or weapon, or establish any contact with the sheriff's department. He did however initiate a strip search by requiring Chapman to enter a fitting room with the sales manager to inspect her clothing. Because Dillard's policy mandates police intervention in strip search situations, a reasonable jury could very well find that the initiation of a strip search by an armed, uniformed sheriff's deputy constituted an act that may fairly be attributed to the state. Additionally, if Chapman did not feel free to leave, as a result of the security officer's sheriff's uniform, his badge, or his sidearm, a reasonable jury could find the detention was a tacit arrest and fairly attributable to the state.").

Neuens v. City of Columbus, 303 F.3d 667, 670, 671 (6th Cir. 2003) ("[T]he district court erred when it accepted Bridges' stipulation that he was acting under color of law and considered only the second prong of § 1983 analysis. Because there is no indication in the record that Defendant-Appellant was acting under color of law at the time of the incident, we also conclude that the district court erred in denying Officer Bridges' summary judgment motion. . . . The record clearly demonstrates that Bridges was acting in his private capacity on the morning of December 26, 1998. Bridges was not in uniform, he was not driving in a police car, and he did not display a badge to Neuens or anyone else at the Waffle House restaurant. Bridges was not at the Waffle House pursuant to official duties; rather, he was out with his personal friends for social reasons. Neither Bridges nor his friends made any suggestions that Bridges was a police officer. . . . If after its independent review the district court concludes that Bridges did not act under color of state law, we instruct the district court to dismiss the complaint for failure to state a claim upon which relief may granted.")

Blair v. Harris, No. 08-CV-15090, 2010 WL 3805588, at *6 (E.D. Mich. Sept. 23, 2010) ("Guided by the principles extracted from the foregoing cases, the Court concludes in this case that Plaintiff has failed to establish that Gregory Harris was acting under color of law when he shot Marquise

Blair. The only evidence Plaintiff relies upon is that when Harris observed Blair trying to steal his personal vehicle, he yelled, 'Halt. Stop. Police. It's a police officer's van.' It is undisputed that Harris was off-duty at the time. He was not in his uniform and he did not flash his badge. While it is true that Harris had his gun drawn and pursued Blair as he tried to escape apprehension, the uncontroverted evidence shows that the gun was Harris's personal handgun, not his service revolver. .. While the shooting of Plaintiff's decedent is tragic, focusing, as the Court must, on the nature of the defendant officer's actions and the factual context out of which those actions arose, the Court finds that Harris's actions do not rise to the level of a constitutional deprivation as they were not taken 'under color of law.'")

SEVENTH CIRCUIT

Hernandez v. Causey, 124 F.4th 325, 335-38 (5th Cir. 2024) ("Section 1983 applies 'only when "the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority."'. .This case law aligns with *Lindke's* emphasis that 'state action exists only when' the constitutional deprivation 'ha[s] its source in state authority.'. . As cases cited by Hernandez confirm, a federal officer acting under his agency's authority but assisting a state officer generally acts under color of federal law. . . . Even if we were to apply Hernandez's proposed 'joint action test,' which is applicable to private actors not federal actors, to determine ICE Agent Causey's liability, willful participation alone is insufficient. Hernandez would still be required to allege some agreement, whether explicit or implicit, between Causey and state officers to deprive Hernandez of his rights in order to claim liability under § 1983. We have held that, to satisfy the joint action test for a *private* actor, a plaintiff must plead 'facts showing an agreement or meeting of the minds between the state actor and the private actor to engage in a conspiracy to deprive the plaintiff of a constitutional right, and that the private actor was a willing participant in joint activity with the state or its agents.'. . . Our decision in *Cherry Knoll* reflects the requirement that a plaintiff must plead some type of agreement to pursue a § 1983 claim against a private actor. Applying § 1983 liability to a *federal* actor requires further allegations that place the constitutional deprivation under state rather than federal law. Where the federal actor could have derived their authority to act under federal law, the consensus of circuit courts is that § 1983 necessitates evidence of a conspiracy between the federal actor and a state actor to deprive the plaintiff of his rights under color of *state* law. . . .Federal officers who are called in to assist a state officer can be liable under § 1983 when there is evidence of a conspiracy to deprive and the constitutional deprivation 'ha[s] its source in state authority.'. . But because Causey did not act under color of state law, and because Hernandez has alleged neither details of a conspiracy between Causey and the state officials nor any agreement with them to use excessive force, much less any state authority directive to do so, the district court properly dismissed Hernandez's § 1983 claims.")

Hernandez v. Causey, 124 F.4th 325, 339-41 (5th Cir. 2024) (Dennis, J., concurring in part and dissenting in part) ("I agree with the majority that Hernandez's *Bivens* claim is foreclosed by the Supreme Court's decision in *Egbert v. Boule*[.] . . However, and with great respect for my esteemed colleagues, I would find that Hernandez has pleaded a § 1983 claim upon which relief can be

granted. To plausibly plead that Causey acted under color of state law, rather than federal law, our cases do not require Hernandez to have alleged a conspiracy between the Laurel Police and ICE officers to seize Hernandez. . . Instead, when federal officials either conspire or act jointly with state officials to deny constitutional rights, the state officials provide the requisite state action to support § 1983 claims against the federal officials. . . . Contrary to the majority's view, I read *Knights of Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board*, 735 F.2d 895 (5th Cir. 1984), to apply the so-called joint action test to federal officers. . . There, we held 'when federal officials conspire *or* act jointly with state officials to deny constitutional rights, "the state officials provide the requisite state action"' for purposes of § 1983. . . Despite the use of the word 'or,' the majority reads *Knights* to require a conspiracy and rejects Hernandez's argument that the joint action test applies to federal officers. . . In my view, *Knights* explicitly dictates that we find federal officials act under color of state law when the federal government 'act[s] jointly with state officials to deny constitutional rights.'. . Our cases following *Knights* confirm as much. . . Given its significant reliance on out-of-circuit authority, it is apparent that the majority wants our circuit's precedents to conform with some other circuits' precedents, which admittedly do impose a strict conspiracy requirement. *See, e.g., Ante,* at —— (relying on caselaw from the Seventh, Ninth, and Tenth Circuits that do not align with *Knights).* . . While the pursuit of conformity is an important one, under our rule of orderliness, we are duty bound to apply *Knights'* explication of the law at this stage. . . I therefore cannot join the part of the majority's opinion that *sub silentio* overturns a prior published panel opinion. . . .Applying the joint action test derived from binding precedents to the facts of this case, I would find that Hernandez plausibly alleged that translator Causey acted under color of state law when he seized Hernandez with a gunshot/excessive force. Neither the majority, the district court, nor the Government point to any federal law or regulation that Causey acted pursuant to when he came to the scene as Officer Driskell's translator, when he began to chase after Hernandez who was leaving a state law traffic investigation, or when he eventually shot Hernandez to seize him. To the contrary, the Government disavows that the ICE Agents were on the scene to perform immigration operations—they were only there as the Laurel Police Department's translators to accomplish the state's purpose of enforcing its traffic laws. . . Further still, according to Officer Driskell, the ICE translators were an 'additional tool in his toolbox' and he had relied on them in the past for translation assistance when stopping Hispanic people. The level of interdependence manifested in this case by Laurel Police Department Officer Driskell, acting pursuant to state law, instructing ICE Agents to partake in a local police matter as translators and then to pursue and seize Hernandez. Causey followed that instruction and seized Hernandez by shooting him in the arm, in contravention of the Fourth Amendment's guarantee that individuals be free from an unreasonable government seizure by the use of excessive force. . . Viewing the alleged facts in the light most favorable to Hernandez leads me to conclude that Causey was a 'willful participant in joint action with the State or its agents.'. . I would reverse the district court's dismissal of Hernandez's § 1983 excessive force claim against Causey. Still, for the reasons assigned by the majority, I agree that we must affirm the district court's dismissal of Hernandez's *Bivens* claim. I respectfully concur in part and dissent in part.")

Cielak v. Nicolet Union High School District, 112 F.4th 472, 480-81 (7th Cir. 2024) ("Cielak's claims fail at this first step: he has not plausibly pleaded a violation of his substantive due process or equal protection rights because Johnson's post-allegation abuse—after Cielak graduated from NHS—was not done under color of state law. Cielak cannot merely assert that Johnson was a state employee; instead, he must allege that Johnson's 'invocation of state authority in one way or another facilitated or enabled the alleged misconduct.'. . In other words, in committing the abuse, Johnson must have been 'exercising power "possessed by virtue of state law and made possible only because [he] is clothed with the authority of state law."'. . But once Cielak graduated from NHS, Johnson's abuse was unrelated to his duties as a teacher and was not done pursuant to or facilitated by any authority he had as a teacher. Simply, after 1983, Johnson and Cielak 'did not encounter each other as [student and teacher], but as private persons,' so Johnson's actions 'were those of a private citizen in the course of a purely private [ ] interaction.'. .Cielak makes much of the fact that Johnson continued to invoke the sham physiological study during the post-allegation abuse, but his allegations do not show that Johnson 'was anything other than a private citizen or that his [teaching] duties related to [Cielak's] claims.'. . Cielak does not allege that the study was part of Johnson's duties or related to Johnson's employment at NHS. . . And the fact that Johnson, using his authority as a teacher, initiated the abuse when Cielak was a student does not mean the abuse after 1983 was enabled by an invocation of state authority. . . Cielak also argues that Johnson was only able to abuse him after the 1983 allegation because of Johnson's prominence in the community. But influential status is not itself a 'sign[ ] of state authority.'. . In abusing Cielak after his graduation, Johnson was 'functionally equivalent to ... any private citizen' who happens to have influence in a community. . . In sum, as Cielak can show no violation of his rights after Hodges's allegation, the district court properly dismissed his § 1983 claims.")

Scott v. Univerisity of Chicago Medical Center, 107 F.4th 752, 761 & n.9 (7th Cir. 2024) ("We assume—but do not decide—that taking temporary protective custody of a child is an exclusive and traditional function of the state. But, here, the University of Chicago Medical Center did not 'exercise' that function, . . . given that Dr. Liou never took the Scotts' newborn away from them. The Scotts have pointed to no case in which the mere threat of performing a traditional state function transforms a private actor into one acting 'under color of state law.' Given that the Scotts have failed to show Dr. Liou and the University of Chicago Medical Center performed a public function, this theory fails.[9] **[fn. 9:** The parents argue that our decision in *Rodriguez v. Plymouth Ambulance Service,* 577 F.3d 816, outlined a fourth set of state action factors that likewise supports their theory that the hospitals and their employees were acting under color of state law. That decision, however, simply considered the 'public function' question as it applies to medical providers in state prisons. . . The case focused primarily on 'the relationship among the state, the health care provider *and* the prisoner,' recognizing that, in a prisoner context, the state is 'the ultimate responsible party for the prisoner's health care.'. . Here, the state had no control or coercion over the newborns' medical care, nor was there a contract between the state and the defendant providers to care for the newborns (an 'important factor' in *Rodriguez*). . . .We have never applied the factors from *Rodriguez* outside of the prison context and will not do so here.**]**")

DiDonato v. Panatera, 24 F.4th 1156, 1161-62 (7th Cir. 2022)("To plead that a defendant acted under color of state law, a § 1983 plaintiff must allege that a defendant's invocation of state authority in one way or another facilitated or enabled the alleged misconduct. That the defendant is a state employee is not enough. '[S]tate officials or employees who act without the cloth of state authority do not subject themselves to § 1983 suits.'. . . The district court applied these exact principles and determined that DiDonato failed to allege that Panatera acted under color of state law. We reach the same conclusion after taking our own independent look at the allegations in DiDonato's second amended complaint. . . . DiDonato's complaint describes behavior that, while abhorrent, was 'wholly unconnected' to Panatera's employment. . . DiDonato and Panatera did not encounter each other as paramedic and patient, but as private persons together in Panatera's home. Panatera's 'actions were those of a private citizen in the course of a purely private social interaction.'. . Any action or inaction was not under color of state law. Because we agree with the district court that DiDonato failed to allege that Panatera acted under color of state law, we need not immerse ourselves in any aspect of the court's reasoning under *DeShaney*. We instead stop on the state action point and AFFIRM the dismissal of DiDonato's § 1983 claim.")

First Midwest Bank Guardian of Estate of LaPorta v. City of Chicago, 988 F.3d 978, 987 (7th Cir. 2021) ("A *Monell* plaintiff must establish that he suffered a deprivation of a federal right *before* municipal fault, deliberate indifference, and causation come into play. LaPorta's claim fails at this first step. He did not suffer a deprivation of a right secured by the federal Constitution or laws. It's undisputed that Kelly was not acting under color of state law when he shot LaPorta. His actions were wholly unconnected to his duties as a Chicago police officer. He was off duty. He shot LaPorta after they spent a night out drinking together and had returned to his home to continue socializing at the end of the evening. Kelly's actions were those of a private citizen in the course of a purely private social interaction. This was, in short, an act of private violence.")

Ferguson v. Cook County Correctional Facility/Cermak, 836 F. App'x 438, ___ (7th Cir. 2020) (not reported) ([W]e do not agree with the district court that Ferguson's claims fail because, having posted his individual bond and having left Cermak (i.e., jail), he was not in custody at the time. Though someone on bail subject to electronic monitoring arguably is not in custody, . . . the events at Mt. Sinai happened before Ferguson was taken home. A deputy sheriff brought a handcuffed Ferguson to and from Mt. Sinai in his cruiser, so Ferguson was in the custody of the Cook County Sheriff's Department until he was released at his apartment. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). . . Of course, the mere fact that Ferguson was in custody at the time is not sufficient to expose the Mt. Sinai defendants to § 1983 liability. . . Dismissal was still proper because they did not act under the color of state law. . . Private actors do not expose themselves to suit under § 1983 simply by being involved in the involuntary commitment process, although a private actor may function as a state actor if compelled by the state to commit a mentally ill patient or if contracted by the state to provide detainees with medical care. . . Here, the allegations do not support an inference that Mt. Sinai had to admit Ferguson. Illinois law does not force a receiving institution to commit a patient;

instead, medical professionals must conduct an independent examination and release a patient who, in their judgment, does not require commitment. . . Additionally, Ferguson's complaint makes clear that Balawender had Ferguson sent to Mt. Sinai under the civil-commitment laws because he was *not* a detainee anymore, so Mt. Sinai was not acting as a contractor for detainee healthcare.")

Harnishfeger v. United States, 943 F.3d 1105, 1120 (7th Cir. 2019) ("The defendants argue that *Knutson* does not control here, not because the Indiana Army National Guard is materially different from the Wisconsin Air National Guard, but because Harnishfeger was a member of a federal program when Kopczynski demanded her removal. The proper focus, however, is not on the target of the action but on the actor. . . The defense argument implies that any public or private VISTA sponsor (the Indianapolis Public Schools or a local Boys and Girls Club, for example) becomes a federal agent whenever it hosts a VISTA volunteer, a view we find untenable. The defense points out that Harnishfeger's VISTA position was federally funded and subject in part to federal guidelines. But both factors were present in *Knutson* as well, see *id*. at 767 ("the federal government provides salaries, benefits, and supplies to full-time Guard officers and technicians"), 768 ("Wisconsin adopts and [defendant] opts to utilize federal substantive and procedural rules"), and that did not 'alter the state-law character' of the Wisconsin Air National Guard's actions. . . In demanding Harnishfeger's removal from her VISTA placement, Lieutenant Colonel Kopczynski was a Guard officer exercising her supervisory authority over the Guard's Family Program Office for the Guard's benefit and in furtherance of the Guard's mission. That was action under color of state law, so § 1983 offers a remedy.")

Martin v. Milwaukee County, 904 F.3d 544, 554-57 (7th Cir. 2018) ("Generally, scope of employment is a fact issue. . . But, as the district court here correctly noted, when the facts are undisputed, and all reasonable inferences therefrom lead to but one conclusion, judgment as a matter of law is appropriate and required. 'Wisconsin courts have stated that it is proper to decide the scope of employment issue on a motion for summary judgment as long as the underlying facts are not in dispute and reasonable inferences leading to conflicting results cannot be drawn from the undisputed facts.'. . .Courts have phrased the scope test for § 895.46 in slightly different but compatible ways. We distill the test to its essence. An act *is not* in the scope unless it is a natural, not disconnected and not extraordinary, part or incident of the services contemplated. An act *is not* in the scope if it is different in kind from that authorized, far beyond the authorized time or space, or too little actuated by a purpose to serve the employer. But an act *is* in the scope if it is so closely connected with the employment objectives, and so fairly and reasonably incidental to them, that it may be regarded as a method, even if improper, of carrying out the employment objectives. We must consider the employee's intent and purpose, in light of subjective and objective circumstances. Here, we may take it as granted that the sexual assaults occurred during the authorized time and space limits of Thicklen's employment (although there may be some question about whether Thicklen was actually authorized to be in the particular locations of the sexual assaults at the times he perpetrated them). But even when viewing the evidence in the light most favorable to Martin and the verdict, we hold no reasonable jury could find the sexual assaults were

in the scope of his employment. No reasonable jury could conclude the sexual assaults were natural, connected, ordinary parts or incidents of contemplated services; were of the same or similar kind of conduct as that Thicklen was employed to perform; or were actuated even to a slight degree by a purpose to serve County. No reasonable jury could conclude the sexual assaults were connected with the employment objectives (much less closely connected) or incidental to them in any way. No reasonable jury could regard the sexual assaults as improper methods of carrying out employment objectives. The evidence negates the verdict. Uncontested evidence at trial demonstrated County thoroughly trained Thicklen not to have sexual contact with inmates. County expressly forbade him from having sexual contact with an inmate under any circumstances, regardless of apparent consent. County's training warned him that such sexual contact violates state law and the Sheriff's Office's mission. County not only instructed him not to rape inmates; it also trained him how to avoid or reject any opportunity or invitation to engage in any sort of sexual encounter with inmates. . . .Martin failed to offer any evidence the sexual assaults were natural, connected, ordinary parts or incidents of the services contemplated. She presented no evidence from which a reasonable jury could conclude these sexual assaults were similar to guarding inmates. And she presented no evidence from which a reasonable jury could conclude the sexual assaults were actuated in any way by a purpose to serve County. . . .This case is distinguishable from cases involving excessive force by police officers. Some force, even deadly force, is sometimes permissible for police officers. But the rapes in this case were not part of a spectrum of conduct that shades into permissible zones. Inmate rape by a guard usually involves no gray areas. . . . We do not hold sexual assault could never be within the scope. We simply conclude that on these facts, even when viewed most favorably to Martin and the verdict, no reasonable jury could find these sexual assaults were within the scope.")

Robinett v. City of Indianapolis, 894 F.3d 876, 881-82 (7th Cir. 2018) ("An employee acts within the scope of his employment when his conduct is 'of the same general nature as that authorized by the public employer' or 'incidental to the conduct authorized by the employer.'. . An employee can act under color of state law, meanwhile, even when he 'misuse[s]' state power. . . That is to say, he can be held liable for conduct beyond what 'the State in fact authorized.'. . Our cases underscore the difference between 'scope of employment' and 'under color of state law.' . . . No doubt there are some cases in which the two standards will align, but for issue-preclusion purposes, it is enough to note that one does not inexorably lead to the other. In short, the statute protects public employees who act within the scope of their employment from having to foot the bill for defense costs in a civil-rights action regardless of the outcome. Win or lose, however, the employee must have been acting within the scope of his employment; a mere allegation to that effect is not enough to put the public employer on the hook for the cost of the defense. Both the statutory text and precedent make this clear. The judge found that Robinett acted as a private person, not a police officer, when he failed to come to Carmack's aid. Robinett doesn't contest that determination. Because he was not acting within the scope of his public employment, the City need not shoulder the financial burden of his defense.")

Robinett v. City of Indianapolis, 894 F.3d 876, 884-85 (7th Cir. 2018) (Rovner, J., dissenting)

("That the employee here successfully defended on the ground that he was not acting under color of state law or within the scope of his public employment is irrelevant. What matters is that he was sued as a public employee who '**could be**' subject to liability under a statute that applies only to public employees. His defense, by the way, also benefitted his public employer, who would have been on the hook at least for any compensatory damages and possibly for punitive damages had the plaintiff been successful. Nothing in the statute ranks defenses. Robinett was found not liable because he successfully convinced a court that he was not acting under color of state law, but he well could have been liable. The color-of-law analysis in this case is a closer call than it appears at first glance. Anders went to Robinett not only as a friend but as a person who could identify a police-placed tracking device for what it was. And Robinett responded using knowledge that he likely gained as a police officer, confirming that the device was what Anders suspected it to be. Robinett even directed Anders to place the device back on his car and to leave his former wife (who had a protective order) alone, acts a police officer might well take in the scope of his employment and under color of state law. Granted, a competent police officer who was fully aware of the situation would also have alerted the department that Anders knew he was being tracked and had the ability to remove the device or otherwise evade detection. In any case, the questions of scope of employment and color of state law required litigation through discovery and all the way to summary judgment in this case, subjecting Robinett to extensive attorney's fees solely because he was a public employee. This is just the type of case the legislature likely meant to cover with its promise of indemnification for fees for its public employees. . . . Robinett's successful defense of this claim benefitted the City of Indianapolis to Robinett's detriment. The record reveals that Robinett held a second job at the local Olive Garden restaurant. Whatever this suggests about the pay scale for Indianapolis police officers, it tells us that Robinett is probably ill-equipped to pay more than $20,000 in attorney's fees and costs that he incurred defending himself against the civil rights charges leveled against him as a police officer. The plain language of the statute directs the City of Indianapolis to indemnify Robinett for the fees he incurred here. I respectfully dissent.")

Miller v. Vohne Liche Kennels, Inc., 600 F. App'x 475, 477 (7th Cir. 2015) ("It is true that delegating an exclusive public function to a private entity does not absolve a state of its constitutional obligations. *See West v. Atkins*, 487 U.S. 42, 54–55 (1988), *Rodriguez v. Plymouth Ambulance Serv.,* 577 F.3d 816, 824–26 (7th Cir.2009). Yet the activities that have been held to fall within a state's exclusive function are few. *See Terry v. Adams*, 345 U.S. 461 (1953) (administration of elections); *Marsh v. Alabama*, 326 U.S. 501 (1946) (operation of a company town); *Jackson v. Metro. Edison Co.,* 419 U.S. 345 (1974) (eminent domain); *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991) (preemptory challenges in jury selection); *Evans v. Newton*, 382 U.S. 296 (1966) (operation of a municipal park). The fact that a 'private entity performs a function that serves the public does not transform its conduct into state action.' *Wade v. Byles*, 83 F.3d 902, 905 (7th Cir.1996). And while delegation of a state's entire police power to a private entity may turn that entity into a state actor, that is not what happened here. . . Police protection in Plymouth is provided by the Plymouth Police Department. VLK is not authorized by the City or the State of Indiana to engage in police powers akin to those of a Plymouth police

officer. True, the Training Board has approved the use of VLK-trained dogs by police officers in Indiana. Training drug-sniffing dogs and their handlers, however, is not an exercise exclusively reserved to the state. . . Thus, because VLK could not have engaged in state action by training the dog, Miller does not have a plausible claim against the companies under § 1983.")

Listecki v. Official Comm. of Unsecured Creditors, 780 F.3d 731, 740-41 (7th Cir. 2015) ("[T]he Archdiocese argues—and the district court found—that the Committee performs a 'public function' making it a governmental actor. Under this test, a private entity is a governmental actor when it is performing an action that is 'traditionally the exclusive prerogative of the State.'. . This test is rarely met. . . The Archdiocese argues that the Committee is basically stepping into the shoes of the Trustee. First, that theory is belied by the fact that the Committee can, and does, conflict with the Trustee. Were they performing the same function, they would presumably be on the same page. Second, the goal and purpose of the committee is to act on behalf of and for the creditors. Conversely, the goal of the Trustee is to 'promote the integrity and efficiency of the bankruptcy system for the *benefit of all stakeholders—debtors, creditors, and the public.*'. There is some overlap between their functions—*e.g.*, both engage in restructuring discussions and converse with the court regarding the status of the case and the debtor's estate—but the traditional function of the governmental entity is to act as an impartial supervisor of the bankruptcy process for the benefit of all. The Committee, however, is far from impartial. The Archdiocese also argues, and the district court found, that a debtor-in-possession performs a public function, and when the Committee obtained derivative standing to pursue avoidance claims, it stepped into the shoes of the debtor-in-possession, thereby becoming a governmental actor. . . The problem for the Archdiocese is that the debtor-in-possession does not perform an action that is '*traditionally the exclusive prerogative* of the State.'. . As the Code makes clear, the 'trustee' avoids transfers-not the United States Trustee or any other governmental entity. . . It is not the government or even a governmental actor that traditionally avoids transfers, but rather individual trustees and debtor-in-possessions. This is not the exclusive prerogative of the government. . . Although each determination of an entity's governmental actor status is fact- and case-specific, our conclusion that the Committee is not a governmental actor is supported by the Supreme Court's precedent. . . . There might be a 'nexus,' between the Committee and the government, but it is not a close one. . . For all these reasons, we find the Committee is not acting under the color of law and so RFRA does not apply. Therefore we need not address the Committee's argument that RFRA's application here would create federalism issues.").

Belbachir v. County of McHenry, 726 F.3d 975, 978, 979 (7th Cir. 2013) ("Had the contract between the federal government and McHenry County to house aliens suspected of being forbidden to enter or remain in the United States made the county jail a federal instrumentality and its personnel (maybe including Centegra's employees, though they were not employees of the jail) federal officers, the jail staff would be suable for federal constitutional violations under the doctrine of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), rather than under section 1983. But the contract did not federalize McHenry County Jail, which continued to house nonfederal as well as federal prisoners.

Cases similar to this, allowing section 1983 claims by federal prisoners against county or city employees, are legion. [collecting cases] Although Centegra's employees are not public employees, they rightly do not deny that in performing functions that would otherwise be performed by public employees, they were acting under color of state law and therefore could be sued under section 1983. . . Otherwise state and local government could immunize itself from liability under section 1983 by replacing its employees with independent contractors.")

Rice ex rel. Rice v. Correctional Medical Services, 675 F.3d 650, 671-73 (7th Cir. 2012) ("We have our doubts as to whether the district court was correct in categorizing Ceniceros as a private rather than a state actor. Rice was treated by Ceniceros in fulfillment of the jail's obligation to provide medical care, including necessary psychiatric care, to Rice as an inmate of the jail. The orders committing Rice to a private facility simply reflect a judicial determination, solicited by Rohrer as the jail's mental health care provider, that Rice required more intensive psychiatric treatment than could be provided to him at the jail, and treatment that had to be provided without his consent. And the record suggests that it was not happenstance or judicial fiat that resulted in Oaklawn's selection as the facility to which Rice would be committed on the first two occasions in October 2003 and May 2004 (and as one of the four facilities to which he could have been committed in October 2004). Rather, the facts support the inference that Rice was committed to Oaklawn because of Oaklawn's voluntary, contractual undertaking to provide psychiatric services to the jail's inmates. . .The commitment orders did not alter Rice's status as a pretrial detainee. Because he was incarcerated, the jail had an obligation to address Rice's serious medical needs. . .That obligation included a duty to provide psychiatric care to Rice as needed. . . If Rice had been committed to the state's own facility for treatment by state-employed physicians, there would be no question that those physicians would qualify as state actors who could be liable for any deliberate indifference to his psychiatric needs . . . This would be true whether Rice were committed to a psychiatric unit within the jail . . . or instead transferred to a state-owned facility outside of the jail . . . . That Rice was instead committed to the care of a private psychiatrist—or, in the third instance, was refused care by that psychiatrist—whose employer had contracted to provide psychiatric care to the jail's inmates, arguably does not alter the analysis materially. The Supreme Court has not yet addressed whether medical care provided to a prisoner in a private facility outside of the prison walls constitutes state action. However, in *West,* the Court held that medical care provided on the grounds of the prison by a private physician under contract with the state does constitute state action. . . . Although the court cited the location of the treatment as one factor supporting its conclusion, . . . nothing in its analysis suggests that the result necessarily would have been different had the care been provided at a private facility. . . . Instead, central to the court's analysis was that the care was provided under contract with the prison in fulfillment of the prison's obligation to provide for the inmate's medical needs. That is arguably just as true here as it was in *West.* One might infer that on each of the three occasions when the court ordered Rice's involuntary commitment, Ceniceros and Oaklawn became involved not because the court chose Oaklawn for its own reasons, or because Oaklawn was otherwise obliged to provide psychiatric care to all who sought it, as an emergency room might be, . . .but rather because Oaklawn had voluntarily agreed to provide inpatient psychiatric care to the jail's inmates when needed. . . . .Had

it been possible for Rice to receive inpatient care from Ceniceros on the premises of the jail, there would be no question that Ceniceros would qualify as a state actor under both *West* and *Rodriguez.* And the district court's focus on the court-ordered nature of Rice's commitments implicitly presumes that had Rice been accepted for admission at Oaklawn in the absence of such an order, the same might be true. . . The court viewed the judicial commitment orders as superseding Oaklawn's voluntary assumption of the jail's duty to provide psychiatric care to its inmates. But the record suggests that the orders had much more to do with overruling Rice's will than with Oaklawn's willingness to treat Rice on its premises. . . . On these facts, a factfinder might conclude that Oaklawn and Ceniceros were not dragooned into treating Rice as a result of the court's commitment orders, but rather had voluntarily assumed that role by virtue of Oaklawn's contract with the jail. . . We need not ultimately resolve Ceniceros' status, however, because as we discuss later in this opinion, we conclude that the facts do not support a finding of deliberate indifference on Ceniceros' part. We have voiced our doubts about the district court's conclusion that Ceniceros was not a state actor because that is the sole basis on which the district court resolved the Estate's claim against Ceniceros and because, given the widespread practice of outsourcing jail and prison medical services to private contractors, it is certain that this issue will recur. We do not consider what we have said here to be binding, but we do wish any future court's exploration of this issue to take into consideration the circumstances we have highlighted as relevant to the state-actor determination.")

Javier v. City of Milwaukee, 670 F.3d 823, 831, 832 (7th Cir. 2012) ("[T]he key question in the Javiers' statutory claim against the City was whether Glover was acting as a vigilante for his own purposes or as a police officer when he shot Prado. . . Glover's inquest testimony suggested that he pursued and shot Prado pursuant to his off-duty responsibilities under the 'always on duty' rule because Prado had tried to run him over and appeared to point a gun at him. The City challenged Glover's version of events, noting its inconsistency with other evidence and arguing that the shooting was part and parcel of a purely personal dispute. But because the jury had to decide whether Glover used excessive force under color of law *and* whether his actions were within the scope of his employment, there was a great risk that jurors would conflate the two. . . . The City conveyed the incorrect impression that because Glover had been criminally charged, he could not have been acting within the scope of his employment. The two are not mutually exclusive. Without an instruction telling the jury that the law is precisely the opposite—that Glover's conduct could be criminal, excessive, and outside his authority and still be within the scope of his employment—the jury was missing a critical 'relevant legal principle[ ]' and was likely 'confuse[d] or mis[led].' . . The jury needed to hear *from the court* that the scope-of-employment concept recognizes that an officer can exceed or abuse his authority—even intentionally or criminally—and still be acting within the scope of his employment. The judge should not have refused the Javiers' proposed limiting instruction or their modified scope-of-employment instruction.")

Wilson v. Price, 624 F.3d 389, 392-95 (7th Cir. 2010) (City alderman's actions in savagely beating employee of automobile repair shop until he was unconscious and suffered broken jaw, after employee refused to move illegally parked cars for which alderman had received complaints

from his constituents and refused to find owner of shop upon alderman's request, were not made "under color of state law," within meaning of § 1983 , providing civil action against state official or employee for deprivation of federally guaranteed right, even assuming that alderman was at shop conducting legislative investigation in accordance with Illinois law, since alderman crossed line from legislative role that was within scope of his aldermanic duties and entered realm of law enforcement that was wholly unrelated to his legislative duties upon demanding that employee move cars.)

Lewis v. Downey, 581 F.3d 467, 471 n.3 (7th Cir. 2009) ("An interesting question not presented by either party is the applicability of § 1983 to employees of a local correctional facility that is housing federal inmates under contract between the federal and local governments. *See* 18 U.S.C. § 4002. A county employee caring for federal prisoners arguably becomes a *federal* actor, rather than the requisite *state* actor, rendering § 1983 inapplicable. . .Because it is not currently before us, we reserve our answer to the question for another day. We doubt, however, that the contractual relationship does anything to change the status of county jail employees as *state* actors. *Cf. Logue v. United States*, 412 U.S. 521, 528-32 (1973) (declining, for purposes of federal government liability under the Federal Tort Claims Act, to characterize as federal employees county jailers who were caring for federal prisoners).").

Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 826, 827, 830 (7th Cir. 2009) ("The situation before us today is not identical to the one before the Court in *West.* However, in applying *West*, our focus must be on the particular *function* of the medical care provider in the fulfillment of the state's obligation to provide health care to incarcerated persons. . . .When a party enters into a contractual relationship with the state penal institution to provide specific medical services to inmates, it is undertaking freely, and for consideration, responsibility for a specific portion of the state's overall obligation to provide medical care for incarcerated persons. In such a circumstance, the provider has assumed freely the same liability as the state. Similarly, when a person accepts employment with a private entity that contracts with the state, he understands that he is accepting the responsibility to perform his duties in conformity with the Constitution. . . . We cannot tell, on the face of the complaint alone, the relationship of Plymouth, and through it, the EMTs, to the prison system or to Mr. Rodriguez. *West* requires that this trilateral relationship be analyzed in order to determine whether their actions fairly can be attributed to the state.").

Johnson v. LaRabida Children's Hospital, 372 F.3d 894, 897 (7th Cir. 2004) (privately employed special police officer not entrusted with full powers possessed by the police does not act under color of state law).

Hampton v. Cagle, No. 4:20-CV-04210-SLD-JEH, 2024 WL 3967265, at *4 (C.D. Ill. Aug. 28, 2024) ("Municipalities may delegate policymaking authority for traditional public functions to a private entity, which may make the actions that entity takes fall within the scope of state action. . . For example, a court found that ISC [Inmate Services Corporation] acted under color of state law when it transported a prisoner because 'custody of the state prisoners is traditionally an exclusive

state function' and 'ISC had authority to transport [the prisoner] only because the state delegated that function to ISC.'. . Here, Hampton established that ISC was performing a traditionally exclusive state function because it was in the business of transporting detainees across state lines and did so in Hampton's case via a delegation of state authority from Pulaski County. . . Therefore, ISC was acting under color of state law when it entrusted Hampton's transport to Nesby.")

Byrne v. City of Chicago, No. 19 C 1383, 2019 WL 6609297, at *3 (N.D. Ill. Dec. 5, 2019) ("As noted, the complaint alleges in the alternative that Schuler, while in his apartment, either encouraged his girlfriend Byrne to shoot herself with his gun or himself shot her. Because neither action related in any way to the performance of a police duty, Schuler is not alleged to have acted under color of state law. . . .Even if Schuler was technically on duty that evening, even if Byrne was shot with Schuler's CPD-issued service weapon, and even if Byrne knew that Schuler was a CPD officer, governing precedent holds that the dispositive question is whether Schuler's conduct 'related in some way to the performance of the duties of [his] office.'. . Neither of Schuler's alleged actions—encouraging Byrne after a night of drinking to shoot herself in the face, or shooting Byrne himself—bore any relationship to the performance of his police duties. Schuler accordingly was not acting under color of state law.")

Pindak v. Dart, 125 F.Supp.3d 720, (N.D. Ill. 2015) ("In sum, despite the various factual disputes–regarding the meaning of the Post Orders, the appearance of the guards' uniforms, and the relationship between the guards and the deputies–the fact that the Plaza is a public forum by itself requires the conclusion that the guards act under color of state law when deciding whether or not to remove panhandlers from the Plaza.")

Pindak v. Cook County, No. 10 C 6237, 2013 WL 1222038, *5 (N.D. Ill. Mar. 25, 2013) ("The court agrees with Plaintiff that the alleged regulation of his speech in a public forum is a public function. Plaintiff has adequately asserted that Securitas officers were regulating his speech when they interfered with his peaceful panhandling because there was no apparent security threat from his conduct. Nothing in the record suggests that Plaintiff's presence or actions posed a threat to other citizens on Daley Plaza. When Securitas personnel allegedly banned Plaintiff while he was making only non-threatening overtures, they took on the mantle of state actors regulating speech in a public forum. Plaintiff has adequately alleged to survive a motion to dismiss that Securitas is liable pursuant to § 1983 because its officers were performing a public function.")

Green v. Wexford Health Sources, No. 12 C 50130, 2013 WL 139883, *5, *6 (N.D. Ill. Jan. 10, 2013) ("The Supreme Court has long recognized that private physicians and nurses who contract with the State to provide medical care to prisoners act 'under color of law' for purposes of § 1983. *See, e.g., West v. Atkins,* 487 U.S. 42 (1988); *Rice ex rel. Rice v. Correctional Medical Services,* 675 F.3d 650, 671 (7th Cir.2012). The defendants' attempt to distinguish this case from *West* based on different contractual terms regarding liability and indemnification is unavailing: '[i]t is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State.' *West,* at 55–56. The Supreme

Court did not, in *Minneci*, explicitly overturn a long line of established law on who may be a § 1983 defendant. *See Winchester v. Marketti*, No. 11 C 9224, 2012 WL 2076375, *2–3 (N.D.Ill. Jul. 8, 2012) (Zagel, J.). *Minneci* does not bar the plaintiff's civil rights claims.")

Boyle v. Torres, 756 F.Supp.2d 983, 994, 995 (N.D. Ill. 2010) ("The UCPD Officers' argument is bottomed on the assumption that private police or security forces do not exercise full police powers, and thus are not state actors, if they do not perform every function performed by municipal police officers. It is difficult to see how this assumption can be correct. . . . In any event, there can be no question that the UCPD's role is one that has traditionally been the exclusive prerogative of the state: they carry guns, they wear police uniforms, and they patrol their territory in squad cars; they have the ongoing authority to detain citizens and place them in handcuffs; they have the authority to demand that individuals furnish them with ID. When the ensemble of the officers' powers and functions is kept in view, there can be no doubt that they are state actors.")

EIGHTH CIRCUIT

Brown v. Linder, 56 F.4th 1140, 1145 (8th Cir. 2023) ("[A]ccepting as true all of Brown's well-pleaded factual allegations and drawing all reasonable inferences in his favor, we conclude that his complaint does not adequately allege that Linder acted under color of state law when he rebuked Brown's expert testimony. The bare assertion that Linder identified himself as a UI law professor and acted within the scope of that employment when he criticized Brown is not enough to allege plausibly that Linder's conduct was state action. . . Nothing in Brown's complaint indicates that Linder's criticisms involved an exercise of 'power possessed by virtue of state law' or were 'made possible only because [Linder] [wa]s clothed with the authority of state law.'. . And absent from the complaint is any detail about what Linder's official duties as a state employee include or how his conduct was facilitated by state resources. . . Without facts like these, Brown fails to allege that Linder's condemnation was anything other than 'purely private.'. . Brown's allegations are therefore exactly the sort of 'labels and conclusions' that cannot survive a Rule 12(b)(6) motion. . . At the end of the day, we do not doubt that the public might regard a law professor's views on expert testimony as particularly authoritative. Indeed, it is certainly possible that Linder's occupation brought attention to, or elevated the credibility of, his criticism of Brown. Nonetheless, that Linder happens to work for a public university rather than a private one does not, by itself, mean that his conduct was under color of state law.")

Roberson v. Dakota Boys & Girls Ranch, 42 F.4th 924, 932-35 (8th Cir. 2022) ("Where North Dakota 'outsourced one of its constitutional obligations'—the duty to provide adequate medical care—to the Ranch, that 'private entity may ... be deemed a state actor.'. . North Dakota had a constitutional obligation under the Due Process Clause, which the Ranch assumed. Thus, this Court need not assess whether the State had a similar obligation under the Eighth Amendment. However, the parties focused much of their analysis on *West* and subsequent Eighth Amendment cases. That precedent reinforces that the Ranch was a state actor here. The Fourteenth Amendment precedent for a state's duty to provide medical care to persons in state custody draws upon, and is

intertwined with, the Eighth Amendment precedent for a state's duty to provide medical care to prisoners. . . Given the similarities between states' obligations to people in their custody under the Eighth and Fourteenth Amendments, Eighth Amendment state-action precedent is persuasive here. . . Providing medical care to a state detainee is a performance of a traditional, exclusive public function. . . Under *West*, a private medical facility conducts this public function even if it also treats non-state detainees or lacks a financial contract with the state. 'It is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State.'. . . The critical facts are that the Ranch cooperated with North Dakota, that A.A.R. could receive treatment only from it, and that it functioned as A.A.R.'s medical provider 'within the state system[.]' These facts make it a state actor. . . By assuming North Dakota's constitutional obligation to provide A.A.R.'s medical treatment, the Ranch became a state actor. The Robersons state a plausible claim against it under § 1983.")

Yassin v. Weyker, 39 F.4th 1086, 1089-91 (8th Cir. 2022), *cert. denied*, 143 S. Ct. 779 (2023) ("Mixing the color-of-law inquiry with the summary-judgment standard introduces a complication. Genuine issues of material fact are for juries to resolve. . . The answer is different for legal questions, which are typically decided by courts, even at summary judgment. . . So which one is the under-color-of-law determination? It turns out that the Supreme Court has already answered this question. In *Cuyler v. Sullivan*, for example, it made clear that the under-color-of-law determination is a 'question of law.'. . To the extent there is any room left for debate, the predominant view is that it is legal. . . We recognize, of course, that the under-color-of-law determination can turn out to be quite 'fact[ ]bound.'. . But as long as the underlying material facts are undisputed, courts can decide the question, even when those undisputed facts point in different directions. . .To be sure, juries still have a role to play when material facts are in dispute. Suppose in this case, for example, that the parties disputed whether Weyker had been cross-deputized as a federal agent. . . In those circumstances, a jury may well need to resolve the factual dispute first, before the district court can decide the color-of-law question. . . Color of law is rooted in authority. . . . The question is whether the conduct is 'fairly attributable to the State.'. . To determine if it is, the focus is on the 'nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of ... official duties.'. . State law had nothing to do with 'the nature and circumstances' of Weyker's conduct. . . At the time, she was in Nashville working on a federal task force as a Special Deputy United States Marshal. She introduced the other task-force members in the room during the call, including the lead federal prosecutor and a federal agent. And the witness she was trying to protect, Muna Abdulkadir, was only on her radar because she was assigned to a federal investigation. Weyker also did not stray from the 'performance of [her] official duties' when she spoke to Officer Beeks and his supervising officer. . . As someone who was tasked with 'investigative work on the [sex-trafficking] task force,' she acted within the scope of those duties by trying to keep a federal witness out of trouble. . . The same goes for her statements in the affidavit she prepared the next day. . . .Weyker's work on the federal sex-trafficking investigation led to Yassin's arrest, she acted within the scope of her federal duties while dealing with the situation, and she referenced her federal-task-force role during her conversations with Officer Beeks and his supervisor. . . What matters, in other words, is that she

'act[ed] or *purport[ed] to act* in the performance of [her federal] duties, even if [s]he overstep[ped] [her] authority and misuse[d] power.'. .Our rule today is straightforward. Without any 'actual or purported relationship between [Weyker's] conduct and [her] duties as a [St. Paul] police officer,' no section 1983 action is available.")

Doe v. North Homes, Inc., 11 F.4th 633, 637-39 (8th Cir. 2021) ("The power to decide to incarcerate a person rests with the state. . . And so, only the state can decide to delegate that power. . . Even so, we can see how that conclusion may seem at odds with *Richardson v. McKnight*'s statement: 'correctional functions have never been exclusively public.' . . But *Richardson* expressly limited its scope to § 1983 immunity, not § 1983 liability. . . . And, in upholding a qualified-immunity denial, *Richardson* expressly left the state-actor question for the district court to decide. . . While one circuit saw *Richardson* as dispositive on the public-function question, others did not. [citing cases] Against that legal landscape and through the *Iqbal* standard, we sift the facts alleged here. Doe alleged that North Homes cared for juveniles whose liberties the state (counties) decided to restrict. She also alleged that the state (agencies) agreed to empower North Homes to run two units, through which North Homes could deprive residents of their liberties. And she alleged that the state (legislature, agencies, and courts) gave North Homes the power to detain residents in a correctional facility whenever it wanted and for whatever reason it saw fit. While conceding Doe's inability to leave the DOC unit, North Homes could not tell us *why* she could not leave (i.e., whose authority kept her there). True, involuntary commitment may not amount to a public function . . . but Doe's complaint did not rest on the involuntary character of her commitment. . . Instead, she alleged that North Homes moved her to, and detained her in, a *corrections* unit, where the alleged abuse occurred. . . She also alleged that North Homes later detained her in the *corrections* unit to punish and silence her efforts to report abuse. Construing the complaint in her favor, we conclude that Doe plausibly alleged that North Homes's exercise of a public function (the state's authority to detain her) caused her involuntary detainment in a *corrections* unit. As a result, we disagree with the decision to dismiss Doe's § 1983 claims at the pleading stage.")

Doe v. North Homes, Inc., 11 F.4th 633, 639-41 (8th Cir. 2021) (Gruender, J., dissenting) ("To state a claim under § 1983, a plaintiff must allege facts sufficient to show that the defendant acted under color of state law and that the defendant's conduct violated a federally protected right. . . Only the first element is at issue here. Although '§ 1983 excludes from its reach merely private conduct,'. . . 'a private entity can qualify as a state actor,' triggering § 1983 liability, 'in a few limited circumstances[.] . . One such circumstance is 'when the private entity performs a traditional, exclusive public function.'. . The private party must be performing a function that was 'traditionally the *exclusive* prerogative of the State.'. . The court concludes that Doe alleged facts sufficient to show that North Homes qualifies as a state actor under the public-function test. I disagree. Although the court alludes to several functions, it never identifies one that is both 'the *exclusive* prerogative of the State,'. . . and a function that Doe alleged North Homes was performing when she suffered the abuse. . . . [I]nvoluntary detention is not a function that Doe alleged North Homes was performing when she suffered the abuse. On the contrary, the complaint

indicated that Doe's foster mother and Kanabec County enrolled Doe in North Homes. . . And in any event, involuntary detention is not an exclusive public function. . . . So, what *does* the court think transformed North Homes into a stator actor for § 1983 purposes? The court stresses Doe's allegation that the abuse occurred after she was transferred to a unit in the corrections facility due to behavioral issues. . . But the location where North Homes housed Doe does not change the fact that North Homes was neither incarcerating her as punishment for a crime nor detaining her 'involuntarily' in the relevant sense. . . If involuntary criminal confinement is likely not an exclusive public function . . . and involuntary *civil* confinement is definitely not an exclusive public function, . . . then it is difficult to see why *voluntary civil* confinement should nonetheless qualify as an exclusive public function simply because it occurs in a unit licensed by the state department of corrections. Thus, I agree with the district court that Doe did not allege facts sufficient to show that North Homes qualified as a state actor under the public-function test. I also agree with the district court that Doe did not allege facts sufficient to show that North Homes qualified as a state actor under the joint-action test. . . . To survive a motion to dismiss, a plaintiff 'must allege, at the very least, that there was a mutual understanding, or a meeting of the minds, between the private party and the state actor.'. . Further, the plaintiff must allege a 'close nexus not merely between the state and the private party, but between the state and the alleged deprivation itself.'. . After carefully reviewing Doe's complaint, the district court concluded that it fell short of this demanding standard. After doing the same, I agree. For the foregoing reasons, I would affirm the district court's dismissal of Doe's complaint. Accordingly, I respectfully dissent.")

Campbell v. Reisch, 986 F.3d 822, 827-28 (8th Cir. 2021) ("In short, we think Reisch's Twitter account is more akin to a campaign newsletter than to anything else, and so it's Reisch's prerogative to select her audience and present her page as she sees fit. She did not intend her Twitter page 'to be like a public park, where anyone is welcome to enter and say whatever they want.'. . Reisch's own First Amendment right to craft her campaign materials necessarily trumps Campbell's desire to convey a message on her Twitter page that she does not wish to convey. . . even if that message does not compete for room as it would, say, in a campaign newsletter. While Reisch's posts open up an interactive space where Twitter users may speak, that doesn't mean that Reisch cannot control who gets to speak or what gets posted. It's her page to manage as she likes. Though Campbell and others may not like how Reisch runs her page, 'the place to register that disagreement is at the polls,'. . . or, at least, on Campbell's own page. We therefore reverse and remand for the district court to enter judgment in Reisch's favor.")

Campbell v. Reisch, 986 F.3d 822, 828-31 (8th Cir. 2021) (Kelly, J., dissenting) ("Missouri State Representative Cheri Toalson Reisch appeals the district court's adverse judgment that she violated Mike Campbell's First Amendment rights by blocking him from her Twitter account. Because I believe Reisch was acting under color of state law when she blocked Campbell, I respectfully dissent. . . Under 42 U.S.C. § 1983, 'a public employee acts under color of state law while acting in [her] official capacity or while exercising [her] responsibilities pursuant to state law.'. . Here, the court's determination that Reisch was not acting under color of state law rests on

its finding that Reisch used her Twitter account mainly to 'position herself for more electoral success down the road.' In my view, this finding is neither supported by the record nor dispositive of the state-action inquiry. . . .On this record, and given the focus of the 'under color of state law' inquiry on the 'actual or purport[ed]' relationship between Reisch's conduct and her official duties, . . . I cannot conclude that Reisch used her Twitter account primarily for campaign purposes, let alone that she made such a showing by a preponderance of the evidence. Instead, evidence that Reisch blocked Campbell 'to suppress speech critical of [her] conduct of official duties or fitness for public office,'. . . strengthens the inference that her conduct was attributable to the state. . . . Just as public officials 'may not preclude persons from participating' in the public-comment portion of a town hall meeting 'based on their viewpoints,'. . . Reisch cannot block users from her Twitter account because she dislikes their opinions. But this is precisely what Reisch did. The weight of the evidence, including Reisch's own testimony at trial and during her deposition, shows that Reisch blocked Campbell (and others) because she thought he shared the view of Missouri State Representatives Bruce Franks and Kip Kendrick that she engaged in 'unacceptable' behavior as a public official. Because Reisch, acting under color of state law, was 'impermissibly motivated by a desire to suppress a particular point of view' when she blocked Campbell, . . . I believe she discriminated against Campbell based on his viewpoint, thereby violating the First Amendment. For these reasons, I would affirm the district court's judgment.")

Johnson v. Phillips, 664 F.3d 232, 239, 240 (8th Cir. 2011) ("Phillips contends that he did not commit a constitutional violation because he was not acting under color of law at the time of the alleged sexual assault. In his view, once he removed Johnson's handcuffs, everything that followed–the conversation about homeless shelters, the drive to a second location, and the assault itself–occurred while he was acting in his capacity as a civilian, not as a city official. . . . Here, Phillips first effected a traffic stop, arrested Johnson on an outstanding warrant, and searched her car. Then, while wearing a police uniform and operating a police car, he released Johnson from the patrol car and directed her to follow him in her car. A reasonable factfinder believing these facts could conclude that Phillips was purporting to act as a police officer performing official duties when he led Johnson to the empty parking lot and committed the sexual assault. The district court thus properly rejected Phillips's motion to dismiss this claim.")

Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 423 (8th Cir. 2007) (In this case, the state effectively gave InnerChange its 24- hour power to incarcerate, treat, and discipline inmates. InnerChange teachers and counselors are authorized to issue inmate disciplinary reports, and progressive discipline is effectuated in concert with the DOC. Prison Fellowship and InnerChange acted jointly with the DOC and can be classified as state actors under § 1983 .").

Wickersham v. City of Columbia, 481 F.3d 591, 598, 599 (8th Cir. 2007) (To be sure, the mere invocation of state legal procedures, including police assistance, does not convert a private party into a state actor. . . . The contributions of the Columbia police go beyond the kind of neutral assistance that would normally be offered to private citizens in enforcing the law of trespass. . . .

When a private entity has acted jointly and intentionally with the police pursuant to a 'customary plan,' it is proper to hold that entity accountable for the actions which it helped bring about. . . . Since Salute and the city were knowingly and pervasively entangled in the enforcement of the challenged speech restrictions, we conclude that Salute was a state actor when it interfered with appellees' expressive activities. The district court did therefore not err in holding that Salute's curtailment of appellees' freedom of expression constituted state action and was actionable under § 1983.").

Moore v. Carpenter, 404 F.3d 1043, 1046 (8th Cir. 2005) (When a police officer is involved in a private party's repossession of property, there is no state action if the officer merely keeps the peace, but there is state action if the officer affirmatively intervenes to aid the repossessor enough that the repossession would not have occurred without the officer's help. . . .").

NINTH CIRCUIT

Thai v. County of Los Angeles, 127 F.4th 1254, 1256, 1259-60, 1262 (9th Cir. 2025) ("We consider whether two law enforcement officers from the Los Angeles District Attorney's Office, who were assigned full time to a joint federal-state task force investigating allegations of fraud in Social Security disability benefits applications, were acting under color of state law for purposes of 42 U.S.C. § 1983. Because the federal government was the source of authority under which the task force was implemented and because the officers' day-to-day work was supervised by a federal officer, we conclude the officers were acting under color of federal, rather than state, law. . . .In sum, the CDI [Cooperative Disability Investigation] Unit in Los Angeles was created by the OIG, the SSA Regional Office, and the California DDS and led by a federal special agent. In addition to federal personnel, it included state personnel from the DDS and state or local law enforcement officers, including Sanchez and Villasenor. . . .We agree with our sister circuits. To determine whether state officials assigned to a joint federal-state program operate under color of state law, we consider the totality of the circumstances. In general, where the source of authority for the program is federal in nature and the state officials' participation in the challenged conduct is subject to the immediate control of a federal supervisor, those officials act under color of federal law, not under color of state law. . . .Plaintiffs provide no evidence that 'the authority of the state was exerted in enforcing the law' such that the officers' conduct is fairly attributable to the state. . . Rather, Sanchez and Villasenor engaged in the conduct that allegedly deprived Thai and Doan of their rights while operating within a federal program, under the daily supervision and immediate control of a federal officer, and therefore acted under color of federal law. Roberts' federal supervising authority distinguishes Sanchez and Villasenor from officers of other joint federal-state agencies supervised by state employees and ultimately held to act under color of state law.")

O'Handley v. Weber, 62 F.4th 1145, 1160 (9th Cir. 2023) ("In sum, we conclude that Twitter's content-moderation decisions did not constitute state action because (1) Twitter did not exercise a state-conferred right or enforce a state-imposed rule under the first step of the *Lugar* framework, and (2) the interactions between Twitter and the OEC do not satisfy either the nexus or the joint

action tests under the second step. Our resolution of this issue is determinative with respect to O'Handley's claims under 42 U.S.C. § 1983 because each of those claims requires proof of state action.")

Pasadena Republican Club v. Western Justice Center, 985 F.3d 1161, 1171-72 (9th Cir. 2021) ("In all, WJC and its agents were not state actors for purposes of the Club's § 1983 claims. The Club fails to allege that the City has 'undertaken a complex and deeply intertwined process' with WJC to discriminate against the Club by canceling its speaking event. . . The Club also fails to allege that the City 'has so deeply insinuated itself into this process that [WJC's] conduct constituted state action.'. . . When the City executed the Lease, it was not delegating final policy-making authority on political speaking events in the City; it was simply conveying a property interest—the right of occupancy—in the premises. WJC maintained the authority to decide who, when, for what reason, and for how long a visitor could occupy the premises during nonbusiness hours. Therefore, when WJC executed—and rescinded—the rental agreement with the Club, WJC was exercising its discretionary authority on its own behalf as the holder of a possessory interest in the Property. WJC was not exercising any 'policymaking authority for a particular city function' on behalf of the City. . . And, of course, there is no claim that renting out event space during nonbusiness hours is a 'traditional, exclusive public function.' The government does not, without more, become vicariously liable for the discretionary decisions of its lessee. Accordingly, the undisputed facts show that the City did not delegate any final policy-making authority that caused the Club's alleged constitutional injury.")

Rawson v. Recovery Innovations, Inc., 975 F.3d 742, 747, 752-54, 757 (9th Cir. 2020) ("The specific alleged conduct Rawson challenges includes involuntarily committing him without legal justification, knowingly providing false information to the court, and forcibly injecting him with antipsychotic medications without his consent. . . The relevant inquiry is therefore whether Defendants' role as custodians, as litigants, or as medical professionals constituted state action. . . . As in *West*, any deprivation effected by Defendants here was in some sense caused by the State's exercise of its right, pursuant to both its police powers and *parens patriae* powers, to deprive Rawson of his liberty for an extended period of involuntary civil commitment. . . . In that sense, Defendants were 'clothed with the authority of state law' when they detained and forcibly treated Rawson beyond the initial 72-hour emergency evaluation period. . . Thus, under *West*, if Defendants 'misused [their] power by demonstrating deliberate indifference to' Rawson's rights to liberty, refusal of treatment, and/or due process, 'the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to' civilly commit Rawson for purposes of protecting both the public and Rawson himself. . . These facts, in light of *West*, weigh in favor of finding that Defendants acted under color of state law. . . . The Court reasoned in *West* that the State has an Eighth Amendment obligation 'to provide adequate medical care to those whom it has incarcerated,' and that the State employs private contract physicians, and relies on their professional judgment, to fulfill this obligation. . . Similarly here, the State has a Fourteenth Amendment obligation toward those whom it has ordered involuntarily committed. . . In the now-vacated *Pollard* opinion, where we held that employees of a privately-operated prison

acted under color of state law, we rejected the notion that 'by adding an additional layer, the government can contract away its constitutional duties' by having private actors rather than state actors perform some of the work. . . Accordingly, the State's particular Fourteenth Amendment duties toward persons involuntarily committed weighs toward a finding of state action in this case. . . . Defendants also argue that the prosecutor's role here is analogous to the public defender in *Polk County v. Dodson*, . . . and therefore that the prosecutor is not a state actor when prosecuting commitment petitions. We disagree. The prosecutor here is not advocating for the private interests of the hospital or mental health professionals. Neither the prosecutor's nor Defendants' 'professional and ethical obligation[s] ... set [them] in conflict with the State.'. . Instead, Defendants cooperate with the executive arm of the State to further the *State's* interest in protecting both the public and the patient. . . Accordingly, the role played by the county prosecutor here, in practice and by statute, supports a finding of state action by the Defendants. . . .Although Defendants were nominally private actors, exercised professional medical judgment, and were not statutorily required to petition for additional commitment, . . .on balance, the facts weigh toward a conclusion that they were nevertheless state actors. As in *Jensen*, the State here has 'undertaken a complex and deeply intertwined process [with private actors] of evaluating and detaining individuals' for long-term commitments, and therefore, 'the state has so deeply insinuated itself into this process' that '[the private actors'] conduct constituted state action.'. . Just as *West* found state action with private contract physicians rendering treatment services for prisoners at a state prison, we hold the same under the arrangement the State has devised for involving private actors in long-term involuntary commitments. Defendants were not merely subject to extensive regulation or subsidized by state funds. . . Given the necessity of state imprimatur to continue detention, the affirmative statutory command to render involuntary treatment, the reliance on the State's police and *parens patriae* powers, the applicable constitutional duties, the extensive involvement of the county prosecutor, and the leasing of their premises from the state hospital, we conclude that 'a sufficiently close nexus between the state and the private actor' existed here 'so that the action of the latter may be fairly treated as that of the State itself.'. . We therefore conclude that Defendants were acting under color of state law with respect to the actions for which Rawson attempts to hold them liable. We reverse the district court's grant of summary judgment to the contrary and remand for further proceedings.")

Hyun Ju Park v. City and County of Honolulu, 952 F.3d 1136, 1140 (9th Cir. 2020) ("Our circuit has developed a three-part test for determining when a police officer, although not on duty, has acted under color of state law. The officer must have: (1) acted or pretended to act in the performance of his official duties; (2) invoked his status as a law enforcement officer with the purpose and effect of influencing the behavior of others; and (3) engaged in conduct that 'related in some meaningful way either to the officer's governmental status or to the performance of his duties.'. . . Park's claims against Naki and Omoso fail at the first step. The complaint does not plausibly allege that either officer was exercising, or purporting to exercise, his official responsibilities during the events that led to her injuries. Both officers were off-duty and dressed in plain clothes, drinking and socializing at the bar in their capacity as private citizens. They never identified themselves as officers, displayed their badges, or 'specifically associated' their actions

with their law enforcement duties. . . Thus, even accepting Park's allegations as true, there is no sense in which Naki and Omoso performed or purported to perform their official duties on the night in question.")

Pistor v. Garcia, 791 F.3d 1104, 1114-15 (9th Cir. 2015) ("[W]hether the defendants were acting under color of state or tribal law when they seized the gamblers *is* a necessary inquiry for the purposes of establishing the essential elements of the gamblers' § 1983 claim . . . . As we have long recognized, 'actions under section 1983 cannot be maintained in federal court for persons alleging a deprivation of constitutional rights under color of tribal law.'. . The tribal defendants can thus be held liable under § 1983 only if they were acting under color of *state*, not tribal, law at the time they seized the gamblers.")

Naffe v. Frey, 789 F.3d 1030, 1036-39 (9th Cir. 2015) ("Although we have never decided if and when a state employee who moonlights as a blogger acts under color of state law, we have considered more generally when the actions of off-duty state employees give rise to § 1983 liability. . . .*Stanewich, McDade,* and *Anderson* establish our framework for determining whether Naffe pleaded facts sufficient to support her allegation that Frey acted under color of state law. Under those cases, a state employee who is on duty, or otherwise exercises his official responsibilities in an off-duty encounter, typically acts under color of state law. . . That is true even if the employee's offensive actions were illegal or unauthorized. . . A state employee who is off duty nevertheless acts under color of state law when (1) the employee 'purport[s] to or pretend[s] to act under color of law,' Stanewich, 92 F.3d at 838; McDade, 223 F.3d at 1141, (2) his 'pretense of acting in the performance of his duties ... had the purpose and effect of influencing the behavior of others,' *Anderson,* 451 F.3d at 1069, and (3) the harm inflicted on plaintiff ' "related in some meaningful way either to the officer's governmental status or to the performance of his duties[]"'. . . . On the other hand, a government employee does not act under color of state law when he pursues private goals via private actions. . .Naffe's § 1983 claim fails under this framework for several reasons. First, Naffe's factual allegations do not give rise to the reasonable inference that Frey harmed Naffe while on duty or when 'exercising his responsibilities pursuant to state law.'. . Frey is a county prosecutor whose official responsibilities do not include publicly commenting about conservative politics and current events. . .Second, Frey's comments about Naffe are not sufficiently related to his work as a county prosecutor to constitute state action. . . .Third, the facts Naffe pleads do not support her claim that Frey 'purported or pretended to act under color of [state] law' when he blogged about her. . . To the contrary, Frey frequently reminded his readers and followers that, although he worked for Los Angeles County, he blogged and Tweeted only in his personal capacity. . . . And although Frey drew on his experiences as a Deputy District Attorney to inform his blog posts and Tweets, that alone does not transform his private speech into public action. . . . In sum, Naffe seeks to support her allegation of state action by claiming repeatedly that Frey acted '[i]n his capacity as a Deputy District Attorney' when he criticized her online. But she does not allege facts that support this claim. And, as the district court correctly held, a bare claim of state action does not withstand a Rule 12(b)(6) motion.")

George v. Edholm, 752 F.3d 1206, 1216 (9th Cir. 2014) ("To hold Dr. Edholm personally liable as a state actor, George must establish not only that Edholm was induced to act as he did, but also that Edholm intended to assist Freeman and Johnson in obtaining evidence for their investigation. . . We hold only that Edholm's actions could be attributed to the state, based on our holding that a reasonable jury could conclude that Freeman and Johnson provided false information, encouragement, and active physical assistance to Edholm. We do not reach the different question whether a jury could conclude that Edholm is himself liable under § 1983.")

Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1140 (9th Cir. 2012) ("Desert Palace's behavior qualifies as state action under the joint action test thanks to its system of cooperation and interdependence with the LVMPD. First, under the SILA program, some Desert Palace security personnel have the authority, normally reserved to the state, to issue a citation to appear in court for the crime of misdemeanor trespassing. To gain this authority, security guards must take a training course given by the LVMPD. This delegation of authority by the police department, Crumrine explained, helps 'alleviate some of the manpower concerns of the police' by relieving them from responding to every claim of trespassing that arises at a casino. Security guards with SILA authority may not arrest a suspect who has an outstanding arrest warrant, so they routinely call the LVMPD's records department to get information concerning warrants. The citations that security guards issue are no different from those issued by police officers, and failure to respond to them by appearing in court constitutes a separate offense. . . Desert Palace and the state are therefore joint participants in the SILA program, which produces benefits that accrue to both Desert Palace and the LVMPD.")

Florer v. Congregation Pidyon Shevuyim, 639 F.3d 916, 926 (9th Cir. 2011) ("While CPSNA had entered into a contract with DOC to provide religious instruction and guidance to inmates, the contract cannot reasonably be read to require Defendants to provide Florer with a Torah, calendar, or rabbi visit. Defendants are not state actors under the public-function analysis.")

Ibrahim v. Department of Homeland Sec., 538 F.3d 1250, 1257 (9th Cir. 2008) ("Ibrahim reads our decision in *Cabrera* as making an exception to this rule where, as here, federal officials recruit local police to help enforce federal law. But we created no such exception in *Cabrera*; instead, we reaffirmed the long-standing principle that federal officials can only be liable under section 1983 where there is a 'sufficiently close nexus between the State and the challenged action of the[federal actors] so that the action of the latter may be fairly treated as that of the State itself.' . . . California had nothing to do with the federal government's decision to put Ibrahim on the No-Fly List, nothing to do with the Transportation Security Administration's Security Directives that told United Air Lines what to do when confronted with a passenger on the No-Fly List, and nothing to do with Bondanella's decision to order the San Francisco police to detain Ibrahim.").

Maggio v. Shelton, No. 2:14-CV-01682-SI, 2015 WL 5126567, at *8 (D. Or. Sept. 1, 2015) ("Dr. Anderson. . . is not an emergency room doctor. Based on the facts alleged by Plaintiff, Dr. Anderson had more than an 'incidental and transitory relationship' with Plaintiff. Indeed, Dr.

Anderson agreed to provide medical care to Plaintiff, a state prisoner. As alleged by Plaintiff, Dr. Anderson treats many prisoners who are referred to him by ODOC. Plaintiff saw Dr. Anderson on four separate occasions: once for the initial referral, again for the surgery, again for the pin removal, and once again after Plaintiff complained about pain lasting for months after the procedure. The fact that Plaintiff was sent back to Dr. Anderson by TRCI staff on multiple occasions, even after Plaintiff complained about the medical treatment he received from Dr. Anderson, suggests that Dr. Anderson 'voluntarily'. . . accepted TRCI's delegation of its duty to provide Plaintiff's medical care. Considering the relationship between TRCI, ODOC, Plaintiff, and Dr. Anderson, the Court concludes that Plaintiff sufficiently alleges that Dr. Anderson effectively engaged in a public function by providing medical care to Plaintiff, a person involuntarily in the custody of the state.")

Guzman-Martinez v. Corrections Corp. of America, No. CV–11–02390–PHX–NVW, 2012 WL 5907081, at *10-*12 (D. Ariz. Nov. 26, 2012) ("It is undisputed that CCA operates the Center under a contract with the City, which transfers to CCA the City's obligations and benefits obtained through a contract with ICE. It also is undisputed that operating a prison traditionally is a governmental function and private operators of a state prison generally are considered as acting under color of state law. [collecting cases] However, it is disputed whether CCA and its employees 'exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'. . Whether the CCA operates the immigration detention center under color of state law or under color of federal law is determinative because, 'by its very terms, § 1983 precludes liability in federal government actors.'. . The CCA Defendants contend they were not state actors because Plaintiff was in ICE custody at the time of the alleged incidents, detention of aliens is exclusively within federal authority, and CCA's authority derived from the federal government. Plaintiff contends that 'CCA Defendants are state actors by virtue of CCA's contractual relationship with [the City of] Eloy.' The specific conduct complained of is: (1) CCA's and DeRosa's failure to implement policies and practices to prevent assault, sexual assault, and abuse of transgender immigrant detainees by detainees and guards and failure to appropriately monitor and supervise detention conditions of transgender immigrant detainees and (2) Mohn's and Adams' failure to adequately evaluate the risk to Plaintiff as a transgender woman detainee and failure to properly classify and place Plaintiff in safe housing with adequate supervision. Even if the specific conduct complained of deprived Plaintiff of a constitutional right, Plaintiff was detained at the Center by ICE under federal law, not by the City under state law. Adopting policies and practices regarding ICE detention of immigrants is 'both traditionally and exclusively governmental,'. . . but it is traditionally the 'exclusive prerogative' of federal government, not state government. . . CCA's authority and obligation to adopt policies and practices regarding the classification, housing, monitoring, and supervision of transgender immigrant detainees, if any, is delegated by ICE through contracts with the City. Thus, the public function test is not met under the circumstances alleged here. . . . Under the joint action test, courts consider whether the state has knowingly accepted benefits derived from unconstitutional conduct, thereby becoming interdependent with the private entity and a joint participant in the challenged activity. . . Without more, governmental funding and extensive regulation do not establish governmental involvement

in the actions of a private entity. . . To be liable under the joint action test, not only must the private party be a willful participant with the State or its agents in an activity that deprives a plaintiff of her constitutional rights, but also the private party's actions must be 'inextricably intertwined' with those of government. . . Here, the Amended Complaint does not allege that the state or the City have knowingly accepted benefits derived from unconstitutional conduct or that the City and CCA or its employees acted jointly in the challenged activity. Even if the contract between the City and CCA imposed extensive regulation and provided governmental funding, it would be insufficient to establish joint action. The contract merely acted as a conduit for transferring regulation and funding from ICE to CCA. . . . Under the compulsion test, courts consider whether the coercive influence of the state effectively converts a private action into a state action. . . The Amended Complaint does not allege that the state or the City coerced CCA or its employees to take any action. . . .Under the nexus test, courts consider whether there is such a close nexus between the state and the challenged action that the action may be fairly treated as that of the state itself. . . The Amended Complaint does not allege that the challenged action may be fairly treated as that of the state or the City itself. . . . The Amended Complaint does not allege facts sufficient to demonstrate that CCA, DeRosa, Mohn, or Adams deprived Plaintiff of a constitutional right while acting under color of state law. Therefore, Count I fails to state a claim upon which relief can be granted against CCA, DeRosa, Mohn, or Adams.")

Beck v. City of Portland, Or., No. CV-10-434-HU, 2010 WL 4638892, at *6, *7 (D. Or. Nov. 5, 2010) ("These cases, *Huffman, Van Ort,* and *Traver,* collectively point to several types of factors relevant to the query of when an off-duty police officer purports or pretends to act pursuant to official authority. First are the indicia of authority such as wearing a uniform, displaying badge, brandishing a weapon, identifying oneself as an officer, issuing commands, or intervening in a dispute. Other considerations may include the officer's role at the time, such as the fact that Gibson was actually hired to perform security under a formal arrangement with the police department. Finally, as explained in *Van Ort,* while mere recognition as a police officer does not turn private acts into acts under color of state law, there are situations where an officer may exert such 'meaningful, physical control' over another 'on the basis of his status as a law enforcement officer' that the officer's actions may amount to official conduct under color of state law. Sheffer argues that walking down the sidewalk in her neighborhood, outside the jurisdiction where she is employed, off-duty, and out-of-uniform, and stepping into the street in front of a neighbor's car with no allegation that she flashed a badge or identified herself as a police officer in any way, and then motioning for her neighbor to stop, are not actions taken under color of state law. Furthermore, Sheffer argues that, under *Van Ort,* simply because plaintiff knew Sheffer to be a Portland police officer does not transform her actions into actions taken under color of state law. Plaintiff argues that Sheffer acted under pretense of state employment by asserting her state-authorized ability to stop moving vehicles as well as to run license plate searches. . . Plaintiff argues that it was precisely because Sheffer was 'cloaked' in the authority of the state that she had the audacity to walk into a public street and stand in front of a moving vehicle and direct plaintiff to pull over. Although the issue is close, I agree with defendant. As defendant notes, she was off-duty, out of uniform, and not in her jurisdiction. She did not flash a badge. She did not have a weapon. She did not issue an

oral command to stop. She did not identify herself in any way as a police officer. Additionally, her actions were made in the context of what appears to have been a personal dispute between plaintiff and Sheffer. And while plaintiff may have known that Sheffer was a police officer, that alone does not cloak Sheffer's actions with official authority. If that were the test, a police officer's every action would be subject to a federal constitutional claim by any family member, neighbor, friend, etc. based only on the status of being in law enforcement. The caselaw does not support such a standard.")

Committee for Immigrant Rights of Sonoma County v. County of Sonoma, No. C 08-4220 RS, 2010 WL 2465030, at *4 (N.D. Cal. June 11, 2010) ("When a Santa Rosa sheriff's deputy stops, detains, arrests, or jails an individual he or she is cloaked with the authority of state law, regardless of whether an ICE agent requested the action. The officer's uniform, badge, gun, vehicle, are all provided by the state or county, not federal authorities. The power to engage in law enforcement activities comes from the state. Although the Santa Rosa sheriffs may have been working with ICE agents to enforce federal law, they necessarily acted under color of state law.")

Joseph v. Dillard's, Inc., No. CV-08-1478-PHX-NVW, 2009 WL 5185393, at *13 (D. Ariz. Dec. 24, 2009) ("While the Ninth Circuit appears not to have addressed this specific context, the Fifth Circuit has decided that a private employer of an off-duty police officer does not act under color of law unless the officer 'failed to perform an independent investigation, and that evidence of a proper investigation may include such indicators as an officer's interview of an employee, independent observation of a suspect, and the officer writing his own report.'. . Plaintiff utterly failed to address this argument in her response. However, the issue may be resolved on the facts and evidence already presented. Plaintiff's section 1983 claim is predicated on Villarreal's actions in taking her to the floor and arresting her for alleged assault. . . Therefore, the question is whether Villarreal, an undisputed state actor, performed an independent investigation before arresting Plaintiff for assault. The undisputed facts indicate that he did. No Dillard's employees directed or requested Villarreal to arrest Plaintiff for assault. In fact, at no point did any Dillard's employees direct or request Villarreal to investigate or arrest Plaintiff for any crime. The extent of Dillard's involvement in the incident was to inform Villarreal that it wanted Plaintiff to leave the store. Only when Plaintiff was moving toward the exit did Villarreal lunge at and arrest her for alleged assault. Villarreal independently observed Plaintiff's actions and the Phoenix Police Department prepared its own police report after the incident. Because the state conducted its own investigation, Dillard's was not acting under color of law during the incident.").

See also ***Pollard v. Geo Group, Inc.***, 629 F.3d 843, 854-58 (9th Cir. 2010), *rev'd on other grounds sub nom,* ***Minneci v. Pollard,*** 132 S. Ct. 617 (2012) ("[T]he threshold question presented here is whether the GEO employees can be considered federal agents acting under color of federal law in their professional capacities. We conclude that they can. . . . We note at the outset that the one federal court of appeal to have directly addressed the question – the Fourth Circuit – has held that employees of private corporations operating federal prisons are not federal actors for purposes of *Bivens.* Neither the Supreme Court nor our court has squarely addressed whether employees of

a private corporation operating a prison under contract with the federal government act under color of federal law. That said, we have held that private defendants can be sued under *Bivens* if they engage in federal action. . . . In our view, there is no principled basis to distinguish the activities of the GEO employees in this case from the governmental action identified in *West.* Pollard could seek medical care only from the GEO employees and any other private physicians GEO employed. If those employees demonstrated deliberate indifference to Pollard's serious medical needs, the resulting deprivation was caused, in the sense relevant for the federal-action inquiry, by the federal government's exercise of its power to punish Pollard by incarceration and to deny him a venue independent of the federal government to obtain needed medical care. On this point, *West* is clear. . . . The relevant function here is not prison management, but rather incarceration of prisoners, which of course has traditionally been the State's '*exclusive* prerogative.'. . .Likewise, in the § 1983 context, our sister circuits have routinely recognized that imprisonment is a fundamentally public function, regardless of the entity managing the prison. . . . In accord with *West* and other federal courts of appeal, we hold that there is but one function at issue here: the government's power to incarcerate those who have been convicted of criminal offenses. We decline to artificially parse that power into its constituent parts – confinement, provision of food and medical care, protection of inmate safety, etc. − as that would ignore that those functions all derive from a single public function that is the sole province of the government: 'enforcement of state-imposed deprivation of liberty.'. . Because that function is 'traditionally the *exclusive* prerogative of the [government],' it satisfies the 'public function' test under *Rendell-Baker.*")

TENTH CIRCUIT

VDARE Foundation v. City of Colorado Springs, 11 F.4th 1151, 1168 (10th Cir. 2021) ("In sum, the allegations don't show that the City ever threatened or ordered the Resort to take any action akin to what the Commission did to distributors in *Bantam Books.* Nor does it allege that the City sent police officers to intimidate anyone as in *Bantam Books*. . . Likewise, VDARE hasn't pleaded that the Resort and the City were intertwined through regulatory, administrative, financial, or contractual regimes, such as those discussed in *Blum* and its progeny or in *Gallagher*, which could have given the City direct influence over the Resort. As well, VDARE's allegations don't compare to the facts in *R.C. Maxwell*, *Hammerhead*, *X-Men*, or *Penthouse*, cases in which a government official directly communicated with a private third party in an effort to pressure that party to take a specific action. In sum, we agree with the district court that 'for unconstitutional state action to exist, state law must direct and/or state agencies and officials must commit conduct that directly violates a party's [F]irst [A]mendment rights.'. . The City didn't engage in such conduct here. Thus, we conclude that VDARE hasn't plausibly alleged that the Resort's cancellation of the Conference was state action.")

Big Cats of Serenity Springs, Inc., v. Rhodes, 843 F.3d 853, 870-71 (10th Cir. 2016) ("The district court nonetheless concluded the 'enlistment of state law enforcement' was sufficient to hold federal officers liable under § 1983. The court and the government rely on an unpublished district court case from California for support, *Reynoso v. City & County. of San Francisco*, No. C 10-

00984 SI, 2012 WL 646232 (N.D. Cal. Feb. 28, 2012). In that case, San Francisco police officers entered the plaintiff's residence to search for drugs. But the court found substantial concerted action by the state and federal officials. 'After the premises was secured, the ATF agents "merely substituted themselves for the agents of the City and County of San Francisco in the break-in of plaintiffs' home and took up the search and seizure initiated by the City and County of San Francisco authorities."'. . Because the federal defendants were significant participants in the *state scheme*, those federal defendants' actions could ' "fairly be attributed to the state."'. .The circumstances here are quite different. The deputies were not actively engaged in pursuing a common law enforcement objective. Nor were they attempting to vindicate any state or county interest. They were only operating under the false assumption that the entry was authorized under federal law and pursuant to court order. In sum, the complaint does not allege the federal and state actors shared an unconstitutional goal. Nor do we find sufficient state cooperation, considering the local deputies' entire involvement consisted of complying with the requests of the APHIS inspectors. More accurately, the federal officials are better seen as acting under color of *federal* law—the AWA—when they instructed the state officials to cut the locks. Because the federal officials did not act under color of state law, the district court erred in denying the government's motion to dismiss the § 1983 claim.")

Wittner v. Banner Health, 720 F.3d 770, 774-77, 780 (10th Cir. 2013) ("Plaintiffs' state action theory, as set out in the complaint, hinges entirely on the state statutory scheme allowing seventy-two-hour involuntary mental health holds and NCMC's role thereunder as a 'designated facility.' Plaintiffs contend the state of Colorado transformed the medical facility and its health care employees into state actors by assuming the power to authorize the involuntary commitment of mentally ill persons and delegating that power to designated facilities which the state regulates. In so doing, plaintiffs argue, the state assumed the duty to provide constitutionally adequate medical care for the involuntarily committed patient, and NCMC and its employees acted under color of state law when it contracted to perform the state's obligation of care. . . .Without more, . . .a statutory grant of authority for a short-term involuntary hold in a private hospital does not pass the nexus/compulsion test for turning private action of the hospital or the certifying doctor into state action. . . . Plaintiffs cite to some out-of-circuit district court decisions finding involuntary commitment of the mentally ill to be a public function and thus state action. But this view has been rejected in our circuit. . . .Using public function reasoning, some courts have applied *West* to private *prisons. See Rosborough v. Mgmt. & Training Corp.,* 350 F.3d 459, 461 (5th Cir.2003) (quoting *Skelton v. Pri–Cor, Inc.*, 963 F.2d 100, 102 (6th Cir.1991)). But we and other circuits following *Spencer,* 864 F.2d 1376, have declined to import this 'public function' label onto short-term involuntary mental health holds in private *hospitals. See Harvey*, 949 F.2d at 1131; *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254 (1st Cir.1994). *West* anticipated *Brentwood's* focus on all relevant quantitative and qualitative facts by supplementing its public function reasoning with joint action and symbiotic relationship analyses, finding it relevant that contracted doctors were not given unfettered discretion but were required to cooperate with state prison personnel. . . But that does not help plaintiffs because the facts alleged here do not create a close question under any of the four tests.")

Phillips v. Tiona, No. 12–1055, 2013 WL 239891, *12-*15 (10th Cir. Jan. 23, 2013) (not reported) ("Structurally, CCA is in no way a public entity. It is a private, for-profit, business corporation, listed on the New York Stock Exchange, in the business of, among other things, the private management of prisons and other correctional facilities under contract with all three federal corrections agencies, sixteen states, and local municipalities. It is the fifth-largest corrections system in the nation behind only the federal government and three states. It houses more than 80,000 inmates in more than 60 facilities, 44 of which are company-owned, and it employs nearly 17,000 people. CCA operates three correctional facilities in the State of Colorado, under contract with the State: Bent County Correctional Facility, Crowley County Correctional Facility, and, as relevant here, Kit Carson Correctional Center. The State of Colorado contracts with CCA pursuant to state statute authorizing the CDOC 'to permanently place state inmates classified as medium custody and below in private prisons,' Colo.Rev.Stat. § 17–1–104.9, subject to legislation comprehensively regulating such prisons. . . Functionally, private prisons like KCCC only partly mirror prisons operated by the state. . . As indicated above, the State of Colorado remains intimately involved. Private prisons in Colorado must, among other things, 'abide by operations standards for correctional facilities adopted by the executive director of the department of corrections.'. . Notably, inmates assigned to private prisons remain officially in the custody of the CDOC, and the CDOC retains sole authority to assign and transfer inmates, make final determinations on disciplinary matters affecting liberty interests, make decisions that affect sentences or time served, including earned time credits, make recommendations to the state board of parole, develop work requirements, and determine eligibility for any form of release from a correctional facility. . . By outsourcing the incarceration of its prisoners, the State relieves itself of significant expenses, from those related to housing prisoners and providing food, medical, dental and other care, plus a full range of programs, to security, and the burden of payroll and state benefits to staff and administrators. In addition the State avoids exposure to the risks and expense of litigation and judgments. CCA personnel have no claim on benefits from the State, and CCA, by statute, indemnifies the State and its employees from all liabilities, including those stemming from civil rights claims; and it must carry insurance to back up that indemnification. . . .The line separating a State-operated prison from one operated by a private corporation is not just cosmetic. There are important differences, creating a material and significant asymmetry. Thus, for instance, whereas the State and its CDOC employees enjoy Eleventh Amendment immunity from damages suits under § 1983 for their official actions, . . . and CDOC employees in their individual capacities enjoy qualified immunity in § 1983 damages actions, CCA and its private prison employees enjoy neither. They are fully exposed to the numerous civil rights suits brought by inmates. . . .On the other hand, unlike federal prisoner suits against government employees, federal prisoners at a privately run federal prison cannot bring a *Bivens* . . . action against the private corporation that manages the prison, or its privately employed personnel working there, when there is a remedy under state tort law. *See Malesko,* 534 U.S. at 72–73; *Minneci,* 132 S.Ct. at 620. But that prohibition is more than offset by the ability to bring actions for simple negligence—a ground not available, for instance, in an Eighth Amendment claim under § 1983. . . And, with respect to the application of Title II of the ADA, states *may*, for certain conduct, enjoy sovereign immunity from

ADA suits for money damages where that conduct does not actually violate the Fourteenth Amendment. . . If it is determined that Title II of the ADA applies to them, private prison management corporations will have no such opportunity for protection. Finally, Title II of the ADA does not apply to federal prisoners in federal prisons, including those privately managed by corporations such as CCA. That is so because Title II covers only states and defined appendages thereof. . . Importantly, regulations issued by the Attorney General implementing Title II suggest that states may not avoid the responsibility to provide services to disabled prisoners by contracting away those obligations. Thus, prison assignments should not make a material difference. . . . The remedy for violations of the regulation, and such conditions, is not to sue the jails for breach of contract under a third-party beneficiary theory, or for violations of the ADA, but to sue the state for failing to meet its own obligations under the ADA. . . .Mr. Phillips has not joined the State as a party, so we do not pursue the matter here. The point is, however, that it would be a mistake to assume some stark difference in disability accommodations between Colorado inmates in State-run prisons and those in private facilities operated under contract. . . In any event, while all these considerations bear somewhat on the problem, in the end we are still faced directly with a question of statutory interpretation: Is CCA a public entity? Is it an instrumentality of government in the same sense as a 'department, agency, or special purpose district'? We think not. In the absence of clarification on the point in the 2008 Amendments to the ADA or any of the regulations issued before or since, we agree with the reasoning of the Second Circuit in *Green* that the proper canon of construction to apply is *noscitur a sociis* (a word is known by the company it keeps), and that 'instrumentality' refers to a traditional government unit or one created by a government unit. Accordingly, we join the Eleventh Circuit and the overwhelming majority of other courts that have spoken directly on the issue, and hold that Title II of the ADA does not generally apply to private corporations that operate prisons. In particular, it does not apply to CCA with respect to the management of KCCC. And the complaint fails to state a claim against CCA upon which relief could be granted for an alleged violation of the ADA.")

M.S. v. Belen Consol. Sch. Dist., No. 15-CV-912-MCA-SCY, 2017 WL 3057662, at *6 (D.N.M. July 18, 2017) ("Viewing the undisputed facts of this case in the light most favorable to M.S., a jury could reasonably find that Esquibel was acting under color of state law when he sexually abused M.S. Like the teacher in *Doe* who took advantage of his position as a teacher and coach to seduce and sexually abuse a student, Esquibel took advantage of his position as SRO and his affiliation with the Belen Police Department softball team to sexually abuse M.S. . . . .In sum, viewing the actions taken by Esquibel that lay the groundwork for the acts of sexual abuse, and the actions taken by Esquibel to hide the abuse, as a continuing course of conduct as did the Courts in *Griffin*, *Doe*, and *Giordano*, a jury could reasonably conclude that Esquibel used his position as the SRO to befriend M.S., to sexually abuse her, and to prevent her from disclosing the abuse. For all of the foregoing reasons, a jury could reasonably conclude that Esquibel's actions were taken under color of state law.")

Baumann v. Federal Reserve Bank of Kansas City, No. 12–cv–01310–CMA–MEH, 2013 WL 4757264, 1 n.1 (D. Colo. Sept. 3, 2013) ("The parties cite no Tenth Circuit authority, nor is the

Court aware of any, commenting on whether FRLEOs [Federal Reserve Law Enforcement Officers] are governmental actors for purposes of § 1983. In certain contexts, courts have found Federal Reserve Banks and/or their employees to be federal actors or instrumentalities. [collecting cases] However, other courts, particularly in the tort context, have held that Federal Reserve Banks and/or their employees are not governmental actors. [collecting cases] In light of the latter opinions which, as opposed to the former ones, address causes of action reasonably analogous to Plaintiff's § 1983 claim, and given the lack of authority on point in the Tenth Circuit, the Court will refrain from disrupting the parties' agreement that FRLEOs 'are not government employees.'")

ELEVENTH CIRCUIT

Charles v. Johnson, 18 F.4th 686, 697 (11th Cir. 2021) ("When a private citizen steps in to render brief, *ad hoc* assistance to a police officer, *Jackson* and *Lugar* are immediately distinguishable. The citizen clearly does not make use of state processes against his personal enemy, and the state is clearly not reaching out to the citizen to form a partnership. Because no other form of citizen-state collaboration applies, the only thread of precedent that could cover the private citizen's actions is the conspiracy thread. We need not determine what the specifics of the conspiracy must be, because it is clear in this case that there is no evidence of a conspiracy whatsoever. The communication between Leckie and Deputy Thacker consisted only of Leckie asking: 'Sir, can you get a cuff on him?' This is not an agreement between the two, and it is certainly distinguishable from the conspiracies examined by the Supreme Court in *Price* and *Adickes*. The Seventh Circuit reached the same conclusion under similar facts in *Proffitt v. Ridgway*. In *Proffitt*, a police officer accepted a bystander's offer to help restrain an arrestee. . . Our sister circuit held that 'the rendering of brief, ad hoc assistance' did not transform a bystander into a state actor. . .We hold that a civilian's rendering of brief, *ad hoc* assistance to a law enforcement officer is not state action, absent proof of a conspiracy to violate the constitutional rights of another. Summary judgment in favor of Leckie was therefore proper.")

Harper v. Professional Probation Servs. Inc, 976 F.3d 1236, 1240 n.5 (11th Cir. 2020) ("As already noted, in the district court PPS didn't contest that it was a state actor for either purpose. To the extent PPS now disputes (however obliquely) that it was a state actor, we hold that it was. Where 'deprivations of rights under the Fourteenth Amendment are alleged,' the under-color-of-law and state-action requirements 'converge.'. . State action includes 'the exercise by a private entity of powers traditionally exclusively reserved to the [s]tate.'. . More specifically, when the government 'delegates adjudicative functions to a private party,' the latter qualifies as a state actor. . . Because as we explain below, PPS was performing delegated judicial functions, it was a state actor for both § 1983 and Fourteenth Amendment purposes.")

Myers v. Bowman, 713 F.3d 1319, 1329-31 (11th Cir. 2013) ("A person acts under color of state law when he acts with authority possessed by virtue of his employment with the state . . . or when the manner of his conduct ... makes clear that he was asserting the authority granted him and not acting in the role of a private person. . . . The dispositive issue is whether the official was acting

pursuant to the power he/she possessed by state authority or acting only as a private individual. . .Our precedents in *Almand* and *Butler* illustrate that an officer cannot be held liable for a constitutional tort when he acts in a private capacity. . . .Murry did not act under color of law when he reported to police that someone had stolen his dog because, in reporting the crime, he act[ed] only as a private individual. . . and not in his official capacity or while exercising his responsibilities pursuant to state law. . . . The theft occurred in connection with a private dispute and not a matter that was before Murry in his official capacity as a magistrate judge, and Murry alleged a theft of private property, not any property that belonged to the government. . . The Myers argue that Murry acted under color of law because he reported the theft using his government-issued SouthernLINC communications system, but we disagree. In *Butler*, we held that the corrections official did not act under color of law even though she used the gun and handcuffs she carried while on duty. . . Likewise, Murry did not act under color of law because he used the SouthernLINC communications device. And the SouthernLINC system was not a proprietary technology of the government. Any citizen could have purchased the technology, and Evans testified that ordinary citizens sometimes reported crimes directly to police officers using a SouthernLINC device or cellular phone instead of by calling a police dispatcher. And if Murry did not have a SouthernLINC device, he could have reported the crime using a cellular phone or other device. Thus there is no reason to believe that [Murry] would not have done, or been able to do, what [he] did to [the Myers] without the use of his SouthernLINC radio, and we must conclude that Murry did not act under color of law. . .The Myers also argue that Murry acted under color of law because Miller would not have pursued the Myers outside of his jurisdiction unless he received the instruction from a government official, but this argument fails too. [T]he primary focus of the color of law analysis must be on the conduct of the [defendant], not the victim or a third-party. . . and the record does not support the conclusion that Murry act[ed] pursuant to the power [he] possessed by state authority. . . . Nor was the arrest made possible only because [Murry] [wa]s clothed with the authority of state law. . . Although Murry's position as a magistrate judge affected Miller's decision to pursue the Myers, Evans acted at all times within his jurisdiction, and it was Evans who caused the Myers to stop their vehicle. Evans would have arrested the Myers even if Miller had stopped his vehicle at the city limits. Although Murry instructed Evans to remove Dustin from the vehicle, the record establishes that Evans would have made the arrest even if Murry had not been present at the scene or directed Evans to remove Dustin from the vehicle. Evans had probable cause to arrest the Myers for a felony theft, and Evans approached the truck with his gun drawn and directed Dustin to place his hands outside the vehicle before Murry gave any direction to Evans. By the time Murry instructed Evans to remove Dustin from the vehicle, Evans was already in the process of arresting Dustin. Murry therefore did not invoke his authority as a magistrate judge to cause the arrest of Dustin. Although Murry invoked his authority as a magistrate judge when he threatened Dustin at the scene of the arrest, that threat occurred after police arrested the Myers and fails to create a reasonable inference that Murry acted under color of law when he reported the theft of the dog. . . Murry is entitled to a summary judgment against the claim for false arrest because he did not act under color of law.")

Butler v. Sheriff of Palm Beach County, 685 F.3d 1261, 1267, 1268 (11th Cir. 2012) ("As in *Almand*, Collier's conduct, or misconduct, was not accomplished because of her status as a corrections officer. Just as 'any thug or burglar could have committed the same violent acts' as the officer in *Almand*, 103 F.3d at 1515, any irate mother with an anger management problem could have done what Collier did. . . . This case actually presents a weaker basis for a finding of action under color of state law than the *Almand* case did. Unlike the defendant in that case, Collier did not use her law enforcement position to strike up a relationship with the victim or to initially gain access to the house where the assault took place. It was Collier's house and she walked in just like any private individual returning home from work. Collier's discovery of a naked man in her daughter's closet was not the result of an official search by a law enforcement officer. When Collier punched Butler, she was acting as an enraged parent; she was not purporting to exercise her official authority to subdue a criminal for purposes of an arrest. When she handcuffed and detained Butler, Collier did not purport to be exercising her authority to arrest a criminal. When she called her husband, she was acting as a wife and parent, not as an officer. And when Collier called her place of work, a boot camp facility for minors, for advice about whether Butler could be charged with a crime, she did no more than an ordinary citizen could do by simply requesting information from law enforcement authorities about whether Butler's conduct was criminal. Although Collier did use the pistol that she wore as an officer, any adult without a felony record can lawfully possess a firearm (and tens of millions do). A law enforcement officer who gets into an after-hours dispute with her domestic partner that tragically escalates into a shooting does not act under color of law merely because the weapon used is the firearm the officer carries on duty. As for the handcuffs, the law does not restrict possession of them to law enforcement officers. In any event, there is no reason to believe that Collier would not have done, or been able to do, what she did to Butler without her handcuffs. They were incidental, not essential, to his detention. . . . If the allegations are true, Collier's treatment of Butler was badder than old King Kong and meaner than a junkyard dog. She might even have acted like the meanest hunk of woman anybody had ever seen. Still, the fact that the mistreatment was mean does not mean that the mistreatment was under color of law. Because the alleged mistreatment of Butler was not inflicted under color of law, the district court correctly dismissed his § 1983 claims. Butler will have to seek his remedies under state law and in state court.").

Carter v. City of Montgomery, 473 F.Supp.3d 1273, ____ (M.D. Ala. 2020) ("Mr. Kloess . . . contends that he cannot be held liable under § 1983 because public defenders are not state actors. Generally, that argument holds true: 'a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding.' *Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981). But a public defender may be a public actor when performing some administrative functions. . . And legal activities cross the line into administrative functions when they become systemic. A public defender's systemic inaction 'carries the imprimatur of administrative approval.'. . Ordinary policies may not subject a public defender to liability under § 1983. When, however, a public defender engages across the board in a practice that systemically deprives defendants of their constitutional rights, 'the adversarial relationship between the State and the Public Defender—upon which the *Polk County* Court relied

heavily in determining that the individual public defender there was not a state actor—has broken down such that the Public Defender is serving the State's interest in exacting punishment, rather than the interests of its clients, or society's interest in fair judicial proceedings.'. . Mr. Carter alleges that kind of breakdown: that Mr. Kloess served the City's interest rather than his own as part of an unconstitutional a 'pay-or-stay' scheme. Mr. Kloess testified that he has requested indigency determinations in the past, but he also testified that he could not name a single defendant for whom he requested such a hearing. . . Whether Mr. Kloess actually sought such hearings is a question of credibility that must go to a jury. . . If a jury chooses not to credit Mr. Kloess's assertion that he has requested indigency determinations, it could conclude that Mr. Kloess systemically deprived defendants of indigency hearings. Therefore, Mr. Kloess is not entitled to summary judgment on the grounds that he is not a state actor.")

C. Statute of Limitations

Wallace v. Kato, 127 S. Ct. 1091, 1094, 1095 (2007) ("Section 1983 provides a federal cause of action, but in several respects relevant here federal law looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations: It is that which the State provides for personal-injury torts. *Owens v. Okure*, 488 U.S. 235, 249-250, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Wilson v. Garcia*, 471 U.S. 261, 279-280, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) . . . . While we have never stated so expressly, the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law.").

See also ***Brown v. Pouncy***, 93 F.4th 331, 334-38 (5th Cir. 2024) ("Brown maintains that we ask whether Section 1983 police brutality claims—and not Section 1983 claims generally, as Pouncy contends—are discriminated against or practically frustrated by Louisiana's prescriptive period. Tellingly, Section 1983 police brutality claims were at issue in both *Wilson* and *Owens*, yet neither analyzed the statute of limitations question based on the nature of police brutality claims specifically and instead considered Section 1983 claims generally. . . That approach makes sense: The doctrinal developments outlined above reflect an 'interest in having firmly defined, easily applied rules.'. . That interest was stymied when courts had to parse which limitations period applied based on the particular facts of a Section 1983 action, . . . and so *Wilson*, then *Owens*, announced a straightforward rule that obviated the need to do so. The claim-specific approach assumed by Brown in his opening brief—and then urged by him in reply—would upend this. Though our court has not addressed this issue before, we embraced *Wilson*'s 'broad and inclusive language' to reject the argument that Section 1983 suits seeking equitable relief are not bound by statutes of limitations. . . . We concluded that '*Wilson*'s strongly expressed interests in judicial economy suggest' no exception for equitable relief exists. . . [O]ur case law reflects the bargain that courts have struck in the gap that Congress left: Accept that *some* plaintiffs may miss out on longer limitations periods afforded to analogous state law claims but give *all* plaintiffs the baseline protection of the limitations period used for '[g]eneral personal injury actions ... [that] constitute a major part of the total volume of civil litigation in the state courts,' so that it is 'most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that

would discriminate against federal claims.'. . . Our court has repeatedly applied Louisiana's one-year prescriptive period, . . . but we agree with Brown that it has not been challenged on these grounds. Puerto Rico, Kentucky, and Tennessee are tied with Louisiana as having the shortest limitations periods applicable to Section 1983 actions, . . . and it does not appear that either the First Circuit or Sixth Circuit has addressed these arguments. But the Ninth Circuit and Eleventh Circuit each addressed challenges to one-year limitations periods after *Owens.* As out-of-circuit cases, they are merely persuasive. . . and offer limited analysis. In *McDougal v. County of Imperial*, the Ninth Circuit rejected the argument that 'a one-year period of limitations is too restrictive to accommodate the important federal interests at stake in a civil rights action.'. . . In *Jones & Preuit v. Mauldin*, the Eleventh Circuit rejected, on remand from the Supreme Court after *Owens*, the argument that a one-year period contravenes federal interests because '[n]o case ... has held that a one-year limitations period conflicts with the policies behind section 1983 by providing an insufficient period in which to file suit.'. . . We read Supreme Court precedent, and our cases applying that precedent, to foreclose Brown's position. Only the Supreme Court, having already solved the problem of uncertainty in the absence of a federal limitations period for Section 1983 claims, can clarify how lower courts should evaluate practical frustration without undermining that solution. And states, like Louisiana, are free to act so that they are no longer outliers.")

Reed v. Goertz, 143 S. Ct. 955, 961-62 (2023) ("This Court's case law 'severely limits the federal action a state prisoner may bring for DNA testing.' *Skinner* v. *Switzer*, 562 U. S. 521, 525 (2011). The Court has 'rejected the extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process.'. . Seeking to fit his § 1983 suit within the 'slim room' left by this Court's precedent, Reed raised a procedural due process challenge to Texas's post-conviction DNA testing law. The sole question now before this Court is whether Reed's § 1983 suit was timely. The parties agree that the statute of limitations for Reed's claim is two years. But the parties disagree about when that 2-year limitations period began to run. That question is one of federal law. . . As a general matter, the statute of limitations begins to run when the plaintiff has a 'complete and present cause of action.'. . To determine when a plaintiff has a complete and present cause of action, the Court focuses first on the specific constitutional right alleged to have been infringed. . . Here, the specific constitutional right allegedly infringed is procedural due process. A procedural due process claim consists of two elements: (i) deprivation by state action of a protected interest in life, liberty, or property, and (ii) inadequate state process. . . Importantly, the Court has stated that a procedural due process claim 'is not complete when the deprivation occurs.'. . Rather, the claim is 'complete' only when 'the State fails to provide due process.'. . Reed contends that the State's process for considering his DNA testing request was fundamentally unfair in violation of the Due Process Clause. Texas's process for considering a request for DNA testing in capital cases includes not only trial court proceedings, but also appellate review by the Court of Criminal Appeals. . . And under longstanding Texas rules of appellate procedure, the Court of Criminal Appeals's appellate review process encompasses a motion for rehearing. . . In Reed's case, the State's alleged failure to provide Reed with a fundamentally fair process was complete when the state litigation ended and deprived Reed of his asserted liberty interest in DNA testing. Therefore, Reed's § 1983 claim

was complete and the statute of limitations began to run when the state litigation ended—when the Texas Court of Criminal Appeals denied Reed's motion for rehearing. The soundness of that straightforward conclusion is 'reinforced by the consequences that would follow' from a contrary approach. . . If the statute of limitations for a § 1983 suit like Reed's began to run after a state trial court's denial of a plaintiff 's motion for DNA testing (or even after the appeal before the plaintiff 's rehearing proceedings), the plaintiff would likely continue to pursue relief in the state system and simultaneously file a protective federal § 1983 suit challenging that ongoing state process. That parallel litigation would 'run counter to core principles of federalism, comity, consistency, and judicial economy.'. . We see no good reason for such senseless duplication. Moreover, significant systemic benefits ensue from starting the statute of limitations clock when the state litigation in DNA testing cases like Reed's has concluded. If any due process flaws lurk in the DNA testing law, the state appellate process may cure those flaws, thereby rendering a federal § 1983 suit unnecessary. And if the state appellate court construes the DNA testing statute, that construction will streamline and focus subsequent § 1983 proceedings. In sum, when a prisoner pursues state post-conviction DNA testing through the state-provided litigation process, the statute of limitations for a § 1983 procedural due process claim begins to run when the state litigation ends. In Reed's case, the statute of limitations began to run when the Texas Court of Criminal Appeals denied Reed's motion for rehearing. Reed's § 1983 claim was timely.")

But see ***Reed v. Goertz***, 143 S. Ct. 955, 970-71 (2023) (Thomas, J., dissenting) ("In sum, there is no getting around the essential problem with Reed's due process claim: To the extent he is not merely seeking an advisory opinion, he is complaining about a court-inflicted injury, and redressing that injury would require an exercise of appellate jurisdiction that the District Court does not possess. In substance, his complaint in this action is a mere reprise of his prior certiorari petition, camouflaged as an original action against the district attorney. Thus, I would vacate the Fifth Circuit's judgment and remand this case to the District Court with instructions to dismiss the complaint for lack of subject-matter jurisdiction. . . . [W]hen a State allegedly violates due process through its *judicial* actions—be it through the denial of a fundamentally fair judicial procedure or through the application of a rule of decision that itself violates due process—the remedy that Congress has provided is appellate 'review of the [challenged] judgmen[t] in this Court.'. . But, if that remedy proves unsuccessful—as it did for Reed—the aggrieved party cannot simply substitute an executive officer as a defendant, charge the state court's errors to that officer, and seek redress for a court-inflicted injury in a purported original action. Properly understood, therefore, Article III, the *Rooker-Feldman* doctrine, and procedural due process principles work in harmony. The majority's piecemeal analysis replaces this natural coherence with chaos. . . . It allows Reed to convert his failed certiorari petition into a § 1983 complaint. And, in doing so, it authorizes a proceeding in which the District Court can do nothing except opine on the constitutional merits of a state-court adjudication. . . . [B]ecause the majority undermines vital principles of federal jurisdiction and destabilizes the orderly working of our judicial system, I respectfully dissent.")

See also ***Reed v. Goertz***, 143 S. Ct. 955, 973-77 (2023) (Alito, J., with whom Gorsuch, J., joins, dissenting) ("As I will explain, there is room for debate about exactly when Reed's DNA

testing claim accrued, but in my view, the notion that this did not take place until rehearing was denied is clearly wrong. . . . We need only decide whether accrual was put off until the CCA denied rehearing, and it is clear to me that this delayed accrual date is wrong. . . As noted, the claim that Reed asserts is not based on the bare text of Article 64, but on what he claims is an erroneous interpretation of that provision by the Texas courts. He thus submits that his claim accrued when the 'authoritative construction of Article 64' that he challenges was pronounced by the CCA. I will assume for the sake of argument that Reed's claim accrued when the CCA issued its 'authoritative construction of Article 64,' but I cannot agree with Reed's argument—which the Court conspicuously declines to defend—that the CCA's interpretation did not become 'authoritative' until rehearing was denied. Reed cites no authority for the proposition that the filing of a petition for rehearing typically suspends the authoritative force of an appellate court's decision, and in fact, it appears that the opposite is true—as this Court's 'GVR' practice illustrates. On or shortly after the day when we hand down a decision, we often 'GVR' cases in which petitions raising similar issues are pending before us. . . .We do not wait to see if a petition for rehearing will be filed; nor do we hold off until a mandate is issued or a certified copy of the judgment is prepared. . . If our decisions did not become authoritative and binding as soon as they are issued, this practice would be impermissible. There is no reason why decisions of the CCA should be viewed any differently. On the contrary, it appears that the CCA has followed a practice similar to our GVR practice. . . And neither Reed nor the Court has cited any contrary Texas authority. Accordingly, Reed's 'authoritative construction' argument became complete, at the latest, when the CCA adopted that construction on April 12, 2017, two years and 11 months before Reed filed his § 1983 complaint. . . .Unlike Reed, the Court does not contend that the CCA's interpretation lacked 'authoritative' status until rehearing was denied. Instead, the Court merely proclaims that the State, acting through Goertz, did not deny Reed due process of law until 'the state litigation ended.'. . I certainly see the logic in this view: until the process afforded by a State has been exhausted, it may be said that the State has not definitively denied the process that the Constitution is alleged to demand. This logic leads to the conclusion that a prisoner like Reed should exhaust state remedies—something that would generally be required if the proper vehicle for contesting the denial of a DNA testing claim were a petition for a writ of habeas corpus. . . But the Court rejected that proposition in *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52 (2009), and it is well-established that a § 1983 plaintiff need not exhaust state remedies. . . Not only is this the general rule, but the *Osborne* Court found that the rule applies in cases involving constitutional challenges to the denial of requested DNA testing. . . Thus, the Court's reasoning collides with precedent. On top of this, the Court's reasoning, if taken to its logical conclusion, points to a result that neither Reed nor the Court is willing to embrace: namely, that a due process challenge to the denial of a request for DNA testing is not ripe until state remedies have been exhausted. . . But that is where the Court's reasoning is likely to lead. . . . In light of these problems, it is not surprising that the Court declines to say anything about whether prisoners who wish to challenge a state DNA testing law may sue as soon as their testing requests are denied. The Court says only that it 'need not address th[e] hypothetical scenario' of a plaintiff who declines 'full appellate review,'. . . but what does that mean? Does it mean that such a plaintiff must exhaust state remedies at the *trial level* but need not appeal? Does it mean that such a plaintiff must pursue *some* (but not "full") appellate review?

Litigants and the lower courts are left to guess. Instead of clarifying the law, the Court's decision may sow confusion. . . Much of Reed's argumentation is not aimed at the argument that his claim accrued when the CCA issued its contested interpretation of Article 64. Instead, Reed directs his attack on the earlier possible accrual dates discussed in Part I of this opinion and in particular the Fifth Circuit's holding that a claim like Reed's accrues when testing is denied at the trial level. . . . Whatever merit these arguments might have in relation to the accrual date adopted by the Fifth Circuit, they ring hollow as applied to the choice between the date when a state high court issues a decision interpreting the state testing statute and the date when that court refuses to rehear and overturn that interpretation. . . And it is hard to see how requiring a § 1983 plaintiff to sue within two years after a state high court decision is issued is unfair or does any damage to federalism, comity, or judicial economy. Reed has provided no explanation why he could not have filed his § 1983 action within two years after the CCA's decision. Instead, he waited until an execution date was set. While that event may have 'concentrate[d] his mind wonderfully,' that is not an excuse for the basic mistake of missing a statute of limitations. . . For these reasons, I would affirm the judgment below, and I therefore respectfully dissent.")

Compare ***Reguli v. Russ***, 109 F.4th 874, 879-83 (6th Cir. 2024) ("At the outset, state law determines the *length* of § 1983's statute of limitations. The Supreme Court has held that the statute incorporates the limitations period for personal-injury torts from the State where the events occurred. . . Conversely, federal law determines when a § 1983 claim *accrues* to trigger the running of this state statute of limitations. . . The Supreme Court has explained that the 'standard' accrual 'rule' starts a limitations period when 'the plaintiff has "a complete and present cause of action."'. . Put differently, this 'injury-occurrence' or 'occurrence' rule triggers the limitations period on the first day that every element of a claim has occurred such that the plaintiff may sue in court over the claim. . . The Supreme Court has recited this rule in three § 1983 cases. [citing *Reed v. Goertz*, *McDonough v. Smith*, and *Wallace v. Kato*] But our § 1983 cases have taken a different approach. We have suggested that the statute adopts a 'discovery rule,' not an 'occurrence rule.'. . This rule postpones the limitations period to the date that the plaintiff discovered, or reasonably should have discovered, basic facts about the claim. . . . Whether she needed to know about only her injury or about both her injury and its cause, she did not file her claim within the one-year statute of limitations. Her complaint alleged that she discovered her *injury*—the invasion of privacy from the Facebook search—'in about January 2020.'. . And her complaint alleged that she learned of this injury's *cause*—'Detective Lori Russ'—at the same time. . . This knowledge started the limitations period in January 2020, whether or not Reguli knew of the 'other elements of' her claim.") *with* ***Reguli v. Russ***, 109 F.4th 874, 884-85 (6th Cir. 2024) (White, J., concurring) ("I agree that Reguli's claim accrued under federal law when she had 'a complete and present cause of action,'. . . when Russ obtained her Facebook records. Under the discovery rule, which the parties agree applies here, Russ must also 'show that Reguli knew of this cause of action (or at least reasonably should have known of it).'. . Whether this is so is generally a fact-intensive inquiry. Here, Reguli's complaint establishes that she should have pursued a First Amendment retaliation claim when she received the discovery packet in January 2020 and perceived that the entire prosecution was unfounded and irregular. Because straightforward application of the

discovery rule makes this clear, I find much of the majority's discussion unnecessary."). *See also* ***Reguli v. Russ***, 109 F.4th 874, 885-88 (6th Cir. 2024) (Murphy, J., concurring) ("We decide this case in the way that the parties have presented it to us. . . So we assume that the 'discovery rule'—which delays the usual start date of a statute of limitations—applies to Connie Reguli's First Amendment claim under 42 U.S.C. § 1983. But this assumption may well prove misplaced. As in another statute-of-limitations case that the Supreme Court recently decided, the parties debate the mechanics of the discovery rule without addressing 'the logically antecedent question': Should this rule apply at all? . . . Although our court has recited the discovery rule in many § 1983 cases, I have my doubts about our approach. Frankly, the Supreme Court's caselaw on this question and our caselaw on it seem to be speaking different languages. . . . In recent cases, the Court has repeatedly considered when different types of constitutional claims accrue to trigger § 1983's statute of limitations. . . Each time, the Court has followed the same general framework. It has first pinpointed the 'specific constitutional right' on which the § 1983 plaintiff relied—whether the Fourteenth Amendment's Due Process Clause or the Fourth Amendment's ban on unreasonable searches and seizures. . . The Court has next turned to the 'common law of torts' to determine the 'accrual' rules for the identified constitutional claim. . . It has explained that the common law 'presumptively' adopted what the majority opinion calls the 'occurrence' rule—not any type of discovery rule. . . That is, the common law typically started the limitations period on the first day that plaintiffs had 'a complete and present cause of action[.]'. . Plaintiffs have such a cause of action when they can seek relief in court because a claim's legal elements have all arisen (whether or not they know of this fact). . . .To be clear, the Court has recognized only a *presumption* in favor of this occurrence rule. It has applied the rule when nothing supported a departure from it. . . But sometimes a constitutional claim (such as an unreasonable-seizure claim) might resemble a tort (such as a false-imprisonment claim) that followed a 'distinctive' accrual test at common law . . . In that scenario, the Court might extend this distinctive test (not the occurrence rule) to the analogous constitutional claim. . . . We first adopted a 'discovery' rule for § 1983's statute of limitations in a 1984 case about the Fifth Amendment privilege against self-incrimination. . . Bereft of any reasoning that would justify our choice of a discovery rule over an occurrence rule, *Sevier* devoted all of one sentence to this topic: 'The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action.'. . Its support? Four out-of-circuit decisions. . . Since then, we have cited *Sevier*'s lone sentence as our source to expand the discovery rule—in seemingly automatic fashion—to many other constitutional claims that plaintiffs have pursued under § 1983. . . Consider a few ways that our current approach to this accrual question differs from the Supreme Court's. To begin with, the Supreme Court has told us to start with the 'specific constitutional right' at issue when determining the proper accrual test. . . But most of our cases start—and end—by adopting a discovery rule without considering the relevant constitutional right. Indeed, many opinions do not even *identify* the right that the § 1983 plaintiff sought to vindicate in the suit. . . Next, the Supreme Court 'presumptively' follows the occurrence rule in § 1983 cases both because the Court looks to 'common-law tort principles' to interpret § 1983 and because States generally followed this rule to decide when the statute of limitations began for their torts. . . We, by contrast, have automatically (not presumptively) adhered to a discovery rule in our § 1983 cases. And none of our cases has even examined

'common-law tort principles,' let alone attempted to ground our broad-brush discovery rule in those principles. . . . As far as I can tell, a broad discovery rule conflicts with these traditional principles. . . .At the same time, the Supreme Court's instructions that we should follow 'distinctive' accrual rules when the common law would adopt them likely leaves *some* room for a discovery rule. . . Most notably, the common law at the time of § 1983's enactment adopted a discovery rule that delayed the running of the statute of limitations when the plaintiff asserted a fraud claim. . . If a constitutional claim under § 1983 resembles such a fraud claim, this 'distinctive' discovery rule might apply. . . Other unique rules might also exist. Even for non-fraud torts, for example, some common-law sources suggested that a defendant's fraudulent effort to hide the tort could delay the start of the statute of limitations. . . .I will not belabor the point further. I hope that what I have said suffices to show the tension between our precedent and the Supreme Court's. Eventually, the distinction between our automatic use of the discovery rule and the Supreme Court's presumptive use of the occurrence rule will matter to the outcome of a § 1983 case. When it does, a panel must address whether our prior decisions bind us to the discovery rule as a precedential matter despite the Supreme Court's caselaw. If a panel finds itself bound, perhaps the en banc court should take a fresh look at our discovery rule. After all, that rule arose long ago in a conclusory fashion well before the Supreme Court's more recent (and reasoned) guidance on this issue.")

See also ***DeLarosa v. Village of Romeoville***, No. 24-1715, 2024 WL 4523808 (7th Cir. Oct. 18, 2024) (not reported) ("Turning first to the time-barred claims, DeLarosa maintains that his Fourth Amendment claims (counts I, II, III, IV, V and VI) were timely because he was barred under *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994), from bringing these claims until his criminal case was dismissed. DeLarosa is correct that *Heck* applies to his malicious prosecution claims (counts I, IV, and VI), *McDonough v. Smith*, 588 U.S. 109, 116–117 (2019), and that those claims are therefore timely. But *Heck* does not apply to an action that would impugn an anticipated future conviction. *See Wallace v. Kato*, 549 U.S. 384, 393 (2007). DeLarosa's claims for unreasonable search and seizure (counts II, III, and V) accrued when the search and seizure were conducted, . . . and the subsequent prosecution did not delay accrual[.] . . In Illinois, Fourth Amendment claims for unreasonable search and seizure are governed by the two-year statute of limitations for personal injury claims. . . As the district court rightly concluded, DeLarosa's Fourth Amendment claims were untimely because he did not file his complaint until June 2023—almost six and a half years after his January 2017 search and arrest."); ***Bannister v. Knox County Bd. of Education***, 49 F.4th 1000, 1008-11 (6th Cir. 2022) ("While Tennessee law determines the length of the limitations period, federal law determines the event that causes the one-year clock to begin to tick (that is, the 'accrual date'). . . The Supreme Court has twice suggested in this § 1983 context that the presumptive accrual rule starts the running of a limitations period on the first day that a plaintiff may sue on a claim, which occurs once the plaintiff has 'a complete and present cause of action[.]'. . We have, by contrast, applied a 'discovery rule' to § 1983 claims. . . This rule delays the start of the limitations period until a plaintiff learns of (or should have learned of) the injury and the party who caused it—even if all of the claim's required legal elements had come into existence before that point. . . We recently attempted to reconcile these cases on the ground

that *Wallace* and *McDonough* did not discuss the discovery rule and so should not be read to have rejected it for § 1983 claims. *See Snyder-Hill*, —— F.4th at ——, 2022 WL 4233750, at *10. But that case involved Title IX and so could not have authoritatively resolved the tension in this distinct § 1983 context. We need not resolve this tension either because the difference between these two accrual rules makes no difference to our outcome. . . Before deciding on the specific requirements for a § 1983 claim, we must 'identify the specific constitutional right' that the plaintiff has invoked. . . This 'threshold inquiry' has importance in this statute-of-limitations context too. . . We may choose the statute-of-limitations rules for a specific § 1983 claim only after looking to the common-law principles governing the tort that is 'most analogous' to the alleged constitutional violation. . .Two cases from the Supreme Court demonstrate this approach. In the first case, a plaintiff alleged that officers violated the Fourth Amendment when they arrested him without legal process (a warrant). *Wallace*, 549 U.S. at 387 & n.1, 389, 127 S.Ct. 1091. The Court identified false imprisonment as the tort most analogous to this unreasonable-seizure claim. . . It then explained that a 'distinctive' accrual rule applied to false-imprisonment claims at common law. . . Even though the plaintiff had a complete cause of action (and could have sued) on the first day of an unlawful detention, the limitations period did not begin to run until this unlawful detention came to an end—either through the plaintiff's release or through the initiation of legal process. . . *Wallace* applied this false-imprisonment rule to the unreasonable-seizure claim. . . It thus holds that a special accrual rule can apply to a § 1983 claim if the rule applies to the most analogous tort. In the second case, a plaintiff alleged that an officer violated due process by introducing false evidence in the plaintiff's criminal case. *McDonough*, 139 S. Ct. at 2155. The Court identified malicious prosecution as the tort most analogous to this fabricated-evidence claim. . . At common law, malicious prosecution required a plaintiff to prove that the underlying criminal case had terminated in the plaintiff's favor. . . The limitations period for this due-process claim thus began to run only on this date (when the case ended in the plaintiff's favor), not the earlier date when the officer used the false evidence. . . *McDonough* thus holds that, when a § 1983 claim adopts an analogous tort's legal elements, those elements can control whether a plaintiff has a 'complete' cause of action. . . This approach creates a problem for this case. The parties' briefing in the district court ignored the 'threshold inquiry' for choosing the accrual rules that govern the Bannisters' § 1983 claims. . . Neither side identified the specific constitutional right at issue. When the School District moved to dismiss the § 1983 claims as time-barred, it did not characterize the complaint as invoking a particular constitutional theory. . . Rather, it argued that the Bannisters did not timely file their claims on April 16, 2018, because the School District's challenged acts all occurred before April 16, 2017. . . The School District thus assumed that its *acts* triggered the limitations period for *every* § 1983 claim. In response, the Bannisters also failed to identify the constitutional rights on which they relied. . . They instead argued that their (unidentified) claims accrued either upon Will's suicide (on April 17, 2017) or later when they learned of his concerning journal entry (on April 30). . . The parties' oversight could affect the proper resolution of this statute-of-limitations issue. The Bannisters' complaint vaguely indicated that the School Districts' 'acts and omissions' violated Will's 'federal constitutional rights' without identifying any specific right. . . While this type of complaint might not represent the best of legal strategies, . . . it does not conflict with modern pleading rules. Those rules required the Bannisters to plead only factual

allegations plausibly setting forth a claim. . . They did not need to identify the 'precise legal theor[ies]' on which they relied. . . And their factual allegations about the events in question could be read to raise different constitutional theories implicating different dates for when the claim came into existence. On the one hand, the complaint's factual allegations could be read (as the district court read them) to assert a *procedural*-due-process claim tied to Will's suspension. . . The complaint repeatedly attacked Will's suspension proceedings as violating 'administrative due process.'. . What is the proper accrual date for this claim? [court discusses possibilities] Under any of these dates, though, the district court held that the Bannisters' claim would be untimely. . .On the other hand, the complaint's factual allegations could be read to raise a *substantive*-due-process claim tied to Will's suicide. The complaint alleged that Will expressed suicidal thoughts in his journal entry and that the School District failed to inform the Bannisters. On appeal, the Bannisters argue that this failure 'shocks the conscience' and violates substantive due process. . . .This substantive-due-process theory might give rise to different accrual rules, depending on the proper common-law analogy. [court discusses possibilities] Ultimately, though, we need not decide the specific accrual rules that apply to any of these due-process theories. Through their conduct (or, more accurately, their attorneys' conduct), the Bannisters have waived their procedural-due-process theory and forfeited their substantive-due-process theory.")

See also ***Dibrell v. City of Knoxville, Tennessee***, 984 F.3d 1156, 1161-63 (6th Cir. 2021) ("Dibrell's false-arrest-and-imprisonment claim and his malicious-prosecution claim are thus specific versions of a general unreasonable-seizure claim alleging the same *constitutional* theory: that the officers seized (and continued to seize) Dibrell without probable cause (or even reasonable suspicion for the initial temporary stop). *Manuel*, 137 S. Ct. at 918; *compare Tlapanco v. Elges*, 969 F.3d 638, 654 n.3 (6th Cir. 2020), *with id.* at 658–60 (Thapar, J., concurring). Yet § 1983 sometimes adopts different *statutory* rules to govern the portion of a detention that preceded legal process (for which the torts of false arrest and false imprisonment might offer the best analogy) as compared to the portion that succeeded it (for which the tort of malicious prosecution might offer the best analogy). *Wallace*, 549 U.S. at 389–90. Here, for example, the officers raised a statute-of-limitations defense to Dibrell's false-arrest-and-imprisonment claim but only a merits defense to his malicious-prosecution claim. We address each defense in turn. . . . In this § 1983 context, the Court has started its accrual analysis with the standard rule: that a claim accrues when the plaintiff has a complete cause of action. . . Our § 1983 caselaw, by contrast, has started the accrual analysis with the competing discovery rule: that the claim accrues when the plaintiff knows of, or should have known of, that cause of action. *See King v. Harwood*, 852 F.3d 568, 578 (6th Cir. 2017); *Johnson*, 777 F.3d at 843. Do our cases imbibing this 'bad wine' warrant reconsideration in light of the Supreme Court's recent teachings? We need not resolve this tension now because Dibrell's claims would be untimely either way. If the standard rule were to apply here, the limitations period for a claim involving a false arrest and imprisonment would 'commence to run' from the date of the wrongful arrest because the plaintiff has a complete cause of action at that point. . . And if the discovery rule were to apply, Dibrell's knowledge that he had been arrested (allegedly wrongfully) would start the clock on the same date. Either approach thus would have triggered the statute of limitations on February 17, 2014. But the Court has not ended with the

standard rule in this § 1983 context. Rather, it has proceeded to look to the accrual rules for the tort most like the constitutional claim at issue. [citing *McDonough*] In *Wallace*, moreover, the Court made clear that the torts of false arrest and false imprisonment have special accrual rules. . . . These torts, which again challenge a detention without legal process, accrue at the earlier of two dates. . . They accrue when the false *imprisonment* ends with the plaintiff's release. . . Or, if the plaintiff remains detained, they alternatively accrue when the *false* imprisonment ends with the issuance of legal process—when, for example, the plaintiff is brought before a magistrate. . . 'From that point on,' a plaintiff relying on the law of torts to challenge any continuing detention must assert a malicious-prosecution claim. . . Dibrell's claim is untimely under these rules. His detention ended on February 18, 2014, when he was released on bond, so the limitations period likely started then. . . Dibrell makes no claim that the bond requirements imposed as a condition of his release qualified as a continuing 'detention' for statute-of-limitations purposes, so we need not consider that theory. . . And regardless, his bond hearing likely triggered *Wallace*'s alternative accrual rule tied to the issuance of legal process. . . At the latest, this 'legal process' issued when he was indicted in April 2015. . . Whether measured from the date of his bond hearing or the date of his indictment, the one-year statute of limitations had long run when Dibrell sued in September 2018."); ***Lockett v. County of Los Angeles***, 977 F.3d 737, 740-42 (9th Cir. 2020) ("Federal courts borrow from state law to determine any applicable statute of limitations for § 1983 claims, including tolling provisions. . . . In this case, while Lockett filed his *Monell* claim against the County two years and five months after his arrest by the deputies—outside of the two-year statute of limitations—his attempted murder charge was pending for eight months. Consequently, his claim against the County may proceed if § 945.3 tolled his civil action while he was in custody. To answer whether § 945.3 governs, we look to whether Lockett's *Monell* claim is 'based upon conduct of the peace officer relating to the offense for which the accused is charged.' Cal Gov't Code § 945.3. . . . While the County correctly argues that *Monell* liability is limited to the 'acts of the municipality,'. . . the peace officer's conduct still constitutes an *element* of a *Monell* claim. Under this understanding of the law, it is clear that the officers' conduct is the 'but for' cause of Lockett's *Monell* claim. Here, Lockett alleges that two deputies severely kicked, punched, and beat him with a baton during his arrest in violation of his right to be free from excessive force—a constitutional violation. In turn, Lockett's *Monell* claim alleges that the County of Los Angeles allowed the proliferation of racially motivated gangs or cliques among Sheriff's deputies, including the two deputies involved in his case, which resulted in the constitutional violation he suffered. To succeed on the latter, Lockett must prove the former. Accordingly, the deputies' conduct necessarily lies at the heart of Lockett's *Monell* claim, *Heller*, 475 U.S. at 799, and his *Monell* claim is 'based upon conduct of the peace officer[s]' within the meaning of § 945.3. His claim was, thus, tolled while his attempted murder charge was pending."); ***Randall v. City of Philadelphia Law Dep't***, 919 F.3d 196, 199 (3d Cir. 2019) ("Here, even after Pennsylvania dropped the charges against Randall, he remained detained. He argues that this detention was part of a continuing practice by the defendants. So, he says, his limitations period did not begin to run until his release on December 24, 2015. If that is right, then his suit was timely. . . . But the continuing-violation doctrine focuses on continuing *acts*, not *effects*. . . In other words, the doctrine relies on a *defendant's* continuing acts, not a *plaintiff's* continuing injury. Here, New Jersey and

Delaware County detained Randall past August 2015. But New Jersey and Delaware County are not defendants. No *defendant* detained Randall beyond August 2015. Nor does it matter that Randall's arrest and prosecution were but-for causes of his continued detention in New Jersey and Delaware County. Continued detention was an *effect* of his Philadelphia arrest and prosecution, not an *act* (or omission in the face of a duty to act) by any defendant. And he has not alleged that the defendants somehow enrolled New Jersey or Delaware County as their agents in detaining him. So that detention did not trigger the continuing-violation doctrine. To be clear, our holding is about the timeliness of Randall's case, not its merits. For the continuing-violation doctrine is a timeliness rule, not a merits rule. His continued detention could be relevant to liability or damages; we need not decide that. But it has no bearing on his suit's timeliness."); ***Battle v. Ledford***, 912 F.3d 708, 715-20 (4th Cir. 2019) ("Virginia law provides an elaborate administrative grievance process for prisoner complaints. Exhaustion of this remedy involves at least three levels of review. . . A prisoner has 30 days to submit a formal grievance, and corrections administrators are then given another 180 days to resolve the grievance. . . Given this structure, Virginia's no-tolling rule, as applied to prisoners seeking to bring § 1983 claims, frustrates the goals of § 1983 and is thus clearly 'inconsistent' with settled federal policy. . . First, application of the no-tolling rule would frustrate the purpose of compensating prisoners who have sustained constitutional injuries. Under Virginia regulations — as implemented by state officials — as much as seven months could be subtracted from the period in which a prisoner can file a federal claim. This inevitable and indeterminate reduction in limitations would be wholly contingent on the efficiency of administrators and the complexity of the case. And as other circuits have noted and common sense suggests, a state's grievance process may extend beyond the state's regulatory deadlines. . . . Application of a no-tolling rule here would also fail to serve § 1983's second primary goal — deterrence. Instead, this rule would enable state officials to shrink a prisoner's filing window and so limit his opportunity to bring a claim. In this way, a no-tolling rule would even create perverse incentives for prison commissioners to extend regulatory deadlines and for wardens and investigators to stall in their review of individual grievances, for doing so might limit government officials' legal exposure. . . . In sum, because Virginia's no-tolling rule is inconsistent with federal law and policy, we cannot apply it here. . .Notwithstanding this analysis, the officers contend that Virginia's no-tolling rule necessarily comports with federal policies because a separate federal law — the PLRA — imposes the relevant exhaustion requirement. But by enacting the PLRA, Congress did not endorse such a no-tolling rule or diminish the interests underlying § 1983. To so conclude would be to overread the PLRA's silence on tolling, misread the PLRA's purpose, and ignore the text of § 1983 and § 1988. . . . Because we hold that Virginia's no-tolling rule is inconsistent with § 1983, we must determine a proper remedy. Battle asks that we apply federal equitable tolling principles to account for the time lost during his 83-day mandatory exhaustion period. We agree with Battle (and our sister circuits) that those principles apply during this period. . . . [E]very circuit that has confronted a state no-tolling rule and reached this question has applied federal law to equitably toll § 1983 limitations during the PLRA exhaustion period. [citing cases from seven other circuits] . . . . [T]he inquiry here is objective. All a court must do is determine the point of exhaustion and run the limitations period from that date. We therefore reject the officers' invitation to deviate from the path followed by seven other circuits. Battle's limitations

period must be tolled for the 83 days in which he exhausted his administrative remedies, as he was required to do before bringing suit. This satisfies the goals of § 1983 and the PLRA while also comporting with principles of equity: it gives Battle the benefit of the full limitations period applicable to other litigants, no more and no less. In sum, Battle's § 1983 complaint is timely; it was filed within two years of the date he exhausted administrative remedies required by the PLRA."); ***Spak v. Phillips***, 857 F.3d 458, 462-66 (2d Cir. 2017) ("The fact that the accrual of Section 1983 claims is analyzed under federal common law, while the merits of those claims are analyzed under the law of the state where the tort occurred, has led to some confusion concerning the standards used to define a 'favorable termination' in the malicious prosecution context. This is because a malicious prosecution claim accrues when the underlying prosecution terminates in favor of the accused, *id*., but 'favorable termination' is also a substantive element of a state law tort claim, *see, e.g.*, *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980). While the same phrase—'favorable termination'—is used in both the accrual analysis and the merits analysis of a Section 1983 suit, it is analyzed under a different legal standard in each context. When the question before a federal court is at what point a malicious prosecution claim accrued, 'favorable termination' is analyzed under federal common law, because the timing of accrual is a question of federal law. *See, e.g.*, *Wallace*, 549 U.S. at 388. When, by contrast, a federal court is analyzing the substantive merits of a plaintiff's claim, the definition of 'favorable termination' is analyzed under state law. . . What constitutes a 'favorable termination' may turn out to be the same in each context, but not necessarily so. However, even if 'favorable termination' in a particular case is unclear as a matter of state law, it can still be conclusively resolved as a matter of claim accrual under federal law. Thus, the fact that a *nolle prosequi* constitutes a favorable termination under Connecticut state law may be relevant to our accrual inquiry, but it is not dispositive. Unless a *nolle* also constitutes a 'favorable termination' under federal common law, then Spak's claim did not accrue for Section 1983 purposes upon entry of the *nolle*. . . . Under Connecticut law, a prosecutor may decline to prosecute a case by entering a *nolle prosequi*. . . The effect of a *nolle* is to terminate a particular prosecution against the defendant. However, a *nolle prosequi* is not the equivalent of a dismissal of a criminal prosecution with prejudice, because jeopardy does not attach. . . The statute of limitations on the *nolled* charge continues to run, and the prosecutor may choose to initiate a second prosecution at any time before the limitations period expires. . . A prosecution can only be reinstituted following a *nolle*, however, by the filing of a new charging document and a new arrest. . . If a new prosecution is not commenced, Connecticut law requires that within thirteen months of the *nolle* 'all police and court records and records of the state's or prosecuting attorney' related to the prosecution be erased. . . .We agree with the district court that as a general matter a *nolle prosequi* constitutes a 'favorable termination' for the purpose of determining when a Section 1983 claim accrues. . .The weight of authority on the common law of malicious prosecution supports this conclusion. . . . We agree with the district court that as a general matter a *nolle prosequi* constitutes a 'favorable termination' for the purpose of determining when a Section 1983 claim accrues. . . The weight of authority on the common law of malicious prosecution supports this conclusion. . . .To be sure, courts and common law authorities state that a *nolle* does not constitute a favorable termination when it is entered for reasons that are 'not indicative of the defendant's innocence.'. . However, this qualifier is defined narrowly. It generally only includes *nolles* that are

caused by the defendant—either by his fleeing the jurisdiction to make himself unavailable for trial or delaying a trial by means of fraud. It also includes any *nolle* entered in exchange for consideration offered by the defendant (*e.g.*, cooperation). . . Spak disputes this conclusion, and cites our decision in *Murphy v. Lynn* which states that the termination of a prosecution must be 'conclusive[ ]' in order to satisfy the favorable termination requirement of a Section 1983 claim. . . *Murphy* involved a malicious prosecution claim originating in New York, while Spak's claim accrued in Connecticut, but it is nonetheless relevant because favorable termination for accrual purposes is a matter of federal law which does not vary from state to state. Spak contends that a *nolle prosequi* is not a 'conclusive' termination of a prosecution because jeopardy does not attach when a *nolle* is entered and the prosecuting attorney may file new charges against the same defendant for the same criminal act at any time before the statute of limitations on the underlying crime has run. This argument misreads our holding in *Murphy*. It is true that, strictly speaking, a *nolle prosequi* only terminates a specific prosecution by vacating a charging instrument; it does not prevent a prosecutor from re-charging the same defendant for the same criminal conduct at some point in the future. . . Under the common law, however, a termination of the existing prosecution is sufficient for a malicious prosecution claim to accrue. . . So long as a particular prosecution has been 'conclusively' terminated in favor of the accused, such that the underlying indictment or criminal information has been vacated and cannot be revived, then the plaintiff has a justiciable claim for malicious prosecution. At that point, all of the issues relevant to the claim—such as malice and lack of probable cause . . . are ripe for adjudication. Nothing in our opinion in *Murphy* can be read to contravene this longstanding common law rule. We are mindful that both our court, *see DiBlasio v. City of New York*, 102 F.3d 654, 658 (2d Cir. 1996), and the Supreme Court have warned against the possibility of parallel civil and criminal litigation arising from the state's prosecution of the same defendant for the same criminal offense[.] [citing *Heck*] However, we read our precedent and the Supreme Court's dicta in *Heck v. Humphrey* to counsel only against duplicative litigation on issues of guilt and probable cause arising out of the same accusatory instrument. . . *Heck* and its progeny generally deal with Section 1983 suits that are filed by plaintiffs asserting that a prior criminal conviction is invalid, and seeking to recover damages for the state's abuse of legal process. Those decisions thus require that the plaintiff demonstrate that the outstanding conviction has been conclusively invalidated in a manner that demonstrates his innocence before he can pursue his civil claim. . . They do not address the type of termination at issue here, in which a plaintiff was never convicted of a criminal offense, but the charges against him were dismissed in a manner that did not preclude future prosecution under a different charging instrument. We do not read those opinions to prevent such a plaintiff from bringing suit on the basis of vacated charges simply because he might be prosecuted again in the future, even successfully. . . Indeed, while it is theoretically possible that a prosecutor could revive a *nolled* case, and obtain a criminal conviction against a defendant who has already received a favorable civil judgment in a malicious prosecution suit, we think that this is highly unlikely to occur in practice. . .Moreover, preventing plaintiffs from bringing suit for malicious prosecution once a *nolle* is entered would be inconsistent with the purpose of Section 1983. . . When the state institutes criminal charges maliciously and without probable cause and requires a defendant to appear before a court and answer those charges, it violates the Fourth Amendment's guarantee against unlawful

seizure. . .The accused is entitled to seek recovery for such a wrongful seizure as soon as the charges are vacated. His day in court should not be delayed merely because the state remains free to bring a similar prosecution in the future. Lastly, Spak's contention that his claim accrued not upon entry of the *nolle*, but thirteen months later when records of the charges against him were automatically erased pursuant to Connecticut state law, *see* Conn. Gen. Stat. § 54-142a(c)(1), is meritless. Connecticut courts have made clear that the erasure provision Spak cites is a purely administrative measure. . . . Moreover, the erasure of records pertaining to a prosecution does not preclude the prosecuting attorney from filing new charges against the same defendant at some point in the future. . . This statute therefore provides no more 'conclusive' bar to future criminal proceedings than the *nolle* itself."); ***Rapp v. Putman***, 644 F. App'x 621, 626 (6th Cir. 2016) ("The district court erred in identifying the applicable statute of limitations for plaintiff's Fourth Amendment malicious-prosecution claim. The district court relied on the two-year statute of limitations for state-law malicious prosecution claims, M.C.L. § 600 .5805(5). But plaintiff's malicious-prosecution claim is based on the Fourth Amendment and § 1983, not state law. Ever since *Wilson v. Garcia*, 471 U.S. 261 (1985), courts apply a single statute of limitations for all § 1983 claims arising in a particular state. In Michigan, it is the three-year statute of limitations for personal-injury claims. *Carroll*, 782 F.2d at 44; M.C.L. § 600.5805(10). Thus, the district court should have applied a three-year statute of limitations, not a two-year one. Even under defendants' preferred accrual date—July 27, 2012, when plaintiff's conviction was reversed—plaintiff's November 11, 2014, complaint was filed within three years of that date. Thus, the district court erred in holding that plaintiff's Fourth Amendment malicious-prosecution claim is time-barred."); ***Bradford v. Scherschligt***, 803 F.3d 382, 387-89 (9th Cir. 2015) ("Here, Bradford alleges a violation of his due process rights based on the initiation of criminal charges that were based on allegedly fabricated evidence. The constitutional violation and resultant injury thus began on the date that the State brought charges against Bradford. Yet, unlike *Jackson*, in which the date of vacatur was the date on which the government could no longer use the unlawful evidence against the plaintiff, or *Rosales–Martinez*, in which the date of vacatur was also the date on which all charges were conclusively resolved, Bradford's conviction was vacated in a manner that specifically permitted the pursuit of the same charges against him based on the same evidence. . . The inquiry here is therefore not as simple as merely identifying the onset date of injury. Indeed, the limitations period 'on common-law torts do[es] not always begin on the date that a plaintiff knows or has reason to know of his injury.'. . To determine the proper date of accrual, we look to the common law tort most analogous to Bradford's claim. . . As we have explained, the right at issue in a *Devereaux* claim is the right to 'be free from [criminal] charges' based on a claim of deliberately fabricated evidence. . . In this regard, it is similar to the tort of malicious prosecution, which involves the right to be free from the use of legal process that is motivated by malice and unsupported by probable cause. . .In a recent case, the Fourth Circuit provided a helpful analysis of the accrual rules for malicious prosecution claims. . . There, the Fourth Circuit was tasked with determining when a certain *Brady*-based § 1983 claim had accrued. . . The court first recognized that under *Wallace*, a court evaluates the proper accrual date for a claim by identifying the common law analogue for the § 1983 claim and applying any 'distinctive' accrual rules associated with that common law analogue. . . Likening it to a malicious prosecution claim, the court held that the §

1983 claim had accrued when prosecutors entered a *nolle prosequi* rather than the date on which the court had originally granted the plaintiff a new trial. . . The court noted that a malicious prosecution claim does not accrue until the proceedings against the plaintiff have 'terminated "in such manner that [they] cannot be revived."'. . We find this reasoning persuasive. Setting the accrual date for Bradford's *Devereaux* claim as the date of acquittal is logical. If Bradford's original 1996 trial had resulted in an acquittal, his *Devereaux* claim would have accrued on the date the charges against him were dismissed. . . The analysis is the same in the retrial setting where, as here, the government pursues the same charges based on the same evidence after the vacatur of the original conviction. In this instance, setting the triggering date for the onset of the limitations period as the date of acquittal also makes practical sense. Had Bradford brought his claims immediately after his conviction was vacated, Detective Scherschligt would almost certainly have moved to stay proceedings on the grounds that a retrial was imminent and that a conviction would produce a *Heck* bar against Bradford's claims. . . Thus, Detective Scherschligt would not only not be prejudiced by a delay in reaching the merits, he might well have benefitted from it. We recognize, however, that the result may be different under other factual circumstances. For example, a similar claim could accrue upon vacatur of a conviction if the conviction was set aside in a manner precluding the government from maintaining charges on evidence presented at the initial trial. . . But in this case, Bradford remained subject to the very same charges based on the same evidence, which forms the basis of his claim, until his February 10, 2010, acquittal. His claim seeking to vindicate his right to be free from those criminal charges based on the allegedly fabricated evidence did not accrue until the charges were fully and finally resolved and could no longer be brought against him. . . We therefore conclude that Bradford filed the underlying action within the three-year statute of limitations period, and it was error to dismiss his deliberate fabrication of evidence claim as time-barred."); ***Woods v. Illinois Dept. of Children and Family Services***, 710 F.3d 762, 768, 769 (7th Cir. 2013) ("To sum up, we reiterate our holding that the limitations period applicable to *all* § 1983 claims brought in Illinois is two years, as provided in 735 ILCS 5/13–202, and this includes § 1983 claims involving allegations of failure to protect from childhood sexual abuse . . . . Woods filed his complaint long after the limitations period had expired, and so it was properly dismissed. His arguments for applying a different limitations period are foreclosed by Supreme Court and circuit precedent, and there is nothing that can be achieved from an evidentiary hearing."); ***Mata v. Anderson***, 635 F.3d 1250, 1252, 1253 (10th Cir. 2011) ("We reject Mr. Mata's argument that his First Amendment retaliatory-prosecution claim did not accrue until the charges against him were dismissed. We note that a § 1983 malicious prosecution claim, which requires favorable termination as an element, does not accrue until the alleged malicious prosecution terminates in favor of the plaintiff. *Wilkins v. DeReyes,* 528 F .3d 790, 801 n. 6 (10th Cir.2008) (citing *Heck v. Humphrey,* 512 U.S. 477, 484-86 (1994)). Unlike a malicious prosecution claim, however, a First Amendment retaliatory-prosecution claim does not require a favorable termination of the underlying action. . . . Mr. Mata's First Amendment retaliatory-prosecution claims accrued when he knew or had reason to know of the alleged retaliatory prosecution[.]").

See also ***DePaola v. Clarke***, 884 F.3d 481, 487 (4th Cir. 2018) ("Consistent with these

views expressed by our sister circuits, we conclude that a prisoner may allege a continuing violation under Section 1983 by identifying a series of acts or omissions that demonstrate deliberate indifference to a serious, ongoing medical need. The statute of limitations does not begin to run on such a claim for a continuing violation of a prisoner's Eighth Amendment rights until the date, if any, on which adequate treatment was provided. . . A plaintiff's claim of a continuing violation may extend back to the time at which the prison officials first learned of the serious medical need and unreasonably failed to act. . . Accordingly, to assert a Section 1983 claim for deliberate indifference under the 'continuing violation' doctrine, a plaintiff must (1) identify a series of acts or omissions that demonstrate deliberate indifference to his serious medical need(s); and (2) place one or more of these acts or omissions within the applicable statute of limitations for personal injury. . . Thus, this principle does not apply to claims that are based on 'discrete acts of unconstitutional conduct,' or those that fail to identify acts or omissions within the statutory limitation period that are a component of the deliberate indifference claim. . .In the present case, DePaola has alleged a continuing violation of deliberate indifference to his serious mental illnesses. He alleges that he notified VDOC of his mental illnesses during the prison intake process and 'repeatedly' sought 'help' from officials and medical staff at Red Onion. He asserts that despite this notice to the defendants, and given the ongoing nature of his mental illnesses, the defendants have violated and 'continue to' violate his rights by failing to provide any treatment or access to a psychiatrist or a psychologist.")

See also ***Beaver Street Investments., LLC v. Summit County, Ohio***, 65 F.4th 822, 827-28 (6th Cir. 2023) ("We hold that the statute of limitations in this case began to run when the redemption period ended on January 21, 2020. First, the County could not have made a '"final decision" to take the property,'. . . until the redemption period concluded. After all, if BSI paid its delinquent taxes during the redemption period, the County would have been *prohibited* from taking the property. . . Second, it did not become 'clear the [County] would seize [the plaintiff's property] by transferring title,'. . . until after the redemption period ended. The County was *prohibited* from transferring title until after the redemption period ended; until that time, whether the County would transfer title was unclear. Third, until the redemption period ended, the County had not taken BSI's 'property without paying for it.'. . Fourth, so long as BSI still had the opportunity to retain title to its property, there was no 'event which gives rise to the claim for compensation.'. . The dissent focuses too narrowly on the Court's language in *Harrison* that, in *that case*, '[t]he taking ... happened when the Board adjudicated the foreclosure of Harrison's property through the land bank process, not before.'. . In doing so, the dissent ignores that in *this case,* no ' "final decision" to take property,'. . . was made until the redemption period concluded. Equally important, the dissent also neglects to consider that the *Harrison* Court explicitly stated that 'the property owner could file a § 1983 action in federal court under the Takings Clause *after* the Board transferred the property to a land bank.'. . Therefore, *Harrison* supports our holding that in this case, the statute of limitations could not have begun to run until the redemption period expired.")

Note: ***Johnson v. Lucent Technologies Inc.***, 653 F.3d 1000, 1007, 1008 & n.6 (9th Cir. 2011) ("We hold that Johnson's § 1981 retaliation claim is subject to the four-year statute of

limitations in § 1658, . . . and not the two-year statute of limitations applicable to personal injury actions pursuant to Cal.Code Civ. Pro. § 335.1. Johnson's retaliation claim is therefore timely. . . . In so holding, we join the Eleventh and the Seventh Circuits, the only circuits that have had the opportunity to consider the issue. [citing cases]")

D. No *Respondeat Superior* Liability

In ***Monell v. Dept. of Social Services***, 436 U.S. 658, 690-91 (1978), the Supreme Court overruled ***Monroe v. Pape***, 365 U.S. 167 (1961), to the extent that *Monroe* had held that local governments could not be sued as "persons" under § 1983. *Monell* holds that local governments may be sued for damages, as well as declaratory and injunctive relief, whenever

> the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover. . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decisionmaking channels.

Monell rejects government liability based on the doctrine of *respondeat superior*. Thus, a government body cannot be held liable under § 1983 merely because it employs a tortfeasor. 436 U.S. at 691-92. *But see* ***United States v. Town of Colorado City***, 935 F.3d 804, 808-11 (9th Cir. 2019) ("Colorado City argues that the district court erred by construing the statute as imposing liability on governments for patterns of constitutional violations committed by their officers and agents. It asserts that § 12601 requires the United States to demonstrate that the Towns 'instituted an official municipal policy' of violating residents' constitutional rights. The United States, on the other hand, contends that the statute 'imposes liability on municipalities for patterns of constitutional violations [that] their law enforcement officers commit, without requiring an additional showing that the municipality's policy or custom caused those violations.' This issue—whether § 12601 imposes *respondeat superior* liability[3]—is one of first impression in our circuit. . . Colorado City relies on the premise that, by including 'pattern or practice' in § 12601, Congress used 'language with a well-defined meaning [ ] developed under [*Monell v. Department of Social Services*. . . for municipal liability.' That contention, however, confuses the relationship between general liability rules in civil rights statutes and the Supreme Court's decision in *Monell*. '[T]he general rule regarding actions under civil rights statutes is that *respondeat superior* applies.'. . In *Monell*, the Court carved out an exception to this general rule by holding that a municipality may not be held liable pursuant to 42 U.S.C. § 1983 for the actions of its subordinates. Instead, to establish municipal liability, a plaintiff must show that a local government's 'policy or custom' led to the plaintiff's injury. . . In reaching its holding, the Court relied on 'the language of § 1983, read against the background of the [statute's] legislative history.'. . Because § 1983 imposes liability only where a state actor, 'under color of some official policy, "causes" an employee to violate another's constitutional rights,' the Court reasoned that Congress did not intend to impose

vicarious liability on municipalities 'solely on the basis of the existence of an employer-employee relationship with a tortfeasor.'. . Moreover, in the Civil Rights Act of 1871—the predecessor statute to § 1983—Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.'. .*Monell*'s holding remains the exception to the general rule. . . We have declined to bar *respondeat superior* liability in other contexts. In *Bonner*, for example, we held that *respondeat superior* liability applies to claims pursuant to § 504 of the Rehabilitation Act of 1973 because '[t]he application of *respondeat superior* ... [is] entirely consistent with the policy of that statute, which is to eliminate discrimination against the handicapped.'. . And, in *Duvall v. County of Kitsap*, we held that *respondeat superior* liability applies to claims brought pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132. . . We likewise decline to extend *Monell*'s holding to claims pursuant to § 12601. . . . First, § 12601, unlike § 1983, does not include the words 'under color of any law, statute, ordinance, regulation, custom or usage.' That difference is important because, by including 'custom' in § 1983, Congress expressly contemplated imposing liability on actors who violated constitutional rights under an official policy. The absence of that language from § 12601, therefore, suggests that Congress did not intend to limit liability to those acting under an official law or policy. Instead, the plain text of § 12601 shows that any government agent who engages in a pattern or practice of conduct that deprives persons of their constitutional rights violates § 12601. Second, § 12601 does not limit liability to those who 'cause [citizens or persons] to be subjected' to a deprivation of their constitutional rights. The *Monell* Court interpreted that language, which appears in § 1983, as imposing liability 'on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights.'. . The lack of that causal phrase in § 12601 suggests that Congress did not intend to limit local governments' liability to situations when 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'. . Taken together, these statutory clues persuade us that Congress intended to allow for *respondeat superior* liability against local governments pursuant to § 12601. In arguing that the statutory text supports its position, Colorado City relies on the fact that the phrase 'pattern or practice' appears in both § 1983 and § 12601. That phrase, it claims, 'refers to the same language necessary to show a "custom" under *Monell*.' We acknowledge that Congress used 'pattern or practice in both statutes, and are mindful that '[a] basic principle of interpretation is that courts ought to interpret similar language in the same way, unless context indicates that they should do otherwise.'. . That principle, however, does not necessarily support Colorado City's argument, for Congress has also used pattern or practice' literally, rather than as a term of art, in several statutes. . . Under those statutes, the United States must demonstrate only that the conduct alleged 'was not an isolated or accidental or peculiar event.'. . It need not show the existence of an official policy or custom. For this reason, Congress's use of 'pattern or practice' in § 12601 does not support the weight that Colorado City wishes to place upon it. Congress could have used the phrase to refer to an official policy or custom, as in § 1983, but it also could have used the phrase to refer to a regular event, as in the statutes cited above. Our interpretation of the statute aligns with our recognition that although '[§] 12601 shares important similarities with § 1983[,] .... the language of § 12601 goes even further than § 1983.'. . Had Congress wished to

eliminate *respondeat superior* liability under § 12601, it could have easily done so with explicit statutory language. . . Its decision not to do so suggests that it intended for § 12601, like most civil rights statutes, to allow for *respondeat superior* liability. . . . Section 12601 provides a civil cause of action to the United States Attorney General when a local government's agents 'engage in a pattern or practice of conduct ... that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.'. . Because the statutory language does not demonstrate that Congress intended to exclude local governments from *respondeat superior* liability, we hold that § 12601 imposes liability based on general agency principles. Accordingly, the district court did not err in its construction of § 12601.")

The rationale of *Monell* has been mechanically applied to private corporations sued under section 1983. *See, e.g.*, ***Coleman v. Hamilton County Board of County Commissioners***, No. 24-3453, 2025 WL 732840, at *7 (6th Cir. Mar. 7, 2025) ("§ 1983 plaintiffs cannot hold private companies like NaphCare vicariously liable for the acts of their employees. *See Savoie v. Martin*, 673 F.3d 488, 494 (6th Cir. 2012). Instead, plaintiffs must show that their injuries arose out of a private company's policy or custom (such as its failure to train its employees)."); ***Martinez v. Nueces County, Texas***, 71 F.4th 385, 391-92 (5th Cir. 2023) ("We read Martinez's proposed amended complaint as alleging that Wellpath, as a state actor, had a pattern or policy of deliberate indifference as to adequate medical care, and that policy was the moving force behind a deprivation of Martinez's constitutional rights that led to his injury. Assuming, without deciding, that a nationwide corporation such as Wellpath can be sued as a municipality, . . .we proceed to the merits. As with his claim against Nueces County, Martinez must show the existence of a policy or custom that was the moving force behind the violation of his constitutional rights. . . Martinez has alleged a custom or policy of deliberate indifference. Again, he can show this via a pattern that has 'occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of [Wellpath's] employees.'. . And again, there is not enough detail in Martinez's complaint to clear this bar. . . .Wellpath is a nationwide company that operates in jails and other institutions across the country. Plaintiff's own exhibits state that the company operates in more than 500 facilities in 34 states and is responsible for around 300,000 people in custody every day. . . The complaint does not allege a single instance of medical negligence (aside from his own) that occurred in Nueces County and that was caused by Wellpath. . . In fact, it is unclear from the face of the complaint what exact role Wellpath even played at Nueces County. True, a plaintiff is not required to identify the precise policymaker to make out a *Monell* claim. . . But he is required to 'state a claim to relief that is plausible on its face,'. . . and from the face of Martinez's pleadings, there is no reason to conclude that Wellpath, at an organization-wide level, had a policy of deliberate indifference that was the moving force of Martinez's alleged constitutional violation at the Nueces County Jail."); ***Roy v. Ivy***, 53 F.4th 1338, 1347 (11th Cir. 2022) ("A private entity, like Wexford, that contracts to provide medical services to inmates performs traditional state functions and, therefore, is treated as a municipality for purposes of § 1983 claims. . . A municipality, however, may be held liable under § 1983 if its policy or custom causes the plaintiff's injury."); ***Greene v. Crawford County, Michigan***, 22 F.4th 593, 617 (6th Cir. 2022) ("We agree with the district court that, '[e]ven if

[CMH] were considered a municipality for purposes of a *Monell* claim,' there is no evidence of a 'policy that resulted in any alleged violation of Mr. Greene's constitutional right to be free from deliberate indifference.'. . CMH contracted with the Crawford County Jail to provide mental health services. Even if the estate was correct that CMH should have trained its employees to seek medical care for inmates experiencing withdrawal or delirium tremens, it points to no evidence of 'prior instances of unconstitutional conduct' involving CMH that would have placed CMH 'clearly on notice that the training in this particular area was deficient and likely to cause injury.'. . We therefore affirm the grant of summary judgment in favor of CMH."); ***Dean v. Wexford Health Sources, Inc.***, 18 F.4th 214, 235 (7th Cir. 2021) ("*Monell* governs Wexford's liability in this case because we, like our sister circuits, treat private corporations acting under color of state law as municipalities. *Iskander v. Vill. of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982); *see also Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 789–96 (7th Cir. 2014) (tracing the development of the doctrine and questioning its foundations)."); ***Harper v. Professional Probation Servs. Inc***, 976 F.3d 1236, 1244 n.10 (11th Cir. 2020) ("There is one loose end, which the parties haven't raised on appeal but which is necessary to resolving the plaintiffs' due-process claim: When suing a corporate entity under § 1983, a plaintiff must show that the entity itself committed or caused the constitutional violation. . . Because § 1983 doesn't hold employers vicariously liable for the acts of their employees, the plaintiffs here must demonstrate that the unconstitutional actions of PPS's employees were taken pursuant to a 'policy or custom ... made ... by those whose edicts or acts may fairly be said to represent official policy.'. . . At the motion-to-dismiss stage, the plaintiffs have alleged a sufficient basis to conclude that PPS's 'policy or custom' caused their injuries. PPS, they say, 'typically' (and 'often') extended probation sentences from 12 to 24 months and '[g]enerally' added substantive terms of probation. They further contend that PPS's conduct was part of 'one central scheme' that it operated 'in materially the same manner every day, with every person assigned to PPS.' And, of course, they assert that PPS subjected each of them to similar constitutional violations on different occasions."); ***Palakovic v. Wetzel***, 854 F.3d 209, 232 (3d Cir. 2017) ("The Palakovics also asserted a vulnerability to suicide claim against MHM, the corporation providing medical services at SCI Cresson. To state a claim against a private corporation providing medical services under contract with a state prison system, a plaintiff must allege a policy or custom that resulted in the alleged constitutional violations at issue. *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 583–84 (3d Cir. 2003). Therefore, the question is whether the Palakovics sufficiently alleged that MHM had a policy or custom that resulted in a violation of Brandon's Eighth Amendment rights. . . .The Palakovics alleged that MHM's policies of understaffing and failing to provide proper treatment resulted in Brandon's isolation, untreated mental illness, and eventual suicide. At the motion to dismiss stage, these allegations are sufficient to proceed to discovery. Absent discovery, the Palakovics could not possibly have any greater insight into MHM's exact policies or their impact on Brandon."); ***Pyles v. Fahim***, 771 F.3d 403, 410 n.23 (7th Cir. 2014) ("Although Wexford is a private corporation, we analyze claims against the company as we would a claim of municipal liability."); ***Rouster v. County of Saginaw***, 749 F.3d 437, 453 (6th Cir. 2014) ("Private corporations that 'perform a traditional state function such as providing medical services to prison inmates may be sued under § 1983 as one acting under color of state law.' *Street v. Corrections Corp. of Am.*, 102 F.3d 810, 814 (6th Cir.1996) (internal

quotation marks omitted). However, private corporations cannot be held liable on the basis of respondeat superior or vicarious liability. *Id.* at 818."); ***Tsao v. Desert Palace, Inc.***, 698 F.3d 1128, 1139 (9th Cir. 2012) ("Every one of our sister circuits to have considered the issue has concluded that the requirements of *Monell* do apply to suits against private entities under § 1983. [collecting cases] Like those circuits, we see no basis in the reasoning underlying *Monell* to distinguish between municipalities and private entities acting under color of state law."); ***Johnson v. Dossey***, 515 F.3d 778, 782 (7th Cir. 2008) ("Like public municipal corporations, they cannot be sued solely on that basis: a 'private corporation is not vicariously liable under § 1983 for its employees' deprivations of others' civil rights.'. . However, like a municipality, a private corporation can be liable if the injury alleged is the result of a policy or practice, or liability can be 'demonstrated indirectly 'by showing a series of bad acts and inviting the court to infer from them that the policy-making level of government was bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned ... the misconduct of subordinate officers.'"); ***Smedley v. Corrections Corporation of America***, 175 F. App'x 943, 946 (10th Cir. 2005) ("While it is quite clear that *Monell* itself applied to municipal governments and not private entities acting under color of state law, it is now well settled that *Monell* also extends to private defendants sued under § 1983. *See e.g., Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 (10th Cir.2003) (collecting circuit court cases). As such, a private actor such as CCA 'cannot be held liable solely because it employs a tortfeasor – or, in other words ... cannot be held liable under § 1983 on a respondeat superior theory.' . . . As we understand it, Ms. Smedley appears to argue that because corporations could be held liable under 42 U.S.C. § 1983 both before and after *Monell*, it 'simply defies logic to state that the traditional liability that existed for corporations prior to' *Monell* 'should somehow be abrogated as a result of the Supreme Court extending liability under § 1983 to municipalities where no such liability existed before.'. . We disagree. The Tenth Circuit, along with many of our sister circuits, has rejected vicarious liability in a § 1983 case for private actors based upon Monell. . . As Ms. Smedley has failed to provide any evidence that CCA had an official policy that was the 'direct cause' of her alleged injuries, summary judgment for CCA was appropriate."); ***Austin v. Paramount Parks, Inc.***, 195 F.3d 715, 728 (4th Cir. 1999) ("We have recognized, as has the Second Circuit, that the principles of § 1983 municipal liability articulated in *Monell* and its progeny apply equally to a private corporation that employs special police officers. Specifically, a private corporation is not liable under § 1983 for torts committed by special police officers when such liability is predicated solely upon a theory of respondeat superior."); ***Buckner v. Toro***, 116 F.3d 450, 452 (11th Cir. 1997) ("We conclude that the Supreme Court's decision in *Wyatt* has not affected our decision in *Howell v. Evans*. The policy or custom requirement is not a type of immunity from liability but is instead an element of a § 1983 claim. Accordingly, we affirm the district court's finding that the *Monell* policy or custom requirement applies in suits against private entities performing functions traditionally within the exclusive prerogative of the state, such as the provision of medical care to inmates.").

See also ***Stearns v. Inmate Services Corp.***, 957 F.3d 902, 909-10 (8th Cir. 2020) ("Whether, in the end, ISC had policies and customs that caused the conditions of Stearns's confinement, is a jury question. . . ISC has no express policy for the length of time a prisoner

should be kept in transit. However, ISC policies clearly contemplate transports as long as 7 to 10 days. Further, the record, including affidavits by other prisoners transported by ISC, shows that it was well within ISC practice to pick up and drop off prisoners on multi-state journeys such as this one. If ISC is found to have a custom of extending a pretrial detainee's transport in this way, given the totality of the circumstances present in this case, a jury could reasonably view the extension as causing conditions that are excessive in comparison to the presumed goal of securely transporting Stearns from Colorado to Mississippi. . . Therefore, viewing the totality of the circumstances endured by Stearns, ISC is not entitled to summary judgment as a matter of law.")

See also ***Graening v. Wexford Health Serives***, No. CV 1:20-00400, 2021 WL 972278, at *9–10 (S.D.W. Va. Mar. 15, 2021) ("In *Powell v. Shopco Laurel Co.*, the Fourth Circuit made the limits of *Monell* applicable to private corporations acting under color of state law. . .Thus, to state a claim against a private corporation under § 1983, a plaintiff must plausibly allege that a 'policy or custom' of the defendant caused of the unlawful conduct at issue. . . . Plaintiff's *Monell* allegations are essentially two: (1) Nurse New stated, in the presence of Dr. Garcia, that Wexford was withholding referrals to specialists for all but life-threatening illnesses; (2) as of the time plaintiff filed his complaint, he had been seeking a referral unsuccessfully for over six months despite alarming symptoms. Defendants argue that this is not enough. The court disagrees. It does not matter that New was a low-level employee. Plaintiff is not saying that New came up with this policy, only that his statement reveals its existence. While only one allegation, it is a fairly powerful one. If it is true that New said it, as the court must assume, then it is plausible that Wexford had a policy of wrongfully withholding referrals to inmates. This fact, together with the currently unexplained delay in plaintiff's case, is sufficient to state a claim under *Monell*."); ***S.K. v. Lutheran Services Florida, Inc.***, No. 217CV691FTM99MRM, 2018 WL 2100122, at *11-12 (M.D. Fla. May 7, 2018) ("When plaintiff brings a § 1983 claim against a private entity under contract with the State, plaintiff must allege that the violation of rights was the result of an official policy or custom. . . Plaintiff must identify the policy or custom which caused his injury so that liability will not be based upon an isolated incident, . . . and the policy or custom must be the moving force of the constitutional violation. . . . Contrary to the entity defendant's assertions, the Court finds that plaintiff has sufficiently alleged a policy or custom that was the moving force behind the failure to provide plaintiff and other foster children with adequate dental care. Plaintiff has alleged more than mere isolated incidents as plaintiff states in detail numerous instances where foster children were overdue for dental examinations and put at risk of dental harm . . . . Taking these allegations as true, the Court concludes that S.K. has adequately pled a § 1983 claim against the entity defendants for violating S.K.'s constitutional rights to proper medical treatment and reasonable safety via an official custom or policy."); ***Callaway v. City of Austin***, No. A-15-CV-00103-SS, 2015 WL 4323174, at *6 n.2 (W.D. Tex. July 14, 2015) ("The Fifth Circuit has yet to adopt this holding, but every circuit that has considered the issue has extended *Monell*'s rejection of respondeat superior liability to private corporations. [collecting cases]."); ***Harris v. Secretary, Dept. of Corrections***, No. 2:12–cv–153–Ftm–29DNF, 2013 WL 6069161, *7 n.3 (M.D. Fla. Nov. 18, 2013) ("Private contractors that run prisons do act under color of state law for purposes of § 1983 liability. . . Nevertheless, as explained herein, the principle that respondeat superior is not a

cognizable theory of liability under § 1983 holds true regardless of whether the entity sued is a state, municipal, or private corporation."); ***Combs v. Leis***, No. 1:12cv347, 2013 WL 781993, *3 (S.D. Ohio Mar. 1, 2013) ("'A private entity which contracts with the state to perform a traditional state function such as providing medical services to prison inmates may be sued under § 1983 as one acting "under color of state law."'. . However, a private entity cannot be held vicariously liable for the actions of its agents. . . Therefore, a plaintiff must (1) identify a policy or custom; (2) connect the policy or custom to the private entity; and (3) show that executing that policy amounted to deliberate indifference to the plaintiff's illness."); ***Ford v. Wexford Health Sources, Inc.,*** No. 12 C 4558, 2013 WL 474494, *9 (N.D. Ill. Feb. 7, 2013) ("The Court now turns to Ford's official capacity claim against Wexford brought pursuant to *Monell* and its progeny. Wexford, a private corporation contracted by the Illinois Department of Corrections, is subject to a *Monell* claim for Section 1983 liability just as any municipality would be."); ***Green v. Wexford Health Sources***, No. 12 C 50130, 2013 WL 139883, *11 (N.D. Ill. Jan. 10, 2013) ("In analyzing a section 1983 claim against a private corporation, the court uses the same principles that would be applied in examining claims against a municipality. . . An inmate bringing a claim against a corporate entity for a violation of his constitutional rights must show that the corporation supports a 'policy that sanctions the maintenance of prison conditions that infringe upon the constitutional rights of the prisoners.'. . Because liability is not premised upon the theory of vicarious liability, the corporate policy 'must be the "direct cause" or "moving force" behind the constitutional violation.'. . In the case at bar, the plaintiff has alleged no facts whatsoever that suggest an inadequate treatment 'policy' on the part of Wexford."); ***Jones v. Correctional Medical Services, Inc.***, 845 F.Supp.2d 824, 835 (W.D. Mich. 2012) ("Defendant is correct that CMS cannot be held liable under Section 1983 on a supervisory liability theory. Because CMS was providing medical services to inmates under contract with MDOC, it may properly be sued under Section 1983. *See Hicks v. Frey*, 992 F.2d 1450, 1458 (6th Cir.1993). But the Supreme Court disallowed Section 1983 *respondeat superior* liability in *Monell*. . . . Instead, a government body—or a nongovernmental entity such as CMS, in this case—can be found liable under Section 1983 where a constitutional wrong arises from execution of that entity's policies or customs."); ***Carrea v. California***, No. EDCV 07-1148-CAS (MAN), 2009 WL 1770130, at *8 (C.D. Cal. June 18, 2009) ("[P]laintiff cannot pursue Section 1983 claims against the Radiology Group merely because it employed medical personnel who allegedly provided plaintiff with constitutionally inadequate medical care. Rather, plaintiff must allege the elements of municipal liability under *Monell* . . . . The Radiology Group, of course, is not a municipality. While the Ninth Circuit has not addressed whether a private corporation or other entity acting under color of state law should be treated as a municipality for purposes of Section 1983 liability, other circuits, as well as several district courts in the Ninth Circuit, have concluded that a private corporation is liable under Section 1983 only when its official policy or custom causes a deprivation of constitutional rights."); ***Archuleta v. Correctional Healthcare Management, Inc***., No. 08-cv-02477-REB-BNB, 2009 WL 1292838, at *2 (D. Colo. May 8, 2009) ("Initially, it should be noted that CHM, having contracted to provide services typically provided by local government, is considered to be the 'functional equivalent' of the municipality. *See Buckner v. Toro,* 116 F.3d 450, 452 (11th Cir.), *cert. denied,* 118 S.Ct. 608 (1997). *See also Powell v. Shopco Laurel Co.*, 678 F.2d 504, 506 (4th Cir.1982); *Iskander v. Village of Forest Park,* 690

F.2d 126, 128 (7th Cir.1982); *Taylor v. Plousis*, 101 F.Supp.2d 255, 263 (D.N.J.2000); *Miller v. City of Philadelphia*, 1996 WL 683827 at * 8 (E.D.Pa. Nov. 25, 1996). . . For this reason, neither CHM nor any of its employees may be held liable simply on the basis of *respondeat* superior. . . More specifically, to support their claim that CHM's alleged failure to implement appropriate policies that could have prevented plaintiff's injuries, 'plaintiff[s] must demonstrate the [CHM's] inaction was the result of Adeliberate indifference' to the rights of its inhabitants.'"); ***Deese v. City of Jacksonville, Fla***., No. 3:06-cv-733-J-34HTS, 2008 WL 5158289, at *15 (M.D. Fla. Dec. 9, 2008) ("When a private entity like [CMS] contracts with a county to provide medical services to inmates, it performs a function traditionally within the exclusive prerogative of the state. . . In so doing, it becomes the functional equivalent of the municipality. . .Thus, the standard applicable for imposing liability in this § 1983 action on the COJ is equally applicable to CMS."); ***Lassoff v. New Jersey***, 414 F.Supp.2d 483, 494, 495 (D.N.J. 2006) ("The Amended Complaint alleges that Bally's security personnel conspired with Trooper Nepi to deprive him of his constitutional rights. . . In particular, Lassoff asserts that Bally's security personnel acted in concert with Trooper Nepi, denying Lassoff the assistance of counsel during their joint custodial questioning of Lassoff. . . He further alleges that he was in the custody and control of Bally's security personnel when Trooper Nepi beat him. . . 'Although not an agent of the state, a private party who willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right acts 'under color of state law' for purposes of § 1983.' . . Thus, Defendants Flemming and Denmead do not escape potential liability by virtue of being private security guards.. . . Bally's motion to dismiss, however, requires further analysis. Bally's, the corporate entity, is not alleged to have acted in concert or conspired with Trooper Nepi. Instead, Lassoff seeks judgment from Bally's on a vicarious liability theory. Neither the Third Circuit nor the Supreme Court has answered whether a private corporation may be held liable under a theory of respondeat superior in § 1983 actions. However, the Supreme Court's decision in *Monell v. Department of Social Services* provides guidance. . . *Monell* held that municipalities could not be held vicariously liable in § 1983 actions. Extrapolating the Court's reasoning in that case, other courts, including this one, have ruled that private corporations may not be held vicariously liable. *See Taylor v. Plousis*, 101 F.Supp.2d 255, 263 & n. 4 (D.N.J.2000). . . . The same result should obtain here. Accordingly, the § 1983 claims against Bally's will be dismissed."); ***Olivas v. Corrections Corporation of America***, No. Civ.A.4:04-CV-511-BE, 2006 WL 66464, at *3 (N.D. Tex. Jan. 12, 2006) ("It is appropriate to apply the common law standards that have evolved to determine § 1983 liability for a municipal corporation to a private corporation; thus, a private corporation performing a government function is liable under § 1983 only if three elements are found. . . The first is the presence of a policymaker who could be held responsible, through actual or constructive knowledge, for enforcing a policy or custom that caused the claimed injury. . . Second, the corporation must have an official custom or policy which could subject it to § 1983 liability. . . And third, a claimant must demonstrate that the corporate action was taken with the requisite degree of culpability, and show a direct causal link between the action and the deprivation of federal rights."); ***Wall v. Dion,*** 257 F. Supp.2d 316, 319 (D. Me. 2003) ("Though, it does not appear to me that the First Circuit has addressed this question head on, Courts of Appeal in other circuits have expressly concluded that when a private entity contracts with a county to provide jail inmates with medical services that entity is

performing a function that is traditionally reserved to the state; because they provide services that are municipal in nature the entity is functionally equivalent to a municipality for purposes of 42 U.S.C. § 1983 suits. . . . Following the majority view that equates private contractors with municipalities when providing services traditionally charged to the state, Wall's claims against these movants will only be successful if they were responsible for an unconstitutional municipal custom or policy."); ***Mejia v. City of New York***, 119 F. Supp.2d 232, 276 (E.D.N.Y. 2000) (noting that Second Circuit and other circuits have held 'that a private corporation cannot be held liable in the absence of the showing of an official policy, practice, usage, or custom.").

For a thoughtful and refreshing opinion questioning the application of *Monell* to private corporations, *see* ***Shields v. Illinois Dept. of Corrections***, 746 F.3d 782, 785, 786, 789-92, 795-96 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1024 (2015) (Hamilton, J., joined by Posner, J., with Tinder, J., concurring) ("This case illustrates the often arbitrary gaps in the legal remedies under § 1983 for violations of federal constitutional rights. Viewing the evidence through the lens of summary judgment, we can and must assume that Shields is the victim of serious institutional neglect of, and perhaps deliberate indifference to, his serious medical needs. The problem he faces is that the remedial system that has been built upon § 1983 by case law focuses primarily on individual responsibility. Under controlling law, as a practical matter, Shields must come forward with evidence that one or more specific human beings acted with deliberate indifference toward his medical needs. Shields has not been able to do so. The Illinois Department of Corrections and its medical services contractor, Wexford, diffused responsibility for Shields' medical care so widely that Shields has been unable to identify a particular person who was responsible for seeing that he was treated in a timely and appropriate way. Several of the individual defendants employed by Wexford were aware of portions of Shields' course of treatment, but no one person was responsible for ensuring that Shields received the medical attention he needed. No one doctor knew enough that a jury could find that he both appreciated and consciously disregarded Shields' need for prompt surgery. The problem Shields faces also raises a serious question about how we should evaluate the responsibility of a private corporation like Wexford for violations of constitutional rights. The question is whether a private corporation should be able to take advantage of the holding of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which requires a plaintiff suing a local government under § 1983 to show that the violation of his constitutional rights was caused by a government policy, practice, or custom. Our prior cases hold, but without persuasive explanations, that the *Monell* standard extends from local governments to private corporations. As we explain below, however, that conclusion is not self-evident. We may need to reconsider it if and when we are asked to do so. As state and local governments expand the privatization of government functions, the importance of the question is growing. Given the state of the controlling law, though, we must ultimately affirm the summary judgment for all defendants on the constitutional claims. . . . We consider first the claim against the Wexford corporation itself. The question posed here is how § 1983 should be applied to a private corporation that has contracted to provide essential government services—in this case, health care for prisoners. The answer under controlling precedents of this court is clear. Such a private corporation cannot be held liable under § 1983 unless the constitutional violation was caused by an unconstitutional policy or custom of

the corporation itself. *Respondeat superior* liability does not apply to private corporations under § 1983. E.g., *Iskander v. Village of Forest Park,* 690 F.2d 126, 128 (7th Cir.1982). Because Shields has no evidence of an unconstitutional policy or custom of Wexford itself, these precedents doom his claim against the corporation. For reasons we explain below, however, *Iskander* and our cases following it on this point deserve fresh consideration, though it would take a decision by this court sitting en banc or pursuant to Circuit Rule 40(e), or a decision by the Supreme Court to overrule those decisions. We start with the background of § 1983 and the Supreme Court cases relevant to the issue, then turn to circuit court decisions, and finally discuss reasons to question those circuit decisions and adopt a different approach for private corporations. . . . A close look at the reasoning of *Monell* provides no persuasive reason to extend its holding to private corporations. *Monell* gave two reasons for barring *respondeat superior* liability for municipalities under § 1983. First, the Court focused on the language of § 1983, which imposes liability on a person who 'shall subject, or cause to be subjected,' any person to a deprivation of Constitutional rights . . . .Second, the Court concluded that the legislative history of the Civil Rights Act of 1871 showed that Congress did not intend to impose *respondeat superior* liability on municipalities. . . . The rejection of *respondeat superior* liability for municipalities in *Monell* has been the subject of extensive analysis and criticism. . . . Perhaps the most important criticism to emerge from this literature is that *Monell* failed to grapple with the fact that *respondeat superior* liability for employers was a settled feature of American law that was familiar to Congress in 1871, when § 1983 was enacted. Congress therefore enacted § 1983 against the backdrop of *respondeat superior* liability, and presumably assumed that courts would apply it in claims against corporations under § 1983. . . .The Court's reliance on the Sherman Amendment is also problematic. The rejection of the proposal to hold municipalities liable for actions of private citizens it could not control says little about whether a municipality should be held liable for constitutional torts committed by its own employees acting within the scope of their employment. . . . Given these flaws on the surface of its reasoning, *Monell* is probably best understood as simply having crafted a compromise rule that protected the budgets of local governments from automatic liability for their employees' wrongs, driven by a concern about public budgets and the potential extent of taxpayer liability. Of course, the critiques of *Monell's* rejection of *respondeat superior* liability for municipalities have not yet persuaded the Supreme Court to reconsider that rule. Given our position in the judicial hierarchy, then, we are bound to follow *Monell* as far as municipal liability is concerned. We need not extend that holding, however, to the quite different context of private corporate defendants. [court proceeds to critically examine history, precedent, policy surrounding application of *Monell* to private corporations] For all of these reasons, a new approach may be needed for whether corporations should be insulated from *respondeat superior* liability under § 1983. Since prisons and prison medical services are increasingly being contracted out to private parties, reducing private employers' incentives to prevent their employees from violating inmates' constitutional rights raises serious concerns. Nothing in the Supreme Court's jurisprudence or the relevant circuit court decisions provides a sufficiently compelling reason to disregard the important policy considerations underpinning the doctrine of *respondeat superior.* And in a world of increasingly privatized state services, the doctrine could help to protect people from tortious deprivations of their constitutional rights. . . . The facts in this case are . . . an excellent example of the problems generated by barring *respondeat*

superior liability for corporations under § 1983. On the facts before us, it appears that Wexford structured its affairs so that no one person was responsible for Shields' care, making it impossible for him to pin responsibility on an individual. If *respondeat superior* liability were available, Wexford could not escape liability by diffusing responsibility across its employees, and prisoners would be better protected from violations of their constitutional rights. In view of these considerations, we have considered the possibility of circulating an opinion overruling *Iskander* and its progeny on this point for consideration by the entire court under Circuit Rule 40(e). Since Shields has not asked us to overrule those cases and Wexford has not had occasion to brief the issue, we have decided not to take that approach. A petition for rehearing en banc would provide an opportunity for both sides to be heard on this issue, and our decision is of course subject to review on certiorari. For now, this circuit's case law still extends *Monell* from municipalities to private corporations."). *See also* ***Moore v. LaSalle Management Company, L.L.C.***, 41 F.4th 493, 509 (5th Cir. 2022) ("We have, apparently, never squarely decided whether plaintiffs can hold *private* defendants vicariously liable under § 1983. Plaintiffs say they can. But the issue just isn't properly before us. The Corporate Defendants argued in their motion for summary judgment that our decision in *Baker v. Putnal* . . . prevents Plaintiffs from holding them vicariously liable under § 1983. Plaintiffs chose not to respond to this argument in their opposition. . . Rather, they argued only that they could hold the Corporate Defendants vicariously liable for their *state*-law claims for excessive force and failure to provide medical care. We do not consider arguments 'raised for the first time on appeal.'. . Therefore, we leave for another day whether plaintiffs can hold private defendants vicariously liable under § 1983.")

But see ***Howell v. Wexford Health Sources, Inc.***, 987 F.3d 647, 654 (7th Cir. 2021) ("Wexford is not a municipal government. It is a private corporation that contracts with the Illinois Department of Corrections to provide healthcare services that the government is obliged to provide to incarcerated persons. Circuit precedent establishes at this time that private corporations acting under color of law also benefit from *Monell's* rejection of respondeat superior liability for an employee's constitutional violations. See *Shields v. Illinois Dep't of Corrections*, 746 F.3d 782, 786 (7th Cir. 2014) (following precedent but criticizing extension of *Monell* to private corporations). In a case against a private contractor that provides healthcare to incarcerated people, the 'critical question' for liability is 'whether a municipal (or corporate) policy or custom gave rise to the harm (that is, caused it)'. . . . The most important doctrinal elaborations—individual versus official liability, qualified immunity, and *Monell* liability rather than respondeat superior—bear only a tenuous connection to the text of § 1983, let alone to its history. Repair of the creaky doctrinal structure, however, will need to come from the Supreme Court or Congress. For now we do the best we can, recognizing the challenges that parties face in asserting and defending claims under the statute."); ***Beard v. Wexford Health Sources, Inc.***, 900 F.3d 951, 953 (7th Cir. 2018) ("*Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), holds that a municipal corporation cannot be vicariously liable if its employees deprive others of their civil rights. *Iskander* treats private corporations the same way, when their liability depends on performing governmental functions. Beard maintains that *Monell* should be limited to governmental litigants. But Beard has not explained how *Iskander* harmed him. We asked Beard's

counsel what additional damages he would have sought if Wexford could be found vicariously liable. He did not point to any. So we need not decide whether *Iskander* should be overruled; anything we say about the subject would be advisory."); ***Collins v. Al-Shami***, 851 F.3d 727, 734 (7th Cir. 2017) ("Under existing precedent, neither public nor private entities may be held vicariously liable under § 1983. . . Though we have recently questioned whether the rule against vicarious liability should indeed apply to private companies, *see Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 786, 789–95 (7th Cir. 2014), we again leave that question for another day. Dr. Al-Shami is not liable, so—even if the theory of *respondeat superior* were available—neither is his employer."); ***Perez v. Fenoglio,*** 792 F.3d 768, 780 & n.5 (7th Cir. 2015) ("In this circuit, a private corporation cannot be held liable under § 1983 unless it maintained an unconstitutional policy or custom. . . . We recently examined the legal soundness of this rule in *Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 789 (7th Cir.2014) (questioning whether the *Monell* principle, which shields municipalities from respondeat superior liability in actions brought under § 1983, is properly extended to private corporations), *cert. denied,*135 S.Ct. 1024 (2015). However, the parties do not here challenge it."); ***Hahn v. Walsh***, 762 F.3d 617, 638-40 (7th Cir. 2014) ("The plaintiffs submit that they should be able to pursue a claim under § 1983 against HPL for its employees' misconduct. In their view, we have erred in extending the limitation on municipal liability established in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), to private actors. *Monell* permits suits against municipal entities under § 1983, but only when a governmental policy or custom caused the constitutional deprivation; municipal entities cannot be liable for their employees' actions under a respondeat superior theory. . .Our cases have extended this limitation to private entities. . . .The plaintiffs ask us to 'revisit these holdings' because they are based on 'historical misreadings' and we are 'free to revisit and reject [our] extension of *Monell* to private corporations.'. . As a preliminary matter, the plaintiffs have waived the issue of HPL's respondeat superior liability because they failed to raise it before the district court. . . . Even if we were to reach the respondeat superior issue, we would not take the position urged by the plaintiffs. The plaintiffs point to no 'intervening on-point Supreme Court decision' that would permit us to overrule our prior cases. . . Our considered decision in *Iskander* is compatible with the holding of every circuit to have addressed the issue. *See Shields v. Illinois Dep't of Corr.,* 746 F.3d 782, 790 & n. 2 (7th Cir.2014) (collecting cases). Because the issue was waived or, alternatively, because it fails on the merits, we conclude that the plaintiffs' argument for holding HPL liable on a respondeat superior theory is unavailing."); ***Washington v. Eaton***, No. 3:20-CV-1111(VLB), 2021 WL 3291658, at *11 (D. Conn. Aug. 2, 2021) ("Strictly speaking, *Monell* dealt with a public employer. However, in the Second Circuit, the principle that public employers are not liable for constitutional torts of their employees under § 1983 has been extended to private employers. . . In opposition, Plaintiff provides a five-page block citation of the Seventh Circuit's decision in *Shields v. Illinois Dep't of Corr.*, 746 F.3d 782 (7th Cir. 2014), which explained in dicta that it would have applied the doctrine of respondeat superior to the facts of that case. . . Plaintiff argues that neither case cited by the university, *Rojas v. Alexander's Dep't Store, Inc.*, 924 F.2d 406 (2d Cir. 1990) and *Wells v. Yale Univ.*, 2011 U.S. Dist. LEXIS 82453 (D. Conn. July 28, 2011), discuss the arguments for limiting *Monell*'s application to private entities that were presented in *Shields*. *Shields* advances a critical, but ultimately unavailing view that *Monell*'s rejection of respondeat

superior should be broadly reexamined and should not be extended to private entities. . . Nevertheless, the panel in *Shields* recognized that it was bound by controlling precedent. . . *Shields* acknowledged that every circuit to have considered the issue has extended *Monell* to private entities, shielding employers from vicarious liability. . . Since *Shields* was decided, no circuit has reversed its precedent nor adopted the panel's reasoning in the first instance. Here, there has been no intervening change in the law by the U.S. Supreme Court. *Rojas v. Alexander's Dep't Store, Inc.* remains binding precedent in the Second Circuit. *Rojas* is consistently applied. . .Given the well-settled controlling law in this circuit, the Court dismisses Count Seven of the Complaint without leave to amend."); ***T.S. v. Twentieth Century Fox Television***, No. 16 C 8303, 2017 WL 1425596, at *7 (N.D. Ill. Apr. 20, 2017) ("In Count V, Plaintiffs allege that the Fox Defendants are liable for their employees' and agents' conduct in relation to Plaintiffs' § 1983 due process claim under the theory of respondeat superior. Plaintiffs base this claim on dicta in the Seventh Circuit's decision *Shields v. Illinois Dept. of Corr.*, 746 F.3d 782, 789 (7th Cir. 2014), to preserve their argument as an alternative basis for liability in case this dicta becomes law. To clarify, in *Shields*, the Seventh Circuit recognized that under § 1983 a private corporation cannot be held liable based on the employee-employer relationship, namely, respondeat superior, but that this issue deserved 'fresh consideration' in the future. *See id.* at 789 (citing *Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982)). The Court thus grants the Fox Defendants' motion with prejudice."); ***Scheidler v. Metro. Pier & Exposition Auth.***, No. 16-CV-4288, 2017 WL 1022077, at *3 (N.D. Ill. Mar. 16, 2017) ("First, Plaintiff states that his argument that MPEA 'is liable for the unconstitutional acts of its private agent, NPI, under the doctrine of *respondeat superior*' is only an 'alternative basis for liability.'. . Plaintiff's 'alternative' argument is that 'the current law on *respondeat superior* under *Monell* should be modified or reversed * * * so as to apply to a municipality such as MPEA in the context of a § 1983 claim.'. Plaintiff's reasons for reversing *Monell* are that the 'lack of *respondeat superior* liability under *Monell* is a much-criticized doctrine, especially in light of government privatization' and permitting vicarious liability would be 'consistent with other contexts' where a corporation is barred from 'evad[ing] its own statutory liability.'. .Plaintiff's argument is a non-starter. In 1978, the Supreme Court held that 'a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.'. . In light of its place in the federal judicial hierarchy, this Court cannot reverse the Supreme Court and nearly forty years of Seventh Circuit precedent adhering to *Monell* by holding that *respondeat superior* is now a viable theory of municipal liability under Section 1983. This Court is bound to follow *Monell*, and thus Plaintiff's 'alternative basis of liability' fails to state a claim as a matter of law.")

See also ***Baker v. Fishman***, No. CV147583PGSTJB, 2017 WL 2873381, at *3 n.3 (D.N.J. July 5, 2017) ("Although the Court is constrained to follow the Third Circuit's non-precedential decision in *Weigher*, some courts have decided differently. *See, e.g., Hutchison v. Brookshire Bros., Ltd.*, 284 F. Supp. 2d 459, 472-73 (E.D. Tex. 2003); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 991 n.4 (W.D. Wash. 1997). As another court in this district opined:

> The policy considerations which prompted the Supreme Court to reject qualified immunity for private prison guards are the same considerations which suggest that private corporations providing public services, such as prison medical care, should not be immune

> from *respondeat superior* liability under § 1983. In the context of a claim that the deprivation of medical care amounted to a constitutional violation, proof of such claim would almost certainly prove a case of ordinary state law malpractice where *respondeat superior* would apply. It seems odd that the more serious conduct necessary to prove a constitutional violation would not impose corporate liability when a lesser misconduct under state law would impose corporate liability.

Taylor v. Plousis, 101 F. Supp. 2d 255, 263 n.4 (D.N.J. 2000)."); ***Pindak v. Dart***, 125 F.Supp.3d 720, 764-65 (N.D. Ill. 2015) ("In light of the Seventh Circuit's willingness to revisit *Iskander,* Plaintiffs urge this court to hold Securitas vicariously liable for the actions of its employees under a theory of *respondeat superior,* even if they fail to establish that Truman and Kelly acted pursuant to an official policy or custom. The court is sympathetic to Plaintiffs' request. In addition to the problems that the Seventh Circuit aptly identified in *Shields,* this case illustrates another kind of problem that arises from *Iskander's* holding. Often, as may ultimately be the case here, there will be no individual 'final policymaker' or 'final policy decision' by the private corporation. Rather, the authority to determine the private entity's policies and procedures will be divided among the private corporation and the relevant government agency or agencies. This case for example, presents much more complicated relationships between governmental and private entities than the Seventh Circuit considered in *Shields*. Here, the Public Building Commission (a municipal entity), hired MBRE (a private company) to manage the public building. MBRE in turn contracted with SMI, which was purchased by Securitas, and which itself employs subcontractors (for example, Waters is an employee of Star Detective Agency, a Securitas subcontractor. . . In addition to the diffuse responsibilities within an organization–as the Court of Appeals noted in *Shields* – these complex relationships spread responsibility across public and private entities. In this case, for example, Coleman explained that several people were involved in updating the Post Orders. . .. This divided and overlapping authority presents difficult questions regarding causation and complicates the task of identifying who, if anyone, has final 'policymaking' authority within the meaning of *Monell*. As the Appellate Court recognized in *Shields,* these legal standards simultaneously encourage government agencies to delegate responsibility to private corporations and encourage those private corporations to structure their operations to evade liability. . . . While the court is sympathetic to Plaintiffs' request, it remains bound by the holding in *Iskander.* After *Shields,* the Seventh Circuit revisited the question of permitting *respondeat superior* liability for private entities in § 1983 actions, but once again demurred because the plaintiffs had not preserved the question at the district court. . . In dicta, however, the Seventh Circuit cautioned that *Iskander* remains the law. . . .Because *Iskander* precludes vicarious liability, the court is required to grant summary judgment to Securitas on Count III."); ***Medrano v. Wexford Health Sources, Inc.,*** No. 13 C 84, 2015 WL 4475018, at *7 (N.D. Ill. July 21, 2015) ("Medrano. . . urges the Court to deny Wexford's motion to dismiss the *respondeat superior* claim on the basis of the reasoning expressed in *Shields v. Illinois Department of Corrections,* in which the Seventh Circuit questioned the rationale expressed in precedential case law for prohibiting *respondeat superior* liability for corporations under § 1983. . .Despite the *Shields* panel's reasoning, this Court is bound to follow existing precedent. . . The Seventh Circuit was clear that the law of this Circuit 'still extends *Monell* [and its prohibition on *respondeat superior* liability] from municipalities to private corporations.'.

. And shortly after its decision in *Shields,* the Seventh Circuit indicated it would not apply *respondeat superior* liability under § 1983 to corporations until an 'intervening on-point Supreme Court decision' requires it. *Hahn v. Walsh,* 762 F.3d 617, 640 (7th Cir.2014), *reh'g and suggestion for reh'g en banc denied* (Sept. 9, 2014). Thus, Medrano's claim against Wexford based on *respondeat superior* must be dismissed."); ***Shehee v. Saginaw Cnty.***, No. 13-13761, 2015 WL 58674, at *6-8 (E.D. Mich. Jan. 5, 2015) ("The Supreme Court has never extended *Monell* to private corporations acting under color of state law. But nearly every circuit to examine the issue, including the Sixth Circuit, has done so. *See Street v. Corr. Corp. of Am.,* 102 F.3d 810, 818 (6th Cir.1996) (quoting *Harvey v. Harvey,* 949 F.2d 1127, 1129–30 (11th Cir.1992) (collecting cases)). It is not clear why. *Street v. Correctional Corporation of America* was the first Sixth Circuit case to extend *Monell* to private corporations. It did so without any meaningful explanation as to why private corporations should be insulated from vicarious liability. The court's more recent decisions provide no additional insight. *See Rouster v. Cnty. of Saginaw,* 749 F.3d 437, 453 (6th Cir.2014); *Savoie v. Martin,* 673 F.3d 488, 494 (6th Cir.2012); *Johnson v. Karnes,* 398 F.3d 868, 877 (6th Cir.2005). Perhaps it is time to question the rationale for allowing private contractors to avoid liability for the acts of its employees. [citing and quoting from *Shields v. Illinois Dept. of Corrections,* 746 F.3d 782, 794 (7th Cir.2014)] A 2005 New York Times investigation described Prison Health Services as providing 'flawed and sometimes lethal' medical care. . . New York state investigators examining PHS 'say they kept discovering the same failings: medical staffs trimmed to the bone, doctors under-qualified or out of reach, nurses doing tasks beyond their training, prescription drugs withheld, patient records unread and employee misconduct unpunished.'. . One investigation found that the doctor overseeing care in several upstate New York State jails phoned in his treatment orders from Washington. . . In one investigative report, the chairman of the New York commission's medical review board criticized PHS for being ' "reckless and unprincipled in its corporate pursuits, irrespective of patient care."'. . ' "The lack of credentials, lack of training, shocking incompetence and outright misconduct" of the doctors and nurses in the case was "emblematic of P.H.S. Inc.'s conduct as a business corporation, holding itself out as a medical care provider while seemingly bereft of any quality control."'. . '[I]n cutting costs,' the New York Times reported, '[PHS] has cut corners.'. . Although the defendants offer several reasons why Dr. Lloyd changed Shehee's medication, it appears that cost may have been a motivating factor. *Respondeat superior* liability would provide a powerful counter-weight to the financial incentive to skimp on patient care. *Shields* makes that case, too, providing a compelling argument for treating private corporations differently than government municipalities. Nonetheless, this Court is bound by Sixth Circuit precedent, and *Street v. Corrections Corp. of America,* 102 F.3d 810, 818 (6th Cir.1996), remains good law. Unless the Sixth Circuit reverses course, *respondeat superior* provides no basis to hold a private corporation liable for the tortious acts of its employees. PHS cannot be held liable for Dr. Lloyd's treatment decisions."); ***Horton v. City of Chicago***, No. 13-CV-06865, 2014 WL 5473576, at *4 n.2 (N.D. Ill. Oct. 29, 2014) ("In *Shields v. Illinois Dep't of Corr.,* 746 F.3d 782 (7th Cir.2014), the Seventh Circuit suggested that it may overrule precedents establishing that private corporations cannot be found liable for § 1983 violations under a theory of *respondeat superior*. However, as long as those precedents remain good law, the Court is bound to apply the current rule that *respondeat superior* liability does not

exist under § 1983, even where a corporate defendant acts under color of state law."); ***Herrera v. Santa Fe Pub. Sch.***, 41 F.Supp.3d 1027, 1179-80 (D.N.M. 2014) ("*Monell* applies to corporations, including ASI New Mexico. Despite the Court's initial puzzlement in the hearing, it is clear under Tenth Circuit law, and has been for decades, that *Monell's* rule against vicarious liability applies to private corporations. . . . There is a fair question whether this is a wise rule. The Honorable David Frank Hamilton, Circuit Judge for the United States Court of Appeals for the Seventh Circuit, in an opinion which the Honorable Richard A. Posner, Circuit Judge for the United States Court of Appeals for the Seventh Circuit, joined, criticized this rule at length, noting that, in his view, *Monell's* rule against vicarious liability incorrectly reads history, and stating that, in his view, the consensus among the federal courts of appeals extending *Monell's* rule to private corporations was an error. [citing *Shields*] The Court agrees. Whatever the merits of this argument, however, Tenth Circuit precedent binds the Court on this point."); ***Revilla v. Glanz***, 8 F.Supp.3d 1336, 1339-41 (N.D. Okla. 2014) ("While the Supreme Court has only applied *Monell* to municipalities, the Circuit Courts of Appeal have applied *Monell* to private entities, acting under color of law, that are sued under 42 U.S.C. § 1983. . .Thus, private corporations may not be held liable under § 1983 based upon *respondeat superior,* but may only be held liable where their policies caused a constitutional violation. . .The Seventh Circuit, very recently, called into question the reasoning behind applying *Monell* to private corporations. . . .The reasoning of *Shields,* and its thorough analysis of Supreme Court precedent, provides potent arguments for *not* extending *Monell* to private corporations like CHC. However, this Court is bound to follow Tenth Circuit precedent, and the settled law in all Circuits to have decided the issue is that *Monell* extends to private corporations and thus they cannot be held liable on a *respondeat superior* basis for their employees' conduct. Accordingly, in order to state a § 1983 claim against CHC, plaintiffs must satisfy *Monell* and must allege facts to show the existence of a CHC policy or custom by which each plaintiff was denied a constitutional right and that there is a direct causal link between the policy or custom and the injury alleged."); ***Smith v. Corrections Corp. of America, Inc.***, 674 F.Supp.2d 201, 205 n.3 (D.D.C. 2009) (Several judges of this Court have concluded that for a private corporation to be held liable for the actions of its employees, a plaintiff must prove the employees acted pursuant to a corporate policy or custom. *See, e.g., Jackson v. Correctional Corp. of Am.,* 564 F.Supp.2d 22, 27- 28 (D.D.C. 2008); *Gabriel v. Corrections Corp. of Am.,* 211 F.Supp.2d 132, 137-38 (D.D.C. 2002). These cases based their holdings in part on the reasoning that where a private corporation provides a service ordinarily provided by a municipality, the corporation 'stands in the shoes of the municipality and is subject to the same liability.' *Jackson,* 564 F.Supp.2d at 27. Although these cases reach the correct result, the Court will not adopt their reasoning – the Supreme Court has never suggested that where a private actor under contract with the state exercises power traditionally reserved to a state, that private actor is clothed with the liabilities and immunities of the state. Were the reasoning of these cases correct, a plaintiff who wanted to bring a section 1983 claim against a private actor exercising a traditional state prerogative would be barred from doing so because a state is not a 'person' within the meaning of section 1983. *See Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989). No decision of the Supreme Court has adopted such a limited reading of section 1983. *Cf. Correctional Servs. Corp. v. Malesko,* 534 U.S. 61, 82 (2001) (Stevens, J., dissenting) (Supreme Court jurisprudence

recognizes general rule that 'state prisoner may sue a private prison for deprivation of constitutional rights")."); ***Cortlessa v. County of Chester***, No. Civ.A. 04-1039, 2006 WL 1490145, at *3, *4 (E.D. Pa. May 24, 2006) ("Count IX alleges that Primecare is liable, pursuant to 42 U.S.C. § 1983, for violations of Plaintiff's Eighth Amendment right to medical treatment while incarcerated. Stated differently, Plaintiff claims that Primecare is responsible, on the basis of *respondeat superior* liability, for the deliberate indifference of its employees towards Plaintiff's serious medical needs. Primecare has argued that it cannot be held liable under a theory of *respondeat superior* liability because it is an independent contractor for a municipality and, as such, should enjoy protection from vicarious liability similar to that granted to municipalities in *Monell* . . . . Primecare cites to *Natale v. Camden County Correctional Facility*, 318 F.3d 575 (3d Cir.2003) and a variety of decisions from other Circuit Courts and District Courts, for the proposition that private corporations such as Primecare cannot be held liable under Section 1983 on the basis of *respondeat superior*. . . . The Court has analyzed this issue and reaches the following conclusions. First, the issue of whether immunity from *respondeat superior* liability under Section 1983 extends to private contractors was not one of the two issues presented to the *Natale* Court. . . . The language relied on by Primecare is therefore merely dicta. As such, there is currently no Third Circuit authority requiring a decision in favor of Primecare. Second, the Court finds that there is clear disagreement among the federal courts concerning this issue. Both parties have cited persuasive authority for different conclusions. . . . Third, even if Primecare is correct and a *Monell*-type immunity applies to it, an entity entitled to such immunity can still potentially be held liable under Section 1983 based on a theory of failure to train its employees, which Plaintiff alleges. . . At this stage, therefore, the Court is not prepared to conclude that Primecare is entitled to summary judgment on this claim."); ***Hutchison v. Brookshire Brothers, Ltd.,*** 284 F.Supp.2d 459,472, 473 (E.D.Tex. 2003) ("The court now turns to the question of Brookshire Brothers' liability. Defendants' argue that, even if Plaintiff succeeds in proving concert of action between McCown and Shelton, Plaintiff's Fourth Amendment claim against Brookshire Brothers ought to be dismissed because '[o]bviously there is no respondeat superior for § 1983 purposes.'. . Where Defendants brush aside Plaintiff's claim in a single sentence, the court finds a more complicated issue. What is clear is that Defendants have cited the wrong precedent to support their statement of law. *Collins v. City of Harker Heights* stands for the proposition that a municipality (and not a private employer) generally 'is not vicariously liable under § 1983 for the constitutional torts of its agents.'. . .It is not so clear, however, that a private employer cannot be held vicariously liable under § 1983 when its employees act under color of law to deprive customers of constitutional rights. The court can find no case that supports this proposition, and the language of § 1983 does not lend itself to Defendants' reading. . . . Though the Supreme Court has stated that § 1983 'cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor,' . . . the Court has made no similar statement regarding private employers. Indeed, there would be no textual basis for such a statement. Additionally, the court finds no persuasive policy justification for shielding private employers from vicarious liability. While the Supreme Court has found that Congress did not want to create a 'federal law of respondeat superior ' imposing liability in municipalities in the § 1983 context because of 'all the constitutional problems associated with the obligation to keep the

peace,'. . . this court cannot find any similar concerns implicated in the private context. Imposing liability on private corporations affects neither the state's police power nor its ability to regulate its municipalities. Instead, allowing the imposition of vicarious liability would seem to keep Congress within its broad power to regulate interstate commerce. Thus, no significant federalism issues are raised when private employers are held liable for the constitutional torts of their employees. For these reasons, the court holds that neither *Monell* nor its progeny can be read to shield private corporations from vicarious liability when their employees have committed a § 1983 violation while acting within the scope of their employment. If Plaintiff can demonstrate that Shelton committed a Fourth Amendment violation in the course of his employment, Brookshire Brothers may be held liable. Such a violation would be 'within the scope of employment' if it were ' 'actuated, at least in part, by a purpose to serve the [employer],' even if it is forbidden by the employer.' . . The court infers that the scope of Shelton's responsibilities to Brookshire Brothers includes handling customer disputes and ensuring that customers pay for their gas; this may be reasonably inferred from Plaintiffs deposition testimony and Hill's statement that Plaintiff had to talk to her manager. . . Shelton's actions, as alleged by Plaintiff, allow the further inference that he was motivated at least in part by a desire to serve Brookshire Brothers. Though Shelton allegedly placed the siphoned gasoline into his own gas tank and collected no money for Brookshire Brothers, there is some evidence that Shelton first tried to collect on the alleged debt and resolve the dispute in favor of his employer. . .Thus Plaintiff has succeeded in demonstrating a genuine issue of material fact with regard to whether Shelton was acting within the scope of his employment. Defendants' motion for summary judgment is DENIED with respect to Brookshire Brothers on this claim."); ***Taylor v. Plousis***, 101 F. Supp.2d 255, 263 & n.4 (D.N.J. 2000) ("Neither the Supreme Court nor the Third Circuit has yet determined whether a private corporation performing a municipal function is subject to the holding in *Monell*. However, the majority of courts to have considered the issue have determined that such a corporation may not be held vicariously liable under § 1983. [citing cases] . . . . Although the majority of courts to have reached this conclusion have done so with relatively little analysis, treating the proposition as if it were self-evident, the Court accepts the holdings of these cases as the established view of the law. However, there remains a lingering doubt whether the public policy considerations underlying the Supreme Court's decision in *Monell* should apply when a governmental entity chooses to discharge a public obligation by contract with a private corporation. . . . An argument can be made that voluntarily contracting to perform a government service should not free a corporation from the ordinary respondeat superior liability. A parallel argument involves claims of qualified immunity which often protect government officials charged with a constitutional violation. If a private corporation undertakes a public function, there is still state action, but individual employees of that corporation do not get qualified immunity. . . . The policy considerations which prompted the Supreme Court to reject qualified immunity for private prison guards are the same considerations which suggest that private corporations providing public services, such as prison medical care, should not be immune from respondeat superior liability under § 1983. In the context of a claim that the deprivation of medical care amounted to a constitutional violation, proof of such claim would almost certainly prove a case of ordinary state law malpractice where respondeat superior would apply. It seems odd that the more serious conduct necessary to prove a constitutional

violation would not impose corporate liability when a lesser misconduct under state law would impose corporate liability.").

On the liability of private corporations for failure to train, *see* ***Miller v. City of Chicago***, No. 19 CV 4096, 2019 WL 6173423, at *2 (N.D. Ill. Nov. 20, 2019) (not reported) ("Miller's claims against Rodeway fail for another reason. Even if Rodeway or its employee acted under color of state law, a private corporation is treated like a municipality for § 1983 purposes. *Gaston v. Ghosh*, 920 F.3d 493, 494–95 (7th Cir. 2019); *Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 789 (7th Cir. 2014). So, like a municipality, a corporation is not subject to vicarious liability for the actions of its employees. . . To prevail on her claim, Miller must allege that the constitutional violation resulted from an 'unconstitutional policy or custom of the corporation itself.'. . Miller has not adequately alleged that her injuries were the result of Rodeway's 'official policy or custom.'. . Miller argues that Rodeway did not train its employees to refuse access to police officers requesting access to guests' rooms absent a search warrant, exigency, or consent. She labels this failure to train a policy. But liability attaches only where the corporation's policymakers make 'a deliberate choice to follow a course of action' from 'among various alternatives.'. . A failure to provide adequate training may be a basis for liability—if it has a direct casual connection to plaintiff's injury—but 'the plaintiff must show that the failure to train reflects a conscious choice among alternatives that evinces a deliberate indifference to the rights of the individuals with whom those employees will interact.'"); ***Piercy v. Warkins***, No. 14 CV 7398, 2017 WL 1477959, at *15–16 (N.D. Ill. Apr. 25, 2017) ("ACH argues that it cannot be held liable for failing to train the correctional officers, because ACH is only responsible for training its own employees. But courts in this district have allowed a private corporation to be liable for failing to train correctional officers on matters relating to the private corporation's responsibilities. . . Correctional officers would provide ACH employees with information about inmates' health, so ACH had a contractual interest in the officers' practice for obtaining and communicating that information. Indeed, there is evidence that correctional officers did give ACH employees information about inmates' medical conditions. . .There is enough evidence to create a dispute about whether correctional officers knew Piercy was vomiting blood, but failed to tell medical staff. Had they been adequately trained on how to use the protocols, Plaintiff contends, they would have known what to do about Piercy's bloody vomit—specifically, they would have known to contact the ACH medical providers. Assuming that ACH required jail officials to use these protocols (which the court must do on Defendants' summary judgment motion), Plaintiff claims that ACH did not train the officers on (1) when to consult the protocols that were intended to govern how the officers treated inmates when medical personnel were not present, and (2) how to reconcile allegedly conflicting protocols. Defendants claim that Plaintiff's argument that officers were not adequately trained about whether to consult the protocols at all is a 'red herring because the officers never consulted the protocols regarding Piercy.'. . ACH seems to argue that if the officers had consulted the protocols, then they would have called the provider . . . implying the fault lies, at most, with the officers, not ACH. But that is beside the point—when faced with an inmate who was vomiting blood, which the protocols clearly treat as a dire situation requiring immediate medical attention, officers did not consult them. The evidence of how much training officers received, moreover, is sufficiently vague that a

reasonable jury could conclude that it was inadequate. Defendants also argue that more training on when to consult the protocols would not have 'affected the outcome' for Piercy. . . Defendants again try to distinguish *Awalt*, where the court concluded that there was sufficient evidence for a jury to find that the failure to give the officers general training about when to consult medical professionals caused an inmate's death, after officers did not alert medical staff that he was having a seizure. . . Here, contrary to Defendants' argument, the evidence of causation is even clearer: Defendants themselves acknowledge that if the officers had consulted the protocols, they probably would have alerted medical staff to Piercy's condition.")

The Supreme Court has resolved the question of whether *Monell* applies to claims for only declaratory or prospective relief. *See* ***Los Angeles County, Cal. v. Humphries***, 131 S.Ct. 447, 451, 452 (2010) ("We conclude that *Monell*'s holding applies to § 1983 claims against municipalities for prospective relief as well as to claims for damages. . . . The language of § 1983 read in light of *Monell*'s understanding of the legislative history explains why claims for prospective relief, like claims for money damages, fall within the scope of the 'policy or custom' requirement. Nothing in the text of § 1983 suggests that the causation requirement contained in the statute should change with the form of relief sought. . . . Respondents further claim that, where prospective relief is at issue, *Monell* is redundant. They say that a court cannot grant prospective relief against a municipality unless the municipality's own conduct has caused the violation. Hence, where such relief is otherwise proper, the *Monell* requirement 'shouldn't screen out any case.'. . To argue that a requirement is necessarily satisfied, however, is not to argue that its satisfaction is unnecessary. If respondents are right, our holding may have limited practical significance. But that possibility does not provide us with a convincing reason to sow confusion by adopting a bifurcated relief-based approach to municipal liability that the Court has previously rejected. . . . For these reasons, we hold that *Monell's* 'policy or custom' requirement applies in § 1983 cases irrespective of whether the relief sought is monetary or prospective."). *See also* ***Snyder v. King***, 745 F.3d 242, 250 (7th Cir. 2014) ("Both the parties and the district court spoke about the possibility of injunctive and declaratory relief against the County Defendants as though it were an issue totally distinct from whether Snyder adequately stated a *Monell* claim against those defendants. That was incorrect. The Supreme Court has squarely held that *Monell's* 'policy or custom' requirement applies in Section 1983 cases irrespective of whether the relief sought is monetary or prospective. *Los Angeles Cnty., Cal. v. Humphries,* 131 S.Ct. 447, 453–54 (2010). Snyder cannot obtain injunctive or declaratory relief against the County Defendants for the same reason he cannot obtain nominal damages: he has not adequately pleaded a suit against them. It is therefore unnecessary to consider whether any claim for injunctive relief is moot.").

See also ***Yoshikawa v. Seguirant***, 74 F.4th 1042, 1044, 1047 (9th Cir. 2023) (en banc) ("Our circuit has long held that a plaintiff may bring a cause of action against state actors alleging violations of 42 U.S.C. § 1981 under both § 1981 and 42 U.S.C. § 1983. Each of our sister circuits with jurisdiction over this question has disagreed. A majority of the active judges in our court voted to rehear this case en banc to reconsider our ruling that § 1981 provides an implied cause of action. Today, we join our sister circuits in holing that it does not. We vacate and remand this case

to the district court with instructions to allow Hitoshi Yoshikawa to replead his § 1981 claim as a § 1983 claim, the proper vehicle for his claim of discriminatory enforcement of the City of Honolulu's building codes. . . . That Congress created an express cause of action against state actors in § 1983, but declined to do so in § 1981, bolsters our view. Accordingly, we overrule *Federation.* And to the extent that our precedents rely on *Federation*'s reasoning or are otherwise inconsistent with our holding today, we overrule those decisions as well. Section 1981 establishes substantive rights that a state actor may violate. It does not itself contain a remedy against a state actor for such violations. A plaintiff seeking to enforce rights secured by § 1981 against a state actor must bring a cause of action under § 1983."); ; ***Felton v. Polles,*** 315 F.3d 470, 482 (5th Cir. 2002) ("[R]equiring § 1981 claims against state actors to be pursued through § 1983 is not a mere pleading formality. One of the reasons why the § 1981 claim in this situation must be asserted through § 1983 follows. Although *respondeat superior* liability may be available through § 1981, . . . it is *not* available through § 1983...."); ***United States v. City of Columbus***, No. CIV.A.2;99CV1097, 2000 WL 1133166, at *8 (S.D. Ohio Aug. 3, 2000) ("In *City of Canton* . . ., the Supreme Court reaffirmed its rejection of liability under § 1983 based on a theory of vicarious liability because federal courts 'are ill-suited to undertake' the resultant wholesale supervision of municipal employment practices; to do so, moreover, 'would implicate serious questions of federalism.' This Court concludes that [42 U.S.C.] § 14141 is properly construed to similar effect. Its language does not unambiguously contemplate the possibility of vicarious liability and such legislative history as exists manifests a congressional intent to conform its substantive provisions to the standards of § 1983. . . . The Court therefore construes § 14141 to require the same level of proof as is required against municipalities and local governments in actions under § 1983.").

NOTE: In ***Barbara Z. v. Obradovich***, 937 F. Supp. 710, 722 (N.D. Ill. 1996), the court addressed the issue of "whether a political subdivision of a state, such as the School District, can sue (as opposed to being sued) under section 1983." The court concluded that a school district is not an "other person" that can sue within the meaning of section 1983. *Id. Accord* ***Housing Authority of Kaw Tribe of Indians of Oklahoma v. City of Ponca City***, 952 F.2d 1183, 1192 (10th Cir.1991); ***School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd.***, 877 F.Supp. 245, 251 n. 3. (E.D.Pa.1995); *Contra* ***South Macomb Disposal Authority v. Washington Tp.***, 790 F.2d 500, 503 (6th Cir.1986); ***Santiago Collazo v. Franqui Acosta***, 721 F.Supp. 385, 393 (D.Puerto Rico 1989).

See also ***Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale***, 11 F.4th 1266, 1276-83 (11th Cir. 2021) ("[T]he City argues that FLFNB, as an unincorporated association, is not a 'person' that may bring suit under § 1983. . . . There is some historical support for the City's reading, but this view stands in tension with the text's ordinary meaning, Supreme Court precedent, successive amendments to § 1983, and longstanding, settled practice. Absent clear direction from the Supreme Court, we decline the City's invitation to bar all unincorporated associations (other than unions) from being able to sue under § 1983. . . . *Monell*, *Ngiraingas*, and *Will* each interpreted the first use of the word 'person' in § 1983, which relates to which entities may be proper § 1983 *defendants* – '[e]very person' who under color of law causes a deprivation of federal rights shall be liable to the party injured. By contrast, today we interpret § 1983's second

use of the word 'person' – 'any citizen or other person' -- a phrase that delineates which entities may be proper § 1983 *plaintiffs*. . . . In order to decide whether FLFNB has a cause of action in this case, we must determine whether 'other persons,' in addition to including non-citizen individuals and corporate entities, extends to unincorporated associations. . . . All told, historical context suggests that the word "person" as used in Section 1 of the 1871 Civil Rights Act did not extend to unincorporated associations. But this does not end the analysis, because we are not interpreting Section 1 of the 1871 Civil Rights Act. Instead, we must apply § 1983 of Title 42 of the United States Code as it exists *today*, that is, as thrice amended since its initial enactment in 1871. We must therefore account for any changes in the legal meaning of 'person' that may have informed Congress's decision to perpetuate that term across amended versions of § 1983. . . . [B]y the time of the 1979 and 1996 amendments to § 1983, federal law made it quite clear that unincorporated associations were 'persons' that could sue to enforce constitutional rights under § 1983. It is telling that against this backdrop, Congress did not choose to restrict the scope of the term 'person' when it re-enacted amended versions of § 1983. . . Whatever 'person' meant in 1871, its meaning included unincorporated associations by the time Congress 'perpetuated' the word 'person' in new versions of § 1983 in 1979 and 1996. . . Even setting these textual and historical considerations aside, *Allee* suggests that an unincorporated entity like FLFNB, just like the unincorporated union in that case, is a 'person' for § 1983 purposes. . . .[T]he Court concluded, without limiting its reasoning, that unincorporated unions were § 1983 'persons.'. . . In keeping with a broad reading of Allee, most federal courts to have confronted the question of whether a non-union unincorporated association is a 'person' under § 1983 have answered in the affirmative. [collecting cases] Moreover, there is a longstanding and robust practice of treating unincorporated associations as proper § 1983 plaintiffs as a matter of course. The Eleventh Circuit and an array of other courts have evaluated § 1983 claims brought by all manner of unincorporated associations seeking to vindicate a diverse array of constitutional interests -- including the Orlando and Santa Monica local Food Not Bombs chapters -- without even hinting that they lacked a § 1983 cause of action. [collecting cases] . . . . The Tenth Circuit, which holds that unincorporated associations cannot sue under § 1983, stands alone against the trend of treating unincorporated associations as 'persons.'. . . At bottom, in enacting § 1983, Congress 'intended to give a broad remedy for violations of federally protected civil rights.'. . . Absent some indication from the Supreme Court that unincorporated associations are not 'persons,' we decline the City's invitation to upset longstanding practice recognizing that unincorporated associations are 'persons' that may sue under § 1983. . . We hold that FLFNB is a person that may bring suit under § 1983."); ***Rural Water District No. 1 v. City of Wilson***, 243 F.3d 1263, 1274 (10th Cir. 2001) (agreeing with Sixth Circuit in *South Macomb* and holding that water district, a quasi-municipality, could sue under § 1983 to enforce federal statutory rights).

E. Individual Capacity v. Official Capacity Suits

When a plaintiff names an official in his individual capacity, the plaintiff is seeking "to impose personal liability upon a government official for actions he takes under color of state law." ***Kentucky v. Graham***, 473 U.S. 159, 165 (1985). *See also* ***Community House, Inc. v. City of Boise,***

Idaho, 623 F.3d 945, 966 (9th Cir. 2010) ("We simply cannot find anything in the record that suggests that either the parties or the district court appreciate the difference between personal and official capacity § 1983 lawsuits. When asked during oral argument about the capacities of the defendants, CHI's counsel could not recall what was in the complaint. Thus, it is an appropriate time to republish the Supreme Court's explanation of this important distinction.") [The court goes on to reference language from *Kentucky v. Graham*].

See also ***Rossy v. City of Buffalo***, No. 23-7296-CV (L);, 2025 WL 816301, at *5 (2d Cir. Mar. 14, 2025)(not reported) ("A key distinction between official capacity and individual capacity Section 1983 claims is the availability of qualified immunity. '[B]ecause a claim asserted against a government official in his official capacity is essentially a claim against the governmental entity itself, the defense of qualified immunity, which may be available to individual defendants as they are sued in their individual capacities, is not applicable to claims against them in their official capacities.'. . . [I]f the district court correctly determined that no individual capacity claims under Section 1983 had been asserted in the complaint, then its qualified immunity analysis could not apply to the official capacity Section 1983 claims and that analysis would have been completely unnecessary. In other words, the district court's denial of summary judgment on the Fourth and Fourteenth Amendment claims against Tedesco and Acquino on qualified immunity grounds is inconsistent with its later determination that the complaint did not contain any individual capacity claims. In light of this discrepancy, and because we would not need to reach the appeal of the denial of qualified immunity in the absence of an individual capacity Section 1983 claim, we exercise pendent jurisdiction in order to first determine whether the district court properly concluded that Plaintiff did not assert individual capacity claims against Tedesco and Acquino. . . .The district court concluded that 'Plaintiff sued the officers in only their official capacities as acting under the color of law, despite captioning the suit as against the officers "Individually and in their representative capacities."'. . In reaching that conclusion, the district court erroneously suggested that the allegation that the officers acted 'under the color of law' means that they could not have acted in their individual capacities. To the contrary, '[p]ersonal-capacity suits ... seek to impose individual liability upon a government officer for actions taken *under color of state law*,' *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (emphasis added), precisely because the 'acts of officers in the ambit of their personal pursuits are plainly excluded' from Section 1983, *Screws v. United States*, 325 U.S. 91, 111 (1945). Here, the complaint clearly 'provided [Tedesco and Acquino] with sufficient notice of potential exposure to personal liability.'. . Not only did the complaint explicitly state that Plaintiff 'sues all defendants in both their individual and official capacities,'. . . it also sought punitive damages, 'which are only available in individual capacity suits,'. . . and it alleged facts sufficient to demonstrate that Tedesco and Acquino, 'acting under color of state law, caused the deprivation of a federal right[.]'. . Indeed, the district court determined that the 'color of state law' requirement had been 'met without dispute.'. . Moreover, Tedesco and Acquino never argued in the district court that they had not been sued in their individual capacity, and the fact that they moved for summary judgment on qualified immunity grounds, which only applies to individual capacity claims, confirmed that they were on notice of the individual capacity claims in the complaint. In sum, the district court erred in concluding that Plaintiff failed to sue Tedesco and

Acquino in their individual capacities."); ***Rashada v. Flegel***, No. 23-1674, 2024 WL 1367436, at *3, *5 (6th Cir. Apr. 1, 2024) (not published) ("Rashada's complaint explicitly states that he is suing Flegel and Morgan in their official capacities. The form complaint contained a prompt asking '[o]fficial and/or personal capacity?', and Rashada responded 'suing official.'. . To be sure, as a *pro se* litigant, Rashada may not have known the import of the prompt on the form. Moreover, his response indicates that he may have meant to merely express that he was suing two individuals who are also officials in the correctional facility. Nevertheless, the ultimate inquiry we make when conducting the course of proceedings test is whether the defendants have sufficiently been put on notice that they will need to defend themselves in their individual capacity. . . . When a complaint specifically identifies that the plaintiff brings official capacity claims, defendants will not be on notice of an individual capacity claim against them. . . And, although this Court has stated in an unpublished opinion that '[t]o the extent doubt persists' in evaluating the factors for the course of proceedings test, 'this doubt should be resolved in' the *pro se* plaintiff's favor, Rashada's clear statement of capacity in his complaint does not leave room for doubt. . . Thus, the district court did not err in construing his complaint as asserted against Defendants in their official capacities. . . .In this case, the district court acknowledged that '[i]f Plaintiff had named Defendants in their personal capacities, [it] would not dismiss this matter on screening, as Plaintiff has stated a plausible Eighth Amendment excessive force claim.'. . That is, but for a procedural pleading deficiency in Rashada's *pro se* complaint, the district court would have found that he stated a claim for relief as to at least one of his claims. Ordinarily, a plaintiff would have the opportunity to cure such a procedural deficiency without court involvement. Indeed, had the deficiency been raised by Defendants in response to Rashada's complaint after having been served—or even if Rashada later discovered it on his own—he would have been entitled to amend his complaint 'once as a matter of course' within 21 days of serving it or 21 days after being served with a responsive pleading or motion to dismiss. . . We are aware of no authority suggesting that PLRA screening is meant to foreclose this normal operation of Rule 15. Given Rashada's *pro se* status in the district court and the highly technical nature of pleading official and personal capacity claims, in the 'interest of justice,' Rashada should be permitted to amend his complaint and pursue his claims against Defendants in their proper capacities."); ***Does v. Whitmer***, 69 F.4th 300, 306 & n.6 (6th Cir. 2023) ("Despite the Supreme Court's repeated attempts at clarification, the distinction between individual- and official-capacity suits 'continues to confuse lawyers and confound lower courts.'[6] **[fn.6:** Few of our sister circuits have proposed tests for distinguishing between individual- and official-capacity actions. . . These tests accentuate rather than resolve the difficulty of distinguishing between the two categories of suits and may, in part, run counter to the Supreme Court's guidance in *Hafer* and *Lewis*.**]** 'We need not wade into this swamp, however, because a close reading of the plaintiffs' complaint makes clear that plaintiffs have failed to state a claim against the ... [d]efendants in their individual capacities.'"); ***Tran v. City of Holmes Beach***, No. 19-13470, 2020 WL 4036588, at * ___ n.3 (11th Cir. July 17, 2020) (not reported) ("The City and the Department assert, as another reason why the third amended complaint is a shotgun pleading, that the Hazens have failed to specify in what capacity many of the defendants are being sued. The Hazens allege that they are suing the unnamed city and state officials in their 'official *or* individual capacity.' . . . That is a failing, the argument goes, because it affects how those officials must

defend against the Hazens' claims: in an individual-capacity claim a defendant may assert the defense of qualified immunity, . . . while in an official-capacity claim the plaintiff must establish that a governmental 'policy or custom' was behind the alleged violation of federal law, *see Hafer v. Melo*, 502 U.S. 21, 25 (1991). That may (or may not) be a reason to dismiss a complaint as a shotgun pleading. A number of district courts in this Circuit have ruled that it is. [collecting cases] But we need not decide that question because multiple grounds for dismissal are not required."); ***Enoch v. Hamilton County Sheriff's Office***, No. 19-3428, 2020 WL 3100192, at *3 (6th Cir. June 11, 2020) (not reported) ("[S]tate officials sued in their individual capacities may not avail themselves of the State's sovereign immunity. *See Hafer v. Melo*, 502 U.S. 21, 31 (1991). Here, Enoch and Corbin sued the Deputies for money damages in their individual capacities. . . Therefore, Defendants-Appellants' defense of immunity under the Eleventh Amendment fails as a matter of law."); ***Gordon v. Schilling***, 937 F.3d 348, 362 (4th Cir. 2019) ("[T]he defendants assert that Amonette can be held liable only in his official capacity for creating and enforcing the challenged policies. We disagree. The defendants are correct that Gordon pursues a deliberate indifference claim against Amonette in his personal capacity in that Gordon 'seek[s] to impose personal liability' on Amonette for actions that he took 'under color of state law.'. . The defendants are incorrect, however, in their assertion that a person injured by an unconstitutional policy is limited to an official-capacity claim against the official who created or enforced that policy. [collecting cases] For the aforementioned reasons, we are satisfied that genuine issues of material fact exist as to Gordon's deliberate indifference claim against Amonette."); ***United Pet Supply, Inc. v. City of Chattanooga, Tenn.,*** 768 F.3d 464, 484 & n.3 (6th Cir. 2014) ("We have always understood qualified immunity to be a defense available only to individual government officials sued in their personal capacity. 'As qualified immunity protects a public official in his individual capacity from civil damages, such immunity is unavailable to the public entity itself.'. . That McKamey is a private entity acting in a governmental capacity does not change the unavailability of qualified immunity as a defense in an official-capacity suit. Just as the City of Chattanooga cannot assert qualified immunity as a defense against an official-capacity suit, neither can Walsh, Nicholson, Hurn, or McKamey. . . . We note that in *Bartell* we permitted a non-profit entity to assert qualified immunity in a case where it was not specified whether the defendants were sued in their official or individual capacity. . . Because we previously permitted a corporate defendant to assert qualified immunity as a defense to an individual-capacity suit, . . . and because permitting an assertion of qualified immunity as a defense to an official-capacity suit would conflict with clear Supreme Court precedent, we presume that *Bartell* involved an assertion of qualified immunity only in the defendants' individual capacity. A handful of other circuits have permitted private corporations to assert qualified immunity, but all of the cases were similarly unclear as to whether the suit was in the corporation's personal capacity or official capacity. [collecting cases]"); ***Benison v. Ross***, 765 F.3d 649, 665 (6th Cir. 2014) ("[P]ersonal immunity defenses, such as absolute immunity or qualified immunity, are not available to government officials defending against suit in their official capacities. *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985). The Benisons' surviving claims are based solely on actions taken by CMU as an entity. Although President Ross, Provost Shapiro, and Dean Davison discussed the decision to file a lawsuit against Kathleen to seek recovery of her sabbatical pay, it was CMU, not its individual administrators, that

had a legally enforceable contract right. Thus, CMU as an entity filed the lawsuit against Kathleen in state court. Moreover, there is no evidence that any of the individual defendants participated in the decision to place a hold on Christopher's transcript. As with the filing of the lawsuit, it was CMU as an entity that held Christopher's transcript because of his outstanding tuition balance. Accordingly, President Ross, in his official capacity as a representative of CMU, is the only defendant against which the Benisons may proceed. Because public officials may not assert qualified immunity as a shield in their official capacities, no defendant has the capacity to claim qualified immunity as a defense. Therefore, the Benisons' claims based on CMU's decision to file a lawsuit against Kathleen and to place a hold on Christopher's transcript were not properly dismissed on summary judgment as against President Ross in his official capacity."); ***Essex v. County of Livingston***, No. 11–2246, 2013 WL 1196894, *2-*4 (6th Cir. Mar. 25, 2013) (unpublished) ("As an initial matter, it seems that this area of the law has confused the parties involved in this case. In the instant case, the § 1983 claim against Bezotte is asserted against him in his individual capacity. An individual-capacity claim is distinct from a claim against a defendant in his official capacity. . . The former claim may attach personal liability to the government official, whereas the latter may attach liability only to the governmental entity. . . In other words, an official-capacity claim is merely another name for a claim against the municipality. . . Claims asserted against the municipality are not entitled to the qualified-immunity defense and, thus, such claims cannot be resolved on interlocutory appeal unless they are necessarily resolved by our qualified-immunity determination on the individual-capacity claims. . .In a case such as this, where the supervisor is also the policymaker, an individual-capacity claim may appear indistinguishable from an official-capacity or municipal claim, but these failure-to-train claims turn on two different legal principles.") [*see* post-*Iqbal* cases on supervisory liability, *infra*] *See also* ***Phillips v. City of Cincinnati***, No. 1:18-CV-541, 2019 WL 2289277, at *6 (S.D. Ohio May 29, 2019) ("The Court agrees with the City that Mayor Cranley and City Solicitor Muething are not proper defendants for this claim because the raison d'etre of *Monell* is to impose liability on a *municipality* under certain circumstances—not individuals. Even if Mayor Cranley or City Solicitor Muething were found to have instituted an unconstitutional policy, liability under *Monell* would fall to the City. Here, Plaintiffs' *Monell* claims will continue against the City, but *Monell* claims against Mayor Cranley or City Solicitor Muething in their individual capacities are improper. . . Moreover, to the extent that Plaintiffs bring *Monell* claims against Mayor Cranley and City Solicitor Muething in their official capacities, the claims are properly construed as against the City. . . Accordingly, Plaintiffs' motion to amend is denied to the extent that the Third Amended Complaint seeks to add *Monell* claims against Mayor Cranley and City Solicitor Muething.")

The Eighth Circuit, sitting en banc, has jettisoned its "clear statement" test and joined the other circuits in adopting the "course of proceedings" test to determine the capacity in which an official is being sued when it is unclear from the language of the complaint. *See* ***S.A.A. v. Geisler***, 127 F.4th 1133, 1136, 1138-39 (8th Cir. 2025) (en banc) ("S.A.A. petitioned for rehearing *en banc* so that we may reconsider our approach to determining the capacity in which a § 1983 defendant is sued when the complaint does not specify. Specifically, S.A.A. urges us to reject the clear statement rule in favor of the course of proceedings test used in all the other circuits. S.A.A.

contends that, under the course of proceedings test, her claims should be construed as against Geisler in her individual capacity, so the grant of summary judgment should be reversed. . . . The clear statement rule conflicts with the Federal Rules of Civil Procedure, is in tension with Supreme Court decisions, and unwarrantedly sets us alone among the courts of appeals. For each of these reasons, we now reject the clear statement rule. . . . Faithfully applying Supreme Court precedent and the Federal Rules of Civil Procedure, we join our sister circuits in rejecting the clear statement rule in favor of the course of proceedings test for determining the capacity in which a § 1983 defendant is sued. . . . Accordingly, the district court on remand should determine whether the course of proceedings indicates S.A.A.'s intent to sue Geisler in her individual capacity. . . Our sister circuits can offer helpful guidance. The fundamental question is whether the course of proceedings has put the defendant 'on notice that she was being sued in her individual capacity' and that 'her personal liability was at stake.'. . 'Throughout, the underlying inquiry remains whether the plaintiff's intention to hold a defendant personally liable can be ascertained fairly.'. . Relevant factors include, but are not limited to, how early in the litigation the plaintiff first specified individual capacity claims, whether the plaintiff's complaint included a prayer for punitive damages, and whether the defendant declined to raise a qualified immunity defense. . . The earlier that a plaintiff indicates that she intends to pursue individual capacity claims, the more compelling.")

See also ***Sanders v. Newton***, 117 F.4th 1059, 1065-66 (8th Cir. 2024) ("Nunley admits that she failed to 'use the magic words "individual-capacity" in the [c]omplaint.'. . Nonetheless, she maintains that she brought 'claims ... against Defendant Newton in his individual capacity and against the members of the Kansas City Board of Police Commissioners as a *Monell* style claim.'. . More specifically, she notes that she 'explicitly ma[de] a municipal liability claim' against the Board and 'ma[de] a claim against [Officer] Newton specifically for his actions alleged to have resulted in a Fourth Amendment violation.'. . She asks this court to liberally construe her amended complaint so that the counts against Officer Newton and the Board are not duplicative. She further points out that she 'explicitly ... requested leave to Amend in her Response [in Opposition to Officer Newton's Motion for Summary Judgment] to explicitly state it was an individual capacity claim.'. . . We agree with Nunley that *Murphy* resolves the Eleventh Amendment issue in this case. In his answer to Nunley's first amended complaint, Officer Newton asserted that the § 1983 'claim against [him] in his individual capacity [is] barred by qualified immunity.'. . He separately argued that the § 1983 claim 'against [him] in his official capacity is barred by 11th Amendment immunity.'. . Thus, Officer Newton had 'sufficient notice [he was] being sued in [his] personal capacit[y].'. . And, like the defendants in *Murphy*, it was not until Officer Newton filed his motion for summary judgment that he first argued that Nunley brought only official-capacity claims against him. . . In her response in opposition to the motion for summary judgment, Nunley requested leave to amend the complaint, stating: To the extent the [c]ourt requires, [Nunley] seeks leave to amend the [c]omplaint to specifically assert an individual capacity claim [against Officer Newton]. Such an amendment is in the interest of justice and does not prejudice [Officer Newton] in any way as all of the relevant issues have been addressed in discovery and are discussed in the instant motion. . . . As in *Murphy*, the district court did not rule on Nunley's request. . . Nunley's

request to seek leave to amend her complaint is comparable to the plaintiff in *Murphy* who filed a separate motion for leave to amend his complaint. . . As in *Murphy*, 'we are confident that the district court would grant [Nunley] leave to amend the complaint to state personal-capacity equal protection claims if we remanded for consideration of that issue,' given that the district court has already analyzed Officer Newton's request for qualified immunity. . . Further, 'given the liberality of Fed. R. Civ. P. 15(a) regarding amendments, granting such leave to amend would not abuse the court's discretion.'. . We deem Nunley's complaint amended."); ***Young Apartments, Inc. v. Town of Jupiter, Fla***., 529 F.3d 1027, 1047 (11th Cir. 2008) ("The main concern of a court in determining whether a plaintiff is suing defendants in their official or individual capacity is to ensure the defendants in question receive sufficient notice with respect to the capacity in which they are being sued. . . . [W]hile it is 'clearly preferable' that a plaintiff state explicitly in what capacity defendants are being sued, 'failure to do so is not fatal if the course of proceedings otherwise indicates that the defendant received sufficient notice.' *Moore v. City of Harriman*, 272 F.3d 769, 772 (6th Cir.2001). In looking at the course of proceedings, courts consider such factors as the nature of plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity which serve as an indicator that the defendant had actual knowledge of the potential for individual liability. . . In examining the course of proceedings in this case, we are persuaded that Young Apartments raised claims against the individual defendants in their personal capacities, and that the individual defendants were aware of their potential individual liability."); ***Powell v. Alexander,*** 391 F.3d 1, 22 (1st Cir. 2004) ("We now join the multitude of circuits employing the 'course of proceedings' test, which appropriately balances a defendant's need for fair notice of potential personal liability against a plaintiff's need for the flexibility to develop his or her case as the unfolding events of litigation warrant. In doing so, we decline to adopt a formalistic 'bright-line' test requiring a plaintiff to use specific words in his or her complaint in order to pursue a particular defendant in a particular capacity. However, we do not encourage the filing of complaints which do not clearly specify that a defendant is sued in an individual capacity. To the contrary, it is a far better practice for the allegations in the complaint to be specific. A plaintiff who leaves the issue murky in the complaint runs considerable risks under the doctrine we adopt today. Under the 'course of proceedings' test, courts are not limited by the presence or absence of language identifying capacity to suit on the face of the complaint alone. Rather, courts may examine 'the substance of the pleadings and the course of proceedings in order to determine whether the suit is for individual or official liability.'"); ***Moore v. City of Harriman***, 272 F.3d 769, 773, 775 (6th Cir. 2001) (en banc) ("The officers in this case urge us to read *Wells* as adopting the Eighth Circuit's rule presuming an official capacity suit absent an express statement to the contrary. They argue that to withstand a motion to dismiss, *Wells* requires complaints seeking damages for alleged violations of § 1983 to contain the words 'individual capacity,' regardless of whether the defendants actually receive notice that they are being sued individually. Although we acknowledge that *Wells* contains language supporting this reading, we find the more reasonable interpretation to be that § 1983 plaintiffs must clearly notify defendants of the potential for individual liability and must clearly notify the court of its basis for jurisdiction. When a § 1983 plaintiff fails to affirmatively plead capacity in the complaint, we then look to the course of

proceedings to determine whether *Wells'*s first concern about notice has been satisfied. . . . In conclusion, we reaffirm *Wells'*s requirement that § 1983 plaintiffs must clearly notify any defendants of their intent to seek individual liability, and we clarify that reviewing the course of proceedings is the most appropriate way to determine whether such notice has been given and received . . . . "); ***Biggs v. Meadows***, 66 F.3d 56, 59-60 (4th Cir. 1995) (adopting the view of the majority of circuits, including the Second, Third, Fifth, Seventh, Ninth, Tenth and Eleventh, that looks to "the substance of the plaintiff's claim, the relief sought, and the course of proceedings to determine the nature of a § 1983 suit when a plaintiff fails to allege capacity. [citing cases] . . . . Because we find the majority view to be more persuasive, we hold today that a plaintiff need not plead expressly the capacity in which he is suing a defendant in order to state a cause of action under § 1983.").

See also ***Weaver v. Kelley***, No. 21 CV 203, 2023 WL 8701073, at *5–6 (N.D. Ill. Dec. 15, 2023) (" '[A] civil rights plaintiff must specify whether suit is brought against the defendant in his official capacity or in his individual capacity. This is not an insignificant distinction.' *Hill v. Shelander*, 924 F.2d 1370, 1372 (7th Cir. 1991). Weaver specified in the caption of his complaint, in the preamble, and in the prayer for relief that he was suing the IDOC defendants in their official capacities. . . When there is uncertainty about whether a plaintiff sued a government defendant in their official or personal capacity, a court looks at the language of the complaint, the conduct alleged, and how the parties treated the suit, including the type of damages, to determine the nature of liability. . . Weaver argues that his complaint's allegations against three of the IDOC defendants were enough to put those defendants on notice that he intended to sue them in their individual capacity. Weaver alleges that those three were'"responsible for calculating Weaver's outdate, communicating the outdate to Will County [jail], and facilitating the transfer, processing, and release of Weaver individually, jointly, and in conjunction with [the other two IDOC defendants].'. . These allegations are about the roles those defendants played in IDOC's process, they do not alert the three defendants that Weaver is suing them in their individual capacity. . . Weaver's complaint states that the IDOC defendants were responsible for creating the policies and customs for calculating sentence term, . . . he alleges that the defendants were acting within the scope of their employment, . . . and does not describe any individual tortious behavior, all of which indicate the suit was brought against the IDOC defendants in their official capacities. . . Furthermore, the parties have thus far treated the suit as a suit against the IDOC defendants in their official capacity—plaintiff did not ask for punitive damages, nor did any of the defendants raise a qualified immunity defense as one might expect if the complaint was alleging personal liability on the part of the IDOC defendants. . . Weaver seeks compensatory damages, and while that could point to a personal capacity suit, the conduct at issue and the fact that Weaver listed the defendants as being sued in their official capacities override that inference. . . Given the language of the complaint, the conduct alleged, how the parties have treated the suit, and the nature of the damages sought, this suit is against the IDOC defendants in their official capacities. As such, there is no possibility of § 1983 liability against the IDOC defendants and summary judgment is appropriate. . . .Because § 1983 liability does not lie against a state or a state official sued in their official capacity and Weaver sued the IDOC defendants in their official capacity, judgment in favor of the IDOC is appropriate

as a matter of law."); ***Cocroft v. Smith***, 95 F.Supp.3d 119, 128 (D. Mass. 2015) ("In this case, the complaint does not specify whether Officer Smith was being sued in his individual or official capacity. The factual allegations against Officer Smith reference actions taken by him in his capacity as a police officer and Cocroft made no demand for punitive damages. Nonetheless, Officer Smith filed a summary judgment motion asserting qualified immunity as a defense. The issue was briefed by both parties and this Court issued an Order finding that at that stage of the proceedings, he was not entitled to qualified immunity. Clearly, Officer Smith was operating under the assumption that he was being sued individually. He prepared for and proceeded to trial without suggesting otherwise. Under these circumstances, I find that the claims against Officer Smith were properly treated as claims against him in his individual capacity."); ***Gaetani v. Hadley***, No. CIV.A. 14-30057-MGM, 2015 WL 113900, at *3 (D. Mass. Jan. 8, 2015) ("Defendants erroneously interpret Plaintiff's frequently-used phrase, 'under color of state law,' to essentially mean that Plaintiff's complaint indicates that he intended to sue Defendants only in their official capacities. In contrast to Defendants' interpretation of this phrase, Black's Law Dictionary defines 'color of law' to mean '[t]he appearance or semblance, *without the substance*, of a legal right.'. . Under the standard applied at this stage, the court interprets the complaint in accordance with this definition. . .To the extent that the Plaintiff intended to sue Defendants in their official capacity (if he did at all), Plaintiff's claims are dismissed pursuant to the doctrine of sovereign immunity. . . However, since the complaint may also fairly be interpreted as bringing claims against Defendants as individuals, it will hereinafter be read to allege claims against Defendants solely in their individual capacities."); ***Whitehurst v. Harris***, No. 6:14-CV-01602-LSC, 2015 WL 71780, at *8 n.5 (N.D. Ala. Jan. 6, 2015) ("The complaint states that Harris and Brown are being sued only in their individual capacities, but then alleges that they are 'final policymakers.' The term 'final policymaker' is applicable only when governmental officials are sued in their *official* capacities in an effort to impose liability against a government entity. . . Again, this Court reads the complaint as alleging a supervisory liability claim, since Whitehurst does not dispute such a characterization."); ***Jimenez v. Brown***, No. 5:13-CV-877-DAE, 2014 WL 7499451, at *7-8 (W.D. Tex. Jan. 8, 2014) ("A supervisory official can also be liable in his official capacity if he is the type of 'final policymaker' whose decisions represent the decisions of the county. . . In that instance, the case is effectively a suit against the municipality. . .Because Jimenez does not identify whether he brings claims against Brown in his individual or official capacity, the Court must look to the course of the proceedings to determine the nature of his claims. . . Factors relevant to the inquiry include the substance of the complaint, the nature of relief sought, and statements in dispositive motions and responses. . . Here, the course of proceedings demonstrates that claims alleged against Brown are official capacity claims. The claims against Brown are significantly different than those alleged against the other defendants: while Jimenez alleges conduct-based claims against the other defendants, he alleges policy-based claims against Brown. . . In their Motion for Summary Judgment, Defendants address their liability in both their individual and official capacities. In addressing the individual capacity claims, Defendants limit their discussion to conduct-based claims, rather than the policy-based claims. . . Defendants address the policy claims only to the extent that they impact municipal liability. . . While Jimenez has proceeded pro se, his Response does not suggest that Brown should be liable in his individual capacity. Given the

nature of the claims and the manner in which they have been addressed by the parties, the Court construes the claim against Brown to be a claim against Brown in his official capacity."); ***Daskalea v. District of Columbia***, 227 F.3d 443, 448 (D.C. Cir. 2000) ("Neither the complaint nor any other pleading filed by plaintiff indicates whether Moore was charged in her official or her individual capacity. In some circuits, that would be the end of the matter, as they require a plaintiff who seeks personal liability to plead specifically that the suit is brought against the defendant in her individual capacity. . . Although it has not definitively resolved the issue, . . . the Supreme Court has typically looked instead to the 'course of proceedings' to determine the nature of an action. . . Following the Supreme Court's lead, this circuit has joined those of its sisters that employ the 'course of proceedings' approach."); ***Rodriguez v. Phillips***, 66 F.3d 470, 482 (2d Cir. 1995) ("Where, as here, doubt may exist as to whether an official is sued personally, in his official capacity or in both capacities, the course of proceedings ordinarily resolves the nature of the liability sought to be imposed."); ***Hill v. Shelander***, 924 F.2d 1370, 1374 (7th Cir. 1991) ("[W]here the complaint alleges the tortious conduct of an individual acting under color of state law, an individual capacity suit plainly lies, even if the plaintiff failed to spell out the defendant's capacity in the complaint."). *Accord* ***Miller v. Smith***, 220 F.3d 491, 494 (7th Cir. 2000); ***Shabazz v. Coughlin***, 852 F.2d 697, 700 (2d Cir.1988) ("Notwithstanding the complaint's ambiguous language, ... Shabazz's request for punitive and compensatory damages, coupled with the defendants' summary judgment motion on qualified immunity but not Eleventh Amendment grounds, suggests that the parties believed that this action is a personal capacity suit."); ***Joyce v. Town of Dennis***, Civil Action No. 08-10277-NMG, 2010 WL 1383178, at *5 (D. Mass. Mar. 30, 2010) ("With respect to the capacity argument, when a complaint does not specify the capacity in which an individual is sued, the First Circuit invokes a 'course of proceedings test' under which courts are not limited by the presence or absence of language identifying capacity to suit [sic] on the face of the complaint alone. Rather, courts may examine the substance of the pleadings and the course of proceedings in order to determine whether the suit is for individual or official liability. . . This case and Joyce's complaint focus on a Town policy and practice invoked to deny her entry into the May, 2007 men's tournament. . . Moreover, Joyce explicitly refers, in Counts II-V of her complaint, to the individual defendants as 'state actors'. Thus, although some factors are counter-indicative, Joyce's claims are best described as targeting the defendants in their official capacities and, therefore, are merely duplicative of Count I."); ***Pollock v. City of Astoria***, No. CV 06-845, 2008 WL 2278462, at *5, *6 (D. Or. May 28, 2008) ("Here, the complaint does not expressly allege in which capacity Plaintiffs intend to sue Defendant Officers, but its construction gives the court no reason to depart from this circuit's controlling presumption in favor of personal capacity § 1983 claims. First, Plaintiffs separate their claims against the City of Astoria and Defendant Officers into two discrete sections . . . Construing Plaintiffs' claims against Defendant Officers as official capacity claims would render this intentional division superfluous. It would also render the claims themselves, as recited in the complaint, otherwise superfluous. Second, Plaintiffs name Defendant Officers personally in the complaint and seek money damages. . . . Third, the complaint does not explicitly allege that the claims against Defendant Officers are made in their official capacity. This activates the presumption that Plaintiffs' claims against Defendant Officers are personal capacity claims . . . . Therefore, Plaintiffs' claims against Defendant Officers are made in

their personal capacity and not barred by the Eleventh Amendment prohibition against official capacity suits.").

See also ***Sanders-Burns v. City Of Plano***, 594 F.3d 366, 373, 377, 378, 380 (5th Cir. 2010) ("The question then is whether Sanders-Burns's amended complaint, which only replaced the statement that Cabezuela was sued in his official capacity with the statement that Cabezuela was sued in his individual capacity, relates back to Sanders-Burns's original complaint for statute of limitations purposes under Rule 15(c). . . We hold that it does. . . . After examining the cases decided by the Sixth, Seventh, Eleventh, and D.C. Circuits, we are convinced that the different outcomes result from the specific circumstances presented in each case, as one would expect where the core concern is adequacy of notice. . . .Here, Cabezuela had actual knowledge of the action at all times because he was named as a defendant in the original complaint and was personally served within a week of the filing of the original complaint. . . .Further, the facts here indicate that Cabezuela is not prejudiced in defending against the individual capacity claims. First, the answer to the complaint filed by the Defendants asserts the affirmative defense of qualified immunity – a defense against an individual capacity lawsuit. The inclusion of the affirmative defense of qualified immunity is important because it suggests that the attorney representing Plano and Cabezuela, in his official capacity, is likely to have communicated to Cabezuela that he may have been sued in his individual capacity. . . . After conducting a side-by-side comparison of the original and amended complaints, we note that the only modification between the original and amended complaint is the substitution of the word 'individual' for 'official.' As such, we determine that, except for the mistake in paragraph eight, Sanders-Burns's original complaint alleges suit against Cabezuela in his individual capacity."); ***Garcia v. Dykstra***, 260 F. App'x 887, 895 (6th Cir. 2008) ("That Smutz and Pavlige asserted a qualified immunity defense in both the answer and the amended answer distinguishes this case from *Shepherd*, making it more factually similar to *Moore*. The qualified immunity defense shows that they were in fact on notice of the possibility of an individual capacity § 1983 claim by the time they filed both the original and the amended answer."); ***Rodgers v. Banks,*** 344 F.3d 587, 594, 595(6th Cir. 2003) ("Like the plaintiff in *Moore*, Plaintiff did request compensatory and punitive damages in the original complaint, which we have held provides some notice of her intent to hold Defendant personally liable. . . However, unlike the plaintiff in *Moore*, the caption on Plaintiff's complaint listed Defendant's name and her official title, and specifically stated that Defendant was being sued in her 'official capacity as the representative of the State of Ohio department of Mental Health.'. . .The amended complaint's caption still lists Defendant's name and official title, and the amended complaint incorporates by reference paragraphs 2-7 of the original complaint, including the statement that Defendant was being sued in her official capacity. The amended complaint is otherwise silent as to whether Defendant is being sued in her official or individual capacity. Moreover, Defendant has not moved for summary judgment on the issue of qualified immunity, yet another indication that Defendant was not adequately notified that she was being sued in her individual capacity. . . Having applied the course of proceedings test, we hold that insufficient indicia exists in the original complaint and amended complaint suggesting that Defendant was on notice that she was being sued in her individual capacity. Therefore, the Eleventh Amendment bars Plaintiff's suit to the extent that she

seeks money damages. Plaintiff's claim is hereafter limited to seeking other relief arising under 42 U.S.C. § 1983."); ***Shepherd v. Wellman,*** 313 F.3d 963, 966-69 (6th Cir. 2002) ("Where no explicit statement appears in the pleadings, this Circuit uses a 'course of proceedings' test to determine whether the § 1983 defendants have received notice of the plaintiff's intent to hold them personally liable. . . Under this test, we consider the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims for qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability. . .We also consider whether subsequent pleadings put the defendant on notice of the capacity in which he or she is being sued. . . . In the instant matter, the plaintiffs failed to specify in their complaint that they were suing Wellman as an individual, rather than in his official capacity. The plaintiffs later amended their complaint, but the amended complaint also failed to specify the capacity in which the plaintiffs were suing Wellman. The plaintiffs filed a second motion to amend, in which they specified that they were suing Wellman as an individual. The magistrate judge denied the motion to amend, and the district court affirmed. . . .We think the magistrate judge had good reason to deny leave to file a second amended complaint, and that the denial was not an abuse of discretion. . . . [T]he plaintiffs' request for monetary damages is the only indication that they might be suing Wellman in his individual capacity. Although *Moore* recognizes that the request for monetary damages is one factor that might place an individual on notice that he is being sued in his individual capacity, we do not read that case as holding that a request for money damages is alone sufficient to place a state official on notice that he is being sued in his individual capacity. To so hold would be inappropriate, because the rest of the complaint so strongly suggests an official capacity suit. Furthermore, unlike in *Moore*, there were no subsequent pleadings in this case that put the defendant on notice that he was being sued as an individual. For these reasons, we conclude that the district court's dismissal of the § 1983 action against Wellman was proper."); ***Brown v. Karnes***, No. 2:05-CV-555, 2005 WL 2230206, at *3 (S.D. Ohio Sept. 13, 2005) ("Plaintiff's Complaint does not specify whether he is suing Sheriff Karnes in his official capacity or his individual capacity. . . However, because neither the face of the Complaint nor the 'course of proceedings' indicates that Plaintiff is suing the Sheriff in his individual capacity, the Court finds that the Sheriff has been sued only in his official capacity. . . As such, the § 1983 claim against Sheriff Karnes is the equivalent of a claim against Franklin County, and is governed by [*Monell*].").

Naming a government official in his official capacity is the equivalent of naming the government entity itself as the defendant, and requires the plaintiff to make out *Monell*-type proof of an official policy or custom as the cause of the constitutional violation. *See, e.g.,* ***Potochney v. Doe,*** No. 02 C 1484, 2002 WL 31628214, at *3 (N.D. Ill. Nov. 21, 2002) (not reported) ("[A] suit against a Sheriff in his official capacity is a suit against the Sheriff's Department itself. . . Plaintiffs are not required to show any personal involvement of Sheriff Ramsey in such an official capacity case."). While qualified immunity is available to an official sued in his personal capacity, there is no qualified immunity available in an official capacity suit.

See ***Hafer v. Melo***, 112 S. Ct. 358, 361-62 (1991) (personal and official capacity suits distinguished). *See also* ***Petty v. County of Franklin, Ohio***, 478 F.3d 341, 349 (6th Cir. 2007) ("There simply is no evidence that Sheriff Karnes was in any way directly involved in what happened to Petty, either initially when he was beaten in the jail cell, or later when his surgery was delayed and his requests for liquid food were allegedly not met. . . . Thus, if Petty's suit is against Karnes in his personal capacity, Petty fails to meet the causation requirements laid out in *Taylor*. To the extent that Petty's suit is against Karnes in his official capacity, it is nothing more than a suit against Franklin County itself. . . And as Defendants point out, Petty was unable to come forward with evidence – beyond the bare allegations in his complaint – showing that a Franklin County custom or policy was the moving force behind the violation of his constitutional rights."); ***Med Corp., Inc. v. City of Lima***, 296 F.3d 404, 417 (6th Cir. 2002) ("The district court reasoned that an individual capacity suit could not be maintained against the Mayor 'because 1) the Mayor never acted in his individual capacity, and 2) the Fourteenth Amendment does not apply to individual actions' because '[t]he Fourteenth Amendment protects property interest[s] only from a deprivation by state action.'. . . [T]he fact that Mayor Berger acted in his official capacity as mayor does not immunize him from being sued as an individual under § 1983. The district court's second reason for rejecting the individual capacity suit – that the Fourteenth Amendment protects only against actions of the state – also conflicts with *Hafer*. The state action requirement of the Fourteenth Amendment is satisfied by showing that a state official acted 'under color of' state law, as when the official exercises authority conferred by a state office. . . The state action requirement does not limit civil rights plaintiffs to suits against only government entities. The district court's interpretation of 'state action' would eliminate all § 1983 suits against individual state officers."); ***Ritchie v. Wickstrom***, 938 F.2d 689 (6th Cir. 1991) (clarifying confusion between official capacity and individual capacity).

The official capacity suit is seeking to recover compensatory damages from the government body itself. *See* ***Brandon v. Holt***, 469 U.S. 464, 471-72 (1985); ***Kentucky v. Graham***, 473 U.S. 159 (1985); ***Letcher v. Town of Merrillville***, No. 2:05 cv 401, 2008 WL 2074144, at *6 (N.D. Ind. May 13, 2008) ("In the case of law enforcement defendants, meeting the under color of law requirement invariably will include similar allegations that the defendants were performing official duties, in uniform, or driving marked cars. . . The defendants' argument improperly conflates the requirement that a plaintiff allege that the defendants acted under color of law with the determination of their capacity in the suit. Accordingly, the court concludes that the defendants have been sued in their individual capacities."); ***Chute v. City of Cambridge,*** 201 F.R.D. 27, 29 (D. Mass. 2001) ("It is well settled that filing a civil action against a city official in that person's official capacity is simply another way of suing the city itself. When a plaintiff brings a civil action against a governmental agency, and against a person who is an official of the agency in that person's official capacity, it is critical that the parties be properly identified to provide complete clarity as to who the parties are and in what capacity they are being sued.").

To avoid confusion, where the intended defendant is the government body, plaintiff should name the entity itself, rather than the individual official in his official capacity. *See, e.g.*, ***Leach***

v. Shelby County Sheriff, 891 F.2d 1241, 1245 (6th Cir. 1989) (prudent course for plaintiff who seeks to hold government entity liable for damages would be to name government entity itself to ensure requisite notice and opportunity to respond), *cert. denied*, 495 U.S. 932 (1990); ***Johnson v. Kegans***, 870 F.2d 992, 998 n.5 (5th Cir. 1989) (implying plaintiffs must expressly name governmental entity as defendant to pursue *Monell*-type claim), *cert. denied*, 492 U.S. 921 (1989); ***Pennington v. Hobson***, 719 F. Supp. 760, 773 (S.D. Ind. 1989) ("better practice is to make the municipal liability action unmistakably clear in the caption, by expressly naming the municipality as a defendant.").

Compare ***Asociacion De Subscripcion Conjunta Del Seguro DeResponsabilidad Obligatorio v. Flores Galarza,*** 484 F.3d 1, 26 (1st Cir. 2007), *reh'g and reh'g en banc denied* (1st Cir. 2007) ("Here, the complaint, in combination with the course of proceedings . . . establishes that Flores Galarza is being sued for damages in his personal capacity. If the JUA [Compulsory Liability Joint Underwriting Association of Puerto Rico, a Commonwealth-created entity] wishes to seek a personal judgment against Flores Galarza in a ruinous and probably uncollectible amount for actions that he took as the Commonwealth Treasurer to serve the interests of the Commonwealth, they are entitled to do that. . . . If such a judgment might induce the Commonwealth to indemnify Flores Galarza from the Commonwealth Treasury to spare him from ruin, that likelihood is irrelevant to the personal-capacity determination.") *with* ***Asociacion De Subscripcion Conjunta Del Seguro DeResponsabilidad Obligatorio v. Flores Galarza,*** 484 F.3d 1, 37 (1st Cir. 2007), *reh'g and reh'g en banc denied* (1st Cir. 2007) (Howard, J., concurring) ("The lead opinion concludes that a viable takings claim may exist against state officials acting in their individual capacities, but that Flores Galarza is entitled to qualified immunity because his withholding funds was reasonable in light of the unique circumstances present. . . I am not entirely convinced that federal takings claims may ever properly lie against state officials acting in their individual capacities.")**.**

See also ***Brooks v. Arthur***, 626 F.3d 194, 202 (4th Cir. 2010) ("Put simply, because the litigation landscape is materially different in a personal-capacity suit – as opposed to an official-capacity suit – the parties are not in privity."); ***Andrews v. Daw***, 201 F.3d 521, 523 (4th Cir. 2000) ("[A] government employee in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata.").

See also ***Solida v. McKelvey***, 820 F.3d 1090, 1093-94 (9th Cir. 2016) ("This appeal begins and ends with the threshold question of whether a *Bivens* action can provide the injunctive and declaratory relief that Roca Solida seeks against McKelvey in her individual capacity. In answering no, we join our sister circuits in holding that relief under *Bivens* does not encompass injunctive and declaratory relief where, as here, the equitable relief sought requires official government action. . . *Bivens* is both inappropriate and unnecessary for claims seeking solely equitable relief against actions by the federal government. By definition, *Bivens* suits are individual capacity suits and thus cannot enjoin official government action."); ***Evans v. Bayer***, 684 F.Supp.2d 1365, 1369 (S.D. Fla. 2010) ("An issue remains, however, concerning whether

injunctive relief can be sought against a defendant in his individual capacity if the act must be in his official capacity to have official consequences. The Court finds the answer to be no. Evans argues that the Court can compel Bayer to destroy the records in question and sanction those who inhibit his action. Bayer contends that the Court cannot compel him to act in violation of his employer's policies or state law. Bayer's first premise is dubious, his second may have merit. But in either event, the Court need not untangle this knot. Even if the Court could compel Bayer to act in his individual capacity, the compelled action would have no official consequences. The only decision the Court has found on point agrees. The District Court of the Eastern District of Pennsylvania wrote, '[w]e do not see how a court can order an officer in his personal capacity to take an official act.' *Barrish v. Cappy,* No. 06-837, 2006 WL 999974, at *4 (E.D.Pa. Apr. 17, 2006). Accordingly, Evans's demand for an injunction is DISMISSED WITHOUT PREJUDICE. Evans has leave to file an amended complaint naming the proper parties.").

For an interesting case raising the question of whether there should be individual liability for a constitutional violation where the official claims that budgetary constraints prevented compliance with the Constitution, *see* ***Peralta v. Dillard***, 744 F.3d 1076, 1082-84 (9th Cir. 2014) (en banc), *cert. denied,* 135 S. Ct. 946 (2015) ("Peralta would have had the jury ignore that there was no money or staff available to treat him immediately, and hold Brooks personally liable for failing to give Peralta care that Brooks would have found impossible to provide. Peralta claims that this approach is compelled by our decisions in *Jones v. Johnson,* 781 F.2d 769 (9th Cir.1986), and *Snow v. McDaniel,* 681 F.3d 978 (9th Cir.2012). . . .As an en banc court, we're not bound by either decision. Even if we were, it wouldn't help Peralta. In *Jones* and *Snow,* plaintiffs sought both money damages and injunctions. Neither case dealt with jury instructions; the question in both was whether the case could proceed at all. Lack of resources is not a defense to a claim for prospective relief because prison officials may be compelled to expand the pool of existing resources in order to remedy continuing Eighth Amendment violations. . . A case seeking prospective relief thus can't be dismissed simply because there is a shortage of resources. Damages are, by contrast, entirely retrospective. They provide redress for something officials could have done but did not. What resources were available is highly relevant because they define the spectrum of choices that officials had at their disposal. To the extent *Jones* and *Snow* can be read to apply to monetary damages against an official who lacks authority over budgeting decisions, they are overruled. . . .Peralta seeks only damages. Allowing the jury to consider the constraints under which an individual doctor operates in determining whether he is liable for money damages because he was deliberately indifferent doesn't mean that prisoners have no remedy for violations of their Eighth Amendment rights. For example, although prisoners can't sue states for monetary relief, they *can* sue for injunctions to correct unconstitutional prison conditions. . . Section 1983 also authorizes prisoners to sue municipal entities for damages if the enforcement of a municipal policy or practice, or the decision of a final municipal policymaker, caused the Eighth Amendment violation. . . A chronic shortage of resources may well amount to a policy or practice for which monetary relief may be available under *Monell,* but *Monell* claims can't be brought against states, which are protected by the Eleventh Amendment. *See, e.g., Quern v. Jordan,* 440 U.S. 332, 345 (1979). The prison where Peralta was held was, of course, run by the state. Our dissenting

colleagues would have the jury hold Brooks liable for delay in treatment caused by shortages beyond his control, on the theory that the state will wind up paying any damages award. According to the dissenters, this will give the state an incentive to improve prison conditions. . . But the state is protected from monetary damages by the Eleventh Amendment. We may not circumvent this protection by imputing the state's wrongdoing to an employee who himself has committed no wrong. The dissenters attempt an end run around the Eleventh Amendment by subjecting the state to precisely the kind of economic pressure against which the amendment protects it. We have no quarrel with the dissenters' view that Peralta may have suffered an Eighth Amendment violation. If the state provided insufficient resources to accord inmates adequate medical care, it could be compelled to correct those conditions. . . But such a lawsuit could provide no redress for past constitutional violations because the state is protected by sovereign immunity, 'a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.'. . Congress could abrogate this immunity, but it has not done so for cases brought under 42 U.S.C. § 1983. *See Quern,* 440 U.S. at 345. We decline to bring about by indirection what Congress has chosen not to do expressly.")

See also ***Zingg v. Groblewski*** , 907 F.3d 630, 638 (1st Cir. 2018) ("We are not aware of any authority. . .to support the proposition that there is a per se Eighth Amendment prohibition against corrections officials considering cost, even when considered only in the course of selecting treatment that is aimed at attending to an incarcerated person's serious medical needs. . . Thus, even if there were sufficient evidence in the record to show that Groblewski took cost into account in making his July 15 denial of Humira in favor of Dovonex, that evidence would not in and of itself provide a supportable basis for a finding of deliberate indifference, given what the record shows regarding what Groblewski knew about Zingg's condition, MPCH's treatment protocol for psoriasis, and the potential risks posed by Humira that topical medications do not pose.")

But see ***Peralta v. Dillard***, 744 F.3d 1076, 1089, 1092, 1093 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015) (Christen, J., with whom Rawlinson, M. Smith, and Hurwitz, JJ., join, and with whom Bybee, J, joins as to Parts I, II, and III, dissenting in part and concurring in part) (en banc) ("The decision announced today overturns more than thirty years of circuit precedent by holding that lack of resources is a defense to providing constitutionally inadequate care for prisoners. Because it will deny any remedy for prisoners who have suffered injuries due to prison officials' deliberate indifference and eliminates an important incentive for improving prison conditions, I respectfully dissent. . . . The majority assures us that prisoners will still be able to bring § 1983 claims if they seek injunctive relief and attempts to distinguish *Jones* and *Snow* on the basis that Peralta sought only money damages. But the principle in *Jones* and *Snow* was first articulated in *Spain,* which drew no distinction between the type of relief sought by the plaintiff. . . .[U]ntil today, we have never suggested that cost may be a defense to Eighth Amendment claims for damages. . . . .The rule articulated in *Spain*, *Jones*, and *Snow* recognizes that the constitutionally-required threshold for the humane treatment of prisoners is impossible to safeguard if prison officials are permitted to claim lack of resources as a defense. In the case of California prisons, there can be no doubt that chronic underfunding and overcrowding have

plagued prison administrators and the prison population for decades. . . The majority's decision will effectively prevent prisoners from bringing suits for damages against prison officials who have violated their Eighth Amendment rights by demonstrating deliberate indifference to serious medical needs: those who actually control prison budgets are immune from damage suits, *Tenney v. Brandhove*, 341 U.S. 367, 376–79 (1951) (providing absolute immunity for state legislators); and prison officials responsible for substandard care or conditions will be shielded by the newly-announced 'lack of resources' defense.")

See also ***Peralta v. Dillard***, 744 F.3d 1076, 1098-1101 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015) (Hurwitz, J., with whom Rawlinson, M. Smith, and Christen, JJ., join, and with whom Bybee, J., joins as to Parts I and II, dissenting in part and concurring in part) ("Today's opinion therefore renders damages suits by inmates who suffer grievous injuries as a result of constitutionally forbidden indifference all but impossible in practice. In every case in which state actors are sued for failing to provide minimal medical care—even those cases involving loss of life or serious permanent injury—the defense will be lack of resources, and that defense will almost surely succeed. This will encourage further constitutional violations: If states do not have to pay damages for depriving inmates of the level of care required to avoid violating the Eighth Amendment, there will be little reason to increase appropriations for prisoner care. . . .In the end, the only rational justification for today's decision is concern for the prison medical provider. That solicitude is valid: With shoestring budgets, prison doctors must triage medical care. . . .[T]his case does not deal with the imposition of liability on a doctor who was unable to see a patient. Peralta managed to become Dr. Brooks' patient, and the suit attacks decisions made by Dr. Brooks from that point forward. . . More importantly, the majority's focus on the personal liability of prison physicians ignores an important reality—the state is in every respect the real party in interest in a damages suit. California indemnifies employees for torts committed in the scope of their employment. . . .When a state funds its employee's defense and indemnifies him against any judgment, it ought not then assert that he is faultless because the state is really to blame. The policy concern that no doctor will work for a prison if he faces the possibility of personal liability has already been addressed (and apparently effectively so) by California's promise to hold the physician harmless. Having made the policy decision to incarcerate a large number of wrongdoers, California should not be allowed to avoid the Eighth Amendment consequences of that decision by systematically underfunding medical care. At a minimum, when a state attempts to do so, we should create an exception to the judge-made collateral source rule and allow the plaintiff to inform jurors that the state, not the individual defendants, will pay any compensatory damages awarded. . . .Such an approach would not, as the majority suggests, Maj. Op. at 11, violate state sovereign immunity. States have no obligation to indemnify their employees for damages imposed because of constitutional violations. But, when a state chooses to do so, the state agent should not be heard to argue that the imposition of liability on him individually is unfair. Section 1983 and the Constitution do not codify a collateral source rule. . . .Today's decision, as Judge Christen's dissent convincingly demonstrates, is wrong on the record of this case. But even if that were not so, the decision sweeps far too broadly, effectively foreclosing any liability for permanent

injuries and deaths caused by the deliberate indifference of state funding authorities. I therefore dissent from the affirmance of the judgment in favor of Dr. Brooks.")

See also ***Shorter v. Baca***, 895 F.3d 1176, 1191 (9th Cir. 2018) ("If plaintiffs in § 1983 actions demonstrate that their conditions of confinement have been restricted solely because of overcrowding or understaffing at the facility, a deference instruction ordinarily should not be given. Similarly, if plaintiffs in § 1983 actions demonstrate that they have been subjected to search procedures that are an unnecessary, unjustified, or exaggerated response to concerns about jail safety, we do not defer to jail officials. Otherwise, 'careless invocations of "deference" run the risk of returning us to the passivity of several decades ago, when the then-prevailing barbarism and squalor of many prisons were met with a judicial blind eye and a "hands off" approach.'").

F. Supervisory Liability v. Municipal Liability

Supervisory liability can be imposed without a determination of municipal liability. Supervisory liability runs against the individual, is based on his or her personal responsibility for the constitutional violation and does not require any proof of official policy or custom as the "moving force," ***City of Oklahoma City v. Tuttle***, 471 U.S. 808 (1985) (quoting ***Polk County v. Dodson***, 454 U.S. 312, 326 (1981)), behind the conduct.

See also ***Hunt v. Davis***, 749 F. App'x 522, ___ (9th Cir. 2018) ("Cases addressing municipal liability are also inapplicable to Hunt's claim against Sheriff Clark individually. Municipal liability requires an allegation of a constitutional injury flowing from a governmental policy or custom. . . This can be established by a showing 'that an official with final policymaking authority ratified a subordinate's unconstitutional decision or action and the basis for it.'. . Such a ratification is 'chargeable to the municipality' as a policy or custom. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). But whether there is a municipal policy or custom that caused constitutional injury is a distinct inquiry from whether a particular official, 'through the official's own individual actions, has violated the Constitution.'. . As neither the Supreme Court nor our circuit has established that an official's post-incident ratification of or acquiescence to a claimed constitutional violation is alone sufficient for individual liability under § 1983, . . the district court erred when it held that Hunt stated a claim against Sheriff Clark on this basis."); ***McGrath v. Scott***, 250 F. Supp. 2d 1218, 1222-23 (D. Ariz. 2003) ("In their pleadings, both parties rely on cases involving questions of municipal liability under § 1983 to establish the legal standard for supervisory liability under § 1983. . .However, municipal and supervisory liability present distinct and separate questions that are treated and analyzed as such. . . Supervisory liability represents a form of personal liability against an individual, while municipal liability is entity liability. Supervisory liability concerns whether supervisory officials' own action or inaction subjected the Plaintiff to the deprivation of her federally protected rights. Generally, liability exists for supervisory officials if they personally participated in the wrongful conduct or breached a duty imposed by law. . .In contrast, municipal liability depends upon enforcement by individuals of a municipal policy, practice, or decision of a policymaker that causes the violation of the Plaintiffs

federally protected rights. . . Typically, claims asserted against supervisory officials in both their individual and official capacities provide bases for imposing both supervisory liability (the individual claim) and municipality liability (the official capacity claim) if the supervisor constitutes a policymaker.")

1. Pre-*Iqbal* Cases

"[W]hen supervisory liability is imposed, it is imposed against the supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates." ***Clay v. Conlee***, 815 F.2d 1164, 1170 (8th Cir. 1987). *See also* ***Lloyd v. Van Tassell***, 2009 WL 179622, at *5, *6 (11th Cir. Jan. 27, 2009) (not published) ("A supervisor may be individually liable under § 1983 only when: (1) 'the supervisor personally participates in the alleged unconstitutional conduct'; or (2) 'there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation.'. . A causal connection is established when: (1) the supervisor was on notice, by a history of widespread abuse, of the need to correct a practice that led to the alleged deprivation, and he failed to do so; (2) the supervisor's policy or custom resulted in deliberate indifference; (3) the supervisor directed the subordinate to act unlawfully; or (4) the supervisor knew the subordinate would act unlawfully and failed to stop the unlawful action. . . 'The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.'. . In order to be held liable under § 1983 in an official capacity, the plaintiff must show that the deprivation of a constitutional right resulted from: '(1) an action taken or policy made by an official responsible for making final policy in that area of the [County's] business; or (2) a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker.'. . Only a final policymaker may be held liable in an official capacity. . . This is similar to the standard used for imposing supervisor liability, although the plaintiff must also prove that the defendant was a policymaker. Also, the qualified immunity defense does not apply to an official sued in his official capacity."); ***McGratposth v. Scott,*** 250 F. Supp.2d 1218, 1222, 1223 (D.Ariz. 2003) ("[M]unicipal and supervisory liability present distinct and separate questions that are treated and analyzed as such. . . . Supervisory liability concerns whether supervisory officials' own action or inaction subjected the Plaintiff to the deprivation of her federally protected rights. Generally, liability exists for supervisory officials if they personally participated in the wrongful conduct or breached a duty imposed by law. . .In contrast, municipal liability depends upon enforcement by individuals of a municipal policy, practice, or decision of a policymaker that causes the violation of the Plaintiffs federally protected rights. . . Typically, claims asserted against supervisory officials in both their individual and official capacities provide bases for imposing both supervisory liability (the individual claim) and municipality liability (the official capacity claim) if the supervisor constitutes a policymaker.").

As with a local government defendant, a supervisor cannot be held liable under § 1983 on a *respondeat superior* basis, ***Monell v. Dept. of Social Services***, 436 U.S. 658, 694 n.58 (1978), although a supervisory official may be liable even where not directly involved in the constitutional

violation. The misconduct of the subordinate must be "affirmatively link[ed]" to the action or inaction of the supervisor. ***Rizzo v. Goode***, 423 U.S. 362, 371 (1976).

Since supervisory liability based on inaction is separate and distinct from the liability imposed on the subordinate employees for the underlying constitutional violation, the level of culpability that must be alleged to make out the supervisor's liability may not be the same as the level of culpability mandated by the particular constitutional right involved.

While § 1983 itself contains no independent state of mind requirement, ***Parratt v. Taylor***, 451 U.S. 527, 535 (1981), *overruled in part on other grounds*, ***Daniels v. Williams***, 474 U.S. 327 (1986), lower federal courts consistently require plaintiffs to show something more than mere negligence yet less than actual intent in order to establish supervisory liability. *See e.g.*, ***Blankenhorn v. City of Orange***, 485 F.3d 463, 486 (9th Cir. 2007) ("While Chief Romero did not personally dismiss complaints against Nguyen, as was the case in *Larez* and *Watkins*, he did approve Nguyen's personnel evaluations despite repeated and serious complaints against him for use of excessive force. That approval, together with the expert testimony regarding the ineffectiveness of Nguyen's discipline for those complaints, could lead a rational factfinder to conclude that Romero knowingly condoned and ratified actions by Nguyen that he reasonably should have known would cause constitutional injuries like the ones Blankenhorn may have suffered."); ***Whitfield v. Melendez-Rivera***, 431 F.3d 1, 14 (1st Cir. 2005) ("Supervisors may only be held liable under § 1983 on the basis of their own acts or omissions. . . Supervisory liability can be grounded on either the supervisor's direct participation in the unconstitutional conduct, or through conduct that amounts to condonation or tacit authorization. . . Absent direct participation, a supervisor may only be held liable where '(1) the behavior of [his] subordinates results in a constitutional violation and (2) the [supervisor's] action or inaction was Aaffirmatively link [ed]' to the behavior in the sense that it could be characterized as Asupervisory encouragement, condonation or acquiescence' or Agross negligence ... amounting to deliberate indifference.''. .Our holding with respect to Fajardo's municipal liability informs our analysis of the mayor's and the police commissioner's supervisory liability. Because the plaintiffs failed to provide sufficient evidence establishing that Fajardo's police officers were inadequately trained, it follows that the plaintiffs failed to prove that the mayor and the police commissioner were deliberately, recklessly or callously indifferent to the constitutional rights of the citizens of Fajardo. The plaintiffs failed to show that there were any training deficiencies, much less that the mayor or the police commissioner'should have known that there were ... training problems.' . . Moreover, as discussed above, the evidence was insufficient to support the theory that the mayor or the police commissioner had condoned an unconstitutional custom."); ***Atteberry v. Nocona General Hospital***, 430 F.3d 245, 254, 256 (5th Cir. 2005) ("Ordinarily, supervisors may not be held vicariously liable for constitutional violations committed by subordinate employees. . . . Deliberate indifference in this context 'describes a state of mind more blameworthy than negligence.'[citing *Farmer* and *Estelle*] Accordingly, to prevail against either Norris or Perry, the Plaintiffs must allege, *inter alia*, that Norris or Perry, as the case may be, had subjective knowledge of a serious risk of harm to the patients. . . . In sum, the Plaintiffs alleged that Norris and Perry knew both that

a dangerous drug was missing and that patients were dying at an unusually high rate. They also alleged that although Norris and Perry should and could have investigated the deaths and missing drugs or changed hospital policy, they did nothing for a considerable period of time. For Rule 12(b)(6) purposes, the requisite deliberate indifference is sufficiently alleged."); ***Doe v. City of Roseville,*** 296 F.3d 431, 441 (6th Cir. 2002) (Discussing standards of supervisory liability among the Circuits and concluding that "[a]lthough Jane had a constitutional right to be free from sexual abuse at the hands of a school teacher or official, she did not have a constitutional right to be free from negligence in the supervision of the teacher who is alleged to have actually abused her. Negligence is not enough to impose section 1983 liability on a supervisor."); ***Carter v. Morris***, 164 F.3d 215, 221 (4th Cir. 1999)("A plaintiff must show actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and 'an Aaffirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.' [citing Shaw v. Stroud]"); ***Camilo-Robles v. Hoyos***, 151 F.3d 1, 7 (1st Cir. 1998) ("Notice is a salient consideration in determining the existence of supervisory liability. . . . Nonetheless, supervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he 'may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness.' *Maldonado-Denis v. Castillo- Rodriquez*, 23 F.3d 576, 582 (1st Cir.1994). To demonstrate deliberate indifference a plaintiff must show (1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk. . . . [T]he plaintiff must 'affirmatively connect the supervisor's conduct to the subordinate's violative act or omission.'. . This affirmative connection need not take the form of knowing sanction, but may include tacit approval of, acquiescence in, or purposeful disregard of, rights-violating conduct."); ***Lankford v. City of Hobart***, 73 F.3d 283, 287 (10th Cir. 1996) (following Third Circuit approach and requiring personal direction or actual knowledge for supervisory liability); ***Baker v. Monroe Township***, 50 F.3d 1186, 1194 & n.5 (3d Cir. 1995) (applying Third Circuit standard which requires "actual knowledge and acquiescence" and noting that other circuits have broader standards for supervisory liability); ***Howard v. Adkison***, 887 F.2d 134, 137,138 (8th Cir. 1989) (supervisors liable when inaction amounts to reckless disregard, deliberate indifference to or tacit authorization of constitutional violations); ***Gutierrez-Rodriguez v. Cartagena***, 882 F.2d 553, 562 (1st Cir. 1989) (supervisor's conduct or inaction must be shown to amount to deliberate, reckless or callous indifference to constitutional rights of others); ***Meriwether v. Coughlin***, 879 F.2d 1037, 1048 (2d Cir. 1989) ("[S]upervisory liability may be imposed when an official has actual or constructive notice of unconstitutional practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act."); ***Rascon v. Hardiman***, 803 F.2d 269, 274 (7th Cir. 1986) (supervisory liability requires showing that "official knowingly, willfully, or at least recklessly caused the alleged deprivation by his action or failure to act."); ***Salvador v. Brown***, No. Civ. 04-3908(JBS), 2005 WL 2086206, at *4 (D.N.J. Aug. 24, 2005) ("The Third Circuit Court of Appeals has articulated a standard for establishing supervisory liability which requires 'actual knowledge and acquiescence.' *Baker v. Monroe Township,* 50 F.3d 1186, 1194 & n. 5 (3d Cir.1995). . . . Plaintiff has not alleged that Defendants Brown or MacFarland had any direct participation in the alleged retaliation by corrections officers. It appears that Plaintiff bases

Commissioner Brown and Administrator MacFarland's alleged liability solely on their respective job titles, rather than any specific action alleged to have been taken by them adverse to Plaintiff.").

But see ***Brandon v. Kinter***, 938 F.3d 21, 38-39 (2d Cir. 2019) ("The cases on which defendants rely do not hold that all claims under § 1983 require a mental state greater than negligence. . . To the contrary, the § 1983 statute 'contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right.' *Daniels v. Williams*, 474 U.S. 327, 330 (1986). *Daniels* does not foreclose all § 1983 claims based on negligence. The Supreme Court simply stated that, '*depending on the right*, merely negligent conduct may not be enough to state a claim' and expressly declined to 'rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care.'. . Our Circuit has not stated whether a First Amendment free exercise claim requires more than negligence, and we need not do so here. Even assuming *arguendo* that it does, in the instant case, as we will outline shortly, Brandon has introduced sufficient evidence to create a genuine dispute as to whether the defendants acted with deliberate indifference in serving him pork. Under our holding in *Greenwich Citizens Committee, Inc. v. Counties of Warren and Washington Indus. Development Agency*, 77 F.3d 26 (2d Cir. 1996), deliberate indifference clearly suffices. We, therefore, decline to reach the question of whether something less than deliberate indifference—like negligence—would also be sufficient to establish an affirmative First Amendment claim. . . .We conclude that a reasonable jury could find that the defendants acted with deliberate indifference to Brandon's free exercise rights. Accordingly, and for those reasons, we need not decide at this time whether negligence would also be sufficient to state a claim under the Free Exercise Clause.")

In ***Greason v. Kemp***, 891 F.2d 829 (11th Cir. 1990), the court found the Supreme Court's analysis in ***City of Canton v. Harris***, 489 U.S. 378 (1989), provided a helpful analogy in determining whether a supervisory official was deliberately indifferent to an inmate's psychiatric needs. The court held that a three-prong test must be applied in determining a supervisor's liability: "(1) whether, in failing adequately to train and supervise subordinates, he was deliberately indifferent to an inmate's mental health care needs; (2) whether a reasonable person in the supervisor's position would know that his failure to train and supervise reflected deliberate indifference; and (3) whether his conduct was causally related to the constitutional infringement by his subordinate." 891 F.2d at 836-37.

See also ***Ontha v. Rutherford County, Tennessee***, 2007 WL 776898, at *5, *6 (6th Cir. Mar. 13, 2007) (not published)("Sheriff Jones acknowledged in his affidavit that the Rutherford County Sheriff's Office 'does not have a written policy specifically prohibiting' the use of a patrol car to strike a person who is fleeing on foot. . . Plaintiffs posit that this lack of training served as implicit authorization of or knowing acquiescence in Deputy Emslie's allegedly inappropriate use of his patrol car to chase and strike Tommy Ontha as he attempted to flee. Yet, to establish supervisory liability, it is not enough to point after the fact to a particular sort of training which, if provided, might have prevented the harm suffered in a given case. Rather, such liability attaches only if a constitutional violation is 'part of a pattern' of misconduct, or 'where there is essentially

a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable or would properly be characterized as substantially certain to occur.' . . . In this case, Plaintiffs do not contend that Deputy Emslie's purported misuse of his patrol car was part of a pattern of comparable violations, as opposed to an isolated occurrence. Neither have Plaintiffs suggested any basis for us to conclude that the tragic events of this case were an 'almost inevitable' or 'substantially certain' byproduct of a lack of training as to the proper operation of a patrol car when pursuing an individual traveling on foot. . . . Under this record, we find as a matter of law that Plaintiffs cannot sustain their § 1983 claims against Sheriff Jones in his individual capacity."); ***Vaughn v. Greene County, Arkansas***, 438 F.3d 845, 851 (8th Cir. 2006) ("Vaughn further contends Sheriff Langston's failure to train Jail personnel on providing care for ill inmates and his policy or custom of deliberately avoiding information regarding the medical conditions and needs of inmates evidences Sheriff Langston's deliberate indifference to Blount's serious medical needs. Again, we disagree. A supervisor 'may be held individually liable ... if a failure to properly supervise and train the offending employee caused a deprivation of constitutional rights.' . . Under this theory of liability, Vaughn must demonstrate Sheriff Langston 'was deliberately indifferent to or tacitly authorized the offending acts.'. . Vaughn fails to do so. We cannot say Sheriff Langston's practice of delegating to others such duties as reading mail and responding to communications regarding Jail inmates amounts to deliberate indifference. Moreover, there is no indication from the record Sheriff Langston had notice his policies, training procedures, or supervision 'were inadequate and likely to result in a constitutional violation.'"); ***Sargent v. City of Toledo Police Department***, No. 04-4143, 2005 WL 2470830, at *3 (6th Cir. Oct. 6, 2005) (not published) ("We disagree with Sargent's argument that Taylor is vicariously liable for all of Whatmore's allegedly illegal actions. Certainly, supervisory officers who order a subordinate officer to violate a person's constitutional rights and non-supervisory officers present during a violation of person's civil rights who fail to stop the violation can be liable under § 1983. . . Additionally, the supervising officer can neither encourage the specific act of misconduct nor otherwise directly participate in it. . . Whether Whatmore committed a Fourth Amendment violation when he entered Sargent's home, Taylor is not vicariously liable for any alleged violation because there is no indication either that Taylor ordered Whatmore to enter the house illegally or that Taylor knew that Whatmore entered the home without consent. Thus, Taylor never ordered nor participated in a violation of Sargent's rights."); ***Turner v. City of Taylor***, 412 F.3d 629, 643 (6th Cir. 2005) ("This Court has explained the standards for supervisory liability under § 1983 as follows:[T]he § 1983 liability of supervisory personnel must be based on more than the right to control employees. Section 1983 liability will not be imposed solely upon the basis of respondeat superior. There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.1984) (citing *Hays v. Jefferson County*, 668 F.2d 869, 872–74 (6th Cir.1982))[.]"); ***Mercado v. City of Orlando,*** 407 F.3d 1152, 1157, 1158 (11th Cir. 2005) ("All of the factors articulated in *Graham* weigh in favor of Mercado. Because he was not committing a crime, resisting arrest, or posing an immediate threat to the officers at the time

he was shot in the head, if Padilla aimed for Mercado's head, he used excessive force when apprehending Mercado. At this point, we must assume that Padilla was aiming for Mercado's head based on the evidence that Padilla was trained to use the Sage Launcher, that the weapon accurately hit targets from distances up to five yards, and that Mercado suffered injuries to his head. Padilla was aware that the Sage Launcher was a lethal force if he shot at a subject from close range. The officers were also aware that alternative actions, such as utilizing a crisis negotiation team, were available means of resolving the situation. This is especially true in light of the fact that Mercado had not made any threatening moves toward himself or the officers. Thus, in the light most favorable to Mercado, Padilla violated his Fourth Amendment rights when he intentionally aimed at and shot Mercado in the head with the Sage Launcher. . .We further conclude, however, that Officer Rouse did not violate Mercado's Fourth Amendment rights. Although Officer Rouse did not fire the Sage Launcher, Mercado contends that she should be held responsible under a theory of supervisory liability. . . Officer Rouse was in another room during the incident, and did not see Padilla aim or fire the gun. She did not tell Padilla to fire the Sage Launcher at Mercado's head. Given that Padilla was trained in the proper use of the launcher, that the Department's guidelines prohibited firing the launcher at a suspect's head or neck except in deadly force situations, and that . . . there is no evidence that Padilla has used similarly excessive force in the past-all of which are undisputed facts in the record-Rouse could not reasonably have anticipated that Padilla was likely to shoot Mercado in the head either intentionally or unintentionally. Even under the 'failure to stop' standard for supervisory liability, Rouse cannot be held liable."); ***Randall v. Prince George's County, Maryland,*** 302 F.3d 188, 207 (4th Cir. 2002) ("Because supervisors 'cannot be expected to promulgate rules and procedures covering every conceivable occurrence,' and because they may be powerless to prevent deliberate unlawful acts by subordinates, the courts have appropriately required proof of multiple instances of misconduct before permitting supervisory liability to attach."); ***Sutton v. Utah State School for the Deaf and Blind***, 173 F.3d 1226, 1240, 1241 (10th Cir. 1999) ("Where a superior's failure to train amounts to deliberate indifference to the rights of persons with whom his subordinates come into contact, the inadequacy of training may serve as the basis for § 1983 liability. . . . We are persuaded that plaintiff-appellant Sutton's allegations cannot be dismissed as inadequate in light of the repeated notification to Moore, as pled, of notice that James, with all his impairments, had been subjected to repeated sexual assaults by the much larger boy. In light of James's severe impairments, and the notification to Moore as alleged of danger to James, and the averment of Moore's failure to take action to prevent James being repeatedly molested, App. at 5, we are persuaded that a viable claim that would 'shock the conscience of federal judges' was stated."); ***Barreto-Rivera v. Medina-Vargas,*** 168 F.3d 42, 49 (1st Cir.1999) ("Officer Medina-Vargas's history in the police department was troubled at best. Despite failing the psychological component of the police academy entrance exam, he was admitted to the school. Over the course of his twenty- five year career, Officer Medina-Vargas was disciplined thirty times for abuse of power, unlawful use of physical force and/or physical assaults; six incidents led to recommendations that he be dismissed from the force. Toledo-Davila's first review of Officer Medina-Vargas's file came in 1992, when an investigating officer recommended his dismissal because he had an extensive record of physical assaults and there had been no apparent change in his behavior despite sanctions. Ignoring the recommendation, Toledo-Davila

imposed a fifteen day suspension. Two weeks later, Toledo-Davila reviewed another disciplinary action taken against Officer Medina-Vargas for the improper use of his firearm three years earlier. Following this review, Toledo-Davila reduced Officer Medina-Vargas's sanction from a thirty day suspension imposed by the former superintendent to a two day suspension. There is clearly sufficient evidence in this record to allow a jury to reasonably conclude that Toledo-Davila displayed deliberate indifference to Officer Medina-Vargas's propensity toward violent conduct, and that there was a causal connection between this deliberate indifference and Officer Medina-Vargas's fatal confrontation with Ortega-Barreto."); ***Spencer v. Doe***, 139 F.3d 107, 112 (2d Cir. 1998) ("We have long recognized that supervisors may be 'personally involved' in the constitutional torts of their supervisees if: (1) the supervisory official, after learning of the violation, failed to remedy the wrong; (2) the supervisory official created a policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; or (3) the supervisory official was grossly negligent in managing subordinates who caused the unlawful condition or event."); ***Doe v. Taylor Independent School District***, 15 F.3d 443, 453 (5th Cir. 1994) (en banc) ("The most significant difference between *City of Canton* and this case is that the former dealt with a municipality's liability whereas the latter deals with an individual supervisor's liability. The legal elements of an individual's supervisory liability and a political subdivision's liability, however, are similar enough that the same standards of fault and causation should govern."), *cert. denied sub nom* ***Lankford v. Doe***, 115 S. Ct. 70 (1994); ***Shaw v. Stroud***, 13 F.3d 791, 798 (4th Cir. 1994) ("We have set forth three elements necessary to establish supervisory liability under § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices,' and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." citing *Miltier v. Beorn*, 896 F.2d 848, 854 (4th Cir. 1990)), *cert. denied*, 115 S. Ct. 68 (1994); ***Walker v. Norris***, 917 F.2d 1449, 1455-56 (1990) (applying ***City of Canton*** analysis to issue of supervisory liability); ***Sample v. Diecks***, 885 F.2d 1099, 1116-1117 (3d Cir. 1989) (same).

Compare ***Rosenberg v. Vangelo,*** No. 02-2176, 2004 WL 491864, at *5 (3d Cir. Mar. 12, 2004) (unpublished) ("[W]e respectfully disagree with the *Ricker* Court's decision to cite and rely on the 'direct and active' language from *Grabowski*. We also conclude that the deliberate indifference standard had been clearly established prior to 1999 and no reasonable official could claim a higher showing would be required to establish supervisory liability.") *with* ***Ricker v. Weston,*** No. 00-4322, 2002 WL 99807, at *5, *6 (3d Cir. Jan. 14, 2002) (unpublished) ("A supervisor may be liable under 42 U.S.C. § 1983 for his or her subordinate's unlawful conduct if he or she directed, encouraged, tolerated, or acquiesced in that conduct. . . . For liability to attach, however, there must exist a causal link between the supervisor's action or inaction and the plaintiff's injury. . . .[E]ven assuming, arguendo, that the K-9 officers were not disciplined as a result of Zukasky's investigation, that investigation did not in any way cause Freeman's injuries. . . . We reach the same conclusion as to Palmer and Goldsmith. The undisputed facts indicate that

they knew about Schlegel's prior misconduct but nonetheless promoted him to Captain of Field Services. They also knew of Remaley's violent episodes but permitted him to be a member of the K-9 Unit. These acts are, as a matter of law, insufficient to constitute the requisite direct involvement in appellees' injuries. . . . Importantly, neither Palmer nor Goldsmith were aware of the attacks in question until after they occurred. At that time, they ordered an investigation but ultimately chose not to discipline the officers involved, even though it appears that Zukasky had recommended that at least certain of the officers be disciplined. This decision not to discipline the officers does not amount to active involvement in appellees' injuries given that all of the injuries occurred before the decision. There is simply no causal link between those injuries and what Palmer and Goldsmith did or did not do.").

Compare ***Lynn v. City of Detroit,*** 98 F. App'x 381, 386 (6th Cir. 2004) ("According to several witnesses from within the department, police supervisors in Detroit are neither trained nor instructed to look for evidence of criminality when reviewing officers' activities. Supervisors are expected to keep their eyes open for 'anything amiss,' but they focus on ensuring that reports are complete and accurate and that officers' time has been spent efficiently and productively. Discovery of criminal activity by subordinate officers is ordinarily made through the receipt of complaints from citizens. A supervisor's responsibility upon receiving a complaint is to report it to the Internal Affairs Division; Internal Affairs then handles the investigation. Investigation by Internal Affairs – not by supervisors – is the tool by which the Department attempts to uncover criminality on the part of its officers. Given these facts, we do not think the defendants' failure to investigate the corrupt officers amounts to acquiescence in the officers' misconduct or reflects indifference to violations of the plaintiffs' rights. The defendants were entitled to rely on Internal Affairs to perform its assigned function. The defendants' responsibility was to report specific complaints of criminality or misconduct that they themselves observed. None of the defendants personally observed any misconduct. Ferency and Tate received specific complaints and duly reported them. Ferency also reported generalized rumors of criminal activity. It was the reports to Internal Affairs that led, in time, to the officers' prosecution.") *with* ***Lynn v. City of Detroit,*** 98 F. App'x 381, 388 (6th Cir. 2004) (Clay, J., dissenting) ("The majority opinion suggests that Defendants, based on the record in this case, had no duty to respond to the widespread, commonly known criminal conduct that permeated the walls of the City of Detroit's sixth police precinct's third platoon, other than to sporadically report a few citizen complaints of police misconduct to either Internal Affairs or other officers. What is not disputed is that Defendants, who directly supervised the rogue officers responsible for violations of Plaintiffs' constitutional rights, acted with deliberate indifference when confronted with daily rumors and discussion of their subordinates' criminal behavior. By looking the other way, or by failing to act when faced with apparently reliable reports of police corruption, Defendants actually contributed to the lawlessness of the third platoon by permitting its officers to continue to violate citizens' rights with impunity.").

See also ***Tardiff v. Knox County,*** 397 F.Supp.2d 115, 141-43 (D.Me. 2005)("Unlike individual officer liability, the liability of supervisory officials does not depend on their personal participation in the acts of their subordinates which immediately brought about the violation of the

plaintiff's constitutional rights. . . Liability can result from Sheriff Davey's acquiescence to Knox County Jail's ongoing practice of strip searching all detainees charged with misdemeanors. . . Some evidence in the record points to Sheriff Davey's actual knowledge of this ongoing practice. . . . However, Sheriff Davey disputes that he had actual knowledge of the unlawful custom and practice of strip searching detainees charged with misdemeanors without reasonable suspicion of concealing contraband or weapons. . . Regardless of his actual knowledge, the Court concludes that based on the undisputed evidence in the record he should have known that the practice was ongoing, and that, despite the change to the written policy in 1994 and the institution of new procedures in 2001, the practice had not been eliminated. The issue then becomes whether Plaintiffs have established that Sheriff Davey's conduct amounts to deliberate indifference or willful blindness to an unconstitutional practice of his subordinates. . . Finally, Plaintiffs must establish a causal connection between Sheriff Davey's conduct and the corrections officers' unconstitutional actions. . . . The widespread practice was sufficient to alert Sheriff Davey that the unlawful strip search practice persisted. On the evidence presented in the summary judgment record, the Court concludes that Sheriff Davey's failure to take any corrective action directed at eradicating this pervasive practice – even in the face of official Department of Corrections' reports and the incontrovertible record evidence that the practice persisted – amounts to a reckless indifference of the constitutional rights of class members arrested on misdemeanor charges. Sheriff Davey's reckless indifference allowed the practice to persist for years and caused the violation of the constitutional rights of Plaintiffs arrested on misdemeanor charges. For the foregoing reasons, the Court will grant Plaintiffs' Motion for Partial Summary Judgment with respect to that part of Count II alleging that Sheriff Davey is responsible, in his personal capacity, for the Knox County Jail's unconstitutional custom and practice of strip searching detainees charged with misdemeanors."); ***McAllister v. City of Memphis***, No. 01-2925 DV, 2005 WL 948762, at *4, *5 (W.D. Tenn. Feb. 22, 2005) (not reported) ("Young conducted the hearing. However, Young did not consider the statements of the witnesses. He did not interview the three police officers who were present at the time the incident occurred. This is true despite the fact that Charnes had determined that Polk's statement deserved considerable weight because it is unusual for an officer to admit that he believes that another officer struck a citizen. Although the IAB is not permitted to consider previous complaints against the officer being investigated, a hearing officer is allowed to consider them. Thus, Young knew that Hunt had six prior complaints against him. Moreover, although Young was permitted to subpoena anyone he believed would be helpful, the only person he subpoenaed was Hunt. Young never spoke with Plaintiff, and Plaintiff was not allowed to attend the hearing. Additionally, the MPD's policy states that a presumption of guilt is established when the IAB sustains a charge against an officer. In spite of this seemingly overwhelming evidence against Hunt, Young dismissed the complaint. Following the hearing, the City sent Plaintiff a letter informing him that there was sufficient evidence to sustain Plaintiff's allegations and that the appropriate action had been taken. Deputy Chief Pilot admitted in her deposition that the tone of the letter was misleading. . . This could be evidence that Defendant's actions may have been a result of deliberate indifference to the Plaintiff's rights. Furthermore, as it is IAB's policy to send a letter to every complainant stating that appropriate action was taken, even when no action at all was taken, . . . such a practice may indicate Defendant's ratification of its officers' misconduct. . .

. Therefore, the Court finds that a genuine issue of material fact exists as to whether a meaningful investigation was conducted. Additionally, based on the IAB investigation a genuine issue of material fact exists as to whether Defendant's decision not to discipline Officer Hunt indicates deliberate indifference on the part of the City, as envisioned by the Supreme Court in *City of Canton*....").

See also ***Otero v. Wood,*** 316 F.Supp.2d 612, 623-26 (S.D. Ohio 2004) ("The involvement of Zoretic, Wood, and Curmode . . . cannot be characterized as 'mere presence' or 'mere backup.' Zoretic was virtually looking over Brintlinger's shoulder when Brintlinger fired the gas gun. Wood was directing the firing of the knee knockers in a hands-on and immediate way. Curmode was the 'prime mover' of the entire operation, responsible for planning and initiating all action. None of these Defendants was a remote, desk-bound supervisor; rather, all three were direct participants in the firing of the knee knockers on April 29, 2001. Similarly, taking all of Plaintiff's factual allegations as true, there is a direct causal connection between the supervision provided by Zoretic, Wood, and Curmode and the failure of any officers to provide medical assistance to Plaintiff. Indeed, Zoretic, Wood, and Curmode may all be said to have directly participated in this alleged constitutional violation since they were present in Plaintiff's immediate vicinity and they, too, failed to help and were arguably deliberately indifferent to her need. . . . A reasonable jury could find, based on the facts as presented by Plaintiff, that the use of wooden baton rounds here was objectively unreasonable and that Defendants Zoretic, Wood, and Curmode each played a significant role in this use of force and thus should be liable to Plaintiff under § 1983. While Defendants unquestionably had a legitimate interest in dispersing the crowd that had gathered along Norwich Avenue, a reasonable jury could find that they did so more harshly than was necessary"); ***McGrath v. Scott,*** 250 F. Supp.2d 1218, 1226 & n.4 (D.Ariz. 2003) ("[T]he Court finds that the deliberately indifferent standard adopted in *L.W.* applies generally to all supervisory liability claims under § 1983. A supervisor can be liable in his individual capacity for (1) his own culpable action or inaction in the training, supervision, or control of his subordinates; (2) for his acquiescence in the constitutional deprivation; or (3) for conduct that shows a *deliberate indifference* to the rights of others. Deliberate indifference encompasses recklessness. . . . The Court does not decide if the recklessness standard is objective or subjective, as in either case Plaintiffs Complaint adequately states a claim."); ***Classroom Teachers of Dallas/Texas State Teachers Ass'n/National Education Ass'n v. Dallas Independent School District,*** 164 F.Supp.2d 839, 851 (N.D. Tex. 2001) ("Deliberate indifference to violations of constitutional rights is sufficient for supervisory liability under § 1983. There is no principle of superiors' liability, either in tort law generally or in the law of constitutional torts. To be held liable for conduct of their subordinates, supervisors must have been personally involved in that conduct. That is a vague standard. We can make it more precise by noting that supervisors who are merely negligent in failing to detect and prevent subordinates' misconduct are not liable, because negligence is no longer culpable under section 1983. Gross negligence is not enough either. The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference."); ***Comfort v. Town of Pittsfield***, 924 F. Supp. 1219, 1231 (D. Me. 1996)

("Supervisory liability may attach despite any direct involvement by [police chief] in the unconstitutional activity. Lawrence, however, may only be held liable under § 1983 on the basis of his own acts or omissions. Supervisory personnel are liable under § 1983, upon a showing of a constitutional violation, when: (I) the supervisor's conduct or inaction amounts to either deliberate, reckless or callous indifference to the constitutional rights of others, and (2) an affirmative link exists between the street-level constitutional violation and the acts or omissions of the supervisory officials." cites omitted).

Although the courts do not differ significantly as to the level of culpability required for supervisory liability, there is some split on the question of whether the requisite culpability for supervisory inaction can be established on the basis of a single incident of subordinates' misconduct or whether a pattern or practice of constitutional violations must be shown.

See ***International Action Center v. United States,*** 365 F.3d 20, 26-28 (D.C. Cir. 2004) ("The MPD supervisors do not seek a ruling on whether they enjoy qualified immunity from a supervisory inaction claim based on past transgressions under *Haynesworth*. . . . . What was being appealed, counsel explained, was any effort to base liability on a duty to actively supervise and to train without regard to anything, any other aspect, or any prior history. That merely because these four individuals are supervisors, they had an obligation to anticipate that constitutional torts were highly likely and to take steps to prevent them regardless of any other facts in the case. . . . Plaintiffs do wish to pursue such a theory of liability. At oral argument, they argued that the duty to supervise arose generally from the potential for constitutional violations, even absent proof that the MPD supervisors had knowledge of a pre-existing pattern of violations by either Cumba or Worrell. Plaintiffs contend that the general duty to supervise 'arises in the ordinary course of taking responsibility where the police intervene in the context of mass demonstration activity,'. . .because of the 'substantial risk' of constitutional violations. . . . Plaintiffs also contend that '[t]he duty to supervise does not require proof of a pre-existing pattern of violations.'. . Such a theory represents a significant expansion of *Haynesworth* – one we are unwilling to adopt. The broad wording of the district court opinion, and its failure to focus on what 'circumstances' gave rise to a duty on the part of the supervisors to act, pose the prospect that a claim of the sort described by plaintiffs' counsel could proceed. The district court, in denying qualified immunity on the inaction claim, simply noted that 'it is undisputed that the MPD Supervisors were overseeing the activities of many uniformed and plain-clothes MPD officers present at the Navy Memorial for crowd control purposes during the Inaugural Parade and that those officers included ... Cumba and Worrell,' and that plaintiffs 'allege that in this context, there could be a substantial risk of violating protestors' free speech or Fourth Amendment rights.'. . Without focusing on which allegations sufficed to give rise to a claim for supervisory inaction, the court concluded that immunity was not available because plaintiffs 'have sufficiently alleged a set of circumstances at the Navy Memorial on January 20, 2001, which did indeed make it 'highly likely' that MPD officers would violate citizens' constitutional rights.'. . The district court's analysis failed to link the likelihood of particular constitutional violations to any past transgressions, and failed to link these particular supervisors to those past practices or any familiarity with them. In the absence of any such

'affirmative links,' the supervisors cannot be shown to have the requisite 'direct responsibility' or to have given 'their authorization or approval of such misconduct,'. . . and the effort to hold them personally liable fades into respondeat superior or vicarious liability, clearly barred under Section 1983. . . . The question thus reduces to the personal liability of these four individuals for alleged inadequate training and supervision of Cumba and Worrell – in the absence of any claim that these supervisors were responsible for the training received by Cumba and Worrell, or were aware of any demonstrated deficiencies in that training. That leaves inaction liability for supervision, apart from 'active participation' (defined to include failure to intervene upon allegedly becoming aware of the tortious conduct) and apart from any duty to act arising from past transgressions highly likely to continue in the absence of supervisory action. Keeping in mind that there can be no respondeat superior liability under Section 1983, what is left is plaintiffs' theory that the supervisors' duty to act here arose simply because of 'the context of mass demonstration activity.' . . . We accordingly reject plaintiffs' theory of liability for general inaction, mindful not only of the hazards of reducing the standard for pleading the deprivation of a constitutional right in the qualified immunity context, but also of the degree of fault necessary to implicate supervisory liability under Section 1983.").

Compare ***Braddy v. Florida Dep't of Labor and Employment Security***, 133 F.3d 797, 802 (11th Cir. 1998) ("The standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous. The causal connection between Lynch's offensive behavior and Davis's liability as his supervisor for such behavior can only be established if the harassment was sufficiently widespread so as to put Davis on notice of the need to act and she failed to do so. A few isolated instances of harassment will not suffice, the 'deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration.'"); ***Howard v. Adikson***, 887 F.2d 134, 138 (8th Cir. 1989) ("A single incident, or a series of isolated incidents, usually provides an insufficient basis upon which to assign supervisory liability."); ***Meriwether v. Coughlin***, 879 F.2d 1037, 1048 (2d Cir. 1989) (impliedly accepting defendants' argument that more than one incident is needed to impose supervisory liability); ***Garrett v. Unified Government of Athens-Clarke County,*** 246 F. Supp.2d 1262, 1283 (M.D. Ga. 2003) ("[T]he standard for imposing supervisory liability differs slightly from the standard for municipal liability. Specifically, an individual can be held liable on the basis of supervisory liability either 'when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation.' *Brown*, 906 F.2d at 671. Here, there are no allegations that Lumpkin personally participated in Irby's arrest. Thus, the Court turns to the question of whether there was a causal connection between Lumpkin's actions and the deprivation of Irby's constitutional rights. . . . [I]n the case at bar, a causal connection can only be established if the unconstitutional use of the hog-tie restraint was sufficiently widespread so as to put Lumpkin on notice of the need to act and he failed to do so. . . . The Court finds that Plaintiff has failed to present evidence of a history of unconstitutional, widespread abuse of the hog-tie restraint sufficient to put Lumpkin on notice. As the Court noted earlier, a finding that there was widespread use of the hog-tie restraint does not automatically equate with a finding of widespread abuse.

Plaintiff has not presented any evidence of previous complaints or injuries resulting from suspects being hog-tied by Athens-Clarke County police officers. Simply put, Plaintiff has failed to present sufficient evidence of flagrant, rampant, and continued abuse of the hog-tie restraint so as to impose supervisory liability."), *reversed and remanded on other grounds,* 378 F.3d 1274 (11th Cir. 2004) *and* ***Williams v. Garrett***, 722 F. Supp. 254, 259 (W.D. Va. 1989) ("[P]laintiff. . . . may not rely on evidence of a single incident or isolated incidents to impose supervisory liability . . . must demonstrate 'continued inaction in the face of documented widespread abuses.'") *with* ***Gutierrez-Rodriguez v. Cartagena***, 882 F.2d 553, 567 (1st Cir. 1989) ("An inquiry into whether there has been a pattern of past abuses or official condonation thereof is only required when a plaintiff has sued a municipality. Where . . . plaintiff has brought suit against the defendants as individuals . . . plaintiff need only establish that the defendants' acts or omissions were the product of reckless or callous indifference to his constitutional rights and that they, in fact, caused his constitutional deprivations.").

See also ***Murphy v. New York Racing Ass'n, Inc.,*** 76 F. Supp.2d 489, 501 n.8 (S.D.N.Y. 1999) ("As Plaintiff's reliance on *Camilo-Robles*, a First Circuit opinion, indicates, the Second Circuit has yet to adopt this 'transitive' theory of deliberate indifference, whereby a supervisor's actual or constructive notice of constitutional torts against one plaintiff can serve as the basis of a finding of deliberate indifference to the rights of a subsequent plaintiff. We note, however, that this theory is consistent with the holding of one of the Second Circuit's leading 'deliberate indifference' cases, *viz*., *Meriwether v. Coughlin*, 879 F.2d 1037 (1989).").

See also ***Poe v. Leonard,*** 282 F.3d 123, 144, 146 (2d Cir. 2002) ("One Circuit . . . found a supervisor ineligible for qualified immunity because he failed to conduct a background check on an applicant. *See Parker v. Williams*, 862 F.2d 1471, 1477, 1480 (11th Cir.1989) (finding that a sheriff was ineligible for qualified immunity because he failed to conduct a background check on a mentally unstable person he hired, who then kidnapped and raped a pre-trial detainee), *overruled on other grounds by Turquitt v. Jefferson County*, 137 F.3d 1285, 1291 (11th Cir.1998) (*en banc*). *Parker* is distinguishable because it involved a supervisor's failure to screen a job applicant with a problematic history, rather than his failure to re-screen a problematic officer who was part of a pre-existing staff. In the case at bar, Leonard did not hire Pearl, but instead began to supervise him as part of the staff Leonard inherited from his predecessor. It is not unreasonable for a subsequent supervisor to rely on his predecessor to inform him of subordinates with problematic behaviors or histories. Supervisors cannot be expected to reinvent the wheel with every decision, for that is administratively unfeasible; rather, they are entitled to rely upon the decisions of their predecessors or subordinates so long as those decisions do not appear to be obviously invalid, illegal or otherwise inadequate. . . . Reasonable supervisors confronted with the circumstances faced by Leonard could disagree as to the legality of his inaction. Indeed, even different circuits disagree about whether it is objectively reasonable for a supervisor, upon assuming his new post, to neglect to review his subordinates' personnel histories."); ***Watkins v. City of Oakland***, 145 F.3d 1087, 1093 (9th Cir. 1998) (denying qualified immunity to Chief of Police where he "signed an internal affairs report dismissing [Plaintiff's] complaint despite evidence of Officer Chew's use of

excessive force contained in the report and evidence of Officer Chew's involvement in other police dog bite incidents, and apparently without ascertaining whether the circumstances of those cases required some ameliorative action to avoid or reduce serious injuries to individuals from dogs biting them[,]" and where the Chief "did not establish new procedures, such as including the use of police dogs within the OPD's policy governing the use of nonlethal force, despite evidence of numerous injuries to suspects apprehended by the use of police dogs."); ***Diaz v. Martinez***, 112 F.3d 1, 4 (1st Cir. 1997) (holding, in context of interlocutory appeal on question of qualified immunity, that "a reasonable police supervisor, charged with the duties that Vazquez bore, would have understood that he could be held constitutionally liable for failing to identify and take remedial action concerning an officer with demonstrably dangerous predilections and a checkered history of grave disciplinary problems."); ***Wilson v. City Of Norwich***, 507 F.Supp.2d 199, 209, 210 (D. Conn. 2007) ("In this case, Wilson has shown only that Fusaro was aware of one set of photographs taken years earlier by Daigle of a consenting female colleague. Even drawing all reasonable inferences in Wilson's favor, this history was not enough to make it plainly obvious to Fusaro, or to Norwich, that Daigle might abuse his position of authority in running the liquor sting operation or in fabricating a child pornography 'investigation' to cause young women to pose for nude and semi-nude photographs. It thus fails the *Poe* test that the information known to the supervisor be sufficient to put a reasonable supervisor on notice that there was a high risk that the subordinate would violate another person's constitutional rights."); ***Sanchez v. Figueroa***, 996 F. Supp. 143, 148-49 (D.P.R. 1998) ("In the Court's estimation, where Plaintiff alleges failure to implement a satisfactory screening and/or supervision mechanism as a basis for supervisory liability, deliberate indifference encompasses three separate elements. . . First, Plaintiff must demonstrate that the current screening/supervision mechanisms utilized by the police department are deficient. . . . That is, Plaintiff must demonstrate that candidates whose reasonably observable qualities demonstrate an abnormal likelihood that they will violate the constitutional rights of citizens are being hired and/or active officers whose reasonably observable conduct demonstrates a similar likelihood are not being screened for dismissal or (re)training. . . . Second, in order to demonstrate deliberate indifference, Plaintiff will be required to demonstrate that Toledo knew or should have known that the above-discussed deficiencies exist. . . . Proving knowledge or wilful blindness will require the proffer of evidence that was known or should have been known to Toledo and that put him on notice or should have put him on notice that a problem existed. . . . Third, assuming Plaintiff can successfully demonstrate that a deficiency in the screening and/or supervision mechanisms used by the police existed and that Toledo knew of it, Plaintiff will then have to show that Toledo failed to reasonably address the problem. . . . Toledo can only have acted with deliberate indifference if he failed to address the known problem at all when he became aware of it (or should have become aware of it) or if he addressed it in a manner so unreasonable as to be reckless.").

See also ***Smith v. Gates,*** No. CV97-1286CBMRJGX, 2002 WL 226736, at **3-5 (C.D. Cal. Feb. 5, 2002) (not reported) ("Defendants argue that Police Commissioners cannot be held personally liable under § 1983 because they act by majority rule and therefore have no authority to unilaterally control LAPD policy or supervise officers. . . . The Ninth Circuit has not directly

addressed whether individual members of a police commission or other supervisory body may be held liable, pursuant to the authority granted to them, when they act by majority vote. However, the Ninth Circuit implicitly recognizes that members of a council or board, which acts by majority vote, may be held individually liable for their conduct. . . . The Court therefore rejects the Commissioners' argument that they have no individual liability as supervisors by virtue of the fact they act by majority vote.").

See also ***Lakeside-Scott v. Multnomah County***, 556 F.3d 797, 799 (9th Cir. 2009) ("Can a final decision maker's wholly independent, legitimate decision to terminate an employee insulate from liability a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired? We conclude that, on the record in this case, the answer must be yes, because the termination decision was not shown to be influenced by the subordinate's retaliatory motives.").

2. *Ashcroft v. Iqbal*

The Supreme Court's recent decision in ***Ashcroft v. Iqbal***, 129 S. Ct. 1937 (2009), clearly changes the law of many circuits with respect to the standard of supervisory liability in both section 1983 and *Bivens* actions.

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948, 1949 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution. . . . [T]o state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin. Respondent disagrees. He argues that, under a theory of 'supervisory liability,' petitioners can be liable for 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.'. . That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of 'supervisory liability' is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action-where masters do not answer for the torts of their servants-the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.").

Ashcroft v. Iqbal, 129 S. 1937, 1956, 1957 (2009) (Souter, J., joined by Stevens, J., Ginsburg, J., Breyer, J., dissenting) ("Without acknowledging the parties' agreement as to the standard of

supervisory liability, the Court asserts that it must *sua sponte* decide the scope of supervisory liability here. . . I agree that, absent Ashcroft and Mueller's concession, that determination would have to be made; without knowing the elements of a supervisory liability claim, there would be no way to determine whether a plaintiff had made factual allegations amounting to grounds for relief on that claim. . . But deciding the scope of supervisory *Bivens* liability in this case is uncalled for. There are several reasons, starting with the position Ashcroft and Mueller have taken and following from it. First, Ashcroft and Mueller have, as noted, made the critical concession that a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct are grounds for *Bivens* liability. Iqbal seeks to recover on a theory that Ashcroft and Mueller at least knowingly acquiesced (and maybe more than acquiesced) in the discriminatory acts of their subordinates; if he can show this, he will satisfy Ashcroft and Mueller's own test for supervisory liability. . . . I would therefore accept Ashcroft and Mueller's concession for purposes of this case and proceed to consider whether the complaint alleges at least knowledge and deliberate indifference. Second, because of the concession, we have received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument we normally require. . . We consequently are in no position to decide the precise contours of supervisory liability here, this issue being a complicated one that has divided the Courts of Appeals. . . . The majority says that in a *Bivens* action, 'where masters do not answer for the torts of their servants,' 'the term Asupervisory liability' is a misnomer,' and that '[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.'. . Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely. The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects. . . . The dangers of the majority's readiness to proceed without briefing and argument are apparent in its cursory analysis, which rests on the assumption that only two outcomes are possible here: *respondeat superior* liability, in which 'an employer is subject to liability for torts committed by employees while acting within the scope of their employment,'. . or no supervisory liability at all. The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate. . . In fact, there is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate's constitutional violation and acquiesces, see, *e.g., Baker* v. *Monroe Twp.*, 50 F. 3d 1186, 1994 (CA3 1995); *Woodward* v. *Worland*, 977 F. 2d 1392, 1400 (CA10 1992); or where supervisors A 'know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see,' ' *International Action Center* v. *United States*, 365 F. 3d 20, 28 (CADC 2004) (Roberts, J.) (quoting *Jones* v. *Chicago*, 856 F. 2d 985, 992 (CA7 1988) (Posner, J.)); or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate, see, *e.g., Hall*, *supra*, at 961; or where the supervisor was grossly negligent, see, *e.g., Lipsett* v. *University of Puerto Rico*, 864 F. 2d 881, 902 (CA1 1988). I am unsure what the general test for supervisory liability should be, and in the absence of briefing and argument I am in no position to choose or devise one.").

3. Post-*Iqbal* Liability-of-Supervisors Cases

U.S. SUPREME COURT

Ziglar v. Abbasi, 137 S. Ct. 1843, 1863-65 (2017) ("Applying its precedents, the Court of Appeals held that the substantive standard for the sufficiency of the claim is whether the warden showed 'deliberate indifference' to prisoner abuse. . . The parties appear to agree on this standard, and, for purposes of this case, the Court assumes it to be correct. The complaint alleges that guards routinely abused respondents; that the warden encouraged the abuse by referring to respondents as 'terrorists'; that he prevented respondents from using normal grievance procedures; that he stayed away from the Unit to avoid seeing the abuse; that he was made aware of the abuse via 'inmate complaints, staff complaints, hunger strikes, and suicide attempts'; that he ignored other 'direct evidence of [the] abuse, including logs and other official [records]'; that he took no action 'to rectify or address the situation'; and that the abuse resulted in the injuries described above[.]. . . These allegations—assumed here to be true, subject to proof at a later stage—plausibly show the warden's deliberate indifference to the abuse. Consistent with the opinion of every judge in this case to have considered the question, including the dissenters in the Court of Appeals, the Court concludes that the prisoner abuse allegations against Warden Hasty state a plausible ground to find a constitutional violation if a *Bivens* remedy is to be implied. . . .[A] case can present a new context for *Bivens* purposes if it implicates a different constitutional right; if judicial precedents provide a less meaningful guide for official conduct; or if there are potential special factors that were not considered in previous *Bivens* cases. . . The constitutional right is different here, since *Carlson* was predicated on the Eighth Amendment and this claim is predicated on the Fifth. . . And the judicial guidance available to this warden, with respect to his supervisory duties, was less developed. The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—'deliberate indifference to serious medical needs.'. . . The standard for a claim alleging that a warden allowed guards to abuse pre-trial detainees is less clear under the Court's precedents. This case also has certain features that were not considered in the Court's previous *Bivens* cases and that might discourage a court from authorizing a *Bivens* remedy. As noted above, the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action. . . And there might have been alternative remedies available here, for example, a writ of habeas corpus . . . ; an injunction requiring the warden to bring his prison into compliance with the regulations discussed above; or some other form of equitable relief. Furthermore, legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation. . . Some 15 years after *Carlson* was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court. See 42 U.S.C. § 1997e. So it seems clear that Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs. This Court has said in dicta that the Act's exhaustion provisions would apply to *Bivens* suits. See *Porter v. Nussle,* 534 U.S. 516, 524, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). But the Act itself does not provide for a standalone damages remedy against federal jailers. It could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.

The differences between this claim and the one in *Carlson* are perhaps small, at least in practical terms. Given this Court's expressed caution about extending the *Bivens* remedy, however, the new-context inquiry is easily satisfied. Some differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context. But here the differences identified above are at the very least meaningful ones. Thus, before allowing this claim to proceed under *Bivens*, the Court of Appeals should have performed a special factors analysis. It should have analyzed whether there were alternative remedies available or other 'sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy' in a suit like this one. . . Although the Court could perform that analysis in the first instance, the briefs have concentrated almost all of their efforts elsewhere. Given the absence of a comprehensive presentation by the parties, and the fact that the Court of Appeals did not conduct the analysis, the Court declines to perform the special factors analysis itself. The better course is to vacate the judgment below, allowing the Court of Appeals or the District Court to do so on remand.")

D.C. CIRCUIT

Johnson v. Government of Dist. of Columbia, 734 F.3d 1194, 1204, 1205 (D.C. Cir. 2013) ("Fifth Amendment Class members maintain that the strip search gender disparity violated the Fifth Amendment's equal protection guarantee. We resolve these claims, unlike the claims of the Fourth Amendment class, at the first stage of the qualified immunity analysis by examining whether Dillard violated class members' Fifth Amendment rights. The parties agree that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), controls this issue. . . .Acknowledging that they 'must prove Dillard intended to discriminate against women arrestees,' Fifth Amendment Class members argue that Dillard 'intended a policy, formal or informal, of women-only strip searches.'. . For his part, Dillard insists that his policy throughout the class period required 'every prisoner'—both male and female—to go through the strip search process upon arrival at the Superior Court cellblock. . . Although class members point to some evidence from which we might infer that Dillard knew deputies were implementing his gender neutral policy in a gender imbalanced manner, plenty of other evidence suggests that Dillard was largely missing in action throughout the class period. But even assuming class members could show that Dillard knew what was going on at the cellblock, they have pointed to no evidence from which we could infer that Dillard himself intended to treat women differently from men. . . . [C]lass members cite no testimony by any subordinate indicating that the gender disparity resulted from Dillard's instruction or intention.")

Johnson v. Government of Dist. of Columbia, 734 F.3d 1194, 1208 (D.C. Cir. 2013) (Rogers, J., concurring in part and concurring in the judgment) ("A reasonable jury could find that knowing acquiescence to continuing violations of a plaintiff's Equal Protection rights by one's deputies amounts to purposeful conduct and infer, in the absence of a legitimate non-invidious reason for treating women differently than men, a defendant's discriminatory purpose. . . Dillard repeatedly swore, however, that he believed men and women were being strip searched in the same manner, *see* Dillard Dep. 96:10–97:8, 99:8–101:12, and the Fifth Amendment class fails to proffer evidence from which a reasonable jury could find that he had a women-only strip search policy or knew of

the disparate treatment by his deputies. . . Absent evidence that Dillard either had a blanket policy for strip searching only female arrestees, or knew that his deputies were doing so indiscriminately and did nothing to stop them, a discriminatory purpose by Dillard cannot reasonably be inferred.")

Elkins v. District of Columbia, 690 F.3d 554, 555, 556 (D.C. Cir. 2012) ("Even if Maloney did have a responsibility to train and supervise Williams–Cherry, which he disputes, summary judgment in his favor was still appropriate because the record shows, at best, 'mere negligence,' not an 'affirmative link' between Maloney's conduct and the constitutional injury. . . This link must be strong enough that, from Maloney's perspective, the possibility of a constitutional violation occurring due to poor training or supervision would have been highly likely, not simply foreseeable. . . Supervisory liability under § 1983 is triggered only when a supervisor fails to provide more stringent training in the wake of a history of past transgressions by the agency or provides training 'so clearly deficient that some deprivation of rights will *inevitably* result absent additional instruction.'. . There was no pattern of constitutional violations to put Maloney on notice that training was required; indeed, this was the first search warrant DCRA had ever sought. And even if it was *foreseeable* that an untrained official might take a false step in these new and unfamiliar circumstances, such a result was by no means *inevitable*, especially as the search was led by officers from the MPD, who are trained in the proper execution of a warrant.")

Shaw v. District of Columbia, 944 F.Supp.2d 43, 63, 64 (D.D.C. 2013) ("Kates is alleged to have failed to train, supervise or discipline subordinate USMS employees in the appropriate treatment of female transgender detainees. . . His motion to dismiss contends that the allegations of the complaint are insufficient to state a claim because neither his 'ultimate authority' nor the allegations that 'focus on his training and supervision' are sufficient to 'render [him] personally liable for the alleged wrongful acts of individual USMS employees.'. . There is no question that Kates cannot be held liable for the actions of subordinates based solely on his position as the Superior Court Marshal (his 'ultimate authority'), but that is not what plaintiff alleges. . . As for his alleged failure to train, supervise or discipline, he argues that the allegations are insufficient to establish that he had an obligation to train or supervise in the manner plaintiff alleges—on not treating female transgender detainees as if they are male. . . Relying on *Elkins*, Kates asserts that the complaint (1) fails to allege 'any history of constitutional transgressions by USMS' and thus '"no pattern of constitutional violations to put [the official] on notice that training was required"'. . . and (2) fails to allege 'training that is so clearly deficient ... that some deprivation of constitutional rights will inevitably result.'. . . Plaintiff appears to concede the first point, but not the second. As she points out, the complaint alleges that Kates engaged in *no* training or supervision as to the treatment of female transgender detainees despite knowing the harm that was 'likely to occur' if plaintiff were treated as if she were male. . . The question is not whether plaintiff's claim against Kates will ultimately succeed, but only whether these allegations are sufficient to adequately allege an obligation to train or supervise as to the appropriate treatment of female transgender detainees.")

FIRST CIRCUIT

Justiniano v. Walker, 986 F.3d 11, 19-24 (1st Cir. 2021) ("At the heart of the Alben motion-to-dismiss issue . . . is whether the complaint's Count 3 plausibly alleged not only that Alben's failure to implement training to teach troopers how to deal with mentally ill individuals caused a violation of Justiniano's constitutional rights, but also that Alben was deliberately indifferent to the risk that *not* providing that training would result in a trooper committing that kind of constitutional violation. Justiniano, of course, says the complaint accomplished all of this, while Alben takes the opposite stance. Before we get into those arguments, let's first canvass these legal principles (deliberate indifference, causation in failure-to-train cases) -- they're the backdrop against which we'll assess the complaint's sufficiency, after all. Alben was not on the scene, of course, so Justiniano relies on supervisory liability and a failure-to-train theory to put him on the hook. We've cautioned that '[t]he liability criteria for "failure to train" claims are exceptionally stringent.'. . Generally, a supervisor cannot be held liable under § 1983 on a respondeat superior theory -- a 'supervisor's liability must be premised on his [or her] own acts or omissions' and does not attach automatically even if a subordinate is found liable. . . To connect the liability dots successfully between supervisor and subordinate in this context, a plaintiff must show 'that one of the supervisor's subordinates abridged the plaintiff's constitutional rights' *and* that the supervisor's (in)action 'was affirmative[ly] link[ed] to that behavior in the sense that it could be characterized as ... gross negligence amounting to deliberate indifference.'. . And that's a critical issue here -- deliberate indifference. Deliberate indifference requires a plaintiff to demonstrate or allege '(1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk.'. . Indeed, '[m]ere negligence will not suffice: the supervisor's conduct must evince "reckless or callous indifference to the constitutional rights of others." . . And there's more. '[D]eliberate indifference alone does not equate with supervisory liability,'. . . but rather '[c]ausation [is also] an essential element, and the causal link between a supervisor's conduct and the constitutional violation must be solid[.]'. . For causation in a failure-to-train claim, a plaintiff must allege that the 'lack of training caused [the officer] to take actions that were objectively unreasonable and constituted excessive force.'. . And the causation requirement 'contemplates proof that the supervisor's conduct led inexorably to the constitutional violation.'. . We've observed this 'is a difficult standard to meet,' though not impossible -- for instance, a plaintiff could 'prove causation by showing inaction in the face of a "known history of widespread abuse sufficient to alert a supervisor to ongoing violations."'. . Alternatively, liability might be appropriate '"in a narrow range of circumstances" where "a violation ..." is "a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.''. .So that's what needed to be alleged here -- deliberate indifference and causation that fit these black-letter-law bills. True, '[c]ausation and deliberate indifference are separate requirements ... [, but] they are often intertwined in these cases.'. . So it is here -- both determinations turn on whether Alben was aware of a risk that his subordinates (Walker, in particular) might violate mentally ill individuals' constitutional rights. Justiniano says the complaint does plenty to state this claim plausibly, and thus it should have survived the Rule 12(b)(6) motion. Count 3 alleges that Alben, as Walker's supervisor and a policymaker, failed to provide Walker with the proper training and resources that would have

helped to prevent a violation of Justiniano's constitutional rights (again, the complaint leans on the lethal force as the violation). Justiniano argues that the complaint adequately alleges that Alben was aware of and ignored national trends indicating a problematic rise in bad-outcome encounters between police and mentally ill individuals but provided no specialized training, and that failure to train constituted deliberate indifference to an obvious risk. And, according to Justiniano, the complaint plausibly lays out the requisite causal nexus by alleging that the sought-after deescalation training would have prevented this tragedy, meaning Walker's lack of training by Alben was the cause of the violation of Justiniano's rights. Alben disagrees, asserting that the complaint falls short of alleging facts sufficient to establish that he acted with deliberate indifference to Justiniano's constitutional rights (or, put differently, that Alben had notice of conduct violating constitutional rights but failed to take steps to address it), and, on top of that, the complaint does not adequately allege that proper training would have prevented that violation (i.e., no causation). With the benefit of every possible doubt -- accepting all of the complaint's factual allegations as true, . . . assuming that a constitutional violation occurred, drawing all reasonable inferences in Justiniano's favor, and 'isolat[ing] and ignor[ing]' mere legal conclusions -- this claim's 'non-conclusory, non-speculative' factual allegations do not 'plausibly narrate a claim for relief,'. . . so Justiniano's Count 3 as pled does not pass muster. In broad strokes, as to the alleged facts that arguably could support the supervisory liability theory, this is what the complaint does accomplish: that Alben, as supervisor, did not have specific policies in place 'for dealing with mental health crises without using lethal force' or 'for troopers dealing with mental health crises on techniques to de-escalate'; that Alben was aware of national trends showing an increase in the number of mental health crises and a corresponding increase in the number of death-resulting encounters with police which have prompted some law enforcement entities to institute training regarding these issues, but Alben took no 'affirmative action,' which may have contributed to Justiniano's death. It then asserts that Alben's failure to act in the face of these national trends 'demonstrates a deliberate indifference' to Justiniano's civil rights, and, '[a]s a direct result of' Alben's conduct, Justiniano died. It is not difficult to see what Justiniano was trying to do here. But these alleged facts don't support the essential legal elements of 'reckless or callous indifference to the constitutional rights of others,'. . . and the 'solid' 'causal link between [Alben]'s conduct and the constitutional violation,'. . . that Justiniano needed to state in order to be entitled to relief as a matter of law. Starting with deliberate indifference, it's clear Justiniano's aim was to highlight the absence of training when it comes to police encounters with the mentally ill -- Alben himself acknowledged that shortcoming in the system, as the complaint alleges -- and to try to link that to wrongdoing by Alben. But there are too many pieces missing, even with the benefit of some inferential leaps, for us to conclude deliberate indifference has been plausibly pled. For instance, there are no non-speculative facts in the complaint that allege a specific 'grave risk of harm' in failing to train or that there were 'easily available measures to address the risk' that Alben could have taken but didn't. . . There is no allegation that the referenced mental health training adopted by some other jurisdictions would have been easy to implement in Massachusetts, nor that the trainings actually have been effective in reducing the frequency of constitutional violations of the mentally ill. . . And even if there were such allegations, it still would not be enough to suggest plausibly that Alben knew or should have known *his* troopers might violate the rights of a mentally

ill individual, particularly when there is no known history of such constitutional trampling by Massachusetts troopers alleged. The complaint does not plead that Walker or the Massachusetts State Police more generally had a history of using excessive and constitutionally violative force against individuals who were mentally ill such that Alben should have been on notice of that conduct, nor is there any suggestion that the Massachusetts State Police are otherwise specifically at risk of violating a mentally ill individual's constitutional rights. . . Clearly, then, he could not have ignored -- with deliberate indifference or otherwise -- a non-existent history of these issues. . . Another angle would be to consider whether the complaint plausibly alleged a national trend of constitutional violations so prominent that Alben should have been (or was) on notice of a high risk that, without this training, there was a grave risk that his troopers would violate a mentally ill person's constitutional rights, and he nonetheless ignored it. . . But the complaint does not allege such a widespread, prominent trend of constitutional violations: in fact, the complaint does not actually allege that the 'trend' involves constitutional violations at all, but instead states that there are more and more 'tragic encounters with police where unarmed mentally ill citizens end up dead.' While we do not purport to foreclose the possibility that such a national trend might be enough to provide this notice, the trend as alleged here simply does not rise to that level. And the requisite causal link has not been plausibly alleged either, i.e., that Alben's failure to train his troopers 'caused [Walker] to take actions that were objectively unreasonable and constituted excessive force.'. . Justiniano pleads that '[a]s a direct result of the conduct of Defendant Alben, Wilfredo Justiniano lost his life,' but none of the pled conduct supports that legal conclusion. And while the complaint alleges that Walker acted improperly in light of Justiniano's mental condition, there is no allegation that Walker's decision to shoot Justiniano was related to any mental illness that Justiniano suffered. Yes, the complaint alleges that Walker confronted, fired his gun at, and ultimately killed Justiniano, who was unarmed and experiencing a mental health crisis, but, even if all of that was proven, there still could be no non-speculative inference from those facts that, had Alben provided the training, the shooting would not have happened. Recall, too, that we've said a plaintiff could 'prove causation [in this context] by showing inaction in the face of a "known history of widespread abuse sufficient to alert a supervisor to ongoing violations,"'. . . and it could be alleged by pleading that certain conduct 'is "a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations[.]"'. . This is a non-exhaustive set of examples, certainly, but nothing even approaching these scenarios happened here (as we touched on in part in our deliberate indifference discussion). Instead, the complaint conclusorily alleges that Alben's refusal to change the relevant policies led to the 'inevitable outcome' of Justiniano's death, but does nothing to allege non-speculative facts that would allow an inference that training actually would have altered that outcome. All told, we needed 'more than a sheer possibility that [Alben] ... acted unlawfully[,]' but we didn't get it. . . There's not enough factually alleged here to support a conclusion that Alben acted with deliberate indifference when he neglected to train Walker (and other troopers) on how to interact with the mentally ill; and, regardless of that shortcoming, there's still a dearth of factual allegations to bolster the conclusion that his failure to do so caused Walker to violate Justiniano's rights. Therefore, we affirm the district court's dismissal of the claim against Alben.")

Parker v. Landry, 935 F.3d 9, 14-17, 19 (1st Cir. 2019) ("A supervisory liability claim under section 1983 has two elements: the plaintiff must plausibly allege that 'one of the supervisor's subordinates abridged the plaintiff's constitutional rights' and then forge an affirmative link between the abridgement and some action or inaction on the supervisor's part. . . Such culpable action or inaction may comprise, say, a showing of behavior that constitutes 'supervisory encouragement, condonation or acquiescence[,] or gross negligence ... amounting to deliberate indifference.'. .The concept of supervisory liability is separate and distinct from concepts such as vicarious liability and respondeat superior. . . Although a supervisor need not personally engage in the subordinate's misconduct in order to be held liable, his own acts or omissions must work a constitutional violation. . . Facts showing no more than a supervisor's mere negligence vis-á-vis his subordinate's misconduct are not enough to make out a claim of supervisory liability. . . At a minimum, the plaintiff must allege facts showing that the supervisor's conduct sank to the level of deliberate indifference. . . We train the lens of our inquiry there. . . . Here, the proposed amended complaint does not identify any affirmative acts by any of the defendants that might arguably constitute deliberate indifference. Even in the absence of such facts, though, a plaintiff sometimes can identify a causal nexus by juxtaposing the supervisor's omissions alongside a 'known history of widespread abuse sufficient to alert a supervisor to ongoing violations.'. . But such omissions, if paired only with 'isolated instances' of a subordinate's constitutional violations, will not clear the causation bar. . .In addition to deliberate indifference and causation, the plaintiff must allege facts showing that the supervisor was on notice of the subordinate's misconduct. . . Such notice may be either actual or constructive. . . .The bottom line is that the scanty factual allegations limned in the proposed amended complaint do not make out a plausible showing of deliberate indifference and, thus, do not carry the plaintiff's supervisory liability claims over the plausibility threshold. In the last analysis, the complaint contains no facts sufficient to support a plausible inference that any of the defendants had reason to believe that Dall-Leighton presented a substantial risk of serious harm to female inmates. . . Where, as here, a complaint reveals random puffs of smoke but nothing resembling real signs of fire, the plausibility standard is not satisfied. We iron out one wrinkle. Even in the absence of a showing that officials knew of a substantial risk of serious harm at the hands of a particular subordinate, a plaintiff still may, in rare circumstances, make a plausible showing of deliberate indifference by alleging facts that indicate 'a known history of widespread abuse sufficient to alert a supervisor to ongoing violations,' from which officials could infer a substantial risk of serious harm. . . .We caution, though, that no one should read our opinion as insulating from liability correctional officials who fail to maintain a meaningful and clearly communicated process for detecting sexual abuse of inmates, as that would be inconsistent with our view of the deliberate indifference standard. . . .We need go no further. Moral indignation alone is not enough to permit a court either to hold prison officials liable for every abuse that occurs within a correctional facility or to authorize a plaintiff to embark on a fishing expedition. . . The facts alleged in the plaintiff's proposed amended complaint are simply too exiguous to make out plausible claims of either supervisory liability or civil rights conspiracy against the defendants. . . Accordingly, we hold that the district court acted well within the encincture of its discretion in rejecting as futile the plaintiff's motion for leave to file her amended complaint.")

Guadalupe-Baez v. Pesquera, 819 F.3d 509, 514-17 (1st Cir. 2016) ("Guadalupe's most loudly bruited claims sound in supervisory liability under 42 U.S.C. § 1983. Such a claim has two elements: first, the plaintiff must show that one of the supervisor's subordinates abridged the plaintiff's constitutional rights. . . Second, the plaintiff must show that 'the [supervisor]'s action or inaction was affirmative[ly] link[ed] to that behavior in the sense that it could be characterized as supervisory encouragement, condonation, or acquiescence or gross negligence amounting to deliberate indifference.'. . Supervisory liability is sui generis. Thus, a supervisor may not be held liable under section 1983 on the tort theory of respondeat superior, nor can a supervisor's section 1983 liability rest solely on his position of authority. . . This does not mean, however, that for section 1983 liability to attach, a supervisor must directly engage in a subordinate's unconstitutional behavior. . . Even so, the supervisor's liability must be premised on his own acts or omissions. . . Mere negligence will not suffice: the supervisor's conduct must evince 'reckless or callous indifference to the constitutional rights of others.'. . If a plaintiff relies on a theory of deliberate indifference, a three-part inquiry must be undertaken. . . In the course of that inquiry, the plaintiff must show '(1) "that the officials had knowledge of facts," from which (2) "the official[s] can draw the inference" (3) "that a substantial risk of serious harm exists."'. . '[D]eliberate indifference alone does not equate with supervisory liability.'. . Causation remains an essential element, and the causal link between a supervisor's conduct and the constitutional violation must be solid. . . This causation requirement 'contemplates proof that the supervisor's conduct led inexorably to the constitutional violation.'. . That is a difficult standard to meet but far from an impossible one: a plaintiff may, for example, prove causation by showing inaction in the face of a 'known history of widespread abuse sufficient to alert a supervisor to ongoing violations.'. . '[I]solated instances of unconstitutional activity' will not suffice. . .In addition, a supervisor must be on notice of the violation. . . Such notice may be either actual or constructive. . . Before us, Guadalupe argues that the district court erred in dismissing his supervisory liability claims both because it failed to give proper evidentiary weight to the Report and because it imposed too demanding a pleading standard. We agree in part. The amended complaint alleges that each of the supervisory defendants 'negligently confided and entrusted' the unnamed police officers 'with the authority to discharge their apparent duties.' And as to each, the amended complaint also alleges that:

[He] is responsible to [Guadalupe] for his own actions and omissions, negligent entrustment and negligent supervision ... a behavior ... that ... could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence, amounting to deliberate indifference and reckless disregard of [Guadalupe's] rights and guarantees under the law, and improperly training/supervising his subordinates.

The complaint then alleges that every one of the supervisory defendants failed to take necessary investigatory or remedial action after the shooting.

Certain other allegations, relevant only to Pesquera, Somoza, and Sánchez, likewise bear on these supervisory liability claims. As to this group of defendants, the amended complaint further alleges that each member of the group adopted policies that preserved 'the pattern and practice of use of excessive force.' Given this series of averments, Guadalupe's best case is against Pesquera (who

became Superintendent of the PRPD after the Report became public and held that office at the time of the shooting). The district court nonetheless dismissed the supervisory liability claim against Pesquera, concluding that Guadalupe's allegations were insufficient to 'connect the dots' and demonstrate that Pesquera's conduct was affirmatively linked to the harm that eventuated. . . We think that the court set the bar too high: viewed as part of the tableau constructed by the Report, Guadalupe has stated a supervisory liability claim against Pesquera that is plausible on its face. As Superintendent, Pesquera bore the ultimate responsibility for overseeing and directing all administrative, operational, training, and disciplinary aspects of the PRPD. An appreciable amount of time elapsed between the issuance of the Report and the shooting. Guadalupe alleges, though, that Pesquera continued—or at least failed to ameliorate—'policies which cause the pattern and practice of use of excessive force.' When this allegation is evaluated in conjunction with the rampant constitutional violations limned in the Report and the parade of horribles allegedly visited upon Guadalupe, a plausible inference exists that Pesquera either condoned or at least acquiesced in the offending conduct—conduct that is affirmatively linked to the harm Guadalupe suffered. Thus, Pesquera may be subject to section 1983 liability as a supervisor for that harm. Any claim by Pesquera that he was unaware of the substantial risk of the serious harm that befell Guadalupe would constitute deliberate indifference to the reality of the dysfunction that Pesquera inherited when he took over as Superintendent of the PRPD. . . The short of it is that Guadalupe's supervisory liability claim against Pesquera crosses the plausibility threshold because the DOJ has given him a leg up. Indeed, it is through such reasoning that district courts in Puerto Rico have consistently given weight to the Report and declined to dismiss analogous claims during the pleading phase. . .We add that plausibility determinations cannot be made in the abstract. Here, all that Guadalupe could reasonably know (or be expected to ascertain) at the time he filed suit was that an unidentified police officer had shot him for no apparent reason. But when combined with the Report, that is enough to get Guadalupe across the plausibility threshold: such random and anonymous violence appears to be a predictable culmination of the systemic problems documented in the Report. In this instance, then, the Report plays a critical role in bridging the plausibility gap. Nor is there anything unfair about this result. The existence of the Report put Pesquera on luminously clear notice that he might become liable, in his supervisory capacity, should his acts and omissions contribute to the continuation of the pathologies described in the Report. . . To be sure, Guadalupe's claim against Pesquera, as pleaded, is not a textbook model. He could have included more particulars about Pesquera's role and responsibilities as Superintendent of the PRPD and tied such details to the known circumstances of his shooting. But we have said before, and today reaffirm, that '[a] high degree of factual specificity is not required at the pleading stage.'. . In our view, there is enough here—though not by much—to permit Guadalupe to proceed to discovery.")

Saldivar v. Racine, 818 F.3d 14, 18-20 (1st Cir. 2016) ("The District Court dismissed Saldivar's claim against Racine on the ground that Saldivar had failed to plausibly allege that Racine was deliberately indifferent. The District Court explained that it reached that conclusion because the complaint failed to allege facts that would plausibly show that Racine had the requisite notice of the risk that Pridgen would assault Saldivar. . . Our precedent requires that same conclusion. In

order for a police supervisor to be deemed 'deliberately indifferent,' the supervisor must have 'actual or constructive knowledge' of a 'grave risk of harm' posed by the subordinate and fail to take 'easily available measures to address the risk.'. . The complaint does allege that Pridgen had a number of disciplinary violations prior to the alleged assault and rape. Those violations do not, however, include any that would indicate that Pridgen had any propensity for violence or for any other sufficiently related conduct. This absence renders speculative any inference that one might otherwise arguably draw that any officer who would commit such an offense likely had a record that would suffice to give such an indication. . . . We recognize that we are reviewing a dismissal of a complaint and thus that the plaintiff need not prove her allegations. At this early stage in the litigation, she need only make the kind of allegations that would suffice under the standard set forth in *Iqbal* . . . . Indeed, as we have noted, seemingly all of our analogous § 1983 supervisory liability cases have been resolved at summary judgment, or at other later stages of the litigation. Nonetheless, under the *Iqbal* standard, the complaint must set forth facts that make the § 1983 claim plausible. . . And, here, we do not believe the facts that have been set forth suffice to make it plausible that the supervisor—Racine—is liable under § 1983 for the horrific conduct by Officer Pridgen that is alleged.")

Morales v. Chadbourne, 793 F.3d 208, 220-22 & n.5 (1st Cir. 2015) ("Morales alleges that ICE supervisors Chadbourne and Riccio violated her Fourth Amendment rights because they knew or were deliberately indifferent to the fact that their subordinates routinely issued immigration detainers against naturalized U.S. citizens without probable cause, and formulated or condoned policies permitting the issuance of detainers without probable cause. Defendants argue that Morales has failed to allege sufficient facts to plausibly state a supervisory liability claim. . . .Morales alleges that ICE agents in Rhode Island maintained a practice of 'routinely collaborat[ing]' with state law enforcement authorities 'to issue and enforce detainers against U.S. citizens, particularly naturalized U.S. citizens, ... without sufficient investigation into their citizenship or immigration status and without probable cause to believe that they are non-citizens subject to removal and detention.'. . The complaint further alleges that when an individual is arrested at the ACI and 'provide[s] a foreign country of birth, has a foreign-sounding last name, speaks English with an accent, and/or appears to be Hispanic,' ICE agents 'often fail sufficiently to investigate the arrestee's citizenship or immigration background before issuing an immigration detainer ... without probable cause to believe that the individual is a noncitizen subject to detention and removal by ICE.'. . The complaint further alleges that Chadbourne and Riccio, as the heads of the ICE Boston Field Office and Rhode Island sub-office, 'knew or should have known that their subordinates, including Defendant Donaghy, regularly ... issued immigration detainers against individuals such as Ms. Morales, without conducting sufficient investigation and without probable cause to believe that the subject of the immigration detainer was a non-citizen subject to removal and detention.'. . The complaint adds that Chadbourne and Riccio 'formulated, implemented, encouraged, or willfully ignored [ICE's] policies and customs [in Rhode Island] with deliberate indifference to the high risk of violating Ms. Morales's constitutional rights' and failed to 'change[ ] these harmful policies and customs' although they 'had the power and the authority to change [them] by, for instance, training officers such as Defendant Donaghy to perform an adequate

investigation into individuals' citizenship and immigration status before issuing detainers.'. . Relying on the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), Chadbourne and Riccio contend that Morales's allegations are conclusory and fail to establish an affirmative link between Donaghy's behavior and their action or inaction. . . .We reject Chadbourne and Riccio's argument because, unlike the conclusory allegations in *Iqbal*, the allegations in Morales's complaint are based on factual assertions that establish the affirmative link necessary to sufficiently plead a supervisory liability claim. [Court details allegations] Based on these detailed allegations—combined with the previously highlighted allegations discussing Chadbourne and Riccio's specific roles—and drawing all reasonable inferences in favor of Morales (which we must do at the motion to dismiss stage), it is plausible that Chadbourne and Riccio either formulated and implemented a policy of issuing detainers against naturalized U.S. citizens without probable cause or were deliberately indifferent to the fact that their subordinates were issuing detainers against naturalized U .S. citizens without probable cause. Thus, Morales has sufficiently alleged that Chadbourne and Riccio, through their action or inaction, permitted their subordinates, including Donaghy, to issue detainers without probable cause in violation of the Fourth Amendment. . . . Although there were no specific cases in 2009 directly addressing a supervisor's liability with regard to the issuance of immigration detainers, it is beyond debate that a supervisor who either authorized or was deliberately indifferent to his subordinate's issuance of a detainer without probable cause could be held liable for violating the Fourth Amendment.")

[*See also* ***Morales v. Chadbourne***, 235 F. Supp. 3d 388, 402–03 (D.R.I. 2017) ("Ms. Morales moves for summary judgment, arguing that Director Chadbourne violated her Fourth Amendment right by failing to supervise and train his agents to issue detainers properly and failing to implement more effective immigration detainer policies. Director Chadbourne also moves for summary judgment, arguing that he was not responsible for training agents—that was done at the ICE training academy—or establishing policies for issuing detainers—that happens at ICE Headquarters in Washington, D.C. . . . .Because Director Chadbourne did not physically issue the detainer or have a hands-on role in holding Ms. Morales, the Court reviews his conduct under the premise of supervisory liability. . . . The Court begins its analysis, looking for an affirmative link between Agent Donaghy's conduct and Director Chadbourne's actions and inactions. The undisputed evidence establishes that Director Chadbourne failed to properly train and supervise his subordinates, including Agent Donaghy, concerning the issuance of detainers. Despite acknowledging his responsibility for communicating ICE policy to agents, Director Chadbourne could not recall discussing the detainer form with his agents or providing any training, guidance, or supervision to them. . . He could not recall reviewing the Hayes Memo with the agents. . . Director Chadbourne did not appear to know that probable cause was required to issue a detainer, testifying that 'an agent does not have to make a determination that a person is in the country illegally before issuing a detainer.'. . The result of this failure to supervise is that Agent Donaghy issued the detainer against Ms. Morales without probable cause based on incomplete information without asking a single question before doing so or conducting a further investigation. Furthermore, Director Chadbourne did not supervise how his employees were issuing detainers

through statistical analysis either. He failed to collect statistics about agent-issued detainers and did not report those statistics to ICE headquarters as was required by a 2007 national ICE policy. . . . The bottom line is that Director Chadbourne was not aware that there were any problems with the way his Rhode Island Field Office agents issued detainers because he did not pay attention to the process and explicitly failed to supervise agents. Whether Agent Donaghy's unconstitutional actions were based on Director Chadbourne's inaction in failing to communicate ICE policy, or his failure to review the field offices' detainer statistics for issues, or his failure to ensure through supervision that his agents were not issuing detainers against those asserting citizenship, the Court finds that there was an affirmative link between Agent Donaghy's conduct in issuing an illegal detainer and Director Chadbourne's actions in failing to train and supervise. . . Therefore, Director Chadbourne is liable for the unconstitutional detainer because his supervision and training of his agents, or the lack thereof, was deliberately indifferent to the possibility that their performance, ignorant of the legal standard for issuing a detainer, could cause a deprivation of civil rights.")]

Ramirez-Lluveras v. Rivera-Merced, 759 F.3d 10, 19-21 (1st Cir. 2014) ("The defendants strongly urge that this case be used as a vehicle to recast the contours of supervisory liability in the aftermath of *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). We see no reason to do so or to address what is a hypothetical argument. The plaintiffs' case against the supervisors simply is insufficient to meet this circuit's standards as articulated before and reinforced after *Iqbal.* There are a number of clear rules governing supervisory liability under § 1983. First, the subordinate's behavior must have caused a constitutional violation, although that alone is not sufficient. . . Here, there is a jury verdict establishing Pagán's and the other two officers' violation of constitutional rights. Additionally, the tort theory of respondeat superior does not allow imposition of supervisory liability under § 1983. . . After *Iqbal,* as before, we have stressed the importance of showing a strong causal connection between the supervisor's conduct and the constitutional violation. . . .In addition, the supervisor must have notice of the unconstitutional condition said to lead to the claim. . . .Pagán's disciplinary record evidenced seven instances of alleged misconduct over a nearly fourteen-year period. That record was not sufficient to put supervisors on notice that he presented a 'substantial,' 'unusually serious,' or 'grave risk' of shooting an arrestee. . . Nor did it give notice he required discipline beyond that already given to him. We do not discount the seriousness of the domestic violence allegations. We think the commission of these acts by Pagán against his girlfriend is indeed relevant to whether Pagán could be thought to pose a threat of violence to others when he was on official duty. We disagree with the proposition that private domestic abuse is not relevant to the risk of an officer abusing his public position with violence. Nonetheless, in light of all of the facts here, the causal connection the plaintiffs attempt to draw is insufficient as a matter of law to impose supervisory liability even on those supervisors who knew of the content of Pagán's disciplinary record, much less on those who did not know. The domestic abuse events took place in 1998, nearly nine years before the shooting. The complaint about them was handled seriously by the PRPD. The PRPD investigation found that Pagán had made verbal threats and made threats using his weapon, but did not find he had acted on those threats or inflicted physical harm on others, much less used his weapon to shoot anyone. Further, Pagán was promptly sent for evaluation by the Domestic Violence unit, his firearm was taken away, and he was suspended. Once Pagán and

the complainant's relationship ended, there were no other domestic abuse complaints filed against Pagán. Importantly, while Toledo–Dávila had recommended termination based only on the pre-hearing allegations, that recommendation was not deemed suitable after Pagán was given a hearing. Indeed, Toledo–Dávila said the evidence at the hearing compelled that reduction of the discipline to a suspension for a period of time. Pagán did receive significant discipline after the hearing: a sixty-day suspension without pay. A reasonable official would think that suspension would have a deterrent effect. Indeed, the handling of the charges in a serious manner seemed to have that effect, for there were no other domestic abuse claims made against Pagán after the charges were brought. This evidence is simply insufficient to show the needed causal relationship between the 1998 domestic abuse complaint and the August 11, 2007 shooting. Even after thoroughly investigating the complaint, the PRPD Superintendent did not conclude that the events showed that Pagán was too dangerous to be in a position in which he would encounter civilians. The record does not evidence any causal link between the two events.")

Ramirez-Lluveras v. Rivera-Merced, 759 F.3d 10, 23, 24, 28-30 (1st Cir. 2014) (Torruella, J., concurring in part, dissenting in part) ("Considering the evidence on record, and drawing all reasonable inferences in favor of the non-moving plaintiffs, I believe the majority judges are incorrect in affirming the grant of summary judgment as to all supervisory defendants. Though a close call, I find there are questions of material fact regarding the supervisory liability of Cruz–Sánchez and Colón–Báez that have improperly been kept from a jury. . . .I am concerned by the majority's view that Pagán's disciplinary history was not enough to put the supervisory officials on notice that he presented a substantial risk of shooting an arrestee or civilian. Underlying this finding is the notion that, in order for liability to attach on a deliberate indifference theory, our case law requires that supervisory officials be on notice, not merely of the potential for violence on the part of the subordinate, but of the potential of a specific act of violence, in this case, shooting a civilian. To be sure, the Supreme Court has provided guidance to the effect that there must be warning of a specific kind of injury. [citing *Bryan County*] However, if a subordinate's threats of death by gunfire against another person are not enough to put a supervisor on notice that the subordinate is a prime prospect for engaging in such conduct in the future, is it required that his supervisors wait until the subordinate actually commits such a crime before corrective or preventive measures are taken? Such a strenuous standard cannot possibly be the law. In the case of Pagán, after one episode of executing a civilian, it seems obvious now that he is an ideal candidate for supervisory action based on his proven record. For Cáceres, it was one shot too many. . . .I concede that whether the causal connection here is sufficient, is a close question, particularly as to Cruz–Sánchez. I understand it may seem a stretch to some, at first glance, that a few violent episodes in 1998 would somehow be linked to another violent episode in 2007. However, it is in part because this is a difficult question that I believe the majority errs in not allowing the jury to fulfill its traditional function. . . Though Pagán's most egregious acts of violence happened years before the murder of Cáceres, the disciplinary proceedings related to those acts did not conclude until eight years later, in October 2006, when Pagán served his suspension only months before the execution. . . . A jury should have the opportunity to determine whether Cruz–Sánchez and Colón–Báez were on notice of the risk of harm Pagán posed to civilians. It should also have the occasion

to determine whether either defendant should have seized any of the opportunities they had to keep Pagán from acting out and repeating his violent tendencies. I believe a reasonable jury could answer both inquiries in the affirmative. A claim of ignorance cannot shield them from liability. In fact, such a claim might be probative of deliberate indifference. Accordingly, for these reasons, I dissent.")

Marrero-Rodriguez v. Municipality of San Juan, 677 F.3d 497, 501-03 (1st Cir. 2012) ("The individual defendants who held the positions of Lieutenant of the Municipal Police, Commissioner of the Municipal Police, Operational Field Chief, Operation Field Sub–Director, Commanding Officer of Specialized Units, Administrative Director of Police Training, Captain of the Municipal Police, and/or Instructors are all, on the pleadings, charged with responsibility for police training and the training that day. By contrast, the Municipality is pled to be liable merely because it employs the individual defendants and because it did not have sufficient training regulations in place, and the Mayor is said to be liable because he is Mayor. . . . From these facts a number of inferences may be drawn in favor of plaintiffs' Fourteenth Amendment claim. The conduct of shooting in the back a participant in a training exercise was certainly likely to injure. It is plausible that no reasonable government interest in this training exercise justified a police officer taking out a firearm and placing it to the unprotected back of a prone officer, who was face down, motionless, under control, and unarmed. Further, it is plausibly shocking that Santiago, the co-supervisor of the training, did nothing to intervene when Lt. Pacheco placed the gun to Lozada's back. Moreover, this was done by the highest-ranking supervisor present, as part of a training program. Lt. Pacheco, that supervisor, did not discharge his weapon before entering the facility and did not go through the required checkpoint, in violation of several training protocols. Moreover, Lt. Pacheco said that it was not proper training to merely subdue and control a suspect. Rather, he illustrated 'proper' training by using what was obviously lethal force, entirely disproportionate to any reasonable need, in conducting the lesson. The inference can be drawn that the instruction given by Lt. Pacheco as 'proper' in this type of situation was shockingly indifferent to the rights of the subdued 'suspects.' These factual allegations may not prove to be true; but at this stage, all inferences are drawn in the plaintiffs' favor. In short, as to the defendant officers directly involved, Lt. Pacheco and Santiago, the facts are sufficiently pled. As to the police defendants not present that day, but with direct responsibility for training, the question is closer. The complaint can, if read generously, be read to say they are not being sued merely because they are supervisors who engaged in no misconduct themselves, but because they each had direct responsibility for the conduct of training exercises and had some active involvement in the structuring of the lethal training exercise that day, and that at least some should have been there that day. Other inferences may also be drawn-their failure to implement policies, protocols, or correct training about use of live firearms and preventing deaths in such exercises from the police defendants was itself so lacking in justification as to be shocking to the conscience. This is slightly more than was pled in *Soto–Torres v. Fraticelli*, 654 F.3d 153 (1st Cir.2011), and *Peñalbert–Rosa v.. Fortuño–Burset*, 631 F.3d 592 (1st Cir.2011), where we found the pleadings insufficient. At this early stage we are reluctant to dismiss. The role of these defendants can be made clearer in discovery and nothing precludes later efforts to end the case against them should discovery not substantiate these inferences. It takes more than this, though, to

assert a § 1983 claim against those who have no personal involvement of any sort in the events, such as the Mayor, and more to assert a claim against the Municipality. The Mayor is not amenable to suit, as pled in the complaint, merely because he is Mayor. Nor may the Municipality be sued under § 1983, as pled, on a respondeat superior theory that it is liable because it employs the individual defendants. . . . In this case, although the complaint alleges that there were insufficient regulations in place to govern the training exercise, it also describes several safety procedures that were intended to prevent exactly this type of accident. In particular, it states that: (1) before entering the training area, officers were to discharge their weapons in a sandbox; (2) in the training facility, officers were only to use only 'dummy guns'; and (3) at this particular training, no firearms were to be used. As a result, no plausible claim of municipal liability based on lack of any safety procedures is stated. The facts as alleged may turn out not to be so. It may be that this shooting was a horrid accident brought about by the inexplicable actions of one man, Lt. Pacheco. But we think the Fourteenth Amendment pleadings, as inartful as they are, point to sufficiently plausible theories of violation to survive dismissal at this stage, save as to the Mayor and the Municipality.")

Feliciano-Hernandez v. Pereira-Castillo, 663 F.3d 527, 533-36 (1st Cir. 2011) ("Feliciano-Hernández's complaint fails under *Iqbal* to plead adequately that the individual defendants violated his constitutional rights and so fails the first prong of the qualified immunity analysis. As such, he necessarily fails the second prong as well: an objectively reasonable public official situated as defendants would not be on notice of violations of any constitutional rights. The named defendants are very high-level officials, each of whom, as Secretary of the Department of Corrections, had vast responsibilities. . . . The complaint sets forth a series of conclusions. It alleges that '[i]n keeping the plaintiff confined beyond the term of his sentence, each defendant acted with deliberate indifference and/or reckless disregard of the plaintiff's Eighth Amendment rights and due process of law' and that '[e]ach defendant [ ] unjustifiabl[y] deprived plaintiff of liberty in violation of his Eighth Amendment rights and due process of law.'. The complaint states as to each of the former-Secretary defendants that he or she 'is being sued on the basis of his [or her] deliberate indifference and/or reckless disregard' of the plaintiff's rights. It alleges among other conclusions that the defendants 'failed in their duty to assure adequate monitoring, disciplining, evaluating, training and supervising any and all personnel under their charge, to assure that all inmates were properly classified and released upon completion of their sentence.' It relatedly alleges that '[h]ad the defendants complied with their supervisory duties, they would have identified those employees that did not properly register the plaintiff's classification and inaccurately categorized the crimes for which he had been sentenced.' None of these conclusory allegations suffice to establish a claim. These are exactly the sort of 'unadorned, the-defendant-unlawfully-harmed-me accusation[s]' that both we and the Supreme Court have found insufficient. . . . There are a number of other specific deficiencies in the complaint. We start (and end) with the failure to plead that any of the named defendants, each a former Secretary of the Department of Corrections, had any individual notice that plaintiff's incarceration beyond 1993 was a violation of his constitutional rights, much less that there was an affirmative link to them or that they were deliberately indifferent to those notices of alleged violations of his rights. Actual or constructive knowledge of a rights violation is a prerequisite for stating any claim. . . .Even beyond failing to

show notice to the individual defendants, the complaint fails on other grounds. Feliciano-Hernández 'would still have to go further, for "not every official who is aware of a problem exhibits deliberate indifference by failing to resolve it."'. . . The complaint contains no factual allegations to support even a minimal showing of deliberate indifference.")

Soto-Torres v. Fraticelli, 654 F.3d 153, 157-60 & nn.7 & 8 (1st Cir. 2011) ("Soto-Torres does not allege that SAC [Special Agent in Charge] Fraticelli was present when these events occurred or that Fraticelli witnessed their occurrence. Rather, he makes only two relevant allegations. He alleges that Fraticelli 'was the officer in charge during the incident' and that he 'participated in or directed the constitutional violations alleged ... or knew of the violation[s] and failed to act to prevent them.' These are the only allegations that address Fraticelli's involvement in Soto-Torres's detention. . . . . In *Maldonado* we observed that 'recent language from the Supreme Court may call into question our prior circuit law on the standard for holding a public official liable under § 1983 [and *Bivens*] on a theory of supervisory liability.'. . However, as in *Maldonado,* '[w]e need not resolve this issue ... because we find that [Soto-Torres has] not pled facts sufficient to make out a plausible entitlement to relief under our previous formulation of the standards for supervisory liability.'. . . Soto-Torres essentially brings this suit on a theory of supervisory liability. The only allegations in the complaint linking Fraticelli with the detention of Soto-Torres are that Fraticelli 'was the officer in charge during the incident' and that he 'participated in or directed the constitutional violations alleged herein, or knew of the violation[s] and failed to act to prevent them.' *Iqbal* and our precedents applying it make clear that these claims necessarily fail. As our discussion of the law of supervisory liability makes clear, the allegation that Fraticelli was 'the officer in charge' does not come close to meeting the required standard. While the complaint states that Fraticelli 'participated in or directed the constitutional violations alleged herein,' it provided no facts to support either that he 'participated in' or 'directed' the plaintiff's detention. In some sense, all high officials in charge of a government operation 'participate in' or 'direct' the operation. *Iqbal* makes clear that this is plainly insufficient to support a theory of supervisory liability and fails as a matter of law.For the complaint to have asserted a cognizable claim, it was required to allege additional facts sufficient to make out a violation of a constitutional right. Those additional facts would then be measured against the standards for individual liability. The complaint would have had to plead facts supporting a plausible inference that Fraticelli personally directed the officers to take those steps against plaintiff which themselves violated the Constitution in some way. Such a pleading would then have been tested to see whether the standards for immunity had been met. But in this case, the complaint does not even meet the first prong of our two-part *Iqbal* inquiry. Our precedents make clear that it is not enough to state that a defendant 'was the officer in charge during the incident' and that he 'participated in or directed the constitutional violations' alleged. . . . The district court treated the reasoning of *Maldonado* as inapplicable to this case because the portions of *Maldonado* that laid out the requirements for supervisory liability concerned a Fourteenth Amendment substantive due process claim, whereas here, Soto-Torres attempts to state a supervisory liability theory for violation of his Fourth Amendment rights. However, the constitutional source of a plaintiff's claims are [sic] irrelevant to this court's analysis of whether a plaintiff has satisfactorily articulated a supervisory liability

theory. Neither *Maldonado* nor *Iqbal* suggest [sic] that supervisory liability theories should be treated differently based on whether they are made to support a claim under the Fourth Amendment or the Fourteenth Amendment.")

Leavitt v. Correctional Medical Services, Inc., 645 F.3d 484, 502 (1st Cir. 2011) ("Nor can supervisory officials, like Tritch, be held liable for the conduct of their subordinates solely under a theory of respondeat superior. . . It may be true that the care Leavitt received at MSP was generally inadequate. However, to make out a cognizable Eighth Amendment claim against healthcare providers in their *individual* capacity, he must demonstrate that there is sufficient evidence for a reasonable factfinder to conclude that *each* CMS defendant was 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,' and that *each* defendant did, in fact, 'draw the inference.'. . We cannot conclude that Leavitt has satisfied his burden.")

Sanchez v. Pereira-Castillo, 590 F.3d 31, 48, 49 (1st Cir. 2009) ("We read plaintiff's complaint to assert a claim of supervisory liability under Section 1983 against the administrative correctional defendants, namely Pereira, Fontanez, Díaz, Negrón, and Soto, premised on the theory that those defendants failed adequately to train the correctional defendants who were implicated in the surgery itself. Although 'Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*,' *Iqbal,* 129 S.Ct. at 1948, supervisory officials may be liable on the basis of their own acts or omissions. *Aponte-Matos v. Toledo-Dávila,* 135 F.3d 182, 192 (1st Cir.1998). In the context of Section 1983 actions, supervisory liability typically arises in one of two ways: either the supervisor may be a 'primary violator or direct participant in the rights-violating incident,' or liability may attach 'if a responsible official supervises, trains, or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation.' *Camilo-Robles v. Zapata,* 175 F.3d 41, 44 (1st Cir.1999). In the latter scenario, relevant here, the analysis focuses on 'whether the supervisor's actions displayed deliberate indifference toward the rights of third parties and had some causal connection to the subsequent tort.' *Id.* In either case, the plaintiff in a Section 1983 action must show 'an affirmative link, whether through direct participation or through conduct that amounts to condonation or tacit authorization,' *id.*, between the actor and the underlying violation. In determining whether allegations state a plausible claim for relief, the Supreme Court has suggested that we 'begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.' *Iqbal,* 129 S.Ct. at 1950. Turning to plaintiff's complaint, we find that it does little more than assert a legal conclusion about the involvement of the administrative correctional defendants in the underlying constitutional violation. Parroting our standard for supervisory liability in the context of Section 1983, the complaint alleges that the administrative defendants were 'responsible for ensuring that the correctional officers under their command followed practices and procedures [that] would respect the rights and ensure the bodily integrity of Plaintiff' and that 'they failed to do [so] with deliberate indifference and/or reckless disregard of Plaintiff's federally protected rights.' This is precisely the type of 'the-defendant-unlawfully-harmed-me'

allegation that the Supreme Court has determined should not be given credence when standing alone. *Id.* at 1949. The sole additional reference to the administrative correctional defendants' role in the surgery is the complaint's statement that '[t]he pushiness exerted by John Doe [upon the doctors] followed ... the regulations and directives designed by Pereira and construed and implemented by all of the other Supervisory Defendants .'. . However, the only regulations described in the complaint are the strip search and x-ray regulations promulgated by Pereira. The deliberate indifference required to establish a supervisory liability/failure to train claim cannot plausibly be inferred from the mere existence of a poorly-implemented strip search or x-ray policy and a bald assertion that the surgery somehow resulted from those policies. We conclude, therefore, that the 'complaint has alleged-but it has not Ashow[n]'-Athat the pleader is entitled to relief''from the administrative correctional defendants. *Iqbal,* 129 S.Ct. at 1950 (quoting Fed. Rule Civ. Proc. 8(a)(2)). Although it did so on different grounds, the district court was correct to dismiss the claims against those defendants. . . .We conclude that plaintiff's allegations against Cabán and John Doe are sufficient to allow us 'to draw the reasonable inference that [each] defendant is liable for the misconduct alleged .' *Iqbal,* 129 S.Ct. at 1949. Although the claims against John Doe and Cabán also rest on a form of supervisory liability in the sense that neither one actually performed the surgery on plaintiff, those claims do not depend on a showing by plaintiff of a failure to train amounting to deliberate indifference to his constitutional rights. Instead, plaintiff succeeds in pleading that the defendants were liable as 'primary violator[s] ... in the rights-violating incident,' thereby stating a sufficient claim for relief. . . . We begin with the claims against Sergeant Cabán. . . Plaintiff's complaint specifically alleges that Cabán was directly involved in all phases of the search for contraband. . . and in the ultimate decision to transport plaintiff to the hospital 'for a rectal examination and/or a medical procedure to remove the foreign object purportedly lodged in Plaintiff's rectum.' The complaint goes on to allege that John Doe, acting pursuant to 'orders imparted by Cabán,' pressured the doctors to conduct a medical procedure to remove the illusory cell phone from plaintiff's bowels. Given these allegations, it is a plausible inference that Cabán caused plaintiff to be subjected to the deprivation of his Fourth Amendment rights. *See* 42 U.S.C. § 1983.").

Maldonado v. Fontanes, 568 F.3d 263, 273-75 & n.7(1st Cir. 2009) ("[A]nalyzing the pleadings under *Iqbal*, we hold that the allegations of the complaint do not allege a sufficient connection between the Mayor and the alleged conscience-shocking behavior – the killing of the seized pets – to state the elements of a substantive due process violation.. . . The purported liability of the Mayor for damages for substantive due process violations does not involve a policy of the Municipality for which he is responsible, nor does it rest on his personal conduct. Instead, the allegations against the Mayor are that he promulgated a pet policy for the public housing complexes and was present at and participated in one of the raids. This level of involvement is insufficient to support a finding of liability. . . . Plaintiffs complaint identifies no policy which authorized the killing of the pets, much less one which the Mayor authorized. Second, the complaint does not allege that the Mayor was personally involved in any conscience-shocking conduct during the raids. . . .A government official who himself inflicts truly outrageous, uncivilized, and intolerable harm on a person or his property may be liable; but there is no claim

in this complaint the Mayor himself inflicted such harm. . . The allegations against the Mayor thus do not establish that his involvement was sufficiently direct to hold him liable for violations of the plaintiffs' substantive due process rights. Nor do the allegations make out a viable case for supervisory liability, such that the Mayor could, on these pleadings, be held responsible for violations of the plaintiffs' substantive due process rights committed by subordinate municipal employees or workers from ACS. . . . Some recent language from the Supreme Court may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability. . . We need not resolve this issue, however, because we find that the plaintiffs have not pled facts sufficient to make out a plausible entitlement to relief under our previous formulation of the standards for supervisory liability. . . . Here, the Mayor's promulgation of a pet policy that was silent as to the manner in which the pets were to be collected and disposed of, coupled with his mere presence at one of the raids, is insufficient to create the affirmative link necessary for a finding of supervisory liability, even under a theory of deliberate indifference. The Mayor is entitled to qualified immunity on the pleadings on the Fourteenth Amendment substantive due process claims.").

Horan v. Cabral, No. CV 16-10359-GAO, 2017 WL 4364174, at *3 (D. Mass. Sept. 29, 2017) ("Discovery on *Monell* liability has been stayed, and there has been no discovery on the question of the existence of a policy or practice that caused the plaintiff to be deprived of a constitutional right. Thus, the defendant cannot move for summary judgment on this issue. *See* Fed. R. Civ. P. 56(d). Even assuming an underlying constitutional violation by medical personnel in the respect alleged, the complaint fails to support a plausible inference that Cabral had personally been involved with the subordinate personnel who provided the care such that she could be liable as a supervisor. Drawing a reasonable inference in the plaintiff's favor, that the January 22 letter from the plaintiff's counsel was received and read by Cabral, the letter neither establishes an 'affirmative link' nor plausibly supports the inference that Cabral's conduct 'led inexorably' to the purported constitutional violation. . . Cabral's inaction after receiving a letter that notified her of a disagreement regarding the plaintiff's medical treatment plan is, without more, not enough to establish deliberate indifference on her part. Additionally, an isolated incident of constitutionally deficient medical care does not plausibly allege a policy or practice of deliberate indifference to constitutional violations on the part of Cabral. . . Because the complaint does not state a plausible basis for relief, the § 1983 Eighth Amendment claim against defendant Cabral is dismissed.")

McLaren, as Administratrix of the Estate of Leyland v. Salisbury, No. CV 24-263-JJM-LDA, 2025 WL 846490, at *2–3 (D.R.I. Mar. 18, 2025) ("It has been clearly established since at least 1986, 'that police officers violate the Fourteenth Amendment due process rights of a detainee if they display a "deliberate indifference" to the unusually strong risk that a detainee will commit suicide.'. . . And supervisory liability may attach under § 1983 for failure to train police or correctional officers on the prevention of detainee suicides. . . Taking the allegations in the First Amended Complaint as true, the RIDOC and its agents knew that Mr. Leyland was suicidal. It claims that Defendants failed to act in the face of this knowledge. They placed him on a suicide watch, but then failed to watch. They did not constantly observe him in violation of their own

procedure. This evidence of actual knowledge and lack of required action and inaction is sufficient to show deliberate indifference. As to the Supervisory Defendants did not train the John Does on RIDOC's suicide prevention policy, did not implement the policy, and did not hold the John Does responsible or accountable for violating the policy. On this limited factual record, qualified immunity does not apply. . . .A review of the facts alleged in the Amended Complaint shows that the Estate has plausibly alleged sufficient facts to establish each of their causes of action, including objective and subjective deliberate indifference under the Eighth Amendment. Under the Eighth Amendment, prisoners cannot be treated with 'deliberate indifference' toward 'a substantial risk of serious harm to health' or 'serious medical needs.' . . . The Estate has alleged that the RIDOC and its agents knew that Mr. Leyland was suicidal. They placed him on a suicide watch, but then failed to watch. They did not constantly observe him in violation of their own procedure. This evidence of actual knowledge and lack of required action and inaction is sufficient to show deliberate indifference. As to the Supervising Defendants specifically, the Estate plausibly claims that the Supervisory Defendants failed to properly train the John Doe correctional officers ("COs") Defendants on the RIDOC's suicide-prevention policy, failed to implement the policy, and failed to hold COs responsible or accountable for violating the policy. The First Circuit has long recognized that supervisory liability may attach under § 1983 for failure to train police or correctional officers on the prevention of detainee suicides. . . The Estate has plausibly alleged that a 'seriously elevated risk of suicide, [the supervisors'] knowledge of that risk, and [the supervisors'] failure to take obvious remedial steps, to the point where [their] culpability considerably exceeds negligence and, because it is "reckless" or "callous" or wanton.'")

De Los Santos, as Administratrix of the Estate of De Los Santos v. Salisbury, No. CV 24-266-JJM-LDA, 2025 WL 846411, at *1–3 (D.R.I. Mar. 18, 2025) ("While suffering withdrawal symptoms from substance use disorder, Mr. De Los Santos made known to Defendants that he intended to commit suicide. Despite this information, RIDOC staff provided Mr. De Los Santos with underwear, socks, and two T-shirts, and staff either provided Mr. De Los Santos with shoelaces or did not remove his shoelaces. RIDOC staff also did not keep constant visual supervision of him in violation of standard operating policy and took no action to abate the known risk that Mr. De Los Santos would commit suicide. Two days after arriving in RIDOC care, while alone and unwatched in his cell, Mr. De Los Santos wrapped his shoelaces around his neck, affixed the laces to something in his cell, and hung himself. RIDOC staff called rescue who found Mr. De Los Santos pulseless, and found his body cool to the touch. RIDOC staff reported to Emergency Medical Services ("EMS") that Mr. De Los Santos was last seen alive about an hour earlier. Despite cardio-pulmonary resuscitation, the EMS found no signs of life throughout treatment and transported Mr. De Los Santos's body to Rhode Island Hospital where he was pronounced dead. . . . Taking the allegations in the First Amended Complaint as true, Defendants failed to act in the face of Mr. De Los Santos's known risk of imminent suicide. He presented to RIDOC as an unusually strong suicide risk; he was wearing a suicide prevention Tyvek suit, Pawtucket Police told RIDOC that he threatened suicide, and Mr. De Los Santos himself told Defendants that he was contemplating suicide. Defendants did not follow their own protocol and instead ignored these signs, putting Mr. De Los Santos at risk. The Supervisory Defendants did not train the COs on

RIDOC's suicide prevention policy, did not implement the policy, and did not hold COs responsible or accountable for violating the policy. On this record, qualified immunity does not apply. . . . A review of the facts alleged in the Amended Complaint shows that the Estate has plausibly alleged sufficient facts to establish each of their causes of action, including objective and subjective deliberate indifference under the Eighth Amendment. . . . The Estate has alleged that the RIDOC and its agents knew that Mr. De Los Santos had a history of substance abuse, he swallowed a bag of fentanyl, was wearing a suicide-prevention jumper when he arrived at the ACI, he had attempted suicide while in the custody of Pawtucket Police, and he told RIDOC agents that he had suicidal ideations. The Estate has alleged that, despite the Defendants' actual notice that Mr. de Los Santos was suicidal and likely to harm himself, they did not take necessary precautions to keep him safe and RIDOC agents had not checked on him for over an hour. These allegations of actual knowledge and lack of action are sufficient to plead deliberate indifference. As to the Supervising Defendants specifically, the Estate plausibly claims that the Supervisory Defendants failed to train the John Doe correctional officers ("COs") Defendants on the RIDOC's suicide-prevention policy, failed to implement the policy, and failed to hold COs responsible or accountable for violating the policy. . . The Estate has plausibly alleged that a 'seriously elevated risk of suicide, [the supervisor's] knowledge of that risk, and [the supervisor's] failure to take obvious remedial steps, to the point where [their] culpability considerably exceeds negligence and, because it is "reckless" or "callous" or wanton.'")

Thomas v. Town of Chelmsford, 267 F.Supp.3d 279, ___ (D. Mass. 2017) ("The Court concludes that a school's failure to take action to stop bullying and sexual harassment in response to a student's complaints of rape is sufficiently adverse to state a retaliation claim. . . .The parties spar over whether the individual defendants were deliberately indifferent to students' behavior toward Matthew. Both parties miss the antecedent issue, which is that supervisory liability cannot be predicated on actions by students. First, it is plain that a student does not have a supervisor-subordinate relationship with a teacher or school administrator. Second, a student's actions cannot create the underlying constitutional infringement to support supervisory liability because of the lack of state action. Supervisory liability may nonetheless exist as to individual defendants who encouraged or were deliberately indifferent to the actions of school district employees who infringed the plaintiffs' constitutional rights. The complaint alleges that Superintendent Tiano supervised A.D. Moreau and Principal Caliri. . . The complaint also alleges that Principal Caliri directly supervised Dean Doherty and all teachers at CHS. . . Superintendent Tiano and Principal Caliri are the only two individual defendants alleged to have had supervisory roles. . . But for any supervisory liability to attach to either defendant, the complaint must allege acts or omissions by that supervisor rather than relying on a general theory of vicarious liability. Plaintiffs have already adequately pleaded primary liability for First Amendment retaliation against Superintendent Tiano and Principal Caliri with respect to deliberate indifference to the sexual harassment of Matthew by fellow students. The question is whether the complaint also adequately alleges that Superintendent Tiano and Principal Caliri have supervisory liability for First Amendment retaliation. The plaintiffs argue that Superintendent Tiano and Principal Caliri knew that multiple teachers were making retaliatory comments about Matthew, but that Superintendent Tiano and Principal Caliri

themselves retaliated against Matthew by being deliberately indifferent to the constitutional violations in a way that could be considered supervisory encouragement or condonation. But the complaint suggests that the administration did respond to reports of teachers' retaliatory comments. . . While the plaintiffs argue that the administrators' response was inadequate, the Court's role is not to second-guess supervisory approaches. Rather, the question is whether the plaintiffs plead such deliberate indifference on the part of the supervisors that the supervisors themselves could be said to have engaged in constitutional misconduct. The plaintiffs fail to state a supervisory liability claim against Superintendent Tiano and Principal Caliri.")

Langlois v. Pacheco, No. CV 16-12109-FDS, 2017 WL 2636043, at *7 (D. Mass. June 19, 2017) ("Failure-to-train claims are typically brought against municipal defendants or other entities, not individuals. Nonetheless, 'a supervisor may be held individually liable under § 1983 if ... [a failure to] train the offending employee caused a deprivation of constitutional rights.' *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996); *see also Shirback v. Lantz*, 2008 WL 878939, at *4 n.5 (D. Conn. March 28, 2008) ("It appears to the court that the standard for 'deliberate indifference' as an element of a claim for municipal liability [for failure to train or supervise] is the same as the standard for 'deliberate indifference or gross negligence' as an element of a claim of personal liability.").")

Morales v. Chadbourne, 235 F. Supp. 3d 388, 403 (D.R.I. 2017) ("Director Chadbourne also asserts a defense of qualified immunity. The Court has previously outlined the law, *see supra* Section III.A.2, so will turn directly to Director Chadbourne's factual assertions in support of this defense. In order to qualify for immunity, Mr. Chadbourne would have to prove that the constitutional right was not clearly established and that, as a reasonable officer, he did not understand that his conduct violated that right. Where Director Chadbourne's qualified immunity defense fails is in proving the 'clearly established' prong. The evidence shows that it was clearly established in 2009 that Ms. Morales had a constitutional right as a United States citizen not to have her liberty infringed based on a detainer that lacked probable cause, . . . and Director Chadbourne should have understood that his actions violated the Fourth Amendment. He should have known that agents needed probable cause to issue the detainer, but was deliberately indifferent to the standard under which ICE should issue detainers. The mandatory directives from the Hayes Memo, which he was responsible for knowing, understanding, and communicating to his agents, said as much. Moreover, he had the power and authority to supervise these individuals. ICE policy required him to keep statistics on enforcement of immigration detainers, presumably so that any aberration of policy could be detected, but he failed to do so, permitting violations of the constitutional rights of United States citizens like Ms. Morales. Director Chadbourne's conduct was not objectively reasonable in 2009 and the Court finds that qualified immunity does not shield his deficiencies.")

Diaz v. Devlin, 229 F.Supp.3d 101, 109-10 (D. Mass. 2017) ("For purposes of this motion, Det. Carlson does not argue that the Plaintiffs' constitutional rights were not violated, rather he argues that Plaintiffs have not alleged any facts which establish that any action or inaction on his part

caused any such violations, either by him directly, or in his supervisory capacity. Plaintiffs have made general allegations that Det. Carlson was a member of the WPD vice squad involved in the Jackson investigation, had Jackson under surveillance at another address, helped plan the raid, and 'assisted' in carrying out the raid. Plaintiffs have not pled any specific facts which link Det. Carlson, directly or indirectly, to any [of] the alleged unlawful conduct. Such bare-bones allegations are insufficient to establish a plausible Section 1983 claim against Det. Carlson for illegal search and/or use of excessive force. Plaintiffs suggest that Det. Carlson may be liable for the violations of their rights as a supervisor of those officers who were involved in the raid. However, even assuming that Det. Carlson was the supervisor of the officers who executed the raid, as to the excessive force claim, courts have extended section 1983 liability only to those police supervisors who were physically present and either directed their subordinates to violate others' rights or failed to intervene to prevent their subordinates from violating others' rights. As discussed above, Plaintiffs have not pled any facts which establish that Det. Carlson was present at the Apartment, and, even if they had, they have not alleged that he directed his subordinates to use force against them, or that he was in a position to intervene. Det. Carlson's mere presence, his planning and/or execution of the raid is insufficient 'to create the affirmative link necessary for a finding of supervisory liability.' *Maldonado v. Fontanes*, 568 F.3d 263, 275 (1st Cir. 2009). As to Plaintiffs' Section 1983 supervisory claim against Det. Carlson for illegal search and seizure, as stated above, Plaintiffs' barebones allegations fail to state a plausible claim against Det. Carlson for a direct violation. As to the claim asserted against him in his supervisory capacity, Plaintiffs have failed to link any action or inaction of Det. Carlson the behavior of a subordinate which led to a constitutional deprivation. Instead, Plaintiffs rely on conclusory allegations and unsupported speculation, which is insufficient to establish the affirmative link necessary to establish the deliberate indifference on the part of Det. Carlson in his supervisory capacity. For the reasons set forth above, I find that Plaintiffs have not alleged plausible Section 1983 claims against Det. Carlson for excessive force or illegal search and seizure. Therefore, those claims are dismissed.")

Doan v. Bergeron, No. 15-CV-11725-IT, 2016 WL 5346935, at *5 (D. Mass. Sept. 23, 2016) ("Hodgson's reliance on *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49-50 (1st Cir. 2009), is misplaced. In that case, the First Circuit affirmed the dismissal of a deliberate indifference claim against a prison superintendent and other high-level prison officials because the plaintiff brought forth only bald legal conclusions against those defendants. There, the plaintiff alleged only that those defendants were deliberately indifferent just because they had responsibility 'for ensuring that the correctional officers under their command followed practices and procedures [that] would respect the rights and ensure the bodily integrity of Plaintiff' and failed to do so. . . Here, however, Doan alleges not just Hodgson's responsibility for assuring Doan's adequate medical care, but also that he *knew* about Doan's condition and the absence of adequate care and did nothing to remedy that.")

Doan v. Bergeron, No. 15-CV-11725-IT, 2016 WL 5346935, at *8-9 (D. Mass. Sept. 23, 2016) ("When a plaintiff seeks to hold liable a defendant based on his supervisory role over others who allegedly violated the plaintiff's constitutional rights, the 'clearly established' prong of the

qualified immunity inquiry is satisfied when (1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context. In other words, for a supervisor to be liable there must be a bifurcated 'clearly established' inquiry—one branch probing the underlying violation, and the other probing the supervisor's potential liability. . . As to the first step of the 'clearly established' inquiry, the violations of Gallagher's subordinates—CPS and the Bristol County Sheriff's Office defendants—were violations of clearly established constitutional rights. Doan's right to be free from involuntary medication—implicated by the allegations that CPS defendants gave Doan Haldol even though she was incapable of giving informed consent and they did not have a court order to do so, . . . was clearly established, as the Supreme Court has stated that prisoners 'possess[ ] a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs.'. . Doan's right to be free from harm—implicated by Gallagher's failure to protect Doan from the involuntary medication of Haldol—was also clearly established in Supreme Court case law. . . .As to the second step of the analysis, it was clearly established that a supervisor would be liable for the violations of his subordinates in this context, where Gallagher was alleged to have known about the constitutional violations. A supervisor can be liable for the actions of his subordinates if he or she 'is on notice' to 'ongoing violations' and 'fails to take corrective action.'. . Here, Doan has alleged that Gallagher was aware of the ongoing constitutional violations that she was suffering, had the power to alleviate those violations by relocating Doan, but failed to take corrective action. Gallagher relies on cases from other circuits holding that non-medical jail or prison officials such as Gallagher are entitled to rely on the expertise of medical personnel. *See Arnett v. Webster*, 658 F.3d 742, 755 (7th Cir. 2011) (stating that "if a prisoner is under the care of medical experts, a non-medical prison official will generally be justified in believing that the prisoner is in capable hands"); *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004) (same). However, 'non-medical officials can be chargeable with ... deliberate indifference where they have a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner.' *Arnett*, 658 F.3d at 755. This is what Doan alleges; that Gallagher knew that CPS was involuntarily medicating Doan and failed to take any corrective action. Accordingly, Gallagher is not entitled to qualified immunity at this stage of the litigation.")

Doan v. Bergeron, No. 15-CV-11725-IT, 2016 WL 5346935, at *9 (D. Mass. Sept. 23, 2016) ("Gallagher also argues that Doan has failed to make a cognizable claim against him under *Bivens*. Specifically, he states that Doan is making out a vicarious liability argument, which is not permissible under *Bivens*. . .Doan, however, is not making such a claim. Instead, her claim is one of supervisory liability. A supervisory claim is viable as a *Bivens* claim, but only if liability is premised on the supervisor's 'own acts or omissions.' . . With such a claim, a plaintiff must show that the supervisor's 'action or inaction was "affirmatively linked" to the constitutional violation caused by the subordinate.'. . In other words, the supervisor's behavior must be able to be characterized as 'supervisory encouragement, condonation, or acquiescence or gross negligence ... amounting to deliberate indifference.'. . Here, as Doan alleges, Gallagher knew of the unconstitutional conditions to which Doan was subjected, and though he had power to relocate

Doan from the institution that was responsible for these conditions, he failed to do so, allowing the unconstitutional conditions to continue. Such facts as stated plausibly make out claim that Gallagher was deliberately indifferent to the constitutional violations against Doan by CPS. Accordingly, at this stage, Doan has pled enough so as to survive a motion to dismiss Count V against Gallagher in his individual capacity.")

Rodriguez v. Sancha, No. CV 12-1243(PAD), 2016 WL 1247208, at *8-10 (D.P.R. Feb. 24, 2016) ("Regarding co-Defendants Figueroa–Sancha and Vázquez, Plaintiffs have presented evidence that points to the existence of an atmosphere of possible supervisory encouragement, condonation or acquiescence amounting to deliberate indifference and lack of supervision at the PRPD. It is uncontested that there was no hands-on training in the use (or prevention) of excessive force and of civil rights by the PRPD. All the officers had was the 'local Academy' which consisted of an informal meeting roughly every month where communications from Police Headquarters were discussed and discussions about the use of force and civil rights were held with the participants. This was not hands-on training. Furthermore, at the time the events that gave rise to this complaint took place in 2010, the PRPD was not required to provide regular training on use of force and civil rights to its officers. That is directly in contrast to today, where the PRPD is under an obligation to provide better training and disciplinary process to officers as a result of a stipulation between the local Department of Justice, the United States Department of Justice and the PPRD. The findings by the USDOJ further undermines Defendants' defense. The USDOJ found, among others, that the 'PRPD appears to lack basic contemporary practices that have been adopted by many law enforcement agencies to safeguard the fundamental constitutional rights of the citizens they serve', as well as insufficient guidelines on the application of force, lack of formal requirements for reporting and reviewing use of force, an ineffective disciplinary system, lack of basis processes and resources for internal investigations, inadequate guidance on conducting searches and seizures, inadequate supervision and fragmented community engagement. . . These findings were all bolstered by the formal report issued by the USDOJ in September, 2011 and by the report of Police Department Monitor Efraín Rivera Pérez. . . Co–Defendant Vázquez, in charge of ensuring that the officers of the force were duly trained in civil rights and use of force, further admitted under oath that: training is of the utmost importance in order to prevent police officers from abusing civil rights and using excessive use of force; that an officer not trained in use of force and civil rights is more likely to engage in civil rights violations because of that lack of training; that a duly, regularly trained officer is less likely to use excessive force; that one of the ways of preventing violations of civil rights and use of force is assuring that the police officers have regular training and correct supervision, among others. It is evident that the above elements did not exist in the PRPD while both Figueroa–Sancha and Vázquez were at the agency's helm, and they were both well aware of this situation. The letters from the USDOJ directed to Figueroa–Sancha dated March and April, 2009 clearly spell this out. Thus, the fact that co-defendants Vázquez and Figueroa–Sancha were not at the scene of the incident in question is of little use to them if Plaintiffs can establish that they, as high ranking officers of the PRPD, had knowledge about the constitutional violation atmosphere that permeated the PRPD and did nothing about it. . . .As the supervisor responsible for a mobilization of some fifteen officers which included an arrest, the

impounding of a vehicle and a massive home search, in certainly gives the Court pause that such a vast operation did not render any accusations and instead only produced the arrest of a man for alleged drunk driving who was in fact, completely sober. Furthermore, the fact that no search or arrest warrants were issued on the night in question, when they are the norm and not the exception, casts doubt on Defendants' actions and on whatever instructions were given by Colón, the supervisor of the police operation. It is also telling that Colón was also unaware of the many shortcomings of the officers he commanded, as he was also unaware of the multiplicity of administrative complaints against Fernández and Morales. As the Humacao Regional Director, Colón had a duty to ensure that officers under his command were adequately trained and that their actions comported with police standards. As Plaintiffs correctly point out, when a supervisor fails to monitor the actions of the officers under his charge, an inference can be made that he is acquiescing to their unconstitutional behavior, particularly under the specific facts of this case and given the multiplicity of prior administrative violations by the officers involved. At this Plaintiff-friendly stage, such an inference can be drawn on the facts presented before the Court.")

Johnson v. Han, No. CV 14-CV-13274-IT, 2015 WL 4397360, at *3-6 (D. Mass. July 17, 2015) ("Johnson brings Counts I through IV of his complaint against O'Brien. . . Each count is predicated on a theory of supervisory liability. Johnson claims that O'Brien condoned the withholding of *Brady* material (Count I), the withholding of negative test results (Count II), and the knowing presentation of falsified inculpatory evidence (Count III). Johnson further alleges that O'Brien failed to train, supervise, or discipline Dookhan and Renczkowski (Count IV). O'Brien brings four arguments in support of her motion to dismiss: (1) the obligation to disclose exculpatory and impeachment evidence under *Brady* does not apply to state-employed chemists, (2) the complaint fails to plausibly allege that O'Brien was a supervisor at the time Dookhan and Renczkowski tested the substance, (3) the complaint fails to plausibly plead the requisite elements of supervisory liability, and (4) qualified immunity bars liability. . . . Under *Brady*, it is '[t]he prosecution's affirmative duty to disclose evidence favorable to defendant.' However, the suppression of evidence unknown to a prosecutor and held only by members of the investigative team is still a *Brady* violation. . . In the context of § 1983 liability, the First Circuit has held that investigatory officials such as police officers may be liable for their failure to disclose *Brady* materials. . . . Although the First Circuit has not expressly held that *Brady* obligations similarly extend to state-employed lab chemists, O'Brien provides no persuasive reason to distinguish between different members of the state investigatory team in this regard. . . .O'Brien argues that the complaint does not include facts plausibly suggesting that O'Brien: (1) had actual or constructive knowledge of the direct constitutional violations alleged, amounting to deliberate indifference; or (2) undertook acts or omissions causally related to those violations. O'Brien emphasizes that the complaint concedes that in 2010 she raised concerns regarding Dookhan's work with her supervisors. Accordingly, O'Brien argues she could not have been deliberately indifferent to the alleged violations of Johnson's constitutional rights. . . . Here, the complaint alleges that, during or before 2009, O'Brien: (1) knew Dookhan's resume lied about her educational credentials, (2) saw Dookhan's testing rate and understood this rate to be implausibly high if proper testing procedures were used, (3) observed Dookhan's lab protocols, and (4) had received and dismissed a report of

concerns about Dookhan's high testing rate. The complaint also alleges that, after her promotion to 'Laboratory Supervisory I,' O'Brien became aware that Dookhan removed samples from the evidence room without proper chain-of-custody procedures. Counts I through IV allege claims of supervisory liability based on O'Brien's alleged role in allowing her subordinates to withhold exculpatory evidence and falsify evidence of guilt and in failing to train, supervise, or discipline these subordinates for their actions. As alleged in the complaint, the substance was tested in February 2009, Dookhan prepared and turned over the discovery packet in April 2009, and Dookhan and Renczkowski testified in November 2009. Based on O'Brien's own claim of a promotion date of March 8, 2009, the preparation of the discovery packet and the trial testimony occurred while O'Brien was Dookhan and Renczkowski's supervisor. At least by April 2009, O'Brien knew that Dookhan had lied about her educational credentials, knew that Dookhan claimed to test a high rate of samples and understood these claims to be implausible, observed Dookhan fail to follow lab protocols, and had received prior complaints about Dookhan's testing rates. At the motion-to-dismiss stage, these factual allegations suffice to state a claim that O'Brien was aware, or should have been aware, of a pattern of behavior by her subordinates that was highly likely to lead to the violation of constitutional rights (either through withholding negative test results or falsifying positive test results). The complaint further plausibly pleads that O'Brien acted with deliberate indifference towards that behavior, effectively condoning its continuation throughout 2009 despite her supervisory role. Accordingly, the court will not dismiss Counts I through IV on this ground.")

Williams v. Bisceglia, 115 F.Supp.3d 184, 189 (D. Mass. 2015) ("The First Circuit has upheld conclusory language similar to that alleged by the Plaintiff where the supporting facts asserted elsewhere in the complaint establish 'the affirmative link necessary to sufficiently plead a supervisory liability claim,' and/or a policy or custom of the City which led to the alleged constitutional violation. *See Morales v. Chadbourne*, ––– F.3d ––––, No. 14–1425, 2015 WL 4385945, *11 (Jul. 17, 2015). In this case, Plaintiff has not pled any supporting facts which would support his bare, conclusory allegations against the City and Chief Gemme. On the contrary, these are the same type of conclusory allegations that the Supreme Court found deficient in *Iqbal*. Therefore, these Defendants motion to dismiss the Section 1983 claims against them is allowed.")

Henriquez v. City of Lawrence, No. 14-CV-14710-IT, 2015 WL 3913449, at *4 (D. Mass. June 25, 2015) ("For reasons similar to those stated above in relation to municipal liability, the court finds that Henriquez states a plausible claim for supervisory liability. Henriquez pleads more than conclusory allegations of deliberate indifference. . . Rather, Henriquez alleges that officers in the Department engaged in prior instances of excessive force and denial of medical care constituting a 'history or pattern' of such conduct; Police Chief Romero was aware of prior complaints against officers in the Department for such conduct; and despite this awareness, Police Chief Romero failed to take any steps to supervise, investigate, train, or discipline the officers. Because Henriquez's factual allegations state a plausible claim, Police Chief Romero's motion to dismiss Count II is denied.")

Nascarella v. Cousins, No. 13-CV-10878-IT, 2015 WL 1431054, at *11-13 (D. Mass. Mar. 27, 2015) ("Nascarella has failed to identify evidence giving rise to a reasonable inference that the substance of the training provided to correctional officers was constitutionally deficient. Neither Superintendent Marks' failure to review the Advisory Training Council reports or the difficulty correctional officers exhibited in describing use-of-force techniques appears 'so likely to result in the violation of constitutional rights' as to show that supervisors were deliberately indifferent. . . Accordingly, Nascarella's failure-to-train claim fails as a matter of law. . . .According to Nascarella, Officer Mustone and Officer Marks' combined uses of force on forty-seven occasions in the two years preceding the incident would have put any attentive supervisor on notice that they were likely to use unecessary force against a prisoner in the future. . . Moreover, Nascarella claims that the Facility was put on notice of Officer Mustone and Officer Marks' tendency to use excessive force by way of Morris' complaint, but failed to adequately investigate this allegation or take corrective action, instead summarily dismissing the complaint after a review of Morris' disciplinary record. . . A single incident of misconduct, even if egregious, is generally insufficient to find supervisors liable for their failure to supervise or discipline subordinates. . . This would admittedly be a simpler case if the evidence showed forty-seven complaints of excessive force, rather than forty-seven use-of-force reports. However, the court must view the evidence in context. In cases involving claims of excessive force against police officers by civilians, the court would expect a greater rate of complaints-civilians may have better access to complaint procedures and may, in filing their complaints, operate beyond the control and oversight of the officers they allege used excessive force against them. That is not always the case within a correctional facility, where prisoners may be dissuaded from reporting such events by the knowledge that they remain under the care of the correctional officers about whom they would seek to complain. . . In this context, and in the face of the use-of-force reports, the court cannot find that the absence of a pattern of excessive-force complaints is dispositive. In addition to evidence that forty-seven combined uses of force over two years would cause 'great alarm' on the part of an attentive supervisor, . . Nascarella offers evidence that Superintendent Marks was cited for non-compliance by Department of Correction auditors for failing to ensure the completeness and accuracy of use-of-force packages. . . Finally, Nascarella has offered evidence that, despite being cited for non-compliance, and despite the high number of combined uses of force by Officer Marks and Officer Mustone, Superintendent Marks did not investigate the discrepancies in reporting by these officers when another prisoner alleged that they had kicked and punched him in the face. . . The strength of this evidence may appropriately be weighed by a jury. The evidence suffices, however, to place in dispute the material fact of whether Superintendent Marks exhibited deliberate indifference to a recognizable pattern of the inappropriate uses of force that required investigation and correction through his failure to properly review use-of-force packages. The First Circuit has previously found that the inference that a failure to discipline officers in the past would lead to the belief that they could escape discipline for future acts 'simply too tenuous' to form the basis of a supervisory liability claim. . . In both *Febus–Rodriguez* and *Ramírez–Lluveras,* however, the past, undisciplined acts were unrelated to the type of conduct at issue in those cases. . . In contrast, a jury could reasonably infer that Superintendent Marks' failure to ensure the accuracy of past use-of-force packages, and failure to identify the allegedly alarming rate of force used by Officer

Mustone and Officer Marks, gave rise to a belief in Officer Mustone and Officer Marks that they could continue to use, and under-report, force against prisoners with impunity. The court finds that this conclusion requires less of an inferential leap than in *Febus–Rodriguez* and *Ramírez–Lluveras*. . . . Accordingly, the court finds sufficient record evidence to create a triable issue as to whether Superintendent Marks was deliberately indifferent in his failure to supervise or discipline correctional officers, predictably leading to Officer Mustone and Officer Marks' use of force. . . . As to Sheriff Cousins, however, Nascarella has failed to present evidence that he 'would have known[,] ... but for his deliberate indifference or willful blindness,' that Officer Mustone and Officer Marks posed a significant risk of harm and required supervision or discipline. . . . The record does not establish that Sheriff Cousins has responsibility for reviewing use-of-force reports at the Facility. Accordingly, in the absence of a pattern of excessive-force complaints or other evidence reasonably available to Sheriff Cousins that could have shown a pattern of abuse or tendency towards unconstitutional behavior, no affirmative link can be drawn between his actions and Officer Mustone and Officer Marks' use of force.")

Saldivar v. Pridgen, 91 F.Supp.3d 134, 137-38 (D. Mass. 2015) ("Pridgen's disciplinary record in the Fall River Police Department consists of 11 violations between September, 2003 and June, 2011 that are entirely unrelated to any form of sexual misconduct. The suspensions that Pridgen received were due to 1) failure to abide by departmental policy in handling a domestic violence call, such as improperly informing the victim of her rights and inadequately conducting a search for weapons, 2) abuse of sick leave policy, 3) failure to appear for roll call and 4) failing to maintain a valid license to carry a firearm. Pridgen also received seven reprimands for violations such as failing to abide by proper procedure for the submission of reports, arriving late to work and causing a cruiser accident. Plaintiff has failed to demonstrate that Racine had actual or constructive knowledge of the likelihood or even the possibility that Pridgen would sexually assault a woman while on duty. In other words, Racine lacked the prerequisite notice.")

Stile v. Somerset Cnty., No. 1:13-CV-00248-JAW, 2015 WL 667814, at *5-6 (D. Me. Feb. 17, 2015) (J. Woodcock's opinion adopting R & R) ("A review of the recommended decision and Mr. Allen's objection reveals essential congruity on the legal standard for supervisory liability. The Magistrate Judge observed that under *Iqbal,* courts must often turn to 'judicial experience and common sense'. . . and must often make 'a contextual judgment about the sufficiency of the pleadings.'. . Selecting a different case, Mr. Allen quoted similar language from the First Circuit for the imposition of supervisory liability as appears in the recommended decision: that a plaintiff must demonstrate that his constitutional injury 'resulted from direct acts or omissions of the official, or from indirect conduct that amounts to condonation or tacit authorization.'. . Mr. Stile alleges in his Amended Complaint Final that he got in an altercation with one of the correction officer's relatives, a fellow inmate, and that from then on, the correction officers at the Somerset County Jail waged an ongoing, long and deliberate campaign to physically and mentally abuse him, to unnecessarily and repeatedly strip search him and subject him to visual body cavity searches, to leave him naked for extended periods in his cell, to turn off the hot water when he showered and to refuse to give him a towel, to improperly assign him to administrative segregation,

to refuse to properly process his grievances, to assault him, leaving him black and blue, to deny him clergy, counsel, proper hydration, and visitors, to remove his legal papers, to deprive him of his eyeglasses, and to subject him to daily taunts and abuses. Contrary to Mr. Allen's position, it is a common sense and logical contextual inference that if a Jail Administrator were doing his job, he would have some knowledge of an inmate being treated in this fashion over the course of many months. Under this rubric, it is proper for purposes of a motion to dismiss, to infer that Mr. Allen either condoned or tacitly authorized what occurred. This conclusion obtains regardless of the size of the jail and even assuming that the Magistrate Judge had no right to observe that the Somerset County Jail is not a major metropolitan prison, a proposition that seems dubious, the First Amended Complaint still survives dismissal.")

Stile v. Somerset Cnty., No. 1:13-CV-00248-JAW, 2015 WL 667814, at *9 n.4 (D. Me. Feb. 17, 2015) (Magistrate Judge Nivison's opinion) ("In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court considered whether a Pakistani prisoner stated a claim of intentional discrimination, based on race, religion or national origin, against the Secretary of Defense and the Director of the FBI. The Court rejected a conclusory allegation of a purpose to discriminate where implementation of the policy in question served a neutral investigative purpose, *id.* at 680–81, i.e., a 'nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts,' *id.* at 682. The Court noted that intent in the context of an equal protection claim required more than a showing of volition or awareness of a disparate impact. . . Here, in comparison, the Court must evaluate the plausibility of an inference that the administrator of a relatively small county jail in central Maine was consulted or was aware of the treatment of a pretrial detainee who, allegedly, engaged in a hunger strike and who also either could not or would not walk during daily transports to medical over the course of a 39–day period and, as an alleged result, was subjected to a daily regimen of forced extractions involving electric prods and other force. The supervisory connection for which Plaintiff argues is much more intuitive than the one argued in *Soto–Torres.* Additionally, the condonation or tacit authorization needed to support the connection between Defendant Allen and his subordinates is different from the purposeful discrimination inference required to support the constitutional theory presented in *Iqbal*.")

Facey v. Dickhaut, No. CA 11-10680-MLW, 2014 WL 8105164, at *19 (D. Mass. Sept. 30, 2014) ("Neither defendant is entitled to summary judgment. Mendonsa had a largely supervisory role and *respondeat superior* does not apply to constitutional violations. *See Sanchez*, 590 F.3d at 49. However, the record includes sufficient evidence for a reasonable jury to find that Mendonsa is liable based on his own conduct. As described earlier, Mendonsa 'more than likely' participated in the decision to place Facey in H–1. . . Moreover, as part of the team that decided whether to release inmates from SMU, Mendonsa spoke with SMU inmates three times a week and had access to inmate conflict sheets. . . Finally, in his deposition, Mendonsa admitted that he had heard about Facey's August 2009 attack on Inmate L. . . A reasonable jury could infer from this evidence that Mendonsa was aware of Facey's status as a Blood and his particular conflict with a Gangster Disciple leader. Therefore, a reasonable jury could find that Mendonsa was aware that Facey faced

a significant risk of reprisal from the Gangster Disciples and nevertheless approved his placement H–1, rather than in a safer unit.")

Diaz-Morales v. Rubio-Paredes, 50 F.Supp.3d 98, 114 (D.P.R. 2014) ("In his second cause of action, the Plaintiff holds liable all identified and unidentified defendants who were supervisors during the course of his investigation and prosecution for their deliberate indifference towards their subordinates' violations of his constitutional rights and for failing to monitor, supervise, train and discipline their subordinates. . . The only named defendant in the Plaintiff's complaint who is held liable for his actions in the exercise of his supervisory duties is co-defendant Arill–Garcia as 'the highest and immediate supervising prosecutor of RUBIO PAREDES in the Humacao District Attorney's Office....'. . . The allegations against Arill–Garcia specify that he was present during some of the interviews that both Cruz–Velez and Rubio–Paredes took, and was thus aware of the malicious prosecution against Plaintiff. . . In light of these allegations, the court finds that Diaz–Morales has pleaded a plausible claim of deliberate indifference on the part of Arill–Garcia as supervisor of Rubio–Paredes. Taking the facts alleged as true, the court can reasonably infer that by failing to take any measures to rectify Rubio–Paredes' conduct, Arill–Garcia knowingly allowed the latter to wrongly prosecute the Plaintiff by suborning false testimony. Thus, at this stage of the proceedings, the court **DENIES WITHOUT PREJUDICE** co-defendant Arill–Garcia's motion to dismiss on grounds of lack of supervisory liability.")

Podgurski v. Dep't of Correction, CIV.A. 13-11751-DJC, 2014 WL 4772218, *5, *6 (D. Mass. Sept. 23, 2014) ("Here, taking the complaint as a whole and looking at the facts in the light most favorable to Podgurski, one could reasonably infer that Saba was deliberately indifferent to Podgurski's serious medical needs under either a primary or supervisory liability theory. As to primary violator liability, Podgurski pleaded that his daughter informed Saba, with a letter from Podgurski's podiatrist, that Podgurski required regular podiatric treatment, which Saba 'rebuffed.'. . This allegation, considered together with the allegations that Podgurski showed signs of deterioration that could be apparent to a lay person, including visible infection, walking with a cane, crutch or walker and constant complaints of pain to the Defendants and to nurses, . . . support the plausible inference that Saba knew of the 'facts from which the inference could be drawn' that Podgurski had a serious medical need and then disregarded it. . . Since Podgurski's counsel indicated at the hearing that he contends that Saba was a primary violator and the Court concludes that the pleaded facts are sufficient as to this theory of liability, the Court need not address whether there are sufficient allegations of supervisory liability.")

Guadalupe-Baez v. Police Officers A-Z, CIV. 13-1529 GAG, 2014 WL 4656663, *5-*7 (D.P.R. Sept. 17, 2014) ("In most cases, like the one we review today, the 'causation' element constitutes the biggest challenge for plaintiff. Often, plaintiffs fail to show a plausible connection between the supervisor and plaintiff's constitutional violation, properly supported by facts. The First Circuit recently embarked on this issue and stated: 'After *Iqbal,* as before, we have stressed the importance of showing a strong causal connection between the supervisor's conduct and the constitutional violation.' *See Ramírez–Lluveras v. Rivera Merced,* Nos. 11–2339 & 13–1169, 2014 WL 3398427

at * 8 (1st Cir.2014) . . . This affirmative link, i.e., the causation, must be strong enough to show that it 'contemplates proof that the supervisor's conduct led inexorably to the constitutional violation.' *Ramírez–Lluveras,* 2014 WL 3398427 at *8. In other words, to meet this burden, a plaintiff must plead sufficient facts that, if taken as true, connect the dots between the supervisor's conduct and plaintiff's constitutional violation. . . . Here, Plaintiffs' allegations are insufficient to 'connect the dots,' i.e., show causation, because their allegations are nothing more than legal conclusions, completely devoid of supporting facts. . . . Plaintiffs attempt to hold the Supervisor Defendants liable for their own actions, insofar that by their negligent behavior while supervising Police Officers A–Z, they encouraged, condoned or acquiesced the violation of Guadalupe's rights. However, Plaintiffs do not identify the actual underpinnings of the Supervisor Defendants' alleged failure to train. . . .Plaintiffs' Amended Complaint is a repetition of legal jargon *ad nauseam,* that merely lists the elements of a Section 1983 cause of action without any supporting factual allegations. It is evident that these allegations do not suffice. The court previously had warned Plaintiffs that 'mere labels do not reach the plausibility standard.'. . Today, it is clear that Plaintiffs ignored the court's warning. Plaintiffs justify their deficient pleading arguing that due to Defendants' failure to disclose information about the investigation, they are precluded from pleading factual allegations sufficient to meet the *Iqbal/Twombly* standard. . . For that reason, in support of their 'pattern and practice' allegations, Plaintiffs rely on the Investigation Report of the *Investigation of the Puerto Rico Police Department* by the Civil Rights Division of the United States Department Justice of September 5, 2011 ("U.S. DOJ Report") . . . Nevertheless, as this court previously warned Plaintiffs, 'simply citing the agreement between the government of the United States and the Commonwealth of Puerto Rico for the Reform of the Puerto Rico Police Department does not per se generate any plausibility.'. . Under the *Iqbal/Twombly* standard, the U.S. DOJ Report, by itself, is not enough to establish plausible causation. Moreover, the US. DOJ Report may be used as a stepping stone to pave the way to plausibility, however, it must be supplemented with factual allegations relating to the specific facts of the case, tracing the story between the supervisor's conduct and plaintiff's alleged constitutional violation, in accordance with the supervisory liability standard. Thus, Plaintiffs' supervisor liability claims are **DISMISSED.**")

Carr v. Metro. Law Enforcement Council, Inc., CIV.A. 13-13273-JGD, 2014 WL 4185482, *14 (D. Mass. Aug. 20, 2014) ("Similarly, the claim against the unnamed MetroLEC supervisor who allegedly failed to supervise those who engaged in the destructive search should be allowed to proceed. 'Although a superior officer cannot be held vicariously liable under 42 U.S.C. § 1983 on a *respondeat superior* theory ..., he may be found liable under section 1983 on the basis of his own acts or omissions[.]'. . In the instant case, the allegations of the complaint can be fairly read as asserting a claim against the MetroLEC supervisor who was on site during the search, and therefore is seeking to hold him liable for his own conduct. . . Again, this claim requires further development of the record. Carr is basing her claim against Police Chief Cunningham 'for his own acts or omissions in permitting a culture that condoned the unrestrained use of excessive force by MetroLEC officers' and for his actions in hiring, training and/or supervising officers 'with a deliberate indifference toward the possibility that deficient performance of a task may contribute

to a civil rights [deprivation].'. . It is well established that a supervisor may be liable under § 1983 for 'formulating a policy, or engaging in a custom, that leads to the challenged occurrence.'. . Moreover, in a § 1983 action against a supervisor who was not a direct participant in the incident at issue, 'liability attaches if a responsible official supervises, trains, or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation.... Under such a theory, a supervisor may be brought to book even though his actions have not directly abridged someone's rights; it is enough that he has created or overlooked a clear risk of future unlawful action by a lower-echelon actor over whom he had some degree of control.' *Camilo–Robles v. Zapata,* 175 F.3d 41, 44 (1st Cir.1999) (internal citations omitted). '[T]he extent of a superior's knowledge of his subordinate's proclivities is a central datum in determining whether the former ought to be liable (or immune from suit) for the latter's unconstitutional acts.' *Id.* at 46. This is a factdependent inquiry and the issue should be addressed again after further development of the record. For these reasons, the motion to dismiss Counts IV, V and VIII is denied.")

Cabrera-Berrios v. Pedrogo, 21 F.Supp.3d 147, 153 (D.P.R. 2014) ("The Court recognizes that, at this stage of litigation, the plaintiffs do not possess exact knowledge of either Pesquera's or Diaz–Colon's activities, and, therefore, are unable to substantiate their claim of supervisory liability with more specific and detailed facts. Accordingly, the Court exercises its common sense and judicial experience to deny defendants Pesquera's and Diaz–Colon's motion to dismiss in order to permit plaintiffs the opportunity to gather more information concerning those two defendants' possible acts or omissions leading to the constitutional violations. Granted, plaintiffs have 'a long way to go' in order to substantiate their supervisory liability claims against Pesquera and Diaz–Colon. . . Nevertheless, the Court abstains from estimating the probability that plaintiffs will prevail on those claims. . . In essence, '[t]he role of these defendants can be made clearer in discovery and nothing precludes later efforts to end the case against them should discovery not substantiate these inferences.' . . Accordingly, defendants' motion to dismiss plaintiffs' section 1983 claims is **DENIED.**")

Gary v. McDonald, No. 13–12847–JLT, 2014 WL 1933084, *2, *3 (D. Mass. May 13, 2014) ("Gary sets forth sufficient factual allegations to state a plausible claim for relief. He has alleged that Moniz was responsible for training and supervising subordinates in a way that ensured prisoner safety, as well as being responsible for implementing prison policies to protect inmates from suffering violence at the hands of other inmates. . . These responsibilities include the implementation of an inmate classification plan. . . Gary has also alleged that, despite Moniz having those responsibilities, he was placed into a cell with an inmate who had a history of assaulting other inmates to receive preferable cell assignments. . . Construing the facts in the light most favorable to Gary, it is reasonable to infer that Moniz failed properly to train or supervise PCCF employees on the appropriate screening and placement of violent inmates or failed to implement an adequate placement procedure. . . .With respect to the second step of the qualified-immunity analysis, the issue is whether a reasonable person in Moniz's position would have understood that his conduct violated Gary's constitutional rights. . . As explained, Gary does not

argue that Moniz had personal knowledge that Gary had been placed in the same cell as a violent inmate. . . He does allege, however, that Moniz was responsible for implementing appropriate policies and training measures to ensure prisoner safety. . .Nonetheless, Gary was placed in the same cell as a violent inmate who had a history of assaulting other inmates in order to be placed in a private cell. On the basis of these facts, this Court concludes that a reasonable person in Moniz's position reasonably would have understood that his failure properly to train his subordinates violated Gary's constitutional rights. At the time of the alleged violations, prison officials had a clearly established duty to protect inmates from violence at the hands of other inmates. . .This duty includes the duty to use of some form of classification system to ensure that inmates with a propensity for violence do not pose a danger to others. . . Here, it is reasonable to infer that Moniz did not establish an adequate classification system or failed properly to train his subordinates on the placement of violent and non-violent inmates. Because Gary has adequately claimed that his clearly established constitutional rights were violated, qualified immunity does not bar his claim.")

Jones v. Han, 993 F.Supp.2d 57, *68, *69 (D. Mass. 2014) ("Defendant Han. . . contends that plaintiff must prove she had a 'subjective belief' that there was a risk [of] unconstitutional harm to have been deliberately indifferent, citing *Snell v. Demello*, 44 F.Supp.2d 386 (D.Mass.1999). *Snell* is easily distinguishable. In *Snell*, the plaintiff sued prison officials for violations of the Eighth and Fourteenth Amendments. . . The 'subjective belief' standard from *Snell* originated in the Supreme Court's Eighth Amendment analysis in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). . . . Outside the Eighth Amendment context, however, an official can be deliberately indifferent to constitutional violations by her subordinates without holding a subjective belief that their actions would result in constitutional harms. . . Here, the allegations of the complaint are sufficient to state a claim for acquiescence or 'gross negligence amounting to deliberate indifference' to those violations by defendant. . . It therefore properly states a supervisor liability claim under § 1983.")

Solomon v. Dookhan, No. 13–10208–GAO, 2014 WL 317202, *14-*18 (D. Mass. Jan. 27, 2014) (O'Toole, J. (adopting Magistrate Judge Sorokin's R & R) ("There is no dispute as to the governing law with respect to Nassif's motion (law which also largely governs the motions of Han, Auerbach and Bigby, *infra*). Pursuant to § 1983, a supervisor can only be liable for a subordinate's behavior if '(1) the behavior of [his] subordinates results in a constitutional violation, and (2) the [supervisor's] action or inaction was affirmative[ly] link[ed] to the behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference.' *Pineda v. Toomey*, 533 F.3d 50, 54 (1st Cir.2008) (citations omitted). In addition, to establish supervisory liability, Solomon must allege facts sufficient to support a finding that Nassif either had actual notice of the offending conduct of Dookhan, or that she would have known of Dookhan's conduct 'but for [her] deliberate indifference.'. .A number of factual allegations (many allegedly drawn from the state police investigation) bear mention: (1) Dookhan tested drugs at a rate at least fifty percent higher than other lab technicians (Docket # 14 at ¶ 40); (2) Dookhan's level of production of test results

concerned supervisors; (*id.* at ¶ 48C); (3) Dookhan left many samples out on her benchtop and maintained a work space 'filled with numerous vials open to cross contamination,' (*id.* at ¶ 48C, 48D); (4) Dookhan 'ignored lab procedures' (*id.* at ¶ 48A); (5) the 'Laboratory had a culture of lax oversight' (*id.* at ¶ 48J); (6) Dookhan bore 'responsibil[ity] for training and for some QA/QC procedures' (*id.*); (7) 'Numerous lab personnel expressed concerns with Dookhan's workload, documentation errors, blatant forgeries, and questionable test results' (*id.* at ¶ 48K); (8) the procedures 'to restrict access to the evidence room were ignored and circumvented' (*id.* at ¶ 480); and (9) the 'safe was found open and unattended, was left propped open when [the Lab] was "busy," and was accessible by codes and keys that had not been changed in over a decade' (*id.* at ¶ 48R). The foregoing allegations, combined with the reasonable inferences to be drawn therefrom (and particularly when viewed in light of Nassif's role at the lab both as Director of Analytic Chemistry and within Dookhan's direct chain of supervision), suffice to state a claim of Nassif's supervisory encouragement of, condonation of, or acquiescence in Dookhan's misconduct, or of gross negligence amounting to deliberate indifference toward Solomon's constitutional rights. . . Particularly salient is Dookhan's disturbingly high rate of production, coupled with the other warning signs both specific to Dookhan and visible to those running the lab. Although a fully-developed factual record indeed may not ultimately support the claim, the Court is obliged at this stage to accept all well-pleaded facts alleged in the Amended Complaint as true and to draw all reasonable inferences in Solomon's favor. . . Accordingly, I RECOMMEND that the Court DENY Nassifs motion. . . .Although Han held a higher position within the lab's hierarchy and thus was arguably more removed from events than was Nassif, she nevertheless was the Director of the Hinton Lab. The allegations noted above, combined with the supplemental allegation which supported the claim against Nassif, support the reasonable inference that Han—like Nassif—was aware of the problems with Dookhan as well the problems at the lab noted, *supra.* Accordingly, I RECOMMEND that the Court DENY Han's motion for the same reasons for which I have previously recommended that the Court deny Nassif's Motion (and repeating the same caveat that a fuller factual record may produce a different result at a later stage of the case). . . .Auerbach stands in a materially different position from Han and Nassif. Auerbach had substantially larger responsibilities and did not personally work at or directly supervise the lab itself. Accordingly, absent specific factual allegations, it is not a reasonable inference that Auerbach would have known of Dookhan's misconduct or of the problems at the lab absent his deliberate indifference to Dookhan's violation of Solomon's constitutional rights. Solomon does advance a few allegations specific to Auerbach, noted above. These allegations, and the reasonable inferences to be drawn therefrom, fail to plausibly state a claim that Auerbach knew of, or condoned, Dookhan's violation of Solomon's constitutional rights, or, that he would have known of it but for his deliberate indifference. Simply put, even taking Solomon's allegations as true, Auerbach is too far removed and lacking in knowledge of, or participation in, Dookhan's misconduct to state a claim of supervisory liability under the governing Section 1983 caselaw discussed *supra.* Moreover, the allegations of a 'cover-up' regarding his instructions to Han and Nassif are too generalized and vague to plausibly state a claim of violation of Solomon's constitutional rights. . . .Defendant Bigby moves to dismiss the Amended Complaint as directed against her, as failing to state a claim for supervisory liability. Docket # 96. Solomon alleges in the Amended Complaint that Bigby was

at all relevant times the duly appointed Secretary of the Executive Office of Health and Human Services of the Commonwealth of Massachusetts, responsible for oversight of the Department of Public Health. . . He alleges that Bigby was aware in June 2011, that Dookhan was testing and certifying substances at a rate that was fifty percent higher than any other chemist, and that Bigby described Dookhan's productivity as, 'a red flag that wasn't appropriately investigated.'. . The remainder of the factual allegations concerning Bigby assert generally that she 'failed to properly supervise, train, investigate, and monitor the Department of Public Health and the Hinton Laboratory which employed Dookhan' and that she (along with other lab supervisors) maintained outdated operating procedures for the Hinton lab, failed to seek accreditation, and failed to train lab employees concerning *Brady* obligations and contact with prosecutors. . . .The claim against Bigby fails for two reasons. First, even taking the factual allegations as true, Bigby is even more removed and uninvolved than Auerbach, and thus the allegations regarding Dookhan's misconduct and the operation of the lab do not state a deliberate indifference claim as to Bigby. Second, the only specific factual allegation regarding Bigby is that Bigby was aware in June 2011 that Dookhan was testing and certifying substances at a rate that was fifty percent higher than any other chemist. Much later, Bigby described Dookhan's productivity as, 'a red flag that wasn't appropriately investigated.'. . The fifty percent number is, in and of itself, insufficient to plausibly allege that a person in Bigby's remote position would be on notice of its significance, amounting to deliberate indifference to Dookhan's violation of Solomon's constitutional rights. The remainder of the factual allegations concerning Bigby assert generally that she 'failed to properly supervise, train, investigate, and monitor the Department of Public Health and the Hinton Laboratory which employed Dookhan' and that she (along with other lab supervisors) maintained outdated operating procedures for the Hinton lab, failed to seek accreditation, and failed to train lab employees concerning *Brady* obligations and contact with prosecutors. . . These allegations all sound in negligence only. Accordingly, I RECOMMEND that the Court ALLOW Bigby's motion to dismiss.")

Canales v. Gatnuzis, 979 F.Supp.2d 164, 172 (D. Mass. 2013) ("Deliberate indifference is akin to willful blindness. . . Even where a supervisor does not know of the specific actions of a subordinate that violate a person's constitutional rights, a supervisor may be held liable if he is aware of a general 'pattern or practice' that threatens persons' constitutional rights and is deliberately indifferent to the danger. . . '[I]solated instances of unconstitutional activity ordinarily are insufficient to establish a supervisor's policy or custom, or otherwise to show deliberate indifference.'. . . Plaintiff has failed to plead sufficient facts to make out a plausible claim for supervisory liability against Defendant Horgan. First, the Complaint is devoid of any suggestion that Horgan personally knew Plaintiff was being administered HIV medications or was aware of Plaintiff's protests. Second, Plaintiff fails to plead any facts to suggest that Horgan was aware of similar medication errors or other practices by the medical staff that posed a risk to inmates' constitutional rights. Plaintiff merely states that 'Defendants have a disorganized medical program and failed to maintain a quality assurance program.'. .Plaintiff also states that SCHOC failed 'to maintain adequate and accurate medical records.'. .Even taking these allegations as true, Plaintiff does not allege that Horgan himself was aware of a threat to inmates' constitutional rights. This is

due in part to Plaintiff's failure to allege anything more specific than general factual allegations purportedly applicable to all Defendants. Such pleading fails to inform Horgan or this court of the factual basis for Plaintiff's supervisory liability claim. Nonetheless, as discussed below, Plaintiff has requested that this court allow him to file an amended complaint to give him an opportunity to add sufficient factual allegations, should this court find them lacking. Because this court will allow Plaintiff to file an amended complaint in this matter, Defendants' Motion to Dismiss Count V as to Horgan in his individual capacity is denied without prejudice to Defendants renewing the motion once Plaintiff has filed his amended complaint.")

Bridges v. Ouellette, No. 2:13–cv–00082–NT, 2013 WL 5755588, *6-*8 (D. Me. Oct. 23, 2013) (order affirming R&R) ("Lancaster's summary judgment motion is based on the idea that the mere review and denial of a grievance will not support an action under 42 U.S.C. § 1983. . . This is true. An after-the-fact assessment of a bygone deprivation, made in the context of reviewing an administrative grievance, does not rise to the level of a constitutional deprivation, because the grievance process is not, in itself, constitutionally mandated, . . . and because the grievance process ordinarily concerns completed acts of alleged misconduct rather than ongoing acts. . . .What Bridges says in response is that he would like the opportunity to discover whether Lancaster had the authority and opportunity to do something to assist him. . . He would like to serve interrogatories, requests for admission, and requests for production of documents . . . to better understand, among other things, 'whether or not defendant Lancaster could have ordered that I be allowed to be treated by a psychiatrist, and could have ordered that I be released from restraints'. . . . Based on my review, I conclude that Lancaster's summary judgment motion actually fails to demonstrate that there is no genuine dispute as to any material fact. State officials with supervisory oversight can be liable on constitutional claims based on tacit acquiescence and their own deliberate indifference. . . Lancaster's affidavit suggests that he had supervisory authority to countermand a prison order involving restraint of Bridges. Bridges, meanwhile, is asserting that Lancaster's review may have taken place while Bridges was still being restrained around the clock rather than medicated. Bridges believes that Lancaster may have had the opportunity to aid him and elected not to do anything. That is one plausible inference that could be drawn and it is an inference that is not dispelled by Lancaster's summary judgment showing. . . Lancaster's affidavit does not establish that Bridges was removed from full restraints prior to or simultaneous with Lancaster's investigation. Because it is unclear when Lancaster became aware of Bridges's situation, what exactly that situation was at the time, how long that situation persisted during and following Lancaster's investigation, and what authority or opportunity Lancaster had to intervene, it cannot fairly be said that Lancaster's summary judgment motion shows that there is no genuine issue of material fact. Lancaster's motion for summary judgment needs additional factual development and legal analysis and is insufficient in its present form.")

Llanos-Morales v. Municipality of Carolina, No. 12–1847(ADC), 967 F.Supp.2d 507, 515, 516 (D.P.R. 2013) ("Unlike the complaint in *Soto–Torres,* which merely stated that supervisory police officers were 'in charge' during the constitutional violations and participated in them, the complaint here alleges that the supervisory defendants were responsible for implementing training

programs to curb constitutional abuses and the use of excessive force. . . More than merely alleging that the supervisory defendants failed to prevent constitutional violations generally, which was a threadbare conclusion in *Soto–Torres*, the complaint here goes further by alleging that the supervisory defendants were put on notice of Agosto's potential for civil rights violations because they knew of the complaints lodged against him for excessive use of force and knew of his mental or emotion condition. . . Although the supervisory defendants reassigned Agosto to a desk job, they did not disarm him or take any remedial measures that would help prevent him from violating constitutional rights in the future. . . These specific facts alleging knowledge of Agosto's medical and disciplinary problems, coupled with allegations as to the supervisory defendants' oversight of training and discipline, together are sufficient to plausibly aver supervisory liability for Agosto's violation of the plaintiffs' constitutional rights.")

Molina v. Vidal-Olivo, 961 F.Supp.2d 382, 383-86 (D.P.R. 2013) ("Supervisory liability doctrine, particularly when coupled with the affirmative defense of qualified immunity, imposes a strenuous burden on those harmed by top government agents. . . For good cause. The high standard is necessary; no government could function if its leaders operated under a Damoclean threat of being hailed into court. However, an equally meritorious argument favors individual plaintiffs who lack the necessary resources, knowledge, and time to engage in Freedom of Information Act requests or their own independent research to augment factual allegations against top supervisors. . . .But that is not so in the complaint we consider today—one alleging instances of both *malem prohibitum* and *malem in se.* Plaintiffs' complaint surpasses Rule 8's requirements because the United States has done the legwork. The Civil Rights Division of the Department of Justice compiled a study of the Puerto Rico Police Department ('PRPD') in a 42 U.S.C. § 14141 action brought by the Attorney General of the United States. . . The study, amassed over several years, alleges the PRPD's extraordinary and deliberate indifference to use-of-force policies, deliberate misrepresentations contrary to PRPD statistics, and deliberate indifference to safety. These allegations generally reference the PRPD's leadership, and specifically reference Defendant Figueroa–Sancha. The court has reviewed the Department of Justice's findings on myriad occasions. Years of investigations and questions yielded the following: [detailing findings] . . . . These findings allege gross insufficiency, deliberate indifference, and blatant disregard for safety, which plausibly entitle Plaintiffs to relief against Defendant Figueroa–Sancha. Furthermore, the Defendant–Officers in this case could plausibly fall under the umbrella of officers who received allegedly defective training under Defendant Figueroa–Sancha's ostensibly wanton leadership. . . . .Not withstanding the preceding, the court emphasizes that this ruling is not a ruling on the merits. This opinion reflects only the plausibility of Plaintiffs' claims. The court understands that this ruling opens the door to a plethora of similar lawsuits against the PRPD's top officials, including those serving before and after Defendant Figueroa–Sancha's tenure. It is paramount to reiterate that, at this stage, the court makes no credibility determinations or findings of fact. The allegations against Defendant Figueroa–Sancha may be entirely unwarranted, entirely meritorious, or somewhere in between. The standard to overcome a motion to dismiss is simply pleading facts that could plausibly entitle Plaintiffs to relief. Furthermore, the court stresses that it is hereby not recognizing any distinct rights pursuant to the recently approved agreement between the United

States and the PRPD. . . Plaintiffs' action herein is rooted in 42 U.S.C. § 1983, not 42 U.S.C. § 14141. The court considers the report only to determine the plausibility of Plaintiffs' allegations, not to create any enforceable rights between the parties. Notwithstanding, this opinion does not prospectively provide plaintiffs' attorneys *carte blanche* to file unfounded claims against top supervisors without due diligence and proper investigation. Federal Rule of Civil Procedure 11 and the Model Rules of Professional Conduct adopted by this court impose the highest standards of professional conduct on all attorneys.")

Facey v. Dickhaut, 892 F.Supp. 347, 357 (D. Mass. 2012) ("The complaint here identifies Dickhaut as the Superintendent of SBCC and states that Dickhaut and Mendonsa instituted a policy requiring the separation of known enemies. It contains some general allegations, described earlier, that '[t]he Defendants' were aware of the feud between the Bloods and the Gangster Disciples and placed the plaintiff on the South Side of the facility, where he was attacked. However, to the extent that these general statements are intended as allegations of knowledge and direct participation on the part of Dickhaut, they are too 'threadbare' and 'speculative' to be accorded the presumption of truth, particularly given the absence of any other allegation specifically linking Dickhaut to the events of the case. . .These allegations are insufficient to state a claim that Dickhaut was directly involved in the incident in which the plaintiff's rights were allegedly violated. . . The complaint is also insufficient to state a claim of supervisory liability because it does not contain any allegations showing that Dickhaut was deliberately indifferent in supervising or training the officials who are directly alleged to have placed the plaintiff in danger. . . Accordingly, the complaint is being dismissed in its entirety as to Dickhaut.")

Pena-Pena v. Figueroa-Sancha, 866 F.Supp.2d 81, 91, 92 & n.8 (D.P.R. 2012) ("[T]he Supervisors insist that Plaintiffs allegations point to omissions rather than actions as allegedly required under the applicable standard. . . As recent as a month ago, however, the First Circuit Court of Appeals ruled out such contentions in *Marrero–Rodriguez v. Municipality of San Juan* . . . . [T]he Court . . . stated that omissions such as 'failure to implement policies, protocols, or correct training about use of live firearms' were also bases for the imposition of supervisory liability under § 1983. . . A similar conclusion is warranted in this case, where the complaint plausibly alleges that Plaintiffs' injuries were caused in part by the Supervisors' failure 'to train, supervise and control police officers, procedures and operations'. . . as well as their failure to establish protocols on the use of force, on the use of chemical agents, and on riot police and crowd control policies . . . The Supervisors spend a significant portion of their submissions arguing that *Iqbal* ruled out § 1983 supervisory liability based on inaction or omission. . . As just stated, Plaintiffs' claims against the Supervisors are premised on both actions (the authorization to use force against Plaintiffs and other demonstrators) as well as on omissions (the failure to control the attacking officers and to institute proper policies and procedures). Accordingly, the Court need not address the Supervisors' argument on this issue. Nevertheless, upon a cursory analysis of the applicable case law, the Court is unpersuaded by the Supervisors' exposition.")

Inman v. Siciliano, No. 10–10202–FDS, 2012 WL 1980408, at *13 & n.14 (D. Mass. May 31, 2012) ("Insofar as Ciccolini was responsible for employee training, the analysis is very similar to that which is required in the municipal liability context. . . . . *See, e.g., Jones v. Wellham,* 104 F.3d 620, 628 (4th Cir.1997) ("While a municipal liability claim based upon a particular official's attributed conduct and a supervisory liability claim against that official based upon the same conduct are not perfectly congruent, each requires proof both of the official's deliberate indifference and of a close affirmative link between his conduct and a resulting constitutional violation by a subordinate.") (citation omitted); *Haynesworth v. Miller,* 820 F.2d 1245, 1262 n. 133 (6th Cir.1987) ("[S]ome courts have equated municipal and supervisory liability."). Indeed, the First Circuit has sometimes bundled the analyses together. *See, e.g., Bordanaro v. McLeod,* 871 F.2d 1151, 1154–55 (1st Cir.1989).")

Thath Sin v. Massachusetts Dept. of Correction, No. 10–40226–FDS, 2012 WL 1570810, at *4, *5 (D. Mass. May 2, 2012) ("[B]ecause plaintiff has alleged actual involvement by defendant Saba (through the grievance appeal process), he has stated a claim for supervisory liability. . . At this stage, because the Court cannot say that 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,'. . . plaintiff may assert his claims against defendants Saba. Defendants also contend that the equal protection claim must be dismissed as against defendants Saba and Richard because the complaint does not allege sufficient involvement by them in the discriminatory conduct. However, as noted with respect to Saba, plaintiff does allege involvement through the prisoner grievance process. . . That is sufficient at this stage of the litigation.")

Stewart v. Fleming, 838 F.Supp.2d 1, 3, 4 (D. Me. 2012) ("Here, Stewart makes no allegations that Chief Fleming was a direct participant in the conduct that she alleges violated her constitutional rights. Instead, her allegations against the Chief are simply that, as a supervisor, he 'had knowledge or, ..., should have had knowledge' of the wrongful conduct of Bureau and Mills and 'approved or ratified the conduct of Bureau and Mills.'. . Although that assertion constitutes a factual claim about the Chief's state of mind, the Supreme Court has concluded that a bare allegation of intent is inadequate to state a claim without more specific factual assertions. . . Thus, because Stewart offers no factual allegations to show that Chief Fleming's action or inaction was affirmatively linked to the allegedly constitutionally improper behavior of those he supervised, I will dismiss all the federal claims.")

Moulton v. Carroll County Dept. of Corrections, No. 11–cv–391–PB, 2011 WL 7080656, at *14 (D. N.H. Dec. 14, 2011) ("The County Commissioners in this case were unaware of any problem concerning Moulton's dental care until June 2011, when Moulton alleges he filed a grievance with the Commissioners. Moulton does not allege that the Commissioners had a direct hand in denying him dental care. The Commissioners cannot be held liable, under a supervisory liability theory, therefore, for acts of which they were unaware and were not otherwise alleged to have caused. Accordingly, no supervisory liability lies against the Commissioners for any actions taken by Fowler and Johnson prior to Moulton's June 2011 grievance to the Commissioners. Moulton

received no response to his June 2011 grievance to the Commissioners. Moulton did not provide a copy of the grievance he filed with the Commissioners but alleges in his complaint that his grievance to the Commissioners concerned the 'extraction-only' policy and stated that he 'wanted [his] teeth repaired.' The record is not sufficient to draw a reasonable inference that the Commissioners had subjective knowledge of the CCDC's refusal to provide fillings, as opposed to root canals and crowns, or that the individual Commissioners were deliberately indifferent to his need for fillings. In this Circuit, 'supervisory liability under a theory of deliberate indifference will be found only if it would be manifest to any reasonable official that his conduct was very likely to violate an individual's constitutional rights.'. . Thus, to the extent Moulton intends to state claims against the County Commissioners in their individual supervisory capacities for the CCDC's failure to provide his fillings, those claims should be dismissed.")

Pacheco-Pacheco v. Toledo, Civil No. 09-2121 (JAG), 2011 WL 5977337, at *2, *3 (D.P.R. Nov. 29, 2011) ("[S]upervisory liability is not circumscribed to situations in which the supervisor is a primary, or direct, participant in the illegal incident. A plaintiff may also rest his claim on the fact that a state official '[supervised, trained, or hired] a subordinate with deliberate indifference toward the possibility that deficient performance of the task' could result in a civil rights violation. . . A supervisory official acts with deliberate indifference when 1) there exists a grave risk of harm; 2) the official has actual or constructive knowledge of that risk; and 3) the official fails to take easily available measures to address that risk. *Camilo-Robles v. Hoyos*, 151 F.3d 1, 7 (1st Cir.1998). Put differently, it is sufficient that the supervisor 'has created or overlooked a clear risk of future unlawful action by a lower-echelon actor over whom he had some degree of control.' *Camilo-Robles v. Zapata*, 175 F.3d at 44. Finally, the claimant must also 'affirmatively link' the supervisor's conduct to the subordinate's illegal act or omission. . . This causality requirement 'need not take the form of knowing sanction, but may include tacit approval of, acquiescence in, or purposeful disregard of, rights-violating conduct.'. . After pruning the complaint at hand of boilerplate language and legal conclusions, a plausible claim of supervisory liability emerges. In general terms, it is alleged that Defendant Toledo failed to properly train and discipline the police officers under his command. This, according to Plaintiffs, made possible the situation that led to Mr. Irizarry's death. To start with, the complaint establishes that Toledo and other supervisors are 'vested with the authority to train, supervise, discipline and otherwise control' their subordinates. . . Additionally, the complaint states that they were 'were the policymakers for their respective police corps.'. . Certainly, it is reasonable to infer that Toledo and the other supervisors were in a position to address and correct behavioral issues with their subordinates. The complaint contains several allegations that, when taken as true and together, allow for an inference that Toledo 'created or overlooked a clear risk of future unlawful action' by his subordinates. . . First, that the supervisors were aware of the persistent and widespread use of excessive force by officers under their command. . . The supervisors also knew that police officers hid behind a 'code of silence'. . . when questioned about any of these incidents. . . The Internal Affairs Division, upon a policy set by the supervisors, continually failed to investigate and act upon complaints made by citizens in a suitable manner. . . Finally, the complaint contends that nothing was done by the supervisors to correct these problems. . . These failures 'are and have been ratified by the police department, and

the supervisors.'. .It is unclear whether any of the officers involved in the homicide of Mr. Irizarry-Perez actually had a history of misconduct. . . However, this Court is mindful that '[s]pecific facts are not necessary; the statements need only "give the defendants fair notice of what the claim ... is and the grounds upon which it rests."'. . The complaint does set forth that the supervisors failed to act 'in the face of numerous transgressions of which they knew or should have known.'. . A reasonable inference from the facts alleged in the complaint is that Defendant simply ignored prior incidents of misbehavior by his subordinates. In sum, the dire picture painted by the complaint–that of rampant misconduct by police officers, and of a systemic failure by Defendant and the police corps to address the use of excessive force–provides enough foothold for the Court to deny Defendant's motion. . . . The Court finds, however, that Plaintiffs' complaint goes beyond merely 'parroting' the standard of supervisory liability under § 1983. *Sanchez v. Pereira-Castillo,* 590 F.3d 31, 49 (1st Cir.2009). As such, Defendant's motion must be denied.")

Irving v. Town of Camden, No. 2:10-cv-000367-MJK, 2011 WL 2133836, at *16 (D. Me. May 27, 2011) ("Assuming supervisory liability still is a tenable liability standard in the wake of *Iqbal, see Santana-Castro v. Toledo-Davila,* 579 F.3d 109, 116 n.5 (1st Cir.2009); *Maldonado,* 568 F.3d at 275; *see also Morris v. Ley,* No. 08- 2459, 2009 WL 1784081, 3 (7th Cir. June 24, 2009), clearly mere knowledge, after the fact, of a subordinate's supposed wrongful conduct does not establish 42 U.S.C. § 1983 liability for a supervisor . Rather, there must be an affirmative link between the conduct of the supervisor and the supposed constitutional deprivation experienced by Irving.")

Alicea v. Wilcox, No. 09-CV-12231-RGS, 2011 WL 1625032, 2 (D. Mass. Apr. 28, 2011) ("A perusal of the Complaint with respect to Chief Romero discloses factual allegations sufficient to survive the motion to dismiss. According to the Complaint: (1) Officer Wilcox had been convicted of the criminal assault and battery of two other detainees three weeks prior to the alleged assault on plaintiff Alicea; (2) Chief Romero was aware of the fact that Wilcox was the subject of numerous civilian complaints and lawsuits alleging the excessive use of force, including four of recent vintage filed in the United States District Court; (3) the Department's Use of Force Policy vested responsibility in Chief Romero to oversee its implementation and enforcement; and (4) despite that responsibility Chief Romero neither enforced the Policy nor investigated allegations of violations by the officers under his command, including Wilcox. This is enough for pleading purposes to satisfy Fed.R.Civ.P. 8. With respect to former Mayor Sullivan, however, the only substantive allegation is that as chief executive officer under the City Charter, Mayor Sullivan was 'responsible for the general supervision and control of [the City's] various agencies and departments' and therefore should have known of and corrected abuses of civilians by City police officers. . . This is an allegation of vicarious liability and nothing more. It is plainly insufficient to survive scrutiny under the *Twombly-Iqbal* standard.")

Valle Colon v. Municipality of Maricao, Civ. No. 09-02217(PG), 2011 WL 1238437, at *10 & n.2 (D. P.R. Mar. 23, 2011) ("The First Circuit, in an opinion penned by Chief Judge Lynch, noted that the Supreme Court's language in *Iqbal* 'may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory

liability.'. . However, the First Circuit did not render a final verdict or furnish any guidance to the district courts on this question because the appellate court found that the plaintiffs had not pled facts sufficient to make out a plausible entitlement to relief under the First Circuit's previous formulation of supervisory liability. Notwithstanding the Chief Judge's foreboding, the First Circuit has continued to employ and develop its previously articulated standard of supervisory liability under Section 1983. . . . The First Circuit has sided with those circuit courts' supervisory liability standards that, as one noted commentator observed, 'only survive *Iqbal* to the extent they authorize § 1983 liability against a supervisory official on the basis of the supervisor's own unconstitutional conduct or, at least, conduct that sets the unconstitutional wheels in motion.' Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses, § 7.19[D] (4th ed.2010). 'The issue, then is one of causation, i.e., whether the supervisor's conduct was a proximate cause of the violation of the plaintiff's constitutional rights.' *Id.;* see generally *Dodds v. Richardson,* No. 09-6157, 2010 WL 3064002 (10th Cir. Aug. 6, 2010) (describing in detail how the circuit courts have tackled supervisory liability post-Iqbal).")

Thayer v. Dion, No. 2: 09-cv-00435-DBH, 2010 WL 4961739, at *20 (D. Me. Nov. 30, 2010) ("Assuming supervisory liability still is a tenable liability standard in the wake of *Iqbal, see Santana-Castro v. Toledo-Davila.* 579 F.3d 109, 116 n. 5 (1st Cir.2009); *Maldonado v. Fontanes,* 568 F.3d 263, 275 (1st Cir.2009); *see also Morris v.. Ley,* No. 08-2459, 2009 WL 1784081, 3 (7th Cir. June 24, 2009), clearly mere knowledge of a subordinate's wrongful conduct does not establish 42 U.S.C. § 1983 liability for a supervisor. Rather, there must be an affirmative link between the conduct of the supervisor and the constitutional deprivation experienced by Thayer.")

Brown v. Englander, No. 10-cv-257-SM, 2010 WL 4968174, at *9 (D.N.H. Nov. 24, 2010) ("Here, plaintiff alleges that each named defendant participated in the unconstitutional deprivations alleged, by condoning their subordinates' failure to insure that Brown received the surgery he needed and attempting to lessen his pain while denying or delaying the treatment of his physical back problems. Defendants refused to remedy, and to have continued to support, the practices brought to their attention through the inmate request and grievance processes. Accordingly, these defendants can be sued in their supervisory capacities under section 1983.")

Hernandez v. Castillo, Civ. No. 09-1569(PG), 2010 WL 3372527, at *6, *9, *10, *12 (D.P.R. Aug. 24, 2010) ("Notwithstanding the Chief Judge's foreboding [in *Maldonado*], the First Circuit has continued to employ and develop its previously articulated standard of supervisory liability under Section 1983. . . In this case, much like in *Pereira-Castillo,* Plaintiff parroted the circuit's supervisory liability standard without much if any factual enhancement tying defendant Laboy, or any of the other named defendants, to his constitutional injury. Plaintiff lumps together all five of the DOC Secretaries who were at the helm of the Department during Plaintiff's fifteen or more years of allegedly excessive incarceration as defendants sharing equal responsibility for broadly-worded and generalized conduct that fails to rise above legal conclusion or, as the Supreme Court has articulated, the 'sheer possibility that a defendant has acted unlawfully.'. . . Plaintiff does not allege that Defendant promulgated any policy that led to the bungling of his sentence, nor does he

specify which practices and procedures Defendant failed to implement to protect Plaintiff's constitutional rights. Plaintiff fails to allege any facts specifically linking Defendant's training or supervision of subordinate personnel to the erroneous classification of his sentence, which the Court surmises is normally the responsibility of DOC record-keepers. Indeed, Plaintiff would have fared better in lodging a complaint against those lower-echelon DOC employees directly handling his case, such as the prison's record-keepers or the Parole Board members who repeatedly denied his requests for release. Plaintiff shoots himself in the foot when he states that the Parole Board knew but never gave notice to the DOC Secretaries of the nature of Plaintiff's sentence or of his right to be released upon rehabilitation. This statement undermines any role that the defendants may have played in acting deliberately indifferent toward Plaintiff's plight. As previously explained, notice is an important factor in making a determination of liability because one cannot act with deliberate indifference toward a person's constitutional rights if one does not know that his rights are being violated in the first place. . . . Assuming the complaint's facts are true, the Court laments the sad saga that Plaintiff was forced to endure as a prisoner whose Kafkaesque plight appeared to be repeatedly ignored by the DOC. However, the Court cannot replace its constitutional directive to judge facts indifferently through the eyes of the law with its sympathy for Plaintiff having suffered a terrible injustice. Plaintiff simply failed to state a plausible claim for relief by painting too broad a brush and not digging deeper beyond the surface of a generalized grievance against the heads of a department. By not doing the extra legal work required to make those specific causal connections between his alleged harm and those responsible for it, he missed his opportunity to obtain any relief.")

Lopez-Jimenez v. Pereira, No. 09-1156CCC, 2010 WL 500407, at *4, *5 (D. P.R. Feb. 3, 2010) ("[P]laintiffs have also included allegations in which they aver that defendants were 'aware of serious lapses in security and of the unreasonable risk of death existing at Bayamón 292 Institution through information available to them through regular channels of communication at the Administration of Correction ... [but] failed to enforce acceptable correctional practices at that institution or otherwise provide adequate security to Gilberto J. López-Jiménez...'. . . This, however, is akin to the 'knowledge and acquiescence' supervisory theory of liability rejected in *Iqbal*, where the Court held that it is not enough to just allege that a supervisor at least had knowledge of and was deliberately indifferent to the constitutional violation. *Iqbal*, at 1949. *See also Maldonado v. Fontanés*, 568 F.3d at 274, n. 7 (recognizing that " "[s]ome recent language from the Supreme Court may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability" and quoting *Iqbal*.) While we cannot say that plaintiffs' complaint does not show 'a possibility that someone acted unlawfully,' this is not enough under the revised pleading standards. *Id.* Instead, there must be factual allegations sufficient to rise above the 'speculative level' or the 'merely possible or conceivable.'. . . As plaintiffs' complaint does not plead enough facts to state a claim to relief that is plausible on its face, it must be dismissed.").

Brenes-Laroche v. Toledo Davila, 682 F.Supp.2d 179, 186, 187 & n.3 (D.P.R. 2010) ("We . . . find that Plaintiff pleads sufficient facts to pin section 1983 liability upon all of the supervisory

officers. As the Complaint's description of the parties and factual allegations show, the supervisory officers acts and omissions were affirmatively linked to their subordinates' unconstitutional behavior such that they could be characterized as either encouragement, condonation, acquiescence, or gross negligence amounting to deliberate indifference. We do not yet know which of these categories of misconduct would most appropriately describe Defendants' acts or omissions given our undeveloped factual record. However, we must credit Plaintiff for setting forth a factual scenario in which each individual defendant personally participated in the deprivation of rights, or at the very least, formulated a policy or engaged in a custom that led to a deprivation that was foreseeable and that each had power and authority to alleviate. . . . This is a case of a purported policy of the SJTOU's using excessive force, authorized by the unit's supervisors all the way up the chain of command, and directly ordered or permitted by them on the day of the alleged beatings. As stated in the factual background of this opinion and as reiterated in Plaintiff's Opposition to the Motion to Dismiss, each Defendant is implicated with having participated in the SJTOU's constitutional violations, either by consulting, ordering, or deliberately neglecting the unit's foreseeable use of excessive force. . . . Thus, here we are not presented with a case of wholly conjectural or hypothetical factual allegations that merely repeat the formulaic or conclusory language of supervisory liability, requiring dismissal under the standards set forth by the Supreme Court in *Iqbal*. We find that Plaintiff has pled sufficient facts to make out a plausible entitlement to relief under the First Circuit's formulation of supervisory liability, even if such has been called into question by the Supreme Court's new pleading standards. [noting that *Maldonado* casts doubt on the standard for holding a public official liable for damages under section 1983 on a theory of supervisory liability] We are cognizant of the difficulty described by Plaintiff in identifying who is responsible for what, especially when the SJTOU allegedly removed their badges and attacked Plaintiff in a coordinated group effort. We understand the difficulty faced by many civil rights litigants in Plaintiff's position who are not armed with sufficient facts, more likely to be found in Defendants' possession, to survive *Iqbal's* pleading standard at this pre-discovery stage of litigation. We hope the Circuit will clarify the supervisory liability standard to guide us in this task. For now, we heed the Supreme Court's suggestion to 'draw on [our] judicial experience and common sense.' *Iqbal*, 129 S.Ct. at 1950. We deny Defendants request to dismiss the claims against the supervisory officers to allow discovery on these important factual issues that need to be resolved in order to determine more precisely each individual defendant's role, and thus liability, in violating Plaintiff's constitutional rights.") .

Whitten v. Blaisdell, No. 09-cv-450-SM, 2010 WL 376903, at *4, *5 (D.N.H. Jan. 22, 2010) ("Mere knowledge of the constitutional misdeeds of a subordinate does not, without more, give rise to a supervisor's liability for that conduct in a § 1983 action, where the underlying constitutional violation requires proof of the subordinate's purposeful action. *See Iqbal,* 129 S.Ct. at 1949 (discussing contours of liability for officials charged with Equal Protection violations arising from superintendent responsibilities). . . . Whitten alleges that, by utilizing the DOC grievance process, he alerted defendants MacLeod, Blaisdell, and Wrenn to the inadequacies in his medical care. Whitten alleges that these defendants, as supervisors for the medical staff directly responsible for providing his inadequate medical care, were more than merely aware of the

inadequacies in his medical treatment. These supervisors, by virtue of being the decision makers in the grievance process, are charged with the obligation, and given the concomitant opportunity, to remedy the medical staff's failure to provide adequate medical care. This is particular true where, as here, the supervisors' failure to remedy or correct the denial of adequate medical care could be reasonably understood by the medical providers to amount to condonation of their failure to provide treatment. Where, as here, the issue is denial of medical care for a medical condition, and pain and other serious problems that are ongoing, supervisory approval of the medical staff's actions can be understood to lead inexorably to a continuing or future violation of an inmate's right to adequate medical care. . .Whitten states that he grieved the inadequacy of his medical treatment to MacLeod, to Blaisdell, and then on to Wrenn. These supervisory officials, by doing nothing, led Whitten to continue to receive inadequate medical care. Accordingly I find that, for purposes of preliminary review, Whitten has stated claims against the supervisory defendants for their deliberate indifference to, and denial of adequate medical care for, his serious medical needs.")**.**

Kilroy v. Maine, Civil No. 9-324-B-W, 2010 WL 145294, at *4 (D. Me. Jan. 8, 2010) ("The Supreme Court's decision in *Iqbal* seems to have constricted the airways of supervisory liability law making it much harder for a plaintiff with such a claim to survive a motion to dismiss. *See Iqbal*, 129 S.Ct. at 1948. In the First Circuit before and after *Iqbal*, the plaintiff must plead facts sufficient to suggest that there was an affirmative link between the supervisor's conduct and the alleged constitutional violation. *See Sanchez v. Pereira-Castillo*, __ F.3d. __, __, __, 2009 WL 4936397, 12-13 (1st Cir. Dec. 23, 2009; *Maldonado v. Fontanes*, 568 F.3d 263, 274-75 & n. 7 (1st Cir.2009); *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 14 (1st Cir.2005); *Choate v. Merrill*, 08-49-B-W, 2009 WL 3487768, 2-4 (D.Me. Oct. 20, 2009) (pending recommended decision). Kilroy's individual capacity claims against Mills and Harvey are based on a quintessentially *respondeat superior* theory of liability and the *Iqbal* majority insisted: 'Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. ... Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.' 129 S.Ct. at 1948.")

Mulero Abreu v. Ocquendo-Rivera 729 F.Supp.2d 498, 514, 515 (D.P.R. 2010) ("In this case, the plaintiffs reference the sexual harassment claim policy that the supervisory defendants allegedly ignored that would have prevented constitutional violations, and also offer details regarding how and why Mulero's supervisors should have or did know about the alleged violations. Supervisory liability, however, 'lies only where an affirmative link between the behavior of a subordinate and the action or inaction of his supervisor exists such that the supervisor's conduct led inexorably to the constitutional violation.' *Maldonado*, 568 F.3d at 275 (quotations and citations omitted). Given the strict standard set by *Maldonado*, the Court finds that plaintiffs' allegations are similarly deficient to establish an 'affirmative link' between Orquendo's alleged behavior and the inaction of PRPD supervisors 'such that the supervisor's conduct led inexorably to the constitutional violation.'. . Accordingly, all claims for supervisory liability are hereby **DISMISSED.**")

Picard v. Hillsborough County Dept. of Corrections Medical Dept., No. 09-cv-271-SM, 2009 WL 4063191, at *4 (D.N.H. Nov. 20, 2009) ("Defendant O'Mara is alleged to have been made aware of Picard's need for medical attention for his weight loss by virtue of the HCDOC grievance system and failed to take action to insure the adequacy of the medical care provided to Picard. I find that a reasonable official receiving a grievance from Picard complaining of his significant weight loss and the failure of the HCDOC Medical Department to address the problem, would know that the failure to address those issues and to provide Picard with adequate medical care at the HCDOC, would likely violate Picard's constitutional rights. *See Maldonado*, 568 F.3d at 275. Picard has alleged sufficient facts to assert a claim that O'Mara was aware of and failed to remedy a deprivation of adequate medical care for Picard's weight loss, and that O'Mara is liable for the violation of Picard's Eighth Amendment right to adequate medical care.")**.**

Torres-Santiago v. Diaz-Casiano, No. 08-1650 (GAG/BJM), 2009 WL 4015648, at *8, *9 (D.P.R. Nov. 16, 2009) ("Defendant Toledo, in his personal capacity, contends that the evidence in the record fails to make out a claim against him based on supervisory liability under Section 1983. Toledo argues that the plaintiffs have shown no facts which establish Toledo's personal involvement and have failed to otherwise show supervisory liability. . . The plaintiffs do not contend that Toledo was personally involved with the events of September 27-28, 2006; rather, they argue that Toledo is liable under Section 1983 for the violation of plaintiffs' Fourth and Fourteenth Amendment rights on the theory of supervisory liability for his failure to adequately supervise, train, and discipline the officers under his command. . . Under Section 1983, supervisory liability cannot be predicated on the theory of *respondeat superior*, and supervisors may only be held liable on the basis of their own acts or omissions. . . Nevertheless, a supervisor may be liable under Section 1983 if he formulates a policy or engages in a practice that leads to a civil rights violation committed by another. . . Absent direct participation, a supervisor may be held liable where (1) the behavior of his subordinates results in a constitutional violation, and (2) the supervisor's action or inaction was affirmatively linked to the behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence, or gross negligence amounting to deliberate indifference. . . . On a motion to dismiss, and by extension on a motion for judgment on the pleadings, the court must not credit 'bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.'. . Merely alleging that a supervisor failed to train his subordinates is patently insufficient to establish a Section 1983 claim against the supervisor. . . Here, the plaintiffs' amended complaint makes only conclusory allegations that Toledo knew or should have known of the defendant officers' violent propensities; knowingly failed to properly train, supervise, or discipline the defendant officers; knowingly failed to implement reasonable or adequate policies and procedures to avoid abuse of plaintiffs' civil rights; and personally reviewed and/or adjudicated plaintiffs' administrated complaint and failed to act on it – all of which, the complaint alleges, constituted gross negligence amounting to deliberate or reckless indifference to the plaintiffs' constitutional rights. . . These 'bald assertions' and 'unsupportable conclusions' are plainly deficient to survive a motion for judgment on the pleadings. The fact that their administrative complaint (whether or not personally reviewed by

Toledo, as conclusorily alleged) did not result in disciplinary action against the defendant officers does not reflect Toledo's knowing failure to adequately train, supervise, and discipline them, amounting to callous or reckless indifference. . . Aside from the absence of disciplinary action on the administrative complaint, the plaintiffs have not offered any other evidence in support of their assertions against Toledo, and further, they have established no affirmative link between Toledo's acts or omissions and his subordinates' alleged violation of the plaintiffs' constitutional rights. Rather, the plaintiffs only set forth generally that Toledo failed to train, supervise, and discipline officers under his control. Therefore, the plaintiffs have failed to allege a plausible entitlement to relief under Section 1983. Accordingly, the court **DISMISSES** with prejudice plaintiffs' Section 1983 claim against defendant Toledo in his personal capacity for violation of the plaintiffs' Fourth and Fourteenth Amendment rights.").

Merchant v. Blaisdell , No. 09-cv-231-PB, 2009 WL 3447245, at *4 (D.N.H. Oct. 16, 2009) ("Mere knowledge of the constitutional misdeeds of a subordinate does not, without more, give rise to a supervisor's liability for that conduct in a § 1983 action, where the underlying constitutional violation requires proof of the subordinate's purposeful action. . . .Merchant states that he grieved the inadequacy of his medical treatment to MacLeod, to Blaisdell, and then on to Wrenn. These supervisory officials, by doing nothing, led Merchant to continue to receive inadequate medical care. Accordingly I find that, for purposes of preliminary review, Merchant has stated sufficient facts to state claims against the supervisory defendants for their deliberate indifference to, and denial of adequate medical care for, his serious medical needs.").

Stanley v. Landers, No. 09-cv-52-PB, 2009 WL 2242676, at *8 (D.N.H July 23, 2009) ("There is no supervisory liability in § 1983 actions based on a respondeat superior theory of liability. *See Ashcroft v. Iqbal,* __ U.S. __, __, 129 S.Ct. 1937, 1949 (2009). The standard set forth in the First Circuit for supervisory liability under section 1983 is that a supervisor may be held personally liable 'for the behavior of his subordinates only if "(1) the behavior of his subordinates results in a constitutional violation, and (2) the supervisor's action or inaction was affirmatively linked to that behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference,'' leading inexorably to the constitutional violation. *Pineda v. Toomey,* 533 F.3d 50, 54 (1st Cir.2008) (citation and internal brackets omitted). The First Circuit's precedent, to be consistent with *Ashcroft,* 129 S.Ct. at 1949, must be interpreted to make officials liable only for their own actions or omissions. . . . Stanley asserts that he has made 'repeated multiple written and verbal complaints' regarding Landers' abusive conduct and false arrests to Landers' supervisors, Goodnow and Jordanhasi, which they ignored. . . . The allegations in the complaint are sufficient to state a claim for supervisory liability as to Goodnow and Jordanhasi for failing to investigate Stanley's complaints and supervise Landers.")

Chao v. Ballista, 630 F.Supp.2d 170, 177-79 & n.2 (D. Mass. 2009) ("Plausibility, as the Supreme Court's recent elaboration in *Ashcroft v. Iqbal* makes clear, is a highly contextual enterprise – dependent on the particular claims asserted, their elements, and the overall factual picture alleged

in the complaint. . . .Allegations become 'conclusory' where they recite only the elements of the claim and, at the same time, the court's commonsense credits a far more likely inference from the available facts. . .This analysis depends on the full factual picture, the particular cause of action, and the available alternative explanations. Yet in keeping with Rule 8(a), a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible. . . .Together, [the] factual allegations [of the complaint] raise the plausible inference that, given their supervisory duties and security responsibilities, the Defendants failed to adequately train, supervise, or investigate Ballista's year-long sexual encounters with Chao. They encompass also a failure to adopt policies and procedures within the DOC that would have prevented the sexual abuse alleged in the complaint. . . . Given the public attention devoted to sexual abuse in prisons writ large, and the repetitive, long-lasting abuse alleged in this case, it is a fair inference from the pleadings that prison officials – including Commissioner Dennehey – were deliberately indifferent to the risks and reality of this abuse. . . . Notably, the state of mind required to make out a supervisory claim under the Eighth Amendment – i.e., deliberate indifference – requires less than the discriminatory purpose or intent that Iqbal was required to allege in his suit against Ashcroft and Mueller. . . Together with the other contextual factors discussed above, what qualifies as a fair or credible inference from the facts alleged in the pleadings must be calibrated accordingly.. . . While the Defendants' personal involvement will be further tested at the summary judgment stage, Chao's claims have met the crucial threshold of plausibility and survive the Defendants' Motion to Dismiss.")

SECOND CIRCUIT

Tangreti v. Bachmann, 983 F.3d 609, 612-20 (2d Cir. 2020) ("Following *Ashcroft v. Iqbal*, . . . courts may not apply a special rule for supervisory liability. Rather, the plaintiff must directly plead and prove that 'each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . Applying the proper standard, we conclude that there is insufficient evidence in the pretrial record for the inference that Bachmann, through her own actions, displayed deliberate indifference to the substantial risk of sexual abuse. Even considering only Tangreti's version of the facts, the pretrial record does not support the inference that Bachmann had subjective knowledge that Tangreti was at a substantial risk of sexual abuse. . . It is not sufficient, as the district court maintained, that Bachmann *should have known* of the substantial risk of sexual abuse. . . . This court articulated standards for supervisory liability in *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995), but the Supreme Court's decision in *Iqbal* called those standards into question and this court has not clarified whether or to what extent the *Colon* standards continue to apply. . . The district court relied on *Colon* to conclude that Bachmann was 'conceivably personally involved' in violating Tangreti's rights under the Eighth Amendment either because Bachmann was grossly negligent in supervising the officers or because she failed to act on information indicating that Tangreti was at substantial risk of sexual abuse. . .We disagree with that conclusion. *Iqbal* holds that a plaintiff may not rely on a special test for supervisory liability. Rather, 'a plaintiff must plead that each Government-official defendant,

through the official's own individual actions, has violated the Constitution.' . . Accordingly, for deliberate-indifference claims under the Eighth Amendment against a prison supervisor, the plaintiff must plead and prove that the supervisor had subjective knowledge of a substantial risk of serious harm to an inmate and disregarded it. . . The pretrial record in this case does not support the inference that Bachmann had the required subjective knowledge that Tangreti was at a substantial risk of being sexually abused. . . .*Iqbal* cast doubt on the continued viability of the special standards for supervisory liability set forth in *Colon*. . . Without clear direction from this court, . . . district courts in the circuit have sought, with inconsistent results, to determine the effect of *Iqbal* on supervisory liability. . . . Circuit courts have considered the impact of *Iqbal* as well. The Tenth Circuit has concluded that, 'after *Iqbal*, [a p]laintiff can no longer succeed on a § 1983 claim against [a d]efendant by showing that as a supervisor he behaved knowingly or with deliberate indifference that a constitutional violation would occur at the hands of his subordinates, unless that is the same state of mind required for the constitutional deprivation he alleges.' [citing *Dodds v. Richardson*]. . . The focus is on what the *supervisor* did or caused to be done, 'the resulting injury attributable to his conduct, and the *mens rea* required of him to be held liable, which can be no less than the *mens rea* required of anyone else. Simply put, there's no special rule of liability for supervisors. The test for them is the same as the test for everyone else.'. . Other circuits have endorsed this view. . . We join these circuits in holding that after *Iqbal*, there is no special rule for supervisory liability. Instead, a plaintiff must plead and prove 'that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . 'The factors necessary to establish a [§ 1983] violation will vary with the constitutional provision at issue' because the elements of different constitutional violations vary. . . The violation must be established against the supervisory official directly. In this case, '[t]o state a claim under the Eighth Amendment on the basis that a defendant has failed to prevent harm, a plaintiff must plead both (a) conditions of confinement that objectively pose an unreasonable risk of serious harm to their current or future health, and (b) that the defendant acted with "deliberate indifference[.]"'. . . Deliberate indifference in this context 'means the official must "know[ ] of and disregard[ ] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."'. .Tangreti must therefore establish that Bachmann violated the Eighth Amendment by Bachmann's own conduct, not by reason of Bachmann's supervision of others who committed the violation. She must show that Bachmann herself 'acted with "deliberate indifference"'—meaning that Bachmann personally knew of and disregarded an excessive risk to Tangreti's health or safety. . . Tangreti cannot rely on a separate test of liability specific to supervisors. . . . Given this record, at most it may be said that Bachmann could have or should have made an inference of the risk of sexual abuse. . . But there is no evidence that she made that inference until October 31, 2014, when she discovered, and questioned Tangreti about, the ongoing sexual abuse. There is therefore insufficient evidence in the pretrial record that Bachmann acted with deliberate indifference to support Tangreti's § 1983 claim. Contrary to the district court's conclusion, it is not enough for Tangreti to show that Bachmann was negligent, or even grossly negligent, in her supervision of the correctional officers or in failing to act on the information she had. The deliberate-indifference standard 'require[es] a showing that the official was subjectively

aware of the risk,'. . . and that showing has not been made. . .In sum, we agree with Bachmann that the scope of supervisory liability under § 1983 for violations of the Eighth Amendment was not clearly established at the time of the relevant conduct. To hold a state official liable under § 1983, a plaintiff must plead and prove the elements of the underlying constitutional violation directly against the official without relying on a special test for supervisory liability. In the context of the Eighth Amendment, that requires a showing of deliberate indifference on the part of the state-official, and the pretrial record in this case cannot meet that standard. Accordingly, we **REVERSE** the judgment of the district court and remand with instructions to enter summary judgment for the defendant.")

Morgan v. Dzurenda, 956 F.3d 84, 89-90 (2d Cir. 2020) ("Here, while Chapdelaine and Godding both held supervisory roles at Osborn, Morgan seeks to hold them liable only for acts that they themselves committee. . . The crux of Morgan's allegations against Chapdelaine and Godding is that they violated the Eighth Amendment by ignoring his pleas for help. Morgan nowhere suggests that Chapdelaine, Godding, or any other defendant improperly allowed a subordinate prison official to commit a constitutional violation. The doctrine of supervisory liability is therefore not implicated.")

Ganek v. Leibowitz, 874 F.3d 73, 93 (2d Cir. 2017) ("[T]he fact that the decision to search LG's offices was 'carefully considered at the highest levels' of the U.S. Attorney's office is not enough to admit an inference that supervisors knew or should have known that a statement in the warrant affidavit, attributed to Adondakis, was false. . . Certainly Ganek does not plead, either generally or with specific reference to this case, that FBI and U.S. Attorney supervisors, when reviewing search warrant applications, do not routinely rely on their subordinates to report accurately the statements made to them by cooperating witnesses. Nor do they—or could they—suggest that doing so is reckless. . . In sum, because Ganek has failed to state cognizable Fourth Amendment, procedural due process, and failure-to-intercede claims, and, in any event, because Ganek has failed to plead sufficient facts as to each supervisor defendant's personal involvement in the submission of the alleged misstatement to the magistrate judge, the supervisor defendants are entitled to dismissal of these claims.")

Raspardo v. Carlone, 770 F.3d 97, 116-17 (2d Cir. 2014) ("Individual liability under § 1983 in hostile work environment claims may also involve supervisory liability. In addressing the 'federal analog' of § 1983 *Bivens* actions, the United States Supreme Court in *Ashcroft v. Iqbal* confirmed that liability for supervisory government officials cannot be premised on a theory of *respondeat superior* because § 1983 requires individual, personalized liability on the part of each government defendant. . . . A supervisor is protected by qualified immunity so long as reasonable officials could disagree about whether the supervisor's action was grossly negligent in light of clearly established law. . . The standard of gross negligence is satisfied where the plaintiff establishes that the defendant-supervisor was aware of a subordinate's prior substantial misconduct but failed to take appropriate action to prevent future similar misconduct before the plaintiff was eventually injured. . . . A supervisor is not grossly negligent, however, where the plaintiff fails to demonstrate

that the supervisor knew or should have known of a problematic pattern of employee actions or where the supervisor took adequate remedial steps immediately upon learning of the challenged conduct. . . A plaintiff pursuing a theory of gross negligence must prove that a supervisor's neglect caused his subordinate to violate the plaintiff's rights in order to succeed on her claim. . .We have not yet determined the contours of the supervisory liability test, including the gross negligence prong, after *Iqbal*. . . We need not decide this question here because, as explained below, Gagliardi did not act with gross negligence in his supervision of Carlone, and the other tests for supervisory liability are not satisfied.")

Terebesi v. Torreso, 764 F.3d 217, 234, 235 (2d Cir. 2014) ("[A] supervisor may be held liable if he or she was personally a 'direct participant' in the constitutional violation. . . . In this Circuit, a 'direct participant' includes a person who authorizes, orders, or helps others to do the unlawful acts, even if he or she does not commit the acts personally. . . .Our case law thus clearly establishes that planners may be liable under section 1983 to the extent that a plan for a search or seizure, as formulated and approved by those defendants, provides for and results in an unconstitutionally excessive use of force. . . We therefore reject the defendants' assertions that the law in this respect is not clearly established. . . A defendant who plans or directs an unreasonable use of force is liable for the resulting constitutional violation as a 'direct participa[nt].'")

Doe v. Whidden, 557 F. App'x 71, 2014 642671, *1, *2 n.1 (2d Cir. Feb. 20, 2014) ("We need not decide how the Supreme Court's decision in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), affected the standards for establishing supervisory liability as articulated in *Colon v. Coughlin,* 58 F.3d 865, 874 (2d Cir.1995), as Doe has not adduced sufficient evidence to show personal involvement under either standard. *See Grullon v. City of New Haven,* 720 F.3d 133, 139 (2d Cir.2013) (noting possibility that *Ashcroft v. Iqbal* "heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations" but concluding that complaint failed adequately to plead supervisor's personal involvement even under *Colon v. Coughlin* standards).")

Hogan v. Fischer, 738 F.3d 509, 519 n.3 (2d Cir. 2013) ("The Attorney General also argues that the claims against CO Erhardt, the one named defendant allegedly involved in the spraying incident, should be dismissed because Hogan has inadequately alleged his personal involvement. The district court did not address Erhardt's personal involvement in the spraying incident. We decline to address it in the first instance, but note that the complaint could be liberally construed to allege that Erhardt controlled access to the cell block, allowed the John Doe guards access to Hogan's cell, and then failed to intervene when it became apparent that the guards were violating Hogan's rights. . .We express no view on the extent to which the Supreme Court's decision in *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), 'may have heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations,'. . . or whether Hogan's current complaint plausibly alleges personal involvement.")

Grullon v. City of New Haven, 720 F.3d 133, 139-41 (2d Cir. 2013) ("Although the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), may have heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations, we need not reach *Iqbal's* impact on *Colon* in this case, for Grullon's initial complaint did not adequately plead the Warden's personal involvement even under *Colon*.. . .Grullon's complaint, as filed, did not sufficiently allege the Warden's personal involvement in or awareness of the health, safety, and communications issues raised by Grullon. There were no such direct allegations; there were no indirect allegations sufficient to permit an inference the Warden had acted or failed to act in any of the ways that would subject him to personal liability for the deprivations alleged by Grullon. We conclude that the district court did not err in dismissing Grullon's claims against the Warden in his individual capacity for lack of sufficient allegations of the Warden's personal involvement. We reach a different conclusion with respect to the denial of Grullon's request to amend. . . .Here, the district court dismissed Grullon's action with prejudice on the basis of his initial pleading, denying him leave to file an amended complaint alleging that he in fact sent his Letter to the Warden complaining of prison conditions. At the pleading stage, even if Grullon had no knowledge or information as to what became of his Letter after he sent it, he would be entitled to have the court draw the reasonable inference—if his amended complaint contained factual allegations indicating that the Letter was sent to the Warden at an appropriate address and by appropriate means—that the Warden in fact received the Letter, read it, and thereby became aware of the alleged conditions of which Grullon complained. It is of course possible that the Warden read the Letter and took appropriate action or that an administrative procedure was in place by which the Warden himself would not have received the Letter addressed to him; but those are potential factual issues as to personal involvement that likely cannot be resolved without development of a factual record. As we have previously held, 'when a *pro se* plaintiff brings a colorable claim against supervisory personnel, and those supervisory personnel respond with a dispositive motion grounded in the plaintiff's failure to identify the individuals who were personally involved, under circumstances in which the plaintiff would not be expected to have that knowledge, dismissal should not occur without an opportunity for additional discovery.'")

Vincent v. Yelich, 718 F.3d 157, 173 (2d Cir. 2013) ("A supervisory official may be liable in an action brought under § 1983 if he 'exhibited deliberate indifference to the rights of inmates *by failing to act on information indicating that unconstitutional acts were occurring.*' [citing *Colon*] As set out in Part II.A.2. above, Annucci testified in *State v. Myers* that he was 'aware of the Second Circuit's decision in *Earley v. Murray* at the time it came out in 2006,' that he was aware that *Earley I* ruled 'that DOCS did not have the authority to add a period of post-release supervision, if it was not included by the sentencing judge,' and that he 'did not agree with that decision'. . . Annucci testified that, 'at that time in 2006' he '*did not* begin a resentencing initiative.'")

Reynolds v. Barrett, 685 F.3d 193, 206 n.14 (2d Cir. 2012) ("We need not here determine if the pattern-or-practice framework can *ever* be used in a § 1983 suit against a policy-making supervisory defendant, although we note our considerable skepticism on that question in light of

the Supreme Court's decision in *Ashcroft v. Iqbal,* 556 U.S. 662, 676 (2009). In *Iqbal,* the Supreme Court held that 'b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's *own individual actions,* has violated the Constitution.'. . In so holding, the Court explicitly rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Thus, 'each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.'. . *Iqbal* has, of course, engendered conflict within our Circuit about the continuing vitality of the supervisory liability test set forth in *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995). . . But the fate of *Colon* is not properly before us, and plaintiffs have not articulated any reason in their briefs to treat individual print shop supervisors and their policy-making superiors differently in the context of this suit. . . . Because plaintiffs have failed to develop any argument as to why the pattern-or-practice framework is suitable to establish the liability of individual supervisory defendants in § 1983 suits, we deem that argument waived.")

Shomo v. City of New York, 579 F.3d 176, 184 (2d Cir. 2009) ("Given Shomo's failure to allege the supervisors' personal involvement in the alleged Eighth Amendment violations, the district court properly ruled that Shomo failed to state valid claims against the supervisors. Even so, we conclude that Shomo should be granted leave to replead against these defendants. The district court determined that Shomo's complaint was inadequate because there were no allegations 'that Fraser and Perry were aware of the violations,' that grievances sent to the supervisors notified them of constitutional violations, or that the supervisors acted or failed to act in a way that caused any constitutional violations. It is possible that Shomo could remedy the inadequacies identified by the district court.").

James v. City of Rochester, No. 23-CV-6057DGL, 2023 WL 4413972, at *2-3 & n. (W.D.N.Y. July 10, 2023) ("Under the standards set forth in *Iqbal* and *Tangreti*, I conclude that plaintiff's allegations concerning [Monroe County Sheriff] Baxter are insufficient to make out a claim against him under § 1983. Plaintiff has simply alleged in conclusory fashion that Baxter provided training to MCSO deputies and that the training was inadequate. . . . In short, plaintiff's allegations fail to show Baxter's personal involvement in the alleged constitutional violation. Plaintiff's claim against Baxter rests essentially on a theory of supervisory liability, which is foreclosed by *Tangreti*. . . . The case relied on by plaintiff, *Stone #1 v. Annucci*, No. 20-CV-1326, 2021 WL 4463033 (S.D.N.Y. Sept. 28, 2021), is inapposite. The court in that case held that a senior prison official can be held liable for his role in creating a policy by which violations of the Eighth Amendment occurred, if he can be shown to have acted with the necessary *mens rea* of deliberate indifference to the consequence of that policy. . . Plaintiff in the case at bar has not alleged that Baxter created a policy that led to a constitutional violation, much less that he did so with a culpable state of mind. This case has nothing to do with MCSO policies, but with the manner in which one particular warrant was executed.")

Stone #1 v. Annucci, No. 20-CV-1326 (RA), 2021 WL 4463033, at *7–10 (S.D.N.Y. Sept. 28, 2021) ("The parties here dispute the state of the law in the wake of *Tangreti*. In particular, they disagree about whether the creation of policies by a supervisory defendant can constitute personal involvement in an underlying constitutional violation sufficient to establish Section 1983 liability. As noted above, whereas Defendants argue that the third *Colon* factor is no longer good law, . . . Plaintiffs argue that *Tangreti* 'does not change the fundamental framework' governing their claims[.] . . .At the outset, Plaintiffs' maximalist position—that 'personal involvement of supervisors can still be established by the five factors articulated in *Colon*,'. . . is clearly not correct. Although it is true that *Tangreti* did not expressly state, 'We are overruling *Colon*,' it made clear that plaintiffs seeking to hold supervisors liable 'cannot rely on a separate test of liability specific to supervisors'—i.e., exactly what the five-factor *Colon* test was. . . Going forward, a plaintiff must establish that each defendant's own conduct violated the constitution, and such liability can no longer be solely premised on a defendant's ''supervision of others who committed the violation.'. . This clear direction from *Tangreti* plainly abrogates the fourth *Colon* factor, which allowed liability for a defendant who was 'grossly negligent in supervising subordinates who committed the wrongful acts.'. . The *Tangreti* decision also makes clear that a plaintiff must show that each supervisor himself or herself possessed the requisite *mens rea* to be held liable for the constitutional violation, *e.g.*, in a case like this, that he or she 'acted with "deliberate indifference"—meaning that [the defendant] personally knew of and disregarded an excessive risk to [plaintiff's] health or safety.'. . District courts applying *Tangreti* in the months since it was decided have generally stated that the five-factor *Colon* test is no longer good law. [collecting cases] It is simply not plausible, then, for Plaintiffs to argue that the old *Colon* test survived *Tangreti* in its entirety. At the same time, however, the Court disagrees with Defendants about the fate of policymaker liability under Section 1983 after *Tangreti*. Although the Second Circuit generally rejected *Colon*, *Tangreti* does not suggest that *Colon*'s third factor—whereby a defendant can be said to be personally involved in a constitutional violation if he 'created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom,'. . . could never form the basis of an official's liability. . . . To be clear, *Tangreti* made clear that the requisite *mens rea* for a supervisor under Section 1983 'can be no less than the *mens rea* required of anyone else.'. . But where a plaintiff can establish that a senior official promulgated an unconstitutional policy with a culpable mental state—in this case, deliberate indifference—the Court is of the view that such official could be deemed to be personally involved in a constitutional violation. . . . Reading *Tangreti* and these other decisions together, the Court concludes that a senior prison official can still be held liable for his role in creating a policy by which violations of the Eighth Amendment occurred, but only if he can be shown to have acted with the necessary *mens rea* of deliberate indifference—that is, only if the pleadings or record evidence 'permit the inference that [he] had subjective knowledge of the risk of the sexual abuse inflicted on [plaintiffs] and that [he] decided to disregard that risk.'. . In this sense, although Plaintiffs' contention that *Colon* in its entirety survives *Tangreti* is certainly wrong, the framework applied by this Court in *Pusepa* is still largely applicable. There, this Court noted that a plaintiff adequately pleads a defendant's involvement in an unconstitutional policy by alleging facts showing 'that the defendant had policymaking responsibility and that, after notice

of an unconstitutional practice, the defendant created the improper policy or allowed it to continue, causing the harm.'. . To the extent *Tangreti* bears on this framework, it is by making clear that mere 'notice' of an unconstitutional practice may be inadequate. After all, 'the *mens rea* required of [a supervisor] to be held liable ... can be no less than the *mens rea* required of anyone else.'. . The requisite inference of *mens rea* cannot be established merely by showing that a supervisory defendant '*should have known* of the substantial risk of sexual abuse.'. . This language from *Tangreti* suggests that merely being on notice of sexual abuse in prison, or having constructive knowledge thereof, is not necessarily enough—rather, the defendant-official must subjectively know of the risk of sexual abuse and consciously disregard that risk. . . . One caveat is worth emphasizing: going forward past the pleadings stage, merely showing that defendants were on notice of previous instances of sexual abuse will not necessarily be enough to establish their liability. . . As *Tangreti* makes clear, a prison official charged with deliberate indifference must both (1) be aware of facts from which the inference could be drawn that there was a substantial risk of serious harm to inmates; and (2) actually draw that inference. . . At summary judgment, Plaintiffs will no longer benefit from Rule 9(b)'s recognition that knowledge and intent can be alleged generally. But for now, the allegations, viewed in the light most favorable to Plaintiffs, give rise to a reasonable inference that Annucci and Effman subjectively knew of a serious risk of sexual abuse of female inmates by staff in DOCCS facilities that was not being adequately addressed by the existing policies or the way they were being enforced.")

Cordero v. City of New York, No. 15-CV-3436, 2017 WL 4685544, at *11 (E.D.N.Y. Oct. 17, 2017) ("Viewed in a light most favorable to the plaintiff the claims of supervisory liability against Lieutenant Moran for false arrest may proceed to trial. Lieutenant Moran supervised the investigation and arrest, and approved the overtime claims. He also received overtime himself, arguably as a result of the arrest. . . The jury may find Lieutenant Moran complicit with abuse of the city's overtime policy.")

Matteo v. Perez, No. 16-CV-1837 (NSR), 2017 WL 4217142, at *4–5 (S.D.N.Y. Sept. 19, 2017) ("The Second Circuit has not squarely addressed how *Iqbal* affects the standards in *Colon* for establishing supervisory liability. . . Whether the claim should proceed against Defendant here is a close question. The Complaint alleges only that Defendant received two letters from Plaintiff and failed to respond. Some courts have held that 'mere receipt of a letter from an inmate, without more, does not constitute personal involvement for the purposes of section 1983 liability.'. . To the extent Plaintiff is arguing that Defendant failed to properly supervise subordinates who were violating his rights, 'the mere fact that a defendant possesses supervisory authority is insufficient to demonstrate liability for failure to supervise under § 1983.'. . But courts in this circuit have also held that 'these decisions may overstate *Iqbal's* impact on supervisory liability'. . . given that *Iqbal* involved alleged intentional discrimination. *Iqbal*, 556 U.S. at 676 (2009). The Supreme Court specifically held that '[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.'. . 'Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct of deliberate indifference standards of the Fourth and Eighth Amendments, the personal involvement analysis set forth

in *Colon v. Coughlin* may still apply.'. . Ultimately, Plaintiff has demonstrated 'a tangible connection between the acts of the defendant and the injuries suffered.'. . The Court, in ruling on a motion to dismiss, must "take all facts and draw all inferences in the light most favorable" to the plaintiff, . . and, as noted, must apply the alleged general failure to remedy the inadequate heating to Defendant, the facility's immediate supervisor. Assuming that all five *Colon* avenues to liability remain open to Plaintiff, . . . a reasonable jury could find that the inmate was subjected for a prolonged period to bitter cold through the cumulative effects of Defendant's acts and omissions; if true, that could indeed constitute a constitutional violation[.] . . . Thus, The Court denies Defendant's motion to dismiss on these grounds.")

Case v. City of New York, 233 F.Supp.3d 372, 396 n.16 (S.D.N.Y. 2017) ("The Supreme Court's decision in *Ashcroft v. Iqbal,* which imposed a limitation on supervisory liability, has 'engendered conflict within [the] Circuit about the continuing vitality of the supervisory liability test set forth in *Colon.' Reynolds v. Barrett,* 685 F.3d 193, 205 n.14 (2d Cir. 2012). In the wake of *Iqbal,* district courts in the Second Circuit have disagreed on the continuing vitality of the second, fourth, and fifth *Colon* factors, with some suggesting that the viability of those factors 'depends on the underlying constitutional claim.'. . Courts appear to agree, however, that the third factor remains viable regardless of the underlying claim. . .Because the relevant allegations with regard to the supervisory Defendants here sound only in the first and third factors, the Court need not concern itself with *Iqbal*'s ramifications on this analysis.")

Johnson v. McKay, No. 9:14-CV-0803 BKS/TWD, 2015 WL 1735102, at *9-10 (N.D.N.Y. Apr. 16, 2015) ("District courts in this circuit have routinely held that a prisoner's allegation that a supervisory official failed to respond to a grievance is insufficient to establish that the official 'failed to remedy that violation after learning of it through a report or appeal' or 'exhibited deliberate indifference ... by failing to act on information indicating that the violation was occurring' within the meaning of *Colon.* . . Similarly, district courts have held that 'an allegation that an official ignored a prisoner's letter of protest and request for investigation of allegations made therein is insufficient to hold that official liable for the alleged violations.'. . However, the Second Circuit has recently cautioned courts against dismissing claims at the 12(b)(6) stage for failure to allege personal involvement where the Plaintiff alleges that an official failed to respond to a letter of complaint. [citing *Grullon v. City of New Haven*] Here, under *Grullon,* Plaintiff is entitled to the inference that Defendant Fischer received his notifications, read them, and became aware of the alleged conditions of which Plaintiff complained. Therefore, the complaint plausibly suggests Defendant Fischer's personal involvement.")

Riddick v. Semple, No. 3:15-CV-322 SRU, 2015 WL 1530808, at *2 (D. Conn. Apr. 6, 2015) ("Riddick has named as defendants Commissioner Semple, Warden Falcone, and Deputy Wardens Hein and Dilworth. He describes these defendants as being responsible for creating and enforcing policies, training and supervising employees and the general custody and care of inmates. Riddick alleges that defendants Falcone, Hein and Dilworth were 'aware' that he had completed the Administrative Segregation Program and refused to remove him from Administrative Segregation

status. He alleges that he repeatedly informed the defendants of his conditions of confinement in segregation. Although these allegations might be insufficient at trial or on summary judgment, the Second Circuit has held that allegations that a prisoner informed supervisory officials of his claims can be sufficient to state a claim for supervisory liability. *See Grullon v. City of New Haven,* 720 F.3d 133, 141 (2d Cir.2013). The claims against the supervisory defendants will proceed at this time.")

Golodner v. City of New London, Conn., No. 314-CV-00173-VLB, 2015 WL 1471770, at *7 (D. Conn. Mar. 31, 2015) ("The Second Circuit has raised the possibility that the *Colon* test was overruled in part by the Supreme Court's decision in *Iqbal,* and that the requirement for making out a claim of supervisory liability is now more demanding. *See, e.g., Grullon,* 720 F.3d at 139. However, the Second Circuit has thus far declined to resolve the question, as many other courts in this district have noted. . . This court does not need to consider the question of whether to apply the stricter standard because plaintiff has not satisfied the less exacting *Colon* standard. Further, even if plaintiff had met the *Colon* test, other courts in this district have found that where the 'constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply.'")

Argro v. Osborne, No. 3:12-CV-910 NAM/DEP, 2015 WL 1446427, at *15 (N.D.N.Y. Mar. 30, 2015) ("Under *Iqbal,* the allegation in the second amended complaint that Bette Osborne 'knew that [DSS] employees are routinely entering people's homes and conducting searches' does not, without more, support a claim for supervisory liability. *Iqbal* expressly rejected as a basis for liability government officials' 'knowledge and acquiescence in' their subordinates' unconstitutional conduct, because such liability would amount to holding the officials 'accountable for the misdeeds of their agents.'. . Plaintiffs allege more than knowledge and acquiescence, however. They allege that, while knowing of the unconstitutional conduct of her subordinates, Bette Osborne failed to establish proper training policies concerning constitutional rights and established a policy or 'protocol' pursuant to which DSS employees 'were allowed to enter anybody's home without a search warrant or court order and without care for protestations of privacy and objections to searches, and do whatever they like.' If proven, such allegations would amount to a showing that, through her own individual actions in carrying out her responsibilities as DSS Commissioner, Bette Osborne caused the constitutional violations of which plaintiffs complain. Imposing liability based on such a showing would be consistent with *Iqbal,*. . . and would satisfy *Colon's* third category, *i.e.,* that Bette Osborne 'created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such policy or custom.'")

Guillory v. Weber, No. 9:12-CV-280 LEK/RFT, 2015 WL 1419088, at *11 (N.D.N.Y. Mar. 27, 2015) (R&R) ("Whether a supervisory official can be liable under the second *Colon* factor—failing to remedy a wrong after learning of the violation—appears to turn on whether the complaint alleges an 'ongoing' constitutional violation. . . A supervisor will be 'personally involved' if the complaint alleges an 'ongoing' constitutional violation, the supervisor reviews the complaint, and it is a

situation that he can remedy directly. . . On the other hand, if the violation has already occurred and is not ongoing, then 'the official will not be found personally responsible for failing to remedy a violation.'. .Here, Superintendent Doldo was unaware of an ongoing constitutional violation. Instead, it is uncontested that on October 14, 2011, Superintendent Doldo learned about the October 12th microwave incident and Plaintiff's inability to enter the Activities Building the previous day. There are no other facts suggesting that Doldo was aware of an ongoing issue with access to the Activities Building during mealtimes. And in fact, Plaintiff was able to enter the Activities Building on October 12th. Therefore, his failure to respond to or act on Plaintiff's letter of complaint, which, at the time, appeared to refer to a previous and isolated error, is insufficient to find him personally involved in the mishaps that took place during the Festival of Sukkot. For this reason, the Court recommends dismissing Superintendent Doldo from Plaintiff's free exercise and RLUIPA claims.") (footnotes omitted)

Rothenberg v. Daus, No. 08-CV-567 SHS, 2015 WL 1408655, at *4 (S.D.N.Y. Mar. 27, 2015) ("The Second Circuit 'ha[s] not yet determined the contours of the supervisory liability test ... after *Iqbal.*'. . Although this Court has already expressed its position that 'the five *Colon* categories supporting personal liability of supervisors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated,' *see Qasem v. Toro,* 737 F.Supp.2d 147, 151–52 (S.D.N.Y.2010) (Stein, J.), other district courts have disagreed as to which *Colon* categories survive *Iqbal.* [collecting cases]")

Peguero v. City of New York, No. 12-CV-5184 JPO, 2015 WL 1208353, at *5 (S.D.N.Y. Mar. 17, 2015) ("In opposing summary judgment on the *Monell* claims, Plaintiffs rely exclusively on the argument that the City may be held liable by virtue of Schwarz's conduct. . . . Plaintiffs reason that because Schwarz had 'supervisory authority' over Labate . . . and personally participated in the violation of Peguero's constitutional rights, his conduct may form the basis of a *Monell* claim. . . This argument confuses municipal and supervisory liability. A supervisor's 'direct participation' in a constitutional violation—even if that participation takes the form of 'ordering or helping others to do the unlawful acts'—is a means to establish that the supervisor had 'personal involvement' in the violation and is therefore liable for damages under Section 1983. . . But it is not sufficient to hold a municipality liable. To subject the City of New York to liability under Section 1983, Schwarz would have to be an official with 'final policymaking authority.'. . It is clear, as a matter of law, that Schwarz—who held the position of sergeant—was not.")

Doe v. New York, No. 10 CV 1792 RJD VVP, 2015 WL 1221495, at *9-11 (E.D.N.Y. Mar. 16, 2015) ("[E]ven if Governor Pataki was not involved in the *creation* of the Hepatitis policy, plaintiff has alleged that the Defendant Policy Makers held meetings to discuss 'methods to keep prison HCV rates under control,'. . . and 'discussed the price of mass treatment and preventative measures in the prison system' in 'various meetings and memoranda between 1993 and 1995[.]'. . . Accepting these allegations as true, it is certainly plausible that Governor Pataki was advised of the Hepatitis policy in one of these meetings and, agreeing with its cost benefit analysis, decided to *allow the continuance* of the policy. . . Therefore, plaintiff's claims against Governor Pataki in

his individual capacity may proceed, for the moment at least, based on his alleged role in creating (or allowing the continuance of) the Hepatitis policy. . . . The allegations in the Third Amended Complaint that Dr. Curtin and Dr. O'Connell, in their role as medical supervisors, indifferently or intentionally enforced the Hepatitis policy at their facilities, is conclusory. . . Plaintiff K. Doe does not identify with any particularity that Dr. Curtin and Dr. O'Connell personally knew about the Hepatitis policy, or encouraged its implementation at their correctional facilities, much less that they were aware of K. Doe's symptoms and were deliberately indifferent to his medical needs. . . . If these allegations were sufficient, it could create the possibility of Section 1983 liability for prison medical supervisors any time there was a failure to diagnose an inmate. 'That result would defeat the Second Circuit's strict requirement of personal involvement as a prerequisite for [Section] 1983 liability.'. . Therefore, plaintiff's claims against Dr. Curtin and Dr. O'Connell are dismissed for failure to adequately allege personal involvement under Section 1983.")

Ellerbe v. Jasion, No. 3:12-CV-00580 MPS, 2015 WL 1064739, at *6-8 (D. Conn. Mar. 11, 2015) ("At issue here is the scope of the second *Colon* category ('[T]he defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong ....'), which is in tension with *Iqbal*. . . In cases decided before *Iqbal*, the Second Circuit held that a supervisor could be shown to be personally involved in a disciplinary hearing where the supervisor reviewed and affirmed the decision of the hearing officer. [citing cases] The Second Circuit has also noted in dicta that 'it is questionable whether an adjudicator's rejection of an *administrative grievance* would make him liable for the conduct complained of.' *McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir.2004) (emphasis added). It is unclear whether this comment in *McKenna*—a case about an inmate's grievance to prison administrators concerning the prison's failure to provide medical treatment—is applicable to an appeal of a decision to impose segregated confinement. At least in Connecticut's prisons, appealing a placement in Punitive Segregation or Administrative Segregation is governed by different rules than an 'Inmate Grievance,' which is a catch-all term for all inmate complaints *other than* appeals of specific listed decisions (a list that includes decisions to place an inmate in Punitive Segregation or Administrative Segregation). Conn. Dep't Corr. Admin. Dir. 9.6 § 4. As a result of the tensions within Second Circuit case law and the uncertainty raised by *Iqbal*, recent decisions by the district courts in this circuit are split over whether and to what extent a supervisor's denial of an administrative appeal constitutes personal involvement. Many decisions rely on a case-by-case approach, finding personal involvement only where a supervisor's role is more active than a 'rubber stamping' of the hearing officer's decision, and/or only where the supervisor's review occurs while the consequences of the hearing (segregated confinement) are still ongoing and can be remedied. [collecting cases] A decision in this district found personal involvement where both factors were shown-that is, the supervisor decided the appeal after an 'extensive review' and was aware of the alleged due process violation 'before the sanctions imposed by [the hearing officer] had expired.' *Friedland v. Otero*, No. 3:11–CV–606 JBA, 2014 WL 1247992, at *10–11 (D.Conn. Mar. 25, 2014); *see also Baldwin v. Arnone*, No. 3:12–CV–243 JCH, 2012 WL 3730010, at *4 (D. Conn. June 20, 2012) (granting plaintiff leave to amend "to include specific allegations" with regard to the supervisor who affirmed the result of the hearing). This Court adopts such an approach. Ellerbe's allegations against Milling

are limited to a conclusory accusation that she 'acquiesced to application of said malfeasance when she signed off and placed the plaintiff on A/S.'. . Under Administrative Directive 9.4, Milling's role as Director of Offender Classification and Population Management is to review a written report and recommendation provided by the hearing officer (in this case, Griggs) and issue a final decision. . . As to timing, the complaint is silent as to exactly when Milling became involved. But a reasonable inference drawn in Ellerbe's favor is that Milling's review occurred before or during Ellerbe's time in Administrative Segregation. Milling's actions were necessary to authorize Ellerbe's placement in Administrative Segregation. . . .Ellerbe fails to allege that Milling's decision was anything more than a 'rubber stamp,' or that she even was on notice that Ellerbe believed that his due process rights had been violated. Although Milling's role—reviewing the hearing officer's recommendation and issuing the final decision—is slightly different from that of an official reviewing an administrative appeal, it shares the qualities that make review of an administrative appeal a questionable basis for personal involvement. The Directive does not require Milling to be present at the hearing or otherwise on notice of what occurred—much less actively involved in the process—and Ellerbe does not allege that she was. While it is conceivable that Griggs's report put Milling on notice that Ellerbe's due process rights were violated during the hearing, Ellerbe has made no such allegation. The fact that Milling approved the placement, in the absence of further allegations, does not amount to personal involvement in the alleged due process violations. As to the timing of Dzurenda's consideration of Ellerbe's appeal, a reasonable inference from Ellerbe's allegations is that Dzurenda's review occurred while Ellerbe was still in Administrative Segregation. Ellerbe alleges that the appeal was decided by October 15, 2010, and that he was in Administrative Segregation for 243 days. Ellerbe's allegations about Dzurenda's involvement are more extensive than those against Milling. Ellerbe alleges that he filed an appeal notifying Dzurenda that evidence was ignored and his due process rights were violated. . . He also alleges that Dzurenda's denial of the appeal specifically referenced and rejected the allegation that a piece of evidence, the videotape, was ignored, . . . and that Dzuranda 'intentionally fabricated information as his basis for denying the appeal,'. . . . These allegations are enough to raise a reasonable expectation that discovery will reveal evidence of Dzurenda's personal involvement. Whether Ellerbe can flesh out his allegations and support them with evidence is a matter to be determined at the summary judgment phase or at trial. The motion to dismiss the due process claim against Milling due to her lack of personal involved is granted, and the claim is dismissed without prejudice. Ellerbe may, within twenty-one days of this ruling, file an amended complaint with additional allegations *only* as to the manner in which Milling was actively involved in violating his due process rights. The motion to dismiss the due process claim against Dzurenda due to his lack of personal involvement is denied.")

Rossi v. Fishcer, No. 13-CV-3167 PKC DF, 2015 WL 769551, at *16-17 (S.D.N.Y. Feb. 24, 2015) ("Plaintiff alleges that Brian Fischer, as the Commissioner of DOCCS, 'has the statutory authority to promulgate rules, regulations, and policies governing the religious rights of prisoners within the department.'. . Similarly he alleges that Catherine Jacobsen as Acting Deputy Commissioner for Program Services 'had the authority to approve policies governing the religious programs in [DOCCS],'. . . and that Mark Leonard, as the Director of Ministerial, Family, and Volunteer

Services 'was responsible for the promulgation of policies affecting the religious rights of all Rastafarian prisoners within [DOCCS].'. . Plaintiff attributes DOCCS's policies on holy days and headgear to Fischer, Jacobsen, and Leonard, along with other defendants. . . A defendant that creates a policy is considered personally involved in any unconstitutional practices that occur under the policy. . . .[P]laintiff has plausibly alleged that defendants Fischer, Jacobson, and Leonard were involved in creating policies under which his right to free exercise was substantially burdened. Thus, these defendants are not properly dismissed from this suit at this juncture. Plaintiff also alleges that defendant Fischer is personally involved in the alleged constitutional violations because he has written letters to defendant Fischer 'complaining about the unconstitutional impediments to plaintiff's ability to practice his faith,' but Fischer has always referred plaintiff's complaints to subordinates. . . Defendants are correct in stating that this allegation cannot demonstrate the requisite personal involvement of Fischer. . . 'If the supervisor fails to respond to [a prisoner's] letter or passes the letter on to a subordinate to handle, the general rule is that the supervisor is not personally involved.'. . Nevertheless, because plaintiff has plausibly alleged Fischer's personal involvement in creating policies under which unconstitutional practices have occurred, Fischer is not dismissed from this suit.")

Smith v. Wildermuth, No. 9:11-CV-0241 TJM/TWD, 2015 WL 403108, at *9-10 (N.D.N.Y. Jan. 29, 2015) (R & R) ("District courts in this circuit have routinely held that a prisoner's allegation that a supervisory official failed to respond to a grievance is insufficient to establish that the official 'failed to remedy the violation after learning of it through a report or appeal.'. . Similarly, district courts have held that 'an allegation that an official ignored a prisoner's letter of protest and request for investigation of allegations made therein is insufficient to hold that official liable for the alleged violations .'. . However, the Second Circuit has recently cautioned courts against dismissing claims at the 12(b)(6) stage for failure to allege personal involvement where the plaintiff alleges that an official failed to respond to a letter of complaint. *Grullon v. City of New Haven,* 720 F.3d 133, 141 (2d Cir.2013) . . . Here, the second amended complaint includes ten pages of ways in which Plaintiff alleges that Defendant Martuscello became aware of an environment existing at Coxsackie in which correction officers had free rein to abuse prisoners. Expressing no opinion as to whether such allegations are sufficient to withstand a dispositive motion, I find that they are sufficient for the purposes of initial review and recommend that the Court direct Defendants to respond to this claim. . . . As noted above, the Second Circuit has recently cautioned courts against dismissing claims at the 12(b)(6) stage for failure to allege personal involvement where the plaintiff alleges that an official failed to respond to a letter of complaint. . . In light of *Grullon,* the second amended complaint sufficiently alleges deliberate indifference to survive initial review. Plaintiff alleges that he repeatedly wrote letters and grievances to Defendants Rock and Evans regarding Inmate Scarbrough's erratic behavior and Plaintiff's fears for his own safety. . . Plaintiff further alleges, and the Court has confirmed, that Defendant Evans was named as a defendant in a lawsuit by Inmate Scarbrough preceding his attack on Plaintiff. . . In that lawsuit, Scarbrough alleged that he was mentally unstable and was not being protected from himself and others. . . Assuming, as the Second Circuit has directed that the Court must, that Defendants Rock and Evans

in fact received those letters and read them, Plaintiff has alleged facts sufficient to survive initial review. . . Therefore, I recommend that the Court direct Defendants to respond to this claim.")

Ocampo v. Fischer, No. 11-CV-4583 CBA MDG, 2014 WL 7422763, at *7-8 (E.D.N.Y. Dec. 31, 2014) ("At the outset, the Court acknowledges that affirming the denial of a grievance is insufficient to establish the personal involvement of a prison superintendent, . . . and that the 'mere receipt of a letter from an inmate, without more, does not constitute personal involvement for the purposes of section 1983 liability[.]'. . . However, '[w]here a supervisory official reviews and responds to a prisoner's [letter of] complaint, [he] is personally involved.'. . . The Court agrees with the R & R that, at this stage of the proceedings, Ocampo has sufficiently alleged Superintendent Breslin's personal involvement in the failure to provide him with adequate medical treatment. Superintendent Breslin's personal involvement in the instant action is not premised solely on his August 8, 2011 determination regarding Ocampo's Hepatitis C related grievance, or the mere receipt of letters regarding Ocampo's medical treatment. Rather, the supplemental materials submitted by Ocampo suggest that Breslin not only received letters regarding Ocampo's medical treatment, but also responded to them. . .To the extent Superintendent Breslin argues in his objections that Ocampo has failed to provide Superintendent Breslin's responses that corroborate these statements, . . . the Court notes that in deciding a motion to dismiss, the Court accepts as true Ocampo's factual allegations and views them in the light most favorable to him. . . Accordingly, on the basis of factual allegations demonstrating that Superintendent Breslin personally responded to issues regarding Ocampo's medical care beyond reviewing the grievance Ocampo filed, at this stage of the proceedings Ocampo has sufficiently alleged Superintendent Breslin's personal involvement in the failure to provide Ocampo with adequate medical care.")

Balkum v. Leonard, 65 F.Supp.3d 367, 371 (W.D.N.Y. 2014) ("Here, Plaintiff alleges in his first claim that he was physically attacked 'while imprisoned in a DOCCS transportation bus ... parked within Lakeview Shock Incarceration Facility,' . . . and alleges in his second claim that 'while within the Lakeview Shock Incarceration Facility' he advised Defendant Richir of the attack committed by his corrections officers . . . . Both claims are listed as occurring on June 17, 2011 at 6:00 p.m. 'within Lakeview Shock Incarceration Facility.'. . As a result, Plaintiff's complaint may liberally be construed to allege that Defendant Richir was present and informed of the alleged attack, or that Defendant Richir was informed of the alleged attack shortly after it occurred but failed to remedy the wrong. Either way, Plaintiff sufficiently alleges Defendant Richir's personal involvement to survive a motion to dismiss by claiming that Defendant Richir learned of the alleged attack but 'failed to correct the wrong acts.'")

Houston v. Schriro, No. 11 CIV. 7374 LAP, 2014 WL 6694468, at *14-15 (S.D.N.Y. Nov. 26, 2014) ("Whatever the status of *Colon,* '[t]he law is clear ... that a prison official's mere response to a grievance, by itself, is not sufficient to establish personal involvement for purposes of § 1983 ...,' although a detailed response may be sufficient. . . Similarly, ignoring a prisoner's letter or complaint is insufficient to render an official personally liable. . . Even assuming Houston's account of the grievances that he filed to be accurate, there is insufficient evidence to establish the

personal involvement of the supervisory-defendants. Houston initially filed a grievance with Brown, IGRAC Supervisor for MDC, who responded that the issue was non-grievable. . . This response was a form letter in which Brown had placed an 'X' to indicate that the complaint '[did] not fall under the purview of the IGRP,'. . . and is far from the substantive response required to establish personal involvement. . . Houston then claims to have filed an IGRC hearing request with Harris, Director for IGRC Hearings Program for NYC DOC, and appeal requests with Agro, the Warden for MDC, Halyard–Saunders, Assistant Commissioner for Programs Administration and Discharge Planning for NYC DOC, and Wolf, Director of the Board of Corrections for NYC DOC. . . All claim that they never received any such grievance, and none responded. . . Even resolving this factual dispute in favor of Houston, receipt of a grievance does not constitute personal involvement. . . Otherwise, the exhaustion requirement would lead to supervisory liability becoming nearly automatic. . . Finally, Houston wrote to Commissioner Schriro. Schriro's office has a record of the letter indicating that she reviewed it and forwarded it to a subordinate to investigate. . . Such delegation is ordinary and appropriate, and is insufficient to constitute personal involvement. . . Accordingly, Defendants' motion for summary judgment on Plaintiff's claims of supervisory liability is granted.")

Guillory v. Ellis, 9:11-CV-600 MAD/ATB, 2014 WL 4365274, *21 (N.D.N.Y. Aug. 29, 2014) ("A supervisory official is personally involved if that official directly participated in the infraction. . . The defendant may have been personally involved if, after learning of a violation through a report or appeal, he or she failed to remedy the wrong. . . Personal involvement may also exist if the official created a policy or custom under which unconstitutional practices occurred or allowed such a policy or custom to continue. . . Finally, a supervisory official may be personally involved if he or she were grossly negligent in managing subordinates who caused the unlawful condition or event. . . The mere receipt of a letter or similar complaint is insufficient to constitute personal involvement; otherwise, a plaintiff could create personal involvement by any supervisor simply by writing a letter. . . In order for a letter to suffice to establish personal involvement, plaintiff would have to show that the supervisor conducted a personal investigation or personally took action on the letter or grievance. . .However, personal action does *not* include referring the letter to a subordinate for investigation.")

Phillip v. Schriro, 12-CV-8349-RA, 2014 WL 4184816, *4-*6 (S.D.N.Y. Aug. 22, 2014) ("Defendants assert that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), invalidated the *Colon* factors regarding supervisory liability and that 'to adequately allege personal involvement, a plaintiff must demonstrate that the defendant, through his or her own conduct, violated the Constitution.'. . Although the Second Circuit has explicitly declined to resolve this issue, *see Hogan*, 738 F.3d at 519 n. 3; *Grullon v. City of New Haven*, 720 F.3d 133, 139 (2d Cir.2013), numerous district courts have confronted the question, and the Court is persuaded by the majority view that *Colon* remains good law. . . While it is true that *Iqbal* reinforces the well-established rule in this Circuit that *respondeat superior* does not apply to § 1983 claims, . . '*Colon'* s bases for liability are not founded on a theory of *respondeat superior*, but rather on a recognition that personal involvement of defendants in alleged constitutional deprivation can be shown by nonfeasance as well as

misfeasance.'. . Therefore, unless or until the Second Circuit or Supreme Court rule otherwise, this Court agrees with the courts that have held that the *Colon* factors 'still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.'. . . Plaintiff has pled sufficient facts to plausibly allege the personal involvement of the Wardens. He alleges that he was denied his constitutional right to attend religious services on ten different occasions and that the Wardens were contacted by a grievance representative concerning these violations. . . Plaintiff also claims that the Wardens were informed of the violations by the Commissioner. . .These 'allegations fall squarely within the second *Colon* category.'. . Under the second *Colon* factor, 'if a plaintiff alleges that a constitutional violation is ongoing, and that a defendant, after being informed of a violation through a report or appeal, failed to remedy the wrong, the plaintiff's claim against the defendant should not [be] dismissed under Rule 12(b)(6).'. . This is not a case where it is clear that the Wardens had no 'genuine' or 'realistic' opportunity to intervene in the alleged violations of Plaintiff's rights. . .Accordingly, because there has been no 'discovery in this case, this Court will not dismiss Plaintiff's claims ... at this time. Discovery ... will reveal whether the [Wardens] were in a position to remedy the alleged ongoing constitutional violation Plaintiff complains of.'. . .Plaintiff's allegations against Commissioner Schriro, by contrast, must be dismissed for lack of personal involvement. A supervisory official is not deemed to have been personally involved solely by virtue of having received a letter or complaint from a prisoner and having referred it to the appropriate department for investigation, which is what Plaintiff alleges here. . . Courts have so held, because 'commissioners and prison superintendents receive large numbers of letters from inmates, and they delegate subordinates to handle them. If courts found personal involvement every time a supervisor forwarded a complaint to a subordinate, the requirement would lose all meaning.'. . For the same reason, Plaintiff's contention that the Wardens were informed of the alleged violation by Commissioner Schriro does not establish her personal involvement. . . Indeed, the letter attached to the Amended Complaint is signed by someone other than Commissioner Schriro, presumably someone working in the Office of the Commissioner. . . This makes the connection between the alleged constitutional violation and Commissioner Schriro even more attenuated. . . Plaintiff's claim against Commissioner Schriro in her individual capacity is therefore dismissed.")

Reid v. Nassau Cnty. Sheriff's Dep't, 13-CV-1192 SJF SIL, 2014 WL 4185195, *12 (E.D.N.Y. Aug. 20, 2014) ("The allegations in the complaints, and particularly the amended complaint, at issue on this motion, are sufficient to state a plausible claim of supervisory liability on the part of Sheriff Sposato in his individual capacity. Specifically, the consolidated plaintiffs' allegations, *inter alia,* that Sheriff Sposato knew about the challenged conditions at the NCCC that violated their constitutional rights, but failed to act to remedy or correct those conditions, are sufficient at the pleadings stage to state a plausible Section 1983 claim against Sheriff Sposato in his individual capacity. Accordingly, the branches of the County defendants' motions seeking dismissal of the consolidated plaintiffs' Section 1983 claims against Sheriff Sposato in his individual capacity are denied. However, Reid has not alleged the direct participation of the Superintendent in any of the wrongdoing alleged in his complaint, nor any basis upon which to find the Superintendent liable in a supervisory capacity. Accordingly, the branch of the County defendants' motion seeking

dismissal of Reid's Section 1983 claims against the Superintendent in his individual capacity is granted and Reid's Section 1983 claims against the Superintendent in his individual capacity are dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for relief.")

Lloyd v. City of New York, 43 F.Supp.3d 254, 266-68 (S.D.N.Y. 2014) ("Defendants contend that the categories in *Colon* are no longer viable after *Iqbal.* . . However, the Supreme Court's decision in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), did not completely eliminate the *Colon* rule. The claims in *Iqbal* involved, *inter alia,* denial of equal protection and discrimination—legal theories that require proof of discriminatory intent. In that context, the Supreme Court held that a supervisor's 'mere knowledge of his subordinate's discriminatory purpose' does not render the supervisor personally involved in violating the constitution. . . Rather, 'a plaintiff must [prove] that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . As the Supreme Court explained, however, 'the factors necessary to establish a [constitutional] violation will vary with the constitutional provision at issue.'. . In this circuit, where discriminatory intent is not an element of a constitutional claim, *Colon* remains the standard for establishing personal involvement by supervisory officials under 42 U.S.C. § 1983. . . Here, Plaintiffs' free exercise claims do not require a showing of discriminatory intent, so personal involvement with respect to those claims is governed by *Colon.* However, because Plaintiffs' equal protection claims require a showing of discriminatory intent, Plaintiffs must allege that each supervisory defendant actively participated in the alleged constitutional violations, and a defendant's failure to act will not result in liability under Section 1983. Thus, the personal involvement analysis varies by claim. . . . The fact that Defendant Schriro forwarded Plaintiff Lloyd's letter of complaint to another official for handling means she cannot be held liable under § 1983. Courts have consistently held that, 'if an official receives a letter from an inmate and passes it on to a subordinate for response or investigation, the official will not be deemed personally involved with respect to the subject matter of the letter.'")

Archie v. Fischer, 9:12-CV-1050, 2014 WL 3670676, *9 (N.D.N.Y. July 23, 2014) ("The fact that Plaintiff may have written a letter does not automatically render the supervisory official responsible for any constitutional violation. . . Prison supervisors cannot be deemed personally involved based simply on a response to a complaint.")

Tretola v. D'Amico, 13-CV-5705 JS AKT, 2014 WL 2957523, *8 (E.D.N.Y. July 1, 2014) ("[T]he Second Circuit in *Colon* listed five ways that a plaintiff can establish liability—not just the two listed—including failure to remedy a wrong after being informed of the violation, grossly negligent supervision of subordinates who committed the wrongful acts, and deliberate indifference to the rights of inmates. . . However, the 'continuing vitality' of these additional methods has 'engendered conflict within our Circuit' due to the Supreme Court's decision in *Iqbal. Reynolds v. Barrett,* 685 F.3d 193, 205 n. 14 (2d Cir.2012). This Court has concluded that only personal involvement and a custom or practice survive as viable bases for supervisory liability. *See Butler v. Suffolk Cnty.,* 289 F.R.D. 80, 95 n. 8 (E.D.N.Y.2013). As to D'Amico and Dewar, the Complaint

appears to allege two bases for supervisory liability: (1) that D'Amico and Dewar were aware of the constitutional violations but failed to take action, and (2) it was the policy, custom, and practice of D'Amico and Dewar to allow or ignore violations of the Second, Fourth, Fifth, and Fourteenth Amendments. . . Neither theory saves them from the State Defendants' motion to dismiss. *First,* as previously stated, failure to remedy a wrong after being informed of the violation has been rejected by this Court as a viable theory after *Iqbal. . . Second,* Plaintiffs' allegations of a policy or custom on the part of D'Amico and Dewar are conclusory at best. The Complaint recites boilerplate language regarding a policy or custom, but provides no factual allegations in support.")

Griffin v. Doyle, 12-CV-4359 JS GRB, 2014 WL 2945676, *6 n.5 (E.D.N.Y. June 30, 2014) ("A supervisory official can nonetheless be held liable if he 'participated directly in the alleged constitutional violation [or] ... created a policy or custom under which [the] unconstitutional practices occurred, or allowed the continuance of such a policy or custom.'. . This Court has concluded that only personal involvement and a custom or practice survive as viable bases for supervisory liability. *See Butler v. Suffolk Cnty.,* 289 F.R.D. 80, 95 n. 8 (E.D.N.Y.2013). Accordingly, awareness and/or negligence are not enough.")

Ciaprazi v. Jacobson, No. 13 Civ. 4813(PAC)(KNF), 2014 WL 2751023, *12, *13 (S.D.N.Y. June 17, 2014) (R & R) ("The Second Circuit has not yet addressed what, if anything, remains of the five ways of showing personal involvement of supervisory defendants after *Iqbal* . . . . However, absent Second Circuit authority to the contrary, the Court finds that *Iqbal* did not abrogate the five forms of evidence showing personal involvement, as articulated in *Colon*. . . .Ciaprazi alleges that Fischer and Dr. D'Silva 'maintain and enforce a policy or custom of denying root canal or any other restorative treatment to all posterior teeth, and of providing instead as "treatment" only extraction for all posterior teeth that may otherwise be restored and saved through root canal.' He was advised by more than one dentist that 'the DOCCS Central Office generated this policy or custom in order to save time, effort and money because root canal and other similar restorative procedures are more time-consuming, labor-intensive and expensive than extractions,' and '[t]he prison dentists are also apparently not compensated by the DOCCS for root canal or other restorative treatment performed on "posterior" teeth.' Ciaprazi's plausible allegations of the deliberate indifference to his dental needs, specifically his posterior teeth, illustrate and support his allegations that the defendants maintain and enforce the policy or custom of 'refusing to provide readily available treatment to save' posterior teeth. Moreover, Fischer and Dr. D'Silva are aware of the policy because Ciaprazi complained about it in his letters to them. However, Fischer and Dr. D'Silva failed to act and continued to maintain and enforce the policy, notwithstanding that DOCCS regulations do not prohibit restorative treatment of posterior teeth. Accordingly, Ciaprazi's allegations, that Fischer and Dr. D'Silva maintain and enforce the policy of refusing to provide restorative treatment to posterior teeth and that by doing so they deliberately disregard his constitutional rights, are sufficiently plausible at this stage of the litigation to indicate the personal involvement of Fischer and Dr. D'Silva.")

Yearney v. Sidorowicz, No. 13 Civ. 3604(CM, 2014 WL 2616801, *8, *9 (S.D.N.Y. June 10, 2014) ("The general rule is that 'an allegation that an official ignored a prisoner's letter of protest and request for an investigation of allegations made therein is insufficient to hold that official liable for the alleged violations.'. .Even if there had been a constitutional violation here, the mere receipt of letters from an inmate is insufficient to show the requisite personal involvement for a § 1983 claim. . . The fact that Dr. Koenigsmann asked a subordinate to respond to Plaintiffs letters does not constitute personal involvement for purposes of § 1983 liability. . .Moreover, the fact that Dr. Koenigsmann's subordinate, writing on his behalf, affirmed the course of treatment offered by the doctors at Sullivan rather than intervening and appeasing Plaintiff's demand for an MRI, is also insufficient to establish Dr. Koenigmsann's personal involvement or 'to shed any light on the critical issue of supervisory liability, and more particularly, knowledge on the part of the defendant.'")

Cruz v. New York, 24 F.Supp.3d 299, 308-09 (W.D.N.Y. 2014) ("Plaintiff alleges that Defendant Fischer 'was provided on a daily basis with reports of applications of force, allegations of excessive use of force and other breaches of security in the Department facilities.'. . He also alleges that Defendants Fischer, Griffin, and Sheahan 'knew and/or should have known that the pattern of physical abuse described above existed in the State prisons prior to and including the time of the assault of plaintiff.'. . Specifically, he alleges these Defendants' awareness through 'DOC's elaborate reporting system,' as well as through '[c]omplaints to the Commissioner, [g]rievances and the Inspector General, and [d]epartment reports.'. . Plaintiff alleges that the Supervisory Defendants had knowledge of 'the failure of the Department to place surveillance cameras on [g]alleries that house the Special Housing Unit,'. . . and that the Special Housing Unit's lack of cameras for security reasons resulted in serious injuries to inmates housed there. . . . Plaintiff also alleges that Defendants' tolerance of abuse by correction officers 'constituted a municipal policy, practice or custom;' that Defendants' conduct was a 'substantial factor' in the continuation of violence by correction officers; and that the Supervisory Defendants permitted, tolerated, and sanctioned the 'persistent and widespread policy' of abuse. . .Plaintiff has alleged sufficient facts to support deliberate indifference on the part of the Supervisory Defendants. As explained above, the Supervisory Defendants 'are alleged to have received extensive information concerning the ... pattern of incidents involving ... violence and the failure of DOC to prohibit staff from continuing such conduct, and have failed to take any steps to curb those unconstitutional abuses.'. . Additionally, Plaintiff has alleged a particular policy as having caused the alleged assault; specifically, the failure of the Supervisory Defendants to place security cameras in the Special Housing Unit in order to deter correction officers from inflicting abuse on inmates. . .With regard to the Supervisory Defendants' knowledge of the alleged abuse by correction officers, Plaintiff's complaint contains an entire section ("New York State Prisons: A History of Abuse"), in which he details how the Supervisory Defendants have knowledge of specific abuses occurring within the Special Housing Unit. . . Accordingly, Defendants' motion to dismiss Plaintiff's second cause of action for failure to allege deliberate indifference against Defendants Fischer, Griffin, and Sheahan, is denied. . . . Defendants further argue that Plaintiff has failed to allege the personal involvement necessary to state an Eighth Amendment violation by prison officials. . . Specifically,

Defendants argue that the Supervisory Defendants were not personally involved in the events that occurred on September 17, 2011. . . As explained in Section IV(A) of this Decision and Order, *supra,* Plaintiff has sufficiently alleged facts demonstrating personal involvement by the supervisory Defendants under category (5) of the *Colon* categories. To the extent that Defendants argue that *Ashcroft v. Iqbal* limits the application of the *Colon* categories so that only the first and third categories under *Colon* apply, as explained in Section IV(A), *supra,* Plaintiff also has alleged sufficient facts that the Supervisory Defendants created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom. Accordingly, Defendants' motion to dismiss Plaintiff's Eighth Amendment claims against the Supervisory Defendants for failure to allege facts supporting personal involvement is denied.")
Ferrer v. Fischer, No. 9:13–CV–0031 (NAM/ATB), 2014 WL 1763383, *2, *3 (N.D.N.Y. May 1, 2014) ("Courts in this circuit have frequently held that the mere receipt of letters from an inmate is insufficient to constitute personal involvement. . . However, the Second Circuit has recently cautioned courts against dismissing claims at the 12(b)(6) stage where the complaint contains allegations that an official failed to respond to a letter of complaint. *See Grullon v. City of New Haven,* 720 F.3d 133, 141 (2d Cir.2013) ("At the pleading state, even if [plaintiff] had no knowledge or information as to what became of his Letter after he sent it, he would be entitled to have the court draw the reasonable inference-if his amended complaint contained factual allegations indicating that the Letter was sent to the Warden at an appropriate address and by appropriate means-that the [defendant] in fact received the Letter, read it, and thereby became aware of the alleged conditions of which [plaintiff] complained."); *see also Toliver v. City of New York,* 530 F. App'x 90, 93 (2d Cir.2013) (describing *Grullon* by stating that 'pro se allegations that a prisoner sent a letter to a warden complaining of unconstitutional conditions that were not remedied are sufficient to state a claim for deliberate indifference against the warden'). . .Plaintiff's allegations regarding Commissioner Fischer are limited, but he does allege that he sent multiple letters to defendant Fischer, that defendant Fischer was fully aware of his situation, and that defendant Fischer failed to respond to the letters or otherwise take appropriate action. Defendant Fischer may be able to adduce sufficient evidence through discovery to demonstrate that he was not personally involved in the violations at issue. . . However, in light of the Second Circuit's recent decision in *Grullon,* I find that at this stage, plaintiff's allegations are sufficient to support defendant Fischer's personal involvement.")

Bessette v. Pallito, No. 1:13–cv–252–jgm–jmc, 2014 WL 1744265, *8 (D. Vt. Apr. 30, 2014) (adopting R&R) ("As to Commissioner Pallito, the only potentially applicable *Colon* categories are the second and fifth. However, Commissioner Pallito's failure to act on the July 26, 2013 appeal or to 'remedy the wrong' alleged in that appeal is insufficient.'"[A] supervisory official having received (and ignored) a letter from an inmate alleging unconstitutional conduct does not, without more, give rise to personal involvement on the part of that official.' *Thompson,* 949 F.Supp.2d at 575. 'The reason for this rule appears to be the fact that high-level DOCS officials delegate the task of reading and responding to inmate mail to subordinates, and, thus, a letter sent to such an official often does not constitute actual notice.' *Id.* (quoting *Voorhees v. Goord,* No. 05 Civ. 1407(KMW)(HBP), 2006 WL 1888638, at *5 (S.D.N.Y. Feb. 24, 2006)).")

Rucano v. Koenigsmann, No. 9:12–cv–00035 (MAD/RFT), 2014 WL 1292281, *11, *12 (N.D.N.Y. Mar. 31, 2014) (adopting R & R) ("Plaintiff alleges that he wrote Defendant Koenigsmann three letters describing the inadequacies of his dental care. Defendant Koenigsmann referred two of those letters to Defendant Grinbergs, who replied to Plaintiff on behalf of Defendant Koenigsmann on May 17 and June 27, 2011. . . Defendant Koenigsmann did not respond to Plaintiff's third letter, dated September 9, 2011, in which Plaintiff alleged that Defendant Kullman and Oliveira refused to provide him with crowns pursuant to an unconstitutional DOCCS' Policy. . . It was once well accepted that neither ignoring an inmate's letter nor referring his letters to a subordinate constituted personal involvement on behalf of a supervisory official. [collecting cases] However, in light of the Second Circuit's recent decision in *Grullon v. City of New Haven,* it would appear that plaintiffs within the Second Circuit are 'entitled to have the court draw the reasonable inference ... that the [official] in fact received the Letter, read it, and became aware of the alleged conditions of which [the inmate] complained.'. .As to the first two letters, it is clear that Defendant Koenigsmann acted upon those letters by referring them to his subordinate. . . However, affording Plaintiff the benefit of this inference, it is possible that Plaintiff's third letter to Defendant Koenigsmann put him on notice of a continuing violation of Plaintiff's Eighth Amendment rights, and he failed to take any action to remedy the wrong. . . Therefore, we recommend that Defendants' Motion be **DENIED** as to Defendant Koenigsmann.")

Young v. Choinski, 15 F.Supp.3d 172, 188-89, 191-93 (D. Conn. 2014) ("Cases in this District have repeatedly acknowledged this split over *Iqbal* in addressing the *Colon* factors, but have abstained from determining 'whether *Iqbal* applies in all cases or just those involving discriminatory intent.'[collecting cases] Although the Second Circuit has not addressed the issue directly, it has suggested that at least some of the *Colon* factors remain viable. . . . Although *Iqbal* does arguably cast doubt on the viability of certain categories of supervisory liability, where the Second Circuit has not revisited the criteria for supervisory liability, this Court will continue to recognize and apply the *Colon* factors. . . .The fact that a prisoner sent a letter or written request to a supervisory official does not establish the requisite personal involvement of the supervisory official. . . . The district courts within this Circuit 'are divided regarding whether review and denial of a grievance constitutes personal involvement in the underlying alleged unconstitutional act.'. . For example, with respect to 'personal involvement,' a number of courts have drawn a distinction between 'a pro forma denial of a grievance and a "detailed and specific" response to a grievance's allegations.'. . Put simply, denial of a grievance alone may be insufficient to establish the 'personal involvement' of a supervisory official. . . Similarly, courts have held that a supervisory official's act of affirming the denial of a grievance on appeal does not constitute personal involvement. . .On the other hand, when a supervisory prison official receives a particular grievance, personally reviews it, and responds and/or takes action in response, such conduct may constitute sufficient 'personal involvement' to establish individual liability for the alleged constitutional violation. [collecting cases] Another factor district courts in this Circuit have examined is the nature of the alleged constitutional violation to determine whether it was 'ongoing' or discrete in nature, and thus whether it could be remedied by the supervisor. . . Following such reasoning, if the

supervisory official is confronted with an 'ongoing' constitutional violation and reviews a grievance or appeal regarding that violation, that official is 'personally involved' if he or she can remedy the violation directly. In contrast, '[i]f the official is confronted with a violation that has already occurred and is not ongoing, then the official will not be found personally responsible for failing to remedy a violation.'. . In the case at bar, Warden McGill directly reviewed two grievances from Young, asserting complaints about the failure of Officers Hartley and Williams to respond to and arrange for treatment of Young's mental health needs on September 3, 2008. McGill denied those grievances after reviewing the incident and concluding that 'all staff involved [had] handled [the incident] in an appropriate manner in accordance with [DOC] directive.'. . Pursuant to the common law of this Circuit, mere denial of a grievance may be insufficient to establish the 'personal involvement' of a supervisory official. . . Nonetheless, if McGill failed to respond adequately upon receiving notice of a violation that could be remedied, . . . such as an 'ongoing' violation, . . . he may be held liable. In the absence of an ongoing violation—one that is capable of mitigation—McGill cannot be held personally liable. . . .In the case in suit, the grievances Young submitted to McGill solely included complaints about misconduct that had already occurred and concluded, as opposed to 'ongoing' violations. Therefore, with respect to plaintiff's allegations regarding his treatment by Williams and Hartley, that conduct could no longer be effectively remedied. Accordingly, Young has failed to allege McGill's 'personal involvement' in the alleged deliberate indifference to Young's serious mental health needs on September 3, 2008. The motion for summary judgment will be granted as to claims of deliberate indifference to mental health needs against defendant McGill in his individual capacity.")

Hollins v. City of New York, No. 10 Civ. 1650(LGS), 2014 WL 836950, *13, *14 (S.D.N.Y. Mar. 3, 2014) ("In 2009, the Supreme Court in *Ashcroft v. Iqbal* squarely addressed supervisory liability claims, and held that "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior."* . . It is unclear—and the Second Circuit has not explicitly ruled on—what remains of *Colon* in the wake of *Iqbal.* . . The district courts of the Second Circuit disagree about what remains of *Colon* after *Iqbal.*[collecting cases] This Court agrees with *Bellamy v. Mount Vernon Hosp.,* which held that 'Only the first and part of the third *Colon* categories pass *Iqbal*'s muster.'. . After *Iqbal,* a supervisor can be liable only 'if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred.'. . Only the first and third prongs of *Colon* require active involvement of a supervisor.")

King v. McIntyer, No. 9:11–CV–1457, 2014 WL 689028, *8-*10 (N.D.N.Y. Feb. 20, 2014) (adopting R&R) ("Defendants assert that Defendant Fischer lacked personal involvement in the alleged constitutional deprivations. In support of this assertion, Defendants rely on two arguments. First, Defendants submit that liability against a supervisory official for an alleged constitutional violation cannot be based on the doctrine of respondeat superior, citing *Blyden v. Mancusi,* 186 F.3d 252, 264 (2d Cir.1999). . . Second, Defendants argue, 'just because a prisoner writes to supervisory officials about instances of alleged mistreatment does not, alone, justify holding those supervisory officials liable under Section 1983,' citing *Liner v. Goord,* 310 F.Supp.2d. 550, 555

(W.D.N.Y.2004). *Id.* Defendants are correct as to their first argument concerning respondeat superior. However, Defendants' argument concerning the effect that a prisoner writing to a supervisor has on that supervisor's personal involvement is abrogated by *Grullon v. City of New Haven,* 720 F.3d 133 (2d Cir.2013). District courts in this circuit have routinely held that a prisoner's allegation that a supervisory official failed to respond to a grievance is insufficient to establish that the official 'failed to remedy that violation after learning of it through a report or appeal' or 'exhibited deliberate indifference ... by failing to act on information indicating that the violation was occurring.'. . Similarly, district courts have held that 'an allegation that an official ignored a prisoner's letter of protest and request for investigation of allegations made therein is insufficient to hold that official liable for the alleged violations.'. . However, the Second Circuit has recently cautioned courts against dismissing claims at the 12(b)(6) stage for failure to allege personal involvement where the plaintiff alleges that an official failed to respond to a letter of complaint. . .Here, like the procedural posture in *Grullon,* Defendants challenge, *inter alia,* Plaintiff's claim of personal involvement as to Defendant Fischer in a motion to dismiss. . . Thus, based on the holding in *Grullon,* Plaintiff is entitled to have the Court draw the reasonable inference from Plainitiff's pleadings that Defendant Fischer in fact received the three letters of complaint that Plaintiff described in his operative complaint. Based on this inference, Plaintiff has alleged facts sufficient to support a finding of Defendant Fischer's personal involvement. Therefore, I recommend that the Court deny Defendants' motion to dismiss with respect to Plaintiff's individual capacity claim against Defendant Fischer. . . .Defendants assert that Defendant Miller lacked personal involvement in the alleged constitutional deprivations. In support of this assertion, Defendants point out that Plaintiff's allegations against Defendant Miller are that Defendant Miller affirmed two disciplinary hearing findings of guilt. . .District courts in the Second Circuit disagree about whether simply affirming an allegedly unconstitutional disciplinary decision constitutes personal involvement. Courts declining to find personal involvement conclude that there is no 'ongoing' violation for the supervisory official to 'remedy' in such a situation. . . Other district courts in this circuit have found personal involvement where a supervisory official affirms an allegedly constitutionally infirm hearing decision. . . . I agree with Magistrate Judge David E. Peebles that the cases finding personal involvement in such situations 'appear to be both better reasoned and more consistent with the Second Circuit's position regarding personal involvement.'. . Here, Plaintiff alleges that Defendant Miller affirmed two disciplinary findings of Plainitiff's guilt. . . Accordingly, under the reasoning articulated in *Bennett, supra,* Plaintiff's allegations that Defendant Miller affirmed two disciplinary findings are sufficient to support the finding that Defendant Miller was personally involved in the alleged constitutional deprivations. Therefore, I recommend that the Court deny Defendants' motion to dismiss with respect to Plaintiff's individual capacity claim against Defendant Miller.")

Carpenter v. City of New York, 984 F.Supp.2d 255, 269 (S.D.N.Y. 2013) ("The analysis of the supervisory liability claims in this case turns on the underlying constitutional claims against the individual officer defendants. Because summary judgment is granted to the individual officer defendants on the false arrest claims, it is also granted to the supervisor defendants on these claims. As to the excessive force claims, however, plaintiffs have raised a genuine question of material

fact as to the existence of a constitutional violation. The question then is whether plaintiffs have raised a genuine question of material fact as to the existence of supervisory liability. They have done so here, because the plaintiffs have submitted sufficient evidence to show that both Chief Esposito and Chief Hall either were present for or partook in the alleged constitutional violations. If the plaintiffs prevail in demonstrating that the arresting officers used excessive force, a jury could also conclude that Chief Esposito and Chief Hall are responsible for these constitutional violations in their supervisory capacity. Accordingly, the excessive force claims against the supervisor defendants survive summary judgment.")

Buffaloe v. Fein, No. 12 Civ. 9469(GBD)(AJP), 2013 WL 5815371, *7-*10 (S.D.N.Y. Oct. 24, 2013) (R&R) ("Although the Second Circuit has not weighed in on what remains of *Colon* after *Iqbal,*. . . several decisions in this district have concluded that by specifically rejecting the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution,'. . . *Iqbal* effectively nullified several of the classifications of supervisory liability enunciated by the Second Circuit in *Colon.* . . While *Colon* permitted supervisory liability in situations where the supervisor knew of and acquiesced in a constitutional violation committed by a subordinate, these post- *Iqbal* district court decisions reason that *Iqbal'*s 'active conduct' standard imposes liability only where that supervisor directly participated in the alleged violation or had a hand in creating a policy or custom under which the unconstitutional practices occurred. These decisions may overstate *Iqbal'*s impact on supervisory liability. *Iqbal* involved allegations of intentional discrimination. . . Where the alleged constitutional violation involved 'invidious discrimination in contravention of the First and Fifth Amendments,' *Iqbal* held that 'plaintiff must plead and prove that the defendant acted with discriminatory purpose,' whether the defendant is a subordinate or a supervisor. . . It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon* may still apply." [collecting cases in footnote])

Pinter v. City of New York, 976 F.Supp.2d 539, 571, 572 (S.D.N.Y. 2013) ("Pinter's opposition to summary judgment offers a conclusory paragraph stating that named defendants Sergeant Michael Madison, Deputy Chief Brian Conroy, Chief Anthony Izzo, Chief Joseph Esposito, and Police Commissioner Raymond Kelly bear supervisory liability-*without explaining how any of these individuals violated Pinter's rights through their own actions. . .As defendants accurately note in their reply brief, Pinter's conclusory paragraph does not show 'any constitutional violation on the part of the [individual supervisory] Defendants,' including Mayor Bloomberg. . .Nor does Pinter's Rule 56.1 Counter–Statement contain evidence that could support the liability of any of the supervisory defendants.")

De Ratafia v. County of Columbia, No. 1:13–CV–174 (NAM/RFT), 2013 WL 5423871, *8, *9 (N.D.N.Y. Sept. 26, 2013) ("This Court agrees with the analysis in *Sash,*. . . that '[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Thus, as in the present case, where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply. . . Hence, the court refers to earlier Second Circuit precedent that applies the tests of deliberate indifference or gross negligence to assess supervisory liability. That analysis demands a showing of actual or constructive notice to the supervisory defendant of constitutional torts committed by their subordinates. . . . Nowhere in the nearly three hundred paragraphs of the complaint, do plaintiffs flush out the direct manner in which defendant Harrison allegedly violated their rights. Instead, plaintiffs assert that defendant Harrison 'failed to properly train and supervise' the officers involved in the incident at plaintiffs' home. However, 'the existence of a municipal policy or practice, such as a failure to train or supervise, cannot be grounded solely on the conclusory assertions of the plaintiff.'. . . Nowhere do plaintiffs provide any factual allegations to support their assertions that the Deputy Sheriffs' actions in this case were due to a failure by defendant Harrison to train properly his officers. Nor does the complaint identify in what way the Sheriff's Department training was insufficient, nor the manner in which there was a failure to train. Plaintiffs also assert that defendant Harrison 'knew or should have known that the Deputy Sheriffs eventually would be faced with the type of vague, indefinite report from an inebriate that Meleck gave' on October 16, 2011, and 'promulgated no standards for evaluation or supervisory review of the Deputy Sheriffs' response to such unreliable reports.' However, absent from the complaint are any facts establishing or suggesting the alleged basis for defendant Harrison's knowledge or awareness of the likelihood that his Deputies would respond in the manner they did herein to the complaint of a drunkard. It is apparent from review of the complaint that the claims as presently stated against defendant Harrison could only be supported pursuant to respondeat superior or vicarious liability doctrines, which do not support liability under § 1983.")

Malik v. Skelly, No. 09–CV–6283–FPG, 2013 WL 5372850, *2, *3 (W.D.N.Y. Sept. 24, 2013) ("In this case, Defendant argues that the second *Colon* factor namely that a supervisor, after being informed of the violation through a report or appeal, failed to remedy the wrong—was abrogated by *Iqbal*. Again, I disagree. In *LaMagna v. Brown*, 474 F. App'x 788, 790 (2d Cir.2012) (unpublished) the Second Circuit favorably cited *Colon* in determining that the dismissal of an amended complaint was warranted where, *inter alia*, there was 'no allegation that [defendant] "failed to remedy the wrong" once being informed of [plaintiff's] assault.' The Second Circuit has yet to overrule *Colon*, and unless and until that happens, *Colon* remains good law. The Complaint in this case sufficiently alleges facts that, if proven, could subject Napoli to potential liability under *Colon*. Amongst other things, the Complaint alleges that Napoli was aware that prison officials had assaulted Plaintiff, that Napoli 'reviewed video tapes depicting the abuses against plaintiff' (Complaint at ¶ 48), and then failed to intervene or otherwise prevent further abuses against Plaintiff. At the pleading stage, where the Court 'must accept as true all of the factual allegations

contained in the complaint,' *Twombly,* 550 U.S. at 572, these allegations suffice to 'raise a reasonable expectation that discovery will reveal evidence' of the charged conduct, *Twombly,* 550 U.S. at 556, especially in light of the Supreme Court's admonition that 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.'. . What discovery will or will not reveal, and what those revelations could equate to at the summary judgment stage is simply a different question for a different day.")

Barnes v. Ross, 926 F.Supp.2d 499, 509 (S.D.N.Y. 2013) ("Applying these principles here, Barnes' allegations are insufficient to state an equal protection claim against Fischer. Barnes alleges that Fischer was aware that inmates at Sullivan were not receiving adequate mental-health treatment. But Barnes does not plead any facts suggesting that Fischer was aware that minority inmates were treated differently than white inmates. And even if Fischer did have knowledge of invidious discrimination by his subordinates, 'purpose rather than knowledge is required' for Barnes' equal protection claim. . . There is no allegation in the complaint that Fischer participated directly in any discriminatory conduct, nor that he purposefully created or encouraged a discriminatory policy. The only other factual allegation concerning Fischer is that he responded to letters written on Barnes' behalf—a fact that, even if true, would not demonstrate his personal involvement. . . Indeed, the Second Circuit held in *Sealey v. Giltner,* 116 F.3d 47, 51 (2d Cir.1997), that a prisoner failed to establish the requisite personal involvement of the Commissioner at that time by writing him letters, even though the Commissioner referred the first letter to a subordinate for investigation and responded directly to the second letter. . .The Court concludes that Barnes' allegations that Fischer was aware of Barnes' treatment and that Fischer received and responded in some manner to letters written on Barnes' behalf are insufficient to plausibly allege that Fischer, Commissioner of DOCCS, had any personal involvement in Barnes' medical treatment at Sullivan that would be sufficient to state an equal protection claim.")

Houston v. Schriro, No. 11 Civ. 7374(HB), 2013 WL 4457375, *11, *12 (S.D.N.Y. Aug. 20, 2013) ("Here, Plaintiff alleges that Brown, Harris, Agro, Halyard–Saunders, and Wolf all received grievances, requests for hearings, or appeals regarding his constitutional claims for deprivation of adequate dental and foot care as well as his deprivation of low-sodium meals in violation of the First Amendment and RLUIPA. . . Regarding the destruction of his medication, Plaintiff claims that Padmore, Harris, Johnson, Schriro, Halyard–Saunders, and Wolf received his complaints. . . Plaintiff also claims that Hall received his complaints about inadequate foot care. . . And Plaintiff claims that Schriro received his complaints about his meals. . . Thus, all of these defendants had notice of these claims, yet according to Plaintiff failed to act. And none of these claims require a showing of retaliatory or discriminatory intent. Accordingly, even in light of *Iqbal*, it is inappropriate to dismiss Plaintiff's claims against these defendants at this stage for lack of personal involvement. *See Grullon,* 2013 WL 3023464, at *5–*7 ("At the pleading stage, even if [Plaintiff] had no knowledge or information as to what became of his [grievance] after he sent it, he would be entitled to have the court draw the reasonable inference ... that the [supervisor] in fact received the [grievance], read it, and thereby became aware of the alleged conditions of which [Plaintiff]

complained."). But the defendants to whom Plaintiff complained are not liable on claims requiring discriminatory or retaliatory intent where Plaintiff's sole allegation against them is that they failed to respond to his grievances. Thus, Plaintiff's surviving First Amendment retaliation claim as to the flooding of his cell is dismissed as to the above defendants. . . Similarly, Plaintiff fails to allege that any defendants, outside of Webb, Hall, Colon, and Agro, caused his strip searches in violation of the Fourth Amendment. Because his claims against the remaining defendants here also involve only their purported failure to respond to his grievances, I dismiss the strip search claims against the remaining defendants on this ground.")

Lee v. Graziano, No. 9:12–CV–1018 (FJS/CFH), 2013 WL 4426447, *6, *7 (N.D.N.Y. Aug. 15, 2013) ("In this case, viewing the facts in the light most favorable to the plaintiff, Lee has alleged a plausible claim that Graziano was responsible for creating a blanket policy that precluded inmates with disabilities from receiving shower chairs or railings. As a superintendent, it was within Graziano's purview to direct staff, formulate policies for the effective operation of Greene Correctional, and ensure that corrections staff comply with such policies. . . .Further, liberally construing Lee's complaint, Correctional Officer John Doe # 1's alleged statement of, 'you don't get any special treatment here at Greene Correctional Facility,' creates a question of fact with respect to Greene Correctional's policy for providing shower accommodations to inmates with disabilities and how that policy was articulated to employees and enforced. This, along with the lack of evidence at this time showing any shower accommodations for inmates with disabilities, which bolsters Lee's liberally construed claims of an unconstitutional policy, leads to a recommendation denying Graziano's motion without prejudice, allowing Graziano an opportunity to raise these arguments at a point when it can be analyzed based upon a more fully developed record.")

Liner v. Fischer, No. 11 Civ. 6711(PAC)(JLC), 2013 WL 4405539, *16 (S.D.N.Y. Aug. 7, 2013) ("This Court agrees with the majority view that 'even after the U.S. Supreme Court's decision in *Iqbal*, these categories supporting personal liability of supervisors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.'[collecting cases]")

Smith v. Conway, No. 10–CV–00824A(F), 2013 WL 4046290, *10 (W.D.N.Y. Aug. 7, 2013) ("Although mere receipt of a letter is insufficient to establish the requisite personal involvement for § 1983 liability, personal involvement may be found where a supervisory official receives and acts on or undertakes an investigation of the inmate's complaint or grievance.")

Liner v. Fischer, No. 11 Civ. 6711(PAC)(JLC), 2013 WL 3168660, *7, *8 (S.D.N.Y. June 24, 2013) ("The law in this Circuit before *Iqbal* was that a plaintiff could state a claim against a supervisory defendant in a § 1983 case where the plaintiff alleged that the defendant: (1) participated directly in the alleged constitutional violation; (2) failed to remedy a wrong after learning of it; (3) created a policy or custom under which the violation occurred, or allowed such a policy or custom to continue; (4) was grossly negligent in supervising subordinates who

committed the alleged violation; or (5) was deliberately indifferent to ongoing unconstitutional acts. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995). The Second Circuit has not ruled as to *Iqbal's* impact on the factors set forth in *Colon*. . . Moreover, courts in this Circuit are divided as to how many of the *Colon* factors survive in the wake of *Iqbal.* [comparing cases] This Court agrees with the majority view that 'even after the U.S. Supreme Court's decision in *Iqbal*, these categories supporting personal liability of supervisors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.'")

Paul v. Bailey, No. 09 Civ. 5784(RO), 2013 WL 2896990, *4, *5 (S.D.N.Y. June 13, 2013) ("Defendant is correct that supervisory officials cannot be held liable simply by virtue of their position of authority, but Plaintiff has alleged facts showing that Defendants had firsthand knowledge of Plaintiff's medical condition and need for alternative footwear, but ignored it. Simply because they are not physicians does not mean that Defendants are not responsible for ensuring that prisoners receive proper footwear or may ignore a doctor's orders. Accordingly, holding the *pro se* Plaintiff to a lower pleading standard, Plaintiff has alleged facts that create a plausible inference that Defendants Bailey and Batson demonstrated deliberate indifference to Plaintiff's medical condition. At a later stage in this litigation, it may become clear that Plaintiff cannot adequately support his claims. But at this stage, under Federal Rule of Civil Procedure 12(b)(6), Plaintiff's factual allegations must be accepted as true unless it is clear that it would be impossible for Plaintiff to establish a legally cognizable claim.")

Randle v. Alexander, 960 F.Supp.2d 457, 466, 478, 479 (S.D.N.Y. 2013) ("Defendants Tracy Alexander and Robert Ercole were, respectively, a sergeant at and the Superintendent of Green Haven while Randle was incarcerated there. . . . Randle has alleged sufficient facts to give rise to a plausible inference that Alexander, but not Ercole, was personally involved in the purported constitutional violations. With respect to Alexander, the Complaint alleges that he participated directly in the conduct by filing a false report to his supervisors in order to 'cover up the [Guard Defendants'] actions.'. . Defendants assert in their Reply that a false report does not rise to the level of a constitutional violation . . . but the case they cite is inapposite. In *Boddie v. Schnieder,* 105 F.3d 857 (2d Cir.1997), the Second Circuit held that 'a prison inmate has no general constitutional right to be free from being falsely accused in a misbehavior report.'. . Here, however, Randle does not allege simply that Alexander stated he misbehaved when he had not, or even that Alexander retaliated against him by filing a false report, . . . but rather, that Alexander played a direct role in covering up an illegal forced fight within the prison. With respect to Ercole, Randle makes a number of allegations suggesting that the Guard Defendants' behavior was a direct result of supervisory gross negligence that harbored an environment in which this type of forced fight was condoned. . . However, these allegations constitute nothing more than recitations of the applicable standard without supporting factual context. For example, Randle alleges that Ercole, in his role as superintendent, 'failed to train and/or supervise Sergeant Alexander and [the Guard Defendants] in how to properly transport inmates throughout the facility, how to deal with inmate altercations within the facility, the appropriate level of interaction the officers should have with

the inmate population, and failed to supervise the officer's interactions with the Green Haven population.'. . And while the characteristics of the alleged forced fights—namely that many guards participated, they took place in an organized manner, and occurred in a particular area of the Green Haven facility—suggest that the Guard Defendants' alleged antics may have been well known among certain subsets of guards at Green Haven, given the alleged cover-up of the incident between Johnson and Randle, it seems implausible that someone in Superintendant Ercole's position would have been aware of the forced-fight practice. Accordingly, on both a failure to train theory, and the theory that Ercole was grossly negligent in permitting the purported practice to continue on his watch, Randle's claims against Ercole fail to survive Defendants' motion to dismiss. And while it is true that Randle does allege that Ercole ignored inmate grievances and complaints—as discussed, such behavior is non-actionable in this context.")

Thompson v. Pallito, 949 F.Supp.2d 558, 574, 575 (D. Vt. May 29, 2013) ("There has been considerable debate and disagreement within this circuit as to how much of the *Colon* test remains viable after *Iqbal.* The Second Circuit has not yet definitively stepped into the breach. . . Some district courts within the Second Circuit have disallowed any § 1983 supervisory liability after *Iqbal,* effectively abrogating *Colon.* [collecting cases] Others have reaffirmed the continued vitality of all five *Colon* categories. [collecting cases] This latter approach seems to reflect the majority position. Here, because Thompson has not asserted intent-based claims—instead relying upon the 'deliberate indifference' standard of the Eighth and Fourteenth Amendments—and because no decision from the Second Circuit has explicitly overruled *Colon,* I follow the majority position within the district courts of this circuit and decline the DOC Defendants' invitation to eliminate all forms of supervisory liability under § 1983. Accordingly, I apply the categories of personal involvement as established by the Second Circuit in *Colon.*")

Byrne v. Trudell, No. 1:12–cv–245–jgm–jmc, 2013 WL 2237820, *7, *8 (D. Vt. May 21, 2013) ("Byrne also alleges that he sent Pallito a 'detailed letter seeking relief from the abuse' alleged in his case, and 'the response was that he upheld their ruling.'. . 'Numerous courts have held that merely writing a letter of complaint does not provide personal involvement necessary to maintain a § 1983 claim.'. . . Further, if a defendant refers or forwards such a letter to another staff member, personal involvement still cannot be shown. . . . 'If, however, the official does personally look into the matters raised in the letter, or otherwise acts on the prisoner's complaint or request, the official may be found to be personally involved.'. . .The precise contents of the alleged letter are unspecified, and it is unclear whether Pallito responded directly to it, referred the matter down the chain of command to a subordinate, or ignored it entirely. Byrne expressly claimed in his Complaint that 'he' affirmatively upheld the decision of those involved, perhaps a cryptic reference to Pallito's personal, direct response to the letter. In any event, giving Byrne the benefit of the doubt as to this ambiguity, I conclude that Byrne has sufficiently alleged Pallito's personal involvement in the claimed constitutional violations. . . In the language of *Colon,* Pallito was a supervisory official who, 'after being informed of the violation through a report or appeal, failed to remedy the wrong.'")

Powell v. Johnson, No. 3:11–CV–1304 (MAD/DEP, 2013 WL 2181268, *5 n.3 (N.D.N.Y. May 20, 2013) ("The issue of supervisory liability for a civil rights violation was addressed by the Supreme Court in *Iqbal,* 556 U.S. 662. The Second Circuit has yet to address the impact of *Iqbal* upon the categories of supervisory liability under *Colon.* Lower courts have struggled with this issue, and specifically whether *Iqbal* effectively calls into question certain prongs of the *Colon* five-part test for supervisory liability. . . While some courts have taken the position that only the first and third of the five *Colon* categories remain viable and can support a finding of supervisory liability [collecting cases], others disagree and conclude that whether any of the five categories apply in any particular case depends upon the particular violations alleged and the supervisor's participatory role [collecting cases].")

Wynder v. McMahon, No. 99 Civ. 772(ILG)(CLP), 2013 WL 1759968, *10 n.16 (E.D.N.Y. Apr. 24, 2013) ("In its prior Order, the Court cited the then-accepted standard for supervisory liability in a § 1983 action, where a plaintiff could establish liability through one of five ways under *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995). . . It then determined that the Complaint sufficiently alleged two of those five ways, direct participation in the violation and creating a policy under which the violation occurred. .. Since that Order was issued in 2008, the Supreme Court changed the standard for supervisory liability in *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). After *Iqbal,* courts in this circuit have not reached a consensus on the extent to which *Iqbal* altered the five *Colon* factors and the Second Circuit has not yet addressed the issue. *See Reynolds v. Barrett,* 685 F.3d 193, 205 n. 14 (2d Cir.2012). However, courts in this circuit have generally agreed that in § 1983 intentional discrimination cases, such as Mr. Wynder's race-based discrimination action, supervisory liability still may be established through those two ways."), *aff'd*, 565 F. App'x 11 (2d Cir. 2014).

Kucera v. Tkac, No. 5:12–cv–264, 2013 WL 1414441, *5 (D.Vt. Apr. 8, 2013) ("[B]ecause Plaintiff has not asserted intent-based discrimination claims, but instead relies on claims under the Fourth and Fourteenth Amendment, the court examines the Amended Complaint to determine whether Plaintiff has adequately pled supervisory liability against Officers Cutting and Roberts under any of the five *Colon* factors.")

Zappulla v. Fischer, No. 11 Civ. 6733(JMF), 2013 WL 1387033, *9, *10 (S.D.N.Y. Apr. 5, 2013) ("Unless and until the Supreme Court or Second Circuit rule otherwise, this Court agrees with those courts that have held that *Iqbal* should not be read to invalidate the *Colon* categories altogether. The *Iqbal* Court specifically noted that '[t]he factors necessary to establish a [constitutional] violation will vary with the constitutional provision at issue.' . . 'It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected [in *Iqbal*] the argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution."'. . Thus, where a plaintiff has alleged a claim that does not include a discriminatory intent element, such as a claim under the Eighth Amendment for denial of medical treatment, the *Colon* test should still apply to the extent that it is 'consistent with the particular constitutional provision alleged to have been

violated.'. . More specifically, if a plaintiff alleges that a constitutional violation is ongoing, and that a defendant, after being informed of a violation through a report or appeal, failed to remedy the wrong, the plaintiff's claim against that defendant should not dismissed under Rule 12(b)(6). . . . That is the case here. The gravamen of Plaintiff's remaining claim is that Defendants violated his constitutional rights by depriving him of adequate medical care following surgery on his right elbow. Liberally construed, the Complaint further alleges that Defendant Lee, after being informed of that ongoing violation through the grievance process, failed to remedy that wrong. Those allegations fall squarely within the second *Colon* category and, in the circumstances of this case, are adequate to state a claim against Lee.")

Watson v. Wright, No. 08–CV–00960(A)(M), 2013 WL 1791079, *7 (W.D.N.Y. Mar. 26, 2013) (I agree 'with the apparent majority view that where, as here, the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply.' *Shepherd v. Powers*, 2012 WL 4477241, *10 (S.D.N.Y.2012).")

Butler v. Suffolk County, No. 11–CV–2602(JS)(GRB), 2013 WL 1136547, *10 n.8 (E.D.N.Y. Mar. 19, 2013) ("The Second Circuit in *Colon* actually listed five ways that a plaintiff can establish supervisory liability—not just the two described above—including failure to remedy a wrong after being informed of the violation, grossly negligent supervision of subordinates who committed the wrongful acts, and deliberate indifference to the rights of inmates. . . However, the 'continuing vitality' of these additional methods has 'engendered conflict within our Circuit' due to the Supreme Court's decision in *Iqbal. Reynolds v. Barrett*, 685 F.3d 193, 206 (2d Cir.2012). In *Iqbal*, the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Although the Second Circuit has yet to determine the effects of *Iqbal* on the *Colon*-factors, the weight of authority among the district courts in the Eastern District of New York suggests that only two of the *Colon*-factors—direct participation and the creation of a policy or custom—survive *Iqbal.* [collecting cases] This Court agrees and, thus, will limit its discussion to only those two factors.")

Loccenitt v. City of New York, No. 12 Civ. 948(LTS)(MHD), 2013 WL 1091313, *5 & n.8 (S.D.N.Y. Mar. 15, 2013) ("While the Supreme Court in *Iqbal* may have narrowed the viability of some of the *Colon* predicates for supervisory liability, the two predicates that are relevant here have been held by courts in this district to have survived *Iqbal.* . . Plaintiff states that Defendant Hilda J. Simmons 'is the highest ranking member of the D.O.C. [and] was informed of the religious violations and failed to remedy the issue' and that she 'is also responsible of [sic] the supervision, oversight and religious service management.'. . Plaintiff states that Commissioner Dora Schriro is liable because she is 'responsible for the policy, practice, supervision, implementation, and conduct' of all D.O.C. personnel and their compliance with the civil rights laws and 'is also responsible for supervisor liability for failure to remedy the situation after being informed of the [ ] complaint.'. . These two allegations satisfy the requirement for pleading supervisory liability

since they support the inference that, as supervisors, these two Defendants created or permitted the continuance of the policy or custom under which the wrongs occurred and, after being informed of Plaintiff's alleged civil rights violations, failed to remedy ongoing wrongs. As for Defendants Kathleen Mulvey, Rose Argo, Deputy Warden A. Baily, Deputy Warden K. Williams, Captain L. Smith and Captain H. Medina, Plaintiff merely lists these Defendants as individuals who were 'made aware of the violations,' and 'failed ... to remedy the situation.'. . Plaintiff does not suggest that they were directly involved in the alleged violations, or in the creation of a policy or custom that permitted such alleged violations, or had any authority or ability to prevent the violations from occurring. Plaintiff's general allegations against these lower-level individual Defendants are not sufficient to demonstrate a basis for subjecting them to personal liability under Section 1983.")

Inesti v. Hogan, No. 11 Civ. 2596(PAC)(AJP)., 2013 WL 791540, *12 & n.23 (S.D.N.Y. Mar. 5, 2013) (R & R) ("Although the Second Circuit has not weighed in on what remains of *Colon* after *Iqbal*, several decisions in this district have concluded that by specifically rejecting the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution,'. . . *Iqbal* effectively nullified several of the classifications of supervisory liability enunciated by the Second Circuit in *Colon*. . . While *Colon* permitted supervisory liability in situations where the supervisor knew of and acquiesced in a constitutional violation committed by a subordinate, these post-*Iqbal* district court decisions reason that *Iqbal*'s 'active conduct' standard imposes liability only where that supervisor directly participated in the alleged violation or had a hand in creating a policy or custom under which the unconstitutional practices occurred. These decisions may overstate *Iqbal*'s impact on supervisory liability. *Iqbal* involved allegations of intentional discrimination. . . Where the alleged constitutional violation involved 'invidious discrimination in contravention of the First and Fifth Amendments,' *Iqbal* held that 'plaintiff must plead and prove that the defendant acted with discriminatory purpose,' whether the defendant is a subordinate or a supervisor. . . It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon* may still apply. [citing cases & Michael Avery et al., *Police Misconduct: Law & Litigation* § 4:5 (2009) (discussing the impact of *Iqbal* on supervisor liability in § 1983 and *Bivens* actions)]")

Aguilar v. Connecticut, No. 3:10–cv–1981 (VLB), 2013 WL 657648, *5, *6 (D. Conn. Feb. 22, 2013) ("In the present case, the Plaintiff essentially asks the Court to ignore the fact that the Plaintiff has not asserted, much less offered facts, of an underlying constitutional deprivation, He asks the court to focus on whether the Warden's conduct satisfies any of the five *Colon* factors; however, a supervisor can only be liable where his or her subordinate engaged in unconstitutional conduct. The Plaintiff has failed to identify Whidden's subordinate and has failed to offer facts as to the purported unconstitutional conduct in which that person engaged which resulted in the

Plaintiff and his assailant being placed in the same cell. He has submitted no evidence of the identity or the conduct of the subordinate. Consequently, the Plaintiff has failed to establish that there was an underlying constitutional deprivation. This is particularly true in the context of a failure to protect claim under the Eighth Amendment, which the Supreme Court has made clear involves a subjective inquiry and analysis. . . . In order to find an underlying violation of the Eighth Amendment in the present case, the Plaintiff would have had to identify the subordinate official who made the cell placement and further provide evidence as to the actual knowledge of risk by that subordinate official. Because the Plaintiff has failed to identify the subordinate official nevertheless demonstrate that this official was both aware of facts from which an inference of an excessive risk to inmate health or safety could be drawn and did draw that inference, the Court cannot determine whether the Plaintiff's Eighth Amendment rights were violated. As discussed above in the absence of a finding that there is an underlying constitutional violation, a supervisory official cannot be liable under § 1983. Therefore where there is no underlying constitutional deprivation by a subordinate, the claim against the supervisor should be dismissed. . . The Court then need not address whether Whidden's conduct satisfied any of the *Colon* factors as the Plaintiff has failed to demonstrate an underlying constitutional deprivation in the first instance.")

A'Gard v. Perez, 919 F.Supp.2d 394, 407 (S.D.N.Y. 2013) ("The Second Circuit Court of Appeals has not addressed the question directly, but it has indicated that at least some of the *Colon* factors other than direct participation remain viable. *See Rolon v. Ward,* 345 F. Appx 608, 611 (2d Cir.2009) ("A supervisory official personally participates in challenged conduct not only by direct participation, but by (1) failing to take corrective action; (2) creation of a policy or custom fostering the conduct; (3) grossly negligent supervision, or deliberate indifference to the rights of others."); *see also Scott v. Fischer,* 616 F.3d 100, 10809 (2d Cir.2010).")

Jean-Laurent v. Lane, No. 9:11–CV–186 (NAM/TWD), 2013 WL 600213, *15, *16 (N.D.N.Y. Jan. 24, 2013) ("Supervisory personnel may be held liable under § 1983 for 'fail[ure] to remedy a violation after learning of it through a report or appeal.' *Colon,* 58 F.3d at 873. However, mere receipt of a report or complaint or request for an investigation by a prison official is insufficient to hold the official liable for the alleged constitutional violations. . . . 'On the other hand, where a supervisory official receives and acts on a prisoner's grievance (or substantively reviews and responds to some other form of inmate complaint), personal involvement will be found under the second *Colon* prong: the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong.'. . . Allegations of awareness on the part of a correctional facility superintendent of an ongoing failure by prison officials to provide a plaintiff with medical treatment for injuries, coupled with failure to remedy the wrong after learning of it through a grievance procedure have been found to be sufficient to survive a Rule 12(b) (6) motion. . . However, the naked assertion in Plaintiff's Complaint that he complained to Defendants Barkley, Hulihan, and Lindquist that he was being deprived of reasonable and adequate dental care, and that his complaints were found unsubstantiated is simply too lacking in factual detail to show that Plaintiff is entitled to relief. . . Plaintiff's Complaint contains absolutely no factual enhancement regarding the manner in which complaints were conveyed to each of the defendants, the content

of the complaints, the timing of the complaints, or the responses of each of those Defendants to those complaints. Therefore, I recommend that Defendants Barkley, Hulihan, and Lindquist's motion to dismiss Plaintiff's Eighth Amendment medical indifference claim against them be granted and that Plaintiff be granted leave to amend.")

Firestone v. Berrios, 42 F.Supp.3d 403, 416-18 (E.D.N.Y. 2013) ("[T]he Plaintiff contends that the Amended Complaint plainly alleges that Dr. Kendall's decisions and actions (or lack thereof) caused the violation of Firestone's constitutional rights. . . She asserts that under the *Colon* prongs, unfortunately embracing this now abrogated standard, her allegations against Dr. Kendall easily satisfy prongs (2), (4) and (5). However, as set forth above, only the first and part of third *Colon* categories appears to pass *Iqbal's* muster, especially in the case of intent-based constitutional claims, which is what the Court faces here. Indeed, the cases that the Plaintiff cites in support of her arguments as to Dr. Kendall's personal involvement all pre-date *Iqbal.* Therefore, the Court looks to the factual allegations contained in the Amended Complaint to ascertain whether the Plaintiff has stated a claim for supervisory liability under Section 1983 post-*Iqbal.* The baseline inquiry is what precisely the constitutional violation is that the Plaintiff is alleging. Certainly, the sexual harassment by Berrios is alleged to constitute disparate treatment based on gender in violation of the Equal Protection Clause. . . With regard to Dr. Kendall, the Plaintiff alleges that she had actual knowledge or should have known of the repeated sexual harassment of the Plaintiff by Berrios; that she failed to take timely corrective or remedial action, thereby acquiescing in the severe and pervasive sexual harassment; and that because Dr. Kendall knew of the harassment that the Plaintiff was subjected to and knew of prior improper sexual conduct by Berrios to other female staff members, this constitutes deliberate indifference to the Plaintiff's constitutional rights. The Plaintiff references the sexual harassment policy that her supervisor, Dr. Kendall, allegedly ignored and maintains that this would have prevented constitutional violations. In addition, she offers details regarding how and why Dr. Kendall should have or did know about the alleged violations. However, despite the Plaintiff's attempts to tie Dr. Kendall's actions or inactions into the sexual harassment, at its core the Plaintiff's claim for supervisory liability is one for failure to remedy a wrong after it has been reported. This is undoubtedly insufficient in the aftermath of *Iqbal.* . . . Thus, the Plaintiff has not sufficiently alleged direct personal involvement. The Supreme Court has plainly rejected the essence of the Plaintiff's allegations against this particular defendant, which is that a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. If the Plaintiff can allege that Dr. Kendall was directly involved in the constitutional violation or was responsible for the policy or custom under which unconstitutional practices occur, then a claim for damages under Section 1983 may lie. . . However, even when viewing the Amended Complaint in the best light for the Plaintiff, the Court cannot discern these contentions from the relevant pleading. Therefore, the Section 1983 claim against the Defendant Dr. Kendall is dismissed without prejudice.")

Smolen v. Fischer, No. 12 Civ. 1856(PAC)(AJP), 2012 WL 5928282, *5, *6 (S.D.N.Y. Nov. 27, 2012) ("Although the Second Circuit has not weighed in on what remains of *Colon* after *Iqbal*,

several decisions in this district have concluded that by specifically rejecting the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution,'. . . *Iqbal* effectively nullified several of the classifications of supervisory liability enunciated by the Second Circuit in *Colon.* . . While *Colon* permitted supervisory liability in situations where the supervisor knew of and acquiesced in a constitutional violation committed by a subordinate, these post-*Iqbal* district court decisions reason that *Iqbal's* 'active conduct' standard imposes liability only where that supervisor directly participated in the alleged violation or had a hand in creating a policy or custom under which the unconstitutional practices occurred. These decisions may overstate *Iqbal's* impact on supervisory liability. *Iqbal* involved allegations of intentional discrimination. . . Where the alleged constitutional violation involved 'invidious discrimination in contravention of the First and Fifth Amendments,' *Iqbal* held that 'plaintiff must plead and prove that the defendant acted with discriminatory purpose,' whether the defendant is a subordinate or a supervisor. . . It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon* may still apply.[citing cases and Michael Avery et al., *Police Misconduct: Law & Litigation* § 4:5 (2009)]")

Johnson v. Pallito, No. 2:12–CV–138, 2012 WL 6093804, *5-*7 (D. Vt. Nov. 26, 2012) (R & R adopted by 2012 WL 6093801 (D. Vt. Dec 7, 2012) ("As noted earlier, this circuit's standard for supervisory liability in a § 1983 action is governed by the principles set forth in *Colon.* . . The Supreme Court's decision in *Iqbal v. Ashcroft* potentially altered this standard when the majority rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Many courts in this circuit post-*Iqbal* have struggled to determine how much of the *Colon* standard remains intact. . . Some courts interpret the decision in *Iqbal* to considerably limit the *Colon* standard [citing cases], while others caution against such an interpretation [citing cases]. The latter cases focus on *Iqbal's* reliance upon the 'constitutional provision at issue' because '[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Put differently, *Iqbal* instructs the court to (1) look at the elements of the claim at issue and (2) determine whether the claim requires a showing of discriminatory intent. If the claim does *not* require a showing of discriminatory intent then the *Colon* analysis may still apply. Conversely, if the claim does require discriminatory intent as an element then an *Iqbal*-limited standard may apply. . . The Court should reach an analogous conclusion here. Construing the allegations most favorably to Plaintiff, I conclude that he has failed to allege sufficient personal involvement with respect to his equal protection and due process claims. Both these claims—similar to those brought in *Iqbal*—require discriminatory intent as an essential element. *See Giano v. Senkowksi,* 54 F.3d 1050, 1057 (2d Cir.1995) (holding that an

equal protection claim requires 'purposeful discrimination'); *see also Jabbar v. Fischer,* 683 F.3d 54, 57 (2d Cir.2012) (explaining a due process claim requires 'a deliberate decision to deprive [an inmate] of his life, liberty, or property'). Consequently, Defendant, as Commissioner of the Department of Corrections, cannot be held liable for failing to remedy a wrong on the basis that he was potentially informed of the violation through Plaintiff's grievance appeals. On the other hand, Eighth Amendment violations do not require discriminatory intent as an element, . . . and, therefore, supervisors may still be found liable for failure to act after notification of wrongdoing through a grievance appeal, *see Colon,* 58 F.3d at 87.")

Barksdale v. Frenya, No. 9:10–CV–00831 (MAD/DEP), 2012 WL 4107805, *5, *6 (N.D.N.Y. Sept. 19, 2012) ("Within this circuit there is a severe division among the district courts as to whether mere review by a DOCCS official of an appeal from a disciplinary hearing, which an inmate claims to have been infected by due process violations, can lead to personal liability on the part of that individual. . . However, 'the Second Circuit has, on at least one occasion, allowed a due-process claim to proceed against an upper-level prison official based on the allegation that the official "affirmed [plaintiff's disciplinary] conviction on administrative appeal."'. . In *Rodriguez v. Selsky,* I followed those cases holding that a supervisory official's affirmance 'of a constitutionally defective disciplinary determination at a time when the inmate is still serving his or her disciplinary sentence, and the violation can therefore be abated, falls within the *Colon* factors articulated in the Second Circuit for informing the supervisory liability analysis.'. . In my view, those cases concluding that a plaintiff's allegations that a supervisory defendant reviewed and upheld an alleged constitutionally suspect disciplinary determination are enough to show his or her personal involvement in the alleged violation appear to be both better reasoned and more consonant with the Second Circuit's position regarding personal involvement. . .In this case the question of which line of supervisory personal liability cases should be followed is not outcome-determinative. The record reflects that plaintiff's appeal of his disciplinary sentence to the Commissioner's office was reviewed by Norman Bezio. There is no evidence of defendant Fischer's involvement in the review of that disciplinary determination. In the absence of such evidence, defendant Fischer is entitled to dismissal of plaintiff's claims against him.")

Ramos v. Lajoie, No. 3:11cv679(DJS), 2012 WL 4056727, *1-*3 (D. Conn. Sept. 13, 2012) ("For many years it was well settled in this circuit that there were five ways to demonstrate the personal involvement of a supervisory defendant: (1) the defendant directly participated in the alleged constitutional violation, (2) after he was informed of the violation through a report or appeal, the supervisory defendant failed to remedy the wrong, (3) the supervisory defendant created a policy or custom pursuant to which the constitutional violation occurred or permitted such a policy or custom to continue, (4) the defendant was grossly negligent in supervising the subordinates who committed the wrongful acts, or (5) the defendant was deliberately indifferent to the plaintiff's rights by failing to act on information that unconstitutional acts were occurring. *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995). In addition, the plaintiff must demonstrate an affirmative causal link between the supervisory official's failure to act and his injury. . .The decision in *Iqbal* caused many courts to question this issue. . . .Since *Iqbal,* some districts courts within this circuit have

determined that not all five of *Colon's* categories of conduct that may give rise to supervisory liability remain viable. [citing cases] Other district courts restrict application of *Iqbal* to cases involving discriminatory intent. . . . . The Second Circuit has not yet addressed this issue. This Court need not determine whether *Iqbal* applies in all cases or just those involving discriminatory intent, because the allegations against the defendants Lajoie, Quiros and Butkiewicus are insufficient to survive dismissal even under the *Colon* standard. The plaintiff alleges that he did not tell defendants Lajoie, Quiros or Butkiewicus about the incident until after it was over. Thus, they were not personally involved in and were not aware of any facts that would have enabled them to prevent the incident. . . Defendants Lajoie, Quiros and Butkiewicus were notified of the incident through the institutional administrative remedy process. The receipt of a letter of complaint or an inmate grievance is insufficient to establish personal involvement of supervisory officials. . . In addition, the plaintiff has alleged no facts suggesting that the incident was other than an unauthorized act by defendant Trifone. Thus, none of the other *Colon* categories apply.")

Gabriel v. County of Herkimer, 889 F.Supp.2d 374, 402, 403 (N.D.N.Y. 2012) ("There is some debate as to whether all five Colon categories of supervisor liability remain available after the United States Supreme Court's decision in *Ashcroft v. Iqbal*. . . . Plaintiff's allegations against these policymaker defendants fit squarely within the third *Colon* category permitting liability based on a supervisor's creation of 'a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom.' *Colon*, 58 F.3d at 873. Plaintiff claims that Sheriff Farber, Cpt. McGrail, and Lt. Coddington promulgated and allowed unconstitutional policies and customs to occur and continue, such as the medical officer policy and the under staffing of nurses at the jail. Sheriff Farber testified that he does not supervise the jail, and his day-to-day duties as County Sheriff do not involve the policies and procedures of the jail. According to him, Cpt. McGrail develops policies and procedures for the jail. Cpt. McGrail testified that he is responsible for the policies and procedures of the jail, and that Sheriff Farber reviews and signs off on those policies. He also testified that Sheriff Farber is responsible for the contract between the County and Little Falls Hospital. Further, as part of their role through that contract, N.P. Macri and Dr. Handy advise the County regarding jail medical policies and procedures. Then, after those policies are signed off on by Dr. Handy and Sheriff Farber, Cpt. McGrail and his staff implement them at the jail. Because there is testimony regarding both Sheriff Farber and Cpt. McGrail's involvement in promulgating and implementing the allegedly unconstitutional policies and practices at the jail, summary judgment is inappropriate and defendants' motion to dismiss Sheriff Farber and Cpt. McGrail will be denied.")

Solar v. Lennox, 2012 WL 3929936, *13 (N.D.N.Y. July 16, 2012) ("In Solar's deposition testimony, he contends that he personally told Rowe about various medical accommodation issues on at least six occasions, three of which related to missed meals that were not provided to Solar while he was medically restricted to eating in his cell. Viewing the facts in the light most favorable to Solar, such repeated, direct conversations regarding an alleged, repeating constitutional violation is sufficient to establish personal involvement. *See Harnett v. Barr*, 538 F.Supp.2d 511, 524 (N.D.N.Y.2008) (concluding that a distinction lies between a supervisory official that is

'confronted with an alleged violation that has ended or ... is ... a continuing violation,' as with the latter the supervisory officially is deemed 'personally involved if he is confronted with a situation that he can remedy directly.') (internal quotation marks and citations omitted).")

Smolen v. Fischer, No. 12 Civ. 1856(PAC)(AJP), 2012 WL 3609089, *7-*9 (S.D.N.Y. Aug. 23, 2012) ("Although the Second Circuit has not weighed in on what remains of *Colon* after *Iqbal,* several decisions in this district have concluded that by specifically rejecting the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution,'. . . *Iqbal* effectively nullified several of the classifications of supervisory liability enunciated by the Second Circuit in *Colon.* . . . These decisions may overstate *Iqbal*'s impact on supervisory liability. *Iqbal* involved allegations of intentional discrimination. . . Where the alleged constitutional violation involved 'invidious discrimination in contravention of the First and Fifth Amendments,' *Iqbal* held that 'plaintiff must plead and prove that the defendant acted with discriminatory purpose,' whether the defendant is a subordinate or a supervisor. . . It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon* may still apply. [collecting cases and citing to Michael Avery et al., *Police Misconduct: Law & Litigation* § 4:5 (2009) (discussing the impact of *Iqbal* on supervisor liability in § 1983 and *Bivens* actions) in footnote] . . . . Since Smolen's claim does not require a showing of discriminatory intent, but instead relies on the deliberate indifference standards of the Eighth Amendment, the *Colon* factors apply in determining defendants' personal involvement. . . Based on Smolen's allegations that Fischer and Perez had knowledge of 'the hazard of [the storm] windows' and lack of 'cell window knobs' from previous fires . . . , they could be found to be personally involved in the alleged violations under *Colon*'s second factor (failure to remedy the wrong after being informed of the violation through a report or appeal) and fifth factor (exhibition of deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring). . . Accordingly, assuming the truth of Smolen's factual allegations of personal involvement of Fischer and Perez, as the Court must in considering a motion to dismiss, Fischer and Perez's motion to dismiss Smolen's claims for lack of personal involvement should be *DENIED.*")

Malik v. City of New York, No. 11 Civ. 6062(PAC)(FM), 2012 WL 3345317, *15, *16 (S.D.N.Y. Aug. 15, 2012) ("Malik alleges in conclusory terms that Superintendent Agro knew that he was provided with insufficient footwear. . . The only factual basis for this allegation, however, is that Malik wrote Superintendent Agro a letter regarding his grievances. . . Malik also has failed to allege that Superintendent Agro created or allowed the continuance of an unconstitutional policy or custom, or that she was grossly negligent in supervising subordinates who committed the

allegedly wrongful acts. . . For these reasons, Malik's claims against Superintendant Agro must be dismissed.")

Beck v. Coats, No. 5:11–CV–420, 2012 WL 2990017, *4 (N.D.N.Y. July 19, 2012) ("Whether all five *Colon* bases for supervisor liability remain available in light of the United States Supreme Court's decision in *Ashcroft v. Iqbal,* 556 U.S. 662, 676–77, 129 S.Ct. 1937, 1948–49 (2009), is subject to debate in this circuit. [collecting cases] Even if all five bases of supervisory liability survived *Iqbal,* plaintiff has failed to allege sufficient personal involvement on the part of defendant Morey. There is nothing in the complaint to suggest Morey was directly involved in the conduct that allegedly violated Beck's constitutional rights, knew that Beck's rights were being violated, created the ordinance at issue, or was grossly negligent in his supervision. Plaintiff alleges that it was Coats who asked him to remove his displays, sent him letters and notices, and signed the summons accusing him of violating section 316.7. There are no allegations implicating Morey in any of this conduct. In fact, plaintiff specifically notes: "I am charging Glenn Morey for he is Gary L. Coats [sic] supervisor." Compl. at 5. This is insufficient to hold Morey liable under § 1983, and he will therefore be dismissed from this action.")

Stresing v. Agostinoni, No. 11–CV–967S, 2012 WL 2405240, at *4, *5 (W.D.N.Y. June 25, 2012) ("Following *Iqbal,* there has been some division in the district courts of this Circuit over whether all five of the Colon factors are still applicable. . . Some courts have interpreted the Supreme Court's directive as imposing individual liability under § 1983 on a supervisor for only his or her *affirmative* actions, and precluding liability based on the failure to act. . . Other courts have determined that *Iqbal* allows for flexibility, in that 'the degree of personal involvement varies depending on the constitutional provision at issue,' and therefore 'the five Colon categories for personal liability of supervisors may still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.'. . The Second Circuit has not yet explicitly recognized this split among the district courts. In a recent unpublished decision, however, the Court quoted *Iqbal'*s pleading requirement with respect to government officials, but nonetheless favorably cited *Colon* in determining that dismissal of the amended complaint was warranted where, inter alia, there was 'no allegation that the [defendant] "failed to remedy the wrong" once being informed of [the plaintiff's] assault.' *LaMagna v. Brown,* No. 11–488–pr, 2012 WL 1109696, *1–2 (2d Cir. Apr.4, 2012), *quoting Colon,* 58 F.3d at 873. .. As such, it appears that a supervisor may still be held liable for his or her own nonfeasance as well as malfeasance.")

Inesti v. Hicks, No. 11 Civ. 2596(PAC)(AJP), 2012 WL 2362626, at *11 & n. 20 (S.D.N.Y. June 22, 2012) (R&R) ("It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth, Eighth or Fourteenth Amendments, the personal involvement analysis set forth in *Colon* may still

apply." [citing Michael Avery et al., *Police Misconduct: Law & Litigation* § 4:5 (2009) (discussing the impact of *Iqbal* on supervisor liability in § 1983 and *Bivens* actions)], *accepted and adopted in entirety by* ***Inesti v. Hagan,*** 2012 WL 3822224 (S.D.N.Y. Sept. 4, 2012).

White v. Schriro, No. 11 Civ. 5285(GBD)(MHD), 2012 WL 1414450, at *7 (S.D.N.Y. May 7, 2012) ("The Supreme Court recently held in *Iqbal,* 129 S.Ct. at 1949, that a supervisor's mere knowledge of a subordinate's discriminatory purpose was insufficient to establish that the supervisor had a discriminatory intent. Following *Iqbal,* courts in this Circuit have generally concluded that 'where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply.'")

Fountain v. City of New York, No. 10 Civ. 7538(BSJ)(KNF), 2012 WL 1372148, at *3, *4 (S.D.N.Y. Apr. 18, 2012) ("The Second Circuit has yet to rule on the question of whether any or all of the *Colon* criteria survive the Supreme Court's ruling on *Iqbal,* and in the interim, courts in this district have been divided as to what forms of supervisory conduct can give rise to § 1983 liability. [citing cases] The Court finds that, with respect to Bailey, it need not reach the question of whether the five factors elucidated in *Colon* survive *Iqbal* as the Amended Complaint fails to allege any involvement whatsoever by this Defendant. The Amended Complaint's only reference to Bailey's involvement is to state that Bailey, amongst others, failed 'to take disciplinary or other action to curb the known pattern of physical abuse of inmates by defendants Dipierr, Coverington and other rogue correction officers ...' The Amended Complaint does not provide any further facts, however, to support its claim that Bailey knew about a 'pattern of physical abuse.' Nor does the Amended Complaint make any allegation that Bailey was aware of the alleged incident, or that he supervised any of the defendants who were personally involved. In light of these pleading deficiencies, the Court finds that the Amended Complaint fails to sufficiently state a claim under § 1983 against Bailey for the purposes of surviving a motion to dismiss. Turning next to Schriro, the Court finds that the Amended Complaint has sufficiently plead a cause of action pursuant to § 1983 against this defendant in order to survive a motion to dismiss. The Amended Complaint contains the allegation that: 'Plaintiff wrote a complaint to Dora Shiro (sic); Comm of Corr, explaining his version of the assault, requesting an investigation be done and disciplinary action be taken against the rogue correction employees, and I never received a response.'. . The Court finds that this allegation sufficiently pleads supervisory involvement on the part of Schriro under either the second or fifth factors of the *Colon* analysis, factors which this Court regards as relevant in its consideration of the allegations in the instant action. In reaching this determination, this Court joins courts in this district which have held that 'the five *Colon* categories for personal liability of supervisors may still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.'")

Bouche v. City of Mount Vernon, No. 11 Civ. 5246(SAS), 2012 WL 987592, at *8 (S.D.N.Y. Mar. 23, 2012) (" 'Accordingly only the first and third *Colon* factors have survived the Supreme Court's decision in *Iqbal.*'" citing *Bellamy*)

Bertuglia v. City of New York, 839 F.Supp.2d 703, 720-23 (S.D.N.Y. 2012) ("[C]ourts in this Circuit are divided over the question of how many of the so-called *Colon* factors survive in the wake of *Iqbal*. [citing cases] Our Court of Appeals has not addressed the question directly yet, but it has indicated that at least some of the *Colon* factors other than direct participation remain viable. *See Rolon v. Ward*, 345 F. App'x 608, 611 (2d Cir.2009) ("A supervisory official personally participates in challenged conduct not only by direct participation, but by (1) failing to take corrective action; (2) creation of a policy or custom fostering the conduct; (3) grossly negligent supervision, or deliberate indifference to the rights of others."); *see also Scott v. Fischer*, 616 F.3d 100, 10809 (2d Cir.2010). . . The plaintiffs allege, with regard to the PA supervisory defendants, that PA defendants Schaffler, Ferrone, and D'Aleo at all times acted 'at their direction' 'and/or with their express approval.'. . This conclusory, formulaic language, standing alone, is not entitled to the assumption of truth. . . The only other allegations against the supervisory defendants are that, after Van Etten, in his capacity as Inspector General, received a complaint by Bertuglia against the Port Authority relating to the Port Authority's bidding process, and in retaliation for that complaint, 'Van Etten, along with ... Nestor and ... Kennedy, as well as defendants [Shaffler] and Ferrone, decided to selectively investigate and prosecute [the plaintiffs], leading to this matter being referred to the New York County District Attorney's Office and ADA Ruzow.'. . Neither the Amended Complaint, nor any other documents relied on by it, contain further facts regarding the specifics of this decision or the manner in which the PA supervisory defendants acted to execute it, or the nature of the supervisory defendants supervision or knowledge of the primary PA defendants. The issue is whether those allegations can support the remaining § 1983 claims against the supervisory defendants under any theory of supervisory liability. The Court will address in turn the remaining § 1983 claims with reference to both the supervisory and primary PA defendants. . . .There are no specific allegations that the supervisory defendants themselves provided false information to the ADA defendants, or indeed that they knew that information provided by subordinates was false; that they created a policy or practice of providing such false information; that they were grossly negligent in supervising the primary PA defendants with regard to their providing the false information; or that they had the opportunity to stop what they knew was a false arrest and did not do so. . . Accordingly, the motion to dismiss the false arrest claim as against the supervisory PA defendants is granted.")

Hamilton v. Fisher, Civ. No. 9:10–CV–1066 (MAD/RFT), 2012 WL 987374, at *17 n.17 (N.D.N.Y. Feb. 29, 2012) ("Several lower courts have struggled with the impact *Ashcroft v. Iqbal* . . . had upon *Colon*, and specifically whether *Iqbal* calls into question certain prongs of the *Colon* five-part test for supervisory liability. *See Sash v. United States*, 674 F.Supp.2d 531, 543 (S.D.N.Y.2009) (collecting cases). Because the Second Circuit has not yet issued a decision settling this matter, *Colon* remains good law.")

Hodge v. Sidorowicz, No. 10 Civ. 428(PAC)(MHD), 2012 WL 6778524, at *15, *16 & n. 15 (S.D.N.Y. Dec. 20, 2011) ("Recently. . . the scope of what qualifies as 'personal involvement' by a supervisor has come into question by virtue of a 2009 decision in which the Supreme Court held, in a pleading context, that '[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a

plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . The Second Circuit has not yet addressed how *Iqbal* affects the five categories of conduct that give rise to supervisory liability under *Colon.* However, because *Iqbal* specifically rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution,'. . .several decisions in this district have held that *Iqbal* has nullified most of the longstanding *Colon* factors. [citing *Bellamy* and *Newton*] These courts have concluded that '[o]nly the first and part of the third *Colon* categories pass *Iqbal*'s muster,' and that '[t]he other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated,' because only the first and third categories sufficiently allege personal involvement to permit supervisory liability to be imposed after *Iqbal.* . . We disagree with this narrow interpretation of *Iqbal,* as have a number of other courts.[citing cases] We believe, as observed in *Sash v. United States,* 674 F.Supp.2d 531 (S.D.N.Y.2009), that '[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.' . . Thus, as in the present case, where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply. . . Hence we look to earlier Second Circuit precedent that applies the tests of deliberate indifference or gross negligence to assess supervisory liability, a standard that demands a showing of actual or constructive notice by the supervisory defendant of constitutional torts committed by their subordinates. [citing *Sash* and *Connick v. Thompson*] . . . . Although *Connick* dealt solely with municipal liability under section 1983, we believe that its analysis is informative as to the scope of personal liability for supervisors and supports our conclusion that *Colon* remains viable. In the context of either municipal liability or supervisory liability, the Supreme Court has clearly stated that a defendant is only responsible for his own actions. . . Hence, if failure-to-train claims or the 'deliberate indifference' test for a supervisor's personal involvement in constitutional violations under § 1983 were no longer viable after *Iqbal,* we would expect that the same type of § 1983 claims would fail if asserted against a municipality. Yet in *Connick,* the Supreme Court applied the 'deliberate indifference' test to a failure-to-train claim. . . *Connick* ultimately rejected municipal liability on the grounds that the plaintiff had not proven the 'pattern of similar violations' establishing that the supervisory defendant had received adequate notice of the specific constitutional violation allegedly resulting from his failure to adequately train his subordinates, and thus failed to show a ' "policy of inaction" [that] [was] the functional equivalent of a decision by the city itself to violate the Constitution.'. . The Court did not, however, suggest that municipal liability was unavailable because it was premised on a failure-to-train claim, *compare Newton,* 640 F.Supp.2d at 448, or allegations of deliberate indifference, which would seem to fall within *Colon*'s fifth category of personal involvement. *Compare Bellamy,* 2009 WL 1835939 at *6.")

Gilliam v. Hamula, No. 06–CV–6351–CJS–MWP, 2011 WL 6148943, at *14 (W.D.N.Y. Dec. 12, 2011) (In deliberate indifference/medical needs case, court notes that "[t]he *Bellamy* case was affirmed by the Second Circuit in an unpublished decision. *Bellamy v. Mount Vernon Hosp.,* No. 09–3312–pr, 387 F. App'x 55, 2010 WL 2838534 (2d Cir. Jul.21, 2010). Nothing here shows that

Hamula participated in a constitutional violation, or created a policy or custom under which a constitutional violation occurred to Plaintiff.")

Young v. McGill, No. 3:09–cv–1205 (CSH), 2011 WL 6223042, at *4 (D. Conn. Dec. 8, 2011) ("The Supreme Court has explained that the degree of personal involvement required varies depending on the constitutional provision alleged to have been violated. . . For example, a claim of invidious discrimination, such as the racial discrimination claim present in *Iqbal*, requires a showing of discriminatory purpose. If, however, the claim relies on unreasonable conduct or the deliberate indifference standard, the factors set forth above may still apply. The Second Circuit has not yet addressed this issue. Until it does, this Court assumes that *Iqbal's* stricter standard applies only to intent-based constitutional claims.")

Jackson v. Goord, No. 06-CV-6172 CJS, 2011 WL 4829850, at *9 n.21 (W.D.N.Y. Oct. 12, 2011) ("Following the Supreme Court's decision in [*Iqbal*] there is some disagreement among district courts in this Circuit as to whether all of the foregoing '*Colon* factors' still apply. *See, e.g., Dilworth v. Goldberg,* 2011 WL 3501869 at *17 (S.D.N.Y. Jul. 28, 2011) (*"Iqbal* has caused some courts to question whether all five of the personal involvement categories survive that decision.") (collecting cases). It is unclear whether *Iqbal* overrules or limits *Colon,* therefore, in the absence of contrary direction from the Second Circuit, the Court will continue to apply those factors. *See, Platt v. Incorporated Village of Southampton,* 391 F. App'x 62, citing *Back v. Hastings on Hudson Union Free Sch. Dist.,* which sets forth all five of the *Colon* bases for imposing supervisory liability.")

Rivera v. Lempke, 810 F.Supp.2d 572, 576 (W.D.N.Y. 2011) ("The Supreme Court has also made clear that, at least as to claims involving discriminatory or retaliatory intent, a claim premised on a supervisor's 'knowledge and acquiescence' in subordinates' wrongdoing is insufficiently stated. . . Thus, following *Iqbal,* courts in this circuit 'have held that a defendant cannot be held liable under section 1983 unless that defendant took an action that deprived the plaintiff of his or her constitutional rights.' *Plair v. City of New York,* __ F.Supp.2d __, 2011 WL 2150658, at *4 (S.D.N.Y.2011). Mere failure to correct, or acquiescence in, a lower-level employee's violation is not enough. . . . Applying these standards here, I conclude that the claims must be dismissed. As to Lempke and Guiney, who were at all relevant times the superintendent and deputy superintendent of Five Points, the complaint simply alleges, with no supporting factual allegations, that they directed Abate to write a false, retaliatory misbehavior report against plaintiff. Plaintiff also alleges that he wrote to Lempke about these matters and that Lempke failed to remedy the constitutional violation. As explained above, such allegations are insufficient to state a § 1983 claim.")

Plunkett v. City of New York, No. 10–CV–6778 (CM), 2011 WL 4000985, at *8, *9 (S.D.N.Y. Sept. 2, 2011) ("The Supreme Court's decision in *Ashcroft v. Iqbal,*. . . did not completely eliminate the Colon rule, as the City contends. The claims in *Iqbal* involved, *inter alia,* denial of equal protection and discrimination– legal theories that require proof of discriminatory intent. In

that context, the Supreme Court held that a supervisor's 'mere knowledge of his subordinates discriminatory purpose' does not amount to the supervisor's violating the constitution. . . . That holding does not change the law on supervisory liability, particularly where, as here, the underlying constitutional right of the inmate is to be free from the use of cruel and unusual punishment or excessive force. In such cases, the traditional *Colon* categories of supervisory liability still apply. . . Indeed, following *Iqbal,* numerous Second Circuit courts have routinely continued to cite all five of the Colon categories as the bases for establishing supervisory liability in cases alleging violations of a plaintiff's Fourth and Eighth Amendment rights. [collecting cases] The cases of [*Bellamy* and *Newton*] which Defendants cite, are not binding on this Court and overlook the specific role that discriminatory intent played in *Iqbal.* In fact, subsequent decisions have explicitly called *Bellamy* and *Newton* into doubt, noting that those rulings 'may overstate *Iqbal*'s impact on supervisory liability' and holding that '[w]here the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth and Eighth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply.'. . It is the opinion of this court that *Colon* remains the standard for establishing personal involvement by supervisory officials under 42 U.S.C. § 1983.")

McGee v. Pallito, No. 1:10–CV–11, 2011 WL 6291954, at *11 (D. Vt. Aug. 3, 2011) ("Given the language in *Iqbal* cautioning courts to examine 'the constitutional provision at issue,'. . . this Court should follow this latter line of cases, and should not discard the *Colon* factors where the claim does not require a showing of discriminatory intent. [citing *Sash* and *Delgado*]")

Dilworth v. Goldberg, No. 10 Civ. 2224(RJH)(GWG), 2011 WL 3501869, at *17 (S.D.N.Y. July 28, 2011) ("*Iqbal* has caused some courts to question whether all five of the personal involvement categories survive that decision. [collecting cases] Others have continued to apply the five *Colon* categories without limitation [collecting cases]. . . . This Court agrees with those courts that have concluded that *Iqbal* must be viewed in light of the fact that it was dealing with an intentional race discrimination claim, and that *Iqbal* was rejecting an argument that the supervisor's mere knowledge of the subordinate's intent is tantamount to proof that the supervisor himself committed a discriminatory act.")

Aguilar v. Immigration and Customs Enforcement Div. of the U.S. Department of Homeland Sec., 811 F.Supp. 803, 806, 814-16, 817 n.5, 820 (S.D.N.Y. 2011) ("The plaintiffs, twenty-five individuals whose homes were searched by agents of the Immigration and Customs Enforcement Division of the Department of Homeland Security ('ICE') during eight operations between February and September of 2007, bring this putative class action against ICE; Michael Chertoff, the former Secretary of the Department of Homeland Security ('DHS'); Julie Myers, the former Assistant Secretary of ICE; John Torres, the former Director of ICE's Office of Detention and Removal Operations (the 'DRO'); and Marcy Forman, the former Director of ICE's Office of Investigations (the 'OI') (Chertoff, Myers, Torres, and Forman, together, the 'Supervisory Defendants'). . . .[I]in order to assert a claim under the equal protection component of the Fifth Amendment, a plaintiff must assert that the defendant intended to discriminate against the plaintiff

because of a prohibited classification. What is less clear is what a plaintiff must assert in order to plead a claim against a supervisory defendant for the violation of a different constitutional provision. . . . The Court of Appeals has not yet definitively decided which of the *Colon* factors remains a basis for establishing supervisory liability in the wake of *Iqbal,* and no clear consensus has emerged among the district courts within the circuit. . . .This uncertainty is echoed in the decisions of the courts of appeals for other circuits. *See, e.g., Argueta v. U .S. Immigration & Customs Enforcement,* 643 F.3d 60, 70 (3d Cir.2011); *Dodds v. Richardson,* 614 F.3d 1185, 1194 (10th Cir.2010); *Parrish v. Ball,* 594 F.3d 993, 1001 (8th Cir.2010). For the purpose of deciding this motion, however, it is not necessary for the Court to determine the standard for supervisory liability for violations of the Fourth Amendment after *Iqbal.* That is because there is no controversy that allegations that do not satisfy any of the *Colon* prongs are insufficient to state a claim against a defendant-supervisor. That is the case with respect to defendants Chertoff and Myers. . . . At best, [plaintiffs' allegations] suggest that the defendants, officials at the highest level of government in charge of overseeing a bureaucracy of tens of thousands of people, had access to information indicating that a handful of field agents in disparate locations around the country had engaged in constitutionally infirm practices. Accepted as true, this allegation is insufficient to establish that defendants Chertoff and Myers knew of and failed to intervene to prevent a widespread pattern of constitutional violations. . . . This conclusion with respect to defendants Chertoff and Myers is in accordance with the recent decision of the Third Circuit Court of Appeals in *Argueta v. U.S. Immigration & Customs Enforcement,* 643 F.3d 60 (3d Cir.2011). . . . *Argueta* reached a different conclusion as to the potential liability of defendant Torres than does this Court . . . . The facts alleged in that case, however, differ in critical respects from the facts alleged in this one. Most notably, the complaint in *Argueta* did not allege that defendant Torres was directly involved in the alleged Fourth Amendment violations by virtue of having authored detailed operational plans. Rather, the plaintiffs in *Argueta* alleged principally that defendant Torres knew of and acquiesced in constitutional violations, because he was on notice that they were occurring, and that he had 'direct responsibility for the execution of fugitive operations.'. . The allegations against defendant Torres that the *Argueta* court considered were thus similar in kind to those alleged against defendants Chertoff and Myers, and dissimilar from those alleged against defendant Torres, in this case. . . . [As to the Fifth Amendment equal protection claims,] the plaintiffs are required to plead that an individual defendant against whom relief is sought 'acted with discriminatory purpose.'. . . The plaintiffs have wholly failed to do so with respect to any of the four Supervisory Defendants.")

Rheaume v. Hofmann, No. 1:10–CV–318, 2011 WL 2947040, at *3 n.1 (D. Vt. June 6, 2011) ("In *Iqbal*, the Supreme Court ruled that '[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.' 129 S.Ct. at 1948. This ruling has led several courts to conclude that only some of the *Colon* factors remain viable. *See, e.g., Bellamy v. Mt. Vernon Hosp,* 2009 WL 1835939, at *4 (S.D.N.Y. June 26, 2009). Other courts have held that the personal involvement requirements for supervisors, post- *Iqbal,* depend 'on the constitutional provision alleged to have been violated,' and that *Iqbal* most directly applies to intent-based

constitutional claims (*e.g.* racial discrimination). *See Qasem v. Toro*, 737 F.Supp.2d 147, 151 (S.D.N.Y.2010); *Sash v. United States*, 674 F.Supp.2d 531, 544 (S.D.N.Y.2009). For purposes of this case, particularly because it does not allege the sort of intentional discrimination addressed in *Iqbal*, I will assume that all of the *Colon* factors still apply.")

D'Attore v. New York City, No. 10 Civ. 3102(JSR)(MHD), 2011 WL 3629166, at *9, *10 (S.D.N.Y. June 2, 2011) ("[T]he scope of what qualifies as 'personal involvement' by a supervisor has recently come into question by virtue of the *Iqbal* decision, in which the Supreme Court held that '[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . . The Second Circuit has not yet addressed how *Iqbal* affects the five categories of conduct that give rise to supervisory liability under *Colon*. . . . We believe, as observed in *Sash v. United States*, 674 F.Supp.2d 531 (S.D.N.Y.2009), that '[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that "a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution."'. . . Thus, as in the present case, where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply. . . . Plaintiff's allegations that he wrote letters to defendants Quinones, Mirabel and Schirro evidence a possible failure by them 'to remedy a wrong after being informed through a report or appeal,' *Hernandez v. Keane*, 341 F.3d 137, 145 (2d Cir.2003), and thus plaintiff sufficiently pleads that defendants disregarded a risk of excessive harm of which they were aware . . . .In light of plaintiff's allegations of his communication of the issues with these supervisory defendants, he sufficiently pleads that they were involved in the alleged violations of his rights and that they acted with a sufficiently culpable state of mind.")

Plair v. City of New York, No. 10 Civ. 8177, 2011 WL 2150658, at **4-6 (S.D.N.Y. May 31, 2011) ("Prior to *Iqbal*, the controlling authority on supervisory liability was *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995), which held that liability 'may be shown by evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.'. . Following *Iqbal*, courts in this district have held that a defendant cannot be held liable under section 1983 unless that defendant took an action that deprived the plaintiff of his or her constitutional rights. [citing cases] In that context, with intention-based constitutional claims in mind, the Supreme Court held that a supervisor's 'mere knowledge of his subordinate's discriminatory purpose' does not amount to the supervisor's violating the constitution. . . However, 'the factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.'. . Here, the underlying constitutional right of the inmate is to be free from the use of excessive force by his jailers. In such a case, I conclude that the traditional *Colon* categories of

supervisory liability still apply. . . Following *Iqbal*, other judges in the Second Circuit have continued to cite all five of the *Colon* categories as the bases for establishing supervisory liability in cases alleging violations of a plaintiff's Fourth and Eighth Amendment rights. [citing cases] . . . . In this action *Colon* remains the standard for establishing personal involvement by supervisory officials under 42 U.S.C. § 1983. Here, the Complaint attempts to state a claim under the third *Colon* category; each of the supervisors is alleged to have received extensive information concerning the City's pattern of incidents involving unnecessary and excessive force to inmates and the failure of the DOC to prohibit its staff from using such force, and the Supervisory Defendants are alleged to have failed to take any steps to curb those unconstitutional abuses. . . They are alleged to have allowed the continuation of a policy or custom under which the unconstitutional practice of using excessive force against inmates incarcerated in the City's jails has occurred. . . However, Plaintiff's allegations of the existence of a policy or custom are conclusory and do not reach the requisite level of plausibility to survive under *Twombly* and *Iqbal.* . . In the Complaint, Plaintiff points to two cases of violence that occurred several years prior to the alleged violence against him and the existence of reports from unspecified time periods which would have reported violence at New York City detention facilities. . . He conclusorily alleges that these prior incidents established a policy or custom of violence against prisoners, and that the Supervisory Defendants were aware of and allowed this policy to continue. . . Given the passage of time and the installation of a new DOC Commissioner and other supervisory staff between the prior violent incidents and the alleged abuse of Plaintiff, as well as the general failure of Plaintiff to plausibly allege that a policy or custom underlay these acts of violence, Plaintiff has not sufficiently alleged that the violence which harmed him was part of a larger policy or custom at the DOC. . . Plaintiff has therefore failed to state a claim under Colon against the Supervisory Defendants.")

Delgado v. Bezio, No. 09 Civ. 6899(LTS), 2011 WL 1842294, at *9 (S.D.N.Y. May 9, 2011) ("The Second Circuit has not yet addressed the impact, if any, of *Iqbal* on the *Colon* standard. Courts in this district have reached contrary conclusions, holding in some cases that only the first and third *Colon* categories remain viable bases for liability, *see, e.g.*, *Bellamy v. Mt. Vernon Hosp.*, 07 civ 1801, 2009 WL 1835939, at *4 (S.D.N.Y. June 26, 2009) and, in other cases, that 'the personal involvement required to overcome a 12(b)(6) motion varies depending on the constitutional provision alleged to have been violated' such that the applicability of each Colon category will depend on the nature of the violation alleged, *see Qasem,* 737 F.Supp.2d at 151-52; *see also D'Olimpio v. Crisafi*, 718 F.Supp.2d 340, 346-47 (S.D.N.Y.2010). This Court agrees with the latter line of reasoning. . . . Here, Plaintiff does not assert an intentional discrimination claim of the sort that was at issue in *Iqbal*, and intent is not an element of his due process claims. Plaintiff's due process claims against Prack, Bezio and Cook fall into the second *Colon* category of personal involvement–namely, that 'the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong.'. . The *Iqbal* decision would clearly preclude liability of a supervisor on the basis of mere knowledge that a subordinate had rendered a decision that was intentionally discriminatory, and would likely preclude as well a claim based on affirmance of such a decision (at least absent a proffer that the affirmance was intentionally

discriminatory). However, it cannot be said that the *Iqbal* holding precludes liability where, as is alleged here, supervisory personnel affirmed a decision that they knew to have been imposed in violation of Plaintiff's due process rights, thus continuing a deprivation of liberty without due process of law. Plaintiff claims that he was denied due process by reason of the withholding of information on confidentiality grounds at his disciplinary hearing. He also alleges that he appealed to, or sought reconsideration from, Defendants Prack, Bezio and Cook. In his appeal and reconsideration-request papers, his attorney identified the withholding of information as grounds for the infirmity of the decision and argued that the reliance on confidential information denied Plaintiff the ability to defend himself at the hearing. . . Defendants Prack, Bezio and Cook each denied an appeal or request for reconsideration. Read in the light most favorable to Plaintiff his Complaint and supporting documents allege sufficiently the personal involvement of Prack, Bezio and Cook, as they are alleged to have had the power, and to have refused, to vacate a penalty they knew had been imposed in violation of Plaintiff's due process rights, thus violating Plaintiff's constitutional rights by knowingly continuing a deprivation of liberty without due process of law. Accordingly, the motion will be denied to the extent it seeks dismissal of Plaintiff's due process claims against Prack, Bezio and Cook.")

Thomas v. Calero, 824 F.Supp.2d 488, 505-11 (S.D.N.Y. 2011) ("The Second Circuit has not yet addressed how *Iqbal* affects the five categories of conduct that give rise to supervisory liability under *Colon.* However, because *Iqbal* specifically rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution,' 129 S.Ct. at 1949, several decisions in this district have held that *Iqbal* has nullified most of the longstanding *Colon* factors. [collecting cases] We disagree with these narrow interpretations of *Iqbal,* as have a number of other courts. [collecting cases] Thus, as in the present case, where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply 'as long as [it is] consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.'. . Here, plaintiff alleges violations of his right to procedural due process within the context of a prison disciplinary hearing. As stated above, this does not require the plaintiff to show that the defendants intended to deprive him of his procedural rights, but only that defendants deprived him of a liberty interest as a result of insufficient process. . . This standard contains no reference to intent, or, indeed, even to the lesser 'deliberate indifference' standard applied to Eighth Amendment claims for denial of medical care, under which a plaintiff must show that the defendant 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'. . Looking, therefore, to *Colon,* we view the second category–that '(2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong,' *Colon,* 58 F.3d at 873 – as the most applicable for evaluating plaintiff's claim. . . . [A] number of courts in this Circuit have concluded that merely affirming the hearing officer's determination is not a sufficient basis to impose liability under the second *Colon* factor. [noting cases] On the other hand, other courts have found that affirming a hearing officer's determination on appeal is sufficient to establish personal involvement under the second *Colon*

factor. [noting cases] We believe that, as a matter of pleading, Director Bezio's actions, by affirming CHO Calero's determination with only a modification of the penalty, . . .are sufficient to demonstrate personal involvement and could lead a trier of fact to impose liability under the second *Colon* factor. . . . Director Bezio's actions fall squarely within the second *Colon* factor– after he learned, via an appeal, of an alleged violation of plaintiff's rights, he not only failed to remedy the wrong, but allowed it to continue. . . . We therefore hold that the facts alleged in plaintiff's complaint against Director Bezio's may be sufficient to prove personal involvement under the second *Colon* factor. In applying *Colon* in this manner, there is one final issue that we must address. Some courts have held that, in applying the second *Colon* category, the plaintiff must plead that there was an 'ongoing' violation, which the defendant had the opportunity to 'remedy.'. . . At the time of plaintiff's appeal to Director Bezio, he was confined in SHU and, following his appeal, his confinement in SHU continued, resulting in a total of 291 days of confinement. . . . Thus, under the second *Colon* factor, we conclude that, when viewed in the light most favorable to the plaintiff, the facts pled are sufficient to withstand defendants' 12(b)(6) motion. Finally, our initial determination was that, despite *Iqbal,* all five *Colon* factors still apply to this case. However, should the Second Circuit adopt a more stringent interpretation and limit the *Colon* categories to include only the first and part of the third categories, we still believe plaintiff's claim survives. Plaintiff claims that by affirming CHO Calero's determination, with only a modification of the sentence, Director Bezio is responsible for the CHO's alleged constitutional violation. Looking to the first *Colon* category, 'that the defendant participated directly in the alleged constitutional violation', we believe plaintiff has pled sufficient facts to overcome defendants' 12(b)(6) motion.")

Germano v. Dzurenda, No. 3:09cv1316 (SRU), 2011 WL 1214435, at *13 n.3 (D. Conn. Mar. 28, 2011) ("The defendants argue that the Second Circuit's traditional factors governing supervisory liability are no longer valid in the wake of *Iqbal.* It is not clear that the Second Circuit's personal involvement theory was limited by *Iqbal. . .* Even if *Iqbal* has limited the personal liability theory, however, 'the Second Circuit has emphasized the importance in providing *pro se* incarcerated plaintiffs with an opportunity to conduct discovery to identify the officials "who have personal liability."' *Sosa v. Lantz,* 3:09cv869, 2010 WL 3925268, at *5 (D.Conn. Sept. 30, 2010) (quoting *Davis v. Kelly,* 160 F.3d 917, 921 (2d Cir.1998)).")

Warrender v. U.S., No. 09-CV-2697 (KAM)(LB), 2011 WL 703927, at *5 n.1 (E.D.N.Y. Feb. 17, 2011) ("Although the Second Circuit has not ruled on the precise issue of whether any of the *Colon* categories remain viable after *Iqbal, see Sash v. United States*, 674 F.Supp.2d 531, 543 (S.D.N.Y.2009), the court agrees with other courts in this district which have found that most of the *Colon* categories have been superseded by *Iqbal. . .* Accordingly, the proper standard under which to view plaintiff's allegations is prescribed by the Supreme Court in *Iqbal* rather than the Second Circuit's earlier decision in *Colon.*")

Livermore v. City of New York, No. 08 CV 4442(NRB), 2011 WL 182052, at *8 (S.D.N.Y. Jan. 13, 2011) ("Although the Supreme Court's decision in *Iqbal* eliminated certain categories of

supervisory liability that were recognized in *Colon*, a plaintiff may still state a claim based on a supervisor creating or condoning a policy or custom under which unconstitutional practices occur. [citing *Scott v. Fischer,* 616 F.3d 100, 108-09 (2d Cir.2010)] We agree with defendants that, as an intellectual matter, it is unlikely that plaintiff will prevail against the Supervisor Defendants on the basis of an unconstitutional policy or custom for two related reasons. First, plaintiff has already concluded that she cannot successfully pursue an analogous *Monell* claim against the City. Second, plaintiff's argument against the Medical Defendants turns on the existence of the DOHMH alcohol withdrawal policy. Thus, arguing that there was an unconstitutional policy or custom appears to be inconsistent with plaintiff's theory that there was a proper policy that the Medical Defendants failed to observe. . . However, the motion to dismiss turns on the sufficiency of the allegations alone. And here, the allegations that relate to policies and customs are sufficiently plausible and provide fair notice to the Supervisor Defendants. Thus, this claim against the Supervisor Defendants survives a motion to dismiss.")

Diaz-Bernal v. Myers, No. 3:09cv1734 (SRU), 2010 WL 5211494, at *18, *20, *21 (D. Conn. Dec. 16, 2010) ("The individual defendants argue that the *Colon* factors were diminished by *Iqbal.* . . In *Iqbal,* the Supreme Court rejected the idea that a supervisor could be liable for an employee's equal protection violations based on their 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.'. . In rejecting the supervisors' liability, the Supreme Court insisted that supervisors 'may not be held accountable for the misdeeds of their agents.... [E]ach government official ... is only liable for his or her own misconduct.... [P]urpose rather than knowledge is required to impose *Bivens* liability ... for unconstitutional discrimination.'. . The Second Circuit has recently suggested that at least some of the *Colon* factors survive *Iqbal. Scott v. Fischer,* 616 F.3d 100, 110 (2d Cir.2010) ("To be sure, [t]he personal involvement of a supervisory defendant may be shown by evidence that: ... the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom.' ") (citing *Colon,* 58 F.3d at 837). . . . Here, the plaintiffs have put forth a plausible claim that Myers and Torres are subject to supervisory liability because their actions imposing intense pressure to make arrests, allowing bystander arrests, and providing inadequate training created a policy under which constitutional violations occurred. . . . Chadbourne and Martin are not liable under the same theory as Myers and Torres, because they did not create the FOTS [Fugitive Operative Teams] arrest quota, and the litigation plaintiffs point to as providing notice to the defendants did not allege unconstitutional conduct in Connecticut or Massachusetts, where Chadbourne and Martin were supervisors. Instead, Chadbourne and Martin are potentially liable for creating a policy of conducting large-scale raids without adequately training raid officers. Courts split over whether a failure to train claim can be the basis for supervisory liability post-*Iqbal. Compare Newton v. City of New York,* 640 F.Supp.2d 426, 448 (S.D.N.Y.2009) ("[P]assive failure to train claims pursuant to section 1983 have not survived the Supreme Court's recent decision in *Ashcroft v. Iqbal.* "), *with D'Olimpio v. Crisafi,* 718 F.Supp.2d 340, 347 (S.D.N.Y.2010) (*Colon's* bases for liability survive because they 'are not founded on a theory of *respondeat superior,* but rather on a recognition that personal involvement of defendants in alleged constitutional deprivations' can be shown by nonfeasance as well as misfeasance.")

(quoting *Colon*, 58 F.3d at 873). I agree with the latter line of cases. A supervisor who has been deliberately indifferent in failing to train is not liable for a passive constitutional violation based on the theory of respondeat superior. Instead, a failure to train can be an active violation on the part of a supervisor who has willfully chosen to allow the harm resulting from a lack of training. In these cases, a failure to train is more akin to those situations in which a defendant 'create [s] a policy or custom under which unconstitutional practices occurred, or allow[s] the continuance of such a policy or custom," which the Second Circuit post-*Iqbal* has recognized as a basis for liability. Scott, 616 F.3d at 110 (quoting Colon, 58 F.3d at 873). There is some evidence here that Chadbourne and Martin should have been on notice about unconstitutional conduct on the part of raid officers, so that their failure to train might be found to constitute deliberate indifference.")

Rivera v. Metropolitan Transit Authority, 750 F.Supp.2d 456, 462, 463 (S.D.N.Y. 2010) ("Precisely what remains of the Second Circuit's personal involvement rule in light of *Iqbal* is not entirely clear. While the Circuit has not yet addressed the question, one of my colleagues has concluded that: '[o]nly the first and part of the third *Colon* categories pass *Iqbal's* muster – a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred. The other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated–situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate.'. . .That view is persuasive. There is no suggestion that any of these defendants directly participated in any of the alleged constitutional violations–false arrest, malicious prosecution, excessive use of force or anything else. Nor is there any admissible evidence that any of them 'create[d] or allow[ed] the continuation of a policy or custom under which [the alleged] unconstitutional practices occurred.'. . It is doubtful that the evidence would permit a finding that any of them thought that violations occurred but looked the other way, and even that would not be sufficient. Accordingly, they are entitled to dismissal.")

McNair v. Kirby Forensic Psychiatric Center, No. 09 Civ. 6660(SAS), 2010 WL 4446772, at *6 (S.D.N.Y. Nov. 5, 2010) ("The *Iqbal* decision abrogates several of the categories of supervisory liability enumerated in *Colon v. Coughlin. . . Iqbal's* 'active conduct' standard only imposes liability on a supervisor through section 1983 if that supervisor had an active hand in the alleged constitutional violation. Only two *Colon* categories survive after *Iqbal* - (1) a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation, and part of (3) if that supervisor creates a policy or custom under which unconstitutional practices occurred. The other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated – situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate.").

Edwards v. City of Kingston, No. 1:08-CV-803 (LEK/RFT), 2010 WL 3761892, at *10 (N.D.N.Y. Sept. 20, 2010) ("The personal involvement of a supervisory defendant may be shown by evidence of, *inter alia:* participation directly in the alleged constitutional violation; failure to remedy the violation after being informed through a report or appeal; creation or allowance of the continuation

of a policy or custom under which unconstitutional practices occur; or gross negligence in supervising subordinates who commit the wrongful acts. *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995). The Supreme Court ruling in *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009), cast doubt on the viability of some of these factors in discrimination suits. The Court ruled that mere knowledge and acquiescense does not suffice to create liability under that type of claim. . . However, the Court's ruling certainly does not prevent finding supervisors liable when their direct participation is alleged or where they have purposefully violated their 'superintendent responsibilities.' As such, Defendants' argument that Gorsline did not directly participate in inappropriate or wrongful sexual conduct against Plaintiffs in unavailing. . . While Plaintiffs directly implicate Gorsline in some measure, particularly in terms of gender discrimination, their claims against him rest on his supervisory role and his full knowledge, at least passive acceptance, and failure to act an ongoing hostile work environment, despite directly witnessing multiple incidents and becoming aware of Plaintiffs' distress. Accordingly, as Gorsline exhibits a sufficient level of personal involvement to be held liable, summary judgment as to the § 1983 claims against him is denied.")

Qasem v. Toro, No. 09 Civ. 8361(SHS), 2010 WL 3156031, at **3-5 (S.D.N.Y. Aug. 10, 2010) ("The Second Circuit has not yet addressed how *Iqbal* affects the five categories of conduct that give rise to supervisory liability under *Colon.* As explained in detail in *D'Olimpio v. Crisafi,* No. 09 Civ. 7283, 2010 U.S. Dist. LEXIS 59563, at *14-18 (S.D.N.Y. June 15, 2010), in the wake of *Iqbal,* certain courts in this district have found that '[o]nly the first and part of the third *Colon* categories pass *Iqbal's* muster,' and that '[t]he other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated,' because only the first and third categories allege personal involvement sufficiently to permit supervisory liability to be imposed after *Iqbal. Bellamy v. Mount Vernon Hosp.,* No. 07 Civ. 1801, 2009 U.S. Dist. LEXIS 54141, at *6 (S.D.N.Y. June 26, 2009); *see also Newton v. City of N.Y.,* 640 F.Supp.2d 426, 448 (S.D.N.Y.2009) ("[P]assive failure to train claims pursuant to section 1983 have not survived the Supreme Court's recent decision in *Ashcroft v. Iqbal.*"); *Joseph v. Fischer,* No. 08 Civ. 2824, 2009 U.S. Dist. LEXIS 96952, at *42-43 (S.D.N.Y. Oct. 8, 2009) ("Plaintiff's claim, based on [defendant's] "failure to take corrective measures," is precisely the type of claim Iqbal eliminated."). This Court, as did the Court in *D'Olimpio,* disagrees with this narrow interpretation of *Iqbal.* As *Iqbal* noted, the degree of personal involvement required to overcome a Rule 12(b)(6) motion varies depending on the constitutional provision alleged to have been violated. Invidious discrimination claims require a showing of discriminatory purpose, but there is no analogous requirement applicable to Qasem's allegations of repeated sexual assaults. *See Sash v. United States,* 674 F.Supp.2d 531, 544 (S.D.N.Y.2009) (citing *Chao v. Ballista,* 630 F.Supp.2d 170, 178 n. 2 (D.Mass. July 1, 2009)); *see also D'Olimpio,* 2010 U.S. Dist. LEXIS 59563, at *16. *Colon's* bases for liability are not founded on a theory of respondeat superior, but rather on a recognition that 'personal involvement of defendants in alleged constitutional deprivations' can be shown by nonfeasance as well as misfeasance. *Id.* at * 17 (quoting *Colon,* 58 F.3d at 873). Thus, the five *Colon* categories supporting personal liability of supervisors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated. . . . Plaintiff's allegations and inferences, if proven, would entitle her to relief under the Fourteenth Amendment

and Eighth Amendments. . . . The Court finds that plaintiff has alleged sufficient facts that Thornton – the Superintendent of the DOCS facility where plaintiff resided–and Rogers–the Deputy Superintendent for Security at that same facility – were deliberately indifferent to her health and safety and that they were responsible for creating or maintaining policies and practices that failed to prevent plaintiff from being raped and assaulted. The Eighth Amendment requires prison officials to take reasonable measures to guarantee the safety of inmates in their custody. . . . Although discovery may ultimately reveal that defendants Thornton and Rogers made every reasonable effort to prevent the alleged sexual abuse, Qasem has alleged sufficient facts to allow the Court 'to draw the reasonable inference' that the defendants 'are liable for the misconduct alleged.'")

D'Olimpio v. Crisafi, 718 F.Supp.2d 340, 347 (S.D.N.Y. 2010) ("The defendants here note that certain courts in this District have read these passages of *Iqbal* to mean that '[o]nly the first and part of the third *Colon* categories pass *Iqbal's* muster ... [t]he other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated.' [collecting decisions] This Court respectfully disagrees. As *Iqbal* noted, the degree of personal involvement varies depending on the constitutional provision at issue; whereas invidious discrimination claims require a showing of discriminatory purpose, there is no analogous requirement applicable to D'Olimpio's allegations regarding his search, arrest, and prosecution. . . *Colon's* bases for liability are not founded on a theory of *respondeat superior*, but rather on a recognition that 'personal involvement of defendants in alleged constitutional deprivations' can be shown by nonfeasance as well as misfeasance. . . Thus, the five *Colon* categories for personal liability of supervisors may still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.")

Morpurgo v. Incorporated Village of Sag Harbor, No. 07-CV-1149 (JS)("KT), 2010 WL 889778, at *14 (E.D.N.Y. Mar. 5, 2010) ("Assuming Plaintiff's allegations against Defendants . . . to be true, Plaintiff has, at most, alleged that these Defendants knew of and possibly acquiesced in the constitutional violations committed by their subordinates . . . . However, Plaintiff has not stated that any of these Defendants participated directly in the alleged illegal conduct (*i.e.*, the inspections of the Property and the posting of the sign indicating Plaintiff's home was unfit for human occupancy). Based upon the lack of particularized allegations against these four individuals, and in light of the Supreme Court's holding in *Iqbal* eliminating supervisory liability in situations where supervisors knew of and acquiesced in a constitutional violation committed by a subordinate, Plaintiff's 1983 claims against [supervisory Defendants] cannot survive the motion to dismiss.")**.**

Klemonski v. Department of Correction, No. 3:09-CV-787 (VLB), 2010 WL 729002, at *2, *3 (D. Conn. Feb. 25, 2010) ("*Iqbal* has arguably nullified the criteria imposing supervisory liability where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate, such that a supervisor can only be held liable if he or she participated directly in the alleged constitutional violation or created a policy or custom under which unconstitutional

practices occurred. *See Sash v. United States*, No, 08 Civ. 8332("JP), 2009 WL 4824669, at *10-*11 (S.D.N.Y. Dec. 15, 2009) (discussing and disagreeing with several district court decisions concluding that *Iqbal* has nullified several criteria for imposing supervisory liability because it established an 'active conduct' standard). The Second Circuit has not yet addressed the effect of *Iqbal* on the standard for supervisory liability. This Court, however, need not resolve the issue. The plaintiff has not alleged any facts in his complaint relating to defendants Murphy and Lantz. He merely identifies them as defendants. Thus, the plaintiff has not satisfied any criteria for imposing supervisory liability and appears to assert only a claim of respondeat superior.")**.**

Mateo v. Fischer, 682 F.Supp.2d 423, 430, 431 (S.D.N.Y. 2010) ("Courts in the Second Circuit are divided on whether a supervisor's'review and denial of a grievance constitutes personal involvement in the underlying alleged unconstitutional act.' *Burton v. Lynch*, No. 08-8791, 2009 WL 3286020, at *6 (S.D.N.Y. Oct. 13, 2009). As Judge Sand noted in *Burton*, some courts distinguish between the *degree* of response to an inmate's grievance – for example, between summarily denying a grievance and denying it in a detailed response that specifically addresses the plaintiff's allegations. . . The Court finds that distinction persuasive. A supervisor's detailed, specific response to a plaintiff's complaint suggests that the supervisor has considered the plaintiff's allegations and evaluated possible responses. . . A pro forma response suggests nothing like that. Here, Mateo's complaint claims only that Fischer received his letters, forwarded at least two of them to subordinates for investigation, and sent Mateo a response to the effect that Mateo had provided insufficient information to support his allegations. Without more, these allegations prove only the scantest awareness of Mateo's claims. Indeed, Mateo's complaint openly admits that Fischer lacked full knowledge of his claims: it suggests that 'facility officials' never reported his allegations in full to Fischer. On these pleadings, the Court must conclude that Fischer lacked personal involvement; all claims against him are dismissed.).

Sash v. U.S., 674 F.Supp.2d 531, 543-45 & n.16 (S.D.N.Y. 2009) ("Although the Second Circuit has not weighed in on what remains of *Colon* after *Iqbal*, several decisions in this district have concluded that by specifically rejecting the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution,' *Ashcroft v. Iqbal*, 129 S.Ct. at 1949, *Iqbal* effectively nullified several of the classifications of supervisory liability enunciated by the Second Circuit in *Colon v. Coughlin.* [citing *Bellamy, Fischer*, and] *Newton v. City of N.Y.*, 640 F.Supp.2d 426, 448 (S.D.N.Y.2009) ("[P]assive failure to train claims pursuant to section 1983 have not survived the Supreme Court's recent decision in *Ashcroft v. Iqbal*."). While *Colon* permitted supervisory liability in situations where the supervisor knew of and acquiesced in a constitutional violation committed by a subordinate, these post-*Iqbal* district court decisions reason that *Iqbal's* 'active conduct' standard imposes liability only where that supervisor directly participated in the alleged violation or had a hand in creating a policy or custom under which the unconstitutional practices occurred. These decisions may overstate *Iqbal's* impact on supervisory liability. *Iqbal* involved alleged intentional discrimination. *Ashcroft v. Iqbal*, 129 S.Ct. at 1942. The Supreme Court specifically held that '[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.' *Ashcroft v. Iqbal*,

129 S.Ct. at 1948. Where the alleged constitutional violation involved 'invidious discrimination in contravention of the First and Fifth Amendments,' *Iqbal* held that 'plaintiff must plead and prove that the defendant acted with discriminatory purpose,' whether the defendant is a subordinate or a supervisor. *Ashcroft v. Iqbal*, 129 S.Ct. at 1948-49. It was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.' *Ashcroft v. Iqbal*, 129 S.Ct. at 1949. Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth and Eighth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply. . . *See, e.g.*, *Chao v. Ballista*, 630 F.Supp.2d 170, 178 n.2 (D.Mass. July 1, 2009) (noting that the 'state of mind required to make out a supervisory claim under the Eighth Amendment – i.e., deliberate indifference – requires less than the discriminatory purpose or intent that Iqbal was required to allege in his suit....); Michael Avery et al., *Police Misconduct: Law & Litigation* ' 4:5 (2009) (discussing the impact of *Ashcroft v. Iqbal* on issue of supervisor liability in section 1983 and *Bivens* actions). . . .Regardless of whether *Colon* or an *Iqbal*-limited standard applies, supervisory defendants Blackford and Merrigan are entitled to summary judgment. It is undisputed that defendant Blackford was not present at Sash's arrest, nor is there any evidence that he directed the use of excessive physical force against Sash. . . Similarly, although defendant Merrigan was present at the scene of the arrest, Sash does not contend that Merrigan ever laid a hand on him, nor does he contend that Merrigan ordered the Mulcahys to use excessive physical force. . . To the extent Sash argues that Blackford and Merrigan are liable on a theory of bystander liability, . . . he offers no supporting evidence. . . . Although Sash contends that Blackford and Merrigan should be liable based on their failure to provide necessary and proper training to the Mulcahys, or alternatively, on their failure to implement a policy that would have prevented the use of excessive force, there is no evidence to support these claims.").

Woodward v. Mullah, No. 08-CV-463A, 2009 WL 4730309, at *2, *3 (W.D.N.Y. Dec. 7, 2009) ("Some courts have found that affirming a hearing officer's determination on appeal alone is sufficient to establish personal involvement under the second *Colon* factor. [collecting cases] However, other courts have concluded that merely affirming the hearing determination is not a sufficient basis to impose liability. [collecting cases] The distinction between these cases appears to be that 'while personal involvement cannot be founded solely on supervision, liability can be found if the official proactively participated in reviewing the administrative appeals as opposed merely to rubber-stamping the results.' *Hamilton v. Smith*, 2009 WL 3199531, *22 (N.D.N.Y.2009), *report and recommendation adopted as modified*, 2009 WL 3199520. . . . Based upon the limited allegations of the complaint, I find that plaintiff has failed to sufficiently allege defendant Bezio's personal involvement in the underlying alleged due process violation.").

Alston v. Bendheim, No. 08 Civ. 1517, 2009 WL 4035574, at *8 (S.D.N.Y. Nov. 23, 2009) ("A medical supervisor can be liable under § 1983 if he is grossly negligent in his supervision of a

subordinate who has committed a constitutional violation. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir.1995).")

Stevens v. New York, No. 09 Civ. 5237(CM), 2009 WL 4277234, at *8 (S.D.N.Y. Nov. 23, 2009) ("The Second Circuit has stated that one of the ways in which a supervisory official can be personally involved in a constitutional deprivation is when 'after being informed of the violation through a report or appeal, [the official] failed to remedy the wrong.' *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995) (*citing Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994)). Stevens has alleged that he contacted King via certified mail, that he spoke with King on the telephone, and that he complied with King's request for supporting documentation and contact information for Stevens' counsel, and that nonetheless, King did nothing. Assuming that all allegations in the Complaint are true, this is sufficient to state a cause of action. Therefore, Stevens' § 1981 and § 1983, NYSHR, and NYCHR claims against defendant King are not dismissed at this time.")

Alli v. City of New York, No. 11 Civ. 7665(BSJ)(MHD), 2012 WL 4887745, *5, *6 & n.1 (S.D.N.Y. Oct. 12, 2012) ("Recently, . . . the scope of what qualifies as 'personal involvement' by a supervisor has come into question by virtue of a 2009 decision in which the Supreme Court held, in a pleading context, that '[b]ecause vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.' *Iqbal,* 129 S.Ct. at 1948. The Second Circuit has not yet addressed how *Iqbal* affects the five categories of conduct that give rise to supervisory liability under *Colon.* However, because *Iqbal* specifically rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution,' several decisions in this district have held that *Iqbal* has nullified most of the longstanding *Colon* factors. . . These courts have concluded that '[o]nly the first and part of the third *Colon* categories pass *Iqbal'*s muster,' and that '[t]he other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated,' because only the first and third categories sufficiently allege personal involvement to permit supervisory liability to be imposed after *Iqbal.* . . We disagree with this narrow interpretation of *Iqbal,* as have a number of other courts. . .We believe, as observed in *Sash v. United States,* 674 F.Supp.2d 531 (S.D.N.Y.2009), that '[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Thus, as in the present case, where the claim does not require a showing of discriminatory intent, the personal-involvement analysis set forth in *Colon* should still apply. . . Hence we look to earlier Second Circuit precedent that applies the tests of deliberate indifference or gross negligence to assess supervisory liability. That analysis demands a showing of actual or constructive notice to the supervisory defendant of constitutional torts committed by their subordinates. . . . Although *Connick* dealt solely with municipal liability under section 1983, we believe that its analysis is informative as to the scope of personal liability for supervisors, and supports our conclusion that *Colon* remains largely intact. In the context of either municipal liability or supervisory liability, the Supreme Court has clearly stated that a defendant is only responsible for his own actions. . . Hence, if failure-to-train claims or the

'deliberate indifference' test for a supervisor's personal involvement in constitutional violations under § 1983 were both no longer viable after *Iqbal*, we would expect that the same type of section 1983 claims would fail if asserted against a municipality. Yet in *Connick,* which post-dates *Iqbal,* the Supreme Court applied the 'deliberate indifference' test to a failure-to-train claim. . . In addressing Connick's failure-to-train claim against the supervisory defendant, the Supreme Court ultimately rejected municipal liability on the grounds that the plaintiff had not satisfied the substantive requirements of the legal standard. The Court thus found that Connick failed to show a ' "policy of inaction" that [was] the functional equivalent of a decision by the city itself to violate the Constitution.'. . Notably, however, the Court did *not* suggest that municipal liability was completely unavailable in the context of a failure-to-train claim. . . Nor did the Court suggest that municipal liability was unavailable with respect to a claim of deliberate indifference. . . We therefore infer that the Court preserved *Colon'*s fifth factor of analysis-concerning deliberate indifference-for claims of personal involvement in section 1983 cases. . . .That said, the complaint is devoid of any specified factual basis for inferring that the Warden or the John Doe Deputy Warden were aware of, or promoted, due-process violations by prison hearing officers, or that they had somehow acquiesced to such conduct by Capt. Caputo or others. Indeed, the proposed complaint offers only a conclusory allegation that Warden Agro was somehow responsible for such a policy or practice. . . Absent any allegation of a factual basis to conclude that this was the case, the proposed claims against Warden Agro and the Deputy Warden are not plausible in light of *Iqbal* and therefore would have to be dismissed.")
[*See also* ***D'Attore v. New York City Dept. of Correction***, No. 10 Civ. 815(JSR)(MHD), 2012 WL 4493977, *6-*8 (S.D.N.Y. Sept. 27, 2012) (R&R adopted by 2012 WL 5951317 (S.D.N.Y. Nov 28, 2012)) (same)].

Joseph v. Fischer, No. 08 Civ. 2824(PKC)("JP), 2009 WL 3321011, at *15 (S.D.N.Y. Oct. 8, 2009) ("Plaintiff's claim, based on Lee's 'failure to take corrective measures,' is precisely the type of claim *Iqbal* eliminated. . . And Lee's independent conduct of reviewing a grievance determination does not make him liable for the alleged improper conduct that underlies that grievance.").

Joseph v. Fischer, No. 08 Civ. 2824(PKC)("JP), 2009 WL 3321011, at *18 (S.D.N.Y. Oct. 8, 2009) ("Under *Iqbal,* a government official's act of affirming the denial of a grievance that alleges the deprivation of a constitutional right, without more, is insufficient to establish that the defendant was personally involved in depriving plaintiff of that right. Although *Iqbal* addressed *Bivens* claims (and, by analogy, section 1983 claims as well), there is no reason why its reasoning should not apply with equal force to RLUIPA claims. Based on the foregoing, I conclude that personal involvement of a defendant in the alleged substantial burden of plaintiff's exercise of religion is a prerequisite to stating a claim under RLUIPA. I also conclude that an official's denial of a grievance alleging a constitutional deprivation, without more, does not amount to personal involvement in the deprivation of that right.").

Doe v. New York, No. 10 CV 1792(RJD)(VVP), 2012 WL 4503409, *8, *9 (E.D.N.Y. Sept. 28, 2012) ("A supervisory official may nevertheless be held liable under Section 1983 if 'the defendant participated directly in the alleged constitutional violation [or] ... created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom ....' *Colon v. Coughlin,* 58 F.3d 865, 873 (2d Cir.1995). . . . *Colon v. Coughlin* actually provided for three other avenues through which a supervisory official may be held liable under Section 1983, including 'fail[ing] to remedy the wrong' 'after being informed of the violation' and being 'grossly negligent in supervising subordinates who committed the wrongful acts' or 'deliberate[ly] indifferen[t] to the rights of inmates.'. . The 'continuing vitality' of *Colon,* however, has 'engendered conflict within [the Second] Circuit,' *Reynolds v. Barrett,* 685 F.3d 193, 205 n. 14 (2d Cir.2012), after the Supreme Court in *Iqbal* rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . Although the Second Circuit has yet to rule on the 'fate of *Colon*'. . . it seems clear to the Court that only the First and Third of the *Colon* avenues of supervisory liability. . .survive *Iqbal*. . . .")

Dorlette v. Quiros, No. 3:10cv615 (AWT), 2012 WL 4481455, *3-*5 (D. Conn. Sept. 26, 2012) ("In *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), the Supreme Court rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution,' concluding that 'each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.'. . Since *Iqbal,* some district courts in this circuit have concluded that not all five of *Colon's* categories of conduct that may give rise to supervisory liability remain viable. . . Other district courts restrict application of *Iqbal* to cases involving discriminatory intent. . . The Second Circuit has not yet addressed this issue. This court need not determine whether *Iqbal* applies in all cases or just those involving discriminatory intent because the allegations against defendants Lajoie and Quiros are insufficient to survive summary judgment even under the *Colon* standard. The defendants argue that the plaintiff has not alleged that either defendant personally engaged in wrongful conduct, and merely alleges formulaic statements of the elements of a claim for supervisory liability. Thus, they contend that the plaintiff has not presented any facts to support a plausible claim of supervisory liability. The plaintiff states that defendants Lajoie and Quiros were on notice of the violent tendencies of certain staff members through requests and grievances submitted by other inmates prior to October 23, 2009. The plaintiff also specifically reported the October 23, 2009 incident. Rather than take action, defendants Lajoie and Quiros denied the plaintiff's grievances. The plaintiff alleges no facts and presents no evidence suggesting that defendants Lajoie and Quiros were notified prior to October 23, 2009, that any correctional officers had violent tendencies. Although the plaintiff notified them about the incident after it occurred, this is insufficient to establish their personal involvement. The plaintiff has not presented evidence that either defendant had sufficient knowledge to have prevented the incident. . . Further, the fact that defendants Quiros and Lajoie denied his grievance appeal does not state a cognizable claim. . . The defendants' motion for summary judgment is granted as to the claims against defendants Quiros and Lajoie.")

Lewis v. City of West Haven, No. 3:11cv1451(VLB), 2012 WL 4445077, *4, *5 & n.1 (D. Conn. Sept. 25, 2012) ("The Court notes that '[s]upervisory liability is a concept distinct from municipal liability, and is "imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates."'. . . The Court notes that the recent Supreme Court decision in *Ashcroft v. Iqbal* 129 S.Ct. 1937 (2009) has called into question whether all of the *Colon* factors remain a basis for establishing supervisory liability and that 'no clear consensus has emerged among the district courts within this circuit.'. . . Here, the Defendants have only moved to dismiss the claims against Karajanis on the basis that Lewis has failed to state a claim for municipal liability and therefore they appear to be seeking only dismissal of the official capacity claims against Karajanis. As noted above, Lewis does not specify whether the claims asserted against Karajanis in Count VIII are official or individual capacity claims or both. Construing the claims in Count VIII, it appears they allege both official and individual capacity claims. Accordingly, since the Defendants have not moved to dismiss the claims on the basis that Lewis has failed to state a claim for supervisory liability under the *Colon* factors, these claims remain extant for summary judgment and trial.")

Jones v. Superintendent of Attica Correctional Facility, No. 10–CV–0823(Sr), 2012 WL 4464685, *3 (W.D.N.Y. Feb. 3, 2012) ("With respect to Superintendent Conway, however, plaintiff's allegations do not suggest that Superintendent Conway was personally involved in the decision to move plaintiff to the housing unit or aware that plaintiff had problems with other inmates on that housing unit prior to the assault. Even interpreting plaintiff's allegations to suggest that he wrote Superintendent Conway about his safety concerns upon his transfer, given plaintiff's allegation that the assault occurred on the same day as his move into the housing block, it is not plausible that Superintendent Conway would have received plaintiff's letter prior to the assault. In any event, such a letter is insufficient to demonstrate personal involvement by a supervisory official.")

Young v. State of New York Office of Mental Retardation and Developmental Disabilities, 649 F.Supp.2d 282, 293, 294 (S.D.N.Y. 2009) ("Until recently, the Second Circuit rule was that a supervisory official was 'personally involved' only when that official: '(1) participate[d] directly in the alleged constitutional violation; (2) fail[ed] to remedy the violation after being informed of the violation through a report or appeal; (3) create[d] or allow[ed] the continuation of a policy or custom under which unconstitutional practices occurred; (4) act[ed] with gross negligence in supervising subordinates who commit the wrongful acts; or (5) exhibit[ed] deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.'[citing *Colon*] This Term, however, the Supreme Court in *Ashcroft v. Iqbal* held that '[b]ecause vicarious liability is inapplicable to ... [section] 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution,'. . and it explicitly rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.''. . Accordingly, '[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.'. . . Precisely what remains of the

Second Circuit rule in light of *Iqbal* is not entirely clear. While the Circuit has not yet addressed the question, one of my colleagues has concluded that: '[o]nly the first and part of the third *Colon* categories pass *Iqbal*'s muster – a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred. The other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated – situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate.'[citing *Bellamy*] Plaintiffs do not contend that Uschakow and Williamson were directly involved in any of the treatment or care at issue. Rather, they assert that they are liable because they failed to failed, either before or after Ms. Young's death, to adopt a policy to prevent DVT [deep vein thrombosis]. . . . As an initial matter, it is difficult to see how either Uschakow or Williamson could be held liable on the theory that he failed, after Ms. Young's demise, to adopt a policy to prevent DVT. Any such failure would bear no causal connection to the harm allegedly caused by their alleged constitutional violation. Plaintiffs' allegations with respect to the inaction of Messrs. Uschakow and Williamson during the period before Ms. Young's death are exceptionally vague, amounting essentially to a claim that they ultimately were responsible for the proper running of the facility and, in consequence, for any failure to adopt a policy to prevent DVT therefore would suffice to establish supervisory liability even after *Iqbal.* The Court has considerable doubt that supervisory liability properly could be imposed on such a basis, as it appears that the duty would be far too general. But it would be inappropriate to resolve that issue until the facts concerning the actual responsibilities of Messrs. Uschakow and Williamson, what they did and did not do, and the relationship, if any, of their actions and omissions to Ms. Young's situation are clear. As these defendants have failed to demonstrate the absence of a genuine issue of material fact on an issue as to which they would have the burden of proof at trial, summary judgment on qualified immunity grounds would be inappropriate at this juncture.").

Jackson v. Goord, 664 F.Supp.2d 307, 324 n.7 (S.D.N.Y. 2009) ("A question has arisen as to whether the traditional supervisory-liability test has been eviscerated by the recent Supreme Court decision in *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937 (2009). *See, e.g.*, Martin A. Schwartz, *Supreme Court Sets Standards For Civil Rights Complaints*, N.Y.L.J., Aug. 3, 2009, at 3, 7 (stating that the Court 'jettisoned the very concept of supervisory liability "). We do not believe that it has done so in the circumstance of this case. The claims by Iqbal involved, *inter alia*, denial of equal protection or discrimination – legal theories that require proof of discriminatory intent. *Iqbal*, 129 S.Ct. at 1948 (citing *Church of Lukumi Babalu Ave, Inc. v. Hialeah*, 508 U.S. 520, 540-541 (1993) and *Washington v. Davis*, 426 U.S. 229, 240 (1976)). The Supreme Court held in *Iqbal* that even supervisors must be alleged and proven to have violated the plaintiff's underlying constitutional right to be held liable. *See id.* at 1949, 1952. Since the claims at issue in *Iqbal* involved discriminatory intent, the Court held that the plaintiff could not prevail by way of the traditional supervisory-liability test of deliberate indifference. *Id.* at 1949. In contrast, in this and many other prison-condition cases, the underlying constitutional right of the inmate is to be free of injurious deliberate indifference by their jailers. *See, e.g., Erickson v. Pardus*, 551 U.S. 89, 89 (2007); *Sledge*

v. Kooi, 564 F.3d 105, 106 (2d Cir.2009). In these cases, then, deliberate indifference by supervisors to known injury-causing conditions should still trigger liability.")

Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801(SAS), 2009 WL 1835939, at *4, *6 (S.D.N.Y. June 26, 2009), *aff'd by Bellamy v. Mount Vernon Hosp.,* No. 09–3312–pr, 387 F. App'x 55, 2010 WL 2838534 (2d Cir. Jul.21, 2010) ("In 1995, the Second Circuit held that a supervisory official is personally involved only when that official: (1) participates directly in the alleged constitutional violation; (2) fails to remedy the violation after being informed of the violation through a report or appeal; (3) creates or allows the continuation of a policy or custom under which unconstitutional practices occurred; (4) acts with gross negligence in supervising subordinates who commit the wrongful acts; or (5) exhibits deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. [citing *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)] The Supreme Court's decision in *Iqbal v. Ashcroft* abrogates several of the categories of supervisory liability enumerated in *Colon v. Coughlin. Iqbal'*s 'active conduct' standard only imposes liability on a supervisor through section 1983 if that supervisor actively had a hand in the alleged constitutional violation. Only the first and part of the third *Colon* categories pass *Iqbal'*s muster - a supervisor is only held liable if that supervisor participates directly in the alleged constitutional violation or if that supervisor creates a policy or custom under which unconstitutional practices occurred. The other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated - situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate. Bellamy's remaining claim alleges that Wright, in his individual capacity, was deliberately indifferent to Bellamy's medical needs. However, Bellamy offers no evidence that any of Wright's actions fall into any of the remaining exceptions that would permit supervisory liability. *First,* Bellamy admits that Wright was not personally involved in the letter responses. Both parties agree that they have never had any form of contact. *Second,* Bellamy offers no evidence that Wright created or contributed to a policy or custom of unconstitutional practices. Bellamy also admitted that he can provide no evidence that Wright was responsible for making any decisions regarding his testosterone medications. . . Bellamy's conclusory allegations that Wright must have known about Bellamy's plight is not enough to impute section 1983 liability.")

THIRD CIRCUIT

Williams v. Papi, 714 F. App'x 128, 133-34 (3d Cir. 2017) ("This Court has noted that there exists 'uncertainty as to the viability and scope of supervisory liability' after the Supreme Court's decision in *Ashcroft v. Iqbal* . . . arguably narrowed or abrogated the ability to find a supervisor liable for conduct of which he was merely aware but did not direct. . . Although we have not yet squarely addressed the extent of *Iqbal'*s impact on the theory of supervisory liability, we have repeatedly held that '[i]t is uncontested that a government official is liable only for his or her own conduct and accordingly must have had some sort of personal involvement in the alleged unconstitutional conduct.'. . Such personal involvement may be established by alleging that the supervisor 'participated in violating the plaintiff's rights, directed others to violate them, or, as the

person in charge, had knowledge of and acquiesced in his subordinates' violations.'. .The District Court concluded that Chiefs Fisher, Ely, Kreig, and Olszewski, and Corporal Miller (as the ranking officer on site) could be held liable as supervisors 'who were either present at the scene of the incident or directly participated in the events,' and that disputes of fact precluded granting them qualified immunity. . . In reaching this determination, the District Court did not separately consider each supervisor's circumstances or the extent of each's personal involvement in the alleged conduct. This lapse is particularly notable concerning Chiefs Kreig and Fisher. Although Krieg was personally involved in various alleged violations, he was the only Meshoppen Borough officer on the scene, meaning he had no subordinates for whose conduct he could be held liable. Thus, to the extent that he was found liable as a supervisor for his own participation in the alleged violations, that is redundant of his individual liability, and he is entitled to summary judgment on this claim. Regarding Fisher, it is undisputed that he was off duty, did not come to scene, and did not direct, condone, or have awareness of the conduct that occurred. Fisher's generalized knowledge that the situation was unfolding is too slender a reed upon which to hold him liable for the conduct of his on-site subordinates. . . We reject Mrs. Williams' theory that Fisher can be held liable based solely on his failure to come to the scene, thereby leaving Miller in charge even though he was allegedly unprepared to handle the situation. To the extent that such a basis for liability exists and survived *Iqbal*, it is certainly not clearly established that the mere failure to show up at a scene when off duty could render a supervisor liable for his subordinates' unconstitutional conduct, and Mrs. Williams has failed to cite any case law in support of the proposition. Fisher is thus entitled to qualified immunity.")

Wharton v. Danberg, 854 F.3d 234, 243, 247 (3d Cir. 2017) ("Suits against high-level government officials must satisfy the general requirements for supervisory liability. In particular, supervisors are liable only for their own acts; in this case, they are liable only if they, 'with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm.' *A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004) (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989)) (alteration in original). This standard for supervisory liability largely overlaps with the over-detention standard—both require a showing of deliberate indifference and causation—but centers the inquiry around a policy or practice. . . . Our precedent is clear that while the detention of sentenced inmates is governed by the Eighth Amendment, the treatment of pretrial detainees is governed by the Due Process Clause. . . For pretrial detainees, therefore, there is no applicable provision more specific than the Due Process Clause and the more-specific-provision rule does not apply. A separate due process analysis is required. The protections of the Eighth Amendment and Due Process Clauses are sometimes, but not always, the same. . . We need not delve into the differences between those two analyses in this context, however. This is a suit against supervisory officials, for the creation of policies and practices. Supervisory policy-and-practice liability requires deliberate indifference. *A.M. ex rel. J.M.K.*, 372 F.3d at 586. Thus, for the same reasons as in our Eighth Amendment analysis, we conclude that there is no genuine dispute of material fact as to deliberate indifference under the Fourteenth Amendment.")

Palakovic v. Wetzel, 854 F.3d 209, 225 n.17, 233 (3d Cir. 2017) ("A supervisor may be directly liable under the deliberate indifference test set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994), if the supervisor 'knew or w[as] aware of and disregarded an excessive risk to the plaintiff['s] health or safety[.]'. . . A plaintiff 'can show this by establishing that the risk was obvious.'. . There is some question as to whether a supervisor may be held indirectly liable for deficient policies under *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989)), as the Supreme Court may have called the so-called *Sample* test into question in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Because the Palakovics have plausibly alleged a claim based on direct supervisory liability, we need not consider the unresolved nature of the *Sample* test today. . . . The Palakovics claimed that the supervisory defendants established a policy whereby mentally ill and suicidal prisoners like Brandon were repeatedly placed in solitary confinement rather than provided with adequate mental health treatment. . . . According to the Palakovics, despite the risk and the obviousness of the need to correct it, the supervisors failed to train officials on how to recognize and properly manage seriously mentally ill and suicidal prisoners, failed to provide suicide prevention training, failed to provide training on the adverse impact of solitary confinement on those with mental illness, and failed to train non-medical staff on the importance of consulting with mental health care providers concerning discipline and management of mentally ill prisoners. The supervisors were alleged to have provided essentially no training on suicide, mental health, or the impact of solitary confinement, and simply acquiesced in the repeated placement of mentally ill prisoners like Brandon in solitary confinement. According to the Palakovics, the supervisors were responsible for the policies concerning the treatment of mentally ill prisoners that gave rise to an unreasonable risk of Brandon's suicide, as well as the failure to provide specific types of training that could reasonably have prevented it. We must take the factual allegations of the amended complaint as true, and those facts are sufficient to support claims against the supervisory defendants.")

Jankowski v. Lellock, 649 F. App'x 184, 187-88 (3d Cir. 2016) ("Once this supervisory relationship is established, we have articulated two ways in which a supervisor may be liable for unconstitutional actions undertaken by a subordinate. First, liability may attach if the supervisor, '"with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm."'. . This standard encompasses Jankowski's failure to train claim, and specifically requires (1) deliberate indifference and (2) direct causation. . . Second, at least prior to *Iqbal*, 'a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced' in the subordinate's unconstitutional conduct. . . . '[W]e have refrained from answering the question of whether *Iqbal* eliminated—or at least narrowed the scope of—supervisory liability because it was ultimately unnecessary to do so in order to dispose of the appeal then before us.'. . As in *Argueta*, we 'make the same choice here because we determine that [Jankowski] failed to allege a plausible claim to relief on the basis of the supervisors' "knowledge and acquiescence" or any other similar theory of liability.'. . Applying this legal framework to the facts in Jankowski's second amended complaint convinces us that the District Court correctly dismissed the claims against both Meyers–Jeffrey and Zangaro. First, Jankowski never alleges that either Meyers–Jeffrey, who was merely an aide in the detention

classroom, or Zangaro had any supervisory or actual authority. . . over Lellock, thus immediately casting serious doubt on both claims. Second, Jankowski's second amended complaint, stripped of its conclusory allegations, pleads very few facts, none of which transform his claims into anything more than pure speculation. This is so because Jankowski relies primarily on the strength of an inference that we believe is unreasonable. He argues that because Lellock (1) pulled approximately twenty-two male students out of detention over the course of the school year to talk to them individually and (2) did so in apparent violation of a district policy forbidding the removal of students from a classroom, it was 'obvious' that Lellock was intending to have 'private one-on-one encounters with those male students.' Thus, he concludes that Meyers–Jeffrey and Zangaro knew or should have known that Lellock was sexually abusing these students. We cannot agree with Jankowski that this final inference is reasonable in light of the facts alleged. Assuming that either or both individuals did have actual authority over Lellock, supervisory liability still requires a plaintiff to show that the supervisor knew about and acquiesced in the subordinate's unconstitutional conduct. . . Jankowski has not met this standard for either Meyers–Jeffrey or Zangaro. Mere knowledge that students are being pulled from class to speak with a school police officer in violation of a district policy does not lead one to reasonably conclude that those students are then being sexually assaulted by that officer. The facts alleged, therefore, do not support the claim that either Meyers–Jeffrey or Zangaro actually knew about Lellock's conduct during the 1998–1999 school year. . . Thus, we hold that both claims of supervisory liability were properly dismissed by the District Court.")

Chavarriaga v. New Jersey Dep't of Corr., 806 F.3d 210, 227, 229-30, 232-33 (3d Cir. 2015) ("[T]he inmate must identify the supervisor's specific acts or omissions demonstrating the supervisor's deliberate indifference to the inmate's risk of injury and must establish a link between the supervisor, the act, and the injury. . . .We are satisfied that appellant's allegations that Brown intentionally denied her potable water for three days or was deliberately indifferent to the denial were insufficient to impose liability on Brown because appellant did not adequately allege facts attributing the denial to Brown. Although the complaint pleaded that Brown was one of an unspecified number of supervisors of the correctional officers who interacted with appellant, appellant did not make specific allegations concerning Brown's duties as a supervisor, or her interactions or communications with correctional officers in general, let alone with the officers directly involved with appellant's custody. The complaint did allege that Brown forced appellant to drink water 'from a dirty toilet bowl,' but this allegation was conclusory because appellant did not plead that Brown gave a direction for appellant to drink in this way. It is clear that appellant based her complaint against Brown for the denial of water on the actions of subordinate personnel, and thus appellant was seeking to place liability on Brown on a *respondeat superior* theory or was alleging that Brown was liable on some other theory merely because of her position as a supervisor. But Brown's position as a supervisor without more did not make her responsible for her subordinates' conduct. Accordingly, we cannot infer from the factual allegations in the complaint that Brown should have been alerted to a history of mistreatment of inmates in general or of appellant in particular. . . . We also are satisfied that appellant did not adequately plead that Brown was instrumental in requiring her to go to the shower or otherwise be naked while in the presence

of male prison personnel and inmates and in not supplying her with sanitary napkins and medications. Rather, though she did plead that Brown directed that her clothing be taken from her, her allegations with respect to the walk to the shower or otherwise be naked in the presence of male prison personnel and inmates and the denial of sanitary napkins and medications are generalized with respect to the individuals responsible for these actions. Although appellant did not adequately plead that Brown should have known that she was deprived of water for three days, we reiterate our rejection of the District Court's conclusion that the deprivations of potable water in this case could not be cruel and unusual punishment under the Eighth Amendment. . . Thus, while we uphold the grant of summary judgment on the denial of potable water as well as on the naked shower walk and other naked exposures and the denial of sanitary napkin and medications claims in Brown's favor, we will reverse the District Court's dismissal of the Eighth Amendment claims against the unknown defendants that appellant alleged were responsible for these deprivations and will remand the case for further proceedings on these claims. . . . Notwithstanding our foregoing discussion, we hold that the District Court correctly granted Brown summary judgment on appellant's Eighth Amendment body cavity search claim. In her brief, appellant attempts to implicate Brown in her manual body cavity search by claiming that 'Jane Doe's simultaneous digital penetration of plaintiff's vagina and rectum was committed in the presence of her direct supervisor, Sgt. Brown.'. . Yet this statement, though quite specific, was in appellant's brief and not her complaint, and is of questionable significance as she goes on in her brief to indicate that Brown '*evidently* authorized and supervised' the search, a comment that suggests that she only is surmising that Brown was involved in the search. . . In any event, appellant by making these allegations in her brief cannot overcome the lack of an adequate pleading in her complaint alleging with specificity that Brown was involved in the search. In fact, although appellant did allege in her complaint that Brown 'supervised various DOC personnel,' she did not allege that Brown supervised Jane Doe. . . Although a court on a motion to dismiss ordinarily 'must accept the allegations in the complaint as true,' it is not compelled to accept assertions in a brief without support in the pleadings. . . After all, a brief is not a pleading. We therefore will affirm the District Court's grant of summary judgment on the body cavity claim in favor of Brown.")

Parkell v. Markell, 622 F. App'x 136, 140 (3d Cir. 2015) ("To establish that a supervisor was deliberately indifferent, Parkell must identify a specific policy or practice that the supervising official failed to employ and show that the existing policy or procedure created an unreasonable risk of a constitutional violation, that the official was aware of but indifferent to the risk, and that the policy or procedure caused constitutional injury. . . We have held that these elements are met where the supervisor 'failed to respond appropriately in the face of an awareness of a pattern of such injuries' or where 'the risk of constitutionally cognizable harm is so great and so obvious that the risk and the failure of supervisory officials to respond will alone support' a finding of deliberate indifference. . .We cannot infer from Parkell's allegations, even construed liberally, that Markell or Biden—even if they allegedly failed to build more prison space or pursue institutional reform—either played a role in determining the prison conditions creating the risk of his injury, or were aware of that risk. . . While the case against Morgan and Coupe is closer, Parkell's allegations are too conclusory to support an inference of deliberate indifference. . . Parkell does not indicate, for

example, how frequently fights over provisions occurred prior to his, how many had resulted in serious injury, and what prison guards' actual response—outside of sounding an emergency alert—to such fighting consisted of. His complaint therefore does not plausibly suggest that the type of violent dispute causing his injury was so pervasive, injurious, and predictable, and guards' typical responses so ineffectual, that Morgan and Coupe *must have been aware* of a problem merely by virtue of their institutional roles. . . However, Parkell's allegations as to Morgan and Coupe are not so implausible as to be factually or legally frivolous. . . He conceivably could address their deficiencies so as to nudge his failure-to-protect claim over the line into plausibility. . . The District Court erred in denying Parkell an opportunity to amend his complaint and flesh out his claim against Morgan and Coupe.")

Hammond v. City of Wilkes-Barre, 600 F. App'x 833, 838 n.8 (3d Cir. 2015) ("As we noted in *Santiago*, courts 'have expressed uncertainty as to the viability and scope of supervisory liability after [*Ashcroft v. Iqbal*, 556 U.S. 662 (2009)].'. . We need not address whether the scope of supervisory liability has narrowed, as Defendants are entitled to summary judgment 'even under our existing supervisory liability test.'")

Barkes v. First Corr. Med., Inc., 766 F.3d 307, 316-25 (3d Cir. 2014), *rev'd on other grounds sub nom*. ***Taylor v. Barkes***, 135 S. Ct. 2042 (2015) ("Before discussing the District Court's qualified immunity analysis, it is necessary first to consider whether and to what extent our precedent on supervisory liability in the Eighth Amendment context was altered by the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Though we have in the past declined 'to wade into the muddied waters of post-*Iqbal* "supervisory liability,"' *Bistrian v. Levi*, 696 F.3d 352, 366 n. 5 (3d Cir.2012); *see also Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 69–70 (3d Cir.2011), we find it appropriate to do so now. . . . 'Failure to' claims—failure to train, failure to discipline, or, as is the case here, failure to supervise—are generally considered a subcategory of policy or practice liability. . . . We developed a four-part test for determining whether an official may be held liable on a claim for a failure to supervise. The plaintiff must identify a supervisory policy or practice that the supervisor failed to employ, and then prove that: (1) the policy or procedures in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory practice or procedure. . . In this Circuit, when a plaintiff seeks to hold a defendant liable under the Eighth Amendment in his or her role as a supervisor, '*Sample's* four-part test provides the analytical structure ..., it being simply the deliberate indifference test applied to the specific situation of a policymaker.'. .Which brings us to *Iqbal*. . . . [T]he Court expressly tied the level of intent necessary for superintendent liability to the underlying constitutional tort. . . .This aspect of *Iqbal* has bedeviled the Courts of Appeals to have considered it, producing varied interpretations of its effect on supervisory liability. . . . Most courts have gravitated to the center, recognizing that because the state of mind necessary to establish a § 1983 or *Bivens* claim varies with the constitutional provision at issue, so too does the state of mind necessary to trigger liability in a supervisory capacity. The Tenth Circuit, for example, held that,

after *Iqbal*, § 1983 liability may attach to 'a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor *or her subordinates*) of which "subjects, or causes to be subjected,"' the plaintiff to a constitutional deprivation, if the supervisor 'acted with the state of mind required to establish the alleged constitutional deprivation.' *Dodds v. Richardson,* 614 F.3d 1185, 1199 (10th Cir.2010) (emphasis added). . . .The Ninth Circuit agreed with this view in *Starr v. Baca,* seeing 'nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases.'. . .We do not read *Iqbal* to have abolished supervisory liability in its entirety. Rather, we agree with those courts that have held that, under *Iqbal,* the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged. In this case, the underlying tort is the denial of adequate medical care in violation of the Eighth Amendment's prohibition on cruel and unusual punishment, and the accompanying mental state is subjective deliberate indifference. . . . Accordingly, we hold that the standard we announced in *Sample* for imposing supervisory liability based on an Eighth Amendment violation is consistent with *Iqbal.* We leave for another day the question whether and under what circumstances a claim for supervisory liability derived from a violation of a different constitutional provision remains valid. . . . Our dissenting colleague disagrees with our conclusion that *Sample* has survived *Iqbal.* In his view, a supervisor can be held liable under the Eighth Amendment only if he committed an affirmative 'action[ ],' was 'personal [ly] involve[d] in his subordinates' misfeasance,' and acted with 'intentional ... deliberate indifference.'. . Our colleague claims that his position recognizes that 'there's no special rule of liability for supervisors' and that 'the test for them is the same as the test for everyone else.'. . But in fact the opposite is true: his test would immunize from liability prison officials who were deliberately indifferent to a substantial risk that inmates' serious medical conditions were being mistreated or not treated at all. . . Simply because an official may have a senior position in the DOC does not make him free to ignore substantial dangers to inmate health and safety. . . .Treating supervisors and subordinates equally under the Eighth Amendment does not mean ignoring the different ways in which each type of officer can, with deliberate indifference, expose inmates to constitutional injury. We think our dissenting colleague fails to recognize this fact, and in doing so makes three significant analytical errors. We address each below. . . . [E]xcessive force claims are different than conditions of confinement claims: instead of deliberate indifference, they require a plaintiff to show that 'officials applied force "maliciously and sadistically for the very purpose of causing harm," or ... with "a knowing willingness that [harm] occur."'. . .The Dissent's position neglects the black-letter principle that the type of Eighth Amendment claim alleged here can be shown by an act *or an omission.* . . . Under the Eighth Amendment, prison officials, from the bottom up, may be liable if by act or omission they display a deliberate indifference to a known risk of substantial harm to an inmate's health or safety. . . The omission alleged here is the deliberately indifferent failure to enforce FCM's compliance with proper suicide-prevention protocols, as required under FCM's contract with the DOC. As we will discuss, there is a material factual dispute on this point. . . . The Dissent would require both that the supervisor 'personally display [ed] deliberate indifference,'. . . and that the supervisor was 'personal[ly] involve[d] in his subordinates' misfeasance[.]'. . . With respect to the former

observation, we agree, which is why our decision requires subjective deliberate indifference on the part of the offending officer. . . With respect to the latter, the Dissent misinterprets the rules for Eighth Amendment liability under *Farmer.*The Dissent asserts that, by affirming *Sample's* vitality post-*Iqbal,* our decision wrongly applies an *objective,* rather than a *subjective,* test for evaluating deliberate indifference, in contravention of *Farmer.* This criticism is unpersuasive for two reasons. . . . Far from being patently objective, *Sample's* test is explicitly concerned with the officer's subjective knowledge. . . .To be sure, *Sample* stated that it derived its test '[b]ased on *City of Canton,*'. . . but the *actual* test that it articulated clearly sounds in subjectivity. . . . [T]his brings us to the second reason that the Dissent's objection fails: the test that *we* derive from *Sample* and apply in this case cannot be described as anything but subjective, and is thus entirely consistent with *Farmer.* . . . To the extent that *Sample* approved, in some circumstances, an objective test for determining a prison official's Eighth Amendment deliberate indifference, that portion of *Sample* has been abrogated by *Farmer* and it is not the test we apply today. Recognizing that our test does, in fact, require an official's subjective deliberate indifference, the Dissent pivots and claims that the plaintiff must nonetheless plead that the supervisor was 'personal[ly] involve[d] in his subordinates' misfeasance.'. . The Dissent's rule would have the practical effect of requiring that a supervisor have personal knowledge of an individual inmate, that inmate's particular serious medical need, and of the prison staff's failure to treat that need, before the supervisor could ever be held liable for deliberate indifference. But *Farmer* itself recognized that a prison official cannot avoid liability under the Eighth Amendment simply 'by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to' suffer a constitutional injury. . . What the Dissent fundamentally fails to recognize is that there are different ways that prison officials can be responsible for causing an inmate harm. . . . [W]here there is evidence of serious inadequacies in the provision of adequate medical care for inmates, and there is evidence that prison officials were aware of the problem and yet indifferent to the risk that an inmate would suffer a constitutional injury, they can be held liable under § 1983 for violating the Eighth Amendment.")

Barkes v. First Corr. Med., Inc., 766 F.3d 307, 332, 336-44 (3d Cir. 2014) (Hardiman, J., dissenting), *rev'd on other grounds sub nom.* ***Taylor v. Barkes***, 135 S. Ct. 2042 (2015) ("Today the Court holds that two of the most senior executives in the Delaware prison system must stand trial for the suicide of Christopher Barkes. In my view, this decision is a classic case of holding supervisors vicariously liable, a practice the Supreme Court proscribed in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). The majority accomplishes this feat by attempting to salvage the supervisory liability doctrine we created twenty years before *Iqbal* in *Sample v. Diecks,* 885 F.2d 1099 (3d Cir.1989). As I shall explain, *Sample* has been abrogated by *Iqbal.* And even assuming I am wrong about *Sample's* abrogation, Defendants Taylor and Williams are still entitled to summary judgment because Barkes has not complied with *Sample's* requirement that she identify a specific supervisory practice or procedure that they failed to employ. I respectfully dissent. . . . Since *Iqbal,* supervisory liability claims must spring from 'actions' or 'misconduct,'. . . . [T]he mere fact that the supervisor occupied a position of authority is insufficient. Accordingly, the overwhelming weight of authority requires plaintiffs to establish the supervisor's personal involvement in his

subordinates' misfeasance. . . The courts of appeals requiring the supervisor's personal involvement—i.e., the Fifth, Seventh, Eighth, and Tenth Circuits—have upheld supervisory liability claims when the challenged policy originates with the supervisor or he contributes to its unlawfulness. . . None of those courts of appeals has upheld a so-called 'failure-to' claim, in which subordinates violate the law while the supervisor fails to take remedial action. Decisions of both the Seventh and Tenth Circuits illustrate the fundamental dichotomy between cases involving the supervisors' personal involvement on the one hand and those relying on the supervisor's position of authority. [Discussing cases] Like the Seventh and Tenth Circuits, the Fifth and Eighth Circuits have rejected similar 'failure-to' claims after *Iqbal.* [Discussing cases] When the Ninth Circuit faced a 'failure-to' claim in *Starr v. Baca,* 652 F.3d 1202 (9th Cir.2011), it departed from the approaches taken by the Fifth, Seventh, Eighth, and Tenth Circuits. Contrary to the other four courts of appeals, the Ninth Circuit upheld an Eighth Amendment supervisory liability claim against a sheriff 'because he knew or should have known about the dangers in the [jail], and ... was deliberately indifferent to those dangers.'. . The plaintiff's complaint contained detailed allegations concerning the sheriff's knowledge of his subordinates' unlawfulness. . . In determining the sheriff's culpability for his inaction, however, the Court permitted the claim to go forward because a state statute held the sheriff 'answerable for the prisoner's safekeeping.'. . In a vigorous dissent, Judge Trott claimed that the 'complaint has all the hallmarks of an attempted end run around the prohibition against using the vicarious liability doctrine of respondeat superior to get at the boss.'. . .In light of *Iqbal,* we must also overrule the framework we adopted for supervisory liability claims in *Sample v. Diecks,* 885 F.2d 1099 (3d Cir.1989). . . . [A]fter denuding *Sample* of its objective quality, the majority upholds a test that does not require the plaintiff to plead personal involvement by the supervisor. Under *Sample,* the plaintiff need only establish a 'supervisory practice or procedure that [the supervisor] failed to employ.' *Sample,* 885 F.2d at 1118. That is a far cry from the 'personally displayed deliberate indifference,' *Nelson,* 585 F.3d at 535, or 'deliberate, intentional act,' *Porro,* 624 F.3d at 1327–28; *Dodds,* 614 F.3d at 1195, that our sister circuits have required after *Iqbal.* 'Simply put, there's no special rule of liability for supervisors. The test for them is the same as the test for everyone else.'. . None of the cases discussed—not even the Ninth Circuit's decision in *Starr*—has upheld a special test that applies only to supervisors. The majority disagrees, saying *Sample's* 'essence' is deliberate indifference, . . . so we should continue to treat supervisors differently. Only by doing so, can the majority circumvent the District Court's prior holdings that the record does not show deliberate indifference. . . *Sample's* unique combination of elements applies only to the supervisory form of deliberate indifference and permits Barkes to take her claim to trial without alleging Taylor and Williams's personal involvement. With due respect to my colleagues' concern that *Iqbal* has 'bedeviled' the courts of appeals, . . .I perceive near unanimous agreement among our sister circuits. Barkes's claim plainly seeks to hold Taylor and Williams vicariously liable for, in Barkes's words, 'presid[ing] over a system,'. . . that she deems unlawful. Today's decision invites plaintiffs to sue senior government officials whenever prison guards use force against an inmate or police officers mistreat a suspect. Regrettably, it exposes Commissioner Taylor and Delaware's prison wardens to lawsuits from any Delaware inmate with a complaint about FCM's services. . . . None of the courts that have considered *Iqbal* have applied a standard like *Sample's,* as the majority does today. The District Court's prior decision that Barkes

cannot prove Taylor and Williams's deliberate indifference combined with the absence of any allegation of personal involvement on their part, entitles them to qualified immunity. . . .Even had *Iqbal* not substantially changed the law of supervisory liability and had *Sample* remained good law, I would still hold that Taylor and Williams are entitled to summary judgment. . . . . Judge Farnan granted them summary judgment on the first supervisory liability claim because Barkes failed to meet *Sample's* threshold requirement. Barkes did not allege in her third amended complaint a specific supervisory practice that Taylor and Williams should have performed, and any allegations that Taylor and Williams should have 'enforced' the contract would do nothing to cure that omission. The District Court should have granted Taylor's and Williams's motion for summary judgment on the supervisory liability claim for the same reasons Judge Farnan did on the earlier supervisory liability claim.")

Valdez v. Danberg, 576 F. App'x 97, 100 (3d Cir. 2014) ("We have recognized two theories of supervisory responsibility: (1) where a supervisor establishes and maintains a policy, practice or custom which directly causes a constitutional harm; and (2) where the supervisor participates in violating a plaintiff's rights, directs others to violate them, or has knowledge of and acquiesces in the violations. *Santiago,* 629 F.3d at 129 n. 5. *See also Sample*, 885 F.2d at 1116–17 (supervisory liability may be imposed only where the supervisor was the 'moving force' behind the constitutional tort).")

Lawal v. McDonald, 546 F. App'x 107, 113, 114 (3d Cir. 2014) ("As the District Court observed, the repeated and collective use of the word 'Defendants' 'fail[ed] to name which specific Defendant engaged in the specific conduct alleged.'. . As a result, the Amended Complaint is ambiguous about each Defendant's role in the operation and whether he committed the act himself or supervised other agents in doing so. In using the collective 'Defendants,' Plaintiffs alleged that *each* of the Defendants: (a) directed the PPA to send the letters to Plaintiffs advising them that they were entitled to a refund, to be picked up at the PPA facility; (b) attacked each driver, throwing him against a wall and handcuffing him; (c) was told by Plaintiffs that Plaintiffs were citizens; (d) interrogated each Plaintiff for more than one hour; (e) acknowledged to each Plaintiff that he 'had been mistakenly detained,' but (f) told them they were not permitted to leave; (g) held the Plaintiffs for several additional hours; and (h) prohibited them from speaking or standing. There is a serious question as to whether it is plausible that each of the three defendants committed all of the acts ascribed to them, particularly given the number of other individuals brought to the facility during the operation and the affidavits submitted with Defendants' motion to dismiss. . . In light of these ambiguities, the Amended Complaint may fail to meet *Iqbal's* directive that 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. .Moreover, given the very narrow potential claim upon which relief may be granted, it is difficult for Defendants to determine which of them are alleged to have held or directed others to hold Plaintiffs after their U.S. citizenship was verified and they were no longer suspected of violating the immigration laws. To the extent Plaintiffs seek to proceed on a theory of supervisory liability, the pleading likely requires further factual assertions linking the direction or act of an individual defendant to the alleged unconstitutional conduct. . .Thus, to resolve the

ambiguity regarding the precise actions each individual Defendant allegedly took, we will provide Plaintiffs a final opportunity to file a pleading that provides the factual enhancements that specify the acts each individual Defendant . . . allegedly took, explains whether each Defendant personally engaged in the acts or if the actions were taken at the specific Defendant's direction, and includes facts concerning the reasonableness of Plaintiffs' detention. Of course, such a pleading must comply with Fed.R.Civ.P. 11. If Plaintiffs choose to file a Second Amended Complaint, the District Court will be free to entertain another motion to dismiss before permitting any discovery and determine whether Plaintiffs have alleged facts that demonstrate a specific Defendant plausibly engaged in an unreasonable seizure after they verified Plaintiffs' citizenship status, and, even if sufficiently alleged, whether the specific Defendant is entitled to qualified immunity.")

Zion v. Nassan, 556 F. App'x 103, 2014 WL 323373, *5 (3d Cir. Jan. 30, 2014) ("The amended complaint includes numerous allegations of Nassan's violent propensities before and during his employment as a Pennsylvania state trooper. The amended complaint specifically alleges that the supervisory defendants were aware of a 2008 jury finding that Nassan was liable for the shooting death of a twelve-year-old boy. . . The supervisors allegedly did not order additional training for Nassan, and one of them allegedly ordered a subordinate to alter Nassan's employment records. . . These allegations establish that the supervisory defendants were aware of a pattern of violent behavior by Nassan and did nothing to remedy the situation. At the time of the shooting, binding precedent held that a supervisor may be liable for his subordinate's constitutional violations if the supervisor 'had knowledge of and acquiesced in' the violations. *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Detention Ctr.,* 372 F.3d 572, 586 (3d Cir.2004). Because the legal norms allegedly violated by the supervisory defendants were clearly established at the time of the challenged actions, we will affirm the District Court's judgment as to the supervisory defendants as well.")

Bistrian v. Levi , 696 F.3d 352, 366 n.5 (3d Cir. 2012) ("This case gives us no occasion to wade into the muddied waters of *post-Iqbal* 'supervisory liability.' 'Numerous courts, including this one, have expressed uncertainty as to the viability and scope of supervisory liability after *Iqbal.*' *Santiago,* 629 F.3d at 130 n. 8 (collecting cases); *see also Argueta,* 643 F.3d at 70. Neither the parties nor the District Court mention 'supervisory liability' as a possible basis for recovery here. As we understand his claims, Bistrian alleges that the named defendants directly and personally participated in the alleged unconstitutional conduct. That is the only theory of recovery we consider.")

Argueta v. U.S. Immigration and Customs Enforcement, 643 F.3d 60, 70 (3d Cir. 2011) ("In this case, Plaintiffs never alleged in their Second Amended Complaint that Appellants actually adopted a facially unconstitutional policy. For instance, they did not claim that Appellants, as part of Operation Return to Sender, ever ordered ICE agents to storm into homes without obtaining the requisite consent. Plaintiffs instead claimed that these four individuals should be held accountable because, among other things, they knew of – and nevertheless acquiesced in - the unconstitutional conduct of their subordinates. The District Court determined that Plaintiffs could pursue a claim under the Fourth Amendment based on a 'knowledge and acquiescence' theory because the Fourth

Amendment does not require proof of a discriminatory or unlawful purpose (and it further concluded that Appellants adequately alleged such a claim in their pleading). In response, Appellants have argued that: (1) at least after *Iqbal,* 'knowledge and acquiescence,' 'failure to train,' and similar theories of supervisory liability are not viable in the *Bivens* context and, on the contrary, a supervisor may be held liable only for his or her direct participation in the unconstitutional conduct; and (2) even under such now defunct theories of liability, Plaintiffs failed to allege a facially plausible *Bivens* claim against Appellants. We recently observed that '[n]umerous courts, including this one, have expressed uncertainty as to the viability and scope of supervisory liability after *Iqbal.*'. . To date, we have refrained from answering the question of whether *Iqbal* eliminated – or at least narrowed the scope of – supervisory liability because it was ultimately unnecessary to do so in order to dispose of the appeal then before us. . . We likewise make the same choice here because we determine that Plaintiffs failed to allege a plausible claim to relief on the basis of the supervisors' 'knowledge and acquiescence' or any other similar theory of liability. Accordingly, we need not (and do not) decide whether Appellants are correct that a supervisor may be held liable in the *Bivens* context only if he or she directly participates in unconstitutional conduct.")

Argueta v. U.S. Immigration and Customs Enforcement, 643 F.3d 60, 72, 74-77 (3d Cir. 2011) ("[W]e assume for purposes of this appeal that a federal supervisory official may be liable in certain circumstances even though he or she did not directly participate in the underlying unconstitutional conduct. The District Court specifically concluded that a Fourth Amendment claim does not require a showing of a discriminatory purpose and that Plaintiffs could therefore proceed under a 'knowledge and acquiescence' theory. Plaintiffs acknowledge that the 'terminology' used to describe 'supervisory liability' is 'often mixed.'. . They contend that a supervisor may be held liable in certain circumstances for a failure to train, supervise, and discipline subordinates. . . . We accordingly stated in a § 1983 action that '[p]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence.' *Rode v. Dellarciprete,* 845 F.2d 1195, 1207 (3d Cir.1988). . . We further indicated that a supervisor may be liable under § 1983 if he or she implements a policy or practice that creates an unreasonable risk of a constitutional violation on the part of the subordinate and the supervisor's failure to change the policy or employ corrective practices is a cause of this unconstitutional conduct. . . . Having addressed the legal elements that a plaintiff must plead to state a legally cognizable claim, we turn to the remaining steps identified by *Iqbal:* (1) identifying those allegations that, because they are no more than conclusions, are not entitled to any assumption of truth; and (2) then determining whether the well-pleaded factual allegations plausibly give rise to an entitlement to relief. . . We acknowledge that Plaintiffs filed an extensive and carefully drafted pleading, which certainly contained a number of troubling allegations especially with respect to alleged unconstitutional behavior on the part of lower-ranking ICE agents. Plaintiffs are also correct that, even after *Iqbal,* we must continue to accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and then determine whether a reasonable inference may be drawn that the defendant is liable for the alleged misconduct. . . .[W]e ultimately conclude that, like Iqbal, Plaintiffs failed to allege a plausible *Bivens* claim against the four Appellants. Initially,

certain allegations in the Second Amended Complaint were conclusory in nature and merely provided, at best, a 'framework' for the otherwise appropriate factual allegations. . . For instance, the broad allegations regarding the existence of a 'culture of lawlessness' are accorded little if any weight in our analysis. . . We further note that the relevant counts in the pleading contained boilerplate allegations mimicking the purported legal standards for liability, which we do not assume to be true. We also must reject certain broad characterizations made by the District Court, which were not supported by either the actual factual allegations in the Second Amended Complaint or reasonable inferences from such allegations. Most significantly, the District Court went too far by stating that Myers and Torres 'worked on these issues everyday.'. . Turning to the non-conclusory factual allegations in the Second Amended Complaint, we begin with the critical issue of notice. Plaintiffs did reference an impressive amount of documentation that allegedly provided notice to Appellants of their subordinates' unconstitutional conduct. However, these alleged sources of notice were fatally flawed in one way or another. Broadly speaking, we must point out the typical 'notice' case seems to involve a prior incident or incidents of misconduct by a specific employee or group of employees, specific notice of such misconduct to their superiors, and then continued instances of misconduct by the same employee or employees. The typical case accordingly does not involve a 'knowledge and acquiescence' claim premised, for instance, on reports of subordinate misconduct in one state followed by misconduct by totally different subordinates in a completely different state. . . . Second, we observe that allegations specifically directed against Appellants themselves (unlike the allegations directed at the agents who actually carried out the raids) described conduct consistent with otherwise lawful behavior. . . In other words, a federal official specifically charged with enforcing federal immigration law appears to be acting lawfully when he or she increases arrest goals, praises a particular enforcement operation as a success, or characterizes a home entry and search as an attempt to locate someone (i.e., a fugitive alien). In fact, the qualified immunity doctrine exists to encourage vigorous and unflinching enforcement of the law. . . .We also agree with Appellants' assertion that Plaintiffs themselves did not really identify in their pleading what exactly Appellants should have done differently, whether with respect to specific training programs or other matters, that would have prevented the unconstitutional conduct. . . . We also cannot overlook the fact that Appellants themselves occupied relatively high-ranking positions in the federal hierarchy. . . .[T]he context here involved, at the very least, two very high-ranking federal officials based in Washington D.C. who were charged with supervising the enforcement of federal immigration law throughout the country (as well as two other officials responsible for supervising such enforcement throughout an entire state). . . . [W]e wish to emphasize that our ruling here does not leave Plaintiffs without any legal remedy for the alleged violation of the United States Constitution. Chavez, Galindo, and W.C. are still free to pursue their official capacity claims for injunctive relief against any further intimidation or unlawful entry into their home. Also, we do not address Plaintiffs' individual capacity claims for damages against the lower-ranking ICE agents named in the Second Amended Complaint.")

Santiago v. Warminster Tp., 629 F.3d 121, 128-34 & n.8, n.10 (3d Cir. 2010) ("While we conclude that the Third Amended Complaint can be read as alleging liability based on the

Supervising Officers' own acts, we will nevertheless affirm the District Court's ruling because those allegations fail to meet the pleading requirements set forth by the Supreme Court in *Twombly* and *Iqbal.* . . . [A]ny claim that supervisors directed others to violate constitutional rights necessarily includes as an element an actual violation at the hands of subordinates. In addition, a plaintiff must allege a causal connection between the supervisor's direction and that violation, or, in other words, proximate causation. . . . Therefore, to state her claim against Chief Murphy and Lt. Donnelly, Santiago needs to have pled facts plausibly demonstrating that they directed Alpha Team to conduct the operation in a manner that they 'knew or should reasonably have known would cause [Alpha Team] to deprive [Santiago] of her constitutional rights.'. . .As to her claim against Lt. Springfield, Santiago must allege facts making it plausible that 'he had knowledge of [Alpha Team's use of excessive force during the raid]' and 'acquiesced in [Alpha Team's] violations.'. . . Numerous courts, including this one, have expressed uncertainty as to the viability and scope of supervisory liability after *Iqbal.* . . . Because we hold that Santiago's pleadings fail even under our existing supervisory liability test, we need not decide whether *Iqbal* requires us to narrow the scope of that test. . . . Santiago alleges that the plan developed and authorized by Chief Murphy and Lt. Donnelly 'specifically sought to have all occupants exit the Plaintiff's home, one at a time, with hands raised under threat of fire, patted down for weapons, and then handcuffed until the home had been cleared and searched.' Because this is nothing more than a recitation of what Santiago says the Alpha Team members did to her, it amounts to a conclusory assertion that what happened at the scene was ordered by the supervisors. While the allegations regarding Alpha Team's conduct are factual and more than merely the recitation of the elements of a cause of action, the allegation of supervisory liability is, in essence, that 'Murphy and Donnelly told Alpha team to do what they did' and is thus a 'formulaic recitation of the elements of a [supervisory liability] claim,' *Iqbal,* 129 S.Ct.. at 1951 (internal quotation marks omitted) – namely that Chief Murphy and Lt. Donnelly directed others in the violation of Santiago's rights. Saying that Chief Murphy and Lt. Donnelly 'specifically sought' to have happen what allegedly happened does not alter the fundamentally conclusory character of the allegation. . . Our conclusion in this regard is dictated by the Supreme Court's decision in *Iqbal.* . . . In short, Santiago's allegations are 'naked assertion[s]' that Chief Murphy and Lt. Donnelly directed Alpha Team to conduct the operation in the allegedly excessive manner that they did and that Lt. Springfield acquiesced in Alpha Team's acts. As mere restatements of the elements of her supervisory liability claims, they are not entitled to the assumption of truth. However, it is crucial to recognize that our determination that these particular allegations do not deserve an assumption of truth does not end the analysis. It may still be that Santiago's supervisory liability claims are plausible in light of the non-conclusory factual allegations in the complaint. We therefore turn to those allegations to determine whether the claims are plausible. . . . In summary, the allegations against Alpha Team are that the officers ordered everyone to exit the house one at a time; that Santiago exited first under threat of fire; that Santiago was patted down in a demeaning fashion, found to be unarmed, and subsequently handcuffed; that the remaining occupants of the home then exited, some of whom were handcuffed while others were not; that Santiago's daughter was coerced into consenting to a search of the home; and that Santiago was left restrained for thirty minutes while her home was searched, during which time she had a heart attack. The question then becomes whether those allegations make it plausible that

Chief Murphy and Lt. Donnelly directed Alpha Team to conduct the operation in a manner that they 'knew or should reasonably have known would cause [Alpha Team] to deprive [Santiago] of her constitutional rights,'. . . or that Lt. Springfield 'had knowledge [that Alpha Team was using excessive force during the raid]' and 'acquiesced in [Alpha Team's] violations.'. . . [T]here is no basis in the complaint to conclude that excessive force was used on anyone except Santiago. Even if someone else had been subjected to excessive force, it is clear that the occupants were not being treated uniformly. Thus, Santiago's allegations undercut the notion of a plan for all occupants to be threatened with fire and handcuffed. While it is possible that there was such a plan, and that Alpha Team simply chose not to follow it, 'possibility' is no longer the touchstone for pleading sufficiency after *Twombly* and *Iqbal***.** Plausibility is what matters. Allegations that are 'merely consistent with a defendant's liability' or show the 'mere possibility of misconduct' are not enough. . . Here, given the disparate treatment of the occupants of the home, one plausible explanation is that the officers simply used their own discretion in determining how to treat each occupant. In contrast with that 'obvious alternative explanation' for the allegedly excessive use of force, the inference that the force was planned is not plausible. Where, as here, an operation results in the use of allegedly excessive force against only one of several people, that use of force does not, by itself, give rise to a plausible claim for supervisory liability against those who planned the operation. To hold otherwise would allow a plaintiff to pursue a supervisory liability claim anytime a planned operation resulted in excessive force, merely by describing the force used and appending the phrase 'and the Chief told them to do it.' *Iqbal* requires more. . . . We next ask whether the allegation that Lt. Springfield was placed in charge of the operation, coupled with what happened during the operation, makes it plausible that Lt. Springfield knew of and acquiesced in the use of excessive force against Santiago. Again, we conclude that it does not. The complaint implies but does not allege that Lt. Springfield was present during the operation. Assuming he was present, however, the complaint still does not aver that he knew of the allegedly excessive force, nor does it give rise to the reasonable inference that he was aware of the level of force used against one individual. . . . In sum, while Santiago's complaint contains sufficient allegations to show that the Supervising Officers planned and supervised the operation and that, during the operation, Alpha Team used arguably excessive force, her allegations do nothing more than assert the element of liability that the Supervising Officers specifically called for or acquiesced in that use of force. . . . The Third Amended Complaint was filed after the close of discovery. Consequently, there is no reason to believe that Santiago's conclusory allegations were simply the result of the relevant evidence being in the hands of the defendants. Under *Iqbal***,** however, the result would be the same even had no discovery been completed. We recognize that plaintiffs may face challenges in drafting claims despite an information asymmetry between plaintiffs and defendants. Given that reality, reasonable minds may take issue with *Iqbal* and urge a different balance between ensuring, on the one hand, access to the courts so that victims are able to obtain recompense and, on the other, ensuring that municipalities and police officers are not unnecessarily subjected to the burdens of litigation. . . The Supreme Court has struck the balance, however, and we abide by it.")

Laffey v. Plousis, 364 F. App'x 791, 2010 WL 489473, at *3, *4 (3d Cir. Feb. 12, 2010) ("Laffey observes that several circuits recognize that in the § 1983 context, one can be held liable for a

constitutional violation by 'setting in motion' certain events which he knows or should know will result in a constitutional violation. . . Laffey asks us to adopt and apply a similar standard in this *Bivens* action and to find that Rackley, Plousis, and Elcik are liable because 'they pressured MVM into disciplining Laffey....' We have yet to apply such a standard in cases arising under § 1983, much less in the context of a *Bivens* action. Furthermore, we are hesitant to adopt this standard following *Iqbal,* a *Bivens* action in which the Supreme Court emphasized 'a plaintiff must plead that each Government-official defendant, *through the official's own individual actions,* has violated the Constitution.' *Iqbal,* 129 S.Ct. at 1948 (emphasis added). And finally, although Laffey argues that Plousis, Rackley, and Elcik 'pressured' MVM into disciplining him, his complaint alleges insufficient facts to support such an inference. In sum, the District Court did not err because Laffey failed to allege facts sufficient to demonstrate that any individual Marshals Service defendant was responsible for his demotion or suspension.")**.**

Bayer v. Monroe County Children and Youth Services, 577 F.3d 186, 191 n.5 (3d Cir. 2009) ("With respect to Bahl, the District Court recognized that he cannot be liable for this violation under § 1983 on a respondeat superior theory, and that plaintiffs 'instead must show that [he] played a personal role in violating their rights.'. . The court concluded that plaintiffs had created a triable issue 'as to whether Defendant Bahl had personal knowledge regarding the Fourteenth Amendment procedural due process violation.' In light of the Supreme Court's recent decision in *Ashcroft v. Iqbal,* No. 07-1015 (May 18, 2009), it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding Bahl liable with respect to plaintiffs' Fourteenth Amendment claims under § 1983. . . . We need not resolve this matter here, however. As discussed *infra,* we believe qualified immunity shields both Dry and Bahl from liability for their conduct in this case; thus, Bahl would be entitled to such immunity whether his alleged liability under § 1983 were to derive from his own conduct or from his knowledge of Dry's conduct.").

Hall v. Phelps, No. 22-CV-480, 2024 WL 1052894, at *4-5 (M.D. Pa. Mar. 11, 2024) ("To establish knowledge and acquiescence of a subordinate's misconduct, a plaintiff must allege the defendant's (1) contemporaneous knowledge of the offending incident or knowledge of similar incidents in the past, and (2) actions or inactions which communicated approval of the subordinate's behavior. . . A plaintiff may not allege that a supervisory defendant had constructive knowledge of a subordinate's unconstitutional conduct simply because of his role as a supervisor. . . Furthermore, failure to train only amounts to deliberate indifference 'where the need for more or different training is obvious' and the lack of training can be expected to result in constitutional violations. . . Evanchick argues that Plaintiffs do not plead his personal involvement in the alleged violation of Christian's constitutional rights *i.e.,* be free from excessive and deadly force. . .Whereas Plaintiffs argue that the facts in their complaint show Evanchick tolerated and actively encouraged the use of excessive force by subordinates by intentional[ly] using his authority as a supervisor to cover up and excuse wrongdoing. In support of this argument Plaintiff's point to Evanchick's pled conduct *after* Christian died, namely his personal involvement in publishing a since contradicted official statement about Christian's death, failing to comply with Plaintiff's

subpoena, and refusing to identify the trooper that fired the fatal shots. However, none of these subsequent actions or inactions are relevant to the court's analysis which turns on what Evanchick did or failed to do *before* Christian was shot and killed. . . . Unlike in *Zion*, Plaintiffs here do not allege that either of the troopers who shot Christian have violent histories including past civil verdicts against them, nor do they allege that Evanchick had any knowledge of such history. However, like in *Barber* they do allege that Evanchick occupied a position of responsibility, in which he should have known other PSP troopers, as noted above, had used excessive deadly force on individuals experiencing mental health emergencies like Christian did on December 30, 2020. While unlike in *Barber* Plaintiffs do not specifically allege legal claims were filed against that trooper or other PSP employees for similar conduct, they do allege that the PSP itself investigated the deadly force incidents involving them. Such investigations should have put Evanchick on notice of PSP troopers potentially unconstitutional use of excessive and deadly force against suicidal persons and alerted him to the need for further training and supervision. As pled Evanchick had knowledge or was at least deliberately indifferent to ongoing constitutional issues or problems within the PSP, and authority or means to address the matters, but, ultimately, failed to take appropriate action. Accordingly, Plaintiffs at this stage of the litigation plausibly plead a supervisory liability claim against Evanchick based on excessive force in violation of the Fourth Amendment.")

Castellani v. City of Atl. City, No. CV 13-5848 (JBS/AMD), 2017 WL 3112820, at *16-17 (D.N.J. July 21, 2017) ("The availability of a supervisory liability theory for excessive force claims is unclear since the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See *Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 70 (3d Cir. 2011)("To date, we have refrained from the answering the question of whether *Iqbal* eliminated—or at least narrowed the scope of—supervisory liability ... [w]e likewise make the same choice here...."). Plaintiff argues that the Court should employ the Eighth Amendment supervisory liability analysis from *Barkes v. First Correctional Medical, Inv.*, 766 F.3d 307, 316 (3d Cir. 2014), *rev'd on other grounds sub nom, Taylor v. Barkes*, 124 S. Ct. 2042 (2015), which permits supervisory liability where the supervisor acted with deliberate indifference in maintaining a custom or policy that directly caused the violation of the plaintiff's constitutional rights. . . .Defendant Hall, on the other hand, relies on *Ricker v. Weston*, 27 Fed.Appx. 113 (3d Cir. 2002), which, while concededly an unpublished decision, addresses supervisor liability in the context of an allegation of excessive force. The Ricker court held that a supervisor may be liable under § 1983 for his subordinate's lawful conduct 'if he or she directed, encouraged, tolerated, or acquiesced in that conduct,' but for liability to attach, 'there must exist a causal link between the supervisor's action or inaction and the plaintiff's injury.'. . In other words, the supervisor 'must be directly and actively involved in the subordinate's unconstitutional conduct.'. . In *Ricker*, the court granted the supervisors' motion for summary judgment because there was 'simply no causal link' between Plaintiff's injuries and what the supervisors did or did not do. . . .Defendant Hall further argues that even if some form of supervisor liability in the context of an excessive force claim still exists post *Iqbal*, Plaintiff's claim still fails because for liability to be established under a deliberate indifference standard, the plaintiff must preliminarily establish that the supervisor is a policymaker. *A.M. ex rel. J.M.K. v.*

Luzerne Cnty. Juvenile Det. Ctr., 372 F.3d 572, 586 (3d Cir. 2004). Defendant argues that Plaintiff has presented no evidence that Hall was a policymaker, as he was a working police sergeant in a large police department, whose only role was to gather information on K-9 handler candidates and produce it to the hiring committee. . . . The Court finds that Plaintiff has failed to raise any genuine dispute of material fact as to Defendant Hall's supervisory liability. Defendant Hall was not the policymaker in this situation, and there is no indication that Hall actually selected Wheaten for the position of K9 Handler, nor that he directed the officers to attack. In the alternative, Defendant Hall asserts qualified immunity, and Plaintiff does not oppose. Plaintiff has not established that Defendant Hall violated a clearly established constitutional right, as he has not identified a case where a supervisor acting under similar circumstances as Hall was held to have violated the Fourth Amendment. See *White v. Pauly*, 137 S. Ct. 548, 552 (2017)(reiterating that the clearly established law must be "particularized" to the facts of the case, and should not be defined "at a high level of generality").")

Wilson v. Gilmore, No. 14CV1654, 2015 WL 3866531, at *6 (W.D. Pa. June 22, 2015) ("Taking as true Plaintiff's allegations concerning Superintendent Gilmore's failure to train and supervise, Plaintiff has stated a plausible claim for relief that Superintendent Gilmore's practice of failing to train and supervise his employees on the DOC's policies regarding use of force, use of restraints, and access to medical care created an unreasonable risk that a constitutional injury would occur, of which he was aware and indifferent to, and which resulted in an injury to Plaintiff. Specifically, Plaintiff has alleged that Superintendent Gilmore was responsible in his position of authority to ensure his correctional officers were trained on use of force, use of restraints, and access to medical care policies and the failure to perform this function created an unreasonable risk of injury. Whether the facts at issue here constitute a constitutional violation is inappropriate for the Court to determine at this juncture. Plaintiff also alleges that Superintendent Gilmore 'tolerated, encouraged, and acquiesced in a practice of excessive use of force by correctional officers at Greene through his failure to appropriately discipline those he knew had violated DOC policy on use of force, application of restraints, and access to medical care.'. . . He further alleges that Superintendent Gilmore acquiesced in the security office's practice of ignoring prisoner complaints of abuse. . . Taking these allegations as true, Plaintiff has stated a plausible claim that Superintendent Gilmore's actions of ignoring inmate abuse complaints and failing to discipline correctional officers for violating the aforementioned DOC policies created an unreasonable risk that the officers, including the other defendants, would violate these policies knowing that they would not be disciplined for such conduct and that these actions indirectly caused his injuries. Accordingly, Plaintiff has sufficiently pled the requisite level of personal involvement as to Superintendent Gilmore and the Defendant's motion should therefore be denied.")

Moore v. Mann, No. 3:CV-13-2771, 2015 WL 3755045, at *4 (M.D. Pa. June 16, 2015) ("Courts have found that an allegation that an official ignored correspondence from an inmate, and that the requesting of an investigation of his allegations, is insufficient to impose liability on the supervisory official. . . While under some circumstances a letter alerting local prison officials, who are in a position to take steps to protect an inmate, may impose such duties to take reasonable

measures to guarantee the safety of the inmate, such is not the case here. Wetzel was not employed at SCI–Coal Township. Further, as Plaintiff admits, by the time he became aware of the allegations via the letter Plaintiff wrote to the Office of Professional Responsibility, the matter was under investigation. . . For these reasons, the claims set forth against Defendant Wetzel will be dismissed from the complaint.")

Doe v. New Jersey Dep't of Corr., No. CIV.A. 14-5284 FLW, 2015 WL 3448233, at *10 (D.N.J. May 29, 2015) ("Pursuant to *Barkes,* the Court analyzes whether Plaintiff has alleged sufficient facts to show that (1) a policy or procedure in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) that Defendant Lanigan was aware that the policy or procedure created an unreasonable risk; (3) that Defendant Lanigan was indifferent to that risk; and (4) that the constitutional injury was caused by the failure to implement the supervisory procedure. Plaintiff's Complaint identifies Defendant Lanigan as a policymaker who is responsible for 'the implementation and enforcement of policies and procedures ... to ensure the physical and emotional safety and well-being of an inmate such as the Plaintiff.'. . Plaintiff's Complaint details a pattern of violent assaults against him by correctional officers and inmates, which were purportedly precipitated by his status as a cooperating witness in the prosecutions of high profile gang members and the mistaken belief among correctional officers that he had also cooperated in the prosecution of a former NJSP correctional officer. In count six, captioned 'Policymaker and/or Supervisory Liability,' Plaintiff alleges, among other allegedly deficient policies, that the NJSP policies regarding protection of cooperating witness were deficient because those policies failed to 'protect, secure, and segregate inmates who have cooperated with law enforcement-especially in a criminal case that involves employees of the NJDOC itself and/or involves violent inmate gang members.'. . Plaintiff further contends that '[i]nmates who have cooperated in cases involving NJDOC employees, particularly Correction Officers, should be transferred out of State and their safety should be ensured[.]'. . The Court also finds that Plaintiff has adequately pleaded the knowledge requirement with respect to Defendant Lanigan. Notably, after the first three assaults by correctional officers, but months before the assault by Defendant McNair on July 24, 2014, Plaintiff's mother allegedly sent letters to upper management and policy makers in the NJDOC in an effort to notify high ranking prison officials about her son's plight. The July 25, 2014 letter from Plaintiff's attorney to Defendant Lanigan, attached as an exhibit to the Complaint and sent after the last violent attack, also references correspondence sent to the Office of the Attorney General during 2013–2014, allegedly to notify state officials about the assaults on and threats against Plaintiff. Plaintiff alleges that the earlier attacks by Defendants Avino and Ortiz resulted in the termination of Defendant Avino and prompted an internal investigation within NJSP. Assuming the truth of these allegations for purposes of the motion to dismiss and giving all favorable inferences to Plaintiff, it is hardly implausible to draw the inference that Defendant Lanigan was aware of Plaintiff's particular plight prior to the attack on July 24, 2014. As explained in *Barkes,* to meet the knowledge requirement for supervisory liability, a supervisor need not have specific or knowledge of a particular inmate's situation in order to hold the supervisor liable for deliberate indifference. . . Here, however, it is plausible under the facts pleaded in Plaintiff's Complaint that Defendant Lanigan was aware that Plaintiff was a repeated

target of assault by correctional officers prior to the July 24, 2014 attack but did not institute any corrective policies, measures, training, or supervision to prevent further injury to Plaintiff. As such, because Plaintiff adequately states a claim for relief against Defendant Lanigan in his supervisory capacity and the State fails to offer additional arguments for dismissal, the State's motion to dismiss the Complaint as to Defendant Lanigan is denied without prejudice.")

Beenick v. LeFebvre, No. 4:14-CV-01562, 2015 WL 2344966, at *4-7 (M.D. Pa. May 14, 2015) ("As Plaintiff points out, Magistrate Judge Blewitt's report and recommendation failed to address the ways in which *Barkes* clarified Third Circuit law in the aftermath of the United States Supreme Court decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). It is true, as Magistrate Judge Blewitt acknowledged and Defendants argue, that government officials may not be held liable for the unconstitutional actions of their subordinates on a theory of *respondeat superior*. . . It was on this principle that Magistrate Judge Blewitt founded his analysis. In doing so, Magistrate Judge Blewitt unfortunately failed to recognize the myriad of ways in which Plaintiff had alleged that Dittsworth, Weavering, and Fagan, through their own individual actions, had violated his constitutional rights. To that end, *Barkes* reiterated that there are two general ways in which a supervisor-defendant can be held liable for the unconstitutional actions and conduct of their subordinates. . . The first is a direct liability theory, including a theory of knowledge and acquiescence, and the second is policy or practice liability, including a theory based on failure to supervise. In his complaint, Plaintiff specified only a failure to supervise claim in Count IV. However, throughout the complaint he utilizes language of knowledge and acquiescence. Consequently, the Court will address both theories as they apply to Plaintiff's allegations. . . . Although *Iqbal* arguably rejected supervisory liability predicated on a theory of knowledge and acquiescence, the Third Circuit has clarified through *Barkes* that the holding in *Iqbal* was dependent on the constitutional violation at issue. . . Because the claim presented in *Iqbal*—First and Fifth Amendment violations—required that the plaintiff prove that the perpetrator acted with a discriminatory purpose, it necessarily followed that the defendant supervisors need have possessed the same mental state. . . Therefore, the *Barkes* court concluded, 'the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged. In this case, the underlying tort is ... [a] violation of the Eighth Amendment's prohibition on cruel and unusual punishment, and the accompanying mental state is subjective deliberate indifference.'. . However, following *Iqbal*, the Third Circuit has heightened its pleading bar for supervisory liability claims predicated on a theory of knowledge and acquiescence. . . [Discussing *Santiago* and *Argueta*] In the case at bar, Plaintiff alleges only that Defendants Dittsworth and Weavering knew that LeFebvre and Mandichak–McConnell routinely ordered prisoners to operate the meat slicer to slice food it was not intended to slice, without any safety precautions and without any training. He alleges more specifically that Defendant Fagan knew of this practice through her periodic inspections, observation, and through verbal and written communications from staff and prisoners. He further alleges that all of the supervisory defendants 'tolerated, condoned, acquiesced in, and encouraged the practice.' These allegations are insufficient to state a claim for supervisory liability under the Third Circuit's heightened pleading standards. As relates to Defendants Dittsworth and Weavering, the open-ended statement that they had knowledge of their subordinates' conduct is purely conclusory

without any facts to support that statement. As for Defendant Fagan, the allegations against her are very similar to those articulated in *Argueta* in terms of specificity and abundance. As those allegations in *Argueta* were found to be insufficient, so too do we find them here. Consequently, to the extent Plaintiff's claim in count IV is predicated on a theory of knowledge and acquiescence, it is dismissed without prejudice, with leave to amend in accordance with this Court's decision to more explicitly state the circumstances and specifics of the Defendants' knowledge. . . .The second way in which a supervisor-defendant may be liable for the acts of its subordinates is if, 'with deliberate indifference to the consequences, [he or she] established and maintained a policy, practice or custom which directly caused [the] constitutional harm.'. . A subcategory of this type of policy or practice liability includes 'failure to' claims, including failure to train, failure to discipline, and most importantly for the matter before this Court, failure to supervise. . . The *Barkes* court went on to reaffirm the continued viability of its test for supervisory liability in the context of a failure to supervise claim under the Eighth Amendment, as originally articulated in *Sample v. Diecks*, 885 F.2d 1099 (3d Cir.1989). . . In that case, the Third Circuit developed a four-part test for establishing a claim based on the failure of a government official to supervise his or her subordinates. Specifically, '[t]he plaintiff must identify a supervisory policy or practice that the supervisor failed to employ, and then prove that: (1) the policy or procedures in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory practice or procedure.'. . Moreover, the *Barkes* court explicitly rejected the notion that the defendant must have committed an affirmative act in order to be held liable under the Eighth Amendment. . . At this point in the litigation the Court need only consider whether Plaintiff has plead a cause of action for failure to supervise, not whether he has proven his claim. I find that he has done so. Specifically, Plaintiff has alleged that all three of the supervisory Defendants were responsible in their positions of authority to make protective gear available and to ensure that the meat-slicer would not be used without its blade guard. The failure to make available protective gear with a dangerous cutting instrument and the failure to train prisoners in the use of that instrument necessarily creates an unreasonable risk of injury, especially in the context of a prison environment where prisoners have less liberty to refuse to follow the order of a superior. Whether the facts at issue here constitute a constitutional violation is inappropriate for the Court to determine at this juncture. I find only that Plaintiff has alleged enough information in his complaint to plausibly state that a constitutional violation has occurred because of Defendants' inactions. . . Moreover, Plaintiff does aver that Defendants knew that Defendants LeFebvre and Mandichak–McConnell routinely ordered prisoners to operate the meat slicer to slice food it was not intended to slice, without any safety precautions and without any training. In the absence of a more developed factual record, the Court is unaware of the exact contours of the Defendants knowledge of their subordinates' conduct. Furthermore, Plaintiff alleges that Defendants did nothing to prevent this practice, instead tolerating, condoning, and encouraging it. . . Finally, Plaintiff alleges that his injury, including the loss of his fingers, was directly caused by the failure of the Defendants to take the actions they were required to and their inaction in preventing Defendants LeFebvre and Mandichak–McConnell from allowing this unsafe practice to persist. These are more than 'naked

assertions' that formulaically recite the elements of the cause of action. Consequently, Defendants' motion to dismiss count IV will be denied to the extent Plaintiff's complaint relies upon a theory of failure to supervise.")

Peet v. Beard, No. 3:10-CV-482, 2015 WL 2250233, at *15-17 (M.D. Pa. May 12, 2015) ("T]he defendants' exclusive focus on Palakovich's asserted inability to make medical decisions and his lack of direct interaction with Peet misses the salient focus that the Third Circuit highlighted in *Barkes*, which is on whether Palakovich's own conduct in his role as a supervisor was itself deliberately indifferent with respect to policies and procedures within the prison. . . . In particular, Peet notes that official policy dictated that emergency response times were to be within four minutes, something that Palakovich himself acknowledged was expected of staff. Nevertheless, there is evidence in the record to show that SCI–Camp Hill officers on duty on the day of the alleged incident had never been trained in effective response times, and indeed were entirely unaware of the 4–minute maximum response time expected until they learned of it during discovery in this case. . . Likewise, DOC nurses who were also under Palakovich's supervision and ultimate authority were also never trained regarding expected response times. . . . T]he evidence reveals a potentially stark contrast between what defendant Palakovich describes as his understanding of the medical emergency response policy, a policy he was charged with implementing, and the general lack of awareness of that policy among those who were charged with Peet's safety during the critical moments when he lay disabled with his face wedged against a scalding radiator. This gulf could have been bridged by essential training, understanding, awareness and communication, but the factual record is largely silent on this score, leaving the gulf between the superintendent's expectations, and staff awareness of those expectations unbridged. Given these unresolved factual questions, we believe that summary judgment would not be appropriate on a supervisory failure-to-train claim. . . .T]he evidence, albeit disputed, when viewed in a light most favorable to the plaintiff would permit a finding of supervisory failure-to-train liability. The nature of this policy, which deals with emergency medical responses, underscores the gravity of adequate staff knowledge and training. . . . Yet, the evidence, and particularly the staff assertions that they were totally unaware of a policy that called for a four minute response to a medical emergency in which it is alleged that an inmate was being blinded, scarred and burned by a radiator for an extended period of time, permits an inference that there was a failure-to-train in this case that rose to a matter of potentially constitutional dimensions. . . . The defendants' suggestion that medical staff are entirely independent of Palakovich, or somehow that they and their decisions fell outside the ambit of his authority, is not legally tenable, and does not provide a basis for summary judgment in light of *Barkes*. . . . T]he plaintiff has done an adequate job of identifying facts that could show that SCI–Camp Hill administrators, including Superintendent Palakovich, were indifferent to their role as supervisors overseeing both corrections staff and medical staff at the prison, and that this indifference—in the face of Peet's serious and documented medical needs—arose to the level of constitutional misconduct.")

Harris v. Hudson Cnty. Jail, No. CIV.A. 14-6284 JLL, 2015 WL 1607703, at *5 (D.N.J. Apr. 8, 2015) ("To make out a supervisor liability claim based on acquiescence, Plaintiff must show that

the supervisor had authority over a subordinated, had actual knowledge of a violation of a plaintiff's rights, and then acquiesced to that violation. . . To recover on such a claim, a plaintiff must also show that the supervisor acted with the requisite mental state, which varies based on the tort alleged. *Barkes,* 766 F.3d at 319–20. In a conditions of confinement claim, the requisite mental state is deliberate indifference.")

Jamison v. Wetzel, No. 1:13-CV-2129, 2015 WL 791444, at *7 (M.D. Pa. Feb. 25, 2015) ("[T]o the extent that these supervisory liability claims rest on the premise that officials did not after-the-fact act favorably upon his past grievances, this claim also fails. An inmate cannot sustain a constitutional tort claim against prison supervisors based solely upon assertions that officials failed to adequately investigate or respond to his past grievances. Inmates do not have a constitutional right to a prison grievance system. *Speight v. Sims,* 283 F. App'x 880 (3d Cir.2008) . . . Consequently, dissatisfaction with a response to an inmate's grievances does not support a constitutional claim. . . . In sum, a number of the plaintiff's claims against these supervisory defendants appear to consist of little more than assertions of *respondeat superior* liability, coupled with dissatisfaction with the processing of this inmate's past grievances, assertions which as a matter of law do not suffice to state a constitutional tort claim. Therefore, these defendants are entitled to be dismissed from this case.")

Womack v. Moleins, No. CIV. 10-2932, 2015 WL 420161, at *2-3 (D.N.J. Jan. 30, 2015) ("There are two ways to establish a supervisory defendant's personal involvement in a subordinate's unconstitutional conduct. First, the supervisor may be liable if he 'participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in the subordinate's unconstitutional conduct.' *Barkes v. First Corr. Med., Inc.,* 766 F.3d 307, 316 (3d Cir.2014). To establish knowledge and acquiescence, a plaintiff must allege the defendant's '(1) contemporaneous knowledge of the offending incident or knowledge of similar incidents in the past, and (2) actions or inactions which communicated approval of the subordinate's behavior.'. . '[C]onstructive knowledge of a subordinate's unconstitutional conduct simply because of [the defendant's] role as a supervisor' is insufficient. Instead, the supervisory defendant must have actual knowledge of the misconduct, but knowledge may be inferred from the circumstances. . . Allegations of participation or actual knowledge and acquiescence must be made with particularity. . . Second, the supervisory defendant may be liable if he, 'with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused the constitutional harm.'. . Claims alleging a failure to train, failure to discipline, or failure to supervise are a subset of such policy or practice liability. . . Generally, failure to adequately train or supervise can only constitute deliberate indifference if the failure has caused a pattern of violations. . . To hold an official liable on a claim for failure to supervise based on a policy or practice, a plaintiff 'must identify a supervisory policy or practice that the supervisor failed to employ, and then prove that: (1) the policy or procedures in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory

practice or procedure.' *Barkes,* 766 F.3d at 317. Similarly, to bring a claim of failure to train under § 1983, 'a Plaintiff must (1) identify the deficiency in training; (2) prove that the deficiency caused the alleged constitutional violation; and (3) prove that the failure to remedy the deficiency constituted deliberate indifference....' *Lapella v. City of Atlantic City,* No. 10–2454 JBS/JS, 2012 WL 2952411, at *6 (D.N.J. July 18, 2012).")

Collinson v. City of Philadelphia, No. CIV.A. 12-6114, 2015 WL 221070, at *4 n.1 (E.D. Pa. Jan. 14, 2015) ("The Third Circuit has expressed uncertainty as to the viability and scope of supervisory liability after the Supreme Court's holding in *Ashcroft v. Iqbal* . . . The Third Circuit recently addressed the concept of supervisory liability after *Iqbal* as it pertained specifically to Eighth Amendment claims. The Circuit held that 'under *Iqbal,* the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged.' *Barkes v. First Correctional Medical, Inc.,* 766 F.3d 307, 319 (3d Cir.2014). The Third Circuit specifically 'left for another day' whether supervisory liability will continue to exist for other constitutional violations. . .With this 'uncertainty,' district courts in this Circuit have continued to apply pre-*Iqbal* standards with caution. *See, e.g ., Pratt v. City of Philadelphia,* 2012 WL 592247, at *3 (E.D.Pa.2012).")

Bornstein v. Cnty. of Monmouth, No. CIV. 11-5336, 2014 WL 6908925, at *3-5 (D.N.J. Dec. 9, 2014) ("Recently, the Third Circuit in *Barkes v. First Correctional Medical, Inc.* ruled that supervisory liability under § 1983 in the Eighth Amendment context survived the Supreme Court's ruling in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). . . Specifically, the Court reaffirmed its four-part standard, established in *Sample v. Diecks,* for determining whether an official may be held liable on a § 1983 Eighth Amendment claim for failure to supervise. . . In reaching its conclusion, the Court stated that 'under *Iqbal,* the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged.'. . Since the parties in the present case did not have the benefit of the *Barkes* opinion when briefing Defendants' Motion for Summary Judgment, the Court directed the parties to provide supplemental briefing on the impact, if any, of *Barkes.* After reviewing the parties' submissions, the Court does not find that *Barkes* altered the personal involvement standard for supervisory liability applicable to this case. The *Barkes* court identified 'two general ways in which a supervisor-defendant may be liable for unconstitutional acts undertaken by subordinates[:]' (1) liability based on an establishment of policies, practices or customs that directly caused the constitutional violation and (2) personal liability based on the supervisor participating in the violation of Plaintiff's rights, directing others to violate Plaintiff's rights, or having knowledge of and acquiescing to a subordinate's conduct. . . The violation alleged in *Barkes* fell into the first category, as it was based on a supervisory officer's failure to supervise with respect to a deficient prison mental health screening policy, while the case at hand presents a claim within the second category, which, beyond mere identification, is not addressed further in *Barkes.* Thus, the *Barkes* ruling is not directly applicable here. Although the Third Circuit's reasoning in *Barkes* relies on the broader notion that the standard for supervisory liability varies with the underlying constitutional tort alleged, ultimately, the *Barkes* ruling is limited to affirming its previously established *Sample* standard and does not indicate an intent to change existing

standards on supervisory liability. Indeed, *Barkes* expressly states that it would 'leave for another day the question of whether and under what circumstances a claim for supervisory liability derived from a violation of a different constitutional provision remains valid.'. . Had the Third Circuit intended to overrule existing standards for supervisory liability, it would have spoken more clearly. Therefore, the Court does not find that *Barkes* alters the well-established personal involvement standard for supervisory liability. . . . In *Barkes,* the Third Circuit reasoned that since the underlying tort was the denial of adequate medical care in violation of the Eighth Amendment, which has an accompanying mental state of subjective deliberate indifference, in order to hold a supervisor liable for failure to supervise in the context of a deficient mental health screening policy, there must also be deliberate indifference on the part of the supervisor, as assessed under the four part *Sample* test. . . Here, the underlying tort is excessive force against a pretrial detainee, which is assessed under the due process 'shocks the conscience' standard. . . . Just as a reasonable jury could find, based on the video evidence and statements of the officers, that the force used by the subordinate officers shocked the conscience, drawing all reasonable inferences in favor of Plaintiff as the non-moving party, a reasonable jury could also find that Sgt. Noland's conduct in permitting Bornstein's treatment by other officers shocked the conscience, especially considering the cumulative amount of force used against him by multiple officers in multiple instances. There remains a genuine dispute of material fact whether Sgt. Noland was personally involved in the alleged constitutional violations and whether his conduct shocks the conscience. Therefore, Sgt. Noland's Motion for Summary Judgment will be denied.")

Rankin v. Majikes, No. 3:CV-14-699, 2014 WL 6893693, at *9 (M.D. Pa. Dec. 5, 2014) ("Rankin will be permitted to proceed with his Fourth Amendment claim against Dessoye and Crane because the Amended Complaint contains sufficient factual allegations to support a supervisory liability theory. Here, Dessoye and Crane are alleged to have had responsibility over the training and supervision of the City Officers and Sergeants. . . Rankin also avers that they failed to train in methods for avoiding the use of excessive or deadly force, including the use of live action simulations and other generally accepted police training methods regarding the avoidance of the use of such force. . . Rankin further asserts that they were deliberately indifferent to that risk, which resulted in the deprivation of his Fourth Amendment rights. . . Dessoye and Crane's motion to dismiss the excessive force claim will be denied.")

Thomas v. Adams, 55 F.Supp.3d 552, 554, 567-68, 578-80, 586-88 (D.N.J. 2014) ("Moving to dismiss Plaintiffs claims, pursuant to Rule 12(b) of the Federal Rule of Civil Procedure, Defendants essentially maintain that Plaintiffs failed to state a plausible claim against them simply because Defendants are high-ranking supervising officials, and Plaintiffs' facts lack the *particularities* of Defendants' decision-making process and actions. This Court disagrees and will deny Defendants' motions, in part, and grant them in part. . . . Nowhere has the *Iqbal* misreading been more evident and distortive of the letter and spirit of Rule 8 than in the matters containing claims against defendants holding supervisory positions. While, half a century ago, the *Conley* passage came to be construed as allowing a pleader to avoid asserting any facts, the *Iqbal* misreading came to be used as a shield that allowed virtually every wrongdoer holding a

supervisory position to escape litigation upon claiming 'insufficiency of pleading,' *i.e.,* upon uttering the hollow phrase which came to mean that a plaintiff, separated from the supervisor-wrongdoer by a few ranks of subordinates, simply had no meaningful way to learn about and plead, without discovery, the *particularities* of the wrongdoer's *exact* conduct. Such *Iqbal* misreading is troubling. The contraction of the *Conley* holding into the *Conley* passage might or might not have done a long term damage. However, the transformation of the careful, thoughtful and well-grounded holding of *Iqbal* into the *Iqbal* misreading threatens such damage. . .*Iqbal* did not change any aspect of substantive law. Nor did *Iqbal* create a liability exception for the defendants fortunate to hold supervisory positions. And, *a fortiori, Iqbal* did not change a single word of Rule 8(a) (or Rule 12(b)), or the meanings of these Rules: the actual *holding* of *Iqbal* merely elaborated on the Supreme Court's original *passim* observation in *Dura* that 'it should not prove burdensome [for a plaintiff] to provide [his defendants with] *some indication* of the [facts] that the plaintiff has in mind,' 544 U.S. at 347 (emphasis supplied), since the Federal Rules have *always* been asking a pleader for a 'short and plain statement of the claim showing that the pleader is entitled to relief.'. . Thirty six years ago, in *Monell [v. Dep't of Soc. Servs.,* 436 U.S. 658 (1978)], the [Supreme] Court ... concluded that Congress had rejected [the concept of] impos[ing] liability upon [supervisory entities] based *purely upon the acts of others* .... Section 1983's causation language imposes liability on a 'person who ... shall subject, or cause to be subjected, any person' to a deprivation of federal rights. . . .Thirty six years after *Monell,* the pleading standard as to supervising officials remains the same. It is with *that* standard in mind, the Supreme Court addressed those *Iqbal* claims that were merely disguised *respondeat superior* challenges. . . .Reading *Leamer, Napoleon* and *Durmer* jointly with the rationale of *Plata,* this Court concludes that, if: (a) supervising officials make systemwide determinations; (b) these determinations become the moving force behind the circumstances under which the subordinate officers effectively have no choice but to deny/reduce/change an inmate's prescribed medical/ mental treatment for non-medical reasons; and (c) such denial/reduction/change in prescribed treatment was foreseeable under the systemwide determinations the supervisors made, then the supervisors are liable to the inmate for his injuries caused by such denial/reduction/change in prescribed treatment, provided that the inmate draws the requisite 'causal link' between the supervisors' decisions and his injury-by stating facts plausibly establishing the supervisors' deliberate indifference to the risk of the inmate's injury. . . .A recent decision by the Court of Appeals details the precise causal link the inmate must draw to plausibly plead such a claim. *See Barkes,* —— F.3d ——, 2014 U.S.App. LEXIS 17261. . . .Read against the holdings of *Barkes* and *Sample,* the guidance in *Plata, Iqbal, Barkes, Argueta, Leamer, Napoleon* and *Durmer* indicates that a plaintiff states a plausible circumstantial-evidence medical care claim against defendants-supervisors if:
(a) there are facts (either pled or amenable to judicial notice) showing that the supervisors' decisions created an operational regime laden with an unreasonable risk of denial of (or reduction/change in) the plaintiffs' mental care for non-medical reasons, and defendants-supervisors, being aware that their systemwide decisions entailed such risk elected to proceed with an implementation of their decisions (regardless of whether the defendants-supervisors were acting maliciously *or* were prompted to act by unfortunate slew of external economic/socio-political/logistical circumstances); and (b) the causal link between these systemwide decisions and

denial of (or reduction/change in) the plaintiffs' mental care can reasonably be inferred from the lack of facts indicating that subordinate officers had a meaningful discretion to properly perform their duties under the circumstances ensuing from the operational regime triggered by the defendants-supervisors' systemwide decisions. . . . [S]tripped of all niceties, the DOC Defendants' qualified immunity argument turns on their self-serving misreading of *Iqbal, i.e.,* on their claim that supervisory officials are necessarily shielded from suit by a plaintiff separated from those supervisors by a few ranks of subordinates, since that the plaintiff cannot be in privy with the particularities of the supervisors' operations and decision-making processes and, hence, cannot plead those particularities. Although, as detailed *supra,* such self-serving misreading of *Iqbal* has become common among defendants holding supervisory positions and even persuaded a few jurists, *see Barkes,* —— F.3rd ——, 2014 U.S.App. LEXIS 17261, at *24 (*"Iqbal* has ... [led some jurists to] believe [that it] abolish [ed] supervisory liability in its entirety"), that misreading is *not* the law and never was the law. Thus, this misreading cannot entitle Defendants to qualified immunity. *Iqbal* did not involve a change in the Fourteenth or Eighth Amendment regime, nor did *Iqbal* eliminate the 'practical guidance' these bodies of law provided to the DOC Defendants, 'fairly warning' them that they could be liable for their decisions and acts evincing deliberate indifference to the risk of harm resulting from denial/reduction/change in Plaintiffs' prescribed mental treatment for non-medical reasons. Not a single statement in *Iqbal* could have led the DOC Defendants to believe that they would be entitled to violate clearly established due process law because the Supreme Court offered a clarification as to the pleading requirement of Rule 8(a), or because the DOC Defendants held supervisory positions, or because Plaintiffs—not being in privy with the DOC Defendants' exact operations—could not plead the particularities of the DOC Defendants' decision-making processes or acts. . . . [T]he DOC Defendants are not entitled to qualified immunity.")

Shawn H. v. Wienk, 2:12-CV-1783, 2014 WL 4792247, *8 (W.D. Pa. Sept. 23, 2014) ("When viewed in connection with the above standards, it is clear that Plaintiffs have failed to sufficiently allege a supervisory liability claim. There are no facts pled in the Complaint that would indicate Berdar or Savini had any personal involvement in the incident or that they directed, or actually knew of and acquiesced in, the alleged violations of S.H.'s constitutional rights. Moreover, for the reasons previously discussed in connection with Plaintiffs' *Monell* claim, Plaintiffs have failed to allege sufficient facts that Berdar and Savini had notice of a prior practice of unconstitutional behavior of a similar conscience-shocking nature on the part of Wienk. Finally, to the extent Plaintiffs are relying on a failure to supervise/train theory of liability, the Complaint is devoid of any factual allegations with respect to a pattern of similar constitutional violations. Accordingly, dismissal of this claim is appropriate as well, and Defendants' Motions will therefore be granted as to Counts II and III.")

Marks v. Corizon Health Care Inc., 4:13-CV-0726, 2014 WL 4252430, *6, *7 (M.D. Pa. Aug. 26, 2014) ("In this case, Marks alleges that he wrote to defendants Leggore, Harris, Davis, and Law asking for help and explaining that he has epilepsy, that he has seizures, that he was placed on a top tier, that he told Hunsberger about his situation, that Hunsberger did not care, and that it

is hazardous for him to be on the top tier. He alleges that he wrote to these defendants after he was assigned to an upper tier but before he fell. At this stage of the proceedings, Marks has sufficiently alleged that he put defendants Leggore, Harris, Davis, and Law on notice of an ongoing dangerous situation and that by failing to take action to correct the situation they acquiesced in the situation. Thus, at this early stage of the proceedings, Leggore, Harris, Davis, and Law are not entitled to dismissal on the basis of lack of personal involvement. Marks has failed, however, to sufficiently allege personal involvement on the part of defendant Shoop. Marks alleges that Shoop is a health care administrator, who, according to Marks, should have made sure that his staff put his medical condition in his file and on the computer. Marks further alleges that he wrote to Shoop's staff, but Shoop neglected to properly oversee his staff. Shoop, however, cannot be liable on the basis of *respondeat superior*. And Marks has not alleged that any facts from which it can reasonably be inferred that Shoop was aware of his situation before his fall. While he attached to his amended complaint a response to a grievance, which response appears to be signed by defendant Shoop, that response indicates that Marks's grievance was dated November 27, 2012, three weeks after his fall. Mark's after-the-fact grievance is not sufficient to show personal involvement on the part of defendant Shoop. Accordingly, we will recommend that the Eighth Amendment claim against Shoop be dismissed.")

Powell v. Wetzel, No. 1:12–cv–01684, 2014 WL 2864686, *2, *3 (M.D. Pa. June 24, 2014) ("The Court will decline to adopt the Report and Recommendation, and deny Defendant Fisher's motion to dismiss Count One. In his amended complaint, Plaintiff alleges that Defendant Fisher was 'personally aware of the irregular confiscation of [his] legal materials by Sgt. Workinger, because Mr. Powell repeatedly informed Superintendent Fisher both verbally and in writing and also pleaded for the return of the legal files,'. . . and that 'Superintendent Fisher tolerated and acquiesced in the disregard of DOC policies by Sgt. Workinger with regard to the confiscation of Mr. Powell's legal files'. . . . Although Magistrate Judge Schwab concluded that Defendant Fisher's 'after-the-fact knowledge of such alleged wrongdoing, through oral communication or written letters or grievances, is not enough to establish the requisite personal involvement,' this legal conclusion runs counter to the principle that a supervisor may be held liable for 'having knowledge of and acquiescing in their subordinates' violations.'. . Plaintiff alleges that he contacted Defendant Fisher several times and requested that he return his legal papers, and Defendant Fisher refused. . . Accordingly, at the pleadings stage, the Court finds that Plaintiff has stated an access to courts claim against Defendant Fisher, and will deny his motion to dismiss Count One.")

Holbrook v. Jellen, No. 3:14–CV–28, 2014 WL 1944644, *10, *11 (M.D. Pa. May 14, 2014) ("We find that Defendants' argument for dismissal of the supervisory Defendants (including Woodside) as well as the application of the four *Turner* factors to Plaintiffs' First Amendment claims to be premature and to be more appropriate at the summary judgment stage of this case after sufficient time for discovery has been afforded. . . . Despite the fact that Defendants have submitted as an Exhibit with their Motion to Dismiss a copy of DC–ADM 803, it does not appear that discovery has commenced in this case. In light of *Thompson v. Smeal*, as well as *Scott v.*

Erdogan, we find that a proper analysis of the *Turner* factors to Plaintiffs' First Amendment claims requires complete and thorough discovery, such as specific evidence as to how the mailings which were sent to inmate Holbrook would cause security risks in the prison. Also, we agree with Plaintiffs that discovery is required as to the specific roles of the supervisory Defendants each time Holbrook's mail was censored to see if these Defendants only engaged in perfunctory reviews of Jellen's decisions or if they conducted their own analysis of the contents of the censored mail. Thus, we concur with Plaintiffs that they are entitled 'to develop evidence to aid the "fact-intensive" and "contextual, record-sensitive analysis" required by *Turner*.'")

Rosembert v. Borough of East Lansdowne, 14 F.Supp.3d 631, 643 (E.D. Pa. 2014) ("In light of the facts asserted in the amended complaint, that supervisory officers were present during the alleged beating of Plaintiff and that previous African–Americans have been targeted in a similar manner by police officers from these Boroughs, Plaintiff has sufficiently stated a claim for failure to train, discipline or control. These facts demonstrate that supervisors were present and aware of the excessive force used in Plaintiff's arrest, and by either engaging in the behavior or silently acquiescing to the conduct, they communicated a message of approval.")

McCargo v. Camden County Jail, No. 13–0868 (RBK)(KMW), 2014 WL 116329, *3 n.2 (D.N.J. Jan. 9, 2014) ("It is worth noting that numerous courts have explained that a plaintiff states a claim by alleging that a supervisory defendant reviewed a grievance where the plaintiff alleges an ongoing violation as she " 'is personally involved in that violation because [s]he is confronted with a situation [s]he can remedy directly.'" [collecting cases] In this case, however, while plaintiff may have alleged an ongoing condition of confinement violation, the complaint does not allege that defendants Taylor or Pizario were involved in reviewing plaintiff's grievances to impute the required knowledge to sustain the claim.")

Cardona v. Warden - MDC Facility, No. 12–7161 (RBK)(AMD), 2013 WL 6446999, *5 (D.N.J. Dec. 6, 2013) ("Numerous courts have explained that a plaintiff states a claim by alleging that a supervisory defendant reviewed a grievance where the plaintiff alleges an ongoing violation as she ' "is personally involved in that violation because [s]he is confronted with a situation [s]he can remedy directly."' [collecting cases] In this case, as plaintiff alleged an ongoing violation that defendant Zickefoose was made aware of through his written requests per facility procedure, he has stated a deliberate indifference claim against her. The claim against Zickefoose will be permitted to proceed.")

Dare v. Township of Hamilton, No. 13–1636 (JBS/JS), 2013 WL 6080440, *7, *8 (D.N.J. Nov. 18, 2013) ("Under pre-*Iqbal* Third Circuit precedent, '[t]here are two theories of supervisory liability,' one under which supervisors can be liable if they 'established and maintained a policy, practice or custom which directly caused [the] constitutional harm,' and another under which they can be liable if they 'participated in violating plaintiff's rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations.'. . . The Third Circuit has recognized the potential effect *Iqbal* might have in altering the standard for

supervisory liability in a section 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing the scope of the test. . . Therefore, it appears that, under a supervisory theory of liability, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. . . Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; e.g., supervisory liability may attach if the plaintiff asserts facts showing that the supervisor's actions were 'the moving force' behind the harm suffered by the plaintiff. . . Here, Plaintiff alleges no facts regarding Chief Tappeiner's personal involvement in the deprivation of Plaintiff's constitutional rights. Plaintiff's Complaint contains only one paragraph that may implicate Police Chief Tappeiner at all. This paragraph consists of the bare allegation that '[t]here was participation by upper management of the Township of Hamilton Police Department, under color of State law, in connection with the deprivation of the rights of Plaintiff, that evidences the customs, patterns, practices, and procedures of Defendants to retaliate and violate the civil rights of Plaintiff.'. . Plaintiff has alleged no facts indicating that Chief Tappeiner directed the deprivation of a plaintiff's constitutional rights or created policies to that effect. Instead, Plaintiff relies on a single paragraph of legal conclusions that only obliquely alludes to 'upper management' without even mentioning Chief Tappeiner. Accordingly, this Court will dismiss the claims against Chief Tappeiner under section 1983.")

McCray v. Holmes, No. 12–2356 (RBK)(JS), 2013 WL 6073852, *4 (D.N.J. Nov. 15, 2013) ("Plaintiff alleges that he appealed his grievances complaining about the lack of his kosher meals to defendant Holmes, but that defendant Holmes failed to restore his kosher meals. Typically, a plaintiff appealing his grievances to the prison administrator is not enough to impose knowledge against the prison administrator of the wrongdoing. [collecting cases] However, in this case, plaintiff alleges an ongoing constitutional violation. Indeed, he alleges that he has not received kosher meals since February, 2012. Furthermore, he alleges that defendant Holmes was made aware of this ongoing violation through plaintiff's prison grievances and appeals. Numerous courts have stated that a plaintiff states a claim by alleging that a supervisory defendant reviewed a grievance where the plaintiff alleges an ongoing violation as he ' "is personally involved in that violation because he is confronted with a situation he can remedy directly."' [collecting cases] In this case, as plaintiff has alleged an ongoing violation that defendant Holmes was made aware of through his grievance appeals, he has stated a free exercise claim against Holmes.")

Jerri v. Harran, No. 13–1328, 2013 WL 4401435, *1, *3 (E.D. Pa. Aug. 16, 2013) ("Although the Third Circuit has, in dictum in several cases, recognized that a theory of knowledge and acquiescence may serve as the basis of a § 1983 claim against a person in a supervisory role in relation to the alleged unconstitutional wrongdoing, the Court has never upheld such a judgment in a precedential decision. *Argueta v. United States Immigration and Customs Enforcement*, 643 F.3d 60, 71, (3d Cir.2011); *Santiago v. Warminster Twp.*, 629 F.3d 121, 129 (3d Cir.2010); *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988). The court has refrained from defining the

precise contours of what is required in order to plead or prove such a claim sufficiently. These decisions impose a high standard, and all but one of the Third Circuit's decisions have not proceeded beyond the motion to dismiss or summary judgment stage. . . . In this case, plaintiffs' allegations of 'knowledge and acquiescence,' are very general and fail to show any specific knowledge or conduct. The Court rejects plaintiffs' argument that their allegations are sufficient to establish supervisory liability.")

Newsome v. Catone, No. 3:12–CV–2475, 2013 WL 2897796, *7-*9 (M.D. Pa. June 11, 2013) ("To the extent that supervisory liability survives after *Iqbal*, the scope of that liability is clearly and narrowly defined. . . . Newsome has not alleged well-pleaded facts showing that 'the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations.'. . Moreover, Newsome has not alleged well-pleaded facts which would establish a claim of supervisory liability grounded upon an assertion that the defendants 'established and maintained a policy, practice or custom which directly caused [a] constitutional harm[.]'. . .Furthermore, to the extent that Newsome's supervisory laibility claims rest on the premise that officials did not after-the-fact act favorably upon his past grievances, this claim also fails. An inmate cannot sustain a constitutional tort claim against prison supervisors based solely upon assertions that officials failed to adequately investigate or respond to his past grievances. Inmates do not have a constitutional right to a prison grievance system. . . Consequently, dissatisfaction with a response to an inmate's grievances does not support a constitutional claim. . . . Indeed, in a case such as this, it is also well-established that non-medical correctional supervisors may not be 'considered deliberately indifferent simply because they failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor.'. . . [C]ourts have repeatedly held that, absent some reason to believe that prison medical staff are mistreating prisoners, non-medical corrections staff who refer inmate medical complaints to physicians may not be held personally liable for medically-based Eighth Amendment claims. . . . In sum, as presently drafted, the plaintiff's amended complaint's claims against these supervisory defendants consist of little more than assertions of *respondeat superior* liability, coupled with dissatisfaction with the processing of this inmate's past grievances, assertions which as a matter of law do not suffice to state a constitutional tort claim. Therefore, these defendants are entitled to be dismissed from this case.")

Dinote v. Danberg, No. 12–cv–377 (GMS), 2013 WL 2297039, *5, *6 (D. Del. May 23, 2013) ("Here, there is no evidence that defendants Danberg, McBridge, or Johnson, in their roles as Commissioner of the Delaware Department of Corrections, Director of Central Offender Records, and Warden of SCI, respectively, had any contact or interaction with Dinote during the time in question or that they made the decision that she be strip searched. Dinote also does not allege that the strip search policy at BWCI was established and/or approved by any of the individual defendants. Specifically, Dinote's brief contains a citation to Danberg's testimony that it is the warden who would establish the strip search policy for that institution. Thus, while Dinote's account of her prison experience may, if proved, demonstrate a constitutional violation, . . . her allegations and pleadings, as well as the evidence she presents, is insufficient to legally implicate the individual defendants presently before the court as the warden of BWCI is not a party to this

action. Instead, Dinote attempts to make out a claim against these defendants by associating institutional policies, such as the requirement that all incoming inmates at BWCI go through the 'standard booking procedure' including a strip search and a shower, with constitutional violations. . . These claims are based solely on defendants' various positions within the Delaware Department of Correction, rather than any alleged individual involvement in the alleged events. . . Thus, defendants are entitled to summary judgment on Dinote's Fourth Amendment claims.")

Broadwater v. Fow, 945 F.Supp. 574, 587, 588 (M.D. Pa. 2013) ("A supervisory defendant in a § 1983 action may not be liable based merely on the theory of *respondeat superior*. *Rode v. Dellarciprete,* 845 F.2d 1195, 1207 (3d Cir.1988). Instead, the plaintiff must allege that the supervisory defendant was personally involved in the incident at hand. . . Unfortunately, the term 'personal involvement' is not universally defined in applicable case law. . . Overall, the supervisor must somehow exhibit a 'deliberate indifference' to the deprivation of the plaintiff's constitutional rights. . . Policy-making supervisors may be liable if they 'established and maintained a policy, practice or custom which directly caused [the] constitutional harm.'. . A supervisor's failure to employ a specific supervisory practice or procedure to correct a known unreasonable risk of constitutional harm also satisfies the personal involvement requirement. . .Mere knowledge and acquiescence in a subordinate's constitutional violations may also qualify as personal involvement. .. Allegations that a supervisor 'tolerated past or ongoing misbehavior' may suffice. . . To establish knowledge and acquiescence of a subordinate's misconduct, a plaintiff must allege the defendant's (1) contemporaneous knowledge of the offending incident or knowledge of similar incidents in the past, and (2) actions or inactions which communicated approval of the subordinate's behavior. . . A plaintiff may not allege that a supervisory defendant had constructive knowledge of a subordinate's unconstitutional conduct simply because of his role as a supervisor. . . A failure to train only amounts to deliberate indifference 'where the need for more or different training is obvious' and the lack of training can be expected to result in constitutional violations.")

Hartmann v. Carroll, 929 F.Supp.2d 321, 326, 327 (D. Del. 2013) ("It is well established that supervisory liability cannot be imposed under § 1983 on a respondeat superior theory. . . Purpose rather than knowledge is required to impose liability on an official charged with violations arising from his or her superintendent responsibilities. . . 'Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.'. . A plaintiff must show that an official's conduct caused the deprivation of a federally protected right. . . Additionally, the filing of a grievance is not sufficient to show the actual knowledge necessary for personal involvement . . . and participation in the after-the-fact review of a grievance is not enough to establish personal involvement . . . .")

Smith v. Indiana County Jail, No. 12–728, 2013 WL 425144, *3, *4 (W.D. Pa. Feb. 4, 2013) ("To state a claim for supervisory liability, a complaint must allege the defendant's *actual* knowledge to support a claim of *deliberate* indifference. This distinction in pleading requirements resulted in the dismissal of a complaint in *Santiago v. Warminster Tp.,* 629 F.3d at 134, where the plaintiff implied but did not allege facts establishing actual knowledge. Instead, the complaint implied the

presence of the supervisory defendants in the vicinity of alleged unconstitutional conduct, and therefore alleged broadly that they knew of and acquiesced in the use of excessive force. The United States Court of Appeals for the Third Circuit concluded that these allegations did not support an inference of awareness of subordinates' allegedly unconstitutional activity so as to support a claim predicated upon personal involvement. The Court of Appeals affirmed the dismissal of the claims against the supervising officers, holding that the plaintiff's allegations were insufficient to establish the degree of knowledge sufficient to 'nudge [[his]] claims across the line from conceivable to plausible' so as to satisfy *Twombly*. . . Similarly, in *Arguenta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 74 (3d Cir.2011), the Court of Appeals affirmed the dismissal of an action against supervising defendants where the complaint did not plausibly allege legally sufficient notice of the underlying unconstitutional conduct of their subordinates . . . .In the case at issue, Plaintiffs' claims, which are based upon allegations of imputed and assumed knowledge, or speculative tolerance of past behavior, are insufficient. There are no allegations that Warden Hummel participated in or directed the sexual misconduct at issue. Instead, Plaintiffs rely upon allegations that the sexual activity of Defendant Gross and Dailey were 'common knowledge of the inmate population.' Plaintiffs impute this purported general knowledge within the inmate population to Warden Hummel, so as to create an inference of notice and deliberate indifference, highlighted by her failure to act to prevent additional occurrences. . . However, the Complaint does not allege that the sexual misconduct was ever reported to Warden Hummel so as to infer a plausible claim of notice or 'actual knowledge.' In the absence of some actual knowledge or notice of Gross and Dailey's misconduct, Plaintiffs' allegations do not support a plausible claim of Warden Hummel's personal involvement in the violation of Plaintiffs' constitutional rights.")

Cress v. Ventnor City, No. 08–1873(NLH)(AMD), 2012 WL 6652804, *3 (D.N.J. Dec. 20, 2012) ("Egg Harbor defendant, John Woods, did not participate in the actual execution of the search warrant and he did not enter plaintiffs' home until after the completion of the operation. Instead, Woods was the team commander who devised the operation plan, assigned the ACERT members' duties, and directed practice runs. Plaintiffs claim that the operation plan was excessive from its inception based on the minor nature of the offense allegedly committed by Lombardi and because there was no real or perceived risk that Lombardi was dangerous. In order to hold Woods personally liable under § 1983, plaintiffs 'must show that he participated in violating their rights, or that he directed others to violate them, or that he, as the person in charge of the raid, had knowledge of and acquiesced in his subordinates' violations.' *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190–91 (3d Cir.1995). The Court finds that even though Woods did not personally use excessive force, there are sufficient disputes of material fact concerning what was known and relied upon in developing the plan so as to preclude summary judgment as to Woods at this time. However, it is likely that a separate special interrogatory question or questions regarding the planning of the operation may be necessary to insure that Woods's claim of qualified immunity is viewed through the lens of facts applicable to his conduct and not others. For example, a jury might conclude that the warrant was obtained without probable cause, that the officers did not have reason to fear Lombardi, and the use of force was unreasonable. On the other hand, they could reach the opposite

conclusion on any, or all, of those factual disputes. A proper set of interrogatories in this case should assess each stage of the operation and the relative role of each defendant to insure the proper application of the qualified immunity doctrine. *See id.* at 1193; *cf. Santiago v. Warminster Twp.*, 629 F.3d 121, 133 (3d Cir.2010) ("Where, as here, an operation results in the use of allegedly excessive force against only one of several people, that use of force does not, by itself, give rise to a plausible claim for supervisory liability against those who planned the operation. To hold otherwise would allow a plaintiff to pursue a supervisory liability claim anytime a planned operation resulted in excessive force, merely by describing the force used and appending the phrase 'and the Chief told them to do it.' ").")

Moriarty v. de LaSalle, No. 12–3013 (RMB), 2012 WL 5199211, *5, *6 (D.N.J. Oct. 19, 2012) ("The Third Circuit permits § 1983 claims to proceed based on a theory of supervisory liability where a plaintiff can show defendants had knowledge of their subordinates' violations and acquiesced in the same. *See Baker v. Monroe Twp.,* 50 F.3d 1186, 1190–91 (3d Cir.1995) (permitting plaintiff to hold a supervisor liable for a subordinate's § 1983 violation provided plaintiff is able to show 'the person in charge ... had knowledge of and acquiesced in his subordinates' violations'). To impose liability on a supervisory official there must be 'both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, and (2) circumstances under which the supervisor's assertion could be found to have communicated a message of approval to the offending subordinate.' *Colburn v. Upper Darby Twp.*, 838 F.2d 663, 673 (3d Cir.1988). Allegations of actual knowledge and acquiescence must be made with particularity. *Rode v. Dellarciprete,* 845 F.2d 1195, 1207 (3d Cir.1988). In this case, the Complaint does not allege or suggest that any of the supervisory defendants had contemporaneous knowledge of the incident. Plaintiff is not entitled to relief as against the supervisory defendants here; Plaintiff alleges that they became aware of the claims via his grievance filings. Participation in the after-the-fact review of a grievance or appeal is insufficient to establish personal involvement on the part of those individuals reviewing grievances. *See Rode,* 845 F.2d at 1208 (finding the filing of a grievance insufficient to show the actual knowledge necessary for personal involvement); *Brooks v. Beard,* 167 F. App'x 923, 925 (3d Cir.2006) (per curiam) (allegations of inappropriate response to grievances does not establish personal involvement required to establish supervisory liability). Accordingly, the supervisory defendants cannot be held liable for Plaintiff's medical claims here and claims against these defendants will be dismissed with prejudice.")

Pfeiffer v. Hutler, No. 12–1335 (AET), 2012 WL 4889242, *4-*6 (D.N.J. Oct. 12, 2012) ("Under pre-*Iqbal* Third Circuit precedent, '[t]here are two theories of supervisory liability,' one under which supervisors can be liable if they 'established and maintained a policy, practice or custom which directly caused [the] constitutional harm,' and another under which they can be liable if they 'participated in violating plaintiff's rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations.'. . The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. . . Hence, it appears that, under a supervisory theory of liability,

and even in light of *Iqbal,* personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. . . Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; *e.g.,* supervisory liability may attach if the plaintiff asserts facts showing that the supervisor's actions were 'the moving force' behind the harm suffered by the plaintiff. . .Here, Plaintiff provides no facts describing how the supervisory defendants, Warden Hutler and Chief Mueller, actively or affirmatively violated his constitutional rights, *i.e.,* he fails to allege facts to show that these defendants expressly directed the deprivation of his constitutional rights, or that they created policies which left subordinates with no discretion other than to apply them in a fashion which actually produced the alleged deprivation. In short, Plaintiff has alleged no facts to support personal involvement by the supervisory defendants, and simply relies on recitations of legal conclusions such that they failed to supervise, oversee or correct the alleged custom by some correction officers at OCJ to verbally abuse and disclose gay inmates or inmates confined on sex crime charges in violation of Plaintiff's constitutional rights. These bare allegations, 'because they are no more than conclusions, are not entitled to the assumption of truth.' *Iqbal,* 129 S.Ct. at 1950. Accordingly, this Court will dismiss without prejudice the Complaint, in its entirety, as against the defendants, Warden Hutler and Chief Mueller, because it is based on a claim of supervisor liability, which is not cognizable in this § 1983 action, pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). Nevertheless, if Plaintiff believes that he can assert facts to show more than supervisor liability, or if he can assert facts to cure the deficiencies of his claims against the other unnamed correction officers, Officer DeMarco and Lt. Martin, then he may move to file an amended complaint accordingly.")

Smart v. Borough of Bellmawr, No. 11–0996 (RBK/JS), 2012 WL 4464561, *8 (D.N.J. Sept. 24, 2012) ("Plaintiff asserts a failure-to-train claim against Defendant Walsh, alleging that Walsh knew of and acquiesced in his subordinates' violations. . . The Third Circuit has previously held that a supervisory official may face § 1983 liability under a knowledge-and-acquiescence theory. *See Baker v. Monroe Twp.,* 50 F.3d 1186, 1190–91 (3d Cir.1995). But the Supreme Court rejected the argument that officials who know of and acquiesce in the misdeeds of their subordinates can be liable for them. *See Ashcroft v. Iqbal,* 556 U.S. 662, 677 (2009). The Third Circuit has not yet decided whether a supervisor may only be held liable if he directly participates in unconstitutional conduct. *See Argueta v. U.S. Immigration & Customs Enforcement,* 643 F.3d 60, 70 (3d Cir.2011). Regardless, Plaintiff has failed to produce evidence that Walsh knew of any violations of his subordinates. Plaintiff argues that none of the Bellmawr law enforcement training materials specifically reference certain state and federal cases involving warrantless entry. But this assertion is not a basis for liability, and Plaintiff has failed to connect Defendant Walsh with any potential constitutional violation committed by Defendant Draham.")

Love v. South River Police Dept., Civ. No. 11–3765, 2012 WL 3950358, *2, *3 (D.N.J. Sept. 10, 2012) ("It is well established that government officials cannot 'be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior,' rather a Plaintiff must show that each government official has violated the constitution through their own individual actions. . . Consequently, to survive a motion to dismiss, a plaintiff bringing a section 1983 claim against named defendants in their individual capacities must allege sufficient factual matter to support a claim for one of the two forms of supervisory liability. The first form of supervisory liability requires the plaintiff to allege that the supervisor 'established and maintained a policy, practice, or custom which directly caused [the] constitutional harm.'. . This form of supervisory liability does not require the plaintiff to allege a direct act by the defendant that caused the constitutional violation. Rather, a plaintiff may establish liability under this first form by alleging that the defendant's policy, practice, or custom, when enforced by subordinates or third parties, caused the plaintiff harm under § 1983. . . .The second form of supervisory liability under § 1983 requires a plaintiff to allege that the supervisor 'participated in violating plaintiff's rights, directed others to violate them, or, as a person in charge, had knowledge of and acquiesced in his subordinates' violations.'. . To establish a claim under the second form of supervisory liability, Plaintiff would have to allege a direct and affirmative act by the Defendant, whether in the form of acquiescence or direct participation, that resulted in an infringement of his constitutional rights. Additionally, supervisory liability requires the plaintiff to show 'a causal connection between the supervisor's actions and the violation of plaintiff's rights.'. . Liberally construing the Amended Complaint and subsequent submissions, it appears that Plaintiff is alleging this second form of supervisory liability. Because the Complaint must be 'held to less stringent standards than formal pleadings drafted by lawyers,' *Erickson,* 551 U.S. at 94, and because many of the allegations in the Amended Complaint require a context specific inquiry and necessitate the development of the factual record before the Court can decided whether, as a matter of law, Chief Bouthillette could be liable, the Court declines to dismiss the Amended Complaint as to Chief Bouthillette at this time. Original Defendants' arguments, which are certainly colorable, are best addressed by way of a motion for summary judgment after discovery has concluded.")

Neil v. Allegheny County, No. 12–03482012, 2012 WL 3779182, *5 n.3 (W.D. Pa. Aug. 31, 2012) ("The *Iqbal* case stated that because 'vicarious liability is inapplicable to § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . Thus, the Supreme Court noted that in section 1983 actions, where master-servant liability is extinct, 'the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.'. . Our Court of Appeals has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a section 1983 suit, but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the supervisory liability test. [citing *Santiago* and *Argueta*]")

Figueroa v. City of Camden, No. 09–4343 (JBS/AMD), 2012 WL 3756974, *9, *11 (D.N.J. Aug. 28, 2012) ("Here, while Defendant City of Camden points to evidence in the record of the training

program that all Camden Police Officers are required to undergo, and evidence that both Defendants Gransden and Roberts did, in fact, complete the required training, *see* Jay Cert. Exs. M–R, there is also evidence in the record that the City's policymakers were on notice that its training program and its internal discipline program were insufficient to prevent a repeated and uncorrected pattern of constitutional rights violations as of 2007 when these incidents occurred. The Court finds that, on a record such as this, Plaintiffs must survive Defendant City of Camden's motion for summary judgment. . . . Alternatively, Defendant Venegas argues that he is entitled to supervisory qualified immunity for his actions overseeing the Camden Police Department because a reasonable supervisor in Defendant's position would not have believed that he was being deliberately indifferent to the risk of the Defendant Officers' use of excessive force. *See Rosenberg v. Vangelo,* 93 F. App'x 373, 378 n. 2 (3d Cir.2004). The Court disagrees. Given the scope of Venegas's responsibilities under his supercession executive agreement with the County, and the context in which he was brought to oversee the Camden Police Department, including the Attorney General's letter, the Court concludes that a reasonable supervisor would have known that disclaiming all responsibility for duties such as discipline and training of police officers would be deliberately indifferent to the possibility of undisciplined officers effecting arrests with excessive force. Whether Defendant Venegas took meaningful steps to improve officer training regarding reasonable force in arrests and to improve internal disciplinary investigations and measures during the year leading up to the incidents complained of herein is not in the present record. Accordingly, the Court will deny Defendant Venegas's motion for summary judgment.")

Lapella v. City of Atlantic City, No. 10–2454 (JBS/JS), 2012 WL 2952411, *10 (D.N.J. July 18, 2012) (" 'A supervisor may be personally liable ... if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations.' *A.M. ex rel J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.,* 372 F.3d 572, 586 (3d Cir.2004). The elements of the cause of action alleged are two-fold, that the supervisor have knowledge of the subordinates' violations and that the supervisor acquiesce in the subordinates' violations. Plaintiff alleges just that, that Police Chief Mooney had knowledge of and acquiesced in Officer Moynihan's conduct. However, while Plaintiff alleges the elements of the cause of action, she provides no factual allegations to support a plausible basis for relief. Rather, Plaintiff recites the elements of the cause of action in legal boilerplate. This is insufficient under Rule 8 and this Count must be dismissed.")

Plouffe v. Cevallos, No. 10–1502, 2012 WL 1994785, at *4 -*6 & n.4 (E.D. Pa. June 1, 2012) ("Plouffe asserts incorrectly that *Bell Atlantic Corp. v. Twombly* has eliminated the requirement that he plead actual knowledge and acquiescence. *Twombly* held that factual allegations must be sufficient to raise a right to relief above a speculative level. . . It did not purport to relax the substantive requirements of supervisory liability under § 1983. If anything, the Supreme Court's later decision in *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009), may bring into question the ongoing viability of knowledge and acquiescence as a basis for supervisory liability at all. In *Iqbal,* the Supreme Court held that a plaintiff must plead that each government-official defendant, through the official's own individual actions, has violated the Constitution. . . *Iqbal's* implications for

supervisory liability are not yet clear. In a few post- *Iqbal* cases, the Third Circuit has questioned but not answered whether *Iqbal* narrowed the scope of supervisory liability. *See, e.g., Argueta v. U.S. Immigration & Customs Enforcement,* 643 F.3d 60, 70 (3d Cir.2011); *Santiago v. Warminster Twp.,* 629 F.3d 121, 130 n. 8 (3d Cir.2010). Indeed, in one case, the Third Circuit commented that '[i]n light of ... [*Iqbal*], it is uncertain whether proof of [personal knowledge regarding a constitutional violation], with nothing more, would provide a sufficient basis for holding [defendant] liable ... under § 1983....' *Bayer v. Monroe Cty. Children & Youth Servs.,* 577 F.3d 186, 190 n. 5 (3d Cir.2009). However, the Third Circuit has not resolved the questions of *Iqbal*'s impact on all of the pre- *Iqbal* theories of supervisory liability. . . Because the Third Circuit has not held that a plaintiff may no longer establish § 1983 liability based on a supervisor's knowledge of and acquiescence in a subordinate's constitutional violation, this Court will continue to apply the pre- *Iqbal* supervisory liability analysis. . . . The defendants argue that the only allegations regarding Cavanaugh and Mottola's knowledge come after the fact, when Plouffe filed a post-termination grievance. Citing *Rode v. Dellarciprete,* the defendants argue that this is insufficient to establish personal involvement on the part of the supervisory officials. In *Rode,* the plaintiff alleged that the Governor had personal knowledge of the unconstitutional conduct against her because the plaintiff had filed grievances with the Governor's administrative office. The Third Circuit held that such allegations were insufficient to show actual knowledge and, hence, personal involvement. . . However, *Rode* is distinguishable from the case at bar. In *Rode,* the grievances filed with the governor's administrative office were the only evidence of actual knowledge on the part of the supervisory official; there was no allegation that the governor had personally reviewed the grievance or otherwise had knowledge of the alleged violation. By contrast, here, Plouffe alleges that defendant Mottola handled Plouffe's particular grievance. . . Furthermore, Plouffe claims that a representative from the Chancellor's Office was present at Plouffe's pre-termination final hearing, and that this representative responded to Plouffe's legal arguments. . . Regarding defendant Cavanaugh, Plouffe also alleged that the president of the local faculty union 'personally brought the matter to the attention of the Chancellor, who said he would look into it when the grievance reached his level.'. . These allegations, which the Court must accept as true, reasonably support a theory of contemporaneous knowledge and acquiescence by defendants Cavanaugh and Mottola.")

Zeigler v. PHS Correctional Health Care, Inc., No. 11–203Erie, 2012 WL 1971149, at *4-*7 (W.D. Pa. June 1, 2012) ("If a prisoner is under the care of medical experts, a nonmedical prison official will generally be justified in believing that the prisoner is in capable hands. . . . [A] non-medical supervisory official may be held liable if there was 'knowledge of "malicious" and "sadistic" medical mistreatment.'. . .In her capacity as the Health Services Administrator, Defendant Overton is not deliberately indifferent if she failed to respond to Plaintiff's medical complaints while he was under the care of medical professionals. . . Defendant Overton's reliance on the opinion of medical professionals even as Plaintiff grieved his complaints about the alleged inadequacies in his medical treatment through the administrative remedy process. . . do not indicate that Overton possessed 'knowledge of malicious or sadistic medical mistreatment' so as to impose liability upon her. . . . The failure to train claim must be dismissed against Defendants Overton and

Baker as such a claim is only available against entity-type defendants and not individuals. . . . Defendants Overton and Baker cannot be held liable for the failure to train their subordinates as they have no constitutional duty to do so.")

Peppers v. Booker, No. 11–3207 (CCC), 2012 WL 1806170, at **6, 7 (D.N.J. May 17, 2012) ("To survive a motion to dismiss, a section 1983 claim against named defendants in their individual capacities, a plaintiff must allege sufficient factual matter to support a claim for one of the two forms of supervisory liability. The first form of supervisory liability requires the plaintiff to allege that the supervisor 'established and maintained a policy, practice, or custom which directly caused [the] constitutional harm.'. . This form of supervisory liability does not require the plaintiff to allege a direct act by the defendant that caused the constitutional rights violation. Rather, a plaintiff may establish liability under this first form by alleging that the defendant's policy, practice, or custom, when enforced by subordinates or third parties, caused the plaintiffs harm under section 1983. . . The second form of supervisory liability under section 1983 requires a plaintiff to allege that the supervisor 'participated in violating plaintiff's rights, directed others to violate them, or, as a person in charge, had knowledge of and acquiesced in his subordinates' violations.'. . To establish a claim under the second form of supervisory liability, Plaintiffs would have to allege a direct and affirmative act by the Defendants that resulted in an infringement of Plaintiffs' constitutional rights. Under this form of supervisory liability, a defendant is held liable for their direct acts whether in the form of acquiescence or direct participation. Additionally, supervisory liability requires the plaintiff to show 'a causal connection between the supervisor's actions and the violation of plaintiff's rights.'. . .Plaintiff's factual assertions, taken as true, are not sufficient to sustain claims against Booker on the basis of knowledge and acquiescence. Plaintiffs assert that the Mayor insisted on or approved of their transfers and demotions. These factual assertions, without more, are not sufficient to establish a plausible claim against Mayor Booker.")

R.M. v. Sainato, Civ. No. 2:11–cv–01676 (WJM), 2012 WL 1623860, at *5-*8 (D.N.J. May 9, 2012) ("In this case, Plaintiff adequately pled that Sheriff Rochford had actual knowledge of an excessive risk to inmate safety. The Complaint alleges that Sheriff Rochford had 'actual ... knowledge' of the fact that Sainato was the subject of a criminal investigation involving allegations of sexual misconduct. . . The Complaint also alleges that Sheriff Rochford had 'actual ... knowledge' that Sainato 'was engaged in a series of sexual encounters with inmates' participating in the SLAP program. . .The Complaint therefore adequately alleges facts supporting Plaintiff's claim that Sheriff Rochford knew of a substantial risk of serious harm to the inmates. Plaintiff also adequately pled that Sheriff Rochford disregarded the risk. . . . Plaintiff adequately pled facts and allegations supporting a theory of fault in hiring. . . .In this case, Plaintiff alleged that Sheriff Rochford was responsible for hiring decisions and failed to adequately screen Defendant Sainato before hiring him. . . . Specifically, Plaintiff alleges that Sheriff Rochford hired Sainato 'despite actual and/or constructive knowledge [that Sainato] was the subject of a criminal investigation and charge(s) involving allegations of inappropriate sexual conduct.'. . Plaintiff's allegations clearly establish a direct causal link between Sainato's background, which includes criminal charges for sexual misconduct, and the particular constitutional violation Plaintiff suffered, *i.e.*, sexual assault.

Thus, Plaintiff sufficiently alleged facts to support that Sainato 'was highly likely to inflict the *particular* injury suffered by the plaintiff.'. . Plaintiff failed to plead sufficient facts and allegations to support a theory of supervisory/training liability. Based on the Supreme Court's reasoning in *City of Canton v. Harris*, 489 U.S. 378 (1989), the Third Circuit developed a four-part test for liability under the Eighth Amendment for failure to properly supervise and train. . . . It is not clear whether this theory of supervisory liability is still available in light of the Supreme Court's decision in *Iqbal.* . . . Like the Third Circuit in *Argueta*, this Court need not reach the question of the scope of supervising liability post- *Iqbal,* because the allegations in the Complaint are insufficient to make out a claim for supervisory liability. Consistent with Judge Sheridan's findings in the First Action, this Court finds that Plaintiff failed to identify a policy or practice that Sheriff Rochford failed to employ. Specifically, Plaintiff failed to 'identify in [his] pleading what exactly [the Defendant] should have done differently, whether with respect to specific training programs or other matters, that would have prevented the unconstitutional conduct.'. . Accordingly, this claim is dismissed without prejudice.")

Szemple v. UMDNJ, No. 10–5445 (PGS), 2012 WL 1600360, at *3 (D.N.J. May 7, 2012) ("In *Iqbal,* the Supreme Court held that '[b]ecause vicarious or supervisor liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . Thus, each government official is liable only for his or her own conduct. The Court rejected the contention that supervisor liability can be imposed where the official had only 'knowledge' or 'acquiesced' in their subordinates conduct." footnote omitted)

Walker v. Walsh, No. 3:11–CV–1750, 2012 WL 1569629, at *3 (M.D. Pa. May 3, 2012) ("After *de novo* review, this Court will adopt the legal standards set forth in the R & R, which recognize that a supervisor may be held liable for the acts of his subordinates if he directed or actually knew of and acquiesced in the misconduct.")

Jackson v. Federal Bureau of Prisons, No. 11–6278 (JBS), 2012 WL 1435632, at *7 & n. 3 (D.N.J. Apr. 25, 2012) ("In light of the Supreme Court's decision in *Iqbal, supra,* the Court questions the continuing validity of the Third Circuit's supervisory liability jurisprudence. As stated by the Supreme Court . . . . However, although the Third Circuit has acknowledged *Iqbal's* potential impact on § 1983 supervisory liability claims, it has declined to hold that a plaintiff may no longer establish liability under § 1983 based on a supervisor's knowledge of and acquiescence in a violation. . . Accordingly, this Court will continue to apply the Third Circuit's traditional supervisory liability analysis as set forth above. . . . Thus, Jackson appears to allege only that Zickefoose failed to take action once notified of the occurrences, even though he also alleges that he did not file any grievances at FCI Fort Dix. Participation in the after-the-fact review of a grievance or appeal is insufficient to establish personal involvement on the part of those individuals reviewing grievances. . . Therefore, Warden Zickefoose cannot be held liable in this instance, and the Complaint will be dismissed with prejudice for failure to state a claim, pursuant to 28 U.S.C. §§ 1915(e)(2) (B)(ii) and 1915A(b)(1).")

Baklayan v. Ortiz, No. 11–03943 (CCC), 2012 WL 1150842, at *5, *6 (D.N.J. Apr. 5, 2012) ("A liberal reading of the Complaint could find that Plaintiffs are asserting a theory of supervisory liability. . . .The only facts offered anywhere in the Complaint in support of a supervisory theory of liability are the descriptions of Defendants' jobs: Plaintiffs state that Defendant Ortiz was 'charged with ultimate responsibility for the training and supervision of Essex County correctional officers, and for the administration and implementation of the Essex County Department of Corrections policies, practices, and/or customs,' and that Defendant Pringle was 'charged with overseeing all programs and operations applicable to custody, inmate management and release from Essex County Correctional Facility.'. . It would be too great a leap for the Court to infer from these cursory job descriptions that Defendants were somehow aware of and acquiescent to the alleged misconduct, or that they were responsible for the policy or procedure which resulted in the alleged misconduct and deliberately indifferent to its result, and that they are therefore liable under § 1983. . . . Count Five alleges that Defendants failed to prevent the alleged unconstitutional conduct by 'knowingly, recklessly, or with gross negligence' failing to 'instruct, supervise, control, and discipline' their subordinates from: (1) unlawfully harassing Baklayan; (2) unlawfully implementing an immigration hold on a U.S. citizen; (3) conspiring to violate Baklayan's rights; and (4) otherwise depriving Baklayan of his rights. . . As with Count Four, Plaintiffs fail to allege any personal involvement in the alleged wrongdoing. . .As mentioned previously, a supervisor may be held liable under § 1983 when he or she 'with deliberate indifference to the consequences, established and maintained a policy, practice, or custom which directly caused [the] constitutional harm,'. . . or where the supervisor has knowledge of the incident and acquiesces to it. . . Plaintiffs have yet to allege any facts suggesting that Defendants knew about Baklayan's predicament or that they established a policy or custom that resulted in constitutional harms to Baklayan. Accordingly, Count Five is dismissed for failure to state a claim upon which relief can be granted.")

Bondurant v. Christie, No. 10–3005 (FSH), 2012 WL 1108523, at *7, *8 (D.N.J. Apr. 2, 2012) ("The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. . . Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. . . Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; *e.g.*, supervisory liability may attach if the plaintiff asserts facts showing that the supervisor's actions were 'the moving force' behind the harm suffered by the plaintiff. . . Here, plaintiff provides no facts describing how these supervisory defendants allegedly violated his constitutional rights, *i.e.*, he fails to allege facts to show that these defendants expressly directed the deprivation of his constitutional rights, or that they created policies which left subordinates with no discretion other than to apply them in a fashion which actually produced the alleged

deprivation. In short, Bondurant has alleged no facts to support personal involvement by the supervisory defendants, and simply relies on recitations of legal conclusions such that they were responsible for its agencies and employees and for developing and applying policies, practices and procedures at their respective agencies. These bare allegations, 'because they are no more than conclusions, are not entitled to the assumption of truth.'. . Accordingly, this Court will dismiss with prejudice the Amended Complaint (Docket entry no. 6), in its entirety, as against the defendants, Chris Christie, Governor of New Jersey; Gary Lanigan, Commissioner of NJDOC; and Jennifer Velez, Commissioner of NJDHS, because it is based on a claim of supervisor liability, which is not cognizable in this § 1983 action, pursuant to 28 U.S.C. § 1915(e)(2)(B).")

Johnson v. Morgan, No. 09–007–LPS, 2012 WL 1427774, at *4, *5 (D. Del. Mar. 30, 2012) ("Under pre-*Iqbal* Third Circuit precedent, '[t]here are two theories of supervisory liability,' one under which supervisors can be liable if they 'established and maintained a policy, practice or custom which directly caused [the] constitutional harm,' and another under which supervisors can be liable if they 'participated in violating plaintiff's rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations.'. . Supervisory liability may attach if the plaintiff shows that the supervisor's actions were 'the moving force' behind the harm suffered by the plaintiff. . . . The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing the scope of the test. . . Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right.")

Gaymon v. Esposito, No. 11–4170 (JLL), 2012 WL 1068750, at *10 (D.N.J. Mar. 29, 2012) ("To the extent that Plaintiffs allege that the Supervisory Defendants are liable in their individual capacities for failing to supervise and/or control Defendant Esposito, the Court finds the factual allegations insufficient to support such a claim. As stated *infra*, the Complaint fails to allege any facts relaying any information about Defendants Fontoura and Ryan's whereabouts and awareness when the alleged injury occurred, namely the fatal shooting of the Decedent by Officer Esposito. The Complaint thus does not state any facts which support their personal involvement in the alleged injury, nor are there any facts alleged supporting their actual knowledge and acquiescence in Defendant Esposito's use of deadly force. The Court thus dismisses Plaintiffs' § 1983 claims for failure to train, supervise and/or control as to the Supervisory Defendants")

Mayo v. County of York, No. 1:10–CV–01869, 2012 WL 871198, at *10, *11 (M.D. Pa. Feb. 16, 2012) (R & R) (" 'It is well-established that inmates do not have a constitutionally protected right to a prison grievance system.'. . Thus, a denial of a grievance or grievance appeal does not amount to a violation of a prisoner's constitutional rights. . . Although the amended complaint fails to state an independent claim upon which relief can be granted based on the processing of his grievances, the fact that the plaintiff filed grievances is relevant to the plaintiff's other claims. In some circumstances a grievance may be sufficient to put a prison official on notice of alleged continuing

abuse by other prison staff and therefore may show actual knowledge of an alleged constitutional violation and acquiescence in the events forming the basis of a prisoner's claims. . . .The plaintiff alleges that he filed grievance informing the defendants of the ongoing denial of prescribed medical care but that the defendants failed to take corrective action. We conclude that the amended complaint sufficiently alleges personal involvement on the part of the defendants involved in the grievance process.")

Festa v. Jordan, 803 F.Supp.2d 319, 325 (M.D. Pa. 2011) ("There is no *respondeat superior* liability in the § 1983 context; a defendant must have personal involvement in the alleged wrongs for liability to attach. . . This personal involvement can be shown where a defendant personally directs the wrongs, or has actual knowledge of the wrongs and acquiesces in them. . . Actual knowledge 'can be inferred from circumstances other than actual sight.'. . Acquiescence is found '[w]here a supervisor with authority over a subordinate knows that the subordinate is violating someone's rights but fails to act to stop the subordinate from doing so, the factfinder may usually infer that the supervisor "acquiesced" in (i.e., tacitly assented to or accepted) the subordinate's conduct.' . . The defendant claims that there is 'a complete lack of evidence' that Ware directed, supervised, or approved of the police searches and seizures. The Court disagrees. The plaintiff has introduced circumstantial evidence from which a rational juror could draw the conclusion that Ware either directed, or knew and acquiesced in, the searches and seizures. First, Ware notified the police that Coss might be with Festa. Second, he expressed a desire that Festa's children not be present at the house. Third, he was actually present at the scene of the completed car search after receiving a phone call from an officer. Fourth, he was present at the search of Festa's home, even though how close he was is in dispute. This is more than a scintilla of evidence from which a juror could disbelieve Ware's claims that he did not direct the officers. After all, Ware admitted that he frequently advises police, at least two phone calls between him and Dunmore officers were made, he acted to ensure that no children were in the house, and he was present at the scene. His mere presence at the scenes of the searches, moreover, plausibly suggests actual knowledge and acquiescence in the events that occurred. For this reason, summary judgment on the grounds that supervisory liability cannot be imposed on Ware will be denied." footnote omitted)

Campbell v. Gibb, No. 10–6584 (JBS), 2012 WL 603204, at *10 & n.6 (D.N.J. Feb. 21, 2012) ("In light of the Supreme Court's decision in *Iqbal*,. . . the Court questions the continuing validity of the Third Circuit's supervisory liability jurisprudence. . . . However, although the Third Circuit has acknowledged *Iqbal*'s potential impact on § 1983 supervisory liability claims, it has declined to hold that a plaintiff may no longer establish liability under § 1983 based on a supervisor's knowledge of and acquiescence in a violation. *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 n. 8 (3d Cir.2010); *Bayer v. Monroe*, 577 F.3d 186, 190 n. 5 (3d Cir.2009). Accordingly, this Court will continue to apply the Third Circuit's traditional supervisory liability analysis as set forth above.")

Cooper v. Sharp, No. 10–5245 (FSH), 2012 WL 274800, at *14 (D.N.J. Jan. 31, 2012) ("Here, plaintiff provides no facts describing how the supervisory defendants, Singer and Dacosta,

allegedly violated his constitutional rights, *i.e.*, he fails to allege facts to show that these defendants expressly directed the deprivation of his constitutional rights, or that they created policies which left subordinates with no discretion other than to apply them in a fashion which actually produced the alleged deprivation. In short, Cooper has alleged no facts to support personal involvement by the supervisory defendants, and simply relies on recitations of legal conclusions such that they failed to supervise, oversee or correct the treatment of civilly committed residents at EJSP–STU as prisoners in violation of plaintiff's constitutional rights.")

Richardson v. Crawford County Correctional Facility, NO. CIV.A. 10-275 ERIE, 2011 WL 7102576, at *9 (W.D. Pa. Nov 21, 2011), *Report and Recommendation Adopted as Modified byRichardson v. Crawford County Correctional Facility*, 2012 WL 253195 (W.D. Pa. Jan 26, 2012) ("Plaintiff alleges that sometime after his return from Meadville Medical Center and while his arm was still in a sling, Defendant Schrekengost slammed a steel door on Plaintiff's injured arm 'with maliciousness and purpose.'. . Further, Plaintiff alleges that Wardens Lewis and Saulsbery 'have been made aware and have had actual knowledge of such physically vindictive conduct of ... Schrekengost in the past pervious to the complained events (and since), of its substantial and dangerous propensities to the safety and health of the inmates and yet have acquiesced in same, doing nothing to correct her said contacts.'. . Defendant Wardens move to dismiss this claim against them because it is grounded in supervisory liability which cannot support a § 1983 action. Defendants are wrong in this regard. Plaintiff has specifically alleged that the Wardens were personally involved in that they knew of Schrekengost's past vindictive conduct and acquiesced in it. This allegation is sufficient to support a claim against Defendants Wardens at this motion to dismiss stage.")

Ballard v. Williams, No. 3:10-CV-1456, 2011 WL 5089726, at *4 (M.D. Pa. Oct. 25, 2011) ("[T]he Magistrate Judge failed to consider that '[i]t is also possible to establish section 1983 supervisory liability by showing a supervisor tolerated past or ongoing misbehavior.' *Argueta v. United States Immigration & Customs Enforcement,* 643 F.3d 60, 72 (3d Cir.2011) (citing *Baker v. Monroe Township,* 50 F.3d 1186, 1191 n. 3 (3d Cir.1995). While merely mishandling a grievance may not be a constitutional violation, 'a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations.' *A.M. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir.2004). In his response brief, Plaintiff suggests that this may well be the sort of liability he is seeking against Palakovich and Zobitne, averring that their actions were 'tantamount to supervisory liability.'. . Admittedly, this claim is difficult to glean from Plaintiff's Amended Complaint. He merely states that Defendant Zobitne, as Unit Manager, had disregarded the Plaintiff's request and never responded back. . . And, although the exact hierarchy at the prison is not explained, this claim could serve as the foundation for supervisor liability. As for Defendant Palakovich, the allegations are even more barren, though it is clear that Ballard is claiming that Defendant Palakovich acted intentionally in depriving Plaintiff of his property. . . As such, both of these potential claims are insufficient to survive the

Motion to Dismiss, even under the liberal *pro se* pleading standard, . . . as additional factual recitations are required. However, as explained below, Plaintiff will be given leave to amend.")

Abraham v. Danberg, 832 F.Supp.2d 368, 378 (D. Del. 2011) ("Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; *e.g.*, supervisory liability may attach if the plaintiff asserts facts showing that the supervisor's actions were 'the moving force' behind the harm suffered by the plaintiff.")

Mohney v. Pennsylvania, 809 F.Supp.2d 384, 391, 392 (W.D. Pa. 2011) ("Generally, in order to establish supervisory liability against government officials in their individual capacities under § 1983, a plaintiff must demonstrate that the officials were personally involved in the commission of the conduct alleged. . . However, the United States Supreme Court has recognized a second theory of supervisory liability in that 'there are limited circumstances in which an allegation of "failure to train" can be the basis for liability under § 1983.' *City of Canton, Ohio v. Harris ,* 489 U .S. 378, 387 (1989). In such case, a plaintiff must establish that the alleged 'failure to train amounts to deliberate indifference to the rights of persons with whom the [untrained persons] come into contact.'. . . Accordingly, Defendants are not correct in asserting that personal involvement is a necessary element of a viable § 1983 claim. Nonetheless, even taken in the light most favorable to Plaintiff, the facts pleaded in the Amended Complaint are not sufficient to constitute deliberate indifference. . . . In his Amended Complaint, Plaintiff states that the Supervisory Defendants 'have encouraged, tolerated, ratified, and had been deliberately indifferent to' a pattern of misconduct involving, among other things, the use of excessive force, the failure to establish proper procedures with respect to encounters with mentally disabled persons, the improper use of taser weapons, and the failure to discipline officers who were the subject of prior complaints. . . . However, there are no facts offered in support of those conclusory statements. The Amended Complaint does not establish the requisite pattern of constitutional violations necessary to make Plaintiff's supervisory liability claim plausible on its face. Nor has Plaintiff provided any facts related to prior encounters between mentally disabled individuals who have doused themselves with gasoline and PSP officers, which would demonstrate the need for the sort of specialized training that Plaintiff alleges was lacking in this case. . . Therefore, the § 1983 claims against Supervisory Defendants Neal, Wilson, and Pawlowski in their individual capacities will be **DISMISSED.**")

Lane v. Phelps, 800 F.Supp.2d 646, 650 (D. Del. 2011) ("The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. . . Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. . . . Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a

defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation[.]")

Major Tours, Inc. v. Colorel, 799 F.Supp.2d 396, 398, 399 (D.N.J. 2011) ("As this Court explained in *Liberty and Prosperity 1776, Inc. v. Corzine,* 720 F.Supp.2d 622, 628-29 (D.N .J.2010), claims based on a showing that a supervisor knew of and acquiesced to the discriminatory conduct of a subordinate are not foreclosed by *Iqbal. Iqbal* rejected supervisory liability in that case because the Supreme Court found that a nondiscriminatory intention, and not discriminatory animus, was the more likely inference to be drawn from the allegations made in that case regarding the supervisor's conduct. . . Consequently, merely permitting the operation of the discriminatory policy did not state a claim against the policymaker because there was no factual allegation or reasonable inference regarding discriminatory purpose behind that decision. . . Conversely, if a plaintiff shows that the supervisory decisions that resulted in the discriminatory effects were taken for a discriminatory reason, then the plaintiff need not show that the supervisor himself directly executed the harmful action. . . .[A] reasonable jury could find that Schulze and Calorel's own actions caused Plaintiffs' buses to be stopped on the basis of the race of the owners.")

Johnson v. Bradford, No. 10-5039 (RBK), 2011 WL 1748433, at *7, *8 (D.N.J. May 6, 2011) ("Under pre-*Iqbal* Third Circuit precedent, '[t]here are two theories of supervisory liability,' one under which supervisors can be liable if they 'established and maintained a policy, practice or custom which directly caused [the] constitutional harm,' and another under which they can be liable if they 'participated in violating plaintiff's rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations.' *Santiago v. Warminster Twp.,* 629 F.3d 121, 127 n. 5 (3d Cir.2010) (internal quotation marks omitted). . . .The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. . . Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal,* personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. . . . Here, plaintiff provides no facts describing how the supervisory defendants allegedly violated his constitutional rights, *i.e.,* he fails to allege facts to show that these defendants expressly directed the deprivation of his constitutional rights, or that they created policies which left subordinates with no discretion other than to apply them in a fashion which actually produced the alleged deprivation. In short, Johnson has alleged no facts to support personal involvement by the supervisory defendants, and simply relies on recitations of legal conclusions such that they failed to supervise or failed to protect plaintiff in violation of his First, Eighth and Fourteenth Amendment rights.")

Nykiel v. Borough of Sharpsburg, No. 08-0813, 2011 WL 869141, at *12, *13 (W.D. Pa. Mar. 9, 2011) ("In *Iqbal,* the United States Supreme Court upheld the decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), that absent *respondeat superior,* each federal government official is liable for his or her

own misconduct. . . However, purpose rather than knowledge is required to impose *Bivens* liability on the official charged with violations arising from his or her superintendent responsibilities. However, contrary to defendant's position, these cases apply to federal employees and not section 1983 supervisory liability claims. . . .The present case differs from *Iqbal* and *Bivens.* First, the officials in *Iqbal* and *Bivens* were federal officials and not state officials, like Chief Rudzki, to which the standards of section 1983 apply. Likewise, in *Iqbal,* the plaintiff was seeking supervisor liability based solely upon the officer's role and not his actions. . . Here, there is a dispute of material facts regarding Chief Rudzki's actions and how they reflect a knowledge of and acquiescence to the detention and subsequent restraining of Nykiel by Officer Duffy and Officer Mitchell for the following reasons. First, prior to arriving to the Sharpsburg police station that day, he spoke with Officer Duffy on several occasions over the telephone and was aware of the surrounding circumstances of Nykiel's arrest. Second, upon Chief Rudzki arriving at the station, the record indicates that Nykiel was exhibiting combative behavior, the officers were restraining him, and the medics were treating him. Chief Rudzki observed the events from the hallway when he arrived at the station for approximately three to five minutes and then went back to his office. Prior to returning to his office, Officer Fusco informed him that he strongly believed Nykiel was overdosing on crack cocaine. The record does not reveal that he adequately inquired as to what was going on or the type of medical treatment or physical treatment being administered to Nykiel. This contemporaneous knowledge of possible offending acts as well as inaction on Chief Rudzki's part could be interpreted by a reasonable juror as circumstances under which Chief Rudzki was aware of and acquiesced to Officer Duffy and Officer Mitchell's actions and communicated a message of approval to the allegedly offending officers. For the foregoing reasons, summary judgment on supervisor liability will be denied.")

Fennell v. Rodgers, 762 F.Supp.2d 727, 732, 733 (D. Del. 2011) ("The Third Circuit has recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a § 1983 suit but, to date, has declined to decide whether *Iqbal* requires narrowing of the scope of the test. . . Hence, it appears that, under a supervisory theory of liability, and even in light of *Iqbal,* personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. . . Facts showing personal involvement of the defendant must be asserted; such assertions may be made through allegations of specific facts showing that a defendant expressly directed the deprivation of a plaintiff's constitutional rights or created such policies where the subordinates had no discretion in applying the policies in a fashion other than the one which actually produced the alleged deprivation; *e.g.,* supervisory liability may attach if the plaintiff asserts facts showing that the supervisor's actions were 'the moving force' behind the harm suffered by the plaintiff. . . Plaintiff has not refuted Scarborough's sworn statement that Scarborough does not know plaintiff, that his duties did not include implementing procedures for requesting medical treatment, and that he was not involved in grievances submitted by plaintiff. While plaintiff argues that Scarborough 'lied,' he provides no evidence to support his argument. . . . A reasonable jury could not find that Scarborough was personally involved in plaintiff[']s claims. Therefore, the court will grant Scarborough's motion for summary judgment.").

Thomas v. Board of Educ. of Brandywine School School Dist., 759 F.Supp.2d 477, 495-97 & n.19 (D. Del. 2010) ("The Court acknowledges some lack of clarity in the case law – and in the parties' briefing − as to the interaction between supervisory liability and the doctrine of qualified immunity. For example, the parties identify Plaintiff's constitutional right as the 'right to be free from sexual abuse.'. . While, of course, Plaintiff has such a right, . . . there is no allegation here that Harter, a supervisor, directly violated that right. Instead, the issue here could be stated as whether Plaintiff had a clearly established constitutional right to be free of a public school superintendent's deliberate indifference to sexual abuse being committed against the student by a teacher. Alternatively, the issue might be stated as whether Plaintiff can demonstrate supervisory liability against Harter; if Plaintiff cannot, then undertaking further qualified immunity analysis becomes unnecessary. . . . Where, as here, individual liability is predicated on a defendant's supervisory role, the supervisor -defendant 'must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior.... Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence ...'. In other words, a supervisor may only be held liable for a constitutional violation in which the supervisor can fairly be said to have had a personal involvement. There are two ways of demonstrating the personal involvement of supervisors sufficient to justify imposing Section 1983 liability on a supervisor in his individual capacity. First, supervisors can be liable 'if they established and maintained a policy, practice or custom which directly caused [the] constitutional harm.'. . . Alternatively, supervisors can be 'liable if they participated in violating plaintiff's rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations.'. . . While the Third Circuit has not adopted a test for determining when supervisory liability exists based on sexual harassment in the public school context, several other courts of appeals have done so, and the Court considers those tests to be highly instructive. Thus, in order to hold Barter liable in his individual capacity, Plaintiff must show; (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student, and (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse, and (3) such failure caused a constitutional injury to the student. . . . Here, there is insufficient record evidence to permit a reasonable juror to find that Harter had actual knowledge of sexual abuse by Holt.")

Mincy v. McConnell, C.A. No. 09-236 Erie, 2010 WL 3092681, at *5 (W.D. Pa. July 15, 2010) ("If a grievance official's only involvement is investigating and/or ruling on an inmate's grievance after the incident giving rise to the grievance has already occurred, there is no personal involvement on the part of that official. . . However, a supervisory official can be found liable under §1983 if it is shown that he had knowledge of and acquiesced in his subordinates' violations. . . . Plaintiff has not alleged that Defendants Harlow, Giroux, or Brooks were, in any way, personally involved in the harassment or retaliation of which he complains. However, Plaintiff does allege that these Defendants were aware of Defendant McConnell's 'retaliatory tendencies' and 'racially motivated abusive behavior,' yet failed to take any corrective action. This awareness

is alleged to have come from numerous 'grievances, civil actions, and complaints' that were allegedly filed against Defendant McConnell, presumably by Plaintiff and other inmates. Construed in the light most favorable to Plaintiff, these allegations are sufficient to show that these Defendants had knowledge of and essentially acquiesced in their subordinates' complained-of misconduct.")

Liberty And Prosperity 1776, Inc. v. Corzine, 720 F.Supp.2d 622, 628, 629 (D. N.J. 2010) ("After the Supreme Court's decision in *Iqbal,* there is some uncertainty over the continued existence of liability for a supervisor who knows about the unconstitutional conduct of subordinates and does nothing to stop it. . . Longstanding Third Circuit Court of Appeals precedent holds that supervisory personnel can be held liable under § 1983 if they had knowledge of and acquiesced in subordinates' constitutional violations. . . But *Iqbal* makes it clear that there is no separate test for liability under § 1983 for supervisors; rather, each claim must satisfy the requirements of individual liability for each defendant regardless of supervisory position . . . A careful reading of *Iqbal* reveals that it does not foreclose Plaintiffs' claim based on knowledge and acquiescence, and therefore the alternative allegations in the Complaint are sufficient. While *Iqbal* did hold that elements of a § 1983 claim cannot be imputed to a supervisor by way of *respondeat superior,* it did not hold that acts or omissions regarding superintendent duties can never state a claim. This distinction is crucial. . . . The allegations in *Iqbal* were insufficient to state a claim under the Equal Protection clause, not because decisions made by a supervisor with respect to whether certain policies will be carried out cannot state a claim, but because that particular claim requires not just acts or omissions that have discriminatory effects, but also that the decisions be the consequence of purposeful discrimination. The requirement of purpose in *Iqbal* flows from the nature of an Equal Protection claim, rather than some general requirement of supervisory liability. . . Some free speech claims made against supervisors may similarly require factual allegations regarding the supervisor's discriminatory purpose, if the restriction is facially content-neutral but the plaintiff claims that it has a viewpoint-discriminatory purpose, for example. . . . Other free speech claims do not require this kind of finding of discriminatory purpose, such as those based on policies that facially discriminate based on content, . . . but may require allegations regarding knowledge and intent when qualified immunity is raised. Even for claims that require a finding of purpose, sometimes this finding is the only reasonable inference from the nature of the restriction, meaning that no separate factual allegation to support a finding of purpose is required. Such is the case here. Even if purpose is a necessary element of Plaintiffs' claims, the Governor's decision to permit the speech limitations reasonably raises the inference that the decision was taken with a discriminatory purpose because a very likely motivation for the policy was to prevent the speech of people who opposed the plan since the policy permitted the speech of Save Our State. It would be as if, in *Iqbal,* the plaintiffs had alleged that Ashcroft had implemented a policy of arresting only Arab Muslims who voted for Ralph Nader. In such a case, if not the only reasonable inference, certainly an extremely strong inference sufficient to state a plausible claim would be that this decision was taken because of, and not in spite of the protected political expression of the targets. In summary, *Iqbal* does not abandon constitutional liability for supervisors' decisions regarding policies implemented by subordinates. The Supreme Court would not have made such a sweeping change to the law by implication. The

case simply reiterates the longstanding distinction between supervisory liability based on the discrete conduct of the supervisor that meets the requirements for the claim, and liability that is imputed to the supervisor solely by virtue of the supervisory position. If a claim requires discriminatory purpose as well as discriminatory effect, then the plaintiff must allege facts sufficient to show that the supervisory decisions that resulted in the discriminatory effects were taken for a discriminatory reason. And, in such cases, where a discriminatory purpose is a plausible inference from the facts, and in the absence of a 'more likely' motivation to be inferred, then this obligation has been met. Thus, the question with respect to the sufficiency of the allegations against Governor Corzine is not about his personal participation, since the allegation of knowledge and acquiescence is sufficient. The question is whether the facts alleged raise a plausible claim that viewpoint discrimination motivated the restrictions, rather than some content-neutral motivation . . . .")

Park v. Veasie, No. 3:CV-09-2177, 2010 WL 2367666, at *7, *8 (M.D. Pa. June 9, 2010) ("Various courts of appeals, including the Third Circuit, have recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a *Bivens* or a § 1983 suit. . . However, it appears that, under a supervisory theory of liability, and even in light of *Iqbal***,** personal involvement by a defendant remains the touchstone for establishing liability for the violation of a plaintiff's constitutional right. Here, Plaintiffs have alleged sufficient facts suggesting that Veasie was both personally involved in the improper search and seizure. . . and that he directed Defendants Bogart and Markochik to violate Plaintiffs' Fourth Amendment rights. For instance, Plaintiffs allege that Veasie intentionally chose officers with little training and experience in conducting a drug raid and that he was responsible for conducting the raid. . . Combined with the more specific allegations that Plaintiffs make concerning Veasie's direct involvement, these allegations are sufficient to survive a motion to dismiss.")

Whitaker v. Springettsbury Tp., Civil No. 1:08-CV-627, 2010 WL 1565453, at *14 (M.D. Pa. Apr. 19, 2010) ("Supervisory liability under § 1983 utilizes the same standard as claims for municipal liability. *Iqbal*, __ U.S. __, 129 S.Ct. at 1948; *Carter*, 181 F.3d at 356. A supervisor will only be liable for the acts of a subordinate if he fosters a policy or custom that amounts to deliberate indifference towards an individual's constitutional rights. . .To establish supervisory liability , a plaintiff 'must (1) identify the specific supervisory practice or procedure that the supervisor failed to employ, and show that (2) the existing custom and practice without the identified, absent custom or procedure created an unreasonable risk of the ultimate injury, (3) the supervisor was aware that the unreasonable risk existed, (4) the supervisor was indifferent to the risk; and (5) the underling's violation resulted from the supervisory practice or procedure.' *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 216 (3d Cir.2001) (citing *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir.1989). As we found above, Plaintiffs have pointed to no evidence in this case to show that a relevant policy or custom proximately caused the alleged use of unconstitutionally excessive force that resulted in Whitaker's death, and Plaintiffs have not identified evidence to support any other factor that must be shown to establish a failure to supervise on the part of Chief Eshbach. Given the absence of evidence in support of this claim, and because we can perceive no basis for

permitting a claim for supervisory liability to go forward on the record developed, we will recommend that the Court enter summary judgment in Chief Eshbach's favor with respect to all claims.").

Bullock v. Beard, No. 3:10-CV-401, 2010 WL 1507228, at *4 (M.D. Pa. Apr. 14, 2010) ("In Count 2, Plaintiffs bring a § 1983 claim against Defendants Beard, Klopotosky, Walsh and Mooney. Most of the language in this claim seems to be couched in the rhetoric of municipal liability claims for failure to train employees. . . However, Plaintiffs have not named any municipal defendants, so this cannot be the appropriate standard for this claim. The only other type of claim that would have been covered under Count 1 is a claim for supervisory liability. The Plaintiffs' Complaint makes out a claim under supervisory liability by alleging that these Defendants had actual knowledge of the Eighth Amendment violations occurring in SCID and acquiescing to these violations. For example, the Plaintiffs alleged that the defendants were deliberately indifferent to the safety of prisoners and thereby condoned the disregard for psychiatric needs of inmates, such that Decedent's death was likely to occur. . . This claim, therefore, alleges the type of knowledge and acquiescence sufficient to make out a claim for supervisory liability pursuant to 42 U.S.C. § 1983.").

Williams v. Lackawanna County Prison, No. 4:CV-07-1137, 2010 WL 1491132, at *4, *5 (M.D. Pa. Apr. 13, 2010) ("Accepting Williams' allegations as true, Williams has pled facts sufficient to state a plausible claim to relief [malicious and sadistic use of force] as to defendants Blume, Craven, and Masci; therefore, we will refrain from dismissing this claim as to these defendants. *See Twombly*, 127 S.Ct. at 1960. However, in his complaints, Williams also indicates that he wishes to sue Warden Donate. Williams claims the following: I have sent numerous grievances to the Warden and nothing has been done. She knows of the violation of my rights and failed to do anything to fix the situation. She also created these policies and customs allowing and encouraging these illegal acts, and she is grossly negligent in managing the people she is suppose [sic] to supervise. . . In his first amendment to his original complaint, Williams asserts, 'Warden Janine Donate refuses to investigate any of my complaints/grievances. I have been grieving my issues to her for 8 months now and she hasn't responded to any of them. She approves and encourages this type of behavior of her prison and staff members.' . . With this claim, Williams appears to be alleging a supervisory liability claim against Warden Donate under 42 U.S.C. § 1983. According to traditional Third Circuit precedent, supervisory personnel are only liable under § 1983 if they participated in or had knowledge of violations, if they directed others to commit violations, or if they had knowledge of and acquiesced in subordinates' violations. *Baker v. Monroe Twp.*, 50 F.3d 1186, 1191 (3d Cir.1995). However, with its decision in *Ashcroft v. Iqbal*, the Supreme Court may have cast doubt on the viability of this standard for holding government officials liable based on a theory of supervisory liability under § 1983. . . . Various courts of appeals, including the Third Circuit, have recognized the potential effect that *Iqbal* might have in altering the standard for supervisory liability in a *Bivens* or a § 1983 suit. [citing *Bayer* and *Maldonado*] However, it appears that, under a supervisory theory of liability, and even in light of *Iqbal*, personal involvement by a defendant remains the touchstone for establishing liability for the violation of a

plaintiff's constitutional right. Additionally, in the context of the Eighth Amendment claim of cruel and unusual punishment, this involvement may be demonstrated 'through allegations of personal direction or of actual knowledge and acquiescence.' *Rode v. Dellarciprete,* 845 F.2d 1195, 1207 (3d Cir.1988); *see also Womack v. Smith,* 2009 U.S. Dist. LEXIS 120728, at *15-17 (M.D.Pa. Dec. 29, 2009) (Conner, J.) (noting that, in applying the *Rode* standard of personal involvement in a case in which the plaintiff alleged cruel and unusual punishment, the Supreme Court's holding in *Iqbal* "is expressly limited to situations involving discrimination" and that the Court in that case made clear that "the factors necessary to establish a Bivens violation will vary with the constitutional provisions at issue"). Here, Williams has not alleged any facts that would support the personal involvement of Warden Donate in either the denial of the grievance process or the alleged assault. . . Instead, Williams merely claims that the warden 'refuses to investigate' his complaints and grievances and has failed to respond 'to any of them.' . .In addition, he claims that '[s]he approves and encourages this type of behavior' within the prison, . . .that she 'created these policies and customs allowing and encouraging these illegal acts,' and that 'she is grossly negligent in managing the people she is suppose [sic] to supervise.'. .These allegations simply amount to a recitation of the legal elements of a constitutional claim that are insufficient to withstand a motion to dismiss. . . Accordingly, we will dismiss, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), the above-referenced claims against Warden Donate premised upon supervisory liability.").

Womack v. Smith, No. 1:06-CV-2348, 2009 WL 5214966, at *5, *6 (M.D. Pa. Dec. 29, 2009) ("We do not subscribe to the defendants reading of *Iqbal.* The defendants insist that this recent Supreme Court decision overturns longstanding Third Circuit precedent which permits a finding of personal involvement through either allegations of 'personal direction or *actual knowledge and acquiescence." Rode v. Dellarciprete,* 845 F.2d 1195, 1207 (3d Cir.1988) (emphasis added). The court believes *Iqbal* is distinguishable from the instant case. First, as the Supreme Court makes clear in *Iqbal,* the factors necessary to establish a *Bivens* violation will vary with the constitutional provisions at issue. *Iqbal,* 129 S.Ct. at 1948. The claims at issue in *Iqbal* involved discrimination in contravention of the First and Fifth Amendments to the Constitution. *Id.* at 1944. Supreme Court decisions are clear that in order to make out a claim of discrimination under the First and Fifth Amendments a plaintiff must plead and prove that the defendants acted with 'discriminatory purpose.' *Id.* In the case *sub judice,* the plaintiff alleges cruel and unusual punishment in violation of the Eighth Amendment, not discrimination. The court's concern here is strictly limited to whether prison officials acted with 'deliberate indifference' towards a 'substantial risk of serious harm to an inmate.' *Farmer v. Brennan,* 511 U.S. 825, 828, 832-37, 114 S.Ct. 1970 (1994). Second, the Supreme Court's own holding is expressly limited to situations involving discrimination. The Court specifically stated that '[i]n the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability ... for *unconstitutional discrimination...." Iqbal,* 129 S.Ct. at 1949 (emphasis added). Therefore, the court will apply the knowledge and acquiescence standard in determining whether the plaintiff has sufficiently pleaded personal involvement. . . . The allegations state that on multiple occasions between December 9, 2004 and January 4, 2005 defendant Smith informed Lappin, Dodrill, Vanyur, Thomas, Kendig and Marioana, in writing,

that the plaintiff was placed in restraints while he was housed in a secure cell and that the plaintiff was compliant when placed in restraints. . . In particular, defendant Dodrill was informed at least once every eight hours, a total of 75 separate notifications, that the plaintiff was being restrained. . . None of the defendants ostensibly took action to alleviate the plaintiff's conditions or reprimanded any of the corrections officers involved. . .We conclude that the allegations are sufficient to subject Defendant Dodrill to potential liability, but are insufficient as to the other defendants. Here, the averments against Dodrill demonstrate that he was notified no less than 75 times of the prolonged restraint of Womack. Such continuous and systematic notification indicate[s] that Dodrill knew of the plaintiff's condition. Additionally, his alleged non-intervention after being notified of the plaintiff's condition indicate[s] that Dodrill acquiesced in the restraining of Womack. In sharp contrast, Womack's claims against Lappin, Vanyur, Thomas, Kendig and Marioana involve only three notices and the court concludes that the allegations against them are insufficient to show knowledge and acquiescence. Specific and detailed allegations are needed to show that these defendants had personal knowledge in order to sustain . . .civil rights claims against them. . . Womack's theory is that the defendants had personal knowledge based solely on defendant Smith's three communications indicating the plaintiff was restrained. . . The Bureau of Prisons employs thousands of employees and oversees thousands of prisoners. The smaller regional offices also are responsible for thousands of employees and prisoners. These allegations are simply insufficient to show that Lappin, Vanyur, Thomas, Kendig and Marioana had actual knowledge. A holding to the contrary would subject the Director of the Bureau of Prisons and regional administrators to potential liability merely because an inmate or a corrections officer transmits a small number of status updates to regional and national authorities. . . Without detailed and specific allegations, the plaintiff's claims against these defendants are insufficient to show they had knowledge of and acquiesced in his treatment. Nevertheless, the court will dismiss the claims against Lappin, Vanyur, Thomas, Kendig and Marioana without prejudice and grant leave to file an amended pleading if discovery reveals additional evidence of actual knowledge.").

Young v. Speziale, No. 07-03129 (SDW-MCA), 2009 WL 3806296, at *7, *9 (D.N.J. Nov. 10, 2009) ("In *Iqbal*, the Supreme Court held that a plaintiff seeking to impose supervisory liability on a § 1983 defendant must allege more than that the particular defendant 'knew of, condoned, and willfully and maliciously agreed to' violate a plaintiff's constitutional rights. . . Although such allegations were held to be insufficient in *Iqbal*, the plaintiff's claims there are distinguishable from those of Young. Specifically, the plaintiff in *Iqbal* brought a *Bivens* action for discrimination in violation of the First and Fifteenth Amendments. Such claims require a plaintiff to plead and prove that the defendant acted with discriminatory purpose . . . As a result of this particular requirement, the Supreme Court concluded that mere knowledge on the part of the supervisor was an insufficient basis for *Bivens* liability, which it treated as equivalent to § 1983 liability. . . There is no such requirement for a § 1983 claim for inadequate medical care arising under either the Eighth or Fourteenth Amendments. . . The Supreme Court, in *Iqbal*, even prefaced its analysis of this issue by recognizing that '[t]he factors necessary to establish a *Bivens* [or § 1983] violation will vary with the constitutional provision at issue.'. . *Iqbal* thus does not support the proposition that general allegations are never sufficient to support a § 1983 claim. . . .The Court is aware of

the qualified immunity doctrine and the underlying policy, espoused therein, against discovery; however, at this juncture, discovery is needed to, at a minimum, determine the players involved in the denial of Plaintiff's request for surgery. Although it 'exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government, ... [l]itigation [may be] be necessary to ensure that officials comply with the law.'").

Gioffre v. County Of Bucks, No. 08-4232, 2009 WL 3617742, at *5 (E.D. Pa. Nov. 2, 2009) ("These supervisory officials here argue that the allegations against them amount to nothing more than formulaic recitations of the elements of supervisory liability and must, therefore, be disregarded. . . Further, they argue that even if the allegations were deemed factual, these facts fail to establish that they were personally involved in Mr. Gioffre's alleged constitutional injuries. . . Specifically, Defendants maintain that Plaintiff has alleged only that they established or implemented policies denying inmates adequate medical care and failed to properly train, supervise, monitor or discipline the medical staff. They argue that such allegations are insufficient to establish the supervisory liability of non-medical prison officials because Plaintiff fails to allege that Defendants had any actual knowledge of Mr. Gioffre's alleged constitutional injuries. . . With respect to Defendants, the Complaint alleges (1) that upon admission, Mr. Gioffre needed a medical examination, which he was not provided because of prison customs and policies, Compl. at & 17; (2) that as of the date of Mr. Gioffre's admission, Defendants had established, tolerated or ratified a practice, custom or policy of failing to provide necessary medical care to inmates to *'avoid the costs of necessary medication, treatment and hospitalization,' id.* at & 29 (emphasis added); and (3) that Defendants were on notice of the constitutionally insufficient practices at BCCF because of 'inmate complaints, court rulings, reports, and other information,' *id.* at & 30. To be sure, this version of the Complaint lacks much detail. Plaintiff does not identify the precise practice or policy instituted by Defendants that created a substantial risk to inmates such as Mr. Gioffre. Nor does Plaintiff provide details about the substance of the complaints, court rulings, and reports received by Defendants regarding the constitutionally insufficient practices at BCCF. Nevertheless, the Complaint alleges a problematic practice or policy, known to and ratified by Defendants, of denying medical care for cost-saving reasons. The Complaint also alleges that Defendants learned of these alleged unconstitutional conditions, but that with deliberate indifference, they failed to remedy the situation. . . These details regarding the motive for the practice or policy of denying inmates medical treatment and the means through which the Defendants learned of the unconstitutional conditions elevate the Complaint, perhaps only barely, from being merely a blanket, general assertion of entitlement to relief. . . . Thus, the Court concludes that while the allegations as to Defendants are minimal and discovery eventually may establish that no such constitutionally impermissible practices or policies existed, the allegations are sufficient at this stage to put Defendants fairly on notice of the claims against them.").

FOURTH CIRCUIT

Johnson v. Robinette, 105 F.4th 99, 124 (4th Cir. 2024) ("Johnson's evidence falls far short of that necessary to establish supervisory or bystander liability against Lt. Robinette. As the district court observed, Johnson failed to forecast evidence sufficient to prove Lt. Robinette knew or should have known that Officer Zimmerman was engaged in unconstitutional acts of sexual abuse or that he had a propensity for engaging in such unlawful action. At most, Johnson testified that Lt. Robinette was in the vicinity of Johnson's cell during some of Officer Zimmerman's strip searches for contraband and, therefore, should have known that Officer Zimmerman was strip searching him. But, at no point was Lt. Robinette present in the cell during any strip search. Even if Johnson's testimony is sufficient to establish that Lt. Robinette was or should have been aware that Officer Zimmerman was conducting some of the strip searches for contraband, the evidence wholly fails to support a finding that Lt. Robinette was aware of a pervasive and unreasonable risk of constitutional injury to Johnson, that he knew or should have known that Officer Zimmerman's contact with Johnson at any point exceeded the proper performance of his official duties, or that he had a reasonable opportunity to prevent Officer Zimmerman from touching Johnson during the searches. Accordingly, we affirm the district court's grant of summary judgment to Lt. Robinette on this basis.")

Kartman v. Markle, 582 F. App'x 151, 154-55 (4th Cir. 2014) ("Kartman testified in his deposition that he repeatedly informed Markle, the Administrator of the Central Regional Jail, in grievances and letters delivered by varying methods, that he faced a substantial risk of harm from other inmates. Markle testified that he never received any of these grievances and, therefore, had no knowledge of Kartman's situation. The district court assumed that Kartman filed the grievances and letters as he claimed. However, the court concluded that there was no evidence that Markle actually received them or had any knowledge of Kartman's issues, based on Markle's testimony and the fact that Markle was not responsible for making prisoner's housing decisions and would not have been the person to respond to these grievances. We conclude that material issues of fact exist preventing summary judgment on this claim. Markle testified that requests to be moved would be placed in his mailbox so long as they were addressed to him and would not be diverted to a supervisor or guard. While Markle stated that he would likely refer the request to a supervisor or the booking department, such a referral would require Markle to initially read and screen the request or grievance. Moreover, the record showed that grievances must be filed with the Administrator of the Jail; filing grievances with officers or supervisors would be insufficient to exhaust. Finally, Kartman submitted a grievance response from the Director of Inmate Services, which could be interpreted as stating that Markle had received Kartman's grievances filed following the October assault. Based on the foregoing, and contrary to the district court's ruling, we find that Kartman provided sufficient evidence to raise a material issue of fact as to whether he filed the disputed grievances and letters and, if so, whether Markle either received them or was willfully blind to their existence. . . The district court ruled that a reasonable person in Markle's position in possession of the incident reports of the October fight, Kartman's November grievances, and Kartman's letter would have known of an excessive risk of harm to Kartman and would have taken action. Because it is unclear whether Markle was in possession of or was aware

of these documents, we vacate the district court's order granting summary judgment and remand for further proceedings.")

Danser v. Stansberry, 772 F.3d 340, 349-50 (4th Cir. 2014) ("The court's observation that Stansberry and Roy were 'directly responsible' cannot be reconciled with the court's failure to identify any conduct of Stansberry and Roy supporting this conclusion. Moreover, the record fails to reveal any such evidence, or other evidence that FCI–Butner or the SHU 'had a policy or practice of ignoring or failing to update the BOP classifications in Sentry and the CIM system.' Thus, all that is present in the record before us is the mere fact that Stansberry and Roy were Boyd's supervisors, and under *Iqbal* that is insufficient as a matter of law to conclude that Stansberry and Roy violated Danser's Eighth Amendment rights. . . Our conclusion is not altered by Danser's argument that Stansberry and Roy are not entitled to qualified immunity because they 'tacitly authorized' Boyd's actions by failing to discipline him after the incident. At its core, Danser's argument reflects a misperception of the 'tacit authorization' theory, which focuses on information known to a supervisor *before* an incident occurs. *See Shaw v. Stroud,* 13 F.3d 791, 798–800 (4th Cir.1994). A supervisor may be held liable under a tacit authorization theory if that supervisor fails to take action in response to a known pattern of comparable conduct occurring before the incident at issue took place. . . Here, there is no evidence in the record that either Stansberry or Roy was aware before the date of Danser's attack of any alleged defects in the assignment process for the recreation cages or of a pattern of officers leaving the recreation area unattended. Therefore, neither Stansberry nor Roy may be held liable under a tacit authorization theory. . . Accordingly, based on the record before us, we conclude as a matter of law that the district court erred in denying the summary judgment motion of Stansberry and Roy.")

Evans v. Chalmers, 703 F.3d 636, 660, 661 (4th Cir. 2012) (Wilkinson, J., concurring) ("A second example of the complaints' overreach lies not so much in the nature of the claims as in the identity of the defendants. The plaintiffs have sued not just the police investigators, but also a number of Durham city officials such as the City Manager, Chief of Police, and various members of the police chain of command. Plaintiffs seek monetary damages from these so-called 'supervisory defendants' under a theory of supervisory liability. In *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), however, the Supreme Court issued several cautionary holdings with respect to such liability—lessons that plaintiffs have utterly failed to heed. To begin with, the Supreme Court explained in *Iqbal* that 'a supervisor's mere knowledge' that his subordinates are engaged in unconstitutional conduct is insufficient to give rise to liability; instead, a supervisor can be held liable only for 'his or her own misconduct.' *Id.* at 677. Yet the complaints in this case repeatedly allege that the so-called supervisory defendants violated plaintiffs' constitutional rights on the theory that they 'knew or should have known' about their subordinates' conduct. This directly contradicts *Iqbal*'s holding that such allegations, standing alone, cannot give rise to supervisory liability. Moreover, the *Iqbal* Court explained that in order to state a claim for supervisory liability, 'a plaintiff must plead that *each* [supervisory] defendant, through the official's *own individual actions,* has violated the Constitution.'. . The plaintiffs here, however, have roped in a number of Durham city officials without pleading any allegedly improper *individual* actions. . . . The absence of individualized

allegations is all the more remarkable in light of the otherwise exhaustive nature of the complaints: combined, the three complaints weigh in at a staggering eight hundred-plus pages. The plaintiffs argue that the absence of specific allegations with respect to each individual supervisor is of no consequence given that they have used the term 'supervisory defendants' as shorthand to allege the collective actions and state of mind for all of the named supervisors. Requiring repetition of the names of specific defendants within the context of each factual allegation, we are told, would be 'pointless and inefficient.' This contention sorely misses the mark. The purpose of requiring a plaintiff to identify how '*each* [supervisory] defendant, through the official's *own individual actions,* has violated the Constitution,'. . . is not to erect some formalistic rule that a complaint must mention each defendant by name some particular number of times. The requirement is instead designed to ensure that the serious burdens of defending against this sort of lawsuit are visited upon a departmental supervisor only when the complaint 'plausibly suggest[s]' that the supervisor engaged in 'his or her *own* misconduct.'. . .At bottom, then, the problem with the supervisory liability claims here is that, like those at issue in *Iqbal,* they fail to cross 'the line from conceivable to plausible.'. . As in *Iqbal,* the plaintiffs' allegations here *could* be 'consistent with' a scenario in which the supervisory officials somehow participated in their subordinates' allegedly unconstitutional conduct. . . But the 'obvious alternative explanation[]'. . . for the supervisors' conduct in assigning the case to certain investigators and attending meetings where the case was discussed is that they wanted to facilitate the investigation, stay abreast of recent developments, and bring the case to closure on a reasonable timeline. That, after all, is their job. In short, the complaints here are wholly indiscriminate. They seek to sweep in everyone and everything, heedless of any actual indications of individual malfeasance that would justify the personal burdens that litigation can impose. What *Iqbal* condemned, the complaints assay. What is more, the complaints' sweeping allegations mirror the sweeping nature of the wrongs of which plaintiffs complain. It is, of course, the purpose of civil litigation to rectify, but not in a manner that duplicates the very evils that prompted plaintiffs to file suit.").

Al-Haqq v. Stirling, No. CA 2:14-098-TMC, 2014 WL 6749096, at *9 (D.S.C. Dec. 1, 2014) ("Even if prior Fourth Circuit case law on supervisory liability is still good law after *Iqbal,*. . . the Plaintiff has not satisfied the requirements for imposing supervisory liability enunciated in cases such as *Carter v. Morris,* 164 F.3d 215, 221 (4th Cir.1999) (a Plaintiff must show actual or constructive knowledge of a risk of constitutional injury, deliberate indifference to that risk, and an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the Plaintiff); *Shaw v. Stroud,* 13 F.3d 791, 798 (4th Cir.1994); and *Slakan v. Porter,* 737 F.2d 368, 370–75 (4th Cir.1984). As a result, a Defendant in a supervisory position over others who has mere knowledge of a constitutional violation is subject to dismissal-the supervisor himself must purposefully violate a prisoner's constitutionally protected rights to be subject to liability. Therefore, to the extent Plaintiff alleges claims premised upon supervisory liability, those claims likewise fail.")

Cook v. Howard, No. 11–1601, 2012 WL 3634451, *4, *5 (4th Cir. Aug. 24, 2012) (not reported) ("Curiously, the Appellants make no attempt to demonstrate that it satisfied the Supreme Court's

explanations of Rule 8(a)(2)'s requirements as set forth in *Twombly* and *Iqbal*, and which were the primary grounds upon which the district court relied. Instead, they rely on pre-*Twombly* and *Iqbal* cases such as *Leatherman* and *Jordan.* While *Leatherman* held that § 1983 claims are not subject to a heightened pleading standard and *Jordan* applied that holding in this Circuit, claims brought in federal court are also subject to the generally applicable standards set forth in the Supreme Court's entire Rule 8(a) jurisprudence, including *Twombly* and *Iqbal.* As we have previously recognized, these later 'decisions require more specificity from complaints in federal civil cases than was heretofore the case.' *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 288 (4th Cir.2012). . . . We agree with the district court that the amended complaint does not satisfy these requirements. The amended complaint suffers from a number of infirmities with respect to the claims against the BCPD. Most strikingly, it repeatedly sets forth legal conclusions masquerading as factual allegations. . . .With respect to Commissioner Bealefeld and Colonel Bevilaqua's liability as supervisory officers, the amended complaint's assertions boil down to contending that because Cook's death occurred at a time when they were supervisors of BCPD officers, they have imputed knowledge of their subordinates' conduct and should be held liable for it. Simply put, the amended complaint does not set forth facts that raise beyond the level of speculation any claim of entitlement to relief under § 1983 or 1985 founded on a theory of supervisory liability.")

O'Connell v. City of Greenville, 4:14-CV-64-BO, 2014 WL 4537182, *2 (E.D.N.C. Sept. 11, 2014) ("Defendant Aden argues that plaintiff's supervisory liability claim fails because the complaint does not allege any facts regarding Aden's individual actions or omissions. The complaint, however, asserts that Aden, the police chief, failed to adequately supervise Does One through Five. Specifically, plaintiff alleges that Aden failed to implement and enforce policies to adequately supervise and train his officials to prevent constitutional violations. These allegations are sufficient to nudge plaintiff's supervisory liability claim across the line from conceivable to plausible. *Twombly*, 550 U.S. at 70. Thus, defendant Aden's motion to dismiss the individual capacity claim on this ground is denied.")

Alexander v. Kenworthy No. 5:11–CT–3142–FL, 2013 WL 461338, *3 (E.D.N.C. Feb. 6, 2013) ("Defendants each assert that plaintiff failed to allege that they had any personal involvement in the alleged failure to clean and maintain the cell containing the staph infection. Plaintiff, however, alleges that each of the defendants was aware of the situation and refused to direct that the cell be cleaned/disinfected. The court finds that these allegations are sufficient to state a supervisor liability claim.")

Panowicz v. Hancock, No. DKC 11–2417, 2012 WL 4049358, *11, *12 (D. Md. Sept. 12, 2012) ("Where a complaint recites only a single instance of harm, courts have generally found a failure to state a claim for supervisory liability. . . . While it may be true that Plaintiff will ultimately be required to show prior instances of misconduct to prevail on his supervisory liability claim, the focus at the dismissal stage is on plausibility. Considering the well-pleaded allegations of the complaint in the light most favorable to Plaintiff, as the court must on a motion to dismiss, Plaintiff has set forth a plausible claim that he suffered a cognizable injury as a result of Defendant's failure

to implement formal safeguards against the erroneous publication of judgments of conviction on a judicial website. The question is a close one, and Plaintiff's ultimate burden in proving deliberate indifference is heavy, but the audit report 'nudge[s][his] claim[ ] across the line from conceivable to plausible[.]'. . The appendix to the audit report indicates that Defendant implemented informal procedures to ensure that judgments were accurately recorded, but the State's recommendation that formal policies be adopted at least suggests that these informal procedures were in some respect insufficient. To the extent that Defendant may have known of a propensity for such errors and failed to respond, whether by implementing a formal policy or providing training to her subordinates, Plaintiff has set forth a sufficient § 1983 claim against Defendant in her individual capacity, albeit by a very thin margin. Ultimately, the 'determining issue on supervisory liability is whether defendant proximately caused a violation of the plaintiff's rights by doing something or failing to do something he should have done,' and 'this issue is ordinarily one of fact, not law.'. . Plaintiff is entitled to discovery to attempt to make the requisite showing. Accordingly, Defendant's motion to dismiss Plaintiff's individual capacity claim under § 1983 will be denied.")

Denney v. Berkeley County, No. 3:10–1383–RMG–JRM, 2012 WL 3877732, *6, *7 (D.S.C. Sept. 5, 2012) ("[S]upervisors may still be held liable under § 1983. *See, e.g., Taylor v. Lang,* No. 12–6069, 2012 WL 2354460, at *2 (D.S.C. June 21, 2012) (conducting supervisory liability analysis under § 1983 post- *Iqbal*); *Smith v. Ray,* 409 F. App'x 641, 650 (4th Cir.2011) (same); *see also Starr v. Baca,* 652 F.3d 1202, 1205–07 (9th Cir.2011) (explaining why *Iqbal* did not affect the existence of supervisory liability under § 1983). That is because the liability of a supervisor is not based on ordinary principles of vicarious liability, but instead on '"a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may [itself] be a causative factor in the constitutional injuries [the subordinates] inflict on those committed to their care."'. . 'Thus, when a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action, not held vicariously liable for the culpable action or inaction of his or her subordinates.' *Starr,* 652 F.3d at 1207. Given that background, it makes sense that the state of mind requirement for a deliberate indifference claim is modified somewhat in the supervisory context, requiring a plaintiff to demonstrate: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *Randall v. Prince George's Cnty., Md.,* 302 F.3d 188, 206 (4th Cir.2002) (quotation marks and citation omitted). Plaintiff Denney's claim against Dewitt fails because he has not shown that Dewitt 'had actual or constructive knowledge that his [subordinates were] engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff.'. . Denney essentially argues that Dewitt must have known of the risk, given the many alleged lapses in protocol by prison officials. But a deliberate indifference claim requires more than that. In order for the fact-finder to infer that an official knew of the risk, the plaintiff must have shown that the risk 'was longstanding, pervasive, well-documented, or expressly noted by

prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it.'. . Denney has offered no evidence that Dewitt was aware that his subordinates were placing individuals charged with crimes against minors into cells where they might be the targets of violence, or of any other violations of policy. Nor has Denney shown that Dewitt knew of the two beatings that occurred at the detention center in the weeks leading up to this incident. Thus, Denney has not raised beyond the level of mere speculation his claim that Dewitt knew his subordinates were engaged in conduct that posed a risk to the safety of individuals in Denney's position.")

Knowles v. Lewis, No. 5:11–CT–3113–FL, 2012 WL 3637241, *5, *6 (E.D.N.C. Aug. 22, 2012) ("The court next turns to plaintiff's claim against Lewis and Smith arising out of their alleged deliberate indifference to his medical care. This supervisor liability claim is based solely upon the fact that plaintiff wrote letters to Lewis and Smith complaining about his medical care. However, this alone, is insufficient to meet the heavy burden in supervisor liability cases. . . Moreover, even if supervisor liability could stem from the letters alone, plaintiff's claims still fails because as DAC supervisory officials, Lewis and Smith are entitled to rely upon the judgment of medical staff at Johnston for the provision of medical care. . . Based upon the foregoing, plaintiff has failed to state a supervisor liability claim based upon alleged deliberate indifference to plaintiff's medical care against Lewis and Smith. Finally, plaintiff alleged a supervisor liability claim against Lewis and Smith based upon the alleged deliberate indifference to the design of the Johnston facility and prison policies resulting in his sun exposure. Lewis and Smith have not proven that plaintiff failed to state a claim upon which relief may be granted for this claim. Thus, to the extent Lewis and Smith seek dismissal of these claims, their motion is DENIED.")

Moore v. Davis, No. 8:11–cv–01173–DCN–JDA, 2012 WL 2890893, *4 n.4 (D.S.C. May 22, 2012) ("[T]he Supreme Court in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), may have entirely abrogated supervisory liability in *Bivens* actions. . . A *Bivens* action 'is the "federal analog to suits brought against state officials under ... § 1983."'. . Therefore, the Supreme Court's reasoning may extend to abrogate supervisory liability in § 1983 actions as well as *Bivens* actions.")

Shannon v. Department of Public Safety and Correctional Services, No. ELH–11–1830, 2012 WL 1150802, at *7 (D. Md. Apr. 5, 2012) ("To the extent that Shannon seeks to hold Warden Wolfe culpable under a theory of supervisory liability, his claims are unavailing. Supervisory liability under § 1983 must be supported with evidence that: 1) the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; 2) the supervisor's response to the knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and 3) there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. . . Shannon does not claim Warden Wolfe had actual or constructive knowledge of the incidents in question, nor are there any grounds alleged for assigning supervisory liability. Shannon does not allege that Warden Wolfe was aware of and disregarded an excessive risk to Shannon's health. . . Further, Warden Wolfe

was entitled to rely on the opinions of medical professionals concerning Shannon's treatment. For these reasons, Warden Wolfe is entitled to summary judgment in his favor.")

Pelzer v. McCall, No. 8:10–cv–1265–MBS–JDA, 2012 WL 761935, at *5 (D.S.C. Feb. 16, 2012) ("[T]he Supreme Court in *Ashcroft v. Iqbal*. . . may have entirely abrogated supervisory liability in *Bivens* actions. . . . A *Bivens* action 'is the "federal analog to suits brought against state officials under ... § 1983."'. . Therefore, the Supreme Court's reasoning may extend to abrogate supervisory liability in § 1983 actions as well as *Bivens* actions.")

Lavender v. City of Roanoke Sheriff's Office, 826 F.Supp.2d 928, 935, 936 (W.D. Va. 2011) ("To plead claims for relief under § 1983 against Johnson in her individual capacity, once again, Lavender must plead facts that show a more than a *respondeat superior* relationship. 'While a municipal liability claim based upon a particular official's attributed conduct and a supervisory liability claim against that official based upon the same conduct are not perfectly congruent, each requires proof both of the official's deliberate indifference and of a close affirmative link between his conduct and the resulting constitutional violation by a subordinate.' *Jones v. Wellham*, 104 F.3d 620, 628 (4th Cir.1997) (citation omitted). To establish supervisory liability , a plaintiff must show: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices;' and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered. . . Here, Lavender's pleadings are essentially boilerplate, devoid of specific facts showing that Johnson either in her official or individual capacity was deliberately indifferent to or tacitly authorized a particular practice that led to the single alleged use of excessive force against Lavender on March 21, 2009 by an unidentified deputy. At the hearing on the motion to dismiss, Lavender's counsel explained that Lavender was attempting to hold Johnson liable under § 1983 because after Johnson became aware of the March 21, 2009 incident, she allegedly failed to 'follow through,' that is, 'properly investigate' the incident and that Lavender also was seeking to hold Johnson liable based on her 'pattern of conduct,' though he did not have 'specific facts.' Counsel's explanation underscores at least two fundamental deficiencies in Lavender's complaint. First, though Johnson's alleged failure to investigate the alleged excessive use of force against Lavender possibly might serve as grist should another excessive force claim arise in the future, it could not have resulted in the constitutional deprivation Lavender alleges–the antecedent excessive use of force–and consequently is not actionable under § 1983. . . Second, the acknowledgment that Lavender does not yet have 'specific facts' to establish a pattern of conduct and is seeking to engage in discovery to support his allegations ignores *Iqbal's* admonition that Rule 8 of the Federal Rules of Civil Procedure 'does not unlock the doors and discovery for a plaintiff armed with nothing more than conclusions.'. . In short, Lavender's complaint falls far short of showing that Lavender is entitled to relief under § 1983 against Johnson in her individual or official capacity, and the court will dismiss those claims against her.")

Harbeck v. Smith, 814 F.Supp.2d 608, 627 (E.D. Va. 2011) ("Although Plaintiff has not conclusively shown that Smith had knowledge of Plaintiff's continued unlawful incarceration, she need not meet that burden at this point. Plaintiff has plausibly alleged that Smith personally received notice of the unlawful incarceration on several occasions and failed to act. Such a showing of personal knowledge is sufficient to survive a motion to dismiss. . . .Therefore, despite the fact that liability for Smith cannot rest on a theory of respondeat *superior*, Plaintiff has alleged sufficient personal involvement on the part of Smith to survive a motion to dismiss under Rule 12(b)(6).")

Humbert v. O'Malley, Civil No. WDQ-11-0440, 2011 WL 6019689, at *7 (D. Md. Nov. 29, 2011) ("The Court will deny Bealefeld and Dixon's motions to dismiss the § 1983 claims. Humbert has properly alleged that Bealefeld had actual or constructive knowledge of officers' misconduct, such as ordering crime lab technicians not to follow up on DNA found at crime scenes. That the police allegedly did so in at least nine cases makes it plausible that Bealefeld had a 'policy of inaction' with respect to his subordinates' DNA collection and processing. . . Because Humbert's constitutional harm involved continued detention despite exculpatory DNA evidence, he has sufficiently pled an affirmative causal link between Bealefeld's inaction and his injury. . . The allegations of police misconduct are so significant that even the mayor should have known about it. . . Accordingly, the Court will deny the motions to dismiss the § 1983 claims against Bealefeld and Dixon.")

Newbrough v. Piedmont Regional Jail Authority, 822 F.Supp.2d 558, 586 & n.14 (E.D. Va. 2011) ("In the Fourth Circuit, a plaintiff seeking to establish supervisory liability under § 1983 must show: (1) that 'the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff'; (2) that the supervisor's response was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices'; and (3) that there existed 'an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.' *Shaw*, 13 F.3d at 799 (internal citations omitted). In short, a plaintiff must demonstrate that the supervisor's constitutionally offensive inaction was itself a 'direct cause' of the injury alleged, *Miltier*, 896 F.2d at 854 − a heavy burden. . . . Arguably, *Iqbal* may have abrogated supervisory liability altogether. . . . Because a *Bivens* action 'is the federal analog to suits brought against state officials under ... § 1983,' *id* at 1948, the Court's reasoning may effectively nullify supervisory liability in both § 1983 actions and *Bivens* actions.")

McFadyen v. Duke University, No. 1:07CV9532011, 2011 WL 1260207, at *57 (M.D.N.C. Mar. 31, 2011) ("[I]n applying [the *Iqbal*] standard, circuit courts have concluded that supervisory liability may still be imposed based on 'deliberate indifference' where the underlying constitutional violation itself may be established based on deliberate indifference. *See Starr v. Baca*, No. 09-55233, 2011 WL 477094, at *4 (9th Cir.2011); *see also, e.g., Smith v. Ray*, No. 09-1518, 2011 WL 317166, at *8 (4th Cir. Feb. 2, 2011) (continuing to apply the *Shaw v. Stroud* "deliberate indifference" standard).").

Hunt v. Robeson County, No. 5:10-CT-3112-FL, 2011 WL 761483, at *6 (E.D.N.C. Feb. 24, 2011) ("Plaintiff alleges that the named supervisors created an official policy and/or an environment that implicitly authorized detention officers and the medical staff to systemically deny inmates proper and adequate medical services. In particular, plaintiff alleges that the supervisory defendants created an environment in which inmates' medical complaints were treated as frivolous or untruthful and that denied inmates' medical services in a timely manner. This is sufficient to state a constitutional claim against the supervisory defendants. *See Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 694-95 (1978). Thus, the motion to dismiss Begay and Harris is DENIED.")

Miller v. Hamm, Civil No. CCB-10-243, 2011 WL 9185, at *12 (D. Md. Jan. 3, 2011) ("Miller claims Stakem-Hornig and City Solicitor Nilson are liable for his constitutional injuries in their capacities as supervisors. In *Shaw v. Stroud,* 13 F.3d 791 (4th Cir.1994), the Fourth Circuit set forth three elements required to establish supervisory liability under 42 U.S.C § 1983: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices,'; and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. . . To satisfy the first element, a plaintiff must show the supervisor had knowledge of a subordinate's conduct that 'pose[d] a pervasive and unreasonable risk of constitutional injury to the plaintiff.'. . This requires that the plaintiff allege conduct that 'is widespread, or at least has been used on several different occasions,' and 'poses an unreasonable risk of harm of constitutional injury.'. . Although Miller brings this claim against both Stakem-Hornig and City Solicitor Nilson, the relevant pleadings focus only on Nilson's knowledge of his subordinate's conduct. . . To the extent that the pleadings support Stakem-Hornig's liability, it is not as a supervisor, but as an active participant in the decision to deny Miller a name-clearing hearing. As a result, the motion to dismiss the claim of supervisory liability will be granted as to Stakem-Hornig. With respect to Nilson, the pleadings do not give rise to a plausible inference that he had actual or constructive knowledge that his subordinate, Stakem-Hornig, was engaging in conduct that posed a pervasive and unreasonable risk of constitutional injury to the plaintiff. The complaint alleges only that Nilson had reason to believe Stakem-Hornig was violating the constitutional rights of BPD officers and that he had knowledge she was acting as a final decisionmaker rather than referring decisions to the BPD. . . The former allegation is too broad and vague to give rise to supervisory liability. The latter allegation, while suggesting potentially improper conduct, does not make it plausible that Nilson was aware Stakem-Hornig was engaging in conduct posing an unreasonable risk to Miller's rights. Miller does not specify the types of decisions Stakem-Hornig was failing to refer to BPD, and he does not assert these decisions repeatedly implicated officers' constitutional rights. Miller has not established the first element of supervisory liability as to either Stakem-Hornig or City Solicitor Nilson. Accordingly, this claim will be dismissed.")

Massenburg v. Adams, No. 3:08CV106, 2010 WL 1279087, at *3 (E.D. Va. Mar. 31, 2010) ("Defendants Adams and Sharpe argue that the complaint does not adequately allege that they were personally involved in any deprivation of Plaintiff's rights. Read in the light most favorable to Plaintiff, both Adams and Sharpe knew Plaintiff's religion prohibited him from working on the Sabbath. Both Sharpe and Adams also knew that the Plaintiff's work assignment required that he work on the Sabbath or face punishment. [FN6. Sharpe knew the foregoing facts because Plaintiff raised the complaint in her presence. Adams knew these facts because Plaintiff wrote a grievance in which he requested that she intervene.] The complaint further suggests that in their respective positions as Camp Administrator and Warden, Sharpe and Adams had the authority and responsibility to intervene and remedy the alleged violation of Plaintiff's free exercise rights, yet they stood indifferent. Such allegations are sufficient, at this juncture, to establish a personal involvement by Adams and Sharpe.").

FIFTH CIRCUIT

Doe v. Ferguson, 128 F.4th 727, 733 (5th Cir. 2025) ("Defendants contend *Ashcroft v. Iqbal* . . . extinguished supervisory-liability claims under § 1983, including the test for school supervisory liability outlined in *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (en banc). We hold that *Iqbal* did not foreclose such claims; *Taylor* remains good law in our circuit. For starters, our court has continued to allow supervisory-liability claims under § 1983 in the 15 years since *Iqbal* was decided. [citing cases] In any event, *Iqbal* concerned *Bivens* claims for invidious discrimination rooted in the First and Fifth Amendments, requiring showing purposeful discrimination. . . Defendants point to language in *Iqbal* referring to the term 'supervisory liability' as a 'misnomer' in actions brought under *Bivens* or § 1983. . .. But the *Iqbal* majority took issue with the term 'supervisory liability' only to the extent it invoked *respondeat superior* liability based on a subordinate's conduct. . . The Court rejected the contention that a supervisor's 'mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution' and concluded that 'purpose rather than knowledge is required to impose *Bivens* liability' on a supervisor. . . Pursuant to *Taylor*, and as discussed *infra*, supervisors are not liable for mere knowledge, but for 'demonstrat[ing] deliberate indifference toward the constitutional rights of the student by failing to take action' that itself 'cause[s]' the constitutional injury. . . Because this standard focuses on the independent misconduct of the supervisor, *Taylor* falls within *Iqbal*'s recognition that 'each Government official ... is only liable for his or her own misconduct'.")

Ford v. Anderson County, Texas, 102 F.4th 292, 321 (5th Cir. 2024) ("Liability under the doctrine of *respondeat superior* is not cognizable in actions brought pursuant to 42 U.S.C. § 1983. . . 'Rather, a plaintiff must show either [that] the supervisor personally was involved in the constitutional violation or that there is a "sufficient causal connection" between the supervisor's conduct and the constitutional violation.'. . Liability may be found where 'supervisory officials implement a policy so deficient that the policy "itself is a repudiation of constitutional rights" and

is 'the moving force of the constitutional violation.' " *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987) (quoting *Grandstaff v. City of Borger*, 767 F.2d 161, 169, 170 (5th Cir. 1985)). Furthermore, '[i]n order to establish supervisor liability for constitutional violations committed by subordinate employees, plaintiffs must show that the supervisor act[ed], or fail[ed] to act, with *deliberate indifference* to violations of others' constitutional rights committed by their subordinates.'. .Based on the evidence of the alleged PR bond policy outlined above, Plaintiffs can plead a colorable supervisory liability claim against Sheriff Taylor, who is the undisputed policymaker in this case. Plaintiffs' proposed third amended complaint contains allegations that Sheriff Taylor implemented the policy of delaying care for detainees with serious medical needs, and that he was personally involved in Newsome's delay of care on the date of her death. While we decline at this stage to address whether Plaintiffs have presented sufficient evidence for their supervisory liability claim to survive a summary judgment challenge, we find that Plaintiffs, at the very least, have shown that amending their pleadings would not be futile.")

Tuttle v. Sepolio, 68 F.4th 969, 975-76 (5th Cir. 2023) ("The district court denied Gonzales's motion to dismiss the excessive force and search-and-seizure claims based on a failure-to-supervise theory. A 'supervisory official may be held liable under section 1983 for the wrongful acts of a subordinate "when [the supervisory official] breaches a duty imposed by state or local law, and this breach causes plaintiff's constitutional injury."'. . We have understood this inquiry to contain three elements: (1) that the supervisor failed to train or supervise the subordinate; (2) a causal link between the failure to train or supervise and the constitutional violation; and (3) that the failure to train or supervise amounts to deliberate indifference. . . The threshold for pleading a failure-to-supervise claim is high, but we conclude that it is satisfied here. Plaintiffs allege multiple specific instances in which Goines fraudulently obtained a search warrant and in which violence occurred. They further allege that Gonzales—in his capacity as Goines's supervisor—knew about these infractions, but did nothing to correct them. As such, these allegations present the uncommon case where deliberate indifference may be attributed to an officer's supervisor. The facts alleged also support the inference that Gonzales failed to supervise Goines, and that a causal link exists between his failure to supervise and the actions that ultimately occurred. The district court did not err in allowing this claim to proceed.")

Hicks v. LeBlanc, 832 F. App'x 836, ___ (5th Cir. 2020) ("A supervisory official may be held liable only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury. . . 'In order to establish supervisor liability for constitutional violations committed by subordinate employees, plaintiffs must show that the supervisor act[ed], or fail[ed] to act, with deliberate indifference to violations of others' constitutional rights committed by their subordinates.'. . 'A failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights.'. . 'A supervisor may also be liable for failure to supervise or train if: "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts

to deliberate indifference."'. . Deliberate indifference requires 'proof that a municipal actor disregarded a known or obvious consequence of his action.'. . To establish a state actor's disregard, there must be 'actual or constructive notice' 'that a particular omission in their training program causes ... employees to violate citizens' constitutional rights' and the actor nevertheless 'choose[s] to retain that program.'. . 'A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference.'. .The complaint contained no allegations that LeBlanc affirmatively participated in the acts that caused Hicks' constitutional deprivation. Instead, Hicks' claim against LeBlanc was predicated on his conduct in (1) failing to promulgate adequate policies, and (2) failing to train and supervise DPSC employees. We must therefore consider whether LeBlanc's alleged actions, or inaction, were objectively unreasonable in light of the clearly established law that a prison official must ensure an inmate's timely release and that such an official may be liable for failure to promulgate policy or failure to train and supervise if he acted with deliberate indifference to constitutional rights. . . Whether LeBlanc acted with deliberate indifference is a close call. Hicks alleged that LeBlanc knew of the DPSC's long history of overdetaining inmates; that DPSC employees used different methods to calculate release dates; and that the DPSC had not disciplined employees who miscalculated sentences. However, the alleged facts—which included processing delays, data errors, inconsistent calculation methodologies, and unspecified deficiencies—speak to the incompetence of DPSC employees and the lack of adequate training and supervision. Based on these allegations, LeBlanc could be held liable for *incompetent* over-detention, such as the failure to process a prisoner's release or immediately compute an inmate's sentence after being sentenced to time served. . . But it cannot be said that LeBlanc had notice that his employees were purposely disregarding sentencing orders out of retaliatory intent. The complaint was devoid of allegations supporting the reasonable inference that a pattern of *intentional* over-detention existed in the DPSC; that is, the alleged facts suggest a pattern of over-detention caused by quality control deficiencies and the lack of training and supervision, not a pattern of over-detention stemming from the blatant refusal to credit offenders with time served contrary to sentencing orders. In the absence of such a pattern, LeBlanc could not have acted with deliberate indifference to Lawson's intentional sentencing miscalculation and over-detention of Hicks. Accordingly, the district court erred in denying LeBlanc's defense of qualified immunity.")

Johnson v. Halstead, 916 F.3d 410, 416-19 (5th Cir. 2019) (*denying reh'g and reh'g en banc*) ("The district court denied Halstead qualified immunity on Johnson's hostile work environment claim but limited the claim to a theory of supervisory liability. A supervisor can be liable for the hostile work environment created by his subordinates 'if that official, by action or inaction, demonstrates a deliberate indifference to a plaintiff's constitutional rights.'. . We first address Halstead's contention that there is a clear legal obstacle to this section 1983 claim. He argues that although a hostile work environment based on sex violates the Equal Protection Clause, it is not clearly established that one based on race does. This ignores multiple cases in which we have considered race-based hostile work environment claims asserted under section 1983. . . .But for Halstead to be liable, it is not enough that Johnson was subject to a hostile work environment. Halstead must have been deliberately indifferent to this racially hostile work environment. . . This

is a 'stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.'. . Johnson thus must allege that 'repeated complaints of civil rights violations' were followed by 'no meaningful attempt on the part of the municipality to investigate or to forestall further incidents.'. . He has done so. There is no dispute that Halstead knew about the alleged harassment. Johnson says he met with Halstead soon after he filed the complaint with HR. The subsequent transfer of Johnson and Halstead's later apology corroborate this. So does the Coleman Report, as it found that a 'high ranking officer' confirmed Johnson's account of his interactions with the Police Chief. The investigators also concluded that there was 'widespread knowledge' of Johnson's situation, and that the 'Chain of Command' knew about the 'hostile, intimidating, and bullying' behavior. Johnson's allegations that Halstead did nothing to try and stop the harassment even though he knew about it—again corroborated by the outside investigation—also satisfy the second requirement for deliberate indifference.")

Perniciaro v. Lea, 901 F.3d 241, 259-60 (5th Cir. 2018) ("Perniciaro contends that Dr. Thompson—the chief of staff at ELMHS responsible for overseeing the provision of care—was deliberately indifferent by failing to adequately supervise Dr. Nicholl in light of Perniciaro's myriad injuries and Dr. Nicholl's failure to create a holistic treatment plan. But without an underlying constitutional violation—of which we have found none—there can be no supervisory liability. . . Perniciaro has failed to establish that Dr. Thompson violated his clearly established rights, and Dr. Thompson is therefore entitled to qualified immunity. As to Lea, the CEO of ELMHS, Perniciaro contends that he was deliberately indifferent by failing to adequately supervise Dr. Nicholl, failing to adequately supervise and train the guards on the proper implementation of ALO, and failing to ensure that all incidences of injuries or violence were reported. Regarding Lea's supervision of Dr. Nicholl, once again the absence of an underlying constitutional violation precludes supervisory liability. Regarding the supervision and training of guards and reporting of injuries, Perniciaro's claims fare no better. Perniciaro has failed to identify any deficiency in the guards' training . . . and there is neither evidence that Lea knew that guards were not properly implementing ALO nor evidence that the need for additional supervision or training should have been obvious. In an environment like ELMHS, where guards are tasked with the difficult job of keeping mentally ill and potentially violent individuals safe from themselves and from one another, the fact that Perniciaro was injured while on ALO is not itself sufficient to make the need for further supervision or training obvious. . . Finally, although Perniciaro points to evidence that he twice sustained injuries that were either unreported or untimely reported, he presented no evidence, nor even argument, that those failures were causally connected to any constitutional violation. Nor is there evidence that those two failures made the inadequacy of existing training and supervision 'obvious and obviously likely to result in a constitutional violation.' Accordingly, Lea, too, is entitled to qualified immunity.")

Pena v. City of Rio Grande City, 879 F.3d 613, 621 (5th Cir. 2018) ("A superior officer issuing a direct order to a subordinate to use excessive force demonstrates both the necessary action and causality for a supervisor-liability claim. Peña's proposed amended complaint thus stated a claim against Solis under this theory. . . . A superior officer issuing a direct order to a subordinate to use

excessive force demonstrates both the necessary action and causality for a supervisor-liability claim. Peña's proposed amended complaint thus stated a claim against Solis under this theory.")

Davidson v. City of Stafford, Texas, 848 F.3d 384, 397-98 (5th Cir. 2017) ("As a threshold matter, the proper inquiry for supervisory liability here would be Chief Krahn's alleged failure to train or supervise, not his interpretation of § 38.02. But even if Chief Krahn's interpretation of § 38.02 was the equivalent of a failure to train or supervise, Davidson has failed to demonstrate a material dispute of fact concerning the deliberate indifference of Chief Krahn. Davidson's evidence is insufficient to demonstrate either a pattern, as discussed in section III.A.2, *supra*, or that his injury was a highly predictable consequence of Chief Krahn's understanding of § 38.02. That is, Chief Krahn's understanding of § 38.02 does not lead to the highly predictable consequence of officers arresting individuals (including Davidson) without probable cause. On this point, our prior decision in *Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000) is instructive. There, we found deliberate indifference where the municipality in question had not trained or supervised the officer who committed the allegedly unconstitutional conduct. . . We further emphasized the fact that the policymaker, a sheriff, had recently investigated the officer and was aware of the officer's 'youth, inexperience, personal background, and ongoing [improper] arrest activities.'. . None of the facts in Davidson's case provide the same cause for concern we recognized in *Bryan County*. Defendants provided evidence demonstrating the extensive training completed by Officers Flagg and Jones, and Davidson points to no evidence concerning the officers' backgrounds or activities with the Stafford PD that demonstrate the high probability of Davidson's arrest. Davidson's evidence therefore fails to create a material dispute of fact as to deliberate indifference, and the district court correctly granted summary judgment on his claim for the liability of Chief Krahn in his individual capacity.")

Terry v. Kinney, No. 15-20548, 2016 WL 5335030 (5th Cir. Sept. 22, 2016) (not reported) ("As the parties recognize, Terry had a clearly established liberty interest in her bodily integrity guaranteed by the Fourteenth Amendment that was violated by McCutchen's misconduct . . . The defendants, as McCutchen's supervisors during the relevant period, may be held liable under 42 U.S.C. § 1983 if they 'learned of facts or a pattern of inappropriate sexual behavior by [McCutchen] pointing plainly toward the conclusion that the subordinate was sexually abusing [Terry]' and 'demonstrated deliberate indifference toward the constitutional rights' of Terry, if that failure to take action caused Terry a constitutional injury.")

Hinojosa v. Livingston, 807 F.3d 657, 668-69 (5th Cir. 2015) ("Defendants contend that the complaint does not properly allege *their responsibility* for the asserted constitutional violation because § 1983 does not contemplate supervisory liability. They argue that they cannot be held liable for the alleged failures of medical personnel and subordinate corrections officers because they did not personally participate in those failures. . . . But Defendants misread the complaint. The complaint does not seek to hold Defendants vicariously liable for the actions of their subordinates. Rather, it seeks to hold them liable for their own actions in promulgating—and failing to correct—intake and housing policies that exposed Hinojosa and other inmates like him

to extreme temperatures without adequate remedial measures. 'A supervisory official may be held liable ... if ... he implements unconstitutional policies that causally result in the constitutional injury.'. . To the extent that Defendants appear to argue they had no hand in the formation of the intake and housing policies described in the complaint, they raise a factual dispute inappropriate for resolution on a motion to dismiss. The complaint specifically alleges that Defendants promulgated and had the power to change the policies that allegedly caused Hinojosa's death. Moreover, while it is true that the complaint contains allegations regarding the conduct of Defendants' subordinates, these allegations seek only to establish direct liability against those subordinates who were also named as defendants in the complaint, not vicarious liability against Livingston, Thaler, and Stephens.")

Hinojosa v. Livingston, 807 F.3d 657, 689 (5th Cir. 2015) (Jones, J., dissenting) ("Especially after *Iqbal,* the plaintiff has not provided the careful factual allegations to meet the burden of pleading, with plausibility, that three of the highest-ranking officials in the Texas prison system were deliberately indifferent to Hinojosa's vulnerability to heat in the conditions he faced at Garza West")

Brauner v. Coody, 793 F.3d 493, 500-01 (5th Cir. 2015) ("A supervisor can . . . be held liable when he was himself deliberately indifferent. In order to hold a defendant supervisor liable on such a theory, 'the plaintiff must show that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference.'. . Thus, Brauner would have to create a genuine issue of material fact that the doctors and wardens failed to supervise or train the subordinate officials. He would then have to create a genuine fact issue that the doctors knew the nurses were disregarding their orders, and the doctors neglected to correct this behavior knowing it posed an actual serious risk to Brauner's health. His evidence is lacking on these points.")

Pena v. Givens, 637 F. App'x 775, 785 n.6, 786 (5th Cir. 2015) ("Although the particular facts of this case do not require us to address the Supervisory Appellants' *Iqbal* argument, we note the many cases in the years since *Iqbal* in which we have continued to apply our rigorous pre-*Iqbal* standards for supervisory liability. *See, e.g., Brauner v. Coody,* 793 F.3d 493, 500–01 (5th Cir.2015); *Pierce v. Hearne Indep. Sch. Dist.,* 600 Fed. App'x 194, 199 (5th Cir.2015); *Whitley v. Hanna,* 726 F.3d 631, 639–41 (5th Cir.2014); *Walker v. Upshaw,* 515 F. App'x 334, 339 (5th Cir.2013). . . . We resolved the psych techs' qualified immunity challenge based on a different part of the qualified immunity standard: the lack of clarity on whether physical restraint in the context of mental-health treatment is a seizure. Of course, this does not answer whether a constitutional violation did or did not occur. It simply answers whether the psych techs can be made to account for it. But the unsettled nature of the law in this area likewise entitles the Supervisory Appellants to qualified immunity. . . . Put simply, if the law did not put the psych techs on notice that their actions would be judged under the Fourth Amendment, then it cannot have put the Supervisory

Appellants on notice that they had a duty to ensure their subordinates were respecting patients' Fourth Amendment rights.")

Lott v. Edenfield, 542 F. App'x 311, 315, 316 (5th Cir. 2013) (not published) ("The complaint fails to adequately allege that either Lappin or Holder had knowledge of the alleged unconstitutional conditions at FCI Big Spring. The complaint does not recite a single fact that would establish that either Lappin or Holder actually received notice of the conditions. Instead, the complaint suggests that Lappin and Holder were aware of the conditions because they are 'the governmental authorities charged with oversight of the United States Bureau of Prisons and FCI Big Spring.' This is essentially a theory of respondeat superior, which is not applicable in *Bivens* suits. . . In the absence of any facts showing that Lappin and Holder received notice, knowledge may not be imputed to them based on their supervisory positions. Although it is a close question, we conclude that the complaint adequately alleges knowledge on the part of Edenfield. The complaint states that many of the plaintiffs filed administrative grievances concerning the alleged unconstitutional conditions. These grievances, along with Edenfield's presence at the prison and immediate responsibility for the prison, support a plausible inference that Edenfield actually received notice of the conditions. However, even if Edenfield was aware of the conditions, the complaint does not include sufficient facts to allow this court to draw the inference that she was deliberately indifferent to the plaintiffs' clearly established rights. The plaintiffs do not suggest that Edenfield personally caused the overcrowding at FCI Big Spring or the alleged conditions related to it. Rather, they argue that she is liable because she was aware of the conditions but failed to address them. Relying on *Farmer v.. Brennan*, 511 U.S. at 832, the plaintiffs argue that the Eighth Amendment imposes a duty on prison officials to provide humane conditions of confinement. Although this is true, *Farmer* requires only that prison officials act reasonably in dealing with prison conditions that they know to be dangerous or inhumane. Applying the doctrine of qualified immunity in the context of deliberate indifference, we conclude that the plaintiffs must plead facts from which we can infer that Edenfield responded to the conditions in a way that any reasonable official in her position would understand to be unacceptable. There are numerous allegations in the complaint regarding the conditions at the prison. The plaintiffs connect every alleged inhumane condition to the broader condition of overcrowding. At no point have the plaintiffs explained what Edenfield could have done to correct the overcrowding at FCI Big Spring, either in the complaint, in subsequent briefing, or at oral argument. The complaint alleges only that Edenfield 'has taken no steps to remediate' the conditions. Without additional facts, we are unable to draw a reasonable inference that Edenfield is liable for the alleged harm to the plaintiffs. . . .Because the complaint does not include facts establishing that Lappin and Holder were aware of the alleged unconstitutional conditions at FCI Big Spring, or that Edenfield responded unreasonably to the conditions, the defendants are entitled to qualified immunity.")

Walker v. Upshaw, No. 11–20628, 2013 WL 829057, *4-*6 & n.19 (5th Cir. Mar. 4, 2013) (not published) ("Supervisory officials may not be held liable under § 1983 for the actions of their subordinates under any theory of vicarious liability. . .When, as here, plaintiffs allege that a supervisory official failed to train or supervise, they must prove that (1) the official failed to train

or supervise the correctional officers, (2) a causal link exists between the failure to train or supervise and the alleged violation of the inmate's rights, and (3) the failure to train or supervise amounted to deliberate indifference. . To hold Upshaw liable on account of inadequate policy, Plaintiffs must show '(1) that the policy *itself* violated federal law or authorized or directed the deprivation of federal rights or (2) that the policy was adopted or maintained by the municipality's policymakers with deliberate indifference as to its known or obvious consequences.'. . Whether the evidence sufficiently 'demonstrate[s] deliberate indifference for supervisory liability is a legal issue that this court may review on interlocutory appeal.'. . . The parties agree that Upshaw had no actual knowledge of Hamilton's prior attack of an inmate with his boots in a different unit years prior to Walker's death and that Upshaw was not at the prison the night Walker died. Because Upshaw had no actual knowledge of the danger posed to Walker, any attempt to hold Upshaw liable for a personal failure to protect Walker would fail. . . Instead, plaintiffs claim that Upshaw is liable for his failure to train and supervise subordinates and his failure to implement adequate policies. . . .Although supervisor liability stems from a supervisor's deliberate indifference to the violations his training causes, . . . Plaintiffs do not seem to base their claim against Upshaw on the actions or inactions of Upshaw's employees due to his training. Plaintiffs make no attempt to show a pattern of Upshaw's employees failing to protect inmates. In fact, they acknowledge that 'normally, the rover on night patrol would come by every 15 to 20 minutes.' This suggests that Upshaw's training was usually effective but that his subordinates' failure to make timely rounds the night Walker died played a significant role in Walker's death. Plaintiffs instead focus on Hamilton's violence and the fact that Upshaw, through his training and supervision of his employees, failed to prevent it. However, 'mere proof that the injury could have been prevented if the officer had received better or additional training cannot, without more, support liability.'. .The Supreme Court has acknowledged that 'in a narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference.'. . . However, the Court stressed that the possibility of 'single-incident liability' based on a failure to train is 'rare,'. . . and this circuit has similarly 'stressed that a single incident is usually insufficient to demonstrate deliberate indifference.'. . Plaintiffs' claims fall far short of the hypothetical offered in *Canton* in which the officers were offered *no* training in a highly dangerous situation. The evidence does not meet the requirements for single-incident liability. . .Similarly, demonstrating that a policy reflects deliberate indifference 'generally requires that a plaintiff demonstrate at least a pattern of similar violations.'. . Plaintiffs do not identify policies that Upshaw created or failed to enforce. Instead, they rely on Upshaw's statement that he oversaw the Ferguson Unit to assert that Upshaw was deliberately indifferent in failing to enforce or create an adequate policy that would have prevented Hamilton from having work boots, a cellmate, and being in a hot, uncomfortable cell that would promote violence given his mental history. Upshaw admitted to knowing that inmates have used their shoes to hurt other inmates, but he had no actual knowledge of Hamilton's prior transgressions. This, however, focuses on actions of inmates and fails to identify any prior constitutional violations resulting from Upshaw's policies. Again, this falls short of the standard required to show that Upshaw maintained a policy with deliberate indifference to its known or obvious consequences. . . . Although *Johnson* speaks to municipal liability, this court has noted

'the close relationship between the elements of municipal liability and an individual supervisor's liability' and held that 'the same standards of fault and causation should govern.'")

Carnaby v. City of Houston, 636 F.3d 183, 189 (5th Cir. 2011)("Mrs. Carnaby maintains that Washington is liable for failure to supervise the other officers on the scene. Under § 1983, however, a government official can be held liable only for his own misconduct. *See Ashcroft v. Iqbal,* ––– U.S. ––––, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Beyond his own conduct, the extent of his liability as a supervisor is similar to that of a municipality that implements an unconstitutional policy. There is no evidence that Washington established any sort of policy during this one incident, so summary judgment on this claim was proper.")

Hernandez v. Horn, No. 10-40384, 2011 WL 462159, at *1 (5th Cir. Feb. 9, 2011) ("The State Defendants have waived the only issue they raise on appeal, *viz.*, the unavailability of supervisory liability. . . . For the first time on appeal, State Defendants assert that '[t]he Supreme Court has eliminated the doctrine of supervisory liability.... Although this Circuit has not had an opportunity to confirm its case law accordingly, other federal courts have recognized that claims for failure to supervise and failure to train − the substance of plaintiffs' complaint in this case − are exactly the types of claims that *Iqbal* forecloses.' We can find no argument by the State Defendants in the district court concerning the invalidity of supervisory liability post-*Iqbal.* . . The State Defendants assert that they have not waived this issue on appeal because they discussed *Iqbal* at length in their district court motion. There, however, the State Defendants addressed only the holding of *Iqbal* regarding pleading standards, never arguing the substantive holding of *Iqbal* concerning supervisory liability. Indeed, the State Defendants appear to have conceded in that motion that they could be liable under the standard set forth in *Youngberg v. Romeo.* . .They never contended in the district court that *Iqbal* had foreclosed claims grounded in failure to supervise or failure to train. . . As the only issue that the State Defendants advanced on appeal is waived, we must dismiss their interlocutory appeal and remand for further proceedings in the district court. We express no view on what matters may be properly raised there on remand.")

Brown v. Callahan, 623 F.3d 249, 253-57 (5th Cir. 2010) ("Whether Dr. Bolin, jail nurses, or other staff violated Brown's rights is not before us; the Browns' case against Dr. Bolin and Nurse Kracja, awaits trial pending the outcome of this appeal, and we express no opinion on its merits. Sheriff Callahan had no knowledge of and did not participate in the events surrounding Brown's fatal period of detention. Thus, the Sheriff can only be held liable in his capacity as a supervisor of the jail for his own unconstitutional conduct. . . . The Browns have alleged two theories of supervisory liability, which, being founded on the same facts, may be discussed together. Mirroring the requirements in this circuit, they contend first that Callahan failed to train or supervise Dr. Bolin and the jail staff; that a causal link exists between the failure to train or supervise and the unconstitutional denial of medical care to Jason; and his failure to train or supervise amounts to deliberate indifference. . . Their second theory of liability is that the Sheriff ratified or condoned Dr. Bolin's custom or policy of intimidating nurses from providing needed medical care, and the custom or policy was 'so deficient that the policy itself is a repudiation of

constitutional rights and is the moving force of the constitutional violation.'. . .Even if we assume *arguendo* that the sheriff's supervision of Dr. Bolin or the nursing staff was inadequate and that there was a causal link between his failure and Brown's death, we cannot conclude that there is a genuine material fact issue as to Callahan's deliberate indifference to constitutional rights. Evidence is also lacking to prove the objective unreasonableness, for immunity purposes, of Sheriff Callahan's management of the jail's medical care. . . .Deliberate indifference implies an official's actual knowledge of facts showing that a risk of serious harm exists as well as the official's having actually drawn that inference. . .Deliberate indifference is more than mere negligence or even gross negligence. . . Proof of deliberate indifference normally requires a plaintiff to show a pattern of violations and that the inadequate training or supervision is 'obvious and obviously likely to result in a constitutional violation.'. . Here, evidence of Sheriff Callahan's failure to supervise Dr. Bolin and the nursing staff is simply too attenuated to permit the inference that the Sheriff was deliberately indifferent, *i.e.,* that he ignored a known or obvious risk of unconstitutionally deficient medical care. . . . [T]he Sheriff's potential liability for an unconstitutional policy runs afoul of the second prong of qualified immunity analysis, where the dispositive inquiry is 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . This court has interpreted 'clearly established law' on the subject of policy promulgation to require 'an intentional choice' and amount to subjective deliberate indifference. . . It must be 'obvious that the likely consequences of not adopting a policy will be a deprivation of civil rights.'. . Applied to this case, it would have had to be clear to the Sheriff that condoning or ratifying Dr. Bolin's practice of nurse intimidation would in fact discourage nurses from seeking constitutionally adequate medical care for the detainees. That he did not have the subjective knowledge required for deliberate indifference and imputation of liability has been explained above. There is also insufficient evidence from which a reasonable jury could infer that Callahan's conduct did not deserve qualified immunity. The district court relied on the same evidence related above that shows, at worst, the Sheriff's negligent supervision of Dr. Bolin and the doctor's relationship with the nursing staff. In the absence of any prior incidents that connoted inadequate medical care at the jail, it is impossible to infer that the Sheriff was essentially callous about inmate medical care or had any reason to suspect the level of care had become or could become constitutionally inadequate. The Sheriff was neither plainly incompetent nor knowingly violating the law, nor were his actions, in the circumstances he faced, objectively unreasonable.")

Floyd v. City of Kenner, La., No. 08-30637, 2009 WL 3490278, at *6 (5th Cir. Oct. 29, 2009) (unpublished) ("Floyd does not complain that Caraway himself filed the alleged unlawful affidavit in support of the warrants. Instead, he claims that Caraway, in his capacity as chief investigator, directed and approved the applications filed by Cunningham. This is an alleged Fourth Amendment violation under *Franks,* as we stated in addressing the claim against Cunningham. 'Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.' *Iqbal,* 129 S.Ct. at 1948. Liability under Section 1983 for a supervisor may exist based either on personal involvement in the constitutional deprivation or 'a sufficient causal

connection between the supervisor's wrongful conduct and the constitutional violation.' *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir.1987). We must determine whether Floyd alleged the 'factual particulars' necessary to state a valid Fourth Amendment claim against Caraway. . .The relevant allegation is that Caraway 'participated in, approved and directed' the filing of false and misleading affidavits. In analyzing the issue, we turn to the Supreme Court's recent decision in *Iqbal*. . . . Certainly our precedents have acknowledged that some limited discovery may at times be needed before a ruling on immunity is proper. As an example, we referred to 'search cases, [because] probable cause and exigent circumstances will often turn on facts peculiarly within the knowledge of the defendants.'. . In such a case, 'if there are conflicts in the allegations regarding the actions taken by the police officers, discovery may be necessary.'. . The importance of discovery in such a situation is not to allow the plaintiff to discover if his or her pure speculations were true, for pure speculation is not a basis on which pleadings may be filed. Rule 11 requires that any factual statements be supported by evidence known to the pleader, or, when specifically so identified, 'will *likely* have evidentiary support' after discovery. Fed.R.Civ.P. 11(b)(3) (emphasis added). There has to be more underlying a complaint than a hope that events happened in a certain way. Instead, in the 'short and plain' claim against a public official, 'a plaintiff must at least chart a factual path to the defeat of the defendant's immunity, free of conclusion.' *Schultea*, 47 F.3d at 1430. Once that path has been charted with something more than conclusory statements, limited discovery might be allowed to fill in the remaining detail necessary to comply with *Schultea*. . . Under these standards, Floyd's allegations against Caraway amount to nothing more than speculation. The conclusory assertion that Caraway 'participated in, approved and directed' the filing of false and misleading affidavits is consistent with finding a constitutional violation, but it needed further factual amplification. *See Iqbal*, 129 S.Ct. at 1949. Floyd might not know everything about what occurred, but the bare allegation does not make it plausible that he knows anything. Unlike his allegations against Cunningham, this bare assertion does not provide any detail about what Caraway, as chief of investigations, did to seek to control Cunningham's filing of an affidavit. Put differently, the conclusion presents nothing more than hope and a prayer for relief. An example of a situation that falls squarely within the kind of case justifying limited discovery is discussed in a recently released but non- precedential opinion by a panel of this court. *Morgan v. Hubert*, No. 08- 30388, 2009 WL 1884605 (5th Cir. July 1, 2009). In *Morgan*, a plaintiff who was in protective custody before Hurricane Katrina was transferred to a general prison population following the storm. . . After being beaten and stabbed, the plaintiff filed a Section 1983 suit against the prison warden. . . The complaint presented sufficient detail to demonstrate a highly plausible allegation of an Eighth Amendment violation. . . The events cited were so clear, the practical effects of such conduct so obvious, that the defendants' responsibility under Section 1983 for the plaintiff's harm simply needed the detail that limited discovery would either provide or deny. . . Unlike in *Morgan*, Floyd has shown nothing in his complaint to indicate a basic plausibility to the allegation. His Section 1983 claim premised on a Fourth Amendment violation therefore fails.").

Barnes v. City of El Paso, No. EP-22-CV-161-KC, 2023 WL 4097075, at *16 (W.D. Tex. June 12, 2023) ("[I]ndividual-capacity supervisory liability claims differ from *Monell* claims in certain

key respects. For example, punitive damages are available from individuals (including supervisors) but not municipalities. . . And individuals can assert qualified immunity, while municipalities cannot. . . Most critically, to succeed on a supervisory liability claim, 'a plaintiff must allege that the defendant was *personally* ... responsible for the policy or custom giving rise to the alleged constitutional deprivation.'. . . A plaintiff must also show that the supervisor acted with deliberate indifference in enacting such policies or customs. . . The Fifth Circuit has recognized that a plaintiff can simultaneously bring municipal and supervisory liability claims based on the same alleged policy or custom. In *Calhoun*, for instance, the plaintiff brought *Monell* claims against the City of Houston, alleging that it 'had a policy of "failing" to "properly discipline," "restrict," and "control" its employees.'. . The plaintiff brought similar supervisory liability claims against the chief of the Houston Police Department, alleging that he 'took no actions to discourage [his officer's] unlawful abuse of authority.'. . The Fifth Circuit upheld dismissal of both sets of claims. . . But it discussed the municipal and supervisory liability claims separately, providing a distinct analysis for each set of claims. . . *Calhoun* thus cautions that supervisory liability claims should be considered separately from *Monell* claims, even when both sets of claims deal with the same factual allegations. In summary, Barnes' supervisory liability claims do not simply duplicate her *Monell* claims. Though the two sets of claims involve similar facts and similar legal standards, Barnes' supervisory liability claims turn on Allen's personal actions, while her *Monell* claims turn on the City's policies and customs, and the actions of its policymakers. . . While these considerations often overlap, they remain distinct. . . Thus, Barnes' supervisory liability claims may proceed.")

Gonzalez v. Gordy, No. 2:18-CV-220, 2020 WL 882049, at *2 (S.D. Tex. Feb. 24, 2020) ("Gonzalez has identified a specific 'quarantine' policy which he states he was subject to and which he claims led to a near-death medical emergency because it denied him medical attention when he was ill. . . The Court concludes such an alleged policy and harm state a claim upon which relief can be granted against a supervisory official.")

Carr v. Montgomery Cnty., Tex., 59 F.Supp.3d 787, 808 (S.D. Tex. 2014) ("In the alternative to Hayden being individually liable for bringing third parties to plaintiff's home for a private purposes during a search, she has claimed that he can be held liable for his failure to supervise his officers violated plaintiff's rights. The court concluded in Section V.B that plaintiff pled sufficient facts to state a claim upon which relief could be granted as to Hayden's supervisory liability for violating the constitutional right not to have officers bring third parties into a home for private a claim sufficient to defeat defendants' motion to dismiss on qualified immunity grounds. Defendants' purposes. Because the claim of supervisory liability is premised on Hayden's deliberate indifference to plaintiff's constitutional rights, which are well-settled rights, plaintiff has also stated motion to dismiss this specific supervisory liability claim against Hayden on the basis of qualified immunity is denied.")

Hawn v. Hughes, 1:13-CV-00036-GHD, 2014 WL 4418050, *5, *7, *9 (N.D. Miss. Sept. 8, 2014) ("Although a plaintiff who seeks to mount a case for supervisory liability against an individual under § 1983 is in for an uphill battle, the battle is not insurmountable; if it were, no individual

could ever be brought into court on a § 1983 supervisory-liability claim, thus rendering the cause of action a nullity. For the reasons stated below, the Court finds that Plaintiffs' § 1983 supervisory-liability claim survives summary judgment. . . .The Court is of the opinion that Plaintiffs have demonstrated for purposes of summary judgment that Director Berthay was aware of alleged acts of excessive force by Officer Hughes in 2007 involving Wampler–George and Brann and acted with deliberate indifference to the same, and that this alleged deliberate indifference proximately caused Officer Hughes' pattern of excessive force to continue with Plaintiffs. Accordingly, Plaintiffs' supervisory-liability claim against Director Berthay survives summary judgment on its merits. The Court now turns to whether Director Berthay is nonetheless qualifiedly immune from suit on the claim. . . . In the opinion of this Court, Plaintiffs have met their burden in showing that a reasonable official in Director Berthay's shoes would have understood that his failure to train or supervise Officer Hughes, despite knowledge of the 2007 Lee County Jail incident involving Wampler–George and likely knowing of the subsequent incident involving Brann, would constitute deliberate indifference. For all of the foregoing reasons, Plaintiffs have overcome Director Berthay's qualified-immunity defense at the summary-judgment stage.")

Martone v. Livingston, 4:13-CV-3369, 2014 WL 3534696, *7, *12 (S.D. Tex. July 16, 2014) ("The TDCJ [Texas Dep't of Criminal Justice] Defendants object that they cannot be held liable under § 1983 for the alleged violation of the Eighth Amendment since there is no allegation of their personal involvement in the conditions of Mr. Martone's confinement. . . To the contrary, Plaintiff seeks to hold the TDCJ Defendants liable under a theory of supervisory liability for 'creating and approving the dangerous conditions that *caused* [Mr. Martone's] heat stroke, and failing to remedy them.'. . Plaintiff has adequately alleged that the TDCJ Defendants acted, or failed to act, with deliberate indifference to constitutional violations as necessary for supervisory liability to attach under § 1983. . . . For the same reasons described above, the Court finds that Plaintiff has adequately stated violations of the Eighth Amendment based on Dr. Murray's alleged failure to implement policies to protect inmates from the extreme heat, alleged policy of leaving the inmates without adequate medical care each night, and alleged failure to adequately train the staff about the risk of heat stroke.")

Khansari v. City of Houston, 14 F.Supp.3d 842, 866-67 (S.D. Tex. 2014) ("Plaintiffs fail to allege any foundational facts capable of showing that Chief McClelland was directly involved in the training or supervising of the officers involved in the incident at the Khansari's home on November 25, 2011; that the training or supervision that Chief McClelland provided to those officers was inadequate; or that Chief McClelland was aware of a pattern of prior violations by any of those officers that put him on notice that additional training or supervision was needed to prevent a violation of Corey's constitutional rights. Plaintiffs' argument that this case fits within the narrow scope of the single incident exception has no merit because a 'lone incident is insufficient to pierce the qualified immunity enjoyed by Chief [McClelland] .'. . Plaintiffs have neither cited a case that has relied on the single incident exception as a means of holding an individual supervisor liable in his personal capacity, nor alleged facts capable of establishing that this exception should be applied to Chief McClelland in this case. To rely on this exception plaintiffs must allege facts capable of

establishing that the 'highly predictable' consequence of Chief McClelland's failure to train or supervise would result in the specific constitutional injury at issue, and that the failure to train or supervise represented the 'moving force' behind that injury. . . There are no allegations here that the officers at issue had not received any training or supervision, or that they had been involved in any cases involving the improper use of excessive force or tasers while responding to calls involving mental health patients. Instead, plaintiffs merely allege that the training all Houston police officers received as a result of Chief McClelland's policies was not enough and that more or different training or supervision would have prevented the plaintiffs' injuries. Such allegations are not sufficient to state a claim for failure to train or supervise against Chief McClelland in his personal capacity. . . Accordingly, defendants' motion to dismiss the § 1983 claims asserted against Chief McClelland for failure to train or supervise will be granted.")

Khansari v. City of Houston, 14 F.Supp.3d 842, 867, 871 (S.D. Tex. 2014) ("This court is not aware of and plaintiffs have not cited any cases imposing personal liability on a supervisor based on ratification. To the extent that ratification might, in some instances, be characterized as the implementation of an unconstitutional policy that causally results in the constitutional injury, subsequent ratification of a subordinate's excessive use of force does not state a claim for which relief may be granted in this case because such ratification could not have caused the constitutional injury about which the plaintiffs complain. Any § 1983 claim plaintiffs have attempted to state against Chief McClelland for ratification of a subordinate's allegedly excessive use of force is therefore subject to dismissal because, as a matter of law, no such claim may be stated against Chief McClelland. *See Hobart v. City of Stafford,* 916 F.Supp.2d 783, 799 (S.D.Tex.2013) (post-incident ratification cannot impart liability on a supervisor). . . . The mere failure to investigate a subordinate's decision does not amount to ratification. . . And policymakers who simply go along with a subordinate's decision do not thereby vest final policymaking authority in the subordinate. . . . Applying the ratification theory as plaintiffs propose in this case would turn it into *de facto respondeat superior.* While the mere failure to investigate a police officer's conduct that allegedly violated a person's Fourth Amendment rights cannot amount to ratification, the converse must also be true: The mere decision to investigate and exonerate also cannot amount to ratification. . . .[E]ven assuming that the policymaker, Chief McClelland, reviewed the conduct of the officers who responded to the call for service at the Khansari's home, he reviewed that conduct after the fact, i.e., after the conduct had been committed without his approval. To hold the City liable because Chief McClelland concluded that the officers acted appropriately would convert liability through ratification into *respondeat-superior* liability.")

Briggs v. Edwards, Nos. 12–2145, 13–5335, 13–5342, 2013 WL 5960676, *4, *5 (E.D. La. Nov. 6, 2013) ("Supervisory liability in § 1983 cases is a murky area of the law. . . Not only are there Circuit splits on this issue, there are conflicting standards that arise from the same Circuit, and even the same courts, and the Supreme Court has said little on the subject. . . . [T]he Fifth Circuit has repeatedly applied a 'deliberate indifference' standard to supervisory liability claims where the supervisor is not directly involved. [collecting cases] Accepting the fact that 'deliberate indifference to the known or obvious fact that such constitutional violations would result,' is the

standard for supervisory liability cases, the Court must then determine how to apply the standard. . . .Applying the deliberate indifference standard to the instant case, the Court finds that, though Plaintiffs' allegations sufficiently allege that Lt. Redmond was deliberately indifferent to the *dangers or installing an after market trigger*, Plaintiffs do not sufficiently allege that Lt. Redmond was deliberately indifferent to Dee Jay's *constitutional rights*. . . Plaintiffs' allegations, even taken as true, cannot show that Lt. Redmond's actions were the cause of or affirmatively linked to the constitutional violation. Lt. Redmond's actions may have been the cause of Dee Jay's death . . . because the gun would not have gone off were it not for the aftermarket trigger, that is not the same as saying that his actions caused the constitutional violations of excessive force and/or denial of medical care. . . Regarding the excessive force claim, Plaintiffs argue that Deputy Phebus either intentionally shot Dee Jay or accidentally shot him because of the aftermarket trigger. Under the former theory, there is no way to conclude that the installation of an aftermarket trigger caused Deputy Phebus to intentionally shoot Dee Jay. If the latter theory is true, the excessive force would be Deputy Phebus' decision to point the weapon at Dee Jay, not the actual shooting. . . Again, there is simply no logical way to conclude that the installation of an aftermarket trigger on Deputy Phebus' weapon *caused* Deputy Phebus to draw a weapon on a teenager who was allegedly unarmed and had his hands in the air. As to the denial of medical treatment claims, there is, again, no way to determine that installation of an aftermarket trigger would cause Lt. Redmond to deny treatment to Dee Jay. Therefore, Defendants' motion to dismiss must be granted on this issue.")

Jackson v. Chavez, No. A–11–CA–417–LY, 2013 WL 3328683, *10, *11 (W.D. Tex. June 26, 2013) ("The State Defendants argue the previously recognized standards for supervisory liability are no longer applicable in the wake of *Iqbal*. Their argument is based on statements in *Iqbal* making clear 'each Government official, his or her title notwithstanding, is only liable for his or her own misconduct' and holding Iqbal's claim of 'knowledge and acquiescence' by a supervisor was insufficient to impose liability. . . The State Defendants note a number of appellate court decisions suggest *Iqbal* 'call[s] into question our prior circuit law ... on supervisory liability.'[collecting cases] However, as the State Defendants admit, the Fifth Circuit has not yet addressed this issue. *See Hernandez v. Hom*, 410 F. App'x 819, 820 (5th Cir.2011) (stating 'this Circuit has not had an opportunity to confirm its case law' on issue post- *Iqbal*, but declining to consider issue on appeal as not properly raised in district court). They also admit other federal circuits have raised the issue, but have not yet ruled *Iqbal* has radically altered the civil rights landscape in the manner they suggest. [collecting cases] Accordingly, the undersigned declines to dismiss the claims against Steen, Cuevas, Weinberg and Fredricks based on this expansive reading of *Iqbal*.")

Jolley v. Geo Group, No. 3:11CV481–LRA, 2013 WL 1364080, *2 (S.D. Miss. Apr. 3, 2013) ("Plaintiff does not suggest that Epps was personally aware that he was not being provided with enough food, or that he was not taken to a specialist or given the medical care he requested or needed, or that he was not provided with toiletries. He simply charges that Epps *should have known*—had he been appropriately monitoring EMCF. Without more, Plaintiff's allegations failed to establish that Epps was personally involved in any constitutional violation against him.

Supervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act; instead, any liability must be based upon active unconstitutional behavior. *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir.1989). The Court finds that although Commissioner Epps would be immune from suit under these circumstances, Plaintiff has also failed to state a constitutional claim against Epps.")

Hobart v. City of Stafford, 916 F.Supp.2d 783, 799 (S.D. Tex. 2013) ("This Court is aware of, and Plaintiffs have cited, no cases that impose liability on a supervisor based on ratification. . . To the extent that ratification might, in some instances, be characterized as the implementation of an unconstitutional policy that 'causally result[s] in the constitutional injury,' . . . subsequent ratification of a subordinate's excessive use of force does not *cause* the constitutional injury. Accordingly, this Court finds that, as a matter of law, no claim may be stated against Chief Krahn based on ratification of a subordinate's allegedly excessive use of force.")

Ard v. Rushing, 911 F.Supp.2d 425, 432 (S.D. Miss. 2012) ("Even assuming the continued viability of supervisory liability following *Iqbal*, as Rushing points out, Miller admittedly had notice of Rushing's policies and procedures regarding the male jailers' interactions with female inmates and plaintiff has failed to come forward with proof which would create a fact issue as to Rushing's knowledge of Miller's disregard of the policy. Moreover, Ard has not established an issue of fact as to whether Rushing was deliberately indifferent. . . She has thus failed to establish the elements of her failure to train/supervise claim, and it is clear that Rushing is entitled to immunity as to this claim as well.")

Turner v. Caskey, No. 4:09–CV–102–LRA, 2012 WL 2921797, *3, *4 (S.D. Miss. July 17, 2012)("Fifth Circuit precedent requires either **personal involvement by an individual Defendant** in the alleged violation, or the **enforcement of some policy or practice resulting in the constitutional deprivation.** *Champagne v. Jefferson Parish Sheriff's Office,* 188 F.3d 312, 314 (5th Cir.1999) (emphasis added). If no personal involvement exists, then a causal link between their actions and the alleged constitutional deprivation must be shown. . .Turner's claim against Caskey is not based on his personal involvement in the incident; Turner did not notify Caskey personally that he feared for his safety. Caskey was not responsible for a "policy" or "custom" which caused Turner's injury. Turner's allegations are insufficient to establish supervisory liability against Caskey based on a failure to train or a failure to supervise theory of liability.")

Amerson v. Pike County, Miss., No. 3:09CV53–DPJ–FKB, 2012 WL 968058, at *5 n.7 (S.D. Miss. Mar. 21, 2012) ("To the extent *Whirl* and *Barksdale* remained valid, the Supreme Court's opinion in *Ashcroft v. Iqbal*, calls them into further doubt. There, the Court appeared to reject 'supervisory liability' and limit an official's liability to his own misconduct. . . In *Carnaby v. City of Houston*, the Fifth Circuit apparently followed *Iqbal's* rejection of supervisory liability, stating: Under § 1983, however, a government official can be held liable only for his own misconduct. . . . Beyond his own conduct, the extent of his liability as a supervisor is similar to that of a municipality that implements an unconstitutional policy.")

Milazzo v. Young, No. 6:11CV350, 2011 WL 6955710, at *4 (E.D. Tex. Dec. 11, 2011) ("The United States Court of Appeals for the Fifth Circuit has not yet interpreted this holding of *Iqbal.* Nonetheless, under existing Fifth Circuit jurisprudence, a supervisor may only be held liable if one of the following exists: (1) his personal involvement in the constitutional deprivation, or (2) sufficient causal connection between the supervisor's wrongful conduct and the constitutional violations. . . Neither of these two conditions contradict *Iqbal* but are consistent with the Supreme Court's holding that mere knowledge or acquiescence is insufficient to create supervisory liability in the § 1983 setting. Here, Plaintiff's allegations do not satisfy either condition. Warden Wheat can be held liable only to the extent that he personally engaged in misconduct. . . Plaintiff's allegations do not even come close to making such a showing.")

Carter v. St. John Baptist Parish Sheriff's Office, No. 11–1401, 2011 WL 6140861, at *7, *8 (E.D. La. Dec. 9, 2011) ("To state a claim against LeBlanc for failure to train or failure to supervise, plaintiffs must allege that LeBlanc had subjective knowledge of a serious risk of harm. . . Plaintiffs fail to do so. Accordingly, they have not shown that LeBlanc acted with deliberate indifference. . . . Plaintiffs' also seek to hold LeBlanc liable as a supervisor on the grounds that he formulates the policies of the LDPSC and those policies directly caused the violations of plaintiffs' rights. An official may be liable when enforcement of a policy or practice results in a deprivation of federally protected rights. . . In their complaint, plaintiffs allege that the following policies of the LDPSC caused their deprivation of rights: (1) failing to ensure adherence to citizens' constitutional rights; (2) failing to properly screen their officers before hiring; (3) approving a culture in which the personnel have an expectation that their actions will not be monitored and that their misconduct would not be investigated; and (4) failing to hold supervisory officers responsible for misconduct. None of the policies plaintiffs cites in their complaint states a claim against LeBlanc. First, the Fifth Circuit has explicitly held that the failure to establish policies ensuring the protection of constitutional rights is not an adequate basis for supervisor liability under Section 1983. . . Second, plaintiffs assertions that the LDPSC fails to properly screen its officers before hiring, approves a culture in which the officers expect that their actions will not be monitored, and fails to hold supervisory officers responsible for misconduct are wholly conclusory and devoid of factual support. The Court acknowledges that at the motion to dismiss stage, it is difficult for a plaintiff to provide proof of an unconstitutional policy. But, plaintiffs must at least set forth sufficient facts to raise their right to relief above a speculative level. Plaintiffs do not provide any factual allegations beyond a bare assertion of the existence of a policy at a high level of generality. Further, plaintiffs fail to allege a causal connection between these policies and the asserted deprivations of their constitutional rights. Because the Court finds that plaintiffs fail to state a claim against LeBlanc in his individual capacity, an analysis of his defense of qualified immunity is unnecessary.")

Colgrove v. Gibson, No. 9:11cv100, 2011 WL 6715821, at *7 (E.D. Tex. Nov. 10, 2011) ("The United States Court of Appeals for the Fifth Circuit has not yet interpreted this holding of *Iqbal.* Nonetheless, under existing Fifth Circuit jurisprudence, a supervisor may only be held liable if one

of the following exists: (1) his personal involvement in the constitutional deprivation, or (2) sufficient causal connection between the supervisor's wrongful conduct and the constitutional violations. . . Neither of these two conditions contradict *Iqbal* but are consistent with the Supreme Court's holding that mere knowledge or acquiescence is insufficient to create supervisory liability in the § 1983 setting.")

Enriquez v. Nolen, No. 6:11CV320, 2011 WL 4716223, at *5 (E.D. Tex. Oct. 2, 2011) ("The United States Court of Appeals for the Fifth Circuit has not yet interpreted this holding of *Iqbal.* Nonetheless, under existing Fifth Circuit jurisprudence, a supervisor may only be held liable if one of the following exists: (1) his personal involvement in the constitutional deprivation, or (2) sufficient causal connection between the supervisor's wrongful conduct and the constitutional violations. *Mesa v. Prejean*, 543 F.3d 264, 274 (5th Cir.2008); *Thompkins v. Belt*, 828 F.2d 298, 303-304 (5th Cir.1987). Neither of these two conditions contradict *Iqbal* but are consistent with the Supreme Court's holding that mere knowledge or acquiescence is insufficient to create supervisory liability in the § 1983 setting.")

Olvera v. Alderete, No. 4:10-cv-2127, 2010 WL 4962964, at *12 (S.D. Tex. Dec. 1, 2010) ("In this case, Olvera does not allege that Defendant Tollett was personally involved in his arrest. Instead, he states in his Response to Defendants' Motion to Dismiss, that he has sued Defendant Tollett under the theory that Tollett oversaw a policy that allowed police officers in the City of Sealy to arrest individuals for taking photographs of police officers, and that such a policy, based on an erroneous understanding of the law, is unconstitutional. However, Olvera's complaint does not contain any mention of this theory, nor any facts that would support a claim against Defendant Tollett based upon this theory. Because this case is now at the motion to dismiss phase, the Court acknowledges that providing proof of an unconstitutional policy or Defendant Tollett's actions that led to the violation of Olvera's constitutional rights is exceedingly difficult for a plaintiff, who has no source of pre-discovery evidence that he may produce to support such a claim. However, Olvera must set forth at least *some* facts that allege the existence of policy, how such a policy is unconstitutional, and how Defendant Tollett implemented such a policy. This Olvera has not done. The Court allows Olvera leave to amend his complaint to address this deficiency.")

Ramirez v. Jim Wells County, Tex., No. CC-09-209, 2010 WL 2598304, at *1, *2 (S.D. Tex. June 25, 2010) ("Citing to *Bell Atlantic Corp. v. Twombly*. . . and *Ashcroft v. Iqbal*. . . , Defendants first object that the facts pled by Plaintiff are insufficient to state a failure to train or supervise claim against Sheriff Lopez and Deputy Valadez. The Court disagrees. . . .Plaintiff specifically pleads that Sheriff Lopez and Deputy Valadez referred to Deputy Martinez as 'Taser Joe' and were responsible for training and/or supervising him on the use of his taser gun. Plaintiff also alleges the following: Defendants Valadez and Lopez have never required Defendant Martinez to be held accountable for taser cartridges, including but not limited to, failing to require him to sign-out taser cartridges, failing to require him to document the extensive use of his taser, and failing to properly train and inform him that the taser gun is an intermediate weapon to be used to gain compliance and not to be used as a replacement for verbal commands and/or as punishment. Assuming these

factual allegations are true, the Court finds Plaintiff has pled sufficient facts from which this Court may draw the reasonable inference that Sheriff Lopez and Deputy Valadez failed to train and/or supervise Deputy Martinez.")

SIXTH CIRCUIT

Does v. Whitmer, 69 F.4th 300, 307-09 (6th Cir. 2023) ("We require 'more than an attenuated connection' between the injury and the supervisor's wrongful conduct. . . Sloppiness, recklessness, or negligence is insufficient to establish liability. . . But deliberate indifference, knowing acquiescence, tacit or implicit authorization, or failure to take precautions against likely violations may suffice. . . .The allegations here are a far cry from those in *Peatross* and *Garza*. The plaintiffs here do not allege that they told Etue and Gaspar that the MSP was violating their rights, that the directors acknowledged problems, or that they attempted to cover up constitutional violations. . . Nor do they claim that the directors received reports that the plaintiffs' rights—as opposed to the rights of the four individual plaintiffs who prevailed in *Does I* and *Does I on appeal*—had been or were being violated and failed to take precautions against likely future violations. Instead, the plaintiffs complain only that Etue and Gaspar failed to act and that the directors' failure encouraged MSP officers to continue violating the plaintiffs' rights. Even drawing all reasonable inferences in the plaintiffs' favor, the complaint's allegations against the MSP directors fail to state a claim of supervisory liability. The district court's ruling on this point was erroneous. However, the district court correctly dismissed the plaintiffs' supervisory-liability claims against Whitmer and Snyder. The two governors are even further removed from the alleged injuries than the MSP directors. The only connection between the governors and the alleged injuries is the governors' generalized responsibility to enforce the law and their supervisory authority over the MSP. That connection is too 'attenuated.'. . Governors may not be held liable for the unconstitutional conduct of their subordinates on a theory of *respondeat superior*. . . The plaintiffs argue that Whitmer and Snyder should have issued an 'executive order, policy directive, or other communication' instructing the MSP not to enforce SORA, but those allegations, like those against the MSP directors, merely charge the governors with a failure to act, which is not enough. . . Therefore, the plaintiffs also fail to state a claim of supervisory liability against the governors.")

Miller v. Gettel, No. 22-1034/1046, 2023 WL 2945340 (6th Cir. Apr. 14, 2023) (not reported) ("'[A] supervisor cannot be held liable simply because he or she was charged with overseeing a subordinate who violated the constitutional rights of another.' *Peatross v. City of Memphis*, 818 F.3d 233, 241 (6th Cir. 2016) (citing *Gregory v. City of Louisville*, 444 F.3d 725, 751 (6th Cir. 2006)). '[A] mere failure to act will not suffice[.]'. . Rather, the 'failure to supervise, control or train the offending individual is not actionable *unless* the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it.'. . This means, '[a]t a minimum,' Miller must plausibly allege that 'the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'. . Miller continues to rely on *Taylor v. Michigan Dep't of Corr.*, 69 F.3d 76, 81 (6th Cir. 1995), and *Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992). But, as this court subsequently explained, neither

decision holds that a knowing abdication of supervisory responsibilities is enough to establish liability for a subordinate's unconstitutional acts. . . The district court observed as much, and concluded that Miller's claims against Gettel and Fondren for failure to train and supervise were based on an alleged failure to act. Miller does not plausibly allege that Gettel or Fondren implicitly authorized, approved, or knowingly acquiesced in the allegedly unconstitutional conduct by the Intoximeters' technician who left the subject device in use after it failed to pass inspection on February 15, 2019.")

Zakora v. Chrisman, 44 F.4th 452, 476-77 (6th Cir. 2022) ("The complaint alleges that Warden Hoffner and MDOC Assistant Deputy Director Rivard were told by Inspectors Chrisman and Huntley about the drug-smuggling problem at Lakeland, but Hoffner and Rivard allegedly either ignored the information or instructed Chrisman and Huntley not to investigate the accusations. In either scenario, a plausible claim is stated for failure to train or supervise their subordinates. Hoffner and Rivard, as supervisors of the inspectors at MDOC, are directly responsible for giving orders to the inspectors. Failing to order an investigation into the drug smuggling, particularly after the two overdoses inside the C-Unit on consecutive days, could be found to constitute 'knowing acquiescence' to the constitutional violation of exposing the inmates in the C-Unit to a substantial risk of serious harm. . . When supervisors responsible for inmate health and safety ignore known threats to those inmates, they are more than simply failing to act. . . . The complaint adequately alleged that Hoffner and Rivard, in the face of a known threat to inmate safety '*personally* had a job to do' in ordering an investigation into the known presence of drugs at Lakeland (and inside the C-Unit specifically), 'and [they] did not do it.'. . This alleged failure could be found to have directly resulted in a violation of Zakora's Eighth Amendment right to be free from the substantial risk of harm. The Estate has therefore stated a claim for failure to supervise against defendants Hoffner and Rivard.")

Crawford v. Tilley, 15 F.4th 752, 761, 766 (6th Cir. 2021) ("Dawn's Eighth Amendment claim against Erwin depends on Erwin's supervisory liability. So, on top of the deliberate indifference standard, Dawn's complaint must also meet the requirements of supervisory liability in § 1983 cases. Supervisory liability comprises two concepts important here: active involvement by the supervisor and causation. . . . At most, Dawn's complaint alleges the following: Erwin accepted Marc's transfer to KSR. Through that process, Erwin was 'made aware' of Marc's medical conditions. . . Erwin knew that Correct Care's deficient policies and customs posed risks to Marc. Erwin never tried to alleviate these risks. And the combination of these actions and inactions proximately caused Marc's injuries. That's it. Even charitably construed, this is all the activity that Dawn's amended complaint attributes to Erwin, and it is not enough to survive *Iqbal*. . . . Dawn's other claim that the problems at KSR were obvious to Erwin is also insufficient. In appropriate circumstances, we have attributed knowledge of obvious risks to prison officials. . . But those defendants, both wardens, had day-to-day obligations at their institutions. . . By contrast, Erwin is responsible for twenty-seven subdivisions within the Department of Corrections. . . At least twelve of these are penal institutions, each of which a warden directly manages. . . There is no allegation that Erwin regularly visited or received briefing on even some subset of them. We've never

attributed knowledge of prison conditions so high up the chain of command with so little in the way of alleged exposure to those same conditions. So there are not enough well-pleaded factual allegations to establish that Erwin knew of particular issues related to Correct Care's practices at KSR. . . That leaves the ongoing lawsuits against Correct Care. The amended complaint provides no detail on where the alleged lawsuits came from. Rather, it observes that Correct Care was operating in more than five hundred institutions spread across thirty-four states. Erwin is never alleged to have read or had reason to know about any of the litigation; Dawn does not allege that any came from Kentucky generally or KSR specifically. So it is not plausible that Erwin knew about particular failures to provide adequate healthcare at KSR. . . . This is not enough to survive 12(b)(6) on an allegation of supervisory liability. Supervisory liability requires 'active unconstitutional conduct' by Erwin. . . But, as explained above, there are no well-pleaded factual allegations that Erwin knew anything besides that he was approving the transfer of a patient with lung cancer and blood clots to KSR to facilitate better medical treatment. . . Without more, Dawn has not pleaded that Erwin's acceptance of Marc's transfer implicitly authorized, approved, encouraged, or knowingly acquiesced in the alleged violation of Marc's constitutional rights. . . Dawn also has not pleaded that Erwin's acceptance of Marc's transfer was a proximate cause of his injuries. Supervisory liability is generally limited to times when the supervisor had existing knowledge of the specific type of conduct that led to a plaintiff's injuries. . . But the amended complaint does not describe the experience of any past inmates at KSR. And as explained above, the allegations about Erwin's knowledge of an existing problem are conclusory and not entitled to a presumption of truth. . . Without more, Dawn has not pleaded that Erwin's acceptance of Marc's transfer proximately caused the alleged violation of Marc's constitutional rights.")

Troutman v. Louisville Metro Dep't of Corr., 979 F.3d 472, 488 (6th Cir. 2020) ("Stephanie does not claim that Bolton encouraged a specific incident of misconduct, directly participated in that misconduct, or abandoned the specific positions of his duty in the fact of actual knowledge of a breakdown in the proper workings of the jail. . . Rather, Stephanie claims that Bolton inadequately performed his responsibilities—for instance, by failing to put in writing the policy of requiring medical clearance before transfer to solitary—but such allegations of inadequate performance fall short of the requirements to impose supervisory liability. . . Indeed, there was a standing 'no bars' policy in place that medical would place on an inmate's XJail if medical determined the inmate was a suicide risk. Even if we are to assume a 'breakdown in the proper workings' of this policy—which is plausible, considering the suicide at issue here—Stephanie does not allege that Bolton *knew* the policy was not working and nonetheless completely abdicated his responsibilities. She has not shown that Bolton 'either encouraged the specific incident of misconduct or in some other way directly participated in it' nor has she shown that Bolton 'at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'. . Rather, Stephanie claims that Bolton inadequately performed his duties, but such claims are insufficient for § 1983 supervisory liability.")

Garza v. Lansing School District, 972 F.3d 853, 866-68, 874-75 (6th Cir. 2020) ("Plaintiff alleges in her complaint that Bacon and Robinson are liable for Duvall's violation of C.G.'s rights because,

as principals of the Beekman Center while Duvall taught there, they received and inadequately responded to multiple complaints that Duvall was physically abusing students. The district court dismissed Plaintiff's claims, finding that '[a]ny action or inaction by Bacon and Robinson occurred years before the events at issue in this case, and neither of those defendants had any supervisory authority over Duvall at the time that he allegedly abused C.G.'. . On appeal, Plaintiff argues that these are not valid bases for dismissal. Taking into account the circumstances involved in this case, we conclude that a lapse of time between a defendant's deliberately indifferent conduct and a plaintiff's injury does not necessarily preclude that defendant's supervisory liability—at least where the defendant had ample notice of the supervisee's likelihood of continuing violations, and the passage of time was not so great as to erase the connection between the supervisor's conduct and the student's subsequent abuse. We note that Plaintiff's claims do not present a statute of limitations issue, as she pursued them promptly after C.G.'s injury. In the instant case, the success of these claims instead turns on whether Plaintiff can show that Defendants actually and proximately caused C.G.'s injury, despite the time lapse between their alleged misconduct and Duvall's abuse of C.G. For the reasons that follow, given the specific facts of this case and for the purposes of a motion to dismiss, Plaintiff has sufficiently shown that Defendants' alleged failure to carry out their duties to report and investigate student abuse caused C.G.'s subsequent abuse. Accordingly, we reverse the district court's dismissal of Plaintiff's claims against Bacon and Robinson. . . . Just as a party need not have 'been present at the time of the constitutional violation' in order to be found supervisorily liable, *Peatross*, 818 F.3d at 242, they need not have current supervisory authority over the alleged violator. If this were not the case, parties would become effectively immune from supervisory liability immediately upon leaving the relevant position of authority, even if a violation occurs just days later. This is not a logical result—if a supervisor has encouraged a violator's misconduct, the effects of that encouragement do not cease at the moment of the supervisor's departure. Moreover, this would encourage individuals to avoid liability for their supervisee's constitutional violations not by responding to them adequately, but by passing the supervisee down the line to a different supervisor—or, more relevantly, by simply transferring the supervisee to another school. Instead, we ask whether Bacon and Robinson acted in a manner demonstrating deliberate indifference to the likelihood of Duvall's future abuse and, if so, whether their deliberately indifferent conduct caused his violation of C.G.'s rights. . . .[V]iewing the evidence in Plaintiff's favor, Alwardt's decision to place Duvall in a new school, where his colleagues had less notice of his history, raises a genuine issue as to whether Alwardt was deliberately indifferent to the possibility of future abuse. Moreover, the record suggests that upon transferring Duvall to Gardner, despite having received multiple reports against Duvall and knowing that he had been suspended based on one, Alwardt assured Gardner's principal, Defendant Nickson, that Duvall was known to be a good teacher and that none of the allegations against him had been substantiated. This, too, arguably further increased Duvall's risk of additional abuse. Defendants again contend that *Roseville* and *Claiborne County* require this Court to affirm the district court's judgment as to Alwardt. We disagree. The record suggests that Alwardt was presented with many more specific reports of abuse than were any of the administrators in *Roseville* or *Claiborne County*. . . . Altogether, we are faced with evidence that raises questions as to whether Alwardt failed to fulfill his obligation to review investigatory reports, failed to

investigate other allegations, exposed students to additional risk by transferring Duvall to a new school, and actually verbally encouraged the use of force. This evidence demonstrates a genuine issue of material fact as to whether Alwardt knowingly acquiesced in or was deliberately indifferent to the possibility that Duvall would continue his abuse. Plaintiff's claim against Alwardt thus withstands summary judgment, and the district court erred in concluding otherwise.")

Graves v. Malone, No. 18-2296, 2020 WL 1900458 (6th Cir. Apr. 17, 2020) (not reported) ("In cases where we have found supervisory liability for excessive force, it has been where the government official ordered, or at least implicitly authorized, the use of force. *See, e.g., Jones v. Sandusky Cty.*, 541 F. App'x 653, 667 (6th Cir. 2013)). Here, the record shows that Hedger ordered or authorized only the *circumstances* that, perhaps, ultimately led to the use of force; indeed, Myers and Potratz both testified that the decision to shoot was their own. Mere creation of the circumstances in which force is ultimately deployed does not give rise to a constitutional violation.")

Howard v. Knox County, Tenn., 695 F. App'x 107, 113-16 & n.2 (6th Cir. 2017)) ("Plaintiffs argue that although Wiegenstein did not himself physically abuse the minor children, he is nonetheless liable as a supervisor for causing minor Plaintiffs W.H. and L.R. to be deprived of a federal right. . . It is well-established that 'a mere failure to act will not suffice to establish supervisory liability,' and that a showing of 'active unconstitutional behavior' is required. *Peatross*, 818 F.3d at 241 (citation omitted). 'However, "active" behavior does not mean "active" in the sense that the supervisor must have physically put his hands on the injured party or even physically been present at the time of the constitutional violation.'. . . In order to bring a claim of supervisory liability against a school official, a plaintiff must show that the defendant's 'failure to take adequate precautions amounted to deliberate indifference to the constitutional rights of students.'. . This requires, at a minimum, a showing 'that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.'. . The issue of deliberate indifference in this context is a question of proportionality. . .The court should first take into consideration the information available to the supervisor at the time, and whether the information available to the supervisor 'showed a strong likelihood' that the defendant would engage in similar behavior in the future. . . The likelihood of future harm may depend upon a showing that the supervisor 'was confronted with a widespread pattern of constitutional violations,' not merely isolated or 'sporadic' incidents. . . Next, the court must consider whether, in light of that information, the school official's response rises to the level of deliberate indifference. . . Taking as true the allegations contained in the amended complaint, we conclude that Plaintiffs have alleged sufficient facts to demonstrate that Wiegenstein had actual knowledge of Shoemaker's abuse. Plaintiffs point to numerous examples where parents and students complained to Wiegenstein about *specific* incidents of abuse witnessed or otherwise discovered, not just a general fear of potential abuse. . . .We must next consider whether, given Wiegenstein's actual knowledge of Shoemaker's abuse, his response rises to the level of deliberate indifference. On the basis of the complaint, it is clear that his actions, and more often, inaction, constituted deliberate indifference. Although knowing acquiescence implies more than 'sloppy,

reckless, or neglectful' execution of duties, . . . 'failure to take *any* disciplinary action despite reports of repeated [abuse] rises to the level of deliberate indifference[.]' . . Moreover, a defendant may be more likely to be considered deliberately indifferent if he took affirmative action that heightened the risk of harm to the plaintiff. . . The complaint alleges that Wiegenstein made no efforts to investigate, report, train, or terminate Shoemaker upon receipt of numerous complaints from students, parents, and teachers. . . This alone is sufficient to establish a claim for deliberate indifference. The complaint also alleges that Wiegenstein, despite knowledge of Shoemaker's abuse, took affirmative actions to heighten the risk of future harm to children. . . . Wiegenstein has failed to identify a single case where we held that a school supervisor who took no action in response to complaints of a constitutional violation was entitled to qualified immunity. . . .We have not yet determined whether a causal connection must be shown where the plaintiff can establish active participation. . . The language of § 1983 itself holds liable any person acting under color of law who 'subjects, *or causes* [a person] to be subjected' to a constitutional violation. 42 U.S.C. § 1983 (emphasis added).")

Peatross v. City of Memphis, 818 F.3d 233, 240-46 (6th Cir. 2016) ("Although Officers Dunaway and McMillen shot Vanterpool, the Estate seeks to hold Armstrong liable in his individual capacity under a claim of supervisory liability. It is important to note at the outset that a § 1983 *individual*-capacity claim differs from a § 1983 *official*-capacity claim. . . . [fn. 3 Since *Iqbal,* the circuits have grappled with the precise contours of § 1983 supervisory liability, and while the claim of supervisory liability has not been altogether eliminated, the requirements for sustaining such a claim vary by circuit]. . . . We have long held that supervisory liability requires some 'active unconstitutional behavior' on the part of the supervisor. . . However, 'active' behavior does not mean 'active' in the sense that the supervisor must have physically put his hands on the injured party or even physically been present at the time of the constitutional violation. . . . '[A] supervisory official's failure to supervise, control or train the offending individual is not actionable *unless* the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it.'. . We have interpreted this standard to mean that 'at a minimum,' the plaintiff must show that the defendant 'at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'. . As part of this inquiry, this court also considers whether there is a causal connection between the defendant's wrongful conduct and the violation alleged. . . A close reading of § 1983 affirms this point. The statute states that every person acting under color of law who 'subjects, or *causes* [a person] to be subjected' to deprivation of constitutional rights 'shall be liable to the party injured[.]' 42 U.S.C. § 1983 (emphasis added). Accordingly, where an official's execution of his or her job function causes injury to the plaintiff, the official may be liable under the supervisory-liability theory. . . In the instant case, the Complaint sufficiently alleges that Armstrong violated Vanterpool's constitutional rights because: (1) the facts plausibly allege that Armstrong knowingly acquiesced in the unconstitutional conduct of his subordinates through the execution of his job function; . . . and (2) the facts plausibly allege that there is a causal connection between Armstrong's 'acts and omissions' and Vanterpool's death[.] . . . Taken as true, these facts and the inferences drawn therefrom . . . support the plausible inference that in the execution of his job functions, Armstrong

at least knowingly acquiesced in the unconstitutional conduct of Officers Dunaway and McMillen. . . .For the foregoing reasons, the Complaint sufficiently alleges that Armstrong 'at a minimum, knowingly acquiesced' in the unconstitutional conduct of his subordinates through the execution of his job functions. . . . [fn. 6 To be clear, we do not suggest that every time an MPD officer violates the constitutional rights of a citizen, Armstrong can be held liable for the conduct in his individual capacity. Qualified immunity is a fact-intensive analysis and will, therefore, turn on the particular circumstances of each case. Here, the Complaint sufficiently pleads that Armstrong *knowingly acquiesced* to the conduct that proximately caused the injury alleged, and we have long held that this behavior is enough.]. . . . [T]he Complaint here alleges that Armstrong essentially allowed the officers to 'do whatever they want, whenever they want, to whomever they want, irrespective of the United States Constitution.' It alleges that Armstrong was involved at least in part in creating and enforcing all department policies; that he did not punish officer misconduct, including the use of excessive force; that he failed to take action in the face of the growing use of excessive force by officers and admonishment from the Mayor on the issue; and that he 'rubber stamped' officer misconduct. . . .Armstrong's alleged conduct of 'rubber stamping' the behavior of officers who shot and killed individuals with increasing frequency 'could be reasonably expected to give rise to just the sort of injuries that occurred'—Vanterpool's unfortunate death. . . Accordingly, the Complaint sufficiently pled a causal connection between Armstrong's acts and omissions and Vanterpool's death. . . . We next examine whether the right alleged to have been violated was clearly established at the time of the violation. As an initial matter, Armstrong argues that the Estate failed to allege a clearly established right because the Estate seeks to hold Armstrong liable under a theory of supervisory liability, and Vanterpool did not have a constitutional right to additional police training. Armstrong's argument evinces a misunderstanding of this prong of the qualified immunity analysis. The Estate need not show that Vanterpool had a constitutional right to additional training or adequate supervision from Armstrong; it need only show that the right that Officers McMillen and Dunaway violated was clearly established at the time of the violation. . . . Armstrong admits that Vanterpool's 'Fourth Amendment rights are clearly established insofar as the alleged misconduct of Officer's Dunaway and McMillen are concerned.'. . Based on Armstrong's concession, which is consistent with this court's precedent, *see Smith v. Cupp,* 430 F.3d 766, 774 (6th Cir.2005), the right is clearly established. Viewing the allegations in the light most favorable to the Estate and accepting the facts and drawing all reasonable inferences from those facts in favor of the Estate, the Complaint 'adequately alleges the commission of acts that violated clearly established law.'. . .In discussing what is now known as § 1983 in the late 1800s, Congressman Hoar of Massachusetts summed up the need for a 'duty of protection':

[For example,] [i]f every sheriff in South Carolina refuses to [hold persons accountable for wrongs allegedly committed against] a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their *failure of duty* can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are [tasked with affording] the equal protection of the laws ... has denied that protection.

Carter, 409 U.S. at 427 (emphasis added).

The words of Congressman Hoar capture the essence of the issue before the Court today, well over a century later. This fact is both ironic and disappointing. There is no doubt that several cities in

this nation today are in a state of crisis regarding civilian and police relations. Here, we have allegations that a government official with supervisory responsibility ratified the conduct of officers who shoot first and make judgments later, evincing a brazen disregard for human life. Ratification of such conduct is abhorrent. It not only flouts accountability, but it undermines the integrity of our justice system. Where internal investigations repeatedly yield only 'rubber stamps' of approval for unconstitutional conduct, it sends the message that human beings are not being killed by accident—they are being killed by design. The law simply does not allow government officials to use qualified immunity to escape liability for such wrongs. At this stage of the proceedings, it is not known whether the Estate will be able to sustain these allegations, but it is clear that the facts alleged in the Complaint set forth a plausible claim of supervisory liability.")

Coley v. Lucas Cnty., Ohio, 799 F.3d 530, 541-42 (6th Cir. 2015) ("A § 1983 claim of personal liability for a failure to train and supervise differs from a § 1983 claim against a municipality for a failure to train and supervise. In order to establish personal liability for a failure to train and supervise

> [t]here must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. *At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.*

Taylor v. Michigan Dep't of Corr., 69 F.3d 76, 81 (6th Cir.1995) (emphasis in original) (quoting *Bradley v. Bellamy,* 729 F.2d 416, 421 (6th Cir.1984)). Plaintiffs allege that Telb had a duty to train and supervise employees of the Sheriff's Department to avoid the use of excessive force and to ensure that the medical needs of persons in the Sheriff's custody were met. They then allege that Telb failed to train and supervise staff regarding the proper use of force and failed to investigate properly allegations of excessive force. This failure to train and supervise specifically included a failure to train on 'the use of a chokehold and the injuries derived therefrom' which action resulted in Benton's 'injuries and death.' Plaintiffs also allege that Telb had 'full knowledge of the assault on Carlton Benton ... but nonetheless intentionally and deliberately made false statements to federal officials about [his] knowledge of Defendant Schmeltz's assault and Defendant Gray's chokehold and the deliberate failure to provide medical attention to Benton.' These allegations are sufficient to show that Plaintiffs have established a valid claim under § 1983, insofar as they have shown that Telb 'at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate' when he helped Schmeltz and Gray to cover up their unconstitutional actions. . . Given Schemltz and Gray's constitutional violations as well as the sufficiency of Plaintiffs' allegations in establishing Telb's potential personal liability for his failure to train and supervise under § 1983, Telb has not shown entitlement to qualified immunity on this claim.")

Essex v. County of Livingston, No. 11–2246, 2013 WL 1196894, *4-*6 (6th Cir. Mar. 25, 2013) (unpublished) ("For individual liability on a failure-to-train or supervise theory, the defendant supervisor must be found to have '"encouraged the specific incident of misconduct or in some

other way directly participated in it.'". . A plaintiff must demonstrate that the defendant supervisor '"at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers."'. . A mere failure to act will not suffice to establish supervisory liability. . . In both *Taylor* and *Hill,* it was the defendant supervisors' active engagement in a function of their position that directly resulted in injury to the plaintiffs. . . . This sort of 'direct participation' or, at the very least, active acquiescence in the known misconduct are likely examples of the outer bounds of the 'active performance' necessary for a supervisory liability claim. . . There must be some conduct on the supervisor's part to which a plaintiff can point that is directly correlated with the plaintiff's injury. . .Contrast a failure-to-train or supervise claim against a municipality; this is a broader claim concerning the custom or policy of a municipality, . . . and thus would implicate the conduct of a defendant supervisor insofar as he acted with deliberate indifference in his official capacity as a policymaker. . . Such claims do not require direct participation in or encouragement of the specific acts; rather, these claims may be premised on a failure to act. . . A plaintiff must establish that the municipality, through its policymakers, failed to train or supervise employees despite: 1) having actual or constructive knowledge of a pattern of similar constitutional violations by untrained employees. . . or 2) the fact that the constitutional violation alleged was a patently obvious and 'highly predictable consequence' of inadequate training. . . . We highlight this crucial distinction between individual-capacity and official-capacity failure-to-train-or-supervise claims because, in the instant case, whether sexual assault was an obvious consequence of inadequate training or whether a pattern of sexual misconduct in other counties sufficed for proving actual or constructive knowledge speaks to the County's liability for Bezotte's conduct in his official capacity. These questions do not bear on the qualified-immunity inquiry of whether Bezotte exhibited the much higher culpability standard of personal involvement. Having discussed the two types of failure-to-train-or-supervise claims before us, we now turn to the issues of qualified immunity and pendent appellate jurisdiction. . . . In the instant case, the genuine issues of material facts found by the district court—whether sexual assault was an obvious consequence of inadequate training and/or supervision and whether a pattern of behavior in other jurisdictions constitutes knowledge of a risk—have no bearing on whether Bezotte was entitled to qualified immunity. As discussed above, such facts concern a deliberate-indifference inquiry in analyzing the claim against the County. Because the facts as alleged by Plaintiffs do not establish a constitutional violation by Bezotte in his individual capacity, we find that he is entitled to qualified immunity. . . . Although the sexual assaults on Plaintiffs are clearly established violations of their constitutional rights, Plaintiffs fail to assert any facts that Bezotte's personal actions violated those rights. For Bezotte to be individually liable for failing to train or supervise, Plaintiffs needed to demonstrate that he took deliberate action or was otherwise involved in Boos' illegal acts. . . . Plaintiffs allege only that Bezotte inadequately trained road patrol deputies and failed to supervise Boos despite knowing that sexual assaults on inmates were occurring in other jurisdictions. This hardly counts as encouragement of the specific incident or knowing acquiescence in Boos' conduct. Indeed, it is an allegation of only a failure to act, which alone is insufficient to support a supervisory-liability claim. . . Plaintiffs were required to point to some actual conduct by Bezotte that directly contributed to their injury; we have no such showing here. We therefore find that the district court erred in denying Bezotte's motion for summary judgment. '[W]hereas the County's

liability may be premised on its policymaker's deliberate indifference,' the individual defendant may be liable only upon a showing of personal involvement. *Harvey v. Campbell, Cnty.*, 453 F. App'x 557, 563 (6th Cir.2011). The question of deliberate indifference for establishing liability against the County for Bezotte's actions in his official capacity as policymaker is a separate inquiry. . .There are simply no facts in the record to support a finding of supervisory liability with respect to Bezotte.")

Campbell v. City of Springboro, Ohio, 700 F.3d 779, 790 (6th Cir. 2012) ("Although Kruithoff was not actively involved in the incidents involving Spike, a causal connection between his acts and omissions and the alleged constitutional injuries is suggested by the record. Chief Kruithoff allowed Spike in the field even after his training had lapsed. He never required appropriate supervision of the canine unit and essentially allowed it to run itself. He failed to establish and publish an official K–9 unit policy, and he was seemingly oblivious to the increasing frequency of dog-bite incidents involving Spike. Furthermore, Chief Kruithoff ignored Clark's many complaints regarding his need to keep Spike up to date on his training. Thus, Chief Kruithoff's apparent indifference to maintaining a properly functioning K–9 unit could be reasonably expected to give rise to just the sort of injuries that occurred. The district court correctly determined that the disputed facts preclude granting summary judgment.")

Campbell v. City of Springboro, Ohio, 700 F.3d 779, 791, 793-95 (6th Cir. 2012) (McKeague, J., concurring in part and dissenting in part) ("I concur in the holding that defendant Officer Nick Clark is not entitled to qualified immunity in relation to plaintiffs' § 1983 excessive force claims. . . . I disagree with the conclusion that Police Chief Jeffrey Kruithoff is not entitled to qualified immunity in relation to plaintiffs' claim that he is individually liable for Clark's use of excessive force on a theory of supervisory failure-to-train liability. . . I also disagree with the dismissal of the City of Springboro's appeal. . . . Neither the City nor Chief Kruithoff can be held liable for Clark's conduct on a theory of *respondeat superior*. . . The City may be held liable under § 1983 if it maintained a policy or custom that caused the violation of plaintiffs' rights. . . . The City can be held liable under plaintiffs' failure-to-train theory if plaintiffs' injuries can be attributed to the City's failure to adequately train Spike *and* this failure amounted to 'deliberate indifference' to the rights of members of the public. . . Specifically, plaintiffs must show three elements: (1) that Spike's training was inadequate to prepare him for the tasks he was expected to perform; (2) that the inadequacy persisted due to the City's deliberate indifference; and (3) that the inadequacy is closely related to or actually caused plaintiffs' injuries. . . .[W]hereas the City's liability may be premised on its policymaker's deliberate indifference, Kruithoff cannot be held liable in his individual capacity for failing to supervise unless he 'either encouraged the *specific* incident of misconduct or in some other way directly participated in it.'. . To hold Kruithoff liable in his individual capacity for injuries shown to be caused by deficiencies in Spike's training or officers' training, plaintiffs must show that Kruithoff 'at least implicitly authorized, approved, or knowingly acquiesced' in the violations and injuries sustained by plaintiffs Campbell and Gemperline. . . Plaintiffs have neither alleged nor presented any evidence to support a finding of Kruithoff's personal involvement in these incidents. The majority purports to apply the correct legal standard

to plaintiff's failure-to-train claim against Kruithoff. Further, the majority acknowledges that 'Kruithoff was not actively involved in the incidents involving Spike.' It follows that Kruithoff is entitled to qualified immunity. Yet, the majority affirms the denial of qualified immunity based on evidence of Kruithoff's indifference to the need for better training of the canine unit. This determination that Kruithoff is exposed to liability in his individual capacity for his alleged failure to adequately train or supervise the canine unit 'improperly conflates a § 1983 claim of individual supervisory liability with one of municipal liability.'. . To the extent plaintiffs have adduced evidence supporting findings that Kruithoff was a City policymaker on matters of training and was so deliberately indifferent to the need for more comprehensive training as to render the training deficiency a matter of *de facto* City policy, he would be liable, if at all, in his *official* capacity, i.e., rendering the City liable. . . Thus, for lack of evidence of Kruithoff's personal involvement in either of these particular incidents, it is clear that he should have been granted summary judgment based on qualified immunity—notwithstanding his responsibility, as Chief and City policymaker, for deficiencies in Spike's and/or officers' training.")

Heyerman v. County of Calhoun, 680 F.3d 642, 647-49 (6th Cir. 2012) ("Section 1983 liability. . .cannot be premised solely on a theory of respondeat superior, or the right to control employees. . . Supervisory officials are not liable in their individual capacities unless they 'either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'. . Heyerman's attempt to hold Mladenoff liable in her individual capacity for her alleged failure to adequately supervise assistant county prosecutors or for her adherence to or continuation of a policy that, in Heyerman's words, 'abdicated' her responsibility 'to act on remand orders', 'improperly conflates a § 1983 claim of individual supervisory liability with one of municipal liability.'. . Municipal liability, however, also is not established in this case. . . .The record contains no evidence of any case in Calhoun County, other than Heyerman's, where a defendant was not timely presented to the trial court after his or her case was remanded by the court of appeals. Thus this is not a circumstance where the need for action was 'plainly obvious' to the municipality's policymakers or where what happened was a 'highly predictable consequence'of the County's existing policy or the failure to train assistant prosecuting attorneys on the handling of remand orders. . . .Undoubtedly, the judicial system—to say nothing of the criminal defense system—has not functioned as it should when a criminal defendant remains imprisoned for seventeen years after his or her conviction has been reversed and no further action has been taken. Section 1983 liability, however, does not necessarily attach to any entity and/or individual as a result of this breakdown. It does not here. In short, Mladenoff was not personally involved in any conduct that led to any violation of Heyerman's speedy-trial rights to establish her individual liability. Heyerman fails to demonstrate a defective policy or practice to hold Calhoun County or Mladenoff in her official capacity liable.")

King v. Zamiara, 680 F.3d 686, at 696, 697, 706, 707 (6th Cir. 2012) ("Superiors and supervisors . . . are generally not liable for the acts of those whom they oversee. . . . Having the right to control the offending employee is not enough, simply being aware of the misconduct is not enough, and

even administrative approval of an action later found to be retaliatory, without more, is not enough. . . The supervisor must be said to have 'directly participated, encouraged, authorized or acquiesced in the claimed retaliatory acts' to be liable under § 1983. . . As an initial matter, we must evaluate Warden Berghuis under the theory of supervisory liability under § 1983. Liability will not lie absent active unconstitutional behavior; failure to act or passive behavior is insufficient. . . Warden Berghuis will be liable for the unconstitutional acts of her subordinates only if she actively participated in the unlawful conduct, such as if she '"implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate."'. . The evidence presented a trial demonstrated that Berghuis at a minimum had knowledge of King's protected conduct. . . . Despite Berghuis's knowledge of King's protected conduct, nothing about the transfer order she signed suggested any potential constitutional violation or retaliation was afoot. . . . Without some level of knowledge of the underlying constitutional violation. . . Berghuis cannot be liable for the acts of her subordinates.")

Broyles v. Correctional Medical Services, Inc., No. 10–1447, 2012 WL 1503760, at *5 (6th Cir. Apr. 30, 3012) (not reported) ("In the amended complaint, Broyles sues an unknown medical services supervisor, John Doe, in both his individual and official capacities; however, Broyles makes allegations only on an individual-capacity basis in his amended complaint . . . Broyles alleges that an unknown medical services supervisor 'failed to properly supervise, develop, and provide an adequate medical system and staff to respond to medical emergencies.' Broyles asserts this failure to supervise and train allowed nurses and staff to make inadequate and incompetent medical determinations. These general allegations are insufficient to establish liability under § 1983 for failure to supervise. Section 1983 liability 'must be based on more than respondeat superior, or the right to control employees.'. . Thus, in such claims, the plaintiff must allege facts showing the defendant 'either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'. . To attempt to hold John Doe liable in his individual capacity simply for his alleged failure to adequately train employees 'improperly conflates a § 1983 claim of individual supervisor liability with one of municipal liability.'. . Because Broyles does not allege that Doe took any deliberate action or otherwise involved himself personally in allegedly unconstitutional acts of others, Broyles's failure-to-supervise claim fails.")

Hall v. Warren, No. 09-2400, 2011 WL 4916703, at *10 & n.4 (6th Cir. Oct. 18, 2011) (not published) ("Warren, who is the warden at TCF, argues that the district court's summary judgment as to her was appropriate because Section 1983 liability may not be based on a *respondeat superior* basis. Although we agree that liability may not be imputed to a supervisor based entirely upon the actions of a subordinate, . . . 'this does not automatically mean that a supervisor can never incur liability under § 1983,' *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 81 (6th Cir.1995). Supervisors can be held liable for their own 'active unconstitutional conduct ... rather than on their supervision of others engaging in unconstitutional conduct.' *Spencer v. Bouchard,* 449 F.3d 721, 730 (6th Cir.2006). Hall claims that Warren personally failed to transfer him to tobacco-free housing despite

receiving a written KITE alerting her to Hall's serious medical condition and the need for a transfer. This was not a 'vague and generalized' notice insufficient to notify a warden 'of the specific concerns about [a prisoner's medical] needs and alleged deprivation.'. . Rather, it clearly documented his medically prescribed need for tobacco-free housing and requested Warren to effectuate a transfer to the Burns Unit because he was getting very ill. Warren has failed to introduce any evidence establishing her lack of involvement in making or overseeing transfer decisions at TCF. Taken in the light most favorable to Hall, this record is sufficient to create a genuine issue of fact as to whether Warren was subjectively aware of the risk of harm to Hall. . . . Even if Hall's claim against Warren were based on her supervisory role, Warren could still be held liable if she 'implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of [an] offending subordinate.' *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.1984). The unanswered KITES could lead a reasonable juror to conclude that Warren knowingly acquiesced in her subordinates' refusal to transfer Hall to a tobacco-free unit. For this additional reason, Warren is not entitled to summary judgment based on her supervisory position.")

Wright v. Leis, No. 08-3037, 2009 WL 1853752, at *3 (6th Cir. June 30, 2009) (not published) ("As for whether Wright sufficiently pleaded a violation by Sheriff Leis, the defendants offer a two sentence argument, essentially claiming that the amended complaint does not allege that 'Leis had any personal contact with Wright....' That, however, misses the point. Wright asserts that Sheriff Leis failed to train his subordinates, making it irrelevant whether Leis had physical contact with Wright. The defendants, by failing to adequately address the issue, waive any objection to the sufficiency of Wright's failure-to-train claim.").

Rossell v. Armstrong, No. 14-2737-JDT-DKV, 2015 WL 8773504, at *4 (W.D. Tenn. Dec. 14, 2015) ("A supervisory official, who is aware of the unconstitutional conduct of his or her subordinates, but fails to act, generally cannot be held liable in his or her individual capacity. . . A failure to take corrective action in response to an inmate grievance or complaint does not supply the necessary personal involvement for § 1983 liability. *See George v. Smith*, 507 F.3d 605, 609-10 (7th Cir. 2007) ("Ruling against a prisoner on an administrative complaint does not cause or contribute to the [constitutional] violation. A guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not."). The complaint does not allege that Defendant Armstrong, through his own actions, violated Rossell's rights.")

Laning v. Doyle, No. 3:14-CV-24, 2015 WL 710427, at *12-13 (S.D. Ohio Feb. 18, 2015) ("Plaintiffs seek to hold Chief Schommer and Sergeant John Doe personally liable under § 1983 for their alleged roles in failing to adequately train, supervise, and discipline Officer Doyle. Plaintiffs allege that Schommer and Doe knew of Doyle's history of violating the constitutional rights of citizens within his jurisdiction, and failed to take any remedial action. They further allege that Schommer and Doe failed to adequately investigate Laning's complaint of Doyle's misconduct. Defendants argue that they are entitled to qualified immunity on these claims, because a supervisor cannot be held liable unless he was actively and personally involved in the alleged

constitutional violation. 'Supervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act ... and cannot be based upon simple negligence.' *Bass v. Robinson,* 167 F.3d 1041, 1048 (6th Cir.1999). . . . In this case, Plaintiffs' Amended Complaint is devoid of any allegations that Chief Schommer or Sergeant John Doe directly participated in Laning's arrest, or in any way encouraged Doyle to engage in the alleged unconstitutional conduct. Although Plaintiffs allege that Sergeant Doe appeared at the scene following the arrest, they do not allege that he played an active part in it. Rather, they allege only that he 'failed to investigate the circumstances of the stop.'. . Likewise, Plaintiffs allege that, although Schommer and Doe knew of Officer Doyle's propensity to engage in misconduct, they failed to take appropriate measures to avoid 'foreseeable and highly predictable consequences.'. . These allegations are insufficient as a matter of law to state a viable claim against them. So are the allegations that Schommer and Doe failed to adequately investigate Laning's complaint about Doyle. . . Accordingly, the Court dismisses all claims asserted against Chief Schommer and Sergeant John Doe in their individual capacities.")

Lacy v. Duell, 1:14-CV-537, 2014 WL 3752919, *6 (W.D. Mich. July 30, 2014) ("The acts of one's subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. . . Moreover, § 1983 liability may not be imposed simply because a supervisor denied an administrative grievance or failed to act based upon information contained in a grievance. . . '[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . Plaintiff has failed to allege that Defendants Goodsen, Prelesnik, Stoddard or Huss engaged in any active unconstitutional behavior. Accordingly, he fails to state a claim against them.")

A.M.S. v. Steele, No. 1:11–cv–298, 2012 WL 2130971, at *6, *7 (S.D. Ohio June 8, 2012) (R&R) ("It is apparent that plaintiffs have erroneously conflated 'supervisory liability' with official capacity liability. Individual capacity claims seek to hold a defendant personally liable for actions taken under color of state law. . . Official capacity claims, in contrast, are the equivalent of claims brought against the governmental entity itself. . . Establishing 'supervisory liability' against defendant Bailey is a way of holding defendant Bailey personally liable in his individual capacity. As it is apparent to the Court that this is in fact plaintiffs' intent in this matter, the Court shall address whether plaintiffs' complaint contains sufficient allegations to state a § 1983 claim against Bailey in his individual capacity as a supervisor of defendants Steele and Mathis. A supervisor cannot be held liable under § 1983 simply by virtue of his position as supervisor over an offending individual. . .Further, '[s]upervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act.'. . Rather, to state a claim for supervisory liability sufficient to withstand a Fed.R.Civ.P. 12(b)(6) challenge, a complaint must allege specific facts demonstrating that the defendant 'either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'. .Defendants argue that plaintiffs' complaint fails to satisfy this standard as it contains no factual allegations that Bailey was directly involved with, or even knew about, Steele's

and/or Mathis' alleged unlawful conduct. . . .The factual allegations pertaining to Bailey in plaintiff's complaint are sparse: Bailey was a Captain in the Cincinnati Police Department with direct supervisory authority over Steele and Mathis on the date R.M. was being held at the police station and 'Steele told Bailey that [Steele] didn't want to speak to [A.M.S.] and that he was going to "let her stew" a bit overnight.'. . Viewing these limited allegations in the light most favorable to plaintiffs, the Court cannot draw a reasonable inference that Bailey encouraged, directly participated in, or even had knowledge of the unconstitutional conduct allegedly committed by Steele and/or Mathis. At most, plaintiffs have alleged that Bailey knew Steele did not want to speak to the mother of a juvenile in police custody. Regardless of Steele's motives for avoiding the conversation, this conduct, in and of itself, is not unconstitutional. Accordingly, Bailey's alleged knowledge that Steele did not want to talk to A.M.S. is insufficient to state a claim against Bailey for supervisory liability")

Sandoval v. Corrections Corp. of America, No. 4:12CV0093, 2012 WL 1552265, at *3, *4 (N.D. Ohio Apr. 30, 2012) ("Supervisory liability cannot be based upon the failure to act, or simply because a supervisor denied a grievance or failed to act based upon information contained in a grievance. . . In the instant case, Plaintiff alleges generally that Defendants Pugh, Johnson, and Hivner should be held liable for the conduct of their subordinates because they 'knew[ ] about the conduct and facilitate[d] it, approve[d] it, condone[d] it, and turn[ed] a blind eye for fear of what they might see.'. . Plaintiff fails, however, to allege any specific instances of 'active unconstitutional behavior' on the part of these Defendants relating to his alleged denial of medical care. In the absence of any such allegations, the Court finds Plaintiff has failed to establish any grounds to impose supervisory liability upon these Defendants.")

Mitchell v. City of Hamilton, No. 1:11–cv–764, 2012 WL 701173, at *3, *4 (S.D. Ohio Mar. 1, 2012) ("Supervisory liability under § 1983 must be premised upon active behavior, not a failure to act. . . . Mitchell does not allege that Chief Ferdelman or Sheriff Jones participated in, authorized, or condoned his arrest on October 29, 2009. At most, Mitchell seeks to hold Chief Ferdelman and Sheriff Jones liable for establishing a policy and custom of training and supervision that was so inadequate as to inevitably result in the violation of his rights. . . As recognized by the Sixth Circuit, general allegations that officers were not properly trained 'are more appropriately submitted as evidence to support a failure-to-train theory against the [government entity] itself, and not the supervisors in their individual capacities.' *Phillips v. Roane Cty., Tenn.*, 534 F.3d 531, 543–44 (6th Cir.2008). Mitchell's sparse allegations against Chief Ferdelman and Sheriff Jones here, similar to those in *Phillips*, 'improperly conflate[ ] a § 1983 claim of individual supervisory liability with one of municipal [or county] liability.'. . Additionally, even if failure-to-train allegations could be sufficient to establish supervisory liability, the allegations fail to meet the Rule 12(b)(6) pleading threshold. The allegations that Officer Britt and Sheriff Deputy Mohr were inadequately trained and supervised are conclusory, as explained in greater detail in the following section. Accordingly, the allegations fail 'to raise a right to relief above the speculative level.'. . The Court will dismiss the claims against Chief Ferdelman and Sheriff Jones pursuant to Rule 12(b)(6).")

Thome v. Lake Erie Correctional Medical Management & Training Corp., No. 1:11 CV 2581, 2012 WL 273612, at *3 (N.D. Ohio Jan. 27, 2012) ("It appears plaintiff may have named Warden Gansheimer as a defendant because, as the Warden, he is the supervisor of all personnel at the prison. . . . In order for liability to attach to Warden Gansheimer, plaintiff must prove that he did more than play a passive role in the alleged violations or show mere tacit approval of the goings on. . . He must show the Warden somehow encouraged or condoned the actions of his subordinates. . . There are no allegations in the Complaint reasonably suggesting that Warden Gansheimer actively engaged in unconstitutional behavior relating to the alleged denial of medical care to plaintiff. Accordingly, the claims against him under § 1983 must be dismissed.")

Debardelaben v. McKeon, No. 2:11–cv–439, 2012 WL 234146, at *2 (W.D. Mich. Jan. 24, 2012) ("Plaintiff alleges that Defendants Bauman and McKeon denied his Step II and III grievance appeals and failed to protect him from the unconstitutional conduct of their subordinates. Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. . . A claimed constitutional violation must be based upon active unconstitutional behavior. . . The acts of one's subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. . . . Plaintiff has failed to allege that Defendants Bauman and McKeon engaged in any active unconstitutional behavior. Accordingly, he fails to state a claim against them.")

Trethewey v. Pekrul, No. 2:10-CV-12335, 2011 WL 4945814, at *6 & n.2 (E.D. Mich. Sept. 8, 2011) ("[E]ven if Pekrul could be considered a supervisory official, his failure to investigate the incident is insufficient to establish that he ratified, and thus was personally involved in, the alleged deprivation of plaintiff's rights. As the Sixth Circuit has repeatedly explained, an allegation that a supervisor was aware of an actionable wrong committed by a subordinate and failed to take corrective action 'is insufficient to impose liability on supervisory personnel under § 1983.'. . . Here, there is no evidence that defendant Pekrul encouraged the arresting officer's alleged use of excessive force or directly participated in it. Thus, he may not be found liable simply for his failure to investigate the incident. . . . In *Marchese v. Lucas,* 758 F.2d 181 (6th Cir.1985), the Court imposed supervisory liability on a Sheriff in part based on his failure to investigate. This case, however, is distinguishable. In *Marchese,* the Sheriff was sued in his official capacity, and was deemed by the court to be a policy maker for the county, rendering his failure to investigate an official policy or custom of the county for purposes of imposing liability. . . *Marchese* is inapplicable to a suit brought against a non-policy making official in his individual capacity.")

Dillingham v. Millsaps, 809 F.Supp.2d 820, 846, 847 (E.D. Tenn. 2011) ("Plaintiffs have incorrectly conflated the constitutional standards for individual supervisory liability and municipal liability. . . . Absent personal involvement in the underlying unconstitutional act, the attempt to hold '[municipal supervisors] liable in their individual capacities for their alleged failure to adequately train employees ... "improperly conflates a § 1983 claim of individual supervisory liability with one of municipal liability."'. . In this case, there is no evidence that Sheriff Bivens

was personally involved or authorized the alleged incident. Consequently, Plaintiffs have improperly brought suit against Sheriff Bivens in his individual capacity. Generally, there are two ways of imposing supervisory liability: (1) a pattern of conduct; or (2) a truly egregious single incident. . . Because Plaintiffs have failed to establish a pattern of similar incidents, Sheriff Bivens will only be liable if there was 'essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable or would properly be characterized as substantially certain to occur.'. . Even assuming that Deputy Millsaps never received a copy of the Policy Manual, he still received training on the appropriate use of force. . . Deputy Millsaps graduated from the Tennessee Law Enforcement Training Academy in 1996 where he received training on the use of force. . . At the time of the alleged incident, Deputy Millsaps was in good standing with the Sheriff's Department and had not received any complaints. . . Additionally, Deputy Millsaps received training at the Academy on how to deal with belligerent individuals, and this training was refreshed every couple of years. . . In addition to the more general training, Deputy Millsaps also attended a taser training class in the fall of 2006 that lasted four to eight hours. . . During this class, he was instructed on the appropriate use of force, both generally and specifically with regard to using tasers. . . For example, Deputy Millsaps was taught that using a taser is appropriate when a person does not respond to verbal commands and is being combative. . . The fact that Dillingham completed this training is significant. Plaintiffs are trying to equate 'failure to give a policy manual' with 'failure to train,' and completely ignoring the fact that Deputy Millsaps received training on the precise weapon at issue in this case. This training-which was tailored to the appropriate use of taser guns-is a lot more specific than the Policy Manual's general statement that officers should use 'reasonable force.' . . . This general 'failure to train' claim should have been directed against Monroe County, not Sheriff Bivens in his individual capacity. . . . Moreover, even when considering this claim, Plaintiffs have failed to cite any specific, affirmative act by Sheriff Bivens that would subject him to liability. Accordingly, Dillingham's Fourth Amendment 'excessive force' against Sheriff Bivens in his individual capacity is **DISMISSED WITH PREJUDICE.** Furthermore, because Sheriff Bivens cannot be held supervisorily liable, there is no need to determine whether Sheriff Bivens is entitled to qualified immunity.")

Campbell v. City of Springboro, Ohio, 788 F.Supp.2d 637, 680, 681 (S.D. Ohio 2011) ("There is no allegation in this case that Chief Kruithoff either encouraged the specific incidents of misconduct or in some other way directly participated in them. Instead Plaintiffs seek to hold Chief Kruithoff liable for establishing a policy and custom of training and supervision that was so inadequate as to inevitably result in the violation of Plaintiffs' rights. One way of showing knowing acquiescence is to show that a supervisor knew of a pattern of constitutional violations and failed to address the problem. In the absence of evidence of a pattern of past misconduct that would suggest knowing acquiescence on the part of a supervisor, . . . the Sixth Circuit has held that 'a supervisory official ... may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable.'. . . [T]here is evidence in this case that in establishing the SPD's canine unit, Chief Kruithoff took few if any steps to ensure that the unit functioned in accordance with the law.

He chose to essentially abdicate any duty he may have had to set policies governing the operation of the unit and to provide training for the officers who were supposedly charged with supervising the unit. Plaintiffs set forth sufficient evidence from which a jury could conclude that the supervision and training in this case were so lacking that the resultant violations of Plaintiffs' Fourth Amendment rights was almost a foregone conclusion.")

Clellan v. Karnes, No. 2:10-CV-170, 2011 WL 249493, at *2, *3 (S.D. Ohio Jan. 25, 2011) ("Even though *Twombly* does not require detailed allegations at the pleadings stage, legal conclusions without any factual support do not meet the standard necessary to overcome a 12(b)(6) motion, which is the applicable standard for this 12(c) motion. Thus, the Plaintiffs in this case fail to make a showing that any of the three Defendants, all of whom are agents of Franklin County, was acting pursuant to a County policy, custom, procedure when the alleged constitutional violations occurred; therefore, their suit against all three Defendants in their official capacities fails. The Plaintiffs also bring suit against each of the three Defendants in their personal capacities. To establish personal liability in a 42 U.S.C. § 1983 action, the plaintiff must demonstrate that an official, acting under the color of state law, caused the deprivation of a federal right, which is a lower standard than must be met to find someone has committed a constitutional violation in an official capacity. . . The Plaintiffs allege that they suffered assault and battery, an intentional infliction of emotional distress, and were falsely arrested. For none of these claims, however, do the Plaintiffs suggest Karnes played a direct role in committing the offense. The Plaintiffs also do not mention that Karnes directed or encouraged the incidents of misconduct they allege Felkner and Montgomery committed. The Sixth Circuit has found that without such a showing, a supervisor cannot be held personally liable for a 42 U.S.C. § 1983 violation subordinates commit. . .Though the Plaintiffs claim the other two Defendants were 'under the direct supervision of their superiors, including Defendant Sheriff Jim Karnes,' they plead no facts which demonstrate that this was in fact the case and that such supervision involved encouraging the deputies to commit constitutional violations. Thus, because the Plaintiffs have not pled facts that indicate Karnes either encouraged the deputies to commit the alleged unconstitutional action or was directly involved in committing such action himself, their claim against him in his personal capacity fails.")

Peterson v. Cooper, No. 1:09-cv-224, 2009 WL 2448141, at *3 (W.D. Mich. Aug. 10, 2009) ("Plaintiff argues that Defendants Embry, Huss and Klinesmith failed to investigate Plaintiff's claims regarding the August 22, 2006 incident after viewing the surveillance video and implicitly authorized, approved and acquiesced in the unconstitutional conduct of Defendants Cooper and Patterson and the two John Doe Defendants. Plaintiff also asserts that Defendants Smith and Caruso are liable for their policies of inaction when they should have known of the widespread pattern of assaults by staff on prisoners. Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948 (2009) . . . The acts of one's subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. . . Moreover, § 1983 liability may not be imposed simply because a supervisor denied an administrative grievance or failed to act based upon information contained in a grievance. . . Plaintiff has failed to allege that

Defendants . . . engaged in any active unconstitutional behavior. Therefore, Plaintiff fails to state a claim.").

Davis v. Strickland, 2009 WL 2047891 (S.D. Ohio July 7, 2009) (prisoners' claims against Governor in his individual capacity dismissed where no allegations that Governor was personally involved or encouraged alleged wrongs).

Jacobs v. Strickland, No. 2:08-cv-680, 2009 WL 1911781, at *3 (S.D. Ohio June 30, 2009) ("Although there are other legal claims that can properly be asserted against a supervisor simply because someone under his or her supervision may have committed a legal wrong, liability for constitutional deprivations under 42 U.S.C. § 1983 cannot rest on such a claim. Consequently, unless the plaintiff's complaint affirmatively pleads the personal involvement of a defendant in the allegedly unconstitutional action about which the plaintiff is complaining, the complaint fails to state a claim against that defendant and dismissal is warranted. . . This rule holds true even if the supervisor has actual knowledge of the constitutional violation as long as the supervisor did not actually participate in or encourage the wrongful behavior.")**.**

SEVENTH CIRCUIT

Stockton v. Milwaukee County, 44 F.4th 605, 619 (7th Cir. 2022) ("[S]upervisory liability cannot attach under § 1983 absent a showing the officer is personally responsible for a deprivation of a constitutional right. . . To maintain an action for supervisory liability against Clarke, Schmidt, or Evans, Stockton cannot rely on a theory of respondeat superior but, instead, must present evidence that the defendants violated the Constitution through their own conduct. . . Stockton must demonstrate Madden's injury occurred at Clarke, Schmidt, and Evans's direction or with their knowledge and consent and that the defendants acted 'either knowingly or with deliberate, reckless indifference.'. . On this record, no reasonable jury could conclude Clarke, Schmidt, or Evans were personally involved either in Madden's care or facilitated, approved, or turned a blind eye to medical staffing levels or sick call slip processing at the MCJ.")

Kemp v. Fulton County, 27 F.4th 491, 498-99 (7th Cir. 2022) ("Kemp argues that Standard and Ford knowingly hired and retained a hearing-impaired correctional officer. Although Standard and Ford deny knowing about Burget's hearing loss, we assume, favorably to Kemp, that they knew about it. *Kingsley*'s objective-unreasonableness test applies equally to supervisory-liability claims. That is because the state of mind necessary to trigger a supervisor's liability varies with the constitutional provision at the heart of the claim, in much the same way that the state of mind needed to establish a section 1983 violation does. . . Thus, applying *Kingsley*'s objective-unreasonableness test, Kemp can defeat summary judgment only if the facts viewed in the light most favorable to him show that Standard and Ford acted purposefully, knowingly, or with reckless disregard for the consequences of hiring and retaining Burget despite his hearing disability. . . Once again, he must show more than negligence. . . . [T]here is no evidence in the record that would allow a reasonable jury to conclude that another officer with no hearing impairment would have heard the fight and intervened earlier. Second, Kemp has presented no evidence that Standard

and Ford knew that Burget was not wearing his hearing aid or that they had any reason to believe that he was unable to perform his job duties without the device. Without notice that Burget was posing a danger to the people detailed in the Fulton County Jail, his supervisors' decision to retain him may have been negligent, but there is no evidence that it was purposeful, knowing, or reckless. . . On this record, Kemp has not presented sufficient evidence for a reasonable jury to conclude that defendants Burget, Standard, or Ford took objectively unreasonable actions that caused his injuries.")

Horshaw v. Casper, 910 F.3d 1027, 1029-30 (7th Cir. 2018) ("Liability under § 1983 is direct rather than vicarious; supervisors are responsible for their own acts but not for those of subordinates, or for failing to ensure that subordinates carry out their tasks correctly. . . We held in *Vance* that a soldier cannot alter this rule by sending a letter of complaint directly to the Secretary of Defense. . .But whether a given supervisor retained some operational responsibilities is a question of fact. Atchison's testimony that he would have transferred Horshaw to protective custody had he received the note implies that he made important operational decisions personally rather than referring complaints to the staff. If so, he could be directly liable under *Farmer*.")

Hoffman v. Knoebel, 894 F.3d 836, 841-43 (7th Cir. 2018) ("As we said at the outset, [there] is enough to show that the plaintiffs were deprived of a liberty interest without due process of law. But who is responsible? In particular, were either the individual defendants (Knoebel and Seybold) or the Clark County Sheriff's Office subject to liability for a constitutional tort? For both sets of defendants, the crucial issue is personal (or departmental) responsibility. . . . We begin with the individual defendants. The plaintiffs do not argue that Knoebel and Seybold are responsible for the failure to provide due process protections in the first instance. Rather, they argue that both defendants were deliberately indifferent for failing to intervene while the plaintiffs were in jail. . . .The plaintiffs also argue that Seybold and Knoebel were deliberately indifferent for failing to bring an end to the DTC's unlawful incarcerations earlier. But it is clear from the record that Knoebel and Seybold themselves lacked authority to change the DTC's sanctioning practices. While Knoebel had some authority over the administrative policies of the Clark County DTC, neither she nor Seybold had the power to over-ride Judge Jacobi's orders. When the staff and outside lawyers did bring due process concerns to Judge Jacobi's attention, he dismissed them. Knoebel and Seybold had no ability to compel the judge to do otherwise. Recognizing this, the plaintiffs contend that Knoebel and Seybold should at least have 'investigated and made a report of the obvious constitutional violations that were running rampant in 2012 and pre-November 2013.' Seybold eventually did make such a report when he expressed his concerns to Clark County Chief Judge Vicki Carmichael in November 2013, and his report contributed to the eventual revelation of the DTC's abuses. But the plaintiffs say more was required. To be sure, the Constitution imposes an affirmative duty to protect the well-being of those in custody. . . And supervisors are liable for constitutional violations if they turn a blind eye or acquiesce to abuses of their subordinates. . . The problem is that Knoebel and Seybold were not supervisors of the DTC, and they certainly had no supervisory authority over the judge. They supervised no one but the participants of the program, and no one argues that the plaintiffs were violating their own

rights. . . With supervisory liability out of the way, this theory lacks a legal basis. . . The Constitution does not impose a general duty to expose wrongdoing anywhere within a government employee's organization. State law might impose expanded reporting duties on employees such as the defendants, but that would not help the plaintiffs. . . . Knoebel and Seybold were not deliberately indifferent for failing to take extra steps once internal efforts were rebuffed.")

Rasho v. Elyea, 856 F.3d 469, 478-79 (7th Cir. 2017) ("Prison officials generally are entitled to rely on the judgment of medical professionals treating an inmate. . . While Dr. Elyea and Dr. Blank were themselves medical professionals who might ordinarily be held to a different standard than a non-medical prison official, in this case Rasho seeks to hold Dr. Elyea and Dr. Blank accountable as prison administrators and policymakers, not treaters. Rasho has not presented evidence that either of them should have realized that something was amiss with Dr. Massa's and Dr. Garlick's transfer recommendation. Accordingly, the grant of summary judgment in their favor was appropriate as well.")

Gill v. City of Milwaukee, 850 F.3d 335, 344 (7th Cir. 2017) ("To succeed on a claim for supervisory liability, a plaintiff must show that the supervisor was personally involved in the constitutional violation. . . That means the supervisor 'must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see.'. . Gill's complaint fails to plausibly allege that Chief Flynn had such personal involvement in the detectives' conduct. It states only that Chief Flynn failed to train the detectives adequately and that he was 'deliberately and recklessly indifferent' to the detectives' actions. There is, however, no allegation or plausible inference that Chief Flynn knew about or was personally involved in the specific conduct. Therefore, we agree with the district court that Gill cannot maintain a claim for supervisory liability.")

Estate of Miller by Chassie v. Marberry, 847 F.3d 425, 428-29 (7th Cir. 2017) ("Although *Iqbal*, *Vance*, and *Burks* all hold that inaction following receipt of a complaint about someone else's conduct is not a source of liability, Miller seeks support from *Haywood v. Hathaway*, 842 F.3d 1026 (7th Cir. 2016), in which the majority of a divided panel thought that allegations against a state prison's warden created a triable Eighth Amendment issue. Haywood contended that he had been held for 60 days in freezing conditions. The panel's majority stressed that the warden had given instructions to the prison's engineering staff, received a report, visited the scene, and declared that all was well. That personal involvement permitted an inference that the warden's own conduct was unconstitutional. Miller's allegation, by contrast, is that Rogers and Marberry brushed off his complaints, leaving them to be handled through the chain of command. That brings Miller's claim within the scope of *Iqbal*, *Vance*, and *Burks* rather than *Haywood*.")

Estate of Miller by Chassie v. Marberry, 847 F.3d 425, 429-33 (7th Cir. 2017) (Posner, J., dissenting) ("Judge Easterbrook's majority opinion speculates that medical personnel might issue lower-bunk restrictions for reasons that don't imply the existence of a serious medical need; points out that not all brain tumors are serious; and reminds the reader that guards are not obliged to

believe whatever a prisoner tells them. All true—but whether Rogers or Marberry was aware of the serious health risk to Miller from being assigned to an upper bunk is an open question that needs to be addressed at a trial. The record contains facts that support Miller's claim that he had a serious medical need and that the defendants knew it and did nothing despite their responsibilities. . . .The defendants knew after Miller's first fall from an upper bunk, and from his complaints to both of them, that he was in danger of a serious injury if he remained in an upper bunk, and it would been the simplest thing in the world for either or both of them to have conveyed his complaints to the prison's medical staff for confirmation of whether he already had, and if not should be given, a lower-bunk restriction. Warden Marberry's reactions to Miller's complaints made to her repeatedly in person as she made her rounds through the Special Housing Unit were grossly insensitive—so callous that they could have been expected to cost her her job. All she would have had to do in response to Miller's complaints was alert the prison's medical staff to them; the staff would have responded with alacrity to a directive *by the warden* to determine whether Miller should be given (or indeed already had, as indeed he did have after January 2008) a lower-bunk restriction. It would have taken her no time, no effort, and no detailed knowledge of Miller's condition to respond intelligently to his repeated and plausible complaints (plausible given his brain tumor and his falls from the upper bunk). After his first fall, and certainly after his second, it must have been obvious to Marberry and Rogers and any other prison personnel who knew of Miller's condition that he should not be consigned to an upper bunk. . . . Judge Easterbrook's opinion cites *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), for its rejection of a theory of 'supervisory liability' that would make supervisors liable for 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.' The Court in *Iqbal* thus rejected the proposition that a supervisor's mere knowledge of a subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. '[P]etitioners may not be held accountable for the misdeeds of their agents.... Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose ... liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.'. . I have no quarrel with that. But knowledge and duty can be entwined. 'A prison official's knowledge of prison conditions learned from an inmate's communications can, under some circumstances, constitute sufficient knowledge of the conditions to require the officer to exercise his or her authority and to take the needed action to investigate and, if necessary, to rectify the offending condition.' *Vance v. Peters*, 97 F.3d 987, 993 (7th Cir. 1996). Both Rogers and Marberry were responsible for the safety of prison inmates and were on notice that Miller's safety was jeopardized as a consequence of confining him to an upper bunk. They were complicit in his suffering and may have hastened his death. A dog would have deserved better treatment. We should reverse.")

Haywood v. Hathaway, 842 F.3d 1026, 1031-33 (7th Cir. 2016) ("Haywood brought forth evidence in opposition to Warden Hathaway's motion for summary judgment that Warden

Hathaway knew both of the extreme cold in the segregation unit and the causes of that cold. . . .The warden's 'plainly inappropriate' responses to Hathaway's grievance, to the extreme weather, and to the situation in the segregation unit allow the inference that he was deliberately indifferent to the extreme cold suffered by Haywood and the other prisoners. . . Our dissenting colleague reads *Iqbal* and *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc), to support a contrary result. We do not believe, however, that *Iqbal* or *Vance* alters the standards set forth in *Farmer v. Brennan*. Indeed, *Iqbal* recognizes that '[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.'. . In *Iqbal*, the *Bivens* claim alleged was 'invidious discrimination' on the basis of race, religion, and national origin 'in contravention of the First and Fifth Amendments.'. . In such situations, the Court explained, 'our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose,'. . . and 'a supervisor's mere knowledge of his subordinate's discriminatory purpose' is not sufficient[.] . . . *Iqbal* simply did not speak to standards of liability for Eighth Amendment violations, for Iqbal had not made a claim under that provision, and the Court certainly gave no indication of discontent with the settled law set forth in *Farmer*. Moreover, even if it had signaled an intent to depart from *Farmer*, the Supreme Court has admonished us not to anticipate its future steps. . . . [T]he standard articulated in *Vance* is satisfied here. The evidence showed that Warden Hathaway had actual knowledge of the unusually harsh weather conditions, that he had been apprised of the specific problem with the physical condition of Haywood's cell (i.e., the windows would not shut), and that, during the time period of Haywood's complaint, the warden toured the segregation unit himself. These facts establish that Warden Hathaway's response was not simply 'plainly inappropriate,' but that Haywood's complaints 'literally [were] ignored' by the individual in the position to remedy them. . . In short, there simply is no evidence that, in *Iqbal*, the Supreme Court overruled or limited *Farmer*. . . *Vance*, as well, has no direct application to this case. *Vance* concerned the possibility of holding the cabinet secretary of a federal department responsible for the implementation of policy at the individual level—a far cry from holding the administrator of a single facility liable for known deficiencies that directly threatened the welfare of prisoners for whom he was responsible. . . *Vance* did not alter—nor could it alter—the standards set forth in the Court's Eighth Amendment caselaw. Indeed, since *Vance*, we have continued to apply *Farmer* to allegations of unconstitutional conditions of confinement. . . Consistent with our approach in *Townsend*, other courts of appeals have determined that, post-*Iqbal*, *Farmer's* deliberate indifference standard continues to govern claims of unconstitutional conditions of confinement brought against supervisory prison officials. [collecting cases]").

Haywood v. Hathaway, 842 F.3d 1026, 1033-35 (7th Cir. 2016) (Easterbrook, J., dissenting in part) ("I agree with the court's disposition of Haywood's First Amendment claim but not with its conclusion that Warden Hathaway can be personally liable for cold temperatures in his cell. Haywood seeks to hold the warden directly (rather than derivatively) liable on the theory that he filed two grievances alerting the warden to the cold. But *Iqbal* concludes that knowledge is not enough. . . .Prisoners need to sue the persons responsible for the conditions of which they complain. A warden is an easy target—his name is known, and it is easy to achieve service of process. But decisions such as *Iqbal* and *Vance* mean that liability rests with the people who injure

prisoners; the top of a bureaucratic hierarchy is the wrong person to sue, unless the claim concerns the prison's formal policies or other decisions that the warden took personally. I do not read *Iqbal* or *Vance* as incompatible with *Farmer*, which did not address the question whether supervisors can be liable for failing to cure problems created or ignored by their subordinates. By contrast, *Iqbal* and *Vance* do address that situation. . . .My colleagues are among many federal judges who prefer an approach under which notice to a supervisor is enough to create personal liability. The Supreme Court encountered such an approach in *Iqbal* and disapproved it. When a panel of this court adopted that approach in *Vance*, the court took the case en banc and disapproved it. As my colleagues observe, decisions in other circuits have continued to impose supervisory liability when notice does not lead to a remedy. They cite *Barkes v. First Correctional Medical, Inc*., 766 F.3d 307, 320 (3d Cir. 2014), and *Colwell v. Bannister*, 763 F.3d 1060 (9th Cir. 2014), and might have added a citation to *Turkmen v. Hasty*, 789 F.3d 218, rehearing en banc denied, 808 F.3d 197 (2d Cir. 2015). *Barkes* has been reversed on immunity grounds, —— U.S. ——, 135 S.Ct. 2042, 192 L.Ed.2d 78 (2015), and the Justices did not tell us their view of the merits; *Colwell* concerned supervisors' policies and not just failure to control subordinates, so its bearing on our dispute is doubtful; but *Turkmen* deals with both policy-creation and subordinate-control in one package. The grants of certiorari in *Turkmen* set the stage for a new look at the question whether and when supervisors (including Hasty, a prison's warden) can be liable for failing to prevent or rectify misconduct by guards and other subordinates. See *Ziglar v. Turkmen*, —— U.S. ——, 137 S.Ct. 292, ——L.Ed.2d —— (2016) (consolidated with *Ashcroft v. Turkmen*, —— U.S. ——, 137 S.Ct. 293, —— L.Ed.2d —— (2016), and *Hasty v. Turkmen*, —— U.S. ——, 137 S.Ct. 293, —— L.Ed.2d —— (2016)). The sort of dispute represented by Haywood's Eighth Amendment claim is now in the hands of the Supreme Court. *Turkmen* may be decided on other grounds (the lead argument is that the Second Circuit erred in implying a *Bivens* remedy against supervisors, while § 1983 supplies an express remedy in our case), but even so *Turkmen* may reflect on the circumstances under which heads of organizations who are alerted to problems but don't fix them can be liable for that failure. They ducked in *Barkes*, a summary reversal, but may conclude that resolution is due in *Turkmen*, which will be briefed and argued.")

Daniel v. Cook County, 833 F.3d 728, 737-38 (7th Cir. 2016) ("Sheriff Dart also argues that he cannot be liable in his personal capacity. He points out that there is no vicarious liability for supervisory officials under § 1983. This is correct but incomplete. The sheriff can be *directly* liable for Daniel's injury. If a senior jail or prison official, including a person with final policymaking power, is 'aware of a systemic lapse in enforcement of a policy critical to ensuring inmate safety, his failure to enforce the policy could violate the Eighth Amendment.'. . Similarly, if a supervisor designed or is aware of the institution's 'deliberately indifferent policy that caused a constitutional injury, then individual liability might flow from that act.' *Armstrong v. Squadrito*, 152 F.3d 564, 581 (7th Cir. 1998). The Department of Justice Report, along with the later Agreed Order incorporating the investigation's findings and the 2010 Monitor Report detailing the Jail's progress, provides substantial evidence that Sheriff Dart had notice of the systemic deficiencies in the Jail's health care. The totality of Daniel's evidence would allow a jury to find that these problems persisted when Daniel received inadequate care and that the sheriff did not respond

reasonably to them. Daniel may proceed with his claim against Sheriff Dart in his personal capacity.")

Perez v. Fenoglio, 792 F.3d 768, 781-82 (7th Cir. 2015) ("As pertains to this case, in order to establish a constitutional violation based upon conditions of confinement, a plaintiff must allege that each prison official named as a defendant has been deliberately indifferent to that plaintiff's objectively serious medical condition, . . . with deliberate indifference occurring where an official realizes that a substantial risk of serious harm to a prisoner exists, but disregards it . . . . Applying *Farmer*, we have stated that deliberate indifference may be found where an official knows about unconstitutional conduct and facilitates, approves, condones, or 'turn[s] a blind eye' to it. . . An inmate's correspondence to a prison administrator may thus establish a basis for personal liability under § 1983 where that correspondence provides sufficient knowledge of a constitutional deprivation. . . Indeed, once an official is alerted to an excessive risk to inmate safety or health through a prisoner's correspondence, 'refusal or declination to exercise the authority of his or her office may reflect deliberate disregard.'. . In other words, prisoner requests for relief that fall on 'deaf ears' may evidence deliberate indifference. . . In this regard, *Gentry v. Duckworth* is instructive. There, an inmate claimed that his right of access to the courts was violated because he was denied scribe materials (e.g., paper, some means of writing, and access to notary services) by prison guards. . . He sent many letters to the superintendent concerning his claims, which went unanswered. . . Although the superintendent may not have been directly responsible for the constitutional deprivation, we concluded that the superintendent knew of the denial of scribe materials because of the prisoner's 'many letters' to him, and that the superintendent had systematically ignored these requests for redress. We thus allowed the inmate's § 1983 action to survive summary judgment. . . We find that Perez's complaint alleges facts sufficient to form a basis for personal liability against the grievance officials for violations of the Eighth Amendment. The complaint alleges that the named defendants each obtained actual knowledge of Perez's objectively serious medical condition and inadequate medical care through Perez's coherent and highly detailed grievances and other correspondences. It also alleges that each of these officials failed to exercise his or her authority to intervene on Perez's behalf to rectify the situation, suggesting they either approved of or turned a blind eye to his allegedly unconstitutional treatment. . . Perez's claims against the grievance officials thus should have been allowed to proceed. Again, we emphasize that the district court screened Perez's complaint before discovery, before submission of any evidence, and before the defendants were even served process. At this early stage of the litigation, we ask only whether Perez's complaint, liberally construed . . . and drawing all reasonable inferences in his favor . . . contains facts sufficient to state a plausible Eighth Amendment claim against the grievance defendants. We believe that it has. Of course, discovery will shed light on whether, as the State contends, the grievance defendants took 'the needed action to investigate' Perez's grievances . . . and 'reasonably rel[ied] on the judgment of medical professionals.'. . However, these are questions of fact that simply cannot be resolved in the absence of a record. Therefore, we reverse the dismissal of Perez's complaint with respect to all of the defendants.")

Locke v. Haessig, 788 F.3d 662, 669-73 (7th Cir. 2015) ("For discrimination claims like those at issue in *Iqbal* and here, where the state of mind of purposeful discrimination is an element of the violation, a supervisor is liable only if she had the specific intent to discriminate. . . For these claims, the plaintiff must show 'more than "intent as volition or intent as awareness of consequences."'. . . The supervisor is liable for undertaking a course of action only because of, not merely in spite of, the action's adverse effects upon an identifiable group. . . Although *Iqbal* involved a claim of invidious discrimination, the Court's discussion shaped the law of supervisory liability for constitutional violations more generally. Before *Iqbal*, most circuits required that a supervisor act (or fail to act) with the state of mind of deliberate indifference to be liable, no matter the underlying constitutional violation. . . .After *Iqbal*, we re-examined the state of mind required for supervisory liability for sexual harassment in *T.E. v. Grindle*, 599 F.3d 583 (7th Cir.2010). . . . Haessig argues that *Iqbal* and *Grindle* together mean that there is a constitutional difference between action and inaction—that purposeful discrimination may be inferred from the former but not the latter. She contends the district court erred as a matter of law in holding that a jury could find Haessig liable for an equal protection violation for purposefully ignoring Locke's complaint of harassment. . .We have doubts about this argument. For one, there is little support in these cases for a distinction between action and inaction. Haessig points us to the Supreme Court's statement that purposeful discrimination 'involves a decisionmaker's undertaking a course of action because of ... the action's adverse effects upon an identifiable group.'. . Haessig seizes on one phrase, 'course of action,' as implying that a supervisor who takes no action cannot, as a matter of law, intend discrimination. We reject such an expansive reading of *Iqbal*. Haessig's argument conflicts with the principle that a supervisor could be liable for ignoring complaints from one identifiable group while acting on similar complaints from those of another group. . . . Short perhaps only of a confession of intentional discrimination, selective inaction can be strong evidence of discriminatory intent. In any event, Locke has provided evidence that tends to show that Haessig's response was more than mere inaction. A reasonable jury could infer that Haessig had the requisite intent to discriminate because she threatened to retaliate against Locke after he complained of sexual harassment. . . . Locke may submit his evidence to a jury and can prevail if he can convince the jury that Haessig treated Locke's complaint differently because he was a man complaining of sexual harassment. Locke does not need to prove that Haessig was motivated solely by his sex in the way that she responded to his complaint, but he must show that she chose her course of action at least in part because of his sex.")

Courtney v. Devore, 595 F. App'x 618, 620 (7th Cir. 2014) ("Here Courtney has alleged that jail officials assigned female guards to monitor his bathroom activity in order to humiliate him. First, he contends that jail administrators granted the transfer requests of other detainees, but kept him assigned to a unit with cross-sex monitoring, despite his transfer requests, to shame him because he was a sex offender. Second, he adds that, when administrators later transferred him to another unit that also used cross-sex bathroom monitors, they did so to retaliate against him for complaining about the humiliation. The facts may later refute these allegations or show that the jail officials acted for institutionally legitimate reasons, but at this stage Courtney's allegations suffice to state an Eighth Amendment claim. We pause to comment on the proper defendants.

Courtney's claim is valid only against the administrators who personally assigned him to these units. . . Courtney has sued the 'Marion County Jail,' which we take to be an inartful attempt to name pseudonymously these administrators. Because Courtney is pro se, on remand the district court may and should assist him in identifying and naming the administrators who assigned him to his jail units. . . Courtney has also named the sheriff, but he has not alleged that the sheriff had any personal role in the assignment. Instead he has alleged only that, after he wrote to the sheriff to complain, the sheriff did not rectify the problem. But chief administrators are ordinarily not personally liable for decisions made by subordinates, even if they receive a letter complaining about those decisions and do not intervene. . . There can be an exception if the superior, by not acting, creates or increases some peril, . . . but Courtney alleges the opposite: the cross-sex monitoring never changed. So the sheriff is personally dismissed.")

Keller v. Elyea, 496 F. App'x 665, 2012 WL 5869308, *1, *2 (7th Cir. Nov. 19, 2012) ("The district court indeed viewed this issue through too narrow a lens: there need not be a case 'on all fours,' with identical facts, in order for a constitutional right to be clearly established for the purposes of qualified immunity. . . Federal courts have long held that deliberate indifference to prisoners' serious medical conditions violates their Eighth Amendment right to be free from cruel and unusual punishment. . . Of particular relevance here, we have ruled that a supervisor may be liable when he turns a blind eye to an inmate's letters requesting medical treatment. . . Thus we cannot agree with the district court's conclusion that there was no clearly established law that would have put Dr. Elyea on notice that his alleged conduct violated Keller's constitutional rights. But we need not reach the question of qualified immunity because there is a more direct basis for affirmance—Keller has not shown that Dr. Elyea caused or participated in any constitutional violation. . . As the district court recognized, Dr. Elyea, the head of the prison system's medical hierarchy, cannot be vicariously liable for the acts of his staff. . . But the principal case relied upon by the court to deny summary judgment on this issue, *Reed v. McBride,* differs from this case in an important way. In *Reed,* we found disputed issues of supervisory liability when supervisors acknowledged receiving the plaintiff's complaint letters and were therefore aware of the continuing harm he was suffering. . . Here, by contrast, Keller has not produced evidence that Dr. Elyea was aware of Keller's conditions or that the alleged violations by the treating medical staff were caused by any policy Dr. Elyea put in place.")

Vance v. Rumsfeld, 701 F.3d 193, 198, 199, 203-05 (7th Cir. 2012) (en banc) ("Whatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated. The Supreme Court has never created or even favorably mentioned the possibility of a non-statutory right of action for damages against military personnel, and it has twice held that it would be inappropriate to create such a claim for damages. See *Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley,* 483 U.S. 669 (1987). The Court has never created or even favorably mentioned a nonstatutory right of action for damages on account of conduct that occurred outside the borders of the United States. Yet plaintiffs propose a novel damages remedy against military personnel who acted in a foreign nation—and in a combat zone, no less. . . Even if we were to create a common-law damages remedy against military personnel and their civilian

superiors, former Secretary Rumsfeld could not be held liable. He did not arrest plaintiffs, hold them incommunicado, refuse to speak with the FBI, subject them to loud noises, threaten them while they wore hoods, and so on. The most one could say about him—the most plaintiffs *do* say about him—is that (a) in 2002 and 2003 he authorized the use of harsh interrogation techniques when dealing with enemy combatants, (b) he received reports that his subordinates sometimes used these techniques, without authorization, on persons such as plaintiffs despite the Detainee Treatment Act of 2005, and (c) he did not do enough to bring interrogators under control. The Supreme Court held in *Iqbal* that liability under a *Bivens*-like remedy is personal. . . Cabinet secretaries (in *Iqbal* the Attorney General) and other supervisory personnel are accountable for what they do, but they are not vicariously liable for what their subordinates do. The Court added that knowledge of a subordinate's misconduct is not enough for liability. The supervisor can be liable only if he wants the unconstitutional or illegal conduct to occur. . . Yet plaintiffs do not allege that Secretary Rumsfeld *wanted* them to be mistreated in Iraq. His orders concerning interrogation techniques concerned combatants and terrorists, not civilian contractors. What happened to plaintiffs violated both Rumsfeld's directives of 2002 and 2003, and the Detainee Treatment Act of 2005. In an ideal world, the Secretary of Defense and the Army's Chief of Staff would have achieved full compliance with the Detainee Treatment Act, but a public official's inability to ensure that all subordinate federal employees follow the law has never justified personal liability. . . .Both *Iqbal* and *al-Kidd* say that supervisors are not vicariously liable for their subordinates' transgressions. . . .Plaintiffs' theme is that Secretary Rumsfeld, having authorized harsh interrogation tactics for enemy combatants in 2002 and 2003, should have intervened after receiving reports that non-combatants were being subjected to these tactics and that interrogators had not properly implemented the Detainee Treatment Act of 2005. Yet the standard form of intervention would have been criminal prosecution (in the civilian courts or by court-martial). The Department of Defense did prosecute some soldiers through courts-martial, and the Department of Justice filed some criminal prosecutions. Plaintiffs think that they should have done more, but no one can demand that someone else be prosecuted. . . A court cannot say that, if there are too few prosecutions (or other enforcement), and thus too much crime, then the Attorney General or the Secretary of Defense is personally liable to victims of (preventable) crime. Yet that's what plaintiffs' approach entails. *Iqbal* held that knowledge of subordinates' misconduct is not enough for liability. The supervisor must want the forbidden outcome to occur. Deliberate indifference to a known risk is a form of intent. But *Farmer v. Brennan*, 511 U.S. 825 (1994), holds that, to show *scienter* by the deliberate-indifference route, a plaintiff must demonstrate that the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm. A warden's knowledge that violence occurs frequently in prison does not make the warden personally liable for all injuries. See *McGill v. Duckworth*, 944 F.2d 344 (7th Cir.1991). Prisons are dangerous places, and misconduct by both prisoners and guards is common. Liability for wardens would be purely vicarious. *Farmer* rejected a contention that wardens (or guards) can be liable just because they know that violence occurs in prisons and don't do more to prevent it on an institution-wide basis. To get anywhere, Vance and Ertel would need to allege that Rumsfeld knew of a substantial risk to security contractors' employees, and ignored that risk because he wanted plaintiffs (or similarly situated persons) to be harmed. The complaint does not contain such

an allegation and could not plausibly do so. . . .Although Vance and Ertel contend that their injuries can be traced (remotely) to Secretary Rumsfeld's policies of 2002 and 2003, as well as to the misconduct of personnel in Iraq, they do not contend that the policies authorized harsh interrogation of security detainees, as opposed to enemy combatants. It is therefore unnecessary to decide when, if ever, a Cabinet officer could be personally liable for damages caused by the proper application of an unlawful policy or regulation. As we observed in *Hammer v. Ashcroft*, 570 F.3d 798, 800 (7th Cir.2009) (en banc), the normal means to handle defective policies and regulations is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author. Accord, *Arar*, 585 F.3d at 572–73. No court has ever held the Administrator of the EPA personally liable for promulgating an invalid regulation, even if that regulation imposes billions of dollars in unjustified costs before being set aside. Cf. *Padilla v. Yoo*, 678 F.3d 748 (9th Cir.2012) (Deputy Assistant Attorney General not personally liable for preparing an opinion concluding that Secretary Rumsfeld's policies were valid). The extent to which untenable directives, policies, and regulations may support awards of damages can safely be postponed to another day. Because we have held that a common-law right of action for damages should not be created—and that plaintiffs' complaint would fail to state a claim against former Secretary Rumsfeld even if such a right of action were to be created—it is unnecessary to decide whether Rumsfeld violated plaintiffs' clearly established rights. The decisions of the district court are reversed.")

Vance v. Rumsfeld, 701 F.3d 193, 210 (7th Cir. 2012) (en banc) (Wood, J., concurring in the judgment) ("I conclude, along with the majority, that the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), governs our decision here. In *Iqbal*, the Court concluded that the Attorney General's knowledge of and participation in the mistreatment of the plaintiff was remote enough that he could not be held vicariously liable for the actions of his subordinates. The same must be said of Secretary Rumsfeld. This is not because his leadership of the Department of Defense had nothing to do with the plaintiffs' injuries. His approval of the so-called harsh techniques may have egged subordinates on to more extreme measures—measures that surely violated the standards of the Detainee Treatment Act of 2005, as well as broader norms such as those in the CAT. But the link between their mistreatment and the Secretary's policies authorizing extreme tactics for enemy combatants is too attenuated to support this case.")

Vance v. Rumsfeld, 701 F.3d 193, 223-25 (7th Cir. 2012) (en banc) (Hamilton, J., joined by Rovner, J. and Williams, J., dissenting) ("I agree with the majority's general statements of the law of personal responsibility under *Bivens* and 42 U.S.C. § 1983. Responsibility is personal, not vicarious. Where we differ is in the application of those general principles to plaintiffs' second amended complaint. . . .The plaintiffs may or may not be able to prove their allegations—it now is unlikely they will ever have the chance to try—but they allege that the use of harsh interrogation techniques amounting to torture was the subject of Mr. Rumsfeld's personal attention. . . They allege that he issued policies or orders contrary to governing U.S. law but authorizing the torture they suffered. . . That should be enough to withstand a motion to dismiss under Rule 12(b)(6). In *Ashcroft v. Iqbal* itself, the Attorney General and the Director of the FBI conceded that they would

have been subject to personal liability for actions of their subordinates if they 'had actual knowledge of the assertedly discriminatory nature of the classification of suspects being of "high interest" and that they were deliberately indifferent to that discrimination.'. .We and other circuits have taken that approach as well. [collecting cases] *Iqbal's* different approach to pleading an individual's *discriminatory* intent does not address the issue of personal responsibility for an unconstitutional practice or policy asserted here. . . The case is before us on an interlocutory appeal from the denial of a motion to dismiss under Rule 12(b)(6). The allegations against Mr. Rumsfeld satisfy the plausibility standard of *Iqbal, Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Erickson v. Pardus,* 551 U.S. 89 (2007). And even if they did not, the plaintiffs should be allowed to amend their pleadings, especially in view of the uncertainty of federal pleading standards after *Iqbal* and the fact that the district court and panel found their present pleadings sufficient to state plausible claims. . . . The majority's grant of absolute civil immunity to the U.S. military for violations of civilian citizens' constitutional rights departs from that long heritage. We leave citizens legally defenseless to serious abuse or worse by their own government. I recognize that wrongdoers in the military are still subject to criminal prosecution within the military itself. Relying solely on the military to police its own treatment of civilians fails to use the government's checks and balances that preserve Americans' liberty. The legal foundations for the claims before us are strong and in keeping with the Supreme Court's decisions and the best traditions of American liberty and governance. We should affirm the district court's decision to allow plaintiffs to try to prove their claims for torture.")

Vance v. Rumsfeld, 701 F.3d 193, 226 (7th Cir. 2012) (en banc) (Rovner, J., with Hamilton, J., and Williams, J., dissenting) ("Vance and Ertel have alleged Secretary Rumsfeld's direct participation in their torture. Vance contends, for example, that Secretary Rumsfeld authorized the interrogation tactics utilized on the plaintiffs and that some of these techniques required Secretary Rumsfeld's personal approval on a case-by-case basis thus inferring that Secretary Rumsfeld must have authorized the torturous interrogation himself. . . These claims may not be true, and if they are, the plaintiffs may have little chance of providing sufficient evidence to convince a trier-of-fact, but they are nevertheless plausible and contain more than bare legal conclusions. *Twombly* and *Iqbal* require no more. I fear future appeals of dismissals will be muddied by the court's attempt to refract the Rule 12(b)(6) standard to protect a high level governmental official engaged in a war to protect the citizens and ideals of this country. But even in the most difficult of cases, we must adhere to the federal pleading requirements dictated by Federal Rule of Civil Procedure 12(b)(6) and the precedent of the United States Supreme Court.")

Vance v. Rumsfeld, 701 F.3d 193, 231 (7th Cir. 2012) (en banc) (Williams, J., joined by Hamilton, J., and Rovner, J., dissenting) ("Whether the plaintiffs have adequately pled Rumsfeld's personal liability for violations of clearly established law is also a delicate question. Arguably qualified immunity should shoulder more of the burden of the majority's demonstrable hesitation to hold high government officials accountable for constitutional violations. *Cf. Padilla v. Yoo,* 678 F.3d 748, 768 (9th Cir.2012) (disposing of suit on qualified immunity grounds rather than affording total immunity to *Bivens*). Nevertheless, I agree with my dissenting colleagues that the plaintiffs'

complaint should survive. This complaint is unusually detailed and alleges Rumsfeld's personal participation in interrogation determinations, something the majority ignores. It is plausible (if not necessarily probable) to infer from Rumsfeld's direct involvement in developing interrogation practices at Camp Cropper and his case-specific approval of techniques used on detainees that he personally authorized the plaintiffs' abuse or remained intentionally indifferent to it. These allegations go well beyond those deemed insufficient in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and present more than a mere possibility of liability. Therefore, I would permit the suit to continue to at least limited discovery.")

Paine v. Cason, 678 F.3d 500, 512 (7th Cir. 2012) as amended on denial of rehearing and rehearing en banc (May 17, 2012) ("Earnest can be liable only for what he did; there is no doctrine of supervisory liability for the errors of subordinates such as Berglind. See *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009).")

Vinning-El v. Evans, 657 F.3d 591, 592 (7th Cir. 2011) ("Warden Evans is entitled to prevail on the § 1983 claim without any need to consider immunity. Section 1983 does not authorize 'supervisory liability.' See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1947-49 (2009). Section 1983 creates liability only for a defendant's personal acts or decisions. Vinning-El does not contend that Evans made or ratified the decision about his diet. The district court therefore should have granted Evans's motion for summary judgment.")

Arnett v. Webster, 658 F.3d 742, 757 (7th Cir. 2011) ("Although *Iqbal* was a discrimination case involving discriminatory purpose, the Court's reasoning in that case has raised questions about whether a stricter standard of personal liability for supervisors applies in deliberate indifference suits. We recently indicated that 'mere "knowledge and acquiescence" is not sufficient to impose' such liability, but that '*Iqbal* did not disturb the ... principles holding that a supervisor may be liable as an individual for wrongs he personally directed or authorized his subordinates to inflict,' *Vance*, 2011 WL 3437511, at *6 & n.5; *see also Starr v. Baca*, No. 09-55233, 2011 WL 2988827, at *4 (9th Cir. July 25, 2011) ("We see nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases."). The landscape of such claims after *Iqbal* remains murky, but we need not clear the waters here because the record doesn't show that Dr. Webster was personally involved in the alleged constitutional violations under the standard set forth in *Gentry*.")

T.E. v. Grindle, 599 F.3d 583, 588-91 (7th Cir. 2010) ("The parties focused their briefing on whether a theory of supervisory liability for equal protection claims was clearly established at the time of Grindle's conduct. However, as the Supreme Court has made clear in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), an equal protection claim against a supervisor requires a showing of intentional discrimination. Because there is no theory of *respondeat superior* for constitutional torts, a plaintiff 'must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.' *Id.* at 1948. In the equal protection context, this means showing that the supervisor, like the subordinate, intended to discriminate on the basis of a

protected class. . . While it appears that our precedent would have previously allowed a plaintiff to recover from a supervisor based on that supervisor's 'deliberate indifference' toward a subordinate's purposeful discrimination, *see Nanda,* 412 F.3d at 842, after *Iqbal* a plaintiff must also show that the supervisor possessed the requisite discriminatory intent. Nonetheless, even in light of *Iqbal,* plaintiffs have offered evidence sufficient to defeat summary judgment on Grindle's qualified immunity defense. Plaintiffs need not prove discriminatory intent in the same manner it was established in *Nabozny,* where male and female victims were treated differently. Plaintiffs have offered evidence that would let a jury easily conclude that Sperlik, acting under color of state law, denied the girls equal protection by molesting and abusing them. Plaintiffs have also offered evidence that would allow a jury to conclude that Grindle knew about Sperlik's abuse of the girls and deliberately helped cover it up by misleading the girls' parents, the superintendent, and other administrators. From this evidence, a jury could reasonably infer − though it would not be required to infer-that Grindle also had a purpose of discriminating against the girls based on their gender. *Cf. Bohen v. City of East Chicago, Ind.,* 799 F.2d 1180, 1190-91 (7th Cir.1986) (Posner, J., concurring) (suggesting that policy of deliberately refusing to respond to complaints of sexual harassment would support an inference of intentional discrimination). If Grindle wishes to argue that she merely wanted to avoid a scandal or that she would have taken similar steps to conceal abuse if boys had been the victims, she can present those arguments to the jury, but such suggestions do not mean that she is entitled to judgment as a matter of law. . . .[W]e must address the impact of *Iqbal* on plaintiffs' due process claim. It is important to note that, as in *Stoneking,* plaintiffs are not relying on a theory that 'mere failure of supervisory officials to act' violates the Due Process Clause. . . Rather, plaintiffs allege that Grindle is liable for actively concealing reports of abuse and creating an atmosphere that allowed abuse to flourish. In other words, they argue that Grindle's own actions deprived them of their constitutional right to bodily integrity. Because plaintiffs seek to do no more than hold Grindle liable 'for ... her own misconduct,' their substantive due process theory is not foreclosed by *Iqbal.* . . When a state actor's deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate, and the actor may be held liable for the resulting harm.").

Turner v. Cook County Sheriff's Office, No. 19 CV 5441, 2020 WL 1166186, at *5 (N.D. Ill. Mar. 11, 2020) ("Plaintiff's individual claim against Sheriff Dart is not based on any direct involvement in Ms. Scott's overdose, but rather on Sheriff Dart's ineffective—or nonexistent—drug detection and treatment policies that allow inmates easy access to drugs and increase the risk/frequency of drug overdoses. . . Plaintiff's individual capacity claim against Sheriff Dart is rooted in his alleged failure to implement policies that provide constitutionally adequate healthcare to detainees suffering from drug addiction and overdose. . . Because of his position, Sheriff Dart had final authority over Jail policies. . . Therefore, Plaintiff's allegations, if true, sufficiently allege that Sheriff Dart was personally involved in the decision-making that amounted to a violation of Ms. Scott's constitutional right to be free from deliberate indifference to her serious medical needs. The Amended Complaint, read in the light most favorable to the Plaintiff, alleges systemic

constitutional violations by way of Sheriff Dart's Jail policies and practices. Therefore, the Court denies Sheriff Dart's Motion to Dismiss the individual capacity claim.")

Powell v. City of Chicago, No. 17-CV-5156, 2018 WL 1211576, at *9 (N.D. Ill. Mar. 8, 2018) ("Plaintiff alleges that Cline and Kirby knew of the Officer Defendants' grave misconduct and knew that the misconduct would likely continue, yet deliberately did nothing (in their capacity as supervisors) to correct the problem. . . Plaintiff neither claims a 'constitutional right to an internal investigation,'. . . nor states a theory of vicarious liability. Rather, Plaintiff says that Cline and Kirby deliberately disregarded his constitutional rights by failing to stop the Officer Defendants from continuing their illegal scheme of, among other things, fabricating evidence against residents of the Ida B. Wells Homes. . . At this early stage, those allegations suffice to state a claim against Cline and Kirby. . . While such claims may or may not survive summary judgment, this Court denies Defendants' motion to dismiss claims against Cline and Kirby.")

Karim v. Obaisi, No. 14 C 1318, 2017 WL 4074017, at *7 (N.D. Ill. Sept. 14, 2017) ("Warden Lemke argues that he cannot be liable for deliberate indifference because he was not personally involved in any decision that led to a deprivation of Karim's constitutional rights. Although it is true that 'the Warden of each prison...is entitled to relegate to the prison's medical staff the provision of good medical care,' *Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009), if a prison official, like Lemke, has a reason to believe, or actual knowledge that the prison's medical staff are mistreating or failing to treat a prisoner, the prison official may be liable for deliberate indifference. . . When viewing the facts in the light most favorable to Karim, . . . even when putting aside Karim's grievances and communications, Lemke had actual knowledge of Karim's abscess and appointment on August 8 and refused to allow Karim to attend his appointment. Thus, he was personally involved in deciding that Karim would not get the treatment that medical professionals determined he needed on that day. Lemke argues that because of the lockdown he could not get Karim the needed treatment, yet his own testimony makes clear that prisoners with serious medical issues could be seen by doctors and dentists during a lockdown. . . . Thus, Lemke's decision to not grant Karim leave to get treatment during a lockdown may constitute deliberate indifference because according to Karim, Lemke saw the abscess on August 8th, understood it to be a serious condition, yet refused to allow Karim to attend the appointment to receive treatment. This is especially so because according to Karim, at the time he saw Lemke on August 8, the abscess was so grotesque that even a layperson like Lemke would have understood that Karim required urgent dental care.")

Miller v. Kienlen, No. 14-CV-00031, 2017 WL 951342, at *10 (N.D. Ill. Mar. 10, 2017) ("The complaint . . . states a plausible claim of deliberate indifference against Kienlen. To be liable under § 1983 in her individual capacity, 'the supervisor must "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see."'. . Miller alleges that he reported to Kienlen that Jefferson was not changing his wound dressings daily, irrigating his wound, and dispensing prescribed medication as his doctor recommended and that Kienlen knew about the risks Jefferson's conduct posed. . . The complaint does not spell out how Kienlen knew

of the risks, but it does not have to; that is what discovery is for. . . In the face of Miller's reports, Kienlen did nothing according to the complaint. . . Viewed in the light most favorable to Miller, these allegations state a plausible claim that Kienlen condoned, approved, or turned a blind eye to Jefferson's alleged conduct.")

Smith v. Burge, 222 F.Supp.3d 669, 687 (N.D. Ill. 2016) ("In essence, Plaintiff asserts that Defendants Martin, Daley, and Hillard as supervisors had knowledge of the systemic torture leading to coerced confessions of innocent individuals, but nevertheless condoned it or turned a blind eye to it. . . The fact that Defendants Daley, Martin, and Hillard were not at Area 2 at the time of Plaintiff's torture and coerced confession does not absolve these Defendants under Plaintiff's theory of liability. *See Sanville v. McCaughtry,* 266 F.3d 724, 740 (7th Cir. 2001) (supervisor "does not have to have participated directly in the deprivation" to be personally involved).")

Smith v. Burge, 222 F.Supp.3d 669, 697 (N.D. Ill. 2016) ("Plaintiff specifically alleges that while Defendant Daley was Mayor: (1) he did not disclose exculpatory information in his possession from the date he resigned as State's Attorney of Cook County in 1989 until he left the Mayor's office in 2011; (2) he did not intervene at any time to direct the CPD to disclose exculpatory information in its possession regarding Defendant Burge and detectives under his command; and (3) he did not direct the CPD to conduct a thorough and aggressive investigation of Defendants Burge, Byrne, Dignan, and the other detectives who tortured and abused African-American men while working under Defendant Burge's command. . . Plaintiff also alleges that in furtherance of this conspiracy, Defendant Daley: (1) repeatedly discredited OPS findings of the systemic torture under Defendant Burge at Area 2; (2) refused to direct Defendant Martin (as CPD Superintendent) to initiate criminal investigations or disciplinary proceedings against Defendant Burge and CPD Detectives under his command; (3) rejected advise from senior staff that the City should sue Defendant Burge rather than continue to defend him in civil proceedings despite Defendant Daley's knowledge of Defendant Burge's wrongdoing; and (4) made false public statements in July 2006 in response to a Special Prosecutor's Report. . . . These allegations sufficiently allege that Defendant Daley, as Chicago's Mayor, participated in a conspiracy to conceal evidence of police torture. . . . The Court therefore denies this aspect of Defendant Daley's motion to dismiss.")

Lemons v. City of Milwaukee, No. 13-C-0331, 2016 WL 3746571, at *20-21 (E.D. Wis. July 8, 2016) ("There is no principle of automatic supervisor liability for constitutional torts. Instead, to be held liable for conduct of a subordinate, a supervisor must have been personally involved in that conduct, meaning that he or she knew about the conduct and 'facilitate[d] it, approve[d] it, condone [d] it, or turn[ed] a blind eye for fear of what [he or she] might see.'. . The supervisors must have acted either knowingly or with deliberate, reckless indifference. . . A supervisor who was merely negligent or grossly negligent in failing to detect and prevent a subordinate's misconduct is not liable, because negligence is not actionable under § 1983. . . Instead, the supervisor must be criminally reckless or at the least in conscious disregard of known or obvious dangers. . . . The City defendants contend that the Supreme Court in *Iqbal v. Ashcroft,* 556 U.S.

662 (2009), altered the above-described concept of a supervisor's liability to require actual participation in the subordinate's malfeasance. The City defendants argue that all individual-capacity claims against Flynn and Hegerty must be dismissed because neither chief was personally involved with anything that happened in Lemons's home while Lemons was alone with Cates. But the City defendants are wrong. . . .Here, Lemons contends that Hegerty and Flynn are liable for their own actions (or inactions) in creating or maintaining insufficient IAD investigatory procedures and their own failures in supervising or disciplining Cates's conduct, enabling Cates to sexually prey upon women he encountered on the job. No evidence suggests that Hegerty or Flynn was present at Lemons's house during the rape, intended for Cates to rape Lemons, or actually knew Cates would do so, but that is beside the point. As to IAD procedures and officer supervision and discipline, Hegerty and Flynn *were* personally involved. There is no dispute that the chiefs were responsible for IAD investigating procedures, received reports regarding pending investigations, and were the ultimate decisionmakers regarding officer discipline. And there is no dispute that Hegerty and Flynn exercised decisionmaking authority regarding Cates individually. Taking the facts in Lemons's favor, Hegerty was apprised of the SW and TC matters, yet gave Cates only a six-day suspension as discipline for the former and nothing for the latter, even in light of information in Cates's file regarding his prior violence toward Officer C. Similarly, Flynn was apprised of the TC and TG matters, yet failed to discipline Cates, even in light of information in Cates's file regarding the Officer C, SW, TC, and TG matters. Taking the facts in Lemons's favor, both chiefs allowed IAD internal investigations to end upon a DA's decision not to charge a crime, failed to consider prior unsustained conduct, failed to implement any system to monitor for patterns of illegal conduct, and caused an attitude in the MPD that sexual misconduct was not going to be treated seriously. . . .A reasonable jury could find that Hegerty and Flynn turned a blind eye to any pattern, exhibiting deliberate indifference to the well-being of future females with whom Cates came into contact in his job and that sexual assault was a foreseeable next offense. . . .In sum, taking the facts in Lemons's favor, Hegerty and Flynn facilitated Cates's conduct and turned a blind eye to it by not disciplining him more severely (or at all) for prior rule infractions, abdicating responsibility for discipline to the DA's office, not providing a means for recognition of patterns of prior conduct even if unsustained, and responding to complaints of sexual misconduct by Cates so inadequately that Cates felt confident that he could rape Lemons with little to no consequence. A reasonable jury could find that Hegerty's and Flynn's personal choices in IAD oversight and in previously not disciplining Cates created the circumstances in which Cates believed that his word would outweigh Lemons's and that the most discipline he would receive was a short suspension—that he would be back on the force with little trouble. Thus, summary judgment will be denied as to this theory of liability.")

Smith v. City of Chicago, 143 F.Supp.3d 741, ___ (N.D. Ill. 2015) ("Defendant McCarthy additionally argues that the Court must dismiss Plaintiffs' constitutional claims brought against him in his individual capacity because Plaintiffs fail to allege that he was personally involved in the alleged constitutional deprivations. To clarify, because the doctrine of respondeat superior (blanket supervisory liability) does not apply to actions filed under § 1983, a plaintiff must allege that an individual defendant, through his own conduct, violated the Constitution. *See Perez v.*

Fenoglio, 792 F.3d 768, 781 (7th Cir. 2015). A supervisor, such as Defendant McCarthy, can be liable under § 1983 if he knows about the misconduct and either facilitates it, approves it, condones it, or turn a blind eye. . .Although Defendant McCarthy denies personal involvement in the approximately 50 individual incidents alleged in the Amended Complaint, Plaintiffs have presented sufficient factual allegations stating a claim for supervisory liability that is legally sound and plausible on its face, namely, that Superintendent McCarthy was aware of the police officers' unconstitutional stops and facilitated this conduct. Construing the facts and all reasonable inferences in Plaintiffs' favor – as the Court must do at this procedural posture – they allege that Defendant McCarthy had knowledge of the unlawful stops and frisks based on the CPD's history of conducting suspicionless stops and frisks, the 2003 Shani Davis lawsuit and the data collected therein, and other actions taken by the ACLU. . . Plus, Plaintiffs assert that Superintendent McCarthy put pressure on Chicago police officers to increase the number of stops and frisks giving the officers a strong incentive to make such stops because the officers' increased numbers would suggest productivity. . . Similarly, Plaintiffs contend that Superintendent McCarthy facilitated the alleged misconduct because he failed to set forth procedures to properly train police officers as to the legal and factual bases for conducting stops and frisks. . . Under the circumstances, Plaintiffs have sufficiently alleged a plausible claim for supervisory liability pursuant to the federal pleading standards. . . The Court thus denies Defendant McCarthy's motion to dismiss the constitutional claims brought against him in his individual capacity.")

Medrano v. Wexford Health Sources, Inc., No. 13 C 84, 2015 WL 4475018, at *6 (N.D. Ill. July 21, 2015) ("For written notice to prison administrators to form the basis of a deliberate indifference claim, the plaintiff 'must demonstrate that the communication, in its content and manner of transmission, gave the prison official sufficient notice to alert him or her to an excessive risk to inmate health or safety.' *Arnett,* 658 F.3d at 755. Medrano cannot make such an allegation here. Rather, Medrano alleges he received regular appointments with doctors, a number of medical tests, and medication prescriptions in an attempt to address his medical conditions. It may be that Medrano has sufficiently alleged that some of this treatment fell below a constitutionally adequate level. That question is not at issue on this motion. But in the absence of allegations that Medrano was 'completely ignored by medical staff,' *Arnett,* 658 F.3d at 756, Director Godinez and Chairperson Miller were entitled to rely on the medical judgments supporting the treatments Medrano alleges he received. . . . Accordingly, Medrano's claims against Director Godinez and Chairperson Miller are dismissed. . . . It is true that *respondeat superior* liability is not available for a claim under § 1983. Medrano, however, does not use the mere fact of Dr. Tilden's title to establish his liability. Rather, Medrano alleges that he received inadequate care at Pontiac when he failed to receive the treatment prescribed by the UIC doctors. Medrano argues that Dr. Tilden had knowledge of this inadequate treatment due to his supervisory positions as Medical Director. In this way, Medrano's allegation is quite different from the allegations against Director Godinez and Chairperson Miller, which the Court has already dismissed. Dr. Tilden is not merely responsible for prison administration generally, but is responsible for medical care in particular. This allegation is enough for the Court to infer that Dr. Tilden knew about any inadequate care Medrano received and did nothing to remedy the situation. This is sufficient to state a claim against

him based on Medrano's accompanying allegation that he has not received the treatment prescribed by the UIC doctors.")

Laba v. Chicago Transit Auth., No. 14 C 4091, 2015 WL 3511483, at *4 (N.D. Ill. June 2, 2015) ("In Count III, Plaintiffs allege that Bhayani, Loughnane and Claypool enjoyed a supervisory capacity at the CTA and approved, facilitated, condoned and ordered the actions of Guidone and Woods in installing the hidden cameras for the alleged purpose of secretly filming Plaintiffs. The conclusory allegations in Plaintiffs' Complaint, by themselves, would not be sufficient to raise Plaintiffs' supervisory liability claim above the speculative level. However, in conjunction with the well-pleaded allegations, this claim survives. Plaintiffs specify each Defendant's supervisory role and claim that these supervisors allegedly communicated together in person and knew that the installation was a violation of Plaintiffs' rights to privacy, but still decided to allow the filming to occur. We may draw the reasonable inference that, by virtue of their positions as supervisors, they knew about the installation of the cameras and subsequently may have known that it was a violation of Plaintiffs' rights to privacy. This is enough to plead knowledge, or at the very least, establish that it is plausible that these Defendants conducted, facilitated or condoned the conduct at issue. Thus, the Court denies Defendants' motion to dismiss Count III.")

Elsayed v. Vill. of Schaumburg, No. 14 C 8387, 2015 WL 1433071, at *4 (N.D. Ill. Mar. 26, 2015) ("Although Elsayed states many of the elements that might give rise to supervisory liability, her allegations are mere legal conclusions, not facts. . . Elsayed's proposed amendments to her complaint do not fix this problem. The added allegations that 'Hudak and O'Brien's superior officers ... were aware of Hudak and O'Brien's regular practice of arresting individuals without probable cause' do not add any *factual* matter to Elsayed's complaint; they merely reiterate the legal conclusions. . . Stripped of the legal conclusions, there is essentially no factual matter—which would be taken as true in this stage of the litigation—to support a § 1983 claim against Hudak and O'Brien's supervisors. The claim for 'supervisory liability' is dismissed.")

Chatman v. City of Chicago, No. 14 C 2945, 2015 WL 1090965, at *8-9 (N.D. Ill. Mar. 10, 2015) ("[T]he City argues that Plaintiff's claim is deficient because '[s]upervisory officials who are simply negligent in failing to detect and prevent a subordinate's misconduct are not culpable under § 1983 because they are not personally involved.'. . The City's recitation of the law is correct. For supervisors to be personally liable under § 1983, the supervisor must 'know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.'. . That is, a supervisor must be personally responsible for the deprivation of a constitutional right. . . But nothing prohibits Plaintiff from bringing a claim against Defendants Walsh, Holy, and Joria for direct liability and, in the alternative, for supervisory liability. . . Here, Plaintiff has alleged that these supervising Defendants were aware of, facilitated, condoned, and oversaw specific unconstitutional activities by their subordinates, including the coercing of a false confession and the withholding of exculpatory evidence. . . Accepting the well-pleaded facts as true and drawing all reasonable inferences in Plaintiff's favor, the motion to dismiss Count VII is denied as against Defendants Walsh, Holy, and Joria.")

Bentz v. Lindenberg, No. 15-CV-00121-NJR, 2015 WL 1064525, at *5 (S.D. Ill. Mar. 9, 2015) ("[I]t appears that Plaintiff's claim against these supervisory defendants stems from their involvement in the grievance process. According to the exhibits, these defendants signed off on grievance denials and appeals. This type of claim arises under the Fourteenth Amendment's Due Process Clause, not the Eighth Amendment. It is equally doomed. Prison grievance procedures are not constitutionally mandated and thus do not implicate the Due Process Clause per se. As such, the alleged mishandling of grievances 'by persons who otherwise did not cause or participate in the underlying conduct states no claim.'. . In other words, the fact that a counselor, grievance officer, or even a supervisor received a complaint about the actions of another individual does not create liability. Therefore, Plaintiff's claim against these individual defendants fails under a theory of supervisory liability rooted in the Eighth Amendment or due process violation arising from the Fourteenth Amendment.")

Hughes v. Moore, No. 14-CV-1410-MJR, 2015 WL 800172, at *4 (S.D. Ill. Feb. 25, 2015) ("[I]f a supervisory official is alleged to have directed the conduct or to have given knowing consent to the conduct which caused the constitutional violation, that defendant has sufficient personal involvement to be responsible for the violation, even though that defendant has not participated directly in the violation. . . A defendant in a supervisory capacity may then be liable for "deliberate, reckless indifference" where he or she has purposefully ignored the misconduct of his/her subordinates. . . Plaintiffs allegations fall squarely within this realm – he claims that Defendants Moore, Jennings, Dallas, and/or Freeman, as supervisors, knew about a pattern of assaults such as Plaintiff experienced, yet 'turned a blind eye' or condoned this pattern by their inaction. At the pleading stage, Plaintiff states a claim that survives review under 1915A, and he may proceed with Count 4 against Defendants Moore, Jennings, Dallas, and Freeman.")

Demouchette v. Dart, No. 09 C 6016, 2015 WL 684805, at *6-7 (N.D. Ill. Feb. 17, 2015) ("To prevail against a supervisor for deliberate indifference, an inmate still must establish personal participation. The inmate must show that the supervisor was personally involved in the deprivation of a constitutional right, and directed the conduct causing it or turned a blind eye to it. *Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir. 2001); *Thomas*, 499 F.Supp.2d at 1093. To begin with and as discussed in the background, it is not clear what role, if any, Lieutenant Hernandez had in creating or implementing the CPR policy. Lieutenant Hernandez further was not the one who signed Officer Mason's September 28, 2008 logbooks, so the record cannot show how Lieutenant Hernandez's alleged practice of ratifying inadequate cell checks contributed specifically to Demouchette's death. Even drawing all inferences in favor of Plaintiffs though, summary judgment is nonetheless warranted. The very arguments Plaintiffs raise here were rejected in *Thomas,* and this Court finds no basis to depart from the Court's analysis there. In *Thomas,* the Court granted summary judgment to supervisors who lacked knowledge of the inmate's medical condition. . . Instructive for the present case, the fact that the supervisors failed to take steps to remedy 'serious health and security risks' that contributed to the inmate's death, including cross-watching and broken monitors, was insufficient for the inmate to maintain a claim

against the supervisors where they lacked awareness of the inmate's medical condition. . . . [T]he record shows that, far from ratifying misconduct, Lieutenant Hernandez met with his staff the day following Demouchette's suicide and instructed them to be more observant and to better watch the detainees. . .The part of *Abdollahi* that Plaintiffs quote—about encouraging inadequate cell checks by failing to discipline the subordinate officers at fault, 405 F.Supp.2d at 1212—involves official capacity claims against the supervisors and thus is inapplicable here. . . Official capacity claims represent another way of pleading a *Monell* claim against an entity. *Estate of Abdollahi*, 405 F.Supp.2d at 1212. The *Monell* claims here, however, have been bifurcated . . . and the relevant claim against Lieutenant Hernandez is in his individual capacity . . . .Because Lieutenant Hernandez did not violate any constitutional right, this Court does not need to consider whether he is entitled to qualified immunity.")

Fisher v. McCallistor, No. 15-CV-00007-JPG, 2015 WL 574542, at *3 (S.D. Ill. Feb. 9, 2015) ("The complaint states an Eighth Amendment claim against Defendant McCallistor. This defendant supervised the strip search of Plaintiff in the presence of female guards on May 13, 2014 . . . . The allegations against Defendant McCallistor suggest that he not only approved of the conduct, but directed it and that the search may have been performed in a manner that was intended to harass or humiliate the inmates involved. Accordingly, Plaintiff shall be allowed to proceed with Count 1 against this defendant.")

Hilliard v. Illinois Dep't of Corr., No. 15-CV-004-MJR, 2015 WL 468691, at *2-3 (S.D. Ill. Feb. 3, 2015) ("Although the S.O.R.T. Team Commander and the Warden may have held supervisory authority over the two John Doe S.O.R.T. Team Officers, this is not enough to hold them liable for the unconstitutional actions of their subordinates. The doctrine of *respondeat superior* (supervisory liability) is not applicable to § 1983 actions. . . The facts do not suggest that either the Defendant S.O.R.T. Team Commander or Defendant Luth was 'personally responsible for the deprivation of a constitutional right.'. . Accordingly, the Defendant S.O.R.T. Team Commander shall be dismissed from Count 1 with prejudice. As noted, Defendant Luth had no personal involvement in the excessive force incidents. Further, if he indeed received Plaintiff's letter or grievance over the incident, his role in reviewing such a complaint does not impose liability on him. . . However, Defendant Luth shall remain in the action for two reasons. First, Defendant Luth is an appropriate party to respond to Plaintiff's discovery requests regarding the identities of the two John Doe S.O.R.T. Team Officer Defendants who assaulted him on August 23, 2014. . . Secondly, because Plaintiff is seeking injunctive relief, Defendant Luth shall remain in the action for the purpose of implementing any injunctive relief to which Plaintiff may ultimately be entitled if he should prevail.")

Sanders v. City of Chicago Heights, No. 13 C 0221, 2014 WL 5801181, at *4 (N.D. Ill. Nov. 7, 2014) ("In Count VII of the First Amended Complaint, Plaintiff brings a separate supervisory liability claim. Although § 1983 does not authorize a separate, cognizable claim for supervisory liability, § 1983 does create liability for a defendant's personal acts, conduct, or decisions. . . Put differently, for supervisors to be personally liable, the supervisor must 'know about the conduct

and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see.'. . In short, a supervisor must be personally responsible for the deprivation of a constitutional right. . . Here, Plaintiff alleges that federal prosecutors prosecuted Defendant Mangialardi and a number of other Chicago Heights Police Officers for racketeering and witness tampering just prior to the incident underlying this lawsuit. . . Similarly, Plaintiff maintains that the Chicago Heights Police Department's misconduct was so widespread that the Mayor enlisted a retired Supreme Court of Illinois Justice to investigate the department. . . Plaintiff further explains that due to the systemic corruption in Chicago Heights, six police officers and fifteen public officials were convicted and sentenced. . . Accepting the well-pleaded facts as true and drawing all reasonable inferences in Plaintiff's favor, he has sufficiently alleged that after the Chicago Heights police officers were indicted and convicted– thereby putting supervisors on notice of the misconduct at issue–the misconduct in the Chicago Heights Police Department nevertheless continued. Moreover, the corruption charges for which Defendant Mangliardi and a number of other Chicago Heights Police Officers were prosecuted, including witness tampering, are similar, in part, to the allegations in Plaintiff's First Amended Complaint. Under the circumstances, Plaintiff has sufficiently alleged supervisor liability. The Court therefore grants Defendant Officers' motion to dismiss Plaintiff's supervisory liability claim in Count VII as a stand alone claim with the caveat that Plaintiff has sufficiently alleged supervisory liability as to his constitutional claims.")

Shesler v. Sanders, No. 13-CV-394-JDP, 2014 WL 5795486, at *10-11 (W.D. Wis. Nov. 6, 2014) ("I am reluctant to extend *Estate of Phillips* to a claim against an individual defendant because it stands to reason that a supervisor who intentionally allows her staff to act with gross negligence could in fact be acting with deliberate indifference herself. But that would be a very difficult claim to prove, and the undisputed facts do not support it here. In a recent decision, the Supreme Court rejected the plaintiff's argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. . .
In the present case, plaintiff presents evidence showing that, at most, defendant Sanders was not actively involved in ascertaining whether DOC staff were properly reviewing prisoners' sentences. Plaintiff comes nowhere close to showing that Sanders *wanted* her staff to negligently review sentences. As with the other defendants, Sanders was at most negligent in her oversight of the sentence review process, but this is not sufficient to sustain an Eighth Amendment claim. Therefore I will grant defendants' motion for summary judgment on the supervisory claim against Sanders.")

Smith v. Hartmann, 12-CV-09915, 2014 WL 4912010, *3, *4 (N.D. Ill. Sept. 30, 2014) ("Plaintiff's SAC offers several theories of Mayor Rockingham's liability in his individual capacity . . . At a minimum, the theory relating to his supervision of Officer Bogdala states a claim under Rule 12(b)(6). The allegations are as follows. Prior to Plaintiff's arrest, Mayor Rockingham learned of two or more incidents when Officer Bogdala used excessive force. He learned of Sharon Jackson's complaint accusing Officer Bogdala of punching her in the face and breaking her eye socket. . . He also learned from Assistant Chief of Operations Crystal Phillips that Officer Bogdala had previously used excessive force. . .Because of this record of misconduct, the Chief of Police

recommended firing him. When Mayor Rockingham learned of this recommendation, he intervened, 'recommend[ing] and inform[ing] Chief of Police Newsome not to fire' him. . . The Chief of Police refrained from firing Officer Bogdala '[a]s a result of Mayor Rockingham's recommendation.'. . Instead, he gave Officer Bogdala a 'last chance' three-year employment agreement. During the course of this continued employment, Officer Bogdala allegedly violated Plaintiff's constitutional rights. The SAC paints a picture that the FAC does not–one that is sufficient to state a claim under Rule 12(b)(6). According to the FAC, Mayor Rockingham facilitated a policy of police brutality; then two officers in the police force happened to use excessive force against Plaintiff. As the Court's prior opinion explained, this theory lacked personal involvement and a causal connection. According to the SAC, however, Rockingham knew of the particular officer who injured Plaintiff–Officer Bogdala. He knew that this officer had a record of excessive force, he knew that the Chief of Police recommended firing him because of this record, and he put a stop to the firing process. As a result of the mayor's intervention, Officer Bogdala participated in an arrest allegedly involving a constitutional injury to Plaintiff. This new theory of supervisory liability in the SAC sufficiently alleges that Mayor Rockingham was 'personally responsible for the deprivation of the constitutional right.' . . It alleges that Mayor Rockingham knew about Officer Bogdala's prior misconduct and that he facilitated it, approved it and condoned it by preventing him from being fired. . . Defendants argue that the SAC fails to 'substantiate that Mayor Rockingham condoned similar conduct to that which is alleged in the *SAC*.'. . The SAC alleges that Officer Bogdala caused Plaintiff a constitutional injury by failing to intervene, not by using excessive force himself. Yet, according to Defendants, the SAC does not provide that Mayor Rockingham had previous knowledge of Officer Bogdala failing to intervene in other incidents. 'Therefore, the Mayor's actions could not have conveyed to Officer Bogdala "that similar actions would be of no consequence in the future."'. .First, drawing all reasonable inferences in Plaintiff's favor, the Court infers that, as a practical reality, if Mayor Rockingham approved of Officer Bogdala's prior face-smashing incident with Sharon Jackson, his approval would apply equally (if not more so) to a failure to intervene–an omission being arguably less offensive than an overt act. Second, Defendant's argument, which cites no supporting case law, misses a point made clear in Seventh Circuit precedent–that an affirmative act of excessive force and a failure to intervene in another officer's use of excessive force both violate § 1983. . . To hold otherwise would insulate non-intervening officers from liability for 'reasonably foreseeable consequences of the neglect of their duty to enforce the laws and preserve the peace.'. . Defendant's attempt to formalistically limit the scope of Mayor Rockingham's approval to Officer Bogdala's misfeasance, as opposed to nonfeasance, contradicts the thrust of the case law under § 1983. At the pleading stage, Plaintiff has alleged enough factual details to support an inference that, as mayor, Rockingham knew that the law does not distinguish between misfeasance and nonfeasance and that, when he allegedly approved of Officer Bogdala's past § 1983 violations, he effectively condoned future § 1983 violations, regardless of whether those involved misfeasance or nonfeasance.")

Wilbon v. Plovanich, 67 F.Supp.3d 927, ___ & n.16 (N.D. Ill. 2014) ("Nothing prohibits Plaintiffs from bringing a claim against McDermott for direct, personal liability and, in the alternative, a

claim for supervisory liability. . . . To the extent that Defendants are arguing that Plaintiffs may not sue both McDermott and also the City of Chicago under a theory of supervisory liability, that argument is also misplaced. The focus of the supervisory liability is McDermott's own personal knowledge of the events that affected Plaintiffs and whether she was personally responsible for those events. The City's liability, however, is not limited to McDermott's personal knowledge and participation, but rather whether Plaintiffs' deprivation is caused by an express policy, a widespread practice or custom, or the deliberate act of a policymaking official. . . McDermott is not the policymaking official of the City 'so any liability of the City based on the act of a policymaking official would be distinct from [McDermott's] liability.'. . . Having said that, summary judgment as to McDermott's supervisory liability is improper because Plaintiffs have not established whether there was probable cause to arrest Plaintiffs and thus whether there was any constitutional violation for McDermott to facilitate, approve, or condone. . . The conflicting evidence creates a jury question with respect to whether McDermott is liable under a theory of supervisory liability.")

Estate of Heenan v. City of Madison, 13-CV-606-WMC, 2014 WL 3778574, *3-*5 (W.D. Wis. July 30, 2014) ("[P]laintiff argues that defendants mistakenly rely on Eighth Amendment deliberate indifference cases, requiring a subjective notice standard, whereas plaintiff here asserts a Fourth Amendment failure to train or supervise claim where the 'deliberate indifference standard is objective,' requiring only 'obvious or constructive notice.'. . In support of its view of the law, plaintiff cites *Farmer v. Brennan,* 511 U.S. 825, 841, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), but misreads that case. In *Farmer,* the Supreme Court described the test for *municipal* liability for deliberate indifference as described in *Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), but rejected applying an 'obviousness' test with respect to the individual liability of prison officials. . . . The distinction being drawn in *Farmer* is *not* between a failure to train claim under the Fourth Amendment as compared to the Eighth Amendment—as plaintiff argues—but rather between a claim against a municipality and a claim against an official of the municipality in his or her individual capacity. Plaintiff's failure to recognize this distinction is troubling given that *all* of the other cases cited in support of applying an 'obviousness' or 'constructive knowledge' test involve claims against a municipality or a government official in his official capacity. . . While the court understands a different standard applies in a Fourth Amendment claim (objective reasonableness) as compared to an Eighth Amendment claim (deliberate indifference), both apply a subjective standard, at least requiring knowledge for a supervisory official to be liable. . . *See, e.g., Backes v. Vill. of Peoria Heights, Ill.,* 662 F.3d 866, 870 (7th Cir.2011) (describing supervisory liability test as requiring knowledge or reckless indifference in case involving an underlying Fourth Amendment excessive force claim). Recently, in a less discussed portion of *Ashcroft v. Iqbal* . . . the Supreme Court considered a supervisory liability claim premised on intentional discrimination under the First and Fifth Amendments. . . After reiterating the Court's long-standing rejection of supervisory liability premised on a theory of *respondeat superior,* the Court held that the plaintiff in that case failed to state a claim against government officials, rejecting the plaintiff's argument for 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.'. .

Instead, the Court held that 'each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.'. . As such, '*purpose* rather than knowledge' is required to impose so-called 'supervisory liability.'. .Courts initially grappled with the import of the Supreme Court's holding in *Iqbal* with respect to supervisory liability claims, including the Seventh Circuit. . . . In an *en banc* opinion, however, the Seventh Circuit went to great lengths to clarify any uncertainty: '*Iqbal* held that knowledge of a subordinates' misconduct is not enough for liability. The supervisor must want the forbidden outcome to occur.' *Vance v. Rumsfeld,* 701 F.3d 193, 204 (7th Cir.2011) (*en banc*). . . Judge Easterbrook, writing for the majority, went on to explain that '[d]eliberate indifference to a known risk is a form of intent,' but 'to show *scienter* by the deliberate-indifference route, a plaintiff must demonstrate that the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm.'. . As a result, the majority held that for the substantive due process claim at stake in *Vance* to proceed, the plaintiffs 'would need to allege that Rumsfeld knew of a substantial risk to security contractors' employees, and ignored that risk because he wanted plaintiffs (or similarly situated persons) to be harmed.'. . The court, therefore, reversed the district court's denial of defendant's motion to dismiss because the complaint did not allege that Rumsfeld wanted plaintiffs to be harmed 'and could not plausibly do so.'. . Here, plaintiff only alleges that Chief Nobel Wray had knowledge of Heimsness's prior violent acts in 2001 and 2006, but the complaint understandably stops short of alleging that Wray had actual knowledge of the risk Heimsness would shoot and kill an innocent citizen necessary for finding Wray *wanted* Heenan or someone similarly situated to be harmed. . . While Heimsness allegedly sent disturbing communications in the months preceding Heenan's shooting via the mobile command center that threatened—or at least expressed a desire—to shoot people or be otherwise violent, plaintiff does not allege that these messages reached Wray, nor is it reasonable to infer from the complaint that they did. At most, the complaint alleges that Wray was generally aware of Heimsness's violent tendencies, and that is not enough to maintain a claim against him in his individual capacity. Rather, the proper outlet for such a claim is the one already directed against the City. *See Sanville v. McCaughtry,* 266 F.3d 724, 739 (7th Cir.2011) ("Failure to train claims are usually maintained against municipalities, not against individuals."). Accordingly, the court will grant defendants' motion and will dismiss Noble Wray as a defendant in this action.")

Boyce v. Johnson, 13 C 6832, 2014 WL 3558762, *5 (N.D. Ill. July 17, 2014) ("Boyce wrote letters to Godinez [Director of Illinois Dep't of Corrections] complaining about the socket, the window, and the mattress. . . A supervisory prison official may not turn a blind eye to alleged constitutional violations. . . Thus, an allegation that a supervisory official knew about an alleged constitutional violation and failed to act is sufficient to state a claim for deliberate indifference. . . Boyce's letters to Godinez placed Godinez on notice regarding the conditions in Boyce's cell, and Godinez did not take action based on those letters. Accordingly, Godinez's request to dismiss the Eighth Amendment claim against him is denied.")

Smith v. Hartmann, No. 12–cv–09915, 2014 WL 2134574, *4-*6 (N.D. Ill. May 22, 2014) ("Although *Stoneking* (or at least *Grindle's* articulation of it) is viable law in the Seventh Circuit,

the Court agrees with Defendants that our court of appeals has not had occasion to consider whether the theory of liability recognized in *Stoneking* is cognizable in a case of police brutality. Therefore, Plaintiff is attempting to assert a new theory of excessive force liability here. The Seventh Circuit acknowledged the applicability of *Stoneking* in cases premised on due process violations stemming from invasions of one's personal security through sexual abuse. By contrast, Plaintiff's claim against Defendants here is premised on a violation of his Fourth Amendment rights stemming from allegations of excessive force during an arrest, and Plaintiff is seeking to hold supervisors liable on what is essentially a *Monell*-type theory of liability. So the allegations are different in kind—premised on a different constitutional violation, in an entirely different context, and where a plaintiff can already hold the city responsible for unconstitutional policies/practices/customs that caused him harm. For that reason, the Court is reticent to break ground and proclaim, as Plaintiff urges, that supervisors in a police department, all the way up through a city's mayor, can be held liable for creating a 'climate' that enabled an officer to inflict harm on an arrestee, particularly when our court of appeals has not done so. However, the Court need not determine whether *Stoneking* has relevance in the police brutality context (or whether qualified immunity would shield either or both Defendants from liability if it did), because that answer would not affect the Court's ultimate determination on this motion. As mentioned, *Stoneking* does not disturb the well-settled principle in the Seventh Circuit that a supervisor cannot be held liable for a subordinate's unconstitutional conduct unless a plaintiff demonstrates that the supervisor 'kn[e]w about the conduct it, facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what they might see.'. . Here, for the purpose of surviving a motion to dismiss, Plaintiff has done that with respect to Police Chief Newsome. Plaintiff alleges that on September 4, 2011—just three months prior to the incident about which Plaintiff complains—Officer Hartmann 'viciously slammed' a suspect's face into the ground and into the side of his squad car. . . The victim filed a citizen's complaint the following week, but Police Chief Newsome ensured that the complaint bypassed the internal affairs protocol, and came straight to his desk. . . Because it did, Newsome was able to ignore the complaint and allow Officer Hartmann to go undisciplined. . . Drawing all reasonable inferences in Plaintiff's favor, the FAC suggests that Newsome did this to ensure that Hartmann would not retaliate and expose Newsome's embezzlement. . . Taking the facts in the light most favorable to Plaintiff, Newsome condoned Hartmann's practice of abusive treatment (*i.e.*, viciously slamming the faces of arrestees) and, by covering up the citizen's complaint, signaled to Hartmann that similar actions would be of no consequence in the future. In that sense, it reasonably can be said that Newsome was 'personally responsible for the deprivation of the constitutional right' of which Plaintiff complains—Hartmann's smashing of *Plaintiff's* face just a few months later. . . Irrespective of some amorphous custom, practice, or policy that Plaintiff alleges that Newsome instituted (and which, Plaintiff argues, supports the application of *Stoneking* here), Newsome, at the very least, turned a blind eye to the precise act complained of by Plaintiff, thereby conveying to Hartmann that he could perform this act with impunity. Newsome therefore facilitated the alleged excessive force inflicted on Plaintiff by Hartmann, and, as such, Plaintiff has stated a Section 1983 claim against Newsome. . . .Plaintiff, however, has not alleged personal involvement with respect to Mayor Rockingham. Plaintiff contends that Rockingham failed to implement the recommendations commissioned by the NAACP and memorialized in the

'Memorandum of Understanding Between the City of North Chicago and Minority Coalition,' despite his knowledge of a 'practice and pattern among the City of North Chicago's police officers ... of using excessive force.'. . Plaintiff also alleges that Rockingham, along with Newsome, 'prevented officers from reporting misconduct by violating the officers' confidences when they reported this sensitive information.'. . According to Plaintiff, these acts demonstrate that Rockingham 'established and maintained [a] policy of allowing the use of excessive force during the arrest and/or detention of accused individuals with deliberate and reckless indifference to the consequences.'. . This merely is a *Monell* claim dressed up in *Stoneking* language. . .In *Grindle,* the Seventh Circuit concluded that the Court's prior references to *Stoneking* precluded the defendants from availing themselves of the protections of qualified immunity. . . But *Grindle* did not dispense with the requirement that, for supervisory liability to attach, a defendant supervisor must have been *personally involved* in the constitutional violation. Mayor Rockingham's alleged failure to institute sweeping corrective measures in the department, such as those promulgated at the behest of the NAACP, amounts to mere inaction, not personal involvement. And the causal connection between Mayor Rockingham's alleged effort to discourage officers from reporting their colleagues by breaching confidences and Hartmann's alleged abuse of Plaintiff is too attenuated for the Court to conclude that Rockingham was 'personally involved' in the shattering of Plaintiff's orbital. Plaintiff's argument would have to be that Hartmann abused Plaintiff during his arrest, because he believed that Bogdala (his fellow arresting officer on the scene) would not report his misconduct thanks to Mayor Rockingham's general discouragement of such a practice. Whereas Plaintiff alleges that Police Chief Newsome knew of, condoned, and facilitated Hartmann's abuse of Plaintiff by keeping secret a recent, nearly-identical allegation, Plaintiff's complaint does not even state that Mayor Rockingham was aware of Hartmann's prior face-smashing incident (or that he even knew that Hartmann was a member of the city's police force, for that matter). Accordingly, the Court concludes that Rockingham's actions were too far removed from Plaintiff's incident to say that he was personally involved, and Plaintiff's allegations concerning unconstitutional policies or customs instituted by the Mayor of North Chicago must be brought as *Monell* claims against the city itself (which, the Court notes, Plaintiff has appropriately done in Count VI of his FAC). *Stoneking*, even if it did apply in the excessive force context, would not change this result. As mentioned above, the Third Circuit concluded that qualified immunity did not shield from liability the defendant principal—who personally received multiple complaints of sexual misconduct from female students, kept them hidden in secret files, and announced a corrective 'policy' to the band director whereby he forbade him from having one-on-one contact with female students. . . . However, the Court determined that the superintendent—who was told of some of the complaints, but took no part in the cover up—could not be held liable, because his behavior did not amount to an affirmative act that resulted in the plaintiff's abuse. . . Here, Mayor Rockingham is more like the superintendent, who at most was aware of complaints of police abuse (by way of lawsuits against the city, if nothing else), than the principal, who actively attempted to hide complaints in a secret file. Although Plaintiff's FAC makes the conclusory allegation that Rockingham and Newsome 'approved and condoned the City of North Chicago's police officers using excessive force' by 'actively concealing police misconduct,' the actual facts that Plaintiff alleges do not support this conclusion with respect to Mayor Rockingham. Again, the FAC is

devoid of allegations that Mayor Rockingham covered up (or even knew) of Officer Hartmann's previous face-smashing incident. Therefore, the allegation that Rockingham covered up incidents of police misconduct strikes the Court as a 'formulaic recitation' of the language from the case law, and one that does not give Defendant 'fair notice of what the * * * claim is and the grounds upon which it rests.'. . In short, even under a *Stoneking* theory of liability, Plaintiff would fail to state a claim that Rockingham caused his injuries. That said, if Plaintiff is in possession of additional factual allegations with respect to Mayor Rockingham that he believes may overcome the deficiencies identified by the Court, he may amend his first amended complaint within 28 days.")

Payne v. City of Chicago, No. 13 C 8643, 2014 WL 585310, *1, *2 (N.D. Ill. Feb. 14, 2014) ("[S]ome lawyers appear to believe that because the filing fee for a federal action is a flat $400 irrespective of the number of defendants sought to be placed in its crosshairs, that provides a license to name anyone on that side of the 'v.' sign even though such inclusion may be clearly wrong. And here, targeting Superintendent McCarthy *is* clearly wrong. For one thing, naming him in his official capacity is at odds with established Supreme Court authority (*Kentucky v. Graham,* 473 U.S. 159, 165 (1985)), which really treats such a claim as one brought against the City of Chicago—which is already named as a defendant itself. Accordingly that 'official capacity' allegation cannot stand. Even more fundamentally, nothing in the Complaint asserts personal involvement on Superintendent McCarthy's part. Complaint ¶ 7 alleges his 'asserted responsibility for training, supervision, and conduct' of the Officer defendants, but the nature of the conduct with which those Officers are charged is not such as to create a causal link between any such responsibility and their actions.There is really no need to elaborate—or, indeed, to call for a response by Payne's counsel. Superintendent McCarthy's motion for his dismissal as a defendant is granted.")

Bohannon v. City of Milwaukee, 998 F.Supp.2d 736, 748 (E.D. Wis. 2014) ("[T]he plaintiff alleges only the conclusory statements that Flynn and Mucha knew or should have known about the officers' pattern of engaging in improper searches (Compl.¶ 64) and 'facilitated, approved, condoned, turned a blind eye to, and/or purposefully ignored' that misconduct (Compl.¶ 65). Those limited and conclusory allegations, by themselves, would not be sufficient to raise the plaintiff's supervisory liability claim above the speculative level; however, in conjunction with the other facts alleged in the complaint, the plaintiff clears that bar. As discussed more fully above, the plaintiff claims that the City and MPD received many complaints relating to improper searches prior to the incident in question. . . The plaintiff also asserts that the City and MPD failed to take any action to address those complaints. . . The defendants point out that, otherwise, 'there are no allegations that support plaintiff's assertion that Chief Flynn or Sergeant Mucha was aware of a pattern of unlawful searches being committed by [defendant officers] or other Fifth District officers.'. . Be that as it may, the Court may draw the reasonable inference that, by virtue of their positions as supervisors, Flynn and Mucha both received reports of the many illegal-search complaints being lodged with the City and MPD. . .Thus, the Court finds that the plaintiff has alleged sufficient factual material to have plausibly pled Flynn's and Mucha's knowledge; he has also adequately

pled that, at the very least, those individuals turned a blind eye to the complaints they were receiving. . . Accordingly, the plaintiff's supervisory liability claim against Flynn and Mucha is sufficiently pled under *Iqbal,* 556 U.S. at 678. The Court is, therefore, obliged to deny the defendants' motion for judgment on the pleadings in this regard.")

Hoskin v. City of Milwaukee, 994 F.Supp.2d 972, 983 & n.4, 984 (E.D. Wis. 2014) ("Supervisors 'need not participate directly in the deprivation [of civil rights] for liability to follow under § 1983.'. . Indeed, so long as the supervisors 'know about the conduct and facilitate it, condone it, or turn a blind eye for fear of what they might see,' they may be held liable. . . In other words, supervisors may be held liable under § 1983 for the actions of their subordinates if they acted 'either knowingly or with deliberate indifference.'. . The *Backes* court reached this conclusion in relation to several police supervisors who had been sued in their individual capacity. . . Meanwhile, the plaintiff sued Flynn in both his individual and official capacities. . . The defendants argue that there is some difference in the standard applied to individual-and official-capacity claims, but does not cite to any case law to support that contention. . . The Seventh Circuit applied the standard described in *Backes* to defendants sued in their official capacity in the case of *Mathews v. City of East St. Louis,* without noting any distinction between the two. . . The Court will take the same path and will treat both the individual-and official-capacity claims against Flynn as one and the same. The Court will also ignore the defendants' argument that Hudson and Mucha cannot be held liable under a *Monell* theory because they are not official policymakers (Br. in Supp. at 16–18); the plaintiffs acknowledge that they do not raise *Monell* claims against those defendants (Pl.'s Resp. at 12 n. 1), so this argument is irrelevant. The plaintiff's allegations on the supervisory liability issue do not go very far beyond those discussed above with relation to his *Monell* claim. . . In fact, aside from his incorporation of facts (Compl.¶ 62) and statement that he suffered damages (Compl.¶ 65), the plaintiff alleges only the conclusory statements that Flynn, Hudson, and Mucha knew or should have known about the officers' pattern of engaging in improper searches (Compl.¶ 63) and 'facilitated, approved, condoned, turned a blind eye to, and/or purposefully ignored' that misconduct (Compl.¶ 64). Those limited and conclusory allegations, by themselves, would not be sufficient to raise the plaintiff's supervisory liability claim above the speculative level; however, in conjunction with the other facts alleged in the complaint, the plaintiff clears that bar. As discussed more fully above, the plaintiff claims that the City and MPD received many complaints relating to improper searches prior to the incident in question. . . The plaintiff also asserts that the City and MPD failed to take any action to address those complaints. . . The defendants point out that, otherwise, 'there are no allegations that support plaintiff's assertion that Chief Flynn, Captain Hudson, or Sergeant Mucha were aware of a pattern of unlawful searches being committed by Vagnini and other Fifth District officers.'. . Be that as it may, the Court may draw the reasonable inference that, by virtue of their positions as supervisors, Flynn, Hudson, and Mucha, all received reports of the many illegal-search complaints being lodged with the City and MPD. . . Thus, the Court finds that the plaintiff has alleged sufficient factual material to have plausibly pled Flynn's, Hudson's, and Mucha's knowledge; he has also adequately pled that, at the very least, those individuals turned a blind eye to the complaints they were receiving. . . Accordingly, the plaintiff's supervisory liability claim against Flynn, Hudson, and Mucha, is sufficiently pled under *Iqbal,* 556

U.S. at 678. The Court is, therefore, obliged to deny the defendants' motion for judgment on the pleadings in this regard.")

See also ***Freeman v. City of Milwaukee,*** 994 F.Supp.2d 957 (E.D. Wis. 2014) (same); ***Venable v. City of Milwaukee,*** 2014 WL 197917 (E.D. Wis. Jan. 15, 2014) (same)

Potts v. Moreci, 12 F.Supp.3d 1065, (N.D. Ill. Nov. 7, 2013) ("In *Antonelli*, the Seventh Circuit explained that the Sheriff of Cook County should not be held liable in his individual capacity for 'clearly localized' claims brought by inmates where he had no knowledge of the facts underlying claims. . . It explained that the Sheriff and others in high-level positions are 'far from most of the day-to-day decisions that may have affected inmates.' . . Under the Seventh Circuit's distinction between 'clearly localized, non-systemic violations' and 'potentially systemic' violations, allegations of the former should be dismissed as to the Sheriff. . . The court held that the Sheriff could be held liable in his individual capacity for those potentially systemic claims that did not solely involve the plaintiff. . . Thus, while high level officials normally cannot be held liable for localized violations, they 'are expected to have personal responsibility for systemic conditions.'. . For example, in *Byron v. Dart*, 825 F.Supp.2d 958, 963–64 (N.D.Ill.2011), the court held that the plaintiff had adequately alleged that jail officials were liable under a failure to protect claim after the plaintiff had been attacked in his jail cell because the plaintiff alleged the defendants 'knew there was a widespread problem of faulty cell doors.' *Id.* at 964.")

Robinson v. Leonard-Dent, No. 3:12CV417–PPS, 2013 WL 5701067, *3 (N.D. Ind. Oct. 18, 2013) ("[E]ven in the *postIqbal* case that defendants suggest has tightened the rules on supervisory liability, the Seventh Circuit held that 'turning a blind eye to and affirmatively covering up' sexual abuse by a subordinate can support personal capacity liability because such conduct may be found to demonstrate the requisite discriminatory intent. *T.E. v. Grindle*, 599 F.3d 583, 588, 590 (7th Cir.2010). Robinson's report to Morton, Morton's then contacting Dent, and the allegation that HASB began a retaliatory investigation rather than address Dent's harassment of Robinson, are sufficient at the pleading stage to support the possibility that the factfinder may ultimately be persuaded that Morton personally had the requisite retaliatory (and therefore discriminatory) intent and participated in the retaliation. . . .The Seventh Circuit continues to acknowledge that one with authority to take action who stands 'idly by' in response to complaints of discrimination may be found to have discriminatory animus. . . The requisite personal responsibility for the constitutional deprivation can take several forms: the supervisor may ' "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see."'. . Dent's successor as Executive Director, George Byers, was on the scene in time to have played a role in (or turned a blind eye to) the retaliatory investigation of AMAAB that deprived Robinson of further business opportunities with the HASB. Morton's fellow Board members may be shown to have had knowledge of Dent's harassing behavior and/or the complaints of Robinson or others and stood idly by, failing to intervene to halt the harassment and facilitating or condoning the allegedly retaliatory investigation afterward. Robinson alleges that Human Resources Director McDonald 'knew of and witnessed' Dent's harassment of Robinson 'but did nothing to stop it.'. . Maintenance

Manager Fleckner allegedly also 'knew of the harassment and did nothing to prevent it.'. . Further challenges to the viability of Count I against each of these individual defendants must await summary judgment.")

Rose v. Justus, No. 13–cv–00810–MJR, 2013 WL 5488451, *2 (S.D. Ill. Oct. 1, 2013) ("The complaint sufficiently alleges personal involvement by Defendants Officer Mike, Levy Bridges, Sgt. Nickol and Sgt. Blackburn, in that each is personally tied to an alleged constitutional violation. There is no such personal involvement alleged on the part of Sheriff Justus. However, there are allegations that it was Justus's policy for grievances and complaints about the conditions of confinement to be ignored–the 'ostrich' approach. At this juncture that is sufficient to state a claim of individual liability as to Justus.")

Miller v. Ryker, No. 11–cv–436–MJR, 2012 WL 3705174, *7 (S.D. Ill. Aug. 27, 2012) ("As to Warden Hodges, Plaintiff's complaint only alleges in one paragraph that he asked to speak with Hodges 'about his serious medical condition' as he passed Hodges on his way to a class. The Court does not find that this allegation is sufficient to have given Hodges actual knowledge of a substantial risk of harm, and supervisory liability does not apply to § 1983 actions, *Burks v. Raemisch*, 555 F.3d 592, 596 (7th Cir.2009); *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir.2001). Plaintiff's claim against Hodges is dismissed without prejudice.")

Thomas v. Illinois, No. 11–cv–571–MJR, 2012 WL 3263587, *11, *12 (S.D. Ill. Aug. 9, 2012) ("Plaintiff names Defendants Michael Puisis (Medical Director of the Illinois Department of Corrections—"IDOC"), Michael Randle (IDOC Director), Derwin Ryker (Lawrence Warden), and Phillip Martin (Lawrence Medical Administrator) in the complaint. However, he does not identify any actions taken by any of these individuals that caused the constitutional deprivations giving rise to this lawsuit. Instead, he appears to assert claims against them based on their role as administrators with supervisory authority over the Defendants who caused the alleged deprivations. For example, in the case of Defendant Martin, Plaintiff claims he 'gave nursing staff [Defendants Brooks and Morris] the assumed authority to circumvent ... rules, policies, training' in order to retaliate and harass Plaintiff (Doc. 1, p. 24). In essence, Plaintiff seeks to impose supervisory liability. Contrary to the belief of many prisoner civil rights litigants, there is no supervisory liability in this type of lawsuit.")

Young v. Wexford Health Sources, No. 10 C 8220, 2012 WL 621358, at *5 (N.D. Ill. Feb. 14, 2012) ("Plaintiff contends that he is not being seen by health care providers with any regularity and that, at least at the time he filed suit, his medical condition—as well as the bleeding and severe chronic pain associated with that ailment—went largely undiagnosed and 'virtually untreated.' Plaintiff alleges that because Warden Hardy denied his emergency medical grievances, as well as appointment cancellations due to lockdowns and missing paperwork, Plaintiff went unseen by medical staff for six months. Where, as here, Plaintiff informed correctional officials that he was being denied access to the health care unit, those officials may be liable under 42 U.S.C. § 1983

for their purported inaction. . . Plaintiff's Eighth Amendment claims against Defendants Hardy and Harris will proceed.")

Jones v. Feinerman, No. 09 C 03916, 2011 WL 4501405, at *5 (N.D. Ill. Sept. 28, 2011) ("It is not clear what impact, if any, *Iqbal* has on the line of cases that hold supervisors may be held liable if they 'facilitated, approved, condoned, or turned a blind eye' to constitutional violations. *E .g., Trentadue v. Redmon,* 619 F.3d 648, 652 (7th Cir.2010). Perhaps this is all just a way of saying what the Seventh Circuit has previously held, that 'a supervising prison official cannot incur § 1983 liability unless that officer is shown to be personally responsible for a deprivation of a constitutional right.' *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir.1996); *see also Vinning-El v. Evans*, __ F.3d __, 2011 WL 4336661, at *1 (7th Cir., Sep.16, 2011) ("Section 1983 does not authorize 'supervisory liability.'") (citation omitted). Or perhaps *Iqbal* has set a more demanding standard than previously set for supervisors to be held responsible for conduct in which they did not personally engage. In this case, however, there is no need to reconcile the standards: here, Jones has not alleged any personal conduct or responsibility of Osafo at all, other than the conclusory allegations that address 'Defendants' as a group. . . For Osafo to be personally liable, the complaint must allege some causal connection between Osafo personally and the violation of Jones's constitutional rights.")

Tillman v. Burge, 813 F.Supp.2d 946, 972-75 & n.14 (N.D. Ill. 2011) ("Plaintiff has alleged that Burge was present at Area 2 during his interrogation, that the physical evidence of his torture was apparent to those at Area 2, and that Burge 'encourag[ed], condon[ed] and permitt[ed]' his torture. . . Though more details concerning Burge's involvement would be useful, the court concludes these allegations are sufficient to support the inference that Burge was indeed personally involved in the deprivation of Plaintiff's constitutional rights. . . . In *Ashcroft v. Iqbal, . . .*the Supreme Court made clear that the bar on *respondeat superior* liability applies in the *Bivens* context just as it does in the § 1983 context. In this court's view, that case plows no new ground as to the allegations alleged here-it merely confirms what the existing § 1983 case law, including *Steidl*, has long held-'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . Plaintiff does also allege that Burge 'supervised, encouraged, sanctioned, condoned and ratified brutality and torture by other detectives and supervisors'. . . , but those allegations are in addition to allegations that Burge was personally involved in the conduct underlying Plaintiff's claims. . . . Finally, Plaintiff makes claims against Daley and Martin for their alleged involvement in his coercive interrogation. Plaintiff alleges that the repeated failures of Martin and Daley to intervene and prevent torture at Area 2, despite their knowledge that it was occurring, proximately caused Plaintiff's torture. . . . With respect to his due process claims, Plaintiff has not alleged that Daley or Martin were personally involved in his torture, an allegation necessary to establish their liability under § 1983. . . .As explained earlier, for a supervisor to be liable for a constitutional deprivation, he 'must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see.'. . . Plaintiff asserts that the Tenth Circuit has held that § 1983 liability can attach where '[a] defendant supervisor's promulgation, creation, implementation, or utilization of a policy ... caused

a deprivation of plaintiff's rights.' Notably, the case he cites, *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir.2010) itself recognizes that *Iqbal* has called this holding into question, and that only 'defendants whose own individual actions cause a constitutional deprivation' face § 1983 liability. In any event, authority in this Circuit requires a showing that a supervisor's actions be tied to the specific constitutional violation at issue in order for the supervisor to be liable. . . . [T]oo many variables stand in the way of a determination that there is a causal connection between Daley and Martin's failure to investigate and the deprivation of Plaintiff's rights. The many years it has taken for the allegations of torture at Area 2 to come to light bear this out-the notion that the wrongdoing would have stopped once an inquiry was launched is simply too tenuous. *Iqbal* has reaffirmed the Supreme Court's unwillingness to extend supervisory liability for constitutional violations in the civil context. Absent any controlling authority for a finding of liability under a 'failure to investigate' theory, the court sustains these Defendants' objections, and grants Daley and Martin's motions to dismiss Count IV.")

Kitchen v. Burge, 781 F.Supp.2d 721, 736 (N.D. Ill. 2011) ("The parties dispute at length whether 'supervisory liability' is allowed under § 1983. On inspection, however, the dispute is merely verbal. The Seventh Circuit has recognized liability for faulty supervision. [citing cases] Here, Kitchen is not seeking to hold Martin vicariously liable for others' actions; he claims that Martin is primarily liable for failing to stop others from violating his constitutional rights. . . His liability, if any, is not for the officers' actions but for his own action in failing to stop them. Accordingly, the municipal defendants' motion to dismiss Count IV is denied.")

Rojas v. Town of Cicero, No. 08 C 5913, 2010 WL 4065483, at *10, *11 (N.D. Ill. Oct. 14, 2010) ("As the Seventh Circuit explained in *T.E. v. Grindle*, 599 F.3d 583 (7th Cir.2010), . . . after the Supreme Court's decision in *Ashcroft v. Iqbal*, . . . 'an equal protection claim against a supervisor requires a showing of intentional discrimination.'. .Thus, although prior Seventh Circuit precedent 'would have previously allowed a plaintiff to recover from a supervisor based on that supervisor's "deliberate indifference" toward a subordinate's purposeful discrimination,' after *Iqbal* a plaintiff must also show that the supervisor possessed the requisite discriminatory intent.'. . This same standard applies to claims under the First Amendment. . . In this case, Rojas relies on the pre- *Iqbal* standard, arguing that Dominick is liable for his 'deliberate indifference.' Specifically Rojas contends that Dominick had a 'head-deep-in-the-sand approach' and was 'unwilling to take a stand against retaliatory actions and threats made by Larry Dominick' and instead 'condoned' those actions. . . As explained in *Grindle*, however, the relevant consideration is not whether Dominick *condoned* discriminatory actions but rather whether Derek Dominick possessed the requisite discriminatory intent.").

Vetter v. Dozier, No. 06-cv-3528, 2010 WL 1333315, at *26 (N.D. Ill. Mar. 31, 2010) ("Recent Seventh Circuit case law indicates that the standards for supervisory liability in this circuit have been established for more than twenty years, and the case law suggests that qualified immunity is less likely when a defendant helps to cover up misconduct. *T.E. v. Grindle*, __ F.3d __, 2010 WL 938047, at *3, *4 (7th Cir. Mar.17, 2010) (citing *Jones*, 856 F.2d 985). In sum, if supervisors were

deliberately indifferent and caused their subordinate's misconduct, then they can be held liable under well delineated case law.").

Petrovic v. City of Chicago, No. 06 C 6111, 2010 WL 1325709, at *4, *5 (N.D. Ill. Mar. 30, 2010) ("[I]n the instant case, because the following conclusory allegations merely parrot the elements of a supervisor liability claim, the Court holds that they are not entitled to the presumption of truth:
(1) 'The Supervisory Defendants knew that the City maintained the widespread and settled policy and practice of failing to adequately train, supervise, discipline, and otherwise control its officers.' ("m.Compl. & 41(a).)
(2) 'They also knew that the maintenance of these practices would result in preventable police abuse, including the type of constitutional harm inflicted on Plaintiff.'(*Id.*)
(3) 'The Supervisory Defendants oversaw, acquiesced in, and even condoned the above-described policies and practices and refused to take steps to correct them.' (*Id.* & 41(b).)
(4) '[T]he Supervisory Defendants caused and participated in the denial of Plaintiff's constitutional rights' by failing to: (a) 'monitor police officers and groups of officers who violate civilians' constitutional rights;' (b) 'discipline police officers who violate civilians' constitutional rights;' and (c) 'implement an effective early warning system to identify police officers and groups of officers who systematically violate civilians' constitutional rights.' (*Id.*)
(5) 'With respect to the Defendant Officers in this case, the Supervisory Defendants knew that the Defendant Officers had a practice of committing misconduct similar to that alleged by Plaintiff. Yet, the Supervisory Defendants approved, assisted, condoned and/or purposely ignored the Defendant Officers' prior misconduct.' (*Id.* & 41(d).)
(6) 'As such, the Supervisory Defendants were, at all times material to this Complaint, deliberately indifferent to the rights and safety of Plaintiff.' (*Id.* & 41(e).)
(7) 'As a result of the unjustified and excessive use of force by Defendant Officers, the actions and inactions of the Supervisory Defendants and the City's policy and practice, Plaintiff has suffered pain and injury, as well as emotional distress." (*Id.* & 42.)
Plaintiff argues that the *Iqbal* Court recognized that allegations that supervisors condoned discrete wrongs, *i.e.*, the beatings by lower-level governmental actors, could be grounds for inferring that the supervisors acted with wrongful intent. See 129 S.Ct. at 1952. Although the *Iqbal* Court stated that under some circumstances that could be true, it also stated that it would not be an appropriate inference in a section 1983 case against supervisors because respondeat superior liability is inapplicable. *Id.* The *Iqbal* Court explained that because the doctrine was inapplicable to Ashcroft and Mueller, plaintiff failed to state a claim in that he provided conclusory, formulaic allegations that supervisors 'knew of, condoned, and willfully and maliciously agreed' to subject plaintiff to such beatings without any factual allegation to suggest that they themselves intended to discriminate against him. *Id.* at 1951-52. So it is in this case. Petrovic has included formulaic recitations of the elements of a supervisor liability claim without any *factual* allegations to create a plausible suggestion that Cline and Morris, not merely indirectly approved, but encouraged the specific incident of misconduct involving Petrovic and Chevas or in some way directly participated in the incident. Thus, the Court grants Cline and Morris' motion to dismiss and dismisses all claims against them without prejudice.").

Fox v. Ghosh, No. 09 C 5453, 2010 WL 345899, at *5 (N.D. Ill. Jan. 26, 2010) ("In this case, Fox has not sufficiently alleged that McCann is personally liable for his purported injuries. Fox's Complaint merely avers that McCann 'knew about [the other defendants'] conduct and facilitated, approved, condoned, or turned a blind eye to it' (1st Am.Compl.&& 19, 26), and 'promulgated rules, regulations, policies, or procedures as Warden of Stateville Correctional Center that directly resulted in [the other defendants'] conduct.' (*Id.*) The court finds that these allegations are precisely the type of '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements' which the Supreme Court found insufficient to state a claim against a government official in *Iqbal*. . . . Fox's section 1983 claims against McCann, therefore, are dismissed without prejudice.")

Terry v. Cook County Dept. of Corrections, No. 09-cv-3093, 2010 WL 331720, at *3 (N.D. Ill. Jan. 22, 2010) ("Thus, the gravamen of Plaintiff's individual capacity claim against Dart is his alleged failure to train and to implement policies designed to provide constitutionally adequate healthcare to pretrial detainees in the Cook County Jail. At first blush, Plaintiff's claim against Dart appears to be more akin to an official capacity claim. . . . However, the Seventh Circuit has stated that 'if [a] supervisor personally devised a deliberately indifferent policy that caused a constitutional injury, then individual liability might flow from that act.' *Armstrong v. Squadrito,* 152 F.3d 564, 581 (7th Cir.1998) . . . . Read in the light most favorable to Plaintiff, the amended complaint alleges that Dart failed to correct a deliberately indifferent policy that caused a constitutional injury. The Court does not see a material difference between a policymaker's failure to correct an unconstitutional policy and a policymaker's establishment of such a policy in the first place. Therefore, Defendants' motion to dismiss the individual capacity claim against Dart is denied.")**.**

Estate of Allen ex rel. Wrightsman v. CCA of Tennessee, LLC, No. 1:08-cv-0774-SEB-TAB, 2009 WL 2091002, at *3 (S.D. Ind. July 14, 2009) ("Plaintiffs do not rely solely on a theory of supervisory liability. Plaintiffs allege that Sheriff Anderson had 'knowledge of the substandard medical care provided to inmates at Jail # 2 by CCA, yet he remained indifferent to the medical needs of inmates at the facility, including the needs of Brian Keith Allen resulting in his death.'. . With this allegation Plaintiffs do not rely on a theory of supervisory liability. Instead, by alleging that Sheriff Anderson did nothing despite knowing that Allen and others were not receiving necessary medical attention, Plaintiffs attempt to hold Sheriff Anderson liable for his own conduct, not the misconduct of his subordinates.")

Levy v. Holinka, 2009 WL 1649660, at *3 (W.D. Wis. June 11, 2009) ("[Plaintiff] alleges that defendants Holinka and Feathers are responsible for the policies that prevent the recognition of Hebrew Israeilites and prohibit the wearing of turbans. He alleges that defendant Jones enforced these policies when he confiscated his kufi and that defendants Holinka and Feathers approved this decision. However, plaintiff should be aware that supervisors cannot be held liable for mere 'knowledge and acquiescence' of their subordinates' unconstitutional acts. *Iqbal*, 129 S.Ct. at

1948. If as this case progresses, it becomes apparent that defendants Holinka and Feathers merely knew of and consented to defendant Jones's alleged wrongdoing, he will not be able to establish their liability for any constitutional violation.' [RFRA claim])**.**

EIGHTH CIRCUIT

Street v. Leyshock, 41 F.4th 987, 989-90 (8th Cir. 2022) ("In an action under § 1983, a supervisor may be liable only for his own misconduct. . . We conclude that the allegations in this case are insufficient to establish a plausible claim that the defendant officers violated any plaintiff's clearly established right against the use of excessive force. The complaint does not adequately allege that any defendant officer is responsible for the use of excessive force against a plaintiff. Plaintiff Street alleges that an officer 'standing behind Defendant Jemerson' jabbed her with a baton and knocked off her glasses, but she does not allege that Jemerson caused that one-time use of force. The other plaintiffs make no allegation that any defendant used force against them or even was present when the plaintiffs were subjected to force. The complaint alleges that defendant Karnowski used force against an unidentified citizen, and that he and defendant Boyher (on one occasion) and defendant Rossomanno (on another occasion) directed the use of force against other non-parties, but there is no allegation that these defendants used force or directed the use of force against any of the plaintiffs. In *Baude*, this court rejected a claim of qualified immunity on the ground that the plaintiff alleged that 'supervisory officers observed or intended the use of excessive force,' and that 'the supervisors issued orders allowing their subordinates to use excessive force against an allegedly peaceful crowd.'. . The complaint in this case, however, does not allege that the defendants issued orders to use excessive force against the crowd as a whole or against the plaintiffs in particular. Nor does it allege that the supervisory officers observed or intended the use of excessive force as to the crowd as a whole or the plaintiffs in particular. Allegations that three supervisory officers used or directed the use of force in three discrete instances are insufficient to support a reasonable inference that the six supervisory officers were deliberately indifferent to the use of excessive force against anyone in the crowd at any time, including against the plaintiffs here. The supervisory officers cannot be held liable for the alleged misdeeds of other police officers on a theory of *respondeat superior*. We therefore conclude that the officers are entitled to qualified immunity on the claims alleging use of excessive force. The partial dissent invites a comparison of the complaint in *Baude* with the complaint in this case. In determining the scope of circuit precedent, however, we are guided by the previous opinion of the court itself. As noted, the *Baude* opinion said that the key allegations of that complaint were that 'supervisory officers observed or intended the use of excessive force' and that 'supervisors issued orders allowing their subordinates to use excessive force against an allegedly peaceful crowd.'. . The complaint in this case does not plausibly allege that the defendants took the actions described in *Baude* regarding the use of excessive force.")

Street v. Leyshock, 41 F.4th 987, 990-92 (8th Cir. 2022) (Kelly, J., concurring in part and dissenting in part) ("The court acknowledges that in *Baude*, a case arising from the same incident and brought against the same defendant officers, we rejected a claim of qualified immunity on the

plaintiff's excessive force claims because the complaint there alleged that 'supervisory officers observed or intended the use of excessive force,' and that 'the supervisors issued orders allowing their subordinates to use excessive force against an allegedly peaceful crowd.'. . The court attempts to distinguish the excessive force allegations here from those in *Baude* by asserting that, unlike in *Baude*, the complaint 'does not allege that the defendants issued orders to use excessive force against the crowd as a whole or against plaintiffs in particular.' But a review of the complaints from both cases reveals that the factual allegations pertaining to excessive force are almost identical. Using nearly the exact same words as in *Baude*, the complaint here likewise alleges facts supporting the conclusion that the supervisory officers observed or intended the use of excessive force. . . and issued orders allowing their subordinates to use excessive force. . . The court dismisses the similarities between the factual allegations in the two complaints by asserting that '[i]n determining the scope of circuit precedent ... we are guided by the previous opinion of the court itself.' It then points to the *Baude* court's summary of the excessive force allegations in that case—i.e., that the complaint there alleged that 'supervisory officers observed or intended the use of excessive force' and that 'the supervisors issued orders allowing their subordinates to use excessive force against an allegedly peaceful crowd'—and asserts that the complaint in this case did not make such allegations. But as noted above, the specific allegations underlying the *Baude* court's description are also in the complaint here. The court does not identify any factual allegations related to excessive force that were raised in *Baude* but not in the instant case. It may be true that we typically look only to the previous opinion of the court and not the underlying record when assessing whether precedent controls a new case with a different set of facts. But here, the two cases—*Baude* and this one—concern the same underlying events and the same defendants. To refuse to review the relevant records under such circumstances risks creating the undesirable result seen here: that two sets of plaintiffs receive disparate treatment despite raising the same claims arising from the same events supported by the same factual allegations against the same defendants. Because the excessive force allegations in *Baude* are indistinguishable from those here, I would affirm the district court's order denying the officers' motion to dismiss with respect to the excessive force claims.")

McGuire v. Cooper, 952 F.3d 918, 922-23 (8th Cir. 2020) ("Sheriff Dunning contends that, even taking in a light most favorable to McGuire all of the reported incidents of prior sexual misconduct by deputies employed by the Sheriff's Office, he is entitled to qualified immunity because these incidents are insufficient to provide notice that an on-duty deputy might sexually assault a member of the public like Cooper did. The circumstances of the prior incidents are contained in the record at paragraph 86 of Sheriff Dunning's declaration dated March 28, 2018. The district court listed in a footnote fifteen prior incidents of sexual misconduct that Sheriff Dunning knew about, but neither made detailed findings regarding them nor reasoned how they were similar to the sexual misconduct at issue in this case. Constraining ourselves to the version of facts in the record that the district court assumed or likely assumed in favor of McGuire, we conclude that the prior instances of sexual misconduct are not similar in kind or sufficiently egregious in nature to demonstrate a pattern of sexual assault against members of the public by deputies. In order to establish a pattern, our case law requires a showing of more than general allegations of a wide

variety of sexual misconduct. It requires the other misconduct to 'be very similar to the conduct giving rise to liability. . . Put another way, the conduct must be 'sufficiently egregious in nature.'. . . In this case, the other misconduct included trading cigarettes for a detainee's display of her breasts; licking a minor stepdaughter's nipples during horseplay; asking 'deeply personal and inappropriate questions' to members of the public; engaging in verbal sexual harassment; having consensual sexual contact at the office; and abusing work hours to conduct personal business or ask women out on a date. While this behavior is troubling, it is not enough to put a supervising official on notice that a deputy might use his position and authority to separate a woman from her boyfriend at the park and coerce her to engage in sexual contact with him. The summary judgment record, even when viewed in a light most favorable to McGuire, fails to establish that Sheriff Dunning received notice of a pattern of similar unconstitutional acts being committed by his subordinates. A reasonable officer in Sheriff Dunning's position would not have known that he needed to more closely supervise his deputies, including Cooper, or they might sexually assault a member of the public.")

Barton v. Taber, 908 F.3d 1119, 1125-26 (8th Cir. 2018) ("The record is devoid of any evidence establishing that Wright knew that Martin was inadequately trained or supervised. Regina Barton's brief asserts that 'Martin has been involved in several lawsuits, the majority of which involve allegations of denial of medical care,' but she cited no evidence to support that assertion. . . While Martin testified that she had been sued by four plaintiffs, there is no indication that the claims against her involved the denial of medical care. Moreover, there is no evidence regarding the nature of Martin's alleged acts or omissions, when those acts or omissions occurred, or when the plaintiffs filed suit. In the absence of such evidence, the mere assertion of prior suits does not support an inference that Wright had notice on September 12, 2011, that the County's training procedures and supervision were inadequate and likely to result in constitutional violations.")

Marsh v. Phelps County, 902 F.3d 745, 754-56 (8th Cir. 2018) ("Marsh's claim that Samuelson and Gregg 'knew or should have known' their actions or omissions created a substantial risk of injury to Marsh evinces a negligence standard not contemplated under § 1983. . . 'To establish personal liability of the supervisory defendants, [Marsh] must allege specific facts of personal involvement in, or direct responsibility for, a deprivation of [her] constitutional rights.'. . As to Marsh's failure-to-train claim, '[a] supervisor's failure to train an inferior officer may subject the supervisor to liability in his individual capacity only "where the failure to train amounts to deliberate indifference to the rights of persons with whom the [officers] come into contact."'. . Overarching these claims is qualified immunity. A supervising officer will not be individually liable for an otherwise unlawful act if he is entitled to qualified immunity. Qualified immunity protects government officials from liability for civil damages in their individual capacities if their conduct did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'. . . Marsh does not allege that Samuelson or Gregg ordered or directed Campana to sexually assault female inmates, or Marsh particularly. Thus, their alleged liability cannot be based on direct participation in this constitutional violation. In this action, Marsh alleges that Samuelson and Gregg failed to protect

her from the substantial risk of harm that Campana presented to herself and other inmates. She argues the evidence that Campana might possibly have problems working around females, that he was counseled to be careful with his interactions lest he open himself up to a law suit, the verbal complaints of Johnson not wanting to work alongside Campana, and the evidence of Campana's character while performing his job duties, all support an inference that Samuelson and Gregg were aware of the risk Campana posed to female inmates. Marsh claims as to Samuelson that it was his inaction against the 'known' danger Campana posed that establishes his liability. Sheriff Samuelson is entitled to qualified immunity unless he had notice of a pattern of conduct that was sufficiently egregious in nature. Qualified immunity from supervisory liability turns on what Samuelson knew of Campana's actions. . . Here, there is insufficient evidence to infer that Samuelson knew of any danger posed by Campana, and most certainly he did not receive notice of a pattern of unconstitutional acts. Much of the problem in this matter is that the evidence Marsh points to as creating material fact issues, is largely information garnered *after* Campana's suspension. That it became known later, when Campana no longer had a presence at the jail, there were red flags lurking but unknown at the time of his hiring does not create liability for Samuelson, nor does it create a fact issue on appeal when these facts were not known by Samuelson prior to Campana's suspension. . . .On these facts, a reasonable officer in Sheriff Samuelson's shoes would not have known that he needed to more closely supervise Campana. . The district court correctly granted Samuelson qualified immunity. . . . Marsh claims that there were written policies that prohibited male officers from being in the female cells and claims without record citation that Samuelson and Gregg were aware Campana 'openly defied' those policies. 'Assuming without deciding that "turning a blind eye" could ever constitute actual notice' of wrongdoing sufficient to support a constitutional claim, being aware that Campana violated jail policy, without more, by accompanying female inmates in their cells 'falls far short of notice of a pattern of conduct that violated' Marsh's constitutional rights. . . .On the facts before us, neither Gregg (nor Samuelson) had information that would have raised an inference that Campana was violating his duties as an officer by sexually assaulting female inmates. It is not a reasonable inference on these facts, for example, to assume that a general claim that someone might possibly have a problem working with women indicates that individual poses a threat of sexually assaulting women.")

Saylor v. Nebraska, 812 F.3d 637, 644-45 (8th Cir. 2016) ("As for the named medical defendants, Dr. Kohl, Dr. White, Dr. Weilage, and Dr. Perez, none were treating physicians. Thus, these defendants also acted in a supervisory capacity. 'To impose supervisory liability, other misconduct [by the medical defendants] must be very similar to the conduct giving rise to liability.' *Livers v. Schenck*, 700 F.3d 340, 356 (8th Cir.2012). This means that there is no real vicarious liability. . . Rather, to be liable under § 1983 the medical defendants had to personally violate Saylor's rights or be responsible for a systematic condition that violates the Constitution. . . Saylor's main argument is that the treatment that occurred after Dr. Christensen left NSP rises to the level of cruel and unusual punishment. Dr. Christensen's treatment plan was three-part: regular psychotherapy treatment, medication, and a safe environment. The medical defendants attempted to provide Saylor with another psychiatrist at NSP, ultimately found him another psychiatrist at TSCI, continued medication as they saw fit within their independent medical judgment, and gave

him his requested private cell. To the extent there was any change in Dr. Christensen's treatment plan, Saylor requested some and agreed to other deviations. Specifically, Saylor stated he was willing to forgo seeing a doctor so long as he could continue taking his medications. After the meeting with Dr. Baker wherein she suggested easing him off Seroquel because it did not seem to be helping and was causing low blood pressure, Saylor agreed to continue taking Xanax. Throughout his time of incarceration, the record shows that Defendants met Saylor's medical needs beyond the minimum standard required. Defendants were aware of his medical needs and took steps to meet those needs. Because Saylor cannot show that Defendants acted with deliberate indifference, there was no deprivation of his Eighth Amendment rights, and thus, Defendants are entitled to qualified immunity.")

S.M. v. Krigbaum, 808 F.3d 335, 340-42 (8th Cir. 2015) ("When a supervising official who had no direct participation in an alleged constitutional violation is sued for failure to train or supervise the offending actor, the supervisor is entitled to qualified immunity unless plaintiff proves that the supervisor (1) received notice of a pattern of unconstitutional acts committed by a subordinate, and (2) was deliberately indifferent to or authorized those acts. . . This rigorous standard requires proof that the supervisor had notice of a pattern of conduct by the subordinate that violated a clearly established constitutional right. Allegations of generalized notice are insufficient. . . . For purposes of this appeal, Krigbaum concedes that Edwards's sexual assaults deprived plaintiffs of a clearly established constitutional right to substantive due process when he committed 'an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective.'. . Sheriff Krigbaum is entitled to qualified immunity unless he had notice of a pattern of conduct that was sufficiently egregious in nature. Qualified immunity from supervisory liability turns on what Sheriff Krigbaum knew of Edwards's actions as tracker, not what Drug Court Administrator Graham–Thompson or Commissioner Sullivan knew. . . . Assuming without deciding that 'turning a blind eye' could ever constitute actual notice, and that Krigbaum knew of this conduct, being aware that Edwards violated jail policy by taking Drug Court participants out for a cigarette break falls far short of notice of a pattern of conduct that violated plaintiffs' rights to substantive due process. . . Like the defendant sheriff in *Walton,* Krigbaum acted to fire Edwards as soon as Krigbaum learned of Edwards's egregious misconduct. . . . In addition to notice of a pattern of unconstitutional conduct, plaintiffs must present sufficient evidence that Krigbaum acted with deliberate indifference to their rights. When the issue is qualified immunity from individual liability for failure to train or supervise, deliberate indifference is a subjective standard that 'entails a level of culpability equal to the criminal law definition of recklessness.'. . '[Plaintiffs] must prove [Krigbaum] *personally knew* of the constitutional risk posed by [his] inadequate training or supervision' of Edwards. . . .Plaintiffs also rely on our statement that to be liable '[t]he supervisor must know about the conduct and facilitate it, approve it, condone it, *or turn a blind eye for fear of what [he] might see.*'. . The statement preceded the Supreme Court's decision in *Farmer* and therefore must be ignored to the extent it is inconsistent with the subjective test for deliberate indifference. Here, plaintiffs presented no evidence that Krigbaum had knowledge of sexual misconduct by Edwards that would create an inference Krigbaum turned a blind eye to or consciously disregarded a substantial risk of the constitutional

harm Edwards was causing—conscience-shocking violations of plaintiffs' substantive due process rights by a member of the Sheriff's Department performing duties for the Drug Court.")

Jackson v. Nixon, 747 F.3d 537, 545 (8th Cir. 2014) ("To state a claim against Warden Burgess, Jackson must plead facts to show that Burgess was directly involved in making, implementing or enforcing a policy decision that 'create[d] unconstitutional conditions.'. . Our case law is clear that the warden's general supervisory authority over prison operations does not make him liable under § 1983. . . We note that personal involvement may be assessed differently depending on the alleged constitutional violation at issue. In cases regarding prison violence, for instance, it can be difficult to demonstrate the warden's 'knowledge of, or connection with' individual incidents between guards and prisoners or among prisoners. . . Here, although Jackson challenges the curriculum of a treatment program—the choice of which was inherently a policy decision—and its effect on him, his conclusory statement that Warden Burgess 'knew or should have known' of the alleged First Amendment violation is insufficient. Instead, Jackson must plead facts that plausibly show direct involvement by the warden in the formation, implementation, or enforcement of that policy, which at this stage of the litigation he has failed to do. Jackson's claims regarding Salsbury's involvement are more specific than his statements regarding the other defendants. In particular, he alleged that as director of the treatment program, she could have allowed him to avoid the religious portions of the program but still remain enrolled in order to comply with his parole stipulation. . . The scope of her authority as to the OUTP curriculum and inmates' participation in it is unclear. Even if she did not determine the OUTP curriculum, however, the claim concerns her ability to help ameliorate the constitutional violation alleged. . . Affording Jackson reasonable inferences from the facts in his complaint, we find that he has plausibly alleged Salsbury's personal involvement.")

Ellis v. Houston, 742 F.3d 307, 325, 326 (8th Cir. 2014) ("Long before the actions of supervisors in this case, the Supreme Court had recognized employee rights to be free from racial harassment and retaliation in *Jones,* 541 U.S. at 383, and *CBOCS,* 553 U.S. at 451. In light of this preexisting law it was readily apparent that a 'continuous racially invidious climate' in a penitentiary, *Snell,* 782 F.2d at 1099, and undertaking 'systematic[ ]' retaliation following complaints, *Kim,* 123 F.3d at 1052, would violate clearly established rights. . . .The black officers presented evidence here that the Nebraska penitentiary's own administrative regulation 112.07 recognized that inflammatory racial comments and jokes violate employee rights. Any reasonable supervisor would have recognized that racial slurs and remarks like those used here would illegally affect the working environment. . . As in the prison in *Snell,* there is also evidence that conduct by the supervisors at the Nebraska penitentiary caused black guards to question whether white officers would come to their aid if they were in danger. . . The evidence in this case is nearly identical to that shown to violate the law in *Allen,* including black officers being monitored more closely than white employees and told not to congregate in the yard, receiving baseless citations, and being denied career advancement opportunities. . . .We conclude that existing precedent put the supervisors on notice that such actions would violate constitutional rights. A reasonable prison supervisor would have understood that permitting and participating in racially derisive remarks and assigning inferior work assignments would violate the black officers' rights under §§ 1981

and 1983. Based on the record evidence, Sergeant Miles has not shown that he is entitled to qualified immunity on the black officers' harassment claims, nor have Lieutenants Stoner and Haney shown they are entitled to qualified immunity on the retaliation claims of Officer Ellis.")

Ellis v. Houston, 742 F.3d 307, 327, 328 (8th Cir. 2014) (Loken, J., concurring in the judgment, joined by Colloton, J.) ("Even if the individual defendant exercised at least some supervisory authority over the plaintiff, as in this case, liability under §§ 1981 and 1983 is not established merely by proof that the defendant was deliberately indifferent to racial harassment by his subordinates, as we suggested in *Ottman,* 341 F.3d at 761, or by proof of a 'general racial animus in the prison' and 'lack of response by the supervisors,' as the courts ruled in *Snell v. Suffolk County,* 782 F.2d 1094, 1097 (2d Cir.1986), and *Allen v. Michigan Department of Corrections,* 165 F.3d 405, 410–11 (6th Cir.1999). In my view, those rulings were overruled by *Ashcroft v. Iqbal*. . . .Thus, 'where the intent to discriminate is an element of the constitutional violation .... the plaintiffs must show that the supervisory officials *themselves* acted with an impermissible motive, not merely that they knew of their subordinates' impermissible motives and did not put a stop to their actions.' *Dodds v. Richardson,* 614 F.3d 1185, 1210 (10th Cir.2010) (Tymkovich, J., concurring), *cert. denied,* 131 S.Ct. 2150 (2011). Applying this standard to a case where multiple co-workers are accused of engaging in racial jokes, taunts, and insults that, over an undefined period of time, created a hostile work environment for five minority plaintiffs, is a complex task. It is not enough that a defendant 'participated' in the racial taunts and insults and turned a blind eye to harassing conduct by his subordinates. Plaintiffs must prove he acted (and failed to act) for the *purpose* of creating a hostile work environment for the plaintiffs, that is, that he intended to alter the terms and conditions of their employment through severe and pervasive racial harassment. Determining the liability of an individual supervisor or co-worker in this type of case is very different than determining when the public employer is liable for the existence of such a hostile work environment in its workplace. *See Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2441–42 (2013). Viewing the current record in the light most favorable to plaintiffs, I agree there is sufficient evidence of Sgt. Miles's sustained participation in racial harassment to preclude summary judgment dismissing the hostile work environment claims against him. Plaintiffs allege that Miles made offensive 'jokes' regularly over the course of a few months in front of the entire first shift, with one witness describing it as 'almost like a daily occurrence.' Miles made the majority of the alleged derogatory comments at roll call, and plaintiffs testified that the harassment was worse when he was there. Though the record suggests that Sgt. Miles was not in charge at roll call, he was an employee of superior rank. . Even if the insensitive comments were initially thought to be mere teasing or joking, a jury could reasonably infer that a supervisor who continued to participate in the hazing after Ellis, one of the targets, exclaimed, 'damn the jokes' and 'enough is enough,' was intentionally creating a hostile work environment. Taking all of these circumstances into account, I agree there is enough evidence in this record to submit to a jury whether Sgt. Miles participated in sufficiently severe or pervasive racial harassment with the purpose of creating a hostile work environment for one or more of these plaintiffs.")

Livers v. Schenck, 700 F.3d 340, 356, 357 (8th Cir. 2012) ("Notice of allegations Commander Kofoed committed dishonest acts unrelated to handling evidence is not sufficient to support Sheriff Dunning's liability for a failure to supervise. . . The district court's finding that some DCSO employees knew of Commander Kofoed's 'administrative lapses' is legally insufficient to impose supervisory liability. . . Nor does our own review of the record reveal notice to Sheriff Dunning. . . . Our cumbersome review of more than 65 bound volumes and 40 video DVDs drew a blank. There is no evidence, or reasonable inference from any evidence, indicating Sheriff Dunning had notice Commander Kofoed may have mishandled evidence in this or any other investigation until after the Stock investigation ended, too late to prevent injury to Livers. Livers also alleges Sheriff Dunning's supervision was inadequate because he did not properly investigate and discipline DCCSI employees for misconduct. Livers contends Sheriff Dunning never disciplined DCCSI employees for possible mishandling of evidence, which made Commander Kofoed think he would not be punished for planting evidence. This assertion is mere speculation and argument, and is not a basis for denying qualified immunity. . . .Livers' final contention—that Sheriff Dunning knew Captain Olson instructed Commander Kofoed not to correct Commander Kofoed's report about the date he 'discovered' the blood evidence in Will's car—is similarly unavailing. Captain Olson did not share this information with Sheriff Dunning until March 2008, long after Sheriff Dunning could have prevented injury to Livers. Again, the record does not support any finding that Sheriff Dunning received notice of the alleged misconduct in time for any failure to act by Sheriff Dunning to have injured Livers. Sheriff Dunning is entitled to qualified immunity both on Livers' failure-to-train claim and his failure-to-supervise claim. . . .Livers also cites *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988), and *Speer v. City of Wynne, Ark.*, 276 F.3d 980, 987 (8th Cir.2002), for his claim Sheriff Dunning should be liable because he ratified Commander Kofoed's fabrication of evidence after it occurred. *Praprotnik* and *Speer* are inapposite because they involve municipal—not individual—liability. . .Applying those cases would violate the principle that a supervisor who does not directly participate in an employee's constitutional violation can only be liable for the violation when it was caused by the supervisor's failure to train or supervise his or her employees properly.")

L.L. Nelson Enterprises, Inc. v. County of St. Louis, Mo., 673 F.3d 799, 810 (8th Cir. 2012) ("Supervisors like Overall, Buckles, and Fox cannot be held vicariously liable under § 1983 for the actions of a subordinate. . . To state a claim, the plaintiff must plead that the supervising official, through his own individual actions, has violated the Constitution. . . Where, as here, the alleged constitutional violation requires proof of an impermissible motive, the amended complaint must allege adequately that the defendant acted with such impermissible purpose, not merely that he knew of a subordinate's motive. . . The amended complaint in this case does not adequately allege that Overall, Buckles, or Fox took adverse action against Landlords Moving with retaliatory motive. Landlords Moving alleges that each of the three supervisors 'either participated himself in the conspiracy and retaliation against [Landlords Moving], knew of the conspiracy and retaliation but failed to take action to halt it, or should have known of the conspiracy and retaliation but deliberately or willfully failed to discover it and halt it.'. . Like the complaint in *Iqbal*, which alleged that supervisory officials 'knew of, condoned, and willfully and maliciously agreed to'

subject the plaintiff to harsh conditions for an illegitimate reason, these asseverations against Overall, Buckles, and Fox are conclusory, and they are not entitled to a presumption of truth. . . The amended complaint asserts that Main took her actions 'openly,' and that they were 'obviously designed to disadvantage Landlords Moving,' but this probably does not suffice to allege even that the actions were known to the particular supervisory officials named as defendants . . . and it assuredly does not plead adequately that the supervisors acted with impermissible *purpose* as required by *Iqbal.* The amended complaint does allege that Fox 'was informed on many occasions throughout 2004' about 'the irregularities within the Sheriff's office,' and then deliberately failed to take corrective action. . . But even assuming the alleged retaliation is among the 'irregularities' this assertion is insufficient to allege that Fox acted with a retaliatory motive. We therefore conclude that the district court properly dismissed the claims against Overall, Buckles, and Fox.")

Wagner v. Jones, 664 F.3d 259, 275 (8th Cir. 2011) ("Wagner's claim against Dean Jones is based on Dean Jones's own actions and omissions during the hiring process. Wagner has alleged facts establishing that even though Dean Jones was on notice that Wagner's political beliefs and associations may have impermissibly affected the faculty's hiring recommendation, she still refused to hire Wagner for any position. Accordingly, Dean Jones's position as a supervisor does not shield her from § 1983 liability. The district court erred in finding that qualified immunity protects Dean Jones from liability in her individual capacity. We reverse the district court's grant of summary judgment as to Carolyn Jones in her personal capacity, and we remand for further proceedings consistent with this opinion.")

Schaub v. VonWald, 638 F.3d 905, 920 (8th Cir. 2011) ("The dissenting opinion is correct that VonWald had no personal interaction with Schaub. However, VonWald was aware of his serious medical needs and deliberately disregarded them by falsely assuring a judge the ADC could handle his needs and then failing to take the proper steps to insure that the ADC could provide adequate care. A prison official may be liable if the official has actual knowledge of a substantial risk of serious harm. . . When VonWald saw Schaub return to the special management unit, it was incumbent upon him to take the necessary steps to provide Schaub adequate medical care, or inform Judge Williamson that the ADC could not accommodate his full-time care; VonWald's inaction constituted deliberate indifference.")

Doe v. Flaherty, 623 F.3d 577, 584 (8th Cir. 2010) ("There is no question, under our precedent, that Doe's substantive due process rights were indeed violated when Coach Smith sexually abused her. . .Whether Wilcher is liable under § 1983 for Smith's abusive conduct, however, is another matter. Supervisory school officials, like Wilcher, can be liable under § 1983 only if they are 'deliberately indifferent to acts committed by a teacher that violate a student's constitutional rights.'. . Therefore, the plaintiffs must prove that Wilcher had [actual] notice of a pattern of unconstitutional acts by Smith, that she showed deliberate indifference to those acts, that she failed to take sufficient remedial action, and that such failure proximately caused injury to Jane Doe.")

Langford v. Norris, 614 F.3d 445, 461, 462 (8th Cir. 2010) ("In this case, it is plain that if Byus knew all the relevant facts about Langford's and Hardin's medical needs, the unlawfulness of failing to ensure that they received adequate treatment would have been apparent. The more difficult question centers on how much Byus actually knew about Langford's and Hardin's medical needs and the allegedly inadequate treatment they received. As we have said, we may take as given the facts that the district court assumed. . . But the only relevant fact identified in the magistrate judge's proposed findings and recommendations is that Byus sent letters to Langford and Hardin in which he acknowledged receiving letters from them. . . .The district court likely inferred that the letters from Langford and Hardin contained at least some description of their medical needs − Langford's stomach and back pain and Hardin's Charcot foot − and the perceived inadequacy of the treatment they had received to that point. . . . Considering these facts together, and drawing all reasonable inferences from them in favor of the plaintiffs, we are convinced that the constitutional right at issue was clearly established as of the time of the relevant conduct, such that a reasonable supervisory official would have known that his actions were unlawful. That is to say, a reasonable official standing in Byus's shoes would have understood that ignoring Langford's and Hardin's complaints about receiving deficient medical care contravened clearly established principles of Eighth Amendment jurisprudence.").

Parrish v. Ball, 594 F.3d 993, 1001 & n.1, 1002 (8th Cir. 2010) ("As we have held, a supervising officer can be liable for an inferior officer's constitutional violation only ' Aif he directly participated in the constitutional violation, or if his failure to train or supervise the offending actor caused the deprivation.''. . The Supreme Court's recent pronouncement in *Iqbal* may further restrict the incidents in which the 'failure to supervise' will result in liability. . . However, we do not address the extent to which *Iqbal* so limits our supervisory liability precedent because, even under our prior precedent, Sheriff Ball is entitled to qualified immunity. . . The summary judgment record, even when viewed in a light most favorable to Parrish, reveals nothing that suggests that Sheriff Ball received any notice of a pattern of unconstitutional acts committed by any of Sheriff Ball's subordinates. Moreover, pursuant to the parties' stipulation of facts at summary judgment, the parties agreed that Sheriff Ball had no occasion to know that Fite was about to engage in a sexual assault. Thus, a reasonable officer in Sheriff Ball's shoes would not have known that he needed to more closely supervise Fite. Therefore, to the extent that such a failure to supervise may survive *Iqbal*, Sheriff Ball was, nevertheless, entitled to qualified immunity on such a claim.")**.**

Nelson v. Correctional Medical Services, 583 F.3d 522, 534, 535 (8th Cir. 2009) (en banc) ("Nelson claims that Director Norris violated her Eighth Amendment rights by failing to ensure that proper policies and customs were implemented with respect to the restraint of female inmates in labor . . . In a § 1983 case an official 'is only liable for his ... own misconduct' and is not 'accountable for the misdeeds of [his] agents' under a theory such as respondeat superior or supervisor liability. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948-49 (2009). Norris is thus liable only if he personally displayed deliberate indifference to the hazards and pain resulting from shackling an inmate such as Nelson during the final stages of labor. *Farmer*, 511 U.S. at 842. Nelson does not contend, nor does the record reflect, that Norris had any personal involvement in Turensky's

decision to keep Nelson restrained while she was in labor. Indeed, there is no evidence that Norris, who was responsible for managing a large state wide prison system, had any personal knowledge of Nelson or the medical care she was receiving. . . . The regulations, directives, and orders in the record suggest administrative concern for the health and safety of pregnant inmates. Without further allegation or evidence of deliberate indifference, Nelson's Eighth Amendment claim against Norris must fail. We conclude therefore that the district court erred in denying summary judgment to Director Norris based upon qualified immunity.")

Cole v. Does, No. 21-CV-1282 (PJS/JFD), 2021 WL 5645511, at *8-9 (D. Minn. Dec. 1, 2021) ("Even when a supervising official did not directly participate in a constitutional violation committed by his inferior officers, he may still be held liable under § 1983 when his 'failure to properly supervise and train the offending employee[s] caused a deprivation of constitutional rights.'. . In order to recover for a failure to train or supervise, however, a plaintiff must establish four elements: (1) the supervisor was on 'notice of a pattern of unconstitutional acts committed by subordinates;' (2) the supervisor 'was deliberately indifferent to or tacitly authorized' the pattern of unconstitutional acts; (3) the supervisor failed to take 'sufficient remedial action' to address the pattern of unconstitutional acts; and (4) the supervisor's failure to remedy the pattern of unconstitutional acts proximately caused the plaintiff's injury. . . Cole and Hennessy-Fiske have not adequately pleaded even the first of these four elements. During the hearing, the Court questioned the parties about what, exactly, Dwyer and Salto would have to know in order to be on 'notice of a pattern of unconstitutional acts committed by subordinates.'. . For example, is it sufficient if they knew that *any* state trooper had engaged in a pattern of unconstitutional acts? Or must they have known that a trooper *under their command* had engaged in such a pattern? Or must they have known that *John Does 1, 2, and 3* had engaged in such a pattern? And what type of conduct must have come to their attention? Is it sufficient if they were aware of *any* type of unconstitutional conduct? Or must they have been aware of instances of *excessive force*? Or must they have been aware of instances of excessive force *against journalists*? With respect to the 'who' question, both sides agreed that it is not sufficient that Dwyer or Salto knew of unconstitutional acts by just any state trooper; Dwyer and Salto argued that they had to know of unconstitutional acts committed by John Does 1, 2, and 3, while Cole and Hennessy-Fiske argued that they had to know of unconstitutional acts committed by troopers under their command (even if those troopers were not John Does 1, 2, or 3). With respect to the 'what' question, Dwyer and Salto argued that they had to know of the prior use of excessive force against members of the press, while Cole and Hennessy-Fiske argued that knowledge of *any* use of excessive force—including, say, excessive force against a suspect or detainee—could suffice. Neither side, however, was able to cite case law that directly supported their positions. For purposes of this motion, the Court will assume, without deciding, that plaintiffs are correct as to both questions. In other words, the Court will assume that Cole and Hennessy-Fiske must plausibly allege that Dwyer and Salto knew that one or more troopers under their command had engaged in a pattern of excessive force (against anyone). Even if this is a correct application of the law—and the Court has its doubts . . . [,] Cole and Hennessy-Fiske have not pleaded a plausible failure-to-train or failure-to-supervise claim, because their complaint does not identify a single instance of excessive force committed by a state trooper under

the command of Dwyer and Salto, much less a *pattern* of excessive force, much less a pattern of excessive force of which Dwyer or Salto was *aware*.")

NINTH CIRCUIT

Richards v. Cox, 842 F. App'x 49, ___ (9th Cir. 2021) ("Here, the parties agree that the requisite state of mind for the Supervisor Defendants—when enacting the birdshot policy in combination with get-down orders—is 'deliberate indifference' to inmate safety. . . The 'deliberate indifference' standard requires a prison official to subjectively know of and consciously disregard an excessive risk to inmate safety. . . The district court here properly determined that, viewing the material facts in a light most favorable to Richards, a reasonable jury could find that the Supervisor Defendants were deliberately indifferent to inmate safety in implementing the birdshot policy in combination with get-down orders. The district court also determined that the Supervisor Defendants' policy was 'so deficient' that it constituted the moving force behind Richards's constitutional violation. . .The Supervisor Defendants admitted that Richards was shot in the face by a correctional officer attempting to follow their birdshot policy.We agree with the district court that the Supervisor Defendants' policy was 'so deficient' that it constituted the moving force behind a constitutional violation. That is because the Supervisor Defendants' policy required bystander inmates to lie on the ground while correctional officers fired 12-gauge shotguns—loaded with birdshot cartridges containing hundreds of metal pellets—directly at the ground during non-deadly prison disturbances. To make matters worse, the Supervisor Defendants admitted that their policy did not require correctional officers to consider the safety of any bystander inmate lying on the ground before firing a 12-gauge shotgun directly at the ground.")

Addison v. City of Baker City, 758 F. App'x 582, ___ (9th Cir. 2018) ("To prove supervisory liability under § 1983, courts must look at the requisite mental state for the specific constitutional violation alleged. *See OSU Student All. v. Ray*, 699 F.3d 1053, 1071–72 (9th Cir. 2012). For claims of free speech violations under the First Amendment, knowledge and acquiescence suffice for supervisor liability. *Id*. at 1075. The district court concluded that Addison presented sufficient evidence to raise a genuine dispute of material fact as to whether Chief Lohner knew about the alleged retaliation and acquiesced to it, and as to whether Chief Lohner directed the actions of his subordinates. Chief Lohner's claim that he cannot be held liable under a supervisory liability theory is therefore unavailing.")

Felarca v. Birgeneau, 891 F.3d 809, 820-21 (9th Cir. 2018) ("We first consider Vice Chancellor Le Grande, Associate Chancellor Williams, and Associate Vice Chancellor Holmes, none of whom was in the police chain of command. Because these administrators had no supervisory authority over the police who allegedly committed the violations, they did not participate in or cause such violations. . . They cannot be supervisors of persons beyond their control. . . Therefore, the district court erred in denying summary judgment to these three administrators. . . We next consider the other UC administrators, Chancellor Birgeneau, Executive Vice Chancellor Breslauer, and Police Chief Celaya, each of whom was in the police chain of command. Viewing the facts in the light

most favorable to plaintiffs, as we must, we assume these officials ordered police to remove the tents, acquiesced in the use of batons to effectuate removal of the tents, and learned that batons had been used during the afternoon protest and injuries had occurred. The question, then, is whether these facts show the degree of personal involvement or causal connection required by our precedents. . . We hold that they do not. Plaintiffs' brief does not describe any specific instance of force against those plaintiffs alleging only supervisory claims. Although some submitted affidavits claiming that police officers used force against them, they have not connected the force applied by each officer to the actions of these administrators. Accordingly, they have failed to establish that the three UC administrators in the police chain of command 'set[ ] in motion a series of acts' that they 'knew or reasonably should have known' would cause the officers 'to inflict a constitutional injury.'. . Without that crucial connection, plaintiffs' argument is nothing more than an attempt to hold the UC administrators liable solely by virtue of their office. That argument fails because 'there is no respondeat superior liability under section 1983.'. .We conclude that Chancellor Birgeneau, Executive Vice Chancellor Breslauer, and Police Chief Celaya did not have sufficient personal involvement in the alleged acts of force. Summary judgment should have been granted by the district court on these claims, and we reverse and remand for the district court to do so.")

Rodriguez v. County of Los Angeles, 891 F.3d 776, 798-99 (9th Cir. 2018) ("As explained above, the deputies' actions violated clearly established law. The question specific to the supervisors is whether they are individually liable for those constitutional violations under principles of supervisory liability. We conclude that they are. A supervisory official is liable under § 1983 so long as 'there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'. . . Thus, a supervisor may 'be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others.'. . Sergeants McGrattan, Ohnemus, and Washington concede that they were personally present and directed the deputies' use of force against appellees. Even assuming that their presence and direction of the extraction teams does not constitute 'personal involvement,' there is a 'sufficient causal connection' to establish the sergeants' supervisory liability for their 'own culpable action or inaction in the ... supervision [and] control of' the deputies. . .We do not accept appellants' argument that the nature of the pre-extraction disturbance, standing alone, justified the supervisors' inaction. Long before the incident in question, the Supreme Court established that government officials violate the Eighth Amendment when they use malicious and sadistic force in the course of quelling a prison disturbance, even one that 'indisputably poses significant risks to the safety of inmates and prison staff.'. .To the extent that appellants Cruz and Blasnek stood by and observed the extractions but 'knowingly refus[ed] to terminate' the deputies' unconstitutional acts, . . . they are individually liable for the same reasons as Sergeants McGrattan, Ohnemus, and Washington. Ample evidence—including appellants' own testimony—supports the conclusion that appellants Cruz and Blasnek directed and observed most of the extraction teams. For example, there was evidence that appellant Blasnek 'observe[d] each extraction.'. . .It is not clear from the record before us that appellant Cruz directly observed Nunez's and Rodriguez's

extractions. Assuming without deciding that Cruz did not observe these extractions, the jury could still have reasonably found the 'requisite causal connection' to hold Cruz liable for his 'own culpable action or inaction in the training, supervision, or control of his subordinates.'. . The jury could have concluded from evidence in the record, including Olmstead's testimony, that Cruz knowingly participated in creating and maintaining a culture of impunity for officers' use of unconstitutionally excessive force, thereby 'setting in motion a series of acts by' his subordinates that Cruz 'knew or reasonably should have known would cause' the violations of appellees' Eighth Amendment rights. . . The jury could also reasonably have concluded that in disabling or failing to follow procedures used to identify uses of excessive force, and in ensuring that violators escaped punishment, Cruz created an environment where the mechanisms for supervision and control over the use of force operated ineffectively and sometimes not at all. Thus, the jury could also reasonably conclude that Cruz's 'inaction in the training, supervision, or control of his subordinates' provided a basis for supervisory liability.")

Peralta v. Dillard, 744 F.3d 1076, 1095, 1096 (9th Cir. 2014) (en banc), *cert. denied,* 135 S. Ct. 946 (2015) (Christen, J., with whom Rawlinson, M. Smith, and Hurwitz, JJ., join, and with whom Bybee, J, joins as to Parts I, II, and III, dissenting in part and concurring in part) ("The majority holds that Dr. Dillard's failure to review Peralta's appeal—an obligation conferred upon him by California law—shields him from liability. Unchecked, this rule will allow care providers to defeat claims of deliberate indifference by arguing that they had no actual knowledge of the prisoner's condition, even if that lack of knowledge is the result of failing to perform duties expressly assigned to them. The majority not only charts a path that permits prison officials to escape liability by arguing that they have inadequate funds to provide emergency care to inmates, it condones an escape hatch from liability available to officials willing to look the other way or who fail to perform assigned duties that might cause them to gain actual knowledge of an inmate's condition. Neither circuit nor Supreme Court authority permits such a result. . . . Here, a reasonable jury could conclude that some Lancaster prisoners' emergency dental problems would go unaddressed if the only staff dentist qualified to review first level appeals did not actually review them. Dr. Dillard knew he was obligated to review the first level appeals, and he knew he was the only staff dentist qualified to do so. On this record, a jury could conclude that Dr. Dillard did not fulfill his obligations and consciously disregarded a substantial risk of serious harm to the dental needs of prisoners at Lancaster. The law does not require that Dr. Dillard intended harm to result. Judgment as a matter of law was inappropriate.")

Lemire v. California Dept. of Corrections and Rehabilitation, 726 F.3d 1062, 1085 (9th Cir. 2013) ("Here, the evidence is undisputed that Carey and Tranquina complied with the order in *Coleman* and implemented a CPR policy at CSP–Solano. Plaintiffs have presented no evidence that either Carey or Tranquina were on notice that staff at CSP–Solano were not complying with the CPR policy, or that some staff were unaware of the policy. While at least two staff members, MTA Hak and RN Hill, were not trained on the policy until a day after St. Jovite died, there is no evidence that Carey or Tranquina knew or had reason to know of this lapse. . . Plaintiffs also argue that the training provided was deficient because it allowed custody staff to acquiesce to medical

staff once on the scene. Plaintiffs have offered no evidence, however, that this interpretation of the Dovey Memo is impermissible. Nor do they show that Carey was deliberately indifferent in interpreting the policy in that way, requiring custodial staff to provide CPR to inmates but to allow medical staff to take primary responsibility once on the scene. We affirm the grant of summary judgment as to Carey and Tranquina on the failure to train claims.")

Maxwell v. County of San Diego, 708 F.3d 1075, 1086 (9th Cir. 2013) ("We must decide whether to grant summary judgment to Captain Reynolds and Lieutenant Salazar alone. Reynolds and Salazar did not directly participate in any of the allegedly unlawful acts. The Maxwells contend that summary judgment is nonetheless inappropriate because a jury could reasonably find Reynolds and Salazar liable as the ranking officers present. We agree. A supervisor is liable under § 1983 for a subordinate's constitutional violations 'if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.' *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir.1989). Reynolds and Salazar testified that they were mere observers who stayed at the end of the Maxwells' driveway. But based on the Maxwells' version of the facts, which we must accept as true in this appeal, we draw the inference that Reynolds and Salazar tacitly endorsed the other Sheriff's officers' actions by failing to intervene. It is undisputed that Reynolds and Salazar were aware of the Maxwells' detention and witnessed at least part of Jim's arrest and beating. Reynolds testified that he heard Kneeshaw yelling 'stop, stop, stop' right before the latter pepper-sprayed and struck Jim. Salazar testified that he heard a 'commotion' at that time. On this appeal we do not weigh the evidence to determine whether Reynolds and Salazar's stated reasons for not intervening are plausible.")

Maxwell v. County of San Diego, 708 F.3d 1075, 1097, 1098 (9th Cir. 2013) (Ikuta, J., dissenting) ("[E]ven if the majority were correct that the deputies violated clearly established law, it is impossible to conclude that Captain Gregory Reynolds and Lieutenant Anthony Salazar could be held liable merely because they were standing behind yellow crime tape at the scene. We have long held that officers may not be held liable '*merely* for being present at the scene of an alleged unlawful act' or for being a member of the same team as the wrongdoers. . . More recently, *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), clarified that there is no respondeat superior liability under § 1983. Rather, a government official may be held liable only for the official's own conduct. . . To bring a § 1983 action against a supervisor, the plaintiff must show: (1) the supervisor breached a legal duty to the plaintiff, *see Starr v. Baca,* 652 F.3d 1202, 1207–08(9th Cir.2011); (2) the breach of duty was 'the proximate cause' of the plaintiff's constitutional injury, . . . and (3) the supervisor had at least the same level of *mens rea* in carrying out his superintendent responsibilities as would be required for a direct violation of the plaintiff's constitutional rights . . . . Here the Maxwells do not allege that Reynolds and Salazar took any affirmative acts to set in motion the allegedly unconstitutional acts of their subordinates, nor do they present any evidence that Reynolds and Salazar knew about their subordinates' conduct in delaying the ambulance or detaining and separating the Maxwells. Moreover, they do not dispute that neither Reynolds nor Salazar crossed the yellow tape across the Maxwells' driveway that restricted entry to the crime scene. The Maxwells allege merely that Reynolds and Salazar (1) were the highest ranking officials at the

scene, (2) could observe the crime scene from the driveway, and (3) heard Kneeshaw yelling at Jim Maxwell to 'stop, stop' just before using pepper spray and striking Jim with his baton. These facts are insufficient to create a genuine issue of material fact that Reynolds and Salazar breached a legal duty to the Maxwells, that they were the proximate cause of the Maxwells' constitutional injuries, or that they acted with the requisite state of mind. First, the Maxwells do not allege that the supervisors were even aware that the deputies delayed Kristin's departure, let alone that the supervisors acted with deliberate indifference. Nor can we infer, solely based on geographic proximity, that Reynolds and Salazar knew or reasonably should have known that the other Sheriff's deputies had forcibly detained the Maxwells and prevented them from seeing their daughter and each other, and that there were no exigent circumstances to justify the detention. This is especially true given that Reynolds and Salazar never entered the crime scene. Nor is there any evidence 'of a *specific* policy implemented by the Defendants or a *specific* event or events instigated by the Defendants that led to these purportedly unconstitutional' seizures. . . . As in *Hydrick,* 'the factual allegations in Plaintiffs' complaint resemble the "bald" and "conclusory" allegations in *Iqbal,* instead of the detailed factual allegations in *Starr.*'. . It is therefore clear that Reynolds and Salazar cannot be held liable for the alleged constitutional violations of other deputies on the scene. . . .It is a truism that 'tragic facts make bad law.'. . Nevertheless, we may not furnish a cause of action where the law does not supply one. . . The deputies arriving at the Maxwells' residence faced a chaotic scene: a woman had been shot in the jaw; the perpetrator was still in the house; multiple ambulances and paramedics were responding to the scene; and frantic relatives were milling about. From the perspective of the deputies, it was more than merely reasonable to take steps to secure the crime scene and separate the witnesses—it was their duty. The majority has not pointed to a single case that clearly establishes that the deputies' actions here violated the Maxwells' constitutional rights. Under existing case law, the deputies are entitled to qualified immunity for their actions. I therefore respectfully dissent.")

OSU Student Alliance v. Ray, 699 F.3d 1053, 1058, 1070, 1071-78 & nn. 15, 18 (9th Cir. 2012) ("Plaintiffs, the *Liberty's* student editors and student publishers, sue under 42 U.S.C. § 1983. We have little trouble finding constitutional violations. The real issue is whether the complaint properly ties the violations to the four individual defendants, who are senior University officials. Plaintiffs confront a familiar problem: they do not know the identities of the employees who threw the newsbins into the trash heap, and they do not know which University official devised the unwritten policy or which official gave the order to confiscate the bins. Plaintiffs do know, however, that three of the four defendants participated in the decision to deny them permission to place bins outside of the designated areas after the confiscation. We conclude that the complaint states claims against those three defendants based on this post-confiscation decision. We also hold that the complaint states a claim against one defendant—the Director of Facilities Services—based on the confiscation itself. . . . *Iqbal* emphasizes that a constitutional tort plaintiff must allege that every government defendant—supervisor or subordinate—acted with the state of mind required by the underlying constitutional provision. . . . The claims against President Ray and Vice President McCambridge require closer examination. According to the complaint, neither defendant actually made the decision to deny plaintiffs permission to place their newsbins throughout campus;

Martorello did that. Both Ray and McCambridge, however, oversaw Martorello's decision-making process and knowingly acquiesced in his ultimate decision. . . . According to the complaint, then, Ray and McCambridge knew that their subordinate, Martorello, was applying the previously unannounced and unenforced policy against the *Liberty*, but not against any of the other off-campus newspaper, and they did nothing to stop him. The question is whether allegations of supervisory knowledge and acquiescence suffice to state claims for speech-based First Amendment and equal protection violations. . . . *Iqbal* does not answer this question. That case holds that a plaintiff does not state invidious racial discrimination claims against supervisory defendants by pleading that the supervisors knowingly acquiesced in discrimination perpetrated by subordinates, but this holding was based on the elements of invidious discrimination in particular, not on some blanket requirement that applies equally to all constitutional tort claims. *Iqbal* makes crystal clear that constitutional tort claims against supervisory defendants turn on the requirements of the particular claim—and, more specifically, on the state of mind required by the particular claim—not on a generally applicable concept of supervisory liability. . . . Put simply, constitutional tort liability after *Iqbal* depends primarily on the requisite mental state for the violation alleged. . . . Here, where President Ray and Vice President McCambridge are alleged to have knowingly acquiesced in their subordinate Martorello's violation of plaintiffs' free speech rights under the First and Fourteenth Amendments, we must decide whether knowledge (as opposed to purpose) satisfies the mental state requirement for free speech violations. With some notable exceptions, courts before *Iqbal* generally did not have to determine the required mental state for constitutional violations, particularly not free speech violations. A uniform mental state requirement applied to supervisors: so long as they acted with deliberate indifference, they were liable, regardless of the specific constitutional right at issue. . . . As for the subordinate officials who violate constitutional rights directly—the officer who shoots the suspect, the Facilities Department employee who junks the newsbins—they act intentionally in most cases. Perhaps they do not always know that their actions are unconstitutional (hence, the qualified immunity defense), but they do intend to take the violative action. Thus, before *Iqbal*, fixing the mental state requirement for a particular constitutional provision was most often unnecessary. The line officers generally satisfied every mental state because they acted intentionally, and supervisors were subject to a uniform mental state requirement divorced from the underlying claim. . . By abrogating the second half of this framework, however, *Iqbal* places new weight on the state of mind requirement for constitutional torts. Now claims against supervisors present problems that claims against subordinates typically do not: must the supervisor have harbored the specific intent to subject the plaintiff to the injury-causing act, or does knowledge or some lesser mental state suffice? . . . . We understand *Iqbal*'s language eliminating the doctrine of "supervisory liability" to overrule circuit case law that, following *City of Canton v. Harris*, had applied a uniform test for supervisory liability across the spectrum of constitutional claims. . . . *Iqbal* means that constitutional claims against supervisors must satisfy the elements of the underlying claim, including the mental state element, and not merely a threshold supervisory test that is divorced from the underlying claim. *Iqbal* does not stand for the absurd proposition that government officials are never liable under § 1983 and *Bivens* for actions that they take as supervisors. . . . *Iqbal* holds simply that a supervisor's liability, like any government official's liability, depends

first on whether he or she breached the duty imposed by the relevant constitutional provision. . . .For two reasons, we conclude that knowledge suffices for free speech violations under the First and Fourteenth Amendments. . . First, it is black-letter law that government need not target speech in order to violate the Free Speech Clause. . . . In other words, the government may violate the speech clause even if it acts without the purpose of curtailing speech. Free speech claims do not require specific intent. Second, only in limited situations has the Supreme Court found constitutional torts to require specific intent. We know of three examples: (1) due process claims for injuries caused by a high-speed chase, *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 836, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); (2) Eighth Amendment claims for injuries suffered during the response to a prison disturbance, *Whitley v. Albers*, 475 U.S. 312, 320–21, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986); and (3) invidious discrimination under the Equal Protection Clause and the First Amendment Free Exercise Clause. . . . For these two reasons—because Supreme Court case law indicates that free speech violations do not require specific intent, and because the rationales that have led the Court to read specific intent requirements into certain other constitutional tort claims do not apply in the free speech context—we conclude that allegations of facts that demonstrate an immediate supervisor knew about the subordinate violating another's federal constitutional right to free speech, and acquiescence in that violation, suffice to state free speech violations under the First and Fourteenth Amendments. The complaint alleges that Ray and McCambridge knowingly acquiesced in Martorello's decision to continue restricting the *Liberty's* circulation under the standardless, unwritten newsbin policy. They stood superior to Martorello; they knew that Martorello denied plaintiffs' publication the same access to the campus that the *Barometer* received; and they did nothing. The complaint therefore states First Amendment and Equal Protection claims against Ray and McCambridge. [footnote observing that "same analysis controls the First Amendment and speech-based equal protection claims. Unlike equal protection claims for racial or religious discrimination, speech-based equal protection claims do not require a showing that the plaintiff was singled out *because of* a particular characteristic. Rather, speech-based equal protection claims require only a showing that the plaintiff was subjected to differential treatment that trenched upon a fundamental right."] . . . . The allegations portray Martorello as the University official responsible for enforcing the unwritten newsbin policy. Thus, the question on which plaintiffs' due process claim against Martorello turns is not whether knowledge and acquiescence, deliberate indifference, or some lesser mental state meets the state of mind requirement for the claim, but rather whether an official's administration and oversight of an unconstitutional policy meets the required threshold. The Tenth Circuit confronted this question in *Dodds,* where the issue was whether the complaint stated a § 1983 claim against a Sheriff for a due process violation that occurred when jail officials denied the plaintiff the opportunity to post bail for several days after his arrest. . . .We agree with *Dodds.* When a supervisory official advances or manages a policy that instructs its adherents to violate constitutional rights, then the official specifically intends for such violations to occur. Claims against such supervisory officials, therefore, do not fail on the state of mind requirement, be it intent, knowledge, or deliberate indifference. . . . Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability, no matter what the required mental state, so long as the policy proximately causes the harm—that is, so long as the plaintiff's constitutional injury in fact

occurs pursuant to the policy. . . .Thus, because it alleges that Martorello was in charge of the newsbin policy and that the confiscation without notice was conducted pursuant to that policy, the complaint pleads a due process claim against Martorello. We note two distinctions from the invidious discrimination claims that *Iqbal* rejected. First, Javaid Iqbal's complaint did not 'contain facts plausibly showing that [Ashcroft and Mueller] purposefully adopted a policy of classifying post–September–11 detainees as "of high interest" because of their race, religion, or national origin.'. . Simply put, the complaint did not tie the alleged unconstitutional conduct—purposeful discrimination by race or religion—to any policy that the supervisory defendants advanced. This case is different. Through concrete allegations, the complaint ties the unconstitutional confiscation of the newsbins to the policy that Martorello administered. Second, the small scope of Martorello's operation matters. It is one thing to allege that, because some low-level government officers engaged in purposeful discrimination, a cabinet-level official must also have engaged in purposeful discrimination. But it is another thing to say that the director of a university facilities department had a hand in the unconstitutional manner in which his employees enforced a department-wide policy. The second claim is plausible. Like all claims at the pleading stage, of course, it requires development. . . .The complaint does not tie President Ray and Vice President McCambridge to the confiscation, through the policy or any other means. Unlike Martorello, these officials are not alleged to have run the department that enforced the policy or to have had any familiarity with the policy's requirements before the confiscation. . . . Therefore, the complaint does not state due process claims against these defendants.")

OSU Student Alliance v. Ray, 699 F.3d 1053, 1079-81 (9th Cir. 2012) (Ikuta, J., dissenting in part) ("Simply put, to state a claim under § 1983 against a government official, a plaintiff must allege that the official's 'own misconduct' violated the plaintiff's constitutional rights. . . What the plaintiff must plead and prove 'will vary with the constitutional provision at issue,' based on the Supreme Court's decisions regarding what conduct violates that particular provision. . . But the Supreme Court is quite clear that 'supervisory liability' is a 'misnomer' in § 1983 cases, and that officials 'may not be held accountable for the misdeeds of their agents.'. . The majority muddles and obscures this simple principle. Plaintiffs' complaint adequately alleges that Vincent Martorello, OSU's facilities services director, violated their First Amendment rights under § 1983 by personally and arbitrarily limiting *The Liberty's* distribution on campus. But their complaint nowhere indicates how OSU's president, Ed Ray, and the vice president of finance and administration, Mark McCambridge, also violated those rights through their 'own individual actions.'. . The majority considers it sufficient that Ray and McCambridge 'knowingly acquiesced' in Martorello's actions. . . Under *Iqbal,* however, an official is not liable under § 1983 for simply knowing about a lower ranking employee's misconduct and failing to act. In holding otherwise, the majority resurrects the very kind of supervisory liability that *Iqbal* interred. I disagree with this departure from *Iqbal*.. . . In sum, for an official's inaction to deprive plaintiff of constitutional rights under color of law, the official must fail to act when the law requires action. . . .Neither exception applies here. Plaintiffs do not allege that Ray or McCambridge had a legal duty to stop Martorello from continued enforcement of his newsbin policy, that they exerted any control over the decisions of the facilities department, or that their failure to intervene in the dispute between

Plaintiffs and Martorello violated any law, statute, or even university requirement. . . . Nor do plaintiffs allege that either Ray and McCambridge personally took an action that deprived plaintiffs of their constitutional rights. . . . In sum, the complaint merely recites 'the *organizational* role of the[ ] supervisors,' and makes 'no allegation that the supervisors took any specific action resulting in' the constitutional violation. *Moss v. U.S. Secret Serv. (Moss II),* 675 F.3d 1213, 1231 (9th Cir.2012) (emphasis in original). This is not sufficient to state a claim under § 1983. The majority misses this central point because it focuses solely on one component of a § 1983 claim: the proper mental state for First Amendment claims. The majority's detailed and elaborate discussion of this issue. . . boils down to the simple, though erroneous, proposition that a plaintiff can adequately allege a § 1983 claim for violation of that plaintiff's First Amendment rights merely by alleging that the official had knowledge of such violation. The majority brushes aside § 1983's requirement that a defendant engage in conduct that 'subjects, or causes to be subjected' a plaintiff to a deprivation of constitutional rights, and instead holds it suffices if a supervisory official 'knowingly acquiesces' in the misconduct of a lower ranking employee. . . But of course, 'acquiescence' is merely a way to describe knowledge and inaction. . . Further, the majority erroneously implies that an allegation of 'knowledge' suffices to establish the causation element of a § 1983 claim, namely, that the official caused the plaintiff's injury. The majority relies on a novel and somewhat impenetrable formulation that 'duty' is generally equivalent to acting with a specified state of mind, and this duty 'eclipses' proximate cause where the plaintiff acts with knowledge that a violation may occur. . . Because (in the majority's view) the mental state of knowledge stands in for both misconduct and causation, the plaintiffs can state a § 1983 claim by alleging only that a supervisor had knowledge of a subordinate's misconduct and took no action.This is not enough. While plaintiffs here must plead the elements of a First Amendment violation, including mental state, they must also plead that each official acted in a way that 'subject[ed], or cause[d] to be subjected,' a citizen to the deprivation of First Amendment rights. . . Plaintiffs here did not allege that Ray or McCambridge engaged in any misconduct or that these officials caused their injury. Therefore, the complaint in its current form does not meet the bare minimum for stating a First Amendment claim under § 1983 against Ray or McCambridge, and this claim must be dismissed.")

Lacey v. Maricopa County, 693 F.3d 896, 916 (9th Cir. 2012) (en banc) ("For an official to be liable for another actor's depriving a third party of his constitutional rights, that official must have at least the same level of intent as would be required if the official were directly to deprive the third party of his constitutional rights. . . With this proviso, a supervisor can be held liable for the constitutional torts of his subordinates if 'a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation' exists, *Starr,* 652 F.3d at 1207(quoting *Hansen v. Black,* 885 F.2d 642, 646 (9th Cir.1989)); *see Iqbal,* 556 U.S. at 677. But an official with no official authority over another actor can also be liable for that actor's conduct if he induces that actor to violate a third party's constitutional rights, provided that the official possesses the requisite intent, such as retaliatory animus. *See Hartman v. Moore,* 547 U.S. 250, 262 (2006); *see also Harris v. Roderick,* 126 F.3d 1189, 1196–97, 1204 (9th Cir.1997) (finding liability for both supervisory and nonsupervisory officials). . . . In claims under the Eighth Amendment, we have

recognized that a supervisor also may be accountable under § 1983 if he was deliberately indifferent to unconstitutional conditions in the prison. *See Starr*, 652 F.3d at 1205.")

Williams v. County of San Mateo, No. 08–17747, 2012 WL 2513962, at *1 (9th Cir. July 2, 2012) (not published) ("Williams has also raised a genuine issue of material fact as to Sheriff Horsley's supervisory liability, because a jury could reasonably find that the Sheriff was aware of the policies and practices concerning the detention of civil detainees. . . As we have previously stated, '"acquiescence or culpable indifference" may suffice to show that a supervisor "personally played a role in the alleged constitutional violations."'. . The Trindle affidavit presents evidence that civil detainees were subjected to the same conditions as criminal detainees. This evidence plausibly suggests that Sheriff Horsley, as the person 'required by statute to take charge of and keep the county jail and the prisoners in it,' . . . acquiesced in the unconstitutional conduct of his subordinates.")

Williams v. County of San Mateo, No. 08–17747, 2012 WL 2513962, at *2 (9th Cir. July 2, 2012) (Ikuta, J., dissenting in part) (not published) ("Because a supervisor who lacks knowledge of any risk to inmate health or safety cannot be deliberately indifferent to such risk, the majority errs in concluding that Williams raised a genuine issue of material fact as to Sheriff Horsley's liability. We use a 'deliberate indifference' standard to analyze claims that a prison official violated pretrial detainees' constitutional rights by subjecting them to punitive treatment. . . Under this standard, a pretrial detainee must show that the prison official both was '"aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,"' and also actually drew that inference. . . The Supreme Court has made it clear that government officials are not liable for the misdeeds of their subordinates; rather, officials can be held liable under § 1983 only for their 'own individual actions' that violate the Constitution. . . Here, Williams has not raised a genuine issue of material fact that Sheriff Horsley evinced 'deliberate indifference.' There is no evidence that Sheriff Horsley personally reviewed Williams's grievances or received any notice that civil detainees were being treated the same as or less considerately than criminal detainees. . . Although the majority relies on the Trindle affidavit, . . .this offers no assistance, because the affidavit is entirely silent regarding the state of Sheriff Horsley's knowledge. In fact, Williams fails to cite any evidence that Sheriff Horsley was actually 'aware of facts from which the inference could be drawn' that pretrial detainees were receiving inappropriate treatment, let alone that he actually drew that inference. . . In short, Williams's claims against Sheriff Horsley are based solely on a theory of respondeat superior: because Sheriff Horsley was the ultimate supervisor of the prison system, he can be held liable. Because the Supreme Court has made clear that a supervisor cannot be held vicariously liable in this manner, *Iqbal,* 556 U.S. at 676, I respectfully dissent.").

Chavez v. U.S., 683 F.3d 1102, 1107-12 (9th Cir. 2012) ("After the Ninth Circuit reinstated plaintiffs' *Bivens* claims against the supervisory defendants, the Supreme Court decided *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In light of *Iqbal*, the supervisory defendants filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The district court denied the motion, finding that the supervisory defendants failed to provide a plausible nondiscriminatory

explanation for the alleged stops. Moreover, the district court held that plaintiffs did not need to allege that the supervisory defendants directly participated in constitutional violations. Instead, citing *Larez v. City of Los Angeles,* 946 F.2d 630, 646 (9th Cir.1991), the district court held that the plaintiffs had plausibly alleged that the supervisory defendants had either knowingly refused to terminate a series of acts they reasonably should have known would cause constitutional violations, acquiesced in constitutional deprivations by subordinates, or displayed reckless or callous indifference to others' rights. The supervisory defendants now appeal from that decision. . . . Relying on *Iqbal,* the supervisory defendants invite the Court to hold that the Fourth Amendment, like the Fifth Amendment, requires plaintiffs to allege that supervisors acted with a 'discriminatory purpose.' This argument, however, misreads *Iqbal.* In *Iqbal,* the Supreme Court did not require allegations of 'discriminatory purpose' in order to render supervisors liable for any constitutional violation by their subordinates. Rather, the Supreme Court noted that plaintiffs cannot base a claim against supervisors on a theory of *respondeat superior,* and must instead show that the supervisors, 'through [their] own individual actions, ha[ve] violated the Constitution.'. . Because a plaintiff claiming invidious discrimination under the Fifth Amendment must allege facts showing that officers acted with a 'discriminatory purpose,' allowing that Fifth Amendment claim to proceed against a supervisor in the absence of a particularized showing of such a purpose would, in effect, render the supervisor vicariously liable for her subordinates' intent. . .The requirement that a plaintiff allege a 'discriminatory purpose,' then, derived from the Fifth Amendment rather than from the fact that the plaintiff pled claims against supervisors. We see nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law by adding a 'discriminatory purpose' requirement to a Fourth Amendment claim against supervisors. *See Starr v. Baca,* 652 F.3d 1202, 1207 (9th Cir.2011) (reaching same conclusion for an Eighth Amendment claim). . . .Because *Iqbal* requires courts to apply an equivalent standard to supervisors and subordinates, we hold that, taking qualified immunity into account, a supervisor faces liability under the Fourth Amendment only where 'it would be clear to a reasonable [supervisor] that his conduct was unlawful in the situation he confronted.' A lower standard would impose vicarious liability on supervisors based on their subordinates' clearly unlawful conduct. Because the plaintiffs' complaint, as described below, does not come close to meeting this standard except with respect to defendant Hunt, who faces liability for his direct participation in the stops, we leave to future cases the determination of what conduct by supervisors may qualify as clearly unlawful. Judged under the standard described above, plaintiffs' complaint fails to state a Fourth Amendment claim against any supervisory defendant except Hunt. Turning first to the supervisory defendants other than Hunt, even assuming *arguendo* that the plaintiffs have sufficiently alleged that Border Patrol agents conducted stops without reasonable suspicion, plaintiffs have not alleged facts that would allow a court to draw a reasonable inference that a reasonable supervisor in these defendants' situations would have found their conduct to be clearly unlawful. The Court discounts, as it must, the plaintiffs' wholly conclusory allegation that the supervisory defendants 'personally reviewed and, thus, knowingly ordered, directed, sanctioned or permitted' the allegedly unconstitutional stops. Having done so, the remaining allegations do not plausibly suggest that these supervisors clearly should have regarded their conduct as unlawful. . . . In contrast to the other supervisory defendants, Hunt faces liability not only as a supervisor, but also for his direct

participation in the stops. As noted above, the Fourth Amendment prohibits an officer on roving patrol near the border from stopping a vehicle in the absence of an objectively 'reasonable suspicion' that the 'particular vehicle may contain aliens who are illegally in the country' or is involved in some other criminal conduct. . . . Here, plaintiffs plausibly allege conduct by Hunt that would be a clear Fourth Amendment violation to a reasonable officer. Plaintiffs allege that, because they traveled at highway speeds, Border Patrol agents could not make the particularized observations necessary to form a reasonable suspicion that plaintiffs' shuttle contained aliens. They further allege that Border Patrol agents instead focused principally on 'the Latin, Hispanic or Mexican appearance of drivers and/or other occupants of vehicles,' a characteristic that, under *Brignoni–Ponce,* clearly does not give rise to reasonable suspicion. . . . Based on the facts set forth in the complaint, we hold that plaintiffs have plausibly alleged that Hunt stopped them based solely on their and their passengers' 'apparent Mexican ancestry,' a characteristic that a reasonable officer clearly would have known did not create reasonable suspicion. Accordingly, the complaint adequately states a claim against Hunt for Fourth Amendment violations, and, at least on the facts alleged, qualified immunity does not shield Hunt from liability. . . .In sum, we hold that, to state a claim against supervising officers for causing their subordinates' purported violations of the Fourth Amendment, a complaint must allege facts that plausibly suggest that a reasonable supervisor would find it 'clear' that the defendant's conduct was 'unlawful in the situation he confronted.' Applying that standard to this case, we hold that plaintiffs' complaint fails to state a claim against any supervisory defendant other than Hunt, who directly participated in the alleged underlying violations. Accordingly, we affirm the district court's ruling with respect to Hunt, but reverse it and direct the entry of final judgment with respect to Ziglar, Aguilar, Obregon, Felix Chavez, and Campbell.")

Chavez v. U.S., 683 F.3d 1102, 1113 (9th Cir. 2012) (Wallace, J., concurring) ("I fully concur in the opinion and judgment, but I would have preferred to resolve this appeal without addressing the effect of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), on supervisory liability in the Fourth Amendment context. This is because even under the pre-*Iqbal* standard described in *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991), plaintiffs' claims meet the same fate described in the panel's opinion for substantially the same reasons. Once we strip away plaintiffs' conclusory allegations as mandated by the section of *Iqbal* addressing general pleading standards, . . . there are no factual allegations alleging that any of the supervisory defendants except Hunt knew or reasonably should have known that their conduct would cause others to inflict a constitutional injury. . . Our court recently reasoned that it did not need to consider the debate regarding the extent to which the Ninth Circuit's pre-*Iqbal* supervisory liability standard remains good law because the complaint's allegations fell even under the old standard. *Moss v. United States Secret Serv.*, 675 F.3d 1213, 1231 n.6 (9th Cir.2012). Similarly, at least eight opinions from other circuit courts have explicitly recognized that *Iqbal* might restrict supervisory liability, but have refused to rule on the extent of the restriction when the question could be avoided. [collecting cases] I would choose to follow an approach signaled by a prior Ninth Circuit opinion whenever we can because it makes good sense and assists us to keep our law intact. That so many other circuit opinions have also taken the same course strongly suggests that it would be a better practice to do

so here. Although I do not disagree with the standard we adopt in our opinion, I would have preferred to follow the wisdom of prior circuit opinions (including our own) and resolve this case without adopting any new standard at all.")

Henry A. v. Willden, 678 F.3d 991, 1003-05 (9th Cir. 2012) ("[T]he State defendants argue that plaintiffs have failed to state a claim against them for supervisory liability. We recently reaffirmed that a plaintiff may state a claim under § 1983 against a supervisor for deliberate indifference. *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011). . . . After thoroughly examining the plaintiffs' complaint, we agree that there are few specific allegations against the State defendants. Most of the allegations in the complaint simply reference 'Defendants,' without specifying whether the conduct at issue was committed by the named State officials, County officials, or the 'John Doe' supervisors or caseworkers. . . .The allegations that do expressly reference the State defendants are too general to state a claim for supervisory liability. In *Starr v. Baca*, the plaintiff alleged that Sheriff Baca himself had been given clear notice by the Department of Justice of the specific unconstitutional conditions in the jails; that the Sheriff received numerous reports documenting inmate violence caused by the unconstitutional conduct of his deputies; and that the Sheriff ultimately acquiesced in these constitutional violations. . . In contrast, the allegations here claim that the agencies directed by Willden and Comeaux have oversight responsibility for Clark County's foster care system and are required to ensure that Clark County is complying with state and federal law. The complaint also alleges that all of the defendants had knowledge of independent reports documenting the systemic failures of foster care in Nevada. But it does not allege that Willden or Comeaux had any personal knowledge of the specific constitutional violations that led to Plaintiffs' injuries, or that they had any direct responsibility to train or supervise the caseworkers employed by Clark County. The allegations that come closest to pleading personal involvement by Willden and Comeaux concern the failure to provide medical records to the children and their foster parents in order to facilitate their medical care. . . .When read together, these allegations suggest that there may be a causal connection between the State defendants' failure to share these medical records and the injuries suffered by plaintiffs such as Henry, who received a dangerous combination of prescription drugs because his medical records were not given to his treatment providers. But even if the complaint in its current form fails to state a claim against the State officials for substantive due process violations, the district court abused its discretion by failing to give the plaintiffs an opportunity to amend their complaint. . . . Here, Plaintiffs offered to amend their complaint if necessary in their response to the motion to dismiss, but the district court did not grant leave to amend and did not provide any reasons for its decision. As we have already concluded, the complaint adequately pleads violations of Plaintiffs' clearly established substantive due process rights, and it plausibly suggests an entitlement to relief from at least some of the defendants. Where the complaint falls short in some places is tying its factual allegations to particular defendants. But this type of deficiency can likely be cured by amending the complaint, and there is certainly no evidence to suggest that allowing amendment would be futile. Therefore, on remand, Plaintiffs should be given an opportunity to amend their substantive due process claims. We note that in any future proceedings in the district court, each defendant's

liability must be analyzed individually using the proper standard, whether that individual is a line-level caseworker, a supervisory official, or a municipality.")

Hydrick v. Hunter, 669 F.3d 937, 939-42 (9th Cir. 2012) (on remand from the Supreme Court for reconsideration in light of *Ashcroft v. Iqbal*) ("As discussed in more detail below, after reviewing the Supreme Court's decision in *Iqbal*, the parties' supplemental briefs, and our court's recent decision in *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011), we now hold that Defendants are entitled to qualified immunity on Plaintiffs' claims for money damages. The conclusory allegations in Plaintiffs' Second Amended Complaint are insufficient to establish Defendants' individual liability for money damages. Our holding, however, is limited. Qualified immunity is only an immunity from a suit for money damages, and does not provide immunity from a suit seeking declaratory or injunctive relief. . . Accordingly, on remand, the Plaintiffs may proceed with their claims for declaratory and injunctive relief. . . .As discussed in greater detail below, in the case before us, the factual allegations in Plaintiffs' complaint resemble the 'bald' and 'conclusory' allegations in *Iqbal*, instead of the detailed factual allegations in *Starr*. . . Accordingly, Plaintiffs pleaded insufficient facts to establish 'plausible' claims against the Defendants in their individual capacities and the Defendants are entitled to qualified immunity. . . .The Plaintiffs' complaint proceeds under two theories of liability against the Defendants in their individual capacities. Plaintiffs allege that the Defendants are: (a) liable for their own conduct because they created policies and procedures that violated the Plaintiffs' constitutional rights; and, (b) liable because they were deliberately indifferent to their subordinates' constitutional violations. . . Plaintiffs' allegations fail to state claims against Defendants in their individual capacities under either theory of liability. Plaintiffs' complaint is based on conclusory allegations and generalities, without any allegation of the specific wrong-doing by each Defendant. For example, Plaintiffs' Fourth Amendment claim alleges that Defendants' 'policies, practices and customs subject [Plaintiffs] to unreasonable searches; searches as a form of punishment; degrading public strip searches; improper seizures of personal belongings; and the use of unreasonable force and physical restraints.' But there is no allegation of a *specific* policy implemented by the Defendants or a *specific* event or events instigated by the Defendants that led to these purportedly unconstitutional searches. Plaintiffs' remaining claims suffer from the same infirmities. Plaintiffs' First Amendment retaliation claim alleges that 'Defendants have personal knowledge of retaliation against [the Plaintiffs] for participation in lawsuits, but Defendants' policies, practices and customs permit and encourage retaliation.' But there is no allegation of a *specific* policy or custom, nor are there specific allegations regarding each Defendant's purported knowledge of the retaliation. The remainder of Plaintiffs' claims are likewise devoid of specifics. The absence of specifics is significant because, to establish individual liability under 42 U.S.C. § 1983, 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.' *Iqbal*, 129 S.Ct. at 1948. Even under a 'deliberate indifference' theory of individual liability, the Plaintiffs must still allege sufficient facts to plausibly establish the defendant's 'knowledge of' and 'acquiescence in' the unconstitutional conduct of his subordinates. *Starr*, 652 F.3d at 1206–07. In short, Plaintiffs' 'bald' and 'conclusory' allegations are insufficient to establish individual liability under 42 U.S.C. § 1983.")

Starr v. County of Los Angeles, 659 F.3d 850, 851-55 (9th Cir. 2011) (O'Scannlain, Circuit Judge, joined by Gould, Tallman, Bybee, Callahan, Bea, M. Smith, and Ikuta, JJ., dissenting from the order denying rehearing en banc), *cert. denied*, 132 S. Ct. 2101 (2012) ("A mere two years ago, the Supreme Court rejected the argument that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), applied only to antitrust and similarly complex commercial cases, stating that its 'decision in *Twombly* expounded the pleading standard for "all civil actions."' *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953 (2009) (quoting Fed.R.Civ.P. 1). The panel majority in this case disregards that holding, suggesting instead that the *Twombly/ Iqbal* standard does not apply to all civil actions. In reaching this erroneous result, the panel also resurrects a theory of supervisory liability for constitutional torts that the Supreme Court has foreclosed. I therefore must dissent from the regrettable failure of our court to rehear this case en banc. . . . Though the majority ultimately professes to apply something like the *Iqbal* plausibility standard, in the end, it applies what might be deemed '*Iqbal* Lite' ("Same insufficient complaints, fewer dismissals!"). The majority states that a complaint's factual allegations must 'plausibly suggest an entitlement to relief,'. . . but it wrongly requires that the determination of whether this standard is met be made in light of whether it would be 'unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.'. . The majority thus creates a sliding scale in which the greater the anticipated discovery expense, the greater the showing of plausibility that is required. The Supreme Court has rejected such an approach. . . Such a reading is nothing more than a thinly veiled artifice to confine *Twombly* to cases in which discovery is especially costly. In doing so, the majority inexplicably muddies the waters made crystal clear by the Supreme Court's pronouncement in *Iqbal*. Today's unfortunate decision yet again places the Ninth Circuit on the wrong side of a circuit split. Although courts have struggled to determine precisely what *Iqbal* requires, *see, e.g ., Swanson v. Citibank, N.A.,* 614 F.3d 400, 403 (7th Cir.2010), there was-until now-no dispute that *Twombly/ Iqbal* is the standard that applies. . . The panel majority's decision leaves our district court judges in the unenviable position of reconciling the instructions of the Supreme Court with those we announce today. The panel majority's analysis of the facts demonstrates what little resemblance its standard bears to the rule articulated in *Twombly* and *Iqbal*. Starr alleges an Eighth Amendment claim based on the conditions of his confinement. He therefore must plead 'factual content that allows the court to draw the reasonable inference,' *Iqbal*, 129 S.Ct. at 1949, that he was injured as a result of 'an excessive risk to inmate health or safety' that Sheriff Baca 'kn[ew] of and disregard[ed],' *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Sheriff Baca must have been both 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also [have] draw[n] the inference.*' *Id.* (emphasis added). The majority contends that 'the factual allegations in Starr's complaint plausibly suggest that Sheriff Baca acquiesced in the unconstitutional conduct of his subordinates, and was thereby deliberately indifferent to the danger posed to Starr.'. . But the majority never explains − indeed, cannot explain-how it is able to draw this inference. The facts pleaded by Starr do not plausibly suggest that Baca 'kn[ew] of and disregard[ed] an excessive risk to inmate health or safety.' *Brennan*, 511 U.S. at 837. To be sure, a *possible* explanation for ten varied and discrete incidents of inmate-on-inmate violence amongst a prison population of 20,000 might be that the leader of the prison

bureaucracy is callously indifferent to such violence. But *possible* is not sufficient. *Twombly* and *Iqbal* require a *plausible* explanation and held that an explanation is not plausible when an '"obvious alternative explanation"' exists. . . Here, 'the obvious alternative explanation' for the inmate-on-inmate assaults is that it is virtually impossible for an administrator in charge of 20,000 inmates − many of whom are violent − to ensure that they never assault each other. Starr's complaint amounts to nothing more than a general indictment of the LASD. The LASD is the largest sheriff's department in the nation. With a budget of $2.4 billion and a staff of 18,000, it is charged with directly protecting over 4 million people in the 9.8 million person county. It also provides critical support to city police departments by housing all of Los Angeles County's nearly 20,000 locally jailed inmates. *See* Los Angeles County Sheriff's Department, http://lasheriff.org/aboutlasd/execs.html. While size alone does not absolve its leadership of responsibility for its shortcomings, it does underscore the difficulty of attributing any specific incident to the deliberate indifference of the official at the top of this large bureaucracy. . . These ten incidents suggest-at most-that Sheriff Baca is an ineffective leader. They do not plausibly suggest that he is deliberately indifferent to inmate violence. . . . The majority's conclusion has the effect of inserting *respondeat superior* liability into section 1983 despite the Supreme Court's admonition that 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . . As a result, even assuming that Sheriff Baca was deliberately indifferent to an excessive risk of inmate violence, Starr still cannot recover unless Baca's indifference caused the assault on Starr. . . Thus, to state a cause of action, a plaintiff must 'allege facts sufficient to show that the defendants had actual knowledge of an impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.; *Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir.2010) . . . Starr's allegations get nowhere close to this standard. As noted above, Starr alleges that the prior incidents of inmate-on-inmate violence were caused by correctional officer negligence − e.g., poor supervision and misclassification of prisoners. But according to Starr's own account, *his* assault was caused by a group of sadistic correctional officers who intentionally helped several inmates stab Starr twenty-three times and then, unsatisfied, joined in the assault themselves. Thus, even if Sheriff Baca had solved the alleged problems of lax supervision and inmate misclassification, it is difficult to see how that would have stopped this assault. Yet the panel resists the notion that Starr must adequately plead a nexus between Baca's alleged deliberate indifference and Starr's injury. Instead, it infers deliberate indifference from violent episodes that do not have a common, concrete cause that a high-level administrator could readily remedy. In resisting any attempt to require Starr to tie the prior incidents to his injury, the majority reveals its true purpose: to impose *respondeat superior* in any jurisdiction which has a history of prior prison problems, no matter how unrelated those problems are to the plaintiff's injuries. In allowing Starr's claim to proceed, this court creates a road map for circumventing the rule against vicarious liability in constitutional litigation. First, allege a constitutional violation committed by a low-level employee of a large administrative agency. Next, list a number of tangential bad acts committed by other members of that agency. And, finally, fault the head of that agency for not sufficiently addressing the general problem of his subordinates' poor behavior. Indeed, it is hard to see why every L.A. County prisoner who is assaulted by another prisoner does not now have a viable claim

against Sheriff Baca. . . The court's ruling today conflicts with *Iqbal* in its statement of the pleading standard, in its application of the pleading standard, and in its far-reaching conclusions regarding supervisory liability. By failing to rehear this case en banc, we fail to correct these errors and once again must wait for the Supreme Court to do so for us.")

Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011), *reh'g en banc denied by* ***Starr v. County of Los Angeles***, 659 F.3d 850 (9th Cir. 2011) and *cert. denied*, 132 S. Ct. 2101 (2012) ("We see nothing in *Iqbal* that indicates that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases. We also note that, to the extent that our sister circuits have confronted this question, they have agreed with our interpretation of *Iqbal*. [citing *Dodds v. Richardson,* 614 F.3d 1185, 1204 (10th Cir.2010), *Sandra T .E. v. Grindle,* 599 F.3d 583, 591 (7th Cir.2010), and *Sanchez v.. Pereira-Castillo,* 590 F.3d 31, 49 (1st Cir.2009)] We therefore conclude that a plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates.").

Starr v. Baca, 652 F.3d 1202, 1218, 1219, 1221 (9th Cir. 2011) (Trott, J., dissenting), *reh'g en banc denied by* ***Starr v. County of Los Angeles***, 659 F.3d 850 (9th Cir. 2011) and *cert. denied*, 132 S. Ct. 2101 (2012) ("Alleging that the Sheriff '*could*' have known, '*should*' have known, and '*should*' have become aware is tantamount to admitting that Starr had no facts to support his allegations. The test that governs this case consists of two words, not one. Indifference is not enough. For indifference to be actionable, it must be deliberate. Starr's conclusory allegations amount to no more than formulaic flak fired into the sky in an attempt to bring down the squadron leader. When we cease to look at the Los Angeles Sheriff's Department (LASD) as an abstraction and look at the reality, we see good reasons for requiring facts before permitting lawsuits against the Sheriff himself: the agency is gigantic. The LASD is the largest Sheriff's Department in the world. It covers 3,171 square miles, 2,557,754 residents, and by contract 42 of the 88 incorporated cities in Los Angeles County. The Department employs 8,400 law enforcement officers and 7,600 civilians and is responsible for 48 courthouses and 23 substations. The Men's Central Jail alone houses a revolving population of 5,000 inmates. In addition, the Department operates the Twin Towers Correctional Facility, the Mira Loma Detention Facility, the Pitchess Detention Center, and the North County Correctional Center. Persons charged with or convicted of crimes are in over one hundred different locations. The layers of administration and management between what happens in a jail are many and they are complex. To infer that specific incidents which occur in a jail are necessarily known by the Sheriff is to engage in fallacious logic. This complexity does not absolve the Department of responsibility for respecting the constitutional rights and general well-being of its charges, but it does show how inappropriate it is to sue the Sheriff individually *unless* in terms of causation the Sheriff can be personally tied to the actionable behavior at issue. Just being a disappointing or even an insufficiently engaged public servant is not enough. Those issues are for the ballot box and the County Board of Supervisors, not the courts. . . . The days of pleading conclusions without factual support accompanied by the wishful hope of finding something juicy during discovery are over. Wisely, we have moved up judgment day to the complaint stage rather

than bog down the courts and parties with pre-summary judgment combat. This conclusion, of course, does not leave Starr without redress. He may sue the Sheriff in his official capacity, which is the same as suing the County of Los Angeles and the Sheriff's Department, and he may pursue his lawsuit on the ground of official policy or longstanding custom and practice − but he may not sue the Sheriff individually just because he is the Sheriff.")

Cross v. City and County of San Francisco, No. 18-CV-06097-EMC, 2019 WL 1960353, at *14-15 (N.D. Cal. May 2, 2019) ("[S]upervisory liability turns on the substantive scienter requirements of the constitutional claim at issue. As the Ninth Circuit explained in *OSU Student Alliance*: '*Iqbal* makes crystal clear that constitutional tort claims against supervisory defendants turn on the requirements of the particular claim – and, more specifically, on the state of mind required by the particular claim – not on a generally applicable concept of supervisory liability.'. . The Ninth Circuit continued: 'courts before *Iqbal* generally did not have to determine the required mental state for constitutional violations, particularly not free speech violations' and, instead, '[a] uniform mental state requirement applied to supervisors: so long as they acted with deliberate indifference, they were liable, regardless of the specific constitutional right at issue.'. . In other words, 't]he line officers generally satisfied every mental state because they acted intentionally, and supervisors were subject to a uniform mental state requirement divorced from the underlying claim.'. . But *Iqbal* abrogat[ed] the second half of this framework' and 'place[d] new weight on the state of mind requirement for constitutional torts. Now claims against supervisors present problems that claims against subordinates typically do not: must the supervisor have harbored the specific intent to subject the plaintiff to the injury-causing act, or does knowledge or some lesser mental state suffice?'. . Given the above legal framework for supervisory claims, the first question in the instant case is what kind of claim has been brought by Plaintiffs. Based on the allegations in the FAC, Plaintiffs seem to be asserting both a claim for invidious discrimination (as in *Iqbal*) *and* a claim for failure to train. For the invidious discrimination claim, Plaintiffs must allege purposeful discrimination by the supervisory defendants, and not just knowing acquiescence or deliberate indifference. . . . For a failure-to-train claim, the intent requirement is not as high as it is for an invidious discrimination claim. For a failure to train, deliberate indifference is the requisite intent. . . Deliberate indifference may be shown by knowledge and acquiescence on the part of the supervisor. . . In the instant case, Plaintiffs claim invidious discrimination because Deputy Chief Redmond and Captain Cherniss knew about the racial targeting in OSS but failed to intervene. For failure to train, Plaintiffs assert that, at the very least, Deputy Chief Redmond and Capt. Cherniss should have known about the racial targeting in OSS but failed to act. If these allegations are credited, then both causes of action would survive the motion to dismiss. The problem for Plaintiffs is that, as the FAC is currently pled, there is an insufficient factual basis for the allegations that the supervisors had the requisite intent under either theory. If the two supervisors were actually involved in some concrete way with OSS, that would be a basis for knowledge; however, at the hearing, Plaintiffs essentially conceded that they did not know if either supervisor did have a role in OSS and that they were simply presuming such because Deputy Chief Redmond and Captain Cherniss are, as a general matter, supervisors over police officers who were actually involved in OSS. The Court therefore grants the motion to dismiss the claims against Deputy Chief Redmond

and Captain Cherniss. The dismiss, however, is without prejudice. If, during discovery, Plaintiffs uncover evidence indicating that one or both did have a role in OSS, then they may move for leave to amend to add the supervisor(s) back to the case.")

Estate of Lopez v. Torres, No. 15-CV-0111-GPC-MDD, 2016 WL 429910, at *6-8 (S.D. Cal. Feb. 4, 2016) ("The law recognizes that personal participation in a constitutional deprivation is not the only predicate for section 1983 liability. . . Anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable. . . In the years post-*Iqbal*, lower courts have interpreted *Iqbal*'s supervisory liability holding in different ways, with some circuits treating *Iqbal* as a pleading decision, others limiting *Iqbal* to its facts, and others reading *Iqbal* as annihilating supervisory liability to various degrees. . . The Ninth Circuit has generally interpreted *Iqbal* in a more limited way. . . However, under *Iqbal* and under the Ninth Circuit's more expansive interpretation of supervisory liability in the § 1983 context, the Court finds that Plaintiffs have failed to state a claim predicated on supervisory liability. In the Ninth Circuit, a defendant may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'. . The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation but also by 'set[ting] in motion a series of acts by others [ ] or knowingly refus[ing] to terminate a series of acts by others, which [a supervisor] knew or reasonably should have known, would cause others to inflict the constitutional injury.'. . The critical question is whether it was reasonably foreseeable to a supervisor that the actions of particular subordinates would lead to the rights violations alleged to have occurred. . . . Plaintiffs allege that Defendants failed to analyze and investigate the reliability of the information provided by an anonymous informant, which they knew or should have known to be false, before conveying this information with reckless or deliberate indifference to its truth or falsity in a 'misleading and inaccurate fashion' to SWAT, which resulted in Lopez' death. . . The Court finds that Plaintiffs allegations are again insufficient to state a claim for excessive force premised on supervisory liability. First, There is no dispute that the anonymous informant provided truthful information regarding Lopez' status as a parolee at large and his address. In addition, this information was corroborated before the SWAT team was deployed. These corroborated facts unquestionably supported the actions to arrest Lopez. While a 20-20 hindsight review of the incident reveals that Lopez was not armed and there was no AK-47 in the Apartment 58, short of making contact with Lopez and searching his apartment, these allegations could not have been investigated prior to the attempted arrest. Second, although Plaintiffs' FAC provides additional facts regarding the role Defendants allegedly played in conveying unverified information to SWAT, they are insufficiently vague. . . . The FAC nowhere identifies the mission parameters, goals, or commands that the 'mission leaders' allegedly issued, or otherwise allege facts suggesting that Lt. Leos and/or Sgt. Holslag instructed or encouraged SWAT officers to use more force than necessary under the circumstances. . . . Plaintiffs do not allege sufficient facts to find that Defendants 'set in motion a series of acts by others...which [they] *knew or reasonably should have known*, would cause others to inflict the constitutional injury.'. . . Plaintiffs contend that Defendants knew providing the information they did to SWAT 'would cause heightened

tension, awareness, and fear, and would give rise to a likelihood of the immediate use of deadly force if Walb or other agents perceived a threat.'. . Even assuming the truth of Plaintiffs' allegations, it is not reasonable to infer that Defendants knew or should have known that conveying that information to SWAT and requesting SWAT's engagement would result in a SWAT officer using excessive force. . . . [E]ven assuming Defendants were supervisors and set in motion the series of acts that ultimately resulted in Lopez's shooting, Defendants did not proximately cause Lopez's death because the actions of the SWAT unit were an intervening event. . . It was the SWAT team's decision to use submachine guns, to pursue Lopez when he fled into the apartment building, and to shoot him when he allegedly was kneeling in compliance with the Officer Walb's order that led to the deprivation of constitutional rights. Although Plaintiffs allege that Lt. Leos and Sgt. Holslag served as mission leaders of the operation, Plaintiffs do not allege any facts suggesting that they instructed or encouraged SWAT officers to employ more force than necessary under the circumstances. Defendants could not have foreseen that highly trained SWAT officers allegedly would use excessive force in attempting to apprehend Lopez, even SWAT officers armed with the very information Defendants provided them with. Thus, the Court finds that Plaintiffs do not allege sufficient facts to find that Defendants 'set in motion a series of acts by others...which [they] knew or reasonably should have known, would cause others to inflict the constitutional injury' (*Larez*, 946 F.2d at 646), demonstrating 'a reckless or callous indifference to the rights of others.' *Starr*, 652 F.3d at 1208. Officer Walb's use of lethal force was unforeseeable in light of the information Defendants conveyed to SWAT when requesting SWAT's engagement.")

Murillo v. Parkinson, No. CV 11-10131-JGB VBK, 2015 WL 3791450, at *11 (C.D. Cal. June 17, 2015) ("[T]he allegations of the First Amended Complaint are wholly bald and conclusory and assert merely that Defendant Sheriff Parkinson knew or should have known that Plaintiff's rights would be violated by the conditions of her confinement at the jail. Plaintiff does not allege any facts that plausibly suggest Defendant Sheriff Parkinson knew of any constitutional deprivations occurring at the San Luis Obispo County Jail. The mere fact that Defendant Sheriff Parkinson is the Sheriff of San Luis Obispo, and thus is the top official with respect to the administration of the Jail, is not an adequate factual predicate for stating a § 1983 claim against him based on the subject matter of the First Amended Complaint. As in *Hydrick,* '[T]he absence of specifics is significant,' because *Iqbal* has made clear that a complaint against a government official must show that the official's own individual actions violated the Constitution. . . Plaintiff's First Amended Complaint does not provide allegations describing why and how Defendant Sheriff Parkinson 'reasonably should have known' that his rank and file employees were engaged in some 'series of acts' (which he did not initiate, command or encourage) which would cause constitutional injury to Plaintiff if Defendant Sheriff Parkinson did not terminate that 'series of acts[.]'. . . Nor does the First Amended Complaint supply specific allegations describing, in more than conclusory fashion, how Defendant Sheriff Parkinson might have 'set [ ] in motion a series of acts by others'. . . that he knew or reasonably should have known would cause his subordinates to inflict constitutional injury on Plaintiff. Without a factually based, non-conclusory allegation that Defendant Sheriff Parkinson actually knew of the conditions to which Plaintiff refers, as a matter of law it cannot be said that Defendant Sheriff Parkinson 'acquiesced' in those conditions or that his conduct exhibited

'reckless or callous indifference to the rights of' Plaintiff. Accordingly, Defendants Sheriff Parkinson and the County of San Luis Obispo are entitled to summary judgment.")

Perez v. United States, 103 F. Supp. 3d 1180, 1199-1206 (S.D. Cal. 2015) ("Defendant Napolitano is sued in her individual capacity for her allegedly unlawful acts and omissions as Secretary of DHS. Defendant Bersin is sued in his individual capacity for his allegedly unlawful acts and omissions as Commissioner of CBP. Defendant Fisher is sued in his individual capacity for his allegedly unlawful acts and omissions as Chief of Border Patrol. Defendants Napolitano, Bersin, and Fisher contend that at the time of the alleged constitutional violation, the 'knowledge and acquiescence' standard was not clearly established in the Fourth Amendment context. Defendants contend that, even if it was clearly established, the SAC fails to allege sufficient facts demonstrating Defendants Napolitano and Bersin's knowledge and acquiescence of the Rocking Policy. . . Plaintiffs contend that the knowledge and acquiescence standard applied to supervisors for excessive force claims long before Yañez was killed. . . . *Chavez* demonstrates that supervisory liability in the Fourth Amendment context requires, at a minimum, knowledge of a pattern or practice of unconstitutional actions taken by subordinates, coupled with culpable action or inaction. . . . Although *Connick* analyzed a claim against a governmental official in his official capacity, *Connick* is equally applicable to claims against government supervisors in their individual capacity. . . .The SAC alleges no facts to support the inference that either Defendant Janet Napolitano, as Secretary of DHS, or Defendant Bersin, as Commissioner of CBP, were directly responsible for the training of Border Patrol agents in their use of force. Instead, the facts alleged in the SAC suggest that the Chief of Border Patrol, not the Secretary of DHS or Commissioner of CBP, is directly responsible for implementing Border Patrol training programs. . . .In addition, the SAC fails to allege sufficient facts to permit the 'reasonable inference' that Defendants Napolitano and Bersin 'disregarded a known or obvious consequence' of their failure to properly train Border Patrol agents on use of force in response to rock-throwing. . . The fact that there were ten rock-throwing deaths along the United States–Mexico Border over an eight year period does not plausibly demonstrate an 'obvious' need for rock-throwing-specific use of force training, such that the failure to provide that training amounts to 'deliberate indifference.'. . The Associated Press article incorporated by reference in the SAC reveals that Border Patrol Agents were attacked with rocks 339 times in 2011 and 185 times in 2012. . . .The SAC alleges that Defendant Napolitano was Secretary of the Department of Homeland Security for the relevant period and that Defendant Bersin was the Commissioner for Customs and Border Protection for the relevant period. At this level of the supervisory chain of command, the Court cannot draw the 'reasonable inference' that Defendants Napolitano and Bersin were aware of a pattern or practice of excessive force in response to rock throwing, absent factual allegations demonstrating specific notice of a such a pattern or practice. . . . The allegation that Defendants Napolitano and Bersin received a mass email each time a Border Patrol agent used force does not permit the 'reasonable inference' that these Defendants were able to appreciate a pattern of excessive force specific to alleged rock-throwing incidents that would require them to take corrective action. . . . The SAC again alleges facts demonstrating that Defendants Napolitano and Bersin were specifically put on notice of the death of Sergio Hernandez, but fails to allege facts that they were given similar notice

of other rock-throwing deaths, let alone a pattern or practice of excessive force used in response to rock-throwing, prior to Yañez's death. The Court concludes that the SAC 'fail[s] to nudge the *possible* to the *plausible*' in demonstrating Defendant Napolitano and Bersin's knowledge of a pattern or practice of excessive force in response to rock throwing, and are therefore liable for culpable action or inaction that caused Yañez's death. . . The Court concludes that Defendants Napolitano and Bersin are entitled to qualified immunity on the ground that the allegations of the SAC fail to make out a constitutional violation. . . Because the Court finds that further amendment would be futile, Plaintiffs' fourth claim is dismissed with prejudice as to Defendants Napolitano and Bersin.")

Perez v. United States, 103 F. Supp. 3d 1180, 1206-12 (S.D. Cal. 2015) ("In the Court's September 3, 2014 Order, the Court concluded that the FAC stated a plausible Fourth Amendment supervisory liability claim against Defendant Fisher. Defendant Fisher now contends that he is entitled to qualified immunity on the grounds that the Fourth Amendment supervisory liability standard was not clearly established at the time of Yañez's death. Defendant Fisher contends that, at the time of the alleged shooting—June 21, 2011—it was not clearly established that 'knowledge and acquiescence' governed supervisory liability for Fourth Amendment excessive force claims. . . Defendant Fisher contends that at this time, the governing standard was *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), which held that 'knowledge and acquiescence' is 'insufficient to satisfy' the standard for supervisory liability in the *Bivens* context. . . Defendant Fisher contends that months later, in *al-Kidd*, . . . the dissent questioned whether the 'knowing failure to act' standard survived *Iqbal*. . . Defendant Fisher contends that the Court relied on *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011) in its September 3, 2014 Order, even though that case was decided four weeks after the alleged shooting incident. Defendant Fisher contend[s] that *Starr v. Baca*'s holding is limited to Eighth Amendment deliberate indifference claims. Defendants contend that as late as 2013 it has been debated whether the 'knowledge and acquiescence' standard survived *Iqbal*. Plaintiffs contend that, as early as 1991, 'it was clearly established in this Circuit that supervisors are liable when they know of and acquiesce in their subordinates' use of excessive force.'. . Plaintiffs contend that *Iqbal* did not '"unsettle" the knowledge and acquiescence standard governing excessive use of force claims' because *Iqbal* 'held only that knowledge and acquiescence was insufficient to establish a claim of *purposeful discrimination*, and the Court expressly tied the level of intent necessary for supervisor liability to *the underlying constitutional tort*.'. . Plaintiffs contend that *Starr v. Baca* was decided before the alleged shooting, and clarified that '*Iqbal* does not affect the standard governing supervisor liability claims when, as is the case here, the level of intent necessary for supervisor liability is greater than needed for the underlying constitutional tort....'. . . *Chavez* is the current standard for supervisory liability in the Fourth Amendment context. 'Because *Iqbal* requires courts to apply an equivalent standard to supervisors and subordinates ... a supervisor faces liability under the Fourth Amendment only where "it would be clear to a reasonable [supervisor] that his conduct was unlawful in the situation he confronted."'. . To meet this standard, a plaintiff must allege, at a minimum, a 'factual basis for imputing ... knowledge' of an unconstitutional practice undertaken by subordinates, coupled with culpable action or inaction. . .Prior to May, 18, 2009, the date *Ashcroft v. Iqbal* was decided. . . .

[s]upervisors could be liable for their subordinates use of excessive force if they were on notice of a pattern or practice of excessive force, failed to take corrective action, and that failure foreseeably caused the plaintiff's injury. . . . The Court finds that the pre-May 18, 2009 and current standards for supervisory liability in the Fourth Amendment context both require knowledge of an unconstitutional pattern or practice of excessive force used by subordinates, coupled with culpable action or inaction. However, Defendant Fisher contends that, at the time of the alleged shooting, June 21, 2011, the governing standard was *Ashcroft v. Iqbal*, . . . which held that 'knowledge and acquiescence' is 'insufficient to satisfy' the standard for supervisory liability in the *Bivens* context. . . Alternatively, Defendant Fisher contends that, on June 21, 2011, there was enough disagreement in the Courts following *Iqbal* such that any Fourth Amendment supervisory liability standard established prior to *Iqbal* was no longer clearly established law. . . .*Starr* demonstrates that *Iqbal* does not necessarily impose a 'purpose' requirement in all constitutional contexts, but instead required that the same requirements for holding a subordinate liable for a *Bivens* violation are equally applicable to 'an official charged with violations arising from his or her superintendent responsibilities.'. . At the time of Yañez's death, there were no Supreme Court on Ninth Circuit cases available that applied *Iqbal* to a Fourth Amendment excessive force claim asserted against supervisors. However, Fourth Amendment excessive force law was clearly established, and *Iqbal* requires that the Fourth Amendment's mental state requirements be applied equally to supervisors. '[S]pecific intent [is not] required in order to establish a violation of the Fourth Amendment.'. . The facts known to the governmental actor are relevant in determining the objective reasonableness of the actor's actions. . . Following *Iqbal*, the pre-May 11, 2009 standard remained good law in the Fourth Amendment excessive force context because it was consistent with the Fourth Amendment's mental state requirements: a supervisor's knowledge of a pattern or practice of excessive force by subordinates and failure to take corrective action is not '"objectively reasonable" in light of the facts and circumstances confronting [the supervisor].'. . As stated previously, the pre-May 11, 2009 standard and *Chavez* both require knowledge of a pattern or practice of excessive force committed by subordinates, coupled with culpable action or inaction. The Court concludes that the standard remained substantially unchanged both before and after *Iqbal* and before and after *Chavez.* The Court further concludes that nothing in *Iqbal* raises the standard for supervisory liability for Fourth Amendment excessive force from knowledge of an unconstitutional pattern or practice, coupled with culpable action or inaction, to a standard requiring a higher mental state. The Court concludes that Defendant Fisher is not entitled to qualified immunity on the ground that the applicable mental state for supervisory liability in the Fourth Amendment context was not clearly established at the time of Yañez's death.")

Jones v. Cate, No. 2:12-CV-2181 TLN CKD, 2015 WL 1440168, at *10-11 (E.D. Cal. Mar. 27, 2015) ("In *OSU*, the Ninth Circuit held that a supervisor's knowledge of and acquiescence in a First Amendment free speech violation was sufficient to impose liability on the supervisor for the constitutional tort. The court gave two reasons for the holding: first, that First Amendment free speech claims do not require specific intention; and second, that United States Supreme Court has 'only in limited situations ... found constitutional torts to require specific intent.'. . The three situations cited by the OSU court are '(1) due process claims for injuries caused by a high-speed

chase ... (2) Eighth Amendment claims for injuries suffered during the response to a prison disturbance ... (3) and invidious discrimination under the Equal Protection Clause and the First Amendment Free Exercise Clause.'. . The case at bar presents a fourth constitutional tort that includes a specific intent requirement. Success on a retaliation claim requires proof that retaliation for the exercise of protected conduct 'was a "substantial" or "motivating" factor' in imposing adverse employment consequences. . . Under *Iqbal* and its Ninth Circuit progeny, Plaintiffs must allege facts which suggest that Defendants Cate and McDonald had the intent necessary to support a retaliation claim when they allegedly failed to train correctional officers and acquiesced in retaliatory events of which they had knowledge. There are no allegations in the FAC which suggest that either Defendant Cate or Defendant McDonald had the requisite animus in allegedly failing to train, investigate, or discipline officers. For this reason, the third claim for relief must be dismissed. It is not clear to the Court whether the deficiencies in this claim could be cured by amendment. Accordingly, the Court will grant Plaintiffs leave to file a second amended complaint.")

Roberts v. Blades, No. 1:13-CV-00312-BLW, 2014 WL 7149576, at *4-5 (D. Idaho Dec. 15, 2014) ("Plaintiff alleges that Warden Blades had notice of Plaintiff's ongoing problem and did not do anything further to solve his problem. This is enough to infer deliberate indifference—knowledge, plus a conscious disregard of an allegedly serious health need. Non-medical prison personnel are generally entitled to rely on the opinions of medical professionals with respect to appropriate medical treatment of an inmate. However, if 'a reasonable person would likely determine [the medical treatment] to be inferior,' the fact that an official is not medically trained will not shield that official from liability for deliberate indifference. . . .Other courts are in agreement. If an alleged constitutional violation is ongoing, and a supervisory official reviewing the inmate's report of a problem has the duty and authority to review the propriety of the medical treatment and take action to remedy the alleged deficiencies (not necessarily by providing medical care himself, but by obtaining the answer to whether the medical care was proper from a person with medical training and directing a remedy to be implemented), then a cause of action lies, because the defendant 'knew of an ongoing constitutional violation and ... had the authority and opportunity to prevent the ongoing violation,' under supervisory liability principles applicable to § 1983 actions. . . Stated differently, where claims are asserted against persons who supervise the provision of prison medical care, the question is not whether the supervisor was 'directly involved' in the plaintiff's diagnosis, but whether the plaintiff has sufficiently alleged or provided evidence from which a jury could find that the supervisor's knowing failure to address the treating provider's deficient care rendered Plaintiff's medical treatment constitutionally inadequate. . . .Based on all of the foregoing, Plaintiff will be permitted to proceed to the discovery and summary judgment stages on his claims against Warden Blades in his personal or individual capacity for damages purposes.")

Hagen v. Williams, No. 6:14-CV-00165-MC, 2014 WL 6893708, at *3 (D. Or. Dec. 4, 2014) ("It is clear that there is a high bar for what is considered a sufficient claim for supervisory liability under section l983. Turning to the allegations in this case, Plaintiff has not met that bar. She has

not alleged a sufficient causal connection between Defendants Williams, Morrow, Nooth, and Gilmore's acts or failures to act and Hagen's death. Here, Plaintiff fails to allege facts with sufficient detail to infer that Williams and Morrow plausibly were aware of the unconstitutional conduct of DOC personnel and were deliberately indifferent to the safety of Hagen. Plaintiff instead relies on the bare assertion that Williams and Morrow would have been aware of 'an ongoing problem of inmate violence throughout the DOC and, specifically ... the murder of an inmate at SRCI by an inmate with whom he had a known conflict.'. . The fact that an inmate was killed in a prison setting prior to Hagen's murder, without more, does not provide the type of notice outlined in *Starr.* And while a homicide in a prison can never be tolerated by prison officials, there is nothing in this record to indicate any similarity or pattern between the prior homicide and Hagen's death that would give rise to deliberate indifference. The claims against Williams and Morrow are dismissed, without prejudice.")

Estate of Shafer ex rel. Shafer v. City of Elgin, Or., No. 2:12-CV-00407-SU, 2014 WL 6633106, at *16 (D. Or. Nov. 21, 2014) ("Defendants argue in order to hold a supervisor liable in an excessive force case, there must be evidence the officer previously used the same type of force that was used against the complaining plaintiff. . . Specifically, defendants argue that to hold Chief Lynch liable in this case, there must be evidence of a prior shooting by Officer Kilpatrick. . . The court disagrees. In a case alleging excessive force by a police officer, liability of the police chief depends on whether he 'set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known, would cause others to inflict the constitutional injury.'. . Although there is no evidence of a shooting by Officer Kilpatrick prior to the shooting of Richard Shafer, a jury could find a causal link in this case from evidence that Chief Lynch knew Officer Kilpatrick repeatedly pointed his gun at unarmed Elgin residents. Summary judgment is improper in a § 1983 claim alleging Fourth Amendment violations against a police chief for supervisor liability when there is evidence of prior citizen complaints made against an officer for use of force, and the opinion of a qualified expert witness demonstrates the police chief failed to take remedial action in response to those complaints. . . This case presents precisely that. The court finds there are issues of fact surrounding whether Chief Lynch took proper remedial action against Officer Kilpatrick after complaints were made to him that Officer Kilpatrick had pointed his gun at other Elgin residents. As such, defendants' motion for summary judgment on the § 1983 claim against Chief Lynch is denied.")

Palmer v. Wexford Med., No. CV 12-08214-PCT-SPL, 2014 WL 5781305, at *9 (D. Ariz. Nov. 6, 2014) ("To the extent Ryan argues that he is not liable because his only involvement was in the grievance process, he overstates the holding of *Shehee,* a Sixth Circuit opinion. Whether involvement in the grievance process is sufficient personal involvement to state a claim of a constitutional deprivation would depend on several factors, such as whether, at the time of the grievance response, the violation is ongoing, *see e.g., Flanory v. Bonn,* 604 F.3d 249, 256 (6th Cir.2010), or the unconstitutional conduct is completed, *see Shehee,* 199 F.3d at 300, and whether the defendant responding to the grievance has authority to take action to remedy the alleged violation, *see Bonner v. Outlaw,* 552 F.3d 673, 679 (8th Cir.2009). Further, under Sixth Circuit

law, liability under § 1983 requires 'active unconstitutional behavior; failure to act or passive behavior is insufficient.' *King v. Zamiara,* 680 F.3d 686, 706 (6th Cir.2012). But under Ninth Circuit law, a defendant can be liable for the failure to act. *See Taylor,* 880 F.2d at 1045.")

Dasovich v. Contra Costa Cnty. Sheriff Dep't, 14-CV-00258-MEJ, 2014 WL 4652118, *7, *8 (N.D. Cal. Sept. 17, 2014) ("The Ninth Circuit has explained various ways in which a supervisory figure can be individually liable in a § 1983 case. A supervisor can be liable if he or she directed his or her subordinates to commit the offensive act. . . Liability also can attach when the supervisor 'set[s] in motion a series of acts by others ..., which he knew or reasonably should have known, would cause others to inflict the constitutional injury.'. . Even when the supervisor does not direct his or her subordinates to commit the offensive act, or set in motion a series of acts by others which caused others to inflict the constitutional injury, the supervisor can still be liable if he or she 'knew of the violations' being committed by subordinates yet 'failed to act to prevent them.'. . The Ninth Circuit also recognizes that '[s]upervisory liability [can be] imposed against a supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others.'. . Finally, a supervisory official can be liable if he or she 'implement[s] a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.'. . . Here, as discussed above, Plaintiff alleges that Defendants, including Sheriff Livingston, developed and maintained training policies that 'led to the improper use of canines by individual officers, including the release of canines to bite on individuals when it is not objectively reasonable to do so.'. . If Plaintiff is able to establish that Sheriff Livingston failed to train, supervise, or control his subordinates in the deployment of canines, he can be held liable under § 1983. . . He can also be held liable if this policy is 'so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.'. .Accordingly, under the liberal pleading standard of Rule 8(a)(2) and drawing all reasonable inferences that Sheriff Livingston is liable for the misconduct alleged, the Court finds that the FAC contains sufficient allegations of underlying facts to give fair notice to Sheriff Livingston and to enable him to defend against the allegations effectively. Accordingly, the Court DENIES Defendants' Motion on this ground.")

Perez v. United States, 13CV1417-WQH-BGS, 2014 WL 4385473, *10-*12 (S.D. Cal. Sept. 3, 2014) ("Plaintiffs allege that each and every Supervisor Defendant violated Yañez's Fourth Amendment rights by 'personally developing, authorizing, and conspiring to effect, and permitting and directing their subordinates to implement, the Rocking Policy' and by 'failing to establish adequate procedures to train the Border patrol agents, failing to establish adequate disciplinary procedures and adequate procedures to investigate agents' misconduct, and acting and failing to act in disregard of previous allegations of Border Patrol agents' use of excessive, lethal force.'. .Defendants contend that Plaintiffs cannot maintain suit against the Supervisor Defendants by alleging their knowledge and acquiescence to the alleged unconstitutional conduct. Defendants assert that Plaintiffs have failed to allege the specific roles of each Defendant beyond their general

responsibilities within DHS, such as how each became aware of the Rocking Policy. Plaintiffs contend that allegations of 'deliberate indifference' or 'knowledge and acquiescence' are sufficient to state *Bivens* violations. . . Plaintiffs assert that all of the public information alleged in the FAC reasonably gives rise to the inference that each Supervisor Defendant was aware of the Rocking Policy, and that they have alleged the specific knowledge of Defendants Napolitano and Fisher. . . . Plaintiffs have alleged in detail several instances of border shootings related to alleged rock throwing and detailed public debate on the Border Patrol's use of lethal force in response to rock throwing, including statements by the NBPC. These allegations make it possible that some or all of the Supervisor Defendants were aware of the alleged Rocking Policy, but 'the non-specific allegations in the complaint regarding [each Supervisor Defendant's individual involvement] fail to nudge the *possible* to the *plausible*, as required by *Twombly*.' *al-Kidd v. Ashcroft*, 580 F.3d 949, 979 (2009), *rev'd on other grounds,* —— U.S. ——, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011); *see also Hydrick v. Hunter,* 669 F.3d 937, 942 (2012) (complaint must allege facts demonstrating that each supervisor was personally responsible for the alleged constitutional violation). Plaintiffs only make specific factual allegations as to Defendants Napolitano and Fisher. As to Defendant Napolitano, the report that the Mexican Attorney General complained to her of excessive force used in one instance is not sufficient to plausibly put her on notice of the alleged Rocking Policy. . . This allegation alone is insufficient to state a claim against Defendant Napolitano on a supervisory liability theory. . .As to Defendant Fisher, the article incorporated by reference in the FAC begins by reporting that 'Border Patrol agents will be allowed to continue using deadly force against rock-throwers, [Defendant Fisher] said, despite the recommendation of a government-commissioned review to end the practice.'. . The incorporated article permits the inference that Defendant Fisher knew of and was responsible for the alleged Rocking Policy. Although the article post-dates Yañez's death, Plaintiffs have alleged that Defendant Fisher has served as the Chief of the Border Patrol since May 2010, and have set forth facts to permit the inference that the alleged Rocking Policy existed for the entirety of Defendant Fisher's tenure. This individualized factual allegation is sufficient to state a claim against Defendant Fisher. The Court concludes that Plaintiffs have failed to allege sufficient facts to state a Fourth Amendment claim against all Defendants except Fisher. The Motion to Dismiss the Fourth Claim as to Defendant Fisher is denied. The Motion to Dismiss the Fourth Claim as to all other Supervisor Defendants is granted.")

Estate of Peterson v. City of Missoula, CV 12-123-M-DLC, 2014 WL 3868217, *18-*21 (D. Mont. Aug. 6, 2014) ("Here, Plaintiffs do not allege or provide evidence that either supervisor was ever present at any point during the investigation related to Colton. Nor do Plaintiffs point to any other instances where other members of the Drug Task Force violated the constitutional rights of other confidential informants or drug suspects. Plaintiffs thus do not forward a valid acquiescence or ratification theory on which to impose supervisory liability. . . Instead, Plaintiffs focus exclusively on deficiencies in Detective Krueger's training as it relates to the use of confidential informants and the handling of potentially suicidal suspects or individuals. . . . Though Chief Muir was responsible for Detective Krueger's training and supervision, Plaintiffs fail to present sufficient evidence to create a genuine dispute that the need for more training in the handling of confidential informants or suicidal drug suspects was obvious. Though a Plaintiff need not always

point to evidence of other constitutional violations in order to demonstrate a need for more training, the need for more training in such cases must be 'patently obvious.'. . Here, Defendants present evidence that Detective Krueger received a great deal of training, though perhaps only limited training in the specific areas of evaluating individuals for suicide risk and the use of confidential informants. Detective Krueger attended a DEA basic drug investigator training course. The Missoula Police Department also had established a process for how to sign up confidential informants. In addition, all City of Missoula police officers receive brief ongoing training daily, must meet or exceed minimum standards for hiring, must meet the employment education and certification standards, and are required to complete the basic academy at the Montana Law Enforcement Academy or that of another state. Also, Missoula City Police Officers must complete a variety of other training courses before they can work on their own. The Missoula Police Department has received national recognition for its training program for new officers. Plaintiffs point to deficiencies related to specific HIDTA training, . . . but do not dispute that Detective Krueger received all of the training required by the Missoula Police Department and the DEA course for drug investigators. . . . Under these circumstances, the Court does not regard the need for additional, specific training regarding the use of confidential informants and suicidal suspects to fall in the 'narrow range of circumstances' where the need for more training is 'so patently obvious' that a claim can be maintained without demonstrating a pattern of or any other similar violations. . . In addition, Plaintiffs fail to address Chief Muir's claim for qualified immunity. Notably, Plaintiffs do not cite any case where a failure to train claim against a supervisor has succeeded despite a plaintiff's failure to demonstrate another instance or pattern of similar violations. The Court thus concludes that Plaintiffs fail to create any genuine dispute of fact that Chief Muir was deliberately indifferent to an obvious need for more or better training. Accordingly, Chief Muir is entitled to summary judgment. . . . For many of the same reasons that Plaintiffs' claims against the individual supervisory officials fail, Plaintiffs' *Monell* claims also fail. Plaintiffs' fail to create any genuine issue of fact that the need for more training or supervision in the area of confidential informant handling and suicidal suspects was obvious. Plaintiffs present no evidence of similar violations or a pattern of unconstitutional conduct on the part of either the Sheriff's Department or the Missoula Police Department. Accordingly, Missoula County and the City of Missoula are entitled to summary judgment on Plaintiffs' § 1983 claims.")

Hernandez v. City of Beaumont, No. EDCV 13–00967 DDP (DTBx), 2014 WL 1669990, *4, *5 (C.D. Cal. Apr. 28, 2014) ("To impose supervisory liability for failure to train, the supervisor must have been 'deliberately indifferent' to the need for 'more or different training.'. .As the chief of the BPD, Plaintiffs allege that Coe 'possessed the power and the authority and [was] charged by law with the responsibility to enact policies and to prescribe rules and practices concerning the operation of the BPD.'. . The Court finds that Plaintiffs have pled sufficient facts to state plausible claims for supervisory liability and for negligent training against Coe for the same reasons their *Monell* claim is sufficient. . . .Here, in determining whether Plaintiffs have stated a claim for municipal and supervisory liability, the Court has already determined that Plaintiffs have pled facts demonstrating that Coe's conduct in failing to adequately train BPD officers in the constitutional implications of using the JPX amounted to a constitutional violation, satisfying the first prong of

the *Saucier* test. The Court also determined that Coe and the City could be liable for the failure to train because the need for such training was 'so obvious' that it amounted to deliberate indifference. This amounts to essentially the same thing as finding that it should have been 'readily apparent' that the failure to train would amount to a violation of constitutional rights. Therefore, the Court finds that Coe is not entitled to qualified immunity.")

Nicholson v. Finander, No. CV 12–9993–FMO (JEM), 2014 WL 1407828, *7, *8 (C.D. Cal. Apr. 11, 2014) ("The Ninth Circuit has not ruled on whether a supervisor who learns about unconstitutional behavior from a prisoner's grievance and fails to intervene is personally involved in the constitutional violation, and the district courts are divided on the issue. . . Some district courts have reasoned that no constitutional claim of any sort may be based upon the administrative appeals process, [collecting cases] while others have held that a grievance appeal reviewer who fails to remedy a denial of adequate medical care personally participates in an Eighth Amendment violation. [collecting cases] In *Michaud v. Bannister,* for example, the District Court for Nevada held that 'an Eighth Amendment violation can attach to *any* official who denies an inmate constitutionally adequate medical care,' and, therefore, 'a supervisor who denies medical care via grievance is equally liable as a physicians' panel determining the medical necessity of a particular treatment.'. . .Here, Plaintiff's only claims against Dr. Finander involve her denial of Plaintiff's administrative grievances. Although Plaintiff states that 'from day one, Dr. Finander denied my pain medication and my chrono,'. . . he does not assert that Dr. Finander was ever involved in a decision to deny him Methadone or a lower bunk chrono except through the grievance procedure. . . . The Court cannot infer from Dr. Finander's supervisory position alone that she directed the other Defendants to ignore Plaintiff's serious medical needs. Nevertheless, a supervisor who learns about an unconstitutional denial of adequate medical care from a prisoner's grievance and fails to intervene may be found to have personally participated in the Eighth Amendment violation. . . Accordingly, the Court recommends denying the Motion to Dismiss the claim against Dr. Finander on the grounds that her role in the alleged Eighth Amendment violation was limited to reviewing Plaintiff's grievances.")

Doe v. City of San Diego, 35 F.Supp.3d 1214, 1226-29 (S.D. Cal. 2014) ("The pivotal question. . .is not whether Plaintiff was constitutionally harmed, but whether the Supervisor Defendants are personally liable for the harming. The answer resides within the confines of Section 1983's supervisory liability jurisprudence. As the Court previously noted, supervisory liability can be imposed only if (1) the supervisor was personally involved in the constitutional deprivation, or (2) there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. . . It is undisputed that the Supervisor Defendants did not personally participate in the sexual assault and battery of Jane Doe. Accordingly, to prevent summary judgment, Doe must produce evidence demonstrating a causal connection between the Supervisor Defendants' conduct and Doe's injury. The Supervisor Defendants contend that this burden is insurmountable because the requisite causal connection can only be forged by demonstrating repeated failure to act to abate repeated constitutional violations, and it is undisputed that at the time of Doe's injuries each Supervisor Defendant knew of only one prior allegation of sexual

misconduct against Officer Arevalos. . .Plaintiff disagrees with the Supervisor Defendants' interpretation of supervisory liability requirements. She contends that the requisite culpability for supervisory inaction can be established on the basis of a single incident of subordinate misconduct. . . Upon review of *Gutierrez–Rodriguez* and the other cases relied on by Plaintiff, however, the Court finds that the limits of supervisory liability are not so unrestrained. . . . Importantly, supervisory liability in *Gutierrez–Rodriguez* was not premised on knowledge of one past incident of misconduct, but, rather, a long history of past complaints and violence. . . .Upon review of the case law—cited by Plaintiff or otherwise—the Court cannot find any case which imposes personal liability on a supervisor for having knowledge of a single prior act of misconduct on the part of a subordinate. . . . Upon review of the case law, the Court concludes that, for cases involving supervisory inaction following subordinate misconduct, a supervisor must have knowledge of pervasive and widespread conduct posing an unreasonable risk of constitutional injury before supervisory liability can attach.")

Jones v. Skolnik, No. 3:10–cv–00162–LRH–VPC, 2013 WL 6498955, *3 (D. Nev. Dec. 10, 2013) ("Thus, although in *Ashcroft v. Iqbal* the United States Supreme Court rejected the idea that 'knowledge and acquiescence' of subordinates' conduct is enough to hold supervisory officials liable under § 1983 where the a claim is one of purposeful and unlawful discrimination, . . . the Ninth Circuit Court of Appeals concluded that where the applicable constitutional standard is deliberate indifference, 'a plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates.'. . Neither the Ninth Circuit nor the United States Supreme Court has squarely addressed whether knowledge of and acquiescence in a subordinates' conduct is sufficient to impose supervisory liability where the underlying constitutional violation does not involve either purposeful discrimination or deliberate indifference. However, other courts have concluded that such a theory may remain viable. [collecting cases]")

Mackenzie v. Hutchens, No. LA CV 12–00584–VBF–JC, 2014 WL 8291423, *6 n.9, *12, *13 (C.D. Cal. Sept. 9, 2013), aff'd 623 F. App'x 483 (9th Cir. 2015) ("The Court will use the phrase 'hold a supervisor liable' or 'hold the sheriff liable', not the term 'supervisory liability.' The Tenth Circuit cogently observed that while that court 'ha[s] referred [in past cases] to claims against supervisors as based on "supervisory liability" ... this label can be misunderstood as implying vicarious liability.'. . . [W]e are left with nothing in the complaint alleging that the sheriff ever directed or encouraged her subordinates to subject plaintiff to any particular condition of confinement, nor that any of the allegedly unconstitutional conditions of confinement were taken pursuant to the jail's policies rather than contrary to them, nor that she actually knew of any condition of confinement and acquiesced in it, nor that she otherwise exhibited callous indifference for the rights of others. Rather, as quoted above, the complaint does not even allege that the sheriff knew of any of the conditions of his confinement, saying only that the sheriff knew 'or reasonably should have known' that the OC Jail's conditions, in general terms, were unconstitutional for civil detainees. . . .**[T]**he mere fact that an official has ultimate authority over the policies and activities of his office, in this case a county jail, is not by itself sufficient to state a claim for relief against

that official without some factual basis to connect the specific policy—or the specific application or interpretation of a policy—to the sheriff.")

Orr v. County of Sacramento, No. CIV. S–13–0839 LKK/AC, 2013 WL 4519637, *8, *9 (E.D. Cal. Aug. 26, 2013) ("Defendants assert that the allegations against the individual defendants are not specific enough under *Iqbal,* to find supervisory liability. The court finds that plaintiffs have alleged sufficient facts. The Complaint alleges that the named supervisory defendants knew that plaintiff had a medical need to be assigned to a lower tier (and a lower bunk) in order to avoid serious injury. It alleges how they knew this—from a prior incident, and from his medical file. The Complaint alleges that because of their failure to train and control their subordinates, plaintiff was nevertheless placed into an upper tier cell. It alleges that plaintiff fell on the stairs, trying to reach his upper-tier cell. The Complaint alleges that the fall on the stairs could not have occurred if plaintiff had been placed in a lower tier cell. Defendants assert that these allegations are conclusory, but they are in fact very specific factual allegations, sufficient to meet the pleading standard of Fed.R.Civ.P. 8, as interpreted by *Twombly* and *Iqbal.* Defendants complain that plaintiff has lumped all the individual defendants together. That is true, but it is not enough to dismiss the claims against them. Plaintiff has named the four senior officials who, collectively, are responsible for creating and implementing policies to ensure that his medical needs are seen to, and who, collectively, are alleged to be responsible for ensuring that those policies are carried out. Plaintiff presumably does not currently know exactly which official was responsible for which aspect of the policies. That would appear to be a matter for plaintiff to learn in discovery, it is not a basis for dismissal.")

Collins v. Lopez, No. 1:11–cv–01534–LJO–SKO PC, 2013 4041828, *4, *5 (E.D. Cal. Aug. 7, 2013) ("Deliberate indifference is shown where a prison official 'knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it,' *Farmer v. Brennan,* 511 U.S. 825, 847, 114 S.Ct. 1970 (1994), and in this Circuit, a sworn allegation that a supervisor or an administrator was placed on notice of a medical problem by letter but failed to take action is sufficient to defeat summary judgment, *Jett v. Penner,* 439 F.3d 1091, 1098 (9th Cir.2006) (citing *Moore v. Jackson,* 123 F.3d 1082, 1087 (8th Cir.1997)) (triable issue of fact in medical care case where inmate alleged he sent letters and administrators denied receiving them). It is therefore sufficient to support a claim at the pleading stage. Indeed, this basis for liability falls within one of the viable and longstanding supervisory liability theories identified by Defendants: alleged knowledge of a violation and the failure to take action to prevent it. *Snow v. McDaniel,* 681 F.3d 978, 989 (9th Cir.2012) (citing *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir.1989)); *Starr v. Baca,* 652 F.3d 1202, 1205–08 (9th Cir.2011), *cert. denied,* 132 S.Ct. 2101 (2012). To the extent Defendants wish to persuade the Court that the act of sending a letter does not, for purposes of supporting a claim, equate to knowledge, the law does not support this interpretation. *Jett,* 439 F.3d at 1098. An allegation of notice given supports an inference of knowledge, and it is immaterial whether the notice was provided through a chance meeting on the yard, a medical examination in the clinic, an inmate appeal, a letter, or some other avenue.")

Love v. Salinas, No. 2:11–cv–00361–MCE–CKD, 2013 WL 4012748, *8-*10 (E.D. Cal. Aug. 6, 2013) ("[T]he Court finds that the evidence presented by Plaintiff with respect to the lack of any meaningful training in cell door operations at DVI is sufficient to create a factual dispute as to whether supervisory Defendants Salinas and Rackley were deliberately indifferent to inmates' safety. From this evidence, the jury also could reasonably conclude that the lack of training caused Defendants Montgomery and Berghorst to engage in the inherently dangerous practice of 'blind' door closing which led to Plaintiff's serious injury on February 12, 2010. The fact that Plaintiff became the first casualty of the inadequate training does not necessarily absolve Defendants Rackley and Salinas of liability. Since a jury could reasonably conclude that Plaintiff's injury was a 'highly predictable consequence' of supervisory Defendants' failure to implement any meaningful training on cell door operations at DVI, *see Connick,* 131 S.Ct. at 1360, Defendants' motion for summary judgment with respect to Plaintiff's 'failure to protect' claim against Rackley and Salinas should be denied. . . . The state of the law in 2010, when the alleged constitutional violation took place, would have given Defendants a fair warning that their failure to protect Plaintiff from a substantial risk of harm from a known dangerous condition was unconstitutional. . . Since Plaintiff has presented sufficient evidence to allow a reasonable jury to conclude that the manner of cell door operations at DVI created significant risk to his safety and that Defendants knew of the risk but chose to disregard it, Defendants are not entitled to qualified immunity with respect to Plaintiff's 'failure to protect' claim at this stage in the proceedings.")

Alvarez-Orellana v. City of Antioch, No. C–12–4693 EMC, 2013 WL 3989300, *6 (N.D. Cal. Aug. 2, 2013) ("Plaintiff makes only conclusory allegations that Livingston knew or should have known that his subordinates were engaging in a pattern or practice of not complying with Penal Code sections 821, 822, and 1269b. . . Plaintiff has not pled facts indicating that Livingston was notified of his subordinates' allegedly unconstitutional conduct. Unlike in *Starr,* where the plaintiff pled that the sheriff was notified of constitutional deficiencies through the reports, Plaintiff fails to allege any specific facts indicating that Livingston was given any notice that a pattern or practice existed amongst his subordinates. . . As in *Moss,* Plaintiff's allegations that Livingston's actions and failure to train his subordinates amount to deliberate indifference are similarly conclusory.")

Estate of Prasad ex rel. Prasad v. County of Sutter, 958 F.Supp.2d 1101, 1113, 1114 (E.D. Cal. 2013) ("Where a complaint 'specifically alleges ... that [a supervisory defendant] was given notice, in several reports, of systematic problems,' and he 'did not take action to protect inmates under his care despite the dangers ... of which he had been made aware,' such allegations 'plausibly suggest that [he] acquiesced in the unconstitutional conduct of his subordinates, and was thereby deliberately indifferent to the danger posed to [plaintiff].'. . Here, the complaint pleads just that. Plaintiffs allege that Cummings, Bhattal, and Garbett authorized and implemented a policy whereby Jail medical staff were available only from 4:00 a.m. to midnight . . . and despite the lack of 24–hour medical staff and the consequent danger to inmates with emergency medical needs, Parker, Samson, and Bidwell created and enforced a policy whereby only medical staff obtained medical care for inmates. . . . Plaintiffs further allege that the Supervisory Defendants were on notice from earlier documented reports that medical staff should be at the Jail seven days a week,

twenty-four hours a day. . . . This is enough to state a claim for deliberate indifference against the Supervisory Defendants.")

Dukes v. Harrington, No. 1:12cv00941 DLB PC, 2013 WL 1003672, *3 (E.D. Cal. Mar. 13, 2013) ("Here, Plaintiff attempts to allege liability against Defendant Harrington based on a letter he wrote to Defendant Harrington. However, simply sending a letter does not support a presumption of knowledge. Pursuant to *Iqbal*, Plaintiff must affirmatively allege that Defendant Harrington received the letter and knew of its contents. He therefore fails to state any claims against Defendant Harrington.")

Downing v. Graves, No. 2:12–cv–00332–JCM–CWH, 2013 WL 420424, *15 (D. Nev. Jan. 31, 2013) ("Although the United States Supreme Court has rejected the idea that 'knowledge and acquiescence' of subordinates' conduct is enough to hold supervisory officials liable under section 1983 where the a claim is one of purposeful and unlawful discrimination, *Ashcroft v. Iqbal,* 556 U.S. 662, 677–684, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), the Ninth Circuit Court of Appeals has held that where the applicable constitutional standard is deliberate indifference, 'a plaintiff may state a claim against a supervisory for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates.' *Starr,* 652 F.3d at 1205. 'Even under a deliberate indifference theory of individual liability, the [p]laintiffs must still allege sufficient facts to plausibly establish the defendant's 'knowledge of' and 'acquiescence in' the unconstitutional conduct of his subordinates.' *Hydrick v. Hunter,* 669 F.3d 937, 942 (9th Cir.2012) (citing *Star v. Baca,* 652 F.3d at 1206–07). In the instant case, plaintiff has alleged sufficient facts to plausibly establish that defendants Skolnik and Cox had knowledge of the improper use of the NDOC disciplinary and grievance procedures and purposes, and failed to train defendants Graves, Griggs, Williams, Wilson, Burson, Howell, Dreesen, Connett, Smith, Foster, Romero, and Woodbury. However, plaintiff has failed to allege facts to state a colorable claim against defendants Skolnik and Cox for failure to train their subordinates in 'the effective operation of the SDCC law library' and 'the constitutional rights of plaintiff and NDOC prisoners in general with respect to prison conditions.' The claim against defendants Skolnik and Cox for failure to train their subordinates in the use of the NDOC disciplinary and grievance procedures may proceed.")

Cornelio v. Hirano, Civ. No. 12–00072 LEK/RLP, 2012 WL 5414836, *5 (D. Hawai'i Nov. 6, 2012) ("'*Iqbal* emphasizes that a constitutional tort plaintiff must allege that every government defendant-supervisor or subordinate-acted with the state of mind required by the underlying constitutional provision.' [citing *OSU Student Alliance*] Vague and conclusory allegations concerning the involvement of official personnel in civil rights violations are not sufficient. . . Despite four attempts to do so, Plaintiff fails to provide any details showing that Hirano knew of a specific danger to Plaintiff and failed to act to prevent the alleged assault. That is, Plaintiff alleges nothing showing that Hirano acted with the state of mind required for an Eighth Amendment violation: deliberate indifference. Plaintiff again simply alleges that Hirano is 'in charge of [MCCC's] overall operation.'. . An individual's 'general responsibility for supervising the

operations of a prison is insufficient to establish personal involvement.'. . Plaintiff fails to state a claim against Hirano and claims against him are DISMISSED with prejudice.")

Hoslett v. Dhaliwal, No. 3:11–CV–00674–KI, 2012 WL 3878415, *3 (D. Or. Sept. 6, 2012) ("As is clear from the allegations, Hoslett brings claims against De Las Heras, Jacquez and Thomas even though none of them are medical providers. Hoslett's allegations dwell on these defendants' supervisory roles at FCI Sheridan. The allegations are conclusory and do not allege sufficient facts for the court to draw a reasonable inference that these defendants are liable under a theory of supervisory liability based on the supervisor knowing of the constitutional violations and failing to prevent them. Claims under Section 1983 cannot rest on respondeat superior liability. Moreover, negligence and medical malpractice do not constitute deliberate indifference. . . The allegations refer to medical malpractice several times. Thus, Hoslett fails to state a claim against De Las Heras, Jacquez, and Thomas that is plausible on its face. Hoslett alleges Dr. Davis constantly denied his need for pain medication. As a doctor, he might be making decisions about Hoslett's treatment. The allegations, though, are more indicative of supervisory liability. Dr. Davis supervises Dr. Dhaliwal, Hoslett's primary caregiver. Hoslett alleges Dr. Davis knew about his pain but does not allege how Dr. Davis gained that knowledge, other than through his supervision of Dr. Dhaliwal. There are no specific allegations Dr. Davis ever treated Hoslett. Accordingly, Hoslett also fails to state a claim against Dr. Davis.")

Martinez v. Delio, No. 1:11–cv–01088–LJO–MJS (PC), 2012 WL 3778842, *2, *3 (E.D. Cal. Aug. 30, 2012) ("Under § 1983, Plaintiff must demonstrate that each defendant personally participated in the deprivation of his rights. . . This requires the presentation of factual allegations sufficient to state a plausible claim for relief. . . . The statute requires that there be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by the plaintiff. . . Government officials may not be held liable for the actions of their subordinates under a theory of respondeat superior. . . Since a government official cannot be held liable under a theory of vicarious liability in § 1983 actions, Plaintiff must plead sufficient facts showing that the official has violated the Constitution through his own individual actions. . . In other words, to state a claim for relief under § 1983, Plaintiff must link each named defendant with some affirmative act or omission that demonstrates a violation of Plaintiff's federal rights. . . .Plaintiff alleges that Defendant Hedgpeth was the Warden at KVSP and thus responsible for supervising and monitoring the facility. The mere fact that Hedgpeth may have supervised the individuals responsible for a violation is not enough. Defendants may only be held liable in a supervisory capacity if they 'participated in or directed the violations, or knew of the violations and failed to act to prevent them.' *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir.1989). The Court's previous screening order instructed Plaintiff on the applicable law and gave him an opportunity to amend. Plaintiff has again failed to allege facts connecting Defendants Zamora and Hedgpeth to the violations alleged. No useful purpose would be served by granting additional leave to amend. The Court recommends Plaintiff's claims against Defendants Zamora and Hedgpeth be dismissed with prejudice.")

Parrish v. Solis, No. C 11–1438 LHK (PR), 2012 WL 3902689, *4, *5 (N.D. Cal. Aug. 28, 2012) ("Here, as in *Hydrick,* Plaintiff does not allege any specific past incidents of the use of excessive force by subordinates of Defendants Solis, Muniz, and Hedrick. Neither does Plaintiff allege any specific incident during which Defendant Solis, Muniz, or Hedrick was given notice of a subordinate's unconstitutional conduct. Plaintiff's allegations are generally conclusory recitals. *Hydrick* makes clear that general allegations failing to describe specific incidents or policies are not enough to survive the *Iqbal* standard of pleading for a supervisory liability. Thus, Defendants Solis, Muniz, and Hedrick are entitled to summary judgment, and are DISMISSED from this action.")

Bock v. County of Sutter, No. 2:11–cv–00536–MCE–GGH, 2012 WL 3778953, *11 (E.D. Cal. Aug. 31, 2012) ("The requisite causal connection between a supervisor's wrongful conduct and the violation of the prisoner's constitutional rights can be established in a number of ways. Plaintiffs may show that a supervisor set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a Constitutional injury. . . Similarly, a supervisor's own culpable action or inaction in the training, supervision, or control of his subordinates may establish supervisory liability. . . Finally, a supervisor's acquiescence in the alleged constitutional deprivation, or conduct showing deliberate indifference toward the possibility that deficient performance of the task may violate the rights of others, may establish the requisite causal connection. . .The Court dismissed Plaintiffs' supervisory liability claim in their First Amended Complaint on the basis that it did not sufficiently plead facts demonstrating each supervisory Defendant's role in any alleged deprivation. However, the additional facts pled in Plaintiffs' TAC allow the Court to infer that a reasonable trier of fact, after discovery, could reasonably find that the supervisory Defendants were aware of and failed to act on constitutional violations regularly practiced by the Sutter County Jail. The very fact that, as alleged, Decedent's court-ordered transfer, which could have saved his life, was purportedly disregarded implicates the supervisors because the type of error alleged suggests that the mistake was a result of flawed measures which were likely implemented by employees in managerial roles. Defendants' Motion to Dismiss Plaintiffs' Supervisory Liability claim against Defendants Parker, Samson and Bidwell is therefore DENIED.")

Campos v. County of Los Angles, No. CV 11–09613 DDP (PJWx), 2012 WL 3656518, *3, *4 (C.D. Cal. Aug. 23, 2012) ("Defendants also argue that all claims against Sheriff Baca should be dismissed because the SAC does not allege that he personally participated in Decedent's confinement or treatment. . . A supervisor may be individually liable if he is personally involved in a constitutional injury or where there is a 'sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'. . Knowing refusal to terminate the acts of subordinates, inaction in training or control of subordinates, acquiescence in constitutional violations, or reckless or callous indifference to constitutional rights may constitute sufficient causal connection to a violation to confer individual liability upon a supervisor. . . In *Starr*, the

Ninth Circuit found supervisory liability allegations against Sheriff Baca sufficient where the plaintiff's complaint alleged several incidents of deputy-on-inmate violence and inmate-on-inmate violence in Los Angeles County jails, that Sheriff Baca received notice of the incidents, and that Sheriff Baca acquiesced in the unconstitutional actions of his subordinates. . . Here, Defendants argue that *Starr* does not apply because this case about suicide, not the deputy-on-inmate violence and inmate-on-inmate violence alleged in *Starr*. The court is not persuaded. First, the SAC here *does* allege inmate-on-inmate violence. The SAC alleges that Decedent feared he would be killed by fellow inmates and requested a transfer to protective housing. . . The SAC further alleges that Decedent reported at least one, and possibly two, violent assaults against him by other inmates. . . Second, and more importantly, even putting aside inmate violence issues, the SAC makes numerous allegations regarding instances of inadequate mental health treatment within the jails (e.g.¶¶ 26, 30, 39), as well as allegations regarding Sheriff Baca's knowledge of mental health-related incidents and issues (e.g.¶¶ 15–17, 19–20, 28–29). Contrary to Defendants' argument, the question is not whether the allegations here are identical to those in *Starr*, but rather whether the SAC sufficiently alleges a causal connection between Sheriff Baca's conduct and Decedent's constitutional injuries.[footnote omitted] The court is satisfied that it does, and that the individual claims against Sheriff Baca are adequately pled.")

Tandel v. County of Sacramento , Nos. 2:11–cv–00353–MCE–GGH, 2:09–cv–00842–MCE–GGH, 2012 WL 3638449, at *8, *10, *11 (E.D. Cal. Aug. 22, 2012) ("A supervisor's physical presence is not required for supervisory liability. . . Rather, the requisite causal connection between a supervisor's wrongful conduct and the violation of the prisoner's Constitutional rights can be established in a number of ways. The plaintiff may show that the supervisor set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury. . . Similarly, a supervisor's own culpable action or inaction in the training, supervision, or control of his subordinates may establish supervisory liability. . . Finally, a supervisor's acquiescence in the alleged constitutional deprivation, or conduct showing deliberate indifference toward the possibility that deficient performance of the task may violate the rights of others, may establish the requisite causal connection. . . .Plaintiff relies on *Starr* and *Redman* to sustain his claim that Dr. Hambly should be found deliberately indifferent as a supervisor. (Pl.'s Opp. at 12:8–22.) In *Redman*, a plaintiff specifically alleged that the Sheriff was ultimately in charge of the facility's operations, that the Sheriff knew that the facility was not a proper place to detain the plaintiff and posed a risk of harm to the plaintiff, but placed the plaintiff there anyway. . . In *Starr*, the plaintiff similarly alleged that the Sheriff knew of the unconstitutional activities in the jail, including that his subordinates were engaging in some culpable actions. . . In fact, the plaintiff's complaint in *Starr* contained numerous specific factual allegations demonstrating the Sheriff's knowledge of unconstitutional acts at the jail and the Sheriff's failure to terminate those acts, including that the U.S. Department of Justice gave the Sheriff clear written notice of a pattern of constitutional violations at the jail, that the Sheriff received 'weekly reports from his subordinates responsible for reporting deaths and injuries in the jails,' that the Sheriff personally signed a Memorandum of Understanding that required him to address and correct the violations at the Jail, and that the Sheriff

was personally made aware of numerous concrete instances of constitutional deprivations at the jail. . . Here, on the other hand, Plaintiff's CSAC does not contain sufficient factual allegations demonstrating that Hambly was aware of Plaintiff's constitutional deprivations or of any other wrongful acts by Jail personnel. Dr. Hambly was not the interim medical director until the beginning of 2007, and yet most of Plaintiff's allegations that Dr. Hambly was on notice rely on reports made before he assumed this post. Accordingly, Plaintiff has not pleaded sufficient facts to support the inference that Hambly was deliberately indifferent to Plaintiff's medical needs. Inasmuch as leave to amend has already been accorded, the Court now dismisses Defendant Hambly from Plaintiff's first claim for relief.")

Ornelas v. Dickinson, No. 1:12–cv–0499–MJS (PC), 2012 WL 3638502, *3, *4 (E.D. Cal. Aug. 21, 2012) ("Plaintiff has not alleged facts demonstrating that Defendants Dickinson, Kramer, Riddle, Robles, Hein, and the Warden's Advisory Group personally acted to violate Plaintiff's personal rights. Plaintiff's allegations against these Defendants only relate to general actions taken against Southern Hispanic inmates generally. Plaintiff does not allege these individuals took any specific actions directed against him. Plaintiff's claims against Defendants Dickinson and the Warden's Advisory Group all relate to their policy-making activities or lack of supervision of policy making. Plaintiff's claims against Defendants Riddle, Robles, and Hein describe only orders they gave to other individuals. Plaintiff has not alleged that any of these Defendants, through their individual actions, violated his rights. Plaintiff shall be given the opportunity to file an amended complaint curing these deficiencies and undertaking specifically to link these Defendants to a violation of his rights.")

Tucker v. City of Santa Monica, No. CV 12–5367–SVW (MAN), 2012 WL 2970587, *6 (C.D. Cal. July 20, 2012) ("[A]lthough plaintiff alleges that Jackman 'turned a blind eye' to proof of the officers' wrongdoing in connection with the investigation of plaintiff's citizen's complaint (Complaint ¶ 10), allegations that a supervisor ratified an officer's conduct through the handling of a subsequent investigation cannot show that the supervisor *caused* the officer's conduct. *See Jones v. County of Sacramento*, 2010 WL 2843409, *6–7 (E.D.Cal., July 20, 2010) (discussing applicable case law and concluding that a supervisor's "isolated and subsequent ratification" of an officer's conduct by failing to sustain a citizen's complaint "can never be sufficient to show that the supervisor caused the officer's conduct," especially after *Iqbal*).")

Brown v. Hoops, No. CV 11–5415–CAS (DTB), 2012 WL 3582003, *13 (C.D. Cal. July 13, 2012) (R & R) ("Sheriff Hoops's liability is not so clear. In a post- *Iqbal* decision, the Ninth Circuit reiterated in *Starr v. Baca,* that, '[a] supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others.' 652 F.3d 1202, 1208 (9th Cir.2012) (citing *Watkins v. City of Oakland,* 145 F.3d 1087, 1093 (9th Cir.1998)). Under *Starr,* the Court finds that were plaintiff able to cite to an official policy of the Sheriff regarding the use of force that was unconstitutional on its face, liability could be imposed on Hoops when his subordinates acted pursuant to that

policy. While plaintiff alleges that Hoops enacted the policy that lead to the use of force, no such official policy has been provided to the Court and no detail of the contents of any such policy has been set forth. Nor has plaintiff alleged that Hoops was present at the arrest or in any way involved in the arrest, or that he, for example, failed to intervene with the deputies['] unconstitutional use of force. As such, the Court finds that to the extent plaintiff is attempting to allege an excessive force claim against Sheriff Hoops, the allegations of the FAC are insufficient to do so.")

Ramirez v. County of Los Angeles, No. CV 11–5370 AHM (MANx), 2012 WL 2574826, at *4, *5 (C.D. Cal. July 3, 2012) ("The Ninth Circuit's decision in *Starr* dealt with allegations similar to those at issue here. In that case, the plaintiff sued Baca in his individual capacity under a supervisory liability theory for injuries he suffered in a Los Angeles County Jail. The plaintiff specifically mentioned in the operative complaint 'numerous incidents in which inmates in Los Angeles County jails have been killed or injured because of the culpable actions of the subordinates of Sheriff Baca.'. . The plaintiff also alleged that Baca was given notice of these incidents and failed to take action to protect inmates in his care. . . The Ninth Circuit held that even under the *Twombly/Iqbal* standard, the allegations against Baca were sufficient. . . The court stated two reasons for its holding: (1) the detailed factual allegations in Starr's complaint went 'well beyond reciting the elements of a claim of deliberate indifference,' and (2) the allegations were 'plausible' because, unlike in *Iqbal,* there was no 'obvious alternative explanation' for why Baca took no action despite his knowledge of the constitutional violations occurring in his jails. . .Recently, in *Hydrick v. Hunter,* 669 F.3d 937, 2012 WL 89157, 4 (9th Cir.2012), the Ninth Circuit reaffirmed its holding *Starr.* The court made clear, however, that the decision in *Starr* was dependent on the numerous allegations describing *specific incidents* 'where Sheriff Baca was on notice of inmate deaths and injuries....'. . . In contrast, the defendants in *Hydrick* had made 'no allegation of a specific policy implemented by the Defendants or a specific event or events instigated by the Defendants that led to these purportedly unconstitutional searches.'. . As a result, the Ninth Circuit held that the plaintiff had failed to allege supervisory liability claims. . .In this case, Plaintiffs make the following allegations in the FAC:

• Hernandez died of a severe head injury he received during the time he was detained in the Twin Towers. (FAC ¶¶ 22–24.)
• Agents of the LASD either severely beat Hernandez or caused him to fall, causing injuries that resulted in his death. (FAC ¶ 28).
• Agents of the LASD 'routinely use excessive force on inmates.' (FAC ¶ 13.)
• Baca knew or reasonably should have known of the routine use of excessive force and that these acts would be 'likely to, and regularly did, result in severe injuries, including death, inflicting extreme anguish on the family members of the victims.' (FAC ¶¶ 12, 17.)
• '[I]n spite of his awareness,' Baca has refused to implement policy changes to prevent the use of excessive force and has enacted policies that prevent investigation of the allegations of abuse. (FAC ¶ 14–15.)
• Baca placed Hernandez under the custody and care of deputies who had documented propensities for unwarranted violence. (FAC ¶ 16.)

Like the defendants in *Hydrick,* Plaintiffs do not allege any specific past incidents of the use of excessive force by Baca's subordinates. Neither does Plaintiff allege any specific incident during which Baca was given notice of his subordinates' unconstitutional conduct. Plaintiffs' other allegations are generally conclusory recitals of the elements of a supervisory liability claim. *Hydrick* makes clear that without allegations describing specific incidents or policies, these allegations are not enough to survive the *Iqbal* standard of pleading for a supervisory liability. Thus, Plaintiff's § 1983 claim against Baca is dismissed with leave to amend.")

Fellows v. Baca, No. CV 10–0698–RSWL (JEM), 2012 WL 3150346, *12 (C.D. Cal. June 8, 2012) (R & R) ("Plaintiff alleges that Sheriff Baca was responsible for operation of the Jail and protecting the civil rights of inmates, including providing adequate medical care and treatment for civil detainees. . . Plaintiff further alleges that Sheriff Baca is responsible for administration of the Jail, particularly staff training regarding proper medical care, but that Baca failed to train, supervise and control his subordinates, which resulted in the deprivation of adequate medical care to Plaintiff. . . Specifically, Plaintiff has alleged facts demonstrating that a 'no room for civil detainees' policy was implemented at the Jail, which resulted in the regular denial and delay of medical treatment to civil detainees generally, and Plaintiff specifically. It is a reasonable inference that Sheriff Baca, as the Jail administrator, was aware of this policy and at least allowed it to continue. There is also evidence of a policy against providing expensive medical care for temporary civil detainees at the Jail, such as treatment to remove a kidney stone. The facts alleged demonstrate a lengthy history of Plaintiff complaining about severe abdominal pain, delay in providing medical appointments to diagnose the condition, and refusal to provide adequate care even after the condition was diagnosed. The facts alleged also evidence a long and widespread pattern of denying or delaying treatment of Plaintiff's other serious medical conditions, which could support a finding of culpable inaction directly attributable to Sheriff Baca in the supervision or control of his subordinates, or acquiescence in the constitutional deprivations at issue. Construing Plaintiff's pro se pleadings liberally, Plaintiff has alleged sufficient facts at this stage of the litigation to state a claim for deliberate indifference and failure to train and/or supervise against Sheriff Baca in his individual capacity.")

Alexander v. Nevada, No. 3:10–cv–00429–RCJ (WGC), 2012 WL 2190837, at *6, *7 (D. Nev. Mar. 12, 2012) (R & R), aff'd, 617 F. App'x 718 (9th Cir. 2015) ("*Iqbal* did not involve a claim of deliberate indifference under § 1983. In *Starr v. Baca,* 652 F.3d 1202 (9th Cir.2011), the Ninth Circuit stated, '[w]e see nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases.'. . . The Ninth Circuit found that the plaintiff in *Starr* included 'many allegations' 'detailing what Sheriff Baca knew or should have known, and what Sheriff Baca did or failed to do.'. . In the recent case of *Hydrick v. Hunter,* 2012 WL 89157 (9th Cir. Jan. 12, 2012), the Ninth Circuit determined that the factual allegations before the court more closely 'resemble[d] the "bald" and "conclusory" allegations in *Iqbal,* instead of the detailed factual allegations in *Starr.*'. . .In *Hydrick,* like the case currently before the court, the plaintiff's predicated, at least in

part, on the theory that the defendants were liable because they created policies that violated the plaintiff's constitutional rights. . . The Ninth Circuit concluded that instead of including specific allegations of wrongdoing, the plaintiff fell short by including only 'conclusory allegations and generalities.'. . . Here, the only allegations Plaintiff includes with respect to Defendants Bannister, Hartman, Morrow, Baca, Neven, Cox, and Skonik are that they are indirectly liable because they: (1) created policies which prohibit constitutional medical care; (2) failed to provide adequate staff or space to provide constitutional medical care; and (3) failed to resolve the issue after being informed there was a problem. . . . The allegations of the Amended Complaint are more akin to the conclusory allegations contained in *Iqbal* and *Hydrick,* than to the specific allegations in *Starr.* Accordingly, Defendants' motion to dismiss Defendants Bannister, Hartman, Morrow, Baca, Neven, Cox, and Skolnik should be granted with leave to amend.")

Hamad v. Gate, No. C10–591 MJP, 2012 WL 1253167, at *4-*7 (W.D. Wash. Apr. 13, 2012) ("Gates argues Plaintiff's Second Amended Complaint still fails to allege Gates was personally involved in violating Hamad's constitutional rights. In this limited respect, the Court agrees. To proceed with his *Bivens* claim, Hamad must allege facts indicating that Secretary Gates was personally involved in and responsible for the alleged constitutional violations. . . . Hamad's allegation that Gates 'knew' that there were innocent men being held at Guantanamo Bay yet continued the policies of his predecessor is not a fact-based allegation; rather, it is still a bald legal conclusion. While 'legal conclusions can provide the framework of a complaint,' to survive a motion to dismiss 'they must be supported by factual allegations.'. . The Court finds Hamad's four added factual allegations are not enough to meet *Iqbal's* plausibility standard. First, Hamad's reliance on a statute setting forth the Secretary of Defense's responsibilities is weak. . . . Hamad fails to allege any policy guidance that Gates himself set regarding Guantanamo Bay let alone policy guidance that Gates set related to Hamad's unlawful detention. Second, Hamad's allegation that various officials evaluated and identified problems with Guantanamo Bay's military commissions is inapposite. . . . There is no factual allegation that Gates knew military officials were holding detainees whom the military itself determined should be freed. Third, a letter from 145 Congressmen to then-President Bush does not plausibly suggest Gates was personally involved in Hamad's unlawful detention. . . . While it is certainly *possible* that the letter put Gates on notice of constitutional violations in Guantanamo Bay, the Court does not find the letter suggests it was *plausible.* . . . Fourth, Hamad's pending habeas petition does not create a reasonable expectation that Gates was aware of Hamad's unlawful detention and/or Gates personally violated Hamad's constitutional rights. . . . At most, Hamad's factual allegations suggest Gates was aware Guantanamo Bay was under scrutiny when he took office in September 2006. However, Hamad's allegations do not nudge his claim that Gates personally participated in his unlawful detention 'across the line from conceivable to plausible.'. . . To the extent Hamad argues Gates is subject to supervisory liability, the Court finds Hamad's argument is weak. In the Ninth Circuit, a supervisor may be liable for the actions of subordinates only if the supervisor is personally involved in the constitutional deprivation, or if there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional deprivation. . . While 'wrongful conduct' may include a supervisor's inaction or acquiescence in the constitutional deprivation, the supervisor must still be

aware of the unconstitutional conduct; otherwise, supervisory liability would melt into vicarious liability-which is not recognized in *Bivens* actions. . . As discussed, there is minimal factual allegation that Gates knew detainees were being unconstitutionally held in Guantanamo Bay let alone Gates implemented policies resulting in Hamad's constitutional deprivation. While Gates may have known he inherited a flawed detention system, Hamad has not alleged enough facts to suggest Gates knew detainees were being held in violation of the Fifth Amendment and therefore is not liable under supervisory liability. In sum, it is possible Gates knew Hamad was unlawfully detained, but it is not plausible based on the facts alleged. Unfortunately, this is not enough to survive dismissal under *Iqbal*.")

Hightower v. Tilton, No. C08–1129–MJP, 2012 WL 1194720, at *3, *4 (E.D. Cal. Apr. 10, 2012) ("Defendants argue that the 'supervisory Defendants'. . .'cannot be held liable based on knowledge and acquiescence in a subordinate's unconstitutional conduct because government officials, regardless of their title, can only be held liable under Section 1983 for his or her own conduct and not the conduct of others.'. . This is a partial and inaccurate statement of the law. A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, *or knew of the violations and failed to act to prevent them.* There is no *respondeat superior* liability under section 1983. . . The supervisory Defendants may be held liable for the unconstitutional conduct of their subordinates which they were aware of and failed to prevent. Defendants are correct, however, that a causal link between the supervisors and the unconstitutional actions or policies must be specifically alleged. . . .In arguing that Plaintiff has not specifically alleged actions by these Defendants with a causal link to the constitutional/statutory violations, Defendants treat all of his allegations 'on information and belief' as conclusory and/or speculative. In fact, the rule in the Ninth Circuit is that pleading 'on information and belief' is sufficient to survive a motion to dismiss as long as the other *Iqbal–Twombly* factors are satisfied. . . . The Court holds that allegations pled on 'information and belief' should be reviewed in the same way as all factual allegations in a Complaint. That is, the Court will review them under *Twombly's* 12(b)(6) formulation requiring sufficient facts pleading to make a claim plausible. The mere fact that allegations begin with the statement 'on information and belief' will not automatically render them insufficient.")

Chacoan v. Rohrer, No. 2:05–cv–02276–MCE–KJN, 2012 WL 1021067, at *3 (E.D. Cal. Mar. 27, 2012) ("[C]ontrary to Plaintiff's contention, *Starr* did not create a new legal standard regarding supervisory liability under § 1983; it merely held that the United States Supreme Court's ruling in *Ashcroft v. Iqbal* . . . did not eliminate supervisory liability from the scope of Section 1983. . . After concluding that it did not, the court reaffirmed the long-standing 9th Circuit standards governing supervisory liability under Section 1983. . . To this end, the court did not err in utilizing Ninth Circuit Model Jury Instruction 9.3.")

Coley v. Baca, No. CV09–08595 CAS (AJW), 2012 WL 1340373, at *4-*6 (C.D. Cal. Mar. 8, 2012) ("Defendant contends that '[r]ather than alleging specific nonconclusory facts' sufficient to state a claim for supervisory liability against Baca, the amended complaint 'merely regurgitates'

and 'copies nearly word for word' portions of the order dismissing plaintiff's complaint, in particular portions of footnote 3 of that order referring to allegations in the *Starr* complaint 'indicating that Baca received several reports of recurring serious problems in the jail and failed to correct them.'. . Defendant contends that plaintiff's 'plagiarized' allegations fail to show 'a history of similar occurrences' or Baca's personal participation in the alleged constitutional violations. . . . The mere fact that plaintiff's allegations charging Baca with knowledge of his subordinates' unconstitutional conduct are derived from *Starr* does not make those allegations conclusory or irrelevant in this action. The facts relevant to the question whether Baca knew or should have known that inmates faced a substantial risk of serious harm from particular conditions of confinement in the county jail will not be unique in every case, nor are they dependent on the identity of the inmate filing suit. At issue in *Starr* was whether the plaintiff adequately alleged that Baca was deliberately indifferent to the substantial risk to inmates of death and injuries posed by inmate-on-inmate violence and deputy-on-inmate violence. Like the plaintiff in *Starr,* plaintiff alleges that he was the victim of an unwarranted physical attack by a deputy that resulted in a serious physical injury. In *Starr,* the alleged incident of deputy-on-inmate violence occurred in January 2006. In this case, the alleged incident occurred in October 2007, approximately twenty months later. Like the plaintiff in *Starr,* plaintiff alleges that Baca received reports from the DOJ and the Special Counsel of 'a continuing and serious pattern and practice of constitutional violations, including abuse of inmates by deputies,' as well as 'notice of increasing levels of inmate violence, lax security and discipline, and other serious defects in Sheriff's Department practices and procedures....'. . . For purposes of a motion to dismiss, the elapsed time between the attack on the plaintiff in *Starr* and the deputy's alleged attack on plaintiff in this case and is not long enough to negate the inference that Baca knew or should have known that county inmates such as plaintiff faced a serious risk of injury of substantial harm from deputy-instigated violence and failed to take adequate steps to protect those inmates. Plaintiff's first amended complaint contains facts plausibly suggesting that Baca is 'liable in his individual capacity for his own culpable action or *inaction* in the training, supervision, or control of his subordinates.'. .Therefore, Baca's motion to dismiss the first amended complaint should be denied.")

Dubrin v. Bonilla, No. 1:11–cv–01484 AWI JLT (PC), 2012 WL 761714, at *3,*4 (E.D. Cal. Mar. 6, 2012) ("A defendant may be held liable as a supervisor under § 1983 if there exists 'either (1) his or her personal involvement in the constitutional deprivation; or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'. . In order to establish a causal connection, a plaintiff may show that the supervisor set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury. . . However, a sufficient causal connection may be shown 'by evidence that the supervisor implemented a policy so deficient that the policy itself is a repudiation of constitutional rights.'. . Given Plaintiffs' allegations that Stainer approved of a policy to deprive the SHU inmates of exercise, Plaintiffs have alleged sufficient facts to state a claim against Defendant Stainer.")

Vaught v. Clark, No. CIV S–09–3422 MCE CKD P, 2012 WL 530198, at *5-*7 (E.D. Cal. Feb.

17, 2012) ("The central, offending act alleged in this case was the maintenance of lockdowns over periods of several weeks without provision for outdoor exercise. Although plaintiff is not specific exactly which defendant had direct control or involvement in the lockdowns, the defendants bear the initial burden of showing that as a matter of law it could not have been McDonald, Gower or Wright. It is reasonable to conclude, indeed, that *by virtue of their supervisory positions in the prison,* one or all of them were directly involved in the decision to enact the lockdowns and one or all of them were involved in the decision(s) to maintain the lockdowns over a long period of time. . . .The defendants cannot simply assert their supervisory positions as prima facie evidence that they had no connection to the alleged deprivation of exercise when plaintiff's core allegation is that the lockdowns were managed in such a way as to deprive him of the ability to exercise for weeks on end. Indeed, it is disingenuous to so argue in the face of plaintiff's clearly written claims: as to defendant Gower, he alleges that Gower 'is in [cahoots] with others to deprive Plaintiff of exercise for much longer than 10 days at a time'; as to defendant Wright, he alleges that Wright has violated his rights under the Eighth Amendment by not providing plaintiff the ability to exercise; and as to defendant McDonald, he alleges that McDonald used his 'controlling authority' in 'not affording Plaintiff his exercise every 10 days ... in violation of the Constitution[.]'. . These are clear allegations of direct involvement in a constitutional violation. Defendants' argument that the complaint asserts liability against them only under a theory of vicarious liability is contradicted by these plain words and is without merit. . . . As for the subjective prong of his claims, plaintiff does not explicitly aver 'deliberate indifference' by defendants. However, he does color the long-term prohibition on outdoor exercise as 'similar to keeping two pit bulls in a cell for months at a time," "treating human beings like trash," and indicative of a practice in which a 'human [is] less than an animal.'. . For purposes of this motion, these allegations, while unorthodox as assertions of deliberate indifference, satisfy the subjective prong of plaintiff's Eighth Amendment claim.")

Ofeldt v. McDaniel, No. 3:10–cv–00494–RCJ–WGC, 2012 WL 506010, at *1, *2 (D. Nev. Feb. 15, 2012) ("[T]he Court disagrees that McDaniel can be personally liable under § 1983 as the First Amended Complaint is pled. There is no respondeat superior liability under § 1983. . . A supervisor can be held liable under § 1983 without committing the act himself or even being present when another commits it, but only if he directly sets into motion the particular violation at issue via his supervisory authority or refuses to stop actions of which he is or should be aware. *See Starr v. Baca,* 652 F.3d 1202, 1205–07 (9th Cir.2011). Under this standard, the magistrate judge reasonably opined that McDaniel as warden could potentially be held personally liable for deliberate indifference to the allegedly unconstitutional conditions complained of in disciplinary segregation at ESP, because McDaniel is alleged to have put in place the policies that led to those conditions and was aware of those conditions but did not remedy them. But the magistrate judge did not have the benefit of *Hydrick v. Hunter,* No. 03–56712, 2012 WL 89157 (9th Cir. Jan. 12, 2012), which case distinguished *Starr.* In *Hydrick,* the plaintiff complained of unconstitutional conditions of confinement, as Plaintiff does here, and the Court of Appeals ruled that the complaint did not satisfy *Iqbal* with respect to supervisory liability under § 1983, because 'there is no allegation of a specific policy implemented by the Defendants or a specific event or events instigated by the Defendants that led to these purportedly unconstitutional searches.'. . The same

is true here. Plaintiff complains of the conditions in disciplinary segregation at ESP but does not identify any specific policies implemented by McDaniel leading to the alleged harms or any specific events instigated by McDaniel himself.")

Hardesty v. Barcus, No. CV 11–103–M–DWM–JCL, 2012 WL 705862, at *9 (D. Mont. Jan. 20, 2012) ("While the factual allegations in support of Hardesty's Section 1983 supervisory liability claim are relatively sparse, they are adequate to satisfy *Twombly* and *Iqbal*. Hardesty alleges, for example, that Barcus violated MHP policies on the use of force by hitting him with the Maglite flashlight, and that Tooley set those events in motion by failing to properly train, supervise, or control Barcus 'such that the laws, rules and regulations regarding the use of force and deadly force were violated by Trooper Barcus.'. . Hardesty also alleges that Tooley 'failed to properly investigate and punish prior constitutional deprivations, which encouraged a culture in the[ ] department[ ] of excessive use of force.'. . These allegations are sufficient to state a claim that is 'plausible on its face,' and to 'raise a reasonable expectation that discovery will reveal evidence of' a basis for Tooley's liability. . . Hardesty's supervisory liability claim is thus sufficient to withstand Tooley's Rule 12(b)(6) motion to dismiss.")

Schwartz v. Lassen County ex rel. Lassen County Jail, 838 F.Supp.2d 1045, 1056 (E.D. Cal. 2012) ("In this case, based on two of the aforementioned theories, Plaintiff's complaint contains sufficient factual allegations to establish a causal connection between Mineau's allegedly wrongful conduct and the constitutional violation such that it survives Defendants' motion to dismiss. First, the complaint contains sufficient factual allegations to permit the court to reasonably infer that Mineau plausibly refused to terminate a series of acts by his subordinates, which the supervisor knew or reasonably should have known would cause others to inflict a Constitutional injury. Specifically, Plaintiff alleges that Decedent's physical health was visibly deteriorating, that he had requested medical care on numerous occasions, that Mineau knew of his deteriorating health but, as undersheriff of Lassen County, failed to ensure that the Facility provided him sufficient medical care. Moreover, based on these same facts, the court can reasonably infer that Mineau plausibly acquiesced in the alleged constitutional deprivation and was deliberately indifferent to the possibility that his subordinates deficiently performed in providing Decedent necessary medical care. In sum, at this stage of the litigation, in which little to no discovery [footnote omitted] has been conducted, and where all reasonable inferences must be drawn in favor of Plaintiff, the Court cannot conclude that, based on the facts as alleged, Plaintiff has *no* plausible claim that Mineau is liable under Section 1983 for Plaintiff's constitutional deprivation in either his individual or supervisory capacity.")

Lovejoy v. Arpaio, No. CV09–1912–PHX–NVW, 2011 WL 6759552, at *19, *23, *24 (D. Ariz. Dec. 23, 2011) ("On this record, it was unconstitutional to arrest Lovejoy for animal cruelty. But as noted previously, Lovejoy has not sued the officers who actually performed the arrest (Simonson and Summers). Lovejoy hangs his entire case on proving that Arpaio was responsible. A supervisor may be liable for subordinates' unconstitutional acts if the supervisor engaged in 'culpable action or inaction in the training, supervision, or control of his subordinates.' *Larez v.*

City of Los Angeles, 946 F.2d 630, 646 (9th Cir.1991). Thus, a supervisor may be liable if he or she:
• sets in motion a series of acts by others, or knowingly refuses to terminate a series of acts by others, which he knows or reasonably should know, would cause others to inflict the constitutional injury;
• acquiesces in the constitutional deprivations of which the complaint is made; or
• otherwise engages in conduct that shows a reckless or callous indifference to the rights of others.
. . Summary judgment in favor of Arpaio is appropriate unless Lovejoy has sufficient evidence from which a jury could conclude that one of these supervisory liability standards i[s] met. Sufficient evidence exists from which a reasonable jury could conclude that Arpaio, in his supervisory role, acted to ensure that Lovejoy would be charged, or culpably failed to act to prevent others from bringing such charges. . . . As the Court concluded in a prior order, Arpaio is a final policymaker for Maricopa County in the context of criminal law enforcement. . . His acts therefore represent official Maricopa County 'policy.' Lovejoy has raised a triable issue of fact here. Indeed, Lovejoy's *Monell* case is substantially the same as his case against Arpaio personally. Both depend on proving that Arpaio caused or acquiesced in Lovejoy's arrest, and that Arpaio ensured Lovejoy would be prosecuted or otherwise remains responsible for the prosecution as the continuing injury caused by the arrest. As discussed above, Lovejoy has sufficient evidence to put those accusations before a jury. The only difference between Lovejoy's claim against Arpaio personally and Lovejoy's claim against the County is that the County has no qualified immunity defense. . . Thus, even if Arpaio was entitled to qualified immunity in his individual capacity (which he is not, *see* Part V.D, *above*), trial would still be necessary on Lovejoy's claim of County liability. Summary judgment on County liability will therefore be denied.")

Anderson v. Hartley, No. 1:09-cv-1924-LJO-MJS (PC), 2011 WL 5876913, at *3 (E.D. Cal. Nov. 22, 2011) ("Plaintiff alleged that Defendant Hartley had or should have had knowledge of the risk created by Defendant Hansen and was deliberately indifferent to that risk. Specifically, Plaintiff alleged that multiple incidents of excessive force by Defendant Hansen were brought to the attention of Defendant Hartley. Despite having knowledge of several such incidents, Defendant Hartley took no action to prevent further harm to prisoners. Instead he left Defendant Hansen in a position where he could, and did, continue using excessive force on prisoners and did use such force against Plaintiff. . . . Plaintiff has alleged sufficient facts to state a claim against Defendant Hartley for failure to protect in violation of the Eighth Amendment.")

McCabe v. Gibbons, No. 3:09-cv-00244-LRH-RAM, 2011 WL 2608603, at *3 (D. Nev. June 30, 2011) ("Here, plaintiff alleges that all of the supervisory defendants became 'aware of the grossly inadequate and dangerously negligent medical care ... at Ely State Prison as early as May 2007' when they learned of the investigation being conducted by the American Civil Liberties Union ("ACLU") . . . Plaintiff alleges that his medical treatment was specifically investigated by the ACLU and included in a report sent to the supervisory defendants in 2008. . . Plaintiff also alleges that the supervisory defendants became aware of the inadequate medical treatment he was being provided because of the media and medical releases he signed in conjunction with the ACLU

investigation. . . Plaintiff claims that despite the supervisory defendants' knowledge of his medical situation, they failed to take any action in response to his serious medical needs. . . These allegations are sufficiently detailed to put the supervisory defendants on notice of plaintiff's claims that they had knowledge of unconstitutional conduct by others and acquiesced in that conduct. Additionally, plaintiff's allegations contain enough facts to raise a reasonable expectation that discovery will reveal evidence to support those allegations. Although the court recognizes that the supervisory defendants who are members of the Board of Prison Commissioners are policymakers who may not be present for the day-to-day activities at the prisons, even policymakers may be held liable when, with a sufficient level of personal participation, they condone or ratify the unconstitutional conduct of subordinates.")

Cruz v. County of San Bernardino, No. CV 11-1821 CAS (DTBx), 2011 WL 1790717, at *6 (C.D. Cal. May 9, 2011) ("Defendants argue that the Court should dismiss plaintiff's supervisory liability claim because the allegations are conclusory and fail to set forth sufficient facts showing a causal connection between Sheriff Hoops's conduct and plaintiff's injury. . . The Court disagrees. Plaintiff alleges that Sheriff Hoops has taken no measures to implement any form of independent review of deputies' statements or investigation of citizen complaints. . . According to plaintiff, this practice of 'rubber stampin'" deputies' statements and reports, has resulted in a system whereby deputies' false statements are never investigated. . . Plaintiff further alleges that Sheriff Hoops is aware of numerous citizen complaints and lawsuits alleging excessive force by sheriff's deputies, but that he has taken no measures to independently investigate them. . . The Court concludes that these allegations relating to Sheriff Hoops's inaction in the training, supervision, and control of his deputies are sufficient to state a claim.").

Taylor v. Clark, No. 1:07-cv-00032-AWI-SMS PC, 2011 WL 917382, at *6, *7, *9 (E.D. Cal. Feb. 16, 2011) ("It is true that the Supreme Court has rejected liability on the part of supervisors for 'knowledge and acquiescence' in subordinates' wrongful *discriminatory* acts. . . However, Defendants argument that *Iqbal* effectively eviscerated supervisory liability is without merit as in the very same decision, the Supreme Court held that 'discrete wrongs − for instance, beatings − by lower level Government actors ... if true and if *condoned* by [supervisors] could be the basis for some inference of wrongful intent on [the supervisors'] part.' *Iqbal*, 129 S.Ct. at 1952 (emphasis added). Further, the Ninth Circuit very recently held that '... where the applicable constitutional standard is deliberate indifference, a plaintiff may state a claim for supervisory liability based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by others.' *Starr v. Baca*, __ F.3d __, 2011 WL 477094, *4 (9th Cir. Feb. 11, 2011). It is under this rubric that the traditional and still valid elements of supervisor liability within the Ninth Circuit are properly analyzed. . . . Accordingly, the crux of issues in this case for purposes of this motion is whether Defendants Clark and Adams knew, or reasonably should have known, of Defendant McKesson's propensity for violence (via the various investigations into accusations against him) and whether they could have taken supervisory and/or disciplinary actions towards Defendant McKesson, other than as actually occurred to equate to a failure to act, that they knew or reasonably should have known would cause instances of Defendant McKesson using excessive force such as

the type Plaintiff claims caused him injury in this case. . . . Defendants further suggest that supervisor liability has been 'entirely eliminated,' or has at least been severely narrowed such that 'liability may no longer be based on inaction, such as knowledge and acquiescence and a failure to act or deliberate indifference regarding a subordinate's alleged unconstitutional conduct,' but rather that 'liability may only be found where the supervisor commits a purposeful act that leads to the deprivation of the plaintiff's constitutional rights.'. . While Defendants' arguments along this vein would be true if this case dealt with a discrimination action under the First or Fifth Amendments, as discussed above, this argument does not extend and should not be applied to claims of deliberate indifference under the Eighth Amendment.")

Gonzales v. Cate, No. 1:09-cv-02149 LJO GSA PC, 2011 WL 23068, at *2 (E.D. Cal. Jan. 4, 2011) ("[I]n order to hold Warden Hartley liable, Plaintiff must allege facts from which the inference could be drawn that a substantial risk of serious harm exists, and facts indicating that Wardeny Hartley drew the inference. . . Here, Plaintiff alleges that he was assaulted, and that Hartley and the other defendants should have known of the risk. Plaintiff has not alleged any facts indicating how Defendant Hartley knew of the risk. He should therefore be dismissed.")

Kennedy v. Hayes, No. 1:09-cv-01946 JLT (PC), 2010 WL 5440805, at *8 (E.D. Cal. Dec. 28, 2010) (Here, Plaintiff seeks to impose liability on the A-Yard medical supervisor ("Doe 1") and the direct supervisor of defendant Hayes ("Doe 2"). . . However, Plaintiff has failed to allege these defendants knew of any alleged unlawful action. Furthermore, the deliberate indifference standard is met only when prison officials have actual knowledge; it is not sufficient to allege the defendants should have been aware of Plaintiff's medical needs. Finally, though Plaintiff states the supervisors acted with deliberate indifference, this conclusory statement, unsupported by any facts, is insufficient to state a claim.")

Fields v. Adam, No. 1:09-cv-1770-MJS (PC), 2010 WL 5113071, at *4 (E.D. Cal. Dec. 8, 2010) ("In this case, Plaintiff alleges only that the Supervisory Defendants knew of the unlawful search and failed to prevent it. There is no allegation that any of them actually participated in the search, that they ordered the search, or that the search was conducted pursuit to a policy that they implemented. Accordingly, Plaintiff has failed to state a claim against any of the Supervisory Defendants. He shall be given leave to amend these claims to attempt to address the deficiencies noted herein.")

Pruitt v. Clark, No. 1:07-cv-01709-AWI-SMS, 2010 WL 3063254, at *5 (E.D. Cal. Aug. 3, 2010) ("The Court finds that Plaintiff's allegations state a claim against Defendants Curtiss and Wan but not Defendant Watking. Defendant Watking conducted an administrative review of Plaintiff's appeal and did not have authority over the work change area or its employees, policies, and practices. There simply is not sufficient factual support for a facially plausible claim that Defendant Watking violated Plaintiff's Fourth Amendment rights. . . Defendants Curtiss and Wan, by contrast, had authority over work change and its policies and practices, and were aware that routine cross-gender strip searches were taking place. This is sufficient to state a claim under

section 1983. . . Turning last to Defendants Clark and Fisher, Plaintiff alleges only that he sent Warden Clark a letter and Fisher responded on Clark's behalf, telling Plaintiff to file an inmate appeal. Defendants Clark and Fisher are only liable for their own misconduct, and the allegations that a letter was sent and responded to with the direction to file an inmate appeal fall short of stating a facially plausible Fourth Amendment claim against them.").

Herrera v. Hall, No. 1:08-cv-01882-LJO-SKO PC, 2010 WL 2791586, at *4, *5 (E.D. Cal. July 14, 2010) ("[I]t was unclear whether the plaintiff's administrative appeal was a request for medical treatment or whether the plaintiff was merely complaining about another prison official's failure to provide him with treatment. The distinction is important because an appeals coordinator does not cause or contribute to a completed constitutional violation that occurs in the past. *See George v. Smith*, 507 F.3d 605, 609-610 (7th Cir.2007) ("[a] guard who stands and watches while another guard beats a prisoner violates the Constitution; a guard who rejects an administrative complaint about a completed act of misconduct does not"). However, if there is an ongoing constitutional violation and the appeals coordinator had the authority and opportunity to prevent the ongoing violation, a plaintiff may be able to establish liability by alleging that the appeals coordinator knew about an impending violation and failed to prevent it. . . . *Iqbal* does not support Defendants' proposition that 'a defendant who is involved only to the extent that he or she considered a plaintiff's inmate appeal may not be held liable.' *Iqbal* does not even discuss the processing of inmate appeals. Further, even if Defendants could be considered supervisors, Plaintiff is not attempting to hold them liable for the unconstitutional conduct of their subordinates. Plaintiff has sufficiently alleged that Defendants' own individual actions in denying Plaintiff's requests for medical treatment violated the Constitution. Plaintiff has alleged sufficient facts to state a claim against [Defendant supervisors].")

Lee v. Alameida, No. 1:02-cv-05037-LJO-GSA-PC, 2010 WL 2629800, at *4 (E.D. Cal. June 29, 2010) ("In the order granting Plaintiff leave to file a first amended complaint, he was advised that in *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court held that, under certain circumstances, a municipality may be held liable based on the failure to train its employees. This Court finds no authority for the extension of *City of Canton* and its progeny to state prison officials being sued in their personal capacity. It appears to this Court, following a review of relevant case law, that the cases involving failure to train are limited to suits against city and county entities. This claim should therefore be dismissed.").

Jones v. Stieferman, No. CIV S-06-2732-FCD-CMK-P, 2010 WL 2546061, at *2 (E.D. Cal. June 23, 2010) ("Plaintiff names Warden Pliler as a defendant in this action based solely on the allegation that she refused to intervene in his mistreatment. As stated above, a supervisory defendant can only be liable for his or her own conduct, not that of others. Except for his allegation that he attempted to communicate with Warden Pliler about his mistreatment, and therefore she was presumably aware of it and failed to intervene, there are no allegations of any affirmative conduct by Warden Pliler. Plaintiff makes no allegation that Warden Pliler actively participated in his alleged mistreatment. Knowledge and acquiescence of mistreatment is insufficient to impose

liability on a supervisory defendant. As discussed above, Plaintiff has been provided sufficient opportunity to cure defects in his complaints, and therefore the undersigned recommends that defendant Pliler be dismissed from this action, without leave to amend, for failure to state a claim.")

Coleman v. Adams, No. 1:06-cv-00836-AWI-SKO PC, 2010 WL 2572534, at *6, *7 (E.D. Cal. June 22, 2010) ("Defendants contend that mere 'awareness' of the negligent acts of their subordinates is not sufficient to hold them liable under Section 1983. However, Plaintiff has alleged more tha[n] mere negligence. . . Defendants' awareness of the fact that Plaintiff was not receiving treatment for his vision problem and did not receive a lower bunk assignment is sufficient to hold them liable for their failure to act. Plaintiff has alleged sufficient facts to hold [Defendants] liable for their participation in the alleged deprivation of Plaintiff's constitutional rights. . . .Taken together, *Mann, Ramirez,* and *Buckley* cannot be read broadly enough to support the proposition that the processing of an administrative appeal cannot, in any circumstances, form the basis of a claim to relief under Section 1983. *Mann, Ramirez,* and *Buckley* are limited to holding that a Plaintiff has no substantive right to a prison grievance system and that due process claims based on the denial of or interference with a prisoner's access to a prison grievance system are not cognizable. Thus, if a prisoner were to raise a claim premised on an asserted denial of due process caused by denied or obstructed access to a prison's administrative grievance system, the claim would not be cognizable under *Mann, Ramirez,* and *Buckley.* Here, Plaintiff is not claiming a loss of a substantive right in the processing of his appeals caused by denied or obstructed access to a prison grievance system. Plaintiff's Section 1983 claim is not premised on Defendants' failure to process his grievances, consider evidence, hear witnesses, provide written findings or otherwise deny Plaintiff's administrative complaints without adequate process. Plaintiff is raising an Eighth Amendment claim, not a Fourteenth Amendment claim. Plaintiff's reference to the administrative complaint system merely bolsters his allegation that supervisory personnel had actual awareness of the risk to Plaintiff's safety. Nothing in the cases cited by Defendants bars Plaintiff from proceeding on that theory. The decisions in *Mann* and *Ramirez* do not touch upon whether an appeal reviewer's actions can be considered 'cruel and unusual' within the meaning of the Eighth Amendment.")

Bovarie v. Tilton, No. 06CV687 JLS (NLS), 2010 WL 743741, at *3, *4 (S.D. Cal. Mar. 1, 2010) ("This Court has previously found that the Plaintiff has sufficiently pled causation on behalf of Defendants, which included directors, wardens, lieutenants, captains and library staff in his Third Amended Complaint. . . The Court found that 'plaintiff alleged the implementations and enforcement of law library policies that effectively denied plaintiff access to the court.'. . . Magistrate Judge Stormes went on to reject defendants' argument that Plaintiff merely alleged the conclusory statement that Defendant [sic] were 'grossly negligent in the supervision and duty' and found that Plaintiff adequately pled that Defendants adopted and enforced policies which led to a deprivation of Plaintiff's constitutional rights. . . Despite this earlier Order, Defendants ask the court to re-evaluate the 4AC in light of *Ashcroft v. Iqbal,* 556 U.S. __, 129 S.Ct. 1937, 1943 (2009), where the United States Supreme Court clarified the pleading standard under Rule 8. In Defendants

R & R currently at issue, Magistrate Judge Stormes recommends that this Court reverse its earlier finding and grant the Defendant Directors' . . . motion to dismiss with prejudice. . . The Court disagrees. . . . In light of the Court's holding in *Iqbal,* Magistrate Judge Stormes found that Plaintiff's allegation that the Directors interfered with his access to the courts by 'promulgating, enforcing and allowing policies, procedures and operations that deny access to legal resources' was no more than a 'formulaic recitation of the elements of a constitutional ... claim.'. . Then, the magistrate judge found that the allegations that Defendant were grossly negligent in their supervision and failed to provide adequate training, funding, and policy for the law libraries was 'insufficient to state a claim against the Directors because even if true, they fail to allege the necessary knowledge and state of mind to established that the Director Defendants caused a violation of Plaintiff's right to access the courts.'. . Plaintiff objects to this recommendation, arguing that *Iqbal* involved a different constitutional violation than in the present case and that the magistrate judgment mis-characterized and mis-summarized his allegations as they pertain to the Director Defendants. . . The Court sustains Plaintiff's objections and rejects Magistrate Judge Stormes' recommendation as it pertains to the Director Defendants. First, it is unclear what standard regarding state of mind and knowledge Magistrate Judge Stormes found was insufficiently pled. The standard applied in *Iqbal* was purposeful discrimination; here, it is deliberate indifference. Moreover, Magistrate Judge Stormes does not explain why *Iqbal* would change the Court's earlier finding that Plaintiff sufficiently pled deliberate indifference on behalf of the Director Defendants. *Iqbal* did not change this standard, nor what must be pled under this standard. . . . The fact that both the Director Defendants and the respondents in *Iqbal* were high-ranking government officials is not sufficient to overturn this Court's previous findings. Accordingly, the Court, having reviewed the 4AC and the decision in *Ashcroft v. Iqbal,* adheres to its original determination that Plaintiff has sufficiently pled a violation of his constitutional right of access to courts on behalf of the Director Defendants.").

Rupe v. Cate, No. CV-08-2454-EFS, 2010 WL 430826, at *4 (E.D. Cal. Feb. 1, 2010) ("The Court finds that Plaintiff sufficiently pled that Defendants Martel, Subia, and Long were aware of the violations and failed to prevent them. Plaintiff alleges that he wrote to Defendants Subia, Long, and Martel about the alleged violations. . . Additionally, Plaintiff alleges that all these Defendants were 'made completely aware of the inappropriate actions of their subordinates ... but actively chose to be deliberately indifferent to these actions.'") **.**

Eastman v. City of North Las Vegas, No. 2:07-cv-01658-RLH-RJJ, 2010 WL 428806, at *5 (D. Nev. Feb. 1, 2010) ("In his deposition, Chief of Police Mark Paresi testified that under his leadership the North Las Vegas Police Department decided to allow their officers to carry and use tasers and implemented a set of policies and procedures regulating their use. . . Paresi further testified that after reviewing the police report in this case, he concluded that Officer Miller appropriately followed police department procedure when he chose to tase Eastman. As noted above, a genuine factual dispute exists regarding whether Officer Miller violated the Eastman's Fourth Amendment rights when he used his taser on him. Consequently, if the finder of fact concludes that Miller is liable under § 1983, the Supervising Officers can also be held liable

because they approved and implemented the policies governing the use of tasers that led to this incident.”).

Avila v. Cate, No. 1:09-cv-00918-SMS PC, 2009 WL 5029827, at *3 (E.D. Cal. Dec. 15, 2009) (“[W]hile a supervisor may be held liable for the constitutional violations of his or her subordinates under section 1983 if he or she ‘participated in or directed the violations, or knew of the violations and failed to act to prevent them,’ *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989); *also Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir.2009); *Preschooler II v. Clark County School Board of Trustees*, 479 F.3d 1175, 1182 (9th Cir.2007); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir.1997), mere knowledge is insufficient to impose liability on a prison official for unconstitutional discrimination, which requires purpose, *Iqbal* at 1949. Therefore, Plaintiff’s attempt to hold Defendants liable for racial discrimination because they were placed on notice of it via his inmate appeals fails as a matter of law. *Id.* These Defendants were not personally involved in intentionally discriminating against Plaintiff and the claim against them is subject to dismissal.”).

Castillo v. Skwarski, No. C08-5683BHS, 2009 WL 4844801, at *7, *8 (W.D. Wash. Dec. 10, 2009) (“Defendants argue that in *Ashcroft v. Iqbal* . . . ‘the Supreme Court eliminated the theory of supervisory liability from *Bivens* suits.’. . In *Iqbal*, the Court stated that because ‘vicarious liability is inapplicable to *Bivens* ... suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.’. . Although this holding seems to have limited the liability of supervisors, the Court disagrees with Defendants’ proposition that supervisor liability has been ‘eliminated.’In an opinion issued post-*Iqbal*, the Ninth Circuit identified four general situations in which supervisory liability may be imposed: (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a reckless or callous indifference to the rights of others. *Al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir.2009) . . . In this case, Defendant Melendez argues that the Court should dismiss Plaintiff’s claims against him because the complaint lacks an allegation of his personal participation. . .The Court agrees. Plaintiff’s complaint alleges as follows: 1.2.5. At all times relevant, Michael Melendez was the Immigration and Customs Enforcement Supervising Deportation and Removal Officer for the Northwest Detention Center. On information and belief, at all times relevant, Michael Melendez was responsible for training and supervision of the ICE agents and officers whose conduct caused the injuries alleged herein. As part of his job responsibilities, Officer Melendez had a duty to ensure that no U.S. citizens were detained by ICE. At all relevant times Officer Melendez was acting under color of federal law and is sued in his individual capacity. * * * 3.33. On information and belief, with deliberate indifference, intent, or reckless disregard, Defendants failed to adequately and properly train and supervise Agents Carl Stephens and Julie Stephens and other officers and agents involved in the arrest, detention, questioning, and removal proceedings to which Mr. Castillo was subjected. On information and

belief, Defendants' failure to provide proper and adequate training and supervision was a proximate cause of the injuries that Mr. Castillo suffered. . .The pleaded facts against Defendant Melendez are no more than labels and conclusions because Plaintiff alleges only that Defendant Melendez 'was responsible for training and supervision' and that he failed to provide 'proper and adequate training.' Moreover, based on these assertions, the Court is left to simply infer the mere possibility of culpable conduct by Defendant Melendez. Therefore, the Court grants Defendants' motion on this issue and Plaintiff's claims against Defendant Melendez are dismissed without prejudice. With respect to Defendant Potter, he argues that Plaintiff's complaint against him is 'similarly flawed.'. . The Court disagrees because Plaintiff has alleged more than mere labels and conclusions. For example, Plaintiff has alleged that (1) Defendant Potter unlawfully approved the Form I-213 and issued an invalid Notice to Appear when he knew, or recklessly or callously disregarded evidence that Plaintiff was a United States citizen, Complaint, & 3.11-3.13, and (2) Defendant Potter's failure to conduct any investigation into the I-213, despite inconsistencies, demonstrates deliberate indifference to [Plaintiff's] constitutional rights, *Id.* & 3.33, 5.3, 5.7. The Court finds that Plaintiff has pled sufficient facts to state a claim that is plausible on its face. Therefore, the Court denies Defendants' motion to dismiss Plaintiff's claim against Defendant Potter.")**.**

Booth v. Carvell, No. CV-F-08-1912 LJO GSA, 2009 WL 4730910, at * 8 (E.D. Cal. Dec. 7, 2009) ("The fourth cause of action for failure to instruct, supervise, control and discipline is . . . insufficient under *Iqbal.* The claim incorporates all preceding allegations and states in a conclusory fashion: 23. At all relevant times, the defendants executing the warrants were acting under the direction and control of the unknown DOE superiors and supervisors. 24. Acting under color of state law, the unknown DOE superiors and supervisors intentionally, knowing, recklessly and with deliberate indifference to the rights of the inhabitants of the area failed to instruct, supervise, control and/or discipline the defendants who executed the warrants to refrain from conducting unlawful searches and seizures, and otherwise depriving citizens of their constitutional and statutory rights, privileges and immunities. 25. Defendant unknown DOE superior and supervisors had knowledge or should have had knowledge that the wrongs alleged herein were going to be committed and had the power to prevent, or aid in preventing, the commission of said wrongs, could have done so, and intentionally, knowingly, or with deliberate indifference to the rights of inhabitants of the area, failed or refused to do so. . . Plaintiff has failed to allege any factual support for his claims of supervisor liability under section 1983. . . . Plaintiff has alleged no facts indicating any personal involvement by defendants. The fact that each of the DOE defendants holds a supervisory position alone, does not render them liable for conduct of their staff. The fourth cause of action alleges no more than what the Supreme Court explicitly warned against, 'a plaintiff armed with nothing more than conclusions.' *Iqbal,* 129 S.Ct. at 1949. These claims are factually insufficient pursuant to the *Iqbal* standard.").

Gonzales v. Price, No. 1:07-cv-01391-AWI-SMS (PC), 2009 WL 4718850, at *7 (E.D. Cal. Dec. 2, 2009) ("To state a claim for relief under section 1983 based on a theory of supervisory liability, Plaintiff must allege some facts that would support a claim that supervisory defendants either:

personally participated in the alleged deprivation of constitutional rights; knew of the violations and failed to act to prevent them; or promulgated or 'implemented a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is "the moving force of the constitutional violation.''' *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir.1989) (internal citations omitted); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). Under section 1983, liability may not be imposed on supervisory personnel for the actions of their employees under a theory of *respondeat superior*. *Iqbal*, 129 S.Ct. at 1949. 'In a § 1983 suit or a Bivens action-where masters do not answer for the torts of their servants-the term Asupervisory liability' is a misnomer.' *Id.* Knowledge and acquiescence of a subordinate's misconduct is insufficient to establish liability; each government official is only liable for his or her own misconduct. *Id.*").

Wiseman v. Hernandez No. 08cv1272-LAB (NLS), 2009 WL 5943242, at *8 n.5, *9 n.8 (S.D. Cal. Nov. 23, 2009) ("Although not specified in *Iqbal*, it seems logical that the more removed a defendant is from a plaintiff, the more factual specificity would be necessary to entitle an allegation to the presumption of truth and to plausibly suggest an entitlement to relief. In other words, where defendants are closely connected to the plaintiff's day to day activities, it would take less factual specificity to survive a motion to dismiss than where the defendants are as far removed as the Attorney General and the FBI Director. . . . The *Iqbql* Court rejected the plaintiff's argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.' *Id.* at 1949. This rejection, however, was based upon the requirement of pleading a discriminatory purpose in order to state a claim for discrimination. Thus, the allegation of knowledge of a subordinate's discriminatory purpose was insufficient to state a claim against the supervisor because there was no allegation that the supervisory individually had a discriminatory purpose. Accordingly, *Iqbal* does not invalidate prior case law stating that supervisory knowledge and failure to stop a constitutional violation is sufficient to state a claim for supervisory liability.")**.**

Kelly v. State of Arizona, acting ex rel. the Arizona Dept. of Corrections, No. CV-09-824-PHX-DGC, 2009 WL 3756699, at *4, *5 & n.3 (D. Ariz. Nov. 6, 2009) ("Plaintiffs do not allege that Defendants Schriro or Larson were present on the yard when Sean Kelly was murdered. They do not allege that Defendants Schriro and Larson had any direct involvement in the unfortunate events of that day. Given Defendant Schriro's role as director of the Arizona Department of Corrections and Defendant Larson's role as warden of the entire Arizona State Prison Complex–Lewis, it is not plausible to believe that either of them knew specifically what was occurring on the yard on the day Sean Kelly was murdered, knew the location or movements of specific inmates that day, knew that the inmates were somehow gaining access to the housing unit in which Sean Kelly was located, or knew that prisoners were allowed to pass through a metal detector without monitoring. The greater factual detail contained in these paragraphs almost certainly applies to the guards who were on the ground − the John Doe defendants named in the case. The paragraphs cannot reasonably be read as applying to Defendants Schriro and Larson. The Court presumes that this is why Plaintiffs assert the allegations only against 'Defendants' generically. Because the more factually specific paragraphs cannot be read as applying to Defendants Schriro and Larson, and

the paragraphs that do name Defendants Schriro and Larson are entirely conclusory, the count one claims against Schriro and Larson must be dismissed. . . . Plaintiffs have pleaded no factual material which plausibly suggests that Defendants Schriro and Larson acted with deliberate indifference toward Sean Kelly − that they were aware of the risk of harm to Sean Kelly and deliberately chose to disregard that risk. As noted above, the requirement is one of actual, subjective intentC'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.' *Farmer*, 511 U.S. at 837. Because Plaintiffs have failed to plead facts that satisfy this standard, count one will be dismissed as to Defendants Schriro and Larson. . . . *Iqbal* also appears to have scaled back supervisory liability under § 1983 and *Bivens* claims. *Iqbal* rejected the argument that 'a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution.' 129 S.Ct. at 1949. The Supreme Court explained: 'In a § 1983 suit or a *Bivens* action − where masters do not answer for the torts of their servants − the term Asupervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.' *Id.* The Supreme Court concluded that 'purpose rather than knowledge is required.' *Id.* The Court need not decide whether this language would eliminate the liability of Defendants Schriro and Larson based solely on their knowledge that others within the Department of Corrections were violating Sean Kelly's constitutional rights. Even if such knowledge remains sufficient for a § 1983 claim, Plaintiffs have not alleged facts sufficient to show such knowledge.").

Shehee v. Baca, No. CV 08-2277-FMC (E), 2009 WL 3462174, at *6 n.6 (C.D. Cal. Oct. 23, 2009) ("After *Iqbal*, the issue of whether an individual's knowing failure to act, alone, can justify section 1983 liability is unclear. *Iqbal* noted that 'purpose rather than knowledge' is required to impose liability on defendants for discharging their responsibilities in a way that may have resulted in constitutional deprivations. *See Iqbal*, 129 S.Ct. at 1949 (discussing same); *see also al-Kidd v. Ashcroft*, 580 F.3d at 976 & n. 25 (acknowledging dissent's contention that the 'knowing failure to act' standard did not survive *Iqbal*, but refusing to reach the issue).

TENTH CIRCUIT

Burke v. Regalado, 935 F.3d 960, 1001 (10th Cir. 2019) ("It was reasonable for the jury to find (1) Sheriff Glanz was responsible for 'an unconstitutional policy or custom,' *Dodds*, 614 F.3d at 1199, of poor training, inadequate staffing, and lack of urgency surrounding jail medical care; (2) that this policy or conduct resulted in a violation of Mr. Williams's right to adequate medical care under the Fourteenth Amendment; and (3) Sheriff Glanz acted with deliberate indifference toward the risk that the policy or conduct of providing inadequate medical care would result in an injury like Mr. Williams's. Accordingly, the evidence was sufficient to support the jury's verdict against Sheriff Glanz holding him liable for supervisory liability.")

Stevenson v. Cordova, No. 17-1053, 2018 WL 2171179, at *8 (10th Cir. May 11, 2018) (not reported) ("Finally, Stevenson also fails to show plain error in the district court's instruction on

the state of mind necessary to find that Cordova and Holloway used excessive force. . . He argues the standard should have been deliberate indifference. We have applied that standard to a supervisor's liability for a subordinate's use of excessive force against a prisoner. *See Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151-52 (10th Cir. 2006). But it remains an open question whether that standard still applies in the wake of the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See Dodds*, 614 F.3d at 1197-99 (discussing *Iqbal* and concluding that a claim against a supervisory defendant must allege that he acted with the state of mind necessary to establish the alleged constitutional violation). To the extent that Stevenson is challenging the district court's decision not to give an instruction on supervisory liability based upon the defendants' deliberate indifference, the lack of evidence of any constitutional violation by a subordinate precluded that theory of liability. And he otherwise fails to demonstrate that Instruction Nos. 10 and 11 erroneously required the jury to find that Cordova and Holloway acted maliciously and sadistically in refusing to loosen the handcuffs, as is required for liability on an Eighth Amendment claim of excessive use of force.")

Moya v. Garcia, 895 F.3d 1229, 1232-34, 1237-39 (10th Cir. 2018) (*amended opinion on denial of rehearing en banc*), *cert. denied*, 139 S. Ct. 1323 (2019) ("The first question is whether Mr. Moya and Mr. Petry have adequately alleged a deprivation of due process. We need not decide this question because of our answer to the second question: in our view, the complaint does not plausibly allege facts attributing the potential constitutional violation to the sheriff or wardens. . . To prevail, Mr. Moya and Mr. Petry must have alleged facts showing that the sheriff and wardens had been personally involved in the underlying violations through their own participation or supervisory control. . .The district court rejected both theories of liability. Here, though, Mr. Moya and Mr. Petry rely only on their theory of supervisory liability. For this theory, Mr. Moya and Mr. Petry blame the sheriff and wardens for the delays in the arraignments. In our view, however, the sheriff and wardens did not cause the arraignment delays. . . . [T]he arraignments could not be scheduled by anyone working for the sheriff or wardens; scheduling of the arraignments lay solely with the state trial court. . . . [T]he court was firmly in control here. Grand juries indicted Mr. Moya and Mr. Petry, and both individuals were arrested based on outstanding warrants issued by the court. And after these arrests, jail officials notified the court that Mr. Moya and Mr. Petry were in custody. The arrests triggered New Mexico's Rules of Criminal Procedure, which entitled Mr. Moya and Mr. Petry to arraignments within fifteen days. Rule 5-303(A) NMRA. Compliance with this requirement lay solely with the court, for an arraignment is a court proceeding that takes place only when scheduled by the court. . . The court failed to comply with this requirement, resulting in overdetention of Mr. Moya and Mr. Petry. These overdetentions were caused by the court's failure to schedule and conduct timely arraignments rather than a lapse by the sheriff or wardens. *See Webb v. Thompson*, 643 Fed.Appx. 718, 726 (10th Cir. 2016) (unpublished) (Gorsuch, J., concurring in part and dissenting in part) ("[T]he only relevant law anyone has cited to us comes from state law, and it indicates that the duty to ensure a constitutionally timely arraignment in Utah falls on the *arresting* officer—not on *correctional* officers."). Mr. Moya and Mr. Petry argue that the sheriff and wardens could have mitigated the risk of overdetention by keeping track of whether detainees had been timely arraigned, requesting arraignments for those

who had been overdetained, or bringing detainees to court prior to a scheduled arraignment. But the sheriff and wardens did not *cause* the overdetention. At most, the sheriff and wardens failed to remind the court that it was taking too long to arraign Mr. Moya and Mr. Petry. But even with such a reminder, the arraignments could only be scheduled by the court itself. . . . [T]he dissent reasons that the right at issue must be the right to freedom from pretrial detention rather than the right to a timely arraignment. Based on this reasoning, the dissent concludes that our misplaced focus on arraignment has caused us to improperly focus on the state district court's role and overlook actions that the defendants could have taken, such as releasing Mr. Moya and Mr. Petry. We have focused on the plaintiffs' right to timely arraignment because that's what the plaintiffs have alleged. As the dissent admits, Mr. Moya and Mr. Petry are imprecise about their asserted right, conflating the right to an arraignment within fifteen days of arrest and the right to pretrial release (or bail). This conflation is understandable because the rights are coextensive under their theory of the case. . . .Under the theory articulated by Mr. Moya and Mr. Petry, the defendants violated the right to freedom from detention by failing to ensure timely arraignments. . . . As discussed above, the defendants were powerless to cause timely arraignments because arraignments are scheduled by the court rather than jail officials. The dissent agrees. But the dissent theorizes that jail officials could have simply released Mr. Moya and Mr. Petry. This theory is not only new but also contrary to what Mr. Moya and Mr. Petry have told us, for they expressly disavowed this theory. . . .The state trial court's alleged failure to schedule timely arraignments cannot be attributed to the sheriff or wardens. Thus, the complaint does not plausibly allege a basis for supervisory liability of the sheriff or wardens. . . . Mr. Moya and Mr. Petry also assert § 1983 claims against the county, alleging that it failed to adopt a policy to ensure arraignments within fifteen days. These claims are based on the alleged inaction by the sheriff and wardens. But, as discussed above, the sheriff and wardens did not cause the arraignment delays. Thus, the county could not incur liability under § 1983 on the basis of the alleged inaction. . . . Mr. Moya and Mr. Petry allege a deprivation of due process when they were detained for more than fifteen days without arraignments. We can assume, without deciding, that this allegation involved a constitutional violation. But Mr. Moya and Mr. Petry sued the sheriff, wardens, and county, and these parties did not cause the arraignment delays. Thus, the district court did not err in dismissing the complaint or in denying leave to amend.")

Marin v. King, No. 16-2225, 2018 WL 272008, at *14–15 (10th Cir. Jan. 3, 2018) (not reported) ("When a § 1983 plaintiff pursues a claim of supervisory liability, he must show the subordinate violated his constitutional rights—a supervisor cannot be liable if the subordinate did not commit a violation. . . Having concluded that Plaintiffs have not successfully advanced their Fifth and Fourteenth Amendment claim against Ms. Ferguson or Dr. Norris, Plaintiffs' attempt to hold Mr. King and Mr. Suttle liable for any purported violation must fail. Moreover, when a supervisor seeks qualified immunity in a § 1983 action, the clearly established prong is met only when the supervisor's and the subordinate's actions violate clearly established law. . . As stated, Plaintiffs fail to show Ms. Ferguson or Dr. Norris violated clearly established law for their Fourth and Fourteenth Amendment claim. Thus, we conclude that Mr. King and Mr. Suttle are entitled

to qualified immunity on Plaintiffs' supervisory-liability claim arising out of that alleged violation.")

Ellis v. Oliver, No. 16-1387, 2017 WL 4857427 (10th Cir. Oct. 26, 2017) (not reported) ("Ultimately, Mr. Ellis has failed to identify any 'specific actions taken by [the warden], or specific policies over which [the warden] possessed supervisory responsibility, that violated [his] clearly established constitutional rights.'. . While this court is sympathetic to the informational disparity. . . between a prisoner and prison officials, especially in the pre-discovery context, something more is required to establish a constitutional violation and overcome the presumption of qualified immunity. . . Since Mr. Ellis has failed to allege facts plausibly showing that the warden's individual actions violated his constitutional rights, he has also failed to show that Warden Oliver caused the constitutional harm and did so with the requisite state of mind.")

Vega v. Davis, No. 16-1028, 2016 WL 7448067, at *4-5 (10th Cir. Dec. 28, 2016) (unpublished) ("Although Plaintiff's Second Amended Complaint does 'nudge' his deliberate indifference claim more toward the line of plausibility than his initial complaint, . . . it still fails the facial plausibility standard. . . . Plaintiff was required to demonstrate that the Warden was aware of facts from which the inference could be drawn that Vega was at a substantial risk of harm or suicide, and the Warden 'must also draw the inference.'. . The Second Amended Complaint fails in both respects. . . . Plaintiff fails to demonstrate how one can infer the Warden was aware of any of the facts that pre-dated his tenure. As this court admonished during the prior appeal, '[t]he mere presence of records, by themselves, does not create the reasonable inference that Davis read them. The plaintiff fails to explain why it is reasonable to infer that a warden would review all of the records of each inmate, or each inmate in the Control Unit, or [Vega's] records in particular.'. . In the current appeal, Plaintiff suggests it is reasonable to conclude that the Warden was aware of Vega's earlier mental health history because he 'reviewed documents related to [Vega] that outlined his disciplinary history dating back to 2003.' We are not persuaded. Although the Warden did review documents that discussed Vega's behavior in 2003—specifically, the assaultive behavior that landed Vega in the Control Unit—those documents say nothing about mental illness. Though the Warden, by reviewing these documents, clearly became aware of Vega's *conduct*, there is nothing to suggest he was aware of or knowingly disregarded Vega's *mental health*, particularly where the facility's own psychologist opined that Vega 'ha [d] no current mental health issues.'")

Keith v. Koerner, 843 F.3d 833, 838-40, 846-47, 849 (10th Cir. 2016) ("[W]e need not define the standard for personal involvement in all instances because Ms. Keith's theories of liability either fail on their merits or fall within the basis of liability we recognized in *Dodds* as surviving *Iqbal*. To establish personal involvement, Ms. Keith first alleges a failure to train by Warden Koerner. Although we have not determined whether a failure to train satisfies the post-*Iqbal* personal-involvement requirement, the evidence in this case does not support Ms. Keith's theory even under our pre-*Iqbal* precedent. Accordingly, we need not determine whether the failure-to-train theory would be legally sufficient under a heightened standard. Second, Ms. Keith argues Warden Koerner failed to implement and enforce policies that would have prevented the sexual assault by

Mr. Gallardo. Because we concluded in *Dodds* that personal involvement may be established by a supervisor's responsibility for policies, Ms. Keith may rely on the same theory here. We discuss each of these personal liability theories below. . . . Because Warden Koerner provided multiple, explicit prohibitions against sexual interaction with inmates, we cannot conclude he failed to train his employees in a way that would establish his personal involvement in Ms. Keith's injury. Indeed, we have held that allegations of failure to train were inadequate to support a § 1983 claim where the officer completed a state training program and we found no evidence of a deficiency in the training. *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998). In *Barney*, we further explained that, even if the training was 'less than adequate, we [were] not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates. Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior.'. . Similarly here, there is no evidence that additional training would have prevented Mr. Gallardo's misconduct. Indeed, Mr. Gallardo raped Ms. Keith after acknowledging that engaging in sex with or sexually assaulting an inmate was grounds for termination and criminal prosecution. . . . Ms. Keith has not identified case law clearly establishing a warden's personal liability based solely on instances of inappropriate conduct that may be considered undue familiarity but that do not rise to the level of sexual misconduct. Consequently, we distinguish between these forms of misconduct in analyzing Warden Koerner's personal involvement, relying on the evidence relating to undue familiarity to the extent it provides context for the conditions at TCF. . . . Although TCF had formal policies prohibiting sexual misconduct, the evidence raises questions about whether those policies were being followed or enforced. Despite facing a higher number of allegations of sexual misconduct and undue familiarity than similar facilities, Warden Koerner's most common response was to deem the allegations unsubstantiated whenever the employee denied them. In turn, even when breach of polices designed to protect inmates from undue familiarity and sexual misconduct was independently corroborated, discipline was lax. Considering the evidence as a whole, a jury could reasonably infer that Warden Koerner was personally involved in failing to enforce policies in a way that allowed sexual misconduct to occur at TCF. . . . Viewing this evidence together with the high volume of complaints at TCF, the multiple complaints against individual employees, and the lackluster response to such complaints, we conclude Ms. Keith has demonstrated a genuine issue of material fact about whether Warden Koerner acted with deliberate indifference to the risk of sexual misconduct by his employees. . . At trial, Warden Koerner may introduce evidence to rebut any inference of knowledge or to show his actions were reasonable under the circumstances, *Farmer*, 511 U.S. at 844, but the weighing of such evidence is the jury's role, not ours, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In summary, Ms. Keith has presented sufficient evidence to establish Warden Koerner's personal involvement, causation, and state of mind, as necessary to present her constitutional violation to a jury. Viewing the circumstances at TCF as a whole, there is sufficient evidence from which a reasonable jury could infer that Warden Koerner was aware of but failed to address a substantial risk that his employees would engage in sexual misconduct and thereby harm TCF inmates, including Ms. Keith.")

Durkee v. Minor, 841 F.3d 872, 876-78 (10th Cir. 2016) ("Plaintiff's claim against Defendant Minor in his individual capacity amounts to a claim of direct supervisory liability. . . To establish such liability, Plaintiff must show Defendant Minor's '*direct personal responsibility*' for the claimed deprivation of his Eighth Amendment right. . . . Accordingly, Plaintiff must prove Defendant Minor caused his injury with a state of mind amounting to deliberate indifference for Plaintiff's safety. *See Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010) (recognizing the elements of individual supervisory liability as (1) personal involvement, (2) causation, and (3) a culpable state of mind equal to that required to establish the underlying constitutional violation). In *Dodds*, we decided a sheriff could be held individually liable for his deliberately indifferent maintenance of a policy that prevented arrestees from posting preset bail for no legitimate reason, in violation of the Fourteenth Amendment's liberty guarantee. . . Plaintiff tells us the parallels of his case to *Dodds* are clear. To us those parallels are clear as mud. *Dodds* involved a policy or procedure that was constitutionally infirm in the overwhelming majority of its applications, if not on its face. . . The policy Plaintiff challenges here presents us with no such dilemma. The detention center's policy of unshackling inmates in the booking area next to the visitation room does not appear problematic on its face; nor has it proven problematic in its application—at least on the record before us—save the present isolated incident. . . Apart from a supervisor's promulgation of the sort of policy at issue in *Dodds*, some of our sister circuits have held a supervisor may cause a constitutional violation when he has actual knowledge of subordinates' past constitutional violations but does nothing to stop future occurrences. . . Nothing in the present record suggests, however, that the policy in question here led to any constitutional violations prior to Ramos's assault on Plaintiff. . . .We suppose cases of supervisory liability under § 1983 are not necessarily limited to those two factual scenarios we have just outlined. But whether Plaintiff's theory of causation is based on an improper or inadequate policy or something else such as failure to train or supervise, the fact remains that he must still present record evidence sufficient to permit a jury to find that *Defendant Minor caused his injury while deliberately indifferent* to his safety. This Plaintiff has not done, which perhaps accounts for the district court's inadequate findings. That Plaintiff misunderstands his burden is well illustrated by his argument to both the district court and us that Defendant Minor's 'inadequate training and supervision of Hochmuth and others at the jail *led to Hochmuth's deliberate indifference* to [Plaintiff's] safety.'. . Plaintiff's argument in support of his individual liability claim against Defendant Minor amounts to little more than Minor should be held liable because he was in charge of the detention center. This simply is not enough to hold Defendant Minor liable in his individual capacity.")

Castillo v. Jones-Cooper, 660 F. App'x 614, 617 (10th Cir. 2016) ("The deliberate-indifference standard is not a negligence standard—Dolan had to *actually know* of the risk. We agree with the district court that Appellants fail to show that Dolan knew of such a risk. Once he knew of the risk—when Gaytan told him why she did not want to see Bobelu on May 29, 2009—Dolan quickly removed Bobelu from his position. Apart from what Dolan learned from Gaytan, Appellants rely only on their own beliefs that Dolan should have inferred that Bobelu might sexually assault a worker based on unrelated disciplinary incidents. Nothing in the record presents a genuine dispute of material fact that Dolan knew of the risk of sexual assault before meeting with Gaytan. Thus,

Appellants have failed to show deliberate indifference sufficient to overcome qualified immunity.")

Wright v. Collison, 651 F. App'x 745, 747-49 (10th Cir. 2016) ("Mr. Wright alleges that Officers Collison and Cannon violated his constitutional rights by acting with deliberate indifference in failing to protect him from other inmates despite their threats to harm him. And he claims that Sheriff Stanley's supervisory policy and practice of housing inmates in overcrowded cells, with actual knowledge that those conditions posed a substantial risk of serious harm to inmates, caused his constitutional rights to be violated. . . . [The district court] concluded that Sheriff Stanley's supervisory conduct could be considered unconstitutional because it was clearly established that 'prison officials have a duty to protect prisoners from violence at the hands of other prisoners.'. . But the law governing a sheriff's obligations *in these circumstances* was not clearly established. The issue is whether case law existing as of August 2011 would alert any reasonable sheriff that he had a constitutional duty to reduce overcrowding by any of the measures suggested by Mr. Wright. But neither Mr. Wright nor the district court has cited such case law. Sheriff Stanley is entitled to qualified immunity.")

Webb v. Thompson, 643 F. App'x 718, 724-25 (10th Cir. 2016) ("Thompson's final argument is that the district court applied the wrong mens rea standard for supervisor liability. We addressed supervisor liability under § 1983 in *Dodds v. Richardson,* 614 F.3d 1185 (10th Cir.2010), noting that 'the factors necessary to establish a [supervisor's] § 1983 violation depend upon the constitutional provision at issue, including the state of mind required to establish a violation of that provision.'. . In other words, 'there's no special rule of liability for supervisors. The test for them is the same as the test for everyone else.'. . In *Dodds,* the constitutional right at issue was substantive due process, which we assumed requires a showing of deliberate indifference. . . In contrast, Webb's right to a prompt judicial determination of probable cause is protected by the Fourth Amendment. . .Fourth Amendment claims are subject to an objective reasonableness standard, and we do not consider an actor's state of mind. . .Thompson nevertheless argues that the applicable mens rea standard is intent. He contends that supervisor liability under § 1983 requires 'a deliberate and intentional act on the part of the supervisor to violate the plaintiff's legal rights.'. . However, this language in *Wilson* merely reinforces that § 1983 does not authorize respondeat superior liability, and therefore to be liable 'a supervisor, as with everyone else' must have 'subjected, or caused to be subjected a plaintiff to a deprivation of his legal rights.'. . . After observing that the plaintiff in *Wilson* alleged that the defendant's act caused constitutional violations, we noted appellants did not challenge the district court's conclusion that deliberate indifference was 'a sufficiently culpable mental state to impose supervisory liability [for prolonged detention claims] under § 1983.'. . We did not engage the question of which mens rea standard applies in *Wilson,* and thus did not contradict the conclusions that we apply an objective reasonableness test to Fourth Amendment claims under § 1983, . . and that the same standard applies to § 1983 claims against supervisors . . . .Nevertheless, the district court did apply the wrong standard. Rather than asking whether Thompson's actions were objectively reasonable, the court asked whether Thompson acted 'knowingly or with deliberate indifference that a

constitutional violation would occur.' Despite this error, because the court found that there was a genuine issue of material fact whether he acted with deliberate indifference, there is also a genuine issue of material fact whether he acted with objective reasonableness. Thus, Thompson is not entitled to qualified immunity on this claim.")

Cox v. Glanz, 800 F.3d 1231, 1248-54 (10th Cir. 2015) ("The requisite showing of an 'affirmative link' between a supervisor and the alleged constitutional injury has '[come] to have three related prongs: (1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind.'. .Admittedly, '[t]he contours of ... supervisory liability are still somewhat unclear after [the Supreme Court decided] *Iqbal,* which "articulated a stricter liability standard for ... personal involvement."'. . . Our clearly-established-law analysis centers on whether the controlling cases 'show that [Sheriff Glanz] took the alleged actions with the requisite state of mind.' . . This state of mind '"can be no less than the *mens rea* required" of [any of his] subordinates [i.e., Jail employees] to commit the underlying constitutional violation.'. . Importantly, as our discussion of the pertinent governing caselaw . . . demonstrates, this is a *particularized* state of mind: actual knowledge by a prison official of an individual inmate's substantial risk of suicide. . . .Our review of relevant caselaw postdating *Hocker* and *Barrie* indicates that the foregoing state of the law in our circuit—which required prison officials to possess knowledge that a specific inmate presents a substantial risk of suicide—had not changed in material respects by July 2009. We are not aware of any controlling Supreme Court or Tenth Circuit decisions that directly answer this clearly-established-law inquiry. However, our view of the requirements of the clearly established law extant when Mr. Jernegan committed suicide (July 2009) does find some support in the Supreme Court's recent decision in *Taylor v. Barkes,* —— U.S. ——, 135 S.Ct. 2042 (2015) (per curiam), where the Court resolved a deliberate-indifference dispute on the clearly-established-law prong of the qualified-immunity standard. There, the Court held that, as of November 2004, there was no clearly established 'right' of an inmate to be adequately screened for suicide. . . The *Taylor* Court emphatically stated that '[n]o decision of this Court even discusses suicide screening or prevention protocols.'. . *Taylor* teaches us that, as of November 2004, there was no constitutional right to such screening or protocols. . .Consequently, in November 2004, a jail's nonexistent or deficient suicide-screening measures would not have necessarily indicated that an individual prisoner's suicide was the product of deliberate indifference in violation of the Eighth Amendment. In light of *Taylor,* our reading of the contours of the law a short five years later should not be surprising. That is, irrespective of the alleged deficiencies in the Jail's suicide-screening protocols, in order for any defendant, including Sheriff Glanz, to be found to have acted with deliberate indifference, he needed to first have knowledge that the specific inmate at issue presented a substantial risk of suicide. Moreover, though not dispositive, our limited corpus of nonprecedential jail-suicide decisions supports our reading of the state of the law when Mr. Jernegan committed suicide. . . .At bottom, when confronting individual-capacity § 1983 claims, our 'focus must always be on the *defendant*—on the ... injury *he* inflicted or caused to be inflicted, and on *his* motives. This is because § 1983 isn't a strict liability offense.'. . As noted, Sheriff Glanz had no personal interaction with Mr. Jernegan or direct and contemporaneous knowledge of his treatment in July 2009. Therefore, insofar as he had knowledge sufficient to form the requisite mental state, it would have

had to necessarily come from his subordinates, notably Ms. Taylor or Ms. Sampson. Because they did not possess such knowledge, the conclusion inexorably follows that Sheriff Glanz could not have possessed such knowledge. Accordingly, though we have not ignored Ms. Cox's strong assertions regarding the systemic failings of the Jail's mental-health screening and treatment protocols, which quite understandably troubled the district court, we conclude that Ms. Cox has nevertheless failed to establish that Sheriff Glanz acted as to Mr. Jernegan with the requisite mental state to constitute deliberate indifference. In other words, she has not carried her burden regarding the essential subjective component of the deliberate-indifference standard. In sum, for the reasons stated, we cannot conclude that Sheriff Glanz's conduct constituted an Eighth Amendment violation under the law that was clearly established at the time of Mr. Jernegan's death. Therefore, Ms. Cox cannot satisfy the clearly-established-law component of the qualified-immunity standard. We must accordingly reverse the district court's denial of qualified immunity to the Sheriff on Ms. Cox's individual-capacity claim under § 1983.")

Attocknie v. Smith, 798 F.3d 1252, 1258, 1259-60 (10th Cir. 2015) ("Cherry's entry of Aaron's home was clearly contrary to well-established law. He is not entitled to qualified immunity on the claim of unlawful entry. And because a reasonable jury could determine that the unlawful entry was the proximate cause of the fatal shooting of Aaron, . . . [W]e need not decide whether Cherry used excessive force when he confronted Aaron. . . .The important procedural failure in this case is not Plaintiff's or the district court's but Smith's. His motion for summary judgment did not raise any ground on which we can reverse. The argument section of the motion devotes four pages to Plaintiff's § 1983 claim against him in his individual capacity. It notes, correctly, that because he was not personally involved in the August 25, 2012 incident until after the shooting, his liability could only be as a supervisor. Next it summarizes his view of the law of supervisory liability and argues that he is not liable under that law because (1) Cherry did not violate the Constitution and (2) even if he did, 'Cherry was not an employee or officer of Sheriff Smith.'. . It then summarizes his view of the law of qualified immunity but concludes that '[t]he second stage of qualified immunity analysis, whether a right was "clearly established" need not even be performed, as Defendant Smith did not personally violate Plaintiff's constitutional rights in any way whatsoever.'. . Smith raised no argument below that he would be entitled to qualified immunity even if Cherry was his employee. Yet given his concession that he cannot challenge on appeal the district court's determination that Cherry was his employee, this foregone argument would be his only path to reversal. Because he does not argue on appeal that the district court committed plain error, we do not address that possibility. . . We affirm the denial of qualified immunity.")

Castillo v. Day, 790 F.3d 1013, 1020 (10th Cir. 2015) ("This court's precedent confirms Plaintiffs' position that a prison guard's failure to take reasonable steps to protect an inmate from a known risk of sexual abuse by another prison guard. . . can be a violation of the Eighth Amendment. . . Accordingly, we reject Pavliska's argument that a prison guard who knows of, yet fails to reasonably respond to, a risk of harm created by another guard can only be liable if the perpetrator is a subordinate.")

Estate of Booker v. Gomez, 745 F.3d 405, 435, 436 (10th Cir. 2014) ("To establish supervisory liability, the Plaintiffs must show Sergeant Rodriguez's (1) personal involvement, (2) causation, and (3) the requisite state of mind with respect to either the excessive force or failure to provide medical care claims. . .Our earlier conclusions that a reasonable jury could find Sergeant Rodriguez actively participated in—and failed to intervene and prevent—the use of excessive force . . . satisfies the first and second elements. Similarly, our earlier conclusion that a reasonable jury could find Sergeant Rodriguez exhibited excessive zeal—by using the taser on Mr. Booker for 60 percent longer than the recommended time period when he was no longer resisting and fully subdued by handcuffs, Deputy Robinette's weight, and Deputy Grimes's carotid neck hold. . . satisfies the third element. Finally, our conclusion regarding clearly established law . . . also precludes summary judgment on this claim. *See* Schwartz, § 7.19[E] ("Under the holding in *Iqbal* that a supervisory official may be held liable under § 1983 only for his or her unconstitutional conduct, there is no longer any need to contemplate whether qualified immunity as applied to supervisory officials requires special or separate consideration.").")

Pahls v. Thomas, 718 F.3d 1210, 1225, 1226 & n.6, 1230, 1231 (10th Cir. 2013) ("[P]ersonal-involvement requirement does not mean. . .that direct participation is necessary. As we recently recognized in *Dodds*, government officials may be held responsible for constitutional violations under a theory of supervisory liability. 'A plaintiff may therefore succeed in a § 1983 suit'—and, we may add, a *Bivens* action—'against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.'. . Because § 1983 and *Bivens* are vehicles for imposing personal liability on government officials, we have stressed the need for careful attention to particulars, especially in lawsuits involving multiple defendants. '[I]t is particularly important' that plaintiffs 'make clear exactly *who* is alleged to have done *what* to *whom*, ... as distinguished from collective allegations.'. . When various officials have taken different actions with respect to a plaintiff, the plaintiff's facile, passive-voice showing that his rights 'were violated' will not suffice. Likewise insufficient is a plaintiff's more active-voice yet undifferentiated contention that 'defendants' infringed his rights. . . Rather, it is incumbent upon a plaintiff to 'identify *specific* actions taken by *particular* defendants' in order to make out a viable § 1983 or *Bivens* claim. . .The same particularized approach applies with full force when a plaintiff proceeds under a theory of supervisory liability. Various officials often have 'different powers and duties.'. . A plaintiff must therefore identify the specific policies over which particular defendants possessed responsibility and that led to the alleged constitutional violation. . .Of course, in all cases, a plaintiff must show that each defendant acted with the requisite state of mind. . . . We pause here to note a critical distinction between *Bivens* and § 1983. The latter is a statutorily conferred cause of action. The former is a cause of action implied directly under the Constitution. The Supreme Court 'has been reluctant to extend *Bivens* liability to any new context or new category of defendants.'. . . And the Court has never held that a *Bivens* action is available against federal officials for a claim based upon the First Amendment. . .No argument was presented to us on the availability of a *Bivens* action for a First Amendment viewpoint-discrimination claim

against a Secret Service officer actively engaged in protecting the President. We therefore need not and do not decide whether *Bivens* is available in these circumstances. We assume, for purposes of this case only, that it is. . . . [A]lthough the requirement of personal participation, including the question of supervisory liability, is a component of liability under § 1983 and *Bivens*, we also incorporate it into our qualified-immunity analysis, where we ask whether a clearly established constitutional right has been violated. . . . To make out viable § 1983 and *Bivens* claims *and* to overcome defendants' assertions of qualified immunity, plaintiffs here must establish that each defendant—whether by direct participation or by virtue of a policy over which he possessed supervisory responsibility—caused a violation of plaintiffs' clearly established constitutional rights, and that each defendant acted with the constitutionally requisite state of mind. . . . [Plaintiffs] must identify specific actions taken by particular defendants, or specific policies over which particular defendants possessed supervisory responsibility, that violated their clearly established constitutional rights. . . Failure to make this showing both dooms plaintiffs' § 1983 and *Bivens* claims and entitles defendants to qualified immunity. . . . In § 1983 and *Bivens* actions, a claim of viewpoint discrimination in contravention of the First Amendment requires a plaintiff to show that the defendant acted with a viewpoint-discriminatory purpose. . . .In this case, for plaintiffs to prevail as to each defendant, they must show that the defendant's individual actions caused viewpoint discrimination to occur, and that those actions were taken '*because of[,]* not merely in spite of, [plaintiffs'] anti-Bush message.'. . Under plaintiffs' supervisory-liability theory, they must show that each defendant adopted and implemented the security policies at issue, not for viewpoint-neutral reasons, 'but for the purpose of discriminating on account of' the particular message plaintiffs wished to convey. . . . We determine that the evidence, at most, shows that each defendant was aware of the disparate treatment to which plaintiffs were subjected. This evidence is insufficient as a matter of law to show that any defendant promulgated the policies at issue or acted for a discriminatory purpose. Each defendant is therefore entitled to qualified immunity.")

Schneider v. City of Grand Junction Police Dept., 717 F.3d 760, 768-71 & n.5 (10th Cir. 2013) ("'[W]e have not yet had occasion to determine what allegations of personal involvement ... meet *Iqbal's* stricter liability standard.'. . [citing cases] None of those cases, however, presented us with the occasion to address the precise contours of this standard. And neither does this case. None of the claims against the individual defendants turns on the question of personal involvement. The district court's summary judgment conclusions were based on the second and third elements, causation and state of mind, and the parties' arguments also are focused on these latter elements. We therefore assume without deciding that Ms. Schneider has presented sufficient evidence of the individual defendants' personal involvement under *Iqbal's* stricter liability standard. . . .On appeal, no one challenges the use of the deliberate-indifference standard. We therefore assume without deciding that deliberate indifference is the applicable state of mind. This is consistent with our approach in *Dodds,* which also concerned a substantive due process § 1983 claim, where we declined to consider whether deliberate indifference was the correct standard because neither party challenged the district court's use of that standard. . . We assumed without deciding, as we do here, that deliberate indifference is the standard for a claim of violation of substantive due process. . . As with the personal involvement element of the claims against the individual defendants, we do

not rely on the element of a municipal policy or custom to resolve Ms. Schneider's claims against the City. The district court assumed without deciding that this element was met, and based its summary judgment decisions in favor of the City on the second and/or third elements—causation and state of mind. We similarly assume without deciding that Ms. Schneider has presented sufficient evidence of a municipal policy or custom for her claims against the City. . . . In the present case, the state-of-mind element is deliberate indifference for both the individual defendants and the City. This may not always be the case. For individual defendants, the applicable state of mind will depend on the type of constitutional violation at issue. . . In contrast, the prevailing state-of-mind standard for a municipality is deliberate indifference regardless of the nature of the underlying constitutional violation.")

Wilson v. Montano, 715 F.3d 847, 857, 858 (10th Cir. 2013) ("[U]nder New Mexico law both Warden Chavez and Sheriff Rivera were responsible for the policies or customs that operated and were enforced by their subordinates at the VCDC and VCSO and for any failure to adequately train their subordinates. We therefore consider the allegations against each supervisory defendant to determine whether they meet the *Dodds* requirements for imposing individual liability under § 1983. . . .The complaint alleges Warden Chavez 'established a policy or custom of holding citizens without pending criminal charges until the court filed orders of release sua sponte.' Allegedly, these policies or customs were 'a significant moving force behind Plaintiff's illegal detention.' The complaint further alleges Warden Chavez's policy of holding citizens without court orders caused the violation of Wilson's Fourth Amendment right to a prompt probable cause determination. That is, because Warden Chavez failed to require the filing of written complaints, detainees, including Wilson, were held at the VCDC without receiving prompt probable cause determinations. The complaint also alleges Warden Chavez inappropriately trained his employees, which led to the violation of Wilson's right to a prompt probable cause determination. Indeed, the complaint alleges there were numerous occasions where the VCDC and the VCSO held individuals for days and, on some occasions, weeks, without law enforcement taking those individuals before a magistrate judge. These allegations, taken as true, sufficiently establish Warden Chavez promulgated policies which caused the constitutional harm of which Wilson complains, i.e., his prolonged detention without a probable cause hearing. . . That Wilson has not alleged he had any direct contact with Warden Chavez or that Warden Chavez actually knew of Wilson's specific circumstances is of no consequence. . . Finally, the complaint alleges sufficient facts to establish Warden Chavez acted with the requisite mental state. To establish a violation of § 1983 by a defendant-supervisor, the plaintiff must establish, at minimum, a deliberate and intentional act on the part of the supervisor to violate the plaintiff's legal rights. *Porro v. Barnes,* 624 F.3d 1322, 1327–28 (10th Cir.2010). The complaint alleges Warden Chavez acted with deliberate indifference to routine constitutional violations occurring at the VCDC. This allegation is supported by Wilson's assertions that there were numerous prior occasions in which individuals at the VCDC and VCSO were subject to prolonged warrantless detention. . . Appellants do not challenge the district court's conclusion that deliberate indifference is a sufficiently culpable mental state to impose supervisory liability under § 1983. The complaint's allegations against Warden Chavez

therefore state a plausible claim for relief under *Dodds,* and the district court did not err in denying the motion to dismiss as to Warden Chavez.")

Keith v. Koerner, 707 F.3d 1185, 1188, 1189 (10th Cir. 2013) ("As an initial matter, it is clearly established that a prison official's deliberate indifference to sexual abuse by prison employees violates the Eighth Amendment. . . Such a violation occurs where 'the official knows of and disregards an excessive risk to inmate health or safety,' and there is an affirmative link between the constitutional deprivation and the supervisor's actions. . . This 'affirmative link' has had three related, indistinct prongs in our case law: '(1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind.' *Dodds,* 614 F.3d at 1195, 1199. We have held that a plaintiff may establish the first prong with evidence that 'the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy' that caused the constitutional harm. *Id.* at 1199. The question here, then, is whether Ms. Keith has alleged facts sufficient to support such a deliberate indifference violation by Mr. Koerner. To state a claim, a plaintiff must only allege enough factual matter in her complaint to make her 'claim to relief ... plausible on its face' and provide fair notice to a defendant. . . The district court found that Ms. Keith did so. . . In particular, it noted that she alleged facts that could tend to establish that Mr. Koerner 'was responsible for managing TCF and knew about multiple instances of sexual misconduct at TCF over a period of years, inconsistently disciplined corrections officers who engaged in prohibited sexual conduct with inmates and thus purportedly tolerated at least an informal policy which permitted sexual contact between prison staff and inmates.'. . . We have reviewed the complaint and conclude that on a motion to dismiss, Ms. Keith has provided notice and nudged her claims beyond the conceivable to the plausible given that we must accept well-pleaded allegations as true. First, Ms. Keith's complaint refers to facts, primarily from the Audit Report, that could support a conclusion that Mr. Koerner was aware of multiple incidents of unlawful sexual conduct at TCF. . . . Second, Ms. Keith alleges facts indicating that discipline in response to complaints of sexual misconduct and undue familiarity at TCF was inconsistent. . . .Third, Ms. Keith alleges facts that tend to show the existence of structural policy problems that contributed to the unlawful sexual conduct here. . . . Fourth, Ms. Keith alleges that the lack of training programs tailored to the all-female population of TCF contributed to the misconduct here. . .These allegations go beyond formulaic labels and conclusions and meet our intermediate pleading standard. . . .Mr. Koerner's arguments to the contrary do not carry the day. He argues that although he may have had knowledge of other incidents of sexual misconduct, he had no indication of potential harm to Ms. Keith specifically. . . But an 'official's knowledge of the risk need not be knowledge of a substantial risk to a *particular* inmate, or knowledge of the particular manner in which injury might occur.'")

Stewart v. Beach, 701 F.3d 1322, 1328 (10th Cir. 2012) ("A § 1983 claim requires 'personal involvement in the alleged constitutional violation.' *Gallagher v. Shelton,* 587 F.3d 1063, 1069 (10th Cir. 2009). The 'denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983.'.

. Whatever knowledge Roberts may have had when he denied the appeal, his only involvement was to deny the grievance appeal, which is insufficient for § 1983 liability.")

Brown v. Montoya, 662 F.3d 1152, 1163-66 (10th Cir. 2011) ("A § 1983 defendant sued in an individual capacity may be subject to personal liability and/or supervisory liability. . . Personal liability 'under § 1983 must be based on personal involvement in the alleged constitutional violation.'. . Supervisory liability 'allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, [or] implements ... a policy ... which subjects, or causes to be subjected that plaintiff to the deprivation of any rights ... secured by the Constitution.' [citing *Dodds v. Richardson*] Section 1983 does not authorize liability under a theory of respondeat superior. . . Instead, to establish supervisory liability, a plaintiff must show that '(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.' *Dodds,* 614 F.3d at 1199. . . . To overcome Secretary Williams's defense of qualified immunity, Mr. Brown must allege facts showing that Secretary Williams, either through his personal participation in Mr. Brown's treatment or the promulgation of a policy, violated a clearly established constitutional right. He has not done so in his Complaint. Personal liability under § 1983 must be based on Secretary Williams's personal involvement, and supervisory liability must be based on his Policy. The Complaint alleges neither. . . .Mr. Brown's Complaint cannot be the basis for personal liability because it does not specifically allege how Secretary Williams acted in Mr. Brown's case or even that he knew about it. Although the Complaint alleges that Secretary Williams was 'charged with notifying sex offenders of their duty to register,' it does not specifically allege that Secretary Williams told Mr. Brown to register or directed anyone else to make Mr. Brown register. Instead, it alleges that Officer Montoya and Deputy Sherriff Aguilar directed Mr. Brown to register. . . Mr. Brown argues in his brief that Secretary Williams is liable as a supervisor because he signed the Policy on which Officer Montoya allegedly relied to classify Mr. Brown as a sex offender. . . But the allegations in Mr. Brown's Complaint do not meet the standard for supervisory liability. To establish supervisory liability, Mr. Brown would have to show that (1) Secretary Williams promulgated or was responsible for a policy that (2) caused the constitutional harm and (3) acted with the state of mind required to establish the alleged constitutional deprivation. . .The Complaint fails on the first step because it does not even mention the Policy. Mr. Brown only attached the Policy to his memorandum in response to Secretary Williams's motion to dismiss and asked the district court to take judicial notice of the Policy. . . . Without specifically alleging Secretary Williams's personal involvement or anything about the Policy, Mr. Brown has alleged no connection between Secretary Williams and any constitutional violation.")

Martinez v. Milyard, 440 F. App'x 637, 2011 WL 4537786, at *1 n.1 (10th Cir. Oct. 3, 2011) ("In *Ashcroft v. Iqbal*, the Supreme Court reiterated that '[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior,' 129 S.Ct. at 1948, and explained that a government official 'is only liable for his or her own misconduct.' *Id.* at 1949. While *Iqbal* has 'generated significant debate about the continuing

vitality and scope of supervisory liability' in § 1983 cases, *Lewis v. Tripp*, 604 F.3d 1221, 1227 n. 3 (10th Cir.2010), this circuit has not yet determined the full extent of *Iqbal's* impact on our case law. We need not resolve this debate here, however, because Martinez's claims fail even under our preexisting standard.")

J.W. v. Utah, 647 F.3d 1006, 1012 (10th Cir. 2011) ("As for the caseworker's supervisor, the district court correctly concluded that Plaintiffs' claim was essentially one of negligent supervision, which is insufficient to support a § 1983 claim. *See Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir.1992). The undisputed evidence in the summary judgment record reflects that the supervisor was not responsible for the placement decision on which Plaintiffs' claim is premised. Plaintiffs have cited to no evidence that the supervisor personally participated or knowingly acquiesced in the alleged deprivations of Plaintiffs' constitutional rights, and thus the district court correctly held that Plaintiffs have not set forth a valid basis for finding the supervisor liable under § 1983.")

Lobozzo v. Colorado Dept. of Corrections, No. 10-1396, 2011 WL 2663548, at *5 (10th Cir. July 8, 2011) ("Prisoners are sometimes victims of sexual abuse at the hands of staff and other inmates alike − a tragic fact demanding the attention of prison administrators. But despite Lobozzo's characterization of the record, there is no evidence any of the CDOC Defendants failed to take seriously their responsibility for the safety of inmates. She failed to make a record equal to her rhetoric. The record simply does not support her allegations that the CDOC Defendants knew of and disregarded an excessive risk that she would be sexually victimized by Martinez.")

Porro v. Barnes, 624 F.3d 1322, 1327, 1328 (10th Cir. 2010) ("Just as § 1983's plain language doesn't authorize strict liability, it doesn't authorize *respondeat superior* liability. The plain language of the statute, again, asks simply whether the defendant at issue '*subject[ed], or cause[d] to be subjected* 'a plaintiff to a deprivation of his legal rights. . .To establish a violation of § 1983 by a supervisor, as with everyone else, then, 'the plaintiff must establish a deliberate, intentional act' on the part of the defendant 'to violate [the plaintiff's legal] rights.'. . . In the due process context, this means the focus is on the force the *supervisor* used or caused to be used, the resulting injury attributable to his conduct, and the *mens rea* required of him to be held liable, which can be no less than the *mens rea* required of anyone else. [citing *Iqbal* and *Dodds*]Simply put, there's no special rule of liability for supervisors. The test for them is the same as the test for everyone else. And as we've already explained, Mr. Porro's claim against Mr. Barnes fails that test.")

Dodds v. Richardson, 614 F.3d 1185, 1194-1206 (10th Cir. 2010) ("[D]etermining whether a plaintiff has demonstrated a defendant-supervisor violated his constitutional rights and whether § 1983 allows a plaintiff to hold a defendant-supervisor liable for that violation may depend on whether that defendant-supervisor, rather than only his subordinates, violated the plaintiff's constitutional rights. For this reason, we properly address this question of supervisory liability now as part of the qualified immunity analysis. . . . Defendant maintains that in order to show he violated Plaintiff's clearly established constitutional rights, and therefore overcome his assertion of

qualified immunity as well as hold him liable under § 1983, Plaintiff must demonstrate that he personally participated in such a violation with a sufficiently culpable state of mind. Defendant points out that Plaintiff does not allege Defendant was one of the jail employees who told him and the individuals who inquired about posting bail on his behalf that he could not post the bail set in his arrest warrant until he had been arraigned by a judge. Nor does Plaintiff contend Defendant personally instructed those employees to refuse to accept bail from Plaintiff the weekend of Friday, April 6, 2007. According to Defendant in his opening brief, the 'policy of the court clerk's office, and no action' by him deprived Plaintiff of his federally protected rights. Defendant argues, as a result, Plaintiff has not shown he committed any act which violated Plaintiff's rights or that he acted with deliberate indifference to Plaintiff's rights. Defendant's argument implicates important questions about the continuing vitality of supervisory liability under § 1983 after the Supreme Court's recent decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). . . .Personal involvement does not require direct participation because § 1983 states "'[a]ny official who "causes" a citizen to be deprived of her constitutional rights can also be held liable.' " *Buck v. City of Albuquerque,* 549 F.3d 1269, 1279 (10th Cir.2008) (quoting *Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir.1990)). Even before *Iqbal,* it was not enough in our circuit 'for a plaintiff merely to show defendant was in charge of other state actors who actually committed the violation. Instead, ... the plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights.'. . In sum, to impose § 1983 liability the plaintiff first had to establish 'the supervisor's subordinates violated the [C]onstitution.'. . Then, the plaintiff must demonstrate 'an "affirmative link" between the supervisor and the violation....'. . . Over time, this 'affirmative link' requirement came to have three related prongs: (1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind. A plaintiff could establish the defendant-supervisor's personal involvement by demonstrating his ' "personal participation, his exercise of control or direction, or his failure to supervise,"'. . . or his 'knowledge of the violation and acquiesce[nce] in its continuance.'. . A defendant supervisor's promulgation, creation, implementation, or utilization of a policy that caused a deprivation of plaintiff's rights also could have constituted sufficient personal involvement. . . A plaintiff then had to establish the ' "requisite causal connection"' 'by showing' ' "the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights."'. . . And, finally, the plaintiff also had to show the supervisor had a culpable state of mind, meaning 'the supervisor acted knowingly or with "deliberate indifference" that a constitutional violation would occur.'. . We did not view these requirements as necessarily distinct. Proof of a supervisor's personal direction or knowledge of and acquiescence in a constitutional violation often sufficed to meet the personal involvement, causal connection, and deliberate indifference prongs of the affirmative link requirement for § 1983 supervisory liability. . . . But then, as the saying will surely go, came *Iqbal*. . . . We have already acknowledged that *Iqbal* may have changed the § 1983 supervisory liability landscape. [citing *Lewis*] But because our cases since *Iqbal* have thus far only presented allegations that do not satisfy our pre-*Iqbal* liability standard, we have not yet had occasion to determine what allegations of personal involvement and mental state do meet *Iqbal's* stricter liability standard. . . . . Whatever else can be said about *Iqbal,* and certainly much can be said, we conclude the following basis of § 1983 liability survived it and ultimately resolves this case: § 1983 allows a

plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor or her subordinates) of which 'subjects, or causes to be subjected' that plaintiff 'to the deprivation of any rights ... secured by the Constitution ....' . . . . A plaintiff may therefore succeed in a § 1983 suit against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation. . . . *Monell* and its progeny clearly stand for the proposition that the very language of § 1983 provides for the imposition of liability where there exists an 'affirmative' or 'direct causal' link between a municipal person's adoption or implementation of a policy and a deprivation of federally protected rights, and that imposing liability upon such a basis does not implicate *respondeat superior* . Nothing in *Iqbal* contradicts this longstanding interpretation of § 1983's language. . . . [T]he facts, taken in the light most favorable to Plaintiff, show Defendant may have played more than a passive role in the alleged constitutional violation − he may have deliberately enforced or actively maintained the policies in question at the jail. Plaintiff has thereby presented facts that establish personal involvement by Defendant in the alleged constitutional violation sufficient to satisfy § 1983. By Defendant's own admission, the policies' enforcement caused the constitutional violation before us. As a result, the facts show Defendant's maintaining these policies at the jail caused Plaintiff to be deprived of his due process rights. . . . Now that we have concluded Plaintiff has shown facts that, if proven at trial, suffice to establish Defendant's personal involvement caused the misconduct complained of, we address whether the facts show Defendant acted with the state of mind required to establish Defendant committed a constitutional violation. The Court in *Iqbal* explained that the factors necessary to establish a § 1983 violation depend upon the constitutional provision at issue, including the state of mind required to establish a violation of that provision. . . . We therefore conclude that after *Iqbal,* Plaintiff can no longer succeed on a § 1983 claim against Defendant by showing that as a supervisor he behaved 'knowingly or with "deliberate indifference" that a constitutional violation would occur' at the hands of his subordinates, unless that is the same state of mind required for the constitutional deprivation he alleges. . . . But given Plaintiff alleges a substantive due process violation, it appears Plaintiff must establish that Defendant acted with deliberate indifference to Plaintiff's due process right to post preset bail. . . . So, let us be clear: We do not pass judgment at this time on the state of mind required to establish a substantive due process violation based upon preventing an arrestee from posting preset bail. We assume, without deciding, deliberate indifference constitutes the required state of mind. Plaintiff has shown facts from which a reasonable jury could infer Defendant knowingly created a substantial risk of constitutional injury to people like Plaintiff. Oklahoma law made Defendant, rather than the clerk or district judges, responsible for controlling the jail and accepting bail from arrestees like Plaintiff. Defendant admits that while he served as the sheriff he maintained policies that prevented felony arrestees whose bail had been set from posting bail after hours and before arraignment. Plaintiff had a liberty interest in being released once his bail had been set. Defendant does not suggest any 'legitimate goal' behind preventing felony arrestees whose bail had been set from posting bail. We therefore agree with the district court that Plaintiff has shown facts that taken in the light most

favorable to him establish that Defendant acted with deliberate indifference and thereby violated his Fourteenth Amendment due process rights. . . . Plaintiff's right to be free from unjustified detention after his bail was set was clearly established such that a reasonable official in Defendant's position in April 2007 would have understood that his deliberately indifferent maintenance of the policies that prevented arrestees from posting preset bail for no legitimate reason violated the Constitution.")

Dodds v. Richardson, 614 F.3d 1185, 1208-13 (10th Cir. 2010) (Tymkovich, J., concurring) ("I fully agree with the majority that the complaint sufficiently alleges former Sheriff Richardson violated clearly established law when he implemented the county court's unconstitutional bail policy. . . I write separately to further note the lack of clarity in the law of supervisory liability, and my view of how this may have been affected by the Supreme Court's recent decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Federal law provides that '[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or *causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.' 42 U.S.C. § 1983 (emphasis added). The phrase 'causes to be subjected' suggests that liability exists for officials who did not directly violate constitutional rights, but, as the majority illustrates, the standard for demonstrating that a supervisory official has caused a violation is far from clear. [discussing *Pembaur*, *City of Canton*] These examples − official policy, decisions of high-ranking officials, and failure to adequately train employees − are not rightfully regarded as theories of *liability* but should instead be viewed as theories of *causation.* As to supervisory liability, the added level of removal between the violation and the supervisor makes questions of causation even more difficult. The Supreme Court has yet to speak with much clarity on the theories of causation that could demonstrate a supervisory official's liability for the constitutional violations carried out by a subordinate. Whether a supervisor has violated the plaintiff's rights is dependent on whether the subordinate violated the Constitution − the supervisor cannot be liable if there was no violation. . . And in some cases, the determination of whether a violation occurred turns on the subordinate's state of mind. . . What remains unclear is the state of mind that the *supervisor* must possess to be liable for causing such a violation. As the majority points out, the Supreme Court recently muddied further these already cloudy waters. . . . *Iqbal* unfortunately did not provide a unified theory for the variety of supervisory liability cases we face. We do know supervisory liability under § 1983 is still only appropriate where the plaintiff can prove that the supervisor *caused* the violation. And in a case like *Iqbal*, where the constitutional violation requires discriminatory intent, a supervisor does not *cause* a violation unless he or she actually intended for his or her subordinates to invidiously discriminate. Mere knowledge and acquiescence of, or even 'deliberate indifference' towards, the discriminatory actions of employees now appears insufficient to prove causation, and thereby prove liability. . . . But *Iqbal* does not address constitutional violations that are based on a state of mind other than specific intent − for instance, a procedural due process violation, or an Eighth Amendment violation based on an official's deliberate indifference. A supervisor is liable for these actions only when the supervisor can be fairly said to have caused the violation, but determining

when this is the case can be tricky, to say the least. . . . The exact method of demonstrating a causal link depends on the actions of the supervisor in relation to the subordinate that led to the violation. Supervisors sometimes directly order their subordinates to take an action, either in a specific case, or by establishing some sort of policy. They may also learn of conduct taken by their subordinates and acquiesce in it after the fact or simply ignore it. Some supervisors may never learn of the unconstitutional actions of their subordinates, not because their subordinates were successful in hiding their behavior, but because the supervisor was 'willfully blind' or deliberately indifferent. And supervisors may have a responsibility, as do municipalities, to ensure that their subordinates are properly trained − failure to carry out this duty may in some cases result in a violation. Just as there are various ways in which a supervisor can be said to have caused a violation, as outlined above, there are different levels of fault associated with these actions. We consider some of these actions to be blame-worthy enough that the supervisor should be liable. . . . In sum, our precedent has established, with varying levels of clarity, that a supervisor is only liable for violations that he caused, and that causation requires at least some degree of fault on the supervisor's part. Exactly how this causation can be shown varies depending on the type of violation and the facts of the case. . . . [S]everal theories of liability are possible. First, a supervisor may directly order a subordinate to violate the plaintiff's rights. . . . Next, some cases say a supervisor may cause violations when he or she has actual knowledge of past constitutional violations being carried out by a subordinate, and does nothing to stop future occurrences. . . . Finally, a series of cases requires a standard of deliberate indifference. Those types of cases include the failure to train, the failure to supervise, and potentially other supervisory shortcomings. . . In those cases, we may find that a supervisor has somehow caused the violation to occur by an egregious failure to act. . . . In sum, our decisions hold that supervisors are liable for constitutional violations they cause. The exact contours of causation − especially regarding an official's state of mind sufficient for liability − are uncertain in light of *Iqbal*. But for purposes of this case, Dodds alleges the sheriff deliberately implemented an unconstitutional bail policy that violated his clearly established rights as a pretrial detainee and thereby caused him injury. As the majority ably demonstrates, his allegations are enough to survive summary judgment.").

Nelson v. Skehan, 386 F. App'x 783, 2010 WL 2748808, at *2 n.2 (10th Cir. July 13, 2010) ("Whether the "acquiescence" component of supervisory liability has survived *Ashcroft v. Iqbal***,** 129 S.Ct. 1937, 1949 (2009), is an open question in this Circuit.").

Lewis v. Tripp, 604 F.3d 1221, 1226, 1227 & n.3 (10th Cir. 2010) ("In this case, the district court failed to set forth the facts it believed a reasonable jury could find with respect to the critical question before us − the nature of Dr. Tripp's involvement, if any, in an unlawful search and seizure. Instead, the court merely stated that Dr. Tripp phoned the Board's office on May 16 and sent two emails to the Board's legal counsel. The court then immediately and summarily concluded that

> [t]his and other [unspecified] evidence proffered by the plaintiff creates a jury question as to whether Dr. Tripp personally directed, or had actual knowledge of

> and acquiesced in, the asserted [but unspecified] constitutional violation. *See Poolaw v. Marcantel*, 565 F.3d. 721, __, 2009 WL 1176466, at *7 (10th Cir.2009) ("For liability under section 1983, direct participation is not necessary. Any official who 'causes' a citizen to be deprived of her constitutional rights can also be held liable. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.") (internal quotation omitted).

D. Ct. Op. at 7-8. The problem with this discussion is that it doesn't tell us what Dr. Tripp did or where, when, or why he took any action that might have violated Dr. Lewis's Fourth Amendment rights. In other words, it does not 'set forth with specificity the facts ... that support a finding that the defendant violated a clearly established right.' *Armijo,* 159 F.3d at 1259. Instead, the opinion merely advances the *legal* conclusion that Dr. Tripp did so, paraphrasing the legal standard for 'supervisory liability' under 42 U.S.C. § 1983 we set forth in *Poolaw* and then holding the standard satisfied. Such a 'conclusory legal ruling' does not constitute findings of fact to which we can defer. . . . In *Ashcroft v. Iqbal*, the Supreme Court recently held that 'purpose rather than knowledge is required to impose *Bivens* liability on ... an official charged with violations arising from his or her superintendent responsibilities.' . .This announcement has generated significant debate about the continuing vitality and scope of supervisory liability not only in *Bivens* actions, but also in § 1983 suits like the one before us. At one end of the spectrum, the *Iqbal* dissenters seemed to believe that the majority opinion 'eliminates ... supervisory liability entirely,' overruling cases like *Poolaw*. *Id.* at 1957 (Souter, J., dissenting). At the other end of the spectrum, the Ninth Circuit has read *Iqbal* as possibly holding that 'purpose ... is required' merely in cases of alleged racial discrimination by governmental officials, given that *Iqbal* itself involved allegations of racial discrimination and such discrimination only violates the Constitution when it is intentional. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 976 n. 25 (9th Cir.2009). Many intermediate positions are also surely plausible. *See, e.g.*, Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability after* Iqbal, 14 Lewis & Clark L.Rev. 279, 294-98 (2010) (discussing some alternatives). We need not stake out a position in this debate today because, as will become clear, Dr. Lewis's claims fail even under our preexisting *Poolaw* standard.")

Christensen v. Big Horn County Bd. of County Com'rs, 374 F. App'x 821, 2010 WL 1627833, at *4 (10th Cir. Apr. 15, 2010) ("The primary thrust of Mr. Christensen's claims against these parties, who did not directly participate in the operative events recounted in the complaint, is that they are formally responsible for operations, conditions, and the conduct of staff at the Big Horn County Jail. He also refers in conclusory terms to their culpability for inadequate supervision and training of jail staff. The short answer to these claims is that, in light of the inadequacy of the underlying constitutional allegations against the actual participants − which we confirm on this appeal − there is nothing for which these defendants may be held derivatively accountable. . . .The slightly longer answer, explained by the district court, is that the allegations for the derivative liability of these defendants are themselves facially deficient. Repeating that analysis here is

unnecessary. Suffice it to say that Mr. Christensen's pleadings in this respect reflect the 'formulaic recitation' of 'bare assertions' deemed categorically deficient by the Supreme Court in *Iqbal*.").

Arocho v. Nafziger, 367 F. App'x 942, 2010 WL 681679, at *3 n.4, *11 (10th Cir. Mar. 1, 2010) ("[G]iven a recent Supreme Court pronouncement, the basic concept of § 1983 or *Bivens* supervisory liability itself may no longer be tenable. . . After *Iqbal*, circuits that had held supervisors liable when they knew of and acquiesced in the unconstitutional conduct of subordinates have expressed some doubt over the continuing validity of even that limited form of liability. *See Bayer v. Monroe County Children & Youth Servs.*, 577 F.3d 186, 190 n. 5 (3d Cir.2009); *Maldonado v. Fontanes*, 568 F.3d 263, 274 n. 7 (1st Cir.2009). . . . The traditional standard for supervisory liability in this circuit 'requires allegations of personal direction or of actual knowledge and acquiescence' in a subordinate's unconstitutional conduct. . . As alluded to earlier, the Supreme Court's recent discussion of supervisory liability casts doubt on the continuing vitality of even this limited formulation of such liability. . . . In any event, Mr. Arocho's allegations do not satisfy our extant standard. His claim here is that 'warden [Wiley] was in the position to correct plaintiff['s] rights violation and fail[ed] to do so.'. . To the extent the rights violation was a function of BOP Director Lappin's decision, Lappin is obviously not Wiley's subordinate and any allegation that Wiley was in a position to 'correct' Lappin's decision would be facially implausible.").

Gallagher v. Shelton, 587 F.3d 1063, 1069 (10th Cir. 2009) ("Gallagher's only allegation involving these defendants relates to their denials of his grievances, namely that they 'rubber-stamped' his various grievances. . . We agree with the reasoning in our previous unpublished decisions that a denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983. . . Because Gallagher's only allegations involving these defendants relate to the denial of his grievances, he has not adequately alleged any factual basis to support an 'affirmative link' between these defendants and any alleged constitutional violation. Accordingly, the claims against Werholtz, Shelton, and Purdue were properly dismissed.").

Green v. Padilla, No. CIV 19-0751 JB\JFR, 2020 WL 5350175, at *35–36 (D.N.M. Sept. 4, 2020) ("As a preliminary matter, the Court notes that there are significant differences between *Ashcroft v. Iqbal* and cases like this one. First, unlike the common law *Bivens* actions that were at issue in *Ashcroft v. Iqbal*, § 1983's language -- imposing liability on 'every person who ... subjects, *or causes to be subjected*, any citizen of the United States ... to the deprivation of any rights ...,' 42 U.S.C. § 1983 (emphasis added), provides for supervisory liability. Second, unlike the Equal Protection claim at issue in *Ashcroft v. Iqbal*, the Female Inmates need not allege discriminatory purpose to state an Eighth Amendment claim. . . Last, the plaintiff in *Ashcroft v. Iqbal* asserted common-law discrimination claims against the two of the highest ranking officials in the United States government -- the Attorney General and the Director of the Federal Bureau of Investigation, officials 'whom the [Supreme] Court has historically afforded the highest level of protection from suit.' Karen M. Blum, *Supervisory Liability after* Iqbal*: Misunderstood but Not Misnamed*, 43

Urb. Law. 541, 543 (2011). The defendants in *Ashcroft v. Iqbal* thus were many more levels removed from the constitutional violations at issue in that case than are the Supervisory Defendants here, who are mid- and upper-level administrators at a state correctional facility. Nonetheless, confusion exists regarding the extent to which *Farmer v. Brennan* supplies the operative standard for a prison supervisor's mental state. In that case, the Supreme Court, acknowledging that 'considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a government official,' distinguished the objective deliberate indifference standard that it used in *City of Canton v. Harris*, 489 U.S. 378 (1989). . . The Supreme Court then further clarified that an official's deliberate indifference entails subjective awareness of a risk of constitutional harm. . . The Supreme Court acknowledged, however, that a plaintiff can prove actual knowledge through circumstantial evidence. . . Tenth Circuit caselaw since *Ashcroft v. Iqbal* suggests that this standard is still operative in supervisory liability cases under the Eighth Amendment. In *Dodds v. Richardson*, the Tenth Circuit confirmed that plaintiffs state a claim for supervisory liability where the defendant possesses the constitutionally required state of mind, which varies with the constitutional violation's nature. . . Accordingly, the Tenth Circuit's pre-*Ashcroft v. Iqbal* test for Eighth Amendment supervisory liability remains operative. . . The Supervisory Defendants nonetheless contend that the Court may discount the Female Inmates' allegations regarding the Supervisory Defendants' state of mind. The Court subjects the Female Inmates' claims to *Ashcroft v. Iqbal*'s procedural prescriptions -- it separates the Female Inmates' legal conclusions and screened the remaining factual contentions for plausibility. . . . The Supreme Court in *Ashcroft v. Iqbal* construed as a legal conclusion the plaintiff's allegations that Ashcroft and Mueller 'each knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff]' to unconstitutional confinement conditions 'as a matter of policy, solely on account of [his] religion, race, and/or national origin for no legitimate penological interest,' and that Ashcroft was this policy's 'principal architect' while Mueller was 'instrumental' in implementing the policy. . . The Supreme Court characterized these allegations as 'bare assertions,' that 'amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim,' and so were legal conclusions couched as factual allegations. . . The Tenth Circuit has since made clear, however, that not all allegations which include legal characterizations are conclusory, and that *Ashcroft v. Iqbal* does not abolish the basic principles of notice pleading. . . . Green's allegations regarding Sanchez' role in Padilla's abuse are more than formulaic legal conclusions couched as factual allegations, and so are entitled to a presumption of truth under rule 12(b)(6). As the Court discusses below, Green alleges sufficient factual allegations regarding her and other inmates' reporting about Padilla's abusive behavior to support that Sanchez knew about the risk. She alleges that she and other inmates reported Padilla's abuse to prison administrators, NM State Police, and PREA auditors, and that Sanchez was aware of this reporting. She details interacting with Springer Correctional administrators regarding her grievance and alleges that Padilla's abuse continued after this reporting. Sanchez' awareness here is not implausible. Unlike in *Ashcroft v. Iqbal*, where the plaintiff alleged that the highest-ranking officials in the United States knew about unconstitutional practices and so designed or implemented those practices, Sanchez is not far removed from the alleged constitutional violations -- he runs a mid-sized state prison facility. As the Tenth Circuit has made clear since *Ashcroft v. Iqbal*, a plaintiff's factual allegations are still

entitled to reasonable inferences for the legal conclusions that they support. . . . *Ashcroft v. Iqbal*'s procedural holding[s] thus do not compel the Court to construe as implausible Green's factual allegations about Sanchez' state of mind.")

Derosier v. Balltrip, 149 F. Supp. 3d 1286, 1297 (D. Colo. 2016) ("Plaintiff's allegations concerning Commander Sanchez are that he and Officer Balltrip discussed Plaintiff's phone call to the Greeley Tribune and 'agreed between themselves that there was probable cause' for Plaintiff's arrest and that Commander Sanchez 'authorized Officer Balltrip to act on his desire to effect a warrantless arrest of [Plaintiff] at his home.'. . Because Plaintiff has alleged that Commander Sanchez participated directly in the probable cause determination and directly authorized the warrantless arrest of Plaintiff inside his home, I find that the first two elements of supervisory liability are satisfied. . . Given my conclusion that the law regarding the alleged constitutional violations was clearly established, and Plaintiff's allegations that Commander Sanchez directly participated in the probable cause determination and authorized the warrantless arrest, I conclude that Plaintiff has sufficiently alleged the state of mind element. *See Schneider*, 717 F.3d at 769 (deliberate indifference state of mind demonstrated where defendant 'knowingly created a substantial risk of constitutional injury').

Mahaffey v. City of Vernal, No. 2:13-CV-4 DN, 2014 WL 7369837, at *10 (D. Utah Dec. 29, 2014) ("Defendants assert that a court must find personal participation in the constitutional violation before supervisory liability can be found. They argue that, because Defendants Bassett and Campbell were not physically present during the alleged constitutional violations, they did not participate personally and are entitled to summary judgment. . . However, personal participation does not require 'the sort of on-the-ground, moment-to-moment control that defendants appear to suggest.'. . As discussed, if a defendant 'promulgated, created, implemented or possessed responsibility for the continued operation of a policy'. . . through which a constitutional violation occurred, the first prong of the test is satisfied.")

Shapiro v. Falk, No. 13-CV-3086-WJM-KMT, 2014 WL 4651952, *7, *8 (D. Colo. Sept. 18, 2014) ("Notwithstanding the lack of clarity with respect to supervisory liability after *Iqbal*, the court finds that Plaintiff's allegations fails to establish that Defendant Bilderaya and Falk were personally involved in the alleged violation of his constitutional rights. First, Plaintiff alleges that both Defendant Bilderaya and Defendant Falk 'consented to' and were 'aware' that mass strip searches–in general, not in this particular instance–were being conducted at SCF. . . The court need not accept Plaintiff's label that Defendants Bilderaya and Falk 'consented to' strip searches at SCF in general–particularly where Plaintiff does not allege any facts to support this conclusion. Further, *Iqbal* clearly forecloses liability based on the fact that Defendants Bilderaya and Falk were 'aware' that mass strip searches were being conducted, even assuming that allegation is true. . . Second, Plaintiff appears to allege that Defendant Bilderaya failed to properly train his subordinates in the SCF Receiving Unit regarding the proper methods for conducting strip searches. . . However, even prior to *Iqbal*, § 1983 liability for a failure to train arises only 'where there is essentially a complete failure to train, or training is so reckless or grossly negligent that future misconduct is almost

inevitable.'. . Here, Plaintiff's Amended Complaint does not outline any specific deficiencies in the training provided to the SCF Receiving Unit, much less how those deficiencies rendered the alleged violation of his Fourth Amendment rights inevitable. . . Accordingly, the court finds that Plaintiff has failed to demonstrate that Defendants Bilderaya and Falk were personally involved in the alleged violation of his constitutional rights. As such, Defendants Bilderaya and Falk are properly dismissed as Defendants.")

Poore v. Glanz, 46 F.Supp.3d 1191, 1203 (N.D. Okla. 2014) ("From all of the evidence, a jury could infer that (1) the manner in which the juvenile female inmates were housed in the north wing of the medical unit was such that they were at risk of sexual abuse by a staff member, (2) as a result of inadequate staffing, supervision, monitoring, and detention of juvenile females, a detention officer could (and did) enter Poore's cell and do as he pleased with her, uninhibited and undetected by any other officer or staff, (3) the risk of harm was so obvious to the female inmates housed in that manner that Glanz realized it, and (4) Glanz failed to take reasonable steps to alleviate that obvious risk. Thus, 'a jury might reasonably infer that [Glanz] was actually aware of a constitutionally infirm condition,' which is all that is required to establish deliberate indifference at the summary judgment stage. *See Tafoya,* 516 F.3d at 922. Hence, Glanz's motion for summary judgment on the § 1983 claim against him in his individual capacity is denied.")

Castillo v. Bobelu, 1 F.Supp.3d 1190, 1203, 1204 (W.D. Okla. 2014) ("Defendants essentially argue that they can be held liable as supervisors only if they ' "purposefully" or "intentionally" (*Iqbal*) under[took] a course of conduct to sexually harass, sexually assault, or rape the Plaintiffs or possess[ed] the same "state of mind" (*Serna/Dodds*) to intentionally sexually harass, sexually assault, or rape the Plaintiffs.'. . While the court disagrees with defendants' stated standards of supervisory liability, it concludes plaintiffs have not offered evidence from which a reasonable jury could find that Jones–Cooper or Bud Dolan or Larsen acted with the required intent. The test for a 'deliberate indifference' claim under the Eighth Amendment has both an objective and a subjective component. The objective component of the test is met if the harm suffered is sufficiently serious to implicate the Cruel and Unusual Punishment Clause. The subjective component is met if a prison official knows of and disregards an excessive risk to inmate health or safety. . . It is clear enough that Bobelu and Humphries' alleged conduct satisfies the objective component of an Eighth Amendment claim. The stumbling block for plaintiffs is the subjective component, which requires 'that the official actually be "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."'. . . The court must therefore evaluate plaintiffs' evidence pertinent to their assertion that each defendant acted with a 'culpable state of mind.'. . .The court agrees with plaintiffs that if a supervisor knows about misconduct and fails to act or is aware of a significant risk and does not alleviate it, she can be held liable under § 1983. The court does not, though, agree that *Smith* alerted Jones–Cooper to a substantial risk of harm to the Hillside inmates. A case involving one incident of sexual assault more than ten years earlier at a different work site in a different city under different circumstances was not enough to alert Jones–Cooper to risks faced by female inmates participating in the prisoner works program at the Governor's Mansion. . .While prior sexual

assaults at the same site have been found sufficient to put a supervisor 'on notice of the dangerous conditions,'. . . plaintiffs have offered no evidence that there had been earlier incidents involving sexual misconduct at the Governor's Mansion or, with one exception (the *Smith* case), with female inmates working elsewhere in Oklahoma pursuant to a prisoner public works project contract. They also did not substantiate their assertion that Jones–Cooper was aware of Bobelu or Humphries' behavior before May 29, 2009 with any evidence.")

Pena v. Greffet, 922 F.Supp.2d 1187, 1244, 1245 (D.N.M. 2013) ("Peña's allegations, taken as true and reasonably construed in a light most favorable to her, plead sufficient facts from which the Court can plausibly infer that both CCA and Hickson deliberately 'engaged' in a custom of suppressing reporting of and disregarding incidents of prison rape that caused the constitutional violations of which she complains. Peña alleges that CCA and Hickson engaged in the practices of placing inmates who reported sexual abuse in segregation or otherwise retaliating against them, violating its own and NMCD's written policies by failing to report allegations of prison rape to outside law enforcement, failing to conduct adequate internal investigations regarding rape allegations, and offering financial incentives to CCA employees for non-reporting of rape allegations. . . Judge Kern in *Henderson v. Glanz* noted that the plaintiff alleged that the defendant was aware of past sexual assaults and continued to understaff the alleged spots where they took place, and Judge Fitzpatrick reasoned in *Brown v. Smith* that allegations of the defendant's failure to train employees and to adequately investigate allegations of past sexual assaults was sufficient to make plausible the defendant's liability; both cases exhibit the defendants' failure to use past incidences of sexual assault to implement policies or to train their staff to prevent the same instances from occurring in the future. Here, although Peña does not specifically allege that there were past instances of sexual assaults at the NMCWF, her allegations imply the existence of past instances of sexual assault by alleging the defendants' response to past reports of such conduct. Whereas the defendants' failures to address such situations in *Henderson v. Glanz* and *Brown v. Smith* were sufficient to make a claim for supervisory liability for the plaintiffs' sexual assaults, Peña goes beyond alleging that CCA and Hickson merely failed to train the staff to prevent further sexual assault or implement policies for the same; Peña's allegations contend that CCA and Hickson affirmatively did the opposite. Her allegations of retaliation against the inmates for sexual assault reports, and that it is a practice or custom not to report such alleged instances to outside law enforcement, in violation of CCA's and NMCD policies, make plausible that CCA's and Hickson's policies and customs not only failed to address the prevention of further sexual assaults, but created an environment that likely led to an environment in which sexual assaults of inmates increased. Whereas Judge Kern concluded that the defendant's failure to affirmatively place more staff on duty 'despite his awareness of frequent sexual assaults ... occurring in [known] spots,' *Henderson v. Glanz*, 2012 WL 5931546, at *4, was sufficient to make a plausible claim for § 1983 liability for the plaintiff's alleged sexual assault, Peña's allegations make plausible that CCA and Hickson not only failed to take action to prevent further sexual assaults despite alleged awareness of past instances, but that they 'engaged in' policies suppressing reporting of the instances by inmates and staff alike. . . While Peña probably should have pled some specific facts about particular past instances, the Court concludes that these allegations nudge her claim across the line

to plausible. Although Peña's Complaint may be criticized as lacking in specific factual allegations connecting CCA's or Hickson's personal involvement to these practices or policies, Peña's allegation that a practice was to place inmates in segregation for reporting sexual assault, combined with her allegation that she was placed in segregation 'following her reporting of Defendant Greffet's rapes,'. . . gives sufficient specific factual background to nudge such a claim against Hickson from speculative to plausible. Moreover, the allegation that there was in place a policy or custom of providing incentives for non-reporting of sexual assaults is troubling for CCA particularly. That there was a policy in place in which CCA employees were given bonuses or other financial incentives for their attempt to suppress the amount of sexual assault reports leads to the inference that both the CCA, as the employer, and Hickson, as the Warden in charge of the NMWCF, engaged in the provision of such bonuses. While Peña fails to differentiate and refer specifically in her allegations to CCA's conduct versus Hickson's conduct, the allegation that incentives were provided for non-reporting supports the conclusion that CCA not only knew about the practice and custom of suppressing reports of sexual assaults at NMWCF, but affirmatively encouraged and engaged in the custom. CCA's and Hickson's custom and practice of suppressing inmates' and staff members' reporting of sexual assaults leads to the conclusion that sexual assaults at NMCWF, such as Greffet's sexual assault of Peña in July/August, 2009, were more prevalent and occurred more frequently than they would have without CCA's and Hickson's engaging in these practices. Peña's allegations are thus sufficient to make plausible that CCA and Hickson engaging in the alleged practices and thereby suppressing sexual assault reports created an environment, without which, Peña's alleged sexual assault by Greffet at NMWCF would not have occurred. Because Peña alleges sufficient factual allegations to state a plausible claim for CCA's and Hickson's liability for violation of her constitutional rights in violation of § 1983, the Court will deny CCA's and Hickson's request to dismiss Count III.")

Shaver v. Glanz, No. 12–CV–0234–CVE–PJC, 2012 WL 3061498, *4 (N.D. Okla. July 26, 2012) ("The Court finds that plaintiff has stated a claim against Glanz in his individual capacity. Plaintiff alleges that she was repeatedly assaulted by Bowers while she was detained in the medical unit of the Tulsa County Jail, and this is a sufficiently serious injury to satisfy the objective component of a deliberate indifference claim. Plaintiff also claims that Glanz was aware of blind spots in the Tulsa County Jail, and that he knew that jail personnel and inmates were engaging in illegal conduct in these blind spots. In particular, she claims that Glanz knew that jail personnel were engaging in sexual acts with inmates and used the blind spots to avoid detection. . . When Glanz learned of Bowers' conduct, plaintiff alleges that Glanz failed to take any disciplinary action against Bowers or refer Bowers to the Tulsa County District Attorney for possible criminal charges. . . She claims that Glanz showed deliberate indifference to the needs of female inmates by failing to take steps to monitor the blind spots and properly staff the north wing of the medical unit with at least one female detention officer. These allegations are sufficient to support an inference that Glanz was aware of a substantial risk of harm to female inmates and that he acted with deliberate indifference by failing to abate the risk. Glanz argues that plaintiff's factual allegations do not specifically and conclusively show that he acted with deliberate indifference,

but he disregards the well-pleaded allegations of the complaint and his arguments are more appropriate for consideration on a motion for summary judgment.")

Kirtman v. U.S., No. CIV–12–504–HE, 2012 WL 2258339, at *3, *4 (W.D. Okla. May 8, 2012) ("Plaintiff's allegations concerning Defendant Ledezma are that he 'allowed medical staff and officers to knowingly cuff Plaintiff behind his back against standing medical orders' and that Plaintiff 'did not make any movements or actions to justify the use of force.'. . Plaintiff has alleged only that Defendant Ledezma had knowledge that other prison officials or medical staff handcuffed Plaintiff behind his back. Plaintiff's allegation that Defendant Ledezma is liable to him solely because of his supervisory position at FCI El Reno or solely because he had knowledge of the actions of other medical staff or prison officials does not state a plausible claim for relief under *Bivens.* Plaintiff has not alleged that Defendant Ledezma personally participated in placing handcuffs on Plaintiff behind his back, personally participated in the medical treatment provided or not provided to Plaintiff, or that Defendant Ledezma implemented a policy showing his authorization or approval of this action. . . Thus, Plaintiff has failed to state a plausible claim upon which relief may be granted, and this claim should be dismissed pursuant to 28 U.S.C. § 1915A(b).")

Busby v. City of Tulsa, No. 11–cv–447–GKF–PJC, 2012 WL 1867167, at *4, *5 (N.D. Okla. May 22, 2012) ("Busby alleges in Paragraph 11 of the First Amended Complaint that Larsen was 'responsible for creating, adopting, approving, ratifying, and enforcing the rules, regulations, policies, practices, procedures, and/or customs of the TPD, including the policies, practices, procedures, and/or customs that violated Plaintiff's constitutional rights as set forth in this Complaint.' However, Busby fails to identify any particular policy that (1) Larsen promulgated, created or implemented, or possessed responsibility for continued operation; that (2) caused the complained of constitutional harm. . . Rather, as more specifically set forth below, Busby's claims against Larsen are that Larsen 'ratified' certain unconstitutional acts taken by Larsen's subordinate, Major Evans. . . . Busby alleges that '[b]y denying Captain Busby's appeal, the City, Chief Jordan and Deputy Chief Larsen approved of and ratified the retaliatory performance evaluation.' Here, as was the case with Busby's previous allegations, Busby alleges Larsen had knowledge of Major Evans' allegedly discriminatory purpose. Knowledge, however, is not a sufficient basis upon which to state a claim of individual liability against a government official for the unconstitutional conduct of his subordinate. . . Moreover, Busby's allegation that Larsen denied Busby's appeal of Major Evans' allegedly retaliatory performance evaluation does not sufficiently allege purposeful misconduct on the part of Deputy Chief Larson. The alleged misconduct was the retaliatory performance evaluation rendered by Larsen's subordinate. Upon review of the allegations contained in Paragraph 31 of the First Amended Complaint, the Court concludes that Busby has failed to plausibly plead that Larsen, by virtue of his own conduct and state of mind, violated the Constitution.")

Harris v. Denver Health Medical Center, No. 11–cv–01868–REB–MEH, 2012 WL 1676590, at *5, *6 (D. Colo. May 10, 2012) ("Supervisory status alone does not create § 1983 liability. . .

Rather, liability of a supervisor under § 1983 requires 'allegations of personal direction or of actual knowledge and acquiescence.'. .For Claim One, Plaintiff alleges that Defendant Stob, representative for Denver Health, 'is the individual who is responsible, through actual or constructive knowledge, for enforcing a *policy and custom, (pull teeth only),* that caused plaintiff's injuries.'. . For Claim Two, Plaintiff alleges the same against Defendant Wilson, D.D.C. Administrator. . . .Construing the Amended Complaint liberally and taking Plaintiff's allegations as true, the Plaintiff alleges that he suffers ongoing physical ailments resulting from a lack of dental care and treatment, the lack of which stems from medical staff refusing to provide such care and treatment pursuant to a policy allowing only tooth extractions, which Defendant Stob has knowingly enforced at the medical center and which Defendant Wilson has knowingly enforced at the detention center. The Plaintiff need not allege that the Defendants 'personally played any part in his treatment' . . . nor that they 'participat[ed] ... in Plaintiff's ongoing dental care.'. . Whether a policy of "tooth extractions only" exists or whether these Defendants actually implemented, promulgated or enforced such policy are not proper considerations in a Rule 12(b)(6) analysis. Rather, the Plaintiff may overcome a Rule 12(b)(6) challenge to his Amended Complaint by alleging: '(1) the [Defendants] promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.'. . Plaintiff's allegations concerning both Defendant Stob and Defendant Wilson meet *Dodds'* requirements.")

Keith v. Werholtz, No. 11–2281–KHV, 2012 WL 1059858, at *7 (D. Kan. March 28, 2012) ("Here, the Court finds that plaintiff has alleged facts sufficient to state a plausible claim against defendant Koerner, who was responsible for managing TCF and knew about multiple instances of sexual misconduct at TCF over a period of years, inconsistently disciplined corrections officers who engaged in prohibited sexual conduct with inmates and thus purportedly tolerated at least an informal policy which permitted sexual contact between prison staff and inmates.")

Poore v. Glanz, No. 11–CV–0797–CVE–TLW, 2012 WL 728199, at *4 (N.D. Okla. Mar. 6, 2012) ("The Court finds that plaintiff has stated a claim against Glanz in his individual capacity. Plaintiff alleges that she was repeatedly raped by Bowers while she was detained in the medical unit of the Tulsa County Jail, and this is a sufficiently serious injury to satisfy the objective component of a deliberate indifference claim. Plaintiff also claims that Glanz was aware of blind spots in the Tulsa County Jail, and that he knew that jail personnel and inmates were engaging in illegal conduct in these blind spots. In particular, she claims that Glanz knew that jail personnel were engaging in sexual acts with inmates and used the blind spots to avoid detection. . . When Glanz learned of Bowers' conduct, plaintiff alleges that Glanz failed to take any disciplinary action against Bowers or refer Bowers to the Tulsa County District Attorney for possible criminal charges. . . She claims that Glanz showed deliberate indifference to the needs of female inmates by failing to take steps to monitor the blind spots and properly staff the north wing of the medical unit with at least one female detention officer. These allegations are sufficient to support an inference that Glanz was aware of a substantial risk of harm to female inmates and that he acted with deliberate indifference

by failing to abate the risk. Glanz argues that plaintiff's factual allegations do not specifically and conclusively show that he acted with deliberate indifference, but he disregards the well-pleaded allegations of the complaint and his arguments are more appropriate for consideration on a motion for summary judgment.")

Shaw v. Glanz, No. 11–CV–518–GKF–FHM, 2012 WL 405151, at *6, *7 (N.D. Okla. Feb. 8, 2012) ("Accepting as true plaintiff's allegations that Glanz was aware of discriminatory practices by his subordinates, plaintiff has arguably met the first requirement for pleading a cognizable § 1983 claim against Glanz for supervisory liability, i.e., that Glanz promulgated, created, or implemented or possessed responsibility for the continued operation of a policy. Further, by alleging she has been treated differently than her Caucasian coworkers with regard to promotions, raises and discipline, and recounting specific instances of such treatment, plaintiff has asserted facts which, if proven, would establish the second element of a § 1983 claim, i.e., that she has suffered constitutional harm. With respect to the third element—the defendant's state of mind—*Iqbal* instructs that discriminatory intent is required to establish a claim for supervisory liability for racial discrimination. . . Plaintiff has alleged Glanz acted 'intentionally or with reckless indifference.' 'Reckless indifference' clearly does not suffice to establish the required *mens rea* under *Iqbal.* Further, while the complaint makes the conclusory allegation that Glanz acted 'intentionally,' plaintiff has failed to allege any facts supporting the allegation. The only allegation of *any* personal involvement by Glanz is that she complained to Glanz and Undersheriff Edwards about the defendant's policies and their negative effect upon her as an African American, and she received a letter in response from Edwards finding the claim of discrimination was not corroborated. . . This allegation, taken as true, might establish 'knowledge and acquiescence' on the part of Glanz, but does not suffice to establish the 'discriminatory intent' state of mind required by *Iqbal.* . . Thus, plaintiff has failed to meet the pleading requirements set out in *Dodds.*")

Kemp v. Lawyer, 846 F.Supp.2d 1170, ___ (D. Colo. 2012) ("A defendant sued in his individual capacity under § 1983, may be subject to personal liability and/or supervisory liability. . . While personal liability under § 1983 must be based on personal involvement in the alleged constitutional violation, . . . supervisory liability under § 1983 'allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant supervisor or [his] subordinates) of which subjects, or causes to be subjected that plaintiff to the deprivation of any rights secured by the Constitution.'. . .Plaintiffs contend that Defendant Dunlap personally directed, had actual knowledge of, and acquiesced in both the forced entry and the use of excessive force. Specifically, they assert in their complaint that Dunlap 'failed to intervene or remedy the violation of Plaintiff's constitutional rights, and instead chose to supervise, directly participate in, and/or acquiesce in the constitutional violations ... with the same purpose and state of mind as Defendant Lawyer—to gain entry into the apartment regardless of the risk to the safety of those inside in order to gather chemical evidence, even though a reasonable officer in [his] position would have known that Jason would not have voluntarily submitted to a chemical test and that they had no right to forcibly require Jason to submit to such a test under the circumstances.'. .In

support of these claims, Plaintiffs allege that: Defendant Dunlap actively participated in escalating the tension and level of force used at the scene, laying the groundwork for Jason's death. As the supervising sergeant on the scene, it was Defendant Dunlap's duty to supervise Lawyer and Firko and to take all reasonable actions to prevent violations of constitutional rights. Yet, rather than directing Lawyer and Firko to cease trying to violently force their way into the home without a warrant, Dunlap condoned, ratified and approved of Lawyer and Firko's actions, and then provided support for their attempts at entry by guarding the back exit from the house. Defendant Dunlap provided support as Defendants Lawyer and Firko escalated the tension and level of force used on the scene, laying the groundwork for Jason's death. Dunlap watched as Firko and Lawyer attempted to kick down the door with their guns drawn, knowing they were seeking entry without a warrant solely to further a fruitless quest for chemical evidence. Dunlap knew that even if Firko and Lawyer gained entry into the residence, Jason would not have voluntarily submitted to a chemical test and that Firko and Lawyer had no right to forcibly require Jason to submit to such a test under the circumstances. Thus, Dunlap knew that the quest for chemical evidence by forcibly entering the residence was likely to be fruitless as well as illegal. Dunlap was present on the scene and, as the supervising officer, was likely informed that Lawyer and/or Firko had ripped a part of the door frame off and shoved it into the open door to prop it open [and ...] that Lawyer and/or Firko had pepper sprayed Jason. . . . When these allegations are taken as true, I conclude that Plaintiffs have alleged facts to support a claim of individual supervisory liability against Dunlap related to the warrantless search based on his failure to stop the entry—which he is alleged to have witnessed and presumptively knew to involve only a minimal traffic accident and/or possible DUI—and where there was no indication that Jason was armed or a flight risk. Failing to stop Defendant Lawyer and Firko's attempt, with guns drawn, to kick their way into the residence without a warrant, and then supporting their ultimate entry by guarding the back exit, constituted implicit approval sufficient to state a plausible § 1983 claim of supervisor liability for a constitutional violation based on the warrantless search. A defendant in a supervisory position can be personally involved in an alleged constitutional violation by his subordinates when he 'personally directed his subordinates to take the action resulting in the alleged constitutional violation' or 'when he had actual knowledge that his subordinates were committing the alleged constitutional violation and he acquiesced in its commission.'. . Plaintiffs also allege sufficient facts of supervisory liability related to the use of excessive force because they have alleged that Defendant Dunlap, as the supervising officer on the scene, had the ability, opportunity and, indeed, the duty to prevent the deadly shooting from occurring. . . Plaintiffs allege that Dunlap was aware that Defendants Lawyer and Firko were attempting armed, forced entry into Jason's residence without permission. Plaintiffs argue that his failure to stop the entry, coupled with his assisting at the rear of the residence, are facts that make out a plausible claim for supervisory liability in the ultimate use of excessive force by Defendant Lawyer. I agree. While Defendant Dunlap was not present at the front of the house, his acts and failures to act as alleged, are not too attenuated to support a plausible claim that he caused the constitutional deprivation of deadly force. As such, I conclude that Plaintiffs have alleged facts that, if proven at trial, suffice to establish a plausible claim that Defendant Dunlap's personal involvement caused the excessive force violation. . . .Finally, I address whether the facts alleged show Defendant Dunlap acted with the state of mind

required to establish he committed the constitutional violations. . . .Under the Fourth Amendment, an action is 'reasonable,' regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'. . In addition, to establish a violation of § 1983 by a supervisor, the plaintiff must, at minimum, demonstrate a deliberate, intentional act on the part of the defendant to violate the plaintiff's legal rights. . . .Plaintiffs have alleged that Defendant Dunlap acted with 'deliberate indifference' to Jason's constitutional rights when he failed to act to stop, control and diffuse the situation and instead assisted by guarding the rear. They have alleged that Defendant Dunlap witnessed the armed attempts to enter without a warrant, chose not to intervene to stop, control or diffuse the encounter while knowing the underlying circumstances, and then provided support for the continued escalation of the events. These facts and the inferences therefrom, when take as true, are sufficient to support a plausible claim that his actions and failures to act constituted deliberate indifference, and such conduct was objectively unreasonable under the totality of the circumstances alleged.")

Kemp v. Lawyer, 846 F.Supp.2d 1170, 1175-77 (D. Colo. 2012) ("[T]o demonstrate that a supervisor-defendant has violated the plaintiff's constitutional right in failing to train—in order to establish individual liability under § 1983—a plaintiff must show: 1) an *underlying violation* of his constitution rights; 2) that the supervisor-defendant's personal involvement *caused* the misconduct complained of; and 3) that the supervisor-defendant acted with the state of mind or *intent* required to establish he committed a constitutional violation; specifically, at minimum, establish a deliberate and intentional act on the part of the defendant to violate the plaintiff's legal rights. . . . I conclude that Plaintiffs' complaint alleges insufficient factual matter to support that Defendant Turano's acts in failing to create policies for CPS officers and/or either failing or inadequately training the CPS officers related to the legalities of search and seizures under the circumstances presented here, demonstrate that his personal involvement ultimately *caused* the misconduct complained of, and that his *intent* was to deliberately and intentionally fail to act (in implementing adequate policies and training) in order to violate Jason's legal rights. . . . I conclude that the factual allegations in Plaintiffs' complaint, even when viewed as true, are insufficient to establish that Defendant Turano's personal involvement caused the underlying constitutional violations and that his intent, in so doing, was to deliberately and intentionally fail to implement policies and train CSP officers in order to violate Jason's legal rights. As such, Plaintiffs' complaint does not establish a plausible claim for individual supervisory liability under § 1983 against Defendant Turano for failure to train.")

Coffey v. U.S., Nos. CIV 08-0588 JB/LFG, CIV 09-0028 JB/LFG, 2011 WL 6013611, at *37-*40 (D.N.M. Nov. 28, 2011) ("McKinley County argues that Coffey has not responded to its argument that *Ashcroft v. Iqbal* has changed or abolished the standard for supervisory liability under 42 U.S.C. § 1983. . . The Tenth Circuit has recognized that *Ashcroft v. Iqbal* limited, and may have even eliminated, supervisory liability for government officials based on an employee's or subordinate's constitutional violations. *See Dodds v. Richardson,* 614 F.3d 1185 (10th Cir.2010). The language that may have altered the landscape for supervisory liability in *Ashcroft v. Iqbal* is as follows: 'Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a

plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . The Tenth Circuit in *Dodds v. Richardson* did not resolve completely how *Ashcroft v. Iqbal* affected supervisory liability. . . The Supreme Court's and the Tenth Circuit's decisions bind the Court. . . The Tenth Circuit has recognized that *Ashcroft v. Iqbal* may create a conflict with its prior precedent on supervisory liability and has not yet decided to resolve that Supreme Court decision with its prior precedent. *See Dodds v. Richardson,* 614 F.3d at 1199. . . . The Tenth Circuit recognized before *Ashcroft v. Iqbal* that supervisory liability was a valid theory on which a plaintiff could hold a government official liable, at least under some circumstances, for conduct in which his or her subordinates engaged. . . District courts within the Tenth Circuit are bound to follow the Tenth Circuit's decisions. . . There is some confusion among courts as to the effect *Ashcroft v. Iqbal* had on supervisory liability. The dissent in *Ashcroft v. Iqbal,* written by Justice Souter and joined by three other Justices, concluded that the majority had eliminated supervisory liability in its entirety. . . The United States Court of Appeals for the Ninth Circuit has, on the other hand, opined that the decision may have only required purposeful conduct by supervisors in racial discrimination cases, as those were the facts in *Ashcroft v. Iqbal.* . . The Tenth Circuit has recognized, besides these two positions, '[m]any intermediate positions are also surely plausible.' *Lewis v. Tripp,* 604 F.3d 1221, 1227 n. 3 (10th Cir.2010). Given that the Tenth Circuit has not yet determine whether *Ashcroft v. Iqbal* has overruled its prior opinions on supervisory liability, including *Serna v. Colorado Department of Corrections* and *Jenkins v. Wood,* given that a district court is bound by Tenth Circuit law until the Tenth Circuit overrules a prior panel's decision, given that the Tenth Circuit has recognized this conflict that *Ashcroft v. Iqbal* has created with supervisory liability but has not yet decided the scope of the conflict, given that the parties have not briefed this issue in detail, given that Coffey may not even be asserting a supervisory liability claim, and given that anything the Court would say would be dicta, the Court declines to address the effect *Ashcroft v. Iqbal* had on supervisory liability. As the Court previously concluded, no McKinley County policy was the moving force behind any violation that may have occurred, and there is no affirmative link between McKinley County's conduct and any of its employees' constitutional violations. Thus, as those grounds resolve Coffey's claims, it is not necessary to address *Ashcroft v. Iqbal's* effect on supervisory liability." [footnotes omitted])

Carbajal v. Seventh Judicial Dist., No. 10-cv-02862-REB-KLM, 2011 WL 3471237, at *19, *20 & n.8 (D. Colo. Aug. 8, 2011) ("The Supreme Court has recently called into question the notion of personal involvement by knowing acquiescence. In *Ashcroft v. Iqbal*, 129 S.Ct. at 1949, the Court suggested that the simple fact that a supervisor knew of and acquiesced in a constitutional violation committed by his subordinates does not establish that he was personally involved in the violation. . . . *Iqbal* has been interpreted by at least two Courts of Appeals as narrowing the scope of what constitutes 'personal involvement' by a supervisor in an alleged constitutional violation committed by his subordinates [citing *Bayer* and *Maldonado*] Accordingly, to establish that a defendant in a supervisory position was personally involved in an alleged constitutional violation committed by his subordinates, a plaintiff must show that the defendant did more than simply acquiesce in the violation. . . . The Courts of Appeals have not provided clear guidance regarding precisely what a plaintiff must show to demonstrate more than mere acquiescence by the

defendant. But *Iqbal* and *Serna* indicate that the defendant's state of mind is the linchpin of the analysis. In *Iqbal,* the Supreme Court suggested that a defendant who acquiesced in a constitutional violation committed by his subordinates was personally involved in the violation only if his acquiescence was motivated by a 'purpose' to allow or further the violation. . . In *Serna,* the Court of Appeals for the Tenth Circuit suggested that a defendant supervisor who acquiesced in a constitutional violation was personally involved in that violation only if he shared the same 'state of mind' with his subordinates who actually committed the violation.")

Fleetwood v. Werholtz, No. 10-2480-RDR, 2011 WL 2938106, at *5, *6 (D. Kan. July 19, 2011) ("Defendants argue that there is no allegation in the second amended complaint concerning what the supervisor defendants actually did, only conclusory allegations, such as allowing a culture of sexual misconduct. . . The supervisor defendants contend that there is no allegation that the supervisor defendants ignored an officer's known history of sexual contact with prisoners. . . The supervisor defendants further argue that the second amended complaint lacks a plausible allegation that the supervisor defendants knew of any risk of harm to plaintiff which they then ignored. . . Finally, the supervisor defendants contend that plaintiff's claims that defendants failed to properly discipline staff for undue familiarity or for failing to monitor the movement of staff and inmates, are not specific to any defendant and are not specific to the alleged incident between plaintiff and defendant VanDyke. Therefore, they argue that there is no sufficient affirmative link alleged between that incident and the supervisor defendants. . . As previously stated, the court's role is to examine the factual allegations in the complaint (as opposed to the legal conclusions) and determine whether they plausibly could lead to an entitlement to relief. It is undisputed that plaintiff has alleged a constitutional violation committed by defendant VanDyke who was a subordinate to the supervisor defendants. The question is whether plaintiff has plausibly alleged an affirmative link between the alleged actions or omissions of the supervisor defendants and the alleged constitutional violation.

As the court has stated, an affirmative link has three elements: personal involvement; a causal connection; and a culpable state of mind. Personal involvement can be alleged by claiming that a supervisor's failure to exercise control or direction caused the alleged illegal acts or that the supervisor promulgated, created, implemented or utilized a policy that caused the alleged deprivation of constitutional rights. There are allegations in the second amended complaint that defendant VanDyke boasted to others about his sexual contacts with inmates and others at TCF. There is also an allegation of one inmate complaint and an affidavit alleging improper sexual contact by defendant VanDyke. It is plausible that plaintiff could prove that these boasts and the written complaints and affidavits were known to the supervisor defendants. There are allegations in the second amended complaint that defendant VanDyke and other TCF officers engaged in a seemingly large amount of improper sexual activity of various kinds, from 'undue familiarity' to sexual intercourse. The second amended complaint alleges that the supervisor defendants reacted mildly and inconsistently to reports of such activity and thus fostered a culture of sexual misconduct. While a claim that defendants 'personally participated in the allowance of a culture of sexual misconduct' is a broad allegation, it is a broad *factual* allegation, not a legal conclusion. Thus, the court is obliged to consider whether it is a plausible allegation which may demonstrate

the supervisor defendants' personal involvement (via a failure to supervise) in the alleged deprivation of constitutional rights. After considering the mass of factual allegations contained in the lengthy second amended complaint, the court does not believe that this claim is implausible. It is plausible to think plaintiff may be able to establish that the alleged failure to supervise defendant VanDyke and others set into motion a series of events which a reasonable supervisor should have known would lead to the alleged constitutional violation. It is also plausible to think that the failure to react to the alleged incidents of sexual misconduct by officers at TCF is evidence that the supervisor defendants were aware of and failed to take reasonable steps to alleviate a substantial risk of harm to female inmates who might come into contact with defendant VanDyke or other officers at TCF. The court rejects the argument that plaintiff does not allege how any of the supervisor defendants knew of the risk of harm to her. The second amended complaint contains numerous allegations of: 1) supervisory authority over defendant VanDyke and TCF; 2) widespread problems of sexual misconduct by defendant VanDyke and other officers at TCF; and 3) other complaints and claims regarding VanDyke and TCF. This is sufficient to make a plausible claim that each of the supervisor defendants was aware of a substantial risk of harm. Finally, the court also rejects the argument that plaintiff's allegations are too general to properly allege an affirmative link between a specific supervisor defendant to the sexual contact between plaintiff and defendant VanDyke. As the court has already noted, in *Tafoya* the Tenth Circuit stated that an official's knowledge of the risk need not be knowledge of a substantial risk to a *particular* inmate, or knowledge of the particular manner in which the injury might occur. Furthermore, there are specific allegations regarding defendant VanDyke which plaintiff may prove were known to the supervisor defendants.")

Mason v. Hartley, 2011 WL 7429431, at *4, *5 & n.2 (D. Colo. July 14, 2011) ("Iqbal has been interpreted by at least two Courts of Appeals as narrowing the scope of what constitutes 'personal involvement' by a supervisor in an alleged constitutional violation committed by his subordinates [citing *Bayer* (3d Cir. 2009) and *Maldonado* (1st Cir. 2009)] Accordingly, to establish that a defendant in a supervisory position was personally involved in an alleged constitutional violation committed by his subordinates, a plaintiff must show that the defendant did more than simply acquiesce in the violation. . . . The Courts of Appeals have not provided clear guidance regarding precisely what a plaintiff must show to demonstrate more than mere acquiescence by the defendant. But *Iqbal* and *Serna* indicate that the defendant's state of mind is the linchpin of the analysis. In *Iqbal,* the Supreme Court suggested that a defendant who acquiesced in a constitutional violation committed by his subordinates was personally involved in the violation only if his acquiescence was motivated by a 'purpose' to allow or further the violation. . . In *Serna,* the Court of Appeals for the Tenth Circuit suggested that a defendant supervisor who acquiesced in a constitutional violation was personally involved in that violation only if he shared the same 'state of mind' with his subordinates who actually committed the violation.")

Nelson v. Glanz, No. 11-CV-189-CVE-PJC, 2011 WL 2144660, at *4, *5 (N.D. Okla. May 31, 2011) ("Although the Tenth Circuit did not expressly abrogate any of its precedent on supervisory liability, it recognized that *Iqbal* 'may very well have abrogated § 1983 supervisory liability as we

previously understood it in this circuit....'. . . Considering all of the allegations of plaintiff's petition, the Court finds that plaintiff has not stated a § 1983 claim against Glanz in his official or individual capacities. The petition alleges that plaintiff's immediate supervisors, not Glanz, discriminated against plaintiff in terms of promotion, pay increases, and discipline, and she claims that Glanz was ultimately responsible for these actions. Taking plaintiff's factual allegations as true, they are insufficient to establish an 'affirmative link' between the adoption of an unconstitutional policy by Glanz and the conduct of his subordinates. . . The allegations of the petition would be sufficient to show that plaintiff's immediate supervisors may have engaged in racial discrimination, but plaintiff does not allege that the Sheriff's Office actually adopted a policy or custom authorizing or encouraging racial discrimination. Plaintiff alleges that the Sheriff's Office adopted employment practices with a disparate impact on African Americans. . . However, § 1983 requires that a plaintiff prove an intentional deprivation of constitutional rights and '[d]isparate impact claims that do not "raise a presumption of discriminatory purpose" are "insufficient to sustain a cause of action under ... [§ 1983]."'. . Plaintiff's allegations that the Sheriff's Office adopted policies that had a disparate impact on minorities do not raise a presumption of discriminatory purpose. Plaintiff will be granted leave to file an amended complaint if she can allege sufficient facts to state a § 1983 claim against Glanz. Specifically, plaintiff must be able to identify a specific policy adopted or promulgated by Glanz or the Sheriff's Office that deprived her of a constitutional right, and she must also have a sufficient basis to allege that Glanz acted to deliberately and intentionally violate plaintiff's constitutional rights.")

Gatrell v. City and County of Denver, No. 10-cv-02311-REB-KLM, 2011 WL 2185793, at *4 (D. Colo. May 26, 2011) ("*Iqbal* has been interpreted by at least two Courts of Appeals as narrowing the scope of what constitutes 'personal involvement' by a supervisor in an alleged constitutional violation committed by his subordinates[.] [citing *Bayer* and *Maldonado*] Accordingly, to establish that a defendant in a supervisory position was personally involved in an alleged constitutional violation committed by his subordinates, a plaintiff must show that the defendant did more than simply acquiesce in the violation. . . . The Courts of Appeals have not provided clear guidance regarding precisely what a plaintiff must show to demonstrate more than mere acquiescence by the defendant. But *Iqbal* and *Serna* indicate that the defendant's state of mind is the linchpin of the analysis. In *Iqbal,* the Supreme Court suggested that a defendant who acquiesced in a constitutional violation committed by his subordinates was personally involved in the violation only if his acquiescence was motivated by a 'purpose' to allow or further the violation. . . In *Serna,* the Court of Appeals for the Tenth Circuit suggested that a defendant supervisor who acquiesced in a constitutional violation was personally involved in that violation only if he shared the same 'state of mind' with his subordinates who actually committed the violation.").

Mallory v. Jones, No. 10-cv-02564-CMA-KMT, 2011 WL 1750234, at *11 (D. Colo. May 3, 2011) ("In the instant case, the Court finds that Plaintiff has alleged facts that set forth an affirmative link between the Supervisory Defendants and the alleged Eighth Amendment violation. Plaintiff has alleged that each of the Supervisory Defendants were notified of CDOC's excessive use of NSAIDs and failure to ensure the adequate monitoring of prisoners for NSAID-induced side

effects such as ulcers and gastrointestinal bleeding, from which Plaintiff suffered. Plaintiff further alleges that, despite knowledge of these problems, the Supervisory Defendants did not take adequate remedial action within the CCF and, as a result, Defendants disregarded Plaintiff's serious medical condition and medical needs. Accordingly, the Court finds that denial of Defendants' Motion to Dismiss Plaintiff's claim against the Supervisory Defendants is warranted.")

Handy v. Diggins, No. 10-cv-02022-WYD-KMT, 2011 WL 1743394, at *1, *6, *7 (D. Colo. Mar. 23, 2011) ("In this prisoner civil rights suit, Plaintiff alleges that Defendants, Chief Diggins, Major Connors and Chaplain Scott, violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the First and Fourteenth Amendments by refusing to provide him with a kosher diet in accordance with his religious beliefs. . . . Defendants contend that Plaintiff's complaint contains no allegations that Chief Diggins was personally involved in the alleged violations. In response, Plaintiff argues that he submitted numerous kites and grievances to Chief Diggins complaining that his subordinates where subjecting Plaintiff to constitutional violations. Plaintiff contends that Chief Diggins is not being sued for his supervisory powers at the DCJ, 'but for his involvement, knowledge, and his failure to stop a subordinate's constitutional violation of which he was aware.'. . In his Complaint, Plaintiff alleges that he submitted a kite to Chief Diggins on April 10, 2010, explaining that he had been requesting a kosher meal since February 2010 and had submitted a grievance on March 19, 2010 to which he had not yet received a response. He further stated that he believed that Chaplain Scott was depriving him of his right to practice his religion and asked Chief Diggins to resolve the issue. . . Plaintiff further alleges that on May 7, 2010, he submitted a grievance to Chief Diggins chronicling his efforts to obtain a kosher meal and noting that he had been denied a kosher meal for nearly ninety days, effectively depriving him of his right to practice his religion and asking Chief Diggins to intervene. . . Plaintiff also contends that, according to DCJ grievance procedures, the grievance he submitted to Major Connors on April 27, 2010 would have been forwarded to Chief Diggins because it was the second grievance. . . Plaintiff argues that these allegations show that Chief Diggins 'had actual knowledge of the misconduct, approved of it, acquiesced in it or failed to stop it.'. . In this case, whether Plaintiff has alleged personal participation sufficient to withstand a motion to dismiss is a close question. Plaintiff has alleged facts to suggest that Chief Diggins was aware of a potential constitutional violation, and that he failed to respond to Plaintiff's grievances or intervene on Plaintiff's behalf. The question is whether knowledge of alleged misconduct, approval of it, acquiescence in it, or failure to stop it, amounts to the personal participation necessary to state a claim against a supervisor since the Supreme Court's decision in *Ashcroft v. Iqbal*. . . . In *Iqbal*, the Supreme Court held that the alleged deliberate indifference to or knowledge and acquiescence of Defendants Ashcroft and Mueller in their subordinates' unconstitutional conduct or discriminatory animus, alone, did not amount to the state of mind required to establish purposeful discrimination. . . . In *Dodds*, the Tenth Circuit held that '§ 1983 allows a plaintiff to impose liability upon a defendant- supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement of which subjects, or causes to be subjected that plaintiff to the deprivation of any rights secured by the constitution.'. . However, the court still has not

determined whether allegations of a supervisor's knowledge of and acquiescence in a constitutional violation, such as those made by Plaintiff in this case, are sufficient to state a claim, post-*Iqbal.* Given the lack of clarity in the law, the court finds that Plaintiff has alleged sufficient facts to suggest personal participation on the part of Chief Diggins and therefore recommends that Defendants' motion to dismiss Plaintiff's claims against Chief Diggins be denied.")

Twitchell v. Hutton, No. 10-cv-01939-WYD-KMT, 2011 WL 318827, at *6, *7 (D. Colo. Jan. 28, 2011) ("[I]n a recent decision interpreting *Iqbal,* the Tenth Circuit noted that the Supreme Court narrowed the scope of supervisory liability under § 1983. *Dodds v. Richardson,* 614 F.3d 1185, 1195 (10th Cir.2010). Thus, after *Iqbal,* the *Dodds* Court instructed that a supervisor can be held liable under § 1983 only if '(1) [he] promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation.'. . Turning to Plaintiff's Complaint, I find that it fails to plausibly plead that Chief Hays − while possessing the required state of mind − acted in such a way that caused Plaintiff's alleged constitutional harm. I agree with Defendants that Plaintiff's allegations focus on Chief Hays' supervisory status in alleging his liability. For example, Plaintiff alleges that Chief Hays, as the commanding officer for the Defendants, was responsible for the Defendants' training, supervision, conduct and for enforcing the regulations of the Steamboat Police Department. . . Plaintiff also makes a conclusory allegation that Chief Hays 'adopted, authorized, and ratified and/or condoned policies and/or customs of the use of excessive force and deliberate indifference ...' that deprived the Plaintiff of her constitutional rights. . . However, Plaintiff offers no supporting facts in connection with her conclusory allegations. Accordingly, I find that Plaintiff's allegations fail to contain sufficient factual matter, accepted as true, to state a plausible claim.")

Garcia v. Webster, No. 09-cv-03024-CMA-KLM, 2010 WL 5572503, at *10 & n.3, *11 (D. Colo. Dec. 20, 2010) ("*Iqbal* has been interpreted by at least two Courts of Appeals as narrowing the scope of what constitutes 'personal involvement' by a supervisor in an alleged constitutional violation committed by his subordinates . . . . Accordingly, to establish that a defendant in a supervisory position was personally involved in an alleged constitutional violation committed by his subordinates, a plaintiff must show that the defendant did more than simply acquiesce in the violation. [FN3 : The Courts of Appeals have not provided clear guidance regarding precisely what a plaintiff must show to demonstrate more than mere acquiescence by the defendant. But *Iqbal* and *Serna* indicate that the defendant's state of mind is the linchpin of the analysis. In *Iqbal,* the Supreme Court suggested that a defendant who acquiesces in a constitutional violation committed by his subordinates is personally involved in the violation only if his acquiescence was motivated by a 'purpose' to allow or further the violation. *See* 129 S.Ct. at 1949. In *Serna,* the Court of Appeals for the Tenth Circuit suggested that a defendant supervisor who acquiesces in a constitutional violation is personally involved in that violation only if he shares the same 'state of mind' with his subordinates who actually commit the violation.] In this case, Plaintiff has failed to allege any personal involvement by Defendant Milyard in denying him medical care beyond simple acquiescence to the actions of medical staff at Sterling. Plaintiff's Complaint does not

contain factual allegations sufficient to plausibly suggest that Defendant Milyard had either a 'purpose' to deny Plaintiff proper medical care, *see Iqbal*, 129 S.Ct. at 1949, or a 'state of mind' similar to that of his subordinates who allegedly were deliberately indifferent to Plaintiff's medical needs . . . . Plaintiff has merely alleged that (1) Defendant Milyard knew that he was complaining about the quality of his medical treatment, and (2) Defendant Milyard did not do 'anything to help.'. . These allegations are insufficient to state a claim against Defendant Milyard.")

ELEVENTH CIRCUIT

A.W. by & Through J.W. v. Coweta County School District., 110 F.4th 1309, 1316-17 (11th Cir. 2024) ("A supervisor is liable for a subordinate's constitutional violation only if she 'personally participates in the alleged unconstitutional conduct' or causes the constitutional violation. . . That is, Hildebrand is liable as Sprague's supervisor only if she participated in violating the students' rights or caused them to suffer a violation at the hands of Sprague. Students are in a noncustodial relationship with the state. . . In that setting, 'conduct by a government actor' violates substantive due process 'only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense.'. . So Hildebrand's liability as a supervisor turns on whether she participated in or caused conscience-shocking conduct, and her independent liability turns on whether her alleged deliberate indifference to the alleged abuse shocks the conscience. We have never held that an official's deliberate indifference in a noncustodial setting can shock the conscience. . . Indeed, even allegations of intentional misconduct seldom shock the conscience. . . Our precedent makes clear that Sprague's alleged abuse did not violate the students' right to substantive due process. We have held that a similar complaint that a teacher abused a disabled student did not shock the conscience. . . .In the light of *T.W.*, Sprague's alleged abuse does not satisfy the shock-the-conscience standard. . . .The Supreme Court has cautioned against judicial expansion of rights to substantive due process 'because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' . . . Allegations of a teacher's intentional abuse are ordinarily the province of state tort law. . . Sprague's alleged abuse does not warrant supplanting state tort law and exceeding the limited contours of the shock-the-conscience standard.")

Myrick v. Fulton County, Georgia, 69 F.4th 1277, 1298-99 (11th Cir. 2023) ("The complaint does not allege that Sheriff Jackson personally directed the Officers to act unlawfully or that he knew they would do so and failed to stop them. That leaves options one and two. With respect to the first, '[t]he deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.'. . Any attempt by Appellants to demonstrate a causal connection between Sheriff Jackson and the alleged constitutional deprivation based on such a history of widespread abuse must fail. There is simply nothing alleged in the complaint demonstrating that Sheriff Jackson would have had notice of the alleged widespread abuse. . . . The complaint focuses only on May's experience at the Fulton County Jail—it does not point to other instances of excessive force or deliberate indifference aside from noting that Fulton County has paid judgments and settlements

for unknown claims in the past. Because Appellants' complaint focuses solely on May's experience—a single incident of allegedly unconstitutional activity—and because none of the policies or customs it alleges are unconstitutional on their own, the complaint does not, as a matter of law, state a claim against Sheriff Jackson for supervisory liability.")

Christmas v. Harris County, Georgia, 51 F.4th 1348, 1355-58 (11th Cir. 2022) ("[B]efore Christmas's assault, Sheriff Jolley was aware of two—and only two—instances of potential concern involving Pierson. In one, Pierson was sued for using excessive force against a young man who later died in police custody. In the other, Pierson's ex-wife alleged that Pierson was following her in his police cruiser. These incidents may well have rendered Pierson unfit to serve as a police officer (and they may have warranted other action too). But, without for a moment condoning Pierson's conduct (there or here), . . . we can't help but observe that neither incident involved a sexual assault, and that (as a result) neither would have put Sheriff Jolley on notice of Pierson's proclivity for sexually assaulting people in his custody. . . . Because these two incidents are of such a different character from the constitutional violation at hand, we simply cannot (consistent with our precedents) say that, based on them, Sheriff Jolley should (or could) have predicted Christmas's assault. And so, we cannot conclude that Sheriff Jolley 'failed to stop' Pierson from sexually assaulting Christmas. . . There's also no indication in the record that Sheriff Jolley 'directed [Pierson] to act unlawfully.'. . On the contrary, Sheriff Jolley—it's uncontested—didn't hear about Pierson's sexual misconduct until *after* Christmas was assaulted. Nor has Christmas pointed to any 'custom or policy [that] resulted in deliberate indifference to constitutional rights[.]'. . 'A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality.'. . 'A custom is an unwritten practice that is applied consistently enough to have the same effect as a policy with the force of law.'. . 'Demonstrating a policy or custom requires showing a persistent and wide-spread practice.'. . The unconstitutional act, moreover, must have been carried out 'pursuant to' the alleged policy or custom. . . . Christmas cannot show that Sheriff Jolley failed to train Pierson. 'Where the proper response ... is obvious to all without training or supervision, then the failure to train or supervise is generally not so likely to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.'. . That's just the situation we have here: That a police officer should not (and may not) sexually assault citizens in his custody is 'obvious to all without training or supervision.'. . . For all these reasons, then, Christmas doesn't meet the 'extremely rigorous' standard 'by which a supervisor is held liable in his individual capacity for the actions of a subordinate[.]'. . As a result, she's failed to show 'that [Sheriff Jolley] violated a constitutional right.'")

Ingram v. Kubik, 30 F.4th 1241, 1256 (11th Cir. 2022) ("Because Ingram does not dispute that Dorning was acting within the scope of his discretionary authority, 'the burden shifts to [Ingram] to show that (1) [Dorning] violated a constitutional right and (2) the right was clearly established at the time of the alleged violation.'. . Ingram has satisfied his burden. A supervisor can be held liable for implementing or failing to implement a policy that causes his subordinates to believe that they can permissibly violate another's constitutional rights if the subordinates then do so based

on that belief. . . As we have explained, the complaint adequately alleges that one of Dorning's subordinates used excessive force and that there is a causal connection between that excessive force and Dorning's policy of allowing such force. And this Court has clearly established that 'a custom of allowing the use of excessive force ... provides the requisite fault[,] ... as a persistent failure to take disciplinary action against officers can give rise to the inference that a [supervisor] has ratified conduct.'. . That 'allegation would [also] provide the causal link between the challenged conduct and the ... policy, because [the officer] would have been acting in accordance with the policy of allowing or encouraging excessive force.'. . This principle applies both to municipalities and supervisors 'responsible for disciplining police officers and setting police department policy.'. . It follows that Ingram's complaint states a claim that Dorning violated his clearly established constitutional rights.")

Quinette v. Reed, 805 F. App'x 696, ___ (11th Cir. 2020) ("Here, to deny the Supervisor Defendants qualified immunity, we must conclude that they were on notice that a failure to punish a subordinate's misconduct with sufficient severity (or anything besides termination)—as opposed to a failure to investigate or provide discipline at all—was a violation of clearly established law that could expose them to personal liability. We cannot reach this conclusion. In this Circuit, the published excessive-force cases imposing supervisory liability appear to all involve supervisors who took *no* action when aware of their subordinate's unlawful conduct. . . Here though, the supervisors *did* investigate and act when they became aware of Reed's misconduct. While reasonable minds may disagree about the level of discipline necessary to prevent further misconduct, the sanctions imposed here were real—up to and including suspension. Thus, even in the light most favorable to Quinette, his claim bears distinct differences from the circumstances present in *Danley*, *Valdes*, and *Fundiller*.")

Quinette v. Reed, 805 F. App'x 696, ___ (11th Cir. 2020) (Wilson, J., concurring in part and dissenting in part) ("I concur in the affirmance of the district court's denial of qualified and official immunity to Reed. However, I would affirm the district court's denial of qualified immunity based on supervisory liability. Accepting Quinette's allegations as true, Reed's extensive history of using excessive force toward inmates was sufficient to put the supervisors on notice of his misconduct, and was sufficiently blatant to require them to act. . . .Reed's history of 'obvious, flagrant, [and] rampant' use of excessive force and related conduct, such as using racial epithets, profanity, and threats, and losing his temper with inmates provided meaningful notice to the supervisors that they needed to correct a constitutional violation. . . Indeed, of the three prior, separate investigations into Reed's excessive use of force, two involved pushing an inmate to the floor. Three of those internal affairs investigations were for using excessive force against restrained inmates. Quinette has sufficiently alleged that each of the supervisors was aware of Reed's history of using excessive force, yet they failed to do anything to 'remedy the situation.'. .Accepting the complaint's well-pleaded allegations as true and construing them in the light most favorable to Quinette, the supervisors knew of the danger that Reed presented and took no action to appropriately supervise or discipline him. The district court correctly determined that they were involved in internal affairs investigations involving Reed in

varying capacities, and each of them failed to adequately discipline, supervise, or train Reed. Since Quinette has sufficiently alleged that the supervisors violated his clearly established constitutional rights, I would conclude that they are not entitled to qualified immunity.")

Bryant v. Buck, No. 19-11913, 2019 WL 6609698, at *4 (11th Cir. Dec. 5, 2019) (not reported) ("The district court also denied Dr. Buck qualified immunity because there 'remain[ed] material questions of fact as to whether, as a supervisor, [Dr.] Buck's policies and customs resulted in deliberate indifference.'. . Specifically, the district court concluded that Dr. Buck could be liable based on two of the infirmary's policies or customs: (a) the treatment policy made little distinction between nurses and doctors; and (b) the infirmary was severely understaffed. . . The district court's analysis seems to conflate the municipal liability claim that was initially pled against Orange County with the supervisory liability claim pled against Dr. Buck. The plaintiffs initially alleged that Orange County's policies and practices—including its failure to properly fund, train, and staff the Orange County Corrections infirmary—resulted in deliberate indifference. That claim was dismissed because the plaintiffs did not plausibly allege that such policies or customs existed. The supervisory liability claim against Dr. Buck, in contrast, asserted that he failed to properly supervise Mr. Gracia's treatment and care. . .A supervisor cannot be liable under § 1983 based on vicarious liability or respondeat superior. . . But a supervisor may be liable if he 'personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation.'. . Dr. Buck did not personally participate in the unconstitutional conduct, as discussed above. The plaintiffs assert, however, that Dr. Buck caused the constitutional violation by failing to adequately train his nursing staff in recognizing the onset of sepsis. He may be liable for failure to train if he had 'actual or constructive notice that a particular omission in the[ ] training program cause[d] [his] employees to violate citizens' constitutional rights, and 'armed with that knowledge,' chose to retain the training program. . . Actual or constructive notice may be established by showing a pattern of similar constitutional violations by untrained employees. . . There is no evidence that, prior to this incident, Dr. Buck had reason to believe the nurses on his staff lacked adequate training to recognize sepsis. Although the plaintiffs alleged that there had been other incidents of deliberate indifference by medical staff at Orange County Corrections, none of them involved sepsis. Accordingly, Dr. Buck cannot be liable for failure to train.")

Piazza v. Jefferson County, Alabama, 923 F.3d 947, 957-58 (11th Cir. 2019) ("The standard by which a supervisor can be held liable for the actions of a subordinate is 'extremely rigorous.'. . Supervisory officials cannot be held liable under § 1983 for unconstitutional acts by their subordinates based on respondeat-superior or vicarious-liability principles. . . Instead, absent allegations of personal participation—of which there are none here concerning Hale or Eddings—supervisory liability is permissible only if there is a 'causal connection' between a supervisor's actions and the alleged constitutional violation. . . One way that a plaintiff can show the requisite causal connection is by demonstrating that a supervisor's policy or custom resulted in 'deliberate indifference to constitutional rights.'. . A plaintiff can also show that the *absence* of a policy led to a violation of constitutional rights. . . Either way, though, to prove that a policy or its absence

caused a constitutional harm, a plaintiff must point to multiple incidents, . . or multiple reports of prior misconduct by a particular employee[.] . . . Hunter has not made the requisite showing with respect to either of the two theories that underlie his supervisory-liability claims against Hale and Eddings. . . . Because Hunter's excessive-force claim focuses solely on Hinkle's episode—'a single incident of unconstitutional activity'—it does not, as a matter of law, state a claim against Hale and Eddings for supervisory liability. . . . The same goes for the supervisory-liability claims predicated on an alleged deliberate indifference to Hinkle's serious medical needs. Hunter asserts that Hinkle was an alcoholic who was neither treated for his alcoholism nor provided his prescription medication upon admission to the jail. Hunter does not, though, point to other instances of inadequate medical screening or delayed medical care at the Birmingham City Jail, nor does he allege any facts indicating that Hale or Eddings were on notice of the officers' alleged deliberate indifference. . . Because Hunter's complaint contains only conclusory assertions that jail officers were indifferent to Hinkle's needs pursuant to certain policies or customs—without alleging any facts concerning those policies or customs—he has not stated a claim for supervisory liability for deliberate indifference to serious medical needs. . . Accordingly, we hold that Hunter has failed to plead facts sufficient to sustain supervisory-liability claims against Sheriff Hale or Captain Eddings and that the district court therefore erred in rejecting the officers' qualified-immunity defenses to those claims.")

Johnson v. Conway, No. 16-12129, 2017 WL 2080251, at *9 (11th Cir. May 15, 2017) (not reported) ("Because Johnson has not shown that the Sheriff was subjectively aware of a substantial risk that excessive force would be used against inmates simply for exercising their right to refuse medical treatment, he has not established that the Sheriff was deliberately indifferent to his constitutional rights. . . Accordingly, Sheriff Conway is not liable as a supervisor under § 1983, and we affirm the grant of summary judgment in his favor.")

Shuford v. Conway, 666 F. App'x 811, 818-19 (11th Cir. 2016) (per curiam) ("The plaintiffs have established a material question of fact as to whether Sheriff Conway and Lt. Col. Sims were on notice of a history of widespread abuse, and also whether Sheriff Conway's custom or policy resulted in deliberate indifference to their constitutional rights. However, neither method of proving the necessary causal connection for supervisory liability can be established for Col. Pinkard in this case. First, deprivations constituting 'widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.'. . Plaintiffs provided eight video discs full of RRT [Rapid Response Team] incidents over the years. They submitted affidavits from seven other pretrial detainees who say they were subjected to excessive force by the RRT. Sheriff Conway testified in his deposition that he viewed many RRT videos, including at least fifty that involved the use of a restraint chair. Sheriff Conway also acknowledged he received 'very vocal ... criticism' from Lt. Cofer about the RRT's actions before Lt. Cofer took charge of the RRT. With regard to Lt. Col. Sims, he reviewed and signed off on every single written report of an RRT entry and use of force. He reviewed hundreds of RRT videos over the last five years, referring some for further investigation. He was also a direct overseer of the RRT, selected the RRT staff, and trained them. This raises a material

issue of fact whether Lt. Col. Sims was on notice of continued occurrences that violated detainees' constitutional rights. The district court ruling that there is 'no evidence in the record' putting Sheriff Conway or Lt. Col. Sims on notice is simply not borne out by our examination of the record. There is also an issue of material fact about whether Sheriff Conway's policies resulted in deliberate indifference to plaintiffs' constitutional rights. 'Deliberate indifference requires the following: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than gross negligence.'. . Again, there is evidence that Sheriff Conway received criticisms of the RRT and watched many videos of RRT incidents. Lt. Cofer, the former head of the RRT, warned Sheriff Conway that he believed unnecessary force was being used. And Sheriff Conway said that at least some others in the Sheriff's office had raised these concerns as well. There is therefore a material question of fact about whether Sheriff Conway was on notice of a risk of serious harm, disregarded it, and did so by conduct that is more than gross negligence. On the other hand, the record establishes that Lt. Col. Sims referred many incidents of RRT force for further investigation by the Professional Standards Unit of the Sheriff's Department. Therefore, plaintiffs have failed to make a sufficient showing of grossly negligent conduct as to Lt. Col. Sims. We affirm the district court in its finding that Lt. Col. Sims did not have supervisory liability under this method of proving a causal connection. There are material questions of fact about whether Sheriff Conway or Lt. Col. Sims were on notice about a history of widespread abuse and whether Sheriff Conway had subjective knowledge of a risk of serious harm, disregarded that risk, and did so by conduct constituting more than gross negligence. As a result, we reverse the district court's grant of summary judgment on these issues. For Col. Pinkard, we affirm the district court finding that he has no supervisory liability under either method of proof. Col. Pinkard did have command and oversight responsibilities for the RRT, but there is no evidence he took any role in overseeing the RRT's use of force, had any notice of the alleged widespread abuse, or was grossly negligent in ignoring a risk of serious harm. Instead, he largely delegated these duties to the RRT Commander. We also affirm the district court finding that Lt. Col. Sims has no supervisory liability under the deliberate indifference standard, because there is no evidence that he had subjective knowledge of any serious risk that he disregarded by conduct that was more than grossly negligent.")

Smith v. LePage, 834 F.3d 1285, 1298-99 (11th Cir. 2016) ("First, no supervisory liability can arise from the second tasing of Mr. Smith because we have concluded it was not a constitutional violation. . . Second, the plaintiffs' § 1983 supervisory liability claim related to the shooting fails because Sgt. Gamble neither participated in the shooting nor had a legally sufficient causal connection to it. The District Court properly rejected the plaintiffs' argument, based on the out-of-circuit case of *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002), that Sgt. Gamble personally participated by escalating the situation. Under this Circuit's law, Sgt. Gamble did not personally participate because he did not shoot at Mr. Smith or order any of the officers to do so, and his mere presence at the scene was not enough. . . Whether Sgt. Gamble's actions were causally connected to the shooting, however, is a closer call. As the District Court noted, Sgt. Gamble may have made 'a tragic mistake of judgment' by not calling in the Special Weapons and Tactics ("SWAT") team. The DeKalb County Police Department Manual states that the SWAT team handles 'barricaded

suspects,' in order to 'contain the situation and attempt to negotiate a peaceful end to the situation.' Once Mr. Smith closed himself in his bathroom and refused to come out, there may have been a so-called barricade situation. . . . Nevertheless, Sgt. Gamble's possible mistake of judgment does not rise to the level of creating a causal connection between his acts and the shooting, because there are no facts suggesting that he either directed the officers to act unlawfully or knew they would.")

Estate of Owens v. GEO Group, Inc., 660 F. App'x 763, 773-74 (11th Cir. 2016) ("[W]e cannot find any support in the record for Leeper's claim that uninterrupted supervision was required on the basis that the facility had mixed medium-security and close-custody inmates in the same classroom. First, Graceville was designed to house close-custody inmates; close-custody inmates were not interspersed in a medium-security facility. Second, courts have generally declined to impose liability where the complained-of danger resulted from mixing inmate custody classifications. . . And in any event, Leeper has not shown that GEO's practice of allowing mixed-custody classes in this penal institution resulted in wide-spread abuses such that prison officials must have known about the palpable danger of serious injury. Finally, Leeper raises still other claims against Warden Henry and Assistant Warden Stewart. The law by now is clear that a supervisor may be held liable for the actions of his subordinates under § 1983 if he personally participates in the act that causes the constitutional violation or where there is a causal connection between his actions and the constitutional violation that his subordinates commit. . . . On this largely barren record, however, Leeper's supervisory liability claims against Warden Henry and Assistant Warden Stewart fail. First, as we've already observed, there was no Eighth Amendment constitutional violation on the part of their subordinates. Second, Leeper has offered no record evidence that Henry or Stewart had personally participated in any way in the events surrounding the attack, or that they had any knowledge of prior attacks under remotely similar circumstances, or had any specific knowledge about the events involved in Owens's attack.Nor does her claim that Stewart was negligent in his training of security staff fare any better. Notably, a supervisory official is not liable under § 1983 for failure to train unless: (1) his failure to train amounts to deliberate indifference of the rights of persons his subordinates come into contact with; and (2) the failure has actually caused the injury of which the plaintiff complains. . . Thus, Leeper must demonstrate that Stewart had 'actual or constructive notice that a particular omission in [GEO's] training program cause[d] [GEO] employees to violate citizens' constitutional rights' and, despite that notice, Stewart chose to retain the deficient training program. . . To establish that a supervisor had actual or constructive notice of the deficiency of training, '[a] pattern of similar constitutional violations by untrained employees is ordinarily necessary.'. . Leeper has not made this showing. Even assuming Stewart's training program was deficient and even if that failure to adequately train or supervise did cause Owens' death, the record forecloses the conclusion that Stewart had actual or constructive notice of the deficiency of the training. There is no evidence that any inmate at Graceville had suffered any harm as a result of an instructor leaving a classroom; therefore, the single incident involving Owens can hardly be termed the result of 'a pattern of similar constitutional violations.'. . Absent any evidence that his subordinates were engaged in behavior that violated the inmates' Eighth Amendment right to be protected from violence at the hands of

other inmates, Stewart had no constitutional obligation to train security guard Strickland or anyone else in some discernibly-different way. Thus, on this record, Leeper cannot establish a constitutional violation grounded in the failure to train or supervise personnel to adequately handle the situation in which an instructor needed to leave the classroom.")

Magwood v. Sec'y, Florida Dep't of Corr., 652 F. App'x 841, 844-45 (11th Cir. June 15, 2016) ("Supervisors are only liable if there is a causal connection between their actions and the injury, and nothing in Magwood's complaint alleges that they personally participated in his medical care. . . Additionally, although Magwood's complaint links several of these defendants to the grievances he submitted, his complaint does not explain how many grievances were sent, what the grievances stated, or why attending the jail's sick-call was an inadequate remedy. Therefore, because Magwood did not show, beyond a speculative level, a causal connection between these defendants and his allegedly inadequate medical care, the district court did not err in granting a motion to dismiss regarding them.")

Bowen v. Warden Baldwin State Prison, 826 F.3d 1312, 1324-25 (11th Cir. 2016) ("[T]he administrator alleges that Deputy Warden Underwood and Officer Davis were *actually aware* of a substantial and seemingly conspicuous risk posed to Mr. Bowen by allowing him to remain in the small cell with Merkerson. . . Even assuming that these defendant officials were unaware of Mr. Bowen's removal request or Merkerson's mother's warning, this lack of awareness does not serve to negate or even to discount the facts they allegedly did know. We conclude, therefore, that the administrator has set forth in his second amended complaint sufficient facts showing that Deputy Warden Underwood and Officer Davis were both 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and ... also dr[e]w the inference.'. . . Because this was the sole disputed element of his claims against these defendants, dismissal was inappropriate. . . .Deputy Warden Underwood and Officer Davis were therefore on notice in March 2010 that 'the law of this Circuit, as expressed in *Cottone*, clearly established that the defendants' total failure to investigate—or take any other action to mitigate—the substantial risk of serious harm that [Merkerson] posed to [Mr. Bowen] constituted unconstitutional deliberate indifference to [Mr. Bowen's] Eighth Amendment rights.'. . . These defendants therefore are not entitled to qualified immunity at this stage of the proceedings.")

McNeeley v. Wilson, No. 15-14023, 2016 WL 1730651, at *6 (11th Cir. May 2, 2016) (not published) ("Here, there is evidence in the record that both Bertuzzi and Wilson knew McNeeley had been sprayed with pepper spray; both were present an hour later when he was put in the four-point restraints chair, and complaining about the effects of pepper spray; and neither did anything to allow him proper decontamination. The Defendants also admit in the reply brief that Lieutenant Wilson knew McNeeley was being held in the chair without a decontamination shower for several hours after being sprayed with chemical agents. *Danley* clearly established that these allegations articulate an Eighth Amendment violation, and thus Lieutenant Wilson and Corporal Bertuzzi were not entitled to summary judgment on the supervisory liability claim.")

Smith v. Owens, 625 F.3d 924, 928 (11th Cir. 2015) ("As to Supervisory Defendant Bruton, Plaintiff alleged in his complaint that Bruton acted with deliberate indifference to his safety by failing to protect him from the violent cellmate who stabbed him. By asserting that Bruton had sole authority to determine cell assignments and that he used this authority to personally ensure that all of Plaintiff's cellmates were gang members, Plaintiff sufficiently alleged a causal connection for § 1983 purposes. . . Moreover, Plaintiff adequately alleged that Bruton knew of the danger and had the means to cure it. . . Specifically, Plaintiff alleged that his cellmate was 'known for stabbing incidents,' and that Bruton knew or should have known of this fact. Accordingly, when viewed in the light most favorable to Plaintiff, he alleged that there was a substantial risk of serious harm to him from attack by this cellmate. . . Moreover, by asserting that Bruton controlled cell assignment, Plaintiff sufficiently alleged that Bruton had the means of preventing the danger. Accordingly, the district court erred by dismissing Plaintiff's § 1983 deliberate indifference claim against Bruton, and we vacate and remand for further proceedings as to this claim.")

Smith v. City of Sumiton, 13-13416, 2014 WL 4211070, *2-*4 (11th Cir. Aug. 27, 2014) (unpublished) ("Our *Franklin* decision is binding precedent that Smith's 'knew or should have known' allegation 'falls short of [the] standard' for deliberate indifference. . . To state a claim for deliberate indifference, a plaintiff must show: '(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than gross negligence.'. . Absent an allegation that the supervisor or city '*actually knew* of the serious risk [the offending corrections officer] posed,'. . . there is no claim. We note that a paragraph of Smith's second amended complaint does allege that: 'Defendants and its officials knew, should have known, or participated in acts of sexual harassment and abuse inside the City of Sumiton Jail or by Sumiton Police Officers or employees in the past and *were aware* of previous misconduct of [Daughtery], but failed to correct those actions.'. . Another paragraph alleges that 'Defendants *had knowledge* of these acts and the potential for this kind of action taken by ... Daughtery based on previous similar acts he had committed.'. . Smith seems to have abandoned those allegations in her brief, which argues that 'knew or should have known' is enough. . . Even if she has not abandoned any argument based on those allegations, her second amended complaint is still due to be dismissed because those allegations are too conclusory to state a claim. . . . There is no allegation that connects Daughtery's alleged earlier misconduct with the defendants' alleged knowledge of it. . . . Disregarding, as our two-prong approach requires us to do, Smith's conclusory allegations about the City and Chief Burnett's awareness or knowledge of Daughtery's past misconduct, paragraph nos. 12–15 give us the following properly pleaded facts: (1) in mid-October 2010, Smith was arrested by the City's police department for unpaid traffic tickets and taken to the City's jail; (2) on her first night in jail, Daughtery, a City police officer, threatened and sexually assaulted her; (3) some unspecified time before assaulting Smith, Daughtery had 'committed sexual harassment and/or sexual assault against individuals arrested or incarcerated by the City.' While those allegations are enough to plead that Smith was assaulted, they do not support a plausible claim that the City or Chief Burnett was aware of or knew about Daughtery's alleged prior sexual harassment or assaults. . . Nor has Smith provided factual matter that would support a plausible claim for supervisory or municipal liability on a ground other than the City's or Chief Burnett's alleged knowledge of Daughtery's

prior misconduct. For these reasons, the district court's judgment dismissing Smith's second amended complaint is **AFFIRMED.**")

Hatcher ex rel. Hatcher v. Fusco, 570 F. App'x 874, 877-78 (11th Cir. 2014) ("In this case, the well-pled factual allegations support a reasonable inference that Fusco personally attempted to dissuade Hatcher from participating in 'Day of Silence.' According to the complaint, Fusco repeatedly threatened Hatcher and her parents with 'consequences' for Hatcher's participation. We reject Fusco's argument that the only reasonable inference is that she was following the superintendent's orders. . . The allegations also support a reasonable inference that Fusco either directed that Hatcher be disciplined or actually knew that she would be and failed to intervene. The complaint indicates that Fusco directed teachers to report on students who were participating in 'Day of Silence.' Hatcher was one such student. Hatcher was summoned to the dean''s office and informed that she was being punished because Fusco had 'told [her] not to do this.' The next business day, Fusco reported on Hatcher's discipline to the superintendent. It is reasonable to infer that Fusco may have caused or knowingly failed to prevent Hatcher's in-school suspension.")

Key v. Lundy, 563 F. App'x 758, 760 (11th Cir. 2014) ("As in our recent decision in *Franklin,* the Defendants here argue that a claim of deliberate indifference is no longer sufficient after *Ashcroft v. Iqbal* . . . . Instead they argue that Key must allege a purposeful and intentional violation of her constitutional rights. However, we rejected that argument in *Franklin,* another Eighth Amendment case. . . As we noted in *Franklin,* the factors necessary to establish a § 1983 claim will vary with the constitutional provision at issue. . . We also distinguished *Iqbal*—which involved claims of invidious discrimination—from the Eighth Amendment deliberate indifference claim at issue in *Franklin.* . . Similarly, Key's § 1983 claims against the Defendants for violations of the Eighth Amendment can survive without allegations of purposeful and intentional conduct as long as she meets this Circuit's standard for deliberate indifference. *Franklin* also addressed the sufficiency of allegations of supervisory liability under the deliberate indifference standard in a factual scenario strikingly similar to that alleged by Key. . . Because the parties and the district court did not have the benefit of our decision in *Franklin,* we remand with instructions that the district court give Key an opportunity to amend her complaint in accordance with that decision. . . The Defendants may then renew their motion to dismiss if warranted.")

Keith v. DeKalb County, Ga., 749 F.3d 1034, 1048 & n.46, 1050, 1053 & n.56 (11th Cir. 2014) ("[I]n order to prove that Sheriff Brown violated Cook's constitutional rights, Keith must show that the Sheriff Brown had subjective knowledge of a risk of serious harm to Cook and that he recklessly disregarded that risk. . . Keith does not allege that Sheriff Brown personally participated in the alleged constitutional violations. Therefore, if Sheriff Brown is to be held liable, he must have failed to correct a widespread pattern of constitutional violations or he must [have] adopted a custom or policy that deprived Cook of his constitutional rights. . . Keith does not allege that Sheriff Brown directed his subordinates to act unlawfully or that he knew that his subordinates would act unlawfully and that he failed to stop them from doing so. . . .Distilled to its essence, Keith's main allegation is that Sheriff Brown created a substantial risk of harm by relying on MHM

staff's determination—that an inmate did not pose a substantial risk of harm to other inmates—in housing the inmate. Of course, Keith does not overtly make this claim; to do so would reveal that Keith's actual complaint is with MHM staff's independent (and, in retrospect, possibly mistaken) determination that Adan did not pose a risk of harm to other inmates. Instead, Keith argues that Sheriff Brown created a substantial risk of serious harm by 'failing' to segregate mental health inmates with violent histories from those with nonviolent histories and by 'failing' to separate mental health inmates charged with a violent crime from those charged with a nonviolent crime. . . In effect, Keith aims to hold Sheriff Brown liable for not disregarding the expert medical opinions of MHM staff. That is, because MHM staff could mistakenly determine that a mental health inmate does not pose a risk of harm to other inmates when in fact he does, Sheriff Brown must take affirmative steps to avoid the mistake. . . .Keith's theory of liability does not square with the law. Simply put, the law does not require that Sheriff Brown ignore the determination and recommendation of MHM staff. A sheriff cannot be held liable for failing to segregate mental health inmates whom trained medical personnel have concluded do not present a risk of harm to themselves or others. . . Moreover, even if we assume that Sheriff Brown violated Cook's constitutional rights, Keith has not demonstrated that it is 'clearly established' that a sheriff has a constitutional obligation to disregard the medical expertise of the very contractors he has hired to ensure that the inmates' mental health is tended to. . . . Although the Supreme Court has left open the possibility that a single incident may prove sufficient to hold a supervisor liable for a failure to train, [citing *City of Canton*] we decline to use this case as the vehicle for flushing out the Supreme Court's hypothetical basis for § 1983 relief. In *Canton,* the Supreme Court hypothesized a police force that gives officers firearms but fails to provide any training regarding the constitutional limitations on the use of deadly force, concluding that the need to provide such training would be 'so obvious' that the failure to do so could amount to deliberate indifference. . . It is not similarly obvious that the 'failure to train' at issue in this case amounts to deliberate indifference. . . .As the Supreme Court has indicated, '[a] [supervisor's] culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.' *Connick,* —— U.S at ——, 131 S.Ct. at 1359. Keith's claim that Sheriff Brown violated Cook's constitutional rights by failing to adequately train detention officers is especially tenuous because not only does she fail to demonstrate that Sheriff Brown was on notice, she also fails to demonstrate how 'better training' would have prevented the incident leading to Cook's death. Therefore, like her claims discussed in subpart A, her failure to train claim must also fail.")

Harrison v. Culliver, 746 F.3d 1288, 1299, 1300 (11th Cir. 2014) ("The evidence demonstrates that Warden Culliver was on notice that inmate-on-inmate assaults occurred on the back hallway; his signature is on each of the incident reports detailing assaults that occurred on the back hallway from 2005 until August 6, 2008. However, the incident reports indicate that only four assaults occurred on the back hallway from 2005 until the day Harrison was assaulted. . . Although assaults did occur throughout Holman, and some did involve weapons fashioned out of a utility knife, box cutter, or razor, . . .the evidence of inmate-on-inmate assault involving weapons does not indicate that inmates were 'exposed to something even approaching the constant threat of violence.'. . Holman is a large institution—according to the District Court's undisputed finding, Holman

housed between 830 and 990 inmates during the relevant time period—and the thirty-three incidents involving weapons, only four of which occurred on the back hallway, are hardly sufficient to demonstrate that Holman was a prison 'where violence and terror reign.'. . Similarly, Holman's policies for monitoring the back hallway did not create a substantial risk of serious harm. The evidence shows that, although a detention officer was not permanently stationed on the back hallway, at least one was assigned as a rover with responsibility for monitoring the back hallway. In addition, a camera monitored the back hallway, and although it did not record, it provided a live stream that a detention officer monitored twenty-four hours a day. . .Additionally, Warden Culliver took reasonable steps to reduce the inmate traffic on the back hallway, relocating the Masjid . . .and library to other areas of Holman. The limited number of inmate-on-inmate assaults on the back hallway from 2005 until August 2008 indicates that the area was fairly secure already. Although placing a detention officer on the back hallway to monitor inmates may have improved the security at Holman, Warden Culliver's decision not to do so did not create a substantial risk of harm. . . The limited number of assaults involving weapons fashioned from box cutters or razor blades—around eleven of a total thirty-three assaults involving weapons over a three year period—is insufficient to establish that Warden Culliver was constructively aware of a pattern of detention officers failing to follow the Standard Operating Procedures. Although we are unable to pin down precisely how many assaults involved box cutters procured through the hobby shop—five incident reports indicate that a box cutter was used, but they do not indicate from where the inmate obtained the box cutter. . .the record fails to demonstrate that any lapses in oversight of cutting instruments created a substantial risk of excessive inmate-on-inmate violence.")

Franklin v. Curry, 738 F.3d 1246, 1250, 1251, 1252 n.7 (11th Cir. 2013) (per curiam) [Note Judge Ripple from 7th Cir. sitting by designation] ("In analyzing Franklin's claims against the Supervisory Defendants, the district court erred by finding allegations that they 'knew or should have known' of a substantial risk of serious harm sufficient to state a deliberate indifference claim. Deliberate indifference requires more than constructive knowledge. The district court began its analysis correctly, stating that, 'to establish supervisory liability under § 1983, a plaintiff must allege that the supervisor personally participated in the alleged unconstitutional conduct or that there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation.'. . The district court then explained that a plaintiff can show a causal connection, inter alia, when 'the supervisor's policy or custom resulted in deliberate indifference.'. . To this point, the district court's analysis was sound. However, the court then went astray when it concluded that Franklin had alleged a causal connection, stating: Franklin alleges that a causal connection exists because Sheriff Curry was *on notice* of Officer Gay's alleged conduct and the need to correct this practice, but failed to do so, and because Sheriff Curry's policy or custom resulted in deliberate indifference, and [w]ith respect to Officers Samaniego, Burchfield, Fondren, Corbell and George, Franklin alleges that they too *knew or should have known* of Officer Gay's pattern of inappropriate conduct with female detainees and inmates but 'were deliberately indifferent....' . . . In reaching these conclusions, the district court neglected to analyze whether Franklin had properly alleged deliberate indifference. In fact, the elements of deliberate indifference do not appear anywhere in the district court's order. . .Its first step should have been

to identify the precise constitutional violation charged—in this case, deliberate indifference—and to explain what the violation requires. . .Had the district court done so, Franklin's failure to allege the required elements would have been apparent. Deliberate indifference requires the following: '(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than gross negligence.'. . Franklin's allegations that the Supervisory Defendants 'knew or should have known' of a substantial risk clearly fall short of this standard. . . . Franklin failed to allege the Supervisory Defendants *actually knew* of the serious risk Gay posed even in the most conclusory fashion. . . . As part of their appeal, Appellants argue that under *Iqbal* supervisors can only be liable for constitutional violations if a plaintiff alleges purposeful and intentional conduct. We reject this argument. Appellants ignore the *Iqbal* Court's caution that '[t]he factors necessary to establish a [claim] will vary with the constitutional provision at issue.'. . The discussion of purposeful intent in *Iqbal* pertained to claims of invidious discrimination, not deliberate indifference. . . Nothing in *Iqbal* suggests that supervisors cannot be held liable for deliberate indifference toward risks posed by their subordinates or that such liability requires a higher *mens rea* than any other deliberate indifference claim. So long as a supervisor's own conduct-and not that of his subordinate-constitutes deliberate indifference, his status as a supervisor changes nothing.")

Estate of Bearden ex rel. Bearden v. Anglin, No. 12–15572, 2013 WL 5788569, *2-*4 (11th Cir. Oct. 29, 2013) (not published) ("As a supervisor, Anglin can be liable for either his personal participation in the alleged constitutional violation or his actions as a supervisor in creating a custom or policy that caused his subordinates to commit the constitutional violation. . . 'The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so.'. . 'The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.'. .Under this standard, perfect efforts are not required of jailers, and where the jail has standard operating procedures to protect at-risk detainees, these usually will be sufficient to confer qualified immunity, even when aspects of the system are imperfect. . . Additionally, the lack of a written suicide policy, in and of itself, does not impose liability automatically. . . In this case, there are no substantiated allegations that Anglin was present at the time that Bearden committed suicide or that he was involved personally in her care at the jail. . . As a result, the only possible basis for liability as to Anglin is in his role as a supervisor and jail administrator, establishing the anti-suicide procedures at the jail and overseeing their implementation. The Estate faults Anglin for failing to create a suicide policy, changing the medical staffing plan to eliminate some off-site treatment, and maintaining cells with anchor points. To establish knowledge of serious risk, the Estate points to Anglin's knowledge of the previous suicides at the Bay County Jail, all of which were prior to Anglin's assumption of control of the jail. This was the key fact relied upon by the district court in altering its judgment. There is no evidence on the record, however, as to whether the suicide rate was unusually high or whether the suicides were the result of the failure of a common aspect of the jail's anti-suicide program. Without this type of information, Anglin could not have possessed personal knowledge of a serious risk to suicidal prisoners that was created by

the jail's medical program so that he could be held to have purposefully or recklessly disregarded such risk. Additionally, these prior suicides occurred under the private administrator's system, portions of which had been adjusted. Under the new policies, no suicides occurred that could have put Anglin on notice of serious risks. Although it appears that Anglin was familiar with these incidents, at least somewhat, based on his role in overseeing the county's contract and planning the jail's transition, no evidence suggests that he had particular knowledge about how those inmates committed suicide so as to alert him of serious problems with the cells. In fact, out of the three cases of suicides executed by a ligature device, at least one of them occurred in a manner substantially different from Bearden's suicide, namely in a bathroom rather than in a cell. As a result, the district court and the Estate both misjudged the value of this knowledge in bolstering the Estate's claim. These facts do not suggest that Anglin was aware of the potential suicide risk associated with the mesh door being used as an anchor point. The Estate's position would impose a duty to suicide-proof virtually all cells, a duty not required by the Constitution. Without knowledge of the particular serious risk at issue, Anglin could not have been deliberately indifferent, and therefore no § 1983 action can be maintained.")

Hendrix v. Tucker, No. 13–10050, 2013 WL 4504595, *1, *2 (11th Cir. Aug. 26, 2013) (not published) ("After careful consideration, we conclude that the district court did not err in dismissing Hendrix's claim under § 1915(e)(2)(B)(ii) because the complaint did not 'contain sufficient factual matter, accepted as true, to state a claim to relief' against the defendants, based on a theory of supervisory liability. Supervisors can be held 'liable under ... § 1983, for the unconstitutional acts of [their] subordinates if [they] personally participated in the allegedly unconstitutional conduct or if there is a causal connection between [their] actions ... and the alleged constitutional deprivation.'. . A plaintiff may establish a causal connection by showing that: (1) 'a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation and he fail[ed] to do so'; (2) 'the supervisor's improper custom or policy le[d] to deliberate indifference to constitutional rights'; or (3) 'facts support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so.'. . Even if Hendrix's complaint is construed liberally, . . it was insufficient to support supervisory liability. . . . Hendrix's amended complaint alleges two potential grounds for supervisory liability. First, Hendrix attempts to establish a causal connection by arguing that the defendants were 'on notice of the need to correct the alleged deprivation and [they] fail[ed] to do so.'. . Hendrix asserts that the defendants were on notice because they were aware of his administrative grievances and state court litigation. However, '[t]he deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.'. . And, as demonstrated by, for example, the outcome of the state court litigation, which determined that Hendrix's claims had no merit, there was not 'obvious, flagrant, [and] rampant' abuse here, sufficient to support supervisory liability. Second, Hendrix's complaint states there is 'a long standing policy, practice, and custom of treating similarly situated prisoners differently in this application of gain time.'. . However, Hendrix does not plead any specific facts to support this

conclusory statement. Hendrix's 'vague and conclusory' statements are insufficient to support supervisory liability.")

Goodman v. Kimbrough, 718 F.3d 1325, 1334 (11th Cir. 2013) ("Goodman has adduced no evidence that either Boland or Feemster was subjectively aware of the peril to which Goodman was exposed on the night in question, and that failure is fatal to his claim. And though Goodman points to the officers' failure to conduct head counts and cell checks and their disengagement of the emergency call buttons in support of his assertions, the fact that the officers deviated from policy or were unreasonable in their actions—even grossly so—does not relieve Goodman of the burden of showing that the officers were subjectively aware of the risk; in other words, he cannot say, 'Well, they should have known.' Were we to accept that theory of liability, the deliberate indifference standard would be silently metamorphosed into a font of tort law—a brand of negligence redux—which the Supreme Court has made abundantly clear it is not. . . . Our decision in this case should not be taken to condone Boland and Feemster's actions. To the contrary, we are disturbed by the dereliction of duty that facilitated the violence visited upon Goodman while he was under the officers' charge. But we are federal judges, not prison administrators, and the standards for coloring a constitutional claim in this area of the law are exacting for the very purpose of preventing federal judges like us from meddling, even by our best lights, in the administration of our nation's prisons. . . . As we see it, the fact that jailers in Clayton County did not enter every cell in accordance with policy and commonly deactivated emergency call buttons is simply insufficient to meet the 'extremely rigorous standard for supervisory liability' that our cases demand in cases such as these. . . We are unable to conclude that these policy violations are sufficient to create a genuine issue of fact as to the existence of a custom, so settled and permanent as to have the force of law, that ultimately resulted in deliberate indifference to a substantial risk of serious harm to Goodman. . . That is especially so in light of the undisputed evidence that Officers Boland and Feemster were disciplined—and in fact recommended for termination—following their violations of Sheriff's Department policy on the night Goodman was injured. . . And all of that says nothing about the remarkable fact that Goodman's complaint is bereft of any allegation that Sheriff's Department policy or custom actually caused Goodman's injuries. The district court did not err in granting summary judgment for Sheriff Kimbrough.")

McCreary v. Parker, 456 F. App'x 790, ___ (11th Cir. 2012) ("'[S]upervisors can be held liable for subordinates' use of excessive force against inmates in violation of the Eighth Amendment on the basis of supervisory liability under 42 U.S.C. § 1983. Supervisory liability under § 1983 occurs when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation.' *Valdes v. Crosby*, 450 F.3d 1231, 1236 (11th Cir.2006) (quotations and citations omitted). There is no allegation that Parker himself directly took part in the decision to place McCreary in Evans's cell. As for the other method by which Parker could be responsible for his subordinates' actions, a 'causal connection may be established when: 1) a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he or she fails to do so; 2) a supervisor's custom or policy results in deliberate indifference to

constitutional rights; or 3) facts support an inference that the supervisor directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them from doing so.'. . Parker argues that he is being denied immunity simply because a death occurred in an overcrowded jail. However, Plaintiff has alleged plausible facts indicating that Parker met two of the *Valdes* factors. . . .Plaintiff alleged that Parker instituted a policy of double-celling inmates who were in disciplinary or administrative holding. Here, due to Parker's double-celling policy, Evans was not allowed to be quartered by himself, and this ultimately resulted in McCreary—who had not yet been convicted of any crime—being celled with an inmate who had threatened to cause serious injury to any young black men who were quartered with him. Plaintiff also alleges that Parker had publically admitted that the jail was dangerous due to the overcrowding. Parker had received an inmate Self Report Survey that indicated dangerous conditions, but Plaintiff alleges that Parker's response was merely to complain about inmates being allowed to participate in a survey. Plaintiff also alleged that Parker himself had been informed by inmates that staff members were placing certain inmates together in order to increase the likelihood of violence—the same thing that Plaintiff alleges happened to McCreary. Given Parker's alleged knowledge of the increasing frequency of inmate-on-inmate violence, Judge Edelstein's report, and allegations that inmates had repeatedly complained to Parker about being quartered with dangerous inmates and Parker's failure to correct same notwithstanding his ability to do so, as well as the operation of Parker's own policy of double-celling in the face of these circumstances, Plaintiff has pleaded sufficient facts to state a claim against Parker that is plausible on its face.")

AFL-CIO v. City of Miami, 637 F.3d 1178, 1190 (11th Cir. 2011) ("A supervisor can be held liable for the actions of his subordinates under § 1983 if he personally participates in the act that causes the constitutional violation or where there is a causal connection between his actions and the constitutional violation that his subordinates commit. . . A causal connection can be established if a supervisor has the ability to prevent or stop a known constitutional violation by exercising his supervisory authority and he fails to do so. . . The district court concluded that the plaintiffs failed to bring forward any evidence that the defendants directly violated the plaintiffs' constitutional rights or that they directed that the plaintiffs' constitutional rights be violated. The district court also concluded that the plaintiffs failed to adduce any evidence that the defendants knew that the plaintiffs' constitutional rights were being violated and failed to intervene. We agree.")

Doe v. School Bd. of Broward County, Fla., 604 F.3d 1248, 1266, 1267 (11th Cir. 2010) ("Scavella did not personally participate in Hoever's sexual assault of Doe. Therefore to impose liability on Scavella for Hoever's constitutional violation, Doe must establish Scavella's liability in a supervisory capacity. . . . She cannot do so. 'It is well established in this circuit that supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates' unless the 'supervisor personally participates in the alleged constitutional violation' or 'there is a causal connection between actions of the supervising official and the alleged constitutional deprivation.'. .This requisite causal connection can be established in the following circumstances: (1) when a 'history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so' or (2) when a supervisor's 'improper custom or policy

results in deliberate indifference to constitutional rights.'. . For a history of abuse to be sufficiently widespread to put a supervisor on notice, the abuse must be 'obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.'. . We agree with the district court that Doe cannot show the requisite causal connection between Scavella's actions and Hoever's sexual assault of Doe based on his notice of Hoever's 'history of widespread abuse' or his 'custom or policy' of deliberate indifference. 'The standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous.' . . Here, there is no basis for claiming that the two complaints against Hoever prior to Doe's sexual assault rose to the level of sexual harassment similarly 'obvious, flagrant, rampant and of continued duration.'. . Also insufficient is Doe's conclusory assertion of a custom or policy resulting in deliberate indifference to Doe's constitutional right to be free from sexual assault. . . . Accordingly, in the absence of evidence that Scavella personally participated in Doe's sexual assault, was on notice of a history of Hoever's widespread abuse of female students, or had a policy in place permitting such assaults, Doe cannot show that Scavella has supervisory liability for Hoever's deprivation of her constitutional right to be free from sexual abuse.").

Keating v. City of Miami, 598 F.3d 753, 763-65 (11th Cir. 2010) ("Timoney, Fernandez, Cannon, and Burden argue that the Protesters failed to allege sufficient facts to establish a causal connection between their supervisory actions and the alleged constitutional violations by the subordinate officers. Therefore, we first review whether the Protesters' complaint sufficiently alleges violations of the First Amendment under a theory of supervisory liability. . . . Specifically, the Protesters allege that Timoney, who is the Chief of the Miami Police Department, approved orders permitting the police line to advance while beating unarmed demonstrators and discharging projectiles and tear gas. . . The Protesters allege that Fernandez, Deputy Chief of the Miami Police Department and second in command to Timoney, made the decision to utilize 'herding techniques' to corral the demonstrators by personally directing the police lines to march northward. . . The Protesters allege that Cannon, a Captain in the Miami Police Department, directed the police lines to begin discharging weapons at the unarmed demonstrators. . . . In light of the Protesters' allegations, we find that they satisfied the heightened pleading requirement for a § 1983 claim under a supervisory liability theory by alleging a causal connection established by facts that support an inference that Timoney, Fernandez, and Cannon directed the subordinate officers to act unlawfully. . . The Protesters allege that Timoney, Fernandez, and Cannon committed a violation of the Protesters' First Amendment rights because their commands caused the subordinate police officers to disperse a crowd of peaceful demonstrators, including the Protesters, who were exercising their freedom of expression. . . . Because Timoney, Fernandez, and Cannon had the authority, and exercised that authority, to direct the subordinate officers to engage in unlawful acts to violate the Protesters' First Amendment rights, they likewise had the authority to stop the subordinate officers from exercising such unlawful acts. Therefore, because Timoney, Fernandez, and Cannon knew that the subordinate officers would engage in unlawful conduct in violation of the Protesters' First Amendment rights by directing such unlawful acts, they also violated the Protesters' First Amendment rights by failing to stop such action in their supervisory capacity. . . . However, Burden's alleged failure to stop the subordinate officers' unlawful activity did not

cause the violations of the First Amendment because Burden did not have the authority to stop the subordinate officers from violating the Protesters' First Amendment rights, even though he was an authorized decisionmaker. Burden did not direct the subordinate officers to engage in unlawful conduct that violated the Protesters' First Amendment rights. Burden's ranking as a Major in the Miami Police Department is subordinate to that of Chief Timoney, and Chief Timoney directed the subordinate officers to engage in unlawful conduct. Burden and Timoney stood next to each other during the demonstration. It would be unreasonable to have expected Burden to stop the subordinate officers' conduct after Timoney directed the subordinate officers to engage in unlawful acts because Burden did not have any authority to contravene Timoney's orders. Additionally, the Protesters only allege that Burden was present when the subordinate officers engaged in the unlawful activity. Therefore, Burden did not violate the Protesters' First Amendment rights by failing to stop the subordinate officers from conducting such unlawful activity because his inaction did not cause the constitutional violations. The Protesters failed to allege a constitutional violation against Burden, and thus, Burden is entitled to qualified immunity.").

Edwards v. Fulton County, No. 09-13591, 2010 WL 346383, at *1 (11th Cir. Jan. 29, 2010) (not published) ("Ronald Edwards, an African-American male employed as a Community Development Specialist in Fulton County's Department of Housing and Community Development, filed a § 1983 complaint against Fulton County and defendant-appellant Thomas Andrews, individually, alleging pay discrepancies. In the complaint, Edwards specifically alleged that he was paid less than women and white employees who performed the same duties, and that Andrews, as the County Manager, ignored memoranda notifying him of the discrepancies and continued the discriminatory practice. According to the complaint, Andrews's actions constituted violations of the Equal Protection and Due Process Clauses.. . . Here, Edwards alleged that Andrews personally made the decision to continue discriminatory pay practices after these practices were repeatedly brought to his attention. Taking this allegation as true, which we must at this stage of the proceedings, the complaint sufficiently alleges that Andrews's actions violated Edwards's clearly established constitutional right to equal protection and equal pay. Moreover, we disagree with Andrews's argument that the complaint failed to meet the heightened pleading requirement. The complaint contains 'a claim for relief that is plausible on its face,' and not merely 'an unadorned, the-defendant-unlawfully-harmed-me accusation.' [citing *Twombly* and *Iqbal*]").

Harper v. Lawrence County, Ala., 592 F.3d 1227, 1236, 1237 (11th Cir. 2010) ("Supervisory liability lies where the defendant personally participates in the unconstitutional conduct or there is a causal connection between such conduct and the defendant's actions. There are three ways to establish such a causal connection:

> when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. Alternatively, the causal connection may be established when a supervisor's custom or policy ... result[s] in deliberate indifference to constitutional rights or when facts support an

> inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so.

Cottone, 326 F.3d at 1360-61 (internal quotations omitted) Here, because there are no allegations in the Complaint regarding the supervisors' personal participation in the denial of Harper's Fourteenth Amendment rights, we look to whether Plaintiff has alleged a 'causal connection.' Although Plaintiff does mention 'widespread' constitutional rights deprivations (*see* Compl. at 16), it seems that the bulk of her facts against Gene Mitchell, Kenneth Mitchell, and Brown allege 'causal connection' based on their customs or policies that resulted in harm to Harper. Specifically, Plaintiff alleges that those Defendants, who were responsible for the management and administration or oversight of the jail, had customs or policies of improperly screening inmates for alcohol withdrawal, improperly handling inmates addicted to alcohol or drugs, delaying medical treatment and restricting access to outside medical providers in order to save money, primarily using emergency medical treatment for physical injuries only, and also failing to train jailers in identifying inmates with alcohol dependency. . . . In sum, given the Complaint's factual detail about Harper's incident and the similar incident involving Parker just one month before, as well as the specific allegations regarding the customs or policies put in place by the supervisors, Plaintiff met both the Rule 8 and heightened pleading standards. . . Accordingly, we hold that Plaintiff sufficiently alleged that the supervisory Defendants violated Harper's Fourteenth Amendment rights based on their customs or policies.").

Bryant v. Jones, 575 F.3d 1281, 1299, 1300 (11th Cir. 2009) ("It is well established that liability in § 1983 cases cannot be premised solely upon a theory of *respondeat superior*. . . In *Brown v. Crawford*, 906 F.2d 667 (11th Cir.1990), we observed that supervisory liability occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences. . . The evidence before the district court established that Jones contrived a broad plan to eliminate white managers and replace them with black managers so as to create a 'darker administration.' As a means of implementing this scheme, Jones and his administration would 'eliminate' the white managers' positions rather than simply firing the white managers. His discriminatory intent was further made plain by his open expressions of racial animus, calling Bryant a 'white bastard' and declaring that he wanted to terminate Kelley because he felt she let 'whites' control the parks. . . . In sum, this evidence showed compellingly that Jones, as the CEO, was the architect of a racially discriminatory scheme, a scheme that was designed to produce the overt discrimination the plaintiffs suffered. Unquestionably, he spawned the claims the plaintiffs have brought against him.").

Gross v. White, 340 F. App'x 527, 2009 WL 2074234, at *2 (11th Cir. July 17, 2009) ("'The standard by which a supervisor is held liable in his individual capacity for the actions of a

subordinate is extremely rigorous.' *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir.2003) (quotation marks and alteration omitted). A claim based on supervisory liability must allege that the supervisor: (1) instituted a custom or policy which resulted in a violation of the plaintiff's constitutional rights; (2) directed his subordinates to act unlawfully; or (3) failed to stop his subordinates from acting unlawfully when he knew they would. *See Goebert v. Lee County,* 510 F.3d 1312, 1331 (11th Cir.2007). Gross alleged just the opposite. He stated that the jail's rules and regulations required 'Red Dot,' violence-prone inmates to be separated from the general inmate population. He asserted that unnamed deputies broke those rules by placing him in a cell with a Red Dot inmate who was known to escape from his restraints and to be violent. Gross did not allege that White directed anyone to break the rules or that White knew anyone would do so. Gross' allegations fail to meet the 'extremely rigorous standard' for supervisory liability under § 1983. *Cottone,* 326 F.3d at 1360. . . . '[S]upervisors can be held personally liable when either (1) the supervisor personally participates in the alleged constitutional violation, or (2) there is a causal connection between the actions of the supervisor and the alleged constitutional violation.' *Id.* Gross did not assert that White personally violated his constitutional rights or caused the alleged violation to occur. He did not allege that there was any custom or policy of holding violence-prone, Red Dot inmates in jail cells with other inmates. He merely alleges that the deputies 'knew about' rules and regulations requiring these inmates to be kept separate from the general population and that they 'ignored them' by placing him in a cell with a Red Dot inmate who later attacked him. An allegation about an isolated occurrence is not enough to state a claim for deliberate indifference against White.").

Ratlieff v. City of Fort Lauderdale, 748 F.Supp.3d 1202, ____ (S.D. Fla. 2024) ("Because it is undisputed that the Off-Site Defendants were not physically located at the scene; did not personally participate in the alleged violations; did not direct subordinates to deploy tear gas or KIPs; and do not appear to have had any reason to know their subordinates were acting unlawfully, the Court concludes that Ratlieff has not established the requisite 'causal connection between actions of the supervising official and the alleged constitutional violation.'. . Accordingly, the Off-Site Defendants cannot be held liable for alleged violations of Ratlieff's First Amendment rights under a § 1983 supervisory theory of liability as a matter of law. . . . In contrast to the Off-Site Defendants, all agree that Dietrich, Cristafaro, and Figueras ("On-Site Defendants") were at the Intersection between 7:01 p.m. and 7:07 p.m when Ratlieff was gassed and struck. As it is undisputed that the On-Site Defendants were present at the Intersection and each had the authority to order and/or put a stop to Ratlieff's alleged First Amendment violations, Dietrich, Cristafaro, and Figueras's supervisory liability is again contingent upon whether the situation on the ground at the Intersection between 7:01 p.m and 7:07 p.m. justified the skirmish line's continued deployment of less-lethals without a dispersal order. Under Ratlieff's version of the facts, which a reasonable jury could accept or reject, she has demonstrated 'facts which support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so.'. . Accordingly, Ratlieff has demonstrated a genuine dispute of material fact as to the On-Site Defendants' supervisory liability, and summary judgment in their favor upon this basis is premature.")

Barefield v. Dunn, No. 2:20-CV-917-WKW, 2023 WL 5417550, at *17 (M.D. Ala. Aug. 22, 2023) ("[D]espite some confusion by the parties, this supervisory-causal-connection framework supplements (*not* supplants) the general rule that officials, whether or not they bear the title of supervisor, may be held liable for their *own* unconstitutional conduct. And here, according to *Farmer v. Brennan* and its progeny, officials—even if they bear the title of supervisor—*personally* violate the Eighth Amendment by the nature of their *own* conduct if they manifest deliberate indifference to a substantial risk of serious harm, which causes a plaintiff's injuries. . . That is, under excessive-inmate-violence claims, liability may attach to 'supervisor' defendants so long as the *Farmer* standard is met as applied against them because they 'personally participated in the unconstitutional conditions of confinement due to the responsibility wielded by such officials for control and maintenance of the facilities.'. .Accordingly, the court need not restrict itself to the supervisory-causal-connection framework for subordinate action where Barefield alleges that a defendant's individualized deliberate indifference to an excessive risk of inmate violence caused his injuries. And Eleventh Circuit case law clearly confirms this approach. When analyzing excessive-inmate-violence claims, the Eleventh Circuit has repeatedly determined personal liability by asking whether a defendant, regardless of his supervisory status, demonstrated deliberate indifference to a substantial risk of serious harm, without analyzing the subordinate-action-causal-connection framework.")

Mathis v. Corizon Health Inc., No. 3:14CV469/MCR/EMT, 2015 WL 3651088, at *4 (N.D. Fla. June 11, 2015) ("The factual allegations of the complaint must plausibly show that the supervisory official acted with the same mental state required to establish a constitutional violation against his subordinate; therefore, the court must first identify the precise constitutional violation charged and explain what the violation requires. . . For example, in the Eighth Amendment context, a violation requires deliberate indifference; therefore, the plaintiff's factual allegations must show that the supervisory defendants actually knew that the subordinate posed a risk of serious harm.")

Kendall v. Sutherland, No. 1:13-CV-04263-RWS, 2014 WL 5782533, at *13-14 (N.D. Ga. Nov. 5, 2014) ("[U]nlike the plaintiff in *Franklin,* Plaintiffs here allege facts beyond conclusory statements. By alleging that Jackson reported abuse to deputies and filed formal complaints, the Court finds—construing all reasonable inferences in favor of Plaintiffs—that Sheriff Warren knew about the abuse because it was reported through a formal grievance process. While Plaintiffs use 'knew or should have known' language like in *Franklin,* at the motion-to-dismiss stage Plaintiffs' factual allegations about Jackson's formal reports provide a plausible basis to infer Sheriff Warren's subjective knowledge of Sutherland's actions. At this point—September 2012—Sheriff Warren knew that Sutherland posed a serious risk to McLaughlin and others. Sutherland then continued to abuse McLaughlin until January 2013. Apparently, '[n]o action was taken to avoid further contact between Sergeant Sutherland and Plaintiff Kimberly McLaughlin after [Jackson's complaints].'. . Further, after Sheriff Warren became aware of this risk, Sutherland victimized Plaintiff Brooks in December 2012 or January 2013 and then raped Plaintiff Kendall in January 2013. In view of the facts in the Second Amended Complaint, Plaintiffs plausibly allege that

Sheriff Warren knew Sutherland was going to act unlawfully but failed to stop him. Consequently, the Court finds that Plaintiffs have stated a claim against Sheriff Warren for deliberate indifference.")

Pozdol v. City of Miami, 996 F. Supp. 2d 1290, 1300 (S.D. Fla. 2014) ("The Court finds that the history of widespread use of excessive force by the Miami Police Department during the three year period preceding decedent's shooting was sufficient to put Defendant Exposito on notice of widespread constitutional deprivations, which were not corrected. Moreover, the Court finds that the Complaint's allegations, supported by the findings of the Department of Justice investigation and the Miami Police Department's own finding of a 13% unjustified shooting rate for the 2008 to 2011 period, sufficiently pled the existence of a causal connection between Defendant Exposito's failure to act and decedent's constitutional deprivation. As the Court has determined, Defendant Exposito was put on notice and failed to act, it must next determine whether the right that he failed to protect was clearly established at the time of the challenged conduct. . . .At the time of decedent's killing, the law clearly established that supervisory officials could be held liable under section 1983 for their subordinates' constitutional violations where a causal connection exists between the supervisor's failure to act and the constitutional violations. *Cottone,* 326 F.3d at 1360–61. Moreover, the Supreme Court determined long ago that 'a police officer may not seize an unarmed, nondangerous suspect by shooting him dead.'. . Having found that Plaintiff has met her burden of alleging sufficient facts to defeat Defendant Borroto's claim to qualified immunity, Defendants' Motion to Dismiss Count II, to the extent that it asserts qualified immunity from civil liability and that Plaintiff failed to state a cause of action demonstrating entitlement to relief, is denied.")

Tolbert v. Trammell, 2:13-CV-02108-WMA, 2014 WL 3892115, *8, *9 (N.D. Ala. Aug. 4, 2014) ("Supervisors can violate federal law and be held individually liable for the conduct of their subordinates under § 1983 'when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation.'. . Such a causal connection exists (1) when 'a history of widespread abuse' put the supervisor on notice of the need to correct the constitutional deprivation, and he failed to do so; (2) when the supervisor's custom or policy resulted in deliberate indifference to constitutional rights; or (3) when facts support the inference that the supervisor directed his subordinates to act unlawfully or knew that they would and failed to stop them. . . Plaintiff's amended complaint uses buzzwords for supervisory liability but contains few supporting factual allegations. Plaintiff claims that 'Defendant Trammell and other officers' obvious, flagrant, and rampant behavior, has continued across a lengthy period of time and in doing so is sufficient to put Defendant Roper ... on notice of the widespread abuse and deprivations which resulted in the violation of citizens' constitutional rights....'. . . The amended complaint also claims that Roper acted with 'deliberate indifference' and 'as a matter of custom and practice.'. . This language clearly mirrors the first two categories of causal connections for supervisory liability above, but the court is not required to accept as true 'legal conclusions[ ] couched as factual allegation[s].'. . Plaintiff's bare assertions that Roper had notice and knowledge do not suffice; the 'conclusory nature' of such assertions 'disentitles them to the presumption of truth.'. . . Without

Roper having notice or knowledge, plaintiff cannot demonstrate the causal connection required for supervisory liability under the first two categories. Plaintiff tacitly acknowledges the lack of factual support by stating, 'that is what discovery is for,' emphasizing the pleading standard, and arguing for time to gather more details during discovery. . . Rebutting qualified immunity imposes more of a burden than stating a claim, however, and even stating a claim 'does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.'. . Pleadings that fail to state a claim are not entitled to discovery to improve their factual foundation. . . Lacking factual allegations to support plaintiff's bare assertions, the amended complaint does not plausibly show a causal connection between Roper's actions and Trammell's alleged misconduct or satisfy the 'extremely rigorous' standard for § 1983 supervisory liability. . .Therefore, the court concludes that Roper is entitled to qualified immunity, and plaintiff's § 1983 claim as against Roper in his individual capacity based on the Fourth Amendment will be dismissed.")

Fitzgerald v. Corrections Corp. of America, No. 5:13–cv–261–RS–EMT, 2014 WL 1687109, *5, *6 (N.D. Fla. Apr. 29, 2014) ("The factual allegations of the complaint must plausibly show that the supervisory official acted with the same mental state required to establish a constitutional violation against his subordinate. *See Franklin v. Curry,* 738 F.3d 1246, 1249–51 & n. 7 (11th Cir.2013) (in analyzing plaintiff's claims against supervisory defendants, district court must first identify the precise constitutional violation charged and explain the elements of that particular violation, for example, deliberate indifference or other mens rea; second, the district court must weed out conclusory allegations and determine whether the facts alleged enable the court to draw the reasonable inference that the supervisor is liable for the alleged misconduct); *Maxwell v. Cnty. of San Diego,* 708 F.3d 1075, 1097 (9th Cir.2013) ("To bring a § 1983 action against a supervisor, the plaintiff must show: (1) the supervisor breached a legal duty to the plaintiff; (2) the breach of duty was 'the proximate cause' of the plaintiff's constitutional injury, and (3) the supervisor had at least the same level of mens rea in carrying out his superintendent responsibilities as would be required for a direct violation of the plaintiff's constitutional rights ...") (citing *Iqbal,* 129 S.Ct. at 1949); *Dodds v. Richardson,* 614 F.3d 1185, 1204 (10th Cir.2010) (after *Iqbal,* "[a]plaintiff may [ ] succeed in a § 1983 suit against a defendant-supervisor by demonstrating: (1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation."); *Whitson v. Stone Cnty. Jail,* 602 F.3d 920, 928 (8th Cir.2010) (after *Iqbal,* a supervisory defendant is liable only if he or she personally displayed the same mental state required to establish a constitutional violation by his or her subordinate). Filing a grievance with a supervisory person does not, alone, make the supervisor liable for the allegedly violative conduct brought to light by the grievance, even if the grievance is denied. *See Gallagher v. Shelton,* 587 F.3d 1063, 1069 (10th Cir.2009); *Grinter v. Knight,* 532 F.3d 567, 576 (6th Cir.2008); *Shehee v. Luttrell,* 199 F.3d 295, 300 (6th Cir.1999); *see also Lomholt v. Holder,* 287 F.3d 683, 683 (8th Cir.2002) (defendants' denial of plaintiff's grievances did not state a substantive constitutional claim). . . . Plaintiff has not alleged facts suggesting Doyle actually knew of his serious medical need; nor has he alleged facts showing that Doyle personally participated in the delays in treatment, directed medical staff to delay, or knew that staff would

delay and failed to stop them from doing so. Therefore, Plaintiff failed to state an Eighth Amendment claim against Defendant Doyle. The same is true with regard to Plaintiff's claim against Defendant Warden Ellis. Plaintiff alleges Ellis failed to 'fix the situation' even after a CCA official directed him to do so. However, this vague allegation, devoid of any further factual enhancement, is insufficient to support an inference that Warden Ellis actually knew that his subordinates' conduct posed a risk of serious harm, and that he disregarded that risk by conduct that was more than gross negligence.")

Higginbotham v. City of Pleasant Grove, No. CV–12–BE–252–S, 2013 WL 5519577, *47 (N.D. Ala. Sept. 30, 2013) ("The court notes that Defendants' argument that a 'knowledge and failure to stop' cause of action is insufficient to state a cause of action after *Iqbal* is misplaced and ignores the discrimination context of *Iqbal.* Because the instant case does not allege discrimination based on race, religion, sex, or national origin, the requirement of 'purposeful discrimination' for supervisory liability that applied in *Iqbal* does not apply here.")

Smith v. City of Sumiton, No. 6:12–cv–03521–RDP, 2013 WL 3357573, *4 n. 11 (N.D. Ala. July 2, 2013) ("Defendant argues '[p]ost-*Iqbal*, there can be no § 1983 liability against a supervisor who did not personally participate in the alleged constitutional violation, and who took no affirmative action to directly cause the alleged constitutional violation.'. . However, in its post-*Iqbal* case law, the Eleventh Circuit has not limited supervisory liability to merely personal participation on the part of the supervisor, but instead has continued to allow liability with sufficient allegations of a 'causal connection between supervisory actions and the alleged deprivation.'")

Powell v. Barrett, No. 1:04–CV–1100–RWS, 2012 WL 567065, at *4, *5 (N.D. Ga. Feb. 17, 2012) ("Plaintiffs seek to establish deliberate indifference on the part of Defendant to Plaintiffs' constitutional rights by showing that Defendant was on notice of the over-detentions and yet failed to take action to stop them. Specifically, Plaintiffs allege that Defendant 'engaged in a pattern of continued inaction in the face of employees' documented widespread abuse of [Plaintiffs' constitutional rights] by failing to ensure their release on their Release Dates.'. . In support of her Motion for Summary Judgment, Defendant does not deny the problem of over-detentions; on the contrary, she admits that such a problem existed but argues that she 'vigorously addressed [it] with a wide variety of actions' and thus was 'anything but deliberately indifferent' to it. . . . In support of her argument that she was not deliberately indifferent to the problem of over-detentions, Defendant alleges that she took the following actions: '(1) request[ed] funding for additional staff; (2) [took] steps to increase the efficiency of existing staff; (3) work[ed] to improve the transfer of information from the courts to the Jail, so that releases could be processed more efficiently; and (4) hir[ed] a new Chief Jailor to study and improve Jail processes, particularly including the release process.'. . . In this case, Plaintiffs argue that the aforementioned measures Defendant took were insufficient to address the problem of over-detentions and at times led to perverse results (i.e., longer delays). . . However, the question the Court must answer is not whether Defendant approached the problem in the best way or achieved the best results, but whether she was

'deliberately indifferent'—that is, whether she failed to take corrective action. As stated above, this is an 'extremely rigorous' standard to meet. . . . In spite of the evidence of negligence on the part of Defendant, under the rationale of *West*, the Court cannot conclude, based on the conduct set forth above, that Defendant acted with deliberate indifference to the problem of over-detentions at the Jail. Accordingly, the Court finds that Plaintiffs have failed to satisfy the standard for supervisory liability."), *aff'd in part by* ***Powell v. Sheriff, Fulton County Georgia***, 511 F. App'x 957 (11th Cir. 2013).

McDaniel v. Yearwood, No. 2:11–CV–00165–RWS, 2012 WL 526078, at *16 (N.D. Ga. Feb. 16, 2012) ("In this case, the Court concludes that Plaintiff has failed to establish supervisory liability on the part of Sheriff Smith based on any failure to properly train or supervise the deputies. As a threshold matter, while Plaintiff makes vague and conclusory allegations of failure to train and supervise, Plaintiff has failed to allege facts making a plausible showing that Sheriff Smith in actuality failed to train or supervise the deputies in this case. Plaintiff does not allege what training or supervision the deputies did receive, if any, or what training or supervision was lacking and needed. Furthermore, and more importantly, Plaintiff has not alleged, much less with plausibility, that Sheriff Smith knew of a need for further training or supervision. Indeed, Plaintiff fails to allege even a single other incident in which a BCSO sheriff's deputy conducted an unlawful arrest or used excessive force. By failing to allege any other incident of abuse, much less a history of widespread abuse, Plaintiff has failed to show that Sheriff Smith was on notice of a need to further train or supervise. Plaintiff has thus failed to show 'the necessary causal connection between [Sheriff Smith] and the unconstitutional conduct at issue for supervisory liability to be imposed.'")

C.C. ex rel. Andrews v. Monroe County Bd. of Educ., No. 00-753-CG-M, 2011 WL 6029758, at *2, *3 (S.D. Ala. Dec. 5, 2011) ("On this second appeal, the Eleventh Circuit vacated and remanded the court's order in light of the fact that the United States Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), was issued after briefing in this case had closed but before the court entered its summary judgment order. (Doc. 123, p. 8). The Eleventh Circuit instructed this court to reconsider the summary judgment order on the equal protection claim in light of *Iqbal*. . . . The court finds that this evidence is not sufficient for a reasonable jury to conclude that Payne purposefully discriminated against the plaintiffs because they are female. As Payne points out, one of the four students allegedly molested by Floyd, JH, was male. . . Yet there is no allegation, nor any evidence, that Payne acted any more diligently or decisively with regard to JH's allegation of abuse than with regard to the plaintiffs' allegations. This is an admittedly low bar by which to judge Payne's conduct. But, where *Iqbal* requires "purpose rather than knowledge" in order to overcome qualified immunity, . . . the court finds the converse: kno No. 00-753-CG-M.wledge, but no purpose. This want of factual allegations as to Payne's purposeful, discriminatory intent against female students based upon their gender compels the court to find that Payne is entitled to qualified immunity with regard to the § 1983 equal protection claim only.")

Howell v. Houston County, Ga., No. 5:09-CV-402 (CAR), 2011 WL 3813291, at *25 n. *13 (M.D. Ga. Aug. 26, 2011) ("In *Ashcroft v. Iqbal,* the Supreme Court noted that in the context of

section 1983 suits 'the term "supervisory liability" is a misnomer' because 'each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.'. . The Supreme Court's statement in *Iqbal* suggests that some of the Eleventh Circuit's language regarding supervisory liability − for instance, the statement in *Gonzalez* regarding '[t]he standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate' − is perhaps no longer technically accurate. Nonetheless, the Eleventh Circuit's actual standards for 'supervisory liability' appear to only impose liability on a supervisor for his own misconduct. Indeed, the Eleventh Circuit has continued to quote its pre-*Iqbal* 'supervisory liability' standards after *Iqbal, See Bryant,* 575 F.3d at 1299.")

Steen v. City of Pensacola, 809 F.Supp.2d 1342, 1346-48 (N.D. Fla. 2011) ("In short, the plaintiff may pursue the same claims against the City of Pensacola (official claim) and Chief Mathis (individual claim). The real question is whether, following the Supreme Court's *Iqbal* decision in 2009, there is still such thing as a claim for individual supervisory liability under the factual circumstances in this case and, if so, whether Chief Mathis is entitled to the defense of qualified immunity on the facts presented. . . . Based on the plaintiff's briefing and pleadings, the substantial amount of time spent discussing it during oral argument, and the language of Count III itself, the gravamen of the plaintiff's claim against Chief Mathis is that he failed his 'duty to create, adopt, and implement rules, regulations, practices and procedures which clearly direct police officers as to the appropriate use of *Tasers'* (emphasis added); his failure to do so, the plaintiff maintains, constituted a 'de facto' custom, policy and practice that led to 'the blatant use of excessive force' by Officer Ard, which included 'two high voltage [taser] darts' that 'intruded upon Steen's physiological functions and physical integrity, and caused Steen extreme pain and death.'. . The claim against Chief Mathis, as noted, is premised on a theory of supervisor liability, since the allegation is not that Chief Mathis used excessive force (he was not even there), but that his policies brought about Officer Ard's use of excessive force. As will be shown, individual supervisory liability in Section 1983 cases is muddled and unsettled. . . . . [T]he Supreme Court fomented disagreement on the availability of individual supervisory liability when it issued its split 5-4 decision in *Iqbal, supra.* . . . The courts have thus arrived at differing interpretations following the decision in *Iqbal.* . . . Despite uncertainty among academics and in some circuits, in the Eleventh Circuit, supervisory liability appears to have survived *Iqbal* – at least for the time being. *See, e.g., Harper v. Lawrence County, Ala.,* 592 F.3d 1227, 1236 (11th Cir.2010) (referencing without discussion the same, pre-*Iqbal* standard for supervisory liability); *Gross v. White,* 340 F. App'x 527, 531 (11th Cir.2009) (same). While the Eleventh Circuit has recognized that, 'in a § 1983 action, a plaintiff must [now] plead that each Government-official defendant, through the official's *own individual actions,* has violated the Constitution,'. . . it appears that the court continues to allow supervisory liability when a causal connection is established (even when no 'individual actions' are present), for example, when the supervisor merely knows of a constitutional violation, has the authority to stop it, and fails to do so. . . The plaintiff alleges in Count III that Chief Mathis *'knew* that his officers were using [tasers]' in such a way that posed 'a serious risk of personal injury,' and, in particular, that he was *'allowing* his police officers to use excessive and unreasonable force by ... fir[ing] Tasers into moving vehicles or at persons in operation of moving

vehicles, in reckless disregard and deliberate indifference to the health and welfare of suspects [including Steen].' This would appear to be an allegation of 'knowledge,' not 'purpose,' and would therefore seem to fall within the *Iqbal* supervisory liability limitation. However, despite uncertainty concerning the viability of individual supervisory liability in some circuits and academia, this allegation would appear sufficient to state a claim under the 'causal connection' prong of individual supervisory liability and survive dismissal under Rule 12(b)(6) in the Eleventh Circuit.")

Brandon v. Williams, No. CV410-183, 2011 WL 1984619, at *4 (S.D. Ga. May 19, 2011) ("The pivotal allegation here, however, is that the gym-herding was routine (discovery may reveal if it was routine enough to impute notice to him) *and* that Williams himself saw the exposed baseball bats. '[W]hen facts support an inference that the supervisor ... knew that the subordinates would act unlawfully and failed to stop them from doing so,' *Harper,* 592 F.3d at 1236, the pleading threshold has been crossed. Brandon has just barely alleged that here, so Williams shall also remain in this case.")

Drury v. Volusia County, No. 6:10-cv-1176-Orl-28DAB, 2011 WL 1625042, at *6 (M.D. Fla. Apr. 28, 2011) ("Sweat argues that he is not alleged to have directly participated in the underlying sexual activity and that a basis for supervisory liability against him has not been sufficiently set forth. Sweat notes that 'the Plaintiff attempts to establish a causal connection by alleging widespread abuse of which Defendant Sweat either knew or should have know[n].' . . Sweat's assertion that the Complaint's allegations are insufficient to overcome qualified immunity at this stage of the case is not well-taken. . . Plaintiff has described widespread abuse and has set forth a factual basis for Sweat's knowledge or reason to know and his failure to take corrective action. She has sufficiently alleged a constitutional violation by Sweat, and Sweat will not be granted qualified immunity at this stage of the case.")

Allen v. City of Grovetown, No. CV 110-022, 2010 WL 5330563, at *8 (S.D. Ga. Dec. 20, 2010) ("The crux of Plaintiff's claim against Defendant Robinson, individually, is that he failed to properly train or supervise Defendants Harden and Freeman in the methods of suicide prevention and thus directly contributed to Love's death. . . . Plaintiff neither alleges facts showing that the need for more or different training or supervision was 'obvious' nor facts that could be reasonably construed as putting Defendant Robinson on any kind of notice as to a need for corrective measures. For instance, Plaintiff has not cited to prior instances of suicide or suicide attempts at the Grovetown facility. Likewise, Plaintiff has not set forth any facts indicating that Defendant Robinson had any actual knowledge with regard to the nature of Love's risk of suicide.")

CC v. Monroe County Bd. of Educ., No. 00-0753-CG-M, 2009 WL 4456356, at *7 (S.D. Ala. Nov. 25, 2009) ("[A] principal can be found to have violated a student's right to be free from sexual harassment under supervisory liability theory. Supervisory liability under § 1983 'occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between action of the supervising official and the alleged constitutional

deprivation.' This causal connection 'may be established and supervisory liability imposed where the supervisor ... [has a] deliberate indifference to constitutional rights.' *Hartley v. Parnell,* 193 F.3d 1263, 1269 (11th Cir.1999); *see also Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 452-3 (5th Cir .1994)("a supervisor can be liable for 'gross negligence' or 'deliberate indifference' to violations of their subordinates."); *Stoneking v. Bradford Area Sch. Dist.,* 882 F.2d 720, 725 (3d Cir .1988); *Howard v. Bd. of Educ. of Sycamore Cmty. Unit Sch. Dist.,* 893 F.Supp. 808, 817-8 (N.D.Ill.1995)(holding that the plaintiffs asserted an adequate equal protection claim against a principal because the plaintiff asserted the principal was notified of harassment and intentionally took no action to stop the harassment.).")**.**

Diaz-Martinez v. Miami-Dade County, No. 07-20914-CIV, 2009 WL 2970468, at *15 (S.D. Fla. Sept. 10, 2009) ("Defendants Calvert and Keller argue that *Iqbal* eliminates 'supervisory liability' claims, thereby foreclosing Plaintiff's claim in Count VI. Defendants Calvert and Keller further contend that they are not being sued for any action taken as a supervisor (such as an order or instruction to the line officers), but, instead, are being sued for their own personal conduct as police officers. As they are already been sued in Counts I-IV for this alleged conduct, their argument continues, Plaintiff should not be permitted to maintain a redundant count for supervisory liability, when he is not suing Defendants Calvert and Keller for any supervisory actions, and when such a count is no longer recognized by the Supreme Court. The Court rejects Defendants Calvert and Keller's reading of *Iqbal* as overbroad. The above-quoted passage from *Iqbal* stands for the proposition that a supervisor cannot be vicariously liable solely for the acts of a subordinate. However, there is no indication that the Supreme Court intended to wipe out the well-developed body of law surrounding supervisory liability, and Eleventh Circuit decisions post-*Iqbal* have given no indication that § 1983 supervisory liability claims are now barred. *See Gross v. White,* 2009 U.S.App. Lexis 15939 (11th Cir. July 17, 2009) (citing *Iqbal* and, in another part of the opinion, summarizing Eleventh Circuit case law on supervisory liability claims). Additionally, regarding Defendants' argument that Plaintiff's supervisory liability claim against Defendants Calvert and Keller is redundant because it realleges conduct that they are already being sued for in Counts I through IV, this argument fails because Plaintiff is 'the master of the complaint,' *Holmes Group, Inc. v. Vornado Air Circulation Sys.,* 535 U.S. 826, 831 (2002), and therefore he has the right to assert multiple and alternative theories of liability and have each considered on its own merits.").

Young v. Holmes, No. CV409-118, 2009 WL 2914188, at *2 (S.D. Ga. Sept. 3, 2009) ("Here, Young names Ms. Miles, the head of the medical staff, and McArthur Holmes, the jail's administrator, as defendants. Nowhere in the complaint, however, does he offer any facts showing that they were directly involved in or caused any of the deprivations or injuries Young complains of. His only contact with Holmes was in a letter complaining of the incident, and he sat down with Miles to discuss it. . .Their knowledge of the incidents, standing alone, is an insufficient basis for § 1983 liability. *See Iqbal,* 129 S.Ct. at 1949. Nor does his statement that such 'incidents like the ones stated have become a classic routine practice at' the jail cure the supervisory problem. . . As discussed below, such conclusory statements, unsupported by factual allegations, are simply

insufficient to show deliberate indifference on the part of the supervisory staff. *See Iqbal,* at 1949-50. Thus, Miles and Holmes should be dismissed from this suit.")

Morales v. Palm Beach County Sheriff's Office, No. 09-80636-CIV, 2009 WL 2589489, at *3 (S.D. Fla. Aug. 19, 2009) ("Under appropriate circumstances the failure to adequately train may give rise to a claim cognizable under § 1983, *see City of Canton, Ohio v. Harris,* 489 U.S. 378 (1989). Mere conclusory allegations of failure to train, however, are not enough; and the courts have generally held that there is no affirmative constitutional duty on the part of a supervising public official to train, supervise, or discipline subordinates so as to prevent constitutional torts, except where the supervisor has contemporaneous knowledge of an offending incident or knowledge of a prior pattern of similar incidents, and circumstances under which the supervisor's inaction could be found to have communicated a message of approval to the offending subordinate. . . The Eleventh Circuit has held that nothing less than a showing of gross negligence is required to establish liability for inadequate training. *Cannon v. Taylor,* 782 F.2d 947, 951 (11 Cir.1986).").

Sutherland v. St. Lawrence, No. CV407-096, 2009 WL 2900270, at *4 n.9 (S.D. Ga. Aug. 17, 2009) (" In *Iqbal,* the Supreme Court held that 'the term Asupervisory liability'' is a misnomer.... Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. . Thus, it rejected the plaintiffs claim that a supervisory official can be liable for *purposeful* discrimination based only upon his knowledge and acquiescence in the conduct (i.e., something less than purpose). . .The dissent characterized the majority holding as a major break from prior precedent that will severely limit a litigant's ability to maintain a § 1983 or *Bivens* action against supervisory officials. . . Indeed, it states that the Court has done away with supervisory liability entirely. . . This Court, however, is not convinced that *Iqbal* presents such a sea change; instead, it is a clarification. Plaintiffs must offer facts showing that defending supervisory officials acted with the same level of culpability as their subordinates when they and their subordinates are charged with violating the same constitutional right. That holding is entirely consistent with past precedent. After all, the deliberate indifference framework has always required more than a supervisor's'mere knowledge' that a constitutional violation has occurred in order to state a viable claim against that official. The plaintiff must allege some facts showing that the supervisory official was, like his subordinate, deliberately indifferent to the plaintiff's constitutional rights. The *Iqbal* dissent, on the other hand, seeks to impose a new rule. It would mix the culpability standards, allowing a supervisory claim based upon a lesser showing of culpability. Viewed in that light, this Court will continue to rely upon past precedent in making its supervisory liability inquiry.").

Russell v. Douglas County, No. 1:09-CV-20-RWS, 2009 WL 2240387, at *1 n.2 (N.D. Ga. July 27, 2009) ("The principles of supervisory liability that apply in § 1983 cases parallel the principles applied in *Bivens* actions. . . Writing in dissent, Justice Souter stated that the Supreme Court 'eliminat[ed] *Bivens* supervisory liability entirely' this past Term. *Ashcroft v. Iqbal,* __U.S. __, __, 129 S.Ct. 1937, 1957, 173 L.Ed.2d 868 (Souter, J., dissenting). If Justice Souter fairly

characterized the scope of the majority opinion in *Iqbal*, then it follows that supervisory liability under § 1983 has been 'eliminated' as well, and Russell's claim fails for that reason.").

G. No Qualified Immunity From Compensatory Damages for Local Entities; Absolute Immunity From Punitive Damages

Although an official sued in his or her individual capacity may raise qualified immunity in a suit brought against the individual for damages, *see generally* ***Harlow v. Fitzgerald***, 457 U.S. 800 (1982) and ***Anderson v. Creighton***, 483 U.S. 635 (1987), the Court has held that a local government defendant has no qualified immunity from compensatory damages liability. ***Owen v. City of Independence***, 445 U.S. 622 (1980).

See also ***Kimberly Regenesis, LLC v. Lee County***, 64 F.4th 1253, 1259-60 (11th Cir. 2023) ("The Supreme Court has made clear, for example, that 'an official in a personal-capacity action may ... be able to assert personal immunity defenses' (like quasi-judicial immunity) but that 'these defenses are unavailable' in a suit against a municipality. . . Put another way, '[t]he[ ] defenses of absolute immunity and qualified immunity are the official's personal privileges for his official acts. They do not belong to the governmental entity, and the entity itself is not allowed to assert them.'. . Indeed, courts have widely held that a municipality—or an official sued in his official capacity (which is the equivalent of a suit against the municipality)—cannot assert quasi-judicial immunity. [collecting cases] What all of this means is that any official immunity—including quasi-judicial immunity—belongs to the commissioner, not the county. . . The county conceded as much at oral argument. Because the immunity does not belong to the county, the county is not aggrieved by the district court denying the immunity. And so the denial of quasi-judicial immunity did not give the county standing to bring this interlocutory appeal challenging the denial of the commissioner's alleged immunity."); ***Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.***, 877 F.3d 136, 142-43, 148-50 (3d Cir. 2017) ("Barna cites to no case of controlling authority from the Supreme Court or our Court supporting his position, and we have found none. To the contrary, we have twice upheld the temporary removal of a disruptive participant from a limited public forum like a school board meeting. . . .Notwithstanding the absence of precedential authority, Barna urges us to recognize that the right to participate in school board meetings despite engaging in a pattern of threatening and disruptive behavior was clearly established based on a handful of district court decisions, only some of which predate the defendants' institution of the ban. . . .Turning to that inquiry, we believe that the circumstances of this case compel our review here. The District Court's legally incorrect holding granting 'judgment in favor of the Defendants on the basis of qualified immunity,'. . . directly contravenes the Supreme Court's holding in *Owen*. The availability of qualified immunity for a municipal entity is thus precisely the type of 'pure question of law' that commands our attention. . . Holding otherwise would problematically permit the District Court's pure legal error to stand uncorrected. . . .[W]e conclude that there are exceptional circumstances permitting review of the otherwise forfeited issue of the Board's entitlement to immunity. Because the District Court erred in awarding qualified immunity to the Board, we will vacate with respect to the grant of summary

judgment in the Board's favor."); ***Manning v. Cotton***, 862 F.3d 663, 671 (8th Cir. 2017) ("Deciding to uphold the district court's denial of qualified immunity for the Officers does not resolve whether the City is entitled to summary judgment on the municipal liability claims. Moreover, this circuit has explicitly held that the question of whether a city 'is liable under 42 U.S.C. § 1983 for failing to train its police force is *not* "coterminous with, or subsumed in"' the question of whether a city's officers are entitled to qualified immunity because 'resolution of these two issues requires entirely different analyses.'"); ***Soto v. Gaudett***, 862 F.3d 148, 162-63 (2d Cir. 2017) ("The defense of qualified immunity protects a government official, sued for actions he took under color of state law, from claims for damages against him in his individual capacity. That defense does not belong to the governmental entity; the entity itself is not allowed to assert that defense. . . And since a suit against a government official in his official capacity is the equivalent of a suit against the government entity, *see generally Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), the defense of qualified immunity is also unavailable to the individual sued in his official capacity[.]"); ***Mendiola-Martinez v. Arpaio***, 836 F.3d 1239, 1249-50 (9th Cir. 2016) ("The district court never determined whether the County Defendants' policies led to a violation of Mendiola-Martinez's rights under *Monell*. Instead, it ruled that Maricopa County and Sheriff Arpaio were entitled to qualified immunity on the shackling claims and granted summary judgment on that basis. The district court erred in doing so. . . .As permitted under *Pearson*, . . . the district court began with the second part of this inquiry and found that the constitutional right Mendiola-Martinez was seeking to enforce—to be completely free of restraints during labor and postpartum recovery—was not clearly established when she was in MCSO custody. But as a threshold matter, Maricopa County is not eligible for qualified immunity because counties 'do not enjoy immunity from suit—either absolute or qualified—under § 1983.'. . . Sheriff Arpaio is likewise not eligible for qualified immunity. When a county official like Sheriff Arpaio is sued in his official capacity, the claims against him are claims against the county. . . Mendiola-Martinez brought this action against Sheriff Arpaio in his official capacity as the person who 'oversees the operations of the Maricopa County jails and is responsible for and accountable for ultimate decisions of the Office.' She does not contend that Sheriff Arpaio is personally liable for the alleged constitutional violations, nor does she allege that he is liable as a supervisor under a vicarious liability theory. . . Accordingly, Sheriff Arpaio, like Maricopa County, is not eligible for qualified immunity and awarding summary judgment on that basis was improper"); ***Capra v. Cook County Bd. of Review***, 733 F.3d 705, 712 (7th Cir. 2013) ("Given *Monell* and the history of the Civil Rights Act, extending absolute immunity to the Board here would be a dramatic expansion of immunity that would severely limit the scope of section 1983 further than Congress intended and further than the Supreme Court ever has. Insulating municipalities from suit on a theory of quasi-judicial immunity when a policy, custom, or policymaker has violated the Constitution would, as the Supreme Court noted in *Monell*, drain that important decision of its meaning. . . The Board is not protected by quasi-judicial absolute immunity [for decision revoking property tax reduction]."); ***Beedle v. Wilson***, 422 F.3d 1059, 1068 (10th Cir. 2005) ("The Hospital nonetheless contends it is not liable because at the time it filed its state suit and opposed Mr. Beedle's various motions to dismiss, the Hospital had a good-faith basis for believing it was not a governmental entity for § 1983 purposes and thus was not precluded from bringing a libel action. . . This contention approximates a

qualified immunity defense in that the Hospital claims a reasonable official would not have known its actions violated a clearly established federal right. . . Such an argument is misplaced because a governmental entity may not assert qualified immunity from a suit for damages. . . A qualified immunity defense is only available to parties sued in their individual capacity."); ***Langford v. City of Atlantic City***, 235 F.3d 845, 850 (3d Cir. 2000) ("[W]e are satisfied and accordingly hold, as do *Monell* and *Carver*, that a municipality (in this case, Atlantic City) can be held liable for its unconstitutional acts in formulating and passing its annual budget."); ***Berkley v. Common Council of City of Charleston***, 63 F.3d 295, 302 (4th Cir. 1995) (en banc) (holding "that a municipality is not entitled to an absolute immunity for the actions of its legislature in suits brought under 42 U.S.C. § 1983."). *Accord* ***Carver v. Foerster***, 102 F.3d 96, 105 (3d Cir. 1996) ("We know of no circuit that currently accepts the doctrine of municipal legislative immunity under Section 1983."); ***Goldberg v. Town of Rocky Hill***, 973 F.2d 70, 74 (2d Cir.1992); ***Woodall v. County of Wayne***, No. 17-13707, 2020 WL 373073, at *6, *8 (E.D. Mich. Jan. 23, 2020) ("[I]f Defendants continue to defend individual suits by invoking qualified immunity, plaintiffs may never even be able to reach the question of whether an underlying constitutional violation occurred unless they also prove *Monell* liability. . . The Wayne County Sherriff's alleged *Monell* liability may very well be the lynch pin of all potential Wayne County illegal strip search cases. Answering the question once, for everyone, is the most efficient course of action. . . . Plaintiffs' proposed class, and their four proposed subclasses, will be certified as for allegations against Wayne County and the Wayne County Sherriff under *Monell*."); ***Kessler v. City of Providence,*** 167 F. Supp.2d 482, 490, 491 (D.R.I. 2001) ("In this case, Plaintiff is not seeking damages against Defendants Prignano and Partington; instead she seeks one day's wages from the Police Department that she lost from the suspension. Therefore, Defendants can not assert the doctrine of qualified immunity as an affirmative defense. For this reason, the individual Defendants' motion for summary judgment is denied; and therefore, the Defendant City of Providence's motion to dismiss, which is inexorably tied to Prignano and Parrington's motion for summary judgment, is also denied.").

See also ***Campos v. Fresno Deputy Sheriff's Association***, No. 1:18-CV-1660 AWI EPG, 2021 WL 1577816, at *4, *8, *10 & n.7 (E.D. Cal. Apr. 22, 2021) ("Together, *Owen*, *Leatherman*, and *Evers* can be read as standing for the proposition that, in order to redress constitutional wrongs, a municipality will be held liable for constitutional injuries caused by its practice, policy, or custom, irrespective of its officers' ability to assert qualified immunity and irrespective of any good faith reliance on state statutes. This proposition would seem to undercut application of a good faith affirmative defense to a municipality. Recognizing the good faith defense for a municipality could negate *Owen*'s balancing and goal of ensuring the availability of compensation for injuries caused by municipal policies and practices. To the Court's knowledge, and as confirmed by the parties' briefing, no court in a reasoned decision has extended the good faith affirmative defense to municipalities. In light of *Owen*, *Leatherman*, and *Evers*, until the Supreme Court or the Ninth Circuit holds otherwise, this Court cannot hold that the County is entitled to assert the good faith affirmative defense. . . . In sum, after applying *Harper*, the Court concludes that *Janus* is to be applied retroactively. . . .The parties have been unable to find any cases post-*Janus* in which a municipality like the County has been held liable for pre-*Janus* conduct. . . . [T]he law is unsettled

in the Ninth Circuit with respect to a municipality's liability under § 1983 when the municipality is following or acting in accordance with state law. Some courts find that there is no liability when the municipality follows a non-discretionary mandatory state law because the municipality did not make a policy decision. [citing cases] Some courts find or suggest that following state law, even if a non-discretionary, mandatory, state law duty is involved, does not relieve a municipality of liability. [citing cases] Other courts have noted that the issue has not been definitively settled. . . Within the Ninth Circuit, at least, part of the disagreement involves how to interpret *Evers*. Given the divide, the Court will not decide the issue without more in depth briefing from the parties. . . . [U]ntil further proceedings occur, the Court cannot hold that the fact that Chandavong and Her are challenging the taking of vacation hours is immaterial. In sum, this appears to be a unique case. The ultimate resolution of the County's liability (if any) will have to await further proceedings. . . In light of the arguments made in connection with the FDSA's motion to dismiss the SAC and the supplemental briefing received, the Court will not dismiss the third cause of action against the County for vacation hours involuntarily taken from Chandavong and Her pre-*Janus* when they were not members of the FDSA. . . .The Court at this time is not resolving the question of whether the County was under a mandatory duty, or what the effect of a non-discretionary mandatory duty on the County would be for purposes of § 1983. The Court is only noting the potential issues surrounding the proper classification of the vacation hours taken.")

But see ***Allen v. Santa Clara County Correctional Peace Officers Ass'n***, 38 F.4th 68, 70-75 (9th Cir. 2022) ("Although left undecided in *Danielson*, that case preordains our decision here. In *Danielson*, we held that a union may assert a good faith defense in an action to recover retroactive agency fees if the union relied on binding Supreme Court precedent and state law in assessing the fees. . . Private parties may 'rely on judicial pronouncements of what the law is, without exposing themselves to potential liability for doing so.'. . And precedent recognizes that municipalities are generally liable in the same way as private corporations in § 1983 actions. . . It therefore follows that the rule announced in *Danielson* for unions also applies to municipalities. We thus hold that municipalities are entitled to a good faith defense to a suit for a refund of mandatory agency fees under § 1983. . . . Contrary to the Employees' contention, the Supreme Court did not rule out such a defense for municipalities in *Owen.* In *Owen*, the Court rejected 'a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations.'. . In explaining its rationale, the Court stated that the 'municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.'. . The Employees take this statement to mean that a municipality may not assert a good faith defense. We do not read *Owen* so broadly. When speaking of 'good faith,' the Court discussed it only in terms of qualified immunity, not the affirmative defense of good faith at issue here. . . . The takeaway is that *Owen* was a case about qualified immunity, so its references to 'good faith' were made only in that context, not to the affirmative defense of good faith available to private litigants. . . . At the time, the County acted under a presumptively valid state law permitting the payroll deductions. . . And because unions may assert a good faith defense in an action to recover these compulsory fees as a matter of law, . . . so too may municipalities. We decline to hold municipalities to a different standard than we held unions in *Danielson.* . . . Because,

under *Danielson*, unions get a good faith defense to a claim for a refund of pre-*Janus* agency fees, . . . and municipalities' tort liability for proprietary actions is the same as private parties, . . . the County is also entitled to a good faith defense to retrospective § 1983 liability for collecting pre-*Janus* agency fees.")

While punitive damages may be awarded against individual defendants under § 1983, *see* ***Smith v. Wade***, 461 U.S. 30 (1983), local governments are immune from punitive damages. ***City of Newport v. Fact Concerts***, 453 U.S. 247 (1981). Note, however, that "***City of Newport*** does not establish a federal policy prohibiting a city from paying punitive damages when the city finds its employees to have acted without malice and when the city deems it in its own best interest to pay." ***Cornwell v. City of Riverside***, 896 F.2d 398, 399 (9th Cir. 1990), *cert. denied*, 497 U.S. 1026 (1990).. *See also* ***Trevino v. Gates***, 99 F.3d 911, 921 (9th Cir. 1996) ("Councilmembers' vote to pay punitive damages does not amount to ratification [of constitutional violation].").

See also ***City of Hartford v. Edwards***, 946 F.3d 631, 636 (2d Cir. 2020) ("Edwards also argues that, because excessive force is not a specific intent based claim, *see Graham v. Connor*, 490 U.S. 386, 397 (1989), the jury did not need to determine whether Officer May's conduct was wilful or wanton in order to award compensatory damages. This highlights the fatal defect in Edwards's reading of the statute. The problem is not what the jury needed to find to award compensatory damages; the problem is that the jury expressly found that Officer May's conduct was 'done maliciously or wantonly or [in] reckless disregard or indifference to the rights' of Edwards. . . Such a finding is all that is necessary to trigger section 7-465's exception for wilful or wanton conduct under the facts of this case. Finally, Edwards argues that excusing municipalities from paying any damages on behalf of their employees when punitive damages are awarded would be an absurd result. This is an argument better directed to the Connecticut legislature, which has the authority to draft and amend statutes. But even as a policy matter, Edwards's argument is unpersuasive. Edwards himself recognizes that not all excessive force claims are predicated on wilful or wanton conduct. . . Moreover, there remains a multitude of situations in which plaintiffs can seek assumption of liability under section 7-465. For example, had the jury *not* awarded punitive damages, had Edwards not sought punitive damages, or had Edwards brought multiple claims against Officer May and the jury awarded punitive damages for one claim and not for another, this would have been a different case. Edwards exercised his right to seek punitive damages, which necessarily put the wilful or wanton nature of Officer May's actions at issue. The jury agreed with Edwards that Officer May's conduct caused him personal injury for which it awarded compensatory damages and that the nature of that same conduct required a punitive damages award. It is for this reason that Hartford need not pay on behalf of Officer May."); ***Chestnut v. City of Lowell,*** 305 F.3d 18, 21, 22 (1st Cir. 2002) (en banc) (vacating award of punitive damages against City, remanding and giving plaintiff option of having new trial on issue of actual damages against City); ***Schultzen v. Woodbury Central Community School District***, 187 F. Supp.2d 1099, 1128 (N.D. Iowa 2002) (After an exhaustive survey of the case law and a comprehensive discussion of the issue, the court concludes : 'In light of the well-settled presumption of municipal immunity from punitive damages and the absence of any indicia of

congressional intent to the contrary, the court finds that punitive damages are unavailable against local governmental entities under Title IX."); ***Saldana-Sanchez v. Lopez-Gerena,*** 256 F.3d 1, 12, 13 (1st Cir. 2001) (discussing cases where waiver of *City of Newport* immunity has been found)**.**

But see ***Moore v. LaSalle Management Company, L.L.C.***, 41 F.4th 493, 509-13 (5th Cir. 2022) ("Plaintiffs also contend that they raised fact disputes on punitive damages against the Corporate Defendants and all the Individual Defendants, except for Mitchell. The district disagreed and concluded that punitive damages under § 1983 aren't available against the Corporate Defendants as a matter of law. We agree with Plaintiffs. . . To begin, the parties dispute whether the Corporate Defendants are immune from punitive damages under § 1983. The Corporate Defendants concede that private corporations typically are not immune. What they argue, though, is that private *prison-management companies* are. Why? Because private prison-management companies are 'engaged in the performance of acts for the public benefit.' The district court agreed with the Corporate Defendants. But we agree with Plaintiffs: Private companies may be held liable for punitive damages under § 1983 whether they performed acts for the public benefit or not. The parties agree that the Supreme Court's decision in *City of Newport v. Fact Concerts, Inc.* governs this question. . . There the Court faced a question of statutory interpretation: When Congress enacted § 1983, did it abolish common-law municipal immunity from punitive damages? . . . The Court answered *no.* . . .Municipalities had 'well established' immunity from punitive damages at common law, said the Court. . . And nothing about § 1983 showed Congress intended to abrogate it. . . Therefore, municipal immunity from punitive damages survived § 1983. The Corporate Defendants, though, can't get past *City of Newport*'s first step. They cannot point to a well-established history of common-law immunity from punitive damages because it doesn't exist. Indeed, the Corporate Defendants do not point to a single case showing that *any* private corporation had a common-law immunity from punitive damages—whether it was 'engaged in the performance of acts for the public benefit,' or not. . . . The district court erred in concluding that the Corporate Defendants were immune from punitive damages. Nothing supports that they would have been immune at common law. We cannot create that immunity for them now."); ***Revilla v. Glanz***, 8 F.Supp.3d 1336, 1342, 1343 (N.D. Okla. 2014) ("The specific question presented by CHC's argument is whether the Court's holding in *City of Newport* should be extended to preclude recovery of punitive damages against a private entity such as CHC. As noted, CHC has presented no legal authority directly on point, and plaintiffs cite a few authorities in which district courts determined that punitive damages may be recovered against a private entity in a § 1983 suit. [collecting cases] Based upon all of these authorities, the Court is unable to apply the punitive damages immunity afforded municipalities under the *City of Newport* case to CHC, which is a private corporation. The reasoning of *City of Newport* seems largely hinged upon the fact that the traditional purposes of punitive damages (punishment and deterrence) would not be served by imposing punitive damages upon local governments, because taxpayers would foot the bill, governments would likely have to increase taxes or reduce public services, and such an award would place the local government's financial integrity in serious risk. . . Those same purposes do

not apply to a private corporation. Accordingly, CHC's motion to dismiss the punitive damages claim is denied at this time.")

The Supreme Court had granted certiorari to address the following question: "Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Section 6-5-410 ("la. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. Section 1983?" In ***City of Tarrant v. Jefferson***, 682 So.2d 29 (1996), *cert. dismissed*, 118 S. Ct. 481 (1997), plaintiff sued individually and as a personal representative for the estate of his mother, alleging that Tarrant firefighters, based upon a policy of selectively denying fire protection to minorities, purposefully refused to attempt to rescue and revive his mother. On appeal from an interlocutory order in which the trial court held that the question of the survivability of Ms. Jefferson's cause of action for compensatory damages under section 1983 was governed by federal common law rather than by Alabama's Wrongful Death Act, the Supreme Court of Alabama reversed, holding that Alabama law governed plaintiff's claim. Under the Alabama wrongful death statute, compensatory damages are not available. The statute allows only punitive damages.

Compare ***Estate of Gilliam ex rel. Waldroup v. City of Prattville***, 639 F.3d 1041, 1048 (11th Cir. 2011) ("Gilliam, who died seven hours after the use of force, could not file a § 1983 claim that would have survived under Ala.Code § 6-5-462. At the same time, Gilliam's estate could not assert a § 1983 claim through the wrongful death statute, Ala.Code. § 6-5-410, because it could not produce admissible evidence that the use of force caused Gilliam's death. This case is, therefore, an unusual one, where application of Alabama law does not provide for survivorship. But, just because applying Alabama law causes the Estate to lose in this unusual case does not mean Alabama law is generally inconsistent with federal law. . . . And, with no inconsistency between Alabama law and federal law, we cannot, as the dissent proposes, craft a highly specific federal common law rule of survivorship that applies to the unique facts of this case. . . .Because the Alabama survivorship statute is not inconsistent with federal law, we must apply the statute as written to the facts of this case.") *with* ***Estate of Gilliam ex rel. Waldroup v. City of Prattville***, 639 F.3d 1041, 1050 (11th Cir. 2011) (Martin, J., dissenting) ("I respectfully dissent from the Majority's opinion because I cannot agree that there is 'no inconsistency between Ala.Code § 6-5-462 and federal law.' To the contrary, I would conclude that the Alabama survivorship statute, to the extent that it permits the abatement of tort actions for wrongful conduct that immediately contributes to a person's death, is inconsistent with both the abuse prevention and compensation goals underlying and embodied in 42 U.S.C. § 1983.").

A municipality may still be subject to ***Monell*** liability where the individual officer is able to invoke qualified immunity. *See, e.g.*, ***Palmerin v. City of Riverside***, 794 F.2d 1409, 1415 (9th Cir. 1986).

Courts sometimes confuse the consequences that flow from two very different determinations. If the court or jury concludes that there is no underlying constitutional violation,

then ***City of Los Angeles v. Heller***, 475 U.S. 796 (1986), would dictate no liability on the part of any defendant. (See discussion of "Derivative Nature of Liability," *infra*) If, however, the determination is that there is no liability on the part of the individual official because of the applicability of the second prong of qualified immunity, the law was not clearly established, it does not necessarily follow that there has been no constitutional violation and that the municipality cannot be liable.

See, e.g., ***Meier v. City of St. Louis, Missouri***, 934 F.3d 824, 829 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 2566 (2020) ("St. Louis also argues that regardless of its policy, it cannot be held liable because Meier has not brought claims against any individual SLMPD employee. It relies on *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018), in which we stated that 'absent a constitutional violation by a city employee, there can be no § 1983 or *Monell* liability for the City.'. . This argument misreads *Whitney*. Municipal liability requires a *constitutional violation* by a municipal employee, but it does not require the plaintiff to bring suit against the individual employee. *See Webb v. City of Maplewood*, 889 F.3d 483, 487–88 (8th Cir.) ("[O]ur case law has been clear ... that although there must be an unconstitutional act by a municipal employee before a municipality can be held liable, there need not be a finding that a municipal employee is liable in his or her individual capacity." (cleaned up)), *cert. denied*, —— U.S. ——, 139 S. Ct. 389, 202 L.Ed.2d 289 (2018). Assuming that the seizure of Meier's truck violated her constitutional rights—an assumption that St. Louis does not dispute at this juncture—Meier has adduced evidence sufficient to establish St. Louis's liability for that violation."); ***Horton by Horton v. City of Santa Maria***, 915 F.3d 592, 603 (9th Cir. 2019) ("When a municipal defendant's motion for summary judgment is 'inextricably intertwined' with issues presented in the individual officers' qualified immunity appeal, this court may exercise pendent party appellate jurisdiction. . . . In this context, the 'inextricably intertwined' concept is a narrow one. . . . Here, appellate resolution of the collateral appeal does not 'necessarily' resolve the pendent claim, for several reasons. . . First, as we have explained, our qualified immunity determination with respect to Officer Brice rests solely on the 'clearly established' law prong; we do not reach the question of whether Officer Brice's actions gave rise to a constitutional violation."); ***Evans v. City of Helena-West Helena, Arkansas***, 912 F.3d 1145, 1146 (8th Cir. 2019) ("While a municipality cannot be held liable without an unconstitutional act by a municipal employee, there is no requirement that the plaintiff establish that an employee who acted unconstitutionally is personally liable. . . So even if the clerk personally has absolute or qualified immunity from suit and damages, that immunity does not foreclose an action against the City if the complaint adequately alleges an unconstitutional policy or custom and an unconstitutional act by the clerk as a city employee."); ***Bustillos v. El Paso Cty. Hosp. Dist***., 891 F.3d 214, 222 n.6 (5th Cir. 2018) ("In dismissing the county liability claims, the district court stated that it had found the Doctors and Nurses 'did not violate the constitution.' This is not our understanding of the district court's qualified immunity analysis, which found 'the second qualified immunity prong dispositive.' Granting of qualified immunity on the 'clearly-established' prong is not the same as holding that no constitutional violation occurred. That would conflate the two prongs of qualified immunity. Thus, a grant of qualified immunity based on the 'clearly-established' prong does not necessarily negate the

constitutional violation element of a county liability claim, as the district court erroneously assumed."); ***Webb v. City of Maplewood,*** 889 F.3d 483, 486-87 (8th Cir. 2018) ("[E]ven if we accepted the City's premise that its officials all enjoy personal immunity from suit, it hardly follows that they did not engage in any unlawful acts or that the City is thereby immune as well. Whether the challenged acts occurred, whether they were unlawful, and whether the City is liable for them under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), would still be open questions. . . .We have not always been as clear as we could have in discussing the relationship between individual and municipal liability. As the City notes, we have stated in the past that it is 'a general rule' that 'for municipal liability to attach, individual liability first must be found on an underlying substantive claim.' *See McCoy v. City of Monticello*, 411 F.3d 920, 922 (8th Cir. 2005). But in *McCoy* we used that language to explain why a city could not be held liable 'on either an unconstitutional policy or custom theory or on a failure to train or supervise theory' once it has been determined that the underlying official conduct was 'objectively reasonable' and thus did not violate the plaintiff's rights. . . In *McCoy* we cited six cases that allegedly applied the 'general rule'; in five of them we simply held that because the challenged official conduct was not unconstitutional, the municipality had nothing to be liable for. . . . [I]t is now clear that the absolute immunity of its policymakers does not shield a city from liability for its policies. . . .[D]espite our occasional use of overbroad language, our case law has been clear since *Praprotnik* that although 'there must be an unconstitutional act by a municipal employee' before a municipality can be held liable, . . there 'need not be a finding that a municipal employee is liable in his or her individual capacity.'"); ***Moya v. Garcia***, 895 F.3d 1229, 1240 (10th Cir. 2018) (McHugh, J., concurring in the result in part and dissenting in part), (*amended opinion on denial of rehearing en banc*), *cert. denied*, 139 S. Ct. 1323 (2019) ("I would reverse the district court's order dismissing Plaintiffs' claims against the County. But because the Defendants did not violate clearly established law, I would hold that the individual defendants are entitled to qualified immunity and, on that basis alone, partially affirm the district court's order."); ***Groden v. City of Dallas , Texas***, 826 F.3d 280, 283 n.2 (5th Cir. 2016) ("The city argues we need not reach the merits of Groden's appeal because the jury verdict in favor of Officer Gorka blocks Groden from appealing the dismissal of his suit against Dallas for the same constitutional violation. The city points out that, according to Groden's complaint, Gorka was the only officer who carried out Dallas' allegedly unconstitutional policy. Thus, if a jury found that Gorka did not violate the Constitution, then Dallas could not have violated the Constitution through Gorka. Under the city's reasoning, the jury verdict renders the dismissal of Groden's claims against the city correct—even if the dismissal had been erroneous when it occurred. *See City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam). As we have said above, the city's argument is flawed: we do not know whether the jury found that Gorka acted constitutionally when arresting Groden. The jury was charged on both the constitutional issue and on qualified immunity and subsequently rendered a general verdict. We cannot know which issue the jury found to be decisive. *Heller*'s holding applies only when 'no issue of qualified immunity was presented to the jury.'. . Accordingly, the jury's verdict for Gorka does not prevent Groden from appealing the dismissal of his claims against Dallas."); ***Askins v. Doe No. 1***, 727 F.3d 248, 253-55 (2d Cir. 2013) ("In dismissing Askins's claim against the City, the district court relied on the proposition 'that the City cannot be liable

under *Monell* where Plaintiff cannot establish a violation of his constitutional rights.'. . The court explained: 'All of the alleged constitutional violations in this case are either time-barred or barred by the doctrine of qualified immunity. Therefore, it cannot be said that any allegedly illegal City policy caused Plaintiff a constitutional remediable injury, and no *Monell* claim lies against the City.'. . .This conclusion reflects a misunderstanding of the relationship between the liability of individual actors and municipal liability for purposes of *Monell.* The court was entirely correct in stating that the City 'cannot be liable under *Monell* where Plaintiff cannot establish a violation of his constitutional rights.'. . Unless a plaintiff shows that he has been the victim of a federal law tort committed by persons for whose conduct the municipality can be responsible, there is no basis for holding the municipality liable. *Monell* does not create a stand-alone cause of action under which a plaintiff may sue over a governmental policy, regardless of whether he suffered the infliction of a tort resulting from the policy. Liability under section 1983 is imposed on the municipality when it has promulgated a custom or policy that violates federal law and, pursuant to that policy, a municipal actor has torturously [sic] injured the plaintiff. . . Establishing the liability of the municipality requires a showing that the plaintiff suffered a tort in violation of federal law committed by the municipal actors and, in addition, that their commission of the tort resulted from a custom or policy of the municipality. . .It does not follow, however, that the plaintiff must obtain a *judgment* against the individual tortfeasors in order to establish the liability of the municipality. It suffices to plead and prove against the municipality that municipal actors committed the tort against the plaintiff and that the tort resulted from a policy or custom of the municipality. In fact, the plaintiff need not sue the individual tortfeasors at all, but may proceed solely against the municipality. . .Where the plaintiff does proceed against both the municipal actors alleged to have inflicted the tort and the municipality that promulgated the offensive policy, the plaintiff's failure to secure a judgment against the individual actors would, indeed, preclude a judgment against the municipality *if* the ruling in favor of the individual defendants resulted from the plaintiff's failure to show that they committed the alleged tort. But where the plaintiff has brought a timely suit against the municipality and has properly pleaded and proved that he was the victim of the federal law tort committed by municipal actors and that the tort resulted from an illegal policy or custom of the municipality, the fact that the suit against the municipal actors was untimely, or that the plaintiff settled with them, or abandoned the suit against them, is irrelevant to the liability of the municipality. By the same token, the entitlement of the individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is also irrelevant to the liability of the municipality. . . . The doctrine that confers qualified immunity on individual state or municipal actors is designed to ensure that the persons carrying out governmental responsibilities will perform their duties boldly and energetically without having to worry that their actions, which they reasonably believed to be lawful at the time, will later subject them to liability on the basis of subsequently developed legal doctrine. . . That policy, however, has no bearing on the liability of municipalities. Municipalities are held liable if they adopt customs or policies that violate federal law and result in tortious violation of a plaintiff's rights, regardless of whether it was clear at the time of the adoption of the policy or at the time of the tortious conduct that such conduct would violate the plaintiff's rights. . . To rule, as the district court did, that the City of New York escapes liability

for the tortious conduct of its police officers because the individual officers are entitled to qualified immunity would effectively extend the defense of qualified immunity to municipalities, contravening the Supreme Court's holding in *Owen.* The district court did not rule that Askins failed in his amended complaint to allege that he was the victim of a constitutional tort committed by municipal actors, or that he failed to allege that the tort resulted from an unconstitutional custom or policy of the City, or that the suit against the City was untimely or otherwise defective. So far as the court has ruled up to now with respect to the suit against the City, the court has identified no deficiency in the plaintiff's amended pleading. . . Accordingly, there was no basis for dismissing the complaint against the City."); ***International Ground Transportation v. Mayor and City Council of Ocean City***, 475 F.3d 214, 220 (4th Cir. 2007) ("In this case, the verdict form shows that the jury found that the City deprived IGT of procedural and substantive due process but that the individual defendants did not. The City argues that these findings trigger application of the *Heller* rule and require that judgment as a matter of law be entered in its favor. However, the jury was instructed that it could find the individual defendants not liable based on qualified immunity. Thus, the jury could have found that constitutional violations were committed but that the individual defendants were entitled to immunity. Indeed, this is the only way the jury's verdict may be read consistently, and we must 'harmonize seemingly inconsistent verdicts if there is any reasonable way to do so.'. . The jury was specifically instructed that it could find the individual defendants not liable based on qualified immunity. However, the verdict form submitted to the jury allowed the jury to find that the individual defendants committed constitutional violations but were entitled to qualified immunity only by checking the 'No' answers to the questions asked regarding the individual defendants (e.g. 'Do you find that the following persons deprived White's Taxi of procedural due process?"). The City, in fact, conceded at oral argument that there was no way for the jury to find that qualified immunity applied except by answering 'No' to the questions asking whether the individual defendants had committed constitutional violations. Moreover, because the jury made specific findings that the City had committed constitutional violations, the only way to read the jury's verdict consistently is to read the questions asked of the individual defendants as encompassing qualified immunity. As we are required 'to determine whether a jury verdict can be sustained, on any reasonable theory,'. . . we must conclude that the language of the verdict form permitted the jury to find that the individual defendants committed constitutional violations but were entitled to qualified immunity."); ***Roberts v. City of Shreveport,*** 397 F.3d 287, 292 (5th Cir. 2005) ("Plaintiffs allege that Chief Prator failed to train Officer Rivet sufficiently. Chief Prator responds that this issue is foreclosed in his favor because the jury verdict in Officer Rivet's trial found Rivet's conduct objectively reasonable. Chief Prator is incorrect. The jury, after all, found that Officer Rivet violated Carter's constitutional rights, even though it also accepted Officer Rivet's defense that his conduct was objectively reasonable. Under such circumstances, Chief Prator remains vulnerable to a failure to train claim because the plaintiffs may be able to demonstrate that by his failure to train or supervise adequately, he both caused Carter's injuries and acted deliberately indifferent to violations of Fourth Amendment rights by Shreveport police officers, including Officer Rivet. . . . Nevertheless, even assuming that lack of training 'caused' Carter's injuries, the plaintiffs have not provided sufficient evidence of either Prator's failure to train (the first requirement) or his deliberate indifference to Carter's constitutional rights (the third

requirement) to create a triable fact issue. . . A plaintiff seeking recovery under a failure to train or supervise rationale must prove that the police chief failed to control an officer's 'known propensity for the improper use of force.' . . Moreover, to prove deliberate indifference, a plaintiff must demonstrate 'at least a pattern of similar violations arising from training that is so clearly inadequate as to be obviously likely to result in a constitutional violation.'"); ***Scott v. Clay County, Tenn***., 205 F.3d 867, 879 (6th Cir.2000) ("[I]f the legal requirements of *municipal* or *county* civil rights liability are satisfied, qualified immunity will *not* automatically excuse a municipality or county from constitutional liability, even where the municipal or county actors were personally absolved by qualified immunity, *if* those agents *in fact* had invaded the plaintiff's constitutional rights."[emphasis in original, footnote omitted]); ***Myers v. Oklahoma County Board of County Commissioners***, 151 F.3d 1313, 1317-18 (10th Cir. 1998) ("[I]f a jury returns a general verdict for an individual officer premised on qualified immunity, there is no inherent inconsistency in allowing suit against the municipality to proceed since the jury's verdict has not answered the question whether the officer actually committed the alleged constitutional violation. . . In this case, the defendants moved for summary judgment on the basis of qualified immunity, but the district court denied that motion. . . The defendants may have attempted to raise the issue at trial as well. . . On the record before us, we are unable to determine the grounds for the jury's decision. The jury verdict form was a general one. The form instructed the jury only to declare the defendants 'liable' or 'not liable' on the use of excessive force claim. In addition, neither party placed a copy of the jury instruction in the record. Therefore, it is possible that the jury based its decision on qualified immunity. With that ambiguity lurking, the *Heller* rule does not foreclose the suit against the County."); ***Hinton v. City of Elwood***, 997 F.2d 774, 783 (10th Cir. 1993) ("An individual municipal officer may . . . be entitled to qualified immunity . . . because the officer's conduct did not violate the law. When a finding of qualified immunity is predicated on this latter basis, such a finding is equivalent to a decision on the merits of the plaintiff's claim. ... In such a case, a finding of qualified immunity may preclude the imposition of any municipal liability."); ***Doe v. Sullivan County, Tenn.***, 956 F.2d 545, 554 (6th Cir. 1992) ("To read *Heller* as implying that a municipality is immune from liability regardless of whether the plaintiff suffered a constitutional deprivation simply because an officer was entitled to qualified immunity would . . . represent a misconstruction of its holding and rationale."). ***Adkins v. City of New York***, 143 F.Supp.3d 134, 141-42 (S.D.N.Y. 2015) ("The defense of qualified immunity is, however, unavailable to one defendant in this case, the City of New York (the 'City'). . . . Qualified immunity of individual actors is irrelevant to *Monell* liability. *Askins v. Doe No. 1,* 727 F.3d 248, 254 (2d Cir.2013). *Monell* liability does require that plaintiff adequately allege a policy or pattern of misconduct. . . . Plaintiff has alleged that both eyewitness accounts and internal police documents show the existence of a specific pattern of misconduct, *viz.*, handcuffing transgender detainees to railings, and further show official inaction in the face of this pattern. Plaintiff claims that an internal NYPD recommendation called for changes in the department's treatment of transgender people, but the NYPD chain of command took no steps in response to it. . . . The Court does not and need not take any position on the admissibility or ultimate sufficiency of plaintiff's possible evidence. It asks only whether plaintiff has 'nudged [his] claims across the line from conceivable to plausible.'. . He has done so."); ***Bell v. City of New York***, No. 13–CV–5317 (JG)(VMS), 2013 WL 6268083, *3 n.1 (E.D.N.Y. Dec. 4,

2013) ("It appears that, in addition to asserting qualified immunity on behalf of the officers, the City may also be arguing that because the officers should be afforded qualified immunity, the claims against the City should also be dismissed. If the City is indeed making that argument, it is mistaken. It is true that a municipality cannot be liable under *Monell* unless the plaintiff is harmed by the illegal act of a municipal employee. But a municipality may be liable for adopting an illegal policy or custom even though the individuals implementing that policy or custom are immune because none of them violated *clearly established* law. *See generally Askins v. Doe No. 1,* 727 F.3d 248, 253–54 (2d Cir.2013). A contrary rule would effectively extend qualified immunity from individuals to municipalities."); ***Pinter v. City of New York***, 976 F.Supp.2d 539, 552-70 (S.D.N.Y. 2013) ("The Second Circuit held in *Pinter II* that the individual defendants are entitled to qualified immunity from Pinter's false arrest and malicious prosecution claims because even according to Pinter's allegations, 'the officers had *arguable* probable cause to arrest Pinter' for prostitution. . .The Second Circuit left open the question, however, of whether the individual defendants had *actual* probable cause. . . .Drawing all reasonable inferences in favor of Pinter, a jury could find that Pinter's arrest was not based on probable cause. This is not to question the Second Circuit's conclusion that 'UC 31107 could have reasonably believed that Pinter had agreed to be compensated in exchange for allowing UC 31107 to act on his desire to perform oral sex on Pinter.'. . Rather, the facts of this case, viewed in the light most favorable to Pinter, illustrate the distinction between arguable probable cause and actual probable cause. On the one hand, applying the standard for qualified immunity as settled by the Second Circuit's Summary Order, it would be inaccurate to say that UC 31107 was ' "plainly incompetent"' or must have ' "knowingly violate[d] the law"' in concluding that Pinter had agreed to engage in prostitution. . .Because UC 31107 had arguable probable cause for an arrest, he is entitled to qualified immunity. . . .On the other hand, declaring Pinter's arrest—according to his version of events—to be based on actual probable cause would dilute the Fourth Amendment's protection of individual liberty from unreasonable government intrusion. An officer does not have probable cause to believe a person is a prostitute simply because the person remained silent after being inexplicably offered a fee for what he expected to be consensual, gratuitous sex. . .To allow the police to arrest such a person for prostitution—moments later, and without so much as an attempt at confirmation—would invite abuses. . . . Because a reasonable jury could find that UC 31107 lacked probable cause for Pinter's arrest, Pinter could establish at trial that he was subject to a violation of his constitutional right to be free from unreasonable seizure under the Fourth Amendment. This conclusion leads to a dilemma. The Second Circuit held in its Summary Order that 'Pinter's *Monell* claims are derivative of his claims against the individual defendants, and therefore any claims dismissed as against the individual defendants must also be dismissed as against the City.'. . Accordingly, the Second Circuit ordered that this Court 'shall not permit the plaintiff to pursue *Monell* claims derived from either the false arrest or malicious prosecution claims.'. . In a subsequent, published opinion, *Askins v. Doe No. 1,* however, the Second Circuit held that 'the entitlement of ... individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is ... irrelevant to the liability of the municipality.'. . .*Askins* conflicts with *Pinter II.* The latter holds that where a plaintiff has suffered a constitutional tort at the hands of an officer who is entitled to qualified

immunity, the City is immune from a *Monell* claim based on the tort; the former holds the opposite. . . . Defendants attempt to reconcile the holdings of *Askins* and *Pinter II* by arguing that *Pinter II* held not only that the arresting officers had arguable probable cause, but that they had actual probable cause, and thus that Pinter suffered no constitutional injury. . . Defendants' interpretation is not plausible. If the Second Circuit had intended to make a holding that the arresting officers had probable cause—a holding with significant implications for the Fourth Amendment—it would have done so explicitly, rather than through a debatable inference. In addition, the Second Circuit would have analyzed probable cause, not *arguable* probable cause, and would not have used the redundant qualifier 'arguable' when characterizing its holding. . . . Because of the conflict between *Pinter II* and *Askins*, this Court cannot proceed without violating one of the two Second Circuit authorities. Either this Court must disregard the law of the case as articulated in the *Pinter II*, as well as the explicit directions with which *Pinter II* concludes, or this Court must disregard *Askins.* While this Court is extremely wary of failing to comply with an explicit directive of the Second Circuit, it is equally wary of failing to adhere to a subsequent and more authoritative statement of Second Circuit law. *Askins* is a published opinion that extensively analyzed this issue, while the unpublished decision in *Pinter II* has no precedential effect beyond this immediate case. . .Because *Askins* provides a thorough, binding, directly on-point analysis that conflicts with the unpublished decision in *Pinter II*, I follow *Askins* and conclude that the Second Circuit's grant of qualified immunity to the individual defendants does not bar Pinter from bringing *Monell* claims against the City that derive from his arrest having lacked probable cause. . . In particular, the Second Circuit's qualified immunity finding does not by itself bar Pinter's false arrest and malicious prosecution claims against the City. A reasonable jury could find based on the record evidence that the City had a custom of carrying out arrests like Pinter's, and that the City was deliberately indifferent to the obvious risk of arresting gay men for prostitution without probable cause. . . . Pinter offers evidence that could support a finding that the NYPD engaged in a pattern of arresting gay men without probable cause for prostitution at video stores, and especially at the Blue Door. . . .Pinter also cites numerous excerpts from depositions and other evidence tending to show that the NYPD failed to train undercover officers to avoid arresting gay men for prostitution without probable cause based on a misunderstanding of the circumstances. . . . A reasonable jury could find that the City was deliberately indifferent to the obvious risk of false arrests like Pinter's, as discussed above. A reasonable jury could also find that the City abused the criminal process for illegitimate ends by carrying out prostitution arrests not in order to obtain convictions but in order to improve its position in nuisance abatement negotiations, as discussed below. This scenario provides sufficient support for the conclusion that Pinter's arrest resulted from a municipal custom of commencing criminal proceedings such as his not with a desire to see the ends of justice served, but based on the improper motive of seeking leverage in nuisance abatement negotiations. This conclusion would be sufficient to establish 'actual malice' in the limited sense required for a malicious prosecution claim . . . . Finally, the City is not entitled to summary judgment on Pinter's excessive force claim. A reasonable jury could find that the officers in the van acted in accordance with an unconstitutional policy or custom of the City to leave arrestees in unduly tight handcuffs for hours at a time in police vans while other prisoners were collected, without training NYPD officers concerning the proper use of 'double locked' handcuffs or how to respond to complaints

regarding pain caused by handcuffs. . . . Drawing all reasonable inferences in favor of Pinter, there is also sufficient evidence in the record for a jury to find that the City had a custom of arresting gay men for prostitution without probable cause in order to obtain the collateral objective of commencing nuisance abatement proceedings against video stores frequented largely, although not entirely, by members of the gay, lesbian, bisexual, and transgender communities. . . . In light of the above, a reasonable jury could conclude that the custom of prostitution arrests that resulted in Pinter's arrest constituted an abuse of criminal process. . . Pinter has a triable abuse of process claim under Section 1983 against the City. However, the Second Circuit's conclusion that the individual defendants had arguable probable cause forecloses Pinter's abuse of process claims against them."); ***Sunn v. City & County of Honolulu***, 852 F. Supp. 903, 907 (D. Haw. 1994) ("[T]he circuits which have considered the issue have held that *Heller* is inapplicable to cases where police officers are exempt from suit on qualified immunity grounds." citing cases); ***Munz v. Ryan***, 752 F. Supp. 1537, 1551 (D. Kan. 1990) (no inconsistency in granting official qualified immunity, while holding municipality liable for constitutional violations if caused by final policymaker).

See also ***Taylor v. Las Vegas Metropolitan Police Department***, No. 219CV995JCMNJK, 2019 WL 5839255, at *14–15 (D. Nev. Nov. 7, 2019) ("'[A]n officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity.' *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994). . . . In *Grossman*, an individual officer arrested plaintiff pursuant to an unconstitutional ordinance. . . The Ninth Circuit held that the individual officer was entitled to qualified immunity, but the city remained liable. . . . Here, as in *Grossman*, determining chapter 16's constitutionality as applied to plaintiff is dispositive of claims 7, 9, and 12. Officers Young, Ferguson, and Albright acted in reliance on chapter 16 of the CCC which, as this court noted, is a facially constitutional regulation aimed at addressing pedestrian congestion on public walkways. Plaintiff displayed his table on the sidewalk, which necessarily means that it was in plain view and in a public place. In furtherance of chapter 16's policy of preventing obstructive uses of sidewalks, Officers Young, Ferguson, and Albright cited plaintiff for his expressive conduct and seized his table. However, § 16.11.020 of the CCC specifically exempts tables used in furtherance of First Amendment activity from the definition of an 'obstructive use' unless the table is 'actually obstructing' the sidewalk. Plaintiff has alleged that, because of his positioning on the sidewalk, he did not actually obstruct the walkway. Further, plaintiff has clearly demonstrated that his table was essential to his live drawing. For that reason, the court, as discussed above, finds that plaintiff has stated a colorable as-applied constitutional challenge to chapter 16 of the CCC. Consequently, Officers Young, Ferguson, and Albright either relied on an unconstitutional interpretation of chapter 16 or unconstitutionally applied chapter 16 to plaintiff's expression. Thus, these erroneous applications of chapter 16 stymied plaintiff's First Amendment rights. Further, plaintiff's First-Amendment-protected expression cannot support probable cause. . . But the individual officers were relying on the policy and interpretation promulgated by LVMPD. . . One way a plaintiff may demonstrate municipal liability for a constitutional violation is by showing that the violation occurred as a result of inadequate training on the part of the municipality. . . Therefore, plaintiff has sufficiently pleaded a *Monell* claim against LVMPD for

promulgating the policy of citing street performers for obstruction *per se* when they use a table or other object for First Amendment expression. On the other hand, the individual officers are entitled to qualified immunity for their good faith reliance on the duly-enacted statute as interpreted by LVMPD. Accordingly, the LVMPD defendants' motion to dismiss is granted in part and denied in part as to claims 7, 9, and 12. The individual officers are dismissed as defendants. LVMPD itself is not.")

See also ***Pinter v. City of New York***, 976 F.Supp.2d 539, 575 (S.D.N.Y. 2013) ("Section 1292(b) of Title 28 of the United States Code allows a district judge to certify a question or order to the appellate court when it is 'not otherwise appealable under this section' if she is 'of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.' The instant case involves a controlling question of law where two panels of the Second Circuit have reached conflicting conclusions. Furthermore, immediate appeal would materially advance the ultimate termination of the litigation. If the Second Circuit holds that its prior ruling in *Pinter* controls despite the more recent conflicting holding in *Askins*, it may find that any claim where lack of probable cause is an element must be dismissed-that is, the false arrest, malicious prosecution and abuse of process claims against the City. This would leave only Pinter's excessive force claim for trial, which is a claim based on a much narrower and more limited set of facts than the other three. I am sympathetic to plaintiff's argument that this case already has a lengthy and complicated history and that this will be the second interlocutory appeal to the Second Circuit. However, proceeding with trial before the Second Circuit rules on this issue puts the Court at risk of expending scarce judicial resources by trying what may be unviable claims. For the foregoing reasons, the following question is certified for appeal to the United States Court of Appeals for the Second Circuit: Is the Second Circuit's decision in *Pinter v. City of New York*, 448 F. App'x 99 (2d Cir.2011) overruled by its decision in *Askins v. Doe No. 1*, 727 F.3d 248 (2d Cir.2013)?"). (*certification denied,* Nov. 25, 2013.)

But see ***Jiron v. City of Lakewood,*** 392 F.3d 410, 419 n.8 (10th Cir. 2004) ("Plaintiff argues that dismissal of the claims against the remaining defendants was improper because summary judgment was granted to Officer Halpin on the basis of qualified immunity. Plaintiff is correct that some dismissals against the officer on the basis of qualified immunity do not preclude a suit against the municipality. . . However, when a finding of qualified immunity is based on a conclusion that the officer has committed no constitutional violation − i.e., the first step of the qualified immunity analysis − a finding of qualified immunity *does* preclude the imposition of municipal liability."); ***Turpin v. County of Rock,*** 262 F.3d 789, 794 (8th Cir. 2001) ("Having concluded that the district court properly granted Officer Svoboda and Deputy Anderson summary judgment on qualified-immunity grounds, we likewise conclude that the county was entitled to summary judgment. *See Abbott v. City of Crocker*, 30 F.3d 994, 998 (8th Cir.1994) (municipality cannot be liable unless officer is found liable on underlying substantive claim)."); ***Mattox v. City of Forest Park***, 183 F.3d 515, 523 (6th Cir. 1999) (exercising pendent appellate jurisdiction over City's interlocutory appeal on grounds that "[i]f the plaintiffs have failed to state a claim for

violation of a constitutional right at all, then the City of Forest Park cannot be held liable for violating that right any more than the individual defendants can.").

See also ***Grim v. Baltimore Police Department***, No. CV ELH-18-3864, 2020 WL 1063091, at *4 (D. Md. Mar. 5, 2020) ("To be sure, '*Monell*...and its progeny do not require that a jury must first find an individual defendant *liable* before imposing liability on [a] local government.'. . Thus, although an individual defendant may be entitled to qualified immunity, the local government entity can be liable under § 1983. . . However, in such a scenario, the plaintiff still must establish that the individual defendant committed constitutional violations in order for the entity defendant to be held liable under § 1983."); ***Glenn v. City of Columbus***, No. 4:07-CV-52 (CDL), 2010 WL 2600718, at *2 (M.D. Ga. June 23, 2010) ("Although this Court finds the holding and rationale of the Court of Appeals to be remarkably charitable to law enforcement officers who used deadly force against an unarmed man under dubious circumstances, the Court of Appeals's holding and rationale lead to the inescapable, albeit perhaps puzzling, result that if the Court of Appeals had to decide the remaining claims in this case, it would find that they fail as a matter of law. Duty bound to follow the dictates of the Court of Appeals, the Court therefore finds in favor of Defendants on the remaining claims for the following reasons. First, regarding the federal law claims against the City of Columbus, although the holding of the Eleventh Circuit's opinion focused upon the qualified immunity issue, the opinion suggests in much broader terms that the Eleventh Circuit found the use of force was reasonable under the circumstances and, therefore, no constitutional violation occurred. Second, the Eleventh Circuit's opinion contemplates that, even if a constitutional violation occurred, the beanbag munition policy cannot be a basis for municipal liability because the Eleventh Circuit concluded that the policymaker was entitled to qualified immunity on Plaintiffs' claims against him, suggesting that the training could not amount to a deliberate indifference to the rights of persons with whom the officers using the beanbag munition come into contact."); ***Strain v. Borough of Sharpsburg, Pa.***, 2007 WL 1630363, at *7 n.9 (W.D. Pa. June 4, 2007) ("The Supreme Court has held that qualified immunity section 1983 does not extend to municipalities. . . This is true even where the individual officers of the municipality are entitled to qualified immunity because the law that they are alleged to have violated was not clearly established at the time. . . Where, however, qualified immunity is granted to individual officers on the ground that there was no constitutional violation, the grant of qualified immunity precludes municipal liability."); ***Martin v. City of Oceanside***, 205 F. Supp.2d 1142, 1154, 1155 (S.D.Cal. 2002) ("If a court finds the officers acted constitutionally, the city has no liability under § 1983. Here, the Court has already concluded that the officers' conduct was not unconstitutional. It is true that the Court has answered the first *Saucier* question, whether plaintiff alleges facts that show a constitutional violation by the officers, in the affirmative. However, it is equally clear from the Court's analysis above that in answering the second *Saucier* question, in the course of which the Court is permitted to review both parties' summary judgment papers, rather than just plaintiff's complaint, the Court has determined that the uncontradicted facts show the officers did not violate plaintiff's constitutional rights. First, the Court has determined that the officers' entry into plaintiff's home was justified by the 'emergency aid' exception to the Fourth Amendment's warrant requirement. Second, the Court has found that the officers' alleged failure to announce

their presence and purpose, even if true, did not make their search of plaintiff's home unreasonable under the Fourth Amendment. Third, the Court has determined that the officers' pointing guns at plaintiff did not constitute excessive force under the circumstances. Therefore, because the officers' conduct did not violate plaintiff's constitutional rights, there is no unconstitutional action which can be charged against the City, and plaintiff's *Monell* claim against the City fails."), *aff'd*, 360 F.3d 1078 (9th Cir. 2004); ***VanVorous v. Burmeister***, No. 2:01-CV-02, 2001 WL 1699200, at *10 (W.D. Mich. Dec. 26, 2001) (not reported) ("The Court has determined that the Individual Defendants, including Burmeister, are entitled to qualified immunity. Unlike the court in *Doe v. Sullivan County*, however, this conclusion was not based solely on the reasonableness of the officers' belief that their conduct was lawful. Under *Saucier*, the Court was first required to determine whether VanVorous suffered a constitutional violation at all before asking whether that right was clearly established. The Court concluded that the Individual Defendants acted reasonably in using deadly force and did not violate VanVorous' Fourth Amendment rights. More recent Sixth Circuit opinions have made clear that a determination that the individual defendants committed no constitutional violation, whether by a court on summary judgment or by a jury, precludes municipal liability under § 1983. [citing cases] When there is no underlying constitutional violation by individual officers, there can be no municipal liability either.Therefore, the Court will grant the City of Menominee's motion for summary judgment of Plaintiff's claims.").

In ***Hegarty v. Somerset County***, 53 F.3d 1367, 1380 (1st Cir. 1995), the court noted:

> The determination that a subordinate law enforcement officer is entitled to qualified immunity from suit under section 1983 is not necessarily dispositive of the supervisor's immunity claim. Nevertheless, it does increase the weight of the burden plaintiff must bear in demonstrating not only a deficiency in supervision but also the essential causal connection or "affirmative linkage" between any such deficiency in supervision and the alleged deprivation of rights.

H. No Eleventh Amendment Immunity for Local Entities/State Immunities Not Applicable

Political subdivisions of the state have no Eleventh Amendment protection from suit in federal court. ***Moor v. County of Alameda***, 411 U.S. 693, 717-21 (1973). *See also* ***Northern Ins. Co. of New York v. Chatham County, Ga.***, 126 S. Ct. 1689, 1693 (2006) ("A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. . . Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties. [citing *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979); *Workman v. New York City*, 179 U.S. 552, 565 (1900); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890)] *See also Jinks v. Richland County*, 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit").

This is true even when, as respondent alleges here, 'such entities exercise a Aslice of state power.'' *Lake Country Estates, supra,* at 401, 99 S.Ct. 1171.").

See also ***Peart v. Seneca County***, 808 F.Supp.2d 1028, 1034 (N.D. Ohio 2011) ("Defendants argue that I should follow those district courts holding "counties, as political entities, are not sui juris; they are held accountable through their elected representatives, to wit, their commissioners." *McGuire v. Ameritech Servs., Inc.*, 253 F.Supp.2d 988, 1015 (S.D. Ohio 2003). . . . Ohio courts have treated the question of a county's capacity to be sued as turning on the extent to which a county is an instrumentality of the state. . . Defendants assert that Ohio counties thus lack capacity for the same reason counties in the past asserted sovereign immunity − Ohio law treats them as an arm of the state. But the Supreme Court has held that a political subdivision is not 'the State' and cannot enjoy sovereign immunity from a § 1983 suit. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977). . . . Moreover, in the special context of § 1983 actions, 'a state law that immunizes government conduct otherwise subject to suit under 1983 is pre-empted ... because the application of state immunity law would thwart the congressional remedy.' *Felder v. Casey,* 487 U.S. 131, 139 (1988). Section 1983 preempts Ohio law where it imposes a barrier to bringing an otherwise valid claim, and therefore Rule 17(b) does not bar this suit against the county."); ***Stack v. Karnes,*** 750 F.Supp.2d 892, 894-99 (S.D. Ohio 2010) ("[T]he issue before the Court is whether a county's lack of capacity to sue or be sued under Section 301.22 precludes the ability of such county to become amenable to a § 1983 claim pursuant to *Monell.* Ohio federal courts have dealt with this issue inconsistently. [collecting cases] Moreover, the Sixth Circuit has not directly dealt with this issue. . . . Because of the inconsistent manner in which Ohio district courts have dealt with this issue and because the Sixth Circuit has not squarely addressed the issue, this Court will consider it in depth. . . . [T]he Court must determine the applicability of the Eleventh Amendment to local governments, such as Franklin County, and the effect, if any, of the immunity from suit provided to such counties under Ohio Revised Code Section 301.22 on a § 1983 claim. . . . [T]he Eleventh Amendment does not apply to local governments unless they are considered an arm of the state. . . In that regard, the Supreme Court has consistently refused to apply Eleventh Amendment protection to counties because they are not arms of the state. . . .With the immunity afforded by the Eleventh Amendment being inapplicable to Franklin County, the Court turns to the effect of Section 301.22 on Franklin County's amenability to suit on a § 1983 claim. . . . While Ohio law is free to define and set forth the ability of political subdivisions, like Franklin County, to retain and ultimately waive immunity *under state law,* the Eleventh Amendment is controll[ing] as a matter of *federal law.* . . .Ohio counties are precluded from claiming protection to suit on grounds of lack of capacity pursuant to Section 301.22. . . . The fact that Ohio counties, absent application of Section 301.22, are not 'bodies politic and corporate' for *purposes of Ohio law* is not the appropriate inquiry. . . Rather, the meaning of 'person' for purposes of § 1983 focuses on the intent of Congress, not that of the individual states. . . . Thus, pursuant to Plaintiff's *Monell* claim, Franklin County is considered a 'person' for purposes of § 1983 and the immunity afforded under Sections 301.22 and 2743.01, respectively, is inapplicable.")

Furthermore, a state court may not refuse to entertain a § 1983 action against a school board on the ground that common law sovereign immunity barred the suit. ***Howlett v. Rose***, 496 U.S. 356, 110 S. Ct. 2430 (1990). *See also* ***Martinez v. California***, 444 U.S. 277, 284 (1980) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 ... cannot be immunized by state law."); ***Rodriguez v. City of Camden***, No. 12–2652 (JEI/AMD), 2013 WL 530863, *2 n.3 (D.N.J. Feb. 11, 2013) ("In light of the disposition of the Motion, the Court does not reach Defendants' alternative argument concerning qualified immunity pursuant to N.J.S.A. § 59:3–3. However, the Court notes that no state statute can provide a qualified immunity defense to a federal cause of action pursuant to 28 U.S.C. § 1983. Moreover, even under federal law, qualified immunity applies to individual government officials, not municipalities."); ***Turner v. City of Toledo***, 671 F.Supp.2d 967, 971, 972 (N.D. Ohio 2009) ("Courts have generally treated questions of whether a § 1983 suit may be brought against a 'political subdivision' of a state, as this Court did in its two previous opinions on this matter, under the rubric of Eleventh Amendment sovereign immunity analysis, and have looked to whether the governmental entity in question shares the state's own immunity from suit. Thus, the Sixth Circuit has expressly permitted suits under § 1983 to proceed against Ohio counties, on the ground that counties do not enjoy sovereign immunity. . . So too, the Supreme Court has reasoned that a municipality, unlike a state, is a 'person' under § 1983 because a state enjoys sovereign immunity, while a municipality does not. . . . [A] governmental entity's status under state law is not conclusive of whether that entity may be sued under federal law, though state law does provide evidence of whether a given entity is, in fact, 'the State.' In the present case, there is no question that Lucas County, like the school board in *Mt. Healthy,* is a 'political subdivision' of the State of Ohio, see Ohio Rev.Code ' 2743.01(B). Thus, *Mt. Healthy* (as the Court has noted in both of its previous decisions on this issue) precludes the argument that Lucas County cannot be sued under § 1983.An additional problem with Lucas County's position is that, in the special context of § 1983 actions, 'a state law that immunizes government conduct otherwise subject to suit under 1983 is pre-empted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy.' *Felder v. Casey,* 487 U.S. 131, 139 (1988). . . . Therefore, under *Felder*, Ohio law is pre-empted insofar as it would impose any barrier to bringing an otherwise-valid § 1983 action, and there is thus no Rule 17(b) problem with Lucas County's status as a party to this case. But even assuming that all of the preceding discussion is incorrect and Lucas County cannot, in fact, be made a party to *any* action, even a § 1983 action in federal court, there is no question that the Board of Commissioners could nonetheless be sued on the County's behalf.").

See also ***Williams v. Reed***, 145 S. Ct. 465, 469-70 & nn. 2, 3 (2025) ("The Secretary argues that Alabama's exhaustion requirement constitutes a 'neutral rule of judicial administration' and that the Alabama Supreme Court permissibly applied that statutory rule to bar the claimants' § 1983 suit in state court. *Haywood* v. *Drown*, 556 U. S. 729, 738 (2009). The claimants respond that Alabama may not preclude § 1983 suits on failure-to-exhaust grounds when, as here, plaintiffs challenge the Department's delays in processing their claims. Otherwise, they say, Alabama's rule would create a catch-22 preventing adjudication of, and in effect immunizing state officials from,

this narrow category of § 1983 claims about delays in the administrative process.[2] **[fn. 2:** The claimants also contend, more broadly, that this Court's § 1983 precedents—especially *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496 (1982), and *Felder* v. *Casey*, 487 U. S. 131 (1988)—categorically bar both federal and state courts from applying state administrative-exhaustion requirements to § 1983 claims. We need not address that broader argument.**]** In light of this Court's precedents, we agree with the claimants. In the unusual circumstances presented here—where a state court's application of a state exhaustion requirement in effect immunizes state officials from § 1983 claims challenging delays in the administrative process—state courts may not deny those § 1983 claims on failure-to-exhaust grounds. . . . **[fn. 3:** In *Haywood*, the Court declined to address 'whether Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to § 1983.'. . This case similarly does not require us to address that underlying question: Alabama 'has made this inquiry unnecessary by creating courts of general jurisdiction that routinely sit to hear analogous § 1983 actions.'**]**")

See also ***Haywood v. Drown***, 129 S. Ct. 2108, 2115-18 (2009) ("Correction Law § 24 violates the Supremacy Clause. In passing Correction Law § 24, New York made the judgment that correction officers should not be burdened with suits for damages arising out of conduct performed in the scope of their employment. Because it regards these suits as too numerous or too frivolous (or both), the State's longstanding policy has been to shield this narrow class of defendants from liability when sued for damages. [footnote omitted] The State's policy, whatever its merits, is contrary to Congress' judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages. . . . That New York strongly favors a rule shielding correction officers from personal damages liability and substituting the State as the party responsible for compensating individual victims is irrelevant. The State cannot condition its enforcement of federal law on the demand that those individuals whose conduct federal law seeks to regulate must nevertheless escape liability. . . . While our cases have uniformly applied the principle that a State cannot simply refuse to entertain a federal claim based on a policy disagreement, we have yet to confront a statute like New York's that registers its dissent by divesting its courts of jurisdiction over a disfavored federal claim in addition to an identical state claim. The New York Court of Appeals' holding was based on the misunderstanding that this equal treatment of federal and state claims rendered Correction Law § 24 constitutional. . . To the extent our cases have created this misperception, we now make clear that equality of treatment does not ensure that a state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action. . . . We therefore hold that, having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy. [footnote omitted] A State's authority to organize its courts, while considerable, remains subject to the strictures of the Constitution. . . We have never treated a State's invocation of 'jurisdiction' as a trump that ends the Supremacy Clause inquiry, see *Howlett*, 496 U.S., at 382-383, and we decline to do so in this case. . . .[T]he dissent's fear that 'no state jurisdictional rule will be upheld as constitutional' is entirely unfounded. . . Our holding addresses only the unique scheme adopted by the State of New York-a law designed to shield a particular

class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners). Based on the belief that damages suits against correction officers are frivolous and vexatious, . . . Correction Law § 24 is effectively an immunity statute cloaked in jurisdictional garb. Finding this scheme unconstitutional merely confirms that the Supremacy Clause cannot be evaded by formalism.")

Haywood v. Drown, 129 S. Ct. 2108, 2135, 2136, 2138 (2009) (Thomas, J., with whom Roberts, C.J., Scalia, J., and Alito, J., join as to Part III, dissenting) ("Unlike the Florida immunity rule in *Howlett,* NYCLA § 24 is not a defense to a federal claim and the dismissal it authorizes is without prejudice. . . For this reason, NYCLA § 24 is not merely 'denominated' as jurisdictional-it actually is jurisdictional. . . . It cannot be that New York has forsaken the right to withdraw a particular class of claims from its courts' purview simply because it has created courts of general jurisdiction that would otherwise have the power to hear suits for damages against correction officers. The Supremacy Clause does not fossilize the jurisdiction of state courts in their original form. Under this Court's precedent, States remain free to alter the structure of their judicial system even if that means certain federal causes of action will no longer be heard in state court, so long as States do so on nondiscriminatory terms. . . . By imposing on state courts a duty to accept subject-matter jurisdiction over federal § 1983 actions, the Court has stretched the Supremacy Clause beyond all reasonable bounds and upended a compromise struck by the Framers in Article III of the Constitution. Furthermore, by declaring unconstitutional even those laws that divest state courts of jurisdiction over federal claims on a non-discriminatory basis, the majority has silently overturned this Court's unbroken line of decisions upholding state statutes that are materially indistinguishable from the New York law under review. And it has transformed a single exception to the rule of state judicial autonomy into a virtually ironclad obligation to entertain federal business. I respectfully dissent.")

But see ***Winston v. County of Franklin***, No. 2:10-CV-1005, 2011 WL 2601562, at *4 (S.D. Ohio June 30, 2011) ("[T]he Board in this case was under no duty to provide a safe detention space in the Franklin County Juvenile Detention Center because the Board lacks the statutory authority to create policies related to the safety and protection of detainees. Rather, it is the juvenile judge who submits an annual written request for an appropriation to the board of county commissioners that includes reasonably necessary expenses for the maintenance and operation of the detention facility, and the care, maintenance, education, and support of detainees. . . . The Board's statutory authority is essentially limited to funding the detention center's budget, and constructing, leasing and/or purchasing juvenile detention centers. . . . Thus, pursuant to *Pembaur,* because the Board did not have any final policymaking authority related to the maintenance of safety for detainees of the creation of the standards of safety, it cannot be held vicariously liable for actions of employees at the juvenile detention center in allegedly failing to meet safety standards through different policies and customs. . . . Franklin County is not *sui juris* and, therefore, lacks the capacity to sue or be sued except where specially authorized by statute. . .The Ohio Revised Code establishes the capacity of a county to sue or be sued. *See* O.R.C. §§ 301.22. That section provides that only a county that adopts a 'charter or an alternative form of government' may be considered 'a body

politic and corporate for the purpose of enjoying and exercising the rights and privileges conveyed under it by the constitution and the laws of this state' and is 'capable of suing and being sued, pleading and being impleaded.' Franklin County has not adopted a charter or an alternative form of government and, therefore, is not a body corporate and politic amenable to suit as provided by O.R.C. §§ 301.22. Thus, Franklin County cannot be sued, and the Plaintiffs' claim against this Defendant fails.")

See also ***Tafari v. McCarthy***, 714 F.Supp.2d 317, 384 (N.D.N.Y. 2010) ("In 2009, the United States Supreme Court held that § 24 is unconstitutional to the extent that it precludes inmates from pursuing § 1983 actions. *Haywood v. Drown*, __ U.S. __, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009). However, at least two judges in this District have observed that because *Haywood*'s focus is on concerns about civil rights claims and the Supremacy Clause, the decision 'does not affect the question of whether this Court has proper jurisdiction to hear [a] pendent state law claim.' *Crump v. Ekpe*, No. 9:07-CV-1331, 2010 U.S. Dist. LEXIS 10799, 2010 WL 502762, at * 18 (N.D.N.Y. Feb.8, 2010) (Kahn, J. and Peebles, M.J.); *May v. Donneli*, No. 9:06-CV-437, 2009 U.S. Dist. LEXIS 85495, 2009 WL 3049613, at *5 (N.D.N.Y. Sept.18, 2009) (Sharpe, J. and Treece, M.J .). . . Therefore, I recommend that Defendants' motion for summary judgment be granted with respect to Plaintiff's pendent state claims.").

In ***Hess v. Port Authority Trans-Hudson Corp***., 115 S. Ct. 394 (1994), the Court held that injured railroad workers could assert a federal statutory right, under the FELA, to recover damages against the Port Authority and that concerns underlying the Eleventh Amendment- "the States' solvency and dignity"- were not touched. The Court explained, *id.* at 406:

> The proper focus is not on the use of profits or surplus, but rather is on losses and debts. If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" . . . then the Eleventh Amendment's core concern is not implicated.

See also ***Guertin v. State of Michigan***, 912 F.3d 907, 936, 941 (6th Cir. 2019*), reh'g and reh'g en banc denied*, 924 F.3d 309 (2019), *cert. denied sub nom.* ***City of Flint v. Guertin***, 140 S. Ct. 933 (2020) *and cert. denied sub nom.* ***Busch v. Guertin***, 140 S. Ct. 933 (2020) ("Flint readily concedes municipalities do not enjoy sovereign immunity. That would normally end our analysis, but this is not a typical case. At the time of the crisis, Flint was so financially distressed that the State of Michigan had taken over its day-to-day local government operations by way of a statutory mechanism enacted to deal with municipal insolvency—gubernatorial-appointed individuals who 'act for and in the place and stead of the governing body and the office of chief administrative officer of the local government.'. . Flint contends it became an arm of the state because of the State of Michigan's takeover. We thus find it more appropriate to resolve whether this extraordinary factor dictates a different outcome. . . On de novo review, . . . we agree with the district court that the City of Flint is not entitled to Eleventh Amendment immunity. . . . In sum, Flint has not met its burden to show that when under emergency management, it was an

'arm of the state' protected by the Eleventh Amendment. The foremost consideration—the state's potential liability for judgment—counsels against a finding of Eleventh Amendment immunity, and the remaining factors do not 'far outweigh' this factor."); ***Brent v. Wayne County Dep't of Human Servs.***, 901 F.3d 656, 681-82 (6th Cir. 2018) (" 'The state's potential legal liability for a judgment against the defendant "is the foremost factor" to consider in our sovereign immunity analysis.'. . Here, state law strongly suggests, although perhaps does not conclusively establish, that the State of Michigan would be responsible for judgments entered against Wayne County DHS. To start, the Michigan legislature abolished county departments of social services in 1975 and replaced them with a single statewide Department of Human Services (formerly called the Family Independence Agency). . . Numerous district courts have thereby concluded that county-level 'child protective services offices are therefore not county agencies, but are merely local offices of the state DHS.'. . Given that county DHS offices are merely local subdivisions of the state DHS, and given that state agencies are required to pay for court judgments, it follows that the State of Michigan—and not Wayne County—is liable for judgments against Wayne County DHS."); ***Karns v. Shanahan***, 879 F.3d 504, 518-19 (3d Cir. 2018) ("After giving equal consideration to all three factors, we weigh and balance them. We no longer adhere to the balancing analysis conducted in *Fitchik* in light of intervening changes in Eleventh Amendment immunity analysis articulated by the Supreme Court. Applying the revised analysis, we determine that while the state-treasury factor counsels against awarding Eleventh Amendment immunity, the state law and autonomy factors both tilt in favor of immunity. Indeed, in the intervening years since our decision in *Fitchik*, it has become apparent that the state law factor weighs heavily in favor of a finding of immunity. Weighing and balancing the qualitative strength of each factor in the context of the circumstances presented, we hold that NJ Transit is an arm of the state. We therefore conclude that NJ Transit is entitled to claim the protections of Eleventh Amendment immunity, which in turn functions as an absolute bar to any claims in this case against NJ Transit and the officers in their official capacities."); ***Maliandi v. Montclair State University***, 845 F.3d 77, 85-86, 99 (3d Cir. 2016) ("[W]e are mindful of the near unanimity among the Courts of Appeals that the factors relevant to an Eleventh Amendment inquiry typically favor immunity in the state college setting. However, because the particulars of our *Fitchik* test differ from analogous tests in other Circuits and because each entity seeking immunity warrants an individualized analysis, these cases do not dictate the answer to the question of first impression with which we are presented today. That question has bedeviled district judges in our Circuit, who are divided in their application of the *Fitchik* test to MSU. . . .We now resolve this dispute by concluding that MSU is an arm of the State, and in the process, we seek to synthesize our jurisprudence regarding the *Fitchik* factors for the benefit of district courts in future Eleventh Amendment cases. . . .After undertaking our own analysis of MSU's Eleventh Amendment immunity, we cannot agree with the District Court's determination that all three *Fitchik* factors counsel against immunity. For the reasons set forth below, we conclude that the funding factor counsels against immunity, but that the status under state law and autonomy factors—while close—tilt in favor of extending MSU immunity from suit. On balance, because two of the three coequal factors support MSU's claim for immunity, we hold that MSU is an arm of the State that enjoys the protections afforded by the Eleventh Amendment. . . .The upshot of our review is that

Fitchik's funding factor weighs against immunity, but its status under state law and autonomy factors both favor immunity. Thus, on balance, the *Fitchik* factors favor MSU's claim to Eleventh Amendment protection. . . We recognize that, absent recourse to the federal courts, Maliandi may have limited and unsatisfying avenues to obtain relief for the alleged discrimination she suffered. Yet, comity and state sovereignty are constitutional precepts and lynchpins of our federalist system of government, and where, as here, the State creates an entity that functions on balance as an arm of the State, the Eleventh Amendment's protection must carry the day. Accordingly, the constitutional right of the State of New Jersey to be free from private suit in federal court must be respected, and, unless the District Court determines on remand that New Jersey has waived its immunity for Maliandi's NJLAD claim, the suit against MSU must be dismissed."); ***Lowe v. Hamilton County Dept. of Job & Family Services***, 610 F.3d 321, 325, 326 (6th Cir. 2010) (setting out four-part test for determining whether entity is political subdivision or arm of state and concluding that the fact that "the state may reimburse HCJFS for these damages does not change the fact that HCJFS is the party legally liable for the judgment. The question of legal liability is paramount because it is 'an indicator of the relationship' between the state and the entity asserting sovereign immunity."); ***Cash v. Hamilton County Dept. of Adult Probation,*** 388 F.3d 539, 545 (6th Cir. 2004) ("The County argues that it is entitled to Eleventh Amendment immunity from suit because the Hamilton County Department of Adult Probation is an arm of the common pleas and municipal courts of the state of Ohio. To support this contention, the County cites a number of Ohio statutes. . . . The bald assertion that the Department is an arm of the common pleas and municipal courts is insufficient by itself to garner Eleventh Amendment immunity. . . Rather, this argument is one of many factors that must be considered by the district court. We have recognized that the most important factor is 'will a State pay if the defendant loses?' . . . The County raised the issue of Eleventh Amendment immunity in its motion for summary judgment. Although the district court granted the County's motion, the order provides no findings or analysis pertaining to the Eleventh Amendment. A final resolution of this issue will turn on factual findings regarding whether the Department of Adult Probation is part of the Ohio court system and whether the State or the County would pay damages for a constitutional violation perpetrated by the Department. We therefore remand this issue to the district court for further development."); ***Manders v. Lee,*** 338 F.3d 1304, 1328 n.51 (11th Cir. 2003) (en banc) ("*Hess* says that the state treasury factor is a 'core concern' of Eleventh Amendment jurisprudence. . . . It is true that the presence of a state treasury drain alone may trigger Eleventh Amendment immunity and make consideration of the other factors unnecessary. Thus, this is why some decisions focus on the treasury factor. If the State footed the entire bill here, there would be no issue to decide.The Eleventh Amendment, however, does not turn a blind eye to the state's sovereignty simply because the state treasury is not directly affected. Moreover, the United States Supreme Court has never said that the absence of the treasury factor alone defeats immunity and precludes consideration of other factors, such as how state law defines the entity or what degree of control the State has over the entity. As mentioned earlier, although the state treasury was not affected, the *Hess* Court spent considerable time pointing out how that lawsuit in federal court did not affect the dignity of the two States because they had ceded a part of their sovereignty to the federal government as one of the creator-controllers of the Compact Clause entity in issue. If the state-treasury-drain element were always

determinative in itself, this discussion, as well as the other control discussion, would have been unnecessary."); ***Endres v. Indiana State Police,*** 334 F.3d 618, 627 (7th Cir. 2003) ("Sharing of authority among units of government complicates both practical administration and legal characterization. Even if as a matter of state law the counties act as agents of the state in raising and remitting revenues, it remains a matter of federal law whether this makes each county's department part of the state. . . The dispositive question is more 'who pays?' than 'who raised the money?'. . . . The combination of *J.A.W.* and the 2000 legislation leads us to conclude that county offices of family and children in Indiana now must be classified as part of the state for purposes of the eleventh amendment. This does not require the overruling of *Baxter*, which dealt with superseded legislation. It is enough to say that the statutes now in force make county offices part of the state, as *J.A.W.* held and as the formal organization chart now shows them."); ***Alkire v. Irving,*** 330 F.3d 802, 813 (6th Cir. 2003) ("Unfortunately, we find ourselves with virtually no evidence on the most important point − who is responsible for a monetary judgment against the Holmes County Court − as it was not briefed by the parties, who assumed *Mumford* [*v. Basinski,* 105 F.3d 264, 268 (6th Cir.), *cert. denied,* 522 U.S. 914 (1997)] was binding precedent. As we shall hold that a remand is in order in any event, we choose to remand this issue to the district court. The district court can make the initial determination whether Ohio would be legally liable for a judgment against the Holmes County Court, as well as an evaluation of the other factors that may bear on whether the Holmes County Court should receive sovereign immunity."); ***Hudson v. City of New Orleans***, 174 F.3d 677, 683 (5th Cir. 1999) ("Ultimately we are most persuaded by the fact that the state treasury will in all likelihood be left untouched if damages were to be levied against the Orleans Parish District Attorney's office. It is well established that this . . . factor is crucial to our Eleventh Amendment arm of the state analysis. . . . In sum, we conclude that the Orleans Parish District Attorney's office is not protected from suit in federal court by the Eleventh Amendment."); ***Harter v. Vernon***, 101 F.3d 334, 340 (4th Cir. 1996) ("In sum, when determining if an officer or entity enjoys Eleventh Amendment immunity a court must first establish whether the state treasury will be affected by the law suit. If the answer is yes, the officer or entity is immune under the Eleventh Amendment."). *But see* ***Sales v. Grant***, 224 F.3d 293, 298 (4th Cir. 2000) (concluding that a promise of indemnification does not alter the non-immune status of state officers sued in their individual capacities).

See also ***Harvey v. Cty. of Hudson***, No. 14-3670 (KM), 2015 WL 9687862, at *6-7 (D.N.J. Nov. 25, 2015) ("I find that training and supervision of a detective as to the permissible use of deadly force is no mere administrative or personnel matter. It lies at the core of the HCPO's law enforcement functions. For claims arising from that training, the HCPO would be entitled to indemnification under the NJTCA. . . Accordingly, because (1) the state will, in fact, be responsible for any judgment against the HPCO, and (2) the HCPO's supervision and training of officers is a law enforcement function, the first *Fitchik* factor weighs strongly in favor of sovereign immunity with respect to these allegations. . . .Because all three of the *Fitchik* factors weigh in favor of sovereign immunity, I find that the HCPO must be treated as an arm of the State for purposes of these claims, which arise from the training and supervision of investigative officers. Accordingly, these claims are barred by the Eleventh Amendment and are dismissed with prejudice

for lack of subject matter jurisdiction. . . . Administrative tasks concerning personnel—hiring, firing, promotion, demotion—are to be distinguished from law enforcement functions. . . When performing such administrative functions, the HCPO has more autonomy; it acts more as a component of county government, rather than as an arm of the State. . . As to a judgment arising from claims involving these administrative functions, the NJTCA would not mandate indemnification by the State. . . Therefore, as to the claims of negligent hiring or failure to discipline, the first *Fitchik* factor weighs against sovereign immunity. For the same reason, the second and third *Fitchik* factors also lean against the application of sovereign immunity. The HCPO points to no statutory or *de facto* domination of its administrative or personnel functions by the State. Administrative tasks are not part of the HCPO's core law enforcement function, and therefore would not be regarded as state functions under *Wright.* The *Fitchik* factors therefore work against the application of sovereign immunity with respect to claims arising from the HCPO's ordinary administrative or personnel decisions. Accordingly, I will not dismiss on jurisdictional grounds the Complaint's allegations of negligent hiring and failure to discipline.")

See also ***K. J. by & through Johnson v. Jackson***, 127 F.4th 1239, 1251 n.8 (9th Cir. 2025) ("We have held that California public school districts are 'to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity.'. . We take no position on whether this holding should be revisited given our new test for evaluating whether an entity is an arm of the state under the Eleventh Amendment. *See Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), *cert. denied*, —— U.S. ——, 144 S. Ct. 1465, 218 L.Ed.2d 694 (2024). In any case, K.J.'s request for expungement falls within the *Ex Parte Young* exception to Eleventh Amendment sovereign immunity."); ***Walker v. Jefferson Cnty. Bd. of Educ.***, 771 F.3d 748, 757 (11th Cir. 2014) ("'Whether [an entity] is an "arm of the [s]tate" must be assessed in light of the particular function in which the [entity] was engaged when taking the actions out of which liability is asserted to arise.' *Manders*, 338 F.3d at 1308. Both of the cases before us concern employment-related decisions (i.e., hiring, assignment, and compensation), and under *Stewart,* 908 F.2d at 1509–11, local school boards in Alabama are not arms of the state with respect to such decisions. Accordingly, the Jefferson County Board of Education and the Madison City Board of Education are not immune under the Eleventh Amendment from suits challenging those decisions under federal law."); ***Cash v. Granville County Bd. of Educ.***, 242 F.3d 219, 226, 227 (4th Cir. 2001) ("[W]e conclude that upon our consideration of each of the factors identified for determining whether a governmental entity is an arm of the State and therefore one of the United States within the meaning of the Eleventh Amendment, the Granville County Board of Education appears much more akin to a county in North Carolina than to an arm of the State. . . . . In reaching our conclusion in this case, we continue to follow our jurisprudence, as stated in *Harter, Gray, Bockes*, and *Ram Ditta*, and in doing so, we believe that we are faithfully applying the relevant Eleventh Amendment jurisprudence announced by the Supreme Court in *Regents, Hess, Lake Country Estates*, and *Mt. Healthy*. We therefore reject the district court's view that the Supreme Court's recent decisions in *Regents* and *McMillian* overruled our decisions in *Harter*, *Gray*, *Bockes*, and *Ram Ditta*."); ***Belanger v. Madera Unified School District,*** 963 F.2d 248, 251 (9th Cir. 1992) (holding school districts in California are state agencies for purposes of the Eleventh Amendment). *See generally*

Eason v. Clark County School Dist., 303 F.3d 1137, 1141 n.2, 1144 (9th Cir. 2002) (holding school district in Nevada is local or county agency, not state agency and collecting cases from circuits); ***Doe v. Montgomery County Board of Education***, No. CV 21-0356 PJM, 2021 WL 6072813, at *8 (D. Md. Dec. 23, 2021) ("Defendants correctly point out that members of this Court have consistently held that county boards of education in Maryland, including the Board at bar, are state agencies and thus immune from suit under § 1983."); ***Dennis v. Bd. of Educ. of Talbot Cnty.***, 21 F.Supp.3d 497, 501-02 (D. Md. 2014) ("County school boards and their officials are considered state agencies and state officials. . . Because the Board and individually named Defendants in their official capacities are a county school board and school officials, they are not 'persons' and cannot be sued under § 1983. The Fourth and Fourteenth Amendment claims will be dismissed against them accordingly."); ***Weaver v. Madison City Bd. of Educ.***, No. 5:11–cv–03558–TMP, 2013 WL 2350181, *9 (N.D. Ala. May 29, 2013)("Since *Stewart,* courts in the Eleventh Circuit, and particularly district courts in Alabama, have consistently found that local boards of education are not protected by the Eleventh Amendment as 'arms of the State.' Rather, there is a consistent line of authority holding them to be local political subdivisions, comparable to counties and municipalities."); ***Stevenson v. Owens State Community College***, 562 F.Supp.2d 965, 968 (N.D. Ohio 2008) ("With regard to how the state courts treat the entity for state sovereign immunity purposes, Ohio courts have held that state community colleges organized under Ohio Rev.Code Chapter 3358, like Owens, are state entities protected by Ohio's sovereign immunity.[collecting cases] This Court agrees with that analysis and accepts these cases as authority that Ohio courts treat community colleges as arms of the state.").

In ***Regents of the University of California v. Doe***, 117 S. Ct. 900, 905 (1997), the Court held that "[t]he Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party."

I. States: Section 1983 Does Not Abrogate 11th Amendment Immunity and States Are Not "Persons" Under Section 1983

In the absence of consent to suit or waiver of immunity, a state is shielded from suit in federal court by virtue of the Eleventh Amendment. The state may raise sovereign immunity as a defense to a federal claim in state court as well. *See* ***Alden v. Maine***, 527 U.S. 706 (1999). A damages action against a state official, in her official capacity, is tantamount to a suit against the state itself and, absent waiver or consent, would be barred by the Eleventh Amendment. A state may waive its 11th Amendment immunity by *removing* to federal court state law claims as to which it has surrendered its sovereign immunity in state courts. *See* ***Lapides v. Bd. of Regents***, 535 U.S. 613 (2002). Congress may expressly abrogate a state's sovereign immunity pursuant to its enforcement power under the Fourteenth Amendment. ***Pennhurst State School and Hospital v. Halderman***, 465 U.S. 89, 98-100 (1984). *See also* ***United States v. Georgia***, 126 S. Ct. 877 (2006); ***Tennessee v. Lane***, 124 S. Ct. 1978 (2004); ***Nevada Dep't of Human Resources v. Hibbs,*** 538 U.S. 721 (2003). The Court has held that Section 1983 does not abrogate Eleventh Amendment immunity of state governments. ***Quern v. Jordan,*** 440 U.S. 332, 345 (1979).

See also ***Wisconsin Dep't of Corrections v. Schacht***, 118 S. Ct. 2047, 2051-52 (1998) ("We now conclude, contrary to the Seventh Circuit, that the presence in an otherwise removable case of a claim that the Eleventh Amendment may bar does not destroy removal jurisdiction that would otherwise exist. . . . The Eleventh Amendment. . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. . . Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it."); ***Constantine v. Rectors and Visitors of George Mason University***, 411 F.3d 474, 482 (4th Cir. 2005) (noting that Eleventh Amendment immunity is not strictly an issue of subject-matter jurisdiction but that court should address issue promptly once the State asserts its immunity); ***Parella v. Retirement Board of the Rhode Island Employees' Retirement System***, 173 F.3d 46, 55 (1st Cir. 1999) ("[T]he Supreme Court has now clearly stated that courts are free to ignore possible Eleventh Amendment concerns if a defendant chooses not to press them."). *Compare* ***David B. v. McDonald***, 156 F.3d 780, 783 (7th Cir. 1998) (With no reference to *Schacht*, holding "the eleventh amendment, extended in *Hans v. Louisiana* . . . to federal-question cases, deprives the court of jurisdiction.") *with* ***Endres v. Indiana State Police,*** 334 F.3d 618, 623 (7th Cir. 2003) ("Because the eleventh amendment does not curtail subject-matter jurisdiction (if it did, states could not consent to litigate in federal court, as *Lapides* holds that they may), a court is free to tackle the issues in this order, when it makes sense to do so, without violating the rule that jurisdictional issues must be resolved ahead of the merits.").

See also ***Stevenson v. City of Chicago***, No. 17 CV 4839, 2018 WL 1784142, at *12 (N.D. Ill. Apr. 13, 2018) ("Here, the ISP Defendants did not consent to removal because Plaintiffs had not served the ISP Defendants until after the City of Chicago Defendants removed this action to federal court. With this in mind, it is well-settled that the waiver of Eleventh Amendment immunity must be clear. . . Thus, Plaintiffs' contention that ISP's failure to move to remand under 28 U.S.C. § 1447(c)—assuming that the ISP Defendants had a legal basis to do so—was a clear declaration of Eleventh Amendment immunity waiver is simply too attenuated under the circumstances. To clarify, the Supreme Court in *Lapides* and the Seventh Circuit in *Board of Regents* focused on the voluntary, active nature of the state's consent to proceed in federal court. . . As discussed, ISP did not make a voluntary, active decision to litigate this action in federal court nor are the ISP Defendants taking advantage of the federal forum for any unfair purpose or advantage as contemplated by *Lapides* and its progeny. . . As such, ISP has not waived its Eleventh Amendment protection under the circumstances[.]")

In ***Will v. Michigan Dep't of State Police***, 491 U.S. 58 (1989), the Court held that neither a state nor a state official in his official capacity is a "person" for purposes of a section 1983 damages action. Thus, even if a state is found to have waived its Eleventh Amendment immunity in federal court, or even if a § 1983 action is brought in state court, where the Eleventh Amendment has no applicability, ***Will*** precludes a damages action against the state governmental entity. This holding does not apply when a state official is sued in his official capacity for injunctive relief.

491 U.S. at 71 n. 10. *See also* ***Lane v. Cent. Alabama Cmty. Coll.,*** 772 F.3d 1349,1351-52 (11th Cir. 2014) ("Here, Lane seeks equitable relief in the form of reinstatement of his employment. We have determined previously that requests for reinstatement constitute prospective injunctive relief that fall within the scope of the *Ex parte Young* exception and, thus, are not barred by the Eleventh Amendment. . . .In the light of our reinstatement precedents, we conclude that the district court erred in dismissing Lane's official-capacity claim against Franks as barred by the Eleventh Amendment. We affirm in part and vacate in part; and we remand the case for further proceedings consistent with this opinion and with the Supreme Court's decision in *Lane v. Franks,* 134 S.Ct. 2369 (2014).")

See also ***Gerlach v. Rokita***, 95 F.4th 493, 500-01 (7th Cir. 2024) ("A plaintiff cannot circumvent the sovereign immunity enjoyed by states and their employees in their official capacities simply by pleading a cause of action against those same employees as individuals. Where 'the judgment sought would expend itself on the public treasury or domain,' the suit is against the sovereign, not the individual. . . Even if the sought after compensation would not definitively be paid out of the state treasury, if the amount the plaintiff seeks 'should have been paid by the State,' the suit is likely one against the state itself. . . Any compensation Gerlach seeks correlates directly to the interest her property earned while in state custody—interest that flowed to the state, not individual state employees. . . The money Gerlach seeks is in the state coffers, not the personal bank accounts of Indiana's current and former attorneys general. Targeting individual state employees for those funds does not change the fact that the amount she claims she is owed should have been paid by the state. . . Because the State of Indiana benefited from retaining interest earned on Gerlach's property, we conclude that Gerlach's suit for compensatory relief is actually against the State of Indiana. . . Since Gerlach's claim for compensatory relief is against the state, her claim is doubly barred—first because § 1983 does not create a cause of action against a state and second because Indiana enjoys sovereign immunity under the Eleventh Amendment. . . Finding that Gerlach's claim is really against the state, we need not resolve whether an individual can be held liable for a Fifth Amendment takings violation. Accordingly, the district court correctly dismissed her claim for compensation under § 1983."); ***Hohenberg v. Shelby County, Tennessee***, 68 F.4th 336, 342-44 (6th Cir. 2023) ("[T]he Environmental Court is not a 'person' under § 1983. For one, 'person's' semantic content suggests as much. The Environmental Court is not a natural person, and it is not a 'bod[y] politic [or] corporate.'. . Even if 'person' extends to 'corporations, both private and public,' as *Will* held, courts are not private or public corporations. They 'exercise ... judicial power, by the proper officer or officers, at a time and place appointed by law.'. . All of this explains why we have held that 'a court'—in that case the Akron municipal court—'is not a "person" within the meaning of § 1983.'. . The Environmental Court also operates as an organ of the State of Tennessee rather than of a 'body politic or corporate.' Its powers and responsibilities flow from Tennessee's Constitution and laws, not from a corporate or municipal charter. As part of the General Sessions court, the Environmental Court exercises the Volunteer State's 'judicial power.'. . State statutes delimit the Court's jurisdiction and many of its procedures. . . And superior Tennessee courts, up to the Tennessee Supreme Court, hear appeals from its judgments. . .Turn to traditional federalism and immunity principles, 'presuppositions of our ... history' that § 1983

honors. . . Lawsuits against state courts, like laws regulating state judges, strike at the heart of state sovereignty. . . .Section 1983 actions against the Environmental Court also would clash with core sovereign immunity principles. '[C]ase after case' describes state courts, including local courts like this one in Michigan and Ohio, as arms of the State and beneficiaries of their State's sovereign immunity. . . We know of no case charting a different course. As the Court observed in *Will*, it is difficult to understand why § 1983 would create a right to sue an entity that could always assert immunity from suit. Hohenberg and Hanson push back. They say that the Environmental Court is an arm of Shelby County, not the State of Tennessee, making it a § 1983 'person.'. . But we rejected a similar argument in *Walsh* . . . and it has no more force today. It does not matter that Tennessee law sometimes treats the Environmental Court as a county entity. . . . [T]he meaning of 'person' under § 1983 turns on federal, not state, law. . .It does not matter that Shelby County funds the Court. It does so in accordance with a state statute requiring as much . . . and at any rate the Court's receipt of County funds does not outweigh the other factors making it a State entity[.] . . It does not matter that Shelby County's voters, rather than the State of Tennessee's voters, pick the Environmental Court's judges. A similar reality holds for every Tennessee inferior court judge, who 'shall be elected by the qualified voters of the district or circuit to which they are to be assigned.'. . Once again, local elections do not counterbalance the other factors that paint the Court as an instrumentality of the State. . . All told, because the Environmental Court is not a 'person' and because it is instead an arm of the State, claimants' § 1983 action against it fails."); ***Laborers' Int'l Union of North America, Loc. 860 v. Neff***, 29 F.4th 325, 331-32 (6th Cir. 2022) (concluding that the [Cuyahoga County, Ohio] Juvenile Court is an arm of the State); ***Jones v. Cummings***, 998 F.3d 782, 786-87 (7th Cir. 2021) ("Our sister courts routinely have held that prosecutors and district attorneys in states with comparable laws are state officials. . . . Likewise, this court and the District Court for the Southern District of Indiana have held that Indiana's county prosecutors are state officials when they are prosecuting criminal cases. . . . Recognizing this, he asks this court to hold that 'unlawful rogue actions of a prosecutor are not "a decision, a duty, an obligation, a privilege, or a responsibility of the prosecuting attorney's office[ ]"' and thus his suit against Cummings would not be captured by Ind. Code § 33-39-9-4 (requiring the state to pay expenses incurred by an action against a prosecuting attorney). But any such exception would sweep away the rule—immunity would mean nothing if it existed only when the prosecutor would win on the merits. Jones has sued Cummings for performing his duty to bring charges against criminal defendants. He took that action as an officer of the state, and that, under *Will*, is the end of it."); ***McLean v. Gordon***, 548 F.3d 613, 618 (8th Cir. 2008) ("We need not address the question of whether the State waived its Eleventh Amendment immunity by voluntarily removing this matter to federal court. Section 1983 provides for an action against a 'person' for a violation, under color of law, of another's civil rights. As the Supreme Court reminded us, 'a State is not a Aperson' against whom a § 1983 claim for money damages might be asserted.' [citing *Lapides* and *Will*] Thus, the district court erred in failing to grant summary judgment for DSS, an agency or 'arm [ ] of the State,' on the section 1983 claim brought by McLean."); ***Harper v. Colorado State Bd. of Land Commissioners***, 2007 WL 2430122, at *4 (10th Cir. Aug. 29, 2007) (not published) ("The Harpers maintain that '[t]he reason a state agency (or a state itself) is generally not a 'person' for purposes of a suit for damages under [§ 1983] is because of the 11th Amendment ..., which

immunizes states from federal court suits for damages.'. . This argument is not persuasive. The Supreme Court has recognized a distinction between the immunity afforded by the Eleventh Amendment and the limitations in the scope of § 1983 arising from the terms of the statute. . . Accordingly, because the § 1983 claims at issue in this appeal are asserted against the Land Board, an entity that is not a 'person' under that statute, the district court's grant of summary judgment was proper."); ***Manders v. Lee,*** 338 F.3d 1304, 1328 n.53 (11th Cir. 2003) (en banc) ("If sheriffs in their official capacity are arms of the state when exercising certain functions, then an issue arises whether Manders's § 1983 suit is subject to dismissal on the independent ground that they are not 'persons' for purposes of § 1983. [citing *Will*] This statutory issue, however, is not before us as it was neither briefed nor argued on appeal."); ***Gean v. Hattaway,*** 330 F.3d 758, 766 (6th Cir. 2003) ("[T]he need for this court to undertake a broad sovereign immunity analysis with respect to the § 1983 claims is obviated by the fact that the defendants in their official capacities are not recognized as 'persons' under § 1983. Even if Tennessee's sovereign immunity has been properly waived or abrogated for the purposes of the federal statute the defendants allegedly violated, a § 1983 claim against the defendants in their official capacities cannot proceed because, by definition, those officials are not persons under the terms of § 1983."); ***Garrett v. Talladega County Drug and Violent Crime Task Force***, 983 F.Supp.2d 1369, 1376. 1377 (N.D. Ala. 2013) ("In this case, the evidence clearly shows that the Task Force is created by, and controlled by, the office of the Talladega County District Attorney. It is a subdivision of that office. All District Attorney's offices are deemed to be agencies of the State of Alabama. . . Accordingly Eleventh Amendment immunity applies to deprive this court of jurisdiction over the claims against the Task Force. . . .As an agency of the Talladega County District Attorney, the Task Force 'is not a legal entity subject to being sued' under 42 U.S.C. § 1983. . . Accordingly, the section 1983 claims are due to be dismissed for this alternative reason as well."); ***Tower v. Leslie-Brown,*** 167 F. Supp.2d 399, 403 (D. Me. 2001) ("Defendants Peary and Leslie-Brown therefore enjoy the same immunity from suit in their official capacities that their employing agencies do.").

See also ***Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony***, 123 S. Ct. 1887, 1892 (2003) ("Although this case does not squarely present the question, the parties agree, and we will assume for purposes of this opinion, that Native American tribes, like States of the Union, are not subject to suit under § 1983.") *and* ***Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony***, 123 S. Ct. 1887, 1894 (2003) ("[W]e hold that the Tribe may not sue under § 1983 to vindicate the sovereign right it here claims."); ***Waukegan Potawatomi Casino, LLC v. City of Waukegan***, 128 F.4th 871, 876-77 (7th Cir. 2025) ("We have yet to determine whether tribes, or their arms, can sue to vindicate non-sovereign rights under § 1983. Courts have grappled with this issue since *Inyo County*. On one hand, it is a foundational principle of statutory interpretation that a term is presumed to have the same meaning throughout a statute. . . This presumption is 'at its most vigorous when a term is repeated within a given sentence.'. . Indeed, § 1983 references both persons who may be sued and persons who may sue in the same breath. Building off this presumption and sovereign immunity to suit under § 1983, the Fourth Circuit has found that an arm of the state is incapable of maintaining § 1983 actions regardless of the nature of its claims. *Va. Off. for Prot. & Advoc. v.*

Reinhard, 405 F.3d 185, 189–90 (4th Cir. 2005) (analyzing *Inyo County*'s implications in the context of a state agency and finding no "evidence of statutory intent to allow suits by sovereigns under § 1983 that would overcome the general presumption that 'person' in a statute does not include the sovereign"). In a similar vein, the Tenth Circuit has remarked that 'a "person" within the meaning of § 1983 possesses neither 'sovereign rights" nor "sovereign immunity."'*Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1236 (10th Cir. 2010). On the other hand, this reasoning renders *Inyo County*'s painstaking analysis of the 'legislative environment' of the word 'person' and the sovereign/non-sovereign rights distinction entirely gratuitous. The Sixth Circuit recognized as much when it dispensed with a similar argument. *Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589, 596 & n.5 (6th Cir. 2009). For their part, the Ninth and Tenth Circuits seem to recognize the sovereign rights divide but have not affirmatively held that tribes can sue to vindicate non-sovereign rights. *Muscogee (Creek) Nation*, 611 F.3d at 1234–36; *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514–15 (9th Cir. 2005). To add even more confusion to the mix, tribes have mounted attempts to bring § 1983 suits as parens patriae to enforce quasi-sovereign rights, with varying degrees of success. Compare *Dep't of Health & Soc. Servs. v. Native Vill. of Curyung*, 151 P.3d 388, 399–402 (Alaska 2006) (permitting parens patriae action), with *Chemehuevi Ind. Tribe v. McMahon*, 934 F.3d 1076, 1082 (9th Cir. 2019) (finding parens patriae action inconsistent with § 1983).This is a difficult question that should not be taken lightly given its significant implications for federalism and tribal governance. However, we need not answer it today because WPC's claim would fail on the merits if allowed to proceed."); ***Pistor v. Garcia***, 791 F.3d 1104, 1112-14 (9th Cir. 2015) ("Although '[t]ribal sovereign immunity "extends to tribal officials when acting in their *official* capacity and within the scope of their authority,"'. . . tribal defendants sued in their *individual* capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties. . . .The principles reiterated in *Maxwell* foreclose the tribal defendants' claim to tribal sovereign immunity in this case. The gamblers have not sued the Tribe. The district court correctly determined that the gamblers are seeking to hold the tribal defendants liable in their individual rather than in their official capacities. . . . Even if the Tribe agrees to pay for the tribal defendants' liability, that does not entitle them to sovereign immunity: 'The unilateral decision to insure a government officer against liability does not make the officer immune from that liability.'").

A state official sued in her individual capacity for damages is a "person" under § 1983. *See* ***Hafer v. Melo***, 502 U.S. 21 (1991). ***Hafer*** eliminates any ambiguity ***Will*** may have created by clarifying that "[T]he phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Id*. at 26.

See also ***State Emp. Bargaining Agent Coalition v. Rowland***, 718 F.3d 126, 137 (2d Cir. 2013) ("While acknowledging that the Eleventh Amendment generally does not bar claims for monetary damages against state officials in their individual capacities, the district court nonetheless held that plaintiffs' claims were barred because the action, 'though nominally against

the Governor and the Secretary of OPM,' was in reality a suit against the State, as a damages award would cause 'the loss of substantial public resources.'. .The district court erred. Where a complaint 'specifically seeks damages from [ ] defendants in their individual capacities[,] ... the mere fact that the state may reimburse them does not make the state the real party in interest.'. . That is true even if the award is quite large, as we noted in *Huang v. Johnson,* where the plaintiffs sought a $50 million award. 251 F.3d 65, 70 (2d Cir.2001) (holding that the fact that defendants 'might not be able to pay [the award] on their own [did] not transform the claim into one against [defendants] in their official capacities'). We therefore hold that the claims for monetary damages against the defendants in their individual capacities are not barred by the Eleventh Amendment."); ***Ritchie v. Wickstrom***, 938 F.2d 689, 692 (6th Cir. 1991) (Eleventh Amendment did not bar suit against individual sued as policymaker for state institution, even "[i]f the State should voluntarily pay the judgment or commit itself to pay as a result of a negotiated collective bargaining agreement...."); ***Kroll v. Bd. of Trustees of Univ. of Ill.***, 934 F.2d 904, 907 (7th Cir. 1991) ("Personal capacity suits raise no eleventh amendment issues."), *cert. denied*, 112 S. Ct. 377 (1991).

See also ***Sossamon v. Lone Star State of Texas***, 131 S. Ct. 1651, 1659, 1660 (2011) (Provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) creating private cause of action for violations of the RLUIPA, and authorizing person to assert such violations as claim or defense to obtain "appropriate relief" against government, did not clearly and unequivocally notify states that, by accepting federal funds, they were waiving their sovereign immunity to suits for money damages under the RLUIPA, and did not result in waiver of state's immunity from damages suit by prisoner whose free exercise rights were allegedly burdened; Congress, by using phrase "appropriate relief," did not clearly manifest its intent to include damages remedy."). *But see* ***Tanzin v. Tanvir***, 141 S. Ct. 486, 492-93 (2020) ("A damages remedy is not just 'appropriate' relief as viewed through the lens of suits against Government employees. It is also the *only* form of relief that can remedy some RFRA violations. For certain injuries, such as respondents' wasted plane tickets, effective relief consists of damages, not an injunction. . . Given the textual cues just noted, it would be odd to construe RFRA in a manner that prevents courts from awarding such relief. Had Congress wished to limit the remedy to that degree, it knew how to do so. . . Our opinion in *Sossamon* does not change this analysis. *Sossamon* held that a State's acceptance of federal funding did not waive sovereign immunity to suits for damages under a related statute—the Religious Land Use and Institutionalized Persons Act of 2000—which also permits '"appropriate relief."'. . The obvious difference is that this case features a suit against individuals, who do not enjoy sovereign immunity. . . . We conclude that RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities. The judgment of the United States Court of Appeals for the Second Circuit is affirmed.")

See also ***Barnett v. Short***, 129 F.4th 534, 539-43 (8th Cir. 2025) ("Though our court has said without explanation in two nonbinding opinions that RLUIPA doesn't permit the recovery of damages, . . . we conclude that RLUIPA's reference to 'appropriate relief' encompasses damages. Damages are 'the traditional form of relief offered in the courts of law.'. . Far from being unusual,

damages are more nearly the default remedy in American courts in most circumstances, and nowhere in RLUIPA has Congress affirmatively excluded this commonplace recovery. . . As Barnett and several amici point out, moreover, damages are many times the only relief that a jail inmate can obtain. That's because jail inmates are often housed in particular jails for less time than it takes to litigate a case to completion, and their transfer or release from those facilities will typically moot their requests for injunctive relief, as here. RLUIPA specifically extends its protection to jail inmates, *see* 42 U.S.C. §§ 2000cc–1(a), 1997(1)(B)(ii), and so, since opportunities for injunctive relief will frequently be fleeting, damages are even more 'appropriate' than they otherwise would be. Furthermore, the congressional admonition that RLUIPA 'shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution,'. . . would be hard to square with a congressional intent to place the most common form of relief outside the bounds of what is appropriate. The Supreme Court's decision in *Tanzin v. Tanvir*, 592 U.S. 43, 141 S.Ct. 486, 208 L.Ed.2d 295 (2020) furnishes instructive guidance. In that case, the Court considered a question under the Religious Freedom Restoration Act (RFRA) similar to the one we now confront. The Supreme Court has described RFRA as RLUIPA's 'sister statute,' and indeed Congress enacted RLUIPA to fill part of the void created when the Court held that RFRA did not apply to states and their subdivisions. . . Like RLUIPA, RFRA permits a plaintiff to sue to recover 'appropriate relief against a government' when it substantially burdens a person's exercise of religion without furthering a compelling governmental interest. . .The Court in *Tanzin* unanimously held that a damage remedy fits the bill. . . It explained that 'damages have long been awarded as appropriate relief' in suits against government officials and are still 'commonly available' against them, such as in § 1983 suits for clearly established violations of the First Amendment. . . The Court also observed that Congress knew how to limit RFRA plaintiffs to injunctive relief but did not do so. . . The same could be said for the availability of damages in a RLUIPA action given the similar contexts in which RFRA and RLUIPA operate and the fact that Congress knows how to limit the types of relief available no less with RLUIPA than with RFRA. . . . We therefore conclude that the district court erred in dismissing Barnett's RLUIPA claim against the county. We recognize that there might be some uncertainty as to whether Barnett is seeking to hold the county liable simply because it employs Short and, if so, whether RLUIPA permits claims based on vicarious liability. But the district court did not consider these questions, and the parties on appeal do not discuss them. So we leave it for the district court on remand to resolve these matters in the first instance should the parties choose to raise them. Though Barnett's RLUIPA claim against the county may proceed, his RLUIPA claim against Short is a different matter. We do not disagree with Barnett's contention that RLUIPA's text appears to subject Short to liability for damages. Once again, RLUIPA permits claims against a 'government,'. . . and it defines 'government' to include county officials and 'any other person acting under color of State law.'. . That language permits suits against individual defendants in both their official and individual capacities. . . But we conclude that Congress's authorization of suits against non-recipients of federal money in their individual capacities exceeds its spending power. That's because 'the legitimacy of Congress' power to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on whether the recipient voluntarily and knowingly accepts the terms of that "contract."'. . Short has not consented to any

conditions of federal funding, so it's hard to understand how Congress's spending power can be brought to bear on her directly. . . . We do not decide whether Short's acceptance of employment at the jail somehow amounts to her consent to the conditions Congress imposed on her employer because Barnett doesn't argue the point; he simply says that Short's consent isn't required, but we disagree. It appears we are in the company of every other circuit to have considered the matter, both before and after the Supreme Court held in *Tanzin* . . . that plaintiffs could assert RFRA claims against defendants in their individual capacities. *See, e.g.*, *Tripathy v. McKoy*, 103 F.4th 106, 114 (2d Cir. 2024); *Landor v. La. Dep't of Corr. & Pub. Safety*, 82 F.4th 337, 342–44 (5th Cir. 2023). As the Fifth Circuit once explained, 'only the grant recipient ... may be liable for its violation,' since 'individual RLUIPA defendants are not parties to the contract in their individual capacities.'")

Compare ***Haight v. Thompson***, 763 F.3d 554, 568-70 (6th Cir. 2014) ("In the face of *Sossamon*, the inmates make a thought-provoking, but in the end unconvincing, argument. For all of the similarities between this case and that one, they note, one thing is missing: *Sossamon* considered lawsuits against prison officials in their official capacity, not a claim against the prison officials in their individual capacity. Because lawsuits against state officials in their official capacity amount to lawsuits against the State for purposes of Eleventh Amendment (and other constitutional) immunities, and because lawsuits against state officials in their individual capacity do not, they insist that the clear-statement rule does not apply to this claim for monetary relief. Put another way, even if *Sossamon* establishes that the phrase 'appropriate relief' fails to satisfy the clear-statement rule, it does not establish that the clear-statement rule applies to this claim for relief. In making this argument, the inmates understate the coverage of the clear-statement rule. Clarity is demanded *whenever* Congress legislates through the spending power, whether related to waivers of sovereign immunity or not. . . One of the distinguishing features of the spending power is that it allows Congress to exceed its otherwise limited and enumerated powers by regulating in areas that the vertical structural protections of the Constitution would not otherwise permit. . . So long as States consent to the bargain—receiving federal funds in return for allowing Congress to regulate where it otherwise could not—the Constitution permits the arrangement. This feature of the spending power requires clarity throughout, not just in money-damages actions against state officials sued in their official capacity. . . . Because the imperative of clarity applies in all of these settings and because *Sossamon* establishes that the phrase 'appropriate relief' does not clearly entitle a claimant to money damages, the claimants' request for money damages must fail. . . . We have considerable company in reaching this conclusion. Every circuit to consider the question, whether before *Sossamon* or after, has held that RLUIPA does not permit money damages against state prison officials, even when the lawsuit targets the defendants in their individual capacities. *See Washington v. Gonyea*, 731 F .3d 143, 145–46 (2d Cir.2013); *Stewart v. Beach*, 701 F.3d 1322, 1334–35 (10th Cir.2012); *Sharp v. Johnson*, 669 F.3d 144, 153 (3d Cir.2012); *Nelson v. Miller*, 570 F.3d 868, 886–89 (7th Cir.2009); *Rendelman v. Rouse*, 569 F.3d 182, 186–89 (4th Cir.2009); *Sossamon v. Texas*, 560 F.3d 316, 327–29 (5th Cir.2009); *Smith v. Allen*, 502 F.3d 1255, 1271–75 (11th Cir.2007). Some of these cases, it is true, chart a different path. Some hold that because spending-power legislation is in the nature of a contract and because the State, not the defendant

prison officials, receives money under the federal legislation, it would be inappropriate to impose a money-damages remedy on local prison officials. . . With respect, this approach proves too much. If accepted, it would mean that even an eminently clear statute—say, that 'plaintiffs could obtain money damages in actions against state and local prison officials, whether sued in their official or individual capacity'—would not permit money damages. That is not consistent with *Dole* or *Arlington Central* or *Pennhurst* itself.") *with* ***Haight v. Thompson***, 763 F.3d 554, 570-72 (6th Cir. 2014) (Cole, J., concurring) ("Although I agree that the plaintiffs cannot recover from the prison officials in their individual capacities, I respectfully depart from the majority's analysis. I do so for two reasons: first, to explain why *Sossamon v. Texas,* 131 S.Ct. 1651 (2011), does not resolve the money-damages claim, and second, to express my view that we do not need to reach the plaintiffs' argument that RLUIPA's Commerce Clause basis authorizes money damages. There can be no question that *Sossamon* was decided on narrow grounds specific to the legal framework at issue in that case—namely, sovereign immunity. Indeed, the Court noted that 'the word "appropriate" is inherently context-dependent,' and then went on to conclude that '[t]he context here—*where the defendant is a sovereign*—suggests ... that monetary damages are not "suitabl"' or "proper."'. . *Sossamon* does not establish that RLUIPA's provision for 'appropriate relief' categorically excludes monetary damages. It establishes only that the term 'does not so clearly and unambiguously waive sovereign immunity to private suits for damages that we can be certain that the State in fact consents to such a suit.'. . The majority's reliance on *Sossamon* has the virtue of simplicity, but it ignores the fact that courts operate under different presumptions when encountering a request for monetary relief from a state, as opposed to a request for monetary relief from an officer sued in his or her individual capacity. When a plaintiff sues the state, we presume that money damages are unavailable, unless the state has consented to an express waiver of its immunity. . . In contrast, we regularly grant monetary relief to plaintiffs who successfully sue officers in their personal capacities. . . It is therefore fair to assume that a provision for 'appropriate relief' would not authorize money damages from the state absent the state's waiver, but would authorize them from personal-capacity defendants absent some other legal principle limiting the scope of the term 'appropriate.' That other legal principle can be found in *Arlington Central*—a case that should be central to our Spending Clause analysis. There, the Court extended *Pennhurst's* clear-statement principle to apply not only to the *conditions* a Spending Clause enactment places on participating states, but also to the *remedies* the enactment makes available when a state fails to comply. . .Thus, the Court concluded that a provision allowing plaintiffs to collect 'reasonable attorneys' fees as part of the costs' of bringing suit did not encompass expert fees because the statute had failed to put the states on notice that they could be liable for this expense. . . *Arlington Central* controls here and requires that RLUIPA 'furnish[ ] clear notice regarding the liability at issue.'. . In my view, RLUIPA's provision for 'appropriate relief' does not 'unambiguously authorize' prisoners to recover money damages from prison officials. . . I therefore agree with my colleagues that the relief the plaintiffs seek is not available.")

See also ***Davila v. Gladden***, 777 F.3d 1198, 1209-12 (11th Cir. 2015) ("After careful consideration, we conclude that Congress did not clearly waive sovereign immunity to authorize suits for money damages against officers in their official capacities under RFRA. Also, even if we

were to assume the statute authorizes suits for money damages against officers in their individual capacities, we hold that the Defendants here would be entitled to qualified immunity. . . .In *Sossamon v. Texas,* . . . the Supreme Court held that identical 'appropriate relief' language in the related statute RLUIPA did *not* waive states' sovereign immunity from money damages. . . .The only two circuit courts to address whether RFRA waived the federal government's sovereign immunity have held that it did not. [citing *Oklevueha Native Am. Church of Haw., Inc. v. Holder,* 676 F.3d 829, 841 (9th Cir.2012) and *Webman v. Fed. Bureau of Prisons,* 441 F.3d 1022, 1026 (D.C.Cir.2006)]. . . . We recognize that in *Sossamon,* the Court was addressing the sovereign immunity of the states. . . However, the Court's analysis in addressing the ambiguity of 'appropriate relief' applies equally to issues of federal sovereign immunity. Congress did not unequivocally waive its sovereign immunity in passing RFRA. RFRA does not therefore authorize suits for money damages against officers in their official capacities. . . . Second, we decline to address whether RFRA authorizes suits against officers in their individual capacities. Even if RFRA did authorize individual-capacity suits for money damages, these Defendants would be entitled to qualified immunity. . . . Whether or not the District Court concludes that the Defendants violated Mr. Davila's rights under RFRA at trial, the law preexisting the Defendants' conduct did not *compel the conclusion* that their actions violated RFRA. . . . Officers are entitled to clear notice about how their actions violate federal rights. In order to do away with qualified immunity for these offices, it must have been clearly established under RFRA that a prisoner can get religious property from outside sources when the religious items available through authorized means are not sufficient to meet the prisoner's religious needs. Mr. Davila has offered no prior case clearly establishing that proposition. . . . So even if Mr. Davila is successful at trial in proving a RFRA violation, these Defendants would be protected from paying money damages in their individual capacities.")

See also ***McNeil v. Community Probation Services, LLC***, 803 F. App'x 846, ___ (6th Cir. 2020) ("All factors considered, Tennessee private probation companies do not act for the State and thus may not invoke Tennessee's sovereign immunity in this lawsuit. Reinforcing this conclusion is a more concrete reality: We know of no case in which a private probation company has successfully invoked sovereign immunity."); ***Kreipke v. Wayne State Univ.***, 807 F.3d 768, 775 (6th Cir. 2015) ("Which test we should apply to determine whether WSU is a state agency and therefore not a 'person' under the FCA is a matter of first impression in this Circuit. The circuits that have considered this issue have unanimously held that courts should apply the same test used to determine whether an entity is an 'arm of the state' entitled to sovereign immunity under the Eleventh Amendment. *See U.S. ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.,* 739 F.3d 598, 602 (11th Cir.2014) (joining the Fourth, Fifth, Ninth, and Tenth Circuits in adopting the 'arm of the state' analysis under the Eleventh Amendment for purposes of the FCA). These other circuits reached this conclusion based, in part, on the Supreme Court's observation in *Stevens* that the scope of the inquiry into whether an entity is a 'person' under the FCA is virtually identical to the sovereign immunity inquiry under the Eleventh Amendment. . . Indeed, the Supreme Court has since underscored 'the virtual coincidence of scope' between the two inquiries, *Stevens,* 529 U .S. at 780, by holding that, in contrast to states and state agencies, the term 'person' under the FCA

includes local governments and municipalities. . .The definition of a 'person' under the FCA therefore parallels the limitations on sovereign immunity under the Eleventh Amendment, as Eleventh Amendment immunity extends to state and state agencies, but not to local governments and municipalities. In light of this similarity and consistent with the Supreme Court's guidance in *Stevens,* we also adopt the arm-of-the-state analysis under the Eleventh Amendment to determine whether an entity is a state agency excluded from liability under the FCA.")

J. 28 U.S.C. § 1367(a): Supplemental Jurisdiction

28 U.S.C. § 1367(a) states that:

> Except as provided in subsection (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

The statute applies to actions commenced on or after the date of its enactment, December 1, 1990, and responds to the Supreme Court's refusal to acknowledge pendent party jurisdiction without a clear indication of Congressional intent to create such jurisdiction. *See* ***Finley v. United States***, 490 U.S. 545 (1989).

By expanding the scope of the federal court's power to hear claims that previously would have kept the litigation in state court, ' 1367(a) will no doubt serve to increase the number of section 1983 suits filed in the federal forum.

1. With respect to local government defendants, § 1367(a) permits plaintiffs to include the governmental entity as a pendent party defendant when no policy or custom claim may exist under § 1983, but where state law might allow recovery on a *respondeat superior* basis. Given § 1367(a), the rationale of ***Aldinger v. Howard***, 427 U.S. 1 (1976), rejecting pendent party jurisdiction in such a setting, would no longer be controlling. *See, e.g.*, ***Cameron v. Craig***, 713 F.3d 1012, 1023-24 (9th Cir. 2013) ("Because California has rejected the *Monell* rule, *see* Cal. Gov't Code § 815.2, state law 'imposes liability on counties under the doctrine of respondeat superior for acts of county employees; it grants immunity to counties only where the public employee would also be immune.' *Robinson*, 278 F.3d at 1016. The defendants do not raise any state statutory immunities. Thus, should Cameron prevail on her excessive force claim, liability could extend to the County.")

2. Supplemental jurisdiction would also allow retention of state law claims against individual officials who might be dismissed from the § 1983 action on grounds of qualified immunity, assuming that the § 1983 action remains alive against the local government unit.

3. Section 1367(a) would provide supplemental jurisdiction for claims against purely private actors, where those claims are appropriately related to the § 1983 claims against the state actors.

4. Where a state has waived its Eleventh Amendment immunity and consented to suit, a state may be named as a defendant on a state law claim, where that claim is part of the same "case or controversy" as the § 1983 claim(s) against the state actors. ***Rosen v. Chang***, 758 F. Supp. 799, 803-04 (D.R.I. 1991).

NOTE: Section 1367(d) provides in part that '[t]he period of limitations for any claim asserted under subsection (a) ... shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.' The Supreme Court has rejected a constitutional challenge to that section. *See* ***Jinks v. Richland County,*** 123 S. Ct. 1667, 1673 (2003) ("Section 1367(d) tolls the limitations period with respect to *state-law* causes of action brought against municipalities, but we see no reason why that represents a greater intrusion on 'state sovereignty' than the undisputed power of Congress to override state-law immunity when subjecting a municipality to suit under a federal cause of action. In either case, a State's authority to set the conditions upon which its political subdivisions are subject to suit in its own courts must yield to the enactments of Congress. This is not an encroachment on 'state sovereignty,' but merely the consequence of those cases. . .which hold that municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.").

K. Pre-*Iqbal*: No Heightened Pleading Requirement For *Monell* Claims

Although Fed. R. Civ. P. 8 requires only "notice pleading," plaintiffs attempting to impose ***Monell*** liability upon a governmental unit had been required, in some circuits, to plead with particularity the existence of an official policy or custom which could be causally linked to the claimed underlying violation. *See, e.g.*, ***Strauss v. City of Chicago***, 760 F.2d 765 (7th Cir. 1985).

In ***Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit***, 113 S. Ct. 1160 (1993), the Supreme Court unanimously rejected the "heightened pleading standard" in cases alleging municipal liability. While leaving open the question of "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials," [***See*** **Blum's Qualified Immunity Outline**] the Supreme Court refused to equate a municipality's freedom from *respondeat superior* liability with immunity from suit. 113 S.Ct. at 1162.

Finding it "impossible to square the 'heightened pleading requirement' . . . with the liberal system of 'notice pleading' set up by the Federal Rules[,]" the Court suggested that Federal Rules 8 and 9(b) would have to be rewritten to incorporate such a "heightened pleading standard." *Id.* at 1163. The Court concluded by noting that "[i]n the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.*

In ***Crawford-El v. Britton***, 118 S. Ct. 1584 (1998), the Court addressed the "broad question [of] whether the courts of appeals may craft special procedural rules" for cases in which a plaintiff's substantive constitutional claim requires proof of improper motive and "the more specific question [of] whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment." *Id.* at 1587. In striking down the D.C. Circuit's "clear and convincing" burden of proof requirement in such cases, a five-member majority of the Court, in an opinion written by Justice Stevens, clarified that the Court's holding in *Harlow v. Fitzgerald*, 457 U.S. 731 (1982), that "bare allegations of malice" cannot overcome the qualified immunity defense, "did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation." 118 S. Ct. at 1592. The Court noted that "although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in *Harlow*, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation." *Id.* The Court explained that the subjective component of the qualified immunity defense that was jettisoned in *Harlow* "permitted an open-ended inquiry into subjective motivation [with the] primary focus . . . on any possible animus directed at the plaintiff." *Id.* at 1594. Such an open-ended inquiry precluded summary judgment in many cases where officials had not violated clearly established constitutional rights. "When intent is an element of a constitutional violation, however, the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff . . . or to deter public comment on a specific issue of public importance." *Id.*

Sensitive to the concerns about subjecting public officials to discovery and trial in cases involving insubstantial claims, the Court noted that existing substantive law "already prevents this more narrow element of unconstitutional motive from automatically carrying a plaintiff to trial[,]" and "various procedural mechanisms already enable trial judges to weed out baseless claims that feature a subjective element . . . ." *Id.*

First, under the substantive law on which plaintiff relies, there may be some doubt as to the whether the defendant's conduct was unlawful. The Court gave as an example the question of whether the plaintiff's speech was on a matter of public concern. Second, where plaintiff must establish both motive and causation, a defendant may still prevail at summary judgment by, for example, showing that defendant would have made the same decision in the absence of the protected conduct. *Id.*

The Court noted two procedural devices available to trial judges that could be used prior to any discovery. First, the district court may order a reply under Fed. R. Civ. P. 7(a), or grant a defendant's motion for a more definite statement under Rule 12(e). As the Court noted, this option of ordering the plaintiff to come forward with "specific, nonconclusory factual allegations" of improper motive exists whether or not the defendant raises the qualified immunity defense. 118 S. Ct. at 1596-97. Second, where the defendant does raise qualified immunity, the district court should resolve the threshold question before discovery.

> To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law. [footnote omitted] Because the former option of demanding more specific allegations of intent places no burden on the defendant-official, the district judge may choose that alternative before resolving the immunity question, which sometimes requires complicated analysis of legal issues. If the plaintiff's action survives these initial hurdles and is otherwise viable, the plaintiff ordinarily will be entitled to some discovery. Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.

Id. at 1597.

The majority opinion concluded that "[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself." *Id.* at 1595. Instead of the categorical rule established by the Court of Appeals, the Court endorsed broad discretion on the part of trial judges in the management of the factfinding process. *Id*. at 1598.

Chief Justice Rehnquist dissented, and formulated the following test for motive-based constitutional claims:

> [W]hen a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive, the defendant will be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext.

Id. at 1600 (Rehnquist, C.J., joined by O'Connor, J., dissenting).

Justice Scalia, joined by Justice Thomas, dissented and proposed the adoption of a test that would impose "a more severe restriction upon 'intent-based' constitutional torts." *Id.* at 1604. (Scalia, J., joined by Thomas, J., dissenting). Under Justice Scalia's proposed test,

> [O]nce the trial court finds that the asserted grounds for the official action were objectively valid (e.g., the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (e.g., the incompetent person fired was a Republican).

Id.

For the Court's most recent reinforcement of the proposition that heightened pleading is not required unless specified by the Rules, *see* ***Erickson v. Pardus***, 127 S.Ct. 2197, 2200 (2007) ("It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered 'a cognizable independent harm' as a result of his removal from the hepatitis C treatment program. . . . The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was 'endangering [his] life.' . .It alleged this medication was withheld 'shortly after' petitioner had commenced a treatment program that would take one year, that he was 'still in need of treatment for this disease,' and that the prison officials were in the meantime refusing to provide treatment. . . This alone was enough to satisfy Rule 8(a)(2). Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings. The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel."); ***Hill v. McDonough***, 126 S. Ct. 2096, 2103 (2006) ("Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts."); ***Swierkiewicz v. Sorema,*** 122 S. Ct. 992, 998 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. [footnote omitted] This Court, however, has declined to extend such exceptions to other contexts. . . . Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. '1979, 42 U.S.C. § 1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).").

See also ***Jones v. Bock***, 127 S. Ct. 910, 918, 919, 921, 926 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court. . . What is less clear is whether it falls to the prisoner to plead and demonstrate exhaustion in the complaint, or to the defendant to raise lack of exhaustion as an affirmative defense. The minority rule, adopted by the Sixth Circuit, places the burden of pleading exhaustion in a case covered by the PLRA on the prisoner; most courts view failure to exhaust as an affirmative defense. . . We think petitioners, and the majority of courts to consider the question, have the better of the argument. Federal Rule of Civil Procedure 8(a) requires simply a 'short and plain

statement of the claim' in a complaint, while Rule 8(c) identifies a nonexhaustive list of affirmative defenses that must be pleaded in response. The PLRA itself is not a source of a prisoner's claim; claims covered by the PLRA are typically brought under 42 U. S. C. § 1983, which does not require exhaustion at all, see *Patsy v. Board of Regents of Fla.*, 457 U. S. 496, 516 (1982). Petitioners assert that courts typically regard exhaustion as an affirmative defense in other contexts. . . and respondents do not seriously dispute the general proposition. . . The PLRA dealt extensively with the subject of exhaustion, see 42 U. S. C. ''1997e(a), (c)(2), but is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense. This is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense. In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns. [citing *Leatherman, Swierkiewicz* and *Hill*] . . . . We think that the PLRA's screening requirement does not − explicitly or implicitly − justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself . . . . We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints. We understand the reasons behind the decisions of some lower courts to impose a pleading requirement on plaintiffs in this context, but that effort cannot fairly be viewed as an interpretation of the PLRA. 'Whatever temptations the statesmanship of policy-making might wisely suggest,' the judge's job is to construe the statute − not to make it better.'. . . We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks. We once again reiterate, however − as we did unanimously in *Leatherman, Swierkiewicz,* and *Hill* − that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts."); ***Albino v. Baca***, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc) ("First, although it may be more a matter of a change of nomenclature than of practical operation, we overrule *Wyatt v. Terhune,* 315 F.3d 1108, 1119 (9th Cir.2003), in which we held that a failure to exhaust under § 1997e(a) should be raised by a defendant as an 'unenumerated Rule 12(b) motion.' We conclude that a failure to exhaust is more appropriately handled under the framework of the existing rules than under an 'unenumerated' (that is, non-existent) rule. Failure to exhaust under the PLRA is 'an affirmative defense the defendant must plead and prove.' *Jones v.. Bock,* 549 U.S. 199, 204, 216 (2007). In the rare event that a failure to exhaust is clear on the face of the complaint, a defendant may move for dismissal under Rule 12(b)(6). Otherwise, defendants must produce evidence proving failure to exhaust in order to carry their burden. If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts. Second, we hold that Albino has satisfied the exhaustion requirement of § 1997e(a). Defendants have failed to prove that administrative remedies were available at the jail where Albino was confined. Because no administrative remedies were available, he is excused from any obligation to exhaust under § 1997e(a). We therefore direct the district court to grant summary judgment to Albino on the issue of exhaustion.").

On exhaustion requirements under the PLRA, *compare* ***Garrett v. Wexford Health***, 938 F.3d 69, 84 & n.21, 86-91 (3d Cir. 2019), *cert. denied*, 140 S. Ct. ___ (2020) ("When he filed the TAC, Garrett was no longer a prisoner and therefore was not subject to the PLRA's administrative exhaustion requirement. . . Thus, because it relates back to the original complaint, the TAC cures the original filing defect. . . . A recent decision by the Tenth Circuit, *May v. Segovia*, 929 F.3d 1223 (10th Cir. 2019), takes a contrary view of the operation of Rule 15. In *May*, the Court decided that Rule 15 relates back to the original complaint for purposes of the PLRA's exhaustion requirement, concluding that an amended complaint 'supersedes the original complaint's *allegations* but not its *timing*.'. . In addition, the *May* Court took the view that relation back for purposes of cure is only permissible when the pleading flaw is jurisdictional in nature and is therefore an affirmative pleading requirement. . . The Tenth Circuit's approach is at odds with our decision in *T Mobile*. We therefore decline to adopt it. . . . We acknowledged the Commonwealth's concession that Ahmed would not have been barred from filing a *new* § 1983 complaint following his release, and that any new matter would not have been subject to the PLRA's strictures. But we declared that Ahmed was 'bound by the PLRA because his suit was filed ... almost three years before he was released from prison.'. . In applying *Ahmed* to Garrett's case, the District Court concluded that the filing of the initial complaint was the unalterable starting point from which to consider a plaintiff's status as a prisoner. This over-reads *Ahmed*, the post-judgment posture of which renders it inapposite to Garrett's case. Ahmed was a prisoner subject to the PLRA when he filed his complaint, and he remained a prisoner subject to the PLRA when the District Court entered its final judgment. Because he sought to reopen a final judgment, the policy favoring the finality of judgments was implicated. The permissive policy favoring amendment under Rule 15 was simply not relevant. . . In the post-judgment context, the narrow grounds for relief set forth in Rules 59 and 60 must guide a District Court's decision about whether an otherwise-final judgment should be disturbed. . . . Thus, a different set of rules emphasizing vastly different policies pertained to the motion in *Ahmed*, and those rules do not apply to Garrett's case. . . .*Bock* teaches, then, that the usual procedural rules apply to PLRA cases unless the PLRA specifies otherwise, and that a decision about whether to apply the usual procedural rules should not be guided by 'perceived policy concerns.'. . Applying these important principles, we conclude that the PLRA does not override the usual operation of Rule 15 here. Accordingly, Garrett's status as a non-prisoner at the time he filed the TAC is determinative of the Medical Defendants' administrative exhaustion defense. . . . Looking beyond our own case law, a sister Circuit has applied *Bock* to circumstances similar to Garrett's, and that Court reached a conclusion consistent with how we decide the instant matter. In *Jackson v. Fong*, 870 F.3d 928 (9th Cir. 2017), the Ninth Circuit considered whether Jackson, a prisoner who filed an initial complaint before administratively exhausting his claims, and who was granted leave to amend his complaint after his release, continued to be subject to the PLRA's exhaustion requirement. As the Ninth Circuit summed up the matter, Jackson's case turned on 'whether the court should look to the initiation of the suit (when Jackson was a prisoner, and had not exhausted his remedies), or to Jackson's operative third amended complaint (filed when Jackson was not a prisoner, and the exhaustion requirement did not apply).'. .The Ninth Circuit observed that the operative complaint 'completely supersedes' any earlier complaints, and that *Bock* directs that an exhaustion defense

under the PLRA should be considered within the framework of the Federal Rules of Civil Procedure. . . Applying these principles, the Court concluded that Jackson's 'amended complaint, filed when he was no longer a prisoner, obviates an exhaustion defense.'. . In reaching its decision, the Ninth Circuit explicitly chose not to follow our opinion in *Ahmed*, both because *Ahmed* predates *Bock* and because it did not apply Rule 15. . .The *Jackson* Court dismissed several of the defendants' policy concerns about the potential for its holding to lead to litigation abuse by prisoners. It observed, for instance, that Rule 15 permits a District Court discretion to deny leave to amend, particularly where a prisoner appears to be 'gaming the courts' in some manner. . . In addition, the Court observed that an administrative exhaustion requirement after a prisoner's release would not serve the purpose of permitting officials to address problems internally because, after release, 'there is no internal [grievance] process left to undermine.'. . Because Jackson could have chosen to file a new suit but did not do so, his decision to amend promoted judicial economy. *Id.* Finally—and most importantly—the Ninth Circuit observed that, under *Bock*, it did not have license to rely on policy concerns in carving out exceptions to the Federal Rules in any event. . . Here, the Medical Defendants contend that we should not follow *Jackson*. . . . The[ir] arguments are unpersuasive. The decision of whether to permit a plaintiff to file an amended or supplemental complaint under Rule 15 is within a District Court's discretion and is guided by Rule 15's liberal standards. . . . The problem with [defendants'] arguments is that they are the sort of 'perceived policy concerns' that the Supreme Court has directed cannot dictate whether we apply the usual pleading rules. . . .We decline to adopt the Eleventh Circuit's analysis. *Harris*, which was decided prior to the Supreme Court's decision in *Bock*, purports to rely on the 'plain and ordinary meaning' of the language of the PLRA—namely, the '[n]o ... action may be brought' language. . . In *Bock*, the Supreme Court described the nearly identical language of the PLRA's exhaustion provision as 'boilerplate language' that should not 'lead to the dismissal of an entire action if a single claim fails to meet the pertinent standards.'. . Applying *Bock*, as we must, we cannot agree with the Eleventh Circuit's interpretation. The PLRA is not sufficiently plain in its meaning to override the usual operation of Rule 15. . . In sum, we conclude that there is nothing in the PLRA to indicate that a plaintiff cannot employ Rule 15 to file a supplemental pleading to cure an initial filing defect. Because Garrett filed the TAC as a non-prisoner, administrative exhaustion was not an appropriate basis for its dismissal. We will therefore vacate the District Court's dismissal of Garrett's claims against the Medical Defendants for failure to exhaust administrative remedies.") *with* ***May v. Segovia***, 929 F.3d 1223, 1228-29, 1231-34 (10th Cir. 2019) ("According to Mr. May, the SAC superseded his previous complaints when it was deemed filed in January 2016. Because the filing occurred after his release, he argues that, for the purposes of the exhaustion requirement, his prisoner status must be determined at that point. . . . The amended complaint, as the operative complaint, supersedes the original complaint's *allegations* but not its *timing*. . . . Mr. May relies on the Ninth Circuit's opinion in *Jackson v. Fong*, 870 F.3d 928 (9th Cir. 2017), for the proposition that we look only to the timing of the SAC when determining the applicability of the PLRA. *Fong* presents a factual scenario similar to Mr. May's. The plaintiff in *Fong*—Mr. Jackson—was a prisoner in the midst of his final administrative appeal when he filed his original complaint. . . Shortly after filing his suit, Mr. Jackson moved to amend his complaint. But before that motion was granted, as with Mr. May, he was released from custody. .

. . Relying on *Jones* and circuit caselaw, the [Ninth Circuit] determined that to require Mr. Jackson to exhaust would 'ignore[ ] the general rule' that 'a supplemental complaint "completely super[s]edes any earlier complaint, rendering the original complaint non-existent and, thus, its filing date irrelevant."'. . Despite the similar facts, *Fong* is distinguishable. There, the operative complaint was 'a supplemental complaint within the meaning of Rule 15(d).'. . Under Rule 15(d), a plaintiff may amend his complaint to account for 'any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.'. . It is axiomatic that a supplemental complaint, filed after the plaintiff has been released from prison and raising claims that 'happened after the date of the pleadings to be supplemented,' would not be subject to the exhaustion requirement. Such claims would have been 'brought' for purpose of the PLRA by a non-prisoner. As *Jones* implies, the district court reviewing an amended complaint filed under Rule 15(d) would have the responsibility, when the exhaustion defense is raised, to differentiate between claims that are exhausted—or to which the exhaustion requirement does not apply because they were first brought after the plaintiff was released from prison—and claims that are unexhausted, dismissing the latter and allowing the former to proceed. . . But that is not this case. The SAC was not filed under Rule 15(d) because Mr. May's *Bivens* claim did not arise from transactions or events that occurred after the First Amended Complaint. Indeed, it is undisputed that his only claim on appeal was first raised, at the latest, in the First Amended Complaint, which was filed eight months prior to his release. But even if we were to agree that *Fong* is on point, Mr. Segovia contends the PLRA would still require Mr. May to exhaust his administrative remedies. *Fong* cited another Ninth Circuit case—*Rhodes v. Robinson*—approvingly, and there the Ninth Circuit held that new claims were 'brought' for purposes of the PLRA exhaustion requirement when the supplemental complaint was 'tendered' to the court for filing, not when the court deemed it filed. . . .We have not yet adopted this approach in the Tenth Circuit. Mr. Segovia argues, for the first time on appeal, that we should do so now. . . Mr. May contends that a combination of *Jones* and our circuit precedents forecloses adoption of the tender rule. . . . The timing of the claims, as opposed to the sufficiency of the allegations, was not before us in *Murray*, and our opinion there should not be construed as addressing the timing-allegation distinction. Thus, *Murray* does not preclude us from adopting the tender rule and we do so now. . . .In summary, we conclude that Mr. May was a prisoner within the meaning of the PLRA when he brought his due-process claim, irrespective of which complaint first introduced his due process claim, and thus, he was required to exhaust any available administrative remedies as to that claim.")

See also ***Hayes v. Dahlke***, 976 F.3d 259, 270-71 (2d Cir. 2020) ("We therefore hold that, because the DOCCS Inmate Grievance Procedure imposes a mandatory deadline for the CORC to respond, an inmate exhausts administrative remedies when he follows the procedure in its entirety but the CORC fails to respond within the 30 days it is allocated under the regulations. We decline to impose a 'reasonableness' requirement found nowhere in the text, which would leave inmates – and courts – to blindly speculate how long one must wait before filing suit. . . . In reaching this decision, we join six other circuits that have considered state prison procedures with similar mandatory deadlines and found that the administrative remedies were either exhausted or 'unavailable' when the prison did not respond within the allotted time. . . .Because we rule on

exhaustion alone, we decline to consider whether the administrative procedures here were so 'opaque' that they are 'unavailable' under *Ross*. In doing so, we avoid wading into the often complex and highly fact-specific inquiries of the unavailability exception.")

L. *Twombly, Iqbal,* and Post-*Iqbal* Cases Asserting *Monell* Claims

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1968, 1969, 1974 (2007) ("Justice Black's opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of 'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'. . This 'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard . . . . On such a focused and literal reading of *Conley's* 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. . . . [A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. [citing cases and commentators] We could go on, but there is no need to pile up further citations to show that *Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. . . .*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival. . . . [W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942, 1943, 1949-54 (2009) ("This case . . . turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient. . . . Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second,

only a complaint that states a plausible claim for relief survives a motion to dismiss. . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'. . In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. . . . We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'. .The complaint alleges that Ashcroft was the 'principal architect' of this invidious policy. . .and that Mueller was 'instrumental' in adopting and executing it. . . .These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim. . .namely, that petitioners adopted a policy ' Abecause of,' not merely Ain spite of,' its adverse effects upon an identifiable group.'. .As such, the allegations are conclusory and not entitled to be assumed true. . . It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent's constitutional claims against petitioners rest solely on their ostensible Apolicy of holding post-September-11th detainees' in the ADMAX SHU once they were categorized as Aof high interest.'. . To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin. This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of 'of high interest' for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving 'restrictive conditions of confinement' for post-September-11 detainees until they were ' "cleared" by the FBI.' . . Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'. . . [R]espondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8. It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's

account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners. . . . Our decision in *Twombly* expounded the pleading standard for 'all civil actions'. . .and it applies to antitrust and discrimination suits alike. . . . Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise. . . .It is true that Rule 9(b) requires particularity when pleading 'fraud or mistake,' while allowing '[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally.' But 'generally' is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid-though still operative-strictures of Rule 8. . . . And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.")

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1959-61 (Souter, J., joined by Stevens, J., Ginsburg, J., Breyer, J., dissenting) ("The complaint . . . alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it. Ashcroft and Mueller argue that these allegations fail to satisfy the 'plausibility standard' of *Twombly*. They contend that Iqbal's claims are implausible because such high-ranking officials 'tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command.'. . But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here. . . . Iqbal's claim is not that Ashcroft and Mueller 'knew of, condoned, and willfully and maliciously agreed to subject' him to a discriminatory practice that is left undefined; his allegation is that 'they knew of, condoned, and willfully and maliciously agreed to subject' him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller 'Afair notice of what the Y claim is and the grounds upon which it rests.'"")

Johnson v. City of Shelby, Miss., 135 S. Ct. 346, 346-47(2014) ("We summarily reverse. Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. . . In particular, no

heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (a federal court may not apply a standard 'more stringent than the usual pleading requirements of Rule 8(a)' in 'civil rights cases alleging municipal liability'); *Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)'). The Fifth Circuit defended its requirement that complaints expressly invoke § 1983 as 'not a mere pleading formality.'. . The requirement serves a notice function, the Fifth Circuit said, because '[c]ertain consequences flow from claims under § 1983, such as the unavailability of *respondeat superior* liability, which bears on the qualified immunity analysis.'. . This statement displays some confusion in the Fifth Circuit's perception of petitioners' suit. No 'qualified immunity analysis' is implicated here, as petitioners asserted a constitutional claim against the city only, not against any municipal officer. . . 34 Our decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), are not in point, for they concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, they instruct, must plead facts sufficient to show that her claim has substantive plausibility. Petitioners' complaint was not deficient in that regard. Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim. . . For clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,' petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to § 1983. . . .For the reasons stated, the petition for certiorari is granted, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.")

CASES IN THE CIRCUITS

D.C. CIRCUIT

Bell v. D.C., 82 F.Supp.3d 151, 159 (D.D.C. 2015) ("Unlike *Singh* and *Muhammad,* Plaintiff's complaint in this case lacks the kind of 'factual content' to support her allegation of an 'increasing number of complaints ... claiming racial profiling, harassment and continuous violations of the constitutional rights of African Americans.'. . The complaint does not, for instance, state the number, nature, and timing of the complaints of police misconduct; the identity of the officers who were the subject of the complaints; or even whether complaints were made against Officer John Doe. Absent such facts, Plaintiff's generalized assertion of ignored and unanswered complaints of harassment and police misconduct amount to little more than 'an unadorned, the-defendant-unlawfully-harmed-me accusation' that does not pass muster under *Iqbal* . . . . Because Plaintiff's complaint fails to plead sufficient 'factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged,' the court must grant the District's motion to dismiss Count II.")

Robinson v. District of Columbia, 736 F.Supp.2d 254, 265 (D.D.C. 2010) ("Taking these allegations together, the Court finds plaintiff has alleged a specific form of misconduct: intimidating and harassing motorcyclists by, *inter alia*, swerving into their lanes of traffic and causing them to fall or lose control of their vehicles. She alleges the District should have known about this misconduct because it was 'commonplace' and reported, but the District refused to investigate or otherwise pursue the reports. Finally, she presents a plausible causal connection between the District's alleged failure to train, supervise, or discipline officers regarding the alleged misconduct and the constitutional deprivation Mr. Robinson allegedly suffered. . . Plaintiff has alleged enough facts to suggest she may be entitled to relief against the District; accordingly, it would be inappropriate to dismiss her claim at this stage of the proceedings.")

Robertson v. District of Columbia, No. 09-1188 (RMU), 2010 WL 3238996, at *7, *8 (D.D.C. Aug. 16, 2010) ("Relying on *Atchinson*, the plaintiff asserts that she has stated a § 1983 claim against the District, noting that she has alleged an instance of misconduct, inadequate training and 'deliberate indifference' on the part of the District. . . Yet the portion of *Atchinson* holding that a plaintiff adequately pleads 'deliberate indifference' simply by invoking the phrase in his or her complaint appears to have been superseded by the Supreme Court's ruling in *Ashcroft v. Iqbal*. . . Although the plaintiff in this case alleges that the District acted with deliberate indifference in failing to train its officers, the complaint contains no facts suggesting that the District knew or should have known of any deficiencies in the training of its officers with respect to potentially suicidal detainees. . .Accordingly, the complaint fails to state a § 1983 claim against the District based on improper training of MPD officers. The plaintiff's more general claim that the District maintained a policy or custom of failing to provide adequate care to potentially suicidal detainees suffers from the same defect. As with the failure to train claim, the complaint contains no facts indicating that the District knew or should have known of any deficiencies in the treatment or care provided to potentially suicidal detainees like the decedent. . .These deficiencies require dismissal of the plaintiff's § 1983 claim against the District.")

Matthews v. District of Coumbia, 730 F. Supp.2d 33, 37, 38 (D.D.C. 2010) ("Here, plaintiffs allege that five different individuals were subjected to invasive public strip searches by numerous MPD officers on six different occasions and in six different locations in 2006 and 2007. . . These searches occurred even though the MPD has issued a general order detailing when strip searches are permissible, and indicating that strip searches are prohibited in public areas. . . Based on the number of instances of alleged unlawful misconduct, and the number of officers involved, it is 'plausible,' *Iqbal*, 129 S.Ct. at 1949, that the officers' behavior resulted from the District's failure to train or supervise its employees. Indeed, the Court can plausibly infer from the facts animating plaintiffs' allegations that the strip searches were not the result of rogue officers acting contrary to their training. . . . In denying the District's motion to dismiss, the Court is not ruling on whether plaintiffs' allegations, if proven, would be sufficient to establish that the District actually failed to

train or supervise its employees. . . . At this stage of the litigation, and drawing all 'reasonable inference[s]' in plaintiffs' favor, the Court merely concludes that plaintiffs have 'state[d] a claim to relief that is plausible on its face.'")

Martin v. District of Columbia, 720 F.Supp.2d 19, 23, 24 (D.D.C. 2010) ("Plaintiff's conclusory statements − unsupported by additional factual allegations − are simply insufficient to state a claim under § 1983 against the District. . . Accordingly, because plaintiff has provided only ' " formulaic recitation"' of the elements of a § 1983 failure-to-train claim, the Court GRANTS defendant's motion to dismiss as to plaintiff's municipal liability claim. This claim is hereby dismissed without prejudice. . . . In the event that plaintiff seeks leave of the Court to file an amended complaint reasserting municipal liability, plaintiff should be mindful that he must assert a factual basis for his municipal liability claim sufficient to overcome the more stringent pleading standards imposed by the Supreme Court's decisions in *Twombly* . . . and *Iqbal*. . . . Specifically, plaintiff must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,' not mere conclusory statements regarding the District's alleged liability.")

Smith v. District of Columbia, 674 F.Supp.2d 209, 212-14 & n.2 (D.D.C. 2009) ("Here, Ms. Smith adopts the 'deliberate indifference' theory of municipal liability − where ' "the municipality knew or should have known of the risk of constitutional violations," but did not act.'. . Ms. Smith offers two allegations to support her claim that the District was deliberately indifferent. First, she contends that there were systemic problems associated with referrals for off-site medical treatment of inmates and specialists care that were known to defendant D.C. The defendant failed to take reasonable actions to ensure that systemic problems were addressed. . . Second, she asserts that defendant knew or should have known that there were unreasonable delays associated with the deceased's treatment and failed to take the steps necessary to correct systemic problems associated with such delays. . . In short, Ms. Smith alleges that the District knew or should have known about supposedly ongoing Eighth Amendment violations regarding Gilbert Smith's medical care. These allegations, however, cannot survive the District's motion to dismiss. They do nothing more than recite the requisite causal elements of custom or policy liability based on deliberate indifference − that is, that the District 'knew or should have known' about possible constitutional violations yet failed to act. . . But '[a] pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do."' *Iqbal*, 129 S.Ct. at 1949 . . . . Ms. Smith's allegations regarding the District's knowledge therefore 'are conclusory and not entitled to be assumed true.'. . . Ms. Smith's complaint, and indeed the entire record, is devoid of any facts or allegations that the District of Columbia knew or should have known about Gilbert Smith's supposed mistreatment. Nowhere does she allege that, for example, Gilbert Smith forwarded complaints or grievances about his treatment to the District of Columbia. . . Although she alleges that '[o]n almost a daily basis, the deceased made requests for medical care, treatment, and attention,' Compl. & 12, the Court cannot reasonably infer that these requests were made to or forwarded to the District. The District neither operated, nor provided medical care at, the Correctional Treatment Facility. . . Therefore, even if this allegation is true, it does not plausibly

suggest that the District knew or should have known about Gilbert Smith's medical treatment, but failed to act. . . . Ms. Smith's allegations supporting her claim of custom or policy based on deliberate indifference, then, 'amount to nothing more than a 'formulaic recitation of the elements' of' the claim for liability . . . . To be sure, the D.C. Circuit previously held that a plaintiff need only plead that a municipality ' Aknew or should have known' about the ongoing constitutional violations' to sustain a claim for *Monell* liability predicated on deliberate indifference. . . But *Warren* preceded *Iqbal,* and must now be interpreted in light of that subsequent Supreme Court decision. Under *Iqbal,* such conclusory pleadings are no longer sufficient to state a claim on which relief may be granted. . . This Court concludes that, notwithstanding *Warren,* the sufficiency of Ms. Smith's allegations here must be assessed under the standard set by the Supreme Court in *Twombly* and *Iqbal*.")

Smith v. Corrections Corp. of America, Inc., 674 F.Supp.2d 201, 206, 207 (D.D.C. 2009) ("Ms. Smith offers two allegations to support her claim that CCA was deliberately indifferent. First, she contends that there were systemic problems associated with referrals for off-site medical treatment of inmates and specialists care that were known to defendant CCA and Unity. These defendants failed to take reasonable actions to ensure that systemic problems were addressed. . .Second, she asserts that defendants knew or should have known that there were unreasonable delays associated with the deceased's treatment and failed to take the steps necessary to correct systemic problems associated with such delays. . . In short, Ms. Smith alleges that CCA knew or should have known about supposedly ongoing Eighth Amendment violations regarding Gilbert Smith's medical care. These allegations, coupled with Ms. Smith's specific factual allegations, are sufficient to survive CCA's motion to dismiss. To be sure, the allegations in paragraphs fifteen and twenty-one of the complaint do not, by themselves, state a section 1983 claim based on deliberate indifference. Indeed, they do nothing more than recite the requisite causal elements of custom or policy liability based on deliberate indifference − that is, that [CCA] 'knew or should have known' about possible constitutional violations but failed to act. . . . The allegations in paragraphs fifteen and twenty-one, standing alone, 'are conclusory and not entitled to be assumed true .'. . But Ms. Smith bolsters these allegations with factual allegations that plausibly suggest she is entitled to relief. Ms. Smith alleges that '[o]n almost a daily basis, the deceased made requests for medical care, treatment, and attention including, but not limited to, providing medication ..., providing prompt and adequate dressing changes ..., providing of sanitary cell conditions ..., [and] providing of prompt transfers to medical facilities.'. . Because CCA operated the Correctional Treatment Facility, the Court can reasonably infer that these complaints and grievances were made to CCA. Accordingly, Ms. Smith has properly pleaded that CCA knew of the supposed unconstitutional medical care and treatment Gilbert Smith received. And Ms. Smith's allegation that CCA 'failed to take reasonable actions to ensure that systemic problems were addressed,' Compl. & 15, coupled with the absence of any indication that Gilbert Smith's medical care and treatment improved during his incarceration, plausibly suggests that CCA failed to act in the face of its employees' allegedly unconstitutional behavior. Hence, Ms. Smith has sufficiently alleged that Gilbert Smith's supposed unconstitutional medical treatment resulted from CCA's deliberate indifference.").

FIRST CIRCUIT

Abdisamad v. City of Lewiston, 960 F.3d 56, 60-61 (1st Cir. 2020) ("Abdisamad argues that his claims fall into a 'state-created danger' exception discussed in *Irish*. But that is simply not accurate. Our opinion in *Irish* observed that other 'circuits have recognized the existence of the state-created danger theory' but that '[w]hile this circuit has discussed the possible existence of the state-created danger theory, we have never found it applicable to any specific set of facts.'. . We also noted that 'we "may elect first to address whether the governmental action at issue is sufficiently conscience shocking" before considering the state-created danger element,'. . . and that 'mere negligence would be insufficient to maintain a claim of substantive due process violation[.]'. . The record in *Irish* contained no information about police protocol and training. Given the specific facts alleged as to the individual defendants, these were 'relevant both to the substantive due process and qualified immunity inquiries,'. . . and we vacated the dismissal and remanded for discovery[.]. . Abdisamad argues that *Irish* requires vacatur of the dismissal in this case to allow him to take discovery about what protocol and training might have been violated in the events that gave rise to this lawsuit. Not so. This case does not resemble *Irish* for many reasons, including that *Irish* dealt with the liability of individual police officers, not municipal liability, and that Abdisamad does not allege that the City Defendants' policies caused R.I.'s death, but rather that R.I.'s death resulted from the City Defendants' *failure* to follow those policies. '[A] different standard is used to determine liability for individual and municipal defendants.'. . Individual government officials may be sued 'for federal constitutional or statutory violations under § 1983,' though 'they are generally shielded from civil damages liability under the principle of qualified immunity.'. . But 'liability can be imposed on a local government only where that government's policy or custom is responsible for causing the constitutional violation or injury.'. . Municipal liability 'cannot be based on respondeat superior but requires independent liability based on an unconstitutional policy or custom of the municipality itself.'. . Although municipalities' policies 'not authorized by written law' can nevertheless be actionable, they must be 'so permanent and well settled as to constitute a "custom or usage" with the force of law.'. . A 'municipality's failure to train or supervise ... only becomes a basis for liability when "action pursuant to official municipal policy of some nature caused a constitutional tort."'. . Abdisamad's amended complaint does not plausibly allege that a Lewiston policy or custom led to R.I.'s death. Its factual allegations do not support a plausible inference that the City Defendants' actions resulted from an unconstitutional policy or custom. They include no facts whatsoever about a Lewiston policy that would be unconstitutional and create municipal liability. To the contrary, the amended complaint alleges that R.I.'s death resulted from defendants' 'failure ... to follow their protocols,' rather than from defendants' actions that were consistent with a Lewiston policy or custom. That allegation cannot serve as the basis for municipal liability and in fact precludes such liability.")

Saldivar v. Racine, 818 F.3d 14, 20, 23 (1st Cir. 2016) ("Saldivar argues that she has stated a plausible *Monell* claim because her complaint alleges that Racine was acting as a final policymaker for the City when he made decisions regarding Pridgen's retention, supervision, and training in

response to Pridgen's disciplinary violations. But even assuming that the allegation that Racine is a final policymaker is plausible, that allegation is not enough. A City is liable under *Monell* for the acts of a final policymaker only if those acts constitute deliberate indifference. *See Connick,* 563 U.S. at 61; *Young v. City of Providence,* 404 F.3d 4, 26 (1st Cir.2005). And so here, too, Saldivar's § 1983 claim may survive the motion to dismiss only if the complaint plausibly alleges that Racine was deliberately indifferent to the grave risk of harm that Pridgen posed. But that claim is not plausible for the reasons we have just given regarding the limited allegations contained in the complaint. And thus here, too, we agree with the District Court that the claim cannot go forward. . . .We end by emphasizing that to survive a motion to dismiss a claim must merely be 'plausible on its face.'. . Moreover, we have said that in cases 'in which a material part of the information needed is likely to be within the defendant's control,' ' "some latitude may be appropriate" in applying the plausibility standard.'. . In such cases, we have said that 'it is reasonable to expect that "modest discovery may provide the missing link" that will allow the appellant to go to trial on her claim.'. . But the missing link that is common to the claims at issue in the case before us has not been alleged 'upon information and belief,' as it was in *Menard, . . .* and is not plausible simply by appeal to common sense, as in *García–Catalán, see* 734 F.3d at 103. Here, the gap between the allegations in the complaint and a plausible claim is wider than it was in those cases. Importantly, Saldivar *was* allowed modest discovery before she filed her amended complaint, namely access to Pridgen's disciplinary record, upon which Saldivar's allegations are based. There is no indication from that record, however, that any of the violations involved violent conduct. Simply put, the complaint alleges conduct by a member of the City police force that is shocking. But the complaint seeks to hold the officer's supervisor and the City liable. Absent more facts than the complaint contains, we cannot discern a plausible claim for doing so under § 1983 or under the law of negligence in Massachusetts. Accordingly, the decision of the District Court dismissing Saldivar's complaint is ***affirmed.***")

Freeman v. Town of Hudson, 714 F.3d 29, 38 (1st Cir. 2013) ("The Freemans have advanced only a 'final authority' theory of municipal liability. The complaint, however, references no state or local laws establishing the policymaking authority of any individual or group of individuals. The complaint alleges misconduct from many separate actors, but gives no guidance about which acts are properly attributable to the municipal authority. Absent this information, the complaint fails to state more than respondeat superior liability on the part of the Town and the Commission. This is not enough to support a section 1983 action against a municipality, *Monell,* 436 U.S. at 691, and the district court correctly dismissed the claims against the Town and the Commission.")

Haley v. City of Boston, 657 F.3d 39, 52, 53 (1st Cir. 2011) ("The City also contends that both municipal liability claims fail as a matter of pleading to meet the Supreme Court's recently elucidated 'plausibility' requirement. . . This contention elevates hope over reason. The complaint alleges that the detectives' withholding of the sisters' statements occurred pursuant to a standing BPD policy, under which Boston police officers regularly kept helpful evidence from criminal defendants. The complaint further alleges that this policy was designed to encourage successful prosecutorial outcomes despite the existence of evidence pointing to innocence. The complaint

contrasts the BPD's policy with that of the district attorney's office, which it alleges had a standing policy to disclose all known exculpatory and impeachment evidence in full compliance with *Brady.* Haley argues that, in his case, the district attorney's office was unable to fulfill its salutary (and constitutionally mandated) disclosure policy because the BPD failed to apprise it of the sisters' statements. The end result was Haley's wrongful conviction. Haley's second municipal liability claim draws on many of these same facts. The difference is the allegation, made in the alternative, that the BPD's unconstitutional suppression of the sisters' statements, if not the result of a standing policy, was precipitated by poor training, to which the City was deliberately indifferent. For its part, the City vigorously disputes the accuracy of these allegations. It denies that the BPD either put in place an unconstitutional policy or turned a blind eye to the need for training. But this is neither the time nor the place to resolve the factual disputes between the parties. Whether Haley can prove what he has alleged is not the issue. At this stage of the proceedings, we must take the complaint's factual allegations as true, and those allegations paint an ugly but plausible picture. If proven, that picture will support a finding of municipal liability. We do not reach this conclusion lightly. Evaluating the plausibility of a pleaded scenario is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'. . Disclosure abuses are a recurring problem in criminal cases, *see United States v. Osorio,* 929 F.2d 753, 755 (1st Cir.1991), and the BPD's failure to disclose the sisters' statements is wholly unexplained. Given the volume of cases involving nondisclosure of exculpatory information and the instant failure to disclose statements that clearly would have undermined the prosecution's theory of the case, we think that the municipal liability claims pleaded by Haley step past the line of possibility into the realm of plausibility. . . Indeed, if the detectives intentionally suppressed the discoverable statements even when such activity was condemned by the courts (as Haley has alleged), it seems entirely plausible that their conduct was encouraged, or at least tolerated, by the BPD. Although couched in general terms, Haley's allegations contain sufficient factual content to survive a motion to dismiss and open a window for pretrial discovery. . . Consequently, the district court erred in dismissing Haley's section 1983 claims against the City.")

Palermo v. Town Of North Reading, 370 F. App'x 128, 130 n.4 (1st Cir. 2010) ("The Palermos asserted at oral argument that Paragraph 26 of the amended complaint raised a sufficient *Monell* claim for purposes of a motion to dismiss. That paragraph alleged that 'the actions, decisions, and policies' of the Town 'deprived the Plaintiffs of all economically beneficial use of the Premises.' Under *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), this allegation is not nearly sufficient to support a *Monell* claim because the complaint as a whole contained no factual assertions whatsoever regarding Town policy. *See Ashcroft v. Iqbal,* __ U.S. __, __, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to Astate a claim to relief that is plausible on its face.'") (quoting *Twombly,* 550 U.S. at 570). As noted above, the factual premise of the amended complaint was that the Palermos had been treated differently from other property owners, not similarly in accordance with Town policy.")

Pope v. City of Boston, No. 24-CV-10980-DJC, 2024 WL 4712857, at *3–4 (D. Mass. Nov. 7, 2024) ("Pope alleges that the City is liable because for many years, the City and certain police officers engaged in various patterns and practices of 'fabricating, withholding, and destroying evidence, inducing false testimony, suppressing statements that were legally required to be provided to the defense, deliberately failing to investigate the actual perpetrators, assisting potential exculpatory witnesses in being unable to testify, and engaging in improperly suggestive identification procedures.'. . The complaint alleges that BPD and the City 'failed to train, discipline, and supervise officers who conducted investigations into homicides' and the City 'was, or should have been, aware of the potential for misconduct and actual misconduct of its officers, but failed to act.'. . The complaint further alleges that throughout 'the 1970s and 1980s, officers of the [City] regularly withheld and fabricated evidence, leading to botched investigations and wrongful convictions.'. . In support of a pattern and practice, the complaint alleges that there were at least five other cases involving O'Malley both before and after Pope's investigation and conviction in which he demonstrated misconduct by 'facilitat[ing] flawed identifications,'. . . pressured a witness to provide false testimony. . . and several years later was the lead detective in a 'botched investigation' that included using false information in relation to search warrant affidavits[.] . . The complaint also points to two reports from the 1990s as support that O'Malley engaged in practices of threatening witnesses to provide false testimony, including the St. Clair Committee Report which described that the BPD in general had inadequate training, supervision and discipline. . . Pope further alleges that BPD's 'widespread practices, which were so well settled as to constitute the *de facto* policy of the [City], were allowed to exist because the municipal policymakers with authority over the same exhibited, at minimum, deliberate indifference to the problem' and these widespread practices were the 'moving force' behind the misconduct that constituted the constitutional violations in Pope's case. . . The City challenges that Pope's allegations do not support a pattern and practice of deliberate indifference because the alleged allegations from the cited cases fail to show a history of constitutional violations by the City and even the alleged incidents could not have put the City on notice of a failure to train because the incidents alleged occurred after 1986, the year in which Pope was convicted. . . Most instructive here is *Haley v. City of Bos.*, 657 F.3d 39, 52 (1st Cir. 2011) in which the First Circuit affirmed that more generalized allegations were sufficient at the pleading stage. In *Haley*, the First Circuit held that plaintiff had adequately alleged a *Monell* violation that the BPD had a standing policy or practice of withholding exculpatory information and had failed to train its officers based on BPD withholding certain exculpatory witness statements from the prosecution and that BPD 'regularly kept helpful evidence from criminal defendants' to secure successful prosecutions. . . In reversing the dismissal, the First Circuit relied upon 'the volume of cases involving nondisclosure of exculpatory information' and further held that the motion to dismiss stage was 'neither the time nor the place to resolve the factual disputes between the parties.'. . In light of *Haley* and its progeny, the Court agrees that Pope's allegations are sufficient at the pleading stage to allege a *Monell* claim that the City was on notice of constitutional violations. Although '[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program,' . . . here, it has been alleged that O'Malley engaged in falsification of evidence, coercion of witnesses

and untruthful testimony both pre-dating and post-dating Pope's investigation, arrest and conviction which are a plausible pattern and practice widespread enough to plausibly put the City on notice of same. . . Although '[a] pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train,'. . . Pope has also alleged that throughout 'the 1970s and 1980s, officers of the [City] regularly withheld and fabricated evidence, leading to botched investigations and wrongful convictions.'. . Pope further points to evidence from *Haley v. City of Bos*. . . in which testimony from the former BPD Commissioner indicated that 'there was no policy or practice in the BPD [in 1971 and 1972] requiring the disclosure of exculpatory and/or impeachment evidence to state prosecutors or to defendants.'. . Multiple instances of misconduct, especially when perpetrated by the same department or even individual officer, may demonstrate a failure to train or discipline. . . Here, Pope's allegations, in combination with the various instances of misconduct by O'Malley and the fact that the City had been sued previously for similar constitutional violations based on the same time period, at a minimum, suggest that the City had notice of constitutional violations committed by its officers, exacerbated by inadequate training and discipline, and was deliberately indifferent to the rights of its residents. . . Accepting the allegations as true and drawing reasonable inferences in favor of Pope, the Court holds that Pope has plausibly stated a *Monell* claim under § 1983.")

Mazza v. City of Boston, No. CV 24-10333-NMG, 2024 WL 4505328, at *4 (D. Mass. Oct. 15, 2024) ("Here, plaintiff contends that officers withheld exculpatory evidence from him, namely the statement made by Anderson's brother, conspired to prosecute and deprive him of his rights, and failed to intervene on his behalf. Regarding the witness statement, plaintiff blames his conviction on the City, whose policies, regulations, rules, and practices he alleges were prejudicial. Moreover, plaintiff claims that municipal authorities had notice of police misconduct yet allowed it to continue with deliberate indifference to the harm caused. Such allegations are analogous to those in *Haley v. City of Boston* and are therefore sufficient to state a plausible *Monell* claim. In *Haley*, plaintiff claimed the BPD withheld exculpatory statements made by his sister and that the withholding was pursuant to standing BPD policy. . . Plaintiff's complaint contrasted the policy with that of the district attorney's office, which purportedly had a policy of disclosing all exculpatory evidence as required, and asserted that the difference caused his conviction. . . On these facts, the First Circuit recognized the *Monell* claim as plausible. . . Contrary to the City's assertion, plaintiffs are not required to detail the alleged unconstitutional policies with specificity at the pleading stage. . . . Plaintiff here claims that the officers' unconstitutional actions resulted from the City's failure properly to train and supervise its officers on appropriate procedures, namely the proper handling of evidence and witness interviews. . . Plaintiff contends that the City was responsible for training its officers and that the City's failure adequately to train or supervise them caused the alleged unconstitutional withholding of evidence. Such allegations, unlike plaintiff's more general claims with respect to the City's policies, fail to survive the City's motion to dismiss. Plaintiff has not alleged anything that would amount to 'deliberate indifference,' as the First Circuit has defined it. . . Specifically, his complaint fails to allege that his harm is related in any way to a history of recurring rights violations, nor does he claim another instance of an

unconstitutional withholding of evidence or improper interview that would constitution a *Monell* violation. . . While there are instances where a violation is 'so obvious' that a failure to train is self-evident, plaintiff makes no assertion that this is such a case. . . Instead, as courts have recognized, the criteria for liability in failure-to-train cases are 'exceptionally stringent' and difficult to prove, and the instant case is no exception. . . Because failure-to-supervise claims are subject to the same stringent standard as failure-to-train claims, plaintiff's allegation that the City is liable for failure to supervise is equally unavailing. . . Allegations of one's own injury, unmoored from a pattern of conduct by the municipality, thus cannot support a *Monell* claim on a theory of failure either to train or supervise.")

Huffman v. City of Boston, No. 21-CV-10986-ADB, 2022 WL 2308937, at *7–8 (D. Mass. June 27, 2022) (" The City moves to dismiss the *Monell* claim because, in its view, Plaintiffs have made only bare assertions and recitations of the claim elements. The Court finds that Plaintiffs have, albeit just barely, done more than 'say the magic words "custom" and "policy"' as the City suggests. . . To support their claim that the City has a custom of failing to investigate or discipline police misconduct, Plaintiffs point mainly to BPD's failure to diligently pursue investigations into the uses of forces against Chambers-Maher and Huffman, Hall's experience being deterred from filing her complaint, and the inaction of all other officers on scene, as well as previous admissions from the City that BPD officers were generally pressured to adhere to a code of silence regarding officer misconduct, and that civilians felt discouraged from filing complaints. . . To further bolster their claim, Plaintiffs also offer examples of past confirmed occasions where BPD failed to investigate or discipline police misconduct, though those incidents did not involve the use of force against protestors. . . Plaintiffs' allegation that the City condones a code of silence within its police force can support a *Monell* claim. . . To be sure, Plaintiffs' support for this claim is presently thin, particularly since Plaintiffs have done little to link their allegations together to present a 'systemic pattern' of persistent failure to discipline or investigate, but more is not required at the pleading stage. Plaintiffs have specifically articulated that the City knew constitutional violations occurred and either chose not to investigate or otherwise delayed or discouraged investigation. Taking Plaintiffs' factual allegations as true and viewing the Amended Complaint in the light most favorable to Plaintiffs, the allegations allow for a reasonable inference that the City has a custom of failing to discipline police misconduct. . . To the extent Plaintiffs also contend that the City, acting through BPD, had a custom of using excessive force against the May 2020 protestors, . . . that claim has also been sufficiently pleaded for the purposes of a Rule 12(b)(6) motion. The Amended Complaint contains numerous allegations that officers used OC spray, batons, and other physical force against the four Plaintiffs during the May 31 protest. Plaintiffs sufficiently allege, though just barely, that similar constitutional violations occurred on May 29, giving decisionmakers sufficient notice that officers would continue to use unreasonable force against peaceful protestors in the demonstrations to come. The City's argument that the allegations are not enough to support a *Monell* claim because they rest only on 'one night of civil unrest' is unavailing. . . In addition to the fact that Plaintiffs have suggested that similar conduct occurred during demonstrations on surrounding days, 'egregious instances of misconduct' even when 'relatively few in number but following a common design, may support an inference that the instances would

not occur but for municipal tolerance of the practice in question.'. . Here, Plaintiffs describe four similar incidents of excessive force used against peaceful protesters. Further, Plaintiffs may not know, or cannot know, without discovery the full extent of the unreasonable force used by the City against protesters during the May 2020 protests. This Court, in line with several other district courts presented with similar facts, finds that Plaintiffs have sufficiently pleaded that the City had notice of the unlawful use of force against protestors and was deliberately indifferent to those constitutional violations. . . Finally, as a separate basis of liability, Plaintiffs also claim that the City, acting through its policymaker Commissioner Gross, failed to properly handle the May 2020 protests. This claim rests on the contention that Commission Gross's decisions to distribute and endorse the use of riot batons against peaceful protestors and to limit the public's ability to leave the protest area, led to the constitutional deprivations. . . Government policy or custom may be established by 'a single decision by municipal policymakers under appropriate circumstances.'. . In other words, liability may attach where there is 'a deliberate choice to follow a course of action [ ] made from among various alternatives by the official ... responsible for establishing final policy with respect to the subject matter in question.'. . Because three of the four Plaintiffs' injuries occurred while they were trying to leave the protest area and some of the alleged injuries were caused by blows from riot batons, it can be reasonably inferred that Commissioner Gross's policy decisions led to the constitutional deprivations. Plaintiffs will have to overcome significant issues of proof if they are to prevail at trial. Nonetheless, the Court finds that, at this stage, Plaintiffs have adequately pleaded municipal liability based on the role that City customs and policies allegedly played in the constitutional violations. While the Court does 'not lightly infer a municipal policy or practice from a few scattered claims ... neither should [it] blind [itself] [.]")

Bannon, for the Estate of Root v. Godin, No. CV 20-11501-RGS, 2020 WL 7230902, at *1–2 (D. Mass. Dec. 8, 2020) ("The City argues that plaintiff has failed to plead an actionable claim because the Complaint neither identifies with specificity the deficiency in training that led to Justin Root's death nor sets out a pattern of unconstitutional conduct by Boston officers that would have placed the City on notice of a need for further training of its officers. The court agrees that the Complaint, while rich in generalities, is rather thin on detail. However, at this early stage of the litigation, to withstand a Rule 12(b)(6) attack, a Complaint need not be replete with factual allegations; rather a plaintiff's burden is to set out 'plausible grounds' for an entitlement to relief. . . While this standard 'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action's elements will not do,'. . . here the sparsity of the Complaint may be fairly attributed to the infancy of the litigation and the plaintiff's lack of access to the discovery tools that are typically deployed to flesh out the factual underpinnings of a liability claim. That said, the court does not find the Complaint so devoid of factual detail as to leave the City clueless about the nature of the plaintiff's claims. She identifies thirteen areas, albeit in general terms, in which she alleges that the City allegedly failed to provide adequate training as well as several specific policies which the City allegedly failed to enforce to insure officer compliance with constitutional mandates. . . She also alleges that the City 'knew or should have known that their police officers ... might be in a position to consider the use of deadly force on a suspect such as Mr. Root that (a) did not pose any immediate danger to police officers or others, (b) did not have a firearm, (c) was

severely injured and covered in blood, and (d) lying on the ground,' and thus that the purported inadequate training and supervision 'amount[ed] to deliberate indifference to clearly established constitutional rights of others, including Mr. Root, to be free from the use of excessive force and the deprivation of life without due process of law.' . . These allegations suffice, for present purposes, to withstand the motion to dismiss.")

Regis v. City of Boston, No. 19-CV-10527-IT, 2020 WL 2838862, at *3 (D. Mass. June 1, 2020) ("Here, Plaintiffs make a number of allegations as to why the City Defendants are liable under § 1983 for both the City Defendants' policies and customs and for their failure to train its employees. Specifically, they allege the City Defendants have a policy that the warrant affiant is not to be present where and when the BPD deploys 'SWAT' teams to execute a no-knock raid, . . . an absence of a city policy requiring officers to check the names of individuals on a warrant with the names of individuals residing in a unit that is being raided before executing the raid, . . . an absence of a city policy requiring officers conducting a raid to double check the property address against the warrant address before executing the raid, . . . an absence of a policy requiring officers conducing the raid to survey the home the day before the raid so as to ensure that the activity in the home is consistent with that described in the warrant, . . . an absence of a policy requiring officers to immediately compare the names and described features of those individuals named in the warrant with those encountered in the property being raided, . . . and, a failure to train officers on how to interact with children encountered in a home that is being raided[.] . . Plaintiffs *Amended Complaint* [#20] sets forth short and plain statements of the claim for which they are seeking relief, and these statements are sufficient to provide the City Defendants with notice as to the basis for the claims. The City Defendants do not dispute this. Nevertheless, the City Defendants move for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). The City Defendants argue that the complaint only describes an 'isolated incident' and that the City's existing policies on executing no-knock raids, which the City attaches to its opposition, show 'quite the opposite of "deliberate indifference" with regard to ensuring entries at correct addresses.'. . Maybe so, but these arguments go to the merits of Plaintiff's claims that there is a direct causal link between the City's policies and the alleged violation of the Regis's family's rights and that the City was deliberately indifferent to how their failure to train its officers caused the alleged violations under the federal Constitution. . . They do not undermine the sufficiency of the pleadings.")

Henriquez v. City of Lawrence, No. 14-CV-14710-IT, 2015 WL 3913449, at *3 (D. Mass. June 25, 2015) ("While admittedly a close question, this court finds that Henriquez's allegations are sufficient at this stage to state a plausible claim for an unconstitutional policy or custom. Henriquez alleges that Officer Camacho and other officers in the Department engaged in prior incidents of excessive force and denial of medical care constituting a 'history or pattern' of such conduct, citizens complained about officers' use of excessive force and denial of medical care, the City was on notice of such complaints, and the City failed to take any action in response to the complaints, including failing to investigate, supervise, discipline, and train the officers. Although Henriquez does not provide many factual details as to the prior incidence of misconduct and prior complaints, she provides more than legal conclusions or a recitation of the elements of the cause of action. . .

Henriquez alleges facts that, taken as true and taken together with the reasonable inferences from those facts, state a plausible claim.")

Bochart v. City of Lowell, 989 F.Supp.2d 151, 155 (D. Mass. 2013) ("The Court acknowledges that there is an inherent difficulty in pleading a § 1983 action against a municipality. Under the federal system of notice pleading, a complaint need only allege a 'short and plain statement of the claim.'. . Publicly-available information concerning similar constitutional violations may often exist only as allegations only, not facts. Early dismissal on that basis could inappropriately prevent or discourage plaintiffs from asserting their constitutional rights. On the other hand, a municipality can be held liable only if a policy or custom actually exists, and should not be forced to expend its limited resources conducting discovery in every case where a plaintiff makes a bare allegation of a 'policy or custom.'. .Moreover, what suffices to state a custom or practice varies from case to case. The size of the municipality, the frequency of the alleged violations, the length of time during which the alleged violations have occurred, and the similarity in character of the alleged violations are among the factors to be considered in determining whether a series of incidents has risen to the level of a 'custom' or 'practice.' There is no set formula for ascertaining the appropriate degree of specificity or plausibility in a complaint, and each case must be considered on its own merits.")

Comeau v. Town of Webster, Mass., No. 11–40208–TSH, 2012 WL 3042384, *8 (D. Mass. July 24, 2012) ("Here, to survive the motion to dismiss, Plaintiffs must have pled facts to show it is plausible that the Board of Health adopted and implemented spoilage/storage/contamination policies, not for the purpose of a neutral health and safety reason, but for the purpose of violating Plaintiffs' civil rights. . .In support of their § 1983 claim, Plaintiffs merely contend Webster's Board of Health: (1) 'has a duty and an obligation of reasonable care to administer, properly supervise, direct, and control those agents acting on its behalf ...,' *Compl.*, ¶ 161; and (2) had policies and customs in place for the purpose, including but not limited to administering, directing, supervising and controlling inspection and disposition of food products.'. . None of Plaintiffs' allegations identify a policy that caused a violation of their right to due process. Instead, Plaintiffs attempt to implicate the town by parroting the elements of a § 1983 claim. On such meager allegations, Plaintiffs' claim for municipal liability cannot succeed. . . . Plaintiffs' formulaic allegation that the Board of Health 'had policies and customs in place' is precisely the type of blanket, conclusory allegation that the Supreme Court has determined should not be given credit when standing alone.")

Chalifoux v. City of Lowell, No. 10-11847-RGS, 2011 WL 841068, at *1, *2 (D. Mass. Mar. 8, 2011) ("[I]t is doubtful in this age of *Twombly-Iqbal* pleading that the Complaint as presently drafted would survive unscathed a well-crafted motion to dismiss. A post-*Twombly* complaint must allege 'a plausible entitlement to relief.'. . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . Here, while the Complaint alleges plausible causes of action against Officer Panek and perhaps one or more of the unidentified officers, the claims against the City of Lowell are set out in a formulaic recitation of

every theory of municipal and supervisory liability recognized by federal law. None of theories, however, is given any factual anchoring. For example, the failure by the City to properly train Officer Panek in the use of pepper spray is alleged in apparent obliviousness of the long-established rule that a single instance of employee incompetence will not support a recovery for a failure to train. . . Similarly, supervisory liability is alleged without any identification of the supervisor or the individual failures on that supervisor's part that are alleged to have caused a constitutional wrong. . . That said, this is not a well-crafted motion to dismiss. As plaintiff fairly points out, the bulk of the City's supporting memorandum appears to have been copied verbatim from an earlier and apparently successful pleading filed before Magistrate Judge Bowler in a separate case, including the inadvertent incorporation of factual references to that case. While there is nothing particularly wrong with boilerplate − it gets used because it is reusable − it is more effective when molded to the shape of the boiler it is meant to reinforce. . . For the foregoing reasons, the City of Lowell's Motion to Dismiss itself from the Complaint is *DENIED* without prejudice. The court *ORDERS* the bifurcation of the municipal and supervisory liability claims brought against the City (and presumably certain superior officers of the Lowell Police) from the Fourth and Fourteenth Amendment claims brought against the individual officers.")

Counter v. Healy, No. 09-12144-RGS, 2010 WL 2802179, at *6 (D. Mass. June 28, 2010) ("Whether or not Counter's allegations against the City of Cambridge suffice to state a claim for municipal liability pursuant to Section 1983 presents a closer question, but Counter has advanced enough facts to proceed to discovery on this claim. To be sure, Count III, standing alone, reads as a boilerplate recitation of the elements of a *Monell* claim, without supporting factual allegations. . . Counter, however, has pleaded that he serves as a mentor to students of color at Harvard and is aware of, and has discussed with the Police Department, numerous instances of 'mistreatment of students of color by the Cambridge Police.'. . These allegations, combined with the specific allegations regarding the two different criminal complaints Counter faced, are sufficient to state a claim for relief that is plausible on its face.")

SECOND CIRCUIT

Hu v. City of New York, 927 F.3d 81, 106-07 (2d Cir. 2019) ("In short, the Amended Complaint provides no basis for concluding that the defendants' discriminatory enforcement actions against the plaintiffs 'represent[ed] the conscious choices of the municipality itself.'. . While it can reasonably be inferred that the plaintiffs have been the victims of persistent harassment by several subordinate officers at DOB, the factual allegations do not 'compel[ ] the conclusion that the local government has acquiesced in or tacitly authorized its subordinates' unlawful actions.'. . Accordingly, we affirm the District Court's dismissal of the plaintiffs' *Monell* claim.")

- ***Raymond v. Brusino***, No. 23-CV-552-LJV-JJM, 2025 WL 470159, at *4–8 (W.D.N.Y. Feb. 12, 2025) ("Raymond's remaining objections relate to Judge McCarthy's review of the sufficiency of his proposed *Monell* claims against the City of Niagara Falls and Niagara County. Judge McCarthy deemed the proposed amendments futile because they included

only conclusory allegations about the municipalities' policies (or lack thereof) and a single incident of alleged misconduct. . . . To state a *Monell* claim, a plaintiff must plead three elements: '(1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right.'. . . Although Raymond does not specify the type of *Monell* claims he tries to bring in his proposed second amended complaint, he seems to assert two theories of liability: 1) the existence (or non-existence) of a custom, policy, or practice and 2) deliberate indifference on the part of municipal policymakers. The Court will address the plausibility of each in turn. . . . In essence, Raymond says that because the detectives and deputies who raided his apartment did not use body cameras, the two municipalities must either 1) not have had a policy requiring the use of body cameras or 2) had policies exempting certain employees from using body cameras while serving warrants. But nowhere in his proposed amendments—or even in his briefing—does Raymond allege any other time when Niagara Falls or Niagara County law enforcement officers did not wear body cameras, either during the execution of a warrant or while performing other duties. And as courts throughout the Second Circuit routinely hold at the pleading stage, a single incident is not enough to establish a custom, policy, or practice under circumstances like these. . . . Even construing the allegations in the proposed second amended complaint in the light most favorable to Raymond, they suggest nothing more than one incident of allegedly unconstitutional conduct. And as Judge McCarthy found, . . . that is not enough for *Monell* liability. What is more, even if all that were not true—even if Raymond had plausibly alleged the lack of a policy requiring detectives or 'Sheriff's Office personnel' to use body cameras or an exemption from such a policy when serving warrants—his *Monell* claim still would fail because there is no causal link between those allegations and the injury he allegedly suffered. According to the first two versions of Raymond's complaint and now his proposed second amended complaint, his rights were abridged when law enforcement officers beat him while executing a search warrant at his apartment. . . Based on those circumstances, the sort of alleged municipal custom, policy, or practice that might give rise to a viable *Monell* claim would be one that encouraged or condoned the use of excessive force by officers. Raymond tries to connect his alleged injury with either the supposed lack of a body camera policy or policies permitting exemptions based solely on speculation about how law enforcement officers are likely to behave without body cameras. That thin connection is not enough. . . . To hold otherwise would require a breathtaking logical leap: that because there was no policy requiring body cameras to be used by law enforcement during law enforcement activities, or because certain law enforcement officers were exempt from such a policy when executing warrants, the municipalities were complicit in the excessive use of force. That logical leap is neither appropriate nor warranted. Indeed, if what Raymond suggests is true, then whenever excessive force was used by a police officer, the municipality employing that officer would face *Monell* liability unless it required the use of body cameras. And that is not the law. . . In sum, Raymond has not alleged a viable *Monell* claim both because his proposed pleading is factually deficient and because his theory of liability is faulty. For either and both of those reasons, his objection to Judge McCarthy's R&R is misplaced. . . .

> Raymond's proposed pleading does not specifically allege a failure to train, supervise, or discipline on the part of the City of Niagara Falls or Niagara County. But by repeatedly referring to 'deliberate indifference,' he seems to suggest that the municipalities' failure to act here demonstrates their failure to educate law enforcement about the constitutional rights of citizens, or to properly supervise or discipline law enforcement, and thus gives rise to *Monell* liability. . . . That legal theory fails as well. . . . First, Raymond has not even raised an explicit claim that the two municipalities failed to train law enforcement. Second, the implicit claim alleges nothing more than the particular circumstances of the single raid on his apartment. He does not allege other incidents that would put municipal policymakers on notice of the risk of constitutional violations from not requiring employees to wear body cameras. He does not allege any facts about the frequency with which City of Niagara Falls or Niagara County law enforcement officials encounter situations like the raid he describes. Indeed, other than the incident at issue, he does not point to a single failure to discipline. And even with respect to this incident, he does not even suggest that a municipal policymaker learned about the failure to wear body cameras during the raid on Raymond's apartment so that they could have disciplined the officers involved. Raymond's proposed second amended complaint therefore falls well short of plausibly alleging the deliberate indifference on the part of a municipal policymaker that might possibly give rise to *Monell* liability. Accordingly, the Court agrees with Judge McCarthy's conclusion that the proposed amendments are futile.") (*See also Flannery v. County of Niagra*, 2024 WL 5395718 (W.D.N.Y. May 15, 2024))

Greene v. City of New York, No. 21-CV-05762 (PAC), 2024 WL 1308434, at *18–20 (S.D.N.Y. Mar. 26, 2024) ("A plaintiff may allege 'an official policy or custom' by showing one of the following: (1) a formal policy officially endorsed by the municipality; (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage of which a supervising policy-maker must have been aware; or (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees. *Staboleski v. City of New York*, No. 19 Civ. 8834, 2021 WL 796616, at *4 (S.D.N.Y. Mar. 1, 2021). Here, Plaintiffs allege that the City is liable on three theories: (1) a formal policy by way of the EDP and Involuntary Removal Policy; (2) a custom of using excessive force against those identified as EDPs; and (3) deliberate indifference to the rights of people with actual or perceived mental disabilities. . . All three theories fail. . . First, the formal Policies do not violate the Constitution. Both Policies implement New York Mental Hygiene Law § 9.41, which permits the police to 'take into custody any person who appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others.' It is well settled—and Plaintiffs do not challenge—that § 9.41 is constitutional. . . As the challenged Policies merely implement a constitutional state law, they cannot form the basis of Plaintiffs' *Monell* claim. . . . Accordingly, Plaintiffs cannot rely on a formal policy to

sustain their *Monell* claim. . . . Plaintiffs alternatively allege that the use of 'excessive force' against the mentally disabled is so widespread that it constitutes a *de facto* policy or practice. . . . Here, to demonstrate a *de facto* policy of excessive force, Plaintiffs point to several reports—issued by the Office of the Inspector General ("OIG Report") and the Urban Justice Center ("UJC Report")—documenting deficiencies in the City's response to mental health calls and to various incidents where the NYPD has used lethal force against the mentally disabled. None of these allegations, in totality or in isolation, indicates a custom of excessive force. . . . Plaintiffs' reference to numerous incidents of police violence towards the mentally disabled also fails to support a finding of a *de facto* policy or custom. In addition to the claims brought by the Individual Plaintiffs, the SAC details 24 separate instances since 1984 where officers used lethal force against a mentally ill person. . . These 24 instances over some 40 years are too few to establish a *de facto* policy. As alleged in the SAC, the 'NYPD responds to approximately 200,000 "EDP" calls a year[, but i]n fact, this number is likely much larger.'. . Even if all 30 incidents alleged in the SAC occurred in a single year, they would represent only a fraction of a percent of all EDP calls responded to by the NYPD annually. Moreover, Plaintiffs do not allege that any of the incidents resulted in findings of liability against the City. . . Here, because the number of alleged incidents of excessive force is vanishingly small and because Plaintiffs have failed to show that any resulted in liability against the City, they have failed to demonstrate a *de facto* policy. . . . Plaintiffs' deliberate indifference theory fails for the same reasons. To demonstrate deliberate indifference adequately, a plaintiff must plead that the City 'had notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action or supervision was obvious, and the policymaker's failure to investigate or rectify the situation evidences deliberate indifference, rather than mere negligence or bureaucratic inaction.'. . As with the *de facto* policy claim, the relatively small number of incidents culled from a nearly forty-year period, none of which is alleged to have resulted in liability, is not sufficient to put the City on notice that its policies caused constitutional violations. Without more, the Court cannot find that Defendants were deliberately indifferent to the rights of the mentally ill. . . In sum, Plaintiffs have failed adequately to plead 'the existence of a municipal policy or custom' under either a formal, *de facto*, or deliberate indifference theory. . . As such, Defendants' motion to dismiss Plaintiffs' *Monell* claim is **GRANTED.")**

Colon v. City of Rochester, 419 F.Supp.3d 586, ___ (W.D.N.Y. 2019) ("In their thirteenth and fourteenth claims for relief, plaintiffs allege respectively that the City has maintained unconstitutional policies with respect to the use of excessive force in making arrests, and by permitting the RPD's use of 'cover' charges to punish so-called 'contempt of cop.' In support of the thirteenth claim, plaintiffs have set forth allegations about several RPD officers, none of whom were involved in the incident giving rise to this suit, asserting that those officers have used excessive force and were never disciplined for their actions. . . There is no bright-line rule for determining whether allegations of prior incidents involving other officers and different alleged victims are sufficient to make out a *Monell* claim. On the one hand, a plaintiff asserting a *Monell* claim must go beyond merely reciting a 'litany of other police-misconduct cases' involving the same municipality. . . But that does not mean that past incidents are irrelevant, or that they can never support a claim of municipal liability. A plaintiff asserting a *Monell* claim

based on a municipality's ongoing practice or custom will typically need to rely on past cases involving police misconduct. . . The question on a motion to dismiss is whether, assuming the truth of the plaintiffs' factual allegations, those past incidents give rise to a plausible claim of deliberate indifference on the part of the municipality to the types of constitutional violations alleged in the case before the court. In making that determination, courts typically consider both the number of alleged prior incidents and the degree of similarity that they bear to the incident that gave rise to the lawsuit at bar. . . In the case before me, plaintiffs have set forth allegations about six RPD officers who have allegedly used excessive force in the past, but never been disciplined for doing so. . . Those twelve incidents took place between July 15, 2001 and September 18, 2015.

Some of the incidents alleged are factually quite dissimilar from the incident that occurred here. . . . Some of the alleged incidents, however, do bear some similarity to the one alleged in this case. . . . The other incidents alleged fall at various points on the spectrum in terms of their similarity to the incident here, but in they all involve alleged uses of excessive force by RPD officers, who were not disciplined for their actions. As stated, plaintiffs assert in the thirteenth cause of action that the City has been deliberately indifferent to RPD officers' use of excessive force, both in carrying out arrests and in non-arrest interactions with civilians. Plaintiffs allege that at the time of the incident giving rise to this suit, the RPD essentially had *no* standards governing officers' use of force. In other words, officers were given free rein to use force as they saw fit. Given those allegations, the Court cannot simply disregard the allegations about prior incidents. If the claim is that the City and the RPD have routinely ignored officers' use of force, no matter *how* excessive or unwarranted, then the fact that some of the prior alleged incidents involved uses of force that were more egregious than what is alleged here is not dispositive. In making this determination, the Court is mindful that this is not a motion for summary judgment. On a motion to dismiss, the Court must accept the truth of plaintiffs' factual allegations, and construe all reasonable inferences in their favor. Applying that standard, I conclude that plaintiffs' thirteenth claim should be allowed to proceed. . . The fourteenth claim alleges that the City and RPD have created and maintained a custom and policy of wrongfully arresting people without probable cause. Plaintiffs allege a number of aspects in which those arrests are wrongful, such as: the use of false 'cover' charges like disorderly conduct, trespass, resisting arrest, etc.; so-called 'contempt of cop' arrests based on the arrestee's perceived lack of respect for the officer; and making arrests without probable cause, simply to meet the goals of temporary law-enforcement initiatives. Plaintiffs also allege that the City's and RPD's policies in this regard proximately caused their injuries. In particular, plaintiffs allege that the arrests of plaintiffs were made in part to carry out an RPD policy then in effect, known as 'Operation Cool Down,' pursuant to which RPD officers were instructed to aggressively engage citizens in public areas, in an ostensible effort to deter crime and violence in Rochester. . . As in the thirteenth cause of action, plaintiffs have alleged and rely upon other past incidents involving RPD officers. . . . While the matter is not free from doubt, the Court will deny defendants' motion to dismiss this claim. The mere fact that lawsuits were filed in connection with these incidents is not in itself probative of the existence of a municipal custom or policy. . . But as with the excessive force claim, that does not mean that the underlying incidents themselves may not be considered in determining whether plaintiffs have adequately stated a claim. Again, this is not a motion for summary judgment, and accepting the truth of plaintiffs' allegations, I conclude

that they have presented a facially viable *Monell* claim in their fourteenth cause of action. It bears repeating that this decision is based on the relatively lenient standard applicable to Rule 12(b)(6) motions. It remains to be seen whether, after discovery, summary judgment may be appropriate.")

Newson v. City of New York, No. 16CV6773ILGJO, 2019 WL 3997466, at *8-10 (E.D.N.Y. Aug. 23, 2019) ("Plaintiff's *Monell* claims are structured similarly to those in *Benitez*. He alleges that the City instituted and implemented 'unlawful policies, procedures, regulations, practices and/or customs concerning the continuing obligation to make timely disclosure to the defense' and avers that there was 'deliberate indifference by policymaking officials at the [QCDA] in its obligation to properly train, instruct, supervise and discipline its employees, including the ADAs involved in the prosecution of the plaintiff's case, with respect to such matters.'. . Importantly, Plaintiff cites 87 cases of prosecutorial misconduct by the QCDA between 1985 and 2004, including 28 cases in which the QCDA withheld *Brady* or *Rosario* material. . . This list of cases largely overlaps with the one submitted in *Benitez* and, as in *Benitez*, the Court finds that it is circumstantial evidence of a pattern and practice of which municipal policymakers 'must have been aware.'. . . To be sure, discovery may reveal that no such policy existed at the time of the proceedings against Plaintiff, if it ever existed at all. But 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely."'. . For purposes of this motion to dismiss, Plaintiff's allegations push his *Monell* claim over the line from 'mere[ly] possib[le]' to 'plausible.'. . Accordingly, the City's motion to dismiss Plaintiff's *Monell* claim as it relates to the conduct of the QCDA is denied. . . .[I]n this case, Plaintiff does not expressly allege that the NYPD wrongfully withheld evidence from *prosecutors*. Instead, his only § 1983 claim as it relates to the NYPD is that it 'withheld favorable material evidence *from the plaintiff and his attorney*.'. . This fails to state a constitutional violation. As the Second Circuit held nearly three decades ago, 'the police satisfy their obligations under *Brady* when they turn exculpatory evidence over to the prosecutors.'. . Thereafter, it is the responsibility of the prosecutors, not the police, to ensure that *Brady* material is disclosed to the defense. . . Because Plaintiff has failed to explicitly allege a constitutional violation by the NYPD, he cannot maintain a *Monell* claim against the City based on the NYPD's alleged misconduct. . . . In this case, the Court deems it appropriate to allow Plaintiff to amend his § 1983 claim to include an explicit allegation that the NYPD failed to forward exculpatory evidence to the QCDA. As noted above, the factual portion of the complaint amply supports the inference that the NYPD did not disclose evidence to prosecutors when it should have. . . It is plausible that, had the ballistics evidence and cellphone been received by the QCDA more promptly, they would have influenced the decision to continue the charges against Plaintiff rather than dismiss them without further action. It is also plausible that the belated disclosure of this evidence contributed to the QCDA's *own* failure to abide by its obligations under *Brady*, which itself resulted in the postponement of trial and prolonged the amount of time that Plaintiff would remain incarcerated. Therefore, allowing Plaintiff to amend the complaint will not be futile. The amended complaint, in its current form, does not allege any facts—only 'mere assertion[s],'. . . that there was a municipal pattern or practice that caused the NYPD to withhold evidence from prosecutors, or that tolerated or ratified such conduct. . . The compendium of judicial decisions attached to the

amended complaint describes occasions where the QCDA withheld evidence, not where the NYPD did so. Accordingly, should Plaintiff desire to amend the complaint, he must furnish additional facts from which such a policy or custom can be inferred. Alternatively, Plaintiff may join individual police officers as defendants under Federal Rule of Civil Procedure 21, . . .in which case a showing of a municipal custom or policy will not be required. For the reasons stated above, Plaintiff's § 1983 claim as it relates to the conduct of the NYPD is dismissed with leave to amend.")

Price v. City of New York, No. 15 CIV. 5871 (KPF), 2018 WL 3117507, at *19–20 (S.D.N.Y. June 25, 2018) ("Plaintiff . . . asserts a *Monell* claim against the City based upon its alleged failure to train its employees about the interplay between social media use and the First Amendment. . . . In order for municipal liability to attach on a failure-to-train theory, 'a municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact."'. . 'A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train.'. . . Plaintiff alleges that '[t]he City's failure to train employees on the proper use of social media carries a high risk that deleting comments or blocking users will cause violations of those users' First Amendment rights.'. . This allegation, without more, does not 'nudge[ ] [Plaintiff's] claims across the line from conceivable to plausible,'. . . and fails to meet the 'rigorous standard of culpability and causation' required to plead municipal liability based upon alleged municipal inaction[.]. .Plaintiff's bare allegation therefore does not state a claim of deliberate indifference by the City. . . . It may well be that this lawsuit, and this Opinion, place the City on notice of the need to train its employees that viewpoint discrimination is unlawful in forums governed by the Free Speech Clause, including the City's official Twitter accounts. Indeed, the Court hopes that it does. But that does not mean that the City's alleged failure to train—when it had no reason to believe 'to a moral certainty' that its failure would result in constitutional violations. . . caused the violation of Plaintiff's First Amendment rights.")

Price v. City of New York, No. 15 CIV. 5871 (KPF), 2018 WL 3117507, at *20–21 (S.D.N.Y. June 25, 2018) ("[A]lthough the FAC is not entirely clear, it can be read to suggest that the City should be liable because its employees failed to correct the problem—that is, unblock Plaintiff on Twitter—after Plaintiff made them aware of what had happened. . . . By making these allegations, Plaintiff may be attempting to argue that the City of New York itself undertook the alleged conduct pursuant to a policymaker's adoption or ratification of his subordinates' conduct. . . . It is true that Commissioner O'Neill is a 'policymaker' for *Monell* purposes, such that his decisions can bind the City of New York. . . But Plaintiff's bare allegation that she 'complained orally to NYPD Commissioner James O'Neill about being blocked on Twitter' is insufficient to show that O'Neill knew that his subordinates blocked Plaintiff *for unconstitutional reasons.* . . Because Plaintiff fails to allege that O'Neill knew that Obe and Brooks blocked Plaintiff *because of her viewpoint,* and because the allegations do not suggest that O'Neill agreed with his employees' decision to engage in viewpoint discrimination, Plaintiff fails to allege plausibly that the City ratified or adopted the conduct of Brooks and Obe. For these reasons, the Court grants the City Defendants' motion to

dismiss the *Monell* claim against the City of New York, and the official-capacity claims against Obe, Brooks, and Pierre-Louis, related to the their blocking of Plaintiff from the subject Twitter accounts.")

Turner v. City of New York, No. 17-CV-8563 (KBF), 2018 WL 2727889, at *3–4 (S.D.N.Y. June 6, 2018) ("Plaintiff attempts to support his claim that the Officers were acting pursuant to a pervasive NYPD policy or custom based on: (1) vague reference to 'numerous lawsuits, complaints and notices' brought against the City, the NYPD, and individual NYPD officers that allege similar constitutional violations; (2) certain statements made by Judge Shira A. Scheindlin in an unrelated civil case, *Floyd v. City of N.Y.*, 813 F. Supp. 2d 417 (S.D.N.Y. 2011); . . . (3) a conclusory assertion that '[t]housands of individuals, like plaintiff, have been arrested and prosecuted for trespassing without probable cause,' and that the City is aware of such instances 'through lawsuits, notices of claims, complaints filed with the NYPD's Internal Affairs Bureau, and the Civilian Complaint Review Board, and extensive media coverage'; (4) the decision of Judge Sheindlin in another unrelated case, *Davis v. City of N.Y.*, 959 F. Supp. 2d 324, 355 (S.D.N.Y. 2013); (5) various conclusory assertions that the City and NYPD are broadly aware of such policies and/or customs and have failed to take any corrective measures. . . But those purported bases, even when considered in their totality and viewed in the light most favorable to the plaintiff, are plainly insufficient to support a municipal liability claim capable of withstanding defendants' motion for judgment on the pleadings. First, plaintiff's various references to other individuals who have been wrongfully searched and/or arrested are vague and insufficient to state a claim to relief that is plausible in this case under *Iqbal* and *Twombly*. Plaintiff asserts, in a conclusory fashion, that the City and NYPD have violated 'thousands' of other people's constitutional rights. But plaintiff does not make *any* specific factual allegations regarding those other people, their claims, or why they are relevant to the allegations raised herein. Besides noting that the City and NYPD (and some individual officers) have faced other complaints and lawsuits, and making the conclusory allegation that those previous complaints involved similar conduct, the SAC does not even attempt to describe or explain the actual similarities between those previous complaints/lawsuits and the incident giving rise to this lawsuit. A complaint must allege 'more than a sheer possibility that a defendant has acted unlawfully,' and more than 'facts that are merely consistent with a defendant's liability.'. . The SAC's vague and conclusory assertions regarding previous constitutional violations does neither. Second, plaintiff's reference to statements made by Judge Scheindlin in two entirely unrelated cases (*Floyd* and *Davis*) does nothing to bolster his *Monell* claim against the City in this case. Plaintiff does not describe how or why the facts or allegations in *Floyd* or *Davis* are relevant to the misconduct alleged herein. Further, plaintiff does not even attempt to explain how or why Judge Scheindlin's statements are relevant to the question at hand, which is whether the Officers in this case acted pursuant to a policy and/or custom of the City. The cited statements from *Floyd* and *Davis*, as presented in the SAC, are irrelevant to the Court's analysis of the pending motion. Even assuming that plaintiff did successfully allege a custom or practice for unlawful searches and/or arrests, however, the allegations in the SAC do not create a plausible inference that any such custom or practice was pervasive. . . As previously noted, plaintiff does not even attempt to actually explain *how* the 'thousands' of other instances of

misconduct relate to the misconduct alleged herein, or, critically, how many of those previous instances actually involved misconduct. Without further factual support, the other lawsuits and complaints referenced by plaintiff represent nothing more than unproven allegations that are plainly insufficient to support a municipal liability claim. Additionally, reference to certain statements made by Judge Scheindlin (which, the Court notes, were specific to the facts and legal questions at issue in those cases) are immaterial. Whatever evidence was before Judge Scheindlin is not currently before the Court, and is not laid out in the SAC. In short, the SAC is devoid of the types of factual allegations regarding a pervasive policy or custom that is required to sustain a *Monell* claim against a municipal entity like the City. For that reason, plaintiff's municipal liability claim must be dismissed.")

Paul v. City of New York, No. 16-CV-1952 (VSB), 2017 WL 4271648, at *6–7 (S.D.N.Y. Sept. 25, 2017) ("Whether an individual officer has violated the Fourth Amendment during a particular encounter is an entirely separate question from whether a municipal policy caused a constitutional violation. While the municipal policy must be the 'moving force' behind the ultimate constitutional injury, . . it need not be facially unconstitutional[.]. . Here, Plaintiffs have adequately alleged that the NYPD had a policy that needlessly escalated otherwise safe situations by breaching doors of contained EDPs, which caused constitutional violations to which the City was deliberately indifferent. While Plaintiffs are of course required to plead an actual constitutional injury that resulted, they have done so here, which Defendants implicitly concede by choosing not to move to dismiss the excessive force and unlawful entry claims. Defendants also argue the Banks Communication does not support a plausible inference of the existence of an unconstitutional policy, and is 'more fairly construed as raising a thoughtful inquiry as to law enforcement best practices in light of evolving experience with EDPs.'. . Again, Defendants' arguments display a fundamental misunderstanding of *Monell* doctrine; Plaintiffs need not establish that the municipal policy itself is facially unconstitutional. . . Defendants also misconstrue the force of the Banks Communication, which cites 'several occasions in the past,'. . . and supports Plaintiffs' allegation that the Police Commissioner was on notice of the danger posed by partial door breaches involving emotionally disturbed persons. The Amended Complaint also alleges that at least two other EDPs have died during interactions with NYPD officers. . . Moreover, the fact that the Banks Communication could also be viewed as 'a thoughtful inquiry as to law enforcement best practices in light of evolving experience with EDPs,'. . . does not mean that the Communication is not relevant to and/or evidence of a policy and an alleged *Monell* violation. Thus, Plaintiffs have plausibly asserted a municipal policy and inaction in light of notice of constitutional deprivations on the part of the NYPD. Next, Defendants argue that the Amended Complaint fails to plausibly allege failure to train. The Amended Complaint does not specify a particular deficiency in the NYPD's training program. However, Plaintiffs do allege that the ESU is a 'specialized unit' tasked with handling people experiencing 'emotional disturbances,'. . . which implies some amount of additional training on interacting with mentally disturbed individuals. Moreover, plaintiffs cannot be expected to know the specifics about a municipality's training program or be able to name the alleged deficiencies at the pleading stage. . . Therefore, dismissal of Plaintiffs' *Monell* claim at

the motion to dismiss stage is premature under the circumstances presented here, and Defendants' motion to dismiss the *Monell* claim is DENIED.")

An v. City of N.Y., No. 16 CIV. 5381 (LGS), 2017 WL 2376576, at *3–5 (S.D.N.Y. June 1, 2017) ("The Complaint adequately alleges the equivalent of an official policy based on a failure to supervise or train. The allegations satisfy all three requirements for deliberate indifference under *Walker*. First, the Complaint plausibly alleges that the City knows to 'a moral certainty' that NYPD officers will confront individuals filming them. . . The City issued the FINEST Message, entitled 'Recording of Police Action by the Public,' that reminded officers that the public may legally record police interactions. Second, the Complaint plausibly alleges a history of employees mishandling the situation in which an officer is being recorded. The Complaint cites 47 lawsuits, 18 news reports and hundreds of complaints to the CCRB involving allegations that NYPD officers arrested or otherwise interfered with individuals who were recording them in public. Further, the CCRB concluded that complaints regarding police interactions in which the officer was being filmed warranted an Issued-Based Report, a document the CCRB produces if its investigation 'reveals problems that go beyond specific acts of misconduct and suggest the need for a change in police department policy, procedures, or training.' At this stage of the litigation, these allegations support the inference of a history of NYPD officers mishandling situations in which individuals film police activities in public. . . Third, the Complaint plausibly alleges that the 'wrong choice' by a police officer will 'frequently' deprive an individual of a constitutional right. . . The FINEST Message expressly warns officers that 'intentional interference such as blocking or obstructing cameras or ordering the person to cease ... violates the First Amendment.' The allegations regarding the numerous lawsuits, news reports, complaints to the CCRB between 2014 and 2016 and the CCRB's decision to prepare the so-called 'bystander report' not only support the inference that the City's need for more or better supervision to protect against constitutional violations was obvious, they also support the inference that the City failed to make meaningful efforts to address the risk of harm. . . The City's argument that a plaintiff cannot rely on these sources because they contain hearsay is unavailing; although this objection may prevail on summary judgment, it does not on this Rule 12 motion. . . Accordingly, the Complaint plausibly alleges a municipal policy based on a failure to supervise or train. The City argues that Plaintiff lacks standing in light of the FINEST Message, which it contends is a constitutionally-adequate official policy. . . . The City reasons that Plaintiff cannot allege standing because the FINEST Message did not authorize the NYPD officers to arrest Plaintiff in July 2014 solely for recording a police interaction. Neither *Curtis* nor *Lyons* stands for the proposition that a plaintiff is foreclosed from alleging standing whenever the municipality has a written policy that is constitutionally adequate. As subsequent cases make clear, a 'municipal policy' may be found '[w]here a city's official policy is constitutional, but the city causes its employees to apply it unconstitutionally.'")

Brown v. City of New York, No. 13-CV-06912, 2017 WL 1390678, at *14 (S.D.N.Y. Apr. 17, 2017) ("Brown alleges numerous times that the DOC allows—even invites the Bloods to control DOC facilities such as GMDC. . . Standing alone, these allegations are conclusory and are insufficient to support a plausible *Monell* claim based on Brown's single incident. But Brown also

claims that the Bloods perpetrated a similar attack on another inmate a few days before he was attacked, . . . and he cites an assortment of cases and articles reporting on corruption and gang-related violence at Rikers. Granted, many of these reports offer no support for Brown's allegation that the City has an unofficial custom of allowing gang activity to occur at GMDC. Certain ones, however, bear enough factual similarity to the incident that is the subject of this lawsuit to allow Brown's *Monell* claim to survive the City's motion to dismiss. For example, Brown cites a *New York, Times* article about the killing of a teenage inmate at Rikers by other inmates in 2008. . . In that case, the teen's attackers had allegedly been enlisted by correction officers to act as enforcers to help maintain control over the jail. The scheme, nicknamed 'the Program,' also gave certain inmates special privileges such as deciding who was allowed to use chairs in common rooms. Brown also cites a 2007 *Village Voice* article reporting on violence at Rikers. . . That article, which quotes deposition testimony by a former correction officer, describes how certain inmates were deputized as enforcers by correction officers to control other inmates. The article also discussed an alleged practice known as 'write with us,' in which DOC personnel conspired to make false reports on incidents involving inmates. These articles, which contain allegations that are strikingly similar to the factual allegations here, plausibly support Brown's contention that the DOC has not adequately responded to a pattern of misconduct. At this stage in the litigation, the court finds that Brown has adequately alleged the existence of a municipal policy or custom. To state a claim for municipal liability under § 1983, a plaintiff must not only establish the existence of a municipal policy or custom, but also show a causal connection, or 'affirmative link,' between the policy and the deprivation of his constitutional rights. . .The City argues that, even if Brown has sufficiently alleged the existence of a municipal policy, he has not plausibly alleged that his constitutional rights were violated as a result of that policy. If the City has a custom of enlisting gang members to help control other inmates, it is plausible that the attack on Brown—and the correction officers' lack of response—was directly connected to this policy. Accordingly, the City's motion to dismiss Brown's claim for municipal liability based on an unofficial custom or practice is denied.")

An v. City of New York, 230 F.Supp.3d 224, 229-31 (S.D.N.Y. 2017) ("The Complaint fails to allege that the City has a practice that is 'so persistent and widespread as to practically have the force of law.'. . Plaintiff cites six lawsuits filed between 2012 and 2016 and one newspaper report. But the Complaint fails to allege that any of the six lawsuits, which were filed over a course of four years, resulted in a finding that the NYPD officers violated the plaintiffs' First Amendment rights. . . .The Complaint also cites a newspaper report about an incident in which an officer was charged with official misconduct after arresting a person who was filming him. These lawsuits and the one newspaper article do not plausibly support an inference of a widespread illegal custom of violating individuals' First Amendment rights at the time of Plaintiff's arrest. . . .Plaintiff argues that the lawsuits and newspaper article show that the City had notice of 'repeated allegations of misconduct, including after the FINEST message was issued, and yet took no corrective action.' Plaintiff's argument is unavailing as to both parts—that the City had notice that the need to act was obvious and that it took no corrective action. First, the six lawsuits and one newspaper article over the span of four years is insufficient to plausibly allege the need was obvious. The district court opinions that Plaintiff cites in his brief in which the court held a plaintiff had pleaded

deliberate indifference involved significantly more instances of similar misconduct than that alleged in the Complaint. . . .Second, the Complaint is insufficient in alleging that the City, once on notice, failed to take corrective action required to show deliberate indifference. As to the incident cited in the news article, the officer was charged with a crime after the arrest. As to the other incidents, the Complaint does not allege any specific facts regarding whether the City investigated or disciplined the officers that arrested Plaintiff or the officers in any of the six lawsuits cited in the Complaint. . . . In sum, because the Complaint does not adequately allege the existence of an official policy or its equivalent, Plaintiff lacks standing to pursue injunctive relief against the City.")

Williams v. City of New York, No. 14-CV-5123 NRB, 2015 WL 4461716, at *7 (S.D.N.Y. July 21, 2015) ("We agree with our colleagues, who have consistently held boilerplate allegations such as the ones in this case to be inadequate. The Complaint assures us that *some* policy or custom drives officers to arrest falsely, to apply excessive force, and to prosecute maliciously, but utterly fails to identify any specific policy or custom. Likewise, the Complaint mentions the ideas of deliberate indifference and failure to train, but fails to identify any widespread pattern of conduct to which the City blinded itself or any deficiency in the City's oversight and training. At bottom, the Complaint alleges that, at one particular place and time, NYPD officers used excessive force in falsely arresting one criminal suspect. Seasoning an allegation of one-off conduct with catchphrases from leading Supreme Court cases is not sufficient to state a *Monell* claim. Therefore, we dismiss the section 1983 against the City.")

Adams v. City of New Haven*,* No. 3:14-CV-00778 JAM, 2015 WL 1566177, at *4 (D. Conn. Apr. 8, 2015) ("What facts does a plaintiff asserting a § 1983 failure-to-train claim need to plead in order to withstand a motion to dismiss? Over a decade ago, the Second Circuit suggested that such plaintiffs 'need only plead that the city's failure to train caused the constitutional violation,' in view of the fact that '[i]t is unlikely that a plaintiff would have information about the city's training programs or about the cause of the misconduct at the pleading stage.' *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 130 n. 10 (2d Cir.2004). Since then, however, the pleading standards have been 'substantially reworked' in *Twombly* and *Iqbal*, and so district courts 'have generally required that plaintiffs provide more than a simple recitation of their theory of liability, even if that theory is based on a failure to train.' *Simms v. City of New York,* 2011 WL 4543051, at *2 n. 3 (E.D.N.Y.2011), *aff'd,* 480 F. App'x 627 (2d Cir.2012). The Second Circuit has endorsed this approach (albeit in an unpublished disposition), stating that, '[w]hile it may be true that § 1983 plaintiffs cannot be expected to know the details of a municipality's training programs prior to discovery, ... this does not relieve them of their obligation under *Iqbal* to plead a facially plausible claim.'")

Kucharczyk v. Westchester Cnty., No. 14-CV-601 KMK, 2015 WL 1379893, at *6 (S.D.N.Y. Mar. 26, 2015) ("Although there is no heightened pleading requirement for complaints alleging municipal liability under § 1983, . . . a complaint does not 'suffice if it tenders naked assertion [s] devoid of further factual enhancement,'[citing *Iqbal*]. . . Thus, to survive a motion to dismiss,

Plaintiffs cannot merely allege the existence of a municipal policy or custom, but 'must allege facts tending to support, at least circumstantially, an inference that such a municipal policy or custom exists.'. . Put another way, conclusory allegations of a municipal custom or practice of tolerating official misconduct are insufficient to demonstrate the existence of such a custom unless supported by factual details.")

Tieman v. City of Newburgh, No. 13-CV-4178 KMK, 2015 WL 1379652, at *20-23 (S.D.N.Y. Mar. 26, 2015) ("[T]he Court concludes that Plaintiff has sufficiently alleged that the need for more or better supervision was obvious. There is no bright line rule for how many complaints of civil rights violations is sufficient to show the need for more supervision, nor is there a bright line rule for how recent those complaints must be. The City asserts that the complaints relied on by Plaintiff regarding excessive force incidents that occurred between 2005 and 2008 are too sparse and too remote to support an inference of obviousness. . . However, the City provides no authority to support the notion that a plaintiff must cite a certain number of complaints in a certain time period to make out a *Monell* claim. Indeed, the case law supports Plaintiff's position here. [collecting cases] The Court does not see any material difference between the seventeen excessive force claims in seven years in *McCants*, the fifteen excessive force claims in five years in *Farrow* . . . and the thirteen claims alleged in nine lawsuits in five years here. . . While there may be questions about the quantum of proof Plaintiff has regarding these other complaints at summary judgment, Plaintiff's allegations allow the Court to plausibly infer that the City was on notice that the police officers were using excessive force in making arrests. . . However, an allegation of numerous claims of excessive force by itself is insufficient to raise an inference of deliberate indifference due to failure to supervise. Instead, a plaintiff must allege that 'meaningful attempts to investigate repeated claims of excessive force are absent.'. . Put another way, '[f]or deliberate indifference to be shown, the response must amount to a persistent failure to investigate the complaints or discipline those whose conduct prompted the complaints.'. . Here, Plaintiff does not offer any allegations plausibly establishing that the City failed to investigate the listed complaints of excessive force. The *only* allegation Plaintiff makes regarding the City's response to the other lawsuits and the complaints made in the public forum is that '[u]pon information and belief, the officers that were the subject of these lawsuits were not disciplined by [the City] for their actions.'. . This is insufficient. There are two ways to plausibly plead deliberate indifference with respect to failure to supervise/discipline. First, a plaintiff may plead (1) that there was a pattern of allegations of or complaints about similar unconstitutional activity and (2) that the municipality *consistently failed to investigate* those allegations. Second, a plaintiff may plead (1) that there was a pattern of actual similar constitutional violations and (2) the municipality *consistently failed to discipline* those involved. However, what Plaintiff alleges here is (1) that there was a pattern of allegations of or complaints about similar unconstitutional activity and (2) that those allegedly involved were not disciplined. This does not plausibly plead a claim for deliberate indifference. There is no basis for the Court to conclude that Plaintiff plausibly alleged that the past conduct was *actually* unconstitutional, and therefore it would not be deliberately indifferent of the City to fail to punish police officers for conduct that was not improper or that they did not commit. Indeed, to plausibly allege a deliberate indifference failure to discipline claim

under the second strategy, Plaintiff must allege a consistent pattern of a failure to discipline unconstitutional action. . . Finally, Plaintiff's allegation that the Matrix Report concluded that the City's 'discipline guidelines and decisions are unstructured' and recommended that certain changes be made is insufficient to plausibly plead that there was a consistent failure to investigate allegations of misconduct or punish incidents of unconstitutionally excessive force to meet the stringent standard of deliberate indifference. In particular, Plaintiff alleges no causal link between the allegedly 'unstructured' discipline guidelines and the unconstitutional practice of not investigating allegations of use of excessive force. For the above reasons, the Court holds that Plaintiff has not plausibly alleged a failure to supervise/discipline case against the City. . . .[S]ince *Twombly* and *Iqbal,* 'courts in this district have generally required that plaintiffs provide more than a simple recitation of their theory of liability, even if that theory is based on a failure to train.'. . To state a claim for municipal liability based on failure to train, Plaintiff therefore must allege facts that support an inference that the municipality failed to train its police officers, that it did so with deliberate indifference, and that the failure to train caused his constitutional injuries. . . Other than Plaintiff's boilerplate assertions discussed above, the sole fact Plaintiff pleaded with respect to the City's failure to train its officers is that, 'only 43% of sworn officers who responded to the polling in the [Matrix Report] agreed that they received appropriate training to do their job well.'. . This factual allegation is just not enough to nudge Plaintiff's claim from possible to plausible. The polling data is not specific as to training regarding the use of excessive force. Nor has Plaintiff pleaded any facts suggesting that an alleged training deficiency *caused* his constitutional injury, for example by identifying 'procedural manuals or training guides' or by 'highlight[ing] relevant particular aspects of police training or supervision.'. . The allegation that, three years after the incident in question took place, only 43% of officers who responded to polling stated that they received appropriate training to do their job well does not allow the Court to plausibly conclude that, at the time of the incident, the City's training as to the use of force during arrest was insufficient and that that insufficiency led to Plaintiff's injuries. . . For the foregoing reasons, Plaintiff fails to state a claim against the City under *Monell.* However, the Court will give Plaintiff one last chance to plead a *Monell* claim against the City.")

A. ex rel. A. v. Hartford Bd. of Educ., 976 F.Supp.2d 164, 197 (D. Conn. 2013) ("The Supreme Court of the United States has held that there is no heightened pleading standard for civil rights actions alleging municipal liability under Section 1983. . . Instead, a plaintiff need do little 'more than plead a single instance of misconduct,' and plaintiff's complaint need include little more than 'a short plain statement of the claim showing that the pleader is entitled to relief[]'. . . .The Court concludes that, under the facts alleged in Plaintiffs' Amended Answer and Counterclaims and for reasons discussed at length *supra,* a claim that the Board evinced deliberate indifference to the allegations of discrimination as to show that the defendant intended the discrimination to occur is plausible, and consequently survives a motion to dismiss.")

Cooper v. City of New York, No. 12 Civ. 8008(SAS), 2013 WL 5493011, *6, *7 (S.D.N.Y. Oct. 2, 2013) ("Cooper alleges that the City has a policy of racial profiling that led to his arrest and subsequent prosecution in violation of his constitutional rights. . . Specifically, Cooper alleges that

the City's *de facto* policies include the failure to properly train police officers, resulting in the racial profiling of African–Americans. He alleges,

[u]pon information and belief, the CITY OF NEW YORK failed to screen, hire, supervise and discipline their police officers, including the DEFENDANT DETECTIVE MICHAEL MacDOUGALL herein, for racial bias, particularly with respect to the treatment of African–Americans, lack of truthfulness, and for their failure to protect citizens from unconstitutional conduct of other police officers, thereby permitting and allowing the defendant DETECTIVE MICHAEL MacDOUGALL herein to be in a position to maliciously prosecute the plaintiff and violate his federal constitutional rights, and/or permit these actions to take place with their knowledge and consent. . . .

Drawing all inferences in favor of Cooper, Cooper has failed to properly plead a plausible *Monell* claim against the City. The Complaint contains nothing more than '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,' which 'do not suffice' to withstand defendants' motion to dismiss. . . Cooper has failed to allege any fact which would give rise to an inference that the City had a constitutionally violative policy or that a policymaking individual was deliberately indifferent to the NYPD's alleged lack training. . . Therefore, Cooper's *Monell* claim against the City is dismissed with leave to amend.")

Guzman v. U.S., No. 11 Civ. 5834(JPO), 2013 WL 5018553, *4-*6 (S.D.N.Y. Sept. 13, 2013) ("Given that *Leatherman* predates both *Twombly* and *Iqbal,* the City highlights that it 'does not set forth the proper standard under which a Court should evaluate whether a run-of-the-mill complaint is sufficient to survive a motion to dismiss under Rule 8.'. . The City also contests the Court's citation of *Rheingold* for the proposition that *Leatherman'*specifically rejected the argument that a plaintiff must do more than plead a single instance of misconduct to establish municipal liability under section 1983.'. . Additionally, the City notes that the Second Circuit has continued to cite its opinion in *Dwares v. City of New York,* 985 F.2d 94 (2d Cir.1993), for the proposition that 'merely asserting the existence of a municipal policy is insufficient absent allegations of underlying facts'. . . despite the Supreme Court's rejection of *Dwares*' central holding that *Monell* claims require a heightened standard in *Leatherman.* The City is correct in noting that, when alleging a pervasive, albeit unofficial, pattern or practice carried out by officials without final policymaking authority, '[a] single incident alleged in a complaint, especially if it involved only actors below the policymaking level, *generally* will not suffice to raise an inference of the existence of a custom or policy.'. . Additionally, with respect to the failure to train theory of municipal liability, advanced by Plaintiff in paragraphs 502–506 in his Complaint, the alleged deprivation must have 'occurred as the result of a faulty training program, "rather than as a result of isolated misconduct by a single actor...."'. . . This requirement-the so-called 'identified training deficiency'-together with a 'close causal relationship' between the training failure and the constitutional wrong, reflects a requirement that 'plaintiffs [ ] prove that the deprivation occurred as the result of a municipal policy rather than as a result of isolated misconduct by a single actor, ensur[ing] that a failure to train theory does not collapse into *respondeat superior* liability.'. .The

City wrongly assumes that the Court disregarded *Twombly, Iqbal,* and their progeny. The Court's prior opinion clearly outlined the applicable legal standard for a motion to dismiss, citing both cases. Moreover, the Court's analysis of Guzman's *Monell* claim reflected a conclusion that Guzman's allegations with respect to the City's policy, custom, or practice were *plausible* on their face, highlighting the Court's awareness of the relevant precedent and its effect. . . Nevertheless, it was error to maintain the *Monell* claim in light of the Complaint's boilerplate allegations and this particular claim's lack of factual support. As this Court has previously observed, '[t]o state there is a policy does not make it so.'. .And while *respondeat superior* is a valid theory by which a plaintiff may assert a state tort claim against a municipality, as Guzman has done here, a *Monell* claim pursuant to § 1983 requires something more, and is not to be equated with, nor subsumed into, agency theory. . . At bottom, Guzman's Complaint merely recites, without factual support, that the threats and coercion to which he was subjected are the products of an unofficial policy, carried out by officers and sanctioned by the City. Additionally, with respect to the failure to train theory, there are no allegations from which the Court could infer deliberate indifference on the part of policy-making officials or even the required causal link between a failure to train and the resultant harm. Accordingly, upon reconsideration, Guzman's *Monell* claim is dismissed.")

Goode v. Newton, No. 3:12cv754 (JBA), 2013 WL 1087549, *7, *8 (D. Conn. Mar. 14, 2013) ("While the parties largely agree on the ultimate requirements under *Monell,* they disagree about the nature of the pleading standard for *Monell* claims on a Rule 12(b)(6) motion. Plaintiff argues that the proper standard for pleading a *Monell* claim is articulated in *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit,* 507 U.S. 163 (1993), which, according to Plaintiff, makes clear that a *Monell* claim can survive on conclusory allegations, so long as the pleading gives fair notice to Defendants. . . Plaintiff claims that *Leatherman* remains good law, notwithstanding the Supreme Court's decisions in *Twombly,* 550 U.S. 544, and *Iqbal,* 556 U.S. 662. *Leatherman* does not, however, represent a substantive carve-out for *Monell* claims, but rather stands for the proposition that courts may not impose a more rigorous pleading standard to *Monell* claims. . . To survive a motion to dismiss, a *Monell* claim must include enough factual material to be plausible. . . That said, in evaluating the plausibility of *Monell* claims, courts are mindful of the Second Circuit's observation that '[i]t is unlikely that a plaintiff would have information about the city's training programs or about the cause of the misconduct at the pleading stage.'. .The question, then, is whether the nonconclusory allegations in the Amended Complaint are sufficient to render the *Monell* claims plausible. The Court recognizes that this presents a close question, but concludes that Plaintiff has pled sufficient facts 'to raise a reasonable expectation that discovery will reveal evidence' of inadequate training or supervision . . . . First, the Court notes that Plaintiff alleges two separate violations—six months' apart—committed by New London officers, which share a common thread: manufactured criminality. According to the Amended Complaint, Officer Newton planted drugs and falsified his police report, and Officer Lynch lied to obtain a 'no trespassing' letter from the NLHA that then served as the basis for a pretextual arrest. Second, notwithstanding Defendants' characterization of the Francovilla incident as 'completely unrelated' to this suit . . . , the Francovilla matter involves allegations that New London policemen falsified police reports and manufactured criminal charges in 2009 . . . . Third, as Plaintiff notes, the New London police

force is relatively small, consisting of approximately eighty sworn officers. . . In light of the small size of the police force, the prior allegations of falsifying police reports in 2009, and the continued practice of falsifying reports in 2010, the Court finds that it is plausible that Defendants had an informal custom of 'tolerating police misconduct' and that this custom caused the violations alleged in Counts Four and Six. . . Accordingly, the City Defendants' motion to dismiss is denied as to the *Monell* counts.")

Sherwyn Toppin Marketing Consultants, Inc. v. City of New York, No. 08 CV 1340(ERK)(VVP), 2013 WL 685382, *5, *6 (E.D.N.Y. Feb. 25, 2013) ("Claims against municipalities under § 1983 are not subject to a heightened pleading standard. . . Nevertheless, such claims must meet the requirements of Rule 8 of the Federal Rules of Civil Procedure and satisfy the plausibility standard articulated in [*Ashcroft* and *Twombly*] . . .Moreover, 'boilerplate allegations of unconstitutional policies and practices' are insufficient to survive a motion to dismiss for failure to state a claim. . .Here, the complaint lacks sufficient factual details concerning *Monell* liability and contains mere conclusory statements regarding the City's alleged unconstitutional policies and practices. In this regard, the amended complaint includes only two brief allegations. First, plaintiffs allege that the 'process of setting up illegal roadblocks as a form of harassment is a specific practice and policy of the New York City Police Department and has been utilized on numerous occasions against similarly situated establishments in Brooklyn.'. . No evidence is cited in support of this statement in the amended complaint and the 'illegal roadblocks' are not mentioned in plaintiffs' memorandum of law in the discussion of their claims against the City. Moreover, it is not clear which cause of action the alleged 'illegal roadblocks ... practice and policy' would support, even if evidence of such a practice and policy had been presented. Second, plaintiffs allege that '[d]efendants' illegal actions were undertaken pursuant to municipal defendants' customs, practices and policies.'. . This allegation is insufficient to state a cause of action against the City.")

Collins v. City of New York, 923 F.Supp.2d 462, 477-79 & n.7 (E.D.N.Y. 2013) ("The First and Ninth Circuit have followed *Grandstaff's* logic. . . The Court is likewise persuaded. Subsequent events may, as the City argues, reflect only Hynes's support for a subordinate accused of wrongdoing. But the lack of any corrective action might also reflect a tacit policy on Hynes's part to condone whatever his subordinates deemed necessary to secure a conviction. Collins is, for now, entitled to the latter inference. . . In any event, Collins's theory does not hinge solely on Hynes's response to an isolated incident. He further alleges that despite scores of cases involving *Brady* violations and other prosecutorial misconduct, Hynes has never disciplined an assistant for such misconduct, even after the violations were confirmed by court decisions. The City claims that the prior instances of misconduct were not precisely the same as those alleged by Collins. Those differences might lead a jury to agree that there was no underlying policy connecting each incident. But the Court's role at this stage is to determine whether Collins has alleged facts that support a plausible theory. . . The Court concludes that Collins's allegations regarding Hynes's response—or lack thereof—to misconduct by Vecchione and other assistants make plausible his theory that Hynes was so deliberately indifferent to the underhanded tactics that his subordinates employed as to effectively encourage them to do so. . . Hynes himself is not named as a defendant and would,

in any event, be entitled to the same absolute immunity that protects Vecchione. . . . Since Collins's complaint is governed by *Iqbal*, it is subject to a higher standard than the Second Circuit applied in *Walker*. He must allege, not only a viable theory, but facts that render the theory plausible. In that regard, allegations of *Brady* violations are unhelpful. Better training as to what *Brady* requires might increase officer awareness of what information must be disclosed to prosecutors, but it could not plausibly have prevented the egregious conduct alleged here because Vecchione, according to the allegations, was well aware of what Gerecitano and Hernandez had done to secure Oliva's testimony. Further, the Court agrees with the City that the litany of other police-misconduct cases are insufficient to make a plausible case for *Monell* liability. The cases either involve *Brady* violations, post-date Collins's conviction, or involve something less (settlements without admissions of liability and unproven allegations) than evidence of misconduct. *Zahrey*, by contrast, involves actual evidence of analogous misconduct during the relevant time frame. But the wrongdoing in *Zahrey* occurred, as noted, in the Internal Affairs Bureau. Without more, the Court would be hard-pressed to conclude that two incidents in two completely separate units within the NYPD were sufficient to plausibly establish the City's deliberate indifference. The Mollen Report, however, establishes—at least for present purposes—that the misconduct underlying this case and *Zahrey* was sufficiently widespread to support an inference of deliberate indifference. An entire section of the Report is devoted to 'Perjury and Falsifying Documents,' which is described as 'a serious problem facing the Department.'. . It describes testimonial and documentary perjury—'as when an officer swears falsely under oath in an affidavit or criminal complaint'—as 'probably the most common form of police corruption facing the criminal justice system today, particularly in connection with arrests for possession of narcotics and guns.'. . Finally, it notes that '[s]everal officers ... told us that the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: "testilying."'. . Of course, the Report's findings are not conclusive. But they at least make it plausible that the type of misconduct that led to Collins's arrest and prosecution was endemic within the NYPD. A jury could reasonably infer from that circumstance, if proven, that the department's policymakers were aware of a serious risk of constitutional violations, and that the failure to take any action in response to the problem—whether through training or otherwise—was the result of deliberate indifference.")

Triano v. Town of Harrison, NY , 895 F.Supp.2d 526, 539-41 (S.D.N.Y. 2012) ("After *Twombly* and *Iqbal*, the Second Circuit has made clear that Plaintiff must do more than merely state that the municipality's failure to train caused his constitutional injury. . . . To state a claim for municipal liability based on failure to train, Plaintiff therefore must allege facts which support an inference that the municipality failed to train its police officers, that it did so with deliberate indifference, and that the failure to train caused his constitutional injuries. [citing cases] Plaintiff's mere claim that the Town failed to train and supervise its police officers is a 'boilerplate assertion[ ]' and is insufficient, without more, to state a *Monell* claim. . .Nor has Plaintiff pled any facts suggesting that an alleged training deficiency caused his constitutional injury, for example by identifying 'procedural manuals or training guides' or by 'highlight[ing] relevant particular aspects of police training or supervision.'. . The only facts which Plaintiff includes in the Amended Complaint relate to his interactions with Barone on the night of his arrest . . ., but 'the facts provided in

connection with the single incident experienced by [ ][P]laintiff does not put the [Town] on notice as to what its policymakers have done or failed to do that amount[s] to deliberate indifference to unconstitutional conduct by its police force,' *Rodriguez v. City of New York,* No. 10–CV–1849, 2011 WL 4344057, at *5 (S.D.N.Y. Sept. 7, 2011). Because Plaintiff has done no more than make conclusory assertions, he has not adequately alleged that the Town's training policies caused Plaintiff's injuries, thus providing an independent basis to dismiss this claim.")

Castilla v. City of New York, No. 09 Civ. 5446(SHS), 2012 WL 3871517, *3-*5 (S.D.N.Y. Sept. 6, 2012) ("Castilla does not claim that the City's liability pursuant to *Monell* and its offspring arises from a formal City policy or an unconstitutional act by an authorized decision-maker. Rather, she alleges, under the third and fourth theories, a widespread custom of at least tolerating male police officers' sexual misconduct, and a failure to train, supervise, and/or discipline male police officers in connection with their handling female detainees and informants. Taking plaintiffs' allegations as true, the Court finds that Castilla has sufficiently pled claims for *Monell* liability against the City of New York. This finding is based, in part, on the Second Circuit's recognition that '[it] is unlikely that a plaintiff would have information about the city's training programs or about the cause of the misconduct at the pleading stage, and therefore need only plead that the city's failure to train caused the constitutional violation.' *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 130 n. 10 (2d Cir.2004). The Second Circuit has not yet addressed whether *Iqbal* has heightened the pleading requirements for such a municipal liability claim, but district courts in this Circuit have continued, post-*Iqbal*, to apply the pleading standard articulated in *Amnesty* to a *Monell* claim based on a failure to train. [citing cases] Thus, in assessing the sufficiency of plaintiff's *Monell* claims—particularly the failure to train claim—the Court keeps in mind that plaintiff has not yet had the full benefit of discovery. The City's position cannot be ignored. The City contends that this case simply concerns an isolated incident involving a single rogue police detective. The City may be right. However, the alleged facts, taken as true for purposes of this motion, plausibly suggest otherwise. Plaintiff alleges that multiple detectives and officers helped Sandino threaten, abuse, and sexually assault Castilla over many hours and in many locations, including at a police precinct. The complaint specifically alleges concerted action by other police officers in addition to Sandino who were not supervised and at least not immediately stopped or disciplined. Sandino is alleged to have continued for weeks after the assault to contact, proposition, and threaten Castilla. When Sandino paid Castilla a visit at her family's home, Sandino was accompanied by another officer. Furthermore, Castilla alleges that the police officers maintained a 'code of silence' to cover up their misconduct. In *Michael v. County of Nassau*, the U.S. district court in the Eastern District of New York found, on a motion to dismiss decided under *Iqbal*, that an informal custom 'of at least tolerating police misconduct' and/or a failure to properly train police officers could be inferred where the alleged conduct took place over several hours, including at police headquarters, and several officers participated in the repeated denials of the plaintiff's rights. . . Castilla, like the plaintiff in the *Michael* case, alleges a string of incidents in which she was repeatedly victimized by multiple officers in multiple locations, both on and off City property. More than that, Castilla alleges various other instances of male police officers taking sexual advantage of females under their custody or control. . . Although the City challenges

the admissibility of the evidence plaintiff cites as relevant examples of police misconduct, the Court need not decide that issue at this time. Finally, the City argues that plaintiffs' allegations do not demonstrate an unconstitutional policy or custom, but rather show the opposite: a readiness on the part of the City to investigate and discipline police officers who misbehave. In particular, the City points to the IAB's responsiveness to Castilla's IAB complaint and the fact that Sandino was ultimately punished for his wrongdoing. While these facts inure to the City's benefit on this motion, Castilla also alleges that not all the individual perpetrators have been investigated and disciplined. In any event, the issue of whether the City eventually investigates and disciplines employees accused of misconduct is distinct from whether the City was deliberately indifferent to the violation of citizens' constitutional rights in the first place. In other words, even if the City took corrective action, its training and supervision of male officers vis-a-vis female detainees and informants still may have been inadequate. The Court is not evaluating the ultimate merits of plaintiff's *Monell* claims here. The Court is simply finding that the allegations of very serious police misconduct, supported by adequate facts, raise an inference of municipal liability that is plausible enough to permit the claims to proceed. . . .Accordingly, for the reasons set forth above, the City's motion for judgment on the pleadings with respect to Castilla's claims against the City is denied. Plaintiff is entitled to discovery regarding the City's policies and practices regarding training, supervision, and discipline in connection with male officers' handling of female suspects, prospective confidential informants, and inform")

Rodriguez v. City of New York, No. 10 Civ. 1849(PKC), 2011 WL 4344057, at *5 (S.D.N.Y. Sept. 7, 2011) ("[T]he facts provided in connection with the single incident experienced by the plaintiff does not put the City on notice as to what its policymakers have done or failed to do that amount to deliberate indifference to unconstitutional conduct by its police force. The actions at issue were undertaken by perhaps two police officers in a single precinct. The plaintiff provides no facts relating to any action undertaken by any City policymaker or any facts referencing established City policies in, for example, training manuals or otherwise. Plaintiff's vague reference to the existence of additional incidents of unjust arrest, detention and incarceration based on improperly reviewed bench warrants occurring prior to the alleged incident on February 15, 2007 (Compl.¶ 67), without providing even the most basic facts pertaining to such incidents, cannot be said to establish a policy of deliberate indifference putting the City on notice of the grounds upon which the plaintiff's *Monell* claim rests. Accordingly, plaintiff has failed to state a claim upon which relief can be granted against the City of New York.").

Plair v. City of New York, No. 10 Civ. 8177, 2011 WL 2150658, at *7, *8 (S.D.N.Y. May 31, 2011) ("Following *Iqbal* and *Twombly, Monell* claims must satisfy the plausibility standard: It is questionable whether the boilerplate *Monell* claim often included in many § 1983 cases, including this one, was ever sufficient to state a claim upon which relief could be granted. . . In light of [*Ashcroft* and *Twombly*] it is now clear that such boilerplate claims do not rise to the level of plausibility. [citing cases] Here, the complaint lacks sufficient factual details concerning *Monell* liability and contains boilerplate allegations of unconstitutional policies and practices. . . Specifically, Plaintiff conclusorily alleges that the City 'permitted, tolerated and was deliberately

indifferent to a pattern and practice of staff brutality and retaliation by DOC staff at the time of plaintiff's beatings [which] constituted a municipal policy, practice or custom and led to plaintiff's assault.'. . . As discussed above in reference to Plaintiff's claims under *Colon*, the prior violent incidents relied upon by Plaintiff are too attenuated and isolated from his own injury to plausibly establish (a) a policy or custom of violence against prisoners, and (b) that his injury was linked to that policy or custom. Plaintiff relies on conclusory allegations to fill the gaps in his complaint, rendering his *Monell* allegations insufficient under *Iqbal* and *Twombly.*")

Michael v. County of Nassau, No. 09-CV-5200(JS)("KT), 2010 WL 3237143, at *4, *5 & n.2 (E.D.N.Y. Aug. 11, 2010) ("Defendants . . . contend that Plaintiff has not sufficiently pled a *Monell* claim for municipal liability. . . The Court disagrees. Plaintiff's Complaint does not identify any official Nassau County policy or custom that resulted in the alleged constitutional violations. Nor does Plaintiff's Complaint identify a policymaker who promulgated such a policy or custom through his acts. But, at least at this stage, the law does not require him to do so. . . . On the surface, it might be argued that *Amnesty America* conflicts with the *Iqbal* and *Twombly* standard, by permitting a plaintiff to assert a *Monell* 'failure to train' claim without amplifying the complaint with enough facts to render the claim 'plausible.' But such an argument sees the forest while ignoring the trees. The Supreme Court has instructed that assessing a complaint's plausibility 'is context-specific, requiring the reviewing court to draw on its experience and common sense.'. . Though pre- *Iqbal*, the Second Circuit, drawing upon its experience and common sense, has recognized that plaintiffs should be afforded a lenient pleading standard on failure to train claims, because they have no realistic way to learn about a municipality's training programs without discovery. *Amnesty America*, 361 F.3d at 130 n. 10. Here, the Complaint pleads sufficient facts to infer that Nassau County had: (1) an informal policy, or a custom, of at least tolerating police misconduct; and/or (2) failed to properly train its officers, thereby expressing deliberate indifference to the potential for violations. The conduct alleged in the Complaint took place over several hours. At least five officers allegedly participated in repeated denials of Plaintiff's rights, including his right to be free from arrest without probable cause, his right to counsel, and his right to be free from excessive force. Some of the officers allegedly mocked Plaintiff during the ordeal, including for invoking his right to counsel. (Compl ¶¶ 40, 53, 65, 79.) Much of the alleged conduct took place at police headquarters. (Compl.¶¶ 45-82.) This includes an alleged beating Plaintiff suffered in a public hallway at headquarters. (Compl.¶ 70.) And it also includes an incident where officers allegedly interrupted a video recording of Plaintiff's interrogation so they could beat him. (Compl.¶¶ 72-77.) Thus, Plaintiff has not alleged one isolated incident of police misconduct. . . He has alleged multiple incidents over a long, continuous time period. And, assuming Plaintiff's allegations as true, the fact that so much of this happened at headquarters, including in a public hallway, suggests that the officers involved did not fear supervisory personnel observing their conduct, intervening to stop them, or subjecting them to disciplinary action for their misdeeds. . . And this, in turn, suffices − at this stage − to create the plausible inference that Nassau County had an informal policy or custom of at least tolerating police misconduct. . . Likewise, the alleged involvement of numerous officers, the mocking Plaintiff allegedly received when invoking his

right to counsel, and the headquarters location, suffices to suggest that Nassau County poorly trained and/or supervised its officers concerning the need to not violate suspects' civil rights.")

Araujo v. City of New York, No. 08-CV-3715 (KAM)(JMA), 2010 WL 1049583, at *9 (E.D.N.Y. Mar. 19, 2010) ("In the context of a motion to dismiss, '[t]o allege the existence of an affirmative municipal policy, a plaintiff must make factual allegations that support a plausible inference that the constitutional violation took place pursuant either to a formal course of action officially promulgated by the municipality's governing authority or the act of a person with policymaking authority for the municipality.' *Missel v. County of Monroe*, No. 09-0235-cv, 2009 U.S.App. LEXIS 24120, at *4 (2d Cir. Nov. 4, 2009) (citing *Vives v. City of New York*, 524 F.3d 346, 350 (2d Cir.2008)); *see also Iqbal*, 129 S.Ct. at 1951; *Twombly*, 550 U.S. at 555. Mere 'boilerplate' assertions that a municipality has such a custom or policy which resulted in a deprivation of the plaintiff's rights is insufficient to state a *Monell* claim. . . Here, plaintiff's Complaint contains only a conclusory allegation that the Municipal Defendants had *'de facto* policies, practices, customs, and usages of failing to properly train, screen, supervise, or discipline employees ... [which] were a direct and proximate cause of the unconstitutional conduct alleged.' . . Plaintiff alleges no facts to indicate any deliberate choice by municipal policymakers to engage in unconstitutional conduct. Moreover, plaintiff's allegation that the Municipal Defendants acted pursuant to *'de facto* policies, practices, customs, and usages' (Compl.& 58), without any facts suggesting the existence of the same, are plainly insufficient to state a Section 1983 claim against the Municipal Defendants.")**.**

Cuevas v. City of New York, No. 07 Civ. 4169(LAP), 2009 WL 4773033, at *3, *4 (S.D.N.Y. Dec. 7, 2009) ("Plaintiff's boilerplate allegations against the City of New York satisfy neither the elements enumerated above, nor the pleading requirements set forth in *Iqbal*. In conclusory fashion, Plaintiff makes the following allegations against the City of New York: That all of the aforesaid actions, errors and omissions by defendants including the City of New York's and New York City Police Department's failures to supervise or properly train 'John Doe's [sic] and Jane Doe Numbers '1' through '5' [sic] inclusive, and their agents, servants and employees, were intentional, reckless, and grossly negligent; and moreover evidenced a deliberate callous and reckless indifference to the plaintiff [sic] constitutional rights; all of which constituted a policy of supervisory indifference and a pattern and practice of indifferent conduct by defendants. (Compl.& 18) That there was direct affirmative culpability on the part of defendant CITY for the actions, errors and omissions of the aforesaid officers and supervisory personnel in this matter. . . That all of the aforesaid actions, errors and omissions, and those alleged hereinafter, of the said defendants and their agents, servants, employees and subordinate officials, were particularly egregious; were morally culpable; were actuated by evil and reprehensible motives; constituted wrongs directed at the general public; implied and entailed a criminal indifference to civil and administrative obligations; implied a policy, custom and practice of deliberate, callous and reckless indifference and constitutional violations of the citizens of the City of New York; established an inference of gross negligence and failure to train; and/or involved a wanton and reckless disregard of and indifference to plaintiff's rights. . . That all of the aforesaid actions ... constituted a single, unusually brutal and egregious beating administered by a group of municipal employees,

sufficiently out of the ordinary to warrant an inference that such act was attributable to inadequate training or supervision amounting to deliberate indifference and/or gross negligence. . . While these allegations are heavy on descriptive language, they are light on facts. Baldly asserting that Plaintiff's injuries are the result of the City's policies does not show this Court what the policy is or how that policy subjected Plaintiff to suffer the denial of a constitutional right. After stripping away the bare legal conclusions, the Complaint is devoid of any 'well-pleaded factual allegations ... plausibly [giving] rise to an entitlement to relief.' *Iqbal,* 129 S.Ct. at 1950. Accordingly, Plaintiff's claims against the City of New York are dismissed.").

Colon v. City of New York, Nos. 09-CV-8, 09-CV-9, 2009 WL 4263362, at *1, *2 (E.D.N.Y. Nov. 25, 2009) ("The Colons claim to have been falsely arrested, imprisoned, subjected to an illegal strip search, and maliciously prosecuted. . . The City is said to be liable under section 1983 for the Colons' injuries, pursuant to *Monell v. Dept. of Social Servs.,* 436 U.S. 658 (1978), because the acts complained of were the result of the 'customs, policies, usages, practices, procedures, and rules' of the City. . . The following are alleged to be City customs or policies: (a) wrongfully arresting minority individuals on the pretext that they were involved in drug transactions; (b) manufacturing evidence against individuals allegedly involved in drug transactions; (c) using excessive force on individuals who have already been handcuffed; (d) unlawfully strip-searching pre-arraignment detainees in the absence of any reasonable suspicion that said individuals were concealing weapons or contraband; and (e) arresting innocent persons in order to meet 'productivity goals' (i.e. arrest quotas). . . The Colons assert that such customs and policies may be inferred from the existence of other similar civil rights actions that have been brought against the city, Complaints & 85 (listing example cases), and from a January 2006 statement by Deputy Commissioner Paul J. Browne that police commanders are permitted to set 'productivity goals,' Complaints & 86.In support of its motion to dismiss, the City argues that the Colons fail to identify any actual custom or policy of the city, and that their allegations are too speculative and inconclusive to meet the pleading standard established in *Bell Atlantic v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009). Absent a viable federal claim against the City, the court is urged to decline supplemental jurisdiction over the Colons' state-law claims with respect to the City. '[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.' *Iqbal,* 129 S.Ct. at 1940 (citing *Twombly,* 550 U.S. at 556). Informal inquiry by the court and among the judges of this court, as well as knowledge of cases in other federal and state courts, has revealed anecdotal evidence of repeated, widespread falsification by arresting police officers of the New York City Police Department. Despite numerous inquiries by commissions and strong reported efforts by the present administration − through selection of candidates for the police force stressing academic and other qualifications, serious training to avoid constitutional violations, and strong disciplinary action within the department − there is some evidence of an attitude among officers that is sufficiently widespread to constitute a custom or policy by the city approving illegal conduct of the kind now charged.It would be desirable to quantify this general reputation, but such quantification is beyond the scope and capacity of the court on this motion. Upon inquiry at oral argument, neither party was able adequately to address what documentation may exist supporting

or refuting the existence of such a policy or custom. . . Nevertheless, there are substantial issues: first, whether this reputation is predicated on a significant number of misstatements by police officers − even though the overwhelming majority of the police force does not engage in such fabrications; and, second, whether failure to train, supervise, or discipline members of the police force that do commit such fabrications constitutes a policy or custom under *Monell.* . . While the charge may prove to be completely unfair to the city and its generally outstanding police force, there are sufficient issues of fact to warrant further proceedings under *Monell.* Neither *Twombly* nor *Iqbal* can trump the Constitution. Under these circumstances, the Colons have 'nudged their claims across the line from conceivable to plausible,' and state viable section 1983 claims against the City.").

THIRD CIRCUIT

Estate of Roman v. City of Newark, 914 F.3d 789, 798-801, 805-06 (3d Cir. 2019) ("Although a policy or custom is necessary to plead a municipal claim, it is not sufficient to survive a motion to dismiss. A plaintiff must also allege that the policy or custom was the 'proximate cause' of his injuries. . . He may do so by demonstrating an 'affirmative link' between the policy or custom and the particular constitutional violation he alleges. . . This is done for a custom if Roman demonstrates that Newark had knowledge of 'similar unlawful conduct in the past, ... failed to take precautions against future violations, and that [its] failure, at least in part, led to [his] injury.'. . Despite these requirements, Roman does not need to identify a responsible decisionmaker in his pleadings. . . Nor is he required to prove that the custom had the City's formal approval. . .The pleading requirements are different for failure-to-train claims because a plaintiff need not allege an unconstitutional policy. . . Instead, he must demonstrate that a city's failure to train its employees 'reflects a deliberate or conscious choice.'. . For claims involving police officers, the Supreme Court has held that the failure to train 'serve[s] as [a] basis for § 1983 liability only where [it] ... amounts to deliberate indifference to the rights of persons with whom the police come into contact.'. . . In view of this case law, Roman has not pled a municipal policy, as his amended complaint fails to refer to 'an official proclamation, policy, or [an] edict.' However, he has sufficiently alleged a custom of warrantless or nonconsensual searches. He has also adequately pled that the City failed to train, supervise, and discipline its police officers. . . . We conclude that the allegations regarding Newark's failure to train, supervise, and discipline are strong enough to survive a motion to dismiss. . . Among them are: a failure to train officers on obtaining a search warrant . . . and on 'issuing truthful investigative reports,'. . .; a failure to supervise and manage officers, . . .; and a failure to discipline officers, . . . first by 'refus[ing]' to create a well-run Internal Affairs Department, . . . and second by 'inadequately investigating, if investigating at all, citizens' complaints regarding illegal search and seizure[.]'. . . The result was a 'complete lack of accountability' and of 'record keeping,'. . leading to a culture in which officers 'knew there would be no professional consequences for their action[s]'. . . As the amended complaint alleges, it should come as no surprise that these conditions led to a federal investigation. . . . Roman has sufficiently alleged a municipal liability claim against the City of Newark under § 1983. He cites various examples of inadequate police training, poor police discipline, and unheeded citizen complaints.

He tells us certain police officers did not receive training for over 20 years, and their training did not cover the basic requirements of the Fourth Amendment. In his pleadings, he states the Newark Police Department did not discipline officers who engaged in police misconduct, . . . including unlawful searches and false arrests[.] . . He also notes the public filed formal complaints about improper searches and false arrests that were disregarded almost wholesale. . . These alleged practices were ongoing when Roman's search and arrest occurred, and the City had notice of them at that time. While the proof developed to support these allegations may or may not be persuasive to a finder of fact, they are enough to survive dismissal at this stage. Based on this conclusion, we part with the District Court's holding that Roman failed to state a § 1983 claim against the City. Though we affirm otherwise, we vacate and remand its decision on municipal liability.")

Brookins v. City of Philadelphia, No. CV 24-470, 2024 WL 1889242, at *8–9 (E.D. Pa. Apr. 30, 2024) ("The City argues Ms. Brookins cannot establish municipal liability because (1) she does not plead a municipal policy or custom, (2) she does not allege conduct by a municipal policymaker, and (3) she does not allege prior instances of misconduct to support a failure to train claim. The City misunderstands Ms. Brookins's theory of liability. Ms. Brookins is proceeding on a single incident failure-to-train theory of municipal liability. Our Court of Appeals instructs Ms. Brookins does not need to establish a policy or a policymaker to support a failure-to-train claim. . . . And Ms. Brookins does not need to allege earlier instances or a pattern of misconduct to state a claim if she pleads the need for training the City's police officers in handling death scene photographs of deceased individuals is 'so obvious,' failure to do so constitutes 'deliberate indifference' to citizens' constitutional rights. Ms. Brookins relies on our Court of Appeals's decision in *Berg v. County of Allegheny* involving a single incident failure-to-train claim against Allegheny County based on a warrant clerk's clerical error prompting the police to arrest the wrong person. . . Mr. Berg alleged police wrongfully arrested him based in part on the County's 'failure to provide sufficient procedural or technical safeguards against errors such as the one that resulted in Berg's arrest.'. . Judge Ambrose granted summary judgment on Mr. Berg's municipal liability claim against Allegheny County. Our Court of Appeals reversed, finding an issue of fact remained as to whether the County was deliberately indifferent to an obvious risk. Our Court of Appeals likened the County's alleged failure to provide protective measures against the clerk's mistake to 'a failure to equip law enforcement officers with specific tools to handle recurring situations.'. . We are also guided by Judge Marston's analysis a year ago in *Alexander v. Bucks County*. Mr. Alexander sued Bucks County correctional officers under section 1983 for violations of his constitutional rights. . . Mr. Alexander alleged Bucks County failed to adequately train correctional officers on the use of force with inmates with mental illnesses. . .The County moved to dismiss the *Monell* claim arguing the County did not describe the nature of the County's training program or whether officers acted consistent with the program or policy. . . Judge Marston reasoned Mr. Alexander is not required to plead details of the training program with specificity at the motion to dismiss stage. . . 'Instead, the complaint must identify the training program that the plaintiff believes is deficient, describe that deficiency, and explain how the deficiency caused the plaintiff's injuries.'. .Judge Marston found Mr. Alexander satisfied this standard because he alleged the County had no use-of-force policy for officers encountering incarcerated people with mental

illnesses despite its knowledge officers will regularly interact with incarcerated people with mental illnesses and at times officers will be required to use force on them. Judge Marston inferred the County's failure to train presents an 'obvious risk' from the fact the facility places individuals with mental illnesses in a different unit than individuals without mental illnesses. . . Ms. Brookins identifies the allegedly deficient training program as the failure 'to maintain any policies or training regarding the privacy rights of family members in the context of photographing or sharing photographs of deceased individuals.'. . Ms. Brookins's allegations point to a recurring situation of officers needing to respond to suicides, homicides, or accidents resulting in death. Much like Mr. Berg's allegations the County did not equip its clerks with the necessary tools, Ms. Brookins alleges the City did not equip officers with the tools necessary to respond to a recurring situation—death scenes—because it did not employ policies or training on the privacy rights of family members of the deceased. Ms. Brookins need not detail with specificity the allegedly inadequate training at the motion to dismiss stage. The parties may explore in discovery the obviousness of the need for training and the risk presented by a failure to train.")

Siehl v. City of Johnstown, No. CV 18-77J, 2019 WL 762933, at *10 (W.D. Pa. Feb. 20, 2019) ("Here, Plaintiff has alleged with great specificity that Defendant Johnstown caused the deprivation of his rights by its failure to employ policies and protocols regarding the training, supervision, and discipline of its police officers including, but not limited to, the initiation of prosecution only on a finding of probable cause, and police responsibility not to fabricate evidence or interfere with a criminal suspect's attorney-client relationship. . . Constitutional injuries are a 'highly predictable consequence' of a failure to train (and likewise supervise and discipline) police officers in the handling of recurring situations involving investigations and arrest. . . Plaintiff has alleged a plausible claim pursuant to *Monell* and *Bryan County*. Therefore, the Court must deny Defendant City of Johnstown's Motion to Dismiss Count VI.")

Lansberry v. Altoona Area Sch. Dist., No. 3:18-CV-19, 2018 WL 3520496, at *14 (W.D. Pa. July 20, 2018) ("After several careful readings of the Amended Complaint, the Court finds that Lansberry failed to state a plausible *Monell* claim. As noted above, to state a plausible claim for deliberate indifference in the § 1983 context, a plaintiff generally must allege that the government entity had notice of a pattern of similar constitutional violations by employees who had not been properly trained. . . However, Lansberry's Amended Complaint fails to allege that AASD had notice of a pattern of constitutional violations. For example, Lansberry does not allege that AASD had received, and failed to adequately respond to, previous reports of bullying. Nor does he allege that other students' rights to bodily integrity had been violated due to known bullying incidents that the school failed to properly address. In other words, while Lansberry alleges that W.J.L. experienced bullying, he does not allege a wider bullying problem at AASD that could have plausibly put AASD on notice that the constitutional rights of its students were being violated. Accordingly, Lansberry does not plausibly allege that, given the conditions at Altoona Junior High with regard to bullying, the need for additional training was 'so obvious' and the status quo so likely to result in constitutional violations that AASD 'can reasonably be said to have been deliberately indifferent to the need.'. . Therefore, the Court finds that Lansberry failed to state a

plausible *Monell* claim.")

Estate of Bard v. City of Vineland, No. 117CV01452NLHAMD, 2017 WL 4697064, at *5 (D.N.J. Oct. 19, 2017) ("As in *Iqbal*, and also in *Zampetis*, Plaintiff's conclusory contention that an infirm policy, or custom, or training practice by the City of Vineland, and the police chiefs' knowledge of one or all of these infirmities, caused Bard's shooting death is insufficient to properly plead a viable *Monell* claim. Plaintiff is required to provide facts – not simply regurgitate all the legal bases for liability under *Monell* - to support her contentions and adequately plead her claims against the City and the police chiefs. Because of Plaintiff's failure to do so, Plaintiff's claims against the City of Vineland, Codispoti, and Beu must be dismissed.")

Wichterman v. City of Philadelphia, No. CV16-5796, 2017 WL 1374528, at *4 (E.D. Pa. Apr. 17, 2017) ("In this case, plaintiff alleges that 'reasonably trained...police supervisors were aware of their responsibilities to train...police to recognize the signs of overdose and to intervene to reverse the effects of overdose.'. . Plaintiff also alleges that '[d]efendant City of Philadelphia, as an entity that operates a prison system and police holding cells, is aware of the need to train its employees as described above.'. . In similar circumstances, courts have concluded that failure-to-train claims based on a single incident state a claim under *Monell*. . . . At this stage, plaintiff's allegations with respect to the lack of training on monitoring and treating detainees on opiates are sufficient to state a *Monell* claim against the City based on a failure-to-train theory.")

Geist v. Ammary, No. 11–07532, 2012 WL 6762010, *7 (E.D. Pa. Dec. 20, 2012) ("In the Complaint, Plaintiff alleges the following:

> 38. At all relevant times the Defendant, City of Allentown, gave the Defendant, Ammary, a Taser, despite actual notice that the Ammary was not a candidate for using a taser [sic] because of his propensity to use excessive force against the public.
> 39. At all times herein relevant Defendant, City of Allentown, intentionally, purposefully, and knowingly, had a policy, practice, regulation or custom of giving minimal training about the usage of the taser [sic], especially on a non violent female minor.
> 40. At all times herein relevant the policy of the Defendant, City of Allentown, practice, regulation or custom caused Plaintiff to be subject to arrest and abuse by Defendant, Jason Ammary.
> 43. The Defendant, City of Allentown, failed to use adequate training before issuing a taser [sic] to Defendant, Ammary.

I find these allegations sufficient to survive the instant motion to dismiss. If Plaintiff can prove that Defendant had policies or customs that condoned the use of excessive force in effectuating seizures of suspects, the municipality could be liable. Plaintiff identifies a 'policy and practice' which potentially constitutes deliberate indifference to the constitutional rights of citizens, namely,

failing to create a policy or train officers regarding proper Taser gun use and deployment. Likewise, if the Plaintiff can prove that the municipality did not provide training to police officers on procedures to avoid the use of excessive force in arresting suspects, she could prevail on her excessive-force claim. These allegations are not merely a recitation of the elements of a *Monell* claim, but point towards specific failings in training that led to the specific violation of constitutional rights here alleged. Plaintiff is entitled to discovery to determine whether her allegations of inadequate training and corrupt policy are true. The court will therefore deny the motion on this point.")

Ford v. City of Philadelphia, No. 12–2160, 2012 WL 3030161, *6, *7 (E.D. Pa. July 24, 2012) ("In the instant case, Plaintiff contends that the City maintained a policy, practice or custom that failed to account for additional or different training, supervision, investigation, or discipline that related to: (a) Legal cause to stop, detain, and/or arrest a citizen; (b) police officers' duties and responsibilities to engage in proper investigative techniques; (c) proper police procedure for interviewing juvenile witnesses to a crime; (d) police officers' duties not to coerce witnesses into identifying a suspect; (e) police officers' constitutional duties to disclose to the prosecution exculpatory information; (f) the failure to identify and take remedial or disciplinary action against police officers who were the subject of prior civilian or internal complaints of misconduct; (g) the hiring and retention of officers who are unqualified for their employment position; and (h) the failure to properly sanction or discipline officers who are aware of and conceal and/or aid and abet violations of constitutional rights of citizens by other Philadelphia police officers. . . Defendant contends that these allegations are nothing more than 'threadbare recitals of the elements of a cause of action,' and that Plaintiff 'appears to take a scattershot approach by launching a barrage of legal conclusions at the wall to see which ones will stick.'. . More specifically, Defendant avers that Ford's *Monell* claim must be dismissed because he has not identified a precise policy, practice, or custom which demonstrates that the City was deliberately indifferent to his constitutional rights. . .The Court disagrees. In order for Ford to prevail on his municipal liability claim, he needs to show that the City was deliberately indifferent 'to the rights of people with whom the police c[a]me into contact.'. . To properly do so, Ford must establish that the City had a pattern of engaging in constitutional violations such as those present in this case, and that this pattern lead to his eventual constitutional injuries. . . Ford cannot, however, prove such a pattern without a sufficient period of discovery to adduce this evidence. . . As such, Plaintiff's claim that the City maintained a policy that failed to properly train, supervise, investigate, or discipline its officers is still too premature for the Court to dismiss from suit at this time. Accordingly, Defendant's request for dismissal on these grounds is denied.")

Zenquis v. City of Philadelphia, 861 F.Supp.2d 522, 531, 532 (E.D. Pa. 2012) ("The City argues that the amended complaint contains only 'a formulaic recitation of the elements of a failure to train argument' and otherwise 'does not allege a pattern or practice of The City of Philadelphia to violate the rights of its citizens by acts of "vigilante justice."'. . .As pleaded, this is not a situation in which there was a single exceptional incident of constitutional misconduct. . . After the mistaken public dissemination of Zenquis's name and photograph as a suspect in the rape, the police are

alleged to have adopted the same tactic to apprehend Carrasquillo— *i.e.*, instructing private citizens to detain the suspect and to use force to do so, with the understanding that force could be used 'with impunity.' At the least, the two alleged incidents of vigilante behavior instigated by the police (together with the other allegations catalogued above) are sufficient to place the City on notice of the factual basis for the claim of municipal liability.")

Washington v. City of Philadelphia, No. 11–3275, 2012 WL 85480, at *7 (E.D. Pa. Jan. 11, 2012) ("Though *Leatherman v. Tarrant County*. . . makes plain that § 1983 claims are not subject to a heightened pleading standard, *Iqbal*'s unambiguous extension of *Twombly* to 'all civil actions' leaves the ordinary notice pleading requirement intact for those claims. . . .Under this standard, a pleading may not simply offer 'labels and conclusions'. . . and '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'. . . Plaintiff's municipal liability claims fail Rule 8's notice pleading requirement under *Iqbal* and *Twombly.* Plaintiff's allegations are conclusory for they 'express[ ] ... factual inference[s] without stating the underlying facts on which the inference[s][are] based.'. . Aside from the single incident of alleged police misconduct, the complaint pleads no other facts necessary to establish a municipal liability claim.")

Halterman v. Tullytown Borough, No. 10-7166, 2011 WL 2411020, at *8, *9 (E.D. Pa. June 14, 2011) ("All of Halterman's allegations as to Tullytown policy are conclusory. Halterman's claims as to Tullytown's failure to train or supervise its employees include no factual details as to Tullytown's training programs, the history of cognate violations allegedly committed by its employees, or Tullytown's supposed failure to respond to these violations with discipline. Halterman thus fails to provide 'enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.'. . Instead, it appears that Halterman has merely imagined what types of training deficiencies or failures to discipline *might* support municipal liability in the present case and then asserted that these deficiencies and failures indeed exist. She thus on the complaint as drafted fails to state a cause of action against Tullytown as a municipality for violation of § 1983.")

Mitchell v. Township of Pemberton, No. 09-810 (NLH)("MD), 2010 WL 2540466, at *6 (D.N.J. June 17, 2010) ("The Supreme Court's and, accordingly, the Third Circuit's recent clarification of the standard for reviewing a complaint to determine whether a valid claim has been advanced instructs that a plaintiff, such as Plaintiff in this case, cannot merely claim that a racial profiling policy or custom caused a constitutional violation, without a single fact, aside from the Plaintiff's particular incident, to support such a claim. This rule prevents a defendant from being subjected to a plaintiff's fishing expedition through discovery in the hope that facts will be unearthed to support plaintiff's speculation. . . . Despite this, the Court recognizes that Plaintiff's racial profiling claim against the mayor, the police chief and the town may not be foreclosed to him in the future, for two reasons. First, *pro se* complaints, 'however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers[.]'. . . Second, information concerning a town's customs or policies, the policymakers' motivations behind such policies, or the facts surrounding

police department customs, are typically unavailable to an outsider, so that pleading facts to sufficiently advance a racial profiling claim may be impossible without some assistance through litigation tools such as request for admissions, interrogatories, document requests, and depositions. With these two considerations in mind, the Court will not grant Plaintiff leave to amend his complaint with regard to his claims against the mayor, police chief and town, as it does not appear that during the time since Plaintiff filing his original complaint, he has gathered the requisite factual basis to support his racial profiling claim. The Court notes, however, that Plaintiff's case remains pending, and discovery has commenced, as to Plaintiff's constitutional violation claims against the two officers invovled in the February 2007 stop. Should Plaintiff, by developing his case against the officers, discover facts to support that the officers were acting pursuant to a racial profiling policy or custom promulgated by the mayor or the police chief, the Court will entertain a motion for leave to amend the complaint at that time. . . As it stands now, Plaintiff's claims are too specious to go forward.")

Lease v. Fishel, No. 1:07-CV-0003, 2010 WL 1390607, at *6 (M.D. Pa.Mar.31, 2010) ("Defendants argue that Lease has made only conclusory allegations in the amended complaint that are insufficient to state a valid cause of action against Hamilton Township. . . The Court must agree. Lease alleges in the amended complaint that Hamilton Township failed to properly train and supervise its employees 'by acquiescing to Beard, Balutis, and Fishel retaliating against the Plaintiff for seeking a redress of his grievances.' . . He further alleges that though Hamilton Township has been properly notified about Beard, Balutis, and Fishel's retaliatory actions, no action has been taken to prevent continued retaliation. . . Even considering these allegations and the entire amended complaint in a light most favorable to Lease, the allegations are not sufficient to sustain the claim against Hamilton Township. The Court is not satisfied that the amended complaint contains 'sufficient factual matter' to show that this claim is facially plausible. These allegations are more in the form of bare-bones legal conclusions that are not sufficient in light of the newly articulated pleading standard in *Twombly* and *Iqbal.* For instance, there is no allegation and no inference to be drawn from the allegations that specific training was needed or that the absence of specific training was the moving force behind Lease's First Amendment injuries. Accordingly, the Court will dismiss this claim. Lease will have an opportunity to cure these deficiencies in complying with this Court's order granting Defendants' motion for a more definite statement, discussed below. *See Alston v. Parker,* 363 F.3d 229, 235 (3d Cir.2004) (court must generally *sua sponte* extend leave to amend dismissed civil rights claims).").

Griffin v. Township of Clark, No. 09-4853 (JLL), 2010 WL 339031, at *8 (D.N.J. Jan. 22, 2010) ("A history of a policy or custom is not always necessary to state a *Monell* claim . . . . Officer Griffin has alleged that Chief Connell is a policy-maker − he is the Chief of Police for the Township. Additionally, this Court found above that Officer Griffin has adequately plead, for purposes of a motion to dismiss, that Chief Connell violated his First Amendment rights. Thus, the Court also will allow Officer Griffin's *Monell* claim against the Township based on a theory of policy-maker liability to proceed at this time. Defendants' motion to dismiss this claim is denied. . . . . With respect to [the failure to train] claim, Officer Griffin simply alleges in his Complaint

'Pursuant to official policy or custom and practice, [the] Township of Clark intentionally, knowingly, or with deliberate indifference to the rights of the Plaintiffs failed to train, instruct, supervise, control and/or discipline ... Defendant Chief Connell and other officials, known and unknown, in the performance of their duties.' (Compl. & 29.) This bare allegation lacks the requisite specificity required by *Iqbal* to survive a motion to dismiss. Officer Griffin's *Monell* claim based on this theory is dismissed without prejudice.").

Swift v. McKeesport Housing Authority Action, No. 08-275, 2009 WL 3856304, at *9 (W.D. Pa. Nov. 17, 2009) ("In the instant case, plaintiff in a conclusory fashion alleges that MHA is liable under § 1983 because MHA has a policy or custom that led to the deprivation of plaintiff's rights afforded by the Fourteenth Amendment and the USHA and recites a number of circumstances, which he asserts violated his rights under the Constitution and Section 8. To support his claim, plaintiff alleged that a MHA employee and the employee's relative expressed to plaintiff adverse and inflammatory remarks about plaintiff's faith and disabilities, made repeated false statements to authorities about plaintiff, and sent plaintiff a letter through an attorney expressing a desire to sue plaintiff. Plaintiff alleged that MHA's policies and practices deprived him of property rights available to him under Section 8 voucher program. Plaintiff alleged that he was not permitted the proper or the same amount of time allowed to other Section 8 voucher participants of different religions or who lack a disability and that his Section 8 benefits were terminated without providing him a fair and proper informal hearing, before determining the outcome of plaintiff's grievance proceedings. Plaintiff's allegations, however, are mere conclusions that policies or practices exist. Conclusory allegations are not entitled to assumption of truth. *Twombly,* 550 U.S. at 555. Liberally construing the alleged facts, the court would have to speculate whether these specific circumstances were a single instance or part of an official policy or custom. Plaintiff failed to implicate one of the three ways the Court of Appeals for the Third Circuit identified as necessary to show municipal liability for the actions of the municipality's employees. First, plaintiff did not identify a policy or procedure long accepted by defendant, i .e., plaintiff did not set forth factual allegations concerning any similar incidents that have occurred in the past to prove some pattern of conduct or identify a specific municipal ordinance or regulation that could establish a custom or policy. Second, plaintiff did not set forth factual allegations concerning the identity of the MHA employee who made the decision to terminate plaintiff's Section 8 voucher or concerning the policy making authority of the employee who was ultimately responsible for the decision to terminate plaintiff's voucher. Whether one has the authority to formulate official municipal policy is a matter of state law. . .Third, plaintiff did not set forth any factual allegations that show an official with authority ratified the alleged violations. Therefore, the court cannot conclude that the complaint raises a plausible claim that municipal liability can attach to MHA. *Iqbal,* 129 S.Ct. at 1950. Because plaintiff did not sufficiently state a claim under § 1983 for municipal liability, the court will grant defendant's Motion to dismiss plaintiff's § 1983 claims without prejudice. Plaintiff may file an amended complaint within thirty days; provided, that plaintiff is able to set forth a sufficient factual basis to support a plausible claim for municipal liability.").

FOURTH CIRCUIT

Owens v. Baltimore City State's Attorneys Office, 767 F.3d 379, 403, 404 (4th Cir. 2014) ("Although prevailing on the merits of a *Monell* claim is difficult, simply alleging such a claim is, by definition, easier. For to survive a motion to dismiss under Rule 12(b)(6), a complaint need only allege facts which, if true, '"state a claim to relief that is *plausible* on its face."'. . The recitation of facts need not be particularly detailed, and the chance of success need not be particularly high. . . A plaintiff fails to state a claim only when he offers 'labels and conclusions' or formulaically recites the elements of his § 1983 cause of action. . .In support of his claim, Owens alleges that '[r]eported and unreported cases from the period of time before and during the events complained of" establish that the BCPD had a custom, policy, or practice of knowingly and repeatedly suppressing exculpatory evidence in criminal prosecutions. He further alleges that 'a number of motions were filed and granted during this time period that demonstrate that [the BCPD] maintained a custom, policy, or practice to allow this type of behavior either directly or ... by condoning it, and/or knowingly turning a blind eye to it.' The assertions as to 'reported and unreported cases' and numerous 'successful motions' are factual allegations, the veracity of which could plausibly support a *Monell* claim. That BCPD officers withheld information on multiple occasions could establish a 'persistent and widespread' pattern of practice, the hallmark of an impermissible custom. . . If (but only if) the duration and frequency of this conduct was widespread and recurrent, the BCPD's failure to address it could qualify as 'deliberate indifference.'. . Urging a different result, the BCPD contends that Owens alleges nothing more than 'unadorned, the-defendant-unlawfully-harmed-me accusation[s].'. . We recognize, of course, that courts have dismissed *Monell* claims when the plaintiff has alleged nothing more than a municipality's adherence to an impermissible custom. But Owens has done more than that: Owens has alleged facts—the existence of 'reported and unreported cases' and numerous 'successful motions'—which, if true, would buttress his legal conclusion. Owens's brief, but non-conclusory, allegations closely resemble those in *Haley v. City of Boston*, 657 F.3d 39 (1st Cir.2011). There, a defendant was convicted of murder when two Boston police officers suppressed a witness's statement casting doubt on his guilt. . . The defendant discovered this *Brady* material, and after thirty-four years in prison, obtained his release; he then sued the Boston Police Department under § 1983. The First Circuit reversed the district court's dismissal of the claim, holding that the defendant had stated a plausible *Monell* claim against the Boston Police Department in view of the 'wholly unexplained' nature of its officers' suppression of evidence and the alleged (but *not* identified in the opinion or record) 'volume of cases' involving similar violations in the Boston Police Department. . . The *Haley* court concluded that this 'volume' of other cases documenting officers' suppression of evidence lent credence to the claim that policymakers 'encouraged, or at least tolerated' an impermissible practice. . . Accordingly, '[a]lthough [the complaint was] couched in general terms,' the court concluded that the complaint nonetheless 'contain[ed] sufficient factual content to survive a motion to dismiss.'. . The same reasoning applies here. Of course, to prevail on the merits, Owens will have to do more than *allege* a pervasive practice of BCPD misconduct; he must *prove* it. But at this early stage in the proceedings, we must conclude that Owens has pled sufficient factual content to survive Rule 12(b)(6) dismissal.")

Fordham v. Doe, No. 4:11-CV-32-D, 2011 WL 5024352, at *6 (E.D.N.C. Oct. 20, 2011) ("Assuming without deciding that the 21 sustained complaints imparted constructive notice on city policymakers of improper taser use, Fordham has failed to show that knowledge of these 21 sustained complaints gives rise to a 'specific intent or deliberate indifference ... to correct or terminate' the officers' improper behavior. . . Although Fordham claims that the city did not respond to these complaints, he provides no factual basis for this assertion. . . Rather, he merely asserts that the city, as a matter of policy, fails to inform complaining citizens of corrective action taken against officers found to have used their tasers improperly. However, the failure to inform citizens of corrective action does not necessarily suggest that such corrective action was not taken or suggest that any improper taser use equates to an excessive use of force. In short, Fordham has failed to plausibly allege that the city policymakers failed to respond to complaints of excessive force arising from improper taser use, much less that any failure met the scienter standard required by *Randall* and *Carter.* Without providing plausible allegations that support deliberate indifference on the part of the city policymakers, Fordham cannot show that any indifference caused his injuries.")

Jackson v. Brickey, No. 1:10CV00060, 2011 WL 652735, at *9 (W.D. Va. Feb. 11, 2011) ("Jackson's current allegations are limited to mere conclusory statements regarding the police department's failure to train, and thus these statements amount to the 'naked assertion[s] devoid of further factual enhancement' that I must disregard for pleading purposes. . . As above, Jackson's references to generalized deficiencies within the department do not sufficiently flesh out his allegations. . . Once again, I am not applying a heightened pleading standard to Jackson's claims, but rather requiring Jackson to provide some basis for determining that his allegations are plausible.")

Harden v. Montgomery County, No. 8:09-CV-03166-AW, 2010 WL 3938326, at *3 (D. Md. Oct. 6, 2010) ("Even though the Court assumes the veracity of the allegations against the individual officers and grants the Plaintiff all reasonable inferences from those allegations, the Complaint does not 'plausibly establish' the inference that a policy or custom of the County is responsible for the actions of the individual Defendants. . . . Plaintiff counters that section 1983 claims are not subject to a 'heightened pleading standard[]'. . . . However, the Court is simply applying the generally-applicable pleading standard of Federal Rule of Civil Procedure 8(a), as interpreted by the Supreme Court in *Iqbal* and *Twombly;* the Court is not fashioning a special form of heightened pleading for section 1983 claims. Thus, *Leatherman* and *Jordan* are inapplicable, and the Plaintiff's section 1983 claims against the County must be dismissed.")

FIFTH CIRCUIT

Ford v. Anderson County, Texas, 102 F.4th 292, 320 (5th Cir. 2024) ("Plaintiffs' proposed third amended complaint properly pleads a municipal liability claim against Anderson County for its alleged policy of requesting PR bonds for detainees requiring hospitalization. The district court abused its discretion in deciding that Plaintiffs' evidence of the PR bond policy was so inadequate

that it would be futile for Plaintiffs to amend their complaint. Jail Captain Choate admitted that Anderson County Jail seeks PR bonds '[a]nytime that [jail staff] believe someone is going to go to the hospital.' Furthermore, Choate admitted that this practice was carried out due to jail staffing concerns, and Nurse Green allegedly admitted that his ability to send detainees to the hospital was curtailed by Sheriff Taylor. Sheriff Taylor also admitted to participating in the process of coordinating a PR bond for Newsome. Because Plaintiffs have presented evidence that this policy existed, that Sheriff Taylor seemingly knew of the policy, and that the delay caused by the policy contributed to Newsome's death, Plaintiffs' attempt to state a municipal liability claim against Anderson County should not have been considered futile. Furthermore, Plaintiffs' proposed third amended complaint states that the PR bond policy applied 'anytime an inmate/detainee was experiencing a serious medical need,' including 'emergency situations such as Rhonda Newsome's.' Plaintiffs have not pleaded a pattern of prior constitutional violations, as is typically required to establish that a municipal policy was implemented with deliberate indifference. However, given our prior cases indicating that a delay in medical care to a critically ill detainee can constitute deliberate indifference, . . . we find that a constitutional violation would be a 'highly predictable' consequence of a policy that purposefully delays emergency care to detainees requiring hospitalization. We note that at this stage in the litigation, we decline to determine whether Plaintiffs' evidence of the alleged PR bond policy is sufficient to overcome a motion for summary judgment. For Plaintiffs to establish that this policy was implemented with deliberate indifference and prevail on their municipal liability claim based on a single incident, they will have to show that the PR bond policy indeed was a blanket practice that applied even to emergency situations. Alternatively, they could establish deliberate indifference by showing a pattern of prior constitutional violations. At this juncture, however, Plaintiffs simply need to plead allegations that are sufficient to survive a Rule 12(b)(6) motion to dismiss. . . They have done so. Because Plaintiffs have presented evidence indicating that their allegations related to the PR bond policy are not the products of pure speculation, we find that the district court abused its discretion in denying Plaintiffs the opportunity to properly plead these allegations against Anderson County.")

Ratliff v. Aransas Count., Texas, 948 F.3d 281, 284-85 (5th Cir. 2020) ("[W]e note that the ordinary *Twombly* pleading standard applies. It is, of course, true that *Leatherman*, a pre-*Twombly* case, held that courts must not apply a 'heightened' pleading standard to *Monell* claims. . . Although Ratliff argues otherwise, however, *Leatherman* did not require courts to accept 'generic or boilerplate' pleadings in this case or in any other context. Indeed, our precedents make clear that the *Twombly* standard applies to municipal liability claims. . . 'To survive a motion to dismiss, Ratliff's *Monell* pleadings 'must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'")

Prince v. Curry, 423 F. App'x 447, 451-52 (5th Cir. 2011) ("[W]e conclude on this *de novo* review that even when taking this factual content into consideration, Prince still fails to state a claim for relief against Tarrant County that is plausible on its face. The facts discussed in Prince's motion to supplement relate to one other case involving a sex offender whose sentence was found to have been mistakenly enhanced by Tarrant County officials, as well as the trial court and defense

counsel, under circumstances similar those of Prince's case. . . . The existence of only one or, at most, two other similarly situated defendants does not plausibly suggest that Tarrant County has a policy or custom of unconstitutionally subjecting sex offenders to enhanced sentences that is 'so persistent and widespread as to practically have the force of law.' . .Nor does the existence of one or two prior incidents indicate that Tarrant County was deliberately indifferent to defendants' rights or had a pattern of failing to train personnel to comply with the relevant sex offender classification system. . . Prince's factual allegations are simply not enough to meet the 'stringent standard of fault' for establishing a municipality's deliberate indifference, which requires showing that 'a municipal actor disregarded a known or obvious consequence of his action.'. . Furthermore, Prince's claim clearly does not fall into what the Court recently described as the extremely narrow category of claims where 'the unconstitutional consequences of failing to train could be so patently obvious that a city [or other local government] could be liable under § 1983 without proof of a pre-existing pattern of violations.'. . Accordingly, we hold that accepting Prince's factual allegations as true, Prince's complaint does not contain enough factual matter to state a plausible claim for relief against Tarrant County.")

Delacruz v. City of Port Arthur, No. 1:18-CV-11, 2019 WL 1211843, at *14-15 (E.D. Tex. Mar. 14, 2019) ("Plaintiffs allege that the City did not provide officers de-escalation and crisis intervention techniques training ("CIT training") for interacting with persons with mental impairments. They allege that a 2005 Texas state law requiring officers to undergo such training put the City's policymakers on notice that the City's training policy was insufficient. Plaintiffs contend that the City's deliberate indifference to providing officers this state-mandated training caused the defendant officers to resort to unreasonable and excessive force by treating Manuel as a criminal resisting arrest rather than as a person with mental impairments, which was a violation of Manuel's constitutional rights. The City argues that the Complaint is conclusory and fails to establish causation and deliberate indifference. It maintains that Plaintiffs have not identified any policymaker who knew the alleged lack of training would cause, or had caused, any previous constitutional violations. The City argues that the Texas statute requiring such training places that burden on the Texas Commission on Law Enforcement ("TCOLE"), not the City, and that even if a statutory violation were found, that does not equate to a constitutional violation. Further, the City points out that Plaintiffs concede that two of the City's officers have the training, which indicates that the City has conducted such training. . . . [Plaintiffs] allege that the named Officers did not receive the state-mandated training and that only two of the City's officers have received such training. These facts are sufficient, particularly under the 12(b)(6) standard, to infer that the City failed to train the involved officers adequately. . . The City argues that Plaintiffs do not identify a policymaker or an established policy not to train officers in techniques related to interactions with mentally disabled persons. At the 12(b)(6) stage, however, 'the specific identity of the policymaker is a legal question that need not be pled; the complaint need only allege facts that show an official policy, promulgated or ratified by the policymaker, under which the municipality is said to be liable.'. .Similarly, Plaintiffs' allegation that only two of the City's police officers had received the state-mandated CIT training suggests that inadequate training existed within the ranks of the police department. The City also argues that because these two officers received the training, it

shows that the municipality did, in fact, offer the training. Conversely, the same evidence suggests that the City *knew* this training was required, but *still* failed to comply with the mandate throughout the force. If anything, it underscores the inadequate training of the City's police force. The City also argues that its failure to comply with state law does not equate to a constitutional violation. While this is accurate, it similarly misses the point: the constitutional violation at issue is the alleged excessive force purportedly exerted by the Officers, not the failure to comply with state law. This lack of compliance, however, could support a 'failure to train' finding. . . Plaintiffs do not seek to hold the City accountable for non-compliance with Texas law, but rather to hold it responsible for a constitutional violation allegedly stemming from the lack of adequate training.")

Delacruz v. City of Port Arthur, No. 1:18-CV-11, 2019 WL 1211843, at *17-18 (E.D. Tex. Mar. 14, 2019) ("Plaintiffs do not cite to any officially adopted or promulgated policy, or to any pattern or sequence of events, that could allow the court to infer that the City has a policy or custom of dispatching improperly trained officers to mental health calls. While the limited number of CIT-trained officers could plant the seed of an inference that the City likely does not dispatch these officers to every CIT-related call, the complaint lacks any 'factual enhancements' that would permit the court draw such an inference. Rather, this allegation relies solely on the incident that gave rise to Manuel's demise, which is insufficient to plead a practice 'so persistent and widespread as to practically have the force of law.'. . Because Plaintiffs' claim lacks particularity that would raise the claim above the speculative level, the court cannot conclude that Plaintiffs have sufficiently stated a claim against the City for instituting a policy to dispatch only non-CIT trained officers, or alternatively, for failure to institute a policy to dispatch CIT-trained officers to situations where their expertise is needed. Plaintiffs have also, at times, framed this claim as a failure to train dispatchers about when to dispatch CIT-trained officers. Any such claim is similarly devoid of adequate facts to survive the City's motion to dismiss.")

Arevalo v. City of Farmers Branch, Texas (***Arevalo II***), No. 3:16-CV-1540-D, 2017 WL 5569841, at *6-7 (N.D. Tex. Nov. 20, 2017) ("Arevalo's conclusory assertions are insufficient to enable the court to reasonably infer that Chief Fuller is a final policymaker. As the court notes above, decisionmaking authority and policymaking authority are distinct concepts under *Monell*. Policymakers possess not only the discretion to direct specific actions, but also the 'final authority to establish municipal policy' with respect to those actions. . . And that authority is delegated by the city through either express delegations—such as state or local law—or implied customs and behavior. Here, however, Arevalo has failed to allege any state or local law or evidence of custom that would enable the court to reasonably infer that the Farmers Branch chief of police possesses final policymaking authority. She instead relies solely on the repeated, conclusory assertions that Chief Fuller is a 'final policymaker.' These threadbare recitations of a *Monell* element are insufficient to plausibly plead that Chief Filler is a final policymaker. . . This is because the policymaking authority of chiefs of police within their own department is not something that can be inferred from their title alone. Courts that have determined that chiefs of police are final policymakers have done so because the particular governmental body has provided the chief of police with policymaking authority. . . Other government entities, such as the City of Dallas, do

not delegate final policymaking authority to their chief of police. . . Thus without any additional well-pleaded facts regarding a particular police chief's policymaking authority, the court cannot reasonably infer that the chief of police is a *de facto* final policymaker. . . . For the foregoing reasons, the court concludes that Arevalo has failed to plausibly plead that Chief Fuller was a final policymaker for Farmers Branch. Absent final policymaking authority, neither his decision not to train Officer Johnson nor his decision to hire him can qualify as official city policy. And absent any other basis to hold Farmers Branch liable to Arevalo under § 1983, the court holds that Arevalo's second amended complaint fails to state a claim for municipal liability against Farmers Branch.")

Sanders v. Vincent, No. 3:15-CV-2782-D, 2016 WL 5122115, at *4 (N.D. Tex. Sept. 21, 2016) ("These conclusory allegations are insufficient to support a reasonable inference that there existed an official city policy or custom that led to the violation of Sanders' constitutional rights. First, Officer Bagley's alleged statement that '[r]ight now what you are doing is violating a policy that you should not be doing this okay,'. . . is insufficient to plausibly allege that the Town of Addison actually had a policy against videotaping police activities. Second, even assuming that all of the facts alleged in the amended complaint are true, Sanders has alleged only that a single episode occurred in which Officer Bagley, Officer Jones, and Lt. Vincent violated his constitutional rights. . . Sanders does not allege that there was any prior instance in which an Addison police officer prohibited the videotaping of police activities, interfered with individual citizens' exercise of their First Amendment rights, or arrested individuals 'merely for failing to provide...identification.'. . The court is therefore unable to draw the reasonable inference that there was a widespread practice that was so common and well-settled as to constitute a custom that fairly represented municipal policy. Nor does he allege any facts that enable the court to draw the reasonable inference that Addison police officers received insufficient training. 'A mere allegation that a custom or policy exists, without any factual assertions to support such a claim, is no more than a formulaic recitation of the elements of a § 1983 claim and is insufficient to state a claim for relief.'. . Without factual allegations that are sufficient to support a reasonable inference that such official policies or customs exist, Sanders' amended complaint fails to state a plausible § 1983 claim against the Town of Addison, and defendants' motion to dismiss must be granted.")

Schaefer v. Whitted, 121 F. Supp. 3d 701, 718-20 (W.D. Tex. 2015) ("Defendants attack the factual sufficiency of Plaintiff's municipal liability pleadings, arguing they amount to a 'bare-bones' recitation of elements of a *Monell* claim. . . In *Leatherman,* . . .the Supreme Court rejected the Fifth Circuit's application of the heightened pleading standard to § 1983 claims against municipalities, reaffirming 'all the Rules require is a "short and plaint statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'. . *Leatherman* predates the 'plausibility' requirement of *Twombly* . . . and *Iqbal* . . . . It remains unresolved how and to what extent the directives of *Twombly* and *Iqbal* alter the *Leatherman* pleading standards for municipal liability claims. However, the Court agrees, for now, the standards can be reconciled in the manner articulated in *Thomas v. City of Galveston,* 800 F.Supp.2d 826, 842–45 (S.D.Tex.2011). To state a claim, the complaint must contain 'more than

boilerplate allegations' but need not contain 'specific facts that prove the existence of a policy.'. . .The Court finds Plaintiff's allegations concerning the City's policy or custom are inadequate to state a claim for relief. Plaintiff's allegations are simply a reformulation of the elements of a claim for municipal liability based on an unconstitutional custom or practice devoid of any factual enhancement or support. . . To survive a motion to dismiss, Plaintiff must allege the existence of a sufficient number of similar prior violations rather than isolated instances. . . Without specifically identifying policies promulgated by City policymakers, and without providing specific examples of persistent and widespread abuse, Plaintiff fails to provide the City with fair notice of the grounds for its claim. . . These allegations are no more than 'generic, boilerplate recitations of the elements of claims against a municipality for an unconstitutional custom or practice' and thus do not raise a plausible claim City police adopted unconstitutional customs or practices. . . . In contrast, Plaintiff's failure to train or supervise claims pass muster. Plaintiff alleges the City failed adequately train or supervisors its officers concerning: (a) the use of deadly force; (b) interactions with individuals legally entitled to possess and carry weapons; and (c) citizens' Second Amendment right to possess weapons for self-defense in their homes. . . To substantiate these claims, Plaintiff alleges the City does not 'properly train officers on how to interact with [lawfully armed citizens], or educate them on the laws concerning the lawful possession of weapons and the rights of citizens to lawfully possess weapons' nor does it 'train officers about the legal distinction between possessing weapons in one's home versus public areas.'. . Plaintiff also alleges the City 'trains its officers it is always permissible to shoot a person with a weapon, even when the officer has been given a warning and the arrested citizen is non-threatening'. . . Plaintiff alleges the City knew the 'obvious consequences of these policies was that City of Austin Police officers would be placed in recurring situations' similar to those faced by Officer Whitted, 'these policies made it highly predictable that the particular violations alleged here ... would result,' and yet with deliberate indifference to Schaefer's rights, failed to train its officers in these areas. . . While Plaintiff fails to allege sufficient instances of similar past conduct by City police tending to substantiate the claim they were subjectively aware of the risk of failing to train its police force, . . . the Court finds, taking Plaintiff's allegations as true, 'the need for more or different training [was] obvious, the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'. . Indeed, it is highly predictable failing to train officers regarding how to act with individuals legally entitled to carry firearms would result in the constitutional violation alleged here and this failure to train was a moving force behind Schaefer's death. Because these allegations refer to 'the specific topic of the challenged policy or training inadequacy,'. . . they provide the City with adequate notice of the claims against it. Accordingly, Defendants' motion to dismiss is DENIED as to these claims.")

Thomas v. City of Galveston, Texas, 800 F.Supp.2d 826, 841-45 (S.D. Tex. 2011) ("In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), the Supreme Court rejected the Fifth Circuit's application of a heightened pleading standard to Section 1983 claims against municipalities, reaffirming that 'all the Rules require is "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim

is and the grounds upon which it rests.'. . However, *Leatherman* pre-dates *Twombly* and *Iqbal*, and courts have split as to the appropriate pleading requirements for municipal liability following those cases. Some courts have allowed generic or boilerplate assertions of the grounds for holding the municipality liable. [collecting cases] Other courts have treated *Twombly* and *Iqbal* as dramatically altering the pleading requirements for municipal liability claims. [collecting cases] The Court believes that *Leatherman* and *Iqbal* may be reconciled, without allowing boilerplate allegations, on the one hand, or requiring plaintiffs to plead specific factual details to which they do not have access before discovery, on the other. *Iqbal* instructed that '[d]etermining whether a complaint states a plausible claim for relief' is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'. . In the context of municipal liability, as opposed to individual officer liability, it is exceedingly rare that a plaintiff will have access to (or personal knowledge of) specific details regarding the existence or absence of internal policies or training procedures prior to discovery. . . Accordingly, only minimal factual allegations should be required at the motion to dismiss stage. Moreover, those allegations need not specifically state what the policy is, as the plaintiff will generally not have access to it, but may be more general. . . Unlike the context presented in *Iqbal*, where high-ranking government officials were sued in their individual capacities, the concerns of protecting public servants from the 'concerns of litigation, including avoidance of disruptive discovery,' *Iqbal*, 129 S.Ct at 1953, are not present in suits against municipalities. . . Moreover, municipal liability claims do not occur in a vacuum, but rather arise in the context of a plaintiff's specific allegations of misconduct by individual officials to which he was personally subjected. Still, a plaintiff suing a municipality must provide fair notice to the defendant, and this requires more than genetically restating the elements of municipal liability. Allegations that provide such notice could include, but are not limited to, past incidents of misconduct to others, multiple harms that occurred to the plaintiff himself, misconduct that occurred in the open, the involvement of multiple officials in the misconduct, or the specific topic of the challenged policy or training inadequacy. Those types of details, or any other minimal elaboration a plaintiff can provide, help to 'satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests,'. . . and also to 'permit the court to infer more than the mere possibility of misconduct.'. . This balance, requiring more than boilerplate allegations but not demanding specific facts that prove the existence of a policy, is in line with the approach of other courts post- *Iqbal.* Where a plaintiff provides more than a boilerplate recitation of the grounds for municipal liability, and instead makes some additional allegation to put the municipality on fair notice of the grounds for which it is being sued, 'federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.' *Leatherman*, 507 U.S. at 168- 69. . . . The Court finds that Plaintiff has provided only generic, boilerplate recitations of the elements of claims against a municipality for an unconstitutional custom or practice, failure to adequately train or supervise, and negligent hiring of officials. Although Plaintiff's allegations are fairly lengthy, they consist only of a list of number of broadly-defined constitutional violations (for example, 'excessive force' and 'unlawful searches and seizures") followed by the assertion that there was a pattern of such violations, that there was a failure to train, or that the violations resulted from improper hiring. This does not provide the city with fair notice of the grounds for which it is being

sued, or allow the Court to plausibly infer actionable misconduct by the city. As discussed above, Plaintiff must provide at least minimal factual allegations regarding the city's liability that go beyond generic restatements of the elements of such a claim. Because he has not done so, Defendants' Motion to Dismiss is granted without prejudice with respect to this claim." footnotes omitted)

Mills v. City of Bogalusa, Nos. 12–991, 12–997, 12–1078, 13–5477, 2013 WL 6184984, *8, *9 (E.D. La. Nov. 25, 2013) ("Fifth Circuit cases since *Twombly* and *Iqbal* have continued to disapprove of complaints that merely recite failures to train, supervise, or discipline as an element of a municipal liability claim. . . Persuasive authority holds that a plaintiff can transcend bare, conclusory allegations to state a plausible claim for relief by identifying in the complaint, among other things, 'past incidents of misconduct to others, multiple harms that occurred to the plaintiff himself, misconduct that occurred in the open, the involvement of multiple officials in the misconduct, or the specific topic of the challenged policy or training inadequacy.'. .Turning to the present case, plaintiff alleges that Sheriff Crowe failed to train officers in the appropriate use of force against detainees, failed to discipline officers who used unnecessary force, failed to train commanders in the supervision of deputies, and sanctioned the use of solitary confinement and other material deprivations as forms of punishment. . . Contrary to defendants' argument, these allegations concern very narrow, plausible subject areas. That plaintiff's constitutional injuries occurred in the Washington Parish Jail around other inmates and officers or with command authorization is a specific factual allegation that adds to the overall plausibility of his municipal liability claims. . . In light of these allegations and the authority cited above, plaintiff has adequately stated a claim for relief that may proceed to trial if founded on evidence.")

Oporto v. City of El Paso, No. EP-10-CV-110-KC, 2010 WL 3503457, at *5, *6, *8 (W.D. Tex. Sept. 2, 2010) ("Here, Plaintiffs allege thirty-two prior incidents, spanning fifteen years, in which El Paso Police Department officers allegedly made use of excessive deadly force. . . The incidents are described in varying degrees of detail, with some described in a few sentences and some simply listed with a date and police report number. . . . This case, in which thirty-two incidents of excessive deadly force have been alleged, falls within the acceptable range of 'sufficiently numerous prior incidents' needed to allege a pattern at this stage. The Court notes that the procedural posture of this case is distinguishable from much of the case law on establishing a pattern. Discovery has not occurred in this case, whereas many decisions on this subject concern post-discovery motions. . . . The key common element, made sufficiently clear in the pleadings, is the alleged repeated use of excessive deadly force, often with fatal results. Thus, Plaintiffs have alleged a custom or widespread practice in sufficient detail, similar enough in nature to the alleged facts underlying the instant suit, to allow their pleadings to withstand the City's motion to dismiss. . . . Even with the higher pleading standards of *Twombly* Plaintiffs have alleged sufficient prior incidents to defeat Defendant's motion. . . . Here, where Plaintiffs' allegations are asserted with some level of detail, Plaintiffs should also at least be entitled to discovery. . . .")

Charles v. Galliano, No. 10-811, 2010 WL 3430519, at *6 (E.D. La. Aug. 26, 2010) ("The Supreme Court has expressly prohibited the application of a heightened pleading standard to § 1983 claims against municipalities. . . Instead, a plaintiff need only comply with notice pleading requirements by presenting a 'short and plain statement of the claims showing that the pleader is entitled to relief.'. .Boilerplate allegations of inadequate municipal policies or customs are generally sufficient. *See, e.g., Mack v. City of Abilene,* 461 F.3d 547, 556 (5th Cir.2006); *Ortiz v. Geo Group, Inc.*, 2008 WL 219564 at *2 (W.D.Tex. Jan. 25, 2008); *Jacobs v. Port Neches Police Dept.*, 1996 WL 363023, *13-15 (E.D.Tex. June, 26, 1996); *DeFrancis v. Bush*, 839 F.Supp. 13, 14 (E.D.Tex.1993). Plaintiff alleges that after he reported to his supervisor that Galliano had harassed him, 'The City of Kenner, thorough its defendant employees, and through policy, custom, or practice did not take prompt remedial action to protect Charles from further racism, discriminatory acts or threats to his safety.'. .Plaintiff further alleges: The City of Kenner did not adequately or timely address Charles' numerous and documented claims of severe and pervasive harassment, discrimination, and abuse. The City of Kenner and its employees and mayor allowed Charles to be subjected to retaliation at the workplace after he made repeated complaints to supervisory personnel about the hostile work environment in which he was forced to work due to ongoing racially-discriminatory acts. Thus, it was the practice of the City of Kenner and its employees and mayor to ignore complaints of discriminatory behavior. . . Considering the foregoing, the Court finds that plaintiff has alleged a municipal policy or custom sufficient to survive defendants' motion to dismiss.")

Wright v. City of Dallas, Texas, No. 3:09-CV-1923-B, 2010 WL 3290995, at *3, *4 & n.4 (N.D. Tex. July 19, 2010) ("Plaintiff argues that based on *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), there is no heightened pleading standard for municipal liability under § 1983. . . In *Twombly* and *Iqbal*, the Supreme Court clarified that the pleading requirement for facts rather than conclusions lies within Fed.R.Civ.P. 8(a), not any heightened pleading standard. The difference between the Rule 8(a) pleading standard and an impermissible heightened pleading standard is in the factual particularity or specificity needed to state a claim. . . A heightened pleading standard requires that a plaintiff 'allege "specific facts" beyond those necessary to state his claim and the grounds showing entitlement to relief.'. . The *Twombly* court did not find that 'the allegations in the complaint were insufficiently "particular[ized]"; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.' . Requiring Plaintiff to allege facts sufficient to infer the existence of an official custom or policy does not impose an impermissible heightened pleading requirement. In conclusion, because Plaintiff alleges only one incident to support his inference of an official custom or policy, his factual allegations are insufficient to nudge his claims of municipal liability from conceivable to plausible, and the City's motion to dismiss should be granted. . . . Plaintiff urges the Court to deny the motion to dismiss as premature because he is 'entitled to discovery ... prior to any ruling from this Court.'. . Rule 8 'does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.'")

Dwyer v. City of Corinth, Tex., No. 4:09-CV-198, 2009 WL 3856989, at *8, *9 (E.D. Tex. Nov. 19, 2009) ("Plaintiff argues that Defendants' 'failure to train, supervise, test, regulate, discipline or otherwise control its employees and the failure to promulgate and enforce proper guidelines for the use of Tasers constitutes a custom, policy, practice and or procedure in condoning unjustified use of force.' SECOND AMEND. COMP. at 11. Plaintiff argues that 'the Corinth Police Department's Use of Force Policy ... makes clear that the use of the Taser is only permitted to prevent harm to an Officer or some other person.'. . Plaintiff alleges that the 'excessive use of the Taser' is a '*de facto* policy' of the City of Corinth. . . Defendants argue that Plaintiff's claims of 'improper training, supervision/discipline, and retention' should be dismissed because the allegations are insufficient to state a claim. . . According to Defendants, Plaintiff does not make allegations of 'deliberate indifference' in regard to his claims. Here, Plaintiff has alleged facts that allow the Court to conclude that he is entitled to relief. *Iqbal,* 129 S.Ct. at 1950 (quoting Fed. Rule Civ. Proc. 8(a)(2)). The Supreme Court has expressly prohibited the application of a heightened pleading standard to section 1983 claims against municipalities. *Jones v. Bock*, 549 U.S. 199, 212-13 (2007) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U .S. 163, 168 (1993)). Instead, a plaintiff need only comply with notice pleading requirements by presenting a 'short and plain statement of the claims showing that the pleader is entitled to relief.'. . 'Boilerplate' allegations of inadequate municipal policies or customs are generally sufficient. . . Plaintiff has alleged that the policy or custom of Defendants, which includes poor training and discipline of law enforcement officers, played a part in the deprivation of his rights. While the allegations alleged by Plaintiff, standing alone, do not contain the sort of specificity normally required, the allegations are nonetheless sufficient to withstand a motion to dismiss at the pleadings stage. . . Plaintiff need not set forth all the details of his case against a municipality under section 1983 at the pleadings stage. *Leatherman,* 507 U.S. at 168. Based on the Court's 'judicial experience and common sense,' Plaintiff's alleged facts give rise to a plausible entitlement to relief under the FHA. *Iqbal*, 129 S.Ct. at 1950 (quoting *Twombly*, 550 U.S. at 555.). Taken as true, Plaintiff's allegations could plausibly entitle Plaintiff to relief under section 1983. Therefore, the Court recommends that Defendants' motion to dismiss Plaintiff's section 1983 claims against the City of Corinth for a failure to properly train and discipline officers and for improper retention should be denied.").

SIXTH CIRCUIT

Linden v. City of Southfield, Michigan, 75 F.4th 597, ___ (6th Cir. 2023) ("While the Second Amended Complaint asserts that the City provided the First Responders with inadequate training, it marshals no facts to support this bare conclusion. For example, the Second Amended Complaint does not contain any factual allegations about the content or extent of training that the First Responders received. The Second Amended Complaint also does not allege other similar incidents that would have put the City on notice of a need for more training. Finally, its factual allegations do not give rise to a plausible inference that the need for training to avoid incidents like what happened to Beauchamp was so 'obvious' that any failure to provide such training would have amounted to deliberate indifference. . . If anything, the fact that numerous laypersons recognized

signs that Beauchamp was still alive suggests that the City could reasonably have expected the First Responders not to pronounce Beauchamp dead without special training on the topic. In the same vein, the obvious signs of life Beauchamp displayed also undermine the inference that the First Responders would have acted differently had they received more or different training from the City. . .We therefore affirm the district court's dismissal of Linden's claims against the City on the alternative ground that Linden failed to plead the elements of *Monell* liability, again without deciding whether the First Responders' conduct violated Beauchamp's constitutional rights.")

Red Zone 12 LLC v. City of Columbus, 758 F. App'x 508, 515-17 (6th Cir. 2019) ("Here, Red Zone claims that the City is responsible for potential constitutional violations because its employee—Pfeiffer—improperly pursued a nuisance abatement suit against it. Though the district court addressed whether a city can be liable under § 1983 when a city prosecutor acts on behalf of the state in enforcing state law, we need not do so because the critical question is whether he acted pursuant to City policy. Thus, Red Zone must identify a City policy or custom that was the moving force behind the violation. We affirm because we conclude that Red Zone did not adequately allege that Pfeiffer acted pursuant to city custom or policy in bringing the nuisance action. Throughout Red Zone's complaint, attached exhibits, and briefs, it contends that the City 'had a custom and policy by which it used the city attorney as its sole investigator and decision maker concerning whether and when to exert pressure on a recalcitrant business/property owner by filing a nuisance action to effectuate its urban redevelopment program.'. . To support the contention that the City has a custom of using the city attorney to file inappropriate nuisance actions on behalf of the state, Red Zone points to two public websites. First, Red Zone notes that the City's website includes a redevelopment plan for the area where Red Zone operated. Red Zone alleges that the City's redevelopment plan indicates that the City has a custom of pursuing unconstitutional nuisance actions. But this argument proves too much. Many cities have redevelopment plans. Without more, the simple existence of a redevelopment plan does not indicate a custom of constitutional violations. Second, Red Zone points to the Columbus city attorney website's description of its 'Zone Initiative Team.' Here, Red Zone quotes the team's description: 'This is a team of attorneys and others assembled from several divisions whose goal it is to use civil nuisance abatement actions to rid the City of dilapidated buildings. The team addresses issues from the neighborhood perspective, and focuses on what is popularly referred to as quality of life issues.'. . Again, even if true, this website fails to support the argument that the City has a custom of using the nuisance abatement system unconstitutionally. Nuisance abatement actions are constitutional. Counterintuitively, Red Zone also argues that the City is liable under § 1983 because '[t]he *city's policy* of contacting and working with business and property owners to resolve any alleged nuisance *was never utilized*.'. . But this argument cuts against the heart of a § 1983 claim—that official policy or custom was the 'moving force' behind the constitutional violation. . . If this case was an aberration from normal City policy, as Red Zone contends that it was, then this is precisely the type of claim for which § 1983 was *not* intended. . . Thus, under the facts that Red Zone has alleged, its allegation that the City has a custom of using nuisance abatement actions in an unconstitutional manner is no more than a 'sheer possibility.'. . It might be true that the City has a custom of pursuing unconstitutional nuisance actions. But Red Zone has not sufficiently pled facts

which give its claims facial plausibility. . . Rather, Red Zone conclusively and repeatedly argues that the City's 'use of the civil nuisance action process has unfortunately become a city policy, custom, and/or practice.' . . But without facts supporting that the City has ever filed a similarly inappropriate nuisance action against another business, or that Pfeiffer served as an official municipal policymaker under the circumstances, we cannot find that the City '"cause[d]" one of its employees to violate the plaintiff's constitutional right.'. . We therefore conclude that the district court correctly dismissed the § 1983 claims against the City on the grounds that Red Zone did not adequately allege a municipal custom or policy.")

Osberry v. Slusher, 750 F. App'x 385, ___ (6th Cir. 2018) ("Osberry's complaint also contains a claim that Chief Martin is responsible for the Officers' conduct. To raise such a claim, Osberry 'must demonstrate that the alleged federal violation occurred because of a municipal policy or custom.'. . Osberry can establish an illegal policy or custom by showing one of the following: '(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations.'. . . The district court analyzed Osberry's claim under the third option, as a 'failure to train' claim. This requires Osberry to plead '(1) a clear and persistent pattern of illegal activity, (2) which the City knew or should have known about, (3) yet remained deliberately indifferent about, and (4) that the City's custom was the cause of the deprivation of her constitutional rights.'. . In other words, Osberry must allege that Chief Martin ignored a 'clear and persistent pattern of misconduct' that should have prompted corrective training for the Officers. . . For this type of *Monell* claim, the municipal liability arises from the history of misconduct that created 'notice that the training in this particular area was deficient and likely to cause injury.'. . . This is a close call. Osberry alleges that the Officers used the same unlawful tactics here as they used in six specific cases ranging from 2012 to 2017. We do not know the facts or circumstances of these cases, but the district court inferred that these prior instances could establish a pattern of misconduct, so it granted Osberry's request to amend her complaint to add these allegations about prior instances. And the Officers concede that the amended complaint is sufficient. . . . Thus, despite our skepticism, if we accept Osberry's allegations as true, she sufficiently pleaded a failure to train claim. This does not end our inquiry into Osberry's *Monell* claim. Even though the district court analyzed Osberry's claim as a failure to train claim, the allegations in her amended complaint perhaps fit best within the first option—the classic *Monell* case that an illegal, official policy existed. Under this theory, a plaintiff must '(1) identify the municipal policy or custom, (2) connect the policy to the municipality, and (3) show that his particular injury was incurred due to execution of that policy.'. . Here, according to Osberry, Chief Martin affirmatively taught the Officers to:
(1) yell out 'stop resisting' and 'stop obstructing' to imply that all defendants whom they are attacking or manhandling are resisting arrest and/or obstructing official business . . . (2) include a resisting arrest charge in any criminal complaint against any citizen who is injured during an arrest or search . . . ; and (3) overwhelm and intimidate suspects, regardless of the level of probable cause, and to over respond to and escalate casual interactions with citizens to allow officers to use excessive and abusive . . . . Looking at these allegations, Osberry's *Monell* claim seems more about

the affirmative policies of Chief Martin—how he taught and instructed the Officers to perform their duties—and less about topics left out of the Officers' training. To be sure, these conclusory allegations, without more, may be insufficient to survive a motion to dismiss. . . . Osberry, however, provides more detailed allegations in her amended complaint—the six cases from 2012 to 2017 where the Officers employed Chief Martin's unlawful tactics. . . This factual allegation nudges Osberry's *Monell* claim 'across the line from conceivable to plausible.'. . And while this type of a *Monell* claim is also a close call, it is at least plausible that Chief Martin's affirmative policies caused this pattern of misconduct. In sum, Osberry has sufficiently pleaded a viable *Monell* claim under either theory. But which theory Osberry ultimately pursues (or which theory can survive summary judgment) may largely depend on discovery and whether any evidence suggests that Chief Martin implemented an illegal, official policy—or alternatively, that Chief Martin ignored a pattern of misconduct that should have prompted corrective training. We need not answer that question now. The district court correctly denied the Officers' motion to dismiss the *Monell* claim.")

Bailey v. City of Ann Arbor, 860 F.3d 382, 388-89 (6th Cir. 2017) ("Bailey maintains that, in reviewing a motion to dismiss a *Monell* claim, the plausibility standard of *Twombly* and *Iqbal* does not apply. He insists that the 'no set of facts' pleading standard articulated in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), remains good law and applies to this claim. That is wrong. The Supreme Court overruled the *Conley* standard in *Twombly*. 550 U.S. 544, 561–62 (2007). That means district courts may not rely on contrary language in *Petty v. County of Franklin*, 478 F.3d 341, 345 (6th Cir. 2007), which is inconsistent with the Supreme Court's more recent and precedentially superior decisions in *Twombly* and *Iqbal*.")

Robertson v. Lucas, 753 F.3d 606, 623 (6th Cir. 2014) ("Appellants do not plead that appellees maintained a policy or custom of refusing to turn over exculpatory or impeachment evidence. Appellants' nebulous assertions of wrongdoing in the form of 'flawed investigations' and 'unconstitutional searches and seizures' do not pertain to the alleged *Brady* violations; rather, appellants assert constitutional violations in the conduct leading up to but not including the disclosure of exculpatory evidence. Rule 8 requires that a plaintiff's pleadings 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'. . Appellants' complaint, which fails to claim that their rights were violated by a policy or custom of refusing to turn over exculpatory or impeachment evidence, cannot be said to have given appellees fair notice of this claim. As this deficiency is manifest from the face of appellants' complaint, we affirm the district court's dismissal of appellants' *Monell* claims alleging *Brady* violations against Richland County and the City of Cleveland.")

Howard v. City Of Girard, Ohio, 346 F. App'x 49, 2009 WL 2998216, at *2, *3 (6th Cir. Sept. 21, 2009) ("To prevail on a claim against the city under § 1983, plaintiff must establish both: (1) the deprivation of a constitutional right, and (2) the city's responsibility for that violation. . . Despite the fact that Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim' at the complaint stage, we hold that plaintiff's amended complaint falls

short of the *Twombly* threshold. The district court noted correctly that while plaintiff argues '[The City of] Girard was deliberately indifferent to Howard's Aright to due process of law,'' he does not 'identify which particular right Girard violated.' Moreover, the Due Process Clause of the Fourteenth Amendment does not generally require a municipality to protect an individual from harm by third parties.")

Laning v. Doyle, No. 3:14-CV-24, 2015 WL 710427, at *12 (S.D. Ohio Feb. 18, 2015) ("Plaintiffs' allegations in this case go beyond conclusory allegations of inadequate training or a pattern of unconstitutional behavior. Plaintiffs have specifically alleged that Officer Doyle has been the subject of 'internal complaints and at least one other lawsuit.' Plaintiffs further allege that the City knew about these complaints, and yet failed to take any remedial action. . .In the Court's view, these factual allegations satisfy the requirements of *Iqbal* and *Twombly,* and state a plausible claim against the City. Whether Plaintiffs will be able to prevail on this claim, or even survive summary judgment, remains to be seen. However, the Court agrees that, at a minimum, Plaintiffs are entitled to discovery. In *Scott v. Giant Eagle, Inc.,* No. 1:12–cv–3074, 2013 WL 1874853 (N.D. Ohio May 3, 2013), the court noted that 'applying *Iqbal* too strictly in situations where knowledge of a custom, policy, or practice is unobtainable absent some preliminary discovery could lead to unfair results.'. . This is particularly true when the evidence needed is within the exclusive, or almost exclusive, possession of the opposing party. Accordingly, the Court overrules Defendants' motion to dismiss the § 1983 claim asserted against the City of Huber Heights.")

Minick v. Metro. Gov't of Nashville, 3:12-CV-0524, 2014 WL 3817116, *2, *3 (M.D. Tenn. Aug. 4, 2014) ("Here, Ms. Minick claims that ¶¶ 4.30–4.38 of her Amended Complaint are sufficient to state a claim for municipal liability against Metro Nashville under § 1983. However, the referenced allegations are boilerplate and conclusory and contain no specific factual assertions. In numerous cases, courts (including this one) have found that boilerplate allegations premised on a single incident of alleged police brutality—*i.e.,* the incident that caused the plaintiff's injury—are insufficient to state a municipal liability claim, thereby justifying dismissal under Rule 12(b) (6). . .Here, the Amended Complaint does not identify or describe any of Metro Nashville's policies, procedures, practices, or customs relating to training; it does not identify any particular shortcomings in that training or how those shortcomings caused the alleged violation of Minick's rights; and it does not identify any other previous instances of excessive force or similar violations that would have put Metro Nashville on notice of a problem. . . Accordingly, the court finds that the Amended Complaint does not contain sufficient allegations to state a claim for municipal liability against Metro Nashville. The court recognizes that presenting municipal liability claims is more difficult after *Twombly* and *Iqbal,* but the prevailing view within this circuit and within this district is that allegations that essentially amount to notice pleading of a municipal liability claim are insufficient. . . In sum, Ms. Minick's § 1983 claims against Metro Nashville will be dismissed. Because it is conceivable that Ms. Minick could allege sufficient facts to support a § 1983 municipal liability claim, the dismissal will be without prejudice.")

Hamer v. County of Kent, No. 1:13–CV–504, 2014 WL 1276563, *6 (W.D. Mich. Mar. 27, 2014) ("*Twombly* and *Iqbal* did not overrule *Leatherman.* Even after *Twombly* and *Iqbal*, a district court would err in imposing a heightened pleading standard on a complaint alleging municipal liability. Rather, the district court must now apply the new pleading standard applicable to all federal cases as a result of *Twombly* and *Iqbal.* Under that standard, a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.'. . In short, although *Twombly* and *Iqbal* did not overrule *Leatherman*, they did overrule *Conley v. Gibson* by enunciating a new pleading standard applicable to all federal cases.")

A.M.S. v. Steele, No. 1:11–cv–298, 2012 WL 2130971, at *5, *9 (S.D. Ohio June 8, 2012) (R & R) ("With respect to the City of Cincinnati, plaintiffs allege that in response to a gang-related increase in drug and crime activity the City has developed a custom, policy and practice of arresting young black males for little or no reason, or on false or inflated charges, or on no charges at all, in order to empty the streets of suspected or potential criminals. . . Further, plaintiffs allege that although the official policy is that parents of minors are to be notified when a minor is arrested and before they are taken to the Juvenile Detention Center, the actual policy, custom and practice among Cincinnati Police is to routinely detain minors without notifying their parents. . . This actual practice, which is contrary to the official policy, is used to deny minors access to counsel (a likely result of notifying a parent) and interrogate and extract evidence or confessions. . . Further, the City's official policy requires that interviews with suspects be recorded in their entirety, but the actual policy, custom and practice among police detectives is to browbeat, threaten, deceive, and otherwise coerce minors in custody into agreeing to provide confessions off-tape and then record only the false confessions or statements. . . This practice makes it appear that the confessions are voluntary and more credible, when they are not, to obtain more criminal convictions. . . . Regarding the City of Cincinnati, plaintiffs allege that the City, by and through its policymakers (John Doe Defendants 4–10), is liable for plaintiffs' constitutional injuries for the failure to provide adequate training to police officers and detectives and for establishing, permitting or condoning policies, practices or procedures of: 'arrest first, investigate later' and 'the ends justify the means' in policing high-crime neighborhoods such as Northside; coercing confessions 'off-tape' and selectively recording portions of confessions to enhance their credibility and increase conviction rates; not notifying guardians of minors that are held for questioning to avoid the possibility of counsel being obtained for the minors; allowing police officers and detectives to present skewed information and evidence to grand juries to increase indictment rates; and allowing rogue officers like Steele to operate without intervention, thus failing to prevent known or obvious police misconduct. . . Plaintiffs further allege that these policies, practices, and procedures resulted in the violations of plaintiffs' clearly established constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. . . Notably, these allegations are in addition to the extensive factual allegations, recited *supra*, pertaining to specific acts of defendants Steele and Mathis. . .Plaintiffs have alleged sufficient facts at this juncture showing that the City of Cincinnati's practices and policies are insufficient to protect the rights of minor suspects and have caused the deprivation of plaintiffs' constitutional rights. Accepting plaintiffs' allegations as true and drawing all inferences in a light most favorable to plaintiffs, the undersigned finds that plaintiffs have sufficiently pled a

§ 1983 *Monell* claim against the City of Cincinnati. Accordingly, defendants' motion to dismiss plaintiffs' § 1983 claim against the City of Cincinnati should be denied.")

Rucker v. City of Cleveland, No. 1:10 CV 2613, 2011 WL 52486, at *1 (N.D. Ohio Jan. 6, 2011) ("The Court has reviewed Mr. Rucker's Complaint against the City, alongside the standard enunciated in *Twombly*, and concludes as a matter of law that there are no allegations demonstrating a plausible right of recovery against the City. Mr. Rucker's conclusory allegations against the City fail to meet the pleading standards set forth in Fed.R.Civ.P. 8. Accordingly, the Court will grant the City's motion to dismiss Mr. Rucker's Complaint against it, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief may be granted.")

Cunningham v. Cleveland Police Dept., No. 1:10-CV-453, 2010 WL 5636778, at *5, *6 (N.D. Ohio Dec. 22, 2010) ("[A]lthough Plaintiff's second cause of action recites the key elements of a § 1983 claim against the City of Cleveland, it does so only in a conclusory manner. The gravamen of Plaintiff's argument is that the City failed to train its officers on proper seizure and forfeiture procedures. But, Plaintiff failed to assert any factual allegations to support its conclusion that the city had a policy of failing to train officers on these issues, or encouraging officers to take actions contrary to its written policy, which Plaintiff acknowledged was lawful. Instead, Plaintiff repeatedly made unsupported blanket assertions that the City's inadequate training, or lack thereof, was accountable for the alleged unlawful behavior by the officers in question. For example, Cunningham states:

To be sure, as we see it, it has to be the fault of the City, and those who supervise them [the officers], if these officers did not know the State of Ohio Legislature provided a statutory remedy for people to get their property back when officers seize it without probable cause − the situation here.

(Doc. 18, p. 12). Such statements are conclusory and are not sufficient to state a plausible claim. As stated by the Supreme Court in *Iqbal*, conclusory statements are not entitled to be assumed as true. . . When accepting Plaintiff's remaining factual allegations as true, it is possible to infer that Defendant City acted unlawfully, but it is not plausible. For instance, Plaintiff failed to assert facts from which the Court can do more than speculate that the City's training, or lack thereof, caused the alleged harm. Furthermore, the Court cannot find any facts from which to infer that the City acted with deliberate disregard to its citizen's rights. In order to survive a motion to dismiss, Plaintiff's Amended Complaint had to allege facts showing that the City's failure to train amounted to deliberate indifference to the rights of persons with whom the police come into contact. . . In this case, the Plaintiff's filings, consisting of a Complaint, Amended Complaint, Response to Defendant's Motion for a More Definite Statement and Response to Defendant's Motion to Dismiss, do not allege sufficient facts to survive Defendants' motion and proceed to the next stage of the judicial process. Plaintiff made no factual allegations to support that the City acted intentionally to harm persons such as Plaintiff or to show that the City had a long-standing history of unlawful conduct in this area. Although Plaintiff suggests that he will provide convincing proof of the City's unconstitutional policy at trial, that proffer does not negate Plaintiff's duty pursuant to Fed.R.Civ.P. 8 to plead facts plausibly showing that the City acted unlawfully at the pleading

stage. There are no facts in the Amended Complaint that reasonably describe a specific policy or custom of the City of Cleveland that violated Cunningham's rights. Accordingly, Plaintiff's conclusory allegations do not suffice to satisfy the pleading standard announced in *Iqbal* and *Twombly*.")

Johnson v. Metropolitan Government of Nashville and Davidson County, No. 3:10-0589, 2010 WL 3619790, at *4 (M.D. Tenn. Sept. 13, 2010) ("Plaintiff must produce facts showing a plausible right to relief because Metro was deliberately indifferent to the need to train, supervise or discipline police officers or Metro was deliberately indifferent to improper pursuit policies or customs, and that such inadequacies were likely to result in the violation of a citizen's constitutional rights. . . Plaintiff Sweat's pleading on municipal liability has 'stop[ped] short of the line between possibility and plausibility of entitlement to relief.'. . Thus, the § 1983 claims against Metro must be dismissed for failure to state a claim.")

Modd v. County of Ottawa, No. 1:10-cv-3372010, 2011 WL 5860425, at *7 (W.D. Mich. Aug. 4, 2010) ("Certainly, *Leatherman* must be read in conjunction with *Twombly* and *Iqbal*, such that allegations of municipal policy or custom must be sufficient to raise a 'plausible' inference that officers were acting pursuant to municipal custom or policy. At the pleading stage, however, no more is necessary. Under this standard, the amended complaint is sufficient. Plaintiff alleges that the existence of a policy, pattern, or practice of withholding or denying prescription medication is evidenced by the fact that plaintiff was denied all prescription medication for a seven-day period. . . Plaintiff further alleges that on at least twelve occasions prior to plaintiff's incarceration, incoming inmates at the Ottawa County Jail were denied medications which had previously been prescribed for them. . . These factual allegations, accepted as true, are sufficient to meet plaintiff's rather light burden of alleging a plausible claim of a county custom or policy. Further inquiry into this question must await discovery and summary judgment, or trial.")

Fletcher v. Michigan Dept. of Corrections, No. 09-CV-13904, 2010 WL 2376167, at *6 (E.D. Mich. June 9, 2010) ("Although pre-*Twombly*, *Petty* provides guidance in assessing the sufficiency of Plaintiff's complaint. Similar to Petty's allegation that Franklin County had a policy of failing to 'adequately and reasonably train, supervise and discipline officers in such a way to properly protect the constitutional rights of citizens,' Plaintiff alleges that the Oakland County Sheriff's Office had the policy or custom 'to inadequately train or supervise its officers, deputies, nurses and counselors, with respect to the constitutional rights of the inmates.'. . This allegation, however, was the least specific allegation regarding the customs or policies of the Sheriff's Office. Plaintiff goes on to allege six more specific policies relating to the handling of mentally ill inmates, including failure to comply with maintenance orders, as well as inmate abuse and the improper handling of complaints of abuse. Moreover, other courts in the Eastern District of Michigan have found less specific allegations concerning a municipality's customs or policies to be sufficient to withstand a motion to dismiss. [collecting cases] Although the court certainly does not find Plaintiff's pleadings to be *more* than sufficient to survive a motion to dismiss, based on the above-cited case law and applying the Rule 12(b)(6) standard, the court finds Plaintiff's allegations to be

minimally sufficient. Defendants' motion to dismiss will therefore be denied as to Sheriff Bouchard in his official capacity.")

Lott v. Swift Transp. Co., Inc., No. 2:09-cv-02287, 2010 WL 937769, at *3 (W.D. Tenn. Mar. 17, 2010) ("[T]he Court disagrees that Plaintiffs' failure to identify in their complaint the particular policy or custom responsible for the alleged deprivation of their rights necessarily mandates dismissal under Rule 12. Although Swift correctly notes that a private corporation can only be held liable under § 1983 when it has a policy or custom that causes a civil rights violation, *see Street v. Corrections Corp. of Am.*, 102 F.3d 810, 818 (6th Cir.1996), complaints under § 1983 are not subject to any heightened pleading standards, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination*, 507 U.S. 163, 167-68 (1993). Instead, a plaintiff's complaint − whether it seeks relief under § 1983 or under any other legal theory − must be plausible and not merely conceivable. *See Iqbal*, 129 S.Ct. at 1950-51. Identifying the precise policy or custom may help make the complaint's allegations more plausible, but categorically viewing such a failure as dispositive in every case involving § 1983 claims risks imposing a higher standard of pleading than the Federal Rules of Civil Procedure mandate.").

Birgs v. City of Memphis, No. 09-2468, 2010 WL 625401, at *4 (W.D. Tenn. Feb. 18, 2010) ("To state a successful claim under § 1983 for failure to train, the municipality's failure must 'amount [] to *deliberate indifference* to the rights of persons with whom the police come into contact.'. . A plaintiff must demonstrate that the municipality 'has ignored a history of abuse,' and was on clear notice that its training was deficient to prove that the municipality was deliberately indifferent. . . The easiest way for an individual to meet her burden is to point to past incidents of similar police conduct that authorities ignored. . . Birgs argues that her Complaint meets these criteria. She points to the following excerpt as evidence: 21. Defendant City of Memphis permitted, encouraged, and tolerated an official pattern, practice or custom of its employees' violation of the constitutional rights of the public at large, including the Plaintiff's. 22. Defendant City of Memphis failed to properly train and instruct the individual Defendants in the proper use of force. Defendant City of Memphis acquiesced in the use of excessive force and/or ratified the actions of the Defendant Officers in the use of excessive force. 23. The actions of all Defendants constitute willful misconduct or an entire want of such care or recklessness as to raise a presumption that the actions were done with conscious indifference to the consequences in a willful and wanton manner and that Plaintiff is entitled to have punitive damages assessed against Defendants. . . The allegations are nothing more than 'a formulaic recitation of the elements of a cause of action.'. . Stripped of legal language, Plaintiff's Complaint contains no facts that could plausibly lead one to believe that the City deliberately ignored a history of abuse by officers in the Memphis Police Department. . . The Complaint also fails to allude to any incident of brutality other than the one Birgs allegedly suffered. . . Although intensive fact pleading is not required, a plaintiff has the burden to plead more than conclusory statements. *Iqbal*, 129 S.Ct. at 1949. Because Birgs' Complaint fails to allege 'more than a sheer possibility that a defendant has acted unlawfully,' the Court GRANTS the City's Motion to Dismiss Birgs' failure-to-train claim.").

Hutchison v. Metropolitan Government of Nashville and Davidson County, 685 F.Supp.2d 747, 751 (M.D. Tenn. 2010) ("In the context of Section 1983 municipal liability, district courts in the Sixth Circuit have interpreted *Iqbal's* standards strictly. [collecting cases] . . . . Plaintiff's claim regarding Defendant Metropolitan Government's custom, policy or practice of stopping vehicles and ordering passengers to exit the vehicles without sufficient cause and in disregard of passengers' disabilities is just such a conclusion without additional factual assertions of any kind. While Plaintiff details the events of the traffic stop, he does not include any facts related to a municipal policy on probable cause and traffic stops, or a municipal custom, policy or practice regarding drivers or passengers who are disabled. Similarly, beyond the assertion that Defendant Metropolitan Government failed to adequately train its officers in stopping vehicles and/or ordering passengers out of those vehicles in disregard of their disabilities and injuries, Plaintiff gives no additional factual support. Therefore, Plaintiff's pleadings have 'stop[ped] short of the line between possibility and plausibility' regarding municipal liability. The Supreme Court's decisions in *Twombly* and *Iqbal* seem to suggest a shift from notice back toward fact pleading. *See e.g* ., Wright & Miller ' 1216; West Group, Federal Practice & Procedure Supplemental Service ' 1357 (referencing the Notice Pleading Restoration Act of 2009, S. 1504, introduced in the Senate to reinstate pre-*Twombly* standards for the motion to dismiss); and Jay S. Goodman, *Two, New, U.S. Supreme Court Cases Raise the Question: Is Notice Pleading Dead?*, 58 Feb R.I. B.J. 5 (2010). This reversal of over fifty years of Federal Rules of Civil Procedure interpretation will likely bring vast consequences in fairness to plaintiffs while doing little to increase fair notice to defendants. *See* Wright & Miller ' 1216 ("the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved") (quoting Robert Millar, Civil Procedure of the Trial Court in Historical Perspective 190-93 (1952)). Although Plaintiff's Amended Complaint cannot survive the Motion to Dismiss after *Iqbal*, the Court must note that it is uncomfortable with this pleading standard as now applied, especially in the context of Section 1983 and municipal liability.")**.**

Buster v. City of Cleveland, No. 1:09 CV 1953, 2010 WL 330261, at *8, *9 (N.D. Ohio Jan. 21, 2010) ("The complaint contains no suggestion of a custom or policy of the City of Cleveland which may have resulted in the deprivation of a federally protected right of the plaintiff. Buster states in a generic recitation that the City of Cleveland 'had in effect certain explicit and de facto policies, practices and customs which were applied to the treatment of persons engaged and/or arrested by City of Cleveland Police.'. . He further alleges that the City 'failed to adequately train properly or supervise properly each and all of the individual defendants named (including DOE 1,2, and 3) above.'. . As noted above, a pleading must more than unadorned, 'the defendant unlawfully harmed me' accusations. *Ashcroft v. Iqbal*, __ U.S. __, __, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). A pleading that offers only 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'. . Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. . . There are no facts in the Amended Complaint that reasonably describe a specific policy or custom of the City of Cleveland that violated Buster's constitutional rights. Instead, he merely recites the elements of a cause of action to hold the City of Cleveland

responsible for the actions of its employees. This is precisely the type of claim that is not actionable in a § 1983 action. Thus, the fifth cause of action is dismissed.").

Williams v. City of Cleveland, No. 1:09 CV 1310, 2009 WL 2151778, at *4 (N.D. Ohio July 16, 2009) ("A municipality can only be held liable under § 1983 if the complaint alleges that Plaintiff's injury directly resulted from the municipality's policies or customs. . . Under the heightened pleading standard articulated by the Supreme Court of the United States in recent decisions, Plaintiff's amended complaint does not sufficiently state a § 1983 claim. . . Plaintiff's amended complaint recites the critical element of a § 1983 claim against a municipality − a policy or custom − but does so in a conclusory manner. Plaintiff makes no factual allegations that can support the conclusion that the City has a policy or custom of ignoring exculpatory evidence and continuing with prosecutions. To merely state that the City has a policy or custom is not enough; Plaintiff must allege facts, which if true, demonstrate the City's policy, such as examples of past situations where law enforcement officials have been instructed to ignore evidence. Here, while Plaintiff has alleged facts sufficient to demonstrate that exculpatory evidence was ignored in his case, he has not alleged facts from which it can be inferred that this conduct is recurring or that what happened in his case was due to City policy. Accordingly, the amended complaint would not state a claim cognizable under federal law. Thus, Plaintiff's motion for leave to amend the complaint is denied as futile and Count V of Plaintiff's complaint against the City is dismissed.").

SEVENTH CIRCUIT

Williams v. Dart, 967 F.3d 625, 639 (7th Cir. 2020) ("[T]he Sheriff faults plaintiffs for failing to plead 'the nature or severity of *their own* pending charges or criminal backgrounds.' We search Rule 8 and cases interpreting it in vain for a requirement that a plaintiff plead the defendant's defenses for him. . .The Sheriff would also have us ignore as 'conclusory,' for example, plaintiffs' allegation that his 'administrative review' policy was based on 'racist assumptions about the likelihood that people from primarily African American neighborhoods pose a public safety risk or are likely to reoffend.' Because we can think of no cause of action that contains as an element proof of racist assumptions about neighborhoods in Chicago, plaintiffs' allegation cannot fairly be characterized as conclusory. . . Finally, leaning heavily on *Iqbal*, the Sheriff argues there are good reasons to believe his policy was race-neutral in conception and execution. That may or may not be so, but in any event '[l]itigants are entitled to discovery before being put to their proof.'. . *Iqbal* is not a mandate to weigh a plaintiff's likelihood of ultimate success at the pleading stage. . . Instead it demands 'more than a sheer possibility' of liability. . . Alleging merely that defendants 'approved' a policy of arresting and detaining 'Arab Muslim men' was not enough in that case arising in the immediate wake of the terrorist attacks of September 11, 2001, . . . but there is a good deal more to plaintiffs' complaint here. The district court erred in dismissing plaintiffs' equal protection claims on the pleadings.")

Swanigan v. City of Chicago, 881 F.3d 577, 585-87 (7th Cir. 2018) (Hamilton, J., concurring in part and dissenting in part) ("I respectfully dissent. . . from the decision to affirm dismissal of

Swanigan's challenge to the 'cleared-closed case' policy. He alleges that the Chicago Police Department maintains a file on him that effectively—but falsely—identifies him as the 'Hard Hat Bandit.' This is not a case where the police suspected him of those crimes but were unable to prove guilt beyond a reasonable doubt. There is no doubt here, as my colleagues acknowledge. Swanigan was not the Hard Hat Bandit. In my view, he has standing to raise this claim, and on the merits he should be allowed to proceed past the pleadings. . . .Next, consider how any traffic stop of Swanigan in Chicago is likely to unfold as long as the false information is in his police file. When the police carry out a traffic stop, they are entitled to demand the driver's identification, of course, and it is routine to check the driver's record for active war-rants, driving history, and criminal history. Those checks are done for important reasons, including officer safety. If the files are checked, the officer checking Swanigan may well be told that the police department believes he committed a series of armed robberies. At that point, an officer's normal caution will give way immediately to extreme caution, putting Swanigan at a much higher risk that any movement might be misinterpreted as dangerous. And note that this scenario assumes lawful and reasonable actions by both Swanigan and a police officer. How many cases have we seen in this country of unarmed subjects, especially men of color, being shot and even killed by police based on hair-trigger responses to innocent actions? In my view, these risks for Swanigan—today—are not speculative but substantial. He has alleged, and should be allowed to prove, that he has standing to challenge the 'cleared-closed case' policy as applied to him. On the merits of this claim, Swanigan would face a challenge. Ordinarily a civilian has no cognizable legal interest in what police investigative files say about him. *Paul v. Davis*, 424 U.S. 693, 697 (1976), held that even a *public* accusation by the police that a civilian was an 'active shoplifter' did not violate the due process clause of the Fourteenth Amendment. But what Swanigan alleges here is an extreme case with substantial risk of tangible harm not present in that case. And there is virtually nothing to be said here for the integrity of the police files. At this point, after the conviction of the real Hard Hat Bandit, the police refusal to correct the files falsely labelling Swanigan the Hard Hat Bandit is arbitrary and capricious—and dangerous. Constitutional law (not to mention common sense) establishes that the police are *entitled* to rely on such information in their files, . . . even if it turns out to be mistaken. . . .Based on Swanigan's allegations, it is hard to understand how the false information that is still in his police file is the product of anything other than knowing falsity or deliberate indifference to the truth. Why not allow a civilian who faces substantial risk of harm due to false police information an opportunity to have that information corrected? And on the other side of the scales, what harm would the Chicago police or public suffer if the plainly false information were corrected? Again, that information is not just unproven or contestable—it is false. I cannot think of any harm such a correction would cause the police, and it might well help avoid a tragedy. I would allow Swanigan to pursue this claim on the merits beyond the pleadings so that the courts could address it and its potential ramifications based on real evidence rather than allegations and theoretical arguments.")

White v. City of Chicago, 829 F.3d 837, 843-44 (7th Cir. 2016) ("The Supreme Court held in *Leatherman* . . . that federal courts may not apply a ' "heightened pleading standard"—more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil

Procedure—in civil rights cases alleging municipal liability under ... 42 U.S.C. § 1983.' The Court emphasized that 'Rule 8(a)(2) requires that a complaint include only a "short and plain statement of the claim showing that the pleader is entitled to relief."'. . The *Leatherman* holding has survived the Court's later civil pleading decisions in *Iqbal* and *Twombly*, which require the pleader to allege a 'plausible' claim. . . White alleged in his amended complaint: 'In accordance with a widespread practice of the police department of the City of Chicago: O'Donnell requested the judge to issue a warrant on the basis of O'Donnell's conclusory allegation that other law enforcement officers claimed or believed plaintiff had committed an offense, and O'Donnell did not present the judge with an affidavit setting out any affirmative allegation of facts that would indicate that plaintiff had committed an offense.' Together with the individual claim against O'Donnell and the standard printed form that does not require specific factual support for an application for an arrest warrant, this allegation was enough to satisfy the 'short and plain statement of the claim' requirement of Rule 8(a)(2). White was not required to identify every other or even one other individual who had been arrested pursuant to a warrant obtained through the complained-of process. . . In the end, however, Officer O'Donnell's sworn testimony about the NAGIS Report provided sufficient evidence to establish probable cause. Probable cause also establishes that White did not suffer a constitutional injury, which is a necessary element of a *Monell* claim. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Since White's *Monell* claim fails on other grounds, the error on the sufficiency of the pleading was harmless.")

McCauley v. City of Chicago, 671 F.3d 611, 616-19 (7th Cir. 2011) ("Though the district court's analysis was faulty, the equal-protection claim against the City was properly dismissed. To state a *Monell* claim against the City for violation of Mersaides's right to equal protection, McCauley was required to 'plead[ ] factual content that allows the court to draw the reasonable inference' that the City maintained a policy, custom, or practice of intentional discrimination against a class of persons to which Mersaides belonged. . . He did not meet this burden. . . . We have interpreted *Twombly* and *Iqbal* to require the plaintiff to 'provid[e] some specific facts' to support the legal claims asserted in the complaint. . . The degree of specificity required is not easily quantified, but 'the plaintiff must give enough details about the subject-matter of the case to present a story that holds together.'. . The required level of factual specificity rises with the complexity of the claim. . . . This case is more like *Brooks* than *Swanson*. Many of the alleged 'facts' are actually legal conclusions or elements of the cause of action, which may be disregarded on a motion to dismiss. . . For example, McCauley alleges that the City 'has an unwritten custom, practice and policy to afford lesser protection or none at all to victims of domestic violence' and that '[t]here is no rational basis' for this purported policy. Similarly, McCauley alleged the following:

[The City], through its agents, employees and/or servants, acting under color of law, at the level of official policy, practice, and custom, with deliberate, callous, and conscious indifference to McCauley's constitutional rights, authorized, tolerated, and institutionalized the practices and ratified the illegal conduct herein detailed, and at all times material to this Complaint, [the City] had interrelated *de facto* policies, practices, and customs.

These are the legal elements of the various claims McCauley has asserted; they are not factual allegations and as such contribute nothing to the plausibility analysis under *Twombly/Iqbal*.Once

the legal conclusions are disregarded, just one paragraph of factual allegations remains:
Defendant violated McCauley's constitutional rights under 42 U.S.C. § 1983 by:
a. failing to provide adequate security and promptly arrest Martinez;
b. failing to promulgate any policy to ensure the prompt arrest of individuals guilty of violating protective orders;
c. maintaining a policy or custom of failing to timely arrest violators of protective orders;
d. maintaining a custom and practice of failing to adequately train officers concerning the necessity of promptly arresting individuals guilty of violating protective orders;
e. maintaining a policy or custom of failing to have safeguards in place to ensure that violators of protective orders were timely arrested;
f. failing to have a custom, practice and policy in effect to verify whether someone who is arrested for domestic violence is on parole;
g. failing to have a custom, practice and policy to communicate with state officials and law enforcement officials regarding domestic violence arrests;
h. failing to have a custom, practice and policy in effect in order to communicate with parole agents on domestic violence arrests;
i. failing to have a custom, practice and policy in effect to verify whether an arrestee of a domestic violence offense is on parole prior to issuing an order of protection; and
j. maintaining a custom, practice and policy of ignoring the seriousness of domestic violence arrests.
McCauley maintains that these allegations are sufficient to state a *Monell* equal-protection claim against the City. We disagree. In order to state a facially plausible equal-protection claim under *Monell*, the factual allegations in McCauley's complaint must allow us to draw the reasonable inference that the City established a policy or practice of intentionally discriminating against female victims of domestic violence in the provision of police protection. That is, McCauley needed to allege enough 'by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible."' Because the Equal Protection Clause is 'concerned ... with equal treatment rather than with establishing entitlements to some minimum of government services, [it] does not entitle a person to adequate, or indeed to any, police protection.'. . . 'On the other hand, selective withdrawal of police protection, as when the Southern states during the Reconstruction era refused to give police protection to their black citizens, is the prototypical denial of equal protection.'. . The allegations in the paragraph quoted above do not plausibly suggest that the City maintained a policy or practice of selective withdrawal of police protection. To the contrary, the complaint alleges that the City failed to have particularized practices in place for the *special* protection of domestic-violence victims. In essence, the complaint alleges that the City failed to promulgate specific policies for this particular class of crime victims, not that the City denied this class of victims *equal* protection. At most, the factual allegations in the complaint plausibly suggest the uneven allocation of limited police-protection services; they do not plausibly suggest that the City maintained an intentional policy or practice of *omitting* police protection from female domestic-violence victims as a class. Just as in *Brooks*, McCauley's factual allegations are entirely consistent with lawful conduct − here a lawful allocation of limited police resources. . . And the complexity of McCauley's equal-protection claim distinguishes this case

from *Swanson.*")

McCauley v. City of Chicago, 671 F.3d 611, 620, 622-25, 627-29 (7th Cir. 2011) (Hamilton, J., dissenting in part) ("I agree with my colleagues that plaintiff has failed to state a claim against defendant Walker. I respectfully dissent from the rejection of plaintiff's equal protection claim against the City of Chicago. I am skeptical about plaintiff's ability to prove the claim, but his complaint should be sufficient to survive a motion to dismiss for failure to state a claim, even under the new and subjective pleading standards announced in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). I explain first my skepticism, then some of the problems raised by *Iqbal*, and finally why the complaint should survive the motion to dismiss. Mr. McCauley's suit seeks to enforce the Fourteenth Amendment's equal protection requirements on the decisions of a major city police force about how to allocate its resources. Plaintiff's only viable equal protection theory is that the Chicago police department made a deliberate decision to minimize the police protection available to victims of domestic violence, and that the police did so because of an intentional animus against women, who make up the vast majority of adult victims of domestic violence. . . . As a subordinate federal court, it is our responsibility to do our best to apply the law as stated in *Iqbal*. My colleagues do so here, and the *Iqbal* standard is clearly decisive for the panel majority. The problem here is that it also our responsibility to do our best to apply other Supreme Court decisions involving pleading standards, including *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993); *Erickson v. Pardus*, 551 U.S. 89 (2007); and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), as well as the Federal Rules of Civil Procedure as adopted by the Court and approved by Congress, and the form pleadings that are part of the Federal Rules of Civil Procedure and that were also approved by the Court and Congress. *Iqbal* is in serious tension with these other decisions, rules, and forms, and the Court's opinion fails to grapple with or resolve that tension. I do not believe it is an exaggeration to say that these decisions, rules, and forms simply conflict with *Iqbal*. As a result of this unresolved tension, since *Iqbal* was decided, the lower federal court decisions seeking to apply the new 'plausibility' standard are wildly inconsistent with each other, and with the conflicting decisions of the Supreme Court. . . .First, *Iqbal's* reasoning and holding conflict with Rule 9(b), which requires that a party alleging fraud or mistake 'state with particularity the circumstances constituting fraud or mistake.' As for other states of mind, however, the rule provides: 'Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.'. . . Second, *Iqbal* conflicts with other recent Supreme Court decisions. *Iqbal* did not overrule or question a number of the Court's prior cases on notice pleading. . . . Third, *Iqbal* conflicts with the form complaints approved by the Supreme Court and Congress as part of the Federal Rules of Civil Procedure. Rule 84 provides that the forms in the appendix 'suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.' *Iqbal* did not purport to overrule or amend Rule 84 or the forms, but it is difficult to reconcile the new 'plausibility' standard with those forms. Many of the approved forms require virtually no explanation of the underlying facts as long as the defendant is informed of the event or transaction that gave rise to the claim, according to the broad notice purpose of the rules. . . . Unless one can plausibly explain away the tension between *Iqbal* and Rule 9(b) and the Rule 84-endorsed form complaints, then *Iqbal* conflicts with the Rules Enabling Act, 28 U.S.C. § 2071 *et*

seq., and the prescribed process for amending the Federal Rules of Civil Procedure. . . . Fourth, *Iqbal's* reliance on the fact/conclusion dichotomy is highly subjective, and returns courts to the long disapproved methods of analysis under the regime of code pleading. . . . *Iqbal's* reliance on the fact/conclusion dichotomy makes the difference indeterminate. Application of the dichotomy is leading to judge-specific and case-specific differences in outcome that confuse everyone involved. . . . Fifth, *Iqbal's* reliance on 'judicial experience and common sense' invites the highly subjective and inconsistent results that have been observed. The *Iqbal* concept of plausibility is 'context-specific.'. . As a practical matter, the concept invites district judges to exercise their individual views of the likely merits of the case at the outset, when the only information available is the complaint. Worse still, an uncritical reading of the Court's 'obvious alternative explanation' reasoning seems to invite judges to weigh competing explanations for alleged conduct and dismiss cases merely because they believe one explanation over another. . . In application, this standard bears a striking resemblance to the most stringent pleading requirement in American civil law, for pleading scienter in securities fraud claims, pursuant to the specific direction of Congress in the Private Securities Litigation Reform Act. See 15 U.S.C. § 78u-4(b)(2) (requiring plaintiff to 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"); accord, *Tellabs, Inc. v. Makor Issues and Rights, Ltd.*, 551 U.S. 308, 323-24 (2007) (explaining that a 'strong inference' must be 'cogent and compelling, thus strong in light of other explanations' for the defendant's actions). Congress has not imposed such a demanding standard for pleading in any other context − including civil rights and employment discrimination cases, which often turn on whether a defendant's explanation for a decision is legitimate or merely a pretext covering for unlawful bias. Rule 9(b) and the Supreme Court decisions in *Swierkiewicz* and *Leatherman* permit plaintiffs to plead intent generally, meaning without the sort of specifics required under the PSLRA. But if the *Iqbal* pleading standard is applied in the district court, plaintiffs who already face the uphill battle of proving secret intent must now contend with the possibility of pre-discovery dismissal whenever the alleged pretext asserted by defendants in their motion to dismiss sounds plausible to the common sense of the particular judge. The potential harm of *Iqbal* in this context is that outcomes will vary based on how different judges view the plausibility of, for example, a police policymaker harboring and acting on improper motives toward women who complain of domestic violence. . . . In the face of all these problems, what are the lower federal courts to do? . . . . The first thing we can do is recognize the uncertainty that litigants, their lawyers, and district courts now face. As a result of that uncertainty, the courts of appeals should insist that in all but the most unusual situations, a party whose pleading is dismissed based on the *Iqbal* plausibility standard should be entitled to an opportunity to amend the pleading after the court has made its decision. . . . We should exercise caution to avoid punishing parties for imperfect predictions as to how the subjective and inconsistent *Iqbal* standard might be applied in their case. . . .But where that approach is not enough to resolve the case, I believe we must take care not to expand *Iqbal* too aggressively beyond its highly unusual context − allegations aimed at the nation's highest-ranking law enforcement officials based on their response to unprecedented terrorist attacks on the United States homeland − to cut off potentially viable claims. *Iqbal* exemplifies the old adage about hard cases. The failure of the Supreme Court to address all of the law that would conflict with broad application of the case should weigh heavily against that broad

application, at least until the Supreme Court provides clearer guidance about how to reconcile *Iqbal* with its prior cases, the Federal Rules of Civil Procedure, and their accompanying forms. Reading the present complaint as a whole, plaintiff McCauley has alleged the particulars of a plausible *Monell* claim. As the majority points out, McCauley has alleged the elements of such a claim using the relevant legal language. While some of these statements are conclusory in nature, they serve to notify defendants and the court of the type of claim being brought. There can be no doubt that the complaint provides sufficient notice of the circumstances that gave rise to the claims. McCauley made factual allegations that Chicago police failed to arrest Martinez despite knowledge of his harassment and violations, ¶ 25, and that this failure resulted from a custom of untimeliness and indifference with regard to the seriousness of domestic violence, ¶ 125(c) and (j). McCauley alleges 'deliberate indifference' generally, see ¶ 126, but elsewhere describes numerous specific failures to act that are factually consistent with such an intent. See, *e.g.*, ¶ 51. It is difficult to imagine what more McCauley might allege on the crucial question of intent without reciting a list of specific states of mind that Chicago police policy-makers might have. We did not require such a recital in *Swanson* and we should not do so here. By extending *Iqbal* to dismiss plaintiff McCauley's equal protection *Monell* claim against the City of Chicago, the majority runs afoul of *Leatherman*, Rule 9(b), and the form complaints approved by the Supreme Court and Congress as part of the Federal Rules of Civil Procedure. Perhaps the Supreme Court majority intended *Iqbal* to work such a revolution in federal civil practice, but if so, the Court failed to grapple with the conflicts and did not express any direct rejection of these other governing sources of law. Under these circumstances, therefore, I would reverse the dismissal of plaintiff's equal protection claim against the City of Chicago and give him an opportunity to pursue discovery. Even if I agreed that the current version of the complaint failed to state a claim, I would remand with instructions to give plaintiff an opportunity to file an amended complaint to try to comply with the new and uncertain standards of *Iqbal*.")

Cosby v. Rodriquez, 711 F.Supp.3d 983, ___ (N.D. Ill. 2024) ("Plaintiff Cosby alleges two primary theories of *Monell* liability against the City of Chicago. First, he alleges that the City (and Superintendent Brown) were 'deliberately indifferent to the widespread unconstitutional practices within CPD that caused Plaintiff's injuries.'. . Second, he argues that Superintendent Brown, as a 'final policymaker' for the city, 'authorized and directed the officers' unlawful conduct at the summer 2020 protests.'. . For the reasons discussed below, the court sustains Plaintiff's claim with respect to the former theory, but not the latter. . . .The Second Amended Complaint thus paints a picture of a widespread practice of specific forms of police abuse of protesters from 2003 onward—including excessive force using batons, other escalatory behavior—which Mr. Cosby alleges played out widely during the 2020 protest, injuring both him and other protesters. Plaintiff Cosby's Second Amended Complaint thus plausibly states that CPD officers customarily engaged in practices similar to those Cosby alleges they inflicted on him at the 2020 protests. The Second Amended Complaint's allegations go well beyond 'mere isolated event[s]' and state the existence of 'general pattern[s] of repeated behavior' that could be construed, in the light most favorable to Plaintiff, as municipal customs. . . Moreover, the fact that numerous internal and external investigations and reports repeatedly pointed out these failures plausibly implies that the City was

'aware of the risk created by the custom[s] or practice[s] and ... fail[ed] to take appropriate steps to protect the plaintiff.'. . Finally, Plaintiff plausibly alleges that these customs—and the City's deliberate indifference in the face of those customs—were a 'moving force' behind his injury. . . It is reasonable to infer from his Second Amended Complaint that the City's repeated failure to hold officers accountable for the use of excessive force—including through a culture of silence—emboldened officers to harm Mr. Cosby; indeed, the Second Amended Complaint specifically alleges that a code of silence results in officers' feeling 'they can abuse and violate the rights of individuals without consequence.'. . And Cosby's own injuries are alleged to result from excessive force and retaliatory animus toward protestors, the unlawful practices he has alleged. . . Nor does the existence of the Consent Decree require dismissal of Plaintiff's *Monell* claim. Emphasizing Plaintiff's allegations concerning that Decree, the City urges that those allegations themselves 'demonstrate that there are express policies in place that prohibit the very conduct he alleges caused his injuries, and that the City has been anything but deliberately indifferent to the alleged constitutional violations.'. . The Consent Decree is a 'binding contract' that 'directly contradict[s]' Plaintiff's claims that abusive police tactics are official policy of the City, Defendants contend. . . The law is clear, however, that *Monell* liability may be predicated not only on official or written policies but also on 'implicit polic[ies] or a gap in expressed policies,' or '"a series of violations [that confirm] the premise of deliberate indifference."'. . . Valuable as it is, the Consent Decree does not defeat a finding that the CPD in fact engaged in other policies or widespread practices in connection with the BLM protests. . . The bulk of the Defendants' argument on this score is that the City's 'ongoing efforts to implement the terms of the Consent Decree demonstrate that it is not deliberately indifferent to Plaintiff's constitutional rights ....'. . . In support, the City asserts that it has 'dedicated tens of millions of dollars, countless hours, and vast resources to work towards implementing the Consent Decree to improve police practices in Chicago.'. . As a preliminary matter, this argument goes beyond the four corners of Plaintiff's complaint; the complaint makes no mention of how much money or time the City has spent combating the alleged code of silence or the use of excessive and retaliatory force at protests. . .The sources the City does cite on this issue do not satisfy the court that the Consent Decree's existence requires dismissal of Plaintiff's *Monell* claim . . . . [D]rawing inferences in Mr. Cosby's favor (as the court must at this stage), the City's failure to change its policies in time for the 2020 protests tells a 'story that holds together' about its deliberate indifference to the means of unconstitutional policing Mr. Cosby alleges he suffered. . . The court makes no findings on these issues. But Cosby has plausibly alleged that the City's deliberate indifference to widespread unlawful practices on the part of its officers resulted in his injuries. These allegations are sufficient to support a claim for *Monell* liability.")

Cosby v. Rodriquez, 711 F.Supp.3d 983, ___ (N.D. Ill. 2024) ("Plaintiff's separate theory of *Monell* liability—that Superintendent Brown, as a final policy maker for the City, directed and authorized unlawful conduct—requires only brief discussion. . . As the City points out, Plaintiff relies mostly on conclusory allegations in support of this theory. . .For example, Plaintiff alleges that Brown 'made all command decisions about the Chicago Police Department's systemic response to protesters during the 2020 uprisings ....'. . . According to Mr. Cosby, that included his encouragement and permission to CPD officers to 'target, attack, and harass' those protesting, and

that he was 'physically present' for one—Mr. Cosby does not specify which—protest during which he did not intervene to stop officers' violent behavior. . . The Second Amended Complaint also alleges that, in the months following the protests, Brown defended officers in various ways. . . Nowhere in these allegations can the court find more than 'bare assertions' concerning Brown's implementing a specific policy directly traceable to Mr. Cosby's harm. . .The court thus agrees with the City that Plaintiff has not plausibly pleaded this latter theory of *Monell* liability.")

Hendrick v. Bryant, No. 20-CV-00249, 2021 WL 4502159, at *1–5 (N.D. Ill. Sept. 30, 2021) ("Hendrick claims that the City has a history of using excessive force, particularly against young African-American men such as him. . . Yet, according to Hendrick, the City does not document when police officers point their weapons at people. . . And the United States Department of Justice ("DOJ") found that, '[the] CPD does not investigate or review these force incidents involving less than lethal force to determine whether its responses to these events were appropriate or lawful, or whether force could have been avoided.'. . Further, the DOJ found that even though police officers are technically required to report when they use force, in practice they do not provide enough detail about their actions to allow for review and investigation. . . As a result, the DOJ concluded, 'there is no meaningful, systemic accountability for officers who use force in violation of the law or CPD policy.'. . Hendrick further alleges that the CPD was required to take certain actions to increase accountability for police use of force by January 1, 2019 according to a consent decree. . . Specifically, the CPD was ordered to develop a training bulletin identifying when police officers 'should and should not point a firearm at a person.'. . It was also required to clarify in policy that police officers must document every time they 'point[ ] a firearm at a person to detain the person' and that police officers can only point firearms at people 'when objectively reasonable under the totality of the circumstances.'. . Further, the City was required to mandate, by July 1, 2019, that CPD officers report every time they point a gun at someone to detain them to the Chicago Office of Emergency Management and Communications. . . However, the City failed to comply with these requirements and did not implement any policy addressing police officers pointing firearms at people. . . . Hendrick has filed a six-count Complaint, but the City's motion to dismiss only concerns Count I, which asserts a claim for excessive force pursuant to 42 U.S.C. § 1983. . . . As pleaded, Count I is intelligible and gives the City fair notice of Hendrick's intention to pursue a *Monell* claim for excessive force. Specifically, the count alleges that the City failed to ensure oversight and accountability when its police officers pointed guns at people. It includes several specific factual allegations in support of that claim. . . Indeed, the City's arguments in its motion to dismiss demonstrate that it has identified and understood the basis of Hendrick's *Monell* claim against it. Requiring Hendrick to replead this claim via a separate count would serve no purpose and is not required by the letter or the spirit of Rule 10(b). . . . Hendrick's allegation that the City has no policy specifically regarding police officers pointing guns at people is a factual contention, not a legal conclusion. If Hendrick merely alleged a conclusion, such an allegation could be disregarded. . . But Hendrick is specific about the alleged problem with the City's gun-pointing policy: it does not have one. . . This allegation is not vague and does not smuggle in any legal conclusions, nor does it merely state an element of a *Monell* claim, such as deliberate indifference by the City. . . . Finally, the City contends that Hendrick's Complaint is insufficient because he

only alleges one instance of unconstitutional conduct and has not alleged 'additional facts probative of a widespread practice or custom.'. . But Hendrick has pointed to such facts through his allegations that the City agreed to, and then failed to, adopt a gun-pointing policy under the consent decree. A single instance of unconstitutional conduct, when combined with allegations indicating a broader practice, can suffice to state a *Monell* claim. . . . Hendrick has pleaded that the 'moving force' of his injury was 'CPD's refusal to train and document when its officers point a weapon at someone.'. . Hendrick's say-so that the lack of training caused his injury is, of course, entitled to no deference. But Hendrick's factual allegations—including the City's awareness of its gun-pointing problem, its failure to comply with court orders regarding new policies and training, and the specific injury suffered by Hendrick—allow the Court, making inferences in Hendrick's favor, to conclude that Hendrick has plausibly alleged the necessary connection. He will, of course, have to support that causal link with proof to avoid summary judgment and, eventually, at trial. But for now, his allegations are sufficient to state a claim.")

Liggins v. City of Chicago, No. 1:20-CV-04085, 2021 WL 2894167, at *7 (N.D. Ill. July 9, 2021) ("The City first argues that Liggins makes only 'formulaic, conclusory statements' about municipal policies. . . The Court strongly disagrees. The allegations in Liggins' Complaint are overwhelmingly factual, and they clearly meet the relevant pleading standard. Liggins alleges, *inter alia*, that on more than 70 specific occasions in the last few decades Chicago police officers have fabricated witness identifications, fabricated witness statements, manipulated witnesses to influence their testimony, and concealed exculpatory evidence, in order to arrest and prosecute suspects such as Liggins. . . These allegations are corroborated by an FBI report containing the personal observations of an Assistant State's Attorney, as described in the Complaint. . . The Complaint cites the 2017 Department of Justice report that described the pervasive lack of training, discipline, and accountability in the Department. . . According to the Complaint, that Department of Justice report found that supervising investigators did not 'diligently review the investigative records to determine whether witnesses have lied in police reports or whether supervisors have blindly approved reports without attempting to determine whether the reports are fabricated.'. . A 2016 Chicago Police Accountability Taskforce report, also cited in the Complaint, made similar findings. These two reports cover the span of time during which Alonzo and Egan are alleged to have fabricated evidence against Liggins. Moreover, the Complaint alleges that '[b]etween 2004 and 2016, the City paid more than $500 million in settlements or judgments in police misconduct discovery, *without even conducting disciplinary investigations* in more than half of the cases.'. . The Complaint also explains that '[b]etween 2011 and 2015, nearly half of complaints filed against Chicago police officers were not even investigated' and 'fewer than 4% of those cases' resulted in discipline. . . According to the Complaint, former Chicago Mayor Rahm Emanuel, former Superintendent of the Chicago Police Charlie Beck, and the president of the Chicago police officer's union have all acknowledged that there is a 'code of silence' that protects police officers from discipline. . .Liggins also cites a cotemporaneous case in which it was found that there was a pattern or practice of 'failing to adequately discipline officers' and of a 'code of silence' about officer misconduct. . . These factual allegations support the Plaintiff's assertion that '[a]s a matter of both policy and practice,

municipal policymakers and department supervisors condoned and facilitate [*sic*] a code of silence within the Chicago Police Department,' had a 'practice of not tracking and identifying police officers who are repeatedly accused of the same kinds of serious misconduct, failing to investigate cases in which the police are implicated in a wrongful charge or conviction, [and] failing to discipline officers accused of serious misconduct' which allowed and emboldened officers such as Alonzo and Egan to violate the constitutional rights of civilians like Liggins. . . These . . . specific factual allegations covering the approximate time of the alleged constitutional violations are more than the pleading standard requires. It is difficult to imagine how the Plaintiff could be any more specific without the benefit of discovery.")

Page v. City of Chicago, No. 19-CV-07431, 2021 WL 365610, at *2–3 (N.D. Ill. Feb. 3, 2021) ("First, Page alleges that the City of Chicago maintains widespread practices of failing to discipline, supervise, and control its police officers. While the Second Amended Complaint contains myriad allegations pertaining to the City of Chicago's alleged practices, these allegations are insufficient to support such findings. For example, Page alleges that prior to his arrest the CPD 'facilitated the type of misconduct at issue by failing to adequately punish and discipline prior instances of similar misconduct[.]'. . He also alleges that CPD officers 'abuse citizens in a manner similar to that alleged herein on a frequent basis, yet the Chicago Police Department makes findings of wrongdoing in a disproportionately small number of cases.'. . These allegations are general and unsupported by the facts. Similarly, Page alleges that four of the Defendant Officers 'had dozens of citizens' complaints filed against them without the City of Chicago implementing any significant discipline against them.'. . As stated earlier, these allegations—without more information connecting the complaints to the alleged constitutional violation at issue here—are insufficient to support Page's *Monell* claim. . . To further support, Page claims that '[a]s a matter of express policy, the City of Chicago refuses to take into consideration patterns of [unsustained] allegations of civil rights violations when evaluating the merits of a complaint.'. . This claim is simply too vague and unclear to support a plausible inference that the CPD maintains any widespread practice that caused Page's injury. Page also alleges that the CPD maintained a widespread practice referred to as the 'code of silence' under which officers do not report other officers' misconduct. . . According to Page, the City of Chicago was 'aware of, and condone[d] and facilitate[d]' this practice through their inaction. . . To support his allegation, Page alleges that Chicago Mayor Rahm Emanuel admitted in a December 2015 television interview that a 'code of silence exists among Chicago police officers[.]" (*Id.* at ¶ 59-60). The Court notes that Mayor Emanuel's statement was made in the context of an excessive force case involving a police shooting. This is distinguishable from the facts alleged here. Page further alleges that the "code of silence' is the moving force behind his constitutional injuries because Defendant Officers' 'decision to violate plaintiff's civil rights was proximately caused by a belief that they were impervious to consequences due to the City's willingness to tolerate a code of silence and failure to investigate.'. . While the Mayor's address sufficiently supports the allegation that the CPD maintained a 'code of silence,' Page has failed to adequately allege facts showing the requisite causal connection to allow the Court to plausibly infer that the 'code of silence' was the moving force behind his injury. . . Page also alleges that his constitutional deprivation arises out of the

CPD's widespread practice of failing to train its officers. Failure to train 'may serve as the basis for § 1983 liability only where the failure to train … amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact.'. . A prerequisite to deliberate indifference is that 'the defendant must have actual or constructive notice of a problem.'. . Actual or constructive notice can be shown by a 'pattern of similar constitutional violations by untrained employees.'. . Here, Page has failed to plead a claim for failure to train. Specifically, he has not alleged any other similar constitutional violations by Chicago police officers other than his own, he has not identified the type of training the City failed to provide, nor does he allege sufficient facts linking a failure to train to his injuries. In support of his claim, Page merely asserts that 'CPD does not provide officers or supervisors with adequate training and does not encourage or facilitate adequate supervision of officers in the field.'. . He broadly explains that '[t]hese shortcomings in training and supervision result in officers who are unprepared to police lawfully and effectively; supervisors who do not mentor or support constitutional policing by officers; and a systemic inability to proactively identify areas for improvement, including Department-wide training needs and interventions for officers engaging in misconduct.'. . Outside of these generic statements, there are no further facts substantiating these allegations. Because no other facts link these allegations to particular instances of police misconduct, there is not enough for this Court to plausibly infer that the CPD is liable under this theory. Page attempts to overcome the factual deficiencies in the Second Amended Complaint by citing to the Department of Justice's January 2017 report on the Chicago Police Department ("DOJ Report"), which mainly addresses the CPD's deficiencies as it relates to the use of excessive force. Page's argument is unavailing because he has not brought an excessive force claim and he has failed to show how any of the deficiencies identified in the DOJ Report relate to his claim that Defendant Officers arrested him without probable. . . Therefore, the Court dismisses Page's *Monell* claim without prejudice.")

Mack v. City of Chicago, No. 19 C 4001, 2020 WL 7027649, at *5–6 (N.D. Ill. Nov. 30, 2020) ("Some case law suggests that general allegations of a 'code of silence' and failure 'to train, supervise, discipline, and control its police officers' are insufficient to state a *Monell* claim, and that a plaintiff seeking to assert such a claim must identify other instances of misconduct similar to what he has experienced in order to show 'that there is a true municipal policy at issue, not a random event.'. . The Court of Appeals considered this issue in *White v. City of Chicago*, 829 F.3d 837, 844 (7th Cir. 2016), where the plaintiff alleged little more than that he had been arrested on an inadequately-supported warrant 'in accordance with a widespread practice of the police department of the City of Chicago.' The district court's dismissal of the *Monell* claim was error, the court held: 'White was not required to identify every other or even one other individual' who had been the victim of the alleged constitutional violation. . . Since *White*, many courts have declined to grant motions to dismiss that are premised on the argument that the complaint does not contain allegations beyond those relating to the plaintiff. . . At summary judgment or trial, Plaintiff will have to offer evidence of widespread unlawful practices and its failure to train officers, and demonstrate how those practices and failures caused the alleged wrongdoing in this case. He need not do so at the pleading stage. The City's motion to dismiss Count VI is denied.")

Watson v. City of Chicago, No. 15 C 11559, 2017 WL 11565719, at *3–4 (N.D. Ill. Aug. 23, 2017) ("Watson relies primarily on two sets of facts to support his contention that the City had a custom of condoning or failing to discipline police brutality. First, he argues that the City's own April 13, 2016 Police Accountability Task Force Report concluded that the City failed to train the police, perpetuated a code of silence, and encouraged the use of excessive force. . . Because the facts supporting that conclusion are already contained in a document created by the City itself, Watson contends that he does not need to repeat those facts in the Amended Complaint. . . It is true that nothing prevents Watson from mining the Task Force Report for factual support, and indeed Watson (or any other plaintiff, for that matter) can rely on facts in the Report to satisfy Rule 11's requirement that every factual assertion has evidentiary support, or likely will have evidentiary support after reasonable discovery. . . But it is one thing to dig up specific facts set forth in the Task Force Report and assert them as allegations, and quite another to simply rely on the bare conclusions in the Task Force Report. Put another way, Watson does not actually identify any *specific* facts in the Report that illustrate the existence of a police code of silence or a widespread custom of turning a blind eye to policy brutality, nor does Watson allege facts that establish a causal link between the City's practices and his own injury. In the Amended Complaint, Watson simply states that the Task Force Report '*conclu[des]* that the Defendant City of Chicago and its law enforcement parastatals have for decades systemically failed in ways that cause extrajudicial injury at the hands of the police ....'. . . Conclusory allegations alone cannot sustain a *Monell* claim. . . Litigation via 'executive summary' will not cut it. Instead, only when specific *factual* allegations are asserted can the Court evaluate whether a *Monell* claim has been adequately stated. The Task Force Report might very well contain specific factual material that would support a *Monell* claim. But in an adversarial system of litigation, it is not for the Court to sift through a 183-page report, looking for facts to support Watson's attempt to state a claim. . . Aside from the Task Force Report, the other set of facts that Watson relies on emanates from a statement made by Chicago Mayor Rahm Emanuel on December 9, 2015. . . Specifically, Watson quotes the mayor as saying the following:

They [The Police Accountability Task Force] have to examine decades of past practices that have allowed abusive police officers with records of complaints to escape accountability....This problem is sometimes referred to as the Thin Blue Line. Other times it is referred to as the code of silence. It is the tendency to ignore, deny or in some cases cover-up the bad actions of a colleague or colleagues. No officers should be allowed to behave as if they are above the law just because they are responsible for upholding the law. Permitting and protecting even the smallest acts of abuse by a tiny fraction of our officers leads to a culture where extreme acts of abuse are more likely.

. . . . Unlike the plaintiff in *Spearman*, here Watson has not supplied other factual allegations to bolster his *Monell* claim (as discussed earlier, the Task Force Report's *conclusions* do not count). Nor does Watson allege that Mayor Emanuel would have *personal* knowledge that policymakers knew, in January 2015, of a widespread custom that caused the constitutional violations, or that the policymakers who did know of a custom condoned the custom or were deliberately indifferent that violations would occur. The Amended Complaint, even when read in Watson's favor, lacks sufficient factual specificity. ***4** One final point is worth noting: the Court is of course *not* applying a heightened pleading standard to *Monell* claims. Time and again the Supreme Court has

emphasized that Section 1983 claims are not subject to a Rule 9(b)-type standard. But *Iqbal* and *Twombly* do instruct that 'determining whether a complaint states a plausible claim for relief will ... be a context-specific task ....'. . . A claim involving a more complex substantive standard—both on knowledge (or deliberate indifference) and on causation—often will require more detail, both to give the opposing party notice of what the case is about and to adequately plead the claim. . . In this case, Watson not only attempts to state a claim against a municipality for its failure to train and control the police, but also alleges that the City perpetuated a code of silence and encouraged the use of excessive force. To succeed, ultimately he must prove that the City exhibited deliberate indifference to the systemic problems—and that the constitutional deprivation he suffered was caused by that deliberate indifference instead of being an isolated violation. . . Yet Watson provides nothing more than a quote from the Mayor and a restatement of the Executive Summary from the Task Force Report as factual support for his *Monell* claim. *Iqbal* requires *factual* allegations; legal conclusions and conclusory allegations are not entitled to the presumption of truth. . . So Watson's allegations are insufficient to state a claim of municipal liability.")

Barnett v. City of Chicago, No. 18 C 7946, 2020 WL 4336063, at *4 (N.D. Ill. July 28, 2020) ("The City Defendants argue that Barnett may not rely only on his personal experience as the basis for his *Monell* claim. But the Seventh Circuit has indicated that at the motion to dismiss stage, a plaintiff may do just this instead of having to plead examples of other individuals' experiences. [collecting cases]")

Hill v. Cook County, No. 18-CV-08228, 2020 WL 2836773, at *15 (N.D. Ill. May 31, 2020) ("Hill offers more than mere boilerplate. Even if the additional cases that Hill cites are not on all-fours with his claims here, '[p]ost-*White* courts analyzing *Monell* claims...have "scotched motions to dismiss" premised on arguments that the complaint does not contain allegations beyond those relating to the plaintiff." *Williams v. City of Chicago*, 2017 WL 3169065, at *9 (N.D. Ill. 2017) (collecting cases) (citing *White v. City of Chicago*, 829 F.3d 837, 844 (7th Cir. 2016)). Courts in this district have generally stuck with this approach when addressing motions to dismiss municipal *Monell* claims. *See, e.g., Hill v. City of Chicago*, 2020 WL 509031, at *4 (N.D. Ill. 2020); *Pursely v. City of Rockford*, 2019 WL 4918139, at *6–7 (N.D. Ill. 2019); *Hallom v. City of Chicago*, 2019 WL 1762912, at *4 (N.D. Ill. 2019); *Williams v. City of Chicago*, 315 F. Supp. 3d 1060, 1078–79 (N.D. Ill. 2018). Discovery may or may not yield proof that there is a widespread practice of violating constitutional rights. But in the meantime, Hill has alleged enough to support a plausible *Monell* claim against both municipal defendants.")

Jones v. Hunt, No. 19 C 4118, 2020 WL 814912, at *2–3 (N.D. Ill. Feb. 19, 2020) ("The City argues that Jones still fails to plead enough facts to proceed on a failure to train claim against it. To determine whether Jones has sufficiently alleged a widespread practice courts sometimes consider allegations of other similar instances of misconduct. . . But this is not a requirement, and Jones need not 'identify every other or even one other individual' who was arrested because of the same misconduct at the pleadings stage. . . Alternatively, courts have looked to other factual

allegations to buttress a plaintiff's claim. . . In *White*, for example, the plaintiff alleged that the defendant officer sought an arrest warrant, knowing he lacked probable cause, based upon conclusory allegations that the plaintiff had committed a criminal offense. . . The plaintiff also attached a copy of the 'standard complaint form' that did 'not require specific factual support for an application for an arrest warrant.'. . The Seventh Circuit found that plaintiff's allegations of a widespread practice of requesting warrants based on conclusory allegations, '[t]ogether with the individual claim against [the officer] and the standard printed form,' were enough to state a claim. . . Here, Jones offers no additional factual allegations beyond his conclusory assertions that the alleged violations 'can be proven to have occurred in thousands of instances.'. . . Jones levies broad accusations of misconduct that are not 'tailored to identify particular police training procedures or policies.'. . Accordingly, he has not pleaded enough facts to nudge his claim 'across the line from conceivable to plausible,'. . . or to 'put the [City] on proper notice of the alleged wrongdoing[.]". . Because Jones may be able to cure the complaint's shortcomings, the Court dismisses the *Monell* claim without prejudice.")

Hill v. City of Chicago, No. 19 C 6080, 2020 WL 509031, at *4 (N.D. Ill. Jan. 31, 2020) ("Plaintiffs appear to rely on a widespread practice theory of liability. To be successful on such a claim, 'the plaintiff must demonstrate that there is a policy at issue rather than a random event. This may take the form of an implicit policy or gap in expressed policies, or "a series of violations to lay the premise of deliberate indifference."'. . Defendants contend that Plaintiffs fail to allege the policy at issue, or that any such policy has a causal link to their claims. In so arguing, Defendants set the bar too high for a motion to dismiss. True, Plaintiffs allege several practices and customs unrelated to the claims in this case. But the complaint also alleges that the Chicago Police Department had a widespread practice of suppressing and manufacturing evidence and contriving false narratives against innocent persons that they coerced witnesses into adopting. . . The complaint then supports those allegations by stating that at least 70 cases have come to light since 1986 in which Chicago Police Department officers have fabricated evidence or suppressed exculpatory evidence that led to convictions, . . . describing a Federal Bureau of Investigation report that discusses Chicago police detectives feeding information to witnesses and working with them to rehearse false narratives, . . . and describing the department's pattern of suppressing exculpatory information which they support by citing to several other cases,[.]. . Moreover, the complaint alleges that the Defendants acted in accordance with these widespread practices in securing the wrongful conviction of Plaintiffs. This is enough to make the Plaintiffs' *Monell* claim plausible. Defendants' motion to dismiss Count V is denied.")

Harper v. Flores, No. 18 CV 6822, 2019 WL 6033597, at *3 (N.D. Ill. Nov. 14, 2019) ("These allegations raise an inference that Crest Hill has a practice of concealing and condoning officer misconduct. And that alleged practice plausibly insulated Flores from professional discipline and criminal prosecution, allowing him to kill Samantha with impunity. The Harers 'present a story' of indifference to or approval of officer misconduct 'that holds together,' even if that story is not the truth about what 'really' goes on in Crest Hill. . . That is enough for the Harers' *Monell* claim to survive Crest Hill's motion to dismiss. . . . And although the court agrees that Flores's drinking

problem, as alleged, may have had nothing to do his shooting of Samantha, Crest Hill's alleged failure to act on that drinking problem is a 'bad act' supporting the inference that Crest Hill generally condones police misconduct.")

Bishop v. White, No. 16 C 6040, 2019 WL 5550576, at *5 (N.D. Ill. Oct. 28, 2019) ("Plaintiff alleges that the City of Chicago has an 'informal policy of encouraging its police officers to use unnecessary force in effecting arrests of male black citizens and to make false arrests of male black citizens,' it 'fails to train its police officers' not to make such improper arrests, and plaintiff's arrest is 'merely one of many instances of such misconduct.'. . To state a claim of municipal liability based on an unconstitutional custom or policy under *Monell*, . . . plaintiff must ' "plead[ ] factual content that allows the court to draw the reasonable inference" that the City maintained a policy, custom, or practice' that caused a deprivation of his constitutional rights. . . 'An official policy or custom may be established by means of [1] an express policy, [2] a widespread practice which, although unwritten, is so entrenched and well-known as to carry the force of policy, or [3] through the actions of an individual who possesses the authority to make final policy decisions on behalf of the municipality or corporation.'. . Plaintiff identifies no express policy or final policymaker, so his claim of an 'informal policy' apparently falls within the category for practices so widespread and deeply entrenched that, though unwritten, they carry the force of policy. But plaintiff's purely conclusory allegation that his arrest is 'merely one of many instances of such misconduct' is insufficient. Plaintiff must provide 'some specific facts' to support his claim, . . . and 'the Seventh Circuit has made clear that isolated incidents are insufficient to establish a practice or custom under *Monell*.'. . Plaintiff does not make any specific, non-conclusory factual allegations to support an inference of a widespread practice other than to allege that he, himself, suffered a constitutional deprivation. That is the sort of conclusory allegation of an isolated incident that falls short of the *Twombly/Iqbal* standard, . . . because, rather than 'plausibly suggesting...an entitlement to relief,' it is 'merely consistent with' it[.]").

Mendez v. City of Chicago, No. 1:18 C 6313, 2019 WL 4934698, at *3–4 (N.D. Ill. Oct. 7, 2019) ("Failure to train or turning a blind eye to repeated excessive force violations could both give rise to *Monell* liability. . . . Plaintiffs alleging a pattern or practice of constitutional violations may incorporate admissible evidence from official investigations, although they are not required to do so at the pleading stage. . . Plaintiff alleges facts sufficient to survive a motion to dismiss on his *Monell* claim. Plaintiff alleges that the City's practice of foot pursuits raises the risk of excessive force. . . Plaintiff alleges he was shot during precisely such a foot pursuit, in similar circumstances to those explicated in the portion of the Department of Justice report cited in his complaint. . . Plaintiff alternatively alleges systemic training failures giving rise to Chicago Police's repeated unnecessary use of force, particularly against fleeing suspects. . . Finally, Plaintiff alleges the CPD fails to adequately train or enforce rules related to use of force, undermining deterrence value of those policies in a systematic way. . . Plaintiff thus directly alleges a claim of the type the Supreme Court approved in *Harris* and the Seventh Circuit approved of in *Glisson*, along with allegations supporting his claim in the form of several reports on CPD's practices. . . These allegations state a claim for a *Monell* violation as to unreasonable and excessive

use of force, because taken as true they suggest the City's practices or customs proximately caused the use of excessive force against the Plaintiff. . . Plaintiff alleges no facts specific to his claim that the City has a pattern of unlawful searches. . . Plaintiff's complaint primarily focuses on documenting the CPD's failure to train officers about use of force. . . Although a facially plausible complaint need not give 'detailed factual allegations,' it must allege facts sufficient 'to raise a right to relief above the speculative level.'. . Mr. Mendez does not allege facts suggesting a pattern or custom of unlawful stops, despite alleging such a pattern exists when seeking relief. . . Since he fails to allege specific facts, we dismiss his *Monell* claim as to a pattern of unlawful searches.")

Hallom v. City of Chicago, No. 1:18 C 4856, 2019 WL 1762912, at *4 (N.D. Ill. Apr. 22, 2019) ("Hallom has sufficiently pleaded a *Monell* claim against the City by alleging that it has a widespread practice or custom of covering up police misconduct and that this practice was the cause of his injuries. Hallom alleges that the City 'has known and has encouraged a "code of silence" among its police officers.'. . Citing a report from the Department of Justice, Hallom alleges that the City's code of silence is furthered by CPD police officers lying about police misconduct, or intentionally omitting material facts about police misconduct, to hide such misconduct. . . Hallom alleges, again citing the report from the Department of Justice, that high-level CPD officials, current CPD officers, the City's Mayor, and the president of the CPD officers' union all know of this practice. . . In addition to alleging his own injury—his wrongful pretrial detention—Hallom's allegations give rise to the reasonable inference that others have suffered similar injuries because of the City's alleged custom of covering up police misconduct with intentional lies or omissions concerning material facts. . . Ultimately, Hallom need not provide 'evidentiary support' at this stage of his lawsuit. . . Rather, all Hallom needs to do is allege facts sufficient for us to 'draw the reasonable inference that the defendant is liable for the misconduct alleged.'. . Hallom has plausibly alleged his Section 1983 claim against the City, and we therefore deny defendants' motion to dismiss that claim.")

Austin v. City of Chicago, No. 18 C 7268, 2019 WL 4750279, at *3-4 (N.D. Ill. Sept. 30, 2019) ("Austin contends that the Chicago Police Department's code of silence fostered an environment in which officers could act with impunity, which in turn led the officers to violate his civil rights. . . In so arguing, it appears that Austin is alleging an implicit policy exists, which is properly analyzed under a widespread practice – not an express policy – theory of *Monell* liability. . . . Austin argues that the police department's code of silence and lack of an effective early warning system to mitigate unlawful police conduct led to the officers' violation of his civil rights. Both allegations are insufficient to state a *Monell* claim. There are two main problems with Austin's allegations against the City of Chicago. First, Austin does not allege any facts to explain how these policies caused or related to his own experience. Rather, Austin merely recites the elements of a *Monell* claim in conclusory fashion. That is not enough to survive a motion to dismiss . . . Second, while it is not impossible for a plaintiff to demonstrate the existence of an unofficial policy or custom based on his own experience, it is 'necessarily more difficult...because "what is needed is evidence that there is a true municipal policy at issue, not a random event."'. . There is nothing in the complaint that allows the Court to infer there was a widespread practice of false arrests or

fabrication of evidence at the Chicago Police Department. The closest Austin comes to alleging his experience was not a random event is listing complaints filed against two of the defendant officers in his response to the motion to dismiss. But Austin provides no information about how (if at all) those complaints relate to the officers' conduct towards him. In short, Austin's allegations against the City of Chicago consist only of boilerplate legal conclusions. Thus, to the extent Austin asserts a *Monell* claim against the City of Chicago, it is dismissed without prejudice.")

Stidimire v. Watson, No. 17-CV-1183-SMY-SCW, 2018 WL 4680666, at *4 (S.D. Ill. Sept. 28, 2018) ("Plaintiff asserts that Watson, in his official capacity as the St. Clair County Sheriff, was deliberately indifferent to the serious risk that Stidimire would commit suicide, because the jail had no suicide prevention policy, provided inadequate training and supervision for employees regarding detainee suicide prevention, and had a practice of routinely denying detainees with mental health problems access to mental health professionals and suicide-proof cells. Plaintiff also alleges that Watson was aware of the risk of suicide in the jail as there had been two suicides and fourteen suicide attempts in the jail during the seventeen months preceding Stidimire's death. A *Monell* claim subjects a local governing body, such as the County, to monetary damages under 42 U.S.C. § 1983 'if the unconstitutional act complained of is caused by (1) an official policy adopted and promulgated by its officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority.'. . Here, Plaintiff alleges that the policies and widespread informal practices of the St. Clair County Sheriff's Department were the moving force behind the failure to protect Stidimire from the known risk of suicide in the jail. Heightened pleading standards do not apply to *Monell* claims. . . Therefore, drawing all inferences in Plaintiff's favor as the Court must do at this stage, the Court finds these allegations sufficient to put the County on notice of the claims against it. Defendants' motion to dismiss Count II is denied.")

Taylor v. City of Chicago, No. 17-CV-03642, 2018 WL 4075402, at *6-7 (N.D. Ill. Aug. 27, 2018) ("Taylor has sufficiently alleged a constitutional injury. Moreover, he has numerous specific factual allegations showing that the City authorized and had a custom approving of this unconstitutional conduct. Specifically, he alleges that the City knew that O'Brien frequently fabricated evidence. Moreover, the City authorized and maintained a code of silence amongst its police department that discouraged police officers from blowing the whistle on such misconduct. These allegations are supported by a report from the Department of Justice, . . . a factual finding from a federal jury, . . . a public acknowledgment from the Mayor, . . . and a finding made by the City's Police Accountability Task Force[.]. . Courts in this District have found similar allegations arising from the Chicago Police Department's code of silence sufficient to state a *Monell* claim against the City. *See, e.g.*, *Powell*, 2018 WL 1211576, at *9; *Bolden*, 2017 WL 8186995, at *5–6. This Court follows suit here. Thus, Defendants' motion to dismiss Taylor's *Monell* claim is denied.")

Williams v. City of Chicago, No. 17 C 5186, 2018 WL 2561014, at *10 (N.D. Ill. June 1, 2018) ("[T]he City argues that Williams's *Monell* claim is deficient because it 'mainly references his own alleged incident.'. . But even this argument acknowledges that Williams has included allegations of other instances with regard to the street files. . . Not only that, a plaintiff raising a *Monell* claim may rely solely on his own experience, rather than being required to plead examples of other individuals' experiences. [citing *White v. City of Chicago*] In determining whether a plaintiff has sufficiently pled a widespread practice in a *Monell* claim, the Court looks to the instances of misconduct alleged, the circumstances surrounding the alleged constitutional injury, and additional facts probative of a widespread practice or custom. . . Looking at all of the circumstances here, Williams has alleged that no less than three GPRs were destroyed or lost and that multiple reports were falsified by the Officers (or numerous reports selectively omitted exculpatory information gained in witness interviews). Based on these allegations, Williams has sufficiently pled that the City has a policy or custom that violates the Constitution. . . Moreover, the Officers remain potentially liable on the underlying claims, so the Court denies the City's motion to dismiss the *Monell* claim against it at this stage.")

Leibowitz on behalf of Estate of Jacoby v. DuPage County, No. 12 C 6539, 2018 WL 1184731, at *4 (N.D. Ill. Mar. 7, 2018) ("Jacoby's evidence, viewed in a light most favorable to him, does not permit an inference that any of his *Monell* theories could succeed, primarily because he presents no evidence that it is highly, or even somewhat, predictable that an officer who lacks specific tools to handle an individual who presents in an agitated state and refuses to cooperate in a medical assessment is likely to violate his constitutional rights such that failure to train amounts to deliberate indifference. Although it may have been obvious to the officers that Jacoby was severely obese, plaintiff has no evidence specific to obesity that would distinguish such a person from any other detainee in the same situation. For example, he proffers no expert testimony about law enforcement practices that suggest that acceptable practices in correctional or detention settings should include particular protocols for obese or agitated detainees, nor does he identify a course of training that might have made a difference here. In short, the issue in this case is straightforward. It is whether the individual defendants used excessive force against Jacoby on this single occasion in violation of the Fourth Amendment. For these reasons, the Sheriff is entitled to summary judgment on the failure-to-train claim.")

Powell v. City of Chicago, No. 17-CV-5156, 2018 WL 1211576, at *9 (N.D. Ill. Mar. 8, 2018) ("According to Plaintiff, the 'code of silence' permeated throughout CPD, enabling 'the individual officer defendants to engage in egregious misconduct for many years.'. . Plaintiff specifically alleges that the 'code of silence' was not just an unspoken rule, but part of the customary course of instruction at the Chicago Police Academy. . . Based upon those allegations, Plaintiff sufficiently pleads that the City has a policy or custom that violates the Constitution. . . Here, the individual officers remain potentially liable on the underlying claims, so this Court denies Defendants' motion to dismiss the *Monell* claim against the City at this stage.")

Shields v. City of Chicago, No. 17 C 6689, 2018 WL 1138553, at *3-4 (N.D. Ill. Mar. 2, 2018) ("Plaintiff states that it is common knowledge among the CPD that misconduct complaints reviewed by the IPRA do not result in immediate discipline. . . Plaintiff further asserts that when he was detained on June 6, 2016, Defendant Officers knew the City had a policy or practice that did not hold officers accountable for their use of excessive force. . . Also, Plaintiff states that Defendant Officers Josephs and Wiberg knew from their past experience with IPRA complaints that it was highly unlikely that the IPRA would recommend discipline for the alleged misconduct. . . Further adding to this custom or practice, the IPRA did not request statements from the Defendant Officers (as barred by their CBAs). . . Plaintiff also highlights the United States Justice Department's ("DOJ") January 2017 Report concluding that the CPD has engaged in a custom or practice of unreasonable force, due in part, to deficiencies in training, supervision, and accountability. . . Further, Plaintiff points to the existence of a 'code of silence' where Chicago Police Officers conceal police misconduct such as excessive force, including that a Police Accountability Task Force Report found that the CBAs between the police unions and the City have essentially turned the code of silence into an official policy. . . According to Plaintiff, the above widespread custom or practice was deliberately indifferent to his rights secured by the United States Constitution and was the moving force behind his constitutional injuries. . . . In the present motion, the City argues that Plaintiff has failed to adequately allege his *Monell* claim because he only mentions a single incident, namely, the alleged excessive force surrounding his arrest and detention on June 6, 2016. In response, Plaintiff asserts that he can allege a failure to train claim based on his own experience without alleging other, similar violations. Indeed, the Supreme Court has left open the possibility that in a narrow range of failure to train cases, a plaintiff need not prove a pattern of similar violations to establish deliberate indifference. . . . Outside of this exception, '*Monell* claims based on allegations of an unconstitutional municipal practice or custom—as distinct from an official policy—normally require evidence that the identified practice or custom caused multiple injuries.'. . That being said, the Supreme Court's discussions in *Connick*, *Brown*, *Canton*, and the Seventh Circuit's decision in *Chatham* concern proving a failure to train *Monell* claim, not pleading one. . . In *White*, the Seventh Circuit recognized the difference in the standards for pleading a *Monell* claim based on a widespread practice or custom and proving one. In doing so, the Seventh Circuit clarified that *Monell* claims are not subject to a heightened pleading standard in the context of allegations that the CPD has a custom or practice where police officers submit arrest warrant applications without enough information to establish probable cause for arrest. . . In his complaint, the plaintiff in *White* alleged his own experience in which the officers submitted an inadequate application for his arrest warrant and also included the standard CPD form used for arrest warrants, which on its face did not require specific factual support. . . Under these circumstances, the Seventh Circuit concluded that the plaintiff had sufficiently alleged a *Monell* custom or practice claim because he alleged more than his own constitutional injury based on the attached form. . . Here, Plaintiff has sufficiently alleged his *Monell* claim against the City by alleging factual details concerning the CPD's alleged widespread practice or custom of covering-up police officers' unconstitutional use of excessive force and that this practice was the moving force behind his constitutional injuries. In particular, not only has Plaintiff alleged his own Fourth Amendment excessive force injury, but he has also

alleged that the Police Accountability Task Force Report and January 2017 DOJ Report highlight the deficiencies in relation to the CPD's use of excessive force that are sufficiently similar to Plaintiff's excessive force allegations – raising a reasonable inference that he is not alone in suffering constitutional injuries resulting from this alleged practice or custom. . . Moreover, despite the City's argument to the contrary, Plaintiff's allegations – read as a whole – include more than mere legal conclusions and boilerplate language. . . In particular, Plaintiff gives context to his *Monell* claim by explaining that Chicago Police Officers' CBAs prohibit the IPRA from properly investigating complaints of excessive force and that by delegating responsibility to the IPRA to investigate and recommend discipline of Chicago Police Officers, the City enables the 'code of silence' of covering-up police misconduct involving the use of excessive force. In addition, the City's arguments that Plaintiff's allegations do not 'establish' the existence of a widespread policy are misplaced because at this stage of the proceedings, the Court must determine whether Plaintiff has stated a plausible claim for relief, not that he has 'established' or 'proven' his claims. . . For these reasons, the Court denies the City's motion to dismiss Plaintiff's *Monell* claim as alleged in Count V of the Amended Complaint.")

Santos v. Curran, No. 17 C 2761, 2018 WL 888758, at *5 (N.D. Ill. Feb. 14, 2018) ("Curran complains that Santos uses only boilerplate language and refers only to a single problem he personally experienced, which cannot give rise to a claim for a widespread practice. But recently, the Seventh Circuit has reminded courts not to apply a 'heightened pleading standard' to *Monell* claims. *White v. City of Chicago*, 829 F.3d 837, 844 (7th Cir. 2016) (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L.Ed. 2d 517 (1993)). A plaintiff may rely solely on his own experience to state a *Monell* claim, rather than pleading examples of other individual's experiences. *See id.* at 844 (noting that plaintiff "was not required to identify every other or even one other individual who had been arrested pursuant to a warrant obtained through the complained-of process"); *Williams v. City of Chicago*, No. 16-cv-8271, 2017 WL 3169065, at *8–9 (N.D. Ill. July 26, 2017) ("Post-*White* courts analyzing *Monell* claims ... have 'scotched motions to dismiss' premised on arguments that the complaint does not contain allegations beyond those relating to the plaintiff." (collecting cases)). Therefore, Santos' allegation that he was unconstitutionally detained pursuant to a policy or practice of indefinitely detaining individuals pursuant to ICE immigration detainers, which the Sheriff enforced, suffices at this stage to state a *Monell* claim against Curran in his official capacity. *See Barwicks v. Dart*, No. 14-cv-8791, 2016 WL 3418570, at *4 (N.D. Ill. June 22, 2016) (at summary judgment, single incident cannot establish *Monell* claim, but at the motion to dismiss stage, a plaintiff "need only *allege* a pattern or practice, not put forth the full panoply of evidence from which a reasonable factfinder could conclude such a pattern exists"). Additionally, Santos has pleaded that Curran developed and implemented the detention policies and practices at the Lake County Jail, which would include the alleged unconstitutional policy of detaining individuals indefinitely pursuant to an ICE detainer. Because 'Illinois sheriffs have final policymaking authority over jail operations,' *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973, 976 (7th Cir. 2000), Santos has also sufficiently pleaded a claim pursuant to the third theory of *Monell*

liability[.] . . The Court therefore allows Santos' claim against Curran in his official capacity to proceed.")

Arrington v. City of Chicago, No. 17 C 5345, 2018 WL 620036, at *5 (N.D. Ill. Jan. 30, 2018) ("The City also argues that Plaintiff's claim of investigatory procedures that protect officers from excessive force claims is insufficient because it is based on 'broad conclusory allegations about the investigative practices of the Chicago Police Department detectives and a former IPRA investigator.' But a "conclusory" allegation is one that reaches a legal conclusion. As detailed above, Plaintiff does not merely allege that the City's investigatory procedures encourage excessive force. That allegation alone is conclusory. Plaintiff, however, goes on to make several factual allegations about specific customs and practices the City employs to investigate allegations of excessive force, and how those customs and practices permit police officers to protect themselves from discipline or punishment. . . Contrary to the City's attempt to dismiss these allegations as 'conclusory,' they are allegations of fact, which is what is required under *Twombly* to make a claim plausible. Of course, the City may contend that these allegations are false. But that is not the question on a motion pursuant to Rule 12(b)(6). The City also attacks Plaintiff's *Monell* claim by separately arguing that 'Plaintiff does not sufficiently allege a widespread practice of false reporting,'. .; that 'Plaintiff failed to set forth a widespread practice of failure to adequately document claims,'. . .; and that 'Plaintiff failed to allege a widespread practice of failure to discipline officers when they commit perjury and false reports[.]'. . This is another way of arguing that Plaintiff's allegations are conclusory. But as discussed, Plaintiff provides additional factual details about how the City conducts excessive force investigations. It is certainly plausible that the alleged opportunity for officers to be privy to the facts discovered by investigators would result in widespread false reporting and inadequate documentation. Furthermore, a failure to discipline is inherent in these allegations. Lastly, the City argues that even if the police department has a custom of condoning excessive force and protecting officers accused of excessive force, it 'strains plausibility' to allege that this policy was the moving force behind the crash at issue here. . . The City contends that Officer Ewing would not 'choose' to 'ram' his vehicle into another vehicle at high speed, because it is 'an act totally against self-preservation.'. . But it is not implausible for a police officer to engage in a high speed chase. Indeed, the Chicago police department has issued a general order to its officers regarding when it is permissible to engage in a high speed chase. . . The Court also does not find it implausible that in certain circumstances, an officer might use his vehicle to impede a fleeing suspect's vehicle, and such an action could plausibly be the basis for an excessive force claim. Although it is danger of a different kind, the Court is not convinced that using a police vehicle to impede the escape of a suspect's vehicle is necessarily any more dangerous than other circumstances police officers face in the course of their duties, at least such that it pushes Plaintiff's *Monell* causation allegations out of the realm of plausibility. To the extent the City condones or enables police officers to use excessive force, the fact that Officer Ewing is alleged to have used his vehicle to commit the act of excessive force—as opposed to his fist or gun—does not undermine the causation element of Plaintiff's *Monell* claim.")

Turner v. M.B. Financial Bank, No. 14-CV-9880, 2017 WL 4390367, at *8–9 (N.D. Ill. Oct. 3, 2017) ("Plaintiffs are plainly asserting a *Monell* claim in the complaint. . . Plaintiffs allege that '[a]s a matter of both policy and practice, the Chicago Police Department directly encourages, and is thereby the moving force behind, the very type of misconduct at issue here by failing to adequately train, supervise and control its officers, such that its failure to do so manifests deliberate indifference.'. . They allege that Defendant 'facilitates the very type of misconduct at issue here by failing to adequately investigate, punish and discipline prior instances of similar conduct, thereby leading Chicago Police Officers to believe their actions will not be scrutinized and, in that way, directly encouraging future abuses such as those affecting Plaintiff.'. . They contend that 'officers of the Chicago Police Department abuse citizens in a manner similar to that alleged by Plaintiffs in this Count on a frequent basis, yet the Chicago Police Department makes findings of wrongdoing in a disproportionately small number of cases.'. . Moreover, Defendant is 'aware of,' 'condone[s],' and 'facilitate[s]' by their inaction a "code of silence" in the Chicago Police Department.'. . In particular, 'officers routinely fail to report instances of police misconduct and lie to protect each other,' are not disciplined for this behavior, and Defendant has 'failed to act to remedy the patterns of abuse' despite its knowledge of these problems. . .While these allegations bare some resemblance to boilerplate, they have sufficient factual content to make Plaintiffs' claim plausible. Plaintiffs allege that the City fails to adequately investigate and punish past instances of excessive force by police, which has the effect of condoning and encouraging excessive force by police in the future, such as the alleged excessive force that occurred here. . . Similarly, Defendant's 'disproportionately small' number of findings of police wrongdoing and alleged indifference to the underreporting of excessive force claims because of the police's 'code of silence' are factual allegations that reinforce plausibility of any 'policy or custom.' . .These are more than simply legal conclusions, and Defendant does not explain why these allegations are insufficient. Although borderline, there are enough factual allegations in the third amended complaint to 'nudge[ ]' this claim 'across the line from conceivable to plausible.'. . Therefore, Plaintiff states a claim under *Monell* against the City of Chicago in Count I.")

Scheidler v. Metro. Pier & Exposition Auth., No. 16-CV-4288, 2017 WL 1022077, at *5-6 (N.D. Ill. Mar. 16, 2017) ("Rule 8 'does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.'. . Pleading that an unspecified number of lawsuits filed at unspecified times involving unspecified actors and unspecified allegations that violate unspecified rights does not plead sufficient factual allegations to show is plausible that MPEA acted with deliberate indifference regarding NPI's security practices in the face of a 'pattern of constitutional violations.'. .Nor does Plaintiff's hazy allegation that there were 'one or more lawsuits' allege a number of incidents by which one could infer a 'pattern' of relevant unconstitutional conduct. The closest Plaintiff comes is his allegation that 'prior litigation involving a different victim' alleged that NPI maintained a 'policy, custom and practice of confiscating video recording equipment,' and MPEA was aware of this 'policy' because NPI was sued. . . There is no factual content to this allegation beyond asserting that there is a generalized policy of confiscation that applies in unspecific circumstances and was referenced in an unspecified 'prior litigation.' That is insufficient. . . . Here, Plaintiffs' *Monell* claims are high on the complexity scale—consisting of

multiple 'policies' that violate multiple constitutional rights and purportedly corrupt all of NPI's interactions with protestors. But Plaintiff does not plead any facts suggesting why it would be 'plainly obvious' that allowing NPI to handle Navy Pier security would result in a 'substantial risk' that visitors to Navy Pier would have their rights under the First, Fourth, and Fourteenth Amendments violated. . . Merely asserting that there will be 'predictable violations' of the Constitution because 'MPEA failed to adopt and implement any policy or policies limiting the actions of security personnel' does not make that allegation plausible.")

Stokes v. Ewing, No. 16 C 10621, 2017 WL 2224882, at *2-5 (N.D. Ill. May 22, 2017) ("In essence, Stokes is suing the City for instituting an implicit policy, custom, or practice that rewards officers in proportion to the number of guns confiscated and licenses the arrest of individuals on false charges unless they can obtain and turn over a gun. . . This policy, as applied to him, allegedly violated his rights under the Fourth and Fourteenth Amendments. . . The City contends that Stokes' Complaint fatally lacks the requisite specificity to allege a plausible *Monell* claim. Conclusory and boilerplate allegations, the City points out, leave a complaint stranded. Further, the City argues that Stokes has not provided facts permitting an inference that the alleged policy was the driving force behind his injury – 'that a widespread reward system directed or even influenced the Defendant Officers' actions' – or that the City was deliberately indifferent to the effects of its policy. . . In addition, the City maintains that the Complaint fails to elevate what happened to Stokes and his co-arrestee above a 'random event,' because it does not identify other instances of the conduct claimed to be 'widespread.'. . Stokes, on the other hand, warns against applying a heightened pleading standard to *Monell* claims and notes that his Complaint sufficiently puts the City on notice of the factual basis for his suit. . . . Contrary to the City's facile assertion, 'deliberate indifference' is not an absolute pleading requirement for *Monell* claims. Rather, the Seventh Circuit has typically regarded it as an *alternative* to an implicit policy of the sort alleged here. . . . Here, . . . Stokes charges the City with active participation in maintaining a policy that itself licenses unconstitutional conduct. As such, 'deliberate indifference' is conceptually superfluous to the implicit policy alleged here, and Rule 8(a) does not require corresponding allegations in Stokes' Complaint. The City's most substantial attack on the Complaint concerns the absence of allegations beyond those relating to Stokes (and, ostensibly, his co-arrestee). This argument merits more consideration but is ultimately rejected in view of *White v. City of Chicago,* 829 F.3d 837 (7th Cir. 2016). . . . White was not required to 'identify every other or even one other individual who had been arrested pursuant to a warrant obtained through the complained-of process.'. . To be sure, at summary judgment, impropriety from a single incident may not give rise to liability on the sort of *Monell* claim at issue. . . But that was not the procedural posture in *White,* and it is not the situation presented here. Post-*White* courts analyzing *Monell* suits have scotched motions to dismiss premised on the same arguments as the City's. . . .In this case, Stokes alleges the City's complicity not in failing to train, supervise, or prevent misconduct, but in establishing a widespread custom or implicit policy that licenses unconstitutional conduct. A 'series of bad acts' is not required to state such a claim. . . Thus, Seventh Circuit precedent clearly maps the proper course here. Pursuant to *White* and *Jackson,* Stokes need not plead the factual circumstances of additional instances of misconduct pursuant to the alleged policy. Of course, the Court does not opine on

Stokes' chances on the merits, but is merely content that Stokes' Complaint adequately meets the pleading requirements of Rule 8(a). Presented with no sound basis for dismissing Stokes' *Monell* claim, the Court denies the City's Motion to Dismiss.")

Clay v. Cook Cty., No. 14-CV-10515, 2017 WL 878451, at *3 (N.D. Ill. Mar. 6, 2017) ("Plaintiff's allegations are sufficient to state a *Monell* claim based on Defendants' alleged practice, custom, and/or policy of holding individuals beyond the constitutionally required time for a bond hearing (two days) where those individuals were being held for other charges. . . Plaintiff cites to (1) his own personal experience at the Cook County Jail; (2) alleged admissions made to Plaintiff by Cook County Jail personal; (3) alleged knowledge of other instances in which individuals being held for other charges were not provided a bond hearing within two days; and (4) another lawsuit in this district in which the same alleged policy, practice, and/or custom was raised. . .The Seventh Circuit case on which Defendants' motion to dismiss relies, *McCauley,* 671 F.3d 611, does not support dismissal of Plaintiff's *Monell* claim. In *McCauley*, the plaintiff failed to state a *Monell* claim against the City of Chicago for failure to maintain policies to protect victims of domestic violence from persons who violate parole or court orders, where the complaint contained no factual allegations supporting the plausibility of the claim, and the facts alleged were 'actually legal conclusions or elements of the cause of action.'. . Here, by contrast, Plaintiff cites not only his own experience at the Cook County Jail, but also the alleged experience of other inmates who were waited more than two days for a bond hearing when they were being held on other charges, alleged admissions from Cook County Jail personnel that this was its policy or practice, and another lawsuit alleging the same alleged policy or practice. From these allegations, the Court is able 'to draw the reasonable inference' that the Cook County Jail maintained a policy or practice that caused Plaintiff's alleged constitutional deprivation.")

Klinger v. City of Chicago, No. 15-CV-1609, 2017 WL 736895, at *16–18 (N.D. Ill. Feb. 24, 2017) ("The issue here is whether Plaintiff has alleged sufficient facts to move beyond the pleadings stage on her *Monell* liability claim against Sheriff Kaupas. The Court holds that she has not. Plaintiff alleges in only a conclusory fashion that the Sheriff has 'a policy and/or custom ... to inadequately and improperly investigate citizen complaints of police misconduct,' and to 'inadequately supervise and train officers of the Will County Sheriff's Office, ... thereby failing to adequately discourage further constitutional violations on the part of these officers.'. . Her further allegation that 'Kaupas and other County policy makers are aware of, and condone and facilitate by their inaction, an environment within the Will County Sheriff's Office in which officers fail to report misconduct committed by other officers, such as the misconduct at issue in this case'. . . also is conclusory. No other facts alleged in the complaint regarding the Sheriff or the Sheriff's office are alleged from which the Court could infer a factual basis for these conclusory *Monell* allegations. . . . [C]ourts in this district generally dismiss *Monell* claims in which '[a]ll of the allegations in the Complaint pertain exclusively to [the plaintiff].'. . . Plaintiff makes no allegations about any similar incidents or complaints against Sheriff Kaupas from which the Court can infer that the Sheriff was at fault either for Griebel's use of force against Plaintiff or the alleged conspiracy to cover-up Griebel's identity after the assault occurred. To the extent that Plaintiff's

Monell claim is based on a failure to train, supervise, and discipline, Plaintiff's allegations too are not supported by non-conclusory facts. . . . Plaintiff does not allege any similar constitutional violations by which a failure to train can plausibly be inferred. . . Absent any factual allegations that would give rise to a credible inference that Sheriff Kaupas's own conduct contributed to the alleged constitutional violations, Plaintiff's *Monell* claim against the Sheriff must be dismissed. . . .Unlike the allegations against Sheriff Kaupas, the factual allegations regarding a police cover-up involving at least two Chicago police officers at different times and places (Officer Maas, at the scene of the incident, and Detective Callaghan, a few days later when Plaintiff went to the station to file a criminal complaint against the person who assaulted her) nudge Plaintiff's *Monell* claim against the City of Chicago slightly closer to the pleading threshold of plausibly suggesting the existence of an informal policy or custom by which acts of misconduct of other law enforcement officers (Griebel) could be said to be tolerated. The two Chicago police officers in question are alleged to have intentionally misled Plaintiff with the joint purpose of thwarting Plaintiff's efforts to discover the identity of the officer who assaulted her, falsified information on a police report, and made threats of pursuing a criminal prosecution against Plaintiff if she continued her efforts. . . . This Court is not convinced that the involvement of the two police officers here is sufficient to implicate the City of Chicago as an entity. The second source of support for Plaintiff's *Monell* claim against the City of Chicago is found in *LaPorta*, 102 F. Supp. 3d at 1020-21. In that case, the court held that the plaintiff's *Monell* allegations of a widespread practice in the Chicago Police Department of 'failing to investigate, discipline, or otherwise hold accountable its police officers' to be plausible where the plaintiff had alleged that 'complaint registers' and 'repeater lists' made publicly available by order of the Illinois appellate court 'revealed that officer misconduct was prevalent within the CPD, but largely condoned, and to the extent possible, hidden from the public.'. . This information, however, is not specific enough for the Court to conclude that the type of police misconduct referenced in the *LaPorta* case (as shown in the publicly released complaint registers and repeater lists), is sufficiently similar to the allegations of police misconduct at issue here. . . Accordingly, the Court finds that the inference of a municipal unofficial policy or custom in this case is too weak based solely on the allegations of the current complaint, which do not involve allegations of other similar complaints or incidents. The Court cannot plausibly infer from the complaint that the actions of the defendant police officers are attributable to an informal policy or custom of the City of Chicago arising out of its deliberate indifference to similar events. . . For this reason, the Court concludes that Plaintiff's *Monell* claim against the City of Chicago must be dismissed.")

White v. Watson, No. 16-CV-560-JPG-DGW, 2016 WL 6277601, at *4 (S.D. Ill. Oct. 27, 2016) ("Here, the plaintiff has alleged that the policies – including the policy to have no policy – and widespread practices of the St. Clair County Sheriff's Department listed above were the moving force behind the failure to protect Scarpi from the known risk of suicide in the Jail. This is sufficient to state a § 1983 claim under *Monell* for deliberate indifference to a detainee's safety needs. That fourteen suicides attempts in the Jail were, for one reason or another, unsuccessful does not foreclose the possibility that inadequate policies amounted to a constitutional violation.

Additionally, the plaintiff's failure to allege the specific aspects of the existing Jail staff training that are inadequate will not render the Amended Complaint insufficient as to Count II.")

Cheatham v. City of Chicago, No. 16-CV-3015, 2016 WL 6217091, at *6–7 (N.D. Ill. Oct. 25, 2016) ("Plaintiff alleges that the City had an official policy involving the use of excessive force. 'An official policy or custom may be established by means of [1] an express policy, [2] a widespread practice which, although unwritten, is so entrenched and well-known as to carry the force of policy, or [3] through the actions of an individual who possesses the authority to make final policy decisions on behalf of the municipality or corporation.' *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 675 (7th Cir. 2012). Plaintiff appears to allege an express policy: 'Defendant City of Chicago planned and implemented a policy, practice, custom and usage of interrogating person[s], that was designed to and did preempt lawful activities by illegally detaining persons, using excessive force against persons, retaliating against witnesses to police misconduct, and discouraging police officers from reporting the misconduct of other officers.'. . However, Plaintiff does not allege anything more than that such a policy exists. Conclusory allegations of a 'policy or practice' in support of a *Monell* claim 'are not factual allegations and as such contribute nothing to the plausibility analysis under *Twombly /Iqbal.*' *McCauley*, 671 F.3d at 617-18. Plaintiff also alleges that the City had a policy of inadequately training, supervising, and disciplining police officers. A failure to train or supervise employees rises to the level of an official policy or custom only where that failure to train amounts to 'deliberate indifference to the rights of persons with whom the untrained employees come into contact.'. .Plaintiff has alleged that, prior to February 22, 2015, the City of Chicago was aware of several complaints of police misconduct involving the use of excessive force and numerous claims of constitutional violations involving Medina specifically. Plaintiff also alleges that the City inadequately and improperly investigated citizen complaints of police misconduct and instead tolerated that misconduct. The allegations that the City knew about, failed to properly investigate, and tolerated misconduct raises a plausible claim that the City was deliberately indifferent through a policy or custom of inadequately training, supervising, and disciplining police officers. The City of Chicago's Motion to Dismiss Count III is granted to the extent that Plaintiff alleges an express policy and denied to the extent that Plaintiff alleges the City was deliberately indifferent and had a policy or custom of inadequately training, supervising, and disciplining police officers.")

Collier v. Ledbetter, No. 4:14-CV-4103-SLD-JEH, 2016 WL 5796765, at *4–6 (C.D. Ill. Sept. 30, 2016) ("To demonstrate municipal liability under the second prong of *Monell*, a custom-or-practice theory, a plaintiff must show that the municipality's widespread custom or practice was the 'moving force' behind his injury. . . The Seventh Circuit has declined to adopt any 'bright-line rules defining a widespread custom or practice.'. . Nor has it reached a conclusion as to 'how frequently [unconstitutional conduct] must occur to impose *Monell* liability, except that it must be more than one instance, or even three.'. . Ultimately, a plaintiff must persuade the finder of fact 'that there is a policy at issue rather than a random event.'. .To successfully plead a custom-or-practice *Monell* claim, a plaintiff must also plead facts suggesting actual or constructive notice on behalf of the municipality—that is, the custom or practice alleged must be 'so persistent and

widespread that ... policymakers should have known about the behavior.'. . Where a municipality is alleged to have acquiesced to a harmful practice or custom, the plaintiff will ultimately have to show that policymakers were 'deliberately indifferent' to the harm the custom or practice might precipitate. . . A policymaker will be deemed deliberately indifferent 'where the plainly obvious consequence of [his or her] decision ... would be the deprivation of a third party's federally protected right.'. . . A well-pleaded custom-or-practice *Monell* claim will not only 'identify a custom or policy' as the source of a plaintiff's injury but also 'specify what exactly that custom or policy was.'. . Offering as non-conclusory factual support merely the circumstantial weight of five supposedly unconstitutional arrests (none of which, as pleaded, have resulted in an adjudication of guilt or liability for the City), Collier leaves it to the Court to infer that the Rock Island Police Department's hiring, training, investigation and disciplinary practices are not only substandard but also the causal forces behind all of these incidents, such that the City should be held liable for its acquiescence. This is not a reasonable inference, and Collier's shotgun suggestion of allegedly faulty practices cannot be relied upon to bridge the gap. To successfully plead that the City's assent to deficient police practices caused his injury and the four others he describes in his amended complaint, Collier would need to plead facts that illustrate those deficiencies and not just their purported consequences. . . District courts in the Seventh Circuit have adopted a similar requirement for specificity. For instance, the Northern District of Illinois granted a defendant village's motion to dismiss a custom-or-practice *Monell* claim where the plaintiff's allegations comprised 'completely conclusory, throw-it-against-the-wall-and-see-what-sticks language,' failing to state a specific policy or practice for which the municipalities could be held liable. . . Arguably, to require Collier to specify more narrowly the custom or practice that could entail the City's *Monell* liability raises the concern that without the benefit of discovery, he may be foreclosed from acquiring the information he needs to draft a sufficient pleading. The Seventh Circuit has acknowledged this reservation, reasoning nevertheless that under less stringent *Monell* pleading requirements 'all counsel would need to do would be to concoct some explanation of [a] plaintiff's injury that implicated the municipality—for example, a custom and practice of hiring as police officers those with a history of brutality—and the doors of the federal courtroom would swing open.' *Strauss*, 760 F.2d at 769. In addition to inadequately identifying an injurious custom or practice, Collier has failed to plead facts sufficient to fulfill *Monell*'s notice requirement. He has not plausibly alleged that City policymakers deliberately disregarded the plain and obvious consequences of the custom or practice, or that it was so 'persistent and widespread' that policymakers should have been aware of it. . . Although Collier repeatedly alleges that the City's improper police training, inadequate investigation, ineffective discipline and insufficient hiring are 'pervasive practice[s],'. . . the allegation of their pervasiveness is a conclusory assertion merely echoing *Monell*'s 'widespread and well-settled' requirement. It is not entitled to the presumption of truth. Setting aside this blanket allegation, the Court is again left to weigh only the facts pleaded in the accounts of the arrests of Derrell Dickerson, Airlyn Powell, Leonard Robinson, Darrin Langford and Collier himself. Pleading isolated incidents of municipal misconduct is generally insufficient to establish a 'widespread custom or practice.'. . Collier has not alleged that every arrest made by one of the City's officers—or even a substantial percentage thereof—results in a constitutional injury. On the contrary, he has alleged that excessive force was exercised in five of

the presumably hundreds of arrests made by Rock Island police between 2011 and 2015—and done so in such a way as to raise no other inference than that lawsuits were filed, in itself no indicator of unconstitutional behavior by the police. The inference cannot reasonably be drawn from these accounts that any excessive force exercised against these individuals was a product any practice or custom that the City should have or would have identified and remedied had it not been deliberately indifferent. Rather, these facts, even if each and every officer in each alleged case had in fact engaged in constitutional violations, plausibly establish only the isolated misconduct of five individual officers. Because Collier does not plead facts that plausibly establish a specific City custom or practice that served as the moving force behind his constitutional injury, and because he fails to support his claim with allegations plausibly suggesting that the forceful arrest he suffered was the product of a pervasive pattern of misconduct toward which the City was deliberately indifferent, Collier's amended complaint fails to adequately state a custom-or-practice *Monell* claim. The City's motion to dismiss the *Monell* claim in Collier's amended complaint is granted.")

Lee v. Woodlawn Cmty. Dev. Corp., No. 14 C 06511, 2016 WL 2997902, at *5 (N.D. Ill. May 25, 2016) ("[T]he Amended Complaint fails to allege that anyone at the CHA was *aware* that Woodlawn Community employees failed to reasonably accommodate disabled residents. In *Pindak v. Cook County*, the district court dismissed a *Monell* claim because the plaintiff failed to adequately allege that the Public Housing Commission 'was aware that First Amendment violations were likely, but deliberately chose not to train employees.'. . The Public Building Commission had contracted with third-parties. . . to provide security officers on Chicago's Daley Plaza and the plaintiff alleged that these officers 'routinely interfere[d] with his peaceful panhandling activity ....'. . . .The district court observed that the plaintiff failed to assert 'that anyone at [Public Building Commission] had knowledge that Securitas officers allegedly interfered with Plaintiff's panhandling,' or 'any specific facts about the training [Public Building Commission] employees or agents received.'. . Because '[n]othing in the record suggest[ed] that [Public Building Commission] made a *deliberate* choice not to train employees about obvious constitutional threats,' the district court dismissed the plaintiff's *Monell* claim. . . Like the plaintiff in *Pintak*, Lee does not allege in his Amended Complaint that the CHA was aware that Fourteenth Amendment violations were likely, yet deliberately chose not to train Woodlawn Community's employees. And as in *Pintak*, the Amended Complaint is void of any facts about the training that CHA employees and agents received. In sum, the *Monell* claims cannot stand without any factual basis from which to plausibly infer that the CHA was deliberately indifferent to the need for training. Counts Seven and Eight must be dismissed.")

Foy ex rel Haynie, Jr. v. City of Chicago, No. 15 C 3720, 2016 WL 2770880, at *9-10 (N.D. Ill. May 12, 2016) ("Plaintiff's failure-to-train allegations also do not pass muster because they are boilerplate and lack any supporting facts. . . .Plaintiff's allegations of a failure to discipline are also boilerplate and lacking in detail. . . .Plaintiff succeeds in repeating all of the trigger words required of a *Monell* claim but absolutely no factual content to demonstrate a widespread practice of failing to adequately punish prior instances of similar misconduct. . . .Because Plaintiff has

already taken discovery on this claim and after six iterations of her claims has yet to sufficiently state a *Monell* claim, Plaintiff's *Monell* claim against the City is dismissed with prejudice.")

Brown v. Evans, No. 15 C 2844, 2016 WL 69629, at *3-5 (N.D. Ill. Jan. 6, 2016) ("Brown's allegations in his *Monell* claim are focused first on Evans' actions; however, 'a single isolated incident of wrongdoing by a nonpolicymaker is generally insufficient to establish municipal acquiescence in unconstitutional conduct.'. . And Brown's boilerplate policy and practice statements contain no facts that would allow a plausible inference that the City has a practice or policy of failing to train, supervise, or discipline or condones a 'code of silence.'. . Even considering the Complaint in the light most favorable to Brown, the allegations of the City's policy and practice claims are too vague and lacking in sufficient details to give proper notice of their basis. . . In support of his *Monell* pleading, Brown asks the Court to take notice of additional facts and a newspaper article submitted with his Response. . . In opposing a motion to dismiss, a plaintiff 'may submit materials outside the pleadings to illustrate the facts the party expects to be able to prove' and 'elaborate on his factual allegations so long as the new elaborations are consistent with the pleadings' without converting the motion to one for summary judgment. . . First Brown states that in September 2014 Evans was charged with two felonies for assault on a suspect and was relieved of his duties pending the outcome of that case. This fact supports the Complaint's allegations of misconduct by Evans. The City argues this fact entirely undercuts a theory of failure to discipline; however, Evans served for over ten years before being removed from the force, which could support a theory that the Department 'turned a blind eye' to his conduct until a criminal charge forced the issue. Second, the attached newspaper editorial questions why, with Evans' history of citizen complaints, the Police Department continued to promote him. This article intimates that the Department approved of Evans' 'aggressive policing style' because it resulted in a drop in the homicide rate. . . Again, this relates directly to Evans' actions and the Department's view of his actions. However, it could also support an inference that Evans is one example of a wider failure to discipline. Similarly, Evans' history of citizen complaints and civil rights lawsuits supports Brown's theory that Evans is a bad actor and shows that the Department disciplined Evans in two out of at least forty-five excessive force complaints in a ten-year span. Although a municipality 'cannot be held liable *solely* because it employs a tortfeasor,'. . . this long history of complaints without corresponding discipline edges the Complaint toward a policies or practice claim. . . . Brown has not clearly stated the linkage between Evans' alleged violations and his *Monell* claim. He must do so to provide the City sufficient notice of the basis for these allegations. . .The failure to supervise and discipline claims are therefore dismissed without prejudice to re-plead. But none of Brown's new facts support even a stretched inference of a failure to train. . . . Although *Monell* claims may proceed with conclusory allegations of a policy or practice, some facts must be pleaded to put the defendant on notice of the alleged wrongdoing. . . Brown has not indicated any facts to support a failure to train claim. This aspect of his *Monell* claim is also dismissed without prejudice and with leave to re-plead. Brown also directs the Court's attention to another case pending against Evans in the Northern District, stating the *Monell* claim survived dismissal there and has proceeded to discovery. Because the City has already engaged in *Monell* discovery in that case, Brown argues that it would not be inconvenient for it to do so here. The

allegations of a different complaint involving different facts and actors are irrelevant to Brown's claims before this Court. . . Furthermore, the Court is disturbed by Brown's characterization that the *Monell* claim in that case was found to be sufficient, when in fact that court did not consider the sufficiency of pleading or the merits of that claim. . . Furthermore, that discovery proceeded on the *Monell* claim in that case has no bearing on the sufficiency of Brown's pleadings. The City's Motion to Dismiss the *Monell* claim is granted. Count XII is dismissed without prejudice.")

Duff v. Grandberry, No. 14 C 8967, 2015 WL 9259844, at *2-3 (N.D. Ill. Dec. 18, 2015) ("Here, Duff alleges that Grandberry and Reilly violated his constitutional rights by using unreasonable and excessive force to arrest him. . . He further alleges that Maywood's use-of-force policy 'allows the use of any degree of force so long as it does not result in death to effect an arrest regardless of whether the arrestee poses a threat of physical harm to themselves or the officer, regardless of whether the arrestee is resisting arrest and regardless of whether the arrestee was trying to escape.'. . Thus, Duff contends that Maywood's official policy on the use of nondeadly force was the 'moving force' behind the violation of his federally protected right. . . At the pleading stage, these allegations are sufficient to state a viable *Monell* claim. . . . [A]s alleged in the Amended Complaint, Maywood's use-of-force policy does indicate that '[a]n officer is justified in using force less than deadly force when the officer reasonably believes it is necessary [t]o effect an arrest.'. . But Supreme Court precedent requires that the officer consider the *totality* of circumstances, including 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest of attempting to evade arrest by flight,' in determining whether the amount of force to effect an arrest is reasonable. . . Thus, while it is an extremely close call, viewing the allegations in the complaint and all reasonable inferences therefrom in the light most favorable to Duff, as the Court must at the pleading stage, the Court declines to dismiss Count IV.")

Maldonado v. City of Hammond, Ind., No. 214CV310-PPS, 2015 WL 1780133, at *1-3 (N.D. Ind. Apr. 20, 2015) ("This is a § 1983 case in which, according to the complaint, Norma Maldonado's dog (Lilly) was shot and killed by Hammond Police Officer Timothy Kreischer in the presence of two of Ms. Maldonado's minor children. . . . Maldonado alleges that the city had no training in place on how officers should handle barking dogs and that Kreisher was not disciplined for shooting Lilly. Where a total absence of training is alleged concerning as common and ordinary a scenario as barking dogs encountered on patrol, and lethal force was used with no apparent question of its appropriateness by the police department, I find that the failure to train claim (including facts in support of the deliberate indifference prong) has been pled with adequate specificity. To make the 'context-specific' plausibility determination required by *Twombly/Iqbal,* I draw on my 'judicial experience and common sense.'. . I conclude that Maldonado has pled sufficient 'details about the subject-matter of the case to present a story that holds together' and to permit a reasonable inference that the city is liable on a failure to train theory.")

Hoskin v. City of Milwaukee*,* 994 F.Supp.2d 972, 977, 978 (E.D. Wis. 2014) ("At the outset, the Court must note that *Monell* claims are subject to the pleading standard set out by the Supreme

Court in the *Twombly* and *Iqbal* cases and discussed more fully by the Court, above. . .This is an important note because the plaintiff asserts that a liberal pleading standard applies to *Monell* cases. . . Specifically, the plaintiff asserts that Seventh Circuit precedent allows *Monell* claims to escape dismissal even when they are 'based on relatively conclusory allegations.'. . Prior to the issuance of the *Iqbal* and *Twombly* decisions, it may very well have been possible to state only 'boilerplate allegations,' and survive dismissal in § 1983 cases. . . But, in the time since, the Seventh Circuit has not returned to such a liberal pleading standard. . . In fact, the Seventh Circuit has made clear that *Iqbal* applies to motions to dismiss in *Monell* cases, just as it would apply in any other case. . . In that way, under *McCauley,* the Court must disregard conclusory and boilerplate statements in the pleadings to determine whether, without those, the plaintiff has alleged sufficient factual matter to state a claim for relief that is plausible on its face. . . In other words, there is no liberal pleading standard applicable to *Monell* claims; rather, the Court must apply *Iqbal* and *Twombly* just as it would in evaluating most other claims. However, it is also important to note that this principle swings the other way, too: the Court does not apply a *heightened* pleading standard to civil rights claims, including *Monell* claims. . . The Seventh Circuit released its decision in *Estate of Sims* after the Supreme Court had already issued its *Twombly* decision. . . Thus, presumably, the Seventh Circuit was aware that the Supreme Court had at least hinted at a change in the Rule 8(a) pleading standard in *Twombly,* and yet the Seventh Circuit nonetheless declined to apply a heightened pleading standard to *Monell* claims. . . Moreover, even though *Estate of Sims* pre-dates *Iqbal,* the Court has not found any case law following either case that calls into question the proposition that *Monell* claims are not subject to heightened pleading standards. In fact, district court cases from around the Circuit continue to cite *Estate of Sims* for precisely that proposition. . .The Seventh Circuit, itself, continues to cite the case approvingly for other purposes in § 1983 litigation, and has never questioned the conclusion that *Monell* claims are not subject to a heightened pleading standard. . . For this reason, the Court must not apply a heightened pleading standard to the plaintiff's *Monell* claim. Of course—as with practically all of the case law in this area—there is a further qualification that applies to that conclusion. Recently, the Seventh Circuit reaffirmed *McCauley's* holding that, for pleadings, ' "the degree of specificity required ... rises with the complexity of the claim."'. . Thus, while there is not a heightened pleading requirement for *Monell* claims, *per se,* the Court must also beware to apply a pleading standard that requires a degree of specificity to meet the complexity of such a claim. In essence, all of this is a roundabout way of stating that the Court will apply the standard described in *Iqbal* and *Twombly* to the plaintiff's *Monell* claim. Nothing more and nothing less. It will not apply a heightened pleading standard, but it also will not apply an unduly liberal pleading standard, either.")

Hoskin v. City of Milwaukee, 994 F.Supp.2d 972, 980-83 (E.D. Wis. 2014) ("To state a widespread practice claim under *Monell,* the plaintiff must allege 'facts tending to show that the City policymakers were aware of the behavior of officers, or that the activity was so persistent and widespread that City policymakers should have known about the behavior.'. . The City, however, cannot be liable unless that policy, 'although not authorized by written law and express policy, is so permanent and well-settled as to constitute a "custom or usage" with the force of law'. . . It is necessary that there be some 'true municipal policy at issue, not a random event.'. . . Thus, in order

to find a widespread policy, the Supreme Court, in *City of Canton v. Harris,* and the Seventh Circuit, in other cases, have both looked for circumstances demonstrating that municipal officials were deliberately indifferent to known or obvious consequences of the municipality's action or inaction. . .The plaintiff can plead this deliberate indifference by alleging facts that would establish 'either (1) failure to provide adequate training in light of foreseeable consequences; or (2) failure to act in response to repeated complaints of constitutional violations by its officers.'. . But, whatever the evidence of deliberate indifference, the plaintiff 'must also show a direct causal connection between the policy or practice and his injury, in other words that the policy or custom was "the moving force [behind] the constitutional violation."'. . This is a tall order to fill; even so, the plaintiff has alleged facts sufficient to do so. The plaintiff's factual allegations, taken as true, adequately state a claim that is plausible on its face, and thus dismissal of the plaintiff's *Monell* claim against the City would be inappropriate at this time. Most importantly, the plaintiff has sufficiently alleged that the City received numerous complaints of illegal searches prior to the incident in question. . . The defendants assert that these allegations are insufficient because they 'fail to assert any facts pertaining to the time, place, or identity of the individuals involved with the other complaints of unlawful searches.'. . This, the defendants argue, means that the plaintiff has failed 'to plead facts which establish that the complaints of other unlawful searches occurred before the subject incident of December 16, 2011.'. . This argument fails for two reasons. First, the plaintiff quite clearly alleged that such complaints were made '[a]s early as 2008.'. . The complaint also discusses that the MPD 'had been receiving complaints for several years before' opening its own investigation. . . On this basis, the Court can draw the reasonable inference, . . . that the plaintiff is alleging that the MPD and the City had received similar complaints prior to the subject incident. Second, the Court does not believe it is necessary for the plaintiff to have pled specifics like the time, place, or identity of the other complaints. General allegations that the City and MPD received complaints is enough to give rise to an inference that its officials had knowledge that other, similar illegal searches were occurring. Frankly, specifics like time, place, and identity would add very little in the way of substance to the allegations of the complaint. Moreover, the plaintiff would not possibly have access to that information without discovery. Finally, the Court reiterates that it should not apply a heightened pleading standard in *Monell* claims, *e.g., Estate of Sims,* 506 F.3d at 514; this is not a case that falls under Rule 9 of the Federal Rules of Civil Procedure, such that it must be pled with particularity. For these reasons, the Court finds that the plaintiff's allegations support the conclusion that the City had received complaints of illegal searches prior to the subject incident. Having received those complaints, the City necessarily had knowledge or notice that aggressive searches were occurring and was deliberately indifferent. However, rather than training and disciplining its officers or investigating complaints, the City instead occasionally commended its aggressive officers and ignored or rejected the complaints. . . An obvious consequence of these actions would be for aggressive searches to continue and escalate, such that the City could be found deliberately indifferent if the plaintiff's allegations are true. . . Indeed, the plaintiff alleges that the City not only failed to provide adequate training in light of foreseeable consequences, but also that it failed to act in response to repeated complaints of constitutional violations by its officers, such that he has adequately alleged that the City was deliberately indifferent. . .Finally, the Court points out that, taking the plaintiff's allegations as

true, the City's alleged widespread policies ultimately caused the deprivation of the plaintiff's constitutional rights. As the Court has already noted, whatever the evidence of deliberate indifference, the plaintiff 'must also show a direct causal connection between the policy or practice and his injury, in other words that the policy or custom was "the moving force [behind] the constitutional violation."'. . The plaintiff has alleged facts to meet this requirement. At the very least, the Court can infer, . . that the alleged policies were a but-for cause of the plaintiff's injuries, because if the City had, for instance, taken steps to investigate the offending officers, it could have found that they were responsible for other similar incidents and removed them from the force. Likewise, if the City had better disciplined or trained its officers (or perhaps not encouraged them to conduct aggressive searches), it is likely that the officers in question would not have illegally stopped the plaintiff's car, illegally searched the plaintiff, or illegally arrested him. The plaintiff has, therefore, pled facts sufficient to plausibly allege that the City's policies were the moving force behind the constitutional deprivation that he suffered. To be sure, the plaintiff's complaint is not a model of clarity in relation to his *Monell* claim: some of its assertions are vague and border on the sort of conclusory statements that the Court can disregard . . . . At this stage of the proceedings, the Court is obliged to deny the defendants' motion for judgment on the pleadings on the plaintiff's *Monell* claim against the City.")

Listenbee v. City of Harvey, No. 11 C 03031, 2013 WL 5567552, *3-*5 (N.D. Ill. Oct. 9, 2013) ("Despite disclaiming any responsibility to provide evidence at the pleading stage, Listenbee attaches to his response brief a 2012 report from the Civil Rights Division of the Department of Justice, which investigated the use of force by Harvey police officers and made findings and recommendations to improve 'serious deficiencies' that 'create an unreasonable risk that constitutional violations will occur.'. . This letter is properly considered in support of Listenbee's claims at the motion-to-dismiss stage. In opposing a Rule 12(b)(6) motion, a plaintiff may elaborate on his factual allegations, so long as the new elaborations are consistent with the pleadings, and may submit materials outside the pleadings to illustrate the facts he expects to be able to prove. *Geinosky v. Chicago*, 675 F.3d 743, 746 n.1 (7th Cir.2012) (citing numerous cases). Indeed, the Seventh Circuit has advised that, in the wake of *Twombly* and *Iqbal*, a plaintiff 'who can provide such illustration may find it prudent to do so.' *Id*. Here, the DOJ letter lends plausibility to Listenbee's allegations that his beating was not an isolated incident but the product of systemic shortcomings. . . The same is true for the denial of medical care claim, here governed by the Fourteenth Amendment's due process guarantee, rather than the Eighth Amendment, although the 'deliberate indifference' standard applies either way. . . Listenbee contends that the detainees at the Harvey jail are 'routinely' denied medical care. According to the complaint this routine practice is attributable to the absence of an appropriate system for accurately documenting and administering medical and medication needs, observing the health status of detainees, and promptly reviewing medical requests from detainees, among other shortcomings. . . The DOJ letter suggests that Harvey officers routinely fail to state whether arrestees 'sustained any injuries or received medical care,' which lends plausibility to Listenbee's allegations that Harvey lacks systems for appropriately acknowledging and documenting arrestee's injuries, let alone providing access to medical care for them. The DOJ letter also recommends that the Harvey police

department make it a policy to have supervisors report to the scene of any arrest involving the use of force that caused serious injury, 'to ensure that all injured are provided care.' Again, this bolsters Listenbee's allegation that in 2010, the Harvey police did not have policies that ensured all injured arrestees were provided care. . . Listenbee's deliberate indifference claim is also rendered plausible by the allegations regarding his own experience while locked up in the Harvey jail. For instance, he alleges that multiple police officers or staff saw his condition and failed to provide any help or relief. He alleges that he complained to anyone within hearing distance that he was in severe pain, and he was either ignored or told that nothing could be done for him. These allegations permit the inference that, rather than being an isolated incident, Listenbee's experience at the jail was the product of a policy of indifference to the health of detainees. . . . Because the complaint plausibly alleges that *de facto* policies of the City caused his injuries arising from the use of excessive force and subsequent denial of medical care, the City of Harvey's motion to dismiss the plaintiff's *Monell* claims is denied.")

Sacks v. Niles Tp. High Schools, Dist. 219, No. 12 C 4553, 2013 WL 3989297, *2, *3 (N.D. Ill. Aug. 2, 2013) ("District 219 contends that Sacks's claim should be dismissed because he has not identified which *Monell* prong he is pursuing and, regardless, he failed to set forth the basis for his *Monell* claim. Sacks, however, is not held to a heightened standard in pleading a *Monell* claim, even after *Twombly* and *Iqbal*. . . Sacks's failure to explicitly identify the *Monell* prong is not fatal to his claim against District 219, for a plaintiff need not plead legal theories if the alleged facts are sufficient to show that the claim is plausible. . . Moreover, Sacks clarified in his response that he is arguing that District 219 maintains an express policy—the school code—that when enforced, as alleged here, causes a constitutional deprivation. Although the specific details of the policy are lacking, Sacks has sufficiently provided defendants with notice of the alleged wrongdoing, citing to Heintz's testimony in the 2012 administrative hearings.")

Ingoldsby v. Triplett, No. 12–681–GPM, 2013 WL 3337841, *3, *4 (S.D. Ill. July 2, 2013) ("Plaintiffs' amendment fails to state a claim to relief that is plausible on its face because Plaintiffs have simply tacked on a bare policy allegation to their already deficient complaint. . . While a heightened pleading standard is not required to state a *Monell* claim against a municipality, *Leatherman v. Tarrant County*, 507 U.S. 163, 164, (1993), a plaintiff cannot simply allege the existence of a policy or practice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009). The plaintiff 'must do more than merely parrot the language of *Monell*' to state a claim. . . Plaintiffs' proposed amendment is utterly devoid of any facts plausibly establishing that the policy or custom actually exists. Plaintiffs' allegations are based soley on their own experience, and there is nothing to suggest that any other similar incidents have occurred. Thus, at best, Plaintiffs allegations support an isolated incident of improper conduct unrelated to municipal policy. Since Plaintiffs' amendment fails to state a claim to relief that is plausible on its face, leave to amend is denied.")

Stacey v. Peoria County, Ill., No. 13–CV–1051, 2013 WL 3279997, *6, *7 (C.D. Ill. June 27, 2013) ("The *Leatherman* Court held that courts may not impose a heightened pleading standard for § 1983 municipal liability cases beyond that which is required of all cases under Rule 8. . . This

Court is following *Leatherman* and is not imposing a heightened pleading standard. This Court is applying the pleading standard announced by in the Supreme Court in *Twombly* and *Iqbal* which applies to all cases in federal court subject to the pleading standards in Rule 8. . . This Court is properly applying the principles announced in *Leatherman,* and so, is not refusing to apply controlling precedent. . . .Stacey must meet the generally applicable pleading standards announced in *Twombly* and *Iqbal* in order to state a claim. Stacey's municipal liability claim fails to meet that standard.")

Jacoby v. DuPage County Ill., No. 12 CV 6539, 2013 WL 3233339, *2, *3 (N.D. Ill. June 26, 2013) ("Because Jacoby has sued the Sheriff only in his official capacity, the court need only consider whether he has sufficiently pleaded a *Monell* claim against him. . . Jacoby is not held to a heightened standard in pleading a *Monell* claim, even after *Twombly* and *Iqbal.* . . . Jacoby first argues that he has stated a claim because the County and the Sheriff have admitted in their motion to dismiss that the Sheriff is the final policymaking authority for the jail. Further, Jacoby alleges that '[t]he policies and customs at the DuPage County Jail failed to safeguard' him. . . Although vague, Jacoby does allege that he suffered an injury at the hands of unknown officers or jail guards, that he complained of this injury to various jail employees, and that his injury went untreated for two days because of a failure to properly address the medical needs of detainees. . . .Lacking access to information, Jacoby is not in a position to allege whether the Sheriff was aware of his injury or of the alleged failure to treat that injury, or whether the Sheriff actively condoned the failure. Nor is Jacoby likely to be privy to information about other instances of detainees with similar experience. Nonetheless, he does allege that he made repeated complaints over an 11–day period and that he was repeatedly denied medical care. This series of incidents at least minimally permits the inference that there was a widespread practice that had the force of policy to disregard the legitimate medical needs of detainees. . .The motion to dismiss this claim against the Sheriff is denied.")

Ford v. Wexford Health Sources, Inc., No. 12 C 4558, 2013 WL 474494, *9 (N.D. Ill. Feb. 7, 2013) ("In the motion to dismiss, Wexford argues that Ford has failed to allege a custom or practice of deliberate indifference to his medical needs. Despite Wexford's argument to the contrary, Ford has alleged a widespread practice among Wexford employees of delaying medical treatment that caused him unnecessary pain and suffering. . . Specifically, he alleges facts showing a custom or practice of: (1) delayed delivery of medical permits . . . ; failure to administer medication or administration of ineffective medication . . . ; and delayed scheduling of medical appointments . . . . Viewing these allegations in a light most favorable to Ford, taking as true all well-pleaded factual allegations and making all possible inferences from the allegations in Ford's favor, these allegations support a permissible inference that Wexford has a widespread custom or practice of treating inmates' medical needs with deliberate indifference. . . Because Ford has sufficiently alleged a *Monell* claim that is plausible on its face under the federal notice pleading standards, the Court denies Wexford's motion to dismiss.")

Winchester v. Marketti, No. 11 CV 9224, 2012 WL 2076375, at *4 & n.3 (N.D. Ill. June 8, 2012) ("The precise pleading requirements for failure to train claims in the post-*Iqbal* world are not entirely clear. On the one hand, failure to train claims are clearly not subject to a heightened pleading standard over and above Rule 8. [citing *Leatherman*] On the other hand, given its 'nebulous' nature, . . . it would seem that a relatively high level of factual specificity is required at the pleading stage to make a failure to train claim facially plausible. . . The instant Complaint is sorely lacking in factual specificity. No details are given as to when Plaintiff began suffering seizures, how many seizures he suffered, how long the seizures lasted, when he notified Defendants of his condition, or whether any Defendants actually observed him having a seizure. Nevertheless, as discussed in greater detail below, I am allowing most of the individual claims through. What is fatal to the *Monell* claims, however, is that Plaintiff makes no attempt to plead a pattern of similar constitutional violations with any degree of factual specificity. . . .I cannot say precisely where the facial plausibility line should be drawn for post- *Iqbal* failure to train claims. But I can say with a fairly high degree of certainty-particularly in light of the Supreme Court's recent ruling in *Connick*, emphasizing the 'tenuous' nature of failure to train liability and the need to demonstrate a pattern of recurring constitutional violations-that this complaint falls short of that line. . . The claims against Grundy County, CHC and HPL are dismissed without prejudice. Plaintiff may replead against these Defendants in a more fact-specific manner. Of particular importance, Plaintiff must give more details concerning other similar constitutional violations that have occurred at the Grundy County Jail such that Defendants' deliberate indifference to the consequences of a failed training program can be plausibly inferred. . . . To be clear, *Connick* is not about pleading standards. However, the opinion makes clear that the Supreme Court considers a failure to train claim to be among the most difficult theories for a § 1983 Plaintiff to prevail under because of its factual complexity. If *Iqbal* plausibility operates as a sliding scale based on the inherent complexity of a claim, as the Seventh Circuit has suggested it does, . . . then failure to train claims demand a relatively high level of factual specificity at the pleading stage.")

Adams v. City of Chicago, No. 06 C 4856, 2011 WL 4628703, at *1, *2 (N.D. Ill. Sept. 29, 2011) ("Defendant City of Chicago argues that Plaintiffs fail to state a proper *Monell* claim. A municipality or other local government may be liable under 42 U.S.C. § 1983 'if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation.'. . To properly state a *Monell* claim, a plaintiff must allege that: '(1) the City had an express policy that, when enforced, causes a constitutional deprivation; (2) the City had a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage within the force of law; or (3) plaintiff's constitutional injury was caused by a person with final policymaking authority.'. . Plaintiffs allege that Defendant City of Chicago violated their constitutional rights pursuant to widespread practices: (1) that the City failed to properly train, supervise, discipline, and control its officers; (2) that the City failed to identify and respond to officers who repeatedly engaged in patterns of misconduct, including the Special Operations Section; (3) that through its inaction the City condoned and facilitated a 'code of silence' in the Chicago Police Department; and (4) that Defendant Officers had and continued to engage in a pattern of misconduct similar to the

misconduct against Plaintiffs. Further, Plaintiffs allege that these practices were known by municipal policy-makers of the City both before and after Plaintiffs' arrests. Defendant City of Chicago argues that these allegations are insufficient because they make broad and generalized allegations without identifying the specific custom, policy, or practice of which they complain. The Court disagrees. The Court finds these allegations sufficient to satisfy *Twombly* and its progeny.")

Knapp v. City of Markham, No. 1:11-CV-00093-DLB PC, 2011 WL 3489788, at *5 (N.D. Ill. Aug. 9, 2011) ("With respect to the City of Markham, Knapp's complaint adequately alleges municipal liability. Plaintiffs in a § 1983 suit against a municipality need not meet any heightened pleading standards, but must only comply with conventional pleading standards. . . Throughout his complaint, Knapp alleges that the City of Markham 'has a pervasive and unconstitutional custom, practice, and policy of condoning discrimination against nonAfrican-American employees.'. . He claims that the City has intentionally targeted and discriminated against Caucasian employees for years and lists examples of other employees who have filed complaints. . . Knapp alleges that the City Council appointed an African-American to the position of Deputy Chief after the Defendants demoted Knapp because of his race. . . This allegation is in line with Knapp's broader claim that the City of Markham maintains a practice of treating African-American employees more favorably than Caucasian and other non-African-American employees. Knapp's allegations are sufficient to state a claim of municipal liability at this stage.")

Roberts v. City of Indianapolis, No. 1:10-cv-1436-TWP-DML, 2011 WL 2443672, at *2, *3 (S.D. Ind. June 14, 2011) ("Plaintiff's *Monell*-related allegations are fairly scant, limited to two statements: the Chief of Police (1) failed 'to take corrective action with respect to police personnel, whose vicious propensities were notorious' and (2) 'failed to assure proper training and supervision of the personnel, or to implement meaningful procedures to discourage lawless official conduct.'. . These bare-bones assertions, Defendants argue, fail to state a *plausible* claim that the City has a custom, policy, or practice which caused Plaintiff's alleged constitutional deprivation. This argument is well-taken. That said, it is also important to note that the Supreme Court has expressly rejected heightened pleading standards for Section 1983 claims against a municipality. [citing *Leatherman*]And, significantly, even after *Twombly* and *Iqbal*, district courts in the Seventh Circuit have affirmed this principle, holding that plaintiffs are not required to plead specific facts to prove the existence of a municipal policy. [collecting cases] Here, Plaintiff has alleged that he suffered injuries after police officers locked him in a police car without air conditioning and with the windows closed. The clear upshot of Plaintiff's allegations is that this injury was a consequence of the City's failure 'to assure proper training and supervision' and 'implement meaningful procedures' to discourage officer misconduct. At bottom, the Court finds that Plaintiff has, by the slimmest of margins, stated a plausible *Monell* claim.")

Suber v. City of Chicago, No. 10 C 2876, 2011 WL 1706156, at *4 (N.D. Ill. May 5, 2011) ("It's worth repeating that the Court does not apply a heightened pleading standard to § 1983 cases (or, for that matter, to any other claims that fall outside Rule 9(b) or statutes that required heightened

pleading). But *Iqbal* and *Twombly* do instruct that '[d] etermining whether a complaint states a plausible claim for relief will ... be a context-specific task....'. . . . Suber is trying to state a claim against a municipality for a failure to train, which requires the high-culpability standard of deliberate indifference to the deprivation of a constitutional right. On top of that, the underlying constitutional right asserted by Suber (as best as can be deciphered) is substantive due process, specifically, conscience-shocking executive action in the context of an injury inflicted on a bystander, yet another high-culpability standard to meet. Yet to support the failure to train claim, Plaintiff alleges no facts other than the single episode of the injury inflicted on him, and does not even allege that the City acted with 'deliberate indifference.' That is insufficient to state a claim of municipal liability in this context.")

Tugle v. Stith, No. 10-849-GPM, 2011 WL 1627332, at *2 (S.D. Ill. Apr. 28, 2011) ("Defendants also argue that Ms. Tugle fails to sufficiently plead a § 1983 claim against the Village because she 'failed to allege any express policy' that caused the Constitutional violation . . . Defendants are correct that municipal liability for a § 1983 claim cannot be based on respondeat superior, but must arise from a claim of municipal policy or custom. . . Here, Ms. Tugle alleges that the Village 'had customs, policies, and practices that violated the [Fourth Amendment] rights of its arrestees' including, *inter alia*, failure to 'properly train, investigate, discipline, and/or fire Officer Stith'. . . This is sufficient to survive Defendants' Rule 12(b)(6) challenge.")

Jordan v. Diaz, No. 10 C 1178, 2010 WL 5476758, at *4 (N.D. Ill. Dec. 23, 2010) ("As the Sheriff defendants note in their motion to dismiss, an 'official capacity claim must at a minimum include allegations in conclusory language that a policy existed, buttressed by facts alleging wrongdoing by the governmental entity.' No heightened pleading standard applies to *Monell* claims. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). Thus, a plaintiff need not plead particular facts on which his claim of an official policy or custom is based; a 'short and plain statement' that the official policy or custom caused his injury will suffice to survive a motion to dismiss. . . Plaintiff's second amended complaint, filed after the Sheriff defendants moved to dismiss his first amended complaint, successfully remedied their concern that the first amended complaint failed to allege 'any policy, practice, or custom at all as required in *Monell.'* The second amended complaint alleges 'a policy or widespread custom at the Cook County Jail of ignoring detainees' serious medical conditions" and 'unconstitutionally denying detainees' treatment for their serious medical condition.' Plaintiff further alleges that defendants Dart and Thomas either 'established this policy or allowed a de facto policy of denying procedures necessary to treat the serious medical conditions of detainees,' and that they 'allowed the custom and practice of denying detainees' necessary medical treatment and thereby endorsed it.' These allegations are sufficiently specific to state a *Monell* claim.")

Aleman v. Dart, No. 09-cv-6049, 2010 WL 4876720, at *7 (N.D. Ill. Nov. 23, 2010) ("Plaintiff is not required to meet a heightened pleading standard for a § 1983 official-capacity claim. . . Thus, Plaintiff need not plead particular facts upon which he bases his claim of an official policy or custom, and a 'short and plain statement' that a government entity's official policy or custom

caused his injury is sufficient to survive a motion to dismiss. . . . Plaintiff's complaint sufficiently alleges *Monell* liability under § 1983. Plaintiff alleges that the customs, policies, and practices of the institutional Defendants caused Plaintiff's harm and that the institution charged with ensuring adequate health care to pre-trial detainees repeatedly and consistently failed to provide adequate health care to inmates with obvious, serious medical needs. Plaintiff describes the alleged failures as including the failure to recognize the risk of harm to inmates, the failure to provide adequate care for obvious conditions, the failure to acknowledge complaints of serious medical needs, and the failure to ensure that inmates with serious medical needs were taken to the appropriate medical facilities. Plaintiff also alleges that Defendants repeatedly violated his constitutional rights: his requests for treatment were repeatedly ignored and they continued to be ignored even after he informed staff that he was still in pain. Furthermore, Plaintiff alleges that the previously-referenced DOJ report found that the medical care provided by Cook County Jail fell below the constitutionally required standards of care, conceivably putting the institution on notice of constitutional violations within the jail. Plaintiff's complaint contains a sufficiently "short and plain statement" that a government entity's official policy or custom caused his injury. When read in a light most favorable to Plaintiff, the facts alleged adequately state a cause of action for § 1983 municipal liability, and Plaintiff's complaint, when taken as a whole, sufficiently alleges the existence of official policies or customs that deprived Plaintiff of his constitutional rights.")

Jones v. Navia, No. 09-cv-6968, 2010 WL 4878869, at *5 (N.D. Ill. Nov. 23, 2010) ("Plaintiff's claims here amount to little more than 'boilerplate allegations' that Cities and Cook County policymakers knew of and tacitly supported unspecified customs. . . Therefore, he fails to state a claim upon which relief can be granted under *Monell.* [citing *Iqbal*] Accordingly, we dismiss Count VII as to all relevant parties, including Cities and Cook County.")

Evans v. City of Chicago, No. 10 C 542, 2010 WL 3075651, at *2, *3 (N.D. Ill. Aug. 5, 2010) ("While Plaintiff's allegations of a practice within the police department are conclusory, such conclusory allegations suffice 'so long as facts are pled that put the defendants on proper notice of the alleged wrongdoing.'. . Here, Plaintiff's allegation of a practice within the police department gives Defendant 'fair notice' of what the 'claim is and the grounds upon which it rests.'. . Plaintiff defines what the practice is − to conduct warrantless searches and make arrests without probable cause when investigating the use of deadly force by Chicago police officers − and what that policy is meant to accomplish − to produce evidence, without regard to its reliability, that exonerates the officer from allegations of wrongdoing in his use of deadly force. This level of specificity, along with Plaintiff's description of how the practice was applied to her particularly, provides Defendant sufficient notice of the claim against it. Defendant argues that Plaintiff's claim should fail because she only alleged one instance in which the policy was applied, without further facts substantiating the existence of the policy. This case, though, is distinguishable from many cases in which a plaintiff asks the court to infer the existence of a policy from only a single incident, without articulating a specific policy. . . . Here, . . . Plaintiff identified the alleged policy with specificity, so the fact that she has only alleged one instance in which the policy was applied does not defeat the claim.")

Wiek v. Keane, No. 09 CV 920, 2010 WL 1976870, at *4 (N.D. Ill. May 12, 2010) ("*Monell* claims are not subject to a heightened pleading standard. . . Wiek's burden is simply to allege facts that would give the City notice of his municipal liability claim. In his amended complaint, Wiek alleges that he was held overnight after being arrested in his home without a warrant. He further alleges that the officers held him pursuant to a City policy allowing police officers to 'hold an arrestee overnight so that the arrestee could be exhibited in a corporeal identification procedure.'. . There is nothing more Wiek can allege. He is not required to provide extrinsic evidence that a policy existed. Wiek correctly relies on *Willis v. City of Chicago* for the proposition that when officers make an arrest without a warrant, they may not hold the arrestee in custody for the purposes of gathering additional evidence to justify the arrest. . . Therefore, Wiek's assertions that the officer's held him overnight in accordance with a municipal policy are sufficient to put the City on notice of his claim.")

Anderson v. City of Blue Island, No. 09C5158, 2010 WL 1710761, at *2 (N.D. Ill. Apr. 28, 2010) ("Anderson alleges that Blue Island acted with deliberate indifference in failing to train its police officers to respect the constitutional rights of mentally ill arrestees despite the frequency with which Blue Island police officers would confront persons suffering from mental illness. Anderson claims that the police officers who subdued him on the night in question were not trained in crisis intervention for mentally ill persons and that this particular deficiency in their training was the moving force behind the violation of his constitutional rights. Anderson's complaint highlights a specific alleged deficiency in the training provided to the Blue Island police officers he encountered on the night in question and presents a plausible causal connection between the training and the constitutional deprivation he allegedly suffered. Anderson has alleged enough facts to suggest he may be entitled to relief against Blue Island; dismissal of his claim at this stage would be inappropriate.").

Maldonado v. Racine County, No. 09-C-1173, 2010 WL 1484235, at *3, *4 (E.D.Wis. Apr. 12, 2010) ("In the present case, Maldonado does more than merely recite the elements of a § 1983 claim. She alleges that she was harmed by a specific policy or custom of Racine. Although Racine is correct in stating that Maldonado does not present any supporting facts to establish that such a policy actually exists, under the circumstances of this case, such pleading is not required. At this stage, Maldonado need only sufficiently inform the defendants of the nature of her claim and persuade the court that the complaint states [a] plausible claim for relief. Whether or not Maldonado is able to muster evidence of the actual existence of such a policy or custom is a hurdle she will have to clear should the defendants move for summary judgment. . . First, is the complaint sufficient to inform the defendants of the nature of the plaintiff's claim? As for this question, the court concludes that the amended complaint is sufficient. Maldonado does not merely baldly allege that she was harmed by a policy or custom but rather identifies the specific policy or custom of Racine that she alleges resulted in her injury, i.e. Racine's policy or custom 'to disregard the investigation and substantiation requirements of Article 3, Section D.17. of the Agreement.'. .Second, the court must ask, is the claim plausible? This is a 'context-specific task that requires

the reviewing court to draw on its judicial experience and common sense' to determine whether the well-pleaded facts alleged in the complaint are sufficient to 'permit the court to infer more than the mere possibility of misconduct.'. . . On this question as well, the court finds that Maldonado has satisfied the minimal requirements imposed by Rule 8(a).")

Miller v. City of Plymouth, No. 2:09-CV-205 JVB, 2010 WL 1474205, at *4, *6 (N.D. Ind. Apr. 9, 2010) ("[A] plaintiff is not held to a heightened standard in pleading a *Monell* claim. . . And here, although they are at times confusing, the Plaintiffs' allegations attempt to fit within the second method of establishing a *Monell* claim in that Plaintiffs allege that the City failed to adequately train and supervise its employees in conducting traffic stops, using dogs in the field, and in keeping records of vehicle stops and the use of police dogs. . . . The Supreme Court's ruling in *Iqbal* has created some skepticism in the various circuits as to whether the Supreme Court's decisions in *Twombly* and *Iqbal* suggest a shift from notice-pleading back toward fact-pleading. . . For its part, however, the Court of Appeals for the Seventh Circuit is proceeding cautiously and continues to emphasize that neither *Twombly* nor *Iqbal* have changed the fundamentals of pleading. *See, e.g., Bissessur v. Ind. Univ. Bd. of Trustees,* 581 F.3d 599 (7th Cir.2009) ("Our system operates on a notice pleading standard; *Twombly* and its progeny do not change this fact."). . . . In the context of section 1983 municipal liability, district courts in the Seventh Circuit post *Twombly* and *Iqbal,* have continued to apply *Leatherman's* holding that plaintiffs are not held to a heightened pleading requirement nor are they required to plead specific facts to prove the existence of a municipal policy. [collecting cases] The Millers have alleged facts related to the traffic stop which create a plausible claim for relief under the First, Fourth, and Fourteenth Amendments. They allege that they were wrongfully stopped by Weir and the other officers because of their race, subjected to searches by the officers, subjected to an illegal canine sweep of the car and their persons, handcuffed, and detained for nearly an hour, all under false pretenses. In addition, they have alleged that the impetus for their claims is the inadequate training of the officers by the City (and County) as it relates to vehicle traffic stops and the use of police dogs in searches. Finally, they have set out the alleged policies they believe led to the inadequate training of the officers, i.e., the failure to require reports of officers regarding traffic stops and the deployment of canine searches, the failure to train regarding a proper search of a vehicle, etc. Even after *Twombly* and *Iqbal,* a plaintiff doesn't have to come forward with evidence to survive a motion to dismiss. Moreover, giving the Millers' the benefit of liberal pleading standards due to their *pro se* status, it appears that they have pled sufficient facts to assert a plausible claim under *Monell* and sufficient facts to put the City on notice of the claim. The Motion to Dismiss is, therefore, DENIED.")

Diaz v. Hart, No. 08 C 5621, 2010 WL 849654, at *7 (N.D. Ill. Mar. 8, 2010) ("Defendants argue that Diaz fails to adequately define the custom, policy, or practice at issue and that the factual allegations in the complaint do not meet the pleading requirements set out in *Iqbal.* Post-*Twombly* and *Iqbal,* other courts in this district have continued to apply *Leatherman's* holding that plaintiffs are not required to plead specific facts to prove the existence of a municipal policy. [collecting cases] Diaz's allegations regarding a widespread custom are specific enough to alert defendants to the policy he alleges infringes on his constitutional right. Diaz alleges in significant detail that (1)

he had an injury that required surgery; (2) he was examined by doctors at the Jail, NRC, and Stroger who said he needed surgery; and (3) no surgery was ever performed. These allegations, which include dates, names of parties, accounts of doctors' visits, and the locations of those visits, are specific enough to put defendants on notice of the policy Diaz is seeking to hold them liable for.")

S.J. v. Perspectives Charter School, No. 09 C 444, 2010 WL 502752, at *5, *6 (N.D. Ill. Feb. 9, 2010) ("To state an actionable § 1983 claim based on policy, practice, or custom, a plaintiff cannot merely assert the existence of a policy. . . . Here, S.J. alleges no specific 'policies, practices and customs' of 'Defendants' other than 'failure to properly train employees.'. . S.J.'s pleading of this Count amounts to mere 'legal conclusion' without "show[ing] that [S.J.] is entitled to relief.'. . In its statement of facts, moreover, S.J. fails to allege or describe any incidents other than the search of S.J., and claims that this shows failure to properly train employees. . . . [A]lthough the single strip search alleged is 'consistent with' S.J's theory of liability, S.J. has failed to plead facts sufficient to state a failure to train claim.")**.**

Riley v. County of Cook, 682 F.Supp.2d 856, 861, 862 (N.D. Ill. 2010) ("[T]he Supreme Court has expressly rejected a heightened pleading standard for § 1983 claims against a municipality. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 165-66 (1993). Courts in this district have affirmed this principle post-*Twombly. See Eckert v. City of Chicago,* 2009 WL 1409707, at * 6 (N.D.Ill. May 20, 2009); *Jones v. Bremen High Sch. Dist.* 228, 2009 WL 537073, at *4 (N.D.Ill. Mar. 4, 2009). Thus, an official capacity claim can survive even with conclusory allegations that a policy or practice existed, so long as facts are pled that put the defendants on proper notice of the alleged wrongdoing. *McCormick v. City of Chicago,* 230 F.3d 319, 325 (7th Cir.2000). In this case, Defendants contend that Plaintiff's official liability claims against all Defendants are deficient. As to Counts I and II against Andrews and Dart, Defendants urge that they contain unsupported conclusions that Defendants acted with deliberate indifference by failing to maintain appropriate suicide prevention policies. However, given the above standards, the Court disagrees. Plaintiff's Complaint alleges that Andrews and Dart were responsible for the care and management of the prisoners at Cook County Jail, and had policymaking authority to implement appropriate procedures to do so. Plaintiff further alleges that Andrews and Dart acted with deliberate indifference by failing to institute suicide prevention practices at Cook County Jail, and elaborates six specific examples of inadequate procedures as well as the failure to adequately monitor the jail cells. Plaintiff claims that Hopkins' suicide was the result of this direct indifference. Plaintiff has clearly gone beyond bare legal conclusions and provided Defendants with fair notice of the basis for her claim. Plaintiff's assertions are therefore sufficient to establish official capacity claims against Andrews and Dart.")**.**

Gilbert ex rel. James v. Ross, No. 09-cv-2339, 2010 WL 145789, at *2, *3 (N.D. Ill. Jan. 11, 2010) ("Plaintiff is not required to meet a heightened pleading standard for a § 1983 official-capacity claim. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168 (1993); *Simpson v. Nickel,* 450 F.3d 303, 306 (7th Cir.2006). Thus, Plaintiff need not plead particular facts upon which he bases his claim of an official policy or custom, and a 'short

and plain statement' that a government entity's official policy or custom caused his injury is sufficient to survive a motion to dismiss. *Id.;* see Fed.R.Civ.P. 8(a)(2). Citing *McCormick v. City of Chicago,* 230 F.3d 319, 325 (7th Cir.2000), Defendants concede that the law does not require Plaintiff to meet a heightened standard of pleading to state an official-capacity claim, but emphasize *McCormick's* statement that *Monell* requires conclusory allegations to be 'buttressed by facts alleging wrongdoing' by the relevant government entity. See *McCormick,* 230 F.3d at 325-26. This language should not be read to require more than notice pleading, but only to require that the pleadings allege that the government entity is responsible for the constitutional deprivation resulting from the alleged policy or custom. . . In fact, as *McCormick* explicitly notes, '[t]he Supreme Court has made it very clear that federal courts must not apply a heightened pleading standard in civil rights cases alleging § 1983 municipal liability.'. . Plaintiff's complaint sufficiently alleges official capacity liability under § 1983 as to Counts I and II. Plaintiff alleges that Officer Ross and an unknown officer were acting in their official capacities as Cook County and Village of Maywood police officers. Plaintiff further alleges that the Cook County Sheriff and the Cook County Sheriff's Department, as well as the Village of Maywood, directly encourage the misconduct at issue here by a failure to train, supervise, and control officers. The misconduct is described in detail in paragraphs fifteen through eighteen of the complaint, where Plaintiff specifically describes being randomly stopped, physically abused, forced into a police car without probable cause for an arrest, and dropped off near known gang members. Plaintiff alleges that the municipalities encourage this conduct by failing to punish or scrutinize it. Plaintiff also alleges that other Cook County and Village of Maywood citizens have been similarly mistreated but that there have been no findings of misconduct by the municipalities; rather, Plaintiff claims that there is a 'code of silence' by which similar misconduct is not reported. These facts, when read in a light most favorable to Plaintiff, adequately state a cause of action for § 1983 municipal liability. Defendants, relying on *Sivard v. Pulaski County,* 17 F.3d 185, 188 (7th Cir.1994), also argue that Plaintiff's claim must be dismissed for failure to allege more than a single instance of wrongdoing. Although Plaintiff has not identified any other person who was a victim of Defendants' alleged policies, he does, as described above, allege that the failure to train, supervise, and scrutinize, as well as the 'code of silence,' is an ongoing practice that continually harms the citizens of Cook County and the Village of Maywood. Furthermore, *Sivard* involved a motion for summary judgment, not a motion to dismiss, and does not address notice pleading standards. . . Plaintiff's complaint, when taken as a whole, sufficiently alleges the existence of official policies or customs that deprived Plaintiff of his constitutional rights.").

Gardunio v. Town of Cicero, No. 09-CV-1162, 2009 WL 4506318, at *9 (N.D. Ill. Nov. 30, 2009) ("Defendants also argue that Plaintiff's allegations regarding Dominick's actions are insufficient to establish the Town's liability because Plaintiff has failed to allege when or how Dominick orchestrated Plaintiff's arrest and prosecution. But as Defendants themselves note, Section 1983 claims against municipalities are not subject to a heightened pleading standard. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 165-66 (1993). Therefore, even post-*Twombly,* Plaintiff is required only 'to allege Aenough facts to state a claim to relief that is plausible on its face.'' *Eckert v. City of Chicago*, 2009 WL 1409707, at *6 (N.D.Ill.

May 20, 2009) (quoting *Twombly*, 550 U.S. at 570); see also *Jones v. Bremen High Sch. Dist. 228*, 2009 WL 537073, at *4 (N.D.Ill. Mar. 4, 2009) (holding that under *Twombly*, Plaintiff 'is not required to plead with specificity the existence of a municipal policy").")

Wilson v. City of Chicago, No. 09 C 2477, 2009 WL 3242300, at *3 (N.D. Ill. Oct. 7, 2009) ("[T]he City argues that the Court should dismiss claims against it because Wilson has not adequately pleaded municipal liability. The City argues that cursory allegations of *Monell* liability are insufficient to plead a claim against the City. Specifically, the City argues that Wilson has not provided any other examples of the alleged 'widespread practices' about which he complains. *Monell* claims, however, are not subject to a heightened pleading standard. *Lanigan v. Village of E. Hazel Crest, Ill.*, 110 F.3d 467, 479 (7th Cir.1997). And notice pleading does not require Wilson to plead all of the facts logically entailed by the claim. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir.2008). It is not reasonable to expect a plaintiff to have information about other incidents at the pleading stage; instead, a plaintiff should be given the opportunity to develop an evidentiary record to determine whether he can provide support for his claims. *McCormick v. City of Chicago*, 230 F.3d 319, 325 (7th Cir.2000) (error to dismiss *Monell* claims on the ground that they were too conclusory); *Sledd v. Lindsay*, 102 F.3d 282, 288-289 (7th Cir.1996) (reversing dismissal of *Monell* claims where dismissal based on plaintiff's failure to identify specific factual patterns in the complaint). Wilson's pleadings makes it clear that he alleges that the individual Defendants coerced false testimony in order to frame him and then withheld the knowledge that the testimony was false from him. Wilson's pleadings further makes it clear that he alleges that the City of Chicago turned a blind eye to its officers' practice of withholding exculpatory information and that failure emboldened the Defendants causing them to believe they could get away with framing him. Such allegations are more than labels and conclusions; rather they provide a factual basis that sets forth a short and plain statement that the government entity's official policy or custom is the cause of his injury. If the Court accepts these allegations as true, as it must, Wilson's factual allegations more than adequately raise his right to relief above the speculative level and the Court need not draw any further inferences to conclude that the City would be liable for the misconduct alleged. The Court DENIES the City's Motion to Dismiss.").

Eckert v. City of Chicago, No. 08 C 7397, 2009 WL 1409707, at *6 (N.D. Ill. May 20, 2009) ("'[T]he Supreme Court has rejected any heightened pleading requirement for claims against a municipality.'. . Post-*Bell Atlantic*, other courts in this district have affirmed *Leatherman's* holding that plaintiffs are not required to plead with specificity the existence of such a municipal policy. . .We agree with Defendants that under the post-*Bell Atlantic* pleading standard, a plaintiff must provide more than boilerplate allegations to survive a motion to dismiss. . . However, *Bell Atlantic* only requires plaintiffs to allege 'enough facts to state a claim to relief that is plausible on its face.'").

EIGHTH CIRCUIT

Watkins v. City of St. Louis, Missouri, 102 F.4th 947, 953-54 (8th Cir. 2024) ("Watkins argues she is not required to specifically plead the existence of an unconstitutional policy or custom to withstand the City's motion to dismiss. This is true. . . But she still 'must allege facts which would support the existence of an unconstitutional policy or custom.'. . Dismissal is proper when a complaint does not contain any 'allegations, reference, or language by which one could begin to draw an inference that the conduct complained of ... resulted from an unconstitutional policy or custom ....'. . .Although we hold Watkins has pled sufficient facts to support her § 1983 claims against the individual officers, we agree with the district court that Watkins has not alleged sufficient facts to support her § 1983 claims against the City on any of the *Monell* bases. First, Watkins has not alleged the existence of an unconstitutional official policy because she has not identified 'a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters.'. . Second, Watkins has not alleged facts that support the existence of an unconstitutional unofficial custom. Watkins's complaint does not allege facts plausibly suggesting '(1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) an injury by acts pursuant to the government entity's custom.'. . Instead, Watkins simply makes conclusory assertions that such misconduct occurred. Indeed, the only facts in Watkins's complaint that might support these conclusory allegations are the facts of her own arrest, and '[g]enerally, an isolated incident of alleged police misconduct ... cannot, as a matter of law, establish a municipal policy or custom creating liability under § 1983.'. .Third, Watkins has not alleged facts stating a claim for failure to train or supervise. Watkins's complaint does not allege facts plausibly suggesting (1) the City's 'officer training practices were inadequate;' (2) the City 'was deliberately indifferent to the rights of others in adopting these training practices, and' the City's 'failure to train was a result of deliberate and conscious choices it made;' and (3) the City's 'alleged training deficiencies caused [Watkins's] constitutional deprivation.'. . As before, Watkins's allegations are conclusory, and she does not assert specific instances or provide specific examples of inadequate officer training or supervising practices that could support an inference of an unconstitutional policy or custom. Accordingly, we affirm the district court's dismissal of Watkins's § 1983 claims against the City.")

Smith v. Allbaugh, 987 F.3d 905, 911-12 (10th Cir. 2021) ("Ms. Smith fails to assert sufficient facts to support a causal link between Defendants' actions and the constitutional violation. Ms. Smith asserts five policies and procedures that Defendants failed to promulgate or enforce. She pleads two policies that Defendants failed to 'enforce': (1) a policy requiring facility nurses and staff to immediately inform the facility medical provider when facing complaints of difficulty breathing or complaints relating to the abdomen; and (2) a policy requiring facility nurses and staff to immediately contact emergency services if an inmate complained of severe difficulty breathing or experienced a sudden onset of altered medical status. . . However, Ms. Smith only alleges that JHCC medical staff failed to follow such procedures, . . . not that Defendants failed to enforce these policies. Indeed, Ms. Smith fails to plead any facts tending to show that Defendants were aware of prior instances of these policies not being followed and that they failed to rectify those

situations. Ms. Smith further pleads that Defendants failed to 'promulgate, implement, and/or enforce policies' (1) 'requiring medical staff to inform a physician and/or refer an inmate to a hospital when an inmate complained of difficulty breathing, experienced acute stomach pain, or showed obvious signs of medical distress;' (2) 'requiring a facility physician to conduct an in-person examination of a critically ill patient or arrange for their transfer to a facility where a physician's examination was available;' and (3) 'regarding necessary protocols when an inmate lacks capacity to refuse medical treatment.'. . However, the first two policies are the same policies that Ms. Smith argues should have been enforced above. As for the final policy, Ms. Smith attaches a copy of the Waiver of Treatment/Evaluation Form in the complaint that states protocols that must be followed by the medical staff when completing the form. . . Again, while the medical staff may not have followed the protocol, Ms. Smith fails to allege facts that Defendants knowingly failed to enforce the policy and therefore fails to assert a causal link between their actions and the constitutional violation. Ms. Smith also failed to plead sufficient factual allegations to support deliberate indifference on the part of these defendants. First, Ms. Smith alleges that Defendants 'were aware that the policies and procedures they created, promulgated, implemented, and/or enforce[d]—or failed to create, promulgate, implement, or enforce—resulted in grossly deficient medical care to inmates at Joseph Harp.'. . However, such conclusory allegations, without sufficiently pleaded supporting facts, are insufficient to state a claim. . . Second, Ms. Smith alleges that Mr. Allbaugh referred to JHCC as a 'sinking ship.' However, such a broad statement is inadequate to demonstrate that Mr. Allbaugh knew there were specific policies being violated and failed to enforce them. It is likewise inadequate to demonstrate awareness of an absence of specific policies to prevent the violation of inmates' constitutional rights.")

Whitney v. City of St. Louis, Missouri, 887 F.3d 857, 861 & n.5 (8th Cir. 2018) ("Whitney Sr. contends that the district court was wrong when it concluded that absent a constitutional violation on the part of Sharp, the City had no *Monell* liability. He claims that *Monell* liability is still possible because other jail personnel who were not named as defendants 'arguably fulfilled a "do nothing" Jail policy vis-a-vis an inmate committing suicide.' This claim fails for the same reason as the claim against Sharp. The complaint alleges that unnamed jail personnel were deliberately indifferent while Whitney was hanging himself. Tellingly, the complaint does not allege any facts to support this legal conclusion. The surmise of the allegation is unsupported by sufficient factual allegations. There is, for example, no claim that any identifiable jail official had knowledge that Whitney was in the process of committing suicide or even that a particular jail official suspected that he might be committing an act of self-harm. In short the complaint fails to allege any constitutional violation arising out of a municipal policy that would expose the City to *Monell* liability. . . . We also note that a failure to implement a specific policy does not equate to a failure to adopt a constitutionally adequate policy.")

B.A.B., Jr. v. Board of Educ. of City of St. Louis, 698 F.3d 1037, 1040, 1041 (8th Cir. 2012) ("It is well-established that § 1983 claims based on the Board's failure to train its employees require proof that '(1) the [Board's] training practices [were] inadequate; (2) the [Board] was deliberately indifferent to the rights of others in adopting them, such that the "failure to train reflects a

deliberate or conscious choice by [the Board]"; and (3) an alleged deficiency in the ... training procedures actually caused the plaintiff's injury.' . . Plaintiffs must prove that 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [Board] can reasonably be said to have been deliberately indifferent to the need.'. . .Plaintiffs' Complaint did not come close to meeting these rigorous standards. The substantive due process claim of Ms. Allen required proof of conscience-shocking behavior. The Complaint alleged that Nurse Franklin told B.A.B. she would administer the vaccine by shot, not by nasal mist, the allegedly harmful alternative, because his asthma put him in need of the H1–N1 vaccination. However inappropriate it may have been to override Ms. Allen's refusal to consent, this was not conscience-shocking behavior by a public school nurse. B.A.B.'s Fourth Amendment claim failed to allege that he refused to consent to this minimally invasive procedure, only that he told Nurse Franklin his mother did not consent. Adding these insufficiencies to the inadequate and conclusory allegations regarding the Board's failure to train, we conclude these § 1983 claims were properly dismissed, either for failure to plead a plausible claim, or for failure to state a claim.")

Cole v. Does, No. 21-CV-1282 (PJS/JFD), 2021 WL 5645511, at *3-4, *8 (D. Minn. Dec. 1, 2021) ("Following *Twombly* and *Iqbal*, some confusion in the case law arose because in a decision that preceded *Twombly* and *Iqbal*—*Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)—the Supreme Court had appeared to hold that a claim against a municipality for failing to adequately train police officers who violated the plaintiff's civil rights was adequately pleaded, even though the claim provided nothing more than what *Twombly* described as 'a formulaic recitation of the elements of a cause of action.' Despite the apparent tension between *Leatherman*, on the one hand, and *Twombly* and *Iqbal*, on the other, *Iqbal* did not even mention *Leatherman*, and *Twombly* cited it only once in a footnote (with no hint of disapproval). . . In the aftermath of *Twombly* and *Iqbal*, the federal courts took two positions regarding the continued viability of *Leatherman*. Some courts read *Leatherman* narrowly to hold only that the lower court had erred in applying a heightened pleading standard to *Monell* claims, but to express no opinion as to whether the complaint at issue was adequate under the correct ("un-heightened") pleading standard. Other courts read *Leatherman* more broadly to hold that the complaint at issue was *adequate*. Because *Leatherman* had not been overturned, these courts applied *Leatherman* in finding that formulaic *Monell* claims passed muster. The undersigned took the latter view in *Gearin v. Rabbett*, No. 10-CV-2227 (PJS/AJB), 2011 WL 317728 (D. Minn. Jan. 28, 2011), which declined to dismiss a *Monell* claim premised on the deliberate indifference of municipal policymakers to the unconstitutional conduct of an official named Kantrud. . . .Understandably, Cole and Hennessy-Fiske have cited this Court's order in *Gearin* in arguing that a lenient *Leatherman* pleading standard—rather than a stricter *Iqbal/Twombly* pleading standard—should apply to supervisory-liability claims brought under 42 U.S.C. § 1983 (claims that are similar, although not identical, to *Monell* claims). . . On reflection, however, the Court concludes that it erred in *Gearin*, and that there is no 'civil rights' exception to the *Iqbal/Twombly* standard. In the more than 10 years since *Gearin* was decided, numerous appellate and trial courts have applied

the *Twombly/Iqbal* pleading standard to *Monell* and supervisory-liability claims. [collecting cases] In reconciling *Leatherman* with *Twombly* and *Iqbal*, these courts have persuasively argued that *Leatherman* did not hold that the bare-bones complaint at issue in that case was adequate. Rather, *Leatherman* simply held that *Monell* claims should be evaluated under the Rule 8 pleading standard—whatever that standard requires—and not under a heightened pleading standard. Accordingly, the Court will apply the *Twombly/Iqbal* standard to plaintiffs' claims again Dwyer and Salto. . . . Like the allegations at issue in *Iqbal*, Cole and Hennessy-Fiske's allegation that Dwyer and Salto authorized or approved the Doe defendants' use of force against the journalists is a ' "naked assertion[ ]" devoid of "further factual enhancement."'. . Nowhere in their complaint do Cole and Hennessy-Fiske explain how they know what Dwyer and Salto said to the Doe defendants or provide any details about when or how Dwyer and Salto authorized and approved of the Doe defendants' use of force against the journalists. As a result, the Court cannot find that Cole and Hennessy-Fiske have satisfied their burden to plead 'enough facts to state a claim to relief that is plausible on its face.'")

Taylor ex rel. Taylor v. Isom, No. 4:11–CV–1351 CAS, 2013 WL 2447602, *4, *5 (E.D. Mo. June 5, 2013) ("The Supreme Court has rejected any heightened pleading requirement for claims against a governmental entity. . . To survive a motion for judgment on the pleadings, however, a complaint must allege facts sufficient 'to state a claim to relief that is plausible on its face.'. . Considering this pleading standard, in order to state a viable § 1983 claim against the Board or Isom, plaintiff was required to plead facts sufficient to show at least an inference that her constitutional rights were violated as a result of action taken pursuant to an official policy, or as a result of misconduct so pervasive among non-policymakers as to constitute a widespread custom and practice with the force of law. . .Assuming arguendo that plaintiff suffered a constitutional deprivation, she has pleaded no facts in the Complaint that would demonstrate the existence of either an official policy or a widespread custom or practice that caused the deprivation. Plaintiff's allegations concerning official policy and custom are mere labels and conclusions, which are inadequate to state a claim. . . Although plaintiff need not identify the specific unconstitutional policy to survive a motion for judgment on the pleadings, *see Crumpley–Patterson v. Trinity Lutheran Hospital*, 388 F.3d 588, 591 (8th Cir.2004), she must, at the least, allege facts that would support the drawing of an inference that the conduct complained of resulted from the existence of an unconstitutional policy or custom. *Id.* Plaintiff does not plead any facts that would support the existence of an unconstitutional policy or custom. Rather, all the facts alleged relate to the actions of the police officer defendants themselves. . .In the absence of any factual allegations to support the existence of an unconstitutional policy or custom, there is no basis upon which to hold the Board or Isom liable under § 1983. These defendants' motion for judgment on the pleadings should therefore be granted.")

NINTH CIRCUIT

J. K. J. v. City of San Diego, 42 F.4th 990, 999 (9th Cir. 2021) (amended opinion) ("[E]ven recognizing that 'a failure to train can be a "policy" under *Monell*,'. . . J.K.J. alleged no facts that

would indicate any 'deficiency in training actually caused the police officers' [alleged] indifference to [Jenkins'] medical needs[.]'. . On the contrary, the amended complaint claimed that San Diego officers 'are trained in accordance with ... Police Department policies to take immediate action to summon medical care' in circumstances like those Taub and Durbin encountered when they met Jenkins. Indeed, J.K.J. alleged that Durbin acted 'in direct contravention to the policy and training of the ... Department.' These allegations suggest that the moving force behind the alleged constitutional violation was not a failure to train, but the officers' failure to heed their training. J.K.J. resists this conclusion. He appears to argue that the officers' alleged deviation from training indicated 'the need for more or different training.'. . But the amended complaint never identified what additional training was required beyond what Taub and Durbin received. Nor did it allege facts indicating that this supposed failure to enhance officer training was the moving force behind Jenkins' injuries. Accordingly, J.K.J. failed to state a claim for municipal liability.")

Hyun Ju Park v. City and County of Honolulu, 952 F.3d 1136, 1141-43 (9th Cir. 2020) ("When, as here, a plaintiff pursues liability based on a failure to act, she must allege that the municipality exhibited deliberate indifference to the violation of her federally protected rights. . . We agree with the district court that Park's *Monell* claim must be dismissed because she has not plausibly alleged that the County's inaction reflected deliberate indifference to her Fourteenth Amendment right to bodily integrity. . . . Park premises her claim against the County on the failure of the relevant policymaker—here, the Chief of Police—to address deficiencies in the two Honolulu Police Department policies or customs mentioned earlier. As to Policy 2.38, Park contends that the Chief of Police failed to amend the policy to prohibit officers from carrying firearms whenever they consumed alcohol in any amount. As to the 'brotherhood culture of silence,' Park alleges that the Chief of Police failed to implement mandatory whistleblowing policies, which would have rooted out the culture of silence. Even accepting those allegations as true, Park has not plausibly alleged that the Chief of Police had actual or constructive notice that his inaction would likely result in the deprivation of her federally protected rights. . . . Park has not plausibly alleged that the Chief of Police was aware of prior, similar incidents in which off-duty officers mishandled their firearms while drinking. In her complaint, she alleges only that, on two prior occasions, she witnessed Kimura drunkenly brandish his firearm in the presence of Naki and Omoso while drinking at the bar. As Park acknowledges, however, the Chief of Police did not learn of those incidents before her injury, and she alleges no other prior incidents that would have alerted the Chief of Police that officers were interpreting Policy 2.38 to require conduct that endangered members of the public. Instead, she asserts that the Chief of Police knew or should have known of Policy 2.38's foreseeable consequences because the Honolulu Police Department referenced on its website a Hawaii statute prohibiting individuals with alcohol-abuse disorders from possessing firearms. That allegation falls far short of establishing deliberate indifference. . . . Park's allegations concerning the 'brotherhood culture of silence' fare no better. Park asserts that the Chief of Police had actual notice of the foreseeable consequences of his inaction because he knew about three prior instances in which officers attempted to conceal each other's misconduct. But Park offers no details about the type of misconduct allegedly committed by these officers or the extent to which their actions implicated community members' federally protected rights. Without *any* information about the

nature of the prior incidents, we cannot reasonably infer that the Chief of Police knew or should have known that the culture of silence would likely result in the deprivation of Park's constitutional rights.")

Hyun Ju Park v. City and County of Honolulu, 952 F.3d 1136, 1144-49 (9th Cir. 2020) (Smith, J., concurring in part and dissenting in part) ("I respectfully disagree with the majority's analysis of Park's *Monell* claim against the County. . . . Park plausibly alleges that Officer Kimura handled his revolver on the night in question for HPD reasons, not personal reasons. Construing the facts in Park's favor, Officer Kimura therefore acted under color of law. . . . On the facts plausibly alleged in the SAC, I have no doubt that Officer Kimura's drunken wielding of his revolver in a bar full of people was an abuse of power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'. . Thus, I believe that the majority's assumption that Officer Kimura acted under color of law in fact reflects the correct result. I therefore also have no doubt that Park has plausibly alleged a Fourteenth Amendment violation of her right to bodily integrity, given the plausible allegation of a state actor, and of deliberate indifference by the County as I discuss below. . . . Park points to many policy corrections that plausibly would have prevented her injuries, including a prohibition on firearm possession while consuming alcohol in any amount, guidance regarding assessing impairment and preventing firearm misuse by impaired officers, mandatory reporting of officer misconduct, and whistleblower protections for reporting officers. I would reject Defendants' suggestion that a policy prohibiting firearm carrying while 'drinking' would have been just as ineffective as the actual policy—prohibiting firearm carrying while 'impaired'—because 'impairment starts with the first sip.' Most people do not consider themselves impaired after 'one sip.' Similarly, I disagree with the majority's conclusion that HPD Policy No. 2.38 did not require HPD officers to carry their firearms with them to a bar. It is unclear when exactly the majority reads the policy to direct (or even permit) officers to dispossess themselves of their holstered pistols in relation to a plan to drink at a bar, nor is it clear what the officers should then do with the pistol. Officers who fail to carry their pistol while at a bar but not impaired would violate the policy's plain terms. Officers who become impaired while carrying a holstered pistol are dangerous. . . . I disagree with the majority's conclusion that Park has failed to plausibly allege that the County had notice here. Officer Kimura's repeated engagement in drunken and dangerous weapons handling occurred in the presence of other HPD officers. This put the County on at least 'constructive' notice of the substantial risk of harm, whether on account of its policies generally or on account of its policies' effects on Officer Kimura specifically. I certainly would not shield the County from being charged with 'constructive notice' of Officer Kimura's past behavior where the very reason individual policymakers may not have had 'actual' notice was the offending brotherhood culture of silence. To the extent that the majority identifies additional facts that, if alleged, would have made out a more compelling case for constructive or actual notice, Park should be given leave to amend. . . For the foregoing reasons, I respectfully dissent as to the dismissal of Park's *Monell* claims against the County. I would reverse the district court and allow that portion of Park's lawsuit to proceed.")

Garmon v. Cty. of Los Angeles, 828 F.3d 837, 846 (9th Cir. 2016) ("A local government may be liable under § 1983 for an official's conduct where the official had final policymaking authority concerning the action at issue, and where the official was the policymaker for the local governing body for the purposes of the particular act. *Goldstein v. City of Long Beach*, 715 F.3d 750, 753 (9th Cir. 2013). In fact, a municipality may be liable for an 'isolated constitutional violation when the person causing the violation has final policymaking authority.' *Lytle v. Carl*, 382 F.3d 978, 983 (9th Cir. 2004) (citation omitted). A municipality's failure to train its employees may also constitute an actionable policy or custom under § 1983 if it amounts to deliberate indifference to the rights of persons with whom the untrained employees come into contact. . .A *pro se* complaint must be held to less stringent standards than formal pleadings drafted by an attorney. . . Because Garmon filed her operative complaint *pro se*, we "construe the pleadings liberally" and afford her 'the benefit of any doubt.' *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)). Although the operative complaint states that Garmon is suing the County Defendants for violating a county policy, it includes other allegations that might support viable theories for county liability. For example, the operative complaint states that 'Steve Cooley ... is [a] policy maker for the District Attorney's office.' An amended complaint could add allegations to bolster a claim that the facts alleged constitute an isolated constitutional violation stemming from Cooley's actions as a final policymaker. . . The operative complaint also states that Hanisee, 'acting on behalf of the County of Los Angeles ... acted negligently ... by misusing the power of her office.' Garmon might be able to allege more facts that would support a claim that Hanisee's actions were performed as a final policymaker. Likewise, the operative complaint alleges claims for 'Negligent training' and 'Negligent supervision.' Garmon could allege additional facts relating to the County's failure to train and supervise. . . Allegations based on these theories could be consistent with the operative complaint, rather than necessarily inconsistent with it as the district court concluded. Thus, it was an abuse of discretion to deny leave to amend. The court shall grant Garmon leave to amend on remand.")

AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 637 (9th Cir. 2012) ("Our circuit precedent, articulated first in *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir.1986), and most recently in *Whitaker*, 486 F.3d at 581, requires plaintiffs in civil rights actions against local governments to set forth no more than a bare allegation that government officials' conduct conformed to some unidentified government policy or custom. The County argues that our precedent has been implicitly overruled by the reasoning of intervening Supreme Court decisions, including *Ashcroft v. Iqbal*. . . . Yet briefing on this appeal was completed before our decision in *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011). There, we identified and addressed conflicts in the Supreme Court's recent jurisprudence on the pleading requirements applicable to civil actions. . . .[W]hatever the difference between [*Swierkiewicz*, *Dura Pharmaceuticals*, *Twombly*, *Erickson*, and *Iqbal*], we can at least state the following two principles common to all of them. First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not

unfair to require the opposing party to be subjected to the expense of discovery and continued litigation. . . This standard applies to *Monell* claims and should govern future pleadings in this case. The district court abused its discretion when it denied AE the opportunity to allege additional facts supporting the claim that Portillo's, Wampler's, and Felix's alleged constitutional violations were carried out pursuant to County policy or custom. AE's allegation of plausible facts supporting such a policy or custom could have cured the deficiency in the *Monell* claim.")

Dougherty v. City of Covina, 654 F.3d 892, 900, 901 (9th Cir. 2011) ("Here, Dougherty's *Monell* and supervisory liability claims lack any factual allegations that would separate them from the 'formulaic recitation of a cause of action's elements' deemed insufficient by *Twombly*. . . Regarding the *Monell* claim, Dougherty alleged only that (1) 'Defendant CITY's policies and/or customs caused the specific violations of Plaintiff's constitutional rights at issue in this case[ ]' and (2) 'Defendant CITY's polices and/or customs were the moving force and/or affirmative link behind the violation of the Plaintiff's constitutional rights and injury, damage and/or harm caused thereby.' The Complaint lacked any factual allegations regarding key elements of the *Monell* claims, or, more specifically, any facts demonstrating that his constitutional deprivation was the result of a custom or practice of the City of Covina or that the custom or practice was the 'moving force' behind his constitutional deprivation. Regarding supervisory liability, Dougherty alleged only 'negligent' hiring and training and pointed to no instances of deliberate indifference. Dougherty failed to plead 'enough facts to state a claim to relief that is plausible on its face.'")

Cariega v. City of Reno, No. 316CV00562MMDWGC, 2017 WL 1900980, at *3–4 (D. Nev. May 8, 2017) ("The FAC alleges that the City of Reno has a 'pattern and practice of not processing traffic citation payments and quashing the related arrest warrants of Native Americans and/or other minorities in a proper and timely manner.'. . The FAC's mere legal conclusion that there is a 'pattern or practice' without pointing to specific decisions of the City of Reno's lawmakers, specific acts of the City's policymaking officials, or factual examples of practices so persistent as to have the force of law, is insufficient under the pleading standards of *Iqbal/Twombly* to withstand a motion to dismiss under Rule 12(b)(6). Therefore, the Court grants Defendant's Motion. The Court has discretion to grant leave to amend and should freely do so 'when justice so requires.'. . As pleaded, the FAC does not contain sufficient factual allegations to state a claim for relief under § 1983. However, the Court is unclear on whether amendment would be futile. Accordingly, the Court grants Plaintiff leave to amend the FAC if Plaintiff is able to cure the deficiencies identified in this Order.")

Lopez v. Cnty. of Los Angeles, No. CV 15-01745 MMM MANX, 2015 WL 3913263, at *7-8 (C.D. Cal. June 25, 2015) ("After *Iqbal*, *Monell* allegations must identify the challenged policy, custom, or failure to train, explain why it is deficient, and state how it harmed plaintiff. Where a claim is based on a failure to train, the complaint must also plead facts showing that the municipality's conduct amounted to deliberate indifference. . . .Plaintiffs' complaint fails to plead a plausible *Monell* claim based on defendants' alleged policies and practices. . . Plaintiffs do not sufficiently identify the specific policy, custom, or failure to train being challenged, explain why

it is deficient, or state how it harmed Gabriel or them. Nor do plaintiffs allege facts showing that the defendants acted with deliberate indifference in failing properly to train their employees. Rather, plaintiffs do little more than recite the elements of a municipal liability claim. This is not sufficient under *Twombly* and *Iqbal*.")

Hernandez v. City of Beaumont, No. EDCV 13–00967 DDP (DTBx), 2013 WL 6633076, *5 (C.D. Cal. Dec. 16, 2013) ("Plaintiffs' complaint does not meet the heightened pleading standards for municipal liability after *Iqbal.* Nowhere does Plaintiffs' complaint contain specific allegations regarding the customs, policies, and practices that they allege are insufficient. Instead, Plaintiffs plead simply that City, Coe, and Does 1–10 'act[ed] with gross negligence and with reckless and deliberate indifference' in (1) employing and retaining Clark and Velasquez, who they knew or should have known had dangerous propensities; (2) inadequately training, supervising, and disciplining Clark and Velasquez; (3) maintaining inadequate procedures for reporting misconduct; (4) failing to adequately train officers in their use of the JPX pepper spray gun; and (5) maintaining an unconstitutional policy or practice of arresting and detaining individuals without probable cause and through use of excessive force. . . Plaintiffs plead no facts regarding what policies and practices City used in training, hiring, disciplining, and supervising their officers in the use of the JPX pepper spray gun, let alone why those policies and practices were deficient. Plaintiffs also fail to plead any facts as to why Clark and Velasquez had 'dangerous propensities' or why Coe and City should have known about them. Therefore, the Court GRANTS the motion to dismiss this cause of action against City, with leave to amend should Plaintiffs be able to allege specific facts giving rise to an inference of *Monell* liability.")

Tien Van Nguyen v. City of Union City, No. C–13–01753–DMR, 2013 WL 3014136, *9, *10 (N.D. Cal. June 17, 2013) ("Plaintiff's *Monell* allegations are little more than conclusory. Although the allegations allude to the possibility of a deficient policy regarding the use of canines, they do not describe the policy. Plaintiff's broad charges are insufficient to give fair notice to the City about the specific basis for municipal liability, such that the City could defend itself. . . .Plaintiff has thus failed to sufficiently allege a Section 1983 claim against the City for municipal liability and Defendants' motion to dismiss this claim is granted with leave to amend.")

Mateos-Sandoval v. County of Sonoma, 942 F.Supp.2d 890, 898-900 (N.D. Cal. 2013) ("The Supreme Court, in *Leatherman v. Tarrant Narcotics Intelligence and Coordination Unit,* cited with approval to *Karim–Panahi* in rejecting a 'heightened pleading standard' for *Monell* claims. . . *Karim–Panahi* has not been overruled, but the Ninth Circuit has recognized that, under the Supreme Court's recent pleading jurisprudence, it is no longer clear that, without more, an allegation that an officer's conduct 'conformed to official policy, custom, or practice' continues to be sufficient to state a claim under *Monell. See A.E. ex rel. Hernandez v. County of Tulare,* 666 F.3d 631, 637–38 (9th Cir.2012); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556 (2007); *Iqbal,* 556 U.S. at 678. In *Starr v. Baca,* the Ninth Circuit attempted to reconcile the apparent inconsistency between the Supreme Court's decisions in *Twombly* and *Iqbal* and other recent cases in which the Court construed Rule 8(a) in a way that would permit more claims to survive a motion

to dismiss. . . .Recently, in *A.E. ex rel. Hernandez v. County of Tulare,* the Ninth Circuit applied the *Starr* standard to a *Monell* claim. . . . In the present case, as in *A.E.,* Plaintiffs base their *Monell* claims on the theory that County Defendants had deliberate customs, policies, or practices that were 'the "moving force" behind the constitutional violation [Plaintiffs] suffered.'. . But Plaintiffs' allegations, in contrast those offered by the plaintiffs in *A.E.,* specify the content of the policies, customs, or practices the execution of which gave rise to Plaintiffs' Constitutional injuries. . . Plaintiffs allege that County Defendants 'routinely enforce' § 14602.6 by: seizing and impounding vehicles on the basis that the driver does not have a current, valid California driver's license, including when the vehicle was not presenting a hazard or a threat to public safety; keeping the vehicle [even though] someone was available to pay the impound fee to date, usually for the 30 day period specified by § 14602.6; seizing and impounding vehicles even though the driver has previously been licensed, whether in California or a foreign jurisdiction; failing and refusing to [provide] a hearing on the justification for impounding the vehicle for 30 days; failing and refusing to provide notice of the reason for impounding the vehicle for 30 days; and, on information and belief, charging an above-cost administrative fee. (Docket No.1, at p. 4.) These allegations, in contrast those set out by the plaintiffs in *A.E.,* specify the content of the policies, customs, or practices the execution of which gave rise to Plaintiffs' constitutional injuries. . . The allegations are sufficient to 'give fair notice and to enable the opposing party to defend itself effectively,' particularly since information relating to the policies, customs, and practices of County Defendants in enforcing § 14602.6 and related statutory sections is likely to be easily available to them. . . As to *Starr's* second prong—whether the allegations 'plausibly suggest entitlement to relief"—it is inherently plausible that Plaintiffs' constitutional claims, which largely are based in the alleged misconstruction of or failure to comply with California statutory law, arose as a result of the County Defendants' customs, policies, or practices. . . To the extent that Plaintiffs' allegations relating to each individual Constitutional claim satisfy Rule 8(a), plaintiffs therefore have pled facts sufficient to state a claim that County Defendants are liable under *Monell.*")

Brown v. Contra Costa County, No. C 12–1923 PJH, 2012 WL 4804862, *11, *12 (N.D. Cal. Oct. 9, 2012) ("Prior to *Iqbal* and *Twombly,* the long-standing rule was that a plaintiff need only make 'a bare allegation that the individual [defendants'] conduct conformed to official policy, custom, or practice.' *Karim—Panahi,* 839 F.2d 621, 623 (9th Cir.1988). Indeed, the Supreme Court rejected a heightened pleading standard for *Monell* claims in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168 (1993). While neither Iqbal nor *Twombly* overruled *Leatherman,* the pleading standard for *Monell* claims has been thrown into question, and, in the Ninth Circuit at least, appears to have been modified. In *Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir.2011), *cert. denied,* 132 S.Ct. 2101 (2012), the Ninth Circuit considered the impact of *Iqbal* and *Twombly,* and concluded that a pleading of municipal liability 'must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively,' and that the facts must 'plausibly suggest an entitlement to relief.' *Id.* at 1216 (citations omitted); *see also AE ex rel. Hernandez v. County of Tulare,* 666 F.3d 631, 636–38 (9th Cir.2012) (noting impact of recent Supreme Court decisions, including *Twombly/Iqbal,* on pleading standards, and applying *Starr* to municipal liability claims, holding

that 'plausible facts supporting a policy or custom ... could ... cure[ ] the deficiency in [a] Monell claim'). Here, the court finds that while the FAC alleges all three bases for *Monell* liability, it asserts legal conclusions only. That is, there are no facts pled in support of any of these theories of liability. Accordingly, the motion to dismiss must be GRANTED with leave to amend to allege facts sufficient to state a claim against the County under §§ 1981 and 1983.")

Cannon v. City of Petaluma, No. C 11–0651 PJH, 2012 WL 1183732, at *19 (N.D. Cal. Apr. 6, 2012) ("Prior to the U.S. Supreme Court's decisions in *Twombly* and *Iqbal,* a claim of municipal liability based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice was sufficient to state a claim. . . However, the Supreme Court has now made clear that conclusory, 'threadbare' allegations that merely recite the elements of a cause of action will not withstand a motion to dismiss. . . In light of *Iqbal,* it appears that the prior Ninth Circuit pleading standard for *Monell* claims—'bare allegations'—is no longer viable.")

Smith-Downs v. City of Stockton, No. 2:10–cv–02495–MCE–GGH, 2012 WL 671932, at *9, *10 (E.D. Cal. Feb. 29, 2012) ("In arguing that the FAC sufficiently states a *Monell* claim against the City, Ulring, and Moore, Plaintiffs rely on the Ninth Circuit's pre-*Iqbal* decision in *Karim–Panahi,* 839 F.2d 621, 624 (9th Cir.1988), which held that 'a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a *bare allegation* that the individual officers' conduct conformed to official policy, custom, or practice.'. . Plaintiffs' reliance on pre-*Iqbal* law to demonstrate sufficiency of their complaint is misplaced. The Supreme Court in *Iqbal* made it clear that conclusory, 'threadbare' allegations merely reciting the elements of a cause of action cannot defeat the Rule 12(b)(6) motion to dismiss. . . Thus, a viable *Monell* claim against the City, Ulring and Moore requires more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'. .The FAC does not contain *any* factual allegations plausibly demonstrating that the City, Ulring or Moore had official or de facto policies of failure to train police officers and deputy sheriffs. Plaintiffs have failed to identify what training practices the City, Ulring or Moore had and how these practices were deficient. . . .Accordingly, construing the facts in the light most favorable to the non-moving party, the Court finds that Plaintiffs have failed to state a *Monell* claim upon which relief can be granted.")

Tandel v. County of Sacramento, Nos. 2:11–cv–00353–MCE–GGH, 2:09–cv–00842–MCE–GGH, 2012 WL 602981, at *17 (E.D. Cal. Feb. 23, 2012) ("A pre- *Iqbal* Ninth Circuit decision held that 'a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.' *Whitaker v. Garcetti,* 486 F.3d 572, 581 (9th Cir.2007). However, the Supreme Court in *Iqbal* made it clear that conclusory, 'threadbare' allegations merely reciting the elements of a cause of action cannot defeat the Rule 12(b)(6) motion to dismiss. . . Thus, a *Monell* claim against the County requires more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.' ")

J.K.G. v. County of San Diego, No. 11CV305 JLS (RBB), 2011 WL 5218253, 7 (S.D. Cal. Nov. 2, 2011) ("In order to withstand a motion to dismiss for failure to state a claim, a *Monell* claim must consist of more than mere 'formulaic recitations of the existence of unlawful policies, customs, or habits.' *Warner v. Cnty, of San Diego,* 2011 U.S. Dist. LEXIS 14312, at *10 (S.D.Cal., Feb. 14, 2011). Prior to the Supreme Court's holdings in *Twombly* and *Iqbal*, the Ninth Circuit had held that 'a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss "even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice."'. . In light of *Twombly* and *Iqbal*, however, something more is required; mere conclusory allegations are insufficient. . . Here, the Court finds that Plaintiff's complaint does not meet the pleading requirements of *Twombly* and *Iqbal.* Plaintiff merely recites the existence of unlawful policies, practices, and customs, without supporting these conclusory allegations with specific facts. Plaintiff has provided no facts from which to infer that the County 'condones' the use of excessive force, unlawful searches and seizures, or the filing of false police reports, outside this one alleged instance.")

Von Haar v. City of Mountain View, No. 10-CV-02995-LHK, 2011 WL 782242, at *5 n.2 (N.D. Cal. Mar. 1, 2011) ("The Ninth Circuit does not appear to have considered whether the Supreme Court's decisions in *Iqbal* and *Twombly* would require something more than 'bare allegations' regarding municipal liability. Here, however, Plaintiff alleges more than bare legal conclusions and identifies three specific areas in which the City of Mountain View, pursuant to practice and custom, allegedly fails to adequately train its officers. Such a claim is cognizable under Section 1983, although liability will not ultimately attach unless Plaintiff can prove deliberate indifference.")

Kelly v. Spokane Airport Bd., No. CV-10-0312-LRS, 2011 WL 204867, 4 (E.D. Wash. Jan. 20, 2011) ("Taking all of Plaintiff's allegations together, the Court finds Plaintiff has sufficiently pleaded a claim of municipality liability against SIA. Plaintiff has gone beyond the minimal 'bare allegations' standard followed by the Ninth Circuit. Plaintiff has alleged Defendant Olsen deprived Plaintiff of certain constitutional rights, that Defendant SIA had a policy which amounts to deliberate indifference to Plaintiff's and others' constitutional rights, that the Defendants acted pursuant to such policy, and that the policy was the moving force behind the constitutional violations. Plaintiff has plausibly alleged facts which suggest but do not prove that the Defendants may have legal liability herein. However, without basic discovery, Plaintiff cannot reasonably be expected to go further at this time. Plaintiff is not required at this stage in the litigation to state with any *extra* specificity the nature and extent of this de facto policy by Defendant. Defendant SIA's motion to dismiss should be denied in this respect.")

Canas v. City of Sunnyvale, No. C 08-5771 JF (PSG), 2011 WL 1743910, at *6, *7 (N.D. Cal. Jan. 19, 2011) ("Despite the length of these allegations, the Court concludes that the facts alleged are insufficient to support a theory of municipal liability. Although '[t]he Ninth Circuit has held that a bare allegation that individual officials' conduct conformed to official policy, custom, or

practice suffices to plead a *Monell* claim in this circuit'[citing cases], these cases no longer are controlling in the post- *Iqbal/ Twombly* era. . . . Although Plaintiffs have been litigating their claims for more than three years and have had several opportunities to amend, their *Monell* allegations still are conclusory in nature. Other than alleging that the officers' EMT training was inadequate [to] enable them to assist the Decedent after he was shot, Plaintiffs do not explain in detail *how* the City's alleged policies or customs are deficient, nor do they explain *how* the alleged policies or customs caused harm to Plaintiffs and the Decedent. . . . [On the inadequate training claim], [a]lthough Plaintiffs allege that the City provides less training in police work than is required by POST standards, they do not identify the relevant standards or otherwise explain how the City's policies result in 'diluted training.'. . To the extent that Plaintiffs' seek to establish municipal liability based on the theory that the City ratified the alleged unconstitutional conduct of the officers, the claim also fails to meet the *Iqbal* standard. Plaintiffs' ratification claim appears to be based solely on the fact that the City's investigation did not result in disciplinary action against the officers.")

Ward v. Nevada, No. 3:09-CV-00007-RCJ-VPC, 2010 WL 1633461, at *5 (D. Nev. Feb. 26, 2010) ("Here, plaintiff's complaint mentions that one of the defendants failed 'to instruct, supervise, and train their employees and agents' in the delivery of medical care to detainees. . . . Then plaintiff alleges that both defendants acted 'pursuant to policies, customs, practices, rules, regulations, ordinances, statutes and/or usages of the State of Nevada.'. . These bare allegations lack the required factual content to overcome a motion to dismiss. The Supreme Court has explained in *Iqbal* that, under Federal Rule of Civil Procedure 8(a), a plaintiff must support claims with factual content. . . . However, *Karim-Panahi v. Los Angeles Police Dep't,* 839 F.2d 621, 624 (9th Cir.1988), notes that § 1983 claims for municipal liability can be 'based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.' The Ninth Circuit's ruling in *Karim-Panahi* gathered support under *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168 (1993), which rejected any heightened pleading standard with respect to § 1983 claims for municipal liability. *Accord Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 515 (2002) (holding that plaintiff in Title VII discrimination claim need not allege 'specific facts' beyond those necessary to state a claim). Nonetheless, *Leatherman* held that the pleading of municipal liability claims is to remain consistent with those standards under Rule 8. *See Leatherman,* 507 U.S. at 168. Turning to the most recent controlling law on Rule 8, *Iqbal* and *Twombly* declare that allegations must be supported by factual content, and the Court makes no exceptions for § 1983 municipal liability claims. Therefore, plaintiff's amended complaint should seek to include factual content to support his allegations.").

Coric v. County of Fresno, No. 1:08cv1225 JTM (BLM), 2010 WL 364322, at *3, *4 (E.D. Cal. Jan. 25, 2010) ("Plaintiff alleges that despite Sheriff Mims' 'warning' to county officials of the over crowding and under staffing in the jail, the County continued to inadequately fund the jail, even after Plaintiff was beaten in the absence of sufficient supervision. . . Construing this factual allegation as true and in the light most favorable to Plaintiff, the Court finds it is possible to draw

an inference that the County acted consciously in its budget decisions regarding funding to the jail. . . . Plaintiff alleges, 'the County of Fresno were [sic] well aware that they were under staffed[ ] for the amount of inmates housed in Fresno County Jail' and 'ignored the risk of injuries (in this case serious) as a result of *being under staff* [sic].'. . Plaintiff further states, among other things, 'the Sheriffs dept. had clearly informed the County that the over-crowding and under staffing was a real issue.'. . Again, if the Court assumes the factual content of Plaintiff's Complaint to be true, the information about under staffing and over crowding that was given to County officials by Sheriff Mims, and the attack on Plaintiff itself (documented in letters and medical reports), provide a plausible claim that both the Sheriff and County knew, or that it was obvious, that over crowding and under staffing would eventually lead to a violation of detainees' constitutional right to protection. . . . According to Plaintiff, had there been sufficient numbers of officers on duty at the time he was attacked, the attacks would not have happened, nor would the perpetrators have had the time and opportunity to drag him back to the scene for a second beating when he attempted to leave for help. Plaintiff asserts 'there wasn't *any* staff watching out for inmates safety during the time Plaintiff was [ ] beaten! Plaintiff wasn't beaten once (1), but *twice* (2), Plaintiff dragged back to a second beating for attempting to leave and find *someone* to *Help* him. A period of time passed for both attacks to happen.'. . Taken as true, and construed in the light most favorable to the Plaintiff, these facts lead to a reasonable inference that inadequate funding for sufficient staff presence led to the attack on Plaintiff. Having assessed the four conditions that need to be alleged under *Monell*, the Court finds Plaintiff's Complaint contains sufficient factual matter, accepted as true, that allows the Court to draw a reasonable inference of liability on the part of Defendant. *Iqbal*, 556 U.S. __, 129 S.Ct. at 1949, 173 L.Ed.2d 868 (2009).").

Kassim Abdulkhalik v. City of San Diego, No. 08CV1515-MMA (NLS), 2009 WL 4282004, at *10, *11 (S.D. Cal. Nov. 25, 2009) ("A plaintiff has alleged sufficient facts to assert a *Monell* claim ' Aeven if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.'' *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 624 (9th Cir.1988) (quoting *Shah v. County of Los Angeles*, 797 F.2d 743, 747 (9th Cir.1986)). Here, Plaintiff's allegations are sufficient under the standards set forth *supra.* Specifically, Plaintiff alleges: Defendant City of San Diego effectively has condoned and ratified the use of excessive and unnecessary force and other violations of constitutional rights of persons in San Diego by failing to thoroughly investigate such violations, punish those responsible, and modify its training, procedures, and policies to prevent the recurrence of same, which caused the violation of Kassim Abdulkhalik's rights. By ratifying and condoning the violation of its citizens' constitutional rights, including the rights of Mr. Abdulkhalik, Defendant City of San Diego has encouraged the future use of excessive force and other constitutional violations. . . Plaintiff alleges that the City has adopted a custom or policy of failing to investigate violations of constitutional rights or modify its training, procedures, and policies to prevent future constitutional violations. Plaintiff alleges that by adopting this policy, the City has essentially condoned and ratified the use of excessive and unnecessary force, which led to the injuries ultimately alleged by Plaintiff. Plaintiff also alleges facts to support his allegations that the City indeed has such a policy by alleging facts that McBeth filed a complaint of harassment with the

San Diego Police Department against McMurrin, but that the SDPD never contacted Mr. Abdulkhalik in connection with this complaint and never bothered to tell Mr. McBeth how his complaint was addressed − if at all.' (*Id* . at & 16.) Plaintiff's allegations are sufficient to state a claim for liability under *Monell*. Thus, the Court hereby **DENIES** Defendants' motion for judgment on the pleadings on this claim.").

Carnes v. Salvino, No. CV-08-1846-PHX-GMS, 2009 WL 2568643, at *5 (D. Ariz. Aug. 18, 2009) (" 'In [the Ninth Circuit], a claim of municipal liability under § 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice.'' *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir.2007); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 682-83 (9th Cir.2001); *Peschel v. City of Missoula*, No. CV 08-79- M-JCL, 2009 WL 902438, at *4 (D. Mont. Mar. 27, 2009) (citing multiple Ninth Circuit district court cases that have applied the "bare allegations" standard post-*Twombly*).")

Young v. City of Visalia, No. 1:09-CV-115 AWI GSA, 2009 WL 2567847, at *6 (E.D. Cal. Aug. 18, 2009) ("In light of *Iqbal*, it would seem that the prior Ninth Circuit pleading standard for *Monell* claims (i.e. "bare allegations") is no longer viable.").

TENTH CIRCUIT

McCubbin v. Weber County, No. 1:15-CV-132, 2017 WL 3394593, at *20 (D. Utah Aug. 7, 2017) ("In this case, Plaintiffs' allegations hue much more closely to municipal action or inaction that *itself* violated federal law, rather than a single bad decision tied to a facially valid policy or practice. Thus, issues of fault and causation are less difficult here. Plaintiffs allege that Weber County's policy of identifying who to serve with the gang-specific injunction *itself* violated the Constitution by being wholly discretionary, and inviting subjectivity and improper ethnic considerations into the service and enforcement of the injunction. Plaintiffs' allegations also appear to involve a pattern of tortious conduct by Weber and Ogden agents: Hispanics were disproportionately targeted and served, at least two non-gang members were successfully prosecuted under the injunction, and at least two non-gang members remain on a gang database for future enforcement actions. Whether these pattern allegations simply reinforce the claim that municipal policy or practice itself violated the constitution, or also suggest some other, narrower theory of liability, such as failure to train or supervise, the allegations plausibly support an inference of deliberate indifference on the part of the municipality itself to the consequences of the policy or practice, that is, injury to the Plaintiffs' First Amendment and due process rights. And whether these allegations more appropriately support that a decisionmaker, like Mr. Allred, promulgated an actual policy attributable to the County, or that the County permitted a practice so persistent as practically to have the force of law—or whether the evidence fails to live up to either view—will become apparent as discovery proceeds. . . For now, the allegations on the whole support both theories. Plaintiffs have stated plausible § 1983 claims for municipal liability in these circumstances.")

Bark v. Chacon, No. 10-cv-01570-WYD-MJW, 2011 WL 1884691, at *3, *4 (D. Colo. May 18, 2011) ("Here, I find that Plaintiff's allegations regarding the City's and County's failure to adequately train and supervise its police officers are not sufficient to state a claim for municipal liability under § 1983 and Fed.R.Civ.P. 12(b)(6). While Plaintiff generally alleges that the City and County have not properly trained or supervised the individual Defendants with respect to certain tasks such as obtaining search warrants, recognizing exigent circumstances, giving *Miranda* warnings, questioning suspects, as well as concepts of reasonable suspicion and probable cause, he fails to allege specific deficiencies in training and supervision, or explain how the incident described in the Amended Complaint could have been avoided with different or better training and supervision. Mere conclusory allegations that an officer or group of officers are unsatisfactorily trained will not 'suffice to fasten liability on the city.'. . . Even construing the allegations in the Amended Complaint in the light most favorable to Plaintiff, I find that Plaintiff has set forth only a 'formulaic recitation' of the elements of a § 1983 claim based on failure to train and supervise and, therefore, Plaintiff's claims against the City and County based on inadequate training and supervision should be dismissed under Fed.R.Civ.P. 12(b)(6).")

Twitchell v. Hutton, No. 10-cv-01939-WYD-KMT, 2011 WL 318827, at *6 (D. Colo. Jan. 28, 2011) ("[H]ere, since Plaintiff has set forth only a 'formulaic recitation' of the elements of a § 1983 claim based on failure to train, Plaintiff's inadequate training allegation should be dismissed against the City under Fed.R.Civ.P. 12(b)(6).")

ELEVENTH CIRCUIT

Plowright v. Miami Dade County, 102 F.4th 1358, 1370-71 (11th Cir. 2024) ("In the first count of his second amended complaint, Plowright alleged in conclusory fashion that the county 'had a county wide custom of shooting ... dogs.'. . Without any additional details about the circumstances of past incidents, however—including whether the dogs in question posed an imminent threat—Plowright failed to allege facts plausibly indicating that there was such a custom or, even if there was, that the custom 'constituted deliberate indifference to [his] constitutional right[s].'. . Plowright's bare assertion that Rondon and Cordova were 'act[ing] in their role as decision makers for the county' when they encountered Niles, . . . is likewise too conclusory to carry his claim[.] . .Plowright's second claim against the county fares no better. Although a municipality can be held liable under § 1983 for a 'policy- or custom-based failure to adequately train or supervise its employees,' Plowright alleged no facts indicating that the county 'was aware of the need to train or supervise its employees' on encounters with domestic animals before the incident giving rise to his complaint. . . Once again, Plowright's naked statement that the county 'knew or should have known [Rondon and Cordova] did not have adequate policy training' about how to deal with domestic animals, . . . is insufficient to satisfy the pleading standard. To the extent that Plowright seeks to rely on the news article attached to his second amended complaint, that attempt also fails. The article does not show that these incidents happened *before* Cordova shot Niles or that they involved circumstances in which a reasonable officer could not have believed that the dogs posed

an imminent danger. Because Plowright failed to state a claim under *Monell*, the district court properly dismissed his claims against the county.")

Hoefling v. City of Miami, 811 F.3d 1271, 1280 (11th Cir. 2016) ("Although Mr. Hoefling may ultimately have to identify (and provide proof concerning) a single final policymaker in order to survive summary judgment or prevail at trial, . . . we do not think that he had to name that person in his complaint in order to survive a Rule 12(b)(6) motion. All he needed to do was allege a policy, practice, or custom of the City which caused the seizure and destruction of his sailboat. And that, as we detail below, he did.")

Banuchi on behalf of the Estate of Foster v. City of Homestead, No. 20-25133-CIV, 2021 WL 2333265, at *5–6 (S.D. Fla. June 8, 2021) ("In count four, Banuchi alleges the City had a number of unofficial customs or practices, falling, more or less, into three general categories: (1) insufficient investigations or processing of complaints of officer misconduct . . . (2) inadequate recordkeeping . . . and (3) maintenance of a 'code of silence' among City officers. . . According to Banuchi, these practices resulted in Foster's shooting death. . . In its motion to dismiss, the City argues that, despite summarily identifying a long list of what Banuchi describes as 'de facto policies, practices and/or customs,' Banuchi has failed to set forth any actual factual allegations establishing that the City has a widespread pattern and practice of inadequately handling police misconduct complaints, insufficient recordkeeping, or an improper 'code of silence.' The Court agrees. Banuchi says that the factual basis of her claim rests on her allegations of the City's 'continued use of an officer with a well-known history of on-duty shootings and on-duty killings of civilians.'. . Banuchi maintains her complaint 'alleges five prior on-duty shootings plus a catalogue of other misconduct and police violence by Green prior to the Foster shooting.'. . She also says that count four 'details the customs and practices that allowed Green to remain armed despite numerous on-duty shootings and numerous investigations into alleged excessive force, neglect of duty, unbecoming conduct, unreasonable searches and seizures, illegal arrests, illegal seizures, and other misconduct.'. . But Banuchi's allegations, along with her characterization of those allegations, are problematic. First, the vast majority of Banuchi's allegations are comprised of vague and conclusory assertions, devoid of factual support. For example, Banuchi lists dozens of 'de facto policies, practice, and/or customs'. . . but provides no factual support that would establish the necessary widespread and persistent practice required for municipal liability. Similarly, Banuchi's vague claims that 'complaints have been lodged against ... Green for excessive force, neglect of duty, unbecoming conduct, unreasonable search and seizure, illegal arrest, illegal seizure, and other misconduct'. . . are both factually unsupported and, in any event, insufficient. Banuchi provides no context for the 'complaints': Who submitted them? When were they submitted? To whom were they submitted? How many were there? What did they say? Further, even if Banuchi had set forth facts supporting the existence of the alleged complaints, she fails to allege whether the complaints were ever substantiated in any way. Lastly, her reference to Green's having 'used deadly force against three others and excessive force not resulting in death against a fourth'. . . is also conclusory and vague: missing is any allegation that the deadly force was improper or any facts showing that the force, against the fourth person, was actually excessive.

Banuchi's summarily labelling it as excessive, is simply not enough. Banuchi's separate allegations, as to Green's prior shooting incidents, elsewhere in her complaint fare no better. While she provides more details about the shootings, she fails to even allege that any of them amounted to excessive force. . . In sum, Banuchi fails to allege facts supporting the kind of widespread, known, and substantially similar constitutional violations that are required to state a *Monell* against the City. Second, Banuchi's characterization of her complaint's allegations, in her response, is misleading. She argues that her complaint 'alleges ... a catalogue of ... misconduct and police violence by Green prior to the Foster shooting.'. . Tellingly, she provides no citation to her complaint to support her claim. And, indeed, there is no factual support for Banuchi's portrayal of Green's prior 'misconduct' or unconstitutional 'police violence' anywhere in the complaint. Accordingly, then, Banuchi has failed to allege facts showing a pattern of prior known, constitutional violations that rise to the level of establishing any kind of unofficial policy that could have led to Green's shooting of Foster. Accordingly, the Court dismisses count four. . . . In count five, Banuchi identifies a number of City 'failures': a failure to maintain or utilize an 'early warning system' to detect personnel problems . . . a failure to identify officers with the highest numbers of complaints . . . and a failure to 'act on' the identification of officers with the highest number of personnel complaints[.] . . Once again, like her allegations in count four, Banuchi's claims of 'de facto policies, practices, and/or customs' are wholly unsupported by any accompanying facts. The cases Banuchi relies on as support prove the point: in contrast to her own allegations, the complaints in those cases allege actual facts establishing a history of excessive force. . . And so, for the same reasons set forth above, in the preceding section, the Court dismisses count five because Banuchi fails to allege facts showing a pattern of prior known, constitutional violations that rise to the level of establishing an unofficial policy that led to Green's shooting of Foster.")

Burns v. City of Alexander City, 110 F.Supp.3d 1237, 1250 (M.D. Ala. 2015) ("As to the Alexander City Defendants' contention that the Second Amended Complaint does not satisfy the basic requirements of notice pleading, Plaintiffs argue that they have alleged enough at this point, in light of Judge Thompson's holding in *Porter, supra,* in which the plaintiffs brought a claim for § 1983 municipal liability against the City of Enterprise, Alabama. . . . The complaint in *Porter* and the Second Amended Complaint in the present case are similar enough that *Porter* is persuasive. Here, Plaintiffs allege that a deliberate indifference is at work in Alexander City based on what Plaintiffs contend are acts of unlawful uses of force prior to Mr. Crayton's death that were known to Alexander City, which is like enough to arguing a 'consistent' failure by the City to train. Upon consideration of *Porter,* the Alexander City Defendants' argument that the Second Amended Complaint is insufficient under *Twombly, Iqbal,* and Rule 8, Fed.R.Civ.P., is not compelling. . . . Accordingly, the motion to dismiss the municipal liability claims is due to be denied.")

Bell v. Shelby County, Ala., No. 2:12–CV–2991–LSC, 2013 WL 5566269, *3-*5 (N.D. Ala. Oct. 8, 2013) ("Counties in Alabama do not participate in the day to day governance of the jail or the creation of its policies; they merely provides the funding. . . Nonetheless, a county may be liable if its failure to provide funding 'constituted deliberate indifference to a substantial risk of serious

harm to the prisoners.'. . In this case, therefore, Shelby County could be liable for its own actions in providing (or failing to provide) the funding for the jail. Plaintiff must therefore plead facts that allow the court to plausibly infer that the County government acted with deliberate indifference regarding this funding. In her pleadings, Plaintiff alleges two potential factual bases for a finding of deliberate indifference on the part of Shelby County. First, she alleges the County failed to provide funding for the medical treatment of prisoners. . . Secondly, Plaintiff alleges Shelby County failed to provide funding for the maintenance of the jail, including its plumbing system. . . The factual support for these two claims varies greatly in Plaintiff's pleadings, and the Court will thus address them separately. The first claim, regarding funding for the medical treatment of prisoners, is due to be dismissed. In *Ancata,* the Eleventh Circuit held that counties had a non-delegable duty to provide for indigent prisoners' medical treatment. . . Thus, if Shelby County had taken any action that contributed to the violation of Allred's constitutional right to treatment, it could not hide behind an outside contractor to avoid liability for it. However, this does not absolve Plaintiff of her duty to plead facts that plausibly allege that the County actually did something to contribute to the violation. . .Here, Plaintiff alleges only that 'the lack of funding for appropriate medical care for inmates, caused or contributed to the utter denial of treatment to Allred, as a cost saving mechanism.'. . This conclusory statement cannot suffice to survive a motion to dismiss, especially when Plaintiff has not even pleaded any facts that support a conclusion that a lack of funding existed in the first place. Plaintiff presents no facts, or even allegations, concerning the jail's budget, or any decision by the County to cut or limit that budget by limiting prisoner healthcare. Plaintiff provides no factual basis to infer that the jail nurse who turned Allred away without treatment did so because of a lack of funding. She does not allege that jail officials failed to notice Allred's illness because the jail was understaffed or because of security problems that could be tied to a funding failure. . . Likewise, Plaintiff presents no facts alleging that any of the other incidents mentioned in her Third Amended Complaint were caused by a lack of funding. . .Even in *Ancata,* which was decided prior to the Supreme Court's abrogation of the 'any set of facts' standard, the Plaintiff provided considerably more substance from which to infer a lack of funds from the county. . . In that case, the prisoner was twice denied treatment until a court order was obtained, so the court could legitimately infer at least the possibility of a county policy requiring such an order. . . Here we have only the fact that the decedent received no treatment. The Court is permitted to infer 'obvious alternative explanation[s]' that reflect lawful conduct instead of the violations Plaintiff claims. . . The facts here make it at least as likely that Shelby County properly funded a contract that should have served the prisoners' needs, and that the denial of treatment stemmed from either the mistakes or the deliberate indifference of entities other than Shelby County. The County cannot be held liable under § 1983 for any actions not its own. . . Therefore, Plaintiff has not stated a claim against Shelby County for failure to fund medical treatment, and this claim must be dismissed. It does not follow, however, that the same result must be reached regarding Plaintiff's allegations that Shelby County failed to properly fund the maintenance of the jail. Plaintiff provides considerably more factual support for this claim. She claims that the plumbing system was not maintained in proper order. More specifically she alleges that drinking fountains were inoperable and that the hot water regulation failed at multiple times during Allred's incarceration. Because this regulation failed, the water was sometimes too hot to

cup in one's hands or drink. Deterioration in the physical upkeep of the jail can serve as the basis of a complaint that prisoners' constitutional rights have been violated. . . While the maintenance problems alleged in the present case may not be as severe as those in *Marsh*, the Court is not prepared to dismiss this claim. Plaintiff further alleges that the plumbing problems in the jail contributed to Allred's injuries by leading to dehydration, which is one cause of hepatic encephalopathy. Dehydration could also have contributed to the severity of Allred's bronchopneumonia. The Court may thus plausibly infer that Shelby County's failure to maintain the jail was one cause of Plaintiff's injuries. At the least, these facts form a framework that makes it reasonably likely that discovery will reveal further evidence. . . Therefore, Plaintiff's claim against Shelby County set out in Count I for failure to maintain the plumbing system in the jail survives this motion to dismiss.")

Rykard v. City of Dothan, No. 1:10-cv-868-MHT, 2011 WL 3875609, at *3 (M.D. Ala. Aug. 9, 2011) ("The City argues that Plaintiff fails to point to any pervasive custom or practice of city jail personnel failing to give prisoners the medication. However, a review of the complaint clearly shows that Plaintiff specifically averred '[t]he City of Dothan through its agents and employees and pursuant to a policy of the city failed to provide the plaintiff with the medication prescribed.'. . Further, there is no heightened pleading standard as to § 1983 claims asserted against municipal defendants. . . Thus, Plaintiff must simply satisfy the basic pleading requirement of Fed.R.Civ.P. 8(a)(2) which requires a 'short and plain statement of the claim showing that the pleader is entitled to relief.' In order for the plaintiff to satisfy his 'obligation to provide the grounds of his entitlement to relief,' he must allege more than 'labels and conclusions'; his complaint must include '[f]actual allegations [adequate] to raise a right to relief above the speculative level.'. . Further, the Supreme Court has further stated that '[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face ... A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'. . . Turning to the complaint at issue, the Court finds that there are sufficient allegations which allow the Court to reasonably infer that the defendant may be liable for the alleged misconduct. Taking the facts as true − as the Court must do − Plaintiff informed numerous jail personnel of her worsening medical condition and all these personnel ignored and neglected her over some period of time. There are reasonable facts to infer that a policy and custom exists where multiple city employees repeatedly ignore a detainee's ongoing requests for medical care despite obvious serious symptoms. Thus, the Court determines that dismissal is inappropriate as this nascent phase of the lawsuit. The claim is more properly addressed at summary judgment.")

Cooper v. City of Starke, Fla., No. 3:10-cv-280-J-34MCR, 2011 WL 1100142, at *6-*8 (M.D. Fla. Mar. 23, 2011) ("To the extent Plaintiffs contend that Smith is subject to supervisory liability on the basis of a 'failure to train and/or supervise,' Plaintiffs have failed to identify any specific deficiency or deficiencies in Smith's training and/or supervision of Watson and Crews. Moreover, Plaintiffs do not adequately allege that the failure to train amounted to deliberate indifference because Plaintiffs do not set forth any facts demonstrating that Smith had notice of a need to train

and/or supervise. . . . Although, in their introductory paragraphs Plaintiffs assert in a conclusory fashion that Defendants have 'tolerated, condoned and encouraged a pattern of brutality and excessive force,'. . . the Amended Complaint is devoid of any facts in support of this contention. . . . Thus, the Court finds that Plaintiffs' vague references to unidentified failures, policies, and patterns are not sufficient to withstand a motion to dismiss. . . .Similar to the principles for supervisory liability, a municipality also may not be held liable for constitutional deprivations on the theory of *respondeat superior.* Upon review, the Court concludes that Plaintiffs' boilerplate and conclusory allegations of municipal policy or practice − devoid of factual development − are insufficient to state a § 1983 claim. Plaintiffs fail to identify any *actual* policies or decision makers and, in describing only the single incident of force involving Plaintiffs, fail to offer any facts to support the existence of a widespread custom.")

Oliver v. City of Montgomery, Ala., No. 2:10-cv-467-MHT, 2011 WL 833954, at *9 (M.D. Ala. Feb. 15, 2011) ("The Supreme Court has made it clear that courts may not impose a heightened pleading requirement for claims pursuant to 42 U.S.C. § 1983 against municipal entities. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167-68, 113 S.Ct. 1160, 1162-63, 122 L.Ed.2d 517 (1993). However, this Court does not attempt to impose any kind of 'heightened' requirement, but rather the basic pleading requirements of Fed.R.Civ.P. 8. *See Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009). . . A careful review of the plaintiffs' facts fail to show a claim that any deprivation of their rights was attributable to a policy or custom of the City of Montgomery.")

Robbins v. City of Miami Beach, No. 09-20804-CIV, 2009 WL 3448192, at *2 (S.D. Fla. Oct. 26, 2009) ("Here, Robbins's alleges that the City of Miami Beach's failure to investigate excessive force complaints is a 'custom or policy' that was the 'moving force [behind] the constitutional violation' at issue. . . In the pleadings, Robbins submits that the City has refused to properly investigate excessive force complaints and failed to discipline or prosecute police officers for using excessive force. The plaintiff claims that when incidents of excessive force are investigated, the investigation reports omit unfavorable evidence, exclude statements of non-police witnesses, and rely solely on the word of the police officers involved. These factual allegations are sufficient to support municipal liability for constitutional violations pertaining to excessive force. However, no facts whatsoever have been alleged to support municipal liability under § 1983 for equal protection violations or for the alleged conspiracy, and, therefore, these claims must be dismissed.")**.**

M. Ethical Concerns for Government Attorneys

Note the ethical problems for government attorneys who might be required to defend both the government body and its employees. After ***Monell***, there is the potential for a conflict of interest between the local government body and its employee when both are named as defendants in a § 1983 suit. It is in the interest of the local government unit to establish that the employee was not acting pursuant to any official policy or custom. The employee, on the other hand, may avoid or substantially reduce personal liability by asserting that his conduct was pursuant to official

policy. *See* ***Dunton v. County of Suffolk***, 729 F.2d 903 (2d Cir. 1984). *But see* ***Patterson v. Balsamico,*** 440 F.3d 104, 114, 115 (2d Cir. 2006) ("In *Dunton*, . . . this court declined to create a *per se* rule requiring disqualification whenever a municipality and its employees are jointly represented in a Section 1983 case. . . Rather, a case-by-case determination is required, and it is clear that the facts of this case do not rise to the level of those in *Dunton.* It is true that Gorman represented all defendants from the time this action was first filed on December 18, 2000 until shortly after this Court remanded the case to the district court. However, Gorman had successfully obtained the dismissal of all claims against all defendants in the district court, and there was no apparent conflict in the interests Gorman represented on appeal. Balsamico's position was that he did not participate in the January 1999 incident. That position was not inconsistent with the County's position. Moreover, on September 17, 2004, approximately five weeks before the commencement of trial on October 25, 2004, a new lawyer, Diodati, was substituted for Gorman to represent Balsamico. At trial, therefore, Balsamico was represented by counsel who had no potential conflict of interest. This case is materially distinguishable from *Dunton,* where the same attorney represented both the municipality and an individual defendant at trial and where there was an actual conflict of interest in the positions that were of benefit to the two clients. This Court has found a new trial unnecessary even where municipal counsel actually represented individual officers employed by the municipality at trial where there was no actual conflict of interest. *Rodick v. City of Schenectady,* 1 F.3d 1341, 1350 (2d Cir.1993). The defense attorney in *Rodick,* as here, had jointly represented the municipality and individual police officers prior to trial, and had successfully sought dismissal of the claims against the municipality. Although, unlike this case, the same attorney remained on the case on behalf of the individual defendants throughout the trial, this Court concluded that whatever potential conflict may have existed did not require a new trial because defense counsel advanced and argued all possible defenses available to the officers, including the qualified immunity defense. . . This case more closely resembles *Rodick* than *Dunton.* We required a new trial in *Dunton* because the defense attorney had in fact advanced arguments at trial that were directly contrary to the individual officer's interests. . . . It is clear that, as was true in *Rodick,* Balsamico cannot make the required showing of a sufficiently serious actual conflict of interest. The particular conflict cited in *Dunton* as inherent in Section 1983 actions against municipalities, namely that the municipality can escape liability by arguing that its employees were not acting within the scope of official employment while the employee can escape liability by arguing the opposite, is simply not present here. At no time did Gorman assert that Balsamico was acting 'outside the scope of his employment' during the January 1999 assault, as the attorney had in *Dunton.* Rather, Balsamico's defense, before and during trial, was that he had not actively participated in the January 1999 assault."); ***Moskowitz v. Coscette,*** No. 02-7097, 2002 WL 31541004, at *2 (2d Cir. Nov.15, 2002) (unpublished) ("We have recognized that a potential conflict can arise between the interests of a municipal employee and the interests of the municipality when both are defendants in a lawsuit arising out of the municipal employee's alleged misconduct. *See Dunton v. Suffolk County,* 729 F.2d 903, 907 (2d Cir.1984). For the reasons that follow, however, we do not believe that any conflict of interest here warrants Rule 60(b)(6) relief. It is true that the fact that a police officer acts pursuant to orders can bolster a qualified immunity defense where the officer could reasonably have believed that he was not violating any rights. . . .

It is also certainly possible that the jury would have viewed Coscette as less culpable had it perceived him merely to be following orders, and would not have awarded (or would have awarded lower) punitive damages. . . . Coscette's reliance on our decision in *Duton v. Suffolk County,* 729 F.2d 903 (2d Cir.1984), is misplaced. In *Dunton*, the attorney representing the municipality and the officer sacrificed the officer's interests to those of the municipality by arguing that the officer acted not as a police officer but as an irate husband. *Id.* at 907-08. Here, in contrast, the defense attorney did not argue that Coscette's actions went beyond the scope of his employment, and the Town had in fact conceded that Coscette's actions were taken under the color of state law. There is simply no indication that at any time before, during, or after the trial the defense attorney took a position, advanced an argument, or adopted a strategy that benefitted the Town at Coscette's expense."); ***Lieberman v. City of Rochester***, 681 F.Supp.2d 418, 425, 429, 430 (W.D.N.Y. 2010) ("District courts have interpreted *Dunton* to require disqualification of counsel representing both an individual officer and the municipal employer in Section 1983 cases only where counsel acts in a way that is *actually* against the officer's interests. . . . In other words, a potential conflict is insufficient to warrant disqualification; rather, the employee must show that an actual conflict exists. Further, in the absence of a showing of actual prejudice to the employee, the Second Circuit has declined to disturb jury verdicts against municipal employees in Section 1983 actions where the employee was jointly represented with the municipality. . . .These post-*Dunton* decisions refute any suggestion by the Officers that *Dunton* stands for the proposition that joint representation of a municipality and its employee is prohibited in all Section 1983 cases. . . . Although the City's and the Officers' involvement in three separate proceedings arising from the same incident appears unusual, any potential conflict arising from their roles in those proceedings has been adequately addressed by the City's retention of outside counsel to represent it in the Article 75 proceeding and the Officers' Section 1983 lawsuit. To require the City to retain outside counsel in a third action − this case − without a demonstrable showing that Corporation Counsel is laboring under an actual conflict would impose an even greater financial burden on the City that is not justified under controlling precedent. My determination on the important and sensitive issues raised in this motion, however, does not exclude the possibility that circumstances may arise or change as this litigation proceeds that will necessitate revisiting those issues. For that reason, I deny the motion without prejudice to renewal.").

In ***Coleman v. Smith***, 814 F.2d 1142 (7th Cir. 1987), the Seventh Circuit noted that it was "troubled by the Second Circuit's broad holding that after ***Monell*** an automatic conflict results when a governmental entity and one of its employees are sued jointly under section 1983." *Id*. at 1147-48. The court in ***Coleman*** found no conflict of interest warranting disqualification where the Village acknowledged that the individual defendants were acting in their official capacities and where the claim against the Village was of an "entirely different character" than the claim against the individual defendants. *Id*. at 1148.

In ***Silva v. Witschen***, 19 F.3d 725 (1st Cir. 1994), the court upheld an award of attorney fees to the City of East Providence, Rhode Island, for fees by counsel appearing for five individual defendants, and by the City Solicitor appearing on behalf of the City and the same five individuals

in their official capacities. The First Circuit agreed 'that it was reasonable for the five defendants, in their individual capacities, to obtain representation by their own counsel while the merits of plaintiffs' claims remained in litigation, since counsel to the City represented the individual defendants in their official capacities only.' *Id.* at 732. The court also affirmed the disallowance of fees for counsel for the individual defendants for services rendered 'after the point in time when it became clear that no conflicts of interest precluded the individual defendants' joint representation by counsel to the City.' *Id.*

In ***Atchinson v. District of Columbia***, 73 F.3d 418 (D.C. Cir. 1996), the court of appeals affirmed the district court's denial of leave to amend the complaint on the eve of trial to name a police officer defendant in his individual, rather than official, capacity. The court noted that "the district court's concerns regarding Officer Collins's choice of counsel and litigation strategy seem well-founded." *Id.* at 427. The court further observed:

> Municipal officials sued only in their official capacities may early on, as here, agree to be represented by the municipality's attorneys. Subsequently naming the officials in their individual capacities, however, may make continued joint representation problematic, if not impossible. A municipality and officials named individually may have mutually exclusive defenses. For example, officials sued individually may find it advantageous to agree with a plaintiff that training was inadequate, for a jury might conclude that officials without proper training should not be liable for any harm caused. Because of these potential conflicts, it is possible that had the officials known all along of the potential for personal liability, they would never have agreed to joint representation at the outset. [*Id.*]

In ***Johnson v. Board of County Commissioners for the County of Fremont***, 85 F.3d 489, 493-94 (10th Cir. 1996), the court adopts the following position on the conflict issue:

> While some courts have held separate representation is required in the face of the potential conflict, *see, e.g., Ricciuti v. New York City Transit Auth*, 796 F.Supp. 84, 88 (S.D.N.Y. 1992); *Shadid v. Jackson*, 521 F.Supp. 87, 90 (E.D.Tex. 1981), we decline to adopt a per se rule. We hold that when a potential conflict exists because of the different defenses available to a government official sued in his official and individual capacities, it is permissible, but not required, for the official to have separate counsel for his two capacities. *See Silva v. Witschen*, 19 F.3d 725, 732 (1st Cir. 1994); *Richmond Hilton Assocs. v. City of Richmond*, 690 F.2d 1086, 1089 (4th Cir. 1982); *Clay v. Doherty*, 608 F.Supp. 295, 303 (N.D.Ill. 1985). Obviously, if the potential conflict matures into an actual material conflict, separate representation would be required. [citing *Dunton* and *Clay*] Model Rules of Professional Conduct, Rule 1.7. Though separate representation is permissible, an attorney may not undertake only the official capacity representation at his or her sole convenience. Under Colorado Rules of Professional Conduct, Rule 1.2(c), a

> lawyer may limit the objectives of her representation only "if the client [consents] after consultation." In the case where an attorney has been hired to represent a government official in only his official capacity in a suit where the official is also exposed to liability in his individual capacity but has no representation in that capacity, this rule serves an important function. When adhered to properly, the rule ensures the defendant is adequately informed about the workings of 42 U.S.C. § 1983 and the potential conflict between the defenses he may have in his separate capacities. Above all else, the attorney and the district court should ensure the official is not under the impression that the official capacity representation will automatically protect his individual interests sufficiently. Courts have recognized a "need for sensitivity" to the potential for conflict in this area, and have advised that "[t]he bar should be aware of potential ethical violations and possible malpractice claims." *Gordon v. Norman*, 788 F.2d 1194, 1199 n. 5 (6th Cir. 1986) (quotation omitted). In the service of these interests, we embrace the Second Circuit's procedure whereby counsel notifies the district court and the government defendant of the potential conflict, the district court determines whether the government defendant fully understands the potential conflict, and the government defendant is permitted to choose joint representation. *See Kounitz v. Slaatten*, 901 F.Supp. 650, 659 (S.D.N.Y. 1995). In addition, the defendant should be told it is advisable that he or she obtain independent counsel on the individual capacity claim We reinforce that, as with many issues relating to the relationship between attorney and client, the crucial element is adequate communication.

See also ***DeGrassi v. City of Glendora***, 207 F.3d 636 (9th Cir. 2000), where the court affirmed the district court's rejection of a former city council member's claim to indemnification from the city for attorney fees incurred in defending a slander action. The city had complied with its obligation to provide a defense when it offered defense of the slander action against the city council member subject to the condition that the city control the litigation and approve of any potential settlement. The city council member rejected the offer and retained her own counsel. In rejecting her request for indemnification, the court noted that 'there is no authority entitling DeGrassi to retain independent counsel on the strength of her unilateral assertion of a conflict of interest involving the City. Section 995.2(a)(3) permits the public entity to refuse to provide a defense if it determines that the defense would create a conflict of interest between the entity and the employee. *See id.* That section does not entitle the employee to independent counsel simply because she asserts the existence of a conflict of interest.' *Id.* at 643.

In ***Maderosian v. Shamshak***, 170 F.R.D. 335 (D. Mass. 1997), the court held that a conflict of interest that arose from town counsel's joint representation of the town, the town's selectmen, and the police chief, warranted relief from the judgment with respect to plaintiff's due process claim against the police chief in his individual capacity. Plaintiff, a part-time police officer, had sued defendants for terminating him without due process. The police chief, in his motion to set aside the judgement, submitted an affidavit in which he stated that, with respect to the termination

of the plaintiff, town counsel had advised the police chief that plaintiff was an 'at will employee' who was not entitled to notice and a hearing prior to termination. *Id.* at 337. At the trial for the wrongful termination, town counsel did not elicit any testimony concerning his conversation with the police chief, the advice the chief had received or the fact that the chief had relied on counsel's advice. *Id.* at 341.

The court concluded:

> There is no question that Town Counsel's dual representation of the Town, its Selectmen and Chief Shamshak presented a conflict of interest. Although in hindsight the potential conflict of interest should have been readily apparent, at the time of trial, I did not recognize this conflict and therefore, failed to inquire of the parties as to whether or not they were aware of the conflict, the potential prejudice which this conflict presented and whether they knowingly and voluntarily wished to proceed with Town Counsel as trial counsel in this matter. Chief Shamshak as a lay person cannot be expected to recognize the potential conflict and therefore, cannot be said to have waived his objection to multiple representation. . . . It is obvious that there was an actual conflict of interest between Chief Shamshak and Town Counsel, who was also acting as his trial counsel and that Town Counsel's failure to advise Chief Shamshak to testify as to his conversation with Town Counsel, a conversation during which Town Counsel may have given Chief Shamshak erroneous legal advice, resulted in prejudice which may well have affected the jury's verdict in this case. Additionally, I am convinced that Chief Shamshak's interests may have been prejudiced by the actual conflict of interests created by Town counsel's simultaneous representation of him and the Town.

Id. at 340-42.

In ***Guillen v. City of Chicago***, 956 F. Supp. 1416 (N.D. Ill. 1997), plaintiff sued the City and several police officers for their role in the death of her husband. The court denied plaintiff's motion to disqualify the City's corporation counsel from reprensenting the paramedic employees of the City who transported her husband to the hospital and who were to be witnesses, but not parties, in the legal proceedings. The court held that City counsel could continue to represent the paramedics at their depositions, 'but with one caveat: City counsel must fully inform its clients of the pros and cons of joint representation. . . . For instance, what if the statements given to City Counsel by the paramedics do tend to establish liability of the City or the officers? What then? Under these circumstances, City counsel should candidly disclose the potential hazards of common representation to Marlow and O'Leary. The paramedics will then be in a position to decide whether or not retaining City counsel is in their best interests.' *Id.* at 1426, 1427.

II. *HECK v. HUMPHREY & WALLACE v. KATO* : INTERSECTION OF SECTION 1983 AND *HABEAS CORPUS*

A. *Heck v. Humphrey*

In ***Heck v. Humphrey***, 512 U.S. 477 (1994), the Supreme Court held that a state prisoner cannot bring a § 1983 suit for damages where a judgment in favor of the prisoner would necessarily imply the invalidity of his conviction or sentence.' *Id*. at 486. If a successful suit would necessarily have such implications on an outstanding conviction or sentence, the complaint must be dismissed and no § 1983 action will lie unless and until the conviction or sentence has been invalidated, either on direct appeal, by executive order, or by writ of habeas corpus. *Id.* at 487. The statute of limitations on the section 1983 claim would then begin to run from the time of the favorable termination.

See also ***Brennan v. Cass County Health, Human & Veteran Services***, 93 F.4th 1097, 1101 (8th Cir. 2024) ("Brennan's predominant claim in this action is that she was civilly committed in 2019 in violation of her constitutional rights and Minnesota law. Because Brennan's civil commitment order stands, she cannot proceed in this Court with a wrongful commitment claim. . . . This Court has determined *Heck*, which barred claims challenging the validity of still-valid criminal judgments, applies to constitutional claims challenging a civil commitment order. . . Brennan's attempt to distinguish *Thomas* on the ground that she was a patient in a hospital while Thomas was a state prisoner is a distinction without a difference. The pertinent inquiry turns not on the status of the person being committed but rather on the nature of the underlying proceeding. Because Brennan's state civil commitment order remains valid, we dismiss her wrongful commitment claim without prejudice."); ***Bell v. Raoul***, 88 F.4th 1231, 1233-35 (7th Cir. 2023) ("We have no published decisions in which we have applied the *Heck* doctrine to civil detainees such as those incarcerated in Illinois as sexually violent persons, though we have done so a handful of times in nonprecedential dispositions. . . Today, in accordance with every other circuit that has considered this issue, we too apply *Heck* to those civilly confined under the Illinois SVPCA and similar statutes. Like a prisoner wishing to challenge a criminal conviction or sentence, a civil detainee cannot sue a state official under 42 U.S.C. § 1983 for violating his constitutional rights when a judgment in the plaintiff's favor would necessarily imply the invalidity of his confinement, unless the grounds for the confinement have already been set aside in other proceedings. . . . By no means are we alone in holding that *Heck*'s reasoning applies to challenges to state-law based civil commitments like the one imposed on Timothy Bell. Indeed, if we consider unpublished decisions, five circuits have reached that exact conclusion. [collecting cases] Our research shows no circuit adopting a contrary position. Bell's § 1983 claim squarely challenges the validity of his continued civil commitment pursuant to Illinois law. His complaint seeks money damages and an injunction, yet entitlement to either remedy would necessarily require him to prove in the first instance the illegality of his civil commitment. Therein lies the *Heck* barrier: Bell cannot use § 1983 to pursue those remedies unless and until he succeeds through a different outlet in favorably terminating or otherwise showing the invalidity of his civil commitment under the SVPCA. . . .

Nor does it matter that Bell is no longer confined within the Rushville Treatment and Detention Facility. He remains in the state's SVPCA program despite recently being released to home confinement—a form of state custody. . . . Indeed, our conclusion extends further. The *Heck* bar applies after a detainee's release until the judgment that caused the detention is invalidated. See *Savory v. Cannon*, 947 F.3d 409, 419 (7th Cir. 2020) (en banc) (holding that a defendant's § 1983 claim accrued only when he obtained a pardon, not when he was released from prison). Bell must therefore wait until he receives a favorable termination of his civil commitment before seeking relief under § 1983 for his allegedly excessively long confinement."); ***Thomas v. Eschen***, 928 F.3d 709, 711-13 (8th Cir. 2019) ("Thomas's claim . . . collides with the rule from *Heck v. Humphrey*. In *Heck*, the Supreme Court held that a claim for damages is 'not cognizable under § 1983' if it would undermine a still-valid state criminal judgment. . . To be sure, Thomas's claim involves a *civil*-commitment order, not a *criminal* conviction, and neither this court nor the Supreme Court has applied *Heck* in this particular context, at least in a published decision. . . Even so, *Heck*'s logic reaches Thomas's wrongful-commitment claim too. . . . [A]s in *Heck*, Thomas is trying to use section 1983 to bring what is essentially a malicious-prosecution claim. Courts have long recognized that individuals like Thomas can sue those who pursue 'unfounded proceedings ... to have [them] declared insane' for malicious prosecution, even if the proceedings are 'not criminal in their nature.'. . .To bring such an action, however, the plaintiff ordinarily has to 'prove the termination of the former proceeding in his favor.'. . . Given that Thomas has not done so, we have little trouble concluding that his claim 'is not cognizable under § 1983.'. . To hold otherwise would undermine 'finality and consistency' and encourage 'parallel litigation.'. . Thomas argues that *Heck* does not apply because his wrongful-commitment claim is based on the underlying 'conduct' of prison officials, not on the 'fact of [his] civil commitment itself.' He reasons that, because *Heck* does not apply to constitutional claims that, 'if successful, would not *necessarily* imply that the ... conviction was unlawful,'. . . his claim may proceed. His theory is that facts other than the deceptive and manipulative conduct of prison officials led to his commitment, particularly the extent of his mental illness. But Thomas's attempt to distinguish this case from *Heck* conflicts with both his theory of the case and the description of the injury he allegedly suffered. He does not claim that encouraging him to misbehave, by itself, violated his constitutional rights or injured him. Rather, he alleges that relying on his misbehavior to *civilly commit him* is what gave rise to his cause of action. Indeed, as Thomas told the district court, his 'constitutional rights were violated *because* [prison officials] obtained a civil commitment against him.'. . In short, Thomas's real complaint is that he never should have been committed in the first place. This has also been his central argument throughout the Iowa proceedings, and each time the Iowa courts have disagreed with him. As long as those judgments stand, he cannot proceed with his wrongful-commitment claim."); ***Magee v. Reed***, 912 F.3d 820, 822-23 (5th Cir. 2019) ("Magee's claims stem *not* from his arrest but from his denial of bail. In *Eubanks v. Parker County Commissioners Court*, we held that *Heck* was inapplicable to violations stemming from a denial of bail because a denial of bail has 'no bearing' on the validity of the underlying convictions. . . Even assuming Magee was guilty of the crime he was arrested for, he was still entitled to bail under the Louisiana Constitution. LA. CONST. art. I, § 18. Success on Magee's false imprisonment and free speech retaliation claims would not invalidate his initial arrest or guilty

plea. Thus, the district court erred in relying on *Heck* to dismiss Magee's false imprisonment and free speech retaliation claims."); ***Huber v. Anderson***, 909 F.3d 201, 208 (7th Cir. 2018) ("We recognize that many of Huber's claims relate to events that are now more than 20 years in the past. But that is a natural consequence of the *Heck* rule. And this is not a situation in which the doctrine of laches has any role to play. As our account of Huber's saga illustrates, he did try to contest his custody, but he was acting *pro se* and did not know what steps he needed to take. He did not sit on his rights. If wrongful custody lasts for a long time, then *Heck* will require both parties to litigate over dated civil claims. That is simply the price of the *Heck* doctrine, which normally ensures that civil litigation does not undermine the basis of criminal convictions and sentences."); ***Smith v. Hood***, 900 F.3d 180, 185-86 (5th Cir. 2018) ("This circuit has thus far applied the *Heck* doctrine only to claims that implicate criminal convictions or sentences. In Smith's case, however, the district court concluded that there was 'no reason not to' apply *Heck* to the civil commitment context, citing other courts that have done so. . . In *Huftile*, the Ninth Circuit reasoned that *Heck* is equally applicable to people who are civilly committed because, as with a criminal sentence, the appropriate avenue to challenge the validity of civil confinement is through a habeas petition, not § 1983. . . Because *Heck*'s holding was based at least in part on 'prevent[ing] a person in custody from using § 1983 to circumvent the more stringent requirements for habeas corpus,' the Ninth Circuit held that *Heck*'s reasoning therefore applies to the civil commitment context as well. . . Though we note that the Ninth Circuit's and other courts' reasoning on this issue is persuasive, whether *Heck* extends to civil commitments is still a res nova question in this circuit. However, Smith's case is an unusual one because the parties, including Smith, all assume that the *Heck* doctrine does apply in a civil commitment case. Smith, in a peculiar move on appeal, concedes that *Heck* should bar any claim that would challenge the validity of his underlying civil commitment. He argues only that some of his claims are viable because they are, allegedly, conceptually distinct from the commitment itself. As to some of these claims, however, we reject his argument that they are, in fact, distinct. Additionally, he fails to demonstrate a denial of a federal right with regards to other claims. . . . Ultimately, we conclude that Smith raises only one § 1983 claim that is both conceptually distinct and asserts a denial of a constitutional right: his allegation that Defendants McMichael, Chastain, and Savoie confined him using leather and metal restraints in violation of his due process rights. . . . Smith's claim that those Defendants' use of restraints amounted to a due process violation is a challenge to the conditions of his confinement rather than the fact of his confinement itself, and is thus unquestionably not barred by *Heck*. . . As to this claim, the district court incorrectly concluded that 'any award for damages under the theories advanced by the plaintiff would necessarily include a finding by this court that he is wrongfully held [at the State Hospital].' Accordingly, we find that the district court erred by dismissing this claim."); ***Karsjens v. Piper***, 845 F.3d 394, 406 (8th Cir. 2017) ("This action . . . would not necessarily imply the invalidity of any of the plaintiffs' commitment. See *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1140 (9th Cir. 2005) (noting *Heck* applies to civilly committed persons as well as prisoners). They do not allege that their initial commitment was invalid. Nor is it alleged that any specific class members should be immediately released. Instead, the plaintiffs claim that they should receive relief including regular, periodic assessment reviews to determine if they continue to meet the standards for civil commitment. It is conceivable that upon receiving

an assessment none of the plaintiffs would be eligible for release, despite the district court's finding otherwise. Because the injunctive relief sought would not necessarily imply the invalidity of the plaintiffs' commitment, this action is not barred under *Heck* or *Preiser*."); ***Kuhn v. Goodlow***, 678 F.3d 552, 555 (7th Cir. 2012) ("We have previously reserved judgment on whether *Heck* applies to 'an administrative proceeding or a finding of a violation of a city ordinance,' *Justice v. Town of Cicero*, 577 F.3d 768, 773 (7th Cir.2009), and we continue to reserve judgment until the issue can be more thoroughly considered from a carefully maintained record."); ***Hoog-Watson v. Guadalupe County Tex***, 591 F.3d 431, 434 (5th Cir. 2009) ("For the purposes of a *Heck*-based motion for summary judgment, a proceeding's civil or criminal nature is a question of fact. . . . In other words, the existence (or not) of a prior criminal proceeding is, like many other concrete circumstances, a fact to be proven by the party asserting the § 1983 claim. . . . Thus, we evaluate the defendants' motion for summary judgment by determining whether Hoog-Watson's evidence created a genuine question of fact with respect to the animal cruelty proceeding's criminal or civil nature."); ***Cougle v. County of Desoto, Miss***., 303 F. App'x 164, 165 (5th Cir. 2008) ("*Heck* applies to proceedings that call into question the fact or duration of probation. . . . The district court correctly recognized that the allegations of unlawful search and arrest in this case, if true, would necessarily imply the invalidity of the revocation of Cougle's probation, which was based, at least in part, on the same search and arrest. Cougle has not demonstrated that the revocation of his probation has been reversed, expunged, set aside or called into question as required by *Heck* as a prerequisite for this case to proceed.").

See also ***Bryant ex rel. Bryant v. City of Ripley, Miss.,*** No. 3:12CV37-B-A, 2015 WL 686032, at *3 (N.D. Miss. Feb. 18, 2015) ("To date, the Fifth Circuit has had no occasion to address the role and effect of Section 43–21–51(5) for *Heck* purposes; so this court has no binding authority to guide it on the issue. A number of courts in other circuits have addressed the issue in similar circumstances, however. Among them is an Arizona district court in the case of *Dominguez v. Shaw*, No. CV 10–01173–PHX–FJM, 2011 WL 4543901 (D.Ariz. Sept. 30, 2011). In Arizona, as in Mississippi, a juvenile court adjudication 'shall not be deemed a conviction of crime.'. . The minor plaintiff in *Dominguez* was adjudicated a delinquent for resisting arrest and later brought a § 1983 action to recover for, inter alia, alleged false imprisonment and excessive force claims. . . Citing a number of cases in which various courts applied *Heck* to juvenile adjudications, the *Dominguez* court recognized that Arizona (like Mississippi) treats a minor who has committed a crime differently than an adult who has committed the same crime, but the court found no reason why this distinction should extend to *Heck* analysis. . . The court stated, 'Whether the juvenile court's finding is labeled a conviction or an adjudication is, for *Heck* purposes, irrelevant.'. . This court finds accordingly.")

B. Application to Fourth Amendment Claims

In the wake of *Heck*, there has been considerable confusion and debate about whether and when certain Fourth Amendment claims might run afoul of the *Heck* rule that requires deferral of

the § 1983 action until there has been a favorable termination of the criminal proceeding. Much of the confusion stems from a footnote in *Heck*, where the Court noted:

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery. . .and especially harmless error. . . such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury. . . which, we hold today, does not encompass the 'injury' of being convicted and imprisoned (until his conviction has been overturned).

Heck, 512 U.S. at 487 n.7. *See also* ***Ballenger v. Owens,*** 352 F.3d 842 , 846, 847 (4th Cir. 2003) (*Heck* precluded § 1983 claim where suppression of evidence seized pursuant to challenged search would necessarily invalidate criminal conviction).

But see ***Graff v. Aberdeen Enterprizes, II, Inc.***, 65 F.4th 500, 521-22 (10th Cir. 2023) ("The causes of action set out in the SACAC, taken together with the SACAC's prayer for relief, do not threaten to imply the invalidity of Plaintiffs' underlying convictions or any component part of the sentences imposed. . . Thus, those claims are not *Heck* barred and 'should be allowed to proceed.'. . In reaching the opposite conclusion, the district court reasoned that application of *Heck* to the SACAC is 'all the more appropriate' because 'some Plaintiffs pled guilty and voluntarily entered into plea agreements, and their sentences were the primary issue for consideration in the plea proceedings.'. . This court does not perceive the relevance of the district court's analysis. No claim set out in the SACAC calls any aspect of the underlying criminal judgments into question, whether obtained by a jury verdict or plea agreement. If the district court intended to imply that individual plaintiffs who entered into plea agreements setting out an agreed-upon fine, fee, or cost forever thereafter gave up the right to challenge any method employed by state and private actors to collect court debts, it did not identify any precedent supporting such a result. Such a rule does not appear anywhere in *Heck* or this court's decisions interpreting *Heck*."); ***Rollins v. Willett***, 770 F.3d 575, 576-77 (7th Cir. 2014) ("Rollins pleaded guilty. There isn't any doubt that he *was* guilty—that he'd been driving on a suspended or revoked license. If he can prove that the action of the police in forcing him to get back in his car and show them his driving papers was unconstitutional, that cannot change the fact that he was driving without a valid license. Illegal searches and seizures frequently turn up irrefutable evidence of guilt. The evidence can be suppressed if the government attempts to present it at trial, but there was no trial. A finding that the defendant was illegally seized—the finding he seeks in this suit—would therefore have no relevance to the validity of his guilty plea and ensuing conviction. The case is like *Reynolds v. Jamison,* 488 F.3d 756 (7th Cir.2007). The plaintiff had pleaded guilty to telephone harassment and then brought a false-arrest claim. Whether the arresting officer had probable cause to arrest

the plaintiff had no bearing on the validity of the guilty plea and conviction, and so *Heck* was irrelevant. *Id.* at 767. *Lockett v. Ericson*, 656 F.3d 892 (9th Cir.2011), is similar. The plaintiff had pleaded nolo contendere to charges that he was driving under the influence and then sued the police for having searched his home without probable cause and in the course of the search having obtained evidence concerning the DUI charge. The court held that whether the search had been unlawful could not affect the plaintiff's conviction because the conviction had not been based on any evidence introduced against him, so again *Heck* was inapplicable. . . And in this case as well. The district judge did say that the 'plaintiff should also understand that his remaining claims fail, even if they are not *Heck*-barred,' such as his claim that the police had unlawfully demanded that he show them his driver's license and when he refused ordered him out of the car and subjected him to a full custodial search and arrest. But the judge ignored the fact that there was no evidence that the police had seized the plaintiff lawfully by ordering him back into his car—the action that precipitated his arrest, thus extending the seizure. The case must be remanded for reconsideration of the plaintiff's Fourth Amendment claim, unclouded by *Heck.*"); ***Lockett v. Ericson***, 656 F.3d 892, 896. 897(9th Cir. 2011) ("Lockett pled nolo contendere after the superior court denied his California Penal Code section 1538.5 suppression motion. He was not tried, and no evidence was introduced against him. Therefore, like the convicted plaintiffs in *Ove*, Lockett's conviction 'derive[s] from [his] plea[ ], not from [a] verdict[ ] obtained with supposedly illegal evidence.'. . 'The validity of' Lockett's conviction 'does not in any way depend upon the legality' of the search of his home. . . We therefore hold that *Heck* does not bar Lockett's § 1983 claim."); ***Apampa v. Laying***, 157 F.3d 1103, 1105 (7th Cir. 1998) (as in the parallel case of an illegal search, a Title III suit by a convicted defendant need not challenge the conviction and so does not fall afoul of *Heck*); ***Simpson v. Rowan***, 73 F.3d 134, 136 (7th Cir. 1995) (claims relating to illegal search and arrest not barred by *Heck* because neither claim, if successful, would necessarily undermine validity of conviction for felony murder).

Compare ***Byrd v. Phoenix Police Dep't***, 885 F.3d 639, 643-45 (9th Cir. 2018) ("*Heck* does not prohibit a habeas corpus petition and a § 1983 action from proceeding simultaneously; indeed the Court seemed to anticipate this possibility. . . The critical question under *Heck* is a simple one: Would success on the plaintiff's § 1983 claim 'necessarily imply' that his conviction was invalid? . . Answering this question, we find that *Heck* does not bar Byrd's § 1983 claims. Because Byrd's conviction resulted from a plea agreement and Byrd alleged no facts in his complaint suggesting that the plea was not knowing and voluntary, success in the § 1983 action would not affect his conviction. Our conclusion finds support in *Ove v. Gwinn*, 264 F.3d 817 (9th Cir. 2001), which reviewed the dismissal of a § 1983 case involving plaintiffs who were convicted pursuant to plea agreements of driving under the influence. . . . Similarly, *Heck* poses no bar to Byrd's claims. He pleaded guilty to conspiracy to commit possession of a dangerous drug for sale. No evidence was produced against him at his plea hearing. Thus, success on his § 1983 claims would not necessarily demonstrate the invalidity of his conviction. Appellees argue that *Whitaker v. Garcetti*, 486 F.3d 572 (9th Cir. 2007) and *Szajer v. City of Los Angeles*, 632 F.3d 607 (9th Cir. 2011), support the district court's application of the *Heck* bar. . . We find those cases are distinguishable. In those cases, as here, the plaintiffs were convicted pursuant to pleas of guilty and nolo contendere to

crimes of possession—possession of illegal drugs in *Whitaker*, and possession of an illegal assault weapon in *Szajer*. . . The evidence supporting the possession convictions in those cases and the conspiracy conviction here was found in the challenged search. . . . In *Whitaker* and *Szajer*, however, the plaintiffs' civil suits 'challenge[d] the search and seizure of the evidence upon which their criminal charges and convictions were based.'. . Therefore, in both cases, the court concluded that if the plaintiffs prevailed on the § 1983 claims, 'it would necessarily imply the invalidity of their state court convictions.'. . Here, in contrast, Byrd's conviction was based on methamphetamine he threw when the police were questioning him, which they subsequently recovered 'a distance away from where he was at.' Byrd's civil suit concerns allegations that the police illegally searched his person and used excessive force on him—*after* they discovered the drugs, for all we know—which has nothing to do with the evidentiary basis for his conspiracy conviction. . . Therefore, success in Byrd's § 1983 action does not 'necessarily imply' that his conviction was invalid.") *with* ***Byrd v. Phoenix Police Dep't***, 885 F.3d 639, 645-46 (9th Cir. 2018) (Eaton, J., concurring) ("I join in the panel's reasoning in all respects other than those dealing with the *Heck* bar. Under *Heck*, where a plaintiff's § 1983 claim for damages, 'even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.'. . Applying this rule, some of this Circuit's opinions have concluded that, because no evidence is presented against a plaintiff where a conviction results from a plea agreement, a § 1983 case is not barred by *Heck*[.] . . I believe this analysis to be correct, and thus would not draw the distinction, apparently made in *Whitaker* and *Szajer*, that would impose the *Heck* bar in cases where the § 1983 action involves the seizure of evidence that might have been used to prosecute a defendant had there been a trial. . . . This rule regarding pleas has been adopted elsewhere, and, it seems to me, should be adopted here. . . . Thus, I would allow Byrd's § 1983 claims to proceed, not because he pled guilty to conspiracy, and there was no way of knowing whether he threw the drugs away before or after the complained of civil rights violations, but because his conviction resulted from a plea agreement and was thus based on no evidence at all.").

See also ***Szajer v. City of Los Angeles***, 632 F.3d 607, 611, 612 (9th Cir. 2011) ("§ 1983 claims premised on alleged Fourth Amendment violations are not entirely exempt from the *Heck* analysis, as the Szajers suggest. Nonetheless, the Szajers urge this Court to follow two Seventh Circuit cases: *Copus v. City of Edgerton*, 151 F.3d 646 (7th Cir.1998) and *Booker v. Ward*, 94 F.3d 1052 (7th Cir.1996). In those cases, the plaintiffs were allowed to pursue § 1983 claims based on Fourth Amendment violations although their criminal convictions were not challenged. The Seventh Circuit read footnote seven to mean that § 1983 claims based upon Fourth Amendment violations may proceed because *Heck* simply does not bar such claims. . . These holdings, however, are in direct conflict with Ninth Circuit precedent. . .We decline to take up the Szajers' invitation to follow the Seventh Circuit's approach because this Court must follow its own precedent."); ***Crooker v. Burns,*** 544 F.Supp.2d 59, 62, 63 (D. Mass. 2008) ("Circuit courts have split on whether the Supreme Court's allusion to this possibility signifies that civil Fourth Amendment claims should receive a blanket exception from the application of *Heck* or whether courts should analyze such complaints on a case-by-case basis. As Judge Neiman ably explained, the Seventh, Eighth,

Tenth, and Eleventh Circuits have adopted the 'blanket exception' approach, while the Second, Sixth, and Ninth Circuits, and arguably the Fifth Circuit as well, follow the 'case-by-case' approach. [citing cases] The First Circuit has not weighed in on this issue. Defendants do not appear to challenge Judge Neiman's recommendation that this court apply the 'case-by-case" approach. Indeed, evolving authority seems to favor this mode of analysis, rather than the 'blanket exception' approach taken by some courts. . . Leaving aside the merits of the arguments relied on by the circuit courts that have addressed this issue, the Supreme Court itself recently appeared to confirm the position that *Heck* might apply to Fourth Amendment claims in *dicta* appearing in *Wallace v. Kato*, 127 S.Ct. 1091 (U.S.2007). In that case, the Court observed, in a slightly different context, 'that a Fourth Amendment claim can necessarily imply the invalidity of a conviction, and that if it does it must, under *Heck*, be dismissed.' . . This statement strongly suggests that the Supreme Court never meant footnote seven of *Heck* to completely exempt Fourth Amendment claims from its holding.").

Depending upon the facts of the case, the courts have found *Heck* applicable to both false arrest claims and excessive force claims. For false arrest claims, *see, e.g.*, ***Patrick v. City of Chicago***, 81 F.4th 730, 737 (7th Cir. 2023) ("Patrick seems to be alleging that police officers engaged in a conspiracy to hold him without probable cause in order to give law enforcement time to build a stronger case against him. In the Third Amended Complaint, Patrick maintains that he was acting in self-defense when he shot at Freeman. This evidence, including the overwhelming evidence that Freeman instigated the shoot-out, was allegedly ignored by the prosecution. According to Patrick, he discharged his weapon to scare Freeman away. Under Illinois law, self-defense is an affirmative defense to aggravated discharge of a firearm. . . Because Patrick's self-defense allegations, if accepted as true, would necessarily imply the invalidity of his conviction, we must conclude that this claim is *Heck*-barred. . . Accordingly, for these reasons, Patrick's § 1983 unlawful pretrial detention claim cannot proceed."); ***Wiley v. City of Chicago,*** 361 F.3d 994, 997 (7th Cir. 2004) ("If, as alleged, Wiley was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of a prosecution premised on the planted drugs."), *cert. denied*, 125 S. Ct. 61 (2004) ; ***Case v. Milewski***, 327 F.3d 564, 567, 568 (7th Cir. 2003) ("Because Case plead guilty to resisting arrest . . . his claim is barred by *Heck* . . . . If this court were to allow Case to recover damages because he was arrested without probable cause, Case's conviction would be rendered invalid because, under Illinois law, so long as there is physical resistance an officer has probable cause to arrest someone who resists an arrest attempt."); ***Snodderly v. R.U.F.F. Drug Enforcement Task Force,*** 239 F.3d 892, 899 (7th Cir. 2001) ("The issuance of an arrest warrant is an act of legal process that signals the beginning of a prosecution. Therefore, Snodderly's sec.1983 wrongful arrest claim seeks damages for confinement imposed pursuant to legal process, thereby making it akin to a malicious prosecution claim and triggering the application of *Heck*."); ***Covington v. City of New York,*** 171 F.3d 117, 123 (2d Cir. 1999) ("[I]n a case where the only evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence."); ***Hudson v. Hughes***, 98 F.3d 868, 872 (5th Cir. 1996) ("[B]ecause a successful section 1983 action for false arrest on burglary

charges necessarily would imply the invalidity of Hudson's conviction as a felon in possession of a firearm, *Heck* precludes this claim.").

But see ***Shultz v. Buchanan***, 829 F.3d 943, 949 (8th Cir. 2016) ("Success on Shultz's Fourth Amendment claim . . . would not demonstrate the invalidity of his conviction for public intoxication. All of the conduct relating to the public intoxication offense necessarily occurred in public and before Buchanan's entry into Shultz's home. *See* Ark. Code Ann. § 5-71-212. Shultz's claim is thus not barred by *Heck*."); ***Nelson v. Jashurek***, 109 F.3d 142, 145-46 (3d Cir. 1997) (*Heck* did not bar § 1983 suit where plaintiff did not charge officer falsely arrested him, but charged officer effected a lawful arrest in an unlawful manner); ***Brooks v. City of Winston-Salem***, 85 F.3d 178, 182 (4th Cir. 1996) ("[A] charge that probable cause for a warrantless arrest was lacking, and thus that the seizure was unconstitutional, would not necessarily implicate the validity of a subsequently obtained conviction − at least in the usual case.") ***Mackey v. Dickson***, 47 F.3d 744, 746 (5th Cir.1995) (claim of unlawful arrest, standing alone, does not necessarily implicate validity of criminal prosecution following arrest); ***Brown v. Gorman***, No. CV 07-026-BLG-RFC-CSO, 2008 WL 2233497, at *4 (D. Mont. Apr. 29, 2008) ("Plaintiff alleges that he was racially profiled because as an African American he was stopped for speeding by Defendant Gorman while white motorists traveling at speeds in excess of the speed limit were not stopped. This is sufficient to state a claim for denial of equal protection on the basis of race. Plaintiff is not challenging his conviction, and his racial discrimination claim, if successful, would not necessarily imply the invalidity of his underlying conviction. Accordingly, Plaintiff's claims are not barred by *Heck*[.]")

See also ***Irizarry v. City & County of Denver***, No. 21-CV-01490-PAB-SKC, 2023 WL 2528782, at *5–6 (D. Colo. Mar. 15, 2023) ("In claims four, six, seven, and nine, Mr. Irizarry and Mr. Shockley assert that they were prevented from exercising their First Amendment rights and were arrested in retaliation for engaging in protected speech on June 2, 2019. . . The Court finds that these four claims are barred by *Heck.* To prevail on a First Amendment free speech or retaliation claim, a plaintiff must establish that his activities are protected by the First Amendment. . . Mr. Irizarry and Mr. Shockley argue that they were engaged in protected speech by conducting protests on police brutality and Denver's treatment of the homeless. . . However, a judgment in favor of the plaintiffs on these claims would imply the invalidity of their convictions for Disturbing the Peace. The Denver ordinance that plaintiffs were convicted under is the 'fighting words' exception to the right to free speech. . . A § 1983 judgment in plaintiffs' favor would find that Mr. Irizarry and Mr. Shockley were engaged in constitutionally protected speech, which would invalidate their convictions for disturbing the peace. Mr. Irizarry and Mr. Shockley have not demonstrated that their convictions have been overturned on appeal, expunged, or called into question by a writ of habeas corpus. . . As a result, claims four, six, seven, and nine are barred under *Heck*. . . .In claims one and three, Mr. Irizarry and Mr. Shockley assert unlawful arrest claims against Sergeant Ingersoll and Denver for their arrests on June 2, 2019. . . Mr. Irizarry and Mr. Shockley argue that Sergeant Ingersoll arrested them for 'protesting homelessness and for saying the phrase "Fuck the Police,"' yet Sergeant Ingersoll never witnessed any violence or heard them use fighting words. . . Plaintiffs argue that Sergeant Ingersoll had no probable cause for the arrests.

. . The Tenth Circuit has held that *Heck* does not universally bar Fourth Amendment unlawful arrest claims. . . Defendants argue that a judgment in plaintiffs' favor would imply the invalidity of their convictions for Disturbing the Peace because it would conclude there was no probable cause to arrest plaintiffs on June 2, 2019. . . In support of their argument, defendants cite *Talmadge v. Marner*, No. 21-cv-01829-STV, 2022 WL 1591600, at *4 (D. Colo. May 19, 2022), where the court found that *Heck* barred a plaintiff's Fourth Amendment unlawful arrest claim. . . However, the Court finds that *Talmadge* is distinguishable because the plaintiff in that case was arrested for resisting arrest. . . A plaintiff convicted of resisting arrest, which is defined as 'intentionally preventing a peace officer from effecting a *lawful arrest*,' is barred from bringing a § 1983 claim for unlawful arrest because such a claim negates an element of the underlying offense, the lawfulness of the arrest. . . Mr. Irizarry and Mr. Shockley's allegation that Sergeant Ingersoll lacked probable cause for the arrests would not be barred under *Heck* because a finding that Sergeant Ingersoll lacked probable cause would not negate an element of the disturbing the peace convictions. . . As a result, claims one and three are not barred under *Heck*. . . . In claims ten and eleven, plaintiffs challenge the constitutionality of RTD's [Regional Transportation District] Wynkoop Plaza Rules. . . Defendants cursorily state that claims ten and eleven should be dismissed under *Heck*, but provide no legal argument for dismissal. . . Plaintiffs were convicted of Disturbing the Peace under Den. Rev. Mun. Code § 38-89(a). *Id.* at 1. A finding that the RTD Wynkoop Plaza Rules are unconstitutional would not imply the invalidity of the convictions for Disturbing the Peace under the Denver Code. Consequently, claims ten and eleven are not barred under *Heck*."); ***Calabrese v. Tierney***, No. 19-12526 (FLW), 2020 WL 1485944 (D.N.J. Mar. 27, 2020) ("Plaintiff's claims solely involve the police officers' basis for the motor vehicle stop, and his conviction presumably stems from marijuana and drug paraphernalia discovered on Plaintiff's person or in Plaintiff's vehicle during the traffic stop. Because the instant lawsuit only requires the Court to ascertain the validity of the traffic stop, such a determination will not impact the validity of Plaintiff's conviction. In a civil rights suit, doctrines such as 'fruit of the poisonous tree' and the 'exclusionary rule' are inapplicable, and therefore, in analyzing whether Plaintiff's constitutional rights were violated by an unlawful stop, the Court need not reach the ultimate questions of whether the evidence seized during the traffic stop should have been suppressed or the ultimate validity of Plaintiff's conviction. *See Hector v. Watt*, 235 F.3d 154, 158 (3d Cir. 2000) (explaining that the exclusionary rule "is not a personal constitutional right of the party aggrieved" and thus, victims of such violations "cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution" (internal citations and quotation marks omitted)); *Price v. City of Philadelphia*, 239 F. Supp. 3d 876, 903 (E.D. Pa. 2017)("[t]he 'fruit of the poisonous tree' doctrine likewise cannot be used by a plaintiff in a civil suit to avoid consideration of evidence obtained through police misconduct") Accordingly, Plaintiff's civil rights claim does not impugn the validity of his guilty plea or conviction and the *Heck* bar does not apply.")

1. *Wallace v. Kato* and False Arrest Claims

The Supreme Court has now made clear that the statute of limitations on a section 1983 false arrest claim begins to run at the time legal process is initiated. In ***Wallace v. Kato,*** 127 S. Ct. 1091(2007), the Court held:

> We conclude that the statute of limitations on petitioner's § 1983 [false arrest/false imprisonment] claim commenced to run when he appeared before the examining magistrate and was bound over for trial. Since more than two years elapsed between that date and the filing of this suit—even leaving out of the count the period before he reached his majority—the action was time barred. . . . If a plaintiff files a false arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended. . . . . If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit. . . . We hold that the statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process. Since in the present case this occurred (with appropriate tolling for the plaintiff's minority) more than two years before the complaint was filed, the suit was out of time.

Id. at 1097, 1098, 1100.

2. Post-*Wallace* Cases:

Yoast v. Pottstown, No. 22-1960, 2023 WL 4418213, at *2 n.5 (3d Cir. July 10, 2023) (not reported) ("Yoast argues that the Supreme Court in *Wallace v. Kato*, 549 U.S. 384 (2007), held that false arrest claims can never be barred by *Heck*. He is incorrect. The Court in *Wallace* determined that the statute of limitations began to run for Wallace's false arrest claims when Wallace was arraigned and held pursuant to legal process. . . It rejected Wallace's arguments that his claim did not accrue until his conviction was vacated because the claim would have been barred by *Heck*. The Court noted that a defendant could file a false-arrest claim before he was convicted and the matter could be stayed pending the resolution of the criminal proceedings. The Court explained that '[i]f the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal.'")

Mills v. City of Covina, 921 F.3d 1161, 1166-68 (9th Cir. 2019) ("We begin by determining whether Mills's § 1983 claims for unlawful stop and detention, false arrest, false imprisonment, failure to screen and hire properly, failure to train properly, and failure to supervise and discipline

are time-barred. The parties and the district court agree that those claims accrued on April 14, 2013, when the search was conducted and Mills was arrested. That is correct. '[T]he accrual date of a § 1983 cause of action is a question of federal law ....' . . . Mills had complete and present causes of action for all but his malicious prosecution and *Monell* liability claims when he was subjected to a search in violation of the Fourth Amendment and was arrested; therefore, those claims accrued at that time. Next, to determine whether the statute of limitations ran on Mills's claims, we 'apply [California's] statute of limitations for personal injury actions, along with [California's] law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law.'. . California's two-year statute of limitations for personal injury actions thus applies to Mills's claims. . . Mills filed his claims on September 22, 2016, roughly three years and five months after the search and arrest. His claims would therefore be time-barred absent tolling. The parties agree that California Government Code § 945.3 tolled the statute of limitations during Mills's criminal proceedings in the Superior Court, but not during his criminal appeal. The parties also agree that, but for additional tolling, the statute of limitations elapsed during Mills's criminal appeal. Mills, however, argues that California Code of Civil Procedure § 356 tolled the statute of limitations during the pendency of his criminal appeal because he was legally prevented from bringing those claims during that period by the Supreme Court's decision in *Heck*. We disagree. Under § 356, '[w]hen the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.' As Appellees argue, a judicially created bar to commencing an action appears to fall outside § 356 based on its plain language. The California Supreme Court, however, has explained that § 356 'has been applied in situations where the action is legally prohibited by other means than injunctions or statutory prohibition.'. . Indeed, while the California Supreme Court has not specifically addressed the impact of a judicially created bar on § 356, it has held 'that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights.'. . We are bound by this interpretation. . . Notably, however, in *Hoover* and each case it discussed, a *definitive* bar to commencing an action was required to trigger tolling under § 356, regardless whether the prohibition was by statute, injunction, or otherwise. . . Because we hold the *Heck* bar did not operate as such a definitive bar to the commencement of Mills's action, we need not decide whether a judicially created bar can trigger tolling under § 356. . . . [W]e find that where, as here, a § 1983 claim accrues pre-conviction, the *possibility* that *Heck* may require dismissal of that 'not-yet-filed, and thus utterly indeterminate, § 1983 claim,' is not sufficient to trigger tolling under California Code of Civil Procedure § 356. In such circumstances, it is not known whether the claim is barred by *Heck* until the claim is filed and the district court determines that it will impugn an extant conviction. Until that determination is made, a plaintiff is not 'legally prevented from taking action to protect his rights.'. . Mills nevertheless implores us to adopt a rule allowing California plaintiffs to wait until the resolution of their criminal appeals to file their § 1983 claims, leaving district courts to retroactively pronounce the applicability of the *Heck* bar and, in turn, tolling under § 356. As discussed above, however, the Supreme Court rejected the petitioner's invitation to adopt a similar rule in *Wallace* in part because '[d]efendants need to be on notice to preserve beyond the normal limitations period evidence that will be needed for their defense; and a statute

that becomes retroactively extended, by the action of the plaintiff in crafting a conviction-impugning cause of action, is hardly a statute of repose.'. . We likewise decline to adopt such a rule. Ultimately, nothing prevented Mills from commencing his suit during his criminal appeal. Had he done so, the district court could have determined whether his claims impugned his conviction. If so, the district court could have dismissed those claims without prejudice, and Mills could have refiled the claims once his conviction was reversed. . . If Mills's claims did not impugn his conviction, the suit could have proceeded. Because Mills was not legally precluded from commencing his § 1983 claims during the pendency of his criminal appeal, he was not 'legally prevented from taking action to protect his rights' and tolling under § 356 was not triggered. . . We therefore affirm the district court's holding that all but Mills's claims for malicious prosecution and *Monell* liability are time-barred.")

[*See also* ***Cross v. City and County of San Francisco***, No. 18-CV-06097-EMC, 2019 WL 1960353, at *7–10 (N.D. Cal. May 2, 2019) ("Here, § 945.3, on its face, provides for tolling of the statute of limitations in a civil action while criminal charges are pending before a 'superior court.' Cal. Gov't Code § 945.3. The purpose of § 945.3 is clear. The statute has three objectives: (1) civil damage complaints should not be used as plea bargaining levers in the pending criminal proceeding; (2) civil actions should not be used as a discovery device in the pending criminal proceeding; and (3) criminal defendants should be encouraged to await the outcome of the criminal action before bringing a § 1983 case. . . As to these objectives, it does not matter whether criminal charges are pending in a state superior court or in a federal district court. That is, if criminal charges are pending before a federal district court, the same three objectives would still be served by applying tolling. . . . Only two other courts appear to have considered whether § 945.3 could be applied where criminal charges are pending in a federal trial court, instead of a state superior court. . . Both held that statutory tolling should apply. . . .Accordingly, the Court holds that statutory tolling is applicable in the instant case and thus there is no time bar to Plaintiffs' claims. . . . Even if Plaintiffs could not rely on statutory tolling, their claims still would not be time barred because equitable tolling also applies. . . . As the Court noted at the hearing, Plaintiffs' decision to wait for the federal criminal proceedings to be completed before proceeding with their civil action was justified given that (1) more likely than not, the court in the civil action would stay the case until the federal criminal proceedings were completed and that (2) Plaintiffs could not realistically litigate their civil action while federal criminal proceedings were still ongoing without putting their Fifth Amendment rights in the criminal proceedings in jeopardy. . . The Court also notes that the facts in the case at bar also bear some similarity to facts in those cases that have allowed for equitable tolling because the plaintiff has been pursuing an alternate remedy before initiating suit. . . Here, Plaintiffs were litigating the issue of selective enforcement in an alternate forum, *i.e.*, the criminal proceedings, before moving on to file a civil action. Defendants argue still that equitable tolling should not be permitted here because they would suffer prejudice if the Court were to allow this civil case to proceed. More specifically, they argue prejudice because 'the records retention policy for Department of Emergency Management records is three years, and those records have now disappeared. [Also], [m]emories have faded, and because the USAO and DEA created the paperwork and prosecuted these matters, the SFPD lacks their normal investigatory records to

refresh recollection.'. . But none of these arguments is particularly compelling, at least at this juncture of the proceedings.")**]**

Johnson v. Winstead, 900 F.3d 428, 436-39 (7th Cir. 2018) ("The *Heck* bar is normally raised defensively to win dismissal of a § 1983 claim when the plaintiff's conviction has not been overturned; if the bar applies, the plaintiff's claim must be dismissed as premature. In contrast, *Heck*'s rule of deferred accrual is raised *offensively* to overcome a statute-of-limitations defense. The Court's decision in *Wallace* was such a case. . . . Our cases since *Wallace* have sent mixed signals on the methodological question. Some take a categorical approach to *Heck* questions, either implicitly or explicitly. . . Others approach *Heck* questions on a fact-intensive, case-by-case basis. . . .[T]he analysis in *Moore* was categorical, based on the theory of relief; we did not undertake a factual evaluation of each plaintiff's criminal case to determine what role the constitutionally tainted trial evidence played in his conviction. That makes sense in this context. Applying *Heck* categorically is sound as a matter of limitations law where the need for clear rules is especially acute. *Moore* points the way toward greater consistency in evaluating *Heck* questions. Applying it here, we hold that *Heck*'s rule of deferred accrual applies to § 1983 claims for violation of the Fifth Amendment right against self-incrimination. A claim of this kind seeks a civil remedy for a trial-based constitutional violation that results in wrongful conviction and imprisonment. Such a claim, if successful, necessarily implies the invalidity of the conviction and under *Heck* is neither cognizable nor accrues until the conviction has been overturned. As we've noted, the Eighth Circuit reached the opposite conclusion in *Simmons v. O'Brien*, holding that *Heck* categorically does not apply to a § 1983 claim for violation of the Fifth Amendment right against self-incrimination. 77 F.3d at 1095. More specifically, in *Simmons* the plaintiff was convicted of murder based in part on his videotaped confession, and his conviction was upheld on direct appeal and post-conviction review. He then brought a § 1983 claim alleging that his confession was obtained without *Miranda* warnings and while he was under physical and mental duress. The district court thought the claim was premature under *Heck* 'until a habeas court ruled on the validity of [the] conviction.'. . The Eighth Circuit disagreed. Leaning heavily on the reference to harmless-error doctrine in *Heck*'s footnote 7, the court held: 'Because harmless error analysis is applicable to the admission at trial of coerced confessions, judgment in favor of [the plaintiff] on this § 1983 action challenging his confession will not *necessarily* demonstrate the invalidity of his conviction.'. .This misreads footnote 7 for the reasons we've already explained. More fundamentally, the Eighth Circuit's holding is irreconcilable with *Heck* itself. The claims at issue there included a challenge to the admission at trial of an unlawful voice identification. . . A constitutional error in admitting identification evidence at trial is subject to harmless-error review. . . If the Eighth Circuit is right, *Heck* would have come out differently, at least as to the unlawful-identification claim. Finally, the Eighth Circuit's approach cannot be reconciled with our decision in *Moore*, which held that claims for trial-based constitutional violations are indeed *Heck*-barred until the conviction is overturned. For these reasons, we decline to follow *Simmons*. . .Our holding that *Heck* applies does not mean that *all* of Johnson's Fifth Amendment claims may proceed. To the extent that Johnson seeks damages associated with alleged Fifth Amendment violations at his first trial in 2007, the claims are indeed time-barred. That conviction was reversed

in 2010, and the two-year time clock began to run then. The limitations period expired long before he filed this suit in 2015. The claims arising from the second trial in 2012 are timely, however. That conviction was reversed in 2014, and Johnson filed suit less than a year later.")

Mordi v. Zeigler, 870 F.3d 703, 707-09 (7th Cir. 2017) ("A plaintiff is the master of his own complaint . . . and so we must examine what Mordi is asking for, before we can decide whether he may pursue his section 1983 action or if the *Heck* line of cases stands in his way. . . As the Supreme Court put it in *Muhammad v. Close*, . . . '*Heck*'s requirement to resort to state litigation and federal habeas before § 1983 is not ... implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence.' In addition, 'when a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by an alleged Fourth Amendment violation because the conviction does not rest in any way on evidence that may have been improperly seized.'. . Mordi insists that he is complaining only about the improper racial profiling that led to his traffic stop, and about the officers' decision to prolong his detention while they waited for the drug-sniffing dog to arrive. If he were to prevail on either or both of these points, his conviction would be unaffected. . . . [E]ven if [Mordi] were to prevail on his racial-profiling and prolonged-detention arguments, the discovery of the cocaine found within the car would be just as secure, his guilty plea would stand, and his conviction would, too. All he can hope for in his Fourth Amendment case would be some form of damages for the loss of his time and the dignitary insult inflicted by racial discrimination. Despite the fact that Mordi insisted in his complaint that he was not challenging his conviction (a point that the district court recognized), the state urges us to read the complaint as if he were. There is an exception to the *Heck* bar, under which a challenge may be brought to actions such as searches and seizures or a false arrest that do not have any necessary effect on the validity of a conviction. . . . The state acknowledges the *Wallace* exception, but, it argues, there is an exception to that exception. The second-layer exception comes into play if a plaintiff's allegations *necessarily* imply the invalidity of a conviction (even one based on a guilty plea); in that case, it says, the *Heck* bar springs back into existence. . . .The worst one can say about Mordi's case is that he made a few half-hearted attempts to assert his innocence between the time the police arrested him and the time he found himself facing federal charges. But those efforts did not make their way into his complaint as anything but background information or an account of what he said at the time. . . . Mordi is not asking for any form of relief that would undermine his guilty plea or his conviction. He is raising a civil rights complaint, and he is raising the type of complaint that *Wallace* says accrues at the time of the stop and arrest. In addition, even if Mordi filed a complaint that included some *Heck*-barred contentions and other cognizable arguments, we have held that the proper response is not to toss the entire complaint. Instead, the judge must carve off any *Heck*-barred contentions and proceed with what remains. . . The district court cut off this case at the screening stage, based on a finding that it could not properly proceed under section 1983. This was in error, and so we Reverse and Remand for further proceedings consistent with this opinion.")

Morrill v. City of Denton, 693 F. App'x 304, ___ (5th Cir. 2017) ("The statute of limitations for a section 1983 claim is determined by the forum state's limitations period for personal injury torts.

. . In Texas that is two years from the date the cause of action accrues. . . So if Morrill's claim accrued the day the officers allegedly used excessive force, then the statute of limitations expired in August 2014, months before he filed his complaint. Morrill disputes the date of accrual. He argues his claim did not accrue until the state dismissed a resisting arrest charge against him in March 2014. Federal law determines when a section 1983 cause of action accrues. . . It does so when the plaintiff has 'a complete and present cause of action.'. . An excessive force claim generally accrues on the date when the force is inflicted. . . Morrill tries to distinguish his case because he was charged with resisting arrest. He contends his cause of action did not accrue until the resisting arrest charge was dismissed because: (1) the charge was 'fraudulent concealment' that kept him from knowing of his injury; (2) his excessive force claim is analogous to a malicious prosecution claim, which does not accrue until the underlying prosecution ends; and (3) although he knew he had been hurt when the excessive force occurred, he did not know the force was excessive as a constitutional matter until the charge was dismissed.

We reject his attempts to avoid the normal accrual rule. First, the resisting arrest charge did not conceal facts necessary to Morrill's cause of action. For fraudulent concealment to toll a limitations period, a plaintiff cannot be aware of the critical facts underlying a cause of action and must instead reasonably rely on a defendant's deception that obscures those facts. . . Even if Defendants were deceptive, Morrill's complaint does not allege facts showing he reasonably relied on the resisting arrest charge to conclude that the officers did not use excessive force. Instead, his complaint alleges he knew the critical facts all along: he did not resist arrest and complied with officer commands, yet officers kicked and tased him 'without provocation or justification.' It says he immediately and at all times 'steadfastly refused to even discuss [the] possibility of agreeing ... that he in any way, shape, or form resisted arrest.' Second, Morrill's excessive force claim is not analogous to a malicious prosecution claim. A malicious prosecution claim only accrues once the criminal charges are dismissed because an element of that tort is the termination of a criminal prosecution in the plaintiff's favor. . . Thus, no cause of action exists until the prosecution is resolved. The same is not true of a section 1983 excessive force claim, which can be brought whether or not the defendant is prosecuted for resisting arrest. . . We have repeatedly held that a pending criminal charge does not delay accrual of an excessive force claim arising out of an arrest for that charge. . . Morrill claims this case is different because resisting arrest is more closely linked with the amount of force an officer may lawfully use than was true for the crimes in these prior cases. Determining whether force is excessive does require consideration of whether a plaintiff was 'actively resisting arrest.'. . But we do not see why this makes a difference. Even if Morrill's excessive force claim would call into question a conviction for resisting arrest, mere pending charges would not prevent the claim from accruing. . . And, as discussed above, Morrill was aware of the factual basis for his claim long before the state dismissed the resisting arrest charge, and the existence of his claim, unlike the existence of a malicious prosecution claim, 'did not depend on the outcome of the subsequent criminal proceedings.'. .Finally, Morrill argues that although he was aware of his personal injury in August 2012, he had no actionable constitutional claim until the resisting arrest charge was dismissed. He cites no caselaw for this proposition, and this court has long held that a plaintiff need only know the facts underlying a cause of action for accrual to begin, not that a claim is legally viable. . . Morrill's constitutional injury was complete on the day the alleged excessive

force took place. His section 1983 claim thus accrued in August 2012, more than two years before he filed suit.")

King v. Harwood, 852 F.3d 568, 578-79 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 640 (2018) ("The Supreme Court clarified in *Wallace* that the rule in *Heck* does not extend to claims for false arrest or false imprisonment, in which the limitations period begins when the allegedly false imprisonment ends, such as by the commencement of legal process. . . Whereas some circuits, including ours, *see, e.g.*, *Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir. 1999), had held that *Heck* applied to pre-conviction claims for false arrest, *Wallace* limited the rule in *Heck* to claims of malicious prosecution. In short, under *Heck*, a malicious-prosecution claim is not available before the favorable termination of criminal proceedings, nor does the limitations period for such a claim begin until the favorable termination of criminal proceedings. Here, the district court recognized that King's § 1983 suit was 'based upon a malicious prosecution claim.' Nevertheless, the district court applied the rule in *Wallace* to hold that King's 'cause of action accrued and the statute of limitations began to run on the date the judgment was vacated on July 18, 2014, rather than the date the charges were dropped.'. . This language comes from *Wallace*, where the Supreme Court held that the date on which charges are dropped is not necessarily the date on which a false-imprisonment claim accrues, because such a claim instead accrues when the *false* imprisonment ends, which may be the date of indictment or arraignment. . .When the Kentucky Court of Appeals granted King relief, it vacated her *Alford* plea, but it did not result immediately in a 'termination of the ... criminal proceeding in favor of the accused,' as *Heck* would require for the limitations period to begin. . . Rather, King's case was remanded for trial on the same charges that formed part of the malicious prosecution for which King now seeks relief. Accordingly, the one-year statute of limitations period did not begin until October 9, 2014, when King's indictment was dismissed, and King's complaint—filed October 1, 2015—is timely under *Heck*. The district court therefore erred in holding that King's malicious-prosecution claims were time-barred.")

Buckley v. Ray, 848 F.3d 855, 867 (8th Cir. 2017) ("The Supreme Court's decision in *Wallace* controls Buckley's claim. The trial court invalidated Buckley's 1999 conviction on November 1, 2010. No extant conviction exists for his § 1983 claims to impugn. The possibility that the State may have re-tried and convicted him of the cocaine charges—"*an anticipated future conviction*"—does not implicate the *Heck* rule. . . .The *Brady* violation committed against Buckley by the Law Enforcement Defendants caused him damage when he was convicted and incarcerated in 1999. The trial court vacated his conviction on November 1, 2010. That is the date on which his cause of action accrued. The limitations period on Buckley's claims, in accordance with Arkansas law, ended on November 1, 2013. His claims against the Law Enforcement Defendants, filed over a year later, are time-barred.")

Rapp v. Putman, 644 F. App'x 621, 625 (6th Cir. 2016) ("For plaintiff's retaliatory-prosecution claim, 'what would otherwise be the accrual date,' *Wallace,* 549 U.S. at 393, was when defendants initiated the prosecution. At that point, plaintiff had engaged in protected activity (first element), defendants took an adverse action (second element) by initiating a prosecution of plaintiff

purportedly motivated by plaintiff's protected conduct (third element) and without probable cause (fourth element). . . Notably, in contrast to the *malicious*-prosecution claim at issue in *Heck,* a plaintiff need not prove favorable termination of the prosecution in order to establish a *retaliatory*-prosecution claim. . . Thus, once defendants initiated the prosecution against plaintiff, each element of the cause of action was present and his claim became actionable. . . At that point, plaintiff had no '*extant conviction* which success in [a] tort action would impugn.'. . Therefore, *Heck* would not have barred the claim. As a consequence, *Heck's* delayed-accrual rule does not apply. . . Because *Heck* does not apply in this situation, the general accrual standard controls. Under that standard, plaintiff's claim accrued in September 2008, when defendants initiated the prosecution. The governing statute of limitations for § 1983 claims arising in Michigan is three years. . . Thus, as the district court held, plaintiff's November 2014 complaint is untimely as it pertains to his First Amendment retaliatory-prosecution claim.")

Smith v. Campbell, 782 F.3d 93, 100-02 (2d Cir. 2015) ("While the applicable statute of limitations in a § 1983 case is determined by state law, 'the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law.'. . Rather, 'it is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.'. . . Accordingly, [Smith's] cause of action for First Amendment retaliation accrued on November 26, 2007, more than three years prior to the filing of the initial complaint. That the full scope of her injury was not known at that time, including whether or not she would be convicted of the traffic infractions and that Campbell would continue harassment. . . does not alter the date that her cause of action accrued. . . Plaintiff argues that the accrual of her claim was delayed until after her trial or appeal and incorrectly cites *Heck v. Humphrey,* 512 U.S. 477 (1994), for this proposition. Quite apart from whether *Heck* is at all relevant, her argument mistakenly conflates the Fourth Amendment tort of malicious prosecution with the First Amendment tort of retaliation. These two kinds of claims are not subject to the same standards. . . . [I]it may be that had Smith's claim been one for malicious prosecution in violation of her Fourth Amendment rights, that claim would not have accrued until after the trial and appeal related to her tickets. That, however, is not the cause of action which plaintiffs have pressed in this case. As the Supreme Court explained in *Wallace,* delayed accrual of the constitutional tort in *Heck* occurred because in that case there was an extant criminal conviction that, unless otherwise expunged, a federal court's finding of a constitutional violation under § 1983 would necessarily 'impugn.'. . Put another way, *Heck* only comes into play potentially to delay accrual of an action when a resolution of that action in a plaintiff's favor could not be reconciled with an extant criminal conviction. . . The *Heck* rule *does not* delay the accrual of 'an action which would impugn *an anticipated future conviction.*' *Wallace,* 549 U.S. at 393. Nor does the *Heck* rule operate as a toll on the statute of limitations when a criminal conviction that would be impugned by a § 1983 action occurs after the accrual of the § 1983 action. . . .In this Circuit, First Amendment claims, even those arising out of the same series of events that give rise to Fourth Amendment claims, do not require a favorable termination in the criminal action to be cognizable as a matter of law. . . Moreover, the First Amendment retaliatory prosecution claim here presents itself in a temporal posture similar to the unlawful arrest claim that the Supreme Court's decision in *Wallace* held

accrued prior to any conviction. Just as in a false arrest claim, the cause of action here accrues when all of the elements necessary to state the claim are present, even though later developments in a related criminal action may ultimately effect the viability of the claim and a stay of the § 1983 action may be appropriate while the criminal action pends. . . As a consequence of the foregoing analysis, there is nothing in our prior case law that delays the accrual of Smith's claim for retaliatory prosecution in violation of her First Amendment rights. Having not been delayed or otherwise tolled, Smith's claim accrued on November 26, 2007. Thus, the district court was correct that Smith's claim for retaliatory prosecution, filed more than three years later on June 24, 2011, is barred by the statute of limitations. The holding of the district court as to this claim is affirmed.")

Moore v. Burge, 771 F.3d 444, 446 (7th Cir. 2014) ("[C]laims based on out-of-court events, such as gathering of evidence, accrue as soon as the constitutional violation occurs. That's because misconduct by the police does not (at least, need not) imply the invalidity of any particular conviction. See not only *Wallace* but also, *e.g.*, *Rollins v. Willett,* No. 14–2115 (7th Cir. Oct. 21, 2014); *Booker v. Ward,* 94 F.3d 1052 (7th Cir.1996). These decisions deal with the Fourth Amendment's rule against unreasonable searches and seizures; their holdings are equally applicable to contentions that police tortured suspects during interrogation, because that misconduct is actionable whether or not a suspect confesses, and whether or not any statement is used in evidence at trial. To the extent that Burton, Dungey, Freeman, and Tillis may be arguing that police violated their rights by giving false testimony, or that during trial prosecutors withheld material exculpatory evidence about misconduct during their interrogations, *Heck* indeed bars relief until a conviction is set aside. The district court must modify its judgment so that any claims based on proceedings in court are dismissed without prejudice under *Heck.* Absolute immunity for prosecutors and witnesses, see *Rehberg v. Paulk,* —— U.S. ——, 132 S.Ct. 1497, 182 L.Ed.2d 593 (2012); *Buckley v. Fitzsimmons,* 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), would make it hard for these plaintiffs to recover damages based on the conduct of the trials even if their convictions should be vacated some day. That may be why all five plaintiffs stress the injuries they say they suffered at the hands of the police before judicial proceedings began. Those claims are unaffected by *Heck* and are outside the scope of anyone's absolute immunity.")

Matz v. Klotka, 769 F.3d 517, 530, 531 (7th Cir. 2014) ("Under *Heck,* a plaintiff may not recover damages under § 1983 when a judgment in his favor would necessarily imply the invalidity of a criminal conviction or sentence that has not been reversed, expunged, invalidated, or otherwise called into question. . . There is no question that Matz's conviction and sentence have neither been invalidated nor called into question. . . The only question is thus whether Matz's conviction or sentence necessarily depended on his allegedly coerced confession. We conclude, like the district court, that success on Matz's Fifth Amendment claim would necessarily imply the invalidity of Matz's sentence. At sentencing, the judge relied heavily on Matz's confession as well as his subsequent decision to recant his admissions. Specifically, Matz explained to the judge that he confessed out of loyalty to his fellow Latin King codefendants in the hopes that he could take the fall and the rest of them 'would be able to go home.' The sentencing judge rejected the notion that Matz confessed because 'it was the right thing to do,' and opined instead that Matz thought he

could be out in 'five—ten years' and emerge in his 'rightful spot' as the leader of the Latin Kings brotherhood because he had stepped up and taken responsibility for the 'weaklings' beneath him. The judge believed that when the reality of the prison sentence Matz was facing set in and it came to light that his fellow Latin Kings had inculpated him in the crime, he was scared and realized that it was not worth taking the fall for his confederates. The court accordingly concluded that Matz had only a 'sort of a selfish, self-centered remorse' and thus posed a high risk of reoffending. Matz's confession and the sentencing judge's assessment of the reasons behind it thus figured prominently in the court's decision to sentence Matz consecutively on the two counts of conviction. Because that sentence remains intact, Matz cannot pursue a § 1983 claim for damages premised on his allegedly coerced confession because success on his claim would call into question his sentence. *Heck* thus bars Matz's Fifth Amendment claim.")

Hornback v. Lexington-Fayette Urban County, Government, No. 12–6589, 2013 WL 5544580, *2, *3 (6th Cir. Oct. 8, 2013) (not reported) ("The district court correctly concluded Hornback knew or had reason to know of the unlawful search of his bedroom on the day of the search. On August 31, 2010, Hornback knew he was not under the supervision of the Division of Probation and Parole, Appellees did not have a warrant or his consent to search his bedroom, and that Appellees nonetheless had searched his bedroom. On that date, Hornback had a 'complete and present cause of action' and could have sued for relief. . . Hornback fails to identify any case law in support of his contention that the Supreme Court's ruling in *Wallace* is applicable only to claims of false arrest. While the *Wallace* Court issued a case-specific ruling, the driving principle behind that ruling that the deferred accrual rule of *Heck v. Humphrey,* 512 U.S. 477 (1994), does not apply to actions 'which would impugn an anticipated future conviction' is generally applicable, including to claims such as Hornback's. . . Hornback correctly notes *Wallace* distinguishes between causes of action for malicious prosecution and those for false arrest. . . The Court drew this distinction based on the nature of the claims, however; unlike malicious prosecution, some torts redressable under § 1983 (like false arrest) 'accrue before the setting aside of indeed even before the existence of the related criminal conviction.'. . Claims of illegal search are analogous to claims of false arrest, as a potential plaintiff very often has a complete cause of action even before criminal proceedings commence. While Hornback argues he could not know his rights had been violated until the trial judge granted his motion to suppress, he fails to identify any authority in support of his contention. Hornback had a colorable claim for the violation of his Fourth and Fourteenth Amendment rights on the day of the search, and the statute of limitations began to run on that date. Hornback also asserts that if this court declines to apply the *Wallace* holding to § 1983 illegal search claims, 'orderly adjudication of illegal search claims would take place, the risk of inconsistent legal determinations would be minimized, and the clogging of courts with unnecessary filings would be avoided.' The *Wallace* Court, however, announced a procedure for lower courts to follow when confronted with scenarios such as the one Hornback faced: If a plaintiff files a false-arrest claim before he has been convicted (*or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial*), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended. *Wallace,* 549 U.S. at 393–94 . . . Hornback's arguments

concerning judicial efficiency are unpersuasive and ultimately irrelevant to the question of when his legal injury arose.")

Franklin v. Burr, No. 13–1154, 2013 WL 5738891, *1, *2 (7th Cir. 2013) (not published) ("There is no necessary inconsistency between the propositions that (a) a conviction based on a guilty plea is valid, and (b) the police violated the accused's rights at the time of arrest or interrogation. One court of appeals held otherwise in *Trimble v. Santa Rosa*, 49 F.3d 583, 585 (9th Cir.1995), but that decision predates *Wallace* and cannot be considered authoritative. Given *Wallace,* Franklin's claim is not barred by *Heck*—which means that the claim accrued in 1996 and that this suit is untimely. The judgment of the district court is affirmed.")

Serino v. Hensley, 735 F.3d 588, 591 (7th Cir. 2013) ("The general rule is that a § 1983 claim accrues 'when the plaintiff knows or has reason to know of the injury which is the basis of his action.'. . There is a specific rule, however, for false arrest claims. The Supreme Court held that for these claims, the action begins to run 'at the time the claimant becomes detained pursuant to legal process'—that is, when the arrestee is bound over by a magistrate or arraigned on charges. . . Thus, Serino needed to bring his false arrest claim by September 15, 2010—two years after his arraignment. He did not file his complaint until March 28, 2012. His claim is time-barred. Serino argues that the statute did not begin to run until March 31, 2010, the day the state dropped his second criminal charge. He invokes *Heck v. Humphrey,* 512 U.S. 477 (1994), in which the Supreme Court held that a § 1983 claim based on an unconstitutional conviction does not accrue until the conviction has been invalidated. . . Serino's theory is that the *Heck* rule operated to delay the accrual of his false arrest claim—a claim that could imply that the charges against him were meritless—until there was no longer a pending state criminal proceeding. But this argument is a non-starter, because *Heck* relied on the principle 'that civil tort actions,' as opposed to habeas corpus petitions,'"are not appropriate vehicles for challenging the validity of *outstanding criminal judgments.'*. . And in *Wallace,* the Supreme Court explicitly clarified that 'the *Heck* rule for deferred accrual is called into play only when there exists a "conviction or sentence that has not been ... invalidated," that is to say, an "an outstanding criminal judgment."'. . Here, as in *Wallace,* Serino was never convicted. As such, at the time Serino's false arrest claim began to accrue, 'there was in existence no criminal conviction that the cause of action would impugn.'. . *Heck* cannot help Serino here.")

Gakuba v. O'Brien, 711 F.3d 751, 752, 753 (7th Cir. 2013) ("*Heck* does not apply absent a conviction. . . It is *Younger v. Harris,* 401 U.S. 37 (1971), with which we must be concerned. *Younger* holds that federal courts must abstain from taking jurisdiction over federal constitutional claims that may interfere with ongoing state proceedings. See *SKS & Assocs., Inc. v. Dart,* 619 F.3d 674, 677 (7th Cir.2010). Gakuba's claims of damages resulting from illegal searches, seizures, and detentions meet that description: they involve constitutional issues that may be litigated during the course of his criminal case. . . . Deciding those issues in federal court could undermine the state court proceeding. . . . Because monetary relief is not available to him in his defense of criminal charges, however, and because his claims may become time-barred by the time

the state prosecution has concluded, the district court should have stayed rather than dismissed Gakuba's civil-rights claims.")

Moore v. Mahone, 652 F.3d 722, 725, 726 (7th Cir. 2011) ("[I]n the wake of *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), complaints must be dismissed if they fail to state a 'plausible' basis for relief. The basis for relief stated in our plaintiff's complaint is, given *Heck*, implausible, for it is that the plaintiff was the victim of an utterly unprovoked assault, and while that conceivably is true, it is barred by *Heck*. The judge could have retained the case (minus the deliberate-indifference claim) on the authority of *Evans*, and just have forbidden the plaintiff to embroider his claim with the rejection of the disciplinary board's findings. But likewise he could do what he did − dismiss it. But not with prejudice. The plaintiff was proceeding pro se. He may not have heard of *Heck v. Humphrey* when he filed his complaint. All the judge said in dismissing the claim was that 'as plaintiff lost good time regarding the March 2, 2007, altercation with [the two officers], his claim that they used excessive force against the plaintiff is barred by *Heck v. Humphrey*.' This was too terse, and in fact was erroneous. That the plaintiff was disciplined didn't trigger the application of *Heck*, as the judge implied; what triggered it was the fact that the plaintiff was challenging the findings of the disciplinary board. The judge should have said that, and rather than dismissing the case with prejudice should either have retained it but warned the plaintiff that he could not challenge the findings made by the disciplinary board or have permitted him to file a second amended complaint that would delete all allegations inconsistent with those findings. . . . The case must be returned to the district court to decide whether to dismiss the complaint without prejudice or not dismiss but warn the plaintiff that he cannot challenge the disciplinary board's findings.")

Evans v. Poskon, 603 F.3d 362, 363, 364 (7th Cir. 2010) ("The district court did not discuss *Wallace v. Kato*, 549 U.S. 384 (2007), doubtless because neither side cited it. But *Wallace* holds that a claim that accrues before a criminal conviction may and usually must be filed without regard to the conviction's validity. The Court held that a claim asserting that a search or seizure violated the fourth amendment − and excessive force during an arrest is such a claim, see *Graham v. Connor*, 490 U.S. 386 (1989) − accrues immediately. The prospect that charges will be filed, and a conviction ensue, does not postpone the claim's accrual. *Wallace* added that a conviction does not un-accrue the claim, even if the arguments advanced to show a violation of the fourth amendment also imply the invalidity of the conviction. . . Instead of dismissing the § 1983 suit, the district judge should stay proceedings if the same issue may be resolved in the criminal prosecution (including a collateral attack). . . . Evans's situation illustrates how a fourth-amendment claim can coexist with a valid conviction. He contends three things: (1) that he did not resist being taken into custody; (2) that the police used excessive force to effect custody; and (3) that the police beat him severely even after reducing him to custody. (Evans says that his skull was fractured and his face mangled, leading to three surgeries and bone grafts. He also contends that his vision has been permanently impaired. These are not normal consequences of arrest.) Proposition (1) is incompatible with his conviction; any proceedings based on this contention must be stayed or dismissed under *Wallace* or *Heck*. But propositions (2) and (3) are entirely consistent

with a conviction for resisting arrest. . . . These aspects of the suit can proceed. And if Evans is willing to abandon proposition (1), there would be no need for a stay of any kind.")

Dique v. New Jersey State Police, 603 F.3d 181, 187, 188 (3d Cir. 2010) ("Dique argues that *Gibson* is binding precedent that we must follow. The Officers, by contrast, argue that the Supreme's Court 2007 decision in *Wallace* repudiates *Gibson* and mandates accrual when the wrongful conduct occurred. Because an intervening Supreme Court decision is a 'sufficient basis for us to overrule a prior panel's opinion,' we are able to bypass our general rule of not overruling a prior panel's opinion without referring the case to the full Court. . . . Although, as we just noted, a Fourteenth Amendment selective-enforcement claim will accrue at the time that the wrongful act resulting in damages occurs, Dique's claim did not accrue until July 2001 because the discovery rule postponed accrual. In 1990 he was reasonably unaware of his injury because Mulvey purported to stop his car for a speeding violation. It was not until July 2001, when his attorney became aware of the extensive documents describing the State's pervasive selective-enforcement practices, that Dique discovered, or by exercise of reasonable diligence should have discovered, that he might have a basis for an actionable claim. His claim accrued at that time. Because he asserted his selective-enforcement claim over two years later, the statute of limitations bars it.").

Dominguez v. Hendley, 545 F.3d 585, 588, 589 (7th Cir. 2008) ("A § 1983 claim for a due process violation based on the denial of a fair criminal trial may be brought only after the conviction is set aside. Otherwise, that civil claim would imply the invalidity of the outstanding conviction and would thus constitute a collateral attack on the conviction through an impermissible route. . . So viewed, Dominguez's claim did not accrue until 2002 and is therefore timely. Hendley argues, however, that the underlying reason why Dominguez asserts that his trial was unfair relates to his arrest, and thus we should find that his claim accrued no later than the time when his unlawful seizure was terminated − that is, the time of his arraignment. Fourth Amendment claims for false arrest or unlawful searches accrue at the time of (or termination of) the violation. . . .Even if no conviction could have been obtained in the absence of the violation, the Supreme Court has held that, unlike fair trial claims, Fourth Amendment claims as a group do not necessarily imply the invalidity of a criminal conviction, and so such claims are not suspended under the *Heck* bar to suit. Hendley, however, is assuming that Dominguez's claim is limited to his arrest and does not also include independent charges of due process violations. That assumption overlooks critical parts of the case. Dominguez has asserted all along that the defendant officers violated his right to due process by manipulating or tampering with identification and testimonial evidence. He backed up these allegations with evidence at the trial. His due process claim is thus more than a Fourth Amendment claim by another name, and for that reason, it is not barred by the limitations rule announced in *Wallace*. Dominguez's right to sue arose only after his criminal conviction was set aside, and, as the district court held, he filed within the two years permitted by law.").

Johnson v. Dossey, 515 F.3d 778, 783 (7th Cir. 2008) ("We turn to the pendent state law claims of malicious prosecution, false arrest, and false imprisonment. Relying on *Wallace v. Kato*, the defendants argue that the claims are time-barred. At least two things prevent us from agreeing.

Wallace involved the accrual date for a claim of false arrest and false imprisonment, but not as to state law accrual dates. The Court specifically stated that, while the statute of limitations in § 1983 cases is derived from the analogous state law, the 'accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law.'. . *Wallace* has no effect on Illinois law.").

Meadows v. Whetsel, No. 06-6211, 2007 WL 1475279, at *2 (10th Cir. May 22, 2007) (not published) ("Meadows does not dispute that Okla. Stat. tit. 12, ' 95(")(3) furnishes the applicable statute of limitations for his case. Instead, he takes issue with the district court's determination that his cause of action 'accrued' in 2002 when the alleged police misconduct took place. . . .To the extent Meadows alleges constitutional violations based on his arrest and imprisonment on May 29 to June 7, 2002, these claims are barred by the two-year statute of limitations. . . . Next, Meadows contends police did not have probable cause to arrest him on May 29, 2002 and subsequently violated his rights to due process by holding him in custody for ten days without filing formal charges. In addition, he claims he was entitled to, but never received, a prompt judicial determination on probable cause under the Supreme Court's ruling in *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). . . Under the applicable precedents, these claims are barred by the two-year statute of limitations since they stem from police action that occurred roughly four years before Meadows filed his complaint. . . . . But to the extent we construe Meadows's complaint as alleging a claim for malicious prosecution, that claim may not be time-barred. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that where a § 1983 plaintiff has been convicted and is challenging the prosecution leading to that conviction, a malicious prosecution claim does not mature until the conviction has been invalidated. . . We have extended the *Heck* rule to situations like this one in which a malicious prosecution claim relates to charges that have been dismissed, holding that the claim does not ripen until the charges are dismissed. . . It is unclear exactly when the charges were dismissed, but the record suggests the state court did not formally dismiss them until February 2005. He filed his complaint in February 2006. Thus, his malicious prosecution claim may not be barred by the two-year statute of limitations. . . Because the district court did not address the merits of the malicious prosecution claim and we decline to do so for the first time on appeal, we remand this issue to the district court.").

Fisher v. Bureau of Alcohol, Tobacco & Firearms (ATF), No. 22-CV-6440-CJS, 2023 WL 2082552, at *17 n.32 (W.D.N.Y. Feb. 17, 2023) ("Assuming that the PAC otherwise stated a plausible claim for false arrest, the claim would be potentially actionable even though the criminal charges related to the arrest are still pending against Fisher in Ontario County and could result in a conviction. . . The Court, though, would stay the claim until Fisher's criminal matter was resolved, and then consider whether it was barred by *Heck*.")

Olaizola v. Foley, No. 16-CV-3777 (JPO), 2019 WL 428832, at *4 (S.D.N.Y. Feb. 4, 2019) ("[T]he Court takes no view on whether Olaizola's detention ended upon his release from the Bronx precinct office. . . And although the Court doubts that an arresting officer's unilateral issuance of a Desk Appearance Ticket constitutes the sort of legal process that triggers accrual of

a false-arrest claim, the Court need not decide that issue either. . . Instead, the Court notes only that Olaizola was arraigned on September 11, 2012, in connection with the challenged arrest. Because arraignment unquestionably constitutes legal process, . . Olaizola's false-arrest claim against Foley accrued at the latest on September 11, 2012. And because Olaizola's April 4, 2016 complaint was not filed within three years of that date, Olaizola's false-arrest claim is time-barred. . . The Court therefore grants summary judgment to Foley on Olaizola's false-arrest claim.")

Miller v. Stallworth, No. 3:17-CV-01711 (JAM), 2018 WL 3974730, at *4 (D. Conn. Aug. 20, 2018) ("[T]he Second Circuit has ruled that a false arrest claim under Connecticut law requires proof of a favorable termination. . . Moreover, the Connecticut Supreme Court has also observed that '[t]he same reasoning which makes conviction a defense in an action for malicious prosecution would apply as strongly to such a cause of action for false imprisonment as is here asserted, and if conviction is a defense in one, so it should be in the other.'. . I am required to follow this precedent and to conclude for purposes of a constitutional claim of false arrest that arises in Connecticut that favorable termination of a prosecution is a required element of the cause of action for false arrest. Although plaintiff vacillates between whether he pleaded no contest to the charges from his arrest of June 21, 2015, or whether those charges remain pending . . . , he has not alleged that any charges from his arrest of June 21, 2015, have been favorably terminated.")

Harris v. City of Chicago, No. 15 CV 3859, 2018 WL 835350, at *4-5 (N.D. Ill. Feb. 13, 2018) ("The standard rule is that a claim accrues when a plaintiff has 'a complete and present cause of action.'. . Harris asserts that defendants coerced his confession, interrogated him in a manner that shocks the conscience, fabricated evidence and his confession, failed to intervene in each other's wrongful acts, and conspired with each other along the way. Each of these claims stems from the same alleged wrongs—that defendants engaged in unlawful and untruthful acts during their investigation and then used that wrongfully obtained evidence in legal proceedings against Harris. Harris had a complete and present cause of action for each of these claims once his confession was used against him to deprive him of his liberty—which occurred when he entered a plea of guilty based on his confession and was sentenced to 15 years in prison. *Heck* deferred that accrual, but once his conviction would no longer have been impugned by claims about the confession and the *Heck* bar was removed, the statute of limitations on these claims began to run. State law governs the length of the statute of limitations, which is two years in Illinois. *Wallace*, 549 U.S. at 388; 735 ILCS § 5/13-202. Harris filed this suit in May 2015, more than two years after the clock began to run on his claims, and so they are time barred. . . .Harris argues that his claims are akin to malicious prosecution, so they did not accrue until the proceedings ended in his favor—here when charges against him were dropped in May 2013. I disagree. The reason a malicious prosecution claim cannot be brought before the accused has prevailed on his criminal case is that to allow otherwise could lead to inconsistent judgments. *See Heck*, 512 U.S. at 484. The same cannot be said for Harris's claims. As discussed above, once he prevailed on his motion to suppress and the state did not appeal, there was no longer a risk of contradictory outcomes. As such, there is no justification for incorporating this element of malicious prosecution into Harris's due-process

based, coerced confession and fabrication of evidence claims and so his suit is dismissed as untimely.")

Saunders v. City of Chicago, No. 12-CV-09158, 2015 WL 7251938, at *5-7 (N.D. Ill. Nov. 17, 2015) ("Applying the general rule that accrual of § 1983 claims occurs when the plaintiff has a complete and present cause of action, Fifth Amendment claims alleging self-incrimination violations accrue within the criminal proceeding itself. Under a strict reading of *Wallace*, though, because a violation within a criminal proceeding necessarily occurs *before* a conviction, it would not be eligible for *Heck*'s delayed accrual rule. That being said, *Wallace* applies only to Fourth Amendment § 1983 claims, which usually relate to police conduct that occurs before a criminal proceeding is initiated. . . The Supreme Court has not applied *Wallace* to Fifth Amendment § 1983 claims, which can be predicated on state action occurring all the way up to the point of conviction (*i.e.*, during the criminal proceeding or at sentencing). . . As such, applying *Wallace* equally to § 1983 claims brought under the Fourth and Fifth Amendments would result in the exclusion of *all* pre-conviction § 1983 claims from deferred-accrual eligibility, essentially erasing *Heck* tolling. This is an unreasonable result. Since the Court's initial ruling in this case, the Seventh Circuit has addressed this issue, explaining that the relevant inquiry for determining *Heck*-tolling eligibility is whether the alleged constitutional violation occurred 'in court' or 'out of court,' thus clarifying the 'pre-conviction/post-conviction' delineation discussed in *Wallace*. See *Moore v. Burge*, 771 F.3d 444, 446 (7th Cir. 2014). . . . To be clear, the in-court/out-of-court distinction impacts the applicability of *Heck* tolling, not necessarily *Heck* barring; a § 1983 claim can necessarily imply the invalidity of a conviction or a sentence but nonetheless be ineligible for *Heck*'s deferred-accrual rule. . . . Here, Plaintiffs' Fifth Amendment self-incrimination claims are based on Defendants' use of Plaintiffs' incriminating statements in their respective criminal convictions and sentencings. . . Because Plaintiffs' claims are based on 'in court' violations under *Moore*, *Wallace* does not apply, and Plaintiffs' self-incrimination claims are eligible for deferred accrual under *Heck*. . . But the inquiry does not end there. Just because a Fifth Amendment self-incrimination claim is *Heck* eligible does not mean that the claim necessarily implies the invalidity of the conviction. . . .Both *Hill v. Murphy* and *Matz v. Klotka* post-date the Court's initial ruling on Defendants' motion to dismiss, and both opinions show that *Heck* can apply to Fifth Amendment self-incrimination claims. To determine whether a § 1983 claim necessarily implies the invalidity of a conviction or sentence, a court 'must consider the factual basis of the claim,' including the factual allegations in the complaint. . . . Plaintiffs have adequately pled that their incriminating statements played a significant-enough role in their respective criminal proceedings such that the invalidity of those confessions necessarily implies the invalidity of Plaintiffs' convictions. . . . For these reasons, the Court now vacates its dismissal of Count I of Plaintiffs' complaints as time-barred and reinstates Count I in its entirety in each of Plaintiffs' complaints. Defendants are free to re-raise this argument at the summary judgment stage should evidence surface indicating that Plaintiffs' incriminating statements did not figure prominently in their respective convictions and sentences, such that the invalidity of those confessions does not call Plaintiffs' convictions and sentences into question.")

Pipitone v. City of New York, 57 F. Supp. 3d 173, 186 n.15 (E.D.N.Y. 2014) ("In *Wallace v. Kato,* 549 U.S. 384, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), the Supreme Court held that § 1983 claims are governed by "the standard rule that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief," *id.* at 388, 127 S.Ct. 1091 (internal quotation and punctuation marks omitted). In *Gabelli v. SEC,* —– U.S. ——–, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013), a case that had nothing to do with § 1983, the Supreme Court quoted the *Wallace* language for the proposition that claims normally accrue at the time of the injury, rather than its discovery, *id.* at 1221–22. Yet following *Gabelli,* the Second Circuit continued to hold that § 1983 claims accrue upon discovery of the injury rather than occurrence of the injury. *See, e.g., Hogan,* 738 F.3d at 518; *Walters,* 517 Fed.Appx. at 42. We note the apparent tension between *Wallace, Gabelli,* and Second Circuit § 1983 precedent only for purposes of transparency, and to illustrate the complexities and ambiguities of accrual doctrine. That tension does not affect the holding here because, as explained below, the accrual of these claims is governed by the diligence-discovery rule.")

Taylor v. City of Chicago, No. 14 C 737, 2015 WL 739414, at *5 n.2, *6 (N.D. Ill. Feb. 19, 2015) ("Since *Wallace,* the courts in this district have been split on whether the *Heck* bar rule applies to Fifth Amendment invalid confession claims. [collecting cases] Where a criminal defendant pleads guilty and his allegedly invalid confession plays no part in the criminal proceeding, *Franklin* instructs that *Heck* is inapplicable, and thus a Fifth Amendment claim based upon an invalid confession will be deemed to have accrued when the coerced confession took place. On the other hand, where a confession is used in the criminal proceeding and a civil claim that successfully challenges the confession would effectively nullify the conviction or sentence, *Heck* will bar such a claim, and the claim does not accrue until after the conviction is overturned or otherwise invalidated. Finally, where a plaintiff alleges a coerced confession (by torture or otherwise), to the extent that the constitutional claim is actionable in and of itself without regard to whether any self-incriminating statements were extracted or such statements were used during a criminal proceeding, *Heck* would neither bar such a claim nor defer its accrual. Consistent with *Heck* and *Wallace,* the crux of the inquiry in all three situations remains the same–whether the civil claim based upon a coerced confession 'necessarily impugns the validity of the conviction.'. . Here, Plaintiff alleges that the Defendant Officers coerced him into making self-incriminating statements and these statements were later used during the criminal proceeding to convict him. . . Furthermore, Taylor alleges as part of his claim that his conviction rested largely on the unconstitutional use of these coerced statements at trial. . . Because success as to Plaintiff's Fifth Amendment claim would necessarily imply the invalidity of his conviction, the Court concludes that, under *Heck's* deferred accrual rule, Taylor's claim did not begin to accrue until his conviction was set aside in 2013. Taylor filed his Complaint in February 2014, well within the two-year statute of limitations. Accordingly, his Fifth Amendment coerced confession claim is not time-barred, and the motion is denied as to Count I.")

Bryant ex rel. Bryant v. City of Ripley, Miss., No. 3:12CV37-B-A, 2015 WL 686032, at *3 (N.D. Miss. Feb. 18, 2015) ("To date, the Fifth Circuit has had no occasion to address the role and effect

of Section 43–21–51(5) for *Heck* purposes; so this court has no binding authority to guide it on the issue. A number of courts in other circuits have addressed the issue in similar circumstances, however. Among them is an Arizona district court in the case of *Dominguez v. Shaw*, No. CV 10–01173–PHX–FJM, 2011 WL 4543901 (D.Ariz. Sept. 30, 2011). In Arizona, as in Mississippi, a juvenile court adjudication 'shall not be deemed a conviction of crime.'. . The minor plaintiff in *Dominguez* was adjudicated a delinquent for resisting arrest and later brought a § 1983 action to recover for, inter alia, alleged false imprisonment and excessive force claims. . . Citing a number of cases in which various courts applied *Heck* to juvenile adjudications, the *Dominguez* court recognized that Arizona (like Mississippi) treats a minor who has committed a crime differently than an adult who has committed the same crime, but the court found no reason why this distinction should extend to *Heck* analysis. . . The court stated, 'Whether the juvenile court's finding is labeled a conviction or an adjudication is, for *Heck* purposes, irrelevant.'. . This court finds accordingly.")

O'Laughlin v. City of Pittsfield, No. 13–cv–10111–MAP, 2013 WL 6858171, *5 (D. Mass. Dec. 30, 2013) ("Plaintiff's second argument is that, given his case's up-and-down procedural history (e.g., the Massachusetts Appellate Court's reversal of his conviction and the SJC's reinstatement of it), a reasonably prudent person in his shoes would not have known that his cause of action accrued on the date the writ of habeas corpus issued instead of the date that the Supreme Court denied certiorari, thus truly expunging Plaintiff's conviction. Unfortunately for Plaintiff, no authority supports this basis for equitable tolling. As *Wallace* makes clear, the proper course for Plaintiff would have been to file his section 1983 claims within three years of the issuance of the writ of habeas corpus when he knew that his conviction had been called into question. If necessary, the court could have stayed the action pending the Supreme Court's decision on the Commonwealth's petition for certiorari. . . .*Heck* establishes that Plaintiff's claim accrued when his conviction was 'called into question' by the issuance of habeas relief. . . That date was, at the latest, September 1, 2009, when Judge Young, on instructions from the First Circuit, issued the writ of habeas corpus and released Plaintiff on conditions. . . Starting at that point, Plaintiff had a full three years to file his lawsuit, up to September 1, 2012. By the time Plaintiff filed his complaint on January 18, 2013, his claims were untimely.")

Shakleford v. Hensley, No. 12–194–GFVT, 2013 WL 5371996, *4 (E.D. Ky. Sept. 24, 2013) ("Based on the aforementioned authority from the Supreme Court and the Sixth Circuit, as well as the persuasive reasoning of the sister-district courts in this circuit, the Court finds that Shakleford's Section 1983 search and seizure claims are time barred. Trooper Hensley came to Shakleford's home on August 6, 2007 looking for a television and a VCR, which Shakleford voluntarily produced. Trooper Hensley then proceeded to search Shakleford's home on the authority of an invalid warrant. At this point, Shakleford had a 'complete and present cause of action,' which triggers the accrual of his Section 1983 illegal search and seizure claim. And this injury was not hidden from Shakleford. He was present to see the search take place, and it is this knowledge, rather than the legal knowledge of the sufficiency of the warrant, that is relevant to the accrual analysis. Therefore, Shakleford's Section 1983 claims for illegal search and seizure accrued on

August 6, 2007, the date of the search and seizure, and as he did not raise them until he initiated this action six years later, the claims are time barred and properly dismissed.")

Telfair v. Tandy, No. 08-731 (WJM), 2008 WL 4661697, at *7, *8 (D.N.J. Oct. 20, 2008) ("Based on the Supreme Court's language in *Wallace*, it would appear that *Wallace* effectively supersedes the Third Circuit's reasoning in *Gibson*, . . .and that *Heck* is inapplicable here . . . and that *Smith v. Holtz* likewise is abrogated by *Wallace*. . . . Thus, under *Wallace*, any Fourth Amendment claim must be brought and, in all likelihood, stayed pending resolution of the underlying charges. . . In the event of a conviction on the underlying charges, the stay may extend for years while post-conviction relief is sought. . . This is not an ideal situation because of the potential to clog the court's docket with unresolvable cases. However, in this case, there does not appear to be any clear basis to dismiss the illegal search and seizure claim on the merits. Therefore, this Court is constrained at this time to also allow this claim to proceed, but stay the action until plaintiff's criminal proceedings are concluded.")

Kamar v. Krolczyk, No. 1:07-CV-0340 AWI TAG, 2008 WL 2880414, at *7 (E.D. Cal. July 22, 2008) ("In light of *Wallace* , the *Heck* bar did not prohibit Plaintiff from filing this action until the criminal charges against him were dismissed. The rules announced in *Wallace* apply retroactively to Plaintiff because the Supreme Court applied these rules to the parties in *Wallace* . . . Because the *Heck* bar did not apply to the filing of this action, this action accrued at the time of the search and Plaintiff is not entitled to a later accrual date. Plaintiff contends that *Wallace* does not apply to this action and *Harvey* is still good law because *Wallace* and *Heck* concerned false arrest and malicious prosecution claims. Plaintiff argues that *Harvey* still applies to this civil rights claims based on Fourth Amendment violations. The court disagrees. Nothing in *Wallace* appears to limit it to certain types of civil rights violations.")

Jefferson v. Kelly, No. 06-CV-6616 (NGG)(LB), 2008 WL 1840767, at *4, *5 (E.D.N.Y. Apr. 22, 2008) ("Based upon the allegations in Plaintiff's Complaint, the latest date of accrual for any of these claims (false imprisonment, false arrest, excessive force, and coerced confession) is July 18, 2003, the day on which Detective Greco and his partner questioned Plaintiff and obtained his written statement. Thus, Plaintiff's December 11, 2006 Complaint was not filed within the three-year limitations period applicable to section 1983 claims. . . . To the extent that Plaintiff's allegations may be read as an attempt to state a malicious prosecution claim, the claim is not similarly time-barred.").

Barnhill v. Strong, No. JFM 07-1678, 2008 WL 544835, at *6 (D. Md. Feb. 25, 2008) ("*Wallace* dictates that these claims be dismissed. As in *Wallace*, the claims here of unlawful search, seizure, and excessive force are analogous to the common law torts of false arrest and imprisonment, and *Wallace* makes clear that despite the pendency of criminal proceedings, the statute of limitations on such claims begins to run at the time the legal process is initiated. Here, any search, seizure, or excessive force ended on September 12, 2001, when plaintiffs were brought before the state Commissioner. Any remaining claims form part of a malicious prosecution case. Accordingly,

even though plaintiffs' motion to suppress was not granted for several years, the statute of limitations for these federal claims expired on September 12, 2004.") **.**

Fulton v. Zalatoris, No. 07 C 5569, 2008 WL 697349, at *3 (N.D. Ill. Mar. 12, 2008) ("[D]ismissing the false arrest claim rather than staying the proceedings would act in practical effect to bar Plaintiffs from later refiling the claim. Although Plaintiffs' initial filing was timely, if the claim was dismissed, Plaintiffs would no longer be able to comply with Illinois' two-year statute of limitations. . . As in this case, where a claim 'for monetary relief cannot be redressed in [a parallel] state proceeding,' a stay must be ordered. *Deakins v. Monaghan*, 484 U.S. 193, 202 (1988).").

Cash v. Bradley County, 2008 WL 501338, at *2 (E.D.Tenn. Feb. 21, 2008) ("Plaintiff argues *Wallace* should not apply because it was not decided until 2007, well after the incident in question occurred. Unfortunately for Plaintiff, the Supreme Court's interpretation of the law is binding, regardless of whether there was a different interpretation a decade ago. If the Supreme Court had not decided *Wallace*, the Sixth Circuit's decision in *Shamaeizadeh* may have allowed Plaintiff to bring his case. But in that hypothetical scenario, if Plaintiff had won his case and Defendants appealed, the Supreme Court could have issued a ruling setting out the same holding as in *Wallace*, which would hold Plaintiff's claim to be time-barred.")**.**

Porter v. City of Davis Police Dept., 2007 WL 4463344, at *5 n.2 (E.D. Cal. Dec. 17, 2007) (" *Heck* was based on the premise that no cause of action has accrued until the conviction has been vacated or expunged. . . Until *Wallace*, *Heck* was seen as barring any defendant/prisoner tort claim which might impugn the criminal judgment. The conceptual bases of *Heck* and *Wallace* seem irreconcilable. *Wallace* does not answer the situation where a cause of action might be accruing, but not expired when the entry of final judgment in a criminal action is entered. If *Heck* is to be followed, the cause of action which once commenced running would then be deemed never to have accrued. Even more confusing would be the situation where a cause of action had expired during the pendency of the criminal action, but according to *Heck* would not have even accrued upon entry of final judgment. Confusing, to say the least. Perhaps *Heck* now only applies to suits which sound in malicious prosecution.")

Mallard v. Potenza, 2007 WL 4198246, at *3 (E.D.N.Y. Nov. 21, 2007) ("Plaintiff cites no authority for the proposition that *Wallace* does not apply in the context of § 1983 claim for an illegal search and seizure. Indeed, at this relatively early stage, the only courts to consider the expansion of *Wallace* to the search and seizure context have made this rather modest leap. [collecting cases] In sum, the Court fails to see any reasoned basis to distinguish between claims for false arrest and search and seizure, and therefore holds that *Wallace* applies with equal force to a claim for an illegal search and seizure.")**.**

Richards v. County of Morris, 2007 U.S. Dist. LEXIS 49290, at *11, *12, *15, *16 (D.N.J. July 5, 2007) ("Unless their full application would defeat the goals of the federal statute at issue, courts

should not unravel states' interrelated limitations provisions regarding tolling, revival, and questions of application. [citing *Wilson v. Garcia*, 471 U.S. 261, 269 (1985)] . . . . When state tolling rules contradict federal law or policy, in certain limited circumstances, federal courts can turn to federal tolling doctrine. . . . Based on the Supreme Court's language in *Wallace*, this Court concludes that *Wallace* effectively supersedes the Third Circuit's reasoning in *Gibson*,. . . and that *Heck* is inapplicable here. Consequently, Plaintiff's allegations of false arrest, false imprisonment, racial profiling, and unlawful search and seizure in violation of his Fourth and Fourteenth Amendment rights are time-barred, because plaintiff's claims actually accrued on April 15, 1997, the date of the unlawful search and arrest. This Complaint was submitted on April 23, 2007, long after the statute of limitations had expired on April 15, 1999. Plaintiff alleges no facts or extraordinary circumstances that would permit statutory or equitable tolling under either New Jersey or federal law. Rather, plaintiff pleads only ignorance of the law and his incarceration, neither excuse being sufficient to relax the statute of limitations bar in this instance.").

Hayhurst v. Upper Makefield Tp., 2007 WL 1795682, at *8, *9 (E.D.Pa. June 21, 2007) ("Although Ms. Hayhurst's claim for false arrest is barred by *Heck*, the Court will not dismiss it at this time. *Heck* only bars § 1983 claims that suggest the invalidity of a criminal conviction until that conviction is overturned or declared invalid. If Ms. Hayhurst's pending appeal of her disorderly conduct appeal is successful, *Heck* will no longer apply. Ms. Hayhurst has therefore requested that, if the Court finds her false arrest claim barred by *Heck*, it should stay the entire case pending resolution of her criminal appeal. The defendants have filed an opposition to this request, asking that Ms. Hayhurst's false arrest claim be dismissed outright and that the remaining excessive force claim be allowed to proceed to trial. Having found that Ms. Hayhurst's false arrest claim should be stayed under *Heck* until the resolution of her criminal appeal, the Court believes that Ms. Hayhurst's excessive force claim should be stayed as well. Although the excessive force claim is not barred by *Heck*, it arises out of the same facts and involves the same evidence as the false arrest claim. Declining to stay the excessive force claim would therefore risk having two separate trials on each of plaintiff's claims, should Ms. Hayhurst succeed in her appeal. Although the Court is sympathetic to the defendants' desire to have this claim resolved expeditiously, the Court believes a stay of all claims is necessary to prevent the risk of essentially duplicative proceedings.")

Finwall v. City of Chicago, 490 F.Supp.2d 918, 921-23 (N.D. Ill. 2007) ("It is undisputed that Finwall was arraigned on April 13, 2001 and therefore the limitations period ended on April 13, 2003, well before Finwall filed suit. Finwall nevertheless contends that his false imprisonment claims are timely because his claims were also the subject of a class-action lawsuit, the filing of which tolled the statute of limitations. . . . In short, probable cause and length of detention would both have been at issue in the class action proposed in *Lopez*, and therefore the statute of limitations was tolled for both false arrest and unlawful detention claims. The tolling continued until May 20, 2004, the date the plaintiff in *Lopez* withdrew his motion for class certification, freeing Finwall to file his individual suit two months later. In summary, *Lopez* tolled the accrual of Finwall's false arrest and unlawful detention claims until May 20, 2004. Therefore his claims, filed July 15, 2004,

are timely. However, the only defendant common to both *Lopez* and the instant suit is the City of Chicago, and therefore Finwall's false arrest and unlawful detention claims against individual defendants Garcia and Boyd (Counts I & III) are time-barred. Finwall's argument that his claims against Garcia and Boyd are timely under the discovery rule is unfounded: although he may not have learned the specifics of the detectives' alleged fabrication of evidence until their depositions, he knew at the time of his arrest that no probable cause existed.").

Hill v. City of Chicago, No. 06 C 6772, 2007 WL 1424211, at *3, *4 (N.D. Ill. May 10, 2007) (Fourth Amendment claims foreclosed by *Wallace*, but not equal protection and coerced confessions claims, which claims accrued when convictions were vacated)**.**

Caldwell v. City of Newfield, Civil Action No. 05-1913 (RMB), 2007 WL 1038695, at (D.N.J. March 30, 2007) ("Under *Wallace*, any Fourth Amendment claim must be brought and, in all likelihood, stayed pending resolution of the underlying charges. . . In the event of a conviction on the underlying charges, the stay may extend for years while post-conviction relief is sought. . . Because of *Wallace*'s potential to clog the Court's docket with unresolvable cases, this Court will reach Defendant's arguments under *Heck* last, only where dismissal of Plaintiff's claims on other grounds is unavailable.").

3. Excessive Force Claims

For cases involving excessive force claims, *see, e.g.*, ***Torres v. Madrid***, 60 F.4th 596, 600-02 (10th Cir. 2023) (appeal after remand) ("[I]n cases where there are multiple uses of force or a continuing use of force, *Heck* may bar the plaintiff's claims as to some force but not all. . . The analysis of whether *Heck* bars the entirety of a plaintiff's excessive-force claims thus requires 'compar[ing] the plaintiff's allegations to the offense [s]he committed.'. . Recall that Ms. Torres pleaded no contest to two offenses: (1) aggravated flight, which requires 'willfully and carelessly driving [her] vehicle in a manner that *endangers the life of another person*' after being instructed to stop, . . . and (2) assault upon a peace officer causing the officer to 'reasonably believe that [she] is *in danger of receiving an immediate battery*[.]'. . Both convictions are based on Ms. Torres's decision to step on the gas, placing Defendants in potential peril. Ms. Torres therefore properly acknowledges that her plea could 'foreclose[ ] an excessive force claim based on shots fired by Defendants at the moment [she] initially pulled forward to leave the parking space.'. . But we have repeatedly recognized that a reasonable use of force—such as when an officer is subject to a direct physical threat—may become unreasonable even seconds later when force persists after the threat has passed. . . Ms. Torres's plea, justified by the alleged danger in which she placed Defendants at the moment her vehicle advanced, is therefore not 'necessarily inconsistent' with a claim that Defendants later used excessive force when, despite any danger having passed, they fired additional bullets into the rear of her vehicle, including the one that struck her in the back. . . . Ms. Torres concedes that *Heck* precludes recovery for force used as she drove toward the officers. Instead, she bases her claims on the bullet that hit her—one, among others, that was fired at the back of the vehicle, allegedly after any threat had passed. Ms. Torres has therefore presented a

theory of liability that is not inconsistent with her plea. . . .We therefore conclude that Defendants lack a *Heck* defense to Ms. Torres's claims that they employed excessive force after the vehicle had passed the officers. The district court's grant of summary judgment must therefore be set aside insofar as it relies on *Heck*. Should this case proceed to trial, the district court will need to instruct the jury on the appropriate scope of Ms. Torres's claims.").

See also ***Hall v. Merola***, 67 F.4th 1282, 1292 & n.4 (11th Cir. 2023) ("Factual allegations bar claims under *Heck* in only narrow circumstances: 'where the allegation in the § 1983 claim is a specific one that both necessarily implies the earlier decision is invalid *and* is necessary to the success of the § 1983 suit itself.'. . 'When a plaintiff alleges a fact that, if true, would conflict with the earlier punishment, but that fact is not necessary to the success of his § 1983 suit, the *Heck* bar does not apply.'. .Applying that guidance here, we must conclude that the district court erred. If a factual allegation contradicts a guilty verdict, our case law requires district courts to consider whether the fact is 'necessary' to the success of the § 1983 suit itself. . . Here, Hall's factual allegation—that he wasn't tampering with the sprinkler system—could be false and Hall could still succeed on his lawsuit if Officers Watson and Wright used more force than constitutionally permissible in stopping Hall from tampering with the sprinkler system. That is, Hall's denial of tampering with the sprinkler isn't 'necessary' to the success of his excessive-force claim. . . . Judge Newsom's thoughtful concurrence on this point is, really, we think just a question of semantics. Here's why: Hall sued for excessive force. The question is whether Hall's factual allegation—that he didn't tamper with the sprinkler—means that *Heck* bars his claim. Judge Newsom agrees that, if Hall *admitted* tampering, then there'd be no problem with Hall's suit because an officer can use more force that constitutionally permissible—that is, excessive force—in effecting discipline that is otherwise warranted. . . But that agreement means Hall's denial that he tampered with the sprinklers isn't 'necessary' to success in his suit. In other words, if we removed that factual allegation, or flipped it to an admission, Hall's suit could succeed just the same. All Hall needs to do is show that the officers used excessive force. So the denial isn't logically necessary. . . . The point is this: a factual allegation that denies the truth of a disciplinary conviction doesn't mean that *Heck* bars the suit if—as is the case here—the plaintiff could succeed if he or she admitted the truth of the disciplinary conviction. . . To the extent Judge Newsom contends that Hall couldn't succeed on an 'I didn't do it' theory, we agree that Hall couldn't use a § 1983 suit to overturn his disciplinary conviction. But that doesn't mean his excessive-force claim is *Heck*-barred because the validity or invalidity of Hall's disciplinary conviction is irrelevant to whether the officers used excessive force against him."); ***Hall v. Merola***, 67 F.4th 1282, 1300-01 (11th Cir. 2023) (Newsom, J., concurring in part and concurring in the judgment) ("I agree with pretty much everything in the majority opinion. I write separately only to offer one tiny clarification. The majority opinion correctly concludes that, in the particular circumstances of this case, Hall's Eighth Amendment claim isn't barred by *Heck v. Humphrey* . . . and its progeny. . . For me, though, that conclusion turns on exactly what kind of 'excessive force' claim Hall is pursuing. Has he raised only what I'll call an 'I didn't do it' claim—*i.e.*, a claim that he didn't tamper with the sprinkler in his cell and, therefore, that any force that Officers Watson and Wright used to subdue him was, by definition, constitutionally excessive—or has he also raised an 'I did it but the force used to subdue me was

nonetheless constitutionally excessive' claim? As the majority opinion explains, the district court seemed to think that Hall had presented only an 'I didn't do it' claim: 'The district court noted in a footnote that this was "not a case in which Plaintiff admitted that yes, he tampered with the security device ... but the officers used excessive force in subduing him. Instead, Plaintiff alleges in his complaint that he was not tampering with a safety device in his cell and Defendants Watson and Wright chemically gassed him for various retaliatory or discriminatory reasons."'. . If that were indeed the only type of excessive-force claim that Hall had pleaded, *Heck*, in my view, would foreclose it. . . .All of which is to say that if we were stuck with the premise that the lone excessive-force claim that Hall pleaded was of the 'I didn't do it' variety, I'd have to conclude that *Heck* barred it. But—and for me it's a big but—I don't think we're stuck with that premise. Rather, I think that Hall's pro se complaint, liberally construed, is properly read to present an 'I did it but the force used to subdue me was nonetheless constitutionally excessive' claim. . . . So, as I see it, Hall alleged an 'I did it but ...' claim. That claim—unlike any I didn't do it' claim that he might also have brought—is not *Heck*-barred because it doesn't necessarily imply the invalidity of the prison disciplinary proceeding. To the contrary, it acknowledges the result of that proceeding and insists that Officers Watson and Wright violated the Eighth Amendment for independent reasons."); ***Surat v. Klamser***, 52 F.4th 1261, 1273-74 (10th Cir. 2022) ("In concluding Ms. Surat had met her burden on the first prong of qualified immunity, the district court relied on the following facts: (1) she was convicted of resisting arrest and obstruction of a peace officer; (2) she was a twenty-two-year-old, 115-pound woman, who was unarmed, and restrained in a wrist hold by an officer twice her size. The district court also concluded a reasonable jury could find (3) Ms. Surat did not hit Officer Klamser or physically assault him as he attempted to place her in handcuffs, but that (4) she did use physical force to resist her arrest by pulling away from his grip, attempting to pry his fingers off of her arm, and pawing at his arms. These facts do not conflict with her underlying convictions for obstructing a peace officer or resisting arrest. The district court does not suggest Ms. Surat did not use physical force against Officer Klamser, or that her physical force was justified. Instead, it acknowledges she resisted arrest by using physical force against Officer Klamser. And the conclusion that the jury could find Ms. Surat used physical force rather than violence is not inconsistent with the elements of her convictions. . . Ms. Surat's use of physical force against Officer Klamser is also not inconsistent with a conclusion that she did not pose an imminent threat of danger to him, or that more than minimal force was unreasonable in response. Accordingly, we reject Officer Klamser's *Heck*-based challenges to the district court's assessment of the facts and turn to whether Ms. Surat has shown a reasonable jury could find Officer Klamser violated her Fourth Amendment right to be free from excessive force."); ***Jefferson v. Lias***, 21 F.4th 74, 86-87 (3d Cir. 2021) ("Lias argues that Jefferson's claims are barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). There, the Supreme Court held that a § 1983 action is barred if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of [a prior] conviction or sentence.'. . The conviction at issue here is second-degree eluding under N.J. Stat. Ann. § 2C:29-2(b), to which Jefferson pled guilty. A person may be convicted under New Jersey's eluding statute if he (1) knowingly flees or attempts to evade police while driving on a street or highway; (2) after having received a signal from the police officer indicating he should stop; and (3) creating a risk of death or injury to any person. Because

'creating a risk of death or injury to any person' is an essential element of the conviction, Lias contends Jefferson's excessive force claim cannot proceed as Lias was justified in using deadly force to prevent the risk from continuing. Lias's argument is unavailing for a number of reasons. For one, as we have explained above, precedent in our Circuit (and in accordance with opinions issued by our sister circuits) establishes that the unbounded use of deadly force is not justified against an individual in flight simply whenever they have precipitated risk to others. *See Lytle*, 560 F.3d at 415 ("Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public ... the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable."). If an individual has engaged in risky flight, but no longer is threatening to officers or the public, the use of deadly force against the individual may no longer be reasonable. The analysis as to whether the use of deadly force to halt a suspect's escape is 'objectively reasonable' depends on the resolution of the kind of intensive, multi-factor analysis articulated by *Graham* and our subsequent Fourth Amendment excessive force precedent. For another, we have declined to apply *Heck* to bar Fourth Amendment excessive force claims under § 1983 when we have found that the quantum of force used may have been disproportionate to the conduct implicated by the underlying conviction, even in cases involving resisting arrest and assaulting officers. *See, e.g.*, *Nelson v. Jashurek*, 109 F.3d 142, 145 (3d Cir. 1997) (holding *Heck* did not foreclose excessive force claim, noting that "the fact that Jashurek was justified in using 'substantial force' to arrest Nelson does not mean that he was justified in using an excessive amount of force and thus does not mean that his actions in effectuating the arrest necessarily were objectively reasonable"); *Lora-Pena v. FBI*, 529 F.3d 503, 506 (3d Cir. 2008) (per curiam) (also declining to apply *Heck* to bar an excessive force claim, noting "Lora–Pena's convictions for resisting arrest and assaulting officers would not be inconsistent with a holding that the officers, during a lawful arrest, used excessive (or unlawful) force in response to his own unlawful actions."). Consequently, Lias's reliance upon *Heck* to defeat Jefferson's excessive force claim is misguided."); ***Sanders v. City of Pittsburg***, 14 F.4th 968, 971-73 (9th Cir. 2021) ("Here, Sanders was charged with resisting arrest under § 148(a)(1), which prohibits 'resist[ing], delay[ing], or obstruct[ing]' a police officer during the discharge of his duties. Under California law, a conviction under this statute requires that the defendant's obstructive acts occur while the officer is engaging in 'the *lawful* exercise of his duties.'. . The use of excessive force by an officer is not within the performance of the officer's duty. . . Thus, the 'lawfulness of the officer's conduct' is necessarily established as a result of a conviction under § 148(a)(1). . . In other words, a defendant can't be convicted under § 148(a)(1) if an officer used excessive force at the time of the acts resulting in the conviction. Consequently, an excessive force claim can't survive the *Heck* bar if it's predicated on allegedly unlawful actions by the officer *at the same time* as the plaintiff's conduct that resulted in his § 148(a)(1) conviction. . . Such an allegation would undermine the validity of the § 148(a)(1) conviction. On the other hand, if the alleged excessive force occurred *before* or *after* the acts that form the basis of the § 148(a) violation, even if part of one continuous transaction, the § 1983 claim doesn't 'necessarily imply the invalidity of [a] criminal conviction under § 148(a)(1).'. . Sanders contends that his claim is not *Heck*-barred because his conviction could have been based on his fleeing officers prior to his arrest in the gully. Under that theory, success on his § 1983 claim would leave the conviction undisturbed since his act of resistance occurred *before* the dog bite and

arrest. Sanders relies primarily on *Hooper*, which held that resisting arrest 'does not lose its character as a violation of § 148(a)(1) if, at some other time during that same "continuous transaction," the officer uses excessive force or otherwise acts unlawfully.'. . . We allowed Hooper's excessive force claim to proceed because *Heck* is no impediment 'when the conviction and the § 1983 claim are based on different actions during "one continuous transaction."'. . Hooper's § 1983 action could separately target one action—the allegedly unlawful dog bite—without disturbing the § 148(a)(1) conviction. Accordingly, *Hooper* merely holds that *Heck* presents no bar to an excessive force claim when an officer's allegedly *unlawful* action can be separated from the *lawful* actions that formed the basis of the § 148(a)(1) conviction, even if they occurred during one continuous transaction. Here, we cannot separate out which of Sanders's obstructive acts led to his conviction since all of them did. As part of his guilty plea, Sanders stipulated that the factual basis for his conviction encompassed the three instances of resistance identified in the preliminary hearing transcript. Specifically, Officer Bryan testified that he ordered his dog to bite Sanders's right calf as he observed other officers struggling to apprehend Sanders's arms in the gully. So unlike *Hooper*, the dog bite in this case is unquestionably part of the actions that formed the basis of Sanders's conviction. Under these facts, there is no way to carve out the dog bite from the § 148(a)(1) conviction without 'necessarily imply[ing]' that the conviction was invalid. . . Because the dog bite was part of the § 148(a)(1) conviction's factual basis, it was necessarily lawful for purposes of the *Heck* analysis. And while *Hooper* held that a continuous transaction can be broken into 'different actions' for purposes of a § 1983 action, it did not suggest we may slice up the *factual basis* of a § 148(a)(1) conviction to avoid the *Heck* bar. On the contrary, *Yount*—the case relied on by *Hooper*—specifically rejected this argument. . . . Indeed, we have previously held that a jury conviction for § 148(a)(1) based on multiple acts of resistance necessarily means that officers' actions throughout the whole course of the defendant's conduct' was necessarily found lawful and any action alleging excessive force based on those actions would be *Heck*-barred. . . Similarly, *Heck* bars any § 1983 claim alleging excessive force based on an act or acts constituting any part of the factual basis of a § 148(a)(1) conviction. In sum, we hold that Sanders cannot stipulate to the lawfulness of the dog bite as part of his § 148(a)(1) guilty plea and then use the 'very same act' to allege an excessive force claim under § 1983. . . Success on such a claim would 'necessarily imply' that his conviction was invalid. . . Sanders's claim against Officer Bryan is, therefore, barred under *Heck*."); ***Poole v. City of Shreveport***, 13 F.4th 420, 426-27 (5th Cir. 2021) ("We agree with the district court that *Heck* is no barrier to Poole's claim. The law Poole violated criminalizes 'the intentional refusal of a driver to bring a vehicle to a stop' under circumstances that endanger human life. . . At the time the shooting occurred, Poole had already stopped driving and exited his truck. Poole's excessive force claim therefore is 'temporally and conceptually distinct' from his flight offense. . . Put another way, it would not be inconsistent with the state court's finding that Poole fled the police for a jury to conclude that an officer used excessive force after that flight ended."); ***Lopez v. Sheriff of Cook County***, 993 F.3d 981, 987 (7th Cir. 2021) ("Lopez pleaded guilty to aggravated discharge of a firearm, which requires a person to knowingly or intentionally fire in the direction of another person. . . Under Illinois law, however, a person can be found guilty of that offense without posing a threat of serious harm to another. . .This means Lopez can be guilty of aggravated discharge of

a firearm while also having had excessive force used against him by an officer after the fact. These two realities are not mutually exclusive. So *Heck* does not bar Lopez's § 1983 claim."); ***Hooks v. Atoki***, 983 F.3d 1193, 1201 (10th Cir. 2020), *cert. denied,* 141 S. Ct. ___ (2021) ("*Heck* bars Mr. Hooks from recovering damages based on the first four alleged uses of force. Mr. Hooks's no contest plea to two counts of assault and battery of a police officer means he admitted repeatedly hitting the officers before he was subdued. For Mr. Hooks to prevail on his excessive force claim with respect to these uses, he would need to prove that it was unreasonable for the officers to defend themselves by subduing him. In other words, Mr. Hooks would need to show 'he did nothing wrong.'. . That inquiry would necessarily entail an evaluation of whether and to what extent Mr. Hooks used force against the officers, an inquiry that would take aim at the heart of his criminal plea, thereby violating the spirit of *Heck*. . . The fifth and sixth uses of force are different. Those allegations align with the examples we articulated in *Havens*, i.e., 'the claim may be ... that the officer used force after the need for force had disappeared.'. . Mr. Hooks alleges that after Officer Irby tased him once, he fell, hit his head, and lay unmoving, on his stomach on the ground. Yet, Officer Irby tased him again and Officer Harding placed him in a chokehold. An officer can be liable for using excessive force against a suspect who 'no longer posed a threat.'. . Drawing all reasonable inferences in Mr. Hooks's favor, it is plausible that the officers were on notice that Mr. Hooks no longer posed a threat after he collapsed on his stomach on the ground."); ***Harrigan v. Metro Dade Police Dep't Station #4***, 977 F.3d 1185, 1193-97 (11th Cir. 2020) ("[W]e conclude that *Heck* does not bar Harrigan's suit. Officer Rodriguez focuses on just two of Harrigan's state-court convictions -- for aggravated assault and fleeing to elude, conceding as he must that Harrigan's remaining convictions could not be negated if his § 1983 action were to succeed. Rodriguez says that Harrigan's § 1983 claim 'is directly at odds with' those two convictions and that Harrigan's 'version of events, if proven to be true at trial, would show that' he 'was wrongly convicted.' Harrigan's essential claim in this excessive-force suit is that Officer Rodriguez shot him while he was sitting 'stationary' in his vehicle, stopped at a red light. He claims that 'it was only after being shot by Officer Rodriguez that [he] then accelerated [his] vehicle.' Thus, the shooting was unprovoked and without any justification. Nothing in the record before us 'irrefutably' contradicts that claim; the fact is that 'both [Rodriguez's] excessive use of force and' Harrigan's convictions 'are not a logical impossibility.'. . As we see it, a jury could have found that Officer Rodriguez shot Harrigan first, and that Harrigan then committed aggravated assault and fled the scene. The jury could have found the following: Officers Carter, Baldwin, and Rodriguez stopped Harrigan at the intersection of SW 216th Street and Allapattah Road. The vehicle was stationary at a red light. Officers Baldwin and Rodriguez got out of their police cars and approached Harrigan as he sat in the stolen Ford pickup truck. Without provocation, Officer Rodriguez opened fire. Then, and only then, did Harrigan drive his truck at Officer Baldwin before fleeing the intersection and leading the officers on a high-speed chase. That finding would be consistent with the jury's general guilty verdicts for aggravated assault and fleeing to elude. And, under this set of facts, a federal jury still could find for Harrigan on his § 1983 claim without undermining -- much less negating -- his aggravated-assault and fleeing-to-elude convictions. The 'facts required for' Harrigan 'to prove his § 1983 case do not necessarily logically contradict the essential facts underlying' those convictions, and that means '*Heck* does not bar the § 1983 action

from proceeding.'. . . Officer Rodriguez may be right. Perhaps the jury rejected Harrigan's necessity defense because it concluded that Rodriguez shot Harrigan only after Harrigan gunned his truck at Officer Baldwin. But because the jury returned general verdicts, we don't know that for certain. . . Perhaps the jury rejected Harrigan's necessity defense for a different reason. Maybe it thought Harrigan had intentionally caused the danger that existed -- after all, Harrigan's encounter with police officers began because he had stolen a truck. The jury could have believed that Officer Rodriguez shot Harrigan; that Harrigan then committed aggravated assault and fled the scene; and that Harrigan was not entitled to the necessity defense he sought. That 'construction of the facts' allows for Harrigan's success in his § 1983 suit without undermining his 'underlying conviction[s].'. . The long and short of it is that the jury's rejection of Harrigan's necessity defense does not 'necessarily' bring his § 1983 suit within *Heck*'s grasp. Finally, Officer Rodriguez invokes what we've called the 'inconsistent-factual-allegations rule.'. . He says that *Heck* bars Harrigan's § 1983 claim because Harrigan's 'complaint makes specific factual allegations that are inconsistent with the facts upon which his punishment was based.'. . As we've explained, the inconsistent-factual-allegations rule on which Rodriguez relies -- itself 'an additional gloss on the *Heck* analysis,'. . . applies only in a 'narrow category of cases': 'where the allegation in the § 1983 complaint is a specific one that both necessarily implies the earlier decision is invalid *and* is necessary to the success of the § 1983 suit itself.'. . 'When a plaintiff alleges a fact that, if true, would conflict with the earlier punishment, but that fact is not necessary to the success of his § 1983 suit, the *Heck* bar does not apply.'. . It still remains true that a trial jury could sustain Harrigan's excessive-force § 1983 complaint without negating his state-court convictions. . . . Harrigan says that, after Officer Rodriguez began shooting at him, Harrigan 'backed up' before deliberately swerving around Officer Baldwin in front of him. Though this claim is inconsistent with Harrigan's conviction for aggravated assault on Officer Baldwin, the claim is not necessary to the success of Harrigan's § 1983 suit. As in *Dixon*, the gravamen of Harrigan's lawsuit is that Officer Rodriguez used excessive force by shooting him without provocation. Whether Harrigan intentionally threatened to harm Officer Baldwin or tried only to avoid him -- and we know from his conviction that the former is true -- does not answer whether Officer Rodriguez used excessive force. That Harrigan committed aggravated assault on Officer Baldwin does not necessarily doom his § 1983 claim. The entry of a judgment in Harrigan's favor on his § 1983 excessive-force suit would not necessarily imply the invalidity of his state-court convictions. That means *Heck* does not bar Harrigan's lawsuit, and the district court's conclusion that it does was error."); ***El v. City of Pittsburgh***, 975 F.3d 327, 339 (3d Cir. 2020) ("Will was convicted of 'creat[ing] a hazardous or physically offensive condition' with 'intent to cause public inconvenience, annoyance or alarm.'. . Therefore, his § 1983 claim would be barred by *Heck* if, in order to prevail, he needed to demonstrate that he did not do so. But, even if an individual is engaged in disorderly conduct, there still could be a level of responsive force that is reasonable and a level that is 'excessive and unreasonable.'. . Viewing the facts in the light most favorable to Will, a jury could conclude that Officer Welling's use of force was objectively unreasonable, even taking Will's disorderly conduct into account."); ***Aucoin v. Cupil***, 958 F.3d 379, 381-84 (5th Cir. 2020) ("[A]n inmate cannot bring a § 1983 claim for excessive use of force by a prison guard, if the inmate has already been found guilty for misconduct that justified that use of force. But *Heck* does not bar a § 1983 claim for a

prison guard's excessive use of force *after* the inmate has submitted and ceased engaging in the alleged misconduct. . . In this case, Prisoner Layne Aucoin complains that Lieutenant Andrew Cupil and Master Sergeant Reginald Robinson, guards at the Dixon Correctional Institute, assaulted him. He says they first assaulted him in his cell—and then again later in the prison lobby and shower. At a subsequent prison disciplinary proceeding, Aucoin was found guilty of defiance, aggravated disobedience, and property destruction for misconduct in his cell. But his misconduct ceased while he was in his cell. We conclude that *Heck* bars his § 1983 claim as to the alleged use of force in his cell—but not as to the alleged use of force in the prison lobby and shower. That is what the district court held at one point as well, but the court subsequently changed its mind and dismissed Aucoin's entire claim under *Heck*. We therefore reverse and remand for further proceedings. In doing so, we of course express no comment on the merits of Aucoin's § 1983 claim. We hold only that portions of his claim are not barred by *Heck*. . . . So when a plaintiff brings multiple § 1983 claims, *Heck* may bar those claims that potentially conflict with the factual underpinnings of a prior conviction, while posing no bar to other claims. Put simply, there is no *Heck* bar if the alleged violation occurs 'after' the cessation of the plaintiff's misconduct that gave rise to his prior conviction. . . .Applying this analytical framework here, we hold that Aucoin's excessive force claims for events occurring in his cell are barred by *Heck*—but that the alleged beatings in the prison showers and lobby are not. Aucoin argues that *Heck* does not apply to any of his claims, because he never challenged the loss of the time credits and, by extension, the validity of the underlying conviction. We disagree. First, it is of no consequence that he does not contest the loss of his good-time credits. . . Second, Aucoin overlooks one critical failing: He *does* challenge the conviction by maintaining his innocence in the events that led up to his disciplinary conviction. Specifically, he alleged both in his complaint and in his live testimony that prison staff 'snuck up' on him, sprayed him with mace, and beat him—all unprovoked. He has insisted, in other words, that he is wholly blameless for the use of force against him in his cell. But a claim is barred by *Heck* if the plaintiff's factual allegations supporting the claim are necessarily inconsistent with the validity of the conviction. . . That is the case here: If the factual account of Aucoin's complaint is taken as true, then he cannot be guilty of defiance, aggravated disobedience, and property destruction—in direct conflict with his disciplinary conviction. As we have stated before, when a plaintiff's claim 'is based solely on his assertions that he ... did nothing wrong, and was attacked by the [ ] officers for no reason,' that suit 'squarely challenges the factual determination that underlies his conviction' and is necessarily at odds with the conviction. . . It is precisely this 'type of claim that is barred by *Heck* in our circuit.'. . The district court was therefore right to dismiss his claim for excessive force within the cell and up to the point that he was restrained. But the district court erred in dismissing all of Aucoin's claims under *Heck*. Aucoin's pleadings include allegations that he was beaten and maced in the prison showers and lobby after he had surrendered. His complaint makes clear that these actions occurred after whatever he may have done in his prison cell, and it does so with at least as much specificity as the plaintiff did in *Bush*. So, as in *Bush* and *Bourne*, the plaintiff challenges the exercise of force distinct and isolated from the facts leading to the disciplinary conviction. As a result, 'the factual basis for the conviction is temporally and conceptually distinct from the excessive force claim[s].'. . *Heck* does not bar those subsequent, discrete claims. . .In sum, *Heck* bars Aucoin's claims of

assault while he was in the cell, up to the point he was restrained. But it does not bar the alleged assault in the showers and lobby after he surrendered—allegations we must take as true at the motion to dismiss stage. We reverse and remand."); ***Sconiers v. Lockhart***, 946 F.3d 1256, 1268-70 (11th Cir. 2020) ("As background, and as we have noted, following the incidents between Sconiers and Lockhart, Sconiers pled guilty to resisting or obstructing an officer without violence. Lockhart argues that Sconiers's guilty plea to this charge precludes him under *Heck* and Florida collateral estoppel from 'asserting that he was obeying Lockhart's orders to sit down so the area could be cleared and did not lunge at the officer.' Lockhart is mistaken. In *Heck*, the Supreme Court was concerned about prisoners using § 1983 to implicitly invalidate their convictions, thus making an 'end-run around habeas.'. . To prevent this from happening, the *Heck* Court erected a wall preventing prisoners from obtaining damages under § 1983 in any action where success would necessarily imply the prisoner's state conviction was invalid. . . If a judgment in favor of a prisoner in a § 1983 case would have this effect, the court must dismiss the complaint unless the prisoner can show that the related state conviction has already been invalidated. . . But when the facts required for a prisoner to prove his § 1983 case do not necessarily logically contradict the essential facts underlying the prisoner's conviction, *Heck* does not bar the § 1983 action from proceeding. . . .Sconiers pled guilty to resisting, obstructing, or opposing Lockhart, 'who was then and there in the lawful execution of a legal duty ... , to-wit: clearing the ro[v]er's area, without offering or doing violence to the person of such officer.' Crucially, the charging information provides no further facts, and the record similarly fails to identify any facts Sconiers admitted when he entered his guilty plea. So we can look to nothing to illuminate the sequence of events, including who said what when and who hit whom when. As a result, we are left with no way to determine whether Lockhart's use of force was necessarily responsive to Sconiers's non-violent resistance. . . For instance, Sconiers could have 'resisted' by standing up when he should not have or failing to sit when instructed to do so. But following that, Sconiers could have been fully compliant with Lockhart's demands. And Lockhart could have nonetheless used unnecessary force on Sconiers at that time. Or Sconiers's failure to heed Lockhart's commands could have occurred after Lockhart engaged in an unwarranted use of force. For these reasons, similar to the facts in *Hadley*, both Lockhart's excessive use of force and Sconiers's resistance are not a logical impossibility. Lockhart responds that the arrest affidavit irrefutably establishes he used force only in response to Sconiers's cursing at him and defiance of him, even after Lockhart warned him that he would be pepper-sprayed if he continued his intransigence. But the problem for Lockhart is that he has not established the arrest affidavit was incorporated into Sconiers's guilty plea. Indeed, the plea agreement is not even in the record here. Without that, we cannot determine that Sconiers pled guilty to that recitation of events. As a result, *Heck* does not bar Sconiers's excessive-force claim against Lockhart because Lockhart has not established that Sconiers's admitted in his plea that his resistance prompted Lockhart's use of force."); ***Johnson v. Rogers***, 944 F.3d 966, 968 (7th Cir. 2019) ("The district court's two reasons for ruling against Johnson—qualified immunity and *Heck*—are incompatible. A suit barred by the doctrine of *Heck* is premature and must be dismissed without prejudice, because *Heck* holds that the claim does not accrue until the conviction has been set aside. . . By contrast, a claim barred by the doctrine of qualified immunity fails on the merits and must be dismissed with prejudice. Here the district

court dismissed with prejudice, an inappropriate step when *Heck* governs. It is possible to bypass *Heck* and address the merits—after all, *Heck* concerns timing rather than subject-matter jurisdiction. See *Polzin v. Gage*, 636 F.3d 834, 838 (7th Cir. 2011). But the district court did not bypass *Heck*. Relying on it, the court concluded that suit had been filed too soon, and a premature suit must be dismissed without prejudice. We therefore start with *Heck* to determine whether it is appropriate to consider immunity at all. *Heck* concludes that a person cannot use § 1983 to collect damages on a theory irreconcilable with a conviction's validity, unless that conviction has been set aside. (Whether this rule extends past the end of imprisonment is a subject before the *en banc* court in *Savory v. Cannon*, No. 17-3543 (argued Sept. 24, 2019). We assume for current purposes that it does.) Defendants contend that any recovery for excessive force used at the time of arrest would be inconsistent with Johnson's conviction for resisting arrest. Yet *Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), holds that a claim of wrongful arrest may proceed even if a person has been convicted of the offense that led to the arrest. Whether the police had probable cause to arrest is distinct from the question whether a criminal conviction, on a different factual record or a guilty plea, is valid. Likewise when the arrested person contends that the police used excessive force. The propositions 'the suspect resisted arrest' and 'the police used too much force to effect the arrest' can be true at the same time. And so we held in *Evans v. Poskon*, 603 F.3d 362 (7th Cir. 2010), and its successors, such as *Mordi v. Zeigler*, 870 F.3d 703 (7th Cir. 2017), and *Hill v. Murphy*, 785 F.3d 242 (7th Cir. 2015). . . . Johnson, however, does not deny that he tried to obstruct the police from maintaining custody after his arrest. He contends only that Rogers used force that was unreasonable in relation to the nature of his obstruction. This contention can be resolved in Johnson's favor without casting any doubt on the validity of his conviction. It follows that *Heck* does not block this suit."); ***O'Brien v. Town of Bellingham***, 943 F.3d 514, 529-30 (1st Cir. 2019) ("Whether *Heck* bars § 1983 claims is a jurisdictional question that can be raised at any time during the pendency of litigation. . . In this case, the record reflects that O'Brien's excessive force claims arising from the incident in the woods are 'so interrelated factually' with his state convictions arising from those events that a judgment in O'Brien's favor would 'necessarily imply' the invalidity of those convictions. . . Indeed, if the officers had used excessive force against O'Brien while arresting him in the woods, as he now claims, their unlawful behavior would have provided O'Brien with a defense against the charges for resisting arrest and assault and battery under state law. . . . Similarly, the district court correctly found that *Heck* bars any claim that Officer Melanson and Sergeant Perry used excessive force leading up to when O'Brien struck them with the phone handset. Granting a judgment against Officer Melanson and Sergeant Perry would have implied that O'Brien's conduct was justified, while the officers' actions were unjustified, which would have necessarily undermined the validity of O'Brien's assault and battery convictions**.** As we explained in *Thore*, although '[a] § 1983 excessive force claim brought against a police officer that arises out of the officer's use of force during an arrest does not necessarily call into question the validity of an underlying state conviction ... [,] it is not necessarily free from *Heck*' either. . . And because O'Brien has not specified any theory of relief, let alone attempted to identify a factual scenario which would survive *Heck*, we need not go any further, as any argument to that effect is waived. . . .The arguments that O'Brien does raise on appeal are confusing, conclusory, and easily discarded. First, O'Brien's assertion that the Defendants waived

a defense based on *Heck* is unavailing as we have already noted that it is a jurisdictional issue that can be raised *sua sponte* by the court."); ***Hunter v. City of Leeds***, 941 F.3d 1265, 1274-76 & n.12 (11th Cir. 2019) ("Before we can decide whether the officers are entitled to qualified immunity based on their conduct, we must first determine what exactly that conduct was. . . Although we must view the facts in the light most favorable to Hunter, as the nonmoving party, the officers' primary argument on appeal is that the District Court erred in crediting Hunter's assertion that he never pointed his gun at Kirk or any of the officers. They argue that his guilty plea to menacing prevents him from relitigating whether he pointed his gun, on the ground of either judicial or collateral estoppel, or the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994). We conclude that collateral estoppel bars Hunter from asserting, contrary to his guilty plea, that he never pointed his gun at Kirk, but does not bar him from contesting Kirk's statements regarding the number of times that Hunter allegedly pointed his gun. . . . Since we conclude that collateral estoppel bars this assertion, we do not reach the officers' claim that judicial estoppel also bars the assertion. Furthermore, the facts properly asserted—i.e., not barred by collateral estoppel—do not 'necessarily imply the invalidity of [Hunter's] conviction.'. . Because it is logically possible that Hunter pointed his gun at Kirk, and that Kirk nonetheless used excessive force in response, the *Heck* bar does not apply. . . . Although Hunter's guilty plea to menacing constitutes an admission that he pointed his gun at Kirk, it cannot fairly be construed as an admission that he pointed his gun at Kirk all three times. The only fact *necessarily* decided by his guilty plea is that Hunter pointed his gun at Kirk (at least) once. The indictment upon which his guilty plea was based stated only that Hunter 'attempt[ed] to intentionally cause the death of another person, Robert Kirk, *by pointing a pistol at Peace Officer Robert Kirk*,' which could be based on a single act of gun-pointing, or three, or ten. Though Hunter cannot dispute that he did in fact point his gun at Kirk, it would not be inconsistent with his guilty plea to permit him to dispute *when* he pointed his gun, or whether he pointed his gun multiple times as Kirk claims. Therefore, while collateral estoppel prevents Hunter from denying simply that he ever pointed his gun at Kirk, it does not go so far as to prevent him from denying Kirk's claims that he pointed his weapon multiple times."); ***Harris v. Pittman***, 927 F.3d 266, 278 (4th Cir. 2019) ("Pittman offers an alternative justification for going beyond our mandate and refusing to adopt Harris's account in evaluating the reasonableness of Pittman's use of force: According to Pittman, doing so would require invalidating Harris's state court conviction, something a federal court may not do under *Heck v. Humphrey*[.] . . This argument – also raised for the first time on appeal – is without merit. Nothing about Harris's § 1983 suit calls into question his North Carolina judgment of conviction on charges of assaulting Officer Pittman while in possession of Pittman's gun. Harris would remain guilty on those charges even if Pittman were found to have used excessive force when he arrested Harris following Harris's commission of his crimes."); ***Bourne v. Gunnels***, 921 F.3d 484, 491 (5th Cir. 2019) ("Bourne was convicted of tampering with his cell door and creating a disturbance in connection with the use of force, resulting in a forfeiture of thirty days' good-time credit. The district court determined that *Heck* bars the excessive-force claims because, 'if true, [they would] implicate the validity of his disciplinary conviction for creating the disturbance that resulted in the use of force.' To the contrary, Bourne's § 1983 excessive-force claims implicate neither the validity of his underlying conviction nor the duration of his sentence. Bourne's

underlying conviction is for aggravated assault with a deadly weapon. A finding of excessive force here would have no bearing on that conviction. Nor would it negate his disciplinary conviction, potentially affecting the duration of his sentence by restoring his good time credits. Bourne was disciplined for '[t]ampering with a locking mechanism or food tray slot and '[c]reating a [d]isturbance' resulting from his jamming the food-tray slot to his cell and refusing to relinquish it, thereby requiring the use of force by prison officials. Conversely, the § 1983 excessive-force claims arise from the specific force defendants used after he was restrained on his cell floor. The basis of Bourne's § 1983 excessive-force claims, therefore, is distinct from the basis of his disciplinary conviction. A finding of excessive force would not negate the prison's finding that Bourne violated its policies and was subject to disciplinary action as a result. A ruling in Bourne's favor on his excessive-force claims would not affect his underlying conviction, his disciplinary conviction, or the duration of his sentence. Accordingly, *Heck* and its progeny do not bar Bourne's excessive-force claims."); ***Phillips v. Curtis***, No. 18-5868, 2019 WL 1551698, at *1–2 (6th Cir. Apr. 10, 2019) (not reported) ("Generally speaking, for example, if an individual is convicted of resisting arrest, that conviction bars claims that the police used excessive force during an arrest. . . . A victory in a damages suit thus would mean that the officer used force improperly, while the conviction for resisting arrest would dictate the opposite conclusion. . . . That is a classic *Heck* problem. But a person convicted of resisting arrest may still allege that an officer used excessive force *after* the arrest occurred. In that situation, the civil suit and the conviction potentially deal with separate moments and potentially can coexist without contradicting one another. . . In this case, Phillips purports to identify two separate incidents, one when she endangered Curtis, the other when he opened fire. To be sure, if the two incidents happened at roughly the same time—or in legitimate response to one another—*Heck* would bar her lawsuit. For placing Curtis in substantial danger of serious death or injury would mean that, at that moment, Curtis could use deadly force. . . But Phillips says that she placed Curtis's life in jeopardy at point one, she ceased to be a threat at point two, and only after that did Curtis shoot her. Under that scenario, assuming a material gap in time between the two events, her victory in this lawsuit would not necessarily invalidate her criminal conviction. All of this means that the district court applied *Heck* prematurely in granting the defendants' motion to dismiss. Limited discovery should flesh out the nature of Phillips's plea and the timing of her conduct and the shooting. We realize that seven years have passed since the events in question. Under these circumstances, it is imperative that the district court require Phillips (and, where necessary, the officers) promptly to provide answers to these questions or the lawsuit should be dismissed for failure to prosecute it."); ***Dixon v. Hodges***, 887 F.3d 1235, 1237-40 (11th Cir. 2018) ("Dixon was punished and lost gain time, but his § 1983 suit, if successful, would not *necessarily* imply that his punishment is invalid. Because success in this § 1983 suit would not necessarily be 'logically contradictory' with the underlying punishment, this suit is not barred by *Heck*. . . .Pollock admits, in an accurate statement of the law, that '[i]t is possible for an excessive-force action and a battery conviction to coexist without running afoul of *Heck*.'. . A prisoner may be punished for battery on a prison guard, and that prison guard may be held liable for using excessive force on the prisoner in subduing him; both may be true. At first glance, then, it appears *Heck* is inapposite. Pollock contends that *Heck* nonetheless applies here because Dixon alleges that he did not lunge at Pollock before

Pollock used force against him. Because Dixon's disciplinary punishment is grounded in those facts, and Dixon is alleging contrary facts in his § 1983 complaint, Pollock claims that *Heck* should bar the suit. We have recognized that, in some cases, *Heck* may bar a prisoner's suit 'if his § 1983 complaint makes specific factual allegations that are inconsistent with the facts upon which his [punishment was] based.'. . This footnote in *Dyer*, relied upon by Pollock, is a recitation of the inconsistent-factual-allegations rule from *McCann v. Neilsen*, 466 F.3d 619 (7th Cir. 2006). *McCann* is a Seventh Circuit decision that reversed a district court's dismissal of a § 1983 complaint under *Heck*. . . It approvingly discusses the inconsistent-factual-allegations rule, an 'additional gloss on the *Heck* analysis,' only in the context of one case: *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003). . . In *Okoro*, the plaintiff brought a § 1983 suit following his conviction of a drug crime after heroin was discovered in a search of his home. . . His defense in the criminal drug case was that he sold gems, not heroin, and that police officers had stolen his gems during their search. . . After his drug conviction, he alleged in his § 1983 complaint that the police officers who searched his home had violated his civil rights by illegally seizing his gems. . . The Seventh Circuit determined that the plaintiff's suit was barred under *Heck* because his § 1983 suit had the effect of 'challenging the validity of the guilty verdict by denying that there were any drugs and arguing that he was framed.'. .To the extent we adopted the inconsistent-factual-allegation gloss on *Heck* in our *Dyer* decision, we agree with the Seventh Circuit that it is only apposite in the narrow category of cases like *Okoro*: where the allegation in the § 1983 complaint is a specific one that both necessarily implies the earlier decision is invalid *and* is necessary to the success of the § 1983 suit itself. The 'logical necessity' of conflict between the punishment and the § 1983 suit, itself 'at the heart of the *Heck* opinion,' is present only in these circumstances. . . When a plaintiff alleges a fact that, if true, would conflict with the earlier punishment, but that fact is not necessary to the success of his § 1983 suit, the *Heck* bar does not apply. Such is the case here. The gravamen of Dixon's § 1983 complaint is that Pollock used excessive force against him. The success of this claim is not necessarily dependent on whether Dixon lunged at Pollock or not. His disciplinary punishment, of course, establishes that he did. . . But that factual finding is not determinative of whether Pollock used excessive force against Dixon. It is logically possible both that Dixon lunged at Pollock and that Pollock used excessive force against him. Because 'there is a version of the facts which would allow the [punishment] to stand' alongside a successful § 1983 suit, *Heck* does not control. . . . We conclude that *Heck* and its progeny, including *Balisok*, do not bar this lawsuit. On the contrary, *Dyer* requires that the suit be allowed to proceed through the threshold gates of *Heck*. We therefore vacate the judgment of the District Court and remand for further proceedings not inconsistent with this opinion."); ***Viramontes v. City of Chicago***, 840 F.3d 423, 427-29 (7th Cir. 2016) ("This court has held that a plaintiff's conviction for assaulting a police officer does not 'necessarily imply' that the officer used appropriate force during the course of arrest after the assault. . . A subsequent excessive-force claim may, however, imply the invalidity of a conviction if the plaintiff attempts to testify in a way that contradicts the conviction's factual basis. To balance this tension, we held in *Gilbert* that the district court should implement *Heck* by instructing the jury that it must take as true the facts proved at the earlier criminal or disciplinary proceeding. . . The district court gave this exact instruction. . . . [W]e expressly stated in *Gilbert* that an instruction could be read to the jury 'at the start of trial, as necessary during the evidence,

and at the close of the evidence.'. . The district court did exactly what we stated district courts should do and thus did not err. Despite the plain language in *Gilbert*, Viramontes argues that this case is distinguishable because the court in *Gilbert* was faced with a plaintiff who 'encountered difficulty adhering to an agnostic posture on' the disciplinary board's factual findings. . . Viramontes argues, then, that no instruction should be given until a defendant contradicts a prior conviction. Although Viramontes correctly articulates the factual situation in *Gilbert*, we decline to adopt his narrow interpretation of the rule. In most cases, a district court judge won't know before trial whether a plaintiff will remain agnostic about a prior conviction. Indeed, before trial, all plaintiffs must claim to remain agnostic in order to have their day in court. . . Waiting to instruct the jury to take certain facts as true until the plaintiff claims innocence or disputes the conviction's factual basis might confuse the jury. An instruction before the presentation of evidence solves this potential problem—the jury knows upfront that it must decide all facts except for the facts already stipulated. Even if the rule was not as plain as we make it here, the district court's decision would still withstand scrutiny because Viramontes proved that he could not remain agnostic about his conviction. Viramontes claimed in his deposition that he never tried to hit Officer Lapadula, a claim that directly contradicts his conviction. Further, at trial, Viramontes testified that he 'never resisted'. . . and was 'innocent[.]'. . . Far from remaining agnostic, Viramontes's conduct makes clear why a *Gilbert* instruction is necessary in these cases. Because the district court was within its discretion to give the *Gilbert* instruction at the beginning of trial, the timing of the instruction was appropriate."); ***Tolliver v. City of Chicago***, 820 F.3d 237, 242-44 (7th Cir. 2016) ("Tolliver pled guilty to aggravated battery of a peace officer. . . .[I]n order to be guilty of aggravated battery to a peace officer, Tolliver must have (1) known that Sobieraj was a peace officer performing his official duties; and (2) intentionally or knowingly; (3) voluntarily; (4) without legal justification; (5) caused bodily harm to Officer Sobieraj. . . . In Tolliver's current version of the shooting, he concedes that he knew that Sobieraj was a peace officer performing his duties and that Sobieraj was injured when he attempted to move away from Tolliver's car as it rolled towards him. But Tolliver's version of the event denies any act that was knowing, intentional, voluntary and lacking legal justification that caused the harm to Officer Sobieraj. Instead, Tolliver affirmatively asserts that he did not intentionally drive the car towards the officers, and that after the first, unprovoked shot, he was paralyzed, fell over, and could not see what was happening. He argues that it is reasonable to infer that he knocked the gear shift into a forward gear when he fell or 'ducked' to the right after being shot, and he assumes his car drifted towards the officers. Without any acknowledgment of the mental state necessary for a conviction for aggravated battery, Tolliver's version of the shooting thus implies the invalidity of his conviction. . . .Tolliver's conviction was based on voluntarily, and knowingly or intentionally causing bodily harm to Officer Sobieraj, without legal justification. But if the incident unfolded as Tolliver alleges in his civil suit, then he could not have been guilty of aggravated battery of a peace officer because the officer shot him without provocation and was injured as a result of involuntary and unintentional actions by a paralyzed Tolliver. Because Tolliver is the master of his ground, and because the allegations he makes now necessarily imply the invalidity of his conviction, *Heck* bars his civil suit. . . . Tolliver could have brought a suit for excessive force that occurred after the crime was complete. . . .If Tolliver had conceded that he voluntarily and intentionally or knowingly drove towards the

officers, or if Tolliver had even remained agnostic on who struck the first blow, he could have brought a claim that the officers' response of firing fourteen bullets at him constituted excessive force and that claim . . . would not be barred by *Heck*. . . But Tolliver's version of events negates the mental state necessary to support his conviction for aggravated battery of a peace officer and thus necessarily implies the invalidity of his conviction."); ***Parvin v. Campbell***, No. 15-5566, 2016 WL 97692, at *4-5 (6th Cir. Jan. 8, 2016) (not reported) ("As we have previously found that an officer's excessive use of force is a defense to a charge of resisting arrest under Tennessee law, Parvin's resisting arrest conviction barred his excessive force claim because he did not raise excessive force as a defense. Parvin's excessive force claim challenges his underlying conviction and is, therefore, barred under *Heck*. But the analysis does not end here. For *Heck* to bar a § 1983 claim, success on the claim must necessarily imply the invalidity of the conviction. Accordingly, both the § 1983 claim and the conviction must arise out of the same events. . . On the other hand, an excessive force claim is not barred when the alleged use of force occurred after the suspect was handcuffed and brought under control. . . In such a case, the force would not be 'inextricably intertwined' with the suspect's resistance to arrest. This case falls much closer in that spectrum to the *Cummings* situation. Parvin made no effort to argue excessive force *after* arrest to the district court, nor does he do so on appeal. Both Parvin's and Campbell's versions of facts describe Parvin being handcuffed after he was pepper-sprayed. Parvin specifically argues that Campbell used excessive force before he was handcuffed. Therefore, under our prior holdings, Parvin's excessive force claim arises out of the same conduct that led to his conviction. Moreover, Parvin's claim is not that Campbell used excessive force after Parvin stopped resisting or to stop his resistance. Rather, his claim is based solely on his assertions that he did not resist arrest, did nothing wrong, and was attacked by Campbell for no reason. Thus, Parvin's suit 'squarely challenges the factual determination that underlies his conviction for resisting an officer' and, if he prevails, 'he will have established that his criminal conviction lacks any basis.'. . This is exactly the type of claim that is barred by *Heck*."); ***Hill v. Murphy***, 785 F.3d 242, 248 (7th Cir. 2015) ("'Imply' is not synonymous with 'invalidate.' A judgment in favor of Hill's claim in this civil suit that his conviction of making a false statement was unconstitutional because it rested on police coercion would not invalidate the conviction, or provide a ground for a suit for postconviction relief (release from prison), but it would cast a shadow over the conviction. It would allow Hill to argue that he had been determined by a court to have been unjustly convicted and sentenced but was forbidden to obtain relief on the basis of that finding. It would thus enable him to indict the legal culture. This *Heck* forbids. . . . Hill thus can't be permitted in his civil suit to prove that his first statement was coerced, though he can complain about the beating or threats or other brutalities that induced the three statements to the extent the brutalities inflicted injuries (whether physical or mental) for which tort damages can be awarded. All that matters, in short, is that Hill be forbidden to assert on remand that the statement on which his conviction of making a false statement to the government was predicated was coerced, for if it was coerced then an element of his conviction would be negated."); ***Havens v. Johnson***, 783 F.3d 776, 782-83 (10th Cir. 2015) ("An excessive-force claim against an officer is not necessarily inconsistent with a conviction for assaulting the officer. For example, the claim may be that the officer used too much force to respond to the assault or that the officer used force after the need for force had disappeared. . . . Havens pleaded guilty to attempted first-degree assault

of Defendant Johnson. A person commits first-degree assault if '[w]ith intent to cause serious bodily injury to another person, he causes serious bodily injury to any person by means of a deadly weapon.'. . And a person commits *attempted* first-degree assault if 'acting with the kind of culpability otherwise required for commission of" an assault (intent to cause serious bodily injury), 'he engages in conduct constituting a substantial step toward the commission of' the assault. . . In short, Havens pleaded guilty to intentionally taking a substantial step toward causing serious bodily injury to Johnson. At Havens's plea hearing his lawyer partially stated the factual basis for the plea: a police officer was in front of Havens's car and Havens was gunning the engine in an effort to get away. Havens's plea is incompatible with his § 1983 claim. His complaint did not allege, and his opening brief does not argue, that Johnson used excessive force in response to an attempted assault by Havens. Rather, he contends that Johnson's use of force was unreasonable because Havens did not have control of the car, he did not try to escape, he never saw Johnson, he did not drive toward Johnson, and he was hit by police vehicles and shot almost instantly after arriving on the scene. In other words, he did nothing wrong and did not intend or attempt to injure Johnson. This version of events could not sustain the elements of attempted first-degree assault under Colorado law and the factual basis for Havens's plea. Havens does not present an alternative scenario consistent with his attempted-assault conviction. . . Because Havens's only theory of relief is based on his innocence, and this theory is barred by *Heck,* we affirm the district court's grant of summary judgment to Johnson."); ***Hayward v. Cleveland Clinic Found.***, 759 F.3d 601, 613-14 (6th Cir. 2014) ("This Court does not pass judgment on whether Defendants' conduct constituted excessive force. Rather, this Court acknowledges that under current Sixth Circuit precedent, pre-arrest excessive force is an affirmative defense to a charge of resisting arrest in Ohio, and would therefore render invalid a conviction for resisting arrest. Because the factual circumstances in this case indicate that Defendants' allegedly excessive force occurred during Plaintiff's resistance to the arrest, the district court properly dismissed Plaintiff Aaron Hayward's excessive force claim based on *Heck.* . . . If Plaintiff were to succeed on an illegal home entry claim, it would render his arrest unlawful and imply the invalidity of his underlying guilty plea for resisting arrest. Therefore, the district court properly denied this claim as barred under *Heck.*"); ***Green v. Chvala***, 567 F. App'x 458, 459, 460 (7th Cir. 2014) ("Green was convicted of recklessly endangering others by speeding away from the officer, and an officer may reasonably use deadly force when a suspect 'poses a threat of serious physical harm, either to the officer or to others.' *Tennessee v. Garner,* 471 U .S. 1, 11–12 (1985); *see also Plumhoff v. Rickard,* 134 S.Ct. 2012, 2021–22 (2014). Thus, *Heck* would bar any allegation that Schroeder used excessive force after Green began driving recklessly under § 941.30(2), the offense of conviction. But *Heck* does not bar Green's claim here because, construing his allegations liberally, *see Erickson v. Pardus,* 551 U.S. 89, 94 (2007), we understand him to allege that Schroeder used deadly force *before* the reckless driving that led to his conviction. Green alleges that Schroeder fired at him as he slowly drove past Schroeder, before he sped away. *Heck* does not bar that claim because, if it did, then resistance that did not jeopardize safety, such as the low-speed driving that Green describes, would invite the police 'to inflict any reaction or retribution they choose.'. . We caution, though, that Green survives *Heck* only if, as his complaint implies, the conviction is for conduct that occurred after the shooting."); ***Suarez v. City of Bayonne***, 566 F. App'x 181, 184-86 (3d Cir. 2014) ("The

District Court held that Suarez's excessive force and unreasonable seizure claims amounted to a collateral attack on his simple assault conviction, and were therefore barred by the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). We disagree. . . We have recognized that *Heck* does not automatically bar a § 1983 claim for excessive force against an officer even though the plaintiff was convicted of resisting arrest (or, as here, simple assault) based on the same interaction with police. . . This is so because law enforcement officers can 'effectuate[ ] a lawful arrest in an unlawful manner.'. . It is important to separate, for purposes of our *Heck* analysis, Suarez's arrest on East 11th Street and the fracas at police headquarters. The District Court concluded that the East 11th Street incident 'began the chain of events leading to [Suarez's] guilty plea for simple assault on Detective Rhodes,' and therefore a verdict in Suarez's favor would undermine his conviction. . . We disagree with this conclusion. If a jury were to credit Suarez's version of the East 11th Street incident, that would not imply the invalidity of his simple assault conviction based on the incident at police headquarters. Under New Jersey law, Suarez would have been entitled to resist an unlawful use of force by the Detectives, but such a right would have dissipated once he had been taken into custody and the excessive use of force abated. . . Even if the Detectives employed excessive force on East 11th Street, Suarez's right to resist would have expired by the time he was searched at police headquarters, and therefore he would still be guilty of simple assault. Hence, the claim is not barred by *Heck.* The analysis is a bit more subtle with respect to the tussle at headquarters. Suarez pleaded guilty to kicking Rhodes in the groin while undergoing the second search. To the extent that Suarez claims either: (1) that he did not kick Rhodes at all and he was beaten wholly without provocation; or (2) that he used a reasonable amount of force when he kicked Rhodes after Rhodes attacked hi m, his claim is barred by *Heck.* With respect to the former, the reason is that such a theory would undermine the factual basis for his guilty plea insofar as he admitted to kicking Rhodes at his change of plea hearing. With respect to the latter, by pleading guilty to the criminal offense of simple assault, Suarez has conceded that he did not use reasonable force when he kicked Rhodes in response to an excessive and unreasonable use of force. . . He testified at his deposition, however, that Carey hit him at least twice, on his head and in his ribs, and that Rhodes hit him more than once. . . Suarez did not plead guilty to any conduct relating to Detective Carey, and thus if the jury were to credit Suarez's testimony and find that Carey used excessive force in restraining him, his conviction for assaulting Rhodes would not be undermined. Similarly, if the jury found that Rhodes continued to beat Suarez beyond the point necessary to secure him after his brief resistance, the jury could return a verdict in Suarez's favor without undermining his assault conviction. We conclude that the District Court erred in holding that Suarez's excessive force and unreasonable seizure claims are barred by *Heck,* and we will accordingly reverse the District Court's grant of summary judgment to the Detectives on these claims."); ***Helman v. Duhaime***, 742 F.3d 760, 762, 763 (7th Cir. 2014) ("In this case, the only viable theory of § 1983 liability is Helman's theory that he did not attempt to draw his weapon until after shots were fired at him. That theory is inconsistent with his conviction for Resisting Law Enforcement under Ind.Code § 35–44–3–3.We begin by considering that criminal provision. The language of Ind.Code § 35–44–3–3 provides that '[a] person who knowingly or intentionally ... forcibly resists, obstructs, or interferes with a law enforcement officer ... while the officer is lawfully engaged in the execution

of [his] duties ... commits resisting law enforcement....' Cases interpreting that provision have held that the officer is not 'lawfully engaged in the performance of his duties' if he is employing excessive force, and therefore a person who reasonably resists that force cannot be convicted under that provision. . . Accordingly, Helman would not be criminally liable under that statute if he attempted to draw his weapon in response to excessive force. It follows, then, that the criminal conviction under that statute necessarily entails a finding that at the time he drew his weapon, he did not face the use of excessive force by the officers. Helman's § 1983 action, however, is premised upon the assertion that he drew his weapon only in response to the officers' use of excessive force. Specifically, he asserts that when the flash bang device detonated, he had a cup of coffee and a bottle of water in his hands. He maintains that he did not reach for his gun until after the officers began firing at him, and that they fired at him only because he possessed a weapon, not in response to any action by him in reaching for it. In fact, he argues to this court that the transcript of his guilty plea does not contain any admission that he reached for his gun prior to being shot. The problem is that Helman's version of the facts would necessarily imply the invalidity of his state court conviction for resisting law enforcement. It would have been objectively unreasonable for officers to open fire on a person who was not reaching for a weapon or otherwise acting in a threatening manner, and therefore the officers would have been employing excessive force if they did so. . . If Helman attempted to access the gun only after the officers began firing at him, then Helman would have been attempting to draw a deadly weapon in response to excessive force. Accordingly, under *Heck*, Helman may not pursue a § 1983 claim premised upon that factual scenario. Helman is left, then, with an argument under § 1983 that the officers violated his Fourth Amendment rights in shooting him when he was reaching for his firearm. That claim, however, cannot survive summary judgment because such a response is objectively reasonable. In fact, Helman does not even argue that he could pursue a § 1983 claim under such scenario. The district court properly held that Helman was precluded by his conviction from pursuing this § 1983 action."); ***Sharif v. Picone***, 740 F.3d 263, 269 n.5, 270 (3d Cir. 2014) ("District courts in our Circuit have relied upon *Heck* and *Walker* in tandem for the proposition that nolo contendere pleas, and the resulting convictions, bar pleaders from bringing 42 U.S.C. § 1983 claims in certain instances. We need not decide that question because even Appellees concede that Sharif's claim of excessive force does not amount to a collateral attack on his aggravated assault conviction. They further concede that he did not admit any 'facts which would indicate no civil liability on the part of' the corrections officers. . . Indeed, we held in *Nelson v. Jashurek*, that *Heck* does not bar an excessive force claim because the claim can stand without challenging any element of the conviction. . . Regardless of whether he engaged in assaultive conduct, Sharif remains free to contend that the reaction of the corrections officers was such that it constituted excessive force in comparison to the threat he posed. Thus, *Walker* is distinguishable from this case. District courts within the Third Circuit that have chosen to consider or admit past nolo pleas, have done so largely on the basis of collateral estoppel principles discussed in *Heck*. As explained above, those principles are not applicable in this case, particularly given our holding in *Nelson* that *Heck* does not bar an excessive force claim because such a claim would not negate any element of the conviction. . . Given these considerations, we hold that Rule 410 barred the admission of Sharif's plea of nolo contendere."); ***Navejar v. Iyiola***, 718 F.3d 692, 697, 698 (7th

Cir. 2013) ("Navejar cannot deny that he disobeyed orders or assaulted Iyiola because those denials would 'necessarily imply' the invalidity of his discipline. . . But Navejar's assault on Iyiola is not necessarily inconsistent with his sworn contention that the guards answered his assault with excessive force *after* they subdued him. . . . Without a lawyer for Navejar to advocate the limits of *Heck,* the court mistakenly barred Navejar from arguing that, after he assaulted Iyiola, the guards responded with disproportionate force."); ***Daigre v. City of Waveland, Miss***., 549 F. App'x 283, 286, 287 (5th Cir. 2013) ("Daigre pleaded guilty to violating Mississippi Code § 97–9–73, which prohibits 'any person [from] obstruct[ing] or resist[ing] by force, or violence, or threats, or in any other manner, his lawful arrest.' However, her complaint contains several statements that contradict an admission of guilt under § 97–9–73. For example, Daigre's complaint alleges, 'At no time did [Daigre] physically resist or assault the Defendant Officers in any way, and the force used against her was unnecessary, unreasonable and excessive.' The complaint further states that '[a]t no time during the events described ... was [Daigre] ... a threat to the safety of herself or others, or disorderly.' Bluntly, the complaint says, '[Daigre] committed no criminal offenses.' The complaint elsewhere summarizes, '[T]he Defendant Officers' assault, arrest, and detainment of [Daigre] was illegal, wrongful and false, where [Daigre] had committed no crime, and there was no need for any amount of force—excessive or otherwise—to be administered against her.' The total effect of these statements is clear: Daigre's excessive-force claim is barred because she 'still thinks [she is] innocent.'. . Unlike the allegations in *Bush,* Daigre's broad claims of innocence relate to the entire arrest encounter, and not merely a discrete part of it. . . The result is dismissal under *Heck.*"); ***Schreiber v. Moe***, 596 F.3d 323, 335 (6th Cir. 2010) ("We conclude that under these circumstances, Schreiber's § 1983 excessive-force claim does not challenge his conviction for attempting to resist his arrest. . . The *Heck* doctrine applies only where a § 1983 claim would '*necessarily'* imply the invalidity of a conviction. . .'To hold otherwise [would be to] cut off [a] potentially valid damages action[ ] as to which [Schreiber] might never obtain favorable termination − [a] suit[ ] that could otherwise have gone forward had [Schreiber] not been convicted.'. .Therefore, Schreiber should be permitted to proceed on his claim that Moe used excessive force during the course of the arrest."); ***Connors v. Graves,*** 538 F.3d 373, 377 (5th Cir. 2008) ("Because section 14:20(2) authorized the use of any force in response to Connors's decision to fire at the officers, a finding that the officers used excessive force would necessarily mean that Connors had not violated section 14:94(E). Thus, *Heck* bars Connors's excessive force claim because he has not proven that his conviction under section 14:94(E) has been reversed or invalidated."); ***Lora-Pena v. F.B.I.***, 529 F.3d 503, 506 (3rd Cir. 2008) ("[C]onvictions for resisting arrest and assaulting officers would not be inconsistent with a holding that the officers, during a lawful arrest, used excessive (or unlawful) force in response to his own unlawful actions."); ***Hadley v. Gutierrez***, 526 F.3d 1324, 1331(11th Cir. 2008) ("The parties spend considerable time debating at what point during the encounter Hadley resisted. Because of his guilty plea, we assume he resisted at some point during the night. What we do not definitively know, however, is whether the punch complained about occurred at a time when Hadley was resisting. The resisting arrest count to which Hadley pleaded guilty is general in nature, and offers no insight into the sequence of events surrounding Hadley's arrest, including at what point Hadley resisted. . .It is theoretically possible that Hadley was punched then resisted, or even that he resisted first, but was punched

after he stopped resisting. So the question becomes, viewing the evidence in the light most favorable to Hadley, whether a jury could conclude that at some point Officer Ortivero punched Hadley in the stomach when he was not resisting? If so, there is a constitutional violation not barred by *Heck*. The jury is free to disbelieve Hadley's deposition testimony that he never resisted outside of the Publix, yet also believe that he was nonetheless punched at a time when he was not resisting. Under that version of facts . . . there is no *Heck* bar."); ***Bush v. Strain***, 513 F.3d 492, 498 (5th Cir. 2008) ("As *Ballard* illustrates, a § 1983 claim would not necessarily imply the invalidity of a resisting arrest conviction, and therefore would not be barred by *Heck*, if the factual basis for the conviction is temporally and conceptually distinct from the excessive force claim. Accordingly, a claim that excessive force occurred after the arrestee has ceased his or her resistance would not necessarily imply the invalidity of a conviction for the earlier resistance. . . In this case, there is conflicting evidence about whether Bush was injured before or after her resistance ceased, and the crux of the dispute is whether the factual basis for Bush's excessive force claim is inherently at odds with the facts actually or necessarily adjudicated adversely to Bush in the criminal proceeding. . . . Because Bush has produced evidence that the alleged excessive force occurred after she stopped resisting arrest, and the fact findings essential to her criminal conviction are not inherently at odds with this claim, a favorable verdict on her excessive force claims will not undermine her criminal conviction. The magistrate judge's contrary conclusion was erroneous."); ***Gilbert v. Cook***, 512 F.3d 899, 901, 902 (7th Cir. 2008) ("Just as *Wallace v. Kato*, 127 S.Ct. 1091 (2007), holds that *Heck* does not affect litigation about police conduct in the investigation of a crime, so we hold that *Heck* and *Edwards* do not affect litigation about what happens after the crime is completed. Public officials who use force reasonably necessary to subdue an aggressor are not liable on the merits; but *whether* the force was reasonable is a question that may be litigated without transgressing *Heck* or *Edwards*. . . . .Only a claim that 'necessarily' implies the invalidity of a conviction or disciplinary board's sanction comes within the scope of *Heck*. . . .There remains the fact that Gilbert encountered difficulty adhering to an agnostic posture on the question whether he had hit a guard. . . . Instead of insisting that Gilbert confess in open court to striking a guard, the judge should have implemented *Heck* and *Edwards* through instructions to the jury at the start of trial, as necessary during the evidence, and at the close of the evidence. It would have sufficed to tell the jurors that Gilbert struck the first blow during the fracas at the chuckhole, that any statements to the contrary by Gilbert (as his own lawyer) or a witness must be ignored, and that what the jurors needed to determine was whether the guards used more force than was reasonably necessary to protect themselves from an unruly prisoner.This case must be retried, and Gilbert must be allowed to present evidence about what the guards did to him after he extended his hands through the chuckhole."); ***Dyer v. Lee***, 488 F.3d 876, 879, 881(11th Cir. 2007) ("It is not the case that a successful § 1983 suit by the plaintiff would '*necessarily* imply the invalidity of [her] conviction' for resisting arrest with violence. . . . Other courts to have addressed the applicability of *Heck* in situations similar to the instant case have emphasized the importance of logical necessity and the limited scope of the *Heck* holding. [collecting cases] . . . . [F]or *Heck* to apply, it must be the case that a successful § 1983 suit and the underlying conviction be logically contradictory. Here, that is not the case. . . . *Heck* was not intended to be a shield to protect officers from § 1983 suits. It was intended to protect *habeas corpus* and promote finality and consistency.

Provided those goals are met, a § 1983 suit is not barred by *Heck*."); ***Thore v. Howe***, 466 F.3d 173, 180 (1st Cir. 2006) ("A § 1983 excessive force claim brought against a police officer that arises out of the officer's use of force during an arrest does not necessarily call into question the validity of an underlying state conviction and so is not barred by *Heck*. . . Even the fact that defendant was convicted of assault on a police officer does not, under *Heck*, as a matter of law necessarily bar a § 1983 claim of excessive force. . . In this case Thore asserts two theories. The first is that he was not guilty of assault at all, and so Officer Howe's use of force was excessive. That theory is plainly barred by *Heck*. The more modest second theory is that his excessive force claim need not impugn his convictions for assault and battery with a dangerous weapon in order to establish that Officer Howe used excessive force. Thore says that even if his car had previously hit the cruisers and brushed Officer Dibara's body, by the time of the shooting, Thore was stationary in a car, boxed in with nowhere to go, and posed no threat to the officers, who had been told that he had no gun. Just as it is true that a § 1983 excessive force claim after an assault conviction is not necessarily barred by *Heck*, it is also true that it is not necessarily free from *Heck*. The excessive force claim and the conviction may be so interrelated factually as to bar the § 1983 claim. . . Officer Howe argues, relying on *Cunningham*, that this is such a case: that Thore's third conviction for assault and battery with a dangerous weapon was based on his refusal to obey commands to get out of his car, and on his gunning his engine to start to get away. In doing so, he endangered the two officers: Officer Dibara on foot and Officer Howe in his cruiser. We cannot tell from the record before us whether this is so. While we conclude that *Heck* does not automatically bar consideration of an excessive force claim by an individual who has been convicted of assault, the record before us does not permit a determination of the requisite relatedness."); ***McCann v. Neilsen***, 466 F.3d 619, 622, 623 (7th Cir. 2006) ("The question for us, then, is not whether McCann *could have* drafted a complaint that steers clear of *Heck* (he could have), but whether he did. In other words, does the complaint contain factual allegations that 'necessarily imply' the invalidity of his convictions. . . On this question, we find it dispositive that the district court took an ambiguously worded paragraph in the complaint − one that could be read to avoid the *Heck* bar − and construed it in a manner that favored the defendant. In deciding a Rule 12(c) motion, we accept the facts alleged in the complaint in the light most favorable to the plaintiff. . . Giving McCann the benefit of all reasonable inferences, we conclude that his complaint can reasonably be read in a manner that does not implicate *Heck*. To repeat, the operative paragraph of the complaint states as follows: At the time and date aforesaid, the plaintiff did not pose a threat of violence or great bodily harm to the defendant, was not in the commission of a forcible felony nor was he attempting to resist, escape or defeat an arrest otherwise [sic] acting *so as to justify the use of deadly force by the defendant*. (Emphasis added.) The district court read this paragraph to constitute a categorical denial by McCann that he ever posed a threat of violence to the deputy, or ever attempted to resist or defeat arrest. Given the convoluted syntax employed, this reading is not completely unreasonable, and, so read, this paragraph renders McCann's allegations arguably inconsistent with his assault and obstruction convictions. But there is an equally plausible construction that avoids inconsistency with McCann's assault and obstruction convictions. That is, by reference to the concluding and qualifying clause emphasized above, the paragraph can be read as alleging that McCann never posed a threat of violence, attempted escape, or resisted arrest *to a degree* that

would have justified the use of deadly force as a response. Read in this way, McCann is not denying his assaultive and obstructive conduct, but is alleging that regardless of what he may have done, the deputy's use of deadly force as a response was not reasonable. Given our obligation at this stage of the proceedings to construe the complaint in the light most favorable to the nonmoving party, we give the complaint this construction and hold that McCann's claim is not barred by *Heck*. On remand, McCann should be given an opportunity to file an amended complaint that clarifies and implements this reading of his allegations."); ***Riddick v. Lott***, No. 05-7882, 2006 WL 2923905, at *2 (4th Cir. Oct. 12, 2006) (not reported) ("In this case, the record is sparse. Without knowing the factual basis for Riddick's plea, we cannot determine whether his claim of police brutality would necessarily imply invalidity of his earlier conviction for assaulting an officer while resisting arrest. . . It is not clear from Riddick's *pro se* complaint whether the officer's alleged punch preceded, coincided with, or followed Riddick's resistance and assault. If the officer's alleged punch caused Riddick to engage in the conduct that undergirds his conviction, then a successful § 1983 suit would necessarily imply invalidity of that conviction, since a person cannot be found guilty of resisting arrest if he is simply protecting himself, reasonably, against an officer's unprovoked attack or use of excessive force. . . If, however, there is no legal nexus between the officer's alleged punch and Riddick's resistance and assault; that is, the alleged punch occurred, independently, either before Riddick resisted arrest, or after his resistance had clearly ceased, then a successful §1983 suit for excessive force would not imply invalidity of the conviction. . . . In analogous cases, courts have ruled that *Heck* does not bar 1983 actions alleging excessive force despite a plaintiff's conviction for resisting arrest because a 'state court's finding that [a plaintiff] resisted a lawful arrest ... may coexist with a finding that the police officers used excessive force to subdue [the plaintiff].' . . In a similar vein, Riddick's conviction may coexist with a finding that the officer's alleged attack was unprovoked and occurred independently of Riddick's own resistance. Because the timing of the events is unclear, we vacate the district court's order dismissing Riddick's action without prejudice pursuant to *Heck* and remand for further proceedings consistent with this opinion."); ***Swiecicki v. Delgado***, 463 F.3d 489, 495 (6th Cir. 2006) ("The specific language of the Cleveland resisting-arrest ordinance (requiring that the arrest be lawful in order to convict) in combination with the applicable Ohio caselaw (where a finding of excessive force invalidates the lawfulness of an arrest) dictates the result here. Swiecicki's success on his excessive-force claim would therefore necessarily imply the invalidity of his Ohio state-court conviction for resisting arrest. Thus, the statute of limitations did not begin to run until Swiecicki's state-court conviction was overturned."); ***Ballard v. Burton***, 444 F.3d 391, 399, 400 (5th Cir. 2006) ("The Texas statute in *Sappington* and *Hainze* authorized use of deadly force upon reasonable belief that there was imminent danger of serious bodily injury. Those decisions turned on the fact that, because serious bodily injury to the defendant was an element of the § 1983 plaintiff's conviction, it was impossible for the defendant to have used excessive force because the statute authorized use of deadly force to defend against the bodily injury that the § 1983 plaintiff had inflicted upon him. . . . *Hainze* and *Sappington* each involved a conviction for aggravated assault under Texas law where the assault was against a defendant in the § 1983 claim for excessive force. Each of those convictions required proof that the § 1983 plaintiff had caused serious bodily injury. By contrast, Ballard's conviction was for assault, by physical menace, on an officer who is

not a defendant in his§ 1983 claim. Ballard's conviction did not require proof that he caused bodily injury, serious or otherwise. Not a single element of Ballard's simple assault conviction would be undermined if Ballard were to prevail in his excessive force claim against Burton or Oktibbeha County. For this reason, unlike the *Hainze* and *Sappington* convictions, Ballard's Mississippi conviction for simple assault does not, as a matter of law, necessarily imply that Burton did not use excessive force as alleged in the instant complaint. . . . A finding that Burton's use of force was unreasonable would imply neither that Ballard did not attempt by physical menace to put Boling in fear of imminent bodily harm, nor that Ballard's assault on Boling was in necessary self defense. Although we have distinguished *Sappington*, our method of analysis remains consistent. . . . Based on the events described in the summary judgment record, we conclude that a judgment in Ballard's favor on his § 1983 claim against Burton and Oktibbeha County could easily coexist with Ballard's conviction for simple assault of Boling, without calling into question any aspect of that conviction."); ***Hainze v. Richards***, 207 F.3d 795, 796, 797 (5th Cir. 2000) (Where plaintiff had been convicted of aggravated assault under Texas law, court held, Aas in *Sappington*, the force used by the deputies to restrain Hainze, up to and including deadly force, cannot be deemed excessive."); ***Sappington v. Bartee***, 195 F.3d 234, 237 (5th Cir. 1999) (§ 1983 suit barred where plaintiff's criminal conviction "required proof that he caused serious bodily injury to [officer]. [Officer] was justified in using force up to and including deadly force to resist the assault and effect an arrest. As a matter of law, therefore, the force allegedly used by [officer] cannot be deemed excessive."); ***Hudson v. Hughes***, 98 F.3d 868, 873 (5th Cir. 1996) ("Because self-defense is a justification defense to the crime of battery of an officer, Hudson's claim that Officers . . . used excessive force while apprehending him, if proved, necessarily would imply the invalidity of his arrest and conviction for battery of an officer.").

See also ***Beets v. County of Los Angeles***, 669 F.3d 1038, 1040, 1041, 1044-48 (9th Cir. 2012) ("We hold that *Heck* bars plaintiffs' suit. Plaintiffs seek to show that Deputy Winter used excessive force, but the jury that convicted GPR's accomplice has already determined that the deputy acted within the scope of his employment and did not use excessive force. Accordingly, a verdict in plaintiffs' favor would tend to undermine Morales' conviction. Moreover, Morales, GPR's accomplice, challenged the propriety of Deputy Winter's actions in her criminal trial, her interests in doing so were in no way inconsistent with plaintiffs' interests, and Morales was convicted by a jury. Under these circumstances, plaintiffs' § 1983 action is barred by *Heck.* . . .Morales' conviction for felony resisting arrest and assault with a deadly weapon on a peace officer were under an aiding and abetting theory. As such, the jury had to have found that Rose committed those crimes. The jury was specifically instructed that it could not find that Rose committed the crimes unless it determined that Officer Winter was in the lawful performance of his duties and did not use excessive force. As such, Morales' conviction necessarily rested on the jury's findings as to the actions of Deputy Winter with respect to Rose. That is, the jury found that Deputy Winter was in the lawful performance of his duties and did not use excessive force. . . .Plaintiffs raise two issues on appeal. First, they argue that *Heck* should be strictly interpreted and may not be applied to § 1983 actions where the plaintiffs have not been convicted or charged with any crimes. Second, they argue even if *Heck* were applicable, it would not bar their civil action. They argue that they

should be allowed to show that Deputy Winter had managed to move to one side of the truck when he shot GPR through a side window, and accordingly Deputy Winter was no longer in danger when he shot, and the shooting occurred subsequent to GPR's criminal activity. We address their arguments in reverse order because our conclusion that *Heck* would otherwise bar this action focuses our consideration of whether the preclusion extends to these plaintiffs who were not criminally prosecuted or convicted. . . . Our reasoning in *Cunningham* is persuasive here. There was no break between GPR's assault with the pickup truck and the police response. Deputy Winter acted during the course of GPR's and Morales' criminal activity and brought that activity to an end. Deputy Winter's actions were 'within the temporal scope of [GPR's and Morales'] crime and [were] part of a single act for which the jury found that[Morales] bears responsibility.'. . There was no separation between GPR's criminal actions and the alleged use of excessive force such as existed in *Smithart* (alleged assault occurred after Smithart got out of the truck) or *City of Hemet* (alleged assault occurred after Smith was detained). Thus, even were it determined that the maroon pickup truck had come to a stop a fraction of a second before Deputy Winter fired, the shots would remain part of the temporal scope of GPR's and Morales' crimes. . . .In sum, the record shows that the jury that convicted Morales determined that Deputy Winter acted within the scope of his duties and did not use excessive force, and that plaintiffs seek to show that the very same act constituted excessive force. Thus, if GPR rather than Morales had been convicted, there is no doubt that this civil action would have to be dismissed pursuant to *Heck.* Similarly, it is clear that Morales' conviction bars her from bringing a § 1983 action based on Deputy Winter's action. . . . The remaining question is whether the *Heck* bar extends to the plaintiffs in this case who were not tried or convicted. . . . Our description of the *Heck* preclusion doctrine in *City of Hemet* references 'a criminal conviction,' not 'the plaintiff's' criminal conviction. . . Our choice of language suggests that the *Heck* preclusion doctrine may apply to civil actions brought by individuals other than the convicted criminal if such application does not otherwise violate any constitutional principles. . . . Plaintiffs argue that they have not had an opportunity to litigate the factual issues underlying their § 1983 action and that Morales' criminal proceedings should not bar them from their day in court. . . .Here, as in *Cunningham,* the first two prongs are satisfied: (1) the issue in Morales' criminal proceeding and in this § 1983 action are identical—whether Deputy Winter used excessive force; and (2) Morales' conviction constitutes a judgment on the merits—Deputy Winter did not use excessive force. However, plaintiffs were not parties to the criminal prosecution of Morales. Accordingly, *Heck* preclusion can only apply if plaintiffs 'had an identity or community of interest with, and adequate representation by, the losing party in the first action,' and under the circumstances 'should reasonably have expected to be bound by the prior adjudication.'. . . We conclude that under the particular facts of this case, plaintiffs should reasonably have expected to be bound by the jury's decision in Morales' criminal proceeding and because a favorable decision in plaintiffs' civil action would undermine her conviction, the civil action is barred by *Heck.* . . .[W]e hold that where more than one person engages in a concerted criminal act during the course of which one of the criminals is killed by the police, then when the propriety of the officer's action is critical to the conviction of a surviving criminal, and the deceased's interests in the issue are in no way inconsistent with the surviving criminal's interest in the issue, the 'community of interest' is such that the deceased and those asserting claims through the deceased may reasonably be bound

by the determination of the issue by a jury in the criminal proceeding."). *But see* ***Eberhardinger v. City of York***, 782 F. App'x 180, ___ n.2 (3d Cir. 2019) ("Officer Smith also argues on appeal that Officer Smith cannot be found to have violated Eberhardinger's constitutional rights under clearly established law because such a conclusion would be inconsistent with Foster having pleaded nolo contendere to, among other offenses, reckless endangerment. To support this position, he cites *Heck v. Humphrey*, which held that 'in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed' or otherwise invalidated. . . But *Heck* concerned the relationship between a prisoner's criminal conviction and his own § 1983 suit, . . . and it has been applied to bar a *third party's* § 1983 suit only where the convict was the third party's accomplice, *see Beets v. County of Los Angeles*, 669 F.3d 1038, 1048 (9th Cir. 2012) (holding that "where more than one person engages in a concerted criminal act during the course of which one of the criminals is killed by the police, then when the propriety of the officer's action is critical to the conviction of a surviving criminal, and the deceased's interests in the issue are in no way inconsistent with the surviving criminal's interest in the issue," the *Heck* doctrine may apply); *see also Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 616 (6th Cir. 2014) ("*Heck* does not apply to third-party § 1983 claims."). That is not the case here, so regardless of whatever relevance Foster's conviction may have at trial, it does not dictate a different result in our review of the District Court's qualified immunity determination."); ***Hayward v. Cleveland Clinic Found.,*** 759 F.3d 601, 616 (6th Cir. 2014) ("*Heck* does not apply to third-party § 1983 claims. In *Heck,* the Supreme Court addressed a situation where 'a state prisoner seeks damages in a § 1983 suit" and a "district court [would have to] consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of *his* conviction or sentence.'. . The Court was concerned that '§ 1983 and the federal habeas corpus statute, 28 U.S.C. § 2254, were "on a collision course."'. . Because such a concern does not extend to the civil rights claims of third parties, the district court erred in applying *Heck* to bar Plaintiffs Annie and Essex Hayward's § 1983 claim."); ***Thomas v. City of Philadelphia***, No. CV 17-4196, 2019 WL 4039575, at *9 (E.D. Pa. Aug. 27, 2019) ("[D]efendants ignore a critical distinction between there being an outstanding criminal conviction of a *plaintiff* versus that of a *third-party witness.* In *Heck,* the Supreme Court explained that 'when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.'. . However, 'if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.'. .The cases cited by the defendants involved a plaintiff's claim being barred by his own conviction, not a witness's testimony being barred by the witness's conviction, and the Court's separate research reveals no cases extending *Heck* in such a way.").

Compare ***Martell v. Cole***, 115 F.4th 1233, 1234-35, 1237-41 (9th Cir. 2024) ("Under *Heck,* a § 1983 action cannot be maintained by a plaintiff who has been convicted of a crime if 'a

judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.'. . A conviction under § 148(a)(1) requires that the criminal defendant resist or obstruct lawful conduct by an officer. *Lemos v. County of Sonoma*, 40 F.4th 1002, 1006 (9th Cir. 2022) (en banc). A subsequent § 1983 action for excessive force is therefore barred by *Heck* if the force that the plaintiff challenges as unlawful is the same force that the plaintiff was convicted of resisting. . . . In this case, Martell engaged in multiple acts of resistance or obstruction that could serve as a factual predicate for his § 148(a)(1) conviction, both before and after the use of force he claims was excessive. His guilty plea did not specify which act was the basis of his conviction. Success in his § 1983 lawsuit therefore would not undermine his guilty verdict because the verdict could be based on any one of his acts of resistance or obstruction. Because '[a]n action under section 1983 is barred if—but only if—success in the action would undermine the [guilty verdict] in a way that "would *necessarily* imply or demonstrate that the plaintiff's earlier conviction was invalid,"' *Heck* does not bar Martell's suit. . . . In *Lemos*, our en banc court rejected the view that *Heck* precludes a plaintiff's suit absent a clear 'temporal or spatial distinction or other separation between the conduct for which [the plaintiff] was convicted ... and the conduct which forms the basis of her Section 1983 claim.'. . To determine whether a § 148(a)(1) conviction bars a subsequent damages claim for excessive force, a court must look to the particular act or acts for which the plaintiff may have been convicted. . . The court cannot conclude generally that the plaintiff's conviction was 'based on the entire incident as a whole,' such that a finding of excessive force at any time during the incident would necessarily conflict with the conviction. . . We held in *Lemos* that *Heck* does not bar a § 1983 action even when the plaintiff alleges the officer used excessive force during one of several resisting or obstructing acts that 'could be the basis for the guilty verdict' if the record does not show that this particular act was the factual predicate for the plaintiff's § 148(a)(1) conviction. . . . Our cases resolve this appeal. Martell's guilty plea under § 148(a)(1) did not specify which act (or acts) of resistance or obstruction was (or were) the basis of his plea. His plea could have been based on any of several acts of resistance or obstruction, either before or after the use of force he challenges. . . .Our en banc decision in *Lemos* did not suggest that its *Heck* analysis depended on the precise amount of time or space between the act of obstruction for which the plaintiff was convicted and the use of force the plaintiff challenged as excessive. . . In all cases involving the application of *Heck* to a § 148(a)(1) conviction, the question is whether the specific act for which the plaintiff was convicted was resistance to the particular use of force the plaintiff alleges was unlawful. If it was not, 'success on the merits' of the plaintiff's § 1983 action 'would not "*necessarily* imply that the plaintiff's conviction was unlawful."'. . As *Lemos* and *Hooper* make clear, this principle holds true regardless of the number of seconds or minutes between the plaintiff's act of resistance or obstruction and the officer's allegedly unlawful use of force. . . . In this case, as in *Hooper* and *Lemos* and in contrast to *Sanders*, the record is silent about which one (or more) of Martell's resisting or obstructing acts was (or were) the factual predicate of his guilty plea. Because of that silence, a finding that the deputies used excessive force when Martell 'was thrown face first down to the ground' would not necessarily imply the invalidity of Martell's conviction. Absent an indication in the record that the factual predicate for his conviction was resistance to or obstruction of the specific use of force he now challenges, Martell's conviction would be sufficiently supported by any of his resisting or obstructing actions before

and after that use of force. . . . In sum, we held in *Lemos* that a § 1983 excessive force suit may proceed after a § 148(a)(1) conviction unless the obstructive act that was the factual basis for the conviction was resistance to the use of force the plaintiff now alleges was unlawful. . . We further held that when the factual predicate of the conviction is unclear from the record and conduct that would be sufficient to support the conviction was not obstruction of or resistance to the allegedly excessive force, success in the plaintiff's § 1983 suit would not necessarily imply the invalidity of the plaintiff's conviction, and the suit would not be barred. . . Our holdings in *Lemos, Hooper,* and other cases require us to reverse the dismissal of Martell's complaint. . . .*Heck* does not bar a § 1983 action following a § 148(a)(1) conviction unless the factual basis for the conviction was resistance to or obstruction of the particular use of force the plaintiff alleges was excessive. When the factual predicate of the conviction is not clear from the record and the conviction could have been based on an act of resistance or obstruction different from the plaintiff's conduct during the allegedly unlawful use of force, a judgment in the plaintiff's favor in the § 1983 action would not 'necessarily imply the invalidity of [the] conviction.'. . Because Martell's conviction is adequately supported by his resisting or obstructing conduct that took place both before and after the deputies' allegedly unlawful use of force, we reverse the judgment of the district court and remand for further proceedings.") *with* ***Martell v. Cole***, 115 F.4th 1233, 1241 (9th Cir. 2024) (Lee, J., dissenting) ("In September 2020, several San Diego Sheriff's Deputies busted through the door of Ronald Martell's apartment after receiving a 911 call about an ongoing domestic violence incident. As the body camera footage shows, the deputies yelled at Martell to put up his hands and get on the ground. Martell did neither, kneeling with his hands by his sides. The deputies immediately twisted Martell's arms behind his back and pushed him to the floor as he instinctively resisted.' This entire exchange lasted seconds. The deputies sat with Martell for several minutes before handcuffing him and escorting him out of the home. Martell pleaded guilty to one violation of California Penal Code § 148(a)(1), stating only that he 'willfully obstructed or delayed a peace officer in the performance of his official duties.' He then sued under 42 U.S.C. § 1983, alleging that the officers used excessive force during this arrest. Given the broad factual basis of his plea, Martell contends that his claim is not barred by *Heck v. Humphrey*, which precludes § 1983 actions that would necessarily require the plaintiff to prove the unlawfulness of his conviction.'. . The majority opinion agrees. To get there, the majority opinion separates Martell's brief scuffle with the deputies into several seconds-long intervals such that his guilty plea can be read to cover only one of those artificially severed events. That holding is just another step in this circuit's slow erosion of the *Heck* bar. We have already said that spatial and temporal distinctions are not dispositive when analyzing convictions under § 148(a)(1). Now, the majority opinion goes even further and slices a fleeting incident into multiple isolated events—even though Martell's entire interaction was a single, inseverable event—to evade the *Heck* bar. I respectfully dissent.")

Compare ***Lemos v. County of Sonoma***, 40 F.4th 1002, 1003-09 (9th Cir. 2022) (en banc) ("[B]ecause the record does not show that Lemos's section 1983 action necessarily rests on the same event as her criminal conviction, success in the former would not necessarily imply the invalidity of the latter. We therefore reverse and remand for further proceedings. . . . The district court granted summary judgment to the defendants. The court reasoned that '[g]iven [Lemos's]

and her cohorts' continuous screaming and provoking,' there was 'no temporal or spatial distinction or other separation between the conduct for which Lemos was convicted, by a jury, and the conduct which forms the basis of her Section 1983 claim.' The court concluded that "Holton's actions ... form[ed] one uninterrupted interaction and the jury's finding that he did not use excessive force would be inconsistent with a Section 1983 claim based on an event from that same encounter.'A divided three-judge panel of this court affirmed. . . We voted to rehear the case en banc. . . .To decide whether success on a section 1983 claim would *necessarily* imply the invalidity of a conviction, we must determine which acts formed the basis for the conviction. When the conviction is based on a guilty plea, we look at the record to see which acts formed the basis for the plea. . . We follow the same approach when the conviction is based on a jury verdict. As several other courts of appeals have recognized, a court must look at the record of the criminal case—including the jury instructions—to determine which facts the jury necessarily found. . . .This case involves a conviction for resisting, delaying, or obstructing a peace officer, in violation of California Penal Code section 148(a)(1). That offense has three elements: '(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.'. . The second element is particularly significant because California courts have held that an officer who uses excessive force is acting unlawfully and therefore is not engaged in the performance of his or her duties. . . For that reason, the jury at Lemos's criminal trial was instructed that '[a] peace officer is not lawfully performing his or her duties if he or she is ... using unreasonable or excessive force.' It follows that *Heck* would bar Lemos from bringing an excessive-force claim under section 1983 if that claim were based on force used during the conduct that was the basis for her section 148(a)(1) conviction. . . In that circumstance, to prevail in the section 1983 action, she would have to prove that Holton used excessive force, thus 'negat[ing] an element of the offense' of which she was convicted. . . But, crucially, the jury was told that it could find Lemos guilty based on any one of four acts she committed during the course of her interaction with Holton: making physical contact with Holton at the door to the truck; placing herself between Holton and Labruzzi; blocking Holton from opening the truck door; and pulling away from Holton when he attempted to grab her. Because the jury returned a general verdict, we do not know which act it thought constituted an offense. Although any one of the four acts could be the basis for the guilty verdict, Lemos's section 1983 action is based on an allegation that Holton used excessive force during only the last one; at oral argument, Lemos expressly stated that she understood that act to refer to her pulling away from Holton just before he tackled her, and she disavowed any claim based on force used by Holton earlier in their encounter. There would be no contradiction in concluding (as the criminal jury may have) that Lemos obstructed Holton during the lawful performance of his duties by, say, blocking him from opening the truck door while also concluding (as Lemos alleges in this action) that Holton used excessive force when he tackled her five minutes later. Thus, if Lemos were to prevail in her civil action, it would not *necessarily* mean that her conviction was invalid. The action is therefore not barred by *Heck.* . . . Although *Beets* did involve a jury verdict, both the criminal prosecution and the section 1983 action involved the same event: Officers fatally shot a man who was driving a truck toward them. . . The passenger in the truck was convicted of aiding and abetting

the driver's assault on the officers, and the parents of the deceased driver brought a section 1983 claim, alleging that the officers used excessive force. . . We held that *Heck* precluded the section 1983 action because success would have necessarily implied the invalidity of the passenger's criminal conviction. . . We explained that 'there are *not* multiple factual bases for [the passenger's] conviction for aiding and abetting in the assault.'. . In other words, the section 1983 action was predicated on the same conduct that the criminal jury had already determined was lawful. . . Although we disapprove of *Beets*'s repetition of the *Smith* dictum, the reasoning of *Beets* does not undermine our holding here. In this case, unlike in *Beets*, the jury was instructed that multiple acts could serve as the predicate for the criminal conviction, and we do not know which the jury chose. Because the district court erred in holding that Lemos's action was barred by *Heck*, we reverse the grant of summary judgment to the defendants.") *with* ***Lemos v. County of Sonoma***, 40 F.4th 1002, 1009-13 (9th Cir. 2022) (en banc) (Callahan, J., joined by Lee, J., dissenting) ("Like a wolf in sheep's clothing, the majority opinion may appear at first blush to simply dispense with the *Heck* preclusion doctrine due to the unique factual scenario presented, but something more troubling lingers beneath the surface. The majority's reasoning presupposes that an uninterrupted interaction with no temporal or spatial break between a § 1983 plaintiff's unlawful conduct and an officer's alleged excessive force can be broken down into distinct isolated events to avoid the application of the *Heck* bar. In this way, the decision creates an escape hatch to *Heck*. . . . Of course, an allegation of excessive force by a police officer is not barred by *Heck* if the alleged act is distinct temporally or spatially from the factual basis for the section 148(a)(1) conviction, because such an allegation would not 'necessarily' imply the invalidity of the conviction. . . But the court must determine whether there is a legitimate analytical way to parse the individual's obstructive acts from the officer's use of force. The majority apparently concludes that the four acts identified in the jury instructions provide all the court needs to make its *Heck* determination. . . . [T]he fact that the jury instructions offered four acts which could form the basis for Lemos's section 148(a)(1) conviction cannot alone be determinative of whether the *Heck* bar applies. Under California law, the question remains whether Lemos's obstructive acts can be separated, temporally or otherwise, from Deputy Holton's alleged excessive force. Here, they cannot. The cases tend to fall into two categories: the first, where the alleged excessive force occurs after the chain of events underlying the section 148(a)(1) conviction . . . , such as in *Hooper v. Cnty. of San Diego*, 629 F.3d 1127, 1134 (9th Cir. 2011) and *Sanford v. Motts*, 258 F.3d 1117, 1118 (9th Cir. 2001) (the *Heck* bar does not apply), and the second, where the alleged excessive force occurs during the chain of events underlying the section 148(a)(1) conviction, such as in *Beets* and *Sanders v. City of Pittsburg*, 14 F.4th 968, 970 (9th Cir. 2021) (the *Heck* bar applies). Thus, if Lemos had been bitten by a police dog after she had been arrested for violating section 148(a)(1), for example, her conviction for resisting an officer would not have barred her § 1983 lawsuit. But the facts underlying Lemos's conviction, including each of the four acts listed in the jury instructions and Deputy Holton's alleged excessive force, all occurred during a single indivisible chain of events before her arrest, and therefore her § 1983 is barred by *Heck*. . . . [T]he majority engages in the 'temporal hair-splitting' cautioned against by courts time and again in search of a distinct break between Lemos's criminal act and Deputy Holton's alleged use of force where none meaningfully exists. . . Because no such break exists, Lemos could only have been

convicted if the jury found that Deputy Holton did not use excessive force throughout the interaction, an element of the conviction which the jury was instructed on. But Lemos can only prevail on her § 1983 claim if she proves that Deputy Holton did use excessive force during that same interaction. Thus, allowing Lemos's § 1983 action to proceed violates the holding of *Heck* and creates conflicting resolutions arising out of a single event. Because the majority opinion 'expand[s] opportunities for collateral attack' on criminal convictions despite clear Supreme Court guidance to the contrary, I respectfully dissent.")

See also ***Hooper v. County of San Diego***, 629 F.3d 1127, 1131-34 (9th Cir. 2011) ("The facts of *Smith* allowed us to differentiate cleanly between two phases of the encounter with the police. In the first phase, when Smith stood on his porch and refused the officers' lawful orders, he violated § 148(a)(1) by 'resist[ing], delay[ing], or obstruct[ing]' the police in the performance of their duties. In the second phase, when the police arrested him, Smith may or may not have violated § 148(a)(1), depending on whether the police acted lawfully in effecting the arrest. . . . Four years after *Smith*, the California Supreme Court held that a conviction under § 148(a)(1) can be valid even if, during a single continuous chain of events, some of the officer's conduct was unlawful. *Yount v. City of Sacramento*, 43 Cal.4th 885 (2008). According to the Court, a conviction under § 148(a)(1) requires only that some lawful police conduct was resisted, delayed, or obstructed during that continuous chain of events. In other words, the California Supreme Court interpreted the elements of § 148(a)(1) differently than did the California Court of Appeal in *Susag*, the decision upon which we relied in *Smith*. . . . The Court's decision in *Yount* does not mean that our holding in *Smith* was wrong. But it does mean that our understanding of § 148(a)(1) was wrong. Section 148(a)(1) does not require that an officer's lawful and unlawful behavior be divisible into two discrete 'phases,' or time periods, as we believed when we decided *Smith*. It is sufficient for a valid conviction under § 148(a)(1) that at some time during a 'continuous transaction' an individual resisted, delayed, or obstructed an officer when the officer was acting lawfully. It does not matter that the officer might also, at some other time during that same 'continuous transaction,' have acted unlawfully. We are, of course, bound by the California Supreme Court's interpretation of California law. . .We therefore apply *Heck* to § 148(a)(1) as the California Supreme Court interpreted it in *Yount*. . . The question before us is the basic *Heck* question − whether success in Hooper's § 1983 claim that excessive force was used during her arrest 'would "necessarily imply" or "demonstrate" the invalidity' of her conviction under § 148(a)(1). . . Given California law, as clarified by *Yount*, we hold that it would not. The chain of events constituting Hooper's arrest was, in the words of the Court in *Yount*, 'one continuous transaction.' A holding in Hooper's § 1983 case that the use of the dog was excessive force would not 'negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of [Hooper's] attempt to resist it [when she jerked her hand away from Deputy Terrell].'. . . In so holding, we agree with many of our sister circuits in similar cases. . . . To the extent the state law under which a conviction is obtained differs, the answer to the *Heck* question could also differ. Nonetheless, the decisions of our sister circuits are instructive, for many state statutes that criminalize resisting lawful arrest and other lawful police conduct are very similar. It is thus not surprising that most of the circuit courts that have addressed the *Heck* bar in cases involving such statutes should have given the same answer, and that we, in

turn, agree with that answer. In sum, we conclude that a conviction under California Penal Code § 148(a)(1) does not bar a § 1983 claim for excessive force under *Heck* when the conviction and the § 1983 claim are based on different actions during 'one continuous transaction.' In the case now before us, we hold that Hooper's § 1983 excessive force claim is not *Heck*-barred based on her conviction under § 148(a)(1)."); ***VanGilder v. Baker,*** 435 F.3d 689, 692 (7th Cir. 2006) ("Here, VanGilder was originally charged with felony battery on a police officer. After plea bargaining, the charge was reduced, and VanGilder was convicted instead of resisting a law enforcement officer, a misdemeanor. Thus, whether this suit is barred by *Heck* hinges on whether an action against Baker for excessive use of force necessarily implies the invalidity of VanGilder's conviction for resisting. The answer is no. Exactly what happened during the blow-by-blow in the St. Elizabeth's emergency room, and thus whether VanGilder is entitled to damages, is a question to be decided at trial. But as a threshold matter, it is clear that a judgment for VanGilder, should he prevail, would not create 'two conflicting resolutions arising out of the same or identical transaction.' . . VanGilder does not collaterally attack his conviction, deny that he resisted Baker's order to comply with the blood draw, or challenge the factual basis presented at his change of plea hearing. Rather, VanGilder claims that he suffered unnecessary injuries because Baker's response to his resistance − a beating to the face that resulted in bruises and broken bones − was not, under the law governing excessive use of force, objectively reasonable. . . Were we to uphold the application of *Heck* in this case, it would imply that once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages. Put another way, police subduing a suspect could use as much force as they wanted − and be shielded from accountability under civil law − as long as the prosecutor could get the plaintiff convicted on a charge of resisting. This would open the door to undesirable behavior and gut a large share of the protections provided by § 1983."); ***Smith v. City of Hemet***, 394 F.3d 689, 696 (9th Cir. 2005) (en banc) ("A conviction based on conduct that occurred before the officers commence the process of arresting the defendant is not 'necessarily' rendered invalid by the officers' subsequent use of excessive force in making the arrest."); ***Washington v. Summerville***, 127 F.3d 552, 556 (7th Cir. 1997) ("Washington's success on either his unlawful arrest or excessive force claim would not have necessarily implied the invalidity of a potential conviction on the murder charge against him."); ***Smithart v. Towery***, 79 F.3d 951, 952 (7th Cir. 1996) ("Because a successful section 1983 action for excessive force would not necessarily imply the invalidity of Smithart's arrest or conviction, *Heck* does not preclude Smithart's excessive force claim.").

See also ***Peterson v. Johnson***, 714 F.3d 905, 911-18 (6th Cir. 2013) ("[W]e are squarely presented with the question of first impression regarding what kind of preclusive effect we must give to the hearing officer's finding that Peterson grabbed Johnson's hand and not vice versa. The answer to that question turns first on federal law and then on Michigan law. . .The federal courts in this Circuit have occasionally given preclusive effect to factfinding from Michigan prison hearings. . . . Enter the Supreme Court's opinion in *University of Tennessee v. Elliott*, which explained that 'when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts

must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.'. . *Elliott* addressed a state agency determination that had not been appealed to state court, and found that the agency's factual determinations were binding in the plaintiff's collateral § 1983 action. . . Thus, while *Elliott* obviously does not speak directly to Michigan hearing-officer findings, it does establish four criteria for, in the context of a § 1983 case, according preclusive effect to a state administrative agency's unreviewed factual determination. We take each one in turn. [Court finds all four criteria satisfied] Neither the Michigan Supreme Court nor the Michigan Court of Appeals has yet determined whether preclusive effect should be given to a major misconduct hearing's factfinding. Thus, we will have to be guided by their standard rules on agency issue preclusion. [Court concludes that "Michigan courts would grant preclusive effect to the hearing officer's finding that Peterson grabbed Johnson's hand."] Sometimes explaining what something is *not* goes a long way toward showing what it is. And because this is an issue of first impression, we wish to make perfectly clear that our preclusion analysis is distinct from two other parallel lines of law. First, we are not suggesting that the hearing officer's *legal* conclusion that Peterson committed assault and battery has any bearing on whether Johnson treated Peterson with excessive force. It does not. As this Court explained in *Lockett v. Suardini,* 526 F.3d 866, 873 (6th Cir.2008), an assault-and-battery conviction is analytically distinct from an excessive force claim; a prisoner can commit the former and simultaneously be the victim of a guard's excessive force. Rather, what we hold is that the hearing officer's *factual* finding that Peterson was the one who grabbed Johnson's hand precludes a contrary finding in federal court. That being true, the question then becomes whether, on the facts of this case, a reasonable jury could find that Johnson's brief struggle to free his hand and then return Peterson to his cell was a malicious and sadistic use of excessive force. . . We find that it could not and accordingly affirm the district court. Further, our holding includes only *factual* issues decided by a state agency. Both *Elliott* and the state cases on which we rely were explicit that the preclusive effect they recognized concerned purely factual determinations, and that limitation makes good sense. Had the hearing officer purported to make a *legal* conclusion regarding Peterson's federal constitutional rights, our analysis would necessarily be different and we could not likely be so deferential. . .Second, we are not relying on the rule from *Heck v. Humphrey,* 512 U.S. 477 (1994), and *Edwards v. Balisok,* 520 U.S. 641 (1997), that rejects a prisoner's § 1983 claim where vindicating it would necessarily imply the invalidity of a prison agency's disciplinary determination. That rule applies only where a prisoner's § 1983 challenge 'threatens ... his conviction or the duration of his sentence.' *Muhammad v. Close,* 540 U.S. 749, 751 (2004) (per curiam). Peterson's challenge threatens neither. He does not seek relief for any effect that the assault-and-battery conviction may have had on good-time credits nor does anything in the record show that good-time credits were implicated, and there is no indication that his underlying murder conviction or sentence is in any way affected by his claim. Instead, Peterson seeks solely financial damages for Johnson's alleged excessive force. Thus, the *Heck/Edwards* rule has no relevance here.").

See also ***Westbrook v. City of Cincinnati***, No. 1:21-CV-476, 2025 WL 437211, at *4–6 (S.D. Ohio Feb. 7, 2025) ("Here, Westbrook asserts a § 1983 claim based on the Officers' alleged use of excessive force. Helpfully, the Sixth Circuit has specifically identified two scenarios in

which *Heck* may bar a § 1983 excessive force claim. . . 'The first is when the criminal provision makes the lack of excessive force an element of the crime.'. . 'The second is when excessive force is an affirmative defense to the crime[.]'. .That is because, in both situations, 'the § 1983 suit would seek a determination of a fact that, if true, would have precluded the conviction.'. . Beyond merely laying out the applicable framework, *Hayward* also provides helpful instruction on how that excessive force framework plays out in the context of Ohio's resisting-arrest statute, Ohio Rev. Code § 2921.33—the statute underlying one of Westbrook's convictions here. In that setting, *Hayward* adopts a bright-line rule: *Heck* bars § 1983 claims resting on allegations of pre-arrest excessive force, but not those resting on post-arrest excessive force. . . In explaining the basis for that rule, *Hayward* acknowledged some confusion in Ohio law as to whether the lack of excessive force is actually an element of the crime of resisting arrest. . . But whatever tension may exist on that front, the court noted it was beyond dispute that the presence of excessive force would constitute an affirmative defense. . . Thus, one way or the other, 'a § 1983 claim of [pre-arrest] excessive force would necessarily imply the invalidity of an underlying conviction for resisting arrest." *Id.* And that, in turn, means *Heck* bars pre-arrest excessive force claims by plaintiffs convicted of resisting arrest. By contrast, *Heck* does not 'bar § 1983 suits alleging *post-arrest* excessive force.'. . That's because 'excessive force occurring after' a plaintiff's resistance and arrest does 'not necessarily imply the invalidity of the underlying conviction for resisting arrest.'. . So to discern whether *Heck* bars a plaintiff's § 1983 excessive force claim 'a court must carefully examine the facts and the temporal sequence of the underlying offense and the alleged unconstitutional conduct' to determine when the allegedly unlawful force was used in relation to when the officers accomplished the arrest. . . In other words, whatever *other* factual disputes may exist here, only one set of facts matters for resolving the *Heck* question: Whether the Officers allegedly used excessive force *before* they arrested Westbrook, or *after*. . . . Even viewing the facts in Westbrook's favor (as the Court must at summary judgment), the record reveals that Westbrook's excessive force claim challenges exclusively pre-arrest conduct. . . . All told, because the state court found Westbrook guilty of resisting arrest, and because Westbrook bases his excessive force claim only on the Officers' pre-arrest conduct, *Heck* prevents this Court from considering his § 1983 claim. The Court thus **GRANTS** the Officers' motion for summary judgment and dismisses this action [without prejudice]."); ***Anderson v. La Penna***, No. 18 C 6159, 2019 WL 1239667, at *3–4 (N.D. Ill. Mar. 18, 2019) ("On August 28, 2018, plaintiff pled guilty to misdemeanor resisting arrest and was subsequently sentenced to 364 days in the Cook County Department of Corrections. In exchange for his guilty plea on the misdemeanor charge, the felony charges were dismissed *nolle prosequi*. Plaintiff's unlawful detention claim alleges that there was no probable cause for the felony charges of armed habitual offender, aggravated unlawful use of a weapon, aggravated battery to a police officer, and felony resisting arrest. Thus, to avoid his claim being barred by *Heck*, plaintiff will need to prove there was no probable cause for the felony charges without impugning his misdemeanor resisting arrest conviction. The parties agree that the only difference between felony resisting arrest and misdemeanor resisting arrest is that the felony charge requires that the defendant proximately caused an injury to the officer. Defendants argue that this alone shows that a finding that there was no probable cause for the felony charge would impugn plaintiff's misdemeanor conviction. Plaintiff's complaint, however, alleges that the police

officer defendants falsified claims of injuries, and that, in fact, plaintiff did not cause any injuries to the officers. At this stage, there is nothing to suggest that a finding that there was no probable cause for the felony resisting arrest charge would necessarily impugn plaintiff's misdemeanor conviction. Nor is there anything to suggest that a finding that there was no probable cause for the other felony charges would necessarily impugn plaintiff's conviction. As currently drafted, however, plaintiff's complaint is inconsistent with his conviction. '[I]f [the plaintiff] makes allegations that are inconsistent with the conviction's having been valid, *Heck* kicks in and bars his civil suit.'. . .In the instant case, even drawing all reasonable inferences in plaintiff's favor, plaintiff's description of the events in his complaint includes language that implies his conviction is invalid. For example, the complaint states '[d]espite his cooperation, Defendant Officers Swoboda and Giovenco ordered Plaintiff William Anderson to place his hands on the squad car and remain in that position.' The complaint goes on to allege '[a]fter standing with his hands on the squad car for a period of time, Plaintiff William Anderson repeatedly expressed his desire to leave, stating that he had done nothing wrong. As Plaintiff William Anderson turned and told this to Defendant Officers Swoboda and La Penna, Defendant Officers Swoboda and La Penna tackled William Anderson to the ground.' Plaintiff's misdemeanor conviction required a showing that he 'knowingly resist[ed] or obstruct[ed] the performance by one known to the person to be a peace officer...of any authorized act within his or her official capacity.'. . Plaintiff's description of the events is inconsistent with a showing of these elements. Although plaintiff could have drafted his complaint to avoid this inconsistency, as currently drafted, his claims are barred by *Heck*. The court will allow plaintiff to file an amended complaint to cure this defect."); ***Garrett v. Needleman***, No. 16 CV 1062, 2017 WL 2973481, at *4–5 (N.D. Ill. July 12, 2017) ("A conviction for assault or battery of a peace officer does not necessarily bar a § 1983 claim of excessive force stemming from the same incident, 'so long as the § 1983 case does not undermine the validity of the criminal conviction.'. . 'A contention that a guard struck back after being hit is compatible with *Heck*. Otherwise guards (and for that matter any public employee) could maul anyone who strikes them, without risk of civil liability as long as the private party is punished by criminal prosecution or prison discipline for the initial wrong.'. . 'An argument along the lines of "The guards violated my rights by injuring me, whether or not I struck first" does not present the sort of inconsistency' that warrants application of the *Heck* doctrine. . . . In *Hardrick,* the plaintiff was allowed to proceed on his § 1983 claim that police officers used excessive force after the plaintiff had been subdued and was in custody. . . Likewise, in *Brengettcy v. Horton,* after having been convicted of battery of a peace officer, the plaintiff filed a civil rights action claiming excessive force alleging that the officer used unnecessary and unreasonable force against him after he struck the officer. . . Success on such a claim in that case 'd[id] not undermine [the plaintiff]'s conviction or punishment for his own acts of aggravated battery.'. . Where the facts alleged by a § 1983 plaintiff contradict or necessarily imply the invalidity of his conviction, however, *Heck* bars the claim. *Moore v. Mahone*, 652 F.3d 722, 723-24 (7th Cir. 2011). In *Moore*, a prisoner with a battery conviction could not proceed with his § 1983 claim that a correctional officer used excessive force against him; the prisoner asserted that he had committed no battery on the guard to justify any use of force in response. . . That plaintiff could have argued that officers overreacted to his battery, which might not necessarily have implied the invalidity of his battery conviction. But because the

plaintiff asserted and persisted with his claim that he had committed no battery at all to justify any use of force, his claim was barred by *Heck*. . . It is possible for a plaintiff to remain 'agnostic' about the facts supporting his criminal conviction. . . But 'a plaintiff is master of his claim and can, if he insists, stick to a position that forecloses relief.'. . In this case, plaintiff insists that he was 'willingly compl[ying]' with defendant Needleman's orders when the officer '[s]uddenly and without warning ... pushed [plaintiff] to the ground' and then struck him in the face several times.'. . Regardless of whether plaintiff expressly challenges his convictions, he cannot disavow their factual underpinning without calling into question their validity. . . Plaintiff's position that he was in full compliance with defendants' directives, and that they attacked him without any justification for doing so, requires dismissal of his excessive force claim pursuant to *Heck*. This case presents a scenario very similar to *Tolliver v. City of Chicago*. Therein, the plaintiff, in pleading guilty to aggravated battery to a peace officer, stipulated that the evidence would establish that he had driven his vehicle towards an officer who, in fear for his safety, fired his service weapon at the vehicle. . . In the plaintiff's subsequent civil rights action, he maintained that he was paralyzed except for his 'eyeballs' at the time, and was therefore unable to intentionally drive the car, which merely rolled in the officer's general direction. . . The Court of Appeals affirmed summary judgment in favor of the officer, finding that the plaintiff's version of events was *Heck*-barred for alleging facts inconsistent with his conviction for aggravated battery of a peace officer. . . The Court of Appeals found that 'if the incident unfolded as Tolliver alleges in his civil suit, then he could not have been guilty of aggravated battery of a peace officer because the officer shot him without provocation and was injured as a result of involuntary and unintentional actions by a paralyzed Tolliver.'. . Defendants' unrefuted evidence reflects that plaintiff pleaded guilty to two counts of aggravated battery to a peace officer and one count of aggravated unlawful use of a weapon. As part of the plea colloquy, plaintiff stipulated that he had exited the vehicle, made a quick movement, and pulled away when Needleman attempted to perform a protective pat down. He further conceded that he had scratched Needleman's neck and bitten Peraino on his wrist. Additionally, he admitted that he had drawn a loaded semi-automatic handgun from his waistband. Plaintiff does not contend that defendants resorted to excessive force after he pointed a gun at them or otherwise attempted to harm them; he does not argue that the officers overreacted to his aggressive actions; and he does not suggest that they engaged in force after he was already restrained. Instead, he maintains that the officers took him to the ground and assaulted him without any reason for doing so. Plaintiff's account contradicts the admissions he made at his plea hearing. If plaintiff's current version of the incident is true, these facts would necessarily imply that both of his convictions are invalid. . . Under the facts presented, the *Heck* doctrine bars plaintiff's excessive force claim. A finding that defendants resorted to force for no reason would necessarily impugn plaintiff's underlying convictions."); ***Barbosa v. Conlon***, 962 F.Supp.2d 316, 330, (D. Mass. 2013) ("While the First Circuit has not addressed the issue, this court will assume, without deciding, that an admission to sufficient facts and a continuance without a finding 'constitutes a conviction for the purposes of the *Heck* limitation on subsequent § 1983 actions.'. . Nevertheless, there is nothing in the plaintiffs' claims for excessive force that conflicts with or challenges the criminal judgments against the plaintiffs.While the plaintiffs' conduct may be a factor in assessing the defendants' response, the fact that the plaintiffs may have engaged in unruly conduct does not give the police *carte blanche*

to exert unreasonable force against them. The police may still be liable for use of excessive force. . . . [I]n the instant case the plaintiffs' admissions are not *per se* inconsistent with their claims that the police used force that was unreasonable under the particular circumstances confronting the police at the time of the arrests. Since the plaintiffs' action, 'even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff[s],' their 'action should be allowed to proceed[.]'. . Consequently, the defendants' motion for summary judgment on the plaintiffs' excessive force claim will be denied."); ***Russo v. DiMilia***, 894 F.Supp.2d 391, 406, 407 (S.D.N.Y. 2012) ("'It is well established that an excessive force claim does not usually bear the requisite relationship under *Heck* to mandate its dismissal.'. . As the 'police might well use excessive force in effecting a perfectly lawful arrest[,] ... a claim of excessive force in making an arrest does not require overturning the plaintiff's conviction even though the conviction was based in part on a determination that the arrest itself was lawful.'. . Here, the excessive force claim does not bear the 'requisite relationship' to Plaintiff's conviction for menacing in the third degree. The jury was instructed that it should convict Plaintiff of menacing DiMilia in the third degree if it found: (1) that Plaintiff 'by physical menace placed or attempted to place John DiMilia in fear of death or imminent serious physical injury or imminent physical injury'; and (2) that Plaintiff 'did so intentionally.'. . . '[A]n officer's decision to use deadly force is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'. . Because the jury did not specify what exactly Plaintiff did that menaced DiMilia, the Court cannot rule out the possibility that the jury found that Plaintiff placed DiMilia in fear of 'imminent physical injury.' If this is the case, Defendants' use of force could be found excessive without invalidating Plaintiff's conviction for menacing, as the use of deadly force to respond to a threat of 'imminent physical injury,' as opposed to 'death or serious physical injury,' could be found excessive. For this reason, a reasonable jury in this case could find that the shooting of Plaintiff by Algarin and Guedes was an excessive use of force, despite Plaintiff's conviction for menacing DiMilia."); ***Sekerke v. Kemp***, No. 11cv2688 BTM (JMA), 2013 WL 950706, *5, *6 (S.D. Cal. Mar. 12, 2013) ("In several cases, the Ninth Circuit has applied *Heck*'s favorable termination requirement to consider, and sometimes preclude, excessive force claims brought pursuant to 42 U.S.C. § 1983. For example, in *Cunningham,* the Ninth Circuit found § 1983 excessive force claims filed by a prisoner who was convicted of felony murder and resisting arrest were barred by *Heck* because his underlying conviction required proof of an 'intentional provocative act' which was defined as 'not in self defense.'. . A finding that police had used unreasonable force while effecting the plaintiff's arrest, the Court held, would 'call into question' the validity of factual disputes which had necessarily already been resolved in the criminal action against him. . . However, in *Smith v. City of Hemet,* 394 F.3d 689 (9th Cir.2005), the Ninth Circuit considered whether excessive force allegations of a prisoner who pled guilty to resisting arrest pursuant to Cal. Penal Code § 148(a)(1) were also barred by *Heck* and found that 'Smith's § 1983 action [wa]s not barred ... because the excessive force may have been employed against him subsequent to the time he engaged in the conduct that constituted the basis for his conviction.'. . Under such circumstances, the Ninth Circuit held Smith's § 1983 action 'neither demonstrate[d] nor necessarily implie[d] the invalidity of his conviction.'. . *see also Sanford v. Motts,* 258 F.3d 1117,

1120 (9th Cir.2001) ("[I]f [the officer] used excessive force subsequent to the time Sanford interfered with [the officer's] duty, success in her section 1983 claim will not invalidate her conviction. *Heck* is no bar."); *cf. Hooper v. County of San Diego,* 629 F.3d 1127, 1134 (9th Cir.2011) (holding that a conviction for resisting arrest under Cal.Penal Code § 148(a) (1) does not 'bar a § 1983 claim for excessive force under *Heck* [if] the conviction and the § 1983 claim are based on different actions during "one continuous transaction."'). Here, Defendants have not shown that Plaintiff's excessive [force] claims against them are necessarily inconsistent with his adjudication of guilt for battery on a peace officer. Thus, this Court cannot say that Plaintiff's excessive force claims 'necessarily imply the invalidity' of his battery conviction under Cal.Code Regs., tit. 15 § 3005(d)(1). . . The factual context in which the force was used is disputed. Plaintiff's Complaint and its exhibits contain allegations by both him and a fellow inmate witness that he was nonresistant when Kemp and Andersen entered the office and used force against him. . . Plaintiff's own exhibits also contain allegations by Defendants Andersen, Kemp, and Crespo which contradict Plaintiff's version of events. . . Thus, while Defendant Savala, the hearing officer presiding over Plaintiff's CDC 115 hearing, considered this evidence and found it 'substantiated' a charge of assault on a peace officer, . . . Defendants Kemp, Andersen and Crespo may still be found liable if, as Plaintiff alleges, they punched, kicked, and beat him with a baton while he lie on the floor 'on [his] stomach with [his] hands behind [his] back.'. . .For these reasons, the Court DENIES Defendants' Motion to Dismiss Plaintiff's excessive force claims on grounds that they are barred by *Heck.*"); ***Michaels v. City of Vermillion***, 539 F.Supp.2d 975, 992-94 (N.D. Ohio 2008) ("The *Swiecick*i court recognized the particularly close relationship between the offense 'resisting arrest' and the use of force by the police in accomplishing an arrest. While *Heck* bars excessive force claims that imply the invalidity of a resisting arrest conviction under Ohio law, . . . the use of force that gives rise to an excessive force claim could potentially occur after a lawful arrest was accomplished. Under these circumstances, the excessive force claims do not imply the invalidity of the resisting arrest conviction. The Sixth Circuit thus expressly limited the applicability of *Heck* based on the timing of the alleged excessive force. . . *Heck* only bars § 1983 claims when the force at issue is allegedly used ***prior to, or in conjunction with***, the suspect's resistance. . . When the alleged excessive force is used ***after*** the suspect ceases resisting arrest, the *Heck* rule does not apply. . . . . Taking the facts as set forth by the Plaintiffs, Officer Grassnig allegedly tased Michaels after the arrest had been effectuated, after Michaels had ceased resisting, and while Michaels was fully inside the squad car. Although this is a close question given that the events at issue occurred in quick succession, the Court finds that the Plaintiffs have raised a material issue of fact with respect to whether the tasing incident to Michaels' lawful arrest is distinct from the gratuitous tasing the Plaintiffs assert as the basis of their excessive force claims. This case thus falls into the narrow category described by the dicta in *Swiecicki*: Because Michaels has alleged that the police tased him gratuitously after he resisted arrest (and after he had ceased resisting arrest), Swiecicki does not require the Court to apply the *Heck*-bar."); ***Bramlett v. Buell,*** No. Civ.A.04-518, 2004 WL 2988486, at *3, *4 (E.D. La. Dec. 9, 2004) (Distinguishing *Hainze*, *Sappington*, and *Hudson* as cases in which 'the force used by the officer occurred simultaneously with the force exhibited by the plaintiff.' Here, Aif the jury were to conclude that the officers' decision to shoot Bramlett was excessive in light of their asserted goal of protecting the bystanders,

that would do nothing to undermine the fact that seconds earlier Bramlett had committed an aggravated battery upon Officer Major.").

C. *Heck* Does Not Apply to False Arrest Claims That Might Impugn an Anticipated Criminal Conviction

Prior to the Supreme Court's decision in ***Wallace v. Kato***, 127 S. Ct. 1091(2007), a number of circuits applied *Heck* to claims that, if successful, would necessarily imply the invalidity of an anticipated conviction on a pending criminal charge. *See, e.g.,* ***Smith v. Holtz,*** 87 F.3d 108, 113 (3d Cir. 1996). *See also* ***Harvey v. Waldron***, 210 F.3d 1008, 1014 (9th Cir. 2000) ("We agree with the Second, Third, Sixth, Seventh, Tenth and Eleventh Circuits and hold that *Heck* applies to pending criminal charges, and that a claim, that if successful would necessarily imply the invalidity of a conviction in a pending criminal prosecution, does not accrue so long as the potential for a conviction in the pending criminal prosecution continues to exist."); ***Beck v. City of Muskogee Police Dep't***, 195 F.3d 553, 557 (10th Cir. 1999) ("*Heck* precludes § 1983 claims relating to pending charges when a judgment in favor of the plaintiff would necessarily imply the invalidity of any conviction or sentence that might result from prosecution of the pending charges. Such claims arise at the time the charges are dismissed."). *Accord* ***Cummings v. City of Akron***, 418 F.3d 676 (6th Cir. 2005); ***Shamaeizadah v. Cunigan***, 182 F.3d 391, 397-99 (6th Cir. 1999); ***Covington v. City of New York***, 171 F.3d 117, 124 (2d Cir. 1999); *But see* ***Brown v. Taylor***, No. 04-51280, 2005 WL 1691376, at *1 (5th Cir. July 19, 2005) (unpublished) ("To the extent that Brown's allegations concerned pending criminal charges, however, the district court's dismissal of his civil-rights complaint under *Heck* was erroneous. Insofar as it remains unclear whether Brown has been tried or convicted on those charges, the district court should have stayed the instant action until the pending criminal case against Brown has run its course. [citing *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir.1995)].").

Wallace now makes clear that the *Heck* doctrine does not bar the filing of *false arrest* claims where there is no outstanding criminal conviction but only an "anticipated future conviction." The Court explains:

> [T]he *Heck* rule for deferred accrual is called into play only when there exists 'a conviction or sentence that has *not* been ... invalidated,' that is to say, an 'outstanding criminal judgment.' It delays what would otherwise be the accrual date of a tort action until the setting aside *of an extant conviction* which success in that tort action would impugn. . . . What petitioner seeks, in other words, is the adoption of a principle that goes well beyond *Heck:* that an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside. The impracticality of such a rule should be obvious. In an action for false arrest it would require the plaintiff (and if he brings suit promptly, the court) to speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict,

> . . . all this at a time when it can hardly be known what evidence the prosecution has in its possession.

Wallace, 127 S. Ct. at 1098.

Post-*Wallace* Cases:

Haas v. Noordeloos, No. 19-3473, 2020 WL 591565, at *1 (7th Cir. Feb. 6, 2020) (not reported ("[T]o the extent the district court implied that Haas's claims are barred by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), we conclude that such a holding is premature. *Wallace v. Kato*, 549 U.S. 384, 393–94 (2007) makes clear that an anticipatory *Heck* bar is not a valid ground for dismissal. Because this case was resolved by the district court at such an early stage, it is difficult to assess precisely what legal theories the pro se plaintiff intends to pursue. To the extent he wishes to collaterally attack his pending criminal prosecution, the appropriate action here is 'to stay the civil action until the criminal case or the likelihood of a criminal case is ended.'. . On remand, the district court should evaluate at an appropriate time what claims Haas intends to pursue and whether they implicate or are ancillary to his pending criminal case. This may also require consideration at some point of the issues of potential claim and issue preclusion, but we are unable to sort those out at this stage. Once the claims are clarified, the civil defendants in this case should be served, and the district court should consider the possibility of a stay pursuant to *Wallace*.")

Mills v. City of Covina, 921 F.3d 1161, 1166 n.1 (9th Cir. 2019) ("Prior to *Wallace*, the rule in this circuit was that a § 1983 action like this one 'alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned.' *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000). District courts have expressed confusion over whether this deferred accrual rule survived the Supreme Court's decision in *Wallace*. . . The deferred accrual rule we announced in *Harvey* for Fourth Amendment claims was based on our more general holding 'that *Heck* applies to pending criminal charges, and that a claim, that if successful would necessarily imply the invalidity of a conviction in a pending criminal prosecution, does not accrue so long as the potential for a conviction in the pending criminal prosecution continues to exist.'. . That general holding is 'clearly irreconcilable' with *Wallace*'s holding that 'the *Heck* rule for deferred accrual is called into play only when there exists a conviction or sentence that has *not* been ... invalidated.'. .Thus, *Harvey's* deferred accrual rule has been effectively overruled' and is no longer good law.")

Jordan v. Blount County, 885 F.3d 413, 415-16 (6th Cir. 2018) ("The question here is whether, as the district court held, Jordan's claim accrued when his conviction was vacated, or whether instead it accrued upon his later acquittal. . . . The closest common-law analogy to a *Brady* claim is one for malicious prosecution, because that claim, unlike one for false arrest, 'permits damages for confinement imposed pursuant to legal process.'. . One element of a malicious-prosecution claim 'is termination of the prior criminal proceeding in favor of the accused.'. . A *Brady* claim

under § 1983 cannot accrue, therefore, until the criminal proceeding so terminates. Thus, the more specific question here is whether Jordan's 'criminal proceeding' terminated in 2011, when the state court of appeals vacated his conviction and remanded for further proceedings in the trial court. Our decision in *King v. Harwood*, 852 F.3d 568 (6th Cir. 2017), makes clear that the answer is no. . . .The defendants argue that, per our decision in *D'Ambrosio v. Marino*, 747 F.3d 378, 384 (6th Cir. 2014), Jordan's § 1983 claim accrued as soon as his conviction was vacated. But that reading elides the difference between the vacatur in that case and in this one. There, a federal district court vacated D'Ambrosio's conviction by means of an unconditional writ of habeas corpus, which by its terms barred the state from retrying him. . .Thus, the vacatur itself terminated the state criminal proceeding, and D'Ambrosio's claim accrued once that vacatur 'became final[.]'. . For that reason our comments about the import of any 'anticipated future conviction[,]'. . . were merely dicta. Jordan's claim therefore accrued at the same point D'Ambrosio's did: when his criminal proceeding ended. The district court's judgment is reversed, and the case remanded for further proceedings consistent with this opinion.")

D'Ambrosio v. Marino, 747 F.3d 378, 385, 386 (6th Cir. 2014) ("We see no reason not to apply *Wallace's* pretrial principles to the retrial context, as D'Ambrosio's position requires the same 'speculat[ion] about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict' that was fatal to the petitioner's position in *Wallace.* . . Contrary to D'Ambrosio's argument, the possibility that his § 1983 claims 'might impugn an anticipated future conviction d[oes] not trigger the *Heck* rule for deferred accrual.'. . By a similar token, though, defendants improperly ignore the requirement that § 1983 claims like D'Ambrosio's, which imply the invalidity of a prior conviction, accrue only when the conviction 'is reversed or expunged.'. . .Application of this rule to D'Ambrosio's case is straightforward. Until the vacatur of D'Ambrosio's state conviction became final, *Heck* barred his § 1983 claims, which clearly implied the invalidity of his conviction. . . Crucially, a panel of this court held that D'Ambrosio's state conviction had not been vacated before the grant of the unconditional writ, which occurred—at earliest—in 2010. . . His § 1983 suit was filed in 2011. Because D'Ambrosio's civil rights claims did not accrue until his state conviction was vacated and the *Heck* bar was lifted, the two-year statute of limitations does not bar his current claims.")

Garza v. Burnett, 672 F.3d 1217, 1218 (10th Cir. 2012) ("Prior to 2007, this court applied the *Heck* bar to both extant and anticipated convictions. *See Beck v. City of Muskogee Police Dep't,* 195 F.3d 553, 557 (10th Cir.1999). However, the Supreme Court held in 2007 that *Heck's* bar and its principle of deferred accrual do not apply to anticipated convictions. *Wallace v. Kato,* 549 U.S. 384, 388 (2007). These shifting authorities have placed appellant Gerardo Thomas Garza in an unusual position. Garza filed a civil-rights complaint just days before the Supreme Court handed down *Wallace.* He contends that under pre- *Wallace* Tenth Circuit precedent, his complaint was timely when it was filed. But Garza concedes that his complaint is now untimely in light of *Wallace.* He argues that this intervening change in the legal landscape entitles him to equitable tolling under Utah law, and moves to certify the equitable tolling question to the Utah Supreme Court. . . . Garza's complaint was timely under Tenth Circuit precedent at the time of filing, but

was rendered untimely by *Wallace*. Accordingly, the equitable tolling issue is dispositive of this appeal. Because it is unclear whether Utah would toll the statute of limitations based on an intervening change in controlling circuit precedent, we grant Garza's request to certify this issue to the Utah Supreme Court.") [*See* ***Garza v. Burnett***, 547 F. App'x 908, 910 (10th Cir. 2013) (Pursuant to the Utah Supreme Court's response to the certified question, Garza is entitled to equitable tolling and the judgment of the United States District Court for the District of Utah is hereby **REVERSED.** The case is **REMANDED** for further proceedings consistent with this order and judgment and the newly stated Utah law.")]

Arroyo v. Starks, 589 F.3d 1091, 1095 (10th Cir. 2009) ("Courts disagree as to whether the *Heck* bar applies to pre-trial programs similar to diversion agreements. *Compare, e.g., S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633, 639 (6th Cir.2008) (holding *Heck* inapplicable to pre-trial diversion agreements); and *Butts v. City of Bowling Green,* 374 F.Supp.2d 532, 537 (W.D.Ky.2005) (same), *with Gilles v. Davis,* 427 F.3d 197, 211-12 (3d Cir.2005) (holding that § 1983 claims of a plaintiff who had participated in pre-trial probationary programs were barred by *Heck*). In our judgment, holding that the *Heck* bar applies to pre-trial diversions misses the mark. The Supreme Court in *Wallace* made clear that the *Heck* bar comes into play only when there is an actual conviction, not an anticipated one.").

Zarro v. Spitzer, 274 F. App'x 31, 2008 WL 1790431, at *3 (2d Cir. Apr. 18, 2008) ("The State, in its *amicus* brief, suggests that *Heck* bars any claims relating to the July 2003 charges because those charges have not yet been resolved in Plaintiff's favor. . . While the State may be correct in suggesting that Plaintiff's Complaint fails to state a claim for malicious prosecution based on the July 2003 charges because those charges have not been resolved in Plaintiff's favor, . . . *Heck* itself is inapplicable to those charges, as there is no extant conviction that a judgment in Plaintiff's favor could impugn [*citing Wallace*].")

Eidson v. State of Tennessee Dept. of Children's Services, 510 F.3d 631, 640, 641 (6th Cir. 2007) ("[I]rrespective of the difference between types of § 1983 claims asserted, the rule of *Heck* cannot be divorced from its post-conviction setting. This is the teaching of *Wallace* . *Wallace* simply cannot be fairly read to imply that the accrual of a § 1983 malicious-prosecution-type claim is necessarily and indefinitely delayed in a pre-conviction setting until there is some accused-favorable resolution of pending or anticipated future prosecution. The *Wallace* court even referred to the '*Heck*-required setting aside of the extant conviction' as it explained the 'impracticality' of the urged 'bizarre extension' of *Heck* to the pre-conviction setting. . . The court went on to observe that '[i]f a plaintiff files a false arrest[-type § 1983] claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.'. . Recognizing that a § 1983 plaintiff's right to relief could be preserved in this manner, the *Wallace* court deemed it unnecessary to extend the rule of *Heck* to the pre-conviction setting. The *Wallace* court thus took the same approach employed in this case by the district court, which

held first, that the pendency of juvenile court proceedings did not delay the accrual of plaintiff Eidson's § 1983 cause of action; and second, that plaintiff was required to proceed with his claims within twelve months after they accrued and obtain an abstention-based stay pending resolution of the juvenile court proceedings or suffer dismissal for filing beyond the period of limitation. Plaintiff maintains this approach is not equitable. He observes that *Wallace* refrained from holding that the running of the statute of limitations on the § 1983 action would be equitably tolled during any abstention-based dismissal or stay of the § 1983 action. . . Hence, he argues that *Wallace* affords no assurance that the statute of limitations would be tolled during the pendency of an abstention-based stay. Plaintiff's protest is overstated. The *Wallace* court did not hold that the running of the limitation period *could* not be tolled; only that tolling is traditionally a matter of state law and that adoption of an 'omnibus' federal tolling rule would not be appropriate. . . The *Wallace* court was content to entrust the matter of tolling to abstaining district courts in the exercise of their discretion on a case-by-case basis. Yet, prerequisite to obtaining any such tolling relief, of course, is the timely filing of the § 1983 action that will prompt abstention during the pendency of related state court proceedings. Because plaintiff did not timely file his § 1983 action, he forfeited any hope of such relief. It follows that the district court did not err in refusing to recognize the *Shamaeizadeh* extension of the rule of *Heck*. Although its given reason for doing so is questionable, its decision has been subsequently vindicated by *Wallace* and *Fox*, and we are free to affirm the district court's ruling on other grounds. . . Accordingly, because we conclude that the rule of *Heck* does not apply in the pre-conviction setting to delay accrual of plaintiff's due process cause of action, we concur in the district court's ruling that plaintiff's § 1983 claims are time-barred.")**.**

Fox v. DeSoto, 489 F.3d 227, 233, 234 (6th Cir. 2007) ("[T]he Supreme Court's decision in *Wallace*, issued during the pendency of this appeal, effectively abrogates the holding in *Shamaeizadeh* and clarifies that *Heck* has no application to the § 1983 claims in this case. . . . This court, drawing on the reasoning in *Heck* and acknowledging that *Heck* did not resolve the issue, joined other courts in extending application of *Heck* and its effect on the statute of limitations to certain pre-conviction circumstances. . . In no uncertain terms, however, the Court in *Wallace* clarified that the *Heck* bar has no application in the pre-conviction context. . . . *Wallace* clarifies the distinction between claims of malicious prosecution, such as the one addressed in *Heck*, and claims of false arrest and false imprisonment. As noted above, *Heck* held that a claim of malicious prosecution does not accrue until the underlying conviction is invalidated. . . and this holding was reaffirmed in *Wallace*. . . The statute of limitations for a claim for false arrest, however, 'where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process.' . . The *Wallace* Court rejected both the argument that the statute of limitations on a false arrest claim should begin only after 'an anticipated future conviction ... occurs and is set aside,'. . and that the statute of limitations on such a claim should be tolled until an anticipated future conviction is set aside. . . . Accordingly, the possibility that the plaintiff's already-accrued § 1983 claims might impugn an anticipated future conviction did not trigger the *Heck* rule for deferred accrual. Thus, we not only affirm the dismissal of the state law

claims as time-barred, but also find that the plaintiff's Fourth Amendment claims were likewise barred by the one-year statute of limitation and should have been dismissed as untimely.").

DeLeon v. City of Corpus Christi, 488 F.3d 649, 652, 656 (5th Cir. 2007) ("This appeal turns on whether a deferred adjudication in Texas is a 'sentence or conviction' for the purposes of *Heck*. We hold that it is. . . . We conclude that a deferred adjudication order is a conviction for the purposes of *Heck*'s favorable termination rule. This case does not require that we decide whether a successfully completed deferred adjudication, with its more limited collateral consequences under Texas law, is also a conviction for the purposes of *Heck*, and we do not decide that question.' [footnotes omitted])

McClish v. Nugent, 483 F.3d 1231, 1251 & n.19 (11th Cir. 2007) ("Holmberg's § 1983 claim arose out of his arrest for allegedly interfering with the ongoing arrest of McClish by Deputies Terry and Calderone. The deputies arrested Holmberg for 'resisting arrest without violence,' see Fla. Stat. § 843.02, and the charge was eventually dismissed without prejudice pursuant to Florida's pretrial intervention program, see Fla. Stat. § 843.02. The district court determined that *Heck* barred Holmberg from bringing a § 1983 claim because of his participation in PTI. Although we have never determined that participation in PTI barred a subsequent § 1983 claim, the district court cited to Second, Third, and Fifth Circuit cases holding that a defendant's participation in PTI barred subsequent § 1983 claims. Dist. Ct. Order at 19- 20 (citing *Gilles v. Davis*, 427 F.3d 197 (3d Cir.2005); *Taylor v. Gregg*, 36 F.3d 453 (5th Cir.1994); *Roesch v. Otarola*, 980 F.2d 850 (2d Cir.1992)). The district court then concluded that 'Holmberg's participation in PTI, which resulted in a dismissal of the charge of resisting arrest without violence, is not a termination in his favor, and therefore, he is barred from bringing a § 1983 claim for false arrest.' We disagree. *Heck* is inapposite. The issue is not, as the district court saw it, whether Holmberg's participation in PTI amounted to a favorable termination on the merits. Instead, the question is an antecedent one − whether *Heck* applies at all since Holmberg was never convicted of any crime. The primary category of cases barred by *Heck* − suits seeking damages for an allegedly unconstitutional conviction or imprisonment − is plainly inapplicable. Instead, the district court based its *Heck* ruling on the second, indirect category of cases barred by *Heck*: suits to recover damages 'for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.' . . . The problem with using this second *Heck* category to bar Holmberg's § 1983 suit is definitional − to prevail in his § 1983 suit, Holmberg would not have to 'negate an element of the offense of which he has been convicted,' because he was never convicted of any offense. [citing *Heck* and *Wallace*] . . . . Even if we were to assume that *Heck* somehow applies to this case, Holmberg correctly cites to *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d 1298 (11th Cir.2005), for the proposition that the Supreme Court has apparently receded from the idea that *Heck's* favorable-termination requirement also applies to non-incarcerated individuals. . . . The logic of our reasoning in *Abusaid*, although dicta, is clear: If *Heck* only bars § 1983 claims when the alternative remedy of *habeas corpus* is available, then *Heck* has no application to Holmberg's claim. Holmberg was never in custody at all, and the remedy of *habeas corpus* is not currently available to him.").

Whitehurst v. Harris, No. 6:14-CV-01602-LSC, 2015 WL 71780, at *9 (N.D. Ala. Jan. 6, 2015) ("While *Heck* is concerned with state-federal comity in the context of § 1983 claims, it does not in itself dictate that courts stay a third party's § 1983 suit whenever the defendant still faces the prospect of criminal proceedings in state court.")

Wharton v. County of Nassau, No. 07-CV-2137(RRM)(ETB), 2010 WL 3749077, at *4 (E.D.N.Y. Sept. 20, 2010) ("For the same reasons announced in *Hargroves,* Plaintiffs in this case are entitled to equitable tolling on their § 1983 false arrest claim. Plaintiffs, through no fault of their own, relied on then-authoritative Second Circuit precedent to their detriment, and strict application of *Wallace* would effectively deprive Plaintiffs of their cause of action. *See Kucharski v. Leveille,* 526 F.Supp.2d 768 (E.D.Mich.2007) (equitably tolling plaintiffs' false arrest claim in light of the change in law occasioned by *Wallace*). Moreover, Plaintiffs have acted with reasonable diligence to pursue their claims. Plaintiffs filed suit within thirteen months of obtaining a favorable termination, and while they had approximately ten months after Wharton's acquittal where the claim would have been timely even under *Wallace,* they could no better predict the upcoming change in law than the *Hargroves* plaintiffs. Finally, although Plaintiffs waited approximately three months after the *Wallace* decision to file their claim, this short delay is insufficient to diminish the extraordinary circumstance for which equitable tolling now applies. Accordingly, this Court finds that Plaintiffs' § 1983 false arrest claim is timely.")

Wilson v. Maxwell , No. 08-4140 (FLW), 2008 WL 4056364, at *5 (D.N.J. Aug. 28, 2008) ("Based on the Supreme Court's language in *Wallace,* it would appear that *Wallace* effectively supersedes the Third Circuit's reasoning in *Gibson* . . . and that *Heck* is inapplicable here . . . and that *Smith v. Holtz* likewise is abrogated by *Wallace* . . . Thus, under *Wallace,* any Fourth Amendment claim must be brought and, in all likelihood, stayed pending resolution of the underlying charges. . . In the event of a conviction on the underlying charges, the stay may extend for years while post-conviction relief is sought. . . This is not an ideal situation because of the potential to clog the court's docket with unresolvable cases.").

Kamar v. Krolczyk, No. 1:07-CV-0340 AWI TAG, 2008 WL 2880414, at *6 (E.D. Cal. July 22, 2008) ("The court finds that the recent Supreme Court case of *Wallace v. Kato*, __ U.S. __, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), has effectively overruled *Harvey*. In *Wallace* , the plaintiff contended that any civil rights action that would impugn his anticipated future conviction could not be brought until that conviction occurs and is set aside. . . The Supreme Court refused to embrace what the Supreme Court entitled a 'bizarre extension of *Heck*.'. . In *Wallace* , the Supreme Court overruled those circuits that had applied the *Heck* to bar Section 1983 claims when criminal charges were ***only pending***.")

Kennedy v. City of Villa Hills, No. 07-122-DLB, 2008 WL 650341, at *5, *6 (E.D.Ky. Mar. 6, 2008) ("*Wallace* still stands for the principle that courts should refrain from considering alleged § 1983 claims where there are pending or potential state criminal proceedings and resolution of the

constitutional tort claims would impugn the integrity of a possible future criminal conviction. The difference, post-*Wallace* versus pre-*Wallace* , is that now the proper procedure is to stay the action rather than dismiss the claims without prejudice pursuant to *Heck*, which is what this Court did in Kennedy's prior action. In light of the Supreme Court's decision in *Wallace*, this Court's previous dismissal of Plaintiff's Complaint without prejudice pursuant to *Heck* and *Shamaeizadeh* may. . .now present statute of limitations problems for Plaintiff that this Court in its prior order stated would not occur. Yet, there is a critical difference between the case now before this Court and the decisions of *Wallace* and *Fox*. In *Wallace* and *Fox*, the plaintiffs did not file their civil complaint in the first instance until after their criminal charges had been dismissed or overturned. Plaintiff here did file his initial Complaint while his disorderly conduct charge was still pending. The Court is not inclined to unilaterally punish Kennedy for circumstances not of his own making. The Court ordered Kennedy's claims dismissed as premature based on then binding precedent. Plaintiff relied upon the Court's directive of when his claims would accrue, and that reliance was not misplaced. Under these circumstances, application of equitable principles is appropriate and has been similarly recognized where a party relied to its detriment upon a court's order. . . To hold otherwise would unfairly prejudice the Plaintiff in this case. . . Moreover, the *Wallace* decision also reveals that the Supreme Court considered the possibility of a factual situation similar to that before this Court, noting the potential harm to a plaintiff that could result. [citing footnote 4 of *Wallace*] Holding that Plaintiff's claims herein are now time-barred post- *Wallace* by the applicable statutes of limitation would result in *Heck* ultimately producing immunity for the Defendants, a scenario the Supreme Court deemed unacceptable. At least a few lower courts have also been faced with similar quagmires. In *Kucharski v. Leveille*, 526 F.Supp.2d 768 (E.D.Mich.2007) the court highlighted this note in *Wallace* as support for its conclusion that plaintiff's claims should not be time-barred despite being filed outside the statute of limitations. . . The *Kucharski* court also looked to equitable tolling in saving plaintiff's claims from a strict application of *Wallace* . On the other hand, in *Sandles v. U.S. Marshal's Service*, No. 04- 72426, 2007 WL 4374080 (E.D.Mich. Oct. 18, 2007) (unpublished decision), the court declined to apply *Wallace*'s footnote 4 exception because the plaintiff had waited ten months after his criminal conviction was reversed before filing his claims. More importantly, these two cases signify *Wallace* considered the possibility that strict application of its holding might produce § 1983 immunity when civil claims with associated criminal proceedings were filed and then dismissed pursuant to *Heck*, 'a result surely not intended.' *Wallace* , 127 S.Ct. at 1099 n. 4. . . . Plaintiff here diligently pursued his rights as evidenced by his first filing. Given the Court's Memorandum Order dismissing his claims and instructing him to refile upon resolution of the criminal proceedings, there was no reason for him to know of any other filing requirement, and there is no true prejudice to Defendants as previously noted herein. Accordingly, for these and all of the other reasons previously discussed herein, the Court finds that Plaintiff's second filing is deemed timely and assertion of his federal claims is not otherwise time-barred.").

McCray v. City of New York, 2007 WL 4352748, at *14 (S.D.N.Y. Dec. 11, 2007) ("Plaintiffs argue that, because they have alleged fraudulent concealment and fabrication of evidence, they are entitled to the equitable tolling of their false arrest and imprisonment claims. . . The doctrine of

equitable tolling is to be applied only upon a showing that 'rare and exceptional circumstances' prevented a party from timely asserting his or her claim, and that the party, 'acted with reasonable diligence throughout the period he sought to toll.' . . 'A plaintiff seeking equitable tolling of a limitations period must demonstrate that defendants engaged in a fraud which precluded him from discovering the harms he suffered or the information he needed to file a complaint.'. . In this case, while Plaintiffs have alleged that the Defendants engaged in fraudulent concealment, they have not shown that this fraud precluded them from discovering that they were allegedly falsely arrested and falsely imprisoned. Plaintiffs have not explained why they were unable to assert their federal and state false arrest and imprisonment causes of action when these claims originally accrued. As a result, the Court can find no basis to toll the statute of limitations. Moreover, with respect to § 1983 false arrest actions, accrual governed by the *Heck* delayed accrual rule is limited by *Wallace v. Kato*, 127 S.Ct. 1091 (2007). In *Wallace*, the Supreme Court ruled that, 'the statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process.'. . Here, Plaintiffs claim that their convictions could not have been obtained in the absence of their inculpatory statements, which they allege were products of their false arrest and imprisonment. *Wallace* settles that Plaintiffs' federal claims for false arrest and imprisonment accrued against Defendants no later than April 1989, when Plaintiffs were arraigned on felony complaints for the April 19, 1989 crimes. . . Plaintiffs filed their federal claims in this action in 2003. Because the time limits on their false arrest and false imprisonment claim accordingly expired three years later, in April 1992, those claims are clearly time-barred and are accordingly DISMISSED WITH PREJUDICE.")

Kucharski v. Leveille, 526 F.Supp.2d 768, 770-75 (E.D.Mich. 2007) ("In its last order, the Court held that the plaintiffs' complaint was filed out of time because the cause of action accrued at the time of the illegal seizure, not when the state court convictions were overturned. Although the later conclusion was ordained by a well-established line of Sixth Circuit precedent, . . . that precedent was overturned by the Supreme Court in *Wallace*. The Court in *Wallace* held that a false arrest claim accrues when the illegal detention ends − in *Wallace*'s case, when the arrested suspect was taken before a judicial officer. A section 1983 case must be filed, the Court held, within the period of limitations measured from that date. With respect to the complication potentially caused by *Heck*, the Court noted that a district court could 'stay the civil action until the criminal case or the likelihood of a criminal case is ended.'. . Then, '[i]f the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* would require dismissal; otherwise, the civil action will proceed, absent some other bar to suit.'. . Because the *Wallace* Court did not allow equitable tolling to save the plaintiff's claim in that case, this Court did not consider the possibility in the present matter. However, just as limitations periods are taken from state law, so are the rules regarding equitable tolling. . . . Michigan courts . . .recognize the concept of equitable tolling to relieve a party of the effect of a statute of limitations in certain circumstances. For instance, the Michigan Supreme Court has allowed tolling, thereby allowing a case to proceed, when the plaintiff's failure to comply with the statute is a result of the confusing state of the law. . . . Based on the foregoing state court precedents, this Court finds that Michigan recognizes the doctrine of

equitable tolling, and that a plaintiff may obtain relief from a statute of limitations thereunder if the delay in filing 'is the product of an understandable confusion about the legal nature of her claim,'. . . that confusion is created by the courts themselves, . . . and the delay does not result simply from the plaintiff's lack of diligence . . . . Moreover, where a specific statute controlling the period of limitation is found to abrogate the common law, courts must resort to the statutory tolling rules. The Court believes that this case qualifies under Michigan law for the application of equitable tolling. First, there is confusion in the jurisprudence that is not clarified by any statutory pronouncement. The confusion results not from the length of the applicable statute of limitations, but from a determination when the statute starts to run. That confusion has been created by the courts themselves, as evidenced by *Wallace*'s overruling of this Circuit's precedents. *Wallace* altered the understanding of *Heck v. Humphrey*'s effect on the time a section 1983 claim for unlawful arrest accrues. . . . Although *Heck* involved a plaintiff who already had been convicted in state court, most if not all circuits concluded that *Heck* barred a section 1983 claim by a plaintiff with criminal charges pending against him if success in the 1983 suit would be inconsistent with a future conviction. . . . There can be no question that the plaintiffs relied on Sixth Circuit precedent to their prejudice in this case. The untimeliness of the plaintiffs' complaint results from an understandable confusion about the state of the law as to when their claim accrued. That confusion was created by the courts themselves. The delay did not result from the plaintiffs' failure to diligently pursue the claim. In fact, the plaintiffs filed their complaint less than one year after their convictions were reversed. Moreover, strict application of *Wallace* to this case effectively deprives the plaintiffs of their cause of action. If the plaintiffs had filed their case immediately after the search on May 4, 2001, Sixth Circuit precedent would have required dismissal of the case as barred by *Heck*. Once the law changed, the plaintiffs' convictions having been reversed on September 30, 2004, the plaintiffs would be barred by the statute of limitations under *Wallace*. This is 'a result surely not intended.'. . Rather, this is the unusual case that fits neatly within the doctrine of equitable tolling. The Court concludes that Michigan law tolled the three-year statute of limitations while the plaintiffs' convictions were still viable, and filing this case within three years of the reversal of those convictions does not result in a statute of limitations bar.")**.**

Pethtel v. Washington County Sheriff's Office, 2007 WL 2359765, at **7 -10 (S.D.Ohio, Aug. 16, 2007) ("The holding in *Shamaeizadeh* has been severely undermined by the Supreme Court's recent decision in *Wallace v. Kato* . . . . In *Wallace,* the Court held that the statute of limitations on a § 1983 claim of false arrest accrues on the date the plaintiff appears before a magistrate and is arraigned on the charges filed against him. . .The Court also held that *Heck's* deferred accrual rule does not apply when the cause of action accrues before a criminal conviction has taken place. . .Because . . . Plaintiff's § 1983 and *Bivens* claims accrued prior to the date he pleaded no contest to the reduced charge of disorderly conduct, the *Heck* bar does not apply. Moreover, because Plaintiff's sentence consisted of a fine rather than imprisonment, a habeas remedy was never available to him. As the Sixth Circuit has noted, five justices of the Supreme Court are of the belief that the *Heck* bar, requiring a plaintiff to have his sentence or conviction invalidated before filing a § 1983 suit, does not apply when the plaintiff has not been sentenced to a term of imprisonment.

. . . For all of these reasons, the Court rejects Defendants' argument that Plaintiff's claims are barred by *Heck.*' Court goes on to find all claims barred by statute of limitations after *Wallace*)

Curry v. Hennessey, 2007 WL 1394531, at *2 (N.D. Cal. May 10, 2007) ("After *Wallace*, the Ninth Circuit's holding that *Heck* applies to cases directed to pending criminal charges is limited to the situation where there is an extant conviction at the time the federal case is filed. In cases such as this one, where there is no extant conviction, it is appropriate to follow the Supreme Court's suggestion and stay the case.")

Lopez v. Unknown Galveston Police Officer #1, No. G-06-0371, 2007 WL 1108736, at * 5 (S.D. Tex. Apr. 11, 2007) ("Despite Fifth Circuit decisions that previously held otherwise, *see Price*, 431 F.3d at 892, and *Brandley*, 64 F.3d at 196, the Supreme Court's decision in *Wallace* establishes that regardless of the potential effect on pending or future criminal proceedings, a plaintiff must file a § 1983 action within the relevant limitations period.")

Jackim v. City of Brooklyn, No. 1:05 cv 1678, 2007 WL 893868, at *26, *27 & n.41 (N.D. Ohio Mar. 22, 2007) ("Until February 21, 2007 the law was fairly settled, in this Circuit and most others, that application of the principle in *Heck* required a dismissal of all claims subject to the bar arising therefrom. . . . On February 21, 2007 the Supreme Court altered the landscape surrounding the interplay between § 1983 claims and *Heck*. In *Wallace*, . . .in the context of determining when the statute of limitations for a § 1983 claim for false arrest begins to run, the Supreme Court concluded that the principle of *Heck* technically only applies to 'extant' convictions − i.e., those which have been entered and have not been set aside. Thus, the Court concluded that *Heck* does not prevent an action from being instituted under § 1983 where a conviction is no more than a future possibility. . . . Thus, while the Supreme Court does not seem to agree with the Sixth Circuit that it is *Heck* that bars consideration of § 1983 claims in the face of ongoing state criminal proceedings, it does make clear that it does not contemplate that such civil proceedings will proceed in those circumstances. Rather, the Supreme Court indicated that a stay of civil proceedings should be imposed pending a resolution of pending criminal charges, and, presumably, any appeals or *habeas corpus* proceedings attendant thereto. Indeed, the majority's decision made it clear that a stay of proceedings is likely the only just way to deal with potentially conviction − impugning § 1983 claims when it went on to find that *Heck* never tolls the statute of limitations on such § 1983 claims − whether they be mere future possibilities, or even extant convictions still subject to attack. Thus, whether this Court is bound by existing Sixth Circuit precedent which applies *Heck* to future convictions (because the Supreme Court did not overturn any specific Circuit decision so holding) or is correct in concluding that the *Wallace* decision effectively overrules that authority by its express discussions of *Heck*, the result is the same − Bruce Jackim's remaining claims may not proceed while the criminal charges are still pending. As to those remaining claims, all further proceedings in this matter are stayed pending further order of this Court. . . . The inefficiency of this result is not lost on the Court. In this era where district courts are judged, in substantial measure, by how efficiently they resolve or dispose of cases on their docket, an order which could potentially stall a case (or many such cases) for years to come makes little practical sense.").

Watts v. Epps, 475 F.Supp.2d 1367, 1369 (N.D. Ga. 2007) ("Despite several lower court decisions that have previously held otherwise, [citing cases from circuits], the Supreme Court's decision in *Wallace* makes clear that tolling under *Heck* does not apply in the pre-conviction context. . . Regardless of its potential effect on pending or future criminal proceedings, a plaintiff must file a § 1983 action within the relevant limitations period. . . . *Wallace* teaches that it is the issuance of a stay − and not the tolling of an action − that is the appropriate prophylactic device to prevent federal courts from undercutting state criminal convictions by preordaining in § 1983 actions the constitutionality of arrests or seizures.")

D. Fabrication-of-Evidence Claims: *McDonough v. Smith*

McDonough v. Smith, 139 S. Ct. 2149, 2154-61 & n.10 (2019) ("Relying in part on this allegedly fabricated evidence, Smith secured a grand jury indictment against McDonough. McDonough was arrested, arraigned, and released (with restrictions on his travel) pending trial. Smith brought the case to trial a year later, in January 2012. He again presented the allegedly fabricated testimony during this trial, which lasted more than a month and ended in a mistrial. Smith then reprosecuted McDonough. The second trial also lasted over a month, and again, Smith elicited allegedly fabricated testimony. The second trial ended with McDonough's acquittal on all charges on December 21, 2012. On December 18, 2015, just under three years after his acquittal, McDonough sued Smith and other defendants under § 1983 in the U. S. District Court for the Northern District of New York. Against Smith, McDonough asserted two different constitutional claims: one for fabrication of evidence, and one for malicious prosecution without probable cause. The District Court dismissed the malicious prosecution claim as barred by prosecutorial immunity, though timely. It dismissed the fabricated-evidence claim, however, as untimely. McDonough appealed to the U. S. Court of Appeals for the Second Circuit, which affirmed. . . .The statute of limitations for a fabricated-evidence claim like McDonough's does not begin to run until the criminal proceedings against the defendant (*i.e.*, the § 1983 plaintiff) have terminated in his favor. This conclusion follows both from the rule for the most natural common-law analogy (the tort of malicious prosecution) and from the practical considerations that have previously led this Court to defer accrual of claims that would otherwise constitute an untenable collateral attack on a criminal judgment. . . . Although courts look to state law for the length of the limitations period, the time at which a § 1983 claim accrues 'is a question of federal law,' 'conforming in general to common-law tort principles.' *Wallace* v. *Kato*, 549 U. S. 384, 388 (2007). That time is presumptively 'when the plaintiff has "a complete and present cause of action,"'. . . though the answer is not always so simple. . . Where, for example, a particular claim may not realistically be brought while a violation is ongoing, such a claim may accrue at a later date. . . . Though McDonough's complaint does not ground his fabricated-evidence claim in a particular constitutional provision, the Second Circuit treated his claim as arising under the Due Process Clause. . . McDonough's claim, this theory goes, seeks to vindicate a '"right not to be deprived of liberty as a result of the fabrication of evidence by a government officer."'. . We assume without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those

separate questions. . . . McDonough is correct that malicious prosecution is the most analogous common-law tort here. . . . We follow the analogy where it leads: McDonough could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution. As *Heck* explains, malicious prosecution's favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments. . . The requirement likewise avoids allowing collateral attacks on criminal judgments through civil litigation. . . These concerns track 'similar concerns for finality and consistency' that have motivated this Court to refrain from multiplying avenues for collateral attack on criminal judgments through civil tort vehicles such as § 1983. . . . Because a civil claim such as McDonough's, asserting that fabricated evidence was used to pursue a criminal judgment, implicates the same concerns, it makes sense to adopt the same rule. . . . This case differs from *Heck* because the plaintiff in *Heck* had been convicted, while McDonough was acquitted. Although some claims do fall outside *Heck*'s ambit when a conviction is merely 'anticipated,' *Wallace*, 549 U. S., at 393, however, McDonough's claims are not of that kind[.]. . As articulated by the Court of Appeals, his claims challenge the validity of the criminal proceedings against him in essentially the same manner as the plaintiff in *Heck* challenged the validity of his conviction. And the pragmatic considerations discussed in *Heck* apply generally to civil suits within the domain of habeas corpus, not only to those that challenge convictions. . . The principles and reasoning of *Heck* thus point toward a corollary result here: There is not ' "a complete and present cause of action,"'. . . to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing. Only once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, . . . will the statute of limitations begin to run. . . . Smith suggests that stays and ad hoc abstention are sufficient to avoid the problems of two-track litigation. Such workarounds are indeed available when claims falling outside *Heck*'s scope nevertheless are initiated while a state criminal proceeding is pending, . . .but Smith's solution is poorly suited to the type of claim at issue here. When, as here, a plaintiff's claim 'necessarily' questions the validity of a state proceeding, . . . there is no reason to put the onus to safeguard comity on district courts exercising case-by-case discretion—particularly at the foreseeable expense of potentially prejudicing litigants and cluttering dockets with dormant, unripe cases. . . The accrual rule we adopt today, by contrast, respects the autonomy of state courts and avoids these costs to litigants and federal courts. In deferring rather than inviting such suits, we adhere to familiar principles. The proper approach in our federal system generally is for a criminal defendant who believes that the criminal proceedings against him rest on knowingly fabricated evidence to defend himself at trial and, if necessary, then to attack any resulting conviction through collateral review proceedings. McDonough therefore had a complete and present cause of action for the loss of his liberty only once the criminal proceedings against him terminated in his favor. . . . Smith is correct that *Heck* concerned a plaintiff serving a sentence for a still-valid conviction and that *Wallace* distinguished *Heck* on that basis, but *Wallace* did not displace the principles in *Heck* that resolve this case. A false-arrest claim, *Wallace* explained, has a life independent of an ongoing trial or putative future conviction—it attacks the arrest only to the extent it was without legal process, even if legal process later commences. . . That feature made the claim analogous to common-law false imprisonment. . . By

contrast, a claim like McDonough's centers on evidence used to secure an indictment and at a criminal trial, so it does not require 'speculat[ion] about whether a prosecution will be brought.'. . It directly challenges—and thus necessarily threatens to impugn—the prosecution itself. . . Second, Smith notes (1) that a fabricated-evidence claim in the Second Circuit (unlike a malicious prosecution claim) can exist even if there is probable cause and (2) that McDonough was acquitted. In other words, McDonough theoretically could have been prosecuted without the fabricated evidence, and he was not convicted even with it. Because a violation thus could exist no matter its effect on the outcome, Smith reasons, 'the date on which that outcome occurred is irrelevant.'. . Smith is correct in one sense. One could imagine a fabricated-evidence claim that does not allege that the violation's consequence was a liberty deprivation occasioned by the criminal proceedings themselves. . . To be sure, the argument for adopting a favorable-termination requirement would be weaker in that context. That is not, however, the nature of McDonough's claim. As already explained, McDonough's claim remains most analogous to a claim of common-law malicious prosecution, even if the two are not identical. . . *Heck* explains why favorable termination is both relevant and required for a claim analogous to malicious prosecution that would impugn a conviction, and that rationale extends to an ongoing prosecution as well: The alternative would impermissibly risk parallel litigation and conflicting judgments. . . If the date of the favorable termination was relevant in *Heck*, it is relevant here. It does not change the result, meanwhile, that McDonough suffered harm prior to his acquittal. The Court has never suggested that the date on which a constitutional injury first occurs is the only date from which a limitations period may run. . . To the contrary, the injury caused by a classic malicious prosecution likewise first occurs as soon as legal process is brought to bear on a defendant, yet favorable termination remains the accrual date. . . Third and finally, Smith argues that the advantages of his rule outweigh its disadvantages as a matter of policy. In his view, the Second Circuit's approach would provide more predictable guidance, while the favorable-termination approach fosters perverse incentives for prosecutors (who may become reluctant to offer favorable resolutions) and risks foreclosing meritorious claims (for example, where an outcome is not clearly 'favorable'). These arguments are unconvincing. We agree that clear accrual rules are valuable but fail to see how assessing when proceedings terminated favorably will be, on balance, more burdensome than assessing when a criminal defendant 'learned that the evidence was false and was used against him' and deprived him of liberty as a result. . . And while the risk of foreclosing certain claims and the potential incentive effects that Smith identifies could be valid considerations in other contexts,[10] [fnote 10: Because McDonough's acquittal was unquestionably a favorable termination, we have no occasion to address the broader range of ways a criminal prosecution (as opposed to a conviction) might end favorably to the accused. . . To the extent Smith argues that the law in this area should take account of prosecutors' broad discretion over such matters as the terms on which pleas will be offered or whether charges will be dropped, those arguments more properly bear on the question whether a given resolution should be understood as favorable or not. Such considerations might call for a context-specific and more capacious understanding of what constitutes 'favorable' termination for purposes of a § 1983 false-evidence claim, but that is not the question before us.] they do not overcome the greater danger that plaintiffs will be deterred under Smith's theory from suing for redress of egregious misconduct, . . . nor do they override the guidance of the common

law and precedent. . . .The statute of limitations for McDonough's § 1983 claim alleging that he was prosecuted using fabricated evidence began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial. The judgment of the United States Court of Appeals for the Second Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.")

McDonough v. Smith, 139 S. Ct. 2149, 2161-62 (2019) (Thomas, J., with whom Kagan, J. and Gorsuch, J. join, dissenting) ("We granted certiorari to decide when 'the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run.'. . McDonough, however, declined to take a definitive position on the 'threshold inquiry in a [42 U. S. C.] § 1983 suit': ' "identify[ing] the specific constitutional right" at issue.'. . Because it is only '[a]fter pinpointing that right' that courts can proceed to 'determine the elements of, and rules associated with, an action seeking damages for its violation,'. . . we should have dismissed this case as improvidently granted. McDonough's failure to specify which constitutional right the respondent allegedly violated profoundly complicates our inquiry. McDonough argues that malicious prosecution is the common-law tort most analogous to his fabrication-of-evidence claim. But without ' "identify[ing] the specific constitutional right" at issue,' we cannot adhere to the contours of that right when 'applying, selecting among, or adjusting common-law approaches.'. . McDonough also contends that his suit is timely because he suffered a continuing constitutional violation, but this argument is similarly difficult to evaluate without identifying precisely what that violation was. Moreover, because the constitutional basis for McDonough's claim is unclear, we are unable to confirm that he has a constitutional claim at all. In my view, it would be both logical and prudent to address that antecedent question before addressing the statute of limitations for that claim. McDonough also urges us to resolve the question presented by extending *Preiser* v. *Rodriguez,* 411 U. S. 475 (1973), and *Heck* v. *Humphrey,* 512 U. S. 477 (1994). But the analysis under both cases depends on what facts a § 1983 plaintiff would need to prove to prevail on his claim. . . And McDonough declines to take a position on that issue as well. . . Further complicating this case, McDonough raised a malicious-prosecution claim alongside his fabrication-of-evidence claim. The District Court dismissed that claim on grounds of absolute immunity. McDonough has not fully explained the difference between that claim and his fabrication claim, which he insists is both analogous to the common-law tort of malicious prosecution and distinct from his dismissed malicious-prosecution claim. . . Additionally, it appears that McDonough's fabrication claim could face dismissal on absolute-immunity grounds on remand. . . The Court, while recognizing that it is critical to ascertain the basis for a § 1983 claim when deciding how to 'handl[e]' it, . . . attempts to evade these issues by 'assum[ing] without deciding that the Second Circuit's articulations of the right at issue and its contours are sound.' . . But because the parties have not accepted the Second Circuit's view that the claim sounds in procedural due process, . . . that claim as 'articulated by the Court of Appeals' might be different from the claim McDonough actually brought. . . The better course would be to dismiss this case as improvidently granted and await a case in which the threshold question of the basis of a 'fabrication-of-evidence' claim is cleanly presented. Moreover, even if the Second Circuit were correct that McDonough asserts a violation of the Due Process Clause, it would be preferable for

the Court to determine the claim's elements before deciding its statute of limitations. . . McDonough asks the Court to bypass the antecedent question of the nature and elements of his claim and first determine its statute of limitations. We should have declined the invitation and dismissed the writ of certiorari as improvidently granted. I therefore respectfully dissent.").

Post-*McDonough* Cases

First Circuit

Jordan v. Town of Waldoboro, 943 F.3d 532, 545-46 (1st Cir. 2019) ("Jordan argues that the magistrate erred in granting summary judgment for the defendants on his federal constitutional claims for malicious prosecution. The parties agree that to make out a claim for malicious prosecution, Jordan must show that 'the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor.'. . The district court held that -- even assuming Jordan could meet the first two requirements -- he could not show that the criminal proceedings terminated in his favor, and it therefore concluded that summary judgment was appropriate. It was recently a live question in our circuit whether post-*Hernandez-Cuevas* Supreme Court precedent rendered the favorable termination element 'an anachronism.'. . But the Supreme Court arguably resolved this question when it reiterated that a plaintiff cannot bring a section 1983 fabricated-evidence claim that is analogous to the common-law tort of malicious prosecution 'prior to favorable termination of [the] prosecution.' *McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 2156, 204 L.Ed.2d 506 (2019). And in any event, Jordan's brief to this court accepts the *Hernandez-Cuevas* elements, and Jordan has therefore waived any argument that he need not satisfy the favorable termination element of a malicious prosecution claim. . . So, we face the question of whether the state criminal proceedings against Jordan terminated in Jordan's favor. . . Jordan concedes that, to satisfy the favorable termination element, a plaintiff must show that the prosecution was terminated in such a way as to imply the plaintiff's innocence. . . The district attorney dismissed the criminal proceedings against Jordan because '[t]he victim and key witness in the case for the State, Scott Jordan[,] Sr[.], ha[d] died.' . . . Jordan's criminal case was dismissed because the death of the key witness made the prosecution impracticable. Therefore, the dismissal was not sufficiently favorable to the accused, and Jordan cannot satisfy the favorable termination element under *Hernandez-Cuevas*[.]")

Jordan v. Town of Waldoboro, 943 F.3d 532, 550-55 (1st Cir. 2019) (Barron, J., concurring) ("Scott Jordan, Jr. brings a pair of claims under 42 U.S.C. § 1983 for damages that target the pretrial criminal detention that he allegedly endured in violation of the Fourth Amendment of the federal Constitution. He styles his first such § 1983 claim, which targets the pretrial detention that followed his initial warrantless arrest, as one for 'false arrest.' He styles his second such § 1983 claim, which targets the pretrial detention that, it appears, followed a criminal complaint and summons, as one for 'malicious prosecution.' Without assessing the relative strength of the underlying alleged Fourth Amendment violations, we hold that this 'false arrest' § 1983 claim may

proceed but that this 'malicious prosecution' § 1983 claim may not. The question that prompts this concurrence thus arises: how can our different treatment of these two § 1983 claims be justified? Our answer relies on Jordan's concession that a 'favorable termination' requirement applies to this 'malicious prosecution' § 1983 claim but not to this 'false arrest' § 1983 claim. . . Because the criminal proceedings ended upon the alleged victim's death before the criminal trial and not after, say, an acquittal, Jordan cannot satisfy that requirement. . . I thus join our opinion in full. I write separately, however, to register my doubt that the 'favorable termination' requirement applies to a § 1983 claim that targets a pretrial criminal seizure simply because it is made pursuant to an arrest warrant, as some of the precedent that Jordan cites in support of his concession appears to indicate. . . Even an arrest pursuant to a warrant violates the Fourth Amendment if law enforcement secures it by tricking the magistrate into finding probable cause. . . I am thus not convinced that a plaintiff must show that any follow-on criminal proceedings ended in his favor when he seeks damages under § 1983 for a seizure pursuant to an arrest warrant. Or, at least, I am not convinced that a plaintiff should have to make that showing even when the challenged seizure occurs so early in the criminal case that it precedes a grand jury handing up an indictment or a prosecutor filing a criminal information. . . For, as our treatment of Jordan's 'false arrest' § 1983 claim demonstrates, a plaintiff need not make that showing when he seeks damages for the harm caused by a similarly early-stage *warrantless* seizure. . . . Jordan's 'false arrest' § 1983 claim borrows its elements from the common-law tort of false arrest, which permits recovery for an unlawful seizure without legal process and which does not impose the 'favorable termination' requirement. . . . Because both the § 1983 and common-law types of 'false arrest' claims target seizures that precede any criminal process, moreover, it makes sense that no 'favorable termination' requirement applies. Neither the seizure's lawfulness nor the harm that it inflicts turns on how any follow-on criminal proceedings end. There is, however, another type of Fourth Amendment-based § 1983 claim that also takes aim at a seizure that occurs early in a criminal case and thus before even, say, a grand jury has handed up an indictment or a prosecutor has filed a criminal information. . . But, this type of Fourth Amendment-based § 1983 claim targets a seizure that is made pursuant to at least some legal process, as it targets a seizure that is made pursuant to an arrest warrant. Thus, in accord with how plaintiffs often style such § 1983 claims, the common-law tort of malicious prosecution, which is subject to a 'favorable termination' requirement, is often thought to supply the proper common-law analog for this type of § 1983 claim, as our precedent has also indicated. . . But, although this type of § 1983 claim, like the claim for the common-law tort of malicious prosecution, seeks recovery for a seizure pursuant to legal process, the two types of claims differ in important ways. A claim for the common-law tort of malicious prosecution focuses on whether 'criminal proceeding[s]' have been initiated or continued with malice and without probable cause. . . . [T]he initiation of the criminal process -- and the stigma inherent in its initiation -- is the source of the injury for the common-law tort of malicious prosecution. Thus, such a claim for that tort 'always involves defamation' while 'detention or confinement is no part of the issue,'. . . and 'any damages recoverable' must be based 'on the wrongful use of judicial process rather than detention itself[.]'. . The source of the injury for a Fourth Amendment-based § 1983 claim that seeks recompense for a *seizure* pursuant to legal process, however, is the detention itself, not the legal process used to effect it. . . Thus, per Congress's instruction in 42 U.S.C. § 1988, we likely must look beyond the

common-law tort of malicious prosecution to determine this type of § 1983 claim's requirements. . . *Manuel* also supports our doing so. The plaintiff contended there that his pretrial detention violated the Fourth Amendment because the magistrate's finding of probable cause relied on evidence that law enforcement authorities had fabricated. . . *Manuel* permitted that Fourth Amendment-based § 1983 claim, even though the plaintiff had styled it as one for 'malicious prosecution,' to proceed, without referring to the § 1983 claim at issue as one for 'malicious prosecution.'. . . *Manuel* ultimately left open whether a 'favorable termination' requirement applied to the claim there at issue, . . . and, prior to *Manuel*, we did state that the 'favorable termination' requirement applied to such a claim, *see Hernandez-Cuevas*, 723 F.3d at 99 n.8. But, *Hernandez-Cuevas* declined to borrow the requirements of the common-law tort of malicious prosecution wholesale in defining the requirements for that Fourth Amendment-based § 1983 claim, even though it involved a seizure made pursuant to an arrest warrant. . . And, after *Manuel*, we suggested that the 'favorable termination' might not apply to such a Fourth Amendment-based § 1983 claim, notwithstanding that it seeks recompense for a seizure made pursuant to legal process. *See Pagán-González*, 919 F.3d at 602; id. at 605-11 (Barron, J., concurring) (discussing the possible need for adjustment of the probable-cause and favorable-termination elements). . . .But, while all these signs point away from applying the 'favorable termination' requirement to this type of Fourth Amendment-based § 1983 claim for damages from a seizure pursuant to an arrest warrant, there is one important sign that arguably does not. In *McDonough*, the Supreme Court recently held that the 'favorable termination' requirement did apply to the 'malicious prosecution' § 1983 claim at issue there, even though the plaintiff sought damages, in part, for restraints on his liberty that he attributed to his pretrial seizure. . . Thus, I must address whether *McDonough* calls for a different analysis than the one that, in *Pagán-González*, I suggested would be proper. I do not think that *McDonough* does. The Court described the § 1983 claim in that case as one that targeted 'the integrity of *criminal prosecutions* undertaken "pursuant to legal process"' rather than only the plaintiff's initial seizure pursuant to an arrest warrant. . . Nor did *McDonough* indicate that -- like the claims in *Manuel* and *Pagán-González*, and like the claim that Jordan brings -- the § 1983 claim there was based on the Fourth Amendment as opposed to, for example, the federal constitutional right to procedural due process. Moreover, while *McDonough* did identify practical reasons for applying a 'favorable termination' requirement to the § 1983 claim before it, I am not convinced that these practical reasons apply equally to all purely Fourth Amendment-based § 1983 claims that seek damages for the harm caused by a warrant-based seizure. *McDonough* invoked the need to prevent a 'ticking limitations clock on criminal defendants as soon as they become aware that fabricated evidence has been used against them,' given 'practical problems in jurisdictions where prosecutions regularly last nearly as long as -- or even longer than -- the relevant civil limitations period' and thus where 'criminal defendants could face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them.'. . But, that concern would not necessitate the imposition of a 'favorable termination' requirement if such a Fourth Amendment-based § 1983 claim would not accrue until the assertedly unlawful detention terminates. Such termination could occur upon either the plaintiff's release from detention (including bail conditions) or the emergence of a separate legal basis for the detention -- whether

that separate legal basis takes the form of a subsequent lawful arrest warrant, the handing up of an indictment by a grand jury, or a prosecutor's filing of a criminal information -- and thus would have nothing to do with the way that any follow-on criminal proceedings end. *McDonough* also explained that the 'favorable termination' requirement 'avoid[s] parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.'. . But, the Fourth Amendment's warrant requirement stems from concerns about trusting law enforcement to assess probable cause for itself. . . Thus, a Fourth Amendment-based § 1983 claim for damages from a warrant-based arrest -- at least when that seizure precedes a grand jury's indictment or a prosecutor's filing of a criminal information -- poses no greater inherent risk of interfering with follow-on state criminal proceedings than does a § 1983 claim that targets an equally early-stage warrantless arrest. Yet, 'in accord with [the] common practice,' a federal court that faces a § 1983 claim of that latter, warrantless-seizure-based sort may simply 'stay the civil action until the criminal case or the likelihood of a criminal case is ended.'. . *McDonough* did also emphasize that 'clear accrual rules are valuable.'. . A termination requirement such as I have described, however, would not appear to be unduly hard to administer. That is especially so, given how uncertain even the 'favorable termination' requirement itself can be. . .The time that a criminal defendant may spend in pretrial detention after a warrant-based arrest but before a prosecutor files a criminal information or a grand jury hands up an indictment may be brief. But then, so too is the time that a criminal defendant may spend in such early-stage detention after a warrantless arrest. The brevity of that detention has never been thought to justify conditioning a plaintiff's right to recover damages under § 1983 for that detention on his capacity to show that any criminal proceedings that may thereafter ensue ended in his favor. That is why we permit Jordan's 'false arrest' § 1983 claim to proceed. But, for that very reason, I am not convinced that a plaintiff should have to make that 'favorable termination' showing to obtain such recompense under § 1983 when he seeks damages for the harm caused by an equally early-stage unconstitutional seizure just because it is made pursuant to an arrest warrant. For, brief though the detention caused by that seizure may have been, there are few protections more basic than the right to be free from unjustified imprisonment, and thus there are few that are more in need of the kind of fulsome remedy that Congress supplied in § 1983 -- even if the common law itself does not supply one, too.")

Jordan v. Town of Waldoboro, 943 F.3d 532, 551 n.10 (1st Cir. 2019) (Barron, J., concurring) ("I focus in this concurrence on whether, just because a seizure is made pursuant to an arrest warrant, the 'favorable termination' requirement applies to a Fourth Amendment-based § 1983 claim for damages from that seizure. Jordan's 'malicious prosecution' § 1983 claim does not, however, involve a seizure made pursuant to an arrest warrant. Rather, according to the stipulated facts, following his warrantless arrest on November 21, 2014, law enforcement personnel served Jordan with a Uniform Summons and Complaint that same day for a violation of Me. Stat. tit. 17-A, § 353.1A.2 by unauthorized taking/transfer. Law enforcement then transported Jordan to Two Bridges Jail, from which Jordan was released that same day on bail with conditions of release pursuant to a bail bond. It thus appears that this Fourth Amendment-based § 1983 claim -- unlike his Fourth Amendment-based 'false arrest' § 1983 claim -- seeks damages for a period of detention

that followed some legal process, in which that legal process took the form of the issuance of a mere criminal complaint and summons, which, under Maine law, may occur even without the involvement of a prosecutor and simply upon the action of a law enforcement officer. . . I do not address whether detention that follows that kind of relatively informal legal process -- unlike detention that follows legal process that takes the form of an indictment, a criminal information filed by a prosecutor, or some comparable charging event -- justifies subjecting a Fourth Amendment-based § 1983 claim to a 'favorable termination' requirement to ensure that its pursuit will not interfere with any state criminal prosecution that may ensue. . . I also do not address whether the seizure that grounds this claim ended upon Jordan's release on bail or instead only upon the termination of certain bail conditions that restricted his liberty.")

Tempest v. Remblad, No. 120CV00523MSMLDA, 2022 WL 2817865, at *7-10 & nn.18, 19 (D.R.I. July 19, 2022) ("Several courts have assessed *Heck* in this context, where a first conviction allegedly resulted from constitutional violations for which the defendant-turned-plaintiff seeks civil recompense, but after which a second conviction was entered. If the integrity of the second conviction is not impugned by the civil action, they have ruled, there is no *Heck* bar because the *first* conviction that *is* impugned had in fact been invalidated. Where this has happened, a successful civil verdict does not even implicitly challenge the second conviction, the only one left standing. There are no parallel ongoing proceedings which could result in inconsistent determinations. And, finally, since the 'tainted' conviction has already been vacated, it cannot be attacked by habeas corpus, so *Heck's* concern that the civil action not improperly substitute for a *habeas* petition is not implicated. Support for this construct comes from a line of cases following *Poventud v. City of New York*, 750 F.3d 121 (2d Cir. 2014) (en banc). . . . The correctness of an analysis separating the two convictions in this kind of case and barring the civil action *only if* the conviction whose integrity is impugned has not been invalidated receives strong support from a First Circuit pre-*Poventud* opinion written by Chief Judge Sandra Lynch. A second pre-*Poventud* opinion provides support for the idea that in a case like this the two convictions are not fungible, and the *Heck* analysis is not broad-brush but instead affects only those convictions 'necessarily' impugned by the civil action. . . .In this case, Mr. Tempest's claims are aimed at the first conviction, not the second and, therefore, they are not barred by *Heck.* . . . This would be the end of the matter and the due process claim of Count II could proceed unimpeded were it not for a limitations question. While state law determines the applicable limitations period, federal law determines the accrual date. . . The defendants maintain that the due process action accrued when the first conviction was invalidated, removing any *Heck* bar. That would mean an accrual date of either July 13, 2015, when the state PCR was granted or, at the latest, July 14, 2016, when the Supreme Court affirmed. In either event, the limitations period would have expired at least 18 months before December 18, 2020, when this action was filed. There is some support for this position in *McDonough v. Smith,* ___ U.S. ___, 139 S. Ct. 2149, 2158 (2019), which held that the statute of limitations in a lawsuit for fabricated evidence accrued when the criminal prosecution terminates in the plaintiff's favor 'or a resulting conviction has been invalidated' within the meaning of *Heck*. In that case, the acquittal marked the end of the prosecution. Mr. Tempest maintains that the action did not accrue until the prosecution terminated with his *Alford* plea,

conviction, and sentence to time served. According to him, the action was filed one-day shy of the limitation's expiration. . . The pivotal question is whether *Heck* would have been a bar to filing this lawsuit after the first conviction was overturned but while the criminal charges were still pending. According to the Complaint, the state threatened to use at a second trial much of the very same infirm evidence that had caused the reversal in the first place. . . And, indeed, again according to the Complaint, the Superior Court had denied Mr. Tempest's motions in limine to exclude that evidence from the later prosecution. Thus, Mr. Tempest argues, had a conviction resulted after a second trial, the civil action would 'impugn' its validity and *Heck* would be a bar. He argues that he could not be expected to file this civil action until the possibility of that prospect no longer existed.[18] **[fn. 18:** The Court is mindful of the fact that the state of the law with respect to *Heck* allows a situation to exist in which prosecutors who had committed or permitted the commission of violations of constitutional rights would be incentivized to continue prosecutions in order to protect themselves from the consequences of the earlier constitutionally infirm prosecution. Instead of dismissing cases that should be dismissed they would instead benefit from forcing a plea, even an *Alford* plea, and threatening lengthy further prison in order insulate themselves from the consequences of their prior bad acts. While the Court does not opine about whether that was the state of play in this case it is interesting to note that the prosecution's threat to use infirm evidence and seek more prison time had Mr. Tempest proceeded to trial certainly indicates that it may well have been the case here. This systemic flaw, however, is one that cannot be resolved within the context of this case.**]** At one time, there was some federal support for that position. [citing cases] The First Circuit has not addressed this question, but it seems clear under *Wallace v. Kato* that Mr. Tempest's argument that he was precluded by *Heck* from bringing this action until September 18, 2017, when the case finally terminated, would not be successful. . . The Court is thus constrained to hold that the cause of action accrued no later than July 14, 2016, and the three-year statute of limitations expired. . . . **[fn. 19:** Had Mr. Tempest brought this action while the criminal charges were pending, it could have been stayed until such time as they were resolved, satisfying *Wallace v. Kato*. . . That course has been followed in this Circuit.")

Second Circuit [Note that *Kee, Smalls, and Ashley* are all pre-*Thompson v. Clark*]

Kee v. City of New York, 12 F.4th 150, 162-63, 165, 169-70 (2d Cir. 2021) ("On appeal, the defendants do not dispute that the dismissal of Kee's criminal prosecution on speedy trial grounds is a favorable termination under state law in the context of his state tort claim for malicious prosecution. We agree and reiterate that, under New York State law, dismissal of a criminal prosecution on speedy trial grounds . . . is generally a favorable termination for the purpose of a New York tort claim for malicious prosecution. . . The dispute on appeal as to this element is whether, as a matter of *federal* law, a speedy trial dismissal satisfies the favorable termination element for purposes of a malicious prosecution claim brought under Section 1983. Kee challenges the district court's determination that, under federal law, a dismissal on speedy trial grounds does not qualify as a favorable termination. Specifically, he asserts that under general principles of traditional common law, and following the precedent of our Circuit, speedy trial dismissals are favorable. In contrast, defendants assert that the district court correctly granted them summary

judgment on Kee's Section 1983 malicious prosecution claim because, under federal law, a plaintiff must show that the underlying prosecution terminated in a manner indicating innocence and that the dismissal of Kee's prosecution on speedy trial grounds is merely 'neutral as to innocence and equally consistent with guilt.'. . The district court, as well as defendants, support their analysis by relying upon our decision in *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018). As discussed below and in *Lanning*, New York state tort law has diverged from traditional common law with respect to what qualifies as a favorable termination. This divergence has unfortunately been the source of some confusion in Section 1983 litigation, and district courts in the Circuit have reached different conclusions regarding the impact of our decision in *Lanning* on the question of whether a speedy trial dismissal is a favorable termination in the context of a federal malicious prosecution claim. *Compare Blount v. City of New York*, 15-CV-5599 (PKC) (JO), 2019 WL 1050994, at *5 (E.D.N.Y. Mar. 5, 2019) ("*Lanning* makes clear that, as the Circuit consistently held pre-*Lanning*, dismissals on speedy trial grounds are terminations in the favor of the accused."), *with Minus v. City of New York*, 488 F. Supp. 3d 58, 66 (S.D.N.Y. 2020) (concluding, after reviewing *Lanning* and prior case authority, that "a speedy trial dismissal is not a favorable termination for purposes of a Section 1983 claim without an affirmative indication of the accused's innocence"); *see generally Herrera-Amador v. N.Y.C. Police Dep't*, 16-CV-5915 (NGG) (VMS), 2021 WL 3012583, at *4 (E.D.N.Y. July 16, 2021) (collecting cases). We now clarify that *Lanning* did not modify, but rather re-affirmed, the longstanding 'indicative of innocence' standard for Section 1983 malicious prosecution claims under which this Court has repeatedly held, and holds again today, that a speedy trial dismissal generally constitutes a 'favorable termination.'. . . Therefore, we again hold that *Murphy* is good law and binding precedent—namely, a speedy trial dismissal is generally a favorable termination for purposes of a malicious prosecution claim under Section 1983. In clarifying that a dismissal on speedy trial grounds is *generally* a favorable termination, we note the qualifier. Although such dismissals are generally (or presumed to be) favorable, the defendant may attempt to present evidence to rebut this presumption. Thus, as explained in *Murphy*, a plaintiff will prevail on this 'favorable termination' element as a matter of law when there was a speedy trial dismissal unless the defendant produces evidence of a 'non-merits-based explanation for the failure to pursue the prosecution' of the plaintiff. . . . Even though defendants acknowledge that a fair trial claim is cognizable even in the absence of a trial under *Frost*, they argued in their brief that Kee still must satisfy a 'favorable termination' requirement that is identical in its scope to that same element in the context of a malicious prosecution claim, and they asserted Kee failed to meet that requirement. The Supreme Court recently held that a fair trial claim based on fabricated evidence does not accrue until the underlying criminal proceeding terminates in the plaintiff's favor. *See McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 2158–61, 204 L.Ed.2d 506 (2019). Moreover, in *McDonough*, the Supreme Court suggested that there may be a need 'for a context-specific and more capacious understanding of what constitutes "favorable" termination for purposes of a § 1983 false-evidence claim.'. . However, because the plaintiff's acquittal on the underlying criminal charges 'was unquestionably a favorable termination,' the Supreme Court had 'no occasion to address the broader range of ways a criminal prosecution ... might end favorably to the accused' in the fair trial context. . . As an initial matter, because we have already concluded that Kee has met the

'favorable termination' requirement mandated for a malicious prosecution claim, defendants' argument is moot because, even if that identical standard were to be applied to a fair trial claim, Kee would still satisfy that requirement. In any event, in *Smalls v. Collins*, —— F.4th ——, 2021 WL 3700194 (2d Cir. Aug. 20, 2021), we recently addressed this issue in the wake of *McDonough* and rejected the precise argument asserted by the defendants here . . . . Instead, we held that '[w]here the plaintiff asserts a section 1983 fair-trial claim based on fabricated evidence, all that is required is that the underlying criminal proceeding be terminated in such a manner that the lawsuit does not impugn an *ongoing* prosecution or *outstanding* conviction.'. . Applying that standard here, because Kee's underlying criminal proceeding was dismissed on speedy trial grounds, his fair trial claim does not impugn an ongoing prosecution, nor would it potentially invalidate any outstanding conviction if he were to prevail. Accordingly, this dismissal on speedy trial grounds constitutes a favorable termination under the standard articulated in *Smalls*, which is necessary for the accrual of a fair trial claim based upon fabricated evidence under *McDonough*.")

Smalls v. Collins, 10 F.4th 117, 131-40 (2d Cir. 2021) ("The plaintiffs argue on appeal that the district courts erred in granting the defendants' motions because (1) *McDonough* does not require plaintiffs asserting section 1983 fair-trial claims based on fabricated evidence to demonstrate that their underlying criminal proceedings terminated in a manner indicative of innocence; and (2) their underlying criminal proceedings were terminated in such a way that satisfies *McDonough*'s accrual rule. For the reasons explained below, we agree. . . . In contrast to malicious prosecution claims, which require a plaintiff to demonstrate 'that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence,' *Lanning*, 908 F.3d at 22, we have long held 'that Section 1983 liability attaches for knowingly falsifying evidence even where there simultaneously exists a lawful basis for [the] deprivation of liberty' that the plaintiff suffered. . . . The same is true of other types of section 1983 fair-trial claims, such as those alleging the withholding of exculpatory or other impeachment material in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). . . This is because malicious-prosecution and fair-trial claims 'arise out of different constitutional rights, protect against different constitutional injuries, and implicate different constitutional concerns.'. . Malicious-prosecution claims 'essentially allege[ ] a violation of the plaintiff's right under the Fourth Amendment to be free from unreasonable seizure,' the 'touchstone' of which is 'reasonableness.'. . . A section 1983 fair-trial claim, by contrast, will not be defeated by evidence of probable cause because it 'cover[s] kinds of police misconduct not addressed by ... malicious prosecution claims' and vindicates a different constitutional right – the right to due process protected by the Fifth and Fourteenth Amendments. . . The due process clauses of the Fifth and Fourteenth Amendments prohibit the government from 'depriv[ing] any person of life, liberty, or property, without due process of law,' U.S. Const. amend. XIV, § 2; *accord* U.S. Const. amend. V, and thus, unlike a plaintiff asserting a Fourth Amendment violation, a plaintiff may assert a violation of her due process rights even where the relevant deprivation was otherwise '[ ]reasonable,' U.S. Const. amend. IV. 'Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable "corruption of the truth-seeking function of the trial process,"' and deprivation of life, liberty, or property under such circumstances violates the

accused's right to due process. . . 'No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee.'. . . We have therefore never required that a plaintiff alleging a section 1983 fair-trial claim establish a favorable termination indicative of innocence. . . . In *Heck,* the Supreme Court announced an accrual rule for section 1983 actions involving an underlying criminal conviction. . . . In *McDonough,* the Supreme Court extended the rule announced in *Heck* to ongoing criminal prosecutions. . . . Relying extensively on its prior decision in *Heck,* the Court found it useful to analogize McDonough's fabricated-evidence claim to the common-law tort of malicious prosecution, noting that malicious prosecution's favorable-termination requirement 'is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting judgments.'. . The Court explained that 'similar concerns for finality and consistency' had motivated it to limit the 'avenues for collateral attack on criminal judgments through civil tort vehicles such as § 1983' and to adopt *Heck*'s 'favorable-termination requirement.'. . Although *McDonough* differed from *Heck* because the plaintiff in *Heck* had been convicted while the plaintiff in *McDonough* was acquitted, the Court reasoned that McDonough's claims challenged the validity of the criminal proceedings against him 'in essentially the same manner' as the plaintiff in *Heck*. . .A criminal defendant therefore cannot 'bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing.'. . 'Only once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*, will the statute of limitations begin to run.'. . Applying this newly formulated rule, the Court reversed the judgment of the Second Circuit, concluding that the statute of limitations for McDonough's section 1983 fabricated-evidence claim did not begin to run until the criminal proceedings against him 'terminated in his favor – that is, when he was acquitted at the end of his second trial.'. . . *McDonough* did, however, announce a new accrual rule for fabricated-evidence claims. Relying on *Heck's* 'favorable-termination requirement,' the Supreme Court concluded that '[t]here is not a complete and present cause of action to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are *ongoing*.'. . To bring a fabricated-evidence claim, a plaintiff must therefore establish – as a condition precedent to suit – that the claim has accrued within the meaning of *McDonough.* The core question at the heart of these appeals is what constitutes a favorable termination sufficient to trigger *McDonough*'s accrual rule for fabricated-evidence claims. The defendants point out that *McDonough*'s accrual rule for fabricated-evidence claims was premised on an analogy to malicious-prosecution claims and argue that *McDonough*'s favorable-termination requirement should thus be interpreted to be coextensive with malicious prosecution's favorable-termination requirement, under which a plaintiff must establish that the proceeding ended in a manner indicative of innocence. This argument is inconsistent with the reasoning and holding of *McDonough* and, we think, lacks merit. . . . Notably, *Heck's* analogy to malicious prosecution did not result in the Supreme Court's adoption of a termination-indicative-of-innocence requirement for all section 1983 claims premised on an underlying conviction. Rather, to guard against parallel litigation and promote finality and consistency, the Court adopted an accrual rule designed to avoid inconsistent results and new avenues of collateral attack. . . Under the *Heck* Court's favorable-termination requirement, . . . if a section 1983 plaintiff establishes –

before bringing suit – that the 'action, even if successful, will *not* demonstrate the invalidity of any *outstanding* criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.'. . A plaintiff may satisfy this requirement by demonstrating 'that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.'. . None of these resolutions requires an affirmative showing of innocence. . . . [T]he *McDonough* Court found itself confronted with a set of facts that raised concerns similar to those present in *Heck* and simply extended *Heck*'s reach to section 1983 lawsuits brought during pending criminal prosecutions. . . Although the *McDonough* plaintiff's claims did not fall within *Heck* because, unlike the plaintiff in *Heck*, he had been acquitted and there was therefore no outstanding conviction, the Supreme Court decided that the 'pragmatic considerations' underlying the *Heck* rule apply with equal force to '*ongoing*' criminal proceedings. . . .In reaffirming the *Heck* rule while extending it to ongoing prosecutions, *McDonough* no more required an affirmative indication of innocence than *Heck* did. Indeed, the notion that *McDonough* established malicious prosecution's favorable-termination requirement as the accrual rule for section 1983 fair-trial claims is inconsistent with the rule announced in *McDonough*. The Supreme Court phrased its accrual rule disjunctively, making clear that invalidation of a conviction within the meaning of *Heck or* termination of an ongoing criminal proceeding in the defendant's favor would be sufficient to trigger the statute of limitations. . . Further, while the Court had 'no occasion to address the broader range of ways a criminal prosecution (as opposed to a conviction) might end favorably to the accused' because the plaintiff's 'acquittal was unquestionably a favorable termination,' it suggested that a 'context-specific and more capacious understanding of what constitutes "favorable" termination' might be appropriate for fabricated-evidence claims in light of prosecutors' broad discretion over 'the terms on which pleas will be offered or whether charges will be dropped[.]'. . This language undercuts any suggestion that *McDonough*'s accrual rule is merely coextensive with malicious prosecution's favorable-termination requirement. Requiring a plaintiff alleging fabricated-evidence claims to establish that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence would also be fundamentally inconsistent with our longstanding distinction between section 1983 fair-trial and malicious-prosecution claims. As noted above, malicious-prosecution and fair-trial claims assert the violation of different constitutional rights and protect against different constitutional injuries. It makes sense to require a favorable termination indicative of innocence in the context of malicious prosecution claims where the essence of such a claim 'is the alleged groundless prosecution[.]'. . Absent affirmative indications of innocence, the termination of the proceeding does not necessarily mean that the government lacked reasonable grounds for initiating the prosecution; a favorable termination indicative of innocence is therefore critical to determining whether the plaintiff has a viable claim. . . A section 1983 fair-trial claim, by contrast, focuses on the constitutionality of the process and addresses a different constitutional injury – deprivation of life, liberty, or property due to corruption of due process by official misconduct. . . Whether the proceeding was terminated in a manner indicative of innocence therefore is not dispositive in the context of a section 1983 fair-trial claim, and we have never

required that a plaintiff alleging such a claim establish a favorable termination indicative of innocence. Accordingly, *McDonough*'s accrual rule does not import malicious prosecution's favorable-termination requirement onto section 1983 fair-trial claims. Where the plaintiff asserts a section 1983 fair-trial claim based on fabricated evidence, all that is required is that the underlying criminal proceeding be terminated in such a manner that the lawsuit does not impugn an *ongoing* prosecution or *outstanding* conviction. . . This requirement may be satisfied where a criminal conviction has been invalidated or a criminal prosecution has been terminated in the criminal defendant's favor because, in such circumstances, there is no risk that a section 1983 plaintiff's claim will impugn an existing conviction or the basis for an ongoing prosecution. . . . Smalls's section 1983 fabricated-evidence claim poses no risk of demonstrating the invalidity of any outstanding criminal judgment because there is no such judgment. And his lawsuit does not run parallel to, nor does it impugn, any pending prosecution or existing conviction because there is no conviction and there are no pending charges. Smalls has therefore satisfied *McDonough* and there is no bar to his suit")

Smalls v. Collins, 10 F.4th 117, 140-44 (2d Cir. 2021) ("Relying on *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), the *Daniel* defendants argue that, even if a termination indicative of innocence is not required under *McDonough*, Daniel's claim – which involves a pretrial deprivation of liberty – is governed by the Fourth Amendment and therefore collapses into a malicious-prosecution claim. According to the *Daniel* defendants, this means that Daniel must demonstrate that his underlying criminal case was resolved in a manner indicative of innocence as is required for malicious-prosecution claims. The *Daniel* defendants essentially assert that, in *Manuel*, the Supreme Court categorically precluded due process fabricated-evidence claims seeking damages for pretrial detention. They argue that the Supreme Court held that such claims may only be brought under the Fourth Amendment and that, as a result, a fabricated-evidence claim seeking damages for pretrial detention is subsumed under the elements of a malicious-prosecution claim. But in *Manuel*, the Supreme Court granted certiorari to decide only whether a section 1983 claim based on a 'pretrial detention following the start of legal process' could 'give rise to a Fourth Amendment claim.'. . The Court answered this question in the affirmative. . . We have held that *Manuel* did not rule out the possibility that, in such circumstances, the Constitution also permits a due process claim that the plaintiff was deprived of life, liberty, or property as a result of the use of fabricated evidence. In *Frost v. New York City Police Department*, 980 F.3d 231 (2d Cir. 2020), we concluded that the district court erred in granting the defendants' motion for summary judgment as to Frost's section 1983 fair-trial claim, which was premised on his pretrial detention. . . In reaching this conclusion, the majority rejected the dissent's argument that Frost's claim failed as a matter of law because, under *Manuel*, it arose under the Fourth Amendment and there was 'ample probable cause for Frost's arrest, [pretrial] detention, and prosecution.'. . The dissent – like the *Daniel* defendants – essentially argued that Frost's fair-trial claim was more accurately described as arising under the Fourth Amendment, rather than the Due Process Clause, because the allegedly fabricated evidence was only used to initiate pretrial proceedings against Frost (and was not, in fact, introduced at trial). . . The majority found this argument unpersuasive, concluding that our precedent established that, in this context, 'the (perhaps imprecisely named)

fair trial right protects against deprivation of liberty that results when a police officer fabricates and forwards evidence to a prosecutor that would be likely to influence a jury's decision, *were that evidence presented to the jury*.'. . Accordingly, '[n]otwithstanding the nomenclature, a criminal defendant's right to a fair trial protects more than the fairness of the trial itself[;] [i]ndeed, a criminal defendant can bring a fair trial claim even when no trial occurs at all.'. . The majority in *Frost* reconciled this result with *Manuel*, explaining:

The Supreme Court's holding in *Manuel v. City of Joliet* ... does not compel a different result. In *Manuel*, the Supreme Court held that a § 1983 plaintiff could challenge his pretrial detention based on purportedly fabricated evidence under the Fourth Amendment, even after a judge determined that this evidence constituted probable cause. But just as a Fourth Amendment claim survives the initiation of "legal process," our precedents establish that a fair trial claim under the Due Process Clause may accrue before the trial itself. Accordingly, the holding of *Manuel* does not preclude Frost's fair trial claim.

Id. at 251 n.14 . . . The defendants' argument is therefore foreclosed by *Frost.* Under our precedent, Daniel may assert a fabricated-evidence claim related to his pretrial detention under the Due Process Clause. . . . It is therefore an open question as to whether the dismissal of Daniel's charges pursuant to an ACD constitutes a favorable termination for purposes of *McDonough*. The pragmatic concerns animating *McDonough* counsel in favor of concluding that it does. As explained above, *McDonough* extended *Heck* to section 1983 fabricated-evidence claims filed during an ongoing prosecution because allowing such suits would impugn the basis for a pending prosecution and 'impermissibly risk parallel litigation and conflicting judgments.'. . These concerns are not implicated where, as here, the charges against the plaintiff are dismissed pursuant to an ACD. When a defendant accepts an ACD in New York state court, his criminal prosecution is 'adjourn[ed] ... without [a] date ordered' for it to resume. . . While the government retains the right to move to 'restore the case to the calendar,' it must make such a motion within 'six months' – or in some cases 'one year' – after the defendant accepts the ACD. . . If the government does not move within the prescribed time period, 'the accusatory instrument is, at the expiration of such period, deemed to have been dismissed by the court in furtherance of justice' and 'the arrest and prosecution shall be deemed a nullity.'. . In such circumstances, there is no risk of parallel litigation because the charges have been dismissed. Nor is there any risk of conflicting judgments because no determination of guilt or innocence was made, and no judgment was entered. Rather, once the charges against Daniel were dismissed, any concerns about the possibility of 'two-track litigation' dissipated. . . This conclusion is reinforced by the rationales underlying our enduring distinction between malicious-prosecution and fair-trial claims. While a termination indicative of innocence is necessary in the context of malicious-prosecution claims to ensure that there were no reasonable grounds for the prosecution, *see Lanning*, 908 F.3d at 28, depriving an individual of life, liberty, or property by fabricating evidence violates due process regardless of whether there was probable cause because '[n]o arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee.'. . In contrast to a malicious-prosecution claim, which focuses on the validity of the initiation of the prosecution, a section 1983 fair-trial claim predicated on fabricated evidence guards against the deprivation of life, liberty, or property as a result of the corruption of due

process, . . . and therefore does not require a favorable termination indicative of innocence. . . Consistent with this distinction, it is well-settled that acceptance of an ACD bars a malicious-prosecution claim because it leaves the question of innocence or guilt unanswered and is thus not a termination indicative of innocence. . . And it was similarly well-accepted, prior to *McDonough*, that an ACD did not preclude a fair-trial claim. . . *McDonough* did not impose malicious prosecution's favorable-termination requirement onto fair trial claims or overrule our precedent concerning the contours of fabricated-evidence claims. . . Rather, as explained above, *McDonough* simply extended *Heck's* favorable termination requirement to ongoing prosecutions under circumstances that implicate *Heck*'s pragmatic concerns for finality and consistency. Such concerns are not present where, as here, the charges against Daniel were dismissed pursuant to an ACD. . . . The dismissal of Daniel's charges pursuant to an ACD therefore constituted a favorable termination within the meaning of *McDonough* and *McDonough* poses no bar to suit.")

Ashley v. City of New York, 992 F.3d 128, 139-42 (2d Cir. 2021) ("Civil contends that under *McDonough v. Smith*, 139 S. Ct. 2149 (2019), plaintiffs asserting a fabricated-evidence claim must establish that the underlying prosecution terminated in their favor. He asserts that, because Ashley has not shown a favorable termination, any possible errors in the jury instructions were harmless. We hold, however, that Ashley's criminal case did terminate favorably to him. Our favorable-termination analysis here relies on our precedents regarding favorable termination in the malicious-prosecution context. The Supreme Court explained in *McDonough* that fabricated-evidence claims might merit a 'context-specific,' and indeed 'more capacious,' understanding of what constitutes a favorable termination. . . But even assuming, *arguendo,* that the favorable termination requirement for fabricated-evidence claims is identical to that used for malicious prosecution claims, we believe that our malicious prosecution precedents compel the conclusion that Ashley's prosecution terminated in his favor. In the malicious prosecution context, we have held that, to be deemed a favorable termination, the prosecution's 'final disposition [must be] such as to indicate the accused is not guilty.' *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980). This requirement is most easily met with a judgment of acquittal. But we have long recognized that a termination may be favorable when, although the termination is 'not based on the merits, ... the failure to proceed implies a lack of reasonable grounds for the prosecution.'. . This principle, which we have repeatedly and consistently recognized, . . . is stated most clearly in *Murphy v. Lynn*, 118 F.3d 938 (2d Cir. 1997). There, we explained that whether a non-merits termination is 'indicative of innocence depends on the nature and circumstances of the termination; the dispositive inquiry is whether the failure to proceed implies a lack of reasonable grounds for the prosecution.'. . And although we held in *Murphy* that, as a 'general[ ]' matter, 'certain types of dispositions'—such as dismissals for facial insufficiency in which the prosecution has 'fail[ed] to allege sufficient facts to support the charge'—do not qualify as favorable terminations, we emphasized that the determination is context-specific. . . Here, the circumstances surrounding the termination of Ashley's prosecution show favorable termination, even though the disposition was denoted as a dismissal for facial insufficiency. . . .[T]he problem with the prosecution's case did not stem from a deficiency in the pleading, but rather from the court's sense that the prosecution's

case without more simply did not support a charge of unlawful possession of marijuana against Ashley. Indeed, although the prosecution was offered multiple opportunities to strengthen its case and supersede the deficient pleading, it declined to do so. . . It follows that the prosecution's dismissal would 'indicate [that Ashley is] not guilty.'. . As a result, we need not decide whether and how the favorable-termination standard for fabricated-evidence claims may be 'more capacious' than the favorable-termination standard for malicious prosecution claims, . . . because we hold that in the circumstances before us, Ashley's state criminal case terminated favorably to him even under our malicious prosecution precedents.")

McDonough v. Smith, 783 F. App'x 91, ___ & n.1 (2d Cir. 2019) ("This case is before us on remand from the Supreme Court, which reversed our decision in *McDonough v. Smith*, 898 F.3d 259 (2d Cir. 2018), and remanded for further proceedings consistent with the Supreme Court's opinion. *See McDonough v. Smith*, 139 S. Ct. 2149, 204 L. Ed. 2d 506 (2019). We now **VACATE** the judgment of the district court and **REMAND** for further proceedings consistent with the opinion of the Supreme Court. . . .We express no view as to whether Smith has waived or forfeited the argument that absolute immunity bars McDonough's fabricated-evidence claim. *See Brown v. City of New York*, 862 F.3d 182, 187-88 (2d Cir. 2017).")

Perez v. City of New York, No. 20-CV-1359 (LJL), 2022 WL 4236338, at *1-14 (S.D.N.Y. Sept. 14, 2022) ("Defendants' primary argument is that Plaintiff cannot show favorable termination of her criminal proceedings. That argument is without merit. Defendants contend that an 'ACD bars a malicious-prosecution claim because it leaves the question of innocence or guilt unanswered and is thus not a termination indicative of innocence.'. . That argument may have had merit when Defendants filed their opening brief in support of the motion for summary judgment on January 21, 2022. On April 4, 2022, however, the Supreme Court decided *Thompson v. Clark*, 142 S. Ct. 1332 (2022), rejected the Second Circuit test for favorable termination, and held that '[t]o demonstrate a favorable termination of a criminal prosecution for purposes of the Fourth Amendment claim under § 1983 for malicious prosecution, a plaintiff need only show that his prosecution ended without a conviction[.]'. . In light of *Thompson*, Defendants' argument is meritless. . . . Based on *Thompson*, Plaintiff has established favorable termination. . . Perez's case ended in an ACD. . . That ACD culminated in a dismissal of all her charges.")

Smith v. Town of Lewiston, No. 17-CV-959-LJV-LGF, 2022 WL 3273241, at *8–9 (W.D.N.Y. Aug. 11, 2022) ("Prior to *Thompson*, for a federal malicious prosecution claim to succeed in the Second Circuit, the favorable-termination element required some affirmative indication of the plaintiff's innocence in the underlying proceeding. *Lanning v. City of Glens Falls*, 908 F.3d 19, 25 (2d Cir. 2018). In *Thompson*, however, the Supreme Court deciphered 'the elements of the most analogous tort as of 1871 when § 1983 was enacted, and concluded that '[i]n most American courts that had considered the question[,] ... the favorable termination element of a malicious prosecution claim was satisfied so long as the prosecution ended without a conviction.'. . Indeed, the Court noted that several courts during that era employed identical language: they asked only whether the prosecution was '*at an end.*'. . Based on that historical analysis, the Supreme Court concluded that

'a Fourth Amendment claim under § 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence.'. . Instead, '[a] plaintiff need only show that the criminal prosecution ended without a conviction.'. . That standard is clearly met here: the judge dismissed the action with prejudice. . . Therefore, in light of *Thompson*, Smith has satisfied this element of his federal malicious prosecution claim as a matter of law. In contrast, under New York State law, a prosecution is favorably terminated when it cannot be brought again and when its termination is not inconsistent with the innocence of the accused. . . .In this case, it is unclear whether the criminal proceedings were favorably terminated under New York State law. The order dismissing the proceeding simply states that the information was dismissed with prejudice on Smith's motion with no opposition from the prosecution. . . Smith's counsel presented several arguments for dismissal in that motion, including that: (1) the information was defective on its face; (2) the underlying conduct was protected by the First Amendment; and (3) depending on the availability of certain audio recordings, the charge should be dismissed based on spoliation of evidence and due process grounds. . .The transcript from the proceedings provides no clarity; on the contrary, it only adds confusion. . . .[I]t is possible that the proceedings were dismissed because the prosecution and Smith agreed for some reason that the prosecution would not object to dismissal and would effectively abandon the prosecution. On the other hand, it also is possible that the charge was dismissed on its merits. Therefore, there is a material issue of fact on that element of Smith's state law malicious prosecution claim. In sum, the underlying proceedings were terminated in Smith's favor for the purpose of his federal law malicious prosecution claim, but there is a material issue of fact as to this element under state law standards.")

Fourth Circuit

Smith v. Travelpiece, 31 F.4th 878, 884-88 (4th Cir. 2022) ("[I]dentifying when Plaintiffs' cause of action accrued requires that we first isolate the precise constitutional violation alleged. Plaintiffs' § 1983 claim focuses on an improper search warrant. The search warrant, it is alleged, was improper because the Defendant made false statements and material omissions in his affidavit in support of the warrant. Plaintiffs claim that this violated their right to be free from unreasonable searches and seizures under the Fourth Amendment and their right to due process under the Fourteenth Amendment. . . . When an officer improperly obtains a search warrant using deceptive falsities or omissions and uses that ill-gotten warrant to search and seize property, the Fourth Amendment's right to be free from unreasonable searches and seizures is violated. . . Plaintiffs claim that the improper search warrant also violated their procedural due process rights under the Fourteenth Amendment. In short, they claim that Trooper Travelpiece's lies and omissions during the warrant process deprived them of the fair procedures that are required before a search and seizure of property can occur. But '[t]he Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases.'. . Dressing a Fourth Amendment claim up in due process language does not transform it into a Fourteenth Amendment claim. . . One might just as well dress up any Fourth Amendment claim this same

way. When a police officer searches a suspect's home with no warrant, one might complain that the officer did not follow the procedures laid out in the Fourth Amendment requiring a warrant by oath or affirmation from an impartial judge. But no matter its dress, that is a Fourth Amendment unreasonable-search claim and not a due-process claim. So too here. Nor do the allegations here implicate claims for improper detention or prosecution. . . To raise those claims, Plaintiffs would have needed to allege Trooper Travelpiece acted improperly after the search. . . Plaintiffs fail to allege Trooper Travelpiece infringed their constitutional rights after the search and seizure was complete. Trooper Travelpiece's only improper actions occurred in making deceptive statements and omissions in his search-warrant affidavit. Thus, Plaintiffs only plead a single constitutional violation—an unreasonable search and seizure of property in violation of the Fourth Amendment. . . Having identified the claim as a Fourth Amendment unlawful-search-and-seizure-of-property claim, we must next identify its best common-law-tort analogy. This requires turning to 'common-law principles that were well settled' in 1871 when Congress enacted § 1983. . . And common-law courts have long considered the government's illegal search and seizure of property to be a trespass. . . In 1763, the English Court of Common Pleas recognized that an action brought by the victim of an illegal search and seizure by government officers pursuant to an unlawful warrant was 'an action of trespass' and upheld a large jury verdict for the plaintiff. . . . So trespass is the most natural common-law analogy for a Fourth Amendment unreasonable-search-and-seizure claim. When Congress passed § 1983, a trespass was '[a]ny entry upon land in the rightful possession of another, without license or permission.'. . That claim accrued at 'the time it was committed, and not from the time when the full extent of the injury was ascertained.'. . Once the wrongful entry occurred, Plaintiffs 'could have filed suit' with a 'complete and present cause of action.'. .That accrual rule, well-settled in the common law of 1871, is consistent with the Fourth Amendment as well. The Fourth Amendment protects people's interest in property as well as 'certain expectations of privacy.'. . And those interests are violated as soon as an unlawful search and seizure of property occurs—no further prosecution is required. . . Given that the Fourth Amendment is concerned with property and privacy—not guilt or innocence—the values of the Fourth Amendment are served by ensuring that a § 1983 plaintiff can vindicate their interests in property and privacy when they are violated, no matter if a prosecution is commenced. . . Our Court previously adopted the rule that the statute of limitations for a § 1983 claim based on an unconstitutional search and seizure of property runs from the time of the search and seizure. . . And although we lacked the Supreme Court's recent guidance on § 1983 accrual rules, *Cramer*'s conclusion conforms to that guidance, the common law of 1871, and the requirements of the Fourth Amendment. So Plaintiffs' § 1983 claim based on an unconstitutional search and seizure of property accrued at the time of the search. . . As Plaintiffs filed suit more than two years after the search, we agree with the district court that the § 1983 claim is time barred. One final argument must be considered. Plaintiffs argue that even if a Fourth Amendment search claim typically accrues at the time of the search, this particular search claim did not accrue until the charges against them were dismissed because the claim 'necessarily threatens to impugn' their prosecutions. . . Based on language in *Heck* and *McDonough*, Plaintiffs argue that a favorable-termination accrual rule is required anytime a § 1983 claim 'necessarily threatens to impugn' a prosecution. . . We disagree. Both *Heck* and *McDonough* applied the favorable-termination accrual rule only after determining

that the claim's appropriate analog was malicious prosecution. . . We are instead governed by *Wallace*, which involved a constitutional claim of unlawful seizure of a person analogous to the tort of false imprisonment. . . In *Wallace*, the plaintiff had been convicted of murder based on a confession the police obtained after arresting the plaintiff without probable cause. . . The confession was held inadmissible on appeal and prosecutors dropped the charges against the plaintiff. . . Even though the particular facts showed that the alleged unlawful seizure would impugn the prosecution, the Supreme Court rejected the malicious-prosecution analogy and held the tort accrued without favorable termination of a future prosecution. . . *Wallace* rejected the 'bizarre extension of *Heck*' that Plaintiffs ask us to adopt here—'that an action which would impugn *an anticipated future conviction [or prosecution]* cannot be brought until that conviction [or prosecution] occurs and is set aside.'. . Adopting that extension 'would require the plaintiff (and if he brings suit promptly, the court) to speculate about whether a prosecution will be brought ... and whether the pending civil action will impugn that [prosecution].'. . If accrual depends on the prosecutor's conduct after the completion of the constitutional violation, § 1983 plaintiffs are left to a guessing game of if, or when, their claims will ever accrue. . . The appropriate common-law-tort analogy for a constitutional violation, and accordingly its accrual date, is based on the nature of the constitutional violation when it is complete. . . Plaintiffs only allege a search and seizure of property that violated the Fourth Amendment. That claim accrued when Trooper Travelpiece performed the unlawful search in 2014. And the applicable two-year statute of limitations ran out well before they sued in 2019. So the suit is time-barred and must be dismissed.")

Burley v. Baltimore Police Department, No. CV ELH-18-1743, 2019 WL 6253251, at *24 (D. Md. Nov. 22, 2019) ("The ruling of the Supreme Court was consistent with decisions of several circuits, concluding that a fabricated evidence claim begins to run when the criminal proceedings resolve in the defendant's favor. *See Floyd v. Attorney Gen.*, 722 F. App'x 112, 114 (3d Cir. 2018); *Mills v. Barnard*, 869 F.3d 473, 484 (6th Cir. 2017); *Bradford v. Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015); *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008); *Castellano v. Fragozo*, 352 F.3d 939, 959-60 (5th Cir. 2003) (*en banc*). . .In light of the Supreme Court's ruling in *McDonough*, I conclude that the limitations period as to plaintiffs' fabricated evidence claim began to run when the criminal proceedings against them terminated in their favor, that is, when their convictions were vacated in December 2017. Therefore, plaintiffs' due process/fabricated evidence claim in Count I was timely filed.")

Sixth Circuit

Anderson v. Knox County, No. 22-5280, 2023 WL 4536078, at *8 n.8 (6th Cir. July 13, 2023) (not reported) ("Our sister circuits are split on the issue of whether a plaintiff can bring a fabrication claim after acquittal and what that claim looks like. *Compare Black*, 835 F.3d at 371 (the Third Circuit allowing such a claim) *and Zahrey v. Coffey*, 221 F.3d 342, 348–49 (2d Cir. 2000), *with Saunders-El v. Rohde*, 778 F.3d 556, 562 (7th Cir. 2015) (not allowing such a claim). Moreover, the Supreme Court's decision in *McDonough v. Smith* impliedly recognized fabrication

claims based on acquittal. *See* 139 S. Ct. 2149, 2161 (2019) ("The statute of limitations for McDonough's § 1983 claim alleging that he was prosecuted using fabricated evidence began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial."). Under the Second Circuit's view, a plaintiff must show that the fabricated evidence 'critically influenced' the prosecutor's 'decision to prosecute.' *See Frost v. N.Y. City Police Dep't*, 980 F.3d 231, 248 (2d Cir. 2020). Under the Third Circuit's view, which allows a fabrication claim upon acquittal, to prevail, a plaintiff must demonstrate that 'there is a reasonable likelihood that, absent that fabricated evidence, [he] would not have been criminally charged,' i.e., that probable cause didn't otherwise exist. . . The problem for Anderson is that he doesn't establish that the supposedly fabricated evidence critically influenced the prosecutor's decision to prosecute or that probable cause didn't otherwise exist. Nor does he suggest another way to make out a fabrication claim on acquittal. So Anderson can't prevail here even if we were to adopt a separate acquittal test—a question that we leave for another day.")

Hamann v. Township of Van Buren, No. 20-10849, 2021 WL 534487, at *6 (E.D. Mich. Feb. 11, 2021) ("*McDonough* does not alter the principle that a plaintiff has a complete and present cause of action and can file suit and obtain relief for an unlawful search and seizure at the time the search occurs. *See Heck*, 512 U.S. at 487 n.7. It follows, then, that the three-year statute of limitations on the plaintiffs' claims attacking the 2015 search-and-seizure expired well before they file their complaint in 2020.")

Friskey v. Bracke, No. CV 2:17-056-WOB, 2020 WL 465026, at *9–11, *13 (E.D. Ky. Jan. 28, 2020) ("[T]here is a split amongst the Circuit Courts of Appeal regarding the viability of a fabrication of evidence claim after an acquittal. For example, in *Saunders-El v. Rohde*, the United States Court of Appeals for the Seventh Circuit recognized that a plaintiff's claim based on allegations that 'the prosecutor and investigators conspired "to manufacture false evidence and bring trumped-up charges,"' was foreclosed by the plaintiff's acquittal. . . In contrast, in *Black v. Montgomery Cty.*, 835 F.3d 358, 371 (3d Cir. 2016), *as amended* (Sept. 16, 2016), the United States Court of Appeals for the Third Circuit held that 'an acquitted criminal defendant may have a stand-alone fabricated evidence claim against state actors under the due process clause of the Fourteenth Amendment if there is a reasonable likelihood that, absent that fabricated evidence, the defendant would not have been criminally charged.'. . . Consistent among the courts that recognize that a fabrication of evidence claim may survive a criminal defendant's acquittal is that the plaintiff asserting the claim must show some sort of connection between the alleged fabrication of the evidence and a due process 'injury.'. . A causation requirement is also consistent with the United States Supreme Court's decision in *McDonough*, which found that, like malicious prosecution (which the Court found was the most analogous common-law tort), the tort of fabrication of evidence requires the plaintiff 'to show that the criminal proceedings against him – and consequent deprivations of his liberty – *were caused by* [Defendant's] malfeasance in fabricating evidence.'. . Thus, assuming (without deciding) that Friskey's fabrication of evidence claim is still viable after his acquittal, he must still point to some causal connection between the allegedly fabricated evidence and consequent deprivations of his liberty resulting from the

criminal proceedings against him. This Friskey simply does not do, as Friskey fails to point to any specific deprivation of his liberty at any point during the criminal proceedings (either resulting from his arrest, his criminal prosecution, or his sentence imposed after his conviction for drug manufacturing) caused by the alleged alterations to the rifle. Nor could he, as any 'deprivation of liberty' derived from Friskey's arrest and/or prosecution could not have been 'caused' by the alleged alterations. . . .It is true that the Sixth Circuit recognized in *Stemler* that a fabrication of evidence claim 'does not require a conclusion that the state did not have probable cause to prosecute the claimant.'. . However, this does not require the Court to ignore as irrelevant Friskey's admitted drug manufacturing activities and the abundance of other evidence found with the CN-Romarm rifle when evaluating whether the alleged post-seizure/pre-trial alterations to the rifle 'caused' Friskey to be deprived of liberty by virtue of his arrest and prosecution. Friskey does not argue that, absent the alleged alterations to the rifle, he would have never been arrested or prosecuted. Nor could he credibly do so, in light of the abundance of evidence against Friskey (*i.e.*, the .22 rifle, the ammunition, 571 marijuana plants, equipment for cultivating marijuana, and $8015), his own admissions to criminal activity prior to trial, and the fact that he was, indeed, convicted of manufacturing 100 plants or more of marijuana, a charge that was independent of his possession of the CN-Romarm rifle. In these circumstances, it simply cannot be said that the allegedly fabricated evidence (the alterations made to the rifle prior to trial) 'caused' his arrest or prosecution, as he certainly would have been arrested and prosecuted for his significant drug activities without it. . . . In summary, Friskey cannot show that he suffered from any deprivations of his liberty (or any other injury) as a result of the alleged alterations to the CN-Romarm rifle, which he must do to succeed on a tort claim for fabrication of evidence. *McDonough*, 139 S.Ct. at 2156. Nor has Frisky pointed to any probative evidence suggesting that Muse is the individual who removed the scope and bi-pod from the CN-Romarm rifle prior to trial, much less that he 'knowingly fabricated' the CN-Romarm rifle before it was introduced into evidence at Friskey's trial. Rather, Friskey is left with only his own speculation and conclusory allegations, which are simply insufficient to withstand summary judgment. For all of these reasons, Muse is entitled to summary judgment on Friskey's fabrication of evidence claim.")

Pippin v. City of Reynoldsburg, No. 2:17-CV-598, 2019 WL 4738014, at *6-7 (S.D. Ohio Sept. 27, 2019) ("Nothing in the logic of *McDonough* is necessarily limited to a deprivation of liberty claim and therefore this Court finds the analogy applies to Plaintiff's claim for unconstitutional taking of property. By the logic in *McDonough*, Plaintiff's claim accrued when the prosecutor entered the *nolle prosequi* in December 2016. His Complaint, filed seven months later, was therefore timely. On the face of the Complaint, this Court cannot rule out the possibility that Plaintiff's claim for unconstitutional taking of property would have been barred by *Heck* because a judgment in his favor would have undermined the then-valid conviction. . . .This Court concludes that, whether under the Fourth Amendment or under the Fifth Amendment, Plaintiff has properly stated a claim for relief, alleging that Defendants unconstitutionally seized or effected a taking of his personal property. This claim accrued when the proceedings against him terminated in his favor with the *nolle prosequi*. Therefore, his Complaint was timely filed. Defendants' Motions to Dismiss are denied. . . .*Wallace* concluded that 'the standard rule' is that a plaintiff's § 1983 claim

accrues 'when the plaintiff has a complete and present cause of action.'. . Courts must first 'identify the specific constitutional right at issue.'. . In *McDonough*, the plaintiff's fabricated-evidence claim was understood to arise under the Due Process Clause of the Fifth Amendment. . . The *McDonough* court concluded that a plaintiff has a 'complete and present cause of action…only once the criminal proceedings against him terminated in his favor.'. . With *McDonough* as with *Knick,* this Court informed the parties at a telephonic status conference that the outcome of the case had the potential to be dispositive in this matter. . . In their supplemental brief filed after this Court resumed consideration of this matter, Defendants attempt to argue that *McDonough* does not apply to the instant matter because Plaintiff has not asserted a fabricated evidence claim. . . To the contrary, this Court finds Plaintiff has done exactly this, stating in his Amended Complaint that 'Mauger, alone and/or with others including Downard, caused false search warrants to be presented to judges…, executed search warrants he knew to be based on false information, including the Pippin search warrant…'. . . And because *McDonough* squarely addresses the statute of limitations in fabricated-evidence cases, this Court finds *McDonough* controls the analysis here.")

Seventh Circuit

Towne v. Donnelly, 44 F.4th 666, 671-74 (7th Cir. 2022) ("In the context of a First Amendment retaliation claim, we have held that, '[g]enerally, the statute of limitations clock begins to run ... immediately after the retaliatory act occurred,'. . . so long as the plaintiff 'knows or should know that his or her constitutional rights have been violated[.]' . . At least two circuits have held that this general accrual rule for First Amendment retaliation claims applies equally to First Amendment retaliatory prosecution claims and that, consequently, the cause of action typically accrues when the retaliatory charges are brought. . . At that point, a plaintiff can state a complete claim by alleging that (1) he participated in an activity protected by the First Amendment; (2) he suffered a harm—that is, the criminal charges—likely to deter future protected activity; and (3) the charges were motivated by retaliation. . . For a First Amendment retaliatory prosecution claim, the plaintiff also must plead a lack of probable cause supporting the charge. . . The district court correctly determined that Mr. Towne's First Amendment retaliatory prosecution claim accrued when he learned that the defendants indicted him on charges that he believed to be retaliatory. According to Mr. Towne's complaint, he learned of the unlawful charges in September 2017, when the indictment was issued by a state's attorney with whom he had a history of conflict and personal animosity. . . .In *McDonough,* the question before the Court was when the statute of limitations begins to run for a § 1983 action based upon allegations of fabricated evidence. The district court and the court of appeals had concluded that the limitations period 'began to run when the evidence was used against [the plaintiff].'. . The Supreme Court reached a different conclusion. Analogizing these claims to the tort of malicious prosecution, an element of which is a favorable termination of proceedings, the Supreme Court held that due process claims based on fabricated evidence do not accrue until the favorable termination of the underlying criminal proceedings. . . . Mr. Towne maintains that, for two reasons, *McDonough* supports the view that *all* First Amendment retaliatory prosecution claims do not accrue until the prosecution is favorably terminated. First, he

contends that, like a due process claim based on fabricated evidence, a retaliatory prosecution claim is akin to the common-law tort of malicious prosecution and therefore also should include a favorable-termination requirement. Second, Mr. Towne asserts that the practical concerns supporting the decision in *McDonough* apply equally to First Amendment challenges to a state prosecution. We examine in turn each of these arguments. We are not convinced that a First Amendment retaliatory prosecution claim has the strong parallels to malicious prosecution that are present with a due process claim based on the fabrication of evidence. In comparing the evidence-fabrication claim to malicious prosecution, the Court drew upon its reasoning in *Heck*[.] . . In *Heck*, it had determined that the 'common-law cause of action for malicious prosecution provides the closest analogy' to a due process claim for destruction and fabrication of evidence because 'it permits damages for confinement imposed pursuant to legal process' and therefore necessarily impugns the entire legal process. . . The Court explained, '[t]he essentials of McDonough's claim are similar: His claim requires him to show that the criminal proceedings against him—and consequent deprivations of his liberty—were caused by Smith's malfeasance in fabricating evidence. At bottom, both claims challenge the integrity of criminal prosecutions undertaken "pursuant to legal process."'. . . Under established law, however, to bring a retaliatory prosecution claim under the First Amendment, a plaintiff need only plead and prove an absence of probable cause for the underlying charge. . . Thus, the plaintiff's allegations do not necessarily impugn or implicate the entire prosecution. Additionally, a plaintiff need not assert or establish that he was confined or deprived of liberty as a result of the charges. . . Indeed, in *Gekas*, we pointedly said that 'First Amendment retaliation claims and malicious prosecution claims are fundamentally different causes of action.'. . *McDonough* itself noted that 'the argument for adopting a favorable-termination requirement [is] weaker' in situations where there is not a 'liberty deprivation occasioned by the criminal proceedings themselves.'. . Mr. Towne sees things differently. He submits that in *Hartman*, the Supreme Court already has analogized First Amendment retaliatory prosecution claims to malicious prosecution and therefore set the groundwork for requiring favorable termination. We cannot accept this argument. In *Hartman*, the Supreme Court observed that it 'could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it).'. . The Court declined to engage in that debate, however. Instead, it adopted a no-probable-cause requirement for retaliatory prosecution claims because these claims require that retaliation be the 'but-for cause' of the charge. . . To be sure, the events that led to the lawsuit in *McDonough* and those underlying Mr. Towne's claim are undeniably similar because the basis for both is a prosecution that is based on false evidence and not supported by probable cause. . . . There is, however, an important difference between Mr. Towne's claim and the one in *McDonough*: Mr. Towne claims a violation of the First Amendment. Such a claim—unlike an evidence-fabrication claim under the Due Process Clause—does not necessarily focus on the entire prosecution, and, in that respect, is not akin to malicious prosecution with its favorable-termination requirement. . . Mr. Towne also submits that the pragmatic concerns motivating the favorable-termination requirement in *McDonough* are equally present in the context of a First Amendment retaliatory prosecution claim. For instance, litigants who wish to challenge an ongoing prosecution as retaliatory 'could face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against

the very person who is in the midst of prosecuting them.'. . The latter choice involves undesirable risks of 'tipping his hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context.'. . Because of these concerns, Mr. Towne maintains, a litigant should not be required to file his claim before the proceedings against him are completed in his favor. We agree with Mr. Towne that many of the practical concerns expressed in *McDonough* . . . apply also to First Amendment retaliatory prosecution claims that challenge ongoing state prosecutions. Nevertheless, we are not convinced that these interests justify extending the favorable-termination requirement to retaliatory prosecution claims arising under the First Amendment. Requiring a favorable termination in a First Amendment retaliatory prosecution claim because of these pragmatic concerns would narrow First Amendment protections. As the law now stands, a First Amendment claim accrues when a person is prosecuted without probable cause in retaliation for protected activity, even if evidence is later discovered to support the charge and lead to conviction. . . Perhaps for this reason, Mr. Towne points to no circuit that imposes such a favorable-termination requirement on retaliatory prosecution claims. On the other hand, as discussed earlier, several circuits have concluded that First Amendment retaliatory prosecution claims accrue when the retaliatory charges are brought. . . Further, if several of the concerns about parallel litigation become acute in a particular case, those concerns can be assuaged through the prudent use of stays and abstention. . . This practice is preferable to delayed accruals in situations like this one, where the action impugns an indictment as without probable cause but not necessarily the entire prosecution.")

Brown v. City of Chicago, No. 20-CV-03599, 2021 WL 6102980 (7th Cir. Dec. 22, 2021) (not reported) ("[W]e agree with the district court that Brown's Fourth Amendment claims—which relate to whether he was arrested and detained without probable cause—are untimely. There is a two-year statute of limitations for an Illinois-based § 1983 claim. . . And Brown's claims accrued when his pretrial detention ended, decades before his complaint in 2020. *See Manuel v. City of Joliet, Ill.*, 903 F.3d 667, 669–670 (7th Cir. 2018) (Fourth Amendment claim of unlawful pretrial detention accrues when detention ends), *enforcing* 137 S. Ct. 911, 920–22 (2017). With respect to Brown's claim of unlawful posttrial detention, however, we agree with Brown that the dismissal here was too hasty. In his amended complaint, Brown directly attacks the procedure and evidence used to convict him and send him to prison. According to the complaint, he was convicted and imprisoned because police presented a 'false and incomplete version of events to prosecutors,' wrote false reports, and gave false statements and testimony, while the prosecutors knew what the police were doing and, rather than intervening, happily played along. This set of allegations is properly characterized as a Due Process claim because, after a criminal conviction, 'the Fourth Amendment drops out,' and a challenge to the conviction or ensuing incarceration arises under the Due Process Clause. *Manuel v. City of Joliet, Ill.*, 137 S. Ct. at 920 n.8; *see also Lewis v. City of Chicago*, 914 F.3d 472, 480 (7th Cir. 2019). This type of claim did not accrue along with the Fourth Amendment challenge to the arrest and pretrial detention. Under the Supreme Court's decisions in *Heck v. Humphrey*, 512 U.S. 477 (1994), and *McDonough v. Smith*, 139 S. Ct. 2149 (2019), Brown could not pursue a § 1983 claim about his prosecution while his convictions remained valid because, if he succeeded, the integrity of the convictions would necessarily be

called in to doubt. As Brown argues, his Due Process claim was barred until his convictions were vacated based on later developments in the law. Contrary to the district court's ruling, moreover, our decision in *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020) (en banc), makes clear that a federal claim's similarity to the state-law tort of malicious prosecution is not fatal. The plaintiff in *Savory* was pardoned after spending 30 years in prison; he then brought § 1983 claims that 'strongly resemble[d] the common law tort of malicious prosecution.'. . We concluded that, until his pardon, those claims—which were premised on harms the plaintiff suffered after his criminal conviction—were barred by *Heck* . . . Brown, too, challenges not just his arrest but his postconviction detention. And like the plaintiff in *Savory*, and for that matter in *Heck*, he therefore raises cognizable federal claims.")

Sanders v. St. Joseph County, Indiana, 806 F. App'x 481, ___ & n.2 (7th Cir. 2020) ("Under the Supreme Court's decisions in *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997), Sanders could not have used § 1983 to contest his custody while it was ongoing. So his claim of unlawful detention accrued, at the earliest, when he was released from jail.[2] *See Manuel*, 903 F.3d at 670; *Tobey v. Chibucos*, 890 F.3d 634, 645 (7th Cir. 2018). . . . If, however, a conclusion that Sanders's confinement was unconstitutional would imply the invalidity of an ongoing criminal proceeding or a prior criminal conviction, then *Heck* would continue to bar Sanders's claim after his release and until either those proceedings terminated in his favor or the conviction was vacated. *See McDonough v. Smith*, 139 S. Ct. 2149 (2019); *Savory v. Cannon*, 947 F.3d 409, 414 (7th Cir. 2020).")

Camm v. Faith, 937 F.3d 1096, 1110-11 & n.3 (7th Cir. 2019) ("Our conclusion that the *Brady* claim may proceed in part requires us to address the defendants' argument that the claim is barred by the statute of limitations. Unlike the Fourth Amendment limitations issue, the defendants preserved an untimeliness defense below in opposition to the *Brady* claim. Nonetheless, it's a nonstarter under circuit precedent. In *Johnson v. Dossey*, 515 F.3d 778, 782 (7th Cir. 2008), we held that a similar *Brady* claim accrued when the defendant was finally acquitted. We relied heavily on the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), which bars a criminal defendant from seeking damages for an allegedly unlawful conviction unless and until the criminal proceedings have terminated in his favor. . . .The Supreme Court recently reached the same conclusion in a closely related context. In *McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 204 L.Ed.2d 506 (2019), a special prosecutor was accused of fabricating evidence and using it against a criminal defendant at two trials. The first ended in a mistrial; the second ended with an acquittal. The Court held that the limitations period for a claim of that nature does not begin to run until the criminal proceedings against the defendant have terminated in his favor with a final acquittal. . . To be clear, no *Brady* claims were at issue, and the Court emphasized that it was not expressing any opinion about the accrual of anything but the claim before it. . . But much of the Court's reasoning lends support to what we held in *Johnson*. Most importantly, the Court emphasized *Heck*'s 'pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.'. . In the same vein, the Court

stressed that '[t]here is not a complete and present cause of action to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing.'. . . Both considerations have just as much force in the *Brady* context. We therefore reiterate once more that the statute of limitations for a *Brady* claim does not accrue until the criminal proceedings terminate in the defendant's favor. Here, as in *Johnson*, the proceedings did not terminate until Camm was finally acquitted. He filed his complaint just one year after that, so his *Brady* claim is timely.")

In re: Watts Coordinated Pretrial Proceedings, No. 19-CV-1717, 2022 WL 9468253, at *9 (N.D. Ill. Oct. 14, 2022) ("A fair reading of Seventh Circuit fabricated evidence jurisprudence, from *Whitlock* to *Patrick*, reveals that the due process violation occurs once the material fabricated evidence is introduced 'in some way'—or more precisely, 'in his criminal case'—that results in the criminal defendant's conviction and ultimately deprives him of his liberty. . . One such way, but not the only way, is through a conviction following a trial. Another way is when the fabricated evidence is used to coerce the defendant to plead guilty. Any reading to the contrary would reward egregious deliberate misconduct from state actors by making conviction following trial the only pathway to vindicate constitutional violations. The Court can discern no cogent basis for such a distinction. Therefore, the Court does not find Defendants' argument persuasive.")

Stephenson v. City of Chicago, No. 21 C 0338, 2022 WL 1556380, at *2–3 (N.D. Ill. May 17, 2022) ("Stephenson's argument involves characterizing his claim as more than a straight-forward pretrial detention claim because he also alleges that defendant officers fabricated a story that he illegally possessed a firearm in order to arrest and later prosecute him. In *McDonough*, the Supreme Court determined that *Heck's* favorable termination requirement applied not only to plaintiffs who have been convicted, but also to plaintiffs who were subject to ongoing criminal proceedings. *See McDonough*, 139 S.Ct. at 2154-57; *Savory v. Cannon*, 947 F.3d 409, 417 (7th Cir. 2020) (en banc). In doing so, the Supreme Court reasoned that plaintiffs who are subject to ongoing criminal proceedings do not have a 'complete and present cause of action' for accrual purposes until the criminal proceedings have ended in plaintiffs' favor. . . Under Stephenson's allegations that the defendant officers used fabricated evidence to arrest and prosecute him, *Heck* supplies the rule for accrual, and thus Stephenson's Fourth Amendment and conspiracy claims are timely because they accrued on the favorable termination date, January 29, 2020. . . Simply put, 'given the nature of his Fourth Amendment claim, a finding that [Stephenson's] detention in jail was unconstitutional would imply the invalidity of the charges brought against him, *Heck* barred that claim until those charges were dismissed.' *Culp v. Flores*, 454 F.Supp.3d 764, 769 (N.D. Ill. 2020) (Feinerman, J.).")

Walker v. City of Chicago, No. 1:21-CV-02648, 2022 WL 971891, at *3–4 (N.D. Ill. Mar. 31, 2022) ("Walker misapplies *McDonough* and *Heck* to his false-arrest claim. Unlike in *McDonough*, a false-arrest claim is brought under the Fourth Amendment—not the Fourteenth Amendment's Due Process Clause. The nature of the claim is a key difference: the Fourth Amendment prohibits unreasonable seizures—like false arrests—and measures the reasonableness of the search

exactly *at the time* of the seizure. There either is probable cause—or there is not—right at the time of the seizure. . . How the false arrest plays a role in the later prosecution (if there even is one) does not matter; indeed, the actual arrest might not play a role *at all* in a later prosecution, particularly if law enforcement gathers and relies on other evidence. In contrast, a fabricated-evidence claim *always* relies on the *use* of the fabricated evidence in a criminal prosecution, and is thus akin, as *McDonough* says, to the common law tort of malicious prosecution. . . This distinction is 'significant enough to warrant dissimilar treatment under *Heck*.'. . Because Fourth Amendment claims 'merely anticipate convictions,' they do not 'represent the same threat to an existing prosecution as the due process case in *McDonough* ....'. . . As a result, Walker's claim 'should accrue when the Fourth Amendment wrong ends.'. . Put another way, the false-arrest claim in late October 2015 when Walker's arrest ended and legal process began. Walker points to two other cases to support his accrual argument: *Jackson v. City of Chicago*, 2021 WL 3883111 (N.D. Ill. Aug. 31, 2021), and *Culp v. Flores*, 454 F. Supp. 3d 764 (N.D. Ill. 2020). Both cases are distinguishable from Walker's. In *Jackson*, the district court concluded that the plaintiff's conviction was 'inextricably tied up' in his Fourth Amendment false-arrest claim, . . . so the plaintiff's claim did not accrue until the criminal proceedings 'were *fully* terminated.'. . Citing *Culp*, the court in *Jackson* reasoned that the police officers in that case based the arrest on 'false allegations, testimony[,] and fabricated police reports.'. . *Culp*, however, pre-dates the Seventh Circuit's decision in *Smith*. And because *McDonough* explicitly left intact *Wallace's* holding 'that a Fourth Amendment claim is not barred by *Heck* even if it could possibly affect a future prosecution,'. . . the Court must continue to apply *Wallace* to false-arrest claims. Walker's false-arrest claim is dismissed on limitations grounds. . . . [A]n evidence-suppression claim under *Brady v. Maryland*. . . is not the same as an evidence-fabrication claim. . . As the Seventh Circuit explained in *Avery,* a *Brady* disclosure allows the accused to use the exculpatory evidence at trial so that 'the jury has a fair opportunity to find the truth[.]'. . Fabricated evidence, on the other hand, 'will *never* help a jury perform its essential truth-seeking function,' and thus inherently violates the defendant's right to due process. . . What's more, the requisite elements are different for each claim. To win a *Brady* claim, 'a plaintiff must demonstrate that the evidence in question was favorable to him, the police suppressed the favorable evidence, and prejudice ensued because the suppressed evidence was material.'. . But to prove an evidence-fabrication claim, a plaintiff must demonstrate that 'the defendant officers created evidence that they knew to be false' and that 'the evidence was used in some way to deprive [him] of liberty.'. . To be sure, Walker could have more clearly pleaded the evidence-fabrication claim in the Complaint or at least explained it more clearly in his response brief. A claim for pretrial detention based on fabricated evidence, for example, stems from the Fourth Amendment's right to be free from seizure without probable cause. . . This is different from the use of false evidence to convict someone, which comprises a violation of the right to a fair trial under the Due Process Clause. . . Although Walker was eventually convicted, it is unclear if he spent any time in pretrial detention. In any event, Walker did spend time in prison pursuant to the conviction and sentence, so the evidence-fabrication claim remains viable for the alleged violation of due process that caused his imprisonment.")

Cusick v. Gualandri, No. 20-CV-06017, 2021 WL 5447041, at *5–6 (N.D. Ill. Nov. 22, 2021) ("Count II alleges unlawful pretrial detention in violation of the Fourth and Fourteenth Amendments. In *Lewis v. City of Chicago*, 914 F.3d 472, 475, 478 (7th Cir. 2019), the Seventh Circuit relied on *Manuel* . . . to hold that the 'Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention.'. . Cusick acknowledges *Lewis* but argues that the Supreme Court's decision in *McDonough* has upset that precedent. In *McDonough*, the Court assumed without deciding that pretrial confinement can serve as a deprivation of liberty under the Due Process Clause. . . The Court explicitly declined to offer an opinion on this assumption, limiting itself to the statute of limitations issue on which it had granted certiorari. . . Since *McDonough*, the Seventh Circuit has affirmed its holding in *Lewis* without necessarily requiring an analysis of *McDonough*. . .This Court acknowledges the uncertain viability of a Fourteenth Amendment unlawful detention claim in this Circuit, and that district courts here are divided about how to handle these claims. However this Court agrees with other district courts that have declined to dismiss on the pleadings a Fourteenth Amendment unlawful detention claim brought in conjunction with a Fourth Amendment claim. . . . Considering the allegations in this case and having reviewed the parties' briefs and the case authority, the Court believes the better course in this case is to allow the claims to proceed as pled. The requests to dismiss the Fourteenth Amendment claim in Count II is denied. . . . Cusick filed this lawsuit on October 8, 2020. He contends that his claim accrued on December 13, 2019, when he was acquitted at trial. This would put him comfortably within the statute of limitations. The defendants, meanwhile, assert that the clock started running on March 3, 2017, when Cusick posted bond and was released from pretrial detention. In that case, Cusick's claim would be untimely. Defendants argue that the Seventh Circuit's recent decision in *Smith*, 3 F.4th 332 controls. Smith was arrested in 2013, detained for seven months, released on bond in 2014, and acquitted in 2016. He filed suit in 2018, bringing an unlawful pretrial detention claim. . . Smith alleged that 'the officers violated § 1983 by using fabricated evidence to place him in custody in violation of the Fourth Amendment.'. . The Seventh Circuit held that his claim accrued upon his release from custody and therefore was untimely. . . The Court identified the 'contours of the constitutional right' of Smith's claim—the 'wrong…is the detention rather than the existence of criminal charges.'. . *Smith* distinguished *McDonough*, . . .which held that a § 1983 fabrication of evidence claim accrued upon acquittal. Smith's claim could 'be separated from his overall prosecution'; indeed the allegedly fabricated evidence in his case 'was *not* used at his trial, and nothing in his complaint suggests that it was.'. . The Seventh Circuit explained that '[a] due process claim attacks the whole prosecution, while the Fourth Amendment claim—whether about a search, arrest, or pretrial detention—can *sometimes* be severed from the rest of the prosecution.'. . *Smith* is easily distinguishable from the allegations in the present case. Count II 'attacks the whole prosecution'. Unlike in *Smith*, where Plaintiff alleged only that officers used fabricated evidence to place him in custody, Cusick alleges that Defendants fabricated evidence and presented false information to the grand jury to obtain an indictment *and* at his trial to convict him. . . In *Savory v. Cannon*, 2021 WL 1209129, at *6 (N.D. Ill. Mar. 31, 2021), on remand from the Seventh Circuit, the court explained that '*McDonough* makes clear that a plaintiff must wait until the favorable termination of the criminal proceedings to bring a § 1983 claim that, if successful, would be incompatible with

his guilt.' The plaintiff in *Savory* challenged the integrity of the criminal prosecution itself, and the court found his Fourth Amendment claim timely because it did not accrue until his pardon by the Governor—9 years after his release from prison. . . Here, a fair reading of the complaint shows Cusick challenges the integrity of the whole prosecution. His claim did not accrue until he was acquitted on December 13, 2019.")

Ochoa v. Lopez, No. 20-CV-02977, 2021 WL 4439426, at *5-8 (N.D. Ill. Sept. 28, 2021) ("*Johnson* predates *McDonough* and several judges in this District have questioned its continued viability. [collecting cases] Instead of distinguishing *Johnson*, Ochoa insists that *Brown*, 2019 WL 4694685, at *1, a post-*Johnson* case is highly instructive. . . . In reviewing Ochoa's claims, the Court finds that the above-referenced cases, especially *Brown*, support Ochoa's position. True, as Officer Defendants claim, unlike the plaintiffs in some of these cases, Ochoa was never acquitted . . . , but acquittal is not the *sine qua none* of deferred accrual under *Heck*, and making such a nuanced distinction ignores Supreme Court and Seventh Circuit precedent. Officer Defendants invite the Court to ignore *McDonough* and apply *Wallace*, . . . a pre-*McDonough* case, instead. . . . The Court declines the invitation. It cannot be disputed that the principles that emanate from *McDonough* and its Seventh Circuit progeny stand for the proposition that a criminal defendant/Section 1983 plaintiff cannot initiate certain Section 1983 constitutional claims which call into question the validity of his conviction until his criminal proceedings are over. Notably, but perhaps not surprisingly, Officer Defendants' motion fails to mention *McDonough* or *Savory*. The Court finds that Ochoa's Section 1983 compelled self-incrimination claim, which necessarily implicated the validity of his conviction, did not begin to accrue until October 23, 2019, when the State of Illinois dismissed all charges against him. . . Accordingly, his self-incrimination claim is timely. . . . Officer Defendants argue that Ochoa's Fourth Amendment claim for wrongful pre-trial detention is also time-barred. . . Ochoa counters that his claim is not time-barred, as a Fourth Amendment claim for wrongful pretrial detention accrues when the wrongful conviction ends. . . The Court agrees. In *Manuel II* . . . on remand, the Seventh Circuit stated that under the Fourth Amendment, 'there *is* a constitutional right not to be held in custody without probable cause. Because the wrong is the detention rather than the existence of criminal charges, the period of limitations also should depend on the dates of the detention.'. . The court further rationalized its holding based on the principle that a claim cannot accrue until the potential plaintiff is entitled to sue, but the detention itself forbids a suit for damages contesting that detention's validity. Based on this reasoning, the court held that the claim accrued when detention ends. . . However, as Officer Defendants point out, the Fourth Amendment is no longer a basis for relief for post-conviction detention once a defendant is convicted of a criminal offense. . . Once a defendant is convicted, if he challenges the sufficiency of the evidence to support his conviction and any ensuing incarceration, he must do so under the Due Process Clause of the Fourteenth Amendment. . . Yet, Officer Defendants concede that Ochoa could proceed with his Fourth Amendment claim of prolonged pretrial detention for the period between when his conviction was reversed on February 15, 2017 . . . and when he was released on October 23, 2019. . . . The Court disagrees with Officer Defendants that Ochoa has not specifically pled this claim, as the time period of February 25, 2017 through October 23, 2019 is accounted for in Count IV. For the time period

prior to February 15, 2017, during Ochoa's post-conviction detention and before the Illinois Appellate Court reversed his second conviction, Ochoa still has a valid claim under the Due Process Clause of the Fourteenth Amendment. Missing from Officer Defendants' Reply is any authority that holds that the statute of limitations has expired for Ochoa's claim as it relates to this time period. Officer Defendants suggest that the clock started ticking when Ochoa's pretrial detention ended, and his post-trial custody began. But, as the court in *Hill v. Cook Cnty.* noted, the Seventh Circuit has rejected this approach because it would essentially leave Ochoa out of luck. . . . A criminal defendant cannot use Section 1983 to contest his custody while it is ongoing, and a claim of unlawful detention can only accrue once he is released from jail. . . At no point was Ochoa released from custody following his initial arrest in 2002 until his release in 2019. Because Ochoa was not released from custody until October 23, 2019 . . . , his Fourth Amendment and Fourteenth Amendment claims did not begin to accrue until that date. Again, because Ochoa filed his complaint on May 19, 2020, less than a year after October 23, 2019, Count IV is not time-barred by the statute of limitations.")

Jackson v. City of Chicago, No. 20 C 5886, 2021 WL 3883111, at *3–5 (N.D. Ill. Aug. 31, 2021) ("The Seventh Circuit recently observed that *Manuel II* does not, on its own, answer the question of whether a favorable termination of criminal proceedings is necessary for a statute of limitations to accrue on a Fourth Amendment Claim. *See Smith v. City of Chi.*, 3 F.4th 332, 340 (7th Cir. 2021) (noting that in *Manuel II*, by the time the plaintiff was released there was no prosecution his Section 1983 suit could impugn and therefore nothing that could bring the *Heck* rule into play). In *Smith*, the court explicitly held that 'even when charges remain outstanding, a Fourth Amendment claim for unlawful pretrial detention accrues upon the plaintiff's release from detention, and not upon the favorable termination of the charges against the plaintiff.'. . *Smith* noted the distinction between a due process claim and a Fourth Amendment claim: '[a] due process claim attacks the whole prosecution, while the Fourth Amendment claim—whether about a search, arrest, or pretrial detention—can sometimes be severed from the rest of the prosecution.'. .'At bottom, the court said, 'the Court in *McDonough* did not explicitly overrule *Wallace's* holding that a Fourth Amendment claim is not barred by *Heck* even if it could possibly affect a future prosecution. We will not do so, either.'. . In the Court's view, however, *Smith* is distinguishable on its facts and does not dictate the result in this case. In *Smith*, the Seventh Circuit pointed out the plaintiff's Fourth Amendment claim could be separated from the overall prosecution. . . The allegedly fabricated evidence in the plaintiff's case was not used at his trial, and therefore '*Heck* would not require a court to bar Smith's claim if he had brought it immediately upon his release on bond.'. . In contrast, Jackson's conviction is inextricably tied up in his Fourth Amendment claim. The Court finds persuasive Judge Feinerman's analysis in *Culp v. Flores*, 454 F. Supp. 3d 764 (N.D. Ill. 2020). In *Culp*, the plaintiff's Fourth Amendment claim alleged that the plaintiff committed no crime, that the defendants did not have any reason to believe the plaintiff violated any law, and that the defendants 'based the arrest, detention and/or prosecution of [the plaintiff] on their false allegations, testimony and fabricated police reports.'. . These allegations are akin to those presented in this case. Citing *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020), and *Sanders v. St. Joseph Cnty.*, 806 F. App'x 401 (7th Cir. 2020), Judge

Feinerman concluded that success on the plaintiff's Fourth Amendment claim 'would be incompatible with a conviction on the charges for which Culp was arrested, detained, and prosecuted,' and therefore 'there is no logical way to reconcile the claim with a valid conviction.'. . . So too, here. Any legal challenge to Jackson's Fourth Amendment claim 'would have automatically implicated the validity of [Jackson's] criminal convictions because both injuries are premised on the same set of facts.'. . Accordingly, the statute of limitations on Jackson's Fourth Amendment claim did not begin to run until the criminal proceedings terminated in his favor. But when did that occur in this case? Defendants advocate for September 20, 2018, the date Jackson's motion for a new trial was granted following an appeal process. Jackson, on the other hand, asserts his claim accrued on October 18, 2018, the date the circuit court issued a disposition of *nolle prosequi*. The Court agrees with Jackson. . . . In the Court's view, prevailing on a motion for a new trial does not complete the story. Jackson was still subject to pending charges; the case against him was not conclusively terminated. Accordingly, Jackson's claim did not accrue until the entry of the *nolle prosequi* disposition, at which time the criminal proceedings were *fully* terminated. . . Therefore, the Officer Defendants' Motion to Dismiss Count I is denied. . . . The parties do not appear to dispute that the statute of limitations on Jackson's Due Process claim began to run at the time the criminal proceedings were terminated in Jackson's favor. Given the Court's conclusion regarding the *nolle prosequi* disposition, the Officer Defendants' Motion to Dismiss Count II is also denied.")

Fulton v. Bartik, No. 20 C 3118, 2021 WL 2712060, at *9 (N.D. Ill. July 1, 2021) ("Here, a judgment for plaintiffs on the unlawful pretrial detention claim would have undermined the validity of their convictions because both their pretrial detention and convictions were based on the same allegedly fabricated evidence. Therefore, a judgment in plaintiffs' favor on the unlawful pretrial detention claims 'directly challenges—and thus necessarily threatens to impugn—the prosecution itself.' *McDonough*, 139 S. Ct. at 2159 (citing *Heck*, 512 U.S. at 486– 487). 'There is no logical way to reconcile th[e] claim[ ] with a valid conviction.' *Savory*, 947 F.3d at 417. While City Defendants urge this court to follow *Brown* v. *City of Chicago*, No. 18 C 7064, 2019 WL 4694685, at *3 (N.D. Ill. Oct. 8, 2019), in which the court concluded that *McDonough* did not save a plaintiff's unlawful detention claim, that decision predated *Savory* and *Sanders* and did not have the benefit of their guidance on whether an unlawful pretrial detention claim can operate as a collateral attack on a criminal conviction. City Defendants offer no argument that success on this claim does not run into *Heck*. Instead, they recast the claim as 'essentially a false arrest claim' . . . but that is not correct. . . Count III stands.")

Camm v. Clemons, No. 4:14-cv-00123-TWP-DML, 2021 WL 2661626, at *7-8 (S.D. Ind. June 29, 2021) ("In this case, Camm's Fourth Amendment claim for wrongful detention necessarily implies the invalidity of his conviction, so his claim accrued when he obtained a favorable termination of the underlying criminal proceedings against him. This follows the direction from the Supreme Court in *McDonough* and *Heck* and is consistent with the Seventh Circuit's recent decision in *Savory*. Relying on language from the Supreme Court's decision in *Heck*, the Defendants contend that Camm obtained a favorable resolution when his first criminal conviction was reversed on direct appeal on August 10, 2004. While the reversal by the Indiana Court of

Appeals was a favorable decision, it was not a favorable termination of the criminal proceedings against Camm. When reversing the first conviction, the Indiana Court of Appeals explicitly noted that Camm was subject to being retried, and the State continued to pursue the criminal charges against him all the way through two more trials. This Court agrees with the district court in *Savory*: '[b]ecause the State elected to re-try [the plaintiff] after the state appellate court's [ ] reversal of the convictions entered at his first trial, [the plaintiff] remained fully subject to pending criminal charges. Those are precisely the circumstances in which, according to *McDonough*, a § 1983 claim has not yet accrued.'. . On October 24, 2013, Camm was acquitted of all the criminal charges against him, and he was released from custody. It was at that point that Camm obtained a favorable termination of the underlying criminal proceedings against him. Therefore, Camm's Fourth Amendment claim for wrongful arrest and detention accrued on October 24, 2013, and he brought the claim one year later on October 24, 2014. Thus, Camm's Fourth Amendment claim was timely filed and is not barred by the statute of limitations. The Defendants' Joint Motion for Partial Summary Judgment based on the statute of limitations argument is denied.")

Cruz v. City of Chicago, No. 20-CV-250, 2021 WL 2645558, at *10 (N.D. Ill. June 28, 2021) ("After *McDonough*, the Seventh Circuit had the chance to abandon its ruling in *Lewis*. But instead of overturning *Lewis*, the Court of Appeals doubled down. In *Camm v. Faith*, 937 F.3d 1096, 1105 (7th Cir. 2019), the Seventh Circuit reiterated that the Fourth Amendment, not the Due Process Clause, governs a claim about an unlawful pretrial detention. . . .The same result applies here. Micaela Cruz invokes both the Fourth and Fourteenth Amendments, but the claim 'is really one for wrongful arrest and detention in violation of the Fourth Amendment.'. . The Fourteenth Amendment does not govern unlawful pretrial detention claims, so Count II is dismissed.")

Grayer v. City of Chicago, No. 20-CV-00157, 2021 WL 2433661, at *1-3 (N.D. Ill. June 15, 2021) ("No party disputes that the Fourth Amendment applies to claims arising from pretrial detention. But the Fourteenth Amendment comes into play only for claims that arise following a criminal conviction. Because Plaintiffs were never convicted of a crime, the Fourteenth Amendment plays no permissible role in Plaintiffs' complaint. Accordingly, Defendants' partial motion to dismiss is granted. . . . Plaintiffs allege they were subjected to pretrial detention without probable cause in violation of their Fourth and Fourteenth Amendment rights. . . No party disputes that a Section 1983 claim alleging wrongful pretrial detention arises under the Fourth Amendment. . . But the question remains: can a challenge to pre-trial incarceration also arise under the Fourteenth Amendment? In short, the answer is no. . . . In the wake of *Manuel I* and *II*, the Seventh Circuit has further clarified that the pre/post-conviction line permits no equivocation: pretrial claims arise under the Fourth Amendment, and post-conviction claims arise under the Fourteenth Amendment. . . . Despite this precedent, Plaintiffs argue that *Lewis* is contrary to the Supreme Court's decision in *McDonough v. Smith*[.] . . This Court respectfully disagrees. Contrary to Plaintiffs' suggestion, *McDonough* did not hold that 'unlawful pretrial detention can also sound in the Fourteenth Amendment.'. . *McDonough*, rather, addressed when the statute of limitations for a fabricated evidence claim begins to run. . . Acknowledging that 'the Second Circuit treated [the plaintiff's claim] as arising under the Due Process Clause,' the Supreme Court pointedly noted

that '[w]e assume without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions.'. . In view of this qualification, this Court cannot find that *Lewis*—which directly applied *Manuel I*—and later on-point Seventh Circuit cases were abrogated by implication through *McDonough*. . . Moreover, this conclusion is bolstered by the Seventh Circuit's post-*McDonough* application of *Manuel I* and *Lewis* in *Kuri* and *Young*—neither of which mention *McDonough*. . . Plaintiffs attempt to avoid the effect of *Lewis* and related decisions by distinguishing, for claim-accrual purposes, between allegations of fabricated evidence (*e.g.*, *McDonough*) and those involving unlawful detention (*e.g.*, *Lewis* and *Manuel I*). . . This distinction does not make a difference—at least not in this case. Although Plaintiffs cite some decisions explaining that a later date of accrual should apply to fabrication of evidence claims, . . . at issue here is the legal basis of the claimed right of action, not the marker for when that action accrues. And on that score, the law is against Plaintiffs: *Lewis* rejected any distinction between pretrial fabrication of evidence claims and those based on wrongful pretrial detention. *Lewis*, 914 F.3d at 479 ("all § 1983 claims for wrongful pretrial detention— whether based on fabricated evidence or some other defect—sound in the Fourth Amendment"). . . Because that rule is the controlling law in this circuit, Plaintiffs' reliance upon the Fourteenth Amendment is foreclosed.")

Weston v. City of Chicago, No. 20 C 6189, 2021 WL 2156459, at *5 (N.D. Ill. May 27, 2021) ("The Seventh Circuit did not specifically address the accrual of the coerced-confession due process claim, and on remand in *Savory*, the defendants maintained that the claim was untimely because it accrued at the time of the coerced confession. The district court explained that the argument 'presents the difficult question whether *Moore* ...survived *McDonough*, which holds that the *Heck* bar applies when a claim, as pleaded, would necessarily imply the invalidity of criminal proceedings or a conviction.'. . The court saw no reason to 'run to ground' this challenge to the due process claim at the pleading stage because 'discovery on the Fourteenth Amendment coerced confession claim will be no broader than discovery on the Fifth Amendment claim' asserting a violation of the plaintiff's self-incrimination privilege. . . Therefore, it denied the motion to dismiss, without prejudice to renewal at summary judgment. . . This case is similar to *Savory*, and the Court is inclined to follow the same approach that the district court followed on remand there. It will not significantly change the scope of discovery in this case to put off this 'difficult question,' given that plaintiff has raised a similar coerced-confession claim under the Fifth Amendment. And putting the question off may prove to simplify it, when it is considered in the light of a full factual record and any intervening authority that might arise in the interim. Defendants' motion is denied as to the due process coerced-confession claim, without prejudice to renewing the argument at summary judgment.")

Jordan v. City of Chicago, No. 20-CV-4012, 2021 WL 1962385, at *3–4 (N.D. Ill. May 17, 2021) ("Defendants rely on a dictum in *Knox v. Curtis*, 771 F. App'x 656, 658 (7th Cir. 2019), for the proposition that a Fourth Amendment claim based on fabrication of evidence accrues when a person is released from custody or convicted. . . This court finds the *Knox* dictum unpersuasive in light of the Supreme Court's accrual analysis in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), and

the Seventh Circuit's en banc accrual analysis in *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020), *cert. denied,* 141 S. Ct. 251 (2020). The Supreme Court analyzed a very similar accrual question in *McDonough*, except that the plaintiff brought a claim under the due process clause rather than the Fourth Amendment. The Court held that '[t]he statute of limitations for a fabricated-evidence claim...does not begin to run until the criminal proceedings against the defendant (*i.e.*, the § 1983 plaintiff) have terminated in his favor.'. . The Seventh Circuit similarly held in *Savory*, 947 F.3d at 418, that the plaintiff's fabricated evidence claim under the due process clause accrued not when he was released from custody, but when the then-governor of Illinois later pardoned him. The Seventh Circuit expressly declined to decide when the plaintiff's Fourth Amendment claim accrued and left the question for the district court on remand. . . Although *McDonough* and *Savory* considered when a due process claim accrued, the reasoning of both cases parallels the Seventh Circuit's analysis of the accrual date of the plaintiff's Fourth Amendment claim in *Manuel II*. As the *Manuel* II court explained, under ordinary accrual principles 'a claim does not accrue before it is possible to sue on it.'. . . In both *McDonough* and *Savory*, the court held that the plaintiff's claim accrued when the plaintiff was released and *Heck* ceased to bar his § 1983 civil suit. . . . Significantly, the Supreme Court did not phrase the accrual rule it adopted in *McDonough* in terms of the source of the constitutional right the plaintiff invoked. The Court's opinion set out an accrual rule for 'fabricated-evidence claim[s].'. . As the district court recognized on remand in *Savory,* a § 1983 suit alleging evidence fabrication calls the validity of the criminal charges into question and triggers the *Heck* bar—regardless of whether the claim is brought under the Fourth or Fourteenth Amendment. . . This court therefore holds that under *Manuel II*, a Fourth Amendment evidence fabrication claim accrues when (1) the defendant is released from custody, and (2) *Heck* no longer bars the plaintiff's § 1983 claim. With favorable inferences, Jordan alleges that his Fourth Amendment pretrial detention claim would have called the validity of his conviction into question, making it *Heck*-barred until the prosecutor dismissed the charges against him and he was released in December 2019. . . Because Jordan filed his complaint within two years of that date, his Fourth Amendment pretrial detention claim is timely.")

Savory v. Cannon, 532 F.Supp.3d 628, ___ (N.D. Ill. 2021) ("Before proceeding, the court pauses to describe what the Seventh Circuit did and did not resolve regarding the various limitations issues implicated by Savory's claims. In its 2017 dismissal order, this court held, based on the Seventh Circuit's then-prevailing understanding of the *Heck* doctrine, that Savory's claims accrued in December 2011, when he was released from state custody upon the termination of his parole. . . Because the limitations period for § 1983 claims in Illinois is two years, . . . this court dismissed Savory's § 1983 claims—which he did not file until January 11, 2017—as time-barred. . . The Seventh Circuit reversed, ruling that 'a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.'. . Thus, as a general matter, Savory's claims accrued only when the Governor pardoned him on January 12, 2015, just under two years before he filed suit. . . The 'as a general matter' hedge in the preceding sentence reflects that the Seventh Circuit expressly left open for this court's consideration three questions that might possibly result in a different accrual date for

some of Savory's claims. The first question concerns when Count III—which, as noted, alleges malicious prosecution and wrongful pretrial detention under the Fourth and Fourteenth Amendments—accrued insofar as it states an otherwise viable cause of action. . . As the Seventh Circuit observed, . . . answering that question requires attention to *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), and its own opinion on remand from that decision, *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018). The second question concerns whether there are two accrual dates for Savory's claims—one in April 1980, when the state appellate court reversed Savory's convictions at his first trial, and the other in January 2015, when the Governor pardoned him for the convictions at his second trial—or just one accrual date, the day of the pardon. . . [A]nswering that question requires consideration of whether *McDonough v. Smith*, 139 S. Ct. 2149 (2019), overruled in pertinent part *Johnson v. Winstead*, 900 F.3d 428 (7th Cir. 2018). The third question, related to the first, is whether '*McDonough* dictates—contrary to [the Seventh Circuit's] 2018 *Manuel* opinion—that [Savory's] claim for unlawful detention after legal process accrued at the same time as all of his other claims, specifically at the time of his pardon.'. . . *McDonough* held that *Heck* barred a plaintiff whose first trial ended in a mistrial, and who was then retried and acquitted, from bringing a fabricated evidence claim until 'the underlying criminal proceedings ha[d] resolved in [his] favor,' meaning until his acquittal—which in turn means that the claim did not accrue until that time. . . To support its holding, the Supreme Court invoked 'pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.'. . The Court explained that the contrary result would impose upon '[a] significant number of criminal defendants … an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them,' adding that 'the parallel civil litigation that would result if plaintiffs chose the second option would run counter to core principles of federalism, comity, consistency, and judicial economy.'. .The dual-accrual rule of *Johnson* cannot be reconciled with the Supreme Court's analysis in *McDonough*, at least under the circumstances of this case. Because the State elected to re-try him after the state appellate court's April 1980 reversal of the convictions entered at his first trial, Savory remained fully subject to pending criminal charges. Those are precisely the circumstances in which, according to *McDonough*, a § 1983 claim has not yet accrued— circumstances where, if the claim had accrued in April 1980, Savory would have been compelled to bring parallel civil litigation involving the facts of his criminal case against the very persons who were the moving force behind his continued prosecution, and where there would have been a risk of conflicting judgments if Savory prevailed in the civil case and the State prevailed in the criminal case. . . . It follows that Savory's Fifth Amendment coerced confession claim accrued only once, when he received his pardon, because only then did the criminal proceedings fully resolve in his favor. In sum, Savory's Fifth Amendment coerced confession claim is timely in its entirety, having been filed within two years of his pardon that, after nearly four decades, terminated the criminal proceedings in his favor. . . . Defendants correctly contend that no malicious prosecution claim may be grounded in the federal constitution or pursued under § 1983. . . As the Seventh Circuit has made clear, 'when a plaintiff alleges that officials held him in custody before trial without justification, "[m]alicious prosecution is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify the

detention."'. . The § 1983 malicious prosecution claim accordingly is dismissed with prejudice. As for the Fourth Amendment unlawful detention claim, Defendants contend that it is untimely, having accrued, at the latest, when Savory's pretrial detention ended in May 1981 upon his second conviction. . . In support, Defendants rely on the Seventh Circuit's decision on remand in *Manuel*, which held that a pretrial detention claim accrues 'when the detention ends.' . . Defendants could just as well have argued that Savory's unlawful detention claim accrued when he was released from prison in December 2006, or from parole in December 2011. Savory contends that *McDonough* compels the conclusion that his unlawful detention claim accrued only when he was pardoned. . . Savory is correct. As noted, *McDonough* makes clear that a plaintiff must wait until the favorable termination of the criminal proceedings to bring a § 1983 claim that, if successful, would be incompatible with his guilt. . . That describes Savory's unlawful detention claim, for his allegation that he was detained without probable cause and 'in spite of the fact that [the officers] knew [he] was innocent,' . . . 'challenge[s] the integrity of [the] criminal prosecution[ ]' and 'directly challenges—and thus necessarily threatens to impugn—the prosecution itself,[.] . . Because Savory's unlawful detention claim did not accrue until his pardon, it is timely. *See Sanders v. St. Joseph Cnty.*, 806 F. App'x 481, 484 n.2 (7th Cir. 2020) (recognizing that an unlawful detention claim "that impl[ies] the invalidity of an ongoing criminal proceeding or a prior criminal conviction" is *Heck*-barred even "after [the plaintiff's] release and until either those proceedings terminated in his favor or the conviction was vacated"); *Culp v. Flores*, 454 F. Supp. 3d 764, 769 (N.D. Ill. 2020) (same).")

Spencer v. Village of Arlington Heights, No. 18-CV-00528, 2020 WL 4365640, at *2 (N.D. Ill. July 30, 2020) ("Defendants argue that Spencer's only remaining claim, Count 3, is barred by the applicable statute of limitations. . . Count 3 is a claim for unlawful pretrial detention based on the Fourth Amendment. . . Spencer filed the complaint on January 23, 2018. . . If Spencer's claim accrued upon his release from jail on August 15, 2015, the claim is untimely. . . If Spencer's claim accrued when the criminal charges were dismissed on January 25, 2016, the claim is timely. . . Defendants appropriately cited authority that existed when they filed their briefs, but since then the Seventh Circuit and district courts in this district have issued additional decisions in this area. After *McDonough*, the Seventh Circuit stated, in the context of a claim for unlawful pretrial detention, that the plaintiff's 'claim of unlawful detention accrued, at the earliest, when he was released from jail.'. . The Seventh Circuit further explained: 'If, however, a conclusion that Sanders's confinement was unconstitutional would imply the invalidity of an ongoing criminal proceeding or a prior criminal conviction, then *Heck* [*v. Humphrey*, 512 U.S. 477 (1994)] would continue to bar Sanders's claim after his release and until either those proceedings terminated in his favor or the conviction was vacated.'. .Applying those principles, the question is whether Spencer's claim would imply the invalidity of the criminal proceedings. Spencer's claim is premised on his allegations that he committed no crime. . . Spencer alleges that the defendant officers filed a false complaint under oath and committed perjury. . . Spencer alleges that, as a result of the complaint, 'he was illegally detained and jailed.'. . If successful, the claim would imply the invalidity of the criminal proceedings. . . Thus, Spencer's claim did not accrue until the proceedings terminated in his favor, in other words, until the charges were dismissed on January

25, 2016. . . Spencer filed the claim on January 23, 2018, within the two-year statute of limitations.")

Barnett v. City of Chicago, No. 18 C 7946, 2020 WL 4336063, at *2–4 (N.D. Ill. July 28, 2020) ("Although Barnett purports to base his claim in the Fourteenth Amendment, he cannot successfully raise a Fourteenth Amendment due process fabrication of evidence claim. While it is beyond doubt that 'a police officer who manufactures false evidence against a criminal defendant violates due process,' that violation becomes actionable only '*if* that evidence is later used to deprive the defendant of her liberty in some way.'. . Barnett was only subject to pretrial detention and bond conditions; he does not allege any post-trial deprivation of liberty. . . As the Seventh Circuit recently clarified, 'all § 1983 claims for wrongful pretrial detention—whether based on fabricated evidence or some other defect—sound in the Fourth Amendment.'. . To state a claim for fabrication of evidence sounding in the Fourth Amendment, Barnett must allege that Kulisek knowingly, intentionally, or with reckless disregard for the truth made false statements that were necessary to the probable cause determination. . . Barnett alleges that Kulisek made false statements in the police report and that those statements formed the basis for the probable cause determination. Therefore, Barnett has sufficiently pleaded a Fourth Amendment fabrication of evidence claim against Kulisek. . . . A Fourth Amendment claim for wrongful pretrial detention accrues when the wrongful detention ends. . . Because Barnett has alleged that false statements provided the basis for the probable cause determination against him, he has alleged that his detention remained wrongful even after he was formally charged. . . In such cases, wrongful detention claims based on falsified probable cause accrue upon the detainee's release. . . Barnett's amended complaint reveals that he was released from custody on October 1, 2016, more than two years before he filed his complaint. But the Court must also consider the effect of the ongoing criminal proceedings on Barnett's ability to bring suit on his wrongful detention claim. Under *Heck v. Humphrey*, Barnett could not bring a § 1983 suit concerning his confinement until the criminal proceedings terminated in his favor if the suit would 'necessarily imply' the invalidity of an outstanding criminal conviction or sentence. . . In *McDonough*, the Supreme Court emphasized that the *Heck* bar extends to a fabrication of evidence claim based on evidence used to secure an indictment given that such a claim 'directly challenges—and thus necessarily threatens to impugn—the prosecution itself.'. . Although *McDonough* concerned a Fourteenth Amendment fabrication of evidence claim, rather than one based in the Fourth Amendment, its application of *Heck* applies to Barnett's Fourth Amendment claim. . . . Here, Barnett alleges that the Chicago Police 'had no information to lead them to believe that Barnett had committed a crime,' aside from the false assertions in the arrest report. . . Barnett's wrongful detention claim 'centers on evidence used to secure an indictment and at a criminal trial' and so 'directly challenges—and thus necessarily threatens to impugn—the prosecution itself.'. . This means that the claim did not accrue until Barnett's acquittal on December 2, 2016, making the filing of his complaint on December 3, 2018 timely. . . Therefore, the statute of limitations does not bar Barnett's wrongful detention claim based on fabrication of evidence.")

Hill v. City of Chicago, No. 19 C 6080, 2020 WL 4226672, at *2–3 (N.D. Ill. July 23, 2020) ("Seventh Circuit law governing Fourth Amendment pretrial detention claims has changed in recent years. In *Manuel v. City of Joliet*, the Supreme Court overturned Seventh Circuit precedent and held that the Fourth Amendment governs claims for unlawful pretrial detention both before and after the initiation of formal legal process (i.e. when a criminal defendant has been brought before a judge). . . The Supreme Court declined to decide when such claims accrue, leaving that question for the Seventh Circuit. . . On remand, the Seventh Circuit held that unlawful pretrial detention claims accrue on the date the detention ends. . . But because the charges against the plaintiff in *Manuel II* were dismissed, the Seventh Circuit did not have occasion to consider whether a conviction (and thus the end of the pretrial detention) triggers accrual. *Knox v. Curtis*, 771 F. App'x 656 (7th Cir. 2019), appeared to provide some insight on that question. In *Knox*, the plaintiff sued a witness and a police officer after he was convicted of improperly communicating with the witness about his alleged criminal activity, blaming their false statements for his arrest and ultimate conviction. The Seventh Circuit held that the plaintiff's Fourth Amendment unlawful pretrial detention claim was timely and that it accrued either when he was released on bond or when he was convicted. . . In rejecting the Defendant officer's argument that *Heck* barred the plaintiff's claim, the *Knox* court stated that '[t]o the extent that [plaintiff] challenges his post-conviction detention, *Heck* indeed bars his § 1983 suit. However, [plaintiff] also challenges his pretrial (pre-bond) detention, the unlawfulness of which does not have "any necessary effect on the validity of [his] conviction."'. . Plaintiffs contend that the *Knox* court's statement was specific to the facts of that case (i.e. that *Heck* applies to some Fourth Amendment pretrial detention claims, it just did not apply there). While that may be true, so far as the Court can tell, Knox alleged that his arrest, pretrial detention, and conviction were based on the same false statements, which is exactly what Plaintiffs allege here (nor does Plaintiffs' motion explain where the difference in the facts lies). Accordingly, because the facts in *Knox* were similar to the facts here, the Court found the decision persuasive (albeit not binding) and concluded that Plaintiffs' pretrial detention claims accrued upon their convictions. . . Following the Court's ruling, however, the Seventh Circuit clarified the impact of *Heck* on pretrial detention claims in *Sanders v. St. Joseph's County*, 806 F. App'x 481 (7th Cir. 2020). In *Sanders*, the Seventh Circuit reversed the district court's dismissal of the plaintiff's unlawful pretrial detention claim on statute of limitations grounds, holding that his claim accrued, at the earliest, when he was released from jail. . . In so holding, the court qualified that '[i]f, however, a conclusion that [plaintiff's] confinement was unconstitutional would imply the invalidity of an ongoing criminal proceeding or a prior criminal conviction, then *Heck* would continue to bar [plaintiff's] claim after his release and until either those proceedings terminated in his favor or the conviction was vacated.'. . Defendants correctly point out that *Sanders* is not precedential, but the analysis still addresses the accrual question here. And since *Sanders* was decided, several district courts have held that unlawful pretrial detention claims are subject to *Heck*. *See Culp v. Flores*, 2020 WL 1874075, at *2-3 (Apr. 15, 2020); *Hill v. Cook County*, 2020 WL 2836773, at *11 (N.D. Ill. May 31, 2020); *Serrano v. Guevara*, 2020 WL 3000284, at *18 (N.D. Ill. June 4, 2020). The Court finds the reasoning in those decisions persuasive. Here, Plaintiffs allege that they were 'arrested, charged, and incarcerated' as a result of 'Defendants' false allegations and fabricated evidence.'. . In turn, the only fabricated evidence

the complaints discuss is the stories the Defendant officers allegedly made up by manipulating Harris and McKinnie. . .The complaints also allege that at trial 'Harris's and McKinnie's statements were the only evidence linking [Plaintiffs] to the shooting' and the 'judge convicted [Plaintiffs] on the basis of Harris['s] and McKinnie's pretrial statements,' which were 'entirely the result of Defendants' fabrication.'. . Because Plaintiffs allege that Defendants used the same evidence to support their pretrial detention that also secured their convictions, a finding that their detentions were unconstitutional would necessarily imply the invalidity of those convictions. As such, *Heck* barred Plaintiffs' Fourth Amendment claims until their convictions were overturned in September 2018. . . Because Plaintiffs filed their claims within two years of that date, they are timely.")

Hill v. Cook County, No. 18-CV-08228, 2020 WL 2836773, at *9-11 (N.D. Ill. May 31, 2020) ("Drawing upon *McDonough*, the Seventh Circuit recently expounded on when a claim accrues in *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020). The plaintiff in *Savory* claimed that the government had suppressed and fabricated evidence. . . The Seventh Circuit found that 'no section 1983 claim could proceed until the criminal proceeding ended in the defendant's favor or the resulting conviction was invalidated within the meaning of *Heck*.'. . Savory was released from state custody in 2011 with a conviction on his record. . . The Seventh Circuit held that his claim accrued only 'when the governor of Illinois pardoned him,' not when he was released. . . 'Until that moment, his conviction was intact and he had no cause of action under section 1983.'. . The pardon started the statute-of-limitations clock ticking. Here, Defendants try to make the same argument that failed in *Savory*. They argue that the clock started ticking when Hill's pretrial detention ended (and his post-trial custody began). . . But the 'rule urged by the defendants would result in claims being dead on arrival in virtually all section 1983 suits brought in relation to extant convictions.' . . By their logic, Hill's section 1983 claim would have accrued upon his conviction, 'even though preclusion rules would effectively prevent [him] from bringing any claim inconsistent with' his criminal conviction. . . Under Defendants' approach, Hill could never bring an unlawful detention claim. If he filed after his conviction, but before his conviction was overturned, he would file too soon. But if he filed after dismissal of the indictment, he would file too late. It would create a heads-I-win-tails-you-lose dynamic against criminal defendants. And in *Savory*, the Seventh Circuit flatly rejected the notion that criminal defendants are simply out of luck. In *Sanders v. St. Joseph County*, 2020 WL 1531354 (7th Cir. 2020), the Seventh Circuit returned to the issue of when a pretrial detention claim accrues. Sanders himself brought an unlawful detention claim. . . The Seventh Circuit held that Sanders 'could not have used § 1983 to contest his custody while it was ongoing,' and his 'claim of unlawful detention accrued, at the earliest, when he was released from jail.'. . The Court qualified its ruling in two footnotes. First, if the plaintiff 'meant to challenge the legitimacy of his initial seizure, any claim related to his arrest that does not implicate the ensuing custody expired two years after the arrest.'. . That is, when a plaintiff challenges the initial detention, and a finding in his favor wouldn't undermine the later incarceration, then the claim accrues when the initial detention ends. . . Second, if the claim does implicate a conviction and ensuing incarceration, then the claim accrues only if the criminal defendant ultimately prevails:

If, however, a conclusion that [plaintiff's] confinement was unconstitutional would imply the invalidity of an ongoing criminal proceeding or a prior criminal conviction, then *Heck* would continue to bar [plaintiff's] claim after his release and until either those proceedings terminated in his favor or the conviction was vacated.
. . . Hill bases his Fourth Amendment claim on the assertion that he did nothing wrong. He claims that the Robbins Defendants made up a story that he was the getaway driver, coerced witnesses into implicating him, suppressed exculpatory evidence, and fabricated other evidence. . . The Robbins Defendants then passed off their investigation to the Cook County Sheriff Defendants. . . The Cook County Sheriff Defendants relied on the tainted investigation, and then proceeded to suppress exculpatory evidence and coerce false statements from witnesses. . . Defendants based Hill's arrest, detention, and prosecution on falsified police reports and fabricated evidence. . . To secure his conviction, they used the same evidence that supported his pretrial detention. . . If Hill had brought his pretrial detention claim while incarcerated for murder, and prevailed, that finding would imply that he was innocent. Much like the plaintiffs in *Heck* and *Savory*, Hill 'assert[s] the suppression of exculpatory evidence and the fabrication of false evidence in order to effect a conviction.'. . 'There is no logical way to reconcile those claims with a valid conviction.'. . Another court in this district recently addressed this very issue. *See Culp v. Flores*, 2020 WL 1874075 (N.D. Ill. 2020). In *Culp*, the plaintiff claimed that he was arrested and charged without probable cause, and that his subsequent detention was based on fabricated police reports prepared by the arresting officers. . . The defendants argued that Culp's claims were time-barred because he was released from prison in 2013, two years before he brought suit. . . Judge Feinerman analyzed Culp's claims under the Seventh Circuit's framework in *Savory* and *Sanders*, and held that 'given the nature of his Fourth Amendment claim, a finding that Culp's detention in jail was unconstitutional would imply the invalidity of the charges against him, [and] *Heck* barred that claim until those charges were dismissed.'. . '[S]uccess on that claim would be incompatible with a conviction on the charges for which Culp was arrested, detained, and prosecuted,' so the claim 'did not accrue until the charges against him were dismissed.'. . The same analysis applies here. Hill's unlawful detention claim didn't accrue until the Circuit Court of Cook County dismissed the indictment in December 2017. He filed this lawsuit one year later. So he satisfied the statute of limitations, with one year to spare.")

Moore v. City of Chicago, No. 19 CV 3902, 2020 WL 3077565, at *4 (N.D. Ill. June 10, 2020) ("*Heck*'s favorable termination rule applies to plaintiff's unlawful detention claims. Those claims turn on allegations of fabricated evidence. And those allegations of fabricated evidence necessarily would have implied the invalidity of plaintiff's ongoing criminal prosecution. Last year the Supreme Court applied the favorable termination rule to a claim of fabricated evidence. Plaintiffs who bring such claims 'challenge the integrity of criminal prosecutions undertaken pursuant to legal process.' [citing *McDonough*] They 'challenge the validity of the criminal proceedings against him in essentially the same manner as the plaintiff in *Heck* challenged the validity of his conviction.'. . The Court thus held: 'There is not a complete and present cause of action to bring a fabricated-evidence challenge to criminal proceedings while those criminal proceedings are ongoing. Only once the criminal proceeding has ended in the defendant's favor,

or a resulting conviction has been invalidated within the meaning of *Heck*, will the statute of limitations begin to run.'. .Defendants argue that *Heck* has nothing to do with unlawful pretrial detention claims brought under the Fourth Amendment. They argue that plaintiff's claims expired almost a decade ago, two years after he was released on bond. Not so. Plaintiff claims that he was unlawfully detained based solely on fabricated evidence. His claims 'directly challenge[ ]—and thus necessarily threaten[ ] to impugn — the prosecution itself.'. . His claims thus could not have accrued until his sentence was vacated and his charges were dismissed.")

Culp v. Flores, No. 17 C 252, 2020 WL 1874075, at *2-3 (N.D. Ill. Apr. 15, 2020) ("The Fourth Amendment claim alleges that Defendants 'lacked probable cause to criminally charge and prosecute' Culp and that they 'based the arrest, detention and/or prosecution of [him] on their false allegations, testimony and fabricated police reports.'. . The statute of limitations for this claim is two years. . . Citing *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018), and *Mitchell v. City of Elgin*, 912 F.3d 1012 (7th Cir. 2019), for the proposition that a Fourth Amendment pretrial detention claim accrues when the seizure ends, Defendants contend that Culp's claim is time-barred because he was released from jail on April 30, 2013, well over two years before he filed suit. . . Citing the Supreme Court's subsequent decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), Culp argues under the *Heck* doctrine that his Fourth Amendment claim did not accrue until January 12, 2016, when the criminal case was dismissed. . . In the alternative, he argues that because his bond conditions were severe enough under the standard articulated in *Mitchell* to effectuate a continued seizure, his claim did not accrue until those restrictions were lifted upon the dismissal of his criminal case. . . The law governing the accrual date for § 1983 claims like Culp's has been fluid, and both sides present reasonable and cogent arguments. Culp's position prevails based on the understanding of *McDonough* and *Heck* expressed by the en banc Seventh Circuit in *Savory*. Two aspects of the Seventh Circuit's analysis are pertinent here. First, *Savory* observes that *McDonough* establishes that the *Heck* doctrine applies to § 1983 claims brought not only by plaintiffs who have standing convictions, but also by plaintiffs who have not been convicted and are subject to ongoing criminal proceedings. . . Second, *Savory* explains that when a plaintiff subject to ongoing criminal proceedings brings a § 1983 claim that, if successful, would be incompatible with a conviction on those charges, *McDonough* establishes that, under *Heck*, the claim does not accrue 'until the criminal proceeding end[s] in the [plaintiff's] favor.'. .Culp's Fourth Amendment claim is premised on the complaint's allegations that he committed no crime, . . . that Defendants 'did not have any reason to believe that [he] had violated … any city, state or federal law,'. . . and that Defendants 'based the[ir] arrest, detention and/or criminal prosecution of [him] on their false allegations, testimony and fabricated police reports[.]'. . Because success on that claim would be incompatible with a conviction on the charges for which Culp was arrested, detained, and prosecuted, '[t]here is no logical way to reconcile th[e] claim[ ] with a valid conviction.'. . It follows under *Savory*'s understanding of *McDonough* and *Heck* that Culp's Fourth Amendment unlawful detention claim—even if that claim were limited to the time he spent in jail, and did not extend through the time he was on bond—did not accrue until the charges against him were dismissed on January 12, 2016. This, in turn, renders that claim—brought one year later—timely under the two-year statute of limitations. This result finds strong support

in *Sanders v. St. Joseph Cnty.*, __ F. App'x __, 2020 WL 1531354 (7th Cir. Mar. 31, 2020). The plaintiff in *Sanders* brought an unlawful detention claim, presumably under the Fourth Amendment, alleging that he was wrongfully jailed for several months. . . The district court dismissed the claim on statute of limitations grounds, and the Seventh Circuit reversed. . . Citing *Manuel*, the Seventh Circuit held that the plaintiff 'could not have used § 1983 to contest his custody while it was ongoing,' and therefore that his 'claim of unlawful detention accrued, at the earliest, when he was released from jail.'. . Standing alone, that passage in *Sanders* supports Defendants' position that Culp's Fourth Amendment wrongful detention claim accrued upon his release from jail. In a footnote, however, the Seventh Circuit added this qualification:

If, however, a conclusion that [the plaintiff's] confinement was unconstitutional would imply the invalidity of an ongoing criminal proceeding … , then *Heck* would continue to bar [his] claim after his release and until either those proceedings terminated in his favor or the conviction was vacated. *See McDonough v. Smith*, 139 S. Ct. 2149 (2019); *Savory v. Cannon*, 947 F.3d 409, 414 (7th Cir. 2020).

Id. at *2 n.2. This analysis directly answers the accrual issue here: Because, given the nature of his Fourth Amendment claim, a finding that Culp's detention in jail was unconstitutional would imply the invalidity of the charges brought against him, *Heck* barred that claim until those charges were dismissed. And because Culp's wrongful detention claim is timely even if it is limited to the time he spent in jail, it is unnecessary at this juncture to decide whether, under *Mitchell*, his seizure continued for Fourth Amendment purposes while he was on bond. . . .As with the Fourth Amendment claim, the parties' arguments regarding the Fourteenth Amendment claim are reasonable and cogent, but unlike the question of when the Fourth Amendment claim accrued, Seventh Circuit case law does not conclusively answer whether Culp has a viable Fourteenth Amendment claim. Resolving that very difficult question would have no impact on this case at this juncture because, regardless of its answer, the case will remain in federal court (as the Fourth Amendment claim survives), and because discovery on the Fourth and Fourteenth Amendment claims will be coextensive (as both rest on the same factual predicate). Accordingly, the court declines to dismiss the Fourteenth Amendment claim on the pleadings, knowing that it will have an opportunity to address the claim when Defendants renew their challenge at summary judgment.")

Hill v. City of Chicago, No. 19 C 6080, 2020 WL 509031, at *4 (N.D. Ill. Jan. 31, 2020) ("[T]he *Heck* bar does not toll the statute of limitations on Fourth Amendment unlawful pretrial detention claims. . . *McDonough v. Smith*, 139 S. Ct. 2149 (2019), does not change this result. As *Brown* points out, *McDonough* was concerned with avoiding 'collateral attacks on criminal judgments through civil litigation.' *Brown*, 2019 WL 4958214, at *3 (quoting *McDonough*, 139 S. Ct. at 2157). And 'unlike fair trial claims, Fourth Amendment claims as a group do not necessarily imply the invalidity of a criminal conviction, and so such claims are not suspended under the *Heck* bar to suit.' *Dominguez v. Hendley*, 545 F.3d 585, 589 (7th Cir. 2008). Rather, the Seventh Circuit recently clarified that a wrongful pretrial detention claim accrues upon conviction (if not sooner). *Knox v. Curtis*, 771 Fed. Appx. 656, 658 (7th Cir. 2019) ("[plaintiff's] claim that he was arrested and detained without probable cause accrued either in August 2017 (when he was

released on bond), or in November 2017 (when he was convicted).") (internal citations omitted); *see also Brown*, 2019 WL 4958214, at *3 (concluding the same). Accordingly, the Plaintiffs' wrongful pretrial detention claims accrued no later than January 31, 2013, and the statute of limitations has long since run. Defendants' motion to dismiss Count II of the complaints is granted.")

Andersen v. City of Chicago, No. 16 C 1963, 2019 WL 6327226, at *5–6 (N.D. Ill. Nov. 26, 2019) ("The Seventh Circuit has said that 'a Fourth Amendment claim for wrongful detention accrues when the detention ends.'. . Defendants argue, based on this premise, that Andersen's pretrial detention ended in 1982, when he was convicted, and he should have brought his claim within two years of that date. Further, Defendants note, Andersen was released from any detention in 2007 (when he was released from prison), which is also more than two years before he brought suit. . . In response, Andersen argues that *Heck* applies to his Fourth Amendment claim—to challenge his pretrial detention would impugn his conviction because it would challenge his confession and other evidence withheld and destroyed. Therefore, he asserts, he could not have brought his Fourth Amendment claim until favorable termination of his conviction. . . Defendants' argument that this claim accrued when Andersen was convicted is unsupported. Andersen's detention did not end when he was convicted. In *Camm*, the Seventh Circuit discussed, without deciding, a similar statute of limitations issue. . . In that case, the plaintiff had been held pretrial, convicted, then retried twice ending in an acquittal. The Court allowed the plaintiff's Fourth Amendment claim to move forward based on the initial probable-cause affidavit issued in the case. Though the defendant had been convicted (twice) after the submission of that affidavit, at no point did the Court suggest that the claim accrued at the time of conviction. . . Although not binding for that purpose, *Camm* indicates that the Seventh Circuit's understanding is not that all Fourth Amendment claims accrue at the time of conviction. But that would only get Andersen to 2007, still too late to bring his claim. Even if a court were to determine that his detention ended at the end of his supervised release in 2010, he would still come up short. That is where *Heck* comes in. Although Defendants argue that *Heck* has no place in the pre-conviction context, in certain situations, *Heck* applies to ongoing prosecutions. . . In some cases, the harm is distinct and accrues without regard to *Heck,* because at that point whether a prosecution will be brought is merely speculative. *See Wallace v. Kato*, 549 U.S. 384, 390–91 (2007) (claim for arrest without a warrant accrues once detention is pursuant to legal process); *see also McDonough*, 139 S. Ct. at 2159 ("A false-arrest claim, *Wallace* explained, has a life independent of an ongoing trial or putative future conviction—it attacks the arrest only to the extent it was without legal process, even if legal process later commences."). . . A claim, however, that 'centers on evidence used to secure an indictment and at a criminal trial...does not require speculation about whether a prosecution will be brought....It directly challenges—and thus necessarily threatens to impugn— the prosecution itself,' thereby implicating the concerns addressed in *Heck*. . . Andersen's Fourth Amendment claim centers on the argument that he was wrongfully detained based on a coerced confession that implicated withheld and/or destroyed evidence. That confession was used to secure the charges against him, proceed with his prosecution, and convict him at trial. As such, *Heck* applies to his Fourth Amendment claim. To bring the claim earlier would have impermissibly challenged an

extant conviction. Andersen's Fourth Amendment claim, therefore, accrued with the favorable termination of his case and is timely.")

Brown v. City of Chicago, No. 18 C 7064, 2019 WL 4958214, at *3 (N.D. Ill. Oct. 8, 2019) ("Count VI states a claim for federal malicious prosecution. The court dismissed this count in its ruling on the City's motion to dismiss because the Seventh Circuit does not recognize such a claim. . . The Estate Defendants have also moved to dismiss Count VI to the extent Plaintiff has restated the claim as one for pretrial detention without probable cause. But the court also rejected Plaintiff's attempt to restate this count as a Fourth Amendment claim in its earlier ruling. . . Moreover, any unlawful pretrial detention claim that Plaintiff might have asserted would be time-barred under Seventh Circuit precedent holding that such a claim is not subject to the delayed accrual rule from *Heck*. . . Plaintiff's reliance on *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018) ("*Manuel II*"), is misplaced. While the Seventh Circuit in *Manuel II*, 903 F.3d at 670, held that a claim for pretrial detention without probable cause begins to accrue when the pretrial detention ends, *Knox*, 771 Fed. Appx. at 658, clarified that pretrial detention can be considered as ending upon conviction. . . Thus, Plaintiff's Fourth Amendment claims for his detention before his 1990 and 2008 trials needed to be filed in 1992 and 2010, respectively. *McDonough* does not save Plaintiff's claim for pretrial detention without probable cause either. As already noted, *McDonough*, 139 S. Ct. at 2157, is grounded in a concern for avoiding 'collateral attacks on criminal judgments through civil litigation.' A Fourth Amendment claim does not constitute such a collateral attack. *See Dominguez v. Hendley*, 545 F.3d 585, 589 (7th Cir. 2008) ("Even if no conviction could have been obtained in the absence of the violation, the Supreme Court has held that, unlike fair trial claims, Fourth Amendment claims as a group do not necessarily imply the invalidity of a criminal conviction, and so such claims are not suspended under the *Heck* bar to suit."). The delayed accrual embraced by the Supreme Court in *McDonough* is not implicated here.")

Brown v. City of Chicago, No. 18 C 7064, 2019 WL 4694685, at *5 (N.D. Ill. Sept. 26, 2019) ("Although the *McDonough* plaintiff had never been convicted, the Court held that *Heck* applies because a fabricated-evidence claim brought before a favorable termination in the criminal proceedings could result in 'conflicting civil and criminal judgments' and 'collateral attacks on criminal judgments through civil litigation.'. . Concluding otherwise would mean that '[a] significant number of criminal defendants would face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them.'. . Not only does that second option 'risk[ ] tipping [a plaintiff's] hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context,' but such parallel litigation also 'run[s] counter to core principles of federalism, comity, consistency, and judicial economy.'. . This same reasoning from *McDonough* was embraced by the Seventh Circuit in its recent decision in *Camm*, 2019 WL 4267769, at *10–11, in which the court held that a *Brady* claim did not accrue until after the plaintiff in that case—who, like Mr. Brown, had been convicted at two trials—was acquitted at the third trial.The outcome in *Winstead*, like the one that Defendant advocates, would have required

Plaintiff to file his claims related to his 1990 trial and convictions in 2005 when he was granted a new trial. In other words, according to Defendant, Mr. Brown should have filed his suit at the same time that the State was preparing to prosecute him again—the exact situation *McDonough* cautioned against. . . The court concludes that Defendant's motion to dismiss Counts I through V of Brown's complaint, as they relate to the 1990 trial and convictions, must be denied. Count I states a fabrication-of-evidence claim—specifically, that the Individual Defendants fabricated a number of items of evidence, including Plaintiff's confession, depriving Mr. Brown of a fair trial. As in *McDonough*, . . . Plaintiff's fabrication-of-evidence claim regarding the 1990 trial and convictions did not begin to accrue until 2017, when his convictions were vacated and the charges against him were finally dropped. This complaint, filed less than a year later, states a timely fabrication claim.") [*Accord*, ***Brown v. City of Chicago,*** 2019 WL 4958214 (N.D. Ill. Oct. 8, 2019) (applying same reasoning in refusing to dismiss claims against Estate Defendants)]

Switzer v. Village of Glasford, Ill., No. 1:18-CV-1421, 2019 WL 3291519, at *2-5 (C.D. Ill. July 22, 2019) ("The Supreme Court has held that pretrial detention without probable cause is actionable under § 1983 as a violation of the Fourth Amendment. . . However, the Court left open the question of when the claim accrues. . . Although *Manuel v. City of Joliet ("Manuel II")*, 903 F.3d 667 (7th Cir. 2018), determined that a claim for unlawful pretrial detention under the Fourth Amendment accrues when the detention ends, the Seventh Circuit declined to decide whether a plaintiff's pretrial release on bond constitutes a prolonged seizure within the meaning of the Fourth Amendment. That is the core of the case at hand. On June 20, 2019, the Supreme Court held that the statute of limitations for a fabricated-evidence claim does not begin to run until the criminal proceedings against the defendant (i.e., the § 1983 plaintiff) have terminated in his favor. *See McDonough v. Smith*, 139 S. Ct. 2149 (June 20, 2019). . . . Initially, Defendants assert Plaintiff was never seized as contemplated by the Fourth Amendment because his pretrial release restrictions were not an onerous restriction on travel, nor a significant restriction on liberty. Plaintiff's pretrial release conditions are provided as follows: Plaintiff must (1) appear for future hearings; (2) submit to the orders and process of the court; (3) not depart the state without leave; (4) give written notice of any change of address; and (5) not violate any criminal statutes. . . Defendants further argue Plaintiff was never actually housed or incarcerated, but rather, he was arrested 'at such a late time that Plaintiff did not arrive to the jail until the early morning hours of the next day[.] Plaintiff was simply booked and released on October 1, 2015.'. . .Here, the totality of the circumstances indicate that a seizure did, in fact, occur. While Defendants focus on the travel restrictions stipulation, it is not the only factor the Court considers. Plaintiff was pulled over, arrested, physically placed into a police car, taken to Peoria County Jail, required to bond out of jail, and also had travel restrictions placed upon him. . . Under the *Mendenhall* standard, Plaintiff surely did not feel he was free to leave the backseat of a police vehicle—let alone leave the jail where law enforcement was currently booking him for a crime—even if he did understand that he could request permission to leave the state while on pretrial release. Defendants' specific emphasis on 'onerous travel restrictions' as the threshold for a seizure overlooks the fact of his initial detention. Moreover, the Court assesses the entirely of the restrictive situation, not just the pretrial

release travel restrictions. A plaintiff's liberty may certainly be restrained in other ways, as it was here. . . Additionally, Defendants seem to incorrectly equate a seizure with spending time in jail. The Supreme Court has previously offered examples of circumstances that might indicate a seizure without physical incarceration. Such examples include, but are not limited to, 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'. . Since the Supreme Court has not specified that a Fourth Amendment seizure must physically incarcerate the seized individual, Defendants' argument is unpersuasive. . . .Next, Defendants argue that any recognizable seizure must be limited in time and scope to any actual detention that did occur. From Defendants' perspective, Plaintiff did not remain seized within two years of the date of the filing of his original Complaint, and thus his claims fall outside the statute of limitations. Plaintiff was arrested late in the evening of September 30, 2015, released on bond on October 1, 2015, and filed his original Complaint more than two years later on November 21, 2018. . .. Because a seizure did occur as alleged in Count I, the question in this case becomes when the statute of limitations begins to run—either upon Plaintiff's pretrial release on October 1, 2015, or when the charges were dismissed on December 7, 2017. . . . It is true that the concept of a 'continuing seizure' has been previously rejected by the Seventh Circuit. . . However, several 'sister circuits have adopted the minority approach that 'pretrial release might be construed as a "seizure" for Fourth Amendment purposes if the conditions of that release impose significant restrictions on liberty.'. . Such significant restrictions have been broadly defined. [collecting cases] Understanding this position is the minority, there is still 'out-of-circuit support for the proposition that the concept of "seizure" under the Fourth Amendment extends beyond physical detention.'. . .Here, in order to prevent alleged police misconduct from escaping Fourth Amendment oversight, it is appropriate to find that Plaintiff's pretrial release on bond is classified as a significant restriction on liberty. Accordingly, pretrial release on bond is included in the definition of a Fourth Amendment seizure. . . .In June 2019, the Supreme Court faced a similar predicament in *McDonough v. Smith*, 139 S. Ct. 2149 (June 20, 2019), which is dispositive to the issue presented here. Similar to how Burgess allegedly falsely swore in a complaint and falsely testified, the defendant in *McDonough* fabricated evidence and presented fabricated testimony. The Court held that the statute of limitations for a fabricated-evidence claim, and ultimately for a § 1983 plaintiff, does not begin to run until the criminal proceedings against the defendant have terminated in his favor. . . This favorable termination requirement 'applies whenever "a judgment in favor of the plaintiff would necessarily imply" that his prior conviction or sentence was invalid.'. . . In sum, under the *McDonough* standard, the statute of limitations for a § 1983 plaintiff begins to run 'when the criminal proceedings against him are terminated in his favor.'. . For McDonough, that meant when he was acquitted at the end of his second trial; for Plaintiff, that means when his charges were dismissed on December 7, 2017. Applying the two-year statute of limitations to the accrual date of December 7, 2017, Plaintiff's Complaint is timely so far as it was brought before December 7, 2019. Plaintiff's claim is therefore timely as his original Complaint was filed on November 21, 2018. Here, for the aforementioned reasons, Plaintiff's pretrial release on bond can be classified as a significant restriction on liberty and, since the Supreme Court has now provided

favorable authority, is thus included in the definition of a Fourth Amendment seizure. Accordingly, Defendants' Motion to Dismiss with respect to Count I is DENIED.")

Mayo v. Lasalle County, No. 18 CV 01342, 2019 WL 3202809, at *3 n.3 (N.D. Ill. July 15, 2019) ("Following *Manuel I*, the Seventh Circuit has held that the Fourth Amendment is the ***exclusive*** ground for a claim of unlawful pretrial detention, even when based on allegations of fabrication of evidence. . . In *McDonough v. Smith*, 139 S. Ct. 2149 (2019), however, the Supreme Court addressed the question of the accrual date for a pretrial due process claim based on allegations of fabrication of evidence and involving pretrial restrictions on liberty. The Court assumed without deciding that the framing of the claim as implicating the Due Process Clause was appropriate. . . That assumption seems to cast some doubt on the Seventh Circuit's view that *Manuel I* foreclosed grounding a claim of pretrial restriction of liberty based on the use of fabricated evidence on the Due Process Clause in addition to the Fourth Amendment. But the plaintiffs have not defended their complaint by asserting that they have a fabrication of evidence due process claim and even if they had, this Court could not disregard the Seventh Circuit's interpretation of *Manuel I* based on the Court's mere assumption—rather than holding—that such a claim is viable.")

Mayo v. Lasalle County, No. 18 CV 01342, 2019 WL 3202809, at *4 n.5 (N.D. Ill. July 15, 2019) ("The Supreme Court's holding in *McDonough* again bears noting. In *McDonough*, the Court held that that *Heck* ***does*** apply to toll the accrual date of a due process claim for fabrication of evidence (assuming such a claim exists) until termination of the charges in the civil plaintiff/criminal defendant's favor because until that time, a fabrication of evidence claim impugns the integrity of the prosecution or conviction. That is understandable; as the Seventh Circuit observed in *Lewis*, a conviction 'premised on deliberately fabricated evidence will always violate the defendant's right to due process.'. . Pursuing such a claim before a criminal proceeding has been terminated in a manner consistent with the claim would contravene *Heck*'s principle that civil actions are not the appropriate means for contesting the validity of a criminal prosecution or conviction. But *McDonough*'s holding has no bearing here, because Mayo and Burt, like the plaintiffs in *Wallace* and unlike the plaintiffs in *McDonough*, challenge the validity of their detention on Fourth Amendment grounds; they do not challenge the validity of a subsequent prosecution in terms of Due Process or assert a fabrication of evidence claim.")

Eighth Circuit

Martin v. Julian, 18 F.4th 580, 584 (8th Cir. 2021) ("[T]he Supreme Court has not clearly decided whether there is a § 1983 cause of action for malicious prosecution under either the Fourth Amendment or the Due Process Clause. *See McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 2155-58, 204 L.Ed.2d 506 (2019), reviewing when the statute of limitations begins to run on a § 1983 fabricated-evidence claim; *Wallace*, 549 U.S. at 390 n.2, 127 S.Ct. 1091, noting the Court 'ha[s] never explored the contours of a Fourth Amendment malicious prosecution suit under § 1983.' As the district court recognized, we have held that 'an allegation of malicious prosecution

without more cannot sustain a civil rights claim under § 1983.'. . This means that Defendants' alleged wrongful conduct must also infringe 'some provision of the Constitution or federal law.'. . Here, the alleged Fourth Amendment violations -- false imprisonment and seizure of property based on fabricated evidence -- occurred before legal process began and are time-barred, despite Plaintiffs' claim that the unlawful seizures continued even after the criminal charges were *nolle prossed*. . . The only due process claim alleged in the complaint was failure to disclose evidence (the recruitment of confidential informant Miller) in violation of *Brady*. Plaintiffs do not contest the dismissal of their *Brady* claims on appeal. Nor did they include § 1983 malicious prosecution claims in the substantive Counts of their complaint. On this record, we conclude the district court did not abuse its discretion in declining to vacate or set aside its initial dismissal Order because Plaintiffs failed to state plausible § 1983 malicious prosecution claims under controlling Eighth Circuit precedent.")

Ninth Circuit

Bonelli v. Grand Canyon University, 28 F.4th 948, 952-55 (9th Cir. 2022) (" The general rule is that a civil rights claim accrues under federal law 'when the plaintiff knows or has reason to know of the injury which is the basis of the action.'. . .We have held that this traditional accrual rule applies to the constitutional and statutory violations that Bonelli asserts here. For Fourth Amendment violations, 'federal law holds that a cause of action for illegal search and seizure accrues when the wrongful act occurs ... even if the person does not know at the time that the search was warrantless.'. . By his allegations, Bonelli knew that he was wrongfully detained, and his student ID wrongfully seized, on the days that each incident occurred. The statute of limitations on Counts 1 and 2, both § 1983 claims premised on Fourth Amendment violations, thus began to run on February 19, 2017 and July 25, 2017, respectively. We have likewise applied the traditional accrual rule to § 1983 claims alleging First Amendment violations, including First Amendment retaliation. . . .Thus, Bonelli's Count 3 § 1983 claim alleging First Amendment violations also accrued on February 19, 2017. . . . We have explained that the usual accrual rule—that a claim "accrues under federal law when the plaintiff knows or has reason to know of the actual injury"—governs § 1981 claims alleging racial discrimination, as well as federal civil rights claims generally. . . .We thus conclude that Bonelli had 'complete and present cause[s] of action' by August 24, 2017, at the latest. . . But Bonelli did not file his complaint until January 20, 2020, more than two years later. Under traditional accrual principles, his action is untimely. . . Resisting this, Bonelli invokes *Heck* to argue that his claims did not accrue until August 29, 2018, when GCU rescinded Bonelli's disciplinary warning. But we conclude that *Heck* does not apply to Bonelli's claims. . . . *Heck* analogized to the common law tort of malicious prosecution, one element of which 'is termination of the prior criminal proceeding in favor of the accused.'. . It is this aspect of *Heck* that Bonelli latches onto. He argues we should apply *Heck*'s deferred accrual rule so that his claims did not accrue until GCU rescinded his disciplinary warning, which was less than two years before he filed suit. Bonelli's reliance on *Heck* is misplaced. . . . As we have explained, '[w]here there is no "conviction or sentence" that may be undermined by a grant of relief to the plaintiffs, the *Heck* doctrine has no application.'. . .Bonelli cannot show how his §

1983 claims would be at odds with any conviction or sentence. By its terms, *Heck* does not apply here. . . . To the extent that Bonelli seeks not the direct application of *Heck*, but a *Heck*-like rule of delayed accrual, his argument fares no better. If a plaintiff has a 'complete and present cause of action,' his claim accrues under federal law. . . . Bonelli's more subtle reliance on *Heck* consists of attempting to analogize his claims to the tort of malicious prosecution, which *Heck* also invoked by way of analogy. . . Malicious prosecution has a favorable-termination requirement, . . . and Bonelli suggests that his claims likewise required the favorable termination of his university disciplinary warning. The problem for Bonelli is that his claims are not properly analogized to the tort of malicious prosecution, either factually or legally. Sections 1981 and 2000d protect against racial discrimination; neither of these claims sounds in malicious prosecution. The same is true with Bonelli's § 1983 claims. None of Bonelli's claims depended on GCU rescinding the disciplinary warning. Bonelli knew or had reason to know of his claimed injuries—alleged seizures of his person and property, curbing of his First Amendment rights and related retaliation, and discrimination—when those acts occurred. Based on the allegations of his complaint, the disciplinary warning was perhaps an outgrowth of these same incidents. But the tort of malicious prosecution 'challenge[s] the integrity of criminal prosecutions undertaken "pursuant to legal process."' *McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019) (quoting *Heck*, 512 U.S. at 484). And that is not the nature of Bonelli's claims. Setting aside that this lawsuit is not about criminal prosecutions, Bonelli challenges not the process that was brought to bear against him through the disciplinary warning, but discrete incidents that allegedly produced immediate injuries. It is not apparent that any of his claims would necessarily imply the invalidity of his disciplinary warning, either. . . . Of course, even in a 'classic malicious prosecution' situation, the injury 'first occurs as soon as legal process is brought to bear on a defendant.' *McDonough*, 139 S. Ct. at 2160. And in that context the law steps in and does provide for a later accrual only upon the favorable termination of the prosecution. . . But the reason for that customized accrual rule is important, and it shows why Bonelli's attempted analogy to malicious prosecution is unpersuasive. As the Supreme Court explained in *McDonough*, we impose a favorable-termination requirement for malicious prosecution based on 'pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.'. . . Whatever facial similarities that might exist between a university disciplinary process and a state criminal prosecution, Bonelli has not explained how the 'core principles' reinforcing the malicious prosecution analogy—'federalism, comity, consistency, and judicial economy,'. . . support extending this analogy to the collegiate code-of-conduct inquiry alleged in his complaint. Bonelli cites no case taking that approach. . . . If Bonelli had filed suit during the pendency of GCU's review of his disciplinary warning, the district court could have considered whether to stay the case pending completion of that process. . . But Bonelli's position on appeal would mean he would have no cognizable § 1983 claim at all, unless and until that process terminated in his favor. . . Although that would conveniently prevent Bonelli's own claims from now being untimely, it would likely forestall many other § 1983 claims, without adequate legal justification. And it would do so in a context much different than *Heck* or *McDonough*. Here, the implication of Bonelli's argument is that if his university disciplinary warning had not been rescinded (*i.e.*, favorably terminated), he might have no further recourse at all. We do not think

the malicious prosecution analogy can be stretched to impose such a hard bargain in the context before us.")

Meza v. Quidort, No. EDCV 23-01379 DDP (SHKX), 2024 WL 4152347, at *3 (C.D. Cal. Sept. 10, 2024) ("Here, the Officer Defendants assert that the standard two-year statute of limitations, and not the 'favorable termination' accrual rule, applies because this is a *suppression* of evidence case rather than a *fabrication* of evidence case, and therefore *McDonough* is inapt. . . This is a distinction without a difference. As the Court explained in *McDonough*, the 'accrual analysis begins with identifying the specific constitutional right alleged to have been infringed.'. . Although the Court assumed without deciding that a fabrication of evidence claim arises under the Due Process Clause, so too would a suppression of evidence claim. Comparing fabrication of evidence claims to malicious prosecution claims, the Supreme Court observed that '[a]t bottom, both claims challenge the integrity of criminal prosecutions undertaken "pursuant to legal process."'. . The same is equally true of a suppression of evidence claim, and indeed, Plaintiff has also alleged a malicious prosecution claim against Karakesisoglu. Accordingly, the favorable termination rule, and not the more generally applicable two-year statute of limitations, applies to Plaintiff's § 1983 claim. Because that claim did not accrue until the felony charges against Plaintiff were dismissed in 2021, the claim was timely filed.")

Jimenez-Bencebi v. State of Arizona, No. CV-23-02075-PHX-DWL, 2024 WL 2923715, at *19 (D. Ariz. June 10, 2024) ("Plaintiffs' reliance on *McDonough* is misplaced. There, the Supreme Court held that the defendant 'could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution.'. . The Court explained that the 'favorable-termination requirement is rooted in pragmatic concerns with *avoiding parallel criminal and civil litigation* over the same subject matter and the related possibility of *conflicting civil and criminal judgments*. The requirement likewise avoids allowing collateral attacks on *criminal judgments* through civil litigation.'. . The principles animating *McDonough* are not present here, where the underlying proceeding was a civil dependency proceeding. *Macias v. Kaplan-Siekmann*, 2024 WL 83448, *5 (D. Ariz. 2024) ("Here, Plaintiffs did not have to wait until the dependency proceedings terminated prior to filing their claims because Plaintiffs' § 1983 claims do not involve any allegations pertaining to unlawful criminal proceedings. Therefore, Plaintiffs should have brought their claims forward once they knew that they were injured.").")

Manansingh v. United States, No. 2:20-CV-01139-DWM, 2021 WL 2080190, at *4-5 & nn. 2, 3 (D. Nev. May 24, 2021) ("Plaintiffs first argue that their claims would have been barred by *Heck* had they pursued them prior to the June 21, 2018 dismissal of Manansingh's indictment. The argument is unpersuasive. '*Heck* established the now well-known rule that when an otherwise complete and present § 1983 cause of action would impugn an extant conviction, accrual is deferred until the conviction or sentence has been invalidated.' *Bradford v. Scherschligt*, 803 F.3d 382, 386 (9th Cir. 2015). While the Ninth Circuit determined at one point that the *Heck* bar extended to pending criminal proceedings, . . . the Supreme Court subsequently held in *Wallace*, that '*Heck* applies only when there is an extant conviction and is not implicated merely be the

pendency of charge[.]'. . Here, no conviction was ever obtained, let alone invalidated, so *Heck* does not apply. 'Consequently, the resolution of this [case] hinges on traditional rules of accrual and not on the extension of *Heck* to [these] proceedings.' *Bradford*, 803 F.3d at 386. . . . Plaintiffs' substantive due process claim (Claim 4) includes a properly pled Fifth Amendment fabricated evidence claim. . . . That claim is also timely, as it did not accrue until 'the criminal proceedings against [Manansingh] terminated in his favor.' *McDonough v. Smith*, 139 S. Ct. 2149, 2161 (2019). Here, the criminal case against Manansingh was dismissed by order of the district court on June 21, 2018. Although it was not a final assessment of innocence, courts have held that dropping charges or a *nolle prosequi* is an affirmative choice to terminate criminal proceedings *for purposes of claim accrual.* [citing cases] Because Plaintiffs brought their fabrication claim within two years of the dismissal of the criminal charges against Manansingh, that claim is timely. . . . 'Favorable termination' in this context is not necessarily concomitant with the 'favorable termination' element of malicious prosecution. *See Roberts v. City of Fairbanks*, 947 F.3d 1191, 1202 n.12 (9th Cir. 2020) (malicious prosecution claim may require termination 'dispositive of the defendant's innocence'). . . . Apart from a dispute over what qualifies as 'favorable termination,' the parties do not appear to dispute that this claim is timely under *McDonough.*")

Caldwell v. City of San Francisco, No. 12-CV-01892-DMR, 2020 WL 6270957, at *5–7 & n.3 (N.D. Cal. Oct. 26, 2020) ("*McDonough* did not address whether a plaintiff must show favorable termination of a criminal case in order to prevail on a constitutional claim challenging the use of fabricated evidence in that case. Instead, *McDonough* considered the question of when the statute of limitations begins to run on a section 1983 fabricated evidence claim. . . . Relying on its decision in *Heck*, and noting that it was 'follow[ing] the analogy [to malicious prosecution claims] where it leads,' the Court concluded that the plaintiff 'could not bring his fabricated-evidence claim under § 1983 prior to favorable termination of his prosecution.'. . *McDonough* discussed *Heck* at length. It explained that in *Heck*, the Court held that 'in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid,' a section 1983 plaintiff must prove that his or her conviction had been invalidated. . . A plaintiff may do so by showing that the conviction 'has been [1] reversed on direct appeal, [2] expunged by executive order, [3] declared invalid by a state tribunal authorized to make such determination, or [4] called into question by a federal court's issuance of a writ of habeas corpus.'. . *McDonough* reasoned that 'malicious prosecution's favorable-termination requirement is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil judgments' and 'avoids allowing collateral attacks on criminal judgment through civil litigation.'. . The Court then concluded that '[b]ecause a civil claim such as McDonough's, asserting that fabricated evidence was used to pursue a criminal judgment, implicates the same concerns, it makes sense to adopt the same rule.'. . Therefore, a statute of limitations on a fabricated evidence claim begins to run 'once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of *Heck*[.]'. . Here, Defendants distort *McDonough* by asserting that it imposed a 'favorable

termination' requirement for fabricated evidence claims that is identical to the requirement for malicious prosecution claims. *See* Mot. 10 (citing *Mills v. City of Covina*, 921 F.3d 1161, 1170-71 (9th Cir. 2019) (malicious prosecution claim requires a termination reflecting plaintiff's innocence)). According to Defendants, Caldwell cannot allege that the criminal proceedings terminated in his favor as he was never acquitted or declared innocent of the charges. Defendants are wrong. *McDonough* made no such ruling. Instead, it decided the question of when a claim for fabricated evidence accrues; it noted that it was not deciding the 'contours' of such a claim, and it did not hold that such a claim is identical to a malicious prosecution claim. . . In fact, Defendants' interpretation of *McDonough* contradicts the express ruling in *McDonough* that a fabricated evidence claim does not accrue until 'the criminal proceeding has ended in the defendant's favor, *or a resulting conviction has been invalidated within the meaning of Heck*[.]'. . In a recent opinion, the Ninth Circuit examined this exact language and held that '[b]y posing the favorable-termination rule and invalidation under *Heck* disjunctively,' '*McDonough* firmly undermines the . ..insinuation that they are coterminous.'. . Here, it is undisputed that Caldwell's conviction was 'invalidated within the meaning of *Heck*' because it was 'declared invalid by a state tribunal authorized to make such determination.'. . *Roberts* is directly on point here. It held that the favorable termination rule applicable to malicious prosecution claims is distinct from the 'four means of favorable termination' articulated in *Heck*. In *Roberts*, the Ninth Circuit addressed the question of 'whether § 1983 plaintiffs may recover damages if the convictions underlying their claims were vacated pursuant to a settlement agreement.'. . The settlement agreement provided that the parties would ask a court to vacate the plaintiffs' convictions, and specifically recognized that '[t]he parties have not reached agreement as to [the plaintiffs'] actual guilt or innocence.'. . . After a state court vacated the plaintiffs' convictions and they were released from prison, the plaintiffs filed a section 1983 action alleging deprivation of liberty, malicious prosecution, and several other claims. . . The district court dismissed their claims as barred by *Heck*, holding that the 'vacatur of convictions pursuant to a settlement agreement was insufficient to render the convictions invalid[.]'. .The Ninth Circuit reversed, holding that the *Heck* bar was inapplicable because the plaintiffs' convictions were vacated and the underlying indictments had been dismissed. The court ruled that in the absence of a criminal judgment or charges pending against the plaintiffs, *Heck* did not apply as a bar to the subsequent civil rights action. . . The defendants argued that even though the convictions were vacated, they had not been 'declared invalid' as required by *Heck* because the settlement did not establish the plaintiffs' innocence and thus did not meet the 'favorable-termination' rule for a malicious prosecution claim. . . The Ninth Circuit rejected this argument as improperly conflating 'the favorable-termination rule in the tort of malicious prosecution with *Heck*'s four distinct means of favorable termination.'. . It expressly found that '*Heck*'s favorable-termination requirement is distinct from the favorable-termination element of a malicious-prosecution claim.'. . According to *Roberts*, the argument forwarded by the defense (which is the same argument asserted by Defendants in this case) 'contravenes the plain language of *Heck*' because convictions can be invalidated on the grounds set forth in *Heck* without 'indicat[ing] the innocence of the accused,' as is required for a malicious prosecution claim. . . It noted that '[c]onvictions "called into question by a federal court's issuance of a writ of habeas corpus" routinely terminate in a manner that could not sustain a malicious-

prosecution action.'. . . Defendants acknowledge that in *Roberts*, the Ninth Circuit clearly stated that the favorable termination element of a malicious prosecution claims should not be conflated with the favorable termination requirement of *Heck*, and that *Heck* does not bar a 1983 suit unless the plaintiff could succeed in a malicious prosecution action. But Defendants go on from there to pronounce that '[t]he converse...is also true—a plaintiff cannot succeed in a malicious prosecution or fabrication of evidence action merely by overcoming the *Heck* bar.'. . Defendants cite two cases which purportedly support their pronouncement, but neither do. *Mills v. City of Covina*, 921 F.3d 1161, 1170-71 (9th Cir. 2019) discusses the elements of a malicious prosecution claim, including the favorable termination element, but says nothing about fabrication of evidence claims. In *Bradford v. Scherschligt*, 803 F.3d 382, 386-89 (9th Cir. 2015), the court held that a *Devereaux* claim for fabrication of evidence accrues when the conviction or sentence is invalidated, but in the retrial context, it accrues on the date the plaintiff is acquitted in a retrial. *Bradford* does not hold that a fabrication of evidence claim requires a favorable termination. . . . In sum, *Roberts* considered and rejected the exact position taken by Defendants here. . . Accordingly, Caldwell does not have to plead that the underlying criminal proceedings terminated in his favor in order to proceed with his section 1983 due process claim against Crenshaw.")

E. *Edwards v. Balisok*

In ***Edwards v. Balisok,*** 520 U.S. 641 (1997), the Supreme Court extended the principle of *Heck* to prisoners' § 1983 challenges to prison disciplinary proceedings, claiming damages for a procedural defect in the prison administrative process, where the administrative action taken against the plaintiff resulted in the deprivation of good-time credits. Where prevailing in the challenge would necessarily affect the duration of confinement, by restoration of good-time credits, the § 1983 claim will be dismissed and plaintiff will have to invalidate the disciplinary determination through appeal or habeas corpus before pursuing a damages action. *Id.* at 648. The prisoner in *Edwards* also sought prospective injunctive relief, "requiring prison officials to date-stamp witness statements at the time they are received." The Court recognized that "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983.' However, because neither the Ninth Circuit nor the District Court considered the claim for injunctive relief, the Supreme Court left the matter for consideration by the lower courts on remand. 520 U.S. at 648, 649. *Compare, e.g.*, ***Clarke v. Stalder***, 154 F.3d 186, 189-91 (5th Cir. 1998) (*en banc*) ("[U]nlike the sort of prospective relief envisioned by the Supreme Court in *Edwards* that may have only an 'indirect impact' on the validity of a prisoner's conviction, . . . the type of prospective injunctive relief that Clarke requests in this case − a facial declaration of the unconstitutionality of the 'no threats of legal redress' portion of Rule 3 − is so intertwined with his request for damages and reinstatement of his lost good-time credits that a favorable ruling on the former would 'necessarily imply' the invalidity of his loss of good-time credits.") *with id.* at 194 (Reynaldo G. Garza, J., dissenting) ("The majority must remember that Justice Scalia in *Heck* established that if a federal judicial action would 'necessarily imply' the invalidity of a prison conviction the court

may not act. . . . Justice Scalia's words are 'necessarily imply' not 'possibly imply' or 'probably imply.'").

See also ***Olivier v. City of Brandon, Mississippi***, No. 22-60566, 2023 WL 5500223, at *4 (5th Cir. Aug. 25, 2023) (not reported), *reh'g and reh'g en banc denied*, ___ F.4th ___ (5th Cir. Nov. 14, 2024) ("*Clarke* squarely applies to Olivier's case. As in *Clarke*, Olivier also seeks to enjoin a state law under which he was convicted. . . He likewise requests 'prospective injunctive relief ... on grounds of facial unconstitutionality.'. . Under *Clarke*, such relief 'necessarily implies' the invalidity of the conviction and is barred under *Heck*. . . It also goes without saying that, as an en banc decision, *Clarke* is binding. . . Olivier's attempts to distinguish *Clarke* do not persuade us. For starters, he argues that the only relief he seeks is to enjoin the prospective enforcement of the Ordinance, not damages. Not so: Olivier sought compensatory and nominal damages at the district court. And either way, *Clarke* would still bar his challenge. Damages notwithstanding, *Clarke* makes clear that *Heck* forbids injunctive relief declaring a state law of conviction as 'facially unconstitutional.'. . Simply put, a '[c]onviction based on an unconstitutional rule is the sort of "obvious defect" that, when established, results in nullification of the conviction.'. . True, unlike the inmate in *Clarke*, Olivier is not serving his sentence. But in this circuit, *Heck* applies even if a § 1983 plaintiff is 'no longer in custody' and 'thus [cannot] file a habeas petition.'. . . There is admittedly friction between *Clarke* and these decisions. On one hand, *Skinner* suggests that an injunction would not 'necessarily' imply the invalidity of a conviction unless that outcome is 'inevitable.'. . Yet enjoining a law as unconstitutional may not 'inevitably' lead to the invalidity of the underlying conviction; preliminary injunctions 'merely [ ] preserve the relative positions of the parties until a trial on the merits can be held.'. . .But on the other hand, the injunctive relief in *Wilkinson* (parole review) and *Skinner* (DNA testing) resemble the one in *Edwards* (date-stamping): they concern matters that are entirely separate from the underlying conviction. . . That is different from a challenge to the constitutionality of the very law that led to plaintiff's conviction, as in *Clarke*. Again, *Clarke* distinguished *Edwards* on this very basis: it found the relief sought in *Edwards* had 'only an indirect impact on the validity of [the] prisoner's conviction.'. . Still, we need not bridge the gap between *Clarke* and these decisions today. Olivier does not claim that *Clarke* is no longer good law; he only seeks to distinguish it. We have already rejected those efforts above. Finally, Olivier urges us to carve out an independent exception to *Heck* for prospective challenges like his. That is what the Ninth Circuit did in *Martin* when it permitted several homeless individuals to enjoin two ordinances that banned camping and lodging on public property. . . In so doing, the *Martin* court reasoned that *Heck* ensured the 'finality and validity of previous convictions'—not to 'insulate future prosecutions from challenge.'. . But again, that brings us right back to *Clarke*, which Olivier does not seek to overturn. . . And because we have rejected Olivier's invitation to distinguish *Clarke*, we likewise leave this question for another day. All this leads to one conclusion: affirmance. But we will make one modification to the judgment. The district court denied Olivier's claims 'with prejudice.' That mandate, however, would bar Olivier from pursuing his claims even if his conviction were later 'reversed,' 'expunged,' or 'declared invalid.'. . To avoid this outcome, we have explained that the 'preferred' language under *Heck* is to dismiss the claims 'with prejudice *to their being asserted again until*

the Heck conditions are met.'. .Under *Clarke*, Olivier's request to enjoin the enforcement of the Ordinance as unconstitutional would 'necessarily' imply the invalidity of his conviction. . . Thus, the *Heck* bar applies.").

But see ***Olivier v. City of Brandon, Mississippi***, No. 22-60566, 2024 WL 4797535, at *2 n.2 , *3 (5th Cir. Nov. 14, 2024) (Ho, J., joined by Elrod, C.J., and Smith, Willett, Duncan, and Oldham, JJ., dissenting from denial of rehearing en banc) ("At least two of our sister circuits also construe *Heck* not to apply in cases such as this. *See also Martin v. City of Boise*, 920 F.3d 584, 615 (9th Cir. 2019) ("*Heck* ... serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge."); *Lawrence v. McCall*, 238 F. App'x 393, 396 (10th Cir. 2007) ("*Heck does* not bar ... prospective relief"). In *City of Grants Pass v. Johnson*, ––– U.S. ––– (2024), the Supreme Court abrogated *Martin's* interpretation of the Eighth Amendment. *Grants Pass* does not undermine *Martin's* analysis of *Heck.* . . .*Clarke* not only misreads *Heck.* It also defies common sense. The fact that Olivier was previously convicted under the ordinance should make him not just a permissible but a perfect plaintiff. But instead, *Clarke* uniquely prohibits citizens like Olivier from bringing suit. That gets things entirely backwards. And it sends an odd message to citizens who care about defending their constitutional rights. On the one hand, we tell citizens that you can't sue if you're not injured. But on the other hand, we tell them that you can't sue if you *are* injured. Once again, when it comes to suits against the government, the message is: 'Heads I win, tails you lose.' *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring). Citizens like Olivier deserve their day in court. *Clarke* turns the law upside down. We should have granted rehearing en banc to overturn it."); ***Olivier v. City of Brandon, Mississippi***, No. 22-60566, 2024 WL 4797535, at *3-4 (5th Cir. Nov. 14, 2024) (Oldham, J., joined by Elrod, C.J., and Jones, Smith, Richman, Willett, Ho, and Duncan, JJ., dissenting from the denial of rehearing en banc) ("As we recently said while sitting en banc: '[A] suit seeking prospective injunctive relief does *not* implicate *Heck's* favorable-termination requirement (or, for that matter, *Preiser's* habeas-channeling rationale).' *Wilson v. Midland Cnty.*, 116 F.4th 384, 398 n.5 (5th Cir. 2024) (en banc) (emphasis added) (citing *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). The panel in this case nevertheless applied the *Heck* bar to a street preacher's claim for injunctive relief. That result is indefensible. . . . As our en banc court recently explained, *Heck* bars the *retrospective* use of 42 U.S.C. § 1983 to collaterally attack criminal convictions. . . Contrariwise, *Heck* permits *prospective*-relief claims that (1) do not implicate the habeas remedy of release from custody, and that (2) do not resemble 'tort suits that would undermine criminal proceedings and judgments.'. . *Heck* plainly does nothing to bar Olivier's prospective-relief claim. In relevant part, Olivier seeks a court order 'enjoin[ing] named defendants from taking specified unlawful actions'—namely, enforcing a law that abridges his constitutional rights *in the future.* Injunctions do not work backwards to invalidate official actions taken in the past. Rather, they operate to prevent future official enforcement actions upon threat of contempt. . . 'All that a court can do is announce its opinion that the statute violates the Constitution, decline to enforce the statute in cases before the court, and instruct executive officers not to initiate enforcement proceedings.'. . None of that does anything to undermine, collaterally attack, or otherwise impose tort liability on Olivier's previous

conviction. . . . The grant of a forward-looking injunction. . . does not invalidate Olivier's previous conviction. Viewed in this light, it is clear that *Heck* does not bar § 1983 claims for prospective injunctive relief. Indeed, at least one of our sister circuits has expressly rejected this interpretation of *Heck. See Martin v. City of Boise*, 920 F.3d 584, 614 (9th Cir. 2019) ("The logical extension of the district court's interpretation is that an individual who does not successfully invalidate a first conviction under an unconstitutional statute will have no opportunity to challenge that statute prospectively so as to avoid arrest and conviction for violating that same statute in the future. Neither *Wilkinson* nor any other case in the *Heck* line supports such a result. Rather, *Wolff, Edwards*, and *Wilkinson* compel the opposite conclusion."). * The panel's decision is unpublished, so it carries no precedential effect under our rule of orderliness. It also conflicts with *Wilson.* So if there is a saving grace, it is that future panels can do the right thing—notwithstanding today's error. That is hollow solace to Gabriel Olivier, of course. He deserves better. I respectfully dissent.")

Compare ***Hebrard v. Nofziger***, 90 F.4th 1000, 1008, 1010-13 (9th Cir. 2024) ("[W]e find that under this case law, it is clear from the face of Hebrard's complaint that his claim is *Heck*-barred. His claim is materially similar to the claim in *Edwards* that was found to be barred by *Heck*. . . . [I]f Hebrard's complaint makes clear that he wants to obtain a judicial determination that his disciplinary 'conviction was wrongful,' his claim is barred by *Heck* even though he did not request 'damages directly attributable to' the loss of his earned-time credits in his prayer for relief. . . A plain reading of Hebrard's complaint reveals that his § 1983 claim seeks such a ruling. . . . [C]ontrary to the position taken by the Second Circuit in *Peralta*, . . . a prisoner's conscious decision not to request relief for the loss of his earned-time credits does not mean his claim does not challenge the validity of the duration of his confinement. . . Rather, as the *Edwards* Court explained, a prisoner's due process challenge 'to the procedures' employed at his disciplinary hearing 'necessarily impl[ies] the invalidity of the deprivation of his [earned]-time credits'—even if he affirmatively declines to bring a direct challenge to 'the result[ing]' revocation of his earned-time credits—so long as the alleged 'procedural defect,' if proven, would demonstrate the 'invalidity of the judgment' in his disciplinary hearing. . . That is precisely what Hebrard's due process claim demands. . . He seeks a judicial determination that he was improperly adjudged guilty and thereby impermissibly sanctioned for baseless rule violations because of Nofziger's unconstitutional actions: Nofziger's alleged refusal to call witnesses, to present evidence of wrongdoing, to conduct an investigation, or to permit Hebrard to put on a defense. Because *Edwards* resolved a due process challenge that is factually analogous to the claim in Hebrard's complaint, it compels the result we reach here. Namely, although Hebrard does not seek to recover for his lost earned-time credits, his claim is barred by *Heck* because he challenges the constitutional validity of his disciplinary conviction, which constitutes an implied challenge to the validity of the sanctions imposed as a result.") *with* ***Hebrard v. Nofziger***, 90 F.4th 1000, 1014, 1017-22 (9th Cir. 2024) (Sung, J., dissenting) ("Plaintiff Alexander Hebrard, an Oregon state prisoner, filed a claim under 42 U.S.C. § 1983 challenging a prison disciplinary action that resulted in various sanctions, including revocation of 27 days of earned-time credits. The district court *sua sponte* dismissed Hebrard's § 1983 claim for failure to state a claim based on *Heck v. Humphrey*[.] I agree with the

majority that *Heck* is an affirmative defense, and that the defendant, Nofziger, bears the burden of proving it applies. I also agree with the majority that Hebrard's § 1983 action, if successful, would necessarily imply the invalidity of the revocation of Hebrard's earned-time credits—even though his complaint does not seek restoration of those credits. . . However, I disagree with the majority's conclusion that the district court properly dismissed Hebrard's claim as *Heck*-barred. . . .The question at the heart of this case is: Would restoration of Hebrard's earned-time credits necessarily lead to his immediate or speedier release from custody? On this record, we simply do not know the answer to that question. Under Oregon law, it is possible that Hebrard is receiving earned-time credits that cannot lead to his immediate or speedier release. And we can't rule out that possibility because we don't know what sentence or sentences Hebrard is serving, or what his underlying conviction or convictions are. Because we can't be certain that restoration of Hebrard's earned-time credits would necessarily affect the duration of his custody, we can't be certain that his claim is *Heck*-barred. . . . We can't tell from the record whether restoration of Hebrard's earned-time credits would necessarily affect the length of time he must serve. Therefore, we can't tell whether his claim was properly dismissed under *Heck*. . . . In this case, Nofziger conceded at oral argument that we have no way of knowing on this record that Hebrard is *not* serving an indeterminate sentence. This means it is possible that Hebrard (like Engweiler and Nettles) is serving an indeterminate sentence that is eligible for earned-time credits but a parole board retains discretion to decide when to release him (if ever). If so, then restoration of Hebrard's earned-time credits would *not* necessarily lead to his immediate or earlier release, and his claim is not *Heck*-barred. . . . I agree with the majority that, because the district court dismissed Hebrard's complaint for failure to state a claim, we should 'affirm the district court's dismissal of his claim only if the *Heck* bar is obvious from the face of his complaint.' However, I disagree with the majority's conclusion that the *Heck* bar is obvious from the face of Hebrard's complaint. . . .Moreover, it was Nofziger's burden to prove that the *Heck* affirmative defense applies—Hebrard was not required to plead enough facts in his complaint to show that *Heck* does not apply. The majority and I agree that *Heck* is an affirmative defense. Therefore, compliance with *Heck* is 'not a pleading requirement.'. . . Because it is not obvious from the face of Hebrard's complaint that his claim is *Heck*-barred, and *Heck* compliance is not a pleading requirement, the district court erred in concluding that Hebrard 'failed to state a claim' based on *Heck*. Further, because Hebrard did not fail to state a claim, the district court erred in concluding that it was obliged to dismiss his claim under 28 U.S.C. § 1915(e)(2)(B)(ii). . . .We don't know whether Hebrard's claim is actually *Heck*-barred. But even assuming that Nofziger could have met his burden to prove that *Heck* applies (and simply neglected to do so), I fear that the majority's decision will have unintended consequences for future cases. . . . The majority's decision . . . effectively turns the *Heck* affirmative defense into a pleading requirement for prisoners proceeding *in forma pauperis* under the PLRA, at least in cases that involve postconviction credits. Unless the prisoner makes clear on the face of the complaint that restoration of the prisoner's credits would not necessarily lead to their immediate or earlier release, then, under the precedent set by the majority's opinion, the district court will be *required* under § 1915(e)(2)(B)(ii) to *sua sponte* dismiss the complaint for failure to state a claim. . . . On this record, we do not have the information we need to be certain that Hebrard's claim is within the core of habeas and properly dismissed as *Heck*-barred. Because the record does not include that essential

information, the district court erred in (1) determining that the *Heck* bars Hebrard's claim, and (2) dismissing his complaint for failure to state a claim. Hebrard was not required to plead around the *Heck* affirmative defense. Moreover, Nofziger forfeited (and possibly waived) the *Heck* affirmative defense and failed to meet his burden to prove that *Heck* applies despite having multiple opportunities to do so. For these reasons, I would reverse the district court's dismissal of Hebrard's § 1983 claim as barred by *Heck*, and I respectfully dissent.")

See also ***Moskos v. Hardee***, 24 F.4th 289, 295-96 (4th Cir. 2022) ("Moskos alleges that the defendants violated his substantive and procedural due process rights by conducting a sham investigation, following which he was convicted of several disciplinary infractions and lost good-time credits. Moskos brought his suit under 42 U.S.C. § 1983, which provides a cause of action for individuals seeking damages for constitutional violations. But § 1983 does not provide a cause of action in the circumstances present here. The Supreme Court has long held that 'habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement' and that this 'specific determination must override the general terms of § 1983.'. . This principle applies just as clearly to prison disciplinary convictions resulting in the loss of good-time credits as it does to other convictions, since the restoration of good-time credits is 'within the core of habeas corpus in attacking the very duration of [the prisoner's] physical confinement itself.'. .It has long been settled law, therefore, that a plaintiff may not challenge the validity of a disciplinary conviction through a damages suit under § 1983. In particular, 'when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.'. . If so, 'the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence already has been invalidated,' whether on direct appeal, by executive order, by a state tribunal, or by a federal court's issuance of a writ of habeas corpus. . . In *Edwards v. Balisok*, . . . the Supreme Court made clear that this rule applies not merely to substantive challenges to convictions, but also to those challenges to internal prison procedures that would be 'such as necessarily to imply the invalidity of the judgment.'. . . And *Balisok* was emphatic as to how the courts should handle such claims: '[A] claim is either cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed.'. . Here, as in *Balisok*, Moskos brings a due process challenge to the disciplinary investigation conducted against him, which resulted in the loss of good-time credits. Here, as in *Balisok*, Moskos has not invalidated his disciplinary convictions. And here, for virtually identical reasons as in *Balisok*, Moskos's due process challenge would 'necessarily imply the invalidity of the punishment imposed.'. .After all, the gravamen of Moskos's due process argument is that the defendants falsified information, because of which 'Moskos was ultimately found guilty of three prison disciplinary offenses that he did not commit,' causing him to lose good-time credits. . . [A] conclusion that prison staff fabricated evidence to cover up their involvement clearly would imply that Moskos's disciplinary convictions were invalid. Indeed, Moskos states repeatedly that he was wrongfully convicted 'based solely' on the due process violations he alleges. . . Because his claims would necessarily imply the invalidity of the judgment, they must be dismissed under *Balisok*. If Moskos believes that he has been wrongfully convicted of these disciplinary infractions, he is of course free to seek legal recourse. But if he seeks to do

so in federal court, he must use the channel that Congress has provided for such claims. That path is through a habeas petition, subject to those statutory requirements that Congress carefully crafted to respect the finality of state judgments. In law, unlike in history, not all roads lead to Rome. Since Moskos did not take a proper road, we affirm the district court as to his due process claim."); ***Colvin v. LeBlanc***, 2 F.4th 494, 499 (5th Cir. 2021) ("Colvin maintains that he should be released in 2023, not 2052, and challenges the methodology used to calculate his release date. Regardless of whether Colvin challenges the application of good time credit or the failure to credit his state sentence with federal time served, his claim ultimately challenges a single issue: the duration of his state sentence. A claim for speedier release is actionable by writ of habeas corpus. . . and a § 1983 damages action predicated on the sentence calculation issue is barred by *Heck* because success on that claim would necessarily invalidate the duration of his incarceration."); ***Lennear v. Wilson***, 937 F.3d 257, 267, 276-77 (4th Cir. 2019) ("On March 6, 2017, Petitioner filed a habeas petition under 28 U.S.C. § 2241 in the United States District Court for the Eastern District of Virginia. . . on grounds that the disciplinary review process violated his due process rights because he was denied access to and official consideration of video surveillance evidence of the incident, citing *Wolff v. McDonnell*, 418 U.S. 539 (1974). . . . In *Edwards v. Balisok*, 520 U.S. 641 (1997), the Supreme Court expressly rejected the use of *Hill*'s 'some evidence' standard in the procedural due process context. In particular, the Court held that *Hill*'s 'some evidence' standard addresses the '*evidentiary requirements* of due process' but 'in no way abrogate[s] the due process requirements enunciated in *Wolff*.'. . Accordingly, *Hill*'s 'some evidence' standard is 'irrelevant' in determining whether a denial of procedural due process is harmless. . . Rather than applying *Hill*'s 'some evidence' standard, courts tasked with determining whether prison officials' failure to disclose or consider testimonial or documentary was harmless have considered whether the excluded evidence could have 'aided' the inmate's defense. . . Accordingly, we hold that in evaluating whether prison officials' failure to disclose or consider evidence was harmless, courts must determine whether the excluded evidence could have aided the inmate's defense."); ***James v. Pfister***, 708 F. App'x 876, ___ (7th Cir. 2017) ("We agree with James that the district court erred in relying on *Heck* as a reason to dismiss his lawsuit. *Heck* and *Edwards* do not bar review of prison disciplinary proceedings under § 1983 unless that review could imply the invalidity of the plaintiff's continued custody. . . As we explained in *Simpson*, . . . *Heck* and *Edwards* are 'beside the point' for inmates whose infractions are punished by disciplinary segregation or restrictions on recreation, since neither penalty 'is a form of "custody" under federal law.' In contrast, *Heck* and *Edwards* will be an obstacle for an inmate who tries using § 1983 to regain good time that was revoked after a disciplinary hearing, since he remains in 'custody.' But James did not lose good time, a fact confirmed by an attachment to his appellate brief."); ***LaFountain v. Harry***, 716 F.3d 944, 950 (6th Cir. 2013) ("In substance, LaFountain's claim based on his misconduct charges is a claim that the defendants entrapped him. But entrapment is generally a complete defense. . . Thus, if true, the prison should not have convicted LaFountain of the misconduct charges that resulted in the loss of his good-time credits. Moreover, LaFountain alleged that Barbier 'purposefully falsified evidence in order to assure that [LaFountain] would be found guilty[.]' This allegation, too, implies the invalidity of the prison's misconduct findings and thus the deprivation of LaFountain's good-time credits. . . And the duration of LaFountain's confinement is directly

affected by the loss of his good-time credits. . . Thus in this appeal, as in an earlier one, 'LaFountain's challenges to his misconduct hearings and the resultant loss of "good time" credits[ ] affect the length of his sentence and ... are barred under *Edwards* and *Heck.*'. . LaFountain tries to circumvent *Heck* by citing *Thomas v. Eby*, 481 F.3d 434 (6th Cir.2007). There, the court allowed a prisoner to proceed with a retaliation claim based on a misconduct charge even though the prisoner was convicted of the misconduct. But *Thomas* involved disciplinary credits, not good-time credits. And 'disciplinary credits ... do not determine when a sentence ... is completed[.]'. . Here, in contrast, the prison deprived LaFountain of good-time credits, which do result in a reduction of a prisoner's sentence. . .*Thomas* is therefore inapposite."); ***White v. Fox***, 294 F. App'x 955, ___ (5th Cir. 2008) ("A 'conviction,' for purposes of *Heck*, includes a ruling in a prison disciplinary proceeding that results in a change to the prisoner's sentence, including the loss of good-time credits. . . . A claim for damages based on a failure to receive a written statement of the evidence relied on in a prison disciplinary proceeding is cognizable under § 1983. Therefore, the district court in this case erred in dismissing White's § 1983 claim in its entirety. . . .On remand, the district court should decide White's § 1983 claim to the extent that White seeks damages for the disciplinary board's failure to provide him with a written statement of the evidence relied on during the disciplinary proceeding. The court should also consider the 'snitch' claim and the alleged harm that resulted from this designation. We caution, however, that the damages cannot encompass the 'injury' of being deprived of good-time credits, and must stem solely from 'the deprivation of civil rights.'")

Compare ***Yarbrough v. Decatur Housing Authority***, 941 F.3d 1022, 1028-30 (11th Cir. 2019) ("[T]he precedents holding that procedural due process prohibits decisions predicated on no evidence must not be understood to license review of the correctness of an agency decision. Instead, these precedents establish only that a procedure that permits decisions founded on no evidence violates the Due Process Clauses. . . .As the Supreme Court explained in *Hill*, the form of minimal evidentiary review mandated in some contexts by procedural due process requires only 'some evidence' that 'supports the decision' in question. . . . The decision to terminate Yarbrough's voucher satisfies this standard. The Authority's decision was based on testimony from Gray, two grand jury indictments, arrest records, and testimony from Yarbrough herself. As noted, Yarbrough admitted the arrests and did not deny that she had sold prescription medications to an undercover informant or otherwise dispute the factual basis of the charges. This evidence supported the conclusion reached by the Authority, . . . namely, that Yarbrough had engaged in drug-related criminal activity. . . .As we have explained, no procedural due process violation follows from an agency's failure to introduce evidence sufficient under the applicable standard of proof. Although due process may require a particular standard of proof in a certain kind of proceeding, . . . the Due Process Clauses do not forbid garden-variety errors in applying standards of proof, regardless of the legal source of those standards. As a result, we conclude that the decision to terminate Yarbrough's voucher easily passes muster under the 'some evidence' standard. Yarbrough argues that procedural due process prohibits a housing authority from rendering a termination decision based solely on unreliable and non-probative hearsay, but we need not reach that issue. Nor must we decide whether procedural due process requires some assessment of the

reliability and probative value of hearsay evidence. Yarbrough's indictments and arrest records, especially in the light of her own testimony, bear sufficient indicia of reliability and are adequately probative to constitute 'some evidence' in support of the Authority's decision.") *with* ***Yarbrough v. Decatur Housing Authority***, 941 F.3d 1022, 1031 (11th Cir. 2019) (Martin, J., concurring) ("In my view, due process requires more than *Hill*'s 'some evidence' standard for the voucher-termination decision. The Majority Opinion suggests that Supreme Court 'precedents establish *only* that a procedure that permits decisions founded on *no* evidence violates the Due Process Clauses.'. . But this statement overlooks the additional requirements described in *Wolff*[.] . . . As the Supreme Court clarified, *Hill* 'in no way abrogated' *Wolff*; rather, *Hill* should be considered 'in addition to' the earlier *Wolff* decision. . . So, in addition to 'some evidence,' due process in this voucher-termination case also requires: (1) advance 'written notice of the charges'; and (2) 'a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action.'. . .I therefore concur in the Majority's judgment that the Authority did put forth some evidence to support its decision to terminate Yarbrough's Section 8 housing voucher, but not in the Majority Opinion's propositions that *Hill* rejected the 'substantial evidence' standard and that the due process requirements in *Hill* are exhaustive.")

See also ***Elder v. McCarthy***, 967 F.3d 113, 124, 126, 129-30 (2d Cir. 2020) ("[A] sentence requiring an inmate to serve time in the SHU represents a substantial loss of liberty even for a lawfully imprisoned person. As noted above, the confinement is much more restrictive and other conditions, such as unrelenting light and lack of exercise, are harsh. Accordingly, our prior rulings have left no room to doubt that 'certain due process protections must be observed before an inmate may be subject to confinement in the SHU.'. . These protections include providing the inmate with 'advance written notice of the charges; a fair and impartial hearing officer; a reasonable opportunity to call witnesses and present documentary evidence; and a written statement of the disposition, including supporting facts and reasons for the action taken.'. . As the Supreme Court has observed, '[c]hief among the[se] due process minima ... [i]s the right of an inmate to call and present witnesses ... in his defense before the disciplinary board.'. . An inmate's request to call witnesses may be denied due to 'irrelevance or lack of necessity,' or where 'granting the request would be unduly hazardous to institutional safety or correctional goals.'. . The burden to defend such a denial, however, 'is not upon the inmate to prove the official's conduct was arbitrary and capricious, but upon the official to prove the rationality of the position.'. . .Due process principles require prison authorities 'to provide assistance to an inmate in marshaling evidence and presenting a defense when he is faced with disciplinary charges.'. . When the inmate is confined before the hearing, 'the duty of assistance is greater because the inmate's ability to help himself is reduced.'. . Such required assistance includes 'gathering evidence, obtaining documents and relevant tapes, and interviewing witnesses.'. .This constitutional obligation is violated by a 'failure to ... interview an inmate's requested witnesses without assigning a valid reason.'. . As with the failure to make witnesses available at a disciplinary hearing, '[t]he burden is not upon the inmate to prove the [assistant's] conduct was arbitrary and capricious, but upon the [assistant] to prove the rationality of his position.'. .The Supreme Court instructed in 1985 that due process prohibits disciplinary action affecting an inmate's liberty interest without 'some evidence' of guilt. . . A reviewing

court's application of this standard 'does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence.'. . Rather, the court considers 'whether there is *any evidence* in the record that could support the conclusion reached by the disciplinary board.'. .Read at its most expansive, the Court's 1985 articulation suggests a low standard indeed. In this Circuit, however, we have not 'construed the phrase "any evidence" literally.' Rather, we have required that such disciplinary determinations be supported by some '*reliable* evidence' of guilt. . . .[W]e conclude that Kling's findings that Elder was guilty of both forgery and theft were not supported by some *reliable* evidence. . . Although the record demonstrates that Kling inspected the Lawrence disbursement forms and concluded that the handwriting on those forms was similar to the handwriting on Elder's documents, the entire proceeding rested on the assumption—one unsupported by any direct evidence and supported by McCarthy's report only by inference—that forgery and theft had occurred. The hearing record lacked any direct evidence that Lawrence had complained of theft or forgery, or that money was withdrawn from Lawrence's account against his will. Further, the hearing record before Kling contained no samples of withdrawal forms submitted by Lawrence in the past, or any reliable sample of Lawrence's signature to suggest that the targeted forms were in fact forgeries. Thus, in the absence of a reliable sample of Lawrence's signature on a withdrawal form, Elder was accused of forgery based merely on the fact that the written signatures on the targeted forms looked similar to his handwriting. This unusual aspect of the record persuades us that, in the circumstances of this case, the evidence before Kling was insufficient to find Elder guilty of theft and forgery.")

F. ***Muhammad v. Close***

In ***Muhammad v. Close***, 540 U.S. 749 (2004) (per curiam), the Supreme Court confirmed the view of a majority of the circuits that '*Heck*'s requirement to resort to state litigation and federal habeas before § 1983 is not . . . implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence.' *Id.* at 751. Thus, assuming a challenge to such disciplinary administrative determinations raises no implication for the underlying conviction and has no impact on the duration of the sentence through revocation of good-time credits, the *Heck* favorable-termination rule will not apply. *Id.* at 754, 755. *See also* ***Taylor v. United States Probation Office***, 409 F.3d 426, 427(D.C. Cir. 2005) ("Because Taylor's complaint challenges only the fact that he was confined at one facility rather than another and, thus, does not challenge the fact or duration of his confinement, the rule of *Heck* is inapplicable."); ***Martinez v. Lunes***, No. 1:04-cv-6469-LJO-DLB PC, 2007 WL 4539010, at *2 (E.D.Cal. Dec. 19, 2007) ("In this action, plaintiff challenges the validity of his disciplinary weapon conviction; however, as he points out in his opposition, the conviction does not affect the validity of his confinement or its duration because he did not lose good time credits as a result of the conviction. Plaintiff alleges in his amended complaint, and defendants do not dispute, that as a result of the weapons conviction, plaintiff received a ten-month SHU term and loss of privileges. Because the punishment imposed at the disciplinary hearing does not affect the duration of plaintiff's sentence, this action is not barred by *Heck v. Humphrey*, 512 U.S. 477, 487-88 (1994) or *Edwards v. Balisok*, 520 U.S. 641 (1997).).

Compare ***Peralta v. Vasquez***, 467 F.3d 98, 100 (2d Cir. 2006) ("What is not clear, however, is whether a prisoner who was subject to a single disciplinary proceeding that gave rise to two types of sanctions − one that affected the duration of his custody and the other that affected the conditions of his confinement − can, without needing to satisfy the favorable termination rule, maintain a § 1983 action aimed solely at the second type of sanction. We now resolve this open question and hold that, in 'mixed sanctions' cases, a prisoner can, without demonstrating that the challenged disciplinary proceedings or resulting punishments have been invalidated, proceed separately with a § 1983 action aimed at the sanctions or procedures that affected the conditions of his confinement. But we also hold that he may only bring such an action if he agrees to abandon forever any and all claims he has with respect to the sanctions that affected the length of his imprisonment."); ***Pollard v. Romero***, No. 07-cv-00399-EWN-KLM, 2008 WL 1826187, at *6, *7 (D. Colo. Apr. 23, 2008) ("[T]he single disciplinary proceeding in this case gave rise to a mixed sanction (*i.e.*, segregation) that affects both the conditions of Mr. Pollard's confinement and its terms. . . Mr. Pollard has not introduced any evidence that his disciplinary conviction has been invalidated. . . Therefore, the magistrate judge concluded that his claim should be dismissed. . . This conclusion poses a more pressing question which is now before me, namely, whether and under what circumstances a prisoner may employ section 1983 in a mixed sanctions case to challenge the conditions rather than the terms of his confinement. Neither the Supreme Court of the United States nor the Tenth Circuit has answered this question yet. However, the Second circuit in *Peralta v. Vasquez*, 467 F.3d 98, 104 (2nd Cir.2006) has addressed the issue. . . . The magistrate judge considered the *Peralta* court's approach but rejected it without analysis. I disagree and find the Second Circuit's reasoning persuasive. Therefore, considering the state court's pending decision concerning the validity of Plaintiff's disciplinary conviction and considering the possibility that Plaintiff would be willing to abandon his duration claim, . . . staying this proceeding is more appropriate because it will allow Plaintiff to pursue his claim related to the conditions of confinement (assuming he meets the requirements).") *with* ***Haywood v. Hathaway***, 842 F.3d 1026, 1028-30 (7th Cir. 2016) ("[N]o matter what a prisoner demands, or waives, § 1983 cannot be used to contest the fact or duration of confinement. See *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). From its outset, this suit has been a quest for money damages. That's not all. The holding of *Heck* and *Edwards* is that a claim under § 1983 does not accrue as long as it would imply the invalidity of a conviction or disciplinary sanction that affects the duration of custody. If the claim has not accrued, it cannot matter what relief a prisoner seeks. Yet if it is possible to seek damages while waiving other relief, this must mean that the claim accrues immediately and the statute of limitations runs from the time of the events said to be wrongful. That would surprise the many prisoners who wait patiently until they are entitled to sue under *Heck*, for if Haywood is right the time to do so could have expired. Haywood relies on *Peralta v. Vasquez*, 467 F.3d 98 (2d Cir. 2006), which held that a prisoner who foreswears any contest to the length of his confinement may use § 1983 to seek damages. The Second Circuit understood 'the purpose of the *Heck* favorable termination requirement [to be] to prevent prisoners from using § 1983 to vitiate collaterally a judicial or administrative decision that affected the overall length of their confinement'. . . To disavow any collateral attack on the conviction or revocation of good-

time credits is to take the situation outside *Heck*, the court concluded. We do not agree with that conclusion, which no other circuit has adopted (though none has expressly rejected it, either). *Heck* and *Edwards* say that a challenge is not possible as long as it is inconsistent with the validity of a conviction or disciplinary sanction. . . .This is a version of issue preclusion (collateral estoppel), under which the outstanding criminal judgment or disciplinary sanction, as long as it stands, blocks any inconsistent civil judgment. . . It is a rationale considerably different from the one that *Peralta* attributed to the Court. . . . Nothing in *Heck*, *Edwards*, or any of the Court's later decisions suggests that the 'favorable termination' element that the Court thought essential can be elided by a plaintiff's disavowing a kind of relief that *Preiser* holds is never available under § 1983 in the first place. The approach taken in *Peralta* is incompatible with *Heck* and its successors; *Peralta* is functionally what would happen if the whole sequence were overruled and only *Preiser* left standing. *Peralta* is incompatible not only with the Supreme Court's decisions but also with *McCurdy v. Sheriff of Madison County*, 128 F.3d 1144 (7th Cir. 1997), which held that a plaintiff cannot sidestep *Heck* by conceding a conviction's validity. Our decision in *Burd v. Sessler*, 702 F.3d 429, 435–36 (7th Cir. 2012), which holds that a prisoner cannot avoid *Heck* by waiting until the sentence expires and it is too late to file a collateral attack, also is irreconcilable with the Second Circuit's view that a § 1983 suit for damages is permissible whenever it cannot end in a decision that changes the length of a person's confinement. We decline to follow *Peralta*, which did not mention *McCurdy* and therefore created a conflict among the circuits, perhaps unintentionally. We shall stick with the established law of this circuit.")

See also ***Santos v. White***, 18 F.4th 472, 476-77 (5th Cir. 2021) ("Because *Heck* applies to the duration of confinement, it applies not just to criminal convictions but also to prison disciplinary rulings that 'result[ ] in a change to the prisoner's sentence, including the loss of good-time credits.' *Clarke v. Stalder*, 154 F.3d 186, 189 (5th Cir. 1998) (en banc). *Heck* therefore bars claims that would, if accepted, 'negate' a prison disciplinary finding that had resulted in the loss of good-time credits. . . Meanwhile, *Heck* is not 'implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence.'. . Rather, a claim is barred only if granting it 'requires negation of an element of the criminal offense or proof of a fact that is inherently inconsistent with one underlying the criminal conviction.'. . The resulting inquiry is 'fact-intensive' and dependent on the precise nature of the disciplinary offense. . . It is unclear, from the record, whether any of Santos's claims are barred by *Heck.* In his disciplinary proceeding, Santos was found guilty of nine rules violations: three 'Defiance' violations, four 'Aggravated Disobedience' violations, one 'Property Destruction' violation, and one 'Unauthorized Area' violation. Though the disciplinary reports list factual findings, the elements required to find a prisoner guilty of those violations do not appear anywhere in the record. It is thus impossible to determine which facts were *necessary* to the disciplinary board's conclusions. It may be that the elements of, for instance, aggravated disobedience would be logically incompatible with some of Santos's claims of excessive force, but the record does not currently permit that inference. Furthermore, not all of the disciplinary board's findings implicate *Heck.* The board imposed a forfeiture of 180 days of good time for one count each of aggravated disobedience, defiance, and property destruction, all arising from Santos's assault on Wells in the Fox-6 D-Tier area of the

prison; his other violations, including all of those in the shower, resulted in sanctions such as loss of canteen and phone privileges. Disciplinary sanctions of that type bear on the 'circumstances of confinement,' rather than on that confinement's 'validity' or 'duration,' and are thus not barred by *Heck*. . . Moreover, the disciplinary board imposed no sanctions at all on Santos for actions after the administration of the chemical agent in the shower, and it noted that he 'complied with orders' after that point. Thus, *Heck* does not bar Santos's claims from that point onward. It is not sufficient to deem Santos's claims to be 'intertwined' with his loss of good-time credits. Rather, in applying *Heck*, a court must bar only those claims that are 'necessarily at odds with' the disciplinary rulings, and only with those rulings that resulted in the loss of good time credits. . . The defendants have thus not met their burden for summary judgment on the current record. Whether the board's findings related to the assault on Wells bar the corresponding claims by Santos must be determined by a fact-specific analysis informed by the elements necessary to establish those violations."); ***Santos v. White***, 18 F.4th 472, 477-79 (5th Cir. 2021) (Willett, J., concurring in the judgment) ("This case involves an all-too-common set of facts: Appellant (a prisoner) claims that Appellees (prison officers) spontaneously and unlawfully abused him. Appellees, on the other hand, insist they used lawful force to control Appellant's misbehavior. Though the majority opinion reaches the correct conclusion—the district court erred in its unqualified dismissal under *Heck*—I write to emphasize two points of departure. . . First, my colleagues punt on *Heck* when a hand-off is warranted. Could the record have more information? Absolutely. Do we *need* more? No. *Heck* does not categorically compel an element-by-element inquiry, and the majority opinion needlessly complicates things by concluding that the record precludes analysis. This case is *Aucoin* redux. . . Appellant maintains he was subject to unprovoked, unlawful violence at every stage of the encounter. . . But if true, he 'cannot be guilty of [the offenses for which he lost good-time credit]—in direct conflict with his disciplinary conviction.'. . So we need not dwell on the component elements of Appellant's conviction to determine that most of his claims are incompatible with the disciplinary board's findings. Take the claims arising from the pre-shower salvo. The majority implies that some of these claims may not be *Heck* barred. . . Sure, *Heck* is not 'implicated by a prisoner's challenge that threatens no consequence for ... the duration of his sentence.'. . But all of Appellant's pre-shower claims turn on the same narrative: He was attacked without provocation. This is fundamentally inconsistent with the officers' account, which prompted Appellant's loss of good-time credit for property destruction, aggravated disobedience, and defiance. Most of Appellant's suit thereby 'challenges the factual determination that underlies his conviction[s],'. . .meaning most of his claims fail. But most does not mean all. A portion of Appellant's suit alleged violence unrelated to any supposed need to gain control. Appellant pleaded an excessive-force claim against Captain Wells for ordering him to 'spread his butt cheeks' and spraying him 'in the anus with pe[p]per spray.' Appellant also pleaded that Captain Wells threatened and cut him with a knife after he was 'no longer resisting or attempting to flee or, otherwise, commit any crime.' These are not trivial details. Neither the incident report nor any other summary-judgment evidence provides an iota of justification for this alleged force. We are thus left with no circumstance where these claims, if proven true, would conflict with Appellant's disciplinary conviction—let alone those portions that impacted the duration of his confinement. . . This is not to say that the elements underlying an

administrative offense are categorically irrelevant under *Heck*.. . But no case, until today, suggests this information is an analytical prerequisite. . . I nonetheless join the judgment because, as was the case in *Aucoin*, 'the district court erred in dismissing all of [Appellant's] claims under *Heck.*'"); ***Gray v. White***, 18 F.4th 463, 468-69 (5th Cir. 2021) ("The record is insufficient to determine whether, or which of, Gray's claims are barred by *Heck.* The disciplinary reports list various factual findings but do not state which of these findings were *necessary* to his convictions. It is unclear, for instance, whether commission of 'aggravated disobedience,' as defined by the disciplinary board, would still leave room for the possibility that the officers' use of force in response to Gray's disobedience violated his Eighth Amendment rights—or, to put it differently, whether 'it is possible for [Gray] to have [committed all ten rule violations] *and* for [the officers' use of force] to have' been applied maliciously and sadistically to cause harm. . . If so, '*Heck* does not bar [his] claim.'. . Moreover, not all of Gray's disciplinary violations resulted in the loss of good time credits. The reports of the disciplinary board indicate that he forfeited ninety days' good time as a cumulative sanction for several of his defiance and aggravated-disobedience infractions, all of which were based on conduct occurring within the shower, but that his sanctions for intoxication, contraband, and property destruction instead resulted in fines and loss of privileges. Disciplinary sanctions of this type bear on the 'circumstances of confinement' rather than that confinement's 'validity' or 'duration' and thus are not barred by *Heck*.. . Because it remains possible reasonably to infer the compatibility of Gray's claims and those findings of the disciplinary board necessary to find Gray guilty of the violations resulting in loss of good time, the defendants have not met their burden for summary judgment with regard to the *Heck* bar. Whether Gray's claims within the shower are in fact barred on the basis of the disciplinary board's findings of defiance and aggravated disobedience must be determined by a fact-specific analysis informed by the elements necessary to establish those violations."); ***Gray v. White***, 18 F.4th 463, 470-71 (5th Cir. 2021) (Willett, J., concurring in judgment alone) ("I concur in the judgment for the same reasons discussed in my concurrence today in *Santos v. White*, No. 20-30048, —— F.4th ——, 2021 WL 5346744 (5th Cir. 2021). Rather than reiterate my reservations in a footnote, however, I write separately to address the points of departure unique to this case. . .The majority opinion overlooks two critical facts. First, not all of Appellant's disciplinary violations resulted in the loss of good-time credits. Appellant forfeited 90 days of good-time credit as a cumulative sanction for several of his defiance and aggravated-disobedience infractions, all of which were based on conduct *occurring within the shower.* But other sanctions—namely, those in his cell for intoxication and contraband—resulted in fines and loss of privileges. This ameliorates any conflict between Appellant's in cell account of unprovoked violence and the Appellees' recollection. Even had these offenses impacted his confinement, Appellant's claim (that Captain Wells used unlawful force) does not contradict the offenses (intoxication and contraband) for which he was found guilty. . .Second, Appellant also alleged that Captain Wells unlawfully assaulted him while en route *to the shower.* Neither the incident reports nor any coordinate administrative violation provides a justification for this alleged use of force of force. I therefore see no basis to conclude that this facet of Appellant's claim 'squarely challenges [any] factual determination' of the prison disciplinary board. . .As such, I would hold that these claims can proceed and REVERSE.")

See also ***Morgan v. Schott***, 914 F.3d 1115, 1117-22 (7th Cir. 2019) ("Prisoners cannot make an end run around *Heck* by filing an affidavit waiving challenges to the portion of their punishment that revokes good-time credits. We recently addressed that very tactic and found it incompatible with the *Heck* line of cases. *Haywood v. Hathaway*, 842 F.3d 1026 (7th Cir. 2016). Morgan provides no reason to question *Haywood*, and we reaffirm its reasoning. Morgan's attempt to analogize his case to *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), and *Skinner v. Switzer*, 562 U.S. 521, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011), misunderstands those decisions. Judgment in Morgan's favor would necessarily imply the invalidity of his prison discipline. Thus, no § 1983 claim has accrued. This suit is premature and must be dismissed without prejudice. . . .As part of Morgan's strategy to avoid the *Heck* bar, he filed an affidavit purporting to 'abandon any and all present and future challenges' and 'waiv[e] for all times all claims' pertaining to the portion of his punishment that impacted the duration of his confinement. He preserved only 'claims challenging the sanctions affecting the conditions of [his] confinement.' Morgan argued that his affidavit rendered *Heck* inapplicable, citing the Second Circuit's decision in *Peralta v. Vasquez*, 467 F.3d 98 (2d Cir. 2006). The magistrate judge concluded that *Heck* barred Morgan's suit and entered summary judgment for Schott and Veath, dismissing Morgan's due-process claim with prejudice. The judge rejected Morgan's attempt to use strategic waiver to 'dodge' *Heck*. He said Morgan's due-process claim 'call[s] into question the validity of the prison discipline[ ] because to accept that claim necessarily implie[s] that the discipline was somehow invalid.'. . .Morgan relies on *Peralta v. Vasquez*, 467 F.3d 98, in which the Second Circuit considered the mixed-sanctions scenario and chose to embrace strategic waiver as a means of removing the *Heck* bar. The court held that a prisoner facing condition-of-confinement sanctions and duration-of-confinement sanctions could challenge the former under § 1983 without complying with *Heck*'s favorable-termination requirement. . . All the prisoner must do is 'abandon, not just now, but also in any future proceeding, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking.'. . We rejected *Peralta* in *Haywood v. Hathaway*, 842 F.3d 1026. The approach Morgan urges us to adopt rests on a misunderstanding of *Heck*. The favorable-termination rule is more than a procedural hurdle that plaintiffs can skirt with artful complaint drafting or opportunistic affidavits. Rather, it is grounded in substantive concerns about allowing conflicting judgments. As we explained in *Haywood*, the *Heck* rule is 'a version of issue preclusion (collateral estoppel), under which the outstanding criminal judgment or disciplinary sanction, as long as it stands, blocks any inconsistent civil judgment.'. . Neither *Peralta* nor Morgan can account for this aspect of *Heck*. Endorsing Morgan's arguments would undercut another feature of the Court's favorable-termination jurisprudence. *Heck* held that 'a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence *does not accrue* until the conviction or sentence has been invalidated.'. . Morgan's argument is incompatible with that holding. If a prisoner's challenge to a disciplinary hearing implies the invalidity of the resulting sanctions, no § 1983 claim has accrued. And '[i]f the claim has not accrued, it cannot matter what relief a prisoner seeks.' *Haywood*, 842 F.3d at 1028. Selective waiver simply doesn't alter the analysis. Morgan concedes that *Haywood* controls his case and asks us to overrule it. But we do not reverse our precedents lightly; we need 'compelling reasons' to do so. . . The Supreme Court has not cast doubt

on *Haywood*, and it does not represent a minority approach among our sister circuits. . . Moreover, we remain convinced that '*Peralta* is incompatible with *Heck* and its successors.'. . State prisoners cannot avoid the favorable-termination rule by engaging in strategic waiver. If judgment for a § 1983 plaintiff would necessarily imply the invalidity of his punishment, the *Heck* rule applies and favorable termination of the underlying proceeding is a prerequisite to relief. . . .It's worth noting that Morgan could have challenged the Board's ruling in other ways. . . . And after exhausting state review, he could have sought relief under the federal habeas corpus statute. Instead he immediately sued for money damages under § 1983—and ran directly into *Heck*. Although Morgan does not currently have a cognizable § 1983 claim, it is at least possible that he could convince a state court to provide the favorable termination required by *Heck*. Illinois courts apply a six-month limitations period to certiorari actions, but a court might hear a late certiorari action if no 'public detriment or inconvenience would result from [the] delay.'. . *Heck*-barred claims must be dismissed. . . But given the possibility of future state-court proceedings, Morgan's claim should have been dismissed *without* prejudice. . . We modify the judgment to reflect a dismissal without prejudice. As modified, the judgment is affirmed.")

See also ***Minter v. Bartruff***, 939 F.3d 925, 929 (8th Cir. 2019) ("In this case, the Complaint alleged that Defendants' unconstitutional conduct deprived Plaintiffs 'of their statutory right to accrue earned-time credit ... [and] of receiving a reduction of sentence upon their completion of the SOTP.' Plaintiffs requested damages and an order requiring 'Defendants to recalculate ... the Plaintiffs' accrued earned-time credit under Iowa Code section 903A.2 to reflect each day that the Plaintiffs demonstrated good conduct and a willingness [to participate] despite the IDOC's decision to not place [them] into the SOTP.' Without question, this is a claim for restoration of earned-time credits, so habeas corpus is the exclusive federal remedy. The district court properly concluded this claim is *Heck*-barred. However, the Complaint also included an Eighth Amendment claim that necessary medical care is being unconstitutionally denied, and claims for prospective injunctive relief to remedy allegedly unconstitutional procedures in administering the SOTP program. 'Ordinarily, a prayer for such prospective relief will not "necessarily imply" the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983.'. . The district court did not consider these issues in dismissing the entire case without prejudice, and the record on appeal is inadequate to resolve them.")

G. *Nance v. Ward; Hill v. McDonough; Nelson v. Campbell*

Nance v. Ward, 142 S. Ct. 2214, 2219, 2222-23, 2225-26 (2022) ("This case concerns the procedural vehicle appropriate for a prisoner's method-of-execution claim. We have held that such a claim can go forward under 42 U. S. C. § 1983, rather than in habeas, when the alternative method proposed is already authorized under state law. See *Nelson* v. *Campbell*, 541 U. S. 637, 644–647 (2004). Here, the prisoner has identified an alternative method that is not so authorized. The question presented is whether § 1983 is still a proper vehicle. We hold that it is. . . . Both *Nelson* and *Hill*, though, reserved the question at issue here: whether the result should be different when a State's death-penalty statute does not authorize the alternative method of

execution. See *Nelson*, 541 U. S., at 645; *Hill*, 547 U. S., at 580. In each case, the Court observed that using a different method required no change in the State's statute, but only a change in an agency's uncodified protocols. Here, all parties agree that Georgia would have to change its statute to carry out Nance's execution by means of a firing squad. They dispute whether that fact switches Nance's claim to the habeas track. Except for the Georgia statute, this case would even more clearly than *Nelson* and *Hill* be fit for § 1983. Since those two cases, we have compelled a prisoner bringing a method-of-execution claim to propose an alternative way for the State to carry out his death sentence. He must, we have said, present a 'proposal' that is 'sufficiently detailed' to show that an alternative method is both 'feasible' and 'readily implemented.'. . In other words, he must make the case that the State really can put him to death, though in a different way than it plans. The substance of the claim, now more than ever, thus points toward § 1983. The prisoner is not challenging the death sentence itself; he is taking the validity of that sentence as a given. And he is providing the State with a veritable blueprint for carrying the death sentence out. If the inmate obtains his requested relief, it is because he has persuaded a court that the State could readily use his proposal to execute him. The court's order therefore does not, as required for habeas, '*necessarily* prevent' the State from carrying out its execution. . . Rather, the order gives the State a pathway forward. That remains true, we hold today, even if the alternative route necessitates a change in state law. Nance's requested relief still places his execution in Georgia's control. Assuming it wants to carry out the death sentence, the State can enact legislation approving what a court has found to be a fairly easy-to-employ method of execution. . . . In recognizing that § 1983 is a good vehicle for a claim like Nance's, we do not for a moment countenance 'last-minute' claims relied on to forestall an execution. . . . In deciding whether to grant a stay of execution, courts must consider whether such a challenge 'could have been brought earlier' or otherwise reflects a prisoner's 'attempt at manipulation.'. . And outside the stay context, courts have a variety of tools—including the 'substantive [and] procedural limitations' that the Prison Litigation Reform Act imposes—to streamline § 1983 actions and protect 'the timely enforcement of a sentence.'. . Finally, all § 1983 suits must be brought within a State's statute of limitations for personal-injury actions. . . Here, the District Court held Nance's suit untimely under that limitations period. . . The Eleventh Circuit did not review that holding because it instead reconstrued the action as a habeas petition. Now that we have held that reconstruction unjustified, the court on remand can address the timeliness question, as well as any others that remain.").

Nance v. Ward, 142 S. Ct. 2214, 2226 (2022) (Barrett, J., joined by Thomas, Alito, and Gorsuch, JJ., dissenting) ("An inmate must bring a method-of-execution challenge in a federal habeas application, rather than under 42 U. S. C. § 1983, if 'a grant of relief to the inmate would necessarily bar the execution.' *Hill* v. *McDonough*, 547 U. S. 573, 583 (2006). Under this criterion, Michael Nance must proceed in habeas because a judgment in his favor would 'necessarily bar' the State from executing him. . . Nance asked the District Court to 'enjoin the Defendants from proceeding with [his] execution ... by a lethal injection,' claiming that the use of such method would violate the Eighth Amendment as applied to him. . . But lethal injection is the only method of execution authorized under Georgia law. . . Thus, if Nance is successful, the defendants in this case—the commissioner of the Georgia Department of Corrections and the warden—will be

powerless to carry out his sentence. That makes habeas the right vehicle for Nance's Eighth Amendment challenge.").

Hill v. McDonough, 126 S. Ct. 2096, 2101, 2103 (2006) ("In the case before us we conclude that Hill's § 1983 action is controlled by the holding in *Nelson*. Here, as in *Nelson*, Hill's action if successful would not necessarily prevent the State from executing him by lethal injection. The complaint does not challenge the lethal injection sentence as a general matter but seeks instead only to enjoin the respondents 'from executing [Hill] in the manner they currently intend.' . . The specific objection is that the anticipated protocol allegedly causes 'a foreseeable risk of ... gratuitous and unnecessary' pain. . . . Hill's challenge appears to leave the State free to use an alternative lethal injection procedure. Under these circumstances a grant of injunctive relief could not be seen as barring the execution of Hill's sentence. . . . Any incidental delay caused by allowing Hill to file suit does not cast on his sentence the kind of negative legal implication that would require him to proceed in a habeas action."); ***Nelson v. Campbell***, 541 U.S. 637, 644 (2004) ("A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself − by simply altering its method of execution, the State can go forward with the sentence.").

See also ***Boyd v. Warden, Holman Corr. Facility***, 856 F.3d 853, 865 (11th Cir. 2017) ("Following *Nelson* and *Hill*, we have entertained method-of-execution challenges to specific aspects of a state's lethal injection protocol pursuant to § 1983.); ***Adams v. Bradshaw***, 644 F.3d 481, 482, 483 (6th Cir. 2011) ("Relying on *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006), the Warden argued that federal courts lack jurisdiction to consider Adams's lethal-injection claim under § 2254 and that such a claim is cognizable only under 42 U.S.C. § 1983. The district court denied the motion, and we granted the Warden's petition for leave to file this interlocutory appeal. . . . The Warden's contention that *Hill* 'holds that a challenge to the particular means by which a lethal injection is to be carried out is non-cognizable in habeas' is too broad. Nowhere in *Hill* or *Nelson* does the Supreme Court state that a method-of-execution challenge is not cognizable in habeas or that a federal court 'lacks jurisdiction' to adjudicate such a claim in a habeas action. Whereas it is true that certain claims that can be raised in a federal habeas petition cannot be raised in a § 1983 action, . . . it does not necessarily follow that any claim that can be raised in a § 1983 action cannot be raised in a habeas petition, *see Terrell v. United States*, 564 F.3d 442, 446 n. 8 (6th Cir.2009). Moreover, *Hill* can be distinguished from this case on the basis that Adams has not conceded the existence of an acceptable alternative procedure. . . Thus, Adams's lethal-injection claim, if successful, could render his death sentence effectively invalid. Further, *Nelson*'s statement that 'method-of-execution challenges [ ] fall at the margins of habeas,' 541 U.S. at 646, 124 S.Ct. 2117, strongly suggests that claims such as Adams's can be brought in habeas.")

H. *Wilkinson v. Dotson*

In ***Wilkinson v. Dotson,*** 125 S. Ct. 1242 (2005), the Court held that *Heck* and *Edwards* did not

apply to a prisoner's challenge to the procedures used for determining parole eligibility. As the Court pointed out, success for plaintiff would not mean immediate release from confinement or a shorter stay in prison; success meant 'at most new eligibility review, which at most will speed consideration of a new parole application.' *Id.* at 1248.

Compare ***Kitchen v. Whitmer***, 106 F.4th 525, 539-44 (6th Cir. 2024) ("The district court below—and now Kitchen on appeal—reason that Kitchen's requested relief would not necessarily lead to an early release from prison, so Kitchen can bring his claim under § 1983. . . Defendants disagree. They contend that it is 'flawed' to focus on whether Kitchen will get an early release because it ignores whether success for Kitchen would necessarily imply the invalidity of his sentence. . . And Defendants believe there is 'no way for Kitchen to challenge Michigan's parole jurisdiction statute' without 'invalidating his underlying criminal sentence.'. .Defendants have the better argument. We hold that Kitchen's claim must be brought through habeas for two reasons. First, the district court focused solely on whether a successful claim would spell an early release for Kitchen and overlooked whether the claim implicates the validity of his sentence. Second, once we apply the correct legal test, we see that Kitchen's claim would necessarily imply the invalidity of his sentence if successful. . . . First, the correct legal test. As mentioned, the district court analyzed only whether Kitchen's requested relief would lead to a quicker release and ignored the question of invalidity, an essential part of the Supreme Court's test. . . . [T]he district court erred by considering only whether quicker release will result if Kitchen's challenge succeeds. From *Preiser* to *Wilkinson*, the Court has emphasized 'the need to ensure that state prisoners use only habeas corpus' if they try 'to invalidate the duration of their confinement,' either '*directly*' by requesting an early release or '*indirectly*' through a judicial holding that 'necessarily implies the unlawfulness' of one's custody. . . Both halves of the test are independently dispositive, yet the district court treated only the first half as essential. And once we establish the proper test, the next question is whether Kitchen's claim fails it. . . . The short answer is yes. Kitchen's claim, if successful, would necessarily imply the invalidity of his sentence. Here's the long answer. Kitchen's claim boils down to this: Keeping him in prison for forty-two years before he is eligible for parole violates his Eighth Amendment rights. He claims the Michigan parole statute is to blame for his unconstitutional confinement. But this argument neglects the reality that the statute does not operate alone. He is in prison for that long not just because of the statute but also because of his sentence. When Kitchen was sentenced in 1987, Michigan's parole statute specified that prisoners would not be eligible for parole until they served their minimum sentence. . . In Michigan, therefore, a judgment imposing a minimum sentence of forty-two years could not be understood as anything but a sentence without parole for forty-two years. So a prisoner's minimum sentence and a prisoner's parole eligibility date are inextricable. . . . Kitchen being in prison without parole is not the sole product of Section 791.234(1). It stems from his sentence. It is impossible to challenge the statute as applied to a particular prisoner without attacking the sentence. So when Kitchen complains of being kept in prison without parole, even if he frames it as a complaint against Section 791.234(1), he is inevitably challenging his sentence, the true source of the alleged constitutional injury. . . . . If Kitchen's claim is successful, he will receive relief that effectively cuts short his sentence of forty-two years in prison before parole eligibility and

resentences him to thirty-six years in prison before parole eligibility. In short, under Kitchen's original sentence, he must serve a minimum sentence of forty-two years, but under the district court's granted relief, he must serve only thirty-six. Because 'his sentence would be different' after the district court's order, the relief implies 'the unlawfulness of his sentence as originally imposed.'. . . In sum, the court cannot grant Kitchen the relief he seeks without undercutting his sentence. His sentence put him in prison for forty-two years without parole. To order the Parole Board to consider him now rewrites that sentence. . . This sort of adjustment lies in the province of habeas, not § 1983.") *with* ***Kitchen v. Whitmer***, 106 F.4th 525, 546-52 (6th Cir. 2024) (White, J., dissenting) ("Given that Kitchen seeks '[n]either "immediate release from prison," [n]or the "shortening" of his term of confinement,'. . . his suit does not constitute the classic scenario, involving relief directing immediate or sooner release from confinement, when the habeas-channeling rule comes into play. . . . Two principles expounded in *Dotson* are critical to Kitchen's case. First, an action attacking a prisoner's 'sentence,' in the relevant sense of the word, involves 'the judgment authorizing the prisoner's confinement.'. . So whether an action is an attack on a 'sentence," such that it cannot be brought under § 1983 and must be brought as a habeas challenge, turns on whether a favorable judgment in the action would invalidate or necessarily imply the invalidity of the State's judicial authorization to confine the prisoner. . . . Kitchen's action is cognizable under § 1983. All his suit necessarily seeks is consideration for parole, which the Parole Board may, in its discretion, deny. Even if a favorable judgment would necessarily imply the invalidity of the minimum-sentence provision of his judgment of conviction, as the majority seems to conclude, that implication is of no consequence because the State cannot deem whatever it pleases to be part of a prisoner's 'sentence' and thereby dictate the statutory vehicle by which the prisoner may vindicate a constitutional right. A 'sentence' in the special *Heck*-sense of the word is the judgment (or portion thereof) giving the State authorization to confine a prisoner. Here, that authorization comes from the fact of conviction combined with the maximum-sentence provision of Kitchen's judgment, not the minimum-sentence provision. Given that Kitchen seeks mere consideration for parole and that the Parole Board retains discretion to deny it, the State will possess lawful authority to confine him for the same amount of time—his maximum sentence—regardless whether his suit succeeds. Put differently, the lawfulness of Kitchen's ' "continuing confinement' and "imprisonment,"'. . . in the past, present, and future—is not necessarily negated by any implied invalidation of a provision of his judgment that solely defines, by virtue of Michigan Compiled Laws § 791.234, when he is eligible for consideration for parole. Thus, Kitchen's claim does not fall within the habeas-channeling exception to § 1983. . . . [T]he nonimplication of immediate release or a shorter stay in prison in the event of Dotson and Johnson's success determined whether their actions would necessarily imply the invalidity of their sentences. And here, a favorable judgment in Kitchen's suit does not implicate immediate release or a shorter stay in prison, thus indicating an attack on a Michigan minimum-sentence provision—as the majority views this case—is not subject to § 1983's habeas-channeling exception. . . . In sum, Kitchen does not challenge his sentence, but, rather, the State's choice to tie parole eligibility to the minimum term of an indeterminate sentence as violative of the Eighth Amendment as applied to him. But even if Kitchen's challenge is viewed as an action necessarily implying the invalidity of the minimum-sentence provision of his sentence, under Michigan's indeterminate

sentencing scheme, success would not necessarily implicate the lawfulness of the State's confinement of Kitchen, either from the start or any time thereafter. Thus, his action is not subject to § 1983's implicit habeas-channeling exception and was properly brought under § 1983.")

See also ***Courtney v. Butler***, 66 F4th 1043, 1046, 1050-53 (7th Cir. 2023) ("*Heck* extends to civil litigation that would call into question the validity of a parole revocation, at least when the revocation is based on the parolee's wrongdoing. . . The new question here is whether and how *Heck* applies when release on parole is denied based not on the parolee's actions but on state officials' alleged failures to do their jobs. Plaintiff James Courtney was sentenced to three years in state prison followed by one year of 'mandatory supervised release,' the current name for parole in Illinois. But in a practice known as 'violating at the door,' Courtney's mandatory supervised release was revoked before he ever left prison. The stated reason was not that he had acted wrongly in some way but that he had no arrangements for a place to live that state officials deemed suitable. Courtney spent the one year of his 'mandatory supervised release' in prison. Courtney then brought this suit under 42 U.S.C. § 1983 against current and former administrators of the Illinois Department of Corrections and the Menard Correctional Center. He alleges that defendants failed to investigate living arrangements that he proposed and ignored his grievances. He also alleges that his mandatory supervised release was revoked without evidence that he violated any terms of release and without adequate procedural protections, all in violation of his constitutional rights. The district court dismissed all of Courtney's claims as barred by *Heck v. Humphrey*. We affirm in part and reverse in part and remand for further proceedings on Courtney's claims that state officials failed to do their jobs so that he could be paroled. . . . *Heck*'s favorable-termination requirement . . . extends to claims that a plaintiff's good-time credit, parole, or supervised release was improperly revoked. Such claims would, if successful, necessarily challenge the duration of a plaintiff's confinement. . . . Courtney's claims do not challenge his original conviction or sentence. Defendants contend instead that *Heck* bars his claims because a judgment in his favor would necessarily imply that the Prisoner Review Board's November 14, 2013 order revoking his mandatory supervised release was invalid, and that order has not been set aside. To determine whether *Heck* bars Courtney's claims, we evaluate each in turn. . . . Courtney alleges that the process leading to revocation of his supervised release was procedurally deficient, depriving him of his liberty without due process of law. Specifically, Courtney claims he was not given notice or the opportunity to be heard before he was denied release and that he was not given notice or a chance to be heard at the Prisoner Review Board hearing. He also complains that he was denied the opportunity to procure witnesses or to obtain counsel before the Board's hearing and that the Board's hearing was not held 'within a constitutionally permissible time' after his release was denied. This claim is barred by *Heck*. The alleged procedural defects would, if proven, imply that the Board's revocation of Courtney's supervised release was improper. . . Before Courtney can bring such a claim, he must show that the order revoking his supervised release has been set aside in some fashion, and that has not happened. . . .Next, we address Courtney's claim that defendants anticipatorily revoked his mandatory supervised release without evidence that he had actually violated any of its terms, in violation of his Eighth and Fourteenth Amendment rights. Courtney claims that because he was 'violated at the door,' he never lived at a host site that violated his

supervised release conditions, so the revocation of his supervised release was unconstitutional. This claim is also barred by *Heck.* A judgment in Courtney's favor would necessarily imply that the revocation of his supervised release was unjustified and invalid. . . . Last, we address Courtney's primary claim, taking at face value his factual allegations: that at least some defendants deliberately or recklessly failed to effect his release on or after October 4, 2013. Courtney alleges that, prior to his scheduled release date, defendants failed to investigate three of the host sites he identified, including the halfway house in East St. Louis. Then, after he was deemed in violation of his conditions on October 4, 2013, Courtney alleges, defendants ignored his communications and grievances complaining that he was being wrongfully detained and imploring defendants to release him to the host sites he had previously identified. Courtney alleges that defendants' actions resulted in longer imprisonment in violation of the Eighth and Fourteenth Amendments. The inquiry under *Heck* is whether Courtney's claims would necessarily invalidate the Board's order. We analyze separately his allegations regarding defendants' conduct before and after the Board revoked his supervised release. . . . The Board revoked Courtney's supervised release after it determined that he had not identified an approved host site. Courtney's claims that defendants, *after* November 14, 2013, deliberately or recklessly ignored his grievances and communications regarding possible host sites, if substantiated, would not necessarily imply that the Board's decision to revoke his supervised release *on* November 14, 2013 was invalid. . . . We also find that *Heck* does not bar Courtney's claims that defendants deliberately or recklessly failed to investigate potential host sites or to respond to his grievances before November 14, 2013. As noted above, the Board found that Courtney did not have an approved residence, as is required for mandatory supervised release. . . Courtney does not challenge the Board's finding. He agrees that the Department of Corrections never approved a host site for him. His claim is that defendants prolonged his imprisonment by deliberately or recklessly failing to act. Three host sites he submitted were never investigated, nor did the department find or even propose any alternatives. As a result, no host site was approved, and he remained in prison for another year. Defendants cite several cases, all non-precedential or otherwise non-binding, in which *Heck* barred claims by plaintiffs alleging that their parole was wrongly revoked. In those cases, parole was revoked because the relevant decision-making body determined that the parolee acted or failed to act in some manner that violated conditions of his parole. . .This case is different. Though the Board's order was styled as a 'violation,' the order did not revoke Courtney's supervised release because he engaged in any act of his own volition that violated terms of his mandatory supervised release. As Courtney himself stresses, he never lived at a location that violated the conditions of his release. Rather, his mandatory supervised release was revoked because an item on his release checklist was unchecked: he had no approved host site. . . . Because his release was contingent on the Department of Corrections approving a host site, the Board's order was, at bottom, based not on a finding that Courtney had done anything wrong but on a finding that defendants in the Department had not done something: approved a host site for Courtney. The Board did not find that the host sites Courtney submitted were not suitable. That would be a different case. Here, the Board simply found that no host site had been approved, a task that, as the Department's Administrative Directive 04.50.110 makes clear, Courtney was utterly incapable of achieving by himself. He needed defendants to act, and he alleges they deliberately or recklessly failed to do so. . . .[W]hile

violations of state law or policy do not per se violate the Constitution, when those violations result in unjustified deprivations of liberty, the Constitution is implicated. . . .Another way to frame the *Heck* issue on these claims is to observe that if Courtney had sought relief while in custody, these claims would be understood best as calling for a writ of mandamus—ordering correction officials to find a suitable residence during supervised release—not a writ of habeas corpus. Courtney claims he was wrongfully imprisoned, but he traces his wrongful imprisonment to the defendants' failure to perform their duties, not to a legal infirmity in the Board's decision ordering his continued confinement. If Courtney can prove that defendants deliberately or recklessly failed to investigate host sites and to respond to his grievances, that proof would not imply that the Board acted improperly when it revoked his mandatory supervised release. The Board based its decision upon a finding that the Department of Corrections had not approved a host site. Courtney's allegations are entirely consistent with that finding. Accordingly, Courtney's claims, if successful, would not 'necessarily demonstrate the invalidity of confinement or its duration.'. . Accordingly, *Heck* poses no bar to Courtney's claims that at least some defendants deliberately or recklessly acted or failed to act in ways that caused him to spend an extra year in prison rather than on mandatory supervised release."); ***Courtney v. Butler***, 66 F.4th 1043, 1054-55 (7th Cir. 2023) (Brennan, J. concurring) ("I agree with my colleagues that Courtney's third claim should proceed, but for slightly different reasons. As noted, the key question under *Heck* is 'whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.'. . . A judgment in his favor means he should have been released sooner, but it does not necessarily imply the invalidity of his revocation. Comparing a putative judgment in Courtney's favor with the Board's revocation decision shows this. The Board revoked Courtney's MSR because he lacked an approved host site. But a win for Courtney on his § 1983 claim does not necessarily imply the invalidity of his revocation. If Courtney prevails, it means the defendants' deliberate indifference prevented him from obtaining an approved host site and leaving prison on his MSR date. Yet it also confirms the ground for the Board's revocation—that Courtney lacked an approved site. In other words, a judgment for Courtney on his § 1983 claim means the Board's revocation was proper, but that defendants' unconstitutional conduct still caused him to stay in prison longer than he otherwise might have. Courtney's third claim thus falls short of necessarily implying the invalidity of his parole revocation. *Heck* often plainly bars § 1983 claims bearing on a prison board's parole revocation decision. . . But in this specific circumstance, I agree the *Heck* bar does not apply to Courtney's third claim that defendants intentionally or recklessly failed to effect his release.")

See also ***Dimmick v. Bourdon***, No. 18-4051, 2019 WL 1849044, at *3 (10th Cir. Apr. 25, 2019) (not reported) ("As we understand it, Dimmick's goal in seeking a new parole revocation hearing is not so much to obtain earlier release but to obtain a new decision from the parole board that does not stigmatize him as a rapist or sex offender. But even if he seeks a new parole revocation hearing in the hope of eventually being returned to parole, *Wilkinson* indicates he may pursue a claim under § 1983 so long as the Board retains discretion to grant or deny release as a result of any such hearing (and there is no indication that it does not). . . . We therefore reverse the district court's dismissal of this aspect of Dimmick's complaint."); ***Sampson v. Garrett***, 917 F.3d 880, 881-82

(6th Cir. 2019) ("Whether *Heck* applies to an access-to-the-court claim alleging state interference with a direct criminal appeal is a new question for us. That it is a new question, however, does not necessarily make it a hard question. Because the right of access is 'ancillary to [a lost] underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court,' a successful access claim requires a prisoner to show that the defendants have scuttled his pursuit of a 'nonfrivolous, arguable' claim. . . Sampson maintains that he is entitled to damages because the defendants prevented him from using the trial transcripts and other materials in his direct—and unsuccessful—appeal. He could prevail on that claim only if he showed that the information could make a difference in a nonfrivolous challenge to his convictions. He could win in other words *only* if he implied the invalidity of his underlying judgment. *Heck* bars this kind of claim. We are not alone in seeing it this way. [collecting cases] *Fuller v. Nelson*, 128 F. App'x 584 (9th Cir. 2005), it's true, went the other way. It held that *Heck* does not bar an access-to-the-court claim alleging that state officials kept a prisoner from filing an appeal. . . As the Ninth Circuit saw it, *Heck* does not apply where '[t]he remedy for the unconstitutional deprivation ... would not be immediate release.'. . The Ninth Circuit gestured at *Wilkinson v. Dotson* . . . for that idea. . . That reflects a crabbed reading of *Heck* as well as *Wilkinson*. *Wilkinson* held that *Heck* does not bar a due process challenge to state parole-eligibility procedures. . . While the Court noted that the prisoners were not requesting release, but rather new procedures in mere hopes of swifter parole, it did not consider *Heck* inapplicable *only* because the claims' success would not mean release. . . The Court emphasized that the new parole procedures (or even a grant of parole for that matter) would not imply the invalidity of the prisoners' original sentences. . . By contrast, a favorable judgment on Sampson's access-to-the-court claim *would* necessarily bear on the validity of his underlying judgment, because that is exactly what he says the defendants kept him from contesting fairly. All of this may explain why the Ninth Circuit's unpublished decision in *Fuller* does not even appear to have force in the Ninth Circuit. *See Pineda v. Nev. Dep't of Prisons*, 459 F. App'x 675, 675 (9th Cir. 2011) (per curiam) (*Heck* bars access-to-the-court claim concerning forced absence from pretrial evidentiary hearing). That takes care of the access claim."); ***Davis v. U.S. Sentencing Com'n***, 716 F.3d 660, 666 (D.C. Cir. 2013) ("Because the Supreme Court has knocked out three of the pillars on which *Razzoli* rests, we now allow that holding to fall. . . Adopting *Wilkinson's* habeas-channeling rule, we hold that a federal prisoner need bring his claim in habeas only if success on the merits will 'necessarily imply the invalidity of confinement or shorten its duration.'. . Otherwise, he may bring his claim through a variety of causes of action. . . And so it is with Davis. Success with his equal protection challenges to Amendment 706 or Amendment 750 will not 'necessarily imply the invalidity of [his] confinement or shorten its duration.'. . Success would do no more than allow him to seek a sentence reduction, which the district court retains the discretion to deny. . . His claim for declaratory relief avoids the habeas-channeling rule we announce today, and its dismissal was improper."); ***Bogovich v. Sandoval***, 189 F.3d 999, 1004 (9th Cir. 1999) (not all challenges to parole board's policy implicate invalidity of continued confinement); ***Anyanwutaku v. Moore***, 151 F.3d 1053, 1055-56 (D.C. Cir. 1998) (noting that "a majority of our sister circuits have held that challenges to state parole procedures whose success would not necessarily result in immediate or speedier release need not be brought in habeas corpus, even though the prisoners filed their suits for the very purpose of increasing their

chances of parole. [citing cases]"). *But see* ***Burd v. Sessler***, 702 F.3d 429, 432, 434, 435 (7th Cir. 2012) ("Mr. Burd submits that the favorable termination requirement does not bar his claim for monetary damages because, in this situation, such a judgment would not necessarily call into question the validity of his conviction or sentence. He further argues that the unavailability of collateral relief at this point in the litigation makes *Heck's* favorable termination requirement inapplicable. We shall examine each of these arguments in turn. . . We address first Mr. Burd's contention that the favorable termination requirement of *Heck* and its progeny is inapplicable because an award of damages for having been denied an opportunity to research his motion to withdraw his plea or his right to appeal his sentence would not necessarily imply that his conviction or sentence is invalid. Mr. Burd submits that his situation is analogous to those presented to the Supreme Court in *Wilkinson v. Dotson* . . . and in *Skinner v. Switzer*. . . .The approach of *Nance* and *Hoard* establish the path that we must follow today. Because the underlying claim for which Mr. Burd sought access to the prison law library was the opportunity to withdraw his guilty plea, he cannot demonstrate the requisite injury without demonstrating that there is merit to his claim that he should have been able to withdraw the plea. Such a showing necessarily would implicate the validity of the judgment of conviction that he incurred on account of that guilty plea. The rule in *Heck* forbids the maintenance of such a damages action until the plaintiff can demonstrate his injury by establishing the invalidity of the underlying *judgment.* Accordingly, we conclude that Mr. Burd has not established a basis for recovering any type of damage relief under § 1983."); ***Goodwin v. Ghee,*** 330 F.3d 446 (6th Cir. 2003) (en banc) (evenly divided en banc court affirming district court's application of *Heck* to bar prisoner's § 1983 claim that Parole Board's decision was in retaliation for his exercise of First Amendment rights).

See also ***Collins v. Dallas Leadership Foundation***, 77 F.4th 327, 330-31 (5th Cir. 2023) ("The *Heck* rule applies whether a plaintiff is currently incarcerated or not. *See Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (per curiam). Collins relies on *Dotson* for the proposition that *Heck* does not bar his claim. There, the Supreme Court explained that claims of alleged due process violations during parole proceedings were *not* barred under the rule laid out in *Heck* because an attack on the constitutionality of the parole proceeding's procedures would not 'necessarily have meant immediate release or a shorter period of incarceration; the prisoners attacked only the wrong procedures, not the wrong result.'. . But Collins is not really challenging his parole *procedures* at all. Instead, he argues that the parole board's *determination* was erroneous because it considered his inaccurate parole documents—an error Reed and Alfredo allegedly inserted into his parole review. In Collins' own words, Reed and Alfredo's actions 'prevented [him] from a favorable review decision that could have expedited his parole release,' and he seeks $1,000 a day 'since his parole was denied.' The implication is clear: But for the error in his paperwork, he would have been released, and he deserves damages because he was not. Collins thus challenges a 'wrong result'—which *Dotson* specifically prohibits. . . . The purpose of the rule laid out in *Heck* was to stop civil tort actions for damages where the plaintiff would be required 'to prove the unlawfulness of his ... confinement.'. . Here, Collins believes he is owed money damages because he was not released after his early 2021 parole hearing due to Reed and Alfredo's alleged retaliatory actions. Granting such relief would necessarily imply the invalidity of his confinement after that hearing

for reaching the wrong determination. Consequently, *Heck* renders Collins' claims frivolous."); ***Pinson v. Carvajal***, 69 F.4th 1059, 1071-75 (9th Cir. 2023) ("In short, an action sounds in habeas 'no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit ... *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.'. . Of course, the Supreme Court has also emphasized the importance of release from custody when considering whether a claim sounds in habeas. . . We do not mean to suggest that the relief requested is immaterial to a claim's characterization: we continue to adhere to the principle that the core of habeas is reserved for claims that seek release from confinement. . .The critical analytical consideration is *why* such claims are actually at the core of habeas. Thus, the proper analytical tack when determining whether actions like the one brought by Sands are at the core of habeas is to consider *why* release from confinement is necessary to remedy the underlying alleged violation. It is at this critical step in the analysis that Petitioners and our sister circuits go astray. The question of whether a claim goes to the core of habeas does not turn, as they seem to suggest, solely on whether the prisoner requested release as opposed to some other form of relief. . . Instead, as previously discussed, our review of the history and purpose of habeas leads us to conclude the relevant question is whether, based on the allegations in the petition, release is *legally required* irrespective of the relief requested. By collapsing the habeas analysis into a simple inquiry of the requested relief, Petitioners, and the authority they cite, fail to account for the historic purpose of the writ and misapprehend the relationship between the nature of a claim and its requested relief. . . Or, stated differently, a successful claim sounding in habeas necessarily results in release, but a claim seeking release does not necessarily sound in habeas. . . . Moreover, we recognize that the Supreme Court has left open the key question of whether there are circumstances when a challenge to the conditions of confinement is properly brought in a petition for writ of habeas corpus. *See Ziglar v. Abbasi*, 582 U.S. 120, 144–45, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017) ("[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of confinement.") . . . We conclude that Sands has failed to allege facts to support his legal contention that his detention was unlawful because no set of conditions exist that would cure the constitutional violations at FCI Lompoc. Because Sands's claims lie outside the historic core of habeas corpus, we conclude the district court properly found it lacked jurisdiction to hear Sands's petition."); ***Hill v. Snyder***, 878 F.3d 193, 208-11 (6th Cir. 2017) ("The *Heck* doctrine instructs that no matter how a § 1983 claim is couched, if its success would necessarily affect the length of a sentence, the litigant must rely on habeas relief. Even if Plaintiffs frame their challenge as one to the sentencing process, Count II functionally asks us to declare sentences of life without parole for juvenile offenders unconstitutional. Such a ruling would necessarily implicate the duration of Plaintiffs' impending sentences by imposing a ceiling, and *Heck* therefore requires Plaintiffs to follow a different legal path to obtain the relief. Fortunately, multiple avenues remain open for Plaintiffs to challenge life imprisonment without parole, including direct appeal and habeas. But because Count II necessarily implicates the length of their impending sentences, it is not cognizable under § 1983. The district court properly dismissed Count II. . . . The reasoning in *Wilkinson* and *Wershe* applies with equal force here, where the Plaintiffs do not seek direct release from prison or a shorter sentence, but instead seek an examination of the "Defendants' policies and procedures governing

access to prison programming and parole eligibility, consideration and release." This circuit has already expressly found such challenges cognizable under § 1983. Following this clear precedent, we hold that *Heck* does not warrant dismissal of Count IV. . . . At least two key *Heck* cases squarely address the interplay between good time credits and § 1983 challenges. Under the credit system at issue in *Preiser*, the restoration of credits would have automatically resulted in the deduction of time from the challenged sentence. . . Success on the § 1983 claim necessarily implicated the duration of confinement and was therefore not cognizable. . . By contrast, in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), the Supreme Court evaluated a challenge to prison officials' revocation of good time credits by means of constitutionally infirm disciplinary proceedings. The Court found that the challenge was cognizable under § 1983 because the prisoners could obtain prospective relief—the implementation of valid disciplinary proceedings—without necessitating restoration of their good time credits. . . Because success did not mean earlier release, the § 1983 claim could proceed. . . The differing outcomes of *Preiser* and *Wolff* show that the critical question is whether restoring credits automatically results in earlier release. Under Michigan's parole system, credits deducted from a term-of-years sentence do not automatically result in earlier release; they merely hasten the date on which prisoners fall within the jurisdiction of the Michigan Parole Board. Even after an inmate falls within its jurisdiction, the Board retains discretion to grant or deny parole. . . Success on Count V would not, therefore, necessarily shorten the duration of confinement, rendering this case similar to the cognizable § 1983 claim in *Wolff*. . . *Heck* does not bar Count V. . . . *Heck* does not bar claims that implicate the *constitutionality* of a sentence; it bars claims that necessarily implicate the *length or duration* of a sentence. Just as the *Wolff* petitioners could use § 1983 to obtain constitutionally sound disciplinary procedures without running afoul of *Heck*, Plaintiffs may use Count VI to seek better rehabilitative programming without necessarily expediting their release. Count VI seeks to make the period of confinement more meaningful, which may indirectly result in speedier release. But that indirect result flows from the discretion of the Michigan Parole Board; it does not automatically follow from success on Count VI. Accordingly, Count VI is cognizable under § 1983. In holding that *Heck* does not bar Counts IV, V, and VI, we adhere to the lines carefully drawn by the Supreme Court and this circuit. We must look to the possible results when determining what remedies are open to prisoners bringing constitutional challenges. Where vindication of a constitutional right would necessarily allow a prisoner to walk free before his sentence expires, *Heck* instructs that he must pursue his claims via habeas. But where success would not automatically result in speedier release, *Wilkinson*, *Wolff*, and this court's decision in *Wershe* demonstrate that § 1983 remains an available remedy. Because the Michigan Parole Board retains discretion to deny parole to those who are or become eligible, success on Counts IV, V, and VI would not automatically spell speedier release for Plaintiffs. Accordingly, these claims may proceed under § 1983."); ***Terrell v. U.S.***, 564 F.3d 442, 445-49 (6th Cir. 2009) ("Terrell commenced his claim by petitioning the district court to enter an order, pursuant to 28 U.S.C. § 2241, to require the Commission to give him a live in-person parole hearing. Terrell contends that the Commission violated statutory law and his constitutional right to due process when it denied his request for an in-person hearing. He does not contend that remedying the Commission's procedural violation will necessarily entitle him to an earlier release from custody. Release on

parole is discretionary. In 1977, in *Wright v. U.S. Bd. of Parole,* 557 F.2d 74 (6th Cir.1977), we held that a federal prisoner could challenge the process used to make his denial of parole determination as part of a § 2241 habeas petition. . . . Before and since that time, the Supreme Court has made a number of decisions regarding the relationship between habeas and § 1983, starting in 1973 with *Preiser v. Rodriguez,* 411 U.S. 465 (1973), and continuing with *Wolff v. McDonnell,* 418 U.S. 539 (1974), *Heck v. Humphrey,* 512 U.S. 477 (1994), *Edwards v. Balisok,* 520 U.S. 641 (1997), and *Wilkinson v. Dotson,* 544 U.S. 74 (2005), *aff'g,* 329 F.3d 463 (6th Cir.2003) (en banc). The Court in *Preiser, Heck,* and *Balisok* held that a challenge, respectively, of a prisoner's underlying conviction or sentence, that necessarily demonstrated the invalidity of the confinement's legality, or that would result in the restoration of good-time credits which necessarily shortens the duration of confinement, can only be brought under habeas. . . In *Wolff* and *Dotson,* the Court held that challenges by state prisoners to procedures that would only lead to new proceedings, discretionary and not necessarily spelling immediate release or a shorter duration of confinement, may be brought under § 1983. . . A question that arises from this line of cases is whether habeas and § 1983 (or the equivalent for a federal prisoner) are mutually exclusive actions. The circuits appear to be in conflict on this question. In *Wright,* we held that the claim before us could be brought as a § 2241 habeas action. In *Dotson,* the Supreme Court held that a claim, a constitutional challenge to parole procedures that would at most order a new discretionary hearing, akin to the claim before us, was properly brought under § 1983. If the *Presier* line of cases, decided since *Wright,* also indicated that the actions are mutually exclusive, then we must conclude that we lack jurisdiction to entertain Terrell's habeas petition. . . . [T]he Ninth Circuit envisions 'a class of suits outside of the core habeas claims identified in *Preiser.*'. . Of course, such claims would be § 2241 claims challenging the execution of the prisoner's sentence, not 28 U.S.C. § 2255 claims challenging the imposition or duration of the prisoner's sentence. That captures the dispute between the Seventh Circuit and the Ninth Circuit. The Seventh Circuit considers the claims the Supreme Court held *must* be brought as habeas actions pursuant to the *Preiser* line of cases − whether under § 2255 or § 2241 − as coextensive with the claims that *can* be brought under habeas in its totality. In other words, there are no 'suits outside of the core habeas claims identified in *Preiser,*'. . . for which jurisdiction might overlap with § 1983 (or the APA). The Supreme Court's opinion affirming our en banc decision in *Dotson* captures this debate. The majority held that challenges to parole procedures that would not 'necessarily spell speedier release' and claimed '*future* relief (which, if successful, [would] not necessarily imply the invalidity of confinement or shorten its duration)' were 'yet more distant' from the 'core' of habeas within which habeas is the exclusive available action. . . Therefore, the challenge could be brought under § 1983. . . . Under the view Justice Scalia shares with the Seventh Circuit, habeas is the exclusive available action for the domain over which habeas is available, which is for claims that would change the level of custody, shorten its duration, or terminate it completely. The majority left open the question we have here of whether the procedural challenge could be brought under both § 1983 and habeas. Our cases have held that the action before us can both be brought under habeas and the equivalent civil action. The upshot of this is that neither the Seventh Circuit's reasoning nor Justice Scalia's reasoning concurring in *Dotson* applies here because both would deny the existence of the situation before us where a challenge to procedures used in the

administration of discretionary parole falls under habeas. Assuming such a situation, the Ninth Circuit is correct that nothing in the *Preiser* line of cases suggests that *Wright* has been overruled for the mere reason that the Court has decided that the claim before us also falls under the equivalent of § 1983 for federal prisoners. Thus, we conclude we have jurisdiction to entertain Terrell's habeas petition."); ***Docken v. Chase,*** 393 F.3d 1024, 1031(9th Cir. 2004) (holding Athat when prison inmates seek only equitable relief in challenging aspects of their parole review that, so long as they prevail, *could* potentially affect the duration of their confinement, such relief is available under the federal *habeas* statute. Whether such relief is *also* available under § 1983 depends on the application of *Heck*'s favorable termination rule in this case, an issue not before us and one that we do not decide.' (emphasis original)).

See also ***Thornton v. Brown***, 757 F.3d 834, 838, 841-46 (9th Cir. 2014) ("The Supreme Court has not directly considered the application of the *Heck* doctrine to §1983 actions that challenge conditions of parole. Among the courts of appeals, only the Seventh Circuit has done so, in *Drollinger v. Milligan*, 552 F.2d 1220 (7th Cir.1977), and *Williams v. Wisconsin*, 336 F.3d 576 (7th Cir.2003). Consistent with Supreme Court precedent and that of our sister circuit, we hold that such an action is not barred by *Heck* if it is not a collateral attack on *either* the fact of a parolee's confinement as a parolee *or* the parolee's underlying conviction or sentence. Because we conclude that Petitioner's action is not such an attack, we reverse and remand. . . . Here, we hold that Plaintiff's claims, which challenge two parole conditions, do not fall within that [*Heck's*] exception, because a judgment enjoining enforcement of his GPS [monitoring requirement and residency restrictions will neither affect] the 'fact or duration' of his parole nor 'necessarily imply' the invalidity of his state-court conviction or sentence. . . . Here, Plaintiff does not challenge his status as a parolee or the duration of his parole, and even if he succeeds in this action, nearly all of his parole conditions will remain in effect. Those conditions include drug and alcohol testing and treatment; psychiatric and behavioral counseling; limitations on travel, employment, association with certain individuals, patronage of certain businesses, and the use of motor vehicles; a curfew; numerous sex-offender registration requirements; a duty not to contact his robbery victim; and other restrictions. In these circumstances, we hold that his challenge to two parole conditions does not threaten his 'confinement' as a parolee. . . .Moreover, because Plaintiff challenges only the discretionary decisions of the Department in imposing the GPS monitoring and residency restrictions, his success would not imply the invalidity of his conviction or sentence. . . . Even if successful, Plaintiff's claims will have no effect on his criminal sentence, including the duration of his parole. . . . Because his challenge to discretionary decisions of the Department will not affect his court-imposed prison term or result in release from parole, Plaintiff's possible success in this action would not 'necessarily imply' the invalidity of any state-court judgment. . .We need not and do not decide whether we would reach a different result had the Department merely implemented a parole condition that was required by statute as a direct consequence of a court's judgment of conviction or sentence. . . . In sum, we hold that a state parolee may challenge a condition of parole under § 1983 if his or her claim, if successful, would neither result in speedier release from parole nor imply, either directly or indirectly, the invalidity of the criminal judgments underlying that parole term. Because Plaintiff challenges just two parole conditions, which were imposed through

a discretionary decision of the Department, his success would do neither, and *Heck* does not bar him from proceeding under § 1983."); ***Thornton v. Brown***, 757 F.3d 834, 846, 848(9th Cir. 2014) (Ikuta, J., dissenting) ("As a matter of California law, Thornton's challenges, if successful, would necessarily demonstrate that a portion of his underlying sentence was invalid. Because the Supreme Court has held such challenges must be brought in a habeas petition, not under § 1983, I would affirm the district court. In holding otherwise, the majority misunderstands California law, misapplies Supreme Court precedent, and creates a circuit split with the Seventh Circuit. . . . Because Thornton was sentenced under § 1170 for his 2010 robbery offense, his sentence necessarily included the term and conditions of parole set by the CDCR, Cal.Penal Code § 3000(a)(1), (b)(7). In challenging his parole conditions, then, Thornton is challenging a statutorily mandated component of his sentence, and if he is successful, it would necessarily imply the invalidity of a portion of his sentence. Therefore, under the rules explained in *Dotson*, he may not bring this challenge under § 1983."); ***Ford v. Washington***, 2007 WL 1667141, at *3, *4 (D. Ore. June 1, 2007) ("Neither the Supreme Court nor the Ninth Circuit has specifically addressed whether a parolee's challenge to the conditions of his parole fits within the core of habeas corpus. Courts that have addressed the issue generally distinguish between situations where (1) the parolee challenges the conditions of his parole in the context of his parole being revoked for violation of those conditions and (2) the parolee preemptively challenges the conditions of his parole even though his parole has not been revoked. Courts have found challenges to parole conditions in the context of revocation for a violation of those conditions are, in effect, challenges of the validity of the parole-revocation decision or the plaintiff's continued imprisonment. Under *Heck*, therefore, the revocation decision must be found invalid in separate proceedings before a parolee can properly bring a § 1983 action. . . In cases in which there has not been a parole revocation, however, courts have been less consistent.[discussing cases] Although none of these cases is binding on this Court, the Court finds the reasoning of the *Yahweh* court persuasive especially in light of the Supreme Court's opinion in *Wilkinson v. Dotson* . . . Applying the Supreme Court's reasoning and adopting the analysis in Yahweh, this Court concludes parole conditions are not part of Plaintiff's sentence. Accordingly, Plaintiff may bring a challenge under § 1983 as to the parole condition of taking polygraph tests.") *Accord* ***Lee v. Jones,*** 2006 WL 44188 (D. Ore. 2006).

See also ***Murphy v. Raoul***, No. 16 C 11471, 2019 WL 1437880, at *12–13 (N.D. Ill. Mar. 31, 2019) ("[T]he plaintiffs' case is about fair procedure and not release from incarceration, although as a remedial matter they might end up there. . . Here, the plaintiffs are neither challenging their sex-crimes convictions nor their sentences, which include their MSR terms of three years to life. Put a little differently, the plaintiffs do not seek to invalidate the fact or duration of their confinement. Rather, they seek to change the processes used in determining the penultimate condition of their confinement—location. In *Wilkinson v. Dotson*, the Supreme Court held that a civil rights plaintiff may seek a constitutional change in the parole procedures used to adjudicate his confinement status. . . The Court reasoned that, because neither prisoner sought an injunction ordering his immediate or speedier release into the community, a remedy in their favor would mean *at most* new eligibility for review. . . That might have sped up the consideration of their release, but it did not automatically follow that that the inmates would in fact be released. .

. The Court analyzed *Heck*'s use of the word 'sentence' to mean not prison procedures, but 'substantive determinations as to the length of confinement.'. . That led to the conclusion that prisoners may bring § 1983 challenges to prison administrative decisions. . .The Seventh Circuit has followed suit. . . It is the defendants' position that the plaintiffs are challenging a condition of their confinement because they are 'seeking a different program or location or environment,' turning the question into whether what they ask for amounts to a 'quantum change in the level of custody.'. . Beginning in *Graham*, the Court of Appeals recognized that '[t]he difficult intermediate case is where the prisoner is seeking not earlier freedom, but transfer from a more to a less restrictive form of custody.'. . The critical distinction from that work-release case to this one is that here, unlike there, the plaintiffs are not claiming entitlement to release. . .Instead, the plaintiffs in this case dispute the procedures used in host site review. . . . The statutory scheme here 'in no way affects the duration, much less the fact, of confinement. [Their] supervised release will still be in place, and it will last just as long.'. . Accordingly, a straightforward application of *Richmond* carries the day. '[A] challenge to rules that affect placement in community confinement [shall be treated] the same way as rules that affect placement in parole systems.'. . The defendants were wrong to frame the question as prison versus supervised release, but even if they were right, the plaintiffs' claims nonetheless land in § 1983's net. . . The plaintiffs have been consistent since day one in not directly requesting release but asking for a constitutional application of the relevant law and policy to their situations. . . Thus, the plaintiffs properly brought their claims under § 1983."); ***Murphy v. Madigan***, No. 16 C 11471, 2017 WL 3581175, at *6 (N.D. Ill. Aug. 18, 2017) ("Plaintiffs do not allege unlawful acts of the decision makers that would necessarily overturn the decision denying them housing like Edwards' deceit and bias claim. Instead, Plaintiffs allege that the procedure for determining housing is unconstitutional and, like Edwards' claim for injunctive relief, that claim is properly brought under § 1983. . . Should Plaintiffs prevail, some of the Plaintiffs may, hypothetically, be released on MSR because under constitutional procedures because the Defendants may be more likely approve proposed host sites. The possibility of this outcome, however, does not necessarily imply the validity of their sentences and therefore the claims are not barred by the *Heck* doctrine. . . .Defendants do not clarify the distinction between the two but suggest that under *Graham* 'claims of entitlement to probation, bond, parole fall within the *Heck* rule,' and therefore Plaintiffs' claims are barred. . . However, Plaintiffs do not claim 'entitlement' to parole or MSR. Plaintiffs claim entitlement to a constitutional process in determining whether they will be released on MSR, not to release on MSR. *Richmond v. Scibana* clarifies the distinction first outlined in *Graham*: 'a prisoner claiming a right to *release* on parole must use § 2241 (or § 2254 for a state prisoner); but a prisoner claiming that parole officials are apt to use incorrect rules when resolving a future application must use the APA (or 42 U.S.C. § 1983 for a state prisoner).' 387 F.3d 602, 605 (7th Cir. 2004). Here, Plaintiffs do not claim a right to release but instead that officials are using unconstitutional rules. Therefore, *Graham* and *Richmond* support Plaintiffs' claims as properly brought under § 1983.")

I. Challenges to Extradition Procedures

There are conflicts in the Circuits as to the applicability of *Heck* to challenges to extradition procedures. *See, e.g.*, ***Weilburg v. Shapiro***, 488 F.3d 1202, 1204, 1206 (9th Cir. 2007) ("The issue presented is whether the United States Supreme Court's ruling in *Heck v. Humphrey*, 512 U.S. 477 (1994), bars prospective plaintiffs, who have not otherwise successfully challenged their underlying convictions, from bringing section 1983 actions that are based upon a violation of extradition law. . . . We conclude that *Heck v. Humphrey* is not a bar to the present action. . . . Here, the gravamen of the complaint is that the defendants returned Weilburg to Illinois in violation of state and federal law, by ignoring established extradition procedures and effectively kidnapping Weilburg. Such allegations, if proven, would not invalidate Weilburg's incarceration in Illinois."); ***Harden v. Pataki,*** 320 F.3d 1289, 1301, 1302 (11th Cir. 2003) ("We hold that a claim filed pursuant to 42 U.S.C. § 1983 seeking damages and declaratory relief for the violation of a state prisoner's federally protected extradition rights is not automatically barred by *Heck.* We also hold that such a claim is not barred by *Heck*, where the specific allegations are that law enforcement officials failed to provide an extradited prisoner with a pretransfer habeas corpus hearing or a signed warrant by the governor of the asylum state, or released him into the hands of a private extradition service instead of government agents."), disagreeing with Seventh Circuit's analysis in ***Knowlin v. Thompson***, 207 F.3d 907 (7th Cir.2000).

J. Suits Seeking DNA Testing

There are also conflicts regarding suits seeking access to evidence for purposes of DNA testing. *See* ***District Attorney's Office for Third Judicial Dist. v. Osborne***, 129 S. Ct. 2308, 2318, 2319 (2009) (noting that '[e]very Court of Appeals to consider the question since *Dotson* has decided that because access to DNA evidence . . . does not "necessarily spell speedier release," *ibid.*, it can be sought under § 1983[,]' but not resolving 'this difficult issue.' Court 'assume[s] without deciding that the Court of Appeals was correct that *Heck* does not bar Osborne's § 1983 claim.' On merits, Court refuses to 'recognize a freestanding [substantive due process] right to DNA evidence untethered from the liberty interests [Osborne] hopes to vindicate with it.' *Id.* at 2322.); ***District Attorney's Office for Third Judicial Dist. v. Osborne***, 129 S. Ct. 2308, 2331 n. 1(2009) (Stevens, J., joined by Ginsburg, J., Breyer, J., and Souter, J. (as to Part I), dissenting) ("Because the Court assumes *arguendo* that Osborne's claim was properly brought under 42 U.S.C. § 1983, rather than by an application for the writ of habeas corpus, I shall state only that I agree with the Ninth Circuit's endorsement of Judge Luttig's analysis of that issue. See 423 F. 3d 1050, 1053-1055 (2005) (citing *Harvey v. Horan*, 285 F. 3d 298, 308-309 (CA4 2002) (opinion respecting denial of rehearing en banc)); see also *McKithen v. Brown*, 481 F. 3d 89, 98 (CA2 2007) (agreeing that a claim seeking postconviction access to evidence for DNA testing may be properly brought as a § 1983 suit); *Savory v. Lyons*, 469 F. 3d 667, 669 (CA7 2006) (same); *Bradley v. Pryor*, 305 F. 3d 1287, 1290-1291 (CA11 2002) (same)."). *But see* ***District Attorney's Office for Third Judicial Dist. v. Osborne***, 129 S. Ct. 2308, 2325, 2326 (2009) (Alito, J., joined by Kennedy, J., concurring) ("What respondent seeks was accurately described in his complaint − the discovery

of evidence that has a material bearing on his conviction. Such a claim falls within 'the core' of habeas. . . . We have never previously held that a state prisoner may seek discovery by means of a § 1983 action, and we should not take that step here. I would hold that respondent's claim (like all other *Brady* claims) should be brought in habeas.").

The Supreme Court has resolved a conflict in the circuits by deciding the issue it left open in *Osborne*. See ***Skinner v. Switzer***, 131 S. Ct. 1289, 1293, 1300 (2011) ("Adhering to our opinion in *Dotson*, we hold that a postconviction claim for DNA testing is properly pursued in a § 1983 action. Success in the suit gains for the prisoner only access to the DNA evidence, which may prove exculpatory, inculpatory, or inconclusive. In no event will a judgment that simply orders DNA tests 'necessarily impl[y] the unlawfulness of the State's custody.'. . We note, however, that the Court's decision in *Osborne* severely limits the federal action a state prisoner may bring for DNA testing. *Osborne* rejected the extension of substantive due process to this area, 557 U.S., at __ (slip op., at 19), and left slim room for the prisoner to show that the governing state law denies him procedural due process, see *id.*, at __ (slip op., at 18). . . . Unlike DNA testing, which may yield exculpatory, incriminating, or inconclusive results, a *Brady* claim, when successful postconviction, necessarily yields evidence undermining a conviction: *Brady* evidence is, by definition, always favorable to the defendant and material to his guilt or punishment. . . . Accordingly, *Brady* claims have ranked within the traditional core of habeas corpus and outside the province of § 1983.") [**NOTE**: In ***Reed v. Goertz***, 143 S. Ct. 955, 962 (2023), the Court held that "when a prisoner pursues state post-conviction DNA testing through the state-provided litigation process, the statute of limitations for a § 1983 procedural due process claim begins to run when the state litigation ends."]

But see ***Skinner v. Switzer***, 131 S. Ct. 1289, 1304 (2011) ((Thomas, J., joined by Kennedy, J., and Alito, J., dissenting) ("This Court has struggled to limit § 1983 and prevent it from intruding into the boundaries of habeas corpus. In crafting these limits, we have recognized that suits seeking 'immediate or speedier release' from confinement fall outside its scope. . . We found another limit when faced with a civil action in which 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.' *Heck, supra,* at 487. This case calls for yet another: due process challenges to state procedures used to review the validity of a conviction or sentence. Under that rule, Skinner's claim is not cognizable under § 1983, and the judgment of the Court of Appeals should be affirmed. I respectfully dissent.")

See also ***Howard v. City of Durham***, 68 F.4th 934, 946-48 (4th Cir. 2023) ("*Brady*'s duty of disclosure does not extend post-conviction; rather, a convicted individual's right to due process 'must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief.' *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). Nonetheless, a convicted individual may 'have a liberty interest in demonstrating his innocence with new evidence under state law.'. . When a state enacts a law granting convicted individuals a right to evidence and a procedure for accessing such evidence, that 'state-created right can, in some circumstances, beget yet other rights to

procedures essential to the realization of the parent right.'. . And in considering a due process claim challenging state post-conviction procedures, courts must ask whether the state procedure '"offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"' or "transgresses any recognized principle of fundamental fairness in operation."'. . In *District Attorney's Office for the Third Judicial District v. Osborne,* the Supreme Court held that there is no freestanding substantive due process right to DNA evidence. . . Nevertheless, it did identify a due process liberty interest grounded in Alaska's general post-conviction relief statutes that made evidence from DNA testing available to defendants. . . Based on those statutes, the Court held that Alaska provided the defendant a 'substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence.'. . Here, Howard claims that Pennica and Soucie violated his due process rights by suppressing exculpatory evidence that a state court ordered to be disclosed under North Carolina's post-conviction relief statutes. As such, we must consider whether North Carolina law created a liberty interest for Howard to demonstrate his innocence post-conviction, and whether there is a genuine dispute of material fact as to whether Pennica and Soucie violated that interest by intentionally withholding evidence of the Jones interview. . . North Carolina has created a constitutionally protected right to demonstrate one's innocence post-conviction with new evidence and DNA testing. . . . [A]lthough a police officer generally does not owe a duty to disclose exculpatory evidence post-conviction, in this case, such a duty became essential to realizing Howard's rights to demonstrate his innocence under state-created procedures. Both by statute and by court order, Howard had a right to access DPD's files. . . And it would transgress 'fundamental fairness' if a police officer could willfully ignore North Carolina's state-created procedures and a court order by withholding evidence to which an inmate seeking post-conviction relief was entitled. . . As such, Howard's rights are entitled to protection under the Due Process Clause 'to insure that [this] state-created right is not arbitrarily abrogated.'"); ***In re Pruett***, 784 F.3d 287, 290-91(5th Cir. 2015) ("In *Skinner v. Switzer,* 562 U.S. 521, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011), the Supreme Court held that a judgment in favor of the plaintiff in his § 1983 suit for an order requiring DNA testing 'would not "necessarily imply" the invalidity of his conviction' because the results might prove exculpatory, inconclusive, or might further incriminate the prisoner. . . In concluding that it lacked jurisdiction, the district court held that Pruett's complaint was not properly brought under § 1983 because a judgment granting the relief he sought would necessarily imply the invalidity of his sentence. Relying on *Skinner,* Pruett argues that his complaint is properly brought under § 1983 because he challenges neither his conviction nor sentence, but only the State's authority to carry out an execution at this time. He asserts that a ruling in his favor would not invalidate his sentence, but would only be a finding that the Eighth Amendment will not allow his execution to proceed at this time because the State's failure to properly preserve evidence is presently preventing him from challenging his conviction. He maintains that when the DNA technology develops in such a manner as to permit him to demonstrate his actual innocence notwithstanding the State's negligent handling of the physical evidence, he will, at that time, be permitted to attack the legality of his conviction in a habeas application. Pruett does not provide any evidence that such technology is likely to develop or, if so, when. In fact, he admits that it is unknown whether it will ever be possible to generate a DNA profile from the torn pieces of the disciplinary report. Thus, he is

essentially asking for an indefinite stay of execution based on nothing but speculation. Unlike Skinner, who sought DNA testing, Pruett has already had DNA testing performed using the most current technology presently available. He seeks '[a] declaratory judgment that [his] execution would be in violation of the Eighth and Fourteenth Amendments because the State's negligently handling the evidence made it impossible for Pruett to prove his innocence.' We agree with the district court that this is a direct challenge to the validity of his sentence and, therefore, cannot be maintained under § 1983. Because Pruett has already unsuccessfully challenged his conviction and sentence in an earlier federal habeas proceeding, his current complaint is successive. Accordingly, the district court correctly determined that it did not have jurisdiction to consider it in the light of the fact that Pruett did not obtain our prior authorization pursuant to § 2244(b)(3)."); ***Newton v. City of New York,*** 779 F.3d 140, 147-54, 158 (2d Cir. 2015) ("The City does not genuinely dispute that New York law conferred on Newton 'a liberty interest in demonstrating his innocence with new evidence.' . . Newton retains such an interest even without the City's concession. For the purpose of determining whether a liberty interest exists in this case, we think the New York statute that Newton invokes is materially indistinguishable from the Alaska statute upon which Osborne relied. . . . Moreover, the State's explicit statement on the importance of DNA testing—reflected in its enactment of Section 440.30(1–a) in 1994—only strengthens the case for State recognition of a liberty interest. . . .Fundamental adequacy does not mean that State procedures must be flawless or that every prisoner may access the DNA evidence collected in his case. Nor does it mean that DNA evidence must be stored indefinitely. It means only that when State law confers a liberty interest in proving a prisoner's innocence with DNA evidence, there must be an adequate system in place for accessing that evidence that does not 'offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress [ ] any recognized principle of fundamental fairness in operation.' . . .Considering the similarities and differences between the two statutes, we conclude that the liberty interest created by New York law is no narrower than that created by Alaska law; procedures for vindicating this interest therefore should also be evaluated under the standard described in *Osborne*. . . . Unlike McKithen, Newton readily concedes that the State's statutory procedures are adequate. Instead, he contends that the *City*, not the State, provided him with fundamentally inadequate process by undermining the State's procedures by its recklessly chaotic evidence management system. Having demonstrated that (in contrast to Osborne and McKithen) he diligently and repeatedly tried the State's procedures for obtaining the necessary DNA evidence, Newton claims that the NYPD's evidence management system was so inadequate as to nullify those procedures. This appeal and Newton's arguments thus present an issue that we have yet to address relating to the interaction between State law and local government in the context of post-conviction relief. We are unaware of precedent that prevents Newton from challenging a municipal custom or practice that, he contends, undermines otherwise adequate State procedures. *McKithen* certainly does not do so, and so the District Court erred insofar as it held that *McKithen* squarely foreclosed Newton's claims. Moreover, by pointing out Osborne's failure to avail himself of Alaska's procedures, *Osborne* appears to have contemplated precisely such as-applied challenges by plaintiffs who attempt unsuccessfully to invoke State post-conviction relief procedures. . . The procedures created by Section 440.30(1–a) require the State, upon a defendant's motion, to 'show what evidence exists

and whether the evidence is available for testing.'. . In essence, Section 440.30(1–a) creates an 'essential' corollary procedural right to a faithful accounting of evidence. . . In New York, local government appears to play an integral role in this process. . . and a failure of local government in carrying out its role can nullify the adequacy of State procedures and expose the municipality to constitutional liability. This is hardly a new concept. In other contexts we have permitted plaintiffs to pursue claims against municipalities for deprivations of State-created interests. . . If procedures followed by a municipality rather than a State prove to be constitutionally inadequate, even in the context of facially adequate State procedures, then a defendant may sue the municipality for violating his due process rights on the ground that the municipality's implementation of State procedures is inadequate. Even in the realm of municipal (rather than State) inadequacy, however, we must take care to avoid 'suddenly constitutionaliz[ing]' the area of DNA testing and thereby 'plac[ing] the matter outside the arena of public debate and legislative action.'. . At least three factors help us avoid that pitfall here. . . .First, reinstating the § 1983 verdict against the City will not impair the validity of, or expand the rights provided by, Section 440.30(1–a)(a). As noted, this case presents a challenge to the City's *execution* of State law, not to the law itself. . . .Second, when, as here, a municipality promulgates policies or practices that affect the criminal procedure laws of the State, those policies or practices may fail to reflect the considered judgment of the State legislature. A local pattern, custom, or practice may frustrate or even obstruct otherwise adequate State law procedures. In those instances, it seems to us, neither *Osborne* nor *Medina* mandates the same level of deference to local government as they do to State legislative action. Third, the procedural right at issue here is quite narrow: Newton was not entitled to the preservation of evidence under State law, but only to a faithful accounting of the evidence in the City's possession. We do not decide what specific City procedure is necessary to manage and track evidence. We simply reinstate a jury verdict that found that the then-existing system was inadequate and that the City, through its agents, servants, or employees, intentionally or recklessly administered an evidence management system that was constitutionally inadequate and that prevented Newton from vindicating his liberty interest in violation of his Fourteenth Amendment right to due process. . . .Nevertheless, the City argues that there was insufficient evidence to support the jury's findings that the City's evidence management system was fundamentally inadequate, and that the City officials' failures and misconduct relating to that system reflected a practice or custom. . . .In sum, Newton presented evidence that thousands of sometimes decades-old yellow invoices at the Bronx property clerk's office—out of a total of not more than 3200 such invoices per year—were in old out-to-court folders that had improperly never been closed out; evidence listed as 'out-to-court' for over twenty years was lost; the PCD had lost track of and was unable to retrieve evidence in an unreasonably large number of cases (involving evidence older than five years); several high-level officials tasked with supervising the NYPD's evidence management system were unfamiliar with the PCD's procedures; and the PCD's dysfunction had an unconstitutionally deleterious effect on case closings in a large number of cases, including, obviously, Newton's. The problem in Newton's case was with the retrieval of evidence that was sitting there all along. Despite the preservation of the evidence that proved crucial in exonerating Newton, the PCD was unable to locate it from 1994 to 2005 and inaccurately represented that it had been destroyed either in a fire or pursuant to a regular disposal procedure that may not even have existed. Had Newton accepted

the City's recklessly erroneous representations about the evidence at face value, he might have remained in prison far longer than he did. Taken together, this evidence supports a finding that the City, through the poor administration of its evidence management system, perpetuated a practice or custom that was wholly inadequate. . . . [H]ad the City destroyed his DNA evidence according to a legitimate procedure that conformed with State law, Newton would have no claim under § 1983. Without deciding a question not before us, we do not see how an incarcerated defendant (or even a person like Newton) without exonerating evidence obtained by invoking State procedures would have a due process claim for relief under § 1983 based on our holding today. In contrast to *Youngblood*, the issue here is whether a municipality may be held liable for its reckless maintenance of a system that made it impossible to retrieve evidence that *had been* preserved, that State law recognized as particularly significant, and that ultimately exonerated the defendant."); ***Durr v. Cordray***, 602 F.3d 731, 736, 737 (6th Cir. 2010) ("We . . . conclude that Durr's request to seek DNA evidence was cognizable under § 1983. But we find that we cannot grant Durr a stay of his execution for these very same reasons: success on his claim would do no more than yield access to the evidence, it would have no direct effect on the validity of his conviction or death sentence, and he would have to bring another, separate action in order to even challenge the conviction or sentence. That is, *even if* Durr were to prevail on his § 1983 action (and obtain the necklace for DNA testing), success in that action would not directly invalidate or undermine his conviction or sentence. Consequently, there is no nexus between the merits of Durr's underlying claim and his pending execution, so this claim − no matter its merit − cannot justify our interference with the State's enforcement of an otherwise uncontested judgment of conviction and sentence."); ***Blaine v. Klein***, No. CV 10-9038 CJC (VBK), 2011 WL 5313488, at *3, *4 (C.D. Cal. Dec. 17, 2010) ("It appears that Plaintiff is attempting to claim that Defendants denied him access to evidence for DNA testing. Plaintiff's claims are foreclosed by the Supreme Court's decision in *District Attorney's Office for the Third Judicial District v. Osborne* __ U .S. __, 129 S.Ct. 2308, 2319-23,174 L.Ed.2d 38 (2009), in which the Court held there was no federal constitutional right to obtain post-conviction access to the state's evidence for DNA testing. In particular, a prisoner has no substantive due process right to obtaining DNA evidence after his conviction. . . Rather, a person claiming a due process violation with regard to post-conviction DNA testing must show that he has a protected liberty interest created by the laws of his state 'to prove his innocence even after a fair trial has proved otherwise.'. . If he makes such a showing, he must then show that the state's procedure for obtaining DNA evidence is constitutionally inadequate because it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation.'. . Because a convicted prisoner has a lesser liberty interest than a criminal defendant who had not yet been convicted, the state correspondingly has more flexibility in demanding what procedural protections to afford in the context of a criminal trial. Here, Plaintiff has failed to allege that he requested the DNA evidence in the California state courts prior to filing the within action in the Federal Court. California Penal Code Section 1405 provides an elaborate scheme under which a person in prison may seek and obtain DNA testing of evidence. . . . Plaintiff has failed to allege that Penal Code Section 1405 offends some fundamental principle of justice or is fundamentally unfair so as to violate due process. . . As a result, the alleged facts, when liberally construed and

viewed in a light most favorable to Plaintiff, do not state a claim that Defendants violated his constitutional right to due process by denying his post-conviction request for evidence for DNA testing.")

See also ***Summers v. Eidson***, No. 06-70047, 2006 WL 3071226, at *2 (5th Cir. Oct. 25, 2006) ("Summers argues that the relief sought, namely that this court require that William Spaulding's parole records be turned over to Summers, would not necessarily imply the invalidity of his conviction or sentence because a *habeas* court would then have to determine whether the failure to disclose these records constituted a *Brady* violation and therefore whether or not to overturn his conviction. *Kutzner*, however, forecloses this argument."); ***Bounds v. United States District Court***, No. 06-0233, 2007 WL 1169377, at *3 (W.D. La. Apr. 18, 2007) ("As correctly identified by Magistrate Judge Hornsby, an action to disclose evidence that may permit an inmate to challenge his conviction, even if a separate *habeas* action is required to invalidate the conviction, necessarily implies that the conviction was invalid for purposes of *Heck* in the Fifth Circuit. . . .A decision granting the disclosure of the Rule 35(b) motion would permit Bounds to adjudicate whether a *Brady* violation occurred and whether his conviction was unlawfully obtained. Therefore, the Court will not compel disclosure of the Rule 35(b) motion and related documents.").

K. *Spencer v. Kemna*: *Heck's* Applicability When *Habeas Corpus* is Unavailable

There are conflicting opinions on the question of whether and under what circumstances *Heck* applies when *habeas* is unavailable. In ***Spencer v. Kemna***, 523 U.S. 1 (1998), the Court addressed the question of whether a petition for a writ of *habeas corpus* for the purpose of invalidating a parole revocation was made moot by the plaintiff's having completed the term of imprisonment underlying the challenged parole revocation. One of plaintiff's "collateral consequences" arguments was that under the doctrine of *Heck*, he would be precluded from seeking damages under § 1983 for the alleged wrongful parole revocation unless he could establish the invalidity of the revocation through the *habeas* statute. In an opinion authored by Justice Scalia, the Court noted the following:

> [Petitioner] contends that since our decision in *Heck* . . . would foreclose him from pursuing a damages action under 42 U.S.C. § 1983 unless he can establish the invalidity of his parole revocation, his action to establish that invalidity cannot be moot. This is a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available. It is not certain, in any event, that a § 1983 damages claim would be foreclosed. If, for example, petitioner were to seek damages `for using the wrong procedures, not for reaching the wrong result,'. . . and if that procedural defect did not `necessarily imply the invalidity of' the revocation, . . . then *Heck* would have no application all.

523 U.S. at 17.

A majority of the Justices, in *dicta*, expressed the view that *Heck* has no applicability where the plaintiff is not "in custody" and, thus, habeas corpus is unavailable. *See* ***Spencer v. Kemna***, 523 U.S. 1, 20, 21 (1998) (Souter, J., joined by O'Connor, Ginsburg, and Breyer, JJ., concurring) ("[W]e are forced to recognize that any application of the favorable-termination requirement to § 1983 suits brought by plaintiffs not in custody would produce a patent anomaly: a given claim for relief from unconstitutional injury would be placed beyond the scope of § 1983 if brought by a convict free of custody (as, in this case, following service of a full term of imprisonment), when exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas. The better view, then, is that a former prisoner, no longer `in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy. Thus, the answer to Spencer's argument that his habeas claim cannot be moot because *Heck* bars him from relief under § 1983 is that *Heck* has no such effect. After a prisoner's release from custody, the habeas statute and its exhaustion requirement have nothing to do with his right to any relief.") and *id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under § 1983.").

Compare ***Wilson v. Midland County, Texas***, 116 F.4th 384, 388, 393-400, 404 (5th Cir. 2024), *pet. for cert. filed*, No. 24-672 (Dec. 12, 2024) ("Wilson's entire case is built on the premise that the favorable-termination requirement applies *only* to custodial plaintiffs. But the favorable-termination requirement is unconcerned with custody. It is instead concerned with *all* § 1983 claims by *all* civil plaintiffs who seek civil remedies against defective criminal processes. . . . The Supreme Court's subsequent decisions underscore this broad, tort-based conception of the favorable-termination element. Namely, that it applies to all § 1983 suits challenging a tainted conviction or sentence, regardless of whether the plaintiff is in custody. . . . True, the favorable-termination requirement obliquely protects the habeas statute by prohibiting custodial plaintiffs from collaterally attacking their convictions. . . But it sweeps far wider. That's because favorable termination is an element of *all* § 1983 claims challenging tainted criminal prosecutions, convictions, and sentences, not just those filed by litigants subject to the habeas statute. That is why the Court distinguished between *Heck*'s tort principle and *Preiser*'s habeas principle, which are separate and independent justifications for requiring favorable termination: 'This [favorable-termination] conclusion follows ***both*** from the rule for the most natural common-law analogy (the tort of malicious prosecution) ***and*** from the practical considerations that have previously led this Court to defer accrual of claims that would otherwise constitute an untenable collateral attack on a criminal judgment.'[citing *McDonough*] In this way, it vindicates the broader principles justifying the rule at common law: protecting the finality of criminal judgments, preventing inconsistent civil and criminal proceedings, and avoiding friction between state and federal courts. . . And of course, finality, consistency, federalism, and comity are threatened whenever one brings a civil challenge to a criminal conviction, sentence, or prosecution. . . Second, and relatedly, *McDonough* undermined (if not completely eliminated) any suggestion that the favorable-termination element is required only when the § 1983 plaintiff is in custody. McDonough filed suit

outside of custody—three years *after* he had been acquitted of all charges. . . . *McDonough* thus followed *Heck*'s footnote 10 and held the favorable-termination requirement does not begin and end with the habeas statute, which is why it 'is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.'. . So even if it was proper for an inferior court to discount *Heck*'s footnote 10 as 'infamous' and 'the very quintessence of dicta' when the Court decided it, *post*, at 37 (Willett, J., dissenting), *McDonough* makes the Court's instructions impossible to ignore. Nor is *McDonough* aberrational in this regard. Three years later, in *Thompson v. Clark*, . . . the Court once again subjected a noncustodial plaintiff to the *Heck* bar. The prosecutor dismissed all charges against Thompson, so he obviously was not in custody. . . But he still had to show favorable termination. . . Today, it should be clear beyond cavil that the favorable-termination element applies regardless of whether the § 1983 claimant was, is, or never could be in custody. . . In sum, *Heck*'s favorable-termination requirement is rooted in tort law principles that apply both inside and outside of prison—not habeas principles. That's why favorable termination is an element of any and all § 1983 claims challenging tainted convictions, sentences, or prosecutions. It's also why *Heck*'s footnote 10 followed logically from the Court's tort-based reasoning. . . Custodial status, in other words, matters not. . . Applying these principles here, Wilson's § 1983 claim is not cognizable. . . . [N]othing in this suit prevents Wilson from pursuing favorable termination upon dismissal. As we have explained, 'a *Heck* dismissal is a dismissal without prejudice.'. . And the district court correctly entered a without-prejudice dismissal here. Practically, that means Wilson is free to secure favorable termination and then re-raise her claims under § 1983. Until then, her claim is not cognizable and must be dismissed. . . . Instead of parsing *Preiser*'s dicta, *Heck* performed a comprehensive and independent analysis of § 1983—an analysis that relied on the common law of torts, wholly on the common law of torts, and nothing but the common law of torts. . . The upshot? *Whenever* a plaintiff seeks money damages under § 1983 for a tainted conviction, sentence, or prosecution (as in *Heck*, *Edwards*, *McDonough*, *Thompson*, and this case), one required element in that backwards-looking tort claim is favorable termination. . . . Because *Heck* is rooted in tort, not habeas, it's only natural that *Heck*'s favorable-termination rule transcends custodial status. . . . Put simply: *Heck* and *Preiser* announced distinct rules rooted in distinct genealogies. True, *Preiser* and *Heck* are superficially similar in the sense that both charted the boundaries of § 1983. But the similarities end there. *Heck* relied on tort law, while *Preiser* relied on habeas. That's why *Heck* applies outside of prison, while *Preiser* mostly does not. . . . In our view, neither *Spencer* nor *Close* undermines *Heck*'s tort-law foundation. . . . The non-custodial question posited but not answered in *Spencer* and *Close* is irrelevant. That is because *Heck* is not a case about custody; it is a case about tort law. And tort law applies inside *and outside* of prison. . . That is why *Heck* framed its accrual rule as one focused on the elements of a § 1983 action for damages arising from a tainted conviction—rather than a rule focused on custody, habeas, or anything else. . . And even if there was some debate on any of this—such that the issue was not settled in 2004, when *Close* was decided—the debate is settled in 2019, when *McDonough* was decided. In the latter case, the Court applied § 1983's favorable-termination requirement to a non-custodial plaintiff. And that makes perfect sense because, again, the elements of a tort claim have nothing at all to do with the custodial status of the claimant. True, Justice Souter thought custody should've mattered in *Heck.* And in *Spencer* and *Close*, several justices reiterated their defense of

Justice Souter's view of the world. But that does not change *Heck*'s tort-law holding. Nor does it empower our inferior court to disregard Supreme Court precedent, including *McDonough*.. . . All of these doctrines point in the same direction, as the en banc Seventh Circuit held: Section 1983 does not give special priority to a federal forum. . . When invoked to challenge a tainted criminal proceeding, § 1983 includes a favorable-termination requirement. Plaintiffs can satisfy that element in federal court, in state court, or in no court (e.g., through executive expungement). True, favorable termination is sometimes difficult to satisfy. Undoubtedly, as Wilson worries, some plaintiffs will not be able to do so. *Heck* explains, though, why that high bar must be cleared before seeking civil money damages from a tainted criminal proceeding. The Court sought to avoid parallel litigation on the issue of guilt, preclude the possibility of conflicting resolutions arising out of the same proceeding, prevent collateral attacks on criminal convictions through the vehicle of civil suits, and respect concerns for comity, finality, and consistency. . . We cannot ignore these instructions. . . . [I]t is also important that civil plaintiffs do not put the cart before the horse. Criminal proceedings and criminal judgments require criminal remedies—not civil ones. If and when Ms. Wilson pushes aside her criminal conviction, then but only then can she come back to civil court and ask for money. Until then, her § 1983 suit must be dismissed.") *with* ***Wilson v. Midland County, Texas***, 116 F.4th 384, 406-08, 410-13, 415-16, 418-22 (5th Cir. 2024) (Willet, J., joined by King, Elrod, Graves, Higginson, and Douglas, JJ., dissenting), *pet. for cert. filed*, No. 24-672 (Dec. 12, 2024) ("Today's en banc case poses one—and only one—question: Does *Heck v. Humphrey*'s favorable-termination rule apply to noncustodial § 1983 plaintiffs? This question has been hotly debated in the lower courts since *Heck* was decided three decades ago. Footnoted dicta and vehement concurrences from various Supreme Court justices over the years have played starring roles. The unsurprising upshot is a deep and enduring circuit split.[12] [citing cases] Indeed, we are the second circuit to take the issue en banc in recent years. . . With boundless respect for my eminent colleagues, the plurality. . . has disfigured *Heck* to impose a favorable-termination requirement as an 'element' for '*all* § 1983 claims by *all* civil plaintiffs who seek civil remedies against defective criminal process.'. . This holding is doubly violative: Americans robbed of their constitutional rights are also robbed of any federal forum to vindicate those rights. I respectfully dissent and would hold that *Heck*'s favorable termination rule applies only to custodial § 1983 plaintiffs. . . .Habeas is the elephant in the room whenever the scope of § 1983 is at issue because § 1983, absent carefully specified limits. . . could sideline the federal habeas statute. But to say that some limits on § 1983 are necessary (because the specific controls the general) is not to establish the validity of the plurality's proposed limitation. . .And the justification of the plurality's limitation is wanting. It is not based on conflict with another statute. It is seemingly based on protecting a set of values (comity, finality, etc.) that, for 153 years now, § 1983 has always opposed—and intentionally so. . . . The plurality today asserts that the *Heck* Court held that 'favorable termination is itself an element of any § 1983 claim that seeks money damages for a tainted conviction.'. . But *Heck*'s holding was far more limited. It applies only to prisoners whose claims are closely analogous to malicious prosecution. This is evident because: (1) *Heck* was limited to addressing whether prisoners could use § 1983 to challenge their convictions or confinement; (2) the *Heck* opinion is framed in terms of the overlap between § 1983 and § 2254, which indicates the Court remained acutely concerned about the statutes' respective scopes in

Heck; and (3) tort law merely served as a 'starting point'. . . in *Heck* to determine the elements for the prisoner-plaintiff's specific claims, and it would make little sense to apply its holding more broadly. . . .Whether favorable termination should apply to noncustodial plaintiffs was not the question presented—much less answered—in *Heck.* . . .The *Heck* Court was clear that *Heck* was the latest in a line of cases that dealt with the overlap between § 1983 and § 2254. And the Court was acutely focused on delineating when a prisoner could use § 1983 instead of § 2254. . . . In contrast to what I have explained thus far, the plurality misreads *Heck* to be 'based' only in 'tort law.' While I agree that tort law had a *role* in *Heck*'s analysis, the plurality elevates tort law to be the *sine qua non* of *Heck.* Respectfully, the plurality misunderstands *Heck* and distorts the Court's precedents on the use of common-law analogs to interpret § 1983 by extending the *Heck* bar without regard to the proper analogous tort. . . .To sum up, the question presented in *Heck* was whether *prisoners* could bring a claim that would necessarily challenge their convictions under § 1983. The Court was deeply concerned about the answer to that question because *if* the answer was yes, prisoners with outstanding criminal judgments could choose § 1983 over § 2254 and bring claims that, if successful, would require the prisoner's release, which is 'as close to the core of habeas corpus as an attack on the prisoner's conviction.'. .To answer the presented question, the Court had to determine the reach of § 1983. Because § 1983 is not a source of substantive rights, it looked to the common law as a 'starting point' or 'guide' and determined that malicious prosecution was the right fit for Heck's claims. In what was clearly off-the-mark dicta, the Court mused that favorable termination might apply more broadly, but dicta does not bind us. And, as the next section will address, the Court *still* hasn't resolved whether non-prisoners must prove favorable termination—a point the Court has explicitly acknowledged. Regardless, malicious prosecution is a bad fit for Wilson's claims, and we should not try to shoehorn the favorable-termination requirement where it does not fit. . . . I'll now address the three post-*Heck* cases that the plurality believes 'underscore [its] broad, tort-based conception of the favorable-termination element. Namely, that it applies to all § 1983 suits challenging a tainted conviction or sentence, regardless of whether the plaintiff is in custody.'. . With greatest respect, the plurality is wrong on all three. [Dissent discusses *Edwards*, *McDonough*, and *Thompson*] In sum, the plurality overreads *McDonough.* On whether *McDonough* settled the reach of *Heck* and enshrined the dicta of footnote 10, I agree with Judge Easterbrook: 'Certainly, *McDonough* ... did not do so.'. . . Finally, the plurality points to *Thompson v. Clark.* . . . The plurality infers that because Thompson was not in custody, 'it should be clear beyond cavil that the favorable-termination element applies regardless of whether the § 1983 claimant was, is, or never could be in custody.' . . But the plurality misses a critical point: The reason the Court required favorable termination in Thompson's case is because the analogous common-law tort for Thompson's malicious-prosecution claim was, unsurprisingly, malicious prosecution, which contains favorable termination as an element. The Court never addressed Thompson's custodial status because it had no reason to. So *Thompson* could not have held that a favorable-termination requirement applied to noncustodial plaintiffs writ large. . . .In sum, not one of the post-*Heck* cases supports the plurality's position. The plurality fails to track what questions were presented by the cases and under what circumstances. The Supreme Court has never addressed the application of favorable termination to plaintiffs like Wilson who are not in custody and whose claims are not analogous to the common-law tort of malicious prosecution.

In fact, the Court has acknowledged the ongoing debate and pointedly declined to resolve it, expressly stating in *Muhammad v. Close* that 'this case is no occasion to settle the issue.'. . As none of these cases addressed the issue, I would take the justices at their word and accept their pronouncement that the issue remains unsettled. . . .Whether Wilson might (or might not) be able to prove favorable termination outside of § 1983 only matters if *Heck* requires her to prove favorable termination *in the first place.* . . If Wilson is allowed to sue under § 1983, then it matters not whether she might also have state remedies available to her. That's the whole point of § 1983: to give those victimized by state officials a federal forum. The sole issue for us is whether *Heck* applies to noncustodial plaintiffs—nothing else. The plurality and concurrence particularly focus on the availability of Texas state habeas. Texas's unique habeas statute specifies '[a]t the time the application is filed, the applicant must be, or *have been*, on community supervision.'. . Not all state habeas statutes reach this far. In this circuit, for example, Mississippi's statute only 'extend[s] to all cases of illegal confinement or detention.'. . Under the concurrence's approach, the line between § 1983 being available or not 'would depend on the vagaries of state law.'. . If Wilson happened to live in another state in *this* circuit, her case might well turn out differently based on the reasoning in the concurrence. Also, and this cannot be overstated, to consider the existence of state remedies when determining the reach of § 1983 is, respectfully, contrary to the historical record. It was precisely '[b]ecause Congress lacked confidence in state institutions, including state courts, [that] it explicitly gave federal courts jurisdiction over the new civil action.'. . To then turn around, as the concurrence does, and say that there is no federal cause of action because Wilson could also pursue state remedies turns § 1983 on its head . . . Our circuit has been on the wrong side of this fateful split for almost a quarter-century. Today, we squander the opportunity to take '[t]he better view' of *Heck* by holding that 'a former prisoner, no longer "in custody," may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement.'. .When Wilson learned that she had been victimized by Petty's mind-boggling conflict of interest, had she read § 1983's sweeping textual command, she would have been heartened to take Congress at its word that she had a federal-court remedy for what she had endured. It may be true that a federal-court remedy isn't guaranteed for *every* constitutional violation. . . But the historical record shows that § 1983 was enacted to provide one for a wide swath of violations that couldn't be entrusted to protection by the state courts. . . Today, the court 'unjustifiably limit[s]' that 'plain breadth of § 1983,' leaving plaintiffs like Wilson violated but not vindicated. . . There is no justification for applying *Heck*'s favorable-termination requirement so broadly. We are not bound by dicta in *Heck*'s footnote 10, it makes little sense to apply a favorable-termination rule to noncustodial plaintiffs whose claims are not analogous to the common-law tort of malicious prosecution, no post-*Heck* precedent binds us, and the en banc court's justifications collide head-on with § 1983. When Justice Ginsburg disavowed *Heck*'s footnoted musings on the ancillary question of noncustodial plaintiffs, she cited Justice Frankfurter's maxim that '[w]isdom too often never comes, and so one ought not to reject it merely because it comes late.'. . Unfortunately for our circuit—and unfortunately for Wilson—wisdom remains a no-show. The only hope for wronged noncustodial plaintiffs like Erma Wilson is that the Supreme Court will at last confront the persistent circuit split, seize this 'occasion to settle the issue,'. . . and vindicate a bedrock constitutional guarantee that, sadly, is even more tenuous in

today's plea-bargain age than when the Founding generation first enshrined it. Respectfully yet emphatically, I dissent.")

Compare ***Savory v. Cannon***, 947 F.3d 409, 417-23, 427-28, 430-31 (7th Cir. 2020) (en banc) ("Applying the analytical paradigm of *Heck* and *McDonough* to Savory's case, we first look at the nature of his section 1983 claims and conclude that, like Heck's claims, they strongly resemble the common-law tort of malicious prosecution. Indeed, Savory's claims largely echo Heck's complaint, asserting the suppression of exculpatory evidence and the fabrication of false evidence in order to effect a conviction. There is no logical way to reconcile those claims with a valid conviction. Therefore, *Heck* supplies the rule for accrual of the claim. Because Savory's claims 'would necessarily imply the invalidity of his conviction or sentence, his section 1983 claims could not accrue until 'the conviction or sentence ha[d] been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.'. . In Savory's case, that occurred on January 12, 2015, when the governor of Illinois pardoned him[.] . . Until that moment, his conviction was intact and he had no cause of action under section 1983. . . His January 11, 2017, lawsuit was therefore timely under *Heck*, and we must reverse the district court's judgment and remand for further proceedings. *McDonough* supports the same result. Because McDonough (who was not held in custody during his trials) was acquitted rather than convicted, his section 1983 claim would not have infringed upon the exclusivity of the habeas corpus remedy. The Court nevertheless indicated that the other concerns discussed in *Heck* still guided the outcome, and no section 1983 claim could proceed until the criminal proceeding ended in the defendant's favor or the resulting conviction was invalidated within the meaning of *Heck*. So too with Savory. Although his sentence had been served and habeas relief was no longer available to him (and thus habeas exclusivity was not at issue), the other considerations raised in *Heck* controlled the outcome: he had no complete cause of action until he received a favorable termination of his conviction, which occurred when the governor issued a pardon for the subject conviction. . . . The *Heck* bar accounts for the preclusive effect of state court criminal judgments on civil litigation by lifting the bar only when the plaintiff has achieved a favorable termination of the criminal proceeding. . . Under the defendants' rule, a section 1983 claim would accrue on release from custody even though the conviction remained intact, and even though preclusion rules would effectively prevent the plaintiff from bringing any claim inconsistent with the original criminal conviction. Claimants like Savory, who obtained a pardon several years after release from custody and who may have the most meritorious claims, would be too late. Nothing in *Heck* requires such a result. . . Although a straight-forward reading of *Heck* and its progeny (including *McDonough*) determines the outcome here, we must address the defendant's arguments that concurring and dissenting opinions of certain Supreme Court justices cobbled together into a seeming majority or the opinions of this court may somehow override the prime directive of *Heck*. Several of our post-*Heck* cases contain dicta or rely on reasoning that is in conflict with *Heck* and *McDonough*, and we must address and clarify those cases as well. . . . [I]n *Spencer v. Kemna*. . . Justice Souter again filed a concurrence expressing the view that he urged in his *Heck* concurrence, namely 'that a former prisoner, no longer "in custody," may bring

a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.'. . Justice Ginsburg, who had been in the majority in *Heck*, this time agreed with Justice Souter (who was also joined by Justices O'Connor and Breyer), joining his concurrence and filing her own. . . . Justice Stevens dissented in *Spencer*, but he approved Justice Souter's basic premise[.] . . The defendants contended in the district court and maintain on appeal that this dicta in concurring and dissenting opinions, cobbled together, now formed a new majority, essentially overruling footnote 10 in *Heck*. But it is axiomatic that dicta from a collection of concurrences and dissents may not overrule majority opinions. . . The Supreme Court may eventually adopt Justice Souter's view, but it has not yet done so and we are bound by *Heck*. . . The defendants also assert that footnote 10 of *Heck* (which specifically rejected Justice Souter's proposed rule) was dicta, and therefore does not control the outcome here. The plaintiff in *Heck*, they note, was incarcerated and allowing a section 1983 suit during incarceration would have permitted an endrun around the habeas corpus statute. No such concern is present, they argue, in the scenario addressed in footnote 10 of *Heck*, specifically, persons who are no longer in custody and cannot bring habeas challenges. But *Heck* was concerned with more than the exclusivity of the habeas corpus remedy for persons in custody, or the intersection between habeas corpus and section 1983. The favorable termination rule in *Heck* also rested on concerns arising generally from collateral attacks on extant criminal convictions through civil law suits. Specifically, requiring a section 1983 plaintiff to prove favorable termination of the criminal conviction avoids parallel litigation over the issues of probable cause and guilt, and precludes the possibility that a plaintiff might succeed in a civil tort action after having been convicted in the underlying criminal prosecution, allowing the creation of conflicting judgments arising out of the same transaction. . . These concerns were repeated recently in *McDonough* as rationales supporting the application of *Heck*'s favorable termination rule in a case that did not implicate concerns about habeas corpus. Because the plaintiff had been acquitted rather than convicted, there was little likelihood of a collision between habeas corpus and section 1983. Yet the Court cited the continued relevance of the favorable-termination rule as being 'rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.'. . In further support of the favorable termination rule, the Court also cited related concerns for finality, consistency, and the avoidance of unnecessary friction between the state and federal court systems. . . Although footnote 10 of *Heck* addressed a factual scenario that was not before the Court, to dismiss all of footnote 10 as dicta is to divorce a significant part of the Court's rationale from its holding. The Court was simply making clear how broadly it intended its holding to apply. . . . The defendants also asserted below and argued on appeal that this court has abrogated the rule in *Heck*, citing five cases: *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000); *Simpson v. Nickel*, 450 F.3d 303 (7th Cir. 2006); *Burd v. Sessler*, 702 F.3d 429 (7th Cir. 2012); *Whitfield v. Howard*, 852 F.3d 656 (7th Cir. 2017); and *Sanchez v. City of Chicago*, 880 F.3d 349 (7th Cir. 2018). According to the defendants, those cases 'together sensibly hold an individual who is no longer in custody with no access to habeas corpus relief may bring a § 1983 action challenging the constitutionality of a still standing conviction without first satisfying the favorable termination rule of *Heck*.'. . As we just explained, however, this court may not on its

own initiative overturn decisions of the Supreme Court. Although four of those five cases came to correct resolutions, some of our language and reasoning has created confusion regarding the applicability of *Heck* in cases where habeas relief is not available. Indeed, it was on these cases that the district court relied in concluding that Savory had brought his claims too late. . . . We reaffirm *DeWalt*'s basic holding today: a section 1983 complaint that challenges a disciplinary sanction related only to the conditions of confinement and that does not implicate the validity of the underlying conviction or the duration of the sentence (e.g. loss of good time credits) is not subject to *Heck*'s favorable termination requirement. . . But part of the reasoning and language of *DeWalt* went further than that and implied that, in all cases where habeas relief is unavailable, then section 1983 must provide an avenue of relief. . . . This language suggesting that a section 1983 remedy must be available when habeas relief is unavailable is in conflict with footnote 10 of *Heck* and with our holding today. Moreover, it was unnecessary to the holding in *DeWalt*, and we now disavow that language. . . . Our dissenting colleague urges the court to adopt an accrual rule tied to the end of custody. A claim accrues when a plaintiff has 'a complete and present cause of action.'. . When a section 1983 claim resembles the common-law tort of malicious prosecution, the Court treats favorable termination as an element of the claim. . . Without favorable termination, a plaintiff lacks 'a complete and present cause of action.' Yet the dissent's rule would require a plaintiff to file suit without this essential element of the claim. . . . In requiring favorable termination before allowing a section 1983 claim to proceed, *Heck* sets a high standard. Undoubtedly, as the dissent asserts, some valid claims will never make it past the courthouse door. *Heck* explains, though, why a high bar must be cleared before seeking damages in a civil action on claims that imply the invalidity of a criminal conviction. The Court sought to avoid parallel litigation on the issue of guilt, preclude the possibility of conflicting resolutions arising out of the same transaction, prevent collateral attacks on criminal convictions through the vehicle of civil suits, and respect concerns for comity, finality and consistency. . .We are not in a position to alter the *Heck* standard or set aside these concerns. . . . *Heck* controls the outcome where a section 1983 claim implies the invalidity of the conviction or the sentence, regardless of the availability of habeas relief. Claims that relate only to conditions of confinement and that do not implicate the validity of the conviction or sentence are not subject to the *Heck* bar. We disavow the language in any case that suggests that release from custody and the unavailability of habeas relief means that section 1983 must be available as a remedy. That includes the cases on which the district court, in good faith, reasonably relied. *McDonough* confirms that habeas exclusivity is just one part of the rationale for *Heck's* holding. Concerns about comity, finality, conflicting judgments, and 'the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments' all underpin *Heck's* favorable termination rule. . . The Supreme Court may revisit the need for the favorable termination rule in cases where habeas relief is unavailable, but it has not yet done so. Savory's claims, which necessarily imply the invalidity of his conviction, accrued when he was pardoned by the governor of Illinois. His section 1983 action, filed within two years of the pardon, was therefore timely filed. We reverse the district court's judgment and remand for further proceedings.") *with* ***Savory v. Cannon***, 947 F.3d 409, 433-34 (7th Cir. 2020) (en banc) (Easterbrook, J., dissenting) ("The Justices expressed concern in *Manuel* and its successor *McDonough* about a rule starting the time

so early that legitimate claims would be lost. We should be equally concerned about a rule starting the time so late that claims never accrue. The majority's approach does just that. Some sentences are too short to allow collateral relief. We routinely see cases in which it has taken a decade to pursue a direct appeal, collateral review in state court, and collateral review in federal court. If confinement ends before collateral review begins, the custody requirement prevents all further review. If the sentence is fully served while state collateral review is ongoing, federal collateral review cannot begin. (Only state prisoners 'in custody' can seek review under § 2254(a).) So a rule under which a § 1983 claim does not accrue as long as the criminal judgment stands means that thousands of defendants sentenced to less than five or ten years in prison can *never* present a § 1983 claim, no matter how egregious the constitutional violations that led to wrongful conviction and custody. Released prisoners can obtain relief under the majority's approach if their convictions are set aside by pardon (Savory's situation) or certificate of innocence. Yet in most states pardons are rare, and pardons for federal crimes are rarer still. Getting a certificate of innocence is wickedly hard in both state and federal systems, because the applicant must show factual innocence, and even an acquittal does not establish that. . . Proof of innocence—the need to prove a negative—is difficult to come by. Again Savory may be an exception; he eventually found conclusive DNA evidence. Few wrongly convicted persons are so fortunate.")

Compare ***Teagan v. City of McDonough***, 949 F.3d 670, 678-79 (11th Cir. 2020) ("[T]here is an open question as to whether *Heck* applies to situations where, as here, a § 1983 plaintiff may no longer seek habeas relief because she is no longer in custody. . . It is unclear whether *Heck* would apply here, as the length of imprisonment was so short 'that a petition for habeas relief could not have been filed and granted while [Ms. Teagan] was unlawfully in custody.' *Morrow v. Fed. Bureau of Prisons*, 610 F.3d 1271, 1272 (11th Cir. 2010). *See also id*. at 1273 (Anderson, J., concurring) ("[S]everal circuits have recognized an exception from the *Heck* favorable termination requirement for plaintiffs no longer in custody that were precluded from obtaining habeas relief.") *with* ***Teagan v. City of McDonough***, 949 F.3d 670, 684 (11th Cir. 2020) (Tjoflat, J., specially concurring) ("I concur in the judgment of the Court. I write separately to state that I believe Teagan's 42 U.S.C. § 1983 claims are barred under *Heck v. Humphrey*, . . . which requires Teagan to prove that her 'conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus' before her claims are cognizable under § 1983. . . Because Teagan has not offered such proof, the City is entitled to summary judgment on her § 1983 claims regardless of whether the actions of the municipal court could be attributed to the City under *Monell*.")

See also ***Hall v. Merola***, 67 F.4th 1282, 1293-95 (11th Cir. 2023) ("Hall alleged that Officer Wright violated the First Amendment by 'unlawfully gassing [Hall] with chemical agents because [Hall] file[d] lawsuits and grievances against correctional officers.'The parties disagree about whether *Heck* applies to Hall now that Hall is no longer in custody on his criminal convictions. . . They spend much of their briefs on the topic—a question that has divided our sister circuits. But we can decide this appeal without resolving this thorny question. As we've mentioned, Hall alleged

that Officers Wright and Watson violated the First Amendment by 'unlawfully gassing [Hall] with chemical agents because [Hall] file[d] lawsuits and grievances against correctional officers.' Officers Wright and Watson argue that this claim is most similar to a malicious-prosecution claim, though they don't say why. And Hall himself never explains which common-law tort he thinks is most analogous to his claim. As for us, we don't think it's clear that a malicious-prosecution claim is the best fit here. After all, when we look at Hall's claim, Hall doesn't seem to be complaining that he was aggrieved by the disciplinary report (and accompanying loss of 'gaintime') but rather by the use of the gas itself. To be sure, if Hall's claim is that the guards fabricated a sprinkler-system charge to justify their use of gas on him, then his claim would seem to be most analogous to a malicious-prosecution claim because the wrong would be about the alleged misuse of the prison disciplinary system. We agree that that claim would be barred. . . But on the other hand, if Hall's claim complains that the guards used chemical agents on him to retaliate against him for his First Amendment protected speech (in the form of filing prison grievances), then the most analogous tort might be battery because the wrong in that case is about the use of force. And battery can be part of a First Amendment-retaliation claim. 'To state a § 1983 First Amendment retaliation claim, a plaintiff generally must show: (1) she engaged in constitutionally protected speech, such as her right to petition the government for redress; (2) *the defendant's retaliatory conduct adversely affected that protected speech and right to petition*; and (3) a causal connection exists between the defendant's retaliatory conduct and the adverse effect on the plaintiff's speech and right to petition.'. . The analogous common-law tort, then, is the retaliatory conduct—the second prong. In the usual case, the retaliatory conduct is an arrest or a prosecution. *Nieves v. Bartlett*, — – U.S. ——, 139 S. Ct. 1715, 1726, 204 L.Ed.2d 1 (2019). That is, the government arrests or prosecutes someone for their protected speech. *Id.* In those cases, we look to the common-law torts of false arrest or malicious prosecution. . .But a First Amendment retaliation claim can use any sort of adverse action at its second element: a civil lawsuit, . . . or the termination of employment, *Lane v. Franks*, 573 U.S. 228, 243, 134 S.Ct. 2369, 189 L.Ed.2d 312 (2014), for instance. Or, as relevant here, the use of force. We see no reason why Hall cannot rely on the use of force to satisfy the 'adverse action' prong. Other circuits agree. [collecting cases] . . . . So that raises the question of which claim Hall is advancing. Is Hall complaining that Officer Wright instigated a disciplinary action against him for his speech? Or is Hall instead saying that Officer Wright used gas against him to punish him for his speech? The former might be barred by *Heck* as analogous to a malicious-prosecution claim without a favorable termination, but the latter would not. As it turns out, though, we don't need to decide which claim Hall is bringing because we must give him leave to replead."); ***Vasquez Arroyo v. Starks***, 589 F.3d 1091, 1096 (10th Cir. 2009) ("Because we have determined that the Kansas pre-trial diversion agreements are not outstanding convictions and therefore these § 1983 claims impugning their validity are not barred by *Heck*, we need not decide whether *Heck* applies when the plaintiff lacks an available remedy in habeas. Although we implied in *Butler* in dicta that *Heck* does not apply when a habeas remedy is lacking, 482 F.2d at 1278-81, we decline to reach this issue which the Supreme Court has not resolved, *see Close*, 540 U.S. at 752 n. 2, and on which the circuits are split. [footnote collecting cases]"); ***Hanks v. Prachar***, 457 F.3d 774, 776 (8th Cir. 2006) ("We agree with Hanks that *Heck v. Humphrey*, 512 U.S. 477 (1994), likely did not apply, given that he had already served his sentence on the 1998 charges when he filed the

instant lawsuit, *see Jiron v. City of Lakewood*, 392 F.3d 410, 413 n. 1 (10th Cir.2004) (suggesting *Heck* does not apply when plaintiff is no longer in custody for offense)[.]"); ***Jiron v. City of Lakewood,*** 392 F.3d 410, 413 n.1 (10th Cir.2004) (noting that *Heck* might not apply where plaintiff is no longer "in custody" for offense and therefore "has no vehicle, such as a petition for a writ of *habeas corpus*, available to her by which she could seek to challenge the underlying felony menacing conviction.").

In ***Nonnette v. Small***, 316 F.3d 872 (9th Cir. 2002), the plaintiff had fully served the period of incarceration imposed as a result of the deprivation of good-time credits and the imposition of administrative segregation, and his release made habeas unavailable. The Ninth Circuit joined the Second, *see* ***Huang v. Johnson,*** 251 F.3d 65, 75 (2d Cir. 2001), and Seventh Circuits, *see* ***DeWalt v.Carter***, 224 F.3d 607, 616-18 (7th Cir. 2000) [*But see* ***Savory v. Cannon***, *supra*], concluding that, under such circumstances, where the unavailability of *habeas* was due to mootness caused by release from the period of incarceration imposed, which incarceration a successful civil suit would impugn, a § 1983 action was not barred by *Heck*. *Nonnette*, 316 F.3d 872, 876, 877 n.6 (9th Cir. 2002).]

See also ***Covey v. Assessor of Ohio Cnty.***, 777 F.3d 186, 197-98 & n.11 (4th Cir. 2015) ("[A] civil-rights claim does not necessarily imply the invalidity of a conviction or sentence if (1) the conviction derives from a guilty plea rather than a verdict obtained with unlawfully obtained evidence and (2) the plaintiff does not plead facts inconsistent with guilt. . . This is the case here. Mr. Covey never contested his guilt. Nor did he ever seek to suppress the evidence underlying his conviction. Thus, relief under § 1983 or *Bivens* for the alleged illegal searches does not implicate the propriety of Mr. Covey's conviction, and *Heck* acts as no bar. On the other hand, some of Mr. Covey's claims *would* imply the conviction's invalidity. For example, in a portion of the complaint, Mr. Covey alleges that he was falsely imprisoned and deprived of his liberty. . . We construe this allegation as pertaining to Mr. Covey's period of home confinement. As to Mr. Covey, but not necessarily Mrs. Covey, . . . relief for this 'injury' would necessarily imply the invalidity of Mr. Covey's conviction. . .That conclusion alone, however, does not end our inquiry. We have held once—in an unpublished opinion—that *Heck* bars a claim that implies the invalidity of a conviction or sentence even if the claimant is no longer in custody, . . . but only if the claimant could have practicably sought habeas relief while in custody and failed to do so. . . At this stage, it is unclear whether Mr. Covey actually pursued or was practicably able to pursue habeas relief for his conviction. Mr. Covey pleaded guilty on March 30, 2010, and was thereafter sentenced to home confinement for a period of not less than one year and no more than five years. The Coveys filed this action on October 20, 2011, after Mr. Covey completed his term of home confinement. If Mr. Covey was unable to pursue habeas relief because of insufficient time or some other barrier, then *Heck* is wholly inapplicable to the Coveys' § 1983 and *Bivens* claims. Because we cannot make this determination on the record, we hold that *Heck* does not bar any of Mr. Covey's claims for purposes of the defendants' motions to dismiss. We leave it to the district court on remand to decide at summary judgment whether *Heck* bars *any* of Mr. Covey's claims. . . .Because of inadequate briefing by the parties on this issue, we do not address whether a *Heck* bar properly

applies to a person formerly in custody, even if the person could have practicably sought habeas relief. We simply note that the binding precedent from the Supreme Court and in this Circuit does not clearly impose a 'practicable diligence' requirement for former prisoners."); ***Hayward v. Cleveland Clinic Found.,*** 759 F.3d 601, 614-16 (6th Cir. 2014) ("In *S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 638–39 (6th Cir.2008), this Court applied *Powers* to hold that *Heck's* favorable termination requirement does not apply where, due to the length of a sentence, a petitioner was unable to assert a habeas claim. *Powers* logically extends to situations in which petitioners elect to participate in pretrial diversion programs to avoid trial and possible jail time. . . . . In the instant case, Plaintiff Aaron Hayward pleaded guilty to resisting arrest and paid a fine rather than spending an extensive amount of time in jail. He was ineligible for habeas review because he did not serve a sentence long enough to assert a claim challenging his conviction. Therefore, he claims that *Powers* means *Heck* is inapplicable to his case. . . .Although application of *Powers* in this case is a question of law, it is not an issue for which resolution is clear beyond doubt, and a district court should have had the opportunity to consider the facts in this case to determine whether *Powers* applies. Plaintiff has failed to demonstrate any exceptional circumstances that prevented him from asserting this argument before the district court. Plaintiff is not a *pro se* litigant. He was represented by counsel before the district court, and he continues to be represented by counsel on appeal. He had every opportunity to raise his *Powers* argument in any one of his three amended complaints or other filings before the district court, yet he failed to do so. As this Court has found waiver in far more sympathetic cases and Plaintiff fails to assert that he is entitled to application of an exception, this Court declines consideration of Plaintiff's *Powers* argument."); ***Morris v. Noe***, 672 F.3d 1185, 1193 n.2 (10th Cir. 2012) ("[T]he *Heck* bar does not apply to plaintiffs who have no available habeas corpus remedy. *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir.2010); *see also Spencer v. Kenna*, 523 U.S. 1(1998) (five justices agreeing that Heck's favorable termination requirement did not apply to "a former prisoner, no longer in custody"). Because Morris was never in custody, but merely received a citation, *Heck* does not bar Plaintiff's unlawful arrest claim. *See Klen v. City of Loveland, Colo.*, 661 F.3d 498, 515 (10th Cir.2011)."); ***Klen v. City of Loveland, Colo***. 661 F.3d 498, 515, 516 (10th Cir. 2011) ("The *Heck* issue is slightly more complicated than plaintiffs suggest. While Ed Klen paid a fine, he also received a deferred judgment and sentence that required him to 'keep the Court advised of his current business and residential addresses and telephone numbers' and to 'commit no other violations of Title 15 of the Loveland Municipal Code during the deferred period.'. . In the event of a breach of any of these conditions, the Loveland Municipal Court was empowered to enter judgment and impose sentence on his no-contest pleas. . . According to plaintiffs, such a sentence could include incarceration of up to one year on each count. . . . While the restrictions imposed on Ed Klen as a result of his plea required him to do more than pay a fine, they do not appear to qualify as a significant restraint on his liberty sufficient to permit him to invoke a habeas remedy. Thus, his § 1983 claims concerning his conviction are not barred by *Heck*."); ***Cohen v. Longshore***, 621 F.3d 1311, 1316, 1317 (10th Cir. 2010) ("Under these circumstances, and in light of the fact that *Heck* involved a petitioner who was still incarcerated, we are not persuaded that *Heck* must be applied to petitioners without a habeas remedy. We are instead persuaded by the reasoning of the Second, Fourth, Sixth, Seventh [But see ***Savory v. Cannon***, *supra*], Ninth, and Eleventh Circuits

that we are free to follow the five-Justice plurality's approach in *Spencer* on this unsettled question of law. We are also persuaded that the *Spencer* plurality approach is both more just and more in accordance with the purpose of § 1983 than the approach of those circuits that strictly apply *Heck* even to petitioners who have been released from custody. If a petitioner is unable to obtain habeas relief − at least where this inability is not due to the petitioner's own lack of diligence − it would be unjust to place his claim for relief beyond the scope of § 1983 where 'exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.' *Spencer*, 523 U.S. at 21 (Souter, J., concurring). We thus adopt the reasoning of these circuits and hold that a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a § 1983 claim. The district court therefore erred in holding that Plaintiff's false imprisonment claim lacked merit where Plaintiff's prior attempt to obtain a favorable termination in habeas was dismissed based on mootness."); ***Morrow v. Federal Bureau of Prisons***, 610 F.3d 1271, 1273, 1274 (11th Cir. 2010) (Anderson, J., concurring specially) (unpublished) ("Drawing on Justice Souter's concurrence in *Spencer v. Kemna,* 523 U.S. 1, 18, 118 S.Ct. 978, 988 (1998) (Souter, J., concurring), several circuits have recognized an exception from the *Heck* favorable termination requirement for plaintiffs no longer in custody that were precluded from obtaining habeas relief. [collecting cases] Although other circuits have disagreed, I believe the cases from the Second, Sixth, and Ninth Circuits define a sensible application of the favorable termination requirement based on Justice Souter's concurrence in *Spencer* to plaintiffs that are no longer in custody and who, despite due diligence, could not have obtained habeas corpus relief." [footnotes omitted]); ***S.E. v. Grant County Bd. of Educ***., 544 F.3d 633, 638, 639 (6th Cir. 2008) ("Plaintiffs convincingly assert that *Powers v. Hamilton County Public Defender Commission*, 501 F.3d 592,603 (6th Cir.2007) [FN3], *cert. denied*, __ S.Ct. __, 77 U.S.L.W. 3019 (U.S. Oct. 6, 2008) (No. 07-1318), supports their position that *Heck* poses no bar to the instant suit, because A.E. was never in custody, was not convicted or sentenced, and was never eligible for habeas corpus relief. Accordingly, they argue she was improperly prohibited from 'seek[ing] vindication of her federal rights.' . . . Given the facts of this case, where the plaintiff was neither convicted nor sentenced and was habeas-ineligible, we hold that *Heck* is inapplicable, and poses no bar to plaintiffs' claims."); ***Wilson v. Johnson***, 535 F.3d 262, 267, 268 & n.8 (4th Cir. 2008) ("Both parties readily recognize that the circuits are split on this issue. Four circuits regard the five justice plurality in *Spencer* as *dicta*, and continue to interpret *Heck* as barring individuals from filing virtually all § 1983 claims unless the favorable termination requirement is met. . . On the other hand, five circuits have held that the *Spencer* plurality's view allows a plaintiff to obtain relief under § 1983 when it is no longer possible to meet the favorable termination requirement via a *habeas* action. . . As evidenced by the circuit split, the Supreme Court has yet to conclusively decide if a former inmate can file a § 1983 claim when his habeas avenue to federal court has been foreclosed. . . . Because Wilson's § 1983 claim seeks damages for past confinement, he does not fall squarely within the holdings of *Preiser*, *Wolff*, *Heck* or *Spencer*. Thus, while Supreme Court dicta in *Heck* and *Spencer* provides grist for circuits on both sides of this dilemma, we are left with no directly applicable precedent upon which to rely. We believe that the reasoning employed by the plurality in *Spencer* must prevail in a case, like Wilson's, where an individual would be left without any access to federal court if his § 1983 claim

was barred. Indeed, the reach and intent of the habeas remedy would not be circumscribed by Wilson's § 1983 claim since he filed it after the expiration of his sentence. . . . If a prisoner could not, as a practical matter, seek habeas relief, and after release, was prevented from filing a § 1983 claim, § 1983's purpose of providing litigants with 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nations,' . . . would be severely imperiled. Barring Wilson's claim would leave him without access to any judicial forum in which to seek relief for his alleged wrongful imprisonment. Quite simply, we do not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right − freedom − should be left without access to a federal court. . . . While Wilson concedes that filing a petition for habeas corpus was theoretically possible, he argues that complying with habeas' administrative exhaustion requirement during the additional confinement was impossible."); ***Erlandson v. Northglenn Municipal Court***, 528 F.3d 785, 787, 789 n.2 (10th Cir. 2008) ("Mr. Erlandson alleges that his municipal court conviction [for littering his own property] resulted only in a monetary fine. However, the imposition of a fine, by itself, does not satisfy the custody requirement. . . Therefore, because Mr. Erlandson is not in custody, the habeas corpus claims he raises seeking to overturn his conviction must be dismissed. . . . . Because we are relying on the *Rooker-Feldman* doctrine to dispose of any claims asserted by Mr. Erlandson under § 1983, we do not need to decide whether the Supreme Court's 'favorable-termination requirement'. . . applies in cases such as this one where the party seeking relief from a state-court conviction, through no fault of his own, does not have a remedy available under the federal habeas statute. We note, however, that there is currently a split among our sister circuits on this issue. *See, e.g., Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 601-03 (6th Cir.2007) (discussing circuit split); ***Mendoza v. Meisel***, No. 07-4627, 2008 WL 726860, at *1 (3rd Cir. Mar. 19, 2008) (per curiam) ("The District Court reasoned that Mendoza is barred from asserting a § 1983 claim until the convictions on his challenged motor vehicle offenses are set aside or have otherwise terminated in his favor. . . . We disagree with the District Court that *Heck* applies to a case such as Mendoza's. *Heck* does not bar a § 1983 claim where the plaintiff is unable to challenge his conditions of confinement through a petition for federal *habeas corpus*. . . Because Mendoza was never incarcerated, or otherwise in custody, federal *habeas* relief has never been available to him and, therefore, *Heck* cannot apply."); ***Powers v. Hamilton County Public Defender Com'n***, 501 F.3d 592, 601-03 (6th Cir. 2007) ("Drawing on Justice Souter's *Heck* and *Spencer* pronouncements, Powers argues that the favorable-termination requirement is inapplicable to his claims because he has been released from prison. As an initial matter, Powers misstates the nature of the *Heck* limitation that Justice Souter has theorized. What is dispositive in Powers's situation is not that he is no longer incarcerated, but that his term of incarceration − one day − was too short to enable him to seek habeas relief. It seems unlikely that Justice Souter intended to carve out a broad *Heck* exception for all former prisoners. The better reading of his analysis is that a § 1983 plaintiff is entitled to a *Heck* exception if the plaintiff was precluded 'as a matter of law' from seeking habeas redress, but not entitled to such an exception if the plaintiff could have sought and obtained habeas review while still in prison but failed to do so. . . .To date, neither we, nor the Supreme Court, have conclusively resolved whether *Spencer* should be construed as limiting the reach of *Heck* such that a § 1983 claimant in Powers's shoes is excepted from the favorable-

termination requirement. . . . Although we have not yet definitively weighed in on the interplay between *Heck* and *Spencer*, our sister circuits are divided on the question. Four circuits, including the First, Third, Fifth, and Eighth Circuits, have rejected Justice Souter's analysis and instead have held that § 1983 claimants must comply with *Heck's* favorable-termination requirement even if habeas relief was unavailable to them. These courts have reasoned that to recognize an exception to *Heck* along the lines sketched by Justice Souter would amount to an impermissible deviation from Supreme Court precedent. . . .We disagree with the reasoning of our sister circuits who have decreed themselves bound by *Heck* to the exclusion of Justice Souter's comments in his *Heck* and *Spencer* concurrences. . . . We are persuaded by the logic of those circuits that have held that *Heck's* favorable-termination requirement cannot be imposed against § 1983 plaintiffs who lack a habeas option for the vindication of their federal rights. Most analogous to Powers's case is *Leather v. Ten Eyck*, in which the Second Circuit concluded that the plaintiff's § 1983 suit could proceed despite noncompliance with the favorable-termination requirement because the plaintiff had been assessed only a monetary fine in his criminal proceeding and thus was ineligible for habeas relief. . . The Ninth and Eleventh Circuits also have dispensed with the favorable-termination requirement where habeas is unavailable. . . . These Circuits have the better-reasoned view. Powers was fined for his reckless-driving misdemeanor and then imprisoned for at least one, but not more than thirty, days for his failure to pay the fine. Under these circumstances, there is no way that Powers could have obtained habeas review of his incarceration. This is precisely the kind of situation that Justice Souter had in mind when he argued in *Heck* and *Spencer* that the favorable-termination requirement could not be deployed to foreclose federal review of asserted deprivations of federal rights by habeas-ineligible plaintiffs. Accordingly, we join the Second, Ninth, and Eleventh Circuits in holding that the favorable-termination requirement poses no impediment to Powers's § 1983 claims.").

See also ***Sevy v. Barach***, No. 17-13789, 2019 WL 3556706, at *5 (E.D. Mich. Aug. 5, 2019) ("In this case, Sevy's retaliation claim clears any *Heck* bar. For one, Sevy's First Amendment retaliation claim is consistent with his no contest plea. Sevy says Barach and Marshall used force against him because of his protected speech, not that they arrested him for it (or that he was eventually charged and convicted of a minor offense as a pretext). . . Thus, because Sevy might have been both lawfully arrested for disturbing the peace and yet unlawfully subjected to force because of his speech, his First Amendment retaliation claim is consistent with his conviction. In addition, Sevy could not seek habeas review after he pleaded no contest and paid a fine because he was never in custody and so was precluded from challenging his conviction by way of a petition for a writ of habeas corpus. Thus, *Heck* does not bar his § 1983 claim for First Amendment retaliation."); ***Echavarria v. Roach***, No. 16-CV-11118-ADB, 2017 WL 3928270, at *6–7 (D. Mass. Sept. 7, 2017) ("Defendants Hollow and the City of Lynn argue in their reply brief that Plaintiff should not be protected by *Heck* because Plaintiff became ineligible for federal habeas corpus relief by 2000. . . This argument is unsupported by caselaw, and Defendants have not stated a clear reason to impose a Catch-22 upon Plaintiff whereby any § 1983 suit that implicated the validity of his conviction would have been barred by *Heck* prior to the date his motion for a new trial was granted, but also foreclosed after that point because it was too late to file a moot habeas

corpus petition. Defendants cite *Figueroa* for the proposition that 'the impugning of an allegedly unconstitutional conviction in a separate, antecedent proceeding [is] a prerequisite to a resultant section 1983 action for damages,' but they fail to note that this quotation comes from a section discussing the appellants' attempt to 'collapse the habeas proceedings into their section 1983 action, thereby creating a legal chimera through which they seek simultaneously to invalidate [the] conviction and to recover damages,' and involves a case where the criminal defendant's conviction had not been reversed or vacated but could no longer be challenged through a habeas corpus petition because he was deceased. . . Here, Plaintiff's conviction was vacated, and he has not attempted to conflate a habeas corpus petition with a § 1983 suit. To the extent Defendants intend to argue that the filing of a timely habeas corpus petition should be a prerequisite to obtaining the protection of *Heck*, they have not cited cases or other persuasive sources . . . to support this assertion. Furthermore, the Court notes that, pursuant to *Heck*, Petitioner's cause of action did not accrue until his motion for a new trial was granted; therefore, the issue is not whether equitable tolling applies, as Defendants imply, but rather, when his cause of action came into being. . . Accordingly, Plaintiff's suit is not barred by the statute of limitations. Plaintiff's claims did not accrue until, at the earliest, the date his motion for a new trial was granted, April 30, 2015."); ***D.D. v. Scheeler***, No. 1:13-CV-504, 2015 WL 892387, at *8 (S.D. Ohio Mar. 3, 2015) ("The Court also rejects Defendants' argument that S.D.'s claim is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). The *Heck* rule prohibits § 1983 actions that necessarily require the court to find the conviction underlying an action was invalid. Defendants rely upon *S.E. v. Grant County Bd. of Educ.*, 522 F.Supp.2d 826, 831 (E.D.Ky.2007), *aff'd,* 544 F.3d 633 (6th Cir.2008) for their argument that S.D.'s participation in a diversion program constitutes a conviction and bars her § 1983 claim pursuant to *Heck.* In that case, the district court found that there was no material difference between a diversion program entered into by plaintiff, which it deemed was not a favorable termination, and a conviction resulting in probation. . . As discussed, it is disputed whether S.D. participated in a diversion program. But even if she did, Defendants ignore Sixth Circuit case law. On appeal, the Sixth Circuit expressly rejected the Defendants' argument and district court's analysis in *S.E. Grant* and stated, 'where the plaintiff was neither convicted nor sentenced and was habeas-ineligible, we hold that *Heck* is inapplicable, and poses no bar to plaintiffs' claims.'. . Accordingly, Defendants' argument that *Heck* precludes S.D.'s § 1983 claims is inconsistent with Sixth Circuit precedent and must be rejected."); ***Kirk v. Muskingum County Ohio***, No. 2:09-cv-0583, 2010 WL 3719286, at *4 (S.D. Ohio May 24, 2010) ("Like the plaintiff in *Powers,* Plaintiff was not 'in custody' long enough to have obtained habeas review within his short period of incarceration. . . Consequently, the *Heck* doctrine does not apply to Plaintiff's claims in this case. *See Ballanger v. City of Lebanon,* No. 1:07-CV-00256, 2008 WL 4279583 at *4-5 (S.D.Ohio 2008) (holding that the *Heck* doctrine did not apply to a plaintiff incarcerated for forty-five days)."); ***Medeiros v. Clark***, No. CV-F-09-1177 OWW/GSA, 2010 WL 1812641, at *12 (E.D. Cal. May 5, 2010) ("Here, because Plaintiff was never convicted of any crime, he could not challenge the misdemeanor pretrial diversion through appeal or habeas corpus. Plaintiff was never incarcerated and suffers no collateral consequences as a result of the misdemeanor pretrial diversion. *See Nickerson v. Portland Police Bureau,* 2008 WL 4449874 at *8 (D.Or., Sept.30, 2008): "With no habeas remedy available, and no allegations of any collateral consequences

stemming from a traffic conviction, *Heck* does not bar plaintiff's section 1983 equal protection claim."); *see also Cole v. Doe I Thru 2 Officers of the City of Emeryville Police Dep't.*, 387 F.Supp.2d 1084, 1092-1093 (N.D.Cal.2005). Defendants' motion to dismiss the First Cause of Action as barred by *Heck* is DENIED."); ***Ferrell v. Seagraves,*** No. 4:07-cv-35, 2008 WL 4763435, at *1 (E.D. Tenn. Oct. 29, 2008) ("As in *Powers*, Plaintiff was sentenced to only thirty days in jail. . . The length of his sentence effectively precluded him from seeking any resolution to his challenges to his incarceration through federal habeas corpus. . . Accordingly, under the law as it stood at the time of the Court's November 2, 2007 Memorandum and Order, none of Plaintiff's claims were barred by *Heck*."); ***Nickerson v. Portland Police Bureau***, No. 08-217-HU, 2008 WL 4449874, at *8 (D. Or. Sept. 30, 2008) ("*Guerrero* underscores the need to examine why habeas relief is unavailable to a section 1983 plaintiff whose claim would, if successful, necessarily invalidate an underlying conviction. As the *Guerrero* court explained, if habeas relief is unavailable because of a plaintiff's failure to timely pursue habeas remedies, *Heck* will still bar the section 1983 claim. . . . The facts in the instant case are analogous to those in *Nonnette,* not *Guerrero* or *Cunningham*. Here, the allegations in the Amended Complaint indicate that plaintiff was fined upon conviction of the traffic offense for which Officer Hart cited him, but he was never incarcerated. Thus, he has no habeas remedy available to him. Moreover, the unavailability of habeas is not related to a lack of diligence on plaintiff's part. With no habeas remedy available, and no allegations of any collateral consequences stemming from a traffic conviction, *Heck* does not bar plaintiff's section 1983 equal protection claim."); ***El Badrawi v. Department of Homeland Sec.***, 579 F.Supp.2d 249, 273 (D. Conn. 2008) ("*Heck* also does not bar El Badrawi's actions based on his false arrest and initial detention. *Heck*'s logic is rooted in the recognition that prisoners need to exhaust their habeas remedies. . . Accordingly, *Heck* will not bar an action when the prisoner was never in state confinement, and hence never had any remedy in habeas corpus in which he could challenge his conviction or confinement. . . By the same logic, *Heck* does not bar a claim when the prisoner was in custody for such a brief period of time that any available habeas remedy would have been pointless."); ***Ballinger v. City of Lebabnon***, No. 1:07-CV-00256, 2008 WL 4279583, at *5 (S.D. Ohio Sept. 18, 2008) ("The Sixth Circuit has recently held that '*Heck*'*s* favorable-termination requirement cannot be imposed against § 1983 plaintiffs who lack a habeas option for the vindication of their federal rights.' . . That is precisely the case here. In the instant case, plaintiff was incarcerated for forty-five days then released. Like the plaintiff in *Powers* who was fined for a misdemeanor and imprisoned for at least one, but not more than thirty days for his failure to pay the fine, 'there is no way that [plaintiff] could have obtained habeas review of his incarceration.'. . A person convicted of a crime in state court can obtain a writ of habeas corpus only if he is 'in custody' pursuant to the unlawful judgment of that court. . . Since plaintiff was not 'in custody' long enough to seek habeas corpus relief, *Heck*'s favorable termination requirement is not a bar to plaintiff's Section 1983 action."); ***Sanabria v. Martins,*** 568 F.Supp.2d 220, 224-26 (D. Conn. Mar. 26, 2008) ("In *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir.1999), the Second Circuit reasoned that, where a § 1983 plaintiff was never incarcerated for a prior offense and thus had no opportunity to raise a constitutional challenge *via habeas corpus*, *Heck* does not apply. Here, Sanabria pleaded guilty to violating ' 53a-167(a) and was sentenced to pay a $250 fine without any term of incarceration. . . Like the plaintiff in *Leather*, Sanabria had no *habeas corpus* remedy,

and so *Heck* is no bar to his § 1983 action. Under such circumstances, the *Leather* court concluded, a plaintiff should 'be permitted to pursue his § 1983 claim in the district court unless principles of *res judicata* or collateral estoppel preclude his suit.' . . . . Whether the question of how to view Sanabria's guilty plea is approached through the lens of preclusion or evidence law, though, the effect would be the same given the present procedural posture. Even if not estopped from denying the facts underlying his plea and conviction, Sanabria cannot create a disputed issue of material fact relevant to the summary judgment analysis simply by contesting the basis for his guilty plea. . . Sanabria pleaded guilty to interfering with a police officer in violation of Connecticut General Statutes ' 53a-167a, a class A misdemeanor offense, thereby conceding the factual basis for the plea and admitting the facts necessary to establish the three elements of that offense: (1) interference with an officer, (2) with intent to so interfere, (3) while the officer is performing his or her duties. His bare assertions in opposition that he offered no resistance, therefore, provide no demonstration of the existence of a genuine issue of material fact on the subject which underlay his conviction. The analysis does not end here, however, because Plaintiff's § 1983 allegations are not wholly congruent with the facts determined by his guilty plea. . . . Sanabria cannot now proceed with a § 1983 action premised on his contention that he did nothing wrong and that Martins acted without provocation. But to the extent Plaintiff is seeking damages based on the quantum of force Martins used after Plaintiff completed the offense of interfering with an officer (or perhaps in response thereto), there remains a genuine issue of material fact for trial."); ***Denton v. Hanifen***, No. 3:06CV00400-JDM, 2008 WL 655984, at *3 (W.D. Ky. Mar. 7, 2008) ("The Sixth Circuit and others . . . have held that *Heck* is no bar to the claims of a § 1983 plaintiff for whom *habeas* relief was not available to vindicate their federal rights. *Powers v. Hamilton County Public Defender Commission*, 501 F.3d 592, 603 (2008)(citing cases from sister circuits). Such is the case here. A person convicted of a crime in state court can obtain a writ of *habeas corpus* only if he is 'in custody' pursuant to the unlawful judgment of that court. . . A person, even if in pre-trial custody, cannot attack a judgment until it is rendered, or a sentence until he has begun to serve it. . . Thus, even though Mr. Denton was 'in custody' until the court accepted his guilty plea and ordered him released, *habeas* relief was not available to him because no judgment had been rendered and no sentence imposed based on that judgment. In addition, while those on parole or released on their own recognizance continue to suffer restraints on their liberty, and therefore are considered 'in custody' for purposes of *habeas* relief even though not physically behind bars, . . . *habeas* relief is foreclosed to those who have completed their term of incarceration, with no further obligations due, or supervision enforced by, the state. Accordingly, the moment the state court entered its order accepting Mr. Denton's guilty plea and awarded him full credit for time served with no further restraints on his liberty, *habeas* relief was foreclosed to Mr. Denton. The time between the court's acceptance of Mr. Denton's guilty plea and the order releasing him was only slightly more than one week. Thus, although technically he could have pursued *habeas* relief during that small window of time, as a practical matter, *habeas* relief was foreclosed to him once the judge entered the order releasing him and, practically speaking, was never really available. Consequently, *Heck* poses no bar to plaintiff's assertion of his § 1983 claim in this matter."); ***Brown v. City of Chicago***, No. 04 C 8134, 2006 WL 3320103, at *4, *6 (N.D. Ill. Nov. 9, 2006) ("Plaintiff cannot bring a *habeas* action because Plaintiff's *habeas* petition was dismissed on April

27, 2006, by this Court because Plaintiff was not then presently in the custody of the Illinois Department of Corrections or under mandatory supervised release. . . Therefore, the central issue is whether Section 1983 actions should be available to former prisoners, who cannot avail themselves of the *habeas* remedy, or whether such actions are barred by the *Heck* doctrine.. . . .[B]ecause Plaintiff is no longer in custody and, therefore, cannot pursue the *habeas* action, Plaintiff can pursue his Section 1983 claims."); ***Powell v. Bucci***, No. 04-CV-1192, 2006 WL 2052159, at *4 (N.D.N.Y. July 21, 2006) ("At first blush, it appears that the *Heck* Rule would bar the three remaining Counts. Counts 1, 2 and 3 arise out of the August 13, 2004 seizure that resulted in the traffic tickets and subsequent convictions and seek to 'recover damages for [an] allegedly unconstitutional ... imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.' . . . However, the Second Circuit has interpreted *Heck* as applying only when the subsequent conviction resulted in the plaintiff's incarceration. . . . Here, there is no indication that Plaintiff was incarcerated because of her convictions on the traffic violations, and, therefore, the *Heck* Rule does not apply to any of the Counts."); ***Limone v. United States,*** 271 F.Supp.2d 345 (D. Mass. 2003) (unfair to apply *Heck* where government had blocked effective access to post-conviction remedies Aby actively subverting [attempts to prevail through] commutation procedures and by withholding critical evidence until years after [convicted men]had died."), *aff'd in part and remanded in part*, ***Limone v. Condon***, 372 F.3d 39(1st Cir. 2004); ***Lueck v. Wathen,*** 262 F. Supp.2d 690, 699 & n.7 (N.D. Tex. 2003) ("[A] prisoner who is effectively barred from raising a non-frivolous claim in a federal habeas proceeding because the state has interfered with his right of access to the courts should be able to sue for money damages, to the extent those damages can be quantified.").

The court in *Nonnette* distinguished its decision in ***Cunningham v. Gates,*** 312 F.3d 1148 (9th Cir. 2003), *as amended on denial of reh'g*, (Jan. 14, 2003) and *cert. denied*, 538 U.S. 960 (2003), where *Heck* was held to bar plaintiff's claim in a situation where the unavailability of *habeas* was due to a failure to timely pursue *habeas* remedies. 312 F.3d at 1153 n.3.

See also ***Galanti v. Nevada Department of Corrections***, 65 F.4th 1152, 1153-54, 1156 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 527 (2023) ("We hold that *Heck* does not apply in this case. Galanti is no longer in custody and is thus unable to raise claims for credit deductions in a petition for habeas corpus. As such, this case falls within the limited exception to *Heck* we recognized in *Nonnette v. Small*, 316 F.3d 872, 875–76 (9th Cir. 2002). Because *Heck* does not bar this lawsuit, we reverse and remand with respect to Galanti's due process claim, which the district court misconstrued as challenging only the denial of credit-deductions from his parole date. . . . Although the district court did not reach the issue, Defendants assert that all of Galanti's claims are barred by *Heck* because a judgment in his favor would necessarily imply the invalidity of the duration of his sentence. Galanti argues that his claims fall under an exception to *Heck* recognized by our court in *Nonnette* because he is no longer incarcerated and thus cannot bring his claim for credit deductions in a habeas petition. Defendants contend that *Nonnette* is inapplicable because Galanti did not timely pursue habeas relief while in custody. . . . This case is much more like *Nonnette* than *Guerrero.* First, Galanti challenges the deprivation of credit-deductions, not his underlying

sentence. Second, to the extent that *Guerrero* imposes a diligence requirement on § 1983 plaintiffs under *Nonnette*, it does not bar Galanti's claim. Given the timeline Galanti alleges, he had little time to obtain habeas relief. Galanti earned the credits at issue on April 1, 2018, he was released on June 1, 2018, and his parole expired on August 22, 2018, giving him only a few months during which he could have filed a habeas petition. And if his sentence expired during the pendency of his case, which is very likely given the timeframe, it would have been dismissed as moot. This differs from the situation in *Guerrero*, in which the plaintiff allowed the habeas statute of limitations to lapse and then attempted to 'use his failure to timely pursue habeas remedies as a shield against the implications of *Heck.*'. . Moreover, Galanti alleges that he made complaints and took other efforts to rectify the situation while in custody, unlike Guerrero, who waited years before taking 'any action at all.'. . Accordingly, *Heck* does not bar this suit.")

Compare ***Martin v. City of Boise***, 920 F.3d 584, 613-15 (9th Cir. 2019) (*amended opinion on denial of rehearing and denial of rehearing en banc*), *cert. denied*, 140 S. Ct. 674 (2019), *abrogated on other grounds by City of Grants Pass, Oregon v. Johnson*, 144 S. Ct. 2202 (2024) ("Relying on the concurring and dissenting opinions in *Spencer*, we have held that the 'unavailability of a remedy in habeas corpus because of mootness' permitted a plaintiff released from custody to maintain a § 1983 action for damages, 'even though success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits.' *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002). But we have limited *Nonnette* in recent years. Most notably, we held in *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), that even where a plaintiff had no practical opportunity to pursue federal habeas relief while detained because of the short duration of his confinement, *Heck* bars a § 1983 action that would imply the invalidity of a prior conviction if the plaintiff could have sought invalidation of the underlying conviction via direct appeal or state post-conviction relief, but did not do so. . . . Here, the majority of the plaintiffs' claims for *retrospective* relief are governed squarely by *Lyall*. It is undisputed that all the plaintiffs not only failed to challenge their convictions on direct appeal but expressly waived the right to do so as a condition of their guilty pleas. The plaintiffs have made no showing that any of their convictions were invalidated via state post-conviction relief. We therefore hold that all but two of the plaintiffs' claims for damages are foreclosed under *Lyall*. . . .The *Heck* doctrine, in other words, serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge. In context, it is clear that *Wilkinson*'s holding that the *Heck* doctrine bars a § 1983 action 'no matter the relief sought (damages or equitable relief) ... if success in that action would necessarily demonstrate the invalidity of confinement or its duration' applies to equitable relief concerning an existing confinement, not to suits seeking to preclude an unconstitutional confinement in the future, arising from incidents occurring after any prior conviction and stemming from a possible later prosecution and conviction. . . As *Wilkinson* held, 'claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration)' are distant from the 'core' of habeas corpus with which the *Heck* line of cases is concerned, and are not precluded by the *Heck* doctrine. . . In sum, we hold that the majority of the plaintiffs' claims for retrospective relief are barred by *Heck*, but both Martin and Hawkes stated claims for damages to

which *Heck* has no application. We further hold that *Heck* has no application to the plaintiffs' requests for prospective injunctive relief.") *with* ***Martin v. City of Boise***, 920 F.3d 584, 618-20 (9th Cir. 2019) (*amended opinion on denial of rehearing and denial of rehearing en banc*), *cert. denied,* 140 S. Ct. 674 (2019), *abrogated on other grounds by City of Grants Pass, Oregon v. Johnson,* 144 S. Ct. 2202 (2024) (Owens, J., concurring in part and dissenting in part) ("I agree with the majority that the doctrine of *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), bars the plaintiffs' 42 U.S.C. § 1983 claims for damages that are based on convictions that have not been challenged on direct appeal or invalidated in state post-conviction relief. *See Lyall v. City of Los Angeles,* 807 F.3d 1178, 1192 n.12 (9th Cir. 2015).I also agree that *Heck* and its progeny have no application where there is no 'conviction or sentence' that would be undermined by granting a plaintiff's request for relief under § 1983. . . I therefore concur in the majority's conclusion that *Heck* does not bar plaintiffs Robert Martin and Pamela Hawkes from seeking retrospective relief for the two instances in which they received citations, but not convictions. I also concur in the majority's Eighth Amendment analysis as to those two claims for retrospective relief. Where I part ways with the majority is in my understanding of *Heck*'s application to the plaintiffs' claims for declaratory and injunctive relief. . . . *Edwards* . . .leads me to conclude that an individual who was convicted under a criminal statute, but who did not challenge the constitutionality of the statute at the time of his conviction through direct appeal or post-conviction relief, cannot do so in the first instance by seeking declaratory or injunctive relief under § 1983. . . I therefore would hold that *Heck* bars the plaintiffs' claims for declaratory and injunctive relief. We are not the first court to struggle applying *Heck* to 'real life examples,' nor will we be the last. . . If the slate were blank, I would agree that the majority's holding as to prospective relief makes good sense. But because I read *Heck* and its progeny differently, I dissent as to that section of the majority's opinion. I otherwise join the majority in full.")

See also ***Lyall v. City of Los Angeles***, 807 F.3d 1178, 1191-92 & n.12 (9th Cir. 2015) ("We have looked to the separate *Spencer* opinions for guidance as to whether *Heck's* favorable-termination requirement applies in all § 1983 cases and have concluded that, at least sometimes, it does not. Two cases, *Nonnette v. Small,* 316 F.3d 872 (9th Cir.2002), and *Guerrero v. Gates,* 442 F.3d 697 (9th Cir.2006), define the rough boundaries of the *Heck* bar, as we have construed it post-*Spencer.* In *Nonnette,* a state prisoner, after first exhausting his prison administrative remedies, brought a § 1983 suit against prison officials, alleging that they wrongly revoked some of his good-time credits and placed him in administrative segregation without giving him adequate process. The district court held that his § 1983 action was barred by *Heck.* By the time we heard his appeal, however, the inmate had been released. We held that because any habeas corpus petition filed by the now-former inmate would be dismissed as moot, he was not barred by *Heck* from bringing a § 1983 suit. . . We stated that this holding 'affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters; the status of prisoners challenging their underlying convictions or sentences does not change upon release, because they continue to be able to petition for a writ of habeas corpus.'. .In *Guerrero,* decided four years later, we distinguished *Nonnette* and concluded that an ex-inmate's § 1983 suit was barred by *Heck.* The plaintiff in *Guerrero* alleged that various LAPD officials had conspired to subject him to excessive

force, wrongful arrest, and malicious prosecution. . . He did not file suit until approximately a year after his release from prison. . . Examining our previous decisions, we determined that 'timely pursuit of available habeas relief' is an important prerequisite for a § 1983 plaintiff seeking to escape the *Heck* bar. . . Thus, we explained, the plaintiff in *Nonnette* deserved relief from the *Heck* bar because he 'immediately pursued relief after the incident giving rise to [his] claims and could not seek habeas relief only because of the shortness of his prison sentence.'. . Guerrero, by contrast, never challenged his convictions prior to filing his § 1983 suit, despite having years in custody in which to do so. We held that this 'self-imposed' failure to seek habeas relief was not a ground for allowing Guerrero to escape the *Heck* bar. Cortez's case is more akin to *Guerrero* than to *Nonnette.* . . . We acknowledge that Cortez's inability to obtain federal habeas relief is no fault of his own: He was in custody for only two days after his arrest and was not sentenced to any prison time as a result of his infraction conviction. The brevity of Cortez's time in custody made federal habeas effectively unavailable to him. But Cortez failed to exercise his right, under California law, to a direct appeal from his conviction. *See* Cal.Penal Code § 1466(b)(1). Cortez's success in his § 1983 suit would imply that his conviction in California was wrongly obtained. Yet his conviction has never been invalidated. Indeed, Cortez has never sought to invalidate it through direct appeal or post-conviction relief. He is thus barred by *Heck.* . . . We are not an alternative forum for challenging his conviction. We therefore affirm the district court's grant of summary judgment to the defendants with respect to Cortez's unreasonable-seizure claim."); ***Reilly v. Herrera***, 622 F. App'x 832, 834 (11th Cir. 2015) ("We have not explicitly ruled on whether a plaintiff may bring a § 1983 action in the event that habeas relief is unavailable, even if success on the merits would call into question the validity of a conviction. We decline to do so here because Mr. Reilly's case does not fit within the framework of scenarios mentioned in Justice Souter's *Spencer* concurrence. During his three-year term of imprisonment, Mr. Reilly had ample time to pursue an appeal or other post-conviction remedies on the supervised release revocation, yet he did not avail himself of any of them. We doubt that Justice Souter intended to propose a broad exception to include prisoners who had the opportunity to challenge their underlying convictions but failed to do so. [citing *Guerrero*] Consequently, we conclude that Justice Souter's proposed *Heck* exception in *Spencer,* even if adopted, does not apply to Mr. Reilly's case.") [*See also* ***Reilly v. Herrera***, 729 F. App'x 760, ___ (11th Cir. 2018) ("[T]he thrust of Mr. Reilly's current argument is that he would have been entitled to relief under *Spencer* but for our erroneous finding that he failed to pursue state court remedies. Under § 1983, a person acting under color of state law may be held liable for causing the deprivation of 'any rights, privileges, or immunities secured by the Constitution.' 42 U.S.C. § 1983. A § 1983 suit for damages must be dismissed, however, if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.' *Heck,* 512 U.S. at 487. In a concurring opinion in *Spencer,* Justice Souter discussed the implications of *Heck* and opined that a 'former prisoner, no longer "in custody"' should be allowed to 'bring a § 1983 claim establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.'. . To date, however, neither the Supreme Court nor this Court has applied the exception described in Justice Souter's concurrence in a published opinion. Justice Souter's concurring opinion in *Spencer* did not overturn *Heck*'s bar on § 1983 actions challenging the validity of the

claimant's conviction or sentence. . . Therefore, even if we erred in finding that Mr. Reilly had not pursued his state court remedies, our ruling was not clearly erroneous and did not result in manifest injustice because *Heck* is still controlling law.")]; ***Radwan v. County of Orange***, 519 F. App'x 490, 490-91 (9th Cir. 2013) ("The district court properly ruled that *Heck* bars Radwan's § 1983 unlawful search and seizure claim. We have repeatedly found *Heck* to bar § 1983 claims, even where the plaintiff's prior convictions were the result of guilty or no contest pleas. . . In his § 1983 suit, Radwan challenges the search and seizure of the marijuana that formed the basis of his conviction for marijuana possession under California Health and Safety Code § 11357(b). Were Radwan to succeed on his § 1983 search and seizure claim, such success would necessarily imply the invalidity of his conviction for marijuana possession. . . Thus, *Heck* bars this claim. . .Moreover, even though Radwan could not pursue habeas corpus relief, *Heck* bars his § 1983 search and seizure claim because he failed to meet *Heck's* favorable termination requirement due to his own lack of diligence."); ***Guerrero v. Gates***, 442 F.3d 697, 704, 705 (9th Cir. 2006) ("Guerrero's prior convictions have never been invalidated. We therefore hold that, with the exception of his excessive force claim, *Heck* bars Guerrero's § 1983 claims. The fact that Guerrero is no longer in custody and thus cannot overturn his prior convictions by means of *habeas corpus* does not lift *Heck's* bar. Although exceptions to *Heck's* bar for plaintiffs no longer in custody may exist, as suggested by concurring members of the Supreme Court in *Spencer v. Kemna* and adopted by this court in *Nonnette v. Small*, any such exceptions would not apply here. The *Spencer* concurrence suggests that a plaintiff's inability to pursue *habeas* relief after release from incarceration should create an exception to *Heck's* bar. The plaintiff in *Spencer* had diligently sought relief for his claim of invalid revocation of parole. After appealing the denial of his state *habeas* petition all the way to the state supreme court, he filed a federal *habeas* petition. His prison term ended, however, before the court could render a decision. . . . In following the reasoning of the concurrence in *Spencer*, we have emphasized the importance of timely pursuit of available remedies in two cases. In *Cunningham v. Gates*, we held that *Heck* barred the plaintiff's § 1983 claims despite the fact that *habeas* relief was unavailable. *Habeas* relief was 'impossible as a matter of law' in Cunningham's case because he failed timely to pursue it. . . . Although we held in *Nonnette* that the plaintiff could bring § 1983 claims despite the *Heck* bar because habeas relief was unavailable, we did so because Nonnette, unlike Cunningham, timely pursued appropriate relief from prior convictions. *Nonnette* was founded on the unfairness of barring a plaintiff's potentially legitimate constitutional claims when the individual immediately pursued relief after the incident giving rise to those claims and could not seek *habeas* relief only because of the shortness of his prison sentence. . . . Thus, a § 1983 plaintiff's timely pursuit of available *habeas* relief is important. Even so, we emphasized that Nonnette's relief from *Heck* 'affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters,' not challenges to an underlying conviction such as those Guerrero brought.").

See also ***Smith v. Ulbricht***, No. CV 12–00199–M–DLC, 2013 WL 589628, *1, *2 (D. Mont. Feb. 14, 2013) ("In essence, Smith suggests that an individual not 'in custody' for purposes of the habeas statute may always proceed under a section 1983 action. Accordingly, Smith argues *Heck's* bar does not apply and his Complaint should not be dismissed. The Court disagrees. At the outset,

the Court notes that, as stated by the majority in *Heck*, the *Heck* bar does not have an 'in custody' component; it generally applies when a § 1983 action would render a sentence *or* conviction invalid. . . However, in *Spencer*, the four concurring justices and one dissenting justice recognized that, in limited circumstances, *Heck* may not bar a § 1983 action when an individual cannot proceed under a habeas action because he is no longer 'in custody'. . . Relying on Justice Souter's concurring opinion in *Spencer*, this exception was expressly adopted by the Ninth Circuit in *Nonnette v. Small*, 316 F.3d 872, 875–877 (9th Cir.2002). In *Nonnette*, the Ninth Circuit recognized in a § 1983 action challenging the revocation of good time credits that *Heck* should not preclude Nonnette's claim because he could not maintain a habeas action since he was no longer incarcerated. . . Central to the *Nonnette* court's decision was the fact that Nonnette had timely and diligently pursued appropriate relief from prior convictions. . . *Nonnette's* exception to *Heck* is to be narrowly construed, as evidenced by the court's emphasis that it 'affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters.'. . *Nonnette's* exception was clarified in *Guerrero v. Gates*, 442 F.3d 697 (9th Cir.2003). Guerrero was convicted on narcotics charges and served his sentence. . . After he was released, he filed a § 1983 action challenging, among other things, the validity of his convictions. . . After distinguishing *Nonnette*, the Court held that *Heck* barred Guerrero's § 1983 claims . . . .Smith's situation resembles *Guerrero* far more closely than *Nonnette*. Unlike *Nonnette*, Smith has not timely and diligently sought appropriate relief from his prior convictions. According to his Complaint, Smith's first attempt to challenge his June 6, 2008 conviction was April 9, 2012. Smith did not apply for habeas relief and his failure to timely do so was self-imposed. Thus, though habeas relief for Smith may be 'impossible as a matter of law,' he is not entitled to the relaxation of *Heck's* bar. Accordingly, Smith's objection that *Heck* does not bar his complaint because he cannot pursue a habeas action since he is not 'in custody' is overruled."); ***Jean-Laurent v. Hennessy***, No. 05-CV-1155 (JFB)(LB), 2008 WL 5274322, at *3, *4 (E.D.N.Y. Dec. 18, 2008) ("In the instant case, the exception to the *Heck* rule established by the Second Circuit in *Jenkins* and its progeny does not apply. Plaintiff correctly notes that his *habeas* petition, which challenged his 2002 Queens County conviction, was dismissed, in part, because plaintiff was not in custody at the time he filed his *habeas* petition. . . However, plaintiff overlooks the fact that the court also found that his petition was untimely because it was filed over two years after the expiration of the one-year statute of limitations period. . . and there was no basis for equitable tolling. . . . Thus, plaintiff did not file a direct appeal in state court challenging his conviction, and did not file a timely *habeas* petition in federal court with respect to such conviction. Under these circumstances, the exceptions to the *Heck* rule do not apply because plaintiff clearly had legal remedies available to him both in state and federal court to challenge his conviction, but failed to avail himself of such remedies in a timely manner. . . Such a situation is distinct from the individual who challenges his conviction in the state and federal courts in a timely manner but, through no fault of his own, is unable to have the federal court consider his challenge because he is no longer in custody at the time his petition is filed. To hold otherwise in the instant case would allow a plaintiff to completely circumvent the *Heck* rule by filing an untimely *habeas* petition and then arguing that his Section 1983 claims are not barred by the conviction because his challenge was never heard on the merits by the federal court. There is nothing in Supreme Court nor Second Circuit jurisprudence that warrants such a

result."); ***El v. Crain***, 560 F.Supp.2d 932, 944, 945 (C.D. Cal. 2008) ("A complication, not briefed by the parties, arises here because Plaintiff already has completed the 180-day sentence for the underlying conviction. . . In some exceptional situations, *Heck* may not bar a noncustodial plaintiff − one to whom habeas corpus is not available because he is no longer 'in custody' as required . . . from proceeding with a civil-rights action that, if successful, would imply the invalidity of an adjudicated offense. Five Supreme Court Justices in *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 97, 140 L.Ed.2d 43 (1998), believed that a 'convict given a fine alone, however onerous, or sentenced to a term too short to permit even expeditious litigation without continuances before expiration of the sentence,' should not be ineligible for § 1983 relief, because his circumstances rendered impossible any successful challenge to his conviction or parole revocation − although this five-Justice view does not have the status of a *holding*. . . The Ninth Circuit has interpreted *Spencer* as creating a limited exception to *Heck*, permitting some litigants who no longer may pursue habeas relief to bring collateral civil rights claims. . . But this exception is narrow, for it is limited to plaintiffs (1) who are 'former prisoners challenging loss of good-time credits, revocation of parole or similar matters,' . . . not collaterally challenging underlying criminal *convictions*, and (2) who diligently pursued 'expeditious litigation' to challenge those punishments to the extent possible. . . Plaintiff satisfies neither of these tests for an exemption from *Heck*. First, his current action would imply the invalidity of a criminal conviction, not a mere parole revocation or prison administrative decision. Second, although Plaintiff vigorously challenged that conviction in the state courts, he did not do so entirely 'expeditious[ly]': he missed a critical deadline for filing in the intermediate appellate court, resulting in a procedural default. For the foregoing reasons, *Heck* bars Plaintiff's claims of excessive force, and Defendants are entitled to summary judgment on those claims."); ***Adamson v. Los Angeles County***, No. CV 06-4384-ODW ("GR), 2008 WL 779519, at *4 (C.D. Cal. Mar. 20, 2008) ("*Heck* bars Plaintiff's claims even though he has completed his sentence. . . . This is true even though the statute of limitations for filing a petition for writ of *habeas corpus* has expired. . . . Just as in *Guerrero*, Plaintiff did not challenge his conviction by any means, including direct appeal or *habeas*, prior to filing this lawsuit approximately two years after his release from prison. . . . The Ninth Circuit has limited the exception to *Heck*. '*Nonnette*'s relief from *Heck* Aaffects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters,' not challenges to an underlying conviction.' . . Plaintiff challenges his underlying conviction and none of the exceptions apply."); ***Byrd v. Teater***, 2008 WL 495757, at *9 -10 (E.D. Cal. Feb. 21, 2008) ("Plaintiff's sentence was six months incarceration (credit for time-served), voluntary enrollment in a residential alcohol treatment program, and three years felony probation. Plaintiff was still on probation when he filed this action. Plaintiff was not precluded from seeking *habeas* relief before he completed the sentence. *Guerrero* makes clear that *Nonnette* is limited to former prisoner's challenging loss of good-time credits, revocation of parole or similar matters. Plaintiff's claims based on the invalidity of his conviction are barred by *Heck v. Humphrey*. . . . A claim that the right to a speedy trial has been violated of necessity challenges the validity of the underlying conviction. A claim challenging the sentence imposed is barred explicitly by *Heck*. Defendants' motions to dismiss the Section 1983 claims on the basis of *Heck v. Humphrey* are GRANTED WITH PREJUDICE to the extent the Section 1983 claims are based on Plaintiff's alleged false arrest and prosecution, on delay in the criminal proceedings against

Plaintiff, and on the sentence imposed. Defendants' motions to dismiss the Section 1983 claims on the basis of *Heck v. Humphrey* are DENIED to the extent the claims are based on excessive bail. This claim addresses a procedure used that does not depend on the invalidity of Byrd's conviction and for which the availability of *habeas corpus* expired upon Plaintiff's relief from custody."); ***Whitmore v. Pierce County Dept. of Community Corrections***, 2007 WL 2116402, at *5 (W.D.Wash. July 19, 2007) ("The Ninth Circuit has held that when a person fails to file a *habeas* petition while in custody and had an opportunity to file one, a civil rights action may be procedurally barred. *Guerrero v. Gates*, 442 F.3d 697 (9th Cir.2006). Here, there is nothing to indicate Mr. Whitmore attempted to challenge his probation hearings in a *habeas* action. He is no longer in custody, and he is barred from bringing an action challenging the probation revocation proceedings at this point in time.").

Compare ***Gilbank v. Wood County Department of Human Services***, 111 F.4th 754, 785-86 (7th Cir. 2024) ("Judge Easterbrook's separate opinion argues for a different reason for dismissal of the four claims that the judges joining this opinion find barred by *Rooker-Feldman.* He treats those claims for injuries inflicted by state-court judgments as not yet having accrued, applying the principles underlying *Heck v. Humphrey*. . . Perhaps *Rooker-Feldman* and *Heck* share deep roots that call for further exploration. . . Nevertheless, the proposed approach would amount to a dramatic and unprecedented expansion of *Heck* beyond cases complaining about the duration of confinement in criminal cases. I am not prepared to take that step. . . . Nothing on the surface of *Heck* or *Balisok* indicates broader extension of their rule to any other categories of federal cases seeking damages for injuries inflicted by state-court judgments. Judge Easterbrook asserts, however, that we must now 'treat *Heck* as generally applicable to state-court judgments that have not been set aside,'. . . based on this court's decision in *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020) (en banc). *Savory* decided a question of accrual for purposes of applying the statute of limitations to civil claims for wrongful conviction. We held that the plaintiff's conviction remained intact, and his claims had not accrued, until he was pardoned. . . We rejected the civil defendants' and the dissenting judge's arguments that Savory's civil claims accrued earlier, when he was released from state custody but while his convictions remained legally intact. . . The dissent in *Savory* argued for the rule proposed by Justice Souter in his *Heck* concurrence. . . *Savory* did not endorse, explicitly or implicitly, an extension of *Heck* to claims like this plaintiff's, which do not have anything to do with a criminal conviction or the length of a criminal sentence. Perhaps the Supreme Court might take such a step in the future, but I do not see a basis for taking such a broad and consequential step at this point. Regarding *Heck*, I should also address Judge Kirsch's reliance upon it and his suggestion that my view of *Rooker-Feldman* would leave *Heck* with no work to do. . . It's an interesting and creative argument, but it loses sight of history. Lower federal courts have long had an express grant of jurisdiction to review criminal judgments of state courts, in the form of writs of habeas corpus. . . . *Heck* was of course a response to civil actions seeking damages under 42 U.S.C. § 1983 for wrongful convictions in state court. *Heck* was tailored to manage the integration of habeas relief and § 1983. To my knowledge there was no suggestion that *Rooker-Feldman* should apply in the context of challenges to criminal convictions. I do not suggest it should be extended there either, given the different heritages of the relevant statutes and the

doctrines that have evolved to manage the respective roles of state and federal courts. If the question were squarely presented in a future case, we could deal with it then.") *with* ***Gilbank v. Wood County Department of Human Services***, 111 F.4th 754, 796 (7th Cir. 2024) (Kirsch, J., concurring in part and dissenting in part) ("The Supreme Court shares neither Judge Hamilton's concerns nor a desire for a broader *Rooker-Feldman* doctrine. The Court has been clear: 'Neither *Rooker* nor *Feldman* elaborated a rationale for a wide-reaching bar on the jurisdiction of lower federal courts, and our cases since *Feldman* have tended to emphasize the narrowness of the *Rooker-Feldman* rule.'. . And in nearly half a century, the Court 'has never applied *Rooker-Feldman* to dismiss an action for want of jurisdiction.'. . The breadth of the dissent's position—and its incongruity with the Court's view—is clear when applied to the overlap between *Rooker-Feldman*'s bar and that of *Heck v. Humphrey*[.]. . Consider a plaintiff alleging malicious prosecution, a Fourth Amendment violation. *Heck* holds that 42 U.S.C. § 1983 does not authorize him to sue for that violation until his maliciously obtained conviction has been set aside. . . But once that happens, the plaintiff can sue in federal court to remedy the violation of his constitutional rights. The approach in Judge Hamilton's dissent, however, would render *Heck*'s holding superfluous. If the dissent were correct, Roy Heck's § 1983 suit would have been dismissed at the outset on jurisdictional grounds under *Rooker-Feldman*—he was a state court loser complaining of injuries effectuated by his conviction. . . But *Heck* is not jurisdictional. . . Under the dissent's unyielding rule, district courts no longer need to (or even have jurisdiction to) invoke *Heck.* Instead, they must dismiss every suit complaining of injuries that contributed to a state court conviction, whether the conviction has been vacated or not. That is not the law.")

See also ***Goldsmith v. Garrett***, No. 24-1234, 2024 WL 3833300, at *2 (7th Cir. Aug. 15, 2024) (not reported) ([T]he expiration of his custody does not allow Goldsmith to avoid *Heck.* Although several Justices, and at least one court of appeals, have concluded that a claim under § 1983 accrues when custody ends—see *Heck*, 512 U.S. at 491–503 (Souter, J., concurring, joined by Blackmun, Stevens & O'Connor, JJ.); *Spencer v. Kemna*, 523 U.S. 1, 21–22 (1998) (Ginsburg, J., concurring); *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999)—this court held in *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020) (en banc), that the rule of *Heck* continues to apply after a person's release from custody unless the judgment has been set aside by a pardon or equivalent relief. Goldsmith does not contend that his term of supervised release, or any of its conditions, has been set aside by the state's judiciary or by a pardon. He could have sought relief under § 2254 while his supervision lasted yet did not do so."); ***Wells v. Caudill***, 967 F.3d 598, 602 (7th Cir. 2020) ("If while in prison Wells had sought relief from a federal court on the ground that state officials had miscalculated his sentences' ending date, he would have been told to go to state court, for federal collateral relief cannot be used to fix errors of state law. . . Why should the federal role be greater if the prisoner serves out his sentence and then seeks damages? The parties have overlooked a second potential issue too. *Heck v. Humphrey* . . . holds that a federal court may not award damages under § 1983 when that calls into question the validity of a state conviction. *Edwards v. Balisok* . . . extends that rule to state procedures that determine the length of the sentence (as by granting or revoking good-time credits). This court recently held that *Heck*'s bar continues even after a prisoner has been released. See *Savory v. Cannon*, 947 F.3d 409 (7th

Cir. 2020) (en banc). Unless a pardon or a state court sets aside the conviction or decision about time in prison, damages under § 1983 are unavailable. This could be understood to mean that someone in Wells's position needs to obtain a ruling from a state court establishing his proper release date. We mention these subjects, not to decide them, but to make clear that we have not decided them in passing. They are open for consideration in some future case. We have resolved this case as the litigants presented it. Because the district judge did not make a clearly erroneous finding when concluding that Wells had not shown that Caudill acted with the necessary state of mind, the judgment is AFFIRMED.")

See also ***Griffin v. Baltimore Police Dep't***, 804 F.3d 692, 695-99 (4th Cir. 2015) ("While § 1983 suits seeking DNA testing may proceed around the *Heck* bar, § 1983 actions based on *Brady* claims may not. *Skinner* itself makes this distinction clear. . . . What we have here, then, are § 1983 claims predicated on alleged *Brady* violations which would, if proven, necessarily imply the invalidity of Griffin's convictions. And those convictions have not been 'reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal ... or called into question by a federal court's issuance of a writ of habeas corpus.'. . Under *Heck*, therefore, they may not be collaterally attacked through § 1983 now. That Griffin is no longer in custody does not change this result. The *Heck* bar is 'not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.'. . This rule prevents would-be § 1983 plaintiffs from bringing suit even after they are released from custody and thus unable to challenge their conviction through a habeas petition. Were the rule otherwise, plaintiffs might simply wait to file their § 1983 actions until after their sentences were served, and thereby transform § 1983 into a new font of federal post-conviction review. Successful resolution of Griffin's § 1983 claims would necessarily undermine the validity of Griffin's prior convictions. Griffin's claims would appear therefore to fall within the core of the *Heck* bar. . . .Together, *Covey* and *Wilson* delineate the *Heck* bar's narrow exception. A would-be plaintiff who is no longer in custody may bring a § 1983 claim undermining the validity of a prior conviction only if he lacked access to federal habeas corpus while in custody. . . . Griffin did not lack access to habeas relief while in custody. While Wilson had only a few months to make a habeas claim, and while Covey had at most a little over a year, Griffin had three decades. And Griffin actually did bring a federal habeas petition during his time in custody. Although his petition was denied, the fact that he was able to file it demonstrates that the concern animating *Wilson* and *Covey*—that a citizen unconstitutionally punished might lack an opportunity for federal redress if kept in custody for only a short period of time—is absent in this case. Griffin argues that he never had the opportunity to achieve meaningful habeas relief because evidence necessary to his case remained in the hands of the Baltimore Police Department. . . But likelihood of success is not the equivalent of opportunity to seek relief. And even if it were, nothing in the record suggests that Griffin sought the relevant records (much less encountered resistance to their production) until he filed his Maryland Public Information Act request in 2010. That law, meanwhile, has been in effect since 1970. . . Lack of information did not take away Griffin's opportunity for meaningful habeas relief. While our precedent makes clear that lawful access to federal habeas corpus is the touchstone of our inquiry, Griffin's case is further undercut by the fact that he did eventually receive actual notice of possible official misconduct and still did not pursue additional federal

habeas relief. In declining to except *Brady* claims from the rule in *Heck v. Humphrey, Skinner*, 562 U.S. at 536–37, the Supreme Court recognized that the adversary process does not as a rule require a potential respondent to give notice to a potential petitioner of every claim, meritorious or otherwise, that the petitioner may possess. Griffin knew of possible police misconduct by, at the latest, August 4, 2011, the date of his evidentiary hearing in the Baltimore City Circuit Court. His custody did not terminate until over sixteen months later, on December 19, 2012. The habeas 'in custody' requirement, moreover, applies only at the time of filing, not throughout the case. . . Griffin would have had only to file his petition during those sixteen months. He did not do so. In sum, Griffin has identified no impediment to habeas access warranting an expansion of the *Heck* exception. In fact, to dissolve the *Heck* bar for a damages suit some thirty years after a still-valid conviction for a plaintiff who not only could but did file a federal habeas petition would permit the *Heck* exception to swallow the rule. . . .We close by noting that our decision sounds in procedure, not substance. We express no opinion on the actual merits of Griffin's *Brady* claims. Our holding is not meant to bar him from seeking a remedy for possible police misconduct. The remedy of habeas corpus was open to him in the past, and he may retain state remedies he can pursue in the future. We hold only that the vehicle he has presently chosen is not, at least not now, an appropriate one under Supreme Court and circuit precedent. Should his convictions at some point be invalidated, he might again attempt a § 1983 suit free of any *Heck* bar. Until then, however, we must affirm the judgment of the district court."); ***Newmy v. Johnson***, 758 F.3d 1008, 1010-12 (8th Cir. 2014) ("A landscape consisting of *Heck* and the collection of opinions in *Spencer* has resulted in a conflict in the circuits about the scope of *Heck's* favorable-termination rule. Several courts—counting up the five Justices who opined in concurring and dissenting opinions in *Spencer*—have concluded that the *Heck* bar does not apply to a § 1983 plaintiff who cannot bring a habeas action. [collecting cases from 4th, 6th, 7th, 9th, and 10th Circuits] Four other circuits, including this one, have adhered to the conclusion—set forth in footnote 10 of *Heck*—that the favorable-termination rule still applies when a § 1983 plaintiff is not incarcerated. [cases from 1st, 3d, 5th, and 8th Circuits] After *Spencer,* the Supreme Court said in *Muhammad v. Close*, 540 U.S. 749, 752 n. 2, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004) (per curiam), that it had 'no occasion to settle' whether the unavailability of habeas may dispense with the *Heck* favorable-termination requirement. We concluded in *Entzi* that the combination of concurring and dissenting opinions in *Spencer* did not amount to a holding that binds this court. We opted instead to follow footnote 10 in the opinion of the Court in *Heck.* . . .As the Third Circuit recently recognized, the Eighth Circuit—like the First, Third, and Fifth—has 'interpreted *Heck* to impose a universal favorable termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence.' [citing *Deemer v. Beard*] We recognize that this rule could preclude a damages remedy for an inmate who is detained for only a short time with limited access to legal resources, but that is a consequence of the principle barring collateral attacks that was applied in *Heck*. The district court correctly followed circuit precedent in dismissing Newmy's claim."); ***Newmy v. Johnson***, 758 F.3d 1008, 1012 (8th Cir. 2014) (Kelly, J., concurring) ("Although I agree the district court correctly applied this circuit's precedent in dismissing Newmy's suit, I write separately to express my concern that our approach 'needlessly place[s] at risk the rights of those outside the intersection of § 1983 and the habeas statute, individuals not "in custody" for habeas purposes.'. . .[A]s the

Tenth Circuit recently reiterated, '[i]f a petitioner is unable to obtain habeas relief—at least where this inability is not due to the petitioner's own lack of diligence—it would be unjust to place his claim for relief beyond the scope of § 1983 where "exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas."' "); ***Deemer v. Beard***, 557 F. App'x 162, 164-66 (3d Cir. 2014), *cert . denied,* 135 S. Ct. 50 (2014) ("Deemer argues that the District Court erred in applying the *Heck v. Humphrey* favorable termination bar to the facts of his case. He contends that *Heck*'s rule does not, and should not, apply to § 1983 plaintiffs who, like him, are no longer in custody and who, through no fault of their own, never had alternate access to the federal courts' habeas corpus jurisdiction. In view of our existing precedent, we disagree. . . . The main dispute between the parties before us is in identifying the position staked out by this Court. Taking a cue from the five-justice *Spencer* plurality, seven courts of appeals have found that the *Heck* favorable termination rule does not apply to plaintiffs for whom federal habeas relief is unavailable, at least where the plaintiff is not responsible for failing to seek or limiting his own access to the habeas corpus remedy. *See Burd v. Sessler,* 702 F.3d 429, 435 (7th Cir.2012); *Cohen v. Longshore,* 621 F.3d 1311, 1315–17 (10th Cir.2010); *Wilson v. Johnson,* 535 F.3d 262, 267–68 (4th Cir.2008); *Powers v. Hamilton Cnty. Pub. Defender Comm'n,* 501 F.3d 592, 602–03 (6th Cir.2007); *Harden v. Pataki,* 320 F.3d 1289, 1298–99 (11th Cir.2003); *Nonnette v. Small,* 316 F.3d 872, 876–77 (9th Cir.2002); *Huang v. Johnson,* 251 F.3d 65, 75 (2d Cir.2001). We have not adopted this approach. We, along with three other courts of appeals, have declined to follow the concurring and dissenting opinions in *Spencer,* and have interpreted *Heck* to impose a universal favorable termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence. *See Williams,* 453 F.3d at 177–78; *Gilles v. Davis,* 427 F.3d 197, 209–10 (3d Cir.2005); *Entzi v. Redmann,* 485 F.3d 998, 1003 (8th Cir.2007); *Randell v. Johnson,* 227 F.3d 300, 301 (5th Cir.2000) (per curiam); *Figueroa v. Rivera,* 147 F.3d 77, 80–81 & n. 3 (1st Cir.1998); *see also Cohen,* 621 F.3d at 1315 (finding our Court has aligned itself with the First, Fifth, and Eighth Circuits on this question); *Powers,* 501 F.3d at 602 (same). Thus, our decisions in *Gilles v. Davis* and *Williams v. Consovoy* already resolved the issue raised in this case, concluding, as they did, that *Heck's* favorable termination rule applies to all § 1983 plaintiffs, not just those in state custody. . . . *Gilles* and *Williams* dictate that, under *Heck,* any claimant, even if the door to federal habeas is shut and regardless of the reason why, must establish favorable termination of his underlying criminal proceeding before he can challenge his conviction or sentence in a § 1983 action. We are bound by that precedent); ***Walker v. Munsell***, No. 08-30087, 2008 WL 2403768, at *2 (5th Cir. June 13, 2008) ("Appellant argues that *Heck* does not apply because he was fined and not imprisoned following his conviction, and he consequently had no opportunity to challenge his conviction on habeas review. This circuit, however, has determined that *Heck's* bar applies to both custodial and non-custodial § 1983 plaintiffs. *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir.2000)."); ***Abdullah v. Minnesota***, No. 06-4142, 2008 WL 283693, at *1 (8th Cir. Feb. 4, 2008) ("We conclude that the district court did not err in dismissing Abdullah's section 1983 claim under *Heck,* because success on his claim would necessarily render invalid the 'sentence' of a fine imposed for his possession of marijuana, and because he did not allege or show that the fine had been invalidated or that his criminal petty-misdemeanor case had otherwise been resolved in his favor."); ***Entzi v. Redmann***, 485 F.3d 998,

1003 (8th Cir. 2007) ("Entzi argues that because the writ of *habeas corpus* is no longer available to him on a claim challenging the length of his imprisonment, *Heck* does not bar his § 1983 suit against the prison officials. The opinion in *Heck* rejected the proposition urged by Entzi. The Court said that 'the principle barring collateral attacks − a longstanding and deeply rooted feature of both the common law and our own jurisprudence − is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.' *Heck*, 512 U.S. at 490 n. 10. Entzi relies on a later decision of the Supreme Court, *Spencer v. Kemna*, 523 U.S. 1 (1998), in which a combination of five concurring and dissenting Justices agreed in dicta that 'a former prisoner, no longer Ain custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.'. . Absent a decision of the Court that explicitly overrules what we understand to be the holding of *Heck*, however, we decline to depart from that rule."); ***Williams v. Consovoy***, 453 F.3d 173, 177, 178 (3d Cir. 2006) ("Williams cites *Huang v. Johnson*, 251 F.3d 65 (2d Cir.2001), as support for the argument that because *habeas* relief is no longer available to him, he should nonetheless be permitted to maintain a § 1983 action. *Huang* held that a plaintiff for whom *habeas* relief was no longer available on the ground that he had been released from custody could nevertheless maintain a § 1983 action for false imprisonment. . . *Huang* relied on the fact that, post-*Heck*, five Justices took the view in *Spencer* . . . that § 1983 relief should be available to address constitutional wrongs where *habeas* relief is no longer available. . . We decline to adopt *Huang* here. As we recently held in *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir.2005), a § 1983 remedy is not available to a litigant to whom *habeas* relief is no longer available. In *Gilles*, we concluded that *Heck*'s favorable-termination requirement had not been undermined, and, to the extent that its validity was called into question by *Spencer*, we observed that the Justices who believed § 1983 claims should be allowed to proceed where *habeas* relief is not available so stated in concurring and dissenting opinions in *Spencer*, not in a cohesive majority opinion. . . Thus, because the Supreme Court had not squarely held post-*Heck* that the favorable-termination rule does not apply to defendants no longer in custody, we declined in *Gilles* to extend the rule of *Heck*, and likewise decline to extend it here."); ***Vickers v. Donahue***, 135 F. App'x 285, 2005 WL 1519353, at *4, *5 (11th Cir. June 28, 2005)(not published) (applying *Heck* where plaintiff had failed to avail himself of appeal with respect to revocation order and resulting nine month sentence); ***Randell v. Johnson,*** 227 F.3d 300, 301 (5th Cir. 2000); ***Figueroa v. Rivera***, 147 F.3d 77, 80, 81 (1st Cir. 1998) ("The appellants counter that strict application of *Heck* works a fundamental unfairness in this case. After all, Rios was attempting to impugn his conviction when death intervened. Although this plaint strikes a responsive chord, it runs afoul of *Heck's* core holding: that annulment of the underlying conviction is an element of a section 1983 `unconstitutional conviction' claim. . . Creating an equitable exception to this tenet not only would fly in the teeth of *Heck*, but also would contravene the settled rule that a section 1983 claimant bears the burden of proving all the essential elements of her cause of action.").

See also ***Batchelor v. City of Chicago***, No. 18 C 8513, 2020 WL 509034, at *3-4 (N.D. Ill. Jan. 31, 2020) ("Defendants argue that *Heck's* prohibition on Batchelor's Section 1983 claims lifted when he was released from prison, which made habeas relief unavailable to him, and thus

started the clock on his claims. They point to decisions where the Seventh Circuit concluded *Heck* did not bar a plaintiff's Section 1983 claims after he was released from custody, *Manuel v. City of Joliet, Illinois*, 903 F.3d 667, 670 (7th Cir. 2018) ("Manuel II") and *Sanchez v. City of Chicago*, 880 F.3d 349, 356 (7th Cir. 2018), or after habeas relief was unavailable to a plaintiff, *DeWalt v. Carter*, 224 F.3d 607, 617-18 (7th Cir. 2000). Defendants calculate that Batchelor was released in 2006 based on his allegation that he 'languished fifteen years in Illinois prison' following his 1991 conviction. They conclude that Batchelor's Section 1983 claims are some ten years late. The Seventh Circuit recently addressed the same accrual arguments in *Savory v. Cannon*, No. 17-3543, 2020 WL 240447, at *3-14 (7th Cir. Jan. 7, 2020) (en banc). Savory, the plaintiff, was convicted of a double murder that he claimed he did not commit, incarcerated for thirty years, paroled for five years, and then, some three years after his parole ended, received a gubernatorial pardon acquitting him of his conviction. . . Less than two years after his pardon, Savory filed suit against the City of Peoria and certain of its police officers alleging that they fabricated evidence, coerced a false confession from him, fabricated incriminating witness statements, and suppressed exculpatory evidence. . . The court applied the rule set forth in *Heck* and concluded Savory's Section 1983 claims necessarily implied the invalidity of his conviction and thus accrued when that conviction was invalidated by a pardon. . . The court rejected arguments that Savory's claims accrued when he was released from custody and explicitly stated that its reasoning in prior decisions that the *Heck* bar lifts when a plaintiff is released from custody was incorrect and does not survive its decision. . . Batchelor's claims that Defendant Officers suppressed exculpatory evidence, fabricated evidence, and coerced his confession in order to secure his conviction echo the claims at issue in *Heck* and *Savory.* As in those cases, Batchelor's claims necessarily imply the invalidity of his conviction and thus could not accrue until that conviction was vacated. His Section 1983 claims are timely as he filed suit within two years of his conviction being vacated."); ***Fant v. City of Ferguson***, 107 F.Supp.3d 1016, 1028-30 (E.D. Mo. 2015) ("In this case, the Court agrees with Plaintiffs that the only state court convictions at issue are the Plaintiffs' underlying traffic and other minor offenses, which are alleged to have resulted only in fines, not sentences. Plaintiffs allege that their incarceration resulted from post-judgment procedures to enforce non-payment of those fines, but not from any separate conviction or sentence. . . A judgment in Plaintiffs' favor would not necessarily demonstrate the invalidity of Plaintiffs' underlying traffic convictions or fines, but only the City's procedures for enforcing those fines. Nor would Plaintiffs' success in this case 'necessarily' invalidate the fact or duration of their incarceration. Success would mean only a change in the City's procedures prior to incarceration. Even if these procedures were changed, Plaintiffs may still have been found to have willfully refused to pay a fine they were capable of paying and thereafter lawfully incarcerated pursuant to constitutional procedures and conditions. . . The Court notes that the City's discussion of the Sixth Circuit case, *Powers v. Hamilton County Pub. Defender Comm'n,* 501 F.3d 592 (6th Cir.2007), is misplaced and, more importantly, incomplete. Like this case, *Powers* involved a putative class action brought by a plaintiff who was incarcerated for non-payment of a fine incurred as a result of a reckless-driving charge. . . The municipal court in *Powers* appointed a public defender for the plaintiff at both his initial reckless driving hearing and sentencing, as well as a subsequent court hearing after his arrest for failing to pay the court-

ordered fine. . . The plaintiff pleaded no contest to both the initial reckless driving charge and the subsequent failure to pay his fine, the public defender did not seek an indigency hearing, and plaintiff served at least one day in jail for failing to pay the fine. . . He then brought a § 1983 action, alleging that the public defender's office had a policy of failing to request indigency hearings for clients facing jail time for nonpayment of court-ordered fines. . .The Sixth Circuit found that the § 1983 action was cognizable, notwithstanding *Heck*, for two reasons. The first was that the plaintiff's term of incarceration—one day—was too short to enable him to seek habeas relief, and the Sixth Circuit held that *Heck*'s favorable-termination requirement was excused for habeas-ineligible § 1983 plaintiffs. . . As the City correctly notes, this issue is the subject of a circuit split, in which the Eighth Circuit has explicitly disagreed with the Sixth Circuit. . . Therefore, as the City correctly notes, Plaintiffs in this case could not avoid *Heck* merely by arguing their jail terms were too short to enable them to seek habeas relief. But Plaintiffs do not make this argument. Rather, Plaintiffs argue that *Heck* is inapplicable for the second reason discussed in *Powers*—namely, because they do not challenge the fact or duration of their underlying convictions or sentences but only the improper procedures that culminated in their post-judgment incarceration. . . . The same is true in this case. Accordingly, the Court rejects the City's argument that *Heck* bars Plaintiffs' claims."); ***Cabot v. Lewis***, 241 F.Supp.3d 239, 247-56 (D. Mass. 2017) ("The issue before the Court. . . is the narrow question of whether plaintiff's acceptance of pretrial probation bars his claims. For present purposes, it is irrelevant whether plaintiff was in fact arrested without probable cause, whether he in fact chest-bumped Lewis, or even why he accepted the disposition of pretrial probation. . . . Defendants have moved for summary judgment on the ground that plaintiff's acceptance of pretrial probation bars all of his claims under the rule of *Heck v. Humphrey* . . . .[M]ore than twenty years since *Heck*, considerable disagreement has developed as to the scope of its application. Two areas of uncertainty are of potential concern here. First, courts are divided as to whether *Heck*'s favorable-termination requirement applies when a § 1983 plaintiff is not in custody—either because he was never sentenced to prison or has already been released—such that he cannot seek habeas relief. Second, there is disagreement as to whether a disposition other than an ordinary conviction—such as a term of pretrial probation (as occurred here)—can constitute a 'conviction' triggering the favorable-termination requirement of *Heck.* As to the first issue, the law in the First Circuit is settled: the rule of *Heck* applies even if the plaintiff is not in custody and therefore cannot obtain habeas relief. [discussing *Figueroa*) . . . .The second issue is considerably more difficult to resolve. By its terms, the *Heck* rule applies to actions 'to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.'. . Plaintiff contends that because he was never convicted, much less sentenced or imprisoned, the *Heck* rule does not apply. It is certainly true that by its literal terms, the *Heck* rule applies to 'convictions.' A straightforward plea of guilty to a criminal charge would obviously fall within its scope. Whether *Heck* applies, however, to other types of criminal dispositions is less obvious. Many courts have held that the *Heck* rule applies to a plea of *nolo contendere.* Other courts have held that it applies to a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Some courts, including this one, have held that it applies where the plaintiff admitted to sufficient facts and the court entered a continuance without a finding ("CWOF"). *Nolo contendere* pleas and

Alford pleas both result in convictions. And although an admission to sufficient facts does not result in a formal conviction, it does require a formal admission, in open court, to a set of facts that are sufficient to support a criminal conviction. Here, the criminal charges against plaintiff were dismissed after he completed a term of pretrial probation. Under Massachusetts law, a defendant may be placed on a term of pretrial probation, without either pleading guilty or admitting to sufficient facts to warrant a finding of guilty, with the understanding that the criminal charges will be dismissed after the successful completion of a term of probation. . . A disposition by pretrial probation does not, under Massachusetts law, result in a conviction. . . Courts are divided as to whether imposition of a pretrial probation (or an analogous disposition, such as pretrial diversion) constitutes a 'conviction' for purposes of the *Heck* rule. [fn.12 There is some inconsistency in the case law as to how to frame the issue of the applicability of the *Heck* rule to cases involving dispositions of pretrial probation. The issue is sometimes framed as whether pretrial probation is a 'favorable termination' such that subsequent § 1983 claims challenging the lawfulness of a conviction or sentence may proceed. *See Gilles v. Davis*, 427 F.3d 197, 209 (3d Cir. 2005). The issue may also be framed as whether pretrial probation constitutes a 'conviction' such that *Heck* applies at all. The latter appears to be the more appropriate approach. *See McClish v. Nugent*, 483 F.3d 1231, 1251 (11th Cir. 2007). A favorable termination is only necessary if *Heck* applies, and *Heck* only applies as a potential bar to subsequent § 1983 claims if there has been a conviction or sentence—or something sufficiently analogous—the validity of which would be impugned by a successful § 1983 claim.] The Sixth, Tenth, and Eleventh Circuits have concluded that *Heck* does not bar a subsequent lawsuit after disposition of a criminal case through pretrial diversion that ultimately results in dismissal of criminal charges. *See S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 637–39 (6th Cir. 2008) (Kentucky juvenile pretrial diversion program); *Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (Kansas pretrial diversion program); *McClish v. Nugent*, 483 F.3d 1231, 1250–51 (11th Cir. 2007) (Florida pretrial intervention program); *see also Butts v. City of Bowling Green*, 374 F.Supp.2d 532, 537 (W.D. Ky. 2005) (Kentucky pretrial diversion program). The Second, Third, and Fifth Circuits have reached the opposite conclusion. *See Miles v. City of Hartford*, 445 Fed.Appx. 379, 382 (2d Cir. 2011) (Connecticut accelerated pretrial rehabilitation program); *Gilles v. Davis*, 427 F.3d 197, 209–11 (3d Cir. 2005) (Pennsylvania "Accelerated Rehabilitative Disposition" program); *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 655–56 (5th Cir 2007) (Texas deferred adjudication procedure). . . The First Circuit has not yet addressed the issue. Two judges in this district, however, have concluded that the imposition of pretrial probation under Massachusetts law triggers the rule of *Heck* and bars a subsequent related claim under § 1983. *See Kennedy v. Town of Billerica*, 2014 WL 4926348 at *1 (D. Mass. 2014) (pretrial probation bars subsequent related § 1983 claim); *Cardoso v. City of Brockton*, 62 F.Supp.3d 185, 186 (D. Mass. 2015) (same). The courts that have concluded that the *Heck* rule does not apply to pretrial probation generally have done so based on the literal terms of *Heck*. As noted, *Heck* holds that when a successful § 1983 claim 'would necessarily imply the invalidity of [a] conviction or sentence ... the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.'. . . Because the successful completion of a pretrial diversion program results in the dismissal of criminal charges, those courts have concluded that there is no underlying criminal 'conviction' that could be

invalidated by a successful § 1983 claim, and *Heck* therefore does not apply. The view that *Heck* should be applied narrowly has at least two advantages: it is faithful to the literal language of the opinion, and it imposes a bright-line rule that is relatively easy to apply. That approach is not, however, without its problems. Most notably, the literal approach ignores, and appears to be inconsistent with, the purposes and rationale of *Heck.* Those may be characterized, in simple terms, as threefold: finality, consistency, and comity. . . . If dispositions of pretrial probation are not accorded finality—and if they leave open the possibility of continuing litigation and potential damages awards—prosecutors will be less likely to agree to them and they will be less available to defendants. . . .If a civil proceeding seeks to reach a result that is fundamentally contrary to the result of a criminal proceeding—particularly on such basic issues as whether there was probable cause to believe that a crime had been committed—similar concerns will arise, even in the absence of a formal conviction. . . .Finally, the *Heck* decision also appears to have been underpinned, in substantial part, by concerns of federal-state comity that caution against using a federal civil-rights action to impugn the validity of a state criminal proceeding. . . . At a minimum, federal courts should be hesitant to permit claims to proceed that are intended to negate or nullify the outcome of prior state proceedings. The circumstances presented by this case highlight those same concerns. To begin, plaintiff entered into a bargain with the Commonwealth. He essentially consented to a term of probation in exchange for the dismissal of his criminal charges. In doing so, he 'avoid[ed] the possibility of a formal guilty finding but ... he also fore[went] a formal finding that his arrest lacked probable cause.'. . He now seeks to use a federal civil rights action to obtain the formal finding that he avoided in state court. Furthermore, while plaintiff did not plead guilty or admit to sufficient facts, he did accept the state's authority to impose a term of probation. . . A subsequent finding, through a federal civil-rights claim, that defendants were without probable cause to arrest him would completely undermine the state court's imposition of probation. Finally, plaintiff accepted sanctions imposed by the state court, however minimal those sanctions might have been. His liberty was curtailed, at least to some minor degree, during the three-month period of unsupervised probation. Furthermore, the court ordered him to write a letter of apology. While those sanctions, of course, seem trivial compared to a term of imprisonment, they were sanctions nonetheless: a state court judge of competent authority concluded that it was an appropriate consequence under the circumstances. Plaintiff formally accepted that consequence. He now seeks, in substance, to prove that no consequence should have been imposed, because there was no basis for the arrest or the charge. Even his letter of apology would be negated if he were successful; he essentially now contends that he did nothing meriting such an apology. On balance, the considerations favoring the imposition of the favorable-termination rule outweigh the countervailing factors. The Court therefore concludes that the favorable-termination requirement of *Heck* applies under the circumstances of this case. [fn. 14 While the Court recognizes that there may indeed be some unfairness in precluding § 1983 relief where it does not appear that any other form of relief is available for plaintiff's allegedly unlawful arrest, that alone cannot lift *Heck*'s bar. As the First Circuit held in *Figueroa,* permitting a § 1983 action to proceed simply because no other form of relief is available would 'run afoul of *Heck*'s core holding.'] That conclusion does not fully answer the question of whether that requirement bars plaintiff's § 1983 claims. The rule bars only those claims that would undermine the validity of his pretrial probation. . . Thus, a more

detailed analysis of the relationship between plaintiff's individual theories for relief and his criminal case is required. . . . Plaintiff contends that because his claim is premised on his false arrest, rather than malicious prosecution, the favorable-termination requirement is inapplicable. Plaintiff's contention is premised on too narrow a reading of *Heck. Heck* states that the favorable-termination requirement applies both to actions to recover damages for 'allegedly unconstitutional convictions or imprisonment' as well as actions to recover damages 'for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.'. . As an example of the latter category, the court provided the hypothetical of a man convicted of resisting arrest who then sought to bring a § 1983 action against his arresting officers for the violation of his Fourth Amendment rights. . . The favorable-termination rule applies to such a claim, the court explained, because in order to prevail on his § 1983 claim, he would have to negate an element of the offense for which he was convicted— namely, that his arrest was lawful. . .That same reasoning applies here. Plaintiff was arrested for assault and battery on a police officer ("ABPO") for allegedly chest-bumping officer Lewis. The elements of the crime of ABPO are (1) a harmful or offensive touching (2) committed on a public employee engaged in the performance of his duty. . . The § 1983 claim here centers on plaintiff's arrest, which he contends was made without probable cause. To succeed on that claim, plaintiff would need to show that 'defendants acted unreasonably in arresting [him] and taking him into custody.'. . To do that, he would have to show that he did not engage in any harmful or offensive contact with Officer Lewis. In other words, he would have to negate an element of the offense for which he was arrested and for which he received a disposition of pretrial probation. The favorable-termination requirement of *Heck* therefore applies to plaintiff's false-arrest claim. For that reason, and the reasons stated above, defendants' motions for summary judgment will be granted as to the false-arrest claim. . . .As a preliminary matter, criticizing a police officer and asking for his name and badge number is protected speech under the First Amendment. . . Beyond that, plaintiff's retaliatory-arrest claim becomes more difficult. As discussed above, *Heck* bars plaintiff from challenging whether there was probable cause for his arrest. . . . Courts are divided as to whether *Hartman*'s no-probable-cause requirement applies to retaliatory-arrest claims. . . The First Circuit has not yet addressed the issue. However, this Court need not now resolve the difficult question of whether there is a right under the First Amendment to be free from a retaliatory arrest even where there was probable cause for that arrest. Whether or not such a right exists, the Supreme Court has held that such a right is not 'clearly established' for purposes of qualified immunity because reasonable officials could conclude that *Hartman* applies in the context of retaliatory arrests. . . Here, for the purposes of analyzing plaintiff's retaliatory-arrest claim, the *Heck* rule requires the conclusion that there was in fact probable cause for his arrest. Defendants are therefore entitled to qualified immunity. . . Under *Reichle*, it was not clearly established at the time of plaintiff's arrest that a retaliatory arrest that was supported by probable cause could violate the First Amendment. . . Summary judgment will therefore be granted as to the retaliatory-arrest claim. . . .Because plaintiff's challenge to the lawfulness of the alleged strip-search is not a challenge to the fact or length of his confinement, that claim is not barred by *Heck.* Defendants' motions for summary judgment on Count 1 will therefore be denied as to plaintiff's claim that he was strip-searched in violation of the Fourth Amendment.") (footnotes omitted); ***Kennedy v. Town of Billerica***, CIV.A. 10-11457-GAO, 2014 WL 4926348, *1-*3 (D. Mass. Sept.

30, 2014) ("The question presented by the defendant's motion is whether Mitchell Kennedy's pre-trial probationary disposition bars his § 1983 unlawful arrest claim for damages. While the criminal charges were ultimately dismissed, the dismissal, which followed the successful completion of a period of supervised probation, was not one that was 'consistent with the innocence of the accused,' a criterion generally required in order for a disposition to be considered a 'successful termination.'. .The First Circuit has not ruled specifically on whether a state criminal defendant's acceptance of participation in a pre-trial diversion program bars a later § 1983 false arrest claim. The circuits that have addressed the issue are divided. [collecting cases] At least in the circumstances of this case, I am persuaded by the reasoning of the Second and Third Circuits that Mitchell Kennedy's acceptance of pretrial diversion on terms of probation did not imply that his arrest had been made without probable cause. A defendant agreeing to such a disposition avoids the possibility of a formal guilty finding but, even if he also avoids the necessity of formally admitting that the facts of the case are sufficient to support such a finding, he also foregoes a formal finding that his arrest lacked probable cause. . . .The circuits that have not found that pre-trial diversion bars a § 1983 false arrest claim have focused on the plaintiff's ineligibility to seek habeas relief. . . That reasoning does not apply here because the First Circuit has held that the *Heck* rule applies even if habeas relief is actually unavailable. . . Mitchell Kennedy's criminal case was resolved by a dismissal that included his acceptance of a period of probationary supervision as well as other limitations on his liberty. His acceptance of that disposition was inconsistent with his claim here that his arrest by Officer Moran lacked probable cause. For that reason, Moran is entitled to judgment in his favor on that claim as a matter of law."); ***Malden v. City of Waukegan, Ill.***, No. 04 C 2822, 2009 WL 2905594, at *14 (N.D. Ill. Sept. 10, 2009) ("Having concluded that Mr. Malden's claims in this case, if successful, would necessarily imply the invalidity of his criminal conviction, we now address the question of whether *Heck* applies where, as here, a civil plaintiff no longer can challenge a criminal conviction through *habeas corpus.* We conclude that it does. . . . [N]one of the cases Mr. Malden cites for that proposition have held that the favorable termination requirement is inapplicable where a plaintiff: (1) has an underlying criminal conviction, (2) no longer can seek *habeas* relief in connection with that conviction, and (3) asserts a Section 1983 claim that, if accepted, necessarily would imply the invalidity of that conviction. . . . We hold that *Heck's* favorable termination requirement applies to this case, and bars Mr. Malden's claim in Count I."); ***Ference v. Township of Hamilton***, 538 F.Supp.2d 785, 790 (D.N.J. 2008) ("Plaintiff was convicted of violating a municipal ordinance of the Township of Hamilton and assessed a minimal fine and court costs. . . He did not appeal his conviction. . . Similar to the plaintiff in *Gilles*, who entered into Pennsylvania's Accelerated Rehabilitative Disposition program, whereby, after a probationary period his conviction was expunged, Plaintiff here had no recourse to *habeas corpus*; there was no detention to contest. Nonetheless, pursuant to *Gilles*, *Heck* still applies to Plaintiff's section 1983 claims."); ***Williams v. Donald***, 2007 WL 2345254, at *2, *3 (M.D.Ga. Aug. 14, 2007) ("A Circuit split exists regarding whether a former prisoner, who is thus not in custody for federal *habeas* purposes, may be allowed to attack his conviction or sentence through § 1983. The First, Third, Fifth and Sixth Circuits have held such a non-prisoner plaintiff may not attack a conviction in a § 1983 claim, and the Fourth and Eleventh Circuits have indicated in unpublished opinions they would be likely to render the same holding. [collecting

cases] However, the Second and Ninth Circuits have held that *Heck* only applies to plaintiffs whose confinement can be challenged in post conviction proceedings. [citing cases] Having considered these opposite positions, the Court finds *Heck* bars Williams' suit for two reasons. First, the Court is mindful of the Supreme Court's admonition that '[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower federal court] should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions.'. . Second, the Court cannot help but conclude that a judgment in Williams' favor would necessarily imply the invalidity of his sentence − the very outcome *Heck* seeks to bar. As Donald and Roberson argue, Williams' § 1983 lawsuit specifically challenges the validity of his sentence, but Williams' sentence has not been invalidated. . . Fundamentally, Williams seeks to recover monetary damages for allegedly unconstitutional imprisonment, but the sentence about which he complains was never reversed, expunged, declared invalid or called into question. Indeed, the sentence was upheld in a state *habeas* proceeding. Accordingly, Williams' claim is not cognizable under § 1983."); ***Abdullah v. City of Jacksonville***, No. 3:04-cv-667-J-32TEM, 2006 WL 2789137, at *4 (M.D. Fla. Sept. 26, 2006) ("The Eleventh Circuit is not the only Circuit to re-examine *Heck* post-*Spencer*. In fact, a Circuit split has developed regarding the application of *Heck* to situations, such as that in *Vickers*, where a claimant has been released from incarceration and asserts a § 1983 complaint attacking the very reason he was incarcerated. The Third, Fifth and Fourth (in an unpublished opinion) Circuits have held, similar to the Eleventh Circuit's unpublished *Vickers* opinion, that *Heck* clearly ruled a plaintiff may not attack a conviction in a § 1983 claim even if the plaintiff is not in prison and thus not in custody for federal habeas purposes. [citing cases] The Ninth and Second Circuits, however, have adopted Justice Souter's position in Spencer that *Heck* only applies to plaintiffs whose confinement can be challenged in post conviction proceedings. [citing cases] In the present case, the gravamen of plaintiff's § 1983 claim is that the JSO Officers (Brown and Rodgers) unlawfully arrested him and caused him to spend twenty-nine days in prison at the Duval County Pretrial Detention Facility based on 'false charges.' Plaintiff's § 1983 claim attacks the very reason he was arrested and later adjudicated guilty (based on the plea of no contest). Like in *Vickers*, if plaintiff here is allowed to proceed with his § 1983 claim and prevails, such a result would impliedly render his conviction invalid, which is the precise situation that *Heck* seeks to preclude. While it appears the Eleventh Circuit would find plaintiff's claim *Heck* barred, because the City does not raise or rely on *Heck*, the reach of *Heck* in these circumstances is not entirely settled in the Eleventh Circuit and plaintiff's § 1983 suit fails for other reasons, the Court declines to decide this case on *Heck* grounds. The Court, however, thought it prudent to raise the *Heck* issue sua sponte due to its potential application to plaintiff's claims at bar.").

See also ***Harrison v. Michigan***, 722 F.3d 768, 774 (6th Cir. 2013) ("*Powers* has no bearing on this case because, as Justice Souter made clear in his concurrence in *Spencer*, the exception applies only to those § 1983 litigants who are unable as a matter of law to satisfy *Heck's* favorable-termination requirement or, at least, those unable as a matter of law to satisfy it by means of a federal habeas action. . . . In this case, however, Harrison was not prevented from seeking habeas relief in prison by the brevity of his sentence. Nor was he prevented by law from satisfying the

favorable-termination requirement by other means—as is evident by the fact that he succeeded in securing a favorable termination before he brought this § 1983 suit. As a result, both *Spencer* and *Powers* are irrelevant to Harrison's claim."); ***Huftile v. Miccio-Fonseca***, 410 F.3d 1136, 1139-42 (9th Cir. 2005) (holding "*Heck* applies to SVPA [Sexually Violent Predators Act] detainees with access to *habeas* relief; detainee argued *Heck* shouldn't apply Abecause he was no longer civilly committed and hence was unable to file a *habeas* corpus petition[,]' but court of appeals found that "[u]nder California's SVPA scheme, the current petition to recommit Huftile is directly traceable to his initial term of confinement and is thereby sufficient to confer standing for federal *habeas* purposes.").

Compare ***Gilles v. Davis***, 427 F.3d 197, 209-12 (3d Cir. 2005) ("Petit's underlying disorderly conduct charge and his § 1983 First Amendment claim require answering the same question − whether Petit's behavior constituted protected activity or disorderly conduct. If ARD ["Accelerated Rehabilitative Disposition" ("ARD") program, which permits expungement of the criminal record upon successful completion of a probationary term] does not constitute a favorable termination, success in the § 1983 claim would result in parallel litigation over whether Petit's activity constituted disorderly conduct and could result in a conflicting resolution arising from the same conduct. We recognize that concurring and dissenting opinions in *Spencer*. . . question the applicability of *Heck* to an individual, such as Petit, who has no recourse under the habeas statute. . . But these opinions do not affect our conclusion that *Heck* applies to Petit's claims. We doubt that *Heck* has been undermined, but to the extent its continued validity has been called into question, we join on this point, our sister courts of appeals for the First and Fifth Circuits in following the Supreme Court's admonition 'to lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court "the prerogative of overruling its own decisions."'. . Because the holding of *Heck* applies, Petit cannot maintain a § 1983 claim unless successful completion of the ARD program constitutes a 'termination of the prior criminal proceeding in favor of the accused.' . .We have not had occasion to address this issue directly. Our trial courts have held that ARD is not a termination favorable for purposes of bringing a subsequent § 1983 malicious prosecution claim. We find instructive opinions from the Second and Fifth Circuits that have addressed whether similar pre-trial probationary programs are a favorable termination sufficient to bring a subsequent civil suit. [discussing cases] Viewing these factors together, we hold the ARD program is not a favorable termination under *Heck*. Petit's participation in the ARD program bars his § 1983 claim.' footnotes omitted) ***with id.*** at 216-19 (Fuentes, J. dissenting in part) ("Like the District Court, the majority assumes that the favorable termination rule in *Heck* applies to Petit's claim. But because Petit was not in custody when he filed his § 1983 action, *Heck* does not apply to his claims. Under the best reading of *Heck* and *Spencer v. Kemna*, 523 U.S. 1 (1998), the favorable termination rule does not apply where habeas relief is unavailable. . . . I now turn to the critical question on this point: whether Petit could have brought a habeas petition instead of the present § 1983 action. The duration of Petit's ARD program is not on record, but it could not have exceeded two years. . . Since Petit filed suit about one and a half years after his arrest, his ARD program was likely completed before he brought this suit. Thus, Petit could not have pursued

habeas relief. . . . Even if the ARD program was not complete when Petit initiated the instant action, based on my review of the record, I conclude that the ARD program never placed Petit 'in custody' for habeas purposes. ARD is a pre-trial diversionary program, the purpose of which 'is to attempt to rehabilitate the defendant without resort to a trial and ensuing conviction.' . . Although we do not know the precise conditions imposed upon Petit, they do not appear to have required Petit to report anywhere in Pennsylvania since his stated reason for entering ARD was to enable his return to Kentucky as quickly as possible for work. . . . I therefore conclude that, even in the unlikely event that Petit was still in ARD at the time that he filed the present suit, his ARD program was not sufficiently burdensome to render him 'in custody' for habeas purposes. Accordingly, the favorable termination rule does not apply to his claims and the dismissal of his claim on that basis was error.").

See also ***Teichmann v. New York***, 769 F.3d 821, 825 (2d Cir. 2014) (per curiam) ("We denied both motions and directed the parties to file supplemental briefs answering the following question: "Whether this Court should recognize an exception to the preclusionary rule of *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), where the plaintiff is no longer in custody when his § 1983 complaint is filed." We decline to reach this question and rule today on a narrower ground. . . .Since Teichmann's allegations fail to state a claim upon which we may properly grant him relief, we dismiss without considering the *Heck v. Humphrey* issues discussed by the District Court on which we requested additional briefing."); ***Teichmann v. New York***, 769 F.3d 821, 827-28 (2d Cir. 2014) (per curiam) (Livingston, J., concurring in part and concurring in the judgment in part) ("In 2004, Teichmann was convicted in New York state court on one count of attempted commission of a criminal sex act and twenty-two counts of criminal contempt. In this lawsuit, as we and the district court have construed his complaint, Teichmann asserts a § 1983 claim explicitly asking us to review and overturn his conviction. Under *Heck*, this claim is 'not cognizable.' To be sure, some Circuits, including our own, have recognized exceptions to *Heck'*s bar in certain circumstances based on two concurrences by Justice Souter that at one point won the support of five Justices. . . Referring to this line of cases, Judge Calabresi describes the 'law in this Circuit' as holding that 'when a plaintiff does not have access to habeas—at least where the plaintiff has not intentionally caused habeas to be unavailable—favorable termination of the underlying sentence or conviction is not required.' . . While our *en Banc* decision in *Poventud v. City of New York* may not have disturbed certain precedents in this area, . . . the *Poventud* panel decision has been vacated . . . and I respectfully disagree with my colleague's characterization of our still-binding case law. We have never said that a plaintiff's access to § 1983 turns on whether he has intentionally caused habeas to be unavailable. We have recognized an exception to *Heck'*s favorable termination requirement when habeas was *never* reasonably available to the plaintiff through no lack of diligence on his part—that is, where an action under § 1983 was a diligent plaintiff's only opportunity to challenge his conviction in a federal forum. *See Leather v. Ten Eyck,* 180 F.3d 420, 424 (2d Cir.1999) (plaintiff "is not and never was in the custody of the State"). . . Though there is much to recommend the view that *Heck* permits *no* exceptions, those courts recognizing a narrow exception in situations where habeas was never an option have sought to afford access to a federal forum for the adjudication of constitutional claims while, at the same

time, preventing those duly convicted of crimes in state proceedings (and whatever their intentions) from mounting attacks on their extant state convictions in disregard of the habeas statute's requirements. This is the balance that we, and every other Circuit to recognize an analogous *Heck* exception, have struck. . . Perhaps it can be said that a state prisoner who has failed to pursue habeas diligently has 'intentionally' rendered it unavailable. If so, then Judge Calabresi and I agree on the narrow scope of the *Heck* exception that our precedents have recognized. But I do not believe it is an open question whether claims like Teichmann's are cognizable under § 1983. Teichmann's state-court remedies were exhausted in May 2010. He then waited more than a year, until he was no longer in custody within the meaning of 28 U.S.C. § 2254, and filed a federal lawsuit seeking a declaration that his prior conviction was unconstitutional. No court has recognized an exception to *Heck*'s bar under such circumstances, and there is no reason to dispose of Teichmann's § 1983 claim on the merits solely to avoid deciding whether we should be the first to do so."); ***Teichmann v. New York***, 769 F.3d 821, 828-31 (2d Cir. 2014) (per curiam) (Calabresi, J., concurring) ("I fully join in today's opinion but write separately because, although we decided this case easily without reference to the Supreme Court's decision in *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), both the District Court and the parties addressed it, and it is an issue that continues to cause some consternation in this Circuit. In fact, there are many § 1983 actions, like the one here, that can be disposed of on a motion to dismiss without ever needing to reach any *Heck* questions or indeed without needing to discuss *Heck* at all. Because many *Heck* issues are contentious, I believe that a decision on these other grounds is generally preferable. . . . [W]hat 'necessarily demonstrates' the invalidity of a sentence or conviction is often anything but easy to decide, and hence the applicability vel non of *Heck* can be, to put it mildly, troublesome. Similarly, if we accept that a § 1983 suit does 'necessarily' attack a conviction or sentence, what happens if the plaintiff is no longer in custody and therefore cannot challenge the lawfulness of his confinement through habeas? On this issue, there is a deep circuit split. . . The law in this Circuit, however, holds—whether correctly or not—that *Heck* does not bar § 1983 claims when habeas is unavailable, at least so long as the unavailability was not intentionally caused by the plaintiff. *See Huang ex rel. Yu v. Johnson,* 251 F.3d 65, 75 (2d Cir.2001); *Green v. Montgomery,* 219 F.3d 52, 60 n. 3 (2d Cir.2000); *Jenkins v. Haubert,* 179 F.3d 19, 27 (2d Cir.1999); *Leather v. Eyck,* 180 F.3d 420, 424 (2d Cir.1999). Indeed, it is only because of these seemingly binding Circuit cases that in *Poventud v. City of New York* the panel majority (as opposed to the en banc majority) reached the *Heck*-habeas issue that led to en banc consideration in the first place. 715 F.3d 57, 61–62 (2d Cir.2013), *aff'd on other grounds on reh'g en banc,* 750 F.3d 121 (2d Cir.2014). The animating rationale of this result was stated to be that 'some federal remedy—either habeas corpus or § 1983—must be available' to redress constitutional violations. . . Yet there are clearly many members of our Court who disagree deeply with that rationale and our Circuit's apparent position. . . I believe that the law of our Circuit remains as it was despite our recent en banc decision in *Poventud,* in which—though the issue was squarely presented—the majority failed to reach the question of *Heck's* applicability when habeas is unavailable, and ruled instead that because Poventud's § 1983 claim did not undercut his guilty plea, *Heck* was no obstacle. . . That holding *explicitly* did nothing to disturb the cases cited above. . . Thus, until the Supreme Court rules that our position is wrong, or

we resolve the issue en banc, I think that the law in this Circuit remains what it was: when a plaintiff does not have access to habeas—at least where the plaintiff has not intentionally caused habeas to be unavailable—favorable termination of the underlying sentence or conviction is not required. That said, who can doubt that this position, which has split the circuits and has been forcefully attacked by a significant number of judges on our Court, is controversial and hence to be avoided where other, easier grounds for deciding cases are available? Moreover, what *does* remain an open question, even in this Circuit, is perhaps even more difficult: whether *Heck* bars § 1983 suits when the plaintiff has intentionally defaulted his habeas claims. I know of no circuit cases that allow § 1983 claims to proceed in such circumstances, and some have suggested they cannot. . . And despite suggestions to the contrary, *Poventud*, 715 F.3d at 70 (Jacobs, J., dissenting), the *Poventud* panel majority did not address, let alone attempt to decide, the issue. . . Nevertheless, there are serious arguments to be made on both sides of the question. To discuss those arguments, however, is beyond the scope of this concurrence. For today, it is enough to suggest that here, too, we would be wise to move cautiously when deciding future cases, ruling narrowly where possible, and confining ourselves to the facts before us. And this brings us back to the beginning of this concurrence. When there are non-controversial, non-*Heck* grounds for ruling, we and district courts would be well advised to decide on those grounds rather than needlessly on *Heck* ones.")

See also ***Poventud v. City of New York***, 750 F.3d 121, 132-38 (2d Cir. 2014) (en banc) ("This Court has emphatically and properly confirmed that *Brady*-based § 1983 claims necessarily imply the invalidity of the challenged conviction in the trial (or plea) *in which the Brady violation occurred*. . . That should come as no surprise; the remedy for a *Brady* violation is *vacatur* of the judgment of conviction and a new trial in which the defendant now has the *Brady* material available to her. . . .The district court treated Poventud's case as though it were a malicious prosecution claim. . . It measured his admission in the subsequent plea agreement against his claims in his *Brady* submission. Because his 2006 plea was at odds with his alibi defense at his 1998 trial, Judge Batts concluded that his recovery for a *Brady* claim would call his plea into question. That view misunderstands *Brady* and its correlation to § 1983 claims asserting only violations of the right to due process. The district court's view incorrectly presumes that, on the facts of this case, the State could violate Poventud's *Brady* rights only if Poventud is an innocent man. This last restriction has no basis in the *Brady* case law; materiality does not depend on factual innocence, but rather what would have been proven absent the violation. . . . In this case, Poventud has the right to argue to the jury that, with the main State witness impeached, he would have been acquitted based on reasonable doubt or convicted on a lesser charge. . . .[H]ad Poventud's complaint sounded in malicious prosecution, rather than in a procedural *Brady*-based claim, that claim would have been barred because of the favorable termination element of the malicious prosecution tort. . . Finally, Poventud cannot seek to collect damages for the time that he served pursuant to his plea agreement (that is, for the year-long term of imprisonment). *Olsen*, 189 F.3d at 55. With these limitations in mind, we find that Poventud has stated a § 1983 claim. . . .Were Poventud to win at trial—far from a foregone conclusion—the legal status of his 2006 guilty plea would remain preserved. No element of his § 1983 *Brady* claim requires Poventud to prove his absence from the scene of the

crime; if it did, his claim would be *Heck*-barred. Poventud's success at trial would mean only that his 1998 conviction was the product of a constitutional violation; in this case, a New York State court has *already* reached this determination and vacated the conviction as a result. . . .Poventud's claim is one of process. He asserts that members of the New York City Police Department willfully withheld exculpatory evidence that called into question the testimony of the only witness to place him at the scene of the crime. Poventud's claims are not the stuff of prison idleness or self-absorption; he has proven his claims in state court and the State elected not to appeal his victory. Poventud's conviction was vacated because it rested on a constitutional infirmity. Armed with the information previously denied him, Poventud accepted an offer from the State to plead to a lesser offense. He now seeks to recover from those who violated his right to a fair trial. He does not contest the legitimacy of his plea (nor could he). His claim is restricted to the acts of the police officers before and during his trial in 1998. Poventud's victory in state court, securing *vacatur* of his jury trial conviction, gave life to his claim and separated it from the criminal activity that took place in the Bronx on March 6, 1997. Had Poventud claimed that the entire criminal process was one borne of malice, then our decision would be different. But his claims are circumscribed to the misdeeds of the police prior to his jury trial, and nothing more."); ***Poventud v. City of New York***, 750 F.3d 121, 138-43 (2d Cir. 2014) (en banc) (Lynch, J., concurring) ("The question before the Court is whether the rule of *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994), which prohibits a criminal defendant from obtaining damages for wrongful prosecution, conviction or imprisonment until and unless the conviction he complains of has been overturned, prevents the plaintiff Marcos Poventud from suing the defendants for, as he alleges, obtaining a conviction against him that led to his incarceration for almost nine years by deliberately suppressing evidence that cast doubt on the critical identification testimony of the victim. . . The short answer is that it does not, because the criminal judgment against him *was* later vacated by the state court that entered it, because the court found that the police had indeed rendered his trial unfair by suppressing exculpatory evidence. The defendants argue, however, that we should nevertheless forbid Poventud from seeking damages for that wrongful conviction and sentence, because Poventud later, after the full facts were known to both sides, pled guilty to a related but lesser offense, and was sentenced to *one* year of imprisonment. . . . To recapitulate the results of the two trials of Marcos Poventud: at the first proceeding, corrupted by police misconduct, a jury that was ignorant of the truth about the identification witness, convicted him of attempted murder and three other crimes leading to nine years of imprisonment on a ten-to-twenty year sentence; at the second, he was convicted on his plea of guilty to third-degree attempted robbery and was sentenced to one year. Now Poventud seeks damages from those who, in effect, fabricated evidence of his guilt by suppressing evidence that would have shaken, perhaps fatally, the identification testimony used to convict him. The defendants seek to have his suit dismissed, based on the same rule that would have prevented him from suing *while his initial conviction stood unchallenged*, arguing that a fairly obtained conviction by guilty plea (albeit to a lesser offense with sharply limited consequences) prevents a suit seeking damages for the wrongful conduct that resulted in his earlier, more serious, now-vacated conviction, with its resulting drastically more serious punishments. It seems to me, as it does to a majority of the judges of this Court, that the legal answer is simple. . . . Poventud seeks to recover damages for his initial conviction and for that portion of his lengthy imprisonment that

was attributable to that conviction. That conviction exists no longer; a state court declared it invalid, and we must accept the outcome of the legal process that holds him not guilty of those offenses. *Heck* thus does not bar his suit. It seems to me that the answer is equally simple from the standpoint of simple justice. The state court decided that Poventud was not fairly tried, and that the police deliberately suppressed evidence helpful to the defense in order to make the case against him appear stronger than it was. His conviction of four crimes including attempted murder, and sentence to 10 to 20 years in prison is a legal and moral nullity, the result of a trial deliberately corrupted by the police. Whether or not prosecutors might have successfully appealed that judgment, or obtained the same conviction again after a second, fair trial, they chose not to take those risks; whether or not Poventud would have been acquitted at a second trial, he too elected not to take his chances. Our best—however imperfect—approximation of the result that would have come from a fair trial is the result of the plea bargain: conviction on a single, much less serious count, and a sentence to only a year in prison. We must accept as binding the outcome of these criminal proceedings: that Poventud, at an unfair trial, suffered a much more serious conviction and punishment than he received from a fair proceeding, with all the facts known. By the same token, however, Poventud must accept the other outcome of the legal process: his conviction, by plea of guilty, of the offense of attempted robbery in the third degree, and his sentence to one year of imprisonment. Irrespective of the difficulty of his choice to plead guilty, Poventud is legally guilty of that offense. He therefore may not argue that he was wrongly prosecuted or charged; he cannot claim that he was unfairly convicted of a crime, or that he was wrongly required to serve a year in prison. But he certainly may argue that his initial, more serious conviction was wrong, and *wrongful*, and that as a result of deliberately unfair and corrupted processes he was forced to serve many additional years in prison. . . .There is thus a certain common sense, rough justice to the idea that Poventud can seek damages for the difference between the outcomes of his first and second processes, the first conducted outside the rules and the second within them. It is reasonable to ask, however, where is the *truth* in all of this. I think any fair-minded person will agree that the trial that led to Poventud's initial conviction was deeply—and intentionally—corrupted, and that its result is unreliable. But Poventud has now admitted, under oath (albeit under deeply questionable circumstances) that he was indeed involved in the robbery. Are we to award damages, in effect, for the fact that Poventud lost the opportunity to be acquitted of a crime that he may very well have committed because the rules were not followed? I believe that we must. As a matter of law, in order to prevent the horror of convicting an innocent person, we insist that someone charged with a crime may only be convicted and punished if the state can prove his or her guilt by a very demanding standard of proof, beyond a reasonable doubt. If a defendant cannot be thus proven guilty—if the evidence, however *suggestive* of guilt it may be, does not rise to a sufficient level of strength, that defendant must be declared not legally guilty of the crime charged. And certainly, if a defendant is found legally guilty by a jury that has been deprived of the full story by government misconduct, that conviction is void."); ***Poventud v. City of New York***, 750 F.3d 121, 163, 164 (2d Cir. 2014) (en banc) (Jacobs, J., dissenting) ("Precedent compels us to conclude that the *Heck* bar blocks Poventud's claim. Poventud's criminal proceeding did not terminate until he pled guilty to a lesser included offense. . . Therefore, Poventud's *Brady*-based § 1983 claim 'does indeed call into question the validity of

his conviction.'. .Because we conclude that Poventud's claim necessarily implies the invalidity of his extant conviction, we reach the issues that launched this rehearing *in banc:* whether the *Heck* bar applies only to persons in custody, as the majority of the three-judge panel held; whether there are any exceptions to the *Heck* bar; and whether any exceptions that may exist would save Poventud's claim. We reject the holding of the majority opinion issued by the three-judge panel, an opinion which has in any event been vacated. Assuming *arguendo* that there are some exceptions to *Heck,* we conclude that Poventud's action could not come within them. On the basis of self-described *dicta* signed by five Supreme Court Justices (three of whom are no longer on the Court), a Circuit split has opened as to whether some exceptions to *Heck* may be permitted. In a nutshell, these Justices posited that 'a former prisoner, no longer "in custody," may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be *impossible as a matter of law* for him to satisfy.'. .Several Circuits have concluded that the *Spencer* concurrences cannot override *Heck's* binding precedent. *See, e.g., Entzi v. Redmann,* 485 F.3d 998, 1003 (8th Cir.2007); *Gilles v. Davis,* 427 F.3d 197, 209–10 (3d Cir.2005); *Randell v. Johnson,* 227 F.3d 300, 301 (5th Cir.2000) (per curiam); *Figueroa v. Rivera,* 147 F.3d 77, 80 (1st Cir.1998). These courts hold that *Heck's* bar is absolute, heeding the Supreme Court's admonition that, even if binding precedent 'appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'. . Other Circuits have nevertheless held that *Spencer's dicta* allows courts to recognize unusual and compelling circumstances in which *Heck's* holding does not absolutely foreclose a claim. *See, e.g., Burd v. Sessler,* 702 F.3d 429, 435–36 (7th Cir.2012); *Cohen v. Longshore,* 621 F.3d 1311, 1317 (10th Cir.2010); *Wilson v. Johnson,* 535 F.3d 262, 267–68 (4th Cir.2008); *Powers v. Hamilton Cnty. Pub. Defender Comm'n,* 501 F.3d 592, 603 (6th Cir.2007); *Guerrero v. Gates,* 442 F.3d 697, 704 (9th Cir.2006); *Harden v. Pataki,* 320 F.3d 1289, 1298 (11th Cir.2003). There is no need to choose a side in this split because the narrow exception articulated by Justice Souter would be inapplicable here in any event. The motivating concern in the *Spencer dicta* was that circumstances beyond the control of a criminal defendant might deprive him of the opportunity to challenge a federal constitutional violation in federal court. Poventud is not such a person. Poventud challenged his first conviction in state court and won—making it unnecessary for him to seek federal habeas relief. At that point, Poventud had the option of defending in an untainted trial or of pleading guilty to the same crime on reduced charges and accepting a reduced sentence. He chose to plead. Poventud then had the option of filing a motion to challenge the voluntariness of his plea—and Poventud did so, but he withdrew it prior to an evidentiary hearing. It was therefore by no means 'impossible as a matter of law,' *Spencer,* 523 U.S. at 21 (Souter, J., concurring), for Poventud to challenge his conviction and thereby satisfy *Heck's* favorable termination requirement; he simply decided not to.")

Compare ***Taylor v. County of Pima****,* 913 F.3d 930, 935-36 (9th Cir. 2019) ("Taylor seeks damages for wrongful incarceration stemming from the 42 years that he spent in prison. The Supreme Court's holding in *Heck v. Humphrey*. . . provides an important limitation on Taylor's claims. Under *Heck,* a plaintiff in a § 1983 action may not seek a judgment that would necessarily

imply the invalidity of a state-court conviction or sentence unless, for example, the conviction had been vacated by the state court. . . Here, Taylor's 1972 jury conviction has been vacated by the state court, so *Heck* poses no bar to a challenge to that conviction or the resulting sentence. But Taylor's 2013 conviction, following his plea of no contest, remains valid. Accordingly, Taylor may not state a § 1983 claim if a judgment in his favor 'would necessarily imply the invalidity of his [2013] conviction or sentence.'. . As the district court summarized, '*Heck* does not bar [Taylor] from raising claims premised on alleged constitutional violations that affect his 1972 convictions but do not taint his 2013 convictions.' Recognizing that limitation, Taylor stresses that '[h]e challenges his 1972 prosecution, convictions and sentence and does not challenge his 2013 "no contest" pleas *or sentence*.'. . Taylor alleges that his 1972 conviction and resulting sentence were plagued by constitutional violations and that those errors initially caused his incarceration. Critically, however, all of the time that Taylor served in prison is supported by the valid 2013 state-court judgment. The state court accepted the plea agreement and sentenced Taylor to time served. For that reason, even if Taylor proves constitutional violations concerning the 1972 conviction, he cannot establish that the 1972 conviction caused any incarceration-related damages. As a matter of law, the 2013 conviction caused the entire period of his incarceration. . . . [W]hen a valid, unchallenged conviction and sentence justify the plaintiff's period of imprisonment, then the plaintiff cannot prove that the challenged conviction and sentence caused his imprisonment and any resulting damages. . . .We agree with the analyses and conclusions of our sister circuits. A plaintiff in a § 1983 action may not recover incarceration-related damages for any period of incarceration supported by a valid, unchallenged conviction and sentence. We take no pleasure in reaching this unfortunate result, given Taylor's serious allegations of unconstitutional actions by the County. But we cannot disregard the limitations imposed by Congress and the Supreme Court on the scope of § 1983 actions.") *with* ***Taylor v. County of Pima***, 913 F.3d 930, 939-40 (9th Cir. 2019) (Schroeder, J., dissenting as to Part B.2) ("This decision magnifies an already tragic injustice. At the time of Tucson's Pioneer Hotel fire in 1972, Louis Taylor was an African American male of sixteen. Arrested near the hotel, he was convicted on the basis of little more than that proximity and trial evidence that 'black boys' like to set fires. He has spent a lifetime of 42 years in prison following his wrongful conviction. When he filed his state court petition the county that had prosecuted him did not even respond to his allegations of grievous deprivations of civil rights, including the withholding of evidence that the fire was not caused by arson at all, and the indicia of racial bias underlying the entire prosecution. Instead of responding, the county offered Taylor his immediate freedom in return for his pleading no contest to the original charges and agreeing to a sentence of time served. He accepted the offer, since his only alternative was to stay in prison and wait for his petition for collateral relief to wend its way through the courts, a process that could take years. Because his original conviction had been vacated and all of the prison time he had served was as a result of that invalid conviction, he filed this action to recover damages for his wrongful incarceration. Yet the majority holds that he can recover nothing. Why? Because it interprets the few cases with circumstances remotely similar to this one to require the admittedly unfair holding that his plea agreement somehow validates or justifies the original sentence that deprived Taylor of a meaningful life. In my view our law is not that unjust. Our Circuit law actually supports the award of damages for the time Taylor served in prison as a result

of an unlawful, and now vacated conviction. Our leading case is *Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014), where, as here, the plaintiff's original conviction was vacated on habeas review. Hence, a claim for damages resulting from wrongful incarceration was not barred by *Heck v. Humphrey*. . . The majority acknowledges the same is true here. In *Jackson* the plaintiff could not recover damages, however, because the wrongful conviction had not yet resulted in any wrongful incarceration. This was because he was still serving other, earlier imposed sentences and never began serving the term imposed as a result of the unlawful conviction. In other words, there was a lack of causation. . . Taylor, by contrast, served decades of imprisonment as a result of his first, vacated conviction, so there is no lack of causation here. Under *Jackson*, he should recover. That Taylor later, in order to gain prompt release, pleaded no contest to the charges and to a sentence of time served, does not undo the causal sentencing chain set in motion after the original, invalid conviction. The majority's discussion is not consistent with *Jackson*. The Second Circuit's decision in *Poventud* also supports reversal. *Poventud v. City of N.Y.*, 750 F.3d 121 (2d Cir. 2014) (en banc). Poventud's conviction was vacated on collateral attack, on the basis of a *Brady* violation, and a new trial was ordered. . . He then pleaded guilty to a lesser charge, pursuant to a plea agreement that dismissed all other charges and stipulated to a one-year sentence, with time already served. . . The Second Circuit held that Poventud's *Brady*-based claim was not *Heck*-barred insofar as it related to his first conviction. . . As the en banc court explained, were Poventud to win at trial in his civil rights suit, 'the legal status of his [second conviction] would remain preserved.'. . He was permitted to pursue a claim of damages for the time he served beyond the one year plea agreement stipulation. Judge Lynch's concurrence is also instructive, as it focuses on the injustice of relying on the subsequent guilty plea to deny Poventud a remedy for the unfairness of the first trial. . . The majority's decision ignores such injustice in this case. Taylor's case is even more compelling than those of *Jackson* and *Poventud* because his first conviction was so deeply tainted that we now know the disastrous fire may not have been set by anyone, and the prosecution was without adequate foundation from the beginning. He won more than a new trial, but virtual exoneration. His situation is therefore also different from the situation in *Olsen v. Correiro*, 189 F.3d 52 (1st Cir. 1999), where the plaintiff's murder conviction was overturned but he was subsequently convicted of manslaughter. Far from being the product of a new, constitutionally-conducted second trial, Taylor's second conviction was the product of his desperate circumstances. In his 60's, he faced acceptance of the plea offer or waiting years for a habeas petition to work its way through the courts. We should not tolerate such coercive tactics to deprive persons of a remedy for violations of their constitutional rights. To say such a plea justifies the loss of 42 years, as the majority asserts, is to deny the reality of this situation and perpetuate an abuse of power that § 1983 should redress.").

See also ***Carson v. City of Philadelphia***, No. CV 23-2661, 2024 WL 3792223, at *4–6 (E.D. Pa. Aug. 13, 2024) ("The Supreme Court and the Third Circuit Court of Appeals have not yet ruled on the question in this case: does *Heck* necessarily bar § 1983 claims based on a conviction that was overturned where the plaintiff has a second, valid conviction for the same conduct? The Courts of Appeals that have considered this question have all answered no: '*Heck* does not automatically bar a § 1983 claim simply because the processes of the criminal justice

system did not end up in the plaintiff's favor. A plaintiff need not prove that *any* conviction stemming from an incident ... has been invalidated, only a conviction that could not be reconciled with the claims of his civil action.' *Poventud v. City of New York*, 750 F.3d 121, 132 (2d Cir. 2014) . . . In other words, Carson's suit is not necessarily barred in full, as the City Defendants argue, because he pled guilty to third-degree murder. Under *Heck*, the Court must analyze each claim's relationship to Carson's convictions individually. The Court begins this analysis with Carson's Fourteenth Amendment claims for denial of due process and a fair trial based on fabrication and withholding of evidence. Fabrication of evidence and withholding of impeachment or exculpatory evidence are two different claims under the Fourteenth Amendment. Fabrication of evidence 'works an unacceptable corruption of the truth-seeking function of the trial process.'. . Hence, 'if a defendant has been convicted at a trial at which the prosecution has used fabricated evidence, the defendant has a stand-alone claim under section 1983 based on the Fourteenth Amendment.'. . Violations of *Brady v. Maryland*, 373 U.S. 83 (1963) occur when '(1) the government withheld evidence, either willfully or inadvertently; (2) the evidence was favorable, either because it was exculpatory or of impeachment value; and (3) the withheld evidence was material.'. . *Brady* claims 'necessarily imply the invalidity of the challenged conviction in the trial ... *in which the Brady violation occurred.*' *Poventud*, 750 F.3d at 132 (emphasis in original). Carson's Fourteenth Amendment claims for fabrication and withholding of evidence are premised on Officer Keenan's false testimony at trial, the DA's failure to share three witness statements with Carson's trial counsel, and ADA Desiderio's attempt to pressure Wylie into giving false testimony. These claims undoubtedly implicate Carson's trial and first conviction, which was overturned on collateral review. But the Court concludes the claims do not implicate the validity of Carson's second conviction for two reasons. First, Carson pled guilty to third-degree murder with knowledge of the full body of evidence resulting from Lloyd's murder investigation, including the previously undisclosed witness statements. . . Second, Carson's ultimate guilt or innocence has no bearing on the due process violations alleged. Carson could be guilty of Lloyd's murder, but he would still have claims for fabrication of evidence and *Brady* violations in the first prosecution. . . Therefore, the Court concludes *Heck* does not bar these claims as asserted in Count I of the Complaint. Further, to the extent Carson's claims for civil rights conspiracy, supervisory liability, and municipal liability . . . are premised on the alleged fabrication of evidence and *Brady* violations during his first prosecution, these claims do not implicate his 2021 guilty plea. As such, *Heck* does not bar those claims. Count III, a malicious prosecution claim against the individual defendants, is the last claim to consider vis-à-vis the *Heck* bar. To state a malicious prosecution claim, a plaintiff must plead: (1) the defendant[s] initiated a criminal proceeding; (2) the criminal proceeding ended in [his] favor; (3) the defendant[s] initiated the proceeding without probable cause; (4) the defendant[s] acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) [he] suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding. . . Because Carson pled guilty to third-degree murder, this claim fails at the second step: the criminal proceedings related to Lloyd's murder did not end in Carson's favor. For the same reason, this claim is also barred by *Heck* because success would necessarily call Carson's 2021 plea into doubt. . . The City Defendants' motion to dismiss will be granted as to Count III's claim for malicious prosecution.")

See also ***Jackson v. Barnes***, 749 F.3d 755, 760, 761 (9th Cir. 2014) ("This. . . is a case in which a guilty plaintiff's claim is not barred by *Heck.* In this case it is Jackson's second conviction for first degree murder that is outstanding. It is undisputed that the second conviction was insulated from the inculpatory statements that are the subject of Jackson's § 1983 suit against Barnes. The first conviction is the case in which the Fifth Amendment violation occurred. Therefore a judgment in Jackson's favor would—far from 'necessarily imply[ing]' the invalidity of his second conviction—not have any bearing on it. The only conviction a judgment in Jackson's favor would bear on is his first conviction, which *was* 'called into question by a federal court's issuance of a writ of habeas corpus.' In fact, more than 'called into question,' it was reversed. . . Thus, Jackson's § 1983 claim against Barnes for the Fifth Amendment violation is not barred by *Heck.* Our holding is similar to that of the Second Circuit in *Poventud v. City of New York,* No. 12–1011–CV, 2014 WL 182313, ___ F.3d ___ (2d Cir. Jan. 16, 2014) (en banc).") and ***Rosales-Martinez v. Palmer***, 753 F.3d 890, 899 (9th Cir. 2014) ("The viability and scope of Rosales–Martinez's § 1983 claim, in relation to *Heck v. Humphrey* and pursuant to *Jackson* should be evaluated by the district judge on remand. In that connection, Rosales–Martinez's December 2, 2008 guilty plea to one of the original four counts and the credit he received for 501 days of prison time for that sentence suggests a continuous validity to a portion of his original conviction and sentence, and a possible inconsistency between it and a § 1983 action, which may pose a distinction with *Jackson.* In *Jackson,* the entire initial conviction was held invalid; thus, the Ninth Circuit held, the § 1983 case could proceed without violating the rule of *Heck v. Humphrey.* In our case, Rosales–Martinez pleaded guilty to one of the four counts of his original conviction, with the other three being held invalid. On remand, the district judge might consider if this and other differences between the case before us and the decision in *Jackson* are significant. For example, the district judge may wish to consider the extent to which Rosales–Martinez can seek compensatory damages based on the convictions that were vacated as invalid, and the time he served on the count that remained valid, for which he was given credit for 501 days of time served. The district judge may also wish to consider whether any of the facts Rosales–Martinez allocuted to in his December 2, 2008 plea are inconsistent with his allegations in this § 1983 action. These questions are illustrations; the district judge is free to pursue all relevant facts and inquiries.")

See also ***Brown v. Flowers***, No. 23-7006, 2023 WL 6861761, at *11 (10th Cir. Oct. 18, 2023) (not reported) ("In a four-Justice concurrence, the Supreme Court later carved out a possible exception to *Heck*, explaining that 'a former prisoner, no longer in custody, may bring a § 1983 action establishing the unconstitutionality of a conviction or requirement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.' *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., concurring). We have adopted this exception. *Cohen v. Longshore*, 621 F.3d 1311, 1316–17 (10th Cir. 2010) ("We are also persuaded that the *Spencer* plurality approach is both more just and more in accordance with the purpose of § 1983."). Brown maintains that she brought this action after she was no longer incarcerated, so *Heck* does not apply to her under *Spencer*. But when Brown filed her complaint in this case, she was serving a suspended sentence while on supervised probation. . . And because a person serving

a suspended or stayed sentence is still 'in custody,' we conclude that Brown was in custody for purposes of *Heck*. . . Accordingly, we affirm the district court's grant of summary judgment based on *Heck*."); ***Rosato v. New York County Dist. Attorney's Office***, No. 09 Civ. 3742(DLC), 2009 WL 4790849, at *4 (S.D.N.Y. Dec. 14, 2009) ("Plaintiff argues that *Heck* does not bar his § 1983 claims because he is not 'in custody' within the meaning of the federal habeas corpus statute, citing the Second Circuit's decision in *Leather*, 180 F.3d 420. Plaintiff's attempt to distinguish his case based on the fact that he is not incarcerated fails as a matter of law. The Supreme Court's interpretation of the 'in custody' language in the federal habeas statute is not so narrow as to require that a prisoner be physically confined in order to challenge his sentence on habeas corpus. . . An individual on probation or parole is 'in custody' for purpose of federal habeas corpus proceedings. . . Because plaintiff is still serving his sentence of probation, he is 'in custody' within the meaning of the federal habeas statute and his § 1983 claims are barred by *Heck*.").

See also ***Bermudez v. City of New York***, 790 F.3d 368, 376-77 & nn. 4, 5 (2d Cir. 2015) ("[W]e conclude that a jury could find that Defendants' alleged failure to inform ADA Rodriguez about problems in the initial questioning of these witnesses could have prevented ADA Rodriguez from making an informed decision about the reliability of that evidence. . . And this would mean that a jury could find that Defendants remained a proximate cause of the deprivation of Bermudez's due process rights. . . . Bermudez additionally brings a due process claim under *Brady v. Maryland*, 373 U.S. 83 (1963), arguing that Defendant police officers misled ADA Rodriguez as to the nature of the photo identification procedures and the fact that Lopez's testimony was coerced. Bermudez contends that these facts should have been disclosed to him. Police officers can be held liable for *Brady* due process violations under § 1983 if they withhold exculpatory evidence from prosecutors. . . Thus the same disputed issues of material fact exist concerning Bermudez's *Brady* claim. If the prosecutor was not informed about this evidence, then Defendant officers could be found to have been a proximate cause of these asserted due process violations as well. . . . In sum, there are triable issues of fact concerning whether ADA Rodriguez's decision to bring charges was tainted by misleading information about how the witnesses originally came to identify Bermudez as the shooter. It was therefore error to grant summary judgment to Defendants on Bermudez's due process claims. . . .Defendants appear to argue that Bermudez's due process claims fail because there was probable cause to bring an indictment. But the absence of probable cause is not an element of a due process claim. *See Poventud v. City of New York*, 750 F.3d 121, 134 (2d Cir.2014) (en banc) (distinguishing the elements of malicious prosecution from those of other due process claims); *Alexander v. McKinney*, 692 F.3d 553, 556–57 (7th Cir.2012) (listing the elements of a malicious prosecution claim and the elements of a due process claim under *Brady*, and naming lack of probable cause as a requirement only of the former). . . .Bermudez's claim for malicious prosecution fails at the summary judgment stage, because no facts in dispute support a lack of probable cause to charge him with the relevant crime. Where, as here, a grand jury indicted the plaintiff on the relevant criminal charge, New York law creates a presumption of probable cause that can only be overcome by evidence that the indictment 'was the product of fraud, perjury, the suppression of evidence by the police, or other police conduct undertaken in bad faith.' *Green v.. Montgomery*, 219 F.3d 52, 60 (2d Cir.2000) (quoting *Marshall v. Sullivan*, 105 F.3d 47, 54 (2d

Cir.1996)); *accord Gisondi v. Town of Harrison,* 532 N.Y.S.2d 234, 236 (1988). Bermudez argues that the indictment was the product of police suppression of evidence, because Defendant officers failed to disclose the evidentiary problems to ADA Rodriguez. We need not decide this issue, however, because ADA Rodriguez interviewed the two witnesses who testified at the grand jury hearing—Thompson and Velasquez. Thompson told ADA Rodriguez, and then testified at the grand jury hearing, that he saw Bermudez shoot the victim. Velasquez told ADA Rodriguez, and then testified at the grand jury hearing, that she saw Bermudez reach behind his back for a gun. Even if the ADA had been misled about the overly suggestive photo identification and array procedures and about the alleged coercion of Lopez, these interviews provided ADA Rodriguez with probable cause to prosecute Bermudez. Because we find that probable cause existed to indict Bermudez, we do not reach the other elements of Bermudez's malicious prosecution claim against Defendant officers.")

In ***Muhammad v. Close,*** 540 U.S. 749 (2004), the Supreme Court left this issue unresolved. *See Muhammad*, 540 U.S. at 752 n.2 (2004) ("Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement. . . . This case is no occasion to settle the issue.").

See also ***Christy v. Sheriff of Palm Beach County, Fla***., 288 F. App'x 658, ___ (11th Cir. 2008) ("[W]ith respect to Christy's assertion that his lawsuit must be allowed to proceed because habeas relief is unavailable, we have expressly declined to consider that issue in an opinion where the § 1983 action is otherwise barred under *Heck*. [citing *Vickers* and *Abusaid*]"); ***Vickers v. Donahue***, No. 04-14848, 2005 WL 1519353, at *4, *5 (11th Cir. June 28, 2005)(not published) ("While we have not explicitly ruled on whether a plaintiff who has no federal habeas remedy available to him may proceed under § 1983 despite the fact that success on the merits would undermine the validity of, in this case, an order of revocation and the resulting nine month sentence, we decline to do so here because it is unnecessary to the outcome of Vickers's case. First, as the district court pointed out, Vickers was not without a remedy to seek post-revocation relief. He could have appealed the revocation order and, had he prevailed, his § 1983 claims would not be barred by *Heck*. Second, unlike in *Harden*, Vickers's claim here would imply the invalidity of the order of revocation and nine-month sentence he received. . . . Finally, the three cases cited above that permitted a plaintiff to pursue a § 1983 claim because no habeas relief was available did not involve a situation where a conviction itself was called into question. In *Nonnette* and *Carr*, the issue was the validity of prison disciplinary proceedings revoking good-time credits, and in *Huang* the issue was the denial of credit for prison time served and the conviction was not challenged. . . . Here, Vickers's factual basis for his § 1983 claim directly undercuts a signed court order, which found that Vickers had violated his community control for two violations of condition 12. As the district court noted, Vickers insists he did not plead guilty or *nolo contendere* to these violations, but even taking his assertion as true, the undisputed fact remains that he was found to be in violation, convicted for the violation, and sentenced to nine months' imprisonment. Accordingly, we conclude that the *Heck* bar applies to Vickers's claim despite the unavailability of relief."); ***Jones v. David***, No. 08-61274-CIV, 2008 WL 5045951, at * 3 (S.D. Fla. Nov. 24,

2008) ("The Supreme Court has not determined whether *Heck* applies when a plaintiff has been released from custody and is no longer able to challenge past custody in a post-conviction proceeding. . . . The Eleventh Circuit also has not considered this issue. [citing *Abusaid* and *Vickers*] Because it is not clear that this case is *Heck*-barred, either because the plaintiff has a post-conviction remedy or because he filed this action while he was still in custody, it is recommended that the Fourth Amendment claims against Porter proceed.").

A lengthy discussion of the problem, along with a good collection of the cases, can be found in ***Dible v. Scholl***, 410 F.Supp.2d 807, 808, 809, 820-25 & n.15, 828 (N.D. Iowa 2006) ("This controversy brings before the court an issue of first impression within the Eighth Circuit − namely whether the unavailability of a remedy under 28 U.S.C. § 2254, the federal habeas corpus statute, permits a former state prisoner to maintain an action under 42 U.S.C. § 1983, . . . even though success in such an action would necessarily imply the invalidity of a conviction or sentence. Specifically, in this case, the court confronts the question of whether a former state prisoner − who is precluded from pursuing a habeas claim − can maintain an action for damages as a result of alleged due process violations that occurred during a prison disciplinary proceeding under § 1983 or whether his rights are nothing more than a mirage − appearing to exist at first glance, but transforming into an illusion upon careful inspection due to the lack of a federal forum in which to enforce them. . . . Following the Court's opinion in *Spencer,* the federal district and appellate courts have been left to carve out the precise contours of the favorable termination requirement with respect to prisoners who can not access a federal forum via ' 2254. Generally, these federal courts have split into two camps. First, are those courts that find *Heck* directly controls this issue. Therefore, because *Spencer* did not overrule *Heck*, these courts conclude that a prisoner not in custody within the meaning of the habeas statute or whose habeas action has been mooted upon release from incarceration, remains nonetheless precluded from bringing a claim for damages under § 1983 under the language in *Heck.* Second, are those courts that follow Justice Souter's logic in *Spencer* and find that *Heck* did not affirmatively decide the issue, leaving these courts free to conclude that a prisoner without recourse under the habeas statute may bring an action under the broad scope of § 1983. There is no existing Eighth Circuit precedent on this issue. . . . The Fifth, Sixth, and Third Circuits have followed the First Circuit's logic pronounced in *Figueroa. See, e.g., Randell v. Johnson,* 227 F.3d 300, 301-02 (5th Cir.2000) (relying on the reasoning set forth in *Figueroa*); *Huey v. Stine,* 230 F.3d 226, 229-30 (6th Cir.2000) (citing *Figueroa*), *overruled on other grounds by Muhammad v. Close,* 540 U.S. 749 (2004); *Gilles v. Davis,* 427 F.3d 197, 209-10 (3d Cir.2005) (following *Figueroa*). . . Based on an unpublished opinion, it also appears the Fourth Circuit would follow this same reasoning. *See Gibbs v. S.C. Dep't of Prob., Parole, & Pardon Servs.,* No. 97-7741, 1999 WL 9941, at *2 (4th Cir. Jan. 12, 1999) (affirming district court's grant of summary judgment with respect to released prisoner's claims under § 1983 on the grounds the claim was precluded by *Heck*). To summarize, the conclusion reached by these courts is premised upon the belief that *Heck* definitively decided, in the negative, the question of whether a prisoner who is precluded from pursuing habeas relief can file a § 1983 action without first meeting the favorable determination requirement. Based upon this belief, although these courts question the continued viability of *Heck's* favorable termination requirement when habeas

is unavailable, these decisions reflect that ultimately, these courts conclude that they are precluded from following *Spencer,* when to do so would overrule *Heck,* a determination solely within the province of the Supreme Court. . . . In contrast, several circuit and district courts have adopted the view articulated by Justice Souter in *Spencer* and have held that a person who is legally precluded from pursuing habeas relief may bring a § 1983 action challenging a conviction without satisfying the favorable termination requirement of *Heck. See Nonnette,* 316 F.3d at 875-77 & n. 6.; *Huang v. Johnson,* 251 F.3d 65, 75 (2d Cir .2001); *DeWalt v. Carter,* 224 F.3d 607, 616-17 (7th Cir.2000) [*But see* ***Savory v. Cannon***]; . . . *Dolney v. Lahammer,* 70 F.Supp.2d 1038, 1041, 1042 n. 1 (D.S.D.1999); *Haddad v. California,* 64 F.Supp.2d 930, 938 (C.D .Cal.1999); *Zupan v. Brown,* 5 F.Supp.2d 792 (N.D.Cal.1998). This line of case law does not, as alluded to by the First Circuit in *Figueroa,* rely upon the contention that *Spencer* overruled *Heck's* favorable termination requirement. *See, e.g., Nonnette,* 316 F.3d at 877 n. 6 ("We conclude that *Heck* does not control, and reach that understanding of *Heck's* original meaning with the aid of the discussions in *Spencer.*") (citing *DeWalt,* 224 F.3d at 617 n. 5). Rather, these authorities conclude that *Heck* should be read as creating a favorable termination requirement only for those persons who, like Heck, had the remedy of habeas corpus available to them. . . . After a review of the pertinent case law, this court concludes that it will adhere to Justice Souter's reasoning in *Spencer.* In doing so, this court aligns itself with the circuit and district courts that have concluded *Heck* only hints at an answer to the current issue before this court in dicta and therefore, does not constitute directly applicable precedent. . . This is because the prisoner in *Heck* had the remedy of habeas available to him. . . . . This court does not believe its holding will encourage prisoners to delay their challenges to loss of good time credits until their release from incarceration. As the Ninth Circuit has noted, 'The possibility of release from incarceration is the strongest incentive for prisoners to act promptly to challenge such administrative action by habeas corpus after administrative remedies are exhausted.' *Nonnette,* 316 F.3d at 878 n. 7. Further, the court's holding today is not without limitations. For example, other courts have declined to hold that a failure to timely pursue habeas remedies takes a prisoner's § 1983 claim out of *Heck's* purview. *See, e.g., Cunningham v. Gates,* 312 F.3d 1148, 1154 n. 3 (9th Cir.2002). Thus, the court's holding today potentially affects only a small number of prisoners − former prisoners challenging the loss of good time credits or revocation of parole whose claims, under *Spencer,* have been mooted by their release from incarceration, or those prisoners challenging their underlying convictions who were never 'in custody,' or served too short of time to physically file a petition for habeas corpus while 'in custody.' This latter group of potentially affected prisoners is further reduced by the fact that, unlike challenges to parole revocation or loss of good time credits, challenges to an underlying conviction are not mooted upon the prisoner's release from incarceration, and a habeas action may still be maintained provided that it was filed at the time the individual was 'in custody.' *See Spencer,* 523 U.S. at 7-8 (noting collateral consequences have been presumed in cases challenging an underlying conviction) (citing *Sibron v. New York,* 392 U.S. 40, 55-56 (1968)). . . . The decision issued by this court today ensures that prisoners seeking redress from constitutional violations will have a federal forum available to them. A contrary conclusion would have the untoward consequence of creating a right without a remedy, which is in essence, no right at all."). *See also* ***Perry v. Triggs***, No. 1:05CV0010 SWW, 2006 WL 751287, at *2, *3 (E.D. Ark. Mar. 23, 2006)

("As could be suspected, following *Spencer*, a split of authority has developed regarding the application of *Heck* principles to the situation at hand. The First, Fifth, Sixth, and Third Circuits have found that *Heck* definitively decided that an individual (whether imprisoned or not) cannot collaterally attack their conviction in a Section 1983 action. [citing cases] The Eleventh and Fourth Circuits have joined this position in unpublished opinions. [citing cases] On the other hand, the Ninth and Second Circuits have followed the logic first expressed by Justice Souter in his concurrence in *Heck* and again later in *Spencer* that the rule in *Heck* only applies to plaintiffs whose confinement can be challenged in post conviction proceedings. [citing cases] The Seventh Circuit has indicated that it would find an exception to the *Heck* favorable termination rule for individuals who had no way to collaterally attacked their conviction or sentence. [citing cases] Based upon the language of the *Heck* opinion, the undersigned believes that the holding of *Heck* applies with equal force to inmates and those who have been released, until such time as Supreme Court may find it appropriate to limit its reach. . . As recognized by the First Circuit, any other conclusion would pervert the core holding of *Heck* and would ignore the requirement that a Section 1983 plaintiff prove all elements of the cause of action. Thus, although *Spencer* may cast doubt upon the *Heck* favorable termination requirement, we 'leave to the Court the prerogative of overruling its own decisions .'[citing *Figueroa*]").

But see ***Dible v. Scholl***, No. C05-4089-PAZ, 2008 WL 656076, at *4 (N.D. Iowa Mar. 7, 2008) (Paul Zoss, US Chief Magistrate Judge) ("In considering the defendants' motion to dismiss in the present case, Judge Bennett specifically recognized that 'a ruling in Dible's favor would necessarily vitiate his underlying conviction [on the disciplinary charge.]'. . . Judge Bennett further acknowledged that both Supreme Court and Eighth Circuit precedent would bar Dible's section 1983 action, 'unless there is some other reason to take Dible's claims outside the ambit of *Heck*'s favorable termination requirement.' . . Judge Bennett distinguished Dible's claim based on *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) Although the undersigned concurs with Judge Bennett's reasoning, it appears to be at odds with the Eighth Circuit's refusal to rely on the fragmented opinions of five Justices in *Spencer*. It is significant that Judge Bennett's order denying the defendants' motion to dismiss was not immediately appealable as of right because it was not a 'final decision' of the court. . . In contrast, the undersigned's order denying the defendants' motion for summary judgment on qualified immunity grounds was appealable as of right under the collateral order doctrine. . . In *Dible II*, the court noted, 'Although we have some discretion to exercise pendent appellate jurisdiction over related rulings that are not themselves immediately, we have not been asked to do so.' . . Thus, the court limited its review to the undersigned's decision to deny qualified immunity, and did not address the order denying the defendants' motion to dismiss. . . This court reluctantly finds it is compelled to follow *Entzi*, and that failure to do so would be error. Accordingly, the defendants' motion for reconsideration is granted. The denial of the defendants' motion to dismiss is reversed, and this case is dismissed with prejudice on the grounds that the suit is barred by *Heck*'s favorable-termination rule.").

See also ***Gray v. Kinsey***, No. 3:09cv324/LC/MD, 2009 WL 2634205, at *5, *8, *9 (N.D. Fla. Aug. 25, 2009) ("Since *Spencer*, lower federal courts have grappled with defining the contours

of the favorable-termination requirement with regard to § 1983 plaintiffs who cannot access a federal forum via habeas corpus. The recent opinion of District Judge James Cohn in *Domotor v. Wennet*,. . . provides an in-depth and comprehensive analysis of the legal landscape surrounding the *Heck* decision. As explained in *Domotor*, at least five circuit courts (the Second, Fourth, Sixth, Seventh and Ninth Circuits) have found that the concurring and dissenting opinions in *Spencer* provide 'a patchwork plurality' of five Supreme Court Justices allowing a plaintiff to obtain relief under § 1983 when federal habeas corpus is not available to address the alleged constitutional wrongs. [citing cases] On the other hand, four circuits (the First, Third, Fifth and Eighth Circuits) have decided that despite the view expressed by the plurality in *Spencer, Spencer* did not overrule *Heck, Heck* directly controls the issue, and a § 1983 plaintiff not in custody within the meaning of the habeas statute or whose habeas action has been mooted by expiration of his sentence remains prohibited from bringing a claim for damages under § 1983 unless he satisfies the favorable-termination requirement. [citing cases] The Eleventh Circuit has not explicitly decided whether *Heck* bars § 1983 suits by plaintiffs who are not in custody and thus for whom federal habeas relief is not available. In dicta and unpublished opinions, the court has expressed mixed views on the subject. . . . Although Plaintiff is no longer incarcerated and likely unable to bring a habeas action, this Court holds that *Heck's* favorable-termination requirement bars Plaintiff from bringing the § 1983 claims alleged in the Amended Complaint. . . . This case involves plaintiff's traffic conviction that resulted in a fine. . . . Were this court to make a determination in plaintiff's favor, it would necessarily imply the invalidity of his conviction. . . . It is apparent from the nature of the relief plaintiff seeks, as well as the mere 11-day interval between plaintiff's conviction and the filing of this lawsuit, that plaintiff has not obtained an invalidation of his traffic conviction. Despite the unavailability of federal habeas relief, the plaintiff is not without a remedy to seek relief from his conviction through appeal of the traffic conviction. . . . Plaintiff is attempting to substitute this civil rights action for such an appeal. To allow plaintiff to circumvent applicable state procedures and proceed directly to federal court to collaterally attack his conviction through § 1983 would undermine the basis of *Heck's* favorable-termination requirement."); ***Domotor v. Wennet***, 630 F.Supp.2d 1368, 1375-80 (S.D. Fla. 2009) ("A circuit split has developed regarding the application of *Heck* to situations where a claimant, who may no longer bring a habeas action, asserts a § 1983 complaint attacking a sentence or conviction. . . Four circuits reject the idea that the plurality in *Spencer* restricts the favorable-termination requirement of *Heck* for § 1983 actions challenging the validity of a conviction or sentence. [citing cases from 1st, 3d, 5th, and 8th circuits] On the other hand, Five circuits have found that under certain circumstances the *Spencer* plurality allows a plaintiff to obtain relief under § 1983 when it is no longer possible to meet the favorable-termination requirement via a habeas action. [citing cases from 2d, 4th, 6th, 9th, and 7th circuits] A cornerstone for many courts that take the latter position is that the holding of *Heck* does not address whether the favorable-termination requirement applies to plaintiffs who may no longer bring a habeas action. . . .In *Guerrero v. Gates*, 442 F.3d 697 (9th Cir.2006), the Ninth Circuit articulated narrow circumstances where a § 1983 claim was available to a plaintiff who has not satisfied *Heck's* favorable-termination requirements. . . . The Eleventh Circuit has not ruled definitively on this issue and has instead sent mixed signals. [discussing *Abusaid, Vickers, McClish, Christy*] . . . . *Heck* squarely applies to the facts of this case. *First*, Plaintiff's § 1983

claims directly 'imply the invalidity' of Plaintiff's convictions. . . . *Second,* it is undisputed that Plaintiff cannot, at this point, meet *Heck's* favorable-termination requirement. . . Although Plaintiff is no longer incarcerated and likely unable to bring a habeas action,. . . this Court holds that *Heck's* favorable-termination requirement bars Plaintiff from bringing the § 1983 claims alleged in the Amended Complaint. . . . Plaintiff's case would present a much more difficult question if her § 1983 claims were based on a latent injury or a conspiracy discovered by the Plaintiff only after expiration of the applicable limitation period to file a habeas petition or a motion for post-conviction relief. In contrast, the facts before this Court reveal that Plaintiff entered into a plea agreement with knowledge of all or substantially all of the allegations that now form the basis of a § 1983 action for damages. The Court finds that to allow the Plaintiff to circumvent applicable state procedures and collaterally attack her convictions in federal court 'is the precise situation that *Heck* seeks to preclude.'"), *aff'd,* 356 F. App'x 316 (11th Cir. 2009).

L. What Counts as Conviction or Favorable Termination?

Compare ***Duarte v. City of Stockton***, 60 F.4th 566, 570-73 (9th Cir. 2023) ("We have never considered whether the *Heck* bar applies when criminal charges were dismissed after entry of a plea that was held in abeyance pending the defendant's compliance with certain conditions. We hold that *Heck* does not apply in this situation. . . . The *Heck* bar . . . requires an actual judgment of conviction, not its functional equivalent. . . *Heck* speaks of challenges that would impugn 'a conviction *or* sentence,'. . . and Appellees argue that Duarte was effectively sentenced to completing the terms of his plea agreement. But a conviction is a prerequisite to a sentence. . . . To be sure, Duarte pleaded 'no contest' or 'nolo contendere' to the resisting arrest charge. And, under California law, a court ordinarily 'shall find the defendant guilty' upon entry of such a plea, which is 'considered the same as a plea of guilty.'. . But this only serves to underscore that a plea itself is not a conviction. A plea is entered by the criminal defendant, but a conviction does not follow without a subsequent order from the court. . . Indeed, California law provides for several pretrial diversion programs, with terms akin to those in the agreement entered by Duarte, in which this distinction is highlighted. . . Although Duarte entered the equivalent of a guilty plea, the state court never entered an order finding him guilty of the charge to which he pleaded. Instead, the court ordered that its acceptance of Duarte's plea would be 'held in abeyance,' pending his completion of ten hours of community service and obedience of all laws. . . Suspension of the plea is not a finding of guilt or a conviction. After the six months of abeyance elapsed, the charges against Duarte were 'dismissed' in the 'interest of justice on the prosecutor's motion. . . . Dismissal, which imposes no criminal liability, is thus the opposite of a conviction, which imposes such liability. . . Because the charges against Duarte were dismissed, he was never convicted. And because there is no conviction that Duarte's § 1983 claims would impugn, *Heck* is inapplicable. Our conclusion is consistent with the majority of circuits to consider *Heck* in the context of pretrial diversion agreements. The Sixth, Eighth, Tenth, and Eleventh Circuits have all held that where the conditions of the agreement are satisfied and the criminal charges are dismissed without entry of conviction, *Heck* does not bar subsequent civil rights claims. *See Mitchell,* 28 F.4th at 895–96; *Vasquez Arroyo*, 589 F.3d at 1093–96; *S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 637–39

(6th Cir. 2008); *McClish v. Nugent*, 483 F.3d 1231, 1250–52 (11th Cir. 2007). The district court relied on a contrary decision by the Third Circuit, which held that the plaintiff's civil rights claims were *Heck*-barred even though he had never been formally convicted in the state criminal proceedings. *See Gilles v. Davis*, 427 F.3d 197, 208–12 (3d Cir. 2005). But for the reasons explained above, we find *Gilles* unpersuasive. Moreover, *Gilles* predated *Wallace*, in which the Supreme Court explicitly rejected an argument that *Gilles* appears to embrace—that § 1983 claims inconsistent with ongoing criminal charges, not just outstanding criminal judgments, could be barred by *Heck*. . . We recognize the Fifth Circuit has also held 'a deferred adjudication order is a conviction for the purposes of *Heck's* favorable termination rule' because it is 'a judicial finding that the evidence substantiates the defendant's guilt' and 'a final judicial act.' *See DeLeon v. City of Corpus Christi*, 488 F.3d 649, 655–56 (5th Cir. 2007). As explained above, we do not adopt that logic. The final judicial act is either the dismissal of the charges or the imposition of a sentence. Moreover, unlike Duarte, the *DeLeon* plaintiff remained under the conditions of his deferred adjudication agreement and the criminal charges against him had not yet been dismissed. . . Indeed, the Fifth Circuit explicitly declined to decide how it would apply *Heck* for a plaintiff who, like Duarte, did satisfy the terms of his agreement. . . In sum, *Heck*'s 'core' concern is for preventing the circumvention of habeas exhaustion requirements through § 1983. . . More broadly, *Heck* seeks to promote finality and consistency by 'refrain[ing] from multiplying avenues for collateral attack on criminal judgments.' *McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 2157, 204 L.Ed.2d 506 (2019) (collecting cases). Thus, the *sine qua non* of *Heck* is a judgment of conviction and a resultant sentence. . . Challenges that cast doubt on such judgments are the province of direct appeals or habeas—not § 1983. But where, as here, the criminal charges were dismissed and there is no conviction to impugn, the tension with which *Heck* was principally concerned is missing. Also absent are any concerns about finality, consistency, or comity, when there is no order in the state criminal case with which a decision in the federal civil lawsuit could be inconsistent. Because Duarte was never convicted of a crime, his claims should not have been dismissed under *Heck*."); ***Mitchell v. Kirchmeier***, 28 F.4th 888, 895-96 (8th Cir. 2022) ("Here, Mitchell was never convicted of—and therefore, *a fortiori*, never sentenced on—the charges against him. Furthermore, even if the pretrial diversion agreement were a 'conviction or sentence,'. . . the success of Mitchell's § 1983 claims would not imply its invalidity. In North Dakota, a pretrial diversion agreement is simply a contract in which the state agrees to forgo prosecution in consideration for the defendant agreeing not to 'commit a felony, misdemeanor or infraction' for a specified period of time (and, in some cases, agreeing to further conditions). N.D. R. Crim. P. 32.2(a)(1)-(2). The success of Mitchell's § 1983 claims would imply nothing at all about whether his pretrial diversion agreement with the state was a valid contract. Therefore, the favorable-termination requirement does not come into play, and Mitchell's § 1983 claims are not *Heck*-barred. *See Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (holding that *Heck* does not apply to pretrial diversion agreements because "there is no related underlying conviction"); *McClish v. Nugent*, 483 F.3d 1231, 1251 (11th Cir. 2007) (holding that *Heck* does not apply to pretrial intervention agreements, regardless of whether such an agreement "amount[s] to a favorable termination," because the § 1983 plaintiff "was never convicted of any crime" (emphasis omitted)). The district court reached a contrary conclusion by misreading *Heck*. According to the district court, *Heck* bars any § 1983

claim whose success would imply the plaintiff's innocence of charges in a criminal proceeding unless the plaintiff can prove that the proceeding was terminated favorably to him. On this reading, the mere existence of a criminal *charge* incompatible with the plaintiff's § 1983 claim triggers the favorable-termination requirement. But that is not what the Court said in *Heck*, 512 U.S. at 487, 114 S.Ct. 2364 (barring only § 1983 claims whose success would imply the invalidity of the plaintiff's "conviction or sentence"), and it conflicts with what the Court has consistently held since, *see, e.g.*, *Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007) (denying that *Heck* applied where "there was in existence no criminal conviction that the [§ 1983] cause of action would impugn"). We recognize that the Third Circuit has adopted a reading of *Heck* like the district court's. *See Gilles v. Davis*, 427 F.3d 197, 208-12 (3d Cir. 2005). For the reasons explained above, however, we find the cases from the Tenth and Eleventh Circuits that reject this reading more persuasive. *See Vasquez Arroyo*, 589 F.3d at 1095; *McClish*, 483 F.3d at 1251."); ***Vasquez Arroyo v. Starks***, 589 F.3d 1091, 1096 (10th Cir. 2009) ("Because we have determined that the Kansas pre-trial diversion agreements are not outstanding convictions and therefore these § 1983 claims impugning their validity are not barred by *Heck*, we need not decide whether *Heck* applies when the plaintiff lacks an available remedy in habeas. Although we implied in *Butler* in dicta that *Heck* does not apply when a habeas remedy is lacking, 482 F.2d at 1278-81, we decline to reach this issue which the Supreme Court has not resolved, *see Close*, 540 U.S. at 752 n. 2, and on which the circuits are split. [footnote collecting cases]"); ***S.E. v. Grant County Bd. of Educ***., 544 F.3d 633, 639 (6th Cir.2008) (holding *Heck* inapplicable to pre-trial diversion agreements) *and* ***McClish v. Nugent,*** 483 F.3d 1231, 1251 & n.19 (11th Cir. 2007) ("Holmberg's § 1983 claim arose out of his arrest for allegedly interfering with the ongoing arrest of McClish by Deputies Terry and Calderone. The deputies arrested Holmberg for 'resisting arrest without violence,' see Fla. Stat. § 843.02, and the charge was eventually dismissed without prejudice pursuant to Florida's pretrial intervention program, see Fla. Stat. § 843.02. The district court determined that *Heck* barred Holmberg from bringing a § 1983 claim because of his participation in PTI. Although we have never determined that participation in PTI barred a subsequent § 1983 claim, the district court cited to Second, Third, and Fifth Circuit cases holding that a defendant's participation in PTI barred subsequent § 1983 claims. Dist. Ct. Order at 19- 20 (citing *Gilles v. Davis*, 427 F.3d 197 (3d Cir.2005); *Taylor v. Gregg*, 36 F.3d 453 (5th Cir.1994); *Roesch v. Otarola*, 980 F.2d 850 (2d Cir.1992)). The district court then concluded that 'Holmberg's participation in PTI, which resulted in a dismissal of the charge of resisting arrest without violence, is not a termination in his favor, and therefore, he is barred from bringing a § 1983 claim for false arrest.' We disagree. *Heck* is inapposite. The issue is not, as the district court saw it, whether Holmberg's participation in PTI amounted to a favorable termination on the merits. Instead, the question is an antecedent one − whether *Heck* applies at all since Holmberg was never convicted of any crime. The primary category of cases barred by *Heck* − suits seeking damages for an allegedly unconstitutional conviction or imprisonment − is plainly inapplicable. Instead, the district court based its *Heck* ruling on the second, indirect category of cases barred by *Heck*: suits to recover damages 'for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid.' . . . The problem with using this second *Heck* category to bar Holmberg's § 1983 suit is definitional − to prevail in his § 1983 suit, Holmberg would not have to

'negate an element of the offense of which he has been convicted,' because he was never convicted of any offense. [citing *Heck* and *Wallace*] . . . . Even if we were to assume that *Heck* somehow applies to this case, Holmberg correctly cites to *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d 1298 (11th Cir.2005), for the proposition that the Supreme Court has apparently receded from the idea that *Heck's* favorable-termination requirement also applies to non-incarcerated individuals. . . . The logic of our reasoning in *Abusaid*, although dicta, is clear: If *Heck* only bars § 1983 claims when the alternative remedy of *habeas corpus* is available, then *Heck* has no application to Holmberg's claim. Holmberg was never in custody at all, and the remedy of *habeas corpus* is not currently available to him.") *with* ***Gilles v. Davis***, 427 F.3d 197, 209-12 (3d Cir. 2005) ("Petit's underlying disorderly conduct charge and his § 1983 First Amendment claim require answering the same question − whether Petit's behavior constituted protected activity or disorderly conduct. If ARD ["Accelerated Rehabilitative Disposition" ("ARD") program, which permits expungement of the criminal record upon successful completion of a probationary term] does not constitute a favorable termination, success in the § 1983 claim would result in parallel litigation over whether Petit's activity constituted disorderly conduct and could result in a conflicting resolution arising from the same conduct. We recognize that concurring and dissenting opinions in *Spencer*. . . question the applicability of *Heck* to an individual, such as Petit, who has no recourse under the habeas statute. . . But these opinions do not affect our conclusion that *Heck* applies to Petit's claims. We doubt that *Heck* has been undermined, but to the extent its continued validity has been called into question, we join on this point, our sister courts of appeals for the First and Fifth Circuits in following the Supreme Court's admonition 'to lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court "the prerogative of overruling its own decisions."'. . Because the holding of *Heck* applies, Petit cannot maintain a § 1983 claim unless successful completion of the ARD program constitutes a 'termination of the prior criminal proceeding in favor of the accused.' . .We have not had occasion to address this issue directly. Our trial courts have held that ARD is not a termination favorable for purposes of bringing a subsequent § 1983 malicious prosecution claim. We find instructive opinions from the Second and Fifth Circuits that have addressed whether similar pre-trial probationary programs are a favorable termination sufficient to bring a subsequent civil suit. [discussing cases] Viewing these factors together, we hold the ARD program is not a favorable termination under *Heck*. Petit's participation in the ARD program bars his § 1983 claim.' footnotes omitted).

See also ***Aprileo v. Clapprood***, No. 3:21-CV-30114-MGM, 2024 WL 3430855, at *4 (D. Mass. May 21, 2024) ("The court is not convinced that the First Circuit would consider the disposition of the criminal charges against Plaintiff a conviction for purposes of *Heck.* The majority of circuits to consider *Heck* in the context of pretrial diversion agreements – including the Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits – 'have all held that where the conditions of the agreement are satisfied and the criminal charges are dismissed without entry of conviction, *Heck* does not bar subsequent civil rights claims.'. . . I recommend that the court adopt the position announced by the majority of the circuits to have addressed the issue, which is that *Heck* does not

apply when the criminal charges against a § 1983 plaintiff are dismissed without a formal conviction after successful completion of a pretrial diversion agreement."); ***Ricci v. State of Rhode Island***, No. 120CV00543MSMPAS, 2023 WL 4686025, at *14–15 (D.R.I. July 21, 2023) ("The purpose of *Heck* was twofold: first, to avoid the use of civil actions to substitute for writs of habeas corpus to challenge convictions; and second, to avoid the prospect of inconsistency between a conviction and a subsequent successful constitutional challenge to that conviction's underpinning in a civil action. Neither is a concern here. One could not have brought a habeas corpus petition to 'undo' a filing since it is not a judgment of the court much less a final one. Nor could such a petition be brought to vacate an expunged conviction. . . Second, neither a successful filing nor an expunged conviction has any continuing legal effect, so no inconsistency could arise were the civil action in this Court successful. Expungement has the same legal effect as a pardon, which 'fulfills the purposes of Heck's invalidation requirement.'. . 'A full pardon removes all legal consequences of the individual's conviction, avoiding the concern of parallel litigation with an outstanding criminal proceeding.'. . '*Heck* does not present the same bar to § 1983 suits where the underlying conviction has already been expunged; the conviction is no longer "outstanding."'. . Whether a resolution such as a filing is a bar under *Heck* has been the object of some attention and differing views in federal courts. In the District of Massachusetts, a case that has been 'continued without a finding'. . . has been held to be a *Heck* bar, even though once the pretrial probation period passes, the charge is dismissed. *Cabot v. Lewis,* 241 F. Supp. 3d 239, 250-51 (D. Mass. 2017). Other courts have reached opposite conclusions. *See Tomashek v. Raleigh Cnty. Emergency Operating Ctr.,* 344 F. Supp. 3d 869, 874 (S.D.W. Va. 2018) (collecting cases). In *Tomashek*, the Court declined to impose a *Heck* bar because of the defendant's entry into a pretrial diversion program. . . It reasoned that pretrial diversion results in neither an adjudication of guilt nor a conviction; successful completion results in a dismissal. . . The very purpose of the program is to 'avoid[ ] a judgment of criminal guilt – the opposite of a conviction in a criminal action.'. . This Court declines to hold this action precluded by *Heck* for two reasons. First, although a decision by a sister District, as *Cabot* is, would normally be entitled to great consideration, *Cabot* pre-dated *Clark v. Thompson*, which dramatically softened *Heck's* preclusion effect. Until *Clark, Heck's* literal language had required a state court disposition that was 'favorable' to the defendant, which the First Circuit had interpreted as tantamount to an acquittal or other exoneration. In *Clark*, the Supreme Court set a much lower bar – that the state court criminal charge not have ended in a 'conviction.'. . *Cabot* itself acknowledged that its narrow view of *Heck* 'ignores, and appears to be inconsistent with, the purposes and rationale of *Heck.*'. . Thus, there is reason to believe the *Cabot* Court would reach a contrary result, consistent with this Court, were it to consider the issue post-*Clark.* In this Court's view, while pre-*Clark* one might not have been able to say that a filing was tantamount to an acquittal or exoneration, it certainly is not a conviction which is, post-*Clark*, now a precondition to *Heck* preclusion. . . Second, it seems fundamentally unfair to interpose a *Heck* preclusion on Ricci's claims that law enforcement intentionally fabricated a confidential informant to secure a warrant because Ricci accepted the lowest possible disposition in Rhode Island criminal law to resolve the criminal case. At that time, he did not know of the evidence from which an inference of fabrication could be drawn and, indeed, under the Rules of Criminal Procedure in Rhode Island, no discovery deposition of right is allowed. It is somewhat facetious

for the defendants to claim that 'it [was] incumbent upon Plaintiff to challenge the evidence through a *Franks [v. Delaware]]* hearing.' Ricci had no factual basis at all for requesting a *Franks* hearing which is gained only after surmounting a high threshold of proffered evidence of falsity. The Court therefore declines to impose *Heck v. Humphrey* as a bar to this action.")

On "expungement by executive order," *see* ***Carr v. Louisville-Jefferson County***, 37 F.4th 389, 392-93, 394 n.4 (6th Cir. 2022) ("Carr does not contest that her § 1983 claims implicate *Heck*. However, she argues her conviction has already been invalidated through her pardon. In *Heck*, the Court listed four ways a conviction could be invalidated: (1) reversal on direct appeal; (2) executive expungement; (3) declared invalid by a state tribunal; or (4) called into question by a writ of habeas corpus. . . Carr argues her pardon falls under executive expungement. . . We have never previously considered whether a pardoned individual can pursue a § 1983 claim relating to her conviction. Courts that have considered the issue unanimously agree that pardons in some way fall under *Heck*'s reach. [collecting and discussing cases] We join our sister circuits in holding that a pardoned individual has had her conviction expunged by executive order under *Heck*. . . Defendants argue that Carr's pardon does not invalidate her conviction under *Heck* because the pardon did not contain language indicating Carr was innocent. . . . A full pardon, even one that does not indicate an individual is innocent, fulfills the purposes of *Heck*'s invalidation requirement. *Heck* sought to avoid parallel litigation and to prevent collateral attacks on a conviction through a civil suit. . . A full pardon removes all legal consequences of the individual's conviction, avoiding the concern of parallel litigation with an outstanding criminal proceeding. . . .While a full pardon does not always indicate that the individual is innocent, *Heck* does not require a finding of innocence. *Heck* did not impose a prerequisite of innocence to seek relief under § 1983. Instead, it gave examples of state procedures amounting to invalidation of a conviction. It did not mention innocence as a requirement, and there is 'no reason to impose that additional limitation [of innocence] on *Heck*'s holding.'. . . The Supreme Court recently addressed the lack of an innocence requirement in a Fourth Amendment claim under § 1983. *Thompson v. Clark*, —– U.S. ——, 142 S. Ct. 1332, —– L.Ed.2d —— (2022). Thompson was charged in state court proceedings, but 'the charges were dismissed before trial without any explanation by the prosecutor or judge.'. . He sued the police officers who initiated the criminal proceedings under § 1983, alleging they maliciously prosecuted him in violation of the Fourth Amendment. . . The Court compared Thompson's Fourth Amendment claim to malicious prosecution, noting that a favorable termination of the underlying criminal proceedings is required to succeed in a malicious prosecution claim. . . Emphasizing the purposes of the favorable termination requirement—to avoid parallel litigation, preclude inconsistent judgments, and prevent improper collateral attacks—the Court held an affirmative showing of innocence is not required. . . *Thompson* is distinguishable because the plaintiff was never convicted, but the case highlights the purposes of the favorable termination requirement and that an affirmative showing of innocence is not required to satisfy those purposes."); ***Savory v. Cannon***, 947 F.3d 409, 429 (7th Cir. 2020) (en banc) ("The contention that a pardon must be based on innocence in order to serve as a favorable termination finds no support in *Heck*, and we see no reason to impose that additional limitation on *Heck's* holding. If the Court had wanted to specify that the pardon must be based on innocence,

it certainly could have done so, but it did not. Instead, the Court offered a list of possible resolutions that would satisfy the favorable termination requirement, and none require an affirmative finding of innocence. A conviction need only be 'reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.'. . Any of these outcomes can occur without a declaration of a defendant's innocence. *McDonough* added that acquittal is a favorable termination under *Heck* that starts the clock on claim accrual, another resolution that does not necessarily imply innocence."); ***Wilson v. Lawrence County***, 154 F.3d 757, 760-61 (8th Cir. 1998) ("Wilson asserts that his conviction was 'expunged by executive order' by virtue of his full pardon from the governor. The defendants disagree. The district court, relying on Missouri law, concluded that a person who is pardoned by the governor remains guilty in the eyes of the Missouri court and therefore cannot bring a 1983 claim for wrongful incarceration. In our view, however, the issue in this case is one of federal law. . . . The relevant question is whether Wilson's pardon invalidated his conviction within the meaning of *Heck*. We find that it did. . . . The gist of *Heck* is that section 1983 is not an appropriate vehicle for attacking the validity of a state conviction. Wilson does not seek to put it to this improper use. He used the executive clemency process, which the Supreme Court has expressly approved, as the forum in which to challenge his criminal conviction.").

Compare ***Roberts v. City of Fairbanks***, 947 F.3d 1191, 1193-1203 (9th Cir. 2020) ("The primary question before us is whether § 1983 plaintiffs may recover damages if the convictions underlying their claims were vacated pursuant to a settlement agreement. The answer depends on whether such a vacatur serves to invalidate the convictions and thus renders the related § 1983 claims actionable notwithstanding *Heck*. We conclude that where all convictions underlying § 1983 claims are vacated and no outstanding criminal judgments remain, *Heck* does not bar plaintiffs from seeking relief under § 1983. . . .The *Heck* Court was explicit: 'If the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.'. . Because all convictions here were vacated and underlying indictments ordered dismissed, there remains no outstanding criminal judgment nor any charges pending against Plaintiffs. The absence of a criminal judgment here renders the *Heck* bar inapplicable; the plain language of the decision requires the existence of a conviction in order for a § 1983 suit to be barred. . . . The dissent's view that a conviction vacated by settlement is not 'declared invalid' under *Heck* appears to arise out of its conflation of the favorable-termination rule in the tort of malicious prosecution with *Heck*'s four distinct means of favorable termination. . . . *Heck*'s favorable termination requirement is distinct from the favorable termination element of a malicious-prosecution claim. Compare *Awabdy*, 368 F.3d at 1068 (malicious-prosecution plaintiff must "establish that the prior proceedings terminated in such a manner as to indicate his innocence"), with *Heck*, 512 U.S. at 486–87 (favorable-termination rule satisfied when conviction or sentence is (1) reversed on direct appeal, (2) expunged by executive order, (3) declared invalid by a state court, or (4) called into question by a federal court's issuance of a writ of habeas corpus). . . .The dissent accuses us of creating 'a fifth method of favorable termination' in addition to *Heck*'s four—namely, vacatur-by-settlement. . . Not so. We merely hold that where, as here, a § 1983

plaintiff's conviction is vacated by a state court, that conviction has been 'declared invalid by a state tribunal authorized to make such determination,' . . . and that *Heck* is therefore no bar to the suit.") *with* ***Roberts v. City of Fairbanks***, 947 F.3d 1191, 1210-15 (9th Cir. 2020) (Ikuta, J., dissenting) ("Because the plaintiffs' convictions were not 'declared invalid by a state tribunal authorized to make such determination,' nor reversed on direct appeal, expunged by executive order, or called into question by a federal court's issuance of a writ of habeas corpus, . . . the plaintiffs are unable to show that their criminal proceedings were terminated in their favor. They are therefore barred from using a civil action to establish they were wrongly convicted. Thus, the plaintiffs' claim for damages stemming from their allegedly wrongful convictions are 'not cognizable under § 1983.'. . *Heck*'s clear holding resolves this appeal. . . .In sum, the plaintiffs' convictions were not 'declared invalid by a state tribunal.'. . Rather, the convictions were vacated pursuant to settlement agreements, such that the 'criminal judgment[s]' are still 'outstanding,' precluding the plaintiffs' claims for relief. . . . Therefore, the plaintiffs cannot make the necessary showing to bring their § 1983 malicious prosecution action. . . .As an initial matter, *Heck* makes clear that plaintiffs 'must' show that their convictions were terminated in one of four specific ways. . .Vacatur by settlement is not on the list, and the list is exclusive: *Heck* does not permit other, unidentified ways of satisfying the favorable-termination requirement. . . Thus, any attempt to recognize additional means of favorable termination is contrary to Supreme Court precedent. . . Moreover, recognizing vacatur by settlement as another method of favorable termination is contrary to *Heck*'s reliance on the common-law cause of action for malicious prosecution, which was the Court's 'starting point' for determining the viability of a § 1983 claim. . . The common law did not recognize vacatur by settlement as a method of favorable termination: For over a century, courts have recognized that a claim for malicious prosecution does not lie if the prosecution was abandoned based on a settlement or compromise. . . . In sum, the majority has no authority to recognize a new means of favorable termination; *Heck*'s list is exclusive. . . And even if the majority could recognize new means of favorable termination, vacatur by settlement is not a favorable termination at common law, so there is no basis for deeming it a method of favorable termination here. . . .Simply stated, the plaintiffs did not have their prior convictions 'declared invalid by a state tribunal authorized to make such determination,'. . . but instead reached an agreement with the state to vacate their convictions. Regardless of the plaintiffs' reasons for doing so, they cannot now claim that the prior convictions were terminated in a manner that provides a basis for bringing § 1983 malicious prosecution claims. In holding otherwise, the majority casts aside the favorable-termination rule articulated by *Heck v. Humphrey* and thus is inconsistent with Supreme Court precedent. Accordingly, I dissent.")

See also ***Roberts v. City of Fairbanks***, 962 F.3d 1165, 1166-67, 1175 (9th Cir. 2020) (VanDyke, J., joined by Ikuta, J., dissenting from the denial of rehearing en banc) ("The split panel decision in this case created an additional exception to the *Heck* bar that, as far as I can tell, is unprecedented—not only in our circuit, but across the federal courts. It did so by reinterpreting *Heck*'s *favorable* termination requirement into something less than even a *neutral* termination requirement. In doing so, it expressly refused to apply the 'hoary principle[s]' adopted from the malicious prosecution context that were the express basis for the

majority's decision in *Heck*. . . Now, in every situation where a criminal defendant's conviction is ministerially vacated without any judicial determination that the conviction was actually 'invalid,' this new exception casts into doubt the *Heck* bar's applicability. This includes in the many states in our circuit that have statutes that automatically vacate some convictions once the defendant has served his sentence. *Heck* is a quarter-century old, and its better-established exceptions already bedevil federal courts across the country, including this one. The fact that no other court has conceived or applied the panel majority's new exception in over 25 years of applying *Heck* should be reason enough for this Court to rehear this case en banc before cracking this lid on Pandora's box. . . .In the face of controlling Supreme Court precedent, the split-panel majority in *Roberts* created a novel exception to reach a result inconsistent with *Heck*. We should have considered this inconsistency en banc before cementing it as binding precedent in our circuit. I respectfully dissent from the denial of rehearing en banc.")

Compare ***Owens v. Baltimore City State's Attorneys Office***, 767 F.3d 379, 390-92 (4th Cir. 2014) ("Because the grant of a new trial does not trigger the limitations period for a malicious prosecution claim, the statute of limitations on Owens's § 1983 claims did not begin to run on the date he was granted a new trial. Instead, the operative limitations period began to run on the date a malicious prosecution claim became ripe at common law, i.e., the date on which the *nolle prosequi* was entered. It was only on this date that proceedings against Owens were favorably terminated in such manner that they could not be revived. Because Owens filed suit within three years of this date, the statute of limitations does not bar his present cause of action. . . .In sum, we take the Supreme Court at its word. We determine when the statute of limitations on a plaintiff's § 1983 claim begins to run by looking to the common-law tort most analogous to the plaintiff's claim. In general, the limitations period for common law torts commences when the plaintiff knows or has reason to know of his injury. But if the common law provides a 'distinctive rule' for determining the start date of the limitations period for the analogous tort, a court should consider this rule in determining when the limitations period for the plaintiff's claim begins to run. . . Application of this rule to Owens's claims sets the start of the limitations period at the date of the *nolle prosequi*. Because Owens filed suit within three years of this date, his claims were timely filed.") *with* ***Owens v. Baltimore City State's Attorneys Office***, 767 F.3d 379, 404-07 (4th Cir. 2014) (Traxler, CJ, concurring in part and dissenting in part) ("I concur in parts III, IV.A, and V of the majority opinion. However, I respectfully dissent from parts II and IV.B. First, I believe that Owens' *Brady* claims were untimely because they accrued when he discovered the exculpatory and impeaching evidence that had not been disclosed, not when the proceeding was subsequently terminated via entry of the nolle prosequi. Second, I would conclude that the district court correctly determined that the individual defendants were entitled to qualified immunity because it was not clearly established in the spring of 1988 that a police officer's failure to disclose exculpatory evidence made the officer potentially liable for a violation of a criminal defendant's constitutional rights. . . .For a *Brady* claim, the plaintiff need only demonstrate 'that prejudice resulted from the suppression.'. . '[A] defendant's right to pre-trial disclosure under *Brady* is not conditioned on his ability to demonstrate that he would or even probably would prevail at trial if the evidence were disclosed, much less that he is in fact innocent.' [citing *Poventud*] *Brady* is meant to ensure a fair

trial; '[t]he remedy for a *Brady* claim is therefore a new trial, as proof of the constitutional violation need not be at odds with [defendant's] guilt.'. . . Accordingly, I would conclude that the proceedings were 'favorably terminated' when Owens' conviction was vacated and he was granted a new trial on June 7, 2007. The *Brady* violation was complete; 'the harm the alleged Brady violation had done could not be affected by a retrial.'. . His claim was therefore ripe and, assuming he knew about the undisclosed exculpatory evidence in question at that point, the limitations period began running at that time. Alternatively, as previously noted, Owens at the latest was aware of the exculpatory evidence by June 11, 2008, when his attorney filed a motion to exclude that evidence at his retrial. Either way, Owens' claims are untimely.")

In ***Thompson v. Clark***, 142 S. Ct. 1332 (2022), the Supreme Court resolved a split in the Circuits as to whether the "favorable termination" requirement for a Section 1983 malicious prosecution claim requires a disposition with an affirmative indication of innocence or whether favorable termination occurs so long as the criminal prosecution ends without a conviction. *See* ***Thompson v. Clark***, 142 S. Ct. 1332, 1336-41 & n.2 (2022) ("The Courts of Appeals have split over how to apply the favorable termination requirement of the Fourth Amendment claim under § 1983 for malicious prosecution. In addition to the Second Circuit, some other Courts of Appeals have held that a favorable termination requires some affirmative indication of innocence. See, *e.g., Kossler v. Crisanti*, 564 F.3d 181, 187 (CA3 2009) (en banc); *Cordova v. Albuquerque*, 816 F.3d 645, 649 (CA10 2016). By contrast, the Eleventh Circuit has held that a favorable termination occurs so long as the criminal prosecution ends without a conviction. See *Laskar v. Hurd*, 972 F.3d 1278, 1282 (2020). This Court granted certiorari to resolve the split. . . . In this case, Thompson sued several police officers under § 1983, alleging that he was 'maliciously prosecuted' without probable cause and that he was seized as a result. . . He brought a Fourth Amendment claim under § 1983 for malicious prosecution, sometimes referred to as a claim for unreasonable seizure pursuant to legal process. This Court's precedents recognize such a claim. See *Manuel* v. *Joliet*, 580 U.S. 357, 363–364, 367–368, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017); *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (plurality opinion); see also *id.*, at 290–291, 114 S.Ct. 807 (Souter, J., concurring in judgment). And following this Court's precedents, the District Courts and Courts of Appeals have decided numerous cases involving Fourth Amendment claims under § 1983 for malicious prosecution. [collecting cases] . . . . The narrow dispute in this case concerns one element of the Fourth Amendment claim under § 1983 for malicious prosecution. To determine the elements of a constitutional claim under § 1983, this Court's practice is to first look to the elements of the most analogous tort as of 1871 when § 1983 was enacted, so long as doing so is consistent with 'the values and purposes of the constitutional right at issue.'. . . Because this claim is housed in the Fourth Amendment, the plaintiff also has to prove that the malicious prosecution resulted in a seizure of the plaintiff. . . **[fn.2:** It has been argued that the Due Process Clause could be an appropriate analytical home for a malicious prosecution claim under § 1983. . . If so, the plaintiff presumably would not have to prove that he was seized as a result of the malicious prosecution. But we have no occasion to consider such an argument here.**]** . . . . Because the American tort-law consensus as of 1871 did not require a plaintiff in a malicious prosecution suit to show that his

prosecution ended with an affirmative indication of innocence, we similarly construe the Fourth Amendment claim under § 1983 for malicious prosecution. Doing so is consistent, moreover, with 'the values and purposes' of the Fourth Amendment. . . The question of whether a criminal defendant was wrongly charged does not logically depend on whether the prosecutor or court explained why the prosecution was dismissed. And the individual's ability to seek redress for a wrongful prosecution cannot reasonably turn on the fortuity of whether the prosecutor or court happened to explain why the charges were dismissed. In addition, requiring the plaintiff to show that his prosecution ended with an affirmative indication of innocence would paradoxically foreclose a § 1983 claim when the government's case was weaker and dismissed without explanation before trial, but allow a claim when the government's evidence was substantial enough to proceed to trial. That would make little sense. Finally, requiring a plaintiff to show that his prosecution ended with an affirmative indication of innocence is not necessary to protect officers from unwarranted civil suits—among other things, officers are still protected by the requirement that the plaintiff show the absence of probable cause and by qualified immunity. In sum, we hold that a Fourth Amendment claim under § 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction. Thompson has satisfied that requirement here. We express no view, however, on additional questions that may be relevant on remand, including whether Thompson was ever seized as a result of the alleged malicious prosecution, whether he was charged without probable cause, and whether respondent is entitled to qualified immunity. On remand, the Second Circuit or the District Court as appropriate may consider those and other pertinent questions. We reverse the judgment of the U.S. Court of Appeals for the Second Circuit and remand for further proceedings consistent with this opinion.").

But see ***Thompson v. Clark***, 142 S. Ct. 1332, 1341-47 (2022) (Alito, J., joined by Thomas, J., and Gorsuch, J., dissenting) ("[T]his Court has never held that the Fourth Amendment houses a malicious-prosecution claim, and the Court defends its analogy with just two sentences of independent analysis and a reference to a body of lower court cases. I cannot agree with that approach. The Court's independent analysis of this important question is far too cursory, and its reliance on lower court cases is particularly ill-advised here because that body of case law appears to have been heavily influenced by a mistaken reading of the plurality opinion in *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). What the Court has done is to recognize a novel hybrid claim of uncertain scope that has no basis in the Constitution and is almost certain to lead to confusion. . . .The Court asserts that malicious prosecution is the common-law tort that is most analogous to petitioner's Fourth Amendment claim, *ante*, at ——, but in fact the Fourth Amendment and malicious prosecution have almost nothing in common. . . . The Court does not make a serious effort to justify its analogy between unreasonable seizure and malicious prosecution. Instead, the Court largely relies on the fact that 'most of the Courts of Appeals to consider the question' have drawn that analogy, *ante*, at ——, but the Court ignores contrary lower court authority. See, *e.g.*, *Manuel v. Joliet*, 903 F.3d 667, 670 (CA7 2018); *Jones v. Clark County*, 959 F.3d 748, 776–777 (CA6 2020) (Murphy, J., concurring in part); *Pagan-Gonzalez v. Moreno*,

919 F.3d 582, 608–617 (CA1 2019) (BARRON, J., concurring). But in any event, we should not decide this important question without independent analysis, and the Court's own cursory analysis is erroneous. The Court claims that the 'gravamen' of petitioner's Fourth Amendment claim is the same as that of a malicious-prosecution claim: the 'wrongful initiation of charges without probable cause.'. . But what the Court describes is not a Fourth Amendment violation at all. As explained, that Amendment protects against 'unreasonable searches and seizures'—not the unreasonable 'initiation of charges.'. . .Instead of clarifying the law regarding § 1983 malicious-prosecution claims, today's decision, I fear, will sow more confusion. The Court endorses a Fourth Amendment claim for malicious prosecution that appears to have the following elements: (1) the defendant 'initiat[ed]' charges against the plaintiff in a way that was 'wrongful' and 'without probable cause,' (2) the 'malicious prosecution resulted in a seizure of the plaintiff,' and (3) the prosecution must not have ended in conviction. . . This tort has no precedent in Fourth Amendment law. It is markedly different from the common-law tort of malicious prosecution, and its dimensions are uncertain. First, it is not clear why this tort requires both a seizure and a prosecution. As noted, the two do not always go together, and if the aim is to permit the victims of malicious prosecution to sue under § 1983, it is not clear why detention should be required. While pretrial detention certainly increases the harm inflicted by a malicious prosecution, such a prosecution can be very damaging even if the victim is never detained. . . The majority's only answer to the question why the claim requires a seizure is that it is 'housed in the Fourth Amendment,'. . . but that response begs the antecedent question whether the Fourth Amendment houses a malicious-prosecution suit at all. Second, where the person bringing suit under § 1983 is arrested and then prosecuted, it is not clear whether both the arrest and the prosecution must have been done without probable cause and without a legitimate law enforcement purpose. An arrest made without probable cause may be followed by a prosecution based on new evidence that clearly establishes probable cause. And by the same token, the evidence that establishes probable cause at the time of arrest may be thoroughly discredited at some point well before the termination of a prosecution. Third and most important, it is not clear what the Court means when it says that the 'gravamen' of the claim is '*wrongful* initiation of charges without probable cause.'. . Since the Court refers repeatedly to 'malicious prosecution,' one might think that this requires a guilty mental state, but in a footnote, the Court raises the possibility that the constitutional tort it recognizes may require nothing more than the absence of probable cause. . . If that turns out to be so, it is hard to see even the slightest connection between the Court's new tort and common-law malicious prosecution. Malice is the hallmark of a malicious-prosecution claim. Even if a prosecution is brought and maintained without probable cause, a malicious-prosecution claim cannot succeed without proof of malice. . . And if the Court's new tort has nothing to do with malicious prosecution, what possible reason can there be for borrowing that tort's favorable-termination element? . . . Instead of creating a new hybrid claim, we should simply hold that a malicious-prosecution claim may not be brought under the Fourth Amendment. Such a holding would not leave a person in petitioner's situation without legal protection. Petitioner brought Fourth Amendment claims against respondents for false arrest, excessive force, and unlawful entry, but after trial a jury ruled against him on all those claims. . . Petitioner could have also sought relief under state law. . . New York law appears to recognize a malicious-prosecution tort with an element very much like the favorable-termination element that

the Court adopts today, . . . but petitioner chose not to bring such a claim. For these reasons, I would affirm the judgment below, and I therefore respectfully dissent.")

See also ***Barnes v. City of New York***, 68 F.4th 123, 126, 128 (2d Cir. 2023) ("We agree with the district court's dismissal with respect to all of the federal claims alleged by Barnes except for the dismissal of his due process claim based on the use of fabricated evidence as to the drug sale charge of which he was acquitted. Specifically, the district court erred in concluding that because Barnes was arrested, detained, prosecuted, and convicted for drug possession simultaneous to the drug sale proceedings, this precludes, as a matter of law, his ability to plead a deprivation of liberty caused by the drug sale prosecution. Because the prosecution of an individual based on fabricated evidence may itself constitute a deprivation of liberty for purposes of the due process right to a fair trial, Barnes was not required to show that his drug sale prosecution resulted in additional custody or a conviction in order to sufficiently allege a claim at the pleading stage. . . . Barnes's malicious prosecution claim as to the drug sale charge was properly dismissed. However, we affirm the dismissal on a different ground than that relied upon by the district court, which held that Barnes failed to show a deprivation of liberty caused by the drug sale charge, given his contemporaneous detention and conviction on the drug possession charge. Malicious prosecution claims sound in the Fourth Amendment, which proscribes the 'wrongful initiation of charges without probable cause.' *Thompson v. Clark*, —— U.S. ——, 142 S. Ct. 1332, 1337, 212 L.Ed.2d 382 (2022). '[A] Fourth Amendment claim under § 1983 for malicious prosecution requires the plaintiff to show a favorable termination of the underlying criminal case against him.'. . . Here, although Barnes was acquitted of the drug sale charge, he was convicted of the drug possession charge. He thus cannot allege a favorable termination of his criminal proceedings for purposes of his malicious prosecution claim. *See DiBlasio v. City of New York*, 102 F.3d 654, 658–59 (2d Cir. 1996) (affirming dismissal of malicious prosecution cause of action where defendant was acquitted of criminal sale of a controlled substance but convicted of criminal possession of a controlled substance). We accordingly affirm the dismissal of Barnes's malicious prosecution claim because he cannot show that his 'criminal prosecution ended without a conviction.'"); ***Alburg v. Jones***, No. 21-2580, 2023 WL 2823895, at * n.13 (3d Cir. Apr. 7, 2023) (not reported) ("*Thompson* abrogated *Kossler*'s holding that a favorable termination requires an affirmative indication of innocence and held that a plaintiff only needs to show that the prosecution ended without a conviction to establish a favorable termination. . . *Thompson* did not address whether a proceeding can ever terminate in a plaintiff's favor when the prosecution did not end without a conviction on every charge. *Kossler* left open the possibility that even when a plaintiff is convicted on one charge but not the other, a court may still hold that the criminal proceeding favorably terminated if the charged offenses 'contained distinct statutory requirements' and 'aimed to punish two different sets of conduct.'"); ***Shrum v. Cooke***, 60 F.4th 1304, 1310–11 (10th Cir. 2023) ("A § 1983 malicious prosecution claim includes five elements, with this argument turning on the second element: (1) the defendant caused the plaintiff's continued confinement or prosecution; (2) *the original action terminated in favor of the plaintiff*; (3) no probable cause supported the arrest, confinement, or prosecution; (4) the defendant acted maliciously; and (5) the plaintiff sustained damages. . .Under our precedent, a prosecutor's

dismissal, without more, did not constitute favorable termination. . . Instead, we required that the prosecution was terminated for reasons tending to indicate the accused's innocence. . . An example of this is when a prosecutor enters a *nolle prosqui* (a voluntary dismissal of criminal charges) after deciding he cannot prove guilt beyond a reasonable doubt. But if an official concludes a prosecution out of mercy for the accused, for instance, the termination did not indicate the accused's innocence. The district court correctly found under our existing precedent that Shrum's prosecution did not terminate in a manner that indicated his innocence. After the judgment below the Supreme Court clarified the meaning of 'favorable termination.' The Court found that a criminal prosecution terminates favorably, for the purposes of a § 1983 malicious prosecution claim, when the prosecution ends without a conviction. *Thompson v. Clark*, —— U.S. ——, 142 S. Ct. 1332, 1335, 212 L.Ed.2d 382 (2022). . . . As a result, our precedents applying the favorable termination element are no longer good law. The district court therefore erred in granting dismissal on this ground."); ***Smith v. City of Chicago***, No. 19-2725, 2022 WL 2752603, at *1–2 (7th Cir. July 14, 2022) (not reported) ("This case returns to this court on remand from the Supreme Court of the United States. Keith Smith sued the City of Chicago and two of its police officers under 42 U.S.C. § 1983 for violating the Fourth Amendment. In 2013, Chicago Police Officers stopped a car in which Smith, a felon, was a passenger. A search of the car revealed a firearm—evidence used at a probable-cause hearing to secure Smith's detention for felon-in-possession charges. He spent seven months in jail until being released on bond in 2014. After a bench trial in 2016, a judge acquitted Smith on all charges. Smith filed a civil complaint in 2018 challenging the search of the car, claiming the officers fabricated their reports. The district court dismissed Smith's lawsuit as untimely under the applicable two-year statute of limitations. Smith appealed, and we focused our analysis on when Smith's claim accrued. . . Ultimately, we measured timeliness from Smith's release on bond, . . . so we affirmed the district court's dismissal of Smith's claim. . . In May of this year, the Court granted Smith's petition for a writ of certiorari and vacated this case's judgment in light of *Thompson v. Clark*, 142 S. Ct. 1132 (2022). The parties submitted Circuit Rule 54 statements addressing *Thompson*'s effect. We have considered those statements and the *Thompson* decision, and we agree with the parties that *Thompson* dictates a result opposite to our 2021 opinion. After *Thompson*, a Fourth Amendment claim for malicious prosecution accrues when the underlying criminal prosecution is terminated without a conviction. . . Here, that was Smith's acquittal date, so his claim was timely. In its Circuit Rule 54 statement, though, the City seeks summary affirmance on alternative grounds. Noting that lack of probable cause is also an element of a Fourth Amendment malicious prosecution claim, . . . the City argues Smith admitted in his petition for a writ of certiorari that on the day he was arrested, a firearm was found in the vehicle in which he was a passenger. This admission, the City asserts, shows that officers had probable cause to arrest Smith and thus extinguishes his Fourth Amendment claim. The City's assertion is odd, and ultimately beside the point. Smith's claim does not turn on whether officers discovered a firearm. Rather, Smith's theory is that law enforcement fabricated a story to justify an unlawful search, and had that search never occurred, law enforcement would have lacked probable cause to arrest and detain him. In other words, Smith contends his seven-month detention (after a probable-cause hearing) was unreasonable because it was based on illegally seized evidence knowingly tendered by the defendant police officers. In other words, legal process has

been commenced against the defendant in a way that amounts to an unreasonable seizure under the Fourth Amendment. So, we reject the City's argument that Smith has not presented a Fourth Amendment claim. Therefore, we REVERSE the district court's judgment and REMAND this case to the district court for further proceedings. Smith's corresponding conspiracy and *Monell* claims may also be considered on remand."); ***Coello v. DiLeo***, 43 F.4th 346, 354-55 (3d Cir. 2022) ("We have little trouble concluding that Coello's § 1983 claims fall in *Heck*'s sphere. At bottom, they allege that her criminal proceedings were begun and conducted unlawfully and without probable cause, resulting in her wrongful conviction. . . . They are, like Heck's claims, most akin to the tort of malicious prosecution. . . Moreover, we see 'no logical way to reconcile [her] claims with a valid conviction,'. . . which means they could not have accrued unless and until Coello's state criminal proceedings were resolved in her favor[.]. .So when, if ever, did Coello's state criminal proceedings favorably end, thereby triggering the two-year filing deadline? *Heck* did not clarify what it means for a criminal prosecution to end in the § 1983 claimant's favor. In the past, however, we have held that the favorable-termination requirement is met only if the underlying criminal case concludes in a way that affirmatively 'indicate[s] the plaintiff's innocence.'. . But our inquiry has since become simpler. In *Thompson v. Clark*, the Supreme Court fleshed out the meaning of 'favorable termination' in the context of a Fourth Amendment claim under § 1983 for malicious prosecution. . . Looking to the way American courts interpreted that tort in 1871 (when the Civil Rights Act was enacted), it explained that a malicious prosecution claim could typically move forward merely by a showing that the plaintiff's criminal case ended with no conviction. . . No affirmative indication of innocence was necessary back then; neither, said the Court, is it necessary today. . . *Thompson* thus abrogated our decision in *Kossler* and, in the process, streamlined our favorable-termination analysis. A § 1983 claim sounding in malicious prosecution accrues when 'the prosecution terminate[s] without a conviction.'. .Accordingly, because Coello's § 1983 claims sound in malicious prosecution, we hold that the favorable-termination requirement was met on February 26, 2018, when the state court vacated her criminal conviction. We make no inquiry into whether her post-conviction proceedings suggest her innocence of the underlying charges. Coello brought this suit within two years of that date; so, under *Heck*'s deferred-accrual rule, her § 1983 claims were timely. The Linden Defendants, while declining to engage directly with *Heck* or its progeny, offer one argument in opposition. They contend that Coello's 'unexplained' delay in applying for post-conviction relief 'renders her claims untimely.'. . But if *Heck*'s deferred-accrual rule applies, then Coello's § 1983 claims did not exist until her conviction was vacated; thus they could not be deemed untimely by any delay in seeking post-conviction relief. Read more charitably, the Linden Defendants ask us to impose a new rule cabining a plaintiff's ability to use *Heck* to overcome a statute-of-limitations defense: if a plaintiff waits too long to fulfill the prerequisite for claim accrual under *Heck*—that is, waits too long to get her conviction reversed, invalidated, expunged, *etc.*—she forfeits any civil claims that may accrue on favorable termination. In support, they refer us only to general principles underlying statutory limitations periods, such as the need to create 'stability in human affairs' and 'induce litigants to pursue their claims diligently so that answering parties will have a fair opportunity to defend.'. . While we acknowledge that it could well prove harder to defend a § 1983 action that accrues long after the events underlying the plaintiff's claims have passed, we see no need at this

time to complicate further our *Heck* inquiry by imposing the abstract diligence requirement suggested. Thus our only option is to reverse the dismissal of Coello's § 1983 claims and remand for further proceedings.")

See also ***Burnam v. Weld County Sheriffs***, No. 23-CV-00151-NYW-NRN, 2024 WL 1051949, at *11 (D. Colo. Mar. 11, 2024) (" '*Thompson* did not address whether a proceeding can ever terminate in a plaintiff's favor when the prosecution did not end without a conviction on every charge.' *Alburg v. Jones*, No. 21-2580, 2023 WL 2823895, at *3 n.13 (3d Cir. Apr. 7, 2023). Post-*Thompson*, a small number of courts have considered whether the disposal of a criminal proceeding pursuant to a plea agreement, wherein a defendant agrees to plead guilty to some charges in exchange for the dismissal of others, amounts to a favorable termination. Based on the Court's research, the weight of authority concludes that such a scenario does not constitute a favorable termination. [collecting cases] Indeed, if criminal charges are dismissed pursuant to a guilty plea which results in the defendant's conviction of at least some charges, the prosecution did not end '*without a conviction*.'. . Here, the state court dockets reflect that the criminal charges against Mr. Burnam were consolidated and treated as one criminal prosecution. Mr. Burnam ultimately entered guilty pleas with respect to two charges—and was convicted of those charges— in exchange for the dismissal of the remaining charges against him. Although Mr. Burnam argues that the charges to which he pleaded guilty were 'unrelated to the events and aftermath of December 9th 2020,'. . . there has already been a state-court judicial determination that the subject charges against Mr. Burnam were 'of the same or similar character and were tied to a single scheme and plan,'. . . and the Court cannot disturb this ruling. Accordingly, Mr. Burnam cannot 'show that the criminal prosecution ended without a conviction,' as required by *Thompson* . . . and he therefore cannot state a malicious prosecution claim."); ***Mueller v. Walmart Stores East, LP***, No. 1:21-CV-04273-VMC, 2023 WL 5742544, at *8 n.16 (N.D. Ga. July 26, 2023) ("The Court has refused to consider Mr. Mueller's arguments regarding claims under Section 1983 above because they were raised in a surreply. But even to the extent that Mr. Mueller could somehow overcome the state action requirement to bring a claim for malicious prosecution against Defendants under Section 1983, such a claim would likely fail for the same reasons as his state law claims did. In response, Mr. Mueller points to the Supreme Court's decision in *Thompson v. Clark*, 142 S. Ct. 1332, 1341 (2022) which held that 'a Fourth Amendment claim under § 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction.' However, '*Thompson* did not directly address proceedings involving multiple charges where some resulted in the plaintiff's conviction and others were dismissed. The court is not persuaded that the application of *Thompson* to such cases permits a § 1983 claim for malicious prosecution where the charges are related and arise from the same course of conduct conceded by the plaintiff's guilty plea.' *Grainger v. Buckhannon*, No. 8:22-CV-00354-JMC, 2022 WL 2168079, at *3 (D.S.C. June 15, 2022); *see also Hefner v. Jones*, No. 1:21-CV-00227-MR, 2022 WL 1598798, at *3 (W.D.N.C. May 19, 2022) (expressing doubt as to whether "*Thompson* extends to the situation where the charge in question was dismissed as part of a plea agreement whereby the defendant pled guilty to other charges.").); ***Thompson v. Clark***, 673 F.Supp.3d 261, 267-73

(E.D.N.Y. 2023) ("In remanding the case, the Supreme Court did not hold that Plaintiff had prevailed on his malicious prosecution claim or that the claim required a new trial and instead 'remand[ed] for further proceedings consistent with [its] opinion.'. . In doing so, the Court described several additional issues of fact and law that potentially remained relevant to Plaintiff's malicious prosecution claim on remand, 'including whether [Plaintiff] was ever seized as a result of the alleged malicious prosecution, whether he was charged without probable cause, and whether [Defendant] is entitled to qualified immunity.'. . The Court said that 'the Second Circuit or the District Court as appropriate may consider those and other pertinent questions.'. . .Both of the crimes with which Plaintiff was charged, OGA and resisting arrest, are Class A misdemeanors under New York law and, therefore, each subjected Plaintiff to potential punishment of the same magnitude. As in *Coleman*, Plaintiff 'was released without bail after his arraignment,' and the only deprivation of his liberty was his 'ongoing requirement of appearing in court.'. . This restraint on Plaintiff's liberty would have occurred if Plaintiff had been charged with only OGA, a charge that was indisputably based on probable cause for the reasons explained above. As a result, even if there was no probable cause to charge Plaintiff with resisting arrest, he suffered no additional deprivation of his liberty because of that charge."); ***Bentler v. Nederostek***, No. CV 3:22-1107, 2023 WL 3510822, at *4-5 (M.D. Pa. May 17, 2023) ("The court agrees with the Third Circuit panel in *Alburg* that *Kossler's* favorable termination analysis as applied to cases where the plaintiff's underlying prosecution did not end without a conviction on every charge remains intact post-*Thompson.*As indicated above, *Kossler's* favorable termination analysis prescribes a two-part inquiry to determine whether the plaintiff's criminal prosecution terminated in his favor when he was convicted of some but not all charges. First, we examine the relevant criminal statutes on their face to discern their legal relationship—*i.e.*, we ask whether the offenses of conviction and acquittal involved lesser-included offenses or shared common elements. . . Second, we review the underlying facts of the case—which, for purposes of a motion to dismiss, we draw from the complaint—to determine whether the charges Bentler was convicted of were predicated on the same factual basis as the charges of which he was acquitted. . . If the charges Bentler was convicted of sought to punish the same underlying conduct as the charges of which he was acquitted, then the underlying criminal proceeding cannot be said to have terminated in his favor. But if the charged offenses 'contained distinct statutory requirements' and 'aimed to punish two different sets of conduct,' then acquittal on some of the charges may constitute favorable termination. . . . [T]he court finds that Bentler's charges of attempted murder of a police officer were predicated on the same factual basis as the charges of aggravated assault. A review of the facts alleged in Bentler's complaint reveals the attempted murder of police officer and aggravated assault charges all stemmed from the short, tense interaction between Bentler and law enforcement at the boat launch. . . . Since he was convicted of aggravated assault, the jury ultimately found beyond a reasonable doubt that Bentler 'attempt[ed] by physical menace to put any [police officer], while in the performance of duty, in fear of imminent serious bodily injury.' . . That the judge granted a judgment of acquittal for Bentler on the charges of attempted murder of a law enforcement officer—whether it was because there was not sufficient evidence to show Bentler intended to kill the officers, or whether there was not sufficient evidence to show Bentler's actions did not constitute a 'substantial step' towards a killing, or for some other reason, the Complaint does not

explain—does not take the criminal prosecution as a whole outside the ambit of *Kossler* and its progeny, which preclude a finding of favorable termination on this record. . . Therefore, since the aggravated assault convictions preclude a finding of favorable termination of Bentler's criminal proceeding, the court will dismiss Bentler's malicious prosecution claim. Dismissal will be without prejudice since Bentler's convictions remain on appeal, and thus it is still possible for Bentler's criminal proceeding to terminate favorably should his convictions be disrupted and the prosecution end."); ***Reeder v. Vine***, No. 6:20-CV-06026 EAW, 2023 WL 2044126, at *8–9 (W.D.N.Y. Feb. 16, 2023) (Wolford, C.J.) ("'To demonstrate a favorable termination of a criminal prosecution for purposes of the Fourth Amendment claim under § 1983 for malicious prosecution, a plaintiff need only show that his prosecution ended without a conviction.' *Thompson*, 142 S. Ct. at 1335. 'The favorable termination requirement serves multiple purposes: (i) it avoids parallel litigation in civil and criminal proceedings over the issues of probable cause and guilt; (ii) it precludes inconsistent civil and criminal judgments where a claimant could succeed in the tort action after having been convicted in the criminal case; and (iii) it prevents civil suits from being improperly used as collateral attacks on criminal proceedings.'. . In *Thompson*, the Supreme Court rejected the argument that a favorable termination for purposes of a malicious prosecution claim requires the plaintiff to 'show that his prosecution ended with some affirmative indication of innocence.'. . Here, Plaintiff was convicted in Seneca County Court of criminal possession of a controlled substance in the seventh degree after a bench trial. Plaintiff appealed his conviction to the New York Appellate Division Fourth Department, and his conviction was affirmed. . . Thus, the matter was not favorably resolved in Plaintiff's favor. The fact that Plaintiff was acquitted of the charge for possession of a controlled substance with intent to sell but convicted of the lesser offense does not change this conclusion. *DiBlasio v. City of New York*, 102 F.3d 654, 659 (2d Cir. 1996) (affirming dismissal of malicious prosecution claim where plaintiff was convicted of lesser included offense of unlawful possession of cocaine). . . . Plaintiff argues that he nonetheless meets the requisite standard in light of the fact that the Ontario County indictment was dismissed, which Plaintiff characterizes as a dismissal 'in the plaintiff's favor for lack of evidence.'. . However, the judge dismissing the indictment expressly stated that the dismissal was a result of a prosecutor's grand jury instruction error, and specifically noted that the dismissal was with leave to re-present. . . Thus Plaintiff's characterization is facially inaccurate. That the prosecutor opted not to re-present the charges to the grand jury and allow the Seneca County charges to go forward instead does not conclusively constitute a favorable termination of the September 2017 charges, particularly in light of how intertwined the two proceedings were, though the Court need not resolve that question on the instant motion because as discussed below, the claim fails for other independent reasons. . . . [E]ven were the Court to conclude that Plaintiff could show a favorable termination, he cannot satisfy the requirement to show a lack of probable cause."); ***In re Watts Coordinated Pretrial Proceedings***, No. 19-CV-1717, 2022 WL 9468253, at *4 n.8 (N.D. Ill. Oct. 14, 2022) ("As discussed in more detail in the Opinion addressing Defendants' motion to dismiss the complaints filed by Plaintiffs represented by the Loevy Firm, the Supreme Court recently confirmed that the Fourth Amendment housed a 'malicious prosecution claim.' *Thompson v. Clark*, 142 S. Ct. 1332, 1337 (2022). As another court in this District has recently found, the Supreme Court overruled Seventh Circuit precedent that 'a plaintiff subject to a prosecution in

Illinois could not bring a malicious prosecution claim under the Fourth or the Fourteenth Amendments ... as to the Fourth Amendment, but not the Fourteenth Amendment.' *Navarro v. City of Aurora*, 2022 WL 1988990, at *2 (N.D. Ill. June 6, 2022) (internal citations omitted).")

Compare ***Laskar v. Hurd***, 972 F.3d 1278, 1282, 1285-86, 1289-95 (11th Cir. 2020), *cert. denied,* 142 S. Ct. 1667 (2022) ("The main issue in this appeal is whether the dismissal of a prosecution as untimely satisfies the favorable-termination element of a claim for malicious prosecution under the Fourth Amendment. . . .The officials argue that Laskar did not receive a favorable termination. They explain that several of our sister circuits define favorable terminations as those that 'indicate the innocence of the accused.' [collecting cases] Laskar cannot satisfy the favorable-termination element, they contend, because the trial court dismissed the prosecution against him as untimely, which does not suggest that he was innocent of the charges facing him. This argument requires us to decide whether a termination must contain evidence of a plaintiff's innocence to be favorable. We have held that a claim of malicious prosecution accrues when the prosecution against the plaintiff terminates in his favor. . . We have also held that a prosecutor's unilateral dismissal of charges against a plaintiff constitutes a favorable termination. . . But the details of the favorable-termination requirement, including whether a termination must suggest a plaintiff's innocence, otherwise remain unsettled. This question implicates our 'two-step approach to "defining the contours and prerequisites of a § 1983 claim."'. . We must first look to the common-law principles that were 'well settled' when Congress enacted section 1983. . . 'After identifying the relevant common-law rule, we must consider whether that rule is compatible with the constitutional provision at issue.'. .Because the tort of malicious prosecution is the common-law analogue to the constitutional violation that Laskar alleges, . . . we examine the favorable-termination element of malicious prosecution as it existed when Congress enacted section 1983 in 1871. We then consider whether the relevant common-law rule is compatible with the Fourth Amendment. . . . In the light of this history, we have no trouble discerning a well-settled principle of law to guide our analysis. Although States disputed whether a prosecution could terminate without a court order, every State to reach the issue other than Rhode Island agreed that a prosecution terminated when a court formally dismissed the prosecution and discharged the plaintiff. And the vast majority of courts to consider the favorable-termination requirement either adopted standards that excluded considering the merits of the underlying prosecution or held that particular terminations that did not evidence plaintiffs' innocence could satisfy the requirement. Indeed, outside of Rhode Island, the only final terminations that would bar a plaintiff's suit were those that were inconsistent with a plaintiff's innocence—that is, if a jury convicted the plaintiff or if the plaintiff compromised with his accuser to end the prosecution in a way that conceded his guilt. So we can readily discern from that consensus the following principle: a formal end to a prosecution in a manner not inconsistent with a plaintiff's innocence is a favorable termination. . . . In sum, whether a particular termination affirmatively supported a plaintiff's innocence was not material to the favorable-termination element in the vast majority of States. As common-law courts on both sides of the Atlantic stressed, a termination on technical grounds did not cure the harm that malicious prosecution caused. . . Instead, the favorable-termination requirement prevented plaintiffs from using the tort to collaterally attack ongoing criminal proceedings or unfavorable terminations. . . And under

prevailing standards, a plaintiff could satisfy the favorable-termination element of malicious prosecution by proving that a court formally ended the prosecution in a manner that was not inconsistent with his innocence. Because section 1983 is not merely 'a federalized amalgamation of pre-existing common-law claims,'. . . we must determine whether this common-law understanding comports with relevant constitutional principles[.] . . Here, nothing in the Fourth Amendment supports departing from the weight of the common law. A claim of malicious prosecution under the Fourth Amendment is only 'shorthand' for a claim of deprivation of liberty pursuant to legal process, so the validity of these claims depends on whether the seizure was justified, not whether the prosecution itself was justified[.] . . That question almost always turns on whether the judicial officer who authorized the seizure had sufficient information before him to support the seizure. . . Conversely, limiting favorable terminations to those that affirmatively support a plaintiff's innocence redirects the focus to whether the entire prosecution was justified. In other words, the 'indication-of-innocence' approach to favorable terminations considers the wrong body of information. . . The Fourth Amendment does not require plaintiffs to support their innocence with such a narrow, inapposite source of evidence. Because 'the Fourth Amendment protects against "searches" and "seizures" (and not "prosecutions"),'. . . the favorable-termination requirement functions as a rule of accrual, not as a criterion for determining whether a constitutional violation occurred. Indeed, we have never considered the requirement outside of the accrual context. . . In the light of this limited role, the favorable-termination requirement will bar a suit for malicious prosecution only when the prosecution remains ongoing or terminates in a way that precludes any finding that the plaintiff was innocent of the charges that justified his seizure—that is, when the prosecution ends in the plaintiff's conviction on or admission of guilt to each charge that justified his seizure. . . In other words, a plaintiff can satisfy the favorable-termination requirement by proving that the prosecution against him formally ended in a manner not inconsistent with his innocence on at least one charge that authorized his confinement. . . . We acknowledge that our conclusion departs from the consensus of our sister circuits, but we do not agree with the dissent that these decisions should alter our conclusion. To start, the dissent miscounts the circuits that have adopted the indication-of-innocence approach to claims of malicious prosecution under the Fourth Amendment. Although seven circuits have done so, [citing cases,] the dissent erroneously relies on decisions applying state or local tort law to conclude that the Fifth, Seventh, and District of Columbia Circuits followed suit. *See Lemoine v. Wolfe*, 812 F.3d 477, 479 (5th Cir. 2016) (applying Louisiana tort law); *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 925 (7th Cir. 2001) (applying Illinois tort law); *Whelan v. Abell*, 953 F.2d 663, 669 (D.C. Cir. 1992) (applying D.C. tort law). Indeed, the Seventh Circuit has held that a Fourth Amendment claim for unlawful pretrial detention does not require any favorable termination. *See Manuel*, 903 F.3d at 670. More importantly, when considering the decisions of our sister circuits, '[w]e are not merely to count noses. The parties are entitled to our independent judgment.'. . And the justification that our sister circuits offered for the consensus view is unpersuasive. Each circuit to embrace the indication-of-innocence approach grounded its decision in a comment in the *Restatement (Second) of Torts* or the modern decisions of States that adopted that comment. . . . It is far from clear that the *Second Restatement* reflects even a modern consensus. *See Restatement (Third) of Torts: Liability for Economic Harm* § 23 cmt. a & n.a (Am. L. Inst. 2020)

(acknowledging a split in authority, rejecting the indication-of-innocence requirement, and endorsing a "not-inconsistent-with-innocence" approach). Indeed, two of the three states in this Circuit, including the one in which Laskar's seizure and prosecution occurred, do not require an indication of innocence. *Compare Vadner v. Dickerson*, 441 S.E.2d 527, 528 (Ga. Ct. App. 1994) (holding that a dismissal on jurisdictional grounds is a favorable termination if the prosecutor does not recommence the prosecution), *and Kroger Co. v. Puckett*, 351 So. 2d 582, 585–86 (Ala. Civ. App. 1977) (rejecting the approach in the *Second Restatement* (citing *Adams*, 32 So. 503)), *with Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1356 (Fla. 1994) (requiring a termination "that indicates the innocence of the accused"). Setting this issue aside, modern common law is not the touchstone when defining a claim under section 1983. '[T]he Supreme Court has clarified that the relevant common-law principles are those that were "well settled at the time of section 1983's enactment."'. . Although the *Restatements* and modern treatises often reflect ancient legal principles, the indication-of-innocence approach to favorable terminations has no such pedigree. And we cannot base our decision on common-law doctrines that developed long after Congress enacted section 1983. The dissent next faults us for attempting to 'square the tort of malicious prosecution with the Fourth Amendment,'. . . and we readily plead guilty to that charge. Although the dissent acknowledges that the Fourth Amendment does not neatly overlap with the tort of malicious prosecution, it nonetheless contends that we must adhere to the common law. . . This argument turns our approach to malicious prosecution on its head. Our oldest decisions on the subject explained that 'malicious prosecution' is only a 'shorthand way of describing' certain claims for unlawful seizure, not an 'independent Fourth Amendment right ... to be free from a malicious prosecution.'. . . More recently, the Supreme Court has explained that '[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims' and that we must 'closely attend' to the 'constitutional right at issue' when defining these claims. . . To give priority to the common law over the Fourth Amendment, we would need to depart from both our earliest decisions on the subject and the decisions of the Supreme Court. Of course, we cannot do so. Finally, the dissent highlights the ostensible policy benefits of the indication-of-innocence approach, such as the 'additional opportunity' it could create 'for courts to stop false claims' at the pleading stage instead of at summary judgment, . . . but we fail to see how the operation of the Federal Rules of Civil Procedure is relevant to our analysis of the Fourth Amendment. . . We must adhere to the clear commands of the law instead of favoring an alternative policy of judicial economy. . . We need not redefine the favorable-termination requirement to provide extra protection for defendants accused of malicious prosecution. The probable-cause requirement already limits meritless claims by placing the burden on the plaintiff to establish '(1) that the legal process justifying his seizure was constitutionally infirm and (2) that his seizure would not otherwise be justified without legal process.'. . On top of that, the plaintiff must overcome qualified immunity by proving that the absence of probable cause was clearly established. . . And a plaintiff seized without probable cause must prove he suffered an injury to recover compensatory damages for the specific charges he says were unfounded . . . After considering both the common law and Fourth Amendment, we hold that the favorable-termination element of malicious prosecution is not limited to terminations that affirmatively support the plaintiff's innocence. Instead, the favorable-termination element requires only that the criminal

proceedings against the plaintiff formally end in a manner not inconsistent with his innocence on at least one charge that authorized his confinement. A formal end to criminal proceedings will satisfy this standard unless it precludes any finding that the plaintiff was innocent of the charges that justified his seizure, which occurs only when the prosecution ends in the plaintiff's conviction on or admission of guilt to each charge that justified his seizure. Because Laskar's complaint alleges that the prosecution against Laskar formally terminated and does not allege that he was convicted or that he admitted his guilt to each charge that justified his seizure, Laskar has alleged that he received a favorable termination.") *with* ***Laskar v. Hurd***, 972 F.3d 1278, 1298-99, 1303-07 (11th Cir. 2020), *cert. denied,* 142 S. Ct. ___ (2022) (Moore, J., Chief District Judge, dissenting) ("Today, the majority adopts a legal standard for the favorable termination element of a 42 U.S.C. § 1983 malicious prosecution claim that pushes us out-of-step with our sister circuits and requires the Court to depart from its well-founded opinion in *Uboh v. Reno*, 141 F.3d 1000 (11th Cir. 1998). The majority contends that (1) it is bound to reject the indication of innocence standard by a review of 'well-settled' common-law principles at the time of § 1983's passage, and (2) the majority's proposed standard better serves the constitutional concerns implicated by § 1983 and the Fourth Amendment. I dissent because there was no 'well-settled' common-law principle as to what was required of a malicious prosecution claimant to meet the favorable termination element in the late 19th century. Further, the rule adopted by majority is an inadequate filter for meritless claims. . . . Based on my own review of 19th century precedent, I respectfully disagree that there is a well-settled legal principle that commands that we abandon our reasoning in *Uboh* and defy the sound logic exercised in nearly every other circuit. Furthermore, the majority advances a standard that does not appear in any 19th century case, has been rejected by several of our sister circuits, and has not been adopted by any other circuit. The majority argues that its proposed standard more accurately reflects the constitutional considerations at issue under the fourth amendment. However, such considerations do not justify adoption of a rule that appears out of thin air. To be clear, the Majority Opinion does not provide the source of its 'not inconsistent with his innocence on at least one charge that authorized his confinement' rule. . . That is likely because it has not been adopted by any court with persuasive authority before today. . . . Unlike the any-crime rule in *Williams*, a question that circuit courts were split on, the indication of innocence standard has been adopted by all the circuit courts that have resolved this question. As such, formal adoption of the indication of innocence standard would synchronize the Court with our sister circuits. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits all rely on the indication of innocence standard, and no federal court of appeals has adopted the majority's rule. . . . Although the Fifth, Seventh, and D.C. Circuits have only applied the indication of innocence standard to state-law malicious prosecution claims, they have utilized no alternative standard for the favorable termination element in § 1983 malicious prosecution. Furthermore, those courts' application of the indication of innocence to state-law malicious prosecution is (1) indicative of the confines of a § 1983 claim in that jurisdiction, and (2) further evidence of the indication of innocence standard's pervasiveness throughout the federal court system. . . . That the indication of innocence standard continues to be used in light of *Manuel* and *Nieves* speaks to its strength. The Second Circuit in *Lanning* opined that the indication of innocence standard prohibits defendants from 'relitigat[ing] the issue of probable cause ... thus posing the prospect of harassment, waste

and endless litigation.'. . Indeed, allowing the favorable termination requirement to retain its teeth sets the tort of § 1983 malicious prosecution apart from § 1983 false arrest; to hold otherwise would reduce the malicious prosecution inquiry to a mere determination of probable cause. Finally, the Tenth Circuit expressly rejected the not inconsistent with innocence standard. . . In so doing, the Tenth Circuit noted that the indication of innocence test is 'a standard feature of the tort of malicious prosecution and a reflection of the idea that malicious prosecution actions are disfavored at common law.'. . And, the court emphasized the indication of innocence standard balances the important considerations at play—noting that it may bar some meritorious claims, but it serves as 'a useful filtering mechanism, barring actions that have not already demonstrated some likelihood of success.'. . Because almost all courts of appeal have adopted the standard, and our adoption would not only synchronize the circuit courts, but also strike the best balance between filtering out meritless claims and permitting claims that demonstrate some likelihood of success, the Court should adopt the indication of innocence. . . . The majority attempts to massage the favorable termination requirement in a way that will square the tort of malicious prosecution with the Fourth Amendment, thus tying a tidy bow on the debate. However, this Court is not tasked with answering this bigger question, left unanswered by the Supreme Court. Instead, we are asked merely to apply the tort of malicious prosecution under § 1983—a tort which exists, despite some persuasive arguments in favor of its elimination—to a set of facts that might be new to this Court but are far from groundbreaking. If malicious prosecution is a tort that is so incongruous with the Fourth Amendment that it can no longer be cognizable under § 1983, then a court will be asked to prohibit such claims. No one has asked the Court to do so today. Therefore, rather than trying to force § 1983 malicious prosecution to be something completely other than what it is—a tort that concerns the abuse of legal processes—we should apply the law as it lays before us. . . . Accordingly, because the indication of innocence standard (1) has already been applied by this Court, (2) is heralded as the standard in almost every other circuit, (3) permits the dismissal of spurious claims at the motion to dismiss stage, and (4) is not contrary to any well-settled common-law principle at the time of § 1983's passage, I respectfully dissent.")

See also ***Manansingh v. United States***, No. 2:20-CV-01139-DWM, 2021 WL 2080190, at *4-5 & nn. 2, 3 (D. Nev. May 24, 2021) ("Plaintiffs first argue that their claims would have been barred by *Heck* had they pursued them prior to the June 21, 2018 dismissal of Manansingh's indictment. The argument is unpersuasive. '*Heck* established the now well-known rule that when an otherwise complete and present § 1983 cause of action would impugn an extant conviction, accrual is deferred until the conviction or sentence has been invalidated.' *Bradford v. Scherschligt*, 803 F.3d 382, 386 (9th Cir. 2015). While the Ninth Circuit determined at one point that the *Heck* bar extended to pending criminal proceedings, . . . the Supreme Court subsequently held in *Wallace*, that '*Heck* applies only when there is an extant conviction and is not implicated merely be the pendency of charge[.]'. . Here, no conviction was ever obtained, let alone invalidated, so *Heck* does not apply. 'Consequently, the resolution of this [case] hinges on traditional rules of accrual and not on the extension of *Heck* to [these] proceedings.' *Bradford*, 803 F.3d at 386. . . . Plaintiffs' substantive due process claim (Claim 4) includes a properly pled Fifth Amendment fabricated evidence claim. . . . That claim is also timely, as it did not accrue until 'the

criminal proceedings against [Manansingh] terminated in his favor.' *McDonough v. Smith*, 139 S. Ct. 2149, 2161 (2019). Here, the criminal case against Manansingh was dismissed by order of the district court on June 21, 2018. Although it was not a final assessment of innocence, courts have held that dropping charges or a *nolle prosequi* is an affirmative choice to terminate criminal proceedings *for purposes of claim accrual.* [citing cases] Because Plaintiffs brought their fabrication claim within two years of the dismissal of the criminal charges against Manansingh, that claim is timely. . . . 'Favorable termination' in this context is not necessarily concomitant with the 'favorable termination' element of malicious prosecution. *See Roberts v. City of Fairbanks*, 947 F.3d 1191, 1202 n.12 (9th Cir. 2020) (malicious prosecution claim may require termination 'dispositive of the defendant's innocence'). . . . Apart from a dispute over what qualifies as 'favorable termination,' the parties do not appear to dispute that this claim is timely under *McDonough.*"); ***Grytsyk v. Morales***, No. 19-CV-3470 (JMF), 2021 WL 1105368, at *7–8 (S.D.N.Y. Mar. 22, 2021) ("[Defendants] argue that the claim fails because the dismissal of Grytsyk's charges for speedy trial reasons cannot qualify as favorable termination for purposes of malicious prosecution. . . Defendants' argument is foreclosed by binding Second Circuit precedent. [citing *Murphy v. Lynn*, 118 F.3d 938, 950 (2d Cir. 1997)] To be sure, the Second Circuit's decision in *Murphy* notwithstanding, Defendants' argument has been accepted by a host of district judges following *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018), in which the Court held that, to prevail on a malicious prosecution claim under federal law, a plaintiff must show 'that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence.'. . And these district judges have admittedly offered some persuasive reasons to question whether *Murphy* can be squared with *Lanning*. . . In the Court's view, however, these district judges have gotten too far out over the[ir] proverbial skis. It is well established that a district court must follow a precedential opinion of the Second Circuit 'unless and until it is overruled ... by the Second Circuit itself or unless a subsequent decision of the Supreme Court so undermines it that it will almost inevitably be overruled by the Second Circuit'. . . . First and foremost, the *Lanning* Court itself cited *Murphy* favorably. . . Second, since *Lanning*, the Second Circuit has four times cited *Murphy* as good law (albeit for more general propositions). [citing cases] And third, a host of other-district judges have adhered to *Murphy* even after *Lanning*. . . The ultimate point, of course, is not that *Murphy* is rightly decided or long for this world; it may not be either. Instead, it is that the Second Circuit, not this Court or any other district court, gets to decide that question. And in light of the Second Circuit's own citations to *Murphy*, in *Lanning* and since, not to mention the analyses of Judge Engelmayer and others, the Court certainly cannot say that *Lanning* renders the holding of *Murphy* 'untenable.'. . In short, Defendants' argument — that Grytsyk cannot, as a categorical matter, establish favorable termination for purposes of his Section 1983 malicious prosecution claim because the dismissal of his charges was on speedy trial grounds — remains foreclosed by Second Circuit precedent. . . Of course, "'i]n the event that ensuing case law on this point is adverse to this conclusion, the Court will stand ready, at the summary judgment stage, to reconsider this assessment.'"); ***Moore v. City of Chicago***, No. 19 CV 3902, 2020 WL 3077565, at *3 (N.D. Ill. June 10, 2020) ("Defendants equate favorable termination with innocence. *Heck* demands no such thing. '[T]he [*Heck*] Court offered a list of possible resolutions that would satisfy the favorable termination requirement, and none require an affirmative finding

of innocence.'. . A criminal proceeding can terminate favorably 'without a declaration of a defendant's innocence.'. . Plaintiff's sentence was vacated and his charges were dismissed. That is all he needs to allege for his section 1983 claims to satisfy *Heck*."); ***Krause v. Yavapai County***, No. CV1908054PCTMTLESW, 2020 WL 1659908, at *5–6 (D. Ariz. Apr. 3, 2020) ("It appears the Ninth Circuit has never squarely addressed the particular circumstances presented in this case, where after his conviction was reversed, Plaintiff could have been retried for the same charges but was not. Defendants' characterization of the issue in this case as 'what knowledge the Plaintiff derived, or should have derived, from the undisputed fact that retrial was not sought by the Rule 8.2(c) deadline' is misplaced. The accrual date of Plaintiff's § 1983 claim does not depend solely on when Plaintiff knew he was injured. As the Supreme Court noted in *McDonough*, the date on which a constitutional injury first occurs is not the only date from which a limitations period may run. . . 'To the contrary, the injury caused by a classic malicious prosecution [ ] first occurs as soon as legal process is brought to bear on a defendant, yet *favorable termination* remains the accrual date.'. . Defendants also argue that the prosecution terminated favorably to Plaintiff, at the latest, when, under Arizona's speedy trial rules, the time for the State to retry Plaintiff elapsed, and the State did not retry him. Plaintiff contends that despite the 90-day limitation, the State could have retried him, although the resulting conviction could have been subject to reversal if the delay prejudiced him; therefore, his claim did not accrue until then. . . The Court agrees. . . . Plaintiff for the same charges. Defendants attempt to equate the State's decision to allow the 90 days under the speedy trial rules to elapse to dropping charges. However, unlike allowing a procedural time limit to elapse, dropping charges or a *nolle prosequi* is an affirmative choice to terminate the criminal proceeding. . . . In this case, Defendants did not *choose* to drop the charges. Instead, they allowed the time to retry Plaintiff to elapse, and Plaintiff sought enforcement of the Arizona Court of Appeals' Mandate. It was in response to Plaintiff's request that the trial court vacated his conviction and dismissed the indictment. Finally, Defendants erroneously suggest that because Plaintiff knew that any retrial would necessarily exclude the CBLA evidence, this was "sufficient to place Plaintiff on notice that his criminal case had ended favorably" for purposes of accrual by October 2016. . . The question is not whether the State could have *successfully* retried Plaintiff following the Arizona Court of Appeals' decision. Rather, so long as the State had the option of prosecuting Plaintiff for the same charges, if Plaintiff had filed his § 1983 action during that time, there was still the possibility of 'parallel criminal and civil litigation over the same subject matter' or 'the related possibility of conflicting civil and criminal judgments.'. . For the foregoing reasons, the Court concludes that Plaintiff's § 1983 claims did not accrue until February 22, 2017. His original Complaint, filed on February 19, 2019, was therefore timely. Accordingly, the Court will deny the Yavapai County Defendants' Motion to Dismiss.");

See also ***Bronowicz v. Allegheny Cnty.,*** 804 F.3d 338, 347-48 (3d Cir. 2015) ("Even though the Superior Court did not expressly address Bronowicz's challenges to the legality of the sentence and revocation proceedings, the Superior Court's order vacating the January 2011 judgment in light of the Commonwealth's concession of 'an error committed at the time of sentencing' is consistent with Bronowicz's claim that the sentence imposed in January 2011 was invalid. Unlike in *Kossler* and *Gilles,* the Superior Court order does not imply that the sentence

imposed or the proceedings before the Court of Common Pleas in January 2011 were valid. The Superior Court vacated the 'Judgment of Sentence' in its entirety. . . and on remand, the Court of Common Pleas released Bronowicz from custody. . . Neither the Superior Court order nor the subsequent order issued by the Court of Common Pleas vacating Bronowicz's sentence imposed any 'unfavorable' conditions or burdens on Bronowicz that would be inconsistent with his claim that that the January 2011 judgment was imposed illegally. Moreover, the purpose of the favorable termination rule is fully realized by this result because there is no risk that permitting Bronowicz's § 1983 claims to proceed would lead to 'two conflicting resolutions arising from the same transaction.'. . Upon the imposition of the judgment of sentence in January 2011, Bronowicz did exactly what *Heck* requires—he appealed to a competent state tribunal which declared that judgment invalid. . . Bronowicz's claims stemming from the January 2011 revocation proceedings and sentence do not constitute a collateral attack on his sentence because Bronowicz has already successfully challenged his sentence in state court. . . Success on Bronowicz's § 1983 claims attacking the legality of the January 2011 proceedings would be fully consistent with the Superior Court's order. Thus, the Superior Court's order satisfies the favorable termination rule and fulfills its objectives. We hold that Bronowicz's § 1983 claims arising from the January 2011 proceedings before the Court of Common Pleas are not barred by *Heck* because Bronowicz has demonstrated that the judgment imposed was invalidated on appeal. The District Court, however, properly dismissed Bronowicz's remaining § 1983 claims, which, if successful, would impugn the validity of the July 2005 and July 2008 revocation proceedings, as Bronowicz has not demonstrated that those proceedings were terminated in his favor."); ***Kossler v. Crisanti*** , 564 F.3d 181, 188, 191 (3d Cir. 2009) ("Kossler's argument is problematic because his acquittal is accompanied by a contemporaneous conviction at the same proceeding. We are thus faced with a question of first impression in this Circuit: Whether acquittal on at least one criminal charge constitutes 'favorable termination' for the purpose of a subsequent malicious prosecution claim, when the charge arose out of the same act for which the plaintiff was convicted on a different charge during the same criminal prosecution. On these facts, we conclude that this question should be answered in the negative. As an initial observation, we note that various authorities refer to the favorable termination of a 'proceeding,' not merely a 'charge' or 'offense.'. . . Therefore, the favorable termination of some but not all individual charges does not necessarily establish the favorable termination of the criminal proceeding as a whole. Rather we conclude that, upon examination of the entire criminal proceeding, the judgment must indicate the plaintiff's innocence of the alleged misconduct underlying the offenses charged. In urging us not to hold that 'the favorable termination element ... categorically requires the plaintiff to show that all of the criminal charges were decided in his favor,' Kossler himself argues (correctly) that the result 'depend[s] on the particular circumstances.' The argument goes both ways: The favorable termination element is not categorically satisfied whenever the plaintiff is acquitted of just one of several charges in the same proceeding. When the circumstances − both the offenses as stated in the statute and the underlying facts of the case − indicate that the judgment as a whole does not reflect the plaintiff's innocence, then the plaintiff fails to establish the favorable termination element. . . . We read both the *Janetka* and *Uboh* courts' focus on the differences between the offenses charged and the conduct leading to the charges as implying that, under different facts, when the offenses charged aim to punish the

same misconduct, a simultaneous acquittal and conviction on related charges may not amount to favorable termination."); ***Butler v. Compton***, 482 F.3d 1277, 1280, 1281(10th Cir. 2007) ("Although Mr. Butler was not convicted of the burglary charges arising out of Officer Compton's arrest, he was convicted of three other unrelated burglary charges after he pled guilty to those charges. He pled guilty to these unrelated burglary charges as part of the same plea agreement in which the burglary charges arising out of Officer Compton's arrest were dismissed. In this § 1983 action, he does not challenge any conduct relating to his conviction on the three burglary charges to which he pled guilty. His sole challenge is to the constitutionality of Officer Compton's conduct during his arrest for the burglary charges that were dismissed. Recognizing that this was an issue of first impression, the district court concluded that it was appropriate to use Mr. Butler's conviction on the unrelated burglary charges as the basis for applying *Heck* to Mr. Butler's case. The district court reached this conclusion by deciding that, if successful, Mr. Butler's § 1983 action would necessarily call into question the validity of his other unrelated burglary conviction because it was a part of the same plea agreement as the related burglary charges that were dismissed. . . . Mr. Butler's § 1983 action seeks compensatory and punitive damages based on conduct that occurred during an arrest by Officer Compton that resulted in two burglary charges. Mr. Butler was not convicted on those charges because they were dismissed as part of a plea agreement. There is no related underlying conviction therefore that could be invalidated by Mr. Butler's §1983 action. Moreover, the purpose behind *Heck* is not implicated here because there is no attempt by Mr. Butler to avoid the pleading requirements of *habeas*. He cannot bring a *habeas* action because he has no conviction to challenge. Mr. Butler's conviction on unrelated charges may not form the basis for the application of *Heck* where there is no challenge to that conviction in Mr. Butler's § 1983 action.").

See also ***Lessard v. Kravitz***, No. 16-1351, 2017 WL 1453997, at *4 (10th Cir. Apr. 25, 2017) (not reported) ("Having completed a deferred judgment and sentence under Colorado's deferred-judgment statute, which resulted in the withdrawal of his plea and the dismissal of the criminal charge against him, Mr. Lessard has no existing 'conviction' that could be affected by his malicious-prosecution claim. His claims are thus not subject to the *Heck* bar. *Cf. Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1095 (10th Cir. 2009) (holding *Heck* did not bar § 1983 claim claiming plaintiff's signature had been forged on agreement resulting in deferred prosecution, because under Kansas law, there was "no related underlying conviction that could be invalidated by [a] § 1983 [suit]"). We are therefore not concerned with exceptions Mr. Lessard cites that may be used to avoid or qualify *Heck*. He has already avoided that bar. . . His challenge is different: he must show a favorable termination that is suggestive *of his innocence*. The completion of his deferred judgment and sentence, with a resulting dismissal, though evading the *Heck* bar, does not meet this standard. *See Land v. Hill*, 644 P.2d 43, 45 (Colo. App. 1981) (holding that vacation of judgment and dismissal of criminal action after guilty plea under Colorado's deferred-judgment procedure did not constitute a "favorable termination" for purposes of malicious prosecution action). Mr. Lessard's decision to plead guilty in exchange for a deferred judgment may have robbed him of his malicious prosecution claim, but 'such trade-offs are a standard feature of malicious prosecution law.' *Cordova v. City of Albuquerque*, 816 F.3d 645, 652 (10th Cir.

2016)."); ***Cordova v. City of Albuquerque***, 816 F.3d 645, 652-54(10th Cir. 2016) ("*Wilkins* adopted the traditional common law element that a dismissal must 'indicate the innocence of the accused' to qualify as a favorable termination. . . But in *Smith–Hunter*, the New York Court of Appeals rejected the traditional rule, holding that any dismissal that is '*not inconsistent* ' with innocence qualifies as 'favorable.' 734 N.E .2d at 755 (emphasis added). Not only is *Smith–Hunter's* conception of the favorable termination requirement at odds with the rule we adopted in *Wilkins,* it flips the traditional rule on its head by presuming terminations are favorable until proven otherwise. As a result, both *Smith–Hunter* and the Second Circuit's *Rogers* decision, 303 F.3d at 160 (applying *Smith–Hunter* and holding that a speedy trial dismissal is a favorable termination under New York law), are of limited persuasive value. Applying our indicative-of-innocence rule, many courts have found that an abandonment is not favorable even when the crucial evidence was suppressed on *constitutional* grounds. . . In all of these instances, it was the defendant's exercise of his constitutional right to exclude certain evidence that led to the dismissal. Courts often find that no favorable termination has occurred despite the exercise of statutory or constitutional rights resulting in the termination of a case. . . In fact, most courts follow the *Wilkins* approach and look to the circumstances surrounding speedy trial dismissals to determine whether they indicate the innocence of the accused. . . That Cordova had a statutory right to dismissal under the Speedy Trial Act thus does not set aside his burden of meeting the indicative-of-innocence requirement. Thus, a plaintiff generally cannot maintain a malicious prosecution action unless his charges were dismissed in a manner indicative of innocence, even when he was entitled to dismissal on statutory or constitutional grounds. Although this rule may produce a dilemma for defendants at least in some applications, it is both a standard feature of the tort of malicious prosecution and a reflection of the idea that malicious prosecution actions are disfavored at common law. . . A speedy trial dismissal, moreover, is unlike the *nolle prosequi* in *Wilkins,* in which the prosecution merely dropped the charges. This action by the prosecution is ambiguous, in that we cannot know the reasons for dropping the charges. Here, by contrast, the state court unambiguously granted a motion to dismiss the charges against Cordova. But this distinction is irrelevant. The question we must ask is whether the dismissal was indicative of innocence. It cannot be the case that all dismissals that result from granted motions are favorable terminations for purposes of malicious prosecution actions. The dismissal here does not indicate Cordova's innocence, so it is not a favorable termination. The favorable termination requirement thus serves as a useful filtering mechanism, barring actions that have not already demonstrated some likelihood of success. Although the traditional requirement may bar some meritorious actions, where prosecutorial delay *does* indicate the innocence of the accused the plaintiff will not be barred from bringing his malicious prosecution claim under our rule. Our conclusion is thus more receptive to Cordova's fairness concerns than many applications in this area of the law traditionally are—a dismissal due to a lack of jurisdiction or of admissible evidence will rarely reflect on the merits of the case and is therefore more likely to bar a meritorious claim. Nor, we should emphasize, does a dismissal of charges create a presumption of innocence or shift the burden of proving the element of favorable termination to the defendant. In sum, we agree with the district court that the dismissal of the underlying assault charges under New Mexico's Speedy Trial Act was not indicative of Cordova's innocence. The undisputed facts reveal the prosecution did not abandon its effort to try Cordova,

and nothing suggests the speedy trial dismissal indicated his innocence of the charged crime. Absent such a showing, the district court properly granted summary judgment on the malicious prosecution claim."); ***Wilkins v. DeReyes***, 528 F.3d 790, 803 (10th Cir. 2008) ("To decide whether a *nolle prosequi* constitutes a favorable termination, we look to the stated reasons for the dismissal as well as to the circumstances surrounding it in an attempt to determine whether the dismissal indicates the accused's innocence. . . . In the circumstances here, the *nolle proseques* should be considered terminations in favor of Plaintiffs. The dismissals were not entered due to any compromise or plea for mercy by either Wilkins or Buchner. Rather, they were the result of a judgment by the prosecutor that the case could not be proven beyond a reasonable doubt.").

See also ***Northfield Ins. Co. v. City of Waukegan***, 701 F.3d 1124, 1130, 1131 (7th Cir. 2012) ("Here, the district court was presented with a complaint that contains slight inconsistencies as to the date of exoneration. Starks initially alleges that the Illinois Appellate Court reversed his conviction on March 23, 2006, (Starks Compl. at 5), although that court did not issue the related mandate returning jurisdiction to the trial court until January 20, 2007. (*Id.* at 6). Momentarily ignoring the importance of either date, both of these allegations imply that Starks was fully exonerated following action by the Illinois Appellate Court. Alternatively, the complaint alleges that the state's attorney sought to re-prosecute Starks even after the Illinois Appellate Court overturned his conviction. (*Id* . at 6; n.1.) This allegation, of course, suggests that neither action by the Illinois Appellate Court exonerated Starks, which means that his malicious prosecution claim has not yet ripened. . . Notwithstanding that inconsistency, we can definitively say that Starks's malicious prosecution (and related) allegations do not trigger the two Northfield policies in effect from November 1, 1991, to November 1, 1995. Because Starks was not exonerated during that policy period, Northfield has no duty to defend his malicious prosecution claims. . . . That leaves us with the St. Paul Fire policy, effective November 1, 2006, to November 1, 2009. Because we are charged with liberally construing the complaint and policy in favor of the appellants, we will evaluate the two divergent lines of allegations in Starks's complaint, while granting all reasonable inferences to the appellants. We take the easy strain first and assume as true the allegation that Starks has not yet been exonerated. If true, then Starks's claim for malicious prosecution has not ripened. In other words, Starks was not exonerated during St. Paul Fire's policy period, and thus, the insurer has no duty to defend in this scenario. The other line of allegations suggests that Starks was fully exonerated once the Illinois Appellate Court vacated his conviction. If true, the question for us is which date applies: the date of the reversal or the date of the mandate. This is also a relatively easy question because the law in Illinois clearly provides that the effective date of an Illinois Appellate Court decision is the date of judgment, not the date the mandate was issued. . . Thus, even if we were to read the complaint to suggest that Starks was fully exonerated, the effective date of that exoneration is March 23, 2006, which falls outside of St. Paul Fire's coverage. . . . For civil malicious prosecution matters in Illinois, 'a criminal proceeding has been terminated in favor of the accused when a prosecutor formally abandons the proceeding via a *nolle prosequi*, unless the abandonment is for reasons not indicative of the innocence of the accused.'. . The *Swick* rule leaves two possibilities for Starks and the appellants. If the prosecution was abandoned for reasons of Starks's innocence, then May 15, 2012, is the trigger date for his

malicious prosecution claim. On the other hand, if the prosecutors dropped Starks's case for some reason not indicative of innocence—such as the unavailability of a key witness—then the *nolle prosequi* order would not have terminated the prosecution in Starks's favor, leaving Starks yet to be exonerated. We need not decide whether the *nolle prosequi* order in this case is indicative of innocence because in either scenario, the malicious prosecution occurrence falls outside of St. Paul Fire's policy."); ***Northfield Ins. Co. v. City of Waukegan***, 701 F.3d 1124, 1135, 1136 (7th Cir. 2012) (Hamilton, J., concurring) ("For the reasons explained in Judge Kanne's opinion for the court, I am confident that the two insurers in this case are not required to defend or indemnify the city against these claims. As long as the city has kept liability insurance in place over the decades, though, it is highly likely that the city is entitled to a defense and indemnity from at least one insurer, perhaps from more than one. . . . There is plenty of room for confusion and mutual inconsistency in the ways courts handle these different timing issues in these wrongful conviction cases, not to mention malleability of arguments and outcomes. In any particular case, current Illinois law allows capable counsel to make arguments to justify nearly any resolution that would benefit their client—whether the client is the wrongfully convicted plaintiff, the government, or the insurer. Only the Illinois courts can untangle these knots to provide justice, consistency, and predictability. For example, the city here suggested at oral argument that the statute of limitations might have run on Starks' claims before he could even bring them. The convoluted theory seems to be that Starks was actually exonerated back in 2007 when the Illinois Appellate Court issued its mandate, but that his claims did not accrue until the criminal prosecution ended with the 2012 *nolle prosequi.* Under this theory, the 2012 *nolle prosequi* somehow retroactively started the statute-of-limitations clock running back in 2007, effectively barring Starks' claims before they accrued and could be brought. The fact that such an argument could be made with a straight face is a symptom of a need for clarification of Illinois law on these timing issues.")

See also ***Moman v. Valenzuela***, No. 18 C 5678, 2021 WL 3285948, at *5 (N.D. Ill. Aug. 2, 2021) ("[T]he Court must address Moman's argument that *Heck* cannot apply because his juvenile adjudication is not a conviction. *See People v. Taylor*, 221 Ill. 2d 157, 176 (2006) ("In the absence of a statute expressly defining a juvenile adjudication as a conviction, Illinois courts have consistently held that juvenile adjudications do not constitute convictions."). But *Heck* does not apply solely to formal criminal convictions, as the Supreme Court and the Seventh Circuit have consistently applied *Heck* to plaintiffs who have been civilly committed or to prisoner disciplinary determinations. [collecting cases] Moreover, other circuits have held that the *Heck* doctrine can be applied to juvenile delinquency proceedings. [collecting cases] This Court agrees and finds that the *Heck* doctrine applies to juvenile adjudications.")

M. Other Miscellaneous *Heck* Issues

On *Heck's* application to compassionate release motions, *see* ***United States v. Jean***, 108 F.4th 275, 285 (5th Cir. 2024) ("[T]he habeas channeling rule is violated only if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.'. . We cannot hold, as the United States would prefer, that 'any argument "that an intervening change to

sentencing law provides an extraordinary and compelling reason for early release necessarily implicates the validity of the relevant sentence."' There is no better way to see the distinction between where the habeas channeling rule does and does not apply than to compare the facts of *Escajeda* to the facts before the court today. In *Escajeda,* the appellant sought relief because, he argued, his sentence exceeded the statutory maximum and he received ineffective assistance of counsel. . . As we aptly noted then, Escajeda raised 'quintessential arguments for challenging the fact or duration of a prisoner's confinement.'. . Thus, the arguments were not cognizable under § 3582(c). . . Compare that with the arguments raised by Jean. Unlike in *Escajeda,* Jean did not argue that his original conviction was imposed in violation of the Constitution or the laws of the United States. Rather, Jean argued that his sentence is now unjustly long following the decisions in *Mathis, Hinkle,* and *Tanksley.* That a sentence is unfairly long in light of the current state of the law does not 'necessarily imply the invalidity of ... [Jean's] sentence.'. . The district court below said it best: 'Adopting the Government's interpretation of *Escajeda* would nullify section 3582(c).' Accordingly, the habeas channeling rule does not bar Jean's arguments.")

On the question of *Heck's* application to immigration orders, *see* ***Humphries v. Various Federal USINS Employees***, 164 F.3d 936, 946 & n.11 (5th Cir. 1999) ("[I]f *Heck* were to apply in the context of immigration orders, it would, by analogy, bar only those claims that 'necessarily imply' the invalidity of an INS or BIA order. . . Assuming arguendo that Humphries were to recover damages for the alleged involuntary servitude as well as the alleged mistreatment while in detention, these judgments would in no way imply the invalidity of Humphries' detention or exclusion. . . . [A]t least one scenario comes to mind in which *Heck* may bar a claim over which we retain jurisdiction under ' 1252(g). An alien whose claim arises from INS misconduct during an exclusion proceeding, for instance, may be able to invoke our jurisdiction despite ' 1252(g), but because that error may in fact impugn the validity of the underlying proceeding, *Heck* may prove relevant.").

Heck has been applied to claims under Title II of the ADA. *See* ***Mayfield v. City of Mesa***, No. 23-3222, 2025 WL 890507, at *4–5 (9th Cir. Mar. 24, 2025) ("Although *Heck* itself concerned claims under 42 U.S.C. § 1983, we have held that *Heck*'s reasoning applies equally to claims under Title II of the ADA. . . Mayfield contends that *Heck* is inapplicable to her particular claims, because a ruling in her favor here would not necessarily negate an element of the offense of which she was convicted and would not otherwise imply the invalidity of her conviction or sentence. Reviewing the district court's application of *Heck* de novo, . . . we agree. To evaluate 'whether success on' an ADA claim 'would *necessarily* imply the invalidity of a conviction, we must determine which acts formed the basis for the conviction.'. . When, as here, 'the conviction is based on a guilty plea, we look at the record to see which acts formed the basis for the plea.'. . If the plaintiff's success on her claim would ' "negat[e] an element of the offense" of which she was convicted,'. . . then *Heck* bars that claim. Under our precedent, however, *Heck* does not apply when (1) the plaintiff committed *multiple* distinct acts that were each 'sufficient to warrant the filing of a criminal charge'; (2) the plaintiff is challenging police conduct with respect to only one or some of those acts; and (3) 'the record does not reflect which acts underlay [the plaintiff's] plea.'. . Put

differently, when the plaintiff's conviction *could* be based on activity or evidence untainted by purportedly unlawful police conduct, then her claims are not '*necessarily* inconsistent with [her] conviction,' and the *Heck* bar does not apply. . . Applying these principles, we conclude that the district court erred in two respects in its application of the *Heck* bar here. First, the district court erroneously considered whether Mayfield's claims, if successful, would undermine her original *charges* for DUI and not merely her ultimate conviction for reckless driving. But as we reiterated in *Lemos, Heck* only bars claims that 'would necessarily imply the invalidity of a *conviction*,'. . . and here, Mayfield pleaded guilty to, and was only convicted of, reckless driving in violation of Arizona Revised Statutes § 28-693(A). Indeed, once Mayfield accepted her plea agreement and entered her guilty plea, there were no longer any pending DUI charges against her, because the plea agreement explicitly 'amend[ed] the [criminal] complaint to charge the offense to which [Mayfield] plead[ed].' The *Heck* inquiry in this case must therefore be focused only on the specific offense of which Mayfield was ultimately *convicted.* A civil claim that would only undermine a charged offense that was later dropped is not sufficient to trigger the *Heck* bar. Second, the district court erred in concluding that the City had carried its burden to establish the applicability of the *Heck* bar in this case. . . The judicially noticed records from Mayfield's criminal case that were submitted in support of the City's motion to dismiss do not contain any recitation of the factual basis for Mayfield's plea, but instead merely state that '[a] basis in fact exists for believing the defendant guilty of the offense[ ] charged.' As a result, the district court erred in concluding that the City had shown that Mayfield's conviction *necessarily* rested on the *evidence obtained during and after the traffic stop*, such that success in Mayfield's suit would call into question the legality of the collection of that evidence and her ensuing conviction. Nothing in the factual record or in the relevant Arizona law precludes the equally plausible view that Mayfield's plea and conviction could have sufficiently rested solely on Officer Hall's observation of Mayfield's vehicle weaving on the road *prior* to the challenged traffic stop. Visibly weaving in traffic may qualify as driving 'in reckless disregard for the safety of persons or property,'. . . and testimony from Officer Hall concerning Mayfield's weaving would be amply sufficient to establish that offense in a way that is completely independent of the merits of this civil suit. Because the record thus does not suffice to establish which of Mayfield's 'temporally [and] spatially' 'distinct' acts—*viz.*, her weaving while driving or her asserted intoxication—underlies her plea and conviction, a ruling in her favor would not necessarily 'demonstrate the invalidity of" her conviction. . . *Heck* therefore does not bar Mayfield's ADA and RA claims.")

Note that *Heck* has been applied to federal prisoners and *Bivens* actions. *See, e.g.*, ***Martin v. Sias***, 88 F.3d 774 (9th Cir.1996). *See also* ***Mohamed v. Tattum***, 380 F.Supp.2d 1214, 1223 (D. Kan. 2005) ("Just as the actions in *Heck* and *Edwards* implied the invalidity of the plaintiffs' conviction and disciplinary action, a finding that defendant failed to protect plaintiff from an attack by his cellmate implies the invalidity of the disciplinary adjudication whereby plaintiff was adjudged guilty of fighting. Plaintiff's *Bivens* claim bears a sufficient relationship to the disciplinary adjudication such that the claim is not cognizable absent the invalidation of the disciplinary adjudication. If plaintiff's injuries were actually the result of defendant's failure to protect rather than plaintiff's *active participation* in a fight, the disciplinary hearing findings are

necessarily erroneous and must be invalidated. But plaintiff admitted guilt during the disciplinary hearing and has not appealed the disciplinary hearing findings, despite being given an opportunity to do so. Accordingly, his failure to protect action against defendant is not cognizable pursuant to the principles announced in *Heck* and *Edwards*."). *See also* ***Priovolos v. F.B.I.,*** 632 F. App'x 58, 60 n.2 (3d Cir. 2015) ("It appears that Priovolos is no longer serving his sentence for the murder conviction. . . We have held, however, that *Heck's* favorable termination rule applies even when the plaintiff is no longer in custody and cannot pursue habeas relief. *Gilles v. Davis,* 427 F.3d 197, 209–10 (3d Cir.2005). In addition, we have not addressed in a precedential opinion whether *Heck* applies to FTCA actions. For purposes of this appeal, however, we will 'assume that the exception of *Heck* extends to FTCA claims.' *Morrow v. Fed. Bureau of Prisons,* 610 F.3d 1271, 1272 (11th Cir.2010); *see also Erlin v. United States,* 364 F.3d 1127, 1133 (9th Cir.2004) (holding that "a civil action under the Federal Tort Claims Act for negligently calculating a prisoner's release date, or otherwise wrongfully imprisoning the prisoner, does not accrue until the prisoner has established, in a direct or collateral attack on his imprisonment, that he is entitled to release from custody."); *Parris v. United States,* 45 F.3d 383, 384–85 (10th Cir.1995) (holding that *Heck* applies to actions brought under the FTCA)."); ***Johnson v. United States***, No. 24 CIV. 872 (DEH), 2024 WL 5083068, at *16–17 (S.D.N.Y. Dec. 11, 2024) ("In *Wallace v. Kato,* the Supreme Court clarified that *Heck* 'delays what would otherwise be the accrual date of a tort action until the setting aside *of an extant conviction* which success in that tort action would impugn.'. . Importantly, if no criminal conviction exists at the time a claim accrues, the statute of limitations runs normally and is not delayed by *Heck*. . . Thus, in *Wallace*, the Court held that *Heck* did not delay the accrual of the plaintiff's false arrest claim because his claim became available 'when he appeared before the examining magistrate and was bound over for trial.'. . At that time, 'there was in existence no criminal conviction that the cause of action would impugn; indeed, there may not even have been an indictment.'. . Accordingly, *Heck* applies only to claims that (1) arose after the entry of a criminal conviction and (2) would necessarily impugn that conviction if successful. The question before the Court is whether Plaintiffs' claims were *Heck*-barred before their convictions were vacated; if so, then their claims did not accrue until November 2021 and were timely filed in March 2023. To answer that question, the Court must consider three questions: whether *Heck* applies to FTCA actions; whether Plaintiffs' convictions were in existence at the time their claims accrued; and whether success on Plaintiffs' tort claims 'would necessarily imply the invalidity of [their] conviction[s][.]'. . First, neither the Supreme Court nor the Second Circuit has addressed whether *Heck* applies to FTCA claims, but the parties do not dispute that it does. . . *Heck*'s holding that § 1983 claims for unlawful conviction or imprisonment are barred unless the conviction or sentence has been rendered invalid (or at least called into question) rested on the principle that 'civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments.'. . Multiple courts have therefore concluded that *Heck* is not limited to § 1983 claims, but also applies to FTCA claims based on an invalid conviction or sentence. *See, e.g., Erlin v. United States*, 364 F.3d 1127, 1132 (9th Cir. 2004) ("The interests the Supreme Court identified in *Heck* require us to impose the same restriction on FTCA claims that *Heck* imposed on § 1983 actions."); *Parris v. United States*, 45 F.3d 383, 385 (10th Cir. 1995) ("[T]he FTCA, like § 1983, is not an appropriate vehicle for challenging the validity of outstanding criminal judgments."). As

noted, the Second Circuit has not addressed this question, but it has acknowledged that *Heck* is not limited to the § 1983 context, holding that '*Heck* should apply to *Bivens* actions as well,' *Tavarez v. Reno*, 54 F.3d 109, 110 (2d Cir. 1995) (referring to the implied cause of action against the United States for constitutional violations established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). Because the Supreme Court's reasoning in *Heck* applies with as much force to FTCA claims as it does to § 1983 or *Bivens* claims, the Court agrees with the parties that *Heck* applies in FTCA cases.")

The Ninth Circuit has held that *Heck* does not operate as an evidentiary bar. ***Simpson v. Thomas***, 528 F.3d 685, 691, 696 (9th Cir. 2008) ("We turn next to yet another issue of first impression in this circuit: whether *Heck v. Humphrey* may be used to bar evidence in a § 1983 claim for excessive force. We conclude that *Heck* does not create a rule of evidence exclusion. Therefore, if, as in this case, a party is permitted to proceed on a § 1983 claim, relevant evidence may not be barred under the rule announced in *Heck*. . . . In light of our analysis of Supreme Court precedent relating to *Heck*, '§ 1983 and 2254, we hold that *Heck* is not an evidentiary doctrine. Therefore, we reverse and remand for a new trial. We conclude that even if the district court determines on remand that Simpson may not file a § 1983 lawsuit relating to any injuries stemming from Thomas's alleged punch upon entering the cell, Simpson is still entitled to tell the jury the entire story − in other words, he may present evidence and/or testimony that Thomas initiated the physical confrontation in the cell by punching Simpson.").

The Seventh Circuit has held that the *Heck* doctrine is not a jurisdictional bar and that it is a defense that is subject to waiver. ***Polzin v. Gage***, 636 F.3d 834, 837, 838 (7th Cir. 2011) ("Mr. Polzin maintains that the district court improperly ruled on the merits of his claims. In his view, the district court could not address his constitutional arguments on the merits because *Heck* required the court to dismiss his case without prejudice. The *Heck* doctrine is not a jurisdictional bar. . . Because it is not jurisdictional, the *Heck* defense is subject to waiver. . . We have implied, but never explicitly held in a published opinion, that district courts may bypass the question of whether *Heck* applies to decide a case on its merits. We now hold explicitly that district courts may bypass the impediment of the *Heck* doctrine and address the merits of the case."). *See also* ***Courtney v. Butler***, 66 F.4th 1043, 1049 n.1 (7th Cir. 2023) ("The procedural status of *Heck* has divided the circuits. Is the favorable-termination requirement jurisdictional, is it an affirmative defense that must be pled in an answer on pain of waiver, and may a case dismissed without prejudice on *Heck* grounds count as a 'strike' under the Prison Litigation Reform Act? See *Garrett v. Murphy*, 17 F.4th 419, 425–28 (3d Cir. 2021) (surveying circuits and holding *Heck* requirement is non-jurisdictional element of claim and that dismissal on *Heck* grounds may count as a strike for failure to state a claim). The Seventh Circuit has been in the non-jurisdictional affirmative-defense camp, with the strike question addressed in non-precedential orders. See *Polzin v. Gage*, 636 F.3d 834, 837–38 (7th Cir. 2011) (not jurisdictional); *Carr v. O'Leary*, 167 F.3d 1124, 1126 (7th Cir. 1999) (affirmative defense). In light of the circuit split, district courts may find it prudent as a matter of case management to determine earlier rather than later whether a defendant will raise the issue.")

See also ***Kitchen v. Whitmer***, 106 F.4th 525, 533-35 (6th Cir. 2024) ("[T]he circuits are divided on whether *Heck* is jurisdictional. Though the First Circuit said a *Heck* issue implicates a court's subject-matter jurisdiction, *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019), the Third, Fifth, and Seventh Circuits think a successful *Heck* claim shows that the plaintiff does not have a cause of action under § 1983. *Vuyanich v. Smithton Borough*, 5 F.4th 379, 389 (3d Cir. 2021); *Crittindon v. LeBlanc*, 37 F.4th 177, 190 (5th Cir. 2022); *Polzin v. Gage*, 636 F.3d 834, 837–38 (7th Cir. 2011). And the Ninth and Eleventh Circuits are undecided but have cast doubt on the notion that *Heck* is jurisdictional. *Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 (9th Cir. 2016); *Teagan v. City of McDonough*, 949 F.3d 670, 678 (11th Cir. 2020). So although the majority of the circuit decisions point in one direction, they are not unanimous. And we have recently implied that *Heck* is not jurisdictional. . . *See Chaney-Snell v. Young*, 98 F.4th 699, 707–11 (6th Cir. 2024). In that case, we determined that we did not have pendent appellate jurisdiction over a *Heck* argument in a qualified-immunity appeal. . . Although we didn't say that *Heck* wasn't jurisdictional, we implied as much, noting that (1) 'the Court adopted the *Heck* bar to resolve a choice-of-law problem,'. . . (2) *Heck* 'exists to determine whether (and when) a § 1983 plaintiff has "a complete and present cause of action,"'. . . and (3) *Heck* 'creates only a precondition to a § 1983 suit (invalidation of the prior conviction)—not an absolute bar to the suit[.]'. . So we analyze standing first before proceeding to the *Heck* issue. . . .And for the same reason that we must address standing before considering *Heck*, we must also address the *Rooker-Feldman* issue as a threshold question.")

See also ***Hebrard v. Nofziger***, 90 F.4th 1000, 1004, 1006-07 (9th Cir. 2024) ("Under the Prison Litigation Reform Act ("PLRA"), it was authorized to dismiss Hebrard's *in forma pauperis* complaint for failure to state a claim, even though it had raised *Heck sua sponte.* And the court correctly held that were Hebrard's claim successful, it would call into doubt the proper duration of his confinement. As a result, to comply with *Heck*, Hebrard needed to obtain habeas relief before filing this § 1983 action. Because he did not do so, his claim must be dismissed as *Heck*-barred. Accordingly, we affirm. . . .We agree with Hebrard that *Heck* is an affirmative defense that may be waived or forfeited. . . But as explained below, Nofziger did not waive *Heck.* Nofziger's failure to plead *Heck* as an affirmative defense clearly constituted only a forfeiture. And as is further explained below, we also hold that the district court did not err when it looked past Nofziger's forfeiture and *sua sponte* evaluated whether *Heck* barred Hebrard's claim. This is because the PLRA expressly authorized the district court to dismiss Hebrard's complaint for failure to state a claim at any time, even when it raised the legal basis for the dismissal of its own accord. . . . A finding of waiver requires evidence of a party's actions that evince his intentional relinquishment of a known right. . . Hebrard's failure to identify *any* of Nofziger's actions in this case that even remotely suggest he 'intentionally relinquished' his *Heck* defense compels us to conclude that the *Heck* defense was not waived. . . . Admittedly, the same *substantive* rules apply to Rule 12(b)(6) and § 1915(e) dismissals for failure to state a claim. . . But under the plain text of the PLRA, § 1915(e) dismissals for failure to state a claim, unlike Rule 12(b)(6) dismissals, are obligatory, even if the court raised the legal basis for the dismissal *sua sponte.* Thus, Nofziger's forfeiture did not

bar the court's *sua sponte* application of *Heck* to Hebrard's claim. Given his *in forma pauperis* status, § 1915(e) authorized the district court to raise *Heck* as a defense to his claim at any time of its own accord. And because the district court found that *Heck* was 'an obvious bar to securing relief on the face of the complaint,'. . . the standard that governs whether a complaint fails to state a claim for relief because the cause of action is barred by *Heck*—the plain terms of the PLRA mandated the dismissal of Hebrard's complaint for failure to state a claim. . . Thus, under § 1915(e), the district court did not err when it *sua sponte* resurrected Nofziger's forfeited *Heck* defense at the summary judgment stage."); ***Vuyanich v. Smithton Borough***, 5 F.4th 379, 389 (3d Cir. 2021) ("Importantly, the *Heck* decision contains no jurisdictional language. Instead, it holds that a '§ 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.'. . Consistent with this approach, at least one of our sister circuits has treated *Heck* as an affirmative defense rather than a jurisdictional rule. *See Carr v. O'Leary*, 167 F.3d 1124, 1126 (7th Cir. 1999) ("The failure to plead the *Heck* defense in a timely fashion was a waiver[.]"); *but see O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019) (stating, without analysis, that "[w]hether *Heck* bars § 1983 claims is a jurisdictional question"). As the Ninth Circuit has opined, 'compliance with *Heck* most closely resembles the mandatory administrative exhaustion of [Prison Litigation Reform Act] claims, which constitutes an affirmative defense and not a pleading requirement.' *Washington v. Los Angeles Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 (9th Cir. 2016). We agree that *Heck* does not implicate a federal court's jurisdiction; thus there is no need to reach Defendants' *Heck* argument at this time."); ***Colvin v. LeBlanc***, 2 F.4th 494, 498-99 & n.20 (5th Cir. 2021) ("We have routinely characterized a *Heck* dismissal as one for failure to state a claim, . . . but district courts in this circuit have occasionally characterized *Heck* as a jurisdictional doctrine. . . We have also, at least once, affirmed a *Heck* dismissal granted for lack of subject matter jurisdiction. . . We therefore take this opportunity to reiterate that *Heck* does not pose a jurisdictional bar to the assertion of § 1983 claims. *Heck* discussed the scope of § 1983 claims, not subject matter jurisdiction. . . It based its holding on the 'hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments,' and analyzed when and how a § 1983 cause of action accrues. . . By its own language, therefore, *Heck* implicates a plaintiff's ability to state a claim, not whether the court has jurisdiction over that claim. We therefore hold that *Heck* does not present a jurisdictional hurdle that would require a remand of this case to state court.[20] **[fn. 20:** This reading comports with the Seventh Circuit, which has held that '[t]he *Heck* doctrine is not a jurisdictional bar.' *Polzin v. Gage*, 636 F.3d 834, 837 (7th Cir. 2011). Other circuits, often in unpublished cases or in dicta, have suggested the same. [collecting cases] This view is not shared by the First Circuit, where '[w]hether *Heck* bars § 1983 claims is a jurisdictional question that can be raised at any time during the pendency of litigation.' *O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019). And the Eleventh Circuit's approach is unclear, having recently endorsed both approaches. *Compare Teagan v. City of McDonough*, 949 F.3d 670, 678 (11th Cir. 2020) (noting that 'the Supreme Court's own language suggests that *Heck* deprives the plaintiff of a cause of action—not that it deprives a court of jurisdiction' but noting that it has not 'definitively answered that question'), *with Dixon v. Hodges*, 887 F.3d 1235, 1237 (11th Cir. 2018) (per curiam)

(calling *Heck* a rule that 'strips a district court of jurisdiction in a § 1983 suit')."**]**; ***Teagan v. City of McDonough***, 949 F.3d 670, 678 (11th Cir. 2020) ("In his concurrence, Judge Tjoflat concludes that Ms. Teagan's § 1983 claims are barred by *Heck v. Humphrey*[.]. . Having already affirmed the grant of summary judgment in favor of the City on the § 1983 claims, we need not address the applicability of *Heck*. First, the Supreme Court's own language suggests that *Heck* deprives the plaintiff of a cause of action—not that it deprives a court of jurisdiction. . . As a result, some of our sister circuits have concluded that *Heck* is an affirmative defense and not a jurisdictional rule. [collecting cases]"); ***O'Brien v. Town of Bellingham***, 943 F.3d 514, 529-30 (1st Cir. 2019) ("Whether *Heck* bars § 1983 claims is a jurisdictional question that can be raised at any time during the pendency of litigation. . . In this case, the record reflects that O'Brien's excessive force claims arising from the incident in the woods are 'so interrelated factually' with his state convictions arising from those events that a judgment in O'Brien's favor would 'necessarily imply' the invalidity of those convictions. . . Indeed, if the officers had used excessive force against O'Brien while arresting him in the woods, as he now claims, their unlawful behavior would have provided O'Brien with a defense against the charges for resisting arrest and assault and battery under state law. . . . Similarly, the district court correctly found that *Heck* bars any claim that Officer Melanson and Sergeant Perry used excessive force leading up to when O'Brien struck them with the phone handset. Granting a judgment against Officer Melanson and Sergeant Perry would have implied that O'Brien's conduct was justified, while the officers' actions were unjustified, which would have necessarily undermined the validity of O'Brien's assault and battery convictions**.** As we explained in *Thore*, although '[a] § 1983 excessive force claim brought against a police officer that arises out of the officer's use of force during an arrest does not necessarily call into question the validity of an underlying state conviction ... [,] it is not necessarily free from *Heck*' either. . . And because O'Brien has not specified any theory of relief, let alone attempted to identify a factual scenario which would survive *Heck*, we need not go any further, as any argument to that effect is waived. . . .The arguments that O'Brien does raise on appeal are confusing, conclusory, and easily discarded. First, O'Brien's assertion that the Defendants waived a defense based on *Heck* is unavailing as we have already noted that it is a jurisdictional issue that can be raised *sua sponte* by the court.")

Compare ***Crittindon v. LeBlanc***, 37 F.4th 177, 190 (5th Cir. 2022), *cert. denied*, 144 S. Ct. 90 (2023) ("[W]e cannot agree that Plaintiffs' overdetention claims are barred by *Heck* and *Edwards*, a contention no party makes. . . The Supreme Court recently reminded us that our task is not to come up with arguments the parties should have made, but to decide the ones they make. . . When it comes to *Heck* in particular, our court and others have recognized that it is a defense a party must assert as opposed to some sort of jurisdictional bar. . . In any event, *Heck* does not bar this suit: The *Heck* defense 'is not ... implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence.'. . Here, the parties agree that Plaintiffs were held in excess of their sentences and Plaintiffs do not challenge their underlying conviction nor the length of their sentence.") *with* ***Crittindon v. LeBlanc***, 37 F.4th 177, 195 (5th Cir. 2022) (Oldham, J., dissenting), *cert. denied*, 144 S. Ct. 90 (2023) ("[O]fficers asserting qualified immunity can't forfeit the argument that *Heck* bars plaintiffs' claims. That's

because qualified immunity is no 'mere defense to liability'—it's an 'immunity from suit.'. . And once officers have asserted the qualified-immunity defense, it's plaintiffs' burden to negate that assertion. . . That means plaintiffs must overcome any and all antecedent hurdles before they can subject the immunity-asserting officers to suit. And the question whether plaintiffs have a cause of action is obviously antecedent to the qualified-immunity question. In that respect, it's no different from *Bivens*. . .Plaintiffs who lack a cause of action under § 1983 cannot sue state officers—just as plaintiffs who lack a cause of action under *Bivens* cannot sue federal officers. So where the plaintiffs have no cause of action, we should never even get to the qualified immunity question.") *and* ***McNeal v. LeBlanc***, 90 F.4th 425, 433-35 (5th Cir. 2024) (Jones, J., concurring), *reh'g and reh'g en banc denied*, 93 F.4th 840 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 266 (2024) ("I concur that our precedent currently requires that Secretary LeBlanc be denied qualified immunity. *See Parker v. LeBlanc*, 73 F.4th 400 (5th Cir. 2023); *Crittindon v. LeBlanc*, 37 F.4th 177 (5th Cir. 2022), *cert. denied*, --- S. Ct. --- (2023). I further agree with Judge Duncan's special concurrence advocating en banc review of this 'mistaken' precedent, which 'makes LeBlanc answerable for the errors of subordinates, creating vicarious liability in contravention of *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018 (1978), and *Connick v. Thompson*, 563 U.S. 51, 131 S. Ct. 1350 (2011).' In this case, for instance, there is nothing at all to connect LeBlanc with the events that resulted in McNeal's overdetention. But I also write separately because McNeal's claims fail for an additional reason: they are barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2394 (1994). Judge Oldham explained in depth the reasons for *Heck* bar in *Crittindon v. LeBlanc*, as he stated '[b]oth the federal habeas statute, 28 U.S.C. § 2241, and the Civil Rights Act of 1871, 42 U.S.C. § 1983, create causes of action for prisoners with constitutional claims. But the remedies offered by those two statutes—and Congress's limitations on them—differ radically.' 37 F.4th 177, 192 (5th Cir. 2022) (Oldham, J., dissenting). Specifically, 'the habeas statute offers a singular equitable remedy: release from custody. But § 1983 goes further and *also* offers money damages and attorney's fees.'. . Moreover, § 1983 'comes with none of' the 'numerous severe limitations' that Congress has placed on federal habeas. . . In *Heck*, the U.S. Supreme Court 'recognized this "potential overlap between" habeas and § 1983, and it cut off access to the latter in cases where the prisoner's claim sounds in the former.'. . 'The upshot is that, where a prisoner can obtain relief through habeas, he cannot sue under § 1983.'. . *Heck* built on the rule announced twenty years earlier in *Preiser v. Rodriguez*: 'Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the terms of § 1983.'. . . In this case, McNeal was released from custody 41 days late because the Louisiana Department of Public Safety and Corrections sent his release paperwork to the wrong facility. Thus, his case concerns a challenge to 'the fact and length of his confinement.'. . 'That means [his] *only* remedy lies in habeas. And the *Heck* doctrine plainly bars [him] from ignoring the specific terms of the habeas statute, which "*must* override the general terms of § 1983."'. . But McNeal made no good faith efforts to seek state habeas relief. Unlike some of the *Crittindon* plaintiffs, who at least filed petitions for writs of habeas corpus in Louisiana state court, . . . McNeal never made any such filings. At most, he alleges that he 'wrote a letter' to the warden of the facility where he was detained and spoke with some of the officers. These actions fall well short of a good

faith effort to seek state habeas relief. Under *Heck*, only after McNeal successfully obtained such relief via a valid state court order declaring the confinement 'invalid' could he state a claim under § 1983. . . Allowing McNeal and other 'overdetention' plaintiffs to obtain § 1983 relief without requiring them to make even a good faith effort to obtain state habeas relief not only violates the unambiguous language of *Heck* and *Preiser*—as well as centuries of habeas jurisprudence—, it yields perverse incentives for litigants as well. . . . This court should not enable overdetained prisoners to neglect their obligation to seek habeas relief and instead bypass that remedy in order to pursue Section 1983 damages by filing for the wrong type of relief in the wrong court at the wrong time. Louisiana has serially defaulted in its obligation to release prisoners on time. It is beyond this panel's purview to analyze, much less solve this critical problem. However, we should have demonstrated confidence in the state courts' ability, through habeas corpus, to resolve individual cases by remitting individuals like McNeal to the state court system for exhaustion of remedies. This seems to me, as to Judge Oldham, a classic situation that *Heck* intended to address. We should revisit *Crittindon* en banc and overrule it.")

See also ***McNeal v. LeBlanc***, 93 F.4th 840, 841-45 (5th Cir. 2024) (Oldham, J., joined by Jones, Smith, Ho, Duncan, Engelhardt, and Wilson, JJ., dissenting from the denial of rehearing en banc) ("Brian McNeal sued the Secretary of the Louisiana Department of Public Safety and Corrections ("DPSC"). McNeal alleged the Secretary wrongfully detained him for 41 days. All agree McNeal *could* have sought habeas relief during those 41 days. But he chose not to do that. He instead slept on his habeas rights, got out of jail, and then sought declaratory relief, compensatory and punitive damages, and attorneys' fees under 42 U.S.C. § 1983. A panel of our court blessed that approach, effectively holding that the federal habeas statute and § 1983 offer prisoners like McNeal an election of remedies: The former allows prisoners to get out of jail, while the latter allows prisoners to stay in jail and then sue for compensation later. That conflicts with multiple Supreme Court cases, so we should have reheard this case en banc. . . . Despite their radically different histories and scopes, § 2241 and § 1983 have one very important commonality: On their faces, they both apply to a prisoner who says he's in state custody in violation of the federal Constitution. . . The Supreme Court has recognized this overlap and held that here, as in so many other areas, the specific controls the general. . . That is, where a prisoner seeks or could seek the specific, singular remedy of habeas (release), he cannot fall back on the general, broader remedies offered by § 1983. . . .The *Crittindon-Hicks* theory appears to be that the prisoner did not request a habeas remedy; the prisoner did not allege a problem in his conviction or sentence; the prisoner only claimed he was held in jail too long and in excess of his sentence; and therefore, § 1983's gates are wide open to him. The problem, of course, is that the § 1983 plaintiffs in *Preiser* and *Edwards* tried the same move and lost. In *Preiser*, the prisoner alleged only 'that the deprivation of [his] good-conduct-time credits was causing or would cause [him] to be in illegal physical confinement.'. . And in *Edwards* the prisoner alleged only a defect in the revocation of his good-time credits. Neither prisoner challenged his underlying conviction or sentence—just that he wanted to get out of jail sooner than his custodian planned. Nevertheless, the Court held that neither claim could proceed under § 1983. So it is no answer for the *Hicks* panel to say the § 1983 claim can forward because it does not challenge the validity of Hicks' sentence. . . .This court has

twisted itself into knots to avoid a conclusion that should be obvious: A prisoner who has a habeas remedy cannot sue under § 1983. . . Our precedents embrace a contrary rule and should be overruled. It is a shame that we failed to do that here. And we will not be able to avoid reconfronting these issues when we rehear *Wilson v. Midland Cnty., Texas*, 89 F.4th 446 (5th Cir. 2023) (en banc rehearing granted Feb. 14, 2024). For now, I respectfully dissent.")

See also ***Herrera v. Agents of Pennsylvania Board of Probation & Parole***, No. 23-1123, 2025 WL 810242, at *2-5 (3d Cir. Mar. 14, 2025) ("Because Herrera alleges that he was detained for seven months past his maximum release date, we construe his claim as one of overdetention. Detention beyond an inmate's maximum term of imprisonment may constitute cruel and unusual punishment under the Eighth Amendment and give rise to a claim under 42 U.S.C. § 1983. . . . [T]o avoid *Heck*'s favorable termination requirement, a plaintiff 'must demonstrate that success on his § 1983 claims would not conflict with the prior judicial resolution of his criminal proceedings.'. . As a result, to determine whether *Heck* applies, a court must look at the plaintiff's § 1983 claims, assume the plaintiff successfully proves those claims, and evaluate if such a resolution would undermine the legal validity of his conviction or sentence. . . If the court concludes that a judgment in the plaintiff's favor on such a claim would undermine the conviction or sentence, then *Heck*'s favorable termination requirement would apply. If a judgment in the plaintiff's favor would not undermine his conviction or sentence, then *Heck*'s favorable termination requirement would not apply. Under this framework, *Heck*'s favorable termination requirement does not apply to a plaintiff who claims only that he was detained beyond the maximum period of the sentence imposed when such a claim does not imply that his conviction or sentence are legally invalid. Following this same reasoning, several Courts of Appeals have determined *Heck* does not bar certain overdetention claims. The Court of Appeals for the Fifth Circuit determined *Heck* was inapplicable to a series of § 1983 claims alleging that ministerial errors caused inmates to serve more time than their maximum imposed sentences. [citing *McNeal v. LeBlanc*] Likewise, the Court of Appeals for the Eleventh Circuit observed that *Heck*'s favorable termination requirement did not bar a plaintiff's Federal Tort Claims Act complaint asserting overdetention based on prison officials' 'putting down the wrong date as the start date of his incarceration,' because resolution in the plaintiff's favor would not 'impl[y] the invalidity of his conviction or of the sentence imposed.'. . The Court of Appeals for the Seventh Circuit employed similar reasoning, concluding that *Heck* did not bar a plaintiff's claims that defendants' deliberate indifference 'caused him to spend an extra year in prison rather than on mandatory supervised release' when the officials did not investigate the residential sites for his supervised release, despite prison directives requiring them to do so. . . We agree with our sister circuits that *Heck*'s favorable termination requirement does not apply to an overdetention claim that accepts the validity of the maximum sentence imposed but alleges that deliberate indifference delayed the execution of an inmate's release beyond that sentence. . . Instead of calling a substantive judgment into question, such a claim accepts the judgment and challenges some separate action or inaction that delays a prisoner's release. Such allegations 'seek[ ] to vindicate,'. . . rather than collaterally attack, a conviction or sentence[.] . . Put differently, *Heck* does not apply when a prisoner alleges that he and the state agree on the appropriate maximum release date, yet he was held beyond that date.

Here, Herrera alleges that, under the sentence imposed, he should have been released no later than sometime in March 2019, but instead he was released in October 2019. He does not challenge a court order or substantive administrative proceeding, but rather alleges that a ministerial error caused him to remain in prison after the duration of his maximum sentence. . . Reading the complaint in the light most favorable to Herrera, it appears that the Board agreed that Herrera's maximum prison sentence ended on March 4, 2019 and that he was not released until months later. Based on these allegations, if he prevails, the resulting judgment will not undermine his conviction or the sentence imposed. Rather, it would simply reflect that he was held in custody longer than the sentence contemplated. As a result, the allegations and relief sought in Herrera's complaint do not implicate *Heck*'s concerns and, thus, its favorable termination requirement does not apply."); ***Hicks v. LeBlanc***, 81 F.4th 497, 506, 509-10 (5th Cir. 2023) ("As in *Crittindon*, Hicks does not challenge the validity of his sentence, merely the *execution* of his release. He seeks to vindicate—not undermine—his sentence. As in *Crittindon*, the Parties agree that Hicks was held in *excess* of his sentence. And as in *Crittindon*, if Hicks were to succeed based on the period he was held beyond his original sentence, it would not invalidate the conviction or its attendant sentence. *Crittindon* controls this case. *Heck* is no bar here. . . . The implications of Appellants' arguments expose their weakness. Applying *Heck* to any case also cognizable under habeas would obviate many § 1983 remedies the Supreme Court continues to recognize, such as those for First Amendment retaliatory arrest, malicious prosecution, and Fourth Amendment unlawful pretrial detention, among others. Expanding *Heck* as Appellants ask is a request that would overturn a wealth of this Court's precedent on those subjects. In sum, requiring overdetained plaintiffs to rely on state habeas would, in practice, deprive them of a remedy under the federal Constitution. Consider the following: Louisiana requires prisoners to avail themselves of its Administrative Remedy Process, which can take up to 90 days, before asserting the required state habeas claim. The habeas process can take months, all the while the state can defeat a favorable outcome for the plaintiffs by releasing the prisoners during the pendency of the habeas proceedings, as doing so would leave the prisoner without a cognizable § 1983 claim. In other words, under Appellants' conception of *Heck*, the state can continue to detain prisoners for months past the expiration of their duly imposed sentences without consequence under the federal Constitution. This effectively utilizes the filing of state habeas proceedings as a cover for Louisiana's systemic failures. That, quite simply, is not the law. The district court did not err in concluding that Hicks' claims were not barred by *Heck*." [footnotes omitted]) *Accord,* ***McNeal v. LeBlanc***, 90 F.4th 425, 431 (5th Cir. 2024) *reh'g and reh'g en banc denied*, 93 F.4th 840 (5th Cir. 2024), *cert. denied,* 145 S. Ct. 266 (2024) (*Heck* no bar "where McNeal does not challenge his conviction or attendant sentence, but rather the 41 days he was imprisoned *beyond* his release date.")

On the question of whether a *Heck* dismissal counts as a "strike" under the PLRA, *compare* ***Cotton v. Noeth***, 96 F.4th 249, 256-59 (2d Cir. 2024) ("The district court below held that the *Lema* dismissal constituted a strike, relying on *Heck v. Humphrey*, noting that other district courts in this circuit have held that *Heck* dismissals are PLRA strikes. *See, e.g.*, *Toliver v. Colvin*, No. 12-CV-00227V( ), 2016 WL 11258222, at *10 (W.D.N.Y. Sept. 28, 2016), *report and recommendation adopted as modified,* No. 12-CV-227(LJV)(LGF), 2017 WL 547963 (W.D.N.Y. Feb. 10, 2017);

McDaniels v. Fed. Bureau of Prisons, No. 15-cv-6163 (KMK), 2016 WL 6997525, at *4 (S.D.N.Y. Nov. 29, 2016). The district court noted, however, that the Second Circuit had not yet ruled on the issue. The Attorney General argues that we need not decide whether the *Lema* dismissal constitutes a strike. We conclude there is good reason to reach the question. . . . The circuits that have considered the issue are split as to whether *Heck* dismissals count as PLRA strikes. *See Lomax*, 140 S. Ct. at 1724 n.2 (noting the circuit split but not reaching the issue). The Third, Fifth, Tenth, and D.C. Circuits agree that *Heck* dismissals always count as PLRA strikes. *See, e.g.*, *Garrett v. Murphy*, 17 F.4th 419, 427 (3d Cir. 2021) ("We now join the Fifth, Tenth, and D.C. Circuits in holding that the dismissal of an action for failure to meet *Heck*'s favorable-termination requirement counts as a PLRA strike for failure to state a claim."). The Seventh Circuit, however, has expressly adopted the position Cotton is arguing here. *See, e.g.*, *Mejia v. Harrington*, 541 F. App'x 709, 710 (7th Cir. 2013) (unpublished) ("*Heck* ... deal[s] with timing rather than the merits of litigation .... As a result, neither this suit nor the appeal counts as a 'strike' under § 1915(g)."); *see also Courtney v. Butler*, 66 F.4th 1043, 1049 n.1 (7th Cir. 2023) (noting that the Seventh Circuit is in the "jurisdictional affirmative-defense camp"). The Ninth Circuit has taken a qualified position, holding that "[a] *Heck* dismissal is not categorically frivolous -- that is, having 'no basis in law or fact,' " because "plaintiffs may have meritorious claims that do not accrue until the underlying criminal proceedings have been successfully challenged." *Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1055 (9th Cir. 2016) (citation omitted). At the same time, the Ninth Circuit observed that 'so-called *Heck* dismissals come in various guises,'. . . and concluded that a *Heck* dismissal can constitute a PLRA strike for failure to state a claim depending on the circumstances. . . We agree that *Heck* dismissals do not categorically count as a strike. Rather, we hold that whether a *Heck* dismissal qualifies as a strike depends on the circumstances. The key is whether the dismissal turned on the merits or whether it was simply a matter of sequencing or timing. As we have explained, the rule created by the Supreme Court in *Heck* is an 'accrual rule designed to avoid inconsistent results and new avenues of collateral attack.' *Smalls v. Collins*, 10 F.4th 117, 137 (2d Cir. 2021) (citing *Heck*, 512 U.S. at 486-89, 114 S.Ct. 2364). *Heck* dismissals therefore do not reflect a final judgment on the merits; instead, such dismissals 'reflect a matter of "judicial traffic control" and prevent civil actions from collaterally attacking existing criminal judgments.'. . . [O]ne consideration is remediability. There may be cases where it is apparent from the complaint that *Heck* is an irremediable bar -- for example, if it is clear from a complaint that a plaintiff can no longer challenge an underlying conviction (*e.g.*, for timing reasons or because he has already done so), the *Heck* dismissal should count as a strike because the failure to invalidate the conviction is irremediable. In these circumstances, the *Heck* dismissal would constitute a final judgment on the merits. But a dismissal under *Heck* 'without prejudice as premature until [plaintiff] has succeeded in overturning his conviction,'. . . is not a PLRA strike because it is not 'irremediably defective, and dismissal of such [a case] is not based on a determination that it ultimately cannot succeed.'. . As the dissent acknowledges, the 'presumption' that *Heck* dismissals are strikes because they are Rule 12(b)(6) dismissals 'may not be absolute.'. . As we concluded in *Snider*, dismissals for prematurity do not constitute a failure to state a claim '*in the context of the PLRA*[.]' . . In other words, even crediting the dissent's conclusion that suits dismissed under *Heck* functionally do not 'state a claim' under Rule 12(b)(6) because they lack a present cause of action,

those dismissals still do not constitute PLRA strikes. While Section § 1915(g) 'refers to any dismissal for failure to state a claim, whether with prejudice or without,'. . . this Court has made clear that 'fail[ure] to state a claim' was not intended to apply to 'suits dismissed without prejudice for failure to comply with a procedural prerequisite.'. .In light of these considerations, here we conclude that the *Lema* dismissal does not constitute a strike under the PLRA, for the dismissal clearly turned on sequencing and timing rather than the merits. The district court in *Lema* twice wrote that the basis for dismissal was prematurity. Its language makes clear that it was not passing judgment as to the merits of Cotton's claims in the case, but rather that it was dismissing the claims without prejudice to Cotton returning to court if he succeeded in overturning his conviction. Indeed, the district court surmised that Cotton might have filed the complaint 'prophylactically,' because of concerns that the statute of limitations might run. . . The district court clearly was of the view that the *Heck* bar was remediable. We also note that the *Lema* court's citation to Section 1915(e)(2)(B) did not specify which prong of that subsection the court was invoking. . . Because the *Lema* court may have dismissed Cotton's suit for reasons that are permitted under Section 1915(e)(2)(B) but not enumerated in Section 1915(g), it would be inappropriate to presume there was a strike. . . Section 1915(e)(2)(B) provides three separate grounds for dismissing a prisoner's claim: the action is '(i) frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.'. . Thus, the first two grounds for dismissal under § 1915(e)(2)(B) are also grounds for a PLRA strike under Section 1915(g), but the third is not. As the Third Circuit has explained, a strike is appropriate only where a court gives a basis for dismissal that clearly falls within one of the categories enumerated in Section 1915(g). . . Given the lack of specificity here and the remediable nature of the dismissal, we conclude the *Lema* dismissal was not a PLRA strike.") *with* ***Cotton v. Noeth***, 96 F.4th 249, 259-64 (2d Cir. 2024) (Walker, J., concurring in part and dissenting in part) ("The majority concludes that an action dismissed under *Heck* is generally not 'dismissed on the grounds that it ... fails to state a claim upon which relief may be granted,' 28 U.S.C. § 1915(g), except where that dismissal 'constitute[d] a final judgment on the merits[.]'. . I disagree. When a court dismisses a § 1983 action under *Heck*, it generally does so because the plaintiff has 'fail[ed] to state a claim upon which relief can be granted.'. . And the Supreme Court has held that '[t]he text of Section 1915(g)'s three-strikes provision refers to any dismissal for failure to state a claim, whether with prejudice or without.' *Lomax v. Ortiz-Marquez*, 590 U.S. ——, 140 S. Ct. 1721, 1723, 207 L.Ed.2d 132 (2020). Therefore, § 1915(g) presumptively imposes a strike for every *Heck* dismissal. . . .'*Heck* is clear. Suits dismissed for failure to meet *Heck*'s favorable-termination requirement are dismissed because the plaintiff lacks a valid "cause of action" under § 1983.'. . Favorable termination is an 'element that must be alleged and proved.'. . Without it, an action challenging the validity of a sentence or conviction 'is not cognizable under § 1983.'. . Because *Heck* determines when a § 1983 suit is 'cognizable,' *Heck* dismissals are governed by Rule 12(b)(6). Rule 12(b)(6) authorizes dismissal of an action when the initiating complaint 'fail[s] to state a claim upon which relief can be granted.'. . 'Claim' is often synonymous with a 'cause of action.'. . So, when a plaintiff lacks a cause of action, courts dismiss the case under Rule 12(b)(6). . . Cases dismissed under *Heck* are no exception. . . .*Heck* expressly rejected the majority's comparison: 'We *do not* engraft an exhaustion requirement upon § 1983, but rather deny the

existence of a cause of action.'. . This is an important distinction, both legally and practically. . . .First, as *Heck* explained, the two kinds of dismissals have different implications for statutes of limitations. When *Heck* applies, a § 1983 claim does not accrue until after the contested judgment is invalidated. As a result, a § 1983 plaintiff need not seek equitable tolling of a statute of limitations to preserve his claim 'while state challenges to the conviction or sentence [are] being exhausted.'. . By contrast, when *Heck* does not apply, the limitations period may continue to run while a § 1983 plaintiff exhausts his administrative remedies. . . Thus, conflating *Heck's* rule and exhaustion of administrative remedies creates an inconsistency: it treats *Heck* as creating an administrative bar for purposes of the PLRA, but a claim-accrual rule for purposes of § 1983. Second, and more fundamentally, *Heck* reflects concern for finality, not just ripeness. Invalidating a prior conviction or sentence ordinarily requires impugning a judgment entitled to the 'presumption of regularity.'. . Partly for this reason, the Supreme Court understood *Heck* as applying the 'hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments.'. . No such presumption of regularity arises, however, when exhausting administrative remedies. To the contrary, because exhaustion requires no success on the merits, a failure to exhaust may be 'simply' cured. . . In short, we typically presume that a *Heck*-barred claim may never be brought, but that an exhaustion-barred claim may be. . . .To sum up: *Heck* dismissals have little in common with administrative-exhaustion dismissals, whether under the PLRA, broader legal principles, or practically. *Heck* dismissals therefore must fall under the general rule applicable to all Rule 12(b)(6) dismissals: they presumptively count as strikes under § 1915(g).")

See also ***Brunson v. Stein***, 116 F.4th 301, 304-09 & n.3 (4th Cir. 2024) ("Today, we hold that a *Heck* dismissal is necessarily for failure to state a claim and thus counts as a PLRA strike. . . . In his complaint, Brunson acknowledged that he had previously filed four § 1983 suits that were all dismissed under *Heck.* Nevertheless, he moved to proceed *in forma pauperis.* The district court initially granted Brunson's request. But it later vacated that order after deciding that Brunson was precluded from proceeding *in forma pauperis* by the PLRA's three-strikes rule. In reaching this decision, the court found that Brunson's prior dismissals under *Heck* were for failure to state a claim upon which relief may be granted. So Brunson prepaid the $402 fee to file suit. Later, for reasons not relevant here, the district court dismissed his § 1983 complaint. Brunson timely appealed. He then applied to proceed on appeal without prepaying fees. In the application, Brunson argued that he does not have any PLRA strikes because *Heck* dismissals do not count as strikes under the PLRA. . . . This question is the subject of an entrenched circuit split. . . The Third, Fifth, Tenth, and D.C. Circuits have held that *Heck* dismissals are necessarily for failure to state a claim. *See Garrett v. Murphy*, 17 F.4th 419, 427 (3d Cir. 2021); *Colvin v. LeBlanc*, 2 F.4th 494, 497– 99 (5th Cir. 2021); *Smith v. Veterans Admin.*, 636 F.3d 1306, 1312 (10th Cir. 2011); *In re Jones*, 652 F.3d 36, 38 (D.C. Cir. 2011). The Second, Seventh, and Ninth Circuits, meanwhile, have held, to varying degrees, that *Heck* dismissals are not, or sometimes are not, strikes under the PLRA. *See Cotton v. Noeth*, 96 F.4th 249, 257 (2d Cir. 2024) (holding that "whether a *Heck* dismissal qualifies as a strike depends on ... whether the dismissal turned on the merits or whether it was simply a matter of sequencing or timing"); *Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1055

(9th Cir. 2016) (holding that a *Heck* dismissal counts as a strike only when "*Heck*'s bar to relief is so obvious from the face of the complaint, and the entirety of the complaint is dismissed for a qualifying reason under the PLRA"); *Mejia v. Harrington*, 541 F. App'x 709, 710 (7th Cir. 2013) (holding that *Heck* "deal[s] with timing rather than the merits of litigation").[3] **[fn. 3:** Whether the First and Eleventh Circuits classify a *Heck* dismissal as one for failure to state a claim is unclear. *Compare O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019) (stating that '[w]hether *Heck* bars § 1983 claims is a jurisdictional question'), *with Figueroa v. Rivera*, 147 F.3d 77, 81 (1st Cir. 1998) (describing the favorable-termination requirement as an 'element' of plaintiff's claim); *Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185 n.4 (11th Cir. 2020) (explaining that the circuit's precedents had previously 'said in dicta that *Heck* strips a federal court of jurisdiction' but also that '*Heck* deprives the plaintiff of a cause of action,' and ultimately declining to decide the issue).**]** Until now, our Circuit had not waded into this conceptual morass. . . Today, we conclude that *Heck*'s favorable-termination requirement is an element of the type of § 1983 claims *Heck* identified. . . Accordingly, we hold that a dismissal under *Heck* is necessarily a dismissal for 'failure to state a claim upon which relief may be granted' and qualifies as a PLRA strike. . . .[A] *Heck*-barred plaintiff fails to state a claim upon which relief may be granted. A plaintiff who has no 'cause of action,'. . . has no claim either. . . The Supreme Court has recognized as much: If a plaintiff fails to plead a required element and his claim is thus 'not cognizable under § 1983,' the appropriate remedy is dismissal for failure to state a claim. . . .In sum, everything in *Heck* points to the conclusion that favorable termination is an element of a plaintiff's cause of action under § 1983. Arguments to the contrary don't hold water. And without a cause of action, a plaintiff has no claim upon which relief may be granted. So the dismissal of an action under *Heck* is a dismissal for failure to state a claim and thus a strike under the PLRA."); ***Gilmore v. Dart***, 2024 WL 2813340, at *1 n. † (7th Cir. June 3, 2024) (not reported) ("Gilmore has received strikes for three cases in our circuit . . . One of Gilmore's strikes stemmed from a dismissal based on the doctrine of *Heck v. Humphrey*. . . An appeal by a different plaintiff is pending in this court raising the question of whether a complaint dismissed as *Heck*-barred qualifies for a strike under 28 U.S.C. § 1915(g), *Holmes v. Marion County*, No. 22-3032."); ***Ray v. Lara***, 31 F.4th 692, 697-99 (9th Cir. 2022) ("We have held that a *Heck* dismissal 'may constitute a PLRA strike for failure to state a claim when *Heck*'s bar to relief is obvious from the face of the complaint, and the entirety of the complaint is dismissed for a qualifying reason under the PLRA.' *Washington*, 833 F.3d at 1055. Thus, we must consider the complaints in *Farrell* and *Basa* to determine whether *Heck*'s bar to relief was facially obvious in each case. [court finds *Heck* bar to relief was facially obvious in both cases and third complaint was facially lacking in merit where absolute prosecutorial immunity was obvious from face of complaint] In sum, the district court properly assessed three strikes based on Ray's prior dismissals in *Farrell*, *Basa*, and *Friedlander*."); ***Garrett v. Murphy***, 17 F.4th 419, 423-24, 427-28 (3d Cir. 2021) ("Because Garrett has filed many fruitless lawsuits, this Court queried whether he should be allowed to avoid prepaying filing fees under the three-strikes rule. 28 U.S.C. § 1915(g). Garrett's eligibility to avoid prepaying fees turns in part on whether suits barred by *Heck v. Humphrey* are properly dismissed for failure to state a claim. . . Because this is an important question of law that has divided the circuits, we appointed the Georgetown Law Appellate Courts Immersion Clinic as

amicus to address this and other issues relevant to Garrett's application. Amicus has ably discharged its responsibilities, but we nevertheless conclude that Garrett has struck out. A suit dismissed under *Heck* is dismissed for failure to state a claim and counts as a strike. We will deny Garrett's motion to proceed in forma pauperis. To press his appeal, Garrett must first pay the filing fee. . . . Every year, pro se prisoners file over one thousand civil-rights suits in this circuit. . . Many of these suits are barred by *Heck*'s favorable-termination requirement, but courts must nevertheless use their limited time to read the pleadings and dismiss them, delaying justice in other cases. And yet, until now, we have never addressed in a precedential opinion whether a dismissal under *Heck* counts as a PLRA strike for failure to state a claim. . . Several other circuits have addressed this issue. The Fifth, Tenth, and D.C. Circuits have held that dismissals for failure to meet *Heck*'s favorable-termination requirement count as dismissals for failure to state a claim. *Colvin v. Le-Blanc*, 2 F.4th 494, 499 (5th Cir. 2021); *Smith v. Veterans Admin.*, 636 F.3d 1306, 1311–12 (10th Cir. 2011); *In re Jones*, 652 F.3d 36, 38 (D.C. Cir. 2011). The Seventh and Ninth Circuits, however, have characterized *Heck*'s favorable-termination requirement as an affirmative defense subject to 'waiver,' analogous to an exhaustion requirement. *Polzin v. Gage*, 636 F.3d 834, 838 (7th Cir. 2011); *Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 (9th Cir. 2016). The First and Eleventh Circuits have described *Heck*'s favorable-termination requirement as both 'jurisdictional' and as an 'element' of a claim for damages arising from a conviction or sentence under § 1983. *Compare O'Brien v. Town of Bellingham,* 943 F.3d 514, 529 (1st Cir. 2019), *with Figueroa v. Rivera*, 147 F.3d 77, 81 (1st Cir. 1998); *see also Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185, 1191 n.4 (11th Cir. 2020). For our part, we recently held that *Heck*'s favorable-termination requirement 'does not implicate a federal court's jurisdiction.' *Vuyanich v. Smithton Borough*, 5 F.4th 379, 389 (3d Cir. 2021). We now join the Fifth, Tenth, and D.C. Circuits in holding that the dismissal of an action for failure to meet *Heck*'s favorable-termination requirement counts as a PLRA strike for failure to state a claim. We do so for a simple reason: Any other rule is incompatible with *Heck*. *Heck* is clear. Suits dismissed for failure to meet *Heck*'s favorable-termination requirement are dismissed because the plaintiff lacks a valid 'cause of action' under § 1983, and a cause of action in this context is synonymous with a 'claim' under the PLRA. . . This is consistent with the Supreme Court's consistent interpretation of *Heck*'s favorable-termination requirement as necessary to bring 'a complete and present cause of action' under § 1983. *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019) (citation omitted). It is also consistent with the tort of malicious prosecution *Heck* relied on. Favorable termination is (and always has been) a necessary element of a malicious prosecution claim. . . .Without favorable termination, a plaintiff lacks a claim, and the complaint must be dismissed as premature for failure to state a claim. . . Dismissals for failure to meet *Heck*'s favorable-termination element therefore count as PLRA strikes for failure to state a claim."); ***Washington v. Los Angeles Cty. Sheriff's Dep't***, 833 F.3d 1048, 1055-56 & n.4 (9th Cir. 2016) ("Washington advances several arguments concerning why *Heck* dismissals do not qualify as strikes. . . First, we address the legal framework for determining when a *Heck* dismissal constitutes a strike, including whether such dismissals may be 'frivolous, malicious, or fail[ ] to state a claim' under the PLRA. 28 U.S.C. § 1915(g). Ultimately, we hold that a dismissal may constitute a PLRA strike for failure to state a claim when *Heck*'s bar to relief is obvious from the face of the complaint, and the entirety of the complaint is

dismissed for a qualifying reason under the PLRA. Second, we apply this legal framework to the facts of Washington's case, and conclude that the *Heck* dismissal in question, No. 2:09-CV-3052, does not constitute a PLRA strike. . . . First, Washington contends that a complaint dismissed under *Heck*, standing alone, is not a per se 'frivolous' or 'malicious' complaint. We agree. A *Heck* dismissal is not categorically frivolous—that is, having 'no basis in law or fact,'. . . because plaintiffs may have meritorious claims that do not accrue until the underlying criminal proceedings have been successfully challenged. . . For this reason, a *Heck* dismissal is made without prejudice, such that a prisoner may refile the complaint once his conviction has been overturned. . . . Neither do all *Heck* dismissals categorically count as dismissals for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). We have previously determined that the language 'fails to state a claim upon which relief may be granted' in § 1915(g), tracks the language of Rule 12(b)(6), and that dismissals under Rule 12(b)(6) may constitute strikes within the meaning of the PLRA. . . We now hold that *Heck* dismissals may constitute Rule 12(b)(6) dismissals for failure to state a claim when the pleadings present an 'obvious bar to securing relief' under *Heck*. . . We do not hold, however, that a successful challenge to the underlying criminal proceedings, *i.e.*, 'favorable termination,' is a necessary element of a civil damages claim under § 1983. . . Section 1983 merely requires that a litigant allege a 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' and that the challenged conduct transpire 'under color of [state law].'. . The fact that a conviction has been set aside is *not* an element of the claim at issue. Indeed, a particular plaintiff's need to demonstrate that his conviction has been set aside is contingent on a threshold legal determination, made by the court, that the requested relief would undermine the underlying conviction. . . Instead, compliance with *Heck* most closely resembles the mandatory administrative exhaustion of PLRA claims, which constitutes an affirmative defense and not a pleading requirement. . . Like dismissals for lack of administrative exhaustion, *Heck* dismissals do not reflect a final determination on the underlying merits of the case. . . Rather, *Heck* dismissals reflect a matter of 'judicial traffic control' and prevent civil actions from collaterally attacking existing criminal judgments. . . Therefore, as with affirmative defenses, a court may properly dismiss a *Heck*-barred claim under Rule 12(b)(6) if there exists an 'obvious bar to securing relief on the face of the complaint.'. . With respect to No. 2:09-CV-3052, the *Heck* deficiency was plain from the face of the complaint, as Washington sought a 'recall' of his allegedly unlawful sentence, thereby revealing that it was still extant. . . . In light of the above analysis of *Heck*, we must next decide whether the dismissal in No. 2:09-CV-3052 triggered a PLRA strike. Before proceeding, however, we clarify that so-called *Heck* dismissals come in various guises. This is an important distinction because only a complete dismissal of an action under *Heck*—rather than the dismissal of a particular claim within that action—constitutes a strike. . . Broadly speaking, there are two kinds of cases in which *Heck* is implicated. The first type was presented in *Heck* itself, where a prisoner filed a civil suit seeking purely money damages related to an allegedly unlawful conviction. . . *Heck* barred the suit because an award of damages would undermine the validity of the underlying conviction, and the entire action therefore faced dismissal under *Heck*. . . Another type is the one we have before us, in which a prisoner seeks injunctive relief challenging his sentence or conviction—and further seeks monetary relief for damages attributable to the same sentence or conviction. The first request, for injunctive relief, sounds in habeas, and is not subject

to the PLRA's regime. . . The second request, seeking damages, is intertwined with Washington's plea for injunctive relief, and is therefore subject to dismissal under *Heck*. When we are presented with multiple claims within a single action, we assess a PLRA strike only when the 'case as a whole' is dismissed for a qualifying reason under the Act. . . Although one portion of Washington's action might have been dismissed for failure to comply with *Heck*, the remainder sounds only in habeas. A habeas action, as we have held, is not a 'civil action' within the purview of the PLRA because it operates to challenge the validity of a criminal proceeding, and its dismissal does not trigger a strike. . . As a result, Washington has not accrued a strike for the dismissal of his first suit, No. 2:09-CV-3052, because the entire action was not dismissed for one of the qualifying reasons enumerated by the Act. . . Considered from another angle, the *Heck*-dismissed claims were part and parcel of Washington's legal challenge to his criminal sentence. Washington sought relief from the fact or duration of his confinement, specifically a 'recall of his sentence,' and related monetary damages. This prompted the district court to advise him that habeas proceedings were 'the proper mechanism' for challenges to his sentence. Until Washington has proven the invalidity of that sentence, he is barred from obtaining damages arising from it. . . Because Washington's *Heck*-barred damages claims are thus intertwined with his habeas challenge to the underlying sentence, we decline to impose a strike with respect to his entire action. This approach squares with the underlying purposes of the PLRA, where Congress was preoccupied with the proliferation of civil-rights suits challenging prison conditions—not criminal convictions. . . . The two circuit courts to consider this issue directly have both held that *Heck* dismissals may constitute a strike for 'failure to state a claim,' although their reasoning on this score is overbroad. *See Smith v. Veterans Admin.*, 636 F.3d 1306, 1312 (10th Cir. 2011) (holding that "the favorable termination of a habeas case is an *essential element* of a prisoner's civil claim for damages brought under 42 U.S.C. § 1983 that necessarily implies the invalidity of the prisoner's conviction"); *In re Jones*, 652 F.3d 36, 37 (D.C. Cir. 2011) (per curiam) (adopting the reasoning in *Smith*); *see also Hamilton v. Lyons*, 74 F.3d 99, 103 (5th Cir. 1996) (holding, with scant analysis, that *Heck* dismissals are categorically "frivolous").")

III. METHODS OF ESTABLISHING LOCAL GOVERNMENT LIABILITY AFTER *MONELL*

See generally ***Stucker v. Louisville Metro Government***, No. 23-5214, 2024 WL 2135407, at *9, *12 (6th Cir. May 13, 2024) (not published) ("There are four theories of municipal responsibility: '(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations.'. . Plaintiffs pursue the third and fourth of these theories by arguing that LMPD had both a policy of inadequate training and a custom of tolerance of, or acquiescence in, issuing invalid warrants. . . .Notably, although the two theories (inadequate training and acquiescence) differ in some ways, they both require deliberate indifference and causation. . . .As was the case in *Shadrick*, the inadequate training alleged here related to the failure to ensure that municipal employees receive necessary training on one of their job responsibilities—writing and

executing warrants. Likewise, here, there is an 'obvious need to train police officers who lack knowledge of [their] constitutional constraints;' a need illustrated by Troutman's admitted lack of knowledge about proper drafting and execution of search warrants. . . Deliberate indifference is also directly implicated by the Heintze Report's finding that LMPD has a 'culture of acceptance' of impropriety, including by ignoring procedures in place to ensure constitutional compliance."); ***Starbuck v. Williamsburg James City County School Bd.***, 28 F.4th 529, 532-33 (4th Cir. 2022) ("For the purpose of determining liability under *Monell*, local school boards in Virginia are treated as municipalities. . . *Monell* permits suits against a municipality for a federal constitutional deprivation only when the municipality undertook the allegedly unconstitutional action pursuant to an 'official policy' or 'custom.'. .The district court held that *Monell* limited municipal liability to occasions when the municipality's express policy allegedly violated a constitutional right. Although that may be the most common basis for liability under *Monell*, it is not the only one. Rather, [a] policy or custom for which a municipality may be held liable can arise in four ways: (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that 'manifest[s] deliberate indifference to the rights of citizens'; or (4) through a practice that is so 'persistent and widespread' as to constitute a 'custom or usage with the force of law.'"); ***Jackson v. City of Cleveland***, 925 F.3d 793, 828 (6th Cir. 2019), *rehearing en banc denied* (June 27, 2019), *cert. denied,* 140 S. Ct. 855 (2020) ("There are four methods of showing the municipality had such a policy or custom: the plaintiff may prove "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013) (citation omitted).")

See also ***Sorcan v. Rock Ridge School District***, No. 24-1333, 2025 WL 796318, at *3–4 (8th Cir. Mar. 13, 2025) ("The district court determined that Sorcan had failed to state a *Monell* claim because she had not identified a persistent pattern of unconstitutional misconduct by the District. Under *Monell*, '[s]ection 1983 liability for a constitutional violation may attach to [the District] if the violation resulted from (1) an "official [government] policy," (2) an unofficial "custom," or (3) a deliberately indifferent failure to train or supervise.'. . 'Policy and custom are not the same thing.'. . A custom is 'a persistent, widespread pattern of unconstitutional conduct of which officials have notice and subsequently react with deliberate indifference or tacit authorization.'. . A policy, by contrast, is 'a deliberate choice of a guiding principle or procedure made by the [government] official who has final authority regarding such matters.'. . A *single decision* by a government's 'authorized decisionmakers' to adopt a particular course of action 'surely represents an act of official government policy,' regardless of 'whether or not that body had taken similar action in the past or intended to do so in the future.'. . In support of its contention that Sorcan needed to identify a 'persistent pattern of unconstitutional misconduct,' the district court cited *Furlow v. Belmar*, 52 F.4th 393, 406 (8th Cir. 2022). In *Furlow*, the court was concerned with whether the plaintiff had established the existence of a 'custom or usage.'. . Had Sorcan sought to demonstrate *Monell* liability solely on the basis that the District had an unofficial

custom of engaging in 'a continuing widespread, persistent pattern of unconstitutional misconduct,' as in *Furlow*, we could agree with the district court that Sorcan had failed to state a claim against the District. However, even if we assume that the censure itself was not a policy, Sorcan also alleged that the District had an *unwritten policy* of retaliating against individuals for their protected speech. . . She therefore need not identify a persistent pattern of unconstitutional misconduct so long as she identifies that a constitutional violation resulted from authorized decisionmakers making 'a deliberate choice of a guiding principle or procedure.'. . The district court erred in requiring that Sorcan identify a persistent pattern of unconstitutional misconduct."); ***Howard v. City of Durham***, 68 F.4th 934, 952-54 (4th Cir. 2023) ("Howard . . . argues that the district court erred in granting summary judgment to the City on his *Monell* claim. He contends that DPD had an express policy requiring that *Brady* material regarding confidential informants be kept secret, in violation of its constitutional obligations. In the alternative, he argues that DPD's practice of suppressing information regarding confidential informants was persistent and widespread enough to qualify as a custom under *Monell.* This policy or custom, Howard continues, led to Dowdy's failure to disclose evidence of Jackson's status as a paid police informant and deprived Howard of the right to a fair trial. Howard argues that, without evidence that Jackson was an informant with deep ties to the New York Boys, he was unable to demonstrate her motive to falsely implicate him in the murders and divert attention from the true perpetrators. Ultimately, however, we are not convinced that such a violation can be laid at the City's doorstep. Importantly, 'municipal liability attaches only when the decision maker is the municipality's governing body, a municipal agency, or an official possessing final authority to create official policy.'. . This policymaker involvement is required because, as the Supreme Court has made clear, *Monell* liability is not respondeat superior liability under a different moniker. . . Municipalities are responsible only for 'their *own* illegal acts.'. . So, to hold a municipality liable for a constitutional violation under *Monell*, a plaintiff must prove 'the existence of an official policy or custom that is fairly attributable to the municipality and that proximately caused the deprivation of their rights.'. . The policy or custom may be expressed in one of several forms: (1) [T]hrough an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that manifest[s] deliberate indifference to the rights of citizens; or (4) through a practice that is so persistent and widespread as to constitute a custom or usage with the force of law. *Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529, 533 (4th Cir. 2022) . . . Howard seeks to establish a policy or custom through either the first or fourth method. . . . [E]ven accepting that withholding *Brady* evidence of confidential-informant status was an express policy of DPD's Organized Crime Division, . . . there is no evidence that it was an express policy of *the City.* Instead, Howard has identified a set of practices followed by the captain of one police department. The creator of these practices is unknown, and there is no evidence regarding whether the police chief or someone with higher authority ever approved of the policy. Notably, '[w]hether an official has sufficient policymaking authority is a question of state law.'. . And critically to this case, this Court has already rejected the idea that a police captain can set policies for a city, absent any state law granting such authority, noting that a 'police department has multiple captains and multiple lieutenants, and it is far-fetched to assert that each of these individuals has the power to be a final

policymaker for the city.'. . Howard argues that requiring proof of policy approval by a final policymaker conflates the proof required to show an express policy with that required to demonstrate the second type of *Monell* liability, a custom or policy shown through the decisions of a person with final policymaking authority. But he misses a foundational principle of *Monell* liability—that municipalities are liable only for 'acts which *the municipality* has officially sanctioned or ordered.'. . On this point, it's simple: he cannot show that the policy described by Captain Kelly was an official policy of the City because he's offered no proof it was ever approved of by the City. And in any event, this Court rejected the same arguments Howard now raises in *Lytle v. Doyle*, where we held that a police captain's memorandum containing 'a fixed plan for dealing with protesters' could not 'constitute an official written policy of the City because it was never approved by the City Manager' or even the police chief. . . In the alternative, Howard argues that DPD had a persistent and widespread practice of failing to disclose the status of confidential informants who were testifying in cases and that this practice is sufficient to satisfy the fourth method for showing *Monell* liability. But fatally to his claim, Howard offers evidence of only a single incident of unconstitutional activity: the incident in this very case. . . And 'proof of a single incident of the unconstitutional activity charged is not sufficient to prove the existence of a municipal custom.'. . . Nor is it sufficient that, as Howard argues, the Organized Crime Division's custom of keeping confidential informants secret dated back to at least 1990. Even if the City was aware of that custom, to be liable under *Monell*, the City must have had knowledge of the *unconstitutional* behavior, not simply DPD's general secrecy regarding confidential informants.In sum, we affirm the district court's decision granting summary judgment to the City of Durham."); ***Benavidez v. County of San Diego***, 993 F.3d 1134, 1154-55 (9th Cir. 2021) ("Each of the Benavidezes' three *Monell* theories fails. First, the Benavidezes did not sufficiently allege that the County's written 2015 Policy caused the constitutional violations. The 2015 Policy was adopted as part of the settlement agreement that resolved the *Swartwood* dispute. . . and requires municipal actors 'to obtain parental consent and provide advance notice to the parents so that they can be present at the examination[.]'. . Thus, our previous cases holding that the County's former policy was unconstitutional do not speak to the County's policy as of March 2016. Because the Benavidezes allege that Lisk and Jemison *violated* the 2015 Policy, the SAC does not support *Monell* liability on the basis of that policy. Second, the Benavidezes argue that the previous cases finding the County's policy unconstitutional also evince a custom deliberately indifferent to the rights of parents and children that continues to this day, despite the adoption of the 2015 Policy. However, one instance of County employees violating the constitutional rights of parents and children is insufficient to demonstrate a custom supporting *Monell* liability. . . The implementation of the 2015 Policy, which included the Detention Report form and the juvenile cout order form, indicates a changed policy or custom since the court's previous decisions. Absent a pattern of conduct, alleging that the forms used are worded in a way that allows County employees to circumvent the County's written policies in violation of the Constitution is insufficient evidence of a County custom. . . Third, the Benavidezes characterize their *Monell* claim as a failure to train, but again support this claim only with a single incident. . . The Benavidezes also argue that the single incident exception previously identified by the Supreme Court should directly apply here. Where, as here, the County employees are not making life-

threatening decisions. . . and because micromanaging of municipal policies should be avoided, the single incident exception is inapplicable. Ultimately, none of the allegations regarding the County's alleged unconstitutional policy, practice, custom, or failure to train its employees provides factual support for *Monell* liability. Therefore, the court affirms the district court's dismissal of the Benavidezes' claims against the County."); ***Todero for the Estate of Todero v. Blackwell***, 383 F.Supp.3d 826, 840-41 (S.D. Ind. 2019) ("The City of Greenwood argues that municipal liability cannot apply because any deprivation of Mr. Todero's constitutional rights was not from its (1) express policies, (2) implicit policies or custom, or (3) failure to train its officers. . . Ms. Todero responds that enough evidence allows a reasonable jury to find the city liable under each of these theories. . . The City of Greenwood cannot be liable under the first express-policy theory that its use-of-force policy allowed Taser use in cases of '[v]erbal non-compliance.'. . That permission is not enough to say that the policy 'causes a constitutional deprivation,'. . . because it does not require officers to tase passively resisting suspects[.] . . . So even though the city consciously chose' its policy, that policy is 'not one that gave rise to a [constitutional] violation.'. . . Here, the designated evidence shows only a policy that 'might lead to "police misconduct"'; such a policy 'is hardly enough to satisfy *Monell*'s requirement that the particular policy be the "moving force" behind a *constitutional* violation.'. .The second express-policy theory is based on an absence of or gap in express policies. . . Certainly 'in situations that call for procedures, rules, or regulations, the failure to make policy itself may be actionable.' But [t]he key is whether there is a conscious decision not to take action.'. . Here, no designated evidence reveals a 'memo or decision showing that the choice not to act is deliberate.' No designated evidence reveals (as explained below) numerous examples of the constitutional violation in question.'. . And no designated evidence reveals (again, as explained below) an 'absence of protocols,' because the city had a Taser-use policy and provided some Taser training. . . The evidence would not allow a reasonable jury to find that the action was 'one of the institution itself,' rather than 'merely one undertaken by a subordinate actor.'. . The next theory—implicit policy or custom—requires evidence showing more than a 'random event.'. . The key question is whether the City of Greenwood made 'a conscious decision not to take action' in the face of constitutional violations. . . Ms. Todero argues that's the case here because the city did nothing in response to Officer Blackwell's prior use-of-force incidents, which included improper Taser use. . . Ms. Todero, however, points to evidence about the nature of only four incidents, and in two of the four the suspects were more than passively resisting. . .Even if the remaining two prior incidents show evidence of the 'same problem' of Taser use on passively resisting suspects, . . the evidence does not show more than three prior similar incidents as required for *Monell* liability. . . The final theory is a failure to train, which carries 'a stringent standard of fault' that requires a 'pattern of similar constitutional violations' except when the unconstitutional consequences of failing to train' are 'patently obvious.'. . But as already shown, the evidence does not support a pattern of similar violations. Nor is this the 'rare' case when a single situation allows liability because it was 'patently obvious' that the training would cause constitutional violations. . . That situation exists, for example, when a city arms novice police officers with firearms and provides no training on the constitutional limits of deadly force. . . Here though, the City of Greenwood did provide some Taser training. . . Ms. Todero essentially argues that the city should have provided 'special

training,' 'more training,' or 'better training,' but that argument 'would ignore the training the officers did receive.'. . In short, liability from a single incident requires training that leaves an utter lack of an ability to cope with constitutional standards'; Ms. Todero relies instead on the 'sort of nuance [that] simply cannot support an inference of deliberate indifference.'. . Under the stringent and precise limitations on *Monell* liability established by the Supreme Court and Seventh Circuit, district courts cannot declare a factual record 'close enough' to subject a municipality to potential liability. . . Rather, section 1983 demands rigorous standards of culpability and causation. . . Applying those standards here, the actions that form the basis of Ms. Todero's claims were undertaken only by the individual officers—not by the City of Greenwood itself. The City of Greenwood is thus entitled to summary judgment on Ms. Todero's *Monell* liability claims.")

See also ***Duarte v. City of Stockton***, 60 F.4th 566, 573-74 (9th Cir. 2023) ("As to the Stockton Police Department, we held over thirty years ago that municipal police departments in California 'can be sued in federal court for alleged civil rights violations.' *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 624 n.2 (9th Cir. 1988) (citations omitted). More recently, we reaffirmed this holding and extended it to California's county sheriffs' departments. *Streit v. County of Los Angeles*, 236 F.3d 552, 565–66 (9th Cir. 2001). We have never overruled *Karim-Panahi*. The district court reasoned that *Karim-Panahi* could not be reconciled with a concurring opinion in *United States v. Kama*, 394 F.3d 1236, 1240 (9th Cir. 2005). There, without citing *Karim-Panahi* or *Streit*, a judge commented that 'municipal police departments and bureaus are generally not considered "persons" within the meaning of 42 U.S.C. § 1983.'. . But 'concurring opinions have no binding precedential value.'. . And 'as a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel.'. . Therefore, when a subsequent panel makes a 'suggestion' that 'is inconsistent with earlier opinions of this court,' such suggestions are to be disregarded in favor of the earlier, binding holding. . . Neither a lone concurring judge nor the full *Kama* panel could overrule *Karim-Panahi*. . . Nor can we. . . The district judge's determination that the City of Stockton and Stockton Police Department are not persons within the meaning of § 1983 is reversed.")

A. Liability Based on Policy Statements, Ordinances, Regulations or Decisions Formally Adopted and Promulgated by Government Rulemakers

The clearest case for government liability under ***Monell v. Department of Social Services***, 436 U.S. 658 (1978), is the case like ***Monell*** itself, where an unconstitutional policy statement, ordinance, regulation or decision is formally adopted and promulgated by the governing body or a department or agency thereof. In ***Monell***, the Department of Social Services and the Board of Education had officially adopted a policy requiring pregnant employees to take unpaid maternity leaves before medically necessary. *See also* ***City of Newport v. Fact Concerts, Inc.***, 453 U.S. 247 (1981) (vote of City Council to cancel license for rock concert); ***Owen v. City of Independence***, 445 U.S. 622 (1980) (personnel decision made by City Council constitutes official city policy). Note that in both ***Fact Concerts*** and ***Owen***, decisions officially adopted by the government body itself need not have general or recurring application to constitute official "policy."

See also ***Lozman v. City of Riviera Beach, Fla.,*** 138 S. Ct. 1945, 1951, 1954-55 (2018) ("Lozman's claim is that, notwithstanding the presence of probable cause, his arrest at the city council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech: his open-meetings lawsuit and his prior public criticisms of city officials. The question this Court is asked to consider is whether the existence of probable cause bars that First Amendment retaliation claim.... [W]hether in a retaliatory arrest case the *Hartman* approach should apply, thus barring a suit where probable cause exists, or, on the other hand, the inquiry should be governed only by *Mt. Healthy* is a determination that must await a different case. For Lozman's claim is far afield from the typical retaliatory arrest claim, and the difficulties that might arise if *Mt. Healthy* is applied to the mine run of arrests made by police officers are not present here. . . . Here Lozman does not sue the officer who made the arrest. Indeed, Lozman likely could not have maintained a retaliation claim against the arresting officer in these circumstances, because the officer appears to have acted in good faith, and there is no showing that the officer had any knowledge of Lozman's prior speech or any motive to arrest him for his earlier expressive activities. Instead Lozman alleges more governmental action than simply an arrest. His claim is that the City itself retaliated against him pursuant to an 'official municipal policy' of intimidation. . . In particular, he alleges that the City, through its legislators, formed a premeditated plan to intimidate him in retaliation for his criticisms of city officials and his open-meetings lawsuit. And he asserts that the City itself, through the same high officers, executed that plan by ordering his arrest at the November 2006 city council meeting. The fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim. . . . This unique class of retaliatory arrest claims, moreover, will require objective evidence of a policy motivated by retaliation to survive summary judgment. Lozman, for instance, cites a transcript of a closed-door city council meeting and a video recording of his arrest. There is thus little risk of a flood of retaliatory arrest suits against high-level policymakers. As a final matter, it must be underscored that this Court has recognized the 'right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights.'. . Lozman alleges the City deprived him of this liberty by retaliating against him for his lawsuit against the City and his criticisms of public officials. Thus, Lozman's speech is high in the hierarchy of First Amendment values. . . For these reasons, Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City. On facts like these, *Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim. The Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts. This is not to say, of course, that Lozman is ultimately entitled to relief or even a new trial. On remand, the Court of Appeals, applying *Mt. Healthy* and other relevant precedents, may consider any arguments in support of the District Court's judgment that have been preserved by the City. Among other matters, the Court of Appeals may wish to consider (1) whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session; (2) whether any reasonable juror could find that the November 2006 arrest constituted an official act by the City; and (3) whether, under *Mt. Healthy,* the City has proved that it would have arrested Lozman regardless of any retaliatory animus—for example, if Lozman's conduct during prior city council meetings had also violated valid rules as to proper subjects of

discussion, thus explaining his arrest here. For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion."); ***Lozman v. City of Riviera Beach, Fla.,*** 138 S. Ct. 1945, 1955-56 (2018) (Thomas, J., dissenting) ("We granted certiorari to decide 'whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under [42 U.S.C.] § 1983.'. . Instead of resolving that question, the Court decides that probable cause should not defeat a 'unique class of retaliatory arrest claims.'. . To fall within this unique class, a claim must involve objective evidence, of an official municipal policy of retaliation, formed well before the arrest, in response to highly protected speech, that has little relation to the offense of arrest. . . .No one briefed, argued, or even hinted at the rule that the Court announces today. Instead of dreaming up our own rule, I would have answered the question presented and held that plaintiffs must plead and prove a lack of probable cause as an element of a First Amendment retaliatory-arrest claim. I respectfully dissent. . . .By my count, the Court has identified five conditions that are necessary to trigger its new rule. First, there must be 'an "official municipal policy" of intimidation.'. . Second, the policy must be 'premeditated' and formed well before the arrest—here, for example, the policy was formed 'months earlier.'. . Third, there must be 'objective evidence' of such a policy. . . Fourth, there must be 'little relation' between the 'protected speech' that prompted the retaliatory policy and 'the criminal offense for which the arrest is made.'. . Finally, the protected speech that provoked the retaliatory policy must be 'high in the hierarchy of First Amendment values.'. . Where all these features are present, the Court explains, there is not the same 'causation problem' that exists for other retaliatory-arrest claims. . . I find it hard to believe that there will be many cases where this rule will even arguably apply, and even harder to believe that the plaintiffs in those cases will actually prove all five requirements. Not even Lozman's case is a good fit, as the Court admits when it discusses the relevant considerations for remand. . . In my view, we should not have gone out of our way to fashion a complicated rule with no apparent applicability to this case or any other. . . Turning to the question presented, I would hold that plaintiffs bringing a First Amendment retaliatory-arrest claim must plead and prove an absence of probable cause.")

See also ***Lozman v. City of Riviera Beach***, No. 15-10550, 2019 WL 6492481, at *1–2 (11th Cir. Dec. 3, 2019) (on remand from Supreme court) (not reported) ("Lozman can succeed on his claim by showing that his arrest was motivated by retaliation even if there was probable cause to arrest him, and the City can defeat Lozman's claim by showing that he would have been arrested no matter what. But the Court made clear that Lozman's arrest having been made pursuant to an official City policy to retaliate against him was a prerequisite for application of *Mt. Healthy*. The Court assumed, but did not decide, that this was the case. . . Further, the Supreme Court instructed: 'This is not to say, of course, that Lozman is ultimately entitled to relief or even a new trial.'. . In this regard, the Supreme Court advised that the lower court, 'applying *Mt. Healthy* and other relevant precedents, may consider any arguments in support of the District Court's judgment that have been preserved by the City.'. . . The Supreme Court then stated, 'among other matters,' these three questions may be considered on remand:
(1) whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session; (2) whether any reasonable juror

could find that the November 2006 arrest constituted an official act by the City; and (3) whether, under *Mt. Healthy*, the City has proved that it would have arrested Lozman regardless of any retaliatory animus—for example, if Lozman's conduct during prior city council meetings had also violated valid rules as to proper subjects of discussion, thus explaining his arrest here.
. . . The district court has not had occasion to answer these questions. Nor has the district court had the chance to assess additional arguments made by the parties in their post-remand briefing, including, for example, Lozman's argument that the offense of disturbing a lawful assembly, Fla. Stat. § 871.01(1), is unconstitutional and the City's various arguments. Given how much the success of Lozman's retaliation claim turns on the 'unusual' facts of his arrest, . . . we think it appropriate to give the district court the first opportunity to scrutinize the record in light of the Supreme Court's instructions. We therefore remand this case to the district court to decide, in the first instance, whether Lozman is owed a new trial.").

See also ***Estate of Kong v. City of San Diego***, No. 22-CV-1858-BAS-DDL, 2023 WL 4939370, at *5 (S.D. Cal. Aug. 2, 2023) ("A *Monell* claim predicated upon a formal policy differs from one premised upon a practice or custom in two respects. First, formal policies often are committed to writing. . . They include, *inter alia*, ordinances, regulations, statutes, and policy statements. . . .[7] **[fn. 7:** Because they are written, demonstrating the existence of a formal policy perhaps is the most straightforward way in which to satisfy the second element of *Monell*. But despite being straightforward, this route often is elusive, for municipalities have every incentive not to promulgate facially unlawful and unconstitutional edicts as official policy.**]** Second, a single constitutional violation undertaken pursuant to a formal policy may be sufficient to establish municipal Section 1983 liability. . . In other words, Plaintiff need not attribute a history or pattern of similar constitutional violations attributable to the relevant formal policy in order to pursue her *Monell* claim. It is sufficient to show the express policy attaches to the constitutional tort at issue.")

1. Examples of "Official Policy" Cases

a. Policies Sufficient for *Monell* Liability

D.C. CIRCUIT

Frederick Douglass Foundation, Inc. v. District of Columbia, 82 F.4th 1122, 1149-50 (D.C. Cir. 2023) ("We may infer that District policymakers were behind the uniform and unexplained policy exempting individuals expressing 'Black Lives Matter' from enforcement of the defacement ordinance. The sheer scope of non-enforcement supports the Foundation's claim that policymakers promoted or at least allowed an exemption for a favored viewpoint. The Black Lives Matter protests in the District were part of an ongoing, large-scale, national demonstration. People flooded onto the streets in a protest that included painting and marking of 'Black Lives Matter' messages on public and private property. Mayor Bowser commissioned a large street mural proclaiming 'Black Lives Matter.' It is certainly plausible that policymaking officials in the District were aware of the Black Lives Matter protests and the widespread and ongoing violations of the defacement ordinance, and were involved in the ubiquitous non-enforcement of the ordinance against the many

individuals who expressed their message on sidewalks, streets, and other property. The Foundation also alleges one officer stated Mayor Bowser effectively opened up the streets to protest messages. It is also plausible District policymakers were involved in the continued enforcement of the ordinance against other groups, including the Foundation. The Foundation sought a permit from the District and spoke with an officer specifically about painting a mural on the street. At the same time, the Foundation sent a letter to Mayor Bowser requesting permission to paint its message. The police department and the Chief of Police were copied on the letter. Although neither Mayor Bowser nor the police department responded to the letter, the District granted the permit, which was signed by the Commander of the police department's Special Operations Division. And on the day of the event six police cars and a number of officers were waiting. The police officers informed the Foundation's members that if they chalked on the sidewalk, they would be arrested. Such a coordinated and immediate police response to the Foundation's rally could certainly have been the work of policymakers. At a minimum, it is plausible at this stage that the District 'knew or should have known of the risk of constitutional violations' and yet deliberately failed to act. . . The alleged facts 'raise a reasonable expectation that discovery will reveal evidence' either that the Special Operations Commander is a policymaker or that other policymakers like the Mayor were involved in exempting individuals who expressed 'Black Lives Matter' messages from the defacement ordinance and continuing to enforce the ordinance against speakers of other messages. . . Furthermore, the Foundation has alleged facts suggesting the District's exemption from enforcement for a favored viewpoint was 'persistent and widespread.'. . Officers were present during many of the Black Lives Matter protests. The officers watched as thousands of messages were painted on the streets, sidewalks, and other public and private property. Yet not a single person was arrested for numerous and clear violations of the defacement ordinance. The unvarying non-enforcement, against large and small acts of defacement, over a period of weeks, was 'persistent and widespread' and so plausibly constituted a custom or policy for *Monell* liability. . . The District argues there is no evidence of a custom or practice of enforcing the ordinance 'against disfavored messages' and emphasizes the complaint failed to 'allege any other instances where the speech of anti-abortion or other religious groups was targeted for enforcement beyond their own rallies.' But that is not what the Foundation must allege. To make out a First Amendment violation, it is sufficient the District had a policy of exempting a favored view while continuing to enforce the ordinance against everyone else. . . Such an exemption—even in a single, protracted instance—may be sufficient to state a claim under *Monell*. . . We therefore disagree with the district court's holding that the Foundation failed to allege a policy of selective enforcement under *Monell*. The Foundation has more than plausibly alleged a 'persistent and widespread' District practice of selective non-enforcement against those who marked and painted 'Black Lives Matter' messages.")

Hurd v. District of Columbia, 997 F.3d 332, 340-42 (D.C. Cir. 2021) ("Hurd's last theory of municipal liability fares better. Hurd alleges that the District has an unconstitutional policy requiring that an inmate be incarcerated rather than released, without due process, whenever a District employee discovers a record indicating that a previous sentence was not fully served. This theory of municipal liability turns on the existence and content of the District's immediate

incarceration policy based on record checks by District employees. Importantly, the District does not deny the existence of a policy that led to Hurd's incarceration. The District admits that it (i) employs legal instrument examiners; (ii) tasks them with reviewing the records of inmates prior to their release to identify any basis for additional incarceration; and (iii) forbids employees to release the individual if the examiner finds such a record. . . In its brief to this court, the District agrees that, '[w]hen a court orders an inmate released in a particular case, officials must check all records to determine if there is any other charge or detainer requiring the inmate's detention, and if so, must hold him at the D.C. Jail.'. . The District also acknowledged that it has a specific 'Program Statement' that requires its legal instrument examiners to review computerized record databases 'to determine if there are any outstanding warrants or charges preventing release, prior to an inmate's release from the custody of the [Department of Corrections].'. . And before the district court, the District admitted that the legal instrument examiner in Hurd's case had 'no other options' but to hold Hurd because of the 'unexpired judgment and commitment' from the District of Columbia judge who originally sentenced Hurd. . . . Nevertheless, on appeal, the District has tried to portray what happened to Hurd as just an isolated mistake by one legal instrument examiner, arguing that no District policy mandated that Sibert not release Hurd upon discovery of a record indicating the misdemeanor sentences were not served. The District now insists that the written policy statement only requires that inmates be held if there is an outstanding 'charge or detainer,' and that the policy statement does not address what to do with an unserved sentence. . . Because the nature and contours of the alleged policy present a number of disputed issues of material fact, the district court erred in granting summary judgment for the District. First, the District's materially contradictory descriptions of its policy and, in particular, its application to unserved sentences, are unresolved material facts very much disputed by Hurd and critical to determining the constitutionality of the District's policy. Second, while the District attempts to lay Hurd's incarceration on the shoulders of an assertedly single wayward legal instrument examiner who denied Hurd release, that argument begs the critical factual question of 'then what?' The problem identified by Hurd goes far beyond the initial denial of his release. Hurd contends that he was incarcerated under lock and key for just shy of two years. That incarceration, we can reasonably infer from the record, was the result of a series of determinations undertaken by the Department of Corrections itself, not the product of a single decision made by the legal instrument examiner. For instance, the legal instrument examiner attests that he sought out his supervisor for advice regarding whether to release Hurd, and that the supervisor was the one who ultimately wrote 'Denied' on Hurd's release authorization form. . . Moreover, it was the District's Department of Corrections—not the legal instrument examiner—who subsequently emailed Hurd to inform him that his previous release had been erroneous. . . And when Hurd challenged his incarceration without due process, the decision to incarcerate Hurd was defended in court by the District's attorneys, not the legal instrument examiner. . . So regardless of whether the policy of checking the records alone was lawful, . . . the question posed by Hurd's case is how that policy resulted in an incarceration *by the Department of Corrections* for almost two years that was defended in court *by the District*. Because there are conflicting facts and testimony in the record regarding the authority of the Department of Corrections' legal instrument examiners to detain inmates based on record reviews, as well as concerning when and how the District authorizes formal incarceration

based on the findings of a legal instrument examiner, we reverse the grant of summary judgment on Hurd's claim that the District's incarceration policy is unconstitutional. On remand, the relevant nature and operation of the District's policy must be factually resolved and its constitutionality evaluated.")

Barnes v. District of Columbia, 793 F.Supp.2d 260, 284, 291 (D.D.C. 2011) ("[B]ecause plaintiffs have demonstrated that the DOC's practice of strip searching all court returns entitled to release, without individualized suspicion, violates the Fourth Amendment, and because that policy was promulgated by an official with final authority to establish such policies for the District and caused plaintiffs' and class members' constitutional deprivations, the District is liable.")

FIRST CIRCUIT

Watchtower Bible & Tract Soc'y of New York, Inc. v. Municipality of San Juan, 773 F.3d 1, 9 (1st Cir. 2014) ("Here, the record amply demonstrates that the municipal defendants have had a policy and custom of issuing permits to urbanizations without attaching conditions sufficient to ensure public access. This policy and custom led directly to the infringement of the plaintiffs' First Amendment rights. No more is exigible to warrant equitable relief against the municipal defendants.")

Petrello v. City of Manchester, No. 16-CV-008-LM, 2017 WL 3972477, at *8-9 (D.N.H. Sept. 7, 2017) ("In sum, the record reveals that Chiefs Mara and Willard—final policymakers for the City—either knew or should have known about this MPD custom or practice, yet did nothing to end it. More importantly, there is nothing in the record to suggest that Chief Mara or Willard in any way disapproved of this custom. The totality of this record supports only one reasonable conclusion: the City is responsible for a custom or practice of charging passive panhandlers, like Petrello, with disorderly conduct under RSA 644:2, II(c) (hereinafter, "MPD Policy"). Because the City does not dispute, nor could it on this record, that the MPD Policy was the cause of and the 'moving force' behind Officer Brandreth's decision on June 3, 2015 to issue the summons to Petrello, . . . the court holds that Petrello has satisfied the threshold test for *Monell* liability. . . . Unlike the plaintiffs in *Joyce*, Petrello does not allege that the City is liable under § 1983 for failing to train and supervise its police officers. In fact, Petrello disclaimed her failure to train theory at oral argument. Rather, Petrello alleges that the MPD Policy itself is unconstitutional, which caused Officer Brandreth to violate her First Amendment rights. This distinction is important. 'If the allegation against the municipality involves a failure to train, the plaintiff must put forth evidence of a failure to train that amounts to "deliberate indifference to the rights of persons with whom the police come into contact."'. . In such a case, 'a finding that the law was not clearly established may foreclose municipal liability for failure to train.'. . However, when a plaintiff claims that a municipal policy itself is unconstitutional, 'resolving [the] issues of fault and causation is straightforward.'. . Without a failure to train claim, Petrello's case is distinguishable from *Joyce*. In short, a municipality can be held accountable for violations of federal law regardless of whether the relevant federal law was clearly established at the time the municipality committed the

violation. Municipal liability is not foreclosed simply because the relevant law was not clearly established when Officer Brandreth charged Petrello with disorderly conduct. . . Accordingly, the court **DENIES** the City's motion for summary judgment on Count II.")

Baggett v. Ashe, 41 F.Supp.3d 114, 114-15, 125 (D. Mass. 2014) ("Plaintiff presents two theories in support of judgment in her favor. First, she contends that the policy of permitting male guards to be *present* to videotape the strip searches—even if they somehow refrained from actually viewing the inmates while performing the videotaping—violated the Constitution. The court agrees that this policy violated the class members' constitutional rights and that no legitimate, penological interest justified it. Moreover, Defendants are not entitled to the protection of qualified immunity for this violation. . . .In sum, no legitimate penological interest justified the regular practice of using male officers to videotape female inmates while they were being strip searched, even assuming the officers respected the policy requirement to avert their eyes while operating the camera. Moreover, nothing in the record indicates that any emergency situation ever required the use of male officers to handle videotaping. Since the policy violated the Fourth Amendment rights of the class members, and since *Turner* does not save Defendants, the policy as applied to class members was unconstitutional.")

Farry v. City of Pawtucket, 725 F.Supp.2d 286, 295, 296 (D.R.I. 2010) (City's admission in answer that city police officer who shot and killed emotionally disturbed individual during altercation complied with actual customs, policies, practices, and procedures of city, together with city's concession that there was question of fact as to officer's liability, precluded summary judgment on *Monell* claims brought by administratrix of individual's estate against city)

SECOND CIRCUIT

Hernandez v. United States, 939 F.3d 191, 206-09 (2d Cir. 2019) ("The Complaint alleges that the City has an official policy of blindly honoring federal immigration detainers. The City argues that such a policy is not adequately alleged in the Complaint. We disagree. The Complaint alleges that the City's policy of acceding to federal immigration detainers was pursuant to the decisions of the City's lawmakers; namely, their passage of Local Law 22 of 2013. Moreover, the Complaint alleges that there was a practice of 'treating federal immigration detainers as though they were mandatory,' and honoring them without inquiry even when circumstances suggested inquiry was warranted. . . At issue here then is whether this alleged policy caused Hernandez's detention. The City argues that it is not liable for Hernandez's detention because (1) his detention was due to his failure to post bail; and (2) the DOC could rely on the immigration detainer. . . .[W]e conclude that the Complaint plausibly alleges that but for the detainer, Hernandez would have been released, and that the City confined him not for his failure to post bail but because of the detainer. . . .The City also argues that, even if the City detained Hernandez only because of the detainer, the Complaint fails to state a viable *Monell* claim because '[m]unicipal law enforcement officers are permitted to detain a suspect at the request of federal immigration agents who have probable cause to believe that the suspect is removable.'. . Moreover, the City argues that there was probable cause

here because the detainer reflected the existence of an order of removal. We are not persuaded. The Complaint adequately alleges that the City lacked probable cause to rely on the detainer. First, the Complaint alleges that the name on the detainer (Luis Enrique Hernandez-Martinez) did not match Hernandez's name (Luis Hernandez). As explained above, the name discrepancy alone is arguably enough to vitiate probable cause, and the Complaint plausibly alleges that a reasonable officer, whether a court officer, corrections officer, or other City official, would have conducted further inquiry before continuing to detain Hernandez. . . Second, the City could not blindly rely on the federal detainer in the circumstances here. The Complaint alleges that Hernandez told multiple DOC employees that he was a U.S. citizen, and the City could have easily verified his citizenship by checking (1) the DOC Inmate Lookup Service, which listed his nativity as 'New York,' or (2) his rap sheet, which apparently noted that he was a U.S. citizen. . . While we do not hold that an officer is required to investigate every claim of innocence, the City had an independent obligation to verify Hernandez's citizenship in the circumstances here. Where there is a discrepancy in the names and an individual's citizenship can be verified with minimal effort, the City is not free to ignore a claim of innocence. . . .Accordingly, as the Complaint plausibly alleges that the City refused to release Hernandez because of its policy, and that the City would have seen that Hernandez was not subject to an immigration detainer if it had checked, Hernandez plausibly alleges that City policy indeed caused the deprivation of his rights.")

Fate v. Charles, 24 F.Supp.3d 337 (S.D.N.Y. 2014) ("These two distinctions—the justification for the search and the relevant burden of proof—separate searches incident to a lawful arrest from detainee safety searches. Both distinctions preclude *Florence*'s application to a discretionary strip search in a police station. A police station is not a jail. In the absence of a large, potentially dangerous, and ever-changing population of detainees, there is a less compelling law enforcement interest to balance against the extreme intrusion of a strip search. The justification for the broad scope of the search, and the higher burden of proof, dissipates almost entirely in an empty holding cell. . . . In the absence of the unique governmental interest in maintaining a jail, a reasonableness inquiry, rather than presumed deference to police officers, is the proper standard to apply. The exception applied in *Bell*, *Turner*, and *Florence*, like all exceptions permitting suspicionless searches, should be 'closely guarded' and confined to the circumstances necessitating deference to government officials. . .The distinction drawn above is not merely academic. Courts are ordinarily careful to distinguish between detention in police stations and jails—and each of the opinions in *Florence* explicitly drew that distinction. . . . In short, all nine justices explicitly rejected the interpretation that the Defendants argue for here: that the decision in *Florence* applies to strip searches in a police station. . . There are other reasons that *Florence* does not permit the suspicionless visual body cavity search at issue in this case. It does not appear that *Florence* applies to visual body cavity searches at all. . . . [T]he Court's ultimate holding was limited, explicitly, to the searches performed on Florence. . . The opinion cannot be read, as Defendants urge, to authorize suspicionless visual body cavity searches as a matter of law. The line between a strip search and a body cavity search is constitutionally relevant: the scope of a search bears directly on its reasonableness. . . .Second, a judge had not decided whether to commit Fate to the general population of a jail. A majority of the Justices in *Florence* expressed worry that, although it may

be reasonable to conduct suspicionless strip searches upon admission to the general population of a jail, it may not be reasonable to send some arrestees to jail at all. . . . An initial appearance before a judge seems to be important—if not essential—to the applicability of *Bell* and *Turner*. At the very least, a majority of the Justices in *Florence* recognized that, if a jail strip searches every detainee admitted to the general population, the decision to send an arrestee to that jail is functionally a decision to strip search him. Such a decision must be subject to a reasonableness inquiry if it is not made by a judge. Finally, the search here was a discretionary one. There is no evidence or suggestion that the policymakers at the Spring Valley police department had concluded, based on their expertise, that it was appropriate to conduct a visual body cavity search of every arrestee detained at the station. . . . There was no such expert policy judgment here. *Florence* further justified the policy at issue based on correctional officers' 'essential interest in readily administrable rules.'. . There is no rule to uphold here. Instead, Defendants ask the Court to uphold an individual officer's authority to select unlucky arrestees to be strip searched, for no articulable reason, at the officer's absolute discretion. But in the absence of individualized reasonable suspicion, the existence of a well-reasoned general policy is the only thing protecting an arrestee from an arbitrary (unreasonable) search of his person. Defendants' reading of *Florence* would effectively circumvent the requirement that searches incident to a lawful arrest must be reasonable in 'scope and manner of execution.'. . Even if a stationhouse strip search were characterized as a species of special needs search—a characterization unsupported by any authority Defendants have cited here—the officer's decision to search would need to be justified either by individualized reasonable suspicion or by a reasonable general policy. Special needs searches must be reasonable. Reasonableness requires reasons. . . . Regardless of whether stationhouse strip searches are incident to a lawful arrest or special needs searches, the discretion of the officer conducting the search must be limited in some meaningful way. Strip searches are an extraordinary invasion of privacy. Courts must demand factual justification supporting either the officer's exercise of his discretion or the policy pursuant to which he acted. In short, *Florence* does not apply to discretionary visual body cavity searches at a police station. Such searches are still subject to the *Hartline* standard requiring individualized reasonable suspicion.")

FOURTH CIRCUIT

Sharpe v. Winterville Police Department, 59 F.4th 674, 681-82 (4th Cir. 2023) ("Recording police encounters creates information that contributes to discussion about governmental affairs. So too does livestreaming disseminate that information, often creating its own record. We thus hold that livestreaming a police traffic stop is speech protected by the First Amendment. . . . There is 'undoubtedly a strong government interest' in officer safety. . . And risks to officers are particularly acute during traffic stops. . . But even though the Town has a strong interest in protecting its officers, Defendants have not done enough to show that this policy furthers or is tailored to that interest. Nor is that gap filled here by common sense or caselaw. . .So we cannot conclude, at this stage, that the policy survives First Amendment scrutiny. . . Instead, we hold that Sharpe has plausibly alleged that the Town adopted a livestreaming policy that violates the First Amendment.")

FIFTH CIRCUIT

Robinson v. Hunt County, Texas, 921 F.3d 440, 449-50 (5th Cir. 2019) ("Robinson has sufficiently pleaded an official policy of viewpoint discrimination on the HCSO Facebook page. The complaint alleges that, on January 18, 2017, the HCSO account posted a message warning that 'ANY post filled with foul language, hate speech of all types and comments that are considered inappropriate will be removed and the user banned.'. .As discussed above, a policy of deleting 'inappropriate' comments is viewpoint discriminatory. That the January 18, 2017 post was made in the name of the HCSO lends it some official imprimatur, and gives rise to a reasonable inference that the statement 'can be fairly identified as' an action 'of the government itself.'. . Robinson further alleges that she wrote a critical comment in response to the January 18 post and that HCSO took precisely the actions threatened in the post: removing her comment and banning her from the page. Unfavorable comments by other Facebook users on the same post were also allegedly deleted. These allegations are sufficient to state a claim that HCSO's policy was the 'moving force' behind the violation of Robinson's constitutional rights. . . Hunt County's reliance on *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838 (5th Cir. 2009), is inapposite because the plaintiff in that case could point to 'no written policy supporting his claim of municipal liability' and instead attempted to establish the existence of an official policy through a pattern of violations. . . Robinson, by contrast, has plausibly alleged that Hunt County had an explicit policy of viewpoint discrimination on the HCSO Facebook page.")

Jauch v. Choctaw County, 874 F.3d 425, 435-36 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 638 (2018) ("Jauch challenges the indefinite detention procedure. Accordingly, the first and second elements of our inquiry reduce to one question: Is the challenged procedure 'an official policy' that was 'promulgated by the municipal policymaker?'. . It is. There is no dispute that Sheriff Halford is the relevant policymaker. . . And, both prior to and during this litigation, Sheriff Halford and Choctaw County have cleaved to the indefinite detention procedure. Their position is that indefinite detention is and must be the policy in Choctaw County. Accordingly, resolution of the first and second elements is as clear as ever it could be. . . It is also obvious that the indefinite detention procedure caused the due process violation Jauch complains of—indefinite detention. 'Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so,' the causation determination 'is straightforward.'. . The policy Jauch challenges cannot be separated from the procedure that we have found constitutionally deficient. They are one and the same. In cases like this one, where 'fault and causation' are 'obvious,' 'proof that the municipality's decision was unconstitutional' establishes 'that the municipality itself was liable for the plaintiff's constitutional injury.'. . While courts must be careful not to 'blur[ ] the distinction between § 1983 cases that present no difficult questions of fault and causation and those that do,'. . . we have no trouble concluding that this is an obvious case. Choctaw County's relevant policymaker instituted a policy whereby certain arrestees were indefinitely detained without access to courts or the benefit of basic constitutional rights. This unconstitutional policy was 'the moving force' behind Jauch's constitutional injury. . . Under *Monell* and its progeny, Choctaw County is liable.")

Maddux v. Officer One, No. 01-20881, 2004 WL 436000, at *19 (5th Cir. Mar. 9, 2004) (unpublished) ("The written policy condoned forcible entry of a third-party premises despite the absence of the *Steagald* exceptions, and certain testimony in the record causes us to question whether the City in practice went any further in protecting the privacy interests of third parties caught in the melee.")

Luna v. Valdez, No. 3:15-CV-3520-D, 2018 WL 684897, at *9-12 (N.D. Tex. Feb. 2, 2018) ("Defendants move for summary judgment, *inter alia*, on the grounds that the summary judgment evidence fails to establish any policy, practice, or custom that was maintained or adopted by Sheriff Valdez, as the County's policymaker, with deliberate indifference to the rights of citizens and that was the moving force behind any underlying violation of Luna's constitutional rights. Because Luna has failed to introduce evidence that would enable a reasonable jury to find that his continued detention after his name was mistakenly left off the DMU's April 28, 2015 email was the result of a County policy, practice, or custom, the court grants the County's summary judgment motion in part. But to the extent Luna bases his Fourth Amendment claim on the denial due to the Immigration Detainer of release on bail from April 11 through April 27, 2015, or of release for up to 48 hours after he was sentenced on April 27, 2015, the court denies defendants' motion. . . . Defendants contend that there is no written policy that required Luna's continued incarceration; there is no evidence that Sheriff Department training was so cursory and devoid of thoroughness as to amount to no training at all; there is no evidence of a specific deficiency in the training of DMU employees regarding the input of information into the computers and that such specific deficiency had, prior to April 27, 2015, already caused a pattern of detaining inmates who had served their sentences but were not released to ICE within 48 hours of their discharge from criminal charges; there is no evidence of an 'official policy' that directly caused Luna not to be released on or around April 27, 2015, after he served his sentence on the misdemeanor charge; and the evidence establishes that members of the DMU were specifically trained regarding procedures to assure an individual's timely release either to the U.S. Immigration and Naturalization Service ("INS") or from all custody. Luna responds that the County and Sheriff Valdez had an official policy, practice, or custom of honoring all 48-hour ICE 'holds' or 'detainer requests' with respect to individuals who, like Luna, were otherwise cleared for release, without requiring probable cause to believe a different criminal offense had been committed to satisfy the Fourth, Fifth, and Fourteenth Amendments. . . Luna maintains that defendants had a policy of not allowing inmates who, like Luna, were the subject of an ICE hold to be released on bond. He also contends that the evidence shows that defendants had a policy, practice, or custom of holding detainees with ICE detainers beyond the 48 hours requested by the ICE hold. Luna cites evidence that, during his three-month confinement, he repeatedly asked officers working in the Jail when he would be released, and they told him that he was being held because of an immigration detainer and that he would be transferred to the custody of ICE 'sometime in the future.'. . Luna posits that '[t]he fact that [he] was consistently told this by several detention officers on numerous occasions provides some evidence of a persistent and widespread custom on the part of the Defendants.'. . . Defendants do not appear to dispute that the County had a policy or custom of refusing to release on bond any inmate for whom an immigration detainer had been issued. . . Nor do they move for summary

judgment on the ground that Luna cannot prove that an official policymaker can be charged with actual or constructive knowledge of this policy or that this policy was the 'moving force' behind Luna's alleged constitutional deprivation. Defendants do, however, specifically dispute that there was any policy 'which was the direct cause of Luna not being released on or about April 27, 2015, after he served his time on the misdemeanor charge.'. . The court agrees that Luna has failed to adduce any evidence that would enable a reasonable jury to find that the County had a policy or custom of detaining individuals subject to an immigration detainer *beyond the 48 hours requested in the detainer itself*. . . .Based on the summary judgment evidence, however, a reasonable jury *could* find that the County had a policy or custom of honoring ICE immigration detainers requesting that individuals be detained for up to 48 hours after they were otherwise eligible for release. . . .Accordingly, the court grants defendants' motion for summary judgment on Luna's § 1983 Fourth Amendment claim against the County to the extent Luna bases this claim on an alleged policy or practice of detaining individuals subject to an immigration detainer beyond the 48 hours requested in the detainer itself. The court otherwise denies defendants' motion for summary judgment on this claim.")

Mercado v. Dallas Cty., Texas (Mercado II), 229 F.Supp.3d 501, 521 (N.D. Tex. 2017) ("In support of their 'overdetention' claim, plaintiffs allege that Dallas County had a policy and practice of detaining individuals with immigration holds who have otherwise been cleared for release, without requiring probable cause to believe that a different criminal offense has been or is being committed or other authority that would satisfy the Fourth Amendment, and that this policy was the 'moving force' for plaintiffs' § 1983 claim. In addition, they allege that 'Dallas County and Sheriff Valdez are responsible for the policy,' and that '[i]n particular, Sheriff Valdez oversees and is responsible for Dallas County's decision on whether to detain individuals with immigration holds that are otherwise cleared for release.'. . These allegations are sufficient at the Rule 12(b)(6) stage to plausibly allege the elements for municipal liability.")

SIXTH CIRCUIT

Brawner v. Scott County, Tennessee, 14 F.4th 585, 597-600 (6th Cir. 2021), *rehearing en banc denied*, 18 F.4th 551| (6th Cir. 2021), *cert. denied*, 143 S. Ct. 84 (2022) ("With no claims against individual officers remaining, Brawner alleges that various Scott County policies and customs can serve as a basis for imposing liability on the County. As an initial matter, the parties dispute whether Brawner's claim against the County depends on her showing that a county actor violated her constitutional rights. We have not always been consistent in discussing this issue. [comparing cases] But it makes no difference here because Brawner presented evidence from which a reasonable jury could find that Nurse Massengale violated Brawner's constitutional rights and that this violation was the result of the County's policies. To meet her burden to show that Nurse Massengale violated her constitutional right to adequate medical care, Brawner needed to present evidence from which a reasonable jury could find (1) that she had an objectively serious medical need; and (2) that Nurse Massengale's action (or lack of action) was intentional (not accidental) and she either (a) acted intentionally to ignore Brawner's serious medical need, or (b) recklessly

failed to act reasonably to mitigate the risk the serious medical need posed to Brawner, even though a reasonable official in Nurse Massengale's position would have known that the serious medical need posed an excessive risk to Brawner's health or safety. . . .Because a reasonable jury could find that Brawner had an objectively serious medical need, and that Nurse Massengale was either subjectively aware of the risk to Brawner from suddenly discontinuing her medications and failed to respond reasonably to that risk, or that Nurse Massengale recklessly failed to act reasonably to mitigate the risk that the serious medical need posed to Brawner, Brawner presented a jury question as to whether Nurse Massengale violated her constitutional rights. . . . Brawner presented evidence that would allow a reasonable jury to find that her injuries were incurred due to the execution of the fourteen-day and no-controlled-substances policies. As discussed above, Scott County's fourteen-day policy allowed the jail to wait fourteen days before giving detainees a medical examination, which includes among other things, checking for required medications. Captain Tucker testified that the policy sometimes results in the untimely administration of medical services. Further, even after Brawner had a seizure and was returned to jail from the hospital, Nurse Massengale still did not complete her medical examination until the end of the fourteen-day period, and Brawner was never prescribed the medications she had previously been taking or provided with an alternative treatment plan. Although Nurse Massengale testified that she could prioritize detainees to be seen earlier if they were on life-sustaining medications, the chain of events in this case suggests that this authority and the County's fourteen-day policy are insufficient to guard against the consequences to detainees like Brawner who are admitted while on medications that are not technically life-sustaining but where the abrupt discontinuation of those medications could have tragic consequences. Further, Brawner would never have received three of her medications because of the jail's blanket ban on controlled substances. Brawner's medical expert and one of her treating physicians testified that they would never recommend abrupt discontinuation of the medications she was taking given the possibility of seizures, and Brawner's medical expert testified that the abrupt discontinuation of these medications caused her seizures. Additionally, we have previously suggested that abrupt discontinuation of substances that could lead to withdrawal symptoms and potential seizures might pose constitutional problems. . . . In short, because it is undisputed that the jail had a ban on controlled substances, and there was testimony that the abrupt discontinuation of Brawner's prescriptions caused her seizures, Brawner presented sufficient evidence to identify the problematic policy, connect it to the County, and show that the policy caused her injuries. We therefore reverse the district court's judgment for Scott County.")

Taylor v. City of Saginaw, 11 F.4th 483, 486-90 (6th Cir. 2021) (*Taylor II*) ("The City of Saginaw routinely chalked car tires to enforce its parking regulations. In our prior opinion, we held that doing so is a search for Fourth Amendment purposes, and that 'based on the pleadings stage of this litigation, ... two exceptions to the warrant requirement—the "community caretaking" exception, and the motor-vehicle exception—do not apply here.'. . However, we left for another day whether the search could be justified by 'some other exception' to the warrant requirement. . .We consider one of those other exceptions today—specifically, whether suspicionless tire chalking constitutes a valid administrative search. Because we conclude that it does not, we reverse the district court's grant of summary judgment in favor of the City. But because we conclude that

the alleged unconstitutionality of suspicionless tire chalking was not clearly established, the City's parking officer, defendant Tabitha Hoskins, is entitled to qualified immunity. . . . As we held in *Taylor I*, 'chalking is a search for Fourth Amendment purposes' under the property-based *Jones* test. . . And we see no reason to depart from that conclusion, which was a logical extension of the Court's holding in *Jones* that a physical trespass to a constitutionally protected area with the intent to obtain information is a search under the Fourth Amendment. . . . [W]e hold that the administrative-search exception does not justify the City's suspicionless chalking of car tires to enforce its parking regulations. We express no opinion on the remaining exceptions to the warrant requirement because we are 'a court of review, not first view.'. . . [E]very reasonable parking officer would not understand from *Jones* that suspicionless chalking of car tires violates the Fourth Amendment. . . Accordingly, Hoskins is entitled to qualified immunity.") **[***But see* ***Verdun v. City of San Diego***, 51 F.4th 1033 (9th Cir. 2022), *cert. denied,* 144 S. Ct. 73 (2023) (holding chalking policy constitutional under "administrative search exception" to the warrant requirement)**]**

Jackson v. City of Cleveland, 925 F.3d 793, 832-34 (6th Cir. 2019), *rehearing en banc denied* (June 27, 2019), *cert. denied,* 140 S. Ct. 855 (2020) ("None of the rules contained within the Manual, taken individually or collectively, are inconsistent with an interpretation of GPO 19-73 that permits officers to withhold exculpatory information from prosecutors. These rules can be read by a reasonable jury as consistent with a policy of permitting the withholding of exculpatory evidence in violation of *Brady*. . . .GPO 19-73 and the rules in Cleveland's police manual, read together, could be understood to authorize Cleveland officers to withhold exculpatory witness statements from prosecutors. It is for a jury to consider GPO 19-73 and the rules in the Manual in light of Cleveland's actual practices and determine whether Cleveland had a policy of permitting *Brady* violations. Because Cleveland does not contest that it promulgated GPO 19-73 or that the individual Defendants were acting in conformance with GPO 19-73 when they withheld Vernon's exculpatory statements, a reasonable jury could find Cleveland liable under *Monell*.")

Gardner v. Evans, 920 F.3d 1038, 1063 (6th Cir. 2019) ("There is no dispute that it was the City's policy to simply provide the type of notices that plaintiffs received. . . A reasonable jury could find that the harms at issue were caused by the lack of notice. All of the tenant plaintiffs were displaced from their homes due to the red tagging and none appealed the decision. Thus, consistent with the district court's initial conclusion, we likewise conclude that the City is not entitled to summary judgment on the post-deprivation claims.")

Morgan v. Fairfield County, Ohio, 903 F.3d 553, 565-66 (6th Cir. 2018) ("The upshot is that municipalities can be held liable for harms caused by direct actions of the municipalities themselves, . . . harms caused by the implementation of municipal policies or customs, . . . and harms caused by employees for whom the municipality has failed to provide adequate training[.] Each of these different approaches to liability requires a different analysis. But each approach seeks to answer the same fundamental question: did the municipality cause the harm or did an individual actor? When the injury is a result of an action of an employee who has not been trained

properly, we apply 'rigorous requirements of culpability and causation'—holding a municipality liable if it has been deliberately indifferent to constitutional rights. . . On the other end of the spectrum, when an act of the municipality itself causes the injury, 'fault and causation obviously apply.'. . Likewise, when an injury is caused by the straightforward carrying out of a municipal policy or custom, the determination of causation is easy. . . In *Gregory v. City of Louisville*, 444 F.3d 725, 752 (6th Cir. 2006), we concluded that if a challenged policy is facially constitutional, the plaintiff must show that the policy shows a deliberate indifference to constitutional rights. . . Thus, *Gregory* analyzed failure-to-train claims and challenges to facially constitutional municipal policies under the same standard. But as we held in *Garner*, and recently reaffirmed in *Arrington-Bey*, '[t]here are important differences between these types of claims' and so we must analyze them differently. . . That means that we must be careful not to apply *Gregory* too broadly. *Gregory* may help to determine municipal liability when an employee's *interpretation* of a policy causes harm. But that is not the case here. Like *Garner*, this case presents a straightforward challenge to the county's policy itself. And, as in *Garner*, we apply a straightforward test: Morgan and Graf must '(1) identify the municipal policy or custom, (2) connect the policy to the municipality, and (3) show that [their] particular injur[ies] [were] incurred due to execution of that policy.'. .Morgan and Graf have made that showing. It is uncontested that the county's policy required officers to enter '*onto* the back' of any property during *every* "knock and talk." And as acknowledged by the sheriff and members of the SCRAP unit, that policy did not give any leeway for the officers to consider the constitutional limits that they might face. The SCRAP unit did not weigh the characteristics of properties to determine what parts of the properties were curtilage (and thus off limits). The policy gave no weight to the core value of the Fourth Amendment—one's right to retreat into his or her home 'and there be free from unreasonable government intrusion.'. . Quite the opposite: the policy commanded that the SCRAP unit ignore those limits. It was not one employee's interpretation of a policy that caused Morgan's and Graf's injuries—the policy was carried out precisely as it was articulated. And so, because the county's policy itself was the cause of Morgan's and Graf's injury, the county should be held liable under *Monell*.")

Morgan v. Fairfield County, Ohio, 903 F.3d 553, 573-74 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part) ("Here, the majority is correct that the policy directed officers to enter a constitutionally-protected zone. Morgan and Graf have a right to be secure in their home, which includes the curtilage of the home. . . . But the county policy *did not* direct officers to gather information while there. As such, there is no search. . . .[T]he county's policy was silent as to any information-gathering mandate for the officers. As such, the policy *itself* did not direct the officers to violate the Fourth Amendment. . . .Here the county's policy did not direct officers to engage in a purposeful, investigative act of Morgan and Graf's home. Accordingly, since there was no search directed by the policy, no constitutional violation occurred under the original meaning of the Fourth Amendment.")

O'Brien v. City of Grand Rapids, 23 F.3d 990, 1004 (6th Cir. 1994) ("Grand Rapids followed the routine practice of not securing warrants during the management of critical incidents. The trouble is that this policy was illegal.")

Phillips v. City of Cincinnati, No. 1:18-CV-541, 2019 WL 2289277, at *2 n.6 (S.D. Ohio May 29, 2019) ("Although the Sixth Circuit has not addressed the issue, the Ninth Circuit has found that an '**ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.**' *Martin v. City of Boise*, 920 F.3d 584, 604 (9th Cir. 2019) (emphasis added). As this Court has recognized, 'the County Court's August 7, 2018 TRO effectively made being homeless in most of Cincinnati illegal. If Plaintiff [or others similarly situated] can show that there is not a bed available for [them] in Cincinnati shelters, then [they] can likely succeed on [the] Eighth Amendment claim.'")

S.R. v. Kenton County Sheriff's Office, No. 215CV143WOBJGW, 2017 WL 4545231, at *11–12 (E.D. Ky. Oct. 11, 2017) ("Kenneth Kippenbrock was the SRO Coordinator for the Kenton County Sheriff's Office at the time of these events. . . He testified that Sumner's handcuffing of S.R. and L.G. was consistent with the policy of the sheriff's department. . . He also testified that since the SRO program was initiated, more than ten children have been handcuffed by SROs in schools, and it is possible that the number is more than twenty-five. . . Kenton County Sheriff Korzenborn also testified that Sumner acted in accordance with all applicable Kenton County policies in handcuffing S.R. and L.G. He has never asked Sumner whether Sumner has ever handcuffed other elementary children in the district, and he is not interested in knowing how often his deputies handcuff school children. . . Handcuffing children above their elbows behind their back is acceptable practice by his deputies. . . Korzenborn has not implemented any changes in the training of his SROs since these incidents. . .Given this undisputed testimony, Kenton County is liable as a matter of law for Sumner's unlawful handcuffing of S.R. and L.J.")

Cummerlander v. Patriot Preparatory Acad. Inc., 86 F.Supp.3d 808, 824-25 (S.D. Ohio 2015) ("In contrast to the school's policy in *Fewless,* the Academy policy concerning search and seizure is patently unconstitutional. . . . The standard for a constitutional search of a student is reasonable suspicion under the circumstances. A school policy that allows for drug testing under threat of expulsion based on rumors alone, regardless of any other circumstances, and without any other considerations or investigations, falls far short of the constitutional standard. Smith cited to this school policy in an email to Plaintiff's counsel as a justification for demanding JT's drug test. Further, in his Deposition, Smith states that he directly relied on this policy when making his decision to test JT. Smith's limited investigation into JT's alleged comments, and Smith's own statement that he relied only on the statements of Kabealo and CP when making his decision to test JT, also show that Smith acted pursuant to this official, unconstitutional policy. Thus, this written school policy can be said to have 'caused' the violation of JT's Fourth Amendment right, and Defendants Smith and McIIrath, sued in their official capacities, and municipal Defendant Academy are not entitled to summary judgment on the basis of qualified immunity.")

SEVENTH CIRCUIT

Fields v. City of Chicago, 981 F.3d 534, 563 (7th Cir. 2020) ("Here, the district court properly recognized that 'street files' were utilized by law enforcement officers and that a jury could find from the evidence introduced by Fields that there was a 'systemic underproduction of exculpatory materials to prosecutors and defense counsel.'. . The City argues that it was not enough for Fields to produce evidence of ongoing use of street files in which investigative materials were withheld, but Fields must also demonstrate that the withheld evidence would have affected the outcome of the criminal trial. Although knowledge of the risk of constitutional violations is necessary for *Monell* liability, the City's knowledge of that risk is unquestionable in this case. As the district court recognized, the City was aware as a result of prior litigation that the use of street files and the failure to ensure the production of the evidence within those files presented a constitutional problem. In *Jones*, 856 F.2d at 996, we recognized that the custom of the maintenance of street files was department-wide and of long standing, and that a jury could therefore conclude it was consciously approved at the highest policy-making level for decisions involving the police department. . . In fact, the City in *Jones* did not even contest that the use of such a practice presented a due process problem, although the City represented it had abandoned the practice. . . The evidence presented in this case – that such street files were still being used and that exculpatory evidence from such files was still being withheld in criminal cases – allowed a jury to conclude that the City had failed to take the necessary steps to address that unconstitutional practice. Accordingly, the district court did not err in determining that there was a legally sufficient evidentiary basis for a reasonable jury to find for Fields on the issue of *Monell* liability.")

Luce v. Town of Campbell, Wisconsin, 872 F.3d 512, 517-18 (7th Cir. 2017) ("A regulation of the sort the Town has adopted rests on a belief that overhead signs and banners will cause at least some drivers to slow down in order to read what the banners say, and perhaps to react to them (say, by blowing the car's horn in response to 'HONK TO IMPEACH OBAMA'). Stopping to take a picture is just an extreme version of slowing down. Reading an overhead banner requires some of each driver's attention, and diverting attention—whether to banners or to cell phones and texting—increases the risk of accidents. This effect is well established for cell phones and texting and is the basis for legislation by many jurisdictions, uncontested in court as far as we are aware, though talking and texting are speech. It does not take a double-blind empirical study, or a linear regression analysis, to know that the presence of overhead signs and banners is bound to cause some drivers to slow down in order to read the sign before passing it. When one car slows suddenly, another may hit it unless the drivers of the following cars are alert—and, alas, not all drivers are alert all the time. . . . This is enough to support the district court's rejection of plaintiffs' challenge to the no-signs-on-overpasses rule. But it does not speak to the 100-foot addition, which the Town has not even *tried* to justify, despite the fact that one plaintiff has filed an affidavit stating that he wants to demonstrate off the overpass but within the 100-foot limit and has refrained from doing so only because of the threat of prosecution. The ordinance forbids a small 'For Sale' sign on the front lawn of any house near the ends of the overpasses. (The parties tell us that two homes are within the 100-foot limits.) It bans every political sign on a home's lawn, every balloon emblazoned 'Happy Birthday' for a party in the back yard, every 'Merry Christmas' banner draped over the front door in December, and every 'Open' sign in the door of any shop near an overpass. These

prohibitions apply whether or not the sign is large enough to attract drivers' attention. Time, place, and manner restrictions must serve a 'significant governmental interest' and be no more extensive than necessary. . . It is hard to see why signs off the highway, and too small to cause drivers to react, should be banned. . . Perhaps the Town has some justification for the 100-foot rule, but unless it produces one the district court should ensure that political demonstrations and other speech that does not jeopardize safety can proceed. The judgment of the district court is affirmed, except to the extent that it rejects plaintiffs' challenge to the 100-foot buffer zone. With respect to that issue the judgment is vacated, and the case is remanded for further proceedings.")

Dees v. Davis, No. 1:22-CV-163-HAB, 2024 WL 983651, at *6 (N.D. Ind. Mar. 6, 2024) ("Plaintiff designates the use-of-force policy that appears to facially violate federal law when the facts are taken in a light most favorable to Dees. If the use-of-force policy permits the use of pepper spray in the event of verbal non-compliance and passive resistance, and if Davis followed that policy in pepper spraying a passive Dees, then a jury could conclude that *Monell* liability exists. Defendants' motion for summary judgment on the *Monell* claim is denied.")

Housley v. Plasse, No. 222CV00020JRSMKK, 2023 WL 5319766, at *6–7 (S.D. Ind. Aug. 16, 2023) ("To the extent that the Sheriff's Department had a policy to combat COVID-19, a jury could conclude that the few steps taken were so ineffectual as to evince deliberate indifference. There is no evidence that efforts were made to socially distance inmates or to procure tests before December 2020. . . There is no evidence that inmates were provided educational materials about COVID-19. Sheriff Plasse does not explain why jail staff members were not required to wear masks until August 2020. A jury could find that the few policies enacted were insufficient in light of the serious risks posed by COVID-19 and other reasonable measures that could have been taken. . . Many courts have granted summary judgment in favor of municipalities for their responses to the COVID-19 pandemic, but the jail officials in those cases enacted far more comprehensive policies than those presented here. [collecting cases] In this case, however, there are material disputes of fact as to whether the Sheriff was deliberately indifferent to the serious risks of harm given the minimal safety measures he undertook, or at least that are of record. Because there are material disputes of fact as to whether the Vigo County Sheriff's Department COVID-19 policies caused Mr. Whitlock to suffer a constitutional injury, summary judgment must be denied as to the official capacity claim against Sheriff Plasse.")

Santiago v. City of Chicago, No. 19 C 4652, 2020 WL 1304753, at *8-9 (N.D. Ill. Mar. 18, 2020) ("Santiago contends that City's policy on abandoned vehicles expressly fails to address whether it should mail notice before towing and impounding such vehicles or that the City has a widespread practice of never mailing such notice. The Court need not determine whether Santiago objects to a City practice or to an omission in its policies. . . For both types of policies, Santiago ultimately must show 'that there is a true municipal policy at issue, not a random event,' which typically (though not always) requires proof of more than a single incident. . . Santiago's complaint sufficiently alleges an actionable municipal policy. She alleges that the City 'fails to provide any notice by mail whatsoever *prior* to towing vehicles that it considers abandoned.'. . . And she

alleges that the City's failure to mail her notice 'is not an isolated incident, but rather is standard operating procedure by the City,' which, as 'a matter of practice,' does not mail notice before towing and impounding allegedly abandoning vehicles. . . She also alleges that 'the City has unlawfully seized, impounded, and disposed of thousands of vehicles.'. . These allegations are not conclusory, as the City contends. Rather, Santiago has alleged facts that allow a plausible inference that there is an unconstitutional policy, either in the form of an omission in an express policy or a widespread practice. In sum, the Court finds that Santiago has plausibly alleged the existence of a municipal policy that caused a constitutional deprivation.")

Bergquist v. Milazzo, No. 18-CV-3619, 2020 WL 757902, at *5–6 (N.D. Ill. Feb. 14, 2020) ("Generally, municipalities do not face Section 1983 liability unless a plaintiff can show that she suffered injuries of a constitutional magnitude as the result of an official custom, policy, or practice. . . To survive a motion to dismiss, a plaintiff must plead factual content that allow a court to plausibly infer that she: (1) suffered a deprivation of a constitutional right; (2) as a result of either an express municipal policy, widespread custom, or deliberate act of a decision-maker with final policy-making authority; which (3) proximately caused her injury. . . Plaintiff sufficiently pleads her *Monell* claim against the Cook County Sheriff's Office based upon a widespread policy theory. As discussed above, the SAC plausibly alleges that Plaintiff suffered a constitutional deprivation when Defendants arrested her without probable cause and because she was exercising her First Amendment rights. . . It further alleges that Defendant Milazzo claims the arrest occurred pursuant to a policy to detain with handcuffs individuals taking pictures in or around the courthouse if they refuse to identify themselves, and that both Defendant Milazzo and Defendant Larson claim this policy has been in place 'since the 9/11 terror attacks.'. . Plaintiff also alleges that a chief deputy specifically told Defendant Milazzo of this policy. . . Taking these allegations as true, this Court finds plausible that an express policy existed, leading to Plaintiff's detention.")

Murphy v. Raoul, No. 16 C 11471, 2019 WL 1437880, at *24, *26 (N.D. Ill. Mar. 31, 2019) ("In this case, the IDOC requires releasees to secure a qualifying host site to reside at while on MSR. . . The IDOC exercises the sole discretion to approve or deny an inmate's proposed host site based on a variety of statutes and regulations that restrict where sex offenders may live while on MSR. . . Ultimately, a parole agent must authorize the placement. . . The only time a person can apply for the termination of his or her indeterminate MSR term is after successfully serving three years of that term outside of prison. . .So, for someone who is homeless, it is virtually impossible to comply with the IDOC's application of the host site requirement. . . . The undisputed evidence here establishes that the plaintiffs are indigent, that they have no family or friends with whom they can live, and despite their efforts, homeless shelters, halfway houses, and work-release programs are not permitted to accept them as residents. . . Furthermore, there are no halfway houses or transitional housing facilities in Illinois that will accept a convicted sex offender as a resident. . . On top of that, the IDOC does not permit any sex offender to reside at a homeless shelter while on mandatory supervised release, nor does it allow them to participate in work release programs that it provides to other offenders. . . For the plaintiffs, then, the failure to procure a host site is 'not voluntary conduct merely related to, or derivative of, the status of homelessness, but [is] entirely

involuntary conduct that [is] inseparable from [their] status of homelessness.'. . Thus, the defendants' application of the host site requirement constitutes cruel and unusual punishment. . . . Once again, the Court notes that its decision relates to an as-applied challenge and it in no way purports to tell the defendants how to best administer mandatory supervised release for sex offenders. The Court does not order the immediate release of the plaintiffs, nor does it hold that the framework always operates unconstitutionally or that there are no set of circumstances under which it would be valid. The Court only holds that the host site requirement is unconstitutional under the specific facts in this case and as applied to the defendants. It remains the IDOC's job to appropriately exercise its discretion to achieve the goals of the state legislature in implementing mandatory supervised release for sex offenders. . . . The Illinois Legislature thought it best to rehabilitate sex offenders by reintegrating them, like all other convicted felons, into the community after prison. The Constitution thus entitles them to the same conditional liberty that all other releasees receive. Because the defendants' current application of the host-site requirement permits the indefinite detention of the plaintiffs, it breaches the promises enshrined in the Bill of Rights. The Court accordingly grants the plaintiffs' motion for summary judgment . . . as to their equal protection . . . and Eighth Amendment claims[.]")

Brown v. Cook County, No. 17 C 8085, 2018 WL 3122174, at *1, *5 (N.D. Ill. June 26, 2018) ("The plaintiffs in these cases are women who have been victims—often, repeat victims—of these forms of sexual harassment while attempting to do their jobs. They allege that their respective employers, the Law Office of the Cook County Public Defender (CCPD), Cook County, and the Cook County Sheriff's Office (CCSO), which is responsible for security in the jail and courthouse lockups, have not merely failed to protect them from such harassment, but have actually emboldened the harassers by enacting policies and engaging in practices that have led the harassers to believe that they may act with impunity. . . .[T]he plaintiffs have alleged that Dart's official and *de facto* policies and practices have created an environment in which detainees are emboldened to sexually harass female APDs and law clerks. They have additionally alleged that certain of Dart's policies caused an increase in the frequency with which they experience sexual harassment. That is enough to plausibly allege that Dart's policies and practices were the moving force behind the equal protection violation alleged. The Court therefore denies Dart's motion to dismiss the *Brown* plaintiffs' equal protection claim.")

Otero v. Dart, No. 12 C 3148, 2016 WL 74667, at *6 (N.D. Ill. Jan. 7, 2016) ("Plaintiff's argument that Defendant's overdetention policy is unreasonable rests on Defendant's lack of policy for pre-screening acquitted male detainees for release and failure to segregate them from the general population after they return from court – like Defendant's policy for acquitted female detainees. Due to this lack of policy, Plaintiff argues that the nature and quality of his continued detention after acquittal was burdensome and unacceptably dangerous, especially because Defendant no longer had any legal right to detain him. . . . [V]iewing the evidence and all reasonable inferences in Plaintiff's favor – as the Court is required to do at this procedural posture –he has presented sufficient evidence creating a genuine issue of material fact for trial that Defendant's overdetention

policy is unreasonable under the Fourth Amendment. The Court thus denies Defendant's summary judgment motion in this respect.")

Pindak v. Dart, 125 F.Supp.3d 720, (N.D. Ill. 2015) ("The court has found no cases directly addressing whether an agreement by a private contractor to follow policies written by a separate entity constitutes an 'express policy' for *Monell* purposes. The Seventh Circuit has explained that 'an official municipal policy is a deliberate choice to follow a course of action from among various alternatives made by officials with final policymaking authority.'. . The difficulty of identifying a final policymaker within a private company, thus, emerges again in this analysis. . .Some principles do guide the court's inquiry. Most relevant here is the admonition that an official is less likely to be considered a final policymaker when that 'official is constrained by policies of other officials or legislative bodies.'. . Applying this principle here, the court believes that, to hold Securitas directly liable, Plaintiffs must show that the instruction in the Post Orders to 'remove any panhandlers' was a deliberate choice by a Securitas official, rather than a direction from MBRE. . . . There are disputes of fact regarding who wrote the Post Orders and whether Securitas has authority to update and edit them. Those disputes preclude summary judgment on the 'express policy' and 'final policymaker' rubrics.")

EIGHTH CIRCUIT

Wells for next of kin of Locke v. Hanneman, No. 23-CV-273 (ECT/DLM), 2024 WL 3326070, at *7 (D. Minn. July 8, 2024) ("Plaintiffs allege the City had a policy or custom of executing no-knock warrants and of using excessive force against people of color, and that these policies violate the Equal Protection Clause. . . Plaintiffs describe statistics showing that, in 2021 and 2022, eighty percent of no-knock warrants executed by Minneapolis police targeted Black subjects. . . The Amended Complaint alleges that no warrants of this type were executed against a non-Hispanic white subject. . . Plaintiffs allege that the police officers may have been acting reasonably according to official policy, but that the policy in question—executing no-knock warrants exclusively on people of color—was unconstitutional. The bottom line, then, is that the City's exclusive reliance on Officer Hanneman's entitlement to qualified immunity as the ground to challenge Count Two is not persuasive. The officer is not entitled to qualified immunity, and even if he were, that fact alone would not undermine the plausibility of Count Two's policy or custom claim. . . . As with Count Two, Defendants seek dismissal of Plaintiffs' failure-to-train claim in Count Three solely on the basis that Officer Hanneman is entitled to qualified immunity. 'It is the law in this circuit ... that a municipality may not be held liable on a failure to train theory unless an underlying Constitutional violation is located.'. . Because Plaintiffs have plausibly alleged that Officer Hanneman is not entitled to qualified immunity, however, the failure-to-train cannot be dismissed on this basis. Regardless, Plaintiffs' allegations are sufficient. The elements of a § 1983 failure-to-train claim are: (1) that training was inadequate; (2) that the failure to train 'reflects a deliberate and conscious choice' by the municipal entity; and (3) the deficiencies in training actually caused the injury at issue. . . The Amended Complaint alleges that Minneapolis Police Department training regarding the use of force and the use of no-knock warrants was inadequate,

that policymakers knew it was inadequate and knew that the inadequate training allowed Minneapolis police officers to violate citizens' rights, and that the failure to adequately train Minneapolis police officers resulted in Amir's death. . . Were these Plaintiffs' only allegations in support of the failure-to-train claim, Defendants would likely be entitled to judgment on this claim. . . Unlike the plaintiffs in *B.A.B.*, however, Plaintiffs here outline the City's knowledge of the Minneapolis Police Department's use of no-knock warrants, including four specific instances where police officers' use of no-knock warrants resulted in injuries and consequent civil lawsuits against the City. . . Plaintiffs also plead that the City had notice that Officer Hanneman specifically had violated other individuals' rights during the execution of search warrants, but that the City did not offer Officer Hanneman, or any other officer, additional training in the constitutional execution of search warrants. . . And Plaintiffs allege that independent investigators, including the United States Department of Justice, found Minneapolis Police Department training regarding the use of force to be constitutionally insufficient.")

Fant v. City of Ferguson, 107 F.Supp.3d 1016, 1030-31(E.D. Mo. 2015) ("Plaintiffs have pleaded sufficient facts to state a plausible claim that the City's policy and practice of jailing Plaintiffs for their inability to pay fines violates the Due Process and Equal Protection Clauses. . . .The 11 named Plaintiffs have specifically alleged that, pursuant to a City policy and practice, they were each jailed for failure to pay a fine without any inquiry into their ability to pay and without any consideration of alternative measures of punishment. Therefore, Plaintiffs have stated due process and equal protection claims in Count One.")

[*See also* ***Fant v. City of Ferguson***, No. 4:15-CV-00253-AGF, 2015 WL 4232917, at *4 (E.D. Mo. July 13, 2015) ("Although the Court is not convinced that Plaintiffs have sufficiently pleaded that their warrants were based on knowingly or recklessly false information, upon reconsideration and focusing on Plaintiffs' allegations in Paragraph 203 of the complaint, the Court finds that Plaintiffs have plausibly pleaded that the City has a policy of issuing warrants for 'failure to appear' without probable cause. . . Municipalities may be liable under § 1983 if an action 'pursuant to official municipal policy,' including 'practices so persistent and widespread as to practically have the force of law,' cause the plaintiffs' injuries. . . In Paragraph 203 of their complaint, Plaintiffs allege that, as a matter of routine, the City issues arrest warrants for a person's 'failure to appear' after City officials have given the person paperwork crossing out their court date or have moved the court date without informing the person. Whether Plaintiffs can prove that such practices are 'so persistent and widespread' as to have the force of law may be determined at a later stage. At this stage, the Court finds Plaintiffs' allegations sufficient to state a plausible Fourth Amendment claim against the City. . . Therefore, the Court will also grant Plaintiff's motion for reconsideration with respect to Count Six.")]

Meir v. McCormick, 2007 WL 1725701, at *9 (D. Minn. June 15, 2007) ("Policy No. 1.01.22.09 sets forth specific characteristics to help an officer to limit his or her exposure to liability. . . The specific characteristics include 'prepare all official reports with your legal risks in mind,' 'provide information that counters the tactics of adversarial attorneys,' 'articulate details and perceptions

that defend your position,' and 'do and say things that will make you win on the street and in court.'. . The Court concludes that, accepting the facts alleged by Meir as true, a reasonable jury could find that McCormick's use of unreasonable force and subsequent 'cover-up' that included naming Derouin as a victim, omitting Koons as a witness, including untruths in an official report, and overcharging Meir with criminal offenses flowed directly from the City's unconstitutional policy. The City's argument that another portion of the policy directs officers not to violate the constitutional rights of citizens does not cure the deficiencies of the policy directives clearly placing officer liability concerns above accuracy in report writing.")

NINTH CIRCUIT

Hartzell v. Marana Unified School District, 130 F.4th 722, 739 (9th Cir. 2025) ("Hartzell presented evidence from which a reasonable jury could infer that (1) Policy KFA allowed the District to ban those whose speech the District deemed offensive or inappropriate, (2) Divijak found Hartzell's advocacy offensive, and (3) she was banned after criticizing Divijak. Thus, as we explain next, Hartzell presented sufficient evidence from which the jury could have concluded that the District banned her for offensive or inappropriate speech pursuant to an official policy in violation of the First Amendment. . . .Accordingly, the district court erred in granting judgment as a matter of law to the District on Hartzell's First Amendment claim because a reasonable jury could conclude that Hartzell was banned pursuant to the District's 'expressly adopted official policy.'")

Shorter v. Baca, 895 F.3d 1176, 1188 (9th Cir. 2018) ("The searches that Shorter challenges are distinguishable from *Florence*, both in their nature and in the lack of justification for the procedure. At the time that Shorter was detained, officials routinely left noncompliant female inmates shackled to their cell doors for hours, virtually unclothed, and without access to meals, water, or a toilet. These additional procedures distinguish what routinely occurred in the HOH units from what happened in the jails in *Florence.* When left shackled, the female inmates were visible to both the male and female guards on patrol. Moreover, unlike the search procedures in *Florence*, which occurred when detainees were admitted to the jail's general population from smaller group holding cells, the search here occurs any time the detainee returns from court, where the detainee has been shackled and monitored by prison guards at all times. The search procedures here are a humiliating and extreme invasion of Shorter's privacy that must be justified by legitimate penological purposes.")

Lowry v. City of San Diego, 858 F.3d 1248, 1266-68 (9th Cir. 2017) (en banc) (Thomas, J., dissenting) ("[B]alancing the intrusion caused by an off-leash, bite-and-hold-trained police dog against the government's interest in the use of canine force under these circumstances, a reasonable jury could find that 'a strong government interest' did not '*compel*[ ] the employment of such force.'. . I would therefore hold that the district court erred in concluding, as a matter of law, that the use of a police dog did not constitute excessive force. . . I respectfully suggest that the district court also erred in concluding that the City could not be liable even if excessive force had been

established. A municipality may be liable under 42 U.S.C. § 1983 for constitutional violations inflicted by its employees 'when the execution of the government's policy or custom ... inflicts the injury.'. . '[I]n this circuit a policy itself need only *cause* a constitutional violation; it need not be unconstitutional per se.'. . We have explained that '[c]ity policy "causes" an injury where it is "the moving force" behind the constitutional violation.'. . In this case, Lowry alleged in her complaint that the City had an official policy that caused her constitutional violation. Before the district court and on appeal, Lowry has specifically argued that the City's policy of training its dogs to bite and hold a suspect was the direct cause of her injury. The bite-and-hold policy is properly considered the 'moving force' behind Lowry's injury because the dog lunged at her and immediately bit her, according to his bite-and-hold training. . . Moreover, the City admitted in its answer that 'Sergeant Nulton deployed a police services dog in conformity with the official policies and procedures adopted by the San Diego Police Department.' Accordingly, '[t]here is little doubt that a trier of fact could find that [Lowry]'s injury was caused by city policy.'. .The district court erroneously relied on precedent from the qualified immunity context to conclude that the City's bite-and-hold policy was constitutional as a matter of law, and thus that the City could not be liable even if Lowry's constitutional rights had been violated in this particular instance. But our cases analyzing whether the constitutionality of a bite-and-hold policy was *clearly established* for purposes of qualified immunity did not hold that all applications of a bite-and-hold policy are constitutional. Indeed, we have recognized that the *manner* in which bite-and-hold force is employed could be unconstitutional in a particular case. . . In such a case, a municipality could be liable if its bite-and-hold policy is the 'moving force' behind an officer's unconstitutional action, even if the policy is not facially unconstitutional. Here, given the City's concession that Sergeant Nulton acted pursuant to its official policy, a jury could find that the policy caused Lowry's constitutional injury and thus that the City is subject to *Monell* liability. Finally, contrary to the majority's suggestion, a *Monell* plaintiff need not show that the government acted with deliberate indifference to her constitutional rights if she can show that the government's officers acted affirmatively, pursuant to an official policy. Our cases requiring a showing of deliberate indifference have dealt with a government's *failure* to take action or failure to properly train its employees. [collecting cases] Because she did not allege a failure to act and instead alleged that the City's affirmative bite-and-hold policy was the cause of her constitutional injury, Lowry need not demonstrate deliberate indifference. Instead, the City's admission that Sergeant Nulton acted pursuant to official policy adequately demonstrates that the City's policy was the 'moving force' behind Lowry's constitutional violation, thereby satisfying this step of the *Monell* analysis on summary judgment. Accordingly, I would hold that the district court erred in granting summary judgment on this alternate ground. . . By allowing government entities to be held liable when they violate citizens' constitutional rights, § 1983 helps effect the guarantees of the Fourth Amendment. When, as here, a citizen has succeeded in raising disputes of fact as to whether her Fourth Amendment rights were violated, it is for a jury to decide whether a violation occurred and whether the government is liable for that violation.")

Colwell v. Bannister, 763 F.3d 1060, 1063, 1068 (9th Cir. 2014) ("We hold today, as numerous other courts considering the question have, that blindness in one eye caused by a cataract is a

serious medical condition. We also hold that the blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy that 'one eye is good enough for prison inmates' is the paradigm of deliberate indifference. . . .A reasonable jury could find that Colwell was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have helped him, but because the *policy* of the NDOC is to require an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference.") (Lengthy dissent filed by Judge Bybee)

Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1096, 1097 (9th Cir. 2013) ("We turn first to the City's policy, no longer in effect, defining tasers as a low level of force—lower than any other hands-on force, including a firm grip. Sgt. Shelton, at one time a taser instructor for the Snohomish Police Department, described the policy as classifying tasers as a 'low,' 'very low,' or 'very, very low' level of force. He also explained that, pursuant to the City's taser policy, 'I don't need to be threatened to use a taser.' The City concedes that its former policy was unconstitutional but contends the policy did not cause Sgt. Shelton's use of unconstitutionally excessive force in this case. . . . No one contends the City had a policy *requiring* officers to tase non-threatening suspects such that Blondin's tasing could have occurred because a specific policy directed it. Instead, the City's policy told Sgt. Shelton that tasing nonresisting individuals in circumstances like this one was acceptable. It informed him that even a firm grip entails more force than a taser and deputized him with the power to tase an individual who presents no threat at all. A reasonable factfinder could look at this incident, in which Sgt. Shelton acted in accordance with a policy he claims never to have departed from, and conclude that such policy was the moving force behind his use of the taser in this case. The Blondins alternatively allege that the City should be held liable for ratifying Sgt. Shelton's unconstitutional conduct. . . . In a footnote, the district court found it unnecessary to reach the Blondins' ratification-based *Monell* claim 'because the City readily admits that its policy classifies the taser as a low level of force.' It is unclear why the district court thought this admission would impact the ratification argument, which is not based on the City's taser policy. Because the two theories of liability are different, after rejecting the first the court should have proceeded to consider the second. Both remain available to the Blondins on remand.")

Lanier v. City of Woodburn, 518 F.3d 1147, 1148 (9th Cir. 2008) ("This appeal requires us to decide whether the City of Woodburn's policy requiring candidates of choice for city positions to pass a pre-employment drug test as a condition of the job offer is constitutional, facially or as applied to Janet Lynn Lanier, the preferred applicant for a part-time position as a page at the Woodburn Library. The district court held that it was not. We agree that Woodburn's policy is unconstitutional as applied because the City failed to demonstrate a special need to screen a prospective page for drugs, and affirm on this basis. By the same token, Lanier did not show that the policy could never be constitutionally applied to any City position. We reverse the district court's order to the extent it implies otherwise, and remand for its declaratory judgment to be clarified so that it is consistent with our holding.").

Melendres v. Arpaio, 989 F. Supp. 2d 822 (D. Ariz. 2013), *aff'd in part, vacated in part by* ***Melendres v. Arpaio,*** 784 F.3d 1254 (9th Cir. 2015) (policy of sheriff's office directing deputies to detain vehicle occupants because of belief that occupants were not legally present in the United States violated Fourth Amendment)

Holland v. City of San Francisco, No. C10–2603 THE, 2013 WL 968295, *7, *8 (N.D. Cal. Mar. 12, 2013) ("The Parties agree that *Florence* leaves undisturbed a line of Ninth Circuit precedent holding that strip searches of detainees 'charged with minor offenses who are not classified for housing in the general jail population' are unlawful unless the officer directing the search has a reasonable, individualized suspicion that the detainee is carrying or concealing contraband. . . Thus, after *Florence,* a strip search of a detainee charged with a minor offense who has not yet appeared before a magistrate is permissible if: (1) the detainee cannot be held apart from the general jail population; or (2) the officer directing the search has a reasonable, individualized suspicion that the arrestee is carrying contraband. Defendants argue that their strip search of Holland was constitutional under *Florence* because it was carried out pursuant to Sheriff Department policy and happened as part of the regular intake process for all individuals who are admitted to the jail. While substantial deference is due to jail administrators in matters involving the security of the facilities that they are charged with maintaining, *Florence,* 132 S.Ct. at 1510, the undisputed fact that Holland's search was carried out pursuant to Defendants' policy does not alone suffice to make the search constitutional. . . In the present case, viewing the evidence in the light most favorable to Holland, she was arrested for a minor offense and Defendants could have—and in fact did—hold her apart from the jail's general population. Although Defendants assert that they might have had to admit Holland to the general population of the jail at any time, Holland points to evidence suggesting that the jail intended to house her alone, including a sign by her cell that said 'inmate to be housed alone' and a notation in the record of her arrest showing that jail staff was directed to house Holland alone. . . It is not disputed that Holland was strip searched before seeing a magistrate, and Defendants do not contend that they had reasonable, individualized suspicion that Holland was concealing contraband. Accordingly, Holland's Fourth Amendment claim will be permitted to proceed against Barnes, who conducted the strip search. With respect to Holland's *Monell* claim against Hennessey, Defendants do not dispute that Barnes's strip search of Holland was carried out pursuant to department policy or practice and that Hennessey is a policymaker. Defendants' motion for summary judgment is therefore DENIED as to Holland's Fifth Cause of Action, against Barnes, and Seventh Cause of Action, against Sheriff Hennessey in his official capacity. Holland has not pointed to any evidence supporting her claim against Hennessey in his personal capacity.")

Richards v. Janis, 2007 WL 3046252, at *7 (E.D.Wash. Oct. 17, 2007) ("Plaintiffs presented sufficient evidence to establish a genuine issue of material fact as to whether the City of Yakima had a policy or custom serving as the moving force behind Officer Cavin's taser usage. As stated earlier, the Yakima Police Department's taser policy provides in pertinent part: 'Extra caution shall be given when considering use of a Taser on the following individuals: juveniles under 16 years of age, pregnant females, elderly subjects, handcuffed persons, and persons in elevated positions.'

. . Chief Granato interpreted the Department's taser policy as allowing tasering suspects who are handcuffed as long as they are not standing. . . Officer Cavin cannot recall any YPD restrictions on tasering handcuffed individuals . . . By contrast, the National Law Enforcement Policy Center's model policy prohibits tasering a handcuffed prisoner 'absent overtly assaultive behavior.' . . . Based on Officer Cavin's taser usage history, the Department's apparent acquiescence to Officer Cavin's taser usage, and the Department's broad taser policy, the Court concludes a genuine issue of material fact exists regarding whether the Department had a well-settled policy serving as the moving force behind Officer Cavin's taser use. There is also evidence the City of Yakima ratified the officers' conduct toward Mr. Richards. Yakima Detective Feuhrer received statements of eye witnesses Mick Edvalson, Carli Edvalson, Jennifer Sharp, Sherrie Mathers, Tammie West, and Mike Fairbairn. Declarations of these witnesses to this Court stated Mr. Richards never resisted arrest and the officers' conduct was generally abhorrent. Nevertheless, Detective Fueherer did not request an internal investigation and did not give the witness statements to the prosecuting attorney. . . Failure to conduct an internal investigation demonstrates the Department may condone or has ratified the officers' conduct. . . For this reason, the Court also concludes a genuine issue of material fact exists regarding whether the Department has ratified the officers' conduct.").

TENTH CIRCUIT

Hinkle v. Beckham County Bd. of County Commissioners, 962 F.3d 1204, 1237-42 (10th Cir. 2020) ("Under *Florence*, the jail could (1) decide that Hinkle 'will be' housed in the jail's general population, and (2) then strip search him before placing him in the general population. . . Here, the County did not decide that Hinkle 'will be' placed in the jail's general population, in fact just the opposite. By acting as it did, the County set the cart before the horse—it strip searched Hinkle before committing itself to admit him into its jail's general population. In *Florence*, the Court repeatedly stressed that the strip search comes after the facility determines that the detainee 'will be' placed in general population. . . In other words, the 'will be' condition precedes the strip search, which itself precedes placing the detainee in the jail's general population. . . . We would reject any argument that the County—for administrative convenience—could treat all its incoming detainees as bound for its jail's general population, thus allowing universal strip searches. . . Body-cavity strip searches are not so trivial. . . .If we were to accept the County's argument and conclude that *Florence* permits jail policies by which detainees are first strip searched and later sorted out for jail-housing placement, we would render *Florence*'s general-population condition meaningless. *Florence* does not sanction such a policy—strip searching detainees not destined for the jail's general population, or even as here, for the jail itself. . . We therefore conclude that *Florence* does not protect the County's policy. . . . [F]or detainees like Hinkle who will not be housed in the jail's general population, the County needs far more to justify a body-cavity strip search—probable cause that detainee is secreting evidence of a crime. . . The County has not argued that it ever had such probable cause. . .Thus, we conclude that Hinkle was subjected to an unlawful strip search. . . . Here, the testimony from Sheriff Jay, Captain Bilbo, and Detention Officer Atwood, together with the County's own description of its policy, demonstrate that the County had a policy of strip searching all detainees before making housing decisions. With this,

Hinkle has sufficiently shown the County's policy and, thus, has satisfied the first element. . .For the causation and state-of-mind elements, Hinkle can satisfy his burden by demonstrating that the County's policy is facially unlawful. . . The Court has explained that '[w]here a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward.'. . A county's sanctioning of a facially unlawful policy establishes that it 'was the moving force behind the injury of which the plaintiff complains.'. . Further, 'proof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably.'. .Thus, the next issue is whether the County's policy is facially unconstitutional. . . Apart from its failed *Florence* argument, the County advances no argument denying that the policy is unconstitutional in all its applications. Under *Florence*, jail officials must decide that a detainee 'will be' housed in the general population before strip searching him or her. And here, the County's strip-search policy permits strip searches before the key moment in which the jail official with authority decides that the detainee 'will be' housed in the general population. So in enforcing the County's strip-search policy, jail officials strip search all detainees before reaching the operative decision of whether the detainee will be housed in the general population. For these reasons, we conclude that the County's strip-search policy is unconstitutional on its face. And with this, Hinkle has satisfied the causation and state-of-mind elements. Moreover, even if the County's policy were facially constitutional, Hinkle would still satisfy the causation and state-of-mind elements. . . .[T]he County's policy here reflects a deliberate indifference to the obvious consequences of its decision to strip search all detainees before making final housing assignments. Proceeding as if all inmates will be housed in the general population of the jail overlooks the reality that some detainees will not be placed in the jail's general population—for example, former local police chiefs. Yet the County strip searches all detainees, ignoring that any number of reasons might necessitate that a particular detainee be segregated. Accordingly, even though Hinkle has not pointed out a pattern of tortious conduct, we conclude that this case falls within the 'narrow range of circumstances' in which it was 'plainly obvious' that the County's policy of strip searching all detainees would result in a detainee being needlessly body-cavity strip searched. In sum, we conclude that Hinkle was unlawfully strip searched because *Florence* does not authorize the County's policy and the search was otherwise unsupported by probable cause. Moreover, we conclude that the County's strip-search policy is facially unconstitutional because it directs jail officials to strip search all detainees immediately upon arrival at the jail, before determining they 'will be' housed in its jail, and in the absence of probable cause that the detainees are secreting evidence of a crime. And even if the County's policy were facially constitutional, Hinkle could satisfy the causation and state-of-mind elements because the County's policy directly caused Hinkle's unlawful strip search and the County was deliberately indifferent as to the obvious effects of the policy. Before subjecting a detainee to the abject abasement of a body-cavity strip search, jail officials should first conclusively decide whether that detainee will be housed in their jail's general population.")

Herrera v. Santa Fe Pub. Sch., 41 F.Supp.3d 1188, 1193 (D.N.M. 2014) ("There is sufficient evidence on which a reasonable jury could find that the SFPS Defendants had a custom or practice

of conducting suspicionless searches before school events. The evidence is primarily circumstantial, but there is enough of it that a reasonable jury could conclude that the SFPS Defendants trained its agents in search policy with deliberate indifference: that is, there is enough evidence from which a jury could infer that the suspicionless-search practice was widespread, that the SFPS Defendants were on notice of the practice, and that they were deliberately indifferent to this pattern of constitutional violations. The jury also could reasonably conclude that this deliberate indifference was the moving force behind the Plaintiffs' constitutional injuries, and that the SFPS Defendants acted with a culpable state of mind. Accordingly, summary judgment as to that portion of the Plaintiffs' claims that relates to the suspicionless nature of the searches conducted is inappropriate.")

ELEVENTH CIRCUIT

Barnett v. MacArthur, 956 F.3d 1291, 1295-1301 (11th Cir. 2020), *cert. denied sub nom Lemma v. Barnett*, 141 S. Ct. 1373 (2021) ("Even though the breathalyzer tests established that Ms. Barnett was not intoxicated, she was required to remain at the jail for eight hours from the time of her arrest pursuant to the 'hold policy' of the Seminole County Sheriff's Office. Mr. Betham testified that under this policy, even if a DUI arrestee's breathalyzer test results are 0.000, and even if there is no indication that the arrestee is under the influence of drugs, she still must wait eight hours from the time of the arrest to be released—even if she posts bond. Shane Love, the Captain of Operations at the Jail, confirmed at his deposition that it is the policy of the Seminole County Sheriff's Office to detain DUI arrestees for at least eight hours, even if their breathalyzer test results are 0.000. Deputy MacArthur similarly testified that once she arrested Ms. Barnett, she was going to have to stay in jail for eight hours pursuant to this policy. In accordance with the hold policy, Ms. Barnett's jail arrest card stated that she was arrested at 4:10 a.m. and noted that she "can go at 12:10"—eight hours later. D.E. 64-17. Ms. Barnett ultimately was released a little over eight hours from the time of her arrest, at 1:13 p.m., despite having posted bond at 10:58 a.m. . . . The detention claim against the Sheriff in his official capacity is in effect a claim against Seminole County. . . .It is undisputed that the Sheriff's hold policy mandates an eight-hour detention of a person like Ms. Barnett who is charged with a DUI—even if her breathalyzer test results show that her blood alcohol content is .000 and even if she posts bond. . . . In granting summary judgment in favor of the Sheriff, the district court reasoned that the hold policy is consistent with Florida Statute § 316.193(9), which allows the option of holding a person for eight hours after a DUI arrest. . . This constituted error for two independent reasons. First, unlike the hold policy, § 316.193(9) does not mandate the blanket eight-hour detention of all DUI arrestees. Second, even if it did, the statute could be unconstitutional as applied to Ms. Barnett through the Sheriff's hold policy. . . . Unlike the Sheriff's hold policy, pursuant to which officers are *required* to detain DUI arrestees for eight hours, § 316.193 gives officers discretion in determining when to release a DUI arrestee and allows for three release options (only one of which is an eight-hour hold). . . But even if the Sheriff's hold policy were consistent with (or mandated by) § 316.193, the existence of a state statute does not answer the federal constitutional question. It has long been understood that a state law must conform to the Constitution, and if it does not do so it must yield. . . .On this record, Ms.

Barnett's detention claim against the Sheriff must be decided by a jury. Viewing the evidence in the light most favorable to her, Ms. Barnett was kept in custody pursuant to (and because of) the Sheriff's mandatory eight-hour hold policy after her two breathalyzer test results registered blood-alcohol readings of 0.000 and after she posted bond. The only remaining question then, is whether a reasonable jury could find that the hold policy, as applied to Ms. Barnett, violated her Fourth Amendment rights. . . .The Sixth Circuit has rejected the argument that '[w]hen subsequent developments disprove the correctness of a previous police determination that probable cause exists, ... the police no longer have justification under the Fourth Amendment to continue the incarceration, and must release the suspect.' *Peet v. City of Detroit*, 502 F.3d 557, 565 (6th Cir. 2007). We choose not to follow *Peet* for two reasons. First, the Sixth Circuit incorrectly suggested that there were no cases or authorities supporting the Fourth Amendment proposition it rejected. . . When *Peet* was decided in 2007, however, the Fifth and Seventh Circuits had already held under the Fourth Amendment that a person must be released from custody if the probable cause that existed for her arrest has dissipated. *See BeVier*, 806 F.2d at 128; *McConney*, 863 F.2d at 1185. For some reason, the Sixth Circuit did not acknowledge, consider, or discuss those decisions. Second, the Sixth Circuit was concerned that investigators would have an affirmative duty to re-evaluate the matter of probable cause with every new piece of information or evidence they received. . .The Fourth Amendment standard we announce, borrowed from the *McConney* decision of the Fifth Circuit, does not place on police officers an affirmative and independent duty to further investigate in order to continually reassess the matter of probable cause in warrantless arrest cases. It only requires that the officers release an arrestee if evidence they obtain demonstrates beyond a reasonable doubt that there is no longer probable cause for the detention. That standard, we believe, properly balances the competing liberty interests and law enforcement concerns and remains faithful to the Fourth Amendment's textual command that seizures and detentions be reasonable.")

McCullough v. City of Montgomery, No. 2:15-CV-463 (RCL), 2017 WL 956362, at *9 (M.D. Ala. Mar. 10, 2017) ("In this case, plaintiffs allege that the City and Judge Hayes created a series of policies to increase municipal revenue through stops, ticketing, and arrests. . . These are 'systemic and related policies, practices and customs.'. . They note these policies resulted in millions of dollars in fines and forfeitures and note that Montgomery raised more than three times as much in fines and more than fifteen times as much in local court costs as did Huntsville, which has a similar population. . . As previously noted, plaintiffs explicitly do not take issue with any judicial actions taken by Hayes or any other municipal judge. Given that municipal revenue generation is not a function normally performed by a judge, these allegations are thus for non-judicial actions. Rather, they concern the creation of policy for the City or for the municipal courts on behalf of the City. Accordingly, Judge Hayes cannot rely on the doctrine of judicial immunity. That is, because the allegations concern actions outside the scope of the judicial role, there is no immunity and the question shifts to the role of Judge Hayes. . . .Plaintiffs' allegations of a series of interwoven policies designed to increase municipal revenue raise factual questions that cannot be resolved at this time. It is possible to understand Judge Hayes' role as creating policy for the municipal court independent of the City, but it is also possible to understand the allegations as Judge Hayes operating as a *de facto* City official working with the police and others to craft a

series of policies to increase municipal cashflow. Plaintiffs have sufficiently alleged that these policies were created, but it is not clear at this point the precise nature of Judge Hayes' role. Accordingly, plaintiffs have stated a claim either that Judge Hayes is liable in his official capacity or that the City is liable because he was acting as a City official in creating those policies. Which of these two allegation is correct cannot currently be determined, but plaintiffs have nonetheless stated a claim for this Count.")

Avery v. City of Hoover, No. 2:13-CV-00826-MHH, 2015 WL 4411765, at *5 (N.D. Ala. July 17, 2015) ("Ms. Avery alleges that Hoover 'developed a de facto policy of using police officers in its employ ... to respond to instances of behavioral disruptions of disabled children' by arresting the students, and Hoover 'used suspensions against children with behavioral disabilities.'. . As counsel for Ms. Avery explained at the hearing in this matter, a teacher 'who teaches a special ed student is instructed on [the student's] IEP extensively,' but the City of Hoover does not familiarize school resource officers with students' IEPs. . . Consequently, those officers are unfamiliar with the needs of students who have IEPs, but Hoover nevertheless 'encourage[s] and allow[s] police intervention into behavioral issues' and 'use[s] suspensions against disabled children.'. . Ms. Avery has alleged sufficient facts at this stage to maintain her claim that the City had a policy or custom that is responsible for the injury that Ms. Avery has identified. That policy includes the failure to provide adequate training to officers who interact with students with IEPs.")

a. Policies Not Sufficient for *Monell* Liability

UNITED STATES SUPREME COURT

City of Grants Pass, Oregon v. Johnson, 144 S. Ct. 2202, 2218-2226 (2024) ("Public camping ordinances like those before us are nothing like the law at issue in *Robinson*. Rather than criminalize mere status, Grants Pass forbids actions like 'occupy[ing] a campsite' on public property 'for the purpose of maintaining a temporary place to live.' Grants Pass Municipal Code §§ 5.61.030, 5.61.010; App. to Pet. for Cert. 221a–222a. Under the city's laws, it makes no difference whether the charged defendant is homeless, a backpacker on vacation passing through town, or a student who abandons his dorm room to camp out in protest on the lawn of a municipal building. . . In that respect, the city's laws parallel those found in countless jurisdictions across the country. . . And because laws like these do not criminalize mere status, *Robinson* is not implicated. . . . Under *Martin [v. City of Boise]*, judges take from elected representatives the questions whether and when someone who has committed a proscribed act with a requisite mental state should be 'relieved of responsibility' for lack of 'moral culpability.'. . And *Martin* exemplifies much of what can go wrong when courts try to resolve matters like those unmoored from any secure guidance in the Constitution. . . . To be sure, *Martin* attempted to head off these complexities through some back-of-the-envelope arithmetic. The Ninth Circuit said a city needs to consider individuals 'involuntarily' homeless (and thus entitled to camp on public property) only when the overall homeless population exceeds the total number of 'adequate' and 'practically available' shelter beds. . . But as sometimes happens with abstract rules created by those far from the front lines, that

test has proven all but impossible to administer in practice. . . . As we have stressed, cities and States are not bound to adopt public-camping laws. They may also choose to narrow such laws (as Oregon itself has recently). Beyond all that, many substantive legal protections and provisions of the Constitution may have important roles to play when States and cities seek to enforce their laws against the homeless. . . The only question we face is whether one specific provision of the Constitution—the Cruel and Unusual Punishments Clause of the Eighth Amendment—prohibits the enforcement of public-camping laws. . . Homelessness is complex. Its causes are many. So may be the public policy responses required to address it. At bottom, the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes and devising those responses. It does not. . . .Yes, people will disagree over which policy responses are best; they may experiment with one set of approaches only to find later another set works better; they may find certain responses more appropriate for some communities than others. But in our democracy, that is their right. Nor can a handful of federal judges begin to 'match' the collective wisdom the American people possess in deciding 'how best to handle' a pressing social question like homelessness. *Robinson*, 370 U. S., at 689 (White, J., dissenting). The Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation's homelessness policy. The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.")

But see ***City of Grants Pass, Oregon v. Johnson***, 144 S. Ct. 2202, 2228, 2241-44 (2024) (Sotomayor, J., joined by Kagan, J., and Jackson, J., dissenting) ("Sleep is a biological necessity, not a crime. For some people, sleeping outside is their only option. The City of Grants Pass jails and fines those people for sleeping anywhere in public at any time, including in their cars, if they use as little as a blanket to keep warm or a rolled-up shirt as a pillow. For people with no access to shelter, that punishes them for being homeless. That is unconscionable and unconstitutional. Punishing people for their status is 'cruel and unusual' under the Eighth Amendment. . . . Nothing in today's decision prevents these States, cities, and counties from declining to criminalize people for sleeping in public when they have no available shelter. Indeed, although the majority describes *Martin* as adopting an unworkable rule, the elected representatives in Oregon codified that very rule. . . The Court today does not decide whether the Ordinances are valid under a new Oregon law that codifies *Martin*. In 2021, Oregon passed a law that constrains the ability of municipalities to punish homeless residents for public sleeping. 'Any city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness.' Ore. Rev. Stat. § 195.530(2). The law also grants persons 'experiencing homelessness' a cause of action to 'bring suit for injunctive or declaratory relief to challenge the objective reasonableness' of an ordinance. § 195.530(4). This law was meant to ' "ensure that individuals experiencing homelessness are protected from fines or arrest for sleeping or camping on public property when there are no other options."'. . . The panel below already concluded that '[t]he city ordinances addressed in *Grants Pass* will be superseded, to some extent,'. . . by this new law. . . Courts may need to determine whether and how the new law limits

the City's enforcement of its Ordinances. . . The Court today also does not decide whether the Ordinances violate the Eighth Amendment's Excessive Fines Clause. . . . Finally, the Court does not decide whether the Ordinances violate the Due Process Clause. . . .The Due Process Clause may well place constitutional limits on anti-homelessness ordinances. . . .The Eighth Amendment prohibits punishing homelessness by criminalizing sleeping outside when an individual has nowhere else to go. It is cruel and unusual to apply any penalty 'selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.'. .I remain hopeful that our society will come together 'to address the complexities of the homelessness challenge facing the most vulnerable among us.'. . That responsibility is shared by those vulnerable populations, the States and cities in which they reside, and each and every one of us. . . .This Court, too, has a role to play in faithfully enforcing the Constitution to prohibit punishing the very existence of those without shelter. I remain hopeful that someday in the near future, this Court will play its role in safeguarding constitutional liberties for the most vulnerable among us. Because the Court today abdicates that role, I respectfully dissent.")

Florence v. Board of Chosen Freeholders of County of Burlington, 132 S. Ct. 1510 (2012) (In a 5/4 opinion, the Court affirmed the decision of the Court of Appeals for the Third Circuit, *see infra,* but a plurality in Part IV of the opinion (not joined by Justice Thomas) noted that "[t]his case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees. . . . The circumstances before the Court. . . do not present the opportunity to consider a narrow exception of the sort Justice ALITO describes, *post,* at 1524 – 1525 (concurring opinion), which might restrict whether an arrestee whose detention has not yet been reviewed by a magistrate or other judicial officer, and who can be held in available facilities removed from the general population, may be subjected to the types of searches at issue here." 132 S. Ct. at 1522, 1523.)

FIRST CIRCUIT

Burrell v. Hampshire County, 307 F.3d 1, 10 (1st Cir. 2002) ("Hampshire Jail's policy of not screening and then segregating potentially violent prisoners from non-violent prisoners is not itself a facial violation of the Eighth Amendment.")

Sonia v. Town of Brookline, 914 F.Supp.2d 36, 44, 45 (D. Mass. 2012) ("As a duly enacted regulation of the Town's Board of Selectmen, the 'always on duty' policy qualifies as an 'official municipal action' for purposes of a § 1983 claim. However, the 'always on duty' policy could not have caused the plaintiff's injury because the policy forbids the actions of the individual defendants as alleged in the Amended Complaint. . .The plaintiff alleges that the Officers assaulted and arrested him after they refused to pay his company for services that they had requested for a bachelor party. The Officers activated themselves pursuant to the 'always on duty' policy at 'some point' prior to their alleged assault of the plaintiff, while they were intoxicated. The first claim,

then, is that the Town's enactment of the 'always on duty' policy caused the plaintiff's injuries because the officers activated themselves pursuant to it during the assault. The Town has attached a copy of the 'always on duty' policy to the instant motion. Because the policy is referred to in the plaintiff's Amended Complaint and its authenticity is not disputed, the Court will treat its contents as part of the allegations for purposes of resolving the motion to dismiss. The 'always on duty' policy explicitly prohibits officers from making an off-duty arrest when the arresting officer is 'personally involved' in the incident and excepts from permitted arrests any arrests in which the officer is 'personally involved.' According to the policy, off-duty officers are "personally involved" whenever they (or their friends or relatives) are engaged in the incident prior to the arrest, unless those off-duty officers are the victims of a crime. Here, the Officers themselves were engaged in a dispute with the plaintiff prior to arresting him. Accepting the plaintiff's allegations as true, the plaintiff took no action that could have made any of the defendants the victim of a crime. The Officers could not have been more 'personally involved' in the dispute, and therefore, acted in plain violation of the 'always on duty' policy enacted by the Town. Because their actions were not authorized by the 'always on duty' policy, the policy could not have caused the plaintiff's injury.")

SECOND CIRCUIT

Jeffery v. City of New York, 113 F. 4th 176, ___ (2d Cir. Aug. 16, 2024) ("[W]e conclude that the district court correctly dismissed plaintiffs' right-to-travel challenge to a week-long nighttime curfew imposed in New York City to curb escalating violence, destruction, and looting occurring in conjunction with otherwise peaceful demonstrations protesting the Minneapolis death of George Floyd. Upon *de novo* review, we conclude that the challenged curfew withstands even strict scrutiny.")

Murphy v. Hughson, 82 F.4th 177, 185-87 (2d Cir. 2023) ("*Florence* does not dictate the result of this case because Murphy is not challenging a prison-wide policy on its face or as applied to him; rather, his claim concerns actions taken by an individual officer acting on his own whim and contrary to established jail policy. . . . Defendants do not -- and, in view of the Policy's clear language, cannot -- claim there was a policy requiring that every detainee admitted to the County Jail be strip searched or a policy calling for a strip search of a prisoner with Murphy's characteristics. Nor have they asserted a legitimate penological justification for subjecting Murphy to such a search. Instead, on the facts most favorable to Murphy, which we must accept for these purposes, Murphy was strip searched because of an individual officer's *ad hoc* decision. We conclude that, in these circumstances, the standard set forth in our pre-*Florence* case law continues to apply: If a misdemeanor arrestee entering a prison is subjected to an *ad hoc* strip search, without reasonable suspicion, the Fourth Amendment is violated. . . *Florence* did not hold that individual actions, ungrounded in legitimate penological purposes and in contravention of a jail's policy, are exempt from the Constitution's requirement that 'a search be justified as reasonable under the circumstances.'. . Absent an actual penological justification or institutional policy, our prior case law on the constitutional boundaries of permissible strip searches continues to apply. Here, the jail

did not have a policy calling for strip searching Murphy in the circumstances, nor did it have a legitimate penological interest for doing so. Moreover, the Policy was consistent with our pre-*Florence* law, permitting strip searches only upon individualized reasonable suspicion. On the record below, a reasonable jury could surely conclude there was no constitutionally cognizable reason justifying the strip search. As the district court recognized, the Justification Sheet did not provide 'any specific reasonable suspicion to justify the strip search.'. . Indeed, Murphy was a 67-year-old man, who was sitting on a bus a little before 9 a.m. He was arrested on a misdemeanor warrant -- not for weapons or drug violations, but for home maintenance and fire code infractions. Moreover, his $750 bail had been or was being posted; he was to be released or reappear in court no later than 1 p.m., only about an hour after the search took place; and he was not likely to be housed in the jail's general population. In these circumstances, there was little -- if any -- reason to suspect he was hiding a weapon or drugs inside his body cavity or that he would bring contraband into the jail's general population.")

Marlin v. City of New York, No. 15 CI V. 2235 (CM), 2016 WL 4939371, at *19 (S.D.N.Y. Sept. 7, 2016) ("Plaintiff has not supplied sufficient factual content to sustain a *Monell* claim based on the City's alleged policies involving NYPD's use of formations and police lines, use of 'force-related policies, procedures, and training' for crowd and disorder control at First Amendment assemblies, or NYPD's inadequate or deficient 'use of force reporting.'")

THIRD CIRCUIT

Reilly v. City of Harrisburg, No. 22-1795, 2023 WL 4418231, at *3 (3d Cir. July 10, 2023) (not reported), *cert. denied,* 144 S. Ct. 1002 (2024) ("Here, the District Court was correct that Harrisburg has no policy or custom of over-enforcing the Ordinance to prohibit peaceful sidewalk counseling. The City issued no rules, proclamations, or edicts that could be considered a policy, other than the Ordinance itself, which is constitutional on its face under *Bruni*. . . Rather than setting a blanket policy, Harrisburg gives each police officer discretion to investigate and determine whether a violation has occurred. Further, at oral argument Harrisburg's counsel explained that the Ordinance bans only the four listed activities, and they do not include peaceful sidewalk counseling. Finally, Reilly and Biter's evidence that Harrisburg admits that it had an *unwritten* enforcement policy also fails to establish a municipal policy. The litigation statements on which Plaintiffs rely show only that Harrisburg officials misunderstood the Ordinance on its face, not that they had an unwritten policy of unconstitutional enforcement in 2014. Nor is there a custom of restricting such counseling. The record does not reveal one citation or arrest. And although Reilly has evidence of a one-off improper warning in July 2014, she and Biter need 'considerably more proof than [a] single incident' to trigger *Monell* liability. . . On this record, they have not satisfied that burden. Reilly and Biter may subjectively fear they will be cited or arrested, but that falls short under *Monell.* Harrisburg has no policy of prohibiting sidewalk counseling, and the appellants have not shown the existence of any custom. Thus the District Court correctly granted summary judgment for the City, and we affirm.")

J.B. ex rel. Benjamin v. Fassnacht, 801 F.3d 336, 341-47 (3d Cir. 2015) ("This is a case of first impression in this Circuit and all others . . . We must determine whether the Supreme Court's holding in *Florence* extends to juvenile detainees. Analogous to *Florence,* we must balance a juvenile detainee's privacy interest with the risks to their well-being and the institutional security risks in not performing such searches. . . .We encourage detention centers with blanket strip search policies to maintain protocol minimizing the embarrassment and indignity of such a search for the juvenile. Nevertheless, J.B. did not possess the same reasonable expectation of privacy upon admission to the LYIC as did the schoolchild in *Safford.* That he was twelve years old when this occurred does not change that fact. Accordingly, we find that these penological interests outweigh the privacy interests of juvenile detainees. Juvenile detainees present risks both similar and unique to those cited in *Florence.* At bottom, these risks pose significant dangers to the detainee himself, other detainees, and juvenile detention center staff. . . .We do not, however, interpret the Court to have contemplated an exception based on age classifications. Instead, the exceptions contemplated by the Court appear to involve factual scenarios where, for instance, release into the general population of the facility is not necessary. . . Thus, it is reasonable to believe there are scenarios where a juvenile's release into the general population of a detention facility is not necessary. In such a circumstance, the Supreme Court has not ruled on the legality of a strip search and such a search may indeed require a reasonable suspicion analysis as contemplated in *Bell v. Wolfish.* . . But this is quite a different thing than the Court carving out an exception to its holding based on the individual characteristics of a detainee, of which age is a component. Given that the security risks are similar irrespective of whether the facility hosts adults or juveniles and that an individualized inquiry proves unworkable for both, we do not believe the Supreme Court contemplated such an exception. . . .For all of the reasons stated above, *Florence* guides our decision to uphold LYIC's strip search policy of all juvenile detainees admitted to general population at LYIC.")

Florence v. Board of Chosen Freeholders of County of Burlington, 621 F.3d 296, 308, 311 (3d Cir. 2010)("Like the Ninth and Eleventh Circuit Courts of Appeals, we conclude that the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell.* We reject Plaintiffs' argument that blanket searches are unreasonable because jails have little interest in strip searching arrestees charged with non-indictable offenses. This argument cannot be squared with the facts and law of *Bell.* . . In sum, balancing the Jails' security interests at the time of intake before arrestees enter the general population against the privacy interests of the inmates, we hold that the strip search procedures described by the District Court at BCJ and ECCF are reasonable. Accordingly, we will reverse the District Court's grant of summary judgment on Plaintiffs' Fourth Amendment strip search claim and remand for further proceedings consistent with this opinion."), *aff'd*, 132 S. Ct. 1510 (2012).

FIFTH CIRCUIT

Monacelli v. City of Dallas, Texas, No. 24-10067, 2024 WL 4692025, at *2 (5th Cir. Nov. 6, 2024) (not reported) ("Monacelli's primary claim concerns policy liability arising from the Dallas

Police Department's General Orders 609.00 (involving "mass arrests") and 902.00 (involving "less-than-lethal"). Monacelli asserts both General Orders were facially unconstitutional as written in 2020, allegations which, if properly pleaded, would satisfy *Monell*'s third factor. . .This Court considered General Order 609.00 in a *Monell* case arising from the events at issue here and held that General Order 609.00 was not facially unconstitutional. . . Monacelli fails to distinguish *Verastique v. City of Dallas*, and we find no reason in the record to do so. Monacelli's claim as to General Order 902.00 yields the same result. *Verastique* instructs that a policy is not facially unconstitutional unless it 'affirmatively allows or compels unconstitutional conduct.'. .What's more, 'a written policy cannot be facially unconstitutional solely due to instructions that it leaves out.'. . Monacelli does not allege that General Order 902.00 *compelled* unconstitutional conduct but, rather, that it left something out—namely, a prohibition on 'firing or deploying direct contact hits into a crowd of protesters.' These allegations do not plausibly plead that General Order 902.00 was facially unconstitutional.")

Verastique v. City of Dallas, Texas, 106 F.4th 427, 434-36 (5th Cir. 2024) (Plaintiffs attempt to establish the first and third *Monell* elements . . . by alleging that General Order 609.00 is unconstitutional on its face because it (1) permits DPD officers 'to conduct arrests as they saw necessary to quell a civil unrest incident,' with (2) no further 'guidance or restrictions on arrests.' Put another way, they fault the Order for (1) committing certain decisions to the discretion of municipal employees and (2) failing comprehensively to explain every hypothetical stricture that might touch on the legality of an arrest.For purposes of a *Monell* claim, an official, written policy is facially unconstitutional if it 'affirmatively allows or compels unconstitutional conduct.' . . General Order 609.00 does neither. . . . Officers are not prohibited from exercising the Order's grants of discretion in a constitutionally valid manner. Nor are they required to disregard restrictions or limitations not expressly mentioned in the text of the Order itself. . . . Plaintiffs' assault on General Order 609.00 cannot be squared with the limitations that § 1983 places on the scope of municipal liability. . . . *Monell* claims predicated on *respondeat superior* liability are wholly alien to the plain meaning of § 1983. . . The statute does not 'impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.'. . Accordingly, a municipality is liable only for its *own* illegal acts. . . Yet, that's precisely what plaintiffs' theory does: It holds municipalities liable for the unsanctioned and unordered acts of *others*. . . In sum, plaintiffs have not plausibly pleaded that General Order 609.00 is unconstitutional on its face. Dismissal of their claims premised on facial invalidity was therefore proper.")

Edwards v. City of Balch Springs, 70 F.4th 302, 308-09 (5th Cir. 2023) ("[W]e know of no cases from this circuit explaining how to determine whether a formal, written policy 'itself violates federal law'. . . such that it is 'unconstitutional on its face' rather than 'facially innocuous' under *Monell*'s moving-force element. . . Indeed, a district court recently remarked that it was not 'aware' of a 'guide for analyzing a city's written policy' or of any 'caselaw that provides a roadmap for such analysis.'. . The Supreme Court has held that 'recovery from a municipality is limited to acts that are, properly speaking, acts of the municipality—that is, acts which the municipality has

officially sanctioned or ordered.'. . And that Court has indicated that a policy is not facially unconstitutional just because it commits some decisions to an officer's discretion, for '[i]f the mere exercise of discretion ... could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability.'. . Following that precedent, some of our sister circuits have held that a written policy cannot be facially unconstitutional solely due to instructions that it leaves out. For example, the Eighth Circuit has held that a policy that 'fails to give detailed guidance that might have averted a constitutional violation by an employee' is not thereby unconstitutional. . . Likewise, the Ninth Circuit has held that a policy's 'failure to implement procedural safeguards to prevent constitutional violations' is an 'omission' and therefore cognizable only under the deliberate-indifference standard. . . And the Eleventh Circuit has held that 'the deliberate indifference standard applies to section 1983 claims basing liability on a municipality's actions in failing to prevent a deprivation of federal rights.'. . We agree. An official, written policy is 'itself' unconstitutional only if it affirmatively allows or compels unconstitutional conduct. . . But where such an official, written policy merely commits some decisions to an individual officer's on-the-scene discretion, or gives some detailed instructions while omitting others, then that policy satisfies *Monell*'s moving-force element only if those features stem from the policymaker's deliberate indifference. Edwards argues that the City's policy is facially unconstitutional because it contains 'no *immediacy* requirement necessary to justify an officer's use of deadly force' and because it calls 'for an officer to use the officer's own *subjective beliefs* in determining whether deadly force was justified.' Neither argument succeeds.")

Garza v. City of Donna, 922 F.3d 626, 637 (5th Cir. 2019) ("Assuming Ruben De Leon was a final policymaking authority for the City, Appellants must show a policy or custom of his that was the moving force for the episodic acts or omissions of DPD employees. . . Policy can take the 'form of written policy statements, ordinances, or regulations.'. . It can be 'a widespread practice that is "so common and well-settled as to constitute a custom that fairly represents municipal policy."'. . It can take the form of a failure to train, provided that the failure is 'closely related to the ultimate injury' and not just attributable to a particular officer's shortcomings. . . It can also be a decision to adopt a course of action to handle a particular situation, if made by an authorized decisionmaker. . . Appellants do not attribute the actions of the arresting officer, Silva, or the senior officers who performed CPR, Rosas and Suarez, to any particular policy or custom. What they argue for Silva, Rosas, and Suarez is that De Leon's order to post the 'Welcome to Donna Hilton' and 'Punisher' signs announced an official policy of detainee mistreatment. The import of the signs is too general and inexact for the signs to constitute the sort of specific directive required for municipal liability, and it is too nebulous to constitute a moving force. The episodic acts or omissions of these employees therefore cannot be attributed to the City.")

Alvarez v. City of Brownsville, 904 F.3d 382, 390-91 (5th Cir., 2018) (en banc), *cert. denied*, 139 S. Ct. 2690 (2019) ("To establish that the City of Brownsville is liable as a municipality, a policy must have been the 'moving force' behind Alvarez's constitutional violation. . . Stated differently, Alvarez 'must show direct causation, i.e., that there was "a direct causal link" between the policy and the violation.'. . Additionally, Alvarez must demonstrate that the policy was implemented with

'deliberate indifference' to the 'known or obvious consequences' that constitutional violations would result. . . To base deliberate indifference on a single incident, 'it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy.'. . The causal link 'moving force' requirement and the degree of culpability 'deliberate indifference' requirement must not be diluted, for 'where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.'. .Assuming that Police Chief Garcia is a policymaker and that the practice of not freely sharing information from the internal administrative investigations with the criminal investigation division constitutes a policy, Alvarez's theory of liability falls short in two respects: (1) there is not a 'direct causal link between the policy and the violation,' and (2) there was no 'deliberate indifference' shown. . . First, there is not 'a direct causal link between the policy and the violation.'. . .This series of interconnected errors within the Brownsville Police Department that involved individual officers was separate from the general policy of non-disclosure of information from the internal administrative investigations. The general policy of non-disclosure was not a direct cause of Alvarez's injury. . . Second, this general policy of non-disclosure was not implemented with 'deliberate indifference.' To show deliberate indifference based on a single incident, there must be evidence that shows that it should have been apparent or obvious to the policymaker that a constitutional violation was the 'highly predictable consequence' of the particular policy. . . While it was established that information from internal administrative investigations is generally not shared, Sergeant Infante, Commander Avitia, Lieutenant Etheridge, and Police Chief Garcia still understood that this policy did not prohibit them from disclosing video recordings. Moreover, if Officer Carrejo requested or inquired about the existence of any videos of the incident, the videos would have been turned over. Because of the understanding throughout the police department that even with the policy that possibly exculpatory evidence such as the videos could be disclosed, it was by no means 'apparent' that a constitutional violation was a 'highly predictable consequence' of the general policy of non-disclosure. . . Put another way, it can not be 'apparent' that a constitutional violation is a 'highly predictable consequence' if no impression is created from the policy that the evidence central to the alleged violation has to be withheld. Accordingly, there was no 'deliberate indifference' shown in implementing this policy. . . .Both of Alvarez's arguments are unavailing. Placing the final decision making authority in the hands of one individual, even if it makes an error more likely, does not by itself establish deliberate indifference.")

But see Alvarez v. City of Brownsville, 904 F.3d 382, 402-03 (5th Cir. 2018) (en banc), *cert. denied*, 139 S. Ct. 2690 (2019) (Graves, J., joined by Costa, J., dissenting) ("I write separately to: (1) dissent from the majority's moving force analysis; (2) dissent from the majority's deliberate indifference analysis; and (3) address Brownsville's egregiously inadequate training policies. . . .BPD has a policy. . . that IAD officers do not proactively disclose evidence, including *Brady* evidence, to CID investigators. Instead, IAD officers pass all *Brady* evidence up their chain of command to Chief Garcia, who has sole responsibility to ensure that any *Brady* evidence is properly disclosed. Because these officers do not disclose evidence, there is no evidence form generated for the CID case file. Thus, contrary to the majority's view, the

officers committed no 'interconnected errors' in conducting their investigation. The IAD officers faithfully passed the evidence up the chain of command to Chief Garcia without disclosing the evidence to CID. In turn, the CID officer, unaware that relevant evidence existed, conducted no evidentiary follow-up and simply passed the file to the District Attorney's office. This was not error, it was how the system was designed to work. Moreover, while the majority characterizes Garcia's failure to review the file as nothing 'more than negligent oversight,' the record paints a different picture. Indeed, Garcia did not review nine out of thirteen known use of force cases. Even when Garcia did review such files, it may be 'several weeks, even up to a month or more ... after the criminal case had been submitted to the [D]istrict [A]ttorney's office.' Garcia's failure to review the instant case was entirely in line with BPD practice. I therefore respectfully dissent from the majority's conclusion that Alvarez has not established that the non-disclosure policy was the moving force behind the alleged violation. BPD's policy of not disclosing exculpatory evidence to CID investigators was the direct cause of BPD's failure to disclose the video evidence to the District Attorney and the defense.")

Peña v. City of Rio Grande City, 879 F.3d 613, 622 (5th Cir. 2018) ("Peña first cites the police department's written taser policy—reaffirmed six weeks before the incident—that allows for the tasing of moving targets. But that policy is neither unconstitutional on its face nor causally connected to Peña's excessive-force claim. As noted above, Peña's allegations against the officers survive Rule 12(b)(6) not because she was running but because she was a *non-threatening non-suspect*. A felon in flight presents another matter entirely. Because the written policy that Peña identifies is causally irrelevant, it cannot demonstrate the persistent practice she alleges. . . Aside from the abovementioned policy, the only 'specific fact' in the complaint is the single incident in which Peña was involved. But plausibly to plead a practice 'so persistent and widespread as to practically have the force of law,' *Connick*, 563 U.S. at 61, a plaintiff must do more than describe the incident that gave rise to his injury. In *Spiller*, 130 F.3d at 167, we rejected, as 'vague and conclusory,' a claim by a black motorist, arrested without probable cause, that his arrest resulted from the police department's general policy of 'disregard[ing] ... the rights of African American citizens' and of 'engag[ing] [African Americans] without regard to probable cause to arrest.' Though Peña characterizes the relevant policy with greater particularity, her allegations are equally conclusional and utterly devoid of 'factual enhancements.'")

Mabry v. Lee County, 849 F.3d 232, 237-39 (5th Cir. 2017) ("As the district court noted, T.M.'s case 'lies at the intersection' of *Safford* and *Florence*: both precedents share important similarities with the facts here, but neither is on all-fours. . . T.M.'s case is like *Safford* in that it involves the search of a minor student, and it is like *Florence* in that the search was conducted pursuant to routine intake procedures at a correctional facility. The first question we must address, then, is whether *Florence* or *Safford*—or neither—controls in cases when, as here, the inmate who is searched on intake into a correctional facility is a juvenile. Only one of our sister circuits has addressed precisely this question since *Florence* was decided. . . In *J.B. ex rel. Benjamin v. Fassnacht*, 801 F.3d 336 (3d Cir. 2015), a minor was strip and cavity searched pursuant to routine intake procedures at a juvenile detention center. The Third Circuit held that *Florence* controlled

for two reasons. First, focusing on the logic underlying *Florence*, the court asserted that '[t]here is no easy way to distinguish between juvenile and adult detainees in terms of the security risks cited by the Supreme Court in *Florence*.'. . And, the court explained, because juveniles and adults pose the same security risks, it follows that the same constitutional test for reasonableness should apply in assessing searches meant to mitigate those risks. . .Second, the court in *J.B.* homed in on certain language in the *Florence* opinion that seems to indicate a broad scope of the holding, including *Florence*'s expansive definition of jail to include 'other detention facilities.'. . The court noted that this 'sweeping language ... comports with the federal definition of prison: "[A]ny Federal, State, or local facility that incarcerates or detains *juveniles* or *adults*."' . . Thus, relying on its reading of *Florence*'s substantive logic and certain passages in the opinion's language, the Third Circuit concluded that *Florence* controls in cases involving strip and cavity searches of minors. The County urges us to follow the Third Circuit in holding that *Florence* controls in cases involving juveniles. Mabry and her *amici* argue that *Florence* does not control when minors are involved, and that we should instead apply *Safford*'s reasonable-suspicion test or some other alternative. . . . [W]e read *Florence* to mean that, in the correctional context—whether juvenile or adult—courts, which are not experts, should still defer to officials who are. The logic underlying *Florence*'s deferential test thus compels the conclusion that the deference given to correctional officials in the adult context applies to correctional officials in the juvenile context as well. . . .Mabry acknowledges that, under *Florence*, it is her burden to prove the policy's unreasonableness with substantial evidence. Yet, in her brief, Mabry focuses her argument exclusively on the threshold question of whether *Florence* should apply to T.M.'s case. She makes no real effort to present evidence that the Center's search policy is exaggerated, unnecessary, or irrational in any way. . . Accordingly, she effectively concedes that she cannot prevail under *Florence*'s test. Mabry's effective concession on this point is fatal to her claim, even though we note that, at oral argument, counsel for the County could not point to even one instance in which contraband was found via the strip and cavity search that could not have been found through use of the metal detecting wand and pat-down. Furthermore, the County has given no explanation for the Center's blanket policy of placing all incoming juvenile pretrial detainees into its general population as a default matter, absent some special indication from the Youth Court to the contrary. Indeed, at no point in its brief does the County point to *any evidence whatsoever* legitimating *any* components of the Center's intake procedures, including the search policy. Despite the paucity of the County's defense of the Center's policies and procedures, Mabry failed to enter evidence into the record below making a substantial showing that the Center's search policy is an exaggerated or otherwise irrational response to the problem of Center security. Mabry's argument must therefore be rejected.")

Jones v. Lowndes County, Miss., 678 F.3d 344, 350 (5th Cir. 2012) ("Jones and Nance identify only one policy they claim caused the deprivation of their Fourth Amendment rights. Sheriff Howard explained in an interrogatory response that 'the general policy is a target to take the detainee to a Judge within 48 hours but no later than 72 hours and as soon as reasonably possible and without any unnecessary delay.'. . . That the policy recognizes that determinations of probable cause may sometimes occur after the 48–hour benchmark does not, in of itself, violate *McLaughlin,*

and has not been shown in this case to have been a moving force behind the delay. It therefore cannot serve as the basis for plaintiffs' Section 1983 claim.")

Jimenez v. Wood County*, *Tex, 660 F.3d 841, 849, 859 (5th Cir. 2011) (Jerry E. Smith, J., joined by Jones, C.J., and Clement, J., dissenting) (en banc) ("A majority of this court chooses to ignore the Supreme Court and, in the process, nimbly avoids an issue that needs deciding. I respectfully dissent. First, the majority incorrectly concludes that Wood County did not preserve its error. The county raised, in the district court, the argument that our precedent is at odds with Supreme Court caselaw, only to have the argument properly rejected. Given that a district court does not have the authority to overrule our precedents, any further objections would have been futile. More egregious, however, is the majority's failure to address an important constitutional issue: whether the precedent of this circuit, requiring individualized reasonable suspicion before conducting a strip-search of individuals arrested for minor offenses, is incorrect in light of governing Supreme Court caselaw. Even if the county did not properly preserve its argument − and our review is thus for plain error − the first step of the plain-error analysis requires us to decide whether there was error at all. The majority, however, declares that the error was not plain before it decides whether error itself was present. By failing to follow the plain-error analysis properly, the majority chooses to avoid the issue of whether our precedent is at odds with Supreme Court caselaw. And because our precedent is, in fact, directly contrary to a Supreme Court decision, that failure − and the corresponding failure to correct the law of this circuit − is inexcusable. . . .In sum, the majority incorrectly concludes that the county did not preserve error. But, more importantly, the majority wrongly declares that the error was not plain before deciding whether there even was error. If a majority of this en banc court (incorrectly) believes that our precedent is not at odds with Supreme Court jurisprudence, let those judges say so. If, on the other hand, a majority of our judges realize that we have misapplied a Supreme Court decision, we should use the opportunity of en banc rehearing to correct the error. In either circumstance, there is no need to hide behind waiver or assuming-without-deciding. I can think of no reason − and the majority surely has not provided one − for electing not to address whether our precedent is at odds with *Wolfish*, beyond a desire to avoid deciding difficult questions. But resolving hard issues is what the en banc process is usually all about. I respectfully dissent.")

Jimenez v. Wood County*, *Tex, 660 F.3d 841, 849, 859, 860 (5th Cir. 2011) (Emilio M. Garza, J., joined by Jones, C.J., Jerry E. Smith, J., Edith Brown Clement, J., and Priscilla R. Owen, J., dissenting) (en banc) ("The majority refuses to acknowledge the most salient issue raised by the County before the panel and this en banc court: whether this court's precedent in *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir.1985), and its progeny, requiring reasonable suspicion before individuals arrested for minor offenses can be subjected to visual strip searches, conflicts with the Supreme Court's holding in *Bell v. Wolfish*. . . . That is, the County contends not that the district court failed to follow Fifth Circuit precedent but that the Fifth Circuit failed to follow Supreme Court precedent. The County raises this issue separately from the objection to the jury charge under current caselaw. The majority holds, nonetheless, that Wood County failed to preserve this separate issue by not objecting to the district court's jury instructions on this distinct

ground as required by Rule 51 of the Federal Rules of Civil Procedure. But the majority conflates the issues: the County has not argued that the *Bell v. Wolfish* error is confined to the jury instructions. That is, the County's challenge to the minor offense rule before this court is not wed to its alternative claim of jury charge error regarding the application of the 'minor offense' rule under current caselaw. . . The *Wolfish* error permeates the entire case. While the County certainly needed to satisfy the requirements in Rule 51 in order to preserve its alternative argument under current caselaw, its general challenge to the minor offense rule presents us with a broader question: whether the County's failure to challenge the 'minor offense' rule at the trial level prevents this en banc court from considering the obvious tension between our caselaw and Supreme Court precedent. I believe it does not and respectfully dissent.")

Jimenez v. Wood County, ***Tex***, 660 F.3d 841, 849, 861, 862 (5th Cir. 2011) (Edith Brown Clement, J., joined by Jones, C.J., and Garza, J., dissenting) (en banc) ("I join Judge Garza's dissent and parts II and III of Judge Smith's dissent. I write separately to express a narrow disagreement with Judge Smith's application of *Bell v. Wolfish* to Jimenez's claim. As Judge Smith correctly observes, in upholding a blanket strip-search policy applicable to *all* inmates housed at the MCC, including pretrial detainees and witnesses held in protective custody, *Wolfish* necessarily rejected the need for reasonable suspicion before a person entering the general population of a detention facility may constitutionally be strip searched. . . I therefore agree with Judge Smith's conclusion that our precedents holding that reasonable suspicion is always required to strip search those arrested for minor offenses are inconsistent with *Wolfish.* I do not, however, agree with Judge Smith's further conclusion that *Wolfish* necessarily sanctions the strip search of every person even temporarily held at a detention facility. *Wolfish* 'requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'. . In *Wolfish,* the justification advanced for the challenged searches was 'to discover [and] deter the smuggling of weapons, drugs, and other contraband into the institution.'. . But the threat of this type of contraband smuggling is likely to be significantly lessened when an arrestee is temporarily detained in a holding cell rather than being admitted into the general population of a jail or prison. Indeed, the recent Third, Ninth, and Eleventh Circuit opinions on which Judge Smith relies were all careful to clarify that the strip search policies they respectively upheld were applicable only to arrestees entering the general jail populations. . . The record before us indicates that after her arrest, Jimenez was transported to the Wood County jail, strip searched, then placed in a holding cell with three other detainees until she was released the following morning. These facts differ markedly from those considered in *Wolfish, Florence, Bull,* and *Powell,* all of which dealt with strip searches performed prior to entry (or re-entry) into the general population of a detention facility. . . Although *Wolfish* should certainly guide review of Jimenez's claim, I do not agree with Judge Smith that it straightforwardly necessitates a judgment against her. In my view, the balancing test set forth in *Wolfish* . . . requires an evaluation of the 'need for the particular search' in light of the specific facts surrounding Jimenez's detention in the Wood County jail − facts which are underdeveloped on this record because they were essentially irrelevant under this court's erroneous minor-offense rule. Because I would overrule our

precedents establishing the minor-offense rule applied by the district court, I would remand for further development of the record and with instructions to decide Jimenez's claim according to the principles articulated in *Wolfish,* particularly that corrections officials 'should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'")

Victoria W. v. Larpenter, 369 F.3d 475, 477-79, 489 (5th Cir. 2004) ("prison's policy of requiring an inmate to obtain a court order to receive an elective medical procedure' not unconstitutional)

Winzer v. Kaufman County, No. 3:15-CV-01284-N, 2023 WL 2530861, at *3–5 (N.D. Tex. Mar. 14, 2023) ("The Fifth Circuit 'has been wary of" finding municipal liability for a failure to train claim based on single incidents. . . Single violations create liability in only the most egregious cases, . . . such as where the dangerous 'proclivities' of an officer impute knowledge to the government that existing training is insufficient, . . . or where an 'obvious need' for training exists, but the officer 'was provided no training whatsoever.'. . The single-incident exception also applies when the policy at issue is facially unconstitutional. . . In such cases, plaintiffs need not prove deliberate indifference because '[w]here an official policy or practice is unconstitutional on its face, it necessarily follows that a policymaker was not only aware of the specific policy, but was also aware that a constitutional violation [would] most likely occur.'. . Put differently, training on an unconstitutional policy is inherently inadequate. However, plaintiffs still 'must cite evidence which could prove that the policy was the moving force behind the violation.'. . . Plaintiffs contend that Kaufman County may be held liable on a single-incident theory because its official use-of-force policies are inconsistent with *Graham v. Connor,* 490 U.S. 386 (1989). . . . While section 9-4 of the Manual does not reference the objective reasonableness standard, the Use of Force Policy embraces the *Graham* approach. Though the Policy centers on officers' 'reasonable belief' that the use of force is justified, it ties the definition of reasonable belief to objective reasonableness by instructing officers to assess their real-time perceptions against whether 'an ordinary and prudent person' would think similarly. It is an inescapable fact that officers in potential use-of-force situations must exercise their best judgment, and the Policy advises officers how to do so in a way that comports with *Graham.* Accordingly, the County's use-of-force policies are not facially unconstitutional. Further, even in the single-incident context, 'it is the Plaintiff's burden to create a fact issue on the inadequacy of the training on the use of deadly force.'. . Plaintiffs have not demonstrated how excessive force incidents were a 'highly probable' consequence of the County's policy. Indeed, courts consider it 'highly predictable that a County's deputies will follow standards of behavior adopted and authorized by the County,' meaning that constitutional violations will not normally be an obvious result of a policy that passes constitutional muster. . . Nor have Plaintiffs pointed to evidence calling into question whether any of the involved officers had 'dangerous proclivities' toward excessive force violations, such as a history of similar misconduct showing their propensities for violence, recklessness, or questionable judgment. . . There is also no evidence that Kaufman County failed to provide any training whatsoever on the use of force. . . .Plaintiffs have not created a fact issue as to any of the exceptions, and thus they cannot invoke single-incident

liability.")

SIXTH CIRCUIT

Hall v. Navarre, 118 F.4th 749, 758 (6th Cir. 2024) ("Craig's command to engage the protesters was neither facially infirm nor taken with deliberate indifference to its known or obvious consequences. . . Absent such evidence, Hall cannot demonstrate that the City's nebulous policy of engaging the protesters was the 'moving force' behind his alleged injuries. . . Hall takes issue with this framework. To his mind, it is enough for him to show that Navarre's specific use of force was unconstitutional, and that Craig's order, even if lawful on its face, nonetheless was carried out in an improper manner. Put differently, Hall believes that a mere but-for causal connection between a city policy and his injury is enough to establish municipal liability. Not so. When a facially legal municipal policy is at issue, more than but-for causation is required. . . Otherwise, *Monell* would 'become a dead letter.'. . At the extreme, any municipal policy, however benign, from a police department's decision to hire an individual to a municipality's choice to enforce the laws at all, could be a but-for cause of one constitutional violation or another. . . Hall likewise seeks to hold the City liable for the ticket he received from Barr. Hall argues that the citation was issued in retaliation for Hall's attendance at the protest, thereby amounting to a First Amendment violation. Hall attempts to tie the citation to city policy by pointing to Cole's instruction that Barr issue mass citations, a directive Hall says came from the police department's 'highest ranking officials.' He labels this instruction the 'moving force' behind his constitutional injury. But Hall nowhere argues that Cole was an 'official[ ] with final decision-making authority.'. . Equally absent is evidence that Barr was ordered to issue the citation in retaliation for Hall's First Amendment activity, let alone evidence that the City was deliberately indifferent to the possible constitutional consequences of the ticketing. . . Here too, then, he fails to show that the alleged city policy caused his specific injury. Accordingly, we affirm the award of summary judgment to the City on Hall's *Monell* claims.")

Morgan by next friend Morgan v. Wayne County, Michigan, 33 F.4th 320, 328-29 (6th Cir. 2022) ("To sustain an illegal policy or practice *Monell* claim, Morgan must show the existence of a policy, connect that policy to the municipality, and demonstrate that her injury was caused by the execution of that policy. . . Because Morgan has not demonstrated that any individual employee violated her Eighth Amendment rights, she must show that the municipality itself, through its policy or practice, violated her Eighth Amendment rights by manifesting deliberate indifference to her vulnerabilities. . . Standing alone, an allegation that a policy was violated cannot sustain a constitutional deliberate indifference claim. . . Instead, Morgan must show that the policy itself was facially deficient. 'An unconstitutional policy can include both implicit policies as well as a gap in expressed policies.'. . Morgan argues that Wayne County's policy had an unconstitutional gap because the lack of a policy separating male and female inmates created a security risk, which shows that Wayne County was deliberately indifferent to her vulnerabilities. But Wayne County has presented a comprehensive security protocol that addresses minimum staffing, rounds, reporting requirements, head counts, inspections, shower security, and other duties. This policy

was a clear attempt to protect inmates. Indeed, there had been no reported instances of sexual relations or assaults between inmates at UCH before November 2005. And there exists no evidence that prior to this incident, Wayne County knew its policy was ineffective. Morgan cites no authority for the proposition that the Eighth Amendment requires men and women to be housed separately, which, at bottom, is her argument. Accordingly, in this case, she cannot sustain a *Monell* claim against Wayne County.")

Young v. Campbell County, Kentucky, 846 F. App'x314, ___ (6th Cir. 2021) ("Young has not presented any facts from which a jury could reasonably find that Campbell County had a policy or custom that caused a violation of Young's constitutional right to protection from inmate violence. An express policy can be unconstitutional in two ways: '(1) facially unconstitutional as written or articulated, or (2) facially constitutional but consistently implemented to result in constitutional violations with explicit or implicit ratification by city policymakers.' *Gregory v. City of Louisville*, 444 F.3d 725, 752 (6th Cir. 2006). 'Where the identified policy is itself facially lawful, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice."'" *Id.* (quoting *Brown*, 520 U.S. at 407, 117 S.Ct. 1382). To the extent that Young is arguing that Campbell County's classification policies are facially unconstitutional, he provides no authority to substantiate this contention. Young also has not pointed to any evidence showing that the classification policies have been 'consistently implemented to result in constitutional violations with explicit or implicit ratification by city policymakers,' except for Young's alleged assault. . . As the district court found, though Young's expert testified to several inadequacies in the classification policies and how they posed a risk to inmates' safety, . . . such testimony does not show that Campbell County acted with deliberate indifference to the known or obvious consequences of its policies. There is no evidence in the record of the expert even finding that similar deficiencies at other jails or prisons have caused constitutional violations. At most, this supports a conclusion that Campbell County acted negligently by adopting or permitting a policy that proved inadequate in this case. . . But negligence cannot satisfy the deliberate-indifference standard. . . .In some cases, a single act by a policymaker with final policymaking authority may sustain a municipal-liability claim. . . . However, to prove municipal liability under a single-act theory, Young must demonstrate that Jailer Daley made 'a deliberate choice to follow a course of action ... from among various alternatives.'. . As discussed earlier, Young has presented no evidence that Jailer Daley deliberately chose not to reclassify Ka. Consequently, Young has failed to set forth sufficient facts to establish an unconstitutional policy. Young also has not shown that Jailer Daley and Campbell County had a custom of tolerating unconstitutional acts due to Jailer Daley's failure to investigate or discipline the classification officers or the officers who supervised BP2 from June 15 through 18. In order to establish deliberate indifference due to a final decisionmaker's failure to investigate or discipline, Young must show that 'the flaws in this particular investigation were representative of (1) a clear and persistent pattern of illegal activity, (2) which [Jailer Daley] knew or should have known about, (3) yet remained deliberately indifferent about, and (4) that the [CCDC]'s custom was the cause of the [violation].'. . Young has not met this burden as he has not presented evidence of a pattern of constitutional violations or

incidents where inmates were harmed due to failures in the classification system or by CCDC officials failing to follow supervision policies. Absent these showings, 'mere acquiescence in a single discretionary decision by a subordinate is not sufficient to show ratification.' *Feliciano v. City of Cleveland*, 988 F.2d 649, 656 (6th Cir. 1993). Consequently, the facts fall short of showing deliberate indifference by the municipality. Finally, to the extent that Young argues that CCDC classification officers had an unwritten policy or practice of failing to reclassify violent inmates that was condoned by Jailer Daley, . . . such argument is also unavailing. To survive summary judgment under this theory, Young must show, among other requirements, 'the existence of a clear and persistent pattern of [illegal activity].'. . As discussed earlier, Young has failed to make such a showing. In sum, the district court properly found that Campbell County and Jailer Daley, in his official capacity, could not be held liable with respect to Young's deliberate-indifference claims.")

Troutman v. Louisville Metro Dep't of Corr., 979 F.3d 472, 489-91 (6th Cir. 2020) ("If the plaintiff fails to establish a constitutional violation by any individual officer, the municipality itself cannot be held liable under § 1983. . . That is to say, 'where there exists no constitutional violation for failure to take special precautions to prevent suicide, then there can be no constitutional violation on the part of a local government unit based on its failure to promulgate policies and to better train personnel to detect and deter jail suicides.'. . Therefore, liability must rest, if at all, on the actions of Cox in the context of the municipality's policy, since we find that only Cox disputably violated Charles' constitutional rights. . . We agree with the district court in granting summary judgment in favor of the Louisville Metro Government. Stephanie's allegations against the municipality may support the conclusion that it was negligent, but a 'finding of negligence does not satisfy the deliberate indifference standard.'. . Our holding that Cox was arguably deliberately indifferent rests in large part on his *failure* to follow the prison's policy regarding obtaining clearance from medical staff before placing an inmate in solitary confinement. That is to say, underlying our finding of potential liability on Cox is a finding that Cox deliberately ignored jail policy; Stephanie's arguments suggest that if another employee had properly followed the jail's policy, then Charles' suicide could have been prevented. In *Perez*, we found a similar tension between the arguments against an individual officer and against the municipality. . . There, the plaintiff argued that placing the decedent in a single cell before his suicide 'wholly disregarded jail policy' which requires such inmates indicating potentially suicidal behavior be placed in a 'multiple cell with appropriate supervision.'. . Though we found that the individual officer was arguably deliberately indifferent in his disregard of the risk of moving the decedent into solitary, . . . we found that those same arguments counseled against finding the municipality liable. . . In other words, the arguments against the individual officer—that he failed to follow jail policy—itself implies the existence of a policy which, if followed adequately, would have prevented the suicide. . . Here, the municipality *did* have policies in place. It is plausible that the municipality was negligent in enacting and enforcing those policies, but '[d]eliberate indifference remains distinct from mere negligence. Where a city does create reasonable policies, but negligently administers them, there is no deliberate indifference and therefore no § 1983 liability.'. . Stephanie has not shown that 'through its deliberate conduct, the municipality was the "moving force" behind the injury alleged.'. . She has not shown 'that the municipal action was taken with the requisite

degree of culpability' nor has she demonstrated 'a direct causal link between the municipal action and the deprivation of federal rights.'. . . Moreover, '[p]retrial detainees do not have a constitutional right for cities to ensure, through supervision and discipline, that every possible measure be taken to prevent their suicidal efforts.'. . Though we find that Cox was arguably deliberately indifferent in executing jail policies, such a finding of individual liability cannot—without more—support a finding of municipal liability because a municipality 'cannot be held liable under § 1983 for an injury inflicted solely by its employees or agents.'. . The facts here are tragic, and we have written before to note the troubling statistics regarding suicides in jail, . . . but deliberate indifference is a 'stringent standard of fault,'. . . and under that stringent standard, '[v]ery few cases have upheld municipal liability for the suicide of a pre-trial detainee.'. . So too here, where the evidence shows that one of the municipality's officers was at least arguably deliberately indifferent but does not show that the 'deliberate conduct' of the municipality was *itself* a 'moving force' behind the violation of Charles' constitutional rights, nor that there is a 'direct causal connection' between the municipality's policies or customs and Charles' constitutional injury. . .Accordingly, we affirm the district court's grant of summary judgment in favor of the Louisville Metro Government.")

Crabbs v. Scott (***Crabbs II***), 800 F. App'x 332, ___ (6th Cir. 2020) ("The issue now is whether Scott can be liable for the swab of Crabbs' DNA under a municipal policy. On a motion for summary judgment, the district court said no. The court determined that even if Sheriff Scott's office had an 'official policy authorizing the post-acquittal collection of DNA from *felony* arrestees who were on an ID hold,' and even if that alleged policy were unconstitutional, it still could not give rise to liability. The alleged policy, like the Ohio statute, would apply only to felony arrestees, which Crabbs was not. Moreover, the district court held that even if the Sheriff's Office employees *thought* they were implementing the policy when they swabbed Crabbs, that mistake was not reasonably foreseeable, so the policy was not the proximate cause of the swab. Accordingly, the district court granted summary judgment in favor of Scott. . . . There are essentially two ways in which Sheriff Scott could be liable. First, he could be liable if his office's policy authorized the collection of Crabbs' DNA. Second, he could be liable if it was reasonably foreseeable that the policy would cause the collection of Crabbs' DNA, even if technically the policy did not allow the swab. Before moving on, it's worth mentioning that the district court did not conclusively find that the Franklin County Sheriff's Office had any official policy regarding post-acquittal DNA collection. In the same way, we do not purport to hold that such a policy exists; we merely assess whether any alleged policy could create liability for Scott. With that said, we proceed to analyze the two theories of Scott's potential liability in turn. . . . Here, Scott has no formal policy permitting the taking of Crabbs' DNA, because Crabbs was not a felony arrestee at the time the swab was taken. According to the 2011 Memo from Chief Deputy Barrett, Sheriff's Office employees could 'only collect DNA specimens from persons ... arrested on a *felony* charge.' And a bond-violation arrest is not the same thing as a felony arrest in the statutory context, as we noted in *Crabbs I*, 786 F.3d at 430. Crabbs' 'felony voluntary-manslaughter charge was irrelevant to his second arrest.'. . .Therefore, the alleged policy did not give Sheriff's Office employees any authority to swab Crabbs' DNA. Going beyond the written

documents, Crabbs points to Sheriff Scott's earlier position in this litigation and his deposition testimony. Both reveal, according to Crabbs, that Scott thought swabbing Crabbs' DNA was required under the policy. According to this argument, we should interpret the policy to mean what the Sheriff, who made the policy, said it means. Now, *Monell* does contemplate municipal liability for the actions of officials 'whose edicts or acts may fairly be said to represent official policy.'. . So it's at least possible that, if Scott understood the policy to cover Crabbs and then applied it to him, then that application could amount to office policy. . . . Scott did not take the swab, nor did he direct anyone to do so. So his involvement was limited to the policy. Neither Scott's deposition testimony nor his litigation position as to the meaning of the policy is what 'directly caused' the swab of Crabbs' DNA. By the time Scott took a litigation position and was deposed, the deed had already been done—Crabbs' DNA had already been taken. Even assuming Scott had the type of final policymaking authority contemplated by *Pembaur*, there's no way his after-the-fact interpretation of the policy, correct or incorrect, could have 'directly caused' something that had already happened. . . So really, Crabbs is saying that, when it comes to interpreting the policy, and thus why the swab was taken, we should trust Scott's reading. But we are not bound by Scott's after-the-fact interpretation of how the alleged policy should or should not have applied to Crabbs. Because we find that Crabbs was not a felony arrestee, the alleged policy simply did not apply to him, and what Scott says after the DNA swab doesn't change that conclusion. . . . The cornerstone of the proximate-cause analysis is foreseeability; we ask 'whether it was reasonably foreseeable that the complained of harm would befall the § 1983 plaintiff as a result of the defendant's conduct.'. . .So here, the proximate-cause issue is whether, when Sheriff Scott's office passed the alleged policy, it was reasonably foreseeable that the policy could be mistakenly applied to someone like Keith Crabbs—that is, someone who was arrested for a felony, then released on bond, then rearrested for violating that bond, then placed on an ID hold, then tried for and acquitted of the underlying felony, then swabbed for a DNA sample upon release. . . .[T]he issue is no longer whether Scott's employees thought they were applying the policy; that was the question under factual causation. The issue now is whether their doing so was reasonably foreseeable. And on that issue, Crabbs does not point us to any additional evidence. Without more, a reasonable juror could not conclude that the policy was the proximate cause of Crabb's injury. Therefore, summary judgment in favor of Scott was proper. Our assumption that the underlying policy was unconstitutional does not change this outcome, because even an unconstitutional policy must proximately cause the plaintiff's injury. To be sure, in cases involving a municipal actor departing from a municipal policy, the underlying policy is usually constitutional on its face. . . . Crabbs has not pointed us to any cases where the policy being incorrectly applied was facially *unconstitutional*. But we do not go so far as to say that a municipality is *always* liable if its unconstitutional policy leads to a deprivation of rights, regardless of how unreasonably the policy is applied. . . .[M]unicipalities should not have to anticipate and preemptively account for every possible incorrect reading of their policies in order to avoid *Monell* liability. Otherwise we would be drifting too close to *respondeat superior* liability for § 1983 claims against municipalities, an idea that has been repeatedly and resoundingly rejected. . . Accordingly, we would hold Scott liable for Crabbs' injury only if Scott's alleged policy was both the factual *and*

proximate cause of the injury—even though we are assuming that the underlying policy was unconstitutional. “)

Crabbs v. Scott (***Crabbs II***), 800 F. App’x 332, ___ (6th Cir. 2020) (Nalbandian, J., dissenting) (“The majority looks at this case the wrong way. The question is not whether, when the Sheriff’s office passed the policy, ‘it was reasonably foreseeable that the policy could be *mistakenly* applied to someone like Keith Crabbs.’. . Rather, the correct question is simply whether the policy applied to someone like Crabbs. It did. Sheriff Scott admitted that the policy applied to Crabbs. And he never claimed that his employees made a mistake under the policy. So the majority bases its question on a false premise—that Sherriff Scott’s employees in fact made a mistake. But when we frame the question correctly, focusing on the district court’s assumptions and Sheriff Scott’s admissions, we should conclude that Sheriff Scott’s DNA collection policy caused the collection of Crabbs’s DNA. . . . The only question before us is whether Sheriff Scott’s policy of collecting DNA proximately caused the collection of Crabbs’s DNA. . . Sheriff Scott asks us to adopt the district court’s reasoning, arguing that his staff misapplied his policy, so we cannot hold him responsible under *Monell* for his staff’s mistake. If we did, Sheriff Scott argues that we would create respondeat superior liability, which the Supreme Court has forbidden under *Monell*. Sheriff Scott is both right and wrong. He is correct that, under *Monell*, an employee’s mistake cannot transform an employer’s good policy into a bad one. But Sheriff Scott is wrong on that rule’s application here for two reasons. First, Sheriff Scott’s policy is not ‘otherwise sound.’ The opposite is true: the district court assumed that Sheriff Scott’s DNA collection policy is unconstitutional. And second, there was no mistake. Sheriff Scott admitted that his policy of collecting DNA *caused* the collection of Crabbs’s DNA. . . .[A] municipality’s liability depends on the existence of a good policy versus a troublesome policy. And our ‘mistake’ cases protect a municipality only when it has an otherwise sound policy.’ It is this existence of a constitutional policy (or, at least, the lack of an unconstitutional policy), that saves a municipality from liability when its employee makes a mistake. But on the other hand, if a municipality has an unconstitutional policy on its face, such as encouraging excessive force, sexual abuse, beating prisoners, or providing substandard care, there is no problem holding the municipality liable under *Monell*. . . .Here, Crabbs’s appeal falls under the latter scenario: the district court assumed Sheriff Scott implemented an unconstitutional policy of collecting DNA—i.e., it was a bad policy on its face. Indeed, throughout this litigation, the district court has maintained this assumption to avoid ‘a thorny constitutional question of first impression[.]’. . So at this stage of the litigation, the district court’s assumption means that Sheriff Scott had a written policy telling his staff to engage in constitutional violations. This point alone distinguishes this appeal from our ‘mistake’ cases under *Monell*. Now, of course, this does not mean that Crabbs would have ultimately won his case if we did reverse. As I explained, this is a unique case with a strange record. The district court’s assumptions might have ultimately been wrong: a jury could have decided that no official policy existed, or the district court could have determined that the policy was perfectly constitutional. But based on the record in this appeal, Crabbs’s *Monell* claim should continue. . . .Sheriff Scott’s argument should have failed for another reason: there was no mistake when the Sheriff’s employees implemented the policy, contrary to the majority’s interpretation. Sheriff Scott testified

that his policy of collecting DNA *caused* the collection of Crabbs's DNA. His staff confirmed this. And his office paperwork shows that his staff *followed* policy. . . . Sheriff Scott does not cite (nor could I find) any authority when a court dismissed a *Monell* claim for lack of causation when the policymaker admitted it had an official policy—and conceded that the policy caused the alleged constitutional injury. This makes sense, too. So it is unsurprising that the DNA collection policy caused the collection of Crabbs's DNA. . . .In sum, I find it foreseeable that Crabbs would be arrested, released on bond, re-arrested for violating his bond, and placed on an ID hold. It was foreseeable that when officers re-arrested Crabbs, Sheriff Scott's employees would label Crabbs under the same case number as his felony arrest, because he violated the bond in place from his felony arrest. Sheriff Scott admitted that Crabbs fell under the policy and that the policy classified him as a felony arrestee. And there is no evidence that the officers made any factual mistake under the policy. We should read the policy and interpret it as the employees foreseeably would on the day they processed Crabbs back to jail. And when I do, I see that a jury could find it reasonably foreseeable that employees would label Crabbs as a felony arrestee and take his DNA. Indeed, the policy required classifying Crabbs as a felony arrestee, given the options. So while it may ultimately be true that Sheriff Scott did nothing wrong—and his policy was constitutionally sound—at a minimum, there remains a disputed issue of fact on causation. And a reasonable jury could find that Sheriff Scott's policy on DNA collection caused his staff to collect Crabbs's DNA. As a result, summary judgment was inappropriate. I respectfully dissent.")

Roell v. Hamilton Cty., Ohio, 870 F.3d 471, 487-88 (6th Cir. 2017) ("We . . . have utilized the *second* prong of the qualified-immunity analysis to conclude that the deputies are entitled to summary judgment because no caselaw clearly established that the degree of force used by the deputies violated Roell's Fourth Amendment rights. In doing so, we have reached no conclusion with respect to whether Roell's rights were actually violated. We must therefore address Nancy Roell's three theories for Hamilton County's liability by assuming, without deciding, that Roell's Fourth Amendment rights were violated by the deputies' excessive use of force. Hamilton County is subject to liability under § 1983 for its policy on handling mentally ill individuals only if Nancy Roell can 'demonstrate "a direct causal link between the policy and the alleged constitutional violation."'. . But Nancy Roell does not point to any policy that is the 'moving force' behind the deputies' actions. . . She instead argues that Hamilton County's *lack* of adequate policies and training caused the deputies' use of excessive force. . . .The record shows that the deputies received training on topics that included the use of force and tasers, crisis intervention techniques, interacting with the special-needs population and mentally ill suspects, and recognizing the symptoms of excited delirium. Finally, we note that Nancy Roell's argument that Hamilton County failed to train its deputies is completely inconsistent with her § 1983 claim that the deputies' use of excessive force was evidenced by the fact that they *failed to follow* Hamilton County's procedures regarding officer interactions with individuals suffering from excited delirium. This leaves Nancy Roell with her argument that Hamilton County ratified the use of excessive force by Deputies Alexander, Dalid, and Huddleston when it conducted an inadequate investigation of the events. Specifically, she asserts that the investigation merely rubber-stamped the deputies' unconstitutional conduct, neglected to discover what actually took place, and failed to review

whether the deputies' actions violated Hamilton County's policies and procedures. . . . Because Hamilton County is not subject to municipal liability under any of her theories, the district court did not err in granting summary judgment to the county on her § 1983 claim.")

Fields v. Henry County, Tenn., 701 F.3d 180, 183-85 (6th Cir. 2012) ("Henry County does not dispute that Fields's detention resulted from a policy of automatically detaining domestic-assault defendants for a 12–hour period. Nor does it dispute that its policy was to set bail using a bond schedule. . . Thus, the only issue before us is whether those policies violated the plaintiff's Eighth and Fourteenth Amendment rights. . . .Fields argues that Henry County's use of a bond schedule violates his Eighth Amendment right to be free from excessive bail. But there is nothing inherently wrong with bond schedules. . . .Fields also claims that the 12–hour holding period was a 'denial of bail.'. . Not so. The Eighth Amendment's protections address the amount of bail, not the timing. There is no constitutional right to speedy bail.")

Mitchell v. McNeil, 487 F.3d 374, 378 (6th Cir. 2007) (policy of allowing informants to drive an officer's private vehicle is not unconstitutional)

Balbridge v. Jeffreys, 2009 WL 275669, at *7, *8 (E.D. Mich. Feb. 5, 2009) ("The Court finds a policy or custom of transporting female inmates alone with male guards is not unconstitutional, because the majority of men, and the majority of prison guards, are not rapists merely waiting for an opportunity to assault a woman. This is not to say that this policy is wise, or that a different policy would not have protected the Plaintiff's undeniable right to bodily integrity more effectively. But absent a showing that transportation by a male guard alone is tantamount to a sentence of rape for any women unfortunate enough to suffer it, the policy cannot be said to have caused the rape. Rather, the policy failed to prevent the rape, which is inadequate as a matter of law to support liability. . . . The court finds as a matter of law that the Jackson County's policies, or failure to promulgate a specific policy governing the off-site, cross-gender supervision does not constitute deliberate indifference.")

SEVENTH CIRCUIT

Kelley-Lomax v. City of Chicago, Illinois, 49 F.4th 1124, 1125–26 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 785 (2023) ("*Conyers* held, among other things, that the Fourth Amendment (applied to state actors by the Fourteenth) does not regulate disposition of the seized property. . . Disposition, we concluded, is governed by the Due Process Clause. The Fourth Amendment is satisfied if the seizure is reasonable when it occurs—as seizure of an arrestee's property is[.] . . Kelley-Lomax wants us to overrule this portion of *Conyers*, but we do not see any deficiency in that opinion's reasoning. *Conyers* rejected a due process challenge to the City's policy, holding that the City provides detainees with notice and an opportunity to reclaim their property. Kelley-Lomax tries a different tack: substantive due process. He maintains that the City must serve as unpaid custodian of his goods for as long as it takes for him (or his designee) to retrieve the items. Put in that way, the argument lacks any prospect of success. Substantive due process depends on

the existence of a fundamental right, which means a right with deep roots in our history and traditions. . . Kelley-Lomax does not contend that our historical tradition recognizes a right to have the government serve as unpaid custodian of property for extended periods. Instead he characterizes the fundamental right as property itself. We do not doubt that property is a fundamental right; the Takings Clause shows as much. But, as we explained in *Conyers*, property can be abandoned. After that occurs the former owner lacks rights. . . Chicago draws the abandonment line at 30 days. That choice cannot be attacked by pointing to the fundamental status of 'property' in the abstract. Instead the plaintiff must address the actual policy at stake: the government's unwillingness to serve as unpaid bailee for indefinite periods. And on that score Kelley-Lomax does not even try to show that such a role for government has historical provenance. *Conyers* remarked that 30 days is a short time for a detainee to take the steps necessary to retrieve property. . . Perhaps it is too short. The Due Process Clause requires notice and an *adequate* opportunity to protect one's interests. But in this case, just as in *Conyers*, the plaintiff has made an all-or-none argument. Instead of contending that the Constitution requires 60 or 90 days, Kelley-Lomax contends that a detainee is entitled to wait a lifetime before claiming the property. Perhaps that strategy is driven by the fact that during the whole six months he remained in custody, Kelley-Lomax did not try to retrieve the phone or wallet. The choice between 30 days and a longer time did not matter to Kelley-Lomax. But it may matter to other detainees, and *Conyers* leaves timing open. *Conyers* also does not tackle the question whether Chicago must sell the seized items for the detainees' accounts rather than throwing them in the trash. Units of government often take custody of unclaimed property, returning it once the owner has been identified (provided that the time for escheat has not arrived). . . .That approach works well with monetary instruments. Physical items seized from arrested persons make claims on limited space, and for many detainees the costs of arranging a sale in order to free up space would exceed the value of the items in inventory. But cell phones and jewelry often have substantial market value. When the governmental interest is limited to rationing available storage, perhaps the option of sale for detainees' accounts must be considered. . . Conyers did not make an argument along these lines, and neither did Kelley-Lomax. We mention the possibility not to resolve it, but to show that neither *Conyers* nor this decision has resolved it implicitly.")

Gonzalez v. McHenry County, Illinois, 40 F.4th 824, 829-30 (7th Cir. 2022) ("Gonzalez targets what he calls the sheriffs' 'policy' of accepting any pretrial detainee into the jail without regard to the jail's ability to accommodate his serious medical conditions. He argues that, in accepting the decedent into the jail despite his serious medical needs, the sheriffs deprived him of a constitutional right. Gonzalez contends that this purported policy caused the decedent's pain and ultimate death. He suggests that the sheriffs should have 'persuade[d] the prosecutor to seek release on personal recognizance or arrange for release on home confinement' or come up with some other 'creative' solution. Gonzalez does not allege a policy at all. For section 1983 purposes, an official can be said to set a 'policy' only when he possesses the authority to adopt a rule prescribing government conduct on a matter. . . But 'courts, not sheriffs, make pretrial detention decisions.'. . Gonzalez's theory that *Monell* liability can be imposed when jail officials simply comply with a court's confinement orders fails because jailors cannot release pretrial detainees remanded to their

custody. . . State or local law determines whether someone is a policymaker under section 1983. . . . Keeping in custody a detainee remanded to detention by a court is not a 'policy' that can be adopted or discarded; it's an obligation that jailors cannot evade. Illinois law clearly compels a sheriff, in his capacity as a warden of a county jail, to 'receive and confine in such jail, until discharged by due course of law, all persons committed to such jail by any competent authority.'. . . Here, jail personnel did what they could do for the decedent consistent with the U.S. Constitution and the laws of Illinois, and that was to take him to the hospital for treatment when necessary. Gonzalez does not identify, nor could we find, authority for the proposition that the Constitution empowers, much less requires, a sheriff to release a detainee committed to his charge. In essence, Gonzalez asks us to impose *Monell* liability on jail officials who had no policymaking authority over the 'policy' he alleges. But the sheriffs 'cannot be liable under *Monell* when there is no underlying constitutional violation.' *Sallenger v. City of Springfield*, 630 F.3d 499, 504 (7th Cir. 2010). Without a valid allegation of a policy, Gonzalez's claims cannot be sustained.")

Stewart v. Wexford Health Sources, Inc., 14 F.4th 757, 765-68 (7th Cir. 2021) ("As for the defendant Wexford Health Services, private entities acting to fulfill government duties are not vicariously liable for the conduct of their employees. . . Instead, a plaintiff must demonstrate direct liability by showing that the constitutional violation was 'caused by (1) an express municipal policy; (2) a widespread, though unwritten, custom or practice; or (3) a decision by a municipal agent with final policymaking authority.'. . In this case, Stewart claims that Wexford had a widespread custom or practice of not granting black box exemptions to inmates with conditions similar to that of Stewart. In order to succeed on this claim, Stewart must present evidence of an 'unconstitutional practice by the [prison's] staff that is so well settled that it constitutes a custom or usage with the force of law.'. .As part of its contract with IDOC, Wexford must follow IDOC's administrative and institutional directives, including the requirement that all inmates wear black box restraints when they leave prison. The directive allows a medical doctor to issue an exemption when a medical condition so warrants. Therefore, it is IDOC policy that creates the presumption that an inmate will wear a black box outside of the prison unless medically contraindicated. Some Wexford physicians found that Stewart qualified for the exemption at some times, and others did not. Stewart has not provided any evidence that Wexford had a widespread custom or practice of disallowing all exemptions for his condition. In fact, the evidence of Stewart's own experience indicates that the medical providers do as instructed and issue black box exemptions on a case-by-case basis based on the clinical facts before them, as Stewart himself sometimes received the exemption and sometimes did not. Stewart argues that the evidence that he was denied a medical exemption on multiple occasions and by multiple providers is a sufficient pattern of repeated behavior to create a factual question regarding a widespread pattern or practice. Although he was denied an exemption and forced to wear a black box on many occasions (twenty-three, by his count, . . . by his own admission he also received medical exemptions from wearing the black box, sometimes for years at a time. . . He does not enumerate the times he received medical treatment but was not forced to wear a black box, but based on his many medical appointments and the years in which he was exempt, we can assume these were many, too. . . . Stewart's own experience indicates the lack of a *per se* policy against black box exemptions. Stewart also claims that

Wexford had a policy of inaction, and that a lack of policy or obvious gaps in policy created the constitutional violation. It is true that 'the absence of a policy might reflect a decision to act unconstitutionally, but the Supreme Court has repeatedly told us to be cautious about drawing that inference.'. . In this case, Wexford *did* have a policy that required medical providers to evaluate each prisoner on a case-by-case basis to assess the medical risks in light of the security concerns and according to medical standards. Wexford medical providers followed this policy, and at times granted Stewart an exemption even if, more often, they did not grant an exemption. This is not a case in which a prison allowed individual guards to make decisions as to whether a prisoner would wear a black box or not, without any guiding principles. In this case, the prison asked medical professionals to rely on their extensive medical training and judgment to evaluate complex and individualized medical conditions in light of prevailing security concerns. Even assuming the truth of all of Stewart's facts, Wexford did not have a policy or practice of *per se* denials of black box exemptions or of failing to perform assessments to determine whether an exemption was warranted. . . . Stewart also claims that IDOC (through Steele in his official capacity) should have had more specific and directive policies regarding who should receive black box exemptions and that failure to create and implement such policies violate prisoners' constitutional rights. We cannot say that IDOC violated the Constitution by allowing medical providers to evaluate each requestor individually. Each prisoner presents a unique set of medical conditions and individualized experiences with pain. Allowing for an individual medical assessment is not evidence that IDOC failed to implement policies in a way that added up to deliberate indifference. Finally, we do not find sufficient evidence to allow a reasonable jury to conclude that IDOC had an unconstitutional custom or practice of not giving black box exemptions to inmates with conditions like that of Stewart. As we noted above, Stewart himself sometimes received an exemption and sometimes did not. This is evidence that the IDOC did not have an unconstitutional custom or practice of not giving black box exemptions to inmates with conditions like Stewart's.")

Calderone v. City of Chicago, 979 F.3d 1156, 1163-65 (7th Cir. 2020) ("To ultimately prove a *Monell* claim, a plaintiff must have evidence of: '(1) an action pursuant to a municipal policy, (2) culpability, meaning that policymakers were deliberately indifferent to a known risk that the policy would lead to constitutional violations, and (3) causation, meaning the municipal action was the "moving force" behind the constitutional injury.'. . We assume, without deciding, an underlying constitutional violation. . . The City does not contest that it acted under its policy, that is, its personnel rules. Accordingly, the parties debate the second and third elements of the *Monell* claim: culpability and causation. The pivotal question is 'always whether an official policy, however expressed ..., caused the constitutional deprivation.'. . Calderone does not appear to argue that the relevant personnel rules facially violate the Second Amendment rights of City employees; rather, Calderone contends that, as applied to her, the rules violate her Second Amendment rights. Calderone also appears to accept that the text of the personnel rules she relies on does not explicitly forbid an employee from discharging a firearm in self-defense. Rightly so, because all these rules do is generally prohibit unlawful conduct, discourteous treatment of members of the public, and conduct unbecoming of a public employee. But if, as Calderone argues, 'it is the application of such policy that results in a constitutional violation,' she has not carried

her burden to demonstrate causation and culpability. A plaintiff may directly show these elements by 'demonstrating that the policy is itself unconstitutional.'. . Because Calderone cannot do so, she must indirectly show a 'series of bad acts[,] creating an inference that municipal officials were aware of and condoned the misconduct of their employees.'. . Calderone misreads *Calhoun v. Ramsey*, 408 F.3d 375, 379–80 (7th Cir. 2005), to suggest that she need only 'one application of the offensive policy resulting in a constitutional violation ... to establish municipal liability.' As the City points out, in *Calhoun* we acknowledged in the sentence preceding the one Calderone quotes that a municipality is only liable in such circumstances assuming that one of its express policies facially violates the Constitution. . . 'But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the policy and the constitutional deprivation.'. One single incident cannot suffice; rather, Calderone must show 'a series of constitutional violations.'. .Here, Calderone identifies no other employee who suffered the Second Amendment injuries she purportedly has by enforcement of the City's personnel rules. . . Without that evidence, she claims only that the application of the City's personnel rules resulted in her termination from municipal employment in violation of the Second Amendment. The single constitutional violation Calderone allegedly experienced cannot establish *Monell* liability in view of the City's facially constitutional personnel rules. The district court was right to dismiss this claim.")

Levy v. Marion County Sheriff, 940 F.3d 1002, 1010-13 (7th Cir. 2019) ("The Sheriff's Office does not dispute that it created a system with the Marion County Superior Courts to process inmates for release utilizing Odyssey, OMS, and the release workflow, which included an agreement that if a court modified a release order, court staff would contact the Sheriff's inmate records staff to notify them of the change. Likewise, the Sheriff does not challenge the district court's decision to analyze this system as a policy or practice under *Monell*. That said, it is critical to specify the exact policy or practice at issue here to properly conduct our analysis. As noted above, the district court discussed *Monell* as if there were two polices in this case—the 'Transmittal Policy' and the 'Change Notification Policy'—when determining whether the Sheriff's Office had acted with deliberate indifference. Levy argues that the two must be treated as one policy for the purposes of this appeal, and defendants appear to concede the same. A review of the record supports this conclusion. The evidence suggests that the Sheriff's Office adopted the Change Notification Policy to ensure that it received notice of subsequent orders that may have been otherwise overlooked by the existing Transmittal Policy. Thus, the issue on appeal is whether Levy can establish that the Sheriff's adoption and use of this *modified* Transmittal Policy constituted deliberate indifference to a substantial risk of detainees' over-detention and whether that policy's adoption caused his own over-detention. For the reasons explained below, we conclude that absent evidence that the Sheriff's Office knew or should have known that the modified Transmittal Policy would fail, or failed so often that it would obviously result in detainees' over-detention, Levy cannot to show that defendants acted with deliberate indifference. Contrary to the district court's reasoning, Levy posits that to establish deliberate indifference, he is not required to show 'other instances' where the failure to follow the Change Notification Policy

caused prolonged detentions. This is so, he explains, because he challenges a 'decision to adopt [a] particular course of action [ ] properly made by that government's authorized decisionmakers,' and that is a sufficient basis to find municipal liability under § 1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). . . . In this case, however, there is no concern that a policy is not at play. In fact, the Sheriff's Office acknowledged in its appellate brief that it 'does not challenge the district court's decision to analyze this release process as a policy or practice under *Monell*.' Moreover, the record supports Levy's narrative that by continuing to use the Transmittal Policy without any modification, defendants persistently pursued a course of action of selecting and continuing to use a case management system despite many concerns from stakeholders, numerous integration issues, and an inability to process updated release orders from the courts. Thus, if Levy's detention had occurred prior to the Sheriff's adoption of the Change Notification Policy, and he therefore challenged the use of the Transmittal Policy prior to the Change Notification Policy, then there may have been a question for the jury as to deliberate indifference. But Levy's detention occurred *after* the Sheriff's Office took steps to address the purported problems with the Transmittal Policy. Thus, as in *Armstrong v. Squadrito*, . . . we are faced with the question of whether a prison's use of a system with significant weaknesses can be considered deliberately indifferent, even after the prison has taken affirmative steps to address those weaknesses. . . . The logic of *Armstrong* applies with equal force here. Given the concerns regarding the Sheriff's ability to receive and act upon court orders processed through OMS, the Sheriff's Office created backup plans to address the limitations of its systems. First, it developed the release workflow process as part of the Transmittal Policy to ensure that the courts' orders were properly handled and effected. Second, and most importantly, the Sheriff's Office developed the Change Notification Policy, a modification of the release workflow process that required court officials to call or email the Sheriff with any modifications to prior court orders. As in *Armstrong*, these actions 'show[ed] an awareness on the part of jail officials that a danger exist[ed] and an attempt to avert an injury from that danger.' Consequently, without evidence that the Sheriff's Office knew or should have known that these safeguards would fail, or failed so often that they would obviously result in over-detentions, we cannot conclude that defendants acted with deliberate indifference to the risk of detainees' over-detention. Levy's singular experience does not support a finding to the contrary.")

Spiegel v. McClintic, 916 F.3d 611, 617-18 (7th Cir. 2019) ("Spiegel argues that Wilmette's disorderly conduct ordinance constitutes the express policy of the City. The ordinance does not expressly criminalize public videography or photography. . . And, given the requirement that the person act in an 'unreasonable manner,' the ordinance does not raise facial constitutional concerns. . . Certainly, a person can photograph and videotape in a sufficiently disruptive way that it would be not unconstitutional to arrest the individual for disorderly conduct. Spiegel's claim is thus about the enforcement of the statute, not its facial constitutionality. . . Spiegel does not allege that Wilmette anticipated or intended that the ordinance would be enforced to chill lawful, expressive conduct like photography. . .We do not think Spiegel has plausibly alleged an express policy by Wilmette to enforce the disorderly conduct ordinance unconstitutionally. He merely alleges that officers received reports of a disturbance, responded to the reports, and advised an apparent provocateur to stop his surveillance. That's not enough. . . . As for the other bases

for *Monell* liability, Spiegel wisely declines to argue that they exist. Two visits by officers do not constitute a widespread policy or practice. And the complaint makes no mention of any Wilmette officials who might have policymaking authority.")

Hoffman v. Knoebel, 894 F.3d 836, 843-44 (7th Cir. 2018) ("Trying another tack, the plaintiffs argue that under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), Sheriff Rodden can be held accountable for the deprivation of their due process rights. To establish liability under *Monell*, the plaintiffs must show that an official government policy or custom 'is *responsible* for the deprivation of rights.'. . The Sheriff's Department had no involvement with the DTC's [Drug Treatment Court's] deficient hearings. But once they were detained, plaintiffs assert, the sheriff violated their due process rights by failing to adopt policies to bring their unlawful detentions to an end. The Clark County Jail, however, had several policies in place at the time that conceivably could have safeguarded detainees from wrongful detention. The jail sent a 'Weekly Inmate Roster' to the county court listing all the detainees at the jail who had come from the court. Those being wrongfully detained could have complained by using the jail's informal in-house mail system, through which the guards would walk unstamped mail over to court employees. (The jail and courthouse were housed in the same building.) This system was *ad hoc* and imperfect, but there is evidence in the record of several letters that made it to the appropriate court officials. Failing that, detainees could try the U.S. mail or file a grievance through the jail's internal grievance system, although there is scant evidence that these fallback policies were actually used. Relying primarily on *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998), the plaintiffs argue that these policies were constitutionally insufficient to protect against due process violations. In *Armstrong*, the plaintiff turned himself in on a warrant for what he thought would be a same-day bail hearing, but 'the sheriff's office misfiled [the plaintiff's] records and held him for 57 days despite his repeated inquiries.'. . We found that the sheriff was deliberately indifferent for relying solely on a 'will call' list of detainees set to go before a judge to prevent unlawful pre-trial detentions, and by refusing to accept grievances. . . The plaintiffs analogize Clark County's Weekly Inmate Roster to the *Armstrong* sheriff's 'will call' list, and argue that Clark County 'abdicated responsibility' by impermissibly shifting the burden to detainees to end their unlawful detentions. . .There are two problems with this theory. First, the plaintiffs in our case were held pursuant to a facially valid court order, whereas Armstrong was held on a warrant. 'In Indiana, the sheriff's department (which administers the jail) is ... the entity charged with taking those arrested on both civil warrants and criminal warrants to court.'. . The sheriff has no analogous duty when a detainee is held pursuant to a court order. In those cases, the statute requires only that the order be enforced. . . We have held that it is an 'entirely lawful policy' for a sheriff to hold detainees pursuant to a court order, 'unless the custodian knows that the judge refuses to make an independent decision or there is doubt about which person the judge ordered held.'. . Here, Judge Jacobi's orders came after a hearing, and nothing on the face of the orders indicated that those hearings were deficient. . . . Second, there is considerable evidence that, whatever the defects of the sheriff's policies, they were successful in getting some complaints to the DTC staff. In making their case against Knoebel and Seybold, the plaintiffs point to many letters that made it into DTC case files from the in-house mail system. This suggests that the sheriff's deputies were transmitting

some letters from those in custody to the court. Even if the sheriff's informal policies were flawed, those inefficiencies did not cause the plaintiffs' extended incarcerations and fall short of the 'policy or custom of refusing to accept complaint forms' at issue in *Armstrong*. . . The Sheriff's Department followed court orders, as it was required to do, and directed detainees' complaints about those orders to the issuing court. These policies do not support a *Monell* claim. We can assume that the Clark County DTC's imposition of extended jail "sanctions" without proper hearings ran afoul of both state and federal law. None of the defendants before us, however, violated federal due process norms.")

Brown v. Chicago Bd. of Educ., 824 F.3d 713, 714-16 (7th Cir. 2016) ("The Chicago Board of Education has a written policy that forbids teachers from using racial epithets in front of students, no matter what the purpose. Lincoln Brown, a sixth grade teacher at Murray Language Academy, a Chicago Public School, caught his students passing a note in class. The note contained, among other things, music lyrics with the offensive word 'nigger.' Brown used this episode as an opportunity to conduct what appears to have been a well–intentioned but poorly executed discussion of why such words are hurtful and must not be used. The school principal, Gregory Mason, happened to observe the lesson. Brown was soon suspended and brought this suit under 42 U.S.C. § 1983 against the Board and various school personnel. . . . In the case before us, Brown himself has emphasized that he was speaking as a teacher—that is to say, as an employee—not as a citizen. . . . The question remains whether the *Garcetti* rule applies in the same way to 'a case involving speech related to scholarship or teaching.'. . The Supreme Court had no need to address that issue, and so left it for another day. This is not our first opportunity, however, in which to confront that question. See *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007). In *Mayer*, we concluded that a teacher's in–classroom speech is not the speech of a 'citizen' for First Amendment purposes. . . The core of the teacher's job is to speak in the classroom on the subjects she is expected to teach. This meant, we thought, that in–classroom instruction necessarily constitutes 'statements pursuant to [the teacher's] official duties.'. . Here, Brown gave his impromptu lesson on racial epithets in the course of his regular grammar lesson to a sixth grade class. His speech was therefore pursuant to his official duties. That he deviated from the official curriculum does not change this fact. . . .Brown argues that we should ignore *Mayer* and instead follow the Ninth Circuit by understanding the Supreme Court's reservation as a hint that *Garcetti* should not apply 'in the same manner to a case involving speech related to scholarship or teaching.' *Garcetti*, 547 U.S. at 425; see *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014). But *Demers* addressed speech in a university setting, not a primary or secondary school. It relied on the long–standing recognition that academic freedom in a university is 'a special concern of the First Amendment' because of the university's unique role in participating in and fostering a marketplace of ideas. . . In fact, in the primary and secondary school context, the Ninth Circuit follows *Mayer*'s approach. See *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 962–63 (9th Cir. 2011) (holding in–classroom instruction is pursuant to teacher's official duties and unprotected employee speech). So do the Third and Sixth Circuits. *Evans–Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332 (6th Cir. 2010); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) (Alito, J.) (pre–*Garcetti*). Only the Fourth Circuit has adopted the position that Brown

advocates, and it did so without analysis. *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007). We see no reason to depart here from our decision in *Mayer*. Brown made his comments as a teacher, not a citizen, and so his suspension does not implicate his First Amendment rights.")

King v. McCarty, 781 F.3d 889, 898, 900-01 (7th Cir. 2015) ("King has stated a viable claim that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment. He complains that he was degraded and humiliated by being transported in a see-through jumpsuit that left him exposed in front of other inmates as well as guards of both sexes. Such compelled and prolonged nudity seems to be, for present purposes, analogous to a lengthy strip-search. King asserts that there was no legitimate reason for this policy, a point he supports with specific factual allegations. Detainees arriving at the intake facility from other jails were not wearing similar garments, which at least tends to suggest that such clothing is not necessary for safe and secure penal transfers. Moreover, King was strip-searched before and after his transfer, and he remained shackled and under surveillance throughout. These facts tend to suggest there was no security reason for keeping transferees in a state of semi-nudity. Moreover, King's allegation that he was mocked when he objected to the jumpsuit is enough at this stage to raise at least the possibility that the policy was driven by a desire to humiliate or harass. . . Our decision in *Johnson v. Phelan* is not to the contrary. That case involved female guards monitoring male prisoners in their bathrooms, showers, and cells, where the inmates were sometimes by necessity in varying states of undress. The plaintiff objected to being exposed in front of guards of the opposite sex. We affirmed dismissal of the complaint, holding that the policy of cross-sex monitoring was not meant to cause pain or humiliation but instead served several valid institutional goals. One was to avoid Title VII or equal protection problems by removing a basis on which the jail would have to distinguish between its male and female employees. The plaintiff in *Johnson* did not claim he was forced to disrobe for no reason, only that he and other prisoners were monitored by female guards in the shower or toilet, when they would already be naked. King challenges a much different policy of compelled, continuing, and public undress without any obvious justification for the treatment. Like the plaintiff in *Johnson*, King objects to the presence of female guards, but that is not the basis of his complaint. He has described instead a broader constitutional problem, one that does not depend solely on the sex of the guards. (For this reason, the Title VII and equal protection concerns in *Johnson* for women employed as guards do not seem relevant to King's claims.) The unusual practice alleged here, if supported by the facts, looks more like an unjustified effort to humiliate prisoners than did the routine supervision of prisoners in *Johnson.* . . .We said broadly in *Johnson v. Phelan* that *Hudson* held that prisoners retain no right of privacy under the Fourth Amendment. . . We have also said in other cases, however, that the Fourth Amendment continues to protect some degree of privacy for convicted prisoners, at least when it comes to bodily searches, even if that protection is significantly lessened by punitive purposes of prison and the very real threats to safety and security of prisoners, correctional staff, and visitors. . . . We draw support for the line we draw from the Supreme Court's decision in *Florence*, where the issue was whether routine visual strip-searches of pretrial detainees, without individualized suspicion that a detainee was concealing contraband, were reasonable under the Fourth Amendment. The Court allowed such searches but made clear that its opinion did not address searches in which detainees would

be touched as part of the searches. . . King, who was at the time of his transfer no longer a pretrial detainee but a convicted prisoner, alleges only a form of prolonged visual search in which he was not touched. The Supreme Court has adhered to the importance of the subjective element of Eighth Amendment claims by convicted prisoners like King, and the Court has never extended Fourth Amendment protection to a prisoner's claim like King's. In light of those facts, we do not believe we should expand the scope of Fourth Amendment protection to strip-searches of convicted prisoners to create an Eighth–Amendment–light standard in which the subjective purposes of prison officials would not be relevant. We conclude that King has failed to state a claim upon which relief may be granted under the Fourth Amendment.")

Compare ***King v. McCarty***, 781 F.3d 889, 901-04 (7th Cir. 2015) (Hamilton, J., concurring in part and concurring in the judgment) ("I respectfully disagree . . . with Part IV, which rejects King's Fourth Amendment claim on the pleadings and instructs the district court not to consider it on remand. I do not believe the boundary for the protections provided by the Fourth Amendment to a convicted prisoner is the surface of the prisoner's skin, as my colleagues suggest (though they leave open the possibility that no Fourth Amendment protection at all is available to a convicted prisoner). In fact the majority's Fourth Amendment reasoning goes further than the Supreme Court itself and other circuits have gone. The Fourth Amendment requires law enforcement officials to act in a reasonable manner when they subject people to searches of their person or property. It is well established that observation of a nude detainee is a search for purposes of the Fourth Amendment. . . To be sure, those who are detained in connection with proven or suspected criminal activity have sharply diminished expectations of privacy—none when it comes to their property and only very limited rights when it comes to their bodies. Moreover, courts give deference to the judgment of jail or prison staff in determining what searches are reasonable. . . But I do not believe that convicted prisoners have utterly no Fourth Amendment rights, at least when it comes to rights of bodily integrity. . . King's allegations describe an unusual form of prolonged search that he alleges was unreasonable. The Supreme Court has not held that prisoners have *no* Fourth Amendment right to bodily privacy. . . .Our court has on occasion used broad language that denies prisoners essentially any legitimate expectation of privacy, even with respect to their own bodies. See *Johnson,* 69 F.3d at 146 (reading *Hudson v. Palmer* as holding that prisoners do not retain any right of privacy under the Fourth Amendment); *Green v. Berge,* 354 F.3d 675, 679 (7th Cir.2004) (Easterbrook, J., concurring) (prisoners' privacy interests 'are extinguished by judgments placing them in custody'). But *Johnson* is the outlier on this issue. In other cases, both before and after *Johnson,* we have recognized that the Fourth Amendment continues to protect some very limited degree of privacy in prisons, at least when it comes to strip-searches, even if that protection is significantly lessened by the very real dangers of incarceration. [collecting cases] . . . . All of the other courts of appeals except the Federal Circuit (which would rarely if ever have occasion to consider the question) have said that prisoners retain *some* diminished degree of protection against unreasonable bodily searches and/or have allowed such challenges to go forward. As best I can tell, no other circuit applies the categorical rule that my colleagues apply, finding no Fourth Amendment protection against strip-searches or nudity. [collecting cases] With only the pleadings before us on this claim, I believe it is a mistake to attempt now to draw precise boundaries under

the Fourth Amendment. In *Florence* the Supreme Court took care to limit its decision and to leave room for future modification and exceptions. . . We should exercise similar caution here. At this preliminary stage of this case, we should recognize that the Fourth Amendment's focus on objective reasonableness may preserve some outer limit on the actions of even well-meaning prison administrators where such bodily searches are involved, while it also requires courts to give substantial—but not complete—deference to the warden's judgment. The uncertain scope of the law might well allow individual defendants to rely on qualified immunity to avoid damages liability, of course, but Armstrong has also asserted a practice or policy claim against the sheriff in his official capacity under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). We should allow further factual development on this claim in the district court on remand.")

Campbell v. Miller, 499 F.3d 711, 720 (7th Cir. 2007) ("There is nothing in this record indicating that the decision to strip-search Campbell in public was influenced in any way by the City's policy or practice. That decision appears to have been made by Officers Miller and Lamle alone, which precludes finding the City liable under § 1983.")

Nicodemus v. City of South Bend, No. 3:23CV744 DRL, 2024 WL 139248, at *8 (N.D. Ind. Jan. 12, 2024) ("The public has a First Amendment right to record police activity—a critically important right. Law enforcement officers have a right to perform their lawful duties unimpeded. Indiana's buffer law has many constitutional applications within its plainly legitimate sweep. It never once permits an officer to tell a reporter or citizen-journalist to leave altogether or to cease recording police activity. The law is directed toward encroachment on an officer's lawful duties within 25 feet. It doesn't target speech. It penalizes approaching a lawfully-engaged officer (after an order), not recording one. And at 25 feet, in measure small steps from an officer's work, this law has only an incidental effect on the public's First Amendment right to capture audio and video and otherwise to scrutinize police conduct. The court denies a permanent injunction because Indiana's buffer law is not unconstitutional by virtue of being facially overbroad. A case might be different if an officer enforces this law unconstitutionally in a particular scenario, but the court is not deciding such a case today.")

Lopez v. Vidljinovic, No. 1:12-CV-5751, 2016 WL 4429637, at *2-3 (N.D. Ill. Aug. 22, 2016) ("Here, Lopez does not assert that a person with final policymaking authority caused his alleged constitutional injury. The Court therefore must determine whether Lopez's injuries can be reasonably ascribed to either an explicit policy or an established custom or practice. . . There are actually two varieties of 'express policy' claims under *Monell*. The first variation applies 'where a policy explicitly violates a constitutional right when enforced.'. . Under this type of claim, one application of the offensive policy resulting in a constitutional violation is sufficient to establish municipal liability. . . A second way of attacking an 'express policy' is to object to 'omissions in the policy.'. . To prevail under this variation of the express policy theory, a plaintiff must adduce 'more evidence than a single incident' of unconstitutional behavior. . .In his response to the City's motion for summary judgment, Lopez claims four explicit policies were the cause of his alleged

constitutional injury: (1) Municipal Code Sec. 4-68-110; (2) Chicago EMS Policies and Procedures; (3) CPD Special Order S03-08; and (4) CPD Special Order S02-01-04. . . However, Lopez never identifies specific language in any of these polices which is 'explicitly' violative of a person's constitutional rights when applied. Accordingly, the Court analyzes his claims under the 'second' variation of the 'express policy' test. . .Given the lack of facially suspect language in this case, Lopez was obligated to present evidence suggesting that the regulations at issue gave rise to a substantial number of impermissible applications. . . Lopez has failed to meet his burden on this score. He has not provided any evidence of similar incidents of forced medical care resulting from the use of a taser; in fact, he has not adduced any evidence of similar incidents resulting from compliance with these policies at all. Accordingly, Lopez may not pursue a *Monell* claim against the City on an 'express policy' theory.")

Hall v. City of Chicago, No. 12 C 6834, 2012 WL 6727511, *3, *4 (N.D. Ill. Dec. 28, 2012) ("S04–13–09 provides two distinct categories in which law enforcement officers are permitted or required to complete Contact Information Cards. The first circumstance is a 'citizen encounter.'. . S04–13–09 defines a citizen encounter as a 'voluntary interaction between a sworn member and a citizen that does not involve any suspicion of criminal activity.'. . S04–13–09 instructs that a citizen encounter does not require officers to complete a Contact Information Card, but if the officer determines that the completion of a card will serve 'a useful police purpose,' then the officer has the discretion to do so. . . The second circumstance that S04–13–09 pertains to is an investigatory street stop. S04–13–09 defines an investigatory street stop as '[a] contact in which the sworn member has articulable reasonable suspicion that the person is committing, is about to commit, or has committed a crime; consequently, the sworn member has momentarily restricted the person's freedom of movement. The contact should last only as long as necessary to determine if probable cause to arrest exists.'. . If an investigatory street stop does not result in an arrest, an officer is required to complete a Contact Information Card to record the encounter. . . If an investigatory street stop does result in an arrest, an officer is not required to complete a Contact Information Card, as the circumstances of the stop and the arrest will be documented in the officer's arrest report. (In response to the City's Motion to Dismiss, Plaintiffs state that they are only challenging the 'citizen encounters' in S04–13–09, not investigatory street stops.) . . . . The City points out that as an express policy, S04–13–09 cannot cause Plaintiffs' alleged Fourth Amendment violations because S04–13–09 does not authorize nor direct officers to detain an individual without reasonable suspicion. The Court agrees and as such, finds that Plaintiffs' Fourth Amendment *Monell* claim grounded in an express policy theory fails.")

Bladdick v. Pour, No. 09-cv-330-WDS, 2010 WL 5088815, at *6-*8 (S.D. Ill. Dec. 8, 2010) ("At the outset, the Court notes that a determination that Pour was not acting under the color of state law is not dispositive of the municipal liability claim against the Board. . . The Board itself is the state actor 'and its action in maintaining the alleged policy at issue supplies the "color of law" requirement under § 1983.' *Gibson,* 910 F.2d at 1519. . . . Plaintiff contends that the Board's policy of allowing officers, whether on or off duty, to use their own discretion as to whether or not to carry their service weapons without any further guidance is the state action that deprived him of

his constitutional right to be free from unreasonable seizure. The plaintiff has completely failed to put forth any evidence that the Board's policies have caused a constitutional deprivation. A policy which leaves to the discretion of the individual officer whether or not to carry his firearm while off-duty, or while crossing state lines does not, on its face, cause unreasonable seizures of persons in violation of their constitutional rights. Plaintiff wrongly alleges that the carrying of firearms is completely in the officer's discretion, even in situations which present a risk of intoxication or other situations where an officer's judgment may be impaired, creating the impression with officers that acts, such as Pour's in shooting plaintiff, would be tolerated. The exact opposite has been shown by the Board. The Board has set forth the policies and procedures of the police department, which establish guidelines concerning the carrying and use of firearms, including procedures for complying with LEOSA which does not authorize the carrying of a concealed firearm across state lines, or while under the influence of alcohol or any other intoxicating or hallucinating substance. . . . The policies specifically prohibit the use of a firearm while intoxicated, and provide for sanctions and other discipline should the policies not be followed. To the extent that the plaintiff's allegations can be construed to include an allegation of failure to train, or deliberate indifference on the part of the Board, plaintiff's allegations completely fail to meet the standard. Plaintiff's entire claim rests on this one incident in which he was shot by an off-duty officer. Plaintiff has not set forth any facts that show that a need for more training was obvious and likely to result in the violation of constitutional rights, nor did he show a repeated pattern of constitutional violations that would make the need for more training obvious to the Board.")

EIGHTH CIRCUIT

Williams v. City of Sherwood, 947 F.3d 1107, 1110 (8th Cir. 2020) ("Another difficulty with Williams's claims is that she merely speculates vaguely and conclusorily that the city council and mayor had developed unconstitutional policies. The only possible marker of a municipal policy that Williams identifies in her complaint is a city ordinance that created a position at the judge's request to help with serving the warrants associated with the hot-check court and thereby help bring in revenue. But such an ordinance demonstrates merely that events occurring in the court 'parallel[ed] or appears entangled with the desires of the municipality,'. . or that the city knew of and approved of the judge's conduct. . . Critically, at no point does Williams identify an ordinance or other municipal action whereby the city directs someone to commit an act that is a constitutional violation or, with deliberate indifference to known or obvious consequences, directs someone to take an action that leads to a violation of constitutional rights. . . Williams has not alleged that city policymakers deliberately set itself on a course that would lead to her constitutional rights being violated. . . Instead, Williams relies on conclusory assertions that the city council and mayor somehow created some unspoken policy and tasked the judge with carrying it out. But as another circuit recently explained in a case containing similar conclusory allegations, 'any connection between the judicial acts and the [city officials] is too chimerical to be maintained.' *McCullough v. Finley*, 907 F.3d 1324, 1335 (11th Cir. 2018).")

Moyle v. Anderson, 571 F.3d 814, 818 (8th Cir. 2009) ("The undisputed facts in this case do not resemble those confronted by the Fifth Circuit in *Janes.* The county's booking policy did not sanction the placement of violent inmates with nonviolent inmates in the AIU: its policy was that an incoming inmate should be classified as high or low risk after completion of an intake interview. Those designated as high risk were then housed in a separate area of the jail. The county thus intended to segregate violent inmates from nonviolent inmates, and its policy did not prohibit the booking officer from seeking additional information about an inmate beyond that provided by the transferring institution. A policy which does not 'affirmatively sanction' unconstitutional action, and which instead relies on the discretion of the municipality's employees, is not an unconstitutional policy.")

Szabla v. City of Brooklyn Park, 486 F.3d 385, 395, 396 (8th Cir. 2007) (en banc)("[A] claim for municipal liability premised on actions taken pursuant to an official municipal policy must demonstrate that the policy itself is unconstitutional")

Ward v. Olson, 939 F.Supp.2d 956, 963, 964 (D. Minn. 2013) ("Ward claims that the City of Bloomington is liable under *Monell* because its use-of-force policy permits officers to discharge tasers in drive-stun mode against passively-resisting subjects. . . In *Schumacher v. Halverson,* 467 F.Supp.2d 939 (D.Minn.2006), however, the court explained that the use of a taser in drive-stun mode against a passively resisting subject was 'reasonable and in accord with established constitutional principles.'. . In an attempt to distinguish *Schumacher,* Ward argues that the case is inapposite because the municipality in question had an unwritten custom regarding taser use, not a formal policy. . . Such an argument is unavailing, however, as this fact was not relevant to the determination in *Schumacher* that the officer did not use excessive force. . . Therefore, the court determines that the use of a taser in drive-stun mode against a passively-resistant subject does not result in per se excessive force, and summary judgment on the *Monell* claim is warranted.")

Rattray v. Woodbury Cnty., Iowa, 908 F. Supp. 2d 976, 998-1000 (N.D. Iowa 2012) ("As in *Florence*, jail officials in this case 'have a significant interest in conducting a thorough search as a standard part of the intake process,' in order to detect lice or contagious infections, wounds or other injuries, gang affiliation, and contraband, including drugs and weapons, but also including unauthorized items that might become objects of trade or that could be used as weapons or to make weapons. . . Also, much as in *Florence*, I reject the plaintiffs' argument that detainees who have been arrested only on serious misdemeanor or higher offenses and who will not be put into 'general population' *per se* should be exempt from a strip search unless they give officers a particular reason to suspect them of hiding contraband. . . As the Court concluded in *Florence,* it was reasonable for jail officials to conclude that such an exemption would be 'unworkable,' that 'the seriousness of the offense is a poor predictor of who has contraband,' and 'that it would be difficult in practice to determine whether individual detainees fall within the proposed exemption.'. .What makes this so here is the now undisputed (or undisputable), authenticated evidence from the County Jail's 'booking logs' that even detainees initially held alone in separate temporary holding cells, away from the jail's 'general population,' (1) may nevertheless be 'doubled up' in light of the limited

number of temporary holding cells—which undisputedly occurred in Lambert's case—for example, because of the varying volume of arrests and the limited number of temporary holding cells, and (2) may be shackled with other detainees for transportation to court—which undisputedly occurred in Rattray's and Mathes's cases—even before the expiration of their twenty-four hour exclusion from 'general population.' These circumstances are reasonably likely to involve the 'substantial' contact with other detainees that concerned the Court in *Florence*. . . Although the plaintiffs complain that the County is relying only on 'potential' contact with other detainees, it is also reasonable to conclude that it is 'unworkable[]' . . . to use a 'wait and see' approach to see if detainees actually have contact with others before strip searching them. Such a 'wait and see' approach would require jail officials to strip search detainees only when detainees actually had to be 'doubled up' or only when detainees actually had to be shackled with others for transportation to court. Thus, such a 'wait and see' procedure would impose the extra burden of conducting strip searches of detainees 'doubled up' at precisely the time when the influx of arrestees would already be complicating jail intake procedures, and the strip search of detainees before shackling them together would complicate procedures at precisely the time when several detainees would have to be managed for transportation to court. It also would not prevent detainees from secreting contraband in temporary holding cells during the time that they were alone in those cells. Finally, such a "wait and see" procedure would offer considerably less safety to jail officers, who might have numerous contacts with a detainee who has never been strip searched and, consequently, might be hiding a weapon or something that could be used as a weapon, or who could expose them to infectious disease, and it might require them to intervene in an altercation between detainees not recognized as members of rival gangs. . . Where there is a realistic potential that detainees will have substantial contact with other detainees, even if they are not put into the jail's 'general population' during the first twenty-four hours of detention, requiring reasonable suspicion before searching all detainees at the County Jail arrested on serious misdemeanor charges or higher 'would limit the intrusion on the privacy of some detainees but at the risk of increased danger to everyone in the facility, including the less serious offenders themselves.'. . The fact that all three of the plaintiffs had contact with other detainees, either in their holding cells or when they were transported to court, demonstrates that the potential for such contact here was realistic. Moreover, it is reasonable to assume that not all of the detainees shackled together for their initial court appearance will be released—most likely because some of them will be unable to post bond immediately. Therefore, some of them may be returned to the jail and placed in 'general population.'The plaintiffs have failed to generate a genuine issue of material fact that strip-searching them without reasonable suspicion was an exaggerated response to the situation. . . Instead, they are trying to pound the square peg of their circumstances into the uncertainly defined, but nevertheless roundish—or perhaps oval or elliptical—hole of the *Florence* exception. They have generated no evidence that the jail officials reasonably could have kept all detainees separately detained and separately transported at all times during their detention and first trip to court; the record evidence is to the contrary. . .Thus, they have failed to generate genuine issues of material fact that their cases fall within the as-yet not fully defined exception, based on *factual* circumstances, to the general rule of *Florence* that reasonable suspicion is not required to strip search detainees. The strip search of the plaintiffs without reasonable suspicion, to the extent that

such a search did not involve touching by an inspecting officer, 'struck a reasonable balance between inmate privacy and the needs of the institutions' and, consequently, did not, as a matter of law, violate the Fourth Amendment. . . The County is entitled to summary judgment on each plaintiff's 'no reasonable suspicion' strip-search claim.")

NINTH CIRCUIT

Verdun v. City of San Diego, 51 F.4th 1033, 1035, 1046 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 73 (2023) ("We are asked to decide whether the longstanding practice of chalking tires for parking enforcement purposes violates the Fourth Amendment. It does not. Even assuming the temporary dusting of chalk on a tire constitutes a Fourth Amendment 'search,' it falls within the administrative search exception to the warrant requirement. Complementing a broader program of traffic control, tire chalking is reasonable in its scope and manner of execution. It is not used for general crime control purposes. And its intrusion on personal liberty is de minimis at most. We hold that municipalities are not required to obtain warrants before chalking tires as part of enforcing time limits on city parking spots. We affirm the district court's grant of summary judgment to the City of San Diego. . . . [W]e respectfully part ways with the Sixth Circuit's decision in *Taylor v. City of Saginaw*, 11 F.4th 483, 488–89 (6th Cir. 2021) ("*Taylor II*"), which held that tire chalking was not subject to the administrative search exception (but which expressed no opinion on whether chalking might be subject to some other exception to the warrant requirement). While we are reluctant to create a possible circuit split, we do not find *Taylor II*'s analysis persuasive.")

Bull v. City and County of San Francisco, 595 F.3d 964, 980, 981 (9th Cir. 2010) (en banc) ("We agree with the reasoning of the Eleventh Circuit that the rights of arrestees placed in custodial housing with the general jail population 'are not violated by a policy or practice of strip searching each one of them as part of the booking process, provided that the searches are no more intrusive on privacy interests than those upheld in the *Bell* case,' and the searches are 'not conducted in an abusive manner.' *Powell*, 541 F.3d at 1314; *cf. Archuleta v. Wagner*, 523 F.3d 1278, 1284 (10th Cir.2008) (upholding searches of arrestees intermingled with general population of a corrections facility, but not those awaiting bail, and stating that when an arrestee is kept in a holding cell the "obvious security concerns inherent in a situation where the detainee will be placed in the general prison population are simply not apparent"). We therefore overrule our own panel opinions in *Thompson* and *Giles*. We do not, however, disturb our prior opinions considering searches of arrestees who were not classified for housing in the general jail or prison population. . . The constitutionality of searches of arrestees at the place of arrest, searches at the stationhouse prior to booking, and searches pursuant to an evidentiary investigation must be analyzed under different principles than those at issue today. . . . In light of governing Supreme Court precedent, and given the circumstances presented here, we conclude that San Francisco's policy requiring strip searches of all arrestees classified for custodial housing in the general population was facially reasonable under the Fourth Amendment, notwithstanding the lack of individualized reasonable suspicion as to the individuals searched. Because the policy did not violate plaintiffs' Fourth Amendment

rights, we reverse the district court's denial of Sheriff Hennessey's motion for summary judgment based on qualified immunity, and in doing so necessarily reverse the district court's grant of plaintiffs' motion for partial summary judgment as to Fourth Amendment liability.").

Johannes v. Alameda County Sheriff Dept., No. 06-16739, 2008 WL 740305 (9th Cir. Mar. 18, 2008) ((upholding blanket strip search policy of jail "providing for visual strip searches of 'inmates who have been ... outside of the secured facility ... upon return to the facility or housing unit.'")

TENTH CIRCUIT

Tucker v. City of Oklahoma City, No. CIV–11–922–D, 2013 WL 5303730, *16, *17 (W.D. Okla. Sept. 20, 2013) ("On its face, the written policy is fully consistent with *Casey* and *Cavanaugh.* The use of a taser was permitted only for violent or dangerous persons in situations where it was necessary to subdue the person, the person was actively resisting the officer, or the officer perceived a credible threat. Plaintiff's reliance on Chief Citty's deposition testimony is similarly unavailing. Chief Citty testified that the use of a taser on Plaintiff under the circumstances stated in the officer's reports was justified. Unlike Plaintiff's version of events, the arresting officers stated that Plaintiff was actively resisting efforts to handcuff him, that three officers used other control techniques first without success, and that Officer Bemo did a warning arc-display before employing his taser on Plaintiff. While these facts are disputed in this case, Chief Citty's testimony assumed them to be true. Further, the change of policy to which Chief Citty testified was that the current OCPD policy prohibits the use of a taser 'unless a person is actively aggressive towards the officer' rather than simply resisting arrest and failing to comply. . . This change, and other modifications of the policy, were based on company recommendations, nationwide studies, court rulings, and developments in best practices indicating that a taser should not be used solely for compliance. . . The changes were not based on a particular court ruling or case. . . They were not compelled by *Casey* or *Cavanaugh,* in which a taser was used under circumstances that did not involve an effort to control a noncompliant subject. Regarding OCPD's allegedly unconstitutional taser policy, Plaintiff's argument is not that the policy in effect in 2010 directed officers to use tasers under circumstances where doing so would be unconstitutional but, instead, that the policy failed to limit officers' discretion in determining when to use a taser. However, the fact that OCPD gave its officers discretion to determine if they could lawfully use a taser on a person who was resisting efforts to handcuff him does not suggest that its policy was unconstitutional. Under binding case law, '"discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion."' *Novitsky v. City of Aurora,* 491 F.3d 1244, 1260 (10th Cir.2007) (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 482 (1986)). In *Novitsky,* the court of appeals found no proof of an unconstitutional policy regarding police officers' use of a 'twist lock' procedure to remove a person from a vehicle based solely on the fact that the police department's policy allowed officers to determine when circumstances justified the use of the procedure. Here, as in *Novitsky,* Plaintiff has not presented any more than a policy of discretion in the exercise of particular functions. Accordingly, like the court of appeals

in *Novitsky* the Court finds that '[n]o reasonable jury could infer the existence of an unconstitutional policy' based on the facts and evidence presented by Plaintiff.")

ELEVENTH CIRCUIT

White v. Berger, No. 16-11606, 2017 WL 4082876 (11th Cir. Sept. 15, 2017) (not reported) ("White's argument is that the County's construction of the isolation chambers itself was an official government policy that caused a violation of White's constitutional rights. The problem with White's argument is that—even assuming the decision to construct the isolation chambers was made by an individual with final policymaking authority—the complaint does not suffice to meet the strict causation standard applicable in municipal liability case . . . .Here, mere construction of the isolation units is insufficient to support a claim of municipal liability. Legitimate law enforcement functions support virtually all of the cells' features. The presence of a camera in the cells and the need for constant lighting, for example, can be important for the prison to monitor particularly dangerous inmates at all hours. . . Although we have concerns about White's allegations, which we must take as true at this stage of the proceedings, that his cell was being broadcast to a public area of the prison, the complaint contains no facts suggesting that those broadcasts were a function of the prison's construction. Liberally construing White's pleadings, then, the crux of his claims is that these conditions were gratuitously imposed upon him even though he posed none of the risks the isolation units might have been designed to contain and that the defendants were deliberately indifferent to the harmful effects isolation had on him. As alleged, the 'moving force' behind the alleged constitutional deprivation was not the construction of the isolation cells—the features of which may well have had legitimate purposes—but was instead the decision of certain individuals to use the isolation cells to inflict extreme and unnecessary punishment on White. . .The district court therefore properly dismissed White's claims against Seminole County.")

Luke v. Brown, No. 1:05-CV-264-CAP, 2007 WL 4730648, at **14-16 (N.D.Ga. Feb. 23, 2007) ("[T]he court concludes that DeKalb County's policy of training its officers to shoot twice in rapid succession when confronted with a suspect who is wielding an edged weapon in a threatening manner and the suspect is approaching the officer at a distance of 21 feet or less from the officer is not facially unconstitutional. . . . Luke has cited no binding precedent establishing that the firing of a second shot immediately after the first shot renders the second shot unconstitutional under the circumstances described in DeKalb County's policy. . . . In support of her deliberate indifference argument, Luke has presented expert testimony from Tate that the generally accepted standard in contemporary law enforcement is for police departments to train officers to 'Evaluate and Shoot, Evaluate and Shoot.'. . Luke contends that the lack of evaluation between shots constituted deliberate indifference by DeKalb County. However, 'an expert's conclusory testimony does not control this court's legal analysis of whether any need to train and/or supervise was obvious enough to trigger municipal liability without any evidence of prior incidents putting the municipality on notice of that need.'. . Likewise, Luke's presentation of an expert's conclusory testimony cannot control the court's legal analysis of whether the alleged inadequacies of DeKalb

County's policy was obvious enough to trigger municipal liability. The Eleventh Circuit has repeatedly held 'that without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train or supervise.'. . Although there is clearly a need to train officers with respect to the constitutional limitations regarding the use of deadly force, . . . it is undisputed that DeKalb County does provide training with respect to the use of deadly force. Luke, moreover, has failed to present any evidence that DeKalb County's decision to train its officers to use the double-tap method when a suspect is advancing on them from a distance of 21 feet or less wielding a knife in a threatening manner has led to prior constitutional violations or illegal use of excessive force. Aside from Bates' experience, Luke presented no evidence of a single prior incident in which a DeKalb County police officer caused an injury by excessive force because of the double-tap method. Although Bates' circumstances are unfortunate, Luke has failed to present any evidence from which the jury could find that the DeKalb County created a municipal policy with deliberate indifference as to Luke's constitutional rights. For this reason, DeKalb County is entitled to summary judgment on Luke's § 1983 claim.")

Ott v. City of Mobile, 169 F. Supp.2d 1301, 1313 (S.D. Ala. 2001) ("The City has a formal policy requiring off duty officers to carry a firearm. . . The City has another formal policy prohibiting off duty officers subject to department recall or mobilization from consuming alcohol to an extent that would render them incapable of proper performance if called to duty. . . The plaintiffs argue that these policies allow off duty police officers to drink and require them to carry firearms while doing so. The plaintiffs further argue that these policies were the 'moving force' behind Gamble's allegedly unconstitutional actions. . . . The plaintiffs have not asserted, much less established, that the City's firearms and alcohol policies, separately or in tandem, are themselves unconstitutional.")

2. Entity Liability for Facially Neutral Policy Adopted With Impermissible Motive

In ***Scott-Harris v. City of Fall River***, 134 F.3d 427 (1st Cir.1997), *cert. denied*, 118 S.Ct. 1184 (1998), the First Circuit addressed the question of "[h]ow many municipal legislators (or, put another way, what percentage of the legislative body) must be spurred by a constitutionally impermissible motive before the municipality itself may be held liable under section 1983 for the adoption of a facially neutral policy or ordinance?" *Id*. at 437. The court "eschew[ed] for the time being a bright-line rule." *Id*. at 438.

> Rather, we assume for argument's sake (but do not decide) that in a sufficiently compelling case the requirement that the plaintiff prove bad motive on the part of a majority of the members of the legislative body might be relaxed and a proxy accepted instead. Nevertheless, any such relaxation would be contingent on the plaintiff mustering evidence of both (a) bad motive on the part of at least a significant bloc of legislators, and (b) circumstances suggesting the probable complicity of others. . . . We do not think it is a coincidence that in every analogous

> case in which municipal liability has been imposed on evidence implicating less than a majority of a legislative body, substantial circumstantial evidence existed from which the requisite discriminatory animus could be inferred. . . . In this case no such evidence exists. Nothing suggests the City Council deviated from its standard protocol when it received and enacted the ordinance that abolished the plaintiff's job. Nothing suggests that the vote took place in an atmosphere permeated by widespread constituent pressure. Putting speculation and surmise to one side, it simply cannot be inferred that more than two of the council members who voted to abolish the plaintiff's position did so to punish her for protected speech.

Id. at 438, 439.

McCarthy v. City of Cordele, Georgia, 111 F.4th 1141, 1146-47 (11th Cir. 2024) ("[W]hen the final policymaker for a challenged employment decision was a multimember body, the plaintiff must allege that 'a majority' of the members voted in favor of the decision 'for an unconstitutional reason.' *Matthews v. Columbia County*, 294 F.3d 1294, 1295 (11th Cir. 2002). When policymaking authority rests with a collegial body 'as an entity,' allegations that fewer than a 'majority' of the members harbored unconstitutional motives are 'insufficient to impute an unconstitutional motive' to the entity 'as a whole.'. .The City argues, and the district court ruled, that McCarthy failed to allege that a majority of the commissioners voted to fire him because of his race. The City does not dispute that McCarthy plausibly alleged that both Deriso and Reeves had racially discriminatory motives. But because Deriso did not vote, the City argues that McCarthy plausibly alleged only that one of the commissioners who voted to fire him was motivated by racial animus. And an 'unconstitutional motive on the part of one member of a three-member majority is insufficient to impute an unconstitutional motive to the Commission as a whole.'. . We disagree with the City. The allegations in McCarthy's complaint, viewed in his favor, permit the reasonable inference that the commissioners who voted to fire him did so because of his race. McCarthy alleged that Deriso 'led, directed, and encouraged' his fellow commissioners to fire McCarthy and replace him 'with an African American candidate'; that, even before the new commissioners took office, Deriso and Reeves had garnered enough support for their discriminatory plan to tell McCarthy that he was being replaced with a black woman; that, immediately upon entering office, a majority of the commissioners voted to fire McCarthy, even though he was an exemplary employee and the former Commission had renewed his contract one month earlier; that the Commission hired a black woman to replace McCarthy, as Deriso and Reeves had promised; and that all the commissioners who voted to fire McCarthy were black[.] . . Taken together, these allegations 'nudge[ ]' McCarthy's race-discrimination claims 'across the line from conceivable to plausible.'. .McCarthy plausibly alleged that the Commission discriminated against him because he is white, and the district court erred by dismissing his claims of racial discrimination against the City. Federal law is no more tolerant of discrimination against whites than it is discrimination against members of any other race.")

Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 785, 786 (2nd Cir. 2007) ("[O]ur court, unlike the Eleventh Circuit, has never adopted the rule that a plaintiff must demonstrate that a majority of a public body acted with racial animus or in an otherwise unconstitutional manner in order for that plaintiff to hold the municipality liable for constitutional violations. Rather, we have held only that if a defendant public body (or its members) *proves* that, despite the unconstitutional actions of a minority, a majority based their actions on legitimate grounds, it, or its individual members, may prevail. . . There is an obvious difference between the two standards − a difference that, in our view, is critical given the ease with which public officials motivated by racial animus or other unconstitutional purposes can hide their true intentions and thereby prevent injured parties from obtaining the redress to which they are entitled. As the First Circuit aptly explained, 'because discriminatory animus is insidious and a clever pretext can be hard to unmask ... it may be overly mechanistic to hold [a plaintiff] to strict proof of the subjective intentions of a numerical majority of council members.' *Scott-Harris v. City of Fall River*, 134 F .3d 427, 438 (1st Cir.1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris* , 523 U.S. 44 (1998) . . . And, as we have acknowledged in other contexts that involve groups of people combining to make an allegedly discriminatory decision, it is possible that, even if a majority of the individuals that participate in the decision lack unconstitutional motives, the unconstitutional intentions of a minority of those involved can taint the ultimate outcome. . . . Given these considerations, we believe that in appropriate circumstances a plaintiff seeking to hold a municipality or public officials liable based on the actions of a public body may prevail − and, at the very least, should survive summary judgment − even when the plaintiff has not presented evidence that a majority of the individual members of that body acted with unconstitutional motives. In our view, even if a plaintiff does not demonstrate directly that a majority of a public body acted with unconstitutional motives, he should be permitted to take his case to trial if he proffers evidence that strongly indicates that discrimination was a significant reason for a public body's actions and the defendant body, or its members, fails to counter that evidence with its own clear evidence that a majority acted with permissible motives. . . . We need not definitively resolve this issue here, however, because plaintiffs, in fact, *did* offer evidence that at least raises a genuine issue of fact as to whether a majority of the Board acted with racial animus in voting to amend the special use permit.").

Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250, 261-63 (6th Cir. 2006) ("In this case, Scarbrough has offered sufficient evidence to create a genuine issue of material fact as to whether Lively, Strand and Spurling were motivated by animus against homosexuals. . . . .On its face, however, the Board's decision to hire Freels over Scarbrough evidences no improper motivation; thus, in order to hold the Board liable Scarbrough must prove that the Board acted out of a constitutionally impermissible motive. . . The district court held that the Board could not be held liable under § 1983 because Scarbrough failed to prove that a majority of the Board acted with an improper motive in selecting Freels over him. . . . Circuits are split on how to determine if a board, rather than its members, acts with improper motive. The Second, Third, and Ninth Circuits have implied that a board is liable for actions that it would not have taken 'but for' members acting with improper motive. . . Thus, where improperly motivated members supply the deciding margin, the board itself is liable. We decline to follow the approach suggested by Scarbrough from

Scott-Harris v. City of Fall River, 134 F.3d 427, 437 (1st Cir.1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998). In that case, board liability only existed where the plaintiff established both: '(a) bad motive on the part of at least a significant block of legislators, and (b) circumstances suggesting the probable complicity of others.' *Id*. That approach would be difficult to apply, because it leaves many questions unanswered. Among the most important of these is what constitutes a 'significant bloc of legislators' or 'circumstances suggesting the probable complicity of others.' The 'but for' approach from the Second, Third and Ninth Circuit cases is more in accord with the decision from *Mt. Healthy*. In that case, the Court set up a burden-shifting regime in which a key question was whether a board would have acted the same way, absent improper motive. Applying the 'but for' approach here, Scarbrough has submitted enough evidence to hold the Board itself liable. He has submitted evidence showing Lively, Strand and Spurling voted with improper motivation. The Board would not have taken the action it did were it not for their votes. Thus, the Board is not entitled to summary judgment on this issue.").

Laverdure v. County of Montgomery, 324 F.3d 123, 125 (3d Cir. 2003) ("It is undisputed that only a majority of the three-member Board is authorized to establish policy on behalf of the County. . . Therefore, whatever the contents of Marino's statements, because he was only one member of the Board, those comments do not constitute County policy.")

Dixon v. Burke County, Georgia, 303 F.3d 1271, 1276 (11th Cir. 2002) ("For purposes of summary judgment, the District Court assumed that the Grand Jury was a final policymaker for Burke County but found no liability on the facts presented. We are constrained to agree. As the District Court cogently recognized, there has not been a sufficient showing that any member of the Grand Jury, *other* than Perry, may have been improperly motivated by gender considerations, as opposed to the substantive merits of the applicants. A jury would have to resort to pure speculation as to why the other grand jurors acted as they did. As noted above, we see nothing in the record to indicate that Perry had any coercive effect on those that voted. In sum, no municipal liability can attach for one tainted vote out of twelve cast for Chandler.' [footnote omitted])

Matthews v. Columbia County, 294 F.3d 1294, 1297, 1298 (11th Cir.2002) ("Because policymaking authority rests with the Commission as an entity, the County can be subject to liability only if the Commission itself acted with an unconstitutional motive. An unconstitutional motive on the part of one member of a three-member majority is insufficient to impute an unconstitutional motive to the Commission as a whole. . . . That Titus and Ford may have known about the unconstitutional basis of Reynolds's selection and vote or that Reynolds may have affected Titus and Ford's votes by his influence is not enough to show that they ratified the unlawful basis by also voting for the RIF [reduction in force]. . . . A well-intentioned lawmaker who votes for the legislation − even when he votes in the knowledge that others are voting for it for an unconstitutional reason and even when his unconstitutionally motivated colleague influences his vote − does not automatically ratify or endorse the unconstitutional motive.")

Jamieson v. Poughkeepsie City School District, 195 F. Supp.2d 457, 474, 475 (S.D.N.Y. 2002) ("In voting on the renewal of plaintiff's contract, the School Board, as a whole, had the sole decisionmaking authority. Thus, Samselski is a decisionmaker even though she is only one of five Board members who voted on the renewal of plaintiff's contract. Moreover, the impermissible bias of a single individual can infect the entire group of collective decisionmakers. . . . Defendant Samselski was a policymaker as a member of the Board, and the Board possessed final authority over the Superintendent's employment contract. If Samselski is found by a trier of fact to have exercised the requisite amount of authority to influence the policy of the Board with respect to plaintiff's contract renewal, then she would be a policymaker, and the District could be found liable by a reasonable jury.")

Esperanza Peace and Justice Center v. City of San Antonio, No. SA-98-CA-0696-O, 2001 WL 685795, at *15 (W.D.Tex. May 15, 2001) (not reported) (discussing different approaches of various courts and noting "[t]he argument against the *Scott-Harris* approach is that holding a municipality liable for the discriminatory motivations of a minority of its council does not meet the 'official policy' requirement articulated by the Supreme Court in *Monell*. On the other hand, few legislators will admit to unconstitutional motivations behind their vote. It thus becomes an exceedingly difficult and perilous enterprise to establish the intent of a lone legislator. And when the legislative body consists of numerous legislators, each with his or her own myriad and conflicting motivations, the plaintiff's burden is multiplied, if not impossible. . . . It is precisely because the plaintiff's burden of proof is so onerous that *Scott-Harris* left open the possibility of a 'relaxed' approach, and *City of Birmingham*, and the Massachusetts decisions have applied it. The Court believes the *Scott-Harris* approach is preferable because it strikes the proper balance between difficulty of proving a legislative body's motivation and the fact that a municipal ordinance can only become law by majority vote of council. . . It the present case, however, as will be explained below in discussing the evidence of viewpoint discrimination, the Court finds that plaintiffs' constitutionally protected conduct was a substantial or motivating factor in the decision of a majority of council members. Thus resort to *Scott-Harris* will only become necessary if the Court is mistaken in its tally of the member's motivations.")

Scully v. Borough of Hawthorne, 58 F. Supp.2d 435, 455, 456 (D.N.J. 1999) ("In the instant case, Scully was required to prove, by a preponderance of the evidence, the Borough Council was substantially motivated to deny funds for his promotion by the exercise of his First Amendment Rights. This presents the question of what percentage of the Borough Council must have been spurred by a constitutionally impermissible motive before the Borough Council itself may be held liable for a violation of Section 1983. This question does not appear to be an issue that has been settled in this Circuit. Some courts that have been presented with this question have determined that a majority of the members of a legislative body must have been motivated by a constitutionally impermissible motive for liability to attach to a municipality or legislative body. . . Another court, however, acting in the area of race discrimination, determined liability could be premised upon proof a significant percentage of those who were responsible for the challenged action acted on the basis of an impermissible motive. . . The *Scott-Harris* approach appears to strike an appropriate

balance between the difficulty of proving the motivation of a legislative body and the fact a municipal ordinance can only become law by a majority vote of the municipal council.")

a. Entity vs. Individual Liability for Officials Performing Quasi-Judicial or Legislative Functions

Lonzetta Trucking and Excavating Company v. Schan, No. 04-2758, 2005 WL 730363, at *4 (3d Cir. Mar. 9, 2005) (unpublished) ("[Z]oning officials, including the supervisors of Hazle Township, members of the Hazle Township Zoning Board, and the Zoning Officer of Hazle Township would be entitled to absolute immunity in their individual capacities if they were performing 'quasi-judicial' functions. However, the zoning officials in their official capacities, the Hazle Township Zoning Board, and the Hazle Township are not entitled to absolute immunity. The planning board as a governmental agency has no immunity whatsoever.")

Morris v. Lindau, 196 F.3d 102, 111, 112 (2d Cir. 1999) ("The immunities Town Board members enjoy when sued personally do not extend to instances where they are sued in their official capacities. In other words, municipalities have no immunity defense, either qualified or absolute, in a suit under § 1983. . . . Being absolutely immune for their legislative acts, the Town Board members cannot be found personally liable for the abolition of the Police Department. But plaintiffs also named the Town as a defendant. The elimination of the Police Department, a legislative act passed by the Town Council, qualifies under *Monell* as a municipal act for which the Town may be held liable.")

b. Legislative Immunity & Testimonial Privilege

Lee v. City of Los Angeles, 908 F.3d 1175, 1188 (9th Cir. 2018) ("We recognize that claims of racial gerrymandering involve serious allegations: 'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens "as individuals, not 'as simply components of a racial ... class.'"'. . Here, Defendants have been accused of violating that important constitutional right. But the factual record in this case falls short of justifying the 'substantial intrusion' into the legislative process. . . Although Plaintiffs call for a categorical exception whenever a constitutional claim directly implicates the government's intent, that exception would render the privilege 'of little value.'. . *Village of Arlington Heights* itself also involved an equal protection claim alleging racial discrimination—putting the government's intent directly at issue—but nonetheless suggested that such a claim was not, in and of itself, within the subset of 'extraordinary instances' that might justify an exception to the privilege. . . Without sufficient grounds to distinguish those circumstances from the case at hand, we conclude that the district court properly denied discovery on the ground of legislative privilege.")

Cunningham v. Hill, No. 6:06CV69, 2006 WL 1999188, at *3 (E.D. Tex. July 18, 2006) ("[I]t is reasonable to conclude that the rationales for applying the testimonial privilege to federal, state, and regional legislators apply with equal force to local legislators. Accordingly, local legislators

are protected by the testimonial privilege from having to testify about actions taken in the sphere of legitimate legislative activity.")

Jama Investments, L.L.C. v. Incorporated County of Los Alamos, No. CIV 04-1173 JB/ACT, 2006 WL 1304903, at *6 (D.N.M. Jan. 20, 2006) ("The Court concludes that the same policy considerations that bar suit against legislators for legislative acts also prevents the Court from compelling them to testify about legislative acts.")

Knights of Columbus v. Town of Lexington, 138 F. Supp.2d 136, 139, 140 (D. Mass. 2001) ("[T]he doctrine of legislative immunity precludes inquiry into the individual defendants' state of mind. Moreover, since one of the purposes of the doctrine is to safeguard legislators from being burdened with the demands of discovery, the objective facts which can be used to challenge regulations should, if at all possible, come from sources other than the testimony of legislators. Therefore, unless the plaintiffs can establish that they cannot get the factual information they need from other sources, they are hereby precluded from taking the depositions of any of the Selectmen.")

East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City School Dist., 81 F. Supp.2d 1199, 1204 (D. Utah 2000) ("If scrutiny of legislative motive would be inappropriate for the court itself to undertake at this stage of this case, it seems likewise inappropriate for parties to invoke the court's machinery to conduct the same kind of scrutiny of individual Board members' motivations through deposition discovery.")

Cooper v. Lee County Board of Supervisors, 966 F. Supp. 411, 416 (W.D. Va. 1997) ("Although the defendant Board agrees that it is not immune from suit, it contends summary judgment is appropriate as to it because the individual board members, immune from suit, cannot be compelled to testify as to their motives, *Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 46 (4th Cir.1988), overruled in part by *Berkley*, 63 F.3d at 303, and thus the suit against the Board is barred. It is true that the individual board members enjoy a testimonial privilege flowing from the doctrine of legislative immunity. *See Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir.1996). However, while the plaintiff therefore must establish his prima facie case without the benefit of the supervisors' testimony, it does not necessarily follow that the suit against the Board is barred by the supervisors' privilege. Were that the case, Fourth Circuit precedent declining to extend immunity to a legislative board would in effect be defeated any time individual board members were entitled to exercise immunity. Further, the testimonial privilege may be waived.").

c. Waiver of Testimonial Privilege

Trombetta v. Bd. of Education, Proviso Township High School District 209, No. 02 C 5895, 2004 WL 868265, at **2-5 (N.D. Ill. Apr. 22, 2004) ("In their present motion, the District and Jackson seek reconsideration of the Court's denial of their motions *in limine* nos. 4 and 10. In those motions, defendants sought an order barring questioning of any School Board members at trial regarding their motivations for what they characterize as the reorganization (plaintiff characterizes

it as a termination of his employment) on the grounds of legislative immunity from suit, as well as any comment about those motivations by Trombetta or his attorneys (motion # 4), and any reference to their motives regarding the 'termination' (motion # 10). . . . Defendants' request to preclude any inquiry or mention of their motives amounts to a request for entry of summary judgment. Were the Court to grant what defendants request, the case would be over. A claim of retaliation for the exercise of First Amendment rights requires the plaintiff to prove that he suffered adverse action *because of* his exercise of protected rights, or, to put it another way, that 'the defendants' actions [were] *motivated by* [the plaintiff's] constitutionally protected speech.'. . The plaintiff cannot conceivably prevail without introducing evidence of, and arguing, the motivation of those who made the decision he attacks − in this case, Superintendent Jackson, Mayor Serpico, and the Board as a whole. Thus if defendants prevail on their motion for reconsideration, they are entitled to judgment in their favor. This request amounts to a motion for summary judgment which is not made in timely fashion. . . . There is another significant reason why defendants' claim is without merit. The District and Jackson argue that the Board members' legislative role entitles them to a testimonial privilege against inquiry about their reasons for acting. Even were this a viable claim, it is beyond question that the Board members have waived any such privilege. Each of the Board members appeared, without objection, for a deposition (nearly a year ago) and testified fully and completely about all of the events surrounding the termination / reorganization, including inquiries about their motives in acting as they did. If a testimonial privilege existed, it existed when the depositions were taken. Yet the Board members testified at their depositions about their reasons for acting, and they made no effort to seek a protective order barring inquiries about their reasons for acting as they did. . . . Finally, other than citing a plethora of cases, most of them either state-law decisions or non-controlling decisions of other district courts, defendants have made no effort to focus the Court in on any cases like this one in which the decision under attack is an employment-related decision by a public body and the plaintiff's claim is one that, as noted earlier, *requires* inquiry into the motivating factors for the decision. Based on our quick review, most of the cases appear to concern zoning matters, not the termination of a person's employment. If the purported evidentiary privilege proposed by the District and Jackson barred inquiry into the motivations of the members of a public entity that made employment decisions, it effectively would amount to a grant of immunity not just to the entity's individual members, but to the entity as a whole. If accepted, this would not only contravene *Owen v. City of Independence*, 445 U.S. 622 (1980), in which the Supreme Court held that municipal bodies sued under 42 U.S.C. § 1983 are not entitled to the immunities from suit available to government officials, but would also effectively abrogate prohibitions against employment discrimination (Title VII, the ADEA, the ADA) for any municipal body whose "legislative" members are given decision making authority over employment matters. Defendants have marshaled no support for such a sweeping rule.").

3. Whose Policy is It?

a. Local Officials Enforcing State Law

It is important that the challenged policy statement, ordinance, regulation, or decision be adopted or promulgated by the local entity. A local government's *mere enforcement* of state law, as opposed to express incorporation or adoption of state law into local regulations or codes, has been found insufficient to establish ***Monell*** liability. ***Surplus Store and Exchange, Inc. v. City of Delphi***, 928 F.2d 788, 793 (7th Cir. 1991).

See also ***Wilkins v. Herron***, No. 24-80, 2024 WL 5200177, at *2 (9th Cir. Dec. 23, 2024) (not reported) ("Wilkins claims that the School District violated his constitutional rights by enforcing Oregon's regulatory vaccine and mask mandates for public school employees. . .Wilkins does not dispute that the School District was bound by state law to enforce these mandates, but he argues that the School District may nevertheless be held liable based on *Evers v. Custer County*, 745 F.2d 1196 (9th Cir. 1984). *Evers* is distinguishable. There, the plaintiff's claimed injury—the deprivation of her property interests without due process—was caused by municipal conduct that was *not* required by state law. Although a state law had made it the 'duty of the commissioners to record as public highways roads which have become such by use,'. . . it left the determination of whether the road in question was a public highway to the commissioners and did not prohibit them from providing the plaintiff with notice and an opportunity to be heard. By contrast, Wilkins has failed to allege that his injuries were caused by any conduct of Defendants not required by state law. Instead, he concedes that state laws required school employees to be vaccinated and to wear masks and that those laws were binding on the School District. Accordingly, Wilkins has failed to allege that his injuries are traceable to any policy or custom of the School District, as opposed to state law."); ***Buffin v. California***, 23 F.4th 951, 962-65 & n.7 (9th Cir. 2022) ("Here, the San Francisco County Sheriff was charged by state law with enforcing a state-mandated bail regime. We must resolve whether the Sheriff was a state or local official for the purposes of this claim. To do so, we must first home in on the challenged actions the Sheriff took. County officials like the Sheriff can act as county or state officials, depending on the particular context. . . For such officials who 'serve two masters,' we examine whether 'the particular acts the official is alleged to have committed fall within the range of his state or county functions.'. . As the district court explained in great depth when it ruled on the County and Sheriff's motions to dismiss, California's statutory bail regime enlisted the County Sheriff and compelled her to set bail in line with a state-created bail schedule. California law permits a sheriff to set bail using *only* a bail schedule set by the state court; she must set bail at the amount listed in that document. . . Moreover, the Sheriff has no discretion over when to release or hold a pre-trial detainee. If the detainee makes bail, the Sheriff must release her; if not, the Sheriff must keep her in jail pending her court proceedings. . . The district court viewed the State as the Sheriff's master as she set bail under the state-mandated bail schedule. The court therefore concluded that the Sheriff 'act[ed] on behalf of the State' when setting bail. . . Thus, 'the Sheriff [wa]s the actor responsible for enforcing the challenged state law in San Francisco,'. . . and the State was 'the relevant actor when the Sheriff detains a person who

does not pay bail[.]'. . Given that unchallenged ruling, the district court did not err in concluding that the Sheriff in her official capacity acted as the State's agent for the purposes of assessing attorney's fees. . . For when a state statutory regime comprehensively 'directs the actions of an official, as here, the officer, be he state or local, is acting as a state official,' *i.e.*, a state agent. . . In other words, instead of exercising control over the Sheriff by signing her paycheck, the State here used its plenary power over the structure of California's government to enlist the Sheriff and command her to do its bidding when she set bail using a bail schedule. The State may make that choice. But in doing so, the State makes the Sheriff a state official in this context, and so bears responsibility for the unconstitutional actions it mandated she take. . . Despite the State's protest, no further factual information was necessary to establish that the Sheriff acted as an agent of the State. California's own bail law—'the official policy of the State,'. . .—was all the evidence the district court needed. The other provisions of California law generally 'labeling' sheriffs 'as local officials' cannot overcome the fact that—in this particular context—the Sheriff acted for the State. . . Indeed, any other conclusion at the attorney's fees stage would have led to an untenable dissonance with the district court's earlier Eleventh Amendment holding. The district court had noted that the Sheriff was 'entitled to immunity from suit for money damages under the Eleventh Amendment.'. . But the Sheriff could possess that immunity only if she was being sued in her official capacity as a state official. For in an official-capacity suit, a defendant can claim only those 'forms of sovereign immunity that the entity' she represents 'may possess, such as the Eleventh Amendment[.]'. . And only a state, its arms and instrumentalities, and its officials (when sued in their official capacities) enjoy that kind of immunity; the county does not. . . In other words, here the Sheriff's successful assertion of Eleventh Amendment immunity was a telltale sign that she was being sued as a state official—*i.e.*, an agent of the State—in her official capacity. . . That principle also sinks the State's main line of attack in this case. The State's argument that the district court 'conflated the Sheriff's entitlement to immunity as a "state actor" with respect to damages, with the Sheriff's purported status as an *agent* of the State' entirely misunderstands the import of an official-capacity defendant successfully invoking Eleventh Amendment immunity. . . Indeed, we struggle to imagine a situation where an official-capacity defendant, entitled to Eleventh Amendment immunity from monetary relief, would not be an agent of the State and thus a state official. Thus, the district court correctly found that the Sheriff acted as a state official for the purposes of this action, subjecting the State to liability for attorney's fees under § 1988. . . Nor will we reverse the district court's award of attorney's fees because the State's attorneys did not represent the Sheriff throughout this case. Whether a county employee is a state or local official turns on what capacity he acts in when he enforces an unconstitutional law or policy—not which legal office represents him in court. . . And it was the Office of the Attorney General that chose not to represent the Sheriff or to intervene to defend the state bail laws—despite knowing the Sheriff's position that the laws were unconstitutional. . . . Despite the State's apprehension, our holding here does not mean that the State will need 'to intervene to defend the [S]tate's interests every time a local official is sued for purportedly enforcing state law.'. . We simply affirm that a county official who enjoys Eleventh Amendment damages immunity and acts as a discretion-less instrument of the State is a state official. If plaintiffs prove that such an official acted unconstitutionally at the State's command—as the Sheriff did here—the State can face § 1988 fees

liability. . . .Given our reasoning here, we need not determine what bearing, if any, the 'state policymaker' test under *McMillian* has on sovereign immunity inquiries under the Eleventh Amendment or on determinations of whether an official-capacity suit targets a state official or a local official. This case does not raise, and we do not here decide, whether an official-capacity suit against a hypothetical 'state policymaker' under *McMillian* who is not entitled to Eleventh Amendment immunity from monetary relief would constitute an official-capacity suit against a 'state official.'. . To the extent the *McMillian* merits inquiry plays any role, the district court's ruling on that issue would only further buttress our conclusion that the Sheriff was a state official."); ***Ness v. City of Bloomington***, 11 F.4th 914, 922 (8th Cir. 2021) ("Ness alleges that the City and the officers were 'acting under color of state law' when enforcing the harassment statute. But she fails to allege that a city policymaker adopted the *state* harassment statute as the official policy of the *City* of Bloomington, or that the City has a policy or custom of enforcing the statute in an unconstitutional manner. The complaint does not allege that the City incorporated the state statute into its municipal code, or that a policymaker like the chief of police was responsible for the enforcement action. . . We decline to make the 'conceptual leap' that the enforcement of a state statute by city police officers supports a claim that the alleged unconstitutional statute was adopted as a city policy. *Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788, 790-92 (7th Cir. 1991). 'It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing state law.'. . Ness's claim against the City for nominal damages is therefore premised on making the municipality vicariously liable for the actions of its police officers. Her complaint states that she 'ceased her filming activity,' because of the August 2019 'threat by the City, through its police officers Defendants Meyer and Roepke, to enforce the Harassment Statute.' . . Because these allegations are based on the actions of city employees and not on a policy or custom of the City, Ness's claim for nominal damages is insufficient to state a claim. *Monell*[.]"); ***Ermold v. Davis***, 936 F.3d 429, 433-35 (6th Cir. 2019) ("Whether sovereign immunity protects an official from being sued in her official capacity. . . depends on her role in government. Sometimes the inquiry is easy. A governor obviously is a state official; a mayor obviously is not. But not all officials operate within jurisdictional silos—some have hybrid duties in which they serve both state and local government. In such scenarios, immunity depends on which entity the official serves when engaging in the challenged conduct. *McMillian v. Monroe Cty.*, 520 U.S. 781, 785 & n. 2 (1997). And that inquiry turns on how state and local law treat the official. . . Here, plaintiffs contend that when Davis stopped issuing marriage licenses, she acted on the County's behalf. Caudill and the County, however, claim Davis acted on Kentucky's behalf. To resolve this dispute, we must examine and balance six factors:

1. The State's potential liability for a judgment;
2. How state statutes and courts refer to the official;
3. Who appointed the official;
4. Who pays the official;
5. The degree of state control over the official; and
6. Whether the functions involved fell within the traditional purview of state or local government.

. . . . The first and fourth factors are neutral. . . . The second and third factors weigh in favor of

Davis having acted on the County's behalf. . . . The fifth and sixth factors . . . show that Davis acted on the State's behalf. . . . Plaintiffs acknowledge Kentucky's general control over marriage, but they contend that when Davis refused to issue licenses, she made a discretionary policy on Rowan County's behalf. If true, sovereign immunity wouldn't shield Davis because when an official applies state law that leaves the method of application to her discretion, she acts on behalf of local government. . . . In comparing Davis's actions to those of the coroner in *Brotherton* (and to other, similar cases), plaintiffs conflate discretion with insubordination. Whereas Ohio's cornea-harvesting law left to officials the method of application, Kentucky's marriage-licensing laws gave county clerks no wiggle room. Kentucky *required* Davis to issue marriage licenses to eligible couples. . . . Plaintiffs have cited no authority suggesting that if a county official acting on the State's behalf fails to do her job, that failure transforms the source of her power from the State to the county. Indeed, such a proposition would make little sense; for whom an official acts has nothing to do with how well she acts. Davis's refusal to issue licenses, then, did nothing to change the government she acted for. Because Davis acted on Kentucky's behalf when issuing (and refusing to issue) marriage licenses, sovereign immunity protects her (and now Caudill, as the current county clerk) from an official-capacity suit."); ***Ohio ex rel. Moore v. Brahma Inv. Group, Inc.***, 723 F. App'x 284, 288 (6th Cir. 2018) ("Because Berkowitz [City Law Director] brought the nuisance action on behalf of the State, not the City, all claims against the City and [Mayor] Williams were properly dismissed. *See* Ohio Rev. Code § 3767.03; *Cady v. Arenac Cty.*, 574 F.3d 334, 345 (6th Cir. 2009) (holding that county prosecutor was acting as agent of the State of Michigan rather than the county when he issued criminal charges); *Pusey v. City of Youngstown*, 11 F.3d 652, 659 (6th Cir. 1993) (same)."); ***Snyder v. King***, 745 F.3d 242, 246-50 (7th Cir. 2014) ("Snyder sued the County Defendants in their official capacities under 42 U.S.C. § 1983, which is essentially another way of suing the county-affiliated entity they represent. This means that Snyder can only proceed against the County Defendants to the extent that he would be able to proceed against the county—or, more specifically, against the St. Joseph County Voter Registration Board—itself. . . Section 1983 only permits an individual to sue a 'person' who deprives that individual of his or her federally-guaranteed rights under color of state law. Local governing bodies—and the officers thereof, acting in their official capacities—do generally qualify as 'persons' under the statute. . . . But that is not true when a local governing body acts solely as an extension of the State, because State governments and State officials are *not* 'persons' within the ambit of Section 1983. . . As a result, whether or not a plaintiff has stated a Section 1983 claim against a municipal entity typically hinges on the extent to which that municipal entity was independently responsible for the allegedly unconstitutional act. In answering that question, courts have focused on whether 'there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.'. . . To say that any such direct causal link exists when the only local government 'policy' at issue is general compliance with the dictates of state law is a bridge too far; under those circumstances, the state law is the proximate cause of the plaintiff's injury. . . This is the rule to which the district court was referring when it invoked *Bethesda:* a county 'cannot be held liable under Section 1983 for acts that it did under the command of state or federal law.'. . The operative complaint in this case is devoid of any remotely specific allegation that a county-level policy or custom caused Snyder's harm. That alone is grounds for dismissal. .

. . [T]here is no opportunity for the County Defendants—as members of the voter registration board—to decide what constitutes 'a crime' under Section 3–7–46–2. The county sheriff, if anyone, decides who qualifies for the disenfranchisement list; all the voter registration board does is delete the names the sheriff provides. The role of the local voter registration boards is therefore purely reactionary. It is easy to see, given the flaws in the first two steps in Snyder's argument, why the third step and his conclusion are also wide of the mark. Snyder hopes to paint this case as one in which the County Defendants made an independent choice from among various alternatives authorized by state law, but that characterization is based on an inaccurate understanding of the Indiana system. The statute in question does not merely authorize removal from the voter rolls for incarcerated convicts. The statutory language is compulsory. . . And to the extent that any discretion *is* permitted, it is exercised by actors other than the County Defendants. . . .For all of these reasons, this situation does not support a finding of *Monell* liability. When state law unequivocally instructs a municipal entity to produce binary outcome X if condition Y occurs, we cannot say that the municipal entity's 'decision' to follow that directive involves the exercise of any meaningful independent discretion, let alone final policymaking authority. . . It is the statutory directive, not the follow-through, which causes the harm of which the plaintiff complains. . . .Finally, we note that it makes no difference that the County Defendants exercise broad independent discretion with respect to *other* matters of election law and procedure; the question is whether the plaintiff has identified the decisionmaker 'responsible for establishing final policy with respect to the subject matter in question.'. . The subject matter in question is the removal of incarcerated convicts from the voter rolls, and the only 'policy' the County Defendants established with respect to that issue was to follow the mandatory mechanism laid out by statute. Whether one views their role as merely implementing the statutory directive, or as carrying out the removal of those identified as statutorily appropriate by the local sheriff, the local voter registration boards simply do not make an independent policy judgment."); ***Slaven v. Engstrom***, 710 F.3d 772, 780, 781 & n.4 (8th Cir. 2013) ("In the present case, the Slavens' complaint is devoid of *any* allegations of an unconstitutional *Hennepin County* policy separate and distinct from Minnesota law. As set forth *supra,* Counts I and II of their complaint repeatedly reference specific Minnesota statutes, rules, and procedures as depriving them of due process. . . .Hennepin County lacks any policymaking authority regarding the handling and scheduling of the EPC [Emergency Protective Custody] hearing and formal hearing. The Slavens' complaint essentially alleges that *Minnesota law,* and the state court judge's application of that law—not an independent Hennepin County policy—caused the procedural due process violations. Hennepin County cannot be liable to the Slavens under § 1983 for the violation of their procedural due process rights based on the allegations contained in this complaint. . . . Whether, and if so when, a municipality may be liable under § 1983 for its enforcement of state law has been the subject of extensive debate in the circuits. *See Vives v. City of New York,* 523 F.3d 346, 351–53 (2d Cir.2008) (collecting and analyzing cases). We need not decide whether a municipality may ever be liable for enforcing state law because, here, there is no evidence or even allegation that Hennepin [County] was enforcing state law, as opposed to merely being present in a proceeding where a state court, applying state law, allegedly violated the Slavens' constitutional rights."); ***Gottfried v. Medical Planning Services, Inc.,*** 280 F.3d 684, 693 (6th Cir. 2002) ("Sheriff Alexander's obligations under the state

court injunction clearly flow from the State. He did not have any discretionary authority regarding the state court injunction. Rather, he was bound to enforce it by its terms and there is no evidence that it was ever enforced otherwise. As such, any action taken in connection with the injunction would be action taken as an arm of the State for which Sheriff Alexander would be entitled to Eleventh Amendment immunity. . . . Indeed, it is the state court injunction that allegedly caused [Plaintiff's] injury, not any 'policy' or 'custom' of the state, city or county, and the Sheriff acted as an arm of the state in enforcing it."); ***Bethesda Lutheran Homes and Services, Inc. v. Leean***, 154 F.3d 716, 718 (7th Cir. 1998) ("When the municipality is acting under compulsion of state or federal law, it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury. Apart from this rather formalistic point, our position has the virtue of minimizing the occasions on which federal constitutional law, enforced through section 1983, puts local government at war with state government. . . . [T]he state of mind of local officials who enforce or comply with state or federal regulations is immaterial to whether the local government is violating the Constitution if the local officials could not act otherwise without violating state or federal law. The spirit, the mindset, the joy or grief of local officials has no consequences for the plaintiffs if these officials have no discretion that they could exercise in the plaintiffs' favor."); ***Pusey v. City of Youngstown***, 11 F.3d 652, 657 (6th Cir. 1993) ("City prosecutors are responsible for prosecuting state criminal charges ... Clearly, state criminal laws and state victim impact laws represent the policy of the state. Thus, a city official pursues her duties as a state agent when enforcing state law or policy."), *cert. denied*, 114 S. Ct. 2742 (1994); ***Woods v. City of Michigan City, Indiana***, 940 F.2d 275, 279 (7th Cir. 1991) (state judge's bond directive was not policy of City or County); ***Echols v. Parker***, 909 F.2d 795, 801 (5th Cir. 1990) ("county official pursues his duties as a state agent when he is enforcing state law or policy").

See also ***Diaz v. Cantu***, 123 F.4th 736, 745-46 (5th Cir. 2024) ("This circuit has not determined whether a county judge whose office was created by the Texas Constitution serves as an arm of the state. . . The precedents cited by English Cantu concern Texas district judges, not constitutional county judges. . . Admittedly, there is language in some of our opinions similar to this: 'Texas judges are entitled to Eleventh Amendment immunity.' *Davis v. Tarrant County*, 565 F.3d 214, 228 (5th Cir. 2009). Context matters, and that opinion and the ones it cited all dealt with Texas district judges. . . The question here concerns an official who, though having the title of 'judge' and the authority to act in a judicial capacity, also has substantial other authority and duties. Thus, even if most or all other Texas judges are entitled to state sovereign immunity, we still must determine if this judge–administrator also enjoys that immunity. A fresh arm-of-the-state analysis is necessary. [court does analysis] . . . . We conclude that Texas's constitutional county judges are not arms of the state and are therefore not entitled to state sovereign immunity. The district court correctly denied English Cantu state sovereign immunity on his official-capacity claim."); ***Teagan v. City of McDonough***, 949 F.3d 670, 672, 675-78 & n.3 (11th Cir. 2020) ("The McDonough municipal court was exercising its judicial power under Georgia law to adjudicate a state-law offense—and not a violation of a city or county ordinance—and therefore was not acting on behalf of the City when it took the actions that Ms. Teagan complains of. . . . [T]he critical and threshold

question is whether the McDonough municipal court, through Chief Judge Patten, was acting on behalf of the City when it took the actions which form the basis for the constitutional violations alleged by Ms. Teagan. If it was not, the City cannot be held liable under § 1983. . . Whether an official or entity acts on behalf of a municipality or the state 'in a particular area, or on a particular issue,' is—labels aside—a federal question that is 'dependent on an analysis of state law.'. . Although we have not yet addressed this question with respect to municipal courts in Georgia, our decision in *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), provides a critical starting point. . . . 'The practical test articulated in *Familias Unidas* ... is whether the decisionmaker, by virtue of his official conduct, serves as the "final authority or ultimate repository of county power."'. . The narrow question here is whether under Georgia law the McDonough municipal court, through Chief Judge Patten, acted on behalf of the state or the City when adjudicating Ms. Teagan's state-law misdemeanor offense. As we explain, we conclude that Chief Judge Patten acted on behalf of the state because he was exercising his authority under state law to preside over a state misdemeanor offense.[3] [fn. 3: Because this case does not present the question, we leave for another day whether a municipal court judge acts on behalf of a municipality when he or she exercises judicial authority with respect to local ordinances enacted by the municipality. *Compare Walker v. City of Calhoun*, 901 F.3d 1245, 1256 (11th Cir. 2018) (concluding, at the preliminary injunction stage, that a Georgia municipal court acted on behalf of the city in setting bail policy, and therefore was not immune from § 1983 liability in an indigent arrestee's class action lawsuit challenging the court's standing bail order); *ODonnell v. Harris Cty.*, 892 F.3d 147, 155–56 (5th Cir. 2018) (holding that a county judge was a policymaker for the county in establishing an "unwritten, countywide process for setting bail that violated both state law and the Constitution"); *Anela v. City of Wildwood*, 790 F.2d 1063, 1066–67 (3d Cir. 1986) (holding that a municipal court judge's "cash bail schedule," which failed to comply with a state supreme court rule, constituted a municipal practice for which the city could be held liable under *Monell*).] Ms. Teagan correctly points out that municipal courts in Georgia are generally creatures of local government—Georgia law, after all, gives municipalities the power to create municipal courts, appoint judges to those courts, and fix their compensation. . . And the judges of the McDonough municipal court may be removed from office by the mayor and city council. . . But the question here is not whether municipal courts in Georgia should be *generally* viewed as state or municipal actors. It is, instead, is a more narrow one: whether municipal courts in Georgia act on behalf of the state or on behalf of the municipality when they adjudicate misdemeanor offenses under state law. . . Although the Georgia Supreme Court has sometimes characterized municipal courts as municipal bodies 'discharging strictly municipal functions,' *Ward v. City of Cairo*, 276 Ga. 391, 583 S.E. 2d 821, 823 (Ga. 2003), such a definitive across-the-board classification is not accurate. As noted earlier, municipal courts in Georgia have jurisdiction to adjudicate state-law misdemeanor traffic offenses pursuant to Georgia Code § 40-13-21(a)-(b). . . The Georgia Supreme Court has explained that the 'General Assembly's exercise of its constitutional authority to enact legislation vesting municipal courts with jurisdiction over various state misdemeanor offenses ... imbues the municipal court with *limited state judicial power* when it tries a defendant for violations of the state misdemeanors the General Assembly has placed within its jurisdiction.'. . Ms. Teagan was charged with driving without insurance, which

constitutes a state-law misdemeanor offense. . . Under Georgia law and the rationale of *Familias Unidas*, Chief Judge Patten was acting on behalf of the state when he presided over her case, found her guilty, sentenced her, signed a warrant for her arrest, issued a $100 'contempt charge' for her failure to pay the fine, and ordered her to serve the 60-day sentence that had been suspended. . . And because a conviction in a Georgia municipal court for a state-law misdemeanor traffic offense is appealable to the superior court, . . . we cannot say that under Georgia law the City had 'control over' Chief Judge Patten or the McDonough municipal court with respect to the adjudication of Ms. Teagan's state-law misdemeanor traffic offense. . . We therefore affirm the district court's grant of summary judgment to the City on Ms. Teagan's § 1983 claims."); ***Teagan v. City of McDonough***, 949 F.3d 670, 680, 683-84 (11th Cir. 2020) (Jordan, J., concurring) ("I join the court's opinion. The City of McDonough cannot be held liable under 42 U.S.C. § 1983 because the municipal court was not acting on its behalf when adjudicating Ms. Teagan's state-law misdemeanor for failing to maintain automobile liability insurance. I write separately, however, to express my concern that the McDonough municipal court acted unconstitutionally by jailing Ms. Teagan for failing to pay a fine without determining whether her failure to pay was willful. This practice, which does not appear to be isolated throughout municipal courts in Georgia, flouts the venerable and long-standing principle that debtors' prisons are unconstitutional. . . . Ms. Teagan's ordeal seems to exemplify a broader problem. The City of McDonough is not the only municipality in Georgia that raises a significant portion of its revenue from collecting fines—or that collects these fines through its municipal court's vigorous enforcement of traffic violations. . .Nor is Georgia the only state where local governments collect a significant portion of their revenues from fines. . . Some commentators have noted that municipal courts' aggressive enforcement of the payment of fines—including unconstitutionally imprisoning defendants for their debt—has been on the rise since the 2008 recession, when local governments became increasingly strapped for funds. . . Not surprisingly, multiple lawsuits have been filed in our Circuit challenging these types of practices on various grounds, and in at least some cases, district courts have denied motions to dismiss. [collecting cases] Some courts in other parts of the country have likewise allowed these types of claims to proceed past the dismissal or summary judgment stages, or even granted summary judgment in favor of the plaintiffs. [collecting cases] But what happened to Ms. Teagan should not be a common occurrence. . . Jailing a defendant for failing to pay a fine—without any determination that her failure to pay was willful—is a flagrant violation the U.S. Constitution. . . A municipal court cannot shirk its duties to protect indigent defendants' constitutional rights in order to line its city's coffers.").

See also ***Lindke v. King***, No. 19-CV-11905, 2024 WL 3240612, at *6–7 & n.6 (E.D. Mich. June 28, 2024) ("The first question the Court must answer is: may the Defendants invoke state sovereign immunity even though they are county-level officials and not state officials? They may. While Defendants are not employees of the State, their conduct at issue in this action – *i.e.*, entering the Ex Parte PPO into the LEIN system – is compelled by the PPO Statute. Indeed, as noted above, the PPO Statute requires Defendants to enter into the LEIN system all PPOs that they receive. . . Under these circumstances, Defendants are acting as an 'arm of the State' when they enter PPOs into the LEIN system (or when they cause such entry), and they are thus entitled to invoke state

sovereign immunity. . . Because the PPO Statute compels the Defendants to enter PPOs into the LEIN system, Defendants may invoke state sovereign immunity. . . . The Court next turns to whether any exception to state sovereign immunity applies here and permits Lindke to proceed with his claims against Defendants in their official capacity. Lindke invokes the exception described in *Ex parte Young*, 209 U.S. 123 (1908). . . . To fall within the *Ex parte Young* exception, (1) the 'state official must possess some connection with the enforcement of the challenged law' and (2) it 'must be likely that the official will enforce the law against the plaintiff.'. . Both elements of the exception are met here, and thus Lindke's remaining claims are not barred by state sovereign immunity. . . .Of course, the doctrine of state sovereign immunity would not bar a claim against Kays for damages in his personal capacity, but the Court previously dismissed that claim on the basis of qualified immunity."); ***Sroga v. City of Chicago***, No. 18 C 1749, 2020 WL 2112373, at *7 (N.D. Ill. May 4, 2020) ("The City cites *Milwaukee Cty. Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), for the proposition that Sroga cannot challenge the City's use of the P.O.W.E.R. test as that is a test created by the State. *Fielder* is not directly on point. In *Fielder*, the Seventh Circuit concluded that the plaintiffs could not challenge a state's application of a federal statute while conceding that the federal statute was constitutional. . . Here, unlike in *Fielder*, and given the leniency this Court must apply, the amended consolidated complaint is construable as challenging the underlying state statute *and* the City's application of it. The City has otherwise failed to support its argument that a plaintiff can never challenge a municipality's application of state law, and so the Court will not reach that argument."); ***Brewster v. City of Los Angeles***, No. EDCV142257JGBSPX, 2019 WL 7707886, at *6-8 * n.6 (C.D. Cal. July 29, 2019) ("Here, Plaintiffs allege an officially promulgated policy of general applicability that is itself unconstitutional and that directs officers to impound vehicles for 30 days without first securing a warrant. . . .SO7 is a 'decision officially adopted and promulgated' by the Board of Police Commissioners. . . Thus, promulgation of the policy and impoundment of the vehicles pursuant to the policy is the type of activity to which *Monell* liability applies. Under *Evers*, that the Impound Policy implements state law has no bearing on the *Monell* analysis. . . Moreover, a number of Ninth Circuit district court decisions have found municipalities could be liable for actions taken pursuant to state statutes. [collecting cases] The Court acknowledges that the County Commissioners in *Evers* had discretion in shaping the process by which they determined whether the requirements of Idaho Code § 40-103 had been met. There is thus some question whether *Evers* applies when a local government implements a mandatory state law that leaves no room for discretion, as Defendants argue is the case here. . . Other circuits have held that municipal action pursuant to a fully mandatory state law cannot give rise to *Monell* liability, while action pursuant to a law that is merely permissive or leaves room for discretion in its implementation may give rise to *Monell* liability. [citing *Vives* and *Snyder*] [fn. 6: Notwithstanding this out-of-circuit authority, the Court is not convinced that a municipality may not be found liable for enforcing a mandatory state law. *Evers* suggests that the fact that a municipal defendant acted pursuant to state law is irrelevant to the *Monell* analysis. . . At least one Ninth Circuit district court has indicated that, 'even if a municipality enforces a mandatory, but unconstitutional, state or federal law, *Monell* liability may attach even though the municipality does not know that the statute is unconstitutional.' *Miranda-Olivares v. Clackamas Cty.*, 2014 WL 1414305, at *4 n. 5 (D. Or. Apr.

11, 2014). Moreover, a rule that a local government cannot be liable for enforcing an unconstitutional but mandatory state statute would leave plaintiffs who suffer injuries due to the enforcement of such statutes without redress. *See Vives v. City of N.Y.*, 524 F.3d at 350 ("As a practical matter, ... damages are not available against the state because it is not a person within the meaning of Section 1983. Moreover, ... individual employees will often be able to successfully assert qualified immunity. Thus, the plaintiff will often be left to assert his damages claim only against the municipality.") . . . However, the Court need not decide the issue, as it finds the City had discretion in implementing § 14602.6(a)(1).] Plaintiffs counter that Defendants had 'discretion to select between at least two statutory options for impounding vehicles like Plaintiffs'.'. . Under the Vehicle Code, an officer who encounters a person driving with a suspended or revoked license or without ever having had a license may seize the vehicle under § 14602.6(a)(1), seize the vehicle under § 22651(p), or decide not to seize the vehicle. . . . However, once an officer invokes § 14602.6(a)(1) as the impound authority, the 30-day hold is mandatory, with certain exceptions. . . Thus, SO7's instruction that officers use § 14602.6(a)(1) effectively mandated the 30-day hold of Plaintiffs' vehicles. Moreover, that some vehicles owners may be able to recover their vehicles prior to the passing of 30 days under the procedure outlined in § 14602.6(b) does not solve the constitutional problem because subsection (b) puts the burden on the owner to request a hearing and demonstrate mitigating circumstances. Constitutionally, the burden is on the City to justify holding the vehicle beyond the initial seizure. . . Accordingly, regardless of whether a 30-day hold resulted every time § 14602.6(a)(1) was used as the impound authority, the decision to use § 14602.6(a)(1) necessarily led to the seizure of vehicles without the required justification. As the Ninth Circuit noted on appeal, Defendants could have avoided the constitutional issues associated with impoundment under § 14602.6(a)(1) by directing officers to use only the impound authority provided by § 22651(p). . . In summary, the Impound Policy is exactly the type of official, generally applicable policy for which local governments may be held liable pursuant to *Monell*. Ninth Circuit precedent instructs that the fact that a municipal defendant acted pursuant to state law 'goes only to the question of [the individual officials'] good faith in applying the statute' and is irrelevant to whether a municipal action is a policy under *Monell* .. . Even if municipalities may not be held liable for enforcing mandatory state laws that allow no meaningful discretion at the local level, as other circuits have held, the City is subject to liability because it exercised its discretion by directing officers to use § 14602.6(a)(1) in circumstances where § 22651(p) was equally applicable. Accordingly, the Court DENIES the Motion insofar as it seeks to dismiss Plaintiffs' § 1983 claims."); ***Phillips v. City of Cincinnati***, No. 1:18-CV-541, 2019 WL 2289277, at *11 (S.D. Ohio May 29, 2019) ("The Third Amended Complaint contains no allegations that Hamilton County had an official illegal policy or custom. Instead the only potential allegation that Defendant Hamilton County had an illegal policy or custom relates to the action of Defendant Prosecutor Deters as an official with final decision-making authority. In Ohio, 'a county prosecutor has final decision-making authority with regard to the operation of their offices and discharge of their duties.'. . Therefore, Prosecutor Deters is a final decision-maker for the purpose of Hamilton County municipal liability. Regarding Plaintiffs' *Monell* claim, the only action taken by Prosecutor Deters is that he 'acted in [his] official capacity and under color of law when filing a Complaint and Motion for *Ex Parte* Temporary Restraining Orders in case number A1804285.'.

. Even assuming arguendo that this single action by Prosecutor Deters was unconstitutional, '[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell,* unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.'. . Again, Plaintiffs do not identify any existing, unconstitutional policy *of Hamilton County*. The only potentially unconstitutional polices alleged by Plaintiffs are the City's Encampment Policy and the State Court Order – neither of which are Hamilton County policies. Therefore, because Plaintiffs fail to allege that a policy or custom of Hamilton County was the moving force behind the deprivation of their rights, Plaintiffs claims against Hamilton County for municipal liability under *Monell* fail as a matter of law. Accordingly, Hamilton County is dismissed from this action."); ***Welchen v. County of Sacramento***, 343 F.Supp.3d 924, 934-36 (E.D. Cal. 2018) ("Neither *Streit* nor *Cortez* apply to the facts at hand. The Bail Law is a state law, and the Bail Schedule is set by the Sacramento County Superior Court. . . As such, the Bail Law is not a sheriff-established policy that might be considered an administrative action like the policies at issue in *Streit* or *Cortez*. . . .Moreover, district courts within this circuit have determined that California Sheriffs act as representatives of the state, and not a county, when enforcing state laws, including the Bail Law. . . . Despite Plaintiff's argument that Ninth Circuit precedent bars a finding that the Sheriff is a state actor, Plaintiff's Ninth Circuit cases are distinguishable from the instant case. Further, federal district courts determined sheriffs act on behalf of the state when they are detaining an individual based on court orders. . . Similarly, the Sheriff implements the Bail Law according to the Sacramento County Superior Court's Bail Schedule because he is tasked to do so under state law. . . Thus, the Court determines that Ninth Circuit precedent does not preclude a finding that the Sheriff is a state actor. . . .Despite its title, the Sacramento County Superior Court is an arm of the State. . . . [A]fter carefully analyzing the Bail Law, in *Buffin*, the court determined that 'the Sheriff lacks discretion to release the arrested person outside the bounds of the statute.'. . . As in *McNeely*, where the court found that Cal. Pen. Code § 4004 requires sheriffs to detain arrestees 'until legally discharged,' here, the Sheriff similarly does not have discretion when implementing the Bail Law. . . For these reasons, the Court finds that the Sheriff acts on behalf of the state in implementing the Bail Law. Accordingly, the Eleventh Amendment shields the Sheriff from suit for money damages. However, based on the *Ex Parte Young* exception to sovereign immunity, Plaintiff may seek declaratory or injunctive relief against the Sheriff for allegedly unconstitutional conduct related to the Bail Law. . . . Because the Court has determined that the Sheriff acts on behalf of the state on this issue, the County is not liable for the Sheriff's implementation of the Bail Law."); ***Cambridge Taxi Drivers v. City of Cambridge***, No. CV 16-11357-NMG, 2017 WL 373491, at *5 (D. Mass. Jan. 25, 2017) ("As explained above defendants are preempted from regulating TNCs [Transportation Network Companies]. Consequently, state policy, not municipal policy, now prevents defendants from regulating TNCs. Because municipalities are liable only for their own illegal acts, *Connick v. Thompson*, 563 U.S. 51, 60 (2011), defendants cannot be held liable for the conduct alleged in the complaint. See *Yeo v. Town of Lexington*, 131 F.3d 241, 257 (1st Cir. 1997) (Stahl, J., concurring) (citing Surplus Store & Exch., Inc. v. City of Delphi, 928 F.2d 788, 791-92 (7th Cir. 1991))."); ***Fant v. The City of Ferguson***, No. 4:15-CV-00253-AGF, 2016 WL 6696065, at *3, *6 (E.D. Mo. Nov. 15, 2016) ("[T]he City argues that each of the claims

at issue arises out of a municipal court judge's allegedly improper action (or inaction) in carrying out judicial functions as part of the Ferguson Municipal Court, which, according to the City, is an arm of the state and is outside the control of the City as a matter of state law. The City then cites a line of federal cases following the United States Supreme Court's decisions in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), for the proposition that 'the actions of a municipal judge in his or her judicial capacity to enforce state law do not act as a municipal official or lawmaker for purposes of municipal liability under 42 U.S.C. § 1983.'. . .The federal circuit courts of appeal (in the line of cases relied upon by the City) have applied this rule to find that a municipal judge does not act as a final policymaker of the municipality for purposes of municipal liability when she makes a judicial decision under the authority of state law and appealable to the state's higher courts. *See, e.g., Granda v. City of St. Louis*, 472 F.3d 565, 569 (8th Cir. 2007); *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1189–90 (10th Cir. 2003); *Eggar v. City of Livingston*, 40 F.3d 312, 314–16 (9th Cir. 1994); *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992); *Woods v. City of Michigan City, Ind.*, 940 F.2d 275, 277–78 (7th Cir. 1991). In each of these cases, the plaintiffs 'by naming [a particular municipal court judge acting in his judicial capacity] as the source of the constitutional deprivation, detach[ed] the local governments from the unconstitutional policy.' *Woods*, 940 F.2d at 279. But Plaintiffs do not seek to hold the City liable for the judicial decisions made by a municipal court judge in particular cases. Indeed, as noted above, Plaintiffs allege that the constitutional deprivations here took place largely outside of any judicial process. Instead, Plaintiffs' complaint is replete with allegations that each of the injuries alleged was caused by the City's own unconstitutional policies and by the continuing and pervasive unconstitutional practices of a wide range of City employees. The Court finds that Plaintiffs have pleaded enough facts to raise a reasonable expectation that discovery will reveal evidence to support their claim of municipal liability under § 1983, which is all that is required at this stage."); ***Frobe v. Village of Lindenhurst***, No. 11 C 1722, 2014 WL 902878, *9, *10 (N.D. Ill. Mar. 7, 2014) ("For the reasons explained earlier, the officers' enforcement of a facially valid state law does not violate the Fourth Amendment. In any event, Plaintiff's real challenge to the eavesdropping arrest is to the validity of the law itself—but the state law is a state law, not municipal policy. . . . In *Surplus Storage*, a store brought a § 1983 action against a municipality after a municipal police officer, acting in accordance with state law, seized property from the plaintiff without a judicial hearing. . . The district court dismissed the action against the city, and the Seventh Circuit affirmed, because no municipal policy had caused the violation: state statutes provided authority for the officer to seize such property without a judicial hearing. . . As in this case, the *Surplus Storage* plaintiff did not 'claim that the alleged constitutional violation was caused by' a formal policy or an entrenched practice with the effective force of a formal policy, 'that was itself unconstitutional.'. . Instead, the plaintiff argued that the state statutes were unconstitutional and that the municipality could be held liable 'for the deprivation of [plaintiff's] property because [the municipality] ha[d] a "policy" of allowing or instructing its police officers to enforce the challenged statutes.'. .The court rejected the notion that a policy of enforcing state law could be a basis for *Monell* liability. . . . Plaintiff Frobe believes that a policy of training and encouraging officers 'to enforce a flagrantly unconstitutional state law could be a basis for *Monell* liability'. . . but, as the court has already concluded, the IEA cannot be characterized as so

'flagrantly unconstitutional' that its enforcement violates the Constitution. Moreover, the authorities that Plaintiff himself cites confirm the rationale of *Surplus Storage*: in the cases he cites, the defendant municipality was adhering to its own unconstitutional policy. See *Wessel v. Village of Monee,* No. 04 C 3246, 2010 WL 2523574, at *4 (N.D. Ill. June 14, 2010) (complaint adequately stated a cause of action because it alleged that the 'gender-based enforcement' of state statutes was a regular pattern or practice); *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483–84 (1986) (county prosecutor's command for police to forcibly enter a property was a final municipal policy that itself violated plaintiff's Fourth Amendment rights). Count V, the claim against Defendant Village, is dismissed."); ***N.N. ex rel. S.S. v. Madison Metropolitan School Dist***., 670 F.Supp.2d 927, 932 -41 (W.D. Wis. 2009) ("Instead of trying to defend the constitutionality of its racial balancing plan, defendant's primary response is to put the blame on the state of Wisconsin. To the extent it used race to make transfer decisions, defendant says, it was the direct result of Wis. Stat. ' 118.51(7). Under that statute, a 'school board ... shall reject any application for transfer into or out of the school district ... if the transfer would increase racial imbalance in the school district.' According to defendant, ' 118.51(7) left it with no constitutional alternative. 'The culpability of one who harms another under coercion is, and has always been, a subject of intense debate, raising profound questions of moral philosophy and individual responsibility.' *Negusie v. Holder,* 129 S.Ct. 1159, 1169 (2009) (Scalia, J., concurring). Similar questions arise for courts determining whether a municipality should be held accountable for implementing an unconstitutional state law or policy. On one hand, courts emphasize repeatedly that liability under 42 U.S.C. § 1983 is 'predicated upon fault,' *e.g., Wolf-Lillie v. Sonquist,* 699 F.2d 864, 869 (7th Cir.1983), suggesting that municipalities should not be required to pay damages for simply doing what they are told to do. After all, as the Supreme Court has recognized, municipalities are simply creatures of the state. *E.g., Ysursa v. Pocatello Education Association,* 129 S.Ct. 1093, 1100 (2009). They are not protected from 'commandeering' by the state as are states by the federal government, *Printz v. United States,* 521 U.S. 898 (1997), because they have no independent sovereignty. Rather, a municipality derives all of its authority from the state, which may choose to withdraw that authority whenever it wishes. . . On the other hand, courts often reject a defense of 'I was just following orders' when it is asserted by individual defendants in a civil or criminal case, including cases under § 1983. [citing cases] In the context of § 1983, the reason for rejecting such a defense is the idea that, under the Supremacy Clause, public officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy. . . These competing concerns may be the reason circuit courts have come to varying conclusions on the questions whether and to what extent municipalities may be held liable under § 1983 for following state laws. The overarching questions in any case involving municipal liability under § 1983 are whether the unconstitutional act 'may fairly be said to represent official policy' of that municipality and whether the policy was the 'moving force' behind the violation. . . Stated another way, the question is whether there is a 'direct causal link,' *City of Canton, Ohio v. Harris,* 489 U.S. 378, 386 (1989), between the violation and a 'deliberate choice [by the municipality] to follow a course of action ... made from among various alternatives.' . . Although this standard is well established, the Supreme Court has yet to discuss its application in the context a municipality's enforcement of a state law. In this vacuum, lower courts have come to their own unique

conclusions.[collecting cases] . . . . Although different courts may use a different part of the standard to frame their analysis, all of them seem to be trying to resolve the same question that Justice Scalia raised in *Negusie,* which is under what circumstances is it fair to impose punishment for 'just following orders'? Some courts believe that a municipality should not have to choose between violating (or even simply ignoring) state law and violating the Constitution; other courts believe that constitutional rights always take precedence over state law. (In *Vives,* 524 F.3d at 356, the court hinted at a compromise position, that a municipality could be held liable for complying with state mandates that 'are so obviously and deeply unconstitutional that the mere fact of their enforcement gives rise to a strong inference that the municipality must have made a Aconscious choice' to enforce them.") Taking the former position means that municipalities are protected from the heavy burden of undertaking an independent analysis of every state directive for compliance with the Constitution and risking a standoff with state government whenever the municipality concludes that a particular directive does not pass the test. However, it also means that victims of constitutional violations may go without a remedy; although the state might seem to be the more appropriate defendant in such cases, the Supreme Court has concluded that Congress did not intend to include states within the reach of § 1983. . . This circuit's take on the issue is set forth in two opinions, *Surplus Store and Exchange, Inc. v. City of Delphi,* 928 F.2d 788, 791-92 (7th Cir.1991), and *Bethesda Lutheran Homes and Services, Inc. v. Leean,* 154 F.3d 716, 718 (7th Cir.1998), but the discussions in both cases are relatively brief and not necessarily completely consistent. . . . . Surprisingly, the parties do not discuss the tension between *Bethesda Lutheran* and *Surplus Store.* Because it does not affect the outcome of the case, I will apply the standard in *Bethesda Lutheran,* which is more favorable to plaintiff.. . . Whether it is framed as an issue of 'causation,' 'policy' or 'choice,' the question under *Bethesda Lutheran* is whether the municipality enforcing a state law has enough discretion in implementation to make the municipality 'responsible' for any constitutional violation that occurred. . . In this case, the parties agree that, on its face, Wis. Stat. ' 118.51(7) does not give school districts a choice to comply. It states that the school district 'shall' reject transfer requests that 'would increase racial imbalance in the school district.'. . However, the difference between this case and *Bethesda Lutheran* is that defendant was not simply applying ' 118.51(7) directly, but applying its own interpretation of the law in its own guidelines. Although the statute requires school districts to adopt a resolution 'specifying ... the limitation on transfers into or out of the school board under sub. (7),' Wis. Stat. ' 118.51(4)(a)5, it does not tell the district *how* to 'specify' that 'limitation.' Plaintiff argues that the discretion left to the school district is enough to make the policy its own and justify a damages award under § 1983.. . . An important question is whether defendant could have applied Wis. Stat. ' 118.51(7) in a manner that was consistent with the Constitution. If defendant had 'various alternatives' in front of it, some constitutional, some not, but it made the 'deliberate choice to follow a course of action' that violated the Constitution, . . that would weigh heavily in favor of finding that defendant adopted an unconstitutional policy that caused plaintiff's injury. . . . In sum, defendant could not have used the discretion it had to create a constitutional transfer plan that was consistent with Wis. Stat. ' 118.51(7). Even if defendant had not used a binary racial classification system or had allowed greater racial disparities within particular schools or the school district as a whole, its plan would still be unconstitutional under *Parents Involved.* Defendant's transfer plan was

unconstitutional not because of a particular interpretation of ' 118.51(7), but because of the statute's directive to deny all transfer requests that would 'increase racial imbalance.' . . . In this case, the policy choice was made by the state: to prohibit transfers that increase racial balance. Although it was defendant that defined 'increase racial balance,' it did so in the context of trying to implement a state mandate and a state policy. . . . In sum, I conclude that a municipality cannot be held liable under § 1983 for efforts to implement a state mandate when the plaintiff cannot point to a separate policy choice made by the municipality. In that situation 'it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury.'. . . Plaintiff's last argument is that defendant may be held liable because it made the 'choice' to comply with Wis. Stat. ' 118.51(7) rather than the Constitution. Although plaintiff advances a number of legitimate arguments in favor of this approach to municipal liability (mostly tracking the reasoning of *Davis* and *Caminero*), plaintiff recognizes that circuit precedent forecloses it. Under *Bethesda Lutheran,* 154 F.3d at 718, municipalities do not have to choose between following their own interpretation of the Constitution and putting themselves at 'war with state government.'"); ***Lui v. Commission on Adult Entertainment Establishments of the State of Delaware,*** 213 F.R.D. 166, 174, 175 (D. Del. 2003) ("Under Delaware constitutional, statutory, and decisional law, the County acts only as an agency of the State in exercising its zoning authority. . . . The County simply has no alternative but to maintain and enforce the State's policy in this regard. It would be a strange and unfair result, then, to hold that the State is immune from suit for imposing the 2,800 foot restriction but to simultaneously allow the County to be sued for following a State mandate that requires the same restriction."), *aff'd on other grounds,* 369 F.3d 319 (3d Cir. 2004); ***Johnson v. Fink,*** No. 1:99-CV-35-R, 1999 WL 33603131, at *3 (W.D. Ky. Sept. 17, 1999) (not reported) ("Kentucky sheriffs are county officials. However, the particular actions at issue are attributable to the state, and thus, the sheriffs were acting as state officials when they were executing the search warrant."); ***West v. Congemi***, 28 F. Supp.2d 385, 394, 395 (E.D. La. 1998) ("The Fifth Circuit has long recognized that simply following the mandatory dictates of state law cannot form a predicate for *Monell* liability. . . . Chief Congemi was enforcing a constitutional Louisiana state statute, the terms of which mandate termination in the situation at issue. Once it was found that the actions of the plaintiff fell under the definition of proscribed 'direct or indirect' political activity, then the plaintiffs' § 1983 claims against the City of Kenner must necessarily fail."); ***Hill v. Franklin County, Ky.***, 757 F. Supp. 29, 32 (E.D. Ky. 1991) (decision to release intoxicated arrestee was not result of county policy where arrest and release policy was governed by state statutes), *aff'd*, 948 F.2d 1289 (6th Cir. 1991) (Table).

Compare ***Crabbs v. Scott (Crabbs I)***, 786 F.3d 426, 429-31 (6th Cir. 2015) ("At first blush, then, this case looks easy. Sheriff Scott is an officer of the county, not the State, and accordingly he may not invoke the *State's* sovereign immunity. But law-enforcement officers sometimes wear multiple hats, acting on behalf of the county *and* the State. In that setting—today's setting—the immunity question is not whether the officer acts for the State or county 'in some categorical, "all or nothing" manner.'. . Immunity hinges on whether the officer represents the State in the 'particular area' or on the 'particular issue' in question. . . And that depends on how state and local law treat the officer in that setting. . . Relevant factors include: (1) the State's potential

liability for a judgment; (2) how state statutes and courts refer to the officer; (3) who appoints the officer; (4) who pays the officer; (5) the degree of state control over the officer; and (6) whether the functions involved fall within the traditional purview of state or local government. . . . Measured by these six factors, Sheriff Scott acted as a county, not a state, official in this instance. One: The county, not the State, would satisfy any judgment against the sheriff in this case, as the parties agree.

Two: Ohio law classifies county sheriffs as 'county officials' and 'employees.' Ohio Rev.Code §§ 301.28(A)(3), 2744.01; *see Thurlow v. Bd. of Comm'rs of Guernsey Cnty.,* 91 N.E. 193, 194 (Ohio 1910).

Three: The voters of each county elect their own sheriff. Ohio Rev.Code § 311.01(A).

Four: Each county, not the State, pays the salary of its sheriffs and funds their offices. *Id.* §§ 325.01, 311.06.

Five: Each county board has 'final authority' over the sheriff's budget, *State ex rel. Trussell v. Meigs Cnty. Bd. of Comm'rs,* 800 N.E.2d 381, 386 (Ohio Ct.App.2003), and the sheriff serves as the county's 'chief law enforcement officer' with jurisdiction 'coextensive with' the county's borders, *In re Sulzmann,* 183 N.E. 531, 532 (Ohio 1932).

Six: A sheriff's law enforcement duties at common law represented local functions. *See* 70 Am.Jur.2d Sheriffs, Police, & Constables § 2. To be sure, the governor can initiate removal proceedings against the sheriff and issue some orders to him, Ohio Rev.Code §§ 3.08, 107.04, but that does not outweigh the rest of Ohio law and its treatment of sheriffs as local officials. Nothing in the Ohio Constitution says anything to the contrary. *Cf. McMillian,* 520 U.S. at 787–89. All of this explains why Ohio county sheriffs generally are treated as county policymakers. . . And all of this explains why official-capacity lawsuits against the Franklin County Sheriff challenging his law-enforcement and jail-maintenance policies normally proceed as suits against the county itself. . . Sheriff Scott tries to fend off this general rule and the application of these considerations by arguing that, for purposes of DNA collection, he serves as an officer of the State. Why? Because state law—in this case, § 2901.07—controls his DNA-collection policies. 'Where county officials are sued simply for complying with state mandates that afford no discretion,' he adds, 'they act as an arm of the State' under the Eleventh Amendment. *Brotherton v. Cleveland,* 173 F.3d 552, 566 (6th Cir.1999); *see also, e.g., Vives v. City of N.Y.,* 524 F.3d 346, 353 (2d Cir.2008) (asking 'whether the City had a meaningful choice' of action under state law); *Richman v. Sheahan,* 270 F.3d 430, 440 (7th Cir.2001) (treating sheriff as county officer because there was 'no state policy directing the sheriff's actions'). The sheriff is right in one respect but not in another. He is right that sovereign immunity would bar this lawsuit if state law *required* him to take the actions he took. *See Gottfried v. Med. Planning Servs., Inc.,* 280 F.3d 684, 692–93 (6th Cir.2002); *Brotherton,* 173 F.3d at 565. But he is wrong to claim that state law required him to swab Crabbs' cheek after his acquittal. '[T]he essential question is the degree of discretion possessed by the official ... implementing the contested policy.' *Cady v. Arenac Cnty.,* 574 F.3d 334, 343 (6th Cir.2009). If Sheriff Scott's policies 'mechanically adopt and enforce' Ohio's DNA-collection law, he may invoke the State's sovereign immunity to deflect Crabbs' suit. . . If not, the State's sovereign immunity offers him no refuge. Scott's application of his DNA-collection policy to Crabbs does not flow inevitably from § 2901.07. For even if Ohio law *permitted* collecting Crabbs' DNA, a

point we need not decide, § 2901.07 did not *require* it in his case for two independent reasons. For one reason, Crabbs' March 2012 arrest for violating the conditions of his bond—the only one occurring after mandatory collection of DNA from arrestees began in July 2011—was not an arrest 'for a felony offense.' . . .For another reason, no State law required Sheriff Scott to hold Crabbs for a cheek swab after the jury acquitted him. . . .In no way, then, did Sheriff Scott's DNA-collection and ID-hold policies 'mechanically adopt and enforce' Ohio law. . . Because Scott 'could have opted to act differently, ... he did not act as an arm of Ohio when he formulated and implemented the contested polic[ies].'. . That does not make those policies unconstitutional or otherwise illegal, to be clear. But it does leave the sheriff in his normal capacity as a county officer.") *with* ***Cady v. Arenac County***, 574 F.3d 334, 342-45 (6th Cir. 2009) ("The defendants, in particular, never put forth an argument that Broughton was functioning as an agent of the state − and is thus entitled to sovereign immunity − in his dealings with Cady. We nonetheless conclude that Broughton was in fact acting as an agent of the state and that Cady's suit against him in his official capacity is barred by the Eleventh Amendment. . . . Relying on *Brotherton v. Cleveland,* 173 F.3d 552 (6th Cir.1999), the concurring opinion concludes that because County Prosecutor Broughton was not 'rotely' enforcing state law when he entered into the DPA [Deferred Prosecution Agreement], he was not acting as an arm of the state. . .We respectfully disagree. . . . The *Brotherton* court explained that when considering whether a contested policy is state policy, the essential question is the degree of discretion possessed by the official in question in implementing the contested policy. . . But the language of *Brotherton* makes clear that the 'essential question' of discretion applies only to *policy* choices and not to individual acts by the official in enforcing state law. The reason for this distinction is that even in 'rote' enforcement actions, a prosecutor must make a myriad of choices, such as 'whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant.'. .If any of these decisions negated 'state action" simply because the prosecutor could have 'act [ed] differently, or not at all,'. . . then very few prosecutorial actions would be considered 'state action.' Such a position is not supported by *Brotherton* or by other caselaw. . . This case concerns a single action − the decision to enter into the DPA − by County Prosecutor Broughton. A widespread 'policy' is not implicated here. As the concurrence points out, the DPA was the first and only such agreement ever entered into by the county prosecutor's office. The question, therefore, is not whether Broughton could have resolved the case in another manner, but whether the DPA was carried out as part of his prosecutorial duties in enforcing state law. We conclude that the situation here is analogous to a plea bargain, which has long been considered to be one of the 'critical prosecutorial decisions.'. . Prosecutor Broughton had determined, pursuant to his duty as a state prosecutor, that the best way to resolve Cady's case was to drop charges against Cady in exchange for a six-month 'cooling off' period. His actions were sufficiently analogous to plea bargaining to be considered as duties executed as an arm of the state. . . . [W]hen County Prosecutor Broughton made the decisions related to the issuance of state criminal charges against Cady, the entry of the DPA, and the prosecution of Cady, he was acting as an agent of the state rather than of Arenac County. His actions therefore cannot be attributed to Arenac County, and Arenac County cannot be held liable for Broughton's actions even if those actions violated Cady's rights.").

McNeil v. Community Probation Services, LLC, 945 F.3d 991, 993-97 (6th Cir. 2019) ("Under Tennessee law, a county sheriff enforces probation-violation warrants and the bail amounts are established by state law and set by a local judge. The district court granted the probationers a preliminary injunction against the county's and sheriff's enforcement of the bail requirements. The county and sheriff do not challenge the preliminary constitutional ruling. They argue for now only that the probationers should have sued the state judges who determine the bail amounts instead of suing the county and sheriff who enforce them. We affirm. . . .The probationers say that the county and sheriff violated their 'substantive right against wealth-based detention' by detaining them after arrest until they pay bail. . . The problem, say the probationers, is that the judges set the bail amount 'without reference to the person's ability to pay,' outside the person's presence, and without determining whether the person poses 'a danger to the community or a risk of flight.'. . The district court granted the plaintiffs a preliminary injunction against the county and sheriff on this theory. The injunction prohibits them from 'detaining any person on misdemeanor probation ... based on a secured financial condition of release.'. . The probationers acknowledge that a bail-based detention determined through a different process would work. To that end, the injunction permits the county and sheriff to enforce bail accompanied by evidence of the probationer's ability to pay, the necessity of detention, and the alternatives to bail. Sheriff Helton and Giles County appeal. Accepting the preliminary constitutional ruling for purposes of this appeal, they argue only that the district court permitted the plaintiffs to sue the wrong party and thus imposed the wrong remedy. Instead of enjoining them from enforcing the arrest warrants, they say, the court should have enjoined the judges from issuing them. . . . Start with the sheriff—and his amenability to suit. The short answer is that the plaintiffs can sue the sheriff, and it makes no difference whether he acts for the State or the county. If he acts for the State, *Ex parte Young* permits this injunction action against him. If he acts for the county, neither sovereign immunity, qualified immunity, nor any other defense stands in the way at this stage of the case. The longer answer, the more precise answer that accounts for some of the sheriff's arguments, requires us to consider some details of the Tennessee bail system. The threshold question is whether Sheriff Helton acted for the county or the State when he enforced the bail amounts by detaining probationers until payment. . . When a county official commits an alleged constitutional violation by 'simply [ ] complying with state mandates that afford no discretion, they act as an arm of the State,' not the county. . . Tennessee law suggests that Sheriff Helton acted for the State when he enforced the bail amounts. The Tennessee Constitution creates the office of county sheriff. . . And the state legislature prescribes a sheriff's 'qualifications and duties.'. . The legislature requires sheriffs to 'obey the lawful orders and directions of the court[s]' as well as to '[t]ake charge and custody' of the county jail 'and of the prisoners therein ... and keep them ... until discharged by law.'. . Discharged by law as told by whom? The Tennessee Supreme Court tells us. When Tennessee law does not assign anyone the duty to determine whether a county jail detainee is eligible for release, the county sheriff has the responsibility. . . When Tennessee law by contrast assigns that duty to an entity, the sheriff 'is not authorized to release' the county jail detainee until notified by the decisionmaker. . . In this instance, the condition of release is the bail amount. Tennessee entrusts the determination of that amount to its judges. . . That means

Tennessee directs Sheriff Helton to hold probationers in the county jail until they pay bail. . . And that, in turn, means he acts for the State when he takes the challenged action, detaining probationers under judge-set bail amounts. That leaves the question of whether the sheriff can be sued in an injunction action as an official enforcing state policies. In accordance with *Ex parte Young*, . . . sovereign immunity does not stand in the way of a lawsuit against a public official 'actively involved with administering' the alleged violation. . . Tennessee statutes command that involvement when they place the sheriff in charge of keeping detainees in the county jail. . . As a factual matter, the parties agree that Sheriff Helton carries out his statutory responsibility by detaining arrestees in the county jail. All in all, Sheriff's Helton's actions come within *Ex parte Young*'s domain. The Sheriff disputes this conclusion on a few fronts. He claims that his detention of the probationers is not the real violation. The true problem, he says, is the way the judges set bail amounts. There's something to the point. Think of the difficulty of describing the alleged violation without mentioning a judge's action. Fair though the point is, it does not come to grips with another reality—that an alleged violation may involve two actors and the potential immunity of one does not necessarily free the other from suit. Consider the alleged violation to be two actions. Action one: A judge determines a bail amount without considering ability to pay or adequacy of alternatives. Action two: Sheriff Helton detains the probationer until she pays the bail amount. The alleged constitutional violation is detention on an improperly determined bail amount. The plaintiffs might have employed a different theory and sued the judges, if not immune themselves, for their part in carrying out the alleged harm. But 'the plaintiff is the master of the complaint' and free to choose between legal theories. . . Absent some other bar, they are free to sue the sheriff. Sheriff Helton insists that this approach unduly expands *Ex parte Young* by permitting an injunction against an official who implements a constitutional violation caused by another official, citing our observation that courts 'have not read *Young* expansively.'. . The probationers, he says, should have sought an injunction against the judges themselves, and we should not expand *Ex parte Young* when the probationers could receive relief by structuring their lawsuit differently. But this objection suffers from the same flaw as the last. The probationers are free to structure their complaint as they wish. Plus, this approach does not expand *Ex parte Young* anyway. There are plenty of cases allowing injunction actions like this one. . . . It also remains unclear whether the plaintiffs could structure their lawsuit by suing the judges who set the bail amounts. Judges have absolute immunity from suits based on their judicial acts, except in matters over which they clearly lack jurisdiction. . . Although declaratory relief is sometimes available against judges, our sister circuits have pointed out that there is usually no case or controversy between judges acting as adjudicators and litigants displeased with litigation outcomes. . . . All of this leaves the matter more complex and less settled than defendants suppose, especially given that 'we err on the side of granting [judicial] immunity in close cases.'. . For this reason too, we cannot fault the plaintiffs for taking the well-trodden path marked by *Ex parte Young* instead of charting a new-to-our-circuit course through the comparative jungle of judicial immunity. . . .The lawsuit also may proceed against the county for now. The county does not deny that it employs the sheriff. Nor does it deny the sheriff's involvement in the challenged detention. Nor does it claim he acted against its commands when he detained the plaintiffs. Nor does sovereign immunity protect counties from lawsuits. . . The

county, it is true, may be able to raise defenses to this § 1983 claim. It may be able to show, for example, that no constitutional violation occurred or that a county policy or custom did not trigger it. . . But a few considerations counsel against resolving that defense today. At this phase of the case, the county has accepted plaintiffs' allegations that the bail system violates the federal constitution but reserved its right to defend the system during the permanent injunction phase of the case. There's value in assessing the role of any county policy in these alleged constitutional violations in the context of a concrete debate about what those violations are or are not. Discovery may shed light on whether there is a pertinent county policy or not, as the only facts in evidence are a stipulation solely for preliminary injunction purposes. And it's hard to see a practical difference between affirming a preliminary injunction against the sheriff alone and affirming it against both the county and the sheriff, at least in the context of a case in which neither one thus far defends the constitutionality of the practices here. All of that said, the district court may wish to resolve the *Monell* defense promptly on remand. We affirm."); ***Webb v. City of Maplewood,*** 889 F.3d 483, 484-86 (8th Cir. 2018) ("Cecelia Webb and five other motorists have filed a putative class action against the City of Maplewood, Missouri, under 42 U.S.C. § 1983, claiming its policy or custom violates their constitutional rights. They assert the City automatically issues an arrest warrant whenever someone ticketed for violating its traffic and vehicle laws fails to pay a fine or appear in court. Once arrested, the motorist is allegedly presented with a Hobson's choice: Either pay a bond the amount of which was set in advance without any determination of his ability to pay it, or sit in jail possibly for days. The plaintiffs further contend that once a warrant has been issued, a motorist cannot avoid it by voluntarily returning to the municipal court or paying the outstanding fine, but must either submit to a custodial arrest or retain a lawyer to argue a motion before the municipal judge to vacate the warrant. If the court does not grant the motion, the motorist, whose presence in court the judge allegedly demands, will be arrested and jailed. Jail, the plaintiffs assert, is the means by which the City attempts to coerce the motorist into paying the bond to secure his release. The complaint indicates that the City's policy or custom involves additional steps that can ensnare motorists in repeated cycles of arrest, jailing, and pressure to pay a bond irrespective of their ability to do so. The plaintiffs maintain that since their poverty makes it difficult if not impossible to pay the bond, the City thereby violates, among other things, their due-process and equal-protection rights. . . . The City appeals from the order denying it immunity, and we affirm. We review a district court's decision about whether a party is immune from suit de novo. . . The City argues that it enjoys immunity for two reasons: first, under the Eleventh Amendment since the municipal court, which is an arm of the State of Missouri, is responsible for most of the disputed practices and is thus the real party in interest here; and second, because the absolute immunity of the responsible officials renders the City immune as well. The City is wrong in both respects. . . . [I]n arguing for sovereign immunity, the City does not contend that it enacted or maintains the contested practices as an arm of the State, but that virtually all of the practices revolve around the municipal court, a separate and distinct entity over which it disclaims any control, and it is the court that is the arm of the State. But if the municipal court rather than the City is responsible for the practices, the City will have a defense on the merits but not immunity from suit. . . Even if the court were entitled to immunity—an issue we do not opine on—that immunity would not shield the City from its separate liability if any.")

b. Local Government Liability Where Local Entity Exercises Discretion or Control Over Enforcement of State Law

See ***Crabbs v. Scott (Crabbs I)***, 786 F.3d 426, 429-31 (6th Cir. 2015) (*supra,* in previous section). *See also* ***Todman v. Mayor & City Council of Baltimore***, 104 F.4th 479, 487-95 (4th Cir. 2024) ("Section 1983 claims against municipalities require that a plaintiff show not only that his rights were violated, but also that the municipality was responsible for that violation. . . Although the Todmans had 'moved for summary judgment only on whether their constitutional rights were violated,' the district court found that they were also 'entitled to summary judgment on the issue of the City's responsibility for the constitutional violation.'. . The City did not object to this *sua sponte* ruling below, and the district court entered judgment against the City and scheduled a trial on damages. After a three-day damages trial, a federal jury awarded the Todmans $36,000 in compensatory damages and $150,000 for emotional distress. The City has not challenged the amount of that award on appeal. The City instead appeals the district court's summary judgment rulings. It argues that neither the Abandonment Ordinance nor its application to the Todmans violated due process, and that even if it did that application cannot be laid at the feet of the City. It also contends that the district court erred procedurally when it granted summary judgment on the City's responsibility without allowing the City to brief the issue first. . . . We start with the City's contention that the Todmans' procedural due process rights were not violated at all. Due process is guaranteed by the Fourteenth Amendment, which prohibits the states from 'depriv[ing] any person of life, liberty, or property, without due process of law.' To establish a procedural due process violation under § 1983, plaintiffs must show (1) that they were deprived of a cognizable liberty or property interest (2) through some form of state action (3) with constitutionally inadequate procedures. . .The Todmans clearly meet the first two requirements. First, they were deprived of a protected property interest. Ownership interests in personal belongings are protected under the Due Process Clause. . . .Second, the City's Abandonment Ordinance (which is clearly a form of state action) caused that deprivation. . . .We thus conclude that the Todmans were deprived of a cognizable property interest by state action—namely, the operation of the City's Abandonment Ordinance. The first two requirements having been met, we turn to the third: whether the procedures provided here were constitutionally adequate. 'The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it."'. . . The Todmans, however, received neither. . . . Here, the Todmans needed to be notified of the threat of abandonment should their personal possessions be left in the leased premises at eviction. None of the pre-hearing notices given to the Todmans as part of the state-law eviction procedures even mentioned the possibility of personal-property abandonment. So those cannot possibly have provided sufficient notice. The only notice that could even be said to have attempted to inform the Todmans of the possibility of abandonment was the copy of the warrant of restitution in their case sent to them by mail on July 17. But this notice was not sufficient either. While delivery by mail is a constitutionally sufficient method of providing notice, . . . the content of the notice mailed to the Todmans was not reasonably calculated to convey the relevant information. . . .The City points out that the warrant of restitution is a form created by the Maryland judiciary, and that the City has no control over its content. But if the state judiciary

is not providing sufficient notice of the City's ordinance, the City must step in to provide that notice if it wants its ordinance to survive a due process challenge. As mentioned above, the Abandonment Ordinance includes just such additional notice requirements for other types of evictions. The City retorts that it is prohibited from requiring additional notice in holdover cases by Maryland law, which says that after satisfying the steps laid out by state law, landlords are entitled to an eviction order 'without any additional notice.' Md. Code, Pub. Local Laws, art. 4 § 9-19. But that law says they are entitled to an *eviction order*, not to their tenants' belongings. The City could still (consistent with state law) condition the triggering of the Abandonment Ordinance on the landlord's providing additional notice. Or it could undertake to provide such notice itself. What it cannot do is evade the requirements of the Due Process Clause by throwing up its hands and saying, 'We don't make the notice form.' Respecting one of the Constitution's most basic guarantees should be simple and straightforward. The notice due plaintiffs such as the Todmans should include the date of the eviction and the threat and consequences of abandonment. Critically, the notice should be readily accessible and easily understood and should be of a form that drafters of the ordinance would appreciate if their own property were at risk. The notice here was not sufficient. . . .Application of the three *Mathews* factors here makes clear that the Todmans were entitled to more process than the City provided before their personal property rights were extinguished. . . . . Given the absence here of any opportunity at all to contest the abandonment, additional safeguards would be quite valuable. Even a short post-deprivation reclamation period could decrease the risk of error significantly. . . .The City has not suggested to us any way in which its interest in keeping eviction chattels off the streets would be harmed by these additional procedures. . . . There are any number of ways, including those adopted by other jurisdictions. . . for the City to achieve its undeniably legitimate aims without extinguishing evicted tenants' entire property rights with no semblance of proper notice or opportunity for reclamation. The three *Mathews* factors weigh in favor of the Todmans and against the current procedural regime. It is not our job to tell the City how to achieve its objectives. The City must, however, achieve its goals in a way that complies with both state *and* federal law—and that includes the due process protections guaranteed in the United States Constitution. . . . We turn now to the final question: whether the City can be held liable for the due process violation the Todmans suffered. Recall that plaintiffs seeking § 1983 damages from a municipality must show not only that they suffered a constitutional violation, but also that the municipality was *responsible* for the violation and its attendant harm. . . Local government entities are considered responsible only for unconstitutional actions that 'implement[ ] or execute[ ] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'. . . The City's Abandonment Ordinance is just such an official municipal policy. . . An unconstitutional policy, however, does not immediately entitle a plaintiff to compensation. There must be a 'direct causal link' between the municipal policy and the constitutional deprivation[.] . . Here, the causal link is clear. The Abandonment Ordinance was what gave the Todmans' landlord the right to claim possession of their things with legal impunity. As a self-executing statute, it operated automatically without the interference of any other actors upon the Todmans' eviction. And the unconstitutional lack of procedure here was no accident. The Abandonment Ordinance was implemented against the Todmans in conformity with the exact procedures the municipality chose. When a municipal

policy 'directly commands or authorizes constitutional violations, the causal connection between policy and violation is manifest and does not require independent proof.'. . The Abandonment Ordinance here commanded that the Todmans should forfeit their property with no notice requirement and no reclamation rights. There is thus a direct causal link between the City's policy and the violation of the Todmans' constitutional rights and the City can fairly be held responsible to them for the suffering and loss that resulted. The City tries to evade that responsibility by insisting that it does not control the eviction process—and therefore should not bear responsibility if the process was administered unconstitutionally. The City is right that evictions are administered by the Maryland state judiciary, but that is of no moment here. The procedures of the eviction process are not being challenged; the procedures surrounding the Abandonment Ordinance are what we have held were insufficient. And the confiscatory aspect of the Abandonment Ordinance is not governed by the state eviction process. State-judiciary-led eviction proceedings do not generally purport to encompass tenants' rights to their personal property or the abandonment of the same. . . . In short, the State generally provides procedures related to the disposition of the premises (a disposition that is governed by state law); procedures for carrying out the City's Abandonment Ordinance are left to the City to sort out for itself. It is true that the state judiciary (and not the City) authored the warrant of restitution that we held above provided insufficient notice. But the failure of process does not become the responsibility of the State just because the State has elected to provide some notice of the City's policy in the course of its administering evictions. When a municipality passes an ordinance purporting to affect the rights of its citizens, the municipality is the entity responsible for making sure that the ordinance does so constitutionally. Contrary to the City's protestations, this principle is in line with the edicts of *Monell. Monell* says that a municipality is not responsible when individuals working on behalf of the municipality commit a constitutional violation in the absence of a municipal policy. . .But each of the actors here—the state judiciary, the sheriff, and Collins—operated within the Abandonment Ordinance's scheme. The City's policy, embodied in its own ordinance, is specifically *not to require notice for holdover tenants* and *not to provide a reclamation period.* It cannot then point the finger elsewhere when notice is not given and reclamation not provided for. In sum, we think it eminently fair to hold a municipality responsible for harm caused by a failure of due process when it passes a confiscatory ordinance that fails to provide for the process due. We therefore hold that the City is responsible for the Todmans' constitutional harms and liable to them for their damages under § 1983, and affirm the district court as to the same."); ***Fox v. Saginaw County, Michigan***, No. 21-1108, 2022 WL 523023, at *6 (6th Cir. Feb. 22, 2022) (not reported) ("Like these individual officers, the county defendants were obligated to follow Michigan law once they decided to foreclose upon property units. Unlike other county officials, however, their actions leading up to that point were entirely voluntary. The Act on its face is not a mandatory statutory scheme. *See* Mich. Comp. Laws § 211.78(6) (establishing that foreclosure is voluntary). The counties were not required to act as an FGU [foreclosing governmental unit] or to foreclose on any given property, and yet they chose to do so. Because it is clear that the counties 'could have opted to act differently, or not to act,' they did not act as an arm of the State of Michigan. [citing *Brotherton*] Accordingly, they are not entitled to sovereign immunity."); ***Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors of Fairfax Count., Virginia,*** No. 19-1151, 2021 WL 1854750,

at *8–10 (4th Cir. May 10, 2021) (not reported) ("We have not definitively addressed whether *Monell* liability can be predicated on a local government's policy of enforcing state law. . . The majority of our sister circuits to consider the question have suggested that a local government can be subjected to *Monell* liability if it makes an independent choice to enforce or follow parameters set by state law, rather than being obliged to do so. [collecting cases]We find *Vives* instructive. There the City of New York chose to enforce a New York criminal statute that was later found to infringe the First Amendment. . . . The *Vives* court reasoned that '[f]reedom to act is inherent in the concept of "choice,"' and a state law 'mandating enforcement' by local government officials cannot be considered the product of a conscious choice. . . Local governments therefore 'cannot be liable under *Monell* in th[at] circumstance.'. . By contrast, if a local government entity 'decides to enforce a statute that it is authorized, but not required, to enforce, it may have created a ... policy' for which it can be liable. . . In sum, whether a local government entity's policy of enforcing a state statute renders it susceptible to *Monell* liability turns on 'whether a municipal policymaker has made a meaningful and conscious choice that caused a constitutional injury.'. . . The County can be held liable for its policy of enforcing Section 1224 because it consciously chose to enforce that particular state statute after requisite deliberation. . . Section 1225 authorizes—but does not require—Fairfax County to enter into a cooperative agreement with the Commissioner to enforce Section 1224. . . Likewise, the Agreement authorizes but does not mandate the County to enforce Section 1224 and sets parameters on its enforcement. Fairfax County's authority to enforce Section 1224 required the Board's acquiescence; it was under no obligation to enforce this state statute. In other words, the decision to enter the Agreement required county policymakers to make a conscious choice from among the various alternatives, including the alternative not to enforce the statute at all. As a result, the policy of enforcing Section 1224 is one 'for which the [County] is actually responsible' in accord with the principles of *Monell* liability. . .The County's policy, however, differs from the Commonwealth's policy; although the two overlap, they are not coextensive. The Commonwealth is responsible for applying the entire Code to all outdoor advertising. The County, by contrast, has decided to enforce only Section 1224, to enforce it only on certain roads and certain days of the week, and to fine only egregious violators. . . The County's policy does not incorporate other provisions of Virginia's sign regulations but is limited to signs within the limits of highways. Perhaps for that reason, the County's policy does not incorporate Section 1204, which excepts certain categories of outdoor advertising from particular provisions of Virginia's sign regulations 'if securely attached to real property or advertising structures.'. . . [O]ur question is not whether the County is complying with state law but whether the policy it voluntarily adopted and follows—whether in step with other state regulations or not—caused the alleged infringement of BTA's constitutional rights. The County did not adopt the exceptions in the pre-amendment version of Section 1204 into its policy, therefore the County cannot be liable for harms allegedly caused by those exceptions. The target of BTA's First Amendment claim is Virginia's sign regulations. Although the County can be liable for enforcing a state regulation it has voluntarily adopted as its own, it cannot be held liable for state statutes it has not consciously adopted into its own policy. Because BTA has not alleged a link between the County's policy of enforcing Section 1224 and its alleged injury, BTA's Section 1983 action against the County for violation of its First Amendment rights fails."); ***Sandoval v.***

County of Sonoma, 912 F.3d 509, 513-14, 517-18 (9th Cir. 2018) ("California state law provides that a peace officer may impound a vehicle for 30 days if the vehicle's driver has never been issued a driver's license. Relying on this statute, local authorities in California impounded two vehicles because their drivers had not been issued California driver's licenses. . . . Section 14602.6 does not define 'driver's license.' Following a similar practice of local officials throughout the state, the Sonoma County Sherriff's Office interpreted section 14602.6 as applying to individuals who had never been issued a California driver's license. The County impounded drivers' vehicles for 30 days—pursuant to the statute—when they had never been issued a California driver's license, even if they had a license from another jurisdiction. . . . Sandoval and Ruiz also sought to hold the County and City liable for money damages as the final policymakers who caused the constitutional violations. The defendants opposed, arguing that section 14602.6 permits impoundment when the driver has never been issued a California driver's license, and that they could not be liable for enforcing state law. The district court concluded that section 14602.6 did not permit impoundment for drivers who had previously been issued foreign driver's licenses, and that the municipalities' policies interpreting section 14602.6 to do so—contrary to the law—thus caused the constitutional violations. . . . On appeal, the County and City do not dispute that they had a policy of impounding vehicles for 30 days when the drivers had never been issued a California driver's license. Instead, they argue that the 30-day impounds were mandated by state law, and that they cannot be liable under section 1983 for enforcing state law. However, California Vehicle Code § 310 defines 'driver's license' as 'a valid license to drive the type of motor vehicle or combination of vehicles for which a person is licensed under this code or by a foreign jurisdiction.'. . . Accordingly, a driver who has been issued a driver's license in a foreign jurisdiction for the type of vehicle seized has not driven that vehicle 'without ever having been issued a driver's license,' and section 14602.6 does not authorize impounding their vehicles. The impoundment of plaintiffs' vehicles was thus not caused by state law, but by the defendants' policies of impounding vehicles when the driver had never been issued a California driver's license. The district court did not err by granting summary judgment to the plaintiffs on this issue. The City argues at great length that section 14602.6 applies to any driver who has never been issued a California driver's license. But the City's arguments cannot overcome the plain language of section 310, which includes licenses by a foreign jurisdiction. . . . Given the plain meaning of section 14602.6, the County's argument that state law caused the violation of Sandoval's rights is without merit. We thus need not decide whether the County's and City's policies of towing pursuant to section 14602.6 could have given rise to liability under *Monell* even if the statute had authorized the impoundment of the plaintiffs' vehicle."); ***Newton v. City of New York,*** 779 F.3d 140, 151 (2d Cir. 2015) ("If procedures followed by a municipality rather than a State prove to be constitutionally inadequate, even in the context of facially adequate State procedures, then a defendant may sue the municipality for violating his due process rights on the ground that the municipality's implementation of State procedures is inadequate."); ***Cooper v. Dillon,*** 403 F.3d 1208, 1222, 1223 (11th Cir. 2005) ("Similarly, we reject Dillon's argument that, based on the reasoning in *Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791 (7th Cir.1991), Key West cannot be liable for enforcing an unconstitutional state statute which the municipality did not promulgate or adopt. First,§ 1983 liability is appropriate because Key West did adopt the unconstitutional proscriptions in Fla. Stat.

ch. 112.533(4) as its own. *See* Key West, Fla., Code of Ordinances '42-1 ("It shall be unlawful for any person to commit, within the city limits, any act which is or shall be recognized by the laws of the state as an offense."). Second, *Surplus Store* is inapposite because it involved the enforcement of a state statute by a municipal police officer who was not in a policymaking position. . . In this case, by contrast, Dillon was clothed with final policymaking authority for law enforcement matters in Key West and in this capacity he chose to enforce the statute against Cooper. While the unconstitutional statute authorized Dillon to act, it was his deliberate decision to enforce the statute that ultimately deprived Cooper of constitutional rights and therefore triggered municipal liability. . . Thus, Dillon's decision to enforce an unconstitutional statute against Cooper constituted a 'deliberate choice to follow a course of action ... made from among various alternatives by the official or officials responsible for establishing final policy.' . . Accordingly, we find that the City of Key West, through the actions of Dillon, adopted a policy that caused the deprivation of Cooper's constitutional rights which rendered the municipality liable under § 1983."); ***Denton v. Bedinghaus,*** No. 00-4072, 2002 WL 1611472, at *4 (6th Cir. July 19, 2002) (unpublished) ("Whether a local government official or entity acts as an alter ego of the state for Eleventh Amendment purposes depends on the state-law definition of that official's or entity's functions. . . .Here, defendants argue that when they were enforcing the orders of a state court, they acted as alter egos of the state and were entitled to Eleventh Amendment immunity. Defendants' argument comes undone before we can fully address the merits of their Eleventh Amendment defense. The amended complaint alleges that defendants initiated and carried out the confiscation policy at issue. As explained above, based on those allegations, defendants were acting independently of a state-court order."); ***Richman v. Sheahan,*** 270 F.3d 430, 439, 440 (7th Cir. 2001) ("In determining whether the sheriff is an agent of Illinois government when performing particular functions, we have looked to the degree of control exercised by Illinois over the conduct at issue and whether the Eleventh Amendment policy of avoiding interference with state (as opposed to county) policy is offended by the lawsuit. . . . Richman's claim against the sheriff's office is based on its alleged unconstitutional policy (its failure adequately to train and supervise the deputies in deliberate indifference to the plaintiff's rights) regarding the use of force when arresting persons in the courtroom pursuant to a judge's order. Therefore, we must determine whether that alleged policy represents state policy or instead county policy. . . . The sheriff has no discretion in whether to obey a judge's orders, but we are aware of no state policy directing the sheriff's actions regarding the training and supervision of deputies in the use of force in carrying out state court orders. The evidence may show otherwise, but at this stage of the proceedings, we cannot conclude as a matter of law that the alleged unconstitutional policy represents state policy."); ***DePiero v. City of Macedonia***, 180 F.3d 770, 786, 787 (6th Cir. 1999) ("Municipalities that meet the requirements of Ohio Rev.Code ' 1905.01 are authorized to convene mayor's courts. The statute does not, however, require a municipal corporation or its mayor to establish or maintain a mayor's court. . . . In this case, the Mayor of Macedonia is undeniably vested with the authority to make official policy regarding whether to hold and how to structure a mayor's court. . . . A mayor's decision whether to hold a mayor's court at all, and if so, whether to preside over it one's self, appoint a magistrate, or perhaps do both, are policy decisions addressing the administration of the municipality. We therefore hold that the City of Macedonia is not immune from liability

for plaintiff's deprivation of due process."); ***Brotherton v. Cleveland***, 173 F.3d 552, 563-67 (6th Cir. 1999) ("Ohio law permitted Dr. Cleveland to harvest corneas, but it did not prescribe a specific policy, especially not one which sought to prevent eye bank technicians from inquiring about objections to corneal removal. [footnote omitted] We see this case as controlled more by our decision in *Garner v. Memphis Police Department*. . . than by *Pusey*. . . .Ohio law allowed Dr. Cleveland to harvest corneas in the course of his actions as a county coroner, but it did not dictate a method. Dr. Cleveland, acting without state compulsion, chose to harvest corneas, and he selected a policy for Hamilton County; he thus acted as an agent of Hamilton County, not of Ohio."); ***Doby v. DeCrescenzo***, 171 F.3d 858, 868, 869 (3d Cir. 1999) ("The Dobys' suggestion that the enforcement procedures should be considered a municipal or county, rather than a state, policy has merit; because the statute itself does not specify how the county delegate is to receive information and issue warrants, LVF and the county presumably have some discretion in deciding how to implement the warrant application procedure. The *Garner* court found the existence of such discretion determinative in deciding that a municipality could be held liable for enforcing the use of deadly force by its police officers. Ultimately, however, we believe that we need not decide whether a county or state policy is at issue because we conclude that the enforcement policy adopted by LVF and the county is constitutional."); ***McKusick v. City of Melbourne***, 96 F.3d 478, 484 (11th Cir. 1996) ("We agree with McKusick that the development and implementation of an administrative enforcement procedure, going beyond the terms of the [state court] injunction itself, leading to the arrest of all antiabortion protestors found within the buffer zone, including persons not named in the injunction nor shown by probable cause to be acting in concert with named parties, would amount to a cognizable policy choice."); ***Garner v. Memphis Police Dep't***, 8 F.3d 358, 364 (6th Cir. 1993) (court rejects defendants' argument that they had no choice but to follow state fleeing felon policy, holding that "[d]efendants' decision to authorize use of deadly force to apprehend nondangerous fleeing burglary suspects was, . . . a deliberate choice from among various alternatives...."), *cert. denied*, 114 S. Ct. 1219 (1994).

See also ***Augustus v. City of Los Angeles***, No. 2:22-CV-02640-SB-AGR, 2023 WL 4291437, at *13 (C.D. Cal. May 31, 2023) ("The City also argues that the policy of conducting high-risk stops in these circumstances is taught to officers statewide by the California Commission on Peace Officer Standards and Training (POST), and therefore, it is authorized by POST and not the City. But the POST document cited by Defendants makes clear that individual law enforcement agencies have the discretion to determine which types of crimes should be considered 'high-risk' and worthy of a high-risk stop. Moreover, the City cites no authority suggesting that by adopting a policy or practice that originated elsewhere, it can insulate itself from liability when its officers follow that policy or practice. On this record, the uncontroverted evidence establishes that the LAPD had a policy of conducting high-risk stopes on cold-plated vehicles and that this policy was the moving force behind the officers' interactions with Plaintiff. . . . Because it is clear on this record that the LAPD's official policy of using high-risk stops was the moving force behind the officers' actions, Plaintiff is entitled to partial summary judgment on that aspect of its *Monell* claim. The Court makes no summary judgment determination as to whether the policy is constitutional. The City's motion for summary judgment is denied."); ***Dumiak v. Village of***

Downers Grove, 475 F.Supp.3d 851, 854-57 (N.D. Ill. 2020) ("The Village argues that plaintiffs fail to state a claim against the Village under *Monell*[.] . . The Village argues that plaintiffs were injured not by the Village ordinance, but by the Illinois statute. A municipality 'cannot be held liable under section 1983 for acts that it did under the command of state or federal law.' *Bethesda Lutheran Homes & Servs., Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998). But the Village was under no command to enact a content based panhandling ordinance— an ordinance replicating the same constitutional flaws that doom the Illinois statute. . . . The statute allows charitable organizations to solicit money 'when expressly permitted by municipal ordinance.'. . The Village cites no provision ordering municipalities to adopt such ordinances. Panhandling might have violated both ordinance and statute, but the laws—if unconstitutional—inflicted separate harms. Village officers who enforced an unconstitutional municipal law might be liable even if state officers could have enforced an identical, equally unconstitutional state law. The Village also argues that plaintiffs never alleged that the Village cited plaintiffs for violating the ordinance. Plaintiffs allege the dates that they received citations under the Illinois statute and describe how some those citations were resolved. Plaintiffs allege little about having received citations under the Village ordinances—certainly nothing as specific as their allegations about the statute. Still, plaintiffs' allegations raise an inference that they were injured even if they were never cited under the ordinance. The ordinance discriminates against the content of plaintiffs' speech—it bans panhandling yet allows petitioning. That discrimination, even without fines, violates the First Amendment. '[I]n civil rights cases, nominal damages are appropriate when a plaintiff's rights are violated but there is no monetary injury.'"); ***RHJ Medical Center, Inc. v. City of DuBois***, 754 F.Supp.2d 723, 764, 765 (W.D. Pa. 2010) ("The Defendant seems to assert that it is the sovereign state, and not the municipality, that should be held liable for enacting unconstitutional laws which are applied by the municipality. This cannot be correct. According to the Supreme Court's interpretation of the 11th Amendment, a state as sovereign cannot be sued in federal court by a citizen. . . . *Ex parte Young* would not apply in this case, as the actor seeking to enforce the state law was the City of DuBois, not an official of the Commonwealth. A suit could not proceed against any state official under *Ex parte Young*. According to the Defendant's theory, a suit could not lie against the City, because it was simply enforcing a state law. If the Court were to adopt the Defendant's theory, Plaintiff would be unable to sue the municipality, and would be unable to sue the state − there would be a clear violation of rights, without a remedy. This inappropriate and unacceptable conclusion would stand in the face of the bedrock principles upon which our Republic was founded. . . This holding also conflicts with the responsibility of government officials to comport their actions with our Constitution. . . . Municipalities cannot shirk their responsibility to follow this oath, and do not receive immunity for blindly following laws passed by a state."); ***Lowden v. County of Clare***, 709 F.Supp.2d 540, 566-68 (E.D. Mich. 2010) ("The County contends that Plaintiffs have failed to allege a facially plausible municipal liability claim against it under *Monell*. . . . The County contends that Plaintiff's complaint does not contain any facts that support the existence of an official 'policy, custom, or practice' of the County other than a 'policy' of enforcement of state law. The County contends that an arrest, or any injury, under a Michigan statute is necessarily part of a policy of the State of Michigan, rather than any 'policy' devised or adopted by the County. The County quotes *Pusey v. Youngstown*, for the proposition

that 'state criminal laws ... represent the policy of the state. Thus, a city official pursues her duties as a state agent when enforcing state law or policy.'. . . Plaintiffs . . . contend that the County is liable pursuant to § 1983 because enforcement of the Michigan funeral protest statute is discretionary and the County exercised its discretion to enforce it. . . . Plaintiffs contend that an officer is not required to arrest an individual who violates the funeral protest statute, and that Clare County made a deliberate policy decision to enforce the statute in the way that it did. . . . Despite the County's attempt to characterize Plaintiffs' claims otherwise, Plaintiffs contend that the Lowdens' arrests were the result of a policy choice made by the an appropriate official of the County to enforce the funeral protest statute through specific instructions to law enforcement in advance of the funeral. Plaintiffs contend that the County is liable for that policy even if it happens to be consistent with a state law. On that basis, and the reasonable inferences that can be drawn from the facts alleged in the complaint, it is plausible that Plaintiffs may be able to develop facts to demonstrate the actual existence of a municipal policy. Thus, Plaintiffs' claims for municipal liability survive Defendants' motion to dismiss or for judgment on the pleadings."); ***O'Donnell v. Brown***, 335 F.Supp.2d 787, 816, 817 (W.D. Mich. 2004) ("The City Defendants inaptly depict the policies or customs that the police followed in entering the O'Donnell home and removing the children as those of Child Protective Services (a state agency), not of the Police Department (an entity of the City of Lansing). They contend that no Police Department policies or customs were the moving force behind the alleged violations of Plaintiff's constitutional rights. Rather, they argue, they acted based on the CPS policy that verbal authorization by a referee was adequate for entry and removal of the children. The Court rejects this characterization. There can be no question that the Lansing Police Department officers worked according to and under the authority of the Lansing Police Department's policies, and not CPS's. It is true that the family court issued orders relating to the removal of children and that CPS workers took children into custody. But it was police officers who actually performed the act of forcibly entering the home to assist in executing the court order. In fact, CPS social workers, as they themselves acknowledge, cannot go into a home to remove children unless the police lead them in. The family court may have had a 'policy' of issuing verbal orders, but it was the Police Department's 'policy' to assist CPS in carrying out those orders − and it was that departmental policy that resulted in constitutional harms to Plaintiffs in this case and thus implicates the City Defendants."); ***Laurie Q. v. Contra Costa County,*** 304 F.Supp.2d 1185, 1199-1202 (N.D. Cal. 2004) ("Defendant has failed to recognize the distinction between a government actor who *correctly and faithfully* carries out a policy set by the state, and one who commits *non-state-sanctioned violations* of law in the course of her duties under a state program. When the County *accurately* applies the state's mandatory foster care payment schedule (or when a law enforcement officer serves a warrant pursuant to a mandate from a state court), it acts as the former, and a plaintiff may seek recourse only against the state for establishing the policy. However, if the County *incorrectly* calculates benefits or embezzles funds from foster children (or when a law enforcement officer *unlawfully assaults* a suspect taken into custody pursuant to a mandate from state court), it acts as the latter, and a plaintiff may seek recourse against the County. . . . The court finds that the County acts as an independent policymaker (rather than a state instrumentality) for the purposes of section 1983 when it misapplies, miscalculates, or otherwise fails to distribute foster care benefits in violation of state and federal law."); ***Hale O***

Kaula Church v. Maui Planning Commission, 229 F.3d 1056, 1069 (D. Haw.2002) ("The State of Hawaii has delegated its discretionary power to grant or deny special use permits for small lots. Nothing, however, indicates it will pay or indemnify for money judgments against counties for damages for the counties' unconstitutional exercise of such discretion. The government function at issue is a County function, even if done pursuant to the State Land Use Law."); ***Allen v. Leis,*** 154 F. Supp.2d 1240, 1263, 1264 (S.D. Ohio 2001) ("Where county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the State. . . . In contrast, this case implicates Sheriff Leis and the Commissioners in their official policymaking capacity. . . Rather than merely enforcing prescribed Ohio law, the County Defendants voluntarily implemented a Pay-for-Stay Program and they chose the means of enforcing this Program using the Book-in-Fee guidelines. . . Therefore, all of the named Defendants acted as agents of Hamilton County, not of the State of Ohio."); ***Community Health Care Association of New York v. DeParle,*** 69 F. Supp.2d 463, 475, 476 (S.D.N.Y. 1999) ("The question posed on this motion is whether the County can be held responsible for the violation of federal law where its RFP [request for proposal] was approved by the HCFA [Health Care Financing Administration]. . . . Our Court of Appeals has not addressed the issue of what effect, if any, the federal government's mandate or authorization of a municipal policy has on that municipality's liability for the policy under § 1983. The Court in *Caminero*, however, conducted an extensive examination of this issue to hold that in cases in which a plaintiff alleges that a municipality violated a constitutional right by adopting an unconstitutional policy that was in some way authorized or mandated by state law, the municipality can be held liable under § 1983. . . . Likewise, where, as here, the County is responsible for administration of the Medicaid managed care program, a finding of liability on the part of the County is not inappropriate despite the Federal government's supervisory role. Here, County defendant adopted a policy, authorized by the HCFA, which did not guarantee reasonable cost reimbursement in Medicaid managed care contracts and did not allow for its election."); ***Smith v. City of Dayton***, 68 F. Supp.2d 911, 917, 918 (S.D. Ohio 1999) ("In *Kallstrom*, the Sixth Circuit held the City of Columbus could be liable despite the fact that it, like the City of Dayton here, was carrying out an unconstitutional state-created policy, rather than its own policy. While it seems anomalous to hold a city liable for following a mandatory state law which had not yet been declared unconstitutional, the Sixth Circuit did not pause on this question. This Court accordingly assumes a municipality may be held liable under § 1983 for carrying out an unconstitutional state law, even though the law has not yet been held unconstitutional."); ***Rossi v. Town of Pelham***, No. CIV. 96-139-SD, 1997 WL 816160, *20 (D.N.H. Sept. 29, 1997) (not reported) ("Rossi claims that Pelham officials enforced New Hampshire Revised Statutes Annotated (RSA) 41:36, which requires the outgoing tax collector's documents to be surrendered to the board of selectmen, in an unconstitutional manner by deploying Officer Cunha to perform a warrantless search of Rossi's office. Thus, the 'policy' is constituted by the unconstitutional manner that Pelham officials chose to enforce state law, rather than, as in *Surplus Store*, the 'innocuous' act of enforcing state law. This Pelham policy was the moving force behind the constitutional violation, not the otherwise lawful RSA 41:36."); ***Davis v. City of Camden***, 657 F.Supp. 396, 402-04 (D.N.J.1987) (defendant county could be held liable under Section 1983 for its official adoption of an unconstitutional policy of strip searching persons in county jail even though that policy was mandated by state law).

See generally ***Caminero v. Rand***, 882 F. Supp. 1319, 1325 (S.D.N.Y. 1995) (reviewing cases in this area and concluding that cases "suggest a reasoned distinction between (1) cases in which a plaintiff alleges that a municipality inflicted a constitutional deprivation by adopting an unconstitutional policy that was in some way authorized or mandated by state law and (2) cases in which a plaintiff alleges that a municipality, which adopted no specific policy in the area at issue, caused a constitutional deprivation by simply enforcing state law. While allegations of the former type have been found to provide a basis for Section 1983 liability, [cites omitted] allegations of the latter variety may not [footnote omitted] provide a remedy against the municipality[. cites omitted]").

See also ***Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors of Fairfax Count., Virginia***, No. 19-1151, 2021 WL 1854750, at *8–10 (4th Cir. May 10, 2021) (not reported) ("We have not definitively addressed whether *Monell* liability can be predicated on a local government's policy of enforcing state law. . . The majority of our sister circuits to consider the question have suggested that a local government can be subjected to *Monell* liability if it makes an independent choice to enforce or follow parameters set by state law, rather than being obliged to do so. [collecting cases] We find *Vives* instructive. . . . The *Vives* court reasoned that '[f]reedom to act is inherent in the concept of "choice,"' and a state law 'mandating enforcement' by local government officials cannot be considered the product of a conscious choice. . . Local governments therefore 'cannot be liable under *Monell* in th[at] circumstance.'. . By contrast, if a local government entity 'decides to enforce a statute that it is authorized, but not required, to enforce, it may have created a ... policy' for which it can be liable. . . In sum, whether a local government entity's policy of enforcing a state statute renders it susceptible to *Monell* liability turns on 'whether a municipal policymaker has made a meaningful and conscious choice that caused a constitutional injury.'. . . The County can be held liable for its policy of enforcing Section 1224 because it consciously chose to enforce that particular state statute after requisite deliberation. . . Section 1225 authorizes—but does not require—Fairfax County to enter into a cooperative agreement with the Commissioner to enforce Section 1224. . . Likewise, the Agreement authorizes but does not mandate the County to enforce Section 1224 and sets parameters on its enforcement. Fairfax County's authority to enforce Section 1224 required the Board's acquiescence; it was under no obligation to enforce this state statute. In other words, the decision to enter the Agreement required county policymakers to make a conscious choice from among the various alternatives, including the alternative not to enforce the statute at all. As a result, the policy of enforcing Section 1224 is one 'for which the [County] is actually responsible' in accord with the principles of *Monell* liability. . . The County's policy, however, differs from the Commonwealth's policy; although the two overlap, they are not coextensive. The Commonwealth is responsible for applying the entire Code to all outdoor advertising. The County, by contrast, has decided to enforce only Section 1224, to enforce it only on certain roads and certain days of the week, and to fine only egregious violators. . . The County's policy does not incorporate other provisions of Virginia's sign regulations but is limited to signs within the limits of highways. Perhaps for that reason, the County's policy does not incorporate Section 1204, which excepts certain categories of outdoor advertising from particular provisions of Virginia's sign regulations 'if securely attached to real property or advertising structures.'. .

Neither Section 1225 nor the Agreement mention Section 1204, and although the DCC Policy explicitly lists exceptions to enforcement, it does not include the exceptions in Section 1204 or otherwise purport to apply that statute. BTA's complaint does not allege any other source of County policy regarding the enforcement of Section 1224 or any custom outside the written policy. But BTA contends that the County's policy must implicitly incorporate Section 1204's exceptions in order to comply with state law. The County persuasively explains how its enforcement policy accords with the broader scheme of Virginia sign regulation. But more fundamentally, our question is not whether the County is complying with state law but whether the policy it voluntarily adopted and follows—whether in step with other state regulations or not—caused the alleged infringement of BTA's constitutional rights. The County did not adopt the exceptions in the pre-amendment version of Section 1204 into its policy, therefore the County cannot be liable for harms allegedly caused by those exceptions. The target of BTA's First Amendment claim is Virginia's sign regulations. Although the County can be liable for enforcing a state regulation it has voluntarily adopted as its own, it cannot be held liable for state statutes it has not consciously adopted into its own policy. Because BTA has not alleged a link between the County's policy of enforcing Section 1224 and its alleged injury, BTA's Section 1983 action against the County for violation of its First Amendment rights fails."); ***Vives v. City of New York***, 524 F.3d 346, 349-58 (2d Cir. 2008) ("Where a plaintiff claims a constitutional violation as a consequence of the decision of a municipality to enforce an unconstitutional state statute, blame could theoretically be allocated three ways: first, to the state that enacted the unconstitutional statute; second, to the municipality that chose to enforce it; and third, to the individual employees who directly violated plaintiff's rights. As a practical matter, however, damages are not available against the state because it is not a person within the meaning of Section 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989). Moreover, like the individual defendants in this case, individual employees will often be able to successfully assert qualified immunity. Thus, the plaintiff will often be left to assert his damages claim only against the municipality. . . . The crux of the City's argument is that although it has a 'policy in fact' of enforcing the Penal Law, it is the State's enactment of Section 240.30(1) that caused Vives's constitutional violation. The City contends that '[a] municipality does not implement or execute a policy officially adopted and promulgated by its officers when it merely enforces the Penal Law of the State that created it.'. . . The issue of whether − and under what circumstances − a municipality can be liable for enforcing a state law is one of first impression in this circuit. It is also one of great significance both to injured citizens, who may be able to recover against a municipality when other avenues of recovery are cut off if we rule in favor of Vives, and to municipalities, which may incur significant and unanticipated liability in the same event. Like the district court, we look to the decisions of other circuits for guidance, but we bear in mind that these decisions are useful only insofar as they illuminate the foundational question of whether a municipal policymaker has made a meaningful and conscious choice that caused a constitutional injury. Three circuits − the Sixth, Ninth, and Eleventh − have issued decisions that, to varying degrees, support plaintiff's contention that a municipality engages in policy making when it determines to enforce a state law that authorizes it to perform certain actions but does not mandate that it do so. . . . While these decisions can be read to suggest that a distinction should be made between a state law mandating municipal action and one that merely authorizes it, in each case the

policymaker was alleged to have gone beyond merely enforcing the state statute. . . . The City's position is supported − again to varying degrees − by Fourth, Seventh, and Tenth Circuit authority. . . . As with the cases supporting plaintiff's position, none of these decisions is squarely on point. . . . Freedom to act is inherent in the concept of 'choice.' Therefore, in addressing the conscious choice requirement, we agree with all circuits to address state laws mandating enforcement by municipal police officers that a municipality's decision to honor this obligation is not a conscious choice. As a result, the municipality cannot be liable under *Monell* in this circumstance. . . On the other hand, if a municipality decides to enforce a statute that it is authorized, but not required, to enforce, it may have created a municipal policy. However, we do not believe that a mere municipal directive to enforce all state and municipal laws constitutes a city policy to enforce a particular unconstitutional statute. In our view, the 'conscious' portion of the 'conscious choice' requirement may be lacking in these circumstances. While it is not required that a municipality know that the statute it decides to enforce as a matter of municipal policy is an unconstitutional statute, . . . it is necessary, at a minimum, that a municipal policymaker have focused on the particular statute in question. We, therefore, hold that there must have been conscious decision making by the City's policymakers before the City can be held to have made a conscious choice. . . Evidence of a conscious choice may, of course, be direct or circumstantial. . . These conclusions lead us to two subsidiary questions, neither of which can be resolved on the record before us: (1) whether the City had a meaningful choice as to whether it would enforce Section 240.30(1); and (2) if so, whether the City adopted a discrete policy to enforce Section 240.30(1) that represented a conscious choice by a municipal policymaker. . . . Among the questions on remand is whether the City had the power to instruct its officers not to enforce a portion of Section 240.30(1) because it was unconstitutional or a waste of resources, or for some other reason. . . . We found no precedent addressing the issue we believe to be controlling: whether the Police Department's policy makers can instruct its officers not to enforce a given section-or portion thereof − of the penal law. . . . In an effort to resolve our uncertainty concerning the existence of a state mandate to enforce state penal law, we directed the parties to consider whether New York City Charter ' 435(a) constitutes such a mandate. It provides: The police department and force shall have the power and it shall be their duty to ... enforce and prevent the violation of all laws and ordinances in force in the city; and for these purposes to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crimes or offenses. . . . The City argues that because Section 435(a) derives from state-enacted Section 315, it 'is ... a generalized State policy, not a municipal enactment.'. . However, the City also steadfastly refuses to deny that it lacks case-by-case discretion in determining whether to enforce any particular penal statute and suggests that it can make policy decisions about which statutes to enforce in the course of allocating its resources. Focusing on the charter provision as it exists today and not on its history, Vives contends that it cannot be viewed as a mandate from the state because it was adopted by the voters of the City. . . . In light of the unclear case law and the parties' differing positions on Section 435(a), the central question of whether the City is mandated by New York State to enforce all penal laws remains unresolved. We would benefit − and we believe the district court would as well − from the New York Solicitor General's view of the obligation of the New York Police Department to enforce the Penal Law. Further, the state has an interest in this question that is not adequately represented by

either of the parties. Vives, of course, seeks to maximize the City's permissible discretion. And, while it may be in the City's interest in this case to claim that it has an overall duty to enforce the penal law, it might not be in its interest generally to argue that its discretion is constrained. Since the City's apparent concession on this point may not be definitive, we expect on remand that the district court as well as the parties would welcome the views of the New York Solicitor General on this issue. . . . We have held today that a municipality cannot be held liable simply for choosing to enforce the entire Penal Law. . . In light of that holding, we must know whether the City went beyond a general policy of enforcing the Penal Law to focus on Section 240.30(1). Section 435(a) on its face establishes that the City has a general policy of enforcing state penal law. This is not enough. However, there is some evidence − albeit not conclusive evidence − that the City did make a conscious choice to enforce Section 240.30(1) in an unconstitutional manner. This evidence is in the form of examples of how an individual can violate Section 240.30(1) that are contained in police department training manuals issued to prospective police officers. . . . Resolution of the policy issue should also resolve the issue of causation. Relying principally on *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), the City urges that the violation of Vives's constitutional rights was not caused by its intentional act. Rather, the City contends, the injury to Vives was a result of actions taken by the actors who have immunity in this case − the state, which enacted Section 240.30, and the individual officers. While we agree that *Bryan County* sets out the appropriate test for determining whether a municipal action caused a constitutional injury, we disagree with the City's claim that application of the *Bryan County* test to the facts of this case does not allow a finding that the City's policy caused Vives's injury. . . . In light of *Bryan County* and *Amnesty America*, the answer to the causation inquiry must flow from the district court's unappealed holding that Section 240.30 is unconstitutional, and the determination − yet to be definitively made − of whether a City policymaker made a conscious choice to instruct officers to enforce Section 240.30(1) when the City was not required to do so."); ***Panzella v. Sposato***, 863 F.3d 210, 218 n.8 (2d Cir. 2017) ("The County also argues that its adherence to New York law regarding the treatment of the firearms did not constitute a 'policy' as required for a county to be liable under 42 U.S.C. § 1983 pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *See Vives v. N.Y.C.*, 524 F.3d 346, 353–56, 358 (2d Cir. 2008) (holding that city's enforcement of the entire state penal code would not constitute a "city policy" because the city was required to follow state law). Leaving aside the fact that we are here dealing with an injunction and not liability, this argument has no application here, because there was no state law being applied.").

See also ***Brewster v. City of Los Angeles***, 672 F.Supp.3d 872, ___ (C.D. Cal. 2023) ("As it has claimed throughout this case, even though there is no question that the Impound Policy qualifies as a municipal 'policy' for purposes of finding Section 1983 liability, the City asserts that Plaintiffs have no basis to assert *Monell* . . . liability against it. The City's argument can be summarized as follows: Section 14602.6 authorized and/or required it to do what it did, and the statute therefore caused Plaintiffs' injuries, not the City. Defendants know the implications of this argument. Since damages are not available against the State of California, and any individual state official may be eligible for qualified immunity, Defendants' position is this: even if the impounds violated the

constitutional rights of tens of thousands of people, there is nothing Plaintiffs can do about it. Fortunately, Defendants are wrong: the Impound Policy caused Plaintiffs' injuries and the City of Los Angeles is thus liable for them. . . . Essentially, now that the Ninth Circuit has held that Defendants' longstanding view of their legal authority is wrong, and because they have no real argument that their actions were constitutional under the framework set out in *Brewster* . . . and *Sandoval*, . . . the City has sent its lawyers to convince this Court that they never had a choice in the matter, and thus they cannot be held liable. But that is not true: the City had choices. It chose to exercise its policymaking discretion in favor of a particular approach. . . . . And since all of this is essentially a plea to impermissibly smuggle in good faith or qualified immunity principles into the *Monell* context, as noted below, the City remains liable even if the Impound Policy was, in part, a means to enforce a particular statute. . . . The Supreme Court decisions on which Defendants rely – and, indeed, much of the case law on *Monell* liability – clarifies the line between municipal liability and the liability of individual officers where there is no clearly adopted, generally applicable policy. But the Supreme Court has not offered much guidance on the key question here: to what extent can a municipality be liable under § 1983 for enacting a policy that, in part, enforces a state statute? . . . . Before applying relevant lower court authorities, it is useful to explain why the statutory scheme afforded Defendants' complete discretion to enforce Section 14602.6 at all, and certainly did not require them to apply it in an unconstitutional manner. . . . Having determined the broad discretion within which Defendants chose to act, the Court returns to the circuit and district court authority that further establishes the propriety of *Monell* liability in this case. The central Ninth Circuit authority on this question is *Evers v. County of Custer*, in which the Ninth Circuit considered the defendant county's argument that it was not liable 'because it was merely acting according to state law, rather than carrying out County policy.'. . . Applying Evers, a number of Ninth Circuit district court decisions have found municipalities could be liable for actions taken pursuant to state statutes. [collecting cases] The Second Circuit's framework set out in *Vives*, . . . is also instructive. . . . A straightforward application of *Vives* here makes the City liable: the City made a 'meaningful and conscious choice' because it knew it had complete discretion as to how to enforce Section 14602.6 or whether to enforce it all, it exercised that discretion by enforcing it as to some people but not others, and it made that choice based on punishment and deterrence rationales that are inconsistent with the Fourth Amendment. . . . In summary, the Impound Policy is exactly the type of official, generally applicable policy for which local governments may be held liable pursuant to *Monell.* The Impound Policy was the but-for and proximate cause of Plaintiffs injuries; the City's Impound Policy was the 'moving force' behind the constitutional violations and the City 'itself is the wrongdoer.'. . Ninth Circuit precedent instructs that the fact that a municipal defendant acted pursuant to state law 'goes only to the question of [the individual officials'] good faith in applying the statute' and is irrelevant to whether a municipal action is a policy under *Monell*. . . 'Good faith' is simply not a defense to municipal liability. Towards the end of their briefing on *Monell* liability, Defendants finally say the quiet part out loud when they argue that 'S07 could not be a proximate cause because it is not reasonably foreseeable that subjecting a vehicle to a 30-day impound would violate someone's Fourth or Fifth Amendment rights.'. . If that sounds like a plea for qualified immunity based on the assertion that it did not 'foresee' that *Brewster* . . . would come out the way it did, that is because it is. Or, put

another way, it is an improper appeal for 'backdoor municipal immunity.' See Joanna C. Schwartz, *Backdoor Municipal Immunity*, 132 YALE L.J. FORUM 136 (2022). It has long been the law that 'municipalities do not enjoy immunity from suit -- either absolute or qualified -- under § 1983.'. . The City may wish the law were otherwise, but municipalities cannot escape liability for constitutional violations by arguing that the law was not clearly established at the time of the violations."); ***Martin v. Gross***, 340 F.Supp.3d 87, 92-101 (D. Mass. 2018) (on summary judgment motion), *affirmed in part, vacated in part and remanded by* ***Project Veritas Action Fund v. Rollins***, 982 F.3d 813 (1st Cir. 2020) ("These two cases challenge the application of Mass. Gen. Laws ch. 272, § 99 ("Section 99") to secret audio recordings in Massachusetts. . . Section 99, in relevant part, criminalizes the willful 'interception' of any 'communication.'. . An 'interception' occurs when one is able 'to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device' without the consent of 'all parties to such communication.'. . Thus, the statute does not apply to open (or non-secret) recording or to video recording (without audio). . . The plaintiffs in *Martin* argue that Section 99 violates the First Amendment insofar as it prohibits the secret audio recording of *police officers* performing their duties in public. The plaintiff in *Project Veritas* makes a similar, though broader, argument: that Section 99 violates the First Amendment insofar as it prohibits the secret audio recording of *government officials* performing their duties in public. The parties in each case also clash over certain ancillary issues that are discussed in more detail below. On the core constitutional issue, the Court holds that secret audio recording of government officials, including law enforcement officials, performing their duties in public is protected by the First Amendment, subject only to reasonable time, place, and manner restrictions. Because Section 99 fails intermediate scrutiny when applied to such conduct, it is unconstitutional in those circumstances. . . . [T]he Court interprets *Glik* as standing for the proposition that the First Amendment protects the right to record audio and video of government officials, including law enforcement officers, performing their duties in public, subject only to reasonable time, place, and manner restrictions. . . . The police commissioner . . . argues that merely training police officers on how to enforce Section 99 is not a municipal policy for purposes of a § 1983 claim. More pointedly, he argues that even under the framework of *Vives v. City of New York*, 524 F.3d 346 (2d Cir. 2008), the record does not demonstrate a municipal 'choice' to enforce Section 99. He also argues that the plaintiffs' fear of making secret recordings is caused by Section 99 itself, not by any municipal policy to enforce Section 99, and therefore the plaintiffs have failed to show a causal connection between any municipal policy and their alleged harm. The plaintiffs argue that nothing requires BPD to enforce Section 99 against individuals who secretly record police. Therefore, enforcement of the law must be the result of a conscious policy choice by the city, as evidenced by repeated efforts to train officers on Section 99. The plaintiffs further argue that answering the question on the existence of a municipal policy simultaneously resolves the causation question. . . . The parties first dispute the appropriate legal standard for evaluating the existence of a 'policy' for purposes of a *Monell* claim -- an issue on which courts have diverged. The plaintiffs argue that the Court should apply the Second Circuit's framework from *Vives*, as it did at the motion to dismiss. Under *Vives*, the existence of a municipal 'policy' depends on '(1) whether the City had a meaningful choice as to whether it would enforce [the statute in question]; and (2) if so, whether

the City adopted a discrete policy to enforce [the statute in question] that represented a conscious choice by a municipal policymaker.'. . The police commissioner urges the Court to adopt the Seventh Circuit's decision in *Surplus Store & Exchange, Inc. v. City of Delphi*, which stated:

It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality.

928 F.2d 788, 791–92 (7th Cir. 1991). The First Circuit has not weighed in on this question, aside from brief dicta in a concurrence that positively cited *Surplus Store. . . Surplus Store* does not govern here because the record demonstrates that BPD has done more than merely 'enforc[e] state law.' Rather, BPD has highlighted what it believes Section 99 allows (open recording of police officers) and does not allow (secret recording of police officers). To show the existence of a municipal policy, the plaintiffs rely on an array of BPD training materials that discuss Section 99, including a video and a training bulletin. . . . These materials -- particularly the video and bulletin -- demonstrate why *Surplus Store* is inapt here. They instruct officers that Section 99 permits open, but not secret, recording of police officers' actions. But *Glik* did not clearly restrict itself to *open* recording. Rather, it held that the First Amendment provides a 'right to film government officials or matters of public interest in public space.'. . The right is 'fundamental and virtually self-evident,' subject only to reasonable time, place, and manner restrictions. . . The BPD training materials narrowly read this holding, which amounts to more than mere enforcement of state law.

The same considerations demonstrate the existence of a policy under the two-prong *Vives* test. The parties do not dispute the first prong. That is, they seem to agree -- correctly -- that local police have discretion about whether and when to enforce Section 99. The second prong asks whether BPD has adopted a 'discrete policy' to enforce Section 99 that 'represent[s] a conscious choice by a municipal policymaker.'. . The police commissioner does not dispute that these training materials exist and have been disseminated to BPD personnel. Because there is no genuine dispute as to this factual basis for the alleged municipal policy, the only remaining question is one of law, appropriate for resolution on summary judgment: Do these training materials evince a conscious choice' by BPD to enforce Section 99? The answer is yes. Although an individual police officer retains discretion about whether to arrest someone for violating Section 99, the training materials cited above make clear that BPD 'put flesh on the bones' of Section 99 and 'apparently instructed officers that they could make arrests' for what the plaintiffs now claim was constitutionally protected conduct. . . The video, bulletin, and manuals all speak with one voice regarding when Section 99 is and is not violated. The Court concludes, as a matter of law, that this evidence demonstrates a 'conscious choice' and amounts to a municipal policy for purposes of a *Monell* claim. The police commissioner protests that BPD's guidance was in accordance with, and pursuant to, cases interpreting Section 99, and it is unfair to subject BPD to liability for trying to ensure that its officers comply with the law. He also argues that finding a municipal policy here will create 'a perverse incentive not to train police officers.' But the training materials go beyond telling officers when it is impermissible to arrest; taking a narrow construction of *Glik*, they also communicate that it is permissible to arrest for secretly audiorecording the police under all circumstances. In other words, it gives the green light to arrests that, as the Court holds below, are

barred by *Glik*. As the plaintiffs predicted, this analysis also resolves the causation question. 'Where a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward.'. . Here, the commissioner acknowledges that BPD's training materials were intended to ensure that officers complied with *Glik*. But *Glik* did not distinguish between First Amendment protection applicable to audio and video recording. BPD's policymakers interpreted (in the Court's view, misinterpreted) the case as permitting arrest for secret audio recording in all circumstances without regard for the First Amendment interest at stake of police performing their duties in public. BPD's policies narrowly interpreting *Glik* caused the injury complained of in this case. Accordingly, the Court concludes that the plaintiffs have proven the existence of a municipal policy and causation for purposes of their *Monell* claim against the police commissioner."); ***Martin v. Evans***, 241 F.Supp.3d 276, 284-85 (D. Mass. 2017) (on motion to dismiss) ("BPD Commissioner Evans argues that the complaint does not adequately plead *Monell* liability because the city is enforcing a statute passed by the state legislature, not adopting its own policy. He argues that a city cannot be liable for simply enforcing state law. This legal issue has not yet been fully addressed by the First Circuit. . . .Evans argues that the BPD cannot be liable for enforcing state law because a municipality's enforcement of state law is not a city policy or custom within the meaning of *Monell* . . . Evans relies primarily on the Seventh Circuit's decision in *Surplus Store & Exchange, Inc. v. City of Delphi*, which stated: 'It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality.'. . The First Circuit has not weighed in on this question, aside from brief dicta in a concurrence, *Yeo v. Town of Lexington*, 131 F.3d 241, 257 (1st Cir. 1997) (Stahl, J., concurring), that positively cited *Surplus Store*. But the Second Circuit later wrote: '[W]e agree with all circuits to address state laws mandating enforcement by municipal police officers that a municipality's decision to honor this obligation is not a conscious choice. As a result, the municipality cannot be liable under *Monell* in this circumstance. On the other hand, if a municipality decides to enforce a statute that it is authorized, but not required, to enforce, it may have created a municipal policy. However, we do not believe that a mere municipal directive to enforce all state and municipal laws constitutes a city policy to enforce a particular unconstitutional statute.... [I]t is necessary, at a minimum, that a municipal policymaker have focused on the particular statute in question. We, therefore, hold that there must have been conscious decision making by the City's policymakers before the City can be held to have made a conscious choice.' *Vives v. City of N.Y.*, 524 F.3d 346, 353 (2d Cir. 2008) . . . The Second Circuit remanded to the district court for determination of '(1) whether the City had a meaningful choice as to whether it would enforce [the statute in question]; and (2) if so, whether the City adopted a discrete policy to enforce [the statute in question] that represented a conscious choice by a municipal policymaker.'. .Applying the framework articulated by the Second Circuit, the complaint sufficiently alleges a conscious decision by the BPD to enforce Section 99. The complaint alleges: 'BPD's official training materials instruct officers that they may arrest and seek charges against private individuals who secretly record police officers performing their duties in public.'. . The complaint also alleges that a BPD Academy Training

Bulletin 'instructs police officers that they have a "right of arrest" whenever a person' secretly records oral communications. . . Finally, the complaint alleges that a 2010 BPD training video 'instruct[ed] police officers that they could arrest private individuals who secretly recorded police officers performing their duties in public.'. . These factual allegations suggest that the BPD has affirmatively and consciously chosen to educate officers about Section 99 and its particular application to the recording of officers' activities. The plaintiffs adequately plead a Monell claim against BPD Commissioner Evans.")

c. Inter-Governmental Agreements/ Task Forces

See, e.g., ***S.M. v. Lincoln Cty. Missouri***, 874 F.3d 581, 585-89 (8th Cir. 2017) ("A unique aspect in applying these established municipal-liability principles to this case is the central role played by the multi-agency Drug Court. Though generally authorized by state statute, the Drug Court was established by a lengthy August 2006 Memorandum of Understanding ("MOU") between the Forty-Fifth Circuit Court, 'the local Defense Bar, The Sheriffs of Lincoln and Pike Counties, Department of Corrections District Office of Probation and Parole, and designated substance abuse treatment providers.'. . .In *Krigbaum*, we noted that '[t]he Drug Court's multi-agency membership resulted in significant confusion and ignorance regarding who was supervising Edwards on a day-to-day basis when he served as tracker.'. . .Lincoln County argues the evidence was insufficient to show that the County is liable for failing to supervise Edwards while he worked as Drug Court tracker because Sheriff Krigbaum thought the Drug Court supervised Edwards when serving as tracker, Krigbaum lacked actual knowledge of Edwards's misconduct, and no testimony connected the Sheriff's Department to knowledge of Edwards's misdeeds. But this argument fails to take into account the failure-to-supervise instructions submitted to the jury *without objection*. For each plaintiff, the jury was instructed that its verdict will be against Lincoln County if it finds:
First: The Lincoln County Sheriff, as policy maker for Defendant Lincoln County, was responsible for supervising Scott Edwards as Drug Court Tracker; and
Second: Defendant Lincoln County's supervision of Scott Edwards as Drug Court Tracker was inadequate; and
Third: The need for supervision by Defendant Lincoln County was so obvious, and the inadequacy so likely to result in the violation of [each Plaintiff's] constitutional rights, that the policy maker for Defendant Lincoln County can reasonably be said to have been 'deliberately indifferent' to the need for such supervision; and
Fourth: The failure of Defendant Lincoln County to supervise Scott Edwards as Drug Court Tracker was the cause of the injuries to [each Plaintiff].
Two aspects of this instruction are of critical importance to this appeal. In the *first* instruction, the person identified as Lincoln County policy maker was not Sheriff Michael Krigbaum; it was 'The Lincoln County Sheriff.' Thus, in determining supervisory responsibilities, the jury was instructed that it could consider, as plaintiffs argued, that 'the Sheriff' signed an MOU agreeing to be a fully participating Drug Court team member, whether or not Krigbaum ever understood the Sheriff's Drug Court responsibilities or even read the MOU. The *Third* instruction, which exactly tracked the above-quoted liability standard from *Canton* as quoted by this court in *Liebe*, permitted the

jury to find that the need for supervision was 'so obvious' because of danger signals that were apparent to other Drug Court team members but were never conveyed to Sheriff Krigbaum, who ignored Drug Court activities altogether. In a 'no supervision' case involving a municipal-liability claim against one agency participant, a novel and potentially critical legal issue is whether a need for supervision that became obvious to other agencies' officials can establish the deliberate indifference of a Lincoln County Sheriff who was unaware of the danger signals. However, as Lincoln County failed to object to the district court's verdict director, the only issue before us is whether the trial evidence permitted a reasonable jury to find for the plaintiffs on the elements of the claim as instructed. Turning to the specific sufficiency issues, the County's principal defense at trial was that Sheriff Krigbaum was not responsible for supervising Edwards as Drug Court tracker. But the trial evidence was clearly sufficient to permit a reasonable jury to find, as they were instructed, that *the Lincoln County Sheriff*, as a Lincoln County policy maker, was responsible for supervising Scott Edwards as Drug Court Tracker. The terms of the MOU, standing alone, support this finding. And the testimony of Judge Burkemper that the Drug Court considered the agency providing a particular team member to be that person's 'supervisor' gave the jury a common-sense basis for resolving an issue that, in hindsight, was left unresolved when the Drug Court was established, with disastrous results. One of the two critical fact issues at trial was whether the need to supervise Edwards as tracker was, in the words of the jury instruction, 'so obvious ... that the policy maker for Defendant Lincoln County can reasonably be said to have been "deliberately indifferent" to the need for such supervision.' Though this instruction followed the language of the deliberate indifference test articulated in *Canton*, it arguably did not give the jury an accurate sense of how rigorously the standard must be applied 'to ensure that the municipality is not held liable solely for the actions of its employee.'. . But as there was no objection to the instruction, that issue is not before us and we do not consider it. . . .Viewed in toto, we conclude that this evidence, while not overwhelming, was sufficient to permit a reasonable jury to find that (i) it was so obvious to Drug Court team members that failing to provide *any* supervision of Edwards as Drug Court tracker would result in the violation of sexually vulnerable participants' constitutional rights as to constitute deliberate indifference to the need for supervision, and (ii) this deliberate indifference was attributable to the Sheriff of Lincoln County as the Drug Court team member responsible for supervising tracker Edwards.").

See also ***Hernandez v. United States***, 939 F.3d 191, 210 (2d Cir. 2019) ("In defending this appeal, the Government and the City point fingers at each other. The Government argues that the City was responsible for Hernandez's confinement and the City argues that it continued to detain Hernandez only because it was complying with the Government's detainer. The Complaint, however, has plausibly alleged that both the Government and the City were at fault, for it plausibly alleges that both failed to make an inquiry when circumstances warranted an inquiry, and verification could have been obtained with minimal effort. As a consequence of those failings, Hernandez was deprived of his freedom for four days."); ***City of El Cenizo, Texas v. Texas***, 890 F.3d 164, 185-91 (5th Cir. 2018) (Texas law provision requiring that law enforcement agencies having custody of a person subject to an immigration detainer request comply with, honor, and fulfill any request made in the detainer request and inform the person that the person is being held pursuant to that

request, was not facially unconstitutional under the Fourth Amendment; under Immigration and Customs Enforcement (ICE) policy, an immigration detainer request evidenced probable cause of removability in every instance, the immigration detainer mandate authorized and required state officers to carry out federal detention requests, it would remain ICE agent who made underlying removability determination, and mandate would not require officers to ignore facts that would negate probable cause.); ***Galarza v. Szalczyk***, 745 F.3d 634, 636, 639, 640, 645 (3d Cir. 2014) ("We agree with Galarza that immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal. Accordingly, we vacate and remand for further proceedings. . . .Regarding his Fourth Amendment rights, Galarza contends that his detention resulted from Lehigh County's stated policy and practice of enforcing all immigration detainers received from ICE, regardless of whether ICE had, or even claimed to have, probable cause to detain the suspected immigration violator. . . . Regarding his procedural due process claim, Galarza contends that, under Lehigh County's policies, he was held for three days without any notice of the basis for his detention or a meaningful opportunity to explain that he was a U.S. Citizen, despite his repeated requests to contest his detention. At oral argument, counsel for Lehigh County conceded that the policies as alleged would be unconstitutional, and that Lehigh County's sole basis for seeking dismissal of Galarza's claims is the allegedly mandatory nature of ICE detainers. In this light, the only question on appeal is whether Galarza has sufficiently pleaded facts to support his claims that Lehigh County's unconstitutional policies or customs caused the deprivations of his Fourth Amendment and procedural due process rights. . . .Lehigh County argues that the phrase 'shall maintain custody' contained in § 287.7(d) means that detainers issued under § 287.7 are mandatory. Lehigh County acknowledges that § 287.7(d) is titled 'Temporary detention at Department request' and that § 287.7(a) provides that '[t]he detainer is a request.' However, Lehigh County maintains this language is overshadowed by the use of the word 'shall' in § 287.7(d). According to Lehigh County, the word 'shall' means that the 'request' is not really a request at all, but an order. Meaning, Lehigh County cannot be held responsible for Galarza's three-day detention after he posted bail. Galarza argues that the word 'shall' serves only to inform an agency that otherwise decides to comply with an ICE detainer that it should hold the person no longer than 48 hours. We believe that Galarza's interpretation is correct. . . .However, even if we credit that the use of the word 'shall' raises some ambiguity as to whether detainers impose mandatory obligations, this ambiguity is clarified on numerous fronts. First, no U.S. Court of Appeals has ever described ICE detainers as anything but requests. Second, no provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, authorize federal officials to command local or state officials to detain suspected aliens subject to removal. Lastly, all federal agencies and departments having an interest in the matter have consistently described such detainers as requests. . . .For these reasons, we conclude that 8 C.R.F. § 287.7 does not compel state or local LEAs to detain suspected aliens subject to removal pending release to immigration officials. Section 287.7 merely authorizes the issuance of detainers as requests to local LEAs. Given this, Lehigh County was free to disregard the ICE detainer, and it therefore cannot use as a defense that its own policy did not cause the deprivation of Galarza's constitutional rights. Accordingly, the District Court's judgment dismissing Galarza's complaint against Lehigh County is VACATED and the matter is REVERSED for proceedings consistent with this opinion.").

See also ***Gaffett v. City of Oakland***, No. 21-CV-02881-RS, 2021 WL 4503456, at *3 (N.D. Cal. Oct. 1, 2021) ("Defendants frame an overriding issue: does a mutual aid agency need to abide by the requesting agency's policies and procedures? Defendants believe the answer is no, or at least that it is unclear, and this dooms Plaintiffs' case. The answer is indeed not clear. *See Anti Police-Terror Project, et al., v. City of Oakland, et al.*, No. 20-CV-03866-JCS 2020 WL 6381358, at *30 (N.D. Cal. Oct. 31, 2020) (arising from the same protests at issue here). Defendants also raise a policy argument: the answer must be no, because to hold otherwise would be unworkable and chill mutual aid by exposing agencies to liability for others' policies. Whatever dire consequences might ensue, Plaintiffs now insist they do not depend on this issue's resolution. To be fair, Defendants' reading of the Complaint is reasonable. At times, it seems like Plaintiffs are using the failure to follow Oakland's policies as a basis for their Complaint. However, Plaintiffs' current position is only intended to explain why the Sheriff's Office acted unconstitutionally. It is part of their factual narrative, they insist, not a purported basis for relief. Plaintiffs do not presume Oakland's policies create a private right of action, or that violating them is per se evidence of a constitutional violation."); ***Chaaban v. City of Detroit***, No. 20-CV-12709, 2021 WL 4060986, at *1, *8-9 (E.D. Mich. Sept. 7, 2021) ("In May of 2019, Plaintiff was arrested and taken to the Detroit Detention Center, a detention facility that holds pre-arraigned detainees for up to 72 hours. . . The Detroit Detention Center operates under an interagency agreement between the Detroit Police Department and MDOC. . . Under that agreement, MDOC 'provides custody and security services' to the Detroit Police Department and the Michigan State Police for up to 200 arrestees. . .While in custody, during the booking process, Plaintiff alleges she was subject to MDOC's Prisoner Photographic Identification Policy (the 'Photograph Policy'). Section 04.04.133(B) of the Photograph Policy states that when an individual is processed into the MDOC, a photo shall be taken of the prisoner's face and directs that 'headgear shall not be worn.'. . Plaintiff states that under the Photograph Policy, she was forced to remove her hijab for her booking photograph in the presence of male staff and despite her objection that removing her hijab violated her religious beliefs. . . According to the Amended Complaint, MDOC and City of Detroit officers ordered Plaintiff to remove her hijab and threatened to make her 'sleep on the concrete floor of the booking cell without a bed, blanket, mattress, or pillow' if she did not comply. . . Plaintiff states she complied and removed her hijab as a result of those threats. . . . Plaintiff has alleged wearing her hijab is a sincerely held religious belief 'core to her identity' and that wearing the hijab is 'a mandatory aspect of [her] Muslim identity and faith.'. . Defendant City of Detroit does not dispute these allegations, but instead argues Plaintiff fails to state a claim against it because Plaintiff has not identified any City of Detroit policy that substantially burdens religious exercise. Plaintiff was 'confined to an institution' at all relevant times for purposes of RLUIPA. It is also undisputed that the Photograph Policy under which Plaintiff was made to remove her hijab is a policy belonging to MDOC, not the City of Detroit. . . Nevertheless, Plaintiff has alleged the City of Detroit implemented the policy by 'forc[ing] arrestees who wear religious head coverings to remove those head coverings for a photograph.'. . This is a task the City of Detroit is 'bound to perform.'. . Moreover, Plaintiff alleges City of Detroit officers 'falsely stated that the law necessitated for the removal of [her] hijab; threatening to make [her] sleep on the concrete floor of the booking cell

without a bed, blanket, mattress, or pillow if she continued to be noncompliant' and that Plaintiff removed her hijab as a direct consequence. . . According to the allegations in the Amended Complaint, these actions by the City of Detroit 'substantially burdened Plaintiff's religious exercise' in several ways—by requiring to remove her hijab to be photographed . . .; by creating a permanent public record of that image which has been and could continue to be released to the public . . . ; and by requiring Plaintiff to wear the photograph on a wristband and present it to male staff . . . .These allegations, accepted as true and construed in the light most favorable to Plaintiff, are sufficient to state a claim under RLUIPA. . . . Plaintiff's second cause of action, brought under 42 U.S.C. § 1983, alleges Defendants, including the City of Detroit, violated Plaintiff's right to freely exercise her religion pursuant to the First Amendment to the United States Constitution. Section 1983 creates a federal cause of action against 'any person' who deprives someone of a federal constitutional right while acting under color of state law. . . Although § 1983 does not abrogate state sovereign immunity, the statute provides a vehicle to sue local governments for constitutional violations. . . . Plaintiff has sufficiently alleged a constitutional violation. See Section III(E)(1) of this opinion, supra. The issue here is whether the City of Detroit can be held liable for a policy which did not originate with the City, but which has been alleged to be enforced by the City and its officers under the authority of the interagency agreement between the City of Detroit and MDOC. . . Per the terms of the agreement, the Detroit Police Department '[s]hall be made aware of and not contravene MDOC policy and procedure.' . . Thus, the City of Detroit was aware of the Photograph Policy and promulgated that policy or, at a minimum, adopted 'a custom of tolerance or acquiescence of federal rights violations.'. . Because the City of Detroit has not identified any authority to suggest that it cannot be held responsible under existing law, the Court finds that dismissal of Plaintiff's claim at this stage of the proceeding is improper."); ***Morales v. Chadbourne***, 235 F. Supp. 3d 388, 407–08 (D.R.I. 2017) ("Director Wall is entitled to qualified immunity if a reasonable corrections director in May 2009 would not have understood that his conduct violated Ms. Morales' constitutional rights. In light of that definition, the Court looks at the law and policy in May 2009 to determine whether Director Wall would have been on notice that his conduct in honoring the ICE detainer constituted an unlawful seizure. It is important to note at the outset that even Ms. Morales concedes that RIDOC officials are not equipped or required to make citizenship and/or removability determinations. Her position seems inconsistent with her argument that Director Wall and/or his corrections employees should have independently assessed Ms. Morales' citizenship both when she was processed initially at the ACI on the state charges and when she returned from court, held solely on the ICE detainer, to somehow ensure that the detention was constitutional. And while the law across the circuits is clear today that the RIDOC was not required to detain Ms. Morales pursuant to the ICE investigatory detainer, it was not so clearly established in 2009 such that Director Wall acted unreasonably in honoring the detainer. *See Orellana v. Nobles Cty.*, No. CV 15–3852 ADM/SER, 230 F.Supp.3d 934, 939–41, 2017 WL 72397, at *4 (D. Minn. Jan. 6, 2017) (legality *408 of ICE detainers has shifted, citing several 2014 court decisions that held a detainer was a mere request rather than a mandatory requirement); *Galarza v. Szalczyk*, Civil Action No. 10–cv–06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), vacated and remanded by *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Rios–Quiroz v. Williamson Cty., TN*, No. 3–11–1168, 2012 WL 3945354 (M.D. Tenn. Sept. 10, 2012).

The Court has previously found, and the First Circuit confirmed, that there could be no question in 2009 that immigration detainers had to be issued based on probable cause. *Morales II*, 793 F.3d at 211. Therefore, when the State was confronted in 2009 with an ICE-issued detainer, it would have been reasonable for it to assume that ICE had probable cause to issue it. Director Wall has consistently maintained and the facts established that he believed that RIDOC's long-standing policy of honoring ICE detainers was legal and not capable of violating any individual's constitutional rights. Moreover, in 2009 it was reasonable to assume that honoring the ICE detainer was mandatory. This is especially true here where the language of the detainer itself, citing federal law, stated that it was mandatory. *See* 8 C.F.R. § 287.7 (section "requires that you detain the alien for a period not to exceed 48 hours ... to provide adequate time for DHS to assume custody of the alien."). Indeed, before 2009, most state and local law enforcement in New England, honored ICE detainers without independently assessing probable cause, and it was ICE's expectation that the states would hold individuals when ICE issued a detainer. . . Therefore, the Court finds that it was reasonable for Director Wall and RIDOC to conclude in 2009 that the ICE detainer it received was valid, supported by probable cause, and mandatory. His 'reasonable, although mistaken, conclusion about the lawfulness of [his] conduct' does not subject him to personal liability. . . . In light of the facts and the law, the Court finds that based on the totality of the circumstances and undisputed facts, Director Wall is entitled to qualified immunity on this claim."); ***Ayala v. Cty. of Imperial***, No. 15CV397-LAB (NLS), 2017 WL 469016, at *7–8 (S.D. Cal. Feb. 3, 2017) ("A serious flaw in the FAC's allegations is that it fails to allege a relationship between the County and the Task Force that would make the County liable. For example, it does not allege the County supervised or had authority over officers while they were working for the Task Force, or that it had a role in deciding what Task Force officers would do, or that it dictated the Task Force's policies, or anything else that would tend to make the County responsible for what the Task Force did. A *Monell* claim requires that the municpality's policy be the 'moving force' behind the constitutional violation. . . If some other agency's policy, or the Task Force's own policy were the driving force, and if the County did not create that policy, the County would not be liable. . . Furthermore, the County points out that the unidentified officers who shot Ayala are only alleged to be members of the Task Force—not County officers who were deputized. If the Task Force is not under the County's control, its officers are not automatically County officers. The FAC alleges that the officers came from 'various Imperial County and Federal law enforcement agencies' and were assigned to the Task Force. . .Doe Defendants 1–6, the officers who shot Ayala, could have been deputized officers of some other municipality, or even federal officers. The County argues that the FAC fails to even allege that one of its officers shot Ayala, and this argument is well-taken. If none of the County's officers shot Ayala, the County cannot be liable under a *Monell* theory, or any other theory. This is an instance where all that can be inferred is 'the mere possibility of misconduct,' leaving open the obvious possibility that the Plaintiffs are not entitled to relief from this Defendant."); ***Orellana v. Nobles Cty.***, 230 F.Supp.3d 934, ___ (D. Minn. 2017) ("ICE requested Defendants maintain custody of Orellana simply because it had 'reason to believe [Orellana] is an alien subject to removal.'. . As demonstrated, this alone does not provide a constitutionally sufficient basis to further detain Orellana beyond the time he would have otherwise been released. Without any showing that Orellana was likely to escape before a warrant could be

secured, the warrantless arrest made under § 1357(a)(2) violates the Fourth Amendment. . . .Orellana argues that Nobles County's official policy of continuing to detain individuals beyond when they are eligible for release solely because of an ICE detainer caused the constitutional violation in this case. Orellana's argument is well taken. Berkevich, testifying on behalf of Nobles County, stated that in November 2014, if a person subject to an ICE hold was incarcerated and bail had been set and paid, that person would not be released but would be held for up to 48 hours longer. It was Nobles County's adherence to this policy that resulted in Orellana being detained after he was eligible for release. As discussed above, this additional period of detention was made without probable cause, thereby exceeding the warrantless arrest power conferred by § 1357(a)(2). . . .Orellana was arrested and detained while immigration detainer policies were changing across the country and in Nobles County. The record does not show any ill will by Nobles County or any of its employees, and the policy that may have resulted in Orellana's constitutional rights being violated was changed shortly after the events in this case. But a jury could determine that Orellana was detained illegally for 10 days pursuant to an official Nobles County policy that was in effect at that time."); ***Villars v. Kubiatowski***, 45 F.Supp.3d 791, 802 (N.D. Ill. 2014) ("The Seventh Circuit has yet to address the issue, but a very recent Third Circuit case points out that every federal court of appeals that has considered the nature of ICE detainers characterizes them as 'requests' that impose no mandatory obligation on the part of the detainer's recipient. *Galarza v. Szalczyk*, 2014 WL 815127, at *5 (3d Cir. Mar. 4, 2014). Agreeing with the First, Second, Fourth, Fifth, and Sixth Circuits, the Third Circuit emphasized that Congress did 'not authorize federal officials to command state or local officials to detain suspected aliens subject to removal,' that 'all federal agencies and departments having an interest in the matter have consistently described such detainers as requests,' and that to conclude otherwise would offend the Tenth Amendment, which prohibits the federal government from 'command[ing] the government agencies of the states to imprison persons of interest to federal officials.'. . Setting aside the fact that the detainer in Villars's case was not even addressed to the VRLB Defendants (but was instead, for some reason, addressed to the sheriff of Will County), the detainer self-identifies as a 'request,' a clarification that DHS added to the detainer form in 2010 when the agency also removed any mention of the word 'require' from the form. . . The Third Circuit's well-reasoned opinion and the plain language of the detainer itself persuade the Court that the VRLB Defendants were not obligated to detain Villars pursuant to the ICE detainer. In light of that conclusion and the Seventh Circuit's decision in *Harper,* it would be premature at this stage of the litigation—taking Plaintiff's allegations as true and without the benefit of a fully-developed record—for the Court to decide whether the VRLB Defendants had sufficient justification to detain Villars after he posted bond. Accordingly, the Court denies the VRLB Defendants' motion to dismiss Villars's allegations that they violated his Fourth Amendment and procedural and substantive due process rights."); ***Miranda-Olivares v. Clackamas Cnty.***, 3:12-CV-02317-ST, 2014 WL 1414305, *3-*8, *11 (D. Or. Apr. 11, 2014) ("Miranda–Olivares challenges her confinement by the County from March 15 through March 30, 2012, and specifically the County's custom and practice of incarcerating persons who are subject to ICE detainers after the lawful custody on state charges has ended. The County responds that federal law requires this custom and practice because ICE detainers (Form I–247) are issued pursuant to 28 CFR § 287.7 which, it its view, mandates the detention of a suspected alien by a

local law enforcement agency for up to 48 hours. . . . Miranda–Olivares does not challenge an express policy adopted by the County. . . Instead, she challenges the County's undisputed practice or custom of detaining a person based entirely on an ICE detainer even after that person is entitled to release from custody by posting bail or resolving the criminal charges. Based on its interpretation of the language in the ICE detainer and 8 CFR § 287.7, the County argues that its practice or custom does not violate either the Fourth or Fourteenth Amendments because it is mandated by federal law. . . .The County's case relies heavily on the theory that a municipality cannot be liable under *Monell* based on a custom and practice of complying with a mandatory federal law. In support, it points to several decisions from the federal circuits holding that a municipality is not subject to *Monell* liability as a result of enforcing mandatory state law. *See, e.g., Vives v. City of N.Y.*, 524 F.3d 346, 351–52 (2nd Cir.2008) (summarizing the circuit decisions). These courts reason that a municipality's decision to honor the obligation to enforce a mandatory state law is not a conscious choice. . . Although these cases address only state law, their reasoning appears to apply if a municipality had an analogous obligation to follow federal law. . . . However, as explained below, the federal regulation in question, 8 CFR § 287.7, does not mandate detention by local law enforcement, but only requests compliance in detaining suspected aliens. As the Second Circuit posited, albeit without deciding, 'if a municipality decides to enforce a statute that it is authorized, but not required, to enforce, it may have created a municipal policy,' subjecting it to *Monell* liability. . . In this case, any injury Miranda–Olivares suffered was the direct result of the County exercising its custom and practice to hold her beyond the date she was eligible for release based solely on the ICE detainer. The County argues that it had no choice because the ICE detainer mandated her detention pursuant to 8 CFR § 287.7. . .The County finds support for its interpretation of the ICE detainer and regulation in several district court cases. However, those cases are not persuasive. [discussing cases and noting *Galarza*] . . . . [A] conclusion that Congress intended detainers as orders for municipalities to enforce a federal regulatory scheme on behalf of INS would raise potential violations of the anti-commandeering principle. A non-mandatory interpretation is also consistent with the general interpretation of the character of INS detainers in other contexts. No federal circuit court 'has ever described ICE detainers as anything but requests.'. . .[T]his court concludes that 8 CFR § 287.7 does not require LEAs to detain suspected aliens upon receipt of a Form I–247 from ICE and that the Jail was at liberty to refuse ICE's request to detain Miranda–Olivares if that detention violated her constitutional rights. Accordingly, the County cannot avail itself of the defense that its practice and custom did not cause the allegedly unlawful detention. . . . There is no genuine dispute of material fact that the County maintains a custom or practice in violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention. That custom and practice violated Miranda–Olivares's Fourth Amendment rights by detaining her without probable cause both after she was eligible for pre-trial release upon posting bail and after her release from state charges. Thus, Miranda–Olivares is granted summary judgment as to liability on the Second Claim.")

But see ***Galarza v. Szalczyk***, 745 F.3d 634, 645-47 (3d Cir. 2014) (Barry, J., dissenting) ("I am deeply concerned that the United States has not been heard on the seminal issue in this appeal,

an issue that goes to the heart of the enforcement of our nation's immigration laws. And make no mistake about it. The conclusion reached by my friends in the Majority that immigration detainers issued pursuant to 8 C.F.R. § 287.7 do not impose any obligation on state and local law enforcement agencies to detain suspected aliens subject to removal, but are merely requests that they do so, has enormous implications and will have, I predict, enormous ramifications. . . .The sole appellee in this case is Lehigh County, whose only involvement with reference to the central issue before us on appeal is that Galarza was briefly housed in one of its prisons, and that it, through its prison, complied with the immigration detainer once the detainer kicked in. The County, not surprisingly, argued to the District Court why the 'shall maintain custody' language was mandatory—it had, it said, no choice in the matter. Galarza, also not surprisingly, argued that the language was not mandatory, and that the District Court's erroneous conclusion to the contrary was the result of a 'misunderstanding of immigration detainers' because of *Lehigh County's* arguments, 'not the federal government's.'. . .And the record before the District Court on the central issue before us was barebones. In this connection, it bears emphasis that that issue, i.e. whether or not detainers issued pursuant to § 287.7 impose a mandatory obligation to detain on state and local law enforcement agencies, was but one of numerous issues raised in the District Court against the various defendants and combinations of defendants. The District Court issued an extremely thoughtful and very thorough 56–page Opinion, with its finding as to the issue before us essentially tucked away in little more than one paragraph near the end, *see* JA 55–56, undoubtedly because there had been no emphasis on the issue in the District Court and little record made as to it. In the face of all of this, the Majority, in a sweeping Opinion, has decided this enormously important issue. And it did not stop there. Rather, it went on to conclude that '[e]ven if there were any doubt about whether immigration detainers are requests and not mandatory orders,' to read § 287.7 to mean that a federal detainer is a command to a law enforcement agency to detain an individual would violate the anti-commandeering principle of the Tenth Amendment. . . . Maybe it would, and maybe it wouldn't, even assuming, with no great confidence, that the Tenth Amendment issue should have been reached. . . . All of this makes me very uncomfortable. Given the posture of the case before the District Court, I'm not sure how, if at all, the United States could have been brought in. What I *am* sure of is that we have gone very far in this very important case without any input from the United States, and we should pull back now. For now, though, I'm not prepared to say, on what has essentially been a one-sided presentation, that 'shall' really doesn't mean 'shall' but, instead, means 'please.' I respectfully dissent.")

See also ***Burger v. County of Macon***, 942 F.3d 372, 374-76 & n.3 (7th Cir. 2019) ("Regardless whether Burger's firing violated her rights, we face this critical question: Was the firing an act for which Macon County is responsible? We conclude the answer is no. Any state actor who deprives a person of federally guaranteed rights can be sued under 42 U.S.C. § 1983. But for a local government to be liable under § 1983, the rights-depriving act must carry out an official policy made by the local government's lawmakers or officials 'whose edicts or acts may fairly be said to represent' the local government's policy. . . In other words, an act is an official local-government policy when the decision to adopt a particular course of action 'is properly made by that government's authorized decisionmakers.'. .Whether an official has local-government

policymaking authority is a question of state law. . . We therefore turn to Illinois state law to determine whether the alleged rights-depriving acts are part of a Macon County policy. Burger's complaint implies that she was fired because State's Attorney Scott and Assistant State's Attorney Kroncke decided to discharge Burger from her position in the State's Attorney's Office. . . We've recognized that Illinois State's Attorneys are state, rather than county, officers. . . And the same is true of Assistant State's Attorneys, even while at least part of their salaries—like portions of State's Attorneys' salaries—are paid out of the county treasury. . . .But whether Kroncke, like Scott, is a state officer does not resolve the issue. This is because even decisions by a state officer may constitute county policy in certain situations—specifically, when the county can and does delegate county policymaking authority to the state officer. . . In this case we conclude that Macon County could not delegate the relevant authority to the State's Attorney. An Illinois statute gives exclusive control over the internal operations of the State's Attorney's Office directly to the State's Attorney; the county cannot choose otherwise. . . . The statute provides: 'The State's Attorney shall control the internal operations of his or her office and procure the necessary equipment, materials and services to perform the duties of that office.'. . In carrying out this and other statutory responsibilities, Assistant State's Attorneys 'are in essence surrogates for the State's Attorney.'. . Accordingly, when it comes to the internal operations of the office, '[t]he State's Attorney is responsible for the professional conduct and acts of his or her assistants.'. . Kroncke and Scott's management of the State's Attorney's Office culminated in their decision to discharge Burger from her position within the Office. Because Macon County lacked authority—in the first place—to direct or control any decisions about the State's Attorney's Office's internal operations, it could not have delegated any decisional authority on internal-operation matters to Scott and Kroncke. Indeed, by statutory prescription, this managerial authority to hire and fire rested exclusively with the State's Attorney, a state officer. So, the county could not be 'responsible for establishing final policy with respect to the subject matter in question,'. . . and Burger's firing may not 'fairly be said to represent' the county's policy[.] . . Thus, on the one count Burger asserted on federal law, she did not state a basis for county liability under *Monell*. Without a viable federal claim, dismissal was appropriate. . . . This is not to say that for some other claim, the county would necessarily lack responsibility for payment of an adverse judgment against a state officer. . . But we need not address that situation. No judgment against a state officer could be issued on Burger's count resting on § 1983, as she did not assert that count against a state officer, like Scott."); ***Burley v. Gagacki***, 729 F.3d 610, 619 (6th Cir. 2013) ("In this case, plaintiffs conceded in their complaint that Gagacki, the only Wayne County employee alleged to have participated in the execution of the search warrant at their home, was 'deputized as a federal drug enforcement agent working under the auspices of the federal government.' As such, with regard to the raid itself, the district court properly concluded that the federal government's policies and customs were at issue, and not those of Wayne County. . . .Plaintiffs' theory based on a failure to train similarly fails. A municipality's duty to train extends only to 'its employees,'. . . and it can be liable only if its failure to train was 'closely related to' or 'actually caused' the plaintiff's injuries. . . . Plaintiffs have failed to provide proof on either essential element. There is no evidence in the record that anyone in Wayne County's employ, other than Gagacki, participated in the execution of the search warrant at 20400 Greeley. To the contrary, the evidence indicates that the individuals who executed the search

warrant were either directly employed by, or, like Gagacki, working under the supervision of, the DEA. Any duty to train rested with the DEA, and only the DEA's inadequate training could form the basis of a failure-to-train claim. In short, viewing the evidence in the light most favorable to plaintiffs, no reasonable jury could find municipal liability under § 1983."); ***Tucker v. Williams***, 682 F.3d 654, 659 (7th Cir. 2012) ("To determine if a particular entity is a state agency, i.e., an arm of the state, courts look at: (1) the extent of the entity's financial autonomy from the state; and (2) the 'general legal status' of the entity. . . Of the two, the entity's financial autonomy is the 'most important factor.'. . . Taking into account these factors in light of the Interagency Agreement, we conclude that the Task Force is a state agency. According to the Interagency Agreement, the Illinois State Police approves the use of all official funds and supervises all Task Force operations. The Interagency Agreement also provides that the Director of the Illinois State Police appoints personnel to the Task Force, and such personnel are considered employees of the State, and are indemnified and represented by the State as state employees. The Interagency Agreement further provides that the Illinois State Police supply all facilities, training, and specialized equipment. Under these facts, the Task Force is an extension of the Illinois State Police and, as such, is entitled to the same immunity protections afforded to the State Police. Summary judgement for the Task Force was proper."); ***Willis v. Neal***, 2007 WL 2616918, at *9 n.9 (6th Cir. 2007) (Dowd, J., dissenting) ("[T]he Interlocal Cooperation and Mutual Aid Agreement, under which the Twelfth Judicial District Drug Task Force had enlisted the aid of the officers of these various governmental entities for this takedown, recognizes that officers do not relinquish any responsibility simply by participating in the Task Force activities. The Agreement provides, in part, as follows: 12. LIABILITIES. Officers Assigned to the Drug Task Force Remain Employees of Their Hiring Agency. Each law enforcement officer assigned to the Drug Task Force will remain an employee of the local government by which the officer was employed prior to the assignment. The conduct and actions of such officer will remain the responsibility of the local government employing the officer. Any civil liability arising from the actions of a law enforcement officer engaged in Drug Task Force activities will be assumed by the employing local government in the same manner and to the same extent as if the actions were committed within the jurisdiction of the employing local government during the normal course of the officer's employment, independent of the Drug Task Force...."); ***Johnson v. Deep East Texas Regional Narcotics Trafficking Task Force***, 379 F.3d 293, 310, 311 (5th Cir. 2004) (" What happened at 419 Otis Street starting at about 9 a.m. on March 9, 2001, was entirely determined by DEA agent Marshall, who was in charge and whose directions all officers present were required to and did follow. . . . Marshall's decision to force entry, rather than seek entry by consent, and to do so without further information, was entirely his own decision. There is no evidence suggesting that Marshall made that decision for any reason related to any County policy or any understanding thereof which he may have had, or for any reason other than that he thought that decision to be appropriate in the light of his *own* training and experience as a DEA agent and DEA policy and procedures. Indeed the uncontradicted evidenced is that Marshall's decision in this respect was contrary to County policy and practice. If there was causative fault on the part of the authorities, the fault was Marshall's and/or the DEA's, not the County's.' (footnotes omitted)); ***Young v. City of Little Rock,*** 249 F.3d 730, 736 (8th Cir. 2001) ("As the City points out, it does not operate the jail. The City of Little Rock has no jail of its own.

It contracts with the County for the housing of City prisoners. What the County does with prisoners, therefore, the City says, is not its problem, and there is no vicarious liability under § 1983. Although this line of argument has some surface appeal, we do not believe that the jury had to accept it. City employees were aware of the custom of chaining prisoners, and they knew that Ms. Young was being taken back to the jail. Strip searching of prisoners is routine procedure, and the jury could reasonably infer that the City knew that a person entering the jail, in jail clothing with a group of other detainees, would be strip searched. In these circumstances, it is far from unfair to attribute to the City the policies routinely used by the County jail in the housing and processing of City prisoners."); ***Eversole v. Steele***, 59 F.3d 710, 716, 717 (7th Cir. 1995) ("The law enforcement officers involved in the RUFF Drug Task Force, including Detectives McQuinley and Sherck, were acting pursuant to the rules and regulations of their respective law enforcement agencies, in this instance the Fayette County Sheriff's Department and the Connersville Police Department but were not acting pursuant to any policies established by the RUFF Drug Task Force. The RUFF Drug Task Force was simply a multi-jurisdictional effort of law enforcement agencies joined together in a coordinated effort to stop or at least control drug activity in the four-county area. Each participant in the Task Force remained obliged to follow the rules and regulations of his or her respective law enforcement agency. . . . Because the Task Force was nothing more than a joint effort of four counties in the State of Indiana to implement existing law enforcement policies, no new or unique policies were needed.").

See also ***Estate of Perry v. Wenzel***, 872 F.3d 439, 457 (7th Cir. 2017) ("The district court concluded that Perry's § 1983 claims against the County defendants failed as a matter of law because Perry was never in the County's custody and therefore, none of the County defendants owed him a constitutional duty. However, the district court's conclusion that Perry was not in the County's custody was based upon Nurse Virgo's decision not to accept Perry as an inmate because of the condition in which he arrived. We disagree with the district court's analysis, as it improperly substituted the County's booking policy for the proper constitutional analysis. It is the Fourth Amendment and not a County's policy that governs Perry's claim. The district court erred when it permitted the County, via its own policy, to determine whether or not the United States Constitution applied to its actions. Such a rule would allow municipalities to easily isolate themselves from liability by enacting policies that have the effect of dictating when their constitutional duties begin. We reject this rule. Instead, the district court should have applied the constitutional analysis for determining whether a seizure has occurred, as the Fourth Amendment protects 'against unreasonable searches and seizures.'. . When determining whether there has been a seizure, 'the traditional approach is whether the person believed he was "free to leave."'. . This is an objective standard, which focuses on how a reasonable person in the suspect's position would have understood the situation. . . Here, no reasonable jury could conclude that Perry was not in the County's custody. County officers assisted in dragging Perry into the facility and placed him inside the facility, behind a door that could only be opened by a County officer. Further, while Nurse Virgo examined Perry, two County officers (not City officers) physically restrained him on the bench. A reasonable person in Perry's position would not have believed that he was free to leave the County facility. Further, a reasonable person would have believed that it was the County

that was restricting his movement, based upon the fact that the County controlled the entrance and that County Correctional Officers were physically restraining him. Therefore, we hold that Perry was in the County's custody when he died even though the formal booking process was not completed.")

See also ***Tolley v. Rockbridge Regional Drug Task Force***, No. 7:19-CV-00863, 2020 WL 2499705, at *3 (W.D. Va. May 14, 2020) ("To state a claim under § 1983, plaintiff must allege a violation by a *person* acting under color of state law. . . The Rockbridge Regional Drug Task Force is not a person and is therefore not subject to suit. *See Clinton v. Berkeley Cty.*, No. 3:08-CV-10, 2009 WL 35331, at *6 (N.D.W. Va. Jan. 6, 2009) ("[I]t is well settled that a drug task force is not a 'person' [amenable] to suit under § 1983."); *Jackson v. Commonwealth of Virginia*, No. 7:06-CV-00306, 2006 WL 1700655, at *1 (W.D. Va. June 16, 2006) (dismissing claim against Northwest Virginal Regional Drug Task Force because it is not a person under § 1983). Thus, this defendant will be dismissed."); ***Rivera v. Lake County***, 974 F.Supp.2d 1179, 1197, 1198 (N.D. Ill. 2013) ("There is authority for the idea that a 'multijurisdictional law enforcement agency' is subject to suit under § 1983. In *Maltby,* the Seventh Circuit found that a law-enforcement 'Task Force' could be sued where the Task Force was organized pursuant to the Illinois Constitution and to the Intergovernmental Cooperation Act, 5 Ill. Comp. Stat. 220/1. *Maltby v. Winston,* 36 F.3d 548, 560 n. 14 (7th Cir.1994). At the same time, a mere collaboration of other municipal entities that exists in name only would not be amenable to suit, just as a municipality's departments cannot be sued in their name if they lack independent legal existence. . . . Ultimately, whether the Task Force is amenable to suit is a question of fact. Resolution of that question depends on, among other things, whether the Task Force has an independent legal existence and is organized as a separate municipal entity under Illinois law. This Court cannot resolve that question at this stage, so the Motion to Dismiss the Task Force is denied."); ***Sefick v. Hunter***, No. 11 C 50145, 2012 WL 5342408, *2, *3 (N.D. Ill. Oct. 29, 2012) ("Paragraph IV of the agreement contains language that is in fact dispositive of the *Monell* issue. That provision states, in pertinent part, that '[n]ot-withstanding anything herein to the contrary' the Sheriff retains control over 'all matters incidental to the performance of the police protection and law enforcement services,' including but not limited to, the 'methods of rendering such services,' the 'level of standards of performance,' the 'discipline of any personnel,' and the 'general control' over all assigned personnel. Moreover, this same paragraph provides that '[a]t no time shall any officer, official, or employee of the Village undertake to direct any of the assigned personnel as to matters incidental to the performance of police protection and law enforcement services.' This language virtually closes the door on plaintiff's claim that the Village is liable as a policymaker under *Monell.* There is simply no way that any Village official, including Mayor Strickland, could be considered to be a policymaker as it relates to the function of law enforcement personnel or services provided under the agreement. Pursuant to the agreement, all such control over policing was unequivocally retained by the Sheriff exclusively. This conclusion is bolstered by the undisputed evidence of Strickland who stated repeatedly in his deposition that neither he nor any other Village official had any control over the police operations provided by the County under the agreement. Plaintiff also argues that the act of entering into the agreement itself was an official policy of the Village sufficient to create *Monell*

liability. This contention fails for two reasons. First, even if it was a policy-making decision, there is no evidence to show that entering into the agreement caused any of plaintiff's alleged injuries. There is no evident connection between the decision to enter into the agreement and any specific actions by Wagner that are alleged to have harmed plaintiff. Nor is there any evidence demonstrating that the Village sought to impose any unconstitutional police activities on its citizenry via the agreement or the decision to engage the County to provide for its law enforcement needs. Second, this argument is foreclosed by *Ross v. United States*, wherein the Seventh Circuit held that imposing liability on a city that had no authority to influence a county's public safety procedures under an intergovernmental agreement would effectively create the respondeat superior liability that the Supreme Court has soundly condemned. . . A contrary result would effectively read potential § 1983 liability into every intergovernmental agreement in the State of Illinois. . . The reasoning of *Ross* applies to the facts of this case and refutes plaintiff's argument. Because the undisputed evidence in this case establishes that the Village had no policymaking authority over Deputy Chief Wagner or any other law enforcement personnel, under the agreement or otherwise, the Village is entitled to summary judgment as to all of plaintiff's § 1983 claims."); ***Rush v. City of Mansfield***, 771 F.Supp.2d 827, 846-57 (N.D. Ohio 2011) ("In sum, the Court agrees with Judge McHargh that ASORT is subject to suit as an unincorporated association and ***DENIES*** ASORT's Motion for Summary Judgment (Doc. 171) to the extent that it is based on the argument that ASORT is not *sui juris.* ASORT is not a government entity, meets the definition of an unincorporated association under Rule 17(b)(3)(", and is not somehow shielded from suit by Ohio law. . . . The Plaintiffs agree that the Sixth Circuit's segmenting analysis and the Sixth Circuit's jurisprudence regarding the propriety of using deadly force when confronted with an armed suspect − regardless of why the suspect may happen to have been armed − would prohibit such a claim in this case. . .They argue, instead: Plaintiffs did not sue Officer Gouge or Officers Bammann and Frazier, who in the last moments of the raid, fired the deadly shots. Under existing precedent (particularly that requiring a segmenting analysis) those officers did not act unreasonably and/or would be entitled to qualified immunity. But the fact that particular individuals may not be liable does not mean that Plaintiffs did not suffer a constitutional violation or that other Defendants are free of liability. Plaintiffs correctly sued the entities and persons who placed the ASORT team in this dangerous position as they executed a warrant seeking stolen property in a manner that masked their identity as police officers.... It was this plan that was set at night utilizing blinding lights; this plan that triggered a huge disorienting explosion simultaneously with the knock and announce; this plan that relied on misleading intelligence to improperly ramp up the arsenal used to confront the Rush/Hedrick family over stolen property; this plan, in short, that caused the individual ASORT officers to fire the deadly and terrorizing shots at a confused and surprised Gilbert Rush and his family. The plan was the moving force behind the constitutional violation. The Defendants responsible for this plan violated the Fourth Amendment rights of the Plaintiffs. . . .Based on this argument, the Plaintiffs are asserting two somewhat interrelated claims. The Plaintiffs' claim first that the decision to use ASORT in the above manner was not reasonable under the circumstances. . .In other words, the Plaintiffs contend that the search and seizure would have been unconstitutional even if Gilbert Rush never had been shot and killed. . . . The Plaintiffs' also claim that the Defendants failed to identify themselves in a constitutionally reasonable

manner. . . . . In light of these claims, an additional threshold issue remains: what measure of damages is recoverable if the execution of the warrant is unreasonable, but the decision to use deadly force was not excessive when made? It does not appear that any court within the Sixth Circuit has considered previously whether a defendant may be liable for physical injury resulting from the improper execution of a warrant absent a viable claim of excessive force. On this issue, there is some tension between the Sixth Circuit's segmenting approach to use of force claims and the Supreme Court's concern that the unconstitutional service of a warrant might itself give rise to the need for excessive force, and, thus, to physical harm. . . . [C]ourts have exercised care to only hold law enforcement officers liable for harms that proximately flow from their unconstitutional conduct. Thus, where no unconstitutional use of force occurs at the point when force is employed, the Sixth Circuit's segmenting approach assures that officers are not held liable for their earlier constitutional actions, no matter how negligent or unwise. [collecting cases] Understood properly, these cases explain that the reasonable use of force is not rendered unconstitutional simply because officials exercise poor judgment that is distinct from the otherwise reasonable use of force, even where that poor judgment may have helped create the circumstances necessitating the later use of force. None of the cases hold, however, that officers are immune from harms that flow proximately from their own unconstitutional conduct simply because a later use of deadly force might not be unconstitutionally excessive. . . . These cases do not go so far. . . as to insulate officers from harm caused by their unconstitutional acts simply because their later dealings with a plaintiff may not be independently actionable. . . . It is this basic principle of proximate cause that *Hudson* applies: 'an unannounced entry may provoke violence in supposed self-defense by the surprised resident.'. .The rule is simple: when a constitutional violation occurs, liability attaches for harm that is the direct and proximate result of that constitutional violation, but only for such harms. . . Applying that principle to this case, then, if the Defendants failed to knock-and-announce their presence as required by the Fifth Amendment, or otherwise committed a constitutional violation when executing the warrant, and if that failure was the proximate cause of Gilbert Rush's death, the Plaintiffs may recover under § 1983 for that harm."); ***Cline v. City of Mansfield***, 745 F.Supp.2d 773, 795-97, 800 (N.D. Ohio 2010) ("The suggestion that a private social organization could form a SWAT-type team that would be immune from suit certainly goes against the original intent behind § 1983, which was enacted to allow recourse against a private 'law enforcement' entity whose policies, practices, and procedures deprived citizens of their civil rights. . . . ASORT [Allied Special Operations Response Team] is governed by a *private* organization, and, to the extent there is evidence in the record that the leader of ASORT reports to any authority higher than himself for purposes of setting ASORT's policy, practices, or procedures, that authority is vested in this same *private* organization. This alone would seem to establish that ASORT is not a 'government unit[ ], subdivision[,] or agenc[y].' Although ASORT points this Court to an Ohio statute that allows municipalities to form multijurisdictional police task forces, that statute does not somehow transform ASORT into a unit of government. . . . ASORT also seems to argue that it is a government entity because it is performing a traditional municipal function, but this is exactly wrong: that ASORT is performing a traditional municipal function is what makes it *subject* to suit under § 1983, not what makes it *immune* from it. . . It is true, of course, that the members of ASORT are themselves public officials who receive their equipment and salaries from local

municipalities, but this does not automatically make ASORT a part of those municipalities. . . . In sum, the Court concludes that, because ASORT is formed and governed by a private organization, it is not a government unit, subdivision, or agency. . . . ASORT is not a government entity, meets the definition of an unincorporated association under Rule 17(b)(3)("), and is not somehow shielded from suit by Ohio law. Whether ASORT is actually liable in this action, of course, will depend upon whether it proximately caused a violation of a constitutional right."); ***Buckheit v. Dennis***, No. C 09-5000 JCS, 2010 WL 3751889, at *6, *7 (N.D. Cal. Sept. 24, 2010) ("In the absence of control over the arresting officers, the County must not be held liable for their conduct under § 1983. . . Here, the allegations are that: 1) there was a written and/or oral agreement whereby the Town of Atherton agreed to follow an alleged discriminatory policy set by the County, and 2) the County agreed to train officers from the Town of Atherton. The County is alleged to have had control over the officers and to have been a moving force behind their misconduct. Although a close question, the Court finds that these allegations are sufficient to state a claim. . . . There is no allegation that the County participated in Plaintiff's arrest. There is no allegation that the arresting officers were employed by the County. The allegations of the SAC make it clear that it is the Town of Atherton, not the County, which allegedly 'required' Atherton's officers to implement a discriminatory policy. However, the SAC also alleges that there was a contract (either oral or written) pursuant to which the Town of Atherton required its officers to carry out the County's training policies. Although the allegations that the County controlled the officers are sparse, and there are no allegations suggesting that the officers were 'a mere conduit for carrying out [the County's] will'. . . , the facts alleged in the Third and Fourth Claims for relief must be accepted as true on a 12(b)(6). Plaintiff alleges that the Town of Atherton and the County of San Mateo entered into an agreement providing that the County would promulgate or adopt a discriminatory policy, and further agreed that the Town of Atherton would instruct or require its officers to carry out this allegedly discriminatory policy. . . And in the Fourth Claim, the Plaintiff alleges that County and the Town of Atherton entered into an agreement whereby the Atherton police officers would be trained in the discriminatory policies of the County. . . These allegations are sufficient at the pleading stage."); ***Clinton v. Berkeley County***, 2009 WL 35331, at *6 (N.D.W.Va. Jan. 6, 2009) ("To the extent that the plaintiff asserts a claim against the Task Force, it is well settled that a drug task force is not a 'person' amendable to suit under § 1983. *See Harvey v. Estes*, 65 F.3d. 784 (9th Cir.1995) (a multi-jurisdictional drug task force is not a person under § 1983); *Jackson v. Commonwealth of Virginia*, 2006 WL 1700655 (W.D.Va.2006) (same); *Timberlake v. Benton*, 786 F.Supp 676 (M.D.Tenn.1992) (same). Accordingly, the Task Force is not a proper party defendant in this case and should be dismissed."); ***Cutter v. Metro Fugitive Squad***, No. CIV-06-1158-GKF, 2008 WL 4068188, at *12 (W.D. Okla. Aug. 29, 2008) ("[A]n intergovernmental task force made up of various local, county and state agencies may be subject to suit under § 1983 if the parties that created it intended to create a separate legal entity. . .It is premature to determine at this stage of the proceedings whether MFS is subject to suit under § 1983. There is no record evidence regarding the creation of MFS, whether the creators of MFS intended to establish a separate legal entity subject to suit, whether there is a joint operating agreement among the government entities, whether MFS has an independent operating budget, whether its member entities retain responsibility for the employment, salary, benefits, and terms

and conditions of all employees, whether MFS is vested with policymaking authority or has promulgated any rules or regulations for the law enforcement activities of its members, or whether the MFS participants remain obliged to follow the rules and regulations of his or her respective law enforcement agency. . . Thus, MFS's motion to dismiss on the basis that it is not an entity subject to suit under § 1983 is denied without prejudice to reassertion in a motion for summary judgment."); ***Pettiford v. City of Greensboro***, No. 1:06cv1057, 2008 WL 2276962, at *13, *17, *23 (M.D.N.C. May 30, 2008) ("The City argues that Plaintiffs could not 'establish that the municipality actually caused the alleged constitutional deprivation' because any harm suffered by Plaintiffs occurred at the direction of the Federal Parties rather than pursuant to its own official policy or custom. . . . At oral argument, the City was hard-pressed to identify a legal framework for analyzing whether its employees acted as federal agents during the underlying investigation of the Pettifords and whether such a determination, if found, compels dismissal for want of subject matter jurisdiction based on derivative federal immunity. . . . The court has conducted independent research, which demonstrates that other courts have articulated at least four frameworks to determine whether a local law enforcement officer or official may be deemed a federal agent for purposes of tort liability: (1) statutory cross-deputation; (2) totality of the circumstances; (3) borrowed servant doctrine; and (4) government contractor defense. Although these frameworks arise in different contexts, they share common principles, especially the emphasis on day-to-day control or supervision of the employee(s) in question. [The court engages is a lengthy discussion of each.] . . . . In sum, on the present record the City continues to face legal and factual hurdles in its quest to benefit from derivative federal sovereign immunity. Cooperation between federal and local authorities is critical to effective law enforcement, and the court is sensitive to the need to encourage, not hinder, such efforts. It is for this reason that the court engaged in the lengthy analysis above based on research independent from the parties' briefing. . . . The above analysis reveals that the City's motion as styled is misdirected. The question is not whether the City, the sole defendant, is immune because it was acting as a federal agent. Rather, because no liability lies under section 1983 for actions taken under color of federal law, . . . the real issue for the City is whether it can show that Plaintiffs cannot prove an element of their section 1983 claim − that the City acted under 'color of state law' − because all the GSO PD officers involved were allegedly acting as federal agents. The City's motion, therefore, is more properly made on summary judgment, after discovery and based on a more fully developed record. Accordingly, the City's motion to dismiss the section 1983 claim for want of subject matter and personal jurisdiction based on derivative sovereign and prosecutorial immunities is DENIED, without prejudice to its being raised on summary judgment."); ***Arias v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec***, Civ. No. 07-1959 ADM/JSM, 2008 WL 1827604, at *13-*15 (D. Minn. Apr. 23, 2008) ("The City Defendants contend that Plaintiffs' individual-capacity § 1983 claims against them must be dismissed. As a threshold matter, the Court must consider whether § 1983 even applies in this case. The City Defendants assert they were assisting ICE agents in enforcing the immigration laws. . . Congress has addressed this situation in 8 U.S.C. § 1357, which 'specifically empower[s] the Attorney General ... to contract with state and local agencies for assistance in enforcing immigration laws and incarcerating illegal aliens.' . . A formal agreement is unnecessary for a state or local officer 'to communicate with the Attorney General regarding the

immigration status of any individual ... or otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.' 8 U.S.C. § 1357(g)(10). 'In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.' 8 U.S.C. § 1357(g)(3). Significantly, Congress has provided that '[a]n officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.' 8 U.S.C. § 1357(g)(8). The Second Amended Complaint alleges that the City Defendants assisted in the planning and execution of Operation Cross Check, which is a DHS operation implemented by ICE. Although the City Defendants apparently assume that § 1983 applies, it is difficult to discern how their participation in Operation Cross Check occurred under color of state law. Instead, it appears from Plaintiffs' allegations that the City Defendants acted under color of federal authority pursuant to 8 U.S.C. § 1357(g)(8). If so, then Plaintiffs' § 1983 claims should be construed as *Bivens* claims. . . . Although the parties have not briefed the issue, Congress's statutory directive in ' 1357(g)(8) is clear. Accordingly, assuming Plaintiffs' allegations are true, the Court finds that the City Defendants were acting under color of federal authority . . . . [T]o the extent Plaintiffs are asserting that Kulset and Reed Schmidt are liable as supervisors, the Court finds Plaintiffs' allegations fail to state a claim. Under 8 U.S.C. § 1357(g)(3), any Willmar or Atwater officers who assisted ICE in executing Operation Cross Check did so under 'the direction and supervision of the Attorney General.' Because officers of the federal government supervised the Willmar and Atwater police officers during Operation Cross Check, Kulset and Reed Schmidt cannot be liable as supervisors. . . . Although the City Defendants do not address the full implication of 8 U.S.C. § 1357(g), the Court finds that the statute bars Plaintiffs' *Monell* claims against the City Defendants in their official capacities. Plaintiffs seek to hold the City Defendants liable in their official capacities for assisting ICE in implementing Operation Cross Check, which is a federal immigration initiative executed pursuant to federal policy. The City Defendants' assistance falls squarely within the ambit of ' 1357(g). Accordingly, the City Defendants are considered to be acting under color of federal authority and under the supervision of the Attorney General and the DHS Secretary. . . Therefore, Plaintiffs cannot assert a 42 U.S.C. § 1983 *Monell* claim because the City Defendants were not acting under color of state law, and they were not the final policymakers regarding Operation Cross Check. Alternatively, even if ' 1357(g) does not apply, Plaintiffs have still failed to allege a city policy that was the moving force behind the alleged constitutional violations. Plaintiffs' claims arise from the federal policies embodied in the planning and implementation of Operation Cross Check, and not from any city or county policies. . . The Court grants the City Defendants' motion to dismiss the official-capacity *Bivens* claims against them."); ***Howell v. Polk***, No. 04-CV-2280-PHX-FJM, 2006 WL 463192, at *1, *8 & n.8, *14 (D. Ariz. Feb. 24, 2006) ("The Prescott Area Narcotics Task Force ("PANT") is an intergovernmental organization comprised of Yavapai County area municipalities and aimed to reduce unlawful narcotics activities. . . . The PANT Board governs the PANT. . . Plaintiffs claim that the PANT Board is responsible for training all PANT officers, and that all Board Defendants are liable for

failing to adequately train all PANT Defendants with regard to the execution of search warrants. There is no evidence to show that PANT Board members were only responsible for the functioning of the PANT with regard to PANT officers employed by a common municipality. . . .The intergovernmental agreement which established the PANT states that "each [municipality] shall be solely responsible for its own acts or omission and those of its officers and employees by reason of its operations under this agreement." . . . While this provision may affect the distribution of ultimate liability among the parties to the agreement, it cannot supplant federal constitutional law with regard to supervisor liability. . . . Therefore, with regard to this claim, it is irrelevant whether Board Defendants and PANT Defendants are employed by the same municipality. . . . Plaintiffs also claim that all defendants are liable in their official capacities, by which plaintiffs claim that the municipalities for which each defendant works failed to properly train PANT defendants with regard to the execution of search warrants. . . . As with regard to plaintiffs' claims against Board Defendants, there is insufficient evidence from which to conclude that the need for more or different training was so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the municipalities for which each defendant worked were deliberately indifferent to the need for training."); ***Johnson v. Bd. of Police Commissioners,*** 370 F.Supp.2d 892, 902 (E.D. Mo. 2005) ("Plaintiffs allege that Defendants City of St. Louis and Police Board acted in concert pursuant to a 'policy or persistent, common, and well-settled practice and custom of intimidating and driving homeless and homeless appearing people from downtown St. Louis,' which has resulted in a pattern of misconduct by Defendant City of St. Louis and its employees. . . . Defendant City of St. Louis claims it has no legal authority to create policy for Defendant Police Board. Without legal authority, the City of St. Louis argues that there is no 'legal tie' between Defendants City of St. Louis and Police Board, and Defendant City of St. Louis cannot be liable for alleged actions taken by police officers. Notwithstanding this assertion, the Court finds that the fact that the Defendants are separate legal entities does not prevent them from acting in concert to deprive constitutional rights pursuant to a joint policy or custom, as alleged in the Complaint. . . Plaintiffs have alleged that Defendant City of St. Louis developed, and acted together with Defendant Board of Police, to implement the policies responsible for the alleged unconstitutional conduct at issue in this case. The fact that Defendant Police Board and Defendant City of St. Louis are separate legal entities does not warrant dismissal. Plaintiffs have adequately alleged the elements of municipal liability.); ***Pond v. Bd. of Trustees,*** No. 1:03-CV-755-LJM-VSS, 2003 WL 23220730, at *4 (S.D. Ind. Nov. 25, 2003) ("Because the Muncie Police Department did not have the authority to set policy for the Ball State officers, Pond cannot argue that action pursuant to a Muncie Police Department policy caused the Fourth Amendment violation. In addition, the jurisdiction extension Agreement between the Muncie Police Department and Ball State did not give Muncie policymaking authority over Ball State's Police Department. Indiana law limits the jurisdiction of university police officers to a university's real property, but allows municipal police chiefs like Chief Winkle to grant them additional jurisdiction. . . In accordance with ' 20-12-3.5-2, Chief Winkle granted the Ball State police officers jurisdiction throughout Muncie. The additional jurisdiction provision is contained in the same chapter of the Indiana Code that grants the board of trustees the ability to appoint and set policy for university police officers, and nothing in the chapter indicates that a grant of additional jurisdiction by the relevant law enforcement agency

would divest the board of trustees of policymaking authority over the university officers."); ***Tyson v. Willauer,*** No. 301CV01917(GLG), 2003 WL 22519876, at *2 n.4 (D.Conn. Nov. 1, 2003)(not reported) ("[A]t all times relevant to plaintiffs' complaint, Willauer was acting in his capacity as a deputized DEA Task Force Agent, not as a Bloomfield police officer. It is highly questionable as to whether plaintiffs could establish any causal link between any policy of the Town and the actions of Willauer that resulted in their alleged constitutional deprivations."); ***Silberberg v. Lynberg,*** 186 F.Supp.2d 157, 170 n.11 (D. Conn. 2002) ("The court notes that the town defendants can be liable, in cases such as this, as the 'real parties in interest' behind the VSCU [Valley Street Crime Unit]. . . As the court indicated when it dismissed the VSCU as a party, the formation of an interlocal agreement does not create an independent legal entity capable of being sued. . . But that does not mean that simply by acting jointly, the towns can escape all liability for their actions. Several of the town defendants have argued that because no officer from that particular town was involved in the arrest or prosecution of Silberberg, the town can not be liable. However, the towns, as the 'real parties in interest', may be liable for any unlawful actions taken by the VSCU."); ***Ford v. City of Boston,*** 154 F. Supp.2d 131, 148-50 (D. Mass. 2001) ("City liability for the Jail searches of BPD arrestees poses an interesting question of institutional responsibility. . . . The plaintiffs point to an express agreement between the City and the County Sheriff, under which the County agreed to 'take custody of and house' BPD arrestees at the Jail. This case is thus best analyzed as involving a subcontract between the City and the County, under which Jail employees, acting as agents of the City, supervised and cared for City arrestees. . . As such, the City had an affirmative obligation − as is present in the more standard models for municipal liability − to ensure that the policy of the Jail officials did not lead to widespread violation of BPD arrestees' constitutional rights. . . . Having established that the City had an affirmative obligation to monitor conditions for BPD arrestees housed at the Jail, I must next assess whether the City failed to meet that obligation. In so doing, I find the 'deliberate indifference' standard of *City of Canton* readily applicable. . . . [T]he City effectively used the County Jail as its own facility for almost a decade. To permit the City to escape liability in this case would be to sanction willful disregard of municipal obligations. The City presumably could have chosen to build a municipal facility for women, or to hold arrestees in one of the ten existing City police station lockups. . . That it chose instead to contract with the County to house female arrestees did not entitle it to bury its head in the sand and ignore the manner in which the County treated those arrestees. . . . Under these circumstances, there can be no question that the City's liability in damages for Jail violations of BPD arrestees' Fourth Amendment rights is coextensive with that of the County.").

But see ***Deaton v. Montgomery County, Ohio***, 989 F.2d 885, 888-90 (6th Cir.1993) ("The duty to manage and operate the facility belongs to the City and the custom or policy it chooses to implement does not become that of the County because the City has separate statutory authority to house prisoners. Therefore, any constitutional violations of the plaintiffs' rights were the result of City, not County, policy. . . . The interdependence in this instance does not make the County a joint participant since each governmental entity is required to be in compliance with Ohio law. Moreover, because each entity is required to be in compliance with Ohio law, we do not believe the County adopts the City's policy by default absent a showing of deliberate indifference. . . . We

do not believe that the Sheriff of Montgomery County has an affirmative duty to discover whether the city is following state law. There are no facts presented indicating that the sheriff knew or should have known that strip searches were conducted in violation of state law. In other cases where deliberate indifference has been found, the county was held liable for its own action or inaction, or that of a private entity. The instant case deals with another governmental entity governed by the same laws as the County. The City has independent statutory authority to house prisoners and in doing so was required to comply with Ohio law. It is for this reason that we find that Montgomery County is not liable."); ***Pelka v. Ware County, Georgia***, No. CV 516-108, 2018 WL 4343401, at *2–4 (S.D. Ga. Sept. 11, 2018), *appeal dismissed*, No. 19-11039-FF, 2019 WL 4621966 (11th Cir. June 27, 2019) ("The City argues that the Court's September 29 Order concluding that the City's liability under Section 1983 can be imputed from its contract with Ware County is a clear error. Specifically, the City contends that the Court's reliance on *Ancata* is misplaced and that the City cannot be liable for the County's policies. As such, a review of *Ancata* and related precedents is appropriate. In *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700 (11th Cir. 1985), the Eleventh Circuit held that a municipal government could be held liable for the alleged unconstitutional policies of the private medical provider it contracted with to provide health services to its prison. . . The court reasoned that since governments have a 'non-delegable' duty to provide medical care to incarcerated individuals, they can be held liable for violations of that duty, even where the medical care was provided by a private third party entity. . . *Ancata* is, however, distinguishable from this case in that the municipality contracted with a *private* entity for medical services, whereas the City here was contracting with another governmental unit with its own independent duty to provide incarcerated individuals with medical care. This distinction was recognized in *Deaton v. Montgomery Cnty.*, 989 F.2d 885 (6th Cir. 1993), where the Sixth Circuit held that a county was not automatically liable for the strip search policies of a city by virtue of a contract to house county prisoners in the city jail. . . The court explained that unlike *Ancata*, the city had independent authority to house prisoners and was required to follow the same laws as the county. Because of that distinction, the court held that the county did not adopt the city's policy by default absent a showing of deliberate indifference. . . The *Deaton* court went on to find the plaintiff failed to allege facts that showed any deliberate indifference on the part of the county or its agents. . . The court noted that neither the county nor its sheriff had 'an affirmative duty to discover whether the city is following state law.'. . And, moreover, the plaintiff presented no facts indicating the sheriff knew or should have known that the strip search policy was in violation of state law. . . Finally, the court pointed out that the act of filing a suit challenging a policy could be sufficient to put the county on notice in the future. . . Some courts have been critical of the reasoning in *Deaton*. In *Ford v. City of Boston*, 154 F. Supp. 2d 131 (D. Mass. 2001), the court found that the city was liable for the county's strip search policy. . . The court clarified that it was not subjecting the city to *respondeat superior* liability. Instead, 'the question is City liability for promulgation and implementation of an express County policy, not City liability for the negligent acts of County employees acting as agents of the City.'. . The court also rejected the distinction *Deaton* made between private and governmental entities. By contracting with another governmental entity, the city had an affirmative obligation to ensure that the county's policies complied with constitutional standards. Nevertheless, the court still applied

the deliberate indifference standard to determine if the city met its obligation. . . Similarly, in *Trujilo v. City and Cnty. of Denver*, 2016 WL 5791208 (D. Colo. Sept. 7, 2016), the court applied the reasoning from *Ford* to find the city could be liable for the health care policies of the public entity in charge of the prison's health services. . . The court discussed *Deaton*, but, importantly, focused on the allegations necessary to show deliberate indifference on the part of the city. . . Unlike the insufficient allegations in *Deaton*, the *Trujilo* court found the plaintiff in its case alleged facts showing the city was deliberately indifferent, namely that the city had a significant history of failing to train its personnel properly to administer health care to inmates. . . There was further evidence adduced by the plaintiff to show the city was aware of a previous inmate's death, was involved in litigation and an eventual settlement related to that death, and dealt with public outcry stemming from that incident. These facts were sufficient to put the city on notice and 'allege [ ] plausibly that the [c]ity was deliberately indifferent.'. . Finally, *Warren v. Dist. of Columbia*, 353 F.3d 36 (D.C. Cir. 2004), clarifies the contours of the deliberate indifference standard. In that case, the plaintiff sued the District of Columbia and the private prison it contracted with to house plaintiff and other inmates for constitutional violations under Section 1983. . . Discussing the deliberate indifference theory of municipal liability, the court explained that the required culpability involves more than just negligence. . . 'It does *not* require the city to take reasonable care to discover and prevent constitutional violations.'. . The *Warren* court did, however, state that either actual or constructive knowledge of its agents' constitutional violations could be enough to impose liability on a municipality. Accordingly, even under the most lenient standard, a plaintiff must still show that the municipality had sufficient notice of the policy to find it demonstrated deliberate indifference. In the instant case, Plaintiff failed to allege facts that show the City had notice of WCJ's policy. Plaintiff does contend that the policies were a matter of public record, available through the Georgia Open Records Act. . . Access to the public record, however, is insufficient to put the City on notice, particularly under the rigorous standards of culpability required to hold a municipality liable for deliberate indifference. . . Additionally, if making a policy public was enough to satisfy notice, any state with a public record would put every municipality on notice of every promulgated government policy. Finding knowledge based on public records would vitiate the deliberate indifference standard. Plaintiff must allege that the City knew about WCJ's policies or that such knowledge can be inferred from its obviousness. . . Plaintiff, however, failed to allege facts that demonstrate that the City had notice of WCJ's policy or that it was deliberately indifferent to the alleged unconstitutional policies. Plaintiff alleges no prior similar incidents at WCJ or previous lawsuits filed that could provide notice. . . For these reasons, Plaintiff has failed to allege a basis for the City's liability under 42 U.S.C. § 1983. Accordingly, refusing to grant the City's motion to dismiss was an error and its motion for reconsideration (doc. 92) is **GRANTED.**"); ***Hinckley v. Thurston County***, No. C05-5458 RJB, 2006 WL 1705897, at *4(W.D. Wash. June 14, 2006) ("Plaintiff's argument is insufficient because Thurston County's policy of transferring inmates to another jail governed by the same constitutional, statutory, and regulatory standards it faces has no causal relationship with Plaintiff's injuries. Since the record is devoid of any evidence that Thurston County should have known Yakima County ran a constitutionally deficient jail, if indeed that is determined at another stage of

this case, the simple decision to transfer an inmate under a contract sanctioned by State law cannot be said to establish direct liability.").

See also ***Martinez v. Carson***, 697 F.3d 1252, 1253-56 (10th Cir. 2012) ("The incident underlying this action began when Defendants Gary Carson and Don Mangin, employees of the New Mexico Department of Corrections, observed Plaintiffs Phillip Martinez and Ricardo Sarmiento sitting or standing with a third man in a low-lit area outside an apartment building in a high-crime neighborhood at night. Defendants, who had been patrolling the area as task force members with police officers from the Rio Rancho Department of Public Safety, pulled up to the apartment building in an unmarked police car and turned on the emergency lights. The third man fled into the apartment building when Defendants approached, and Rio Rancho police officer Lieutenant Camacho pursued him. Meanwhile, Defendants forced Plaintiffs to the ground, handcuffed them, drew weapons, and conducted a pat-down search. When additional Rio Rancho officers arrived on the scene a few minutes later, Defendants transferred Plaintiffs, still in handcuffs, into the custody of these officers. The Rio Rancho police officers eventually arrested and booked Plaintiffs, holding Mr. Martinez for twelve hours and Mr. Sarmiento for five hours before their release. . . .We conclude that a reasonable jury could find Defendants' conduct to be the proximate cause of at least some portion of Plaintiffs' prolonged detention following Defendants' transfer of custody to the Rio Rancho officers. The jury found that Defendants had no reasonable suspicion of criminal activity when they forced Plaintiffs to lie on the ground, handcuffed them, and transferred them, still in handcuffs, to the custody of Rio Rancho police officers. We conclude that a reasonable jury could further find this initial illegal detention and transfer of custody was the but-for cause of Plaintiffs' further detention in Rio Rancho custody—a jury could reasonably find that Plaintiffs' arrests and prolonged detentions would not have occurred had Defendants not seized them and transferred them to the custody of Rio Rancho officers. Finally, we conclude that the facts and reasonable inferences to be drawn therefrom could support a jury finding that Defendants knew or should have known their illegal seizure and transfer of custody would result in Plaintiffs' prolonged detention after the transfer of custody. Although Defendants may not have foreseen the full extent of the detention, a jury could certainly find that they foresaw at least some additional period of detention while, for instance, the Rio Rancho officers conducted an investigation into probable cause. The extent to which Defendants can be held liable for the further detention depends upon what they reasonably foresaw when they transferred Plaintiffs to police custody, and we conclude that this question is sufficiently disputed to require resolution by a jury.").

See also ***Breitkopf v. Gentile***, 12-CV-1084 JFB AKT, 2014 WL 4258994, *27, *28 (E.D.N.Y. Aug. 29, 2014) ("The Court's research uncovered no cases holding that a municipality must continue to monitor or address a trainee's conduct in order to avoid Section 1983 liability, even though that trainee no longer works or never worked for the municipality and/or is under the control and supervision of another municipality. . .That responsibility lies with the employer. . . .Here, Gentile never worked for the NYPD, and he graduated from the Academy in 2006. Even assuming *arguendo* that there were deficiencies in the Academy's instruction, no rational jury

could find a direct causal link between any such shortcomings and Breitkopf's death, because (1) the City had no control over Gentile and no responsibility to continue training him; (2) the MTAPD provides in-service training independent of the NYPD—training plaintiff claims taught Gentile to shoot first and ask questions later if he encounters an armed, plainclothes individual; and (3) as discussed *supra* (in connection with the Section 1983 claim against the MTA), there is no evidence that the training was constitutionally defective or that any such defects caused Gentile's actions.")

d. Government Entity/Private Prison Management Agreements

See e.g., ***Burke v. Regalado***, 935 F.3d 960, 996 n. 17 (10th Cir. 2019) ("For supervisory liability, a supervisor may be liable even if the person who committed the underlying constitutional violation was not an employee. . . For municipal liability, courts have held entities liable for the actions of independent contractors. In *King v. Kramer*, 680 F.3d 1013 (7th Cir. 2012), the Seventh Circuit held a county could be liable for the deliberate indifference of jail medical providers employed by an independent contractor to which the county had delegated 'final decision-making authority ... over inmates' access to physicians and medications.'. . In *Crooks v. Nix*, 872 F.2d 800 (8th Cir. 1989), the Eighth Circuit explained that prison officials could be liable for the deliberate indifference of contracted medical personnel."); ***Payne v. Sevier County***, 681 F. App'x 443, 448 (6th Cir. 2017) (Donald, J., concurring) ("While I agree with the majority that Mr. Payne has not made the requisite showing to support a finding of *Monell* liability, I find it necessary to emphasize that this rule does not allow, nor does this Court condone, a municipality attempting to escape its constitutional duties by hiring a contractor to provide a fundamental service without supervision. Mr. Payne argues that because Sevier County's duty to provide adequate medical care to its inmates is non-delegable, it maintains responsibility for constitutional deprivations caused by its medical contractor's policies or customs. In making this argument, Mr. Payne relies on *Ancata v. Prison Health Services, Inc*, an Eleventh Circuit decision, in which the Court states in dicta that the county 'remains liable for any constitutional deprivations caused by the policies or customs' of the medical contractor. . . To refute this argument, Defendant Sevier County argued in briefing and at oral argument that a municipality may only be liable for the decisions of a contractor where the municipality 'officially abdicated its right to review and influence the subordinate's decisions.'. .Sevier County asserts that under this rule, even where the municipality 'granted an actor wide discretion to perform a duty and was lax or even negligent in it supervision,' it will not be liable unless it has delegated its policy-making authority. . . Sevier County is correct that '[s]imply going along with discretionary decisions made by one's subordinates ... is not a delegation to them of the authority to make policy.'. . However, this precedent does not absolve municipalities of liability for actions of contracted medical providers. Nor does it relieve municipalities of their constitutional responsibilities as completely as Sevier County has argued here. A municipality may be liable for the decisions of a contractor not only where a supervising policymaker 'expressly approved' a decision by a subordinate that was 'cast in the form of a policy statement,' but also where 'a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware.'. . As the majority opinion makes clear, Mr. Payne has not made a requisite showing that either a custom or policy attributable to Sevier County

caused his injury. However, this opinion should not be read to shield a municipality that attempts to discharge its constitutional duties by hiring contractors to provide fundamental services to those in the municipality's care and then placing its head in the sand to remain oblivious to violations."); ***Daniel v. Cook County***, 833 F.3d 728, 737 (7th Cir. 2016) ("Daniel's suit names as defendants the Cook County Sheriff's Office, Cook County Sheriff Dart in his individual capacity, and Cook County itself. The Sheriff's Office argues that it cannot be liable for Daniel's injuries because it was not responsible for his medical care. Instead, all treatment was to be handled by Cermak Health & Hospitals System, which is a medical facility separate from the Jail itself. But the constitutional duty under the Eighth and Fourteenth Amendments to provide adequate health care rests on the custodian. . . As the district court correctly noted, a government entity 'cannot shield itself from § 1983 liability by contracting out its duty to provide medical services.'. . There is also a close relationship between the Jail and Cermak. The Cermak facilities are physically located within the Jail, and Jail personnel are responsible for delivering patients to Cermak for care. Even if the care Daniel received at Cermak was inadequate, Daniel has offered evidence that the Sheriff's Office exacerbated the problems by failing to communicate with Cermak and failing to deliver Daniel to his appointments. The Sheriff's Department is therefore a proper defendant."); ***Doe v. United States***, 831 F.3d 309, 317-19 (5th Cir. 2016) ("We next examine summary judgment. . . for state actor Williamson County on the plaintiffs' Section 1983 claim. . . . The plaintiffs here do not challenge the transport policy itself. Instead, they argue that evidence shows Williamson County adopted the transport policy by entering into the service agreement with ICE, knew of the potential consequences to detainees if CCA employees violated the policy, and then failed to monitor the detention center properly to ensure no such violation occurred. . . .To the extent that the plaintiffs argue Williamson County is liable directly for the CCA defendants' failure to follow the transport policy, we cannot agree. '[U]nder § 1983, local governments are responsible only for their *own* legal acts.'. . Contrary to the facts in some of the non-binding cases cited by the plaintiffs, Williamson County did not 'delegate[ ] final policy-making authority' to CCA in regard to protocol for transporting detainees. In fact, in the subcontract, Williamson County expressly mandated that CCA comply with all provisions of the service agreement, which required adherence to ICE's transport policy. Williamson County is not directly responsible for CCA's failure to follow policy, and Williamson County did not otherwise act with deliberate indifference in monitoring the detention center. Summary judgment for Williamson County was proper."); ***King v. Kramer***, 680 F.3d 1013, 1020, 1021 (7th Cir. 2012) (*King I*) ("The Supreme Court has confirmed that the infliction of unnecessary suffering through the failure to provide adequate medical care for inmates is covered by the Eighth Amendment (and thus, in our setting, by the Fourteenth). . . The County cannot shield itself from §1983 liability by contracting out its duty to provide medical services. (Indeed, the Court's recent decision in *Filarsky v. Delia,* 132 S.Ct. 1657 (2012), to the effect that private contractors are entitled to assert qualified immunity, suggests by parity of reasoning that they are state actors for other purposes as well.) The underlying rationale is not based on *respondent superior*, but rather on the fact that the private company's policy becomes that of the County if the County delegates final decision-making authority to it. *Ancata v. Prison Health Servs., Inc.,* 769 F.2d 700, 705–06 (11th Cir.1985). The evidence presented for summary judgment purposes shows that the County's policy was to entrust final decision-making authority

to HPL over inmates' access to physicians and medications. Nothing in the record as of now suggests that the County had higher aspirations for the care it was providing, but that those standards were not met. The contract the County had with HPL at the time of King's incarceration states that HPL was responsible for providing a physician to attend weekly sick call 'for an estimated minimum of one hour and an estimated maximum of three hours except as is medically necessary.' The contract also states that 'HPL shall provide monitoring of pharmacy usage as well as development of a preferred drug list.' HPL's practice at the time of King's incarceration was to have Dr. Erickson at the jail for visits with patients for no more than four hours a week. The on-call physician, Dr. Cullinan (who was in Peoria and thus not able to back up Dr. Erickson for personal visits), was not expected to prescribe medications in person. HPL trained its nurses to follow a protocol when inmates arrived with medications excluded from HPL's formulary: Ask the inmate how long he has been on the medication and then notify Dr. Cullinan so that he would be in a position to write orders over the phone to transfer the inmate to a permitted drug. We are not saying here that prescription formularies are *per se* unconstitutional, or that restricted physician access is by definition inappropriate. It is instead the County's endorsement of the particulars of the arrangements in this case and the way the two policies interacted, that caused it to run afoul of the Constitution (if we believe King's account). The County's express policies as embodied in the contract show that the County delegated to HPL final authority to make decisions about inmates' medical care. We have previously said that a municipality would violate the Eighth Amendment under *Monell* if it had a policy requiring jail staff to throw away all prescription medications without implementing an appropriate mechanism for providing alternative treatment. *Calhoun v. Ramsey*, 408 F.3d 375, 379–80 (7th Cir.2005). This case eerily tracks that hypothetical example: HPL routinely switched patients off prescribed medications without appropriate oversight by a physician. Even if the County had not delegated final decision-making authority to HPL, it was on notice that HPL's physician- and medication-related policies were causing problems at the jail. If the County is 'faced with actual or constructive knowledge that its agents will probably violate constitutional rights, [it] may not adopt a policy of inaction.'. . There were at least seven articles published by the La Crosse Tribune expressing alarm over HPL's medication policy. Steve Helgeson, who became the Sheriff on January 1, 2007, testified that he was aware of the discussions involving the jail's problems with medication distribution to inmates in 2004 and 2005. This is enough evidence to create a question of material fact whether the County was aware at the relevant time that HPL had policies that violated inmates' constitutional rights. In summary, King has pointed to significant evidence that the County's policies violated his constitutional rights. Mondry–Anderson was concerned about taking King off alprazolam at booking, but she was required to abide by HPL's policy of switching him to the formulary. King was prescribed dramatic changes in his medication by an 'on-call' physician nearly 300 miles away who took no steps to educate himself about King's condition. These policies caused King to suffer severe seizures that ultimately contributed to his death. We therefore hold that King has presented sufficient evidence to survive summary judgment with respect to the County.").

See also ***Nielsen v. Thornell***, 101 F.4th 1164, 1168-69 (9th Cir. 2024) (as amended) ("Arizona, like many other states, relies on privately run prisons to house some of its inmates. The

NAACP's Arizona chapter and two former prisoners challenge the constitutionality of private prisons, alleging that their profit-motivated mission makes them less safe and secure than state-run prisons. While there may be compelling policy reasons against—or for—private prisons, there can be little debate that private prisons pass constitutional muster. Inmates do not have a protected liberty interest in avoiding private prisons because such prisons do not impose an 'atypical or significant hardship' beyond ordinary prison conditions. Nor do the plaintiffs have a valid Thirteenth Amendment claim based on involuntary servitude because the Amendment expressly carves out an exception for 'punishment for crime.' And their cruel and unusual punishment claim fails, too, because the Eighth Amendment does not cover the type of intrusions into prisoners' 'dignity' as alleged in this case. Finally, inmates do not have a fundamental right to be free from alleged commodification in private prisons. In sum, the Constitution does not prohibit states from turning to private companies to help run their correctional systems. The plaintiffs' arguments are better directed to Arizona's representatives and the citizens who elect them—not the courts. We affirm the district court's dismissal of the lawsuit."); ***Nielsen v. Thornell***, 101 F.4th 1164, 1177-78 (9th Cir. 2024) (as amended) (Nguyen, J., concurring in the judgment) ("Notwithstanding plaintiffs' failure here to state a 'structural bias' claim, a state's private prison scheme in theory could lead to such a biased decisionmaking process that it denies inmates due process. Prison officials, like other administrative prosecutors, must be 'accorded wide discretion' and 'need not be entirely "neutral and detached."'. . But we 'should be chary of schemes that inject "a personal interest, financial or otherwise, into the enforcement process [and] may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."'. . Here, as Judge Lee explains, Arizona incorporates certain statutory guardrails into its private prison scheme to ameliorate conflict of interest concerns. Although private prison contracts must provide the state 'cost savings,' Ariz. Rev. Stat. Ann. § 41-1609.01(G), they must also provide 'a level and quality of services' equaling or surpassing what the state would otherwise provide, *id.* § 41-1609.01(H). In addition, private prison contracts may not authorize prison operators to control inmate custody classifications or release dates—either directly or indirectly. . . And to better align incentives, prison contractors must self-insure against 'civil rights claims and liabilities,' *id.* § 41-1609.01(K)(2), and waive any defense based on sovereign immunity, *id.* § 41-1609.01(L). Plaintiffs allege that despite these protections, inmates in Arizona's private prisons 'experience greater deprivations of liberty' due to 'higher levels of incident reporting' than in state-run prisons. According to plaintiffs, private prisons have an incentive to over-report inmate misconduct because Arizona 'pays a predetermined ... rate to each prison corporation for each day each prisoner occupies a cell or bed in a private prison,' and an inmate 'generates more revenue and profit to a private prison corporation the longer the prisoner remains in the private prison.'. . . Without more, private prison employees' greater vigilance in reporting inmate misconduct does not in and of itself violate inmates' due process rights. Plaintiffs also fail to explain why individual correctional officers—as distinguished from the corporations employing them—are incentivized to over-charge inmate misconduct.")

See also ***Tressler v. Centre County***, No. 1:24-CV-00456, 2024 WL 4989315, at *16 (M.D. Pa. Dec. 5, 2024) ("Centre County may also be suggesting that because it contracted with

PrimeCare to provide medical care, it cannot be liable. If that is what it is suggesting, it is wrong. Centre County had a constitutional obligation to provide medical care to its prisoners and detainees. . . The fact that it contracted with PrimeCare to provide that medical care does not absolve the County of its duty. . . Rather, despite the contract, ' "the county itself remains liable for any constitutional deprivations caused by the policies or customs of"' its contract-medical provider. . . " 'In that sense, the county's duty is non-delegable."'. .Thus, Centre County 'has potential liability stemming from its own, independent obligation to police its medical services contract with PrimeCare Medical, Inc.'. . [collecting cases] And '[w]hile the Court recognizes that "prison officials cannot be required to second guess the medical judgment of the [staff] physician," [the County's] contractual position vis-à-vis PrimeCare Medical, Inc. is an altogether different type of relationship than that between an on-the-ground medical provider and a correctional officer working' at the prison. . . The County's 'potential liability arises from its policy of contracting away of a nondelegable duty coupled with its [alleged] failure to ensure that the contract was properly carried out and the nondelegable duty met.'. .Based on the foregoing, to the extent that Centre County is suggesting that it cannot be liable because PrimeCare was providing contract medical care to its prisoners and detainees, we reject that suggestion. In sum, the complaint states a denial-of-medical-care claim upon which relief can be granted against Centre County."); ***Quinn v. US Prisoner Transport Inc.***, No. 2:18-CV-00149-DBH, 2019 WL 257980, at *11-13 (D. Me. Jan. 17, 2019), *R&R adopted*, 2019 WL 1474389 (D. Me. Apr. 3, 2019) ("Decisions related to the conditions under which a prisoner is transported as part of the extradition process are not discretionary decisions within the scope of absolute immunity afforded prosecutors. . . .In this case, Defendant allegedly chose to use private contractors to transport Plaintiff, rather than public employees. Although there are few cases that directly address public officials' screening, training, and supervisory duties with respect to contractors, as opposed to employees, the lack of a specific case involving a public official's responsibility for a private contractor's alleged constitutional deprivations during the transport of prisoners is not dispositive of the qualified immunity issue. . . At the time the Transport Defendants transported Plaintiff to Maine, the law was clearly established that Transport Defendants' alleged conduct was in violation of Plaintiff's constitutional protections. In fact, at this stage of the proceedings, Defendant does not challenge Plaintiff's assertion that the Transport Defendants' performance was constitutionally deficient. The central question as to Defendant Robinson is whether the law was clearly established that a governmental official, such as Defendant Robinson, alleged to be involved in the transport decision, is absolved of responsibility for assuring that during transport, the treatment of the prisoners satisfied basic constitutional requirements, by simply contracting with a third-party to transport the prisoners, without an assessment of and regardless of the quality of the services provided by the third-party. . . . [T]he law was clearly established at the time of Plaintiff's transport to Maine, a government official responsible for the safety and well-being of prisoners, cannot abdicate that responsibility by contracting with a third-party. Necessarily, therefore, if a government official is aware or obviously should have been aware that the third-party's practices present a genuine risk of a constitutional deprivation, but the official does not take readily available measures to mitigate the risk, the government official can be legally responsible for the deprivation. Plaintiff has alleged such facts in this case. Contrary to Defendant's argument, therefore, the relevant law was clearly

established at the time Plaintiff was transported to Maine."); ***Lowe v. Cuyahoga County/Board of County Com'rs***, No. 1:08–CV–01339, 2012 WL 6960992, at *10 (N.D. Ohio Dec. 8, 2011) ("It is the Court's opinion, from the above law, especially *Ancata,* that the County could be held liable for 'constitutional deprivations caused by the policies or customs' of the insured—MMS. By allowing MMS to establish and implement policies and procedures for the nondelegable responsibility to provide adequate healthcare to inmates, the County, by law, assumed those policies and procedures as its own. The liability policy does not require a legal determination of 'vicarious liability' or liability based on *'respondeat superior.'* The County's liability completely hinged on whether the policies implemented by MMS and its agents satisfied the constitutional duty to provide those incarcerated with legally required medical care. As such, State Auto's argument is not well taken."); ***Hagan v. California Forensic Medical Group***, No. CIV. S-07-1095 LKK/DAD, 2009 WL 728465, at *7 & n.5 (E.D. Cal. Mar. 5, 2009) ("CFMG employees have assumed a public function in providing medical care to inmates on behalf of the County. In performing this function, they are state actors whose conduct is limited by the Eighth Amendment. . . As such, if CFMG employees commit a constitutional violation, and the moving force behind this violation was a County policy manifesting deliberate indifference to constitutional rights, then the County may be liable. The facts that CFMG employees are not directly employed by the county, or that '[n]either BCSO or the jail administration have any supervisorial authority over CFMG,' . . . are relevant only insofar as they speak to these elements. . . Similarly, the County would not be able to limit its liability by delegating policymaking authority to CFMG. *See Lytle v. Carl*, 382 F.3d 978, 982-84 (9th Cir.2004). Neither party argues that such a delegation has occurred here."); ***Sumlin v. Gibson***, 2008 WL 150687, at *4 (N.D.Ga. Jan. 8, 2008) ("Because the Fulton County Jail relied on the contracted medical provider, the Defendants argue, they never had a duty or responsibility to see that the Plaintiff's medical care was handled appropriately. However, the government's duty to ensure that a prisoner receives appropriate medical care is non-delegable. *Ancata*, 769 F.2d at 705. Liability may still attach for non-medical defendants even though § 1983 does not allow claims based on *respondeat superior*. . .For instance, a governmental body could be liable in the event that it or the private health care provider (because it operates under color of state law) adopted a policy or custom of improper treatment of prisoners. . . .Additionally, government defendants could be liable if the private health care provider makes final decisions regarding medical treatment. . . At that point, 'their acts, policies and customs become official policy.'"); ***Daniels v. Prison Health Services, Inc.,*** No. 8:05CV1392T30TBM, 2006 WL 319260, at *4 (M.D. Fla. Feb. 10, 2006) ("Although Prison Health Services has contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations caused by the policies or customs of a health service company. . . In this sense, the county's duty is non-delegable"); ***Martin v. Corrections Corporation of America***, No. 05-2181 M1/P, 2006 WL 181966, at *4 (W.D. Tenn. Jan. 17, 2006) ("[T]he parties dispute whether Defendant Shelby County may be held liable for actions that occurred at the Shelby Training Center while it was operated by CCA. . . . A municipality is not relieved of its obligations to provide adequate medical care simply by contracting out its duties."); ***Herrera v. County of Santa Fe,*** 213 F. Supp.2d 1288, 1291, 1292 (D.N.M. 2002) ("Very few, if any, courts have addressed the specific issue of municipal or county liability, under § 1983, for the actions of a private company operating a jail

or detention center. The Court was able to locate only one case suggesting an appropriate analysis. In *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700 (11th Cir.1985), the estate of a deceased county jail prisoner filed a § 1983 action against the county and a private health care provider, among others. The Eleventh Circuit, while holding that the plaintiff had adequately alleged the possibility that the county's own actions or policies contributed to the prisoner's death, made the following observations: (1) if a constitutional tort committed by an employee of the private health care provider was not a result of the policy or custom of that private entity, the county would not be liable for the constitutional tort; to hold the county liable would require application of the respondeat superior doctrine, which is not permitted under § 1983; (2) however, where the county has delegated final authority to make decisions to a private entity such as the health care provider in that case, the policies and customs of the private entity become the policies and customs of the county; and (3) if the county, expressly or by default, permitted others to determine policy, the county is liable for their actions if the policy proves unconstitutional. . . The *Ancata* court based these observations on the fact that, where a county turns over final decision-making or policymaking authority to a certain employee, the county is liable for any decisions or policies of that employee. Similarly, the court reasoned, where the county turns over a government function such as providing inmate health care to a private company, and also grants that company the authority to make decisions concerning the level of care to be provided, the county has in effect delegated final policymaking authority to the private company and is liable for any policies established by the company. . . . This Court need not resolve the conflict between *Deaton* and *Ford*, since this case does not involve one governmental entity contracting with another. [footnote omitted] Instead, this case presents the type of case as to which *Ancata*, *Deaton*, and *Ford* all appear to agree − under the rationales of all three of these cases, the county may be held liable for a custom or policy established by Cornell, because the county has contracted with Cornell to perform a significant public function. Furthermore, this conclusion makes sense under traditional municipal-liability analysis. As noted in *Ancata*, if a local government delegates final policy-making authority to a particular employee, any custom or policy created by that employee is the custom or policy of the local government as well. Here, by contracting with Cornell to take over management and operation of the detention center, the county delegated final policy-making authority for the operation of the detention center to Cornell. [footnote omitted] Any custom or policy established by Cornell with respect to such operation, therefore, constitutes a custom or policy of the county for purposes of § 1983 liability.").

But see ***Pindak v. Cook County***, No. 10 C 6237, 2013 WL 1222038, *7, *8 (N.D. Ill. Mar. 25, 2013) ("Plaintiff adequately alleges that Securitas officers working for MBRE [MB Real Estate Services, LLC], and by extension for PBC [Public Building Commission of Chicago], have a widespread practice of prohibiting panhandling. Plaintiff cites several instances where he was prohibited from panhandling and alleges that Securitas officers told him the prohibition was perpetual. Plaintiff also asserts that the ban was routinely enforced by different Securitas officers over several years. Though Plaintiff's allegations are sufficient to state a claim that Securitas officers are engaged in 'state action,' however, those allegations are not sufficient to state a claim that PBC is liable for them. Plaintiff admits that PBC's written regulations do not explicitly ban

panhandling. . . And he has not named any individual decision-maker at PBC who should have had notice that he was being repeatedly banned from the Plaza for panhandling. A municipality cannot be held liable for a constitutional violation without evidence of 'a custom, policy or practice that effectively caused or condoned the alleged constitutional violations.'. . . Plaintiff argues that knowledge about Securitas's alleged practice of violating his constitutional rights can be imputed to PBC based on the widespread nature of the practice itself. . . But Plaintiff fails to allege that PBC had a widespread practice of condoning Securitas officers' denial of his rights. PBC did not even contract directly with Securitas. The court will not assume that PBC was aware of the actions of individual Securitas officers and condoned them, absent more specific allegations from Plaintiff. Because Plaintiff has not sufficiently alleged that PBC was controlling or encouraging Securitas officers' actions, he fails to plead that PBC had a widespread practice of banning panhandling. . . . Plaintiff believes that the need for training about panhandlers' rights is so obvious that Defendants' alleged failure to implement training about it shows deliberate indifference. (Pl.'s Resp. at 14.) The court disagrees. As with Plaintiff's widespread practice argument, Plaintiff fails to allege that anyone at PBC had knowledge that Securitas officers allegedly interfered with Plaintiff's panhandling. Nothing in the record suggests that PBC made a *deliberate* choice not to train employees about obvious constitutional threats, and negligent conduct is insufficient to establish a violation of § 1983. . . . Plaintiff has adequately alleged that Securitas had a widespread practice of banning peaceful panhandling on Daley Plaza sufficient to survive a motion to dismiss.")

B. Liability Based on "Custom or Usage"

Monell allows the imposition of government liability not only when the challenged conduct executes or implements a formally adopted policy, but also when that conduct reflects "practices of state officials so permanent and well settled as to constitute a 'custom or usage' with the force of law." 436 U.S. at 691. *Compare* ***Bouman v. Block***, 940 F.2d 1211 (9th Cir. 1991) ("If a practice is so permanent and well settled as to constitute a 'custom or usage' with the force of law, a plaintiff may proceed. . .despite the absence of written authorization or express municipal policy.") *and* ***Denno v. School Board of Volusia County***, 218 F.3d 1267, 1278 (11th Cir. 2000) ("Given the lack of evidence with respect to the prohibition of the Confederate flag at Pine Ridge or at other schools within the district, we agree with the district court that Denno failed to adduce evidence creating a genuine issue of fact as to a pervasive and well-settled custom of banning the Confederate flag so as to make the Board potentially liable under *Monell*."). *See also* ***Culbertson v. Lykos***, 790 F.3d 608, 628-29 (5th Cir. 2015) ("We have already held that the district attorney was not a final policy-maker for the claimed policy here. A policy, though, may be officially promulgated by the governing body, by an official to which policy-making authority has been properly delegated, or by officials or employees of the municipality through a 'persistent, widespread practice' that is 'so common and well settled as to constitute a custom that fairly represents municipal policy.'. . The claimed *de facto* policy of retaliation, plaintiffs allege, can be inferred from the number of individuals in the DA's Office who participated in the campaign against them and the 'very public nature' of the campaign. The plaintiffs also alleged in the

complaint that during the grand jury investigation into the BAT vans, Lykos investigated members of the grand jury and of the prosecutors who conducted the grand jury investigation. Such an act is said also to reflect a policy of retribution. The plaintiffs' complaint falls short of alleging that Harris County had a 'persistent, widespread practice' of retaliation for the exercise of First Amendment rights. . . .Here, the plaintiffs allege there was a retaliatory campaign against them and a retaliatory investigation against the grand jury and its prosecutors, all arising from the same predicate events. The retaliatory campaign against them was publicly known, but they offered no evidence that similar retaliation had victimized others. There was, in other words, no allegation of a 'widespread practice' of retaliation that is 'so common and well settled' as to constitute the policy of Harris County. . .The allegations in this case are limited to the events surrounding the plaintiffs. That is not an allegation of a *de facto* policy of retaliation by the County. Harris County's potential liability rests solely on the actions of the Commissioners Court in cancelling the Lone Star Contract.")

The "custom or usage" in question will be attributed to the government body when the "duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the...governing body [or policymaker with responsibility for oversight and supervision] that the practices have become customary among its employees." ***Spell v. McDaniel***, 824 F.2d 1380. 1387 (4th Cir. 1987).

See also ***Franklin v. Franklin County, Kentucky***, 115 F.4th 461, 470-71 (6th Cir. 2024) ("Franklin first argues that Franklin County is liable for her sexual assault because of its transportation practices. She specifically asserts that the Jail's practice of permitting a lone male officer to transport a female inmate to the hospital '[c]learly expose[s] sick, vulnerable female inmates to sexual abuse,' in violation of the Eighth Amendment. Franklin thus pursues what this court has called an 'affirmative' custom (or policy) claim against the Jail. . . As an initial matter, the Jail's practice of permitting one male officer to transport a lone female inmate appears to be a custom rather than a policy. . . Nothing in the record suggests that the rules governing cross-gender transportation were 'policies promulgated by the official vested with final policymaking authority for the municipality.'. . The practices governing cross-gender transportation are therefore best characterized as a custom because they instead establish only 'the knowledge of policymaking officials and their acquiescence in the established practice.'. . Neither party disputes that this custom exists. With this understanding in mind, we now turn to the relevant caselaw. . . . In the present case, Franklin argues that the Jail 'had a practice that clearly exposed sick, vulnerable female inmates to sexual abuse.' But this argument shows only that the Jail's transportation custom provided the opportunity for Price's unlawful behavior. Opportunity alone, however, fails to show that the Jail's custom 'direct[ly]' caused Franklin's assault. . . Indeed, Franklin must 'show that the particular injury was incurred *because* of the execution of that policy [or custom].'. . Franklin fails to explain how her assault was 'a direct result of [the Jail's] ... custom,' as opposed to Price's unilateral, unlawful actions. . . Price's unlawful actions, after all, were not 'pursuant to' the Jail's policy. . . Franklin thus seeks to hold the Jail liable 'for an injury inflicted solely by' Price. . . This theory of liability is based on '*de facto respondeat superior* liability[, which is] explicitly

prohibited by *Monell*.'. . We therefore reject Franklin's first theory of *Monell* liability."); ***Washington v. Housing Authority of the City of Columbia***, 58 F.4th 170, 183-84 (4th Cir. 2023) ("Like *Owens*, Plaintiff 'has done more' than allege the mere existence of an 'impermissible' municipal custom. . .. Rather, Plaintiff has alleged 'brief, but non-conclusory, allegations' containing facts 'which, if true, would buttress h[er] legal conclusion.'. . Accepting all well-pleaded factual allegations as true, Plaintiff's complaint sufficiently alleges that the constitutional injury—Witherspoon's death by carbon monoxide poisoning resulting from a faulty furnace—'would have been avoided "under a program that was not deficient in the identified respect[s].'". . Had the Housing Authority elected to apply Policy 8-1.C to Allen Benedict Court, a missing carbon monoxide detector and a faulty furnace would have been considered life-threatening conditions requiring immediate attention within twenty-four hours. It's plausible, then, that these particular 'life-threatening conditions' would have been remedied: Witherspoon's detector would have sounded the alarm on the night of January 17, 2019, or the gas-burning furnace would have safely vented the carbon monoxide out of his apartment. In either case, Witherspoon's death 'would have been' averted. . .Similarly, if the Housing Authority had properly staffed inspectors and personnel, operated a uniform repair system, and trained and supervised its employees to comply with applicable housing laws, it is plausible that its employees would have been well-equipped to fix the maintenance issues at the apartments. In fact, Plaintiff alleged that at least one Housing Authority employee complained that he was not trained about carbon monoxide detector requirements. Thus, it appears plausible that had he and other employees been appropriately trained, they would have known to install carbon monoxide detectors, as was required by state and local law. Under such a program, Witherspoon would have had the benefit of a carbon monoxide detector in his apartment, and many of the leaking, gas-burning appliances in Allen Benedict Court would have been repaired. In sum, at this early stage, Plaintiff has alleged sufficient facts to establish that the Housing Authority's policies and customs were the moving force behind the constitutional injury."); ***Moore v. LaSalle Management Company, L.L.C.***, 41 F.4th 493, 509-12 (5th Cir. 2022) ("Plaintiffs . . . contend that the Corporate Defendants and City are all *directly* liable under *Monell*. To prevail, Plaintiffs must show (1) 'an official policy (or custom),' (2) that 'a policy maker can be charged with actual or constructive knowledge,' and (3) 'a constitutional violation whose "moving force" is that policy (or custom).'. . The district court concluded that Plaintiffs could not raise a fact dispute under this test. We disagree. . . . Plaintiffs have raised a fact dispute over Hanson's actual knowledge. We have explained before that policymakers failing to take corrective action after their subordinates violate the constitution is some evidence that they know about an unconstitutional custom. . . Here, some record evidence suggests that guards sprayed Moore with pepper spray and beat him in the Four-Way as punishment. And following Moore's death, Hanson took no disciplinary action against anyone involved. Therefore, a reasonable jury could find on this record that Hanson actually knew that guards used the Four-Way and pepper spray to punish prisoners. *Second*, Plaintiffs have raised a fact dispute on Hanson's constructive knowledge. Constructive knowledge can be attributed to a policymaker 'on the ground that [he] would have known of the violations if [he] had properly exercised its responsibilities, as, for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion.'. . Plaintiffs point to

evidence of exactly that. . . . Jackson's testimony certainly supports widespread and persistent use of the Four-Way and pepper spray to punish prisoners, and that those customs were subject to prolonged public discussion among prison staff. Therefore, a reasonable jury could find on this record that Hanson constructively knew that guards used the Four-Way and pepper spray to punish prisoners. . . Still, the City contends that it can't be liable since its delegation of authority expressly 'prohibited the use of force to "punish" an inmate.' In other words, that Hanson had no authority to adopt an unconstitutional custom. But the City's argument is too clever by half. . . . [W]e have rejected the City's very argument before. As we explained recently in *Arnone v. County of Dallas County*, what matters for attributing a policymaker's actions to a local government is not whether the complained of policy does or doesn't violate the law. '[W]hat matters is the precise "function" that the policymaker is exercising'—i.e., are they setting policy for the *local government* or someone else? . . . And, here, it's undisputed that Hanson set policy for the City when it came to running the prison. Therefore, we cannot agree with the City that it is somehow shielded from *Monell* liability on this record. . . .In short, Plaintiffs win on most, but not all their contentions about the Corporate Defendants' and City's liability. We do not decide if Plaintiffs can or cannot hold the Corporate Defendants vicariously liable for the Individual Defendants' actions. But Plaintiffs have raised fact disputes on the Corporate Defendants' and City's direct liability under *Monell*. Therefore, we reserve the vicarious-liability question, but REVERSE on *Monell* liability."); ***Prince v. Sheriff of Carter County***, 28 F.4th 1033, 1050-51 (10th Cir. 2022) ("Viewing the evidence in the light most favorable to the plaintiff, a reasonable jury could conclude that CCJ maintained unofficial policies or customs of inadequate training, inadequate staffing, and delays in medical attention, often in violation of its own written policies, all as alleged in the complaint. The next inquiry is whether a reasonable jury could conclude that the municipality acted with deliberate indifference. 'The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm.'. .The record below reflects that the Sheriff had actual knowledge of the numerous and systemic problems with CCJ's health care system. In particular, he was aware that CCJ did not employ a licensed physician in violation of its written policy. . . Moreover, three other CCJ inmates died in the three years prior to Bowker's death after seemingly receiving inadequate medical attention. . . The Sheriff testified that the only action he took in response to Manos' death, which took place seven months prior to Bowker's death and under similar circumstances, was directing the jail administrator to ask Miller to better monitor medication logs. Former jail administrator Michael Armstrong agreed during a deposition that requiring staff without medical training to make inmate medical decisions left CCJ's health care system 'destined to fail.' Given the Sheriff's knowledge of the numerous medical deficiencies at the jail, combined with the circumstances of Manos' death, a reasonable jury could determine that the Sheriff was deliberately indifferent to the risk that inmates would receive constitutionally inadequate medical attention. Finally, a reasonable jury could conclude that CCJ's deliberate indifference caused Bowker's death. As a result of CCJ's customs and policies, Bowker failed to receive medication, experienced delays in medical treatment, and untrained staff failed to timely transport him to the emergency room in his final days. According to Prince's medical expert, there is a reasonable probability that

CCJ's failure to provide continuous medical care to Bowker caused his death. We have recently held that a Sheriff's 'continuous neglect' of medical conditions similar to those in this case could lead a reasonable fact finder to infer causation of a plaintiff's injury sufficient to defeat summary judgment. . . Prince has therefore established a genuine dispute of material fact as to the Sheriff's liability. Accordingly, the Sheriff is not entitled to judgment as a matter of law."); ***Mitchell v. Kirchmeier***, 28 F.4th 888, 901 (8th Cir. 2022) ("In sum, Mitchell has stated a claim for municipal liability under *Monell*. If the allegations in his complaint are true, then Morton County law enforcement engaged in a persistent pattern of excessive force against peaceful protestors that was tacitly authorized by Sheriff Kirchmeier and that led to Mitchell's injury. The district court erred in dismissing Mitchell's *Monell* claim against Morton County insofar as the claim asserted liability for the alleged violation of his Fourth Amendment rights."); ***Lucente v. County of Suffolk***, 980 F.3d 284, 297-301, 306-07 (2d Cir. 2020) ("In order to establish *Monell* liability based upon a 'persistent and widespread' practice by a subordinate municipal employee (or employees) other than a policymaker, the employee's unconstitutional conduct must be 'so manifest as to imply the constructive acquiescence of senior policy-making officials.'. . In other words, there must be 'sufficient instances of tolerant awareness by supervisors of abusive conduct to support an inference that they had a policy, custom or usage of acquiescence in such abuse.'. . It is only at that point that, although not expressly authorized, the unconstitutional conduct is so persistent and widespread that it can constitute a custom or usage of which a supervising policymaker must have been aware. . . Here, the district court characterized Foti's conduct as the 'isolated action of a rogue [ ] officer.'. . Although there was no evidence that officers other than Foti participated in the alleged sexual assaults and sexual harassment of female inmates, there was nothing 'isolated' about his alleged misconduct at the Riverhead Facility. Putting aside the allegations from the 1990s contained in the Internal Affairs investigations and corresponding reports, the record includes testimony from six different female inmates – namely, the original plaintiffs in this case – who accused Foti of sexually assaulting and sexually harassing them at the Riverhead Facility. In addition to the alleged sexual assaults and sexual harassment of these six inmates over a period of approximately 18 months, the record is replete with evidence of inappropriate touching and/or other sexual harassment of female inmates on a regular basis by Foti in or around that same timeframe. . . . In short, construing the evidence in the record most favorably to plaintiffs, a rational jury could conclude that Foti's sexual misconduct against the female inmates (including sexual assaults, verbal harassment, and other inappropriate behavior) was not isolated, but rather was severe, persistent, and pervasive conduct that was executed in a manner that would have been difficult to conceal from supervisory personnel at the Riverhead Facility, including policymakers. . . Thus, the evidence regarding the severity and scope of Foti's misconduct towards female inmates, in combination with the evidence of awareness of various aspects of that sexual misconduct by multiple Suffolk County employees within the Riverhead Facility (discussed *infra*), provides strong support (if credited by the jury) for plaintiffs' municipal liability claim. . . . Notwithstanding the ambiguities in the record with respect to these incidents, plaintiffs should be able to ask the jury to rationally infer, especially by the time of the fifth report in 1999, that these reports collectively put the Sheriff on notice that Foti was the subject of serious allegations of sexual assault, sexual harassment, and inappropriate behavior toward female inmates both on-duty

and off-duty, and that those allegations were not sufficiently investigated and addressed in order to ensure the future safety of female inmates at the Riverhead Facility. In reaching this conclusion, we emphasize that this proof was not the cornerstone of plaintiffs' evidence with respect to their attempt to prove the existence of a municipal policy or custom of acquiescing to unconstitutional conduct by Foti toward female inmates. Instead, the bulk of plaintiffs' evidence . . . related to establishing that there was widespread knowledge among supervisors at the Riverhead Facility of Foti's sexual misconduct towards female inmates from 2009 to 2011 (when plaintiffs were incarcerated there), and that corresponding inaction by those supervisors provided a basis for concluding that the Riverhead Facility's policymakers, who ran the facility, had constructive notice of the misconduct. However, even in that context, plaintiffs should be able to utilize these reports from the 1990s as background to attempt to demonstrate that the Sheriff's lack of response to the earlier allegations against Foti evidenced the beginning of a policy or custom of inaction and acquiescence that continued for well over a decade, which thereby placed female inmates at risk of subsequent unconstitutional conduct that is now alleged to have occurred years later with respect to the plaintiffs at the same Riverhead Facility. It is squarely within the province of the jury to decide, in determining municipal liability, what weight this evidence should receive on the issue of a policymaker's actual or constructive notice of the unconstitutional conduct in light of all the evidence in this case. . . . The district court also erred in concluding that any evidence of knowledge of Foti's misconduct by Fisher and McClurkin was insufficient as a matter of law to trigger municipal liability because neither of these Suffolk County employees was a legislatively authorized policymaker nor was delegated policymaking authority. The legal standard for *Monell* liability is not that narrow. As noted *supra*, the Supreme Court has made clear that, if a practice is 'so persistent and widespread as to practically have the force of law,'. . . actual notice by the policymakers need not be proven. . . . We recognize that, under this theory of *Monell* liability, 'even if a policy can be inferred from omissions of a municipality, such as where it acquiesces in a pattern of illegal conduct, such a policy cannot be inferred from the failure of those in charge to discipline a single police officer for a single incident of illegality'; instead, there must be 'more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct.'. . . [I]f plaintiffs' evidence is credited, it would allow a jury to rationally find that, notwithstanding the awareness by supervisory personnel of these allegations of a pattern of misconduct by Foti towards female inmates, no action was taken in response to any of the inmates' complaints. . . .[G]iven the totality of the evidence in this case, a jury should decide whether the supervisory personnel with such alleged knowledge are sufficiently senior, and whether the pattern of unconstitutional conduct by Foti and alleged inaction by supervisory personnel was sufficiently persistent and widespread, to allow an inference of policymaker acquiescence that would trigger *Monell* liability."); ***Vega v. Chicago Park District***, 954 F.3d 996, 1010-12 (7th Cir. 2020) ("At trial, Vega argued that the Park District was liable under § 1983 because it had a widespread custom of discrimination against Hispanics. . . To prevail on this theory, she had to show both that the custom was widespread and that the local policymakers were aware of the custom and took no measures to correct it. . .The district court held that Vega's § 1983 claim failed as matter of law because even if Vega had sufficient evidence of a widespread custom of discrimination against Hispanics, she had insufficient evidence to show that any 'policymaker' knew about it. Vega

challenges this conclusion on appeal, arguing that she presented ample evidence to permit a jury to find that Simpkins, the Park District's Director of Human Resources, was a policymaker and that he was aware of the pervasive discrimination. We need not wade into the 'policymaker' question, though, because Vega failed to show that there was a widespread custom of discrimination against Hispanics in the first place. . . . It is true that Vega had enough evidence to permit a reasonable jury to find in her favor on her Title VII claim for discrimination on the basis of national origin. But the standard of liability is different under § 1983, and the district court correctly concluded that Vega's evidence of discrimination did not satisfy it.").

Compare ***Sopron v. Cassidy***, No. 19-CV-08254, 2022 WL 971563, at *12 (N.D. Ill. Mar. 31, 2022) ("Plaintiff alleges that the City has a longstanding policy or practice of, among other things, fabricating evidence to cause the convictions of innocent people, suppressing exculpatory evidence, condoning and facilitating a code of silence, and failing to discipline its officers for misconduct. . . Plaintiff supports these allegations by stating that, since 1986, 70 cases have come to light in which Chicago police officers have fabricated false evidence or have suppressed exculpatory evidence that led to convictions, . . . describing a Federal Bureau of Investigation report that discusses Chicago police detectives feeding information to witnesses, coercing witnesses into sticking to a specific theory of the case, and physically abusing witnesses . . . and listing several other cases where such pattern of behavior by the Chicago Police Department was found[.] . .Plaintiff has therefore sufficiently stated a plausible *Monell* claim against City. Accordingly, the City's motion to dismiss Count V is denied.") *with* ***Bedford v. Dewitt***, No. 19 C 1, 2023 WL 2561757, at *22–25 (N.D. Ill. Mar. 17, 2023) ("Bedford and Jones base their *Monell* claim on Officer Dewitt's use of force, which Bedford claims deprived her of her Fourth Amendment rights. This claim survives summary judgment, satisfying at this stage the *Monell* claim's threshold requirement for a constitutional injury. . . They argue that the City 'has a *de facto* policy, practice, and/or custom of a Code of Silence that conceals and/or suppresses the investigation of officer misconduct and the disciplining of officers who commit misconduct, including the use of unlawful force.'. .They further allege that the City is aware that this custom and practice exists and threatens citizens' constitutional rights but is indifferent to it. . . Finally, they allege this custom and practice directly resulted in Bedford's constitutional injury. . . But the Plaintiffs have failed to adduce evidence at this stage to carry their burden on all three required elements. . . First, Bedford and Jones have failed to adduce sufficient evidence to support a reasonable jury finding that such a code of silence existed and was widespread in June 2018. Beyond their own single incident involving a handful of officers, they rely entirely on the statements of former Mayor Rahm Emanuel in December 2015 and generalized conclusions about the code of silence and officers' use of excessive force from the April 2016 PATF Report and January 2017 DOJ Report. . . These investigations, conducted a year or more before this incident occurred and—notably—before CPD instituted reforms in 2016–17, are insufficient to demonstrate a widespread, pervasive code of silence when Officer Dewitt encountered Bedford. . . Plaintiffs fail to give examples of any misconduct cover-ups at any time after these reports' issuance. If nothing within CPD had changed in the subsequent 18 months or more, other examples should be readily discoverable. . . To suggest that a reasonable jury could find that a code of silence

existed within CPD, Plaintiffs cite to several cases from this district that discussed and considered evidence of such a de facto policy. . . But Plaintiffs failed to cite to a single case—other than their own—filed after 2016. Those cases involved incidents that occurred well before the referenced reports, CPD's reforms, and June 2018. . . Plaintiffs argue that all this historic evidence shows there is a genuine issue of material fact as to whether the City 'defeated the Code of Silence before Pride Parade in 2018.'. . But it is not the City's burden to prove that it defeated the code of silence by 2018. It remains the Plaintiff's burden to establish that such a widespread practice existed at the time relevant to these events. They fail to meet it here. Even if Plaintiffs could carry their burden on the issue of a widespread practice, Plaintiffs cannot demonstrate municipal fault. They must show that the City both knew of the widespread practice and was deliberately indifferent to it. . . But the City made numerous reforms and implemented mechanisms to address excessive-force instances and investigate them. Given such evidence, Plaintiffs face a high bar to show that the City is deliberately indifferent to a purported widespread practice of covering up excessive-force incidents. . . They have not surmounted it. Plaintiffs rely on evidence from independent monitor reports indicating that the City has not reached full compliance with the January 2019 federal consent decree. This, they suggest, demonstrates that the City is not serious about its reforms for CPD. But failure to reach full compliance within a few years is a far cry from a complete failure to act. Moreover, the Plaintiffs point to no specific information within the independent monitor reports that suggests the City remains deliberately indifferent to preventing excessive use of force or investigating such incidents. Indeed, the Plaintiffs point to no specific information in the reports at all. Their evidence purporting to show the City's deliberate indifference remains vague and conclusory. The Plaintiffs also suggest that the Defendant Supervisors' denial of any code of silence within CPD is, itself, evidence of deliberate indifference to the code's existence. This circular reasoning cannot carry the day. True, if a code of silence existed, its adherents would likely deny it. But so, too, would officers deny the existence or their awareness of a code of silence if it truly did not exist, or if they were unaware of it. Finally, the Plaintiffs assert as evidence of the City's deliberate indifference to police misconduct the proposition that Comm. Rubio assigned Officers Dewitt, Galvan, and Patterson to investigate Officer Dewitt's own misconduct. This is both factually inaccurate and off track. Comm. Rubio assigned them to investigate what happened between the Big City Tap employees and Jones, Bedford, and their group. Officer Dewitt did not investigate his own use of force; Comm. Rubio did. Moreover, this returns to the specific facts of this case, which is insufficient to show deliberate indifference to a widespread de facto policy known to the City. . . The final *Monell* element—causation—similarly falls short. Plaintiffs cannot show by the requisite rigorous standard of causation that the City's action was the 'moving force' behind Bedford's constitutional injury and directly deprived her of her rights. . . The City provided evidence that, according to CPD's reforms and trainings, the Defendant Officers knew their uses of force would be reported and investigated. Indeed, Officer Dewitt's use of force was reported and investigated, both by his supervisor and by COPA. Plaintiffs, in turn, argue that there is genuine issue of material fact as to causation, because they speculate that Officer Dewitt acted as he did because he knew other officers would lie for him to cover up his misconduct. Plaintiffs rely on *Cazares v. Frugoli*, where the *Monell* plaintiff showed an officer knew he could act with impunity, such that causation could be inferred. . . But

in *Cazares*, the plaintiff established that the defendant officer had evaded discipline from other acts of misconduct numerous times. . . Here, by contrast, the Plaintiffs suggest only that Officer Dewitt used force in the presence of other witnesses and officers, so he must have known he could act with impunity. In addition to being speculative, this evidence again falls back on the specific facts of this incident detached from any pattern of officers acting with impunity. This is insufficient to show that the City's action directly caused the constitutional injury. . . The Plaintiffs cannot carry their burden of proof on their *Monell* claim on this record. The City is entitled to summary judgment.") *and* ***Walker v. City of Chicago***, No. 1:21-CV-02648, 2022 WL 971891, at *6–7 (N.D. Ill. Mar. 31, 2022) ("Although all manner of factual scenarios can give rise to a widespread custom or practice for *Monell* purposes, a plaintiff must allege, generally speaking, *multiple* incidents of wrongdoing. . . . Courts are wary of *Monell* custom claims based on single events because single-event claims veer close to the *respondeat superior* theory of liability, which the Supreme Court explicitly rejected in *Monell*. . . Here, the fatal flaw in the *Monell* claim is that it only describes one event in which fabrication of evidence took place: Walker's own arrest and prosecution. . .This single event is not enough to adequately allege a municipal custom or practice. . . In response, Walker argues that he does not need to 'allege a pattern of constitutional violations to survive a motion to dismiss.'. . It is true that there is no absolute requirement that every *Monell* custom claim be supported by multiple alleged instances of wrongdoing. . . But context matters. In some cases—like Walker's—the nature and specifics of the underlying constitutional claim demand that more than one instance is needed to make out a plausible inference for the existence of a widespread but unwritten policy or custom with the force of law. In this case, Walker's allegations are much more specific to him, rather than suggestive of a more systemic practice. To go beyond a single event, Walker relies on various examples of research papers and litigation, as well as the United States Department of Justice's 2017 report concerning misconduct within the Chicago Police Department. . . But the Complaint does not specify what about those citations demonstrate a widespread policy or custom of the *fabrication of evidence*, in contrast to other forms of misconduct (such as fatal shootings) or a 'code of silence' by Chicago Police officers. . . Nor does Walker's response brief try to sift through those sources and identify the fabricated-evidence examples. The Court concludes that these cited sources are too vague (or at the least, Walker presents them that way, without further elucidation on fabricated evidence) to infer that (1) a widespread policy or custom of fabricating evidence existed within the Chicago Police Department or (2) a policy or custom like that was the moving force behind Walker's injury. . . . There are therefore insufficient allegations of an unwritten policy or custom to fabricate evidence.").

See also ***Boyd v. The City of Buffalo***, No. 22-CV-00519, 2025 WL 92362, at *7, *10-12 (W.D.N.Y. Jan. 14, 2025) ("Over the years, courts have commonly recognized that there are several theories by which a plaintiff can establish that a municipality caused – directly or indirectly – the misconduct of its employees: (1) a formal policy officially endorsed by the municipality; (2) actions taken by government officials responsible for establishing the municipal policies that caused the particular deprivation in question; (3) a practice so consistent and widespread that, although not expressly authorized, constitutes a custom or usage of which a supervising policy-

maker must have been aware; or (4) a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees. . . . Plaintiffs maintain that they 'have pled, and there is evidence to support, at least three theories of *Monell* liability,' including that the DA's Office 'tolerated an affirmatively illegal series of practices regarding *Brady* compliance.'. . Because this Court 'need not analyze or articulate every legal or factual theory on which the plaintiff could potentially prevail at trial' to adequately address the present motion, the Court considers only this latter theory here. . . After a thorough review of the evidence, the Court finds that there are genuine disputes of fact as to whether there were widespread customs and practices in the DA's Office during the relevant period that resulted in widespread failures to turn over *Brady* material that caused the alleged violations of Plaintiffs' constitutional rights detailed above. . . . In the present case, a reasonable juror could interpret the record evidence to suggest that there were widespread practices showing a misunderstanding across the DA's Office of *Brady's* requirements. . . . The County's expert testified that 'in the '70s and '80s' the DA's Office's position was that evidence 'had to be exculpatory' to constitute *Brady* material and that evidence that could be used only for impeachment purposes did not need to be disclosed. . . A jury could reasonably find that ADA Drury's and ADA Henry's actions in Boyd's and Walker's trials were consistent with that view. . . . Were a jury to find that there was a widespread practice in the DA's Office during that time period of not properly disclosing *Brady* material, the 'direct causal link between [the] municipal policy or custom and the alleged constitutional deprivation' would be evident. . . In particular, a jury could find that the practices demonstrating widespread misunderstanding of *Brady* requirements within the DA's Office caused the constitutional violations described in the previous section."); ***Salem v. Stoneham Police Department***, No. 22-CV-10350-AK, 2024 WL 4335454, at *12 (D. Mass. Sept. 27, 2024) ("In conclusion, a reasonable jury might find that Carroll and Norton violated Salem's Fourth Amendment rights. It might also find that the Town's police department had a custom or unofficial policy of responding to all possible felonies with drawn firearms and handcuffs in disregard of its reporting requirements. It is not difficult to see how a reasonable fact-finder might determine that such a policy created a plainly obvious and unjustifiable risk of constitutional violations and was the 'moving force' behind the actions of the police detectives on Danby Road. Of course, viewing the record in the light most favorable to the Town, these findings are not foregone conclusions. Therefore, the motions of both parties are denied with respect to § 1983 municipal liability for violations of Salem's Fourth Amendment rights. This Court has laid out the § 1983 analysis to make it abundantly clear that one must not die to avail themselves of § 1983; that death is not necessary to allege a flagrant violation of one's constitutional rights; and that a 'patently obvious' standard is often just common sense. The Court notes § 1983 came to life during the Reconstruction era in the Civil Rights Act of 1871. . . Its very purpose was to 'secure the constitutional ideals of freedom and equality for all.'. . With support from the executive office, the Act represented a comprehensive congressional strategy to cope with and challenge the violent resistance to Reconstruction. . . Courts have heeded this call, too, by interposing themselves 'between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law.'. . Today, instead of closing the doors of § 1983,

this Court elects to keep alive the promise and power intended of it."); ***Cosby v. Rodriquez***, 711 F.Supp.3d 983, ___ (N.D. Ill. 2024) ("Plaintiff Cosby alleges two primary theories of *Monell* liability against the City of Chicago. First, he alleges that the City (and Superintendent Brown) were 'deliberately indifferent to the widespread unconstitutional practices within CPD that caused Plaintiff's injuries.'. . Second, he argues that Superintendent Brown, as a 'final policymaker' for the city, 'authorized and directed the officers' unlawful conduct at the summer 2020 protests.'. . For the reasons discussed below, the court sustains Plaintiff's claim with respect to the former theory, but not the latter. . . .The Second Amended Complaint thus paints a picture of a widespread practice of specific forms of police abuse of protesters from 2003 onward—including excessive force using batons, other escalatory behavior—which Mr. Cosby alleges played out widely during the 2020 protest, injuring both him and other protesters. Plaintiff Cosby's Second Amended Complaint thus plausibly states that CPD officers customarily engaged in practices similar to those Cosby alleges they inflicted on him at the 2020 protests. The Second Amended Complaint's allegations go well beyond 'mere isolated event[s]' and state the existence of 'general pattern[s] of repeated behavior' that could be construed, in the light most favorable to Plaintiff, as municipal customs. . . Moreover, the fact that numerous internal and external investigations and reports repeatedly pointed out these failures plausibly implies that the City was 'aware of the risk created by the custom[s] or practice[s] and ... fail[ed] to take appropriate steps to protect the plaintiff.'. . Finally, Plaintiff plausibly alleges that these customs—and the City's deliberate indifference in the face of those customs—were a 'moving force' behind his injury. . . It is reasonable to infer from his Second Amended Complaint that the City's repeated failure to hold officers accountable for the use of excessive force—including through a culture of silence—emboldened officers to harm Mr. Cosby; indeed, the Second Amended Complaint specifically alleges that a code of silence results in officers' feeling 'they can abuse and violate the rights of individuals without consequence.'. . And Cosby's own injuries are alleged to result from excessive force and retaliatory animus toward protestors, the unlawful practices he has alleged. . . Nor does the existence of the Consent Decree require dismissal of Plaintiff's *Monell* claim. Emphasizing Plaintiff's allegations concerning that Decree, the City urges that those allegations themselves 'demonstrate that there are express policies in place that prohibit the very conduct he alleges caused his injuries, and that the City has been anything but deliberately indifferent to the alleged constitutional violations.'. . The Consent Decree is a 'binding contract' that 'directly contradict[s]' Plaintiff's claims that abusive police tactics are official policy of the City, Defendants contend. . . The law is clear, however, that *Monell* liability may be predicated not only on official or written policies but also on 'implicit polic[ies] or a gap in expressed policies,' or '"a series of violations [that confirm] the premise of deliberate indifference."'. . . Valuable as it is, the Consent Decree does not defeat a finding that the CPD in fact engaged in other policies or widespread practices in connection with the BLM protests. . . The bulk of the Defendants' argument on this score is that the City's 'ongoing efforts to implement the terms of the Consent Decree demonstrate that it is not deliberately indifferent to Plaintiff's constitutional rights ....'. . . In support, the City asserts that it has 'dedicated tens of millions of dollars, countless hours, and vast resources to work towards implementing the Consent Decree to improve police practices in Chicago.'. . As a preliminary matter, this argument goes beyond the four corners of Plaintiff's complaint; the complaint makes

no mention of how much money or time the City has spent combating the alleged code of silence or the use of excessive and retaliatory force at protests. . .The sources the City does cite on this issue do not satisfy the court that the Consent Decree's existence requires dismissal of Plaintiff's *Monell* claim . . . . [D]rawing inferences in Mr. Cosby's favor (as the court must at this stage), the City's failure to change its policies in time for the 2020 protests tells a 'story that holds together' about its deliberate indifference to the means of unconstitutional policing Mr. Cosby alleges he suffered. . . The court makes no findings on these issues. But Cosby has plausibly alleged that the City's deliberate indifference to widespread unlawful practices on the part of its officers resulted in his injuries. These allegations are sufficient to support a claim for *Monell* liability."); ***Kurland v. City of Providence by & through Lombardi***, 711 F.Supp.3d 57, ___ (D.R.I. 2024) ("A reasonable jury could find that a custom of ordering people on public sidewalks to move without cause exists in the Providence Police Department that caused a constitutional harm to Ms. Kurland. The deposition testimony of Lieutenant Smith, Officer Abenante, Officer Richards, and Police Chief Clements shows that the complained-of conduct in this case arose from a well-settled police department practice of ordering people to move. Officer Richards testified that on the date of Ms. Kurland's arrest, he and Officer Abenante had instructed up to ten people to move in the 45-minute period since their arrival in Kennedy Plaza. . . Police Chief Clements does not dispute that he knew about the practice described by the officers, as noted in the discussion of supervisory liability. The same awareness that supports supervisory liability for Police Chief Clements also supports the conclusion that there was an accepted custom of ordering people to move without cause in the Providence Police Department. The defendants do not dispute that Chief Clements is a policymaking official, and, while he only needed constructive knowledge, he has admitted to possessing actual knowledge of the police department's complained-of custom. He also failed to act to end the practice despite complaints that people were being asked to move without cause. Based on these facts drawn from the testimony of the officers, Lieutenant Smith, and Chief Clements, a reasonable jury could find that policymaking officials failed to end a known custom of moving people on public sidewalks without cause, which caused the alleged harm to Ms. Kurland. Therefore, Ms. Kurland has produced sufficient evidence which, if believed, would support municipal liability under *Monell* on the part of the City of Providence and its officials in their official capacities."); ***Estate of Kong v. City of San Diego***, No. 22-CV-1858-BAS-DDL, 2023 WL 4939370, at *6-7 (S.D. Cal. Aug. 2, 2023) ("Courts are 'somewhat split' on the level of detail and the number of similar unconstitutional incidents a plaintiff must show to establish a longstanding practice or custom. . . As one district court surveying the relevant case law recently opined, '[T]here is no *per se* rule' for the number of unconstitutional incidents a pleading must identify to establish a practice or custom under *Monell*, but '[t]he Ninth Circuit and district courts within the Ninth Circuit have repeatedly declined to infer a custom [or practice] of constitutional violations based on two unconstitutional incidents alone.' *Wettstein v. Cnty. of Riverside*, EDCV 19-1298 JGB (KKx), 2020 WL 2199005, at *5 (C.D. Cal. Jan. 22, 2020) (citing, *inter alia*, *Meehan v. Cnty. of Los Angeles*, 856 F.3d 102, 107 (9th Cir. 1988); *Oyenik v. Corizon Health Inc.*, 696 F. App'x 792, 794 (9th Cir. 2017)). The Complaint principally seeks to demonstrate *Monell* liability through allegations of 'practices' or 'customs.' The problem that plagues Plaintiff's practice-or-custom allegations is different from the one that felled her formal-policy allegations. . . . [S]he

fails to posit facts that enable the Court to reasonably infer the practices and customs alleged are of 'sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy.'. . Here, reading the Complaint in a light most favorable to Plaintiff, she attempts to allege only one Fourth Amendment violation attributable to the practices and customs identified: the shooting death of her son. . . This is patently insufficient. . . .In sum, because Plaintiff fails to identify other similar incidents in which the Municipal Defendants' purported practices and customs manifested themselves in constitutional violations, she is precluded from pursuing a *Monell* claim under a practices-or-customs theory."); ***Hargrove v. City of Philadelphia***, No. CV 21-4082, 2023 WL 3229927, at *6 (E.D. Pa. May 3, 2023) ("Plaintiffs have adequately alleged, as supplemented by the news stories in local media discussed, that the City had a policy or custom of releasing inmates late at night into a high crime area with no reliable mode of transportation, proximately causing Hargrove's death. . . Plaintiffs allege that the City of Philadelphia owns and operates the Philadelphia Department of Prisons, which owns, operates, and is responsible for the policies and procedures at CFCF. . . Plaintiffs allege that Warden Gianetta, Warden Farrell, and Commissioner Carney were decision-makers for CFCF and had knowledge and control over the policy of late-night prison releases. . .With respect to custom, Plaintiffs have demonstrated that the City's practice of releasing prisoners late at night with no accessible transportation was a well-settled and permanent one, and that Commissioner Carney knew of and acquiesced to it. . . Additionally, through the same allegations referenced above, Plaintiffs have plausibly alleged this custom was the proximate cause of Hargrove's death."); ***Torain v. City of Philadelphia***, No. CV 14-1643, 2023 WL 174951, at *9 (E.D. Pa. Jan. 12, 2023) ("This evidence suggests that the City knew of officers regularly fabricating probable cause in order to substantiate illegal arrests and that it failed to take precautions against such actions in the future. Further, this custom was the 'moving force' behind Plaintiff's injury as fabrication of evidence and probable cause by the Officers is the conduct Plaintiff alleges caused him to be falsely prosecuted and wrongly imprisoned for 13 years. For these reasons, summary judgment is denied as to the custom theory of municipal liability on the issue of fabrication of evidence to support arrest and probable cause."); ***Johnson v. City of San Jose***, No. 21-CV-01849-BLF, 2022 WL 17583638, at *8 (N.D. Cal. Dec. 12, 2022) ("First, looking to the decisions in *Samaha*, *Tirado*, and *Huffman*, the Court declines to decide that the allegations were over too short a timeframe so as to justify dismissing the policy/custom theory at this stage. Further, the Court notes that under *Menotti*, it can rely on 'repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded' to find a custom or policy. . . Johnson alleged a failure to reprimand at least one police officer for his actions in the protests. . . These allegations, taken as a whole, allow the Court to reasonably infer a custom or policy."); ***Taylor v. City of Saginaw***, No. 1:17-CV-11067, 2022 WL 3160734, at *1-2, *13 (E.D. Mich. Aug. 8, 2022) (on remand) ("Since being filed, this case has been dismissed twice, appealed twice, and remanded twice: first at the pleading stage and then at the summary-judgment stage. . . During that time, the Sixth Circuit has held (1) that tire-chalking constitutes a search that is presumptively unreasonable without a warrant, and (2) that neither the community-caretaker, automobile, nor administrative exceptions to the warrant requirement apply. . .Accordingly, with the class certified, three issues remain: (1) whether any other exception to the warrant requirement applies, (2) whether the City

had a custom or policy of chalking for purposes of *Monell*, and (3) the appropriate remedy if chalking is unconstitutional. . . .No reasonable person would argue that something as trivial and transitory as chalk on a tire offends a reasonable expectation of privacy. But the Fourth Amendment protects more than those expectations that society deems reasonable. As the Supreme Court explained in *Jones*, the Fourth Amendment also protects the ancient right of the people to exclude the government from their 'houses, papers, and effects.'. . In extending that right to this case, the Sixth Circuit held that chalking was reasonable only if it fell within one of the 'few specifically established and well-delineated exceptions' to the warrant requirement. . . Because no such exception applies, . . . this Court must take the Sixth Circuit's prior decisions one step further: Defendants' chalking was not only a search under the Fourth Amendment, but also a violation of it. . .The next issue is whether the City had a custom or policy of chalking, such that it may be held liable for the conduct of its parking officials. . . . The City argues that it is not liable under *Monell* because it did not require Hoskins and other parking officials to use chalk or to 'discipline [them] for not chalking.'. . Instead, it merely provided them with chalk 'as a tool that could be used to perform their job.'. . And, in some instances, they apparently performed their job without chalk. . .The City's argument is unconvincing for two reasons. First, as explained, a plaintiff need not demonstrate an official policy to establish *Monell* liability. '[T]he existence of a custom of tolerance or acquiescence of federal rights violations' is sufficient. . . In this case, the City provided chalk to its parking officers and then issued thousands of parking tickets based in part on their chalking. . . At the very least, the City has 'tolera[ted] or acquiesce[d]' to a pervasive custom of chalking. . . Second, as Plaintiff notes, the City played a more direct role in chalking than it acknowledged. The City provided Defendant Hoskins with not only the chalk but also training for using it, a 'wand' for holding it, and a handheld device for recording when she 'marked' a vehicle. . . Although Defendant Hoskins enjoyed some discretion in deciding *when* to chalk, the practice of chalking was not hers. In her own words, '[s]he just d[id] what the city t[old] [her] to do.'. . Accordingly, all reasonable jurors would agree that the City had a custom of chalking that caused Plaintiff's injury."); ***Wynn v. City of Indianapolis***, No. 1:20-CV-1638-JMS-MJD, 2022 WL 1120490, at *19–20 (S.D. Ind. Apr. 14, 2022) ("In this case, Ms. Wynn asserts that Mr. Reed's death 'resulted from the unconstitutional custom and practice of IMPD officers who routinely use deadly force to apprehend suspects who are young black men.'. . However, not every use of deadly force amounts to a constitutional violation. It is an unfortunate reality that deadly force is necessary and reasonable in some circumstances. . . So, the relevant question is not whether IMPD officers routinely use deadly force against young Black men, it is whether IMPD officers routinely violate the Fourth Amendment by *unreasonably* using deadly force against young Black men. Ms. Wynn's claim that IMPD or the City has a widespread practice of using excessive, deadly force against young Black males fails for lack of evidence. The Dashboard provides basic data on office-involved shootings, but does not provide sufficient information regarding the circumstances of each shooting such that the Court or a factfinder could determine whether excessive force was used in any particular situation. A person can look through the Dashboard to determine how many young Black men have been shot by IMPD officers since 2015, how many of those shootings resulted in death, how many shootings were determined to comply with department policy, how many were deemed 'justified' by prosecutors or resulted in charges

against the involved officer, and so on, but there is no way to know from looking at the Dashboard alone how many of those incidents amount to constitutional violations for purposes of determining whether a pattern of constitutional violations exists. In analyzing any particular use of force by police, the surrounding facts and circumstances are critical, and the Dashboard simply does not provide all of the information required to determine whether the identified officer-involved shootings involved the use of excessive force. . . Neither does any other admissible evidence provided by Ms. Wynn. . . Ms. Wynn also asserts that, in addition to a pattern or practice of shooting young Black men, the City or IMPD demonstrated a pattern or practice of 'inadequate responses to those incidents.'. . But again, Ms. Wynn failed to present any evidence demonstrating such a pattern. The Dashboard does not provide any information concerning IMPD's response to any particular incident, beyond one- or two-word descriptions of whether the use of force was deemed to comply with policy, whether a prosecutor believed charges were appropriate, and whether the firearms review board reviewed the case. . . As such, the Dashboard does not provide a basis from which a factfinder could conclude that IMPD's response was inadequate. . . Put simply, at the summary judgment stage, 'a party must show what evidence it has that would convince a trier of fact to accept its version of events.'. . Ms. Wynn was required to provide evidence from which a factfinder could conclude that IMPD has a widespread pattern or practice of unconstitutionally shooting young Black men, that the City was deliberately indifferent to that pattern, and that the City's inaction caused a violation of Mr. Reed's constitutional rights. But there is nothing in the current record from which a reasonable finder of fact could draw those conclusions. Accordingly, Ms. Wynn's claim fails as a matter of law, and Defendants' Motion for Summary Judgment is **GRANTED** as to the *Monell* claim relating to the use of excessive force."); ***Berry v. Hennepin County***, No. 20-CV-2189 (WMW/JFD), 2021 WL 4427215, at *4–5 (D. Minn. Sept. 27, 2021) ("As Plaintiffs have not alleged that their constitutional injury was caused by inadequate training, Plaintiffs' Section 1983 claim against County Defendants necessarily is based on either an official policy or an unofficial custom. . . 'Policy and custom are not the same thing.'. . '[A] policy is an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters.'. . . Plaintiffs have not identified an official county policy or alleged facts that would support the existence of an official policy. Nor have Plaintiffs cited any law bestowing policymaking authority on Sheriff Hutchinson or alleged that Sheriff Hutchinson is a policy maker. The Court must, therefore, analyze whether Plaintiffs have adequately alleged an unofficial county custom. To state a claim for Section 1983 liability based on a county custom, a plaintiff must plead facts that establish (1) 'the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct' committed by the county's employees; (2) 'deliberate indifference to or tacit authorization' of the misconduct by policymaking officials after those officials have received notice of the misconduct; and (3) that the plaintiff was injured by acts pursuant to the custom, such that 'the custom was a moving force behind the constitutional violation.'. . Even if a plaintiff is not privy to the facts necessary to describe with specificity the alleged custom, the complaint must allege facts that would support the existence of a custom. . .Because it is dispositive of the issue presented here, the Court begins with the second element, which requires a plaintiff to 'allege facts showing that policymaking officials had notice of or authorized' the misconduct. . . Merely referencing previous complaints

made against a local government employee, without more, is insufficient to state a claim for Section 1983 liability based on a custom. . . Plaintiffs do not allege any facts that, if proven, would establish that a policymaking official received notice of any alleged constitutional violations committed by County Defendants' employees. Nor do Plaintiffs allege that a policymaking official authorized or was deliberately indifferent to the alleged constitutional violations committed by County Defendants' employees. And there are no alleged facts from which such an inference could reasonably be drawn. Because Plaintiffs have not alleged any facts to support this necessary element of a claim for Section 1983 liability based on a county custom, Plaintiffs have failed to state a Section 1983 claim against County Defendants. . . Accordingly, the Court must dismiss the Plaintiffs' federal constitutional claims against County Defendants premised on Section 1983 liability, and therefore grant County Defendants' motion to dismiss all such claims against them."); ***Ballheimer v. Batts***, No. 117CV01393SEBDLP, 2020 WL 1317444, at *14-15 (S.D. Ind. Mar. 20, 2020) ("Although as we have determined the Officers are shielded from liability for their unconstitutional conduct, the Town may still be subject to *Monell* liability. . . Plaintiff so claims. The Town resists. . . . Ballheimer alleges the existence of a widespread custom within the Town of unconstitutionally utilizing forced catheterizations to obtain urine samples from suspects. No 'bright-line' rule defines a widespread custom or practice, but a plaintiff generally 'must introduce evidence that acquiescence on the part of the policymakers was and amounted to a policy decision.' *Dixon v. Cty. of Cook*, 819 F.3d 343, 348 (7th Cir. 2016); *Thomas v. Cook County Sheriff's Dept.*, 604 F.3d 293, 303 (7th Cir. 2010). 'There is no clear consensus as to how frequently such conduct must occur to impose *Monell* liability, except that it must be more than one instance or even three.'. . The Town argues that the evidence establishes that no such custom or practice existed. While Officer Batts testified that he directed the use of forced catheterizations, executed pursuant to warrants authorizing reasonable force to obtain urine, on 'several occasions,'. . . there is no evidence that Chief Anderson was aware of the technique employed before Officer Batts. In fact, Chief Anderson unequivocally testified that he was not aware. Officer Batts testified to the opposite effect, but both he clarified that Chief Anderson would only become aware of the forced catheterizations (absent an explicit conversation on the subject, which both Chief Anderson and Officer Batts deny occurring) by reading the corresponding matter's incident report. However, Chief Anderson does not always read incident reports, and he denies doing so in any case where a forced catheterization may have been used. Chief Anderson maintains that he had no knowledge that officers may be utilizing this practice. According to the Town, this evidence establishes that any forced catheterizations were 'isolated' occurrences. We disagree that this evidence forecloses finding that a widespread custom or practice existed. Officer Batts testified that he has utilized forced catheterizations in similar circumstances on 'several' occasions. We are without even a ballpark estimate as to what 'several' means. Three? Ten? Fifty? Without even slight quantification as to how often the unconstitutional conduct occurred, we cannot conclude that the violations occurred on fewer than the minimally required 'one or three instances' as discussed in the case law is necessary to establish a widespread custom. Additionally, the Town has not presented any evidence as to whether other officers were partaking in this conduct. Officer Batts's testimony that he 'did not know' if his fellow officers utilized this technique does not establish as an evidentiary matter that it was not an ongoing practice, as the Town apparently believes. The

Town next argues that Ballheimer cannot prevail because Chief Anderson did not actively participate in the deprivation. . . . The relevant question, overlooked by both parties, is whether Chief Anderson was 'deliberately indifferent' as the 'known or obvious consequences' of his actions. Deliberate indifference, in the context of a widespread practice theory, means 'a reasonable policymaker [would] conclude that the plainly obvious consequences of [his] actions would result in the deprivation of a federally protected right.'. . These consequences may be plainly obvious when one knows or should know of their existence. . . 'The question of whether the defendants' conduct constituted deliberate indifference is a classic issue for the fact finder.'. . We cannot determine whether the evidence is so pervasive that it forecloses a reasonable jury from finding that the Town acted deliberately indifferently when it has failed to apply the relevant legal standards. We also note that the Town fixates on Sheriff Anderson's purported lack of actual knowledge without ever addressing the fact that the determination of 'conscious disregard' is not limited to consideration of only his actual knowledge. . . One of Sheriff Anderson's reporting officers utilized the forced catheterizations on numerous occasions, which were documented in his incident reports. That same officer testified that he discussed doing so with other lieutenants. . . Based on this evidence, a reasonable juror is not barred from finding that Sheriff Anderson should have known of the violations irrespective of what he actually knew."); ***McIntyre v. Unified Government of Wyandotte County***, No. CV 18-2545-KHV, 2020 WL 1028303, at *34 (D. Kan. Mar. 3, 2020) ("Here, plaintiffs' allegations plausibly show that Unified Government had a pattern and practice of allowing Golubski to openly assault, harass and coerce women like Rose while investigating and collecting evidence. These allegations are sufficient to show that Unified Government had actual or constructive notice of the conduct that Golubski employed against Rose and Lamonte, and deliberately chose to disregard the substantial risk of constitutional violations. Plaintiffs have therefore satisfied the custom or policy element of their *Monell* claims for purposes of the motion to dismiss."); ***Villegas v. City of El Paso***, No. EP-15-CV-00386-FM, 2020 WL 981878, at *16–17 (W.D. Tex. Feb. 28, 2020) ("The City attempts to characterize this plethora of constitutional violations as a single incident violating only Plaintiff's rights and therefore insufficient to demonstrate 'persistent, often repeated, constant violations' as required to establish municipal liability. . . However, considered in their entirety, these facts establish a pattern of similar violations that is a far cry from a single incident of abuse of authority by one wayward officer. The sheer number of abuses alleged and the degree of coordinated involvement of multiple members of the El Paso police department show a plausible accepted standard of practice within the department rising to the level of unwritten custom. . . The City also asserts Plaintiff fails to identify a policymaker responsible for this conduct. . . However, Fifth Circuit precedent indicates that a police chief may be an official policymaker. . . Even if Plaintiff does not say the magic words naming the Chief of the El Paso Police Department as the relevant policy maker, all of the violations alleged come from within the police department and Plaintiff pleads these violations are the product of policies implemented by 'command personnel.'. . The Chief of Police is clearly command personnel. Therefore, the City is sufficiently on notice of the nature of the claim. Plaintiff pleads the police department's leadership had actual knowledge of unconstitutional practices. . . Additionally, the extensive coordination by various members of the police department allows the court to draw the reasonable inference that a policymaker had at least constructive

knowledge of the misconduct alleged. . . Even assuming the Chief of Police did not actually know that a minimum of seven officers under his command coordinated to coerce false statements from eight individuals and destroyed evidence undermining the prosecution's theory of the case, the breadth of malfeasance indicates he or other command personnel had constructive knowledge. Plaintiff pleads numerous instances of fabricated and suppressed evidence: four witness statements implicating other suspects, four confessions by other suspects, destruction of a possible murder weapon, and evidence tying a suspect who confessed to the murder weapon. In sum, Plaintiff pleads sufficient facts to state a claim for municipal liability under an implied policy theory."); ***Case v. City of New York***, No. 14 CIV. 9148 (AT), 2019 WL 4747957, at *9 (S.D.N.Y. Sept. 30, 2019) ("Defendants argue that Plaintiffs' citation to various lawsuits brought against the City does not establish proof of notice for deliberate indifference purposes. . . . Here, the Court holds that the number and persistence of legal challenges brought, sometimes resulting in plaintiffs' verdicts and other times in settlements, is sufficient to create a jury question on the issue of notice."); ***Thomas v. City of Philadelphia***, No. CV 17-4196, 2019 WL 4039575, at *24-25 (E.D. Pa. Aug. 27, 2019) ("Finally, the defendants argue that the plaintiff's *Monell* claim should be dismissed because he failed to identify a specific final policymaker who was responsible for the alleged constitutional violations. . . . At trial, the Court will follow *Jett* and *Andrews* and instruct the jury that it cannot find the City liable unless it attributes the alleged misconduct to a final policymaker. At this stage, however, based on the evidence discussed at great length above, the Court concludes that a reasonable jury may attribute the Police Department's alleged failure to train, supervise, and discipline to the appropriate policymaker, i.e, the police commissioner, even though acquiescence by the commissioner has not been specifically identified on the record."); ***Britton v. Maloney***, 901 F. Supp. 444, 450 (D. Mass. 1995) ("Unlike a 'policy', which comes into existence because of the top-down affirmative decision of a policymaker, a custom develops from the bottom-up. Thus, the liability of the municipality for customary constitutional violations derives not from its creation of the custom, but from its tolerance of or acquiescence in it.").

Compare ***Jackson v. Valdez***, 852 F. App'x 129, ___ (5th Cir. 2021) ("We recognize that Jackson is without the benefit of discovery, and that we have no rigid rule regarding numerosity to prove a widespread pattern of unconstitutional acts. Though it is a close call, for a Rule 12(b)(6) dismissal, we cannot conclude that allegations of two incidents of strip searches and four incidents of sex-based classifications of two transgender people in a span of five years support the reasonable inference that a practice of strip searches and classifications of transgender detainees solely on their biological sex is 'so persistent and widespread as to practically have the force of law.'. . . Such isolated violations 'are not the persistent, often repeated, constant violations that constitute custom and policy.' *Bennett*, 729 F.2d at 768 n.3. We conclude that the district court properly dismissed Jackson's municipal liability claim based upon her 'policy' theory.") *with* ***Jackson v. Valdez***, 852 F. App'x 129, ___ (5th Cir. 2021) (Southwick, J., dissenting in part) ("On the merits, my only disagreement is that we should not affirm dismissal of the municipal-policy claim. I will explain. . . . The majority concludes that Jackson has failed to allege enough incidents to prove a policy through the existence of a custom. In my understanding, a plaintiff is not required pre-discovery to distinguish between a formal policy and a custom. The evidence creating a plausible

claim of a policy before a suit is filed may not create clarity about the form in which the policy is expressed. We know that a complaint's assertion of a customary policy can take the form of claiming a pattern of unconstitutional conduct by municipal actors or claiming a policymaker's single unconstitutional action. . . Thus, even if no relevant, formal policy exists, a plaintiff may offer evidence 'demonstrat[ing] the governing body's knowledge and acceptance of the disputed conduct.'. . Municipal liability 'attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official ... responsible for establishing final policy with respect to the subject matter in question.'. . An '"official policy" often refers to formal rules or understandings — often but not always committed to writing.'. . In my view of the complaint, Jackson has sufficiently pled a policy that may ultimately be proven under either theory. . . . Dallas County employees told Jackson that they had a policy. She must plead facts that plausibly allege that the policy existed. Jackson did. After discovery, her allegations about the policy her jailers were referencing may become clearer, or, instead, discovery may reveal there is no policy in any form.It is too early at this stage to conclude that she cannot show a policy simply because she has not yet discovered enough incidents. Jackson's complaint alleged four instances of placing transgender detainees based on their anatomy and two strip searches for determining physical sex characteristics. As the majority correctly states, 'we have no rigid rule regarding numerosity to prove a widespread pattern of unconstitutional acts.' The complaint also quotes jail personnel as saying, 'It's not uncommon for men that look like women to be sitting in the men's section and vice versa. You'll probably see some like you over there. You aren't the first and you won't be the last,' implying that Jackson was part of a larger and continuing collection of people subjected to this treatment. In other words, the quoted statement supports that the way Jackson was treated was the norm rather than the exception. In my view, Jackson has plausibly pled facts which, if true, support the existence of a county policy. . . Whether it exists as an official policy 'formally announced by an official policymaker,'. . . or a persistent, widespread custom 'so common and well settled as to constitute a custom that fairly represents municipal policy,'. . . is irrelevant at this stage. I would not charge Jackson with knowing what form the policy takes until she has had a chance to discover it. Respectfully, I dissent.")

Compare ***Lipman v. Budish***, 974 F.3d 726, 748-49 (6th Cir. 2020) ("Based on the facts alleged in the complaint, a juror could reasonably infer that DCFS and the county had a custom of allowing caseworkers to interview potential abuse victims in the presence of their alleged abusers. The original complaint alleges six different instances, involving multiple different caseworkers, in which Ta'Naejah was interviewed about her abuse in front of Crump and Owens. At the motion-to-dismiss stage, without the benefit of discovery, these facts are enough to draw the reasonable inference that this custom was widespread throughout DCFS and known to policymakers within the county. *See, e.g.*, *Gregory v. City of Louisville*, 444 F.3d 725, 757 (6th Cir. 2006) (finding a custom under *Monell* at the summary judgment stage based on repeated violations and other evidence of an established practice). . . Accordingly, the district court erred in dismissing Plaintiffs' claim against Budish [in his official capacity].") *with* ***Lipman v. Budish***, 974 F.3d 726, 754-56 (6th Cir. 2020) (Nalbandian, J., concurring in part and dissenting in part) ("I concur in the majority's disposition of all the issues here except for municipal liability. . . First off,

'[m]unicipalities may be held liable under § 1983 for constitutional violations committed by their employees if the violations result from municipal practices or policies.'. . But '[i]f no constitutional violation by the individual defendants is established, the municipal defendants cannot be held liable under § 1983.'. . I would have rested the failure of the municipal liability claim on the lack of any substantive due process right, had Defendants properly raised and argued the issue. In any case, the question here is whether Plaintiffs have plausibly alleged that a county custom or informal policy exists in the face of a formal, written policy to the contrary. In their complaint, Plaintiffs point to five or six instances of officials interviewing the same child—Ta'Naejah—in October 2016, February 2017, and March 2017. But we have concluded that 'five instances of alleged misconduct, over three months, all involving the plaintiff himself is not enough to prove a custom.' *Payne v. Sevier County*, 681 F. App'x 443, 447 (6th Cir. 2017) (citing *Thomas v. City of Chattanooga*, 398 F.3d 426, 433–34 (6th Cir. 2005)). . . The plaintiff must 'reach beyond' his own situation and cannot 'solely ... point[ ] to the facts of his own case.'. . Pointing to a few sole instances involving the same person does not plausibly allege a custom 'so persistent and widespread as to practically have the force of law.'. . And the complaint contains no allegations that the county itself embraced this informal practice of a few employees violating the *written, formal* policy the county had. . . Nor does the complaint contain allegations that the county was even aware of some of its employees ignoring its written, formal policy and that it then took no action to stop those employees' violations. . . The complaint lacks any facts plausibly alleging a custom so ingrained that it supports a theory of municipal liability. I respectfully dissent on the issue.")

Compare ***Hildreth v. Butler***, 960 F.3d 420, 426-30 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1527 (2021) ("Because Wexford is a 'private corporation that has contracted to provide essential government services [it] is subject [under § 1983] to at least the same rules that apply to public entities.'. . Hildreth does not point to an official unconstitutional policy; instead, he claims Wexford has a custom of delaying prescriptions. . .To support a § 1983 claim on this theory, Hildreth must show: (1) defendants' practice in refilling prescriptions violated his constitutional rights; and (2) that practice was 'so pervasive that acquiescence on the part of policymakers was apparent and amounted to a policy decision.'. . This requires 'more than a showing of one or two missteps.'. . There must be 'systemic and gross deficiencies.'. . Even if such deficiencies exist, Hildreth must show policymakers knew of the deficiencies and failed to correct them, manifesting deliberate indifference. We put the first requirement to the side because Hildreth has not provided enough evidence on the second to show a practice of delaying prescriptions was widespread, which is the 'pivotal requirement' of his § 1983 claim. . . Hildreth's claim fails on two axes: first, his allegations of delays are insufficiently widespread, as they involve only him; and second, the alleged delays are insufficiently numerous, as he has substantiated only three. . . .We agree with the district court that this case is comparable to *Grieveson v. Anderson*, 538 F.3d 763 (7th Cir. 2008). In *Grieveson*, on four occasions over a period of about eleven months, jail guards gave the plaintiff his entire prescription at once, exposing him to the risk of theft by other inmates. Those four instances were insufficient to establish a widespread practice or custom. . . As *Grieveson* explained, 'evidence of four incidents that [plaintiff] alone experienced is 'simply

not enough to foster a genuine issue of material fact that the practice was widespread.'. . Accordingly, granting summary judgment in Wexford's favor was proper. Our dissenting colleague attempts to distinguish *Grieveson*. Grieveson complained once, while Hildreth complained three times, and Grieveson did not allege widespread non-compliance with official policy. But a single complaint of four incidents over eleven months is not materially different than three complaints, each of a single incident, over nineteen months. And like Grieveson, Hildreth did not allege a widespread failure. Hildreth's allegations concern only himself. He sued on his own behalf and not for others. Indeed, the term 'widespread' is absent from Hildreth's amended complaint, which was filed with the assistance of counsel. Our reasoning and conclusion here agree with other circuits that have considered the frequency of instances to establish a widespread practice or custom. Those cases have concluded that four or more incidents over varying periods—sometimes less than nineteen months—are insufficient to qualify as a widespread practice or custom.[6] [fn. 6: collecting cases] . . . . The dissent states we adopt a 'bright-line rule' as to the number of incidents to establish an unconstitutional custom under *Monell*. . . But rather than set a number, we have considered and applied the precedents of this and other courts to these facts, nothing less and nothing more. Hildreth has not shown five incidents of prescription refill delay, much less eight. And under that law three delays over nineteen months for a single individual does not establish a widespread custom or practice of delaying medication. So we affirm the district court's grant of summary judgment to Wexford on Hildreth's § 1983 claim.") *with* ***Hildreth v. Butler***, 960 F.3d 420, 432-41 (7th Cir. 2020) (Hamilton, J., dissenting), *cert. denied*, 141 S. Ct. 1527 (2021) ("Plaintiff Hildreth has offered sufficient evidence that Wexford knew of his serious health needs—which required reliable, timely refills of his Parkinson's medication—and acted unreasonably in response to those needs. Wexford established prescription refill and renewal systems, i.e., policies, that did not include warnings and back-ups to correct inevitable and serious mistakes. That's enough to show deliberate indifference under *Farmer v. Brennan*, 511 U.S. 825, 843–44, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), and *Glisson v. Indiana Dep't of Corrections*, 849 F.3d 372, 382 (7th Cir. 2017) (en banc). I respectfully dissent. . . . [P]laintiff Hildreth has come forward with evidence that defendant Wexford's policies for renewing and refilling prescriptions reflect deliberate indifference to the serious medical needs of Hildreth himself and other prisoners who depend on reliable refills of prescriptions for medicines that are not kept on-site at the prison. . . . As applied, then, the formal policies did not reliably supply Hildreth with his Parkinson's medication. The record contains evidence of at least three medication lapses over a period of nineteen months. . . . For claims against municipal governments under 42 U.S.C. § 1983, we apply the familiar *Monell* standard: respondeat superior liability does not apply, and the plaintiff must show instead that the constitutional violation was caused by a municipal policy or a custom or practice so pervasive as to reflect municipal policy. . . The Supreme Court has not applied the *Monell* standard to private corporations that act under color of state law, like prison and jail health-care providers. Our precedents have applied *Monell* to such private corporations, though that doctrine has been questioned within the court and the academy. See *Shields v. Illinois Dep't of Corrections*, 746 F.3d 782, 789–90 (7th Cir. 2014). In this case, the correct focus is on Wexford's systems (i.e., its policies) for prescription refills and renewals. *Monell* liability may apply even in the absence of individual liability where the

institutional policies themselves show deliberate indifference to inmates' serious medical needs. *Glisson v. Indiana Dep't of Corrections*, 849 F.3d 372, 378 (7th Cir. 2017) (en banc) (contractor chose not to provide for coordinated care for prisoners with multiple, complex illnesses). . . . This doctrinal niche is often relevant in prison health-care cases, particularly where health care is delivered by a combination of government employees and a private contractor like Wexford. The combination diffuses responsibility between government and contractor and among many individuals. Inmates can suffer because of health-care providers' lack of policy, systematic failures to follow official policy, or obvious gaps in policy. . . In such cases, it may be that no facially unconstitutional policy tells employees to take actions that violate someone's constitutional rights. Instead, the government or its contractor adopts or tolerates practices that predictably lead to constitutional harms. . . . Hildreth has presented sufficient evidence of a *Monell* policy or custom for his claim to survive. A jury could conclude that 'the failure to establish adequate systems' for providing essential medication 'was so pervasive that acquiescence on the part of policymakers was apparent and amounted to a policy decision.'. . Hildreth has identified a policy—or rather, a network of policies and key policy gaps—that can form the basis of Wexford's Eighth Amendment liability. The issue is not exactly how often the policy failed Hildreth. The issue is whether the system established by Wexford policymakers reflected deliberate indifference to the inevitability of human mistakes. A prisoner asserting a deliberate-indifference claim must show that the defendant had actual knowledge of the danger or serious condition the prisoner faced, and that the defendant failed to take reasonable steps in the face of the risk. . . . Ample evidence showed that Wexford had actual knowledge of Hildreth's Parkinson's disease, his prescription, and the need to ensure a steady supply of the medicine. Wexford surely had actual knowledge that some prisoners would have similarly urgent needs for critical prescriptions not available on-site at the prison. Given that actual knowledge of serious medical needs, Wexford had a constitutional duty to take reasonable steps to avoid or minimize the risk of lapses in medication. In other words, Wexford had a constitutional duty to put in place a reasonably reliable system for renewing and refilling such critical non-formulary drugs and to monitor the performance of that system. A jury could easily find that Wexford's system was not reasonably calculated to be reliable because the system had no warning channel and back-up mechanisms by which it could fix mistakes without unnecessary suffering. Wexford's system is not required to be perfect and fail-safe. But for a system so critical to health—and one with many possible points of failure—it lacked warnings to alert Wexford to inevitable mistakes or oversights. This not only prevented Wexford from catching mistakes before patients suffered but apparently prevented Wexford from learning about even repeated failures. Such an unreasonable 'conscious decision not to take action' in the face of a serious medical risk is akin to the decision of the defendant in *Glisson* to forgo a protocol for coordinated care to chronically ill inmates. . . Where there is an obvious risk created by a health-care policy gap—like coordinated care in *Glisson* or medication refill oversight here—a plaintiff need not show some minimum number of injuries to prevail. . . .In Hildreth's case, Wexford's system for providing medication led to a series of serious delays in providing him with his medication—at least three times in nineteen months. Each time this happened, we must assume, Hildreth did everything he could to avoid the problem and then to make Wexford aware of it. . . . Wexford's lack of involvement in the grievance process makes

it *more* culpable and *strengthens* Hildreth's claim. Humans make mistakes. In implementing systems known to be critical to life, health, and safety, a company like Wexford must allow for such mistakes and take reasonable steps to provide warnings and back-up systems. Federal courts do not and should not design the specifics. As noted, though, the Eighth Amendment requires reasonable responses to known risks where prisoners cannot protect their own health and safety. Wexford's admission that it lacked any policy to learn about inmates' complaints supports the conclusion that its prescription policies created an unacceptable risk of harm resulting from this form of deliberate indifference to Hildreth's serious medical needs. . . . The law should not do what the majority opinion's reasoning does here: reward divided responsibility and deliberate ignorance by those who control prisoners' only access to health care. Hildreth's grievances give the impression of a person in pain, screaming into a void. Wexford ignored Hildreth's grievances, seemingly by design. And when Hildreth used the only other avenue available—communication with nurses—he was told only to 'wait and see' if the refill would come. On this record, we should reverse summary judgment for Wexford. . . . The majority opinion adopts a highly restricted approach to establishing a *Monell* custom that is at odds with our precedent. The majority looks only to the raw number of alleged failures and the time period over which they took place. . . It views the broader policy decisions and context surrounding the violations as immaterial. This approach divorces the legal doctrine from its purpose of identifying those cases in which a government or corporate policy causes and fails to address predictable failures to provide needed medical care. After acknowledging that we have adopted no 'bright-line rules' for establishing a *Monell* custom, the majority opinion adopts one by saying that the number of possibly unconstitutional incidents 'must be more than three.'. . There are at least two problems with the approach. First, Hildreth does not present the kind of pure custom case where institutional culpability is inferred solely from repeated employee misconduct and the question is whether the corporation can be held liable for tolerating them. While Hildreth uses the term 'custom' in his briefing—presumably because he asks us to infer something from the repeated medication lapses he experienced—his theory of *Monell* liability implicates both official policies and unofficial customs. Hildreth specifically points to Wexford's admission that it is 'not involved in the grievance process' as evidence of its deliberate indifference. He asks us to infer from Wexford's medication refill policy, its prescription renewal policy, a pattern of noncompliance with each of those policies, a pattern of medication lapses, and—importantly—the utter failure of Wexford to provide a functioning pathway to fix these problems, that Wexford tolerated 'systematic and gross deficiencies' in its process for providing inmates with medication. . . And as described above, the lack of a policy for reporting and correcting failures—undoubtedly a failing attributable to Wexford itself rather than a rogue employee—should be decisive. Second, even when addressing what could be called pure custom cases, we have never held that some minimum number of incidents is needed to establish municipal liability. Rather, the question is one of corporate knowledge and responsibility, as is always the case under *Monell*. . . The majority opinion's per se rule is at odds with our approach to *Monell*, which focuses broadly on indicia of municipal or corporate responsibility rather than just the number of incidents. . . As we said in *Woodward*, a prison health-care company 'does not get a "one free suicide" pass.'. . *Grieveson v. Anderson*, 538 F.3d 763 (7th Cir. 2008), which the majority opinion treats as controlling, is easily distinguishable.

An inmate alleged that the jail maintained a customary practice of failing to distribute inmate prescriptions properly after four instances in which his entire prescription was distributed at once and then stolen by other inmates. . . We held that these four incidents were insufficient to establish a custom. *Grieveson* differs in two critical ways from this case: the inmate complained to the prison officials only once, and the inmate did not allege widespread noncompliance with official policy. Here, by contrast, Hildreth filed at least three grievances and made even more frequent complaints to nurses where Wexford's system failed, and nothing happened. And he described frequent noncompliance with Wexford's refill and renewal policies. Wexford's just-in-time refill system left little room for mistakes, and such a system demands warnings and back-ups where health and safety are at stake. The repeated and foreseeable mistakes in refilling Hildreth's prescription and the failure to respond to his complaints make for a much stronger case of systemic deficiencies here than in *Grieveson*. I would reverse and remand for trial, and I would add a strong suggestion that Hildreth be permitted to pursue additional discovery to expand the evidence of deliberate indifference.")

See also ***Hildreth v. Butler***, 971 F.3d 645, 645-47 (7th Cir. 2020) (Hamilton, J., joined by Rovner, Wood, and Scudder, JJ., dissenting from denial of rehearing en banc), *cert. denied*, 141 S. Ct. 1527 (2021) ("This case poses important questions about *Monell* liability in the context of prison healthcare. We may assume that convicted prisoners deserve their punishment in prison, but the Eighth Amendment imposes limits on that punishment. In important ways, prisoners are dependent and vulnerable. Their custodians may not act with deliberate indifference toward serious dangers to their prisoners or to their serious health needs. . . Custodians who learn of such dangers or needs must respond reasonably to them, whether the threat comes from violence at the hands of other prisoners, *Farmer v. Brennan*, 511 U.S. 825, 844–45 (1994), hazards in the prison environment, *Helling v. McKinney*, 509 U.S. 25, 33 (1993), suicide, *Woodward v. Correctional Medical Services*, 368 F.3d 917, 929 (7th Cir. 2004), or injury, illness, or pain. *Estelle*, 429 U.S. at 104–05. . .The question worth deciding en banc in this case is whether plaintiff Hildreth has come forward with evidence sufficient to find that defendant Wexford acted with deliberate indifference to his and other prisoners' serious medical needs by establishing unreasonable systems ('policies' in the language of *Monell*) for refilling and renewing prescriptions for needed medicines. . . As the health care contractor for the prison, Wexford of course knew of the need for timely and reliable prescription refills and renewals. As explained in the panel dissent, a reasonable jury could also find that Wexford failed to take reasonable steps to meet that need. *Hildreth v. Butler*, 960 F.3d 420, 435 (7th Cir. 2020) (Hamilton, J., dissenting). Wexford designed and implemented systems that left plenty of room for human error or even malice, but without alerts or safeguards to learn of and correct inevitable problems with prescription refills and renewals. As a result, plaintiff Hildreth repeatedly suffered easily avoidable pain and debilitation, for days or more than a week at a time, while waiting for the medicine he needed for his Parkinson's disease. The broader legal question posed here is whether the panel majority decision is consistent with our recent en banc decisions on *Monell* liability in *Glisson v. Indiana Dep't of Corrections*, 849 F.3d 372, 382 (7th Cir. 2017) ("There is no magic number of injuries that must occur before [defendant's] failure to act can be considered deliberately indifferent."), and *J.K.J. v. Polk County*,

960 F.3d 367, 380 (7th Cir. 2020) (" 'in a narrow range of circumstances,' deliberate indifference could be found when the violation of rights is a 'highly predictable consequence' of a failure to provide officers what they need to confront 'recurring' situations"), . . . as well as whether it is consistent with *Woodward v. Correctional Medical Services*, 368 F.3d 917, 929 (7th Cir. 2004) ("CMS does not get a 'one free suicide' pass."). In both *Glisson* and *J.K.J.*, we held that plaintiffs were entitled to a jury trial or verdict on their *Monell* claims without requiring proof of a minimum number of previous failings. In both cases, the *Monell* defendant was on notice of a serious risk of harm to certain prisoners. In *Glisson* it was the risk to patients with complex disease combinations if there were no effort to coordinate care. In *J.K.J.*, it was notice of the risk of sexual abuse by guards. Both *Glisson* and *J.K.J.* applied two key lessons from *Farmer v. Brennan*. First, knowledge of a danger or serious health need may be inferred from circumstantial evidence, including the obviousness of the risk or need. . . Second, a state actor with actual knowledge of such a danger or need is expected to take reasonable, though not perfect, steps to address the danger or need. . . More generally still, this case poses the question whether courts need to channel *Monell* claims into separate and distinct categories depending on how the plaintiff characterizes his claim, whether as one based on a 'pattern' of violations showing an unconstitutional custom or as one based on a more direct challenge to an explicit policy of the governmental or corporate defendant. The panel majority erred by adhering too rigidly to these categories as separate channels and failing to engage with the policy problem and holding of *Glisson*. As a result, the panel majority allowed Wexford to treat the case as only a 'pattern' case, which in turn allowed Wexford to defend itself by saying that it had not known—*and had no way to know*—of the repeated acts of individual oversight or malice that delayed Hildreth's medicine. That defense was actually an unintentional admission that Wexford's systems (i.e., its policies) for prescription refills and renewals were themselves unreasonable. They were unreasonable in the face of inevitable human error precisely because they did not include means for monitoring whether or not urgent medical needs were being met. The categories for *Monell* cases can be helpful, but we should not let them distract us from the central issue. Regardless of how the claim is categorized, 'The central question is always whether an official policy, however expressed (and we have no reason to think that the list in *Monell* is exclusive), caused the constitutional deprivation.'. . I respectfully dissent from the denial of rehearing en banc.")

Compare ***Castro v. County of Los Angeles***, 833 F.3d 1060, 1075-76 (9th Cir. 2016) (en banc) ("[T]he entity defendants argue that the architecture of the West Hollywood police station's sobering cell cannot be a policy, custom, or practice. We need not decide that question, because the design of the cell is not the custom or practice alleged by the plaintiff and found by the jury. Whether or not the design of the cell is a policy, custom, or practice, it is a fact; the sobering cell lacked audio monitoring and video surveillance. . . That is, the design of the cell is only the backdrop for the entity defendants' policy or custom, as described in the jury instructions and as reflected in the record. The LASD and the County made deliberate choices *in light of* the poor design and location of the sobering cell. There was a custom of housing intoxicated inmates in sobering cells that contained inadequate audio monitoring. A representative of the County admitted

that other options existed; there were other cells in which to detain intoxicated prisoners. The entities chose a policy to check on inmates only every 30 minutes. A representative of the County testified that supervision of the sobering cell consisted of 'half-hour checks by the jailer.' These routine practices were consciously designed and, together, they amount to a custom or policy. . . The custom or policy, in summary, was to use a sobering cell that lacked adequate audio surveillance to detain more than one belligerent drunk person while checking the cell visually only once every half hour. . . . The jury found that LASD's and the County's custom or practice caused Castro's injury. Substantial evidence supports the jury's findings.") *with* ***Castro v. County of Los Angeles***, 833 F.3d 1060, 1082-84 (9th Cir. 2016) (en banc) (Callahan, J., joined by Bea and Ikuta, JJ., dissenting in part)("Here, there was no 'known or obvious consequence,' there was nothing 'so obvious' or 'so likely to result in the violation of constitutional rights' as to support a determination of deliberate indifference, and there was no substantial certainty. Castro was attacked by Gonzalez who, pursuant to the County's express policy, should not have been placed in the cell occupied by Castro. There is nothing to suggest that the County should have anticipated violations of its policy. Moreover, the majority observes that the jury found that the individual officers 'knew or should have known that the jail's policies forbade placing the two together in the same cell in those circumstances.' . . Fairly viewed, the record is devoid of evidence that the County 'disregarded a known or obvious consequence,'. . . and there is neither the obviousness nor the likelihood of a violation of a constitutional right necessary to support a finding of deliberate indifference. . . .The majority's need to cobble together different 'choices' in order to construct a policy of deliberate indifference also reflects the fact that there is no direct causal link between the policy perceived by the majority and Castro's injury. Castro was injured by Gonzalez, a violent detainee who was placed in the sobering cell with Castro in direct contravention of the County's clear policy against such placement. . . .On the record before us, holding the County liable is tantamount to de facto respondeat superior liability, which the Supreme Court has consistently disapproved. . . . Castro's tragic injuries were a preventable tragedy, and we affirm the jury's determination of the individual defendants' culpability. However, the evidence proffered by Castro at trial does not support a finding that the County had a policy or custom that reflected deliberate indifference that led to Castro's injuries. Castro presented insufficient evidence that audio monitoring was required for the West Hollywood station's sobering cell in 2009. The adoption of California Building Code standards for audio and visual monitoring did not give the County even constructive notice that monitoring at the West Hollywood police station might be substandard because the Code includes a grandfather clause stating that the new standards are not applicable to existing structures. Moreover, there was no evidence of any prior incidents. The other alleged 'choices' manufactured by the majority—the availability of other cells and 'a policy to check inmates only every 30 minutes'—do not support a determination of deliberate indifference. Moreover, the immediate cause of Castro's injuries was the individual officers' placement of Gonzalez in Castro's cell in direct violation of the County's policy. In sum, there is insufficient evidence to support a finding of deliberate indifference by the County and there is no direct causal link between the County's maintenance of the West Hollywood sobering cell and Castro's injuries. Accordingly, I would vacate the award against the entity defendants.").

Compare ***Brass v. County of Los Angeles***, 328 F.3d 1192, 1201, 1202 (9th Cir. 2003) ("To the extent Brass's claim rests on the County's policy or custom of not starting to process a particular day's releases until it has received all information, including wants and holds, relating to the prisoners scheduled for release, we cannot say the County thereby violated Brass's constitutional rights. To the contrary, we think that that aspect of the County's release program was justified and reasonable in light of the County's problems and responsibilities in processing the large number of prisoner releases it handles. . . . It is unclear, however, whether the 48-hour period applied to probable cause determinations is appropriate for effectuating the release of prisoners whose basis for confinement has ended. One might conclude that when a court orders a prisoner released − or when, for example, a prisoner's sentence has been completed − the outer bounds for releasing the prisoner should be less than 48 hours. We need not determine that question here, however, since we have concluded that in the circumstances of this case, the 39-hour delay in releasing Brass was reasonable and did not violate his constitutional rights.") *with* ***Berry v. Baca***, 379 F.3d 764, 768, 770, 771 (9th Cir. 2004) ("Here, in contrast to *Brass*, the plaintiffs do not limit their challenge to the County's specific policies. Rather, as argued in their briefs to this Court, they challenge the policy 'in toto ... that simply delays all releases until the system, in its sweet time, and with the resources it chooses ... is ready to make releases.' Stated another way, the plaintiffs in this case challenge the implementation of the County's policies, rather than the specific policies themselves. They claim that the County's unreasonably inefficient implementation of its administrative policies amounts to a policy of deliberate indifference to their constitutional rights. . . . [T]he plaintiffs here contend that they were over-detained for twenty-six to twenty-nine hours because the County's policies are being implemented in a manner that is deliberately indifferent to their right to freedom from incarceration. We cannot determine whether the County's implementation of its policies is in fact reasonably efficient based solely on the defendants' self-serving declarations. This would be an improper basis for summary judgment, as the County's explanations and defenses 'depend on disputed facts and inferences' that are proper for jury determination. . . Based on the County's declarations, a juror could find that its explanations reasonably justify a twenty-nine hour delay in release from jail. On the other hand, a juror could also find that the time each necessary administrative task reasonably requires simply does not add up to twenty-nine hours. . . . While the County in both *Brass* and the instant cases has provided some explanation of the steps necessary prior to release, its declarations offer only general assertions as to why these steps would reasonably take up to forty-eight hours. In order to determine if this length of time is, in fact, reasonable, the jury must be presented with the administrative processes, the volume of bookings and releases, as well as other considerations that affect the County's ability to process releases. It may very well be that a reasonable juror would conclude that, given the necessary administrative tasks and voluminous demands on the county, the delays at issue were justified. However, we conclude that this is a factual determination that is appropriately left to the jury to decide.").

Compare ***Price v. Sery***, 513 F.3d 962, 971, 973-74 (9th Cir. 2008) ("We are satisfied that our case law does not support Price's contention that 'reasonable belief' is a lesser standard than 'probable cause' as a matter of law. Both standards are objective and turn upon the circumstances

confronting the officer rather than on the officer's mere subjective beliefs or intentions, however sincere. Our case law requires that a reasonable officer under the circumstances believe herself or others to face a threat of serious physical harm before using deadly force. Moreover, as the Supreme Court clarified in *Scott*, the touchstone of the inquiry is 'reasonableness,' which does not admit of an 'easy-to-apply legal test.'. . The City's policy requires that an officer have a reasonable belief in an 'immediate threat of death or serious physical injury' and thus comports with the requirement. Accordingly, the district court correctly concluded that the City's policy governing the use of deadly force was not, as written, contrary to the requirements of the Fourth Amendment. . . . [W]e agree with the district court that the City's official policy concerning the use of deadly force, as written, does not violate the requirements of the Constitution. Further, we agree with the district court that Price has not made a sufficient showing of a failure to train on the part of the City to survive summary judgment. We conclude, however, that a genuine issue of material fact exists as to whether a 'longstanding' practice or custom of the City might in fact have deprived Perez of his constitutional rights.") *with* ***Price v. Sery***, 513 F.3d 962, 981(9th Cir. 2008) (Fisher, J., concurring in part, dissenting in part and concurring in the judgment) ("A reasonable jury could conclude on the basis of this evidence, viewed in the light most favorable to Price, that the City 'disregarded a known or obvious consequence' of its training practices. . . The Streed Declaration reasonably supports the inference that, quite apart from the letter of the City's deadly force policy, officers were being instilled with a 'shoot first' mindset that foreseeably would result in unjustified applications of deadly force. . . In addition, a logical inference from Chief Foxworth's admission − as the City's highest ranking police officer and head of the Portland Police Bureau − that he erroneously thought that reasonable belief embodied a lesser standard than probable cause within the context of the City's deadly force policy is that the training of the police force also reflected this mistaken understanding. A reasonable jury could conclude training based on this misconception constituted a failure to train. Therefore, I would permit Price also to pursue that theory of liability on remand.").

See also ***Sleater v. Benton County***, No. 19-35459, 2020 WL 3867400, at *1 (9th Cir. July 9, 2020) (not reported) ("Sleater brought this class action under 42 U.S.C. § 1983 against the County on behalf of those arrested pursuant to the 'Pay or Appear' Program. The district court granted summary judgment in favor of the County, holding that Sleater had failed to establish municipal liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), and that the County was protected by quasi-judicial immunity. We disagree on both counts. First, the record contains sufficient evidence to create a genuine dispute as to whether Sleater's injuries were the result of a municipal policy or custom as required for municipal liability under *Monell*. There is evidence in the record to support a conclusion that the County Clerk's actions in connection with the 'Pay or Appear' Program 'may fairly be said to represent official policy' of the County, and therefore may give rise to municipal liability under § 1983. . . As a matter of state law, the County Clerk has statutory authority over the collection of LFOs. . . The County Clerk's authority over LFO collection includes the discretion to review the appropriateness of collection schedules and to request changes to an LFO debtor's payment schedule based on changes in the debtor's financial circumstances. . . When the County Clerk exercises this discretion

(or, as Sleater alleges, systematically declines to do so), the Clerk acts as a county official with 'final policymaking authority.'. . The record also includes evidence from which a reasonable juror could conclude that the County Clerk had a major role in designing, continuing, and ultimately ending the policy. We reject the County's argument that because the authority to issue an arrest warrant lies exclusively with Superior Court judges, the County Clerk's actions here may not be imputed to the County. A custom or practice may give rise to municipal liability under *Monell* even where that practice is ultra vires under state law. . . A reasonable juror could conclude based on record evidence that the Clerk's Office issued arrest warrants without reviewing an LFO debtor's ability to pay as a matter of custom."); ***Wright v. City of Euclid, Ohio***, 962 F.3d 852, 880-81(6th Cir. 2020) ("Wright argues that he can establish municipal liability under three of the four methods: (1) a custom of tolerance or acquiescence of federal rights violations; (2) inadequate training and supervision; and (3) ratification of illegal actions by an official with final decision-making authority. . . . Wright points to the Euclid Police department training on use of force to support his argument that the City has a custom of allowing excessive force. First, there is the link in the training materials to the YouTube video of the Chris Rock comedy sketch discussed earlier. As noted, it is entitled 'How not to get your ass kicked by the police!'. It includes numerous vignettes depicting police officers beating African-American suspects, with commentary from Rock about Rodney King and other matters as also described earlier. The evidence further includes, as also noted, a slide from the same training titled 'Defensive Tactics Training.' The slide includes a cartoon in which a stick figure police officer in riot gear is shown beating a prone and unarmed civilian with a club with the caption 'protecting and serving the poop out of you.'. . Again, as noted, Murowsky testified that he did not believe that the image conveys that the Euclid Police Department 'beat[s] the hell out of people,' . . . but that he didn't know what other message could possibly be taken away from the image. Finally, the use-of-force training contains a meme that depicts two officers with their guns drawn and aimed at something. It is captioned 'Bed bug! Bed bug on my shoe!'. Murowsky testified that he believed the image conveyed that the officers were overreacting to and escalating a situation. Wright has produced enough evidence such that a reasonable jury could find that the City's custom surrounding use of force is so settled so as to have the force of law and that it was the moving force behind violations of Wright's constitutional rights. We therefore **REVERSE** the district court's grant of summary judgment on the issue of municipal liability under § 1983."); ***Perez v. Cox***, 788 F. App'x 438, ___ (9th Cir. 2019) ("The Plaintiff-Appellees, members of the decedent Carlos Perez's family, allege that the Supervisor Defendants promulgated, maintained, or ratified—as well as trained, supervised, or controlled their subordinates pursuant to—the 'actual practice, custom and *de facto* policy' to, *inter alia*: use live birdshot as a means of inmate control; encourage the use of deadly force to respond to non-deadly circumstances; and rely primarily on shotguns to maintain prison order. Inexplicably, the dissent focuses solely on the written policy, which it dubs 'the Use of Force Regulation.' It is well established that § 1983 liability may attach based on a 'policy, *practice, or custom*.' *See, e.g.*, *Pierce v. Multnomah Cty.*, 76 F.3d 1032, 1039 (9th Cir. 1996) (emphasis added). The dissent criticizes the majority for not citing the written policy, overlooking that the focus of the complaint is the 'actual practice, custom, and *de facto* policy' the Supervisor Defendants adopted and condoned. The *written* policy is immaterial."); ***Meier v. City of St. Louis, Missouri***, 934 F.3d 824,

828-29 (8th Cir. 2019), *cert. denied,* 140 S. Ct. 2566 (2020) ("Meier claims that SLMPD has a policy, albeit an unwritten one, of reporting vehicles as wanted on REJIS in hopes of detaining the vehicle against the owner's wishes and without a warrant. To establish the existence of such an 'unwritten or unofficial policy,' Meier must demonstrate '(1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the [municipality's] employees; (2) deliberate indifference to or tacit authorization of such conduct by the [municipality's] policymaking officials after notice to the officials of that misconduct; and (3) that [she] was injured by acts pursuant to the [municipality's] custom, i.e., that the custom was a moving force behind the constitutional violation.'. . We conclude that Meier has adduced evidence from which a reasonable juror could find that each of these three elements is met. . . .A reasonable jury could find that Meier's truck was towed and held pursuant to SLMPD's unwritten but widespread and persistent policy of reporting vehicles as wanted for the purpose of detaining them without a warrant."); ***Nehad v. Browder***, 929 F.3d 1125, 1141-42 (9th Cir. 2019), *cert. denied*, 141 S.Ct. 235 (2020) ("Appellants need not show evidence of a policy or deficient training; evidence of an informal practice or custom will suffice. . . Appellants submitted evidence that: (1) 75% of the San Diego Police Department's officer-involved shootings were avoidable; (2) the Nehad shooting was approved by the department, which took no action against Browder; and (3) the department looks the other way when officers use lethal force. Indeed, Chief Zimmerman explicitly affirmed that Browder's shooting of Nehad 'was the right thing to do,' and the department identified Browder as the victim of the incident and conducted his interview several days after the shooting, once Browder had watched the surveillance video with his lawyer. This evidence is sufficient to create a triable issue at least as to the existence of an informal practice or policy and, thus, *Monell* and supervisory liability."); ***Rodriguez v. County of Los Angeles***, 891 F.3d 776, 803 (9th Cir. 2018) ("We have recognized that a § 1983 plaintiff may prove the second type of *Monell* liability, deliberate indifference, through evidence of a 'failure to investigate and discipline employees in the face of widespread constitutional violations.'. . Thus, it is sufficient under our case law to prove a 'custom' of encouraging excessive force to provide evidence that personnel have been permitted to use force with impunity. [collecting cases] Appellees presented substantial evidence to show that the LASD had a custom of ignoring or condoning excessive force, and that this custom proximately caused the beatings at issue here. That evidence included the CCJV report; Olmstead's testimony; evidence that LASD had not used their force-tracking system to monitor force used against many prisoners, including appellees; and evidence that supervisory staff had observed the practices proved at trial but had done nothing. In declining to grant judgment as a matter of law to appellants on this issue, the district court ruled that the LASD had tolerated excessive force at the jail and had created an atmosphere of wanton violence and impunity. The court wrote that within the jail itself, 'Captain Cruz ... perpetuated a culture where excessive force was encouraged, openly joked with the deputies about force, and promoted the practice of incomplete and ineffective investigations into deputy misconduct.' The record amply supports the jury's verdict and the district court's ruling. There was substantial evidence of repeated constitutional violations, of LASD's awareness of those violations, and of LASD's failure to take any remedial action. Our precedents permitted the jury to infer that LASD had adopted a custom or practice of condoning excessive force and that this culture of violence and impunity proximately caused the injuries

inflicted on appellees."); ***Larson v. Napier***, 700 F. App'x 609, 611 (9th Cir. 2017) ("Although the Sheriff does not have a written policy for either responding to reports of domestic violence or call out and containment – the procedure employed at the Larsons' home – there was ample evidence at trial of 'practices so persistent and widespread as to practically have the force of law.'. . This evidence included: an admission by the Sheriff that the deputies complied with the department's policy; Bureau Chief Byron Gwaltney's testimony that, in a similar situation, he would expect deputies to do the same thing; . . . Gwaltney's testimony that, in responding to Warfe's call about the Larsons, the deputies used tactics 'taught and accepted as the department approach'; various deputies' testimony that they acted consistent with the standard procedures of the department; and the fact that the deputies followed the same procedure at the house next door shortly after the warrantless search of the Larsons' home**.** Although the Sheriff argues that a general call out and containment procedure in and of itself is not unconstitutional, the record reflects that the district court based its ruling on the specific custom or practice of the Pima County Sheriff's Department – namely, seizing individuals and searching their homes before establishing a factual basis for doing so."); ***Montano v. Orange Cty., Texas***, 842 F.3d 865, 875-76, 879 (5th Cir. 2016) ("A formal, written policy is not required to establish a 'condition or practice'. As our court previously noted, 'a condition may reflect ... [a] *de facto* policy, as evidenced by a pattern of acts or omissions "sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by [jail] officials, to prove an intended condition or practice"'. . . . As plaintiffs contend, the consistent testimony of jail employees is sufficient to prove an established *de facto* policy. Jail employees testified to familiarity with the Orange County Sheriff's Office Correctional Facility Operations Plan, which prescribed a guideline range of four-to-eight hours for detainee detoxification. In contravention, the jail's explicit custom was to isolate seemingly-intoxicated detainees in the bubble, and to leave them there until either they became coherent and could be booked, or a contract physician visited. . . . The county emphasizes, as noted, that plaintiffs did not provide specific examples of other instances of detainees who suffered Mr. Montano's fate as a result of the *de facto* policy. But, as also noted, such specific examples are not required to meet the 'condition or practice' element. In that regard, although 'isolated examples of illness, injury, or even death, standing alone, cannot prove that conditions of confinement are constitutionally inadequate', the evidence was sufficient for a reasonable juror to infer a *de facto* policy that every seemingly detoxifying detainee was left in the bubble without emergency medical care. . . Given the striking uniformity of the jail employees' testimony, further evidence was not required for a reasonable juror to infer a *de facto* policy for conditions or practices. Similar to the challenge in *Shepherd*, plaintiffs do not challenge 'the acts or omissions of individuals but the jail's system of providing medical care' to detainees who were seemingly detoxifying. . . Although the *Shepherd* plaintiffs presented a broader variety of evidence than the uniform testimony of the sheriff and jail employees in the action at hand, the result is the same: the uniformity of the evidence allows a reasonable juror to infer a *de facto* jail policy. . . Jurors heard consistent testimony that a given protocol was followed for every similarly-situated detainee. . . In sum, for the unconstitutional-condition-of-confinement claim, the court properly denied the county JMOL against the jury's finding the condition. Trial testimony adequately established the protocol exercised in Mr. Montano's experience was standard jail practice; the record demonstrates his experience was not

a mere 'isolated example', but was, instead, a 'pervasive pattern of serious deficiencies in providing for his basic human needs'."); ***Mendiola-Martinez v. Arpaio***, 836 F.3d 1239, 1243, 1254-56 (9th Cir. 2016) ("We are presented with an important and complex issue of first impression in our circuit: whether the U.S. Constitution allows law enforcement officers to restrain a female inmate while she is pregnant, in labor, or during postpartum recovery. We hold today that in this case, the answer to that question depends on factual disputes a properly instructed jury must resolve. We therefore vacate and remand the district court's grant of summary judgment for the County Defendants on most of Mendiola-Martinez's shackling claims. . . [W]e find that Mendiola-Martinez has presented sufficient evidence for a reasonable jury to conclude that by restraining Mendiola-Martinez when she was in labor. . . and postpartum recovery, the County Defendants exposed her to a substantial risk of serious harm. Instead of disputing the risk posed by the Restraint Policy, the County Defendants seek to justify the policy by arguing that it 'serves a legitimate government purpose, specifically the safety and security of the inmate, detention officers, hospital personnel, as well as the general public.'. . . [I]n excessive force and conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security. . . Such deference is generally absent from serious medical needs cases, however, where deliberate indifference 'can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.'. . Therefore, whether the County Defendants are entitled to deference depends on the type of claim Mendiola-Martinez brings against them: do her shackling claims challenge the conditions her confinement? Or are they of the medical-needs variety? Mendiola-Martinez contends that her shackling claims are a hybrid of both. We agree that her shackling claims do not fit neatly into either category. . . .In such unusual situations, the district court must instruct the jury to defer to the prison officials who adopted and executed a practice or policy needed to preserve discipline and maintain internal security. . .That deference, however, comes with an important caveat: 'The [Supreme] Court has held that deference must be given to the officials in charge of the jail unless there is "substantial evidence" demonstrating their response to the situation is exaggerated.'. . . A jury could find in this case that the restraints used on Mendiola-Martinez were an 'exaggerated' response to the County Defendants' safety concerns. Mendiola-Martinez was arrested for a nonviolent crime, and the County Defendants have failed to show she was a danger to others. Nor is there any evidence that Mendiola-Martinez was a flight risk. In fact, Officer Hertig, who escorted Mendiola-Martinez to the hospital and was with her during the C-section and shortly afterward, testified that Mendiola-Martinez was not a specific security threat and did not give any indication that she would try to escape. Mendiola-Martinez's physical condition when she was transported to the Medical Center and after her C-section also make it highly unlikely that she would flee or fight. . . . Without more than a broad assertion about the penological interest in restraining all inmates—even one who is in labor—a reasonable jury could find that the Restraint Policy exposed Mendiola-Martinez to a substantial and unjustified risk of harm. . . . [A] jury could conclude that the County Defendants were aware of the risk caused by restraining an inmate in labor and deliberately indifferent to that risk by restraining Mendiola-Martinez during transport. A jury could also infer the County Defendants' awareness of the risk of restraining Mendiola-Martinez while she was in labor because

the risk is obvious. . . .Whether the County Defendants were deliberately indifferent to any risk created by restraining women in postpartum recovery is a closer question. Such a risk is not as obvious as restraining an inmate in labor. Mendiola-Martinez's expert states that walking 'without restraint' after a C-section is necessary to prevent blood clots. But Mendiola-Martinez testified that she could walk around the room with the six-to-eight foot 'leg tether,' which was longer than the other chains used to restrain her, and that nurses came into the room to help her walk around. The use of a leg tether long enough to permit Mendiola-Martinez to walk around indicates that the County Defendants were aware of the risk of restraining woman in postpartum recovery and sought to neutralize the risk, not disregard it. Therefore, we conclude that a reasonable jury could *not* find that the use of the leg tether constituted deliberate indifference to Mendiola-Martinez's health and safety in violation of her constitutional rights. Summary judgment on this aspect of Mendiola-Martinez's shackling claims was proper."); ***D.E. v. Doe***, 834 F.3d 723, 733 (6th Cir. 2016) (Keith, J., concurring in the judgment) ("I am deeply troubled that the CBP has established a pattern and practice of violating the Fourth Amendment. Direct evidence of this practice is the laminated card. The laminated card provided by the CBP states that the person receiving the laminated card is being allowed to turn around without crossing the border. The same card also states that the person (and his or her belongings) are still subject to search by a customs official. This card is written evidence that the CBP has a practice of searching persons and items that have not and will not cross an international border *without probable cause and without reasonable suspicion*. Because the 'single fact' that makes border searches reasonable—i.e. a border crossing—is completely absent under those circumstances, the CBP's practice cannot pass constitutional muster. . . . I am even more troubled by the majority's choice to rubberstamp this conduct. I am concerned that if government officials can escape the bounds of the U.S. Constitution by simply forming their lips to say compliance is too difficult, eventually there will be little left of a Constitution to protect, much less a society unburdened by unreasonable intrusions."); ***Daniel v. Cook County***, 833 F.3d 728, 734-36 (7th Cir. 2016) ("In this case, Daniel has not tried to hold any one doctor responsible for his injury. On this record, it is hard to see how he might have done so. This case reflects a common scenario: an institution 'structured its affairs so that no one person was responsible for [the inmate's] care,' and such diffused responsibility can make it very difficult to show individual responsibility for health care failures. *Shields*, 746 F.3d at 795; see also *Glisson*, 813 F.3d at 666 (majority opinion) (divided panel decision, now vacated, on whether private corporation contracting to provide health care for prisoners had policy amounting to deliberate indifference to prisoners' health). Daniel contends instead that the delays and confusion that caused his injury were caused by systemic problems in the health care system for the Cook County Jail that reflect deliberate indifference to inmates' health needs as a matter of official custom, policy, or practice. To hold defendants liable under § 1983 and *Monell*, Daniel must demonstrate that the defendants' 'official policy, widespread custom, or action by an official with policy-making authority was the "moving force" behind his constitutional injury.'. . An unconstitutional policy can include both implicit policies as well as a gap in expressed policies. . . Similar to the plaintiff's claim in *Dixon*, Daniel argues that the Jail had both an unlawful official policy and widespread custom that led to his injury. At bottom, though, he is essentially attempting to prove 'that the unlawful practice'—the failure to establish adequate systems for scheduling health care, keeping health care records,

and addressing inmate grievances about health care—'was so pervasive that acquiescence on the part of policymakers was apparent and amounted to a policy decision.'. . Even setting aside for now the 2008 Department of Justice Report, the Agreed Order, and the Monitor Report, Daniel provided substantial evidence of systemic deficiencies in the Jail's medical care, including extensive testimony from Jail medical staff. . . .The evidence, viewed in the light most favorable to Daniel, raises a genuine issue of material fact as to whether his injury resulted from systemic, gross deficiencies in the Jail's medical care. His indirect evidence shows more than a mere 'one or two missteps,' *Dixon*, 819 F.3d at 348, or isolated problems. Daniel has also offered substantial evidence that Sheriff Dart, who is a relevant policymaker for health care for Jail inmates, knew of these deficiencies and failed to take reasonable corrective action. . . .We are satisfied that the plaintiff has come forward with enough evidence, including his own experience and the extensive deposition testimony from Jail staff, to demonstrate systemic problems with health care scheduling and record-keeping. This is so even without the substance of the Department of Justice Report. And when we include the Report and related documents to prove notice and the apparent absence of a response by the sheriff, it would be reasonable, though not necessary, to infer an official custom, policy, or practice of deliberate indifference toward inmates' serious health needs."); ***Groden v. City of Dallas , Texas***, 826 F.3d 280, 286-87 (5th Cir. 2016) ("If the city had a policy of arresting people without probable cause in retaliation for annoying-but-protected speech, such a policy would be unconstitutional. . . Since Groden has alleged that the city had exactly this policy, he successfully alleged that the city had an unconstitutional policy, and the district court erred by dismissing his complaint on that ground. Further, Groden has pled that Officer Gorka arrested him based on this crackdown policy. He thus pled sufficient facts to show that the alleged crackdown policy—not the ordinance—was the moving force behind the city's alleged unconstitutional arrest."); ***Dixon v. County of Cook,*** 819 F.3d 343, 348-49 (7th Cir. 2016) ("The essence of Lula's claim against the County is that it implemented a records policy that created barriers to informed care. She relies on *Monell v. Dep't of Soc. Servs. of the City of New York*, . . . which requires a plaintiff suing a municipality or comparable entity to demonstrate that the entity's official policy, widespread custom, or action by an official with policy-making authority was the 'moving force' behind his constitutional injury. . . An unconstitutional municipal policy can 'take the form of an implicit policy or a gap in expressed policies.' *Thomas v. Cook Cnty. Sheriff's Dep't,* 604 F.3d 293, 303 (7th Cir.2009). This part of the case was resolved on summary judgment, and so the question before us is whether Lula presented enough in response to Cook County's motion to demonstrate genuine issues of material fact requiring a trial. Lula relies primarily on Cook County's official policy with respect to medical records in the jail; to a certain extent, she also relies on 'widespread custom' and action by an official with final authority. In order to prove the policy, she looks both to written records and to indirect proof. For the latter, a 'plaintiff must introduce evidence demonstrating that the unlawful practice was so pervasive that acquiescence on the part of policymakers was apparent and amounted to a policy decision.'. . This requires more than a showing of one or two missteps. . . As applied to a case such as this one, we look to see if a trier of fact could find 'systemic and gross deficiencies in staffing, facilities, equipment, or procedures' in a detention center's medical care system. And even if there are such deficiencies, a *Monell* claim can prevail only if a policy-making official knows about them and fails to correct

them. . . Lula alleges that the County's records policy led inexorably to inadequate medical care for inmates. The problem was twofold: first, there were both a paper record-keeping system and an electronic record-keeping system, and the two were not coordinated; second, to the extent the County for whatever reason was still relying primarily on paper records, access to them was haphazard. The predictable result was that its medical providers were hamstrung in their ability to reach a proper diagnosis and treatment. Lula argues that if all the doctors involved in treating Dixon had access to all his records, he would not have experienced such a delay in diagnosis and thus his pain would have been addressed much sooner. . . . Taking the County's records policy, the evidence from Dr. Hart, the evidence from Dr. Cruz, the DOJ report, and the additional testimony from Dr. Greifinger together, we conclude that a reasonable jury could find that pervasive systemic deficiencies in the detention center's healthcare system were the moving force behind Dixon's injury. It was therefore error to grant summary judgment in the County's favor on the *Monell* claim."); ***Harvey v. D.C.***, 798 F.3d 1042, 1053-54 (D.C. Cir. 2015) ("The District argues that the legislature's enactment of the intellectual disabilities rights statute in 1979 is sufficient to rebut evidence that it had a policy of deliberate indifference. The District's statutory policy is of 'little value,' where, as in this case, 'there is evidence ... that the municipality was deliberately indifferent to the policy's violation.' *Daskalea v. District of Columbia,* 227 F.3d 433, 442 (D.C.Cir.2000). In the absence of evidence of actual enforcement of its paper policy, the District has failed to create an issue of triable fact. The District also argues that while it was aware of systemic failures in its care for the intellectually disabled, it was not aware that these failures 'could lead to threats to the life and safety of disabled individuals.'. . Regardless of whether the District had actual knowledge of constitutional violations, the evidence establishes that the District should have known that its policy of deliberate indifference was likely to result in the violation of rights of the committed person. As noted above, in 1996, a federal district court warned the District that intellectually disabled individuals are 'ill-equipped' to 'defend against the city's failure to assist their care providers in giving them the care and treatment they desperately need.'. . The District's own compliance monitor warned that class members are 'physical[ly] injur[ed]' because of the denial of health care services. The evidence shows that the District knew that its 'entire mental retardation and developmental disabilities system was fundamentally unable to deliver even the most basic services," *Evans v. Williams,* 139 F.Supp.2d at 97, but did not act to cure the problem. Under these facts, we conclude that the District had a custom or policy of deliberate indifference to the needs of the intellectually disabled, and that this policy caused the violation of Suggs's constitutional rights. Harvey has shown that Suggs's substantive due process rights were violated as a result of the District's custom of deliberate indifference. The District has failed to present evidence creating a triable issue of fact regarding its § 1983 liability. We therefore affirm the district court's grant of summary judgment to Harvey on his § 1983 claim against the District."); ***Perez v. Fenoglio,*** 792 F.3d 768, 780 (7th Cir. 2015) ("Perez's complaint alleges that Nurse Brooks 'told [him] that there was no doctor there therefore she couldn't stitch [his] wound and just wrapped [his] hand.' The question before us is thus whether this statement is sufficient to identify an unconstitutional policy or practice maintained by Wexford. In light of our duty to construe Perez's *pro se* complaint liberally, . . . and to draw all reasonable inferences in his favor, . . . we find that Perez sufficiently alleges that Wexford maintained a policy or practice that

prevented nurses from stitching wounds or prescribing medication without a 'doctor there.' We further infer from his complaint the allegation that Wexford maintained a policy or practice of not having a full-time doctor stationed at the prison at all times (or on call to suture open wounds as necessary). Because these alleged policies are capable of causing delays in treatment—which could result in a constitutional deprivation, . . . the claim against Wexford should have been allowed to proceed."); ***B.S. v. Somerset County***, 704 F.3d 250, 270-72, 274, 275 (3d Cir. 2013) ("Mother contends that the County violated her procedural due process rights by failing to afford her a prompt post-removal hearing after Daughter was removed from her custody on May 5, 2006, and through Eller's actions in meeting *ex parte* with Judge Cascio on June 23, 2006, and providing him with what Mother alleges is false information about her treatment of Daughter. She also argues that the County violated her substantive due process rights because Daughter's removal was based on Eller's 'concoct[ed] facts' and 'manipulate[ed] ... evidence.'. . .Even if *Mathews's* flexible standard permitted less process here than in a case where the state takes custody of a child—and that is a question on which we express no opinion at this time—that would not mean that no hearing was needed to address the deprivation effected by the removal of Daughter from Mother's custody. The deprivation of a parent's custodial relationship with a child is among the most drastic actions that a state can take against an individual's liberty interest, with profound ramifications for the integrity of the family unit and for each member of it. From the parent's perspective, there may be little meaningful difference between instances in which the state removes a child and takes her into state custody and those in which the state shifts custody from one parent to another, as occurred here. In either case, the government has implicated a fundamental liberty interest of the parent who loses custody. The state has caused a deprivation and risks having done so wrongly. . . . Therefore, assuming the 'fiscal and administrative burdens,'. . . of affording such parents a prompt post-removal hearing do not outweigh the need for one—and it is hard to imagine when they would—such a hearing ought to be held. . . . It is no adequate response to say, as the District Court did and as the County continues to argue, that Mother was given an opportunity to be heard because she filed a habeas petition on her own and received a hearing in connection with that. Some courthouse somewhere may be open to someone aggressive and knowledgeable enough to initiate legal action, but that does not meet the state's burden of providing an 'opportunity to be heard at a meaningful time and in a meaningful manner' to a parent deprived of custody, . . . particularly when, as here, no notice was ever given as to how a hearing could be scheduled and the hearing occurred 40 days after Daughter's removal. . . Nor is it sufficient that Mother's custodial rights were eventually addressed after Eller's abuse investigation was concluded. The constitutional deprivation at issue at this point is Daughter's initial removal from Mother's home, so being heard much later, after the deprivation, fails to address the harm. . . . The only remaining question, then, is whether the County is accountable to Mother for whatever damages a jury finds she sustained as a result of that constitutional violation . . .With respect to municipalities such as the County, that inquiry turns on whether the due process violation was a result of the County's 'policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'. . . Although the record does not support a conclusion that the County has a formal policy against providing hearings for parents such as Mother, the evidence does demonstrate, as the County essentially admits in its briefing . . . that, amidst abuse allegations, the County has a custom of

removing children from a parent's home without conducting a prompt post-removal hearing if another parent can take custody. . . . Thus, while the relevant policymaker is not readily apparent, . . . the evidence shows conclusively that, when a non-custodial parent is available to take a child, it is customary for the County to temporarily suspend the other parent's custody rights without a hearing, when abuse is suspected. That custom was utilized with official approbation in this case. And, because there is no question that what the County calls its 'Summary and Order procedure'. . . violated Mother's right to a prompt post-removal hearing, we conclude that the County is liable under § 1983 for whatever damages a jury may deem appropriate to redress that violation."); ***Hunter v. County Of Sacramento***, 652 F.3d 1225, 1236 (9th Cir. 2011) ("We hold that the District Court prejudicially erred in refusing to instruct the jury that, for purposes of proving a *Monell* claim, a custom or practice can be supported by evidence of repeated constitutional violations which went uninvestigated and for which the errant municipal officers went unpunished. We therefore vacate the judgment and remand for a new trial."); ***Bass v. Pottawatomie County Public Safety Center***, 425 F. App'x 713, ___ (10th Cir. 2011) ("Having carefully reviewed the trial testimony and other evidence in this case, and viewing all the evidence in Mr. Bass's favor, we conclude that the jury was presented with sufficient evidence to support reasonable inferences that: (1) the Jail maintained a policy and/or custom of permitting jailors to commingle unclassified, intoxicated detainees with unclassified, non-intoxicated detainees, and the Jail's policy and/or custom created a substantial risk that intoxicated detainees such as Mr. Bass would be seriously injured; (2) the Jail was aware of the substantial risk that intoxicated detainees such as Mr. Bass would be assaulted; (3) the Jail disregarded the risk by allowing jailors to inadequately supervise the drunk pod; and (4) the Jail's deficient supervision practices were a proximate cause of Mr. Bass's injuries."); ***Shepherd v. Dallas County***, 591 F.3d 445, 453 (5th Cir. 2009) ("Shepherd's claim . . . does not implicate the acts or omissions of individuals but the jail's system of providing medical care to inmates with chronic illness. His original complaint contains the full theory of the case: The jail's evaluation, monitoring, and treatment of inmates with chronic illness was, at the time of Shepherd's stroke, grossly inadequate due to poor or non-existent procedures and understaffing of guards and medical personnel, and these deficiencies caused his injury. Shepherd relied on evidence showing that the inadequate treatment he received in a series of interactions with the jail's medical system inevitably led to his suffering a stroke. . . To demonstrate the existence of an unlawful condition, he presented extensive independent evidence on the jail's treatment of inmates with chronic illness. This evidence included a comprehensive evaluative report commissioned by the County, the DOJ report, affidavits from employees of the jail and its medical contractor attesting to the accuracy and applicability of the reports, and a plethora of additional documentary evidence. From this evidence, the court could reasonably infer a *de facto* jail policy of failing properly to treat inmates with chronic illness."); ***Okin v. Village of Cornwall-On-Hudson Police Dept***., 577 F.3d 415, 439, 440 (2d Cir. 2009) ("Okin's claim of municipal liability, although focused on the Village's alleged failure-to train, is fairly construed to articulate a claim that the Village had a custom whereby it acquiesced in unconstitutional conduct by its officers. The record shows more than a dozen contacts between Okin and the Village, that involved a number of officers, including high-ranking officials like Sergeant Weber and Captain Williams, and that recurrently concerned complaints of domestic violence. These incidents suggest a

consistent pattern of failing to adequately respond to Okin's complaints, to implement the New York mandatory arrest statute, to interview the alleged abuser, or to file domestic incident reports, a pattern which may have encouraged further violence. We therefore find sufficient evidence in the record to create a genuine issue of fact as to whether the officers' conduct indicates a practice, tacitly endorsed by the Village, that 'was so persistent or widespread' as to constitute 'a custom or usage with the force of law.'"); ***Williams v. DeKalb County***, No. 07-14367, 2009 WL 1215961, at *6, *7 (11th Cir. May 6, 2009) (not published) ("Williams offered testimony from at least five members of the DeKalb County Police Department who had some knowledge of a homeless relocation policy. One officer testified that he had heard of the practice while he was still in the police academy. Another officer noted that he had heard from his superiors that officers needed to take homeless citizens 'somewhere' if officers could not think of a reason to arrest them. A third officer stated that it was 'common knowledge' that supervisors encouraged officers to relocate the homeless. A fourth officer admitted that officers actually did relocate the homeless. Finally, a supervisory officer testified that relocation was 'done all the time' and had been going on for twenty years. Despite the fact that none of the officers could name any specific officer who had relocated a homeless person, and none of the five admitted to having done it himself, we think their testimony is enough from which a jury could find that the County had a policy of involuntarily relocating homeless citizens. While the circumstantial nature of the officers' testimony may lead a jury to conclude that Williams has not sufficiently proved a policy existed, that is the jury's decision to make. . . . In addition to the evidence about what happened to him, Williams presented an expert in police policy and procedure who testified in deposition that a homeless relocation policy would make constitutional violations like the ones Williams sustained 'very definitely foreseeable.' The expert's report also concluded that '[m]ore likely than not, if the custom and practice of DeKalb County of taking homeless and other undesirables and transporting them over the county line to other jurisdictions did not exist, the false arrest and injuries sustained by Mr. Williams would not have occurred.' We cannot agree with the district court's conclusion that there was 'no evidence' that homeless people were harmed as a result of the alleged relocation policy. Williams' own injuries and his expert's opinion may not be overwhelming evidence that the alleged policy was the 'moving force' behind the violation of his constitutional rights, but they are sufficient evidence of a 'causal link' between the policy and the injuries to get the case to a jury."); ***Gregory v. City of Louisville,*** 444 F.3d 725, 754, 755, 757 (6th Cir. 2006) ("Plaintiff also alleges that the City had a custom of using overly suggestive show-ups and that the City failed to train its officers in proper identification techniques. The district court dismissed this claim, finding that Plaintiff had failed to make a showing of other complaints about the City's use of show-ups. In so holding, the district court overlooked both facts in this case and a significant prong of this Court's jurisprudence. First, Plaintiff need not present evidence of a pattern of complaints consistent with his own if he presents evidence of a written policy unconstitutional on its face. . . The facts of this case show that the City's written line-up 'waiver' form is direct evidence of a custom or practice, obviating the need for circumstantial evidence a court might otherwise seek. . . Second, Plaintiff need not present evidence of other complaints if he can show that the City failed to train its officers in proper identification techniques, and that such failure to train had the 'obvious consequences' of leading to constitutional violations of the sort experienced by Plaintiff. . . . The remaining

question for this Court is whether the evidence, when viewed in the light most favorable to Plaintiff, is such that a reasonable jury could conclude that the City had a custom or practice of using show-ups without consideration of the circumstances, and that pursuant to this custom, Tarter employed a show-up with Plaintiff without consideration of Plaintiff's due process rights. Plaintiff puts forth evidence that the City had a custom of using show-ups in lieu of line-ups in non-exigent circumstances. Plaintiff's evidence includes affidavits from two police practice experts who opined that there existed systematic deficiencies in police officer training; that supervising LDP officers found it 'perfectly acceptable' to conduct non-exigent show-ups days after a crime if an officer could get a suspect to sign a 'waiver;' and that it was established practice to ask suspects in for a line-up, fail to take affirmative actions to constitute a line-up, and request consent to a show-up. . . Plaintiff presents further evidence that using such show-ups was expressly approved through the existence of pre-printed waiver forms. . . Such forms are evidence of established practice. . . Given this evidence, we cannot say that a reasonable jury could not conclude that the City had a custom or practice of conducting show-ups without consideration of the constitutional implications of such show-ups, and thus that the City was 'deliberately indifferent' to the due process rights of its citizens. Accordingly, we reverse the district court's grant of summary judgment to the City."); ***Baron v. Suffolk County Sheriff's Dep't,*** 402 F.3d 225, 239 (1st Cir. 2005) ("This is not a case, then, of attributing liability to the municipality based on a single incident of isolated employee conduct. Rather, the record demonstrates a pattern of ongoing harassment that the jury could have found high-ranking Department officials were aware of and did not stop. . . .The Department was therefore not entitled to judgment as a matter of law or a new trial on the basis of insufficient evidence of the code of silence."); ***Monistere v. City of Memphis,*** 115 F. App'x 845, 2004 WL 2913348, at *4 (6th Cir. Dec. 17, 2004) (City's practice of allowing its police investigators to conduct administrative investigations into complaints against its police officers without any defined parameters was a 'custom' that had the 'force of law' for purpose of establishing city's liability under § 1983 for investigator's conduct in ordering strip search of two officers, in response to a motorist's complaint that officers stole from him during a traffic stop"); ***Cash v. Hamilton County Dept. of Adult Probation,*** 388 F.3d 539, 543, 544 (6th Cir. 2004) ("Contrary to the declaration of the district court that the supervising police officers' testimony was 'undisputed,' the plaintiffs presented substantial evidence suggesting that the City [of Cincinnati] and County had a custom and practice of hauling to the dump all unattended property found at the sites in question. . . . Smith [Field Supervisor for the Hamilton County Adult Probation Department] testified that the standard cleanup procedure was that a Cincinnati police officer would direct the probationers to put all of the items in bags and then place the bags into a sanitation truck. In direct opposition to the testimony that the district court relied upon, Smith testified that he never observed a Cincinnati police officer segregating any of the items and saying that some should be saved. Smith stated that the items are all 'hauled off to the trash, to the dump.' Testimony from Cincinnati Police Officer Thomas J. Branigan also supports the plaintiffs' contention that the City had a custom of destroying homeless individuals' property without notice or the right to reclaim the items taken. . . . [A] genuine issue of material fact exists as to whether the property of homeless persons like the plaintiffs was being discarded as part of the City's official policy. The district court therefore erred in granting summary judgment to the City and County

on the basis that the relevant testimony was uncontested. A genuine issue of material fact also exists over whether adequate notice was provided to homeless individuals like the plaintiffs. The established precedent is that individuals whose property interests are at stake are entitled to a 'notice and opportunity to be heard.'. . The key inquiry in such circumstances is whether the notice is 'reasonably calculated, in all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.' . . The City submits that it published a notice in the local newspaper, which was available for anyone in the Cincinnati area to pick up and read. By contrast, the plaintiffs contend that such a notice is per se insufficient, particularly when the educational and financial restraints of the homeless community are considered. This is an issue for the district court to resolve on remand."); ***Alkire v. Irving,*** 330 F.3d 802, 815 (6th Cir. 2003) ("Alkire asserts that, after the new Holmes County jail opened in 1994, Sheriff Zimmerly established a policy of detaining persons who could not post immediate bail until their initial appearance, because they now had adequate jail space. The record also reflects that, as a matter of course or custom, because the Holmes County Court is a part-time court, the first- available court date was often not until Tuesday mornings; court was never held on weekends or holidays. . . . Thus, the record reflects that, after 1994, any warrantless arrest from late afternoon Friday through Sunday morning, where the defendant did not post bond, would very likely run afoul of the forty-eight hour time limit established in *Riverside.* These policies or customs of the Holmes County Jail are the very sort of 'policy or custom' referred to by *Monell.* It is not necessary that Holmes County officially endorsed these policies or customs through legislative action for it to carry its *imprimatur*."); ***In the Matter of Foust v. McNeill,*** 310 F.3d 849, 862 (5th Cir. 2002) ("Thigpen and McNeill testified that the sheriff's office routinely seized a debtor's entire premises to secure personal property and fixtures. Neither the bankruptcy court nor the district court mentioned this testimony, and the defendants do not address it. If the department repeatedly went beyond the scope of the writs to seize real property, its policy may have violated the Fourth and Fourteenth Amendments. The department was deliberately indifferent to those results, *i.e.*, the seizure of the real property and exceeding the scope of the writ, even if unaware of the unlawfulness of the actions. The Fousts have created a fact question about whether the department's policy of seizing the premises violated the Fourth and Fourteenth Amendments, so this portion of the district court opinion is reversed."); ***Daskalea v. District of Columbia***, 227 F.3d 433, 442, 443 (D.C. Cir. 2000) ("[A] 'paper' policy [against sexual harassment] cannot insulate a municipality from liability where there is evidence, as there was here, that the municipality was deliberately indifferent to the policy's violation. . . That evidence included not only the continued blatant violation of the policy, but also the fact that the policy was never posted, that some guards did not recall receiving it, that inmates never received it, and that there was no evidence of the training that was supposed to accompany it."); ***Stauch v. City of Columbia Heights***, 212 F.3d 425, 432 (8th Cir. 2000) ("The City argues that the Stauches cannot prove that a municipal policy or custom caused their injury. Specifically, it asserts that the Stauches' allegation that city officials failed to follow the procedures set forth in the Code for license renewal is tantamount to saying that the officials acted contrary to City policy. We disagree. The City argued at trial and in its brief on appeal that the Stauches could not claim a protected property interest in license renewal because they knew that the City's practice was to require property to

pass inspection prior to renewal. . .The City cannot simultaneously argue that it required a property to pass inspection prior to license renewal but yet characterize the actions of its officials in implementing this requirement as being 'contrary to City policy.'"); ***Blair v. City of Pomona***, 223 F.3d 1074, 1080, 1081 (9th Cir. 2000) (as amended) ("Th[e] evidence, if believed by the jury, would be sufficient to establish that the Department had the custom of chastising whistleblowers. It would also be sufficient to establish that the Department had failed to train its members not to retaliate against whistleblowers and/or that the Department had failed to discipline those members of the Department who retaliated against whistleblowers. It would be open to the jury to conclude that one or more of these customs or policies was made by those in charge of the Department who were aware of the police code of silence; that the custom or policy amounted to at least deliberate indifference to Blair's right to speak; and that the policy was the moving force resulting in the constitutional deprivation suffered by Blair. . . . The evidence presented to the district court, if believed at trial, and the inferences if drawn by the jury, would justify the conclusion that the Department had a custom, approved by its policy-makers, of at the very least deliberate indifference to the right of a member of the Department to report to a superior the misconduct of a fellow officer. The seriousness of such a custom and the need of a civil rights remedy for it is underlined by what has been observed around the country as to the code of silence in police departments."); ***Sharp v. City of Houston***, 164 F.3d 923, 935 (5th Cir. 1999) ("Sharp relies on retaliations for violations of the 'code of silence' as the city's custom and practice. She presented ample evidence that a code of silence exists. . . . Furthermore, the code can be perpetuated only if there is retaliation for violations of it. The jury instructions, to which the city did not object, included retaliation as part of what defines a code of silence. The city argues that it does not condone the code of silence and has taken actions to discourage it. Based on the evidence presented at trial, however, the jury could have decided that the HPD tolerated and even fostered an attitude of fierce loyalty and protectiveness within its ranks, to the point that officers refused to address or report each others' misconduct. A jury further could conclude that the city's steps to eliminate the code were merely cosmetic or came too slowly and too late to rebut tacit encouragement. The jury could have surmised that Sharp's co-workers and supervisors enforced this HPD-wide 'code of silence' by retaliatory acts. As we have noted, any officer who violated the code would suffer such a pattern of social ostracism and professional disapprobation that he or she likely would sacrifice a career in HPD. . . . Furthermore, the failure of Sharp's supervisors all the way up the chain of command, including Nuchia, to take any real action when made aware of the retaliation supports a conclusion by the jury that the HPD had a policy, custom, or practice of enforcing the code of silence."); ***Ware v. Jackson County***, 150 F.3d 873, 886 (8th Cir. 1998) ("The jury was entitled to infer that a pattern of unconstitutional conduct existed from the evidence of CO Toomer's sexual misconduct, which spanned five months and involved extortion, deception, and repeated sexual acts with an inmate of limited mental capacity, culminating in the rape of Ware. The pattern is also evidenced by the Stone, White, and Jackson incidents. That there was a gap of three years between CO Toomer's misconduct and that of other officers does not amount to a series of isolated incidents so far apart in time that CO Toomer's misconduct may be considered a single act upon which custom or usage cannot be based."); ***McNabola v. Chicago Transit Authority***, 10 F.3d 501, 510-11 (7th Cir. 1993) (jury could reasonably conclude that "the CTA had a custom or policy of

terminating white *per diems*" and replacing them with African-Americans); ***Gentile v. County of Suffolk***, 926 F.2d 142, 152 & n. 5, 153 (2d Cir. 1991) (malicious prosecution causally linked to County's long history of negligent disciplinary practices and cover-ups as to law enforcement personnel); ***Bordanaro v. McLeod***, 871 F.2d 1151, 1155-58 (1st Cir. 1989) (City police department had longstanding, wide-spread, unconstitutional practice of breaking down doors without a warrant when arresting a felon); ***Watson v. City of Kansas City, Kansas***, 857 F.2d 690, 695-96 (10th Cir. 1988) (reversing grant of summary judgment in favor of City where plaintiff alleged policy or custom of affording less protection to victims of domestic violence than to victims of nondomestic attacks); ***Jones v. City of Chicago***, 856 F.2d 985, 995-96 (7th Cir. 1988) (custom of keeping "street files" was department wide and long standing, entitling jury "to conclude that it had been consciously approved at the highest policymaking level for decisions involving the police department...").

See also ***Rettew v. Cassia County***, No. 1:20-CV-00386-BLW, 2022 WL 623206, at *14 (D. Idaho Mar. 3, 2022) ("Plaintiffs have . . . submitted evidence that a 'culture' or 'unwritten rule' existed in the jail discouraging jail staff from calling 'medical too often because they didn't want to pay overtime or not call the ambulance if you don't have to be of not wanting—the county not wanting to pay the bill.'. . Viewing the evidence in a light most favorable to Plaintiff, a jury could conclude that this 'culture' or 'unwritten rule' of discouraging the deputies from calling for medical assistance after hours, coupled with the official policy of only maintaining on-site medical staff from 8:00 a.m. to 5:00 p.m., Monday through Friday, effectively foreclosed the inmates' ability to make their medical needs known to the medical staff, and this amounted to deliberate indifference. . . A jury could further find that this alleged custom or practice of not summoning medical assistance after hours, which resulted in effectively denying inmates access to medical care, was a substantial factor in causing Rettew's death. Plaintiffs therefore may proceed on their *Monell* claims against the Counties on this theory."); ***Alsaada v. City of Columbus***, 536 F.Supp.3d 216, ___ (S.D. Ohio 2021) ("In the present case, Plaintiffs allege that the City has an unwritten policy, practice, or custom of condoning the use of excessive force against some protestors, such as those protesting police violence. They argue specifically that the use of excessive force and the quelling of speech by police during peaceful protests demonstrated Defendants' deliberate indifference in the policies, training, supervision, and discipline needed to prevent officers and mutual-aid law enforcement personnel from violating constitutional rights. This alleged failure to investigate or discipline, or to make any meaningful policy reforms, suggests a conscious choice to allow the pattern of alleged conduct to continue. Plaintiffs also allege that Defendants' custom of acquiescence was the cause of their injuries. The Sixth Circuit has held that a municipality's failure to act in the face of obvious constitutional violations is properly treated as the cause of subsequent, similar violations. . . Defendants state that Plaintiffs have failed to provide any evidence of a pattern or practice of CPD using excessive force on nonviolent protestors or retaliating against them on the basis of their speech and assembly. As a legal matter, Defendants concede that a failure to discipline or investigate can demonstrate a municipal policy or custom 'if the plaintiff can show that the municipality historically failed to investigate or discipline similar conduct such that the municipality's inaction represents an

unofficial custom or tolerance.'. . But Defendants assert that Plaintiffs' claim still is insufficient because, per *Sherrod v. Williams*, 'an *after-the-fact approval* of an officer's conduct cannot logically be the *moving force* behind the constitutional violation.'. . Accepting Plaintiffs' allegations as true, it is at least plausible that CPD's alleged failure to act on city officials' knowledge of potential constitutional violations over the course of several days of protests was the 'moving force' behind subsequent violations of the same type. Therefore, in addition to the 'ratification' theory of liability, Plaintiffs have also adequately pled all four elements of the 'inaction theory' of municipal liability under *Monell.* Thus, even though the mayor and then-Chief Quinlan admitted officers' video-recorded conduct was improper, there have been zero reports by officers of excessive force by others during the protests, zero disciplinary actions or criminal charges for excessive force, and zero efforts to relieve violent officers from duty or remove them from special response teams. . .The video and testimonial evidence presented by Plaintiffs suggests that police have used physical violence, tear gas, and pepper spray against peaceful protestors without provocation, and city officials have done nothing or not enough to condemn and correct these actions. This evidence leads to the inference that Plaintiffs have a likelihood of success in establishing that unconstitutional conduct by police was carried out pursuant to an official policy or custom."); ***Savory v. Cannon***, No. 17 C 204, 2021 WL 1209129, at *8-9 (N.D. Ill. Mar. 31, 2021) ("To bring about *Monell* liability under a 'widespread practice or custom' theory, a municipality's employees' conduct must occur frequently enough to give rise to a reasonable inference that the municipality is 'aware that public employees engage in the practice and do so with impunity.'. . Although there are no 'bright-line rules' concerning how often the offending conduct must occur to rise to the level of a custom, 'there must be some evidence demonstrating that there is a policy at issue rather than a random event or even a short series of random events.'. . Contrary to Defendants' submission, . . . Savory has alleged facts giving rise to a reasonable inference that the alleged constitutional violations were not isolated occurrences or random events. The complaint alleges in detail that the City looked the other way in the face of an entrenched pattern of unconstitutional conduct. . . . And the complaint identifies several criminal defendants who allegedly were subject to misconduct at the hands of Peoria police officers similar to the misconduct alleged by Savory. . . Those allegations are enough to survive a motion to dismiss."); ***Sampson v. Fresno Police Officers***, No. 120CV00322DADSAB, 2021 WL 1060506, at *9 (E.D. Cal. Mar. 19, 2021) ("Here, through incorporation, plaintiff's complaint points to multiple incidents suggesting the existence of a custom or practice of denying police protection to abused women because of animus toward their gender or domestic situations. . . Plaintiff alleges that as far back as 2008, the FPD has denied female domestic abuse victims full police protection. . . Plaintiff has also provided in his complaint multiple examples in which FPD officers failed to follow simple protocol while carrying out a domestic violence investigation. For example, according to the allegations of plaintiff's complaint, FPD officers failed to properly conduct investigatory interviews, interviewing the male abuser before speaking with the female abuse victim. . . Plaintiff also alleges FPD officers engaged in a practice of failing to document signs of abuse, such as refusing to photograph injuries suffered by female victims or treating such injuries as having been self-inflicted. . . These instances, coupled with plaintiff's allegations that defendant officers made misogynistic comments to and about the decedent, are a sufficient basis, if proven,

upon which to reasonably infer the FPD had a custom or practice of denying female domestic violence victims equal police protection because of animus toward their gender. That is all that is required. Accordingly, defendants' motion to dismiss plaintiff's *Monell* claim will be denied."); ***Carter v. City of Montgomery***, 473 F.Supp.3d 1273, 1298-99 (M.D. Ala. 2020) ("In this Circuit, private entities 'acting in the place of a municipality' in carrying out a traditional government function are subject to liability on the same basis as municipalities. . . . Mr. Carter has produced enough evidence to find that JCS [Judicial Correction Services, Inc.] had an established custom of asking the Municipal Court to revoke probation when it knew that a probationer had not willfully failed to pay fines and fees. To demonstrate a custom, Mr. Carter must point to a 'permanent and well settled' course of behavior. . . Courts in this Circuit routinely reject attempts to find customs in isolated incidents. . . But they have also found customs based on as few as three occurrences. . . In determining whether a custom exists, the Court also looks to the time frame over which the incidents occurred. . . And it looks to how similar the incidents are to one another. . . Mr. Carter points to a widespread pattern of unlawful incarceration. The record indicates that JCS asked the Municipal Court to revoke hundreds of probations, . . . and that the Municipal Court incarcerated offenders without assessing their ability to pay on 'many occasions[.] . . And a jury could find that JCS filed revocation petitions when it had reason to believe that probationers could not make their payments because JCS kept records of probationers' employment or lack thereof. . . Those records included a log of when probationers received retirement and disability benefits. . .. More than 200 probationers whom JCS knew to be unemployed, disabled, or receiving Supplemental Security Income benefits served jail time after the Municipal Court revoked their probation. . . These hundreds of revocations followed the same pattern and occurred over less than four years. This case centers around a systemic practice in Montgomery: the unlawful incarceration of indigent defendants for failing to pay traffic fines. In filing revocation petitions, JCS fed the system. If among a single city's probationers 217 instances of a practice over less than four years would not allow a jury to find that a custom exists, the Court cannot imagine what would. A jury could find an established custom on this record."); ***D.C. by Cabelka v. County of San Diego***, No. 18-CV-13-WQH-MSB, 2020 WL 1674583, at *14 (S.D. Cal. Apr. 6, 2020) ("The alleged violations of the Adoption Act occurred over multiple years, and Plaintiffs allege that multiple County employees lied and failed to provide information to Cabelka about D.G.'s history and background. 'It is difficult to discern from the caselaw the quantum of allegations needed to survive a motion to dismiss a pattern and practice claim.'. . However, 'where more than a few incidents are alleged, the determination appears to require a fully-developed factual record.'. . The Court can infer from Plaintiffs' allegations that the County had a policy or custom that caused the alleged violations of the Adoption Act. . . The Court concludes that Cabelka has stated a claim against the County under § 1983 at this stage in the proceedings for violations of her federal rights under the Adoption Act."); ***Nasir v. Town of Foxborough,*** No. 19-CV-11196-DJC, 2020 WL 1027780, at *4-5 (D. Mass. Mar. 3, 2020) ("Like in *Bordanaro*, it is difficult to imagine these facts—a civilian knowing to request certain police action, requesting this action, the police documenting this request, advising the civilian on how to proceed the following day with the request to effectuate this action, then different officers, the following day, effectuating this action, all using common terminology—absent a custom in Foxborough of that practice. Accordingly, the Nasirs have plausibly alleged

that Foxborough has a custom of effectuating civil standbys. The Nasirs do not contend, however, that the custom or policy of effectuating a civil standby is facially unconstitutional. . . .When the alleged municipal policy itself is not unconstitutional, the causal and fault elements for municipal liability require 'significantly more.'. . . Specifically, parties premising municipal liability on a facially constitutional custom or policy must plead facts that the 'policy maker was at least deliberately indifferent to the possibility that the policy in question would lead to a deprivation of a federally-protected right.'. . . [T]he Nasirs have pled no facts suggesting that any policy maker was deliberately indifferent to the possibility that the practice of effectuating civil standbys might lead to a deprivation of federally protected rights. Unlike in *Howie*, the Nasirs have not pled that any policy maker was aware of any instance of misconduct related to civil standbys. Nor have the Nasirs alleged any other facts indicative of Foxborough's knowledge of a risk of potential violations of constitutional rights of persons in such circumstances, and its subsequent failure to undertake any actions that may mitigate such a risk. As such, the Nasirs have not pled facts sufficient to satisfy the causation and fault requirements of Section 1983 municipal liability claims."); ***Vann v. City of Rochester***, No. 6:18-CV-06464(MAT), 2019 WL 1331572, at *9 (W.D.N.Y. Mar. 25, 2019) ("The Court finds that Vann has affirmatively alleged the existence of a longstanding RPD policy or practice of filing false charges and testifying falsely against arrestees that, while not officially memorialized, is sufficiently widespread that it fairly can be said to represent official RPD policy. In particular, the Amended Complaint alleges that Sheppard, the former chief of the RPD, has admitted in sworn testimony that the RPD has a policy pursuant to which RPD officers are instructed to issue dispersal orders to individuals lawfully present on public sidewalks and, if the individuals fail to display the proper degree of deference or subservience, to arrest them on trumped-up 'cover charges' such as disorderly conduct, trespass, obstruction of governmental administration, and harassment. . .The Court offers no opinion on the likelihood that Vann will be able to prove this allegation at trial; however, at this motion to dismiss stage, the Court is required to accept it as true. Moreover, Vann has set. . . forth allegations concerning multiple specific instances wherein this policy, practice, or custom was employed by RPD officers in performing their policing duties. . . Accordingly, the Court finds that dismissal is not warranted on this claim."); ***Doe on behalf of B.G. v. Boston Public Schools***, No. 17-CV-11653-ADB, 2019 WL 1005498, at *8–9 (D. Mass. Mar. 1, 2019) ("There are two requirements to prove a Section 1983 claim based on a municipal custom. First, the custom 'must be attributable to the municipality' such that it is 'so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice.'. . 'Second, the custom must have been the cause of and "the moving force behind" the constitutional violation.'. . Evidence of a single incident of a constitutional deprivation 'is insufficient, *in and of itself*, to establish a municipal "custom or usage" within the meaning of *Monell*.'. . Evidence of 'multiple incidents of misconduct' that suggest a 'systemic pattern of activity,' however, may support an inference of a municipal custom. . . Moreover, a municipality's failure to train its employees can be an actionable custom under Section 1983. . . Here, Plaintiffs claim that school officials had a custom of discouraging and delaying the filing of 51A Reports about sexual assaults committed by students. . . Plaintiffs allege multiple incidents of sexual assault committed by students, including sexual assaults committed by A.J. on ten classmates, that

spanned over three school years. . . In addition, a liberal reading of the Amended Complaint reveals that school staff learned of many sexual assaults committed by A.J. and were required to file 51A Reports to DCF in connection with them, but as a result of the school custom, only one 51A Report was ever filed and, in retaliation for filing that Report, a school teacher was fired. . . Further, Plaintiffs allege that there was a municipal custom of inadequate training of school staff on the proper filing of 51A Reports. . . Plaintiffs claim that these customs were the moving force behind the violation of B.G.'s and A.R.'s constitutional right to bodily integrity. . .The existence of a municipal custom that discouraged the filing of 51A Reports is a reasonable inference to be drawn from Plaintiffs' allegations of a systematic pattern of school staff failing to submit 51A Reports to DCF following multiple sexual assaults. Given that no 51A Reports were filed in connection with known sexual assaults by A.J. on nine children other than B.G., the Court can also infer that school staff were insufficiently trained on the filing of such Reports and that this training inadequacy amounted to deliberate indifference in light of A.J.'s known pattern of sexual assaults. The Amended Complaint could be more fulsome with respect to the alleged municipal customs, and Plaintiffs will have to overcome significant issues of proof if they are to prevail at trial. Nonetheless, the Court finds that, at this stage, Plaintiffs have adequately pleaded municipal liability for violations of B.G.'s and A.R.'s right to bodily integrity based on the role that municipal customs allegedly played in the constitutional violations, and they are entitled to discover and present evidence on Count II. The Municipal Defendants' motion to dismiss Count II is denied."); ***Lynch v. City of New York***, No. 17CV7577, 2018 WL 4660371, at *6-8 (S.D.N.Y. Sept. 28, 2018) ("Plaintiffs sufficiently plead that DOC has a practice of forcing detainees who have already paid bail to remain detained until a critical mass forms such that their releases may be approved and processed in one fell swoop. According to Plaintiffs, there is no justification for this practice aside from convenience. At this stage of the litigation and especially given the primacy of the right to be free from bodily restraint, Plaintiffs plausibly allege that the City acted with deliberate indifference based on its purported knowledge from the CCI Report that its deficiencies in bail processing and release could result in unnecessary over-detentions of pre-trial detainees. . . . .A municipal policy or custom may be demonstrated by '(1) a formal policy officially endorsed by the municipality; (2) actions or decisions made by municipal officials with decision-making authority; (3) a practice so persistent and widespread that it constitutes a custom of which policymakers must have been aware; or (4) a failure by policymakers to properly train or supervise their subordinates, such that the policymakers exercised deliberate indifference to the rights of the plaintiff and others encountering those subordinates.'. . Plaintiffs offer the latter two as independent bases for municipal liability. But the Complaint, taken as true, sufficiently alleges municipal liability based on the City's widespread practices of immediately transporting detainees to DOC facilities to begin an intake process during which they are categorically ineligible for release and continuing to detain those who have paid bail so that releases may be approved and processed in the aggregate. . . Drawing all inferences in favor of Plaintiffs, the Complaint alleges more than mere over-detentions isolated to the named Plaintiffs, but that the City's systemic practices are 'so manifest as to imply the constructive acquiescence of [DOC's] policy-making officials.'"); ***Watson v. City of Kingston***, No. 115CV1356BKSDEP, 2018 WL 4509488, at *6–7 (N.D.N.Y. Sept. 19, 2018) ("Here, Plaintiff has presented evidence that, in addition to the incident

at issue in this case, Kingston police officers have twice subjected him to excessive force, once in 1995 when Kingston police officers hit him during an arrest and he was attacked by a police dog, and again on July 29, 2012, when he Kingston police officers choked him and wrestled him to the ground during an arrest 'for obstructing governmental administration.'. . These three instances, however, are insufficient to show 'a practice that is "so persistent or widespread" as to justify the imposition of municipal policy.' *Giaccio v. City of New York*, 308 F. App'x 470, 472 (2d Cir. 2009) (finding the plaintiff's identification of 'four examples where the defendants might have disclosed positive drug test results' was insufficient to show a persistent or widespread practice); *see also Jones v. Town of E. Haven*, 691 F.3d 72, 85 (2d Cir. 2012) (finding that where the 'Plaintiff's evidence showed two instances, or at the most three, over a period of several years in which a small number of officers' engaged in unconstitutional conduct, "and one incident in which an officer indicated a disposition" to do so, the "evidence fell far short of showing a policy, custom, or usage of officers engage in the alleged unconstitutional conduct" and far short of showing abusive conduct among officers so persistent that it must have been known to supervisory authorities'). Plaintiff also asserts that there are seven cases of 'excessive force/false arrest filed against' Defendants City of Kingston and Kingston Police Department which evidence of the pattern or practice of excessive force during arrests. . . Three of these cases, however, post-date his October 2012 arrest in this case, and therefore do not evidence a custom or policy in October 2012 of which supervisory authorities must have been aware. . . One of the cases cited by Plaintiff, *Clayton v. City of Kingston*, 44 F Supp. 2d 177 (2d Cir. 1999), did not involve a claim of excessive force or false arrest. Without evidence of the facts underlying the remaining three cases, whether Defendants investigated them, or how they were resolved, they fail to raise a question regarding a municipal policy or custom under *Monell*. *See Outlaw v. City of Hartford*, 884 F.3d 351, 379–80 (2d Cir. 2018) ('The lists of the lawsuits filed and the claims sent to the City's insurer might have led to evidence from which an inference of deliberate indifference to excessive force could properly be drawn, but as noted by the district court, there was no evidence as to the facts underlying those claims or how thoroughly they were investigated by the City. The simple fact that claims were made and that some of them were settled would not permit an inference that the City was deliberately indifferent in the supervision of HPD officers with respect to the use of excessive force.'). . . Accordingly, Defendants' motion for summary judgment with respect to the *Monell* excessive force claim is granted."); ***Parada v. Anoka County***, No. CV 18-795 (JRT/TNL), 2018 WL 3621210, at *6-9 (D. Minn. July 30, 2018) ("Parada alleges that Coon Rapids has a policy or custom of arresting Hispanic drivers for misdemeanor traffic offenses and that its policy of refusing to accept the Matrícular Card is pretext for arresting aliens to detain them for immigration authorities. . . Parada alleges that Oman arrested her pursuant to this policy, even though Oman did not witness her driving without a license. . . Indeed, Oman told Parada that his 'supervisor told him to bring her in to get her prints' to identify her, which suggests that both Oman and his supervisor were acting pursuant to a policy to (1) disregard the Matrícular Card and (2) arrest Hispanic individuals to detain them for immigration authorities. . . This inference is supported by allegations that the Defendants waited to take her prints until after they had spoken with ICE agents. The alleged policy caused Oman to overstep the boundaries of Minnesota law and, possibly, the protections of the Fourth Amendment. The Court concludes that Parada states

a *Monell* claim against Coon Rapids based on (1) the prolonging of the traffic stop and (2) Oman's absence during the commission of the crime. Accordingly, the Court will deny the Coon Rapids Defendants' Motion to Dismiss with respect to the Fourth Amendment claims arising from Parada's initial arrest. . . . The Court must decide whether Parada can maintain a *Monell* claim against Coon Rapids based on her Fourth Amendment claim. As discussed above, Parada alleges that Coon Rapids has an unwritten policy of 'arresting Hispanic motorists for pre-textual reasons to place them in immigration custody' and has deliberately failed to train its officers on individuals' Fourth Amendment rights. . . This policy of arresting and detaining Hispanic individuals solely for immigration purposes led to Parada's continued detention. Because Coon Rapids has a policy of detaining Hispanic individuals based on their perceived immigration status, the Court concludes that Parada states a *Monell* claim against Coon Rapids. Accordingly, the Court will deny the Coon Rapids Defendants' Motion to Dismiss with respect to the Fourth Amendment claims arising from Parada's continued detention. . . . Parada alleges that Coon Rapids has a custom or policy of selectively enforcing traffic laws against Hispanic individuals. . . As described above, Parada's allegations surrounding Oman's conduct support a reasonable inference that Coon Rapids officers – as a matter of policy – refuse to accept the Martrícular Card to arrest and detain Hispanic individuals for immigration authorities. Because Parada states an equal-protection claim arising from selective enforcement, the Court concludes that Parada states a *Monell* claim against Coon Rapids. Accordingly, the Court will deny the Coon Rapids Defendants' Motion to Dismiss with respect to Parada's equal-protection claim."); ***Alcorn v. City of Chicago***, No. 17 C 5859, 2018 WL 3614010, at *15, *17 (N.D. Ill. July 27, 2018) ("Plaintiff brings each of the *Monell* claims in Counts II, VI, and VIII under both an 'express policy' and a 'widespread practice' theory of liability. There are two varieties of 'express policy' claims under *Monell.* The first applies, 'as the name suggests, where a policy explicitly violates a constitutional right when enforced.'. . To prevail on this first variation, Plaintiff must identify specific language in the policy that explicitly violates a person's constitutional rights. . . 'Under this type of claim, one application of the offensive policy resulting in a constitutional violation is sufficient to establish municipal liability.'. . The second variation of an 'express policy' claim applies where the plaintiff 'object[s] to omissions in the policy,' *i.e.,* that the policy fails to address certain issues. . . Such claims 'require more evidence than a single incident to establish liability.'. .To prevail on a 'widespread practices' claim, Plaintiff must show that the City engaged in a practice 'so permanent and well settled as to constitute a custom or usage with the force of law.'. . Like the second variation of 'express policy' theory, a 'widespread practice' is 'not tethered to a particular written policy' and 'requires more evidence than a single incident to establish liability.'. . Plaintiff must provide 'evidence that there is a true municipal policy at issue, not a random event.'. . The Seventh Circuit has declined to adopt bright-line rules defining a 'widespread practice', recognizing that 'there is no clear consensus as to how frequently such conduct must occur to impose *Monell* liability, except that it must be more than one instance ... or even three.'. . . To successfully plead a 'widespread practice' claim, Plaintiff must allege facts showing that at least more than one instance of the alleged conduct occurred to establish that a practice in fact exists and that Lumar's allegedly unconstitutional arrest was not merely a random event. . . Plaintiff may rely on incidents relating only to him, *see White v. City of Chicago*, 829 F.3d 837, 844 (7th Cir. 2016), but he still must

allege multiple such incidents such that the Court can draw the reasonable inference that the alleged practice was 'so permanent and well settled' as to constitute custom with the force of law. Plaintiff fails to identify a single other instance in which CPD arrested him or any other detainee at Cook County Jail without probable cause. Additionally, Plaintiff provides no details about the 'records' that allegedly reveal such a widespread practice, for example, what the records report or even what kind of records they are. Without more, Plaintiff's statement about what the records purportedly show is merely conclusory and an insufficient basis for the 'widespread policy' claim. . . The Complaint contains no other allegations that would support the existence of the alleged 'widespread practice.'"); ***Rodriguez v. City of Chicago***, No. 17 CV 7248, 2018 WL 3474538, at *2 (N.D. Ill. July 19, 2018) ("According to the complaint, Defendant Officers' refusal to investigate Rodriguez's complaint and pursuit of an investigation against her instead stem from a 'code of silence' that requires Chicago Police Officers to remain silent about police misconduct. The code of silence is a *de facto* policy, practice, or custom of concealing officer misconduct, which includes failing to investigate misconduct and fabricating evidence against the complaining individual. The City allegedly also has a *de facto* policy, practice, or custom of investigating complaints against off-duty officers differently than complaints against other people. These policies caused Rodriguez's injuries because they motivated Defendant Officers to engage in wrongful acts against her."); ***Hernandez v. Colon***, No. 3:16-CV-30089-KAR, 2018 WL 2422008, at *19 (D. Mass. May 25, 2018) ("There is no dispute that the City did not have a written policy on shut-off procedure and did not offer training. 'When a plaintiff points to no specific unconstitutional policy ... as is the case here, a claim of municipal liability must be grounded in a custom as evidenced by widespread action or inaction by public officials.'. . 'The First Circuit has explained the difference between official policy and unofficial custom: "[u]nlike a 'policy,' which comes into existence because of the top-down affirmative decision of a policymaker, a custom develops from the bottom-up.'. . Morales, who had participated in 'numerous' shut-offs, explained the department's practice or custom in the event occupants of a residence refused to open the door to permit the utility personnel and the police to enter to terminate the services by stating that '[t]here is not much you can do if they refuse. If they don't open the door, we just leave'. . . . This practice meets the definition of a 'custom' and Plaintiff does not argue to the contrary. It is a custom that is not violative of residents' Fourth Amendment rights. Plaintiff has not established a ' "direct causal link"' between the City's custom when participating in utility shut-offs and the deprivation of her constitutional right. . . If Morales had followed the standard practice, he would not have entered. The fact that Morales did not follow this practice does not make the City liable. '[A] "single incident" of misconduct, without other evidence, cannot provide the basis for municipal liability under § 1983. Such a result would be the equivalent of imposing *respondeat superior* liability upon the municipality.'. . Plaintiff has not established the City's liability for any § 1983 claim."); ***Stevenson v. City of Chicago***, No. 17 CV 4839, 2018 WL 1784142, at *8 (N.D. Ill. Apr. 13, 2018) ("Here, Plaintiffs allege that the City of Chicago had a formal policy or an informal but widespread custom or practice of covering up police misconduct and excessive force. With regard to the formal policy, Plaintiffs do not cite, quote, or otherwise identify any official City or CPD policies that allegedly caused their constitutional violation. As for Plaintiffs' allegations that the City has a widespread custom or practice of such violations, Plaintiffs allege

details of six incidents of police misconduct between 2005 and 2015—three involving high-speed vehicle crashes and three involving shootings. While Plaintiffs do not link the shooting allegations to this case, the other vehicle pursuits are similar. Plaintiffs certainly present more than one example in addition to their own July 1, 2016, incident. They have sufficiently alleged that these are not isolated events, but a pattern of the City of Chicago's custom and practice of using excessive force and covering up wrongdoing. . . Plaintiffs successfully allege that CPD has a culture of false reporting and covering up of vehicle pursuits. Plaintiffs include four car crash incidents in their pleadings, counting the present case, which describe instances where CPD officers allegedly lied or made a false report after another police officer used excessive force. Plaintiffs explain that CPD's lack of accountability manifests itself in multiple ways—from false reporting and destruction of evidence to failure to adequately discipline and investigate misconduct—and they specifically allege that such actions occurred here. . . . Plaintiffs have alleged a direct causal link between the de facto policy regarding vehicle incidents and their excessive force claim. CPD's culture plausibly assured Officer Ewing that he could use excessive force in his pursuit of the gold sedan and not worry about being meaningfully disciplined. Plaintiffs' factual allegations are enough to raise a right to relief above the speculative level and states a claim to relief that is plausible on its face."); ***Cordero v. City of New York***, No. 15-CV-3436, 2017 WL 4685544, at *11 (E.D.N.Y. Oct. 17, 2017) ("There is sufficient evidence for plaintiff to proceed on the grounds that: (1) New York city's overtime policy incentivizes officers to make false arrests; and (2) police malfeasance in general and as related to the overtime policy is inadequately monitored to prevent abuse. A reasonable jury may find that this practice is not isolated to a few 'bad' police officers, but is endemic, that NPYD officials are aware this pattern exists and that they have failed to intervene and properly supervise."); ***Estate of Williams v. City of Milwaukee***, No. 16-CV-869-JPS, 2017 WL 3381235, at *20–21 (E.D. Wis. Aug. 4, 2017) ("When viewing the evidence most favorably to Plaintiffs, the Court concludes that they have raised triable issues of fact as to both of their *Monell* theories. As with Plaintiffs' Fourth Amendment claim, the Court will not belabor the point. For the failure to train claim, Plaintiffs' evidence and Clark's opinions suggest a lack of adequate training on how to approach complaints of breathing difficulties. Plaintiffs have further shown that the City knew or should have known that its training was deficient prior to the Williams incident. For the code of silence claim, Plaintiffs' evidence admittedly appears scattershot. Nevertheless, Plaintiffs have woven at least a tenuous thread through the history of alleged MPD misconduct, including the strip search scandal, as well as Clark's opinions, the various studies, and the Williams incident itself, showing that the code existed with Flynn's knowledge and approval, and that this is what motivated Defendants' inactions on the morning of July 6, 2011. Whether the thread will snap under the strain of the City's opposing evidence is for the jury to decide. The City's arguments to the contrary lack merit. First, the City maintains that it provided at least *some* medical training to MPD officers, defeating any assertion of indifference. It is for a jury, however, to determine whether this is sufficient to disprove the City's alleged indifference. Second, the City contends that it could not be expected to train its officers, who were given limited first responder training, to recognize that Williams was suffering from a sickle cell crisis. Not only does this assume that Williams was in such a crisis—a matter in dispute—but it also mischaracterizes Plaintiffs' failure to train claim. Plaintiffs assert

that the City's training on respiratory distress was not only inadequate, but entirely incorrect; the 'if you can talk you can breathe' principle was taught even though the MPD should have known it was wrong. Further, MPD policy allowed officers to exercise discretion to determine whether a breathing complaint was genuine. . . Flynn later acknowledged that the training was mistaken by changing the policy. . .Third, the City attacks Plaintiffs' code of silence evidence by showing that nothing prior to the Williams incident involved sickle cell crisis. In the same vein, the City asserts that circumstances of the strip search cases are factually distinguishable, and thus offer no support for a purported code of silence or lack of discipline. Plaintiffs' theory is not so narrow. They argue that the code of silence and lack of discipline enabled Defendants to treat Williams callously, as they believe occurred in prior incidents like those involving Perry and Jude. Finally, the City argues that the code of silence theory fails because the moving force behind Williams' death was the Officer Defendants' failure to recognize the seriousness of his medical condition, not some underlying, institutionalized freedom to mistreat African-American men. The parties' positions are, unsurprisingly, diametrically opposed on this point and a jury must be called upon to find the truth."); ***Thomas v. Town of Chelmsford***, 267 F.Supp.3d 279, ___ (D. Mass. 2017) ("The plaintiffs claim that Chelmsford schools had a custom of encouraging a win-at-all-costs sports culture that did not apply the same rules to star athletes, and that the municipality was aware of and perhaps even encouraged the culture. As a matter of formal policy, the CSC did implement a Bullying Intervention Plan in 2010 and entered into a Memorandum of Understanding with the Chelmsford Police to work together to respond to bullying. The plaintiffs allege that in practice, though, CSC had a practice of not applying its bullying policies and looking the other way from sexual misconduct and sexual harassment by star athletes. The plaintiffs allege that this culture was the moving force behind the First Amendment retaliation against Matthew by his teachers. The plaintiffs adequately plead municipal liability for First Amendment retaliation based on the role that municipal policy or custom allegedly played in the constitutional violation."); ***Castellani v. City of Atl. City***, No. CV 13-5848 (JBS/AMD), 2017 WL 3112820, at *20 (D.N.J. July 21, 2017) ("Viewing the evidence in a light most favorable to Plaintiff, a reasonable jury could find from this evidence that the City had a custom of ignoring or failing to properly and promptly investigate unconstitutional excessive force complaints against Atlantic City police officers for years preceding this incident, and by its inaction was deliberately indifferent to the need for such investigations to protect persons against excessive force during arrests, and was thus in part complicit in the misconduct that ensued. . . . A reasonable jury could find evidence in the record connecting the failure to investigate and the ACPD condoning the use of excessive force by its officers without fear of discipline with the constitutional violation at issue in this case."); ***Santiago v. Lafferty***, No. CV 13-12172-IT, 2017 WL 1217115, at *13 (D. Mass. Mar. 31, 2017) ("In sum: if a reasonable jury could conclude that the City of Lowell (through its Superintendent of Police) adopted a custom with deliberate indifference to known or obvious consequences, and through that action caused the constitutional injuries alleged, summary judgment cannot enter. The record allows Plaintiffs the opportunity to try to meet this burden at trial. The 1989 Informant Policy may demonstrate the municipality's knowledge of the need for safeguards to protect against the risks inherent in using confidential informants, and the municipality's systematic failure to enforce that policy—which, given that failure's ubiquity, may amount to the actual 'custom' to be analyzed—

may demonstrate deliberate indifference to the very risks that policy was intended to mitigate. . . Superintendent Lavallee—the relevant municipal actor—was potentially aware of officer complaints about the inaccessibility of written policies. In addition, the cavalier or simply non-existent enforcement of safeguards meant to protect against risks inherent to confidential informants, as described by Plaintiffs, may have been so extensive that a jury could conclude it occurred with Superintendent Lavallee's blessing. A jury could further conclude that refusing to supervise the use of confidential informants—including by allowing confidential informants to be used without any documentation or meaningful check—obviously leads to and causes the malfeasance described here, including officers' blindness to the possible planting of evidence to secure easy arrests. Thus, action properly attributable to the city potentially caused Plaintiffs' constitutional injuries, precluding summary judgment on the *Monell* claims."); ***Price v. City of Chicago***, No. 16-CV-8268, 2017 WL 36444, at *10–11 (N.D. Ill. Jan. 4, 2017) ("Plaintiffs have alleged sufficient instances of improper enforcement of the Ordinance to state a plausible claim under *Monell*. As recounted in the Background section, Plaintiffs have alleged numerous—at least fifteen—examples of improper enforcement of the Ordinance at a variety of locations involving various pro-life advocates and police officers. These instances include, for example, treating the Ordinance as a 50-foot buffer zone, referring to distances not mentioned in the Ordinance, enforcing the Ordinance based on the distance from a parking lot gate rather than the entrance door to a clinic, or prohibiting pro-life advocates from standing in a particular place without reference to whether they were 'approaching' another person as the Ordinance requires. Plaintiffs also allege at least seven occasions in which (1) the police told pro-life advocates that they could not stand in a particular location without telling the same thing to pro-choice advocates or (2) the police appeared to reflexively favor pro-choice advocates over pro-life advocates. Additionally, the Plaintiffs allege that pro-choice advocates regularly violate the Ordinance without any police intervention. Taking these allegations as true and adding in the many times the police have intervened against Plaintiffs, the Court can reasonably draw an inference that permits Plaintiffs' selective enforcement theory to survive the current motion to dismiss. In short, taking all of Plaintiffs' allegations as true and making reasonable inferences in their favor, the complaint sufficiently alleges a pattern of conduct that indicates a widespread custom or practice of discriminatory enforcement of the Ordinance, deliberate indifference to the widespread unconstitutional enforcement of the Ordinance, or a training policy that is 'so inadequate that it amounts to a "policy" of "deliberate indifference to the rights of persons with whom the police come into contact."'"); ***Fant v. The City of Ferguson***, No. 4:15-CV-00253-AGF, 2016 WL 6696065, at *4 (E.D. Mo. Nov. 15, 2016) ("Although the Court is not convinced that Plaintiffs have sufficiently pleaded that their warrants were based on knowingly or recklessly false information, upon reconsideration and focusing on Plaintiffs' allegations in Paragraph 203 of the complaint, the Court finds that Plaintiffs have plausibly pleaded that the City has a policy of issuing warrants for 'failure to appear' without probable cause. . . Municipalities may be liable under § 1983 if an action 'pursuant to official municipal policy,' including 'practices so persistent and widespread as to practically have the force of law,' cause the plaintiffs' injuries. . . In Paragraph 203 of their complaint, Plaintiffs allege that, as a matter of routine, the City issues arrest warrants for a person's 'failure to appear' after City officials have given the person paperwork crossing out

their court date or have moved the court date without informing the person. Whether Plaintiffs can prove that such practices are 'so persistent and widespread' as to have the force of law may be determined at a later stage. At this stage, the Court finds Plaintiffs' allegations sufficient to state a plausible Fourth Amendment claim against the City."); ***Bush v. City of Utica, New York***, No. 6:12-CV-1444, 2016 WL 3072384, at *8 (N.D.N.Y. May 31, 2016) ("In sum, viewing the evidence in the record in the light most favorable to plaintiffs, one could conclude that UFD decision-makers, primarily Chief Brooks, made a conscious choice to endorse or sanction an unwritten policy of employing more conservative fire fighting and rescue operations in low-income areas like James Street than those employed elsewhere, that this policy was motivated in some measure by discriminatory animus, and that this policy resulted in the failure of UFD personnel to rescue one or more of the decedents. . . Notably, the Second Circuit left open the possibility that qualified immunity might yet shield Chief Brooks from individual liability when rejecting defendants' appeal at the pleadings stage. . . But now that the record has been more fully developed in discovery, the disputed facts, viewed in the light most favorable to plaintiffs, make it even more clear that Chief Brooks would not be entitled to qualified immunity as a matter of law. . . Indeed, as the Second Circuit previously stated, a policy 'of withholding protective services from the decedents because they lived in a low-income neighborhood,' if such a policy did in fact exist, would clearly lack the requisite rational relation to a legitimate governmental purpose. . . Finally, the disputed facts set forth above, the identified deficiencies in yearly rescue training, and the lack of an explanation in the record as to why the stated training requirements differ for, or do not apply to, supervisory personnel such as Chief Brooks or Deputy Kelly, considered together along with the alleged adherence by UFD personnel to the 'don't go in policy' for fires at low-income properties, preclude summary judgment on plaintiffs' failure to train theory as well."); ***Foy ex rel Haynie, Jr. v. City of Chicago,*** No. 15 C 3720, 2016 WL 2770880, at *7-9 (N.D. Ill. May 12, 2016) ("Plaintiff does not allege the existence of an express policy that caused Haynie's constitutional deprivation nor does she allege that Haynie's death was directly caused by a person with final policymaking authority. Thus, the only way Plaintiff may assert a Section 1983 claim for deliberate indifference to a medical need against the City is by alleging a widespread practice 'so permanent and well-settled that it constitutes a custom or practice.'. . In order for a plaintiff to prevail on a deliberate indifference claim in this context, the municipality or city official 'must have been aware of the risk created by the custom or practice and must have failed to take appropriate steps to protect the plaintiff.'. . In addition, a plaintiff pursuing a widespread practice claim generally must allege more than one, and sometimes more than three, instances of misconduct. . . This requirement is intended to 'demonstrate that there is a policy at issue rather than a random event.'. . Finally, a plaintiff must also allege causation—specifically, that the policy or custom was the 'moving force' behind the constitutional violation. . . .In support of her claim that the City maintained a series of widespread practices that result in the deliberate indifference to pretrial detainees' medical needs, Plaintiff cites to the fact that eight other inmates have died at the Harrison Police Station between 2007 and 2015. . . .While these tragic deaths are unfortunate, there are no allegations that these deaths and Haynie's death share substantive similarities. Simply put, the conclusory reliance on other deaths between 2007 and 2015 at the Harrison Police Station does not establish the possibility that the City's alleged widespread practices are so well-settled

that they amount to an unconstitutional custom or policy."); ***Spalding v. City of Chicago***, 186 F.Supp.3d 884, 916-17 (N.D. Ill. 2016) ("The record contains no evidence that the City had an express policy that violates the Constitution. Rather, Plaintiffs' *Monell* claim rests on the CPD's alleged widespread and unwritten 'code of silence.' According to Plaintiffs, CPD officers are trained under the code to ignore their fellow officers' misconduct and to retaliate against any officer who does not. . . Plaintiffs submit that the retaliation they suffered as a result of their protected speech resulted from their breaking the code, the existence of which Reiter's expert report and testimony support. . .The Seventh Circuit recently addressed a similar *Monell* claim in *Rossi v. City of Chicago*. Doubek, an off-duty Chicago police officer, participated in an assault on Rossi. Mathews, a CPD detective assigned to investigate the assault, 'exerted no discernible effort' on and then closed the investigation. Doubek faced no discipline for her role in the assault. Rossi brought a *Monell* claim against the City 'for perpetuating a "code of silence" that shields police officers from investigation and promotes misconduct by police.'. . In affirming summary judgment for the City, the Seventh Circuit held:

[T]he facts of this case … raise serious questions about accountability among police officers. But a *Monell* claim requires more than this; the gravamen is not individual misconduct by police officers (that is covered elsewhere under § 1983), but a *widespread practice* that permeates a critical mass of an institutional body. In other words, *Monell* claims focus on institutional behavior; for this reason, misbehavior by one or a group of officials is only relevant where it can be tied to the policy, customs, or practices of the institution as a whole.

Id. at 737. The Seventh Circuit added that Rossi did not adduce sufficient evidence of a widespread practice, noting that he 'did not retain a defense expert for his case and his pre-trial disclosures failed to identify any expert reports addressing' the code of silence. . . Unlike Rossi, Plaintiffs here have retained an expert, Lou Reiter. Reiter is a former Deputy Chief of Police of the Los Angeles Police Department who since 1983 has provided law enforcement consultation in police training and management, including with the Civil Rights Division of the U.S. Department of Justice. . . By his own estimate, Reiter has been involved in fifteen civil litigation matters involving the CPD since the late 1980s, including four in which the City retained him as an expert. . . Reiter has testified regarding the CPD's code of silence in five other cases. . . Based on his expertise and his review of the record, including depositions of the City's Rule 30(b)(6) witnesses, Reiter opines that the City maintains a code of silence whereby police officers do not report the misconduct of other police officers out of fear of retaliation. According to Reiter, the code is advanced by the City's conscious decision to fail to acknowledge it, to take affirmative steps to minimize its influence, and to fail to discipline officers who engage in misconduct. . . . Reiter's opinions find support in the record. The fact that the defendant officers are not clustered in a single unit or precinct, range widely in seniority and supervisory authority, and engaged in retaliatory acts against Plaintiffs over a lengthy period suggests that retaliation against those who report misconduct 'permeates a critical mass of' the CPD. . . Further, Hanna testified that instructors at the CPD police academy stress the importance of not breaking the code of silence. . . Considered together with Reiter's report, that evidence 'lays the premise of the system of inference' sufficient for Plaintiffs to forestall summary judgment on their *Monell* claim. . . Defendants also argue that Plaintiffs have not adduced evidence that the retaliatory aspect of the code of silence was

sufficiently widespread to support *Monell* liability; in support, Defendants maintain that Plaintiffs identified only three other cases of alleged retaliation against officers who reported misconduct by other officers, while Reiter identified only one. . . Defendants further contend that because Reiter provides no statistical evidence on the rate of retaliation within the CPD, his report 'offers no evidence of a widespread municipal policy or custom to *retaliate* against officers' who break the code. . . This argument fails to persuade. The Seventh Circuit has declined to 'adopt any bright-line rules defining a "widespread custom or practice" … [b]ut the plaintiff must demonstrate that there is a policy at issue rather than a random event.'. . With the support of Reiter's report, Hanna's deposition testimony that *all* new CPD officers are trained in the code, and the facts of the case, Plaintiffs have done just that. Defendants cite to no precedent requiring empirical evidence to illustrate the existence of a widespread custom, and the weight of Reiter's report and Hanna's testimony creates a genuine issue of fact regarding pervasiveness of the code. This is all that is required on summary judgment."); ***Shultz v. Dart***, No. 13 C 3641, 2016 WL 212930, at *9 (N.D. Ill. Jan. 19, 2016) ("Shultz has adduced enough evidence to show that the floor's security officer maintains his other responsibilities while relieving a tier officer of his duties during the tier officer's lunch break. Shultz has also adduced enough evidence to show that the tier officers station themselves in the hallway rather than in the dorm's doorway. These policies and practices would place the guard responsible for supervising inmates out of sight and hearing of those inmates, which a reasonable jury could find violated due process as interpreted by *Hart*. Shultz therefore may survive summary judgment if the record would permit a jury to find that this conduct was 'a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.'. .The Seventh Circuit has declined to 'adopt any bright-line rules defining a "widespread custom or practice."'. . 'But the plaintiff must demonstrate that there is a policy at issue rather than a random event.'. . Shultz has done just that. As to his claim that having security officers relieve tier officers creates a dangerous situation, there is a notable gap in the jail's express policies—namely, who performs a security officer's duties for the four hours during which he covers for tier officers out on lunch? Dominguez testified that a tier officer processes returning inmates during the time a security officer is relieving the absent tier officer. . . But then who is supervising the first tier officer's inmates while he performs the security officer's tasks? As to Shultz's claim that the tier officers in practice station themselves outside of the tiers, Shultz's testimony, together with the depositions from the other two cases, give rise to a reasonable inference that the guards' placement on the day of the assault was not an isolated event. The consequence of the jail's policies and practices is that detainees, including particularly vulnerable detainees like Shultz, can go for stretches of time without supervision by tier officers. Finally, Shultz has adequately established the causal link between the jail's supervision practices and his injury. A reasonable jury could fund that, had an officer been stationed in the doorway of W House instead of sitting out in the hallway, the officer could have seen several detainees follow Shultz into the bathroom and been able to prevent or interrupt the assault. Accordingly, Shultz may proceed to trial on his claims against Dart and Cook County."); ***Smith v. City of Chicago,*** 143 F.Supp.3d 741, 754 (N.D. Ill. 2015) ("[T]he City's argument that Plaintiffs' *Monell* claims must fail because Plaintiffs have not identified an express, written policy that is unconstitutional on its face is misplaced because Plaintiffs' *Monell* claims

rely on the unofficial stop and frisk policy articulated above. . . . Plus, Defendants can be liable for applying a facially neutral policy – like the City's written anti-racial profiling policy – to Plaintiffs in an intentionally racially discriminatory manner in violation of the Equal Protection Clause. . . .Accordingly, Plaintiffs are not required to base their *Monell* claims on an express, written policy as the City suggests."); ***Pindak v. Dart,*** 125 F.Supp.3d 720, 757 (N.D. Ill. 2015) ("Plaintiffs may also proceed on the theory that Securitas condoned and encouraged a widespread practice. . . . To establish a widespread practice, Plaintiffs must show a series of violations and establish that Securitas was 'aware of the risk created by the custom or practice and ... failed to take appropriate steps to protect the plaintiff[s].'. . They have identified several instances, spanning multiple years, when Securitas guards removed panhandlers from the Plaza. . . .A jury might also reasonably find Securitas' failure to enact new Post Orders or train its employees in response to these repeated incidents reflects deliberate indifference. . . .A jury could reasonably conclude that Securitas' failure to respond to this actual notice or to provide adequate training to its employees before the summer of 2012 showed deliberate indifference to the rights of those panhandlers on Daley Plaza."); ***Schoolcraft v. City of New York***, 103 F.Supp.3d 465, 515-17 (S.D.N.Y. 2015), reconsidered in part in ***Schoolcraft v. City of New York,*** 133 F.Supp.3d 563 (S.D.N.Y. 2015) ("*Monell* claims can be brought against a municipality notwithstanding the fact that the same claims were barred by the doctrine of qualified immunity as asserted against individual officers. . . . Schoolcraft points to two categories of evidence that he contends demonstrates a policy or custom sufficient to survive summary judgment. The first relates to expert testimony and reports regarding the existence of what has been termed the 'blue wall of silence' (or 'Wall'). . . .The second category of evidence offered by Schoolcraft to prove a custom or policy involves officer testimony and accounts of the Wall. This category includes recent incidents of purported retaliatory conduct involving other NYPD officers who revealed crime statistics manipulation. . . . The various reports, expert testimony and the testimony of other officers that were the purported victims or witnesses to this type of retaliation are sufficient to give rise to a question of fact as to whether a custom or policy of retaliation against 'rats' existed and, if so, whether it was the direct cause of Schoolcraft's injuries brought pursuant to Section 1983. While City Defendants are correct that 'contemporaneous or subsequent conduct cannot establish a pattern of violations that would provide notice to the city and the opportunity to conform to constitutional dictates,' the subsequent conduct testimony does not stand alone. . . Similarly, a triable issue exists with respect to causation. It is for a jury to decide whether DI Mauriello labelled Schoolcraft a 'rat,' and whether that designation resulted in the alleged retaliatory conduct discussed above. Several courts have found an issue of triable fact where, as here, 'plaintiff produced records of the testimony of experts, fellow officers, and [a] former Police Commissioner ... before the Mollen Commission to the code of silence that existed among police officers to prevent officers from breaking ranks'. . . If this evidence is admissible, the arguments propounded by the City Defendants in opposition to it can be presented to the jury. It is for a jury to decide whether the commission and IAB reports, drafted several decades ago, are persuasive indications of today's NYPD culture or whether Schoolcraft's harm was the direct result of the NYPD's custom of retaliation against 'rats.' It remains a triable issue whether the other officers' accounts of retaliation, viewed in light of the Wall, are adequate indications of a larger trend. Such questions are not, however, resolvable as a matter of law.");

Cole v. City of Memphis, 97 F. Supp. 3d 947, 958-59 (W.D. Tenn. 2015) ("With respect to Plaintiffs' claims against the City of Memphis for Fourth Amendment violations, Defendant argues that 'Plaintiffs' assert no basis upon which to attach municipal liability.'. . According to Defendant City of Memphis, municipal liability does not exist based on Fourth Amendment violations because Plaintiffs do not assert that the Beale Street Sweep 'constitutes a per se violation of the Fourth Amendment.'. . Defendant misapprehends the test for municipal liability to attach to a claim. Once a custom is established, the inquiry properly focuses on causation. . . The standard for causation, as set forth by the Supreme Court, is the existence of 'a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.'. . Defendant submits no authority that the policy or custom must be per se unconstitutional for liability to attach. Plaintiffs' failure to challenge the Beale Street Sweep as per se unconstitutional under the Fourth Amendment is inapposite to the causation inquiry specifically and the responsibility inquiry generally. Ostensibly, Defendant's argument relies on the concept that an as-applied challenge necessarily requires a showing of 'deliberate indifference.' The test in the Sixth Circuit for applying a 'deliberate indifference' standard, however, is whether a plaintiff challenges the municipality's inaction versus an affirmative policy or custom. . . That Plaintiffs bring an as-applied challenge under the Fourth Amendment, rather than a facial challenge, does not affect the outcome. In the present case, Plaintiffs have submitted sufficient evidence that the Fourth Amendment violations allegedly suffered by Plaintiffs directly resulted from the Beale Street Sweep. . . .The Court agrees with Plaintiffs that, assuming the Beale Street Sweep custom as alleged is factually established, the existence of the custom also establishes the City's responsibility for the custom. The relevant Supreme Court and Sixth Circuit precedent applies the 'deliberate indifference' standard in cases where a plaintiff asserts a § 1983 claim against a municipality for failure to act to protect an individual's constitutional right. . . Contrary to Defendant's position, the 'deliberate indifference' standard is inapplicable to the present case. Plaintiffs do not assert a claim against the City of Memphis for its 'inaction.' Rather, Plaintiffs assert that an unconstitutional custom exists to affirmatively remove individuals from the Beale Street area in violation of their constitutional rights. . . Because the alleged custom is an affirmative one, if Plaintiffs are able to factually establish the existence of the custom, Defendant City of Memphis' responsibility for the custom would be established. . .Plaintiffs cite to case law from other circuits to support the proposition that a facially unconstitutional custom or policy inherently satisfies the deliberate indifference standard. . . Sixth Circuit precedent does not go so far as to establish a bright line rule that a facially unconstitutional custom is exempt from the 'deliberate indifference' standard. The line drawn in Sixth Circuit case law is whether a plaintiff claims a constitutional violation based on a municipality's inaction. Accordingly, the Court declines to dismiss Plaintiffs' claims for failing to provide evidence of deliberate indifference."); ***Awalt v. Marketti***, 74 F.Supp.3d 909 (N.D. Ill. 2014) ("Like municipalities, '[p]rivate corporations acting under color of state law may ... be held liable for injuries resulting from their policies and practices.'. . . Plaintiff argues that the Sheriff's Office and CHC/HPL's decision not to implement a standardized grievance mechanism led to a widespread practice at the Jail of ignoring or delaying response to grievances and medical requests made by detainees. . . .The County Defendants argues that 'Plaintiff has produced no evidence of a widespread custom or practice that put the Sheriff's Office on notice that there were such

problems with these topics, or that such problems directly caused Awalt's death.'. . There is sufficient evidence, however, in the deposition testimony and affidavits of detainees at the Jail that Jail officers routinely ignored grievances. Further, Plaintiff's expert testified that a failure to routinely address detainee grievances created a substantial risk of injury. . . This is sufficient evidence for a reasonable jury to find a 'cognizable policy[]'. . . of failing to establish a reliable grievance process. Furthermore, this evidence is also a sufficient basis for a reasonable jury to find that this failure was the moving force behind Awalt's death. A reasonable jury could conclude that if the Jail had a practice of routinely following up with grievances and medical requests that Awalt's condition would have been addressed. And furthermore, a reasonable jury could also find that if Awalt's condition had been addressed, the seizure that led to his death would have been prevented or treated such that it would not have caused his death. . . . A reasonable jury could find that the lack of training at the Jail was so stark that the correctional officers were left without any reasonable frame of reference to determine when the attention of a medical professional was required. Common sense says that more training would create in the correctional officers a heightened awareness of, and sensitivity to, the detainees' medical needs. Regardless of whether training could change the correctional officer's ability to determine when a medical condition required professional attention, a reasonable jury could conclude that more extensive training would simply have made it more likely that a correctional officer would have been motivated to alert a medical professional to Awalt's condition in time to prevent his death. Although it is a close question on this factual record, the Court finds that there is sufficient evidence for a reasonable jury to find that the Sheriff's Office and CHC/HPL's failure to train the correctional officers caused Awalt's death. . . .Plaintiff has highlighted evidence showing that three detainees besides Awalt had seizure conditions, and were either not provided the medication they required or were ignored by the correctional officers while they suffered seizures at the Jail. Plaintiff has also identified six other detainees who did not receive the medical care or medication they needed while they were at the Jail. Furthermore, Plaintiff's expert has testified that of the 24 detainees booked at the Jail during the three months leading up to Awalt's booking, seven (including Awalt) identified a medical issue at intake, but were denied timely access to medical care or received medical care that fell far below the standard for correctional health care. Plaintiff's expert also testified that this rate of failure to provide medical care indicated that there was a systemic failure to provide medical care at the Jail. This is sufficient evidence for a reasonable jury to find that the Sheriff's Office and CHC/HPL had an implicit policy of deliberate indifference to the medical care provided to detainees. The County Defendants also contend that the denials of medical care Plaintiff cites are not 'sufficiently similar' to Awalt's experience. The County Defendants argue that Awalt must show that the Sheriff's Office and CHC/HPL have a widespread practice of causing detainee deaths by denying them anti-seizure medication. The County Defendants cite *Hahn v. Walsh,* 762 F.3d 617 (7th Cir.2014), in which the plaintiff claimed that his wife's death was caused by a jail's failure to have a policy to treat a diabetic detainee who refused to participate in her own care. The plaintiff in *Hahn* relied of evidence that seven other detainees had died in the defendant's jail from causes unrelated to diabetes. The court held the seven deaths were insufficient to alert the jail to any problem with its policy (or lack of a policy) for treating detainees like the plaintiff's wife. . . Here, by contrast, Plaintiff does not claim merely that the Sheriff's Office and CHC/HPL have a policy

of specifically denying detainees anti-seizure medication. Rather, Plaintiff argues that the Sheriff's Office and CHC/HPL are reckless in their medical care of detainees generally, and Awalt's death was caused by this general recklessness. In this case, evidence that detainees did not receive proper medical attention or were denied their medication is sufficiently similar to Awalt's experience because he too did not receive proper medical attention or medication."); ***Doe v. City of San Diego***, 35 F.Supp.3d 1233, 1239-40, 1244-45 (S.D. Cal. 2014) ("While the City implicitly acknowledges that a 'code of silence' may qualify as a type of custom able to invoke *Monell* liability, the City contends that Plaintiff has not sufficiently demonstrated that the SDPD abides by one. Instead, the City contends that Plaintiff's claim is 'premised solely on conclusions and assumptions using 20/20 hindsight.'. . The City argues that Arevalos was a rogue officer who acted alone, and that the SDPD had no evidence to suggest that Arevalos would sexually assault Plaintiff. . . According to the City, 'Plaintiff's theories are cobbled together by use of isolated incidents, conclusory opinions and opinions based upon non-existent or inadmissible facts. Plaintiff point[s] to events which have no relationship to one another and clearly fail to prove a City custom or policy that amounts to a widespread and longstanding practice.'. . In considering whether triable issues of fact remain, the Court disagrees. Plaintiff has presented sufficient evidence of a code of silence that exists within the SDPD, and which could constitute the moving force behind her constitutional injuries. Specifically, Plaintiff presents: (1) evidence of Arevalos' tenure with the SDPD, during which numerous bad acts went undocumented and largely undisciplined; (2) testimony from former police officers acknowledging the code of silence; (3) expert testimony opining as to the existence and scope of a code of silence. In light of this evidence, the Court finds that there are genuine issues of fact material to the resolution of Plaintiff's claim. . . . Based on the evidence cited, the Court finds that genuine issues of material fact remain with respect to whether a code of silence exists within the SDPD. Arevalos' history with the department serves as primary evidence of the custom. His police record was virtually impeccable, even though he sexually abused a number of women, had a reputation for seeking out and pulling over females, and called himself the 'Teflon Don.' Moreover, Plaintiff's experts, after reviewing the facts of the case, conclude that the code of silence is strictly adhered to within the SDPD. Moreover, Plaintiff's expert, Jeffrey Noble opines on the SDPD's deficient complaint acceptance and investigatory procedures, which, together, make it 'nearly impossible' for an officer to be held accountable for their misconduct. All of these facts demonstrate that there remain genuine disputes as to material facts with respect to whether a code of silence exists. . . . The City attempts to mitigate Plaintiff's evidence, arguing that the SDPD was not officially aware of several of the sexual assault cases until after Arevalos was arrested following the Jane Doe incident. Moreover, the City asserts that Plaintiff has 'cobbled together' unrelated facts from an 18–year period to establish her claim. However, the City fails to address the opinions rendered by Plaintiff's experts, which contain admissible evidence of the SDPD's inadequate reporting policies and pervasive nature of the code of silence. The expert opinions, combined with Arevalos' unfortunate history with the SDPD and the other facts cited previously, create genuine issues of material fact which the Court may not resolve."); ***Haley v. City of Boston***, No. 09–10197–RGS, 2013 WL 4936840, *6 (D. Mass. Sept. 12, 2013) ("The bottom line is that the testimony of Commissioner DiGrazia and Wasserman, if credited by a jury, would establish that *Brady* and possibly *Mooney* violations were rampant within

the BPD and possibly linked to the BPD's use of outdated policy manuals and deficient training in the constitutional obligations of police with respect to exculpatory evidence. That in turn would support a finding that constitutional violations were 'well settled' and 'widespread,' such that 'the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice.'. . The City's argument that the testimony is disputed and generic in many of its recitals is well-taken, but its weight and force are ultimately for the jury to decide."); ***Floyd v. City of New York***, 959 F.Supp.2d 540, 658-67 (S.D.N.Y. 2013) ("Plaintiffs established the City's liability for the NYPD's violation of their Fourth Amendment rights under two theories, either of which is adequate under *Monell: first*, plaintiffs showed that senior officials in the City and at the NYPD were deliberately indifferent to officers conducting unconstitutional stops and frisks; and *second*, plaintiffs showed that practices resulting in unconstitutional stops and frisks were sufficiently widespread that they had the force of law. . . . The NYPD's senior officials have violated section 1983 through their deliberate indifference to unconstitutional stops, frisks, and searches. They have received both actual and constructive notice since at least 1999 of widespread Fourth Amendment violations occurring as a result of the NYPD's stop and frisk practices. Despite this notice, they deliberately maintained and even escalated policies and practices that predictably resulted in even more widespread Fourth Amendment violations. . . The NYPD has repeatedly turned a blind eye to clear evidence of unconstitutional stops and frisks. Further evidence of deliberate indifference is found in the City's current positions as expressed at trial. The City continues to argue that *no* plaintiff or class member was subjected to an unconstitutional stop or frisk. . . .Throughout the class period, the need for better supervision, monitoring, training, and discipline to protect against constitutional violations was obvious, but senior officials at the NYPD '"fail[ed] to make meaningful efforts to address the risk of harm to plaintiffs."'. . .Despite the NYPD's deliberate failure to collect accurate data regarding stops that violate the Fourth Amendment, there is sufficient evidence of such stops to establish *Monell* liability based on 'practices so persistent and widespread as to practically have the force of law.'. . .The NYPD's practice of making stops that lack individualized reasonable suspicion has been so pervasive and persistent as to become not only a part of the NYPD's standard operating procedure, but a fact of daily life in some New York City neighborhoods. . . . Plaintiffs have established the City's liability for the NYPD's violation of plaintiffs' Fourteenth Amendment rights under two theories, either of which is adequate under *Monell*. *First*, plaintiffs showed that the City, through the NYPD, has a *policy* of indirect racial profiling based on local criminal suspect data. *Second*, plaintiffs showed that senior officials in the City and at the NYPD have been *deliberately indifferent* to the intentionally discriminatory application of stop and frisk at the managerial and officer levels. . . . Throughout this litigation the City has acknowledged and defended the NYPD's policy of conducting stops based in part on criminal suspect data, of which race is a primary factor. The NYPD implements this policy by emphasizing to officers the importance of stopping 'the right people.' In practice, officers are directed, sometimes expressly, to target certain racially defined groups for stops. . . .Racial profiling constitutes intentional discrimination in violation of the Equal Protection Clause if it involves any of the following: an express classification based on race that does not survive strict scrutiny;. . . the application of facially neutral criminal laws or law enforcement policies 'in an intentionally discriminatory

manner;'. . .or a facially neutral policy that has an adverse effect and was motivated by discriminatory animus. . .The City's policy of targeting "the right people" for stops clearly violates the Equal Protection Clause under the second method of proof, and, insofar as the use of race is explicit, the first. . . .This policy far exceeds the permissible use of race in stopping suspects as set forth in *Brown v. City of Oneonta, New York.* There, the Second Circuit held that when the police carry out stops as part of a 'search[ ] for a particular perpetrator,' the use of racial information from the victim's description of the suspect is not an express racial classification subject to strict scrutiny. . . .The NYPD's policy of targeting 'the right people' for stops, by contrast, is not directed toward the identification of a specific perpetrator. . . Rather, it is a policy of targeting expressly identified racial groups for stops *in general.* . . . In a case alleging that a municipality bears *Monell* liability based on senior officials' deliberate indifference to equal protection violations by subordinates, it is not necessary for plaintiffs to provide *direct* evidence that the senior officials were motivated by a discriminatory purpose. Rather, it is sufficient if plaintiffs show that: (1) subordinates followed a course of action in part because of its adverse effects on an identifiable group, and (2) senior officials were deliberately indifferent to those adverse effects in such a way that a reasonable inference can be drawn that those officials *intended* those adverse effects to occur. . . . Plaintiffs in this case *did* provide direct evidence of discriminatory intent, as discussed above. But plaintiffs also showed that senior officials in the City and at the NYPD have been deliberately indifferent to the discriminatory application of stop and frisk at the managerial and officer level such that a reasonable inference of discriminatory intent can be drawn. . . .The City and the NYPD's highest officials also continue to endorse the unsupportable position that racial profiling cannot exist provided that a stop is based on reasonable suspicion. . .This position is fundamentally inconsistent with the law of equal protection and represents a particularly disconcerting manifestation of indifference. . . . The Equal Protection Clause's prohibition on selective enforcement means that suspicious blacks and Hispanics may not be treated differently by the police than equally suspicious whites. . . .For the foregoing reasons, the City is liable for the violation of plaintiffs' Fourth and Fourteenth Amendment rights."); ***Hall v. City of Chicago***, No. 12 C 6834, 2012 WL 6727511, *6, *7 (N.D. Ill. Dec. 28, 2012) ("In their Complaint, Plaintiffs allege that the City knew or should have known that law enforcement officers were illegally stopping Plaintiffs because S04–13–09 requires patrol officers to submit their Contact Information Cards to supervisory officers. Plaintiffs suggest that the supervisory officer's knowledge is then imputed to the City. The Court disagrees. The Seventh Circuit recently held that a police supervisor is not a final policymaker for the purposes of § 1983 liability. . . .Notwithstanding this, Plaintiffs assert their Complaint sufficiently states a widespread practice theory under *Monell* because knowledge can be imputed to the City because of the pervasive nature of the practices at issue. As support for the widespread nature of the alleged unconstitutional practices, Plaintiffs provide statistical data in their Complaint which claims 'that unreasonable stops, warrant checks, and questionable justifications for reasonable suspicion have been occurring throughout the City on a regular basis for at least a decade.' . . .The City argues that Plaintiffs' data overstates the number of alleged unconstitutional seizures. The City contends that if Plaintiffs' statistical data for the last ten years are broken down annually, then the data would reveal that approximately 21.4 incidents occurred allegedly without reasonable suspicion and this 'hardly support[s] a conclusion that a

"widespread and pervasive" practice exists that was so systematic and permanent and well-settled that it had the force of law.'. . Given that the Court is required to accept as true all well-pleaded facts in the Plaintiffs' Complaint at the dismissal stage, the Court finds here that Plaintiffs' allegations with respect to the pervasive nature of the alleged constitutional violations is sufficient to establish that the practice was widespread enough to impute constructive knowledge to the City."); ***R.S. ex rel. S.S. v. Minnewaska Area School Dist. No. 2149***, 894 F.Supp.2d 1128, 1137 (D. Minn. 2012) ("Plaintiffs have sufficiently alleged a custom of punishing and searching private out-of-school online communications by the school defendants."); ***Zaborowski v. Dart***, No. 08 C 6946, 2011 WL 6660999, at *6 (N.D. Ill. Dec. 20, 2011) ("Plaintiffs have presented sufficient evidence raising a genuine dispute as to the material fact that the Sheriff's Office had a widespread practice of shackling pregnant detainees during labor, delivery, and/or recovery following delivery and that policymakers were aware of the custom or practice and did not take appropriate steps to protect the Class Plaintiffs."); ***Floyd v. City of New York***, 813 F.Supp.2d 417, 423-56 (S.D.N.Y. 2011) (*Floyd I*) ("[P]laintiffs contend that the City's actions have been woefully inadequate − in fact, so inadequate that the City has *constructively acquiesced* in a widespread pattern of unconstitutional stops and frisks, and exhibited *deliberate indifference* to the need for sufficient training, supervision, monitoring, and discipline to avert such constitutional violations, thereby warranting the imposition of municipal liability.Notably, this is not a question of municipal liability for an unusual yet foreseeable violation − an accident waiting to happen-but rather for a situation that thousands of NYPD patrol officers confront on a daily basis: deciding whether they are justified in stopping a resident based on factors giving rise to reasonable suspicion. . . . In short, there are numerous disputed issues of fact as to the constitutional sufficiency of the NYPD's *practice* of training, monitoring, supervising, and disciplining its officers for stops and frisks conducted in violation of the Fourth Amendment. . . . A duty to train arises so that subordinates entrusted with the discretionary exercise of municipal power can distinguish between lawful and unlawful choices. Because the exercise of such discretion can arise in myriad circumstances, the 'nuance' of a particular training need may only become apparent to municipal policy makers after a pattern of violations arises in substantially similar circumstances. . . . The City does not have a written policy requiring or permitting stops and frisks of persons without reasonable suspicion, nor do plaintiffs allege that it does. The question is whether municipal officials have a widespread custom or practice of unconstitutional stops and frisks that is 'so permanent and well settled as to constitute a "custom or usage" with the force of law,' or whether a custom or practice of subordinate employees is 'so manifest as to imply the constructive acquiescence of senior policy-making officials.' Plaintiffs focus their argument primarily on the latter standard. Construing the facts in the light most favorable to plaintiffs, I conclude that there are disputed issues of fact as to whether or not the City has acquiesced in a widespread custom or practice of unconstitutional stops and frisks. . . . In addition to alleging a widespread practice or custom of suspicionless stops, plaintiffs separately allege that NYPD supervisors have a widespread practice of imposing illegal stop and frisk, summons, and arrest quotas on officers, and that high-level policymakers have been aware of the quotas and have sometimes even encouraged their use 'by pressuring borough and precinct commanders to increase enforcement activity numbers.' . . . Proof that such quotas and/or pressure have caused the pattern of suspicionless stops will necessarily consist largely of

circumstantial evidence. Plaintiffs have presented the smoking gun of the roll call recordings, which, considered together with the statistical evidence, is sufficient circumstantial evidence for this claim to survive summary judgment. Even if plaintiffs' evidence of quotas or pressure post-dates the last stop alleged in the Complaint, plaintiffs allege an ongoing pattern that includes, but is not limited to, the specifically alleged incidents. Thus, I find defendants' argument in this respect to be unavailing. In sum, I find that there is a triable issue of fact as to whether NYPD supervisors have a custom or practice of imposing quotas on officer activity, and whether such quotas can be said to be the 'moving force' behind widespread suspicionless stops. Therefore, I deny defendants' motion for summary judgment on plaintiffs' Fourth Amendment claims against the City. . . . For an Equal Protection claim, discriminatory purpose may be proven through statistics alone. The statistical evidence in the instant case, while strong enough to show a disparate impact, is likely not strong enough to show discriminatory purpose standing alone. However, plaintiffs have presented other proof in addition to the statistical evidence-namely, the inadequacy of the City's efforts to take remedial steps to reduce the racial disparity of stops, as detailed above and further below. Viewing the evidence in the light most favorable to plaintiffs, and in view of the repeated notice of disparate impact and competing contentions over how complete the City's efforts to implement change have been, I cannot say that the City's purported corrective actions have been sufficient to negate the inference that intentional discrimination was the City's 'standard operating procedure.' I therefore deny defendants' summary judgment motion on plaintiffs' Equal Protection claims against the City. . . . This is clearly not a situation in which the City has taken *no* remedial steps. Nonetheless, considering the statistical evidence in conjunction with the narrative evidence of significant shortcomings in the ways that the City's policies have been put into practice, I find that there is a triable issue of fact as to whether the NYPD leadership has been deliberately indifferent to the need to train, monitor, supervise, and discipline its officers adequately in order to prevent a widespread pattern of suspicionless and race-based stops. I therefore deny defendants' summary judgment motion on plaintiffs' failure to train, supervise, monitor, and discipline claims against the City."[footnotes omitted]), on reconsideration, 813 F.Supp.2d 457 (S.D.N.Y. 2011)(motion to reinstate claims arising out of plaintiff's stop and frisk granted); ***Walden v. City of Chicago***, 755 F.Supp.2d 952, 972 (N.D. Ill. 2010) ("The Court finds that viewing all facts and all reasonable inferences in Walden's favor, he has presented sufficient evidence to raise a genuine issue of material fact as to whether Defendant had policies, practices, or customs of coercing confessions and preventing arrestees access to counsel, particularly in the case of African-American men, and whether those policies were the 'moving force' behind Walden's Fifth and Fourteenth Amendment injuries."); ***McElroy v. City of Lowell***, 741 F.Supp.2d 349, 355 (D. Mass. 2010) ("In this case. . . plaintiff fails to provide facts showing sufficient involvement of more than one officer that would justify holding the City liable. Plaintiff does state that there were multiple officers on scene and that they failed to intervene. Plaintiff, however, fails to provide facts that would demonstrate that officers engaged in a concerted action with the aim of violating his civil rights that is in any way similar to the conduct at issue in *Kibbe, Bordanaro* or *Webster.* The mere fact that other officers were in the vicinity, without facts showing active participation in the misconduct, is insufficient to state a plausible claim of municipal liability. Plaintiff additionally argues that it is not the concerted action of multiple officers that justifies imputing liability to the

City but rather the fact that so many officers failed to intervene while witnessing the alleged instance of excessive force and unlawful arrest. Plaintiff thus suggests that the inaction of the officers in the current case is analogous to the concert of action by officers found in the other cases and, therefore, the existence of a custom should similarly be inferred and liability thereby imputed to the City. Again, and unlike the instant case, the officers' conduct in *Kibbe, Bordanaro* and *Webster* was so egregious that even a layperson would have been aware that it violated the victims' civil and constitutional rights. In this case, however, the arresting officer's conduct is not so obviously improper. Even if later found to be unconstitutional, it is not such a flagrant violation that it would allow an inference of improper custom simply because witnessing officers did not intervene on plaintiff's behalf."); ***Lausin ex rel. Lausin v. Bishko***, 727 F.Supp.2d 610, 637 (N.D. Ohio 2010) ("Chief Rowe's actions in this case do not support any contention that the City of Richmond Heights has a custom of tolerance for federal rights violations. In order to support a claim for municipal liability on the basis of an unwritten policy of tolerating federal rights violations, a plaintiff must show: (1) the existence of a clear and persistent pattern of [illegal activity]; (2) notice or constructive notice on the part of the [defendant]; (3) the [defendant's] tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and (4) that the [defendant's] custom was the 'moving force' or direct causal link in the constitutional deprivation. . . Plaintiffs fail to make the required showing in several respects. First, Plaintiffs point only to the actions taken against Gina. Thus, they have failed to show a clear and persistent pattern of unconstitutional conduct. The presence of a custom or policy that is unconstitutional cannot be established by evidence of a single instance of allegedly unconstitutional conduct."); ***McIllwain v. Weaver***, No. 1:08CV00057-WRW, 2010 WL 670118, at *9 (E.D. Ark. Feb. 22, 2010) ("Sheriff Weaver testified that the policy was to strip search all arrestees going to general population. Officer Roberts testified likewise. There is evidence that training practices were inadequate. That there is a written policy requiring reasonable suspicion to search misdemeanor arrestee calls into question whether the alleged failure was a deliberate choice; and it is a question of fact whether any alleged failure to train caused Plaintiff's harm − if she was harmed. Because there are genuine issues of material fact in connection with Plaintiff's failure to train claim, both Defendants' Motions for Summary Judgment are denied on this issue."); ***Oxley v. Penobscot County***, No. 09-cv-21-B-W, 2010 WL 582222, at *14 (D. Me. Feb. 12, 2010) ("[T]his evidence is sufficient to support a finding that Penobscot County has a custom of subjecting misdemeanor arrestees to strip searches and cavity searches based on a watered down reasonable suspicion standard and fails to differentiate between arrestees destined for release on personal recognizance in short order and those who are destined for placement amidst the general prison population when it comes to strip search practices."); ***Cavanaugh v. Woods Cross City***, No. 1:08-CV-32-TC-BCW, 2009 WL 4981591, at *2, *5 (D. Utah Dec. 14, 2009) ("Woods Cross has a written policy stating Tasers may only be used when 'a subject is threatening himself, an officer, or another person with physical force and where alternative restraint tactics have been or are reasonably likely to fail.'. . . But Woods Cross Police Chief Paul Howard testified that he instructed use of force trainers to abandon this continuum of force policy and employ a 'reasonably necessary' test for the use of force. . . He also testified that contrary to the City's Use of Force policy, which states that '[i]t must be stressed that the use of

force is not left to the unfettered discretion of the involved officer,' officers were told that use of the Taser was entirely within their subjective judgment based on the totality of the circumstances. . . Chief Howard acknowledged that this difference created an ambiguity in the use of force policy for any officer applying it in the field. . . . Plaintiffs argue that the City's written policy, which implemented the continuum of force analysis for use of a Taser, was acceptable under the Constitution, but that Woods Cross had an unwritten policy that was the moving force behind this alleged constitutional deprivation. Specifically, Plaintiffs allege that Woods Cross's unwritten policy, established by Chief Howard, allowed for use of a Taser in the sole discretion of the officer without reference to warnings, violence of the offender, or danger to others. . . Chief Howard clearly testified that he ordered trainers to abandon the written use of force policy and replace it with a 'reasonably necessary' policy. Although Chief Howard's deposition is somewhat confused, he also consistently and repeatedly testified that officers were told in their training that the decision to use force is a solely subjective analysis. . .If true that a policy existed in which officers were trained to use only their own subjective judgment when firing a Taser, such a policy would be in violation of the constitutional standards for use of force. *See Graham*, 490 U.S. at 396. Therefore, provided it was the moving force behind the violation, the policy would subject the municipality to liability. . . In this case the Plaintiffs have shown that there are disputed issues of material fact regarding what policy was implemented in Woods Cross regarding use force. Accordingly, the City of Woods Cross's motion for summary judgment is DENIED."), *aff'd by Cavanaugh v. Woods Cross City*, 625 F.3d 661 (10th Cir. 2010); ***Bullock v. Dart***, 599 F.Supp.2d 947 (N.D. Ill. 2009)(County's policy and practice of segregating female possible discharges from remainder of female court returns, such that female actual returns could elect to avoid strip searches, but not segregating male possible discharges in similar manner, was not gender-neutral on its face, for purposes of Equal Protection Clause, even though all court returns were subject to strip searches if they returned to their divisions, where county excepted female actual discharges from requirement of returning to their living quarters.); ***Portis v. City of Chicago***, No. 02 C 3139, 2008 WL 4211558, at *1 (N.D. Ill. Sept. 9, 2008) (summary judgment on liability issue for Plaintiffs challenging practice and custom of City of detaining persons arrested for non-jailable ordinance violations "for more than two hours (and in some cases for as long as 16 hours or more) after it completed all of the administrative steps necessary to determine that they were eligible for release."); ***Brazier v. Oxford County***, No. 07-CV-54-B-W, 2008 WL 2065842, at *8, *9 (D. Me. May 13, 2008) ("Other courts have concluded that a well-settled, widespread custom cannot be established on the basis of two or three incidents involving a solitary officer. . . . [W]hen a particular officer engages in misconduct in the field, on his or her own, the inference that there is an underlying custom giving rise to the conduct is not logically drawn based exclusively on the incident itself, unless and until it is shown that the conduct is participated in by multiple officers or by the same officer on multiple occasions that have come to the attention of policymakers who have not addressed the misconduct through training or discipline. On the other hand, when a particular officer repeatedly engages in unlawful conduct during a routine procedure like processing a misdemeanor arrestee who fails to make bail or a misdemeanor detainee returning from court in shackles who is entitled to immediate release by court order, it is relatively difficult to understand how it would happen, or why any rational corrections officer would wish to perform

such a search, in the absence of a customary practice that has somehow endured despite the existence of a contrary written policy. . . . Ultimately, my recommendation is to deny summary judgment to Oxford County on count I due, essentially, to the fact that the processing that resulted in the alleged strip searches presumably followed a routine jail procedure, because Arlene Kerr's alleged conduct was similar under two separate and distinct scenarios, neither of which should have resulted in a strip search, and because of the potential finding that Arlene Kerr admitted to Brazier that her conduct conformed to the Jail's practice. This evidence appears minimally sufficient to support a finding that Brazier was subjected to unconstitutional strip searches arising from an established custom that could not or should not have gone unnoticed and would not have existed without the acquiescence of policymaking officials and, by extension, without an awareness of an obvious need for additional or different training."); ***Estate of Fields v. Nawotka***, No. 03-CV-1450, 2008 WL 746704, at *8, *9 (E.D. Wis. Mar. 18, 2008) ("The plaintiffs set forth that their claims are *not* based upon a failure to train; rather, they are based upon the failure of the Milwaukee Police Department's policy makers to formulate and execute an internal administrative review of officer shootings and discipline those that have been found to unreasonably use deadly force. . . The court determines that, based upon this theory, there is a genuine issue of material fact that precludes summary judgment. Viewing the evidence in the light most favorable to the plaintiffs, the court determines that there is a material factual issue regarding the police department customs. Unlike this court's previous decisions relating to *Monell* claims for a failure to investigate, the plaintiffs articulate and present evidence about Milwaukee Police Department's investigation practices that could establish their inadequacy. [relying on statements in Lou Reiter's expert affidavit]. . . . [T]he court finds that the plaintiffs' record evidence and supporting affidavits create genuine issues of material fact as to whether or not the investigation process did create a de facto policy of ratifying officer use of deadly force; the court further finds that the plaintiffs' submissions create a genuine issue for trial regarding the causal link between the review process and the fatal shootings."); ***Lopez v. City of Houston***, 2008 WL 437056, at *9, *10 (S.D.Tex. Feb. 14, 2008) ("In light of the severity, duration, and frequency of the alleged violations, as well as 'other evidence,' . . . the Court concludes there is a genuine fact issue as to the existence of an HPD custom in 2002 of using mass detention without individualized suspicion as a law enforcement tool. The following, viewed in the light most favorable to Plaintiffs, support this conclusion: (1) mass detentions without individualized suspicion occurred on three nights over a two month period; . . . . (2) HPD was focused on street racing during the summer of 2002, and created and vetted several plans to combat the racing, with the last plans (the Jackson and Game Plans) expressly incorporating mass detentions into the operation; . . . . (3) the operations on August 16 and 17 were extensively pre-planned by HPD; and (4) the HPD officers assigned to carry out Operation ERACER believed that mass detentions were acceptable and had been approved by high-ranking HPD officials. . . . Viewed together, and drawing all inferences in Plaintiffs' favor, the incidents within the summer of 2002 are sufficient to demonstrate a fact question as to whether HPD had a custom of mass detention without individualized reasonable suspicion. . . . When this evidence is viewed in the light most favorable to Plaintiffs, a jury could reasonably conclude that Chief Bradford had actual or constructive knowledge of an HPD custom of mass detention without individualized reasonable suspicion."); ***Monaco v. City of Camden***,

2008 WL 408423, at *14, *15 (D.N.J. Feb. 13, 2008) ("[A] reasonable jury could find, based on the evidence in the record, that it was the 'well settled' custom of the City and the Police Department not only to fail to conduct timely investigations into allegations of excessive force, . . . but that when such investigations were ultimately performed, they were directed less toward detecting and correcting misconduct than toward shoring up the Department's and the officers' defenses. A jury could reasonably find that such inattention to the question of whether police misconduct actually occurred was 'so likely to result in the violation of constitutional rights' as to evidence the City's deliberate indifference to its officers' use of excessive force. There is, moreover, a strong 'connection between the ... [allegedly inadequate policy identified] and the specific constitutional violation' Plaintiff alleges took place. . . That is, Plaintiff's evidence, if proved at trial, indicates that the City was indifferent to the risk that its officers would use excessive force, which is, according to Plaintiff, precisely what allegedly took place on May 31, 2002."); ***Henderson v. City and County of San Francisco,*** 2007 WL 2778682, at *2 n.2 (N.D. Cal. Sept.21, 2007) (not reported) ("Defendant contends that, in addition to proving that the custom was the moving force behind their injuries, Plaintiffs must also show that it constitutes deliberate indifference on the part of the government entity in order to establish municipal liability. . . Not so. A plaintiff must demonstrate deliberate indifference when it seeks to hold a municipality liable for 'failing to prevent a deprivation of federal rights.'. . Here, by contrast, Plaintiffs argue that an affirmative custom exists of requiring pre-trial and post-conviction detainees to sleep on the floor. 'Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, ... [s]ection 1983 itself contains no state-of-mind requirement independent of that necessary to state a violation of the underlying federal right.'. . Therefore, Plaintiffs need not show deliberate indifference to establish a threshold of potential liability under *Monell*. However, Plaintiffs must nonetheless 'establish the state of mind required to prove the underlying violation.'"); ***Mitchell v. CCA of Tennessee, Inc.***, No. 04-1031-A, 2007 WL 837293, at *6 (W.D. La. Mar. 15, 2007) ("In the present case, Plaintiff alleges that CCA has a 'custom' of ignoring inmates' complaints directed toward their employees. . . . Warden Todd and Chief Maxwell's failure to report or investigate Mitchell's complaint of sexual harassment, if true, creates a genuine issue of material fact as to whether CCA maintained an official custom of ignoring prisoner complaints against their employees. Moreover, proof of such a custom would suffice to show a direct causal link between CCA's policy and the deprivation of Plaintiff's federal rights. That is, absent CCA's failure to report or investigate Mitchell's allegation of sexual harassment in April of 2003, the sexual assault on Plaintiff in May 2003 would not have likely occurred."); ***Hogan v. City of Easton***, No. 04-759, 2006 WL 3702637, at *9, *10 (E.D. Pa. Dec. 12, 2006) (" The City argues that the Hogans have presented absolutely no evidence of a pattern of similar prior violations, which, as stated, they seek to limit to 'complaints or lawsuits in the prior ten years in which an EPD officer unjustifiably fired his weapon and/or was permitted to do so by EPD officials,' . . so as to support a policy or custom. Citing several decisions applying Eleventh Circuit law, they contend that the law requires evidence be 'of a specific nature and of prior incidents of similar alleged misconduct' to support the finding of a policy or custom. . . . There is no basis in our own Circuit law to limit the 'similar alleged conduct' in this case to only shooting incidents, when the Hogans' complaint alleges a more general policy and custom claim on the use of

excessive force. It is clear that when a plaintiff alleges that an officer violated his constitutional rights by using excessive force, municipal liability may be imposed under § 1983 if that same officer has a history of excessive force conduct.[citing *Beck*] To establish deliberate indifference on the part of supervisors and the municipality, a plaintiff also may point to evidence of deficient treatment of prior, similar complaints against that officer. . . . Even without consideration of the Chiefs' Evaluation and the Keystone Study, the Hogans have come forward with sufficient evidence that, if believed, would establish a claim of deliberate indifference by the City Defendants to the use of excessive force by the officers involved in the Hogan shooting. They have shown that Defendant Beitler was involved in three excessive force incidents before the Hogan standoff, but was appointed to the SWAT Team and later to the Criminal Investigation Division. Defendant Marraccini was involved in two excessive force incidents before the Hogan standoff, but was appointed to the SWAT Team, and was involved in other incidents thereafter. Captain Mazzeo allegedly has an extensive record of excessive force complaints filed against him during his career, resulting in substantial monetary settlements. The Hogans have identified at least 12 incidents of excessive force involving Mazzeo, 22 incidents of excessive force involving defendant Michael Orchulli, 6 incidents involving defendant Lawrence Palmer, and 2 involving defendant John Remaley. Combined with the Grand Jury Report − which found that, at the time of the Hogan incident, the City had no Code of Conduct, written safety rules, or recognized manual of policies, and that the command structure failed to identify and remedy obvious safety deficiencies − and the report of plaintiffs' expert Clark − who opined that the use of force here was excessive − the Hogans have satisfied their summary judgment burden of coming forward with sufficient evidence to establish the existence of a policy or custom of deliberate indifference to the use of excessive force by EPD members."); ***Mayes v. City of Hammond***, No. 2:03-CV-379-PRC, 2006 WL 1876979, 2006 WL 1876979, at *53 (N.D. Ind. July 5, 2006) (Plaintiff offered sufficient evidence that the HPD had a widespread policy or custom of failing to train its detectives in minimally acceptable police practices and of failing to supervise such that the City had not adopted an adequate policy regarding the preservation and production of exculpatory evidence."); ***Marriott v. County of Montgomery***, 426 F.Supp.2d 1, 9 (N.D.N.Y. 2006) ("Defendants' argument is seriously flawed. First, constitutional analysis of a procedure does not stop with analysis of the written policy. Both parties here have provided ample evidence that whatever the written policy stated, the procedure that was followed in fact by the COs required all admittees to remove their clothes, submit to a visual examination by the CO conducting the 'change out,' and shower, without the CO making any individual determination that the arrestee possessed contraband. Constitutional words cannot erase unconstitutional conduct."); ***Castillo v. City and County of San Francisco,*** No. C 05-00284 WHA, 2006 WL 194709, at *9 (N.D. Cal. Jan. 23, 2006) ("Given the facts of this case, the thrust of the inquiry is whether it was likely that arrestees would be hurt unnecessarily because the city told its officers to handcuff them behind their backs unless the prisoners needed immediate medical care, even if they were otherwise complaining of pain. . . . San Francisco's policy, when seen in the light most favorable to plaintiff, is to refuse to adjust handcuffs for anyone who does not have an immediate need for medical attention. As in *Alexander*, there was no appearance in the instant case of an immediate need for medical attention at the time plaintiff asked to have the handcuffs adjusted. The Ninth Circuit held that, in those circumstances,

police had used excessive force. A reasonable jury, fully crediting plaintiff's evidence, similarly could conclude that San Francisco's policy obviously was inadequate to prevent such a tort and that the city thereby exhibited deliberate indifference. This Court therefore cannot hold that the City and County of San Francisco is entitled to summary judgment on the *Monell* excessive-force claim."); ***Hare v. Zitek***, No. 02 C 3973, 2005 WL 3470307, at *25 (N.D. Ill. Dec. 15, 2005) ("In an effort to show that the Village's retaliation was inflicted consistent with the Village's widespread practice of retaliation, Mr. Hare has presented testimony from numerous Stickney Police officers, who cooperated with the SAO [State's Attorney's Office]. These officers all testified that they were passed over for promotions, reprimanded, or terminated as a result of their cooperation. This testimony is sufficient to establish a series of violations and create a factual dispute on the issue of whether the Village had a widespread practice of retaliation against those who spoke against the alleged Village corruption."); ***Jackson v. Marion County Sheriff's Dep't.***, No. 103CV0879 DFHTAB, 2005 WL 3358876, at *8 (S.D. Ind. Dec. 9, 2005) ("On the overcrowding issue, however, there is sufficient evidence to present to a jury. Jackson has come forward with evidence of extreme overcrowding of the Lock-Up that was so prolonged as to amount to a government custom or policy reflecting deliberate indifference to likely violations of the constitutional rights of detainees. A jury could reasonably find on this record that the overcrowding presented a substantial risk of serious injury to detainees, that the Sheriff failed to take appropriate steps to protect inmates in this situation, and that the failure caused the beating of Jackson. The Sheriff is not entitled to summary judgment on this claim. Jackson has put forth evidence showing that at least as of May 1999 (27 years after the lead lawsuit was filed), the Sheriff was on notice that the overcrowded conditions of the Lock-Up led directly to inmate-on-inmate violence in violation of constitutional protections. In May 1999, for example, Judge Dillin found that due to overcrowding in the Lock-Up, 'fights in the cellblocks are commonplace, supervision within the cellblocks is minimal, fortuitous, or nonexistent, and injuries from the conflicts are an everyday occurrence.... These are conditions of 'current and ongoing' constitutional violations, and in this court's view are the result of the overcrowding in the Lockup.'. . .Three days before Jackson was beaten, the Sheriff was served with a Verified Petition for Contempt asserting that the overcrowding continued. The Sheriff responded to this petition by moving for a continuance of the contempt proceedings to determine if interim measures would resolve 'the overpopulation problems in the Marion County Lockup.'. . The Sheriff points to some of these interim measures as evidence of his efforts to alleviate the overcrowding and to improve conditions in the Lock-Up. However, Jackson has put forth evidence that on the day he was beaten, the Lock-Up was packed far beyond its 213 detainee population cap, and that the specific cell block where Jackson was kept was filled far beyond its capacity as well. Though evidence of Jackson's mental illness is incapable of supporting an independent claim for relief, it is still relevant to the issue of whether the overcrowding presented a substantial risk of serious injury to Jackson. Likewise, the Sheriff's intake and segregation policies may indeed be relevant to determining whether the Sheriff took appropriate steps to protect detainees from the substantial risk of serious harm posed by overcrowding."); ***Tardiff v. Knox County,*** 397 F.Supp.2d 115, 131, 132 , 135, 136 (D.Me. 2005)("While Knox County Policies C-120 and D-220 have clearly stated, since October 1994, that misdemeanor detainees are not to be strip searched without reasonable suspicion, the record

presents undisputed evidence that substantial numbers of persons arrested for misdemeanor offenses were routinely strip searched without reasonable suspicion at the Knox County Jail. The reports generated by the Department of Corrections following the 1994 Jail Inspection and the 2000 Jail Inspection find, based on staff statements made at those times, that corrections officers at the jail were strip searching all detainees charged with misdemeanors. . . . Based on the undisputed evidence presented in the summary judgment record, the record shows, without cavil, that the practice by corrections officers of strip searching misdemeanor detainees was so widespread that the policymaking officials of the municipality had constructive knowledge of it. Moreover, the Court concludes that Knox County personnel with policy-making authority had actual notice that the corrections officers were unlawfully strip searching misdemeanor detainees without reasonable suspicion. . . . Even though it failed to promulgate new written procedures to eliminate the unconstitutional practice, Knox County could have employed a training regime directed at correcting the unconstitutional practice. . . . However, even if new officers' initial training on strip searches was conducted in accord with the written policy, such training was not aimed at stopping the corrections officers who were engaged in institutionally entrenched unconstitutional practice of strip searching all misdemeanor detainees brought to the Knox County Jail. The result was an ongoing practice that was far removed from the written policy. . . .The record before the Court contains no evidence that any official from Knox County directed, by way of written policy or procedure, training, or other means, that the unconstitutional practice stop. It could be argued that the direction to stop strip searching all misdemeanor detainees was implicit in the new procedures and training. Given the strong evidence of the persistence of the unconstitutional practice even after the 2001 procedural changes, no reasonable person could conclude that the actions of Knox County were directed at stopping the practice. At some point, it must have been evident to Knox County officials that the corrections staff had not gotten the message. Yet, there is no evidence that, even after the 2000 Jail Inspection Report indicated that the practice of strip searching all misdemeanor detainees who were housed continued, Sheriff Davey or any other official from Knox County promulgated any procedures, conducted any training, or engaged in any closer oversight, directed at eliminating the unconstitutional misdemeanor search practices of the corrections officers at the Knox County Jail. . . .The Court will, therefore, grant Plaintiffs' Motion for Partial Summary Judgment against Knox County on that part of Count I as to liability alleging that Plaintiffs' constitutional rights were violated as a result of the custom and practice of strip searching all misdemeanor detainees without reasonable suspicion."); ***Santiago v. Feeney***, 379 F.Supp.2d 150, 159 (D. Mass. 2005) ("Plaintiff does not argue that the City's strip search policy is unconstitutional. Plaintiff contends that the City promotes a custom of illegal strip searches because its policy is ambiguous regarding how non-custodial strip searches must be authorized and conducted. . . While it can be argued that the City's strip search policy is ambiguous concerning whether a warrant must expressly authorize a strip search, it cannot be said that the City promoted a custom of *unconstitutional* strip searches."); ***Lingenfelter v. Bd. of County Commissioners of Reno County,*** 359 F.Supp.2d 1163, 1170, 1171 (D. Kan. 2005) ("Although he acknowledges his status as a county decision-maker and the jail's caretaker, Sheriff Rovenstine contends that he has no duty to ensure that detainees arrested without a warrant receive a probable cause hearing or gain release. Sheriff Rovenstine believes that

someone else, perhaps the arresting officer or the prosecutor, is responsible for the period of confinement between a warrantless arrest and a judicial determination of probable cause. We find unconvincing the sheriff's attempt to shrug off his federal constitutional responsibilities toward detainees confined in the Kosciusko County Jail who have not yet had a probable cause hearing. . . . In the final analysis, the sheriff is the custodian of the persons incarcerated in the jail, and as such, it is he who is answerable for the legality of their custody. . . . Although it is true that the custodian of an arrestee does not have authority to force a judge to make a determination of probable cause, the custodian does have the power to release an arrestee if no timely probable cause finding has been made. Moreover, a failure by a custodian to notify a court of the need for a probable cause determination or a failure to ascertain whether a judicial determination of probable cause has been made are situations in which a custodian's actions could be found to be a proximate cause of a *Gerstein* violation. And if such actions are the result of a municipal policy or custom, as is alleged here, the municipality itself could be liable for having caused the violation."); ***Gremo v. Karlin***, 363 F.Supp.2d 771, 792 (E.D. Pa. 2005) ("In the present case, plaintiff has sufficiently alleged that Gremo's harm was caused by a constitutional violation and that the municipal defendants, the City of Philadelphia and the School District of Philadelphia, may be held responsible for that constitutional violation because of their policies and/or customs. The municipal defendants' policies and/or customs alleged in the amended complaint included concealing information about violence, failing to address safety concerns, failing to train employees to avoid violations of constitutional rights, and cultivating an atmosphere where employees of the municipal defendants would fail to report incidents of violence. Gremo has satisfactorily stated a claim that defendants the City of Philadelphia and the School District of Philadelphia can be held constitutionally liable under 42 U.S.C. § 1983 for violating plaintiff's substantive due process right to bodily integrity secured by the Fourteenth Amendments to the United States Constitution."); ***Panaderia La Diana, Inc. v. Salt Lake City Corp.,*** 342 F.Supp.2d 1013, 1036 (D. Utah 2004) ("A city cannot shield itself from all liability for potential constitutional violations by the simple expedient of enacting a general policy statement that it is the city's policy to not violate constitutional rights."); ***Otero v. Wood,*** 316 F.Supp.2d 612, 627 (S.D. Ohio 2004) ("There are two distinct bases that support municipal liability in this case. First, liability may be based on the City policy that allows the use of wooden baton rounds as a 'first resort' − before the use of less dangerous alternatives. Plaintiff has presented evidence that the City has a policy of discouraging the use of tear gas. Curmode testified that she was ordered by the Deputy Chief of the CDP to discourage the SWAT unit's use of tear gas. This order originated from the policy level of the City and therefore represents City policy, even though it is an unwritten policy. This order was a moving force behind the decision to use wooden baton rounds, or at least to use wooden baton rounds as the first resort, so soon after providing a warning. The Court has already held that the mere use of knee knocker rounds under the circumstances here was excessive force, at least under the facts as presented by Plaintiff. Whatever policy the City had regarding the use of riot guns loaded with wooden baton rounds allowed those guns to be used before extensive warnings, warning shots, or tear gas − all of which would have decreased the risk of serious bodily injury. The City therefore had a policy that caused the excessive force, thereby causing Plaintiff's injury. The second ground for municipal liability here is based on the City's ratification of the unlawful

conduct. Defendants are correct that, generally speaking, evidence of later events cannot establish that a given violation was caused by an official custom or policy. . . A municipality may, however, ratify its employees' acts − thereby subjecting itself to § 1983 liability − by failing meaningfully to investigate those acts. . . Viewed in this light, evidence that a municipality inadequately investigated an alleged constitutional violation can be seen as evidence of a policy that would condone the conduct at issue."); ***Barry v. New York City Police Department,*** No. 01 Civ.10627 CBM, 2004 WL 758299, at *13 (S.D.N.Y. Apr. 7, 2004) (not reported) ("Unlike other cases in which courts have found insufficient evidence of a custom of retaliation, plaintiff's witnesses speak from firsthand experience about the blue wall of silence and plaintiff alleges to have suffered a wide range of retaliatory acts as opposed to one discrete instance of retaliation. . . . Moreover, in contradistinction to the cases defendants cite in defense of their claim that the court should disregard the factual findings of the Mollen Report, here, plaintiff complains of acts that are of the precise nature as the customs and practices described in the Report. As such, the Report is admissible with regard to its factual findings. . . . On balance, in light of the evidence before the court, a reasonable jury could find that a widespread custom of retaliating against officers who expose police misconduct, with officials willfully ignoring if not facilitating the practice, pervades the NYPD."); ***Leisure v. City of Cincinnati,*** 267 F. Supp.2d 848, 857, 858 (S.D. Ohio 2003) ("Though the City runs through a laundry list of 'constitutionally adequate policies and procedures' it has on the books, Plaintiffs' Second Amended Complaint, as explained above, can be read to attack an unwritten custom articulated by the Chief of Police. That unwritten custom, Plaintiffs allege, makes a game of pursuits, that 'cops like a good foot pursuit...the thrill of victory the agony of defeat' . . Defendant correctly cites to *Doe v. Tennessee,* 103 F.3d 495 (6th Cir.1996) for authority on unconstitutional custom, including the proposition that such custom 'must be so permanent and well settled as to constitute a custom or usage with the force of law' . . . Plaintiffs' Second Amended Complaint alleges that an unwritten custom has persisted for many years, citing to events and history that Defendant challenged as 'unrelated' and 'irrelevant' to Plaintiffs' injury. The Court finds that Plaintiffs' Second Amended Complaint adequately pleads that the City has had unconstitutional customs so permanent and well settled as to meet the Sixth Circuit's definition in *Doe*."); ***Garcia v. City of Chicago,*** No. 01 C 8945, 2003 WL 1845397, at **3-5 (N.D. Ill. Apr. 8, 2003) (not reported) ("The relevant question is whether Garcia's injury would have been avoided had the City adequately investigated, disciplined, and prosecuted its police officer employees, instead of protecting them from taking responsibility for their misconduct. . . . In *Latuszkin,* after concluding that there was no basis to find that any city policymakers' were directly involved in the acts at issue, which is a finding under the third method of establishing a municipal policy, the Seventh Circuit went on to find that furthermore, 'nothing in Mr. Latuszkin's complaint suggests that a few parties held in a police department parking lot should have come to the attention of City policymakers.'. . This determination constitutes a finding under [] the second method of proving a municipal policy existed, whether there was a widespread practice. In this case, it is true that Garcia did not present evidence that the final policymaker for the City of Chicago, the City Council, directly participated in the failure to investigate and discipline Chicago Police officers who allegedly committed acts of excessive force. Instead, this court's denial of summary judgment was based upon Garcia's presentation of evidence that the failure to investigate and discipline was

'so persistent and widespread that the City policymakers *should have known* about the behavior.' . . . evaluating all the facts in the light most favorable to Garcia, and drawing all reasonable inferences in Garcia's favor, a reasonable juror could conclude that a custom or policy of not investigating alleged misconduct of police officers, whether they are acting under color of law or as private citizens, would result in police officers, such as Oshana, believing they could use excessive force against civilians, such as Garcia, with impunity."); ***Garrett v. Unified Government of Athens-Clarke County,*** 246 F. Supp.2d 1262, 1279, 1280 (M.D. Ga. 2003) ("[T]he Unified Government had no formal, written policy instructing officers to hog-tie suspects in a manner that would violate their constitutional rights. Therefore, the Court must now determine whether the Unified Government had informally adopted a custom of unconstitutionally hog-tying suspects . . . .The Court finds that Plaintiff has presented sufficient evidence to show that the Unified Government had a widespread custom of using the hog-tie restraint on suspects. . . . However, a finding that there was widespread use of the hog-tie restraint does not automatically equate to a finding that there was widespread *unconstitutional* use of the hog-tie restraint so as to impose municipal liability. . . . Although Plaintiff has presented evidence that Athens-Clarke County officers regularly used the hog-tie restraint, she has not presented any evidence from which a reasonable jury could infer that the hog-tie restraint was persistently employed in an unconstitutional manner so as to constitute a custom of the Unified Government."), *reversed and remanded on other grounds*, 378 F.3d 1274 (11th Cir. 2004); ***Sarnicola v. County of Westchester,*** 229 F. Supp.2d 259, 276 (S.D.N.Y. 2002) ("Sgt. McGurn's actions did not accord with the written strip search/body cavity search policy of Westchester County, which requires reasonable suspicion based on the circumstances of the case. . . However, while the search was a violation of the written policy of Westchester County, it may have been undertaken pursuant to the actual practices and usual customs of the Westchester County police. The deposition testimony of both Sgt. McGurn and Officer Beckley suggest that stip searching all felony narcotics arrestees (possibly including a visual body cavity search) was a routine practice of the County Police. . . The potential contradiction between the policy and the practices of the Westchester County Police preclude summary judgement."); ***Williams v. Payne***, 73 F. Supp.2d 785, 798 (E.D. Mich. 1999) ("One clear and reasonable conclusion that can be drawn from these admissions is that the City of Pontiac, through its police department, maintained a widespread practice to take suspects whom they believed to have ingested narcotic evidence to a hospital for a stomach pumping procedure. These admissions also suggest that one of the ordinary, foreseeable tasks of a police officer is to confront people who are suspected of engaging in the illicit drug market, and that such people commonly ingest drug-related evidence. The facts, when taken in the light most favorable to the opponent of the motion, are sufficient to create a genuine issue of a material fact as to whether a claimed unconstitutional police practice was so widespread as to evince deliberate indifference on the part of the City which resulted in a violation of Williams' constitutional rights."); ***Flores v. City of Mount Vernon***, 41 F. Supp.2d 439, 446 (S.D.N.Y. 1999) ("No *Monell* motion has been made by the municipal defendants here, and none would lie, since the search was conducted pursuant to an admitted policy of strip searching everyone who was arrested for narcotics activity."); ***Open Inns, Ltd. v. Chester County Sheriff's Dep't***, 24 F. Supp.2d 410, 429, 430 (E.D. Pa. 1998) ("[W]e find that the Chester County Sheriff's Department has an admitted unconstitutional custom or practice

of authorizing its officers, at any hour of the day or night, to be hired by private parties to accompany and assist them in serving process in civil actions and then to remain on the premises at the behest (and expense) of the private parties while those private parties carry out seizures, without any inquiry into the legality of such actions, such as whether the seizures are taken pursuant to an antecedent court order or writ."); ***Gary v. Sheahan***, No. 96 C 7294, 1998 WL 547116, *6 (N.D. Ill. Aug. 20, 1998) (not reported) ("[T]his court finds that there is no issue of material fact regarding whether a municipal policy existed that required the routine strip searching of women while men were not routinely subjected to such a strip search in the receiving room upon returning from court. The fact that such a policy is not a written policy or, indeed conflicts with a written statement of policy, does not defeat the plaintiffs' claim that such a policy existed. This court finds that the practice under review was so widespread so as to constitute a de facto policy."); ***Brown v. City of Margate***, 842 F. Supp. 515, 518 (S.D. Fla. 1993) ("[A] smaller number of incidents where the investigation and resulting disciplinary actions were inadequate may be more indicative of a pattern than a larger number of incidents where the department fully and satisfactorily addressed the matter and responded appropriately. . . . While the six incidents of alleged excessive use of force in *Carter [v. District of Columbia*] may not have been statistically significant in Washington, D.C., three such incidents may be sufficient to establish a pattern in Margate."), *aff'd*, 56 F.3d 1390 (11th Cir. 1995); ***Pottinger v. City of Miami***, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992) (Class of homeless persons established that unconstitutional arrests and property seizures by city police were executed pursuant to city custom or policy, so as to make city liable under section 1983.); ***Gomez v. Metro Dade County, Fla.***, 801 F. Supp. 674, 679 (S.D. Fla. 1992) ("In order to impose liability under a 'custom or usage' theory of municipal liability, [plaintiff] must prove a longstanding and widespread practice that is deemed authorized by policymaking officials because they must have known about it and failed to stop it."); ***McDonald v. Dunning***, 760 F. Supp. 1156, 1170 (E.D. Va. 1991) (policy of incarcerating persons arrested on warrant for failure to appear to serve sentence previously imposed without permitting such persons appearance before judicial officer).

See also ***McDowell v. District of Columbia***, 233 F.R.D. 192, 200, 201, 204 (D.D.C. 2006) ("Plaintiff's theory of the case is that Officer S. Williams ("Williams") of the Metropolitan Police Department violated her rights by conducting an illegal strip search and body cavity search. Plaintiff is suing both the District of Columbia and Williams, in her individual capacity. As a result of the difficulties faced by plaintiff in trying to obtain discovery in this case, plaintiff seeks an order granting summary judgment against the District as to the 'practice of allowing in the field strip searches or searches that involve viewing or touching inside the clothes searches' as well as costs and attorneys' fees incurred by plaintiff as a result of defendants' failure to produce the requested discovery materials, namely, the spreadsheet and PD 163's. . . Plaintiff moves under Rule 37 of the Federal Rules of Civil Procedure. . . . By requesting that the court granted summary judgment as to her claim that defendants engage in a practice of allowing improper strip searches, plaintiff is in essence seeking a default judgment. In general, courts favor disposing of cases on their merits. . . Thus, courts must take care, especially when contemplating a litigation-ending sanction, to ensure that it is proportional to the underlying conduct. . .This care requires

consideration of three factors: 1) the resulting prejudice to the opposing party, 2) the resulting prejudice to the judicial system, and 3) the need to deter such behavior in the future. . . . As in *Caldwell*, an award of attorneys fees is indeed warranted here. But for the inefficiencies in defendants' filing system, taken as a whole, discovery in this case would never have dragged on as it has. Such an award, therefore, coupled with a carefully worded instruction to the jury, explaining that a negative inference may be drawn from defendants' inability to locate information within its possession, will more than suffice. . . . Defendants' conduct in this case, while exasperating, in no way suggests any underlying bad faith. The resulting prejudice to the court is not as great as it could have been, because trial dates have not yet been set. On the other hand, the resulting prejudice to plaintiff, the probable inability to obtain the discovery necessary to make out her *Monell* claim, is significant. However, this resulting prejudice, coupled with the need to deter such behavior in the future, can be adequately remedied by the imposition of attorneys' fees and costs against defendants and the possibility of a jury instruction that addresses plaintiff's lack of evidence as to her *Monell* claim.").

Note that liability is attributed to the government unit in custom type cases through a policymaker's actual or constructive knowledge of and acquiescence in the unconstitutional custom or practice. *See, e.g.,* ***Baron v. Suffolk County Sheriff's Dep't,*** 402 F.3d 225, 240-43(1st Cir. 2005) (The Department assigns error to the district court's identification of 'the Department' as the relevant policymaker, arguing that the failure to identify a specific final policymaker within the Department was erroneous because it allowed the jury to find municipal liability if any Department employee knew of Baron's harassment claims. . . Although the district court's instruction would be error if understood this way, . . . it must be read as qualified by the court's later statement that liability could be imposed only if 'Department policymakers' were aware of the custom of retaliation and Baron's situation. It is highly unlikely that the jury interpreted the phrase 'Department policymakers' to mean 'any Department employee,' particularly in light of evidence that the Department superintendent, not just 'any' employee, was aware of Baron's complaints. Yet, even this qualified version of the court's statement might be too broad under the case law because it is only a policy made by the final policymaker that exposes a municipality to liability . . . . Therefore, in a case alleging an affirmative wrongful policy (as opposed to a custom acquiesced in), the court would have to identify an individual or body as the final policymaker, and the jury would have to determine whether the policy at issue could be attributed to that policymaker. . . However, Baron claims not that an individual or body adopted an unconstitutional policy but that the Department had a custom tolerated by policymakers who should have intervened to correct it. In this custom context, our past language has sometimes referred to policymakers in the plural, rather than to a final policymaker. . . The requirement in the affirmative policy cases that the district court identify a final policymaker may therefore not apply in those cases based on custom. . . . We need not resolve this question here; under the plain error standard, it is enough that any error in the district court's reference to 'Department policymakers' without identification of a specific final policymaker is not clear. Moreover, even if the district court should have identified a final policymaker in this custom case, the Department is not entitled to a new trial because it cannot show prejudice resulting from the error. In a post-trial ruling, the district

court concluded without explanation that the superintendent and deputy superintendent set policy for the jail in the relevant areas, implying that it believed Feeney was the relevant policymaker. . . If Feeney did set final policy for the House of Correction, the Department was not prejudiced by the verdict because he admitted that he knew that the code of ilence existed, that there could be consequences for violating it, and that Baron had complained of harassment. In other words, the jury could have found that Feeney had knowledge of the custom that resulted in a deprivation of Baron's constitutional rights and that he acquiesced in the custom by failing to take actions to stop it. The Department asserts, however, that Sheriff Rouse, not Feeney, was the final policymaker under state law. Although there is no evidence on this issue in the record, it seems self-evident that the sheriff is the final policymaker within the Department as a matter of law. . . Emphasizing that Baron did not present any evidence regarding the Sheriff's actual knowledge of the code of silence and retaliatory harassment, the Department contends that a legal determination that the Sheriff was the final policymaker conclusively establishes prejudice. On this point, the Department is wrong. It is true that Baron did not demonstrate that the Sheriff actually knew of the custom that led to his constructive discharge. Although Rouse may not have had actual knowledge of the custom, however, municipal liability can also be based on a policymaker's constructive knowledge − that is, if the custom is so widespread that municipal policymakers should have known of it. . . If the jury had been instructed that Rouse was the policymaker, it might have agreed that there was insufficient evidence to establish that he acquiesced in or condoned enforcement of the code of silence. On the other hand, the jury might also have concluded that if Superintendent Feeney was aware of the code of silence as third-in-command in the Department, constructive knowledge was also attributable to Rouse. . . . n short, the code of silence charged by Baron was real and pervasive. Viewing the verdict against this background, we conclude that the jury instruction's failure to identify a policymaker was not an error (if an error at all) that 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'"); ***Jeffes v. Barnes***, 208 F.3d 49, 64 (2d Cir. 2000)("In sum, a jury could permissibly find that the code of silence was part of Barnes's standard operating procedure at the Jail and that his affirmative actions were a direct cause of the violations of plaintiffs' First Amendment rights. In light of the scope, duration, openness, and pervasiveness of the retaliation against officers who broke the code of silence, the jury could find that Barnes was well aware of the existence and thrust of those acts of retaliation. Based on his failure to make any effort to forestall, halt, or redress the retaliatory conduct, the jury could well find that, even if Barnes did not directly cause the retaliation, he either acquiesced in it or was deliberately indifferent to the reprisals against officers who exercised their First Amendment rights in breach of the code of silence. Given our conclusion as a matter of law that Barnes was the County's final policymaker with respect to the conduct of his staff members toward one another in this area, any of these findings would suffice for the imposition of liability on the County."); ***McNabola v. Chicago Transit Authority***, 10 F.3d 501, 511 (7th Cir. 1993) ("A municipal 'custom' may be established by proof of the knowledge of policymaking officials and their acquiescence in the established practice."); ***Sorlucco v. New York City Police Department***, 971 F.2d 864, 871 (2d Cir. 1992) ("[A] § 1983 plaintiff may establish a municipality's liability by demonstrating that the actions of subordinate officers are sufficiently widespread to constitute the constructive acquiescence of senior policymakers."); ***Brown v. City of Fort Lauderdale***, 923 F.2d 1474 (11th

Cir. 1991) ("[A] longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it."); ***Bielevicz v. Dubinon***, 915 F.2d 845, 854 (3d Cir. 1990) (jury could infer that policymakers knew of custom of using charge of public drunkenness to incarcerate individuals who were not intoxicated).

See also ***M.N.O. v. Magana,*** Nos. Civ. 03-6393-TC, Civ. 04-1021-TC, Civ. 04-6017-TC, Civ. 04-6018-TC, Civ.04-6183-TC, Civ. 04-6443-TC, 2006 WL 559214, at *11, *12 (D. Ore. Mar. 6, 2006) ("When the Chief learned in April 2002 of Magana's stop of Dean, and everyone from the IA investigator, to the auditor, to the Chief himself believed Magana was probably lying about what happened, the need for more or different action was obvious, as the existent policy of dealing with the supervision of officers and the handling of reports of sexual misconduct was clearly likely to result in the violation of someone's constitutional rights. Although defendant alleges that the Chief could not have known from the Dean report the ultimate extent of Magana and Lara's activities, and that they were going to deprive women of their rights to be free from sexual assault from officers, it is quite clear that the Chief was aware that Magana was likely stopping Dean without a reasonable basis to do so, which is a constitutional violation itself. Further, a factfinder could reasonably conclude that an obvious possible conclusion of these sorts of stops would carry into the realm of sexual assault. A police officer who 'hits' on women he encounters while on duty and lies about his conduct is a flagrant and transparent concern. At a minimum, the incident should have alerted the Chief to the need for greater supervision of Magana's contacts with women while on patrol. In sum, a factfinder could find that the Chiefs' collective failure to do anything, even after Buchanan learned of the Dean incident, constituted deliberate indifference. Finally, it is an easy call that whether such deliberate indifference was a causal factor in causing plaintiffs' constitutional injuries is a jury question. If the jury concludes that policymakers were deliberately indifferent in their failure to act to protect plaintiffs' constitutional rights and that such amounted to an official policy or custom of inaction, that jury could conclude that such policy of inaction was a direct causal link in causing the injuries. For the above reasons, defendant's motion for summary judgment on plaintiffs' claims alleging *Monell* liability against the City is denied."); ***Brown v. Mitchell***, 327 F.Supp.2d 615, 634, 635, 646 (E.D. Va. 2004) ("In sum, therefore, at least as respects capital improvements and the Jail, as a matter of local law, although the City Manager certainly has the duty to advise and to make recommendations, Dr. Jamison's office is not the repository of final policymaking authority. . . Rather, the City Charter vests that role in the City Council. As a matter of law, the Court holds that, as respects Brown's Section 1983 suit against the City, the City Council constitutes the final policymaking entity. That holding, however, is not fatal to Brown's Section 1983 case against the City because the record contains substantial evidence that, when construed in the light most favorable to the nonmoving party, would permit the jury to conclude that the City Council itself had knowledge of the conditions at the Jail and engaged in an official policy or custom of inaction towards the Jail in the period leading up to Stevenson's death. . . And, because the City Council constitutes the final policymaking authority respecting the Jail, this evidence is sufficient for purposes of summary judgment and the *Monell* 'custom or policy' requirement. . . . Taken as a whole, the record would permit a reasonable jury to find that the City Council, and hence the City, was aware of the long history of overcrowding,

poor ventilation, and structural defects at the Jail and the risks that those conditions posed, including the risk of spreading infectious disease. Moreover, a jury could conclude that the Jail's conditions violated established federal constitutional rights. And, the record clearly would permit a reasonable jury to conclude that the well-established custom and policy of the City was to be deliberately indifferent to the rights allegedly violated. . . . Simply put, the record here would support a finding that Mitchell, who is statutorily responsible for the safe housing of the City's inmates, knowingly maintained a dangerously overcrowded facility. And, when construed in the light most favorable to the nonmoving party, the fact that Mitchell, by bringing the overcrowding issue to the attention of various City officials, took some steps to alleviate this serious problem does not eliminate the prospect that a jury would so conclude. To be sure, Mitchell can offer that evidence to establish her state of mind. But, that evidence, considered with the record as a whole, merely creates a disputed issue of fact. It does not keep the case from the jury."); ***Blair v. City of Cleveland,*** 148 F. Supp.2d 894, 915 (N.D. Ohio 2000)("Plaintiffs in the case *sub judice* cannot establish that there was a persistent, pervasive practice, attributable to a course deliberately pursued by official policy-makers, which caused the deprivation of Pipkins' constitutional rights. Absent such a course of conduct on the part of the City of Cleveland, to hold the City liable under a failure to investigate theory would be to hold the City liable solely for the actions of its employees. Accordingly, with regard to Plaintiffs' failure to investigate theory, the City of Cleveland is entitled to judgment as a matter of law."); ***Smith v. Blue***, 67 F. Supp.2d 686, 689 (S.D. Tex. 1999) ("Throughout the Complaint, Plaintiffs specifically allege that the practice of pre-recording and then avoiding visual checks was so pervasive as to constitute a custom or policy, and that such a practice was the result of inadequate training. While municipal liability based on inadequate training is difficult to establish, Plaintiffs have alleged facts that support such a theory. Specifically, individual Defendants' admission that it was a routine practice to fill out inspection records beforehand, to save time on paperwork, and evidence that Defendants had lied about the visual checks even after the discovery of Justin's death provide support for that theory."); ***Culberson v. Doan***, 65 F. Supp.2d 701, 716 (S.D. Ohio 1999) ("[W]e conclude that Plaintiffs sufficiently allege in their Complaint that Defendants intentionally engaged in the activity of 'selective enforcement' in violation of § 1983 by failing to act upon her reports of abuse and beatings by Defendant Doan. Such actions of 'selective enforcement' based on race, nationality, religion, or gender can give rise to a claim under § 1983. . . Plaintiffs also sufficiently allege in their Complaint that Defendant Payton, the Chief of the Blanchester Police Department, acted under a policy or custom of the Blanchester Police Department to engage in 'selective enforcement' in this case."); ***Jones v. Thompson***, 818 F. Supp. 1263, 1269 (S.D. Ind. 1993) ("Defendants' actions and inaction were the result of both policymakers of Madison County . . . and of the custom and practice to apply restraints without medical consultations and keep them on for extended and undocumented periods without review."); ***McLin v. City of Chicago***, 742 F. Supp. 994, 1002 (N.D. Ill. 1990) (plaintiffs' allegations "that the code of silence is widespread and that policymaking individuals knew of the code of silence but failed to take steps to eliminate it...are sufficient to state a claim against the City for a policy or custom."). *Accord* ***Myatt v. City of Chicago***, 1991 WL 94036 (N.D. Ill. May 23, 1991) (not reported) (finding significant the alleged admission of high-ranking police officials that a code of silence exists).

See also ***Myers v. County of Orange***, 157 F.3d 66, 69, 77 (2d Cir. 1998) ("We hold that a policy by a police department or district attorney's ("DA") office favoring an initial complainant over a later one without giving primary regard to the particular facts involved in the case violates the Equal Protection Clause of the Fourteenth Amendment. We also hold that, where a district attorney in New York implements a policy directing a police department and assistant district attorneys not to entertain cross-complaints, that policy is imputed to the county, not the State of New York, for purposes of 42 U.S.C. § 1983 liability. . . . In the instant case, the County was found liable not for ADA Brock's decision to prosecute Myers, but for a DA policy that directed the Port Jervis police and county ADAs to engage in investigative procedures that violated Myers' equal protection rights. Orange County's liability for the DA's managerial decision to implement the cross-complaint policy is on a par with a DA's 'direct[ion to] the police to arrest and detain [plaintiff] without a warrant,' *Claude H.*, 626 N.Y.S.2d at 935-36, a DA's 'long practice of ignoring evidence of police misconduct and sanctioning and covering up wrongdoing,' *Walker*, 974 F.2d at 301 (citing *Gentile*, 926 F.2d at 152 n. 5), and a DA's 'decision not to supervise or train ADAs on *Brady* and perjury issues,' *id*., all of which would result in county liability. Thus, Orange County was properly found liable.").

See also ***Benfer v. City of Baytown, Texas***, 120 F.4th 1272, 1286 & n.14 (5th Cir. 2024) ("Benfer's amended complaint identifies five instances of Baytown police allegedly using dogs to apprehend suspects impermissibly. But Benfer fails to provide the needed factual context for four of those incidents—his threadbare complaint notes only the existence of K-9 encounters that resulted in bites. He does not detail the facts surrounding those encounters or make any attempt to show the needed 'similarity and specificity' between events. . . Those five instances also occurred over the span of four years (2019–2022). Five incidents of excessive force over four years in a city as large as Baytown[14] **[fn. 14:** Baytown had a population of 83,701 according to the 2020 census**]** is not enough to meet the heavy burden of showing that Baytown had a custom of allowing officers to use police dogs unconstitutionally. *Cf. Davidson v. City of Stafford*, 848 F.3d 384, 396–97 (5th Cir. 2017) (noting that three incidents over three-and-a-half years were insufficient to establish a pattern of constitutional violations). Therefore, the district court did not err in finding that Benfer had failed plausibly to allege that the City of Baytown had inadequate written policies concerning the use of police dogs or had a pattern/custom of using police dogs to inflict injuries on non-threatening suspects."); ***Bridges v. Dart***, 950 F.3d 476, 478-81 (7th Cir. 2020) ("According to Bridges, the defendants had a policy, practice or procedure to ignore medically necessary prescriptions for lower bunk placements. In support of this claim, Bridges cited in his complaint five lawsuits filed by Department detainees who alleged that, between 2005 and 2012, they were injured when using upper bunks after their lower bunk prescriptions were ignored. . . .We have not adopted bright-line rules defining 'widespread custom or practice,' but there must be some evidence demonstrating that there is a policy at issue rather than a random event or even a short series of random events. . . As we noted in *Thomas*, we have rejected claims of widespread custom or practice in cases involving a single incident, or three incidents. . . .In the district court, Bridges relied on five inmate complaints over a seven-year period to demonstrate that the defendants had

a widespread practice of refusing to honor lower bunk prescriptions. On appeal, Bridges relies on only three of those cases. Two of them settled without any admission of liability and the third was dismissed. Bridges nevertheless asserts that these lawsuits put the defendants on notice that lower bunk prescriptions were being ignored with enough frequency to constitute a widespread practice. . . . These incidents were so few and far between that they could not plausibly be described as 'so persistent and widespread as to practically have the force of law.'. .We suppose that if the Cook County Department of Corrections housed as few inmates as Sheriff Andy Taylor's two-cell lockup in small town Mayberry, three or five incidents in a short period of time might create a question for a jury regarding whether a practice is widespread. But more than five million people reside in Cook County, and the Department houses thousands of detainees, with hundreds entering and leaving on a daily basis. In this context, three or five incidents over a seven-year period is inadequate as a matter of law to demonstrate a widespread custom or practice."); ***Payne v. Sevier County***, 681 F. App'x 443, 447 (6th Cir. 2017) ("The custom that harmed Payne here, he says, is the County's alleged practice of forwarding grievances against First Med to First Med itself. But Payne submitted no evidence that the County followed that putative custom when dealing with inmates other than Payne. Indeed, Payne's only proof were his own five grievance forms, all submitted within a three-month window. Per our decision in *Thomas*, five instances of alleged misconduct, over three months, all involving the plaintiff himself is not enough to prove a custom. . . Moreover, as Payne himself points out, Lieutenant Loveday allegedly said that he forwarded Payne's grievances to First Med because he was 'too busy' to address them himself. That suggests that the handling of Payne's grievances was due more to Loveday's personal circumstances than to a widespread custom. Payne has therefore failed to raise a genuine dispute that a custom caused his injuries."); ***Davidson v. City of Stafford, Texas***, 848 F.3d 384, 395-96 (5th Cir. 2017) ("Here, the underlying conduct by Officers Flagg and Jones, while unconstitutional, was not sufficiently extreme to qualify for a finding of ratification. . . Chief Krahn's conduct is more analogous to the conduct in *Zarnow*, where we did not find ratification when a municipality defended the constitutionality and propriety of its officers' actions, despite our later determination that the officers' actions violated the Fourth Amendment. . . Chief Krahn's actions in investigating Officers Flagg's and Jones's conduct thus cannot support an allegation of ratification resulting in an official policy on the part of the City. Davidson's final argument attempts to impute a policy of unconstitutionally enforcing § 38.02 to the City by relying on seven incidents between January 2010 and June 2013 in which Stafford PD arrested individuals due to, among other things, a violation of § 38.02. In order to find a municipality liable for a policy based on a pattern, that pattern 'must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees.'. . A pattern requires similarity, specificity, and sufficiently numerous prior incidents. . . But Davidson's evidence of an alleged pattern lacks the detail necessary to find a policy on the part of the City. As an initial matter, Davidson provides no evidence that any of the previous arrests resulted in subsequent litigation alleging a constitutional violation. Looking to these prior arrests, most appear to involve facts demonstrating that the arrestees had committed or were in the act of committing another crime, in addition to their failure to identify. Under this court's precedent, these arrests likely did not involve a constitutional

violation, as the officers likely had probable cause to arrest these defendants for the other crime. . . . If we remove these cases from our consideration, Davidson's pattern relies on three cases (two from the records obtained by Davidson and Davidson's case) over three-and-a-half years to form the basis of the alleged pattern of constitutional violations. Without further context of the size of Stafford PD or the amount of arrests made over the corresponding period, these incidents are insufficient to establish a pattern of constitutional violations by the Stafford PD. *See, e.g.*, *Carnaby v. City of Houston*, 636 F.3d 183, 189–90 (5th Cir. 2011) (no pattern: two reports of violations of a policy in four years in Houston); *Peterson*, 588 F.3d at 851 & n.4 (no pattern: twenty-seven complaints of excessive force over four years in Fort Worth); *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002) (no pattern: eleven incidents of warrantless searches in Houston). Because Davidson's arguments on an official policy on the part of the City and ratification based on Chief Krahn's conduct also fail, we affirm the district court's grant of summary judgment in favor of the City on Davidson's § 1983 municipality liability claim."); ***Carnaby v. City of Houston***, 636 F.3d 183, 189, 190 (5th Cir. 2011) ("Mrs. Carnaby alleges that the city failed to train the officers properly in how to approach a high-risk vehicle and that it was the officers' improper approach to Carnaby's car that led to their objectively reasonable belief that deadly force was necessary. In other words, Mrs. Carnaby urges that if the officers had properly approached Carnaby's stopped vehicle, they would not have been in a position in which they would have been at risk from Carnaby's possible firearm, so they would not have shot him. We have yet to address, directly, whether a municipality can ever be held liable for failure to train its officers adequately where the officers did not commit any constitutional violation; we need not decide that issue here. Even if the answer were in the affirmative, Mrs. Carnaby has not produced sufficient evidence to meet all the requirements for municipal liability. To succeed on her failure-to-train claim, she must show that (1) the training procedures were inadequate; (2) the city's policymaker was deliberately indifferent in adopting the training policy; and (3) the inadequate training policy directly caused Carnaby's injury. . . Mrs. Carnaby fails on the second requirement. . . . At the most basic level, she has provided no direct evidence that the policymakers should have known that the training provided in 2004 was insufficient to educate officers, such that those policymakers were deliberately indifferent to the training's weaknesses. Thus, even if the city could be liable for failure to train in the absence of a constitutional violation, Mrs. Carnaby has not produced sufficient evidence to defeat summary judgment."); ***Jones v. Muskegon County***, 625 F.3d 935, 946, 947 (6th Cir. 2010) ("Although Plaintiff did present evidence that several inmates' medical requests were ignored by jail personnel, including Jones's, a jury could not reasonably infer from these five incidents alone that the County had a widespread, permanent, and well-settled custom of ignoring inmate requests. . . Furthermore, Nurse Yonker's statement that inmates are 'not supposed to feel good' does not demonstrate any purported custom by the County Jail, only an unfortunate statement by one prison employee. Because Plaintiff failed to establish a custom of deliberate indifference to the serious medical needs of inmates at the Muskegon County Jail, the court affirms the district court's grant of summary judgment in the County's favor."); ***Clouthier v. County of Contra Costa***, 591 F.3d 1232, 1251, 1252, 1254 (9th Cir. 2010) ("Drawing all inferences in favor of the Clouthiers, a reasonable jury could conclude that the custodial and mental health staff were deficient in their implementation of the County's written policy, because the custodial staff failed

to ensure they had the approval of mental health staff before moving Clouthier. However, that does not create a triable issue of fact on the question whether the County itself is liable for this deficiency. There is no evidence that the County had a longstanding custom or practice of moving detainees from an observation cell into general population without consultation with mental health staff or contrary to their recommendations. Nor is there evidence of a longstanding custom or practice of miscommunication between mental health staff and custodial staff. There is no evidence that the County was on actual or constructive notice that deficiencies in the implementation of its policy would likely result in a constitutional violation. Moreover, nothing in the record indicates that improper transfers of suicidal inmates happened so frequently that the need for corrective measures 'must have been plainly obvious to the city policymakers.'. . In fact, the evidence in the record indicates that between 2001 and 2006, out of more than 175,000 inmates processed at the County's Martinez Detention Facility, 158 suicide attempts were discovered and only six inmates succeeded in committing suicide. . . The County's expert testified that this suicide rate is 'far lower than the statewide average, and far lower than the rate in jails in most counties with similar population sizes.' Not only did the Clouthiers fail to adduce evidence of a pattern of repeated tortious conduct by County staff, but they also failed to adduce evidence of even a single other suicide resulting from the improper transfer of an inmate from an observation cell into the general population. . . . The Clouthiers have not produced sufficient evidence to create a triable issue as to the question whether Clouthier's death was due to a long-standing custom or practice of the County, an omission that amounted to deliberate indifference, or actions the County adopted as policy when it failed to discipline Blush. Holding the County liable for the missteps of its employees in this case would therefore amount to *'de facto respondeat superior* liability,' an avenue rejected in *Monell*."); ***Peterson v. City of Fort Worth, Tex***., 588 F.3d 838, 850-52 (5th Cir. 2009) ("A pattern is tantamount to official policy when it is 'so common and well-settled as to constitute a custom that fairly represents municipal policy.'. . . A pattern requires similarity and specificity; '[p]rior indications cannot simply be for any and all Abad' or unwise acts, but rather must point to the specific violation in question.' *Estate of Davis ex rel. McCully v. City of North Richland Hills,* 406 F.3d 375, 383 (5th Cir.2005). A pattern also requires 'sufficiently numerous prior incidents,' as opposed to 'isolated instances.' [discussion of *Pineda*] The district court, relying on *Pineda,* held that the 27 complaints on which Peterson relies were insufficient to establish a pattern of excessive force. After careful examination of the record, we conclude the district court did not err. Peterson presented evidence that, according to the City's internal affairs records, at least 27 complaints of excessive force were filed between 2002 and 2005. Almost all arose from officers' investigations of what may be called small crimes; the injuries suffered, however, ranged from minor lacerations to broken bones. In one incident, officers allegedly stopped a suspect who was riding a bicycle and, after he had dismounted the bicycle and lay on the ground, beat him until his face bled and his nose and eye socket were fractured. In another incident, an officer who detained an individual as a suspect in the burglary of a car wash knee-struck him in the back and broke his jaw; that individual turned out to be, not a suspect, but one of the car wash's owners. In yet another incident, officers allegedly punched and beat a suspect until he suffered a head injury; although the officers claimed that the suspect was carrying a crack pipe, they were unable to produce the pipe. And finally, in an even more alarming incident, officers

responding to a call alleging tampering with an electrical box entered an apartment without a warrant and allegedly tased an individual until he was unconscious and had stopped breathing. The incidents allege use of force that, if true, would be emphatically excessive. Nevertheless, assuming their truth, the incidents do not, on the basis of this record, tell us that the City maintained an official policy of condoning excessive force. The failure of the evidence is that the plaintiffs have failed to provide context that would show a pattern of establishing a municipal policy. . . For example, the record does not indicate the size of the Fort Worth Police Department or how many arrests were made by the department between 2002 and 2005. We have previously indicated that the size of a police department may be relevant to determining whether a series of incidents can be called a pattern. . . Although the record omits any evidence of the department's size or the number of its arrests, the department's own website indicates that it presently employs more than 1,500 officers, and that there were more than 67,000 incidents of crime in the last year alone. Given the department's size, and absent any evidence of its total number of arrests during the same time period, 27 incidents of excessive force over a period of four years do not reflect a pattern that can be said to represent official policy of condoning excessive force so as to hold the City liable for the acts of its employees' unconstitutional conduct. To hold otherwise would be effectively to hold the City liable on the theory of respondeat superior, which is expressly prohibited by *Monell.* . . . In sum, the 27 incidents, in the context of this record, do not suggest a pattern 'so common and well-settled as to constitute a custom that fairly represents municipal policy.'. . In conclusion, there was sufficient evidence to establish Peterson's excessive force claim. Peterson, however, did not sue the officer or officers who violated his constitutional rights. Instead he sought to impose liability on the City of Fort Worth for the misconduct of its employees. In this connection, he failed to produce evidence to satisfy the demanding standards required by *Monell* and its progeny to hold the City liable, all for the reasons we have detailed in this opinion."); ***James v. Harris County***, 577 F.3d 612, 618, 619 (5th Cir. 2009) ("[N]othing in Wilkinson's own testimony suggested his actual personal knowledge of the Sheriff's policy (a policy which the family has alleged and we have assumed), of pretermitting a thorough investigation and discipline in officer-involved shootings. Thus, to show that the policy was the cause of Wilkinson's use of excessive force, the family was required to establish Wilkinson's knowledge of the policy through other means. To that end, the family sought to establish that a policy of not conducting a thorough investigation of officer-involved shootings was so widely known that it created in the department an expectation of impunity for the use of excessive deadly force, and Wilkinson's personal knowledge reasonably could be assumed. To establish that the policy was widely known, the family relied exclusively on the expert testimony from Dr. David A. Klinger, a criminologist, that line officers tend to break institutional rules if they are not enforced. . . . After a thorough review, we do not find that this testimony supplies the direct causal link to Wilkinson's use of excessive force, because it simply does not connect Dr. Klinger's general theory to Wilkinson's knowledge that the Sheriff had a lax investigation and discipline policy."); ***Grieveson v. Anderson***, 538 F.3d 763, 773-75 (7th Cir. 2008) ("Grieveson has not presented any evidence showing that the Marion County Jail's grievance procedure − the formal policy itself and the allegedly 'sham' manner in which it was carried out − caused his injuries. . . . Likewise, Grieveson's evidence of four incidents that he alone experienced 'fails to meet the test of a widespread unconstitutional practice by the Jail's staff that

is so well settled that it constitutes a custom or usage with the force of law.'. . This simply is not enough to foster a genuine issue of material fact that the practice was widespread − from that evidence alone an inference does not arise that the *county itself* approved, acquiesced, or encouraged the disbursement of entire prescriptions at once."); ***Gates v. Texas Dept. Of Protective And Regulatory Services***, 537 F.3d 404, 437 (5th Cir. 2008) ("Although there was testimony from several TDPRS employees that they never obtain court orders before removing children from their homes, there was a lack of corresponding evidence that those prior entries and removals were not made on the basis of parental consent or exigent circumstances. Therefore, the only case in which we can say with certainty that a constitutional violation may have occurred is the present one − when the TDPRS employees and Fort Bend deputies allegedly entered the Gateses' home without consent. . . . . Because it is permissible in some circumstances to remove a child from his home without a court order, the Gateses needed to present evidence that the prior removals were not based on consent or exigency before an unconstitutional custom can be shown. Therefore, the Gateses have failed to present evidence of a policy or custom that caused their alleged constitutional deprivation with respect to the entry into their home. The analysis regarding the seizure of Travis and Alexis from their schools is similar. The Gateses present no evidence that children were routinely or customarily removed from school in the absence of a court order or a reasonable belief of abuse. Thus, we are left with two instances of unconstitutional conduct. We conclude that this is not sufficient to support a finding that TDPRS customarily and unconstitutionally seized children from their schools in order to interview them at a central location. Therefore, the Gateses' claim fails on this count as well."); ***Alexander v. City of South Bend***, 433 F.3d 550, 557, 558 (7th Cir.2006) ("The sum total of Alexander's accusations is that South Bend's police manual had no information on how to conduct proper witness interviews, photo arrays, or lineups, and that South Bend made several errors handling his case. Allegations about what is not in the manual hardly establish that South Bend adopted a policy or had a custom of suggestive interviews, photo arrays, or lineups, or that it was indifferent to people's rights. In addition, the shortcomings in this investigation are not indicative of a custom or policy; rather, they are indicative of one flawed investigation. Alexander cites to no other suggestive lineups or photo arrays, no other conspiracies against blacks, and no other incidents of destroyed evidence. Alexander's *Monell* claim fails for a complete absence of evidentiary support."); ***Thomas v. City of Chattanooga***, 398 F.3d 426, 433, 434 (6th Cir. 2005) ("Appellants' best argument is that the Department has a custom of mishandling investigations of excessive force complaints. . . . All this aside, appellants must show not only that the investigation was inadequate, but that the flaws in this particular investigation were representative of (1) a clear and persistent pattern of illegal activity, (2) which the Department knew or should have known about, (3) yet remained deliberately indifferent about, and (4) that the Department's custom was the cause of the shooting here. . . . As this Court noted in *Doe*, deliberate indifference 'does not mean a collection of sloppy, or even reckless oversights; it means evidence showing an obvious, deliberate indifference' to the alleged violation. . . The *Doe* Court found that even where a school board had some information that one of its teachers may have sexually abused students in the past and the board failed to remove him before he abused the plaintiff, the school board could not be found liable for having a policy, custom, or practice of condoning such abuse because there was no evidence that the school board

failed to act regarding other teachers in similar circumstances; thus there was no evidence of any deliberate pattern. . .*Doe* makes clear that the plaintiff bears a heavy burden in proving municipal liability, and he cannot rely solely on a single instance to infer a policy of deliberate indifference. Despite the extreme circumstances here, appellants have not met their burden of showing that there is a genuine issue of whether an illegal Police Department policy exists. Appellants' expert inferred an illegal municipal policy from the Department's potentially insufficient investigation of Thomas's case, just as the plaintiff in *Doe* attempted to infer an illegal municipal policy from the school board's failure to remove the dangerous teacher at issue. Appellants' expert did not reach beyond the facts of this case to show any possibility of a pattern. Appellants point to this Court's finding in *Leach v. Sheriff of Shelby County*, 891 F.2d 1241 (6th Cir.1989), in support of the notion that deliberate indifference can be demonstrated by a municipality's failure to adequately investigate claims. However, in *Leach*, this Court was convinced that the municipality had a policy of deliberate indifference to prisoners' medical needs based on the fact that there were several separate instances where the prison failed to investigate prisoner mistreatment. . . Unlike the plaintiffs in *Leach*, appellants have failed to show several separate instances of the alleged rights violation. Furthermore, the fact that Crumley stated that she would find officer Abernathy 'justified' in his shooting if she had to make the same decision again, does not show a pattern of deliberate indifference that goes beyond the facts of appellants' own case. Rather, Crumley's statement was about a hypothetical situation that was based entirely on the facts of Thomas's own case. Therefore, appellants' argument falls prey to the problem of collapsing the municipal liability standard into a *respondeat superior* standard."); ***Milam v. Ctiy of San Antonio,*** Nos. 03-50862, 03-50937, 2004 WL 2469572, at *1, *2, *5 (5th Cir. Nov. 3, 2004) (unpublished) ("Milam sought to hold the City liable for its employees' illegal conduct by introducing evidence that City policymakers were aware of and were indifferent to a pattern of illegal arrests by park rangers, that the rangers were inadequately trained and supervised, and that the City failed to respond meaningfully to Milam's complaints. The City moved for judgment as a matter of law at the close of Milam's case and again at the close of the evidence, but the court denied the motions and sent the case to the jury. The jury found that the arrest was illegal, and the City does not challenge that finding. For purposes of the present appeal, two of the questions on the verdict form − both relating to municipal liability for the illegal arrest − are relevant. In Question 2, the jury was asked the following:Do you find from a preponderance of the evidence that the city of San Antonio was consciously and deliberately indifferent to intentional and illegal arrests of individuals without probable cause by its park rangers, condoning a pattern or practice of such arrests by its park rangers? In Question 3, the jury was asked the following:Do you find from a preponderance of the evidence that the City's policy-making authority, ratified the wrongful conduct of its officers in violation of Mr. Milam's constitutional rights? The jury answered 'no' to Question 2 and 'yes' to Question 3. Pursuant to the verdict form's directive that the jury should proceed to consider damages if it answered 'yes' to either Question 2 or Question 3, the jury awarded $100,000. The evidence adduced at trial might have provided a legally sufficient basis for the jury to determine that the City's policymakers had tolerated a pattern of illegal arrests that rose to the level of customary policy. The jury, though, specifically rejected a pattern-and-practice theory in its negative answer to Question 2. Milam is therefore left with the task of trying to hang the evidence

presented at trial onto the doctrinal hooks of the ratification theory. It is not an easy fit because, at least facially, an illegal arrest that is completed without the involvement of any policymaker does not look like the typical situation in which a policymaker could 'approve[ ] [the employee's] decision and the basis for it' such that municipal policy can be said to have caused the harm. . . Milam attempts in a few different ways to provide evidentiary support for the ratification verdict, but we conclude that the evidence does not support this theory of liability. . . . Milam's primary argument is that his ratification theory is aimed at situations in which policymakers have tacitly permitted informal practices to rise to the level of official municipal policy. It is certainly true, as we discussed above, that *Monell* recognizes that informal customs and usages, no less than formally promulgated pronouncements and ordinances, can come to represent a type of municipal policy. . . Actions taken pursuant to such a customary policy can then subject the municipality to § 1983 liability. Nonetheless, this does not help Milam's case. If Question 2 on the verdict form had limited the jury to considering whether the City had a policy of the formal-pronouncement type, then perhaps Milam's evidence that the City had allowed a pattern of illegal arrests could be shoe-horned into Question 3, the ratification interrogatory. But Question 2 was not so limited; rather, it fully contemplated the possibility that the City had tacitly adopted a customary policy. It did not ask the jury whether the City had promulgated ordinances or the like, but it instead asked them whether the City had 'condon[ed] a pattern and practice' of illegal arrests. The jury answered that it had not. Milam's attempt to equate ratification with liability for customary policy strips the ratification theory of any independent content within the circumstances of this case. . . . To be clear, we do not say that lackluster disciplinary responses are never relevant in a *Monell* case and can never cause constitutional injuries. First, municipal policymakers who fail to supervise and to discipline their police officers, acting with deliberate indifference to the citizens' rights, could create municipal liability if the lack of supervision then caused a deprivation. . . Second, even though a policymaker's response to a particular incident may not cause the injury, the response might provide evidence of the content of a municipality's policies. That is, the failure to take disciplinary action in response to an illegal arrest, when combined with other evidence, could tend to support an inference that there was a preexisting de facto policy of making illegal arrests: the policymaker did not discipline the employee because, in the policymakers' eyes, the employee's illegal conduct actually conformed with municipal policy."); ***Burge v. St. Tammany Parish,*** 336 F.3d 363, 369, 370 (5th Cir. 2003) (*Burge IV*) ("Burge maintains that the constitutional violation he suffered resulted from two claimed deficiencies in the St. Tammany Parish Sheriff's Office, namely: (1) an alleged longstanding practice of failing to deliver all material information uncovered during the course of an investigation to the District Attorney; and (2) assertedly inadequate training in the maintenance and transfer of sheriff's records. . . . Knowledge on the part of a policymaker that a constitutional violation will most likely result from a given official custom or policy is a *sine qua non* of municipal liability under section 1983. . . . The knowledge requirement applies with equal force where a section 1983 claim is premised on a failure to train or to act affirmatively. . . . Both of Burge's theories, therefore, required proof of deliberate indifference. . . . There is no question in this case that the Sheriff of St. Tammany Parish is a final policymaker or that Burge suffered a *Brady* violation in his original trial and conviction for the 1980 murder of Douglas Frierson. . . . The issue on appeal is thus narrowed to whether Burge

presented sufficient evidence to establish knowledge or deliberate indifference to the likelihood of a constitutional violation on the part of the Sheriff. We conclude that he did not."); ***Pineda v. City of Houston,*** 291 F.3d 325, 329-331 (5th Cir. 2002) ("Eleven incidents each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation's largest cities and police forces. The extrapolation fails both because the inference of illegality is truly uncompelling − giving presumptive weight as it does to the absence of a warrant − and because the sample of alleged unconstitutional events is just too small. Opinion evidence resting heavily on this data added little if anything. Left without legs, the opinions were little more than suspicion, albeit by informed persons. The weakness in the approach is apparent in its practical effects. It requires the City to defend 'cases within cases' from historical records to justify searches conduced without a warrant. . . . . Even if this proof was, contrary to our view, sufficient to create a disputed issue of fact on custom, there remains the burden of demonstrating actual or constructive knowledge of the policy-making official for the municipality. . . . The plaintiffs do not allege that the policymakers for the City, the Police Chief and his Assistant Chiefs, had actual knowledge of the pattern of unconstitutional searches relied upon by the district court. Instead they argue that the pattern of unconstitutional searches by the SWGTF [Southwest Gang Task Force] is sufficient to survive summary judgment because it was widespread enough to impute constructive knowledge to the policymakers. We are not persuaded. First, the weakness in proof of any pattern of illegalities aside, the plaintiffs provided no evidence that the incidents were the 'subject of prolonged public discussion or of a high degree of publicity.' Rather they urge that any municipality that collects numerous offense reports, a small proportion of which include warrantless searches ostensibly, from the investigating officer's perspective, within an exception to the Fourth Amendment's warrant requirement, maintains not only a custom of unconstitutional searches, but that knowledge of this should be imputed to the municipal policymakers. This is functionally the *respondeat superior* regime the Supreme Court has repeatedly rejected. . . Second, the plaintiffs provide opinion evidence that the offense reports and number of warrantless searches performed by the SWGTF sent a clear signal to supervisors and policymakers that a pattern of unconstitutional behavior existed within the SWGTF. Such opinions as to whether or not policymakers had constructive knowledge do not create a fact issue, as the 'experts' were unable to muster more than vague attributions of knowledge to unidentified individuals in 'management' or the 'chain of command.' In fact, the offense reports were summarized and presented in digest form and the plaintiffs' experts failed to demonstrate how the unconstitutionality of the reported searches could be gleaned from these summary reports. All of this assumes that policymakers may not rely on the representations of police officers as to the existence of an exception to the warrant requirement. These offense reports are insufficient to establish *actual* knowledge of a pattern even in the hypothetical case that the plaintiffs provided proof that the policymakers had read the *individual* reports. It follows, then, that there can be no constructive knowledge of an unconstitutional custom from the reports passing through the 'chain of command' in summary form. [footnotes omitted]); ***Latuszkin v. City of Chicago,*** 250 F.3d 502, 505 (7th Cir. 2001) ("Mr. Latuszkin's complaint must be dismissed . . . because he claimed no more than a policy or custom of the CPD [Chicago Police Department]. Nowhere did he claim a policy or custom of the City. A municipality may only be held liable where it is the moving force behind the injury because some

policymaker made a deliberate choice to act or not act in a certain way. . . The City correctly notes that the complaint only alleges that the CPD and its supervisory officials turned a blind eye to the parties. The complaint does not allege any facts tending to show that City policymakers were aware of the behavior of the officers, or that the activity was so persistent and widespread that City policymakers should have known about the behavior."); ***Gregory v. Shelby County***, 220 F.3d 433, 440-42 (6th Cir. 2000) ("No one disputes that the written policy for J-Pod was that only one cell door could be opened at a time. . . . While any rational trier of fact could find that the written policy was not followed on more than one occasion, Appellant has wholly failed to point to evidence in the record suggesting that this lapse of compliance with the written policy was so well settled as to constitute a custom thereby attaching liability to Shelby County. . . Appellant contends that the County's responsibility is embodied in its toleration of the custom of leaving cell doors randomly open. Appellant's argument that the custom was tolerated suggests that the County must have either actual or constructive notice of that alleged custom. There is no evidence, however, that the County or any authorized decisionmaker was on notice that two or more cell doors were open at the same time."); ***Floyd v. Waiters***, 133 F.3d 786, 795 (11th Cir. 1998) ("[Plaintiffs] contend that the longstanding and widespread custom was that male security guards transported female students from school campuses to the 'Playhouse,' which was operated by the security department for the purposes of engaging in illicit sex. [footnote omitted] We conclude, however, that this conduct does not constitute a school district 'custom' that could support section 1983 liability. . . . [A] 'custom' requires that policymaking officials knew about the widespread practice but failed to stop it. . . Here, Plaintiffs have provided no evidence that policymaking officials − the BOE [Board of Public Education and Orphanage for Bibb County] − knew about the Playhouse or the activities that occurred there."); ***Jane Doe A v. Special School District***, 901 F.2d 642, 646 (8th Cir. 1990) (no liability on the basis of custom could be attributed to school district where individual defendants had no notice of pattern of unconstitutional acts and did not display deliberate indifference to or tacitly authorize the violation of plaintiffs' constitutional rights).

See also ***Cox v. City of Rochester***, No. 22-CV-6207-FPG, 2025 WL 50340, at *7-8 (W.D.N.Y. Jan. 8, 2025) ("Plaintiff identifies nine officers that have shot dogs and describes the circumstances of those shootings. Regarding the descriptions of shootings by Officers Zimmerman, Celentano, Laureano, Nellist, Kelly, and Algarin, Plaintiff either does not allege or does not provide evidence that these shootings were unreasonable. . . The Court acknowledges that Plaintiff claims in a few of these descriptions that officers were illegally searching or illegally present on private property when a dog shooting occurred. . . However, the Supreme Court has held that a separate Fourth Amendment violation may not be used 'to manufacture a [seizure] claim where one would not otherwise exist.' *County of Los Angeles v. Mendez*, 581 U.S. 420, 427 (2017). Therefore, the reasonableness of the search or the officer's presence on the property is irrelevant when evaluating the reasonableness of a dog shooting because the dog shooting is a separate seizure. . . As such, the Court does not consider any allegations of the unreasonableness of a search or the officer's presence on a property allegations that the officers acted unreasonably in shooting the dogs in those cases. On the other hand, Plaintiff alleges that Officers Cala, Pickney, and Leach acted unreasonably in shooting dogs. Officer Cala was involved in multiple dog

shootings, but Plaintiff only claims that one was unreasonable in 2018. . . Officers Pinckney and Leach were involved in one alleged unreasonable shooting each in 2019 and 2020 respectively. . . Therefore, Plaintiff has identified three cases of misconduct over three years. The Court declines to decide if the officers acted unreasonably in these cases because, even assuming that they did, three incidents of misconduct over three years are insufficient to establish a pattern of misconduct for the *Monell* claim. . . . [T]his case is distinguishable from the hypothesized scenario in *Canton* because in the *Canton* example, the armed police officers were not given *any* training on the constitutional limits of deadly force. In this case, it is undisputed that RPD provides officers with training related to using deadly force against dogs and that the training discusses the Fourth Amendment implications of using deadly force against dogs. . . Additionally, even assuming that everything the Plaintiff has said about the inadequacies of the training is correct, it is insufficient to meet the deliberate indifference standard. Plaintiff's only objections are to the content and the duration of the training, which are just arguments that the training is not in the precise form that Plaintiff would prefer. . . Thus, the evidence proffered by Plaintiff is not enough to show that municipality's failure to train amounts to deliberate indifference and therefore, Plaintiff has failed to establish municipal liability. In sum, Plaintiff has failed to establish municipal liability because she has not demonstrated a pattern of misconduct, which is required to support her custom or usage, failure to train, and failure to supervise *Monell* claim. Additionally, she has failed to show that her claim falls into a narrow range of circumstances in which establishing such a pattern is not required. Therefore, the Court grants summary judgment to Defendants on the First Claim.
"); ***Reyes v. City of Austin***, No. 1:21-CV-992-RP, 2024 WL 5088385, at *8–9 (W.D. Tex. Dec. 12, 2024) ("The Court credits the analysis of the United States Magistrate Judge on this point and responds to Reyes' objections. Reyes acknowledges that there is no official written or otherwise specifically articulated policy on which he can rely. As the City emphasizes, it has a written policy that 'its officers shall not arrest people for or otherwise prevent people from recording police activity.'. . Given the lack of an official or written policy violating his rights, Reyes advances two alternate theories of municipal liability. First, Reyes alleges that his repeated arrests by APD officers while he was filming police activity were part of a 'persistent pattern of illegal conduct' that was so common and well-known to policymakers that it constitutes a custom that fairly represents official policy. . . Second, he also alleges the City is liable because it ratified the illegal conduct by failing to discipline the APD officers involved in his arrests. . .To Reyes' first argument, the existence of a pattern, the Court finds that he has not alleged so many instances that a reasonable jury could find City of Austin liable based on the existence of a persistent pattern. . . . When prior incidents are used to prove a pattern, they 'must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees.'. . . 'It is thus clear that a plaintiff must demonstrate a pattern of abuses that transcends the error made in a single case.'. .A pattern also requires 'sufficiently numerous prior incidents,' as opposed to 'isolated instances.'. . In *Pineda v. City of Houston,* . . . eleven incidents of warrantless entry did not support a pattern of unconstitutional warrantless entry. . . . Similarly, '27 incidents of excessive force over a period of four years do not reflect a pattern that can be said to represent official policy of condoning excessive force so as to hold the City liable for the acts of its employees'

unconstitutional conduct. To hold otherwise would be effectively to hold the City liable on the theory of respondeat superior, which is expressly prohibited by *Monell*.'. . Similarly, three incidents over the course of three-and-a-half years were found in *Davidson v. City of Stafford, Texas* insufficient to constitute a pattern as would support *Monell* liability. . . As described above, Reyes has produced summary evidence to show a material dispute of fact as to the existence of a First Amendment violation in a maximum of five instances. The Court notes that *Pineda* and *Peterson* are not directly applicable, as they refer to a city-wide set of incidents instead of incidents as to a specific individual. But Reyes also has not produced authority showing that a pattern existed showing the City has a policy to arrest him in retaliation to his views. . . If twenty-seven incidents in *Peterson* and eleven in *Pineda* were insufficient to show a pattern of First Amendment violations, the Court finds that five alleged violations—even if all were found to reflect a First Amendment violation—as to Reyes cannot demonstrate repetition so pervasive within the entire City of Austin as to create a pattern. Rather, Reyes has shown the existence of potential 'isolated instances' that cannot give rise to municipal liability. . . Reyes also does not give examples of the City of Austin having a practice persistent and widespread *beyond* his case, as would support a showing of a custom, policy, or practice of First Amendment retaliatory arrest. . . .The evidence Reyes brings forward shows that the APD was critical of him and labelled him anti-police, and that some officers described him to others using inappropriate language, but the evidence does not create a reasonable inference that the APD had a widespread policy or custom of arresting him or others in retaliation for his views. For those reasons, the Court finds that Reyes does not show a persistent pattern of conduct that gives rise to a City of Austin custom, practice, or policy."); ***Black Lives Matter D.C. v. Trump***, 544 F.Supp.3d 15, 51-52 (D.D.C. 2021) ("As support for D.C.'s alleged failure to train its officers, the *Black Lives Matter* plaintiffs point to five past incidents, unrelated to the Lafayette Square events, in four of which the Metropolitan Police Department used chemical irritants on crowds. . . The incidents span a period of twenty years. . . The *Buchanan* plaintiffs, meanwhile, cite a news article which asserts that use-of-force incidents by MPD officers has steadily increased in the last five years . . . and point to the MPD's response to protestors during the 2017 inauguration, where 'police pinned hundreds of protesters into city blocks, used frequent flash-bang grenades, and heavily deployed tear gas[.]'. . The *Buchanan* plaintiffs do not provide specific allegations as to Arlington County's policies or customs, . . . but instead conclude in their briefing that 'Arlington County was deliberately indifferent when it failed to properly train ... Arlington law enforcement officers, on how to appropriately provide mutual aid at the June 1, 2020 Lafayette Park protest.'. . They argue that 'President Trump publicly urged a violent and aggressive law enforcement response,'. . . and '[i]n light of these statements, and the nature of the preceding protests, Arlington County should have known that the Arlington Defendants needed to receive "more or different" training on the use of force at upcoming protests.'. .Accepting these allegations as true, these isolated incidents over the course of two decades in a metropolis as large as Washington D.C. are insufficient to meet the high bar for alleging a municipal policy or custom, as they are too far removed in time to be 'so persistent and widespread as to practically have the force of law.'. .What is more, many of these alleged incidents are too far removed from the specific facts alleged here to have put the District on constructive or actual notice of a failure in training. . . . Although other Courts have found past

incidents of MPD use of tear gas to be sufficient to state a claim for municipal liability, *see, e.g.*, *Horse v. District of Columbia*, No. 17-cv-01216 (D.D.C. Sept. 27, 2019), the Court finds here that these particular allegations are insufficiently similar. 'Because [the majority of alleged] incidents are not similar to the violation at issue here, they could not have put [the District] on notice that specific training was necessary to avoid this constitutional violation.' [citing *Connick*] Accordingly, the municipal liability claims will be dismissed."); ***White v. City of Vineland***, 500 F.Supp.3d 295, 306-07 (D.N.J. 2020) ("Plaintiffs have evidence to support their clam that the City had a custom of permitting officers to use excessive force. The evidence, taken in the light most favorable to the Plaintiffs, shows that the City received 45 complaints about Officer Platania, including 17 involving allegations of excessive force. Although investigators did not sustain any of those investigations, Plaintiffs have evidence suggesting that the investigations were incomplete, at best. The Third Circuit has explained that having an investigative process in place does not protect against municipal liability unless the investigative process is real. . . A reasonable juror could conclude that the City's process was not real. Defendants ask the Court to disregard these incidents because they are not sufficiently factually similar to the case at hand. Defendants' argument, for purposes of a summary judgment motion, are too granular. Often, Defendants rely on the fact that other incidents did not involve the use of a police dog, but that is not the only basis on which Plaintiffs assert the excessive use of force. The Court rejects Defendants' invitation to weigh the evidence. A reasonable juror could conclude from the history of complaints about Officer Platania specifically and other officers more generally that the City had a custom of permitting officers to use excessive force. Contrary to Defendants' argument, the Third Circuit's decision in *Forrest* does require the Court to parse the complaints. It stands only for the unremarkable proposition that the incidents to which a plaintiff points must be of a 'similar nature' to the incident at issue and close enough in time. . . Plaintiffs have made that showing when the evidence is viewed in the light most favorable to them. Defendants can argue about distinctions in the past complaints, and about their import, to the jury, which is the forum for weighing of evidence. The outcome is different for Plaintiffs' false arrest claim, however. The incidents on which Plaintiffs base their claims are complaints about excessive force. They have not pointed the Court to a history of complaints about false arrests. They therefore fail in their burden to identify evidence from which a reasonable juror could conclude that the City has a custom of tolerating false arrests by its officers."); ***Nigro v. City of New York***, No. 19-CV-2369 (JMF), 2020 WL 5503539, at *5–6 (S.D.N.Y. Sept. 11, 2020) ("[A] plaintiff 'need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City.' *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1955 (2018). Thus, Nigro's *Monell* claims against the City — predicated on the City's alleged policy and practice of arresting people in retaliation for reporting on police activity and its failure to properly train its officers on the rights of the media — require additional analysis. Nigro's *Monell* claim based on the first theory — that the City has a policy and practice of arresting people in retaliation for reporting on police activity — fails as a matter of law. In particular, Nigro fails to plausibly allege that the City has a pattern that is 'so persistent and widespread as to practically have the force of law.'. . Nigro cites only a handful of incidents, most of which occurred in 2011 and 2012, in which NYPD officers 'interfered with the ability of journalists and other individuals to document interactions between the public and police officers.'.

. But few, if any, of these incidents involved claims of retaliatory arrest or are alleged to have resulted in a lawsuit or otherwise formal complaint. . . .In any event, ninety-six incidents over two years is not, without more, enough to establish that the City had a policy or practice of retaliating against the media at the time of Nigro's arrest. By contrast, Nigro raises a plausible failure-to-train claim. . . .Nigro plausibly alleges that the NYPD's training on encounters with the media is inadequate, consisting of nothing more than unenforced instructions in the NYPD Patrol Guide and three FINEST Messages issued in 2011, 2014, and 2018 'to remind members of the service of their obligations to cooperate with media representatives acting in a news-gathering capacity at the scene of police incidents.'. . And second, although Nigro's citations to unrelated police encounters, letters, and post-hoc reports are not enough to establish a widespread custom or practice of retaliating against the press and public, 'they do permit a plausible inference of deliberate indifference.'. . In particular, the alleged incidents plausibly establish a history of NYPD officers mishandling situations where the press is involved, resulting in the repeated deprivation of constitutional rights. Finally, contrary to Defendants' contentions, Nigro adequately pleads that the failure to train caused his injuries. . . In short, Nigro adequately pleads a failure-to-train claim against the City, which means Defendants' motion on that score must be and is denied."); ***Petropoulos v. City of Chicago***, No. 19-CV-03206, 2020 WL 1433826, at *4–5 (N.D. Ill. Mar. 24, 2020) ("The Petropouloses argue that allegations based on their own experience – a single instance of misdirected mail – is enough to allege a policy. They contend that the '[c]ase law indicates that for purposes of this motion, the Plaintiffs need not provide any other examples of the Defendant's practice to allege a *Monell* claim.'. . .The Seventh Circuit has not adopted any bright-line rules defining 'custom or practice,' but it has found that 'it must be more than one instance.'. . Indeed, even three instances may not be sufficient in some cases, as the Seventh Circuit has found that an allegation of three incidents did not amount to a 'persistent and widespread practice.'. . A random event does not give rise to a *Monell* claim. . . Requiring a number of examples is a way of enforcing the bar against vicarious liability. A plaintiff could blame almost any slip-up by a municipal employee on a lack of a policy, or insufficient training or supervision. If that allegation were enough to state a claim, the exception would swallow the rule, and *Monell* wouldn't provide much of a barrier. It would be open season on claims against municipalities. It is difficult to sufficiently allege a *Monell* claim by pointing to only one example, particularly when that example is the plaintiff's own experience. . . One data point doesn't show much of a trend. While it is not *impossible* for a single plaintiff to establish a widespread practice or custom with his own experience, it is 'necessarily more difficult' to do so. . . . The Petropouloses don't allege that other families received the same type of startling mail. Instead, they allege only their own experience. That isolated incident – as alarming as it may have been – is not enough to support an inference of a custom or practice."); ***Thomas v. City of Philadelphia***, No. CV 17-4196, 2019 WL 4039575, at *13-14, *19-21 (E.D. Pa. Aug. 27, 2019) ("In his response to the defendants' motion for summary judgment, the plaintiff frames his § 1983 claim against the City as a failure to train, supervise, and discipline claim. . . . [T]he plaintiff need not establish that the municipal policymaker had actual knowledge of a pattern of constitutional misconduct. Constructive knowledge or a showing that the municipal policymaker 'should have known' about the pattern of constitutional misconduct is sufficient. . . .The defendants first argue that the plaintiff has not presented sufficient evidence for

a jury to determine that there was a prior pattern in the Police Department involving the fabrication and concealment of evidence, the use of improper interrogation methods, and the intentional suppression of evidence that negated probable cause. The Court disagrees. As discussed above, the plaintiff supports his claim that there was an alleged and reported upon pattern of similar incidents in the early 1990s by pointing to: (1) the 1978 *Philadelphia Inquirer* series; (2) eight specific incidents similar to the plaintiff's allegations that occurred between 1988 and 1994 (all within five years of the plaintiff's arrest in 1993); (3) the 39th District Scandal; (4) deposition testimony from Department police officers, including Detectives Devlin and Worrell; and (5) and Dr. McCauley's expert report. In their briefing, the defendants attack these pieces of evidence individually. . . .The defendants claim that if eleven out of 500 incidents could not create a triable issue of fact in *Pineda,* eight incidents out of over 2,200 homicides that occurred in Philadelphia from 1990-1994 is similarly insufficient. . . However, the cases relied on by the defendants are, once again, distinguishable. In *Jones* and *Peterson,* excluding the similar events identified by those plaintiffs, there was no evidence of an unlawful pattern. . . And in *Pineda,* although the plaintiff filed an expert report to support his claim in addition to highlighting the eleven similar incidents, the court discounted the expert report because it relied heavily on those eleven incidents. . . Here, in contrast, the plaintiff has presented a collection of other evidence as listed above. Moreover, in addition to the eight specific incidents, Dr. McCauley bases his report on his review of over 1,000 IAD investigations, reports from the IAO, and more. . .Moreover, courts in this circuit—including the court of appeals—have accepted similar numbers of incidents as evidence of a pattern and have been more prone to do so when such evidence is accompanied by additional support, such as an expert report or the deposition testimony of officers. . . .Based on all of the evidence discussed above, considered in the light most favorable to the plaintiff, a reasonable jury could conclude that, prior to the plaintiff's arrest and conviction, Philadelphia Police Department officers engaged in a pattern of similar misconduct."); ***Moore v. City of Ferguson***, No. 4:14-CV-1443 SNLJ, 2016 WL 5791461, at *5-7 (E.D. Mo. Oct. 4, 2016) ("Plaintiffs' main evidence in support of the existence of a 'continuing, widespread, persistent pattern of unconstitutional conduct' by FPD officers is contained in the DOJ Report. The Report concluded that the FPD engages in a pattern of excessive force in violation of the Fourth Amendment and that, specifically, the FPD's use of 'electronic control weapons' ("ECWs") such as Tasers is 'unreasonable.' Furthermore, the Report observed that the '[o]verwhelming majority of force --- almost 90% --- is used against African Americans' and that the FPD demonstrated a 'pattern of insufficient sensitivity to, and training about, the limitations of those with mental health conditions or intellectual disabilities.' Plaintiffs cite to at least five incidents of excessive force that occurred before Jason Moore was Tased. Those incidents occurred between August 2010 and August 2011 and involved ECWs or Tasers. At least four of the five involved African-American men. Although defendants dispute the details of these incidents, five instances of excessive force --- involving Tasers --- predating the events of this matter over the course of just one year constitutes more than isolated incidents. . . .Moreover, although the Report noted that the FPD had a procedure for documenting and reviewing use of force by officers, the DOJ determined that the 'requirements are not adhered to in practice.' The DOJ further stated that it 'learned of many uses of force that were never officially reported or investigated from reviewing emails between FPD supervisors.'.

. Similarly, the DOJ Report observed that Ferguson supervisory personnel have a custom of failing to 'review critical evidence even when it is readily available.' In keeping with the FPD's failure to adhere to its own policies related to use of force review, plaintiff further points out that the FPD's investigation of this matter was limited --- in fact, no one at the FPD initiated the 'data download' for the Taser used on Mr. Moore until four years after the incident, after this lawsuit was well underway. This evidence is perhaps more germane to the second factor, however, to which the Court turns next. . . .Having set forth evidence of a pattern of the use of excessive force by Ferguson officers, plaintiffs must next set forth evidence supporting that the City of Ferguson and Chief Jackson were deliberately indifferent to or tacitly authorized police officers' use of excessive force. Again, the DOJ Report supports plaintiffs' claims. The Report concludes that Ferguson police officers do not minimize their use of force but rather 'respond with impatience, frustration, and disproportionate force' and that 'FPD's weak oversight of officer use of force…facilitates this abuse.' Although official FPD policy 'prohibits use of force unless reasonable alternatives have been exhausted or would clearly be ineffective,' the DOJ found that 'FPD officers routinely engage in the unreasonable use of ECWs, and supervisors routinely approve their conduct.' Specifically, '[s]upervisors seem to believe that any level of resistance justifies any level of force' and those supervisors 'almost never actually investigate force incidents.' In fact, 'though contrary to policy, supervisors almost never interview non-police witnesses, such as the arrestee or any independent witnesses' and, critically, '[t]hey do not review critical evidence even when it is available.' As Chief of Police at the time of the incident in question here, defendant Chief Jackson was the individual designated by the Mayor and City Council to 'have general supervision and control of the police department, including the enforcement of discipline among the members thereof and the instruction of the members in their duties.' City of Ferguson Code of Ordinances, § 33-18. Chief Jackson testified that he had never disciplined an officer for using excessive force. Although the fact that Chief Jackson had never disciplined an officer for using excessive force is not at all dispositive, it is some evidence that supports plaintiffs' claims, particularly in light of the DOJ Report's findings. Plaintiffs have adequately shown that evidence exists to support their contention that the defendant Chief Jackson and City of Ferguson have been deliberately indifferent to or tacitly authorized the FPD's custom of using excessive force. The DOJ found that the custom and practice of use of excessive force was the direct result of the failure to properly supervise and discipline officers by investigating and enforcing the FPD's own use of force policies."); ***Walker v. City of New York***, No. 14-CV-808 ER, 2015 WL 4254026, at *9-10 (S.D.N.Y. July 14, 2015) ("Here, in addition to claiming that the thirty-six actions listed demonstrated a pattern of false arrests, the TAC provides a list of lawsuits that Officers Pantaleo, Howard, Torres, Vaccarino, Cataldo, and Sergeant Conca have all been parties to. . . The Court's independent inquiry revealed that, although most of the purported thirty-six lawsuits that Plaintiff cites consist of false arrest claims, much like *Tieman*, none of them attribute liability to the particular Officers or the City. Nor have any of the lawsuits against the individual Defendants resulted in a finding of liability. . . In fact, they either settled or are currently pending. . . Furthermore, Plaintiff cites lawsuits that span across *thirteen* years without describing them in any detail-thereby making his case even weaker than *Tieman,* in which the plaintiff listed and described lawsuits filed during the five years before the incident at issue. . . Thus, like *Tieman,* the lawsuits that Plaintiff cites, even when

combined with the rest of his allegations, 'are insufficient to plausibly support an inference of a widespread custom.'. . In his opposition papers, Plaintiff characterizes Defendants' motion as 'asking the Court to ... disbelieve the numerous people of color who have brought these lawsuits,' concluding '[t]his is not only a form of deliberate indifference itself, but racially discriminatory indifference.'. . However, that is neither what the City is requesting the Court to do, nor does it describe the Court's role in this case. The City is asking the Court not to presume that a constitutional violation took place in cases in which no finding of liability was ever made or acknowledged. . . Indeed, although it is routine for courts to take judicial notice of court documents, they do so 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'. . It is not within this Court's purview to assess the veracity of either the claims of outside plaintiffs, or the defenses presented against them in cases that have settled or are pending before other judges. While Plaintiff attempts to show a widespread policy or pattern of abuse, he has failed to allege sufficient facts to establish that the City has adopted such an abusive policy towards people of color. Plaintiff fails to satisfy this third factor of the Second Circuit's municipal liability test."); ***Moreno v. City of Dallas***, No. 3:13-CV-4106-B, 2015 WL 3890467, at *9 (N.D. Tex. June 18, 2015) ("The City also argues that Plaintiff's allegations fail to support an inference of a persistent and widespread practice of the use of excessive force. . . .The Court agrees. Although Plaintiff has pointed to eight instances, over the course of five years, in which an officer wounded or killed an individual, these allegations do not support an inference of a pattern of abuses that can be distinguished from mere isolated incidents. . . In view of the size of the Dallas Police Department, and bearing in mind courts' prior holdings in similar cases, facts suggesting an average of less than two incidents of excessive force per year over the course of five years are not sufficient to indicate a pattern of abuses, especially without any further context from Plaintiff."); ***Estate of Shafer ex rel. Shafer v. City of Elgin, Or.,*** No. 2:12-CV-00407-SU, 2014 WL 6633106, at *23-24 (D. Or. Nov. 21, 2014) ("As discussed above for the claim against Chief Lynch, plaintiff's expert Mr. Yerger opined Officer Kilpatrick should have been required to engage in remedial training after Chief Lynch or the City Council received citizen complaints about Officer Kilpatrick. The evidence shows prior to the shooting of Richard Shafer, Officer Kilpatrick had pointed his guns at other Elgin residents. Chief Lynch testified he provided the annual use of force training to Officer Kilpatrick as required by the Use of Force Policy. . . However, Chief Lynch testified he never provided any specific training to Officer Kilpatrick about when he should or should not draw his gun. . . Therefore the court finds issues of fact over whether the City failed to train Officer Kilpatrick about when to point his gun at a citizen. Defendants argue even if the City failed to adequately train Officer Kilpatrick, the failure to train a single officer is insufficient to establish a municipality's deliberate policy under *Monell.* . . In *Blankenhorn,* the Ninth Circuit explained 'absent evidence of a "program-wide inadequacy in training" any shortfall in a single officer's training "can only be classified as negligence on the part of the municipal defendant—a much lower standard of fault than deliberate indifference."'. . . Defendants fail to recognize the small population size of Elgin. . . The Elgin Police Department is a municipal police department with a full-time staff consisting of a police chief, one police sergeant, and one police officer. . . After Sgt. Pallis left the department in June 2011, Officer Kilpatrick was the only police officer in Elgin. As such, even applying *Blankenhorn,* a reasonable

jury could find the City's failure to train Officer Kilpatrick a 'program-wide inadequacy in training' for purposes of *Monell.* . . Plaintiff also brings the claim against the City under a failure to discipline theory. A municipal policy may be inferred from 'widespread practices or evidence of repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded.'. . A plaintiff may prove a widespread practice where several different officers independently engage in the same unconstitutional conduct. . . For the same reasons as the failure to train theory, the court finds given the small size of the Elgin police department, a reasonable jury could conclude the City failed to discipline Officer Kilpatrick. Plaintiff's expert Mr. Yerger opined Officer Kilpatrick should have been disciplined after Chief Lynch or the City Council received citizen complaints about Officer Kilpatrick's use of force. As such, a reasonable jury could also conclude the City's failure to discipline Officer Kilpatrick constituted a policy for purposes of *Monell.* Finally, defendants argue there is no evidence of a causal connection between the City's actions or inactions and the shooting of Richard Shafer. . . The court disagrees. Plaintiff has raised issues of fact regarding whether the Use of Force Policy was sufficient to protect the constitutional rights of Richard Shafer, how the City handled citizen complaints about Officer Kilpatrick, whether Officer Kilpatrick was properly trained in use of force by the City, and whether the City properly disciplined Officer Kilpatrick for prior use of force. The issue of causation is for a jury to decide. . . Therefore, defendants' motion for summary judgment on the *Monell* claim against the City is denied."); ***McCants v. City of Newburgh***, No. 14 CV 556 VB, 2014 WL 6645987, at *4-5 (S.D.N.Y. Nov. 21, 2014) ("The amended complaint alleges the City failed to monitor officers and train them in the use of excessive force, then details seventeen excessive force claims made against the City in the seven-year time period prior to Lembhard's death in 2012. Defendants argue plaintiffs' evidence does not establish a custom or policy because a majority of the claims were settled for nuisance value, did not involve deadly force, and are removed in time from the instant action. The Court is unpersuaded by defendants' arguments. Defendants are correct the seventeen instances simply demonstrate 'other individuals [ ] plausibly alleged that they experienced similar violations ... not that these violations actually occurred.'. . However, it matters not that the instances only prove a claimant asserted a violation, because they evidence the City was on notice to the possible use of excessive force by its police officers on seventeen different occasions. . . Plaintiffs allege the City, in the face of these instances of alleged police misconduct, failed properly to discipline its officers or train them in the use of excessive force. This evidences deliberate indifference because, at least at this stage in the proceedings, the Court must take as true plaintiffs' allegations the police officers involved were not disciplined or sanctioned for their conduct. . . Further, it matters not that only one of the instances involved deadly force, as plaintiffs allege a failure to monitor and train officers adequately in the correct and restrained use of force in general. And, the seventeen instances of alleged police misconduct, as well as the alleged police misconduct resulting in Lembhard's death, involve a pattern of excessive force likely to be proven by evidence of the officers' correct or incorrect use of force. . . And finally, although the claims span a seven-year period, with a majority occurring from 2005 to 2007, this simply evidences the City has allegedly long condoned police misconduct. Accordingly, the Court declines to dismiss plaintiffs' *Monell* claim."); ***Flanagan v. City of Dallas, Tex***., 48 F.Supp.3d 941, 954 (N.D. Tex. 2014) ("The undersigned finds *Pineda* to be of limited

persuasiveness given the factual differences between it and the present case. First, although the appellate court does not say so, the 11 sample cases that the *Pineda* court looked at spanned a four-year period. . . In this case, Plaintiffs allege that DPD police shot at least 12 unarmed people in 2013, the year that Allen died (although it is not known how many of these incidents occurred after his death). . . Plaintiffs discussed three of those shooting incidents in sufficient detail in their amended complaint to denote the similarities to the allegations regarding Allen's shooting, namely that the individuals involved were not provoking or resisting the police when they were shot. . .Second, a warrantless entry differs significantly in seriousness and presumably in frequency from the shooting by a police officer of an unarmed person, whatever the circumstances of the shooting may turn out to be. Therefore, it is reasonable to allow a lower number of incidents to establish a pattern of conduct in a shooting case. . . Further, Plaintiffs allege that, on average, more than four unarmed people have been killed by DPD officers each year for the past dozen years and that there are nearly 100 open internal affairs investigations into such shootings and have been nearly as many grand jury proceedings. While it is a close call, taking all of their allegations to be true, Plaintiffs have pled sufficient facts, at the motion to dismiss stage, from which one could make a reasonable inference of a persistent, widespread practice by DPD officers of using excessive force rising to the level of a custom having the force of official City policy."); ***Price v. Tunica County, Miss***., No. 2:08cv262-P-A, 2011 WL 3426182, at *3 (N.D. Miss. Aug. 5, 2011) ("The court concludes that three dismissed *pro se* inmate lawsuits and ten unsubstantiated inmate grievances over a period of approximately four years (from the first election of Sheriff Hamp in 2004 to the filing of the complaint on December 18, 2008) is insufficient to create a genuine issue of material fact of whether there was a 'persistent, widespread practice' or custom of unconstitutionally inadequate medical care in the Tunica County Jail. First, none of these prior incidents were ever substantiated, rendering them mere allegations. Second, the Supreme Court ruled in *Connick* that four prior incidents of failure to provide exculpatory evidence under *Brady* − all four of which occurred in the same county prosecutor's office and were all substantiated in court proceedings resulting in reversals of the convictions − were insufficient to establish an unconstitutional custom. . . Third, the Fifth Circuit in *Pineda v. City of Houston* concluded that 11 prior reports of warrantless entries into houses by the Houston Police Department were insufficient to establish an unconstitutional custom or pattern given that Houston, Texas was a large city. . . Though Tunica County, Mississippi is not comparable in size to Houston, Texas, the population of the Tunica County Jail over a four year period is large enough to render three dismissed inmate lawsuits and ten inmate grievances of inadequate medical care similarly insufficient to establish a unconstitutional custom or 'persistent, widespread practice.'"); ***Oporto v. City of El Paso***, No. EP-10-CV-110-KC, 2010 WL 3503457, at *9 (W.D. Tex. Sept. 2, 2010) ("There is no bright line rule for determining when a number of incidents taken together comprise a pattern of conduct serious enough to impute constructive knowledge to municipal policymakers. . . However, incidents cited by Plaintiffs appear to have occurred for so long and are sufficiently numerous that they tend to show the existence of a custom and knowledge and acceptance of that custom by policymakers. In *Pineda,* eleven incidents of warrantless searches were held not to be widespread enough to impute constructive knowledge to policymakers; however in *Escobar v. City of Houston,* twenty-six incidents of accidental gun discharges were found to be sufficient to create a fact issue

regarding the City's knowledge of the need for additional training. . . *Escobar,* at the summary judgment phase, uses fewer incidents than in the present case. Thus, at the motion to dismiss stage, thirty-two incidents appear to be sufficiently numerous to infer knowledge of that custom by policymakers. Additionally, excessive use of deadly force can be described as flagrant or severe, which reduces the frequency and pattern length needed to establish constructive knowledge. The Court thus finds that the pleadings properly allege that the City, Wiles and Allen had constructive knowledge of the policy."); ***Washburn v. Fagan,*** No. C 03-0869 MJJ, C 03-1194 MJJ, 2006 WL 1072057, at *6 (N.D. Cal. Apr. 21, 2006) ("The Court finds that Plaintiffs' ratification theory fails for the simple reason that Plaintiffs have produced no evidence demonstrating which municipal officers have final policymaking authority for the City. . . In Plaintiffs' opposition brief, they contend that Sergeant Stansberry, Officer Kristal, and Assistant Police Chief Alex Fagan Sr. were aware of Fagan's alleged misconduct. Plaintiffs also assert that 'Fagan's conduct was widely known to other members of the SFPD.'. . However, there is no evidence to support the conclusion that any of these individuals were authorized policymakers for the City. Accordingly, Plaintiffs have not established a genuine issue of material fact as to the question of whether City policymakers ratified Fagan's actions."); ***Barnett v. City of Columbus***, No. 2:04-CV-1113, 2006 WL 406614, at *11 (S.D. Ohio Feb. 17, 2006) ("In the Court's view, the evidence proffered with respect to allegations of a pattern or policy of use of excessive force by Columbus police officers falls far short of the foregoing standard. The incidents do not serve to show that the City of Columbus condoned conduct amounting to excessive force or that it acted with deliberate indifference so as to amount to the City having an official policy of inaction.'. . All of the thirteen incidents cited by Plaintiff were investigated and found to be without merit. While these incidents involved differing versions of the facts, this Court has no record or factual basis from which to conclude that the Internal Affairs Bureau acted illegally or otherwise condoned unconstitutional behavior.")**;** ***Martin v. City of Columbus,*** No. 2:03CV161, 2005 WL 2671372, at *4, *5 (S.D. Ohio Oct. 19, 2005) ("Here, there was an investigation of Martin's allegations against Officer Haas. However, because Martin's allegations were brought more than sixty days after the incident, the Internal Affairs Bureau determined that Martin's allegations were unfounded. . .Under Article 8.12 of the collective bargaining agreement between the City and the Fraternal Order of Police a citizen complaint must be received by the City within sixty days after the date of the alleged event giving rise to the complaint. The exceptions to this rule are: (1) allegations of conduct which is criminal on its face; (2) allegations of conduct that could reasonably lead to criminal prosecution; and (3) allegations of non-criminal conduct that is the same or similar to conduct that resulted in the recent termination of a member, and the termination was upheld by an arbitrator or the Civil Service Commission. This provision of the CBA has come under this Court's scrutiny before. In *Otero v. Wood,* 316 F.Supp.2d 612, 629 (S.D.Ohio 2004) (Marbley, J.), the officer who took the plaintiff's complaint filled out an 'incident report' (used to inform the police of any unlawful incident) instead of a 'citizen complaint' (used to complain to the police department about the conduct of an officer). The incident report was not converted to a citizen complaint until after the 60-day time period had already run. . . The plaintiff alleged that the use of an incident report rather than a citizen complaint was not an accident, but was deliberately done as a part of the City's policy to insulate officers from discipline. . .This Court found that if the plaintiff's claims were

true, the City had a policy of dealing with citizen complaints in such a way as to virtually ensure that offending officers will not be disciplined for their misconduct. . . Here, Martin states that he did not file his citizen complaint because there were criminal charges pending against him. Martin filed his complaint on May 15, 2002. Yet, Martin's charges were not dismissed until December 30, 2002. Regardless of the reason for the delay, this case is factually distinguishable from *Otero*. It was Martin himself who caused the complaint to be filed outside the 60-day time period, not the City. As this Court has previously recognized, in general, one does not have a constitutional right to have a police investigation conducted in a particular manner, or to have one conducted at all. . . The CBA provision does not preclude all investigation, it only precludes investigation of complaints which are brought outside the 60-day time period and do not meet one of the listed exceptions."); ***Perrin v. City of Elberton, Georgia***, No. 3:03-CV-106(CDL), 2005 WL 1563530, at *10 (M.D. Ga. July 1, 2005) ("In this case, the evidence viewed in the light most favorable to Plaintiff establishes that City of Elberton police officers regularly applied for arrest warrants without providing a sworn statement to the issuing judge. Instead, the officers submitted unsworn warrant applications and unsworn police reports and expected the judge to make a probable cause determination based solely upon these documents. As discussed *supra*, a probable cause determination cannot legally be predicated upon unsworn statements, so this process is not constitutionally sound. The officers followed this process hundreds of times over a period of at least eight years. This history of widespread use of the unsworn warrant application process was sufficient to notify Welsh of the need to take corrective action. Furthermore, there is evidence that Welsh had firsthand knowledge of the process. However, Welsh failed to correct it. Genuine issues of material fact exist as to whether Welsh's supervisory conduct violated Plaintiff's constitutional rights. . . . [I]t is reasonable to conclude that Welsh, the City's Chief of Police, authorized the unsworn warrant application process. It is also reasonable to conclude that Welsh knew of a need to train the City's officers in this area and made a deliberate choice not to take any action to train the officers differently. . . For these reasons, the City of Elberton is not entitled to summary judgment with regard to its alleged unsworn warrant application process."); ***Mosser v. Haney***, No. Civ.A.3:03CV2260-B, 2005 WL 1421440, at *4 (N.D. Tex. June 17, 2005) (not reported) ("Here, the Dallas City Charter states that, while the Chief of Police has immediate control over the police department, the Chief of Police is still subject to the supervision of the City Manager. . . . Thus, the Chief of Police is not the policymaker for Dallas's police department, as he remains subject to the rules and supervision of the City Manager. . . . Because the General Orders were not issued by a policymaker, the Court cannot find that the General Orders constitute the policy of the City of Dallas. For the same reason, the Court also finds that the General Orders do not constitute a custom of the City of Dallas. As noted above, proof of a custom requires the plaintiff to demonstrate actual or constructive knowledge of the custom to the governing body or a policymaker. . . Mosser has not produced any evidence connecting the General Orders with the City Manager or City Council or even showing that the City Manager or City Council were aware of the General Orders. As such, the Court finds that Mosser has failed to demonstrate that the General Orders of the Dallas Police Department are a policy or custom of the City."); ***Lewis v. City of Chicago,*** No. 04 C 3904, 2005 WL 1026692, at *8 (N.D. Ill. Apr. 26, 2005) (not reported) ("Lewis argues CPD intentionally covered up Hicks' homicide. He points to obvious omissions in

Detective Galbreth's report, and OPS' failure to conduct a thorough investigation. . . . He presents no evidence that the city was deliberately indifferent to excessive force complaints prior to Hicks' death. He relies exclusively on evidence relating to CPD's and OPS' deficiencies in investigating Hicks' death. His evidence falls far short of a practice, custom or policy with respect to investigations or discipline. . . Lewis presents no evidence that CPD's alleged failure to investigate excessive force allegations and discipline officers proximately caused Hicks' constitutional injury. Absent evidence of a causal link between the alleged failure to investigate and discipline and Hicks' death, Lewis' § 1983 claim cannot stand."); ***Allen v. York County Jail,*** Nos. Civ. 01-224-P-C, Civ. 02-158-P-C, 2003 WL 221842, at *9 (D. Me. Jan. 30, 2003)("In order for a 'custom or usage' to become the basis of municipal liability, the duration and frequency of the practice must be so widespread and longstanding that the decision making officials' actual or constructive knowledge of the custom can be established. . . . Applying this analysis to Allen's two complaints, it becomes apparent that the serious constitutional deprivations that he alleges were committed by corrections officers who took pains to engage in schemes and conspiracies to keep their conduct hidden. Allen does not actually allege that pretrial detainees were routinely raped and abused by fellow inmates at the behest of correctional officers. He describes in detail a series of events that happened to him personally and a number of corrections officers, some named and some unnamed, who acted improperly vis-a-vis his detention. The apparent theory is that a number of officers intentionally conspired together to deprive an individual of his constitutional rights and they then devised schemes to keep their conduct secret, pursuant to an established 'custom' that was known or should have been known by York county's official decision makers (presumptively Sheriff Cote). While this complaint alleges a significant number of officers conspired to deprive Allen of his rights, it simply does not allege that sort of behavior was so widespread that the official decision maker can be said to have acquiesced in it . . . ."); ***Burns v. Goodman,*** No. CIV. A. 3:99CV0313-L, 2001 WL 498231, at *6, *7, *9 (N.D. Tex. May 8, 2001)(not reported) ("A pervasive, widespread practice . . . is insufficient to constitute official policy for purposes of imposing municipal liability under § 1983 unless policymakers had actual or constructive knowledge of the practice. . . . The court concludes that Burns has not established a genuine issue of material fact as to the City's constructive knowledge of a pervasive, widespread practice of illegal strip searches on the night shift at the Garland jail. . . . Because of a lack of evidence as to constructive notice of the alleged practices, the City has dodged a bullet. . . . Although the City escapes liability in this case, it is now on notice. If there are any future incidents under such circumstances, the City will not be able to shield itself from liability by asserting lack of notice."); ***Samarco v. Neumann***, 44 F. Supp.2d 1276, 1289 (S.D. Fla. 1999) ("Like the policy issue, Samarco has not presented any evidence of a widespread custom of using its canine force in an unconstitutional manner, and which was known and ratified by Sheriff Neumann, the final policymaker for the Sheriff's Office. Moreover, Samarco has not shown the existence of an illicit custom that was so widespread as to constitute the force of law. He merely points to some incidents where other fleeing felony suspects were injured. Such isolated episodes, dispersed over several years, are insufficient to substantiate the existence of a widespread custom violative of § 1983."); ***Doe v. New Philadelphia Public Schools Bd. of Ed.***, 996 F. Supp. 741, 747 (N.D. Ohio 1998) ("[I]n the present case, the court is not of the opinion that Plaintiffs have established a custom on

the part of New Philadelphia regarding the intentional, deliberate, or even reckless dismissal of allegations of sexual misconduct on behalf of its employees. To be sure, with the clarity of 20-20 hindsight it can be said that Ms. Banks and Ms. Potosky's investigative and preventative measures in response to the allegations against Ms. McCune were grossly insufficient. It can even be said in light of J.T. Milius' prior allegations that Ms. Banks was reckless for not raising an antenna when she heard that Ms. McCune was leaving the building with a minor student. These two incidents of neglectful conduct on the part of two New Philadelphia officials are troubling, but they do not rise to the level of a custom within the district, and certainly do not implicate the School Board in any way. Plaintiff is therefore unable to make out a crucial element of a 1983 claim under these circumstances, and summary judgment must be awarded to Defendant New Philadelphia.").

Acts of omission may serve as the predicate for a finding of municipal liability based on deliberate indifference to violations of constitutional rights. *See, e.g.,* ***Scanlon v. County of Los Angeles***, 92 F.4th 781, 811-13 (9th Cir. 2024) ("We have . . . observed three ways a plaintiff can satisfy *Monell*'s policy requirement: The municipal government acts pursuant to an express official policy, the government maintains a longstanding practice or custom, or the act was committed or ratified by an official with policy-making authority. . . Official nonfeasance can constitute a *Monell* violation when the municipality in effect 'has a policy of inaction and such inaction amounts to a failure to protect constitutional rights.'. .This is not our first occasion to consider *Monell* liability as it pertains to a county's child-removal policy. Unlike the warrant-based seizure at issue here, in *Kirkpatrick*, social workers took a newborn from the hospital without securing a warrant. . . . Here, DCFS operated under a more formal policy than the one at issue in *Kirkpatrick*, removing the children pursuant to a warrant. . . .More than merely referencing the relevant standards, DCFS's Application and Statement of Cause thus requires social workers to vet the validity of a proposed removal against the requirements of probable cause and California state law. Despite DCFS's nominal compliance with federal and state standards, there is evidence in the record from which a jury could find that the Department's policy governing the preparation of warrant applications is insufficient *in practice* to protect the constitutional rights of parents like these. Specifically, there is evidence that DCFS maintains a practice of omitting exculpatory information from petitions for removal in a manner tantamount to an official 'policy of inaction.'. . . Drawing all inferences in the Parents' favor, as we must on a motion for summary judgment, a jury could conclude that DCFS's practices are inadequate to protect against constitutional violations such as those now claimed. We therefore remand the *Monell* claim to the district court for additional consideration."); ***Ingram v. Kubik***, 30 F.4th 1241, 1255-56 (11th Cir. 2022) ("Ingram's complaint alleges that there was a causal connection between Dorning's conduct and the excessive force used against Ingram. The complaint alleges that Dorning established a policy that 'incidents of possible, likely, or known misconduct were not investigated, with the foreseeable result that deputies like Kubik believed they could get away with violating Ingram's rights.'. . And Ingram's complaint alleges that Kubik had that belief when he used excessive force. The complaint alleges 'multiple incidents, or multiple reports of prior misconduct by' officers. . . that were not investigated by Dorning. . . .Dorning allegedly 'was copied on all use of force reports' and 'approved of the excessive uses of

force without having any of them investigated.' '[N]o officer was disciplined, let alone terminated, for excessive force or for otherwise violating a citizen's constitutional rights during Dorning's 16-year tenure.' During that tenure, Dorning's website 'identified no person or division to contact with a complaint [against] a deputy.' In response to requests for 'records of internal investigations of deputy misconduct,' Ingram's lawyer was 'told no such records existed,' despite a 'policy and procedure manual' that 'requires thorough and prompt investigations' of allegations of misconduct. And '[d]espite widespread knowledge of the incident' involving Kubik and Ingram 'up the chain of command (including Dorning)[,] ... the incident was not ... investigated.' . . . The allegations of 'multiple reports of prior misconduct,'. . . with no investigation by Dorning 'allow[ ] the court to draw the reasonable inference,'. . . that there is a causal connection between Dorning's failure to investigate any allegations of serious misconduct and Kubik's belief that he could act with impunity. The factual allegations, if true, establish the '*absence* of a policy' of investigating excessive force violations, . . . of which Dorning had knowledge[.] And the complaint relies on more than the incident at issue to establish the custom or policy."); ***Jackson v. Barnes***, 749 F.3d 755, 763, 764 (9th Cir. 2014) ("In inaction cases, the plaintiff must show, first, 'that [the] policy amounts to deliberate indifference to the plaintiff's constitutional right.'. . This requires showing that the defendant 'was on actual or constructive notice that its omission would likely result in a constitutional violation.'. . Second, the plaintiff must show 'that the policy caused the violation in the sense that the municipality could have prevented the violation with an appropriate policy.'. . Jackson's claim against the Sheriff's Department, when liberally construed, . . .adequately states a policy of inaction. Jackson's alleged 'policy of inaction' is the Department's 'complete failure to supervise the practices of [its] deputies.' He adequately states that the Department was on actual or constructive notice that this failure to supervise would likely result in a constitutional violation: he asserts that Barnes 'routinely declined to read *Miranda* warnings' and that, because of the regular nature of Barnes's illegal activity, the Department 'should have known or knew that this unconstitutional conduct was occurring.' Finally, he asserts that this policy was the cause of the constitutional violation here; '[i]n the instant case,' he alleges, 'we are confronted with' the Department's failure to supervise its deputies. In reviewing the district court's judgment on the pleadings, we assume that the facts that Jackson alleges are true, . . . that is, we assume that Barnes in fact routinely declined to give *Miranda* warnings, and that the Department in fact did not supervise the practices of its deputies. With this assumption, Jackson has pleaded a policy of inaction, and therefore the district court erred in granting defendants judgment on the pleadings on that basis. . . . Construing Jackson's complaint liberally, Jackson has met the *Iqbal* standard if only because he has made a critical factual allegation that renders his complaint specific: that Barnes has admitted that he routinely deprived suspects of *Miranda* warnings as a 'ploy' to elicit confessions. Thus, Jackson's contention that the Sheriff's Department knew or should have known about Barnes's unconstitutional conduct, is not merely possible, but plausible. Moreover, Jackson does not state without more that the Department's policies generally caused the violation at issue here: he states specifically that the violation is the result of the Department's 'complete failure to supervise the practices of [its] deputies.' These allegations are sufficiently particular to state a plausible claim of a policy of inaction under *Iqbal*."); ***Conn v. City of Reno***, 591 F.3d 1081, 1104 (9th Cir. 2010) (order and amended opinion, denying rehearing en banc)

("As the Conns have presented sufficient evidence of a failure to adopt and implement suicide-prevention policies so as to give rise to a jury question, the rest of our analysis mirrors that which we described above regarding the failure to train. Given the predictability of suicide risk among detainees, and the likelihood of constitutional violations if suicide threats go unreported, the plaintiffs have presented a genuine issue for the jury on whether the failure to adopt and implement policies on suicide prevention was deliberately indifferent, and whether that deliberate indifference was a 'moving force' behind the violation of Clustka's constitutional rights."), *cert. granted,* 131 S. Ct. 1812 (2011) (*judgment vacated and remanded in light of* ***Connick v. Thompson,*** 131 S. Ct. 1350 (2011) and on remand, ***Conn v. City of Reno***, 658 F.3d 897 (9th Cir. 2011) ("We reinstate the opinion at 591 F.3d 1081, except that in light of the Supreme Court's decision in *Connick v. Thompson* , 131 S.Ct. 1350 (2011), we affirm in all respects the district court's grant of summary judgment as to municipality liability."); ***Johnson v. Holmes***, 455 F.3d 1133, 1145 (10th Cir. 2006) ("Villareal argues that extreme short-staffing at the Department is the cause of any failures on her part during this period. Undisputed testimony shows that Villareal was both covering the large number of cases Perez left behind and serving as a supervisor to other social workers. . . . However, Villareal does not present evidence that budgetary problems at the Department caused her complete failure to investigate. Existence of budgetary problems is not an automatic free pass for unprofessional behavior, and the record is not clear about whether Villareal's workload, and not some less benign explanation, made her unable to investigate the questionable situation in Bogey's home. Summary judgment on this issue was therefore inappropriate."); ***Long v. County of Los Angeles***, 442 F.3d 1178, 1187, 1188, 1190 (9th Cir.2006) ("The County argues that, as a matter of law, a policy of reliance upon the trained professional doctors and nurses who worked in the MSB [Medical Services Bureau] cannot amount to deliberate indifference because the alleged deficiencies identified by Appellant fall within the province of medical and nursing schools, and nothing in the record suggests that the County had reason to believe the professional medical training received by the MSB doctors and nurses was deficient. This argument is contrary to this court's case law, which holds that, even where trained professionals are involved, a plaintiff is not foreclosed from raising a genuine issue of triable fact regarding municipal liability when evidence is presented which shows that the municipality's failure to train its employees amounts to deliberate indifference. Indeed, the County's argument would allow municipalities to insulate themselves from liability for failing to adopt needed policies by delegating to trained personnel the authority to decide all such matters on a case by case basis, and would absolve the governmental agencies of any responsibility for providing their licensed or certified teachers, nurses, police officers and other professionals with the necessary additional training required to perform their particular assignments or to implement the agency's specific policies. . . . The evidence creates a triable issue of fact regarding whether the County's policy of relying on medical professionals without training them how to implement proper procedures for documenting, monitoring and assessing patients for medical instability within the confines of the MSB amounted to deliberate indifference. . . . We conclude that Appellant has presented evidence that creates a triable issue regarding whether the County's failure to implement a policy for responding to the fall of a medically unstable patient, a policy providing for prompt medical assessment if an MSB patient refuses necessary treatment, and a transfer policy, directing MSB staff immediately to

transfer patients no longer medically stable, amounted to deliberate indifference to Mr. Idlet's constitutional rights."); ***Calhoun v. Ramsey,*** 408 F.3d 375, 379-81 (7th Cir. 2005) ("The express policy theory applies, as the name suggests, where a policy explicitly violates a constitutional right when enforced. . . . A second way of complaining about an express policy is to object to omissions in the policy. This, as we understand the argument, is what Calhoun is doing. In fact, we think that it is more confusing than useful to distinguish between claims about express policies that fail to address certain issues, and claims about widespread practices that are not tethered to a particular written policy. In both of these situations, the claim requires more evidence than a single incident to establish liability. . . This is because it is necessary to understand what the omission means. No government has, or could have, policies about virtually everything that might happen. The absence of a policy might thus mean only that the government sees no need to address the point at all, or that it believes that case-by-case decisions are best, or that it wants to accumulate some experience before selecting a regular course of action. At times, the absence of a policy might reflect a decision to act unconstitutionally, but the Supreme Court has repeatedly told us to be cautious about drawing that inference. . . Both in the 'widespread practice' implicit policy cases and in the cases attacking gaps in express policies, what is needed is evidence that there is a true municipal policy at issue, not a random event. If the same problem has arisen many times and the municipality has acquiesced in the outcome, it is possible (though not necessary) to infer that there is a policy at work, not the kind of isolated incident that *Brown* held cannot support municipal liability. . . . Whether we look at this case as one in which Calhoun was complaining about the failure of the County's express policy to make provision for advance verification of medications, or if we look at it as one in which Calhoun is arguing that the County has an implicit policy reflected in an alleged widespread practice of impeding detainee access to medication (a distinction Calhoun has discussed at length), the result is the same. Because he cannot point to any language in the jail's policy that is constitutionally suspect, he must provide enough evidence of custom and practice to permit an inference that the County has chosen an impermissible way of operating. . . . Having argued that the jail had a 'practice of refusing' to pre-verify medication, Calhoun cannot now turn around and argue that the district court erred by instructing the jury on a custom or usage theory. Indeed, the instructions were consistent with Calhoun's proposed instructions and provided an alternative theory for his claim. His effort to hold Kane County liable on the basis of this single incident is inconsistent with *Brown*, and the district court was correct to reject instructions that would have misstated the law."); ***Garretson v. City of Madison Heights***, 407 F.3d 789, 796 (6th Cir. 2005) ("Garretson argues that Madison Heights's conduct, and that of its police officers, was premised on an unwritten custom of not providing medical attention to pre-trial detainees prior to arraignment[,] a policy or custom of inaction. She refers to the 'Madison Heights Policy on Medical Care while in Custody' to support her position. Such an alleged policy of inaction 'must reflect some degree of fault before it may be considered a policy upon which § 1983 liability may be based.' . . . Garretson must show: (1) a clear and persistent pattern of mishandled medical emergencies for pre-arraignment detainees; (2) notice, or constructive notice of such pattern, to Madison Heights; (3) tacit approval of the deliberate indifference and failure to act amounting to an official policy of inaction; and (4) that the custom or policy of inaction was the 'moving force,' or direct causal link, behind the constitutional injury. . . Here, there is no evidence that Madison

Heights, or its Police Department, had a custom of denying medical treatment to pre-arraignment detainees. Nor is there evidence that Madison Heights had notice of a 'clear and persistent pattern' of such treatment demonstrating the existence of a policy of inaction. Nor, as the district court noted, is there evidence that Madison Heights was the 'moving force' behind Garretson's injuries. Therefore, the decision of the district court that the City, and its Police Department, are entitled to summary judgment on the§ 1983 claims is AFFIRMED."); ***Williams v. Paint Valley Local School District***, 400 F.3d 360, 369 (6th Cir. 2005) ("To state a municipal liability claim under an 'inaction' theory, Doe must establish: (1) the existence of a clear and persistent pattern of sexual abuse by school employees; (2) notice or constructive notice on the part of the School Board; (3) the School Board's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and (4) that the School Board's custom was the 'moving force' or direct causal link in the constitutional deprivation. . . The *Monell* custom requirement is an essential element of this claim. The *evidence must show that the need to act is so obvious that the School Board's 'conscious' decision not to act can be said to amount to a 'policy' of deliberate indifference to Doe's constitutional rights*.' emphasis original); ***Blackmore v. Kalamazoo,*** 390 F.3d 890, 900 (6th Cir. 2004) ("A review of the record reveals that Blackmore presented evidence that the County did not have a formal written policy on how to deal with prisoner illnesses, and that the jail's practice was not to provide a substitute nurse if the on-duty nurse calls in sick, resulting in times when a nurse is not on duty. Because we hold that verifying medical evidence is not required to state a claim for deliberate indifference where, as here, the seriousness of prisoner's need for medical care is obvious, and because the record presents an issue of fact regarding the total lack of any County policies, practices, and adequate training for this type of constitutional claim, and regarding whether the harm complained of resulted from the County policies, or lack thereof, we reverse the district court's grant of summary judgment for the County."); ***Hayes v. Faulkner County, Arkansas***, 388 F.3d 669, 674 (8th Cir. 2004) ("The County's policy was to submit the names of confinees to the court and then wait for the court to schedule a hearing. That policy attempts to delegate the responsibility of taking arrestees promptly before a court. In *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir.1992), a policy was deliberately indifferent where the jail had no internal procedures to track whether inmates had been arraigned. . . Because the County's policy here attempts to delegate the responsibility of bringing detainees to court for a first appearance and ignores the jail's authority for long-term confinement, the policy is deliberately indifferent to detainees' due process rights."); ***A.M. v. Luzerne County Juvenile Detention Center,*** 372 F.3d 572, 583 (3d Cir. 2004) ("Although this issue presents a close question on whether the Center's failure to establish a written policy and procedure for reviewing and following up on incident reports amounts to deliberate indifference, we conclude that a reasonable jury could conclude from the evidence that by failing to establish such a policy the Center disregarded an obvious consequence of its action, namely, that residents of the Center could be at risk if information gleaned from the incident reports was not reviewed and acted upon."); ***Natale v. Camden County Correctional Facilitiy,*** 318 F.3d 575, 585 (3d Cir. 2003) ("A reasonable jury could conclude that the failure to establish a policy to address the immediate medication needs of inmates with serious medical conditions creates a risk that is sufficiently obvious as to constitute deliberate indifference to those inmates' medical needs.

The failure to establish such a policy is a 'particular[ly] glaring omission' in a program of medical care . . . PHS [Prison Health Services] 'disregarded a known or obvious' consequence of its actions, i.e., the likelihood that the medical conditions of some inmates may require that medication be administered within the first 72 hours of their incarceration."); ***Gibson v. County of Washoe,*** 290 F.3d 1175, 1195, 1196 (9th Cir. 2002) ("County officials actually knew that some detainees who arrived at the jail would have urgent medical and mental health needs requiring immediate hospitalization. The policymakers also knew that people suffering from mental illness are sometimes combative. In addition, the County had created a mental health screening position, so policymakers knew that jail employees needed to identify and address mental illnesses in order not to neglect the medical needs of prisoners. Given that the County policymakers actually knew that the jail staff would regularly have to respond to detainee mental health needs, it should have been obvious that the County's omission could well result in a constitutional violation. . . Because county policy forbids medical evaluations on incoming detainees who are combative and uncooperative, it was obvious that someone who had a mental illness that made them combative and uncooperative would not be evaluated. If, however, a combative detainee arrives with prescription psychotropic medication in their own name, there is an alternative way to identify those with medical needs. Although a jury could conclude that the nurse actually did identify Gibson as a person in need of mental health treatment, the County's medication policy did not instruct her to act upon this realization. When policymakers know that their medical staff members will encounter those with urgent mental health needs yet fail to provide for the identification of those needs, it is obvious that a constitutional violation could well result"); ***Fairley v. Luman,*** 281 F.3d 913, 918 (9th Cir. 2002) (per curiam) ("John presented evidence sufficient to establish the City's warrant procedures constituted a 'policy.' Chief Luman testified at trial that he was 'the chief policymaker for law enforcement matters for the City of Long Beach.' His decision not to instigate any procedures to alleviate the problem of detaining individuals on the wrong warrant could constitute a policy in light of his testimony he knew it was 'not uncommon' that individuals were arrested on the wrong warrant, and that the problem was particularly acute where twins were involved. As in *Oviatt,* where the city failed to implement internal procedures for tracking inmate arraignments, the policy was one of inaction: wait and see if someone complains."); ***Griffin v. City of Opa-Locka,*** 261 F.3d 1295, 1308, 1314 (11th Cir. 2001) ("After reviewing the record in full and taking all inferences in favor of Griffin, the evidence establishes without any question that sexual harassment was the on-going, accepted practice at the City and that the City Commission, Mayor, and other high ranking City officials knew of, ignored, and tolerated the harassment. As such, we are persuaded that the jury's conclusion that sexual harassment was so persistent and widespread as to amount to a unconstitutional policy or custom is amply supported by the evidence. . . . We believe it fair to say that the City's tolerance of gross sexual harassment, its failure to take remedial action despite actual and constructive knowledge of the problem and its complete lack of any sexual harassment policy or complaint procedure taken together clearly constitute a 'moving force' behind the rampant sexual harassment at the City. As such, we uphold the jury's conclusion that the City had a policy or custom of ignoring or tolerating gross sexual harassment."); ***Munger v. City of Glasgow Police Dep't***, 227 F.3d 1082, 1088 (9th Cir. 2000) ("The unconstitutional policy or custom the Mungers allege. . . is not the failure to offer assistance to intoxicated persons, but

rather the failure to train officers regarding appropriate assistance and treatment of intoxicated persons. In our view, a custom and policy of helping intoxicated individuals could be in place and yet the departments could have failed to implement the policy because they did not train their officers adequately."); ***Oviatt v. Pearce***, 954 F.2d 1470, 1477 (9th Cir. 1992) (decision not to take any action to alleviate the problem of detecting missed arraignments constitutes a policy for purposes of § 1983 municipal liability); ***Rivas v. Freeman***, 940 F.2d 1491, 1495 (11th Cir. 1991) (liability for failure to establish sufficient and appropriate procedures and policies regarding identification of arrestees, warrantless searches, and computer checks for information); ***Leach v. Shelby County Sheriff***, 891 F.2d 1241, 1247 (6th Cir. 1989) (policy of deliberate indifference to medical needs of paraplegic and physically incapacitated prisoners), *cert. denied*, 495 U.S. 932 (1990).

See also ***Little v. City of Morristown, Tennessee***, No. 221CV00047DCLCCRW, 2023 WL 2769633, at *12-13 (E.D. Tenn. Mar. 31, 2023) ("[A] reasonable juror could conclude that there was a clear and persistent pattern of reckless disregard to inmate safety of which the County had actual notice. The County's failure to address and resolve these concerns despite pleas for help from Jail administration also creates a genuine dispute as to whether the County tacitly approved the unconstitutional conduct, such that their deliberate indifference to inmate safety could reasonably be said to amount to an official policy of inaction. In the absence of such official policy of inaction, it may also be reasonably inferred that Little would have been properly supervised and secure while at the Jail. . . . A reasonable juror could conclude that had the Jail been adequately staffed with officials who could properly perform security checks, Little's need for medical care would not have been disregarded. . . . [T]he record is sufficient to create a genuine dispute as to whether the County acted with deliberate indifference to the safety and security of inmates at the Jail through a policy of inaction."); ***Echavarria v. Roach***, No. 16-CV-11118-ADB, 2021 WL 4480771, at *27 (D. Mass. Sept. 30, 2021) ("Plaintiff's theory that the City failed to promulgate a policy relating to disclosure requirements will also survive summary judgment. . . . Although there is a dispute as to whether it had policies regarding the disclosure of exculpatory evidence, . . . the City maintains that it was not on notice that failing to have a detailed exculpatory evidence policy would cause a constitutional violation[.] . . Like the failure to train allegation, the failure to promulgate a policy theory also requires a causal link between the City's inaction and the constitutional deprivation, which can normally be shown via a pattern of past violations, but liability may also occur in the face of an 'obvious and known risk.'. . Here, failing to have a policy on disclosing exculpatory evidence creates a known and obvious risk that police officers would withhold such evidence. . . Accordingly, triable issues about the City's liability exist, and the City's motion for summary judgment on Count I is therefore *DENIED*."); ***Taylor v. Comanche County Facilities Authority***, No. CIV-18-55-G, 2020 WL 6991010, at *9–10 (W.D. Okla. Nov. 25, 2020) ("With respect to state of mind, 'to show that a facially lawful municipal action has led an employee to violate a plaintiff's rights, the plaintiff must show that the action was taken with deliberate indifference as to its known or obvious consequences.'. .The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. In most instances, notice can be established by

proving the existence of a pattern of tortious conduct. In a narrow range of circumstances, however, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction. . . .The record before the Court allows a reasonable inference that the alleged conditions and attendant risks to inmate safety were known to CCDC staff and administrators. . . Based on this evidence, there is a genuine dispute as to whether CCFA, as the entity responsible for operating the jail, knew about the complained-of conditions (i.e., overcrowding, understaffing, insufficient camera monitoring, and institutional tolerance of inmate disobedience), knew such conditions posed a substantial risk of serious harm to inmates, and nonetheless neglected to take any ameliorative action. . . Defendants, for their part, do not directly dispute the cited instances where CCDC exceeded its inmate capacity or the CCDC officers' testimony regarding the allegedly deficient jail conditions, emphasizing instead that Plaintiff does not cite a specific incident 'similar to the attack on Plaintiff.'. . Defendant Hobbs' signed declaration is silent as to Plaintiff's conditions-of-confinement allegations, instead focusing upon the training protocols and written policies that apply to the facility, as well as the training of the specific officers present at the incident. . . But a governmental entity can be held liable for its actions and inaction (e.g., 'permitting conditions' that precipitate an inmate attack or failing 'to adequately train and supervise the detention officers on duty') even if the entity's official policy 'is not unlawful on its face.'. . Nor do Defendants contend that Defendant CCFA 'tried to correct the deficiencies but was hindered' by circumstances beyond its control, such as a lack of funding. . . Considered in the light most favorable to Plaintiff, the evidence in the record is sufficient to create a material fact issue as to whether Defendant CCFA was deliberately indifferent to an excessive risk to inmate safety and to the obvious consequences of its conduct in operating CCDC in this regard. . . . In sum, a jury could conclude from the evidence before the Court that Defendant CCFA was or should have been aware of a significant risk of harm to inmate safety at CCDC, that Defendant CCFA 'failed to take reasonable steps to abate the risk,' and that Defendant CCFA's 'policy of no or ineffective action was the moving force behind the conditions which created the risk of harm in the first place.'. . Defendant CCFA is therefore not entitled to summary judgment on Plaintiff's municipal-liability failure-to-protect claim."); ***Martin v. Hermiston School District 8R***, No. 3:18-CV-02088-HZ, 2020 WL 6547638, at *19-23 (D. Or. Nov. 4, 2020) ("To prevail on a municipal liability claim under § 1983, Plaintiffs must show that a municipal custom or policy caused the violation of their constitutional rights. . . If no constitutional violation occurred, then a municipal liability claim fails under § 1983. . . To establish *Monell* liability, Plaintiffs must show a constitutional violation caused by (1) an employee acting under an expressly adopted official policy; (2) an employee acting under a longstanding practice or custom that amounts to an official policy; or (3) an employee acting as a final policymaker. . . The Court has found that a question of fact remains about whether a constitutional violation occurred, so the Court analyzes each of the avenues through which Plaintiffs allege *Monell* liability against the School District to determine whether the School District is entitled to summary judgment on Plaintiffs' *Monell* claims. . . .An official policy under § 1983 may be a policy of action or inaction. . . A government body's 'failure to implement procedural safeguards to prevent constitutional violations' is a policy of inaction that may cause a constitutional violation. . . To establish a policy of deliberately indifferent inaction,

Plaintiffs must show that the School District ' "was on actual or constructive notice that its omission would likely result in a constitutional violation" and that "the policy caused the violation in the sense that the municipality could have prevented the violation with an appropriate policy."'. . Whether a government entity acted with deliberate indifference to the constitutional rights of citizens generally is a jury question. . . . Plaintiffs produced undisputed evidence that the School District had no procedure to ensure that coaches did not return athletes to play after they sustained a concussion without medical clearance. . . . Viewing the evidence in the light most favorable to Plaintiffs, a jury could conclude from th[e] facts that the School District acted with deliberate indifference to the constitutional rights of its players. The School District lacked a process for identifying which players required medical clearance before returning to practice and play. . . . With no way to verify with accuracy that only players who had received medical clearance following a concussion participated in practices and games, it should have been obvious to the School District that a coach could return a concussed player to practice and play without medical clearance. It was also obvious that a player could suffer a serious injury or even death if the player sustained another head injury. As a result, a reasonable juror could conclude that the inadequacy of the School District's informal memory-dependent method of tracking student concussions was so obvious and the risk of a constitutional violation so likely to occur that the School District was deliberately indifferent to the constitutional rights of C.M. and his parents."); ***Oliver v. Gusman***, No. CV 18-7845, 2020 WL 1303493, at *6–9 (E.D. La. Mar. 19, 2020) ("Plaintiff here challenges systemic deficiencies within OJC and OPSO that he alleges not only violated his constitutional rights but also resulted in numerous other instances of officers failing to protect inmates, which readily distinguishes many of the cases the Moving Defendants rely on. . . Plaintiff's complaint alleges that he was exposed to a substantial risk of serious harm from other inmates in light of OPSO officers' inadequate supervision of inmates and that the Moving Defendants were aware of this risk from the numerous prior instances of inmate-on-inmate assaults where officers failed to intervene, yet they failed to correct the polices that allowed these assaults to continue. Plaintiff has stated a claim for deliberate indifference to his constitutional right to safety. . . . Here, Plaintiff has alleged that the Moving Defendants knew of a substantial risk of serious harm to inmates in their custody from assaults by other inmates that officers would be unlikely to prevent because a pattern of similar incidents had been ongoing for several years before Plaintiff was attacked. Thus, their failure to correct policies known to cause constitutional violations or to implement new policies is objectively unreasonable, regardless of whether the Moving Defendants knew that Plaintiff specifically was at risk."); ***Ballheimer v. Batts***, No. 117CV01393SEBDLP, 2019 WL 1243061, at *11–12 (S.D. Ind. Mar. 18, 2019) ("Defendants' chief argument in opposition to Ballheimer's *Monell* claim is a complete nonstarter: 'Contrary to Plaintiff's claims, there were no policies and procedures in place with regards to these issues. If this claim is recognized, it does not rise to the level of a constitutional violation and/or there is no evidence in support of it.'. . And again: 'The undisputed evidence is that there were no policies and procedures in place with regard to the catheterization issue.'. . Rejecting this argument does not require breaking new ground in this area; to the contrary, [the Seventh Circuit] has recognized these principles for years. In *Sims v. Mulcahy*, 902 F.2d 524 (7th Cir. 1990), [the court] observed that 'in situations that call for procedures, rules or regulations, the failure to make policy itself may be actionable.'. . In the same

vein, [the court] said in *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293 (7th Cir. 2010), that 'in situations where rules or regulations are required to remedy a potentially dangerous practice, the County's failure to make a policy is also actionable.'. . *see also King v. Kramer*, 680 F.3d 1013, 1021 (7th Cir. 2012) (where municipality has 'actual or constructive knowledge that its agents will probably violate constitutional rights, it may not adopt a policy of inaction')."); ***Siehl v. City of Johnstown***, 365 F.Supp.3d 587, 599-600 (W.D. Pa. 2019) ("Here, Plaintiff has sufficiently alleged that the County caused the deprivation of his rights by its failure to employ policies and protocols regarding the DNA testing of biological evidence at a time when law enforcement agencies throughout the United States knew that such testing could provide conclusive evidence of guilt or innocence in a criminal case. Plaintiff further alleges that the County's failure to establish guidelines as to who would pay for the testing after it was determined that such testing was necessary, delayed the DNA testing until all blood samples were consumed in non-DNA testing. . . Plaintiff avers as follows: Had investigating officers conducted or arranged for DNA testing, that testing could have exonerated Mr. Siehl as none of his blood or other biological material was present in an area that would show that he was the murderer. Further, that testing could have provided evidence as to the identity of the real killer. . . .Taking all of Plaintiff's allegations as true, as it must at this stage of the proceedings, the Court finds at the pleading stage that Plaintiff has sufficiently alleged a claim for municipal liability against Cambria County."); ***Turner v. Cook County Sheriff's Office***, No. 19 CV 5441, 2020 WL 1166186, at *3-4 (N.D. Ill. Mar. 11, 2020) ("The Seventh Circuit has not 'adopt[ed] any bright-line rules defining a "widespread custom or practice."'. . In fact, 'there is no clear consensus as to how frequently such conduct must occur to impose *Monell* liability, except that it must be more than one instance, or even three.'. . A plaintiff must sufficiently allege a policy as opposed to a random event. . . At this stage, the Court finds that Plaintiff has met that burden. The Amended Complaint alleges that Jail inmates regularly overdose because of inadequate or nonexistent policies that allow inmates easy and frequent access to drugs. Plaintiff alleges that these policies were the moving force behind the violation of Ms. Scott's constitutional right to be free from deliberate indifference to her drug overdose and ultimate death. In support, Plaintiff cites several inmate overdoses, many occurring within the past five years. Plaintiff also alleges that 'top policymakers' in Cook County publicly acknowledged the problem, cited failures in policy, and were aware of the substantial risk these failures posed to inmates. . . According to Plaintiff, Sheriff Dart knew about the problem and the inmate risk, yet he did nothing. . .Plaintiff's Amended Complaint also claims failure to train and supervise Jail staff to screen for drugs and to appropriately respond to drug overdoses. There are limited circumstances in which a failure to train claim will be characterized as a 'policy' under § 1983 and *Monell*. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). A failure to train or supervise claim is actionable only if the failure amounted to deliberate indifference to the rights of others. . . In this context, deliberate indifference exists where: (1) the defendant failed to provide adequate training considering foreseeable consequences; or (2) failed to act in response to repeated complaints of constitutional violations by its officers. . . Basically, 'the defendant must have actual or constructive notice of a problem.'. .Although Plaintiff arguably alleges other constitutional violations in the form of overdoses and Jail suicides, Plaintiff does not plead any examples of repeated complaints related to those incidents. Thus, Plaintiff pleads only the first kind of failure

to train claim. Specifically, Plaintiff alleges that the Jail was aware of, and publicly acknowledged, a persistent drug smuggling problem that resulted in several inmate overdoses and deaths. Yet, the Amended Complaint alleges that Sheriff Dart failed to adequately train Jail staff on drug screening methods, inmate supervision, drug treatment, and drug overdose response. These allegations are sufficient to establish notice of the problem, its consequences, and a failure to act. Sheriff Dart argues that Plaintiff's allegations are insufficient because the Amended Complaint details one example of drug smuggling, mentions instances where Jail staff administered overdose antidotes, and discusses unrelated cases of overdose from alcohol and legally obtained medication. These arguments quibble with red herring factual details and fail to address Plaintiff's overarching allegations—that inmate overdoses regularly occur, Sheriff Dart and Jail staff know that, the Jail's policies (if they exist) do not adequately address the problem, Jail staff are not appropriately trained or supervised as to drug screening or overdose treatment, and because of all that, Ms. Scott overdosed and died. Sheriff Dart's arguments might be more well-received on a motion for summary judgment, but the Court finds them lacking here. . . . [T]he Amended Complaint contains sufficient allegations to put Sheriff Dart on notice of the bases for Plaintiff's official liability claims."); ***Deloney v. County of Fresno***, No. 117CV01336LJOEPG, 2018 WL 3388921, at *11 & n.22 (E.D. Cal. July 11, 2018) ("[T]he facts alleged do not lead the Court to find this to be in the narrow range of circumstances where single incident liability is appropriate. In *Conn v. City of Reno*, a case involving a pretrial detainee's suicide, the Ninth Circuit held that '[t]he failure to train officers on how to identify and when to report suicide risks produces a "highly predictable consequence": that police officers will fail to respond to serious risks of suicide and that constitutional violations will ensue.'. . . However, after the Supreme Court's decision in *Connick v. Thompson*, the Ninth Circuit specifically vacated the portion of its prior opinion pertaining to *Monell* claims for both failure to train and failure to implement a policy–indicating that single-incident liability does not attach to cases involving inmate suicides presumably because failing to implement policies on suicide prevention did not constitute a 'highly predictable consequence' of such policy failures. . . . In *Conn*, the Ninth Circuit did not explicitly consider whether plaintiffs had established a pattern for purposes of *Monell* liability, but after vacating the opinion on the theory of single incident liability for failure to train and failure to implement policies, affirmed summary judgment for Defendant on those *Monell* claims despite six suicides in the jail in question in less than two years. . . In *Connick*, the Supreme Court found that four overturned convictions because of *Brady* violations committed by Connick's assistant district attorneys did not establish a pattern of violations to put Connick on notice for a need for better *Brady* training because none of those cases involved the failure to disclose the type of evidence involved in Thompson's case."); ***T.E. v. Pine Bush Cent. Sch. Dist.,*** 58 F. Supp. 3d 332, 377-79 (S.D.N.Y. 2014) ("Here, Plaintiffs have proffered sufficient evidence to survive summary judgment on *Monell* grounds based on the District's response, or lack thereof, to anti-Semitic harassment. As discussed, there are issues of material fact as to whether the District had actual knowledge of the harassment that Plaintiffs allege. . . Moreover, there is specific evidence in the record that the Board had actual notice that school administrators were confronting numerous instances of anti-Semitic bullying. . . .Moreover, the emails and the meeting provided the Board with information that anti-Semitic harassment presented administrators and teachers with 'difficult choice[s]' concerning discipline and

prevention, there was a pattern of school personnel 'mishandling the[se] situation[s],' and that those choices had 'cause[d] the deprivation of [students'] rights' to be free from harassment and bullying based on their race. . . The Court also notes that Defendants have not presented any evidence nor do they make any claim that Meier or Greer or the Board in general took steps to address harassment, monitor the administrators' response to anti-Semitism or bullying in general, or independently investigate Plaintiffs' claims after the emails or the June 2011 meeting. . . . In light of evidence of the Board's knowledge of anti-Semitic harassment and its failure to respond in any reasonable way, including through training of school administrators and teachers, a jury could find that the facts demonstrate the District's 'inaction was the result of conscious choice and not mere negligence.'. . Accordingly, Defendants are not entitled to Summary Judgment under *Monell*."); ***Hughes v. City of Chicago***, No. 08-cv-627, 2011 WL 5395752, at *6 (N.D. Ill. Nov. 8, 2011) ("Plaintiffs' claim comes down to whether not having a policy regarding field testing and not training officers on the use of field test kits constitutes deliberate indifference on the part of the City to its citizens' rights. Plaintiffs theorize that because Officers Uczen and Iza had no knowledge of the field test kits (and, even if they did, were not trained on how to use them), Plaintiffs' rights were violated and *Monell* liability follows. However, Plaintiffs' theory ignores the training that the officers had (and followed) regarding the recovery of suspect narcotics at the scene of an arrest. That the policy does not provide instruction on how or when to use field test kits does not automatically mean that it should. Rather, given that Plaintiffs have offered no evidence of additional alleged violations beyond the present incident to support their claims at the summary judgment stage, the Court concludes that Plaintiffs have not come forward with enough to overcome the concerns expressed by the Supreme Court in *Tuttle* and the Seventh Circuit in *Calhoun.* In short, although Defendant Officers remain in the case to answer for their individual conduct at trial, Plaintiffs have fallen short of demonstrating that gaps in the City's policies and training were the moving force behind Plaintiff Dewitt's injuries or that the City was deliberately indifferent to their constitutional rights."); ***Finch v. City of Stamford***, No. 3:10cv748 (MRK), 2011 WL 5245422, at *5 (D. Conn. Nov. 2, 2011) ("If, as Ms. Finch claims, a policy about treating intoxicated or drugged arrestees was needed in Stamford, then it must also be the case that training in that policy was also needed. In sum, the Court cannot imagine a lack-of-policy claim under § 1983 that is not also, and more relevantly, a failure-to-train claim. Both ultimately focus the Court's attention on the same issue: whether the City should have done more to prevent a clearly foreseeable constitutional violation from happening. . . .[A] plaintiff needs to inquire during discovery into the ways the City's police officers are trained, and what policies and practices they routinely follow. She needs to investigate whether past incidents have suggested a need for different practices, or more stringent policies and training. And she must adduce evidence showing that, by ignoring this need, the city caused the injury in question − that things might have gone differently if the City had fostered different practices. Ms. Finch has done none of this. . . .Ms. Finch has not offered evidence to suggest that Stamford's police officers were insufficiently trained at identifying arrestees' medical needs. Nor has she offered evidence that Stamford's practices have ever led to an injury or death other than Mr. Avalone's. Finally, since no medical expert was deposed, no evidence indicates that Mr. Avalone would have survived even if the City's policies had required police to take him immediately to the hospital."); ***Blanchard v. Swaine***, No.

08-40073-FDS, 2010 WL 4922699, at *11, *12 (D. Mass. Nov. 29, 2010) ("[I]t is doubtful that there is a perfect congruence in any municipality between its written policies (which are often set out in a three-ring binder on a shelf) and the policies as implemented in the field (which often occurs under fast-paced and difficult circumstances). But there are at least two relevant ways, alone or in conjunction with one another, in which such a connection could be drawn. The first is where a city's failure to follow its written policies prevents its management from becoming aware of incidents as they arise and implementing appropriate training and discipline in response. . . Here, the Leominster police did not normally file a separate use-of-force report, did not send a detective to investigate use-of-force incidents, and 'usually' (but not always) informed the chief of police of such incidents. A factfinder might reasonably conclude that the LPD was not taking steps to ensure that it was informed of problems as they arose, and thus could not implement appropriate training and discipline in response. It is true, of course, that there is no evidence that the LPD had a history of the use of excessive force, or a history of failing to discipline wayward officers. But that same evidence might be said to support the argument that the LPD was not keeping itself fully informed, rather than refute the causative link. . . The second way a causal connection could be drawn is where a city's failure to follow its written policies sends a message to officers that rules will not be strictly enforced and that officer violations will not be disciplined. . . Although this case does not present highly egregious circumstances of institutional misconduct, a reasonable jury could nonetheless draw such an inference here. . . In summary, a reasonable factfinder could conclude under the circumstances that the City's failure to follow its written policy could have constituted the direct cause of Blanchard's injury. . . Summary judgment will therefore be denied with regard to the claims of failure to supervise, discipline, and investigate."); ***Johnson v. City of Chicago,*** No. 05 C 6545, 2009 WL 1657547, at *10 (N.D. Ill. June 9, 2009) ("Contrary to the City's argument, however, Johnson has pointed to evidence in the record that could lead a reasonable jury to believe that the City's practice of inadequate investigation and discipline of rogue officers caused these officers to violate his rights."); ***Arias v. Allegretti***, No. 05 C 5940, 2008 WL 191185, at *4, *5 (N.D.Ill. Jan. 22, 2008) ("Whether the City's actions in 1997 and 1998 requiring simply a contract change without taking any legislative action shows a lack of deliberate indifference should be left for the trier of fact. The evidence in the instant case shows that in January 2000 Alderman Beavers submitted an official resolution recognizing that 'Chicago police officers who do not carry out their responsibility in a professional manner have ample reason to believe that they will not be held accountable, even in instances of egregious misconduct.' A committee hearing was held, but nothing was done. In 2003, a jury returned a $1 million verdict against the City, finding a plaintiff's injuries were directly caused by the City's custom and practice of not adequately investigating, disciplining or prosecuting off duty police officers who used excessive force. *Garcia v. City of Chicago,* 2003 WL 22175618 (N.D.Ill.2003). Although that $1 million damage award was later reduced by remittitur, the City Council was certainly made aware that its so-called efforts to correct the problems of inadequate investigation and discipline was failing. Yet, nothing more was done at that time. Finally, in 2005 a proposal to amend the Municipal Code was introduced that would have addressed many of the issues raised by Alderman Beavers. The proposal called for sweeping changes in the investigation process. That proposal failed to pass the City Council, and the Chicago Police Department's disciplinary system remains unchanged to

date. Based on the evidence plaintiffs have presented, they are entitled to argue to a jury that the City Council has been deliberately indifferent to the problem of police sexual misconduct, resulting in plaintiffs' injuries. Accordingly, the City's motion for summary judgment on Count I is denied."); ***Samples v. Logan County, Ohio***, No. C2-03-847, 2006 WL 39265, at *10 & n.6 (S.D. Ohio Jan. 6, 2006) ("As a matter of law, the Court cannot say one way or another whether the outcome would have been different had the jail's screening policy involved asking questions about alcohol history. . . However, it is not unreasonable to think that, considering the symptoms Susan was exhibiting in the night, and considering the special precautions the jail takes when an inmate has a known risk of withdrawal, placing Susan in a special observation cell could have made a difference. The Court therefore finds plaintiffs have alleged sufficient facts to establish that the accident happened because of the County's policy. Accordingly, defendants' motion is denied on this claim. . . . The jail has since changed its policy to now include questions about alcohol use. . . Plaintiff's expert, Dr. Gottula, testified that it is common practice at other prisons to ask specific questions at intake about the risk of alcohol withdrawal. These questions have been routinely asked since the late 1990s."); ***Brown v. Mitchell***, 327 F.Supp.2d 615, 631(E.D. Va. 2004) ("In sum, on this record, a reasonable jury could find a pattern or practice for purposes of *Monell* by finding that the City Manager's Office, in its long-standing failure to act in the face of the known conditions at the Jail, acted with deliberate indifference to a known constitutional deprivation."); ***Solis v. City of Columbus,*** 319 F.Supp.2d 797, 809-11 (S.D. Ohio 2004) ("Because, under a no-knock warrant, a citizen loses the protection that would prevent the wrong house from being raided, the city should provide the citizen with the alternative protection of greater care being taken to ensure that the targeted address is correct before the warrant issues. The governmental interest in *not* having in place some sort of procedural safeguards to prevent terrifying and potentially tragic invasions of the wrong homes seems to this Court to be slight. When compared with the interest of innocent citizens in not undergoing the sort of ordeal experienced by Nicole and Carmen Solis, . . . the Court has no problem in concluding that a jury could find the City to have been deliberately indifferent to the rights of its inhabitants by failing to have such a policy. . . . The evidence reveals that Cox simply was not, in several small ways, as careful as he could have been. But why should he have been more careful, when there was no City policy requiring it? A reasonable jury also could find that, had such a policy been in place, Cox would have given the additional attention to accuracy that would have led to a different result. For the foregoing reasons, Defendants' Motion for Summary Judgment is DENIED as to the City and the individual Defendants in their official capacities based on the City's failure to have in place an operational policy that would require more than usual care to be taken in the interests of obtaining an accurate address for the no-knock search warrant that led to the violation of Plaintiffs' rights."); ***Brown v. Mitchell,*** 308 F.Supp.2d 682, 693, 694 (E.D. Va. 2004) ("[T]he housing of inmates in a grossly overcrowded, poorly ventilated, and unsanitary jail facility such as is described in the Complaint is so likely to result in inmate sickness and suffering that there is an obvious likelihood of constitutional deprivations to an identifiable group of persons having a special relationship to the municipality. And, that likelihood of deprivation to those persons is so apparent and obvious that, under *Milligan*, municipal inaction, even standing alone and without a pattern of actual sickness or disease transmissions, can constitute a cognizable 'official policy or custom' for

purposes of *Monell*."); ***Kelsay v. Hamilton County, Tennessee***, No. 1:02-CV-054, 2003 WL 23721334, at *11 (E.D. Tenn. Dec. 9, 2003) ("Kelsay contends that the Hamilton County Sheriff's Department has a higher than normal use of force at the jail against prisoners and there is a history or pattern of ignoring complaints by prisoners of excessive force. There is a dispute whether the Sheriff's Department conducted a meaningful investigation of the incident involving Kelsay, even though Kelsay's mother made jail supervisors aware of his serious injuries. According to Kelsay, no officer submitted an incident report about his injuries even though the Sheriff's Department's manual required an officer to notify the nurse and prepare an incident report upon learning that a prisoner has been injured. Kelsay also asserts that Coppinger had been named in two or three other civil suits involving assaults at the jail but Hamilton County had not conducted an investigation of Coppinger. Furthermore, Kelsay asserts that officers who use excessive force in the jail are not investigated and disciplined. Other jail officers who witness the use of excessive force against prisoners are not disciplined for failing to report it to the proper authorities. Kelsay argues that this lack of training, supervision and control over corrections officers adds up to and constitutes a policy or custom of deliberate indifference toward the constitutional rights of prisoners at the jail, and that this policy or custom of allowing excessive force at the jail was a proximate cause of the violation of Kelsay's constitutional rights. There are genuine issues of material fact in dispute concerning whether Hamilton County can be held liable under 42 U.S.C. § 1983 for the assault committed upon Kelsay in his jail cell. . . . Kelsay may proceed to trial on his claim that Hamilton County failed to adequately train and supervise its corrections officers."); ***Murvin v. Jennings***, 259 F. Supp.2d 180, 186, 187 (D. Conn. 2003) ("Murvin contends that the Town is liable for its police officers' failure to insure that the exculpatory information pertaining to the charges against him was actually transmitted to the prosecuting authority. Murvin claims that the Town's liability can be based on its failure to have an official policy that insures that exculpatory material is properly transmitted to prosecuting authorities as required by state statute. The court agrees. . . . Here, the Town cannot avoid liability as a matter of law merely because it does not have a policy, custom or practice that governs the transmittal of exculpatory material to prosecuting officials. To the contrary, as the foregoing case law clearly establishes, the Town may be liable under § 1983 for its failure to take action to insure that the constitutional rights of criminal suspects are not violated and that its police officers abide by the statutorily-imposed duty to disclose exculpatory information to prosecuting authorities."); ***Terry v. Rice,*** No. IP 00-0600-C H/K, 2003 WL 1921818, at *20, *22, *23 (S.D. Ind. Apr. 18, 2003) (not reported) ("Plaintiff does not argue that there was an application of a policy that resulted in a constitutional violation or that as a policymaker, Sheriff Rice made a decision concerning Donald's treatment that resulted in a constitutional violation. Rather, plaintiff argues that the relevant policy was the absence of a policy − the failure to implement proper procedures for dealing with inmates who are mentally ill or suicidal, as well as a failure to implement proper procedures for obtaining inmates' medical records who were transferred to the jail from RDC. . . . The Montgomery County Jail had no official suicide watch policy. . .The policy for dealing with mentally ill inmates that was in place during the relevant time period dealt only with inmates as they were booked into the jail and did not provide any kind of screening mechanism or address the needs of established inmates, such as Donald. . . . Furthermore, there is little to no evidence concerning what training, if any, the jail officers

received as a part of their job. The record evidence does indicate that, at a minimum, jailers were supposed to receive first-aid and CPR training. . . However, there is no indication that any of the jail officers, who would have had the most opportunity to observe the inmates, were ever 'trained regarding recognition of symptoms of mental illness' pursuant to 210 Ind. Admin. Code § 3-1-11(j) (1998) . . . Not having such policies concerning mentally ill inmates effectively allows jail officers to remain blissfully ignorant to a known and serious threat, and can lead directly to the harm of inmates. A reasonable juror could conclude that whatever procedures were in place concerning a suicide watch option were so inadequate as to amount to deliberate indifference."); ***McDermott v. Town of Windham,*** 204 F. Supp.2d 54, 67-69 (D. Me. 2002) ("The Court finds sufficient evidence in the summary judgment record to demonstrate that Chief Lewsen established a policy or custom of encouraging officers to handcuff all suspects in the course of arresting them. Nevertheless, Plaintiff has not established that this policy is violative of any clearly established federal right. Plaintiff has not shown that she had a clearly established right *not to be handcuffed* incident to her arrest. . . . The fact that the police department had no specific written policy dictating precisely when the use of handcuffs is justified does not amount to a deliberate choice to follow a course of action likely to lead to a constitutional violation or to deliberate indifference on Lewsen's part. To the contrary, Lewsen and the Town provided guidance to officers in effectuating arrests, including with regard to the use of force. Accordingly, the Court will grant summary judgment on the basis of qualified immunity to Defendant Lewsen on Plaintiff's claim of excessive force. . . . The Windham police department's custom, encouraged by Chief Lewsen, to handcuff suspects in the ordinary course of an arrest is not such as to condone constitutional violations."); ***Booker v. City of Boston,*** No. CIV.A.97-CV-12534MEL, CIV.A.97-CV-12675MEL, CIV.A.97-CV-12691MEL, 2000 WL 1868180, at *3 (D. Mass. Dec. 12, 2000) ("The city policy in question is its policy for dealing with allegations of sexual molestation. In a school setting such a policy is of course of vital importance . . . .Under the circumstances, the city enacted what appeared to be a constitutional policy. The crux of the plaintiffs' allegations is that the city utterly failed to distribute copies of the policy to its employees or to train them as to the action the policy required. They have provided evidence which could support a finding that the city did little more than develop the policy, distribute it to its principals in the middle of almost 1000 pages of other documents, and assume that from these actions its employees would understand their mandatory reporting obligations under ' 51A. Not surprisingly, this expectation was not met when the girls complained in the Spring of 1995. As would be expected, under such a 'paper tiger' system, all four school employees (three of whom were administrators) who should have reported the incidents under ' 51A failed to do so. As a result, a jury could conclude that the city was a 'moving force' behind any violation occurring after the girls first reported the incident to Hill."); ***Connors v. Town of Brunswick***, No. 99-331-P-C, 2000 WL 1175641, at *9, *10 (D. Me. Aug. 16, 2000) ("[T]he fact that the Town considered batons important enough to mandate that they be carried but then failed to enforce that policy could support a conclusion that the Town was deliberately indifferent to the need to ensure that its officers were adequately equipped to avoid the usage of unnecessary deadly force. . . . In view of the plaintiff's evidence that failure to carry an impact weapon deprives an officer of a necessary weapon in the continuum of force and that Cap-Stun is an inadequate substitute, one could also infer that Hinton acted recklessly, taking the risk that lack of an impact weapon or an adequate

substitute would result in his officers' use of unjustified deadly force. Such an omission by Hinton could, in turn, be linked to what a jury could find to have been the unreasonable use of deadly force against Weymouth."); ***Andrews v. Camden County***, 95 F. Supp.2d 217, 229, 230 (D.N.J. 2000) ("It is well established that in § 1983 suits, a municipality may be held liable for not having in place a policy that is necessary to safeguard the rights of its citizens, or for failure to act where inaction amounts to deliberate indifference to the rights of persons affected. . . . [I]if defendants knowingly failed to enforce the requirements that a Medical Director be in place and that medical rounds be conducted daily to visit segregated prisoners, this is evidence of reckless disregard of a condition creating an unreasonable risk of violation of inmates' Eighth Amendment rights . . . ."); ***Winton v. Bd of Commissioners of Tulsa County,*** 88 F. Supp.2d 1247, 1268 (N.D. Okla. 2000) ("The Court finds that there is evidence in the record from which a reasonable jury could conclude that the County's action or inaction in response to the risk of harm present in the Jail was not reasonable. . . . There is evidence in the record from which a jury could conclude that the only practical way for the County to have significantly abated the risk of violence at the Jail was to build a new facility. There is also evidence in the record that the County was hampered in its efforts to build a new jail by the voters of Tulsa County, who refused to pass bond issues prior to September 1995. While the Court recognizes the plight of the County, '[t]he lack of funding is no excuse for depriving inmates of their constitutional rights.' *Ramos*, 639 F.2d at 573, n. 19 (citing several cases). The voters of Tulsa County had a choice. The County could pay on the front end to protect the constitutional rights of inmates by building a new jail, or the County could pay on the back end by satisfying judgments in meritorious civil rights actions based on unconstitutional conditions at the Jail. Until a new jail was built in 1999, the voters in Tulsa County had necessarily chosen the second of these options as the County's response to violence at the Jail. . . . A reasonable jury could find that the County's inaction or ineffective action was the moving force behind the conditions at the Jail which caused or permitted a serious risk of inmate harm to exist in the Jail. A jury could find that overcrowding, under-staffing, lack of adequate inmate supervision, lack of inmate segregation and classification, lack of inmate exercise time, dormitory-style housing, all of which existed over a long period of time, were all de facto policies of inaction by the County which created and or contributed to the conditions which created a serious risk of harm in the Jail."); ***Simmons v. Justice***, 87 F. Supp.2d 524, 533 n.11 (W.D.N.C. 2000) ("Defendants cite *City of Canton v. Harris* . . . in support of their argument that Plaintiff has not shown any 'deliberate indifference' on the part of the City of Spindale as is required to show a viable § 1983 claim. . . However, this requirement applies only to a 'failure to train' allegation. . . . Because Plaintiff is not alleging 'failure to train,' this authority is not applicable to his § 1983 claim. For liability to attach to the City of Spindale, Plaintiff will have to prove the city irresponsibly failed 'to put a stop to or correct a widespread pattern of unconstitutional conduct by police officers of which the specific violation is simply an example.' *Kopf*, at 262."); ***Massey v. Akron City Bd. of Education***, 82 F. Supp.2d 735, 746, 747 (N.D. Ohio 2000) ("The plaintiffs do not say that the Defendant Akron Board of Education had an explicit policy of condoning sexual abuse. No school board could have such a policy. Because the plaintiffs do not claim that the Akron Board adopted an official policy, they must show that a 'custom' was adopted through the decision making process that led to Bennett abusing them. . . The plaintiffs say the Board of Education had a custom of

failing to prevent sexual abuse by teachers after repeated notice of trouble with the teacher that should have suggested the teacher was a pedophile. . . . Here, a reasonable jury could find the Akron Board of Education manifested a 'policy' of deliberate indifference to sexual abuse of students by teachers or counselors. . . There are facts sufficient to support a jury in finding a deliberate indifference to Bennett's sexual abuse and harassment of students. These facts are sufficient to support a jury finding that such deliberate indifference reflects a custom of inaction that was a 'moving force' in the constitutional deprivation. The plaintiffs show evidence that the Defendant Akron Board of Education tolerated a pervasive custom, which directly caused the deprivation at issue."); ***Wright v. City of Canton,*** 138 F. Supp.2d 955, 966 (N.D. Ohio 2001) ("Based on *Marchese* and *Leach,* Wright can establish his municipal liability claim by showing (1) a final municipal policymaker approved an investigation into Jackson and Vinesky's conduct (2) that was so inadequate as to constitute a ratification of their alleged use of excessive force. Wright offers sufficient evidence to make this showing. The parties do not dispute that Canton Police Chief Thomas Wyatt approved the internal affairs investigation into the incident that led to Wright's injuries. Under Ohio Revised Code ' 737.12, the chief of police is the final policymaker with regard to investigations that do not result in disciplinary action. Because the investigation into Jackson and Vinesky's conduct did not result in their discipline, Wyatt's approval of the investigation constitutes municipal policy."); ***Weaver v. Tipton County***, 41 F. Supp.2d 779, 789 (W.D. Tenn. 1999) ("In general, to state a municipal liability claim under an 'inaction' theory, Weaver must establish the existence of a clear and persistent pattern of unconstitutional conduct by municipal employees and notice or constructive notice of that pattern on the part of the municipality. . . Weaver must then demonstrate that the municipality's inaction reflected deliberate indifference such that its failure to act reflects an official policy of inaction, and that this policy is the moving force behind the constitutional violation at issue."); ***Cox v. District of Columbia***, 821 F. Supp. 1, 13 (D.D.C. 1993) ("[T]he District of Columbia's maintenance of a patently inadequate system of investigation of excessive force complaints constitutes a custom or practice of deliberate indifference to the rights of persons who come in contact with District police officers."), *aff'd,* 40 F.3d 475 (D.C. Cir. 1994); ***Rubeck v. Sheriff of Wabash County***, 824 F. Supp. 1291, 1301, 1302 (N.D. Ind. 1993) ("[I]n situations that call for procedures, rules, or regulations, the failure to make a policy itself may be actionable."); ***Timberlake by Timberlake v. Benton***, 786 F. Supp. 676, 696 (M.D. Tenn. 1992) ("A local governing body does not shield itself from liability by acting through omission. Thus, when a city provides no guidance to its officers regarding such intrusive actions as strip searches, it must face the consequences of its inaction by being subject to suit.").

See also ***Linthicum v. Johnson***, No. 1:02-CV-480, 2006 WL 1489616, at *29, **32-34 (S.D. Ohio May 26, 2006) ("Linthicum argues that the City's disciplinary code must be evaluated not in the abstract, but rather as applied . . . in the Officers' arbitrations. . . She reasons that as such, the City must be held accountable for the arbitrators' decisions to reinstate the Officers with (in Johnson's case) a non-disciplinary corrective action and (in Kidd's case) three days' unpaid leave. . . She also suggests the City had − but failed to use − ultimate authority over whether to let the Officers return to work, because the City did not 'exercise its right to appeal' the arbitrators' reinstatements. . . . Because Linthicum's allegations that Kidd and Johnson were inadequately

disciplined hinge largely on the Officers' reinstatements by arbitrators after their terminations, an important threshold issue is the extent to which the City may be held liable, under§ 1983, for the arbitrators' applications of the police disciplinary code. . .Unfortunately, neither party offers any specific legal authority on this point. The City reasons that it should not be bound by interpretations of the disciplinary code that are 'poorly reasoned' and in conflict with the police department's own interpretations during the Officers' initial disciplinary proceedings. . . Linthicum responds that the City must be held accountable for the arbitrators' applications of the code as a matter of contract law or general public policy, because the City should not able to shield itself from liability for police misconduct 'simply by negotiating and delegating away its authority to terminate' police officers in a collective bargaining agreement. . .While Linthicum's contractual privity theory has considerable logical appeal, the Supreme Court has suggested that it applies in the§ 1983 context only to the extent that a defendant municipality has delegated its authority to make disciplinary policy along with its authority to terminate individual employees pursuant to that policy. . . . Linthicum has not set forth any facts which suggest that the independent arbitrators who reinstated Officers Kidd and Johnson under the City's official disciplinary code were delegated responsibility for promulgating that code in the first instance. . . The Court is sympathetic to Linthicum's argument that constructions of § 1983 like the one cited above may allow municipalities to limit their § 1983 liability for inadequate discipline by contracting their enforcement authority, under facially constitutional policies, to independent entities. Nonetheless, on the facts of this case, the Court feels itself bound by the authority above. The Court thus concludes that the City cannot be liable for the arbitrators' applications of the police disciplinary code, because Linthicum has not established a genuine dispute of material fact as to whether the arbitrators actually made or adopted that code − as opposed to simply applying it in individual disciplinary appeals. . . . While the City is not accountable under § 1983 for the arbitrators' direct applications of the disciplinary code to reinstate Officers Kidd and Johnson, it remains accountable for failing to exercise any discretion it retained to override or otherwise challenge those reinstatements. As Linthicum observes in her papers, it appears 'the City did not even exercise its right to appeal' the arbitrators' decisions reinstating Kidd and Johnson. . . A reasonable jury could construe this apparent neglect of an opportunity to keep the Officers off the police force as evidence of the City's indifference to police discipline. However, because the failure to appeal concerns only Officers Kidd and Johnson, it is not independently sufficient to establish 'deliberate indifference' under§ 1983. . . Therefore, the Court must consider whether Linthicum has shown at least a genuine dispute of material fact as to whether the City has inadequately disciplined other officers. . . .While the City emphasizes that it initially terminated Underwood and Ewing for their misconduct, it also does not dispute Linthicum's assertion that it did not attempt to preserve those terminations by appealing Underwood and Ewing's reinstatements by arbitrators − or sixteen of the seventeen other reinstatements between 1994 and 2004 − to a court of law. The Cincinnati Police Chief has testified that in his experience, '100 percent' of police terminations are appealed to arbitration. . . The Chief has also testified that the City Manager and legal department decide − with input from the Chief − whether to appeal arbitrators' reinstatements of terminated officers like Kidd and Johnson. . . These facts could reasonably be construed to suggest that the City has exhibited 'deliberate indifference' to police discipline, either because it terminated officers with the expectation that they would be

reinstated by arbitrators, or because it acquiesced in the arbitrators' reinstatements by failing to exercise its discretion to appeal to a court of law. . . . [I]t appears that a reasonable jury armed only with the present statistics and other cited evidence could, in reviewing the evidence in the light most favorable to Linthicum, conclude that the City has engaged in an unofficial custom or policy of 'deliberate indifference' to police discipline. The City's claim for summary judgment as to this issue is therefore DENIED.").

But see ***Cartia v. Beeman***, 122 F.4th 1036, 1045 (8th Cir. 2024) ("Cartia and Adams have not identified a custom. They point to the sheer number of excessive-force lawsuits brought against Lincoln County over the past 10 years, but they provide no details about any of them, including whether they were successful. Without more, the existence of a 'municipal custom of permitting or encouraging excessive force' is just speculation. . . Nor do they have evidence that the Lincoln County Sheriff, a 'policymaking official[ ],' ignored 'unconstitutional misconduct.'. . They claim he effectively admitted to doing so during his deposition, but all he did was answer hypothetical questions. And each one of his responses tracked the law: reasonableness depends on the surrounding facts, including the level of resistance encountered. . . The Fourth Amendment requires nothing more."); ***Franklin v. Franklin County, Kentucky***, 115 F.4th 461, 472-74 (6th Cir. 2024) ("Franklin next argues that the County is liable for Price's actions due to the Jail's alleged policy of 'inaction.' She specifically maintains that 'Franklin County knew that female inmates were particularly vulnerable to sexual assault, that they would be subjected to cross-gender supervision and transport, and that these circumstances carried an obvious risk of sexual misconduct.' Relying heavily on her claims that the Jail was 'aware that multiple instances of sexual misconduct had occurred within the facility' and that 'cross-gender supervision required a greater level of care,' Franklin asserts that the Jail, 'through its inaction, inculcated a "culture of indifference" toward the sexual abuse and assault of female inmates and staff in the Jail.' She thus argues that Franklin County had a policy or custom of inaction toward the sexual abuse of inmates. To succeed on a municipal-liability claim under an 'inaction' theory, a plaintiff must show '(1) the existence of a clear and persistent pattern of' unconstitutional conduct; (2) 'notice or constructive notice' on the part of the municipality; (3) the municipality's 'tacit approval of the unconstitutional conduct, such that [its] deliberate indifference in [its] failure to act can be said to amount to an official policy of inaction'; and (4) 'that the [municipality's] custom was the "moving force" or direct causal link in the constitutional deprivation.'. . Franklin must first show a clear and persistent pattern of unconstitutional conduct. . . With respect to how many instances are required to constitute a 'clear and persistent pattern,' this court has observed that a plaintiff '"cannot rely solely on a single instance" to prove the existence of an unconstitutional custom.' . .This court, however, has concluded that five similar incidents over the course of three years were sufficient to constitute a pattern. . . But it has also concluded that three instances of similar misconduct revealed in one police investigation did not establish a clear and persistent pattern. . . Another ambiguity in this area is that 'our circuit does not appear to have explained how "similar" past incidents must be to constitute a "pattern of similar constitutional violations."'. . But this court's unpublished opinion in *Berry v. Delaware Cnty. Sheriff's Off.*, 796 F. App'x 857, 862 (6th Cir. 2019), provides persuasive guidance in addressing 'similarity.' The *Berry* court held that the

similarity between a plaintiff's claim and an alleged pattern of constitutional violations 'must be particularized.'. . What that means in practical terms is that 'the prior examples of wrongdoing must violate the same constitutional rights [as the plaintiff's] and violate them in the same way.'. . The alleged pattern of similar unconstitutional conduct, however, need not be identical, or even 'almost identical' to that which a plaintiff alleges occurred in her case. . . Using this framework, Franklin would need to show that there was a pattern of Eighth Amendment violations at the Jail (i.e., the same constitutional right that Price violated), that involved some sort of sexual assault on inmates (i.e., the right was violated in the same way as Franklin's was). . . But she would not need to demonstrate that the assault specifically occurred on a transportation vehicle. . .. Given the fact-specific nature of allegations concerning patterns of similar constitutional violations, this inquiry is necessarily context-dependent. In the present case, the three incidents of misconduct highlighted by Franklin are insufficiently similar to Price's conduct. . . .The record instead demonstrates that Price's actions were 'rogue.' Price himself admitted that he knew that he was violating the Jail's policy by sexually assaulting Franklin. Franklin's constitutional violation thus 'resulted from factors other than a faulty [County policy].'. . . Indeed, this is not a case in which there is a 'total lack of any County policies' governing the prevention of sexual assault. . .The Jail's policies explicitly prohibit sexual contact between inmates and staff, require information to be given to each inmate about preventing and reporting such incidents, subject all employees who fail to comply with the Jail's PREA policy to disciplinary action or termination, and require all employees who witness or have knowledge of any sexual activity to report it. We therefore conclude that the County is not liable on a municipal-liability theory of inaction."); ***Mosier v. Evans***, 90 F.4th 541, 549 (6th Cir. 2024) ("Inaction can support municipal liability when: (1) there is a clear and persistent pattern of illegal activity; (2) the municipality has notice or constructive notice of it; (3) the municipality tacitly approves of the illegal activity, such that its deliberate indifference can be said to establish an official policy of inaction; and (4) that policy caused the constitutional deprivation. . . Mosier presents no argument that there is a pattern of constitutional violations, that the County had notice of that pattern, or that the County was deliberately indifferent to that pattern. . . His inaction theory therefore fails.); ***Robinson v. Midland County, Texas***, 80 F.4th 704, 710 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1010 (2024) ("[A] pattern is not sufficient to establish a policy where the municipality had no knowledge of the pattern. There are no allegations that anyone other than the Soluta employees were aware, or should have been aware, of the nurses' failure to provide adequate medical care. . . Plaintiffs freely admit that the nurses' actions were counter to the standard course of treatment and that the nurses 'fabricated' Hall's flo-sheet. This implies that neither Soluta nor Midland County . . . knew of the 'policy' of failing to follow the proper medical procedures. It would be possible to allege that Soluta had a policy of failing to know what their nurses were doing—but that is not what was pleaded. Instead, plaintiffs' theory hinges entirely on the idea that if enough individuals do something, it becomes the fault of the policymaker. Without a showing of knowledge and acquiescence, such a theory is no more than vicarious liability and cannot survive a motion to dismiss. "); ***Austin v. City of Pasadena, Texas***, 74 F.4th 312, 332-33 (5th Cir. 2023) ("We have recognized that a municipality may be liable for failing to adopt policies. . . 'While the municipal policy-maker's failure to adopt a precaution can be the basis for § 1983 liability, such omission must amount to an intentional choice, not merely

an unintentionally negligent oversight.'. . '[M]unicipal failure to adopt a policy does not constitute such an intentional choice unless it can be said to have been deliberately indifferent.'. . 'A failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights.'. . [court sets out Pasadena's "use of force" policy and Electronic Control Weapons policy] Plaintiffs assert the City's formal use-of-force and ECW policies are 'so vague and general that they amounted to no policy at all that meaningfully restrained an individual officer's use of force.' Rather, allegedly, the City's 'actual policy, custom, or practice was to tolerate and encourage excessive force.' Such customs and practices are said to include 'the failure to adopt any policy limiting the use of force against detainees suffering from an epileptic seizure; the failure to utilize pepper spray as a lesser means of force than Tasers; the failure to forbid shooting a Taser into a detainee's chest; and using unlicensed PSOs as jailers.' Plaintiffs rely on the fact that multiple jailers — including a supervisor, as well as a police officer — all acted similarly, and none objected to the unconstitutional actions of the others, to demonstrate the existence of a widespread custom that shows this 'was accepted as the way things are done and have been done' in the City of Pasadena. *See Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985). Defendants respond that the City's use-of-force and ECW policies are typical and in line with Texas law. We find that the record is insufficient to support a jury question that the use-of-force and ECW policies were so vague that they amounted to no policy at all. These policies 'may have been inadequate,' and while a jury might conclude that the City was negligent in not requiring Plaintiffs' specified actions, 'that, of course, is not enough under § 1983.'. . 'Without evidence showing that the higher level of care was obviously necessary, we cannot see how the jury could conclude' that the use-of-force and ECW policies were deliberately indifferent. . . . We affirm the district court's grant of summary judgment as to municipal liability against the City."); ***Martinez v. Nueces County, Texas***, 71 F.4th 385, 389 (5th Cir. 2023) ("A *Monell* claim does not require the plaintiff to identify a written policy. In some situations, a plaintiff can succeed by pointing to similar incidents that are 'sufficiently numerous' and have 'occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees.' *Peterson v. City of Fort Worth*, 588 F.3d 838, 850–51 (5th Cir. 2009) (quotations omitted). Martinez has attempted to plead *Monell* in this way, providing a list of examples that he claims support his allegations that Nueces County had a policy of 'ignoring the serious medical needs of those entrusted to [its] care.'. . In *Bond v. Nueces County*, No. 20-40050, 2022 WL 4595000, at *5 (5th Cir. Sept. 30, 2022) (unpublished), we accepted this way of establishing a policy. But we cannot accept Martinez's version: Martinez fails because the pattern of examples must have 'similarity' and 'specificity.'"); ***Howell v. NaphCare, Inc.***, 67 F.4th 302, 318-19 (6th Cir. 2023) ("The Estate argues that NaphCare had a custom of authorizing its nurses to order restraint chairs, which practice led to Howell's inadequate medical care. As for the County, the Estate contends it was deliberately indifferent in failing to train its officers on proper restraint-chair monitoring. The district court granted summary judgment to both Defendant entities. . . .A private corporation performing traditional state functions can be held directly liable under § 1983 if its customs, practices, or policies led to a constitutional deprivation. . . A custom that has not been formally approved may still serve as a basis for liability if 'the relevant practice is so

widespread as to have the force of law.'. . The Estate bears 'a heavy burden in proving municipal liability, and [it] cannot rely solely on a single instance to infer a policy of deliberate indifference.'. . The Estate argues that 'there is evidence showing that nurses routinely ordered restraint chairs,' and that custom 'caused the denial of adequate medical care' to Howell. If such a custom existed, it violated jail policy that the 'application of any clinically ordered restraints must be ordered by an advanced clinical provider.' The Estate contends that this caused Howell's injury because if Jordan had complied with policy, a doctor would have been contacted and that doctor likely would have ordered Howell to the emergency room. The Estate points to only one piece of deposition testimony that, according to a corrections officer, shows that it was 'typical for nurses to be the ones who are authorizing the restraint chair.' Notably, this single piece of evidence does not make clear that it was 'typical' for nurses to order restraint chairs *without* first receiving authorization from an advanced medical provider, which the policy permitted to be provided 'in writing or via telephone consultation.' That testimony alone is insufficient to show a genuine dispute of material fact as to whether there was a custom of nurses ordering restraints in violation of policy that was 'so widespread as to have the force of law.'. .The district court's grant of summary judgment to NaphCare on the Estate's *Monell* claim is affirmed."); ***Guillot on behalf of T.A.G. v. Russeli***, 59 F.4th 743, 752-53 (5th Cir. 2023) ("Similar to custom, a *de facto* policy is defined as a persistent widespread practice that, although not authorized by an officially adopted policy, is so common and well settled as to constitute a custom that fairly represents a municipal policy. . . '[I]solated acts' cannot establish the existence of a custom or practice. Instead, prior incidents 'must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectional conduct is the expected, accepted practice.'. . According to Guillot, the custom at OCC was to apply heightened observation, which has no written definition, to inmates exhibiting suicidal tendencies. She alleges that on February 18 and March 3, 2020, Powell exhibited such tendencies. Most concerningly, on February 18, he had asked for help, was withdrawn, had a blank stare, and had wrist abrasions, yet he was not sent to suicide watch and instead was placed under heightened observation. Guillot maintains that it is a custom that allows deputies to shirk their responsibility to observe the inmates and meticulously log their observations. Under this deficient *de facto* policy, she claims Powell was denied his Eighth Amendment rights. Nevertheless, even taking all of Guillot's factual assertions as accurate, she has not stated sufficient facts that indicate the alleged policy was a *de facto* policy. Moreover, she does not demonstrate that even if it was a *de facto* policy, that policy was the moving force behind the purported constitutional violation present here. This circuit has consistently rejected the notion that one-off actions constitute a policy. . . Guillot has alleged only two violations, namely, the inaction by guards after Powell's concerning acts on February 18 and March 3. Even taking at face value that Powell should have been moved to suicide watch both times, this does not prove a widespread custom of violating constitutional rights. These are one-off actions, and Guillot has not shown any other valid examples of persistent violations."); ***Leonard v. St. Charles County Police Department***, 59 F.4th 355, 363-64 (8th Cir. 2023) ("Leonard's final claim seeks to hold St. Charles County liable for the actions of its employees. For most of them, the lack of a constitutional violation means 'there can be no § 1983 or *Monell* ... liability.'. . There is one possible exception. Assuming Nurse Martin violated Leonard's constitutional rights, St. Charles County could be

liable if a county-wide 'policy or custom' was to blame. . . There is no argument here that an 'official policy' requires jail officials to withhold prescription medications from inmates. . . The only other possibility is a custom[.] . . . The evidence of a custom is weak. The best Leonard can do is point to a handful of unconnected incidents, ranging from failing to give ulcer medication to one inmate to refusing to accommodate the food allergies of another. On these facts, no reasonable factfinder could conclude that Leonard carried his 'heavy burden' to show a 'widespread, persistent pattern' of withholding prescription medication."); ***Holloway v. City of Milwaukee***, 43 F.4th 760, 770 (7th Cir. 2022) ("The Supreme Court has recognized that omissions, such as failures to act or to train, may provide a basis for *Monell* liability. . . But to be liable for its inaction, a municipality must have notice of the risk of a constitutional violation and fail to act even in the face of such notice. . . Plaintiffs may show such notice in one of two ways: 'Sometimes the notice will come from a pattern of past similar violations; other times it will come from evidence of a risk so obvious that it compels municipal action.' *J.K.J.*, 960 F.3d at 381. Holloway has adduced no evidence of a pattern of prior violations that would have put the City on notice of the risk of the violations he alleges. And as troubled as we are by the overly suggestive identification procedures, we do not believe a reasonable jury could conclude that the risk of the alleged violations was so obvious as to place this case in the narrow set where 'obvious[ness] ... compels municipal action.'. . Thus, summary judgment was also appropriate on Holloway's *Monell* claims."); ***Moore v. LaSalle Management Company, L.L.C.***, 41 F.4th 493, 518 (5th Cir. 2022) (Ho, J., concurring in part and dissenting in part) ("A custom may give rise to liability under *Monell* only if the unlawful practice is 'so persistent and widespread as to practically have the force of law.'. . The pattern of behavior 'must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of ... employees.'. . A pattern thus requires 'similarity, specificity, and sufficiently numerous prior incidents.'. . 'Showing a pervasive pattern is a heavy burden.'. . The majority nowhere acknowledges this heavy burden. . . . In this appeal from the grant of summary judgment, we construe the evidence in Plaintiffs' favor. But that doesn't give us license to prop up Plaintiffs' case with evidence that doesn't exist—or to treat Plaintiffs' briefing as if it were the record. Nor does it license us to make legal pronouncements contrary to our precedent. I respectfully dissent in part."); ***Finch v. Rapp***, 38 F.4th 1234, 1245 & nn. 2 &3 (10th Cir. 2022) ("Finch alleges that Police Department officers had a custom of shooting unthreatening suspects.[2] **[fn. 2:** We note that there is no need for a plaintiff to provide evidence of successful constitutional litigation to prove a municipal liability claim. To the extent the district court's order is read that way, it misstated the proof necessary for a *Monell* claim. . . But a plaintiff must provide evidence of a pattern of *relevant* conduct—here, the use of excessive force on unthreatening civilians.**]** In support, he cites police-involved shootings that occurred over the six years preceding the incident with Finch. But Finch does not argue that all of the more than 20 shootings he cites constituted excessive force. Instead, he points to only a handful of police-involved shootings that '[a] jury could conclude ... were unconstitutional.'. . These alleged constitutional violations have widely varying facts and lack a common theme or pattern. Some do not involve excessive force. Even assuming the subset of cases drawn from the six-year period were constitutional violations, they are isolated when considered in the circumstances presented in this case.[3] **[fn. 3:** Three cases

do not necessarily constitute a pattern of excessive force, contrary to Finch's argument. *Quintana v. Santa Fe County Board of Commissioners*, 973 F.3d 1022, 1034 (10th Cir. 2020), does not require us to find three incidents are sufficient. That case was at the more lenient motion-to-dismiss stage, which we emphasized constituted 'a low bar.'. . Further, there were more than three incidents alleged there. In *Quintana*, the decedent allegedly never received withdrawal medication even though prison staff acknowledged that he was going through withdrawal when he entered the jail. He alleged that three other inmates had 'recently' died from drug withdrawals. He pointed to a DOJ study warning the county of its inadequate medical screening procedures. He finally alleged that he had deficient intake procedures over the *eight* previous times he was incarcerated at the facility. In *Quintana*, the plaintiff offered proof of many more than three incidents. Thus, the case cannot stand for the proposition that three incidents necessarily establish a pattern of unconstitutional conduct for the purposes of *Monell* liability."); ***Novak v. City of Parma, Ohio***, 33 F.4th 296, 310 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 773 (2023) ("Finally, Novak contends that Parma had an established custom and pattern of 'indifference to protected speech in criminal investigations.'. . And he runs through a list of cases where Parma had to reverse course over protected-speech claims. But he does not explain how this list of cases could form a 'clear and persistent pattern' so strong that it resembles official policy condoned by the City. . . Perhaps unsurprising, since it's a 'heavy burden' to show municipal liability based on custom. . . Novak doesn't even suggest (as he must) that this pattern resulted from a deliberate choice 'from among various alternatives' that amounts to an unwritten 'legal institution.'. . Nor does he explain how that *policy*—despite independent warrants from Magistrate Judge Fink and Judge O'Donnell—caused a constitutional violation. . . He simply argues that 'Parma should have known better.'. . This is not enough to support a finding of municipal liability, so we affirm."); ***Hurd v. District of Columbia***, 997 F.3d 332, 337-40 (D.C. Cir. 2021) ("In *Monell*, the Supreme Court held that, under 42 U.S.C. § 1983, municipalities can be held liable for constitutional violations committed by their employees only if a plaintiff shows that the municipality is the 'moving force' behind the constitutional violation, meaning that an 'official municipal policy of some nature caused a constitutional tort[.]' . . Generally speaking, such an official policy exists when (1) the municipality adopts a policy that itself violates the Constitution; (2) the unconstitutional action was taken by a 'policy maker' within the government; (3) the employees' unconstitutional actions 'are so consistent that they have become [a] "custom"' of the municipality of which the supervising policymaker must have been aware; or (4) the municipality knew or should have known of a risk of constitutional violations, but showed 'deliberate indifference' to that risk by failing to act. . . So to survive summary judgment, Hurd had to show that the District or one of its official policymakers directly violated the Constitution, allowed constitutional violations so widespread that they amounted to a municipal custom, or was deliberately indifferent to the risk of constitutional violations. Hurd presents two theories for municipal liability. First, he argues that there has been a pattern of similar unconstitutional practices within the District's Department of Corrections, such that the District either tacitly adopted the employees' conduct as custom or was deliberately indifferent to the constitutional rights of detainees. Second, Hurd argues that the District's official detention policy violated his constitutional rights. Hurd's first theory of liability fails, but the second may succeed depending on as-yet unresolved factual determinations. . . As to his first

theory, Hurd argues that his sudden incarceration without due process was part and parcel of a 'pattern of similar violations' by the District, and also showed the District's deliberate indifference to the constitutional rights of inmates eligible for release. . . To make that showing, Hurd places great weight on two prior class actions—*Bynum v. District of Columbia*, 257 F. Supp. 2d 1 (D.D.C. 2002), and *Barnes v. District of Columbia*, 793 F. Supp. 2d 260 (D.D.C. 2011)—and claims that they 'established [a] record of [the District] ignoring the constitutional rights of prisoners held in the D.C. Jail.'. . .To hold a municipality liable based on a pattern of similar constitutional violations, a plaintiff must show that the municipality 'knowingly ignore[d] a practice that was consistent enough to constitute custom.'. . The practice must be 'persistent and widespread[.]'. . And the actions or 'series of decisions' can only confer liability on the municipality if the custom was so engrained that it amounted to a 'standard operating procedure' of which municipal policymakers must have been aware. . . Hurd did not come forward with summary judgment evidence demonstrating such a widespread practice or custom of spontaneous incarceration after a record review by legal instrument examiners (or by other District employees). *Bynum* and *Barnes* do not do the job for Hurd. Both cases involve failures by the District that bear little resemblance to the type of unconstitutional conduct asserted by Hurd. In both *Bynum* and *Barnes*, the plaintiffs challenged the District's release procedures for inmates who had concluded their sentences and alleged that the District's procedures delayed release and resulted in additional hours or a day of incarceration beyond the end of the imposed sentence. . . Those constitutional violations involving the timing of inmate releases did not put District policymakers on notice of the type of incarceration problem at issue in Hurd's case. The over-detentions in *Barnes* and *Bynum* involved the delayed release of inmates who had fully served their sentences and as to whom the District asserted no lawful basis for any further detention (*e.g.*, no claimed warrants, detainers, or unserved sentences). . . In contrast, Hurd asserts that the District intentionally incarcerated him for an unserved sentence for different offenses—his misdemeanor sentences—after he was mistakenly released from the halfway house four years earlier. Spontaneous incarceration for what is believed to be an unserved sentence is factually and legally distinct from an administratively delayed release at the completion of a sentence for which no lawful basis for further detention is claimed. The governmental activity giving rise to the constitutional claim, which here involved individual record assessments by District employees that led to incarceration for totally different crimes, is distinct from the bureaucratic misadministration of general inmate release protocols in *Bynum* and *Barnes*. More to the point, a District employee could hardly have looked at the conduct at issue in *Bynum* and *Barnes* as a 'standard operating procedure' that caused Hurd's incarceration[.] . . [T]o establish a pattern giving rise to deliberate indifference, the other asserted violations must have materially similar legal implications so as to put the municipality on notice of the probability of future constitutional violations. Hurd failed to make that type of showing. The evidence he points to involving delayed inmate *release* practices could not have put the District on notice of its need to revise its *incarceration* policies for newly discovered unserved sentences. Hurd nonetheless insists that his case is similar enough, citing to *Daskalea v. District of Columbia*, 227 F.3d 433 (D.C. Cir. 2000). That case is no help to Hurd. In *Daskalea*, we held that the District was deliberately indifferent to a pattern of sexual harassment and assault in its jails. . . Hurd argues that, under *Daskalea*, different forms of constitutional

violations can combine to establish a custom. . . But that overreads *Daskalea*. In that case, just seven months before the plaintiff's sexual abuse in the District jail, the District had been found liable for similar sexual mistreatment by its correctional officers. . . The only difference between the two cases was the gender of the prison guards—a fact of no legal moment. . .In Hurd's case, by contrast, the character of the constitutional violations and the asserted policies that led to the constitutional violation are distinct. In *Bynum* and *Barnes*, the delays in release were the result of administratively sluggish release procedures, rather than the purposeful incarceration because of the discovery of a distinct unserved sentence. For Hurd, the problem was not the pace of his release from his weekend detention for marijuana possession, but that he was physically reincarcerated to serve a different sentence for different crimes."); ***Nichols v. Wayne County, Michigan***, 822 F. App'x 445, ___ (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2716 (2021) (" We can . . . readily dispatch Nichols' related claim that the municipalities have a custom or policy of failing to promptly institute the forfeiture proceedings provided for under MITPA. As he now explains it, municipalities may satisfy the Constitution either by holding a continued-detention hearing, separate and apart from any forfeiture proceeding, or by instituting a forfeiture proceeding quickly enough under MITPA (within 50 days of notice). But because Nichols is not entitled to elect his preferred procedures, he can adequately state a constitutional claim only if he alleges *both* that the municipalities have a custom or policy of failing to provide a stand-alone continued-detention hearing and that the municipalities have a custom or policy of failing to initiate constitutionally-timely MITPA forfeiture proceedings. Yet Nichols' only allegation about the timing of forfeiture proceedings is that '[i]t can take months, or even years, for the [municipalities] to initiate a case in state court seeking forfeiture of the vehicle.' The mere assertion that it *can* take months or years to initiate a forfeiture proceeding does not allege a 'policy or custom' to that effect. He points neither to an 'official policy or legislative enactment,'. . . nor to a 'well settled' 'course of action deliberately chosen from among various alternatives[.]'. . In short, he has failed to allege a 'custom or policy' that would show that his 'injury ar[ose] directly from a municipal act.'. . The most that could be said for Nichols' complaint in this regard is that it 'relies on the *absence* of a policy' that would require county prosecutors to more quickly initiate forfeiture proceedings. . . But, as in *Arrington-Bey*, that is just another way of saying that the municipalities failed to train the prosecutors to bring forfeiture hearings within the putative 50-day window. . . 'With such a claim, [Nichols] must show that the allegedly violated right was clearly established. And for the reasons noted earlier, [he] cannot do so.'"); ***Howse v. Hodous***, 953 F.3d 406, 410-11 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1515 (2021) ("Howse faces an uphill battle in trying to prove that Cleveland's (alleged) inadequate training caused his (alleged) constitutional injuries. That's because he must show (1) the training program did not adequately prepare the officers for the tasks they must perform, (2) the inadequacy resulted from the municipality's deliberate indifference, and (3) the inadequacy either closely related to or caused Howse's injury. . . Howse cannot show that these three elements are met here. Cleveland's training academy's standards exceed state requirements, and Cleveland's police force has explicit written policies instructing officers not to use excessive force. Howse offers no evidence to the contrary—at least relevant to the claims here. On top of that, Howse hasn't shown how any inadequacy in the training program led to his constitutional injuries. This causation requirement is 'rigorous.'. . And it's not met here because Howse hasn't

offered any argument that links the legal harm he allegedly suffered back to Cleveland. . . Nor can Howse succeed under a custom-of-inaction theory. To win on this claim, Howse would need to show that Cleveland had notice (or constructive notice) of a 'clear and persistent pattern' of unlawful activity. . . Then he would need to show that Cleveland tacitly approved of that unlawful activity by doing nothing. . . And *then* he would need to show that Cleveland's tacit approval was the moving force behind his constitutional violation. . . Howse points to a Department of Justice memo as evidence of a pattern of unlawful activity. But even assuming that's enough (and we're not sure it is), Howse hasn't shown that Cleveland approved of that unlawful activity *or* that any such approval caused Howse to suffer a constitutional injury. Mere blanket assertions that Cleveland 'tolerated' or 'condoned' officer misconduct aren't enough. . . On the contrary, Cleveland has taken affirmative steps to combat the unlawful use of excessive force. Those steps include a thorough use-of-force policy and active enforcement of that policy. Take this case. After Hodous and Middaugh filed their Use of Force reports, several other officers reviewed those reports to make sure that the force used was reasonable. In sum, Howse hasn't shown that Cleveland can be held responsible for any constitutional wrongs that Hodous, Middaugh, or the John Doe might have committed."); ***Hamilton v. City of Hayti, Missouri***, 948 F.3d 921, 930 (8th Cir. 2020) ("Hamilton further argues that, even if Judge Ragland's bond practice was not an official policy, it was an unconstitutional municipal custom 'so permanent and well settled as to constitute a "custom or usage" with the force of law.' . . To prevail on this theory, he must demonstrate (1) '[t]he existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees'; (2) '[d]eliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct;' and (3) 'proof that the custom was the moving force behind the constitutional violation.'. . Applying this standard, even if we considered Judge Ragland's judicial bond practice to be part of municipal custom or usage, given Hamilton's right to challenge his conditions of release, we would affirm the dismissal of the municipal liability claim because there is no evidence that Judge Ragland, Overbey, or any City employee set the cash-only bond condition with deliberate indifference to Hamilton's rights as an indigent arrestee."); ***Ruiz-Cortez v. City of Chicago***, 931 F.3d 592, 598-600 (7th Cir. 2019) ("At summary judgment, Ruiz-Cortez complained of two City customs: the practice of using paid, active criminals as informants and the failure to supervise informants and their officer-handlers. We can generously assume, for analytical purposes only, that both customs were widespread and attributable to the City, thus meeting the first step of *Monell*. (And we can also assume, again for analytical purposes only, that Ruiz-Cortez in fact suffered a *Brady* injury by virtue of Lewellen's failure to disclose his criminal activity.) Ruiz-Cortez's claim against the City still falters at *Monell*'s other steps: there is no record evidence of culpability or causation. Start with the first custom. Even assuming that there was a custom of using paid criminal informants, that practice is not 'itself' violative of any federal right, including *Brady*. So Ruiz-Cortez must, as he concedes, show that the City engaged in that practice with deliberate indifference to the fact that it would lead officers to violate federal law. . . .Without evidence that could have put the City on notice of the *Brady* risks in employing informants, there is no issue of fact regarding the City's lack of culpability. Ruiz-Cortez's first custom suffers an even greater causation problem. Causation under *Monell* requires a 'direct causal link' between

the municipal action and the constitutional injury. . . Ruiz-Cortez has not identified such causation-related evidence, which makes sense: there is a real gap between a custom of paying criminal informants, even handsomely paying prolific informants, and Ruiz-Cortez's alleged *Brady* injury, which resulted from an officer's corruption. Indeed, as far as the record shows, Lewellen's rogue decision to engage in a drug conspiracy entirely gave rise to the *Brady* injury. The City, therefore, cannot be liable; *Monell* does not subject municipalities to liability for the actions of misfit employees. . . .Ruiz-Cortez's second custom fares no better. Failure-to-supervise claims, like failure-to-train claims, are a 'tenuous' form of *Monell* liability. . . This is because such claims seek to hold a municipality liable not for directly inflicting injury, as was the case in *Monell*, but rather for causing an employee's misconduct. . . Municipal failure claims are thus available only in 'limited circumstances,'. . and they are subject to 'rigorous' fault and causation requirements[.] . . As to fault, here too Ruiz-Cortez must show deliberate indifference. . . Ruiz-Cortez's failure-to-supervise claim does not meet these high requirements. There is, to start, no issue of fact relating to the City's deliberate indifference. The record does not contain evidence that would have, or should have, notified the City that the informant-handler relationship would devolve into a drug conspiracy and give rise to *Brady* problems. . . Most conspicuously absent: any evidence that others, besides Lewellen, committed *Brady* violations like the ones Ruiz-Cortez allegedly suffered. That kind of evidence is normally required for a failure-to-supervise or a failure-to-train claim."); ***Cipolloni v. City of New York***, No. 18-1765-CV, 2018 WL 6600212, at *2 (2d Cir. Dec. 14, 2018) (not reported) ("Cipolloni alleges that the City has a '*systemic* problem' with its database that results in innocent persons being arrested based on vacated or dismissed orders of protection. . . Cipolloni has plausibly alleged that the City has a practice of failing to update the NYPD database to reflect changes to orders of protection. For example, Cipolloni alleged that the NYPD database 'contains no information about the disposition of the case for which the order of protection was issued,' and when the NYPD receives information that the order of protection has been 'modified, vacated, or dismissed, this information is not properly and timely entered into the NYPD database.'. . Cipolloni has failed to plausibly allege, however, that the City has a persistent and widespread practice of arresting individuals based on the NYPD database errors so as to constitute a municipal policy. Cipolloni argues that 'available evidence, and common sense, tells us that the problem ... necessarily affects numerous people.'. . But his complaint provided no concrete information to support the conclusion. His complaint cited only three isolated acts over a more than 20-year period: his own arrest and two other arrests from 1994 and 2011. . . Both of these cases, however, resulted in dismissals of the complaints. . . Cipolloni also cited statistics showing that 9.8% of arrests based on violations of orders of protection from January 2013 to November 2017 were dismissed prior to arraignment. . . But the reasons for these dismissals were not provided, and the mere fact that charges were dismissed does not mean the arrests were 'false.' The sheer possibility that some of these dismissals may be attributable to erroneous NYPD database entries is insufficient to state a claim. Cipolloni, therefore, has failed to plausibly plead that the City has a persistent and widespread practice of making arrests based on NYPD database errors."); ***Brewington v. Keener***, 902 F.3d 796, 802 (8th Cir. 2018) ("[I]n the face of an express municipal policy prohibiting excessive force, two incidents of excessive force—even assumed to be true—cannot be considered a pattern of widespread and pervasive unconstitutional conduct. . .

. In the alternative, Brewington argues that because Sheriff Jeffery was a final policymaker, his action constitutes the creation of an unofficial custom. . . .Other than Deputy Keener's hearsay testimony that a higher-ranked officer told him of an excessive force custom, Brewington offers no evidence that Sheriff Jeffery ever instituted the custom or practice. Brewington's evidence therefore failed to demonstrate the existence of an unofficial excessive force custom or practice that has the effect or force of law in the County. Finally, even assuming the existence of an unconstitutional custom, Brewington cannot show that the policy was the 'moving force' behind Deputy Keener's conduct."); ***Winkler v. Madison County***, 893 F.3d 877, 902 (6th Cir. 2018) ("Winkler's next argument in support of imposing liability on the County appears to be that there was a custom or practice at the Detention Center of not following the County's own established policies for the provision of healthcare to inmates. To show that the County had such a custom or practice of inaction in the face of unlawful conduct by jail personnel and the medical staff, however, Winkler would have to present proof of a persistent pattern of unconstitutional conduct, and that the County had constructive notice of that pattern. . . But Winkler discusses only Hacker's treatment, and therefore cannot establish that the County had a custom of deliberate indifference to the serious healthcare needs of all the inmates incarcerated at the Detention Center."); ***Stanfield v. City of Lima***, 727 F. App'x 841, 851-52 (6th Cir. 2018) ("Stanfield claims that the City of Lima cultivated a custom of tolerance or acquiescence toward uses of excessive force. To prove this, a plaintiff must show: '(1) the existence of a clear and persistent pattern of [illegal activity]; (2) notice or constructive notice on the part of the [defendant]; (3) the [defendant's] tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and (4) that the [defendant's] custom was the "moving force" or direct causal link in the constitutional deprivation.'. . On appeal, Stanfield attempts to establish the first element of this test, the pattern of illegal activity, by referencing eight complaints filed against Montgomery in the years between 2008 and 2016—all for verbally aggressive or physically violent conduct. The investigation reports in the record show that the police department investigated each of these complaints. Montgomery was exonerated of wrongdoing following each complaint. Therefore, there is no record of illegal activity by Montgomery, making it impossible for the City to have ignored a pattern of it. Stanfield argues, 'Logically, if the municipality is actually ignoring the problem of repeated constitutional violations, there will be no record of repeated constitutional violations. Any investigation will find no wrongdoing, since the municipality will be deliberately ignoring any wrongdoing. Thus, the only evidence of a pattern ... in a situation like this is the complaints themselves.' While Stanfield's point is well taken, the facts of this case do not allow him to overcome Defendants-Appellees' summary judgment motion. The mere existence of complaints, without more, is not sufficient evidence to allow a reasonable jury to find the existence of a clear and persistent pattern of illegal activity. . . Therefore, Stanfield cannot establish that the City had a custom of tolerance for federal rights violations. Accordingly, the City of Lima and its police chief are not liable under § 1983."); ***Estate of Perry v. Wenzel***, 872 F.3d 439, 461 (7th Cir. 2017) ("Perry asserts that the City and Chief Flynn are liable for enacting an unwritten policy of ignoring detainee's medical complaints. Perry contends that because Chief Flynn testified that the phrase, 'If you're talking, you're breathing,' was an adage that was used during training, there was a *de facto* policy of failing to

provide medical attention to those who complained of difficulty breathing. But, this argument misconstrues the record evidence. The record indicates that this adage was used as part of a training program that taught City officers how to assess whether an individual had an emergent medical need. There is no evidence that this was the end of the inquiry, but rather the phrase was used as one aspect of an overall inquiry into an individual's health. While here, Officer Kroes used the adage, as discussed above, in a way that the jury might conclude was evidence of his objectively unreasonable response to Perry's complaints, a reasonable jury could not conclude that this was a City policy or custom sufficient to invoke *Monell* liability."); ***Hicks-Fields v. Harris County***, 860 F.3d 803, 810-11 (5th Cir. 2017) ("In sum, even with the DOJ report, Plaintiffs have not met their evidentiary burden of showing a genuine dispute of material fact as to the existence of a 'persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.'. . Quite simply, under our precedent, Plaintiffs have not produced sufficient evidence. . . of similar acts. . . to move to trial. To hold that this evidence is sufficient to establish an official policy of Harris County 'would be effectively to hold the [County] liable on the theory of respondeat superior, which is expressly prohibited by *Monell*.'"); ***Gill v. City of Milwaukee***, 850 F.3d 335, 344 (7th Cir. 2017) ("Gill . . . failed to plead a plausible *Monell* claim. His complaint states that the City of Milwaukee has a *de facto* policy of 'placing an emphasis on clearing cases and convicting suspects over seeking truth,' which led to the coercion of his confession and the concealment of exculpatory evidence. A municipal body may be liable for constitutional violations 'pursuant to a governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.'. . To succeed on this *de facto* custom theory, the plaintiff must demonstrate that the practice is widespread and that the specific violations complained of were not isolated incidents. *Jackson v. Marion Cty.*, 66 F.3d 151, 152 (7th Cir. 1995). At the pleading stage, then, a plaintiff pursuing this theory must allege facts that permit the reasonable inference that the practice is so widespread so as to constitute a governmental custom. . . Gill's complaint fails to do so. It does not provide examples of other Milwaukee police officers taking actions similar to those complained of here. More importantly, it does not plausibly allege that such examples exist. Instead, it simply states that this *de facto* policy caused the 'Defendant Detectives named *supra* to commit the aforesaid wrongful acts against Plaintiff.' The specific actions of the detectives in Gill's case alone, without more, cannot sustain a *Monell* claim based on the theory of a *de facto* policy."); ***Rossi v. City of Chicago***, 790 F.3d 729, 737-38 (7th Cir. 2015) ("Rossi's second contention is closer to the mark as it alleges a 'code of silence,' namely a failure on the part of the police department to discipline and train officers regarding ethical conduct. The district court ruled against Rossi on evidentiary grounds, not because this theory was defective. Indeed, the facts of this case—where Mathews and Chengary conducted superficial investigations and Doubek faced no official discipline for her actions—raise serious questions about accountability among police officers. But a *Monell* claim requires more than this; the gravamen is not individual misconduct by police officers (that is covered elsewhere under § 1983), but a *widespread practice* that permeates a critical mass of an institutional body. In other words, *Monell* claims focus on institutional behavior; for this reason, misbehavior by one or a group of officials is only relevant where it can be tied to the policy,

customs, or practices of the institution as a whole. Rossi failed to do that here. He did not retain a defense expert for his case and his pre-trial disclosures failed to identify any expert reports addressing this particular issue. Rossi did offer three expert reports that were submitted in a separate case, *Obrycka v. City of Chicago,* 2012 WL 601810 (N.D.Ill. Feb.23, 2012). The district court declined to consider these reports because they did not comply with the disclosure requirements of the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 26(e)(2). The exclusion of non-disclosed evidence is 'mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless.'. . In the context of this case, the non-disclosure was neither harmless nor justified because it deprived the city of any opportunity to retain its own experts to analyze the merits of the factual claims of the expert reports. The district court, therefore, did not abuse its discretion in declining to consider the expert reports."); ***McCoy v. Board of Educ., Columbus City Schools***, No. 12–3040, 2013 WL 538953, *5, *6 (6th Cir. Feb. 13, 2013) (unpublished) ("[T]he McCoys' § 1983 claim against the Board is that the Board had *no* policy, leaving individual complaints to be dealt with contextually per an administrator's discretion. While the McCoys attempt to classify this as an official policy of inaction, the mere showing of the absence of a policy is insufficient: the McCoys must also prove that the need to act was obvious and that the Board's decision not to have a policy in place was a conscious one. . . Having failed to demonstrate both, the McCoys have no valid basis for asserting a § 1983 claim against the Board. The McCoys also argue that the aggregate of instances in which an individual supervisor (e.g., Kunz or Tornes) failed to further investigate a reported incident collectively constitutes an official policy of inaction that reflected the Board's conscious decision to be deliberately indifferent. Even if it were true that these supervisors were recklessly passive and reckless in their failure to probe further into the allegations against Stroup, their collective failure to act was not a *Monell* custom in the sense that there was no conscious act on the part of the school board to deliberately engage in a course of action or inaction in light of Stroup's unconstitutional conduct. . .Therefore, the district court properly dismissed the McCoys' § 1983 claims against the Board."); ***Conn v. City of Reno***, 591 F.3d 1081, 1085 (9th Cir. 2010) (order and amended opinion, denying rehearing en banc) (Chief Judge Kozinski, with whom Judges O'scannlain, Kleinfeld, Tallman, Callahan, Bea and Ikuta join, dissenting from the denial of rehearing en banc) ("Until this opinion came along, police officers weren't required to serve as babysitters, psychiatrists or social workers, and judges didn't run suicide-prevention programs. Responsibility for preventing suicide rested with the individual and the family, not the state. But the panel has discovered that the Constitution demands a change in job description: Judges will henceforth micromanage the police, who in turn will serve as mental health professionals. The panel's reasoning has no stopping point, and our decision to let it stand threatens unprecedented judicial intervention in our local institutions."), *cert. granted, judgment vacated and remanded in light of* ***Connick v. Thompson,*** 131 S. Ct. 1350 (2011) and on remand, ***Conn v. City of Reno***, 658 F.3d 897 (9th Cir. 2011) ("We reinstate the opinion at 591 F.3d 1081, except that in light of the Supreme Court's decision in *Connick v. Thompson* , 131 S.Ct. 1350 (2011), we affirm in all respects the district court's grant of summary judgment as to municipality liability."); ***Brumfield v. Hollins***, 551 F.3d 322, 327(5th Cir. 2008) ("Brumfield has failed to raise a genuine issue of material fact demonstrating that Sheriff Stringer is not entitled to qualified immunity on the basis of failing to promulgate policies Y concerning inmate supervision and

medical care. Brumfield places great weight on the fact that Sheriff Stringer had no *written* policies and procedures at the Old Jail similar to the ones at a nearby facility known as the 'New Jail.' From this, she concludes that Sheriff Stringer implemented no policies at all. But we have acknowledged that 'the validity of prison policies is not dependent on whether they are written or verbal. A policy is a policy....' *Talib v. Gilley*, 138 F.3d 211, 215 (5th Cir.1998). Indeed, verbal policies existed concerning inmate supervision and medical care, and Sheriff Stringer, Bryant, Louge, Hollins, and Thornhill all testified to that effect."); ***Szabla v. City of Brooklyn Park***, 486 F.3d 385, 392 (8th Cir. 2007) (en banc) ("Brooklyn Park's written policy concerning the use of dogs is lawful on its face. . . . Brooklyn Park's directives do not affirmatively sanction the use of the dogs in an unconstitutional manner. The policy is simply silent concerning the circumstances under which an officer should provide a warning before a canine is directed to bite and hold a suspect. The directives do not reflect a deliberate choice by policymakers to refrain from warning citizens about the use of dogs. . . .[A] written policy that is facially constitutional, but fails to give detailed guidance that might have averted a constitutional violation by an employee, does not itself give rise to municipal liability. There is still potential for municipal liability based on a policy in that situation, but only where a city's inaction reflects a deliberate indifference to the constitutional rights of the citizenry, such that inadequate training or supervision actually represents the city's 'policy.'. . . The evidence presented on this record is insufficient to make a submissible case of deliberate indifference. The evidence does not show that Brooklyn Park had a history of police officers unreasonably using canines to apprehend suspects without advance warning, such that the need for additional training or supervision was plain. . . So far as the record reveals, this was a one-time incident, and there is no evidence of a pattern of constitutional violations making it 'obvious' that additional training or safeguards were necessary."); ***Doe v. Dallas Independent School District***, 153 F.3d 211, 217 (5th Cir. 1998) ("Plaintiffs . . . contend that DISD's failure to adopt an official policy should subject them to liability. . . . Plaintiffs point to no evidence suggesting that, at the time of the sexual abuse, the lack of an official policy on this issue was the result of an intentional choice on the part of the board of trustees. Moreover, in *Spann v. Tyler Independent School District*, we held that a school board's decision to vest school principals with complete discretion to address allegations of sexual abuse was a 'perfectly reasonable policy for dealing with reported instances of sexual abuse.'. . . If an explicit policy delegating the matter to principals was 'perfectly reasonable,' and thus did not constitute deliberate indifference on the part of the school district, then we cannot say that a custom tantamount to such a policy was not also reasonable. [footnote omitted] Thus, the district court was correct in granting summary judgment in favor of DISD.").

See also ***Barnes v. City of El Paso***, No. EP-22-CV-161-KC, 2023 WL 4097075, at *12 (W.D. Tex. June 12, 2023) ("Barnes alleges that the City caused her injury by failing to equip EPPD officers with body-worn cameras. . .She alleges that 'El Paso remains the largest city in Texas without police body worn cameras by conscious choice.'. . And while she acknowledges that 'the El Paso Mayor and City Council did, in March 2022, pass a measure for body worn cameras,' she notes that the 'timetable of deployment remains unknown.'. . These statements fail to plausibly allege the causation required for *Monell* claims. The connection between a municipal

policy and a plaintiff's injuries 'must be more than a mere "but for" coupling between cause and effect. The deficiency ... must be the actual cause of the constitutional violation.'. . Here, Barnes provides no factual allegations linking the City's policies on body cameras to her injuries, outside of unadorned, conclusory assertions. . . Nor does Barnes provide any factual allegations that might give rise to a causal inference, such as allegations about reports or statistics showing the effect of body-worn cameras in other cities. Without more, Barnes' First Amended Complaint fails to 'raise a right to relief above the speculative level.'. . While the Court is unaware of any Fifth Circuit decision considering a *Monell* claim predicated on the failure to equip officers with body cameras, courts from other circuits have rejected such claims. [collecting cases] The Court finds these cases persuasive and holds that Barnes has failed to plausibly plead that the City's failure to implement body-worn cameras caused her injuries. The City's Motion to Dismiss is therefore granted as to the body camera claim."); ***Barnes v. City of El Paso***, No. EP-22-CV-161-KC, 2023 WL 4097075, at *12-13 (W.D. Tex. June 12, 2023) ("Barnes raises a *Monell* claim against the City for its failure to indemnify its officers in § 1983 suits. . .Barnes alleges that the City 'has no requirement to satisfy judgments entered against its police for violations of civil rights,' and that it encourages its employees not to obtain insurance or indemnification 'so that they remain "judgment proof" in the event of litigation.'. . This policy, Barnes argues, 'actively discourages litigants and attorneys from filing lawsuits because there is often no ability to recover just compensation for violations of constitutional rights.'. . And because judgment-proof officers 'are not held accountable for Constitutional and civil rights violations, this creates an official policy, or unofficial custom, of normalizing the Constitutional and civil rights violations by police and other [City] employees.'. . These statements fail to plausibly allege that the City's indemnification policy caused Barnes' injury. Barnes' theory of liability assumes that (1) the City's indemnification policies will cause § 1983 plaintiffs to bring fewer suits, (2) EPPD officers are aware of this fact, (3) those officers will conclude that they are less likely to face consequences for constitutional violations as a result, and (4) they will change the way they interact with civilians accordingly. This attenuated causal connection falls well short of the 'moving force' causation required to sustain a *Monell* claim. . . Indeed, the link between officer indemnification and constitutional violations is so attenuated that multiple plaintiffs have advanced the exact opposite argument that Barnes advances here. That is, multiple plaintiffs have argued that a practice of indemnifying officers—rather than failing to indemnify them—caused the constitutional harms they suffered. . . Each of those courts concluded that the link between an officer's actions and municipal indemnification policy is too tenuous to give rise to municipal liability. . . That courts have rejected the inverse of Barnes' indemnification claim only underscores its fatal flaw. It is conceivable that a policy of indemnification could encourage constitutional violations by lessening the direct impact of liability verdicts on individual officers. It is also conceivable that a *failure* to indemnify officers could encourage constitutional violations by reducing the number of § 1983 suits. But conceivability is not the same as plausibility. As with Plaintiff's claim based on the failure to implement body cameras, Plaintiff offers nothing more than speculation regarding the effects of the City's indemnification policy. And speculation does not suffice to state a plausible claim. . . At bottom, Barnes' indemnification theory fails to state a claim because 'there are too many variables involved' to make out a plausible causal connection between the City's lack of an indemnification policy and Plaintiff's injury.");

Price v. City of New York, No. 15 CIV. 5871 (KPF), 2018 WL 3117507, at *19 (S.D.N.Y. June 25, 2018) ("Plaintiff does not allege that any person besides herself was blocked by the City's social media moderators. She instead alleges that an informal but widespread custom must have existed because she was blocked on three occasions by three separate City employees. . .But Plaintiff's allegations of three similar constitutional violations do not allow the Court plausibly to infer the existence of a widespread custom or practice that can be attributed to the City. [collecting cases]"); ***Othman v. City of Chicago***, No. 11 C 05777, 2014 WL 6566357, at *5-7, *9 (N.D. Ill. Nov. 20, 2014) ("In their amended complaint, Plaintiffs assert several *Monell*-type allegations. However, in their response brief, Plaintiffs abandon the majority of their *Monell* allegations except for claims related to the City's alleged failure to retrieve Defendant Carranza's weapon and to restrict his police powers while he was on medical leave . . . . Thus, the Court focuses solely on these allegations and any evidence (or lack thereof) in the record to the support the allegations. . . . [E]ven where a plaintiff is attacking gaps in an express policy, the plaintiff must present evidence that a 'true municipal policy' is at issue rather than a random event by demonstrating that the 'same problem has arisen many times and the municipality has acquiesced in the outcome.'. . Here, Plaintiffs have not presented any evidence that a gap in the City's written policies or that its unofficial practices caused widespread constitutional violations. . . .Plaintiffs' claim that Defendant Carranza's 14 shots, taken together, constitute a widespread or longstanding deficient practice of the CPD is unavailing. It is well-established that an isolated problem with a single police officer does not provide a basis for municipal liability. . . .Even more problematic for Plaintiffs' novel argument is that it would be impossible for the City's final policymakers, presumably the City Council, to be placed on 'notice' of each purported constitutional violation (each shot fired) and have an opportunity to take action because all of the shots were fired within seconds of each other. . . . In sum, Plaintiffs have failed to present sufficient evidence to create a genuine issue of material fact as to each of the legal requirements necessary to establish municipal liability under 42 U.S.C. § 1983. In particular, Plaintiffs fail to put forth any evidence to establish that (1) the City's alleged unconstitutional practices actually exist, (2) that the City's final policymakers were 'deliberately indifferent' to these purported practices, and (3) that these alleged practices were the 'moving force' behind Ramiz Othman's alleged constitutional violations. Because Plaintiffs bear the burden of proof as to each of these elements and have wholly failed to present such evidence, the City is entitled to summary judgment on Plaintiffs' municipal liability claims against it."); ***Guzman-Martinez v. Corrections Corp. of America***, No. CV 11–02390–PHX–NVW, 2012 WL 2873835, *10 (D. Ariz. July 13, 2012) ("The agreement between ICE and the City requires the City to house immigration detainees in accordance with certain standards, which Plaintiff does not allege require the City to house transgender women in single-occupancy cells or women's facilities or to keep them away from contact with male detention officers. At most, the Complaint alleges that NCCHC recommends that custody staff be aware that transgender people are common targets for violence and appropriate safety measures should be taken and that the ACA Standards provide that single-occupancy cells should be available for inmates likely to be exploited or victimized. The Complaint does not allege that if custody staff had been provided awareness training or if Plaintiff had been provided a single-occupancy cell, neither detention officer Manford nor detainee Vigil would have subjected Plaintiff to the December 7, 2009 and

April 23, 2010 incidents from which Plaintiff's claims of deprivation of constitutional rights arise. Causation is even more attenuated because even if the City were to adopt certain unidentified policies, they could only be implemented by CCA. Thus, the City's failure to adopt policies regarding housing and protecting transgender women immigration detainees is not the 'moving force' behind the December 7, 2009 and April 23, 2010 incidents from which Plaintiff's claims of deprivation of constitutional rights arise."); ***Logan v. City of Pullman***, No. CV-04-214-FVS, 2006 WL 120031, at **2-4 (E.D. Wash. Jan. 13, 2006) ("To impose liability against the City by liability through omission, Plaintiffs must demonstrate that (1) a City employee violated Plaintiffs' constitutional rights; (2) the City has customs or policies that amount to deliberate indifference; and (3) these policies were the moving force behind the employee's violation of Plaintiffs' constitutional rights. . . As the Court ruled previously in its Order Re: Qualified Immunity, Plaintiffs have already set forth evidence establishing that their constitutional rights under the Fourth and Fourteenth Amendments were violated by the individual Defendant Officers' on the night in question. Thus, the first prong of the *Gibson* test has been satisfied and the focus shifts to the second and third prongs. Under the second prong of the *Gibson* test, Plaintiffs must present evidence showing the City has a policy that amounts to deliberate indifference to the Plaintiffs' constitutional rights. . . Plaintiffs contend their constitutional rights to be free from excessive force were violated because Chief Weatherly approved a facially unconstitutional policy directive equating the use of O.C. spray with the same level of force as a peaceful escort. . . .However, assuming, without deciding, that equating the use of O.C. spray with an escort does constitute an official 'policy' approved by Chief Weatherly, to establish liability, Plaintiffs must still demonstrate this policy amounts to deliberate indifference. . . . Moreover, even if Plaintiffs had presented sufficient evidence to create an issue of material fact as to whether the portion of the City's PPD Manual that equates the use of O.C. spray with an escort was deliberately indifferent to the Plaintiffs' constitutional right to be free from excessive force, Plaintiffs have not satisfied the third prong of Gibson. Plaintiff have not presented any evidence illustrating that such policy was the 'moving force' behind the Plaintiffs' constitutional deprivations."); ***Brown v. Mitchell,*** 308 F.Supp.2d 682, 700, 701 (E.D.Va. 2004) ("Considering the . . . fact that a Virginia sheriff has no authority to construct or modify local jail facilities, Mitchell argues that, because she is required to accept 'all persons' committed to the Jail, she cannot have been deliberately indifferent or grossly negligent as to the alleged overcrowding conditions at the Jail. It is true that, by statute, the locality, not the sheriff, is required to build and maintain a jail of a reasonable size to house the inmate population. . . . A Virginia sheriff, by contrast, has no duty or ability to build, expand, or otherwise improve the structural facilities of a jail. As discussed above, as a constitutional officer, Mitchell's duties and responsibilities are created solely by statute.. . Her statutory duties include maintaining records on all prisoners, formulating and enforcing jail rules, providing security in the jail, and keeping inmates clothed and fed. . . There is no statute, however, requiring or allowing a sheriff to build, add to, or otherwise improve the physical structure of a jail. Thus, Mitchell is correct respecting her inability to remedy the problem of overcrowding by building a new jail or modifying the existing one. Her failure, therefore, to build a new jail or remedy the existing one cannot be considered gross negligence or deliberate indifference. However, Mitchell's argument that, as a matter of law, she is exonerated from either a state-law wrongful

death action or an action under Section 1983 by virtue of Va.Code Ann. § 53.1-119 et seq. is misplaced because the argument simply ignores the remainder of the statutory scheme of which Va.Code Ann. § 53.1-119 et seq. is a part. . . . Under § 53.1-74, which also is a part of Chapter 3 of Title 53: 'When a ... city is without an adequate jail ... the circuit court thereof shall adopt as its jail, the jail of another county or city until it can obtain an adequate jail.' The ensuing sections of Chapter 3 provide for the procedures that are to be followed after such an adoption and set forth mechanisms for providing payment to the adopted jurisdiction. Thus, the General Assembly has provided a means for eliminating overcrowding when overcrowding would render a jail inadequate other than the structural remedies of constructing a new jail facility or expanding an existing one. And, although the authority for arranging for the use of other facilities lies in the local circuit courts, . . . Chapter 3 requires the sheriff to know, and keep records reflecting, the population of the local jail. . . Indeed, the sheriff must report thereon to the Compensation Board and, if asked, to the local circuit court. . . Thus, when a Virginia sheriff knows that a local jail is so overcrowded as to render it inadequate, that sheriff is not, contrary to Mitchell's arguments, without recourse or ability to remedy the overcrowding because, under Virginia's statutory scheme, alternate arrangements can be made by informing the local circuit court of the fact of overcrowding. Indeed, the Virginia legislature provides, quite clearly, that when so informed, the circuit court 'shall adopt as its jail, the jail of another county or city until it can obtain an adequate jail.' . . . Additionally, under another section of the statute, the circuit court can, upon Petition for Writ of Mandamus, command a governing body to put its own jail in good repair and be made otherwise adequate. . . Mitchell, whose job includes the operation of the Jail in accord with the dictates of Title 53, is charged with knowledge of these statutes. And, she is charged with knowledge of conditions in the Jail over which she has charge. Her failure to use these statutory mechanisms in the face of known overcrowding to the extent of the inadequacy as alleged in the Complaint certainly can be considered 'deliberate indifference' within the meaning of Eighth Amendment jurisprudence or gross negligence under Virginia's wrongful death jurisprudence."); ***Ivory v. City of Minneapolis***, No. Civ. 02-4364JRTFLN, 2004 WL 1765460, at *7 (D. Minn. Aug. 4, 2004) ("Plaintiff asserts that defendants' actions violated numerous department rules, and that these violations were not investigated by the Minneapolis Police Department. Specifically, plaintiff claims that Morrison, Ramsdell, and Kaneko violated a number of Minneapolis Police Department Manual Rules that, taken together, detail the appropriate use of force, including deadly force, by police officers and prescribe reporting and review requirements related to the use of force. Plaintiff seems to contend that the alleged lack of an investigation into violation of these rules indicates that such violations are commonplace and condoned by the City and Department. The Court disagrees. Plaintiff has not identified any official policy that arguably played a role in his getting shot. To the contrary, the department rules identified by plaintiff, if followed, help to protect plaintiff from unconstitutional behavior by the police. Further, there is insufficient evidence from which a jury could find that the City and Department had a custom of encouraging or permitting unconstitutional violation of these rules. A single incident of unlawful behavior cannot establish a custom of permitting such behavior, and cannot give rise to municipal liability. . . Further, it is undisputed that the St. Paul police department investigated the use of deadly force during this incident and determined that the officers acted appropriately. The Minneapolis police department

reviewed the St. Paul report and on that basis determined that the officers had followed all necessary rules and procedures. Thus, the City did not fail to investigate the alleged violation of plaintiff's constitutional rights, and there is no evidence of a custom of either deliberate indifference to or tacit authorization of such conduct. The City is entitled to summary judgment on this claim.'[footnote omitted]); ***La v. Hayducka,*** 269 F.Supp.2d 566, 586 (D.N.J. 2003) ("In contrast to the blatantly damaging evidence uncovered in *Russo*, plaintiffs rely solely on the fact that the SBPD [South Brunswick Police Department] did not have a written policy regarding use of force against EDPs. To implicate a municipality, a plaintiff must 'demonstrate that, through its deliberate conduct, the municipality was the moving force behind the injury alleged.'. . . Although the officers acknowledged that they did not receive specific EDP training, Hayduka testified that he had received training regarding the practice of contacting the UMDNJ and accompanying mental health evaluators to on-site screenings. . . . Furthermore, the officers each testified that they were trained in a variety of situations and in using several methods of dealing with people of varying psychological states. When asked if he received training regarding use of force against mentally disturbed individuals, Hayduka stated he received extensive on-the-job training, as well as training on handling people with Alzheimer's Disease. . .Officer Schwarz stated that in continuum of force training, topics included discussions of rational as well as irrational persons. . . Moreover, unlike in *Russo*, plaintiffs have not offered any internal documentation that would establish that the SBPD was aware of a lack of training in dealing with EDPs, or that there existed the potential for rampant injustice as a result of alleged lack of training."); ***Goodwin v. Furr***, 25 F. Supp.2d 713, 717 (M.D.N.C. 1998) ("[P]laintiff's complaint is deficient because it never alleges that the County officially sanctioned or ordered the seizure. It never identifies (1) what 'illegal custom' compelled, much less allowed seizure, (2) any county official who was involved in the seizure, and (3) why the sheriff or deputies may be considered the county's final policymaker with respect to the seized vehicles. The complaint merely states that the County failed to correct unconstitutional practices of the Sheriff and as a result created a custom of illegal practices. Unlike the situation in *Dotson v. Chester*,. . . plaintiff makes no claim that under North Carolina law, the County had either a right or obligation to fund, maintain or operate the seizure program and that it appointed the sheriff to carry out the program.").

C. Liability Based on Inadequate Training, Supervision, Discipline, Screening or Hiring

1. In ***City of Oklahoma City v. Tuttle***, 471 U.S. 808, 813 (1985), the Court disapproved a jury instruction to the effect that "a single, unusually excessive use of force may ... warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge."

Chief Justice Rehnquist questioned whether there could be a "policy" of "inadequate training" at all for ***Monell*** purposes, if the word "policy" implies some deliberate, conscious choice of a course of action. *Id*. at 823. He also raised doubts as to "whether a policy that itself was not unconstitutional . . . can ever meet the 'policy' requirement of ***Monell***." *Id*. at 823 n.7.

Even assuming such a policy could satisfy ***Monell***, the plurality concluded that "considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Id*. at 823.

Justice Brennan agreed that a government policy of inadequate training could not be inferred from a single incident of excessive use of force by a police officer. He did not share the plurality's doubts about whether inadequate training could be viewed as a "policy" under ***Monell***, nor did he think that ***Monell*** required the policy itself to be unconstitutional in order to find government liability. So long as the government policy caused an individual to be subjected to a deprivation of a constitutional right, ***Monell***-type liability could attach. *Id*. at 833 n.8 (Brennan, J., concurring in part and concurring in the judgment). The only clear consensus reached in ***Tuttle*** was that municipal liability based on a policy of inadequate training cannot be derived from a single incident of police misconduct. *See also* ***Robinson v. District of Columbia***, 403 F.Supp.2d 39, 54, 55 (D.D.C. 2005) ("Perhaps recognizing the need for more than a single incident, but providing no analysis whatsoever, Plaintiff attaches a letter summarizing and referencing a Memorandum of Agreement ("MOA") between the United States Department of Justice ("DOJ"), the District of Columbia, and the MPD, and relies entirely on this document as proof of a pattern or practice by the District of failing to investigate and discipline officers for their excessive use of force. . . Having conducted a searching review of this letter, the Court joins with the *Byrd* court in rejecting Plaintiff's lame attempt to transform the mere existence of a MOA into a policy or custom of deliberate indifference, for the MOA does not provide any evidence of specific instances of the District's failure to discipline, and if anything, it demonstrates not deliberate indifference, but rather, an effort to improve its practices and procedures relating to the investigation and discipline of police misconduct. . . . As Plaintiff seems to suggest, . . .it may be fair to infer that the MOA reflects an awareness by the District of serious allegations relating to its use of excessive force and its investigations of such use of force. However, a mere awareness of a problem in January 1999 and a need for improvement is not, as a matter of law, sufficient to impose municipal liability for an incident that occurred in October 2000. When analyzing the introductory letter attached by Plaintiff and descriptions of the MOA, two important legal points become obvious. First, and perhaps most significantly, the MOA conclusively demonstrates that the District was not indifferent to the problems with the MPD, as suggested by Plaintiff. Rather, the District was taking affirmative steps as early as January 1999 to remedy the situation. Indeed, the DOJ itself commended the District's 'unprecedented request' for the DOJ's investigation and recommendations and notes that this request 'indicated the City and the Chief's commitment to minimizing the risk of excessive use of force in [MPD] and to promoting police integrity.' . . . Plaintiff's reliance on the existence of the MOA to support her claims is inherently illogical. Under Plaintiff's approach, 'a municipality would be ill-advised to evaluate its operational practices or to institute reforms lest its efforts be labeled as a policy or custom of deliberate indifference.'"); ***Byrd v. District of Columbia,*** 297 F.Supp.2d 136, 139, 140 (D.D.C. 2003)("In support of his claim, plaintiff recounts the facts surrounding his claim of excessive force and then, without citation, claims that 'it is without question a fact that no real investigation of the facts surrounding

his beating ever took place.'. . While the District appears not to dispute plaintiff's claim that the incident at issue here was not properly investigated, that does not resolve the matter. For, even assuming the truth of plaintiff's claim, which one must do at this stage, that is not sufficient under the law for purposes of imposing liability on a municipality, since a single incident is clearly insufficient to establish the existence of a policy amounting to 'deliberate indifference.'. . Recognizing the need for more than a single incident, plaintiff cites to a Memorandum of Agreement (MOA) between the United States Department of Justice (DOJ), the District of Columbia, and the MPD, and relies entirely on this document as proof of a pattern or practice by the District of failing to investigate and discipline officers for their excessive use of force. . . Having reviewed this MOA, [footnote omitted] the Court must reject plaintiff's lame attempt to transform the mere existence of a MOA into a policy or custom of deliberate indifference, for the MOA does not provide any evidence of specific instances of the District's failure to discipline, and if anything, it demonstrates not deliberate indifference, but rather, an effort to improve its practices and procedures relating to investigation and discipline of police misconduct. . . . From the MOA, it is clear that the District was adopting a proactive remedial approach, and it was, as early as 1999, attempting to reform its practices to eliminate the problems of the past."), *aff'd. by Byrd v. Gainer,* 2004 WL 885228 (D.C. Cir. 2004).

2. In ***City of Springfield, Mass. v. Kibbe***, 480 U.S. 257, 107 S. Ct. 1114 (1987), the Court had granted certiorari to decide the question of whether a municipality could be held liable under section 1983 for the inadequate training of its employees. The Court, however, dismissed the writ as improvidently granted because of an inability to reach and decide the closely related question of "whether more than *negligence* in training is required in order to establish such liability." 107 S. Ct. at 1115.

Four members of the Court dissented from the dismissal of the writ of certiorari. Justice O'Connor (joined by C.J. Rehnquist, and JJ. White and Powell) took the position that inadequate training could serve as a basis for imposing section 1983 liability on a local government, but "only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the [government's] domain." *Id*. at 1121 (O'Connor, J., dissenting). The plaintiff in an "inadequate training" case must show reckless disregard or deliberate indifference in the inadequacy of the training program in order to establish the requisite "causal connection between omissions in a police training program and affirmative misconduct by individual officers in a particular instance . . . ." *Id.*

3. In ***City of Canton v. Harris***, 489 U.S. 378 (1989), the Supreme Court addressed the questions left unresolved in ***Tuttle*** and ***Kibbe***. In ***City of Canton***, the plaintiff claimed a deprivation of her right to receive necessary medical care while in police custody. She asserted a claim of municipal liability for this deprivation based on a theory of "grossly inadequate training." The plaintiff presented evidence of a policy that gave police shift commanders complete discretion to make decisions as to whether prisoners were in need of medical care, accompanied by evidence

that such commanders received no training or guidelines to assist in making such judgments. *Id*. at 382.

The Sixth Circuit upheld the adequacy of the district court's jury instructions on the issue of municipal liability for inadequate training, stating that the plaintiff could succeed on her failure-to-train claim " [where] the plaintiff . . . prove[s] that the municipality acted recklessly, intentionally, or with gross negligence." *Id*.

In an opinion written by Justice White, the Court unanimously rejected the City's argument that municipal liability can be imposed only where the challenged policy is itself unconstitutional and concluded that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." *Id*. at 387. Noting the substantial disagreement among the lower courts as to the level of culpability required in "failure to train" cases, the Court went on to hold that "the inadequacy of training policy may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id*. at 388. The Court observed, *id.* at 390, that:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. [footnotes omitted]

The "deliberate indifference" standard has nothing to do with the level of culpability that may be required to make out the underlying constitutional wrong, but rather has to do with what is required to establish the municipal policy as the "moving force" behind the constitutional violation. *Id*. at 388 n.8.

The Court made it clear that on remand the plaintiff would have to identify a particular deficiency in the training program and prove that the identified deficiency was the actual cause of plaintiff's constitutional injury. It would not be enough to establish that the particular officer was inadequately trained, nor that there was negligent administration of an otherwise adequate program, nor that the conduct resulting in the injury could have been avoided by more or better training. The federal courts are not to become involved "in an endless exercise of second-guessing municipal employee-training programs." *Id*. at 390-91.

Justice O'Connor elaborated on how a plaintiff could show that a municipality was deliberately indifferent under *City of Canton*. First, where there is "a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face, ... failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue." *Id*. at 396 (O'Connor, J., concurring in part and dissenting in part).

For example, all of the Justices agreed that there is an obvious need to train police officers as to the constitutional limitations on the use of deadly force, *see* ***Tennessee v. Garner***, 471 U.S. 1 (1985), and that a failure to so train would be so certain to result in constitutional violations as to reflect the "deliberate indifference" to constitutional rights required for the imposition of municipal liability. 489 U.S. at 390 n.10.

Justice O'Connor was also willing to recognize that municipal liability on a "failure to train" theory might be established "where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion, ... [which pattern] could put the municipality on notice that its officers confront the particular situations on a regular basis, and that they often react in a manner contrary to constitutional requirements." *Id*. at 397 (O'Connor, J., concurring in part and dissenting in part). *See also* ***Spell v. McDaniel***, 824 F.2d 1380 (4th Cir. 1987).

Thus, ***City of Canton*** provides a plaintiff with two different approaches to a failure-to-train case. **First**, a plaintiff may establish deliberate indifference by demonstrating a failure to train officials in a specific area where there is an obvious need for training to avoid violations of citizens' constitutional rights. **Second**, plaintiff may rely on a pattern of unconstitutional conduct so pervasive as to imply actual or constructive knowledge on the part of policymakers, whose deliberate indifference, evidenced by a failure to correct once the need for training became obvious, would be attributable to the municipality. *See also* ***Young v. Bd. of Supervisors of Humphreys County, Mississippi***, 927 F.3d 898, 905 & n.2 (5th Cir. 2019) ("The deliberate-indifference standard typically applies when a governmental entity failed to act. . . . Not surprisingly, the cases the Board cites on appeal to contend that deliberate indifference was the proper standard all concern a government entity's failure to act.")

See, e.g., ***Franklin v. Franklin County, Kentucky***, 115 F.4th 461, 474-75 (6th Cir. 2024) ("The final theory of *Monell* liability asserted by Franklin is based on Franklin County's alleged failure to train, supervise, or discipline its employees with regard to the sexual abuse of inmates. . . . In the present case, Franklin contends that the training that the Jail staff received was constitutionally inadequate because the County made 'deliberate choices not to ... have written policies on preventing sexual misconduct' or to train officers on PREA's requirements regarding prevention [of sexual abuse].' But her contention that the Jail did not have written policies on preventing sexual abuse is belied by the record. The Jail's written policy about sexual misconduct expressly acknowledges that the '[PREA] establishes a zero tolerance standard for incidence of inmate sexual assault and rape; [and] makes prevention of inmate sexual assault and rape a top priority in [the] facility.' Moreover, the written policy forbids 'sexual activity between staff and inmates, volunteers, contract personnel, or work site supervisors and inmates regardless of consensual states [*sic*],' and it subjects offenders to 'administrative and criminal disciplinary sanctions.' Information is also 'provided to ... inmates about sexual abuse/assault[,] including prevention/intervention [and] reporting sexual abuse/assault. ... [This] [i]nformation [is] communicated orally and in writing at the time of booking[,and] [t]he inmate will sign [a

document] acknowledging receipt of this information.' Further undermining Franklin's position is that all Jail officers must undergo a PREA training course before ever interacting with inmates, where the officers learn how to prevent sexual abuse. These facts demonstrate that, contrary to Franklin's contention, the Jail did have written policies concerning the prevention of sexual misconduct. The policies provide that the prevention of sexual assault is a top priority of the Jail, and they require that inmates be provided information about preventing such conduct. This is not a case where there is a 'total lack of any County policies' governing the prevention of sexual assault.' . . Franklin's failure-to-train argument on this point is accordingly unpersuasive because there are in fact written policies (and trainings) governing the prevention of sexual assault in the Jail."); ***Shadrick v. Hopkins Cnty., Ky.,*** 805 F.3d 724, 741-42 (6th Cir. 2015) ("Shadrick can demonstrate SHP's [Southern Health Partner's] failure to provide LPN nurses with adequate training and supervision in one of two ways. She can show '[a] pattern of similar constitutional violations by untrained employees' and SHP's '"continued adherence to an approach that [it] knows or should know has failed to prevent tortious conduct by employees," thus establishing 'the conscious disregard for the consequences of [its] action—the "deliberate indifference"—necessary to trigger municipal liability.' . . . Alternatively, Shadrick can establish 'a single violation of federal rights, accompanied by a showing that [SHP] has failed to train its employees to handle recurring situations presenting an obvious potential' for a constitutional violation. . . This second mode of proof is available 'in a narrow range of circumstances' where a federal rights violation 'may be a highly predictable consequence of a failure to equip [employees] with specific tools to handle recurring situations.'. . . This method of proof does not require Shadrick to show that SHP had actual or constructive notice that its nurses were deficiently trained, as asserted in the dissent; proof of actual or constructive notice is necessary only when a plaintiff pursues § 1983 liability on the pattern theory of constitutional violations."); ***Sornberger v. City of Knowville***, 434 F.3d 1006, 1029, 1030 (7th Cir.2006) ("Establishing *Monell* liability based on evidence of inadequate training or supervision requires proof of 'deliberate indifference' on the part of the local government. . . This proof can take the form of either (1) failure to provide adequate training in light of foreseeable consequences; or (2) failure to act in response to repeated complaints of constitutional violations by its officers. . . . Here, Teresa's proferred evidence suffices to create triable issues with respect to both forms of deliberate indifference. Teresa first cites evidence that Galesburg had a policy of coercing confessions out of female suspects by threatening to have DCFS take away their children. . . . This evidence gives rise to triable issues with respect to Galesburg's municipal liability on theories of both failure to train and refusing to correct complained-of behavior. On this record, summary judgment dismissing the City of Galesburg was therefore improper."); ***Dunn v. City of Elgin,*** 347 F.3d 641, 646 (7th Cir. 2003) ("Deliberate indifference may be shown in one of two ways. First, a municipality shows deliberate indifference when it fails to train its employees to handle a recurring situation that presents an obvious potential for a constitutional violation and this failure to train results in a constitutional violation. . . . Second, a municipality shows deliberate indifference if it fails to provide further training after learning of a pattern of constitutional violations by the police."); ***Cherrington v. Skeeter,*** 344 F.3d 631, 646, 647 (6th Cir. 2003) ("Given the dearth of case law addressing the issue, it cannot be said that police officers routinely confront the question of what to do with children upon arresting their parent or guardian. Thus, the

Defendant City cannot be deemed deliberately indifferent to an obvious need for officer training in this area. [footnote omitted] Likewise, Plaintiffs have failed to identify any similar incidents or prior complaints that might have alerted the Defendant City to the need to cover this topic in its officer training. Absent some form of notice that its officers might confront such a situation, the Defendant City cannot be held liable under a 'failure to train' theory for any alleged deprivation of Daija King's constitutional rights."); ***Brown v. Shaner***, 172 F.3d 927, 931 (6th Cir. 1999) ("The Court [in *Canton*] indicated at least two types of situations that would justify a conclusion of deliberate indifference in the failure to train police officers. One is failure to provide adequate training in light of foreseeable consequences that could result from the lack of instruction. . . . A second type of situation justifying a conclusion of deliberate indifference is where the city fails to act in response to repeated complaints of constitutional violations by its officers."); ***Cornfield v. Consolidated High School District No. 230***, 991 F.2d 1316, 1327 (7th Cir. 1993) ("[I]t may be that a municipality could fail to train its employees with respect to a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face. [cite omitted] Given the nebulous standards governing student searches, school districts and school district administrators cannot be held accountable on this ground because the particular constitutional duty at issue is not clear. Alternately, municipal liability would be proper for a failure to train when the need is not necessarily obvious from the outset, but the pattern or frequency of constitutional violations would put the municipality on notice that its employees' responses to a recurring situation are insufficient to protect the constitutional rights involved. [cite omitted] In other words, the policymakers had acquiesced in a pattern of constitutional violations."); ***Thelma D. v. Board of Education of the City of St. Louis***, 934 F.2d 929, 934-45 (8th Cir.1991) (analysis clearly illustrates the two different methods of establishing ***City of Canton*** deliberate indifference.). *See also* ***Palmquist v. Selvik***, 111 F.3d 1332 (7th Cir. 1997); ***Young v. City of Augusta, Georgia***, 59 F.3d 1160, 1172 (11th Cir. 1995) (same).

See also ***Smith v. City of Chicago,*** 143 F.Supp.3d 741, 752-53 (N.D. Ill. 2015) ("In the Amended Complaint, the named Plaintiffs base their Fourth Amendment and Fourteenth Amendment Equal Protection Clause *Monell* claims on the City's and Superintendent McCarthy's acts and omissions in relation to: (1) failing to properly screen, train, and supervise CPD officers; (2) inadequately monitoring CPD officers and their stop and frisk practices; (3) failing to sufficiently discipline CPD officers who engage in constitutional abuses; and (4) encouraging, sanctioning, and failing to rectify the alleged unconstitutional practices. . . Plaintiffs not only base their *Monell* claims on a widespread unofficial practice, but also on Defendant Superintendent McCarthy's deliberate acts as a decision-maker with final policy-making authority. . . In relation to failure to train and supervise claims, under 'limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983.'. . Under this standard, a local government's failure to train must amount to the deliberate indifference of the rights of the citizens whom the officers encounter. . . 'Deliberate indifference' is a term used in both Eighth Amendment claims and constitutional actions against governmental entities. . . Specifically, 'deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability.'.

. On the other hand, the 'term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents.'. . Proof of deliberate indifference in the context of a failure to train case 'can take the form of either (1) failure to provide adequate training in light of foreseeable consequences; or (2) failure to act in response to repeated complaints of constitutional violations by its officers.'. .Accepting Plaintiffs' allegations as true and all reasonable inferences in Plaintiffs' favor, not only have Plaintiffs alleged enough factual details regarding their failure to train and supervise claim under the federal pleading standards, they have alleged sufficient facts that the City and Defendant McCarthy acted with deliberate indifference under *Sornberger*."); ***Hall v. City of Chicago***, No. 12 C 6834, 2012 WL 6727511, *7-*9 (N.D. Ill. Dec. 28, 2012) ("The City claims that Plaintiffs' bald assertion that the City's municipal policymakers acted with deliberate indifference to the rights of the Plaintiffs fails to satisfy the Plaintiffs' pleading requirements. Plaintiffs respond arguing that deliberate indifference can be 'imputed' to the City because of the City's failure to train its officers adequately and because of its failure to monitor and discipline its officers. . . A municipality will be held liable under *Monell* for 'failure to adequately train or supervise its officers only when the inadequacy in training amounts to deliberate indifference to the rights of the individuals with whom the officers come into contact.'. . . Plaintiffs reference *Sornberger v. City of Knoxville* and *Robles v. Fort Wayne* as support that their pleadings allege sufficiently that the City has acted with deliberate indifference. The Court disagrees. . . .Plaintiffs here fail to plead that the City failed to provide adequate training to Chicago Police Officers despite 'foreseeable consequences,' and fail to plead that the City has received repeated complaints of constitutional violations with respect to S04–13–09. Indeed, based on the Court's prior determination that S04–13–09 does not on its face permit officers to conduct compulsory seizures absent reasonable suspicion, the Court cannot see how the City could predict that patrol officers would conduct unconstitutional seizures when enforcing S04–13–09. Moreover, . . . Plaintiffs fail to make any allegations that the City was aware of a pattern of wrongful conduct involving S04–13–09. While the Court concedes that Plaintiffs' allege that a number of the Contact Information Cards indicate officers were conducting Fourth Amendment seizures without reasonable suspicion, Plaintiffs fail to allege that the City ever received information of constitutional violations and after receiving such information, declined to take any action to correct such violations. . . Thus, the Court finds that Plaintiffs' *Monell* widespread practice theory claims based on the City's failure to train and failure to monitor adequately and discipline officers fails because the Plaintiffs fail to plead that the City acted with deliberate indifference."); ***Brown v. Mitchell,*** 308 F.Supp.2d 682, 706 (E.D.Va. 2004) ("At bottom, as Justice O'Connor's separate opinion in *Harris* makes clear, there are, in fact, two categories of failure to train cases, one involving a pattern of constitutional deprivations and one involving singular deprivations of more obvious rights. And, due to the fair notice requirements of *Monell*, each category proceeds somewhat differently as respects what must be pleaded and proved to establish deliberate indifference. Mitchell, who contends that the Complaint fails to state a claim because it fails to allege a pattern of constitutional deprivations at the Jail, is really asking the Court to place this action in the second O'Connor category, i.e., the category at- issue in *Lytle*. If, however, the Complaint concerns 'a clear constitutional duty implicated in recurrent situations that a particular employee is certain to

face,' . . . it does not need to allege a pattern of constitutional deprivation to state a legally cognizable claim. . . Count II resonates in that category of failure to train cases involving singular violations of clear and recurrent rights rather than in the pattern- mode category of failure to train cases. The Complaint alleges that Mitchell had a duty to ensure that her subordinates were adequately trained to recognize and adequately respond to serious medical conditions presented by inmates under their charge. The constitutional requirements imposed by the Eighth Amendment on the individual employee guards is clear: they must not be deliberately indifferent to a serious medical situation. Moreover, that Eighth Amendment duty is implicated in recurrent situations because, during his or her tenure, every Jail guard is almost certain to be in charge of inmates with serious medical conditions. Thus, as a case implicating a clear and recurrent constitutional right, Brown's Complaint is a cognizable failure to train claim under *Harris*.").

Note that the second method of establishing government liability was recognized by courts prior to ***City of Canton***. *See,e.g.*, ***Eddy v. City of Miami***, 715 F. Supp. 1553, 1555 (S.D. Fla. 1989) ("A municipality's continuing failure to remedy known unconstitutional conduct of police officers is a type of informal policy or custom that is amenable to suit under [§ 1983].").

In ***Spell v. McDaniel***, 824 F.2d 1380 (4th Cir. 1987), a pre-***City of Canton*** case, the court drew a similar distinction between government liability based on a policy of deficient training and liability based on a pattern or custom of unconstitutional conduct condoned by government policymakers. *Id*. at 1389. The court noted an important substantive distinction between the two theories. While government liability can attach for the first constitutional injury that is caused by a proven policy of inadequate or deficient training, there must be some pattern of unconstitutional conduct actually or constructively known to policymakers before government liability can be based on a theory of condoned custom or usage. *Id*.

See also ***Hernandez v. United States***, 939 F.3d 191, 209-10 (2d Cir. 2019) ("[T]o plead a failure-to-train claim, a plaintiff must allege that a municipality's failure to train its employees amounted to 'deliberate indifference' to the rights of individuals with whom the untrained employees have come into contact. This 'stringent standard of fault' is not met here, where the Complaint alleges that the City's employees acted not with deliberate indifference, but because of a purported policy of complying with federal immigration detainers without question, even when circumstances exist to question the validity of the detainer. If there is a constitutional violation, it is because of the City's policy, not because of the City's failure to train its employees. The employers' 'shortcomings,' assuming there were shortcomings, resulted from factors other than a faulty training program. . . Accordingly, the district court properly dismissed Hernandez's failure-to-train claim."); ***Forrest v. Parry***, 930 F.3d 93, 105-07, 117-18 (3d Cir. 2019) ("Plaintiffs that proceed under a municipal policy or custom theory must make showings that are not required of those who proceed under a failure or inadequacy theory, and vice versa. Notably, an unconstitutional municipal policy or custom is necessary for the former theory, but not for the latter, failure or inadequacy theory. . . .This difference can be significant because a plaintiff presenting an unconstitutional policy must point to an official proclamation, policy or edict by a

decisionmaker possessing final authority to establish municipal policy on the relevant subject. And, if alleging a custom, the plaintiff must evince a given course of conduct so well-settled and permanent as to virtually constitute law. . . On the other hand, one whose claim is predicated on a failure or inadequacy has the separate, but equally demanding requirement of demonstrating a failure or inadequacy amounting to deliberate indifference on the part of the municipality. . . This consists of a showing as to whether (1) municipal policymakers know that employees will confront a particular situation, (2) the situation involves a difficult choice or a history of employees mishandling, and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights. . . . Although we have acknowledged the close relationship between policy-and-custom claims and failure-or-inadequacy claims, . . . the avenues remain distinct: a plaintiff alleging that a policy or custom led to his or her injuries must be referring to an unconstitutional policy or custom, and a plaintiff alleging failure-to-supervise, train, or discipline must show that said failure amounts to deliberate indifference to the constitutional rights of those affected. That is not to say that the plaintiffs cannot be one and the same, with claims sounding in both. They can. . . At the outset, we emphasize that, properly considered, there are two ways in which Forrest's § 1983 claim against Camden may have proceeded: first, that Camden's policy or custom of permitting excessive force, false arrest, or other constitutional violations led to Forrest's injuries; and/or second, that Camden's failure to supervise, discipline, or train its officers amounted to deliberate indifference to the rights of the individuals with whom those officers would come into contact. As a result, the bare notion that a custom or policy of 'essentially unsupervised' officers led to Forrest's injury has no basis in law. . . We therefore consider his claim as sounding in the latter—that Camden's failure to supervise, investigate, and train its officers amounted to deliberate indifference. . . .[R]ecall that the onus of demonstrating an official policy or custom only falls on a plaintiff whose municipal liability claim is predicated on an unconstitutional policy or custom, but that such a plaintiff need not show deliberate indifference on the part of the municipality. On the other hand, a plaintiff advancing a claim predicated on a municipality's failure or inadequacy in training, supervision, or otherwise is spared from demonstrating the existence of an unconstitutional policy or custom but must make the deliberate indifference showing. To the contrary, the jury here was incorrectly instructed that, in order to find a municipal liability for inadequate supervision, it had to find that Camden adopted a policy or custom of inadequate supervision amounting to deliberate indifference to the fact that it would 'obviously result in the violation of an individual's right to be free from unlawful arrest and excessive force.'. . Indeed, in relevant part, the instructions begin by stating that the jury must find 'that an official policy or custom of [Internal Affairs] caused the deprivation [of his constitutional rights].'. . And, after presenting the requirements for determining whether a policy or custom existed, it frames Forrest's claim as '[Camden] adopted a policy of inadequate supervision and that this policy caused the violation of [Forrest's] right[s] ....'. . . It then immediately follows with instructions that the jury must also find that Internal Affairs failed to adequately supervise Officers Stetser and Parry, and that said supervision amounted to deliberate indifference. . . The result is confusion as to whether the policy or custom finding is antecedent to reaching the deliberate indifference inquiry, or if the two are intertwined in some other way.")

Compare ***Valle v. City of Houston***, 613 F.3d 536, 546-50 (5th Cir. 2010) ("[W]e find that there is sufficient evidence of causation to survive summary judgment with respect to the escalation of force after the officers' entry. . . . At best, the City's evidence raises a factual dispute whether failure to train all of the patrol officers involved in the incident in CIT tactics was a moving force in the precipitous escalation of force following their entry, which violated Esparza's constitutional rights. . . . The Valles presented some evidence that the City's decision not to implement the 2004 CIT training proposal could potentially lead to the deprivation of constitutional rights. Contrary to the district court's findings, we think that the 2004 proposal was, at least in part, intended to address the potential for the unconstitutional use of excessive force against mentally ill persons. . . . However, the Valles did not link this *potential* for constitutional violations to a pattern of actual violations sufficient to show deliberate indifference. The proposal does not detail any prior specific instances of the use of excessive force by non-CIT officers. Nor did the Valles elicit testimony that City officials were aware of prior shootings of unarmed mentally ill individuals. . . .We further note that it is difficult to show deliberate indifference in a case such as this one where the City has implemented at least some training. The very fact that the City trained a corps of officers in CIT tactics, demonstrates that it was not deliberately indifferent to the dangers of police interactions with mentally ill residents. The City considered the proposal, as well as resource constraints, and determined that the best allocation of limited resources and personnel was to keep the CIT training at the then-current levels. We do not mean to say that anytime a municipality must make decisions about resource allocations, such a decision will preclude a finding of deliberate indifference. Indeed, we can imagine scenarios in which a municipality's decision not to allocate resources to training necessary to prevent constitutional violations would constitute deliberate indifference. But that is not the case before us. As we indicated in the discussion of causation, additional training both in terms of the number of officers who were so trained and the quantity of training that each officer received may have made a difference for Esparza. But without a demonstrated link showing constitutional violations, notwithstanding the level of training the City had already implemented, we cannot say that the City was deliberately indifferent. . . . Proof of deliberate indifference is difficult, although not impossible, to base on a single incident. . . The 'single incident exception' is extremely narrow. . . . In the one case in which we found a single incident sufficient to support municipal liability, there was an abundance of evidence about the proclivities of the particular officer involved in the use of excessive force. . . . On the other hand, we have rejected claims of deliberate indifference even where a municipal employer knew of a particular officer's propensities for violence or recklessness. . . . This court has been wary of finding municipal liability on the basis of a single incident to avoid running afoul of the Supreme Court's consistent rejection of respondeat superior liability. . . . Here, the Valles did not allege or offer evidence that the officers who responded to their call had a propensity for using excessive force, violence, or were otherwise reckless. Our case law does not specifically require evidence of such character traits, but such evidence certainly is probative in determining that a 'highly predictable' consequence of sending the particular officers into a particular situation would be a constitutional violation. . . . Although the evidence shows the possibility-perhaps even the likelihood-of recurring situations involving mental health consumers, the evidence is far more equivocal on the question whether there was an obvious potential for the

violation of constitutional rights and an obvious need for more or different training. . . . We find the actions and decisions of the officers involved in this unfortunate shooting to be very troubling, indeed. However, the Valles did not present sufficient evidence to show that the *highly predictable consequence* of sending non-CIT officers in response to their call for help would result in the shooting of their son."); ***Whitfield v. Melendez-Rivera***, 431 F.3d 1, 13, 14 (1st Cir. 2005) ("[T]he fact that neither Lebron nor Mangome was disciplined for this incident . . . does not provide a sufficient basis by itself to support the jury's verdict. . . . In this case. . . there was an investigation into the shooting incident. According to Mangome, the investigation concluded that Lebron and Mangome had been justified in their use of force. Given that the question of whether Lebron and Mangome were justified in firing at Whitfield was fact-based and was hinged on competing versions of the events, it is not surprising that two different fact-finders (the police investigators and the jury in this case) came to two different conclusions. Standing alone, the lack of any disciplinary charges against Lebron and Mangome is not probative of a 'well settled and widespread' policy or custom.. . Nor does it establish deliberate indifference by the city."); ***Estate of Davis by and through Dyann v. City of North Richland Hills,*** 406 F.3d 375, 385, 386 (5th Cir. 2005) ("We do not suggest that a single incident, as opposed to a pattern of violations, can never suffice to demonstrate deliberate indifference.. . It is true that there is a so-called 'single incident exception,' but it is inherently 'a narrow one, and one that we have been reluctant to expand.' . . 'To rely on this exception, a plaintiff must prove that the 'highly predictable' consequence of a failure to train would result in the specific injury suffered, and that the failure to train represented the 'moving force' behind the constitutional violation.'"); ***Burge v. St. Tammany Parish,*** 336 F.3d 363, 373 (5th Cir. 2003) (*Burge IV*) ("The single incident exception . . is a narrow one, and one that we have been reluctant to expand. . . Accordingly, the exception will apply only where the facts giving rise to the violation are such that it should have been apparent to the policymaker that a constitutional violation was the highly predictable consequence of a particular policy or failure to train. . . It is not reasonably inferable [sic] from the evidence in this case that a *Brady* violation was a highly probable consequence of the Sheriff's policies. Unlike the facts of *Bryan County*, there is no evidence in the present case that the employees of the Sheriff's records room had a reputation for recklessness, or that the on-the-job training those employees received was inadequate. Nor do we accept Burge's argument that the single-incident exception should be expanded based on the latent nature of a *Brady* claim. . . . We decline, therefore, to extend the single-incident exception to the present case, and Burge is accordingly left with the burden of showing deliberate indifference by establishing proof of a pattern of similar violations, a burden he has been unable to carry."); ***Pineda v. City of Houston,*** 291 F.3d 325, 335 (5th Cir. 2002) ("In the only case in this circuit to apply the single incident exception to a failure to train claim, *Bryan County*, we stressed the requirements of notice and causation. . . Assuming arguendo that the plaintiffs have raised a fact issue with respect to whether or not GTF officers were performing specialized narcotics operations, the void in the record remains: the summary judgment record sheds no light on any lack of training in the application of the rules of search and seizure or any evidence of a causal relationship between a lack of training and the death of Oregon. The plaintiffs' single incident argument proves too much, as it essentially requires, again, that any Fourth Amendment violation be sufficient to satisfy the exception."); ***Piotrowski v. City of Houston***

(Piotrowski II), 237 F.3d 567, 582 (5th Cir. 2001) ("As is the case with allegations of failure to adequately screen prospective police officers, it is nearly impossible to impute lax disciplinary policy to the City without showing a pattern of abuses that transcends the error made in a single case. . . . A pattern could evidence not only the existence of a policy but also official deliberate indifference.")*;* ***Estate of Novack ex rel. Turbin v. County of Wood***, 226 F.3d 525, 531 (7th Cir. 2000) ("[P]laintiffs may prove their allegation that the County was deliberately indifferent to the constitutional violations WCJ personnel were inflicting on mentally ill inmates by presenting either a series of unconstitutional acts from which it may be inferred that the County knew WCJ officers were violating the constitutional rights of WCJ inmates and did nothing or by direct evidence that the WCJ policies, practices or training methods were unconstitutional. Plaintiffs have not shown that there was a pattern of suicide at WCJ from which we can draw the inference that the County was aware that WCJ policies for treating mentally ill inmates at risk for suicide were inadequate and chose to do nothing in the face of this knowledge. Even if we were to find that Novack's suicide itself was a result of unconstitutional conduct, a single instance of allegedly unconstitutional conduct does not demonstrate a municipality's deliberate indifference to the constitutional rights of its inhabitants. . . . In the absence of a series of constitutional violations from which deliberate indifference can be inferred, the plaintiffs must show that the policy itself is unconstitutional."); ***Gabriel v. City of Plano***, 202 F.3d 741, 745 (5th Cir. 2000) ("In failure to train cases, the plaintiff can prove the existence of a municipal custom or policy of deliberate indifference to individuals' rights in two ways. First, he can show that a municipality deliberately or consciously chose not to train its officers despite being on notice that its current training regimen had failed to prevent tortious conduct by its officers. . . Second, under the 'single incident exception' a single violation of federal rights may be sufficient to prove deliberate indifference. . . The single incident exception requires proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different police training. . . We have consistently rejected application of the single incident exception and have noted that 'proof of a single violent incident ordinarily is insufficient to hold a municipality liable for inadequate training.' *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir.1998 . . . .") and ***Hanno v. Sheahan,*** No. 01 C 4677, 2004 WL 2967442, at *13 (N.D. Ill. Nov. 29, 2004) ("Plaintiffs invite the court to conclude that the Sheriff's failure to discipline the deputies is sufficient to establish a liability. The court declines the invitation. Although some Circuits have held that a policy of inadequate discipline of police officers could evidence deliberate indifference to the constitutional rights of citizens, those courts have emphasized that 'it is nearly impossible to impute lax disciplinary policy to [a municipality] without showing a pattern of abuses that transcends the error made in a single case.' . . The Seventh Circuit has held that in order to establish municipal liability in the absence of an express policy, a plaintiff must establish 'a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.' . . With respect to the wrongful seizure or excessive force bases of their Fourth Amendment claims, no such evidence is offered. The wrongful seizure and excessive force claims against Sheriff Sheahan are, therefore, dismissed.") *with* ***Brown v. Bryan County***, 219 F.3d 450, 458-60 (5th Cir. 2000) ("[I]f *Monell* liability is to be imposed, it must be done on the grounds of the single decision by

Sheriff Moore to require no training of Burns before placing him on the street to make arrests. . . . . We think it is clear from the Court's decisions in *City of Canton* . . .and *Bryan County*, that, under certain circumstances, § 1983 liability can attach for a single decision not to train an individual officer even where there has been no pattern of previous constitutional violations. . . . Liability of the county depends upon whether it should have been obvious to Sheriff Moore − or stated differently, whether Sheriff Moore had sufficient notice − that the failure to train Burns in his task of making arrests was likely to lead to a violation of the Fourth Amendment rights of those he would encounter. Furthermore, liability attaches only if there is direct causation between the policy and the injury. The *City of Canton* also suggests that a single incident of an alleged constitutional violation resulting from the policy may serve as a basis for liability so long as that violation was an obvious consequence of the policy. Thus, *City of Canton* is persuasive that a pattern of misconduct is not required to establish obviousness or notice to the policymaker of the likely consequences of his decision."). *See also* ***Brown v. Mitchell,*** 308 F.Supp.2d 682, 704, 706 (E.D. Va. 2004) ("[U]nder *Harris*, the absence of an allegation of a pattern is not necessarily fatal to a failure to train claim. . . . [A]s a majority of justices in *Harris* held, a failure to train claim also can be based on a municipality's failure to train its employees concerning an obvious constitutional duty that the particular employees are certain to face. . . Thus, when a failure to train claim posits the deprivation of a clear constitutional right that is implicated in recurrent situations, the presence of a pattern is not an element of the claim. . . . The Complaint's lack of an allegation respecting a pattern of constitutional deprivations, therefore, contrary to Mitchell's argument, is not fatal. Construed liberally in favor of the plaintiff, . .. the Complaint alleges that Mitchell was deliberately indifferent by failing to institute a proper training program respecting the clear and recurrent Eighth Amendment right of inmates to have their serious medical needs attended to. Thus, Count II fairly alleges that Mitchell acted with deliberate indifference, hence satisfying the second element of a Section 1983 failure to train claim.").

See also ***Novak v. City of Parma, Ohio***, 33 F.4th 296, 309-10 (6th Cir. 2022), *cert. denied,* 143 S. Ct. 773 (2023) ("Novak claims that Parma should have trained its officers 'that pure speech is not a crime' save for a few exceptions. . . Novak's claim can survive summary judgment if he points to evidence that Parma 'fail[ed] to provide *any* training on key duties with direct impact' on free-speech issues. . . He says that's the case because Parma officers' only First Amendment training covered protests. There was no discussion of the complexities of parody or other forms of protected speech. What Novak fails to appreciate is that the intricacies of parody are not part of the officers' 'key duties' the way protest management is. So there was no duty to further train them here. What's more, Novak cannot show that deficiencies in training caused the alleged constitutional violations. Indeed, the officers were trained to contact the Law Department (namely, Dobeck) when difficult questions arose. That's just what they did: Riley and Connor looked to Dobeck for advice before pursuing a case. Once he assured them of probable cause, they obtained independent warrants for Novak's arrest and the search of his apartment from two different judges. As the district court pointed out, it strains belief to think an introductory primer on the First Amendment would have led the officers to a different conclusion than three trained lawyers. So Novak can't show that any failure to train actually caused or closely relates to his objections.");

McClendon v. City of Columbia (McClendon I), 258 F.3d 432, 442, 443 (5th Cir. 2001) ("We find this case distinguishable from *Bryan.* Although there is no evidence that disputes McClendon's claim that the City of Columbia does not provide specific training for its officers regarding the use of informants, there is a difference between a complete failure to train, as in *Bryan,* and a failure to train in one limited area. Even if this failure to train is considered sufficiently culpable conduct, however, McClendon has failed to prove a causal connection between this failure to train and his injury. He points to no evidence demonstrating that any training on behalf of the City with regards to the use of informants would have prevented Carney from providing Loftin with the gun used in this case."), *portion of opinion reinstated by* ***McClendon v. City of Columbia (McClendon II),*** 305 F.3d 314, 321 n.3 (5th Cir. 2002) (en banc).

See also ***Walker v. City of New York***, 974 F.2d 293, 299 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1387 (1993), where plaintiff, who spent nineteen years in prison for a crime he did not commit, claimed the police department was deliberately indifferent to his rights by failing to train and supervise officers "not to commit perjury or aid in the prosecution of the innocent."

The plaintiff argued in ***Walker*** that the duty to train in the area of not committing perjury was just like the duty to train in the use of deadly force, that "city policymakers know to a moral certainty that police officers will be presented with opportunities to commit perjury or proceed against the innocent . . . [and that] a failure . . . to resist these opportunities will almost certainly result in injuries to citizens." *Id*.

The Court of Appeals rejected plaintiff's "obviousness" claim, however, noting that plaintiff's argument had "misse[d] a crucial step":

> It is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to citizens . . . *City of Canton* also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response . . . is obvious to all without training or supervision, then the failure to train or supervise is generally not 'so likely' to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.

Id. at 299-300. *See also* ***J.H. v. Williamson County, Tennessee***, 951 F.3d 709, 723-24 (6th Cir. 2020) ("While the details of Cruz's alleged assault on J.H. are troubling, J.H. has not met his burden to establish municipal liability. We have held in unpublished cases that 'opportunity alone, without reason to suspect that it will lead to a constitutional violation, does not establish deliberate indifference.'. . There was no clear pattern of sexual abuse at JDC, and Cruz had no history of misconduct at JDC. And there is no authority to support the offensive claim that a sexual assault is the obvious consequence of an official's sexual orientation. J.H. argues that *Mize* and *Magoffin* are inapposite because, in those cases, the defendants were not charged with assuming responsibility of the plaintiffs in the way that Cruz's job required. But that does not change the fact that '[t]he intentional, violent act that' Cruz is alleged to have 'performed far

outside the scope of his duties' was not 'something that was "obvious" to occur.'. . Furthermore, J.H. has not shown a 'direct causal connection' between the failure to train Cruz and his alleged assault of J.H.—in other words, it is far from clear that any lack of training was the 'moving force' behind Cruz's decision to sexually assault a child. . .Thus, we affirm the district court on this claim."); ***Marsh v. Phelps County***, 902 F.3d 745, 752-53 (8th Cir. 2018) ("Even were we to determine that allowing one employee unfettered access to female inmates constitutes a policy or custom of the same sufficient to support a claim of liability against Phelps County under § 1983, there is no evidence of such acquiescence on the part of the County in the record before us, despite Marsh's assertions to the contrary. That coworkers and inmates from Phelps County Jail later revealed to investigators they had concerns about Campana's interactions with female inmates, and some even talked to Campana about those concerns does not establish a County policy of allowing access. These recollections about access were not from officials with authority over such matters nor is there evidence that these concerns were conveyed to those with authority. On these facts, it is patently incorrect to claim that there was a 'widespread' practice of ignoring the 'widespread' knowledge that Campana engaged in sexually inappropriate behavior. At the time the County hired Campana, a current corrections employee that had previously worked with Campana expressed that Campana might possibly have problems working around females. However, receipt and knowledge of that information upon hiring does not establish a policy of allowing Campana 'unfettered access' to that inmate population, let alone that any such alleged access was the moving force behind the constitutional violation alleged here. In fact, the evidence establishes that the County counseled Campana regarding his too-friendly nature with the female inmates and his unprofessionalism in that same regard, which evidences the opposite of a policy condoning the conduct. At bottom, Marsh identifies no evidence that evinces a deliberate choice of a guiding principle or procedure made by Phelps County authorizing officers to engage in this behavior and no evidence suggests that one existed in the first instance. . .Additionally, as to the argument that the County failed to train its employees (and Campana, specifically) not to engage in sexually deviant behaviors, this court has held that there is no patently obvious need to train an officer not to sexually assault detainees in light of the regular law enforcement duties of officers and the fact that '[a]n objectively reasonable officer would know that it is impermissible' to engage in such behavior. . . While it might be wise and useful to plainly articulate such expectation in a training course, not doing so does not result in causing an officer to actually sexually assault a female detainee. . . Nothing in the record amounts to proof that any failure to train Campana caused Campana to sexually assault Marsh or other female inmates or that the County was deliberately indifferent to Marsh's rights as articulated in her complaint."); ***Flores v. Cnty. of Los Angeles***, 758 F.3d 1154, 1159-61 (9th Cir. 2014) ("The isolated incidents of criminal wrongdoing by one deputy other than Deputy Doe 1 do not suffice to put the County or Baca on 'notice that a course of training is deficient in a particular respect,' nor that the absence of such a course 'will cause violations of constitutional rights.'. . Neither Baca nor the County was faced with a pattern of similar constitutional violations by untrained employees. . . Nor does Flores's failure to train claim fall within the 'narrow range of circumstances [in which] a pattern of similar violations might not be necessary to show deliberate indifference.'. . . There is . . . every reason to assume that police academy applicants are familiar with the criminal prohibition on sexual assault, as everyone is

presumed to know the law. . . There is no basis from which to conclude that the unconstitutional consequences of failing to train police officers not to commit sexual assault are so patently obvious that the County or Baca were deliberately indifferent. . . . Flores's claim for failure to train fails because it is not plausible on its face. . . Flores's sole factual allegation regarding the alleged failure to train consists in the absence of language in the Sheriff's Department Manual that would instruct deputies not to sexually harass or sexually attack women with whom they come into contact. . . Given that the penal code prohibits sexual battery, it is not plausible that inclusion in the Manual of the language that Flores proposes would have prevented the assault on Flores. . . If the threat of prison time does not sufficiently deter sexual assault, it is not plausible to assume that a specific instruction not to commit sexual assault will provide such deterrence, and therefore failure to include such instruction does not constitute deliberate indifference absent a longstanding pattern of such criminal behavior. We agree with our sister circuits that '[i]n light of the regular law enforcement duties of a police officer' there is not 'a patently obvious need for the city [ ] specifically [to] train officers not to rape young women.'. .Accordingly, we hold that Flores has failed to allege sufficiently that the failure to train sheriff's deputies not to commit sexual assault constitutes deliberate indifference to the risk of such assault by a deputy. Given the absence of any pattern of sexual assaults and the clear criminality of the conduct, we also hold that instructions in an employment manual not to sexually harass or sexually assault women cannot plausibly be considered an effective means to prevent sexual assault, when the employees are peace officers sworn to uphold the law which prohibits such assaults. . . . Flores has not alleged facts sufficient to state a claim against the County or Baca, and the district court properly dismissed the action for failure to state a claim."); ***Lewis v. Pugh,*** No. 07-40662, 2008 WL 3842922, at *6 (5th Cir. Aug. 18, 2008) (not published) ("The actions of Pugh in raping and assaulting Lewis in March 2005 were entirely caused by Pugh. There is simply no evidence in the record that Pugh made the decision to rape Lewis for any reason related to any City policy or custom or understanding thereof which he may have had, or for any reason other than his own motivations for assaulting Lewis. In fact, Lewis herself has referred to Pugh as a 'rogue' police officer. In sum, the evidence shows no causal connection between the City's allegedly unconstitutional policy and the actions of Pugh."); ***Atkins v. County of Riverside***, 151 F. App'x 501, 508 (9th Cir. 2005) ("There is no indication that the County needed to train officers to not lie on a police report, or to suppress a lie once told. Atkins has not explained how a failure to train or supervise on *Brady* obligations was the 'moving force' behind Miller's alleged fabrication and concealment."); ***Carr v. Castle,*** 337 F.3d 1221, 1232 (10th Cir. 2003)("Even if Carr is viewed from the most favorable perspective in terms of the Officers not having been trained to know how to react exactly to an individual who had just thrown a four-inch piece of concrete, one thing is certain: They were not trained by the City to shoot him repeatedly in the back after he no longer posed a threat. In sum, even if some inadequacy in training had been shown, Carr cannot demonstrate how it was a direct cause of the Officers' actions and of Randall's consequent death."); ***Hernandez v. Borough of Palisades Park Police Dep't.,*** 58 F. App'x 909, 914 (3d Cir. 2003) ("Here, it was hardly obvious that police officers, sworn to uphold the law, would burglarize the homes of the very citizens whom they were duty-bound to protect because they lacked training that instructed them that such activity was unlawful. . . . Here, there is nothing to suggest that there is an inherently high risk that police officers will commit robberies

absent ethics training. Thus, the failure to train police officers that they should not commit burglaries, or the failure to supervise them to ensure that they do not commit such felonies, is not so likely to result in a violation of a constitutional right as to demonstrate deliberate indifference by Borough policymakers."); ***Kitzman-Kelley v. Warner***, 203 F.3d 454, 459 (7th Cir. 2000) ("Kitzman-Kelley must show one of two things: that there is a history of child welfare employees molesting the children in their care; or that someone inclined to commit child abuse could be deterred through proper training. In considering this latter question, it is necessary to determine, of course, whether the sort of sexual assault alleged here can be avoided by 'training' the perpetrator."); ***Barney v. Pulsipher***, 143 F.3d 1299, 1308 (10th Cir. 1998) ("Even if the courses concerning gender issues and inmates' rights were less than adequate, we are not persuaded that a plainly obvious consequence of a deficient training program would be the sexual assault of inmates. Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior."); ***Hayden v. Grayson***, 134 F.3d 449, 457 n.14 (1st Cir. 1998) ("[T]here has been no showing that whatever training was not provided to Grayson could have thwarted any such purposeful discrimination. Whereas law enforcement training might inform an officer about the proper methods to be used in mediating and diffusing crimes of domestic violence, for example, it does not necessarily follow that an officer intent on discriminating against a particular class of crime victims would be deterred from doing so by 'enlightenment' training, especially given the contraindications implicit in plaintiffs' other evidence that the challenged decisionmaking by Grayson resulted from alcohol abuse, lassitude, or personal animosity toward individuals."); ***Floyd v. Waiters***, 133 F.3d 786, 796 (11th Cir. 1998) ("Applying the reasoning of *Sewell* and *Walker* to the facts of this case, we conclude that the BOE [Board of Public Education and Orphanage for Bibb County] did not act with deliberate indifference to the training and supervision of the security department. Booker's conduct and the operation of the Playhouse were clearly against the basic norms of human conduct. The pertinent conduct was a crime in Georgia. Without notice to the contrary, the BOE was entitled to rely on the common sense of its employees not to engage in wicked and criminal conduct. The record contains no evidence that this reliance ever rose to the level of deliberate indifference by policymaking officials."); ***Sewell v. Town of Lake Hamilton***, 117 F.3d 488, 490 (11th Cir. 1997) (rejecting plaintiff's claim that officer's sexual molestation of arrestee resulted from deliberate indifference in training and supervision); ***Andrews v. Fowler***, 98 F.3d 1069, 1077 (8th Cir. 1996) ("In light of the regular law enforcement duties of a police officer, we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women."); ***Doe v. City of New York***, No. 18-CV-670 (ARR) (JO), 2018 WL 3824133, at *9 (E.D.N.Y. Aug. 9, 2018) ("The first two categories of *Monell* liability are irrelevant here as plaintiff does not allege that Hall and Martins's actions were undertaken pursuant to a formal municipal policy or that these actions were ordered or ratified by a municipal policymaker. She also does not allege any prior incidents, let alone a formal policy, of police officers threatening and intimidating the victims of sexual assaults in order to prevent them from coming forward. Nor does plaintiff plausibly allege that there was a pattern of officers sexually assaulting individuals in police custody that was 'sufficiently persistent or widespread as to acquire the force of law.'. . Indeed, none of the incidents of prior sexual misconduct by Brooklyn South Narcotics officers alleged in the complaint involved

individuals in police custody. . . Doe argues that, due to the inherent power dynamics of the relationship between police officers and arrestees, '[w]hen on duty police [request] to trade sex for drugs or anything else that is spelled rape.'. . But trading drugs for sex is simply not the same thing as sexually assaulting someone in police custody. Moreover, viewing this case as part of a pattern of sexual misconduct sufficiently persistent or widespread to constitute a custom, this is not a case where 'a local government is faced with a pattern of misconduct and does nothing.'. . Instead, the complaint alleges that an Internal Affairs investigation resulted in 15 Brooklyn South Narcotics officers being 'placed on desk duty,'. . . as well as the transfer of 'the commanding officer of citywide narcotics, the head of Brooklyn South Narcotics ... and two captains in the unit[.] . . Nor, for essentially the same reason, does Doe plausibly allege a failure to supervise *Monell* claim: she does not allege facts that support a reasonable inference of a 'failure to investigate or rectify' a 'potentially serious problem of unconstitutional conduct' that 'evidences deliberate indifference.'. . Finally, Doe does not plausibly allege a failure to train *Monell* claim because she does not identify a training deficiency that ' "actually caused" the constitutional deprivation'—here, her sexual assault. . . While this is not the first time an on-duty New York City police officer stands accused of rape, . . . plaintiff provides no reason to believe that this behavior was caused by a failure to properly train officers. Indeed, deciding not to rape someone is not the kind of 'difficult choice of the sort that training or supervision will make less difficult.'"); ***Castellani v. City of Atl. City***, No. CV 13-5848 (JBS/AMD), 2017 WL 3112820, at *22 (D.N.J. July 21, 2017) ("While there is ample evidence to support Plaintiff's claim with respect to failure to supervise or failure to discipline, there is less evidence regarding the failure to train aspect of the claim, as Plaintiff does not appear to allege negligent training. . . Defendant argues that it is absurd to suggest that this incident happened because the officers were not properly trained "not to beat a defenseless person and instruct a dog to maul him for sport or out of uncontrolled anger." (Reply Br. at 10.) The Court agrees, as the City has produced records indicating that ACPD officers regularly undergo yearly in-service training specifically in the area of use of force. . . Accordingly, the Court will deny summary judgment on the aspect of Plaintiff's *Monell* claim dealing with failure to supervise and failure to discipline, but will grant summary judgment with respect to failure to train."); ***Campbell v. Anderson County***, No. 3:06-CV-444, 2010 WL 503141, at *7 (E.D. Tenn. Feb. 8, 2010) ("The court agrees with the reasoning set forth in the cases cited above. Refraining from raping women in police custody is so obvious that even if Anderson County were silent about such conduct, it would not give rise to a constitutional violation. The court finds that Anderson County's training procedures were sufficient as a matter of law, and that no specific training was necessary to inform officers not to rape or sexually assault women in their custody. Accordingly, Anderson County is granted summary judgment on Campbell's claim based on inadequate training."); ***Doe v. Dickenson***, No.CV-07-01998-PHX-GMS, 2009 WL 1211812, at *5, *6 (D. Ariz. Apr. 30, 2009) ("It is well-established, however, that a municipality is not deliberately indifferent in failing to train law enforcement officers to not sexually assault those with whom they come into contact. . . . In short, the City's failure to train Dickenson to not molest John Doe was not deliberate indifference because it is obvious that Dickenson should not do such a thing."); ***Hemmer v. Gayville-Volin School Dist.***, No. CIV. 07-4079, 2009 WL 462705, at *8 (D.S.D. Feb. 20, 2009) ("The Court concludes that Oakley was clearly abusing his position of authority and trust as a

teacher by engaging in a sexual relationship with a sixteen-year-old high school student whom he was coaching and any alleged deficiency in GVSD's sexual harassment training cannot be considered to be the moving force behind Plaintiff's injuries. Oakley's conduct in this case was clearly wrong and grossly immoral. The Court therefore grants Defendants' motion for Summary Judgment as it pertains to Plaintiff's failure to train claim."); ***Breland v. City of Centerville, Georgia***, 2008 WL 2233595, at *3, *4 (M.D. Ga. 2008) ("Plaintiff's argument regarding inadequate training fails because the offense Ware committed against Plaintiff was obviously wrong and was not connected to any training he received or should have received. For liability to attach to Centerville based on deficient training, 'the identified deficiency in [its] training program must be closely related to the ultimate injury.'. . No training is required to teach police officers not to commit sexual assaults. Sexual assault is illegal, and police officers can reasonably be expected to know, without training, that they are not allowed to take sexual advantage of their prisoners. Ware knew that what he was doing was improper and unlawful. . . . An officer does not need to be trained not to commit sexual assault, and even the best training program will not stop an officer who has a criminal intent from committing a crime."); ***Ejchorszt v. Daigle***, No. 3:02CV1350(CFD), 2007 WL 879132, at *7, *8 (D. Conn. Mar. 21, 2007) ("Here Fusaro arguably knew that Daigle was likely to work with young female volunteers during his alcohol sting operations. However, there is no evidence, and it cannot reasonably be argued, that Daigle was faced with a difficult choice in deciding whether or not to abuse his position of authority to take partially nude photos of Ejchorszt. Further, even if Daigle's acts reflect a mistake in judgment rather than wilful misconduct, there is no evidence that his mistake was the result of a faulty training program. Daigle did not need more training to convince him that this conduct was wrong; any reasonable person − or police officer − would likely know that this conduct was entirely inappropriate and could not be justified. Thus there is no genuine issue of fact about whether Daigle's conduct was caused by a faulty training program."); ***Santiago v. City of Hartford***, No. 3:00 CV 2386 WIG, 2005 WL 2234505, at *5 (D. Conn. Sept. 12, 2005) (not reported) ("In the instant case, Plaintiff Santiago, like the plaintiffs in *Amnesty America*, has failed to proffer any evidence concerning the City's training programs and has failed to identify any specific training deficiency. Other than proffering evidence that the sexual assault occurred and that, over a six-year period, there had been reports of fourteen other incidents involving Hartford police officers, which complaints were investigated with discipline imposed against certain individuals, Plaintiff has failed to offer any evidence in support of her claim that the City's training program was deficient in any manner whatsoever and that such deficiency amounted to a deliberate indifference by the City to the rights of people with whom the police would come into contact. Additionally, even if specific deficiencies in training had been identified by Plaintiff, she has failed to advance any theory as to how those training deficiencies, as opposed to some unrelated circumstance not implicating liability on the part of the City, caused Officer Camacho to sexually assault her. The proper conduct for a police officer, refraining from sexual assault and rape of an arrestee, is patently obvious. It is difficult to conceive of how additional training could have prevented the intentional sexual assault of Plaintiff by Officer Camacho so as to justify a finding of liability on the part of the City."); ***Ice v. Dixon***, No. 4:03CV2281, 2005 WL 1593899, at *9 (N.D. Ohio July 6, 2005) (not reported) ("[V]arious courts have found that causation and culpability of municipal

entities are lacking based merely upon an absence of specific training or deficient training of jailers not to sexually assault inmates as 'the proper course of conduct − refraining from sexual assault and rape − is patent and obvious; structured training programs are not required to instill it. Consequently, the absence of such programs (even if such absence was proven) is not so likely to cause improper conduct so as to justify a finding of liability.'"); ***Harmon v. Grizzel***, No. 1:03CV169, 2005 WL 1106975, at *8 (S.D. Ohio Apr. 21, 2005) (not reported) ("Harmon also argues that the training recruits receive regarding sexual misconduct is inadequate. Regardless of the adequacy of the City's training program, the Court finds it difficult to believe that the lack of training was a 'moving force' in the deprivation of the Harmon's rights. Grizzel did not need to be instructed that luring a female into a parking lot under false pretenses, getting into her car, grabbing her nipple without her consent and masturbating was inappropriate and potentially illegal."); ***Johnson v. CHA Security Officers***, No. 97 C 3746, 1998 WL 474138, *6 (N.D. Ill. Aug. 6, 1998) (not reported) ("In this case, CHA was not constitutionally deficient for failing to train its officers not to sexually assault tenants and visitors of CHA complexes since such assaults were clearly contrary to the basic duties of CHA officers and fundamental norms of human conduct. In this type of situation we follow the sound reasoning of our sister circuits and find that a municipal entity cannot be liable under § 1983 for the failure to train its employees not to engage in actions which are so repugnant to the common standards of human decency that common sense should serve as a sufficient deterrent.").

But see ***Drake v. City of Haltom***, 106 F. App'x 897, 900 (5th Cir. 2004) (per curiam) ("The City cites *Barney v. Pulsipher,* 143 F.3d 1299 (10th Cir.1998), for the proposition that sexual assault of detainees is not an obvious consequence of a City's failure to train or to supervise its jailers. *Barney,* however, was decided on a motion for summary judgment, not a motion to dismiss, and the summary-judgment record in *Barney* showed that the jailer who committed the assaults had received instruction on 'offenders' rights, staff/inmate relations, sexual harassment, and cross-gender search and supervision.' *Id.* at 1308. We are unwilling to say, at this point, that it is not obvious that male jailers who receive *no* training and who are left virtually unsupervised might abuse female detainees. Thus, we hold that Appellants have stated cognizable claims against the City under § 1983."); ***Vasconcelloes v. City of New York***, No. 12CIV. 8445(CM)(HBP), 2016 WL 403474, at *3-6 (S.D.N.Y. Jan. 28, 2016) ("The City's argument why the Court should grant summary judgment in its favor and dismiss the *Monell* claim is now markedly different from the argument the City made in its October 2014 letter. It had been the City's position that, after years of litigation, there was no evidence to controvert the police-officer defendants' story of a justified shooting of a person carrying a pistol; therefore, no evidence that the individual defendants committed a constitutional violation and, as such, no basis for a *Monell* claim against the City. . . That was before non-party witness Derbie Michel—present at the scene when Vasconcellos was shot by the police—was deposed by the parties. Michel testified *inter alia* that he was twenty feet away from Vasconcellos when he witnessed the police officers fire their weapons at an unarmed Vasconcellos, who was on his knees, with his hands in the air, telling the officers 'I Give up.'. . .Pivoting away from its argument that summary judgment in its favor was warranted because there was no evidence that the defendant officers' shooting of Vasconcellos was not justified, the City

now argues that the Court should grant it summary judgment 'because any *Monell* discovery plaintiff could ultimately be provided if the motion were denied, would never demonstrate that the officers' decision to kill Vasconcellos in such an unjustified and cruel manner was a difficult choice of the sort that training or supervision would make less difficult.'. . The City posits that 'common sense dictates that the heinous murder of Vasconcellos—as described by Michel—was unconstitutional and illegal without the need for training or supervision,' and that 'the City is entitled to rely on a common sense theory that its officers—even without training—would not behave this way.'. . The City cites various case[s] for the proposition that *Monell* liability cannot lie for a municipality's failure to train its officers, where the bad behavior of its officers was so obviously unconstitutional that the municipality was entitled to rely on a common sense assumption that its officers would not behave in such an egregious manner. . . .The City's attempt to shield itself from the scrutiny of *Monell* discovery by cleverly characterizing this case as falling under the cited 'common sense' line of cases is unavailing. Accepting as true that the police chased, shot, and killed a surrendering, unarmed Vasconcellos—a version of events wholly contradicted by the individual defendants' deposition testimony, as well as other evidence in the record—the officers' decision to use deadly physical force against Vasconcellos was nonetheless precisely the type of 'difficult choice' the Second Circuit talked about in *Walker* . . . . A reasonable jury could easily conclude that once the chase was initiated, rightfully or wrongfully, a difficult choice was presented to the officers, and that for some reason *short of premeditated murder* —perhaps some deficiency in training that made the officers misperceive the situation, or something intrinsic about one or more of the officers that could and should have been addressed through appropriate supervision—one or more of the officers made the fatally wrong choice. In short, what happened on the night Dashawn Vasconcellos was shot and killed by the police, and whether the individual defendants *truly* violated Vasconcellos Constitutional rights are open questions, preluding summary judgment in favor of the City on the *Monell* claim. The City's insistence that the record of the shooting can only be construed as being the cold blooded execution of Vasconcellos would certainly have been in the light most favorable to plaintiff had this been a motion for summary judgment in favor of the individual defendants. However, this is a motion for dismissal of the *Monell* claims against the City defendant only. The construal of the record on this motion must therefore be in the light most favorable to plaintiff *on this motion.* Plaintiff's argument in the present motion is not necessarily that the officers murdered Vasconcellos in cold blood, but that they killed an unarmed man for lack of proper training in handling the particular situation and for firing multiple, and an excessive number of rounds without assessing the situation properly. It is clear that a rational jury might very well conclude that this was a cold blooded execution by rogue cops for which the City is not liable. But a rational jury looking at conflicting testimonies as they are now known might indicate that the officers shot an unarmed man as a result of poor training, or that the shooting was enabled by the City's failure to supervise one or more of the individual defendants. The City's motion for summary judgment is denied.")

The plaintiff in ***Walker*** did state a claim against the City based on "a complete failure by the DA in 1971 to train ADAs on fulfilling *Brady* obligations." 974 F.2d at 300. The *Brady* standard was not so obvious or easy to apply as to require no training. *Id*. *But see* ***Burge v. Parish***

of St. Tammany, 187 F.3d 452, 475 (5th Cir. 1999)(*Burge III*) ("Under the record evidence, however, the cause of the violation cannot be attributed reasonably to the District Attorney's failure to adequately supervise or train his personnel or to diligently seek *Brady* material from the Sheriff's Office. The undisclosed evidence favorable to the defense was of such a quality and quantity that any reasonably qualified and experienced prosecuting attorney would have recognized it as *Brady* material that he was required to disclose. The assistant district attorneys who reviewed the Burge file possessed credentials even superior to those reasonably required by their positions. Thus, there was no obvious need for more or different training to enable them to recognize the particular undisclosed *Brady* material in this case and know that they were required to disclose it.").

Although the court rejected plaintiff's "obviousness" theory as to the New York City Police Department defendants, it concluded that the claim could withstand summary judgment if plaintiff could "produce some evidence that policymakers were aware of a pattern of perjury by police officers but failed to institute appropriate training or supervision. . . . " 974 F.2d at 300. *Accord* ***Carter v. City of Philadelphia***, 181 F.3d 339, 357 (3d Cir. 1999).

See also ***Ambrose v. City of New York***, No. 02-CV-10200 (KMK), 2009 WL 890106, at *20, *21 (S.D.N.Y. Mar. 31, 2009) ("As to Defendants' final argument − that the 'obligation not to ... prosecute innocent individuals is so obvious that no training ... is required' − they rely on *Walker v. City of New York*, which rejects rather than supports their position. . . . Though the plaintiff in *Walker* had 'not expressly alleged a history of police perjury,' the Second Circuit reversed the district court's dismissal of his *Monell* claims, holding that he 'should be allowed to pursue discovery in order to determine whether there was a practice of condoning perjury . . . or a pattern of police misconduct sufficient to require the police department to train and supervise police officers to assure they tell the truth.' . . Accordingly, the Court concludes that Plaintiff has sufficiently alleged that the City is liable for causing, through its failure to train, supervise, or discipline, its employees, the false arrest and malicious prosecution of Plaintiff in violation of his Fourth Amendment rights. Defendants' motion to dismiss those claims against the City is therefore denied."); ***Davis v. Schule***, 1993 WL 58408, *2 (E.D.N.Y. March 4, 1993) (not reported) ("Under the 'duty to train' theory as explicated in *City of Canton v. Harris* [cite omitted], a plaintiff's claim against a municipality with respect to perjured evidence might survive summary judgment, despite the fact that the duty not to commit perjury is obvious to all without training and supervision, if a plaintiff could produce evidence that 'policymakers were aware of a pattern of perjury by police officers but failed to institute appropriate training or supervision.").

4. Illustrative Post-*Canton* Cases

a. "obviousness" cases

For examples of cases in which courts have found the evidence sufficient to put to a jury the issue of municipal liability based on a failure to train or supervise in an area where the need

for training or supervision is obvious, *see, e.g.*, ***Favors v. City of Atlanta***, 849 F. App'x 813, 817-22 (11th Cir. 2021) ("We begin by addressing whether the City was on notice of the need to train in the particular area that allegedly caused the constitutional violation here—namely the use of deadly force in apprehending a suspect in a vehicle. . . The district court found the City was on notice. Specifically, it found that 'the City was on notice of the need to train its officers about the proper justifications for the use of deadly force and of using such force by shooting into vehicles to stop fleeing felons,' including the 'precise type of situation' that Thompson faced. The court noted the repeated incidents of APD officers shooting into vehicles, including two reported incidents (and a potential unreported incident) in 2013, two in 2014, and six in 2015, the year Thompson shot Favors. . .Given this evidence, the court ruled that the City should know to a 'moral certainty' that its officers would be 'required to deal with suspects attempting to flee in vehicles and need to know when the use of deadly force is appropriate.' The City does not contest the district court's determination and agrees that the 'undisputed evidence ... showed that the City was on notice that its officers needed training on the use of deadly force.'. . . In granting judgment to the City as a matter of law, the district court focused its analysis on the number of hours of training Thompson received overall. The court relied on the fact that the APD provided additional basic training beyond that required by the Peace Officers Standards and Training Counsel. The court also observed that the City maintained written policies regarding the appropriate use of deadly force. And it ultimately decided that this record foreclosed a failure-to-train theory of liability. The City echoes this reasoning on appeal. We conclude the district court's, and the City's, focus is misplaced. To be sure, the record shows that Thompson received training on the use of force generally and also received annual in-service training. But the question is whether such training addresses the scenario the City was on notice to prepare for—the fact that its police officers would be 'required to deal with suspects attempting to flee in vehicles and need to know when the use of deadly force is appropriate.' . . . That Thompson received training on other matters of firearm usage is no answer to whether he received adequate training on the 'usual and recurring' use of deadly force when pursuing a suspect fleeing in a vehicle. . .The district court did not discuss this Court's precedent in *Depew* or *Vineyard*. Instead, it relied on out-of-circuit authority to find that a record of *some* training undercuts a finding of deliberate indifference. . . But that is not the law in this circuit. As this Court made clear in *Gold*, deliberate indifference can be shown by 'evidence that the municipality knew of a need to train and/or supervise *in a particular area* and the municipality made a deliberate choice not to take any action.'. . When we evaluate the evidence of the City's training on the use of deadly force with respect to a suspect in a moving vehicle, we find that genuine disputes of material fact remain. Favors presented evidence that the City failed to provide Thompson with annual training on the circumstances that justify the use of deadly force under O.C.G.A. § 17-4-20. The City also failed to provide Thompson with a copy of the statute, as required. . . . Favors also presented evidence showing that in 2015, when the shooting occurred, the City had six reported incidents in which officers discharged their firearms into a vehicle. But none of the reports prepared for these incidents contained information regarding the facts justifying the shootings, or documentation of a supervisor's evaluation of the shootings. There was also a lack of incident reports with proper information and evaluation for the years 2013 and 2014 as well. These incomplete reports are contrary to APD.SOP.3010's reporting requirements. In

addition to this evidence, Favors offered expert testimony that proper documentation and review following the use of force are important in reducing the number of such occurrences. . . . Finally, we dispatch with the notion that the City cannot be held liable for a failure to train that results in an officer's use of deadly force. In arguing for affirmance, the City says Thompson 'made an individual decision to shoot at the moving SUV which resulted in [Favors] being shot.' This characterization, however, is belied by the frequency and predictability of the scenario Thompson faced, which the City itself acknowledged it was on notice to address. . . .We have held that a single constitutional violation may establish municipal liability when there is 'sufficient independent proof that the moving force of the violation was a municipal policy or custom.'. . The City argues that Favors has provided 'no link' between the City's training and his constitutional injury. This record suggests otherwise. For instance, Favors provided evidence that Thompson was not trained in the use of less-than-lethal force in the 22 months leading up to the shooting. Favors's expert stated that this lack of training 'possibly caused' Thompson to resort to lethal force. He opined that Thompson's 'immediate[ ] resort[ ] to a lethal force option' reflected the fact that the only training besides defensive tactics that Thompson had received since he graduated from the police academy was to use lethal force. The expert witness stated that officers typically 'fall back"'on their training, 'especially in a time of a real or perceived crisis.' Our precedent indicates that this kind of expert testimony can create a genuine dispute of material fact. . . . Because triable issues remain on Favors's municipal liability claim, we vacate the entry of summary judgment to the City and remand for further proceedings."); ***Kirkpatrick v. County of Washoe***, 843 F.3d 784, 794-97 (9th Cir. 2016) (en banc) ("Contrary to the dissent's suggestion, evidence of a pattern of constitutional violations is not always required to succeed on a *Monell* claim. . . The Supreme Court has reaffirmed that 'in a narrow range of circumstances' a particular 'showing of "obviousness" can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.'. . Such a situation is 'rare'—'the unconstitutional consequences of failing to train' must be 'patently obvious' and the violation of a protected right must be a 'highly predictable consequence' of the decision not to train. . . . The County does not dispute that, at the time of B.W.'s seizure, it had no policy or procedures for obtaining warrants before removing children from parental custody, or for training its social workers to recognize that a warrant may be required. The lack of a formal policy is not necessarily unconstitutional if DSS removes children only in cases in which the removal is justified by exigent circumstances. . . .However, the evidence that the social workers violated B.W.'s Fourth Amendment rights, in conjunction with Wilcox and Kennedy's testimony that the County had no policy of obtaining warrants before removing children from parental custody and that it was social workers' regular practice to remove children regardless of the risk of imminent bodily harm, raises more than a spectre of deliberate indifference by Washoe County. . . This is therefore a case in which the municipality's 'inadequacy [is] so likely to result in the violation of constitutional rights' that a jury could reasonably find § 1983 liability without needing a pattern of violations to find the County culpable. . . . Given the work performed by DSS social workers, the need for DSS to train its employees on the constitutional limitations of separating parents and children is 'so obvious' that its failure to do so is 'properly ... characterized as "deliberate indifference" to [the] constitutional rights' of Washoe County families. . . Accordingly, a question of material fact exists regarding whether Washoe County

maintained an unconstitutional, unofficial policy. Summary judgment on this claim is inappropriate.") [*But see* ***Kirkpatrick v. County of Washoe***, 843 F.3d 784, 802 (9th Cir. 2016) (en banc) (Kozinski, J., joined by O'Scannlain, Rawlinson, and Bea, JJ., and Watford, J., joining with respect to Part 2, dissenting in part) (" 'A *pattern* of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train.' *Connick*, 563 U.S. at 62 (emphasis added) (citation omitted). Here, there is no evidence that the County unconstitutionally removed *any* other child because it failed to train social workers on how to get warrants. The majority derives a pattern from a single data point. * * * The majority gets it almost right. I dissent because, when life or death are concerned, 'almost right' isn't.")]; ***Shadrick v. Hopkins Cnty., Ky.,*** 805 F.3d 724, 740-41 (6th Cir. 2015) ("LPN nurses complete a level of medical training, they obtain a Kentucky license, and they arrive on the job with a limited set of medical skills. . . . It is predictable that placing an LPN nurse lacking the specific tools to handle the situations she will inevitably confront in the jail setting will lead to violation of the constitutional rights of inmates. A reasonable jury, therefore, could determine that SHP's failure to train and supervise its LPN nurses in meeting their constitutional obligations demonstrates SHP's own deliberate indifference to the highly predictable consequence that an LPN nurse will commit a constitutional violation. . . A jury could find that 'the unconstitutional consequences of failing to train' are 'so patently obvious' that SHP should be held 'liable under § 1983 without proof of a pre-existing pattern of violations.'. . The lack of training and supervision by SHP is clearly evidenced by the blanket inability of the LPN nurses who worked at HCDC to identify and discuss the requirements of SHP's written policies governing their work. . . .Most troubling is the admission of Angela Pleasant, SHP's on-site nursing manager at HCDC, that she was not familiar with the SHP policies she was specifically designated to enforce. Key here also is her open acknowledgement that SHP nurses followed an undocumented policy and custom of providing medical assistance only if an inmate asked for it, despite the existence of written policies, procedures, and treatment protocols mandating that nurses take particular actions at particular times. Two high-level supervisors disclaimed any responsibility for training and supervising the LPN nurses. . . .Shadrick traced the lack of adequate training and supervision to the top of SHP's organization. . . . Shadrick's expert witness opined that SHP failed to provide adequate training and supervision to the LPN nurses. . . Taking this evidence in a light most favorable to Shadrick, . . . a reasonable jury could find that SHP was deliberately indifferent to the need to train and supervise its LPN nurses to provide adequate medical care to inmates, especially in view of the obvious risk that the Constitution could be violated without such training and supervision. . . . Neither the Supreme Court's decision in *Connick* nor this court's decision in *D'Ambrosio v. Marino,* 747 F.3d 378 (6th Cir.2014), compel a different result."); ***Conn v. City of Reno***, 591 F.3d 1081, 1103 (9th Cir. 2010) (order and amended opinion, denying rehearing en banc) ("The failure to train officers on how to identify and when to report suicide risks produces a 'highly predictable consequence': that police officers will fail to respond to serious risks of suicide and that constitutional violations will ensue."), *cert. granted, judgment vacated and remanded in light of* ***Connick v. Thompson,*** 131 S. Ct. 1350 (2011) and on remand, ***Conn v. City of Reno***, 658 F.3d 897 (9th Cir. 2011) ("We reinstate the opinion at 591 F.3d 1081, except that in light of the Supreme Court's decision in *Connick v. Thompson,* 131 S.Ct. 1350 (2011), we affirm in all respects the

district court's grant of summary judgment as to municipality liability."); ***Moldowan v. City of Warren***, 578 F.3d 351, 393 (6th Cir. 2009) ("Because we already have determined that the police have a duty to preserve and turn over to the prosecutor evidence that the police recognize as having exculpatory value or where the exculpatory value of the evidence is apparent, *Harris* dictates that the City has a corresponding obligation to adequately train its officers in that regard."); ***Gregory v. City of Louisville,*** 444 F.3d 725, 754 (6th Cir. 2006) ("This Court finds that the district court erred when it failed to consider that evidence of failure to train on the proper handling of exculpatory materials has the 'highly predictable consequence' of constitutional violations. . . A custom of failing to train its officers on the handling of exculpatory materials is sufficient to establish the requisite fault on the part of the City and the causal connection to the constitutional violations experienced by Plaintiff. . . Plaintiff has carried his burden for summary judgment. . . . We therefore reverse the district court's grant on summary judgment to the City on Plaintiff's *Monell* liability theory for failure to train on the handling of exculpatory materials."); ***Young v. City of Providence***, 404 F.3d 4, 28, 29 (1st Cir. 2005) ("Although there was no evidence of a prior friendly fire shooting, a jury could find from the testimony of Commissioner Partington, Melaragno, and Boehm that the department knew that there was a high risk that absent particularized training on avoiding off-duty misidentifications, and given the department's always armed/always on-duty policy, friendly fire shootings were likely to occur. A jury could conclude that the severity of the consequences of a friendly fire shooting forced the department to take notice of the high risk despite the rarity of such an incident. Dr. Fyfe's report could lead the jury to conclude that it was common knowledge within the police community that the risk of friendly fire shootings with an always armed/always on-duty policy was substantial, and it was also common knowledge that particularized training on on-duty/off-duty interactions (and particularly on the risk of misidentifications) was required to lessen this risk. . . We think, in short, that the jury could find that the department knew that a friendly fire shooting in violation of the Fourth Amendment was a predictable consequence of the PPD's failure to train on on-duty/off-duty interactions, and therefore that the department was deliberately indifferent to Cornel's constitutional rights."); ***A.M. v. Luzerne County Juvenile Detention Center,*** 372 F.3d 572, 583 (3d Cir. 2004) (In our view, the evidence supports an inference that the potential for conflict between residents of the Center was high. Taken as a whole, we believe the evidence concerning the Center's failure to train its child-care workers in areas that would reduce the risk of a resident being deprived of his constitutional right to security and well-being was sufficient to prevent the grant of summary judgment."); ***Flores v. Morgan Hill Unified School District,*** 324 F.3d 1130, 1136 (9th Cir. 2003) ("The plaintiffs have also produced sufficient evidence that the defendants failed to adequately train teachers, students, and campus monitors about the District's policies prohibiting harassment on the basis of sexual orientation. The record contains evidence that training regarding sexual harassment was limited and did not specifically deal with sexual orientation discrimination. The defendants also inadequately communicated District anti-harassment policies to students despite defendants' awareness of hostility toward homosexual students at the schools, and in some cases despite plaintiffs' requests to do so. A jury may conclude, based on this evidence, that there was an obvious need for training and that the discrimination the plaintiffs faced was a highly predictable consequence of the defendants not providing that training."); ***Miranda v. Clark***

County, Nevada, 319 F.3d 465, 471 (9th Cir. 2003) (en banc) ("The complaint . . . construed liberally, alleges not merely an isolated assignment of an inexperienced lawyer, but a deliberate pattern and policy of refusing to train lawyers for capital cases known to the county administrators to exert unusual demands on attorneys. Under pleading standards now applicable, *see Galbraith*, 307 F.3d at ee a1125, the allegations are sufficient to create a claim of 'deliberate indifference to constitutional rights' in the failure to train lawyers to represent clients accused of capital offenses."); ***Sell v. City of Columbus,*** No. 00-4467, 2002 WL 2027113, at *9 (6th Cir. Aug. 23, 2002) (unpublished) ("If Columbus failed to instruct or train the officers responsible for emergency evictions about their constitutional responsibility to provide a hearing in all but 'extraordinary situations' where exigent circumstances preclude them from doing so, . . . that shortcoming is one that is so likely to lead a violation of the constitutional right to due process as to be deliberate indifference to citizens' constitutional rights, and give rise to municipal liability under § 1983."); ***Brown v. Gray,*** 227 F.3d 1278, 1290 (10th Cir. 2000) ("The always armed/always on duty policy was part of the Department's written regulations. Expert testimony established that always armed/always on duty policies present serious safety risks, to officers and to the public, if officers are not trained in off-shift implementation. Captain O'Neill knew to a moral certainty that the policy would result in some officers taking police action while off-shift, yet he pursued a training program that did not adequately prepare the officers to do so. The failure to train officers in implementing this policy was, by Captain O'Neill's own admission, a conscious decision based on the perception that on-and-off-shift situations were the same. The jury was thus presented with sufficient information to conclude that Denver policymakers were aware of and deliberately indifferent to the risks presented by the training program's deficiencies."); ***Allen v. Muskogee***, 119 F.3d 837, 843, 844 (10th Cir. 1997) ("When read as a whole and viewed in the light most favorable to the plaintiff as the party opposing summary judgment, the record supports an inference that the City trained its officers to leave cover and approach armed suicidal, emotionally disturbed persons and to try to disarm them, a practice contrary to proper police procedures and tactical principles. . . . The evidence is sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need."); ***Zuchel v. City and County of Denver***, 997 F.2d 730, 741 (10th Cir. 1993) (finding evidence clearly sufficient to permit jury reasonably to infer that Denver's failure to implement recommended periodic live "shoot-don't shoot" range training constituted deliberate indifference to the constitutional rights of Denver citizens.); ***Davis v. Mason County***, 927 F.2d 1473, 1483 (9th Cir. 1991) ("Mason County's failure to train its officers in the legal limits of the use of force constituted 'deliberate indifference' to the safety of its inhabitants as a matter of law."), *cert. denied*, 112 S. Ct. 275 (1991).

See also ***Monteiro v. Cormier***, No. 121CV00046MSMLDA, 2023 WL 6314658, at *9 (D.R.I. Sept. 28, 2023) ("Unlike the situation in, for example, *Seekamp v. Michaud*, 109 F.3d 802, 808 (1st Cir. 1997), where the police had received some training in high-speed chases, the evidence here could support a finding of no training by the PPD in DNA. There is no dispute that the only training Pawtucket officers in general, and Det. Cormier in particular, had received in DNA was

how to take a swab. . . In an era when DNA testing is an established tool of law enforcement investigations, and the PPD had been using DNA evidence since 2005, a jury could find that total failure grossly negligent. Moreover, Mr. Monteiro has proffered the opinion of Sue Peters, a retained consultant in police protocols. Ms. Peters' declaration offers the opinion that a detective investigating major crimes, as Det. Cormier did, could be expected to have received sufficient training to understand how DNA evidence worked before applying for a warrant and making an arrest. . . Ms. Peters' opinion is that training in Pawtucket fell 'well below the standards of practice in law enforcement criminal investigations,'. . . and that the warrant affidavit included information 'that was misrepresented, not factual, and unverified.'. . PPD officers received no training in how to draft applications for warrants, what those applications should include, or how they should handle exculpatory evidence. There was no policy in place mandating inclusion of any exculpatory evidence in warrant applications, nor was there any policy in place requiring oversight by supervisors before warrants were sought. . . In addition to the overall situation regarding training, Pawtucket as an entity had specific knowledge about Det. Cormier's alleged shortcomings, even if individual supervisors did not. She had received the lowest grade in the police training academy and supervisors had reported inadequate investigations after she made detective. In her early career, she was reprimanded for not properly investigating 40 cases, but was required to follow up with a supervisor for only a month. . .The plaintiff has produced sufficient evidence to warrant a denial of Pawtucket's claim for summary judgment."); ***Ratlieff v. City of Fort Lauderdale, Florida***, No. 22-CV-61029-RAR, 2023 WL 3750581, at *16-17 (S.D. Fla. June 1, 2023) ('The 'so obvious' theory of failure to train liability was first articulated in *City of Canton*, where the Supreme Court left open the possibility that a municipality could be liable in the absence of a pattern of similar constitutional violations. . . . Here, Ratlieff does not allege the need to train the City's officers was 'so obvious.' Thus, clarification is needed to the extent she intends to travel under this theory, and the Court will afford Ratlieff an opportunity to amend her complaint. . . In granting leave, however, the Court emphasizes the narrowness of this theory. . . Ratlieff must establish that the need to train officers in the use of KIPs [kinetic impact projectiles] was 'obvious' enough to trigger municipal liability without any evidence of prior incidents putting the municipality on notice—a high bar under existing caselaw."); ***Martinez v. City of Santa Rosa***, No. 20-CV-04135-VC, 2020 WL 6503406, at *2 (N.D. Cal. Nov. 5, 2020) ("The plaintiffs . . . make various allegations about the City's inaction, including that Santa Rosa lacks any written policy on tear gas and has failed to train its officers in the use of chemical agents and less-lethal projectiles. As discussed at the hearing, the Court has concerns about the veracity of these allegations. But that's not a reason to grant a motion to dismiss. . . And the allegations, if they somehow turn out to be true, describe a failure to train so colossal that it reflects deliberate indifference by the City towards the constitutional rights of its citizens. . . The City notes that a single failure by a municipality to prepare police officers for a particular scenario cannot give rise to municipal liability unless it is a scenario that the municipality knows will arise frequently. . . But that's what the complaint describes. Although a police department may not need to use tear gas frequently, it certainly needs to engage in crowd control frequently, and that would be obvious to any municipality (particularly a city like Santa Rosa, the largest city in, and the business center of, Sonoma County). It would thus be obvious to the City that it needed to train its officers in

crowd control, including in the use of major crowd-control tools like the tear gas it had on hand for this very purpose."); ***Smith v. City of Greensboro***, No. 1:19CV386, 2020 WL 1452114, at *11–12 (M.D.N.C. Mar. 25, 2020) ("Plaintiffs have alleged, with appropriate specificity, certain deficiencies in the way Greensboro trains its officers to use hobble restraints. [court lists specific allegations] The second factor—whether the training represents a deliberate or conscious choice by the municipality, made with indifference to the rights of its citizens—likewise finds support in the complaint's factual allegations. . . . Here, Plaintiffs have alleged that Greensboro was aware that the improper use of a hobble restraint could result in severe injury. The Directive acknowledges that placing undue stress on an arrestee's chest and diaphragm can 'contribute to positional asphyxia.'. . Further, the manufacturer's warning accompanying RIPP Hobbles allegedly contains the admonition 'NEVER Hog-Tie a Prisoner,' the inference being that hogtying is dangerous. . . Thus, it is at least plausible that Greensboro understood that, without appropriate training, its officers in the field would use hobble restraints in a manner which violated citizens' rights to be free from excessive force. . . . [T]he complaint alleges that Greensboro fails to train its officers on how to safely restrain people who, like Smith, are in the 'throes of a mental health crisis.'. . Therefore, Plaintiffs have plausibly alleged an 'affirmative link' between the violation of Smith's rights and the inadequacy of the training provided: that while Greensboro officers are equipped with hobbles, in the absence of proper training, there is a 'reasonable probability' that they will use those hobbles in an excessive fashion. In sum, the complaint contains factual allegations supporting each element of a failure-to-train claim. . . . Accordingly, the Court concludes that Plaintiffs have sufficiently pleaded a *Monell* claim against Greensboro for failing to train its officers with respect to the improper use of hobble restraints."); ***Thomas v. City of Philadelphia***, No. CV 17-4196, 2019 WL 4039575, at *22 (E.D. Pa. Aug. 27, 2019) ("Although the defendants are free to argue to the jury that the alleged misconduct was not obvious to City policymakers, the evidence on record could convince a jury otherwise. Indeed, a contrary ruling at this stage of the case would 'put a premium on blinders.'. . . As discussed above, there is some admissible evidence that Detectives Devlin and Worrell used force and various threats to coerce the Stallworths into testifying against the plaintiff and that they did not include exculpatory evidence in their affidavit of probable cause for the plaintiff's arrest warrant. There is also evidence that Detectives Devlin and Worrell, and other Police Department officers, engaged in similar misconduct on multiple occasions in the early 1990s. Detectives Devlin and Worrell both testified that they were not trained to include exculpatory information in affidavits of probable cause. And other police officers have testified that there was no policy prohibiting the use of low-level force in interrogation rooms in the 1990s. A reasonable jury could find that City policymakers were aware that Department officers, particularly homicide detectives, would repeatedly be in a position to interrogate suspects and witnesses and submit affidavits of probable cause. A reasonable jury could also find that that these situations create a difficult choice 'because the officers will be motivated to bring a suspect to justice,' and that the wrong choice by officers will frequently cause deprivation of constitutional rights. . . In the face of this need to train, supervise, and discipline police officers, a reasonable jury may conclude that the City's inaction 'communicated a message of approval' regarding Detectives Devlin's and Worrell's alleged conduct. . . Therefore, it is for the jury to decide if the City's alleged failure to train, supervise, and discipline in this case rises to

the level of deliberate indifference.");***Virgil v. City of Newport***, No. CV 16-224-DLB-CJS, 2018 WL 344986, at *15 (E.D. Ky. Jan. 9, 2018), *aff'd,* 745 F. App'x 618 (6th Cir. 2018) ("In this case, Virgil has not alleged a pattern of constitutional violations. Instead, he has alleged that the City of Newport acted with deliberate indifference in failing to train its police officers regarding 'prompt disclosure of ... evidence that exonerates a defendant following his arrest or conviction' and fabrication of evidence. . . Virgil's allegations, taken as true, fall within the 'narrow range of circumstances' that the Supreme Court contemplated in *Harris. Connick*, 563 U.S. at 63, 70 (holding that failure to train prosecutors in their *Brady* obligations did not satisfy the single-incident liability theory, but noting that police officers are not "equipped with the tools to find, interpret, and apply legal principles," absent training). In support of his claim, Virgil has put forth factual allegations detailing the Individual Newport Defendants' fabrication of inculpatory evidence and withholding of exculpatory evidence. Along with those allegations, Virgil claims that the City of Newport failed to train its officers on their duty to disclose exculpatory evidence and the impropriety of fabricating evidence. . . 'Given the known frequency with which police' obtain exculpatory evidence and their obligation to collect reliable evidence, the City of Newport's alleged failure to train constitutes deliberate indifference to the 'highly predictable consequence' of the violations of criminal defendants' constitutional rights. . . Moreover, Virgil has adequately alleged that the failure to train was the 'moving force' behind the violation of his constitutional rights. . . Therefore, the Second Amended Complaint has sufficiently stated a § 1983 failure-to-train claim."); ***Manzanillo v. Lewis***, No. 12-CV-05983-JST, 2017 WL 131979, at *10 (N.D. Cal. Jan. 12, 2017) ("In a failure-to-train case, . . a plaintiff need not always prove that there have been repeated violations. Even in the absence of a prior pattern of constitutional violations, *Canton* instructs that in some situations the need for training is 'so obvious' and 'so likely to result in the violation of constitutional rights,' that 'the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.'. . In the rare case, 'a particular showing of obviousness can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.'. . If a violation of a protected right is a 'highly predictable consequence' of a decision not to train, it is possible to establish a 'failure in a ... training program ... so obviously deficient that it could lead to liability for damages resulting from a single violation.'. . A complete absence of training supports an inference of deliberate indifference. . .As previously noted, many witnesses testified that Control Booth Officer on-the-job training is not effective unless the trainee officer observes inmate movement and actually works the control panel to operate the doors in the SHU. . . .Moreover, because the purpose of control booth training is in large part to prevent violence against inmates and staff, a reasonable factfinder could conclude that the violation of an inmate's protected rights would be a 'highly predictable consequence' of the prison's decision not to properly train Brown."); ***Alcis v. Sch. Dist. of Philadelphia***, No. CV 16-1684, 2016 WL 7209938, at *7 (E.D. Pa. Dec. 13, 2016) ("[P]laintiffs have alleged circumstances in which a constitutional violation was a 'highly predictable' result of defendants' failure to train or supervise their employees. The Second Amended Complaint avers that defendants had a policy which limited the circumstances in which students were allowed to use the bathroom. . . As the teacher responsible for supervising Alain and Benjamin on the trip to the bathroom, Ms. Furley was responsible for enforcing this

policy. . . 'Despite their awareness of the risk of sexual assault,' defendants did not train or supervise teachers in enforcing this policy. . . In sum, plaintiffs allege that defendants were aware of a risk of sexual assault involved when students used the bathroom at the same time and had a policy in place to prevent this situation from occurring. A sexual assault between two students in a bathroom together and unsupervised is thus a highly predictable consequence of failing to train or supervise the teachers in charge of enforcing this policy. The Court thus concludes that plaintiffs have adequately pled the elements of a *Monell* claim against defendants."); ***Askew v. City of Memphis***, No. 14-CV-02080-STA-TMP, 2016 WL 3748609, at *12-14 (W.D. Tenn. July 8, 2016) ("Here, there is no evidence in the record showing 'prior instances of unconstitutional conduct demonstrating that [Defendant City] has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury.'. . Therefore, to survive summary judgment, Plaintiffs must point to evidence in the record showing (1) disputed issues of fact as to whether Askew's rights were violated when he was shot, which, as noted previously, they have already done, and (2) disputed issues of fact showing that Defendant City failed to train Defendant Officers 'to handle recurring situations presenting an obvious potential for such a violation.' Plaintiffs must set forth facts to indicate that there was a 'likelihood that the situation would recur' and that it was predictable 'that an officer lacking specific tools to handle that situation would violate citizens' rights.'. . The Court finds that there is evidence in the record which, if believed by the trier of fact, shows 'a likelihood that the situation would recur.' Officer Randolph testified that he had been confronted with the situation of 'a guy passed out behind the wheel dozens of times.'. . Additionally, Defendant Officer Aufdenkamp testified that 'while being a police officer, I've dealt with people slumped back' in a vehicle.' There is also evidence in the record from which the trier of fact could find that Defendant Officers lacked the 'specific tools' or training to handle the situation of such a high risk stop. The evidence shows that Defendant Officers Aufdenkamp and Dyess received basic training on search and seizure and the use of force, including deadly force, under the Fourth Amendment, and this training complies with the State of Tennessee's requirements for training. . . Each officer also received forty hours of in-service training each calendar year of employment. . . Defendant Officer Dyess testified in his deposition that he had received training in how to approach a vehicle in an unknown situation, DUI detection, and the use of force in a deadly force situation. . . However, he acknowledged that '[t]here is no specific guideline for an unknown risk traffic stop where the occupant may be drunk.' From this evidence, the trier of fact could find that Defendant City failed to adequately train MPD officers in how to effectuate high risk stops and that failure was the 'moving force' that resulted in Askew's death and the violation of his constitutional rights. . . Thus, Plaintiffs have presented sufficient evidence to survive summary judgment on their failure to train claim, and this portion of Defendant City's motion is DENIED."); ***Schaefer v. Whitted***, 121 F. Supp. 3d 701, 719-20 (W.D. Tex. 2015) ("Plaintiff's failure to train or supervise claims pass muster. Plaintiff alleges the City failed adequately train or supervisors its officers concerning: (a) the use of deadly force; (b) interactions with individuals legally entitled to possess and carry weapons; and (c) citizens' Second Amendment right to possess weapons for self-defense in their homes. . . To substantiate these claims, Plaintiff alleges the City does not 'properly train officers on how to interact with [lawfully armed citizens], or educate them on the laws concerning the lawful possession of weapons and the

rights of citizens to lawfully possess weapons' nor does it 'train officers about the legal distinction between possessing weapons in one's home versus public areas.'. . Plaintiff also alleges the City 'trains its officers it is always permissible to shoot a person with a weapon, even when the officer has been given a warning and the arrested citizen is non-threatening'. . . Plaintiff alleges the City knew the 'obvious consequences of these policies was that City of Austin Police officers would be placed in recurring situations' similar to those faced by Officer Whitted, 'these policies made it highly predictable that the particular violations alleged here ... would result,' and yet with deliberate indifference to Schaefer's rights, failed to train its officers in these areas. . . While Plaintiff fails to allege sufficient instances of similar past conduct by City police tending to substantiate the claim they were subjectively aware of the risk of failing to train its police force, . . . the Court finds, taking Plaintiff's allegations as true, 'the need for more or different training [was] obvious, the inadequacy so likely to result in violations of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'. . Indeed, it is highly predictable failing to train officers regarding how to act with individuals legally entitled to carry firearms would result in the constitutional violation alleged here and this failure to train was a moving force behind Schaefer's death. Because these allegations refer to 'the specific topic of the challenged policy or training inadequacy,'. . . they provide the City with adequate notice of the claims against it. Accordingly, Defendants' motion to dismiss is DENIED as to these claims."); ***Roberts v. Town of Bridgewater***, No. 15-10266-DJC, 2015 WL 4550783, at *5 (D. Mass. July 28, 2015) ("Accepting the allegations as true, then, the Court can infer, at least, a municipal custom of providing inadequate training to its officers in takedown and arrest techniques, . . . which is an area where the need for 'training is so obvious' that its absence is 'likely to result in the violation of constitutional rights' such that the Town 'can reasonably be said to have been reasonably indifferent to the need.'"); ***M.H. v. County of Alameda***, 62 F.Supp.3d 1049, (N.D. Cal. 2014) ("As in *Gibson,* 'a jury could conclude that County policymakers knew that inevitably some prisoners arrive at the jail with urgent health problems requiring hospitalization.'. . Here, the County was on notice of the dangers of alcohol withdrawal in inmates, a recurring problem in correctional facilities. Indeed, its own policies appear to provide for training that, a reasonable jury could find, was never provided, or was not provided adequately. . . Plaintiffs may prevail at trial on their failure to train claim without showing a pattern of constitutional violations because a jury may find that the failure to provide Harrison adequate medical care – a constitutional right held by pre-trial detainees – was a ' "highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations[]'. . . . " Finally, a reasonable jury could conclude that the County's policy and practice failures were the 'actionable cause' of, or 'moving force' behind, the County's failure to provide adequate medical care to Harrison. . . As discussed above, there were several opportunities for County personnel to prevent the onset of Delirium Tremens, or, at a minimum, to detect its onset, provide adequate treatment, and transfer Harrison to a hospital in compliance with national and County standards. For these reasons, the Court will deny the County's motion for summary judgment with respect to Plaintiffs' *Monell* claims against it arising out of its training concerning alcohol withdrawal."); ***Lucas v. City of Visalia***, No. 1:09–CV–1015 AWI JLT, 2013 WL 1915854, *19, *20 & n. 19 (E.D. Cal. May 8, 2013) ("This case reflects that the City dispatches its police officers in support of

'medical aid' calls. . . In a 'medical aid' call situation, it is foreseeable that police officers will deal with individuals who are upset, who do not want to receive medical treatment, and who do not want personnel to be present. Although there certainly may be overlap, it would seem that the concerns inherent in a medical aid call would not necessarily be the same as the concerns in a 'criminal investigation' call. . . .To be sure, the City contends that Lucas was not tased because he was refusing medical treatment. However, Lucas's position, that the officers should have left when Lucas refused treatment and were ordered all to leave, is not unreasonable, especially when the emergency personnel were out of the residence. . . If the officers had respected Lucas's refusal for treatment and left the residence at any one of Lucas's many requests, Esparza would not have used her taser. There appears to be no training regarding when force may be used in a medical aid call, whether it is appropriate to use a taser on someone who may be having medical problems, and how to deal with an individual who is refusing medical treatment. . .Given that City officers respond to medical aid calls, and considering that a different dynamic is likely to be involved in medical aid calls than in criminal investigation calls, a reasonable jury could find the absence of such training reflects deliberate indifference. Summary judgment on this theory of *Monell* liability will be denied. . . To be clear, the Court is not holding that police officers are to receive paramedic training. If a police officer either promptly summons medical assistance or takes an injured arrestee for medical treatment, then the officer meets his constitutional obligations. . . The Court is merely holding that, based on the evidence presented, there appears to be a different dynamic in a medical aid call. The absence of training concerning that different dynamic is problematic."); ***Guizan v. Town of Easton***, No. 3:09cv1436 (JBA), 2012 WL 3775876, *20 (D. Conn. Aug. 29, 2012) ("Consistent with its own statement of purpose, that SWERT 'is formed for the purpose of providing for the rapid ... deployment of specially trained law enforcement personnel and resources to any incident involving tactical operations, ... or any situation requiring immediate augmentation of local law enforcement personnel to preserve life and protect property'. . . , a reasonable jury could conclude that the need to train SWERT officers in the constitutional limitations on the use of force associated with dynamic entry was 'so obvious' that 'failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.'. . Thus, the Town Defendants are not entitled to summary judgment on Plaintiffs' municipal liability claims."); ***Campbell v. City of Springboro, Ohio***, 788 F.Supp.2d 637, 678, 679 (S.D. Ohio 2011) ("The evidence related to the training and supervision of the SPD's canine unit is described in detail above. That evidence, when viewed in a light most favorable to Plaintiffs, at the very least creates a question of fact as to whether the need for more adequate supervision and training was so obvious and the likelihood that the inadequacy would result in the violation of constitutional rights was so great as to amount to deliberate indifference to Plaintiffs' rights. First and foremost, the evidence shows that Spike was not subject to continual and regular maintenance training although such training was necessary to prevent the deterioration of Spike's performance and responsiveness to Officer Clark's commands. . . .The evidence indicates that Officer Clark's inability to keep up with Spike's maintenance training resulted from a systematic lack of supervision and training throughout the upper levels of the police department. For example, the SPD never developed any clear guidelines for the operation of the canine unit. There are questions of fact as to whether the SPD actually adopted a formal canine policy prior to 2008. The policy that defendants claim was in force − an

IACP model policy that Officer Clark obtained from internet − was never disseminated amongst the staff and was not placed in all of the policy manuals. To the extent that Officer Clark's supervisors were aware of the policy, it provided only vague guidelines for training and certification. For example, the IACP Policy does not actually set out specific training requirements. Rather, it simply states that training requirements must be met. Neither Chief Kruithoff nor anyone else in the SPD ever set forth any written guidelines for the amount and type of training that the SPD would require its canine unit to complete. A policy stating that training requirements must be met is meaningless unless it also states what those requirements are. . . . The SPD never put into place any formal system for monitoring the canine unit. . . . Additionally, there is no evidence that the supervising officers received any training or instruction regarding the use of a police dog as a use of force. Furthermore, despite starting a canine unit, the SPD never amended its use of force policy to address canine use. . . . Indeed, the Court finds that when the evidence is viewed in a light most favorable to Plaintiffs, this is not simply a case in which the training could have been better or a case in which a sound training program was administered negligently. This is a case in which, aside from the initial training that Officer Clark and Spike undertook prior to Spike's certification, there was a complete, across the board absence of training and supervision with regard to the canine unit. Under such circumstances, the inadequate training and supervision may be fairly said to represent the policy of the city. Accordingly, the Court cannot at this point conclude as a matter of law that the City of Springboro could not be held liable for violations of Plaintiff's constitutional rights."); ***Buben v. City of Lone Tree***, No. 08-cv-00127-WYD-MEH, 2010 WL 3894185, at *5, *6 (D. Colo. Sept. 30, 2010) ("Plaintiff contends that Lone Tree's written policy regarding TASER use is inadequate in that (1) it does not prohibit the use of TASERS against passively resisting subjects and (2) it does not prohibit the use of TASERS against a subject who is on an elevated surface. Plaintiff notes that warnings against the use of TASERS in these circumstances were clearly set forth in the TASER International training CD provided to Lone Tree. In order to establish municipal liability for inadequate training on the use of force, Plaintiff must demonstrate: (1) the Deputies exceeded constitutional limitations on the use of force; (2) the use of force arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city towards persons with whom the police officers come into contact, and (4) there is a direct causal link between the constitutional deprivation and the inadequate training. . . I find that Plaintiff has created disputed issues of fact as to all of these elements. First, Defendants concede that there are material issues of fact as to whether their actions exceed constitutional limitations on the use of force. As to the second factor, Plaintiff has come forward with a witness it will seek to qualify as an expert in police policies and procedures who will state that '[e]ncountering persons with abnormal mental conditions is a usual and recurring situation for police officers,' and that Lone Tree should have trained its police officers on how to deal with mentally ill persons. Similarly, there are disputed issues of fact as to whether the failure to train officers in specific skill needed to handle recurring situations − i.e. skills for interacting with mentally ill person and skills regarding the use of TASERS on individuals on elevated surfaces, or who are passively resisting − presented an obvious potential for constitutional violations rising to the level of deliberate indifference. . . It is undisputed that Lone Tree does not have a written

policy specifically addressing the handling of mentally impaired individuals. It is also undisputed that Lone Tree's TASER policy does not contain a directive limiting TASER use to persons who are actively resistant, or a specific admonition concerning deployment of a TASER on a subject on an elevated surface. Plaintiff maintains that policies adopted by the International Association of Chiefs of Police ("IACP"), the Police Executive Research Forum ("PERF"), and numerous police departments prohibit use of a TASER on a passively resistant subject and individuals on an elevated surface. In addition, there are disputes as to whether Lone Tree provided adequate training in these areas. Sergeant Cavenah and Officer Berry testified that they could not recall specific training regarding dealing with mentally impaired individuals. In addition, Plaintiff has raised an issue of fact as to whether Sergeant Cavenah and Officer Berry were re-certified in TASER use at the time of the incident. Construing the facts in the light most favorable to Plaintiff, Lone Tree's failure to address these issues in a written policy or in its training may reasonably be seen by a jury as deliberate indifference to a foreseeable need. Finally, it is clear that the alleged constitutional violations are directly related to the allegations of inadequate training. Construing the facts in the light most favorable to Plaintiff, Defendants would not have needed to deploy their TASERS if they had other skills at their disposal, and they would not have disregarded the danger of deploying a TASER on an individual on an elevated surface. Because Plaintiff has demonstrated the existence of disputed issues of material fact, I find that summary judgment is inappropriate as to Plaintiff's Third Claim for Relief against Defendants Lone Tree and LPD for failure to train."); ***Bowen-Soto v. City of Liberal, Kan.*** No. 08-1171-MLB, 2010 WL 4643350, at *6 (D. Kan. Nov. 9, 2010) ("The court finds that a reasonable jury could find that defendant was aware of the risk it created by inadequately training its officers on hog-tying. As noted above, Supervisor Mulunax was aware of both the *Cruz* case and that other departments were experiencing in-custody deaths as a result of excited delirium. Yet, Supervisor Mulunax did not instruct his officers to not use the hog-tie restraint on individuals suffering from excited delirium. In fact, Supervisor Mulunax failed to inform his officers that the hog-tie restraint was inappropriate when restraining an individual with any type of diminished capacity. Defendant's officers were given the discretion to use the hog-tie restraint when dealing with a combative person. Thus, a reasonable jury could find that defendant was deliberately indifferent to people like Soto."); ***Montes v. County of El Paso, Tex.***, No. EP-09-CV-82-KC, 2010 WL 2035821, at *16, *17 (W.D. Tex. May 18, 2010) ("The Fifth Circuit has held that failure-to-supervise liability requires that 'it at least must have been obvious that the highly predictable consequence of not supervising its officers was that they would apply force in such a way that the Fourth Amendment rights of citizens were at risk.' *Peterson v. City of Fort Worth*, 588 F.3d 838, 850 (5th Cir.2009) . . . The Fifth Circuit has also stated that failure to take complaints and to discipline officers may give rise to municipal liability if there were policies of regularly ignoring complaints and failing to investigate alleged wrongdoing on the part of the officers. . . Plaintiffs' claims survive summary judgment on this point. It is at least arguable, on the evidence already adduced, that Gamboa was unduly absent from his office, that the supervisory system he set up using his senior staff was inadequate, and that the only system for monitoring the use of force − the taking of citizen complaints by members of the Precinct 6 Constable's office at large − was run in a way which actively degraded its effectiveness for this purpose. . . . Where the need to take some action to control government actors is obvious, and the existing policies are

non-existent or clearly inadequate, a failure to act can count as a deliberate and actionable municipal policy choice. . . Both Gamboa, as Ramos's supervisor, and the County, as the ultimate policy-making body, arguably failed to implement adequate supervision and discipline. . . . At this point, the Court need not hold that it is conclusively proved that it was 'obvious that the highly predictable consequence' of these supervisory lapses was that Ramos would violate the Fourth Amendment rights of the Plaintiffs. . . The Court holds, however, that the County has not shown that such a jury finding would be unreasonable, given the evidence already adduced. . . There is some evidence that the County had a policy of inadequately supervising the constables, and that the lax systems left in place at the precinct levels could predictably result in unchecked patterns of police brutality. Under the Supreme Court's rule in *City of Canton*, where the need for municipal action to control police officers is 'obvious,' and the 'inadequacy' of existing policy is 'likely to result in the violation of constitutional rights' by those uncontrolled officers, governmental liability will attach. . . The evidence here at least plausibly meets this test, and so must go to a jury. Accordingly, summary judgment in favor of the County is inappropriate as to the failure to supervise and discipline theory."); ***Scozzari v. City of Clare***, No. 08-10997-BC, 2010 WL 1626419, at *23 (E.D. Mich. Apr. 21, 2010) ("Based on the limited legal authority advanced by the City, the City has not demonstrated its entitlement to summary judgment. In particular, the City has not explained how such limited training, consisting of a 'module' on dealing with persons with mental problems and disabilities, is sufficient to establish that the City did not have a policy of deliberate indifference to individuals with mental health problems. There is at least a genuine issue of material fact as to whether the Officers knew, based on Scozzari's conduct and appearance, that Scozzari had mental health problems. There is also at least a genuine issue of material fact as to a causal connection between the Officers' conduct resulting in Scozzari's death and the Officers' lack of training on how to address individuals known to have mental health problems."); ***Lucas v. City of Visalia***, No. 1:09-CV-1015 AWI DLB, 2010 WL 1444667, AT *5 (E.D. Cal. Apr. 12, 2010) ("Police officers encounter many different persons in a variety of situations. As illustrated by this case, it is foreseeable that police officers will often deal with persons who need or appear to need medical treatment. The absence of training regarding individuals who refuse medical treatment, like the absence of monitoring, investigating, and discipline for excessive force, could indicate deliberate indifference. Lucas has stated a *Monell* claim regarding the absence of training about the appropriateness of using a taser on someone who refuses to receive medical treatment. . . . However, it is not apparent to the Court that the absence of training regarding shocking individuals with episodic seizures amounts to deliberate indifference. Lucas is focusing on a very specific medical condition. There are myriad medical conditions that may afflict a given person/suspect, and it is not reasonable to expect police officers to be trained as to every condition. It may well be that officers should be trained regarding taser use on persons with known seizure disorders, but additional allegations are necessary to show deliberate indifference. By way of example, an allegation that the City knew that its officers would likely encounter individuals who experience episodic seizures, knew that shocking such individuals involved a significant risk of injury/danger, and yet chose not to train on the issue could show deliberate indifference. . . Since it is not clear that amendment would be futile, the Court will dismiss with leave to amend the *Monell* claim that is based on the absence of training regarding the dangers of using tasers on, and

administering multiple taser shocks to, persons with a history of episodic seizures."); ***Wilhere v. Delaware County***, Civil Action No. 09-22, 2010 WL 1381664, at *8, *9 (E.D. Pa. Apr. 1, 2010) ("The county's training for the use of a taser satisfies the three-factors set out in *Carter*. The county knows that its sheriffs are often presented with the difficult decision of when and where to use their tasers on an arrestee and that the wrong choice will result in the deprivation of the arrestee's constitutional rights. Viewing the evidence in the light most favorable to the plaintiff, a jury could find that the training provided to the deputy sheriffs in the use of their tasers is deficient. The manual for the taser used by the deputy sheriffs warns of the dangers inherent in applying the taser in drive stun mode to the actor's groin. The manual advises that the taser should be used in such a way only when the officer is defending himself from a violent attack. Corporal Snyder, however, testified that he instructed the deputy sheriffs that it was permissible for them to apply their tasers to a person's groin in drive stun mode. He further testified that the deputy sheriffs were taught only to avoid the head, face and eye area. . . A jury could find that evidence of such training, in contravention of the taser manual's instructions, amounts to the deliberate indifference necessary to sustain a *Monell* claim against the defendant county."); ***Newsome v. Higham***, No. 7:08-CV-8 (HL) No. 7:08-CV-8 (HL)2010 WL 1258013, at *5 (M.D. Ga. Mar. 29, 2010) ("Examining the facts in light of the standard set out above, the jury could conclude that Sheriff Norton was deliberately indifferent in failing to train Higham. The fact that Georgia law requires POST training for all prison officials, and that prison officials who fail to complete POST training within six months of hire are prohibited from working as prison officials, shows that there is an obvious need to train prison officials. Norton therefore made the deliberate choice not to train Higham, and to allow Higham to serve as a prison official despite the fact that Higham was prohibited by statute from so serving. Moreover, there is a causal connection between Norton's failure to train and Higham's sexual assault of the Plaintiff. Norton has argued the contrary, stating that there is no evidence 'that being P.O.S.T. certified would necessarily have prevented a male employee of a sheriff's department from engaging in sexual contact with a female detainee.' While this may or may not be the case, what is true is that if Sheriff Norton had followed Georgia law and refused to allow Higham to serve as a prison official due to his lack of training, Higham would not have had the opportunity to abuse his position by sexually assaulting the Plaintiff. Sheriff Norton's failure to train Higham was the result of deliberate indifference, therefore, he is not entitled to summary judgment on the Plaintiff's claim for failure to train."); ***Klemash v. Monroe Tp.***, No. 07-4190 (RMB), 2010 WL 455263, at *11 (D.N.J. Feb. 4, 2010) ("Plaintiff has proffered sufficient evidence to establish a factual question regarding whether Monroe Township maintained an unconstitutional policy or practice and whether Monroe Township's failure to provide training on the appropriate use of handcuffs under the Monroe Township SOPs was deliberately indifferent to the risk of constitutional harm. . . . The use of force in requiring a disabled or injured person to place his or her arms behind the back, despite his or her physical incapacity to do so, falls within 'the narrow range of circumstances' where a violation of citizens' right to be free from excessive force would be a highly predictable consequence of a failure to train officers to handle such situations. Similarly, the failure to train officers as to how to transport a handcuffed person from a prone position to a standing position would predictably result in constitutional violations where, as alleged here, an officer picked up a person by the handcuffs and caused physical injury. Because

the Court is unable to determine that Monroe Township was not deliberately indifferent to these risks as a matter of law, and because it appears, giving Plaintiff the benefit of all reasonable inferences, that Plaintiff can maintain a claim that Monroe Township executed an unconstitutional handcuffing policy and that the Township's failure to train caused Plaintiff's constitutional injury, these issues must be addressed by a jury."); ***Odom v. Matteo***, Action No. 3:08-cv-1569 (VLB), 2010 WL 466000, at *9 (D. Conn. Feb. 3, 2010) ("Pendleton and the City of Waterford had an obligation to train police officers regarding the proper use of a Taser, and specifically, to train police officers to forbear from using a Taser on a member of the public with a medical condition rendering her particularly susceptible to harm from being Tasered. If Odom's allegations are true, the failure of Pendleton and the City of Waterford to properly train and supervise Matteo could constitute deliberate indifference to the constitutional rights of the public. Accordingly, the Court will not dismiss Count Fifteen at this stage of the proceedings."); ***Swofford v. Eslinger***, 686 F.Supp.2d 1277, 1285-87 (M.D. Fla. 2009), *aff'd*, 2010 WL 3422565 (11th Cir. Sept. 1, 2010) ("The Court finds that there is sufficient evidence of record from which a reasonable jury could conclude that the County's failure to provide adequate S/DS training resulted in the violation of Mr. Swofford's Fourth Amendment right to be free from the use of excessive force. . . . Defendant Eslinger has identified evidence to suggest that the SCSO officers complete significant training, with a portion of that training directed toward instructing officers on *how* to use deadly force. From the undisputed fact that Mr. Swofford received multiple shots to the abdomen, the Court has little doubt that the officers were trained on accuracy. However, the pertinent issue for the Court's consideration is whether the officers were instructed on *when* to use deadly force.In this regard, the County's experts acknowledge that firearms training ought to include an element of training on judgment as to when it is proper to discharge a weapon. . . . [W]hile the Court is loathe to second-guess the decisions of officers put in harm's way by the call of duty, the Court cannot say that permitting an officer, without the benefit of *any* meaningful training, to rely solely on the officer's instincts or personal judgment as to the presence of a deadly threat and the need to resort to deadly force satisfies the Supreme Court's clear mandate. The evidence in this case, viewed in the light most favorable to the Plaintiff, illustrates this point graphically. Officers Morris and Remus entered Mr. Swofford's property without first indicating their presence. Morris and Remus, themselves forcible intruders on Mr. Swofford's property, encountered Mr. Swofford in his own yard in the middle of the night. At the mere sight of Mr. Swofford holding a gun, which was trained to the ground, not chambered or in a firing position, the Officers opened fire, shooting Mr. Swofford multiple times. They did not announce beforehand their authority as law enforcement officers or direct him to drop his weapon. And, they knew that he was not their suspect, but that he was probably the 'homeowner.'. . . Upon consideration of the foregoing, the Court finds that, viewing the facts in the light most favorable to Mr. Swofford, a reasonable jury could conclude that the County's failure to provide adequate S/DS training to its officers resulted in the violation of Mr. Swofford's Fourth Amendment right against excessive force. Assuming, in the absence of contrary evidence, that the SCSO provides no judgmental S/DS training, a reasonable jury could conclude that the County's abject failure to offer such training constitutes deliberate indifference to the innocent victims of deadly force. Assuming that FATS and simunitions training do contain a judgmental element of training, a reasonable jury could still find the County deliberately

indifferent by the SCSO's failure to provide such training on a regular basis."); ***Swofford v. Eslinger***, 686 F.Supp.2d 1277, 1288 (M.D. Fla. 2009), *aff'd*, 2010 WL 3422565 (11th Cir. Sept. 1, 2010) (Mr. Swofford does not identify a pattern of prior conduct equating to notice to the SCSO that deficiencies in its K-9 training programs hazarded potential violations of citizens' Fourth Amendment rights against unlawful entry onto property. Therefore, Mr. Swofford must show that the need for this specific type of training was so obvious in light of the constitutional dilemmas SCSO officers face in recurring situations that the failure to train in this area is proof sufficient of deliberate indifference to the lives of affected citizens. Viewing the facts in the light most favorable to Mr. Swofford, the Court finds that a jury could so find, and therefore, the Plaintiff has carried this burden. The SCSO has five fulltime K-9 units. . . Corporal Weissman admitted that, as a K-9 officer, he has personally encountered a startled homeowner in his or her backyard 'many times.'. . Thus, a reasonable jury could conclude that SCSO K-9 officers are put in recurring situations in which they must determine whether to enter or continue deeper onto private property based on a perceived tracking signal of a K-9 unit.Further, there is evidence from which a reasonable jury could determine that the County does not train its K-9 teams to 'track' suspects, but to alert to *any* individual who happens to be present during the search, including homeowners and innocent by-standers."); ***Estate of Gaither ex rel. Gaither v. District of Columbia***, 655 F.Supp.2d 69, 94 (D.D.C. 2009) ("Given the duties generally assigned to the Jail's correctional officers to protect the inmates' health and safety, the Court concludes that there is sufficient evidence in the record from which a reasonable jury could find that the Defendant Officials' failure to implement any training program in 2002 − including training on security procedures, such as the closing of cellblock doors and obtaining relief to ensure staffing remains adequate at all times − was deliberately indifferent to the safety of Gaither. Moreover, although the record regarding causation is minimal, the Court is cognizant of the D.C. Circuit's position that '"the proximate cause of an injury is ordinarily a question for the jury."'. . . The Court therefore DENIES Defendants' motion for summary judgment as to Plaintiff's allegation of inadequate training."); ***Pelzer v. City of Philadelphia***, No. 07-38, 2009 WL 2776493, at *13, *14 (E.D. Pa. Aug. 31, 2009) ("Here, there was no stated policy or custom, but a reasonable jury could find the failure to establish pursuit policies creates a sufficiently obvious risk to the rights of pursuit subjects. Foot pursuits are hardly uncommon for a police force serving a city as large and populous as Philadelphia. Accepting this statement as true, the failure to provide a policy or guidelines could be considered an apparent or obvious omission. A jury may also be able to conclude that the issue of pursuit and patrol policies are the result of a policymaker's decision, and that the City's omission was the moving factor behind the plaintiff's injury. . . . I believe there is a genuine issue regarding the obviousness of a need for additional patrol policies. The plaintiff's evidence raises serious questions regarding officer training. Though the officers were given extensive instruction on the use of force, the focus on foot pursuits was allegedly wanting. Given the serious risks and regularity of foot pursuits, a jury may find the City was deliberately indifferent to the adequacy of existing practices and the need for new or additional policies. Because the plaintiff has produced sufficient evidence to raise a question regarding the need for additional policies, I will deny the motion as to this point."); ***Dyshko v. Swanson***, No. 5:08cv587, 2009 WL 1545462, at *9, *10 (N.D. Ohio June 2, 2009) ("While Defendants have stressed the impracticality of having a translator available for every

conceivable language that they may encounter in the Stark County Jail, the Court cannot overlook the fact that no policy existed outlining a method for protecting the rights of anyone in Mrs. Dyshko's situation. As discussed above, one of the contract provisions between Stark County and CHCG [Correctional Health Care Group] was the requirement that CHCG obtain accreditation from NCCHC [National Commission on Correctional Health Care], whose standards included the requirement that interpreters be made available to communicate with inmates whose communication abilities are hindered by a language barrier or hearing problems. A situation in which a non-English, non-Spanish speaker comes into the jail is entirely foreseeable, as is the need to protect that detainee's physical safety and her constitutional rights. Other than Defendants' assertion that the jail attempted to contact a Ukrainian church . . . , the record reflects no attempt by jail personnel to find an objective party − someone other than a relative of a jail official − to help Mrs. Dyshko, nor is there any evidence that any protocol (policy, custom or otherwise) existed to outline or direct any such an attempt, which a jury may reasonably find amounts to a failure by Stark County to train jail officials. The jail officials' unguided last-minute effort to communicate with Mrs. Dyshko resulted in a miscommunication that a jury may reasonably find cost Mrs. Dyshko her privacy and substantive due process rights. The Court finds that the failure to provide a policy for the processing of non-English, non-Spanish speaking detainees may reasonably be seen by a jury as deliberately indifferent to a foreseeable need. . . Further, a jury may reasonably find that this failure resulted in a direct injury to Mrs. Dyshko, including a violation of her substantive due process rights, as outlined above. For that reason, summary judgment is denied as to Stark County on Plaintiffs' failure to train claim under § 1983."); ***Quatroy v. Jefferson Parish Sheriff's Office***, Nos. 04-451, 04-1425, 2009 WL 1380196, at *6-*8 (E.D. La. May 14, 2009) ("The Court agrees with the analyses in these cases and finds that the Sheriff, not the Parish Council, is the relevant policymaker with regard to plaintiffs' claims. Plaintiffs allege that Quatroy's death was because of the Sheriff and JPCC's policies of not providing Methadone to inmates and observing, rather than treating, detoxifying inmates. These allegations go to the management of healthcare within the jail, not the ex ante appointment of an adequate physician or healthcare provider. Louisiana law makes the Sheriff the relevant policymaker in this regard. . . . Plaintiffs have not stated whether or not they contend that these customs are facially unconstitutional, but they allege that the Sheriff maintained the customs with deliberate indifference to the constitutional rights of prisoners. . . The complaint explains that because of the policy, the employees of the JPCC 'were left with little or no direction as to how to care for an inmate experiencing deadly withdrawal.'. . The Court finds the allegation that the Sheriff knew of the policy, and maintained it, despite the 'obvious consequence' that a policy of nontreatment of withdrawal symptoms could result in deliberate indifference to a prisoner's serious medical needs, *see Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976), sufficient to state this element of municipal liability. . . . Plaintiffs' factual pleadings also provide grounds for his allegation that there was an 'official custom' of not treating detoxifying inmates. . . . Plaintiffs allege that instead of being treated, Quatroy was placed in an observation suicide cell. . . . Defendant's arguments that plaintiffs failed to plead facts that would show proof of deliberate indifference or facts showing a pattern of similar violations has no merit under *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U .S. 163 (1993). There, the Supreme Court held that

suits involving municipal liability under section 1983 were not subject to the heightened pleading standard required by the Fifth Circuit at the time. . . The Court rejected respondents' argument that a plaintiff must plead more than a single instance of misconduct to state a claim for municipal liability. . . Rather, the Court held that such suits are governed by the liberal 'notice pleading' requirement outlined in Federal Rule of Civil Procedure 8(a), which requires a complaint to include 'a short and plain statement of the claim showing that the pleader is entitled to relief.'. . . Boilerplate allegations of inadequate municipal policies or customs usually suffice."); ***Wallace v. Hounshel***, No. 1:06-cv-1560-WTL-TAB, 2009 WL 734714, at *11 (S.D. Ind. Mar. 19, 2009) ("Viewed in the light most favorable to the Plaintiff, the evidence of record in this case supports the Plaintiff's argument that Jackson County did not have a sound training program for its jail officers regarding handling inmate medical issues. It appears that none of the jail officers received any specific training regarding the proper use of the Chest Pain Protocol or any other specific protocol; rather, the training that they received from ACH only gave them general instructions regarding the use of the protocols. That general training may well have been adequate if the protocols were self-explanatory and did not require the exercise of any medical discretion. The Chest Pain Protocol did require the exercise of discretion, however, in that it required the officer to determine whether an inmate was experiencing cardiac chest pain, which required a physician referral, or chest pain related to an injury or muscle strain, which did not. There is simply no evidence of record that the jail had a policy in place that required its officers to be trained on how to make that type of determination. . . The record also suggests that the County did not keep track of which of its officers received ACH's training regarding the general use of the protocols and that none of the officers on duty at the time of Wallace's first chest pain episode had attended that training. A reasonable jury could find that the need to train jail officers with regard to handling an inmate's complaints of chest pain was obvious and that the County disregarded that obvious need in deliberate indifference to a substantial risk to its inmates."); ***Lee v. Metropolitan Government of Nashville and Davidson County***, 596 F.Supp.2d 1101, 1124-25 (M.D. Tenn. 2009), aff'd in part on other grounds, 432 F. App'x 435 (6th Cir. 2011) ("Metro's own Student Guide left taser-certified officers with a potentially confused understanding as to when and how the taser device should be activated, particularly if the first application did not have immediate effect. As noted in the factual discussion, on June 28, 2005, Taser sent a bulletin to, among others, Metro, specifically warning that 'repeated ... exposures to the Taser electrical discharge may cause strong muscle contractions that may impair breathing and respiration ... users should avoid ... extensive multiple discharges whenever practicable in order to minimize the potential for over-exertion of the subject or potential impairment of full ability to breathe over a protracted time period.' . . .There appears to have been no attempt by Metro to organize any training based on the information in the Bulletin, to engage taser-certified officers in any discussion about the information contained in the Bulletin, or even to assure that taser-certified officers had read the Bulletin, and not just the e-mail to which the Bulletin was (supposedly) attached. Therefore, even assuming that the taser-certified officers here retained anything useful from the vague training that they received while auditing a course on a single November morning almost a year prior to the Lee incident, it is safe to say that the taser-certified officers such as Mays and Scruggs had little, if any, information about the fact that repeated applications of the taser device could have profound health consequences."); ***Bibbins v.***

City of Baton Rouge, 489 F.Supp.2d 562, 583 (M.D. La. May 2007) ("There is no dispute that identifications are routinely used in the vast majority of criminal investigations. The City is quick to point out that the Louisiana Law Enforcement Handbook in 1986 explained how to conduct a proper identification. However in this case, the summary judgment evidence shows that the City provided its officers with practically no training whatsoever in conducting identifications. The reasonable inferences drawn from the evidence . . . can support a finding that Officers Remington and Davis showed Canty proceeds of the crime (the broken radio) before asking Canty to make an identification of Bibbins. This is the exact sort of conduct that is avoidable with proper training. The court therefore holds that a reasonable jury could find that the total lack of training was the moving force that made it 'highly predictable' that an unconstitutionally suggestive show-up would occur."); ***LeBlanc v. City of Los Angeles***, 2006 WL 4752614, at *18 (C.D.Cal. Aug. 16, 2006) ("Here, the LAPD training materials in the record provide no guidance on how and whether Taser should be used when dealing with narcotically intoxicated individuals, even though LAPD officers probably confront such individuals on a routine basis. Given the testimony of Plaintiff's experts that Taser is highly dangerous when used against such individuals, a reasonable jury can find that the LAPD's failure to instruct officers on Taser use against intoxicated individuals amounts to a deliberate indifference to likely constitutional violations in such circumstances. This is particularly so in light of Colomey's deposition testimony that he was not reprimanded for this incident, and would handle the situation in exactly the same way if confronted with it again. . . . Plaintiff also alleges that the LAPD failed to supervise or audit Taser use by LAPD officers. Each Taser unit contains a digital microprocessor that records every discharge, and the recorded data can be downloaded for audit and examination. After the LeBlanc incident, the Taser unit used against him was sent by the LAPD to Taser Inc. for audit and analysis. However, Taser Inc. could not recover an audit trail for the discharges on LeBlanc, because the device's internal clock battery died and prevented the chip from recording the charges. Taser Inc.'s analysis showed that the last recorded discharge occurred two months before the LeBlanc incident. Plaintiff argues that the fact that the LAPD had to send the unit to Taser Inc. for analysis rather than download the data on its own, and the fact that the unit was not properly maintained, demonstrates a custom of deliberate indifference to the abusive use of Taser in the field. In Plaintiff's view, if the LAPD properly maintains Taser clock batteries, the present of an audit trail would deter its officers from using the weapon in abusive ways. The absence of an audit trail on a single weapon is not, by itself, sufficient to establish a failure to supervise. If the challenged municipal practice is not a formal policy, Plaintiff must show the existence of a custom that is 'so persistent and widespread that it constitutes a permanent and well-settled city policy.'. . That said, the lack of an audit trail on the specific Taser unit at issue can still support an inference of deliberate indifference on Plaintiff's failure-to-train theory."); ***Estate of Harvey v. Jones***, 2006 WL 909980, at *12 (W.D. Wash. Apr. 6, 2006) ("In the instant case, both Officer Jones and Officer Kalich state that they never received any training on how to interact with mentally disturbed persons or persons under the influence of drugs. At the same time, Officer Jones notes that he had been coming in contact with a lot of mentally ill people 'on the streets.' In addition, plaintiff submits evidence that the City of Everett failed to so train police officers even after a similar incident had occurred in 1996, in which a man by the name of Douglas Reagan was arrested while naked and agitated, struggled with police

officers, and ultimately died. The Court finds that this evidence creates a genuine issue of material fact as to whether the City of Everett's failure to train its police officers on how to deal with mentally disturbed persons or persons under the influence of drugs amounted to a deliberate indifference to Mr. Harvey's constitutional rights. Accordingly, the Court agrees with plaintiff that summary judgment on this issue is not appropriate."); ***Allison v. Michigan State University***, No. 5:03-CV-156, 2005 WL 2123852, at *12 (W.D. Mich. Aug. 31, 2005)(not reported) ("Although the ELFD's [East Lansing Fire Department] decontamination policy addressed the need for privacy, the evidence of how the procedure was actually conducted is sufficient to raise an issue of fact for trial as to whether the privacy training received by the ELFD was adequate. Because there is no evidence of prior complaints of privacy violations by the ELFD that would put the City on notice that its officers needed additional training in decontamination procedures, the focus of this Court's analysis must be on whether the City provided adequate training in light of foreseeable consequences that could result from the lack of instruction. A wet decontamination procedure requires detainees to take off their clothes and to be washed off. Such a procedure necessarily implicates privacy issues. Because privacy concerns are foreseeable, a reasonable jury could find that an agency that undertakes responsibility for conducting wet decontaminations must train its employees on how to address privacy concerns and that the failure to provide adequate privacy training amounts to deliberate indifference. There is also evidence in this case from which a jury could find that the privacy training was inadequate. There is evidence that all of the detainees were women, that little effort was made to address the detainees' concern for having a female decontamination officer, that windows from the outside were not covered, that males who were not involved in the decontamination procedure were milling around the decontamination area, that there were no privacy curtains around the decontamination pools, and that some of the detainees were treated in a sexually derogatory manner. These facts are sufficient to create an issue for trial on the adequacy of the training provided by the City of East Lansing to its Fire Department employees who were assigned to carry out this procedure."); ***Freedman v. America Online, Inc.***, 412 F.Supp.2d 174, 194 (D. Conn. 2005) ("This Court is persuaded that Plaintiff has established a genuine issue of material fact as to whether the Town had an unconstitutional official policy permitting its officers to send unsigned warrants to ISPs for subscriber information. Plaintiff has proffered evidence that Young understood that the Town, although not having a formal rule, had adopted a particular course of action-sending unsigned search warrants to ISPs-which, according to the testimony of Young and Sambrook, had been followed consistently over time. . . .[T]he Town reasonably should have known to a moral certainty that the officers would confront situations in which they would need to execute a warrant for an individual's ISP subscriber information. The fact that police officers routinely execute search warrants, combined with the proliferation of internet use, makes it evident that the officers would increasingly confront the situation presented in this case. . . .Defendants point out that the Town provided its officers with training. The most recent training provided to either Young or Bensey, however, occurred more than ten years before the incident involved in this case. Second, the situation presented the Defendant officers with a difficult choice of the sort that training or supervision would make less difficult. The choice in this case was not difficult by way of degree. Rather, it was a choice in which Young, with the proper training, could have presented the warrant application to a judge

before sending it to the ISP. It was therefore a situation that would have made Young's decision less difficult by guiding him as to the proper procedure. . . . Although there is no history of employees mishandling the situation, a single action taken by a municipality is sufficient to expose it to liability, and repeated complaints are not a prerequisite to establishing that a policymaker's inaction was the result of a 'conscious choice,' and not mere negligence. . . . Lastly, Young's decision to send the unsigned warrant to AOL is a wrong choice that would frequently cause the deprivation of a citizen's constitutional rights. As previously stated, police officers routinely execute warrants to ascertain the identity of an anonymous internet speaker. Consequently, the failure to obtain any level of judicial review of the request before it is submitted to an ISP may potentially result in violations of the First and Fourth Amendments."); ***Watkins v. New Castle County***, 374 F.Supp.2d 379, 386, 387 (D. Del. 2005) ("Plaintiffs may be able to establish that the County acted with 'deliberate indifference,' under *City of Canton*, by the fact that it included discussions of positional asphyxia and cocaine-induced excited delirium in its training materials for new officers but allegedly did not require its veteran officers to undergo similar training. . . In a case based on similar facts and evidence, the United States District Court for the Southern District of Ohio held that 'a reasonable jury could find that the City had notice of the potential hazards of agitated delirium with restraint and that the City was deliberately indifferent in failing to adequately train the police and firefighters on how to deal with 'at risk' persons.' *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013, 1020 (S.D.Ohio 1999) (internal citation omitted). Thus, Plaintiffs' have presented evidence to adequately establish that genuine issues of material fact preclude a grant of summary judgment for the County on Plaintiffs' 'failure to train' claims. . . . The Plaintiffs have failed to present similar evidence of 'deliberate indifference' with regard to the Town. They have not argued that the Town possessed information regarding the risks of excited delirium or prone restraint and then failed to train its officers in such matters. Therefore, the defendants' Motion for Summary Judgment . . . will be granted insofar as it pertains to the Town."); ***Lewis v. City of Chicago,*** No. 04 C 3904, 2005 WL 1026692, at **5-7 (N.D. Ill. Apr. 26, 2005) ("The city argues Lewis cannot demonstrate deliberate indifference because CPD trains its police recruits not to use choke holds and neck restraints. The city's argument misses the point because it relies on CPD's current training program. The current training program is not at issue. The issue is whether CPD adequately retrained officers who were originally trained to use neck restraints. Lewis presents evidence that CPD taught neck restraints, including a choke hold or sleeper hold, in the police academy until at least 1983. Officer Soto attended the police academy in 1977. For purposes of this motion, the present training program is irrelevant. The court must focus on Officer Soto's training. Lewis presents evidence the city stopped teaching choke holds after Officer Soto left the police academy, presumably due to risk of injury or death. According to Lieutenant Mealer, CPD stopped teaching choke holds in response to public concern raised over their use. . . . There is no evidence CPD provided any written directive or order to police officers to stop using neck restraints. Indeed, the evidence is to the contrary. . . Although Officer Soto testified he was told not to use choke holds, he could not remember when, how or by whom. There is no evidence he or other police officers trained to use neck restraints were later provided retraining on alternative restraint tactics. Lewis presents evidence that police officers received no retraining on restraint tactics after police academy training. Based on this evidence, a jury could reasonably find the

need for retraining was so obvious and the failure to provide it so likely to result in a constitutional violation that the city's failure to provide retraining amounts to deliberate indifference. CPD is aware police officers are required to arrest fleeing suspects. CPD taught its officers control and restraint tactics, in part, to allow them to accomplish this task. CPD determined choke holds were too dangerous to use, trained new police recruits not to use them, but failed to retrain officers who were originally taught to use choke holds in alternative restraint methods. Even though Officer Soto acknowledged he was later instructed not to use a choke hold, a reasonable jury could conclude that he used the choke hold because CPD failed to train him in alternative restraints. . . .The city relies on *Latuszkin v. City of Chicago*. . . to argue that Lewis has not shown policymakers were aware of the alleged training deficiencies. . . . *Latuszkin* is distinguishable on many grounds. First, *Latuszkin* was not a failure to train case. Thus, it did not involve a policy decision to prohibit use of choke holds because of the known associated risks. Second, unlike *Latuszkin*, Lewis presents evidence that city policymakers *should have known* of the risk of injury if police officers trained to use choke holds were not retrained in alternative restraint methods. Lewis presents evidence that a policy decision was made to prohibit choke holds in response to public concern over the risk of using neck restraints. . . Neither party identifies the policymaker. Under ' 2-84-030 of the Chicago Municipal Code, the Police Board has the power to adopt rules and regulations governing CPD. It is reasonable to infer that the Police Board knew or should have known of the policy change and the reasons for it. Lewis' expert testified that the need to retrain police officers in restraint techniques is obvious because those skills diminish over time. . . Several high ranking CPD officials acknowledged that restraint skills fade over time. . . A jury could reasonably conclude from this evidence that CPD policymakers were deliberately indifferent to the need to retrain police officers on restraint techniques."); ***Solis v. City of Columbus,*** 319 F.Supp.2d 797, 812, 813 (S.D. Ohio 2004) ("In addition to being subject to § 1983 liability based on its deficient operational policy, as outlined above, the City also may be liable, for the same reasons, based on its failure to train officers to comply with that policy. In other words, the jury may find the City liable for its failure to train officers to exercise something more than ordinary care when obtaining addresses for no-knock search warrants. . . .The need occasionally to have another officer complete the visual verification of a search warrant address is a recurring situation in law enforcement. The constitutional violation that occurred here is a predictable result of the failure to give officers the tools to handle this situation by training them in how to insure that information is fully and accurately transmitted and that the final address obtained is correct."); ***Foster v. City of Philadelphia,*** No. Civ.A. 01-CV-3810, 2004 WL 225041, at **13-15 (E.D. Pa. Jan. 30, 2004) (not reported) ("In conclusion, the record reveals that the City has proven the existence of comprehensive written policies regarding the handling detainees who are high-risk for suicide. The City, however, has offered insufficient evidence to refute the Plaintiffs contention that the content of the City's training program was inadequate. . . Thus, the adequacy of the content of the City's training program remains a disputed issue of material fact. . . Inadequacy of training in the area of suicide detection and reduction may be viewed as 'so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.' . . . On the whole, the record of this particular incident, viewed in a light most favorable to Plaintiff, as it must be on summary judgment, would support a

fact-finder in drawing an inference that many of the officers involved failed to follow the City's policies. To be sure, the Supreme Court has cautioned against creating an inference of a failure to train from an isolated incident. 'The existence of a patterns [sic] of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the 'moving force' behind the plaintiff's injury.' . . This record would amply support a conclusion by a reasonable jury that the performance shortcomings were a result of constitutionally inadequate training practices, and were not simply the result of isolated negligence. Ultimately, however, the constitutional adequacy of the City's training program for suicide risk reduction among detainees is a matter for determination in light of all of the facts and circumstances presented at trial, when a full evidentiary record can be developed. At the summary judgment stage, however, the City has not established, as a matter of law, the absence of disputed issues of material fact as to the adequacy of the content of training programs for the identification and handling of high-risk potential suicidal detainees. Therefore, summary judgment must be denied.."); ***Estate of Carpenter v. City of Cincinnati,*** No. C-1-99-227, 2003 WL 23415143, at *12 (S.D. Ohio, Apr. 17, 2003) ("Plaintiff's evidence creates a dispute of material fact, however, as to whether the City's police department had policies of 1) not asking subjects of traffic stops to put their cars in park and turn off the engines and 2) dealing with obstinate subjects by pulling them out of their cars, even when their engines are running. At the very least, the evidence raises an issue as to whether the City failed to train its officers with respect to disabling cars and reaching into cars during traffic stops. During CPRP's investigation of the Timothy Blair incident, Chief Streicher told CPRP that the City had no policy on disabling automobiles at traffic stops. Yet, the Curriculum that the City purports to follow instructs that officers tell every subject of a traffic stop to turn off his engine. Also, Officer Miller testified that the City never trained him to ask a suspect to put the car in park during a routine traffic stop, and Officer McCurley, Officer Miller's field training officer, testified that he never told Officer Miller to ask Mr. Carpenter to turn the engine off or put the car in park because he trusted Officer Miller's judgment. These statements together suggest that, despite the dictates of the official curriculum, the official custom of the City's police department was not to train officers to disable automobiles at the beginning of every traffic stop but to give them wide latitude on this front. In addition, Officer Carder's statement to the CPRP during its investigation of the Timothy Blair shooting that he had once been commended by the City for an extraction similar to that which he attempted on Mr. Blair raises an issue of fact as to whether the City's official policy was for officers to try to yank suspects out of running cars during traffic stops. This analysis all begs the question of whether such policies would create liability for the City under § 1983. If the City failed to train Officer Miller to ask the subject of a traffic stop to put his car in park and turn off the engine and had a policy whereby officers were to reach into running cars to extricate recalcitrant suspects, this might have been a moving force behind a constitutional violation − the use of deadly force against Mr. Carpenter. If the officers shot Mr. Carpenter dead because his car moved forward or backward, then the City's failure to train Officer Miller regarding the proper disabling of a car during a traffic stop was a proximate cause and, thus, a 'moving force' behind the deadly excessive force violation. Surely it would be foreseeable to the City that if it did not train its officers to disable vehicles at the beginning of a traffic stop and did

not train their officers to refrain from reaching in to those running vehicles, officers would reach into moving vehicles, struggles would ensue, drivers would lose control of their vehicles, and officers would feel compelled to escalate their use of force in response. A failure to train its officers on easy ways to avoid such tragic events would evince 'deliberate indifferen[ce]' on the part of the City. The City's motion for summary judgment on Plaintiff's § 1983 claim against the City is DENIED.")***; Fakorzi v. Dillard's, Inc.***,252 F. Supp.2d 819, 831 (S.D. Iowa 2003) ("The reasoning of *Harris* applies with equal force to the case at bar. The City of Coralville gives its officers handcuffs with the expectation that they will use them in arresting suspected criminals when necessary. Just as the officers in *Harris* were 'certain to be required on occasion to use force in apprehending felons,'. . . Coralville police officers have recurring occasions to make arrests and must frequently determine whether to handcuff potential suspects. The Court finds that a failure to train officers in the appropriate use of handcuffs is 'so likely to result in a violation of constitutional rights that the need for training is patently obvious.'. . Therefore, notice to the City is implied in this case."); ***Keeney v. City of New London,*** 196 F.Supp.2d 190, 201 (D. Conn. 2002) ("Keeney did submit an expert report . . . that noted Persi's comments about an increased population of mentally ill individuals in New London and statements by Mugovero and Persi that they did not receive any training on how to handle mentally compromised persons. Further, the expert report concluded that common police policies recognized the futility of standard techniques of intimidation and force against mentally ill individuals. The court concludes that the expert's report raises material issues of fact for each *Walker* factor − whether municipal officials knew to a moral certainty that officers would encounter mentally ill individuals, whether those encounters presented officers with a difficult choice regarding the use of force, and whether the wrong choice would lead to a deprivation of citizen's rights − that preclude summary judgment on this ground for municipal liability."); ***Smartt v. Grundy County, Tennessee***, No. 4:01-CV-32, 2002 WL 32058965, at *3 (E.D. Tenn. Mar. 26, 2002) (not reported) ("[P]laintiff provides the Court with deposition testimony of defendants Womack and Meeks indicating that neither of them knew or were trained about the proper legal standard for the use of deadly force. Deputy Womack testified that the use of deadly force is appropriate when valuable personal property is in danger. . . . He further stated that this belief was consistent with his in-service training. . . Similarly, Sheriff Meeks explained during his deposition that personal property could appropriately be protected with deadly force. . . . He further stated that he had not discussed the appropriate use of deadly force with his officers. . . Tennessee law clearly provides that deadly force is not appropriate to protect personal property. . . The statements of Womack and Meeks might support a finding that Grundy County is liable for a failure to train that amounted to deliberate indifference."); ***Blair v. City of Cleveland,*** 148 F. Supp.2d 894, 908-10 (N.D. Ohio 2000) ("Plaintiffs seek to hold the City of Cleveland liable based upon its alleged failure to adequately train its officers in the use of choke holds and neck restraints. In order to hold a municipality liable for its officers' alleged use of excessive force on a theory of failure to adequately train its officers, Plaintiffs must first show that the City's officers were, in fact, inadequately trained. Second, Plaintiffs must establish that the City's failure to adequately train its officers directly caused Pipkins' injuries. Finally, Plaintiffs must establish that the City was deliberately indifferent to a clear need for such training. . . . [R]easonable jurors could find that the City of Cleveland knew that situations such as the instant

case would arise, in which officers were faced with struggling arrestees, and were forced to decide just what amount and what type of force would be reasonable under the circumstances. . . . Viewing the evidence presented in a light most favorable to Plaintiffs, this court holds that a reasonable juror could find that the City of Cleveland failed to adequately train its officers in the use and/or advisability of neck restraints."); ***Hockenberry v. Village of Carrollton***, 110 F. Supp.2d 597, 602 (N.D. Ohio 2000) (denying Village's motion for summary judgment where plaintiff offerered evidence Asuggesting that the Village provides relatively little training regarding the policies and procedures associated with pursuing a suspect."); ***Weaver v. Tipton County***, 41 F. Supp.2d 779, 790, 792 (W.D. Tenn. 1999) ("The court must thus determine whether in light of the duties assigned to employees at the Tipton County Jail the need for increased staffing, training, or supervision was 'so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [municipality] can reasonably be said to have been deliberately indifferent to the need.'. . . Based on the evidence before it, the court finds a reasonable juror could conclude that Tipton County's failure to ensure that adequate staffing, training, and/or supervision polices were in place and enforced would so obviously result in the violation of prisoners' constitutional rights that Tipton County could be found deliberately indifferent. Furthermore, it is possible that plaintiff's evidence could convince a reasonable juror that but for the inadequate policies, Weaver would not have had his constitutional rights violated. Accordingly, Tipton County's motion for summary judgment is denied."); ***Johnson v. City of Cincinnati***, 39 F. Supp.2d 1013, 1019, 1020 (S.D. Ohio 1999) ("Plaintiff provides evidence from which a reasonable jury could infer that dealing with highly agitated persons was a recurring situation for law enforcement officials nationwide and in Cincinnati and that a violation of civil rights is predictable result of being inadequately trained to handle such persons. Plaintiff provides evidence that City officials knew of the potential danger of the prone restraint before Wilder's death. . . . On the basis of this evidence the Court believes that a reasonable jury could find that the City had notice of the potential hazards of agitated delirium with restraint and that the City was deliberately indifferent in failing to adequately train the police and firefighters on how to deal with 'at risk' persons."); ***Taziloy v. City of Philadelphia***, No. CIV. A. 97-CV-1219, 1998 WL 633747, *15 (E.D. Pa. Sept. 10, 1998) (not reported) ("With respect to the claim that Defendants failed to rectify a dangerous situation, the Court finds that given the nature of the duties assigned to caseworkers, the need for training and supervision is so obvious, and an inadequacy in this regard so likely to result in a violation of a child's constitutional right, that the DHS policymakers can reasonably be said to have been deliberately indifferent to the consequences of employing untrained, overworked, and unsupervised caseworkers."); ***Doe v. Estes***, 926 F. Supp. 979, 988 (D. Nev. 1996) ("Certain situations present a potential for constitutional violations that is so obvious and so clearly likely to occur, that a local government entity's failure to take prophylactic measures may well rise to the level of deliberate indifference even before any particular violation has been brought to the attention of the entity's policymakers. . . . It is the judgment of the court that a reasonable jury could find from the evidence in the record on summary judgment that the danger of children being sexually abused at school is so obvious that a school district's failure to take action to prevent sexual abuse of its students by its teachers − even in the absence of actual knowledge of such abuse − constitutes deliberate indifference, especially where the school district took no steps to

encourage the reporting of incidents of such abuse."); ***Hurst v. Finley***, 857 F. Supp. 1517, 1523 (M.D. Ala. 1994) ("The court now finds that the City's failure to train its law enforcement personnel in the proper procedures to be followed when arresting an individual suspected of driving under the influence of alcohol was closely related to plaintiff Hurst's alleged injury, which was the deprivation of her Fourth Amendment right to be free of search and seizure without probable cause. Furthermore, the court finds that the City's lack of policy requiring that one or a battery of field sobriety tests be administered before placing a suspected driver under arrest was the motivating force behind the alleged violation of Hurst's Fourth Amendment right. . . . As a result, the court finds that Hurst has submitted sufficient evidence from which a jury could find. . . deliberate indifference to the constitutional rights of plaintiff Hurst."), *aff'd*, 63 F.3d 1112 (11th Cir. 1995); ***McClain v. Milligan***, 847 F. Supp. 970, 979 (D. Me. 1994) ("If, as Plaintiff asserts, an optional videotape and a written policy on the use of force are the only materials dealing with the proper use of force that a Rumford police officer might be exposed to, these facts could establish an inadequate training policy sufficient for a finding of municipal liability under section 1983."); ***Simpkins v. Bellevue Hospital***, 832 F. Supp. 69, 75 (S.D.N.Y. 1993) (*City of Canton* "is equally applicable to claims concerning training of medical personnel and hiring and supervision of medical personnel. . . . [C]laim that plaintiff's injuries were caused by the city's failure to assure proper hiring or supervision or training of surgeons assigned to perform operations on inmates is one that should not be dismissed at this stage."); ***Feerick v. Sudolnik***, 816 F. Supp. 879, 887 (S.D.N.Y. 1993) (motion to dismiss by police dept. defendants denied where plaintiffs alleged that "the NYPD failed to train or supervise its officers regarding the handling of P.G. 118-9 interrogations and the need to separate the investigative and interrogative agencies within the NYPD and the DAO."), *aff'd*, 2 F.2d 403 (2d Cir. 1993) (Table); ***Frye v. Town of Akron***, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991) (town's complete failure to train officers on subject of high speed pursuits can be characterized as deliberate indifference); ***Doe v. Calumet City***, 754 F. Supp. 1211, 1225 (N.D. Ill. 1990) (City was deliberately indifferent to the need to train officers in the constitutional limits of strip searches).

See also ***Mitchell v. City of Cleveland***, No. 1:03CV2179, 2005 WL 2233226, at *6 (N.D. Ohio Sept. 12, 2005) (not reported) ("Whether the officers were trained according to general minimum standards set forth by the state for police officers is largely irrelevant, however, because Plaintiff's injuries were not the result of her arrest. Rather, Plaintiff's injuries were the result of the behavior of certain IG's during her booking and detention. The question of whether training is adequate must be assessed by considering the extent of 'jail training.' The Defendants fail to specifically state what 'jail training' the IG's received or even to explain what policies were in place for IG's. The Defendants do not describe, for instance, whether and to what extent training was provided to IG's regarding treatment of injured or disabled prisoners, the removal of personal property from an uncooperative prisoner, or the administration of medical treatment. Given that the Plaintiff required two separate surgeries, '[s]uch undisciplined conduct on the part of law enforcement officers speaks ab initio of a lack of training and discipline.' . . While Plaintiff's showing in response to Defendant's motion for summary judgment is certainly not strong, Defendants bore the burden in the first instance of coming forward with a 'well supported' motion

under Rule 56. On the question of IG training, they simply have not done so. Accordingly, the Court finds that questions of fact exist regarding the adequacy of the training provided to the IG's, and whether any inadequacies in that training were a moving force behind Plaintiff's injuries."); ***Johnson v. City of Richmond, Virginia***, No. Civ.A.3:04 CV 340, 2005 WL 1793778, at *9, *10 (E.D. Va. June 24, 2005) (not reported) ("Relying on expert testimony, the Plaintiff has presented evidence that, although the City's training program appears adequate on the surface, a more thorough review of the training program reveals that it is not consistent with nationally accepted police standards and practices. In that regard, the Plaintiff points to evidence that there is no mandated use of force training that officers must receive after graduating from the Academy, and that there is no evidence that officers are given regular use of force training following graduation. Plaintiff's expert explained that national standards require training on the agency's use-of-deadly force policies at least annually. As further evidence on this issue, the Plaintiff quotes from the depositions of several current officers who demonstrated ignorance of the use of force policies outlined in the General Order on which the City so heavily relies to show that it provides adequate training in the use of force. The expert witness offered by the Plaintiff has opined that, when the City does provide use of force training, it is limited and ineffective. In that regard, the expert explains that the City fails to train its officers on a Use of Force Continuum, which is recommended by DCJS. This continuum teaches the several steps, ranging from less to more lethal alternatives, which are to be taken before using deadly force. The current Richmond Chief of Police, Chief Monroe, acknowledged publicly that there was a gap in the City's training when it came to alternatives to deadly force. There is evidence that, according to generally accepted practice, use of force training must include so-called 'shoot/no shoot' scenarios, to train officers when it is proper to shoot and when it is not. The City's training in this area is limited to the use of simulation machines, which, according to the Plaintiff's expert, is not in keeping with accepted practices and standards. Further, the City keeps no record on the simulation training and thus does not know whether Melvin received this training or how well he did. Without this critical information, the City, according to the Plaintiff's expert, is unable to show that its training is adequate. Again, the new Chief of Police recently has confirmed that adequate training should include both live 'shoot/no shoot' scenarios and situational training as part of the use of force training. To that general evidence, the Plaintiff offered testimony tending to show that the City did not provide adequate training on arrest procedures implicating the use of deadly force. For instance, all of the police officers who were deposed in this case said they did not receive any post-Academy training on arrest and the use of force. And, several officers were unaware of the City's putative policy of the use of force. Through her expert witness, the Plaintiff also offered evidence about four key areas of arrest procedure that are lacking in the City's training program. In each instance, the expert will opine that the deficiency offends general standards or practices. First, the expert opined that Richmond police officers are inappropriately trained on how to respond to suspects who put their hands in their pockets. The expert noted that there is a standard police practice, which has been given to Richmond police officers by an FBI agent, and which calls for the officer to instruct the suspect to keep his hands in his pocket until they can be safely removed upon arrest. Instead of following that procedure, the City teaches its officers to instruct suspects to remove their hands immediately, which, according to the expert, increases the likelihood that force must be used.

Second, the expert opined that the City fails adequately to train its officers in the use of cover and lighting, which also increases the likelihood of the use of force. The Academy provides training on these issues, but there is no evidence of training on lighting in nighttime operations or any post-Academy training on the use of cover. Third, the expert opined that the City fails adequately to train its officers on how to handle high-risk operations. The City has training on 'raids,' but only requires this training for officers who execute search warrants, and not for officers who serve arrest warrants at a suspect's home. Melvin, for example, did not receive this training until after Johnson's death. Fourth, the expert opined that the City fails adequately to train specialized units like the Task Force in high-risk situations. While City policy requires that 'specialized units' receive training on high-risk situations that the unit is likely to encounter, this Task Force received no such training, although it was labeled a 'specialized unit.' The evidence offered by the Plaintiff concerning the deficiencies in the City's training program, particularly with respect to use of force, is disputed by the City and its expert. However, a reasonable jury could conclude that the City acted with deliberate indifference as to adequate training in the use of force, which is an essential part of any training program.").

In ***Doe v. Borough of Barrington***, 729 F. Supp. 376 (D.N.J. 1990), plaintiff sued on her own behalf and on behalf of her children, for harm suffered as a result of an invasion of their constitutional right to privacy. The court found that disclosure by a police officer to neighbors that plaintiffs' husband and father had AIDS, was disclosure of a "personal matter" protected from government disclosure by the Fourteenth Amendment. *Id*. at 382.

Plaintiffs' assertion of liability against the Borough was based on a theory of failure to train its employees about AIDS and the importance of keeping the identity of AIDS carriers confidential. In granting summary judgment in favor of the plaintiffs on the issue of municipal liability, the court held that "[t]he need to train officers about AIDS and its transmission and about the constitutional limitations on the disclosure of the identity of AIDS carriers is so obvious that failure to do so is properly characterized as deliberate indifference." *Id*. at 390.

The court rejected the Borough's defense that there was no deliberate indifference where no other municipality or state agency had adopted a policy on AIDS. "That other municipalities do not have policies regarding AIDS is not material to the analysis set forth in ***City of Canton v. Harris***...." *Id*. The court expressly noted that it was not deciding whether the municipality could disclose a person's affliction with AIDS to someone actually at risk of contracting the disease from the identified AIDS carrier. *Id*. Finally, the court was careful to restrict the municipality's liability to failure to train about the disease AIDS. *Id. Compare* ***Doe v. City of Cleveland***, 788 F. Supp. 979, 986 (N.D. Ohio 1991) (where City's AIDS policy reflected sufficient awareness of need for confidentiality, City could not be held liable where one officer circumvented the policy); ***Soucie v. County of Monroe***, 736 F. Supp. 33, 38 (W.D.N.Y. 1990) (claim against county based on failure to train probation personnel as to the confidentiality of juvenile pre-sentence reports failed to satisfy ***City of Canton*** where there were no allegations that County repeatedly ignored or failed to investigate prior disclosures).

For examples of cases where plaintiffs have alleged specific deficiencies in training and courts have found no deliberate indifference under ***City of Canton***, *see, e.g.*, ***Sabbe v. Washington County Board of Commissioners,*** 84 F.4th 807, 829 (9th Cir. 2023) ("*Monell* requires that plaintiffs show the need 'for more or different action is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymakers of the [county] can reasonably be said to have been deliberately indifferent to the need.'. . Here, Sergeant Braun testified as the County's deposition designee that he had never heard of using an armored vehicle to execute a PIT maneuver and it was 'not something we ever thought of' and thus 'not something we've ever addressed under policy.' Though a jury could decide that the second PIT maneuver constituted deadly force, the record does not give rise to a genuine dispute that the County's failure to establish guidelines for using the V150 to execute PIT maneuvers rose to the level of deliberate indifference."); ***Winkler v. Madison County***, 893 F.3d 877, 902-03 (6th Cir. 2018) ("Winkler further argues that the County is liable under § 1983 for its failure to adequately train its jail personnel. To succeed on a claim based on inadequate training, Winkler 'must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.'. . Even assuming that Winkler could show that the County's training of its jail personnel was inadequate, she presented no proof to show that this inadequacy resulted from deliberate indifference. This court in *Ellis* noted that there are two situations justifying a conclusion of deliberate indifference in claims of failure to train or supervise. 'One is failure to provide adequate training in light of foreseeable consequences that could result from a lack of instruction.' ... 'A second type of ... deliberate indifference is where the city fails to act in response to repeated complaints of constitutional violations by its officers.' . . Because Winkler does not provide evidence of any previous instances where inmates have received constitutionally inadequate healthcare at the Detention Center, the second situation is not in play here. 'The [first] mode of proof is available "in a narrow range of circumstances" where a federal rights violation "may be a highly predictable consequence of a failure to equip [employees] with specific tools to handle recurring situations."'. . Winkler's argument is that '[a]lthough jail policies and state regulations guarantee access to emergency medical care, there is no evidence that any jailer received training on anything other than basic first aid and CPR, even though the jailers were the only medical providers at the jail all but 40 hours per week.' But Winkler does not identify what other medical training she believes that the jail personnel should have received. Nor does she explain how the quality of the medical training provided put the County on notice of the likelihood that jail personnel would respond inadequately to an inmate's medical emergency. . . . We therefore see no basis to conclude that the County exhibited deliberate indifference by failing to provide additional medical training to jail personnel. . . . Winkler's final failure-to-train argument is that 'the deputies in this case were not trained or instructed on how to monitor a patient when no medical personnel were available, and as a result did not adequately monitor Clint Hacker.' But she does not cite to the record to support her proposition that jail personnel received no training on how to monitor inmates. Moreover, she acknowledges that the usual practice at the Detention Center was for a physician to provide detailed guidance to jail personnel about how to monitor individual inmates if the physician determined that monitoring for a medical condition was

necessary. In sum, Winkler has failed to show that jail personnel's monitoring of Hacker was constitutionally inadequate in this case. We therefore uphold the grant of summary judgment in favor of the County."); ***Porter v. Epps***, 659 F.3d 440, 448 (5th Cir. 2011) ("In sum, no reasonable juror could determine that it was 'obvious that the likely consequence[ ]' of not adopting more specific policies in the records department would be a deprivation of civil rights. While it is unfortunate that the records department erred in interpreting the sentencing order for Porter, this error does not support a finding that Epps's policies involving the records department were objectively unreasonable. Accordingly, Epps is entitled to qualified immunity in this regard. . . . There is insufficient evidence to support a finding that Epps's training or supervision of the employees in the records department was objectively unreasonable. . . . Without more, the fact that an employee erred in one instance does not provide sufficient evidence to show that Epps's alleged actions in failing to train were objectively unreasonable."); ***Valle v. City of Houston***, 613 F.3d 536, 544, 545 (5th Cir. 2010) ("To show that the City's training was inadequate, the Valles presented evidence that the City chose not to implement a 2004 proposal for additional mandatory CIT training, prepared at the direction of the Executive Assistant Chief of Police. According to the proposal, CIT training is 'a proven curriculum for helping officers safely de-escalate situations involving individuals in serious mental health crises.'. . . The Valles have failed to present sufficient evidence of causation as to the entry of their home. That decision was made by Captain Williams, the head of the tactical SWAT team, who was trained in CIT tactics. Moreover, although CIT Officer Broussard testified that she was neither told nor consulted about making entry into the home, she further testified that she did not disagree with the decision to enter. While we are troubled that Captain Williams never spoke directly with the only CIT officer on the scene prior to ordering the forceful entry of the Valles' home, any alleged lack of CIT training was not the 'moving force' in the decision to enter the home."); ***Parrish v. Ball***, 594 F.3d 993, 999 (8th Cir. 2010) ("As in *Andrews,* where we found no patently obvious need to train an officer not to rape young women even in the face of actual knowledge of deviant behavior, we do not believe that there is a patently obvious need to train an officer not to sexually assault women, especially where there is no notice at all that such behavior is likely. An objectively reasonable officer would know that it is impermissible to touch a detainee's sexual organs by forcible compulsion. . . .Moreover, Fite himself acknowledged in his testimony that he knew such behavior was wrong. Thus, while it may have been wise to tell officers not to sexually assault detainees, it is not so obvious that not doing so would result in an officer actually sexually assaulting a female detainee."); ***Sanders-Burns v. City of Plano***, 594 F.3d 366, 381, 382 (5th Cir. 2010) ("Sanders-Burns's claims against Plano fail. Sanders-Burns fails to produce evidence demonstrating that Plano's training policy procedures were inadequate. While Cabezuela and King both testified that they never received training regarding positional asphyxia, Cabezuela did receive training on how to deal with individuals at a high risk of custodial death due to being handcuffed in a prone position − the cause of Sanders's death by positional asphyxia. The record also demonstrates that Cabezuela was trained in proper procedures for handcuffing individuals, the importance of monitoring individuals in custody, and when it is necessary to obtain medical help for an individual. . . Furthermore, we previously explained that when officers have received training required by Texas law, the plaintiff must show that the legal minimum of training was inadequate. . . Here, Cabezuela completed the

state-mandated training for police officers. Sanders-Burns does not allege that the state requirements are inadequate. . . . With regard to single-incident liability, Sanders-Burns has failed to provide evidence to support her claim that the need for more training was 'obvious and obviously likely to result in a constitutional violation.' . . Thus, Sanders-Burns has failed to provide evidence under which a reasonable jury could conclude that Plano acted with deliberate indifference to the rights of its inhabitants with respect to training its police officers regarding the dangers of positional asphyxia."); ***Peterson v. City of Fort Worth, Tex***., 588 F.3d 838, 849, 850 (5th Cir. 2009) ("We have previously held that to hold a municipality liable for failure to train an officer, it must have been obvious that 'the highly predictable consequence of not training' its officers was that they 'would apply force in such a way that the Fourth Amendment rights of [citizens] were at risk.'. . Peterson points to no evidence that the City was aware of any risk of injury from knee strikes, and the City showed that officers otherwise go through extensive training on the use of force. Particularly in the absence of evidence that the use of knee strikes had caused serious injuries on previous occasions, Peterson has presented no material fact question to show that it should have been *obvious* to the policymakers that the risk of serious injury was a 'highly predictable consequence' of the failure to train. . . . In a similar vein, Peterson alleges the City was deliberately indifferent to the need to supervise its officers adequately. Again, for the City to be liable for failure to supervise, it at least must have been obvious that 'the highly predictable consequence' of not supervising its officers was that they 'would apply force in such a way that the Fourth Amendment rights of [citizens] were at risk.'. . The department's failure to reprimand one officer for an instance of faulty recordkeeping would not alone raise a genuine issue of material fact on whether the obvious and 'highly predictable consequence' of the department's actions was that citizens' Fourth Amendment rights would be violated, and Peterson has otherwise provided no evidence of inadequate supervision. We find no evidentiary support to submit municipal liability to the jury on the theory that the department failed to supervise its officers."); ***Lewis v. City of West Palm Beach, Florida***, 561 F.3d 1288, 1293, 1294 (11th Cir. 2009) ("To establish a city's deliberate indifference, 'a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action.' *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir.1998). A city may be put on notice in two ways. First, if the city is aware that a pattern of constitutional violations exists, and nevertheless fails to provide adequate training, it is considered to be deliberately indifferent. *Id.* at 1351. Alternatively, deliberate indifference may be proven without evidence of prior incidents, if the likelihood for constitutional violation is so high that the need for training would be obvious. *Id.* at 1351-52. Appellant's argument rests on the latter premise. Appellant claims that the need for training on the proper use of hobble restraints and the proper placement of weight on an arrestee's back during the restraint process is 'so obvious' that it requires proactive training by the City to ensure avoidance of constitutional violations. In establishing this form of notice, the Supreme Court referenced the proper use of firearms and the correct use of deadly force as an area that would be so obvious as to require adequate training by the municipality to avoid liability. *City of Canton,* 489 U.S. at 390 n. 10. In comparison, this Court refused to acknowledge the proper response to handcuff complaints as so obvious as to put the municipality on notice that training is required. *Gold*, 151 F.3d at 1352. Similarly, the application of a hobble does not rise to

the level of obviousness reserved for 'a narrow range of circumstances [where] a violation of federal rights may be a highly predictable consequence' of a failure to provide adequate training. . . Despite the questionable use of the hobble in this particular situation, hobbles do not have the same potential flagrant risk of constitutional violations as the use of deadly firearms. Failure to provide training on hobbles is not a 'particular glaring omission in a training regimen.'. . Notably, in both the case at bar and as previously decided in *Garrett v. Athens-Clarke County,* 378 F.3d 1274, 1280 (11th Cir.2004), hogtying or 'fettering' under the given circumstances does not violate the Fourth Amendment. The City is therefore unlikely to be on notice of its potential legal ramifications in this context. Thus, the hobble, and the understanding of its proper application, does not carry a high probability for constitutional violations in the manner intended by the 'so obvious' notice that would open the door to municipal liability. Additionally, the City of West Palm Beach does provide training on the use of the hobble. . . . While not under a specific constitutional duty under § 1983, the City takes actions to ensure that arrestees are not subjected to unnecessary or painful procedures when restrained. Because the City of West Palm Beach did not maintain a deliberate indifference to a potentially obvious constitutional violation and because the City provides some training on the use of hobbles, the City cannot be held liable under 42 U.S.C. § 1983."); ***Beard v. Whitmore Lake School Dist.***, 244 F. App'x 607, 2007 WL 1748139, at *1, *4, *5 (6th Cir. June 19, 2007) ("This case concerning the unconstitutional strip search on May 24, 2000, of 24 students in the Whitmore Lake High School District reaches this court for the second time. See *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 601 (6th Cir.2005). In the first appeal, this court found that qualified immunity protected the school teachers who engaged in the illegal search. . . This appeal, in contrast, concerns the liability of the District for the conduct of the teachers. . . . [T]he need for additional training was not 'so obvious' to establish the District's deliberate indifference for several reasons. First, it is not inherently foreseeable that teachers would have ignored the District's policy and guidelines and engaged in an excessive and unconstitutional search. The District, as discussed above, provided teachers with the relevant policies and guidelines and could reasonably expect them to review the policies. . . . The teachers disregarded the District's written policies and engaged in a search that this court has found to have been unconstitutional. Second, while the need to have some policy on unconstitutional searches might be obvious, the need to have a training program above and beyond the policy is not obvious in this case. Clearly, the District recognized that there was a risk that teachers might engage in unconstitutional searches and that having a policy was an appropriate course of action. The risk that unconstitutional searches might occur, however, is distinct from the risk that unconstitutional searches might occur despite the existence of the District's policy limiting such searches. . . . Third, and relatedly, the District's decision not to give a higher priority to search training is consistent with the District's position that the need for additional training was not obvious. . . . . Fourth, the students did not present evidence that teachers routinely encountered situations in which the teachers might have engaged in unconstitutional searches of students without proper training. . . . Fifth, this court previously found that the 'law, at the time the searches were conducted, did not clearly establish that the searches were unreasonable under the particular circumstances present in this case.'. . Given that it was not clear at the time that the search at issue in this case was unconstitutional, it is unlikely that the need for training to prevent the unconstitutional search was

'so obvious' that the District was deliberately indifferent to the need to prevent the search. . . Finally, it is important not to conflate our *ex post* view of the District's policy from the District's *ex ante* decision not to engage in additional training. . . . The District has numerous policies and guidelines and it would be impossible to provide sufficient training to cover every possible contingency; a decision to have training on one issue might inevitably lead to insufficient training on another. The Supreme Court in *City of Canton* only required districts to focus on 'obvious' risks; it did not require them to account for every possible risk."); ***Gray ex rel Alexander v. Bostic***, 458 F.3d 1295, 1308, 1309 (11th Cir. 2006) ("Gray emphasizes that Deputy Bostic received no training specifically addressing the detention of students. She contends that Sheriff Sexton should have foreseen that unwarranted handcuffed detentions of students were 'bound to happen' without such training. Thus, Gray is arguing that the need to train was 'so obvious' that the failure to do so constituted deliberate indifference without prior notice. . . . We . . . conclude that the need for training regarding the detention of students specifically is not obvious in the abstract and that a lack of such training is a 'possible imperfection,' but not a 'glaring omission' from a training regimen. Deputy Bostic received training, at both the police academy and the Tuscaloosa County Sheriff's Department, on the proper use of force and the principles of probable cause. The failure to provide specific training regarding the detention of students, in addition to general training regarding use of force during detention and arrest, was not 'so likely' to result in the violation of students' Fourth Amendment rights that Sheriff Sexton reasonably can be said to have been deliberately indifferent to the need for this particularized training without any prior notice."); ***Ciminillo v. Streicher***, 434 F.3d 461, 469, 470 (6th Cir. 2006) ("In arguing that the City of Cincinnati violated his constitutional rights by failing to train its officers in the use of beanbag propellants, Ciminillo points to an agreement entered into between the City of Cincinnati, the Cincinnati Police Department, and the United States Department of Justice regarding, among other things, the use of beanbag propellants. That agreement was entered into less than one month before the events that underlie this action. Furthermore, Ciminillo points to Knight's affidavit, in which Knight states:

> I was trained in use of the bean bag shotgun in the Police Academy consecutively every year at the Police firing range. Part of training is review of Department Policy and Procedure about when you can and can't deploy bean bag shotguns, distances that are safe to deploy the weapon at a subject, and appropriate areas of the body to aim for.

Although Ciminillo argues that a jury could infer from that agreement and Knight's affidavit that the City had not completed the training of its officers, nothing in the record supports such an inference. To the contrary, both the agreement itself and Knight's affidavit suggest that the City was affirmatively taking steps to train officers in the use of beanbag propellants. Furthermore, Ciminillo has submitted no additional evidence regarding the number of incidents of beanbag misuse, delays in the implementation of the Department of Justice agreement, or any other evidence that suggests that the City's training of officers in the use of beanbags is, or ever was, constitutionally defective."); ***Whitfield v. Melendez-Rivera***, 431 F.3d 1, 10, 11 (1st Cir. 2005) ("The parties agree that the Puerto Rico Police Department had promulgated regulations governing the proper use of deadly force and that these regulations were applicable to the municipal police

as well as to the Commonwealth police. . . The district court, however, found that there was a factual dispute as to whether Fajardo had adopted these regulations and trained police officers in accordance with them. The plaintiffs' primary evidence establishing this claim was testimony by the mayor and the police commissioner to the effect that there were no municipal regulations concerning the use of deadly force. According to the court, the jury could infer from this evidence, and from Whitfield's testimony concerning the officers' conduct in violating his constitutional rights, that the officers had not been properly trained in the use of deadly force. Such an inference was not warranted on the undisputed facts of this case. The undisputed evidence is that both officers were in fact trained by the Puerto Rico Police according to the policies of the Puerto Rico Police Department. . . . The defendants' evidence included diplomas certifying that both officers had successfully completed the intensive preparatory course administered by the Puerto Rico Police Department, certificates of training received by both officers establishing that they had participated in ongoing training in the proper handling and use of firearms, and the testimony of Mangome and Lebron that they had been trained concerning the constitutional standard for employing deadly force. . . . Whether Fajardo promulgated its own regulations is irrelevant to the lack of training claim, and the plaintiffs' evidence does not otherwise rebut or contradict the evidence that Lebron and Mangome were trained in accordance with the Municipal Police Act and the related Police Department regulations governing the use of force. The testimony of the mayor and the police commissioner does not create a factual dispute as to whether Fajardo had actually adopted or enforced these regulations."); ***St. John v. Hickey***, 411 F.3d 762, 776 (6th Cir. 2005) ("While St. John can point to evidence in the record tending to show that Sheriff Hickey did not provide specific training on the issue of detaining and transporting disabled and/or wheelchair-bound persons,. . . this in and of itself does not support the conclusion that the need for such training was obvious in order to prevent violations of citizens' constitutional rights. St. John does not argue that the Sheriff failed to provide training on the core constitutional obligations of arresting officers, such as the requirement that an arrest be supported by probable cause and that it be carried out in a reasonable manner under the circumstances. A complete lack of training on concepts so fundamental as these may enable a plaintiff to survive summary judgment 'without showing a pattern of constitutional violations.' . . But such a case is very rare; indeed, the plaintiff must show that a violation of constitutional rights is 'a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.' . . Although it is reasonable, as St. John contends, to assume that arresting officers in Vinton County will encounter disabled and/or wheelchair-bound persons, this assumption alone does not support the conclusion required for § 1983 liability to attach − i.e., that officers' general training on the manner of effectuating an arrest and using 'common sense' is so insufficient that a 'highly predictable consequence' will be recurring violations of the rights of disabled and/or wheelchair-bound persons. . .Because St. John did not produce evidence that Sheriff Hickey ignored a pattern of constitutional violations, nor that the failure to train on the specific issue of arresting and transporting wheelchair-bound persons was highly likely to result in widespread violations of constitutional rights, this Court must affirm the district court's grant of summary judgment to Defendants in their official capacities."); ***Larkin v. St. Louis Housing Authority Development Corporation***, 355 F.3d 1114, 1117, 1118 (8th Cir. 2004) ("Because the Constitution may require

more training for some officers than for others, the Authority may not be protected from liability simply by relying on the requirements of the licensing agency. . . But the burden is on Larkin to proffer evidence establishing that conditions were such that the officers at Cochran Gardens needed additional training. She has failed to meet this burden. Johnson testified at his deposition that his duties at Cochran Gardens included patrolling in the complex's buildings and facilities, interdicting drug activities, and protecting tenants from harmful situations. He stated that he had the authority to arrest those who committed crimes, to search for and seize evidence in connection with an arrest, and to use lethal force where there 'would be bodily harm or more serious' harm. But there was no evidence that these tasks were any different from those which all armed security guards are expected to be able to perform, and are, in fact, trained to perform. . . . Conclusory statements about the conditions at Cochran Gardens and the duties of its security guards are not sufficient for Larkin to meet her burden at summary judgment. Accordingly, we conclude that a reasonable juror could not find that the Authority's reliance on the training provided for licensure was inadequate, given the lack of evidence that Cochran Gardens' officers were required to perform unusually challenging duties under unusually challenging conditions. . . . A reasonable juror could not find, from the evidence provided, that a violation of constitutional rights was inevitably going to occur at Cochran Gardens. Although Dr. Fyfe did testify that the three days of training Johnson received, when coupled with the type of situations he could expect to see at Cochran Gardens, made 'it inevitable that those situations will be mishandled and that a tragedy will occur,' he never testified that the inevitability would have been patently obvious to the Authority. Thus, no reasonable juror could find, after considering the evidence regarding the nature of the property and the circumstances regularly faced by the security guards, that the Authority had actual or constructive notice of any inadequacy of the training it provided to the guards."); ***Dunn v. City of Elgin,*** 347 F.3d 641, 646 (7th Cir. 2003) ("Plaintiffs contend that the City of Elgin showed deliberate indifference by failing to provide any training regarding standby service. They argue that because child custody disputes implicate protected constitutional rights, the City had a responsibility to instruct its officers on how to proceed with regard to custody orders. However, Plaintiffs' argument cannot succeed because the City did adequately train its officers regarding standby service. . . . The fact that two police officers did not follow the policy set forth by the City of Elgin is not enough to prove deliberate indifference by the City. Rather, Plaintiffs had to show that the City was aware that unless further training was given the officers would undermine the constitutional rights of others."); ***Lytle v. Doyle,*** 326 F.3d 463, 473, 474 (4th Cir. 2003) ("[T]he Lytles argue that the City should be liable because it showed deliberate indifference to their rights by failing to adequately train Norfolk police officers in citizens' First and Fourteenth Amendment rights. . . . The training provided to officers in the Norfolk Police Department is extensive, varied, and on-going. The officers must attend basic recruit school, receive four months of field training, and attend inservice training and regular seminars on special topics. The Lytles have not provided any evidence that additional training would have resulted in Lieutenant Brewer or the other Norfolk police officers responding any differently. Officers cannot be expected to analyze the complex issues of law surrounding every statute they are required to enforce and then to decide whether the statute is constitutional. And the City cannot be required to anticipate every situation that officers will face. . . The situation here was hardly one that occurred with sufficient

frequency such that a failure to properly train officers to handle it reflected a reckless indifference to the Lytles' rights."); ***S.J. v. Kansas City Missouri Public School Dist.,*** 294 F.3d 1025, 1029 (8th Cir. 2002) ("[T]here was no showing of a 'pattern of misconduct,' and there is, in our view, no 'patently obvious' need for public schools to train volunteers not to commit felonies at home and in their private lives. We are aware of no authority suggesting that public schools have any such obligation, and we do not believe that the evidence can reasonably support a conclusion that Mr. Robertson's crimes can be attributed in any way to a lack of proper training from the school district."); ***Pineda v. City of Houston,*** 291 F.3d 325, 333, 334 (5th Cir. 2002) ("The summary judgment record cannot support the plaintiffs' assertion that the training the SWGTF officers received was inadequate. The plaintiffs presented no evidence regarding additional training the SWGTF officers should have received that would have prevented the incident here − they only repeat that 'specialized narcotics training' was required, without ever defining the content of that statement. This conflates the issue of whether GTF officers were performing certain types of unauthorized investigations with whether they were properly trained in Fourth Amendment law. The plaintiffs must create a fact issue as to the inadequacy of the Fourth Amendment training received by GTF officers. The plaintiffs do not allege, and do not provide evidence, that the officers were so untrained as to be unaware that warrantless searches of residences absent an applicable Fourth Amendment exception, such as consent, were unconstitutional. And we think that ignorance of such basic rules is most unlikely. This stands in marked contrast to *Brown v. Bryan County* and *City of Canton v. Harris.* In *Bryan County* the deputy who caused the plaintiff's injury had received *no* training in proper pursuit and arrest techniques. In *City of Canton* the officer had received rudimentary first-aid training, but allegedly not enough to recognize a detainee's serious illness. There is no evidence in the summary judgment record to indicate that the SWGTF officers' Fourth Amendment instruction was deficient as to when warrantless searches could be performed. Without this evidence plaintiffs cannot survive summary judgment. . . . In this case, the plaintiffs' experts do not reference the Fourth Amendment training the officers had received prior to the shooting. Even assuming the plaintiffs have created a genuine issue of material fact as to whether or not GTF officers were performing narcotics investigations in violation of HPD policy, and that GTF officers were not adequately trained to perform such investigations, that does not mean that their lack of training *caused* the injury to Oregon, which for these purposes we assume was the result of a warrantless search of a residence in violation of the Fourth Amendment. There is no competent summary judgment evidence of any causal relationship between any shortcoming of the officers' training regarding warrantless searches of residences and the injury complained of. Viewing the evidence in the light most favorable to the plaintiffs, the record fails to put at issue whether additional training would have avoided the accident.' [footnotes omitted)); ***Cozzo v. Tangipahoa-Parish Council-President Government,*** 279 F.3d 273, 288. 289 (5th Cir. 2002) ("Although we agree with the district court that the testimony of Ms. Cozzo's expert witness, stating that Joiner never attended Louisiana's 320-hour peace officer training course, provided evidence sufficient for the jury to infer that Sheriff Layrison failed to train Deputy Joiner, we emphasize that proffering this testimony did not end Ms. Cozzo's evidentiary burden. Even taking the evidence in the light most favorable to the jury's verdict that Sheriff Layrisson's failure to train Deputy Joiner actually caused Ms. Cozzo's injury, Ms. Cozzo still bore the onus to prove that this

failure to train constituted deliberate indifference to her right not to be unconstitutionally dispossessed of her property. Kent's testimony alone is, however, insufficient to meet this burden. *See Conner*, 209 F.3d at 798 (stating that plaintiffs generally cannot show deliberate indifference through the opinion of only a single expert). Moreover, Captain Peoples's attestation that, in nineteen years of working for the Sheriff's Department, he had received and was aware of no citizens' complaints against any employee regarding the manner in which orders are served cuts against Ms. Cozzo's failure to train supervisory liability claim. Specifically, the elapsing of almost two decades without any such complaint being lodged suggests that the inadequate training was not 'obvious and obviously likely to result in a constitutional violation.' . . Ms. Cozzo pointed to no other evictions based on TROs or any such similar events in the Sheriff Department's history and therefore neglected to proffer proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different training. As such, Ms. Cozzo adduced evidence legally insufficient to support the jury's finding of deliberate indifference. Accordingly, this case does not fit within the single incident exception, and Sheriff Layrisson has persuasively argued that the district court erred in concluding that Ms. Cozzo demonstrated failure to train supervisory liability."); ***Isbell v. Ray***, 208 F.3d 213 (Table), 2000 WL 282463, at *8 (6th Cir. Mar. 8, 2000) (" We hold that Isbell has failed to demonstrate that Dekalb County had a policy or custom of inadequately training its law enforcement officers with respect to strip searches. There was a policy. . . that strip searches were to be conducted only upon 'reasonable belief that a person could have drugs, any kind of contraband or weapons.' . . . Although the jailer Tom Lassiter, who allegedly participated in the search, expressed ignorance about the rules for conducting a strip search and stated that he had never been given a policy statement on this subject, this fact alone is not enough to show a deliberate policy of inadequate training on the part of the county. . . . Isbell has not pointed to any other cases of inappropriate strip searches conducted by Dekalb County officers. . . Nor has he shown that his case fits into that narrow class of circumstances in which the risk of injury is so obvious, and constitutional violations are so predictable, that the failure to train officers in strip search procedure is, without more, evidence of deliberate indifference. . . Isbell's conclusory statement that the risk of constitutional violation is particularly obvious because Dekalb County deputies are authorized to conduct strip searches in a recurring set of circumstances is not sufficient to meet this test. He has pointed to nothing unique about the nature of strip search procedure that would put it in this narrow category of cases."); ***Conner v. Travis County***, 209 F.3d 794, 797 (5th Cir. 2000) ("The Conners did not attempt to prove that the County's failure to train its staff in distinguishing between emergency and non-emergency conditions was deliberately indifferent by showing that prior incidents gave the County or Keel notice of the need for specific training. Instead, they rely on the single episode with Mr. Conner and on their experts' statements about the need for more training. We have previously noted the difficulty plaintiffs face in attempting to show deliberate indifference on the basis of a single incident. . . .We can reasonably expect − if the need for training in this area was 'so obvious' and the failure to train was 'so likely to result in the violation of constitutional rights' − that the Connors would be able to identify other instances of harm arising from the failure to train. The fact that they did not do so undercuts their deliberate indifference claim.").

See also ***Sigle v. City of Chicago***, No. 10 C 04618, 2013 WL 1787579, *9, *10 (N.D. Ill. Apr. 25, 2013) ("Sigle offers various complaint registers, lawsuits, and public documents as evidence, but has not proffered any expert testimony opining on the integrity of the complaint register investigations, nor has he adduced deposition testimony of OPS or IPRA investigators familiar with the City's investigation and discipline process. Without more, the plaintiff cannot show that there was an obvious need for further discipline, or that the investigatory and disciplinary procedures in place were plainly inadequate. Without such evidence, a jury could not reasonably conclude that the City had a widespread policy of indifference based only on the defendant officer's complaint register histories, civil rights lawsuits, and statistics regarding the rate of sustained complaints."); ***Bowen-Soto v. City of Liberal, Kan.*** No. 08-1171-MLB, 2010 WL 4643350, at *7, *8 (D. Kan. Nov. 9, 2010) ("There is no Tenth Circuit case similar to *Cruz* which explicitly holds that a police officer violates a person's constitutional rights by failing to recognize excited delirium, nor is there any Tenth Circuit case which holds that a police officer commits a constitutional violation by failing to immediately summon medical assistance for someone suffering from excited delirium. Finally, there is no Tenth Circuit case which holds that a municipality can be 'deliberately indifferent' for failing to train its officers to immediately summon medical help for someone who is experiencing excited delirium. The undisputed facts are that medical assistance *was* summoned within 9 minutes of Soto being subdued. This may not have been soon enough in the opinion of plaintiff's police expert, but the 'delay' does not amount to deliberate indifference by the officers under *City of Canton* and Tenth Circuit case law."); ***Sabo v. City of Mentor***, No. 1:10-CV-00345, 2010 WL 4008823, at *7, *8 (N.D. Ohio Oct. 12, 2010) ("Here, the Plaintiff makes no allegation of repeated complaints and instead relies upon the claim that it was foreseeable that not training officers on when to summon the hostage negotiation team would result in the death of barricaded suspects. . . To prove deliberate indifference under this approach, a plaintiff must show that there was an 'obvious' potential for a constitutional violation. . .Aside from pointing to the statements of Captain Knight that the City of Mentor had no formal training program in place, the Plaintiffs proffer no evidence supporting their claim of deliberate indifference. In light of the heavy showing required to prove deliberate indifference, the Plaintiff fails to create a genuine issue of material fact on the second element of the failure to train claim."); ***Trinidad v. City of Boston***, No. 07-11679-DPW, 2010 WL 2817186, at *13 (D. Mass. July 16, 2010) ("As a result of these two incidents, LoPriore was disciplined by the City of Boston, which imposed a sixty-day suspension without pay, with twenty days to be served and the remainder to be held in abeyance for one year as well as a permanent placement on administrative duty as of May 21, 2004. By imposing this sanction on LoPriore, the City cannot be said to have disregarded 'a known or obvious risk of serious harm.' *Young*, 404 F.3d at 28. To the contrary, placing LoPriore on administrative duty appeared, at the time, to be an adequate and measured sanction to known and knowable conduct by LoPriore and adequately designed to prevent the recurrence of the type of violations arising out of the two prior incidents. . . . Under these circumstances, I find that no reasonable jury could conclude that the City of Boston's investigation of these two incidents, as well as the discipline imposed on LoPriore as a result thereof, demonstrate that it acted in 'deliberate indifference' of Trinidad's constitutional rights."); ***Montes v. County of El Paso,***

Tex., No. EP-09-CV-82-KC, 2010 WL 2035821, at *17 (W.D. Tex. May 18, 2010) ("In failure-to-train cases, the Fifth Circuit has created a burden-shifting test and has explicitly held that when police officers 'have received training required by Texas law, the plaintiff must show that the legal minimum of training was inadequate.' *Sanders-Burns v. City of Plano*, 594 F.3d 366, 382 (5th Cir. 2010). . . . [T]he Plaintiffs have not carried their burden as to the failure-to-train theory, because they have not mustered enough evidence, even when viewed in a light favorable to them, to show that Ramos was inadequately trained."); ***Pickens v. Harris County***, Civil Action No. H-05-2978, 2006 WL 3175079, at *18 (S.D. Tex. Nov. 2, 2006) ("The inability to show a causal link between the training Jones received and his failure to identify Pickens as an off-duty officer is not the only basis to distinguish *Young*. As noted, in *Young*, the off-duty officers operated under a more rigid 'always on, always armed' policy than was present in this case. In *Young*, the First Circuit applied a different standard for deliberate indifference than the Fifth Circuit follows. . . .[I]n the Fifth Circuit, . . . a plaintiff 'usually must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation.' . . . The record does not show a pattern of misidentification that would put Harris County on notice of an obvious need for additional, particularized training, so as to make the failure to provide it deliberate indifference. The defendants offer evidence of three previous friendly-fire incidents, two involving plainclothes on-duty officers, and one involving a uniformed on-duty officer. . . Pickens is the first off-duty law-enforcement officer in Harris County to be shot by on-duty officers. . . The plaintiffs did not produce any additional evidence of friendly-fire shootings. . . . The plaintiffs offer no evidence that inadequate training in on-duty/off-duty officer encounters caused Jones to shoot Pickens. The plaintiffs offer suggestions as to additional training for off-duty officers like Pickens, not on-duty officers like Jones. . . . The record does not support a finding that a particular defect in Jones's training caused him to act in an objectively unreasonable way. In this case, unlike *Young*, the record does not raise a fact issue as to whether, had Jones received specific additional or different training, he would have recognized Pickens as an officer and the shooting would not have occurred. Summary judgment is granted on the failure-to-train and related claims."); ***Williams v. City of Beverly Hills, Mo.***, No. 4:04-CV-631 CAS, 2006 WL 897155, at *16 (E.D. Mo. Mar. 31, 2006) ("Plaintiff's contention that the municipalities should have offered their officers training in ramming or PIT maneuvers does not establish a genuine issue of material fact on his failure to train claims. Plaintiff has cited no cases in which courts have held that failure to train in ramming or PIT maneuvers resulted in a violation of constitutional rights where officers were trained in pursuits and defensive driving tactics. In addition, there is no evidence in the record that Beverly Hills or Pine Lawn had notice that their procedures were inadequate or likely to result in a violation of constitutional rights. There is no evidence that prior instances of ramming occurred in either municipality, or that any complaints concerning ramming were made to either municipality. Thus, it cannot be said that the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the municipalities were deliberately indifferent to the need."); ***Logan v. City of Pullman***, No. CV-04-214-FVS, 2006 WL 120031, at *5 (E.D. Wash. Jan. 13, 2006) ("Here, Plaintiffs argue that in failing to provide 'meaningful, substantive, and practical training regarding the use of O.C. spray in indoor locations, the use of non-violent techniques, and the limits of constitutional force,' the City acted with deliberate

indifference to Plaintiffs' constitutional right to be free from excessive force. . . To succeed on this cause of action, Plaintiffs must show the need to train the officers on using O.C. spray indoors was so obvious and the failure to adopt such a specific training program was so egregious that it rose to the level of deliberate indifference. . . . Plaintiffs have produced no evidence showing the alleged inadequacy of the City's training was the result of a 'deliberate' or 'conscious' choice, which, under *Canton*, is necessary to establish a municipal policy. Absent any evidence showing the alleged inadequacy in the officers' training was the result of a 'conscious' or 'deliberate' choice, any shortcomings in the training can only be classified as negligence on the part of the City, which is a much lower standard than deliberate indifference standard adopted by the Supreme Court in *Canton*."); ***Atak v. Siem***, No. Civ. 04-2720DSDSRN, 2005 WL 2105545, at *5 (D. Minn. Aug. 31, 2005) (not reported) ("Plaintiff's claim against the City is based upon the single incident with defendant Siem. To support his claim, plaintiff points only to an expert's testimony that the need to train officers 'is so obvious' that the City's failure to adequately train officials 'can only be seen as deliberate indifference.' . . Plaintiff's expert emphasizes that the City failed to train officers to carry the Taser on the weak side of their body. However, plaintiff must show that the training deficiency was 'so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'. . Plaintiff has failed to make such a showing or to offer any evidence of recurring situations that alerted or should have alerted the City to any obvious need to further train its officers. Therefore, summary judgment in favor of the City is appropriate."); ***Leonard v. Compton***, No. 1:03CV1838, 2005 WL 1460165, at *8 (N.D. Ohio June 17, 2005)(not reported) ("Other than relying on the constitutional violation itself to establish the existence of inadequate training, plaintiffs have presented no evidence to suggest that the City of Cleveland disregarded an obvious need for training or that such disregard culminated with Ms. Leonard's injury. Although plaintiffs argue that the City of Cleveland has failed to properly train officers on the enforcement of Civil Domestic Relations Orders, they have not pointed to any evidence in the record which actually demonstrates whether or not the City of Cleveland specifically conducts training on this issue. . . Even assuming that the City of Cleveland provides no specific training on this issue, plaintiffs' claim would still fail as they have provided nothing to suggest that the failure to conduct training in this area constitutes a deliberate choice to disregard an obvious risk of constitutional violations. On the contrary, the evidence in this case does not suggest the need for such training to avoid the constitutional injury suffered by Ms. Leonard. Indeed, Officer Durbin testified that this incident was the first time in his ten-year career that he arrested someone when effectuating a parent's court-ordered visitation rights. . . . Because plaintiffs have failed to provide sufficient evidence that the City of Cleveland's deliberate indifference to an obvious need for training led to Ms. Leonard's constitutional injury, the City of Cleveland is entitled to summary judgment on plaintiffs' Section 1983 claim."); ***Perez v. Miami-Dade County,*** 348 F.Supp.2d 1343, 1352, 1353 (S.D. Fla. 2004) ("A court must look to the 'particular area' of need to determine whether training was so obviously necessary that failure to provide training constituted deliberate indifference. . . Thus, in *City of Miami*, the Court determined that a claim of inadequate training in the use of handcuffs failed because the Plaintiff 'presented no evidence of a single prior incident in which a City police officer caused an injury by excessive force in handcuffing.' . . Similarly, here, Plaintiff

has provided no evidence of any incident where Defendant's police officer unlawfully used a vehicle as a deadly weapon. On the other hand, Defendant has presented evidence that it has a training program that teaches its officers not to use their vehicles in a deadly manner except when necessary to protect their life or the lives of others. In such a case, the Court must find that the County did not inadequately train its officers in the use of vehicles as a deadly weapon or systematically cover-up the improper use of vehicles by its officers."); ***Brown v. City of Milwaukee,*** 288 F.Supp.2d 962, 980, 981 (E.D. Wis. 2003) ("The City does not dispute that it had an express policy that, under certain circumstances, officers stopping vehicles for investigative purposes were to surround the vehicle and order the driver out at gunpoint while shouting commands laced with profanities. The City admits that it trained police officers to use this tactic. Plaintiff does not contend that the City's policy was facially unconstitutional but, rather, that it was unconstitutional as applied to the stop of her vehicle. . . . . Plaintiff argues that the City failed to provide any supervision, monitoring or oversight of police officers who implemented the policy, and that such failure amounted to deliberate indifference to the policy's obvious consequences. The City does not dispute that, at the time of the incident, the policy contained no mechanism to review its use. The policy did not require officers who used the sensory overload tactic to advise their superiors of such use or document their actions and the results in reports. Plaintiff argues that it should have been obvious to the City that without supervision and monitoring the consequences of a policy endorsing such highly intrusive conduct would be that individuals' constitutional rights would be violated. However, under Seventh Circuit law, a City cannot be held liable for deliberate indifference unless the plaintiff establishes that the City was or should have been aware of a *pattern* of constitutional violations caused by its policy. . . Here, plaintiff does not present evidence of a pattern of constitutional violations caused by the use of the sensory overload tactic; she refers only to her own experience. Thus, plaintiff may not prevail on her theory that the City was deliberately indifferent to the known or obvious consequences of its policy approving of the use of this tactic."); ***Pliakos v. City of Manchester,*** No. 01-461-M., 2003 WL 21687543, at *17 (D.N.H. July 15, 2003) (not reported) ("The fact that the Manchester Police Department produced a training video discussing the risk factors associated with positional asphyxia suggests that it was engaged in a reasonable effort to keep its officers informed of the latest information available concerning safe methods by which subjects might be restrained. That the individual defendants in this case may not have seen the training video until after the events at issue here, or that they saw but did not benefit from it, does not, without more, amount to 'deliberate indifference' on the part of the municipality."); *But see* ***Gray v. City of Columbus***, No. IP98-1395-C H/G, 2000 WL 683394, at *4 (S.D. Ind. Jan. 31, 2000) ("The written policy plays a critical role in shaping the legal issues in this case. Both Officers Yentz and Darnall testified they were aware of no such policy. Chief Latimer was also not aware of the policy, or else his memory of it was buried so deeply that he did not remember it even when he was personally responding to a document request for policies on searches in a case alleging unconstitutional strip searches and body cavity searches. On this record, a jury could reasonably conclude that the city went to the trouble of formulating a policy on this subject but was deliberately indifferent to the need to provide officers with at least some minimal guidance or training on the subject.").

See also ***Ross v. Town of Austin,*** 343 F.3d 915, 918, 919 (7th Cir. 2003) ("42 U.S.C. § 1983 imposes upon municipalities no constitutional duty to provide law enforcement officers with advanced, specialized training based upon a general history of criminal activity in the community. Here, the fact that APD officers had dealt with armed felons in the past did not obligate Appellees to anticipate the utility of hostage negotiation or tactical combat training. In the context of a failure-to-train claim, deliberate indifference does not equate with a lack of strategic prescience. The fact that Noble, a police officer in a town with a population of fewer than 5000, completed training from the Indiana Law Enforcement Academy and had met all other statutorily mandated training standards, is further evidence that, as a matter of law, it was not the policy of Appellees inadequately to train police officers. By creating a law requiring municipalities to exceed the standards for police training established by state law, not only would this court exceed the scope of our judicial authority by usurping the policy-making authority of state legislators, but we would also impose upon smaller municipalities such as Austin, the untenable burden of maintaining the same standards of law enforcement training specialization as those of large cities or even national armies. Even were it within the province of this court to establish such a policy, it seems neither wise nor practical. Finally, neither Richey's preference for 'street' training of police officers nor his failure to attend a mandatory state training program for chiefs of police evinces an official policy of inadequately training APD officers or a deliberate indifference to the constitutional rights of the citizens of Austin. It does not follow logically from Richey's more favorable opinion of the value of on-the-job experience that he or the APD eschewed formal training as a matter of policy. Nor does his own failure to attend the mandatory training program demonstrate that he, the APD, or the Town had adopted a policy of failing to train Noble or other officers. Tamra does not suggest, and we do not discern, what constitutional harm might have been avoided by Richey's attendance of the training program."); ***Pena v. Leombruni***, 200 F.3d 1031, 1033 (7th Cir. 1999) ("[F]ailing merely to instruct police on the handling of dangerous people who appear to be irrational cannot amount to deliberate indifference, at least on the facts presented in this case. The sheriff had announced a policy that . . . the deputies were not to use deadly force unless they (or other persons) were threatened by death or great bodily harm, and this policy covered the case of the crazy assailant, giving him all the protection to which constitutional law entitled him. Maybe despite what we have just said it would be desirable to take special measures to render such a person harmless without killing or wounding him, . . . but if so the failure to adopt those measures would not be more than negligence, which is not actionable under section 1983."); ***Gold v. City of Miami***, 151 F.3d 1346, 1351, 1352 (11th Cir. 1998) ("This Court repeatedly has held that without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train and supervise. . . . In *City of Canton v. Harris*, . . . the Supreme Court in dictum left open the possibility that a need to train could be 'so obvious,' resulting in a City's being liable without a pattern of prior constitutional violations. . . . [T]o date, the Supreme Court has given only a hypothetical example of a need to train being 'so obvious' without prior constitutional violations: the use of deadly force where firearms are provided to police officers."); ***Febus-Rodriguez v. Betancourt-Lebron***, 14 F.3d 87, 93 n.6 (1st Cir. 1994) ("[W]e do not find that the need to extensively train officers about how to identify and deal with mentally handicapped persons is so obvious, that failure to give this training supports a finding of reckless or callous

indifference to constitutional rights."); ***Benavides v. County of Wilson***, 955 F.2d 968, 975 (5th Cir. 1992) (no deliberate indifference based on Sheriff's failure to conduct further investigations of his deputies, beyond good-faith investigation of applicant's known arrest record), *cert. denied sub. nom. Bassler v. County of Wilson*, 113 S. Ct. 79 (1992); ***Graham v. Sauk Prairie Police Commission***, 915 F.2d 1085, 1104 (7th Cir. 1990) (where villages had taken a number of reasonable steps to investigate police applicant's background, failure to take additional screening steps was not so obvious as to constitute deliberate indifference to constitutional rights); ***Dorman v. District of Columbia***, 888 F.2d 159, 164 (D.C. Cir. 1989) (need for specific training in suicide prevention beyond what officers received, in contrast with need for training in use of deadly force, was not so obvious that city's policy could be characterized as deliberately indifferent); ***Holiday v. City of Kalamazoo,*** 255 F. Supp.2d 732, 738, 739 (W.D. Mich. 2003) ("The deficiency in KDPS' training that Holiday alleges is a failure to specifically instruct the officers in situation where the canine handler is incapacitated and not present at the scene of a canine apprehension. While such a situation occurred in the instant case, it is nonetheless a very unlikely scenario. Under *Harris*, KDPS is only required to adequately train its officers 'to respond properly to the usual and recurring situations which they must deal,' not every remotely-possible situation the imagination can conjure. . . KDPS' training program was adequate to train its officers to deal with routine apprehensions involving police dogs and their handlers."); ***Owens v. City of Fort Lauderdale,*** 174 F. Supp.2d 1282, 1297, 1298 (S.D. Fla. 2001) ("The plaintiffs also contend that this case fits into the narrow range of circumstances in which the need to train was so obvious that the failure to do so can be said to have been deliberately indifferent. . . The only hypothetical example the Supreme Court has given of a need to train that is 'so obvious' without prior constitutional violations is the use of deadly force when officers are provided with firearms. . . . The plaintiffs contend that this case falls within the 'narrow range of circumstances, [when] a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.' . . . The plaintiffs analogize the failure to train officers specifically in the use of neck restraints to the failure to train officers in the use of firearms. I do not think the analogy is apt. This is simply not the type of case in which Byron's injury was 'a highly predictable consequenc' of a failure to train regarding neck restraints. . . . The plaintiffs can simply not show that the likelihood that officers will be forced to restrain citizens − and especially mental patients such as Byron − using choke holds, or lateral vascular neck restraints is so obvious, and constitutional violations so likely to result that the failure of the City to train on the use of choke holds was deliberately indifferent."); ***Tennant v. Florida***, 111 F. Supp.2d 1326, 1335 (S.D. Fla. 2000) ("The court concludes that this case is like *Gold*, where the Eleventh Circuit concluded that the need to train police in the proper response to handcuff complaints is not so obvious that it would support a finding of deliberate indifference without proof of prior incidents."); ***Bullard v. City of Mobile***, No. CIV. A. 00-0114-CB-M, 2000 WL 33156407, at *8 n.6 (S.D. Ala. Dec. 11, 2000) ("It can hardly be said . . . that failure to train every police officer in negotiating tactics or in the use of a bean bag gun or to pick up a knife within thirty seconds would so obviously lead to the violation of a constitutional right that the City could be considered deliberately indifferent."); ***Guseman v. Martinez***, 1 F. Supp.2d 1240, 1261 (D. Kan. 1998) ("It would not have been 'known or obvious' to a reasonable policymaker that a failure to provide immediate further training would

likely result in a deprivation of constitutional rights. Such an eventuality would have seemed remote prior to this incident. Despite the fact that the city had no policy prohibiting restraint techniques of the type challenged, no person had ever before died of positional asphyxiation while in Wichita police custody. There were no known court decisions finding that the use of prone restraint techniques on a person who had resisted arrest was a violation of the person's constitutional rights. The materials in the record indicate that positional asphyxiation is a relatively rare event brought on by a unique combination of circumstances. Plaintiffs cite no evidence that the dangers of positional asphyxiation were widely understood prior to this incident or that police departments in general considered such information to be an essential part of their training regimens."); ***Barber v. Guay***, 910 F. Supp. 790, 801 (D. Me. 1995) ("A failure to train claim must establish deliberate indifference. Here there is no evidence that [Sheriff] Havey knew of any poor police work on the part of Guay to the extent that Havey's failure to supplement Guay's training would necessarily lead to the violation of constitutional rights."); ***Dansby v. Borough of Paulsboro***, No. CIV. A. 92-4558(JEI), 1995 WL 352995, *16 (D.N.J. June 7, 1995) (not reported) ("While plaintiff has adduced evidence that the Paulsboro police received no training on the enforcement of municipal ordinances or the sign-posting statute, this Court simply cannot believe that a small municipality must provide each police officer with extensive training on every obscure state statute and local ordinance. Indeed, plaintiff's assertion that the statutes at issue were rarely, if ever, enforced undercuts his argument that municipal policymakers were deliberately indifferent to the rights of citizens that were violated by the enforcement of these laws."); ***Anderson v. City of Glenwood***, 893 F. Supp. 1086, 1090 (S.D. Ga. 1995) ("The State training is modelled on minimum legal standards under Georgia law, and without other evidence to support a finding of deliberate indifference, the fact that an officer received most of his training through the State and not from his small town police force is not nearly enough to accuse that town of deliberate indifference to the needs of its citizenry. [cites omitted] Anderson also has failed to reveal a direct causal link between not studying the Glenwood policies and procedures (as opposed to general State procedures) and the shooting in this case."); ***Wyche v. City of Franklinton***, 837 F. Supp. 137, 144-45 (E.D.N.C. 1993) ("As evidence that the Town of Franklinton displayed deliberate indifference, the plaintiff relies on the fact that the Town of Franklinton had no written policy on training, responding to 'abnormal mental behavior' calls, hiring, supervision, or equipping officers. In further support of her contention, the plaintiff submitted documents showing that the Town of Franklinton spent less than 1% of its annual budget on police training; that only one officer was on duty during the 8:00 p.m. to 8:00 a.m. shift; that the Town of Franklinton had no specific policy or procedure for investigating complaints against police officers; and, that alternative forms of restraint, such as chemical sprays or stun guns, were not available to [defendant]. The defendants do not dispute that the above facts are true. However, these facts do not aid the plaintiff in meeting her burden of showing deliberate indifference. The plaintiff has not shown that Franklinton police officers needed additional training in the use of force or had a history of using excessive force."); ***Fittanto v. Children's Advocacy Center***, 836 F. Supp. 1406, 1418 (N.D. Ill. 1993) ("Absent any evidence that the Village should have been on notice of the need for specialized training [in investigation of child sexual abuse], a reasonable jury could not conclude that the need was so obvious and the inadequacy so likely to result in constitutional

violation that the Village could be said to have been consciously indifferent."); ***Behrens v. Sharp***, CIV. A. No. 92-1498, 1993 WL 205078, *4 (E.D. La. June 8, 1993) (not reported) ("There is no evidence that the alleged inadequate training of detectives to investigate cases of alleged sexual abuse of a child was 'so obvious ... and likely to result in violations of constitutional rights' that Sheriff Canulette can be said to have been deliberately indifferent to such rights in adopting his training policy."), *aff'd*, 15 F.3d 180 (5th Cir. 1994)(Table), *cert. denied*, 114 S. Ct. 2711 (1994); ***Fulkerson v. City of Lancaster***, 801 F. Supp. 1476, 1486 (E.D. Pa. 1992) (no "obvious need" for specialized training in high-speed pursuits, beyond what was given), *aff'd*, 993 F.2d 876 (3d Cir. 1993); ***Brown v. City of Elba***, 754 F. Supp. 1551, 1558 (M.D. Ala. 1990) (failure to train officers in handling of domestic disputes is not so obviously likely to result in constitutional violations as to satisfy deliberate indifference standard); ***East v. City of Chicago***, 719 F. Supp. 683, 694 (N.D. Ill. 1989) (unlike use of force problem, ingestion of drugs by arrestees was not so common or obvious that City should have recognized need for training in that area).

Compare ***Carswell v. Borough of Homestead***, 381 F.3d 235, 245 (3d Cir. 2004) ("[W]e have never recognized municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons. We decline to do so on the record before us. . . . Mandating the type of equipment that police officers might find useful in the performance of their myriad duties in frequently unanticipated circumstances is a formidable task indeed. It is better assigned to municipalities than federal courts. We conclude that the judgment as a matter of law in favor of the Borough and Chief Zuger as well as that in favor of Snyder must be affirmed.") *with* ***Carswell v. Borough of Homestead***, 381 F.3d 235, 246-50 (3d Cir. 2004) (McKee, J., concurring in part and dissenting in part) ("As the majority ably discusses, the fact that a jury could conclude that Snyder used excessive force to subdue Carswell and thus violated Carswell's Fourth Amendment rights is not enough, standing alone, to deprive him of qualified immunity. It is, however, enough to support a finding that the use of excessive force resulted from the Borough's policy and custom of providing police officers only with guns, i.e. lethal weapons.[footnote omitted] The jury could conclude from Snyder's testimony that, at the very moment he fired the fatal shot, he believed that he was using excessive deadly force where non-lethal force would suffice. Indeed, if the jury accepted his testimony as true, it would have been hard to conclude anything else. The jury could therefore reason that the officer had to resort to excessive force solely because the Borough left him no alternative but to use his gun in a situation where non-lethal force could reasonably have been employed to subdue Carswell. . . . I believe that a jury could reasonably conclude that this record establishes such deliberate indifference because the Borough's training left Officer Snyder with no reasonable alternative to the use of deadly force. . . . Police Chief Zuger compiled the policy manual for the Borough's police department pursuant to his authority as police chief. . . The manual contains the Borough's official policy for the police department, and all police officers in the Borough were required to familiarize themselves with it and attest to having read it. It prescribes an official policy of 'progressive force' for the Borough's police, stating that '[t]he use of force will be progressive in nature, and may include verbal, physical force, the use of non-lethal weapons or any other means at the officer's disposal, provided they are reasonable under the circumstances.' . . Chief Zuger testified further that '[t]he policy of the Homestead Police

Department is to use only the amount of force which is necessary in making an arrest or subduing an attacker. In all cases, this will be the minimum amount of force that is necessary.' . . . [footnote omitted] However, as the majority notes, the Borough provided only guns to its officers. It did not equip them with any non-lethal weapons. Rather, an officer had to request any non-lethal weapon he/she might wish to carry and the request had to be approved by Zuger. If the request was approved, the officer then had to undergo additional training with the new weapon and become certified to use it. . . Although Chief Zuger was not asked about training in lethal force, the fact that officers were equipped with a gun and had to be trained in any approved non-lethal weapon they may have carried certainly supports the inference that the Borough only trained officers in the use of lethal force unless the Borough approved an individual request for a non-lethal weapon. It is obviously foreseeable that an officer who is equipped only with a lethal weapon, and trained only in the use of lethal force, will sooner or later have to resort to lethal force in situations that officer believes could be safely handled using only non-lethal force under the Borough's own 'progressive force' policy. This record therefore presents that 'narrow range of circumstances, [where] the violation of federal rights [is] a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.' . . . [D]efining our inquiry in terms of whether the Constitution creates an approved 'equipment list' for police is both misleading and counterproductive. That is simply not the issue, and that formulation of the issue obfuscates our inquiry rather than advancing it. Given the duties of a police officer, it was certainly foreseeable that the Borough's policy of equipping officers only with guns and training them only in the use of deadly force would sooner or later result in the use of unjustifiable deadly force. . . . The result is. . .not a mandated equipment list, but a mandated alternative to using deadly force in those situations where an officer does not believe it is necessary to use deadly force. . . . Moreover, interpreting the Fourth Amendment as requiring municipalities to provide reasonable alternatives to the use of deadly force imposes no undue burden. In fact, here, it would do nothing more than effectuate the Borough's own announced policy of 'progressive force.' My colleagues imply that the Borough can not be liable under a failure to train theory because its police officers were properly trained in the use of deadly force. . . . However, plaintiff never argued that liability should be imposed on the basis of a failure to train in the use of deadly force. Rather, plaintiff argues that the Borough should be liable because its policy of requiring training only in using deadly force and equipping officers only with a lethal weapon, caused Officer Snyder to use lethal force even though he did not think it reasonable or necessary to do so. Moreover, as I have already noted, given the duties of a police officer, it does not require a 'pattern of underlying constitutional violations' to alert the Borough to the fact that its policies would cause police to unnecessarily use deadly force. Rather, as I have argued above, this record satisfies the teachings of *Brown* because plaintiffs have established that 'narrow range of circumstances, [where] a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.'. . Thus, even without a pattern of abuse, '[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision ... reflected Adeliberate indifference' to the obvious consequence of the policymakers' choice.'").

See also ***Estate of Larsen v. Murr***, No. 03 CV 02589 MSK OES, 2006 WL 322602, at *6 (D. Colo. Feb. 10, 2006) ("The Estate also contends that, at the time of Mr. Larsen's death, the City engaged in a custom of not arming officers with 'less-lethal' weapons. In 2000, the City assembled a committee to address whether to provide 'less-lethal' weapons to patrol officers, but the committee had not finished its work by the time of Mr. Larsen's death. 'Less-lethal' weapons such as Tasers, the 'less-lethal' shotgun, and the pepper ball were available at the time of Mr. Larsen's death but had not been provided to patrol officers. It was not until April 2003 that the City began deploying Tasers to patrol officers. It did not deploy the less-lethal shotgun or pepper ball to patrol officers until later that year. It is unclear that the City engaged in a deliberate decision not to deploy 'less-lethal' weapons between 2000 and 2003. However, assuming it did and that such behavior amounts to a 'custom or policy', there is no evidence in the record that Officer Murr would have acted any differently had he been equipped with a 'less lethal' weapon. He testified that he believed that Mr. Larsen was going to kill him. The Court cannot speculate that if Officer Murr had been issued a 'less-lethal' weapon, he would have chose to use it in these circumstances. Thus, the Court cannot conclude that the failure to issue 'less-lethal' weapons caused Mr. Larsen's death.").

Under some circumstances, having no policy may constitute deliberate indifference. *See, e.g.,* ***Vineyard v. County of Murray, Georgia***, 990 F.2d 1207, 1212 (11th Cir. 1993) ("The evidence demonstrates that the Sheriff's Department had inadequate procedures for recording and following up complaints against individual officers. . . . no policies and procedures manual. . . . [and] inadequate policies of supervision, discipline and training of deputies in the Murray County Sheriff's Department. . . ."); ***Oviatt v. Pearce***, 954 F.2d 1470, 1477-78 (9th Cir. 1992) (decision not to take any action to alleviate the problem of detecting missed arraignments constitutes a policy of deliberate indifference to the obvious likelihood of prolonged and unjustified incarcerations); ***Reynolds v. Borough of Avalon***, 799 F. Supp. 442, 447 (D.N.J. 1992) ("We hold that a reasonable jury might find that the risk of sexual harassment in the workplace is so obvious that an employer's failure to take action to prevent or stop it from occurring − even in the absence of actual knowledge of its occurrence − constitutes deliberate indifference, where the employer has also failed to take any steps to encourage the reporting of such incidents."); ***DiLoreto v. Borough of Oaklyn***, 744 F. Supp. 610, 623-24 (D.N.J. 1990) ("By not creating and implementing a policy and not training its employees regarding accompanying detainees to the bathroom, the Borough has expressed deliberate indifference to the fourth amendment rights of detainees....").

Note also that at least one court of appeals has rejected the notion "that a municipality may shield itself from liability for failure to train its police officers in a given area simply by offering a course nominally covering the subject, regardless of how substandard the content and quality of that training is." ***Russo v. City of Cincinnati***, 953 F.2d 1036, 1047 (6th Cir. 1992) (simple fact that officers received some training in course entitled "Disturbed-Distressed Persons" and that Department had policy of handling barricaded persons, did not necessitate finding that training was adequate as matter of law).

b. constructive notice cases

In ***Kerr v. City of West Palm Beach***, 875 F.2d 1546 (11th Cir. 1989), the court of appeals reinstated a verdict against the City, concluding that there was sufficient evidence from which the jury could have found that the plaintiffs' injuries were caused by the failure of the City and the former police chief to adequately train and supervise performance of the police department's canine unit, and that this failure constituted deliberate indifference to the constitutional rights of the plaintiffs. *Id*. at 1555-56. The evidence introduced included the following:

*officers in City's canine unit resorted to use of canine force more frequently than did officers in other cities

*the high ratio of bites to apprehensions was viewed in other canine units as a sign of irresponsible use of force

*officers in the canine unit often used excessive force when subduing individuals suspected of minor misdemeanor offenses

*reports were filed by officers whenever apprehensions resulted in bites; such reports were reviewed by the police chief

* City was aware of the deficiencies in the training and supervision of the canine unit

The jury could reasonably conclude the City's failure to take any remedial action amounted to deliberate indifference. *Id*. at 1557.

But see ***D.H. v. City of New York***, 309 F.Supp.3d 52, ___ (S.D.N.Y. 2018) ("In an attempt to establish the City's awareness of the purported unlawful enforcement of section 240.37, the amended complaint references three lawsuits since 2008 in which the plaintiffs in those lawsuits alleged that NYPD officers effected unlawful arrests under section 240.37, none of which resulted in a finding of liability or an admission of liability. . . Three allegations of wrongdoing over the course of eight years in a police department with more than 35,000 officers do not indicate that that unlawful enforcement of the statute is a known or obvious result. . . Further, plaintiffs have not asserted that any of these alleged unlawful arrests were related to the challenged municipal acts, nor have they indicated that the City failed to take any remedial action after the lawsuits were initiated. . .Additionally, plaintiffs present a statement from a former NYPD officer that performance goals and arrest quotas cause officers to target the black, Hispanic, and LGBT communities. . . This statement was made on March 1, 2016—after each of the alleged violations. . . Even if the Court assumes that a statement by a single officer in a department with over 35,000 officers would suffice to establish that unlawful enforcement is a known or obvious result of performance goals and arrest quotas, the City would not have known, based on that statement, until after the alleged the violations occurred, meaning that deliberate indifference in light of this allegation could not have caused plaintiffs' injuries. Plaintiffs have not adequately alleged that the

City was deliberately indifferent."); ***Samarco v. Neumann***, 44 F. Supp.2d 1276, 1288 (S.D. Fla. 1999) ("Evidence of a pattern or series of incidents is required to subject a government entity to liability. . . Proof of one or two incidents is not enough. . . Samarco must submit evidence of deficiencies on the Sheriff Office's general training of all its canine deputies, which he has failed to do. . .Thus, he has not produced evidence creating a genuine issue of material fact that the Sheriff's Office has a policy of failing to train its canine units on the proper use and limits of force. Absent a policy to use the canine teams in an unconstitutional manner or evidence that Sheriff Neumann was deliberately indifferent regarding the training of these teams, summary judgment in favor of Sheriff Neumann in his official capacity is warranted.").

See also ***Okin v. Village of Cornwall-On-Hudson Police Dept.***, 577 F.3d 415, 440, 441 (2d Cir. 2009) ("Municipal liability may also be premised on a failure to train employees when inadequate training 'reflects deliberate indifference to ... constitutional rights.'. . .We have no trouble in finding that policymakers would know that officers will confront domestic violence situations, that training assists officers to employ criminal justice strategies attuned to the complexities of domestic violence, and that in Okin's case, the record indicates a history of mishandling her complaints. There is also a strong likelihood that the officers' repeated failures to meaningfully respond to Okin, potentially enhancing the risk of violence, qualifies as a pattern of misconduct that would frequently cause violations of a citizen's constitutional rights and that suggests training so inadequate as to give rise to an inference of deliberate indifference. . . . A closer question is whether Okin, in order to proceed beyond summary judgment on the failure-to-train theory, has 'identif[ied] a specific deficiency in the city's training program and establish[ed] that that deficiency is closely related to the ultimate injury, such that it actually caused the constitutional deprivation.'. . . A pattern of misconduct, while perhaps suggestive of inadequate training, is not enough to create a triable issue of fact on a failure-to-train theory. . . . We agree with the district court's observation that the record shows more than a pattern of misconduct. Because some of the officers were unable during their depositions to remember basic details regarding their training on domestic violence, a reasonable factfinder could plausibly infer that the training program failed to impart with the necessary frequency or specificity how to appropriately respond to domestic violence complaints, including the circumstances that call for interviewing suspects and witnesses, filing domestic incident reports, and making an arrest. It is questionable whether evidence of the officers' inability to recall the substance of their training could alone create a triable issue of fact on the adequacy of a training program. . .The record in this case is not so limited, however. . . . The repeated failure of high-ranking officers to properly respond to domestic violence complaints, when those same officers were responsible for teaching subordinates how to respond [to] domestic violence, suggests a fundamental flaw in the training program − placing training responsibility in the hands of those who may themselves not understand the problem or the appropriate response. . . . We therefore conclude, although the question is close, that Okin offers evidence of a specific training deficiency and that, but for this deficiency, the alleged violations could have been avoided."); ***Arledge v. Franklin County, Ohio,*** 509 F.3d 258, 264 (6th Cir. 2007) ("Plaintiffs claim that Franklin County inadequately trained its caseworkers such that they were not required to contact law enforcement agencies in the county of placement

to insure that prospective care givers did not have criminal backgrounds. This failure resulted in Daniel's placement with Mr. Powers despite Mr. Powers's conviction for aggravated menacing, which would have precluded his eligibility as a possible residence for Daniel.As the district court held, in order to meet the deliberate indifference standard outlined in *Berry* and *City of Canton v. Harris*, the failure to train must reflect a deliberate or conscious choice made by the municipality. . . The County may be held liable only if 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.' . . We agree with the district court that plaintiffs have not established deliberate indifference; rather, the plaintiffs have shown only negligence. As discussed earlier, it is obvious that more could have been done, and that better training and procedures may have helped to prevent Daniel's death. But it cannot be said that the inadequacy of the training provided by the county was so obviously inadequate as to likely result in a violation of constitutional rights. There was no history of this type of violence in Franklin County; only Daniel's tragic incident is presented as evidence of the alleged unconstitutional policy and practice. Accordingly, it cannot be said that Franklin County was deliberately indifferent to the need for more or different training in this context."); ***Pena v. Leombruni***, 200 F.3d 1031, 1033, 1034 (7th Cir. 1999) ("If Winnebago County had seen a rash of police killings of crazy people and it was well understood that these killings could have been avoided by the adoption of measures that would adequately protect the endangered police, then the failure to take these measures might, we may assume without having to decide, be found to manifest deliberate indifference to the rights of such people."); ***Chew v. Gates***, 27 F.3d 1432, 1445 (9th Cir. 1994) ("Where the city equips its police officers with potentially dangerous animals, and evidence is adduced that those animals inflict injury in a significant percentage of the cases in which they are used, a failure to adopt a departmental policy governing their use, or to implement rules or regulations regarding the constitutional limits of that use, evidences a 'deliberate indifference' to constitutional rights. Under such circumstances, a jury could, and should, find that Chew's injury was caused by the city's failure to engage in any oversight whatsoever of an important departmental practice involving the use of force.").

In ***Bordanaro v. McLeod***, 871 F.2d 1151 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 75 (1989), plaintiffs, severely beaten by police officers of the City of Everett, claimed that their injuries "were the direct result of an unconstitutional police department custom of breaking down doors without a warrant whenever its officers were apprehending a felon. Second, the plaintiffs maintained that their injuries had been caused by a custom or policy of gross negligence amounting to deliberate indifference in the recruitment, training, supervision or discipline of Everett's police officers." 871 F.2d at 1155. The First Circuit affirmed the jury's imposition of liability on the City on both theories.

Based on testimonial evidence (uncontradicted version of arrest practice) and inference from the event itself (involvement of entire night watch acting in concert demonstrated shared set of rules, customs and pre-existing practices), the existence of the unconstitutional custom was established. *Id*. at 1156. Furthermore, the court found that the custom was so widespread that the

Chief of Police, a policymaker for the police department, should have known of the unconstitutional practice. Allowing the practice to continue amounted to deliberate indifference to the constitutional rights of the citizens of Everett.

The court concluded that the Chief's "failure to eradicate this facially unconstitutional practice from the police department attributes that custom to the municipality." *Id*. at 1157.

In affirming the jury's finding that the City failed to provide minimally acceptable standards of recruitment, training, supervision and discipline of its police force, the First Circuit noted the substantial evidence presented to the jury on this issue. This was not a case where the jurors were asked to infer a policy of inadequate training from a single, though egregious, incident. The evidence included:

* the City was operating under a 1951 set of rules and regulations

* officers received little or no training after initial police academy course

* City discouraged officers from seeking supplementary training

* no supervisory or command training was required upon promotion to a higher rank

* too much discretion existed at all operating levels

* background checks of prospective officers were superficial

* discipline meted out inconsistently and infrequently

* no disciplinary action had been taken against officers involved in this incident until after they had been indicted

* a full, internal investigation by Everett Police Department did not occur until over one year after incident

871 F.2d at 1159-60.

The court also concluded that it was reasonable for the jury to attribute the established inadequacies to the municipality by finding that the Chief of Police and Mayor had express knowledge of the inadequacies and were deliberately indifferent to these failings. *Id*. at 1161-62. Finally, the jury could have found that the inadequacies in training, supervision and discipline "led directly to the constitutional violations . . . . " *Id*. at 1162.

In ***Bordanaro***, the First Circuit upheld the trial court's admission of post-event evidence (lack of proper internal investigation and failure to discipline officers involved) for the purpose of establishing what customs were in effect in the City *before* the King Arthur incident. *Id*. at 1166.

"Post-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right." *Id*. at 1167. *Accord* ***Beck v. City of Pittsburgh***, 89 F.3d 966, 973 (3d Cir. 1996) (recognizing that post-event incident "may have evidentiary value for a jury's consideration whether the City and policymakers had a pattern of tacitly approving the use of excessive force."); ***Foley v. City of Lowell***, 948 F.2d 10, 13-15 (1st Cir. 1991); ***Grandstaff v. City of Borger***, 767 F.2d 161, 171 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987).

See also ***Allen v. Hays***, 65 F.4th 736, 750 (5th Cir. 2023), *on denial of pet. for reh'g* ("To succeed on a claim of excessive force via the ratification theory, plaintiffs would need to show that the city granted the certificate of bravery because the force was excessive. In other words, the constitutional violation itself must have been ratified. Even accepting all of plaintiffs' contentions as true—as we must under *Twombly*—there are no allegations that the city was aware of the factors that potentially made Hayes's use of force unreasonably excessive. Without such allegations, plaintiffs cannot make out a showing of liability via ratification. Plaintiffs' ratification claims are thus dismissed."); ***Kirk v. Calhoun County, Michigan***, No. 19-2456, 2021 WL 2929736, at *7–8 (6th Cir. July 12, 2021) (not reported) ("Ernest relies almost exclusively on our decades-old *Monell* jurisprudence for the proposition that a sheriff's failure to investigate one instance of allegedly unconstitutional conduct of its deputies can be considered a 'ratification' of their conduct, thereby subjecting the municipality to *Monell* liability under § 1983. *See Leach v. Shelby Cnty. Sheriff*, 891 F.2d 1241, 1248 (6th Cir. 1989); . . . *Marchese v. Lucas*, 758 F.2d 181, 188-89 (6th Cir. 1985). But, as we recently explained in *Pineda v. Hamilton County*, we have since restricted the scope of this ratification theory. . . To prove a 'custom-of-tolerance' theory of liability, a plaintiff must show that 'there was a pattern of inadequately investigating similar claims.'. . Without such evidence, 'there is no demonstration of causation to show that the allegedly inadequate investigation caused the constitutional violation in question.'. . Importantly, 'an entity's failure to investigate the plaintiff's specific claim will, by definition, come *after* the employee's action that caused the injury about which the plaintiff complains.'. . And if there was no custom of tolerating inadequate investigations into illegal conduct, the wrongdoer could not have been motivated by a municipal policy in committing the constitutional violation. 'A series of investigative failures before the plaintiff's injury, by contrast, might at least suggest that the local entity's custom led to the employee's harmful action in the plaintiff's own case.'. .Ernest has not provided any evidence of prior inadequate investigations at Calhoun County that could establish the existence of a custom of tolerating unconstitutional conduct by its deputies."); ***Pineda v. Hamilton County, Ohio***, 977 F.3d 483, 495-96 (6th Cir. 2020) ("Since *Leach* and *Marchese*, . . .we have clarified the scope of this 'ratification' theory in a way that dooms Pineda's claim in this case. Because municipal liability requires an unconstitutional 'policy' or 'custom,' we have held that an allegation of a *single* failure to investigate a single plaintiff's claim does not suffice. . . As a result, 'a claim based on inadequate investigation' requires 'not only an inadequate investigation in this instance,' but also 'a clear and persistent pattern of violations' in earlier instances. . . That is, 'there must be multiple earlier inadequate investigations and they must concern comparable claims.'. . In *Leach*, for example, 'there was a record of approximately 14 other instances of similar abuse in a two-year period.'. . This requirement (that there be multiple failures to investigate) also

follows from § 1983's causation element. To protect against *respondeat superior* liability, the Supreme Court has held that § 1983 imposes a 'rigorous' causation standard where, as here, a plaintiff seeks to hold a local entity liable for its employee's actions. . . A plaintiff must show that the *entity's* unconstitutional custom—not just the *employee's* unconstitutional action—caused the plaintiff's injury. . . In this case's context, there must be a 'link between' the local entity's failure to investigate and the plaintiff's injury. . . And an entity's failure to investigate the plaintiff's specific claim will, by definition, come *after* the employee's action that caused the injury about which the plaintiff complains. Because the injury will have already occurred by the time of the specific investigation, 'there can be no causation' from that single failure to investigate. . . As the Eleventh Circuit noted, 'a single failure to investigate an incident cannot have caused that incident.'. . A series of investigative failures before the plaintiff's injury, by contrast, might at least suggest that the local entity's custom led to the employee's harmful action in the plaintiff's own case. . . Under this framework, Pineda lacks sufficient evidence for his failure-to-investigate claim against the Hamilton County Sheriff's Office and Sheriff Neil. Pineda challenges only a single failure to investigate his own excessive-force claim and has made no attempt to 'show several separate instances of the alleged rights violation.'. . No matter the adequacy of Steve Minnich's specific investigation, Pineda has not identified evidence from which a reasonable jury could find that the Hamilton County Sheriff's Office has a 'policy' or 'custom' of systematically failing to investigate excessive-force claims. . . Not only that, he has not explained how Minnich's later failure to investigate his one allegation could have caused his earlier injury from the deputy's alleged baton strike. . . Lastly, Pineda presents no evidence that Sheriff Neil even knew of his claim, let alone failed to investigate it. And because Neil can be found liable only for his *own* actions, Pineda has no evidence whatsoever against the sheriff in his personal capacity. . .In response, Pineda says he need not establish any pattern of failing to investigate. He argues that even a single act from a high-ranking local official can suffice to create a municipal 'policy' and that Chief Deputy Mark Schoonover approved of the allegedly faulty investigation. This response does not save his claim. We need not even consider whether Schoonover qualified as a high-ranking official whose actions could qualify as the actions of the 'entity' itself. . . Whether or not that is so, Pineda has still provided no basis for concluding that any failure to investigate his own claim caused his earlier injury. As we explained when rejecting a similar argument, Schoonover's 'after-the-fact approval of the investigation' did not cause Pineda's injury. . . And a contrary holding 'would effectively make the [sheriff's office] liable on the basis of *respondeat superior*, which is specifically prohibited by *Monell*.'"); ***Wright v. City of Euclid, Ohio***, 962 F.3d 852, 882 (6th Cir. 2020) ("Wright argues that Chief Meyer's failure to investigate numerous claims of excessive force amounts to ratification of unconstitutional acts by a final decision-maker. A plaintiff can establish municipal liability by showing that the municipality ratifies the unconstitutional acts of its employees by failing to meaningfully investigate and punish allegations of unconstitutional conduct. . . Wright points us to Chief Meyer's lack of investigation and discipline in the other high-profile use-of-force cases involving Euclid police officers, but those instances occurred after Wright's encounter with Flagg and Williams and cannot show that Meyer's failure to investigate and punish the officers involved in those uses of force led in any way to Wright's injuries. However, Murowsky testified that he had *never* heard of a use of force

incident by a Euclid officer that seemed inappropriate to him. That too moves the needle so that a reasonable jury could decide that use of excessive force is ratified by the department. A reasonable jury could likewise find that Meyer and Murowsky's seeming failure to ever meaningfully investigate excessive force complaints rises to the level of a ratification of use of force by a policymaker."); ***Young v. Bd. of Supervisors of Humphreys County, Mississippi***, 927 F.3d 898, 903 & n.4 (5th Cir. 2019) ("One way of establishing liability is to show that a policymaker ratified the acts of a subordinate. . . . We have 'limited the theory of ratification to extreme factual situations.'. . '[U]nless the subordinate's actions are sufficiently extreme—for instance, an obvious violation of clearly established law—a policymaker's ratification ... is insufficient to establish an official policy or custom.' *World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 755 (5th Cir. 2009).[4] [fn.4: The Board suggests that we have limited the ratification theory almost exclusively to cases involving a 'use of excessive force that resulted in bodily injuries or death.' To the contrary, we have regularly applied ratification to economic injuries. . . The Board also wrongly maintains that a ratification theory of liability is appropriate only where the injury is particularly severe. But *World Wide Street Preachers Fellowship*, 591 F.3d at 755, indicates that the theory applies where a policymaker ratifies, for example, 'an obvious violation of clearly established law.'] There was legally sufficient evidence for a reasonable jury to conclude that the Board ratified the unlawful initiation of condemnation proceedings. Drawing all inferences in the light most favorable to Young, testimony at trial showed that Stevens had directed Edwards to post the condemnation notice, even though Young's properties were compliant with state and county law. The Board ratified that action at its next meeting by unanimously voting to proceed with condemnation, and the notice was not withdrawn for over two years. Those facts are 'sufficiently extreme,'. . . to support a finding that the Board approved both Stevens's direction to post the condemnation notice and the underlying implication that the properties were condemnable. . . .The Board takes issue with Jury Instruction 4, which told the jury that it could find the Board liable if it found, by a preponderance of the evidence, one of three things: (1) 'The Board of Supervisors authorized a violation of Mr. Young's property rights,' (2) 'Dickie Stevens had been given the authority by the Board to take the action he took with respect to Mr. Young's property,' or (3) 'The Board ratified Dickie Stevens' actions after the fact.' The Board objects to both the second and third options. The Board contends that the second option erroneously permitted the jury to decide whether the Board gave Stevens final policymaking authority. That, the Board insists, was a question of law for the court, not a fact question for the jury. Even assuming that the court erred in allowing the jury to determine whether Stevens was a policymaker, there was legally sufficient evidence for a reasonable jury to hold the Board liable on a ratification theory, as we have explained. Thus, 'any injury resulting from the erroneous instruction is harmless.'. . Regarding the third option, the Board contends that Jury Instruction 4 incorrectly stated the law on ratification because it 'did not require Young to prove the existence of an unconstitutional policy.' The Board continues that the ratification theory requires a plaintiff to prove a separate violation of an official policy or custom, not just that the policymaker ratified a subordinate's action. But that misstates the ratification theory. Showing that a policymaker ratified the actions of a subordinate is one way of making out a § 1983 claim against a county or municipality; it is not an additional factor that must be established."); ***M.S. by Covington v. Hamilton County Dept. of Education***, 756 F. App'x

510, ___ (6th Cir. 2018) ("Plaintiffs' theory of liability is that Woodmore's principal failed to protect the students from a danger that the principal created, in violation of the Due Process Clause of the Fourteenth Amendment. . . . Plaintiffs have alleged that (1) the principal committed affirmative acts by instructing the schoolchildren to board Walker's bus; (2) this direction endangered the students because of Walker's dangerous driving; (3) this danger was specific to those students; and (4) the principal was sufficiently culpable because she knew that Walker's driving was dangerous. The District contests each point other than the third, which we address in turn [Court finds allegations as to each element sufficient to survive motion to dismiss]. . . . And although there are doubtlessly some cases in which a court could determine that a state actor's actions did not shock the conscience at the motion-to-dismiss stage, this is not that case. . . . Because it is conceivable that the principal received complaints such that it would be conscience-shocking for her to have instructed the schoolchildren to board Walker's bus after their receipt, it would be inappropriate to grant a motion to dismiss on this ground. . . .It should also be noted, however, that even if Plaintiffs ultimately prove the principal engaged in unconstitutional activity, this showing does not necessarily entail that the District is subject to *Monell* liability. To recap, they must also show that there was a clear and persistent pattern of that unconstitutional activity, that the District knew about that pattern, that the District deliberately ignored that pattern, and that the District's ignoring the pattern of unconstitutional activity by the principal had a direct causal link to the deprivation of the students' rights. . . The pleadings allege that the District had knowledge of the principal's unconstitutional actions during the entire period in which they occurred, that the District took no action either to prevent the principal from instructing the students to board the bus or to make the bus safer, and that the District's failure to act in response to this knowledge caused the deprivation of Plaintiffs' constitutional rights. Whether these allegations will be borne out by evidence must wait for a later stage in this litigation, which should not have been terminated at the motion-to-dismiss stage."); ***Przybysz v.City of Toledo***, 746 F. App'x 480, ___ (6th Cir. 2018) ("Przybysz is required to point us to 'prior instances of unconstitutional conduct demonstrating that [Toledo] ha[d] ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury.'. . But Przybysz has failed to point to even a single other instance in which the Toledo police has worked with a confidential informant who has been subsequently murdered by the target of the investigation."); ***Outlaw v. City of Hartford***, 884 F.3d 351, 380-81 (2d Cir. 2018) ("[A] municipal policy of deliberate indifference to the use of excessive force by police officers may be shown by evidence that the municipality had notice of complaints of the use of such force but repeatedly failed to make any meaningful investigation into such charges[.] . . . Thus, *Monell* liability, by its nature, will often turn on evidence concerning victims other than the plaintiffs and alleged misfeasors other than the individual defendants. In addition, a given officer's disciplinary history may be probative of whether it was foreseeable to the municipality that the officer would engage in misconduct yet again. . . To be sure, the right to probative evidence in *Monell* and other actions is 'not absolute' and will be 'frequently qualified in the interest of protecting legitimate interests.'. . . But objections based on facile claims of undue burden, overbreadth, and lack of relevancy do not take account of these principles. The record before us does not show that Outlaw made requests for information as to the City's 'investigations' of excessive-force complaints; but it does show

that he had sought the foundational information as to the existence of such complaints. His effort to obtain that basic preliminary information was largely resisted by the City. . . . Moreover, in response to Outlaw's far more limited request for disciplinary records of just the officers other than Gordon and Allen who were '*involved in the incident/arrest of the Plaintiff referenced in the Complaint*,' the City objected that the request was 'overly broad, vague, and unduly burdensome' on the specious ground that the 'interrogatory *seeks information from the entire Harford [sic] Police Department* based on the term "involved"'. . . . And the City declined to disclose Allen's disciplinary records on the ground, *inter alia*, that the request 'constitutes an invasion of [Allen's] personal privacy.'. . .The City on appeal criticizes Outlaw for failing to cite any 'evidence of any citizen complaint that was filed and was not investigated'. . . . Yet the City had objected to the interrogatories that sought to identify all filed complaints--even those limited to the officers who, in addition to Gordon and Allen, had been involved in the arrest of Outlaw. However, the record does not show any determined effort by Outlaw to obtain the potentially probative information that defendants declined to provide. Following the discovery responses described above, Outlaw moved for an order compelling the City to produce the information he had requested. But he then withdrew his motion. And the record does not reveal any further motion to compel. Some of the City's objections to some Outlaw requests may have been appropriate. But it was incumbent on Outlaw, who of course had the burden of proving the claims he asserted, to utilize procedures provided by the Federal Rules of Civil Procedure to compel responses to his requests that sought necessary information and that were appropriate. Having withdrawn his motion to compel, Outlaw's reliance on the lists of lawsuits and claims filed against the City--one ending in a judgment against the City, dozens being settled, and some perhaps not even involving complaints of excessive force--is flawed by the lack of detailed information he chose not to pursue."); ***Salvato v. Miley***, 790 F.3d 1286, 1296-97 (11th Cir. 2015) ("Salvato's estate argues that 'the Sheriff should be liable because he ratified Miley's use of excessive force in failing to conduct an adequate internal investigation [after] the shooting,' but this argument fails. The sheriff must 'cause[ ],' 42 U.S.C. § 1983, the constitutional violation; that is, he must 'officially sanction[ ] or order[ ]' the action. . . He cannot be held liable on a *respondeat superior* theory of liability. . . The sheriff did not order Miley to shoot Salvato. Salvato's estate presented no evidence of a policy, approved by the sheriff, that led to Miley's use of excessive force. And Salvato's estate fails to present evidence of any 'custom' not 'approv[ed] through ... official decisionmaking channels,'. . . that led to Miley's use of excessive force. Salvato's estate argues that a failure to investigate a single incident is sufficient to establish that the sheriff ratified Miley's actions, but we disagree. '[W]hen plaintiffs are relying not on a pattern of unconstitutional conduct, but on a single incident, they must demonstrate that local government policymakers had an opportunity to review the subordinate's decision and agreed with both the decision and the decision's basis before a court can hold the government liable on a ratification theory.'. . Only when 'the authorized policymakers approve a subordinate's decision and the basis for it' have they 'ratifi[ed]' that 'decision.'. . The sheriff did not 'review' any part of Miley's actions 'before they bec[a]me final,'. . . much less 'approve' the 'decision and the basis for it[.]'. . [W]here the plaintiffs rely on a 'single incident,'. . . the official must have had an 'opportunity to review' the subordinate's decision 'before [it] become[s] final[.]'. . . Salvato's estate also argues that '[n]umerous courts have recognized *post-event*

evidence of a police department's lack of proper internal investigation of an excessive force incident tends to show the customs and policy that were in effect *prior* to the excessive force incident,' but this argument is irrelevant. To be sure, '[p]ost-event evidence can shed some light on what policies existed in the city on the date of an alleged deprivation of constitutional right.' *Bordanaro v. McLeod*, 871 F.2d 1151, 1167 (1st Cir.1989). But '[t]he inferences to be made from these [post-event] facts merely lend weight' to a finding that there was a policy 'behind the actions which led to' the constitutional violation. *Kibbe v. City of Springfield*, 777 F.2d 801, 809 (1st Cir.1985). Again, no party contests that a 'persistent failure to take disciplinary action against officers can give rise to the inference that a municipality has ratified conduct.'. . But an isolated incident is, by definition, not a 'persistent failure.'").

See also ***Reyes v. City of Austin***, No. 1:21-CV-992-RP, 2024 WL 5088385, at *9–10 (W.D. Tex. Dec. 12, 2024) ("To support his ratification theory, Reyes argues that the City had a policy of making illegal arrests of individuals who film police activity because the City did not discipline the officers involved in his arrests. '[I]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final'. . But Fifth Circuit 'precedent has limited the theory of ratification to "extreme factual situations."'. . Here, the underlying conduct by the officers involved in Reyes' arrests was insufficiently extreme for a finding of ratification. . . Also, a policymaker who defends conduct that is later shown to be unlawful does not necessarily ratify that conduct as would incur *Monell* liability. . . Reyes relies on 30(b)(6) testimony from the City of Austin stating that the arrests were consistent with their policy, . . . but consistent with the Fifth Circuit's holding in *Zarnow* and *Peterson*, a municipality defending the constitutionality of its officers' actions in litigation does not itself constitute 'ratification.'. . For those reasons, the Court finds that Reyes does not show a persistent pattern of conduct or ratification that gives rise to a City of Austin unwritten custom, practice, or policy."); ***Tatel v. Mt. Lebanon School District***, No. CV 22-837, 2024 WL 4362459, at *35 (W.D. Pa. Sept. 30, 2024) ("Ratification by supervising policymakers occurred here. Steinhauer and Irvin were the District's final policymakers responsible to develop and implement policies and practices to protect parental rights. Policy I(J), I(F). The District provided no guidance and instead had a de facto policy to defer to 'teacher prerogative.'. . Williams, a nonpolicymaking official, following the de facto policy, decided that she would observe Transgender Awareness Day by reading noncurricular books and instructing her first-grade students that 'he is now a she' and parents may be mistaken about their children's gender. Neither the books nor the instruction was in the curriculum and Williams did not provide notice to the Parent[.] . . When Plaintiffs lodged objections, Williams' supervisors, including the District's final policymakers, ratified and approved that de facto policy. . . Steinhauer acknowledged that he reviewed the books, which presented a child and a transgender character making the decision about their gender and parents making mistakes about the child's gender. . . While he testified he was not aware of Williams' verbal instruction, Steinhauer knew the content of the books and determined it was appropriate for Williams to teach from the books. . . Steinhauer acknowledged the de facto policy that it was a teacher's prerogative to use noncurricular instructional materials and to determine whether or not notice and opt out rights would be provided to parents. . . Irvin

and Bielewicz also approved use of the noncurricular books and Williams' instruction. . . Viewing the record in favor of Defendants, a reasonable jury could only conclude, based on the record, that Steinhauer, Irvin and Bielewicz . . . ratified Williams' conduct, and therefore, are subject to supervisory liability. Because those individuals included the final policymakers for the District, the District is subject to municipal liability on the basis of ratification."); ***Winzer v. Kaufman County***, No. 3:15-CV-01284-N, 2023 WL 2530861, at *6-8 (N.D. Tex. Mar. 14, 2023) ("The Fifth Circuit has cautiously 'cabined' *Monell* claims against municipalities based on their approval of their officers' conduct because limitations 'are necessary to prevent the ratification theory from becoming [one] of *respondeat superior*.'. . Accordingly, a municipality does not automatically ratify conduct later deemed to be unlawful by merely failing to discipline officers or even defending the conduct. . . Ratification occurs if a policymaker approves of unconstitutional conduct (1) with knowledge of 'its underlying, improper basis,'. . . or (2) without knowledge of the conduct's true and unlawful nature, but the officer's actions were 'manifestly indefensible,' even if the policymaker 'blindly accepted' the officers' own version of events. . . . Courts have observed the difficulty, if not impossibility, of demonstrating a causal relationship between a single incident of police misconduct and the municipality's subsequent investigation. . . . In *Grandstaff v. City of Borger*, the Fifth Circuit held that it was proper to infer a preexisting policy or custom where 'no reprimands, no discharges, and no admissions of error' were made following 'incompetent and catastrophic' police performance on a single night. . . Since *Grandstaff*, courts in this Circuit have continued to 'limit[ ] the theory of ratification to "extreme factual situations."'. . Extreme scenarios include 'obvious violation[s] of clearly established law,'. . . and 'collective conduct of many individuals and multiple bad acts.'. . Courts have been lenient to plaintiffs on the other *Monell* elements of causation and deliberate indifference where extreme facts were present. . . The 'extreme factual scenario' exception permitting ratification liability has an 'extremely high' bar. . . Accordingly, it 'has not enjoyed wide application in this Circuit,'. . . and it is especially rare in the excessive force context. . .Where constitutional violations do not meet that bar, plaintiffs may nevertheless attempt to pursue an ordinary *Monell* claim — though without the benefit of exemption from fully demonstrating additional evidence of preexisting policy. . . Plaintiffs ask this Court to forego application of *Grandstaff*, arguing that some courts have questioned the origins of the limitation. . . But regardless of its wisdom, . . . *Grandstaff* and its progeny are still good law without any explicit exception, and this Court is bound by Fifth Circuit precedent. . . To premise the County's liability on its investigation of the shooting and failure to discipline the officers involved, the facts must be sufficiently extreme. . . . The Decedent's death is tragic. However, as evidenced by *Grandstaff*'s apparent singularity among excessive force cases, an officer's conduct may have consequences of great magnitude while still falling short of what courts have held to be 'extreme' factual circumstances. Extreme scenarios exist, for one, where there is an 'obvious' violation of 'clearly established law,' and those circumstances are not present. This Court is bound by the Fifth Circuit's determinations in this case: the Decedent's right to be free from excessive force was not clearly established."); ***Corbitt v. Baltimore City Police Department***, No. CV RDB-20-3431, 2022 WL 846209, at *8–9 (D. Md. Mar. 22, 2022) ("Plaintiff has plausibly pled the existence of a persistent and widespread practice of engaging in unconstitutional vehicular chases, and BPD's knowledge of this practice. Plaintiff asserts that there is 'a culture of acceptance and

condonation of unconstitutional officer use of force during emergency chases.'. . In support, Plaintiff cites six prior lawsuits and describes five specific instances in which BPD engaged in vehicular chases that resulted in death or injury of innocent civilians. . . Plaintiff also references the DOJ Report's investigation into BPD police practices as evidence of 'a rampant pattern of excessive force.'. . At this stage in the litigation, these allegations are sufficient to plead a pattern of widespread unconstitutional conduct—and BPD's knowledge of the same. Second, Corbitt plausibly pleads BPD's deliberate indifference. To plead deliberate indifference, plaintiff need only allege that the municipality was aware of the alleged pattern or practice and 'that the municipality's failure to discipline its officers "allowed" a custom, policy or practice "of [constitutional] violations to develop.''. . In addition to the lawsuits filed over the past ten years, Plaintiff alleges that the DOJ Report's findings of the use of excessive force during vehicular pursuits provided officers with notice of the issue. . . Additionally, Plaintiff complains that BPD has a custom of 'insufficient or non-existent officer discipline,' despite the fact that BPD had knowledge of lawsuits against them as a result of 'violations of citizens' civil rights during police vehicle pursuits.'. . He further claims that Defendant failed to 'take any corrective action in the face of the continuing lawsuits against [the] BPD for civilian injuries and deaths due to officer emergency car chases.'. . Accepting these allegations as true, Corbitt has plausibly alleged that BPD has ignored its officers' practice of engaging in excessive force during vehicular pursuits that result in civilian injuries and deaths, thereby approving the practice by condonation. . . . As the Fourth Circuit made clear in *Owens*, a plaintiff need not allege prior instances in great detail at this early stage. Corbitt likewise relies on prior cases against BPD for fatalities of innocent civilians from vehicular pursuit practices. As in *Owens*, the existence of these cases are factual allegations, which, if true, would bolster Corbitt's *Monell* condonation claim. Although these allegations may be devoid of detail, they provide sufficient factual content to survive a motion to dismiss. . . Moreover, these claims are supported by his reference to the DOJ Report's findings, which have previously provided a valid predicate for a *Monell* claim against BPD. . . BPD also contends that the DOJ Report cannot serve as the basis for Plaintiff's *Monell* claim because Policy 1503 was not the subject or even in effect when the Report was released. . . This argument is inapposite. Under the 'condonation' theory, unlike the 'express policy' theory, a plaintiff need not reference any specific written policy when making their claim—instead, it is sufficient to plead sufficient facts that demonstrate the existence of a widespread pattern or practice. . . Accordingly, Plaintiff has adequately pled facts to establish the elements of the condonation theory of *Monell* liability under § 1983. . . . Plaintiff cites five prior instances in which innocent bystanders were killed as a result of BPD's practice of engaging in unreasonable vehicular chases. . . He points to six prior lawsuits against BPD for fatalities resulting from BPD's vehicular pursuit practices. . . And he alleges that Davis and Smith were 'on notice of BPD officers' failure to consider the risks posed to civilians when initiating emergency pursuits by virtue of the findings of the [DOJ Report].' . . At this stage of the litigation, these allegations are sufficient to state a claim that Defendants had knowledge of the alleged unconstitutional conduct. Second, Corbitt plausibly claims that Davis and Smith's response to this conduct was so inadequate as to constitute deliberate indifference. Plaintiff contends that, despite their knowledge, Defendants 'failed to correct the behavior of their subordinate officers,' and that those officers were not 'disciplined for their failure to consider

factors indicating heightened risk to Baltimore citizens.'. . He also claims that Davis and Smith failed to train their officers on how to properly apply the factors listed in Policy 1503 and thereby 'permitted the trainings to include patently reckless conduct.'. . Although these allegations are insufficient to state a 'failure to train' *Monell* claim, they are sufficient to allege the inaction necessary to establish deliberate indifference. Plaintiff has adequately alleged that, by failing to discipline their officers or correct their conduct during vehicular pursuits, Defendants showed deliberate indifference to the alleged offensive practice. Third, Plaintiff claims that as a result of the Defendant's failure to act, he suffered a constitutional deprivation. . . This element is supported by the nature of Plaintiff's injury: He was shot in the head during a high-speed police chase. . . Defendants' alleged failure to control officers' conduct during vehicular pursuits, if true, is doubtlessly 'a causative factor' in this injury. . . Accordingly, Plaintiff has sufficiently pled a supervisory liability claim to survive the motion to dismiss stage."); ***Alsaada v. City of Columbus***, 536 F.Supp.3d 216, ___ (S.D. Ohio 2021) ("To establish a § 1983 claim against a municipality based on the ratification theory, a municipal official with the final policymaking authority must approve the subordinate's decision and the basis for it. . . The ratification theory of municipal liability does not require proof of a pattern or custom. . . Instead, ratification of a single violative act is enough for municipal liability to attach. . . An official acting with the final decision-making authority may ratify the unconstitutional acts of its employees in two ways. The first is through 'affirmative approval of a particular decision made by a subordinate.' *Feliciano v. City of Cleveland*, 988 F.2d 649, 650 (6th Cir. 1993). The second is by 'failing to meaningfully investigate and punish allegations of unconstitutional conduct."' *Wright v. City of Euclid*, 962 F.3d 852, 882 (6th Cir. 2020) . . . Here, Plaintiffs assert that then-Chief Quinlan was the final policymaker on police practices and provided the 'marching orders' to quell the protests, rather than just to prevent a riot—and that resulted in their constitutional violations. As for proof, Plaintiffs claim that in Columbus, a pattern or practice has long existed of flouting the letter or spirit of CPD policies against excessive use of force, favoring the right to protest, or racially discriminating. What happened to Plaintiffs and other protestors went beyond that pattern or practice because the then-Chief issued the policies the officers were implementing against Plaintiffs and other protestors. Assuming Plaintiffs' allegations are true—that police were armed with military-grade equipment and had a green light to spray pepper spray, deploy tear gas, and fire wooden pellets to inflict pain as a deterrent—then, the consistency of officers' alleged actions supports the assertion that officers were implementing CPD customs or policies. In other words, this Court finds that Plaintiffs have shown a likelihood of success on the merits of a *Monell* claim, insofar as it is premised upon ratification of illegal actions by officials with final decision-making authority."); ***Martinez v. City of Santa Rosa***, No. 20-CV-04135-VC, 2020 WL 6503406, at *1–2 (N.D. Cal. Nov. 5, 2020) ("The complaint focuses on the Santa Rosa Police Department's response to the Black Lives Matter protests on three nights. It alleges many Fourth Amendment violations, including officers indiscriminately firing tear gas into peaceful crowds. The complaint further alleges that the officers committed these acts '[a]t the direction of the Chief of Police' and that their conduct 'continued despite clear reports of protestors being maimed and suffering serious injuries.' According to the complaint, the police chief subsequently defended his officers' conduct in public, claiming that the protestors were 'far from peaceful and that '[his] officers were put in great danger,' 'acted with

restraint,' and only used force 'when provoked by protestors.' These allegations give rise to a claim for municipal liability on a theory of ratification or decision-making by a policymaker. *Monell* is about responsibility. It limits municipal liability to acts that are 'of the municipality'—ones that the municipality has sanctioned or ordered. . . Thus, in a more typical police case, involving an isolated incident of alleged misconduct against one or two citizens, it is hard to infer that the conduct of a police officer is attributable to the municipality. And in such a case, it might be a stretch to infer—merely from a police chief's after-the-fact general defense of the officer—that the municipality is responsible for the officer's conduct. . . This case involves a different situation. The complaint suggests that the Black Lives Matter protests (along with the activity that spun off from the protests) gripped Santa Rosa, prompting the full attention of the entire police department, from the police chief to command staff to line officers. In times like that, when the department is executing an organized, department-wide response, one can presume that the police chief was in control of his department, either directing that response himself or—at the very least—ratifying the actions of his subordinates. Therefore, it becomes easier to infer that the repeated conduct of individual police officers is really the conduct of the department, particularly when the police chief makes comments that could be interpreted as suggesting that the officers who used force did not meaningfully deviate from the department's plan for how to control the crowds. . . In requesting dismissal of this claim, the City appears to ask the Court to draw an inference that the police chief was not meaningfully aware of either the department's plan for responding to the protests or the degree to which the conduct of the officers involved in these high-profile incidents conformed to that plan. It would not be appropriate to draw that inference at this stage of the case, where the allegations in the complaint must be presumed true and all reasonable inferences must be drawn in the plaintiffs' favor. Instead, it is reasonable to infer that the conduct of the individual officers was directed or ratified by the police chief."); ***German v. Roberts***, No. C15-5237 BHS-DWC, 2017 WL 3407052, at *3-4 (W.D. Wash. Aug. 9, 2017) ("[L]ower courts appear to be divided on whether an internal police investigation that concludes that a shooting by its officers was lawful and within the municipality's policies is alone sufficient to support a theory of ratification for the purposes of *Monell* liability. For instance, another judge in our district has recently found that such circumstances create a question of fact regarding ratification that should be resolved by a jury. . . On the other hand, other courts have concluded that such an investigation and conclusion will not constitute ratification on their own absent evidence of 'something more,' such as a 'sham investigation' or 'conduct so outrageous that a reasonable administrator should have known that he or she should do something about it.' *See Kanae v. Hodson*, 294 F. Supp. 2d 1179, 1191–92 (D. Haw. 2003). As noted in *Kanae*, the Ninth Circuit's leading decision on ratification based on internal police investigations appears to require 'something more' than merely a finding that the shooting was justified. *See id.* (citing *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991)). In *Larez*, the Ninth Circuit found that the result of an internal police investigation approving of an officer's use of force could constitute ratification for the purposes of *Monell* liability if the investigation was premised on 'flawed procedures' under which, 'at least in the absence of independent, third-party witnesses, [officers] could get away with anything.'. . Based on the analysis outlined in *Larez*, the Court agrees with Defendants that, when establishing *Monell* liability under a ratification theory, a plaintiff must present more than just a police investigation

that concludes an officer applied reasonable force. A plaintiff must also point to some set of facts to suggest that the investigation's findings reflect a policy or custom that encourages or condones the underlying constitutional deprivation. As subsequently noted by the Ninth Circuit in *Watkins v. City of Oakland, Cal.*, 145 F.3d 1087 (9th Cir. 1998), the *Larez* decision was based on a set of facts where a jury could find that 'that the police chief *was responsible for the constitutional deprivations* because he condoned, ratified, and encouraged the excessive use of force.'. . Implicit in this explanation is the concept that the police chief's conduct actually contributed to the plaintiff's constitutional deprivation. Accordingly, it appears that the ratification theory for *Monell* liability is not premised on the ratification itself creating liability after the fact of injury; but rather, it seems that evidence of ratification is merely a method of proving a preexisting government 'policy, custom, or practice' that proximately causes a plaintiff's constitutional deprivation. Such a formulation of the ratification theory is in keeping with the fundamental principle that *Monell* liability attaches 'when implementation of ... official policies or established customs *inflicts* the constitutional injury.'. . .This is not to say that a local government can escape § 1983 liability simply by adopting the version of facts presented by its own officers every time it investigates a police shooting, regardless of the objective evidence. In fact, such a practice would likely have the opposite of its desired effect by showing that the local government's policies and customs in investigating shootings encouraged the constitutional deprivation by signaling to officers that they could 'get away with anything.' Nonetheless, the Court agrees with the statement in *Kanae* that *Monell* liability requires 'something more' than 'an investigative group accept[ing] an officer's version over a victim's differing version' of the circumstances surrounding a shooting."); ***Hobart v. City of Stafford***, 916 F.Supp.2d 783, 794-99 (S.D. Tex. 2013) ("Fifth Circuit case law is, at times, less than clear about whether ratification is a truly independent theory of municipal liability, as *Praprotnik* suggests, or whether ratification is simply indicative of a pre-existing policy or custom, as *Grandstaff* suggests. Some cases do appear to treat ratification as an independent theory of recovery. [collecting cases] Other post- *Praprotnik* cases might be read to suggest that ratification is a viable theory of recovery only to the extent that it is indicative of municipal policy or custom. [citing cases] As explained above, this Court understands *Praprotnik* to have announced an independent theory of municipal liability premised on ratification. To the extent Fifth Circuit and district courts in this Circuit occasionally analyze ratification claims by asking whether a policymaker's approval of a subordinate's act is sufficient to establish a municipal policy, this Court understands those courts to be asking whether that act itself *constitutes* policy, as they must do under *Praprotnik*, not whether it is *indicative of pre-existing* policy. . . . The *Praprotnik* Court did not explain how, or whether, municipal liability premised on a policymaker's subsequent ratification of acts taken by subordinates was reconcilable with the requirement that a § 1983 defendant be held liable for only those constitutional violations it could be said to have 'caused.' This Court believes that the best way to reconcile the ratification theory announced in *Praprotnik* with the causation requirement of § 1983 would be to cabin the theory to those cases where subsequent ratification can be said to have, in some sense, caused the deprivation. *Praprotnik* itself arose in the employment context. . . It is easy to see how, in an employment context, where a subordinate's decision may be subjected to an internal review by a policymaker before becoming final, ratification can be understood to have caused the deprivation; by approving the subordinate's

actions, the policymaker, in effect, continues the deprivation. In contrast, it is difficult to understand how the subsequent ratification of a subordinate's excessive use of force is a *cause* of that completed violation. Indeed, the Fifth Circuit, in an unpublished opinion, has recognized that ratification is 'most readily conceptualized in contexts like employment.'. .However, the Fifth Circuit has never actually limited the ratification theory to the employment context, or to any other context where liability premised on ratification can be reconciled conceptually with the causation requirement of § 1983. In fact, the Fifth Circuit and this district court have, on numerous occasions, considered whether a policymaker's subsequent approval of an allegedly excessive use of force could subject the municipality to liability based on ratification, thus suggesting that a ratification claim is at least theoretically possible in such a context. . . As such, although the Court doubts the propriety of holding municipalities liable on a ratification theory where the constitutional violation is excessive use of force, it concludes that this Circuit apparently tolerates such claims. Causation, however, is only the first of many hurdles a § 1983 claim premised on ratification must overcome. As the Supreme Court explained in *Praprotnik*, a subordinate's decision is chargeable to the municipality if 'authorized policymakers approve [the] decision *and the basis for it.*'. . . Moreover, 'the theory of ratification ... has been limited to "extreme factual scenarios."'. . . . This Court does not think there is a principled basis for limiting the ratification theory to so-called 'extreme factual scenarios.' . . . Perhaps there is some logic to limiting *Grandstaff* to 'extreme factual scenarios;' it may be reasonable to allow the inference of a pre-existing policy from ratification only when the actions that have been ratified are particularly outrageous. . . As explained *supra* Part III.A, the theory of ratification recognized in *Praprotnik* does not depend on an inference of pre-existing policy, and this Court sees no reason to limit municipal *Praprotnik* liability to ratification of only the most extreme constitutional violations. Furthermore, determining whether the underlying violation is an extreme constitutional violation or only a garden-variety constitutional violation is an ill-defined task. Nonetheless, this Court is bound by the Fifth Circuit, which has consistently held that the ratification theory applies only to 'extreme factual scenarios.'. . Limited guidance exists as to the definition of a sufficiently extreme factual scenario. Fifth Circuit cases consistently compare the facts before them to the facts of *Grandstaff*. . . Although this Court has discussed at length its conclusion that *Grandstaff* is not a ratification case in the *Praprotnik* sense, it follows suit and compares the facts of the case before it to *Grandstaff*. It does so because of the lack of any other successful ratification claims premised on excessive use of force. On that standard, this Court believes the case before it may present a sufficiently extreme factual scenario. . . . The question before the Court is whether the Chief Krahn ratified Officer Estrada's actions and the basis for them. . . A factfinder may conclude that Chief Krahn ratified the alleged unconstitutional basis for the actions if the record supports a conclusion that, even on Officer Estrada's version of the facts, his actions were 'manifestly indefensible.'. . This Court finds genuine issues of material fact as to whether Chief Krahn actually assessed the reasonableness of Officer Estrada's actions, or whether he simply assumed that Officer Estrada's belief that he was facing a threat of death or serious bodily injury necessarily justified the use of deadly force. The combination of physical evidence from the February 18, 2009 incident, and evidence of Officer Estrada's state of mind may lead a jury to conclude that, even on Officer Estrada's own facts, his actions were manifestly indefensible. Even if the record does contain some evidence supporting Officer Estrada's decision,

a jury could nonetheless find that the totality of the circumstances here overwhelmingly reveal the indefensibility of his actions. . .The Court admits that ratification is rarely a viable theory in this Circuit. If only a few of the facts in this case were different, this Court would be obliged to conclude that no reasonable jury could find that the City was liable based on ratification. However, the totality of the facts here, including the physical evidence from the February 18, 2009 incident, evidence of Officer Estrada's state of mind, and indications in the record that Chief Krahn did not consider it his role to evaluate the reasonableness of Officer Estrada's assessment of the threat level convince this Court that a reasonable jury could find the City liable on a ratification theory. Accordingly, Defendants' Motion for Summary Judgment Addressing Ratification Theory of Recovery (Doc. No. 94) must be **DENIED** as to the City of Stafford."); ***Willis v. Mullins***, No. CV F 04 6542 AWILJO, 2006 WL 302343, at *3, *4 (E.D. Cal. Feb. 8, 2006) ("Plaintiff argues that he should be able to find out about payment of punitive damages − after the incident 'because this would be evidence to support plaintiff's *Monell* claims.' . . He argues he should not be limited to evidence of pre-incident punitive damages payments. Plaintiff is correct, as a general proposition, that post incident events may prove that a policy or custom existed pre-incident. Plaintiff cites to numerous cases in support of his argument. [discussing cases] Thus, post-incident indemnification of punitive damages is probative of the existence that the policy existed pre-incident. From this post-incident evidence, which the jury may imply the existence of a pre-incident policy, the evidence may also infer knowledge and moving force. Although tenuous, plaintiff would be able to argue from this evidence that the officers were aware of the pre-incident policy, and was therefore a moving factor in their conduct. To be the moving force, the 'identified deficiency' in the County's policies must be 'closely related to the ultimate injury.'. . In other words, a plaintiff must show that his or her constitutional 'injury would have been avoided' had the governmental entity not indemnified officers. . .Post-incident evidence is relevant to the existence of a custom or policy, from which a plaintiff may argue it was the moving force in the alleged unconstitutional violation. Therefore, post-incident indemnification of police officers is relevant and probative.").

But see ***Waller v. City & County of Denver***, 932 F.3d 1277, 1286 (10th Cir. 2019) ("Incidents that occurred subsequent to the incident at issue in this case cannot have provided Denver with notice of a deficiency in its training program before that incident, and thus they cannot be used as evidence that, prior to Deputy Lovingier's use of force against Mr. Waller, Denver 'decisionmakers ... deliberately chose[ ] a training program that w[ould] cause violations of constitutional rights.'"); ***Barkley v. Dillard Dept. Stores, Inc.***, No. 07-20482, 2008 WL 1924178, at *6, *7 (5th Cir. May 2, 2008) (not published) ("Barkley bases part of his argument on the theory of ratification that we used in *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir.1985), which concerned allegations that the police shot an innocent man. . . . *Grandstaff*, however, has not enjoyed wide application in our circuit. . . We have limited its ratification theory to 'extreme factual situations.' . . . The instant situation is not an extreme factual situation as in *Grandstaff*, but is more like *Snyder*, in which a single officer was involved in shooting a fleeing suspect. Consequently, we decline to apply the theory used by the court in *Grandstaff*."); ***Robinson v. D.C.***, 130 F. Supp. 3d 180, 195-96 (D.D.C. 2015) ("To support her deliberate-indifference theory, Robinson gathered approximately 200 first-hand accounts from dirt-bike riders or bystanders who

claim that, like the incident in question here, police officers used their vehicles to chase and then hit dirt-bike riders throughout the District. . . The District, in response, seeks to whittle down the 200 or so to a more digestible (and perhaps less-likely-to-be-liability-inducing) sum by pointing out that only 22 of the statements speak to incidents taking place *before* the collision at issue—a descriptive observation that Plaintiff does not dispute. . . The first question, then, becomes whether Plaintiff may rely on post-collision events to demonstrate the District's 'deliberate indifference' to the practice that Robinson believes caused her son's death. The Court agrees with Defendants that she cannot. Because *Monell* requires the municipality's practice to have caused the violation at issue, incidents occurring *after* the March 6, 2009, collision cannot be used to demonstrate that such a practice was in place on that date."); ***Dunklin v. Mallinger***, No. C–11–01275 JCS, 2013 WL 1501446, *30 (N.D. Cal. Apr. 10, 2013)) ("Here, Plaintiff has requested discovery on the question of whether the Police Chief is a final policy maker. He has stipulated, however, that the FBRD decision only found that the shooting of Mr. Dunklin was within policy and did not purport to make policy. Consequently, even assuming that Police Chief Suhr acted as a final decision maker in adopting that finding, this is not enough to give rise to *Monell* liability under a theory of ratification. In particular, this Court, like the courts in *Kanae* and *Garcia* finds that merely affirming a finding that a particular use of force was 'within policy' does not constitute ratification under the Supreme Court authority discussed above. Therefore, additional discover under this theory is not warranted and Plaintiff's *Monell* claim fails, as a matter of law, to the extent it is based on a theory of ratification."); ***Escobedo v. City of Redwood City***, No. C 03-3204-MJJ., 2005 WL 226158, at *11, *12, *14 (N.D. Cal. Jan. 28, 2005) (not reported) ("While these cases − *Henry, McRorie, Larez*, and *Grandstaff* − stand for the proposition that the failure to reprimand may support a finding of a municipal policy of deliberate indifference to constitutional violations, none stands for the proposition that 'whenever [a municipality's] investigation fails to lead to a reprimand or discharge of an employee,' the municipality is deemed to have a policy or custom giving rise to § 1983 liability. . . Indeed, the Ninth Circuit (and the Fifth) appears to require more than a failure to reprimand to establish a municipal policy or ratification of unconstitutional conduct. . . . In the case at bar, the Court finds that the City's (or its decision-makers") post-event conduct (failure to reprimand and attempts to persuade the coroner not to classify Mr. Escobedo's death a homicide) does not rise to the level of post-event ratification described in the *Henry, Grandstaff, Larez*, and *McRorie* cases. Plaintiffs here present no evidence of other instances like this one where no post-event action was taken by the City of Redwood City. Plaintiffs present no evidence that the City of Redwood City routinely exonerates its officers of wrongdoing. While the force used by the officers here may very well have been excessive and unconstitutional,. . . Plaintiffs present no evidence that the officers' conduct rose to the *Grandstaff* or *McRorie* levels of gross disregard for human life such that the municipality's failure to reprimand can be found to constitute a policy of deliberate indifference. For these reasons, the Court finds that Plaintiffs have failed to demonstrate that a triable fact exists as to whether the City's post-event conduct evidences a preexisting municipal policy of deliberate indifference to its police officers' unconstitutional treatment of detainees. . . . The *Hopkins* and *Davis* cases are substantially different from the case at bar where there is neither evidence of a department-wide practice of failing to adequately train police officers on the use of nunchucks nor of any perception that the training program in existence

is a sham. The defendant officers may have used the nunchucks improperly but this does not itself evidence a widespread policy that subjects the City to § 1983 liability. With no other evidence to support a custom or policy, Plaintiffs' argument fails. The Court finds no municipal liability on an inadequacy of training theory for Plaintiffs' claim of excessive force.").

See also ***Young v. City of Providence***, 404 F.3d 4, 28 (1st Cir. 2005) ("Young presented evidence that the general policy of the PPD was to document training, and yet for unclear reasons any on-duty/off-duty training was evidently undocumented. . . . In short, there are substantial unresolved issues of fact with respect to the amount of training that the PPD actually gave to officers, including Solitro, on avoiding misidentifications of off-duty officers. The jury could find that there was, at best, very minimal training on these issues, and no real program of training on them at all. A finding of deliberate indifference requires also that the City have disregarded a known or obvious risk of serious harm from its failure to develop a training program that dealt with off-duty identifications in the context of its always armed/always on-duty policy. We think the jury could reasonably make such a finding here. Such knowledge can be imputed to a municipality through a pattern of prior constitutional violations. . . Young does not rely primarily on this sort of notice, although she does have some evidence from which a jury could find that it was common knowledge within the PPD that misidentifications of off-duty officers responding to an incident often occurred in Providence, particularly misidentification of minority officers. It is clear that a jury could find a pattern of knowledge of prior misidentifications and that this was likely to pose a significant risk of harm."); ***Amnesty America v. Town of West Hartford,*** 361 F.3d 113, 128 (2d Cir. 2004) ("The Town argues . . .that the district court correctly concluded that plaintiffs failed to raise a genuine issue of material fact as to McCue's failure to supervise because they have not proffered evidence that the demonstrators repeatedly complained about the excessive force after the demonstrations, or that McCue repeatedly failed to investigate such complaints. This argument is misplaced. While we have held that proof of a policymaker's failure to respond to repeated complaints of civil rights violations would be sufficient to establish deliberate indifference, . . . we have never required such a showing. The means of establishing deliberate indifference will vary given the facts of the case and need not rely on any particular factual showing. The operative inquiry is whether the facts suggest that the policymaker's inaction was the result of a 'conscious choice' rather than mere negligence. . . . Thus, plaintiffs' evidence must establish only that a policymaking official had notice of a potentially serious problem of unconstitutional conduct, such that the need for corrective action or supervision was 'obvious,' . . .and the policymaker's failure to investigate or rectify the situation evidences deliberate indifference, rather than mere negligence or bureaucratic inaction. Considered under this standard, plaintiffs' proffered affidavits are sufficient to withstand summary judgment, because the evidence allows the inference that [Police Chief] McCue himself witnessed (and perhaps encouraged) the unconstitutional conduct, and that the conduct was so blatantly unconstitutional that McCue's inaction could be the result of deliberate indifference to the protesters' constitutional rights."); ***Olsen v. Layton Hills Mall,*** 312 F.3d 1304, 1319, 1320 (10th Cir. 2002) ("We reverse the district court's grant of summary judgment to Davis County because Appellant has alleged the necessary facts that may establish that Davis County manifested deliberate indifference by failing to train its

jail's prebooking officers to recognize OCD and handle sufferers appropriately. . . . Given the frequency of the disorder, Davis County's scant procedures on dealing with mental illness and the prebooking officers' apparent ignorance to his requests for medication, a violation of federal rights is quite possibly a ' Aplainly obvious' consequence'of Davis County's failure to train its prebooking officers to address the symptoms. . . . And this is for a jury to decide. That OCD is relatively common and that the county had procedures in place for dealing with inmates with psychiatric disorders suggest that the municipality may have had constructive notice of the illness' prevalence and consequences. Accordingly, Appellant has raised a genuine issue of material fact as to whether the county had notice of and was deliberately indifferent in its failure to train prebooking officers on OCD.")***;*** ***Henry v. County of Shasta***, 132 F.3d 512, 518-20 (9th Cir. 1997), *amended on denial of rehearing*, 137 F.3d 1372 (9th Cir. 1998) ("Here, factual issues were presented that the county acted in accordance with an established policy or deliberate indifference to violation of rights by stripping and detaining in rubber rooms persons stopped for minor, non-jailable traffic offenses who refuse to sign a notice to appear, or demand to be taken before a magistrate. There was evidence that the county permitted an almost identical incident as that complained of by Henry to occur after the county was sued and after being put on notice unequivocally of its deputies' and nurses' unconstitutional treatment of Henry. . . . In holding that the May and Burns declarations may be used to establish municipal liability although the events related therein occurred after the series of incidents that serves as the basis for Henry's claims, we reiterate our rule that post-event evidence is not only admissible for purposes of proving the existence of a municipal defendant's policy or custom, but may be highly probative with respect to that inquiry. . . When a county continues to turn a blind eye to severe violations of inmates' constitutional rights − despite having received notice of such violations − a rational fact finder may properly infer the existence of a previous policy or custom of deliberate indifference. . . . If a municipal defendant's failure to fire or reprimand officers evidences a policy of deliberate indifference to their misconduct, surely its failure even after being sued to correct a blatantly unconstitutional course of treatment − stripping persons who have committed minor traffic infractions, throwing them naked into a 'rubber room' and holding them there for ten hours or more for failing to sign a traffic ticket or asserting their legal right to be brought before a magistrate − is even more persuasive evidence of deliberate indifference or of a policy encouraging such official misconduct. May's and Burns' declarations are sufficient to show for purposes of summary judgment that such abuse of people who commit minor infractions is 'the way things are done and have been done' in Shasta County, and thus would allow a jury to make a finding as to the existence of a policy or custom.").

In ***Beck v. City of Pittsburgh***, 89 F.3d 966, 973-74 (3d Cir. 1996), "the plaintiff offered in evidence a series of actual written civilian complaints of similar nature, most of them before and some after [the incident in question], containing specific information pertaining to the use of excessive force and verbal abuse by Officer Williams." The court determined that "[w]ithout more, these written complaints were sufficient for a reasonable jury to infer that the Chief of Police of Pittsburgh and his department knew, or should have known, of Officer Williams's violent behavior in arresting citizens, even when the arrestee behaved peacefully, in orderly fashion, complied with all of the

Officer's demands, and offered no resistance." Furthermore, the court "reject[ed] the district court's suggestion that mere Department procedures to receive and investigate complaints shield the City from liability. It is not enough that an investigative process be in place . . . 'The investigative process must be real. It must have some teeth. It must answer to the citizen by providing at least a rudimentary chance of redress when injustice is done. The mere fact of investigation for the sake of investigation does not fulfill a city's obligation to its citizens.' . . . Formalism is often the last refuge of scoundrels." (quoting from appellant's brief). *See also* ***Velazquez v. City of Long Beach***,793 F.3d 1010, 1027-29 (9th Cir. 2015) ("Velazquez advanced several theories of *Monell* liability for excessive use of force, one of which was that the City had a policy or custom of failing to investigate and discipline officers who had allegedly committed prior instances of excessive force. In his pre-trial motions, Velazquez represented that Abuhadwan in particular had received 'ten citizen complaints regarding his conduct,' that three of these complaints involved excessive force, and that Abuhadwan had over '30 internal affairs incidents of force since 2007, 19 of them using a baton or flashlight.' At the start of trial, however, without any explanation, the district court granted Defendants' motion *in limine* to 'preclude reference to complaints, Internal Affairs, and discipline.'. . As a result, the evidentiary basis for a failure-to-discipline *Monell* theory was never presented to the jury. . . . The excluded evidence was relevant, indeed critical, to prove that the City was aware of Abuhadwan's alleged tendency to use excessive force.The district court may have been concerned that permitting the introduction of evidence of prior complaints would have suggested to the jury that Abuhadwan acted in accordance with these past actions. *See* Fed.R.Evid. 404(b). But any such suggestion could have been cured short of categorical exclusion by an appropriate limiting instruction. [citing cases] Instead, the district court entirely prevented Velazquez from developing a potentially meritorious *Monell* claim, without any explanation for its decision. *Beck v. City of Pittsburgh,* 89 F.3d 966 (3d Cir.1996), is particularly instructive in explaining why the exclusion of the proffered lack-of-discipline evidence was an abuse of discretion. The plaintiff in *Beck* presented five prior complaints of excessive force against the defendant officer in support of his *Monell* claim and demonstrated that none of the complaints resulted in disciplinary action. . . *Beck* recognized that 'evidence of other wrongs or acts [that are] not admissible to prove the character of a person' under Federal Rule of Evidence 404(b) was nonetheless admissible for 'proof of knowledge' on the part of the police department. . . Based on the admitted evidence, *Beck* held that 'a reasonable jury could have inferred that the Chief of Police knew, or should have known, of [the officer's] propensity for violence when making arrests.'. . As in *Beck,* a jury might have been able reasonably to infer from prior complaints that the Long Beach Police Department was aware that Abuhadwan had previously used excessive force when making arrests, but had taken no steps to curb his propensity. By precluding any reference to such evidence, the district court prevented Velazquez from even attempting to make such a showing. We thus hold the district court's categorical exclusion of evidence relevant to establishing Velazquez's theory of municipal liability an abuse of discretion. In granting judgment as a matter of law, the district court concluded that 'a reasonable jury would not have a legally sufficient evidentiary basis to find for' Velazquez on his municipal liability claim. Fed.R.Civ.P. 50(a). But when the district court categorically excluded relevant *Monell* evidence, it 'invaded the province of the jury,' to whom the excluded evidence may well have made a difference. . . The City does not argue that

this exclusion of potentially critical evidence was harmless. . . We therefore hold that the 'incorrect evidentiary ruling resulted in the judge erroneously entering judgment as a matter of law for the defendants,'. . . and reverse the district court's grant of judgment as a matter of law on the *Monell* claims.").

See also ***Smith v. City of Holyoke***, No. CV 17-30078-FDS, 2020 WL 1514610, at *13-14 (D. Mass. Mar. 30, 2020) ("High-speed vehicular pursuits are relatively rare, and certainly so when compared to traffic stops or other citizen encounters. They present unique dangers, and not just to the police and public; there is a strong likelihood that they will terminate in an adrenaline-filled, group encounter between police officers and a suspect, which in turn greatly increases the potential for the exercise of excessive force. A single past episode of a vehicular pursuit gone wrong therefore may have substantial significance in the *Monell* calculus, even where that would not be true as to other types of police misconduct. Here, a lawsuit had been filed in 2013 alleging the use of excessive force—specifically, the beating of an unarmed and unresisting suspect---after a vehicular pursuit. . . Under the circumstances, a reasonable jury could conclude that the City was on notice as to the propensity of its officers to use excessive force after a vehicular pursuit. A reasonable jury could further conclude that the City was aware that its training on vehicular pursuits and the use of force was inadequate, but nonetheless exhibited deliberate indifference to the unconstitutional effects of those inadequacies. . . .In summary, Smith has raised a genuine dispute of fact as to whether the City of Holyoke failed to train its officers on its written use of force and vehicular pursuit policy, which may have directly caused defendant officers to violate his constitutional right to be free from excessive force."); ***Duvall v. Hustler***, No. CV 18-3278, 2020 WL 1357315, at *17–18 (E.D. Pa. Mar. 19, 2020) ("In light of this long history of inadequate investigations, a jury could find that the dearth of serious supervision and discipline created the conditions for constitutional violations. First, the City knew 'to a moral certainty'—based on the many previous officer-involved shootings it documented, and also because it would be obvious to any law-enforcement agency—that its officers would require supervision and discipline after use-of-force incidents. . . Second, the City was repeatedly admonished, by its own police oversight agency and by the Department of Justice, that its investigative practices were unacceptable. Third, those problematic practices were likely to result in constitutional violations. In the absence of basic accountability measures like conducting interviews promptly and audio- or video-recording them, there was a substantial risk that the main goal of internal investigations would not be impartial factfinding and appropriate discipline, but would instead be 'damage control or cover-up.'. . A jury could find that this lack of accountability demonstrated the City's deliberate indifference to Sowell's constitutional rights. A jury could also find that these practices created 'a culture in which officers "knew there would be no professional consequences for their action[s]"'. . . and thus 'contributed to the specific constitutional violations' asserted here by creating both an opportunity and a safe environment for officers inclined to protect themselves by collectively falsifying their narrative of their own actions. . . Summary judgment will therefore be denied on Count Nine, Plaintiffs' *Monell* claim, as to their claim of failure to supervise and discipline."); ***Alwan v. City of New York***, No. 14CV4556NGGVMS, 2018 WL 2048366, at *8–9 (E.D.N.Y. May 2, 2018) ("Although the court need not resolve the question, it seems safe to say that Nelson's history of

complaints—which includes eight CCRB complaints, two additional IAB complaints, and two lawsuits alleging the use of excessive force, as well as several domestic- or domestic-related violence complaints—would suffice to create a triable issue as to whether it was obvious to the City that there was a risk that Nelson would use excessive force against arrestees. . . Regardless of whether the City was aware of such a risk, however, Plaintiff's failure-to-supervise and failure-to-discipline theories are unavailing because he has not presented evidence from which a rational factfinder could conclude that the City acted with deliberate indifference to this risk. As noted above, 'deliberate indifference may be inferred if [prior complaints of misconduct] are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents,'. . . or if the City's response is 'so patently inadequate to the task as to amount to deliberate indifference[.]'. . . Plaintiff has not identified any complaints to which the City simply failed to respond. To the contrary, it appears to the court that the City investigated the complaints against Nelson and, to the extent those complaints were found to be substantiated, disciplined him, subjected him to increased force monitoring, and warned him that civilian complaints could derail his career. . . To the extent the complaints against Nelson were found to be unsubstantiated or were settled without an admission of liability by the City, those complaints do not provide a valid basis for concluding that the City was deliberately indifferent to his use of excessive force, because they do not, by themselves, establish that he used excessive force in the first place. . . . Complaints, without more, do not prove that a police officer actually violated anyone's constitutional rights, so those unsubstantiated complaints cannot support a rational conclusion that the NYPD's force-monitoring system was 'so deficient as to reflect a policy of deliberate indifference to the civil rights of the citizenry.'. .Because Plaintiff has not produced evidence from which a rational factfinder could conclude that the City acted with deliberate indifference in failing to train, supervise, or discipline NYPD officers in general, or Hernandez and Nelson in particular, regarding the use of force against the public, the court GRANTS Defendants' motion for summary judgment as to Plaintiff's *Monell* claim."); ***Douglas v. City of Springfield***, No. CV 14-30210-MAP, 2017 WL 123422, at *9–10 (D. Mass. Jan. 12, 2017) ("Here, as in *Cox*, the question is whether Springfield should have looked behind repeated findings of 'not sustained' to address a possible propensity for an excessive use of force by some of its officers in the execution of search and arrest warrants and in similar encounters with civilians. As in the *Cox* case, a number of the officers who arrested Plaintiff had very significant histories of civilian complaints. In addition, the city chose to settle out of court with several plaintiffs who filed a § 1983 lawsuit in which the plaintiffs alleged excessive use of force by Bigda or Kent, two of the officers allegedly involved in the assault on Plaintiff. Cases settle for many reasons, and the decision to settle may say little about the merits of the asserted claims. Nonetheless, a settlement of $175,000, as occurred in a case in which Kent was named as a defendant, supports a reasonable inference that at least some of the claims asserted in that suit had merit . . . . 'As with many issues, the question is to a considerable extent one of degree: while a single accusation of excessive force is not enough, at some point as the accusations and claims begin to pile up, a critical mass may be reached requiring an affirmative response from supervisors.' [collecting cases] A reasonable finder of fact could also infer that there were flaws in the city's investigation of civilian complaints that demonstrated deliberate indifference to the risks posed by officers against whom large numbers of civilian

complaints about excessive use of force had been made. The IIU documents submitted as evidence by Plaintiff show what appears to be a consistent pattern of rejecting civilian complaints against police officers. . . . Nor does it appear from the evidence that the IIU tracked and weighed the number of complaints against an officer as a factor in its responses to citizen complaints. Any failure to take into account repeated complaints against a particular officer could contribute to an ineffective process for investigating civilian complaints. . .Taking these factors into account, a reasonable finder of fact could conclude that Springfield's investigative process was less than effective at identifying officers prone to the use of excessive force. . .If a jury concluded that Springfield's IIU process was ineffective or weak, it could further conclude that a resulting failure to take appropriate action in response to complaints of excessive force might lead Springfield's officers to believe such conduct would be tolerated. . . In view of the disciplinary histories of Bigda, Kent, Templeman, and, to a lesser extent, Kalish, there are genuine issues of material fact as to whether Springfield was deliberately indifferent to the risk that these officers would use excessive force in executing arrest and search warrants and in other charged interactions with civilians. . . Because Plaintiff claims to have been the victim of excessive use of force during the execution of an arrest warrant, he has 'produce[d] evidence that serious prior incidents similar to the alleged constitutional violation in question put the municipality on inquiry notice of [the officers'] danger to the public and that the police department's policy of ignoring or covering up those incidents was "the moving force" behind the alleged violation.'. . The court draws no conclusions as to whether Plaintiff has presented sufficient evidence to support a determination that Springfield knew about and tolerated or acquiesced in a custom or practice of excessive use of force by some members of its police department. . . This is simply a recommendation that the court should not 'rule in [Springfield's] favor as a matter of law, and that the claims against the [c]ity should be submitted to a jury for resolution.'"); ***Cox v. Murphy***, No. CV 12-11817-FDS, 2016 WL 4009978, at *8–12 (D. Mass. Feb. 12, 2016) ("As to Murphy and Flaherty specifically, the City contends that 'not a single excessive force complaint against either Murphy or Flaherty was substantiated, despite thorough investigation by the Internal Affairs Department ... with respect to each complaint.' . . The difficult question at the heart of this case is whether that is sufficient to exonerate the City as a matter of law. More specifically, the core question is whether a reasonable jury could conclude that the City should have looked beyond the formal findings to address the possible propensity of Murphy and Flaherty to use excessive force, and whether its failure to do so demonstrated a custom or practice of tacitly condoning or approving the use of that excessive force. . . .[E]xperience and common sense suggest that the paper record may not tell the entire story. To begin, claims of excessive force are notoriously difficult for citizens to prove. Many citizens, particularly in poor or minority communities, may be unwilling to file complaints against officers, to pursue those complaints, or to cooperate with investigations into the use of excessive force. Individuals who are here illegally are particularly unlikely to want to draw law enforcement attention to themselves. And surely many officers are aware that they are more likely to be believed in a contest of credibility than an arrestee, particularly if the arrestee is a convicted felon. Of course, the word of multiple officers is likely to carry even greater weight. And that problem may be exacerbated by a 'code of silence' or a similar set of widespread attitudes that inhibits or prevents the reporting of police misconduct. As a result, there is reason to believe that

the use of excessive force is underreported, and that even valid claims by citizens do not always result in a finding of 'sustained.'. . Furthermore, complaints of excessive force are not normally distributed randomly throughout police departments. It has been well-documented for decades that a small percentage of police officers is responsible for a large percentage of citizen complaints of abuse. . . With that in mind, police supervisors cannot reasonably assume that no problem exists simply because the accusations against a particular officer have never been formally sustained. Among other things, a supervisor could reasonably infer that when an individual officer accumulates a high or disproportionate number of complaints of excessive force or related misconduct, some further action—whether in the form of further investigation, training, discipline, or some combination of those responses—is warranted. A similar inference might reasonably be drawn when multiple investigations of a particular officer result in a finding of 'not sustained' (as opposed to 'exonerated' or 'unfounded'), or the same officer is named as a defendant in multiple lawsuits for which the municipality ultimately pays a settlement. . . Of course, any one of those accusations or claims may be fabricated. But surely the likelihood that *all* of them are fabricated decreases considerably as the number begins to mount. For that reason, most of the recent Massachusetts federal cases granting summary judgment to municipalities on *Monell*-type claims are inapposite. . . By contrast, in *Semedo v. Elliott*, 2012 WL 2449912 (D. Mass. June 28, 2012), the court denied summary judgment where the plaintiff claimed unlawful arrest based on racial motivation, and produced evidence of 200 complaints against individual officers in the city of Brockton, as well as 12 complaints against 29 officers alleging racial discrimination. . . . The issue is not whether other plaintiffs have proved constitutional violations; it is whether this plaintiff has adduced sufficient evidence that the relevant supervisors were deliberately indifferent to the rights of the citizens with whom Murphy and Flaherty came in contact. There is no clear standard or precise metric by which the Court can measure whether the claim has reached the appropriate threshold to survive summary judgment. The courts should not lightly infer a municipal policy or practice from a few scattered claims, lest every claim of excessive force engender a *Monell* claim. But neither should the courts blind themselves to reality. As with many issues, the question is to a considerable extent one of degree: while a single accusation of excessive force is not enough, at some point, as the accusations and claims begin to pile up, a critical mass may be reached requiring an affirmative response from supervisors. . . Put simply, a very large amount of smoke could reasonably compel the inference that there must be at least a small amount of fire. This is such a case. Nicholas Cox is by no means the first person to allege that Murphy choked him, punched him, or otherwise used excessive force. Murphy has been the subject of at least ten citizen complaints of excessive force or assault, seven of which occurred before Cox's arrest. . . .In addition to citizen complaints, Murphy was the subject of five lawsuits alleging excessive force, one of which involved an allegation of choking. Three of those lawsuits settled, suggesting that there was at least some degree of potential exposure; one resulted in a finding for Murphy; and one is still pending. . . Murphy has never been disciplined for any of those incidents. For his part, Flaherty has been the subject of four other excessive force complaints (one of which occurred after Cox's arrest) and one lawsuit that ultimately settled. . . . Given that evidence, a reasonable jury could conclude that the City was on notice as to the possible propensity of Murphy, or Murphy and Flaherty together, to use excessive force during arrests. A reasonable jury could further

conclude that the City did not take appropriate action in response, and indeed on some occasions did not even conduct a meaningful investigation. Accordingly, there is a genuine issue of material fact as to whether the City's custom or practice of failing to train, supervise, or discipline the officers demonstrated a deliberate indifference to plaintiff's constitutional rights, and that the custom or practice was the direct cause of the alleged violation. . . . To be clear, the Court is making no finding that Murphy or Flaherty used excessive force on Cox; that they had a propensity to use excessive force; or that their supervisors in the Police Department were aware that they had such a propensity or were deliberately indifferent to that possibility. It is simply deciding that it cannot rule in the City's favor as a matter of law, and that the claims against the City should be submitted to a jury for resolution. Accordingly, the City's motion for summary judgment will be denied as to Cox's claim that the City demonstrated deliberate indifference by failing to supervise, investigate, or discipline its officers for the use of excessive force."); ***Pipitone v. City of New York***, 57 F. Supp. 3d 173, 191-92 (E.D.N.Y. 2014) ("The single action or inaction of a municipal policymaker, such as a specific failure to adequately supervise or discipline an officer, can also form an official policy or custom attributable to a municipality for purposes of municipal liability. . . At the culmination of the 1985 disciplinary process, Commissioner Ward himself approved Mo's recommendation and chose not to discipline Eppolito. Because Ward was the NYPD policymaker for disciplinary purposes, that act is sufficient to bind the City. The fact that Ward was acting on Mo's recommendation is beside the point, because '§ 1983 plaintiffs may establish that the city is liable for their injuries by proving that "the authorized policymakers approved a subordinate's decision and the basis for it."'. . Indeed, Ward was obligated to review the recommendation and decide for himself the appropriate disciplinary outcome. . . .With respect to the 1985 failure to discipline Eppolito, the City argues that the record will not support the inference that Commissioner Ward was deliberately indifferent. Contrary to the City's contention, however, a single disciplinary failure can support an inference of deliberate indifference. . . In *Amnesty America,* a police chief was present at two protests at which his officers allegedly assaulted protestors. . . The Second Circuit held that the jury could infer, from the chief's presence on the scene, that in each instance he was aware of the assaults but took no action to resolve them, and thus was deliberately indifferent. . . The City seeks to distinguish *Amnesty America* by noting that the police chief in that case observed his officers commit constitutional violations, whereas in this case Commissioner Ward was aware only that Eppolito allegedly leaked confidential police documents to a well-known mobster, which is not in itself a constitutional violation. Deliberate indifference, however, does not require inaction in the face of a constitutional violation; inaction in the face of a serious and obvious ***risk*** of constitutional harm is sufficient. *See Jones v. E. Haven*, 691 F.3d 72, 81 (2d Cir.2012); *Vann v. City of New York,* 72 F.3d 1040, 1049 (2d Cir.1995). The failure to discipline a detective who colludes with organized crime plainly courts the risk that that detective will do so again. And it is likewise obvious that collusion between a police detective and organized crime might well lead, as it did in these cases, to unconstitutional harm to members of the public."); ***Rankin v. Majikes***, No. 3:CV-14-699, 2014 WL 6893693, at *11 (M.D. Pa. Dec. 5, 2014) ("Rankin adequately alleges that the City of Wilkes–Barre's failure to train its officers on avoidance of force techniques amounts to deliberate indifference to the unreasonable use of deadly force by its officers, and that its failure to train resulted in a pattern of 'improper shootings of

innocent persons.". . Rankin will be permitted to proceed with his Fourth Amendment claim against the City of Wilkes–Barre."); ***Escobar v. City of Houston***, 2007 WL 2900581, at **37-40 (S.D. Tex. Sept. 29, 2007) ("Certainly, as the City states, no amount of training can eliminate the possibility of an accident. Nor can any amount of indexing training ensure that an officer will 'index' his weapon properly each time it is drawn. There are disputed issues, however, as to whether HPD adequately trained officers in safe-weapons handling. The evidence raises fact issues as to whether Officer Carbonneau had been properly instructed and trained on indexing his weapon before a decision to shoot was made. The evidence shows that Officer Carbonneau was not required to take additional training on indexing and related gun-safety issues in the seventeen months after he graduated from the academy. The evidence raises fact issues as to whether this training was inadequate and was a cause of Escobar's death. . . . The Noteworthy incidents raise a fact issue as to whether there is a pattern of weapons mishandling by HPD officers, particularly involving a failure to use weapons-handling techniques − including indexing − intended to prevent accidental discharges. . . . The pattern evidence here is not presented to show the existence of a custom or practice, but rather to show the City's knowledge of the need for additional training in firearms handling, especially indexing. Moreover, the facts described in the Noteworthies are 'fairly similar to what ultimately transpired.'. . . There is a fact issue as to whether the City faced and ignored a pattern of similar incidents. . . . The City argues that its training requirements met and in some respects exceeded the standards set by the State of Texas. . . . Meeting the State's standard, however, does not equate to a finding that as a matter of law, there is no constitutional violation. . . . The evidence shows that HPD's Police Chief receives the Noteworthy and internal affairs investigation of each incident. The relevant comparison is not with the number of times an HPD officer gets through a day without accidentally discharging his or her weapon at or in close proximity to other people, including those in physical encounters. Rather, the issue is whether the number and nature of incidents reveals a pattern showing deficient training that is 'obvious and obviously likely to result in a constitutional violation.' . . . The evidence of twenty-six similar incidents of accidental discharges in five years, coupled with the various inquiries, memos, and letters about HPD's weapons and use-of-force training, the inconsistent evidence as to what training HPD in fact provided on indexing and related techniques, and the obviousness of the risk created if officers are not trained on indexing, raises fact issues that preclude summary judgment."); ***Hogan v. City of Easton***, No. 04-759, 2006 WL 3702637, at *12, *13 (E.D. Pa. Dec. 12, 2006) ("The City Defendants argue that they are entitled to summary judgment on the failure to train claim because the summary judgment record establishes that all EPD members involved in the Hogan incident received the required firearms and deadly force training required by the Pennsylvania Municipal Police Officers Education and Training Commission, 53 Pa.C.S.A. § 2161, et seq ("PMOETC"). . . . We find that the City Defendants reliance on the officers' PMOETC certifications to defeat the failure to train claim is misplaced. The City Defendants do not cite − and the Court has not located − any authority from the Third Circuit to the effect that compliance with firearms training absolutely bars any finding of a policy or custom of deliberate indifference to the need for training on SWAT Team tactics in barricade situations. . . Moreover, the City Defendants again read the Hogans' claim too narrowly. The Hogans do not claim that the officers did not receive firearms and deadly force training. Rather, their complaint pled generally that the

City had a policy or custom to inadequately train officers, and the Hogans argue in their response to the summary judgment motion, that the City Defendants had a policy or custom of indifference to the need to adequately train the SWAT team on how to respond to an incident requiring that a distraught man be subdued without the use of deadly force. . . . The Hogans have met their burden of proof of a pattern of underlying constitutional violations and the existence of an issue of material fact as to whether the need for more or different training was so obvious that the policymaker's failure to respond amounted to deliberate indifference. The evidence they adduced on the failure to train issue includes their expert's report that the EPD lacked adequate policies and training regardingill individuals, that the SWAT Team was operating without any written standards, and that permitting non-SWAT officers who had not trained with the SWAT Team to participate in the situation proximately caused the use of excessive force when the SAGE weapon was deployed. As the Hogans have identified these specific failures in the training practices that the City Defendants failed to remedy, they have satisfied their burden of showing evidence that, if believed, would show that the need for more or different training was so obvious that the policymaker's failure to respond amounted to deliberate indifference. Thus, they have created a jury issue on whether the policymaker's failure to respond amounts to deliberate indifference to the EPD SWAT Team's lack of adequate training."); ***Perrin v. Gentner,*** 177 F.Supp.2d 1115**,** 1124, 1125 (D. Nev. 2001) ("From the statements of those who worked with and came in contact with Officer Gentner, it appears that Officer Gentner has a tendency not only to use excessive force, but to misperceive potential safety threats. If Officer Gentner's own fellow officers were afraid to work with him, surely Metro was on constructive notice that Gentner was not only a potential threat to public safety, but that he regularly flaunted constitutional safeguards intended to protect citizens against the use of excessive force. . . . Plaintiff has presented sufficient evidence to demonstrate that she could present proof of a Metro policy tolerating the use of excessive force through inadequate training and supervision. . . . Finally, there is evidence to show that Metro's policy of tolerating the use of excessive force was the "moving force" behind Officer Gentner's killing of Perrin. . . . Here there is evidence that Metro employed inadequate training procedures and failed to reprimand its officers for using excessive force, actions which Metro should have known would cause its officers to inflict constitutional injuries on citizens. Plaintiff has presented sufficient evidence that Metro's policy of inadequate training and supervision was the moving force behind Officer Gentner's use of deadly force against an unarmed jaywalker. . . . Here Metro should have known of the potential for constitutional violations when it placed a gun in the hands of Officer Gentner and should have taken prophylactic measures to ensure that Gentner did not use deadly force without taking constitutionally mandated precautions. The Court concludes that a reasonable jury could find that Metro's failure to train and supervise its officers constituted a policy which led to an unreasonable use of deadly force against Perrin.").

But see ***Peet v. City of Detroit***, 502 F.3d 557, 568 (6th Cir. 2007) ("All told, the plaintiffs have produced only the arrests of Peet, Williams, and Latham as admissible evidence of a city-wide custom of arresting witnesses without probable cause. But that is not enough to create a genuine issue of material fact. A custom or policy must be shown by 'a clear and persistent pattern,' and three discrete instances in one investigation is simply not enough to reasonably draw such a

conclusion. . . .Just as this court held in *Thomas* that no reasonable juror could 'infer a municipal-wide policy based solely on one instance of potential misconduct,'. . . no reasonable juror could infer such a custom or policy based on a mere three instances that are limited to one police investigation."); ***Beard v. Whitmore Lake School Dist.***, 244 F. App'x 607, 2007 WL 1748139, at *6 (6th Cir. June 19, 2007) ("The students are also unable to show that the District failed to act in response to 'repeated complaints of constitutional violations by its officers.'. . The students seek to establish a pattern of unconstitutional searches by pointing to a January 6, 2000, incident in which District officials searched student's backpacks and pockets. The district court was correct to conclude as a matter of law that the January 6, 2000, incident does not establish a pattern."); ***Jenkins v. Bartlett***, 487 F.3d 482, 492, 493 (7th Cir. 2007) ("The jury found that Mr. Jenkins' constitutional rights were not violated when Officer Bartlett fired upon him, thus the City cannot be held liable for any failure to train. . . . The evidence Ms. Jenkins presents shows only that four individuals were shot by MPD officers while in a vehicle; it does not show that each or any of these shootings amounted to a constitutional violation. . . This is not enough to provide the City or Chief Jones with actual or constructive knowledge that 'the police ... so often violate constitutional rights that the need for further training must have been plainly obvious.'"); ***Green v. City of New York***, 465 F.3d 65, 81, 82 (2d Cir. 2006) ("We also conclude that plaintiffs offered insufficient evidence to reach the jury on a failure-to-train theory; however, this issue is closer. Although plaintiffs offered no evidence of the number of people in New York who are disabled by their inability to communicate verbally, it is likely true, given the City's enormous population, that there are a substantial number of such people and that a significant subset of that population will, at some point in their lives, experience medical emergencies potentially calling for transportation to a medical facility. Further, emergency medical personnel who respond to a medical emergency involving a person who refuses to accept medical treatment do face a difficult choice between honoring the person's refusal and offering treatment or transportation for treatment that they feel is necessary. Because medical professionals are trained to heal, absent proper training, they may well believe they should override the ill or injured person's refusal. Finally, proper training would increase the likelihood of a constitutionally appropriate response. . . . Two factors, however, cause us to conclude that a reasonable jury could not find for plaintiffs on a failure-to-train theory. First, despite the likelihood of a significant problem, there is no admissible evidence in the record of any problem. Second, and more important, the City did not fail to fulfill any training obligation it may have had. It provided personnel with guidelines that specifically and clearly informed them that they had to evaluate non-verbal refusals of medical treatment. Without evidence that these provisions were ignored prior to the incident at issue in this lawsuit, a reasonable jury could not find that the City had a further training obligation. Therefore, the district court correctly dismissed all Section 1983 claims against the City."); ***Williams v. Limestone County, Alabama***, 198 F. App'x 893, 897, 898 (11th Cir. 2006) ("First, Williams fails to provide any evidence − or even allege − that there was a history or pattern of jail personnel's deliberate indifference to inmates' serious medical needs that would render obvious the need for additional or different medical training. In fact, Williams cites only the incident involving himself. On these facts, this is insufficient to establish Sheriff Blakely's liability for a failure to train the jail staff. . . . Second, there is no indication from the record that Sheriff Blakely had notice his policies, training

procedures, or supervision were 'likely to result in the violation of a constitutional right.'. . The contract between Naphcare and Limestone County provided for 24-hour care at the jail, and jail personnel were trained to call Naphcare's on-call nurse should a medical emergency arise outside of the nurses' standard work hours. . . . In this case, Sheriff Blakely promulgated general procedures for dealing with emergency situations, which procedures relied primarily on the medical expertise Naphcare was obligated by contract to provide. The fact that alternative procedures, such as providing jail personnel with additional medical training, might have better addressed Williams' particular needs does not show that Sheriff Blakely was deliberately indifferent to Williams' medical needs."); ***Ellis ex rel. Pendergrass v. Cleveland Municipal School District***, 455 F.3d 690, 701 (6th Cir. 2006) ("Thus, the School District had notice of only two incidents of possible constitutional violations. Pendergrass has not shown how two incidents, over a two-year period, could put the School District on notice of a problem when the School District operated 127 schools with over 69,000 students. To establish deliberate indifference through these reports, Pendergrass would have had to allege and put on some evidence that two incidents of abuse over two years is an excessive number. . . Such a conclusion is compelled by our decision in *Thomas v. City of Chattanooga*, 398 F.3d 426, 431 (6th Cir.2005). In *Thomas*, the plaintiff introduced evidence of forty-five suits of excessive force against the Chattanooga Police Department to establish that the department had a custom of condoning excessive force by its officers. . .This court held that such evidence was 'conclusory' because the plaintiff 'did not produce any data showing what a 'normal' number of excessive force complaints would be.'. .Similarly, because Pendergrass has not presented any evidence that two incidents of substitute-teacher abuse is more than what the normal number of incidents would be, she cannot show that the School District had notice of a problem requiring additional training or supervision. Thus, as a matter of law, her claim of failure to train or supervise fails because a reasonable jury could not find the School District deliberately indifferent."); ***Phillips v. Stevens***, 2007 WL 2359758, at *14 (S.D.Ohio Aug. 16, 2007) ("Mollette submitted copies of intra-divisional memos sent by the Internal Affairs Bureau ("IAB") to Paden's supervising commanders on March 1, 2003, July 3, 2003, August 7, 2003, and September 1, 2003. Each memo noted that Paden had been the subject of three or more citizen complaints within the previous 12 months. The memos directed the commanders to bring the information to the attention of Paden's immediate supervisor to determine whether there was a problem developing that needed to be addressed. . . Mollette has submitted two memos sent by Sergeant Thomas Miller to Chief of Police James Jackson in response to the IAB memos. The first memo, dated March 15, 2003, reviewed six citizen complaints stemming from incidents that occurred between February 8, 2002 and November 10, 2002. Some complained of rude or discourteous behavior; others complained of excessive force. While Sergeant Miller concluded that the complaints were unfounded, he nevertheless found that 'the number of complaints within the specified time period warrant some action.'. . Miller ordered Paden to attend classes on the 'Art of Listening' and 'Dealing with Difficult Customers.' Miller also stated that he would 'continue to monitor Officer Paden closely and try to help him reduce these complaints.'. .The second memo, dated March 19, 2003, reviewed three additional citizen complaints involving a use of force. . . Miller concluded that the uses of force were within departmental policy and that he did 'not see a pattern that would reveal a concern of Officer

Paden's discretion to use physical force at this time.' . . These memos are proof that the City is not deliberately indifferent to citizen complaints involving use of excessive force. The City reviewed each complaint and each self-reported use of force to determine whether the officer engaged in wrongdoing. In addition, once a certain number of complaints were filed against a particular officer, a more in-depth investigation was conducted to determine whether there was a problem that needed to be addressed. In Paden's case, after investigating some of the citizen complaints, Sergeant Miller determined that Paden would benefit from classes to improve his interpersonal communication skills. Although Miller also concluded that there was no need to be concerned that Paden was engaged in a pattern of use of excessive force, the fact that he was alerted to a potential problem and conducted an investigation counsels against a finding of deliberate indifference. Based on the evidence presented, no reasonable jury could find that the City was deliberately indifferent to the alleged problem."); ***Wolfanger v. Laurel County, Ky***., No. 6: 06-358-DCR, 2008 WL 169804, at *10 (E.D.Ky. Jan. 17, 2008) ("While Dr. Alpert suggests that the County was 'deliberately indifferent' in its failure to provide its deputies with specialized training in handling mentally ill and/or suicidal individuals, the mere fact that Laurel County did not offer any specialized training in this area does not necessitate a finding that the County acted unconstitutionally. As noted above, a plaintiff's allegations of inadequate training will not trigger § 1983 liability, unless the situation causing the injury is recurring such that the Court may impute prior knowledge and deliberate indifference to the municipality. Here, the Plaintiff has not suggested that this set of circumstances has ever arisen before, let alone occurred with frequency so as to impute liability to the County. Likewise, the Plaintiff has not shown that Deputy Poynter had a history of using excessive force against mentally ill individuals."); ***Santiago v. City of Hartford***, No. 3:00 CV 2386 WIG, 2005 WL 2234505, at *10 (D. Conn. Sept. 12, 2005) ("Although eight of the fourteen complaints of sexual misconduct by police officers occurred prior to December 1997, when Plaintiff was sexually assaulted, . . . all were investigated, with two of the eight resulting in the arrest of the officer. . . To the extent that Plaintiff disagrees with the level of discipline imposed or deficiencies in the citizen complaint process, that does not demonstrate deliberate indifference to serious acts of misconduct, rising to the level of unconstitutional acts. . . . Plaintiff Santiago has produced no evidence that a policymaker had notice of a potentially serious problem involving unconstitutional conduct, such that the need for additional supervision was obvious, and then made a conscious choice not to investigate or rectify the situation. . . . The Court finds that Plaintiff has failed to present any evidence that a policymaker consciously ignored the need for additional supervision or that the lack of supervision caused her injury. Given this lack of evidence to support her claim, the City is entitled to summary judgment as a matter of law on her failure to supervise theory of liability. . . ."); ***Sauceda v. Dailey***, No. 97-2278-JWL, 1998 WL 422811, *12 (D. Kan. June 12, 1998) (not reported) ("Unlike the plaintiff in *Beck*, Mr. Sauceda has not presented evidence sufficient for a jury to conclude that the county has a custom of dismissing meritorious excessive force complaints. Mr. Sauceda has presented evidence that the county has no system for formally tracking complaints against individual officers, that it treats each complaint as an individual event with no consideration of prior complaints, and that it does not maintain statistics on excessive force complaints. What Mr. Sauceda is missing that the *Beck* plaintiff had, however, is evidence that the county's investigative system had failed in the past and

that it effectively amounted to no investigative system at all. Wyandotte County has presented uncontroverted evidence that Sheriff Dailey has terminated at least one officer on his relatively small staff for employing excessive force, and that he has disciplined other officers for misconduct. While the sheriff's office does not formally track complaints against officers, internal affairs officers do keep informal track of such complaints. The picture painted by this evidence is much different from the picture painted by the evidence in *Beck*, where excessive force complainants had virtually no chance of having their claims sustained. Accordingly, there is no room here for a jury to conclude that the prior complaints against Lt. Melton or any other officer should have put the county on notice of a substantial risk that its officers would inflict constitutional harm.").

See also ***Franklin v. Messmer***, No. 03-5184, 2004 WL 2203592, at *5, *6 (6th Cir. Sept. 14, 2004) (Cole, J., dissenting) (unpublished) ("Franklin points to statistics which demonstrated − as to Messmer specifically and the police force generally − that the introduction of pepper spray into the police officers' arsenal resulted in a significant increase in the total uses of force. In rejecting Franklin's reliance on these statistics, the district court concluded, and the City now argues, that '[t]he alleged increase in the uses of force ... reflects merely a change in the reporting of uses of force.' This assertion, though superficially appealing, misunderstands the statistics. It is true that with the Department's introduction of pepper spray came the requirement that all uses of pepper spray be reported. But the subsequent conclusion − that the statistics reflected only a change in reporting, not a change in actual use − would suffice only if the use of pepper spray had *always* been legal and the City simply added the requirement that the use of pepper spray be reported. Here, in contrast, there had never been pepper spray use unaccompanied by reporting. Any increase in the reported use of force, therefore, would have reflected an actual increase in the use of force. How big an increase? Following the introduction of pepper spray, overall use of force by the City's police officers increased by forty to fifty incidents per month. (And as I noted above, Messmer's statistics mirrored this trend.) Thus, the City's rationale − that the introduction of pepper spray allowed officers to restrain hostile individuals with less dangerous means − defies the evidence. Moreover, the use of other types of force decreased by only about six incidents per month following the introduction of pepper spray, belying the City's claim that the use of pepper spray would result in markedly fewer uses of more dangerous force. Of course, another inference from the large increase in the overall use of force following the introduction of pepper spray is that prior to the allowance of pepper spray, the officers were taking too many risks with their own safety. It may have been that there were hundreds of incidents each year in which a police officer used, say, wrist control or verbal commands when even greater force was necessary. And the City might have further supported that inference by introducing evidence about the number of excessive force complaints that had been filed since pepper spray was introduced. On summary judgment, however, we are required to give all inferences to the nonmoving party, Franklin. In any event, the City's failure to investigate the increased use of force by its officers was itself a dereliction of its responsibilities: it was confronted with data that revealed (at the very least) a potential problem and chose to assume that everything was just fine. A reasonable jury could have concluded, therefore, that the City's lack of response to the new data constituted a deliberate indifference to the protection of its citizens from the excessive use of pepper spray by its police officers."); ***Wallis***

by and through Wallis v. Spencer, 202 F.3d 1126, 1143 (9th Cir. 2000) ("A reasonable jury could readily conclude . . . that the moving force behind the removal of the children from the parents' custody was the policy of accepting telephonic representations from CPS without any procedure for checking on the accuracy or validity of the supposed orders. . . . Similarly, a reasonable jury could conclude that the investigatory vaginal and anal examinations were performed on the children pursuant to a Police Department custom and practice of instigating body cavity examinations without first notifying the parents and without seeking prior court authorization whenever its officers place children in protective custody."); ***Vann v. City of New York***, 72 F.3d 1040, 1049, 1051 (2d Cir. 1995) ("An obvious need [for more or better supervision] may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents. . . . [A] rational jury could find that where an officer had been identified by the police department as a 'violent prone' individual who had a personality disorder manifested by frequent quick-tempered demands for 'respect,' escalating into physical confrontations for which he always disavowed responsibility, the need to be alert for new civilian complaints filed after his reinstatement to full-duty status was obvious."); ***Lasher v. City of Schenectady***, No. 02-CV-1395, 2004 WL 1732006, at *11 (N.D.N.Y. 2004) ("Plaintiff provides circumstantial evidence that ranking members of the City police department had notice of incidents of officer misconduct and consciously chose not to take any disciplinary action. Former Schenectady Police Department internal affairs officer Eric Yager stated in an affidavit that he informed Schenectady Police Department Chief Gregory Kaczmarek that some patrol division officers were entering into investigations without proper training, that the officers were not following proper procedures and policies, and that the officers were acting in an illegal manner towards citizens. Yager stated that Kaczmarek did not believe the information and refused to open an investigation. Furthermore, former Schenectady Police Department internal affairs officer Daniel Johnson stated that the chief requested that complaints regarding certain officers be referred to assistant chiefs, but not to Johnson, for investigation. Taking this evidence in the light most favorable Plaintiff, a fair minded trier of fact could reasonably conclude that the City had notice that its officers engaged in illegal activities with citizens, including the excessive use of force, but exhibited deliberate indifference by declining to properly investigate or impose disciplinary measures."); ***Hayward v. City of New Orleans,*** No. Civ.A. 02-3532, 2004 WL 258116, at *6, *7 (E.D. La. Feb. 12, 2004) ("In most cases, the deficient training of one officer in one aspect of law enforcement does not evidence deliberate indifference to civil rights. . . Nor does the failure to discipline officers in a single case trigger municipal liability. . . The present case involves a single officer with multiple abuse complaints. Recent cases have left unresolved the question of whether a city's failure to discipline a single officer in light of multiple official abuse complaints can evidence an official policy of deliberate indifference to civil rights. Although *Monell* liability has yet to be imposed under this factual scenario, prior precedent indicates that a policy maker's failure to discipline an officer conduct could result in municipal liability. The Fifth Circuit recently indicated that in certain circumstances a repeated pattern of lax discipline in light of official abuse complaints may evidence official deliberate indifference to civil rights. *Piotrowski*, 237 F.3d at 582. Moreover, proof of such a constitutionally inadequate official policy

toward officer discipline might be supported by 'a purely formalistic investigation in which little evidence was taken, the file was bare, and the conclusions of the investigator was perfunctory.'. . . Hayward presents evidence of many previous abuse complaints against Philibert and suggests that the investigations of those complaints were formalistic and inadequate. . . Hayward alleges that city officials, such as Superintendent Pennington, were aware that the investigations were cursory and insufficient. She suggests that the prior investigations reveal a systematic inattention to official police complaints by city policy makers. The need to provide 'specific officers' with more or different training can be so obvious and the inadequacy of existing supervision 'so likely to result in a violation of constitutional rights that the city can reasonably be said to have been deliberately indifferent to the need for training.'. . . In the present case questions of fact exist on whether city policy makers had notice of the abuse complaints against Philibert, whether the city was deliberately indifferent to abuse complaints against Philibert, and − if the city was deliberately indifferent in its investigation of previous civil rights claims − whether the city's failure to train or discipline Philibert was the moving force behind Ms. Hayward's injuries. Accordingly, the Defendants are not entitled to summary judgment on the Plaintiff's *Monell* claim for the city's failure to train or failure to discipline Philibert.' [footnotes omitted]); ***Fultz v. Whittaker,*** 261 F. Supp.2d 767, 780, 781 (W.D. Ky. 2003) ("In part, Plaintiff relies on the absence of specific language regarding the use of neck restraints in the Oldham County Police Department's Policy Manual to establish 'deliberate indifference' by the municipality. Admittedly the policy is rather general. . . As a practical matter, however, it would impossible for a single manual to cover the advisability of every police maneuver an officer may elect to use in the field and the precise circumstances under which such maneuvers can be used. The manual itself instructs the police officers to avoid the use of unnecessary force. Given the fairly particularized training police officers receive at the police academy in the use of neck restraints and other specific defense tactics, Oldham County's force policy is reasonable and certainly does not exhibit a deliberate indifference to the rights of Oldham County's citizenry. Had Plaintiff presented specific evidence that the municipality received complaints from its citizens about the use of neck restraints then Plaintiff would certainly have a much stronger argument that the municipality should have taken action or given its officers some clear instruction on the use of this specific defense tactic. The policy standing alone, however, is simply insufficient to establish that Oldham County disregarded a known risk that its officers would ignore their training at the police academy and improperly utilize neck restraints while in action on the field."); ***Kurilla v. Callahan***, 68 F. Supp.2d 556, 568, 569 (M.D. Pa. 1999) ("In this case, there were three (3) incidents involving Callahan in less than one year. There is no evidence of any independent investigation by the School District of any of these incidents. No disciplinary action was taken against Callahan. Even following Callahan's convictions of the summary offense of harassment in connection with his physical abuse of students, no disciplinary action was taken against Callahan. While Callahan's assault on Kurilla was preceded by only one incident, the failure to take any disciplinary action against Callahan following the three incidents in the span of less than one year is probative of the question of whether the School District had a policy or custom to tolerate or be deliberately indifferent to excessive use of force by teachers."); ***Johnson v. CHA Security Officers***, No. 97 C 3746, 1998 WL 474138, *5 (N.D. Ill. Aug. 6, 1998) (not reported) ("Contrary to CHA's position, plaintiff's

complaint contains more than bare allegations. She alleges a pattern of sexual misconduct by CHA officers that persisted for a year prior to the incident in question, without a meaningful investigative or disciplinary response by CHA. She also alleges that she was injured as a result of CHA's failure to investigate, causing Pate and Grady to believe that they could get away with their actions. This is therefore not a case where the plaintiff has pled facts that relate only to the specific incident in question and therefore should be dismissed. . . Instead, plaintiff alleges a pattern of misconduct which the CHA failed to investigate. We think that these allegations are sufficient to state a claim that CHA was deliberately indifferent to the citizens with whom its officers came in contact."); ***Burnell v. Williams***, 997 F. Supp. 886, 893 (N.D. Ohio 1998) ("Plaintiff Burnell does not claim that the individuals or the School Board had a custom of affirmatively condoning sexual abuse. Clearly, none exists. Instead, Burnell claims that defendants failed to act to prevent the sexual abuse. To state a claim under an 'inaction' theory, Burnell must establish: (1) the existence of a clear and persistent pattern of sexual abuse by school employees; (2) notice or constructive notice of the School Board; (3) the School Board's tacit approval of the unconstitutional conduct, such that a court can say that their deliberate indifference amounted to an official policy of inaction; and (4) that the School Board's custom was the 'moving force' or direct causal link in the constitutional deprivation." citing *Clairborne*.); ***Cox v. District of Columbia***, 821 F. Supp. 1, 13 (D.D.C. 1993) ("[T]he District of Columbia's maintenance of a patently inadequate system of investigation of excessive force complaints constitutes a custom or practice of deliberate indifference to the rights of persons who come in contact with District police officers."); ***Czajkowski v. City of Chicago***, 810 F. Supp. 1428, 1440 (N.D. Ill. 1992) ("It was . . . known in the Department that there was a serious problem of domestic violence against wives of police officers. Plaintiffs present sufficient evidence from which a jury could find that police officers would have understood that excessive force and domestic violence would not necessarily be punished. Plaintiffs also present sufficient evidence from which it could be found that a code of silence existed within the Department. . . . it could also be found that there was deliberate indifference to the fact that failure to discipline officers for such conduct did or could result in additional such incidents. There is a sufficient basis for a jury to find that the City was deliberately indifferent or that it tacitly authorized or condoned the conduct that was occurring."); ***Scott v. Lewis***, 1991 WL 71810, *2 (N.D. Ill. April 26, 1991) (not reported) ("[T]he facts are sufficient to allege that the CHA [Chicago Housing Authority] knew of multiple incidents of unconstitutional conduct by privately hired security guards, and failed to adequately supervise or train the guards, or investigate shootings by them."); ***Doe v. Calumet City***, 754 F. Supp. 1211, 1225 (N.D. Ill. 1990) (unconstitutional strip searches were "part of a consistent pattern of behavior that simply would not have occurred in the department-wide manner that it did if the training had been adequate . . . .").

But see ***Reynolds v. Giuliani,*** 506 F.3d 183, 194-97 (2d Cir. 2007) ("Although plaintiffs decline to state the argument so bluntly, and speak instead in terms of 'ultimate responsibility,' we understand their position to be that the statutes themselves render the states vicariously liable to plaintiffs. We see no support in the language of the Acts or our case law for the proposition that § 1983 claims arising under the Food Stamp or Medicaid Acts are exempt from the standards governing all other § 1983 claims. . . . Plaintiffs contend state defendants were deliberately

indifferent under the test set out in *Walker* because they had knowledge of an obvious need for supervision and the risk of harm to plaintiffs. . . .State defendants did not sit on their hands in the face of an obvious need to act. . . They did not, as did the municipal defendant in *Amnesty*, stand idly by, let alone encourage, the City's non-compliance. . . In short, there is little evidence showing the state to be deliberately indifferent. Nonetheless, we do not hold that any action taken by a local government insulates it from supervisory liability. If a supervisor's steps are proven so meaningless or blatantly inadequate to the task that he may be said to be deliberately indifferent notwithstanding his nominal supervisory efforts, liability will lie. . . Here, however, there is no evidence to suggest that the state's phased efforts were meaningless or obviously inadequate, except the fact of the City's continued failure to comply with certain provisions of law. Contrary to the district court's and plaintiffs' suggestion, the extent of state defendants' ultimate success in averting injury cannot be the legal measure of its efforts to do so, as such a standard is tantamount to vicarious liability. . . .Our view that state defendants' efforts to foster compliance preclude a finding of deliberate indifference finds support in our cases and those of our sister circuits addressing claims against supervisors who tried, but failed, to prevent injury to plaintiffs. [citing cases] The rationale underlying these cases is clear. A local government's liability under § 1983 must be based on its policy or custom under *Monell*. Where, as here, that policy incorporates the defendants' deliberate efforts to protect plaintiffs' rights, it cannot, at the same time, be deemed deliberately indifferent to those rights. . . A natural presumption arises in such cases that any supervisory inadequacies are the result of negligence rather than deliberate choice."); ***Olsen v. Layton Hills Mall,*** 312 F.3d 1304, 1328, 1329 (10th Cir. 2002) (Hartz, J., concurring in part and dissenting in part) ("I assume that 'constructive notice' of a fact can arise when the fact is widely known by those in the particular field of endeavor. . . In *Allen* itself the plaintiff had properly relied on an expert who testified that the municipality's procedures were 'out of synch with the rest of the police profession.' . . . If this is a proper interpretation of 'constructive notice,' then Davis County could have constructive notice of an OCD problem (so that the problem is 'obvious") based on information from outside the experience of its own jail. The record before us, however, contains no evidence of 'best practices' in other prisons with respect to treating persons with OCD, nor does it refer to literature on the subject directed to prison administrators or other law enforcement personnel. All the record contains is medical literature. But a matter cannot be considered 'obvious' to jail administrators simply because it is well known to medical professionals or families of those affected by a particular disorder. Prison officials do not have constructive notice of what appears in medical literature. Because Olsen relies only on medical literature, and provides no evidence regarding what was known by Davis County jail administrators or by jail administrators in general, or even what happens in jails in general, he has not established the obviousness required for liability of Davis County."); ***Hernandez v. Borough of Palisades Park Police Dep't.,*** No. 02-2210, 2003 WL 202441, at * (3d Cir. Jan. 29, 2003) (unpublished) ("Appellant first argues that the existence of a widespread pattern of prior robberies was enough for a reasonable fact-finder to conclude that the policymaker should have known about the constitutional violations. A reasonable fact-finder may conclude that a Police Chief has constructive knowledge of constitutional violations where they are repeatedly reported in writing to the Police Department. [citing *Beck*] In addition, 'constructive knowledge may be evidenced by

the fact that the practices have been so widespread or flagrant that in the proper exercise of [their] official responsibilities the [municipal policymakers] should have known of them.' [citing *Bordanaro*]. Unlike *Beck*, where written complaints clearly alleged that a police officer was acting unconstitutionally, or *Bordanaro*, where officers made no attempt to hide the fact that they would regularly break doors down without warrants, the mere existence of past robberies in the Borough is insufficient to establish that the Police Chief had constructive knowledge that the robberies were being committed by police officers."); ***Christie v. Iopa***, 176 F.3d 1231, 1235 (9th Cir. 1999) ("Plaintiffs cannot satisfy the requirement of a longstanding practice or custom, because they allege to the contrary that a county official has singled them out for unique treatment. A single constitutional deprivation ordinarily is insufficient to establish a longstanding practice or custom**.**"); ***Snyder v. Trepagnier***, 142 F.3d 791, 799 (5th Cir. 1998) ("Even if we accept that this evidence proves Trepagnier was dangerously stressed, there was no probative evidence concerning the stress level in the NOPD as a whole. There was no evidence of a pattern or practice of constitutional violations committed by overstressed New Orleans police officers. There was no evidence showing that the city was aware of the supposedly high stress levels in the NOPD or knew that the absence of a stress management program was likely to endanger the constitutional rights of its citizens. In short, the totality of the evidence does not even approach the *City of Canton* standard: that the inadequacy be 'so obvious' and 'so likely to result in the violation of constitutional rights,' 489 U.S. at 390, that the city can be said to have been deliberately indifferent."), *cert. dism'd*, 119 S. Ct. 1493 (1999); ***Andrews v. Fowler***, 98 F.3d 1069, 1076 (8th Cir. 1996) (where there was "no evidence that the city ever had received, or had been deliberately indifferent to, complaints of violence or sexual assault on the part of an officer prior to the time [Defendant] raped [Plaintiff,] . . . we conclude that the district court did not err by granting summary judgment to the city on Andrews' failure to investigate . . . claim."); ***Sargi v. Kent City Board of Education***, 70 F.3d 907, 912 (6th Cir. 1995) ("Without notice that students suffering from seizures on school buses were harmed by school bus drivers' lack of 'seizure management training,' the Board's failure to conduct such a training program cannot rise to the level of deliberate indifference."); ***Donovan v. City of Milwaukee***, 17 F.3d 944, 956 (7th Cir. 1994) ("The record is devoid of evidence that the failure to supplement its high speed chase policy with an exhortation to consider the safety of fleeing drivers and their passengers has led to frequent constitutional violations. Even if this case were such an instance, we could not find the City deliberately indifferent. There must be a 'pattern of violations' sufficient to put the City on notice of potential harm to the fleeing drivers."); ***Wilson v. City of Chicago***, 6 F.3d 1233, 1240 (7th Cir. 1993) ("A rational jury could have inferred from the frequency of the abuse, the number officers involved in the torture of [plaintiff], and the number of complaints from the black community, that [the Superintendent of Police] knew that officers in Area 2 were prone to beat up suspected cop killers. Even so, if he took steps to eliminate the practice, the fact that the steps were not effective would not establish that he had acquiesced in it and by doing so adopted it as a policy of the city . . . . Deliberate or reckless indifference to complaints must be proved in order to establish that an abusive practice has actually been condoned and therefore can be said to have been adopted by those responsible for making municipal policy."); ***Woods v. City of Wellston***, No. 2:02 CV 762, 2005 WL 1406105, at **12-14 (S.D. Ohio June 15, 2005) (not reported) ("As the Court

understands Plaintiff's claim, Plaintiff alleges that: (1) the City failed to adequately investigate his own complaint of excessive use of force and failed to discipline the arresting officers; and (2) the City had a policy of ignoring citizen complaints involving an excessive use of force, and of failing to discipline officers who engaged in an excessive use of force. Plaintiff first contends that the City failed to conduct an adequate investigation into his complaint of excessive force. . . . Even if Defendants failed to conduct a meaningful investigation into Plaintiff's complaint, this is not enough, standing alone, to establish municipal liability. Once an individual's rights have been violated, a subsequent failure to conduct a meaningful investigation cannot logically be the 'moving force' behind the alleged constitutional deprivation. . .Therefore, to the extent that Plaintiff's claim against the City is based on the City's alleged failure to investigate his own complaint of excessive use of force, the City is entitled to summary judgment. Plaintiff also claims that the City had a policy or custom of ignoring citizen complaints involving an excessive use of force, and of failing to discipline officers who engaged in an excessive use of force. . . . In this case, there is simply no evidence that previous complaints of excessive use of force were ignored by the City of Wellston, or that officers that should have been disciplined were not. Absent any evidence of previous widespread abuse, Plaintiff cannot establish deliberate indifference or the requisite causal connection."); ***Reed v. City of Lavonia***, 390 F.Supp.2d 1347, 1367, 1368 (M.D. Ga. 2005) ("In this case, Plaintiffs fail to point to any specific evidence to suggest that the City was somehow on notice that additional baton training for Officer Masionet was needed. There is no evidence of previous complaints about baton abuse or other claims that Masionet was excessively abusive to arrestees while working for the City of Lavonia. Plaintiffs only vaguely allege that Masionet's previous employment history placed Chief Shirley on notice that Masionet was more inclined to use excessive force during an arrest. The Eleventh Circuit has held, however, that a city is not deemed to have notice of past police misconduct if the plaintiff 'never demonstrated that past complaints of police misconduct had any merit.'. . The panel even added that 'the number of complaints bears no relation to their validity.'. . Here, Plaintiffs apparently rely on the fact that Officer Masionet was accused of using excessive force prior to his employment with the City of Lavonia. Even so, the undisputed record establishes that neither of these excessive force complaints were found to have any merit at the time they were investigated, and no disciplinary action was taken against Masionet as a result of these allegations. Moreover, neither of these previous complaints involved the use of an ASP baton. Such allegations may not serve as notice to the City of a need to re-train Officer Masionet in ASP baton use. This Court thus finds that Plaintiffs have further failed to provide any evidence suggesting that Chief Shirley had knowledge that baton training was needed but deliberately chose not to provide it. The City is accordingly entitled to summary judgment on Reed's failure to train claim."); ***Beal v. Blache,*** No. Civ.A.02-CV-12447-RG, 2005 WL 352861, at *7, *8 (D. Mass. Feb. 14, 2005) (not reported) ("There are distinctions between this case and *McCabe*. In *McCabe*, the allegations involved repeated instances of misconduct. Blache was accused in a single, albeit very serious, incident. The investigation in *McCabe* had confirmed the allegations against the Trooper. The investigation into S.T.'s allegations against Blache had come to no firm conclusions. The Trooper in *McCabe* was suspended without pay for six months. Blache was suspended without pay for a year. While both the Trooper and Blache were required to submit to a psychological examination, the Trooper

was virtually guaranteed reinstatement. Blache was not. His reinstatement was conditioned on his not committing 'any criminal act or acts which in the opinion of the Chief would be unbecoming conduct.' While MacDougall might be faulted for not investigating S.T.'s claims further on his own, rather than relying on the State Police investigation, or for having mistakenly believed that the punishment and conditions that he imposed were sufficient to insure the protection of the public, such fault as there was cannot reasonably be seen to constitute deliberate indifference. . . . As much as one might lament the failure of Chief MacDougall to fully apprehend Blache's potential dangerousness, or his failure to discipline Blache more severely, these failures simply do not rise to the level of a conscience shocking and callous disregard for the rights of others, as a finding of deliberate indifference would require."); ***Ferguson v. Leiter,*** 220 F. Supp.2d 875, 885 (N.D. Ohio 2002)("Plaintiffs do not dispute or refute Leitter's testimony regarding his training as to various restraint techniques, including neckholds, yet Plaintiffs provide no evidence suggesting that Leitter or any other officer's training was so deficient as to constitute deliberate indifference on the part of the city. Nor do Plaintiffs provide any evidence that as of 1998, the city was on notice that the Fostoria officers' training at that time was constitutionally deficient. There is no evidence in the record of any incidents prior to 1998 regarding neckholds, and thus it cannot be said that as of 1998, Fostoria knew or should have known of a problem regarding its officers' training yet failed to implement corrective measures."); ***Owens v. City of Fort Lauderdale,*** 174 F. Supp.2d 1282, 1297 (S.D. Fla. 2001) ("[T]he failure of the City to provide specific training on neck restraints is not unconstitutional such that the single incident with Byron can be said to have been the result of a municipal policy . . . . Given that the plaintiffs have presented only two similar previous incidents, and given that both incidents were unsubstantiated, the plaintiffs have failed to present the kind of pattern or series of violations which would place the City on notice that its training program was inadequate."); ***Tofano v. Reidel***, 61 F. Supp.2d 289, 306 (D.N.J. 1999) ("Plaintiff has presented absolutely nothing which would establish that Ramsey was deliberately indifferent to the rights of its citizens by failing to properly train its officers to deal with mentally unstable individuals. The record is devoid of any evidence of interactions in the past between Ramsey police officers and mentally unstable individuals which would have placed the municipality on notice that its training was inadequate. . . In addition, nothing in the record establishes that it would have been known or 'obvious' to a reasonable policymaker that the training provided to Ramsey police officers concerning interaction with mentally unstable individuals would likely result in the deprivation of constitutional rights."); ***Guseman v. Martinez***, 1 F. Supp.2d 1240, 1260 (D. Kan. 1998) ("There is no evidence here of any similar prior incident in which an individual in custody of Wichita police officers suddenly suffered serious injury or death as a result of positional asphyxia. Thus, the City cannot be said to have been on notice of an inadequate training program by virtue of a history of constitutional violations by its officers."); ***Triest v. Gilbert***, No. Civ. A. 95-1984, 1997 WL 255668, *14 (E.D.Pa. May 8, 1997) (not reported) ("An obvious need for additional or different training is not established by one accident, however horrifying it may be. Plaintiff has adduced no evidence of prior incidents or citizen complaints which might have put the municipal defendants on notice that officers improperly use their police vehicles when responding to emergency situations in general, when responding to domestic disputes in particular, or otherwise."); ***Hanrahan v. City of Norwich***, 959 F. Supp. 118, 124-25

(D. Conn. 1997) ("Plaintiff might be able to establish liability on the part of the City based on police suicides elsewhere if the experience in other jurisdictions made it obvious that more training was needed in Norwich. . . However, the affidavits of plaintiff's proposed experts fall far short of providing a sufficient evidentiary basis for that theory of liability. Plaintiff has presented no proof concerning the number of police suicides in other jurisdictions, the circumstances in which the suicides occurred or the policies and procedures of other police departments for preventing police suicide. On this record, no reasonable juror could find that the City failed to train its police officers in suicide prevention, despite an obvious need for more training, because of deliberate indifference to the need."); ***Ringuette v. City of Fall River***, 888 F. Supp. 258, 271 (D. Mass. 1995) (finding no obvious need for higher level training in signs of drug overdoses); ***Mendoza v. City of Rome***, 872 F. Supp. 1110, 1118 (N.D.N.Y. 1995) ("[T]he mere fact that [Notices of Claims] had been filed against the City of Rome, standing alone, does not establish a pattern, policy, or practice which was causally related to the false arrest and use of excessive force upon the plaintiff."); ***Jones v. Chieffo***, 833 F. Supp. 498, 510 (E.D. Pa. 1993) ("[P]laintiffs have shown no evidence that policymakers in the City or Department knew of or acquiesced in a custom of using police vehicles without sirens in pursuits."), *aff'd*, 22 F.3d 301 (3d Cir. 1994).

c. jail suicide cases

In a number of jail suicide cases, plaintiffs have relied on ***City of Canton*** in an attempt to impose liability upon the governmental entity for a failure to train officers in the detection and prevention of potential suicides or for acquiescence in a policy or custom which is deliberately indifferent to the medical needs of potentially suicidal detainees or inmates.

See e.g., ***Wever v. Lincoln County, Nebraska***, 388 F.3d 601, 607 (8th Cir. 2004) ("Wever's complaint alleges that Carmen was aware of two prior suicides in the Lincoln County jail, one occurring in 1999 while he was sheriff, and one occurring in 1996, prior to his tenure. [footnote omitted] Carmen argues that as a matter of law, one or two suicides are insufficient to put a sheriff on notice that his training and supervision is constitutionally inadequate. Under his proposed rule, a sheriff may sit idly by until at least a third inmate known to be suicidal takes a blanket from an officer and hangs himself, only then ordering his officers not to place a suicidal person in an isolation cell and hand him a blanket. We decline to so hold. We have previously stated that, in most circumstances, a single incident does not provide a supervisor with notice of deficient training or supervision . . . . However, as indicated, this calculus is not rigid, and must change depending on the seriousness of the incident and its likelihood of discovery. In *Howard*, the alleged constitutional violation was caused by an unsanitary cell. *Id.* at 136. A supervisor is not expected to be put on notice of constitutionally deficient sanitation training by a single instance of a dirty cell. But we cannot equate death with dirty cells. Our case law reflects this flexible calculus. In *Andrews*, the plaintiff sued a police chief for failing to supervise an officer who ultimately raped two women. . . We held that the chief's knowledge of two prior complaints against the officer for making inappropriate sexual advances to women during traffic stops was sufficient to create an issue of material fact as to notice, rendering summary judgment improper. . . In some

circumstances, one or two suicides may be sufficient to put a sheriff on notice that his suicide prevention training needs revision. In the present case, Wever has alleged that Carmen was placed on notice by two previous suicides, and we cannot say this is insufficient as a matter of law."); ***Woodward v. Correctional Medical Services of Illinois, Inc.,*** 368 F.3d 917, 927, 928 (7th Cir. 2004) ("[W]e find that there was enough evidence for the jury to conclude that CMS's actual practice (as opposed to its written policy) towards the treatment of its mentally ill inmates was so inadequate that CMS was on notice at the time Farver was incarcerated that there was a substantial risk that he would be deprived of necessary care in violation of his Eighth Amendment rights. . . . [A] reasonable jury could find that CMS's custom of repeatedly failing to follow proper procedures led to Farver's successful suicide attempt. . . . The reality is that CMS's actual policy and practice caused its employees to be deliberately indifferent to Farver's serious health needs. . . . Finally, we cannot leave unaddressed CMS's claim that 'the plaintiff's failure to introduce evidence of any suicide at the Lake County jail besides Farver's dooms plaintiff's efforts to prove a custom or practice.' CMS does not get a 'one free suicide' pass. The Supreme Court has expressly acknowledged that evidence of a single violation of federal rights can trigger municipal liability if the violation was a 'highly predictable consequence' of the municipality's failure to act. . . Here, there was a direct link between CMS's policies and Farver's suicide. That no one in the past committed suicide simply shows that CMS was fortunate, not that it wasn't deliberately indifferent. Moreover, we note that CMS's liability is based on much more than a single instance of flawed conduct, such as one poorly trained nurse. It was based on repeated failures to ensure Farver's safety − by Dean, by Mollner, and by Dr. Fernando − as well as a culture that permitted and condoned violations of policies that were designed to protect inmates like Farver."); ***Cabrales v. County of Los Angeles***, 864 F.2d 1454, 1461 (9th Cir. 1988) (in detainee suicide case, plaintiff prevailed against County on ground that County's policy of understaffing its jail with psychiatrists was itself an unconstitutional policy or custom of deliberate indifference to inmates' medical and psychological needs), *vacated*, 490 U.S. 1087 (1989) (remanded for consideration in light of ***City of Canton v. Harris***, 109 S. Ct. 1197 (1989)), 886 F.2d 235 (9th Cir. 1989) (reinstating prior decision) (***City of Canton*** does not alter previous opinion which was based on finding of unconstitutional policy), *cert. denied*, 494 U.S. 1091 (1990); ***Holscher v. Mille Lacs County***, Civil No. 11–1458 (MJD/LIB), 2013 WL 588717, *12 (D. Minn. Feb. 11, 2013) ("Viewing the evidence in the light most favorable to Plaintiffs, despite having a valid Policy, the Jail experienced multiple suicide attempts and two successful suicides by persons with suicide red flags who were not referred for further evaluation based solely on their own failure to self-report. Additionally, Heacock testified that, despite undergoing the Jail's required training, he would only refer inmates for further evaluation if they self-reported suicidal thoughts. From these facts, a jury could infer that the County's training was inadequate; the County was deliberately indifferent in failing to revise its training; and this inadequate training caused Plaintiffs' injury."); ***Mombourquette v. Amundson***, 469 F.Supp.2d 624, 651-53 (W.D. Wis. 2007) ("I have little difficulty in concluding that a reasonable jury could find that there is an 'affirmative link' between Amundson's failings and the failure to prevent plaintiff from attempting to commit suicide. At least two related problems with the general operation of the jail contributed to defendants' failure to stop plaintiff's attempted suicide: (1) the lack of a clear delineation of authority with respect to assessing risks of suicide;

and (2) inadequate means of staff communication. . . . The likely reason that each party denies responsibility is that the jail's policy does not squarely place responsibility on anyone. Again, all jail staff are equally responsible under the policy, which not surprisingly means that all staff attempt to fix the blame on someone else. Closely related, effective communication was also sorely lacking at the jail. . . . If the jury believes plaintiff's assessment of the jail under defendant Amundson's tenure, with staff essentially running amok without any supervision from Amundson, it could find reasonably that he was deliberately indifferent to a risk that an inmate like plaintiff would seriously harm herself."); ***Wilson v. Genessee County,*** No. 00-CV73637, 2002 WL 745975, at *11, *14 (E.D.Mich. March 26, 2002) (not reported) ("[A] reasonable juror could find that the City of Flint's policy of verbally communicating an individual's suicide risk is inadequate and/or that the City of Flint does not adequately train its police officers regarding its policy, that this failure was the result of the City of Flint's deliberate indifference to Wilson's right to be reasonably protected against taking his own life, and that the inadequacies were closely related to Wilson's eventual suicide. . . . In essence, this case is about a failure to communicate and/or to have policies in place for adequately accessing and communicating an individual's suicide risk at all levels, and especially when transporting an individual from one facility to another. The evidence of record is sufficient to have this issue submitted to a jury to determine whether the individual defendant's actions, and the City of Flint and Genesee County's policies and training amounted to deliberate indifference to Wilson's serious medical need to be adequately screened for suicidal tendencies and to be protected against taking his own life.").

In ***Dorman v. District of Columbia***, 888 F.2d 159 (D.C. Cir. 1989), the court of appeals reversed the district court's judgment for the plaintiff in a detainee suicide case, and remanded with instructions to enter judgment for the defendant District in accordance with defendant's motion for a judgment n.o.v. *Id*. at 160. The court found the evidence insufficient under ***City of Canton*** to establish § 1983 liability on the part of the District.

The court rejected plaintiff's attempt to establish municipal liability by pointing to an obvious need for training, concluding that "the need for specific training in suicide prevention beyond what the officers received ...[was] not 'so obvious' that the city's policy may be characterized as 'deliberately indifferent.'" *Id*. at 164. In addition, the court could find no evidence of a pattern of constitutional violations acquiesced in by municipal policymakers. *Id*. at 165.

See also ***A.H. v. St. Louis County, Missouri,*** 891 F.3d 721, 728-29 (8th Cir. 2018) ("Here, Plaintiffs must show that the Policy itself reflects deliberate indifference of the County and Bernsen to the risk of inmate or detainee suicide that was the 'moving force' behind the violation of Hartwig's rights. . . At the time of Hartwig's suicide, the Policy required incoming inmates to be screened for suicidal ideations, plans, and behavior. It classified inmates into different risk tiers and mandated successively more stringent precautions for each tier. Inmates on precautionary status were required to be housed with a cellmate, were to have their status evaluated at least every three weeks by a member of the mental health team, and were to be moved to the jail infirmary if required to be transferred out of regular housing for disciplinary reasons. The Policy detailed

extensive procedures for handling potentially suicidal detainees and mandated annual employee training. In response to two prior suicides, the Jail removed shelves and modified vents in the segregation area and infirmary that the inmates had used as anchors. Pointing to the two previous suicides in the segregation area and twenty-two attempted suicides between May 2008 and February 2013, Plaintiffs argue St. Louis County was deliberately indifferent because the Policy allowed inmates on precautionary status to be alone in their cells, permitted them to have bed sheets, and did not require them to be monitored more than the inmate population at large when in general housing. Prior cases foreclose this line of attack. A municipal policy 'cannot be both an effort to prevent suicides and, at the same time, deliberately indifferent to suicides.'. . As the district court noted, attempted suicides are not evidence of deliberate indifference. If anything, they show the Policy was effective in avoiding the unfortunate reality of inmate or detainee suicide. For these reasons, we conclude the district court properly granted all defendants summary judgment dismissing Plaintiffs' § 1983 claims."); ***Whitt v. Stephens County***, 529 F.3d 278, 284 (5th Cir. 2008) ("In the absence of 'manifest signs' of suicidal tendencies, a city may not be held liable for a detainee's suicide in a § 1983 suit based on a failure to train."); ***Evans v. City of Marlin***, 986 F.2d 104, 108 (5th Cir. 1993) (City's failure to train police personnel to detect potential suicidal impulses did not give rise to deprivation of constitutional rights of prisoner who committed suicide in city jail cell, absent any manifest signs that prisoner was danger to herself.); ***Rhyne v. Henderson County***, 973 F.2d 386, 393 (5th Cir. 1992) (evidence was insufficient to support finding that county acted with deliberate indifference in adopting policies regarding care of pretrial detainees known to be suicidal); ***Colburn v. Upper Darby Township***, 946 F.2d 1017, 1030 (3d Cir. 1991) (***Colburn* II**) ("In a prison suicide case . . . . plaintiff must (1) identify specific training not provided that could reasonably be expected to prevent the suicide that occurred, and (2) must demonstrate that the risk reduction associated with the proposed training is so great and so obvious that the failure of those responsible for the content of the training program to provide it can reasonably be attributed to a deliberate indifference to whether the detainees succeed in taking their lives."); ***Buffington v. Baltimore County, Maryland***, 913 F.2d 113, 123 (4th Cir. 1990) (evidence was insufficient under ***Canton*** to permit jury to find policy of failure to train officers in suicide prevention actually and proximately caused particular harm), *cert. denied*, 111 S. Ct. 1106 (1991); ***Camps v. City of Warner Robins***, 822 F. Supp. 724, 737, 738 (M.D. Ga. 1993) ("[P]laintiffs have not shown that any alleged need for further training in suicide prevention was plainly obvious to County policymakers. There is no evidence that the training program in place in 1989 resulted in any suicides prior to the incident involving the decedent. Thus, there is no pattern of similar incidents upon which to base a claim for failure to train."); ***Smith v. City of Joliet***, 1993 WL 18981, *7, *8 (N.D. Ill. Jan. 28, 1993) (not reported) (Even where training was "non-existent or at least inadequate," court concluded "the need for more or different training was not so obvious and the inadequacy of current training not so likely to result in a violation of constitutional rights, that the policymakers of the City of Joliet can be said to have been deliberately indifferent to the need to train police officers in recognizing the signs and symptoms of potential suicide victims among its detainees.).

But see ***Grabow v. Cnty. of Macomb****,* 580 F. App'x 300, 313-14 (6th Cir. 2014) (Donald, J., concurring) ("I agree with the panel's analysis and outcome. I write separately to note the troubling statistics surrounding suicides in the Macomb County Jail. The Macomb County Jail has a capacity of 1,238 inmates and processes about 19,000 inmates annually. . . In the year surrounding Prochnow's August 2011 suicide, *five* Macomb County Jail inmates (including Prochnow) committed suicide. Only six percent of U.S. jails reported two or more deaths by any cause in 2011; eighty-one percent of jails reported no deaths. . . In Michigan, only sixteen percent of jails reported one or more inmate deaths by any cause. . . Macomb County Jail's five suicides alone accounted for nearly *twenty percent* of Michigan's twenty-four total reported jail inmate deaths by any cause in 2011, . . . despite the fact that the Jail processed only about eight percent of the state's total annual jail inmates and held only seven percent of the state's jail inmates at any one time . . . . This case is not the first time that this Court has taken notice of Macomb County Jail's high suicide rate. In *Crocker v. County of Macomb,* this Court noted that Crocker's June 2001 suicide was also the fifth suicide at the Jail in less than one year. . . Macomb County Jail's disturbing suicide rate is a microcosm of the larger jail-suicide problem, which accounted for thirty-five percent of all jail deaths in the U.S. in 2011. . . Our decision cites no less than nine prisoner-suicide cases, most of which originate in Michigan. [collecting cases] Our decision could have cited two more cases, both of which occurred prior to Prochnow's suicide, where Macomb County itself was before this Court or district courts in this Circuit as a defendant in an inmate-suicide action. . . . Most of these cases, like the one before us, deal with the suicide of inmates who had a known history of mental illness and suicidal tendencies. And in those cases, like this one, this Court reached the conclusion, first put forward in *Danese v. Asman,* 875 F.2d 1239 (6th Cir.1989), that there is no recognized constitutional right to be properly screened for suicide risk. Thus, no official or municipality can be held liable under § 1983 for inmate suicides where there has been improper screening or no screening. . . And yet the suicides keep happening. How many times should this question come before this Court before the need for adequate suicide precautions for mentally-ill inmates becomes 'clearly established law' for which officials can be held accountable? . . How many times should Macomb County come before this Court before 'the need for better training [becomes] so obvious' that it should be held liable? . . While current law offers no refuge for Grabow, the time may come for this Court to rethink what constitutional protections are available to mentally ill, potentially suicidal inmates and what sort of liability may be imposed on defendants like Macomb County, where these suicides continue to occur at an alarming rate.").

A common problem for plaintiffs attempting to impose § 1983 liability on a government entity in jail suicide cases is making out the underlying constitutional deprivation that is necessary before a remedy will be available against any defendant under § 1983. *Compare* ***Jump v. Village of Shorewood***, 42 F.4th 782, 794 (7th Cir. 2022) ("[W]e have no facts that Marciniak told Sgt. Smith or Officer Taraboi he was suicidal. In fact, Sgt. Smith testified Marciniak had affirmatively told both the opposite. . .The dissent concludes that a jury could find Sgt. Smith lied on that count, but it's undisputed the intake form indicated Marciniak affirmatively said the opposite. And Marciniak's general distress and history of psychiatric treatment would give a reasonable officer notice of general distress and a history of psychiatric treatment, not risk of suicide. . . Nor was the

45 minutes between checks unreasonable. Adding in extra checks would be a special precaution—that's why Shorewood policy was to check every 15 minutes for suicide risks. But Marciniak never gave Sgt. Smith reason to think Marciniak might attempt suicide, so no extra steps were required. . . Nor do the facts bear out that the officers consciously treated Marciniak as a suicide risk. Both Officer Taraboi and Sgt. Smith testified Marciniak told them he was not suicidal, and Smith marked down that Marciniak was not contemplating suicide at that time. It is true that Sgt. Smith's failure to fill in the required suicide watch section introduces some ambiguity into this case. But drawing positive inferences in Jump's favor does not require us to conclude that the officers put Marciniak on suicide watch. All we know is that they failed to follow protocol and that—according to the same form—Marciniak had told them he was not contemplating suicide. This is simply not enough to create a reasonable inference that they did in fact treat Marciniak as a suicide risk. And Sgt. Smith's repeated welfare checks weren't suicide watch checks. It's undisputed Sgt. Smith was trying to calm Marciniak down so he could get his paperwork done. What matters is whether Smith's actions were objectively unreasonable. *Pulera* demands they weren't, and a rational jury couldn't conclude otherwise.") *with* ***Jump v. Village of Shorewood***, 42 F.4th 782, 794-99 (7th Cir. 2022) (Ripple, J., concurring in part and dissenting in part) ("I join Parts I and II of the majority opinion. However, because I disagree with the majority opinion's affirmance of summary judgment on Mr. Jump's failure-to-protect claim, I respectfully dissent as to Part III of the majority opinion. In my view, Mr. Jump has the right have a jury evaluate his failure-to-protect claim. . . .In conformity with the Supreme Court's decision in *Kingsley v. Hendrickson,* . . . we have long held that 'the Fourth Amendment governs the period of confinement between arrest without a warrant and the [probable cause determination].'. . And we have 'since applied the Fourth Amendment's "objectively unreasonable" standard to both "conditions of confinement" and "medical care" claims brought by arrestees who have not yet had their *Gerstein* hearing.'. . .This case should not be taken away from the jury. Mr. Jump has put forth sufficient evidence from which a reasonable jury could conclude that Sergeant Smith acted in an objectively unreasonable manner when he failed to protect Mr. Marciniak from suicide. . . . Here, one single officer had knowledge that the arrestee had prior psychiatric treatment; that the arrestee was upset, confused, and intoxicated; that the arrestee believed his intimate partner could be severely injured or dead; and that the arrestee began to self-harm by slamming his body against the cell walls. Armed with this knowledge, Sergeant Smith questioned Mr. Marciniak, bringing up his difficult relationship with his son, Mr. Jump. He then failed to check on Mr. Marciniak for forty-six minutes, and when he finally did check on Mr. Marciniak, he found him hanging in his cell. He then falsified the booking sheet. A jury could find this conduct objectively unreasonable. In sum, construing the facts in the light most favorable to Mr. Jump (as we must given the summary judgment posture of the case), a reasonable jury could determine that Sergeant Smith acted unreasonably when he failed to check on Mr. Marciniak. We should not deprive him of his right to present this claim to a jury. For these reasons, I respectfully dissent as to Part III.")

See also ***Smith-Dandridge v. Geanolous***, 97 F.4th 569, 578 (8th Cir. 2024) (" '[W]e expect that jailers will learn from their failures in preventing suicide,'. . . and we are confident the WCDC defendants will do so here. However, 'they are not constitutionally liable for every failure, only

those where they are deliberately indifferent to the risk of suicide.'. . On this record, the jailer defendants' inaction to prevent Bell's suicide does not constitute criminal recklessness. The failure to place Bell on suicide watch, or take other suicide-prevention measures, may have been negligent. There were indications that Bell's mental health was unstable, and he showed signs of agitation and anxiety. But there is not enough on the record before us to show the jailer defendants violated Bell's constitutional rights."); ***Edmiston v. Borrego***, 75 F.4th 551, 559-60 (5th Cir. 2023) ("Pursuant to our above-discussed discretion to begin our two-prong qualified-immunity analysis with either prong, we elect to begin with the first. For the reasons that follow, plaintiffs fail to plausibly allege a violation of a statutory or constitutional right. Therefore, we do not reach the second prong (whether clearly-established). To overcome appellants' motions to dismiss based on qualified immunity, plaintiffs must, as stated *supra*, have pled facts permitting our court to draw a reasonable inference that Borrego, Sheriff Carrillo, and Deputy Melendez '(1) had subjective knowledge of a substantial risk of serious harm and (2) responded to that risk with deliberate indifference'. . . In the context of detainee suicide, the requisite substantial risk of serious harm must be specific; plaintiffs must allege defendants 'were aware of a substantial and significant risk that the detainee might kill himself'. . . For the reasons that follow, plaintiffs fail to plausibly allege appellants had the requisite subjective knowledge of a substantial risk of suicide. Accordingly, whether they responded to that putative risk with deliberate indifference does not come into play."); ***Brabbit as Trustee for Bild v. Capra***, 59 F.4th 349, 353-54 (8th Cir. 2023) ("Jails are neither required to provide suicide-proof institutions, nor must they ensure against suicide ever happening. . . In the context of jail suicides, qualified immunity is appropriate if the plaintiff fails to show the jailers acted with deliberate indifference to the risk of suicide. . . To establish deliberate indifference, a plaintiff must show the jailer had actual knowledge of an inmate's 'substantial' risk of suicide and did not take reasonable measures to abate the risk. . . Resolution is not dependent on whether the jailers did all they could have done, but whether they violated the Constitution. . . The constitutional and dispositive question here is whether the uncontroverted measures taken by WCJ were so inadequate as to be deliberately indifferent to Bild's risk of suicide. Our focus in analyzing deliberate indifference is the time in which preventive measures were implemented by the jailers for a known suicide risk. . . A review of the undisputed evidence demonstrates that the preventative measures taken by WCJ were not so inadequate as to constitute deliberate indifference. C400 was specifically designated to hold suicidal inmates for close observation. This area had cameras and large windows, allowing for constant observation of Bild. Bild was assigned to a cell on the bottom floor and prohibited from going upstairs. If he went upstairs, C400 contained a complete barrier on the second floor designed to prevent inmates from jumping. Even though Bild never expressed suicidal ideations to WCJ staff, given Bild's reported prior possible suicide attempt and his unclear mental health condition, WCJ reasonably undertook efforts to monitor and house Bild in an area designed to minimize his risk of suicide. Brabbit's contention that Bild should have been moved from C400 is of no consequence because there is no evidence WCJ had a more suicide-proof cellblock available. . . Likewise, neither the history of jump attempts at WCJ or the correctional officers' failure to report Bild's earlier effort to climb the stairs raises a material fact question given the few jump attempts that have occurred at WCJ over the course of several years and that inmates climb C400's stairs for innocent reasons. Turning to the nurses' conduct, Bild's

condition was assessed and evaluated each day for changes in his demeanor or mental health. Under our precedent, Kaphing's and Nelson's decisions not to seek specialized mental health treatment or maintain Bild on Special Close Watch status do not demonstrate deliberate indifference."); ***George, on behalf of Bradshaw v. Beaver County***, 32 F.4th 1246, 1255-58 (10th Cir. 2022) ("Courts treat jail-suicide claims as a failure to provide medical care, . . . which implicates the Eighth Amendment. . . The Fourteenth Amendment's due-process clause provides pretrial detainees the same protection for medical attention as convicted inmates receive under the Eighth Amendment. . . And we apply the same deliberate-indifference standard no matter which amendment provides the constitutional basis for the claim. . . Plaintiff's supervisory-liability claim in this case requires 'a *particularized* state of mind: actual knowledge by a prison official of an individual inmate's substantial risk of suicide.'. . . Thus, to hold Noel liable as a supervisor, Plaintiff must demonstrate that he had 'actual knowledge ... of [Bradshaw's] substantial risk of suicide.'. . .Plaintiff puts forth no evidence showing Noel had actual knowledge of Bradshaw's substantial risk of suicide. . . Instead, she contends Supreme Court precedent only requires Noel to have known of the 'generalized risks presented by conditions at his jail,' rather than 'the risk to a specific detainee,' to have the culpable state of mind. And she argues that she presented evidence to the district court from which a jury could reasonably conclude that Noel endorsed a widespread custom or policy at BCCF of failing to report suicide risks and that he failed to train officers on suicide prevention. According to Plaintiff, '[t]he very existence of the Suicide Prevention Policy and accompanying procedures ... should have put Sheriff Noel on notice of the substantial risk presented by suicidal detainees' because 'those policies ... required updating and implementation,' and Noel failed to act 'in the face of a substantial risk of suicide to BCCF inmates.' Plaintiff is correct that *Farmer v. Brennan*. . . 'opened the door to a showing that a supervisory jail official could have the requisite mens rea if he knew of the generalized risks presented by conditions at his jail, not merely the risk to a specific detainee.' Indeed, *Farmer* states, 'it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk ... for reasons personal to him or because all prisoners in his situation face such a risk.'. . But *Farmer* concerned deliberate indifference to an inmate's safety who 'would be particularly vulnerable to sexual attack,'. . . and we have applied its deliberate-indifference-to-a-generalized-risk requirement in cases involving the risk of sexual assault. . . But in *Cox*, we determined that supervisory-liability in the inmate-suicide context requires the prison official to have had actual knowledge of an individual inmate's substantial risk of suicide. . . We acknowledged that 'we have taken a different stance on the knowledge of risk that must be alleged' in the prison-sexual-assault context. . . But we found those cases distinguishable because one can assess the risk of sexual assault from the sexual victimizer's characteristics and other external factors, while 'a substantial risk of suicide may be impossible to discern unless the particular inmate reveals indicia of that risk to prison officials.'. . Still, Plaintiff urges us to reject reading *Cox* to mean 'that no supervisory liability can attach to a jail official unless that official subjectively knows of the suicide risk to a particular inmate.' Under that reading, Plaintiff contends, jail officials could implement unconstitutional policies leading directly to inmate suicide and 'escape liability by simply maintaining ignorance of the day-to-day, inmate-specific operations of their jail.' But *Cox* is clear: § 1983 jail-suicide supervisory-liability claims require

the supervisor to have known that the specific inmate at issue presented a substantial risk of suicide. . . '[W]e are bound to follow our ... precedent, absent *en banc* reconsideration or a super[s]eding contrary decision by the Supreme Court.'. . Thus, to defeat Noel's summary-judgment motion, Plaintiff must offer evidence showing Noel had actual knowledge of Bradshaw's substantial risk of suicide, rather than a generalized risk. Plaintiff has pointed to no evidence showing Noel had actual knowledge of Bradshaw's substantial risk of suicide. Even if § 1983 jail-suicide supervisory-liability claims only required the actor to have known of a generalized risk of suicide at the prison, the record does not show Noel knew of any generalized risk. That officers ignored portions of the County's suicide-prevention policy is not enough to raise a fact issue that Noel knew about a generalized risk to suicidal detainees, contrary to Plaintiff's argument, because no inmate had ever successfully committed suicide at the BCCF before this incident. . . And, to the extent Plaintiff contends that Noel endorsed a custom or policy of failing to report suicide risks and train officers on suicide-prevention, thus creating a generalized risk to suicidal detainees, Plaintiff failed to show such a custom or policy existed. As discussed above, Plaintiff demonstrated no pattern of untrained employees' constitutional violations showing deliberate indifference to suicide-prevention or shift-change-report training to rise to the level of County policy or custom. . . Rather, Plaintiff only showed a failure to comply with the County's policies in Bradshaw's case. And any argument that Noel affirmatively endorsed not reporting suicide risks in shift-change reports, rather than failing to train on reporting them, also falls short because Plaintiff does not attempt to prove a pattern evidencing that custom. Because there is no evidence that Noel knew Bradshaw presented a substantial risk of suicide, the district court properly granted summary judgment to Sheriff Noel."); ***Estate of Burgaz by & through Zommer v. Bd. of County Commissioners for Jefferson County, Colorado***, 30 F.4th 1181, 1186-89 (10th Cir. 2022) ("When assessing whether a constitutional violation occurred and whether the law was clearly established, we have the discretion to decide which question to answer first. . .Here, we conclude the Estate failed to plausibly allege a constitutional violation against either deputy because it did not plausibly allege that either deputy was deliberately indifferent to Ms. Burgaz's medical needs. Consequently, each deputy is entitled to qualified immunity. . . . Claims based on a jail suicide are considered and treated as claims based on the failure of the jail officials to provide necessary medical care for those in their custody. . . Thus, the claims are assessed for deliberate indifference to serious medical needs. . . The test for deliberate indifference has a dual objective and subjective component. For the objective component, the complainant must demonstrate that the deprivation is sufficiently serious to warrant intervention or treatment. . . . [E]ven if a jail official has knowledge of a substantial risk of serious harm to detainees, 'he is not deliberately indifferent to that risk unless he is aware of and fails to take reasonable steps to alleviate that risk.'. . Even so, although this portion of deliberate indifference is a subjective inquiry, a jury is allowed to infer a jail official had actual knowledge of the substantial risk to serious harm based solely on circumstantial evidence. . . We review the relevant alleged facts to determine whether it is plausible each deputy had actual knowledge of Ms. Burgaz's risk of and ability to commit suicide. . . .Taking as true all of the plausible allegations and drawing all reasonable inferences in favor of the Estate, Deputy Pesapane knew many facts about Ms. Burgaz that, taken together, fail to demonstrate the immediate and serious risk of suicide was obvious. Deputy Pesapane knew Ms. Burgaz (1) had

attempted suicide previously at the same facility, (2) had various mental illnesses, (3) had a drug addiction, (4) had recently suffered sexual violence, (5) was despondent after hearing she would not be released soon, and (6) was in the least secure room in the SHU. But even so, there were insufficient indicators to put Deputy Pesapane on notice of the immediate risk. At most, Deputy Pesapane could have known she was interacting with a distressed detainee with a history of mental illness and self-harm. But there were no obvious indicators of suicide present. There are no allegations Ms. Burgaz expressed suicidality or intentions to harm herself. Nor did the Estate allege Ms. Burgaz had been placed on suicide watch during this particular stint at the JCDF. Ms. Burgaz's interactions with Deputy Pesapane were for her release, not for any medical attention or psychiatric help. And there is no allegation Deputy Pesapane had been educated to know Ms. Burgaz's grave disappointment at not being released created an imminent risk of suicide. And even though Ms. Burgaz was under some distress, her suicide in the dayroom could not have been obviously foreseen because there is no reason to believe Deputy Pesapane would have thought Ms. Burgaz was capable of committing suicide in the dayroom without being observed and stopped. Ms. Burgaz was physically frail, relying on a walker to move about, so she was relatively immobile and less capable of harming herself. . . And she was in the SHU, where she would ostensibly be watched by deputies manning the security cameras and by deputies conducting the periodic walk-throughs. . .The SHU control room displays sixteen live feeds from the surveillance system, one of which was from a camera in the dayroom. The Estate alleges the camera in the dayroom 'has sufficient clarity that any officer monitoring the live feed would immediately recognize [Ms. Burgaz] was attempting suicide.'. . Although the Estate alleges other suicides have taken place at this jail before, it does not allege that suicides have taken place either in the dayroom or with television cords or on the defendant deputies' watch. There are also no nonconclusory allegations that Deputy Pesapane was aware of the immediate suicide risk posed by the television cords. Consequently, it is not obvious a distressed, physically frail detainee who should have been surveilled constantly would have committed suicide in the dayroom when left alone for twenty minutes. Accordingly, we find the Estate failed to plausibly allege Deputy Pesapane committed a constitutional violation through deliberate indifference to Ms. Burgaz's serious medical needs."); ***Heidel v. Mazzola***, No. 20-1067, 2021 WL 1103507, at *2 (10th Cir. Mar. 23, 2021) (not reported) ("To start, the Estate cannot establish an underlying constitutional violation by any of the jail's officers because they did not have subjective awareness of Ms. Rowell's risk of suicide. Although excessive sleeping, signs of diminished appetite, and refusing to go outside for recreation time can arguably be viewed as suicidal characteristics, they can be 'susceptible to a number of interpretations.'. . Officers viewed this behavior as common among inmates and consistent with Ms. Rowell's previous time at the jail. No evidence suggests that Ms. Rowell mentioned her suicidal thoughts to an officer. Although the Estate argues that the subjective component can be shown by a risk of harm to the inmate population as a whole, our cases have typically required knowledge about a specific inmate's risk of suicide."); ***Estate of Bonilla by & through Bonilla v. Orange County, Texas***, 982 F.3d 298, 306 (5th Cir. 2020) ("The evidence indicates that Bonilla did not request medical help, and her behavior in detention was unremarkable prior to her suicide. This evidence did not give rise to reasonable inferences that the individual defendants were aware of Bonilla's suicidal tendency, much less that they disregarded the risk. The district court correctly

awarded summary judgment in the absence of evidence that Shafer or Dickerson 'acted or failed to act with subjective deliberate indifference to the detainee's rights.'"); ***Troutman v. Louisville Metro Dep't of Corr.***, 979 F.3d 472, 483 (6th Cir. 2020) ("For prison suicide cases, the subjective standard requires that it was 'obvious that there was a "strong likelihood" that an inmate would attempt suicide.'. . It is insufficient to show that an official 'acted with deliberate indifference to some *possibility* of suicide, or even a *likelihood* of suicide.'. . This distinction is critical 'because a finding of deliberate indifference requires a sufficiently culpable state of mind, which the Supreme Court has equated with criminal recklessness.'. . The official's 'state of mind must evince "deliberateness tantamount to intent to punish."'. . Knowledge of the 'strong likelihood' of suicide is a 'question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.'"); ***Downard for Estate of Downard v. Martin***, 968 F.3d 594, 600-01 (6th Cir. 2020) ("Under the Fourteenth Amendment, pretrial detainees have a 'right to adequate medical care.'. . A prison official violates that right when he acts with 'deliberate indifference' to an inmate's 'serious medical needs.'. . The deliberate indifference standard contains both an objective and subjective component. . . First, under the objective component, an inmate must show a 'sufficiently serious' medical need. . . Second, under the subjective component, an inmate must show both that an official knew of her serious medical need and that, despite this knowledge, the official disregarded or responded unreasonably to that need. . . . Foley and Wallace contend that the district court's factual determinations do not satisfy the subjective component of the deliberate indifference standard. We agree. As noted above, 'it is not enough to establish that an official may have acted with deliberate indifference to some *possibility* of suicide, or even a *likelihood* of suicide; the test is a *strong likelihood* of suicide.'. . This is a high bar and typically requires evidence that the inmate was already on suicide watch, previously attempted suicide under similar conditions, or recently expressed a desire to self-harm. . . The district court here failed to apply the 'strong likelihood' standard, finding only that Foley and Wallace perceived some undefined risk that Tye might attempt suicide. The facts and inferences as found by the district court do not evince a 'strong likelihood' that Tye would commit suicide."); ***Arenas v. Calhoun***, 922 F.3d 616, 624-25 (5th Cir. 2019) ("The Constitution does not require an individual officer to intervene immediately in an apparent suicide without sufficient support where doing so would jeopardize his own safety. . . To be sure, a knowing failure to execute policies necessary to an inmate's safety may be evidence of an officer's deliberate indifference. . . Arenas posits that Calhoun flouted SOP VG68-0001, which 'appl[ies] to all State Institutions and requires an officer to 'call for backup by radio or telephone and then immediately cut down the hanging inmate ... and initiate CPR procedures.'. . At deposition, both Shelby and Dickson stated that an officer must comply with that policy. Additionally, Arenas's expert, Raul Banasco, testified that a correctional officer must provide immediate medical care to any inmate attempting suicide. Hence, as proof of deliberate indifference, Arenas asserts that Calhoun violated GDOC policy by refusing to enter Tavara's cell immediately. That argument is unpersuasive. SOP VG68-0001 pertains to the functional area of 'Program Services/Health Services—Mental Health and is entitled 'Managing Potentially Suicidal, Self-Injurious and Aggressive Behavior.'. . The express purpose of the policy is that 'inmates ... who are potentially suicidal, self-injurious, and/or physically aggressive will be *identified*, and *referred* for further evaluation and/or appropriate stabilization-/management.'. .

Indeed, SOP VG68-0001 delineates the procedure for recognizing potentially suicidal and self-injurious inmates and the manner for housing and monitoring them. . . It then concludes with a section on 'Emergency Response' on which Arenas here relies. . . As the GDOC Director of Operations, Steve Upton, clarified, however, that section applies only to inmates who have been identified as potentially suicidal or self-injurious, and, based on such identification, have been placed in a designated stabilization unit. Upton's understanding of the scope of SOP VG68-0001 is not only reasonable but is likely the better reading of the policy in light of its structure, text, and stated purpose. Tavara was neither identified as potentially suicidal nor assigned to a stabilization unit. Rather, he was housed in administrative segregation. Therefore, it was reasonable that Calhoun did not implement the procedures outlined in SOP VG68-0001. And though Banasco urged that an officer must always intervene in a suicide, he did not purport to interpret GDOC protocol. Arenas has therefore failed to show that SOP VG68-0001 is evidence of any deliberate indifference on Calhoun's part."); ***Hyatt v. Thomas***, 843 F.3d 172, 180 (5th Cir. 2016) ("[A]lthough failure to properly execute a suicide prevention policy may amount to deliberate indifference, *see Estate of Pollard*, 579 F. App'x at 266, in this case, considering the steps that Thomas did take, any potential noncompliance with Callahan County's policy would have been at most negligent. . . We therefore hold that, while not ideal, her failure to exercise even greater care to avoid Hyatt's suicide did not amount to deliberate indifference. . . America faces an epidemic of suicide by individuals in custody. According to the Bureau of Justice Statistics, suicide has been the leading cause of death in jails every year since 2000. Margaret Noonan et al., U.S. Dep't of Justice, *Mortality in Local Jails and State Prisons, 2000–2013—Statistical Tables* 1 (2015), *available at* http://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf. In 2013, more than a third of jail inmate deaths were due to suicide. . . In 2015, there were 33 suicides in county jails in Texas. Dana Liebelson & Ryan J. Reilly, *Sandra Bland Died One Year Ago*, Huffington Post – Highline (July 13, 2016), http://highline.huffingtonpost.com/articles/en/sandra-bland-jail-deaths/. Yet preventing detainee suicides is far from impossible. Brazos County, Texas, makes an effort to keep people with mental health issues out of jail, diverting individuals to mental health facilities instead of charging them with a crime. The county jail also screens inmates twice, first with an officer and then with a nurse. As a result, the jail, which houses roughly 650 inmates, has had only one suicide in the past decade. . . It is clear that more can and must be done to address suicides in prisons and jails. Nevertheless, '[d]eliberate indifference is an extremely high standard to meet.'. . Officer Thomas took measures to prevent Jason Hyatt's suicide: she withheld from him the most obvious potential ligature, placed him under video surveillance, and directed her relieving officer to keep a close watch over him. Although these measures were ultimately, and tragically, insufficient, we cannot say that they constitute deliberate indifference. The judgment of the district court granting summary on grounds of qualified immunity is therefore AFFIRMED."); ***Jackson v. West,*** 787 F.3d 1345, 1359 (11th Cir. 2015) ("This case is troubling. The Marion County Jail tragically failed to keep Mr. James safe while he was incarcerated. Under our precedent, however, an officer is liable under § 1983 for the suicide of an inmate only if he had subjective knowledge of a serious risk that the inmate would commit suicide and he disregarded that known risk. Because we find no genuine factual dispute about the subjective knowledge of these seven defendants, we cannot sustain the District Court's ruling. We reverse with the instruction that the District Court grant the

defendants' motions for summary judgment."); ***Belbachir v. County of McHenry***, 726 F.3d 975, 982-84 (7th Cir. 2013) ("The judge said that the County could not be liable unless one of its employees was. That's incorrect. What's true is that if a County employee were liable, the County itself would not be liable merely by virtue of the doctrine of respondeat superior; the doctrine is inapplicable in section 1983 cases. But an institution can violate section 1983 just as an individual can. The plaintiff complains that the County failed to provide annual training to its jail staff on how to recognize the risk of suicide (the members of the staff did receive such training when they were hired), failed to have a written suicide-prevention policy, and lacked policies governing communication between the medical staff and the guards. Granted that the sheriff, the County's policymaker regarding the jail, knew of the suicide risk to prisoners, especially new prisoners-there had been a number of suicide attempts in the previous 10 years (though precisely how many we don't know)—nevertheless the grounds on which the plaintiff accuses the sheriff of deliberate indifference to the risk of suicide are thin. The facts in cases in which a county jail or other local jail (or its sheriff) have been held liable for deliberate indifference to prisoners' safety or health are much more favorable to the plaintiff than the facts in this case. . .It's difficult to see why formal policies would be necessary to assure adequate communication between the guards and the members of the medical staff, since they work side by side. More troublesome is the failure either to have provided annual training or to have had a written policy; with neither, a lot of weight was being placed on guards' memory, though no doubt the suicide attempts jogged their memory. But at worst the sheriff's failure to take the additional measures that the plaintiff thinks necessary was negligent, and maybe not even that. For while the immigration authorities, who monitor the jail's treatment of its federal prisoners, rated the jail's suicide-prevention policy 'deficient' in 2002, they rated it acceptable in both 2003 and (the last evaluation before Belbachir committed suicide) 2004. Shortly after the suicide, it is true, the immigration authorities, in what may be an example of hindsight bias, found fault with the jail's suicide prevention policies for (1) forgoing annual training of the jail staff in suicide prevention; (2) having only an incomplete or inconsistent policy governing intake screenings; (3) lacking written procedures on when to place detainees on, or remove them from, suicide watch; and (4) sometimes allowing guards to perform the required 10–minute checks of prisoners on suicide watch by intercom rather than visually. But there is no evidence that the sheriff was aware of any of these failures except the first. And even if the sheriff was culpable for failing to discover and correct the deficiencies argued by the plaintiff, there is no evidence that correcting them before Belbachir arrived at the jail would have prevented her suicide. Once again a causal relation between fault and injury is missing. The critical failure to prevent Belbachir's suicide occurred when defendant Frederick, having decided that Belbachir was not suicidal, failed to tell the guards to put her on suicide watch. Two of the three deficiencies of which the plaintiff complains—the absence of annual training and of a written suicide-prevention policy—are addressed to the guards rather than to the medical staff. The third—the absence of a policy governing communication between the medical staff and the guards—could not have played a causal role either, because Frederick, not thinking that Belbachir was a suicide risk, had no warning to communicate to the guards."); ***Short v. Smoot***, 436 F.3d 422, 427-30 (4th Cir. 2006) (" The right in question here, defined at the appropriate level of specificity, is the right of a detainee, whose jailers know that he is suicidal, to have his jailers take precautions against his

suicide beyond merely placing him in a cell under video surveillance. We hold that *Brown v. Harris*, 240 F.3d 383 (4th Cir.2001), demonstrates that no such right derives from the Eighth Amendment. . . . Importantly, a prison official 'who actually [knows] of a substantial risk to inmate health or safety may be found free from liability if [he] responded reasonably to the risk, even if the harm ultimately was not averted.'. . . *Brown* demonstrates that the first-shift officers' response to Short's risk of suicide was objectively reasonable and therefore sufficient to prevent liability under the Eighth Amendment. . . . Here, the first-shift officers' response to the risk that Short would kill himself was the same as Ogden's response in *Brown*: they placed the detainee in a cell under video surveillance. Thus, under *Brown*, this response was sufficient under the Cruel and Unusual Punishments Clause regardless of whether additional precautions might also have been advisable. . . . The critical point is that despite the actual failure of the officers' measures to prevent the detainees' suicides, and despite possible inattentiveness of the officers whose duty it was at the time of the suicides to watch the monitors, in both *Brown* and the present case the officers placed their detainees in video-monitored cells, knowing that someone would be responsible for watching the monitors. . . . Appellants do not dispute that it was clearly established on the day of Short's death that the conscious failure by a jailer to make any attempt to stop an ongoing suicide attempt by one of his detainees would constitute deliberate indifference."); ***Gray v. City of Detroit,*** 399 F.3d 612, 616 (6th Cir. 2005) ("*Barber* confirmed an earlier holding that there is no general constitutional right of detainees to receive suicide screenings or to be placed in suicide safe facilities, unless the detainee has somehow demonstrated a strong likelihood of committing suicide. . . . Here, plaintiff has presented no evidence to support his claim that Officer Gross actually knew that Gray was at risk of committing suicide. All of Gray's complaints had been of a physical nature, and none of his behavior had been self-injurious. He did not demonstrate a 'strong likelihood' of committing suicide. The only conceivable way that any individual officer could have possibly concluded that Gray was a suicide risk was to have obtained and appropriately pieced together the knowledge of every other officer involved in the case. And as the District Court said, '[t]he test for deliberate indifference is a subjective test ... not an objective test or collective knowledge.' Because Gray's conduct and statements did not give rise to a constitutional duty on the part of his jailors to screen or monitor him for suicide, there is no evidence that Officer Gross violated Gray's constitutional rights in any way."); ***Crocker v. County of Macomb***, No. 03-2423, 2005 WL 19473, at *4, *5 (6th Cir. Jan. 4, 2005) (unpublished) ("Jail officials cannot be charged with knowledge of a particular detainee's high suicide risk based solely on the fact that the detainee fits a profile of individuals who purportedly are more likely to commit suicide than those who do not fit the profile in all respects. This is particularly true since if past suicide attempts are factored out, the profile described by plaintiff casts a very wide net, and there is no evidence that the majority of detainees who fit the profile in those respects that would be apparent to an observer are at risk for attempting suicide. Thus, absent evidence that any individual defendant knew Tarzwell had a serious medical need manifesting itself in suicidal tendencies or that such need was obvious, plaintiff cannot prevail on the Fourteenth Amendment claim against the individual defendants under the *Estelle* analysis. As in another jail suicide case decided by this court, because there is no evidence that the individual defendants knew Tarzwell was at risk of attempting suicide, '[t]he Aright' that is truly at issue here is the right of a detainee to be screened correctly for suicidal

tendencies and the right to have steps taken that would have prevented suicide.' . . Indeed, plaintiff identifies the right which forms the basis for the alleged constitutional violation in this manner by arguing that although Officer Murphy knew that Tarzwell met certain criteria for a suicide risk, Murphy failed to take steps to confirm the risk, such as checking law enforcement records or asking Tarzwell about his suicidal ideation, and did not conduct any screening of Tarzwell when he was delivered to the jail. We found in *Danese* that a right to be screened correctly for suicidal tendencies and to have steps taken to prevent suicide was not clearly established as of the date of that decision, noting that, '[i]t is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help.'. .Plaintiff has not cited any case decided by the United States Supreme Court or by this Circuit since *Danese* finding a constitutional right to be screened for suicidal tendencies on the part of either a pretrial detainee or a prisoner entitled to the protections of the Eighth Amendment. Consistent with our prior decisions addressing this issue, we hold that the individual defendants' failure to screen Tarzwell for suicidal tendencies or ideation and to take measures that would have prevented his suicide are not tantamount to punishment under the circumstances of this case and cannot serve as the basis for imposing liability on the individual defendants under § 1983. Accordingly, the district court did not err by granting summary judgment in favor of the individual defendants."); ***Matos ex rel Matos v.. O'Sullivan***, 335 F.3d 553, 557 (7th Cir.2003) (defendant must have had actual knowledge of detainee's risk of suicide); ***Cagle v. Sutherland,*** 334 F.3d 980, 987(11th Cir. 2003) (per curiam) ("Cagle concedes, in her brief, that consent decrees can neither create nor expand constitutional rights. She says, however, that the consent decree can still be relevant to a section 1983 action. She claims that the *Praytor* order put Winston County on notice of the understaffing problem and, in this sense, that the violation of the order establishes deliberate indifference to the risk of jail suicide. We disagree. . . . The *Praytor* order derived from a jail-condition class action. Suicide was no factor in that litigation. The word 'suicide' appears nowhere in the *Praytor* complaint and nowhere in the *Praytor* order. Sheriff Sutherland's requests for an additional nighttime jailer were based on his concerns about escape. His requests make no mention of a risk of suicide. These facts fall short of establishing that the County was aware of a strong likelihood of suicide. In addition, no evidence shows that, before Butler, any prisoner had ever committed suicide in Winston County Jail. Nothing in the record required County officials to conclude that commonly prisoners in the Winston County Jail were substantially likely to attempt suicide."); ***Boncher v. Brown County,*** 272 F.3d 484, 488 (7th Cir. 2001) ("The plaintiff is left to argue that the defendants exhibited deliberate indifference to suicide risk by failing to train the intake officers or adopt a better intake questionnaire. It is not clear what good the better training would have done, at least in this case; the basic judgment the intake officers had to make was whether Boncher was joking, and that is not a judgment likely to be much assisted by special training. . . . The form is defective, but because of a rather subtle problem − the failure to specify probing follow-up questions for inmates who indicate mental or emotional problems. That is a serious deficiency and one that ought to be corrected, if only to shield the defendants from liability for commonlaw negligence in suits under state law. But like other courts to consider the issue, we don't see how such a slip, at worst careless, could be proof evidence of something much worse, a deliberate failure to deal with a known high risk of death."); ***Payne v. Churchich***, 161 F.3d 1030,

1041, 1042 (7th Cir. 1998) ("When the § 1983 claim is based on a jail suicide, the degree of protection accorded a detainee is the same that an inmate receives when raising an inadequate medical attention claim under the Eighth Amendment − deliberate indifference. . . . [O]ur cases dealing with § 1983 claims based on a pretrial detainee's suicide have held that a state actor like Deputy Papa can be held liable for a detainee's suicide only if the defendant was deliberately indifferent to a substantial suicide risk. . . . We have held that knowledge of a substantial risk of suicide can be inferred from the obviousness of the risk. . . However, we do not believe that the allegations in the complaint about Mr. Hicks' conduct and tattoo message, without more, indicate an obvious, substantial risk of suicide. There is no allegation of Mr. Hicks' suicidal tendencies, no claim or evidence of past suicide attempts or warnings from family members of a mental disturbance and suicidal condition. . .None of the facts alleged in this case − Mr. Hicks' intoxication, cursing and tattoo − raises an issue of whether Deputy Papa had knowledge of, or even particular reason to suspect, a substantial risk of suicide on Mr. Hicks' part."); ***Liebe v. Norton***, 157 F.3d 574, 578 (8th Cir. 1998) ("The facts of this case are strikingly similar to those in *Rellergert*. In both cases, the prisons had policies in place for the protection of inmates classified as suicide risks. Tragically, in both cases, despite those preventive policies, inmates were successful in committing suicide. . . . While Norton may have been negligent in not checking on Liebe more often, or in failing to notice the exposed electrical conduit in the temporary holding cell, we cannot say as a matter of law that his actions were indifferent. To the contrary, Norton's actions constituted affirmative, deliberate steps to prevent Liebe's suicide. Despite Norton's ultimate failure to prevent that suicide, Norton did not act with deliberate indifference."); ***Barrie v. Grand County***, 119 F.3d 862, 868, 869 (10th Cir. 1997) ("[W]e conclude that in this circuit a prisoner, whether he be an inmate in a penal institution after conviction or a pre-trial detainee in a county jail, does not have a claim against his custodian for failure to provide adequate medical attention unless the custodian knows of the risk involved, and is 'deliberately indifferent' thereto. Whether the detainee has been taken before a magistrate judge or other judicial officer to determine the legality of his arrest is not material, the custodian's duty is the same in either event. And the same standard applies to a claim based on jail suicide, i.e., the custodian must be 'deliberately indifferent' to a substantial risk of suicide."); ***Estate of Hocker by Hocker v. Walsh***, 22 F.3d 995, 1000 (10th Cir. 1994) ("Here, no facts suggest that the Detention Center staff had knowledge of the specific risk that Ms. Hocker would commit suicide. Nor do the facts suggest that Ms. Hocker's risk of suicide was so substantial or pervasive that knowledge can be inferred. Though the staff obviously knew that Ms. Hocker was intoxicated or under the influence of drugs, intoxication with its accompanying incoherence does not, by itself, give the Detention Center staff knowledge that Ms. Hocker posed a specific risk of suicide." footnote omitted); ***Bowen v. City of Manchester***, 966 F.2d 13, 18, 19 (1st Cir. 1992) ("In cases involving the psychological needs of a potentially suicidal detainee, courts have found officials to have acted with deliberate indifference only when the detainee shows clear signs of suicidal tendencies and the officials had actual knowledge, or were willfully blind, to the large risk that the detainee would take his life."); ***Manarite v. City of Springfield***, 957 F.2d 953, 954 (1st Cir. 1992) ("where police departments have promulgated commonplace suicide-prevention policies, courts ordinarily have found supervisors not liable . . . even if officers did not always follow the department's policy and even if other, better policies

might have diminished suicide risks."), *cert. denied*, 113 S. Ct. 113 (1992); ***Hall v. Ryan***, 957 F.2d 402, 405 (7th Cir. 1992) (prison officials not entitled to qualified immunity if they actually knew inmate was serious suicide risk, yet failed to take appropriate steps to protect inmate); ***Schmelz v. Monroe County***, 954 F.2d 1540, 1545 (11th Cir. 1992) (no liability for suicide of prisoner who had never threatened or attempted suicide and who was never viewed as suicide risk); ***Barber v. City of Salem***, 953 F.2d 232, 239-40 (6th Cir. 1992) ("[W]e adopt the Eleventh Circuit's holding in ***Popham*** that the proper inquiry concerning the liability of a City and its employees in both their official and individual capacities under section 1983 for a jail detainee's suicide is: whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to deliberate indifference to the decedent's serious medical needs."); ***Colburn***, *supra*, 946 F.2d at 1023, ("[P]laintiff in a prison suicide case has the burden of establishing three elements: (1) the detainee had a 'particular vulnerability to suicide,' (2) the custodial officer or officers knew or should have known of that vulnerability, and (3) those officers 'acted with reckless indifference' to the detainee's particular vulnerability."); ***Elliott v. Cheshire County, N.H.***, 940 F.2d 7, 10-11 (1st Cir. 1991) ("The key to deliberate indifference in a prison suicide case is whether the defendants knew, or reasonably should have known, of the detainee's suicidal tendencies . . . . Moreover, the risk must be 'large,'. . . and 'strong,'. . . in order for constitutional (as opposed to tort) liability to attach." cites omitted); ***Popham v. City of Talladega***, 908 F.2d 1561, 1564 (11th Cir. 1990) (absent knowledge of detainee's suicidal tendencies, cases have consistently held failure to prevent suicide does not constitute deliberate indifference); ***Burns v. City of Galveston, Texas***, 905 F.2d 100, 104 (5th Cir. 1990) (constitutional right of detainees to adequate medical care does not include absolute right to psychological screening in order to detect suicidal tendencies); ***Belcher v. Oliver***, 898 F.2d 32, 36 (4th Cir. 1990) (plaintiffs' attempt to turn case into one for inadequate training is unavailing where no underlying constitutional infraction); ***Williams v. Borough of West Chester***, 891 F.2d 458, 464-467 (3d Cir. 1990) (not enough evidence to prove that officers knew of arrestee's suicidal tendencies).

See also ***Andrews v. Wayne County, Michigan***, 957 F.3d 714, 724-25 (6th Cir. 2020) ("Andrews argues that the Jail's policy of failing to train its employees in suicide risk assessment shows deliberate indifference. . . . As the district court recognized, Andrews cannot prevail on a failure-to-train theory of liability against the County because no constitutional tort was committed. No constitutional tort was committed here because White did not demonstrate a strong likelihood of committing suicide. Like the pretrial detainee who committed suicide in *Gray*, White 'never made any statements that could reasonably be interpreted as threatening to harm [her]self.'. . During the intake process, White appeared mentally stable during two separate intake interviews and the Jail had no other information to suggest that she was threatening harm. . . She expressly denied suicidal ideation or thoughts of harm when asked (twice). Even her former fiancé failed to flag the issue—because he did not think White was suicidal. . . Furthermore, Carnill testified that had White presented as mentally unstable, he would have taken appropriate precautions, including housing her on the mental health unit and contacting the on-call psychiatrist. Thus, any purported lack of specific suicide risk assessment training did not cause White to commit suicide. Finally,

like the defendant city jail in *Gray*, the County has no history of suicides relative to the KOP program. Thus, as in *Gray*, any purported failure to train its employees in suicide risk assessment did not cause White's death. Other factors, such as White's use of depression and anxiety medication, did not change the calculus. As Andrews' own expert, Dr. A. E. Daniel, M.D., admitted, 'just because a person has depression, [that] doesn't mean [she is] suicidal,' and 'not all persons with depression or anxiety are suicidal.' Indeed, the fact that White had already taken steps to treat her anxiety and depression suggest that any potential suicidal tendencies were under control, and Carnill followed up by asking White if she had any suicidal thoughts or ideations, which she denied. He also referred her to a social worker for evaluation. In short, Carnill, a trained medical professional in the County's employ and entrusted by it to assess White's mental and physical condition, did not display deliberate indifference towards White. Which brings us back to the only defendant in this case, Carnill's employer, the County. This court has 'continuously held that under § 1983, a county can only be held liable if there is a showing of an underlying constitutional violation by the county's officials.' *Burkey v. Hunter*, 790 F. App'x 40, 41 (6th Cir. 2020) (listing cases). Axiomatically, '[t]here can be no *Monell* municipal liability under § 1983 unless there is an underlying unconstitutional act.'. . For this reason, the district court properly held that the County was entitled to summary judgment on the failure to train claim.")

See also ***Cleveland v. Bell***, 938 F.3d 672, 676-77 (5th Cir. 2019) ("In this case, the district court failed to provide any analysis of why it denied qualified immunity to Nurse Bell. Instead, it gave a one-sentence conclusory statement: 'Taking the facts in the light most favorable to Plaintiffs permits a conclusion that, on the night before and morning of Cleveland's death, she acted with deliberate indifference to Cleveland's welfare.'. . The court did not identify which facts showed that Nurse Bell: (1) was aware of information that could lead to the inference that Cleveland was experiencing a life-threatening medical emergency; (2) drew the inference and was subjectively aware of how serious the situation was; and (3) disregarded Cleveland's life-threatening medical emergency, despite appreciating its existence. When the district court fails to identify which facts it relied on, we must review the entire record to determine 'what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'. . We then review *de novo* the district court's application of the law to those facts. . . Having reviewed the record, we find no evidence that on November 11th or 12th, Nurse Bell subjectively 'dr[e]w the inference' that Cleveland was experiencing a life-threatening medical emergency. . . The record contains statements from Nurse Bell indicating that she thought there was nothing wrong with Cleveland and believed he was faking illness. But nothing suggests that these statements reflected anything other than her sincere opinion at the time. Even if we construe her statements in the light most favorable to Plaintiffs, they are insufficient to establish that Nurse Bell knew how serious the situation was. The Supreme Court has made clear that actual knowledge is an essential element of Plaintiffs' burden, as mere negligence cannot establish a constitutional violation. . . Given the lack of evidence about Nurse Bell's subjective awareness of a substantial risk of serious harm to Cleveland, Plaintiffs cannot show a constitutional violation at step one of the qualified-immunity analysis.")

But see ***Sanchez v. Oliver***, 995 F.3d 461, 475 (5th Cir. A2021) ("Here, plaintiffs have

alleged that Oliver actually knew Gauna was suicidal, but declined to keep him on suicidal watch regardless. There was no pre-existing provider–patient relationship. Oliver had no reason to believe that Gauna's expressed desire for protection in the infirmary from his own suicidal tendencies was for secondary gain or in any other way insincere. To the contrary, her notes described Gauna as 'cooperative,' albeit 'very, very depressed.' Gauna told Oliver that he had active suicidal ideation, and experienced it 'all the time,' that 'it always crosses my mind,' and that 'there is always a plan' for how he would commit suicide. Oliver had access to ample evidence that Gauna was genuinely suicidal, and has offered no evidence other than a five-word diagnostic note ('no intent "at the moment"') to indicate that she did not actually perceive this risk. Nonetheless, she made the decision—that was solely within her purview to make—that Gauna be taken off suicide watch and placed into the general population, where he would have access to tie-off points and ligatures, including the bedsheets with which he eventually hanged himself. Sanchez has presented enough evidence from which a reasonable jury could conclude that Oliver was aware of facts from which she could draw the inference that Gauna was suicidal, and that she actually did draw that inference but responded with deliberate indifference, to avoid summary judgment on her § 1983 claim under the Fourteenth Amendment."); ***Rogers v. Santa Rosa County Sheriff's Office***, 856 F. App'x 251, ___ (11th Cir. 2021) (not reported) ("The district court applied the correct standard to evaluate the deputies' conduct. 'The Due Process Clause of the Fourteenth Amendment guarantees pretrial detainees the right to basic necessities that the Eighth Amendment guarantees convicted persons.'. . So detainees have a 'right to be protected from self-inflicted injuries, including suicide.'. . An official who displays deliberate indifference to a detainee's taking of his own life may be liable for violating his substantive right to due process under the Fourteenth Amendment. . . .The district court did not err in determining that the evidence, taken in the light most favorable to Rogers, could lead a jury to find that Gaddis and Bauman knew of a strong risk that Escano-Reyes would attempt to harm himself and deliberately took no action to prevent his suicide. The deputies knew that Escano-Reyes was on suicide watch and had attempted to harm himself a few hours earlier. They heard Escano-Reyes yelling, but they ignored him. The deputies *never* physically checked Escano-Reyes, and Gaddis falsified records to conceal their inaction. A jury could find that, had the deputies monitored Escano-Reyes, they could have prevented him from committing suicide and that their failure to perform the task assigned to them constituted deliberate indifference."); ***Lisle v. Welborn***, 933 F.3d 705, 717 (7th Cir. 2019) ("Proving actual subjective knowledge of the risk is often difficult, . . . but not here. Nurse South was responsible for monitoring and evaluating Lisle while he was on suicide watch. Lisle met his burden on this half of the subjective prong. . . Lisle also offered evidence to support the second component of this prong—that South intentionally disregarded the risk of suicide. He need not offer evidence of purposeful infliction of harm. Here, Lisle alleges that South was deliberately indifferent to his risk of suicide by taunting him for being unsuccessful and actually encouraging Lisle to kill himself while he was in the infirmary on suicide watch. Assuming Lisle's account is true, as we must, South's statements could be deemed cruel infliction of mental pain and deliberate indifference to his risk of suicide, making summary judgment improper.")

See also ***Hare v. City of Corinth***, 949 F. Supp. 456, 462-63 (N.D. Miss. 1996) (on remand) ("The subjective nature of the *Farmer* and *Hare IV* analyses are relevant when determining whether or not the officer had actual knowledge of the existence of the risk, but not at all dispositive of whether or not the risk itself was in fact a substantial one of serious harm. An officer cannot escape liability by being actually aware of an objectively substantial risk of serious harm which he subjectively believes is not substantial. To do so would only protect detainees and inmates from risks of harm that prison officials deem substantial. This portion of the deliberate indifference inquiry focuses upon subjective knowledge, not subjective seriousness."), *rev'd on other grounds*, 135 F.3d 320 (5th Cir. 1998).

See also ***Cook v. Sheriff of Monroe County***, 402 F.3d 1092, 1115-17 (11th Cir. 2005) ("[T]o succeed on her § 1983 claim, Cook must establish that the Sheriff himself, as representative of Monroe County, was deliberately indifferent to the possibility of Tessier's suicide, since neither *respondeat superior* nor vicarious liability exists under § 1983. . . . Accordingly, 'our first inquiry ... is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.' . . . After thorough review of the entire record in this case, we conclude that there is not. Cook in essence offers two municipal policies or customs that she believes establish such a link: first, the County's allegedly deficient procedures for processing and responding to inmate medical requests; and second, the County's failure to adequately train MCDC employees in suicide prevention. However, we need look no further than Cook's failure to establish that the County should have foreseen Tessier's suicide to conclude that any deficiencies that may exist in MCDC polices do not rise to the level of deliberate indifference. Foreseeability, for the purpose of establishing deliberate indifference, requires that the defendant have had 'subjective knowledge of a risk of serious harm,' meaning, in a prison suicide case, knowledge of 'a strong likelihood rather than a mere possibility that the self-infliction of harm will occur.' . . Moreover, because *respondeat superior* liability does not attach under § 1983, the defendant himself − in this case, the Sheriff (as representative of the County) − must have had this knowledge. The record in this case is devoid of any evidence that the Sheriff had any such knowledge. As we have explained previously, '[n]o matter how defendants' actions might be viewed, the law of this circuit makes clear that they cannot be liable under § 1983 for the suicide of a prisoner who never had threatened or attempted suicide and who had never been considered a suicide risk.'. . Cook has presented no evidence that Tessier had previously attempted suicide or had ever been considered a suicide risk. . . . Cook argues that the MCDC's allegedly defective procedures amount to 'deliberate indifference toward a class of suicidal detainees to which Tessier belongs, and that the deliberate indifference toward that class caused constitutional harm to Tessier individually.'. . However, as we have explained previously, under our precedent, the defendant must have had 'notice of the suicidal tendency of the individual whose rights are at issue in order to be held liable for the suicide of that individual.' . . Deliberate indifference, in the jail suicide context, is not a question of the defendant's indifference to suicidal inmates or suicide indicators generally, but rather it 'is a question of whether a defendant was deliberately indifferent to an individual's mental condition and the likely consequences of that condition.' . . For this reason, '[a]bsent knowledge of a detainee's suicidal tendencies, [our] cases have consistently held that

failure to prevent suicide has never been held to constitute deliberate indifference.' . . Thus, even if Cook had established the Sheriff's deliberate indifference toward suicidal inmates in general − and, on this record, precious little evidence points to such a conclusion − this would not suffice to demonstrate the foreseeability of Tessier's suicide and to hold the Sheriff liable under § 1983. . . Because Cook has failed to demonstrate that Tessier's suicide was foreseeable to the Sheriff, the sole defendant in this case, 'there is no legally sufficient evidentiary basis for a reasonable jury to find' deliberate indifference. . . Accordingly, the district court properly entered judgment as a matter of law for the Sheriff on Cook's § 1983 claim."); ***Tittle v. Jefferson County Commission***, 10 F.3d 1535, 1539 (11th Cir. 1994) (*en banc*) ("[I]n this circuit a finding of deliberate indifference requires that officials have notice of the suicidal tendency of *the* individual whose rights are at issue in order to be held liable for the suicide of that individual.").

But see ***Cavalieri v. Shepard,*** 321 F.3d 616, 623, 624 (7th Cir. 2003) ("Of course, the law did not require Shepard to sit by the telephone all day, communicating with the CCCF about transferred prisoners. The question is what he was supposed to do in the face of the knowledge of a life-threatening situation that he actually had. He made several telephone calls to the CCCF, but he passed by the opportunity to mention that he had been informed that Steven was a suicide risk, and that the jail itself had recognized this only a month earlier. If Shepard had known that a detainee had an illness that required life-saving medication, he would also have had a duty to inform the CCCF, or any other entity that next held custody over the detainee. . . . We conclude that the law as it existed at the time of Steven's suicide attempt provided Shepard with fair notice that his conduct was unconstitutional. The rule that officials, including police officers, will be 'liable under section 1983 for a pre-trial detainee's suicide if they were deliberately indifferent to a substantial suicide risk,' . . . was clearly established prior to 1998. The fact that several state agencies were working together on his case, and that Steven happened to attempt suicide in the county's facility rather than at the police station, does not change this analysis.").

See also ***Bowens v. City of Atmore,*** 171 F. Supp.2d 1244, 1253, 1254 (S.D. Ala. 2001) ("Because *Farmer* requires that the defendant's knowledge of the facts and appreciation of the resulting risk be actual, Eleventh Circuit cases suggesting that merely constructive knowledge is sufficient [footnote reference to *Popham v. City of Talladega*, 908 F.2d 1561, 1564 (11 th Cir.1990)] are no longer good law. While the defendant's mere denial of subjective awareness is not dispositive, the plaintiff must provide sufficient circumstantial evidence, including the obviousness of the facts and of the resulting inference of risk, to support a finding of subjective awareness and appreciation. . . . The only circumstance recognized as providing a sufficiently strong likelihood of an imminent suicide attempt is a prior attempt or threat."), *aff'd*, 275 F.3d 57 (11th Cir. 2001), *aff'd*, 275 F.3d 57 (11th Cir. 2001); ***Vinson v. Clarke County***, 10 F. Supp.2d 1282, 1301 (S.D. Ala. 1998) ("[T]he liability of an Alabama county in this context can only properly be based on an indifference to the obvious needs of detainees in general, or of certain defined classes of detainees. . . . Accordingly, the court finds that, in jail suicide cases involving conditions of confinement, the appropriate inquiry is whether jail conditions and past events made it so obvious that suicide would result from the county's failure to modify its jail facilities that the

county could be seen as deliberately indifferent to the interests of all detainees and/or intoxicated detainees.").

The issue of municipal liability for a prison suicide has received extensive consideration by the Third Circuit in ***Simmons v. City of Philadelphia***, 947 F.2d 1042 (3d Cir. 1991). Plaintiff, the mother and administratrix of the estate of the decedent, brought suit under § 1983 against the City and the individual officer who was the "turnkey" on duty when her son hanged himself after being taken into custody for public intoxication. Municipal liability was predicated upon two theories: First, "that the City violated Simmons' constitutional right to due process through a policy or custom of inattention amounting to deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees" and second "that the City violated Simmons' due process rights through a deliberately indifferent failure to train its officers to detect and to meet those serious needs." *Id*. at 1050.

The jury in ***Simmons*** found that the individual officer, although negligent, did not violate Simmons' constitutional rights, but that the City was liable under § 1983. One of the many issues raised on appeal was whether, in light of ***City of Los Angeles v. Heller***, 475 U.S. 796 (1986), the City could be held liable under § 1983 where the individual, low-level official was found not to have violated decedent's constitutional rights.

In affirming the verdict against the City, Judge Becker engaged in a lengthy analysis of municipal liability based on a custom, policy, or failure to train, concluding that to establish municipal liability, principles set forth by the Supreme Court in its "***Pembaur*** trio" must be satisfied. Plaintiff must both identify a particular official with policymaking authority in the area and adduce "scienter-like" evidence with respect to that policymaker.

Judge Becker drew support for the imposition of a "scienter-like" evidence requirement not only from the ***Pembaur*** trio, but also from ***Wilson v. Seiter***, 111 S. Ct. 2321 (1991), in which the Supreme Court held that a prisoner challenging conditions of confinement under the Eighth Amendment must establish "a culpable state of mind" on the part of particular prison officials. 947 F.2d at 1062-63. Finding the level of care owed to pretrial detainees to be at least the same as that owed to convicted prisoners under the Eighth Amendment, Judge Becker determined that ***Wilson*** supported his conclusion that plaintiff was required to adduce "scienter-like" evidence of deliberate indifference of identified policymakers. 947 F.2d at 1064 n.20.

Judge Becker noted that plaintiff need not name the specific policymaker as a defendant, nor obtain a verdict against him to prevail against the municipality. Plaintiff must only present evidence of the policymaker's "knowledge and his decisionmaking or acquiescence." *Id*. at 1065 n.21. *See also* ***Brown v. City of Margate***, 842 F. Supp. 515, 519 (S.D. Fla. 1993) ("Defendant argues that because a municipality can only act through natural persons, the City of Margate could not be found liable unless one or more of the individual named Defendants had also been found liable. Defendants do not cite any authority for this argument, and it merits no more than brief consideration here. . . . The jury may not have been able to decide which official was ultimately

responsible for the City's policies, and therefore declined to find any particular individual liable. This is not necessarily inconsistent with a finding that someone or some combination of policymakers had implicitly or explicitly condoned a policy of tolerance toward the excessive use of force.").

Judge Becker concluded, 947 F.2d at 1064, that:

> In order to establish the City's liability under her theory that Simmons' rights were violated as a result of a municipal policy or custom of deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees, plaintiff must have shown that the officials determined by the district court to be the responsible policymakers were aware of the number of suicides in City lockups and of the alternatives for preventing them, but either deliberately chose not to pursue these alternatives or acquiesced in a longstanding policy or custom of inaction in this regard. [footnote omitted] As a predicate to establishing her concomitant theory that the City violated Simmons' rights by means of a deliberately indifferent failure to train, plaintiff must similarly have shown that such policymakers, likewise knowing of the number of suicides in City lockups, either deliberately chose not to provide officers with training in suicide prevention or acquiesced in a longstanding practice or custom of providing no training in this area.

See also ***Herriges for the Estate of Herriges-Love v. County of Macomb***, No. 19-12193, 2020 WL 3498095, at *9-10 (E.D. Mich. June 29, 2020) ("It is true that 'very few cases have upheld municipality liability for the suicide of a pre-trial detainee.'. . *Simmons v. City of Philadelphia* is one of them. . . There, the plaintiff's decedent, who was arrested for public intoxication, was placed in a cell by himself and hanged himself with a noose made from his pants. . . In the previous five years, twenty inmates had committed suicide; fifteen had been arrested for public intoxication. . . Because the city policymakers were aware of this 'profile' of typical suicidal detainees and failed to provide even minimal training for all its turnkey officers in how to recognize and respond to the profile, the Third Circuit held that there was sufficient evidence to support the jury's finding of municipal liability. In *Gray*, the Sixth Circuit reached the opposite conclusion on different facts at the summary judgment stage of the case. . . The Sixth Circuit distinguished *Simmons* and held that the plaintiff failed to provide evidence that the City of Detroit's policy of inadequate training was the 'moving force' behind the violation of the decedent's constitutional rights. . . 'There was no "profile" that warned officials that plaintiff was a suicide risk [and it was] undisputed that the city produced and disseminated constitutionally adequate policies regarding monitoring for and prevention of suicidal behavior.'. . Of the eight deaths in 'various holding facilities' in eight years, 'only two were suicides, with one occurring in 1998 and 1999.'. . . This case is closer to *Simmons* than to *Gray*. First, there is a distinct pattern here. Unlike *Gray*, the plaintiff has pleaded that '[a]rchaic and outdated communication practices and the inept privatization of mental health services has culminated in disregarding cries for help from pretrial detainees who have repeatedly utilized holes in their bunks and jail-issued bed sheets

to attempt and complete suicide.' . . Although the amended complaint does not indicate how many individuals died by hanging themselves from their bunks, it did allege that 22 inmates committed suicide within sixteen years, three of which occurred within two-and-a-half months of Herriges-Love's death. . . Second, unlike in *Gray*, there is a dispute at the pleading stage over whether CCS 'produced and disseminated constitutionally adequate policies regarding monitoring for and prevention of suicidal behavior.'. . The plaintiff here alleges the exact opposite: '[t]o save time and money, [Correct Care] utilized a computer program which pre-populated Herriges-Love's answers pertaining to his mental health in the negative.'. . The plaintiffs contended this policy was ineffective because (1) 'it failed to require [Herriges-Love]'s intake nurse to ask [Herriges-Love] if he was currently suicidal or planning to commit suicide'; (2) 'it failed to require [Herriges-Love]'s intake nurse to refer [Herriges-Love] to a Qualified Mental Health Professional for a suicide risk assessment;' (3) 'it permitted inexperienced and unqualified employees to ascertain and identify the mental health needs of pretrial detainees;' (4) 'it did not require staff to refer inmates, including [Herriges-Love], to Qualified Mental Health Professionals so long as they were seen by a Qualified Mental Health Professional at some point in the past;' and (5) 'did not require staff to review medical records of inmates, including [Herriges-Love], even though the records were stored electronically in [Correct Care's] computer system.'. . . Finally, unlike in *Gray*, the plaintiff's decedent did make 'statements that could reasonably be interpreted as threatening to harm himself.'. . Correct Care had access to Herriges-Love's records from 2016, which indicated that he was treated by a psychiatrist 'and was involuntarily committed to a mental institution for three weeks for suicide ideation.'. . And the plaintiff alleged that, on July 14, 2017, Correct Care documented 'that [Herriges-Love] expressed feelings of hopelessness, helplessness, and...that there was nothing to look forward to,' but no one informed a shift commander, no one referred him for a mental health evaluation, and no one placed him on suicide watch."); ***Plasko v. City of Pottsville***, 852 F. Supp. 1258, 1266 (E.D. Pa. 1994) ("[T]o find the City of Pottsville liable for the death of detainee, plaintiff must include in the complaint some allegations indicating that responsible policymakers either deliberately chose not to pursue a policy of securing the personal effects of detainees prior to incarceration or acquiesced in a long-standing policy or custom of inaction in light of a prior pattern of similar incidents."); ***Herman v. Clearfield County, Pa.***, 836 F. Supp. 1178, 1188 (W.D. Pa. 1993) ("[A] plaintiff must show that the decedent's rights were violated as a result of a[n] . . . official policy or custom not to train correctional officers, which policy or custom . . . was the product of a conscious decision not to act on a known risk of prison suicides despite the availability of alternatives for preventing such suicides."), *aff'd*, 30 F.3d 1486 (3d Cir. 1994).

For a recent Third Circuit case involving suicide in a state correctional facility, *see* ***Palakovic v. Wetzel***, 854 F.3d 209, 224-32 (3d Cir. 2017) ("We clarify today that . . . the vulnerability to suicide framework applies when a plaintiff seeks to hold prison officials accountable for failing to prevent a prison suicide. It does not, however, preclude other types of claims, even if those claims also relate to an individual who committed suicide while in prison. Here, to the extent Brandon could have brought an Eighth Amendment claim contesting his conditions of confinement while he was alive, his family should not be precluded from doing so

because he has passed away. We agree with the Palakovics that their original claim need not have to fit within the vulnerability to suicide framework, and the District Court erred in dismissing it solely for that reason. . . . Against this backdrop of the extremely serious and potentially dire consequences of lengthy exposure to the conditions of solitary confinement, we turn to the sufficiency of the Palakovics' claim that prison officials who were aware of his history of mental illness permitted Brandon to be repeatedly exposed to inhumane conditions of confinement and acted with deliberate indifference in doing so. . . .Considering these factual allegations in light of the increasingly obvious reality that extended stays in solitary confinement can cause serious damage to mental health, we view these allegations as more than sufficient to state a plausible claim that Brandon experienced inhumane conditions of confinement to which the prison officials—Wetzel, Cameron, Boyles, Luther, and Harrington—were deliberately indifferent. . . We therefore conclude that the District Court should have allowed this claim to proceed to discovery. . . . Considering these allegations and recognizing the high bar the Palakovics must meet in order to ultimately prevail, we conclude that they have presented allegations sufficient to state a plausible claim warranting discovery: Despite receiving some minimal care, Brandon received mental health treatment while at SCI Cresson that fell below constitutionally adequate standards, and the defendants—both the mental healthcare personnel providing treatment and the supervisory officials and medical corporation responsible for the prison's mental healthcare treatment policies—were deliberately indifferent to Brandon's serious medical needs. Thus, this claim, too, should have survived dismissal. . . .Our statements in *Woloszyn* and *Colburn II* requiring a plaintiff to demonstrate a 'strong likelihood' of self-harm were never intended to demand a heightened showing at the pleading stage by demonstrating—as the District Court seemed to require here—that the plaintiff's suicide was temporally imminent or somehow clinically inevitable. A particular individual's vulnerability to suicide must be assessed based on the totality of the facts presented. In our view, the sum of the facts alleged in the amended complaint are more than sufficient to support plausible inferences that there was a 'strong likelihood' that self-inflicted harm would occur, and that Brandon therefore suffered from a particular vulnerability to suicide. . . .Finally, the District Court concluded that the amended complaint failed to adequately plead deliberate indifference on the part of any defendant. In so doing, the District Court erroneously applied a subjective test, examining what the officials 'were actually aware of as opposed to what they should have been aware of.'. . Yet our case law is clear: It is not necessary for the custodian to have a subjective appreciation of the detainee's particular vulnerability. . . Rather, we have held that 'reckless or deliberate indifference to that risk' only demands 'something more culpable on the part of the officials than a negligent failure to recognize the high risk of suicide.'. . After applying the incorrect standard, the District Court then unnecessarily required the Palakovics to demonstrate one of three limited factual circumstances—specifically, where: (1) a defendant took affirmative action directly leading to the suicide; (2) a defendant actually knew of the suicidal tendencies of a particular prisoner and ignored the responsibility to take reasonable precautions; or (3) a defendant failed to take 'necessary and available precautions to protect the prisoner from self-inflicted wounds.'. . . These non-conclusory allegations support an inference that, despite knowing of Brandon's vulnerability and the increased risk of suicide that solitary confinement brings, the defendants disregarded that risk and permitted Brandon to be repeatedly isolated in

solitary confinement anyway. That is sufficient to satisfy the plausibility standard and proceed to discovery on the vulnerability to suicide claims as to defendants Harrington, Rathore, Eidsvoog, Boyles, and Luther.")

5. *Bryan County v. Brown*

In *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), the Supreme Court revisited the issue of municipal liability under section 1983 in the context of a single bad hiring decision made by a County Sheriff who was stipulated to be the final policymaker for the County in matters of law enforcement.

Plaintiff was injured when she was forcibly extracted from a vehicle driven by her husband. Mr. Brown was avoiding a police checkpoint and was eventually stopped by a squad car in which Reserve Deputy Burns was riding. Burns removed Mrs. Brown from the vehicle with such force that he caused severe injury to her knees.

Plaintiff sued both Burns and the County under section 1983. A panel of the Fifth Circuit affirmed the district court's entry of judgment on the jury's verdict against Burns for excessive force, false arrest, and false imprisonment. The majority of the panel also affirmed the judgment against the County based on the decision of Sheriff Moore to hire Burns without adequately investigating his background. The Fifth Circuit concluded that Moore's inadequate screening and hiring of Burns demonstrated "deliberate indifference to the public's welfare." ***Brown v. Bryan County***, 67 F.3d 1174, 1185 (5th Cir. 1995), *rev'd* 520 U.S. 397 (1997).

Burns, the son of Sheriff Moore's nephew, had an extensive "rap sheet," but the numerous violations and arrests included no felonies. State law prohibited the Sheriff's hiring of an individual convicted of a felony, but did not proscribe the hiring of someone like Burns.

The Supreme Court, in a five-four opinion written by Justice O'Connor, reversed the Court of Appeals, distinguishing Brown's case, involving a claim that a single lawful hiring decision ultimately resulted in a constitutional violation, from a case where plaintiff claims that "a particular municipal action itself violates federal law, or directs an employee to do so." 520 U.S. at 404. As the Court noted, its prior cases recognizing municipal liability based on a single act or decision attributed to the government entity involved decisions of local legislative bodies or policymakers that directly effected or ordered someone to effect a constitutional deprivation. *See, e.g.*, ***Pembaur***, discussed *infra*; ***Fact Concerts***, *supra*; ***Owen v. City of Independence***, *supra.* In such cases, there are no real problems with respect to the issues of fault or causation.

See also ***Looper Maintenance Service, Inc. v. City of Indianapolis***, 197 F.3d 908, 913 (7th Cir. 1999) ("Looper's counsel claimed at oral argument that a single act motivated by the intent to deny Looper equal bidding access because of his race could constitute municipal policy within the meaning of 42 U. S.C. § 1983. . . While we agree that this is an accurate statement of the law, it is true only when the act complained of is accomplished by a defendant with final

policymaking authority. . . . As previously stated, Looper's third amended complaint names only the City and IPHA as defendants. The City and IPHA are municipal entities, not individuals with final policymaking authority. Accordingly, Looper has failed to allege that any named individual possessed final policymaking authority and that such an individual denied him a constitutional right within the meaning of 42 U.S.C. § 1983."); ***Bennett v. Pippin***, 74 F.3d 578, 586 & n.5 (5th Cir. 1996) (County held liable for Sheriff's rape of murder suspect, where Sheriff was final policymaker in matters of law enforcement); ***Gonzales v. Westbrook***, 118 F. Supp.2d 728, 735 (W.D. Tex. 2000) ("In this circuit, then, a single unconstitutional act by a local governmental entity's final policymaker may subject that governmental entity to liability under section 1983. . . However, that act must reflect an intentional, deliberate, decision by a final policymaker and, where the act or omission of the final policymaker personally did not directly cause the violation of a constitutional right, only decisions of the final municipal policymaker which constitute a conscious disregard for a high risk of unconstitutional conduct by others can give rise to municipal liability."). *See also* ***Williams v. Kaufman County,*** 352 F.3d 994, 1014 n.66 (5th Cir. 2003) ("The district court did not need to determine whether Harris's conduct also amounted to deliberate indifference, because that element must be shown only when there is a claim that the municipality's facially lawful action caused an employee to inflict the injury, not when the municipality (through its policymaker) has directly caused the injury, as has occurred here. Thus, it is unnecessary to examine the deliberate indifference issue to establish liability in this instance.").

Because there was no pattern of "bad hires" alleged by the plaintiff in ***Brown***, the argument for County liability was based on Sheriff Moore's alleged deliberate indifference in failing to investigate Burns' background, on the theory that "Burns' use of excessive force was the plainly obvious consequence of Sheriff Moore's failure to screen Burns' record." 520 U.S. at 409.

The majority, however, rejected plaintiff's effort to analogize her inadequate screening case to a failure-to-train case. Justice O'Connor noted:

In attempting to import the reasoning of *Canton* into the hiring context, respondent ignores the fact that predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties. As our decision in *Canton* makes clear, 'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. Unlike the risk from a particular glaring omission in a training regimen, the risk from a single instance of inadequate screening of an applicant's background is not 'obvious' in the abstract; rather, it depends upon the background of the applicant. A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to affect the rights of citizens, act improperly. But that is only a generalized showing of risk. The fact that inadequate scrutiny of an applicant's background would make a violation of rights more likely cannot alone give rise to an inference that a policymaker's failure to scrutinize the record of a particular applicant produced a specific constitutional violation.

Id. at 410, 411.

The majority opinion concluded that

> Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute 'deliberate indifference.'

Id. at 411.

Thus, the majority insisted on evidence from which a jury could find that had Sheriff Moore adequately screened Deputy Burns' background, he "should have concluded that Burns' use of excessive force would be a plainly obvious consequence of the hiring decision." *Id.* at 412. In the view of the majority, scrutiny of Burns' record produced insufficient evidence from which a jury could have found that Sheriff Moore's hiring decision reflected deliberate indifference to an obvious risk that Burns would use excessive force. *Id.* at 415.

Justice Souter, joined by Justices Breyer and Stevens, dissented in ***Brown***, characterizing the majority opinion as an expression of "deep skepticism" that "converts a newly-demanding formulation of the standard of fault into a virtually categorical impossibility of showing it in a case like this." 520 U.S. at 421 (Souter, J., dissenting).

Justice Breyer, joined by Justices Ginsburg and Stevens, authored a dissent that criticizes the "highly complex body of interpretive law" that has developed to maintain and perpetuate the distinction adopted in *Monell* between direct and vicarious liability, and calls for a reexamination of "the legal soundness of that basic distinction itself." 520 U.S. at 430. *See also* ***Pinter v. City of New York***, 976 F.Supp.2d 539, 551 n.23 (S.D.N.Y. 2013) ("Pinter correctly notes that questions have been raised about the accuracy of *Monell*'s analysis of Section 1983. . . . If it were within the province of a federal district court to question Supreme Court precedent based on indications of dissension, I might be inclined to do so in this case. But this Court's task is to apply Supreme Court and Second Circuit law as it stands. As a result, I am constrained to apply *Monell* and its progeny, although I add my voice to the chorus of those who would encourage the Supreme Court to revisit *Monell*'s analysis.")

Compare ***Kovalchuk v. City of Decherd, Tennessee***, 95 F.4th 1035, 1038-42 (6th Cir. 2024) ("At issue here is the district court's dismissal of three *Monell* claims: (1) failure to train, (2) failure to supervise, and (3) failure to screen. At oral argument, however, Kovalchuk's lawyer conceded that the complaint was deficient on all counts . . . . These concessions aside, because Kovalchuk's appeal and oral argument focused mainly on his failure-to-screen claim, we highlight further why this claim was not plausibly pleaded. For such a claim, a plaintiff must plead sufficient facts supporting the conclusion 'that a municipal [hiring] decision reflects deliberate indifference

to the risk that a violation of a particular constitutional or statutory right will follow the decision.'. . Unlike failure-to-train claims, which typically involve a pattern of unconstitutional conduct to establish deliberate indifference, . . . failure-to-screen claims usually rest—as Kovalchuk's does here—on a single hiring decision[.] For a 'single hiring decision' by a municipal decisionmaker that resulted in a constitutional violation, which 'can be a "policy" that triggers municipal liability,' there exists a 'particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself.'. .To mitigate this danger, the Supreme Court in *Brown* set forth a stringent test: 'To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability,' the plaintiff alleging failure to screen must show that the decisionmaker was deliberately indifferent to the 'known or obvious consequence' of the hiring decision and that the link between the applicant's background and the specific constitutional violation was sufficiently strong. . . Simply choosing not to inquire into an applicant's background does not amount to deliberate indifference. . . 'Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."'. . As for the causation element of deliberate indifference, establishing that a hiring decision would likely result in any constitutional injury is insufficient to impose municipal liability. . . Instead, the plaintiff must show that '*this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff.'. . . Similar to *Brown*, the central question here is whether Chief Peterson's failure to adequately screen Ward's background was the moving force behind Ward's unconstitutional misconduct, and, as a result, Kovalchuk's injury. . . According to the complaint, Chief Peterson, acting as 'the final policymaker for the Decherd Police Department' and 'as an agent for the City of Decherd,' made the 'deliberate choice to hire and retain' Ward even though he 'should have known' that Ward was 'unfit to be a police officer and to possess a deadly service weapon.' Chief Peterson 'ordered' his investigator not to consult Ward's background, which would have revealed that Ward's previous employer, the Fort Walton Beach Police Department, asked him to resign due to 'concerns about his demeanor and professionalism,' that Ward had failed to complete a training program at this previous employer, and that Ward had 'issues' during his employment with another police department in Alabama. These ambiguous allegations, which merely allude to negligent hiring by the City, do not establish the necessary causal link for Kovalchuk's deliberate-indifference claim. Kovalchuk was required to plead facts plausibly alleging that a 'known or obvious consequence' of the hiring decision was that '*this* officer' (Ward) 'was highly likely to inflict the *particular* injury suffered by the plaintiff' (being held at gunpoint following an unconstitutional stop). . . Allegations of 'issues,' 'concerns about [Ward's] demeanor and professionalism,' and his 'fail[ure] to complete [a] training program' fall short of plausibly linking the danger of hiring Ward to Kovalchuk being held at gunpoint by Ward following an unconstitutional stop. . . More specifically, the mere fact that Ward may have been likely—even exceedingly likely—to commit unconstitutional conduct in general would not have put the City on notice that Ward would commit the 'specific constitutional violation' here. . . The same can be said regarding Ward's predisposition to violence—that alone is insufficient under *Brown*. Based simply on the broad allegations in the

complaint, Kovalchuk's failure-to-screen claim is not plausible. The district court did not err in dismissing this claim. Kovalchuk contends that discovery would reveal more specific information on Ward's background, and in turn, that he was highly likely to engage in the particular conduct at issue. But a plaintiff cannot use discovery to bridge the gap between a deficient pleading and the possibility that a claim might survive upon further investigation. . . Put simply, a plaintiff is "not entitled to discovery" to determine whether a claim can survive past the pleading stage. . . Kovalchuk cannot rely on speculation about what may be learned during discovery to defeat the City's motion to dismiss. . . Ward's conduct here was egregious, and he undeniably victimized Kovalchuk. No citizen should ever have to face being unconstitutionally seized, let alone by an off-duty police officer who brandishes a firearm in an apparent incident of road rage. While we are sympathetic to Kovalchuk's plight, the pitfall in his case is his attempt to hold *the City* liable for *Ward's* misconduct. Ward's unconstitutional actions are not automatically attributable to the City, even if the City negligently hired Ward. To find otherwise would require us to contradict Supreme Court precedent by permitting the City to potentially be liable for its employee's actions via respondeat superior. . . And while adequately pleading a municipal liability claim without the benefit of discovery may be difficult, that task is hardly new. . . Perhaps Kovalchuk could have moved to file an amended complaint after further investigating his claims or in response to the City's motion to dismiss. But he did not, and we must analyze the allegations in the complaint before us, which deficiently pleaded a failure-to-screen claim.") *with* ***Kovalchuk v. City of Decherd, Tennessee***, 95 F.4th 1035, 1042-47 (6th Cir. 2024) (Clay, J., dissenting) ("When hiring former police officer Mathew Ward, the City of Decherd (the "City") refused to review, or even consider, Ward's alarming history of employment infractions and job-hopping as a police officer. In fact, the City deliberately ordered that Ward's background should not be investigated and, in the same breath, entrusted Ward with the unbridled authority that accompanies a police badge and gun. Unsurprisingly, Ward subsequently used excessive force to unlawfully abuse, intimidate, and seize an innocent man, Plaintiff Ilya Kovalchuk. But when Kovalchuk turned to the federal courts for recourse, he did not see his constitutional rights vindicated. Instead, his claims were prematurely dismissed before they could even get through the gate—an error that the majority affirms today, effectively foreclosing the future consideration of municipal liability claims based on the failure to screen a police applicant's background. Because I would allow Kovalchuk's failure-to-screen allegations to proceed, I respectfully dissent. . . . Instead of viewing these failure-to-screen allegations in the light most favorable to Kovalchuk, the majority jumps to premature conclusions regarding the City's ultimate liability, before affording Kovalchuk the opportunity to gather additional evidence to prove his claims. In doing so, the majority requires § 1983 litigants to surmount a nearly impossible hurdle to survive the early 12(b)(6) motion to dismiss stage. . . . Kovalchuk's strongest claim against the City focuses on Chief Peterson's explicit command that his subordinates refrain from investigating Ward's background or employment history during the hiring process. . . Although under *Monell* the City cannot be held vicariously liable for Ward's unconstitutional actions, Kovalchuk's complaint alleges more—that *the City's* deliberately skeletal screening process in hiring Ward led to Kovalchuk's injuries. . . These allegations meet the necessary fault and causation standards to plausibly warrant imposing municipal liability, mandating that Kovalchuk's claims should be allowed to proceed. Indeed, the Supreme Court

expressly opened the door to the possibility that a municipality may be liable for failing to adequately screen if 'a full review of [Ward's] record reveals that [his unconstitutional arrest] would be a plainly obvious consequence of the hiring decision.'. . In the context of a hiring decision, *Brown* articulates that an eventual finding of municipal liability originates from allegations that a cover-to-cover background check would indicate 'that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff.'. . Contrary to the majority's premature conclusion that Kovalchuk has not 'establish[ed]' this causation standard, . . . Kovalchuk's allegations regarding the City's deliberate dereliction of its investigative duties prior to hiring Ward permits the 'reasonable inference' that the City was the moving force behind Kovalchuk's injuries. . . . The gravity of Chief Peterson's—and by extension, the City's . . . deliberate choice cannot be overstated. Without so much as a call to either former police department employer, the City entrusted Ward with a police badge and a gun, imbued with the implicit authority to decide life or death of citizens. By rewarding the City's 'head in the sand' strategy, the majority insulates the City from turning over a single piece of discovery, thereby endorsing and perpetuating the cyclical hiring of predatory police officers. The majority's approach permits those 'wandering' police officers who are fired or forced to resign under threat of termination to nonetheless seek employment in nearby jurisdictions. . . Even further, this misguided immunization of police hiring practices from liability strips away the City's incentive to competently hire police officers, which should be viewed as particularly imperative for employment that is accompanied by state power and the authority to wield deadly weapons. As Kovalchuk's complaint alleges, Ward burned through *two different* police departments prior to being hired by the Decherd Police Department. In the face of clear red flags, Chief Peterson ordered his subordinate to cease further background investigation of Ward and avoid finding out any additional information about him. And then, incomprehensibly, the City seeks to skirt its responsibility by subsequently purporting to be surprised that the unvetted 'wandering officer' later brutalized an innocent citizen. . . . Contrary to the majority's misplaced fear regarding the City's liability if we were to reverse the district court's decision, . . . Kovalchuk's plausible allegations should be permitted to move forward. Doing so at this stage of the litigation does not hold a municipality 'liable' for any action. . . Instead, allowing these allegations to proceed to the discovery phase simply affords often-vulnerable plaintiffs the opportunity to attempt to prove their civil rights claims in federal court, a forum historically relied upon for relief from governmental abuse. . . Rather than the conclusive 'smoking gun' evidence that the majority requires, the proper standard requires allegations that only 'nudge[ ] [Kovalchuk's] claims across the line from conceivable to plausible.'. . Kovalchuk has met that burden in this case. Accordingly, the district court erred in dismissing Plaintiff's claims against the City based on a failure-to-screen theory of *Monell* liability. And the majority, in affirming the district court, improperly raises the plausibility bar presented in *Twombly* and *Iqbal*—to the detriment of present and future civil rights plaintiffs. I therefore respectfully dissent.")

6. *Connick v. Thompson*

Connick v. Thompson, 131 S. Ct. 1350, 1361-63, 1366 (2011) ("Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for specific legal training that was present in the *Canton* scenario is absent here. . . . Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. . . . In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law. *Bryan Cty.*, 520 U.S., at 409. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in 'the usual and recurring situations with which [the prosecutors] must deal.'. . A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same 'highly predictable' constitutional danger as *Canton*'s untrained officer. . . . A second significant difference between this case and the example in *Canton* is the nuance of the allegedly necessary training. The *Canton* hypothetical assumes that the armed police officers have no knowledge at all of the constitutional limits on the use of deadly force. But it is undisputed here that the prosecutors in Connick's office were familiar with the general *Brady* rule. Thompson's complaint therefore cannot rely on the utter lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but rather must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply cannot support an inference of deliberate indifference here. . . . We conclude that this case does not fall within the narrow range of "single-incident" liability hypothesized in *Canton* as a possible exception to the pattern of violations necessary to prove deliberate indifference in § 1983 actions alleging failure to train. The District Court should have granted Connick judgment as a matter of law on the failure-to-train claim because Thompson did not prove a pattern of similar violations that would 'establish that the "policy of inaction" [was] the functional equivalent of a decision by the city itself to violate the Constitution.'")

Connick v. Thompson, 131 S. Ct. 1350, 1381-84 (2011) (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., dissenting) ("In sum, the evidence permitted the jury to reach the following conclusions. First, Connick did not ensure that prosecutors in his Office knew their *Brady* obligations; he neither confirmed their familiarity with *Brady* when he hired them, nor saw to it that training took place on his watch. Second, the need for *Brady* training and monitoring was obvious to Connick. Indeed he so testified. Third, Connick's cavalier approach to his staff's knowledge and observation of *Brady* requirements contributed to a culture of inattention to *Brady* in Orleans Parish. . . . In *Canton*, this Court spoke of circumstances in which the need for training may be 'so obvious,' and the lack of training 'so likely' to result in constitutional violations, that policymakers who do not provide for the requisite training 'can reasonably be said to have been

deliberately indifferent to the need' for such training. . . This case, I am convinced, belongs in the category *Canton* marked out. . . . In sum, despite Justice Scalia's protestations to the contrary, . . . the *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's Office. Thompson demonstrated that no fewer than five prosecutors–the four trial prosecutors and Riehlmann–disregarded his *Brady* rights. He established that they kept from him, year upon year, evidence vital to his defense. Their conduct, he showed with equal force, was a foreseeable consequence of lax training in, and absence of monitoring of, a legal requirement fundamental to a fair trial.").

See also ***Truvia v. Connick***, 577 F. App'x 317, 324 (5th Cir. 2014) ("To prove that Connick's office was deliberately indifferent to the need to train prosecutors on *Brady* requirements, Appellants contend that various Orleans Parish prosecutors committed multiple *Brady* violations in other cases, and the DA office did not have a policy to ensure assistant district attorneys immediately obtained witness statements from police in every case. None of this evidence shows that Connick's office was deliberately indifferent to a need for *Brady* training before Appellants' criminal trial in 1976. First, the *Brady* 'violations' Appellants refer to are not proven *Brady* violations; instead, they are the same discovery requests made by counsel in other, unrelated cases to which the prosecutors responded by denying possession of *Brady* material. This evidence, as previously discussed, fails to show actual *Brady* violations, much less an unconstitutional pattern or policy. Second, Appellants' citations to over a dozen federal and state cases to show a 'continuum' of *Brady* violations are not probative because the vast majority of them occurred after Appellants were convicted in July 1976. The two cases that predated July 1976 . . . surely did not convey the requisite notice under a failure-to-train theory. *See Thompson,* 131 S.Ct. at 1360 (holding that not even "*four* reversals could ... have put Connick on notice that the office's *Brady* training was inadequate") (emphasis added). Third, Appellants have not provided any authority to support their assertion that the DA office was required, above and beyond *Brady,* to have a policy for obtaining all witness statements from police files. Because Appellants have not shown that Connick was on actual or constructive notice of the necessity of *Brady* training for the office's attorneys prior to their convictions, the district court correctly held that that Connick is entitled to judgment as a matter of law.")

But see ***Smith v. Connick***, No. 13–52, 2014 WL 585616, *3-*5 (E.D. La. Feb. 14, 2014) ("In *Connick v. Thompson,* 131 S.Ct. 1350 (2011), a case remarkably similar to the instant matter, the Supreme Court applied the *Monell* framework to a district attorney's failure train assistant district attorneys in the requirements of *Brady.* There, the plaintiff was a former death row inmate who spent eighteen years in prison after prosecutors in the Orleans Parish District Attorney's Office (the same office as Defendants here) failed to turn over exculpatory blood evidence in violation of *Brady.* . .Thompson sued, alleging that the *Brady* violation was caused by unconstitutional policies at the office, and District Attorney Connick's failure to train the prosecutors in his office to avoid such constitutional violations. . . Thompson won a jury verdict in his favor, but the Supreme Court reversed. . . The Court held that Thompson failed 'to show that

Connick was on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in his office would' violate *Brady*. . . Defendants' Motion to Dismiss recognizes that *Connick* permits suits against prosecutors for failure to train, or for administration of unconstitutional policies. Likely for this reason, Defendants have not asked the Court to dismiss Plaintiff's official capacity counts, but instead only asks that the Court limit these counts 'to the narrow dictates of *Connick v. Thompson.*'. . The Court agrees that *Connick* contains the relevant analysis for official capacity suits against municipal prosecutors for failure to train. If Plaintiff wishes to pursue these claims, he must allege facts 'to show that [Defendants were] on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in [the] office would' violate *Brady*. . . He has failed to do so at this time. Based on the Complaint before the Court, there is reason to believe that Plaintiff's allegations are more likely to satisfy the requirements for official capacity suits under § 1983 than those alleged in *Connick.* Chiefly, *Connick* dealt with the sharing of exculpatory blood evidence. The Supreme Court remarked in its review of the case that Thompson's claim that Connick was on notice of *Brady* violations in the past was inadequate to put him on notice of potential abuses in the future because '[n]one of those [prior] cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind.'. . Therefore, Connick could not have been said to be on notice that specific training was necessary to avoid the particular Constitutional violation that occurred. . . Here, the violation of *Brady* concerned the sharing of exculpatory *statements.* It is undisputed that Defendants were aware of prior *Brady* violations regarding exculpatory statements in Defendants' office. Plaintiff was arrested in 1995. Prior to that time, at least six appellate decisions had issued overturing convictions based on the failure of Defendants' office to turn over exculpatory or impeachment statements. [collecting cases] For this reason alone, Plaintiff presents a case distinguishable from the Supreme Court's decision in *Connick.* However, even that difference being apparent, Plaintiff still must tailor his Complaint to the dictates of Supreme Court precedent. Because the Complaint, as it exists, does not apply the *Connick* framework, the Court dismisses it without prejudice to reurge. Plaintiff will be given twenty-days from entry of this opinion to amend his complaint in conformance with *Connick.* Specifically, he must allege facts 'to show that [Defendants were] on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in [the] office would' violate *Brady*.").

Compare ***Livermore v. Arnold***, No. 10-507-B-M2, 2011 WL 693569, at *5-*7 & n.11 (M.D. La. Jan. 20, 2011) ("Considering that the only way to impose Section 1983 liability against a District Attorney's office is pursuant to a *Monell* custom/policy claim and that the plaintiff's claims against Perrilloux and Peever, in their official capacities, are to be treated as claims against the District Attorney's office, the only remaining Section 1983 claim for the undersigned to consider is plaintiff's *Monell* custom/policy claim against the DA's office (*i.e.*, the plaintiff's claim that Perrilloux, as the final policymaker for the D.A.'s office, has implemented an unconstitutional policy of prosecuting all misdemeanor charges without investigation and regardless of whether they have merit). . . . The Western District of Louisiana, in *Johnson*, faced the precise issue before the Court herein relative to Perrilloux's official capacity liability − whether the Supreme Court's holding in *Van de Kamp* concerning failure to supervise and train claims mandates the dismissal

of the plaintiff's complaint insofar as it asserts a *Monell* claim against the District Attorney's Office (*i.e.*, against the district attorney in his official capacity). . . . Perrilloux argues that the plaintiffs have failed to state a claim against him in his official capacity because he is entitled to absolute immunity under an extension of *Imbler's* and *Van de Kamp's* policies to official capacity claims. However, as with the DA defendants in *Johnson*, he is unable to point to any cases from a superior court in which a *Monell* claim against a District Attorney's office has been expressly dismissed on the basis of absolute immunity. . . . This Court also recognizes the uncertainty created by *Van de Kamp* and the debate over whether municipal liability under Section 1983 is consistent with the doctrine of absolute immunity but agrees with the Western District of Louisiana that there is no binding authority from a superior court holding that the doctrine of absolute immunity applies to *Monell* claims and that it is inappropriate to speculate as to whether the doctrine will ultimately be expanded beyond its present scope to official capacity claims. Accordingly, because of the lack of any binding authority supporting the argument that Perrilloux is entitled to absolute immunity concerning the plaintiffs' official capacity *Monell* claim, the plaintiffs may proceed against him on that claim to the extent they have otherwise stated a claim upon which relief may be granted under *Monell*. . . . What plaintiffs' claim boils down to is an allegation that the District Attorney's Office has a policy of prosecuting all misdemeanors without first investigating them to determine whether they have merit. Thus, the constitutional violation alleged is a failure to investigate prior to initiating and proceeding with misdemeanor prosecutions. The Fifth Circuit has specifically recognized that a claim 'that [a] prosecutor failed to investigate is not of constitutional dimension' because '[t]here is no such due process right.'. . Thus, even though Perrilloux is not entitled to absolute immunity with respect to plaintiffs' *Monell* claim, such claim should nevertheless be dismissed for failure to state a claim pursuant to Rule 12(b)(6). . . . [E]ven if plaintiffs' *Monell* claim was not subject to dismissal because of the failure to allege a constitutional violation, it would also be subject to dismissal because the plaintiff has failed to specifically allege a pattern of constitutional violations caused by the alleged general policy (such as any other cases where misdemeanors were prosecuted by the 21st Judicial District D.A.'s office without investigating whether the charges had merit), as required when proceeding under a policymaker theory of liability."); ***Gearin v. Rabbett***, No. 10-CV-2227 (PJS/AJB), 2011 WL 317728, at *7, *8 & n.8 (D. Minn. Jan. 28, 2011) ("Although the Eighth Circuit does not appear to have addressed the question of whether a prosecutor's immunity from § 1983 claims extends to municipalities, . . . the Eighth Circuit has held that defendants who were functionally similar to prosecutors and judges did not enjoy absolute immunity from claims brought against them in their official capacities. . . There is thus substantial authority for the proposition that prosecutorial immunity does not extend to municipalities. The contrary decisions cited by the City − four district-court cases from the 1980s − are not persuasive. Notably, two of those four decisions are from New York federal district courts and thus were overruled by the Second Circuit's decision in *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir.1995). The Court therefore concludes that Kantrud's immunity does not extend to the City. . . . [T]he Eighth Circuit has held that, when a plaintiff attempts to pin *Pembaur*-type liability on a municipality by arguing that the *prosecutor* is a policymaker, the prosecutor's immunity also shields the municipality. *Patterson v. Von Riesen*, 999 F.2d 1235, 1238 n. 2 (8th Cir.1993) ("Because of the prosecutors' absolute immunity, Patterson cannot attach liability to the

decision in question, and, thus, even if the policy was county policy, Patterson still may not recover damages.") . . . . [T]he Court reads *Patterson* to hold only that a plaintiff cannot state a *Monell* claim by alleging that a prosecutor was acting as a policymaker when performing functions protected by absolute prosecutorial immunity."); ***Johnson v. Louisiana***, No. 09-55, 2010 WL 996475, at *11, *12 (W.D. La. Mar. 16, 2010) ("The parties join issue on whether the Supreme Court's holding in *Van de Kamp* mandates the dismissal of Johnson's complaint insofar as it asserts a *Monell* claim against the District Attorney's Office. The District Attorney's Office concedes that the Supreme Court addressed only the individual capacity claims asserted by the plaintiff in *Van de Kamp,* but argues no distinction should be made and that the Supreme Court's ruling in *Van de Kamp* mandates dismissal of Johnson's *Monell* claims. . . . The Court's conclusion that absolute immunity does not extend to *Monell* claims is supported by the exacting requirements a plaintiff must establish in order to recover for a claim based on the policymaker's failure to take affirmative action . . . . Absent a pattern of similar constitutional deprivations, a plaintiff will prevail only where the need for training or other affirmative action 'is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [District Attorney's Office] can reasonably be said to have been deliberately indifferent to the need.'. . A need for training or other affirmative action 'is considered sufficiently obvious only where the deprivation of constitutional rights is a 'highly predictable consequence' of the training deficiency.'. . . Accordingly, the Court finds that District Attorney Davis and District Attorney Burkett are not cloaked with the protection of absolute immunity insofar as Johnson asserts claims against them in their *official* capacity − claims which must be treated as *Monell* claims against the District Attorney's Office itself.") *with* ***Hatchett v. City of Detroit***, 714 F.Supp.2d 708, 726 & n.6 (E.D. Mich. 2010) ("The court is unaware of any binding authority extending a municipality's training duty to professionally educated and degreed employees, such as prosecutors. . . As Justice O'Connor indicated, a municipality's duty to train arises in two circumstances. The first arises when (1) a clear constitutional duty governs particular employees (e.g., police officers) who are likely to face a certain situation and be called upon to act in a certain way (e.g., using deadly force while attempting to apprehend a fleeing felon), ***and*** (2) 'it is ... clear that failure to inform [them] of that duty will create an extremely high risk that constitutional violations will ensue.'. . It is the second of these two requirements that is absent in the case of professionally educated employees − particularly prosecutors, who at the time they are hired presumably are already aware of their constitutional duties by virtue of the fact that they have graduated from law school and passed the bar examination. A municipality need not train prosecutors about that which they already know, including their duties under *Brady*. . . . An exception might well exist if the municipality were aware that its prosecutors have repeatedly violated citizens' rights under *Brady.* In this event, a duty to train (or, more aptly, to retrain) could arise under the second circumstance identified by Justice O'Connor − namely, where there is a 'pattern of constitutional violations.'. . Plaintiff does not allege the existence of any such pattern of *Brady* violations in Macomb County.").

See also ***Dock v. State of Nevada***, No. 2:10-cv-00275-RCJ-LRL, 2010 WL 5441642, at *5 (D. Nev. Dec. 28, 2010) ("The question remains whether immunity should stretch so far as to immunize a municipality itself for its alleged deliberate indifference in failing to train an assistant

of the courts, such as a child protective services worker, simply because the latter enjoys immunity for the alleged unconstitutional acts. The Court finds that it does. Last year, the Supreme Court unanimously reversed the Ninth Circuit in holding that a district attorney's office enjoys absolute immunity against failure-to-train claims arising out of one of its attorney's prosecution-related actions. *See Van de Ramp v. Goldstein,* 129 S. Ct. 855, 862 (2009). The *Van de Kamp* Court noted that with respect to prosecution-related actions, an office's '*general* methods of supervision and training' are not distinguishable from direct supervisory decisions. . .This is a commonsense ruling. If the rule were otherwise, a plaintiff could easily circumvent the immunity doctrines by suing a municipality directly and arguing it 'failed to train' the judge and/or prosecutor. The same reasoning applies to a child protective services worker acting in her investigative capacity. The Court therefore grants the motion to dismiss as to the second cause of action.")

See also ***Nazir v. County of Los Angeles***, No. CV 10-06546 SVW ("GRx), 2011 WL 819081, at *8 (C.D. Cal. Mar. 2, 2011) ("Under *Weiner,* this Court joins the reasoning of the courts in *Goldstein* and *Neri* in concluding that the DA's Office in this case was a state actor when creating a procedure to place police officers on 'Brady Lists.' As discussed in *Goldstein, Weiner* extends to decisions on how to proceed with a prosecution. Furthermore, as discussed in *Neri,* evaluating a witness's credibility, determining what constitutes 'Brady Material,' and decisions on whether to use a police officer as a witness in the future, are prosecutorial functions. . . Having found that the alleged policymaker, the DA's Office, was a state actor in implementing the allegedly unconstitutional procedure, the Court holds that Plaintiff's allegations against the DA's Office are alleged against the state and are barred by Eleventh Amendment immunity. . . Further, as the state is the relevant actor, the County cannot be held liable for the allegedly unconstitutional procedures. . . Thus, the County's Motion is GRANTED and the County and the DA's Office, *as entities,* are DISMISSED WITH PREJUDICE."); ***Neri v. County of Stanislaus Dist. Attorney's Office***, No. 1:10-CV-823 AWI GSA, 2010 WL 3582575, at *8 (E.D. Cal. Sept. 10, 2010) ("Placing Neri's name on a *Brady* List, disclosing what the district attorneys considered to be *Brady* Material, and not utilizing objective criteria for *Brady* List determinations is conduct that requires witness evaluation, involves obligations imposed pursuant to the Supreme Court (*Brady v. Maryland*), requires the application of legal knowledge, and is associated with the judicial phase of the criminal process. . . As such, the acts of placing Neri's name on a *Brady* List and disclosing *Brady* Materials were acts done in a prosecutorial capacity; thus, the acts were done by those who were the agents of the State of California. . . The DAO, and the district attorneys who actually performed the conduct, are entitled to Eleventh Amendment immunity. . . Further, because the conduct at issue was on behalf of the State and not the County, no viable claims are alleged against the County.").

7. Post-*Brown* and Post-*Connick* Cases

Compare ***Verastique v. City of Dallas, Texas***, 106 F.4th 427, 431-34 (5th Cir. 2024) ("On appeal, plaintiffs challenge only the dismissal of their *Monell* claims against the City. . . Those allege that the City is liable for constitutional violations resulting from its (A) failing adequately to discipline

its police officers and (B) promulgating General Order 609.00, an official—but allegedly facially unconstitutional—policy relating to mass arrests. . . . Though the complaint lists nineteen incidents involving one officer, those incidents do not constitute '*any* pattern of conduct—much less a pattern of similar violations.'. . Most are conclusory and devoid of critical factual enhancement. What scant factual details plaintiffs provide *affirmatively proves* that all nineteen incidents are wholly inapposite to the case at hand. . . . All nineteen incidents described in the complaint lack 'similarity and specificity' and do not 'point to the specific violation in question.' *Edwards v. City of Balch Springs*, 70 F.4th 302, 313 (5th Cir. 2023) (cleaned up). Therefore, they cannot plausibly establish a pattern of constitutional violations. The district court correctly dismissed plaintiffs' *Monell* claims premised on the City's failing adequately to discipline its officers. . . . Assume, *arguendo*, that all nineteen incidents listed in the complaint are sufficiently specific and similar. Even so, plaintiffs' failure-to-discipline claim still fails on an alternate ground. Nothing in their complaint suggests that it was 'obvious that "the highly predictable consequence" of not supervising its officers was that they "would apply force in such a way that the Fourth Amendment rights of [citizens] were at risk."'. . .The complaint includes insufficiently numerous incidents to create a pattern capable of providing constructive notice. It took twenty-three years to amass the nineteen incidents mentioned in the complaint. Plaintiffs posit that the protracted time span works in their favor. In their view, the fact that the incidents occurred over two decades further evinces a consistent pattern of failed discipline. Incorrect. . . . Nineteen allegations over the span of twenty-three years yields a mere annualized incident rate of 0.826. In other words: Plaintiffs—at most—show that, for over two decades, Rudloff, on average, received *fewer than one accusation of misconduct per year*. Further cutting against plaintiffs' claim of a consistent pattern of failed discipline are the factors our caselaw has identified as 'relevant to determining whether a series of incidents can be called a pattern[.]'. . Those factors—such as department size and number of arrests—provide the context necessary to evaluate whether an alleged department-wide pattern is so obvious as to impart constructive notice. . . .Accordingly, depending on context, an identical number of incidents can strongly support—or render 'truly uncompelling'—an inference of a pattern of illegality. . . . Plaintiffs have no clue whether nineteen incidents over twenty-three years is sufficiently frequent to be obvious in the context of DPD. So, though they purport to discover a pervasive pattern of failure to discipline, in reality they have alleged nothing at all. Had plaintiffs taken a more reasoned approach, they would have acknowledged that DPD employs 3,200 to 3,300 officers and serves one of the largest cities in the nation. . . . Nineteen incidents over twenty-three years does not support any inference of a department-wide pattern of illegality. . . In sum, the nineteen incidents are not sufficiently similar, specific, or numerous. Therefore, the district court correctly dismissed plaintiffs' failure-to-discipline claim.") *with* ***Verastique v. City of Dallas, Texas***, 106 F.4th 427, 436-41 (5th Cir. 2024) (Graves, J., concurring in part and dissenting in part) ("The plaintiffs allege a long-running pattern of violent misdeeds—a total of nineteen incidents—by a Dallas police officer. They argue that Dallas policymakers should have known about the officer's violent history and disciplined him accordingly. Thus, they argue, the city is liable for the officer's attack on them at a protest against police brutality following the murder of George Floyd. According to the majority, the plaintiffs' claims against the city fail. They fail because even if the officer *did* violently attack them, he did not beat them with his nightstick, or beat them with his

flashlight, or beat them while they were intoxicated, or choke them, or shoot at them while they were driving a car. That is, he did not do to them what he allegedly did to others. Thus, the majority says, the city could not expect that he presented a risk of further harm to the community. I concur in the majority's conclusion that the plaintiffs' claim based on General Order 609.00 is foreclosed by *Edwards v. City of Balch Springs*, 70 F.4th 302 (5th Cir. 2023). But the majority's disposition of the plaintiffs' failure to discipline claim is not supported by the facts or the law. Accordingly, I respectfully dissent from that part of the majority's opinion. . . . The substance of the plaintiffs' allegations is this: Officers, principally Rudloff, responded to the plaintiffs' compliance with their orders by assaulting or shooting them. And Rudloff's actions were only the latest instance in his long and conspicuous history of subjecting Dallas residents to brutal uses of force. . . . The pleading standard for deliberate indifference cases is no higher than it is for other cases. . . When that usual standard applies, we require only enough details to make the plaintiff's basic claims plausible, not to affirmatively prove them. . . Yet the plaintiffs' allegations of Rudloff's past actions are not specific *enough*, the majority says, because the allegations do not affirmatively state whether Rudloff's actions were justified. Maybe his victims threatened him first, the majority speculates, or maybe they were resisting arrest. That analysis is wrong. We are supposed to make inferences in the plaintiffs' favor, not speculate about how the defendants might overcome their allegations. . . The reasonable inference here is there is no justification for an officer to beat a man with a flashlight just because he wanted to 'beat n—s in the head,' or to beat another man so badly as to require stitches and then lie about it, or to slam a person's head into the ground while making an intoxication arrest. Yet at every turn, the majority sews doubt into well-pled allegations by alternately assuming Rudloff's actions were provoked or that they can be chalked up to 'deficient performance or bad judgment.' If that is true, the city may prove it at summary judgment or trial. Until then, the plaintiffs need only allege that Rudloff's history of violence, which the complaint describes as 'use[s] of excessive force' and 'allegations upon allegations of constitutional violations,' put the city on notice of a serious problem. They have done so. . . .Next, the majority concludes that the plaintiffs' allegations about Rudloff's past acts are not similar enough to his actions here to constitute a pattern that would have put the city on notice. As the majority writes, past violations must be 'similar' to constitute an actionable pattern. . .The complaint satisfies that standard as well. The plaintiffs allege that Rudloff committed years of aggressive, unnecessary, and unjustified violence against members of the community. Their own experiences are just the latest examples. Moreover, if the allegations are true, they raise serious questions about why Rudloff was allowed to continue patrolling the streets. Yet the majority discounts those egregious allegations because they did not specifically involve less-than-lethal projectiles or did not 'occur[ ] in the context of a large-scale, multi-day, city-wide riot.' Alternatively, the plaintiffs were not intoxicated, were not beaten with a nightstick, and were not choked. Our cases simply do not support that punctilious approach. Past violations must be 'similar'; they need not be identical. In *Connick*, plaintiffs brought a claim based on a prosecutor's failure to disclose a crime lab report. . . The Supreme Court implied that a pattern of failure to disclose 'physical or scientific evidence of *any kind*' would have been sufficient to show deliberate indifference. . .The plaintiffs' allegations demand a conclusion quite the opposite of the majority's. Because Rudloff's alleged unconstitutional actions were not limited to a single context, or a single means of violence, they

show a propensity to use excessive force in any context, by any method. . . . The plaintiffs point to nineteen complaints of excessive force *against a single officer*. When one officer is the problem, the city is not faced with a scattering of bad apples across a large police force. And indeed, there are allegations here that the department knew about Rudloff's violations. In short, *Peterson* does not support the majority's analysis. . . .I would conclude that the plaintiffs plausibly pled that the city failed to discipline Rudloff for repeated use of excessive force, that its failure constituted deliberate indifference to a risk of further harm, and that such failure was the moving force in the plaintiffs' injuries. I respectfully dissent from that part of the majority's opinion.")

Compare ***Taylor v. Hughes***, 26 F.4th 419, 435-37 (7th Cir. 2022) ("*Monell* liability may attach in two limited sets of circumstances. First, if an express municipal policy or 'affirmative municipal action is itself unconstitutional,' a *Monell* plaintiff has a 'straightforward' path to holding the municipality accountable. . . In such cases, a single instance of a constitutional violation caused by the policy suffices to establish municipal liability. . .The second path to *Monell* liability runs not through an expressly unconstitutional policy, but instead through 'gaps in express policies' or through 'widespread practices that are not tethered to a particular written policy'—situations in which a municipality has knowingly acquiesced in an unconstitutional result of what its express policies have left unsaid. . . Plaintiffs seeking to impose municipal liability on a theory of municipal inaction must typically point to evidence of 'a prior pattern of similar constitutional violations.'. . This heightened evidentiary burden helps ensure that 'there is a true municipal policy at issue, not a random event,'. . . to comport with *Monell*'s holding that 'a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.'. . To be sure, there exists a narrow exception to the requirement of evidence of prior violations for the 'rare' case in which 'the unconstitutional consequences' of municipal inaction are 'so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations.'. . Such cases are ones where 'a violation of federal rights [is] a highly predictable consequence' of a municipality's failure to act. . . Taylor invokes both theories of *Monell* liability. He argues first that CPD's investigative alerts system is facially unconstitutional because, in his view, it permits warrantless arrests without probable cause. Taylor further contends that there is a widespread custom of shoddy audits resulting in arrests based on stale alerts. We find neither argument persuasive. The first claim falls well short. Taylor is correct that CPD's investigative alert policy is not a model of clarity, but nothing in the express terms of the policy allows officers to arrest individuals without probable cause. The policy creates two types of alerts: 'Investigative Alert / Probable Cause to Arrest' and 'Investigative Alert / No Probable Cause to Arrest.' And it expressly states that 'AN ARREST IS NOT AUTHORIZED' on the basis of the second type of alert, but only the first. The policy goes on to require an officer creating an alert to specify a '[j]ustification for the investigative alert request.' Presumably, although this is not stated expressly, the 'justification' for an 'Investigative Alert / Probable Cause to Arrest' must include the basis for the determination that there was probable cause to arrest. And, indeed, the investigative alert entered in Taylor's case listed his offense as 'WEAPONS VIOLATION UNLAWFUL POSS OF HANDGUN.' The policy further provides for regular audits 'to ensure investigative alert requests on file are canceled when the subject of the alert has been apprehended or the investigative alert is no longer needed.' The

Fourth Amendment permits warrantless arrests supported by probable cause. . . And one officer's determination of probable cause may be imputed to other officers in the department, who may arrest on the basis of the first officer's finding. . . The City's policy authorizes arrests based upon probable cause, and it provides a mechanism by which stale alerts are to be canceled. But this mechanism does not appear to have worked as planned, at least at the time of Taylor's arrest—which brings us to Taylor's second theory of *Monell* liability. CPD amended its policy on investigative alerts (formerly called 'stop orders') at least twice in the years prior to 2011, so that the alerts initially expired automatically after seven days, then after six months, and then (in the current system) *never* unless they are manually deleted. That is where the audits come in—to ensure that stale alerts get purged from the system at regular intervals. But the policy does not specify any particular procedure for conducting these audits, and as the district court found, in 2011 'there were thousands of [open] investigative alerts, yet no record of any audits or a paper trail of accountability.' The ineffectiveness of these audits resulted in Taylor's constitutional injury. Under the terms of the policy, the alert for his arrest should have been canceled in June 2011 when he turned himself in at the police precinct, or at the very least upon his acquittal in November 2011. But it was not, so Taylor was arrested on the same alert in December. And inexplicably, the alert yet again remained active for more than a month after this second arrest, until an officer finally canceled it in January. Taylor says this series of events displays deliberate indifference to an implied policy of inaction on the part of the City of Chicago. But under *Monell*, an implied policy is typically actionable only with 'considerably more proof than [a] single incident.'. . And here Taylor can point to only one constitutional violation—his December 2011 arrest. If CPD were engaged in a widespread practice of false arrests based on stale investigative alerts, we would have expected discovery in this case to turn up some evidence to that effect—internal documents, citizen complaints or calls for an investigation, or perhaps some form of inquiry by an inspector general. But Taylor has not come forward with anything along these lines. We are therefore not assured that this arrest was the product of 'a true municipal policy' rather than 'a random event'—and a very unfortunate one at that. . . Put another way, we cannot say here that the municipality's failure to implement more concrete auditing procedures was 'the "moving force" behind the injury alleged.'. . Nor is this case one where a false arrest like Taylor's is a 'highly predictable consequence' of a gap in a municipal policy, permitting *Monell* liability on the basis of a single violation. . . The policy as written requires 'the unit investigative alert file [to be] audited each police period'—roughly every month—to ensure the cancelation of stale alerts. If the policy had been followed as written, Taylor's second arrest would have never happened. Given this express auditing requirement, the likely occurrence of false arrests based on stale alerts was not 'so patently obvious' that the City's failure to provide more direction can be called deliberate indifference. . . We therefore affirm the district court's entry of summary judgment for the City of Chicago on Taylor's *Monell* claims relating to the investigative alerts policy. . . .What happened to Robert Taylor in the second half of 2011 should be a cautionary tale for the Chicago Police Department. The events reflect a combination of administrative corner-cutting and out-and-out misconduct by a member of the force. In the end, Robert Taylor spent 128 days in jail before being cleared of his charges, only to be arrested again for no reason. All of this could have been avoided had the officers in this case—and Officer Hughes in particular—acted with more deliberation and

care. The Fourth Amendment demands nothing less.") *with* ***Taylor v. Hughes***, 26 F.4th 419, 437-40 (7th Cir. 2022) (Hamilton, J., concurring in part and dissenting in part) ("I join almost all of Judge Scudder's careful and persuasive opinion. It provides important and pointed guidance on police officers' duty of candor in seeking search warrants. With regret, however, I cannot join one portion of Part III–F. That portion addresses plaintiff's *Monell* claims against the City of Chicago based on the 'investigative alert' system used by the police department. I agree with much of what is said about the law of *Monell* in Part III–F, but I respectfully dissent from the application of that law to plaintiff's evidence on one theory. I would reverse summary judgment on plaintiff's claim that his second arrest, in December 2011, was caused by a widespread and unconstitutional city practice of failing to carry out the promised 'audits' to remove stale investigative alerts. Plaintiff has come forward with evidence sufficient to take that claim to trial. Under the investigative alert system, Chicago police maintain a database of such 'alerts,' both with and without probable cause, based on information received from officers. Under the policy, an officer who encounters a person subject to an alert labeled 'Probable Cause to Arrest' is authorized to arrest that person pending further investigation. In other words, an investigative alert with probable cause is the practical equivalent of an arrest warrant. . . But how reliable or stale is the information in the database? According to the written policy, 'the unit investigative alert file is [to be] audited each police period.' The policy does not specify who is supposed to carry out such audits or how, or how thoroughly. And here is how the district court summarized the evidence about real-life, as opposed to paper, auditing: In 2011, at the time of Taylor's arrest, thousands of investigative alerts were inputted into the system. *The parties dispute whether any audits took place that year, but there were no records of any audit completed in 2011*, no written criteria for performing audits, and no records demonstrating lieutenants were held accountable for conducting audits. . . . Part III–F of the court's opinion correctly finds that the audit provision of the investigative alert policy is essential for the *written* policy to withstand constitutional challenge. . . The court's opinion also acknowledges that the audit mechanism imagined by the written policy did not work as planned in plaintiff's case. He was arrested on the alert for a second time in December 2011, six months after his original arrest on the same alert and more than a month after he had actually been acquitted on the charge for which that alert had been issued. The court's opinion affirms summary judgment for the city on the failure-to-audit *Monell* claim because plaintiff has not come forward with evidence of similar, prior unjustified arrests caused by the city's systemic failure to audit pending investigative alerts. . . Such evidence should not be needed here. As the court's opinion acknowledges, evidence of other similar constitutional violations is not required under *Monell* for a practice or custom claim where '"a violation of federal rights [is] a highly predictable consequence" of a municipality's failure to act.'. . . The danger that stale investigative alerts will produce constitutional violations (and waste police officers' time) is clear enough that the written policy says that monthly audits are required. That danger is also obvious enough that the audit feature is essential to our conclusion that the written policy is constitutional on its face. Yet *Monell* addresses not just written policies but also actual practices. On this summary judgment record, we must assume that the entire Chicago Police Department carried out *zero* audits of pending investigative alerts in 2011—that it did exactly nothing the entire year of 2011 to carry out a feature of the written policy that's essential to keep the practice within constitutional bounds.

From that evidence, a reasonable jury could infer (a) that a total failure on that scale over that length of time reflected a de facto policy of at least deliberate indifference to (b) an obvious danger of unconstitutional deprivations of liberty based on stale alerts. The court's requirement of evidence of more unconstitutional incidents to prove *Monell* liability in this case of obvious dangers provides another data point in our court's conflicting jurisprudence in this important corner of § 1983 law. In a series of cases, we have applied the obvious-danger reasoning of *City of Canton* and *Bryan County* to affirm or allow *Monell* liability without proof of similar prior violations. See *J.K.J. v. Polk County*, 960 F.3d 367, 382–84 (7th Cir. 2020) (en banc) (affirming *Monell* verdict for plaintiffs; risk that male guards would sexually assault female inmates was so obvious that policymakers' failures amounted to deliberate indifference); *Glisson v. Indiana Dep't of Corrections*, 849 F.3d 372, 382 (7th Cir. 2017) (en banc) (reversing summary judgment on *Monell* claim; dangers faced by chronically ill inmates were so obvious that failure to adopt protocols for coordinated, comprehensive care could be deemed deliberate indifference without evidence of similar prior cases); *Woodward v. Correctional Medical Services of Illinois, Inc.*, 368 F.3d 917, 929 (7th Cir. 2004) (affirming verdict for plaintiff under *Monell*; danger of inmate suicide was so obvious that failure to provide adequate suicide prevention training to jail staff amounted to practice of deliberate indifference without evidence of prior suicides). Compare those decisions, however, to the court's treatment of the issue here, insisting on other similar cases despite the obvious risks posed by systemic failures to audit investigative alerts, and to *Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 237 (7th Cir. 2021) (reversing *Monell* verdict for plaintiff; plaintiff failed to show similar prior cases where prison health-care provider's policy of 'collegial review' before outside medical referrals caused similar unconstitutional delays in critical health care), and *Hildreth v. Butler*, 960 F.3d 420, 426–30 (7th Cir. 2020) (affirming summary judgment on *Monell* claim for prison health-care provider whose policies for refilling and renewing prescriptions led to predictable delays and harm because plaintiff did not offer evidence of enough incidents to establish 'widespread' practice). It's worth noting that all of the obvious-danger cases just cited, other than *Woodward*, divided this court. Perhaps the city could convince a jury, as it has convinced my colleagues, that the failure to carry out audits was not as complete as plaintiff's evidence shows or was the result of nothing worse than negligence. But with respect, the dangers of unjustified arrest here are so obvious and the failure so complete, at least according to plaintiff's evidence, that a reasonable jury could find deliberate indifference at the policy-making level of the Chicago police. In response to these views, one might fairly ask why, if the dangers of unjustified arrests are so obvious, plaintiff cannot come forward with at least a few other examples? I expect that such examples would be quite difficult to find. Chicago must have a mountain of arrest records that did not lead to convictions. (In 2019, CPD made more than 90,000 arrests. Chicago Police Dep't, 2020 Annual Report at 50.) We have no indication that the Chicago police themselves keep track of errors resulting from stale or erroneous information in the investigative alert database. More generally, the city itself has recognized that CPD's recordkeeping practices related to litigation and constitutional compliance are not reliable. . . I have trouble imagining a discovery tool or an independent investigative measure that would be likely to work in this case, at least without prohibitive expense. But for now, suffice it to say that the debacle in this case and the evidence of no regular auditing put the Chicago policymakers on

notice of the need for action. In *Woodward*, we said that the defendant there did not 'get a "one free suicide" pass.'. . In this case, Chicago has received a 'one free bad arrest' pass for its practice of failing to audit stale investigative alerts. It should not count on receiving any more.")

Compare ***Dean v. Wexford Health Sources, Inc.***, 18 F.4th 214, 235-41 (7th Cir. 2021) ("We recently reiterated the elements of a *Monell* claim in *LaPorta*. To begin, a § 1983 plaintiff must always show 'that he was deprived of a federal right.'. . Beyond that, the plaintiff must trace the deprivation to some municipal action (i.e., a 'policy or custom'), such that the challenged conduct is 'properly attributable to the municipality itself.'. . There are at least three types of municipal action that may give rise to municipal liability under § 1983: '(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority.'. . Inaction, too, can give rise to liability in some instances if it reflects 'a conscious decision not to take action.' *Glisson v. Ind. Dep't of Corr.*, 849 F.3d 372, 381 (7th Cir. 2017) (en banc); *accord J.K.J.*, 960 F.3d at 378. Next, the plaintiff must show that 'the policy or custom demonstrates municipal fault,' i.e., deliberate indifference. . . 'This is a high bar.'. . If a municipality's action is not facially unconstitutional, the plaintiff 'must prove that it was obvious that the municipality's action would lead to constitutional violations and that the municipality consciously disregarded those consequences.'. . Finally, the plaintiff must show that the municipal action was 'the "moving force" behind the federal-rights violation.'. . This 'rigorous causation standard' requires 'a "direct causal link" between the challenged municipal action and the violation of [the plaintiff's] constitutional rights.'. . In short, a *Monell* plaintiff must show that some municipal action directly caused him to suffer a deprivation of a federal right, and that the municipality took the action with conscious disregard for the known or obvious risk of the deprivation. Dean relies on an express policy (collegial review), and we assume for present purposes that he has shown a constitutional deprivation. Even so, Dean has not shown municipal fault or moving-force causation—two indispensable prerequisites to *Monell* liability. Dean concedes that collegial review is not unconstitutional on its face. We held as much in *Howell v. Wexford Health Sources, Inc.*, 987 F.3d 647, 659 (7th Cir. 2021). His theory instead is that collegial review caused unconstitutional delays as applied to him. This type of claim presents 'difficult problems of proof.'. . As early as 1985, a plurality of the Supreme Court made clear that a plaintiff seeking to hold a municipality liable for a facially lawful policy generally must prove a prior pattern of similar constitutional violations resulting from the policy. As the Court put it: '[W]here the policy relied upon is not itself unconstitutional, *considerably more proof than the single incident will be necessary in every case* to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.'. . The Court discussed the rationale behind this requirement in *Brown*. First, a prior pattern of similar violations puts the municipality on notice of the unconstitutional consequences of its policy, such that its 'continued adherence' to the policy might 'establish the conscious disregard for the consequences of [its] action—the "deliberate indifference"—necessary to trigger municipal liability.'. . Similarly, a pattern of violations may show that the policy itself, 'rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a

particular incident, is the "moving force" behind the plaintiff's injury.'. .To be sure, there are limited exceptions to this rule. In some 'rare' cases, the risk of unconstitutional consequences from a municipal policy 'could be so patently obvious that a [municipality] could be liable under § 1983 without proof of a pre-existing pattern of violations.'. . . Again, these cases are the exception. Regardless of the exact form of proof, the question is always whether the municipal policy reflects a conscious disregard for a known or obvious risk of the constitutional deprivation. . . .The dissent contends that we have collapsed the critical distinction between the existence of a policy and the effects of that policy. According to the dissent, pattern or practice evidence is only necessary when the presence of an official policy, custom, or practice is in question. Not so. . . [W]e recently recognized the distinction between a policy that is unconstitutional on its face and one that is not in *Calderone.* . . There, the plaintiff brought an as-applied constitutional challenge to the City's personnel rules under *Monell.* The existence of the policy–the written personnel rules–was not at issue. . . Nonetheless, we rejected Calderone's *Monell* claim because she failed to demonstrate causation and culpability based on her single incident of an alleged constitutional violation. Since she could not establish that the personnel rules were unconstitutional on their face, she had to show a 'series of bad acts[,] creating an inference that municipal officials were aware of and condoned the misconduct of their employees.'. . . Dean did not introduce any substantive evidence of a pattern or practice of similar violations. He did not offer substantive evidence that collegial review had caused unconstitutional delays for other prisoners. He only offered substantive evidence of collegial review causing unconstitutional delays in his own healthcare. Nor does he contend on appeal that his is one of those 'rare' cases where the risk of unconstitutional delays is 'patently obvious' even without proof of other violations. . . The district court relied on the 'obviousness' theory, reasoning that the jury could find that collegial review on its face 'would obviously and inevitably delay urgently needed care for some inmates, including Plaintiff' for no medical reason. But as we discuss below, Wexford allows its medical directors to go outside the normal collegial review process in urgent or emergent situations, so it could not have been obvious from the face of the policy that collegial review would delay urgently needed care. If offsite care was urgent, the policy provided an exception to prevent harmful delays. . . . Dr. Barnett's testimony strongly suggests that the delays in Dean's care resulted from the negligent actions of Wexford's agents, and not from collegial review. *Monell* requires more; Dean must show that Wexford itself directly caused the constitutional violation. Dean also points to Dr. Nawoor's testimony that Wexford's 'practices' were to blame for the delays in Dean's care. But Dr. Nawoor never testified (nor did anyone else) that collegial review had caused similar problems for other inmates, so his testimony falls short of establishing that collegial review itself was the moving force behind Dean's constitutional injury. . . Consistent with the Supreme Court's guidance, we have repeatedly rejected *Monell* claims that rest on the plaintiff's individualized experience without evidence of other constitutional violations. [citing cases] We do so again here. While we are sympathetic to Dean's experience, his only substantive proof relates to the delays in care that he himself experienced. He has not proven a pattern of similar constitutional violations or a patently obvious risk of such violations. . . We acknowledge, as we did in *Glisson*, that there may be other pathways to *Monell* liability based on a facially lawful policy. But this case does not require us to further explore that possibility. Dean's only other evidence is the 2014 report, which shows, at most, that

Wexford knew an expert in another case had concluded that a materially different version of its collegial review policy had caused delays at some other IDOC facilities. This notice evidence alone cannot establish that Wexford knew of, and consciously disregarded, the risk that collegial review would likely violate Dean's constitutional rights. Nor has Dean shown that collegial review itself rather than 'a one-time negligent administration of the program' was the moving force behind his constitutional injury. . . Anticipating our holding that the *Lippert* reports do not establish Wexford's deliberate indifference, Dean contends in the alternative that other evidence at trial supported a finding of deliberate indifference. Specifically, Dean points to the testimony of Nurse Lisa Mincey. But Nurse Mincey testified that she complained about *Dr. Nawoor's* conduct. Indeed, Dean points to her testimony again when defending the jury's finding that Dr. Nawoor was deliberately indifferent. Nowhere in the cited testimony does Nurse Mincey fault Wexford. So, we disagree with Dean that other evidence at trial proved Wexford's deliberate indifference. For its part, the dissent contends that Wexford's knowledge can be inferred from the fact that there were ten collegial reviews in the 207 days between Dean's initial presentation of symptoms and his surgery. But why? The question is not whether Wexford knew that Dean's offsite care requests had to go through collegial review. The question is whether Wexford knew that collegial review would likely violate Dean's constitutional rights. We cannot infer such knowledge from the mere fact that Wexford applied collegial review in Dean's case, even if it did so repeatedly. . . . More broadly, the dissent suggests that we are invading the jury's province and improperly reweighing the evidence. Not so. In this sufficiency of the evidence challenge, our role is to police the evidentiary boundary for *Monell* liability. As explained above, Dean introduced no evidence permitting a jury to conclude that Wexford knew in advance that collegial review would violate Dean's constitutional rights in this single-incident case. Even though the jury instructions are unchallenged, we must ensure that the jury had a legally sufficient evidentiary basis for holding Wexford liable. Finally, the dissent claims that 'twelve pages' of the *Lippert* reports are all that stands in the way of affirming the jury's verdict on the Eighth Amendment claim against Wexford. But that is not true. We hold that the 2018 report was inadmissible and that the 2014 report—assuming it was admissible—was not enough to prove Wexford's knowledge. The fundamental problem with Dean's claim, however, is that he has *no* evidence of Wexford's knowledge. Dean's *Monell* claim fails because he lacks critical proof, not because he introduced the *Lippert* reports.") *with* ***Dean v. Wexford Health Sources, Inc.,*** 18 F.4th 214, 244-48, 253-55 (7th Cir. 2021) (Wood, J., dissenting) ("Twelve pages. Twelve pages admitted into evidence subject to a careful limiting instruction. That is the difference, according to the majority in this case, between allowing plaintiff William Dean to keep the $1 million in compensatory damages and $7 million in punitive damages that the jury awarded him (after a $3 million reduction by the court), and overriding the jury's judgment to take it away. The majority takes the position that the district court's admission of those twelve pages from the so-called *Lippert* Reports requires this override. But it is not our role to reassess the evidence and second-guess the jury's conclusions. Even if the court erred in admitting those twelve pages (and in my view it did not), they were not so prejudicial either by themselves or alongside the rest of the evidence to require this radical step. I therefore respectfully dissent. . . .Before considering the evidence, it is crucial to be clear about what Dean, having brought an *as-applied* claim under *Monell v. New York City Department of*

Social Services, 436 U.S. 658 (1978), must prove. It was not Dean's burden to litigate on behalf of others; this was not a class action, and he did not have to prove that Wexford's policy always led to catastrophic results. He had to show only that Wexford's unwavering policy requiring collegial review amounted to deliberate indifference to *his* condition. My colleagues have effectively collapsed the critical distinction between the existence of a policy and the effects of that policy by insisting, at every turn and for each of *Monell*'s elements, that Dean demonstrate a prior pattern of constitutional harm wrought by the collegial-review process. *Monell* requires no such thing. 'Pattern or practice' evidence of a problem or failure is necessary in as-applied challenges only when the presence of an official policy, custom, or practice—*Monell*'s threshold question—is in doubt. In those cases, pattern evidence substitutes an inference from a long-standing practice for the certainty of a written policy. See *Glisson v. Indiana Department of Corrections*, 849 F.3d 372, 382 (7th Cir. 2017) ("The critical question under *Monell* remains this: is the action about which the plaintiff is complaining one of the institution itself, or is it merely one undertaken by a subordinate actor."). In Dean's case, collegial review is an explicit, official policy followed by Wexford; everyone, including my colleagues, readily recognizes this fact. No one denies that Dean was attacking Wexford's own policy and actions; he was not making a subterranean vicarious liability argument that would not be cognizable under *Monell*, nor was he claiming that Wexford dealt with his case pursuant to an implied policy or custom separate from collegial review. A quick overview of some of the key *Monell* precedents demonstrates the properly circumscribed role of pattern evidence. . . . In some contexts, particularly when unwritten customs or practices are being challenged, the question whether the municipality has recognized an official policy often logically overlaps with these elements, such that pattern evidence provides a clear route to proving each. But this does not mean that pattern evidence is required when, as here, the official policy is not in doubt and the notice and causation requirements are analytically separable. Because Dean's case involves an official policy—collegial review—there is nothing more that needs to be said on that point. I thus move on to the notice and causation elements. In situations such as those presented in *Brown, Canton,* or *Tuttle*, the existence of the policy and the municipality's knowledge of the implied policy's risks are two sides of the same coin. The pattern of deficiency shows both the existence of an implicit policy and the municipality's awareness of that policy. . . But in Dean's situation, where the official policy of collegial review is firmly established, the question of notice—was Wexford aware of collegial review's risks—is all that is left. I do not doubt that one way of showing notice would be through pattern evidence—with each additional delay caused by collegial review, Wexford would have been more likely to realize the policy's risks. But awareness can also be proven more directly. For instance, a public report from a respected authority, such as the court-appointed experts who prepared the *Lippert* Reports or the Department of Justice, would without doubt grab a municipal entity's attention too. *Monell*'s 'moving-force' causation inquiry asks whether the policy itself, as opposed to a negligent act of an officer outside the policy or some other intervening cause, precipitated the constitutional injury. Using pattern evidence to prove the cause of a single instance is something that can be done only with care, and only with close attention to the facts of the incident in question. Direct evidence of the cause of the single incident will always suffice; pattern evidence is not essential. When the Supreme Court referred to causation in *Brown*, it noted only that 'the existence of a pattern of

tortious conduct by inadequately trained employees *may tend* to show that the lack of proper training ... is the "moving force" behind the plaintiff's injury.'. . That is what makes evidence of past events relevant, though not necessary, in Dean's case. Because collegial review is an established policy of Wexford, Dean must show only that Wexford was aware of collegial review's risks of harmful delays and that it was collegial review, not individual-officer negligence or some other intervening cause, that lay behind the deliberate indifference to the urgency of Dean's medical need. The majority takes the position that Dean failed on both those scores; I do not agree. Indeed, in my view, as I now explain, Dean has satisfied both elements with or without the *Lippert* Reports. . . . Wexford's knowledge that serious health risks attended collegial review is more than sufficient for satisfying the *Monell* notice requirement. We have never suggested that a government entity must know with something close to certainty that the application of a policy will cause a constitutional violation—such an extreme view would foreclose *Monell* liability for facially lawful policies which, by definition, can in theory be applied lawfully. In fact, all that must be shown is that Wexford knew of collegial review's potential patient-safety hazards at the time it applied the policy to Dean, and here the evidence is overwhelming. My colleagues seek to impose a new condition on *Monell* plaintiffs such as Dean: in addition to demonstrating that Wexford knew of possible problems with collegial review, they contend that Dean needed to provide substantive proof that those problems in fact existed. Framing this as a question of first impression, the majority acknowledges that we have never previously recognized such a condition. But even if this requirement should be created, Dean satisfied it through Dr. Barnett's testimony, which drew upon his past experiences with and observations of collegial review to conclude that the system suffered from general defects. If problems are built into the fabric of collegial review, it follows that they necessarily existed in some form, however inchoate, prior to Dean's case, and the jury could reasonably have reached this conclusion. . . . Substantive proof that problems materialized is not an independent requirement for notice. As I previously noted, it is true that evidence of earlier problems makes it more likely that a municipal entity has learned that its policy is defective. In other words, this kind of evidence is a rough proxy for knowledge, and it may be helpful at the margins if a defendant disputes whether it was aware of a policy's potential risks. But Wexford never contested the Reports' proof of notice, and so this additional evidence is unnecessary. Moreover, even if Wexford had contested the Reports, the jury would have been within its rights to credit them, and thus make a finding of notice, without additional substantiating evidence. . . . The majority draws this requirement from *Daniel v. Cook County*, 833 F.3d 728 (7th Cir. 2016), where the plaintiff had produced both a Department of Justice report (which, like the *Lippert* Reports, was admitted by the district court only for notice) as well as additional evidence substantiating the problems documented in the report. But my colleagues fundamentally misread *Daniel. Daniel* concerned a *Monell* challenge to Cook County's *informal customs and practices*, not to any explicit policy it had. . . As I have stressed, the need for pattern evidence to prove a policy's existence arises only when there is no written policy. In *Daniel*, separate proof was necessary not for notice or for 'moving-force' causation (which was dealt with later in the opinion), but to infer an official policy. . . Because Dean is challenging an explicit policy, either *Lippert* Report standing alone would be sufficient to demonstrate that Wexford was on notice of collegial review's risks.")

Compare ***Flores v. City of South Bend***, 997 F.3d 725, 73-34 (7th Cir. 2021) ("The district court dismissed Flores's *Monell* claim against the City of South Bend because it found no underlying constitutional violation by Officer Gorny. Since we are reversing on that point, however, it is appropriate to take a fresh look at Flores's *Monell* claim, too. . . . Even as the Court has underscored that failure-to-train liability is rare, it has never wavered from the position that this theory remains valid. Most recently in *Connick v. Thompson*, . . . it recognized that a municipality's 'decision not to train certain employees,' despite actual or constructive notice that their actions constitute deliberate indifference to the rights of the public with whom they come into contact, is the 'functional equivalent of a decision by the city itself to violate the Constitution.'. . Notably, failure-to-train liability does not require proof of widespread constitutional violations before that failure becomes actionable; a single violation can suffice where a violation occurs and the plaintiff asserts a recurring, obvious risk. As the Court put it in *Brown*, 'we did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability.'. . Applying these principles, we have upheld failure-to-train allegations on at least two occasions. Sitting en banc in *J.K.J. v. Polk County*, 960 F.3d 367 (7th Cir. 2020), we addressed a case in which two former inmates in the Polk County Jail sued the County for failing adequately to train male guards to prevent their sexual abuse of female inmates. . . The County's training was limited to informing guards that the jail prohibited sexual contact with inmates and holding a single training session that some officers, including the offender in the case, did not attend. . . We found that these allegations sufficed to support failure-to-train liability. . . So too in *Woodward v. Correctional Medical Services of Illinois, Inc.*, 368 F.3d 917 (7th Cir. 2004), we held that a correctional facility's failure to train its employees on suicide prevention (among other shortcomings), resulting in the death of an inmate, supported *Monell* liability. . . We reached this conclusion even though the plaintiff could not prove that any other inmates had lost their lives because of this failure to train, because the prison did not 'get a one free suicide pass.'. . We realize that the Supreme Court has yet to issue an opinion in which it upholds liability on this ground, but we take the Court at its word that this does not mean it has disapproved the theory. At least one of our sister circuits has upheld *Monell* liability under a failure-to-train theory, and others have found allegations to be sufficient to survive summary judgment or a motion to dismiss, without any sign of disapproval from the Supreme Court. [collecting cases] With this background in mind, we turn back to Flores's case. The complaint asserts that the City failed to train Gorny not to drive recklessly, in the face of actual knowledge that both Gorny himself and South Bend police officers generally had a history of reckless speeding. It also asserts that the City has a *de facto* policy of encouraging such behavior. South Bend officers working the night shift, Flores contends, frequently drive above 50 miles per hour, well above posted limits. In addition, she alleges that on at least three occasions before Erica Flores's death, Gorny operated his vehicle at high rates of speed (70 mph, 114 mph, and 60 mph). Yet, despite telling its officers to operate their vehicles only up to a maximum of 50 miles per hour, South Bend never reprimanded anyone for noncompliance with its policies, nor did it require additional training for those who disregarded its guidance. Flores argues that this is enough to support *Monell* liability under both a theory of failure to train and a theory that the City had a *de*

facto policy of encouraging or permitting excessively fast driving. Taking the latter point first, we do not see enough in this complaint to permit Flores to proceed on the *de facto* policy theory. Allegations that officers sometimes drive at high rates of speed do not show a sufficiently specific pattern of conduct to 'support the general allegation of a custom or policy.'. . Finding otherwise would stretch the law too far, opening municipalities to liability for noncodified customs in all but the rarest of occasions, as long as a plaintiff can find a few sporadic examples of an improper behavior. Nothing in *Brown*, *Harris*, or *Connick* supports such an outcome. But the failure-to-train theory is another matter. Stressing that we are still at the pleading stage, we conclude that Flores's complaint plausibly alleges that the City acted with deliberate indifference by failing to address the known recklessness of its police officers as a group and Gorny in particular. Looking at Gorny first, the complaint asserts that on at least three prior occasions, Gorny drove in the dark of night at extreme speeds (from 60 to 114 mph), well above the posted limits of 30 miles per hour, and even above the alleged 50 mile-per-hour policy limit. The City knew that its officers routinely drove over 50 miles per hour, but it took no steps to prevent this behavior—no training, no discipline, no reprimands. A municipality can be held liable under a theory of failure to train if it has actual knowledge of a pattern of criminally reckless conduct and there is an obvious need to provide training to avert harm, even if the prior acts have yet to result in tragedy. . . The City urges us to dismiss Flores's claim because (fortunately) Gorny never killed anyone before he took Erica Flores's life. But this is not a 'one-free-bite' situation. The law does not require the death or maiming of multiple victims before a city must institute proper training. Driving with deliberate indifference to the consequences of one's action—in effect, turning oneself into a speeding bullet—can reach the level of criminal recklessness before the worst happens. Flores's allegations are enough to survive a motion to dismiss. We of course offer no opinion on the way this case will look after all parties have had the chance to develop the factual record further.") *with* ***Flores v. City of South Bend***, 997 F.3d 725, 734-35 (7th Cir. 2021) (Brennan, J., concurring) ("I agree with my colleagues that plaintiff-appellant provided enough facts to state a facially plausible failure-to-train claim. . . I write separately to examine the single-incident theory of failure-to-train liability under *Monell* . . . and the majority opinion's generalized discussion of it. The majority opinion states that a municipality can be liable for failure to train under the single-incident theory 'if it has actual knowledge of a pattern of criminally reckless conduct and there is an obvious need to provide training to avert harm, even if the prior acts have yet to result in tragedy.'. . Although this statement is not incorrect, I do not know that it fully captures the complexity of *Monell* jurisprudence in this area. To establish single-incident liability, a plaintiff must prove that municipal policymakers know that its employees will confront a given situation and not train for it, . . . and the need for training must be obvious without consideration of prior violations. . . But there is more. The single-incident theory is reserved for the 'narrow' circumstance when a municipality fails to train its employees, who 'have no knowledge at all of the constitutional limits' that govern their conduct in situations they are certain to encounter. . . This remains true even though there is 'no reason to assume' that the municipal employees are 'familiar with the constitutional constraints' on their own. Liability for failure to train under the single-incident theory remains 'rare.'. . The majority opinion states: 'At least one of our sister circuits has upheld *Monell* liability under a failure-to-train theory, and others have found allegations to be

sufficient to survive summary judgment or a motion to dismiss, without any sign of disapproval from the Supreme Court.' This sentence, which is followed by citations to a number of decisions, could be overread to suggest that liability under this theory is widely endorsed. But of those decisions, only the D.C. Circuit in *Parker v. District of Columbia*, 850 F.2d 708 (D.C. Cir. 1988)—a case that predates *Connick*, *Bryan County*, and *Canton*—upheld failure-to-train liability. In *Smith v. District of Columbia*, 413 F.3d 86, 98–99 (D.C. Cir. 2005), the D.C. Circuit only analogized the municipality's lack of monitoring standards to a failure-to-train claim. And in *Newton v. City of New York*, 779 F.3d 140, 153 n.11 (2d Cir. 2015), the Second Circuit only contemplated a failure-to-train claim because the plaintiff did not pursue the case on that theory. The remaining decisions concern allegations sufficient to survive a dispositive motion. I write separately only so courts and litigants in the future recall the intricacies of *Monell* jurisprudence and do not misread precedent in this area. I agree with the majority opinion's resolution of this case, and I respectfully concur.")

Compare ***Sandoval v. County of San Diego***, 985 F.3d 657, 682-83 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 711 (2021) ("In granting summary judgment to the County, the district court concluded that Plaintiff could not establish deliberate indifference because there was no evidence that the failure to implement adequate communication safeguards had caused 'prior injury or death to MOC1 inhabitants.' The County does not defend this rationale on appeal, and for good reason. To establish her claim, Plaintiff must show that the County had actual or constructive knowledge that its practices were substantially certain to cause a constitutional violation. . . This standard does not require proof of a prior injury. A constitutional injury can be substantially certain to follow from a practice even if an injury has yet to occur. Otherwise, every *Monell* defendant would get 'one free ... pass' for policies or practices that are substantially certain to violate an individual's constitutional rights. . . Under the proper standard, it is a close question whether Plaintiff has mustered sufficient evidence to create a triable issue of fact on whether the County was deliberately indifferent. There is certainly enough evidence to support a finding of negligence. But to establish deliberate indifference, Plaintiff must prove that the County had actual or constructive knowledge that the failure to implement protocols necessary to ensure that nurses knew when inmates in MOC1 required medical care was 'substantially certain' to result in inmates failing to receive the proper treatment, creating a likelihood of serious injury or death. . . Ultimately, we conclude that summary judgment should not have been granted on the County's liability under *Monell*. Plaintiff has put forward sufficient circumstantial evidence of the County's knowledge such that a reasonable jury could find deliberate indifference. To begin, a jury could infer from the more rigorous policies the County put in place for the sobering and safety cells that it was aware of the importance of ensuring that the nursing staff knew which inmates required medical treatment or observation. For the sobering and safety cells, the medical staff listed the name and location of each patient on a whiteboard. Specific nurses were assigned to monitor each cell. And nurses filled out written logs with their observations of the inmates held in those cells. A reasonable jury could conclude that the County implemented these practices because it understood they were necessary to ensure that inmates requiring medical care would not fall through the cracks. . . This conclusion is only reinforced by the fact that, after Sandoval's death, the County put in place a new practice

for MOC1. Now, when a deputy places an inmate requiring medical care in MOC1, he must place a magnetic placard on the door indicating that the inmate is there for medical reasons. A jury could view this as an acknowledgement by the County that its prior practices—which relied exclusively on verbal communication—were insufficient. . . And, as explained, it could be reasonably inferred from the fact that the County *had* implemented more extensive tracking measures for the sobering and safety cells that it knew at the time that relying on verbal communications alone would create a substantial risk that an inmate's serious medical needs could go unaddressed. That is not to say that a jury is required to find deliberate indifference on the record before us. Perhaps the County could show at trial that there were good reasons for treating MOC1 differently from the other medical cells, and that despite the policies put in place for the sobering and safety cells, it was not aware that similar practices were required to provide adequate medical care in MOC1. But viewing the evidence in the light most favorable to Plaintiff, we conclude that there is a triable issue of fact as to the County's liability under *Monell*. . . Viewing the evidence in Plaintiff's favor, a jury could conclude that Ronnie Sandoval would not have died but for the defendants' unreasonable response to his obvious signs of medical distress. The district court therefore erred in granting summary judgment. We reverse and remand for further proceedings consistent with this opinion.") *with* ***Sandoval v. County of San Diego***, 985 F.3d 657, 695-96 (9th Cir. 2021) (Collins, J., concurring in the judgment in part and dissenting in part), *cert. denied*, 142 S. Ct. 711 (2021) ("The applicable 'deliberate indifference' standard for *Monell* claims. . . differs from the above-discussed standard that applied to the individual Defendants under then-existing law for qualified immunity purposes: whereas the latter applies both an objective and a subjective standard, the former is purely objective. . . In the context of an analogous claim about inadequate monitoring of jail cells, we held in *Castro* that the objective deliberate indifference standard for municipal liability under § 1983 requires a showing that '"the facts available to city policymakers put them on actual *or constructive notice* that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens."'. . Plaintiff failed to present sufficient evidence to satisfy this demanding standard, and the county was therefore entitled to summary judgment. Plaintiff's evidence of prior confusion concerning why particular inmates were placed in MOC1 may well support a claim that the county was negligent, . . . but that evidence does not come close to showing that the county had '"*actual or constructive notice*"' that this practice was '"*substantially certain*"' to result in an unconstitutional disregard of a serious medical need. . . The fact that the county changed its practices concerning MOC1 after this incident—even if admissible for purposes going beyond merely proving that a policy, practice, or custom existed, *but see Conn*, 591 F.3d at 1104 n.7 (applying Fed. R. Evid. 407 to cabin the use of post-event practice)—does not establish that the county had the pre-incident actual or constructive notice *Castro* requires. I therefore disagree with the majority's finding that a reasonable jury could infer that the county had actual or constructive knowledge that its practices in regard to the MOC1 cell were substantially certain to result in an unconstitutional disregard of a serious medical need. Plaintiff contends that the constructive notice standard should not apply because here the county's 'policy itself directs the unconstitutional action.' Plaintiff, however, has presented no evidence that the policy *itself* is unconstitutional. In particular, to the extent that Plaintiff contends that the county had an unconstitutional policy, practice, or custom to affirmatively and completely ignore persons placed

in MOC1, there is no evidence that the county had such a policy: it is undisputed that the MOC1 cell is visible to personnel at the nurses' station; and, indeed, it is undisputed that Sandoval's eventual seizure and collapse onto the floor was immediately detected.")

Compare ***Stucker v. Louisville Metro Government***, No. 23-5214, 2024 WL 2135407, at *11 n.4 (6th Cir. May 13, 2024) (not published) ("The Concurrence notes that the Stuckers raise a single-incident (failure to equip) theory of deliberate indifference under *Ouza* (which does not require evidence of a pattern) and concludes that such a claim requires the court to analyze whether *any* search warrant training occurred. . . But that is not the only theory of deliberate indifference in this case, as the Concurrence recognizes. It is true that *Ouza* factually involved a lack of training, . . . and used a lack of training example[.] . . But in addressing the 'fail[ure] to equip' claim, it did not establish that a total lack of training is required; instead, it referenced 'the need for *more or different* training' to sustain a municipal liability claim. . . What matters under *Ouza* is not a total lack of training, but rather the obviousness of the need for training and the likelihood that deficient training will 'result in the violation of constitutional rights.'") *with* ***Stucker v. Louisville Metro Government***, No. 23-5214, 2024 WL 2135407, at *13-14 (6th Cir. May 13, 2024) (not published) (Nalbandian, J., concurring) ("[A]s the majority acknowledges, both inadequate training and acquiescence *Monell* claims 'require deliberate indifference.'. . Our caselaw recognizes two theories for showing deliberate indifference in the inadequate-training context. *See Ouza v. City of Dearborn Heights*, 969 F.3d 265, 287 (6th Cir. 2020). The parties argue the issue this way too. . . The most common option is for a plaintiff to show that the 'municipality has failed to act in response to repeated complaints of constitutional violations by its officers.'. . But there is another option, and it is the one Stucker primarily pursues. . . In a 'narrow range of circumstances,' a plaintiff can show what is called 'single-incident liability,' demonstrating that a municipality was deliberately indifferent by 'failing to equip law enforcement officers with specific tools to handle recurring situations.'. . The distinctions between the two prove analytically important. To state the obvious, different theories require different showings: The repeated-complaints theory requires evidence of prior issues that give notice of constitutional violations, whereas the single-incident theory requires showing a lack of 'any training.'. . Stucker believes his case is like *Ouza*, where the police department failed to 'provide any training' on the use of excessive force. And Stucker goes so far as to say '[a]t the very least, there is a genuine issue of material fact regarding whether Detective Troutman received search warrant training, which is actionable under *Ouza*.'. . So to analyze this argument, the district court will need to assess whether Troutman received *any* search-warrant training. . . . Because LMPD offers evidence of Troutman receiving some training that, if true, would defeat single-incident deliberate indifference, we must leave ultimate resolution of this question to the trial court.")

Compare ***Ouza v. City of Dearborn Heights, Michigan***, 969 F.3d 265, 287-88 (6th Cir. 2020) ("[A] plaintiff can show deliberate indifference based on 'single-incident liability' if the risk of the constitutional violation is so obvious or foreseeable that it amounts to deliberate indifference for the city to fail to prepare officers for it. . . Plaintiff in the present case premises her municipal liability claim against Dearborn Heights on this latter type of deliberate indifference. . . She alleges

that Dearborn Heights did not provide any training to its police officers regarding excessive force, proper handcuffing technique, or probable cause determinations. Dearborn Heights has not put on any evidence to dispute this, and in fact appears to concede it. Officer Derwick stated in his deposition that he had not received any training from Dearborn Heights with regard to excessive force or probable cause. . . . As Plaintiff points out, Officer Derwick graduated from the Police Academy in 2000, so based on his own testimony, he had not had any training on excessive force or probable cause determinations in the past fourteen years leading up to Plaintiff's arrest. Officer Dottor also acknowledged that he had not received any training on proper handcuffing technique while at the Dearborn Heights Police Department, but instead only received his handcuffing training through the Police Academy. The failure to provide any training on probable cause determinations or use of force (including handcuffing technique) is constitutionally inadequate. Given the frequency with which officers must evaluate probable cause and use force within the course of their duties, we agree with Plaintiff that Dearborn Height's complete failure to provide any type of training as to these two recurring situations may amount to deliberate indifference under *City of Canton v. Harris* and its progeny.") *with* ***Ouza v. City of Dearborn Heights, Michigan***, 969 F.3d 265, 295-98 (6th Cir. 2020) (Griffin, J., concurring in part and dissenting in part) ("It is possible—but only in a 'narrow range of circumstances'—that 'a failure to equip law enforcement officers with specific tools to handle recurring situations' could violate a plaintiff's constitutional rights if the infringement is 'a highly predictable consequence' of the deficient training. . . However, this rare exception to an already tenuous' theory of liability sets an even higher bar for a plaintiff: 'the unconstitutional consequences of failing to train [must] be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations.'. . Caselaw thus demands two elements: 'It must be obvious that the failure to train will lead to certain conduct, *and* it must be obvious ... that the conduct will violate constitutional rights.' *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 995 (6th Cir. 2017). . . . Regarding the specifics of the *Monell* claim, plaintiff focuses on the City's reliance upon the local police academy's training program and the City's apparent lack of annual performance reviews. The majority view these practices as so deficient and generically concludes that a jury could 'easily' find that this so-called obvious violation caused Ouza's injuries. I disagree in part with their factual recitation, and in whole with their legal conclusion. On the facts, the majority opinion accurately quotes defendant police officer Gene Derwick's deposition testimony regarding his general recollection of training while employed by the Dearborn Heights Police Department. Officer Dottor, however, offered more specifics. He testified that although he received 'most of [his] training in the police academy,' he received 'field training' and was specifically trained while employed by the Dearborn Heights Police Department on 'probable cause to arrest involving a domestic violence crime.' Thus, it is disingenuous to suggest that the record shows the City of Dearborn Heights lacks *any* training regime for its officers. But even assuming it does, I disagree that the City's reliance upon training these officers received at the police academy is so obviously unconstitutional that we should attach the rarely found single-incident-liability exception. . . . There is no dispute that the City's officers had foundational training on probable cause and excessive handcuffing. Perhaps that foundation was unsatisfactory. Or maybe the officers' shortcomings in applying that training sprung from something other than the training program.

Consider a third (and most likely) possibility—they made mistakes. Whatever the reason may be, *City of Canton* makes clear it 'says little about the training program or the legal basis for holding the city liable.'. . When a municipal employee has some training, that goes a long way in defeating a deliberate-indifference claim. . . . The majority opinion's afterthought conclusion of 'no performance evaluations equals single-incident liability' is equally problematic. *City of Canton* requires that the City's failure to conduct routine performance evaluations of its individual officers must be 'closely related' to Ouza's 'ultimate injury'—her false arrest and excessive handcuffing. To my knowledge, we have never accepted a plaintiff's request to condemn a municipality's human-resources system (let alone one that is likely collectively bargained over) to the degree that my colleagues do (and in such a nonchalant and conclusory manner). On the contrary, we have universally rejected the notion that the failure to conduct a performance evaluation both causes a specific constitutional injury and reflects deliberate indifference. . . What is it about Ouza's injuries here that are directly related to the City's failure to annually review its officers' performance? There is no connection, and the majority opinion identifies none. Yet, it approves Ouza's *Monell* claim. That does not comport with our causation caselaw. . . And even if we were to put all of this aside, our precedent provided the City of Dearborn Heights with ample reason to believe its practices would survive constitutional scrutiny. Just two years before the events at issue occurred here, we decided a nearly identical case involving the City's immediately northern neighbor, Redford Township. In *Marcilis v. Township of Redford*, the plaintiffs similarly alleged § 1983 excessive-force and false-arrest claims and sought to hold the municipality liable for failing to train and supervise its police officers. 693 F.3d 589, 593 (6th Cir. 2012). They supported their *Monell* claim the same way Ouza does hers: one officer 'could not remember when he last received training about the use of force,' the other officer 'testified that his only use-of-force training took place during his time at the police academy' and that he 'could not remember when he last received training on arrests and search warrants,' and the municipality did not conduct performance evaluations of its officers. . . Yet we concluded the *Monell* claim failed because the plaintiffs 'failed to present probative evidence as to the question of deliberate indifference.'. . True, we came to that conclusion by noting an absence of history of abuse that would have put the municipality on notice of deficient training. . . But given those identical facts, it cannot be 'so patently obvious' to the City of Dearborn Heights just two years later that its training of its officers was constitutionally abhorrent. . . There is 'no evidence indicating [that excessive handcuffing or arrests without probable cause] was systematic or widespread, and there [i]s no evidence that the police department's supervisory personnel sanctioned such [conduct] or even knew of its existence.'. . This lack of a 'direct causal link [between] the constitutional deprivation' and the officers' lack of training and performance reviews means *Monell* liability cannot attach to the City of Dearborn Heights. . . Section 1983 simply 'does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States.'. . The majority opinion's authorization of a *Monell* claim in this instance does just that. I would therefore affirm the district court's grant of summary judgment on plaintiff's *Monell* claim.")

Compare ***J.K.J. v. Polk County***, 960 F.3d 367, 378-86 (7th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 1125 (2021) ("Here, . . . J.K.J. and M.J.J. do not claim that Polk County took

affirmative action to harm them. To the contrary, their theory of *Monell* liability roots itself in inaction—in gaps in the County's sexual abuse policy and its failure to properly train the jailers in the face of obvious and known risks to female inmates. These failures to act, J.K.J. and M.J.J. contend, were deliberate and together caused their constitutional injuries. The Supreme Court has recognized that *Monell* liability can arise from such decisions because a 'city's "policy of inaction" in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution."'. . . But the path to *Monell* liability based on inaction is steeper because, unlike in a case of affirmative municipal action, a failure to do something could be inadvertent and the connection between inaction and a resulting injury is more tenuous. . . . All agree that Polk County's written policies categorically prohibited sexual contact with inmates and required responses to alleged violations. But J.K.J. and M.J.J. presented evidence that the policy contained material gaps. . . .The trial evidence makes the bottom line plain: the jury could have found that Polk County's sexual abuse prevention program was entirely lacking. The policy stated nothing but the obvious—do not sexually abuse inmates. The County then exacerbated the gap by failing to use training as the means of making the policy prohibition a reality (or, at the very least, mitigating risk) within the institution. The jury could have tallied these gaps as part of finding the conscious, deliberate municipal inaction upon which to rest *Monell* liability. . . . The Supreme Court has made plain that a failure to act amounts to municipal action for *Monell* purposes only if the County has notice that its program will cause constitutional violations. . . Demonstrating that notice is essential to an ultimate finding and requires a 'known or obvious' risk that constitutional violations will occur. . . . In many *Monell* cases notice requires proof of a prior pattern of similar constitutional violations. . . This case presents no such pattern. The district court declined to instruct the jury on the theory because it found insufficient evidence of previous instances of sexual assault known to the County. In so concluding, however, the district court recognized that J.K.J. and M.J.J. had available another path to show Polk County had the requisite notice.The alternative path to *Monell* liability comes from a door the Supreme Court opened in *City of Canton v. Harris*, 489 U.S. 378 (1989). The Court observed that there may, as here, be circumstances in which 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights' that a factfinder could find deliberate indifference to the need for training. . . 'In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.'. . Put another way, a risk of constitutional violations can be so high and the need for training so obvious that the municipality's failure to act can reflect deliberate indifference and allow an inference of institutional culpability, even in the absence of a similar prior constitutional violation. . . . Though the Supreme Court has yet to confront a case that presents a viable *Monell* claim based on a municipality's failure to act in absence of a pattern, our court has done so twice. [Court discusses *Glisson* and *Woodward*] Sometimes the notice will come from a pattern of past similar violations; other times it will come from evidence of a risk so obvious that it compels municipal action. But at all times and in all *Monell* cases based on this theory, the Supreme Court has directed the focus on the presence and proof of 'a known or obvious' risk. . . . The jury had ample evidence to find that Polk County's policy failures—both the prevention and detection gaps in its written policies

and the absence of training—occurred in the face of an obvious *and* known risk that its male guards would sexually assault female inmates. . . . We recognize that policies can always be more robust, and training can always be more thorough. PREA is not a constitutional standard, and jails are not required to adopt it. Our federal structure leaves the choices to state and local authorities. Our conclusion is more limited: the risks to female inmates in the confinement setting are obvious—indeed, PREA owes its very existence to that reality—and N.S.'s report of Jorgenson's misconduct reinforced for Polk County that the risks were real and acute in the jail. Faced with that notice, the County had a legal obligation to act—to take reasonable steps to reduce the obvious and known risks of assaults on inmates. . . Just as a municipality cannot issue firearms to new police academy graduates, wish them Godspeed on the streets, and hope the new officers exercise sound judgment when deciding whether circumstances warrant the use of lethal force—the precise example the Supreme Court provided in *City of Canton*—Polk County could not, knowing all that it did about the risk within its jailhouse walls, dispatch male guards to stand watch over its female inmates equipped with nothing more than a piece of paper with a flat instruction not to abuse those under their care. The jury had enough to conclude that Polk County deliberately chose a path of inaction when that option was off the table. . . . The County presses a different view. It sees a guard's sexual abuse of an inmate as so patently wrong and so plainly prohibited by Wisconsin law and the jail's policy that no amount of training and no enhancements to the institution's code of conduct could have made any difference. And this is especially so, the County urges, given the lengths to which Christensen went to hide his conduct. Put most bluntly, no amount of training, no policy, no monitoring—nothing, literally nothing—could have prevented or detected what he did to J.K.J. and M.J.J., or so the County would have it. The County's narrow fixation on Christensen exposes its error. *Monell* liability did not hinge on predictions about whether Christensen would have brought himself to stop abusing J.K.J. and M.J.J. Maybe more robust policies could have fostered a zero-tolerance culture in which Christensen would not have felt free to openly harass female inmates, thereby opening the door to his escalating abuse. Or they could have caused Christensen to curb his conduct because of a greater risk of detection—whether from closer monitoring, more frequent guard rotations, or a policy preventing male officers from being alone with female inmates. But maybe not. The point need not detain us because the evidence allowed the jury to conclude that the County's acting to institute more robust policies—foremost addressing prevention and detection—and then training on those policies would have resulted in another correctional officer, an inmate, or even J.K.J. and M.J.J. taking some step to stop Christensen's sexual assaults. The evidence did not require the jury to accept as inevitable that Christensen's conduct was unpreventable, undetectable, and incapable of giving rise to *Monell* liability. . . . Nor was the jury compelled to conclude that the sexual abuse suffered by J.K.J. and M.J.J. had one and only one cause. . . The law allowed the jury to consider the evidence in its entirety, use its common sense, and draw inferences as part of deciding for itself. . . . Darryl Christensen's long-term abuse of J.K.J. and M.J.J. more than justified the jury's verdict against him. And the jury was furnished with sufficient evidence to hold Polk County liable not on the basis of Christensen's horrific acts but rather the County's own deliberate choice to stand idly by while the female inmates under its care were exposed to an unmistakable risk that they would be sexually assaulted—a choice that was the moving force behind the harm inflicted on J.K.J. and M.J.J. The jury so concluded, and

we AFFIRM.") *and* ***J.K.J. v. Polk County***, 960 F.3d 367, 386 (7th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 1125 (2021) (Hamilton, J., concurring) ("I join Judge Scudder's opinion for the court. In light of comments in the dissenting opinions, it is worth emphasizing that the *Monell* claims against the county are based on much more than whether guards knew right from wrong or knew that it was a crime to have sex with inmates. The *Monell* claims are also based on the county's failure to monitor its guards and its failure to provide effective channels for complaints so as to discourage such abuse. To illustrate the point, consider an analogy involving only greed, rather than lust and a guard's horrific abuse of power over inmates. Any bank will train its tellers that they should not steal and that theft is a crime. All tellers know that whether they receive the training or not. Suppose, though, that a bank's managers fail to conduct regular audits of tellers' cash drawers. Most tellers are honest despite the lack of oversight, but one gives in to temptation. Managers later discover that the one teller has been stealing money for years. The risk of embezzlement, even by tellers who know the law and the rules, is obvious. So is the need for audits. The risk and need are so obvious that the bank's stockholders could easily find that its managers (i.e., its policymakers) were not merely negligent but deliberately indifferent (i.e., reckless) toward this obvious and known risk, even if only one teller gave in to the temptation. The same logic applies here to Christensen, who repeatedly gave in to the temptation to abuse his power over inmates.") *with* ***J.K.J. v. Polk County***, 960 F.3d 367, 386-89 (7th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 1125 (2021) (Easterbrook, J., dissenting in part) ("I agree with the majority that the verdict against Christensen is sound and with Judge Brennan that the verdict against Polk County is not. Because this appeal has occasioned so much ink, and my assessment differs somewhat from that of my colleagues, I have concluded that it would be helpful to state briefly why I find the claim against the County lacking. . . . *Connick* is the only decision in which the Justices assessed on the merits a contention that a unit of government violated the Constitution by inadequate training that failed to avert one particular bad outcome. It rejected the claim. The reasons the Court gave are true of the Jail as well. Christensen is the one and only rapist among the guards; no prior, similar incidents notified the County about looming problems. And as soon as supervisors learned of Christensen's misconduct, the County ended his employment and put him in prison himself. . . . I can see a need for explication about 'emotional' or 'psychological' harassment, but anyone can understand the rule against intimate physical relations between guards and inmates. The Jail made sure that every guard knew about this rule. What training is required to get guards to grasp it? The problem is not a want of *comprehension* (as in *Canton*'s hypothetical) but a want of *compliance*. Yet subordinate employees' failure to comply with a valid policy is not a ground of liability against a municipality. . . . In sum, plaintiffs have not tried to show that the rule against guards' intimate contact with prisoners is hard to understand (in general, or for the Jail's guards in particular). That leaves nothing for a jury to consider. The suit fails for legal reasons. Evidence that earlier violations of the Jail's policy were tolerated by slaps on the wrist would be better proof that the 'real policy' differed from the written one, but only if the toleration were attributable to the County rather than to subordinates. If policymakers create a valid rule that is sabotaged by persons lower in the hierarchy, liability is supposed to fall on those persons rather than the governmental entity. That is how *Monell* differs from respondeat superior. At all events, in a case based on a theory of single-incident liability, which is how my colleagues

treat this suit, evidence about laxity concerning less-serious matters is irrelevant. . . .If *Monell* is to be overruled, and vicarious liability established, that should be done forthrightly (and by the Supreme Court), rather than via the roundabout route the majority has devised.") *and* ***J.K.J. v. Polk County****,* 960 F.3d 367, 389, 394, 399-420 (7th Cir. 2020) (en banc), *cert. denied,* 141 S. Ct. 1125 (2021) (Brennan, J., with whom Bauer and Sykes, JJ., join, dissenting in part) ("The majority opinion holds a municipal employer liable under § 1983 for a failure to train and a failure to supplement policies because its employee did what those policies and training expressly forbade him to do. Liability is based on the single-incident theory hypothesized in *City of Canton*[.] . . The 'rare' and 'narrow circumstances' under which that theory applies do not fit here. . . Nor does this case meet the stringent fault and causation requirements set by the Supreme Court to prove § 1983 liability. The majority opinion upholds a jury verdict finding a county liable for a jail guard's repeated rapes of two inmates. It does so without any evidence that Polk County actually and directly caused the plaintiffs' terrible injuries, and no affirmative link between the County's policies and the guard's crimes. It is undisputed that these horrible crimes were perpetrated without the County's knowledge. It is also undisputed that no pattern of similar violations put the County on notice of a need for specific training that would have prevented these sexual assaults. Yet the majority opinion concludes the same evidence that failed to show notice under pattern liability shows notice under single incident liability, as well as causation. . . .Municipal liability under § 1983 as set by the Supreme Court has traveled a winding route. But that route has a constant beacon to courts: each case examines what federal power may be exercised over state and municipal governments and considers the Court's desire to harmonize § 1983 with the structural limits of federalism. These precedents are dispositive here and warrant detailed review before their application. They prescribe a different outcome than reached by my colleagues in the majority. [Dissent engages in discussion of Supreme Court precedents] . . . . [I]n each of the post-*Monell* cases discussed—*Tuttle*, *Canton*, *Bryan County*, and *Connick*—the Court reversed a jury verdict for the plaintiff. . . . These precedents control the consideration of this case. The Supreme Court has never held a municipality liable for a failure to act in the absence of a pattern of prior similar violations. . . This case does not present such a claim either, for the reasons that follow. . . . The majority opinion holds the County employer liable for the crimes of its employee Christensen under the single-incident theory hypothesized in *Canton*, specifically for failure to train and for failure to supplement County policies. . . Those holdings rest on three conclusions:

1. In the absence of a pattern of prior similar sexual assaults at the jail, the rapes of J.K.J. and M.J.J. by Christensen pose one of those 'rare' and 'narrow range of circumstances'. . . the Court hypothesized in *Canton*'s footnote 10, in which the need for training in constitutional requirements is 'so obvious *ex ante*[.]'. .

2. The jail's omission of sexual assault prevention and detection measures in its written policies amounted to unconstitutional inaction under *Monell*. . .

3. The failure to train about sexual assault prevention and detection measures, or the omission of such measures from written policies, caused plaintiff's injuries. . .

In reaching these conclusions, the majority opinion departs from the Supreme Court's requirements in *Canton*, *Bryan County*, and *Connick* and oversteps the culpability and causation rules governing § 1983 claims, resulting in *respondeat superior* liability, an outcome forbidden since *Monell*. . . . The majority opinion recognizes that this case does not present a pattern of misconduct which gave notice to the County that its training program would cause constitutional violations. . . Nevertheless, it concludes the need to supplement the County's sexual assault training was 'so obvious' that the failure to do so amounted to deliberate indifference under *Canton's* single-incident theory. . . I respectfully part ways with my colleagues in the majority that the requirements to establish single-incident liability have been met here. . . . The majority opinion concludes repeatedly and with certainty that the jail posed an obvious risk that male guards would sexually assault female inmates. . . . *Canton*'s single-incident hypothetical expressly considers only 'the need to train' officers. . . The Court has never extended single-incident liability outside failure to train. . . The claim at issue involves something different—purported gaps in the County's sexual assault express policies—not failure to train. . . . However phrased, it is not a 'difficult choice' or a 'difficult decision' for a guard not to rape an inmate. Such a decision is mandated by the law, written policies and training here, as well as any moral code. Just so, Christensen had no 'difficult choice.' He was instructed by the written policies, training, and the law not to sexually assault, but he willfully and surreptitiously ignored that training and instruction. For all these reasons, this case does not fit within the narrow and rare single-incident exception to the pattern requirement for municipal liability. . . . Plaintiffs' appalling injuries were not caused by a lack of specific training and policy language about sexual assault prevention and detection. They were caused by a miscreant guard's hidden, willful, and criminal defiance. There is no evidence that Christensen made the decision to assault plaintiffs for any reason related to inadequate training or policies. For example, no evidence shows that Christensen calculatedly exploited training and policy gaps. Nor does any evidence show that such gaps emboldened, let alone caused, Christensen to commit rapes. The record shows that when Christensen assaulted plaintiffs he knew he was acting contrary to his training and in violation of County policies. From this undisputed evidence, any reasonable fact finder would have to conclude that Christensen's bad-faith conduct, in conflicting with his employer's policies and training, caused plaintiffs' injuries. Christensen, not the County, was the 'moving force' that caused plaintiffs' injuries. . . . The constitutional claim against the County never should have reached the jury. Summary judgment should have been granted to the County because the claim was legally deficient, as shown above. . . The legal deficiency of the claim, more than the lack of evidence, should have led to its demise. If summary judgment had not been granted on the claim, judgment as a matter of law should have been granted to the County. . . . The majority opinion expands municipal liability under § 1983 beyond the boundaries established by federal appellate courts, including that of this circuit:

• No federal appellate court has ever extended the single-incident exception to the sexual assault context;

• No federal appellate court has ever extended the single-incident exception when the employee's compliance with the municipality's policy and training would have prevented the injuries; and

• Specialized training is not required to know that rape is wrong. . . .

Cash does not apply a single-incident theory analysis or even cite to *Canton's* single-incident hypothetical. *Cash* itself states it is not a failure-to-train case: 'the deliberate indifference concern in this case ... is not with a failure to train prison guards to distinguish between permissible and impermissible sexual contact with prisoners. Nor is it with providing sufficient supervision to ensure that guards make correct choices in this respect.'. . *Cash* also based its conclusion of liability on a generalized risk rather than a particularized inquiry (violating *Bryan County*, 520 U.S. at 410–13, 117 S.Ct. 1382), and it ignored the requirement of similar prior violations (violating *Connick*, 563 U.S. at 62–63, 131 S.Ct. 1350). A failure to supervise case, *Cash* holds: '[K]nowledge that an established practice has proved insufficient to deter lesser [sexual] misconduct can be found to serve notice that the practice is also insufficient to deter more egregious misconduct.'. . But that holding offers no help. Here, unlike *Cash*, the district court ruled that plaintiffs' pattern evidence of lesser misconduct failed to show notice of an obvious need for revised policies and training. Plaintiffs did not appeal that ruling. And unlike the majority opinion here, *Cash* does not deem it obvious that without training male guards will rape female inmates. To the extent the majority opinion may read *Cash* differently, district courts in the Second Circuit have not followed suit. . . . [S]ingle-incident liability should not be extended to cases involving a rogue officer not complying with uncomplicated and constitutionally sound policies and training. . . . Applying *Connick*, the inquiry is whether the Polk County Jail trained its guards not to commit sexual assault, not the amount or particulars of that training. . . Nevertheless, the majority opinion is replete with conclusions on the nature, quantity, and timing of the training: what language was and was not included in Polk County's written policies; what topics were and were not discussed in training sessions; when the training did and did not occur; and how the training should have been done, in contrast to how it was done. . . The majority opinion equates its conclusion of insufficient training with no training. But that decides the amount, type, and frequency of training. After *Connick*, . . . that is not the court's inquiry. . . . A lone correctional officer covertly committed terrible sexual assaults against two jail inmates. That employee is now behind bars for 30 years and has millions of dollars of civil judgments against him. At issue is whether his public employer is also liable for those crimes. Under the majority opinion, a single subordinate employee may secretly override municipal policy and create a new policy under which that public employer is accountable. That is vicarious liability, a collapse into *respondeat superior* against which the Supreme Court has repeatedly warned for 60 years. By stepping out and recognizing fault and causation on these facts, this decision departs from Supreme Court precedents, imports a negligence standard into the law of deliberate indifference, permits federal encroachment into an area of traditional state authority, and splits with other federal circuits. On these facts and under the controlling law, the employee, not the employer, should be held responsible for these plaintiffs' injuries. Therefore, I respectfully dissent in part.").

Compare ***Glisson v. Indiana Department of Corrections***, 849 F.3d 372, 375-76, 378-82 (7th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 109 (2017) ("We assume for the sake of argument here that none of these people, and none of the individual providers at the Diagnostic Center, personally did anything that would qualify as 'deliberate indifference' for Eighth Amendment purposes. Most of them had so little to do with Glisson that such a conclusion is quite unlikely. The question before us is instead whether, because of a deliberate policy choice pursuant to which no one was responsible for coordinating his overall care, Corizon itself violated Glisson's Eighth Amendment rights. . . . It is somewhat unusual to see an Eighth Amendment case relating to medical care in a prison in which the plaintiff does not argue that the individual medical provider was deliberately indifferent to a serious medical need. . . But unusual does not mean impossible, and this case well illustrates why an organization might be liable even if its individual agents are not. Without the full picture, each person might think that her decisions were an appropriate response to a problem; her failure to situate the care within a broader context could be at worst negligent, or even grossly negligent, but not deliberately indifferent. But if institutional policies are themselves deliberately indifferent to the quality of care provided, institutional liability is possible. . . . The critical question under *Monell*, reaffirmed in *Los Angeles Cnty. v. Humphries*, 562 U.S. 29 (2010), is whether a municipal (or corporate) policy or custom gave rise to the harm (that is, caused it), or if instead the harm resulted from the acts of the entity's agents. There are several ways in which a plaintiff might prove this essential element. . . .Either the content of an official policy, a decision by a final decisionmaker, or evidence of custom will suffice. The central question is always whether an official policy, however expressed (and we have no reason to think that the list in *Monell* is exclusive), caused the constitutional deprivation. It does not matter if the policy was duly enacted or written down, nor does it matter if the policy counsels aggressive intervention into a particular matter or a hands-off approach. . . . Mrs. Glisson asserts that Corizon had a deliberate policy not to require any kind of formal coordination of medical care either within an institution (such as the Diagnostic Center or Plainfield) or across institutions for prisoners who are transferred. This is not the same as an allegation that Corizon was oblivious to the entire issue of care coordination. Read fairly, she is saying that Corizon consciously decided *not* to include this service, not that it had never thought about the issue and thus had nothing that could be called a policy. In some cases, it may be difficult to tell the difference between inadvertence and a policy to omit something, but on the facts presented by Mrs. Glisson, this is not one of them. . . .Notably, neither the Supreme Court in *Harris*, nor the Ninth Circuit, nor the Third Circuit, said that institutional liability was possible only if the record reflected numerous examples of the constitutional violation in question. The key is whether there is a conscious decision not to take action. That can be proven in a number of ways, including but not limited to repeated actions. A single memo or decision showing that the choice not to act is deliberate could also be enough. The critical question under *Monell* remains this: is the action about which the plaintiff is complaining one of the institution itself, or is it merely one undertaken by a subordinate actor? We reiterate that the question whether Corizon had a policy to eschew any way of coordinating care is not the only hurdle plaintiff faces: she must also prove that the approach Corizon took violated her son's constitutional rights. At trial, there is no reason why Corizon would not be entitled to introduce evidence of its track record, if it believes that this evidence will vindicate its decision not to follow

the INDOC guidelines. . . .One does not need to be an expert to know that complex, chronic illness requires comprehensive and coordinated care. In *Harris*, the Court recognized that because it is a 'moral certainty' that police officers 'will be required to arrest fleeing felons,' 'the need to train officers in the constitutional limitations on the use of deadly force ... can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.'. . A jury could find that it was just as certain that Corizon providers would be confronted with patients with chronic illnesses, and that the need to establish protocols for the coordinated care of chronic illnesses is obvious. And in the final analysis, if a jury reasonably could find that Corizon's 'policymakers ... [were] deliberately indifferent to the need' for such protocols, and that the absence of protocols caused Glisson's death. . . A jury could further conclude that Corizon had actual knowledge that, without protocols for coordinated, comprehensive treatment, the constitutional rights of chronically ill inmates would sometimes be violated, and in the face of that knowledge it nonetheless 'adopt[ed] a policy of inaction.'. . Finally, that jury could conclude that Corizon, indifferent to the serious risk such a course posed to chronically ill inmates, made 'a deliberate choice to follow a course of action ... from among various alternatives' to do nothing. . . *Monell* requires no more. In closing, we reiterate that we are not holding that the Constitution or any other source of federal law required Corizon to adopt the Directives or any other particular document. But the Constitution does require it to ensure that a well-recognized risk for a defined class of prisoners not be deliberately left to happenstance. Corizon had notice of the problems posed by a total lack of coordination. Yet despite that knowledge, it did nothing for more than seven years to address that risk. There is no magic number of injuries that must occur before its failure to act can be considered deliberately indifferent. . . Nicholas Glisson may not have been destined to live a long life, but he was managing his difficult medical situation successfully until he fell into the hands of the Indiana prison system and its medical-care provider, Corizon. Thirty-seven days after he entered custody and came under Corizon's care, he was dead. On this record, a jury could find that Corizon's decision not to enact centralized treatment protocols for chronically ill inmates led directly to his death.") *with* ***Glisson v. Indiana Department of Corrections***, 849 F.3d 372, 383-90 (7th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 109 (2017) (Sykes, J., joined by Bauer, Flaum, and Kanne, JJ., dissenting) ("Today the court endorses *Monell* liability without evidence of corporate fault or causation. That contradicts long-settled principles of municipal liability under § 1983. The doctrinal shift is subtle but significant. The court rests its decision on the conceptual idea that a *gap* in official policy can sometimes be treated as an *actual* policy for purposes of municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). I have no quarrel with that as a theoretical matter. A municipality's failure to have a formal policy in place on a particular subject may represent its intentional decision *not* to have such a policy—that is, a policy *not* to have a policy—and that institutional choice may in appropriate circumstances form the basis of a *Monell* claim. The Supreme Court's cases, and ours, leave room for this theory of institutional liability under § 1983. . . .But Mrs. Glisson produced no evidence to support the fault and causation elements of her claim. My colleagues identify none, yet they hold that a reasonable jury could find in her favor. I do not see how, without evidence on two of the three elements of the claim. The court's decision thus materially alters *Monell* doctrine in this circuit. With respect, I cannot join it. . . .Where, as here, the challenged policy or custom is

not itself unlawful, something more is required to establish corporate culpability and causation. Helpfully, *Brown* contains further instructions for *Monell* claims like this one that do *not* rest on allegations that a municipal policy on its face violates federal law. This part of *Brown* begins with a warning that's worth repeating here. The Court cautioned that *Monell* claims not involving an allegation that the municipal action itself violated federal law ... present much more difficult problems of proof.'. . .[After discussing *Monell, Brown,* and *City of Canton v. Harris* the dissent concludes that] Together these decisions stand for the proposition that a *Monell* plaintiff's own injury, without more, is insufficient to establish municipal fault and causation. The plaintiff must instead present evidence of a pattern of constitutional injuries traceable to the challenged policy or custom—or at least more than one. Only then is the record sufficient to permit an inference that the municipality was on notice that its policy or custom, though lawful on its face, had failed to prevent constitutional torts. Put slightly differently, the plaintiff's own injury, standing alone, does not permit an inference of institutional deliberate indifference to a *known* risk of constitutional violations. . . .In short, except in the unusual case in which an express policy (or an act of an authorized policymaker) is *itself* unconstitutional, a *Monell* plaintiff must produce evidence of a series of constitutional injuries traceable to the challenged municipal policy or custom; the failure to do so means a failure of proof on the fault and causation elements of the claim. *Brown* is unequivocal on this point: If the plaintiff can point *only* to his own injury, 'the danger that a municipality will be held liable without fault is high' and the claim ordinarily fails. . . It's true that *Brown* and *Harris* do not foreclose the possibility that the requirement of pattern evidence might be relaxed in a narrow set of circumstances where the likelihood of recurring constitutional violations is an obvious or 'highly predictable consequence' of the municipality's policy choice. . . . But the Court took great pains to emphasize the narrowness of this 'hypothesized' exception. . . .Despite the contextual language, I see no reason to think that this hypothetical path to liability in the absence of pattern evidence is open *only* in failure-to-train cases. So I agree with my colleagues that evidence of repeated constitutional violations is not *always* required to advance a *Monell* claim to trial. But it's clear that this path to corporate liability is quite narrow. If the plaintiff lacks evidence of a pattern of constitutional injuries traceable to the challenged policy or custom, *Monell* liability is not possible *unless* the evidence shows that the plaintiff's situation was a recurring one (i.e., not unusual, random, or isolated) and the likelihood of constitutional injury was an obvious or highly predictable consequence of the municipality's policy choice. The Court's use of the terms 'obvious' and 'highly predictable' is plainly meant to limit the scope of this exception to those truly rare cases in which the policy or custom in question is so certain to produce constitutional harm that inferences of corporate deliberate indifference and causation are reasonable even in the absence of any prior injuries—that is, in the absence of the kind of evidence normally required to establish constructive notice. Our cases have always followed this understanding of *Monell* doctrine. . . And in all cases we have consistently required *Monell* plaintiffs to produce evidence of more than one constitutional injury traceable to the challenged policy or custom (unless, of course, the policy or custom is itself unconstitutional, in which case the singular wrong to the plaintiffs is clearly attributable to the municipality rather than its employees). [collecting cases] Finally, following the Supreme Court's lead in *Brown* and *Harris,* we have left open the possibility that a *Monell* claim might proceed to trial based on the plaintiff's

injury alone, but only in rare cases where constitutional injury is a manifest and highly predictable consequence of the municipality's policy choice. . . So far, we've allowed recovery under this exception only once, in a case involving a jail healthcare provider's failure to ensure that its suicide-prevention protocols were scrupulously followed. *See Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917 (7th Cir. 2004). . . . Although there was no evidence of prior suicides at the jail, we held that *Monell* liability was appropriate because inmate suicide is an obvious and highly predictable consequence of a jail healthcare provider's thoroughgoing failure to enforce its suicide-prevention program. . . This case is not at all like *Woodward*. While it's patently obvious that a systemic failure to enforce a jail suicide-prevention program will eventually result in inmate suicide, inmate death is not an obvious or highly predictable consequence of the alleged policy lapse at the center of this case. Mrs. Glisson claims that Corizon's failure to promulgate formal guidelines for the care of chronically ill inmates as required by INDOC Directive HCSD-2.06 caused her son's death. Everyone agrees that nothing in 'the Constitution or any other source of federal law required Corizon to adopt the Directive[ ] or any other particular document.'. . So *evidence* is needed to prove corporate culpability and causation; in the usual case, this means evidence of a series of prior similar injuries. But Mrs. Glisson presented no evidence that other inmates were harmed by the failure to have protocols in place as required by the Directive. In the absence of prior injuries, Corizon was not on notice that protocols were needed to prevent constitutional torts. So Mrs. Glisson cannot prevail unless she can show that inmate death was an obvious or highly predictable consequence of the failure to promulgate formal protocols of the type specified in HCSD-2.06. She has not done so. . . . It's far from obvious that formal protocols of the sort required by Directive HCSD-2.06 were needed to prevent constitutional torts of the kind allegedly suffered by Nicholas Glisson. . . . Unlike the jail-suicide case, it is neither self-evident nor predictable—let alone *highly* predictable—that Corizon's reliance on professional standards of medical and nursing care (instead of HCSD-2.06-compliant protocols) would lead to constitutional injuries of the sort suffered by Nicholas Glisson. . . . *Monell* liability requires proof of culpability significantly *greater* than simple negligence. It also requires evidence that Corizon's action—not the actions of its doctors and nurses—*directly* caused the injury. There is no such evidence here. Without the necessary evidentiary support, a jury cannot possibly draw the requisite inferences of corporate fault and causation. On this record, a verdict for Mrs. Glisson is not possible. More broadly, by eliding the normal requirement of pattern evidence and relying instead on sweeping and unsubstantiated generalizations about the obviousness of the risk, my colleagues have significantly expanded a previously narrow exception to the general rule that a valid *Monell* claim requires evidence of prior injuries in order to establish corporate deliberate indifference and causation. The Supreme Court has instructed us to rigorously enforce the requirements of corporate culpability and causation to ensure that municipal liability does not collapse into vicarious liability. Today's decision does not heed that instruction. Nicholas Glisson arrived in Indiana's custody suffering from complicated and serious medical conditions. Some of Corizon's medical professionals may have been negligent in his care, as Dr. Sommer maintains, and their negligence may have hastened his death. That's a tragic outcome, to be sure; if substantiated, the wrong can be compensated in a state medical-malpractice suit. Under traditional principles of *Monell* liability, however, there is no basis for a jury to find that Corizon was deliberately indifferent to a known

or obvious risk that its failure to adopt formal protocols in compliance with HCSD-2.06 would likely lead to constitutional violations. Nor is there a factual basis to find that this alleged gap in corporate policy caused Glisson's death. Accordingly, I would affirm the summary judgment for Corizon.").

See also ***Hightower v. City of Philadelphia***, 130 F.4th 352, 356-57 (3d Cir. 2025) ("Hightower says the city had a policy or custom of not separating inmates by security-risk level during intake. But he cannot identify any policy saying that. True, the city had a policy of separating *general population* inmates by security level. But it did not have any separation policy for inmates during intake. And the lack of a policy is not a policy. A policy requires 'an official proclamation, policy or edict by a decisionmaker possessing final authority.'. . Plus, the city did have a different written intake policy that, if followed, would have prevented this attack; Tyler should have gone from the infirmary straight to the general jail population. But the city is not liable just because its employees did not follow this policy. . . Challenges to 'failures and inadequacies by municipalities' must take the deliberate-indifference path, not the custom-or-policy path. . . Nor has Hightower shown a custom that violated his right. Even if he could show that the city had a custom of commingling pretrial detainees that was 'so persistent and widespread as to practically have the force of law,' the custom would be facially constitutional because the Fourteenth Amendment does not require the city to reshuffle inmates in intake once they are classified. . . And the city's policy of separating *general population* inmates by security classification does not, as Hightower suggests, make its practice of housing differently classified inmates together in intake for mere hours unconstitutional on its face. For a facial constitutional challenge, it would be too speculative to assume that higher-classification inmates inherently pose a substantial risk of harm to lower-classification ones while they are briefly comingled in intake. . . . Hightower also argues that the city caused his alleged constitutional injury by failing to separate inmates in intake by classification status, a choice that was deliberately indifferent to inmates' rights. Under *Monell*, deliberate indifference requires 'proof that a municipal actor disregarded a known or obvious consequence of his action.'. . Ordinarily, this means that a plaintiff must show that '[a] pattern of similar constitutional violations' put the city on notice that, by failing to act, it was being deliberately indifferent to inmates' rights. . . Here, too, Hightower falls short. Though a deputy warden testified that other violent inmates in intake had attacked nonviolent ones, she could not identify a single example. And Hightower's expert just rehashed equally empty deposition testimony. Though the expert opined that housing Hightower and Tyler together was like 'mixing predator with prey,' a lurid metaphor, he offered no factual support. Without that support, we cannot say that his opinion could sustain a jury's verdict. . . And at oral argument, counsel could not cite any other evidence of a pattern. Hightower says the city can be liable even absent any pattern because Tyler's attack was such an obvious consequence of the city's failure to reshuffle inmates in intake after classification. But this single incident of a higher-classification inmate assaulting a lower-classification one is not enough to hold the city liable. True, the Supreme Court has 'hypothesized' that 'in a narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference.'. . But it has never found this bar satisfied. And the only hypothetical example of this liability that it has recognized is extreme: if a city armed its

police with guns and set them loose without any legal training on when to use them. . . Not even failing to train prosecutors on their *Brady* disclosure duties is enough. . . Thus, the risk to Hightower was not 'so patently obvious' that the city can be held liable. . . Failing to temporarily segregate inmates falls far short of giving police guns without training them on the law of deadly force. * * * * * Hightower suffered greatly. But the city cannot be held liable. Because the city adopted a reasonable policy for handling inmates who are often violent and dangerous, we will affirm."); ***Wadsworth v. Nguyen***, 129 F.4th 38, 68-69 (1st Cir. 2025) ("The record contains no information regarding any pattern wherein MSAD school principals, or any other staff member, harassed a student and the harassment did not stop because staff did not know how to report the harassment. Wadsworth nevertheless suggests that no such pattern is needed in her case because this is the type of situation where the consequences of not training staff would have been obvious to MSAD. We disagree. To begin, Wadsworth has failed to explain how these circumstances fit within the rare category where a plaintiff need not point to a pattern of prior violations. . . Further, we are not aware of any case that supports Wadsworth's position. Indeed, there is nothing about this highly unusual situation that would suggest that failing to train school staff on how to report sexual harassment when the harasser is the principal would mean that no staff would report sexual harassment that they were aware of. Especially in light of the existing sexual harassment policy and reporting procedure, which were provided to staff, we cannot see how a failure to train employees 'is so likely to result in a violation of constitutional rights that the need for training is patently obvious.'. . We do, however, echo the district court's admonition that whether MSAD's training program -- or lack thereof -- is a 'best practice' is not currently before us. Thus, we also affirm the district court's grant of summary judgment to MSAD on Wadsworth's failure to train claim."); ***Stapleton v. Lozano***, 125 F.4th 743, 754 (5th Cir. 2025) ("[T]he Stapletons alleged no 'pattern of similar constitutional violations by untrained employees.'. . The Stapletons allege that 'Chief Solis had a policy of failing to adequately monitor inmates and ignoring their needs,' and 'all inmates held at the Progreso jail would be left unsupervised for periods of time under the policy if the officers received other calls.' Their allegation that a problematic policy exists—and that this policy could violate a detainee's constitutional rights—is not enough to overcome qualified immunity. The Stapletons do not allege or point to a pattern of similar constitutional violations within the Progreso Police Department, including officers' failure to monitor detainees, which amounted to deliberate indifference to detainees' serious medical needs, and resulting substantial harm. 'Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.'"); ***Puente v. City of Phoenix***, 123 F.4th 1035, 1066-68 (9th Cir. 2024) ("Plaintiffs base their 'failure to train' argument on the assertion that, although the City of Phoenix extensively trains PPD officers 'on *how* to use' chemical agents to disperse protesters, it failed to properly teach them '*whether* or *when*' to do so. As previously discussed, we have found no triable issue as to whether Defendants committed a constitutional violation in most claims in this case, but we disposed of Guillen's excessive-force claim solely based on the 'clearly established' prong of qualified immunity. Given that there therefore is a triable issue *only* as to whether Defendants caused Guillen to suffer a constitutional injury, Plaintiffs' 'failure to train' claim rests on showing that Guillen's injury *in particular* was the obvious result of the

allegedly inadequate training. . . But Plaintiffs have failed to show that her constitutional injury was such an obvious consequence that PPD's failure to more thoroughly train its officers on the use of chemical agents amounted to 'deliberate indifference' toward her rights. Plaintiffs do not provide any basis to dispute the record evidence showing that the PPD *did* train its officers about 'whether or when' to deploy chemical agents. The record, including portions cited by Plaintiffs, show that PPD officers received training on the responsibility to protect protesters' 'constitutional rights to assemble and exercise free speech' and were told that chemical agents should only be deployed when 'absolutely necessary' and 'other passive means have failed to restore order.'. . . Rather than cite any 'instance[ ] of similar unlawful conduct' prior to the protest—let alone a pattern—that might provide the City with notice that its existing training program was inadequate, Plaintiffs instead assert that this case presents the 'rare' fact pattern in which evidence of a single violation is enough to establish *Monell* liability under a 'failure to train' theory. . . But the record indicates that, despite deploying at numerous protests every year, Grenadiers rarely resort to using chemical agents. Plaintiffs do not explain how Guillen's alleged constitutional injury in this case is an 'obvious consequence' of PPD's current training regimen when the record indicates that PPD officers almost never deploy chemical agents, let alone illegally. . . We therefore determine that the district court was correct that Plaintiffs failed to raise a material factual dispute regarding a 'failure to train' for purposes of *Monell*.* * * We therefore affirm the district court's dismissal of Plaintiffs' claims against Defendant City of Phoenix."); ***Monacelli v. City of Dallas, Texas***, No. 24-10067, 2024 WL 4692025, at *3 (5th Cir. Nov. 6, 2024) (not reported) ("Monacelli invokes a Dallas Police Department report on lessons learned during the George Floyd protests to identify areas where training or communication could improve going forward. The report does identify some areas where gaps existed in the training of Dallas Police Department officers. But even if Monacelli can show these inadequacies are closely related to his injuries, he cannot show deliberate indifference. 'Deliberate indifference is a stringent standard,' more than mere negligence or, even, gross negligence. . . There are two ways to show deliberate indifference. . . first, plausible allegations of a pattern. . .and, second, the 'single-incident exception,'. . . which we've described as 'extremely narrow.'. . Monacelli relies on the single-incident exception to plead deliberate indifference here. But 'our caselaw has "generally reserved" the single-incident method of proving deliberate indifference for cases in which the policymaker provides "*no training whatsoever*" with respect to the relevant constitutional duty, as opposed to training that is inadequate only as to the particular conduct that gave rise to the plaintiff's injury.'. . Monacelli's complaint does not allege an utter absence of law-enforcement training with respect to the relevant constitutional duty he alleges caused his injuries. Rather, it concedes *some* law-enforcement training, a point reiterated in the Dallas Police Department's lessons-learned report on which he bases much of his claims. . . The complaint thus fails to plausibly allege a single-incident exception under our caselaw. Monacelli's failure-to-enact claim fails for the same reason. . . The complaint does not plausibly allege either a pattern of violations or the absence of policy under the single-incident exception."); ***Cosenza v. City of Worcester***, 120 F.4th 30, 40-41 (1st Cir. 2024) ("The 1999 DOJ report (and other, similar reports and recommendations issued at that time and relied upon by Cosenza) cannot be said to have put Worcester on 'actual or constructive notice that a particular omission in their training program [would] cause[ ] city employees to violate citizens'

constitutional rights.'. . Many of the procedures Cosenza now argues were constitutionally required in 2002 were not required under the Massachusetts Constitution until 2009, . . . and the SJC did not adopt a position consistent with the 1999 DOJ report on which Cosenza relies until 2015[.] . . The Massachusetts Constitution is more protective of due process in this regard than the United States Constitution, which to date incorporates fewer of the precautions advocated for by experts in the field of eyewitness identification than does the Massachusetts Constitution. . . Cosenza also argues that Worcester is liable on similar theories for its officers' alleged fabrication and suppression of evidence. We agree with the district court that Cosenza has not identified any record evidence that Worcester 'had an express policy that caused its officers to fabricate or suppress evidence' or 'fail[ed] to train its officers' in that regard. . . On the contrary, it is undisputed that it was the Worcester Police Department's preferred practice to disclose to the District Attorney's Office all known information about a case. Even if the officers had failed to comply with that practice, that alone is not 'sufficient to establish that they were trained inadequately.'. .On this record, no reasonable factfinder could find deliberate indifference, making summary judgment for the City appropriate."); ***Bell v. Williams***, 108 F.4th 809, 825-26 (9th Cir. 2024) ("While we give deference to the jury's finding that Bell proved his allegations at trial, we hold that Bell's failure-to-train theory fails as a matter of law. Allowing the City to be held liable in this case would extend *Monell* liability far beyond the circumstances in which the Supreme Court has sanctioned it. Compare the facts of this case with the canonical failure-to-train example from *City of Canton v. Harris.* There, the Court assumed that a municipality could be held liable if it sent police officers into the streets without training them on when and how to use deadly force. . . Deliberate indifference to such an obvious risk would satisfy the high standard for a failure-to-train theory of liability. In contrast, San Francisco jail officers receive training at several stages of their careers on how to perform cell extractions and when to place detainees in safety cells. They also receive some degree of training on how to accommodate detainees with disabilities. We assume there was no training module focused directly on the overlap between those two topics, but the lack of such a distinct training module does not demonstrate deliberate indifference. Far from resembling the *Canton* hypothetical, this case aligns more closely with *Connick v. Thompson*, where the Supreme Court rejected plaintiff Thompson's attempt to hold a municipality liable for its prosecutors' failure to turn over exculpatory evidence in a criminal proceeding against Thompson, resulting in Thompson spending eighteen undeserved years in prison. . . The Supreme Court held that the municipality was not liable for its prosecutors' failure to comply with *Brady v. Maryland* because, despite any shortcomings in the municipality's training program, the prosecutors' legal education 'equipped [them] with the tools to find, interpret, and apply legal principles.'. . The prosecutors' general familiarity with the *Brady* rule distinguished Thompson's case from *Canton*, where the hypothetical armed police officers were given no training on the constitutional limits of deadly force. . . As in *Connick*, the training program for jail officers in this case covered the relevant topics with reasonable specificity. With the benefit of hindsight, we can poke holes in the training program and find areas that might deserve greater attention, especially in a case like this where cell extractions are performed routinely in a pod with many disabled detainees. But those narrow gaps do not demonstrate deliberate indifference to a known risk. In constructing the training program, the City could reasonably expect jail officers to connect the dots

between different training modules when those subjects intersect in real-world situations. Thus, the City's training program does not demonstrate deliberate indifference to a known risk under the 'most tenuous' theory of *Monell* liability. . . We reverse the district court's decision denying the City's motion for judgment as a matter of law as to Bell's *Monell* claim based on excessive force."); ***Bannon v. Godin***, 99 F.4th 63, 104 (1st Cir. 2024) (Montecalvo, J., dissenting in part and concurring in part) ("Plaintiff also asserts that the City knows that the police department has a long history of excessive force claims, and it thus follows that the City knew it needed to improve training on the proper use of force. This is far too broad a view of when repeated violations put a municipality on notice that its training is inadequate. Excessive force claims can involve an infinite number of factual scenarios, including highly varying degrees of force itself -- clearly, a use of force can be reasonable in one circumstance yet unreasonable in another. Without more particularized claims that the City's awareness of repeated excessive force claims involving similar policies (such as conduct during multi-officer arrests) or factual scenarios (such as where officers used deadly force against a physically injured arrestee or claims involving the same officers), I cannot conclude on this record that the City had sufficient notice that their training was insufficient as to rise to the level of deliberate indifference. Finally, Plaintiff argues that this case falls within the narrow exception for circumstances where the constitutional violation was highly predictable due to the officers' lack of ability to handle recurring situations. The need to train officers on the constitutional limitations on the use of deadly force, *see Tennessee v. Garner*, 471 U.S. 1 (1985), can be said to be 'so obvious' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights, even without a pattern of violations. . . However, Plaintiff has not asserted that the City offered no training on the use of deadly force, as discussed above. Rather, Plaintiff argues that the training program was 'imperfect' -- imperfection is not sufficient to show deliberate indifference. . . Plaintiff also has not pointed to other areas of training that the officers did not receive to which this exception may apply. Accordingly, because I find that no reasonable juror could find deliberate indifference on the part of the City on this record, I concur with my colleagues in their conclusion that the district court's granting of summary judgment in favor of the City should be affirmed, albeit for different reasons.") (Note: Majority had found no underlying Fourth Amendment violation); ***Estate of Wallmow v. Oneida County***, 99 F.4th 385, 394 (7th Cir. 2024) ("At bottom, the Estate fails on the first prong because the 'policy' it alleges is not a policy at all. Although the facts bear out the Estate's claim that officers did not always conduct cell checks with unflagging rigor—often allowing inmates to leave bed coverings hanging and not always putting eyes on each inmate, since the cameras did not show all parts of each cell—the jail's on-point policy did call on officers to observe each inmate at least once an hour and to look for such abnormalities. The Estate's response is to argue the lax enforcement of the policy is a custom in the jail that *amounts* to a policy decision. Such claims can prevail only where the lax practice was 'so pervasive that acquiescence on the part of policymakers was apparent.'. . That bar is too high to clear on these facts. To be sure, Symonds testified that some rules and regulations enjoyed stricter enforcement than others, and that the rule against hanging bed coverings fell on the slacker side. But he also explained that the cell block that housed Wallmow was for newer inmates, and longer-tenured inmates would have been told 'you can't hang stuff.' Officers did enforce the policy, even if not against newcomers. There was no acquiescence on the County's

part in ignoring the policy, no custom of allowing inmates that small privacy. Nor can the Estate establish, as it must, that the county's inaction bore a 'known or obvious risk' of causing constitutional violations. . . The undisputed evidence here reveals that Wallmow's was the first death by suicide in the jail's 20-year history. Only once before had an inmate made a serious attempt on his own life, and on that occasion an officer intervened to save his life. . . .Wallmow's fate is tragic. Jails should, and often do, have policies that help connect people at risk of death by suicide to mental health resources and get them the help they need. Indeed, Oneida County Jail has those policies and those resources, though no one brought them to bear on Wallmow. The problem with the Estate's claim is that we cannot indulge the temptation to employ hindsight. Wallmow thrice disavowed that he was at risk, the jail took him at his word, and after his talk with Bunce nothing indicated otherwise. So the jail resolved to keep an eye on Wallmow without taking more intrusive steps. That course complies with the Constitution's requirements."); ***Chisesi v. Hunady***, No. 21-11700, 2024 WL 1638587, at *7 (11th Cir. Apr. 16, 2024) (not reported), *cert. denied*, No. 24-406, 2024 WL 5011732 (U.S. Dec. 9, 2024) and *pet. for cert. filed*, No. 24-538 (U.S. Nov. 8, 2024) ("In this case, the § 1983 claim asserted against Sheriff Mack rests solely on a single incident—the shooting of Victor—rather than a pattern of unconstitutional conduct. Even if Officer Hunady committed a constitutional violation, the 'narrow circumstances' that justify imposing liability on Sheriff Mack for failure to train on the basis of a single incident are not present here. Chisesi presented evidence that from 2015 to 2018, there were at least 1,000 officer-involved shootings in the United States where the subject appeared to be in a mental health crisis. Although this evidence shows the possibility of recurring situations involving those suffering mental health crises, the evidence is far more equivocal on whether there was an obvious potential for the violation of constitutional rights and an obvious need for more or different training. While certainly important training topics—engaging with mentally ill individuals, handling barricaded subjects, and performing de-escalation techniques—the failure to train officers in those areas does not "carry a high probability for constitutional violations in the manner intended by the 'so obvious' notice that would open the door to [supervisor] liability." *Id.* Moreover, we cannot say that Sheriff Mack knew to a moral certainty that constitutional violations would result from declining to further train his deputies on engaging with individuals experiencing mental health crises. Thus, Sheriff Mack's failure to train sheriff deputies in these areas falls outside the limited circumstances that the Supreme Court has hypothesized could give rise to single-incident liability for failure to train. Ultimately, we conclude that Sheriff Mack is entitled to summary judgment because Chisesi failed to demonstrate that Sheriff Mack had actual or constructive notice that the particular omissions in the training program were likely to result in constitutional violations."); ***Perez v. City of Fresno***, 98 F.4th 919, 931 (9th Cir. 2024) ("Plaintiffs contend that the following evidence creates a triable issue on their failure-to-train claim: the facts of the incident, testimony regarding the officers' unfamiliarity with the dangers of restraint asphyxia, and Plaintiffs' expert report describing the inadequacies in FPD's and FCSO's training on the risks of prone restraint. But what is missing is any evidence pointing to a pattern of excessive-force incidents by untrained officers that resulted in the outcome here—restraint asphyxia. . . Accordingly, to establish a question of fact regarding municipal liability, Plaintiffs needed to show that the unconstitutional consequences of failing to train officers on restraint asphyxia were 'patently obvious.'. . They did

not. As an initial matter, Plaintiffs acknowledge that FPD and FCSO maintain policies to prevent restraint and positional asphyxia. While two FPD officers testified that they were not trained on prone-restraint asphyxia, a third FPD officer testified that he was trained and was taught to monitor a prone individual's breathing. Likewise, a FCSO deputy stated that it is unlikely that an individual would asphyxiate from downward pressure while in a prone restraint but nevertheless explained that he was trained to monitor for signs of restraint asphyxia. The possible inadequate training of two FPD officers about the risks of restraint asphyxia is insufficient to support a *Monell* claim."); ***Farris v. Oakland County, Michigan***, 96 F.4th 956, 969 (6th Cir. 2024) ("Here, Farris argues that Oakland County has failed to train its officers about when they should use spit hoods on detainees (especially pregnant women). Yet, even if Farris has shown an inadequacy in the county's training, she has fallen short of establishing its deliberate indifference. Farris does not attempt to prove that the deputies have followed a 'pattern' of unconstitutionally using spit hoods. . . And she has not shown that the need to train the officers on this precise practice should have been so 'obvious' that the use of a spit hood on Farris alone could establish the county's deliberate indifference. . . Most notably, Farris identifies no other training defects. To the contrary, the county's use-of-force policy makes clear that the deputies must 'receive annual Use of Force training.'. . The county thus could reasonably conclude that this general training on the need to employ only 'objectively reasonable' force would adequately convey when officers should use spit hoods. . . Farris lastly argues that the county's 'change-out' policy (which allows opposite-sex deputies to help remove an arrestee's personal clothes when necessary) violates Michigan's strip-search law. But again, it is not obvious that a 'change out' equals a 'strip search.' And this state-law issue is irrelevant to this Fourth Amendment claim anyway."); ***McNeal v. LeBlanc***, 93 F.4th 840, 841 (5th Cir. 2024) (Duncan, J., joined by Richman, CJ. and Jones, Smith, Engelhardt, Oldham, and Wilson, JJ., dissenting from denial of en banc rehearing) ("As I've explained before, in the rising tide of suits by overdetained prisoners against Louisiana officials, our court routinely misapplies *Connick v. Thompson*. . . Yes, we pay lip service to *Connick*'s requirement of a 'pattern' of similar violations, *see Parker v. LeBlanc*, 73 F.4th 400, 405 (5th Cir. 2023), but in the same breath we read that requirement out of existence. . . The result is that our court has now 'turn[ed] § 1983 into a source of vicarious liability for the heads of State agencies.'. . That mocks *Connick* and decades of prior precedent. . . Ironically, *Connick* overruled our en banc court. . . Now that a 9-8 majority has refused to rehear this case and correct our pattern of underruling *Connick*, our court may have the last word. If this were a movie, it would be called *The Fifth Circuit Strikes Back*. I dissent."); ***Mosier v. Evans***, 90 F.4th 541, 549-50 (6th Cir. 2024) ("To succeed on a failure to train claim, a plaintiff must show that: '(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.'. . A showing of deliberate indifference requires that the municipality 'completely disregarded' its duty to train. . .Typically, that means total inaction in the face of repeated, known, rights violations. . . In a 'narrow range of circumstances,' when a rights violation is a 'highly predictable consequence' of inadequate training, repeated rights violations need not be shown. . . But in those cases, the risk of rights violations must be 'so obvious,' and the inadequate training 'so likely' to result in such violations, that the municipality can fairly be described as deliberately indifferent. . .Crockett County did not fail to train Evans.

Evans received use-of-force training approved by POST. Mosier's expert, Patrick Looper, concluded that the training was inadequate. But the district court found that Looper's report failed to point to evidence supporting that conclusion and therefore failed to create a genuine dispute of material fact as to the adequacy of Evans' training. Regardless, there is no dispute as to deliberate indifference. Mosier presents no evidence of prior instances of rights violations, so he can rely only on the narrow highly-predictable-consequence theory. Assuming that there was an obvious risk that excessive force might be used against intoxicated detainees, the County made sure that Evans received use-of-force training. Where a municipality provides training that addresses a purported risk, that 'does not present the same "highly predictable" constitutional danger.'. . In situations like this, where relevant training was given, showing that 'additional training would have been helpful' does not establish municipal liability. . . Mosier's failure to train claim fails because it alleges no more than that. For these reasons, the district court properly granted Crockett County summary judgment on Mosier's *Monell* claim."); ***McNeal v. LeBlanc***, 90 F.4th 425, 435-39 (5th Cir. 2024) (Duncan, J., concurring), *reh'g and reh'g en banc denied*, 93 F.4th 840 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 266 (2024) ("I concur in denying Secretary LeBlanc qualified immunity but only because our precedent requires that result. *See Parker v. LeBlanc*, 73 F.4th 400 (5th Cir. 2023); *Crittindon v. LeBlanc*, 37 F.4th 177 (5th Cir. 2022), *cert. denied*, 144 S. Ct. 90 (2023). Our precedent is mistaken, however. It makes LeBlanc answerable for the errors of subordinates, creating vicarious liability in contravention of *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), and *Connick v. Thompson*, 563 U.S. 51 (2011). To repair that far-reaching error, our court should rehear this case *en banc.* We have had several overdetention cases involving DPSC and LeBlanc. . . We will likely have many more. *See Hicks v. LeBlanc*, 81 F.4th 497, 510 (5th Cir. 2023) ("[O]ur Court remains plagued by claims arising from inexplicable and illegal over-detention in Louisiana prisons[.]"). The question is not whether overdetention is a serious problem (it is) nor whether it should be fixed (it should). The question, instead, is about the proper remedy: whether LeBlanc, the head of a large and complex state agency, can be held personally liable under § 1983 for causing a prisoner's overdetention. To answer that question, our circuit borrows the standard for finding a municipality liable under § 1983. *See, e.g., Southard v. Tex. Bd. of Crim. Just.*, 114 F.3d 539, 551 (5th Cir. 1997) (noting "the close relationship between the elements of municipal liability and an individual supervisor's liability," and holding "the same standards of fault and causation should govern" (quotation omitted)). Under that framework, LeBlanc cannot be vicariously liable for an overdetention caused by a subordinate's error. . . LeBlanc must have caused the overdetention himself. To establish that, one must show that LeBlanc's 'deliberately indifferent' failure to train subordinates caused the overdetention. . . And the usual way of establishing failure-to-train liability is to show '[a] pattern of similar constitutional violations by untrained employees.'. . That's where the problem begins. The pattern requirement is critical because it keeps failure-to-train from collapsing into *respondeat superior*. . . The prior violations must be closely similar to the present one. Otherwise, a supervisor would not be on notice of a flaw in the agency's training program, nor would he have any idea how to change the training to fix the problem. . . In other words, absent an alarm bell rung by a pattern, the supervisor's liability would depend solely on his subordinate's error, not on anything the supervisor himself failed to do. That is *respondeat superior* liability, and it is excluded in § 1983 claims. . . The paradigm

illustration of the pattern requirement comes from *Connick*, 563 U.S. 51. A line prosecutor violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence. Could the district attorney's office be liable for that misdeed because the office failed to properly train prosecutors on *Brady*? The answer turned on whether the office had a *pattern* of previous violations. Critically, though, it wasn't enough to say, 'The office had past *Brady* violations.'. . The Supreme Court demanded more. Prior violations had to be specific enough to 'put [the district attorney] on notice that the office's *Brady* training was inadequate *with respect to the sort of* Brady *violation at issue here.*'. . Respectfully, our circuit has not correctly applied *Connick*'s pattern requirement in DPSC overdetention cases. Overdetentions occur for many reasons, as our cases show. A department employee may misclassify a prisoner. . . Or an employee may fail to apply time-served credits. . . Or an employee may misapply the law for calculating time-served credits. . . Or local jails may fail to timely transmit pre-classification paperwork to DPSC. . . To make LeBlanc liable for any one of these overdetentions, *Connick* requires evidence of a pattern of closely similar violations sufficient to notify LeBlanc that his department's flawed training caused the particular violation. . . .Without the pattern evidence required by *Connick*, a failure-to-train claim against LeBlanc collapses into vicarious liability. That is, under our precedent, LeBlanc can be liable as a supervisory official based merely on the fact that overdetentions and delays in processing release dates, writ large, have occurred within DPSC. If that were enough to prove deliberate indifference, though, *Connick* would have come out the other way. The district attorney would have been liable for failing to train prosecutors merely because previous *Brady* violations had occurred in his office. Of course, that is not what *Connick* held. The required pattern had to show, instead, that 'the office's *Brady* training was inadequate *with respect to the sort of* Brady *violation at issue [t]here.*'. . That stringent evidentiary foundation is missing here because our precedent, in contravention of *Connick*, rejects it. Our *en banc* court should correct that far-reaching error. One final note. Our cases speak in the same breath of a supervisor's liability for 'failure to train' and for 'failure to adopt policies.'. . It is unclear to me whether those are meant to be different theories of supervisory liability or different articulations of the same theory. . . If the former, then I seriously doubt that a 'failure to adopt policy' theory has any basis in the Supreme Court's case law. *Connick* is quite specific that it was addressing liability for a 'failure to train.'. . It said nothing about a generic 'failure to adopt or promulgate policies.' Imposing liability because a supervisor 'fails to adopt policies' opens a much broader vista of supervisory liability than for 'failing to train' subordinates. Indeed, *Connick* explained that the 'most tenuous' type of deliberate-indifference liability was 'failure to train.'. . That is because the theory is based not on a municipality's *action* but its *omission.* Premising liability on failing to 'adopt policies,' however, is even more tenuous. At least a failure to train is focused on a supervisor's omissions with respect to a particular duty (training employees) and in response to a problem that training could solve (a pattern of prior employee violations linked to inadequate training). A 'failure to adopt policies,' by contrast, appears to open supervisors to liability merely for failing to be clairvoyant. That cannot meet the stringent standard of deliberate indifference. . . That problem aside, however, our precedent is clear that a supervisor's liability in a case like this must be grounded on a pattern of prior, similar violations. . . That requirement has not been met here. We should rehear this case to fix the problem. As noted, we will likely have many more overdetention

cases against LeBlanc and others. We need to clarify when officials can be liable for overdetaining prisoners. If we fail to do that, we risk turning § 1983 into a source of vicarious liability for the heads of State agencies. In addition to violating Supreme Court precedent, such a misguided project would be futile. The overdetention problem is obviously a serious one. But if evidence does not connect the problem to something LeBlanc *himself* has done or failed to do, then making him personally liable for overdetentions will solve nothing. I urge our court to rehear this pressing issue *en banc*."); ***Sauceda v. City of San Benito, Texas***, 78 F.4th 174, 190 (5th Cir. 2023) ("Sauceda conceded below that the 'relevant policymaker' was the San Benito City Commission, not Morales. And there is no record evidence that a policy to arrest individuals for failing to produce identification was adopted or promulgated by the City Commission. Nor has Sauceda produced evidence of 'a widespread practice that [was] so common and well-settled as to constitute a custom that fairly represent[ed] municipal policy.'. . A solitary instance of violating Sauceda's rights cannot confer liability on the City. . . Sauceda alternatively contends that the City is liable for Officer Lopez's actions because it failed to provide him with sufficient training and adequate supervision. Municipal liability for failure to train or supervise attaches when the failure 'reflects a municipality's deliberate or conscious choice' such that the choice is a policy. . . For this liability to attach, Sauceda must also show that '(1) the training or hiring procedures of the municipality's policymaker were inadequate; (2) the municipality's policymaker was deliberately indifferent in adopting the hiring or training policy; and (3) the inadequate hiring or training policy directly caused the plaintiff's injury.'. . It is not enough that the failure to supervise be due to negligence or ineptitude on the part of the City; Sauceda's burden is to prove it was a result of deliberate indifference. . . The fact that this was an isolated incident raises that burden further because the 'single-incident method of proving deliberate indifference' is 'generally reserved' for cases in which 'no training whatsoever' occurred. . . Here, Sauceda did not produce evidence that could establish that Lopez received *no* training, that his training was intentionally or deliberately inadequate, or that the City had a policy endorsing Officer Lopez's actions. Because of this, the district court found correctly that Sauceda failed to raise a genuine issue of material fact supporting municipal liability."); ***Parker v. LeBlanc***, 73 F.4th 400, 405-06 (5th Cir. 2023) ("LeBlanc argues that this complaint did not adequately allege the requisite 'pattern' of constitutional violations by untrained employees 'ordinarily necessary' under *Connick* to establish deliberate indifference for purposes of failure to train. . . He contends that Parker's allegations 'identify issues of an entirely different kind than the one that allegedly caused Parker to spend too much time incarcerated.' Essentially, LeBlanc insists that there is a meaningful distinction between Parker's over-detention due to his alleged misclassification as a sex offender, as opposed to over-detention due to miscalculations of his sentence or his status being generally lost in the system. The district court 'decline[d] to draw the line as finely as LeBlanc advances and limit the types of problems involved solely to those instances where individuals have been misclassified as sexual offenders.' The court noted that the real problem alleged in the Legislative Audit report was the Department 'not knowing when [inmates'] proper release date was' and that 'inmate sentences have been "done wrong"' as stated in testimony from *Chowns v. LeBlanc*. We agree with the district court's assessment. In a similar case about over-detention — against the same defendant — the plaintiff also relied on a study to show a pattern of constitutional violations and allege supervisory liability.

See Crittindon, 37 F.4th at 186–87. We held that 'a reasonable jury could find that Defendants knew of a "pattern of similar constitutional violations," such that their inaction amounted to a disregard of an obvious risk.'. . The court there noted that LeBlanc was 'in a position to adopt policies that would address this delay' and that he could not 'avoid the evidence that the study exposed unlawful detentions of prisoners.'. . Much of the same is true here, though unlike in *Crittindon*, this case is merely at the 12(b)(6) stage, rather than a motion for summary judgment. . . What LeBlanc may have done to comply with his supervisory obligations is not yet part of the record. Further, Parker has not had the opportunity to conduct discovery. . . . The allegations in the complaint are that there is a 'pattern of over-detention' that renders Parker's own case 'neither unique nor even unusual.' The standard for deliberate indifference requires only a 'pattern of *similar* constitutional violations by untrained employees,' rather than an exact duplication. . . Parker has alleged that he was detained for 337 days past his release date and has cited three pieces of evidence to support his allegations that LeBlanc was aware of the deficiencies of implemented policies that routinely led to errors like the one that violated his constitutional rights. . . . We agree with Parker that his complaint sufficiently alleges the requisite 'pattern' of constitutional violations by untrained employees to establish deliberate indifference for purposes of failure to train. . . We therefore hold that his complaint should proceed to the next stage of litigation, *i.e.*, tailored discovery. *See Carswell v. Camp*, 54 F.4th 307, 311 (5th Cir. 2022)."); ***Edwards v. City of Balch Springs***, 70 F.4th 302, 312-14 (5th Cir. 2023) ("'To show deliberate indifference, a plaintiff normally must allege a pattern of similar constitutional violations by untrained employees.'. . 'A pattern requires *similarity and specificity*; prior indications cannot simply be for any and all "bad" or unwise acts, but rather must point to the specific violation in question.'. . Because deliberate indifference typically requires a pattern, 'we have stressed that a single incident is usually insufficient to demonstrate deliberate indifference.'. . The ' "single incident exception" is extremely narrow,'. . and as an exception to the pattern requirement, it 'is generally reserved for those cases in which the government actor was provided no training whatsoever.'. . Edwards argues that the City 'failed to provide ... appropriate remedial force training.' He relies on a few examples to establish what he sees as a factual question regarding a pattern of violations: (1) Oliver previously 'slamm[ed] Luis Medina, Jr. to the ground ... while Medina was experiencing an epileptic seizure,' and (2) a different officer previously 'sho[t] an unarmed male' and 'assault[ed] an inmate who he claimed verbally assaulted him.' Edwards also points to evidence of 'two other instances in which an officer shot at a moving vehicle.' These examples lack 'similarity and specificity,' and therefore they do not 'point to the specific violation in question.'. . Oliver's prior body-slam is dissimilar to this case because it did not involve a moving vehicle. So too for the different officer's prior shooting and prior assault. While Edwards does point to some scant evidence for two shootings that did each involve a vehicle, he does not describe those instances at all—indeed, he does not identify any evidence that the shootings even violated the department's use-of-force policy. Even for a city as small as Balch Springs, these 'isolated instances' of previous departures from the overall use-of-force policy cannot establish a pattern of deliberate indifference. . . As a result, these examples are not enough to satisfy the causality standard that is *Monell*'s third element. Edwards's failure-to-train claim therefore falls short. . . . Because Edwards has identified no law that requires the City to maintain a 'system to identify and track use of force incidents,' his

supervisory and disciplinary theories can succeed only if he identifies 'a pattern of similar constitutional violations.'. . He has not done so. Instead, he points to the 'violations' discussed above, plus two others: (1) Oliver, while off-duty and without provocation, 'pulled a gun on another driver following a routine traffic accident,' and (2) in 2013, Oliver shared a Facebook post which read that 'I will never in my life be as good at anything else as I am at killing people.' As above, these incidences lack 'similarity and specificity,' and so they do not 'point to the specific violation in question.'. .The prior violations that Edwards identifies certainly reflect individual action that is 'bad or unwise,'. . . but as for the City, they do not amount to 'a complete disregard of the risk that a violation of a *particular* constitutional right would follow.'. . Because deliberate indifference is absent, Edwards's supervisory and disciplinary theories cannot succeed, and that means that Edwards cannot satisfy *Monell*'s third element."); ***Howell v. NaphCare, Inc.***, 67 F.4th 302, 319-20 (6th Cir. 2023) ("The Estate sued Sheriff Neil in his official capacity under a failure-to-train theory, a claim that amounts to suit against Hamilton County itself. . . A municipality may be liable under § 1983 for failure to train when it amounts to deliberate indifference. . .To succeed on a failure-to-train claim, a plaintiff must show: '(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.'. . Regarding the second prong, a plaintiff most commonly demonstrates a municipality's deliberate indifference by pointing to a failure to act 'in response to repeated complaints of constitutional violations by its officers.'. . But a plaintiff can rely on a single incident to establish liability in a narrow range of circumstances 'if the risk of the constitutional violation is so obvious or foreseeable' that it amounts to deliberate indifference for the municipality to fail to prepare its officers for it. . . The Estate relies on this latter route to show the County's deliberate indifference. The Estate initially argues that the County did not provide *any* training on restraint-chair monitoring, but ultimately argues that the County only provided limited on-the-job training that was inadequate. Three types of training regarding observation of inmates in restraint chairs were evinced by the record: training at correctional officer academy; training at orientation; and on-the-job training. One sergeant testified that training was offered by a 'field training officer' after the academy. Collini stated that he received training at the academy and received ongoing on-the-job training; Erwin received the same and showed an awareness and familiarity with the restraint chair policies. Based on the record, it is difficult to ascertain the substance of these trainings—formal or informal—and the Estate's expert only provides in conclusory terms that the County 'failed to properly train and supervise' officers on the 'proper supervision and careful observation of inmates' in restraint chairs. To support its proposition that the County's training was inadequate, the Estate primarily relies on *Shadrick v. Hopkins County*, which held that a jail medical provider inadequately trained its nurses by providing only 'some limited on-the-job-training.'. . But *Shadrick* contained no indication that the nurses received 'any type of ongoing training'; the only training provided appeared to be 'some limited on-the-job training when beginning their employment, such as learning where supplies were kept.'. . . The record in *Shadrick* reveals that the 'limited on-the-job training' offered at the beginning of the nurses' employment on housekeeping issues amounted to no training at all. On this record, we cannot say the same is true regarding the County's training on restraint-chair monitoring. The County offered initial training,

and, while it did rely on on-the-job training, that training was ongoing. The Officers displayed knowledge of and familiarity with the relevant polices that governed restraint chairs, which the Estate's expert agreed were reasonable and appropriate. Finally, 'failure-to-train liability is concerned with the substance of the training, not the particular instructional format.'. . Contrary to the Estate's argument, the County did not wholly fail to train its officers on restraint-chair monitoring. The Estate has failed to show a genuine dispute of fact regarding whether the training was deficient in substance. The Estate's failure-to-train claim against the County fails at prong one, and the district court's grant of summary judgment is affirmed."); ***Valdez v. Macdonald***, 66 F.4th 796, 816-21 (10th Cir. 2023) ("Since *City of Canton*, our court has determined that summary judgment was not appropriate in several single-incident failure-to-train cases. Each of the following cases determined that deliberate indifference and causation presented factual questions that should be decided by a jury. [court discusses *Allen*, *Olsen*, and *Lance* cases] . . . . *Lance* provided this court's most recent articulation of the single-incident failure-to-train claim: (1) 'the existence of a [municipal] policy or custom involving deficient training'; (2) an injury caused by the policy that is 'obvious' and 'closely related'; and (3) that the municipality adopted the 'policy or custom with deliberate indifference' to the injury. . . On this third element, we adopted the Second Circuit's three-part test for deliberate indifference: (i) the municipality's policymakers 'know to a moral certainty that their employees will confront a given situation'; (ii) the situation 'presents the employee with a difficult choice of the sort that training or supervision will make less difficult'; and (iii) '[t]he wrong choice will frequently cause the deprivation of a citizen's constitutional rights.'. . In each of these cases—*Allen*, *Olsen*, and *Lance*—we determined that summary judgment was not appropriate because there were issues of fact regarding whether the municipality was deliberately indifferent and should be liable for failure to train. . . .Denver's pure legal argument is that we need only look to 'whether [its] officers were trained on the parameters of the use of deadly force' and the inquiry 'stops' there. . . Mr. Valdez counters that Denver failed to train officers on the use of deadly force where, as here, an officer has been shot while pursuing a suspect and catches up to him. . . He does not contend on appeal that there was a pattern of such occurrences, so he relies on the *City of Canton* test for single incident liability—whether the need for training on this subject is obvious and lack of training is likely to cause a violation of constitutional rights. . . Denver's legal argument runs counter to *City of Canton*'s single-incident liability test that 'in light of the duties assigned to specific officers or employees the need for more or different training' may be 'so obvious' that failing to train constitutes deliberate indifference. . . The district court correctly recognized that just because Denver trains on the constitutional standard for deadly force does not mean there is no 'need for more or different training.'. .The remainder of Denver's deadly force argument is that the 'need for more or different training' should not have gone to trial. This is not a purely legal question. . . The district court allowed Mr. Valdez the opportunity to prove at trial that this need was 'obvious.'. . And because that issue is at least partly factual and the jury considered it at trial, we do not review it on an appeal from the denial of summary judgment. . . . Denver argues that a 'single-incident failure-to-train municipal liability claim' is 'available only when officers are completely "untrained."'. . This is a legal argument, but Denver has waived it, and it otherwise fails on the merits. Denver did not make this argument in its summary judgment motion and thus forfeited it in district court. . . Denver's

argument otherwise fails. It reads *Connick* too narrowly. *Connick* did not hold that a failure-to-train claim applies only to officers who have received no training at all. For liability, 'a municipality's failure to train its employees *in a relevant respect* must amount to "deliberate indifference."'. . And, as noted, *City of Canton* refers to 'the need for more or different training.'. .*Connick* and *City of Canton* do not suggest that as long as there is any training on deadly force, a municipality can never be deliberately indifferent. . . Also, Denver's 'completely untrained' argument conflicts with our decisions that have described employees as untrained when they did not receive proper training on a particular aspect of their jobs, not just when they have no training at all. . . . Denver argues that '[t]raining is not required for patently obvious criminal conduct.'. . It contends the district court erred in holding that failure to train officers 'to not shoot others out of anger could establish municipal liability.'. . But Denver's argument oversimplifies Mr. Valdez's failure-to-train claim as a legal matter, and it otherwise raises factual issues. Under *City of Canton*, failure-to-train municipal liability turns on whether 'the need for more or different training is so obvious' 'in light of the duties assigned' to the officers. . . Denver's argument is legally flawed because it fails to recognize that even if acts are illegal or clearly inappropriate does not mean officers need not be trained to avoid them. . . Indeed, as the Second Circuit has explained, an employee may still need training in circumstances where, 'although the proper course is clear, the employee has powerful incentives to make the wrong choice,'. . . which may include when a suspect has shot a police officer. What remains of Denver's argument is factual. We may not review a post-trial appellate challenge to the district court's determination at summary judgment that a reasonable jury could decide training was obviously needed on when it is constitutional to fire on a suspect after a police chase during which the officer was shot. Denver's 'patently obvious criminal conduct' argument therefore fails. . . . Denver argues the district court (1) erred in concluding Mr. Valdez could show Denver was 'on notice' of the need to train on the use of deadly force when an officer has been shot and is angry, . . . and (2) erred in failing to identify a difficult decision' that additional training 'would have eased[.]' . . These arguments are variations of Denver's general argument that the district court should have granted summary judgment because Mr. Valdez could not show an 'obvious' need for additional training on the use of deadly force under *City of Canton*. . . Denver's arguments raise mixed questions of law and fact that we may not review on a post-trial challenge to summary judgment. Even if the district court had 'erroneously denied [summary judgment], the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law ... and appellate review of those motions if they were denied.'. . We do not see how the questions of whether 'the need for more or different training is so obvious' and whether 'the inadequacy [is] so likely to result in violation of constitutional rights,'. . . can be answered as a pure legal determination in this case. As noted above, Denver's assertion that its training of officers on the deadly force standard automatically shields it from municipal liability lacks legal authority and conflicts with *City of Canton*, but it also leaves much unanswered that depends on factual context. For example, is it 'obvious' that officers chasing fleeing felons will sometimes be shot? Is it 'obvious' that officers need instruction on how being shot and angered affects application of the deadly force standard? Is it 'obvious' that an officer lacking such training is likely to violate an individual's constitutional rights? Denver argues the answers to these questions should be no, but the questions are not purely

legal ones, and the answers depend on evidence of the training that was and was not provided. . . Even if Denver could plausibly dispute the district court's determinations that a reasonable jury could find that (1) Denver was on notice' of an obvious need for training and (2) Sergeant Motyka confronted a 'difficult choice' in evaluating whether deadly force was still authorized after he was shot, . . . these are 'factual disputes,' not 'purely legal question[s]'[.]. . . Denver's post-trial challenges to the denial of summary judgment are not appropriate for review."); ***Orozco v. Dart***, 64 F.4th 806, 822-27 (7th Cir. 2023) ("Though Koger's claim fails based on the due process analysis above, summary judgment for the County is appropriate for another reason—Koger falls short of demonstrating municipal liability. Oddly, Koger's briefing neither cites to *Monell* nor comprehensively explains his theory of municipal liability. But we interpret his arguments as an attempt to establish municipal liability through a 'gap in policy' theory. He agrees that 'the jail did not have any formal policy (written or unwritten) regarding what is to be done with books confiscated pursuant to the jail's three-book/magazine policy,' and argues that such an omission subjects the Jail to liability. Namely, Koger asserts that 'written policies were and are necessary here because they are a protection against willy-nilly destruction of inmates' personal property.' By refusing to implement a policy on how confiscated books were to be handled, Koger believes the Jail 'create[d] a serious risk that inmates will be deprived of their property without due process.' The County disputes municipal liability, contending Koger identifies no actionable policy or custom and falls short of proving fault and causation. . . . Because Koger is suing a municipality, it is not sufficient for him to merely demonstrate a valid due process violation. He must go a step further and show the municipality itself is liable for the harm he suffered. . . . We have identified 'three requirements to establish a *Monell* claim—policy or custom, municipal fault, and "moving force" causation'. . . Starting with policy or custom, three kinds of municipal action support *Monell* liability: '(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority.'. . Plus, '[i]naction can also give rise to liability if it reflects the municipality's "conscious decision not to take action."'. . In addition to a policy or custom, a *Monell* plaintiff must also show municipal fault. . . This requirement is 'easily established when a municipality acts, or directs an employee to act, in a way that facially violates a federal right.'. . But a plaintiff's route becomes more difficult when he alleges only 'that the municipality caused an employee to violate a federal right.'. . . Under those circumstances, '[t]he plaintiff must demonstrate that the municipality itself acted with "deliberate indifference" to [the plaintiff's] constitutional rights.'. . This is a high bar. As the Supreme Court explains, '"[d]eliberate indifference" is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.'. . Finally, a plaintiff seeking to hold a municipality liable must show causation. . . . Koger points to the three-book policy as causing him injury and giving rise to municipal liability. But we have already held the policy constitutional, . . . so Koger cannot claim that the County's 'affirmative municipal action is itself unconstitutional.'. . Instead, Koger must travel the more difficult liability route and show that the 'municipality caused an employee to violate a federal right.'. . For that, Koger turns to a 'gap in policy' liability theory. Koger suggests that—by creating the three-book policy without any accompanying instructions

for how officers are to deal with confiscated books—the County was deliberately indifferent to the constitutional property rights of Jail inmates. . . . As indicated, 'municipal liability can be premised, as here, on municipal inaction, such as "a gap in express policies."'. . Indeed, a municipality can be held liable when it 'has knowingly acquiesced in an unconstitutional result of what its express policies have left unsaid.'. . Yet while 'gap in policy' liability is possible, it entails unique concerns and stringent requirements. We have cautioned 'the path to *Monell* liability based on inaction is steeper because, unlike in a case of affirmative municipal action, a failure to do something could be inadvertent and the connection between inaction and a resulting injury is more tenuous.'. . So, '[a] gap in policy "amounts to municipal action for *Monell* purposes *only if* the [municipality] has notice that its program will cause constitutional violations."'. . 'Demonstrating that notice is essential to an ultimate finding and requires a "known or obvious" risk that constitutional violations will occur.'. . This means Koger must show the County had notice that its gap in policy would cause constitutional violations and was deliberately indifferent to that risk. . . Koger can demonstrate the requisite notice in either of two ways. He can show a pattern of constitutional violations such that the County was put on notice of the constitutional harm its gap in policy was causing. . . Or he can show that the risk of a constitutional violation under the County's existing three-book policy was so high as to be obvious. . . . Option one is closed to Koger, as there is no record evidence showing an actionable pattern of similar constitutional violations. The testimony and declarations in the record show the three-book policy was rarely enforced and offer no evidence of repeated book or magazine destruction. . . . This evidence does not, as a matter of law, establish municipal notice via a pattern. . . That leaves Koger with option two—demonstrating that the risk of unconstitutional property deprivation under the County's policies was so high as to be obvious. . . Here, too, Koger comes up short. Qualifying circumstances under this doctrine are rare, and this is not one of those cases. . . It was not 'blatantly obvious' that implementing the three-book policy without providing additional guidance to correctional officers would result in constitutional violations. . . Without more, the bare fact that a policy authorizes confiscation does not create an imminent risk that Jail staff will unconstitutionally destroy that property. We also emphasize it is not sufficient for Koger to show that a policy could conceivably or potentially lead to a constitutional violation. . . A constitutional violation must be a 'blatantly obvious' consequence of inaction for single-incident liability, . . . and Koger cannot make that showing here. This case closely resembles *Bohanon*, where we reviewed a § 1983 claim built around a gap in policy liability theory. [court discusses *Bohanon*] The same reasoning applies here. The three-book policy did not present a glaring risk of constitutional violation such that the Jail should have been on notice of impending harm even with no pattern of past violations. The summary destruction of inmate reading materials does not naturally and imminently follow from the three-book policy. Because Koger does not demonstrate municipal fault, a required element, we decline to weigh in on causation. . . . We . . . conclude that Koger cannot establish municipal liability even if his procedural due process claim were sound. He complains of a gap in the County's policies but provides evidence of only a single possible constitutional violation. With no evidence of a pattern of similar constitutional violations, this court is left having to infer that the severity of the policy gap itself put the County on notice. We decline to hold that the three-book policy is the type of policy that makes a constitutional violation

blatantly obvious."); ***Harris v. City of Saginaw, Michigan***, 62 F.4th 1028, 1338-39 (6th Cir. 2023) ("[F]ailure to train is not measured by information retention or whether 'better or more training' would have avoided the incident. Failure to train is measured by inquiring if the City 'completely disregarded' its duty to train its officers on probable cause determinations. . . And here, the record contains undisputed evidence of training per the police chief. . . What is more, when asked in a different manner—not being asked what the Fourth Amendment stands for in general—one of the Officers correctly articulated the probable cause standard and the appropriate considerations when evaluating the evidence. . . Second, we must bear in mind that we are addressing competing motions for summary judgment. As to Harris's motion, we interpret the facts in the light most favorable to the City. The City said they train on probable cause, which Harris did not rebut, instead focusing on potential gaps in training related to the Fourth Amendment more generally. And as to the City's motion, even construing the record in Harris's favor, no reasonable juror could find the City '*complete[ly]* fail[ed] to provide *any* type of [probable cause] training' in light of the police chief's unchallenged testimony. . . Harris also takes issue with the City's policy memo regarding Michigan state law governing warrantless arrests. But substance of the memo aside and accepting Harris's view of its flaws, the memo alone is not in the 'narrow range of circumstances' that establishes single-incident failure-to-train liability. . . This narrow range of circumstances includes situations where a constitutional violation is 'the "obvious" consequence of failing to provide specific [ ] training, and that this showing of "obviousness" [ ] substitute[s] for the pattern of violations ordinarily necessary[.]' . . But where it is understood that an actor receives *some* training on the constitutional subject matter—even training outside the workplace—that actor 'does not present the same "highly predictable" constitutional danger.'. . As in *Connick*, '[w]e do not assume that [on-scene officers] will always make correct [probable cause] decisions[.] But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability.' . . We conduct a similar analysis for the City's potential liability for failure to supervise, which also turns on whether the City exhibited deliberate indifference to its citizens' constitutional rights. . . We have found the failure to supervise when all of the relevant parties disclaimed responsibility. . . . Here, it is not the case that the Officers lacked supervision. The City identifies the known supervisors—the police chief and lieutenant. Instead, Harris mistakenly attributed supervisory responsibilities to the wrong person: Detective Busch. And as discussed above, Busch did not personally arrest Harris and his involvement occurred only after the arrest had been effectuated. So, Harris is unable to establish City liability for failure to supervise the Officers. Because neither the failure to train nor failure to supervise analysis reveals any genuine disputes of material fact, Harris's motion as to these claims should be denied and the City's should be granted."); ***Armstrong v. Ashley***, 60 F.4th 262, 276-78 (5th Cir. 2023) ("Armstrong does not allege that an officially promulgated policy instructed police to investigate using unconstitutional methods. . . Therefore, she had to rely on a custom or practice 'so common and well settled as to constitute a custom that fairly represents municipal policy,' and '[a]ctual or constructive knowledge of such custom must be attributable' to the policymaker. . . As quoted above, Armstrong pled custom or practice and pattern in a conclusory fashion without meaningful factual content. Although Armstrong also alleges that 'persons with final policymaking authority for the Shreveport Police Department participated personally in the misconduct described in this

Complaint,' this, too, is barren of factual support and wholly conclusory. . . Second, Armstrong argues that Shreveport failed to adequately train, supervise, and discipline its officers. . . . Armstrong asserts that Shreveport police officers received subpar training across the board, but this general conclusion is not enough to imply or state that policymakers acted with deliberate indifference. As already discussed, she fails to allege a pattern of similar violations, let alone Shreveport's notice of such a pattern, except in wholly conclusory terms. And she does not point to a 'particular failure to train' that could render a constitutional violation highly predictable. . . This *Monell* claim based on failure to train, supervise, and discipline fails for lack of factual allegations that support a finding of deliberate indifference. . . . In the alternative, Armstrong argues that *Monell* liability may be imposed on prosecutors in the Caddo Parish District Attorney's Office because they allegedly suppressed exculpatory evidence pursuant to a policy or custom. James Stewart, the current Caddo Parish District Attorney, stands in as the official defendant. This claim fails for reasons similar to those that stymie Armstrong's *Monell* claim against Shreveport. Armstrong's allegations of a formal policy and direct policymaker involvement are again entirely conclusory. . . . Armstrong's allegations of an unlawful custom or practice include the same formulaic allegations made against Shreveport . . . .With this claim, however, Armstrong lists nine cases over a 24-year period as examples where exculpatory evidence was suppressed by the District Attorney's practices. But nine constitutional violations over a 24-year period and thousands of prosecutions are hardly sufficient to show a municipal custom. [citing *Connick*] A more fundamental problem, noted by the district court, is the mischaracterization of these nine cases, none of which found a *Brady* violation. . . . This proffered litany cannot constitute a plausible allegation that the Caddo Parish DA's office had a custom of suppressing exculpatory evidence. . . As with her *Monell* claim against Shreveport, Armstrong also alleges failure of the DA's office to adequately train, supervise, and discipline. Just as nine inapposite cases cannot show an unconstitutional custom or pattern, they are insufficient to place the District Attorney on notice as a means to show deliberate indifference. The district court thus properly dismissed Armstrong's *Monell* claims against DA Stewart."); ***Helphenstine v. Lewis County, Kentucky***, 60 F.4th 305, 323-26 (6th Cir. 2023), *reh'g en banc denied*, 65 F.4th 794 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 692 (2024) ("Plaintiff also seeks to impose municipal liability on Lewis County. . . A municipality cannot be liable under a theory of respondeat superior; it can only be held liable for 'its own wrongdoing.'. .This requires plaintiff to demonstrate that the alleged federal violation occurred because of a municipal 'policy or custom.'. . A municipality may be held liable under one of four recognized theories: '(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations.'. . Plaintiff argues that Lewis County failed to adequately train and supervise its jailers regarding medical emergencies. We agree. . . . There are two ways to support a claim that a failure to train or supervise is the result of a municipality's deliberate indifference. Plaintiff may prove (1) a 'pattern of similar constitutional violations by untrained employees' or (2) 'a single violation of federal rights, accompanied by a showing that [the municipality] has failed to train its employees to handle recurring situations presenting an obvious potential for a constitutional violation.'. . Plaintiff has not identified any other

constitutional violations, so she must demonstrate that the single violation (Helphenstine's death) was accompanied by Lewis County's failure to train the jailers to handle this potentially recurring situation. This sort of claim is available only 'in a narrow range of circumstances,' where a federal rights violation 'may be a highly predictable consequence of a failure to equip [employees] with specific tools to handle recurring situations.'. . The question here is whether the County's failure to train its employees amounted to deliberate indifference, on behalf of the County, to the rights of detainees. . . Such a claim has three elements. Plaintiff must show (1) that the County's 'training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.'. . Here, a reasonable jury could conclude that she has met her burden. . . . At bottom, it appears that defendants were not trained on how to identify or address a medical emergency. A jury could easily conclude that this training program, to the extent that it existed, was insufficient. Second, Lewis County's deliberate indifference. 'Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.'. . If the 'unconstitutional consequences of failing to train' employees are 'patently obvious,' the county 'could be liable under § 1983 without proof of a pre-existing pattern of violations.'. . Asking employees to use professional judgment that lies outside their area of expertise may demonstrate deliberate indifference. . . . The inadequacy of the training and supervision at the jail demonstrates that it results from the County's deliberate indifference to the rights of its inmates because the possible unconstitutional consequences are patently obvious. This is particularly palpable when viewing Lewis County's woeful training policy against the backdrop of Dr. von Luhrte's performance and the County's lack of supervision. . . . The jail doctor was unable to deal with common medical conditions at the jail, and he was rarely present at the jail. The deputy jailers did not have any medical training or medical knowledge, so often, no one at the jail could recognize or treat a medical emergency. But with no medical professionals on site, the County effectively asked the jailers to make determinations about what constituted a medical emergency—a requirement well outside their area of expertise. And the County did not supervise the jailers or Dr. von Luhrte at all. A reasonable jury could easily conclude that these policies were the result of the County's deliberate indifference to inmate health and safety. . . . In sum, a jury could conclude that Helphenstine's death was the result of the County's deliberate indifference."); ***Liggins v. Duncanville, Texas***, 52 F.4th 953, 955-57 (5th Cir. 2022) ("As for the policy requirement, a party may point to a formal declaration, an informal custom, or, sometimes, a 'single decision.'. . But, the 'single decision' exception is 'extremely narrow' and only applies in 'rare circumstances.'. . To warrant application, the constitutional harm in question must've been the 'plainly obvious' consequence of the actor's single decision. . . In practice, that means the decision must've been made despite a very 'high degree of *predictability* concerning the consequences of the challenged decision.'. . That's a 'stringent standard[ ]' which requires 'unmistakable culpability and clearly connected causation.'. .Here, Liggins argues that Chief Brown's single decision—ordering his officers to enter the Liggins's home—was the 'moving force' behind Liggins's injuries. Liggins admits Chief Brown's order wasn't patently unconstitutional, so instead he contends that it was adopted with a deliberate indifference to Liggins's rights. But, Liggins's claim doesn't pass muster for two reasons: predictability and

culpability. First, it wasn't 'highly predictable' that a Fourth Amendment violation would result from Chief Brown's order. The single decision exception—especially when tied to deliberate indifference—applies in rare and narrow scenarios. . . We have only entertained the theory in a few cases, including *Brown*, 219 F.3d 450. But, in *Brown*, the outcome was the 'highly predictable consequence[ ]' of the municipal actor's decision. . . There, a sheriff failed to train an officer known to have an 'exuberant and reckless background' on and off the job. . . So, the sheriff was on clear 'notice' that placing him on duty with '*no* training' and '*no* supervision' could lead to an excessive force incident. . . But, this case isn't like *Brown.* Instead, it tracks closer to *Valle v. City of Houston.* In *Valle*, a police officer ordered his agents to enter the home of a mentally ill man. . . After a brief scuffle, the man was shot and killed. . . There, we found there wasn't evidence of deliberate indifference because 'at least some training' had been provided to the officers and, more importantly, there wasn't a 'pattern of similar violations' to rely on. . . Although a 'pattern of misconduct is not required' to prove predictability, . . . '[w]e have stressed that a single incident is usually insufficient to demonstrate deliberate indifference.'. . After all, repetition may be the only thing that puts a policymaker on 'sufficient notice' that a constitutional violation may spring from their single decision. . . Of course, we don't 'suggest that a single incident, as opposed to a pattern of violations, can never suffice to demonstrate deliberate indifference.'. . Instead, we emphasize the difficulty of proving up such claims without any evidence of a pattern. Here, Liggins provides no genuine evidence of a pattern or any other kind of notice. Instead—to prove predictability—Liggins relies on 'well-known studies and literature' to argue Chief Brown's intervention was contrary to accepted police practices. But, bald factual assertions coupled with informational literature isn't enough to support a deliberate indifference claim—even under Rule 12(b)(6). . . Second, Liggins can't show that Chief Brown, at the time of his order, had the 'requisite degree of culpability,' namely that he completely disregarded any risk to Liggins's Fourth Amendment rights. Liggins had stopped taking his prescription medication and was 'suffering from a severe mental health episode.' His own 'health care providers advised [his mom] to call 911.' Although Liggins's mother told Chief Brown her son wasn't dangerous, Liggins 'was expressing suicidal ideations.' So, Chief Brown—for the safety of Liggins—intervened. While Chief Brown could've waited for a 'crisis intervention team,' failing to do so doesn't show that Chief Brown 'disregarded' any of the 'obvious consequence[s]' of his decision. . . Difficult decisions—like sending armed officers into the home of a person suffering from suicidal thoughts—aren't easy and must be made quickly. But, making them doesn't evidence an intentional ignorance of all the associated risks. At worst, failing to wait or fully recognize the risk of harm to Liggins's rights was negligent. But, mere negligence isn't enough to prove deliberate indifference."); ***Henderson v. Harris County, Texas***, 51 F.4th 125, 131-32 (5th Cir. 2022) ("Here, Henderson concedes that she does 'not allege a pattern of similar constitutional violations' and instead 'contend[s] that [her] claim falls within the single-incident exception.'. . There are at least two problems with that. First, as already noted, this is not a case where 'the government actor was provided no training whatsoever,'. . . because everyone agrees Garduno was trained in proper taser use. Second, Henderson again relies *only* on the County's 'failure to produce certain policies and procedures' in response to public information requests. She suggests the only possible conclusion to be drawn from the County's failure to respond to those requests is that the County

had *no* policies and offered its officers *no* training on proper taser use. As the district court rightly concluded, these 'vague allegations are insufficient to establish "deliberate indifference" through the single-incident exception.'"); ***Bohanon v. City of Indianapolis***, 46 F.4th 669, 672-78 (7th Cir. 2022) ("The officers' conduct was egregious, but Bohanon's theory for holding the City liable is flawed. Municipalities cannot be held vicariously liable under § 1983 for the constitutional torts of their employees; for the City to be liable, a municipal policy or custom must have caused Bohanon's constitutional injury. . . A claim against a municipality under § 1983 requires proof of both municipal fault and causation. Bohanon did not prove municipal fault because the narrow exception in the City's substance-abuse policy did not present a policy 'gap' that made it glaringly obvious that off-duty officers would use excessive force in violation of the Fourth Amendment. And because no extreme emergency situation existed at the time of the incident, the City's policies expressly *prohibited* the officers' conduct and were not the 'moving force' cause of Bohanon's injury. . . .As the Department's investigation revealed, the officers' actions in brutally beating Bohanon were plainly prohibited by the City's express policies. The Department's General Order 3.24 covers substance abuse and was enacted 'to ensure [that officers] are not under the influence of alcohol or other drugs while acting in any law enforcement capacity.' The policy categorically prohibits both on-duty officers and off-duty officers in uniform from having alcohol in their blood. It also prohibits off-duty officers with alcohol in their blood from performing any law-enforcement function subject to a very narrow and precisely stated exception. An officer who has consumed alcohol may engage in a law-enforcement function *only* 'in extreme emergency situations where injury to the officer or another person is likely without law enforcement intervention.' General Order 3.12, which details the responsibilities of off-duty officers, defines '[a]n extreme emergency ... to be a situation where action is required to prevent injury to the off-duty [officer] or another, or to prevent the commission of a felony or other serious offense.'. . .Bohanon's principal allegation was that the City caused his constitutional injury when the officers used excessive force against him in violation of his Fourth Amendment rights. He also alleged that the City violated his constitutional rights based on Reiger's failure to intervene to stop Serban's conduct, the officers' illegal seizure of the money in his wallet, and their deliberate indifference to his medical needs when they failed to obtain medical assistance. . . . These three requirements to establish a *Monell* claim—policy or custom, municipal fault, and 'moving force' causation—are by now familiar. And they 'must be scrupulously applied' to avoid a claim for municipal liability backsliding into an impermissible claim for vicarious liability. . . That's especially true of the municipal-fault and causation requirements where (as here) 'a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so.'. . In these circumstances a rigorous application of the proof requirements is especially important. . . Bohanon's *Monell* claim is premised on the Fourth Amendment right to be free from unreasonable seizures. . . The parties agree that his claim satisfies the threshold requirement that the officers acted under color of law when they engaged and then brutally beat Bohanon at Mikie's Pub. . . Bohanon also satisfies the first requirement necessary to bring a *Monell* claim. General Order 3.24 is an express policy prohibiting police action by off-duty officers who have been drinking (subject to a narrow exception). Bohanon claims that it caused the officers to use excessive force against him. And municipal liability can be premised, as here, on municipal inaction, such as 'a gap in

express[ ] policies.'. .It's at steps two and three—municipal fault and 'moving force' causation—that Bohanon's claim collapses. It's undisputed that the officers violated General Order 3.24 when taking off-duty police action while drinking because no extreme emergency situation was present at Mikie's Pub. The parties stipulated to this fact at trial. And it's undisputed that the officers violated General Order 1.30 by using unreasonable force against Bohanon. Therefore, the City's policies expressly *prohibited* both the officers' off-duty law-enforcement action and the excessive force used against Bohanon. The City's policies prohibiting these actions are clearly not facially unconstitutional. Bohanon's theory is that General Order 3.24 should not have included an exception for extreme emergency situations. He contends that this 'gap' in the policy led to the 'highly predictable' outcome of his assault. In Bohanon's view the existence of *any* exception permitting off-duty officers to take police action with alcohol in their blood demonstrates that the City was deliberately indifferent to the obvious risk of constitutional violations based on police use of excessive force. We note at the outset that because Bohanon does not allege that the City directly violated his rights, his 'claim presents "difficult problems of proof."' A gap in policy 'amounts to municipal action for *Monell* purposes *only if* the [municipality] has notice that its program will cause constitutional violations.'. . Typically notice is established by 'a prior pattern of similar constitutional violations.'. . Here, the parties agree that no similar incident—let alone a *pattern* of similar incidents—had occurred since General Order 3.24 was enacted. Bohanon therefore must establish that his case is within the 'narrow range of circumstances' where notice can be inferred from the obviousness of the consequences of failing to act. . . These cases are 'rare.'. . To succeed, Bohanon must show that the 'risk of constitutional violations' was 'so high ... that the municipality's failure to act can reflect deliberate indifference and allow an inference of institutional culpability, even in the absence of a similar prior constitutional violation.'. . Bohanon did not clear this high bar. In the rare cases where we have found this standard to be met, the risks of municipal inaction have been blatantly obvious. [collecting cases] In contrast, it is not at all obvious that a policy *prohibiting* police action while drinking, subject to a narrow and specific exception to protect life and limb, would lead off-duty officers to use excessive force in violation of the Constitution. That's especially true when coupled with the City's policy prohibiting the use of excessive force. Nothing about the text of General Order 3.24 alone put the City on notice that constitutional violations of this kind were likely to occur. . . Bohanon has also failed to prove that the City's policies were the cause of his injuries. . . . There is simply no evidence that the City's policies caused Bohanon's injuries. The officers violated City policy; their actions did not fall within General Order 3.24's narrow exception. At trial Reiger testified that he didn't care if he was disciplined for violating policy. In other words, City policy did not influence Reiger's decision to use excessive force, let alone cause it. Causation is similarly attenuated for Serban, who testified that he used force based on Bohanon's actions, not because of any gap in the City's policies. Bohanon presented no evidence to the contrary. Here, the officers violated City policy that otherwise would have prevented Bohanon's injuries. City policy clearly was not the moving force behind the constitutional violation. What happened to Bradford Bohanon was a tragedy, and we share the district judge's sympathy for Bohanon. But 'a municipality cannot be held liable *solely* because it employs a tortfeasor.'. . Because Bohanon did not establish municipal fault and moving-force causation, the judge was right to set aside the jury's verdict and enter judgment

for the City."); ***Helbachs Cafe LLC v. City of Madison***, 46 F.4th 525, 530–31 (7th Cir. 2022) ("Helbachs does not challenge Order 8 as facially unconstitutional or argue that retaliation was the result of an action by a final policymaker. Rather, its three theories of liability rest entirely on the argument that the retaliation occurred as a result of a municipal custom or practice: (1) that Order 8 was an unconstitutional as-applied express policy because it implicitly prohibited anti-mask signs; (2) that PHMDC had a custom of pre-writing citations which resulted in constitutional deprivations; and (3) that the defendants failed to train PHMDC employees adequately resulting in the violation of Helbachs' constitutional rights. But each theory fails under the same straightforward application of the requirements for *Monell*. A plaintiff challenging a facially lawful policy (express or implied) 'generally must prove a prior pattern of similar constitutional violations resulting from the policy.'. . Likewise, '*Monell* claims based on allegations of an unconstitutional municipal practice or custom ... normally require evidence that the identified practice or custom caused multiple injuries.'. . In most cases (see below), failure to train claims are no different. . . Helbachs provides no evidence of any pattern of similar violations against other businesses, for any of its theories. . . At oral argument, Helbachs conceded there was no evidence to this in the record but claimed that there were additional cases of similar actions taken against other businesses. But Helbachs provided nothing from the record to support this claim (nor do we know what supposed policy or custom it would support—other instances of using Order 8 to prevent businesses from posting a sign? Of pre-writing citations? Of sending poorly trained employees out to violate rights?), so we cannot consider those alleged facts introduced at argument on appeal. . . In turn, Helbachs' as-applied policy claim under *Monell* dies on the vine—without any evidence of a pattern or practice, no reasonable jury could find that retaliation against Helbachs occurred as a result of any municipal policy, express or implied. Recognizing that rare circumstances arise in which the need for better training 'is so obvious' that the city should have effectively been on notice, even in the absence of past violations, . . . the defendants' public health department compliance training program presents no such obvious risk. . . The compliance program Helbachs takes issue with sends PHMDC employees out to conduct health inspections of restaurants, an activity that presents no obvious risk to the First Amendment rights of food and drink license-holders. Though Helbachs views the risk of unconstitutional retaliation through the issuance of citations as having been obvious, it provides no evidence to that, save for its own experience with PHMDC in this case."); ***Morgan by next friend Morgan v. Wayne County, Michigan***, 33 F.4th 320, 329 (6th Cir. 2022) ("Morgan also argues that Wayne County failed to train and supervise its deputies to ensure the safety of mentally ill inmates. Inadequate training can be the basis for a *Monell* claim, but '[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.'. . There are two ways to support a claim that a failure to train or supervise is the result of a municipality's deliberate indifference. Morgan may prove (1) a 'pattern of similar constitutional violations by untrained employees' or (2) 'a single violation of federal rights, accompanied by a showing that [the municipality] has failed to train its employees to handle recurring situations presenting an obvious potential for a constitutional violation.'. . Morgan has not presented proof of any previous sexual assaults at UCH, so the first method is unavailable to her. And she has not shown that any individual defendant violated her constitutional rights, so the second method is unavailable to her. Thus,

Morgan's failure-to-train claim is untenable."); ***George, on behalf of Bradshaw v. Beaver County***, 32 F.4th 1246, 1253-55 (10th Cir. 2022) ("Deliberate indifference requires proof that a municipal actor disregarded a known or obvious consequence of his action. . . . For example, when policymakers have actual or constructive notice that a training deficiency caused city employees to commit constitutional violations, the city may be deliberately indifferent if it chooses to maintain its deficient training program. . . Ordinarily, a plaintiff must prove a pattern of untrained employees' constitutional violations to show deliberate indifference. . . . Plaintiff contends Beaver County was deliberately indifferent to the 'predictable consequences' of failing to train its officers on its suicide-prevention policy and shift-change reports and failing to install CCTV monitoring cameras in the cells housing suicidal inmates. First, concerning Plaintiff's suicide-prevention-policy argument, Plaintiff argues Beaver County neither provided its officers a copy of its suicide-prevention policy nor trained them on it. But BCCF's suicide-prevention policy, along with the rest of the policy handbook, was available to officers 'on every computer in the facility.' And all Beaver County corrections officers complete a twelve-week training program at the Utah POST Academy. POST training includes a four-hour suicide-prevention training, and BCCF sponsors an annual mental-health training, which sometimes includes suicide-prevention training. After POST certification, BCCF officers also receive on-the-job training, called FTO training, to learn how more experienced officers implement BCCF policies. All deputies on duty June 13−15, 2014, were POST-certified officers in good standing. Although some officers testified that they were unfamiliar with BCCF's specific suicide-prevention policy, BCCF officers received some suicide-prevention training and could view the policy. While BCCF could have offered more or better suicide-prevention training, 'showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability.'. . Plaintiff contends a pattern of misconduct exists showing Beaver County was deliberately indifferent 'to the predictable consequences of failing to train its officers on suicide prevention.' She relies on the following: (1) the arresting officer failed to notify a mental-health provider when Bradshaw asked her to kill him twice; (2) the intake officer placed Bradshaw on suicide watch but did not put him in a suicide smock, log fifteen-minute safety-checks, or notify a mental-health provider that he was suicidal; (3) a booking officer failed to notify a mental-health provider that Bradshaw was suicidal; (4) Corporal Rose transferred Bradshaw to cell three, which lacked CCTV monitoring, without authorization from a mental-health provider; and (5) Rose failed to ensure other officers knew Bradshaw was suicidal, placed him in a suicide smock, or performed fifteen-minute checks. But Plaintiff's examples do not show a pattern of constitutional violations by untrained officers over time. They instead demonstrate that officers failed to comply with the County's suicide-prevention policy during this incident—a showing insufficient to establish deliberate indifference to suicide-prevention training. And Plaintiff does not argue that proving a pattern of constitutional violations is unnecessary here. . . Thus, on the facts taken in the light most favorable to Plaintiff, Plaintiff cannot establish that BCCF has a policy of failing to train its officers on suicide prevention. . . Second, Plaintiff argues Beaver County failed to train its officers on shift-change reports. . . But, like Plaintiff's suicide-prevention-policy argument, a failure to comply with BCCF's shift-change-report policy does not evidence a pattern of constitutional violations amounting to a policy of failing to train on shift-change reports. . . Failing to comply with jail policy does not amount to a

constitutional violation on its own. . . And proving deliberate indifference ordinarily requires showing a pattern of similar instances because 'continued adherence to an approach that [policymakers] know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action.'. . Plaintiff offers no evidence showing that Beaver County failed to comply with its shift-change-report policy on any occasion other than this incident. Thus, Plaintiff cannot prove Beaver County acted with deliberate indifference in failing to train its officers on shift-change reports. Last, Plaintiff argues that Beaver County's failure to install CCTV monitoring cameras in the cells used for suicidal inmates in violation of its suicide-prevention policy amounted to deliberate indifference. But again, Plaintiff complains only that the County violated its policy here and offers no evidence of a pattern of constitutional violations showing the County's deliberate indifference to the consequences of failing to install CCTV monitoring cameras in those cells. After all, no inmate had ever committed suicide at BCCF before this incident. And Plaintiff does not argue that proving a pattern of constitutional violations is unnecessary. Because Plaintiff cannot show that the County was deliberately indifferent in failing to train its corrections officers on preventing suicide and preparing shift-change reports or in failing to install CCTV monitoring cameras in certain cells, the district court properly granted summary judgment to Beaver County."); ***Gambrel v. Knox County, Kentucky***, 25 F.4th 391, 408-12 (6th Cir. 2022) ("[A] municipality's improper training or supervision must have 'actually caused' the plaintiff's injury. . . This element requires proof of the two types of causation from the common law of torts: but-for (or factual) causation and proximate causation. . . Even if a municipal employee uses excessive force to harm a plaintiff, then, the plaintiff cannot hold the municipality liable without proof that proper training would have prevented this force. . . And even if a plaintiff can establish this factual causation, the plaintiff still must show proximate causation—which requires, for example, that a municipality could reasonably foresee that an employee's wrongful act would follow from the lack of training. . . Before applying these elements here, we start with two points of agreement from the parties about the nature of Gambrel's claim. To begin with, Gambrel does not allege that the Knox County Sheriff's Office had an official policy condoning excessive force. Its use-of-force policy in June 2016 tracked Kentucky's use-of-force standards, which Gambrel does not challenge. . . Gambrel thus agrees that she must prove the 'most tenuous' of claims against a local government—that Knox County failed to properly train or supervise its agents about the proper uses of force. . . Next, Gambrel does not dispute the County's argument that she can hold it liable only for the allegedly inadequate training or supervision of Ashurst (a deputy in the Knox County Sheriff's Office), not Bolton (the Knox County Constable). According to Knox County, Bolton is an agent of Kentucky rather than the County. The Kentucky Constitution creates the office of county constable as an (unpaid) elected position, Ky. Const. § 99, and Kentucky law permits constables to execute warrants and carry concealed firearms, Ky. Rev. Stat. §§ 70.350(1); 527.020(2). Perhaps given their limited roles, Kentucky also exempts constables from the training duties it imposes on other officers. . . The County thus argues that it had no power to train or supervise Bolton, and he received no training on his own. Under the relevant caselaw, whether Bolton qualified as an agent of Kentucky or Knox County raises a complex question. *Compare Manders v. Lee*, 338 F.3d 1304, 1328–29 (11th Cir. 2003) (en banc), *with Crabbs v. Scott*, 786 F.3d 426, 429–30 (6th Cir. 2015).

Because Gambrel does not dispute the County's claim that Bolton is not its agent, though, we need not consider that question. Instead, Gambrel seeks to hold Knox County liable for Bolton's conduct on the theory that it should have trained *Ashurst* not to allow Bolton (a constable untrained on the use of force) to ride with him. We thus must consider Ashurst's training. According to him, Knox County did not provide any use-of-force training on its own. The County instead relied on the training that Ashurst took to become a certified peace officer at the police academy run by the Kentucky Department of Criminal Justice Training. . . At the academy, Ashurst received 18 weeks of training on courses ranging from the use of firearms to the legal rules relevant to police. His training covered, for example, the proper use-of-force continuum that officers should follow when they confront people showing signs of mental incapacitation due to drug use. Apart from this academy training, Ashurst also took separate training to become the certified firearms instructor for the Knox County Sheriff's Office, which required him to attend an additional two-week course on firearms. Lastly, all peace officers must take 40 hours of annual 'in-service training at the Department of Criminal Justice Training' to remain certified. . . Did this training suffice? We need not decide whether Knox County's heavy reliance on Ashurst's academy training was reasonable or instead showed a level of negligence. . . At the least, Gambrel has not produced enough evidence for a reasonable jury to find the deliberate-indifference and causation elements that the Supreme Court has adopted to prevent § 1983 from becoming a vicarious-liability statute. . . Hobbs's allegations that Ashurst gratuitously beat and shot Mills (and allowed Bolton to engage in similar misconduct) foreclose her claim against Knox County under these two 'rigorous' legal elements. . . Start with deliberate indifference. Gambrel has not identified a 'pattern' of excessive force by Knox County agents. . . She thus must establish the County's deliberate indifference under the seemingly 'rare' single-incident theory. . . Yet it would not have been 'obvious' to Knox County that it needed to instruct a certified peace officer like Ashurst not to engage in (or permit Bolton to engage in) the gratuitous violence that Hobbs alleges. . . . [Hobbs] testified that Ashurst and Bolton gratuitously beat Mills and that Ashurst later shot him for no reason. 'Even an untrained' officer—let alone one trained at the academy—would know that wanton violence 'was inappropriate.'. . Because the need for training against this allegedly intentional misconduct was not 'obvious,' Gambrel cannot prove deliberate indifference through a single misdeed alone. . . Turn to causation. Gambrel likewise points to no evidence suggesting that if Knox County had provided additional training about avoiding gratuitous violence, the training 'would have prevented' the assault on Mills that Hobbs describes. . . Indeed, neither Ashurst nor Bolton so much as hinted that they believed that the unnecessary force recounted by Hobbs would have been an acceptable way to arrest Mills. To the contrary, Ashurst specifically testified that he needed to follow the 'use of force continuum' that he learned at the academy. . . So if he engaged in the conduct that Hobbs describes, it would not have been due to the absence of training. It would have been due to the 'intentional disregard' of that training. . . A large body of precedent supports our conclusion. The deliberate-indifference and causation elements regularly foreclose failure-to-train claims against municipalities when rogue employees engage in blatant wrongdoing (say, a sexual assault of an inmate or a gratuitous beating of a detainee). [collecting cases] Gambrel's contrary arguments lack merit. Alleging that a jury could find deliberate indifference based solely on the Officers' use of force against Mills, she cites the Supreme Court's suggestion in *Canton* that the

single-incident theory might apply if a municipality gave no training to officers about the constitutional limits on deadly force. . . In this case, however, the police academy did train Ashurst on the proper use of force against arrestees (like Mills) who are suspected of being under the influence of drugs, so the case does not involve the complete lack of training that *Canton* hypothesized. . . Indeed, we have regularly relied on academy training to reject claims against municipalities that offered little additional training themselves. . . Gambrel responds that two recent cases have allowed plaintiffs to obtain trials over failure-to-train claims involving a single incident of alleged excessive force. *See Ouza v. City of Dearborn Heights*, 969 F.3d 265, 289 (6th Cir. 2020); *Wright*, 962 F.3d at 881–82. These cases confirm our conclusion. In *Wright*, we did not rely on a city's *unofficial* custom of failing to train its officers to hold it liable for a single incident. Rather, we relied on 'offensive statements and depictions' in the city's *official* training (including, for example, 'jokes about Rodney King'). . . We reasoned that a jury could find that the city's problematic training created a culture approving of excessive force and that this culture caused the plaintiff's injury. . . We would expand *Wright* well beyond its logic if we applied it to this case. Gambrel has not suggested that Knox County had a deliberate policy condoning excessive force. Rather, she seeks to hold the County liable for its alleged deliberate indifference to its inadequate training on the use of force. For the reasons that we have explained, however, she has not shown such indifference. That leaves *Ouza*. There, the plaintiff claimed that a city's police officers lacked probable cause to arrest her and handcuffed her too tightly when doing so, both in violation of the Fourth Amendment. . . We held that a jury could hold the city liable for this single incident because the city provided no additional training to the officers other than the instruction that they received at the police academy over a decade in the past. . . Yet the proper standards for probable cause and the proper methods for handcuffing arrestees are the types of 'technical' issues for which up-to-date training can provide guidance about what is lawful and what is not. . . So *Ouza* held that a jury might find that it is obvious that officers would need additional training on these technical subjects and that this training would have prevented the alleged improper handcuffing and probable-cause miscalculation. . . The same cannot be said for the gratuitous violence that Hobbs asserted in this case. Unlike mistakes over handcuffing or probable cause, it is 'self-evident' that officers cannot beat up and shoot nonresistant arrestees for no apparent purpose. . . So the need for training against this alleged wrongdoing was not obvious, and no amount of additional training would have prevented the allegedly intentional misconduct. . . That conclusion may follow in most cases, Gambrel lastly argues, but Knox County had specific notice of a need to supervise Ashurst. When Knox County hired him, Gambrel says, he had a history of using excessive force at other police agencies. Suffice it to say that none of the prior incidents put Knox County on notice of the type of wrongdoing that Hobbs alleged. Gambrel's cited evidence at best suggests that Ashurst at times 'demonstrated immaturity or a poor attitude.'. . And the Supreme Court has held that even an officer's criminal record (including an assault-and-battery conviction) did not suffice to make a county deliberately indifferent to the risk that the officer would use excessive force. . . *Brown* forecloses Gambrel's reliance on the prior incidents here."); ***Parker v. Blackwell***, 23 F.4th 517, 524 (5th Cir. 2022) ("Here, the alleged connection between McClure's prior termination from the Shelby County Jail for abusing detainees and the alleged abuse of Parker and other detainees in the Shelby County Jail is sufficient to state a claim

for deliberate indifference in rehiring McClure. . . Adequate scrutiny of McClure's background—that he was fired by Shelby County for abusing one or more inmates of the Shelby County Jail—would lead a reasonable supervisor to conclude that the plainly obvious consequences of the decision to rehire him would be that he would abuse inmates again. . . Indeed, his termination for abusing detainees at the Shelby County Jail and subsequent rehiring at that very same jail is the quintessential 'strong connection between the background of the particular applicant and the specific violation alleged.' . . At this stage, it is enough that Parker has plausibly alleged a violation of clearly established rights. At summary judgment, he will have to produce evidence to support those allegations."); ***Gomez v. Galman***, 18 F.4th 769, 778 (5th Cir. 2021) ("The Supreme Court has emphasized that '[t]he connection between the background of the particular [defendant] and the *specific* constitutional violation alleged must be strong.'. . Galman's improper strip-search of an arrestee does not make 'plainly obvious' that Galman had a proclivity toward such brutal violence as alleged here. True enough, the fact Galman headbutted a car's mirror suggests that he is willing to improperly do damage to property. But that is different in kind from the act Galman is accused of here, which is aggressive physical violence toward a citizen. These incidents simply do not 'show that [Galman] was highly likely to inflict the particular type of injury [Gomez] suffered.'"); ***Hyde v. City of Willcox***, 23 F.4th 863, 874-75 (9th Cir. 2022) ("While deliberate indifference can be inferred from a single incident when 'the unconstitutional consequences of failing to train' are 'patently obvious,'. . . an inadequate training policy itself cannot be inferred from a single incident. . . Otherwise, a plaintiff could effectively shoehorn any single incident with no other facts into a failure-to-train claim against the supervisors and the municipality. Because Plaintiffs pleaded no facts even suggesting that the training here was defective, they have failed to state a claim of failure to train against Dannels and Hadfield."); ***Jackson v. Valdez***, 852 F. App'x 129, ___ (5th Cir. 2021) ("[W]hen a municipality's policymakers are on actual or constructive notice that a particular omission in their training program causes municipal employees to violate citizens' constitutional rights, the municipality may be deemed deliberately indifferent if the policymakers choose to retain that program. . . Deliberate indifference may be proven in one of two ways. . . . First, 'municipal employees will violate constitutional rights "so often" that the factfinder can infer from the pattern of violations that "the need for further training must have been plainly obvious to the ... policymakers."'. . This proof-by-pattern method is 'ordinarily necessary.'. . Absent proof of pattern, deliberate indifference can still be inferred in a limited set of cases, where 'evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, [can] trigger municipal liability.'. . This 'single-incident' exception applies when 'the risk of constitutional violations was or should have been an "obvious" or "highly predictable consequence" of the alleged training inadequacy.'. .Jackson attempts to establish deliberate indifference under the 'pattern' theory, so we do not address the 'single-incident' exception. . . Again, it cannot be said that Jackson sufficiently pleaded facts that Dallas County employees conducted strip searches and classified transgender detainees solely on the basis of biological sex 'so often' as to give rise to a pattern. And without such a pattern, the need for training could not have been 'plainly obvious' to Dallas County or its policymakers. Accordingly, the district court did not err in dismissing Jackson's municipal liability claim based on its purported failure to

supervise or train."); ***Howell v. Wexford Health Sources, Inc.***, 987 F.3d 647, 655-59 (7th Cir. 2021) ("Through a bureaucracy that diffuses individual responsibility and accountability, healthcare in a prison or jail may be delivered (or not delivered) so that it is difficult or even impossible to assign the individual responsibility for deliberately indifferent failure that offers the simplest path to § 1983 liability. . . In this case, for example, the jury could reasonably find that Dr. Trost as an individual was not deliberately indifferent to Howell's pain. He repeatedly submitted Howell's case for outside diagnosis and treatment, but his requests were turned down several times through Wexford's collegial review process. *Glisson* provided a fatal example of this sort of diffused responsibility. The plaintiff suffered from several serious illnesses that required comprehensive and coordinated care. He died of starvation, acute renal failure, and associated conditions only 37 days after he entered custody where no individual was responsible for his overall care. We held in *Glisson*, however, that a jury could conclude that Wexford had adopted what amounted to a 'policy of inaction' for which Wexford itself could be held liable. . .There are many other, less severe examples where incarcerated plaintiffs have adequately pleaded *Monell* liability alleging only their individual experiences. . . But the more common paths toward *Monell* liability require proof either of an express policy that is unconstitutional or a widespread practice or custom affecting other individuals or showing repeated deliberate indifference toward the plaintiff. Despite the absence of bright-line rules, there can be little doubt that a practice or custom theory will be more persuasive if a plaintiff can show that the defendant government or company treated other, similarly situated patients in similar unconstitutional ways. . . . To prove a *Monell* claim against Wexford for deliberate indifference to his medical needs, Howell sought to offer evidence that Wexford's collegial review process had caused four other incarcerated persons to experience similarly avoidable pain by delaying needed orthopedic care. That evidence was the target of defendants' motion in limine. The district court reviewed the four affidavits and concluded that none was a suitable comparator. . . . Howell argues that the district court erred in granting Wexford's Rule 50(b) motion because the collegial review process was a company policy or widespread practice that caused the violation of his Eighth Amendment rights. We agree with the district court that Wexford's collegial review process is not unconstitutional on its face. We recognize that the collegial review process *could* be a mechanism for denying or delaying medical care that inmates need. In this case, however, Howell did not offer evidence that would let a reasonable jury find that Wexford's collegial review process is used in a widespread or systemic way to violate constitutional rights.")

Compare ***Shadrick v. Hopkins Cnty., Ky.,*** 805 F.3d 724, 741-42 (6th Cir. 2015) ("Neither the Supreme Court's decision in *Connick* nor this court's decision in *D'Ambrosio v. Marino,* 747 F.3d 378 (6th Cir.2014), compel a different result. . . . This case mirrors the example given in *City of Canton.* The obvious need to train police officers who lack knowledge of the constitutional constraints on the use of deadly force parallels the obvious need to train LPN nurses who lack knowledge about the constitutional dimensions of providing adequate medical care to inmates in the jail setting. Unlike licensed prosecutors who completed law school, routinely attend ongoing continuing legal education classes, receive on-the-job legal mentoring, and labor under rules of professional responsibility to master their *Brady* obligations, . . . LPN nurses employed within the

prison environment may be required to make professional judgments outside their area of medical expertise. Unless the employer provides necessary training, the LPN nurses lack knowledge about the constitutional consequences of their actions or inaction in providing medical care to inmates. Because it is so highly predictable that a poorly trained LPN nurse working in the jail setting 'utter[ly] lack[s] an ability to cope with constitutional situations,'. . . a jury reasonably could find that SHP's failure to train reflects 'deliberate indifference to the "highly predictable consequence," namely, violations of constitutional rights[]'. . . . Unlike *Connick* and *D'Ambrosio,* this case falls squarely within 'the narrow range of *Canton's* hypothesized single-incident liability.'") *with* ***Shadrick v. Hopkins Cnty., Ky.,*** 805 F.3d 724, 751-55 (6th Cir. 2015) (Griffin, J., dissenting) ("I respectfully dissent. I would affirm the summary judgment granted in favor of defendant Southern Health Partners, Inc. (SHP) on both claims. Regarding plaintiff Shadrick's § 1983 claim, the majority opinion acknowledges that SHP maintained a policy requiring its LPNs to monitor and treat Tyler Butler's staph infection under the guidance of its medical director, a licensed physician. Still, it concludes that the LPN training program posed so 'obvious' a risk to Butler's rights that SHP can be held liable 'without proof of a pre-existing pattern of [constitutional] violations.'. . In so holding, the majority expands the theory of 'single-incident' liability beyond the narrow circumstances contemplated in *City of Canton v. Harris,* 489 U.S. 378 (1989), and *Connick,* 131 S.Ct. at 1361–63. . . . . Deliberate indifference, unlike negligence, requires intent. It is not enough to demonstrate only that SHP's training regimen did not comport with best practices; Shadrick must establish that SHP was on notice that its training program was constitutionally deficient but consciously decided not to correct it. The evidence submitted by Shadrick does not create a jury question regarding whether SHP consciously decided to adopt a policy that it knew would cause its employees to violate inmates' constitutional rights. . . .Shadrick's claim against the nurses hinges partially on her theory that Butler's death would have been averted had the nurses followed the SHP policies upon which they had been trained. The majority is apparently swayed by this argument, citing multiple instances in which SHP's employees failed to follow, or appeared unfamiliar with, the company's polices. But if the underlying harm was caused by employees' deviation from SHP's policies, then *Monell* liability cannot lie: the harm is the fault of the individual employees and is not attributable to the governmental entity that employed them. Despite the fact that SHP trained its nurses on applicable policies that—if followed—would have prevented the harm suffered in this case, Shadrick contends that SHP should have trained them more extensively. . . . Shadrick's claim turns on whether a reasonable jury could find that SHP had actual or constructive notice that its nurses were deficiently trained in violation of the Constitution, despite its policies. . . On the evidence Shadrick provided, I submit that it could not. . . . Taking up the mantle of *Canton,* the majority concludes that an inmate's need for competent medical care is so obvious that SHP's failure to train its nurses regarding when to notify medical directors about suspected staph infections amounts to deliberate indifference. There are two problems with this position. First, the single-incident theory of liability described in *Canton* applies only rarely outside of the use-of-deadly-force-training example that *Canton* provided. . . .*Connick's* reasoning is squarely applicable to the LPNs in the present case. An LPN making a rudimentary decision regarding how severe an inmate's symptoms are is not engaging in the type of professional cross-over envisioned in *Canton's* hypothetical. Instead, LPNs in such situations are medical personnel

making rudimentary medical judgments. Although the majority presents LPNs as if they have no medical ability whatsoever, they are clearly trained in the medical field, have at least some degree of knowledge about medical symptoms presented by inmates, and are expected to make at least basic decisions about identifying circumstances under which further medical examination (such as by a doctor) is necessary. . . . The second point is related. Even with the single-incident theory applied in this context, the particular need at issue—the need for increased training regarding when an LPN should contact a medical director—is far from 'obvious.' In this regard, the majority conflates the generalized need for competent medical care with the much more particularized need for LPNs to be trained regarding the appropriate circumstances under which to refer inmates to a medical director. . . The *Canton* exception applies, if ever, only when the need is so patent as to be self-evident: training for armed officers on the constitutional boundaries of the use of deadly force, for instance. . . By contrast, the need here is much more particularized. It is not at all obvious that an LPN who has already completed a course of study and has been specifically instructed to follow SHP's written policies will always need more training regarding when to contact a medical director about a suspected staph infection. It is undisputed that SHP did, in fact, have policies in place on this question, which it required its nurses to read and follow. Therefore, *Canton*'s hypothesized single-incident theory does not apply to this case.")

See also ***Tate v. City of Chicago***, No. 18 C 7439, 2024 WL 4651834, at *4–6 (N.D. Ill. Nov. 1, 2024) ('Even if Plaintiffs conclusively establish the existence of a widespread policy or practice, they must also show that the City's final policymakers were deliberately indifferent to the 'known or obvious consequences' of the policies or practices in question. . . Here, the City states that the final policymakers for some policies would be the City Council and for other policies, including police training, the Superintendent of Police. The City contends that for each of the alleged widespread practices, the evidence fails to establish that any of the final policymakers either had knowledge of the widespread patterns or failed to act on them. To the contrary, the City argues that in many cases, it took active steps to combat the issues and that any failed efforts do not amount to an endorsement. But, as Plaintiffs point out, a jury could conclude that the City's final policymakers had actual and constructive notice of the CPD's pattern of excessive force against children. From 2012–2018, both the Independent Police Review Authority ("IPRA") and Civilian Office of Police Accountability ("COPA"), which report to the City Council, had notice of the pattern of complaints of excessive force against children. Thus, a reasonable jury can infer, since the IPRA and COPA report to the City Council, that the City Council were made aware of these allegations. Also, the January 2017 DOJ report also informed the City Council and other final policy makers of the pattern and practice of the use of excessive force against children. Plaintiffs also claim that despite having knowledge of the ongoing issue with the use of excessive force against children, the City was deliberately indifferent to the substantial risk of serious harm. The City had knowledge of hundreds of complaints of the use of excessive force against children, stemming at least six years from the date of the August 2018 incident in this case, and failed to take any substantive action to address this issue. Plaintiffs argue that any changes that were made were insignificant and did not address the actual issue of the use of excessive force against children. Considering that the discussion involves the use of excessive

force towards minors, it is reasonable to infer that the risk of a constitutional violation was imminent. Yet, there is a dispute of fact as to whether the City indeed had knowledge of the pattern of excessive force or if the City took adequate steps to address the matter. This is also an issue best suited for a jury. . . .Lastly, the City argues that Plaintiffs are unable to establish the causation element of their claim, namely that the policies at issue were the 'direct cause' or 'moving force' behind the constitutional violation. . . . To establish causation, Plaintiffs must show a direct causal link between the CPD's widespread practices or policies, or the actions or inactions of the City's final policymakers, with their constitutional injuries. The City argues that even if excessive force was used in this case, Plaintiffs have failed to present any evidence establishing causation. . . .While the connection between a municipality's inaction and a plaintiff's constitutional injury might be more demanding, it is not insurmountable. . . As previously discussed, there is evidence in the record that could lead a jury to conclude that the City was deliberately indifferent and failed to address the issue of the use of excessive force against minors. . . If a jury concludes that the risk of constitutional injuries to minors due to the use excessive force was indeed obvious, then the jury could also infer causation. . . Thus, summary judgment on the issue of causation is also denied."); ***Bjelland v. City and County of Denver***, No. 1:22-CV-01338-SKC-SBP, 2024 WL 4165428, at *7 (D. Colo. Sept. 12, 2024) ("As the Court understands their argument, Defendants contend that because these protests were 'unprecedented,' Plaintiffs cannot establish the prior notice necessary for deliberate indifference. But absent a pattern of conduct, notice may nevertheless be found if the violation of federal rights is a 'highly predictable or plainly obvious consequence of a municipality's action or inaction such as when a municipality fails to train an employee in specific skills needed to handle recurring situations.'. . In this case, both expert witness reports support a conclusion that the need for officer training and policies in crowd control and crowd management is obvious for a police department, such that a pattern of conduct is not necessary to establish deliberate indifference. . . Even if a protest of this magnitude was unprecedented in Denver, they are not unprecedented nationwide. It strains credulity to suggest that a protest, regardless of the size, would need to first occur locally before a police force was on notice of the need to train its officers in crowd control and crowd management. The expert reports also suggest that Denver's training was deficient in ways highly relevant to the events of the George Floyd protests. For example, Mr. Maguire attests that Denver's training is outdated and does not reflect current standards for crowd management or the use of less-lethal weapons. . . Consequently, Plaintiffs will be permitted to pursue this theory at trial because there are disputed issues of material fact."); ***Ratlieff v. City of Fort Lauderdale***, 748 F.Supp.3d 1202, ____ (S.D. Fla. 2024) ("Unlike her ratification theory, Ratlieff has demonstrated a genuine issue of material fact as to her 'so obvious' failure-to-train theory under *Monell*. . . .To prevail on her 'so obvious' failure-to-train theory, Ratlieff needs to establish that (i) her First Amendment rights were violated; (ii) FLPD had a policy of failing to train officers in crowd control techniques with less-lethal weapons constituting deliberate indifference to First Amendment rights; and (iii) FLPD's failure-to-train policy caused the violation of Ratlieff's First Amendment rights. . . .As explained above, there is a genuine dispute of material fact as to whether FLPD violated Ratlieff's First Amendment rights. The Court accordingly proceeds directly to consider whether FLPD's purported failure to train in this context constitued a policy or custom of deliberate indifference. . . Ratlieff has

demonstrated a genuine dispute of material fact as to whether FLPD had a policy of failing to train officers in crowd control techniques with less-lethal weapons constituting deliberate indifference to First Amendment rights. . . . Given that FLPD is a relatively large police department located in a major metropolitan area, crowd control with less-lethal weapons presents precisely the kind of highly predictable scenario likely to reoccur in which 'officer[s] lacking specific tools to handle that situation will violate citizens' rights' such that a jury would be justified in 'finding that policymakers' decision not to train the officer[s] reflected "deliberate indifference" to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right.'. . Here, policymakers for a city of nearly 200,000 people have armed their police with military-grade less-lethal weapons with the high likelihood that they will be regularly required to manage crowds—including individuals exercising their constitutionally protected speech and assembly rights. . . .Here, viewing the facts in the light most favorable to Ratlieff, the Court concludes that she has presented more than enough evidence to support the inference that FLPD's training deficiencies caused her alleged First Amendment violations. Apart from the record evidence of training deficiencies and the predictability of this situation recurring—which can itself support an inference of causation, . . . Ratlieff has also offered three expert reports supporting her claim that FLPD did not adequately train its officers in crowd management with less-lethal weapons and that these failures caused her alleged First Amendment violations. . . . In sum, based upon the foregoing analysis regarding each of Ratlieff's theories of *Monell* liability, summary judgment is warranted in the City's favor as to Ratlieff's ratification theory— but not as to her 'so obvious' failure-to-train theory. The Court is acutely aware that liability under such a theory remains rare. The risk of the constitutional violation must be foreseeable in such a way that it amounts to deliberate indifference when the municipality fails to prepare their officers for it. . . But viewing the facts in the light most favorable to the non-movant, the Court finds that deliberate indifference and causation present factual questions that should be decided by a jury."); ***Hampton v. Cagle***, No. 4:20-CV-04210-SLD-JEH, 2024 WL 3967265, at *4–6 (C.D. Ill. Aug. 28, 2024) ("Municipalities may delegate policymaking authority for traditional public functions to a private entity, which may make the actions that entity takes fall within the scope of state action. . . For example, a court found that ISC [Inmate Services Corporation] acted under color of state law when it transported a prisoner because 'custody of the state prisoners is traditionally an exclusive state function' and 'ISC had authority to transport [the prisoner] only because the state delegated that function to ISC.'. . Here, Hampton established that ISC was performing a traditionally exclusive state function because it was in the business of transporting detainees across state lines and did so in Hampton's case via a delegation of state authority from Pulaski County. . . Therefore, ISC was acting under color of state law when it entrusted Hampton's transport to Nesby. The second showing, a constitutional violation, is easily satisfied—rape is clearly an invasion of one's right to bodily integrity and a violation of the affirmative duties imposed by the Constitution upon the state and its agents when they hold an individual in involuntary custody. . . As to the third showing, that the violation was caused by an official policy or custom, Hampton has argued that the Operative Complaint satisfies this requirement under a variety of theories, . . . but the Court need not consider each theory to determine whether she has demonstrated her entitlement to a default judgment. An official policy or custom of inadequate training 'may serve as the basis for § 1983 liability only

where the failure to train amounts to deliberate indifference to the rights of persons with whom the [state officials] come into contact.'. . . The Seventh Circuit recently analyzed the issue of *Monell* liability in the context of jailers sexually abusing female detainees. *See generally J.K.J. v. Polk County*, 960 F.3d 367 (7th Cir. 2020). A correctional officer employed by the county raped at least two female detainees entrusted to his custody, and the Seventh Circuit found that sufficient evidence supported the jury's implicit finding that the county's 'sexual abuse prevention program was entirely lacking.'. . . Hampton's factual allegations tell a story which closely aligns with *Polk County*. She describes an obvious power imbalance between herself and Nesby which was materially identical to an inmate and correctional officer. . . ISC exercised delegated policymaking authority over conditions of transport and detention. . . ISC knew of the past allegations and inmate abuse, including Nesby's sexual assault of Arenz mere months prior to October 2018. . . In the face of the obvious risk to detainees' rights to bodily integrity posed by failing to change the policies that enabled Nesby to harm detainees, ISC instead chose to remain inactive. . . It is not hard to infer that these deficient policies caused Hampton to be raped, whether one chooses to fault ISC's decision to not terminate Nesby after he sexually assaulted Arenz, its decision to not monitor his behavior, or its decision to not at least pair him with a female employee to curb his opportunity to overpower and take advantage of detainees. . . ISC's official policy or custom of inadequate training, supervision, and retention of dangerous employees caused Hampton's injuries, and such policy or custom was enacted under color of state law because ISC was exercising authority delegated to it by Pulaski County. Therefore, Hampton has shown that she is entitled to a default judgment under section 1983 against ISC."); ***Leliaert v. City of South Bend***, No. 3:22-CV-359 DRL, 2024 WL 3876146, at *10–11 (N.D. Ind. Aug. 20, 2024) ("[E]ven assuming Officer Morgan did place his knee on Ms. Leliaert's neck for the *Monell* analysis, the record is clear that this act would have violated the South Bend Police Department's explicit policy. Chief Ruszkowski confirmed that 'South Bend Police Department officers are not trained to use neck restraints on arrestees, because neck restraints are not allowed' and that South Bend's 'use of force policy does not allow for any type of neck restraint'. . . The department's policy considers neck restraints to be deadly force and forbids them 'except when deadly force is required to preserve the life of the officer or others'. . . Officer Williams also confirmed this, testifying that the policy prohibited the use of neck restraints to subdue a subject unless the situation was 'life or death'. . . Ms. Leliaert hasn't shown any other examples of neck restraints that would demonstrate a pattern, and the department policy clearly doesn't allow neck restraints unless deadly force is necessary—something she doesn't dispute. . . No reasonable jury could conclude that the department had a policy, practice, or custom of using excessive force through neck restraints. Second, Ms. Leliaert provides no evidence that the officers were insufficiently trained. A plaintiff may take an 'alternative path to *Monell* liability' by alleging that the need for more or different training is 'so obvious that the municipality's failure to act can reflect deliberate indifference and allow an inference of institutional culpability, even in the absence of a similar prior constitutional violation.'. . This is known as a failure-to-train theory of liability. . . Though the law does not 'absolutely foreclose the possibility that a plaintiff might succeed in proving a failure-to-train claim without showing a pattern of constitutional violations,' a plaintiff relying on a failure-to-train theory must still eventually 'provide enough evidence of custom and practice to permit an

inference that the [municipal entity] has chosen an impermissible way of operating.'. . . Ms. Leliaert hasn't provided any evidence or reason to think that these officers were inadequately trained; no reasonable jury could reach such a conclusion on this record. That just leaves Ms. Leliaert's claim that a failure to discipline and code of silence led to the alleged constitutional violation. A 'defendant's "code of silence" can give rise to a valid *Monell* claim,' but the claim still requires 'a widespread practice that permeates a critical mass of an institutional body.'. . . Her summary judgment response says she has presented sufficient evidence of a department-wide policy and incidents of excessive force such that it could also be found that there was deliberate indifference to the fact that failure to discipline officers for such conduct did or could result in additional such incidents, but the record does not support this claim. . . .Ms. Leliaert also hasn't shown the 'direct causal link' between the alleged violation and the City's actions or that the City's actions were the 'moving force' behind the force. "); ***Hight v. Smith***, No. 6:21-CV-01307-LSC, 2024 WL 3243465, at *8 (N.D. Ala. June 28, 2024) ("In arguing that Deputy Jackson's use of excessive force was a plainly obvious consequence of his hiring, Plaintiff emphasizes that Deputy Jackson has previously been sued three times, two of which alleged excessive force against the mentally ill. . . In *John Skinner v. City of Cordova*, the plaintiff alleged that Deputy Jackson forcibly entered his home, stood over him with his firearm drawn, and then assaulted, tased, kicked, and pepper sprayed him. . . In *Latonvia Shelton v. Jackson*, the plaintiff alleged that Deputy Jackson entered her home unannounced, forced her by her hair into a police car, and then, upon arriving at the jail, beat and maced her. . . But there was never any finding of liability in those cases—each of those cases settled and the claims against Deputy Jackson were dismissed. . . Plaintiff has not demonstrated that any of the excessive force allegations against Deputy Jackson 'had any merit.'. . And it is frankly not shocking to the Court that Deputy Jackson has been sued a couple of times for excessive force, given his nearly thirty-year career as a law enforcement officer. . . Accordingly, Plaintiff has not established that excessive force was the plainly obvious consequence of hiring Deputy Jackson. And even if Plaintiff had made this showing, Plaintiff has not shown that Sheriff Smith's decision violated clearly established law. The only binding case that Plaintiff directed the Court to is *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*. . . In *Bryan Cnty.*, the Supreme Court held that a sheriff's decision to hire a deputy who was later accused of excessive force was not deliberately indifferent, despite the fact that the deputy had previously pled guilty to various driving infractions and other misdemeanors like assault and battery. . . While both Deputy Jackson and the deputy in *Bryan Cnty.* were accused by the plaintiffs in their respective cases of excessive force, the comparison ends there. The *Bryan Cnty.* deputy had previously pled guilty to assault and battery, among other offenses, and the Supreme Court still held that the sheriff's hiring decision was not deliberately indifferent. In contrast, Deputy Jackson was hired after two cases alleged, without proving, that he had used excessive force. Therefore, Sheriff Smith did not violate clearly established law, and he is entitled to qualified immunity."); ***Flanks v. City of New Orleans***, No. CV 23-6897, 2024 WL 2295543, at *8–10 (E.D. La. May 21, 2024) ("In *Connick v. Thompson*, the Supreme Court considered whether a single *Brady* violation was sufficient to hold Connick, as the official policymaker for OPDA, liable under *Monell* for the wrongful conviction of John Thompson. . . The Supreme Court, applying dicta from a prior Supreme Court case, *Canton v. Harris*, found that the theory of 'single-incident liability' did not

apply to prosecutors. . . The Supreme Court also noted that four overturned convictions in Louisiana courts because of *Brady* violations by OPDA prosecutors under Connick in the 10 years before Thompson's armed robbery trial 'could not have put Connick on notice that the [OPDA's] *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here.'. . Thompson contended that OPDA failed to disclose an exculpatory blood swatch as the *Brady* violation, but the Supreme Court noted that none of the cases Thompson cited involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. . .In *Armstrong v. Ashley,* the Fifth Circuit affirmed the district court's dismissal of Andrea Armstrong's ("Armstrong") *Monell* claim against James Stewart, in his official capacity as the District Attorney for Caddo Parish ("Stewart"), on a Rule 12(b)(6) motion. . . The Fifth Circuit held that Armstrong's *Monell* claim against Stewart was conclusory because Armstrong alleged, in part, that 'the District Attorney, through its final policymakers, maintained a policy, custom, or pattern and practice of condoning corruption, that included widespread prosecutorial misconduct, including by failing to supervise, discipline, and train its prosecutors …'. . . Armstrong also listed nine cases over a 24-year period where exculpatory evidence was suppressed by the District Attorney as demonstrating a custom of suppressing exculpatory evidence. . . However, the Fifth Circuit held that 'nine constitutional violations over a 24-year period and thousands of prosecutions are hardly sufficient to show a municipal custom.'. . Further, the Fifth Circuit noted that '[a] more fundamental problem … is the mischaracterization of these nine cases, none of which found a *Brady* violation.'. . The Fifth Circuit concluded that '[t]his proffered litany cannot establish a plausible allegation that the Caddo Parish DA's office had a custom of suppressing exculpatory evidence.'. . Here, Plaintiff's allegations center on a widespread practice of OPDA prosecutors withholding exculpatory evidence in violation of *Brady*. . . Plaintiff further alleges that Harry Connick had knowledge of this widespread practice of withholding exculpatory evidence but 'failed to impose reasonable discipline on the employee(s) involved and failed to take other reasonable, remedial measures to deter and prevent such misconduct,' including training and supervising OPDA employees with regard to repeated *Brady* violations. . . In support of these allegations, Plaintiff states that 'Orleans Parish has the highest per capita exoneration rate of any county or parish in the country.'. . Plaintiff also references '51 criminal cases from New Orleans in which courts have found and/or the prosecution has acknowledged that the OPDA violated *Brady*, as well as several others in which strong claims of *Brady* violations existed but the convictions were reversed on other grounds.'. . Plaintiff reasons that, 'the actual total of cases with concealed exculpatory evidence is much higher.'. . Of these 51 criminal cases, Plaintiff identifies and describes 18 of these cases. . .Of these 18 cases, nine appear to predate Plaintiff's conviction in 1985. . . Therefore, the Court only considers the nine cases that predate Plaintiff's conviction. Seven of these nine cases involve the suppression of witness testimony or evidence that the perpetrator did not match the defendant's characteristics. . .The *Brady* evidentiary violations in these seven cases are similar to Plaintiff's allegations that OPDA suppressed evidence of inconsistent descriptions of the perpetrator and Mrs. Carnesi's inconsistent testimony in identifying Plaintiff. Professor Levenson's expert report, which Plaintiff attached to the Complaint, includes a list of cases where courts have found that OPDA violated *Brady*. . . Professor Levenson notes 23 cases where a defendant was convicted of a crime prior to December

1985. . . Plaintiff has already identified and described six of these 23 cases in the Complaint. . . Of these 23 cases Professor Levenson identifies, there are eight cases where courts have found that OPDA violated *Brady* prior to December 1985. . . Professor Levenson also identifies three cases where 'OPDA's conduct amounted to admission of *Brady* violations.'. . She explains that in these cases, OPDA either offered the defendant a plea agreement for immediate release or filed a joint motion with the defendant for relief when the defendant raised a *Brady* violation. . .Because Plaintiff alleges that there are 51 cases where OPDA prosecutors committed *Brady* violations that led to convictions being overturned but only provided specific allegations for 18 'representative cases,' Plaintiff is granted leave to amend the Complaint to clarify if any other of those 51 cases predate Plaintiff's conviction in 1985 and Plaintiff may include cases Professor Levenson has identified. Plaintiff may include these cases in the Complaint to clarify the number of cases where convictions were obtained prior to December 1985 and where a court later found that a *Brady* violation occurred. The Supreme Court's decision in *Connick* and the Fifth Circuit's decision in *Armstrong* did not create a bright line rule as to how many similar cases predating a defendant's conviction where courts have found *Brady* violations would be sufficient to demonstrate a custom of OPDA violating *Brady*. . . Granting Plaintiff leave to amend the Complaint will clarify the number of similar cases the Court can consider in its analysis.Plaintiff also asserts theories of *Monell* liability against Defendant Williams based on OPDA's failure to train, supervise, and discipline its prosecutors based on the same allegation that 51 cases of overturned convictions because of *Brady* violations in Orleans Parish demonstrates a custom of OPDA's failure to train, supervise, and discipline its prosecutors. For the same reasons already discussed above, Plaintiff may amend the Complaint to clarify the number of similar cases that demonstrate a pattern of OPDA violating *Brady* and failing to train, supervise, and discipline its prosecutors with regard to *Brady*."); ***Evans v. Columbia County***, 711 F.Supp.3d256, ___ (M.D. Pa. 2024) ("Here, proceeding under the single-incident theory of liability, Evans points to evidence that the dangers of restraint chair usage were well known such that the need for training was obvious. She notes that there was a prominent warning on the restraint chair that its use could cause injury or death. Evans also points to testimony from her experts that the dangers of use of the restraint chair were well known in the correctional field. . . Further, we note, an inference that officers will confront the situation of a prisoner needing medical care while in restraints is reflected by the fact that the Columbia County Prison had policies regarding both the use of the restraint chair and the provision of medical care to prisoners in restraints.Based on the summary-judgment evidence, a reasonable factfinder could conclude that given the frequency of the use of the restraint chair at the Columbia County prison coupled with the known risks involving prolonged restraint chair use that a violation of a prisoner's right to adequate medical care was a highly predictable consequence of failure to train on the dangers and use of the restraint chair and on how to handle an emergency medical situation involving a prisoner in the restraint chair. In sum, viewing the evidence in the light most favorable to Evans, she has presented enough evidence to create a genuine, material factual dispute about whether Columbia County was deliberately indifferent. In addition to deliberate indifference, a plaintiff asserting a municipal liability claim based on a failure or inadequacy of training, supervision, or discipline must also establish causation. . . Although causation is an element of a failure-to-train claim that is separate from the deliberate indifference element, in

single-incident cases, the same high degree of predictability that a failure to train will lead to a constitutional violation ' "may also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable."'. . Here, Columbia County contends that Evans has not shown what specific training would have made a difference in Tyler's case. But Evans points out that Columbia County failed to provide training on its own written policies concerning the duration of use of the restraint chair and the medical supervision required when a prisoner is restrained. Evans also points out that Columbia County failed to provide training regarding the manufacturer's instructions for use of the restraint chair and on 'basic national correctional and correctional health care standards on restraint chair use.'. . And she points to the opinions of her experts that such lack of training led to Tyler's death. . . This evidence is sufficient for Evans to survive summary judgment as to the causation element. In sum, Evans has presented evidence from which a reasonable factfinder could conclude that Columbia County violated Tyler's right to medical care by failing to adequately train its corrections officers. Accordingly, Columbia County is not entitled to summary judgment as to this claim."); ***Estate of Jensen by Jensen v. Duchesne County***, No. 217CV01031DBBDAO, 2023 WL 5432200, at *3, *16-17 & n.302, *20 (D. Utah Aug. 23, 2023) ("The Estate argues that 'the Tenth Circuit's decision in *Lance v. Morris* ... changed municipal liability under 42 U.S.C. § 1983 in failure-to-train medical situations nearly identical to the situation in this case ....'. . . . In *Lance*, the Tenth Circuit clarified the three-part test for municipal liability for deliberate indifference on a failure-to-train claim, adopting a subtest for the third element. . . For the overarching structure of the claim, the three elements are: (1) 'the existence of a county policy or custom involving deficient training'; (2) 'the policy or custom's causation of an injury'; and (3) 'the county's adoption of a policy or custom with deliberate indifference.'. . Concerning the third element, the court of appeals was 'persuaded by the logic' of a three-part subtest devised by the Second Circuit in *Walker v. City of New York*. . . The three-part subtest for deliberate indifference requires evidence that (1) '[t]he county's policymakers know "to a moral certainty" that [their] employees will confront a given situation'; (2) '[t]he situation ...presents the employee with a difficult choice of the sort that training or supervision will make less difficult'; and (3) '[t]he wrong choice ... will frequently cause the deprivation of a citizen's constitutional rights.'. . . [T]he Tenth Circuit decided *Lance* after this court's summary judgment order, and it expressly adopted a new subtest for a failure-to-train deliberate indifference municipal liability claim, making it 'an intervening change in the controlling law.'. . Further, the factual similarity of *Lance*—in which an inmate who exhibited symptoms that constituted a medical emergency was left untreated for three days because the jail guards did not recognize the medical emergency. . . convinces the court to exercise its discretion under Rule 54(b) to revisit its 2020 Order. . . . [T]he Estate has evidence that the County allowed its Jail staff to assess whether a detainee or inmate was experiencing a 'serious medical emergency,'. . . but it had not trained employees on 'when a medical condition involved an emergency.'. . There is evidence that corrections officers only had first aid training. . . and LPN Clyde was unable to 'conduct any assessments, or diagnose or treat any medical condition.'. . And, according to Sheriff Boren, a corrections officer or LPN Clyde would make a determination about whether something constituted an emergency situation '[j]ust like any other person outside of the correctional setting would.'. . Sheriff Boren expected them to 'use their common sense in making

that decision.'. . From this evidence, the fact finder could 'reasonably infer that the county had provided deficient training on how to detect a medical emergency.'. . . On these facts, a reasonable jury could conclude that the County's failure to train its employees on what constitutes a medical emergency directly and proximately caused Ms. Jensen's death. . . . At issue here is whether there is a dispute of material fact precluding summary judgment in the 'narrow range of circumstances' in which 'deliberate indifference may be found absent a pattern.'[302] **[fn. 302:** The Supreme Court acknowledged the potential for such a situation in *City of Canton*. . . There, it provided an example of single incident liability: municipal policymakers know 'to a moral certainty that their police officers will be required to arrest fleeing felons and they have 'armed [their] officers with firearms, so the 'need to train officers in the constitutional limitations on the use of deadly force is "so obvious" that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.'. . Then in *Connick v. Thompson*, the Supreme Court refused to find such single incident liability where the issue was whether the need to train prosecutors on the law of *Brady* violations was 'obvious' to result in constitutional violations. . . The Court noted that '[p]rosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain.'. . Like *Canton* and unlike *Connick*, the issue here is whether the Jail staff were trained in a subject *different* than the training they undertook to perform the large majority of their job functions.**]** Applying the binding precedent in *Lance* to the facts of this case, the Estate has offered sufficient evidence for a jury to conclude that the County was deliberately indifferent by failing to train its Jail employees on how to recognize a serious medical emergency."); ***Irizarry v. City & County of Denver***, No. 21-CV-01490-PAB-SKC, 2023 WL 2528782, at *11 & n.9, *13 (D. Colo. Mar. 15, 2023) ("The Court finds that one alleged incident, occurring nearly a year prior to the allegations in this complaint, is insufficient to show a practice so permanent and well settled that it constitutes a custom or usage with the force of law. . . . The Tenth Circuit has held that 'a single incident may suffice when caused by an existing policy that "can be attributed to a municipal policymaker."'. . However, plaintiffs have not alleged the existence of a policy, regarding arresting individuals who criticize the police, that is attributable to a municipal policymaker. . . . The plaintiffs argue that the Court can infer a policy of inadequate training based on Sergeant Ingersoll's belief that it was legal to arrest plaintiffs for using profane language to criticize the police. . . However, a plaintiff may not attempt to fasten liability onto a city solely because 'a particular officer may be unsatisfactorily trained' because 'the officer's shortcomings may have resulted from factors other than a faulty training program.'. . The Court therefore rejects this argument. Because Mr. Irizarry and Mr. Shockley have not plausibly alleged an official policy or a custom, the Court will dismiss their claims against Denver without considering the causation or state-of-mind elements of municipal liability."); ***Little v. City of Morristown, Tennessee***, No. 221CV00047DCLCCRW, 2023 WL 2769633, at *12–13 (E.D. Tenn. Mar. 31, 2023) ("Due to the existence of genuine disputes of fact regarding the County's policy of inaction, the Court need not address Plaintiffs' second theory of liability—systematic failure to train officers on matters affecting inmate safety. Nevertheless, it is important to note that Plaintiffs, at this point, have failed to present sufficient evidence to support such a theory of liability. . . . Plaintiffs have neither provided any similar incidents or prior complaints regarding the failure to medically attend to an inmate suffering from an overdose or similar medical condition

at the Jail, nor have they pointed to foreseeable consequences resulting from a lack of instruction. Rather, Plaintiffs focus, for the most part, on Officer Smith's actions of accepting inmates into the Jail without having been trained to do so and his failure to follow established Jail policy regarding the admission and medical evaluation of incoming inmates[.] . . The Jail policy is clear regarding the procedure for admission and the requirement of a medical evaluation. . . . Although it is undisputed Officer Smith did not comply with these policies, to hold the County liable for Officer Smith's actions, without more, would amount to nothing more than vicarious liability, which is an improper basis for municipal liability under Section 1983."); ***Lee v. Cook County Sheriff***, No. 19 C 4560, 2023 WL 2745149, at *4 (N.D. Ill. Mar. 31, 2023) ("The allegation that the officers 'directly violated the rules and regulations of the Cook County Sheriff' is irreconcilable with liability due to a formal policy. The fact that the Cook County Sheriff's Office has formal policies that condemn this behavior does not foreclose the possibility of a conflicting unwritten, *de facto* policy or custom that is unconstitutional, however, with the only alleged instance of misconduct being the one assault of Lee, there are insufficient facts to find one. . . Without facts describing a prior pattern of similar violations making obvious a need for additional training that was not given, a single decision by a final policymaker that resulted in the charged violation, or a ratification of the actions at issue, these avenues to relief remain beyond the reach of Lee's complaint, too. *See Connick v. Thompson*, 563 U.S. 51 (2011). Because Lee failed to plead facts rendering plausible liability on the part of Cook County Sheriff in either an individual capacity or an official capacity, the Court dismisses Defendant Cook County Sheriff entirely."); ***Walker v. City of Milwaukee***, No. 20-CV-487, 2023 WL 2666537, at *11–12 (E.D. Wis. Mar. 28, 2023) ("Walker . . . argues that the City failed to properly train its police officers with respect to mental health crisis response and intervention and interacting with persons having mental health crises. . . The City does not dispute that prior to and during the relevant time period, encountering individuals who are suffering from mental illness and/or experiencing a crisis situation was a recurring situation that MPD officers faced. . . Boll testified that officers requested a Crisis Intervention Officer, or a 'CIT,' to respond to Walker's residence the morning of April 6, 2014. . . Boll testified that a CIT typically deals with people that are going through a crisis, 'just not in their correct state of mind, so they have had special training on how to deal with those people.'. . Purcelli was the CIT on scene that night. . . Purcelli testified that CIT training included learning how to talk to people in a state of crisis, how to 'de-escalate circumstances so that we can communicate with them and to keep them safe and us safe.'. . Purcelli could not remember when she was trained in CIT or how often she was required to go to trainings. . .On the record before me, a reasonable jury could find that the City inadequately trained officers to address individuals in a state of crisis and that the City's inadequacy in training amounted to deliberate indifference. As stated above, a 'municipality acts with deliberate indifference when, "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights," that the deficiency exhibits deliberate indifference on the part of municipal policymakers.'. . Again, while the officers recognized that Walker's alleged mental health crisis necessitated the need for a CIT, Purcelli, the assigned CIT for the encounter, never interacted with Walker. Even though Purcelli testified that part of her CIT training included de-escalating circumstances to keep everyone safe . . . , Purcelli

did not even attempt to de-escalate the situation. . . . It is unclear why the CIT officer, trained to deal with individuals experiencing a crisis situation, was stationed the farthest away from the individual in crisis. On this record, a reasonable jury could determinate that 'in light of the duties assigned' to Purcelli, the need for more or different training was obvious. . . Further, a jury could find that the inadequacy was likely to result in the violation of constitutional rights. . . Purcelli clearly understood that people going through mental health and/or crisis situations may be volatile enough to require de-escalation. Thus, a reasonable jury could find that failure to properly train CIT officers to de-escalate volatile situations is likely to lead to the violation of constitutional rights, such as the use of excessive force. For these reasons, the defendants' motion for summary judgment as to Count III is denied."); ***Clancy v. City of Milwaukee***, No. 21-CV-0881-BHL, 2023 WL 2633584, at *10 (E.D. Wis. Mar. 24, 2023) ("Finding *Monell* liability under a failure-to-train theory without a pattern of prior constitutional violations is a high bar that Clancy has not met. *See Bohanon v. City of Indianapolis*, 46 F.4th 669, 677 (7th Cir. 2022) ("In the rare cases where we have found this standard to be met, the risks of municipal inaction have been blatantly obvious."). Nothing about the text of the City's curfew order suggests constitutional violations were likely to occur, and '[t]o hold otherwise would significantly expand *Monell* and lead us down the road to vicarious liability.'. . Defendants' motion for summary judgment on the *Monell* claim is therefore granted."); ***Estate of Melvin by & through Melvin v. City of Colorado Springs***, No. 20-CV-00991-CMA-STV, 2023 WL 2424838, at *12–13 (D. Colo. Mar. 8, 2023) ("The Court finds that summary judgment in favor of the City is not warranted as to whether the City's training on use of force and Taser use was adequate. Although CSPD's written materials provide that '[a]dditional justification is required for deploying [a Taser] more than 3 times on a single individual,'. . . there is a genuine dispute of material fact as to whether Officers Patterson and Archer were actually trained in accordance with this language. Indeed, Officer Archer testified that he did not recall 'anything stating that it was unsafe to tase someone past three times and that 'there was no set limit on the amount of times you can tase someone.'. . The Officers' supervisors, former Chief Carey and current Chief Vasquez, also testified that officers may repeatedly deploy their Tasers if the officers determine that each Taser use is independently justified after assessing the situation. . . Similarly, Carey and Vasquez affirmed that the 8 deployments used in this case were within policy and that the Officers' conduct was reasonable. . . A reasonable jury could determine that CSPD did not adequately train the Officers on the dangers of repeated Taser deployments and instead trained Officers that repeated tasings are appropriate if 'justified,' with 'additional justification' apparently undefined and left to the Officer's individual discretion. . .Further, the City trained its officers that a Taser deployment is 'effective' if it achieves neuromuscular incapacitation. It is unclear whether CSPD trained its officers that the three deployments in the policy include only 'effective' Taser deployments (using the NMI definition), or *any* Taser deployments, including those which clearly cause pain but do not achieve NMI. For example, Defendants in this case assert that the Officers reasonably believed that only one of the Taser deployments was 'effective'/achieved NMI. The Court cannot discern if the Officers were trained to therefore understand that Mr. Melvin was subject to only one of the three Taser 'deployments' outlined in the policy, notwithstanding that several of the 7 other deployments clearly caused Mr. Melvin pain. Accordingly, the Court finds that there are genuine disputes of

material fact precluding summary judgment on the adequacy of the City's training. . . . The Court also finds that Plaintiff has sufficiently demonstrated that the inadequate training demonstrates deliberate indifference on the part of the City toward persons with whom the police officers come into contact. For a failure to train claim, 'a showing of specific incidents which establish a pattern of constitutional violations is not necessary to put the City on notice that its training program is inadequate.'. . Rather, the Tenth Circuit has held that 'evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability.'. . In this case, the Officers stated that they acted in accordance with their training, and their supervisors, former Chief Carey and current Chief Vasquez, affirmed that the Officers acted reasonably and in accordance with CSPD training. It is undisputed that the Officers' use of force in their encounter with Mr. Melvin was exonerated by the City and that the City did not provide any additional or different training on Taser usage because of Mr. Melvin's death. . .Viewing the evidence in the light most favorable to Plaintiff, the Court concludes that a reasonable juror could find that the Officers 'were trained to act recklessly in a manner that created a high risk of death' and that 'the City could reasonably be said to have been deliberately indifferent' to the need for different training on Taser use. . . Plaintiff has therefore satisfied the third element. Finally, the Court finds that the fourth element—a causal link between the inadequate training and the constitutional violation—is also met in this case. Because the Officers testified that they acted in accordance with their training, a reasonable jury could determine that the Officers would not have used excessive force—*e.g.*, multiple, repeated Taser deployments—had they been trained differently. . . In sum, the Court finds that Plaintiff has met its burden with respect to each of the four elements of the failure to train claim. Summary judgment is therefore not appropriate, and the City's Motion must be denied."); ***Torain v. City of Philadelphia***, No. CV 14-1643, 2023 WL 174951, at *10-11 (E.D. Pa. Jan. 12, 2023) ("There is 'no obligation to specifically train police officers not to engage in criminal conduct that is obviously illegal[,]' including fabricating evidence and probable cause. . . The evidence does not suggest that the officers were confused as to whether their alleged misconduct was illegal, and there is no evidence from which we can infer that any new or different training would have made their conduct less likely. . . For these reasons, summary judgment will be granted on municipal liability under the failure to train theory. . . . In this case, there is sufficient evidence in the record demonstrating a genuine issue of material fact as to whether the City failed to adequately supervise or discipline NFU officers. First, Defendant Walker testified on multiple occasions that supervisors knew NFU officers were violating policies regarding fabrication of probable cause and 'were violating with [them].'. . In addition, the Enforcement Report identifies 'supervisory oversight' and 'discipline' as 'practices [in the Narcotics Bureau] that have created conditions conducive to breeding corruption.'. . . The Report's key findings include that there were excessive delays in resolving disciplinary matters, a lack of accountability for deviations from policy in the disciplinary process, poor tracking of disciplinary actions, and incomplete, unreliable, and uninformative disciplinary databases. . . The Report specifically states that, from 2000 to 2002, nearly half of all the officers, supervisors, and commanders who were found by the IAB to have violated Departmental policies or engaged in serious misconduct were never formally disciplined. . . The Report also identifies

'falsification of evidence' as an area in which these deficiencies of discipline and supervision of officers occurred. . . This evidence creates a genuine issue of material fact as to whether there was adequate supervision and discipline of NFU officers with regard to fabrication of evidence or probable cause. In addition, there is evidence that these failures amount to deliberate indifference. First, municipal policymakers knew that employees would confront situations where they would need to establish probable cause in order to secure a warrant or make an arrest; this is simply a part of the job. The City was also on notice that there had been a history of employees mishandling such situations in the past, as litigation against the City due, in part, to fabrication of evidence and probable cause, was the very purpose of the creation of the IAO and the IAO Reports. . . Finally, the City knew that the misconduct by NFU officers—fabricating evidence or probable cause—would frequently deprive individuals of constitutional rights, as this conduct is illegal and was the source of much litigation against them. For these reasons, we will deny summary judgment on Plaintiff's failure to supervise or discipline theory as there are genuine issues of fact created by the evidence in the record."); ***Johnson v. City of San Jose***, No. 21-CV-01849-BLF, 2022 WL 17583638, at *9 (N.D. Cal. Dec. 12, 2022) ("The Court finds that Johnson has made out a failure to train claim based on the change in policy immediately before the protest regarding the permissible uses of less lethal weapons. . . He alleges that one week before the protest, the police chief sent a memo to all SJPD personnel informing them that the Duty Manual had been revised to permit the use of less lethal weapons for crowd control purposes, a context in which those weapons were previously prohibited. . . Johnson also alleges that while there had been some training on crowd control and the use of less lethal weapons generally, it was not conducted with sufficient frequency, several officers had not received the training, and there was no training on the legally permissible uses of less lethal firearms in a crowd control context in at least the previous five years. . . While failure to train claims are the 'most tenuous' form of *Monell* liability, . . the Court finds that the allegations are sufficient to state a failure to train claim. . . Without training on how to use less lethal weapons in a crowd control situation, Johnson has pled that the City was deliberately indifferent to his constitutional rights by changing the policy to allow for such uses of less lethal weapons. . .The Court also finds that Johnson has adequately alleged that SJPD's failure to supervise the police officers during the protests constituted deliberate indifference. Johnson has alleged that SJPD was aware of the officers' conduct during the protests, . . and did nothing to change course. Further, Johnson alleged that SJPD went so far as to replenish the stock of less lethal weapons midway through the protest, after a very large amount were used, yet failed to direct the officers to change their behavior. . . This behavior creates a reasonable inference of a deliberate indifference by SJPD as to the rights of the protestors. Johnson also asserts a failure to discipline. The Ninth Circuit has held that 'a custom or practice can be "inferred from widespread practices or evidence of repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded."'. . As discussed above, the Court considered SJPD's failure to discipline its employees in evaluating the custom or policy claim. . . . Another court, in evaluating *Monell* liability in the context of similar Black Lives Matter protests, stated that 'when [a police] department is executing an organized, department-wide response, one can presume that the police chief was in control of his department, either directing that response himself or—at the very least—ratifying the actions of his subordinates.'. . In such an instance 'it becomes easier to

infer that the repeated conduct of individual police officers is really the conduct of the department.'. . Here, the facts alleged in the SAC suggest that SJPD was engaged in 'an organized, department-wide response.'. . In such an instance, the Court can infer ratification by the Department."); ***Heidel v. Mazzola***, No. 20-1067, 2021 WL 1103507, at *3 (10th Cir. Mar. 23, 2021) (not reported) ("Here, the jail has had one suicide-by-hanging from decades ago and one recent attempted suicide-by-drowning. While tragic, this is not a pattern of conduct that would establish actual notice of a substantially high risk of suicide. Nor is this one of those rare circumstances where the jail's operating procedures were so deficient, or the risk of the telephone cord was so obvious, that it would 'be liable under § 1983 without proof of a pre-existing pattern of violations.' *Connick v. Thompson*, 563 U.S. 51, 64 (2011)."); ***Anokwuru v. City of Houston***, 990 F.3d 956, 965-66 (5th Cir. 2021) ("[A] plaintiff must plausibly allege that the municipality was deliberately indifferent to the need for proper training. . . A plaintiff may do so by alleging that the municipality had '[n]otice of a pattern of similar violations,' which were 'fairly similar to what ultimately transpired.'. . But in this case, Anokwuru points only to his own incident as proof of a policy of deliberate indifference. . . Granted, in certain limited cases, a plaintiff 'may establish deliberate indifference' through 'a single incident.'. . But Anokwuru's allegations do not pass muster under this narrow exception because the single-incident exception is generally reserved for those egregious cases in which the state actor was provided no training whatsoever. . . In sum, Anokwuru has not plausibly alleged that the City's training practices were inadequate or that the City was deliberately indifferent to Anokwuru's rights. We therefore affirm the district court's dismissal of this claim."); ***Cooper v. Rutherford***, 828 F. App'x 619, ___ (11th Cir. 2020) ("Ms. Cooper has not presented any evidence of prior similar incidents where bystanders or hostages were injured due to officers exchanging gunfire with a suspect. Because there was 'no evidence of a history of widespread prior abuse ... [that] put the [S]heriff on notice of the need for improved training or supervision,'. . . there is no jury question on the matter of deliberate indifference. Second, this is not the 'rare' failure to train scenario where the likelihood for constitutional violations is so high that the need for training would be obvious. As Ms. Cooper acknowledges, the Jacksonville Sheriff's Office had a policy generally providing that officers should not discharge their weapons into moving vehicles except as a last resort (i.e., when all other opportunities have been exhausted, to prevent death or great bodily harm to the officer or other persons, or to prevent the escape of a fleeing felon who would pose an imminent threat of death or great bodily harm). That same policy instructed officers to 'exercise reasonable caution in order to avoid unnecessarily endangering the lives of bystanders. When possible, officers should give consideration to the backdrop, bystanders, and location.'. . We recognize that this general admonition did not specifically address the discharge of weapons in a hostage situation involving a non-moving vehicle. But given the general instruction that officers should use reasonable caution to avoid unnecessary danger to others when deciding whether to discharge their weapons, Ms. Cooper and her son cannot create a jury question on deliberate indifference. We note that Officers Black and Griffith were administratively found to have violated the 'response to resistance' and 'deadly force' policies of the Jacksonville Sheriff's Office, and resigned in lieu of termination. So this was not a case of a municipality turning a blind eye to a first-time violation of its policies. Although we do not necessarily agree with the Sheriff that his policies 'exceed' constitutional standards, . .

. we do conclude that they do not demonstrate deliberate indifference."); ***Hart v. Hillsdale County, Michigan***, 973 F.3d 627, 646 (6th Cir. 2020) ("After the 2011 amendments narrowed the category of individuals required to register under SORA, the Municipal Defendants were on notice that the sex offender registry contained individuals who were no longer subject to the Act. We have already held that 'Michigan's SORA imposes punishment.' *Snyder*, 834 F.3d at 705. Being listed in the sex offender registry 'consigns [registrants] to years, if not a lifetime, of existence on the margins.'. . . Even if the municipalities incorrectly assumed that errors would be caught before any wrongful arrests, prompt action was required to avoid inevitable wrongful listing—wrongful listing that itself implicates constitutional concerns, as explained above. The question that remains is whether the responsibility to undertake that prompt action lay with one or both of the Municipal Defendants. Resolution of that question must await the proceeding below. If the district court determines that the municipalities failed to take reasonable steps to forestall wrongful listings, liability may exist for Municipal Defendants. If the district court determines that the wrongful arrest was foreseeable and that the municipality failed to prepare its officers for that foreseeable risk, municipal liability may result. . . Because those issues are not necessarily and unavoidably resolved by the issues before us, they are entrusted to the district court."); ***Contreras on behalf of A.L. v. Doña Ana County Bd. of County Commissioners***, 965 F.3d 1114, 1139 (10th Cir. 2020) (Baldock, J., concurring in part, dissenting in part), *cert. denied*, 141 S. Ct. 1382 (2021) ("The district court concluded Plaintiff failed to establish a pattern of tortious conduct surrounding the control panel and therefore DACDC officials would not have understood their failure to train officers on appropriate control panel protocol was substantially certain to result in a constitutional violation. Nonsense. Detainees on four separate occasions within eighteen months of the attack on A.L. inappropriately accessed the control panel in the juvenile pod's dayroom. Fortunately, on the first and fourth occasions no harm resulted. Nonetheless, DACDC officials placed the culprits on pre-disc precisely because they realized such conduct was unacceptable and wrought with peril. On the second and third occasions, neither DACDC officials nor targeted detainees were so fortunate. Rather, targeted detainees were ruthlessly attacked and beaten *because the control panel had been left unlocked*. These four occasions considered in the aggregate were sufficient to place DACDC officials on notice that an unsecured control panel in the juvenile pod may result in problems of constitutional proportions for the DACDC, making the questions of causation and deliberate indifference in this case for the jury."); ***Doe v. Edgewood I.S.D.***, 964 F.3d 351, 365-69 (5th Cir. 2020) ("Doe must prove that this official policy was the 'moving force' behind the violation of her constitutional rights. . . Here, there's no dispute that the sexual abuse Hernandez perpetrated on Doe violated her constitutional rights. . . But this third element—causation—proves fatal to Doe's argument. EISD's hiring policy was not the 'moving force' behind Hernandez's unconstitutional actions. 'Moving force' causation is more than 'but for' causation. . . Doe must show that the final policymaker had the requisite degree of culpability and that EISD's policies were the actual cause of the constitutional violation. . .She has not. When it comes to the 'moving force' behind the sexual abuse of Doe, we agree with the district court that Hernandez's misconduct was the actual cause of the violation. Arguably, the hiring administrator's choice to hire Hernandez without further investigation of his employment and criminal history was negligent. But EISD cannot be held liable for an employee's negligence under a *respondeat*

superior theory. . . .Doe also argues that the hiring administrator's decision to hire Hernandez constitutes a district policy that triggers municipal liability under § 1983. The district court disagreed. And so do we. True, we have recognized that 'a single decision by a policymaker may, under certain circumstances, constitute a policy for which [a municipality] may be liable.'. . But a plaintiff who brings a claim pursuant to this 'extremely narrow' 'single incident exception'. . . must show (1) the hiring decision was made by a final policymaker, and (2) a 'plainly obvious consequence of the decision' is a constitutional violation. . . As for the first prong—the hiring decision must be made by a final policymaker—it's critical to distinguish between 'an exercise of *policymaking authority* and an exercise of *delegated discretionary policy-implementing authority*.'. .The former can trigger § 1983 municipal liability; the latter cannot. Here, a hiring administrator screened Hernandez's application and decided to hire him. Unlike the Board, this administrator is not a final policymaker; . . . rather, he or she has only been delegated discretionary policy-implementing authority. By limiting the single decisions that trigger municipal liability to those made by final policymakers, we avoid imposing *respondeat superior* liability, which the Supreme Court has rejected in the § 1983 context. . . That should be the end of the inquiry: The 'single decision exception' does not apply. But even assuming that Doe satisfied the first requirement, she fails on the second. Specifically, a plaintiff must show deliberate indifference—that a constitutional violation is a plainly obvious consequence of the final policymaker's decision. . . To do so, Doe must provide evidence to show 'a strong connection between the background of [Hernandez] and the specific violation alleged,' such that he 'was highly likely to inflict the particular type of injury suffered.'. . Doe has failed to meet this burden. . . . The information about Hernandez reviewed at the time of hiring simply does not show the requisite 'strong connection' between an arrest in 1983 for official oppression and sexual abuse thirty years later—especially when viewed in light of existing caselaw. Both the Supreme Court and this court have declined to find liability under § 1983 where a local governmental entity hired an officer with one or more prior arrests (including those of a sexual nature), the hiring official failed to investigate the unspecified conduct underlying the arrest(s), and/or the hiring official failed to follow-up with prior employers from which the applicant had been terminated. . . Like the hiring officials in *Brown* and *Rivera*, EISD's hiring administrator hired someone with an arrest record without seeking information about the underlying conduct. And like the hiring official in *Hardeman*, EISD's hiring administrator hired someone without contacting the employer who previously fired him. Arguably, in all these cases, the hiring official inadequately assessed an application and made a poor hiring decision. But '[a] showing of simple or even heightened negligence will not suffice.'. . As the Supreme Court has cautioned, 'predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties.'. . 'Where a claim of municipal liability rests on a single decision ... the danger that a municipality will be held liable *without fault* is high.'. . So the standard for showing that Doe's injury was the 'plainly obvious consequence' of the hiring decision is a high bar. . . And under controlling precedent, Doe cannot scale it. We thus agree with the district court that the hiring administrator's decision to hire Hernandez does not trigger municipal liability. . . .Doe has not shown that, when adopting its hiring policy, the Board had knowledge of anyone else

having been injured by an EISD employee who had been arrested—but not convicted—of a crime. Nor has Doe shown a pattern of constitutional violations and a decision by the Board to continue following 'an approach that they know or should know has failed to prevent' such constitutional violations. . . Doe has fallen short of the 'rigorous standards of culpability and causation' that 'must be applied to ensure that [EISD] is not held liable solely for the actions of its employee.'. . The district court got this right too. . . .Jane Doe endured contemptible misconduct, and we do not minimize the cruelty of what she suffered. Both her assailants were criminally punished. But we are bound by on-point precedent, which imposes exacting liability requirements. On these facts, the district court correctly concluded that EISD cannot be held liable under Title IX or § 1983 for its employees' reprehensible acts. We AFFIRM."); ***Vielma v. Gruler***, No. 18-15162, 2020 WL 1672778, at *8-9 (11th Cir. Apr. 6, 2020) (not reported) ("Here, Plaintiffs never suggest that a pattern of prior similar constitutional violations put the City on notice of its need to train officers. Instead, in faulting the City for failing to provide training that would have reduced the loss of life during Mateen's shooting spree, Plaintiffs proceed only under *Canton*'s 'single incident' theory of liability. That is, Plaintiffs acknowledge that nothing like this had ever occurred before in Orlando. . . Although noting that ordinarily a pattern of similar constitution violations by untrained employees will be a prerequisite for a failure-to-train claim, the Supreme Court in *Connick* reasserted the possibility that 'single-incident' liability could attach to a municipality 'in a narrow range of circumstances' where there was an 'obvious need for specific legal training,' regardless of the absence of prior similar incidents. . . And in the earlier *Canton* decision, the Court had hypothesized that there may be situations where 'the need for more or different training is so obvious,' given a specific officer's duties, 'and the inadequacy [of the training is] so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'. . .The district court concluded that Plaintiffs 'did not plausibly allege that the City of Orlando's failure to train officers on security in public places that are highly susceptible to danger, and how to enter and neutralize an active shooter, fits within the narrow range' of circumstances giving rise to *Canton*'s hypothetical liability for a municipality based on a single incident. The court explained that Plaintiffs had failed to plausibly allege 'that nightclubs are at such great risk of attack that a municipality's failure to train its police officers on how to respond and even "neutralize an active shooter" amounts to deliberate indifference. The incredibly specific training envisioned by Plaintiffs on responding to and *neutralizing* a hypothetical active shooter without violating anyone's constitutional rights bears no resemblance to the use-of-deadly-force training envisioned in *Canton.*' The court further observed that neither the Supreme Court nor this Court has ever applied the single-incident liability exception. We agree with the district court that Plaintiffs do not allege the type of factual scenario hypothesized by *Canton*: a situation in which the risk of a constitutional violation is 'so obvious' that failing to provide specific legal training amounts to deliberate indifference to constitutional rights."); ***Waller v. City & County of Denver***, 932 F.3d 1277, 1285, 1287-88 (10th Cir. 2019) ("Although the complaint alleges that Denver has hired some deputies with criminal records, it does not allege that Deputy Lovingier is one of these deputies, nor does it otherwise include any allegations that would plausibly suggest the individuals who hired him should have concluded that his 'use of excessive force would be a plainly obvious consequence of the hiring decision.'. . We therefore

affirm the district court's holding that Mr. Waller did not set forth a plausible municipal liability claim based on Denver's hiring practices. . . . Although Mr. Waller has . . . alleged one similar prior incident, we have found no cases suggesting that a single prior incident can constitute a 'pattern' of conduct giving rise to an inference of deliberate indifference. To the contrary, we have expressly held that '[o]ne prior incident, even if it was a constitutional violation sufficiently similar to put officials on notice of a problem, does not describe a pattern of violations.'. . . [W]e note that the conduct at issue here, unlike in many excessive force cases, did not involve an officer making the wrong call regarding the level of force to employ against an individual who posed a threat to the officer or other individuals or was actively resisting arrest. . . Deputy Lovingier's use of force was improper not because of the amount of force he used, but because no force was warranted in the first place. Even an untrained law enforcement officer should have been well aware that any use of force in this situation—where a restrained detainee was simply addressing a judge at a hearing in a polite, calm voice—was inappropriate. This case does not involve technical knowledge or ambiguous 'gray areas' in the law that would make it 'highly predictable' that a deputy sheriff in Deputy Lovingier's position would need 'additional specified training' to know how to handle the situation correctly. . . . Mr. Waller accordingly has not shown either that there was a pattern of prior similar misconduct or that "'the need for more or different training [was otherwise] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'" We therefore affirm the district court's dismissal of Mr. Waller's failure-to-train theory of municipal liability."); ***Winkler v. Madison County***, 893 F.3d 877, 904-05 (6th Cir. 2018) ("[D]espite Winkler's argument to the contrary, the facts of this case are easily distinguishable from those of *Shadrick v. Hopkins County*, 805 F.3d 724 (6th Cir. 2015). The evidence in *Shadrick* revealed that the jail's private healthcare provider did not have a training program for its LPN nurses beyond very limited on-the-job training concerning issues like where supplies were kept. . . According to *Shadrick*, there is an 'obvious need to train LPN nurses who lack knowledge about the constitutional dimensions of providing adequate medical care to inmates in the jail setting.'. . . Here, there is evidence showing that Healthcare provided training to all of its medical staff concerning the civil rights of inmates, including the right to adequate medical care. This training included an initial one-on-one training session and ongoing group sessions several times a year, as well as specific training on how to provide healthcare to a subgroup of individuals with addictions. Because Winkler has not provided any contrary evidence or otherwise explained how Healthcare's training program was inadequate, the record would not support a jury finding that Healthcare exhibited deliberate indifference toward inmates at the Detention Center by failing to adequately train its medical staff.")

Compare ***Hobart v. Estrada***, 582 F. App'x 348, ___(5th Cir. 2014) ("In *Valle v. City of Houston*, we indicated that, typically, application of the single incident exception requires evidence of the proclivities of the particular officer involved in the excessive use of force. . . While our case law does not absolutely require evidence of character traits or proclivities of the officer responsible for the single constitutional violation, 'such evidence certainly is probative in determining that a "highly predictable" consequence of sending the particular officer [ ] into a particular situation

would be a constitutional violation.'. . Notably, the district court here conducted the *Valle* analysis of Officer Estrada's proclivities in assessing whether the failure to train on CIT procedures was undertaken with deliberate indifference under the single incident exception. The court did not conduct a similar inquiry discussing *Valle* and evidence of Officer Estrada's history or proclivities for using excessive force in the context of the claim for failure to train on the use of force. 'This court has been wary of finding municipal liability on the basis of a single incident to avoid running afoul of the Supreme Court's consistent rejection of respondeat superior liability.'. . In fact, we are aware of only one instance in which we found a single incident sufficient to support municipal liability; that case included 'an abundance of evidence about the proclivities of the particular officer involved in the excessive use of force.'. . Here, the district court applied the exception based solely on evidence that the training was deficient, and that officers will naturally find themselves in situations requiring an assessment on the appropriate use of deadly force. Thus, the court in effect concluded, because Chief Krahn must know the risks of not training properly on the use of deadly force, he could be found deliberately indifferent for not providing better training. We conclude that is far too expansive an application of what is supposed to be an extremely narrow rule. It converts general knowledge of the dangers inherent if poor training is given on the use of force to specific deliberate indifference on the part of this police chief to the risks his office's training created. Deliberate indifference flows from knowledge of the effects of decisions or conditions and taking no steps to correct the shortcomings, which is why the single-incident exception rarely can succeed. Instead of showing a prior incident that would have created the knowledge, the Hobarts have done nothing more than show deficient training on the use of force. In the absence of a prior incident, the training deficiencies must have been so obvious that the shooting here would have appeared to Chief Krahn as a 'highly predictable consequence.'. . The Hobarts have not brought to our attention any case, and we are aware of none, supporting a finding of deliberate indifference based on no more than this. . . We find no evidence to support that Chief Krahn was aware that a shooting such as this was a highly predictable result of the training being provided. It was incumbent on the Hobarts to present such evidence. They did not do so in the form of a pattern of violations or the proclivities of Officer Estrada. The Hobarts also did not offer any other evidence to support that deficiencies in the training made Chief Krahn deliberately indifferent when he did not provide better training. Accordingly, the district court erred in concluding the failure to train on the appropriate use of force was undertaken by Chief Krahn with deliberate indifference. Chief Krahn is entitled to qualified immunity on the claim he failed to train on the appropriate use of force. We DISMISS the appeal of the district court's denial of summary judgment for Officer Estrada on the basis of qualified immunity. We REVERSE the district court's denial of summary judgment for Chief Krahn on the claim for failure to train on the appropriate use of force and GRANT Chief Krahn qualified immunity.") *with* ***Hobart v. Estrada***, 582 F. App'x 348, 2014 WL 4564878, *10-*13 (5th Cir. Sept. 16, 2014) (Graves, J., dissenting, in part, as to Issue II) ("The separate majority essentially eliminates the applicability of the single incident exception to claims for failure to train on the use of deadly force and reverses the denial of summary judgment to Chief Krahn. I disagree. Because I would affirm the district court's denial of summary judgment and dismiss Krahn's appeal, I respectfully dissent only as to Issue II. This court has said that '[s]upervisory officials may be held liable only if: (i) they affirmatively

participate in acts that cause constitutional deprivation; or (ii) implement unconstitutional policies that causally result in plaintiff's injury.'. . Krahn asserts that the City's police officer training program exceeds constitutional standards, that he was not deliberately indifferent, and that he was not objectively unreasonable. . .The Hobarts assert that they have presented evidence that Estrada's excessive force actions were entirely consistent with SPD policy and that Krahn was deliberately indifferent in failing to train Estrada on the use of deadly force. In a failure to train case, the Hobarts can prove deliberate indifference either by showing a pattern of tortious conduct providing notice of inadequate training or by using, as is applicable here, the single incident exception. . . Under the single incident exception, a single violation of rights may be sufficient to prove deliberate indifference. . . The majority misapprehends the holding in *Valle v. City of Houston,* 613 F.3d 536 (5th Cir.2010), as indicating that 'typically, application of the single incidence exception requires evidence of the proclivities of the particular officer involved in the excessive use of force.' Not only is there no such requirement under *Valle,* but such a requirement would defeat the very notion of a *single* violation. . . Contrary to the majority's holding here, *Valle* actually says that, although such evidence may be probative in determining a highly predictable consequence for municipal liability in a situation involving sending a particular officer into a particular situation, there is no requirement of any such evidence. . . Moreover, the United States Supreme Court has made it clear that, 'once a municipal policy is established, "it requires only one application ... to satisfy fully *Monell's*. . . requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy."'. . Thus, any requirement of evidence showing a history of violations pursuant to the policy contradicts controlling precedent. More importantly, while the majority is correct that the single incident exception is narrow, *Valle* does not in any way suggest that *death* is not a highly predictable consequence of failure to train on the use of *deadly* force. Further, in this case, the failure to train on the use of deadly force would clearly represent the moving force behind the constitutional violation stemming from unreasonable use of deadly force. Moreover, this is consistent with Supreme Court precedent, which clearly supports the conclusion that Krahn was deliberately indifferent. . . . Krahn was responsible for ensuring his officers received proper training. Krahn was also the policymaker responsible for promulgating the General Orders of the SPD. The record indicates that an internal investigation found that Estrada's conduct in using deadly force was within the guidelines of the SPD. . . . Both Estrada and Krahn assert that Estrada's use of deadly force was reasonable pursuant to the training, or lack thereof, by Krahn and that he was following the policy promulgated by Krahn. Estrada has failed to establish that his use of deadly force was reasonable, and, thus, he is not entitled to summary judgment on the basis of qualified immunity. It clearly follows that Krahn would obviously be deliberately indifferent in not training Estrada in the appropriate use of deadly force. . .As Estrada has failed to establish that his use of deadly force was reasonable, the evidence that Estrada was in compliance with department policy promulgated by Krahn is sufficient to affirm the district court's denial of summary judgment on this issue. Moreover, because Krahn's failure to train on the use of deadly force establishes deliberate indifference, he is not entitled to summary judgment on the basis of qualified immunity.")

Compare ***Cash v. County of Erie***, 654 F.3d 324, 334-39, 344 (2d Cir. 2011) ("A municipal policy may be pronounced or tacit and reflected in either action or inaction. In the latter respect, a 'city's policy of inaction in light of notice that its program will cause constitutional violations is the functional equivalent of a decision by the city itself to violate the Constitution.'[citing *Connick* and *Canton*] . . . . [D]eliberate indifference may be inferred where 'the need for more or better supervision to protect against constitutional violations was obvious,'. . . but the policymaker 'fail[ed] to make meaningful efforts to address the risk of harm to plaintiffs[.]'. . . In this case, defendants cannot claim that the evidence was insufficient to alert them to the risk of sexual exploitation posed by male deputies guarding female prisoners at ECHC [Erie County Holding Center]. That risk is acknowledged in New York state law, which pronounces prisoners categorically incapable of consenting to any sexual activity with guards, *see* N.Y. Penal Law § 130.05(3)(e)-(f), and subjects guards to criminal liability for such conduct, *see, e.g., id.* §§ 130.25(1), 130.60(1). In short, these laws recognize the moral certainty of guards confronting prisoners in sexually tempting circumstances with such a frequent risk of harm to prisoners as to require a complete prohibition on any sexual activity. . . Thus, the question presented by this case is not whether defendants should have realized the need for such a prohibition, but whether defendants could rely simply on guards' awareness of these criminal laws (and ECHC policies implementing them) to deter sexual exploitation of prisoners, or whether defendants had reason to know that more was required to discharge their affirmative protective duty, specifically, precluding or at least monitoring one-on-one contact between guards and prisoners. In concluding that trial evidence was legally insufficient to support the latter finding, the district court observed that a policy permitting unmonitored one-on-one interactions between a guard and a prisoner of different sexes was not itself unconstitutional, and that the lack of prior sexual *assaults* by male guards of female prisoners failed to alert Gallivan to the fact that such a policy posed a risk of rape to Cash. We take no exception to the district court's first observation, . . . but we cannot agree with its second. To explain, we begin by noting that the pattern ordinarily necessary to prove deliberate indifference in the context of a failure-to-train claim does not neatly transfer to this case. . . A duty to train arises so that subordinates entrusted with the discretionary exercise of municipal power can distinguish between lawful and unlawful choices. . . .The deliberate indifference concern in this case, however, is not with a failure to train prison guards to distinguish between permissible and impermissible sexual contact with prisoners. Nor is it with providing sufficient supervision to ensure that guards make correct choices in this respect. New York affords guards *no* discretion respecting sexual contact with prisoners; the state's proscription of such contact is absolute. Thus, the deliberate indifference concern here is with the adequacy of defendants' own actions to prevent sexual contact between guards and prisoners consistent with their affirmative duty to protect prisoners in their custody. Mindful of this affirmative duty to protect, a reasonable jury could have concluded that the 1999 Allen complaint would have alerted Gallivan to the fact that mere proscriptions on sexual contact between guards and prisoners had proved an insufficient deterrent to sexual exploitation. The Allen investigation report indicated, at best, that a female prisoner repeatedly had engaged in sexual exhibitionism before various guards, none of whom had reported the activity and some of whom may have paid for it with commissary items. At worst, the report indicated that male guards had engaged a female prisoner in a variety of more intimate sexual

activities. . . . A jury could have concluded that this investigative determination should have alerted defendants that they could not rely simply on guards' awareness of a no-tolerance policy to deter sexual misconduct. Likewise, a jury could have determined that Gallivan's conceded awareness of 'highly publicized incidents' at other New York correctional facilities should further have alerted him to the inadequacy of a mere proscriptive policy to deter guards' sexual misconduct. . . . [E]ven if Gallivan had no knowledge of prior sexual *assaults,* it was hardly speculative for a jury to conclude that, at least by 1999, he knew or should have known that guards at ECHC and other local correctional facilities were engaging in proscribed sexual contact with prisoners, and that continued reliance on penal proscriptions alone was insufficient to protect prisoners from the range of harms associated with such misconduct, of which rape is obviously the most serious example. . . . As the Supreme Court recently reiterated, '[p]olicymakers' continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action − the "deliberate indifference" − necessary to trigger municipal liability.' *Connick v. Thompson*, 131 S.Ct. at 1360 (internal quotation marks omitted). That observation, made with reference to a claim of inadequate training, applies with no less force to a supervision claim, particularly where defendants operate under an affirmative duty of protection and their employees are absolutely prohibited by the criminal law from engaging in certain conduct. . . . In so construing the record, we do not suggest that a reasonable jury could not have viewed this trial evidence more favorably to defendants. Indeed, this case presents a close question as to how to weigh the evidence advanced to establish deliberate indifference. But it is not a question that we think must be resolved as a matter of law − rather than fact − for the defendants. When the evidence is viewed in the light most favorable to Cash and all inferences are drawn in her favor, a reasonable jury was not *compelled* to find for defendants. . . Rather, the jury reasonably could have found that defendants knew, by virtue of New York state law, that female prisoners in their custody faced a risk of sexual abuse by male guards; that, by 1999, defendants also knew that a policy simply proscribing all sexual contact between male guards and female prisoners was insufficient to deter such conduct at ECHC; and that, in these circumstances, defendants' mere reiteration of the proscriptive policy unaccompanied by any proactive steps to minimize the opportunity for exploitation, as for example by prohibiting unmonitored one-on-one interactions between guards and prisoners, demonstrated deliberate indifference to defendants' affirmative duty to protect prisoners from sexual exploitation. Accordingly, the district court erred in granting defendants judgment as a matter of law. . . . Because defendants owed plaintiff an affirmative duty of care, and because *any* sexual contact between a guard and a prisoner is absolutely proscribed by New York state law, a reasonable jury could have found that once defendants learned that guards were violating an absolute proscription in any respect, defendants' actions to prevent future violations were so deficient as to manifest deliberate indifference to a risk of the full range of proscribed sexual conduct, including the sexual assault suffered by plaintiff.") *with* ***Cash v. County of Erie***, 654 F.3d 324, 344, 346 (2d Cir. 2011) (Jacobs, C.J., dissenting) ("Taking its holdings together, the opinion can be read (and will be read) to impose strict liability on municipalities and policymakers for any incidents that arise in a prison. . . . If the evidence in this case amounts to sufficient warning of a criminal sexual assault, then a supervisor or government is always on notice of the risk of sexual abuses in prisons, and will

always be liable when, sooner or later, something bad happens. The majority opinion is thus unbounded: It combines an ever-present risk with an inferred 'proactive responsibility,' Op. at 18, in a way that constitutes strict (and vicarious) liability. And nothing limits the opinion to conduct by guards, or to sexual conduct. Did a warden or sheriff, a guard or a County know that sometime in past years one inmate hit another? Or that a guard observed or tolerated sexual misconduct by an inmate and received insufficient discipline for failing to report it (or for a gift of candy)? Or that something like that happened someplace else in the state? If so, they could be held liable as well for every act of prisoner-on-prisoner violence or sexual misconduct (even rape). To hold a municipality and its policymaker liable in this way eviscerates the Supreme Court's limitations on municipal and policymaker liability. . . . In any event, the risk associated with having men and women interact in a closed environment is bred in the bone; it means nothing to say that the prison authorities should anticipate it. Abating that risk is another matter. If the majority opinion is sound, the only effective solution would be to have no guards of the opposite sex in women's or men's prisons. The majority opinion does not take account of the considerable ramifications. Because male inmates greatly outnumber female inmates, the resulting curtailment of opportunity for female guards would likely trigger valid Title VII suits. People with known same-sex preferences may not be able to serve as guards in any prison. And in another sphere, since military officers are responsible for their subordinates, we could not have mixing of the sexes in the military, unless (I suppose) the officers are paired off.").

See also ***Estate of Jones by Jones v. City of Martinsburg, West Virginia***, 961 F.3d 661, 672 (4th Cir. 2020) ("At least as framed on appeal, Jones's death is an isolated incident of excessive force that cannot fall into the *Canton* exception, because Martinsburg *did* have an aggression policy, and the Estate has not shown how or why that policy is deficient—except by pointing to this single incident. MPD's aggression response policy was to 'meet your aggression with the suspect's aggression,' and required that incidents of physical force be necessary, objectively reasonable, and proportionate. . . The Estate does not argue that the policy is facially unreasonable. Instead, it argues that this tragic incident makes obvious that the policy was not sufficiently implemented in training. We take the Estate's point to be that five officers simultaneously violated this policy, and therefore the training must have been deficient. We agree that a reasonable jury could find that the officers' response violated the aggression policy. But *Monell*'s deliberate indifference standard ensures that a municipality either knew or should have known about the deficiency, so it could remedy that deficiency. At its core, the strict *Monell* test asks for some level of notice. And five officers acting at once could not have put the City on earlier notice of the need to better train its officers as to the existing use-of-force policy. Here, the City apparently understood that it needed a use-of-force policy to avoid the risk of likely constitutional violations, and it had one. The City cannot be liable under *Monell* because the Estate cannot prove that any deficiency in training 'reflect[ed] a deliberate or conscious choice by a municipality ....'. . .Because we hold that the Estate has not shown deliberate indifference to the need for better or different training on the use of force, we do not reach whether any failure in training was the moving force behind the constitutional violation. As it is framed by the Estate, the *Monell* claim cannot succeed, and the district court properly granted summary judgment to the

City. We thus affirm the district court's dismissal as to the *Monell* claim only."); ***Wright v. City of Euclid, Ohio***, 962 F.3d 852, 881 (6th Cir. 2020) ("When determining whether a municipality has adequately trained its employees, 'the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform.'. . A failure-to-supervise claim requires a showing of 'prior instances of unconstitutional conduct demonstrating that the municipality had ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury.'. . It is undisputed that Euclid police officers received some form of training on the proper use of force, but a reasonable juror could find that this training is deficient. The Euclid Police Department's training policy and procedures mandate that '[t]he department will establish and maintain a training committee.' However, no such training committee apparently has ever existed. The City's training seems to consist initially of simply reading the use-of-force policy to the officers at rollcall until 'it is believed that all the officers have heard it,'. . . which is then followed up with a one-or-two-page quiz that may or may not be given to officers. The City also engages in some sort of practical training exercise in which officers are given scenarios in which they may use force. But according to Murowsky, who implemented these scenario-based trainings, the scenarios never changed, and the officers' performances were never evaluated. And recall that this training also included the graphic and comedy skit discussed above. . . A reasonable jury could find that the City's excessive-force training regimen and practices gave rise to a culture that encouraged, permitted, or acquiesced to the use of unconstitutional excessive force, and that, as a result, such force was used on Wright. Therefore, we **REVERSE** the district court's grant of summary judgment on Wright's *Monell* claim based on failure to train or supervise."); ***Murphy v. City of Tulsa***, 950 F.3d 641, 652-55 (10th Cir. 2019) ("Failing to teach police officers about certain constitutional limits can demonstrate a municipality's '"deliberate indifference" to constitutional rights.'. . Given the potential for coercion in interrogations, failing to teach police officers how to lawfully interrogate civilians might trigger municipal liability. But this possibility is belied by the summary-judgment record. The City of Tulsa contends that it did teach officers the constitutional limits of interrogation, pointing to a 1987 legal bulletin that tells officers

• how to apply *Miranda v. Arizona*, 384 U.S. 436 (1966), and

• how to interrogate suspects. . . . We conclude that the training bulletin unambiguously extends beyond *Miranda.* The bulletin does extensively discuss *Miranda*, but it also addresses the right to due process. . . . Although the City's evidence of training lacks detail, it is specific enough to prevent municipal liability. In *Barney v. Pulsipher*, for example, we affirmed summary judgment to a municipality on a claim involving failure to train correctional officers about the sexual assault of inmates. . . The county presented evidence of a state-certified basic officer training program and a single correctional officer course. . . Because the plaintiff failed to present evidence 'pertaining to the adequacy of the instruction [the correctional officer] received in these courses,' we concluded as a matter of law that the training was constitutionally adequate. . . That conclusion is equally fitting here. The City presented evidence that it had taught officers how to interrogate suspects and updated those police officers on relevant legal decisions. And at least one part of that training—the 1987 bulletin—told police officers that they could not make threats during interrogations. Considering the entirety of the training, a fact-finder could not reasonably infer that

future constitutional violations would be highly predictable or plainly obvious. Ms. Murphy also relies on her expert's report to argue that this training fell short of professional standards on interrogations. For this argument, Ms. Murphy points to *Allen v. City of Muskogee*, 119 F.3d 837 (10th Cir. 1997). There we held that municipal liability could reasonably be inferred from a police department's deviation from training provided elsewhere. . .The issue involved the training's substance because the municipality had trained its officers contrary to the national standard. . . In our case, the City trained its police officers to follow standard interrogation procedures. Even if the extent of the City of Tulsa's training might have been inadequate, 'showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability.'. .Because Ms. Murphy cannot show deliberate indifference, the City cannot incur liability for failing to train police officers."); ***Jason v. Tanner***, 938 F.3d 191, 197-99 (5th Cir. 2019) ("[I]t wasn't the lack of *training* that *caused* the risk to Jason. Rather, it was the sufficiency of the overall protocol—having only two guards making rounds and relying on other guards peering out of windows. But that situation might have been a mere reality of the prison's budget. Regardless, even if the district court were right about the first two requirements, its deliberate-indifference analysis runs aground. The deliberate-indifference requirement stems from the Supreme Court's ruling in *Monell* some 40 years ago, rejecting pure respondeat superior liability under § 1983. . . It was only eight years ago that the Supreme Court, in *Connick*, fully elaborated on deliberate indifference. . . . Here, there was no repeated pattern of violations. True, there had been three yard fights with brooms and one with a mop. Now there's been one with a yard tool. But prison fights are lamentably common. And three yard fights with brooms and one with a mop just aren't enough to constitute a pattern. Besides, the Supreme Court in *Connick* required that only very similar violations could jointly form a pattern. . . In that case, Thompson underscored that 'during the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office.'. .Yet those cases weren't similar enough for the Court. Similarly, four cleaning-tool incidents don't create a pattern of violation that should've put the prison on notice for a sling-blade incident. That's why in our unreported 2013 *Walker* case, we held that even a repeated pattern of violence isn't by itself enough to prove deliberate indifference. . . There, the warden put a prisoner in the same cell as a notoriously violent inmate. The violent inmate killed his new cellmate, and the dead cellmate's parents sued the prison for failure to train. Yet we held that the plaintiffs hadn't shown deliberate indifference because they couldn't prove it was the lack of training that caused the violation. . . .[T]here is an exception that will sometimes apply (though not here): single-incident liability as theorized in *City of Canton*. . . That exception allows liability where a municipality 'fail[ed] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face.'. . One recent Fifth Circuit case used this exception: *Littell* . . . There, '$50 went missing during a sixth-grade choir class.'. . No one fessed up. So the assistant principal 'took all twenty-two girls in the choir class to the female school nurse, who strip searched them, taking them one at a time into a bathroom, where she checked around the waistband of their panties, loosened their bras, and checked under their shirts.'. . The school district allegedly permitted 'school officials to conduct invasive searches' of students. But it did so with no training whatsoever. . .We found that the facts 'mirror[ed] *Canton*'s

hypothetical in all material respects.'. . But here, there *was* training. There was also a monitoring system in place. Again, it just failed to prevent the attack. Put differently: square peg, round hole. *Littell* was about a supervisor who didn't train his subordinates; not even at all. Had he adequately trained them, they would've known not to strip search young girls. Yet here, it's not so much about insufficient training. Instead, it's about insufficient protocol. This was the first and only sling-blade attack in a presumably otherwise incident-free program. The prison had instituted safety measures against sling-blade misuse—albeit one that didn't prevent this attack. But the Supreme Court's caselaw and our caselaw emphasize that only inadequate training can establish vicarious liability. Not simply an inadequate protocol. . . .In sum, we REVERSE the district court and grant all three appellants qualified immunity."); ***Jackson v. City of Cleveland***, 925 F.3d 793, 828 n.20, 836-37 (6th Cir. 2019), *rehearing en banc denied* (June 27, 2019), *cert. denied*, 140 S. Ct. 855 (2020) ("Plaintiffs also argue that they have a third *Monell* claim based on Cleveland's failure to adopt an adequate policy to prevent *Brady* violations. The district court ruled against Plaintiffs on this theory, finding that they had not established that Cleveland had failed to adopt adequate policies to train officers in *Brady*'s requirements. . . We decline to analyze this theory separately. Plaintiffs cite no Sixth Circuit or Supreme Court case in support of their theory that they have a *Monell* claim—separate from their failure-to-train claim—based on Cleveland's unconstitutional failure to adopt a policy. Instead, the relevant cases they cite are failure-to-train cases. . . That makes sense: the harm alleged and the analysis required under the failure-to-train theory are functionally indistinguishable from the harm Plaintiffs allege and the analysis they wish us to conduct under the failure-to-adopt-a-policy theory. Indeed, the district court stated that to prevail on their failure-to-adopt theory, Plaintiffs needed to show Cleveland was deliberately indifferent to the high likelihood of violations in the absence of a policy. . . As we discuss below, Plaintiffs must make the same showing for their failure-to-train claim. . . . A plaintiff may meet this standard by showing either (1) 'prior instances of unconstitutional conduct demonstrating that the City had notice that the training was deficient and likely to cause injury but ignored it' or (2) 'evidence of a single violation of federal rights, accompanied by a showing that the City had failed to train its employees to handle recurring situations presenting an obvious potential for such a violation.' Plaintiffs do not contend that they can show Cleveland's failure to train was deliberately indifferent via the first method. . . Instead, Plaintiffs argue that they satisfy the second method of showing deliberate indifference because the 'likelihood that the situation [i.e., a situation requiring police to handle exculpatory evidence] will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights' mean that failing to train officers in their disclosure obligations demonstrates deliberate indifference to the 'highly predictable consequence' that untrained officers will violate *Brady*. . . . Plaintiffs have provided testimony sufficient for a jury to find that Cleveland did not in fact train its officers in their disclosure obligations. *Gregory* therefore controls, and there is sufficient evidence for a reasonable jury to find that Cleveland was deliberately indifferent to the risk of *Brady* violations."); ***Garza v. City of Donna***, 922 F.3d 626, 638 (5th Cir. 2019) ("Appellants put forward no evidence of a pattern of violations stemming from deficient training, so their case depends on the single-incident method of demonstrating deliberate indifference. As we have emphasized, deliberate indifference may be inferred this way 'only in narrow and extreme circumstances,' and decisions by our court drawing

the inference are rare. . . Appellants have not carried their burden here. The summary judgment record contains no evidence of the training that Perez did and did not receive, other than that De Leon had trained Perez. Moreover, the record has no evidence about the population that passes through the City's jail or about the jail's operations from which the possibility of recurring situations threatening to constitutional rights might be assessed. It is apparent that this record is inadequate to support a failure-to-train theory as to Perez. Of the jailers, Esteban Garza and Coronado, Appellants note their preoccupation on February 19 with installing signs in the jail, to the detriment of their job duties, and they attribute the jailers' distraction to the directive from De Leon to install the signs. It is true that a decision to adopt 'a course of action tailored to a particular situation' by a municipal government's authorized decisionmaker may constitute an official policy. . . But municipal liability arises only where the '*deliberate* choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy *with respect to the subject matter in question*.'. . Nothing in the record indicates that De Leon was aware of Garza's presence at the jail, much less that he instructed the jailers to disregard Garza in favor of installing the signs. It thus cannot be said that De Leon's directive was deliberate in the sense meant by *Pembaur* or that it was tailored to the particular situation of Garza's confinement. Consequently, it is apparent that the record cannot support municipal liability on this basis. In sum, whatever we may think of the various DPD employees' actions on February 19, 2016, Appellants have not set forth evidence by which those actions might reasonably be attributed to the City. Accordingly, the City is entitled to judgment as a matter of law, making the district court's grant of summary judgment to the City the correct outcome on this record."); ***Doe v. Fort Zumwalt R-II Sch. Dist.***, 920 F.3d 1184, 1190-91 (8th Cir. 2019) ("Doe argues that the district court applied the wrong legal standard by requiring actual notice and behavior that "shocks the conscience." This court need not address these arguments because, on de novo review, Doe has not presented sufficient evidence to establish deliberate indifference. Doe has not shown that the District had reason to believe that its training and supervision were inadequate. He presented no evidence of a pattern of misconduct that would alert the District that its training and supervision were insufficient to prevent Hansen's conduct. . . Instead, he contends that a 2004 Department of Education report—estimating that at least 4.5 million K-12 students experienced sexual misconduct by a school employee—provided notice. The report addresses sexual misconduct generally, not child pornography. It is insufficient to give the District notice of Hansen's particular misconduct or of the risk he would videotape students in the nude. Doe also argues the District had 'actual notice' because it relied on teenage camp counselors to report inappropriate behavior. In 2006, for instance, a camp counselor observed Hansen in a bunk with a fifth grader. Seeing the counselor, Hansen jumped out of the bunk. The counselor did not, however, report this incident until after Hansen's arrest. There is no evidence the District was aware counselors were not reporting inappropriate behavior. Nor is there evidence the District had any warning of Hansen's misconduct before his arrest in 2012. Without notice, the District's failure to provide more training or supervision is not deliberately indifferent. . . This is also not a case where the risk was 'so obvious' that the District's failure to provide more training or supervision constitutes deliberate indifference. . . Doe claims the District created an 'obvious risk' by assigning only one teacher to each cabin and allowing teachers to bring recording equipment into the cabin.

However, the District's policies prohibited Hansen's conduct. Teachers could not use recording equipment where students had an expectation of privacy. Teachers were to maintain professional relationships and could not engage in any kind of sexual relationship with students. The District relied on camp counselors to report any inappropriate behavior. In light of these policies, Doe cannot prove that the risk that a teacher would engage in this kind of conduct was so obvious that it required additional training or supervision. . . . Hansen's behavior was unlawful and criminal. However, the District's failure to provide more supervision and training did not rise to the level of a constitutional violation. The district court properly granted summary judgment."); ***Perkins v. Hastings***, 915 F.3d 512, 523-25 (8th Cir. 2019) ("In sum, Perkins claims on appeal that the City maintained a custom of facade investigations based on alleged shortcomings in the City's investigations into officer-involved shootings. The actionable municipal custom here must be one of deliberate indifference to a pattern of excessive force, however, which Perkins has not established in light of the fact that she has not shown a pattern of underlying constitutional violations. For the same reason, we uphold the grant of summary judgment on Perkins's claim alleging that the City had failed to train or supervise its police officers. . . For the City to be liable under this theory, the 'municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact."'. . As set forth above, Perkins has not established a pattern of similar constitutional violations. . . . The Supreme Court has set forth an exacting test for imposing liability based on a hiring decision, requiring a court to 'carefully test the link between the policymaker's inadequate decision and the particular injury alleged.'. . Perkins points to evidence that Thomas was friends with Hastings's father, that Hastings attended a Ku Klux Klan meeting in high school, that there were irregularities in Hastings's polygraph examination, and that a lieutenant advised against hiring Hastings. We conclude that the referred-to evidence cannot establish the essential link between Thomas's decision to hire Hastings and his use of excessive force against Moore. Stated differently, the evidence presents no genuine issue of material fact that a 'plainly obvious consequence of the hiring decision' would be Hastings's unjustified use of deadly force. . .We also reject Perkins's argument that she has presented sufficient evidence to preclude summary judgment on her claim that Thomas failed to adequately train or supervise Hastings. A supervisor may be held liable 'if a failure to properly supervise and train the offending employee caused a deprivation of constitutional rights.'. . . Perkins has not presented sufficient evidence to show that Thomas had notice of a pattern of excessive force by Little Rock officers, nor has she shown that he acted with deliberate indifference. Hastings's disciplinary record indicates that he was a lazy and careless police officer, seemingly unable to complete the paperwork requirements or meet the scheduling demands of police work. He also engaged in unbecoming conduct and used inappropriate language. While those violations of the police department's general orders or rules and regulations speak volumes about Hastings's general unfitness for police work, they do not establish a pattern of constitutional violations, nor do they show that Thomas's failure to train or supervise Hastings resulted in Moore's death. . . With respect to Hastings's use of force over the course of his career, Thomas ordered additional supervision and additional training after Hastings triggered three EIS alerts and one citizen complaint in 2009 and 2010. Following those remedial actions, Hastings had no further EIS alerts or citizen complaints relating to the use of force.

Although Perkins argues that Thomas should have disciplined Hastings for 'body-slam[ming] a mentally-ill, homeless black woman' in July 2010, . . . Hastings reported that the woman had struck him and that he was trying to prevent her from striking him again. Other than his use of the word 'body slam' to describe the takedown, the record does not support an inference that Hastings's use of force was unconstitutional or that Thomas had notice that the report was false. Finally, relying on statistics, Perkins claims that Hastings used force more frequently against racial minorities, but in the absence of evidence that the force used against racial minorities was excessive or otherwise unjustified, those statistics do not support a supervisory claim against Thomas. Perkins has thus not submitted evidence sufficient to show that Thomas had notice that his training and supervision were inadequate and likely to result in the use of excessive force against Moore."); ***Lapre v. City of Chicago***, 911 F.3d 424, 432-38 (7th Cir. 2018) ("Taken as a whole, the measures in place and the changes being made by the City do not demonstrate deliberate indifference under *Frake* for the City's continued use of cells with horizontal bars. . . . We need not decide whether Lapre has presented sufficient evidence to demonstrate that this care was inadequate or inappropriate because she has presented no evidence that the absence of a suicide kit or a lack of training for lockup personnel proximately caused Ofem's death. . . .[E]ven if we assume that the City had a policy of assessing detainees only on initial entry to the lockup, Lapre's evidence falls short of demonstrating that the City's facially lawful policy was deliberately indifferent to a known or obvious consequence of the policy. . . Lapre has presented no evidence that the policy itself led to additional suicides or that suicides would have been prevented by a different policy. Nor has she shown that the City was aware that this policy was leading to an increase in detainee suicides, for example, and yet persisted in continuing the practice. . . . Lapre has offered no evidence of any particular widespread practice regarding the visual inspections, and so we do not know whether detainees in general were left isolated for extended periods of time, whether they were inspected in person every fifteen minutes or whether there was a combination of in-person and video checks. Moreover, Lapre presents no evidence that the City, as a matter of wide-spread custom or practice, failed to follow the Illinois Lockup Standard of conducting an in-person inspection every half hour. . . . Lapre also failed to offer evidence that in-person inspections of any particular frequency would affect the suicide risk for detainees or that the City was aware that more frequent in-person visits would make a difference. . . . Without evidence of either a wide-spread practice, knowledge of a risk created by a practice, or causation, the claim was properly rejected. . . .Although Lapre asserts both that the City failed entirely to train its officers and that the training provided was inadequate, Lapre has presented no evidence regarding City-wide policies or practices regarding training. She does not point, for example, to evidence that the City has no training program or that the program the City employs has faults. Even if we disregard the City's evidence, Lapre has produced no evidence regarding the City's training practices from which we may infer deliberate indifference. That there may have been lapses in training in the 4th District is not sufficient to allow an inference of deliberate indifference by the City as a matter of policy or wide-spread practice. Finally, Lapre also fails to show causation on her training claim. She has provided no evidence that the City's training program led to Ofem's death, or that the City's program ignored a recurring problem. She has provided nothing more than speculation regarding whether better trained officers would have responded differently, or that a different outcome was possible based on better training. In the

absence of this key evidence, summary judgment in favor of the City was appropriate. . . . The suicide of a teenager in a City lockup is an unmitigated tragedy. The question is whether that death occurred as a result of deliberate indifference by the City through its policies, practices or customs. Lapre focused her discovery on the narrow circumstances of Ofem's death rather than on the City's official policies or unofficial but wide-spread practices or customs. As a result, she was unable to provide evidence that the City failed to adequately address the known consequences of its official or unofficial practices in the lockups. Nor did she provide evidence that any policy or policy gap was the moving force in Ofem's death. The judgment in favor of the City is therefore AFFIRMED."); ***Greene v. City of New York***, No. 17-1920, 2018 WL 3486787, at *3 (2d Cir. July 19, 2018) (not reported) ("Greene's only evidence that prosecutors in the KCDAO committed other violations of their disclosure obligations is a list of 36 court decisions, issued over a 22-year span, finding such violations. However, all but two of those decisions were issued *after* Greene's trial. A plaintiff cannot point to 'contemporaneous or subsequent' violations to 'establish a pattern of violations that ... provide[d] notice to the cit[y] [that it needed] ... to conform [its training or supervising program] to constitutional dictates.'. . The two *prior* violations Greene cites, which occurred in 1975 and 1979, are not enough to sustain his burden. [citing *Jones v. Town of East Haven*] Even if two violations could constitute a pattern, the violations Greene cites are inapposite because they do not concern the nondisclosure of the same sort of evidence at issue in *this* case, *viz.*, an alleged deal between the KCDAO and a potential witness intended to induce his testimony; an audiotape of an interview with a witness; and notebooks containing detectives' notes from interviews with witnesses. . . Accordingly, Greene's showing is insufficient as a matter of law."); ***Littell v. Houston Indep. Sch. Dist.***, 894 F.3d 616, 623-29 (5th Cir. 2018) ("That the alleged facts demonstrate a constitutional violation is presently undisputed. A brief discussion of *why* the alleged search was unconstitutional, however, will nonetheless prove helpful. To search a student's person, school officials must generally have reasonable suspicion that the search will reveal evidence of a violation of school rules or the law. . . . [C]learly established law means that Higgins violated the constitutional rights of the twenty-two girls unless Higgins reasonably suspected that the missing $50 cash (1) would be found on that particular girl's person and either (2) would be found specifically in that girl's underwear or (3) would pose a dangerous threat to students. For what are perhaps obvious reasons, the parties do not dispute that the alleged search failed all three conditions. It was clearly unconstitutional. . . .To be clear, the argument is not that the school district's written search policies are facially unconstitutional or that they caused the alleged constitutional violation by themselves. Rather, the 'official municipal policy' on which Plaintiffs attempt to hang *Monell* liability is the school district's alleged policy of providing *no training whatsoever* regarding its employees' legal duties not to conduct unreasonable searches. In other words, as currently presented, this is a 'failure to train' case. . . . Under *Canton*, when a municipal entity enacts a facially valid policy but fails to train its employees to implement it in a constitutional manner, that failure constitutes 'official policy' that can support municipal liability if it 'amounts to deliberate indifference.'. . . [E]ven absent proof of pattern, deliberate indifference can still be inferred if the factfinder determines that the risk of constitutional violations was or should have been an 'obvious' or 'highly predictable consequence' of the alleged training inadequacy. . . .Here, the alleged facts, taken together and assumed to be true, permit the reasonable

inference—i.e., the claim has facial plausibility—that the risk of public officials' conducting unconstitutional searches was or should have been a 'highly predictable consequence' of the school district's decision to provide its staff no training regarding the Constitution's constraints on searches. Indeed, Plaintiffs' allegations mirror *Canton*'s hypothetical in all material respects. . . . Although the *Canton* hypothetical concerned the Fourth Amendment's constraints on seizures, whereas this case concerns its constraints on searches, 'the precise nature' of both types of obligations is sufficiently clear in the law. . . Indeed, if anything, it is the duties with respect to *searches* that are defined with greater specificity. Student searches are governed by defined principles such as the need for individualized suspicion, the nexus requirement, and the limit on unduly intrusive means. . . . Because excessive-force law is sufficiently clear to ground failure-to-train liability—as *Canton*'s hypothetical makes plain—we hold the same with respect to the law of unreasonable student searches. Also as in *Canton*, the constitutional duty not to conduct unreasonable searches is plausibly alleged to arise 'in recurrent situations that a particular employee is certain to face.'. . .Like the city in *Canton*, moreover, the school district cannot rely on its employees to come pre-equipped with legal knowledge. . . .In these circumstances, the Supreme Court has said, 'there is an obvious need for *some* form of training.'. . But, critically, the school district here allegedly provides 'no training whatsoever' as to how to conduct a lawful search. . . .[W]e must credit Plaintiffs' factual allegations and proceed on the assumption that the school district has made the conscious choice to take *no* affirmative steps to instruct *any* of its employees on the constitutional rules governing student searches—even though at least some of those employees are regularly called upon to conduct such searches. In short, this case presents an alleged '*complete failure to train*' of the kind we have found actionable. Plaintiffs' allegations of deliberate indifference survive a motion to dismiss. We emphasize, however, that our conclusion in no way ordains Plaintiffs' ultimate success. Without a pattern of constitutional violations, deliberate indifference can be inferred only in narrow and extreme circumstances like those of *Canton*'s hypothetical. And in the thirty years since *Canton* issued, *actual* cases reaching those extremes have proved fortunately rare. . . Perhaps at summary judgment or at trial, the evidence in this case, too, will reveal the allegations of deliberate indifference to have been unfounded. . . . But if Plaintiffs' allegations prove true—that is, if the school district knew or should have known that officials like Higgins would certainly be placed in situations implicating Fourth Amendment search law; if the school district knew or should have known that those officials would lack the legal knowledge necessary to handle those situations; and if the school district nonetheless failed to provide those officials any legal training on the subject—then the factfinder will be entitled (but not required) to infer that the school district acted with deliberate indifference to its students' Fourth Amendment rights. In such a case, '[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights c[an] justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right.'. . .The Supreme Court in *Canton* 'reject[ed] [the] contention that only unconstitutional policies are actionable under [§ 1983].'. . Instead, *Canton* permits municipal liability when 'a *concededly valid* policy is *unconstitutionally applied*.'. . In such a case, the 'policy' that grounds municipal liability is the failure to train

municipal employees regarding their constitutional duties, if that failure amounted to deliberate indifference and caused the plaintiff's injury. . . Plaintiffs need not also demonstrate the invalidity of the written policies themselves."); ***Winkler v. Madison County***, 893 F.3d 877, 901-02 (6th Cir. 2018) ("[T]he record does not support Winkler's theory of liability based on the County's alleged policy. To the extent that she is arguing that the County's policy of contracting with a private medical provider for healthcare services at the Detention Center was facially unconstitutional, she provides no authority to support this contention. And this court has made clear that it is not 'unconstitutional for municipalities and their employees "to rely on medical judgments made by [private] medical professionals responsible for prisoner care[,]"'. . . a holding that necessarily leads us to conclude that a municipality may constitutionally contract with a private medical company to provide healthcare services to inmates. Winkler has therefore failed to identify any County policy that is facially unconstitutional. 'Where the identified policy is itself facially lawful, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice."'. . Winkler offers no evidence that Healthcare's staffing or other policies presented an obvious risk to inmates' constitutional rights to adequate medical care. . . Nor does she offer any evidence that the County knew of and disregarded such a risk. And although Winkler contends that Healthcare failed to provide medical policies and procedures, she concedes that the County had its own healthcare policies and that Healthcare established various protocols for the provision of care to inmates like Hacker. Even if we construe Winkler's argument to be that the County had a custom of "inaction" in the face of prolonged unconstitutional conduct by Healthcare, her argument would still fail. Winkler, to support such an argument, would have to allege (1) 'a clear and persistent' pattern of unconstitutional conduct by [Healthcare] employees; (2) the municipality's 'notice or constructive notice' of the unconstitutional conduct; (3) the municipality's 'tacit approval of the unconstitutional conduct, such that [its] deliberate indifference in [its] failure to act can be said to amount to an official policy of inaction'; and (4) that the policy of inaction was the 'moving force' of the constitutional deprivation. . . . This she has failed to do. There is no record of Healthcare providing constitutionally inadequate medical care to inmates in the past, let alone that the County was constructively aware of and thus tacitly approved such hypothetical unconstitutional conduct."); ***Nunez v. City of New York***, 735 F. App'x 756, ___ (2d Cir. 2018) ("[A]s the district court observed, the cited 48 instances of prosecutorial misconduct over 23 years involve sufficiently different conduct from that alleged here—non-disclosure of impeachment materials and the alleged maintenance of a prosecution in the absence of reliable evidence—that they cannot plausibly plead misconduct 'sufficiently persistent or widespread' as to indicate a pattern 'acquir[ing] the force of law.'. . .Thus, Nunez's municipal claims were properly dismissed as against both the City and its alleged policy maker, DA Johnson."); ***Pena v. City of Rio Grande City***, 879 F.3d 613, 623-24 (5th Cir. 2018) ("Peña's proposed complaint identifies multiple alleged inadequacies in the department's taser-training program. She claims the city used uncertified taser trainers, that neither Solis nor Salinas was certified in taser use, and that officers were not trained regarding 'secondary injuries for taser use,' the 'appropriate methods for handling minors,' or 'the legal use of force ... and non-lethal weapons.' Of these many allegations, only the last bears a direct causal relationship to the specific

constitutional violation at issue—the deployment of nonlethal weapons against minor non-suspects. . .Unfortunately for Peña, that allegation fails on the third, deliberate-indifference prong. Because the 'standard for [municipal] fault' is a 'stringent' one, '[a] pattern of similar constitutional violations by untrained employees is ordinarily' required to show deliberate indifference. . . As noted above, Peña fails sufficiently to plead such a pattern. Peña suggests, in the alternative, that the single incident in which she was tased plausibly suggests deliberate indifference by the city. Though it is true that 'a plaintiff may establish deliberate indifference' through 'a single incident,'. . . Peña's allegations lie well beyond the reach of this narrow exception. . . .Our caselaw suggests, however, that the exception is generally reserved for those cases in which the government actor was provided no training whatsoever. In *Brown v. Bryan County*, 219 F.3d 450, 453−54, 462 (5th Cir. 2000), we held the single-incident exception satisfied where a reserve deputy, with '*no training*' from the police department applied excessive force during a car chase. Our later decisions have distinguished *Brown*, emphasizing that 'there is a difference between a *complete failure to train*[ ] ... and a failure to train in one limited area.'. . Peña's proposed complaint acknowledges that Solis and Salinas received taser training from other officers, so her allegations cannot satisfy the exacting test for the narrow single-incident exception."); ***D'Alessandro v. City of New York***, 713 F. App'x 1, 8, 10-11 (2d Cir. 2017) ("[I]f a district attorney or an assistant district attorney acts as a prosecutor, she is an agent of the State, and therefore immune from suit in her official capacity. . . But if a suit centers 'on the administration of the district attorney's office'—that is, on the 'office policy' that the district attorney sets—then the district attorney is 'considered a municipal policymaker,' and the Eleventh Amendment does not immunize him from suit. . . . D'Alessandro acknowledges that *Monell* generally requires a plaintiff to establish a pattern or practice of similar constitutional violations. He insists, however, that his complaint sufficiently alleges such a pattern or practice—or, alternatively, that liability may attach here based on the 'single incident' of his own case. As to both points, we disagree. The Supreme Court has emphasized that '[a] municipality's culpability for a deprivation of rights [under § 1983] is at its most tenuous where a claim turns on a failure to train.'. . To establish a 'failure to train' claim, a plaintiff must generally demonstrate that there has been a 'pattern of similar constitutional violations by untrained employees.'. . Only such a pattern may 'ordinarily' be said to put the municipality on notice of its employees' constitutional violations. . . D'Alessandro's complaint does not sufficiently allege a pattern of similar constitutional violations by the District Attorney's Office. The complaint never mentions specific instances of prosecutorial misconduct beyond D'Alessandro's own case. Rather, the complaint merely insists—over and over again, in a conclusory fashion—that a pattern or custom of misconduct existed. . . . To be sure, D'Alessandro correctly notes that 'in a narrow range of circumstances,' a plaintiff can establish a 'failure to train' claim based on a single incident. . . D'Alessandro's specific argument, however, is squarely foreclosed by *Connick*. The *Connick* Court explained that because prosecutors are subject to a rigorous 'regime of legal training and professional responsibility,' a municipality cannot be said to be on notice of a recurrent problem in a district attorney's office simply because a prosecutor erred in one case. . . As a result, D'Alessandro cannot sustain a 'failure to train' claim based on the 'single incident' of Morris's actions."); ***Mann v. Palmerton Area Sch. Dist.***, 872 F.3d 165, 175 (3d Cir. 2017) ("In

this case there is no evidence of a pattern of recurring head injuries in the Palmerton Area football program. Nor is there evidence that Walkowiak or any other member of the coaching staff deliberately exposed injured players to the continuing risk of harm that playing football poses. In the context of the *Monell* claim, it is also significant that the Pennsylvania General Assembly did not pass legislation that mandated training for coaches to prevent concussions until November 9, 2011, and the legislation did not even go into effect until July of 2012. . . Under these circumstances there is no basis for concluding that a policy or custom of Palmerton Area or its failure to provide more intense concussion training to its coaches caused a violation of Sheldon's constitutional rights."); ***Estate of Perry v. Wenzel***, 872 F.3d 439, 461 (7th Cir. 2017) ("Perry asserts that Chief Flynn and the City of Milwaukee are liable under *Monell* for two reasons. First, because the Police Department and its policymakers failed to institute an internal review of in-custody deaths and to discipline officers for their involvement in those incidents. Second, because the Police Department had an unwritten policy of ignoring its detainees' medical complaints, particularly complaints regarding trouble breathing. Perry contends that there was a *de facto* policy of failing to care for the medical needs of prisoners in the City's custody. But to support this assertion, Perry simply refers to the allegations in his Amended Complaint that there were 12 in-custody deaths prior to the night he was taken into custody and that no investigation followed those deaths. . . This is not sufficient to meet his burden at summary judgment, as a plaintiff must do more than simply point to the allegations in his complaint. . . Further, it is also well-established that Perry must do more than simply rely upon his own experience to invoke *Monell* liability. . . Therefore, Perry's *Monell* claim based upon the City's failure to adequately investigate in-custody deaths and to discipline its officers for their involvement in these incidents fails, and summary judgment was appropriate."); ***Rivera v. Bonner***, 952 F.3d 560, 566-67 (5th Cir. 2017) ("It does not require an enormous leap to connect an applicant's prior arrests for sex crimes with at least some risk—though perhaps not a plainly obvious one—that the applicant might sexually assault detainees at a jail. . . . As illustrated by the instant case, officers in detention facilities are often able to exercise almost complete control over detainees, which creates real risks that officers will sexually assault the people in their care. These risks have received substantial and deserved attention and should, by now, be well-known to corrections officials. Accordingly, when hiring officers for detention facilities, officials must be careful to thoroughly examine applicants' backgrounds and diligently inquire about the conduct underlying any prior offenses. . . . Nevertheless, under the specific circumstances of this case, the connection between Fierros's prior arrests and the injury to Rivera is not strong enough to show that Appellees were deliberately indifferent in hiring him. Much like the officer in *Brown*, Fierros's prior arrests for indecency with a child by sexual contact 'may well have made him an extremely poor candidate' for a position as jailer. . . But Fierros's juvenile record provided no detail regarding the alleged offenses, and there was no evidence that Fierros was ever charged or convicted. . . . Fierros was fifteen years old at that point, and it is entirely possible that he was arrested simply for engaging in uncoerced sexual activity with another minor who was under the age of consent—acts that would not necessarily evince an obvious risk that Fierros would engage in future sexual violence. . . .Because the information available to Appellees was vague and inconclusive, a jury could not find that a plainly obvious consequence of hiring Fierros was that he would sexually assault a detainee. We hold that

Rivera has failed to allege facts sufficient to show that Appellees were deliberately indifferent to known or obvious risks associated with hiring Fierros."); ***Hicks-Fields v. Harris County***, 860 F.3d 803, 811-12 (5th Cir. 2017) ("While it may in theory be possible to establish the inadequacy of a training program with a single incident, . . . 'adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.'. . Plaintiffs allege several training shortcomings, two of which come closer to stating a viable claim: (1) that officers were not properly trained in the use-of-force and (2) that officers were not properly trained in the rendition of medical aid. Again, Plaintiffs primarily rely on the DOJ report as evidence of training deficiencies. But the allegations of the DOJ report are here weak evidence, at best, of a failure to train. Regarding excessive force, the Department's criticisms largely center on improper training regarding restraining prisoners and cell extraction techniques, neither of which are directly at issue here. As for medical aid training, Plaintiffs cite to page twenty-three of the report, which states that '[t]he Jail should increase staff training to ensure that staff is prepared to implement emergency procedures and operate emergency equipment [in] the event of an emergency.' The quoted language is from a section labeled 'Sanitation and Life Safety' and appears to address training in the use of fire safety equipment. Plaintiffs have failed to produce competent summary judgment evidence of Harris County's failure to train regarding responses to assaults by inmates and medical aid following a response incident."); ***Brossart v. Janke***, 859 F.3d 616, 627-28 (8th Cir. 2017) ("A municipal policy or practice is unconstitutional 'on its face' where the policy or practice 'itself violates federal law, or directs an employee to do so.'. . Neither the Nelson County Taser Policy or Use of Force Continuum directs an employee to violate the Fourth Amendment. We concluded that a similar taser policy was facially constitutional in *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 992 (8th Cir. 2015). Plaintiffs, who first briefed this argument in their Reply Brief, argue that the Taser Policy is facially unconstitutional because it permits the use of a taser on non-violent individuals, and 'failure to discourage the use of tasers against non-violent subjects can lead to constitutional violations.' The argument is both untimely and without merit. '[A] written policy that is facially constitutional, but fails to give detailed guidance that might have averted a constitutional violation by an employee, does not itself give rise to municipal liability.'. . A municipality may also be liable where its policies are lawful on their face but municipal action, such as failure to train or supervise, 'was taken with deliberate indifference as to its known or obvious consequences' and 'led an employee to violate a plaintiff's rights.'. . As we have explained, plaintiffs' failure to train claim against Nelson County is foreclosed by our conclusion that Braathen's tasing of Rodney and Thomas did not constitute excessive force. Moreover, the absence of prior complaints to Nelson County of improper taser use means there was no pattern of constitutional violations demonstrating that 'the need for more or different training [was] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'"); ***Payne v. Sevier County***, 681 F. App'x 443, 447 (6th Cir. 2017) ("According to Payne, the policy that harmed him is the County's alleged practice of letting LPNs diagnose and treat inmates without any supervision from a doctor. That is a problem, Payne contends, because LPNs are not trained to diagnose and treat ailments on their own. As a threshold matter, the purported policy is not facially unconstitutional. Just like a statute,

a county policy is facially unconstitutional only if "'he [policy] is unconstitutional in all of its applications.'. . And unsupervised LPNs can—and presumably often do—provide constitutionally adequate medical care. Thus, to establish that the County's use of LPNs constitutes a policy, Payne needed to prove that the practice amounts to deliberate indifference. Payne has not made that showing. He presented no evidence that the LPNs provided subpar treatment to anyone but him. He therefore failed to demonstrate a pattern of 'prior unconstitutional actions' caused by the purported policy. . .Nor did he show that the County's use of LPNs would obviously result in Eighth Amendment violations. Again, to violate the Eighth Amendment, a medical professional must act with deliberate indifference, meaning that she must recognize and consciously disregard a substantial risk to an inmate's health. . .Payne has failed to present evidence that the County's putative policy would cause LPNs to act with that kind of indifference. He has therefore failed to prove the existence of a County policy that harmed him."); ***Mendoza v. United States Immigration & Customs Enforcement***, 849 F.3d 408, 420 (8th Cir. 2017) ("Even if there were no policies or training on how to handle ICE detainers, there must first be an obvious need for the training before a failure to have it will be considered a constitutional violation. . . .Mendoza's real complaint is that the training and policies in place did not include certain steps relevant to Mendoza's particular situation that might have prevented this mistake. However, '[i]n virtually every instance where a person has [allegedly] had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident.'. . Here, there was general training on ICE detainers but not specific training for this particular situation. Lack of particularized training that might have prevented Mendoza's three-day detention does not establish a constitutional violation. . . Each of the employees allegedly made independent mistakes in their various jobs. Their actions cannot reasonably be attributed to a defective governmental policy or custom. Additionally, the claims against Davis and the County automatically fail for lack of an underlying constitutional violation. . . Thus, the district court was correct in granting summary judgment in favor of Davis and the County on Mendoza's claims of supervisory and municipal liability under § 1983."); ***Estate of Alvarado v. Shavatt***, 673 F. App'x 777, 778 (9th Cir. 2017) ("In *Board of the County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), the Supreme Court established the standard of liability for hiring decisions: 'Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."'. . The Supreme Court explained that for liability to exist, there must be 'a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff.'. . 'The connection between the background of the particular applicant and the specific constitutional violation alleged must be strong.'. .Applying that standard to the allegations in this case, we conclude that Plaintiffs have failed to state a claim for deliberate indifference in hiring. . . Although Tackett's previous law enforcement record included several incidents in which Tackett had committed unlawful searches and seizures, it did not include any incident or other conduct that made it 'plainly obvious' that it was 'highly likely' that, if hired, he would 'inflict the *particular* injury' that Tachiquin suffered—seizure accomplished through firing a gun, causing her death."); ***Denham v. Corizon Health, Inc.***, 675 F.

App'x 935, 942-44 (11th Cir. 2017) ("Denham argues that Volusia County and Corizon failed to provide the correctional officers at the jail with medical training, despite using the officers to perform 'critical medical duties,' and that this need to train was obvious. This argument fails. Denham failed to produce sufficient evidence to prove that it was obvious that the correctional officers at the Volusia County jail needed 'more or different' training. This standard is difficult to meet. The Supreme Court has never determined that the need for 'more or different' training was obvious. It has 'given only a hypothetical example of a need to train being "so obvious" without prior constitutional violations: the use of deadly force where firearms are provided to police officers.'. . The facts in this appeal are not analogous to this hypothetical. Denham contends that it was obvious that the officers at the jail needed medical training because Volusia County and Corizon used the officers 'to perform critical medical duties.' But the record does not establish that the officers performed 'critical medical duties,' let alone medical duties. In fact, the officers *were not permitted* to perform the functions of medical staff, except in emergency situations, for which the officers were provided emergency medical training. To whatever extent the officers needed training to deal with 'split-second decisions with life-or-death consequences[,]' like armed police contemplating the use of deadly force, *Connick v. Thompson*, 563 U.S. 51, 64 (2011), that training was provided by virtue of the emergency medical training. Because Denham failed to identify a pattern of similar constitutional violations, she also has not established that the Volusia County officers so often violate constitutional rights that the need for further non-emergency medical-services training must have been plainly obvious to the Volusia County policymakers. . . She cites two incidents—the incident involving Veira and one previous incident where an officer found a dead body. But even assuming that this prior incident constitutes a 'similar constitutional violation,' we have declined to hold a supervisor liable for failure to train where the plaintiff provided evidence of a prior, similar incident with facts similar to the plaintiff's. *Keith v. DeKalb Cty.*, 749 F.3d 1034, 1053 (11th Cir. 2014). We determined that the one prior 'incident did not provide the requisite notice to [the supervisor] that the training provided to detention officers was constitutionally deficient.'. . Likewise, ten complaints filed against one officer did not establish that city officials were aware of past police misconduct because there was no evidence that the past complaints had merit. . . In contrast, we held a city liable where '[t]he evidence revealed *several* incidents involving the use of unreasonable and excessive force by police officers' that established that the 'city had knowledge of improper police conduct, but failed to take proper remedial action.'. . Denham has produced only two incidents. These incidents do not establish sufficient evidence for a jury to find a pattern of constitutional violations supporting Denham's theory of liability for failure to train on non-emergency medical services. . . .Assuming that 'providing inadequate medical care' could be a custom and assuming that the medical care provided to Denham was inadequate, Denham failed to present evidence of other incidents that prove that Corizon had a custom of providing inadequate medical care. . . .Finally, Denham also seeks to hold Volusia County liable for Veira's death based on an alleged policy or custom of understaffing at the jail. She relies on the declarations of two former Volusia County correctional officers and a licensed practical nurse at the jail to support her assertion. These declarations, however, are insufficient to establish Volusia County's liability in this case. To survive summary judgment, Denham must produce sufficient evidence that a policymaker's specific budget decision

was highly likely, and not simply more likely, to inflict a particular injury. . . As we stated in *McDowell*, to test such a link, we look to whether a complete review of the budget decision and the resulting understaffed jail reveal that the policymaker should have known that Veira's death was a 'plainly obvious consequence' of that decision. . . While the declarations mentioned above may support Denham's contention that the jail was understaffed, Denham has failed to present sufficient evidence that a policymaker's specific budget decision was highly likely to cause, or the 'moving force' behind, Veira's death. . . Although Veira's death was a tragic occurrence, the fact that the County's 'budget practices resulted in understaffing does not amount to a purposeful disregard which would violate any citizen's constitutional rights.'"); ***Denham v. Corizon Health, Inc.***, 675 F. App'x 935, 945 (11th Cir. 2017) (Rosenbaum, J., concurring) ("I concur in the panel's decision that the district court's grant of summary judgment to both Corizon Health and Volusia County must be affirmed on the record in this case. I write separately, however, to note that, as to the County, in the eight prior instances where corrections officers either failed to properly maintain watch over inmates or failed to properly document the inmates' activities, the corrections officers were disciplined by only their immediate supervisors and not by a policymaker for the County. Nor does the record in this case contain any evidence that any County policymaker was ever aware that corrections officers regularly and often with the encouragement of their immediate supervisors, falsified inmate watch records. Had such evidence of a County policymaker's knowledge of this practice existed, the result here would have been different because sufficient evidence exists to create a material issue of fact as to whether the practice of falsifying inmate watch records was so widespread as to constitute a custom or policy of Volusia County. What happened here should not happen again. Counsel for Volusia County conceded during oral argument that the facts adduced in this case have since been 'looked at' by County policymakers and would serve as 'pretty firm evidence' of notice in any future litigation. So I would expect that the County will immediately take all necessary remedial actions to correct the systemic failures identified in this tragic and preventable case."); ***Pecsi v. City of Niles***, 674 F.App'x 544, 546-47 (6th Cir. 2017) ("The Supreme Court held in *Florence v. Board of Chosen Freeholders* that the Fourth Amendment permits suspicionless strip searches of individuals about to enter the general population of a detention facility. . . And lower courts have split over whether the holding applies to police station lockups. *Compare Paulin v. Figlia*, 916 F. Supp. 2d 524, 533 (S.D.N.Y. 2013) (it does), *with Fate v. Charles*, 24 F. Supp. 3d 337, 349 (S.D.N.Y. 2014) (it does not). It's also unclear whether there is necessarily a reasonable suspicion to strip search a person arrested for a drug offense. *See Jacobson v. McCormick*, 763 F.3d 914, 917–18 (8th Cir. 2014). Be all that as it may, we need not reach these questions. The dispositive reality is that the City did not have a blanket strip-search policy for drug arrestees. Three Niles Police Department officers testified, all without contradiction, that an officer may conduct a strip search only if he thinks an arrestee brought contraband into the police station. Accordingly, even if we assume for the sake of argument that a reasonable-suspicion standard applies to strip searches of drug arrestees at police station lockups, the City's policy meets it. . . .In Pecsi's eyes, the City showed deliberate indifference merely because it permitted officers to strip search arrestees and remove them from their cells without first getting approval from a supervisor. But the Niles Police Department did not have a pattern of illegal strip searches or sexual assaults by its officers that would have notified them of the need

for closer supervision. The duty to supervise is not a duty to micromanage. A municipality does not open itself up to liability every time it delegates power to employees. The City, true enough, gave Cross the 'opportunity' to abuse Pecsi by empowering Cross to strip search him and remove him from his cell, but 'opportunity alone, without reason to suspect that it will lead to a constitutional violation, does not establish deliberate indifference.' *Mize v. Tedford*, 375 F. App'x 497, 501 (6th Cir. 2010). To hold otherwise would create the '*de facto respondeat superior* liability' that the Supreme Court has assiduously avoided imposing on city governments under § 1983. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). It matters not whether the City complied with a Michigan statute requiring officers to prepare a written report of every strip search. . . It's not clear how requiring officers to write such reports would have changed Cross's behavior, as someone of his ilk surely would have described only that there was a strip search (and why), not exactly what he did on top of that. The issue at any rate is whether the police department's supervision was constitutionally deficient, not whether it satisfied a higher standard created by state law. . .Pecsi adds that the City was deliberately indifferent to the risk posed by Cross, who had a record of reckless conduct. But none of Cross's actions put the City on notice that he had the propensity to commit sexual assault. Three of the four incidents identified by Pecsi—passing bad checks, speeding and driving on a suspended license, and lying to a superior officer—had nothing to do with this kind of incident. They were nonviolent and did not raise the possibility that Cross might commit a far more serious crime. Chief Huff investigated each incident and disciplined Cross as appropriate."); ***Brown v. Battle Creek Police Dep't.***, 844 F.3d 556, 574-75 (6th Cir. 2016) ("Plaintiffs argue that the City did not have a policy instructing officers on when and in what circumstances they should use deadly force against animals. They further claim that there was an unofficial tally system wherein officers would keep a running list of the animals they shot by putting stickers on their lockers to 'brag[ ]' about it, and that it was not uncommon for officers to encounter animals during searches or in the scope of their duties. . . With regard to the tally system, Plaintiffs presented evidence from Officers Angel Rivera, Brad Palmer, Joseph Wilder, and Scott Marshall. Officer Rivera testified that 'it was very common that officers would talk about [how many animals they shot],' and that he could not identify individual officers who did this because 'there were so many of them just bragging about it.'. . With regard to the frequency with which the City's officers encounter animals during searches, Officer Klein testified that '[m]any of the search warrants [he and his team] have executed [have] [involved] aggressive dogs,' and that it was 'not uncommon' when he was 'working road patrol' and when he was on the ERT. . .Despite this evidence, we find that Plaintiffs failed to provide evidence showing that 'the need' for a specific policy and/or training 'was so obvious and the likelihood that the inadequacy would result in the violation of constitutional rights was so great that the [City] as an entity can be held liable here for the extent of [Plaintiffs'] determined damages.'. .This is largely because there was no evidence indicating that participation in the tally system was systematic or widespread, and there was no evidence that the police department's supervisory personnel sanctioned such a system or even knew of its existence. For one, Plaintiffs' constitutional rights were not violated. The seizures of the dogs in this case were reasonable given the specific circumstances surrounding the raid. This finding alone is fatal to their municipal liability claim. . .Second, Plaintiffs did not provide any evidence demonstrating prior instances of unconstitutional dog shootings by the City's police

officers. Plaintiffs appear to generally claim that because there have been numerous instances of animal deaths resulting from officer shootings during searches and that officers face animals frequently, these facts demonstrate prior instances of unconstitutional conduct. Plaintiffs do not show how these prior animal shootings were unconstitutional. . . Third, this case does not present one of those rare circumstances in which 'the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations.'. . The tally system Plaintiffs mention, while not an example of model police behavior, does not provide proof of a pre-existing pattern of similar constitutional violations by police officers. Plaintiffs were unable to provide information as to the number of officers that participated in this tally system, the number of shootings that were tallied, or the number of shootings that were unreasonable exercises of force. Unsubstantiated testimony from a few officers generally describing the tally system while not providing details about the number of officers participating in it or the number of shootings tallied is neither persuasive nor meaningful. Notwithstanding, Plaintiffs provided no evidence that this tally system was sanctioned or encouraged by the BCPD, or that BCPD knew about it and knowingly disregarded it. As the district court stated, based on the 'present record, even crediting everything that's in the record, there's no history, credible history at least, that leads to needless killing of animals in the course of searches in Battle Creek ... and ... under those circumstances the fairly stringent standards for municipal liability by inattention could [not] be met here.'. . Therefore, we find that the district court did not err in granting the City's motion for summary judgment."); ***Livezey v. The City of Malakoff***, 657 F. App'x 274, 276-78 & n.1 (5th Cir. 2016) (per curiam) ("Fierro has a disciplinary record as a police officer. Prior to being hired by the Malakoff Police Department, Fierro worked for the Dallas Police Department. He was terminated by the Dallas Police Department when he rear-ended another vehicle, fled the scene at over 100 mph, subsequently caused another accident, and then filed a false report. Fierro appealed, and his punishment was reduced to a suspension. Fierro, however, voluntarily retired as he was under investigation for other disciplinary matters. He was then hired by the Ferris Police Department, and later terminated under similar circumstances. In sum, his employment history reflects repeated disciplinary actions for vehicle accidents, violations of vehicular chase policies, and filing of false reports. As for the events related to Livezey's death, Fierro was indicted on charges of aggravated assault with a deadly weapon, reckless driving, and official oppression. Fierro accepted a plea deal and was sentenced to nine years' deferred adjudication, fines and court costs, and community service. He was also required to surrender his Texas Peace Officer's License permanently. Livezey's widow, Jeanette, and his children William, John, Susan, and Sandra, brought suit, asserting claims against the defendants for improper hiring, and failure to train and supervise. . . .Before hiring Fierro, Chief Mitchell reviewed Fierro's personal history disclosure forms, requested prior employment records, did a background investigation, and called the Dallas and Ferris police departments. Given that *Brown* held that an almost complete lack of an investigation was not enough to show deliberate indifference, Chief Mitchell's investigation in this case precludes a determination of deliberate indifference. While the plaintiffs rely on Fierro's prior disciplinary record as an officer in Dallas and Ferris, it cannot be said it was plainly obvious that his hiring would cause the specific constitutional violation in question. We have held that failing to respond to a history of 'bad or unwise acts' that 'demonstrate

lack of judgment, crudity, and, perhaps illegalities' is not enough for deliberate indifference. . . . Next, regarding failure to train, the plaintiffs must show: (1) the City's 'training policy or procedure was inadequate'; (2) 'the inadequate training policy was a "moving force" in causing a violation of the plaintiff's rights'; and (3) the City 'was deliberately indifferent in adopting its training policy.'. . There is no indication the City's training was inadequate. Each Malakoff police officer was required to meet state requirements established by the Texas Commission on Law Enforcement ("TCOLE"). The plaintiffs provided no evidence or argument that any officer hired by Malakoff, including Fierro, failed to meet these requirements. The meeting of state standards means there can be no liability unless the plaintiff shows 'that this legal minimum of training was inadequate....' *Benavides v. Cnty. of Wilson*, 955 F.2d 968, 973 (5th Cir. 1992). The plaintiffs provided no evidence, and indeed offered no argument, that the TCOLE standards are inadequate. In any case, there is no evidence that the City or Chief Mitchell deliberately failed to train officers or were indifferent to the need for additional police policies and regulations. The plaintiffs finally argue that Chief Mitchell and the City failed to supervise Fierro adequately. For municipal liability to rest on this ground, the plaintiffs must show that '(1) the supervisor ... failed to supervise ... the subordinate official; (2) a causal link exists between the failure to ... supervise and the violation of the plaintiff's rights; and (3) the failure to ... supervise amounts to deliberate indifference.'. . 'Proof of more than a single instance of the lack of training or supervision causing a violation of constitutional rights is normally required before such lack of training or supervision constitutes deliberate indifference.'. .The plaintiffs allege that a prior traffic-stop incident involving Fierro is enough to establish a pattern of misconduct or violations of which the City or Chief Mitchell were deliberately indifferent. This prior stop, though, did not result in a complaint being filed against Fierro. Further, while the evidence of this stop suggests that Fierro overreacted, the situation did not involve an arrest, any physical force or reckless driving on the part of Fierro, and the driver that was pulled over admitted that he unintentionally cut Fierro off and was going 75 mph in a 50–mph zone. The events are dissimilar enough not to establish a pattern of violations by Fierro. Regardless, a single prior instance would not establish a pattern. . . . The plaintiffs also argue that Fierro's prior disciplinary record at the Dallas and Ferris Police Departments can help establish a pattern of misconduct. As discussed in the Facts section, however, Fierro's prior record indicates sustained complaints for violations of vehicular chase policies and the filing of false reports. The current case deals mainly with unlawful arrest and excessive force. Fierro's prior record, therefore, does not establish a pattern of violations relevant to this case. . . .The district court properly found no municipal liability for the City."); ***Bickerstaff v. Lucarelli***, 830 F.3d 388, 402 (6th Cir. 2016) ("Bickerstaff claims that the City of Cleveland had a policy of inadequate training and supervision because it allowed the police officers who supervised Lucarelli to do nothing to discipline him or stop him from engaging in inappropriate relationships. But to prevail on such a theory, Bickerstaff must show that the City of Cleveland's policy was 'representative of (1) a clear and persistent pattern of illegal activity, (2) which the [City] knew or should have known about, (3) yet remained deliberately indifferent about, and (4) that the [City's] custom was the cause' of the deprivation of her constitutional rights. . . Bickerstaff's speculative allegations fall short of stating a claim against the City. Beyond the blanket assertions that the City 'condon[ed]' or 'tolerat [ed]' police officer misconduct, she points to no facts that would indicate the existence of such an official policy or

custom. Nor does Bickerstaff put forth any facts suggesting that the City ignored a 'clear and persistent pattern' of misconduct. . . With no factual allegations showing a formal policy or any prior incidents to support the City of Cleveland's adoption of such an informal practice or custom, Bickerstaff's *Monell* municipal-liability claim accordingly fails."); ***Crepa v. Cochise County***, 667 F. App'x 605, 606 (9th Cir. 2016) ("Before hiring Cruver, Cochise County and Dever knew or should have known that Cruver's employment history included: a rejected application for a different law enforcement position; two sexual harassment complaints by coworkers; 'serious' and 'critical' admissions to the pre-hire screening psychologist, including offensive remarks and jokes about minorities, women, and other protected groups; and the death of an arrestee in his custody. After Cochise County hired Cruver, an arrestee alleged that Cruver used excessive force against her. These facts, taken as true, do not support the conclusion that 'adequate scrutiny of [Cruver's] background would lead a reasonable policymaker to conclude that the *plainly obvious* consequence of the decision to hire [Cruver],'. . . would be that he would violate Crepea's Fourth and Fourteenth Amendment rights by forcibly entering her property and sexually assaulting her."); ***Richardson v. Huber Hts. City Schools Bd. of Ed.***, 651 F. App'x 362, 366-68 (6th Cir. 2016) ("[A] jury would . . . be justified in concluding that school officials turned a blind eye to hazing at Wayne—particularly within its athletic programs—to the extent that a comment from a coach inviting upperclassmen to 'take care of' a problem elicited sexual assault as a *preferred alternative* to outright violence. Although a jury could find that Soukup may not have precisely envisioned this incident, the evidence supports the inference that school officials could not have been unaware of this culture of student leadership via bullying, and the risk it posed. . . Nevertheless, Richardson's task is not complete. Municipal lability will not attach absent evidence sufficient to 'show that the need to act is so obvious that the School Board's "conscious" decision not to act can be said to amount to a "policy" of deliberate indifference.'. . Richardson must demonstrate:

(1) the existence of a clear and persistent pattern of ... abuse by school employees; (2) notice or constructive notice on the part of the School Board; (3) the School Board's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and (4) that the School Board's custom was the 'moving force' or direct causal link in the constitutional deprivation. . . . Richardson offers no argument or evidence in support of municipal liability. With regard to the first three prongs, even assuming a jury accepts that there was an 'environment of physical abuse and bullying' at Wayne, Richardson must still show 'a clear and persistent pattern of abuse' by school employees—not merely by fellow students—to prevail, and that the Board had notice of it. . . He fails. Moreover, Richardson cannot show that the Board acted with deliberate indifference. In fact, there is evidence of the school's previous, successful responses to instances of bullying or hazing by students. Further, after the incident, K.R.'s assailants were swiftly punished, and inappropriate touching became nearly non-existent afterward. Even if we regard the Board's reactions to reports of abuse as insufficient, more is required: ' "[d]eliberate indifference" in this context does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to sexual abuse.'. . Critically, Richardson does not attempt to explain the fourth prong of the *Doe* test—how the Board's 'custom' was the 'moving force' or direct causal link of his injury. . . This element is 'a causation inquiry,' requiring a demonstration of both 'cause

in fact' as well as 'proximate cause.'. . Even assuming that Richardson can show that the Board's inaction and indifference to the culture of bullying at Wayne High School was a 'but for' cause of K.R.'s injury, he cannot prove proximate cause—that is, he cannot show that 'it was reasonably foreseeable that the complained of harm would befall [K.R.] as a result of the [Board's] conduct.'. . Put simply, there is no evidence in the record that the Board could foresee that Soukup or any coach at Wayne would authorize upperclassmen to sexually assault underclassmen as a method of reinforcing team discipline. . . No testimony, beyond a brief discussion of a single coach on the *basketball* team, has accused coaches of fostering such behavior. Accordingly, we need not draw the unreasonable inference that the Board should have foreseen it. . . . Although Richardson has offered significant evidence of an inappropriate and abusive culture among some students at Wayne High School, and of a special danger to K.R., he cannot establish municipality liability under *Monell*. Summary judgment for the Board was thus appropriate, and we therefore affirm."); ***Brown v. Chapman***, 814 F.3d 447, 462-64 (6th Cir. 2016) ("Plaintiff . . . argues that the City of Cleveland is liable for Chapman's use of excessive force. Plaintiff offers three different theories of municipal liability: that the City's taser policy was unlawful, that the City inadequately trained its officers, and that the City ratified Chapman's violation of Brown's constitutional rights by not conducting a thorough investigation. . . Plaintiff's ratification theory fails because, as discussed above, it requires that plaintiff make allegations against a specific final decisionmaker and plaintiff does not make those allegations. This leaves two theories of liability. . . .Plaintiff claims that the taser policy in place at the time of Brown's death dictated that officers discharge their tasers at 'center mass.'. . Because Chapman fired his taser at Brown's chest, plaintiff argues that this policy was the 'moving force' behind the constitutional violation. . . For the purposes of summary judgment, we agree. When viewing the evidence in the light most favorable to the plaintiff, a reasonable jury could find that the City's taser policy was the moving force behind the violation of Brown's Fourth Amendment rights. . . . [On the inadequate training claim, i]n order to impose liability on the City of Cleveland, plaintiff must show '(1) that a training program is inadequate to the tasks that the officers must perform; (2) that the inadequacy is the result of the [City's] deliberate indifference; and (3) that the inadequacy is closely related to or actually caused the plaintiff's injury.'. .Plaintiff meets the first prong easily with her argument that the City did not adequately train its officers how to use a taser—a task they are required to perform. . . As for the second prong, we have interpreted *City of Canton v. Harris* 'as recognizing at least two situations in which inadequate training could be found to be the result of deliberate indifference.'. . . Plaintiff does not allege that the City of Cleveland 'fail[ed] to act in response to repeated complaints of constitutional violations by its officers.'. . Thus, she must show that the City 'fail[ed] to provide adequate training in light of foreseeable consequences.'. . Plaintiff notes that although Taser International, Inc. (the company that makes the City's tasers) updated its training materials several times before December 31, 2010, the City continued to use old training materials. The difference, plaintiff contends, is significant. The updated materials told officers to avoid chest shots when possible in order to 'reduce[ ] the risk of affecting the heart.'. . The old materials said that '[t]he effective target zone for the TASER device is almost the entire body,' with the exceptions being the head and throat. . . In September 2010, the City's police department trained Chapman using the old materials even though updated materials had been available since May 2010. . . Thus, just

months before Chapman's altercation with Brown, the City instructed Chapman that it was safe to discharge his taser at a suspect's chest. Plaintiff argues that the consequences of this inadequate training—that officers would discharge their tasers at suspects' chests—were foreseeable. We agree. Finally, plaintiff must show 'that the inadequacy is closely related to or actually caused [the] injury.'. . Here, the inadequacy is due to the program's failure to instruct officers to avoid discharging their tasers at suspects' chests, and the intrusion on Brown's Fourth Amendment rights involved the discharge of a taser at his chest. Accordingly, we conclude that, when viewing the evidence in the light most favorable to plaintiff, a reasonable jury could find that there was a direct causal link between the City's inadequate training and the intrusion on Brown's Fourth Amendment rights. Thus, we reverse the district court's grant of summary judgment to the City on plaintiff's excessive-force claim."); ***Blue v. District of Columbia,*** 811 F.3d 14, 19-20 (D.C. Cir. 2015) ("[Plaintiff] contends that the District's single decision not to reprimand Weismiller after the District investigated the relationship demonstrates a municipal policy of ignoring sexual abuse by teachers. But Blue has cited no decision by this circuit, nor are we aware of one, that supports such a theory of municipal liability. As Blue points out, other circuits have recognized that theory, but in the cases Blue cites, the municipality failed to respond to improper actions by numerous municipal officials. . . . This case is quite different. Not only does it involve the alleged misbehavior of only one municipal employee, but, more important, DCPS's May 2009 investigation concluded that Weismiller never had a sexual relationship with Blue. The District therefore had no reason to fire Weismiller. . . .Blue's second asserted basis for a municipal policy—the District's failure to properly screen Weismiller before hiring him—warrants somewhat more analysis. Blue contends that the District's failure to properly screen Weismiller qualified as a municipal policy because it was a single decision by a final policymaker. The district court rejected this theory because Blue failed to 'allege[ ] ... that the decision to hire Weismiller without an adequate background check was made by a final municipal policymaker.'. . Instead, Blue alleged only that '[the] District has "a custom, policy or practice of failing to adequately investigate the backgrounds of its teachers before hiring them."'. . We agree with the district court that Blue's assertion is insufficient to support a claim that the District, in failing to properly screen Weismiller, acted pursuant to a municipal policy actionable under section 1983. . . . Section 1983 plaintiffs have several ways to allege a municipal policy, each with its own elements. If the plaintiff fails to identify the type of municipal policy at issue, the court would be unable to determine, as required by *Iqbal*'s second step, whether the plaintiff had provided plausible support for her claim. Although the court could try to surmise which theory of municipal liability has the strongest support in the complaint, this is not our role. It therefore follows that to state a valid claim against a municipality under section 1983, a plaintiff must plead the elements of the relevant type of municipal policy. Under this standard, Blue's inadequate screening claim fails because, as she concedes, she never indicated the contours of any type of municipal policy. At most, the complaint suggests that the District made a serious mistake in hiring Weismiller, just as other school districts have done in the past. Although, if true, this would be distressing, the complaint does not allege that the District has a policy of failing to properly screen employees. . . . In other words, in order for the district court to assess whether Blue stated a facially plausible complaint, Blue needed to assert the elements of the type of municipal policy that caused her injury. Blue failed to do so.");

Weiland v. Palm Beach Cnty. Sheriff's Office, 792 F.3d 1313, 1328 (11th Cir. 2015) ("In counts two and four, Weiland claims that the Sheriff's Office maintained two unconstitutional policies: (1) a policy of not training its deputies in the appropriate use of force when seizing mentally ill citizens for transportation to mental health facilities (count two); and (2) a policy of using internal affairs investigations to cover up the use of excessive force against mentally ill citizens (count four). We take the two claims in that order. . . . 'In limited circumstances, a local government's decision not to train certain employees ... to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983.'. . But '[a] pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train.'. . Count two does not allege a pattern of similar constitutional violations by untrained employees. Although it contains the conclusory allegation that the Sheriff's Office was 'on notice' of the need to 'promulgate, implement, and/or oversee' policies pertaining to the 'use of force' appropriate for 'the seizure of mentally ill persons and their transportation to mental health facilities,' no facts are alleged to support that conclusion . . . Instead, it is clear that the claim outlined in count two arises from a single incident and the actions of two deputies. Our analysis is not altered by the fact that evidence of previous incidents is not required to establish city policy if the need to train and supervise in a particular area is 'so obvious' that liability attaches for a single incident. . . The complaint does not allege that the need for specialized training in the constitutional restrictions on the use of force when dealing with mentally ill citizens is 'so obvious' that the failure to provide such training amounts to deliberate indifference. The district court's dismissal of count two is correct."); ***Culbertson v. Lykos***, 790 F.3d 608, 625 (5th Cir. 2015) ("The plaintiffs have alleged no facts as to the lack of a training program, nor are there sufficient allegations to support a contention that it was obvious to Harris County that the lack of training or supervision would result in the retaliation by prosecutors or others against other public employees or governmental contractors. There would also need to be allegations that the alleged retaliatory conduct occurred with such frequency that Harris County was put on notice that training or supervision was needed. . . No such allegations have been made."); ***Kitchen v. Dallas Cnty., Tex.,*** 759 F.3d 468, 485, 486 (5th Cir. 2014) ("[T]he record in this case contains no proof, whether in the form of expert evidence or otherwise, that the extraction of mentally ill inmates from jail cells requires specialized training. . . There is no suggestion, for example, that any other municipality in the United States provides such specialized training to detention officers. Plaintiff–Appellant's evidence therefore does not demonstrate the same level of 'patently obvious' risks of 'recurring constitutional violations' that may occur, as hypothesized by the Supreme Court in *Canton,* 489 U.S. at 390, and *Connick,* 131 S.Ct. at 1361–63, in instances where a municipality sends 'armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force.' . . To summarize, Plaintiff–Appellant has failed to identify any pattern of past constitutional violations similar to the events of the present case, and has not demonstrated that the prospect of constitutional violations should have been 'highly predictable' or 'patently obvious' in the present case. . . Accordingly, Plaintiff–Appellant's claims cannot proceed on the basis that Defendant–Appellee Dallas County failed to provide the proper training to the personnel located in the North Tower."); ***Thomas v. Cumberland County***, 749 F.3d 217, 223, 225-27 (3d Cir. 2014) ("The parties do not challenge the existence of a policy or of a

constitutional violation on appeal. The relevant policy for the purposes of municipal liability is the County's decision not to provide conflict de-escalation and intervention training as a part of pre-service training for corrections officers. The alleged constitutional violation stems from the officers' failure to 'take reasonable measures to protect prisoners from violence at the hands of other prisoners.'. . We will focus on whether the failure to provide pre-service training on conflict de-escalation and intervention amounts to deliberate indifference, and whether this deficiency in training caused Thomas's injury. . . .Thomas advances a single-incident theory of liability, arguing that a jury could find that the CCCF was deliberately indifferent 'when "patently obvious" standards, widely-accepted national standard[s] and training relevant to inmate safety were disregarded, at the same time their Corrections Officers were confronting a combustible jail.'. . To find deliberate indifference from a single-incident violation, the risk of Thomas's injury must be a 'highly predictable consequence' of the CCCF's failure to provide de-escalation and intervention training as a part of pre-service training for corrections officers. . . Thomas put forward evidence that fights regularly occurred in the prison. While these fights are not sufficient to create a pattern of violations, because there is scant evidence that they resulted in constitutional violations, they are relevant to whether his injury was a 'highly predictable consequence' of the failure to train on de-escalation techniques for single-incident liability. A reasonable jury could conclude based on the frequency of fights and the volatile nature of the prison that the 'predictability that an officer lacking [de-escalation and intervention training] to handle that situation will violate rights' and the 'likelihood that the situation will recur' demonstrate deliberate indifference on the County's part. . . Thomas also provided expert opinion evidence that the failure to provide conflict de-escalation and intervention training was a careless and dangerous practice not aligned with prevailing standards. Viewing the evidence in the record, including Dr. Kiekbusch's expert opinion, in the light most favorable to Thomas, a reasonable jury could find that the County acted with deliberate indifference. Thomas's case for single-incident liability falls somewhere between the plainly obvious need to train armed police officers 'in the constitutional limitations on the use of deadly force' in *Canton* . . . and the lack of such an obvious need in *Connick,* where prosecutors had a legal education and ethical obligations and the allegedly necessary training was nuanced. . . . However, the case here is more similar to the hypothetical in *Canton* than to the situation in *Connick.* Like the police officers in *Canton,* corrections officers have no reason to know how or when to de-escalate a conflict to avoid a constitutional violation for failure to protect. Given the frequency of fights occurring between inmates in the CCCF that could lead to constitutional violations for failure to protect, the lack of training here is akin to 'a failure to equip law enforcement officers with specific tools to handle recurring situations.'. . In contrast to *Connick,* the officers here have no reason to have an independent education, knowledge base, or ethical duty that would prepare them to handle the volatile conflicts that might lead to inmate-on-inmate violence. Also unlike in *Connick,* there is no nuance to the training Thomas seeks to require. While the prosecutors in *Connick* had some knowledge of *Brady*'s requirements, corrections officers had no de-escalation or intervention training as a part of their pre-service training. . . .Causation is a requirement for failure-to-train liability that is separate from deliberate indifference; however, '[t]he high degree of predictability [in a single-incident case] may also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so

predictable.'. . . Thomas put forward evidence from Santiago—the first inmate who struck Thomas—that the officers could have stopped the argument before violence broke out. He also presented an inmate witness's statement that the officers allowed the inmates to fight. There is ample evidence in the record that Martinez was present throughout the argument, which lasted for several minutes, before Thomas was struck. Thomas offered expert opinion evidence that the CCCF's lack of de-escalation training, among other things, contributed to the serious injuries that Thomas sustained. . . . Presented with this evidence and using their judgment and common sense, a reasonable jury could have concluded that the lack of training in conflict de-escalation and intervention caused Thomas's injuries."); ***D'Ambrosio v. Marino***, 747 F.3d 378, 386-88 (6th Cir. 2014) ("D'Ambrosio . . . contends that his complaint identified an unconstitutional county policy. Explicitly conceding that he is not pursuing an argument that the county failed to properly train its prosecutors about their *Brady* obligations, D'Ambrosio instead argues that his complaint adequately alleged that county prosecutors habitually ignored criminal defendants' constitutional rights in a manner that was 'so persistent and widespread as to practically have the force of law.'. . In this respect, he appears to be arguing not that the prosecutors themselves established a policy of treating criminal defendants unconstitutionally, but that they were simply acting in accordance with a preexisting and ubiquitous county practice that can fairly be deemed to have originated with or at some point been adopted by the municipality. . . But this argument is belied by the allegations of the complaint. The complaint focuses on Marino's rather storied history of improper conduct, alleging that 'Marino had a policy of not allowing defense attorneys to copy relevant documents regarding the case,' that 'Marino and Mason ... created and maintained an official policy' to prosecute D'Ambrosio 'without concern for his constitutional rights,' that 'Marino and Mason ... created and maintained an official policy ... of failing to adequately train' their fellow prosecutors about their *Brady* obligations, and that Marino has a 'shameful track record of breaking rules to win convictions.' Other than that, the complaint alleges only that '[t]he general practice of withholding exculpatory evidence ... was so common and well settled as to constitute an official policy' of the Prosecutor's Office. In support of this assertion, the complaint alleges that one other prosecutor believed that the entire Prosecutor's Office possessed a view of *Brady* obligations that was as 'similarly limited' as Marino's. The complaint also alleges that this prosecutor handled D'Ambrosio's case in the same manner that he has handled all of the other cases that he has prosecuted. These allegations are insufficient to plausibly allege the existence of an official county policy of violating criminal defendants' constitutional rights. The thrust of the complaint is that Marino—and perhaps one or two other members of the Prosecutor's Office—instigated and implemented habitually unconstitutional practices, not that they were following municipal policy in doing so. Municipal liability attaches only where the policy or practice in question is 'attributable to the municipality,' *Heyerman v. Cnty. of Calhoun*, 680 F.3d 642, 648 (6th Cir.2012), but D'Ambrosio's complaint contains no allegations that the practice at issue here was acquiesced to or informed by municipal actors rather than by prosecutors who had adopted the strategy in order to win criminal convictions. . . . Instead of alleging a 'clear and persistent' office-wide pattern of unconstitutional conduct, . . . D'Ambrosio's complaint is limited to allegations regarding the repeated failures of only one prosecutor: Marino. . . . Nor does the complaint plausibly allege the county's 'notice or constructive notice' of habitually unconstitutional conduct. . . .For the *Connick*

Court, four prior *Brady* violations over the course of a decade were not enough to place the prosecutor's office on notice that any sort of action was necessary in order to avoid the *Brady* violations at issue in *Connick*. . . Here, D'Ambrosio claims that the county had sufficient notice of an office-wide practice of persistent unconstitutional conduct by virtue of only one other *Brady* violation and nine other non-*Brady* instances of prosecutorial misconduct—all of which were committed by Marino over two decades. Of these ten cited examples of misconduct, only three had been ruled as improper by the courts prior to D'Ambrosio's conviction in 1989. . .All three of these cases involved Marino's improper trial comments; they did not involve *Brady* violations. . . In *Connick,* four previous *Brady* violations were insufficient to alert the prosecutor's office that another *Brady* violation might occur in the future in the absence of corrective action. Here, the county's knowledge of only three prior instances in which only one of its prosecutors had made improper comments at trial was less. . . This is true even if the county had been aware of Marino's lone other *Brady* violation before a court had identified it as such. Until the county had notice of persistent misconduct, it did not have 'the opportunity to conform to constitutional dictates,' nor could its inaction have caused the deprivation of D'Ambrosio's constitutional rights. . . The county cannot have tacitly approved an unconstitutional policy of which it was unaware. . . As we recognized in D'Ambrosio's previous two appeals to this court, there is no question that the individual prosecutors involved in D'Ambrosio's case violated rights secured to him by the Constitution. But D'Ambrosio's complaint amounts to an attempt to hold the county liable for what Marino and his colleagues did wrong. And this is insufficient to state a claim under *Monell*."); ***Wilson v. Cook County***, 742 F.3d 775, 782-84 (7th Cir. 2014) ("[H]ad the county conducted a thorough background examination prior to allowing Vanaria to work at the hospital, it would have uncovered the fact that he had engaged in grossly inappropriate conduct as recently as seven years earlier. However, it would also have learned that there had been no incidents during the most recent seven-year period of his employment. Given the passage of time without incident and the fact that Vanaria had aged seven years, it is difficult to conclude that Vanaria's misconduct with respect to Almaguer was so obvious that any jury could find causation or deliberate indifference. No doubt Vanaria was more likely to commit sexual misdeeds than someone without his checkered history, but we must recognize that individuals are capable of growth and not necessarily doomed to a life of recidivism. And given that Vanaria was fired from his state position in 1998, it is not implausible to believe that he would have learned from his errors and decided that another infraction would have caused his political support to dry up. Almaguer's argument is more persuasive with the benefit of 20/20 hindsight, but of course we must view things from the perspective of the hospital at the time it hired Vanaria. In 2005, it was far from obvious that he would engage in sexually inappropriate conduct with a complete stranger. Our conclusion is bolstered by a comparison of Vanaria's past conduct with the behavior he exhibited toward Almaguer. Vanaria's *modus operandi* had been one of abuse of power. As a probation officer, he had attempted to trade favorable probation conditions for sexual favors, and his position of supervisory power was what made his proposals possible. By contrast, Vanaria did not exercise any legitimate power over Almaguer. As detailed above, he was able to entice Almaguer through a ruse he concocted, but the manner in which he operated was a sharp deviation from his past misconduct. That is, even if the county had known about his probation history, it could hardly have expected that Vanaria would

have impersonated a human resources employee and lured a complete stranger into the building. He had no history of such conduct. In *Brown* the Supreme Court made clear that it is not enough that a municipality know an employee would be likely to violate a plaintiff's constitutional rights in some kind of general sense . . . . In other words, a plaintiff must connect the dots between the past conduct and the specific constitutional violation. Vanaria's past conduct involved a straightforward abuse of power, whereas in this case his weapon was not power but trickery and lies. Although the acts against Almaguer obviously share some similarities with Vanaria's past conduct—all incidents involve bartering for sexual favors—the lengths he went to in order to dupe Almaguer, someone over whom Vanaria had no legitimate power, do not find a comfortable place within the predictable arc of his past conduct. . . . In sum, we take the Supreme Court seriously when it instructs us to be wary of imposing municipal liability in circumstances like this. . . . Thus, the bar is set high in terms of both culpability (deliberate indifference) and causation, whereby a plaintiff must link the hiring decision to the particular injury alleged. In our view, imposing liability on Cook County under these facts would substitute conjecture and principles of mere negligence for the 'rigorous standards of culpability and causation' the Supreme Court has imposed. . . Simply put, it is too much of a stretch to say that the county not only should have known Vanaria would commit various sexual misdeeds, but that he would also invent a phony position of power that would allow him to violate the bodily integrity of someone he had no business reason to come in contact with. . . Our conclusion means two things. First, it means that the decision to hire Vanaria was not the cause of Almaguer's injury in anything but the 'but for' sense. . . It was not, in other words, the 'moving force' behind the injury. . . Second, and relatedly, it means that the county lacked the requisite mental state of deliberate indifference. For these reasons, we conclude the substantive due process claim was properly dismissed."); ***Schneider v. City of Grand Junction Police Dept.***, 717 F.3d 760, 773 (10th Cir. 2013) ("The evidence indicates that PSA Dyer was *not* a policymaker or decisionmaker for the City with regard to hiring Officer Coyne. He did not make the hiring decision—Chief Gardner did. Consequently, the hiring claim against the City must be based on Chief Gardner's actions or inactions. As discussed above, the background investigation was not inadequate, and, as with PSA Dyer, there is no evidence that Chief Gardner was deliberately indifferent. . . Moreover, no evidence suggested that the City had actual or constructive notice of the need for any additional background investigation. . . Accordingly, we agree with the district court that no reasonable jury could find that the City acted with deliberate indifference in its decision to hire Officer Coyne."); ***Jackson v. Wilkins***, 517 F. App'x 311, 2013 WL 827725, *8, *9 (6th Cir. Mar. 6, 2013) ("The Estate contends that the City was deliberately indifferent to the rights of its citizens when it failed to train its officers on Benton Harbor Police Department General Order 9. That order states in relevant part that, whenever an officer uses a taser on a suspect, the officer should take that suspect 'to a medical facility for clearance prior to transport to the nearest detention facility or other institution.' Had the City trained its officers on General Order 9, the Estate says, Officer Wilkins would have taken Jackson to the hospital, and Jackson would have lived. The problem with this argument is that the City had not formally adopted that order at the time of Jackson's death. And a municipality cannot 'fail to train' its officers on a policy that did not exist. The Estate's real complaint, therefore, is that the City had not adopted General Order 9. But 'the fact that alternative procedures might have better

addressed [Jackson's] particular needs does not show that the [City] was deliberately indifferent[.]'. . The Estate also contends that Officer Wilkins's failure to take Jackson to the hospital proves that the City did not train him properly. But the Estate must point to more than 'an isolated, one-time event' to prove that the City had a policy of inadequate training. . . Instead, it must provide evidence, rather than mere allegation, of 'prior instances of unconstitutional conduct.'. . And the Estate has not done so. As an alternative basis for liability, the Estate argues that Benton Harbor had a policy of failing to discipline its officers for their constitutional violations. Like the failure-to-train claim, however, the Estate must show that Benton Harbor's failure to discipline amounts to 'deliberate indifference.'. . In its attempt to make that showing, the Estate cites only one alleged failure to discipline: the case before us. One example of the City's failure to discipline, however, does not prove that the City had a *policy* of failing to discipline."); ***Atkinson v. City of Mountain View, Mo***., 709 F.3d 1201, 1216 (8th Cir. 2013) ("Notice is the touchstone of deliberate indifference in the context of § 1983 municipal liability. . . Other than the single incident at issue in this case, Atkinson has submitted no evidence of excessive force by Sanders or any other city police officer. Because no reasonable jury could find the city had notice that its lack of written use-of-force policies was likely to result in a constitutional violation, the city's failure to adopt such policies does not create a genuine dispute of material fact. Atkinson has also failed to make a submissible case for municipal liability based on the city's training and supervision of Sanders. Under § 1983, 'a claim for failure to supervise requires the same analysis as a claim for failure to train.'. . Neither claim can succeed without evidence the municipality '[r]eceived notice of a pattern of unconstitutional acts committed by [its employees].'. . Atkinson has presented no evidence indicating the city had reason to believe, before the events giving rise to this case, that its training or supervision of Sanders was inadequate. Absent some form of notice, the city cannot be deliberately indifferent to the risk that its training or supervision of Sanders would result in 'a violation of a particular constitutional or statutory right.'. . Because no reasonable jury could find the city liable under § 1983, the district court correctly granted the city's motion for summary judgment."); ***Campbell v. City of Springboro, Ohio***, 700 F.3d 779, 795, 796 (6th Cir. 2012) (McKeague, J., concurring in part and dissenting in part) ("In evaluating the plaintiffs' failure-to-train claim against the City, the district court correctly relied on the standard set forth in *City of Canton,* 489 U.S. at 390. The court thus nominally recognized that the City's failure to keep up with Spike's training requirements had to (1) amount to a policy of deliberate indifference to an obvious deficiency that could foreseeably result in violation of citizens' constitutional rights, and (2) actually cause plaintiffs' injuries. The district court found that these two requirements were adequately met even though the record contains no history of prior constitutional violations and fails to substantiate a causal connection between the City's failure to keep Spike's training current and either plaintiff's injuries. These defects in the district court's analysis are particularly glaring when the real basis for Clark's exposure to liability is kept in focus—i.e., *Clark's* failure to respond to Spike's engagement of each victim in an objectively reasonable manner under the totality of the circumstances. In other words, there is no causal link in the district court's analysis between the City's failure to keep up with Spike's training and Clark's malevolent or incompetent failure to call Spike off in a reasonable manner. Thus although the City can be held liable for a policy of deliberate indifference to obvious inadequacies in training

or supervision, the record falls short of establishing a sufficient history of canine-unit-related constitutional violations to put the City on notice of obvious inadequacies. Further, the failure-to-train theory against the City suffers from a lack of evidence causally linking any deficiency in training—whether training of Spike or of Clark—to the injuries sustained by plaintiffs. The evidence supporting plaintiffs' failure-to-train theory of liability against the City for Clark's use of excessive force is no more than a mere scintilla, insufficient to forestall summary judgment. Accordingly, in my opinion, the ruling denying summary judgment to the City of Springboro should also be reversed."); ***Tsao v. Desert Palace, Inc.***, 698 F.3d 1128, 1144, 1145 (9th Cir. 2012) ("As Tsao has stated her claim, the alleged deficiency is properly seen as one of omission. Desert Palace in effect adopted *two* policies, with a gap between them that created the circumstances in which Tsao was arrested. First, Desert Palace keeps records of those it ejects from its casinos, and when those people return, it arrests them for trespassing or issues them citations under the SILA program. Second, Desert Palace sends promotional offers to repeat customers inviting them to visit the casino. Desert Palace's security staff has no way of determining whether someone they are about to arrest for trespassing has in fact been invited onto the property, and the marketing staff apparently is not informed that someone has been warned never to return. Desert Palace conducts these two functions entirely separately, without any safeguard in place to prevent the situation that arose here. If any patron evicted by the security department were automatically removed from the marketing department's mailing list, for instance, Tsao would not have received invitations, and there would be no question that she was trespassing. It is this gap in communication between the two departments, this omission, that led to the alleged constitutional violation in this case. A review of our case law on policies of commission further supports the idea that, as Tsao has stated her claim, the policy at issue here is one of omission. An official municipal policy, the Court has explained, 'includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.' *Connick,* 131 S.Ct. at 1359. Thus under the 'direct path' to municipal liability, a policy may be facially unconstitutional, like 'a city's policy of discriminating against pregnant women in violation of the Fourteenth Amendment.' *Gibson,* 290 F.3d at 1185 (citing *Monell,* 436 U.S. at 658). Or the constitutional violation may be the result of a direct order from a policymaking official, like 'a policy-maker's order to its employees to serve capiases in violation of the Fourth Amendment.'. . There is no suggestion here that Desert Palace's overall policy is to oust unwanted gamblers even though they have been invited onto the property, that there is any such persistent or widespread practice, or that a policymaking official directed Makeley to arrest her although the policymaker knew that she was at the casino by invitation. . .As Tsao has stated her claim, the cause of her arrest is thus best seen as an omission in Desert Palace's policies—the failure to create a coordination system between security and marketing. Tsao therefore must show 'that[Desert Palace's] deliberate indifference led to [this] omission.' *Gibson,* 290 F.3d at 1186. To show deliberate indifference, Tsao must demonstrate 'that [Desert Palace] was on actual or constructive notice that its omission would likely result in a constitutional violation.'. . Only then does the omission become 'the functional equivalent of a decision by [Desert Palace] itself to violate the Constitution.'. . As we observed in *Gibson,* '[p]olicies of omission regarding the supervision of employees ... can be "policies" or "customs" that create municipal liability ... only if the omission

"reflects a deliberate or conscious choice" to countenance the possibility of a constitutional violation.'. . Tsao has not alleged that Desert Palace had actual notice of the flaw in its policies. The question thus becomes whether the risk that security personnel might arrest someone who had been invited to the casino was so 'obvious' that ignoring it amounted to deliberate indifference. Tsao has not introduced facts sufficient to make this showing. First, there is no indication that this problem has ever arisen other than in the case of Tsao herself. In considering claims based on a failure to train municipal employees, the Court has noted that 'a pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference.'. . Similarly, the absence here of any evidence of a pattern makes it far less likely that Tsao can prove Desert Palace was 'on actual or constructive notice,'. . . that its policy would lead to constitutional violations. Second, it is far from obvious that the omissions in Desert Palace's policies would necessarily give rise to this situation."); ***Jones v. Town of East Haven***, 691 F.3d 72, 81, 82, 85 (2d Cir. 2012) ("[I]solated acts of excessive force by non-policymaking municipal employees are generally not sufficient to demonstrate a municipal custom, policy, or usage that would justify municipal liability. . . On the other hand, such acts would justify liability of the municipality if, for example, they were done pursuant to municipal policy, or were sufficiently widespread and persistent to support a finding that they constituted a custom, policy, or usage of which supervisory authorities must have been aware, or if a municipal custom, policy, or usage would be inferred from evidence of deliberate indifference of supervisory officials to such abuses. . . A plaintiff alleging that she has been injured by the actions of a low-level municipal employee can establish municipal liability by showing that a policymaking official ordered or ratified the employee's actions—either expressly or tacitly. . . Thus, a plaintiff can prevail against a municipality by showing that the policymaking official was aware of the employee's unconstitutional actions and consciously chose to ignore them. . . A municipal policymaking official's 'deliberate indifference' to the unconstitutional actions, or risk of unconstitutional actions, of municipal employees can in certain circumstances satisfy the test for a municipal custom, policy, or usage that is actionable under Section 1983. . . To establish deliberate indifference a plaintiff must show that a policymaking official was aware of constitutional injury, or the risk of constitutional injury, but failed to take appropriate action to prevent or sanction violations of constitutional rights. . . .Given the standards summarized above, we conclude that the evidence Plaintiff presented at trial was insufficient as a matter of law to support a reasonable finding that Plaintiff's loss was attributable to a custom, policy, or usage of the Town of East Haven. There are a number of different ways in which, given sufficient evidence, Plaintiff might have satisfied the burden of showing municipal liability under the standards of *Monell.* One would be to show a sufficiently widespread practice among police officers of abuse of the rights of black people to support reasonably the conclusion that such abuse was the custom of the officers of the Department and that supervisory personnel must have been aware of it but took no adequate corrective or preventive measures (or some combination of the two). Another might be that officers of the Department expressed among themselves an inclination to abuse the rights of black people with sufficient frequency or in such manner that the attitude would have been known to supervisory personnel, which then took no adequate corrective or preventive steps. A third might be a showing of deliberate indifference on the part of supervisory personnel to abuse of the rights of black

people, which was communicated to line officers so as to give them the sense that they could engage in such abuse of rights without risking appropriate disciplinary consequences. The trial evidence was not sufficient to support a finding against the Town on any such theory. Furthermore, the district court itself found, in ruling on the Town's motion for judgment as a matter of law, that Plaintiff failed to establish a custom, policy, or usage on the part of the Town of not disciplining EHPD officers for violating the constitutional rights of black people, or that the Town created a hostile environment for black people through a practice of harassing, stopping, and interfering with them, and Plaintiff has not suggested on appeal that those rulings were erroneous. The evidence, construed (as it must be) in the manner most favorable to the Plaintiff, unquestionably showed instances of reprehensible and at times illegal and unconstitutional conduct by individual officers of the EHPD. But such a showing is not a sufficient basis for imposing liability on the municipality. To justify imposition of liability on the municipality, the Plaintiff needed to show that her loss was attributable to a custom, policy, or usage of the Town or its supervisory officials. The trial evidence failed to make such a showing. The evidence failed to show a pattern of abusive conduct (or expressions of inclination toward such abusive conduct) among officers, so widespread as to support an inference that it must have been known and tolerated by superiors. It failed to show sufficient instances of tolerant awareness by supervisors of abusive conduct to support an inference that they had a policy, custom or usage of acquiescence in such abuse. Nor was there evidence that supervisors communicated to officers an attitude of indifference to abuse so as to give the officers a sense of liberty to abuse rights. . . . In sum, Plaintiff's evidence showed two instances, or at the most three, over a period of several years in which a small number of officers abused the rights of black people, and one incident in which an officer indicated a disposition to abuse the rights of black people. This evidence fell far short of showing a policy, custom, or usage of officers to abuse the rights of black people, and far short of showing abusive conduct among officers so persistent that it must have been known to supervisory authorities. It showed no instances in which supervisors were aware of abuse, or of a high probability of abuse, but failed to take corrective or preventive action. And it showed no instance in which supervisory personnel exhibited indifference to abuse of the rights of black people. While any instance in which police officers abuse people's rights is intolerable, the question before us in this appeal is whether Plaintiff's evidence was sufficient to support a finding of liability of the Town under the standards of *Monell*. Notwithstanding Plaintiff's showing of some instances of abusive conduct by a few officers, Plaintiff failed to put forth evidence that can justify imposition of liability on the municipality. We therefore conclude that the Town was entitled to the grant of its motion for judgment as a matter of law, and that the district court erred in denying its motion. We therefore remand to the district court with instructions to vacate the judgment in favor of Plaintiff and to enter judgment in favor of the Town."); ***Doe v. Luzerne County***, 660 F.3d 169, 180 (3d Cir. 2011) ("Here, the record does not support Doe's claim that the County's alleged failure to train amounted to deliberate indifference towards Doe's constitutional rights. The record does not demonstrate that any of the County's policymakers knew that its employees would likely confront a situation implicating the violation of one's right to privacy when videotaping certain activities. Similarly, the record is devoid of any evidence that there has been a history of County employees mishandling the production of training videos or videotaping in general; indeed, there is no evidence that there has

ever been another incident like the one Doe experienced. . . Further, it cannot be said that a wrong choice by a County employee while producing a training video or videotaping in general will frequently cause a deprivation of one's constitutional right to privacy. . . Consequently, any alleged failure by the County to train its employees did not amount to deliberate indifference towards Doe's constitutional rights. In any event, Doe has not produced sufficient evidence demonstrating that a deficiency in the County's training program actually caused the alleged violation of her constitutional privacy right. Accordingly, we will affirm the District Court's dismissal of Doe's failure to train claim against the County."); ***Craig v. Floyd County, Ga.***, 643 F.3d 1306, 1308, 1311 (11th Cir. 2011) ("While detained for nine days in jail, Craig received sixteen evaluations from nine different employees of Georgia Correctional before he received a computed tomography scan, which revealed that Craig had air, bleeding, and fractures in his head that required neurological surgery. The district court ruled that Craig could not prove a policy or custom of deliberate indifference based on this single incident. Because Craig failed to present evidence that Georgia Correctional had a policy or custom of constitutional violations, we affirm. . . . A single incident of a constitutional violation is insufficient to prove a policy or custom even when the incident involves several employees of the municipality. . . . Craig's proof of a policy or custom rests entirely on a single incident of alleged unconstitutional activity. Craig presented evidence that several employees of Georgia Correctional evaluated his single injury. Craig complained that the actions and omissions of the employees of Georgia Correctional, taken together, not individually, amounted to deliberate indifference to his serious medical need. Like the former detainee in *McDowell*, Craig 'cannot point to another occasion' when an alleged policy or custom 'contributed to or exacerbated an inmate's medical condition.'. . Craig instead relies on '[p]roof of a single incident of unconstitutional activity,'. . . which is 'not sufficient to impose liability' against Georgia Correctional[.]"); ***Craig v. Floyd County, Ga.***, 643 F.3d 1306, 1312, 1313 (11th Cir. 2011) (Cox, J., specially concurring) ("I do not join the majority opinion because I am not satisfied that this case involves a 'single incident.' I do not have to count 'incidents,' however, to conclude that Craig has failed to offer proof that can support a finding that there was a custom, policy or practice of deliberate indifference to serious medical needs. I therefore concur in the result and the judgment."); ***AFL-CIO v. City of Miami***, 637 F.3d 1178, 1189 (11th Cir. 2011) ("The CIP [Civilian Investigative Panel] report does not say the city was on notice that its First and Fourth Amendment training was deficient before the FTAA demonstration and because the report itself was written after the FTAA summit, it cannot be the basis for establishing notice itself. Accordingly, the district court was correct to conclude that the CIP report was not evidence that the City of Miami was on notice that it needed to improve MPD's training on First and Fourth Amendment issues. The second report cited by the plaintiffs is a March 2003 letter from the United States Department of Justice (DOJ), which details the preliminary findings of a DOJ investigation regarding use of force and use-of-force reporting by the MPD. That letter is certainly evidence that the City of Miami was on notice that its use-of-force policies and training needed improvement. But summary judgment was nonetheless appropriate. A plaintiff must present evidence not only that the municipality was on notice of a need to train but also that the municipality made a choice not to do so. . . Because the plaintiffs failed to adduce evidence on that second point, summary judgment was appropriate."); ***Bryson v. City of Oklahoma City***, 627 F.3d 784, 789, 790, 792 (10th

Cir. 2010) ("We conclude Plaintiff has not presented sufficient evidence to support a finding of deliberate indifference. According to the undisputed evidence presented to the district court, the City had not yet received any complaints or criticisms of any of its forensic chemists' work at the time Ms. Gilchrist concealed exculpatory evidence and falsified her test reports in 1983. Plaintiff argues we can find municipal liability despite the City's lack of contemporaneous notice of problems in the forensic laboratory because Ms. Gilchrist's wrongful actions were a highly predictable or plainly obvious consequence of the relatively short technical training period and lack of meaningful supervision for the City's forensic chemists. We are not persuaded, however, that it was highly predictable or plainly obvious that a forensic chemist would decide to falsify test reports and conceal evidence if she received only nine months of on-the-job training and was not supervised by an individual with a background in forensic science. . . Moreover, although the record reflects that most forensic laboratories began adopting better training and management practices in the 1970s and early 1980s, such practices were by no means universal in 1983, further militating against the conclusion that it was highly predictable or plainly obvious in 1983 that the training and supervision practices employed by the City and other jurisdictions would result in the violation of federal rights. Plaintiff argues we can infer deliberate indifference in 1983 based on the City's prolonged failure to take any remedial or investigatory actions even after criticisms of Ms. Gilchrist began coming to light in 1986, as well as the ease of implementing quality controls to prevent her wrongful actions. However, although this evidence may show that the City later acted with deliberate indifference to Ms. Gilchrist's subsequent misdeeds, it is irrelevant to the material question before us − whether the City consciously or deliberately chose in 1983 to ignore a risk of harm which the City had been put on notice of either by a past pattern of wrongful acts or by the high predictability that wrongful acts would occur. On that question, we find no evidence to support Plaintiff's claim. . . . We are sympathetic to Plaintiff's plight and find it deplorable that the conditions that led to his unjust confinement were permitted to continue for so long a time after the City was put on notice of the deficiencies in its forensic laboratory program. Nevertheless, we see no basis in the summary judgment record for holding the City liable in this case."); ***Hardeman v. Kerr County, Tex***., 244 F. App'x 593, ___ (5th Cir. 2007) ("There must be a strong connection between the background of the particular applicant and the specific violation alleged. Accordingly, plaintiffs cannot succeed in defeating summary judgment merely because there was a probability that a poorly-screened officer would violate their protected rights; instead, they must show that the hired officer was highly likely to inflict the particular type of injury suffered by them. . . It is obvious that Kerr County should have done a better job screening Marrero. His omission of answers to key questions, such as whether he had previously been fired, alone should have been cause for alarm. Furthermore, had the County contacted Harlandale ISD it likely would have learned that the district fired Marrero for making improper advances towards female students. Such information may have prompted the County to rethink hiring him for a position that would place him in close proximity to female inmates on a regular basis. Even if the County was negligent in hiring him, however, that still is not sufficient to hold the County liable for the constitutional violation. . . . There are no grounds to find that the alleged rape in question was a 'plainly obvious consequence' of hiring him. Id. Even if the County had done a thorough job of investigating Marrero, there was absolutely no history of violence, sexual or otherwise, to be found. While the

grounds for his discharge from Harlandale ISD were troubling, especially in retrospect, it requires an enormous leap to connect 'improper advances' towards female students to the sexual assault at issue here."); ***Perez v. Oakland County***, 466 F.3d 416, 431 (6th Cir. 2006) (" It does not seem 'obvious,' as Perez Sr. argues (Pl.'s Br. 59), that allowing a caseworker well-trained in mental health needs and suicide [footnote omitted] to occasionally make housing decisions that affect the mental health of inmates would result in a suicide, and the lack of statistics to support this conclusion furthers the argument that there was a lack of foreseeability. . . We agree with the district court that supplying expert testimony that the County's practice is inadequate and poses a risk to inmates does not support the conclusion that the County acted with deliberate indifference to Perez's mental health needs, though it might support the conclusion that the County was negligent. A finding of negligence does not satisfy the deliberate indifference standard."); ***Whitewater v. Goss***, 192 F. App'x 794, 799 (10th Cir. 2006) ("Plaintiffs have pointed to no evidence that Sheriff Goss was put on notice by information that the SWAT team had employed excessive force against children on prior occasions or that such abuse is to be expected absent some training not given to SWAT-team members. Plaintiffs' bald allegations of training failures contrast with the evidence presented in *Allen v. Muskogee*, . . . in which we reversed a grant of summary judgment on such a claim. In *Allen* the plaintiffs had presented expert testimony that 'the training was out of synch with the entire United States in terms of what police are being trained to do.' . . The evidence here establishes only that the SWAT-team members were trained, and no evidence was presented that the training was deficient under prevailing norms. Nor are the supervisory failures referenced by Plaintiffs such that their 'highly predictable or plainly obvious consequence' would be holding a 12-year-old at gunpoint without justification."); ***Doe v. Magoffin County Fiscal Court,*** 174 F. App'x 962, 968 (6th Cir. 2006) ("Like the municipality in *Brown*, the fiscal court is not liable because Doe cannot demonstrate that any policy or custom of the fiscal court in its hiring practices caused her constitutional injury. . . Adequate scrutiny of Patton's criminal record would not reveal that it was highly likely that Patton would sexually assault a juvenile or lock her in a room against her will. First, the defendants submitted evidence, which Doe does not challenge with any record evidence, that Patton's criminal record does not reveal violent crimes. Second, the crimes with which Patton was allegedly charged do not demonstrate any propensity to commit sex crimes or to imprison someone. At most, the record demonstrates that Patton was convicted of vote fraud, attempted arson, and battery against a male politician while Patton was drunk. As in *Brown*, Patton may have been an 'extremely poor candidate' for his job as custodian or even supervisor, . . . but his convictions do not make it 'plainly obvious' that Patton would commit sexual assault or falsely imprison someone. . . . Doe's case is not salvaged by the fact that the fiscal court and the county judge executives never performed criminal-background checks on potential employees. . . . . Doe has not pointed to any other instance in which the Magoffin County Fiscal Court's failure to perform background checks caused another to be deprived of his or her constitutional rights. Moreover, both Dr. Hardin and Salyer testified in their depositions that background checks were unnecessary because everyone knows everyone else in the county. The mere fact that one employee committed a crime does not demonstrate that Magoffin County's custom of not performing background checks was sure to lead to constitutional deprivations, especially when scrutiny of Patton's record would not have revealed that he was

highly likely to commit rape or imprison someone. Because Doe has failed to demonstrate that any custom of the Magoffin County Fiscal Court was the 'moving force' behind the injury alleged, Doe's federal hiring-practices claims against the Magoffin County Fiscal Court and Salyer in his official capacity fail as a matter of law."); ***Crete v. City of Lowell***, 418 F.3d 54, 66 (1st Cir. 2005) ("In this case, the City's hiring decision was itself legal, and the City did not authorize Ciavola to use excessive force. The process used to investigate the background of Ciavola was reasonable: it revealed the past conduct which Crete asserts links the hiring of Ciavola with his use of excessive force. The department made its hiring decision with knowledge of Ciavola's background and assurances from Ciavola's probation officer that Ciavola would 'make an excellent police officer' despite his assault and battery conviction. But '[e]ven when an applicant's background contains complaints of physical violence, including acts of aggression and assault, this may still be insufficient to make a City liable for inadequate screening of an officer who then uses excessive force.'. . And such is the case here: Crete simply cannot meet his heavy burden. There was insufficient evidence on which a jury could base a finding that a 'plainly obvious consequence' of the City's decision to hire Ciavola was the violation of Crete's constitutional rights. . .Summary judgment was proper."); ***Estate of Davis by and through Dyann v. City of North Richland Hills,*** 406 F.3d 375, 381-85 (5th Cir. 2005) ("When, as here, a plaintiff alleges a failure to train or supervise, 'the plaintiff must show that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference.'. . . We are persuaded that there is no material issue on the record before us with respect to the question of whether Appellants were deliberately indifferent. Because this case falters on the requirement of deliberate indifference, we need not address the other two prongs of supervisory liability. . . . We are persuaded that these facts do not demonstrate a prior pattern by Hill of violating constitutional rights by employing excessive force. We have stressed that a single incident is usually insufficient to demonstrate deliberate indifference. Prior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question. . . That is, notice of a pattern of similar violations is required. While the specificity required should not be exaggerated, our cases require that the prior acts be fairly similar to what ultimately transpired and, in the case of excessive use of force, that the prior act have involved injury to a third party. None of the facts highlighted by the district court indicated use of excessive force against a third party resulting in injury. First, while Hill's over-'exposed' photography stunt and his earned nickname collectively demonstrate lack of judgment, crudity, and, perhaps illegalities, they do not point to past use of excessive force. Similarly, the traffic stop, while perhaps improper in its own right, did not involve excessive force with a deadly weapon resulting in harm to a citizen in a context similar to the present case. By comparison, in *Roberts v. City of Shreveport*, we recently held that a habit of displaying a firearm during traffic stops does not constitute a relevant pattern with respect to using deadly force during a traffic stop. Here, there is no evidence that Hill had previously improperly displayed his weapon to a third party, or used excessive force. Second, Hill's inappropriate use of his gun during training is, at first blush, more troubling. Hill inappropriately fired his weapon in mock settings apparently much like the scene in which Hill ultimately shot Davis. However, because it was a training exercise it is undisputed

that no one's constitutional rights were violated and that Hill never used excessive force against a third party. Furthermore, we hesitate in analyzing supervisory liability to place too much emphasis on mistakes during training. We are wary of creating incentives to conduct less training so as to minimize the chance that a subordinate will make a training mistake that can be used against the supervisor if that subordinate later makes a mistake in the course of duty. More to the point, in training mistakes are the fodder and 'adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis' for holding a supervisor liable. Even if a fact finder were to infer that Hill's training did not stick or that he resisted it, the incidents in training did not effect a violation of a third party's rights. On this record, Appellants cannot be deemed deliberately indifferent by failing to supervise or train differently.' footnotes omitted); ***Estate of Sowards v. City of Trenton,*** No. 03-2036, 2005 WL 434577, at * 10 (6th Cir. Feb. 24, 2005) (not published) ("In order for liability to attach in this type of circumstance, 'the identified deficiency in a city's training program must be closely related to the ultimate injury.' . . A plaintiff must 'prove that the deficiency in training actually caused the police officers' indifference' to the rights or needs of the person harmed. . . For this reason, the injuries based on the inadequacy of training claim, if any, are those stemming from the illegal entry, not the shooting. Again, the district court correctly found that the failure to adequately train was not the proximate cause of the shooting and appropriately limited the damages recoverable to those stemming from the illegal entry, not Sowards's death. The City, then, can only be held liable to the extent its failure to train caused Corporal O'Connor and Officer Scheffler to act with deliberate indifference toward Sowards's rights by entering the apartment without a warrant."); ***McDowell v. Brown,*** 392 F.3d 1283, 1291, 1292 (11th Cir. 2004) ("Mr. McDowell traces the County's liability to its failure to properly fund the resources necessary to staff the Jail. The Supreme Court has recognized that inadequate training may impose § 1983 liability on a municipality in 'limited circumstances.' . . The Court, however, refused to extend liability to inadequate hiring practices. . . McDowell is asking this Court to extend liability to inadequate budgeting practices, but does not identify any 'pattern of injuries' linked to the County's budgetary decisions, nor does he insist that its accounting practices are 'defective.' . . McDowell's claim rests upon one incident, which he attempts to trace back to a single decision; a decision that does not represent a violation of federal law on its face. Our precedent does not permit such an attenuated link. If it did, the 'danger that a municipality would be held liable without fault is high. . . The County's decision impacted this single case; it had no notice of the consequences 'based on previous violations of federally protected rights.'. . McDowell cannot establish that a reasonable member of the Board would conclude that the County's budget decisions would lead to events that occurred here. . . Although the record reflects that several deputies testified that the field division lacked the personnel to move inmates to Grady, no evidence was presented that the County's Board was aware of the health consequences involved. Moreover, the record demonstrated that the field division accomplished non-emergency transfers to Grady within a one-to-two hour window. Finally, the County's policy directed the field division to send all emergency cases to Grady by ambulance, and even non-emergency cases, if transport could not be effected in a timely manner. It was a clear, simple directive that said if you cannot transport with your resources you are to call an ambulance for needed medical transportation. With such practices in place, McDowell cannot establish or

seriously dispute that the Board would anticipate that inmates would not receive timely medical attention. The alleged constitutional violation here was not a 'highly predictable consequence' of the County's failure to budget (and hence, adequately staff) the Sheriff's Office."); ***J.H. ex rel Higgin v. Johnson,*** 346 F.3d 788, 794 (7th Cir. 2003) ("Our decision in *Kitzman-Kelley v. Warner,* 203 F.3d 454 (7th Cir.2000) addresses the importance that an adequate link exist between the danger known to state officials and the alleged harm suffered by the plaintiff in cases falling within the 'special relationship' exception to the *DeShaney* doctrine, as does this case. In *Kitzman-Kelley,* a DCFS intern subjected a seven-year-old foster child to a pattern of sexual abuse. It was alleged that the DCFS defendants violated the child's due process rights by failing to provide adequate screening, training and supervision of the intern. We found that the deliberate indifference standard could not be met by merely showing that hiring officials engaged in less than careful scrutiny of the applicant resulting in a generalized risk of harm, but rather the standard 'require[d] a strong connection between the background of the particular applicant and the specific constitutional violation alleged.' . . Accordingly, proving a general risk of minor dangers is insufficient to warrant liability. It must be shown that there were known or suspected risks of child abuse or serious neglect in particular. . . . Against this backdrop, we cannot conclude in this case that the placement of a child with an individual who had two past accusations of child abuse that were investigated and determined to be unfounded warrants imposing liability on these defendants."); ***Cousin v. Small,*** 325 F.3d 627, 638 (5th Cir. 2003) ("Cousin also failed to demonstrate that the training or supervision obviously was inadequate and plainly would result in violations of constitutional rights. As Cousin concedes, Connick's policy and training program was adequate. Therefore, it is his failure to impose sanctions on prosecutors responsible for *Brady* violations that must be shown to render his supervision inadequate. Connick's enforcement of the policy was not patently inadequate or likely to result in constitutional violations. Where prosecutors commit *Brady* violations, convictions may be overturned. That could be a sufficient deterrent, such that the imposition of additional sanctions by *Connick* is unnecessary. Further, prosecutors exercise independent judgment in trying a case, and they have the legal and ethical obligation to comply with *Brady*. It is not apparent that these prosecutors, who, Cousin concedes, are adequately trained with respect to *Brady* requirements, are so likely to violate their individual obligations that the threat of additional sanctions is required."); ***Morris v. Crawford County,*** 299 F.3d 919, 923-25 (8th Cir. 2002) ("*Bryan County* teaches us that liability may not be imposed unless a plaintiff directly links the applicant's background with the risk that, if hired, that applicant would use excessive force. In other words, a plaintiff must show that the hiring decision and the plaintiff's alleged constitutional injury are closely connected − an applicant's background is that causal link. What then must an applicant's background reveal for a plaintiff's alleged injury to be the plainly obvious consequence of the hiring decision? . . .In sum, to avoid summary judgment, a plaintiff must point to prior complaints in an applicant's background that are nearly identical to the type of misconduct that causes the constitutional deprivation allegedly suffered by the plaintiff. This is a rigorous test to be sure. . . . Deputy Ruiz's background does not reveal that he knee-dropped an inmate (or anyone for that matter), nor does it reveal a single complaint of excessive force. Deputy Ruiz's record includes slapping an inmate at the Sebastian County Detention Center in 1996; mishandling inmates' money and property; 'mouthing off' to two fellow

deputies at Sebastian County and 'invit[ing] [one of them] to the gym any day, any time ... to take care of it' in 1997; disobeying a nurse during which the nurse overheard Deputy Ruiz say 'he was going to knock that bitch out'; and acting insubordinate at work, disobeying orders, cursing other employees, failing to adhere to rules. . . . There are also accusations by Deputy Ruiz's ex-wife that, in 1997, he ran her off the road, tore a necklace off her neck, and pushed her, as well as accusations by Deputy Ruiz's girlfriend that, in 1999, he grabbed her arm and threw her, and threatened to assault her. Morris emphasizes Deputy Ruiz's past incidents of domestic violence, arguing such acts portend violence in the workplace. Both Deputy Ruiz's ex-wife and girlfriend obtained ex parte protective orders against him, but none of their claims were ever substantiated. Morris relies on *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992), for the proposition that violent or abusive behavior of any kind indicates a strong potential for violent behavior against persons in custody. We need not decide whether *Parrish* stands for such a proposition, however, because even if it did, *Bryan County* implicitly rejected such an argument in the context of municipal liability based on a single hiring decision."); ***Riddick v. School Board of the City of Portsmouth***, 238 F.3d 518, 525, 526 (4th Cir. 2000) ("When Crute was investigated in 1989 for openly filming fully-clothed female students, it was not plainly obvious that he would videotape other students with a hidden camera nearly three years later. . . . . Put simply, the causal connection between the 1989 incident and the alleged constitutional deprivation is simply too attenuated to impose municipal liability on the Board. . . . Admittedly, in light of his subsequent reprehensible behavior, the failure to terminate Crute in 1989 was unfortunate and perhaps ill-advised. However, short-sightedness does not suffice to establish 'deliberate indifference.'"); ***Gros v. City of Grand Prairie (Gros IV)***, 209 F.3d 431, 434, 435 (5th Cir. 2000) ("[P]laintiffs cannot succeed in defeating summary judgment merely because there was a probability that a poorly-screened officer would violate their protected rights; instead, they must show that the hired officer was highly likely to inflict the particular type of injury suffered by them. . . . Rogers had never sexually assaulted, sexually harassed, falsely arrested, improperly searched or seized, or used excessive force against any third party. Indeed, the record reflects that he never committed a serious crime. Just as in *Aguillard*, the incident in Rogers's past that was potentially most damaging to his record − the complaint for an alleged improper drawing of his weapon during a traffic stop − was not sustained by UTA. And the reprimands and complaints that were sustained do not meet *Brown's* requirement of a 'strong' causal connection between Rogers's background and the specific constitutional violations alleged."); ***Aguillard v. McGowen***, 207 F.3d 226, 230, 231 (5th Cir. 2000) ("Here, the record is far less suggestive of McGowen committing homicide than the record in *Bryan County* was of Burns committing battery. The record shows that McGowen threatened the mother of a juvenile with arrest, that he meddled in this mother's supervision of the child while he was off duty, and that the mother ultimately hired an attorney and threatened to obtain a restraining order against him. Colleagues at the Houston Police Department reported that McGowen wanted to 'ride where the women were,' and a female colleague stated that she did not want to ride with him under any circumstances. The record also discloses a report that in March 1990, McGowen assaulted and pistol-whipped a teenage boy who was driving his car around McGowen's apartment complex. Significantly, McGowen was neither arrested for nor convicted of the alleged assault. But while all of this may indicate that McGowen was 'an extremely poor candidate' for the County's police

force, . . . the record shows not one shred of solid evidence foreshadowing McGowen's tragic killing of White. McGowen had never been formally disciplined, and his informal discipline record included only the infractions of using the police radio for broadcasting personal messages and refusing to convey information to one party in a vehicular accident. McGowen had never wrongfully shot anyone before, nor did his record reveal him to be likely to use excessive force in general or possess a trigger-happy nature in particular. Certainly, the evidence of deliberate indifference in this case falls short of the quantum and quality of evidence presented in *Bryan County*, which the Supreme Court determined to be insufficient. In short, even when viewing the evidence, as we must, in the light most favorable to Aguillard, the record is bereft of evidence sufficient to impose liability on the County for wrongfully hiring McGowen. While the County may have been negligent in its employment decision, the magnitude of its error does not reach constitutional cognizance. We therefore hold that the district court erred in denying the County's Rule 50 motion for judgment as a matter of law, and we dismiss the County from this case."); ***Kitzman-Kelley v. Warner***, 203 F.3d 454, 458, 459 (7th Cir. 2000) ("[A]lthough it is permissible to base a sec. 1983 claim on a failure to screen properly a candidate for a public position, our case law makes clear that the plaintiff must allege and establish that the defendants went about the hiring process with 'deliberate indifference.' As our colleagues in the Tenth Circuit have noted, the 'deliberate indifference' standard is not met by a showing that hiring officials engaged in less than careful scrutiny of an applicant resulting in a generalized risk of harm. The requisite showing of culpability 'requires a strong connection between the background of the particular applicant and the specific constitutional violation alleged.' [citing *Barney v. Pulsipher*]"); ***Kitzman-Kelley v. Warner***, 203 F.3d 454, 461, 462 (7th Cir. 2000) (Posner, C.J., dissenting) ("The supervisory employees of the state's welfare department who are sued in this case hired Philip Heiden, a college student, as an intern and assigned him to work with the caseworker assigned to Melissa. . . . Heiden was hired on the recommendation of one of his professors, and the defendants did not bother to investigate his background; had they done so, they would have discovered that he had a history of mental illness and drug abuse. After he was hired, on several occasions he took Melissa to his home and there sexually abused her. The defendants did not monitor his work with Melissa. He kept detailed notes of his sessions with her and turned them into his supervisors, but they didn't bother to read them. Had they done so, they would have discovered that he was taking her to his home, though not that he was sexually abusing her. The defendants were negligent in failing to investigate Heiden's background and to monitor his work with Melissa, but negligence, as the plaintiff fails to understand but my colleagues rightly emphasize, is not a basis for liability under 42 U.S.C. sec.1983. . . . The defendants doubtless should have been more careful and not relied entirely on a professor's recommendation, but the failure to exercise due care is precisely what the law means by negligence. It is not as if they had entrusted Melissa to someone whom they knew to have a record as a child molester; that would be an example of conscious indifference to an obvious danger, . . .but it is a far cry from hiring an intern on a professor's recommendation and then neglecting to monitor the intern. If that is reckless indifference, I do not know what it means to say that negligent misconduct is not actionable under section 1983."); ***Lopez v. LeMaster***, 172 F.3d 756, 760 (10th Cir. 1999) ("It is not enough, however, for appellant to show that there were general deficiencies in the county's training program for jailers. Rather, he must identify a specific

deficiency in the county's training program closely related to his ultimate injury, and must prove that the deficiency in training actually caused his jailer to act with deliberate indifference to his safety. . . Appellant did not meet that burden here. Appellant not only did not name his jailer as a defendant in this suit, he failed to identify him at all. That omission seriously undermines his attempt to hold the county liable for any actions deliberately taken by the jailer. Appellant has presented no evidence concerning deficiencies in training of the particular jailer involved in his case. Nor has he shown that the county had a uniform policy of providing its jailers with insufficient training in the areas closely related to his ultimate injury from which we might infer that his particular jailer's training also was insufficient."); ***Carter v. Morris***, 164 F.3d 215, 218, 219 (4th Cir.1999) ("[A] plaintiff cannot rely upon scattershot accusations of unrelated constitutional violations to prove either that a municipality was indifferent to the risk of her specific injury or that it was the moving force behind her deprivation. . . . Section 1983 does not grant courts a roving commission to root out and correct whatever municipal transgressions they might discover − our role is to decide concrete cases. Unfocused evidence of unrelated constitutional violations is simply not relevant to the question of whether a municipal decisionmaker caused the violation of the specific federal rights of the plaintiff before the court. Permitting plaintiffs to splatter-paint a picture of scattered violations also squanders scarce judicial and municipal time and resources. As a practical matter, a case involving inquiries into various loosely related incidents can be an unruly one to try. . . In this case, Carter does not allege that the City of Danville promulgated any formal unconstitutional policy. Rather, she asserts that the City has remained deliberately indifferent to or has actively condoned a long and widespread history of violations of the federal rights of citizens on the part of its police department. But Carter's proffered evidence, mainly allegations of prior instances of excessive force and the discouragement of citizen complaints, ranges far a field of her own alleged constitutional injuries. Her approach is insufficiently precise to establish the existence of a municipal policy or custom that actually could have caused her specific injuries. On the record before us, Carter's only plausible federal claims are that Danville police officers subjected her to an unreasonable search and seizure and to an unlawful arrest. [footnote omitted] The bulk of her evidence, however, is not relevant to those claims. . . . Past incidents of excessive force do not make unlawful arrests or unreasonable searches or seizures 'almost bound to happen, sooner or later, rather than merely likely to happen in the long run.' . . Carter in essence claims that past generalized bad police behavior led to future generalized bad police behavior, of which her specific deprivations are an example. This nebulous chain fails the 'rigorous standards of culpability and causation' required for municipal liability under section 1983. [citing *Brown*]."); ***Barney v. Pulsipher***, 143 F.3d 1299, 1308 & n.7, 1309 (10th Cir. 1998) ("Merely showing that a municipal officer engaged in less than careful scrutiny of an applicant resulting in a generalized risk of harm is not enough to meet the rigorous requirements of 'deliberate indifference.'. . Culpability requires a strong connection between the background of the particular applicant and the specific constitutional violation alleged. Establishing municipal liability in the hiring context requires a finding that 'this officer was highly likely to inflict the particular injury suffered by the plaintiff.' . . . Mr. Pulsipher's background investigation revealed an arrest at age seventeen for possession of alcohol and several speeding tickets. He completed a state certified basic training program, to which he would have been denied

admission had he been convicted of any crimes involving unlawful sexual conduct or physical violence. Plaintiffs have presented no evidence that Mr. Pulsipher's background could have led Sheriff Limb to conclude Mr. Pulsipher was highly likely to inflict sexual assault on female inmates if hired as a correctional officer. . . . We note that the focus of the inquiry in determining when a single poor hiring decision is sufficient to constitute deliberate indifference appears to be on the actual background of the individual applicant and not on the thoroughness or adequacy of the municipality's review of the application itself. . . . Whether or not an unsuitable applicant is ultimately hired depends more on his actual history than the actions or inactions of the municipality. Take, for example, a situation in which a hiring official completely fails to screen an application and hires an applicant, but the applicant actually has a spotless background. In such cases, the Court has stated that the hiring official cannot be said to have consciously disregarded an obvious risk that the applicant would inflict constitutional harm on the citizens of the municipality when even a thorough investigation would have revealed no cause for concern."); ***Snyder v. Trepagnier***, 142 F.3d 791, 797 (5th Cir. 1998) ("Trepagnier had admitted to two nonviolent offenses: stealing a jacket and smoking marihuana. On this evidence, Snyder's claim that the city's screening policies were inadequate fails the *Bryan County* test: that the plaintiff's injury be the 'plainly obvious consequence' of the hiring decision."), *cert. dism'd*, 119 S. Ct. 1493 (1999); ***Allen v. Muskogee***, 119 F.3d 837, 845 (10th Cir. 1997) ("The case before us is within the 'narrow range of circumstances' recognized by *Canton* and left intact by *Brown*, under which a single violation of federal rights may be a highly predictable consequence of failure to train officers to handle recurring situations with an obvious potential for such a violation. The likelihood that officers will frequently have to deal with armed emotionally upset persons, and the predictability that officers trained to leave cover, approach, and attempt to disarm such persons will provoke a violent response, could justify a finding that the City's failure to properly train its officers reflected deliberate indifference to the obvious consequence of the City's choice. The likelihood of a violent response to this type of police action also may support an inference of causation − that the City's indifference led directly to the very consequence that was so predictable."); ***Lancaster v. Monroe County***, 116 F.3d 1419, 1428-29 & n.10 (11th Cir. 1997) (noting that holding of *Parker*, that County could be held liable for hiring policies of Sheriff that resulted in rape of female arrestee, may no longer be good law after *Brown*.); ***Doe v. Hillsboro Independent School District***, 113 F.3d 1412, 1416 (5th Cir. 1997) (en banc) ("When the district court afforded Doe the opportunity to amend his complaint, he could not even allege that the custodian who assaulted his daughter either had a prior record of violent crime or previously had been reported to the officials for sexual misbehavior towards students. Even in the context of resisting a Rule 12 motion to dismiss, plaintiffs have demonstrated an inability to show a nexus between any failure to check criminal background and this assault.").

See also ***Gonsalves v. Clements***, No. CV 21-021 WES, 2021 WL 3471335, at *3 (D.R.I. Aug. 6, 2021) ("Plaintiff alleges that, as policymakers for the City, Clements and Paré were responsible for the training of Endres and McParlin. . . Furthermore, despite having actual or constructive knowledge that officers 'routinely employ force in the seizure of persons, engage in vehicular pursuits, and that such pursuits pose a plain and substantial risk of constitutional

violations and harm to civilians[,]' Clements and Paré failed to issue policies or provide any training regarding 'the reasonable and appropriate use of force by police officers in seizing individuals, utilizing their vehicles in pursuit of individuals, and the de-escalation of police-civilian encounters in a manner designed to reasonably and prudently minimize the risks of civilian harm.'. .Vehicular pursuits involve split-second decisions, complicated tactical considerations, and a significant risk of injury or death to individuals being pursued, bystanders, and officers. And, like the firearms discussed in *Canton*, vehicles can be weaponized to effect deadly force. . . Because of this inherent dangerousness, Plaintiff may be able to establish that the risk of constitutional violations was so patently obvious or highly predictable that the supervisory and municipal Defendants are liable despite a lack of prior incidents. . . . However, that logic does not extend to Plaintiff's theories of inadequate hiring, screening, discipline, remediation, and supervision. . . 'Unlike the risk from a particular glaring omission in a training regimen, the risk from a single instance of inadequate screening of an applicant's background is not "obvious" in the abstract; rather, it depends upon the background of the applicant.'. . The lack of alleged prior incidents therefore dooms the hiring and screening claims. The same goes for the claims of inadequate discipline, remediation, and supervision. If there were no prior unconstitutional acts, there were no opportunities for Clements, Paré, and the City to discipline or correct the officers' behavior. And if there were no missed opportunities for discipline, it is impossible for a policy against providing discipline to have caused the allegedly unconstitutional acts in this case. Thus, the claims in Counts XVII and XVIII of improper hiring, screening, supervision, remediation, and discipline are dismissed without prejudice."); ***Waller v. City of Fort Worth Texas***, No. 4:15-CV-670-P, 2021 WL 233571, at *4–8 (N.D. Tex. Jan. 22, 2021) ("Plaintiffs argue that the City should be held liable for the following five policies:

(a) the City did not require its police officers to visually verify the address to which they had been dispatched on the scene;

(b) the City did not properly train its officers that there are odd-numbered addresses on one side of the street and even on the other;

(c) the City did not and does not require its officers to verbally identify themselves when confronting citizens and prior to using deadly force;

(d) the City policy is to allow its officers to enter and search the curtilage of residences without contacting or receiving permission of the homeowner; and

(e) the City had a policy of generally pairing rookie police officers with other rookie police officers after short field training experience and thus failing to provide sufficient supervision of the younger/inexperienced officers.

. . . For purpose of this order, the Court assumes these policies existed and were promulgated by the correct policymaker. The Court makes these assumptions not because they are necessarily true, but because it is unnecessary to wrestle with those difficulties. For the independent reasons below, the City cannot be liable for these alleged policies.

1. *None of the policies or customs were 'moving forces' in Hoeppner's use of excessive force.*

The first requirement that must not be diluted concerns the causal link between the policy and the constitutional violation. Originally, the Court stated the policy or custom must be a 'moving force' in the plaintiff's constitution violation. . . Since then, the Fifth Circuit has interpreted this phrase

as requiring the plaintiff to 'show direct causation, i.e., that there was "a direct causal link" between the policy and the violation.'. . This requires 'more than a mere "but for" coupling between cause and effect.'. . In this case, the constitutional violation was Hoeppner's excessive use of force. This is key because 'there must be a direct causal link between the municipal policy and the constitutional deprivation.'. . In an excessive force case, the issue is whether the officer's use of force was reasonable. . . It is well-established that officers are justified in using deadly force whenever they reasonably fear serious bodily harm. . . . Importantly, the inquiry focuses on the officer's decision to use deadly force, therefore 'any of the officer's actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in [the Fifth] Circuit.' *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014). . . Identifying the constitutional violation focuses the analysis. Hoeppner's decision to use excessive force occurred in the time between Hanlon's first radio call, before any yelling, and his second radio call for an ambulance—44 seconds. Therefore, any acts or events before that time are immaterial. It follows that the Court must ignore the case's most disturbing fact—that the officers were at the wrong house. The Court must focus solely on policies that would have affected Hoeppner's judgment in those 44 seconds. Four of the policies (policies (a), (b), (d), and (e)) do not impact Hoeppner's thinking or judgment during those 44 seconds. They do no more than set the stage for the events that followed. These policies may be 'but for' causes, but they are not the moving force behind Hoeppner's use of force. . . . For the City to be liable, the policy must be either facially unlawful or, if the policy is facially lawful, enacted with 'deliberate indifference as to its known or obvious consequences.'. . . 'Proof of deliberate indifference normally requires a plaintiff to show a pattern of violations.'. . . .The Court concludes that the policies Plaintiffs identify fail to provide a basis for the City's liability. This case is tragic and the circumstances of Mr. Waller's death are absolutely heartrending. This order is in no way an approval of the City's policies. The Court merely finds that Plaintiffs failed to produce evidence sufficient to raise a fact issue regarding the demanding standards required in establishing municipal liability."); ***Martin v. Hermiston School District 8R***, No. 3:18-CV-02088-HZ, 2020 WL 6547638, at *23-24 (D. Or. Nov. 4, 2020) (" To demonstrate a municipality's deliberate indifference to its inadequate training program, the plaintiff usually must show a pattern of similar constitutional violations caused by inadequate training. . . .Plaintiffs argue that the School District's failure to train its employees and coaches about the requirements of the Oregon statute and regulation shows its deliberate indifference to the constitutional rights of its players and their parents. The School District argues that it adequately trained the coaches to keep players out of practice and play after the player receives a concussion until the player receives medical clearance and no longer exhibits signs and symptoms. The Court agrees. . . . Defendants Bruck, Emery, and Faateete knew that an athlete who had sustained a concussion or suspected concussion should not return to practice and play without first receiving medical clearance. . . . The School District did not have to train its employees on the specifics of the Oregon statute and regulation if it met the requirements of the statute and regulation. Those requirements included requiring coaches to take annual concussion training and ensuring that coaches knew that they should not return players with a concussion or a suspected concussion to sports until the player is symptom-free and received clearance from a doctor to return to athletic participation. The undisputed evidence establishes that the coaches and other School District personnel knew those requirements.

Plaintiffs can establish deliberate indifference on a failure to train theory only if the School District knew that its training was constitutionally inadequate and continued to use the same training method despite the known or obvious risk that constitutional violations that would result from the inadequate training. . . Even if Plaintiffs could show that the employees' training was inadequate, Plaintiffs have produced no evidence that the School District's policymakers knew or should have known about a pattern of constitutional violations caused by the inadequate training and chose to continue the same course. Without that showing, Plaintiffs cannot establish that the School District was deliberately indifferent to constitutionally inadequate training. . . . Plaintiffs may establish *Monell* liability without showing a pattern of constitutional violations if it was obvious to the School District that the School District's failure to train would lead to constitutional violations. . . Single-incident liability is rare and found only 'in a narrow range of circumstances.'. . It was not 'so patently obvious' to the School District that failing to train its employees on the specific mandates of the Oregon statute and regulation would lead to a constitutional violation when the School District employees knew that they should not return players who had received concussions to practice and play without medical clearance. . . Plaintiffs have not established a question of fact that the training the School District provided to its employees was constitutionally inadequate and that the inadequacy was patently obvious to the School District. Consequently, the Court grants the School District summary judgment on Plaintiffs' failure-to-train *Monell* claim. . . . The Court analyzes whether the School District was deliberately indifferent to a failure to supervise in the same manner as it analyzes an alleged failure to train. . . Thus, to establish *Monell* liability based on a failure to supervise, Plaintiffs must show that the School District's failure to supervise its employees amounted to deliberate indifference to the need for adequate supervision. Plaintiffs can establish the School District's deliberate indifference by showing a pattern of similar constitutional violations caused by a failure to supervise or by the rare single-incident liability theory discussed in *Connick* and *Bryan County.*Plaintiffs produced no evidence that shows a pattern of similar constitutional violations caused by the School District's failure to supervise its employees that was known to the School District before Plaintiffs' alleged constitutional violations occurred. Thus, Plaintiffs' failure to supervise *Monell* liability theory turns on whether they can establish that this case falls within the 'narrow range of circumstances' in which single-incident liability occurs. . . Plaintiffs argue that the School District's failure to supervise its coaches and athletic trainer to ensure that they did not return a student who had suffered a concussion to play sports without proper medical clearance falls within that narrow range of circumstances. Plaintiffs have not established that the constitutional consequences of the School District's failure to supervise its employees were patently obvious to the School District. Although the parties dispute the degree of supervision that Defendant Usher should have exercised over Defendants Emery, Faateete, and Bruck, Defendant Usher did supervise them to some degree. Defendant Usher testified that he ensured that the coaches and athletic trainer knew that they should not return an athlete to practice and play without medical clearance if the athlete suffered a concussion. At times, Defendant Usher met with Defendant Emery and discussed the status of athlete injuries, including concussions. Defendant Usher sometimes communicated to coaches about whether an athlete had received medical clearance to return to play after an injury. Defendant Usher also attended some of the games. Although he could have done more to supervise the other

Individual Defendants, under those circumstances, it was not 'highly predictable' or 'patently obvious' to the School District that its supervision of Defendant Usher, the coaches, and the athletic trainer would cause constitutional violations. Plaintiffs have not established that a question of material fact remains concerning whether the School District's supervision of its employees was patently obvious to lead to constitutional violations. As a result, the Court grants the School District summary judgment on Plaintiffs' *Monell* claim based on a failure to supervise."); ***Carter v. City of Montgomery***, 473 F.Supp.3d 1273, ____ (M.D. Ala. 2020) ("The record would allow a jury to conclude that the City was deliberately indifferent to its public defenders' failure to adequately represent Municipal Court defendants. The City received billing records from its public defenders so it knew how few hours they spent in court. Based on the sheer volume of cases in the Municipal Court, a jury could find that the City knew its public defenders systemically failed to provide adequate defenses in violation of the Sixth Amendment. . . Accordingly, because a jury could conclude that the City was on notice of the inadequacy of Municipal Court public defense, it could conclude that the City was deliberately indifferent to the Sixth Amendment violations and hold it liable under § 1983."); ***Bergquist v. Milazzo***, No. 18-CV-3619, 2020 WL 757902, at *6 (N.D. Ill. Feb. 14, 2020) ("Plaintiff alternatively alleges that Cook County 'failed to properly train its police officers on the proper standard for initiating an investigation of a criminal suspect, how to seize their property, and how to preserve their property unless and/or until an order to destroy such property is entered by a court of competent jurisdiction.'. . The Cook County Sheriff's Office's failure to train and supervise constitutes a policy or custom if it amounts to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'. . *Connick* provides two ways Plaintiff can establish deliberate indifference to her constitutional rights: (1) through a 'pattern of similar constitutional violations by untrained employees;' or (2) by establishing that her unlawful detention was a 'highly predictable consequence' of failing to train and supervise. . .Here, Plaintiff claims that the Cook County Sheriff's Office did not properly train or supervise its deputies, pointing specifically to Milazzo's incorrect statement that a 'judicial order' prohibits citizens from filming outside a courthouse. . . Plaintiff also asserts that the Cook County Sheriff's Office failed to sufficiently train its deputies on the proper method for detaining and searching belongings. . . At this stage, this Court finds sufficient factual content to infer that Plaintiff's alleged constitutional deprivations stemmed from the Sheriff's Office's failure to train and supervise its deputies."); ***Passino v. City of Plattsburgh***, No. 817CV1028FJSDJS, 2020 WL 509129, at *5 (N.D.N.Y. Jan. 31, 2020) ("'Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*[.]'. . Furthermore, in a case like this one, 'where the policy relied upon is not itself unconstitutional,' the Supreme Court held that 'considerably more proof than the single incident will be necessary ... to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.'. . Here, Plaintiff does not identify any other specific instances where Defendant City police officers violated a person's constitutional right against excessive force because they were not trained in using physical force on, or otherwise subduing, someone suffering from a severe mental disturbance or under the influence of drugs. . . Plaintiff merely generalizes that, without proper use of force training, situations where officers use excessive force 'could happen daily' and making the wrong choice about whether to use force 'would frequently cause the deprivation of a

citizen's Fourth Amendment rights.'. . Thus, because Plaintiff has failed to allege more than this single incident of unconstitutional activity, the Court finds that Plaintiff cannot hold Defendant City liable under *Monell* and grants Defendants' motion for summary judgment with regard to this claim."); ***Whitledge v. City of Dearborn***, No. 18-11444, 2019 WL 4189496, at *10 (E.D. Mich. Sept. 4, 2019) ("Municipal liability claims predicated on some form of inaction on the part of the state actor impose a 'heavy burden on the plaintiff' because a plaintiff 'cannot rely solely on a single instance to infer a policy of deliberate indifference.' *Thomas v. City of Chattanooga*, 398 F.3d 426, 433 (6th Cir. 2005). Failure to train cases, the Supreme Court has explained, constitute the 'most tenuous' basis for municipal liability. . . The Sixth Circuit has articulated three elements for a failure to train or supervise claim: '(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.' *Ellis v. Cleveland Mun. Sch. Dist*., 455 F.3d 690, 700 (6th Cir. 2006). 'Mere allegations that an officer was improperly trained *or that an injury could have been avoided with better training* are insufficient to prove liability.' *Miller v. Calhoun Co*., 408 F.3d 803, 816 (6th Cir. 2005) (emphasis added). Accordingly, failure to train cases requires proof of '[a] pattern of similar constitutional violations by untrained employees.' *Connick*, 563 U.S. at 62. Here, Plaintiff alleges that the City failed to train its officers in several respects. As explained below, the City is entitled to judgment as a matter of law on each of these claims because the facts alleged fall short of constitutional violation."); ***Montel v. City of Springfield***, 386 F.Supp.3d 67, 79 n.9 (D. Mass. 2019) ("While there can be no municipal liability under section 1983 without an underlying constitutional violation, . . . the Court is troubled by Montel's allegations about the limited training on mental health emergencies that Springfield provides to its police force. . . A failure to train police officers can amount to an official government policy subject to *Monell* municipal liability when a municipality's failure to train 'amounts to deliberate indifference to the rights of people with whom the police come into contact.'. . A plaintiff can show 'deliberate indifference' by demonstrating that 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'. . A pattern of constitutional violations can put a municipality on notice of a training need, but liability can also attach from a single violation of constitutional rights when such a violation was 'a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.'. .Given that suicide rates in Massachusetts have increased substantially in recent years, . . . and that almost all mental health providers recommend calling a police dispatcher as a first step in a mental health emergency, . . . violations of federal rights seem an increasingly likely consequence of a failure to equip law enforcement officers with the tools to handle such emergencies. When nearly half of those killed by police in Massachusetts between 2005 and 2015 were mentally ill and a third of those injured in police shootings during that time period were undergoing a mental health crisis, . . . municipalities would best take notice that a failure to train their law enforcement officers to manage safely these 'recurring situations,'. . . may amount to 'deliberate indifference,'. . . were a constitutional violation to occur."); ***Serna v. City of Bakersfield***, No. 117CV01290LJOJLT, 2019 WL 2164631, at *7 (E.D. Cal. May 17, 2019) ("Single-incident liability for failure to train is reserved for egregious examples of municipalities

electing not to train their employees, thereby disregarding the known or obvious risk that the omission in the training program would cause employees to violate citizens' constitutional rights. Plaintiffs successfully asserting single-incident theories of liability 'generally involve incidents arising from a total lack of training, not simply an assertion that a municipal employee was not trained about the specific scenario related to the violation.'. . Bakersfield Police Department officers did undergo POST training on interacting with people with dementia and did operate under a policy governing the same topic. Plaintiffs' theory of liability based on the failure to train using the recently updated Learning Domain 37 falls far short of meeting the failure-to-train standard and does not create a triable issue of material fact. Defendant City of Bakersfield's motion for summary judgment for *Monell* liability for failure to train is **GRANTED**."); ***Wroth v. City of Rohnert Park***, No. 17-CV-05339-JST, 2019 WL 1766163, at *15–16 (N.D. Cal. Apr. 22, 2019) ("Plaintiffs contend that Rohnert Park provided inadequate training regarding the risks of positional asphyxiation, pointing out that Rohnert Park has no official policies or guidelines regarding restraint techniques and positional asphyxia. . . Moreover, Plaintiffs stress, the only mention of positional asphyxia in any Rohnert Park training materials produced in discovery is a slide from a weaponless defense presentation that states: 'There is little scientific evidence to support the notion that prone restraint results in life-threatening respiratory compromise or asphyxia .... Cannot quantify the exact amount of weight, but it is faulty to theorize weight on back, in the prone position creates asphyxia sufficient to cause death.'. .The Court agrees that summary judgment is inappropriate on this claim. First, Plaintiffs raise triable issues of fact whether officers were adequately trained. Rohnert Park does not identify any specific training that it provided officers regarding the interaction of restraint techniques and asphyxia, and the fact that officers generally received additional medical training . . . is largely irrelevant without a showing that it addressed this particular issue. Rohnert Park also relies on training that the Officer Defendants received in police academies prior to employment, as well as their compliance with statewide mandated California Peace Officer Standards and Training ("POST"). . . This training is relevant to the extent that it appears that the Officer Defendants received some instruction on these concepts during the police academy. . . But the mere fact that officers complied with POST requirements does not relieve Rohnert Park of its constitutional obligations if that training was inadequate. . . If Rohnert Park was on notice that its officials were likely to violate constitutional rights based on gaps in their state-mandated training, it was required to supplement it. But to the extent that Rohnert Park provided any training to these officers, that training actually appears to have undermined awareness of positional asphyxia. . . Moreover, the Officer Defendants' deposition testimony raises disputed factual issues as the adequacy of the training they received from Rohnert Park and other sources such as academy training. Officers expressed varying degrees of awareness of the risks of positional asphyxiation, and a jury could reasonably draw different inferences from their testimony. . . Most significantly, Officer Wattson, who directly applied pressure to Wroth for the longest period of time, testified that he had did not 'know any of the details or particulars to' positional asphyxiation, but had 'heard that in certain instances someone can asphyxiate if they're left in a face down position for 10 plus minutes.'. . A reasonable jury could find that Wroth asphyxiated in far less time. Second, although Plaintiffs do not provide evidence of a pattern of similar violations, there are disputes of fact whether the constitutional

violations asserted were a 'a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.'. . . As another court in this district recently observed, '[i]t is beyond dispute that police officers are often required to subdue suspects and handle them while they are handcuffed.'. . The Court agrees that a jury could therefore 'reasonably conclude it is highly foreseeable that [Rohnert Park's] failure to provide guidance on the proper duration and amount of force to apply.... to the back of a prone and handcuffed suspect, would result in' constitutional violations. . . Finally, viewing the record in Plaintiffs' favor, a jury could reasonably find a causal relationship between inadequate training and the constitutional violation. For instance, a jury could infer that, if Wattson had been trained that positional asphyxiation presented a risk of death in significantly less time than ten minutes, he would have released his knee from Wroth sooner. Similarly, although Defendants suggest that the Court must focus solely on officers who actually applied their weight to Wroth, a jury could reasonably infer that any adequately trained officer present would have been able to intervene. Accordingly, Defendants are not entitled to summary judgment on Plaintiffs' failure to train claim."); ***Delacruz v. City of Port Arthur***, No. 1:18-CV-11, 2019 WL 1211843, at *16-17 (E.D. Tex. Mar. 14, 2019) (" [T]he court concludes that Plaintiffs have failed to establish a pattern of constitutional violations sufficient to show that the City was deliberately indifferent to the risk of the use of excessive force by officers untrained in CIT tactics on persons with mental illnesses or experiencing mental health crises. In the absence of a pattern, in certain unique circumstances, a plaintiff can establish liability based upon a single violation of constitutional rights. . . . The 'single-incident' method of proving deliberate indifference is generally reserved 'for cases in which the government actor received "no training whatsoever" with respect to the relevant constitutional duty, as opposed to training that is inadequate only as to the particular conduct that gave rise to the plaintiff's injury.' [citing *Littell* and *Peña*] Indeed, this exception applies only where the need for training was 'so obvious' that a failure to do so would mean that the policymaker was deliberately indifferent to constitutional rights. . . The need for additional training is considered sufficiently obvious only when the deprivation of constitutional rights is a 'highly predictable consequence' of the training deficiency. . . .The Fifth Circuit has a well-developed body of case law regarding deliberate indifference, which suggests that the single incident exception 'is generally reserved for those cases in which the government actor was provided no training whatsoever.'. . .Here, Plaintiffs do not allege that the City provides *no* training on the use of force. . . . Plaintiffs have not presented 'sufficient evidence to show that the *highly predictable consequence*' of the City's failure to provide their officers CIT training would be the death of a patient being involuntarily committed to a hospital during a mental health crisis."); ***Martinez v. City of Pittsburg***, No. 17-CV-04246-RS, 2019 WL 1102375, at *7 (N.D. Cal. Mar. 8, 2019) ("Based on these facts, a reasonable fact-finder could conclude that PPD's failure to provide more robust policies and training regarding the use of the carotid hold and the dangers of compression asphyxia amounted to deliberate indifference. While the Pittsburg Defendants note Plaintiffs' inability to point to any other serious incidents or death involving compression asphyxia or PPD's use of the carotid hold, Plaintiffs need not make such a showing if the constitutional violation was a 'highly predictable consequence' of the failure to train. . . It is beyond dispute that police officers are often required to subdue suspects and handle them while they are handcuffed. Therefore, a jury could reasonably conclude it is highly

foreseeable that PPD's failure to provide guidance on the proper duration and amount of force to apply during a carotid hold, or to teach officers not to apply force to the back of a prone and handcuffed suspect, would result in an excessive use of force."); ***Aracena v. Gruler***, 347 F.Supp.3d 1107, 1121 (M.D. Fla. 2018) ("Like *Connick*, Count II fails because Plaintiff has not plausibly alleged that the City of Orlando's failure to train officers on 'security in public places that are highly susceptible to danger, and how to enter and neutralize an active shooter,'. . . fits within the 'narrow range of *Canton*'s hypothesized single-incident liability.'. . As discussed more thoroughly above, Plaintiff has not plausibly shown that nightclubs are at such great risk of attack that a municipality's failure to train its police officers on how to respond and even 'neutralize an active shooter' amounts to deliberate indifference. The incredibly specific training envisioned by Plaintiff on responding to and *neutralizing* a hypothetical active shooter without violating anyone's constitutional rights bears no resemblance to the use-of-deadly-force training envisioned in *Canton*. Though municipalities would be wise to train their police officers on responding to active shooters, failure to provide such training does not amount to a constitutional tort. *See Gaviria v. Guerra*, No. 17-23490, 2018 WL 1876124, at *7 (S.D. Fla. Apr. 19, 2018) ("Neither the Supreme Court nor the Eleventh Circuit has ever applied the single-incident liability exception."). Count II thus does not state a plausible claim."); ***Pollard v. Dart***, No. 15-CV-4638, 2018 WL 5717850, at *3–4 (N.D. Ill. Nov. 1, 2018) ("[N]either *Glisson* nor *Brown* dictate the outcome of this case. Unlike the plaintiff in *Glisson*, Pollard presented no evidence that Wexford consciously chose not to adopt a policy that might prevent delays in surgery like the one he experienced. Pollard has also not presented any evidence from which a reasonable jury might conclude that Wexford was aware that its procedures for enrolling patients in surgery were causing harm or would likely cause harm to inmates. This stands in stark contrast to the plaintiff in *Glisson*, who was seen by multiple medical services providers that continually observed his decline in health while in their care. . . Similarly, *Brown* emphasizes that a plaintiff must demonstrate a conscious disregard for a known or obvious risk of injury. . . Pollard has failed to present any evidence that Wexford did so. In addition, Pollard alleges that this is a failure to train case. When a plaintiff alleges that the constitutional violation stems from a corporate entity's failure to train, the plaintiff must demonstrate that a particular training program caused the injury in question. . . A showing that one officer is unsatisfactorily trained is not sufficient, because otherwise corporate and municipal liability would be virtually boundless. . . The relevant inquiry in determining whether or not corporate liability attaches in a section 1983 action is whether or not a corporate training program reflects deliberate indifference to the rights of individuals who will be affected by that program. . . Finally, in a failure to train case, a municipality cannot be liable where the individual officer administering the policy is not liable for the underlying substantive claim. . . . Assuming, without deciding, that the delay in his surgery is a cognizable constitutional injury, Pollard does not identify any specific Wexford training policy that was the moving force behind his injury. . . . In addition, as discussed above, both the Supreme Court and the Seventh Circuit have repeatedly held that *Monell* claims based on a single violation are only viable in rare cases where a plaintiff can demonstrate that a corporate policy or custom would very obviously lead to a constitutional violation. Here, Pollard does not articulate or present evidence of any Wexford training policy or custom at all, much less one that would very obviously lead to a delay like the

one he suffered. Pollard argues that his injury is indicative of an obvious need for better training of Wexford personnel. Even if the delay in his surgery does demonstrate such a need, neither his injury nor the record demonstrate that Wexford consciously disregarded a known or obvious risk of injury by implementing and enforcing the training program or practices in place. . . Finally, Pollard has not presented any evidence that his injury is part of a larger pattern of constitutional violations resulting from a policy or custom evincing deliberate indifference toward those whom the policy would affect. . . Because Pollard has failed to identify and present evidence of any Wexford training policy or custom that would very obviously lead to the type of injury he suffered, summary judgment for Wexford is proper."); ***Albert v. City of New York,*** 2018 WL 5084824, at *9-11 (E.D.N.Y. Oct. 18, 2018) ("The Small plaintiffs make only boilerplate allegations regarding the City's *Monell* liability, alleging that the City 'failed to adequately train, supervise, discipline, sanction, or otherwise direct' members of its police force, including defendant Isaacs. . . They further allege that the City's policies 'have been described in excruciating detail in the various investigations and commissions into the Police Department,' without explaining which 'investigations or commissions' they are referencing. . . They argue that the City 'knew of the longstanding problem of the officers' use of firearms force during fits of road rage and while off-duty,' but provide no support for this alleged knowledge. . . '[C]onclusory ... language' regarding the City's policies is 'insufficient to raise an inference of the existence of a custom or policy, let alone that such a policy caused [the constitutional violation].'. . The Albert plaintiffs provide more detailed allegations of the City's failure to train or supervise its employees, but their allegations do not plausibly make out the necessary elements of a *Monell* claim. . . In their complaint, the Albert plaintiffs provide seventeen examples of instances in which they allege that members of the NYPD 'engaged in fits of road rage and unlawful use of force while off-duty.' . . The City notes that these incidents 'span[ ] eleven years,' which 'equates to less than two incidents per year—not enough to create a policy or practice' in a workforce of 'approximately 36,000 NYPD officers.'. . However, even if these incidents all took place in one year, '[a] training program is not inadequate merely because a few of its graduates deviate from what they were taught.'. . Though 'a single instance of deliberate indifference to subordinates' actions can provide a basis for municipal liability,'. . . plaintiffs provide no information about the City's response to these allegations, nor any evidence to demonstrate that the violation of plaintiffs' constitutional rights was 'a *highly predictable* consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.'. . Moreover, the past incidents plaintiffs include in their complaint involve a significant range of factual situations; only seven out of the seventeen incidents involved *firearms* as opposed to other weapons, and, as the City notes, 'it is not even clear from the allegations whether these situations involved state action, rather than private misconduct or crime[.]'. . Because the City is only liable for its employees' actions if the actions occurred while the employee was acting under color of law, the City would have no obligation to take corrective actions if the incidents occurred during purely private events. . . These allegations fall short of the stringent standard of fault' necessary to plead a City's 'deliberate indifference.'. .Additionally, plaintiffs fail to point to a 'specific deficiency' in the City's training programs that could plausibly have caused their alleged constitutional violations. Though plaintiffs cite dictum from the Second Circuit's opinion in *Amnesty America* that suggests that the pleading standard for a failure to train

claim may be lower on a motion to dismiss, that case was decided before *Twombly* and *Iqbal*, and courts now require that plaintiffs point to a 'specific deficiency in the municipality's training.'. . The closest that plaintiffs come to identifying a specific deficiency is their allegation that Isaacs 'was not trained by defendant [City] or the NYPD to deescalate rather than engage in conflicts while off-duty.'. . But this is an 'unsupported conclusory allegation' that is not sufficient to demonstrate deliberate indifference. . . Furthermore, plaintiffs do not sufficiently demonstrate that Isaacs's actions present the kind of 'difficult choice' that training or supervision would 'make less difficult.'. . Plaintiffs describe the tragic shooting that resulted in Small's death as plainly unjustified, despite Isaacs's false belief that Small may have intended to steal his car or confront him over a prior arrest. . . But 'a blatantly criminal act ... cannot reasonably be seen as posing the type of "difficult choice"' that would give rise to an obligation to train."); ***Cherry v. D.C.***, No. CV 17-2263 (ABJ), 2018 WL 4283566, at *6–7 (D.D.C. Sept. 7, 2018) ("Plaintiff argues that even if the Court finds that the complaint does not include 'sufficiently pleaded facts as to the District's ignoring of a history of constitutional violations,' the complaint should survive defendant's motion to dismiss because 'a pattern of similar violations is not always necessary to show deliberate indifference as applied to necessary training.'. . But plaintiff's reliance on the Supreme Court's observation in *Harris* is misplaced. In *Harris*, the Supreme Court recognized that a municipality's failure to provide any training on an issue that would obviously necessitate training – such as an officer's use of firearms, and in particular, deadly force – could possibly demonstrate a municipality's deliberate indifference. . . But here, plaintiff has not alleged that the District provides no training to SPOs on the use of excessive force. Rather, the complaint states that the District provides SPOs with sixteen hours of pre-assignment training that includes specific instruction on the use of force, and that the training is supplemented by another sixteen hours of on-the-job training. . . Because plaintiff does not allege that the District failed to provide *any* training on the use of force, plaintiff's claim is not analogous to the potential 'single-incident' theory of liability that was described in *Harris*. . . Instead, as the court concluded in the *Odom* case, plaintiff's claim 'requires pleading additional facts that would demonstrate that the training was insufficient and that the District knew or should have known that the training was insufficient.'. . Therefore, plaintiff has not pleaded sufficient factual content to plausibly show that the District was deliberately indifferent to an inadequacy in its training, or that the inadequate training had some connection to the events that led to Smith's death. So, the Court will dismiss the section 1983 claim against the District without prejudice."); ***Arevalo v. City of Farmers Branch***, No. 3:16-CV-1540-D, 2018 WL 1784508, at *6-8, *10 (N.D. Tex. Apr. 13, 2018) ("The Fifth Circuit 'has considered single violation liability several times, and, with only one exception in some [40] years since *Monell*, has consistently rejected application of the single incident exception.'. . The sole exception, *Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000), demonstrates that single-incident liability requires 'an abundance of evidence about the proclivities of the particular officer involved in the excessive use of force.'. . .From these cases, the law clearly establishes that—for a failure to train claim—deliberate indifference can be established under the single-incident exception when the officer received a complete absence of training, when the officer's record provides abundant evidence of a proclivity to commit the specific constitutional violation in question, or when both circumstances are present. . . . As the court noted in *Arevalo*

II, '[b]eyond *Brown*, the Fifth Circuit has declined to find deliberate indifference in several cases where the officers in question had histories generally suggestive of future misconduct— "even where a municipal employer knew of a particular officer's propensities for violence or recklessness."'. . These decisions all instead looked for evidence concerning the officer's proclivity to commit the specific constitutional violation that had occurred. . . . [N]one of the excessive force complaints alleged the use of deadly force. Thus, as in *Roberts*, because there is no evidence that Officer Johnson 'had ever been involved in cases involving the use of deadly force,' not providing him deadly force training was not indicative of deliberate indifference. And given his prior law enforcement experience, training, and lack of a disciplinary record involving the use of deadly force, Officer Johnson's shooting of E.R. was not a 'highly predictable consequence' of not receiving training from Chief Fuller. . . .The court holds that hiring Officer Johnson was not unreasonable under clearly established law, despite his prior conduct. The facts in Arevalo's Rule 7(a) reply are dispositive. Again, Officer Johnson had received no prior reprimands for the use of excessive force. Each of the three internal investigations of excessive force allegations cleared him of wrongdoing. Moreover, none of the allegations involved the use of deadly force. Therefore, Officer Johnson's prior record as a DART police officer showed no 'strong connection' to his shooting of E.R."); ***Estate of Strong v. City of Northglenn***, No. 17-CV-1276-WJM-MEH, 2018 WL 1640251, at *8 (D. Colo. Apr. 5, 2018) ("Plaintiffs' failure-to-train theory must fail. Plaintiffs' Response argues that the allegedly egregious nature of the constitutional violation makes it 'patently obvious' that Wilson and Schlenker had inadequate training, highlighting the claims that children were in the home and that shots were fired through walls, and the allegation that Strong was shot brutally and repeatedly as he lay on the floor, in what Plaintiffs characterize as an 'execution.'. . But even treating these factual claims as true, and even as deeply disturbing as are the allegations that Strong was for all practical purposes executed by Schenkler as Strong lay seriously wounded and not resisting on the floor, the Complaint fails to include any factual allegations that this incident was in fact the product of a training deficiency rather than individual misconduct, or that any of the Cities were aware of such allegedly deficient training but deliberately indifferent to its consequences."); ***Leibowitz on behalf of Estate of Jacoby v. DuPage County***, No. 12 C 6539, 2018 WL 1184731, at *4 (N.D. Ill. Mar. 7, 2018) ("Jacoby's evidence, viewed in a light most favorable to him, does not permit an inference that any of his *Monell* theories could succeed, primarily because he presents no evidence that it is highly, or even somewhat, predictable that an officer who lacks specific tools to handle an individual who presents in an agitated state and refuses to cooperate in a medical assessment is likely to violate his constitutional rights such that failure to train amounts to deliberate indifference. Although it may have been obvious to the officers that Jacoby was severely obese, plaintiff has no evidence specific to obesity that would distinguish such a person from any other detainee in the same situation. For example, he proffers no expert testimony about law enforcement practices that suggest that acceptable practices in correctional or detention settings should include particular protocols for obese or agitated detainees, nor does he identify a course of training that might have made a difference here. In short, the issue in this case is straightforward. It is whether the individual defendants used excessive force against Jacoby on this single occasion in violation of the Fourth Amendment. For these reasons, the Sheriff is entitled to summary judgment on the

failure-to-train claim."); ***Arrington v. City of Chicago***, No. 17 C 5345, 2018 WL 620036, at *3-4 (N.D. Ill. Jan. 30, 2018) ("At bottom, both methods of pleading *Monell* claims—the series of bad acts, and the highly predictable consequence—require allegations permitting a plausible inference that the municipal entity had notice that its employees were engaging in a custom or practice of unconstitutional behavior. The municipal entity's liability then flows from its failure to take action to prevent that custom or practice from injuring the plaintiff. In this case, Plaintiff appears to attempt to allege liability under both the 'series of bad acts' and the 'highly predictable consequence' theories of *Monell* liability. The Court addresses each in turn. . . . In an attempt to plausibly allege a series of bad acts, the Plaintiff cites six examples of excessive force verdicts or settlements concerning actions of Chicago police officers in addition to Arrington's case. But Chicago is a City of more than 2.7 million people. . . that employs approximately 12,000 police officers . . . Moreover, the seven examples Plaintiff cites took place over a 13 year period. The Court questions whether these allegations alone are sufficient to plausibly infer that excessive force is so common among Chicago's police force that the City should have been on notice of such a custom or practice. . . Nevertheless, as is widely known in the Chicago legal community, the Department of Justice completed a report dated January 13, 2017 finding that the Chicago Police Department 'engages in a pattern or practice of unconstitutional use of force.'. . This finding was based on a review of Chicago Police Department and IPRA records concerning incidents between January 2011 and April 2016. . . Although the Justice Department's *conclusion* was not available to the City until January 2017, the *evidence* on which the report is based was readily available to City policymakers in the period of time preceding the incident causing Arrington's death. This evidence is more than sufficient to plausibly infer that the City has a custom or practice of tolerating or enabling the use of excessive force by its police officers, and that the City was on notice of this custom or practice during the relevant time period prior to Arrington's death. Plaintiff did not cite the DOJ Report in her complaint. But the Seventh Circuit has held that government reports such as the DOJ Report at issue here can be admissible evidence of municipal notice relevant to a *Monell* claim. *See Daniel v. Cook County*, 833 F.3d 728, 740-42 (7th Cir. 2016) (citing cases); *see also Simmons v. City of Chicago*, 2017 WL 3704844, at *7-8 (N.D. Ill. Aug. 28, 2017) (finding the DOJ Report admissible at trial on a *Monell* claim against the City); *LaPorta v. City of Chicago*, 2017 WL 4340094, at *13 (N.D. Ill. Sept. 29, 2017) (finding a report by the City's Police Accountability Task Force a basis to deny summary judgment on a *Monell* claim alleging that a "code of silence" exists in the Chicago Police Department). Furthermore, the Seventh Circuit has held that it is proper for courts to take judicial notice of public records on a motion to dismiss pursuant to Rule 12(b)(6) without converting it to a motion for summary judgment. . . . In this case, where Plaintiff alleges that the City enables or condones a custom or practice of excessive force among its police officers, the DOJ Report citing evidence that such a custom or practice does in fact exist is a sufficient basis for Plaintiff's *Monell* claim to proceed.[4] **[n.4** The Court acknowledges that Judge St. Eve recently rejected the DOJ Report as a basis to plausibly allege failure-to-train and failure-to-discipline *Monell* claims against the City. *See Carmona v. City of Chicago*, 2018 WL 306664, at *3 (N.D. Ill. Jan. 5, 2018). But in that case, the plaintiff alleged 'police officers illegally handcuffed and interrogated him in a hospital bed and arrested him without probable cause.'. . Judge St. Eve held that the plaintiff failed to show 'how the deficiencies

described in the [DOJ Report] relate to [his] claim.'. . No such disconnect is present here, where Plaintiff alleges a custom or practice of excessive force among Chicago police officers, and the DOJ Report found such a custom or practice.**]** . . . .Even if the DOJ Report did not exist or was insufficient to demonstrate a 'series of bad acts' putting the City on notice, the Court finds that Plaintiff has plausibly alleged a custom or practice by the City of which excessive force is a highly predictable consequence. Plaintiff alleges that the City perpetuates the custom of excessive force among its police officers by allowing internal investigatory procedures to provide accused officers an opportunity to conform their account of alleged excessive force incidents to the evidence discovered by investigators. This alleged customary opportunity for officers to get their stories straight plausibly assured Officer Ewing that he could use excessive force in his pursuit of Arrington and not worry about being meaningfully disciplined or punished. . . .This Court . . . finds plausible Plaintiff's allegation that by allowing investigatory procedures that permit an accused officer to cover up instances of excessive force, the City sends a message to officers that it condones overly aggressive and unconstitutional policing, thereby causing officers to use excessive force when they might not otherwise if they knew they would be held fully accountable for such actions. . . . The Supreme Court has held that failure to train claims require a certain number of instances of officer misconduct in order to plausibly allege a custom or practice. . . But Plaintiff's claim against the City is not for a failure to train . . . . Rather, Plaintiff's 'highly predictable consequence' theory alleges that the City actively enables the use of excessive force by maintaining loopholes in its investigatory procedures that permit officers to conform their stories to the facts, and provides specific examples of what those loopholes are. As discussed, this is not the type of *Monell* claim that requires allegation of multiple examples."); ***Virgil v. City of Newport***, No. CV 16-224-DLB-CJS, 2018 WL 344986, at *15 (E.D. Ky. Jan. 9, 2018) ("In this case, Virgil has not alleged a pattern of constitutional violations. Instead, he has alleged that the City of Newport acted with deliberate indifference in failing to train its police officers regarding 'prompt disclosure of ... evidence that exonerates a defendant following his arrest or conviction' and fabrication of evidence. . . Virgil's allegations, taken as true, fall within the 'narrow range of circumstances' that the Supreme Court contemplated in *Harris. Connick*, 563 U.S. at 63, 70 (holding that failure to train prosecutors in their *Brady* obligations did not satisfy the single-incident liability theory, but noting that police officers are not "equipped with the tools to find, interpret, and apply legal principles," absent training). In support of his claim, Virgil has put forth factual allegations detailing the Individual Newport Defendants' fabrication of inculpatory evidence and withholding of exculpatory evidence. Along with those allegations, Virgil claims that the City of Newport failed to train its officers on their duty to disclose exculpatory evidence and the impropriety of fabricating evidence. . . 'Given the known frequency with which police' obtain exculpatory evidence and their obligation to collect reliable evidence, the City of Newport's alleged failure to train constitutes deliberate indifference to the 'highly predictable consequence' of the violations of criminal defendants' constitutional rights. . . Moreover, Virgil has adequately alleged that the failure to train was the 'moving force' behind the violation of his constitutional rights. . . Therefore, the Second Amended Complaint has sufficiently stated a § 1983 failure-to-train claim."); ***Soto v. City of N. Miami***, No. 17-22090-CIV, 2017 WL 4685301, at *10-11 (S.D. Fla. Oct. 17, 2017) ("The Eleventh Circuit has held that when a plaintiff relies on prior incidents

to establish a pattern and practice, the incidents must involve similar facts to the case at hand. . . Eight of the ten incidents described in the Complaint consist of police responding to reports of missing residents from MACtown or reports of burglaries at MACtown. . . The descriptions of these incidents do not allege that the constitutional rights of the residents were violated; the Complaint simply states that the police were called to respond to the reported incidents. . . Thus, these incidents do not demonstrate a widespread pattern or practice of police officers violating the constitutional rights of citizens with mental disabilities. . . Two of the incidents described in the Complaint do include allegations of more confrontational interactions between the police and residents of MACtown. On one occasion, the police arrested a resident of MACtown who had bitten his roommate on the lip. . . The resident was transported to the jail and held overnight. . .On a second occasion, Soto alleges that 'North Miami Police responded to an incident at MACtown and tased a person with an intellectual disability.'. . This is the entire description of the incident. The descriptions of these two incidents do not include facts indicating that the police responses were unlawful or that violations of the residents' constitutional rights occurred. Thus, these incidents are also insufficient to establish a pattern or practice. . . . In response to the City's motion to dismiss, Soto argues that a plaintiff may successfully bring a failure-to-train claim without showing a pattern of constitutional violations. . . The Eleventh Circuit has recognized that "[i]n *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court in dictum left open the possibility that a need to train could be 'so obvious,' resulting in a City's being liable without a pattern of prior constitutional violations.'. . . In *City of Canton*, Justice O'Connor stated that '[t]he claim in this case –that police officers were inadequately trained in diagnosing the symptoms of emotional illness – falls far short of the kind of "obvious" need for training that would support a finding of deliberate indifference to constitutional rights on the part of the city.'. . Similarly, the Eleventh Circuit has held that a claim that a city inadequately trained jail employees 'to recognize the need to remove a mentally ill inmate to a hospital or to dispense medication as prescribed' does not constitute such an obvious need to train that it can support a finding of deliberate indifference to constitutional rights. . . Soto has not provided any case law holding that the need to train in a factually similar case was so obvious that the plaintiff did not need to establish a pattern or practice of similar constitutional violations. Therefore, similar to *City of Canton* and *Young*, the Court finds that the need to train in this case does not qualify as one of the 'narrow range of circumstances that a plaintiff might succeed without showing a pattern of constitutional violations ....' . . . Accordingly, Soto has failed to state a § 1983 claim against the City."); ***Mohamed for A.M. v. Irving Indep. Sch. Dist.***, 252 F.Supp.3d 602, ___ (N.D. Tex. 2017) ("[E]ven assuming, *arguendo*, that the City of Irving police officers violated A.M.'s Fourth Amendment right to be from arrest without probable cause, Plaintiff fails to allege a policy, custom, or practice of the City that was the moving force of an alleged constitutional violation. As already stated, the City *cannot* be liable for civil rights violations under a theory of respondeat superior or vicarious liability. . . First, Plaintiff fails to identify any official policy that allegedly caused the underlying constitutional violation. In the absence of an officially promulgated policy, Plaintiff must allege a constitutional deprivation that was more than an isolated incident but was caused by a practice that was sufficiently widespread to constitute a custom having the force of law. . . Plaintiff has not made these allegations. Accordingly, the court is left with an isolated, allegedly unconstitutional

incident, which is generally insufficient to establish an official policy or custom for section 1983 purposes. . . .As an alternative basis for a section 1983 claim against the City, Plaintiff makes the conclusory allegation that the Irving Police Department failed to properly train and supervise its officers with respect to determining probable cause for arrest. . . Plaintiff, however, fails to allege how the City's training policy on probable cause was inadequate. Rather, Plaintiff relies on the conclusory allegation that 'Irving police officers engaged in a pattern of unconstitutional detentions/arrests at least as far back as 2006.'. . Plaintiff also makes the conclusory allegation that, at some unknown time in the past, the City's police chief allegedly acknowledged a pattern of unconstitutional detentions and arrests. . . These conclusory allegations are inadequate to support a failure to train claim. There are no allegations concerning what type of training was being provided to the Irving police officers at or near the time A.M. was arrested, or any allegations as to how the training was defective. Absent such allegations, the Complaint fails to state a section 1983 claim for failure to train."); ***Marlin v. City of New York***, No. 15 CI V. 2235 (CM), 2016 WL 4939371, at *19-21 (S.D.N.Y. Sept. 7, 2016) ("Plaintiff alleges that the NYPD failed to train or supervise the NYPD in proper policing or use of force in controlling demonstrations and protest assemblies even after negative media coverage and complaints to the Civilian Complaint Review Board (CCRB). . . Additionally, he alleges that even after receiving the complaints, the City failed to discipline NYPD supervisors and officers who received complaints . . . . Plaintiff's support for his claim that the City failed to train or supervise police officers consists entirely of conclusory allegations. . . .Plaintiff was allegedly subject to the police's use of excessive force in March 2012, which falls within the five year period from 2010 to 2014 in which there were 207 allegations of force in 179 cases that were substantiated by the CCRB. Plaintiff is entitled to discovery into when the October 2015 Report was commissioned and why. The data provides sufficient factual support for Plaintiff's claim that he was not merely victim to an 'isolated incident' but was instead subject to a pattern or practice of use of excessive force by NYPD. Moreover, I find that Plaintiff adequately states a claim that the City was sufficiently put on notice of NYPD's excessive use of force; the report's publication date is actually not relevant to the issue of notice. Even if the City was not aware of the findings in the October 2015 Report until its publication, it was put on notice by the 207 allegations of force in 179 cases substantiated by the CCRB between 2010 and 2014. Finally, Plaintiff adequately provides support for the inference that the City did nothing about NYPD's pattern of excessive use of force. Despite the number of complaints received and substantiated by the CCRB between 2010 and 2014, officers were not disciplined in over 35% of these cases. Even if the no-discipline rate itself was not known until publication of the October 2015 report, the very fact that a large proportion of officers faced no disciplinary action for unlawful conduct plausibly suggests that the City did nothing. It also counsels against dismissing Plaintiff's claim at this juncture. . . . Viewed in the light most favorable to Plaintiff, the data summarized in these publications creates a plausible inference that NYPD had a pattern or practice of use of excessive force (particularly against Occupy Wall Street protestors), that the City was put on notice of this and did nothing, as shown by its failure to discipline officers, and that the City's inaction caused Plaintiff's alleged constitutional injury."); ***Lopez v. Vidljinovic***, No. 1:12-CV-5751, 2016 WL 4429637, at *4 (N.D. Ill. Aug. 22, 2016) ("Lopez also asserts that the City has a custom or practice of failing to train its EMS and CPD employees on the use of force. . . .To

prove a custom or practice for a failure to train specifically, a plaintiff must show that the failure to train was carried out with deliberate indifference to its known and obvious consequences. . . Typically, a 'pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train.' *Bryan County, Oklahoma v. Brown*, 520 U.S. 379, 409 (1997) (internal quotation omitted). . . . Lopez has failed to adduce evidence of '[a] pattern of similar constitutional violations,' and thus, his claim fails. . . . To be sure, Lopez does proffer some 'material' in support of his claim that the City's behavior reflects the requisite deliberate indifference. As noted above, he points to: (1) a newspaper article chronicling the increase in taser use by the CPD, PSOF [128] ¶ 15; (2) reports commemorating the dismissal of IPRA investigations into allegations of excessive force, *id.* ¶¶ 16-17; (3) statements by Mayor Rahm Emanuel acknowledging a 'code of silence' within the CPD, *id.* ¶¶ 27-30; (4) letter requests from prominent politicians encouraging the DOJ to investigate the CPD, *id.* ¶ 35; and (5) the alleged failure of the IPRA to investigate Lopez's own case, *id.* ¶ 19-25. . . . There is simply no evidentiary basis in this record for a potential factfinder to infer that there has been an increase in *unconstitutional* conduct correlated with an increase in the use of tasers. Similarly, nothing in the record suggests a need for more or different training that is so obvious that policymakers at the City can 'reasonably be said to have been deliberately indifferent to the need.'. . .Likewise, based upon the record presented here, the purported lay opinions and hearsay statements of Mayor Rahm Emanuel concerning an alleged 'code of silence' within the CPD are inadmissible. . . .The requests made by political leaders to the DOJ are similarly unavailing. The requests are inadmissible, do not concern the specific matter at hand, and were written years after Lopez's tasing. . . .Lopez also attempts to prove deliberate indifference by showing that the City of Chicago 'fail[ed] to act in response to repeated complaints of constitutional violations by its officers.'. . More specifically, he asserts that the repeated dismissal of excessive force investigations by the IPRA is evidence of deliberate indifference on the part of the City. . . Lopez's only support on this point comes in the form of statistics that indicate that 2% of excessive force investigations result in a sustained finding against individual police officers. . . Without any evidence regarding whether the 2% sustain rate accurately reflects the actions of each officer in each case, Lopez jumps to the conclusion that the 2% rate, by itself, somehow proves that the City is choosing not to punish officer misconduct. In a further illogical jump, Lopez also claims that this general failure to punish police misconduct, in turn, specifically caused his alleged constitutional injury. . . Here again, Lopez has failed to take the necessary step of presenting cognizable evidence of a causal connection between this data point and his tasing. For example, he offers no evidence that any of the officers at the scene had a history of using excessive force. Nor does he suggest that additional or more thorough IPRA investigations would have revealed that any of the officers involved here actually possessed a history of using excessive force. There is simply no 'causal link' between Lopez's injury and the data he cites. Thus, this evidence does not help Lopez resist the City's motion for summary judgment. Finally, Lopez suggests that the IPRA's alleged failure to investigate Lopez's own case is evidence of deliberate indifference. This argument is divorced from logic and the undisputed timeline in this case. Any alleged failure to investigate Lopez's own incident necessarily happened after he was injured, such that this failure cannot be used to prove deliberate indifference at the time of the injury. Lopez has not presented

any evidence that 'require [s] submission to a jury.'"); ***Guzman v. City of Hilaleah***, No. 15-23985-CIV-GAYLES, 2016 WL 3763055, at *4 (S.D. Fla. July 14, 2016) ("Ultimately, the Court need not engage in a review of these incidents for 'evidence of previous incidents is not required to establish city policy if the need to train and supervise in a particular area is "so obvious" that liability attaches for a single incident.'. . 'In establishing this form of notice, the Supreme Court referenced the proper use of firearms and the correct use of deadly force as an area that would be so obvious as to require adequate training by the municipality to avoid liability.'. . The claim here arises from this precise scenario—the use of deadly force by police officers with municipally issued firearms. The Court therefore finds that the City's alleged failure to train Sergeant Luis and Lieutenant Fernandez could plausibly have created such an obvious risk that it alone establishes the City's deliberate indifference to the risk that the officers would use excessive force against Mr. Guzman. Accordingly, the City's motion to dismiss this claim is denied."); ***Lemons v. City of Milwaukee***, No. 13-C-0331, 2016 WL 3746571, at *22-23 (E.D. Wis. July 8, 2016) ("When a facially lawful municipal action has led an employee to violate a plaintiff's rights, the plaintiff must demonstrate that the municipal action was taken with deliberate indifference as to its known or obvious consequences. . . Deliberate indifference requires proof of disregard of a known or obvious consequence of one's action, and the deliberate indifference must be to the risk of a violation of a particular constitutional or statutory right. . . Mere probability that an officer inadequately disciplined will inflict constitutional injury is not enough; it must be that this officer was highly likely to inflict the particular injury suffered by the plaintiff. . . . In cases alleging inadequate supervision, if a program does not prevent constitutional violations, municipal decisionmakers may be put on notice that a new program is called for, and their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard of the consequences, i.e., the deliberate indifference, for municipal liability. . . Similarly, a custom of failing to discipline police officers 'can be shown to be deliberately indifferent if the need for further discipline is so obvious and procedures so inadequate as to be likely to result in the violation of constitutional rights such that a jury could attribute to the policymakers a deliberate indifference to the need to discipline.'. . Also, a plaintiff may prove deliberate indifference by showing that the City failed to act in response to repeated complaints of constitutional violations by officers. . . Although the individual-capacity claims against Hegerty and Flynn are not identical to the *Monell* claim against the City, the claims have much in common. . . Because Hegerty and Flynn indisputably were policymakers for the MPD, all of their personal actions regarding disciplining (or not disciplining) Cates in particular, failure to track patterns of illegal conduct after unsustained findings, and failure to pursue internal discipline if the DA chose not to charge the officer can be considered regarding whether the City had a policy or custom that caused the harm to Lemons. The court can consider their conduct as policymakers alone plus as just one part of an alleged practice so well settled as to constitute a custom or usage of the MPD. . . .The court notes that in response to the City defendants' summary judgment motion Lemons has limited her argument to Hegerty's and Flynn's failures to supervise IAD and Cates properly and to discipline Cates and the MPD's practices of failing to meaningfully investigate or discipline. Thus, she does not deny that the court should dismiss any deliberate-indifference claim (whether against Hegerty and Flynn individually or the City under *Monell*)

regarding hiring or training policies or practices, including the hiring and training of Cates."); ***Doe v. Town of Wayland***, 179 F.Supp.3d 155, 173 (D. Mass. 2016) ("John's allegations align with *Kibbe* and *Baron*. Although he only alleges conduct pertaining to one particular friendship—the one between Coe and Philip—he alleges multiple instances of misconduct regarding that friendship. These include: staffers' encouragement of Coe and Philip to form a friendship with each other; staffers' advocating to Sarah and Robert at multiple meetings that Philip's friendship with Coe was beneficial to Philip—including via specific affirmative representations that Coe was 'a good kid' and 'good with kids'; continued encouragement of the Coe-Philip friendship, even after learning about Coe's abuse of Rachel; and Moskowitz-Dodyk's reference to Philip's friendship with Coe as a reason for Sarah to not remove Philip from LVC [Learning and Vocational Center]. The Complaint also contains numerous inappropriate omissions from Wayland and TEC [The Education Cooperative] staff—failure to exclude Coe from LVC; failure to inform Sarah and Robert about Coe's past sexual abuse; failure to remove Coe from LVC after he sexually abused Rachel; failure to inform Rachel's parents about Coe's sexual abuse of Rachel; and failure to inform the Does about Coe's sexual abuse of Rachel—which, though not unconstitutional, offers factual support for an inference that socially engineering dangerous friendships was an official custom or policy. This systemic pattern of activity compels the Court to find John's allegations 'more akin to the serial misconduct cases than to cases implicating the single incident rule.'. . Accordingly, the motion is DENIED for Counts II and III."); ***Lopez ex rel Lopez v. City of Cleveland***, No. 1:13 CV 1930, 2016 WL 795855, at *5-6 (N.D. Ohio Mar. 1, 2016) ("The Court agrees with defendant that summary judgment is warranted on the inadequate training allegation. Initially, although the Complaint alleged that the City failed to adequately train its officers regarding excessive force, Katsaris opines that the City failed to train its officers about the use of force when dealing with mentally and emotionally disturbed subjects. In his deposition testimony, however, Katsaris acknowledges that his opinion is based on the training he claims the officers involved received- not the adequacy of the training program itself. In fact, there is no discussion of the contents of the training program in his report. Moreover, the expert's deposition testimony impermissibly goes beyond his report and identifies new theories as to how these officers breached nationally recognized police standards (i.e, the failure to set up a barricade, etc.). And, Katsaris could not identify any similar incidents involving Cleveland police officers and a mentally or emotionally disturbed subject. Nonetheless, even considering the deposition testimony, Katsaris does not identify any failure on the part of the City that evidences its deliberate indifference. . . .Katsaris opines that the City failed to adequately train its officers about the use of force in dealing with mentally ill subjects and, hence, were deliberately indifferent to plaintiff's constitutional rights. This is an inappropriate legal conclusion that the City was deliberately indifferent. Even assuming Katsaris's opinions are admissible, the claim of inadequate training fails because plaintiff presents no other evidence of inadequate training other than Katsaris's opinions that the involved officers' actions fell below nationally recognized police standards. Plaintiff fails to present evidence (or allege) that the City 'failed to provide adequate training in light of foreseeable circumstances' or 'failed to act in response to repeated complaints of constitutional violations by its officers.' In short, plaintiff does not present evidence showing that the City's training itself was inadequate and the inadequate training was a result of deliberate indifference to counter

defendant's evidence of the adequacy of the City's training which is required by the State of Ohio. In fact, other courts have held that where a municipality adheres to state standards for training, there cannot be a finding of deliberate indifference."); ***Edwards v. Cook Cty.,*** No. 15 C 6935, 2016 WL 687915, at *2 (N.D. Ill. Feb. 19, 2016) ("*Connick* describes two ways Edwards can show the County's deliberate indifference to his constitutional rights: (1) through '[a] pattern of similar constitutional violations by untrained employees' or (2) by establishing that his false arrest and illegal detention were 'highly predictable consequence[s]' of failing to train and supervise County employees on their record-keeping responsibilities. . . At the pleading stage, however, Edwards is not required to choose between these two methods of proving deliberate indifference. He is also not required to plead a prima facie case under either proof framework. . . With regard to the pattern method of showing deliberate indifference, the County has not cited any cases in which a *Monell* claim was dismissed because the plaintiff failed to allege a pattern of constitutional violations. To the contrary, the County inadvertently cites a case in which the Seventh Circuit criticized a district court for requiring a complaint to contain more specificity about pattern evidence. *See Jackson v. Marion Cty.*, 66 F.3d 151, 152-53 (7th Cir. 1995). The County's other cases regarding pattern evidence are unhelpful because they were decided at the summary judgment stage rather than on a motion to dismiss. *See Grieveson v. Anderson*, 538 F.3d 763, 774 (7th Cir. 2008); *Estate of Moreland v. Dieter*, 395 F.3d 747, 760 (7th Cir. 2005). The other method Edwards might use to establish *Monell* liability turns on whether the alleged violation of his constitutional rights was a 'highly predictable consequence' of the County's failure to train and supervise employees who were responsible for maintaining accurate warrant records. . . The County appears to believe that *Connick* precludes Edwards from relying on the so-called 'single incident' theory of *Monell* liability. *Connick* held that 'recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training about how to obey the law' because their legal training and ethical obligations enable them to make legal judgments about what *Brady* requires. . . This case is nothing like *Connick*. While it may not be obvious that licensed attorneys will repeatedly violate *Brady* unless they receive hands-on training and supervision, it is foreseeable that failing to train and supervise non-lawyers who are responsible for maintaining warrant records will result in citizens like Edwards being arrested on old warrants and detained for several days until a state judge quashes the warrant."); ***Freeman v. City of Tampa,*** No. 8:15-CV-2262-T-30EAJ, 2015 WL 8270025, at *5 (M.D. Fla. Dec. 8, 2015) ("Plaintiffs request the Court to infer a custom or policy because Defendant Officers' ignorance of the firearm exception suggests a failure to train on the City's part. Plaintiffs contend '[t]he fact that out of six officers, including one in a supervisory capacity, not one objected to or realized that Freeman's conduct was entirely lawful, shows that this was not a case of a single officer being unaware of the law, but a pervasive issue where no officers appear to have been trained to deal with the law abiding gun carrier.'. . The Court cannot make this inference. As such, this claim is dismissed without prejudice. Freeman may amend this claim only if he can allege sufficient facts of any prior similar pattern of incidents that would have placed the City of Tampa on notice of a need to train its officers regarding an individual's right to openly possess a firearm while fishing."); ***Tolan v. Cotton***, No. 4:09-CV-1324, 2015 WL 5310801, at *2-5 (S.D. Tex. Sept. 11, 2015) (summary judgment for City granted) ("The Court takes judicial notice of the fact that Texas statutes provide

that all peace officers in Texas, including Defendant Cotton and the other the peace officers of the City of Bellaire are required to complete training and licensing requirements of the Texas Commission on Law Enforcement ("TCOLE") before serving as a police officer. . . .The summary judgment evidence presented by the City demonstrates that the City's officers received TCOLE training, and that training was adequate. . . Documents numbered 158–1 and 158–2 (exhibits numbered 36–37), 158–7 and 158–8 (exhibits numbered 42–43), specifically detail the training Defendant Cotton received. . . . Dr. Gaut concluded that 'the need to train officers on the specific circumstances when deadly force is not appropriate is so obvious that the City's abject failure to do so constitutes deliberate indifference to the safety of the public.'. . .The facts and circumstances of the instant case do not establish that a failure to train police officers specifically on 'utilizing de-escalation techniques, including proper verbal warnings and communications'. . . and on when excessive force should not be used, the mirror image of the training on when excessive force may be used, makes the training received by City of Bellaire police officers so inadequate that it would be obvious to the City that, without providing that training, the City is rendered deliberately indifferent to the civil rights of the populace. . . .The opinion evidence of William Gaut is the only evidence Robbie Tolan has on the issue of failure to train. Because the City's officers were provided substantial relevant training, neither the 'unmistakable culpability' nor the 'clearly connected' causation requirements established by *Brown* . . . can be shown in this case. . . The City's policy maker has not been shown to be deliberately indifferent to a known need for training. The Fifth Circuit held in *Thompson v. Upshur County,* 245 F.3d 447, 459–60 (5th Cir.2001, that Fifth Circuit precedent makes clear that deliberate indifference on the part of a governmental policymaker cannot generally be shown from a single violation of constitutional rights or expert testimony."); ***Hinojosa v. Sheriff of Cook Cnty.***, No. 13 C 9079, 2015 WL 5307514, at *7 (N.D. Ill. Sept. 10, 2015) ("Hinojosa's case does not fall within this narrow [single incident] exception. Hinojosa does not dispute that Contreras received substantial training and instead contends that Contreras should have received additional training on when to use deadly force against intoxicated individuals or when a taser is involved, as well as training on a ballistic shield's resistance to sharp-edged weapons. . . In support, she cites the deposition testimony of CCSPD sergeant O'Brien, who testified that he could not recall whether any courses have been offered regarding 'what happens when someone is' tased, or 'what will happen if an edged weapon strikes a ballistic shield.'. . Hinojosa also points to the testimony of CCSPD sergeant Hartsfield, who testified that he has never trained officers 'with regard to situations involving stairways and [the] firing of a [t]aser followed by the use of deadly force.'. . As the Court explained in *Connick,* however, '[t]hat sort of nuance simply cannot support an inference of deliberate indifference.'. . Indeed, '[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident.'. . As such, Hinojosa cannot simply argue that the Sheriff should have done more, but must provide some basis for concluding that the Sheriff was on notice of likely constitutional violations and nevertheless chose, through inaction, to disregard highly predictable consequences and to violate the Constitution. That, Hinojosa has not done. Because this case is readily distinguishable from the extreme circumstances of the hypothetical posed in *City of Canton,* no reasonable jury could conclude from the evidence presented that the Sheriff had notice

that a deficiency in its training program would obviously cause its personnel to violate citizens' rights. Summary judgment will be granted on Hinojosa's failure-to-train claim."); ***Pindak v. Dart***, 125 F.Supp.3d 720, (N.D. Ill. 2015) ("It is undisputed that the Sheriff did not have any training or specific policies regarding panhandling, but whether the need for training or policies was, or should have been, obvious to the Sheriff remains a question of fact. Plaintiffs offer evidence showing a series of incidents in which Sheriff's deputies participated in removing panhandlers from the Plaza. . . . This series of alleged bad acts is insufficient, by itself, to establish *Monell* liability based on the absence of training or policies. Plaintiffs must also provide evidence that the circumstances 'brought the risk at issue to the attention of' Sheriff Dart. . . . Lacking such direct evidence of the Sheriff's knowledge in this case, Plaintiffs make two alternative arguments in support of *Monell* liability. First, they contend that they are not required to show actual knowledge on the part of the Sheriff because the nature of the duties assigned to the Sheriff's deputies made the need for training obvious . . . . Plaintiffs contend that in an 'open urban space,' such as the Daley Plaza, 'it was inevitable that panhandlers would be present and seek to exercise their legal rights.'. . Defendants acknowledge as much, noting that panhandlers are on the Plaza 'virtually every day.'. . When the Sheriff assigned deputies to posts on the Plaza, Plaintiffs continue, he should have realized they would come into contact with those panhandlers, and is, therefore, liable for inadequately preparing for those interactions. A jury could certainly reach this conclusion, but a reasonable factfinder might also credit the testimony that peaceful panhandling occurs on the Plaza every day and conclude that the risk of a constitutional deprivation to Plaintiffs was not obvious to the Sheriff. . . . Plaintiffs contend that 'when city policymakers are on actual or constructive notice that a particular omission in their training program caused city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program.'. . They maintain that the Sheriff's Department was on notice that their deference to Securitas led to the violation of panhandlers' First Amendment rights. As *Connick* itself explained, however, plaintiffs prevailing under this theory must show that the city's lack of training caused *its own* employees to violate citizens' constitutional rights. . . . In short, the court agrees with Plaintiffs that they have presented sufficient evidence to survive summary judgment: A jury might conclude that the need for training was so obvious to the Sheriff, based on the nature of the deputies' assignments, that failure to provide such training was deliberately indifferent. A jury might similarly conclude that the lack of training or policy of deference to Securitas caused the Sheriff's deputies to assist Securitas guards with Securitas' custom of removing panhandlers. But these are not the only possible conclusions that can be drawn from the evidence. A jury might, instead, rely on the testimony that peaceful panhandling occurs on the Plaza every day to infer that the risk of Plaintiffs' constitutional deprivation was not obvious to the Sheriff. Similarly, if a jury concludes that Securitas did not engage in a widespread practice of removing panhandlers, it would be difficult for that jury to find that the Sheriff's acquiescence to Securitas represented deliberate indifference to Plaintiffs' rights. Finally, even if a jury concludes that Securitas did engage in such a policy or widespread practice, the jury might conclude that Sheriff's deputies did not actively assist, but merely failed to prevent that practice. Thus, Plaintiffs' allegations against Sheriff Dart must be decided by a jury."); ***Williams v. City of New York***, 121 F.Supp.3d 354, 375 (S.D.N.Y. 2015) ("Plaintiff has produced sufficient evidence

to create a question of fact whether the City was deliberately indifferent to the need for additional training of officers with respect to their interactions with hearing-impaired individuals. Roberson testified that she has overseen NYPD Academy training regarding interactions with individuals with hearing impairments since 2003. The U.S. Agreement (and the events that triggered that agreement) put the City on notice in 2009 that its procedures and officer training might not satisfy its obligations under the ADA and outlined the affirmative steps that needed to be taken so that the City could reasonably ensure that its officers did not violate the rights of individuals with hearing impairments. . . Moreover, putting aside the agreement with the United States, it would be preposterous to believe that given the diversity of the population in the City of New York, the NYPD did not know full well that its officers would encounter persons with hearing impairments in connection with protecting and defending the City and that some of those people would need accommodation in order to interact with the police. Although the U.S. Agreement mandated certain changes to the training that officers received as new recruits, *see* U.S. Agreement § 9, Roberson testified that she did not make any changes to the training program following the U.S. Agreement. The only evidence in the record of any officer receiving relevant training is Officer Romano's training in the academy, which occurred prior to 2009. Thus, although Plaintiff, like Cash, can point to only a single prior incident where the NYPD treated a person with a hearing impairment badly, a jury could find that the single prior incident put the NYPD on notice of the need to train its officers on procedures to comply with the ADA. And, the evidence of the NYPD's treatment of the Plaintiff could be sufficient for a jury to conclude that the City was deliberately indifferent to its ADA obligations."); ***Gallion v. Hinds Cnty., Miss.***, No. 3:12CV736-DPJ-FKB, 2015 WL 3409460, at *4-5 (S.D. Miss. May 27, 2015) ("When a plaintiff attempts to show a pattern of conduct, the conduct must be sufficiently similar to prove deliberate indifference. The United States Supreme Court explored this issue in *Connick v. Thompson,* observing that '[w]ithout notice that a course of training is deficient *in a particular respect,* decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.'. . The plaintiff in *Connick* brought § 1983 claims for alleged *Brady* violations and offered proof of four prior *Brady* violations. . . But the Court was unmoved, finding that unlike Thompson's *Brady* claim, none of the prior *Brady* violations 'involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind.'. .And because those prior violations were dissimilar, 'they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.'. .The evidence in this case is similarly lacking. The closest Plaintiff comes to proof of a pattern is the affidavit of fellow inmate Charles Lavon Gallion. . . According to Charles Gallion, he 'personally witnessed that sometimes the [medical] forms were not picked up on a daily basis and sometimes other incarcerated persons were not treated.'. . He also states that he was 'not given [his] prostate medication timely,'. .. and that 'one would have to fallout before anyone would provide medical attention,'. . . . These averments are not sufficient. First, evidence related to delayed receipt of medical requests simply proves that the County's policy was ignored. Second, Charles Gallion's account of delayed prostate medication is not sufficiently similar to provide notice to Hinds County that a medical-emergency policy was necessary for the detection of conditions like a pulmonary embolism. . . And his remaining allegations are too generic to create a jury question. Charles Gallion never

identifies any of the other inmates; when the incidents occurred; how many occurred; the inmates' symptoms, injuries, or illnesses; whether their conditions would require emergency care; the duration of their conditions; or the treatment they did or did not receive under the existing medical policies that had been adopted just two months before Gallion was incarcerated. Simply put, there is not enough information to know whether the other inmates' symptoms and conditions were sufficiently similar to have put Hinds County on notice that its existing policies were deficient to detect the type of emergency Gallion presented. . . Without greater specificity, there is no way to tell whether Hinds County made 'an intentional choice' not to adopt a medical-emergency policy, with the 'obvious' likelihood that the decision would lead to 'a deprivation of civil rights.'"); ***Estate of Bleck v. City of Alamosa***, 105 F.Supp.3d 1222, 1231-34 (D. Colo. 2015) ("Mr. Bleck does not argue, much less attempt to establish by offer of evidence, that such a pattern of prior incidents exists here. Instead, he suggests that this case presents the exceptional circumstance in which deliberate indifference may be found despite the absence of a pattern of prior unconstitutional behavior. . . This class of cases, however, is exceedingly narrow, and liability will be found only where 'a violation of federal rights is a "highly predictable" or "plainly obvious" consequence of a municipality's action or inaction, such as when a municipality fails to train an employee in specific skills needed to handle recurring situations, thus presenting an obvious potential for constitutional violations.'. . As a general matter, the Supreme Court has cautioned specifically against judicial micro-management in this area. . . .Despite these substantial barriers, Mr. Bleck suggests that this case presents such an extraordinary instance because the City failed to specifically train officers in dealing with the mentally ill. . . . Mr. Bleck focuses primarily on APD's General Order No. 02510 on use of force, which he criticizes for not addressing interactions between officers and the mentally ill. . . His reliance on this document is inapt, however, because his claim against the City is for failure to train, not for maintenance of an unconstitutional written policy. The General Order – a self-described set of 'guidelines in the use of force and in the reporting of the use of force'. . . does not itself contemplate or provide for any particular type of training. Moreover, despite whatever gaps may be thought to exist within the use of force policy specific to dealing with mentally ill or intoxicated persons, nothing therein counters the City's evidence that officers did in fact receive training sufficient to equip them to engage and deal with the mentally ill. Nor has Mr. Bleck made any other effort to demonstrate that the training APD officers do receive is so lacking in relevant substance that a constitutional violation was the 'obvious consequence' of the failure to provide more specific training. . . .More importantly, however—and regardless whether officers were trained to deal with the mentally ill *vel non*—the most salient fact remains that Officer Martinez's decision to go hands on with his duty weapon still in his hand was *directly contrary* to his training in the use of this control technique. . . It was this action that directly and proximately caused the injuries Mr. Bleck suffered. The City was not the 'moving force' behind this injury, however, because the APD had trained its officers *not* to attempt hands on control while still armed, regardless of the mental status of the person sought to be controlled. . . In the absence of vicarious liability, the City may not be held liable based on a single instance in which an officer acted contrary to the specific dictates of his training. Thus, Mr. Bleck's failure to train claim ultimately fails, and the City is entitled to summary judgment."), *aff'd*, 643 F. App'x 754 (10th Cir. 2016); ***Johnson v. City of Vallejo***, 99 F.Supp.3d 1212, 1222

(E.D. Cal. 2015) ("After a careful review of the above described extensive record in this case and relevant case law, the Court concludes that although there is evidence of some systemic issues within the VPD, the evidence does not meet the extremely stringent legal standards required for claims under *Monell.* Although VPD officers shot and killed four people in the span of just three months in the middle of 2012 and Defendants deduced no pattern and made no changes in training in response, there is insufficient evidence that any of the other shootings by police resulted in constitutional violations. In order for a claim to succeed, Defendants must have been on 'actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights.' *Connick*, 131 S.Ct. at 1360 (internal citations omitted). As stated, '[a] pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train.'. . In the instant case there is no evidence that VPD officers committed other constitutional violations. Plaintiffs argue that a reasonable jury could find that the total inaction of the City and Kreins in response to this uptick of police-involved shootings of civilians, and specifically the repeated incidents involving Kenney, showed a 'deliberate indifference' to the constitutional rights of the people of Vallejo. . . However, again, the unconstitutionality of these actions has not been proven. The Court does note the difficult task facing Plaintiffs who wish to bring a claim for failure to train. As is evident by this case, the constitutionality of police conduct is often not determined by an unbiased entity until years after the conduct has occurred. Nevertheless, some evidence of constitutional violations is required to maintain the *Monell* claim in this case. The Court also finds insufficient evidence to create a genuine issue of material fact as to whether 'a sufficient causal connection between [Kreins'] alleged wrongful conduct and the constitutional violation[s]' exists. . . Although the evidence shows that Kreins' inaction may have been called into question in the face of repeated use of lethal force by his officers against victims who either did not have firearms or who at least did not fire them, there is a lack of evidence that this resulted in constitutional violations. Therefore, the Court also grants Defendants' motion as to the claim against Kreins in his individual capacity for supervisory liability."); ***Booke v. Cnty. of Fresno***, 98 F.Supp.3d 1103, 1126 (E.D. Cal. 2015) ("Police interactions with mentally disabled individuals are not uncommon, and courts in this circuit have permitted *Monell* claims to proceed when the policy/training at issue involves interactions with the mentally disabled. . . In those cases, however, the key was an absence of both a policy and training regarding interactions with mentally disabled individuals. . . Here, SPD has Policy 418, which appears to appropriately address interactions with the mentally disabled. Further, although Cpl. Callahan's January 30, 2012 memo indicates that training had not been occurring, training through the received POST DVD's was being made available to SPD officers and the DVD's were intended to address *inter alia* Policy 418. These facts make this case materially different from *Newman* and *Kirby*.In sum, Policy 418 addresses interactions with the mentally disabled, and Plaintiff has identified neither deficiencies within Policy 418 nor other incidents involving SPD personnel and mentally disturbed individuals. Plaintiff has not shown an actual violation of state law, POST training mandates, or Policy 418.6. Summary judgment in favor of the City on this failure to train claim is appropriate."); ***Pluma v. City of New York***, No. 13 CIV. 2017 LAP, 2015 WL 1623828, at *12 (S.D.N.Y. Mar. 31, 2015) ("Here, the proposed amended complaint simply does not allege the kind of deliberate indifference needed to raise a

reasonable inference that the City was culpable in its training or lack thereof. In attempting to articulate this theory, Plaintiff again focuses on instances of inappropriate pepper spray deployment described in the CCRB report and on the NYPD Deputy Inspector spraying a group of protesters. Again, though, this handful of dissimilar incidents occurring over the course of more than a decade is too sparse to put the City on notice that the NYPD's training program produces officers who are likely to commit constitutional violations through their deployment of pepper spray. . . Indeed, the CCRB report noted that officers were already trained regarding deployment in crowds, and the only training revisions it suggested proposed offering additional opportunities to practice aiming because officers often deploy the spray with their nondominant hands. . . The report articulated no concerns that the training would lead to problematic deployment in groups. Thus, these incidents as raised in the proposed amended complaint cannot meet the high standard required to allege that the City was on notice that its training program was so deficient that by failing to alter it, the City was essentially complicit in the violation of Plaintiff's constitutional rights."); ***Ewing v. Cumberland Cnty.,*** No. CIV. 09-5432 JBS/AMD, 2015 WL 1384374, at *27-28 (D.N.J. Mar. 25, 2015) ("The need for use of force training in a jail is obvious, as it is highly predictable that failure to understand its appropriate use would result in injury to inmates and officers alike. A reasonable jury could conclude based on the frequent daily interactions between jailers and inmates that there was a high likelihood constitutional violations might recur if training was not provided. Because it was patently obvious that failure to provide training on the use of force would result in excessive force, the evidence is sufficient for a reasonable juror to conclude that Defendant's failure to train amounted to deliberate indifference. . . The evidence is also sufficient to sustain a 'causal link' between the lack of training and the injuries Plaintiff sustained at the hands of correctional officers. At the time of the incident, four of the five officers in the strip search room (Still, Pratts, Minguela, and Fazzolari) had not yet received training from the academy; and three (Still, Pratts, and Minguela) were supposed to have already received training, but Defendant had delayed it by requesting waivers from the State. According to the training log, none of the officers had attended a specific training on the use of force. Ciagnolini, Pierce, and Sciore, who were the commanding officers at the time, likewise had little training. In fact, the three of them had not had use of force training (or trainings of any kind, for that matter) in the eight years before this incident. It is patently obvious that the officers' ignorance of the rules on how and when to use force against a prisoner might have contributed to their transgression of those rules. Defendant's argument, that there is no causal link between the failure to train and the excessive use of force against Plaintiff, thus cannot be sustained."); ***Poventud v. City of New York***, No. 07 CIV. 3998 DAB, 2015 WL 1062186, at *15-17 (S.D.N.Y. Mar. 9, 2015) ("A reasonable jury could find that the City knows 'to a moral certainty' that police officers will discover exculpatory evidence, including evidence related to false identifications, there is a 'powerful incentive[ ] to make the wrong choice' not to disclose such evidence, and an officer's wrong choice frequently will cause the deprivation of a criminal defendant's liberty. . . Plaintiff cites to eight instances in which courts determined during criminal proceedings that police officers did not disclose all exculpatory material in the years immediately preceding Plaintiff's trial. Plaintiff also cites to a $1.75 million settlement in 1997 of a civil lawsuit that claimed NYPD officers withheld an exculpatory ballistics report. The eight criminal court decisions and the large civil settlement

put the City on notice to a potential problem that NYPD officers were not complying with their *Brady* obligations. Defendants do not contest that they had notice of these alleged violations. Because Plaintiff has met his burden under the *Walker* standard, the next inquiry is whether Plaintiff has raised a triable question of fact as to the existence of obvious and severe deficiencies in the City's response. The City neither investigated nor disciplined the officers involved in the nine civil and criminal court matters. Although an NYPD officer could be disciplined or suspended for failing to disclose evidentiary material to the prosecution, there was no specific procedure for imposing such discipline. . . Nor have Defendants provided any evidence of an officer ever being disciplined for failing to disclose material to the prosecution, to produce a DD5, or to document or disclose material, including in Plaintiff's case. . .Plaintiff also cites to three reports that put the City on notice that it was not investigating allegations made in civil or criminal courts of NYPD officers' constitutional violations. It was not until 2010 that the NYPD developed a policy to learn about lawsuits that allege improper behavior by officers. . . A jury may find such persistent failures give rise to deliberate indifference. . . A reasonable jury could also infer a sufficient causal link between the City's policy or custom of failing to investigate or discipline officers for alleged *Brady* violations and the NYPD officers' failure to disclose evidence that contributed the Plaintiff's conviction and incarceration. . .Defendants' primary argument is that eight of the nine cases cited by Plaintiff are not similar enough to the instant alleged *Brady* violation to demonstrate a pattern of similar conduct by officers and deliberate indifference to it on the part of the City. In support of this contention, Defendants cite to the Supreme Court's holding in *Connick,* which dealt with deliberate indifference in the failure to train context. . . The plaintiff in *Connick* pointed to four convictions being vacated during the ten years before his trial due to prosecutors' *Brady* violations. . . .Although Defendants contend that the Supreme Court's holding regarding the level of specificity required in a failure to train claim extends to failure to discipline claims, the two claims are 'distinct theories of ... deliberate indifference.'. . Nor do Defendants cite to any case law supporting their interpretation. In the failure to discipline or supervise context, courts have required notice of similar types of constitutional violations, such as excessive force or withholding exculpatory material. But, those courts have not required the precise behaviors-such as the failure to disclose exculpatory scientific evidence-as required in the failure to train context. . . Therefore, the nine civil and criminal court matters relating to NYPD officers' failure to give exculpatory evidence to the prosecution are sufficiently similar to the instant alleged *Brady* violation for a jury to find that the City and NYPD were on notice. Plaintiff has met his burden in establishing that a reasonable jury could find the City was deliberately indifferent to allegations that NYPD officers violated their *Brady* requirements and that indifference caused him to be denied a constitutional right. Accordingly, Defendants' Motion is DENIED with respect to Plaintiff's municipal liability claim."); ***Stern v. City of New York***, No. 12-CV-5210 NGG RER, 2015 WL 918754, at *4-5 (E.D.N.Y. Mar. 3, 2015) ("Plaintiff does not allege that the City failed to screen Shammas when he originally was hired or that the City failed to train Shammas. Rather, Plaintiff makes specific factual allegations regarding Shammas's actual record and the City's actual response to that record. For the purposes of a Rule 12(b)(6) motion to dismiss, this is sufficient. . . Whether the facts ultimately demonstrate deliberate indifference on the part of the City to the possibility that Shammas would engage in future constitutional violations of the type alleged by Plaintiff is not at

issue at this juncture. . . Defendants may be correct that as a matter of fact, the City's reaction to Shammas's prior record, which the City characterizes as not including Fourth Amendment violations, does not constitute deliberate indifference. . .But Defendants ignore that Plaintiff has alleged with some particularity that Shammas [Redacted] For the same reasons, Defendants' concern that 'any plaintiff would have a viable *Monell* claim each time any officer had any type of disciplinary history whatsoever' is exaggerated. . . Here, Plaintiff alleges specific disciplinary history that is related to the alleged constitutional violations; Plaintiff has not alleged, for example, that Shammas's history of tardiness and unexcused absence from work made it obvious to the City that he would engage in future Fourth Amendment violations. Defendants' reliance on *Connick v. Thompson,* 131 S.Ct. 1350 (2011), is misplaced. As an initial matter, the Supreme Court framed its entire analysis in *Connick* in the failure-to-train context. For example, the Court explained that '[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.'. . It further held that '[a] pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train.'. . And even notwithstanding the Supreme Court's concerns regarding failure-to-train municipal liability, the Court left open the possibility, first hypothesized in *City of Canton,* that a single incident in the failure-to-train context can be so extreme as to warrant municipal liability in the absence of a pattern of similar constitutional violations. . . But this is not a failure-to-train case, and Plaintiff's theory does not rest upon a pattern of similar constitutional violations by other officers within the NYPD. . . Rather, as discussed above, Plaintiff alleges that a single decision by a municipal policymaker constituted the municipal policy in this case. *Connick* does not squarely address such a theory, and therefore does not control in this case. *Cf. Jones v. Town of E. Haven,* 691 F.3d 72, 81 (2d Cir.2012) (post-*Connick* case analyzing Section 1983 claim based on decision or omission by policymaking official and relying on pre-*Connick* cases, including *Bryan County* and *Amnesty America*)."); ***Waller v. City of Middletown***, No. 3:11-CV-01322 CSH, 2015 WL 778749, at *4-6, *8-10 (D. Conn. Feb. 24, 2015) ("Plaintiffs did not allege a pre-existing pattern of violations. Therefore, their Section 1983 claim against the City turned on the existence of a single violation demonstrating that the City was deliberately indifferent to training police officers with respect to entries and searches of private residences. To hold a municipality liable under Section 1983 without proof of a pre-existing pattern of violations, 'the unconstitutional consequences of failing to train' must be 'patently obvious' and an actual violation of constitutional rights must be a 'highly predictable consequence' of the failure to train. . . In *City of Canton*, the Supreme Court described, by way of an example, a circumstance in which the need to train is obvious and the consequences of failing to train, highly predictable. . . . It is difficult to read this passage and conclude that unlike the need to train officers on the constitutional limitations of the use of deadly force, the need to train officers on the constitutional limitations of searches of private residences conducted pursuant to the execution of an arrest warrant is not also obvious, and the consequences for not training, highly predictable. . . . Although *Connick* declined to recognize a *Monell* claim based on the single incident of liability alleged in that case, courts post-*Connick* have not read the Supreme Court's ruling as foreclosing single incident liability under appropriate circumstances. [collecting cases] The City, even in the absence of prior similar violations, knows to a 'moral certainty,'. . . that its officers will be required, for any number of

reasons, to enter private residences, and that in some instances, they will be compelled to do so, without a search warrant or exigent circumstances. Furthermore, given that an arrest warrant does not bestow officers with unfettered authority to enter private residence in all circumstances, it is plausible that execution of arrest warrants presents officers with 'difficult choice[s] of the sort that training ... will make less difficult[]'. . . and that a 'highly predictable consequence' of officers making the wrong choices. . .would be 'the deprivation of a citizens constitutional rights[]'. . . . The Court therefore concludes that the prior Ruling was not improper to the extent it denied the City's motion to dismiss Plaintiffs' *Monell* claim against the City. The complaint states a claim under the single-incident theory of liability contemplated in *City of Canton,* and recognized by the cited authority post-*Connick.* . . . Even assuming that the single-incident liability theory implicit in the complaint could lead a factfinder to reasonably conclude that the City's failure to train constitutes deliberate indifference under *Walker,* Plaintiffs' *Monell* claim fails on *Reynolds's* second and third prongs. Plaintiffs have not identified obvious and severe deficiencies in the City's training program that reflect a purposeful rather than negligent course of action, and cannot show a casual relationship between a training deficiency and the deprivation of their rights. . . .Notwithstanding the fact that there is some question in the record as to whether the Officers received training on the constitutional limitations of protective sweeps specifically, the record suggests the likelihood that the Officers' received adequate training on searches and seizures incident to an arrest warrant and permissible conduct under the Fourth Amendment. The Officers' Field Manual, the 'Review Training Credit Reports' for each officer issued by the State of Connecticut Officer Standards and Training Council, and deposition testimony from the Officers' training instructor and the Officers' themselves, lend to the conclusion that City's officer training program as it relates to permissible searches under the Fourth Amendment was sound. The Court's prior Ruling implicitly concluded, contrary to fact, that the record contained sufficient evidence in support of Plaintiffs' *Monell* claim. In recognizing a genuine and material issue of fact that found no support in the record, the Court improperly saddled the City with the burden of establishing that its training program was adequate. The Court's ruling denying the City summary judgment on Count Two of the complaint will therefore be vacated and judgment will enter on that count in favor of the City."); ***Petkovich v. City of Montgomery, Ala.***, No. 2:14-CV-923-WHA-WC, 2015 WL 263391, at *4 (M.D. Ala. Jan. 21, 2015) ("Plaintiff alleges no facts indicating the City was on notice of a need to train officers not to fabricate evidence in criminal cases. The Amended Complaint mentions no other incidents that would have alerted the City to such a need. Furthermore, fabrication of evidence is not within the 'narrow' category of cases in which 'the likelihood for constitutional violation is so high that the need for training would be obvious.' The category is so narrow that '[t]he Eleventh Circuit has repeatedly rejected attempts to extend failure-to-train liability [for single incidents] to other law-enforcement situations, such as the use of "hobble" restraints, responding to complaints about the use of handcuffs, and the identification and treatment of mentally ill inmates by jail staff.'. . In light of Eleventh Circuit precedent, this case is not one in which a single incident is sufficient to conclude there was an obvious need for training."); ***Brown v. Novacek***, No. 1:14-CV-00988, 2014 WL 5762952, at *7 (M.D. Pa. Nov. 5, 2014) ("Police officers certainly have knowledge of the dangers of speeding and of texting while driving. As such, even assuming that an inadequate or non-existent formal training policy on

texting while driving or speeding could amount to deliberate indifference, such inadequacy cannot constitute deliberate indifference absent a pattern of constitutional violations. Accordingly, the Court will grant Defendants' motion to dismiss, because Plaintiff has not adequately plead that municipal policymakers exhibited deliberate indifference to the inadequacy of their own training program."); ***Flanagan v. City of Dallas, Tex***., 48 F.Supp.3d 941, 956-58 (N.D. Tex. 2014) ("Under the applicable case law, there are two ways in which a plaintiff can establish a municipality's deliberate indifference to the need for proper training. The most common approach is for the plaintiff to demonstrate that a municipality had '[n]otice of a pattern of similar violations,' which were 'fairly similar to what ultimately transpired' when the plaintiff's own constitutional rights were violated. . . The second approach is the limited exception for 'single-incident liability' in the rare case where a constitutional violation would result from 'the highly predictable consequence' of a particular failure to train. . . . Based on the facts presented in Plaintiffs' amended complaint, Plaintiffs have sufficiently pled that (1) the City's training policy procedures were inadequate; (2) the City was deliberately indifferent in adopting its training policy; and (3) the inadequate training policy directly caused the constitutional violation. . . . In particular, Plaintiffs allege that, (1) due to an acknowledged and obvious lack of training in the use of excessive force, DPD officers have shot dozens of unarmed individuals over the past several years based on the DPD's actual custom of 'shoot first, ask later'; (2) due to this lack of training, Officer Staller caused Allen's death; and (3) Councilman Caraway and Chief Brown have both acknowledged the need for further officer training. . . Moreover, Plaintiffs adequately assert . . . that the City had notice of a pattern of similar constitutional violations which were 'fairly similar to what ultimately transpired' when Allen's constitutional rights were violated. . . From these facts, the inference can reasonably be drawn that the City's conduct evidences 'deliberate indifference to the rights of persons with whom the police come into contact.'. . Further, Plaintiffs have set forth sufficient facts in their amended complaint to adequately allege that Chief Brown was both aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that he also drew the inference, to wit: (1) the large number of shootings of unarmed people over the years; (2) the number of pending internal and grand jury investigations; and (3) Chief Brown's own public statement about the need for more training. . . Accordingly, Plaintiffs' failure to train claim should not be dismissed at this stage."); ***Breitkopf v. Gentile***, 41 F.Supp.3d 220, 254-58 (E.D.N.Y. 2014) ("As an initial matter, the record is bereft of evidence that, before March 2011, the MTA knew of a pattern or even one incident involving the misidentification of plainclothes officers and the use of deadly force by MTAPD employees, the RAND and Task Force Reports, or notice of any purported deficiencies with the NYPD Academy's and the MTA's training of its officers with respect to the use of deadly force and police-on-police confrontations. Further, it is uncontroverted that, before March 2011, the MTA trained its officers, including Gentile, on the basic constitutional limitations on the use of deadly force and how to confront plainclothes officers. . . . Thus, because nothing suggests that the MTA condoned or ignored repeated constitutional violations, plaintiff must rely on a single-incident theory of liability. . . . Since *Connick*, some courts have concluded that a plaintiff cannot rely on the single-incident theory where she challenges the adequacy and not the lack of the existence of training. . . . Nothing in *Connick* or Second Circuit precedent, however, precludes a single-incident theory if the plaintiff can show that the training provided is tantamount to a lack of

training because the municipal employees have an 'utter lack of an ability to cope with constitutional situations,' . . . and 'the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights[.]'. . . This Court applies that standard. As set forth below, even construing the evidence in the record most favorably to plaintiff, no rational jury could conclude that the standard for municipal liability, under a failure to train theory or any other theory, has been met. MTAPD officers initially train at the NYPD Academy, and they receive ongoing training from the MTAPD on, among other topics, the constitutional limitations on the use of deadly force, plainclothes officer confrontations, and the corresponding written guidelines. Although plaintiff takes issue with the amount or format of the training provided to Gentile, that cannot establish deliberate indifference as a matter of law. . . . In sum, even construing the evidence most favorably to plaintiff, no rational jury could find that Gentile had 'the utter lack of an ability to cope with' the situation before him, . . . and that this lack of ability caused Gentile to misidentify Breitkopf and use excessive force. Accordingly, the Court concludes the MTA is entitled to summary judgment on the Section 1983 claim."); ***Geist v. Ammary***, 40 F.Supp.3d 467, 487-92 (E.D. Pa. Aug. 22, 2014) ("The plaintiff argues that the need to train Officer Ammary as a School Resource Officer (SRO)—a police officer working in a school setting—was 'so obvious' that a pattern of constitutional violations would not be necessary for the City to be liable under *Monell*. . . Genuine disputes of material fact remain regarding whether the training provided to Officer Ammary and other SROs was adequate. . . . [T]he only training Officer Ammary received when he became an SRO was to shadow another SRO. . . Chief Hanna was aware of specialized training for officers through the National Association for School Resource Officers (NASRO). . . . Allentown did not provide this training, however, before placing its officers in a school setting or at any time thereafter. . . Officer Ammary testified that NASRO training had been discussed, but he was never afforded this training due to budgetary constraints. . . The plaintiff's expert, however, found that the City of Allentown had a budget surplus of $666,830.00 in 2011—the year Officer Ammary became an SRO at the high school level. . . This evidence alone raises a genuine dispute over Officer Ammary's lack of training, which would be material to the analysis of whether the City was 'deliberately indifferent' to potential constitutional violations. . . Evidence in the record also suggests a history of possible mishandling of students at dismissal which could amount to constitutional violations of students' rights. It was not uncommon for Officer Ammary and other officers to restrain certain students at dismissal simply to run background checks or ensure they didn't have outstanding warrants. . . These actions served to 'set[ ] the tone that police aren't messing around, that they mean business.'. . From these facts, a jury could find that it was foreseeable that a student could be injured during an arrest by a SRO who was inadequately trained in controlling crowds of teenagers and that the training that was offered to SROs was inadequate in these respects. . . . The plaintiff also alleges that Allentown police officers were not properly trained in how to use Tasers because: 1) they were not properly trained on how to aim the Tasers, and 2) they were not trained to never aim the Taser at 'sensitive' areas such as the groin. . .There is a genuine dispute of material fact as to whether the Allentown police department's training on how to aim the Taser was appropriate. Allentown police began using Tasers in July 2011, just before Ms. Wilson was tased. . . Officer Ammary testified that he was trained to aim the laser at the quadrant of the person's body he hoped to hit. . . There is . . . a

genuine dispute of material fact as to whether Officer Ammary was advised not to target sensitive areas, specifically the groin and back. . . Officer Ammary testified that he was only warned not to aim for the face, head, throat, or heart. . . . a jury could find that the department should have known of the potential risks Tasers posed and that the City was 'deliberately indifferent' to the risks improper training could pose. This evidence by the plaintiff raises genuine issues of fact about whether the department's Taser training was adequate. A reasonable jury could find that had the training been adequate the injury to Ms. Wilson could have been avoided."); ***Geist v. Ammary***, 40 F.Supp.3d 467, 493-97 (E.D. Pa. 2014) ("The record raises questions of material fact about whether the Use of Policy or the Taser training adequately addressed when the use of a Taser was an appropriate use of force. Lieutenant Reinik agreed that the Taser training taught officers 'how to use [the Taser] but not when' to use the Taser. Lieutenant Reinik and Chief Hanna admit to relying almost entirely on TASER®'s materials in preparing their training program. Guidance put out by the Department of Justice warns against police departments relying heavily or solely on the materials provided by TASER®, the manufacturer, in its training of officers. The Department of Justice recommends that police departments incorporate their Taser training into use of force policies. From the record, there is a genuine dispute of material fact about whether the Allentown Police Department did integrate the Taser training into its use of policy adequately. It is unclear who developed the Department's Taser Policy and whether already known risks about Tasers were considered in crafting the policy. Officer Hanna, the director of the police academy, testified that he 'did not have any part in the creation or the development or authoring of [the Taser or use of force] policies.' Lieutenant Reinik also said he was not consulted when the policy was put into place. In addition, Officer Ammary was trained on the Use of Force Policy, which supposedly discussed use of a Taser. This training, however, was offered six months before the police department was approved for the use of Tasers and six months before the Taser Policy was added to the Use of Force Policy. Furthermore, there remains a question of whether the training materials and the Use of Force Policy provided officers with appropriate guidance on when the use of a Taser on a minor was appropriate. Lieutenant Reinik could not remember if the Taser training itself addressed when the use of a Taser on a minor was appropriate. The training simply said 'Avoid using on children' without much further explanation. When asked about the Use of Force policy's guidance on juveniles, Officer Ammary testified that the officers' priority was not on 'age or size.' Whether the use of a Taser on a child was appropriate was left to the discretion of the officer. While the department's Taser training materials do advise officers not to use the Taser on 'small children,' this phrase is ambiguous and not well-defined. Officer Ammary himself indicated that he would not Taser a child of age eleven but thought tasing a fourteen-year-old was appropriate. Why one was appropriate and not the other was unclear. Given that seven officers were placed in City schools with Tasers, the department's lack of guidance on what type of force may be used on children and teenagers and lack of guidance on when tasing juveniles was appropriate could amount to 'deliberate indifference.' There also remains a genuine dispute of fact about whether the Use of Force Policy's lack of guidance on when to use a Taser encouraged officers to overuse Tasers as a tool of force. The defendant's expert 'found no evidence that [the Allentown Police Department] encouraged the use of [Conducted Electrical Weapons (a.k.a Tasers)] in all situations.' However, the Taser firing record for the Taser used in this incident

offers a different picture. The Taser used in the incident with Ms. Wilson was fired close to 150 times between the officers' Taser training in July 2011 and the incident with Ms. Wilson at the end of September 2011. Resolving all disputes in favor of the plaintiff, a jury could find that the Use of Force Policy as it related to Taser usage was inadequate in guiding officers on when it was appropriate to use the Taser as a tool of force. Evidence in the record also shows that supervisors in the Allentown Police Department were 'deliberately indifferent' to the risks this lack of guidance posed. The Use of Force Policy itself required the Assistant Chief of Police to review these incidents. Whether this sort of review actually occurred is unclear. Despite numerous incidents which had caused serious injuries to tased persons, the Police Department did not amend or revise the Policy to better guide the officers in the use of their Tasers. For example, one suspect was hit in the back of the head by a Taser probe causing him to go into a seizure. This lack of review and revision could be viewed as showing 'deliberate indifference' on the part of the defendants, after all factual disputes are resolved in favor of the plaintiff. Resolving all of these disputes in favor of the plaintiff, a jury could find that the Police Department's Use of Force policy was deficient and that this deficiency caused Ms. Wilson's injury, making the City liable under *Monell*." footnotes omitted); ***Tolbert v. Trammell***, 2:13-CV-02108-WMA, 2014 WL 3892115, *5 (N.D. Ala. Aug. 4, 2014) ("Even if the claims of excessive force referenced in the amended complaint were demonstrated to have merit, they are not so 'substantially similar' to Trammell's alleged misconduct that they form a pattern of similar constitutional violations. . . The limited information in the amended complaint indicates that the police conduct complained of in at least five of the six claims occurred during arrests. . . Hypothetically, if none of those officers encountered resistence and a plaintiff demonstrated that all five claims had merit, those five claims might provide notice to the City that the BPD requires further training and supervision on appropriate force when an officer makes an arrest and encounters no resistance. However, plaintiff does not claim that Trammell engaged in substantially similar conduct. Using excessive force during an arrest when no resistance is offered differs markedly from pulling over a vehicle for no reason and shouting and pointing a gun at the passengers with no provocation. Plaintiff also does not allege specific facts indicating that Trammell himself committed other similar constitutional violations such that the City might have notice that Trammell as an individual requires further training or supervision. In sum, plaintiff has not alleged facts showing that Trammell's claimed misconduct fits within a pattern of substantially similar constitutional violations such that the City would have notice that the BPD or any officer requires further training or supervision in a specific area. Without any facts to show that the City had notice, the City's alleged failure to train or supervise does not evidence 'deliberate indifference' or rise to the level of a custom actionable under § 1983. . . Accordingly, plaintiff's § 1983 claims as against the City will be dismissed insofar as they are based on the Fourth Amendment."); ***Brown v. Blanchard***, 13-C-0511, 2014 WL 3513374, *8, *9 (E.D. Wis. July 17, 2014) ("In the present case, the question presented in connection with plaintiff's claim against Walworth County is whether the County's failure to provide its deputy sheriffs with training on how to respond to suicide calls amounted to deliberate indifference to the constitutional rights of the individuals with whom the deputies come into contact. The evidence does not indicate that there has been any pattern of constitutional violations involving the rights of suicidal persons in Walworth County, and so the question is whether the

need for training on how to respond to a suicide call without committing constitutional violations (including unreasonable seizures) is so obvious that the County's failure to provide such training amounts to deliberate indifference. A reasonable jury could conclude that the County knew 'to a moral certainty' that its sheriff's deputies would be required to respond to suicide calls. . . . Further, a reasonable jury could conclude that it is obvious that training is needed to ensure that deputies do not unnecessarily precipitate the need to use deadly force during an encounter with a suicidal person. The Crisis Management Guidelines devote an entire chapter to the topic of how to handle suicidal persons, . . . and this supports the conclusion that law-enforcement officers need at least *some* training on what to do when responding to a suicide call. Finally, as far as the present record reveals, Walworth County provides its deputies with no training whatsoever on the proper handling of suicide calls. Thus, the jury could reasonably conclude that Walworth County has failed to adequately train its sheriff's deputies on the proper handling of suicidal persons, and that in doing so it was deliberately indifferent to the risk that constitutional violations would result. The County points out that the Seventh Circuit has held that a failure to provide special training to officers on the proper use of force against 'people who appear to be crazy' is not deliberate indifference, at least in the absence of a pattern of constitutional violations that could have been prevented by special training. *See Pena v. Leombruni,* 200 F.3d 1031, 1033–34 (7th Cir.1999). But in *Pena,* the question was whether special training was needed on the use of force against a crazy person who appeared to be threatening a law-enforcement officer with serious physical harm. The Seventh Circuit held that the municipality's general training on the proper use of force 'covered the case of the crazy assailant, giving him all the protection to which constitutional law entitled him.'. . In the present case, the question is not whether Walworth County should have given its deputies special training on when it was permissible to use deadly force against a person who appears to be suicidal. It is whether the County should have given its deputies training on how to avoid unreasonably creating the need to use deadly force against a suicidal person in the first place. *Pena* is not instructive on this latter question and thus does not foreclose the plaintiff from pursuing a failure-to-train claim at trial. Finally, a reasonable jury could find a causal connection between Walworth County's failure to train its deputies on how to respond to suicide calls and the plaintiff's injury. Had Blanchard received some training on strategies for approaching suicidal persons, such as those mentioned in the Crisis Management Guidelines, he might not have unnecessarily rushed into Brown's room with his gun drawn and unreasonably precipitated a deadly confrontation with Brown."); ***Williams v. School Town of Munster***, No. 2:12–cv–225–APR, 2014 WL 1794565, *4-*6 (N.D. Ind. May 6, 2014) ("Courts have interpreted *Canton* and *Connick* to hold municipalities liable when they have failed to provide any training, so long as the matter on which they failed to train was not too nuanced. For example, in *Thomas v. Cumberland County***,** —— F.3d ——, 2014 WL 1395666 (3rd Cir.2014), the defendant corrections officers did not receive any training in conflict de-escalation and intervention. Following an attack, an inmate brought an action against the county and corrections officers, alleging that the county failed to train the officers in these areas. The court explained that based on the frequency of fights and the volatile nature of a prison, the predictability that an officer who lacked training in de-escalating conflicts would violate an inmate's constitutional rights was great. . . Similarly, in *Jimenez v. Hopkins***,** 2014 WL 176578 (W.D.Ky.2014), the plaintiff alleged that the county violated his rights under the Eighth, Tenth,

and Fourteenth Amendment by acting with deliberate indifference to his medical needs. The plaintiff presented a single violation of federal rights, seeking to hold the county liable under a failure to train theory. The court explained that other than CPR and first-aid training, the county did not provide any training to its officers to look for or to be aware of symptoms of physical illness, how to recognize and respond to medical needs, how to document requests for medical care, or how to pass on medical concerns to jail nursing staff. . . The court explained that this was a recurring situation with an obvious potential for a violation. . .The courts have considered the single incident violations on a spectrum between 'the plainly obvious need to train armed officers "in the constitutional limitations of deadly force" in *Canton* ... and the lack of such an obvious need in *Connick* where prosecutors had a legal education and ethical obligations and the allegedly necessary training was nuanced.'. . The courts begin by looking at the likelihood that such an incident might occur. Here, the need to train the individuals who served as supervisors at the football games perhaps was not as obvious as *Canton* because Alb and Stopper were not provided with weapons. However, the purpose of having supervisors was to ensure safety and to enforce the school's policies. There certainly was a strong likelihood that situations would arise during the course of providing security that would involve the discretionary task of determining how to break up an incident or enforce a policy. The predictability that an untrained supervisor could exceed the constitutional limitations on excessive force or enforce the policies in a discriminatory manner without training was great. This is not a situation like in *Connick* where the government actors had prior training that would have put them on notice of what was expected of them. Williams is not asserting that the school should have provided training in a nuanced area. Rather, he is alleging that the School Town of Munster failed to provide training on how to carry out the predominate tasks the defendants were asked to perform. For these reasons, the court finds that Williams has submitted sufficient evidence for a reasonable jury to conclude that the School Town of Munster's failure to provide any training on how to provide security and enforce its policies was the result of its deliberate indifference to the constitutional rights of the attendees."); ***Hernandez v. City of Beaumont***, No. EDCV 13–00967 DDP (DTBx), 2014 WL 1669990, *3, *4 (C.D. Cal. Apr. 28, 2014) ("Plaintiffs sufficiently plead a violation of Monique's Fourth Amendment rights, satisfying the first requirement for their failure to train claim. With regard to the deliberate indifference requirement, Plaintiffs cite one prior lawsuit, *Valenzuela v. City of Beaumont*, which was filed against the City for excessive force in the use of a different pepper spray gun device with some similarities to the JPX. . . However, a single prior lawsuit involving a different pepper spray device is insufficient to support a finding that the City was 'deliberately indifferent' to the need for more training on the JPX, especially where there is no indication that the claims in the prior action were substantiated or that the plaintiffs there were successful. . . As a result, Plaintiffs must premise their claim on the narrow exception allowing a failure to train claim to proceed where the need for additional training is 'so obvious' that the failure to provide that training amounts to deliberate indifference to the rights of those that are likely to come into contact with the City police. Plaintiffs' TAC corrects the deficiencies the Court identified in the Second Amended Complaint such that Plaintiffs have now stated a plausible claim for municipal liability. Plaintiffs allege that the 'only training' on the JPX 'consisted of a one-time classroom presentation ... followed by a written test.'. . Plaintiffs allege that 'the one-time classroom presentation did not include any

information regarding the constitutional implications or limitations on the use of the JPX, nor did the training include when and how BPD officers can safely deploy the JPX .'. . Further, Plaintiffs allege that BPD officers were told that 'the use of the JPX was "not a use of force."'. .Defendants are correct that neither the fact that the training was only a single day, nor the fact that the officers did not receive 'hands-on' training on the JPX, is sufficient to rise to the level of deliberate indifference. However, Plaintiffs now plead facts, as cited above, that suggest that the JPX training included incomplete and/or blatantly inaccurate information about the constitutional implications of using a JPX and the level of force that use of the JPX would constitute. Plaintiffs further allege that it would have been obvious to any reasonable officer who fired a JPX (or saw one fired) that it did not function like a typical pepper spray device, but was much more powerful than that. . . It would appear, then, that either the supervising officers gave JPX guns to their field officers without ever having fired the device themselves, or they had seen it fired but failed to provide any information during the training program on the obviously dangerous nature of the device. Either way, the supervising officers, and thus the City, can be said to have been deliberately indifferent to the need for training on the dangers and constitutional implications of using the JPX because 'the need for [this] training is so obvious.'. . Further, Plaintiffs allege that the City was 'on notice by the JPX manufacturer's warnings that deployment at a distance of less than five feet will result in serious injury or death.'. . The absence of obviously necessary information, therefore, is sufficient to support Plaintiffs' municipal liability claim."); ***de Tavarez v. City of Fitchburg***, No. 11–11460–TSH, 2014 WL 533889, *5, *6 (D. Mass. Feb. 6, 2014) ("Fitchburg and DeMoura had no policy, written or otherwise, or other training regarding the procedures to follow when an arrestee is known or suspected to have swallowed narcotics at the time of Tavarez Perez's arrest and detention. Fitchburg and DeMoura were aware of the danger of drug ingestion and that it may be successfully medically treated, at the very least because of the Ramirez arrest described above. In this circumstance, the complete lack of any training on how officers should proceed when they know or suspect an arrestee has swallowed narcotics presents an issue of material fact as to whether Fitchburg and DeMoura were deliberately indifferent to the rights of their detainees. . . Additionally, there is a question of fact as to whether some measure of training would have prevented the constitutional harm here."); ***Graddy v. City of Tampa***, No. 8:12–cv–1882–T–24 EAJ, 2014 WL 272777, *9, *11 (M.D. Fla. Jan. 23, 2014) ("To the extent that Plaintiff relies on these four incidents by Cornelius to show that the City's supervision of taser usage was inadequate, the Court again finds that four incidents over a three year period are not indicative of a widespread pattern or practice of inadequate supervision. These four incidents, plus the 2006 taser incident by another officer that was reviewed by the IAB, are the only incidents that Plaintiff points to that occurred prior to November 6, 2008 that did not result in an adverse action against the officer in response to the taser usage. Accordingly, viewing Plaintiff's evidence collectively and in the light most favorable to Plaintiff, Plaintiff has not shown a widespread pattern or practice of excessive force from taser usage. Therefore, Plaintiff has not shown that the City was put on notice, as of November 6, 2008, of the need for taser training and/or that its review of taser usage was inadequate. As such, Plaintiff cannot show that the City had a custom or policy that constituted deliberate indifference to his constitutional rights. . . . [B]ased on all of the evidence and arguments set forth by Plaintiff, the Court concludes that Plaintiff has not shown a widespread pattern or

practice of excessive force from taser usage. Therefore, Plaintiff has not shown that the City was put on notice, as of November 6, 2008, of the need for taser training and/or that its review of taser usage was inadequate. As such, Plaintiff cannot show that the City had a custom or policy that constituted deliberate indifference to his constitutional rights. Without such a showing, the City is entitled to summary judgment on Plaintiff's § 1983 claims."); ***Jimenez v. Hopkins County, Ky.***, No. 4:11–CV–00033–JHM, 2014 WL 176578, *17, *18 (W.D. Ky. Jan. 13, 2014) ("Plaintiff alleges that Hopkins County should be held liable for its failure to train the deputy jailers to ensure that legally mandated health care is provided. Plaintiff's specific complaint against Defendant Hopkins County is that nowhere in the policies are the deputy jailers provided any guidance as to what constitutes a 'medical emergency or what to do in its event.'. . . In the instant case, the Court finds that Plaintiff has produced 'evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation.' *Brown*, 520 U.S. 397, 409 (1997). The record reflects that other than CPR and first-aid training, 'the County does not train officers to look for or be aware of symptoms of physical illness, how to recognize and respond to medical needs, how to document requests from inmates for medical care, or how to pass on medical concerns to jail nursing staff.'. . . The jail's personnel and procedures are structured so that the deputy jailers provide the link between inmates and medical. . . In fact, the nurses testified that they must rely on the deputy jailers to notify medical of any significant medical problems with an inmate. . . Despite this, the deputy jailers who work both the 100 walk and the 500 walk are not provided any training on how to monitor, observe, and determine potential medical needs of the inmates and how to respond to those needs. Thus, Plaintiff has produced sufficient evidence to satisfy the deliberate indifference prong."); ***Chamberlain v. City of White Plains***, 986 F. Supp. 2d 363, (S.D.N.Y. 2013) ("While some have argued that the *Connick* decision so narrowed the single-incident theory as to essentially eliminate it, courts across the country have continued to apply that theory post-*Connick* when its strict requirements have been met. [collecting cases in police and jail context] The District Court in *Wereb* [*v. Maui Cnty.*, 830 F.Supp.2d 1026, 1033–37 (D.Haw.2011)] provides a thorough and well-reasoned analysis of the *Connick* decision's effect on the single-incident theory . . . and in the absence of guidance from the Second Circuit on this issue, I agree that the theory is still a viable one in limited circumstances. . . .I find that the Amended Complaint plausibly alleges deliberate indifference on the part of the City under the *Canton* single-incident theory described above. The Amended Complaint essentially asserts that WPPD officials knew 'to a moral certainty,'. . . that WPPD officers would encounter EDPs in the course of their duties, as evidenced by the fact that the WPPD employee manual includes a section entitled 'Mentally/Emotionally Disturbed Persons.' (AC Ex. A.) The Amended Complaint also alleges that the Public Safety Commissioner for the City of White Plains was familiar with the need for a comprehensive EDP policy from his time at the NYPD. . . But the WPPD manual section on EDPs contains no guidance and no indication that WPPD officers receive any training regarding interacting with EDPs, as the policies contained therein relate solely to procedures once the police have brought an EDP to a hospital. . . Furthermore, given the extreme volatility of such individuals and the need for caution when dealing with them to prevent unnecessary escalation, it is plausible that interactions with EDPs present officers with 'difficult choice[s] of the sort that training ... will

make less difficult,'. . . and that a 'highly predicable consequence' of officers making the wrong choices . . . would be 'the deprivation of a citizen's constitutional rights[]'. . . . Discovery will shed light on whether WPPD policymakers were, in fact, deliberately indifferent to the constitutional rights of EDPs, but at this stage Plaintiff has made sufficient allegations for his *Monell* claim to survive the City's Motion to Dismiss."); ***LeFever v. Ferguson***, Nos. 2:11–cv–935, 2:12–cv–664, 2013 WL 3568053, *8 (S.D. Ohio July 11, 2013), *aff'd,* 645 F. App'x 438 (6th Cir. 2016) ("Even though this case deals with the consequences of failing to train *police officers* in *Brady* obligations instead of prosecutors, that difference does not command a different result here. As the Supreme Court has made clear, the obligation to comply with *Brady* ultimately falls upon the *prosecutor* and not on police officers, despite the fact that it is the police who are on the front line of gathering evidence, whether it be inculpatory or exculpatory. In order to comply with *Brady*, it is the *prosecutor* who 'has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.' *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). While the Sixth Circuit has held that police officers have 'an analogous or derivative obligation' under *Brady*, the obligation upon police officers is to disclose exculpatory evidence *to the prosecutor,* not necessarily to defense counsel directly. *Moldowan v. City of Warren,* 578 F.3d 351, 377–81 (6th Cir.2009). The fact that the police officer's *Brady* obligation is 'analogous' to or 'derivative' of the prosecutor's duty is an important qualifier that brings the Supreme Court's *Thompson* rationale into play. While the police officer may have a duty to disclose exculpatory evidence to the prosecutor, the Supreme Court has made clear that the buck stops with the prosecutor: it is the prosecutor's duty to learn of any evidence favorable to the accused that is known to police officers. *Kyles,* 514 U.S. at 437. In light of the prosecutor's proactive duty to track down *Brady* material, the Court cannot say that a failure to train *police officers* in *Brady* would lead to the 'highly probable' consequence [of] a constitutional violation."), *aff'd on other grounds*, 645 F. App'x 438 (6th Cir. 2016); ***Anonymous v. City of Meriden***, No. 3:10cv37 (MPS), 2013 WL 2254181, *1 (D. Conn. May 22, 2013) ("[T]he nature of the previous misconduct by Barnes during his eight-year tenure as a City police officer—which involved abuse of his position as a police officer during an argument with a neighbor and his sleeping at home while he was on night duty—did not put the City or Chief Cossette on notice that Barnes would sexually abuse a minor such that their failure to prevent this conduct stemmed from 'deliberate indifference' to that possibility. For the same reason, their supervision of Barnes—or any deficiencies in their supervision—cannot be seen as the 'moving force' behind the sexual assaults, the only unconstitutional conduct at issue in this case, and thus does not satisfy the causation standard under § 1983."); ***De-Occupy Honolulu v. City and County of Honolulu***, No. 12–00668 JMS–KSC, 2013 WL 2284942, *10, *11 (D. Hawai'i May 21, 2013) ("The SAC adequately alleges the elements of a failure to train claim. As explained above, the SAC asserts numerous violations of Plaintiffs' constitutional rights, which occurred over eight separate raids on Plaintiffs' Thomas Square encampment. The SAC further asserts that each of the Individual Defendants are [sic] not only supervisors within their department, . . . but directly supervised and participated in these raids. Individual Defendants' direct oversight of the raids, combined with the pattern of alleged constitutional violations at these raids, is sufficient to suggest deliberate indifference as to the City. [citing Connick]"); ***Kirby v. City of East Wenatchee***, No. CV–12–190–JLQ, 2013 WL

1497343, *12-*14 (E.D. Wash. Apr. 10, 2013) ("The required level of notice to demonstrate deliberate indifference is rarely demonstrated by a single incident of constitutionally deficient action or inaction. . . Actual or constructive notice of the need for a particular type of training may be plainly obvious where a pattern of constitutional violations exists such that the municipality knows or should know that corrective measures are needed. Here, as noted by the City, Plaintiff lacks any evidence of other prior incidents of excessive force involving the mentally ill, and cannot establish an ongoing pattern of misconduct. The City therefore contends Plaintiff therefore lacks evidence the City had notice its policies would result in the use of lethal force against suicidal subjects. Instead of relying upon a pattern of similar violations, Plaintiff relies on the 'single incident liability' that the Supreme Court hypothesized about in *City of Canton v. Harris*, 489 U.S. 378 (1989) and discussed in *Connick v. Thompson,* 131 S.Ct. 1350 (2011). These cases left open the possibility, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations. As an example, the Supreme Court in *Canton* referenced the obvious need to train police officers on the constitutional limitations on the use of deadly force, when the city provides the officers with firearms and knows the officers will be required to arrest fleeing felons. . . In *Connick,* the Court rejected the notion that the failure to provide additional training of prosecutors in their *Brady* obligations falls within this narrow range of potential liability theorized in *Canton,* in part because lawyers are trained to be able to obtain the legal knowledge that is required to perform their jobs. The Supreme Court also denied certiorari in a Fifth Circuit case raising a similar challenge to the claim made here. In *Valle v. City of Houston,* the Plaintiffs alleged the City was liable for failing to adequately train its patrol supervisors in crisis intervention team (CIT) tactics for working with the CIT trained officers. . . Plaintiffs presented sufficient evidence that the chief was aware of the need for training related to mental health (as there had been policy proposals previously considered) and that there were recurring situations involving mental health crises. The Valle plaintiffs claim failed because they did not present sufficient evidence of deliberate indifference showing there was an obvious need for more training. The court held that Plaintiffs could not demonstrate that the shooting of their mentally ill son was a 'highly predictable consequence' of sending the non-CIT officers in response to their call for help. Plaintiff Kirby's evidence to establish his failure-to-train theory is narrow. Plaintiff does not argue that the basic and field training police officers receive in the state of Washington is insufficient as a matter of content; Plaintiff presents no evidence of any past specific proclivities of Defendant Marshall; and it is undisputed that prior to Kirby's shooting Chief of Police John Harrison never analyzed, considered, addressed or contemplated separate training or drafting a policy regarding the mental ill. He testified that he reviewed every report of his officers and none suggested to him his officers were acting inappropriately. Nevertheless, unlike in *Valle,* the facts of this case involve a complete absence of any policy and the complete absence of any training in dealing with persons in a mental health crisis. Plaintiff has produced data on the relative frequency with which the City's officers encountered mentally ill people. Plaintiff also has produced police practices experts, including T. Michael Nault, who makes the observation that law enforcement's response to people mental illness has become an issue of national concern. Nault opines that due to the foreseeability of encounters with the mentally ill, 'the need for policy and training is profoundly evident' and that

the City's failure to have policies and training regarding handling mentally disturbed persons and more training on the use of deadly force, failed to comply with generally accepted police practices and standards of care articulated by the International Association of Chiefs of Police and other publications. Plaintiff's experts' opinions on the appropriate de-escalation and scene evaluation practices in dealing with the mentally ill contradict the training Marshall states in his Declaration that he received and relied upon 'that once someone aimed a firearm at me or another ... this is an act of use of deadly force and I should respond immediately.' Additional evidence of 'obviousness' presented by Plaintiff includes the fact that the adjacent city of Wenatchee had a policy on encounters with the mentally ill, as well as the post-incident fact that the Defendant City eventually did in fact adopt a written policy. The court has reviewed the large body of municipal liability jurisprudence shedding light on the issue of deliberate indifference in the context of tragic encounters between police officers and mentally ill individuals. Construing the facts in the light most favorable to Plaintiff, the court concludes Plaintiff's claim falls within the narrow range of circumstances in which a City's failure to address encounters with mentally ill either in a written policy or in its training may reasonably be seen by a jury as deliberate indifference to a foreseeable need. . . Ultimately, there are questions of fact as to whether the need for additional training was so patently obvious so as to raise the City's neglect to the level of deliberate indifference; whether the failure to have a policy on such interventions would likely result in officers making choices in violation of constitutional rights; and whether these failures were the 'moving force' behind Kirby's constitutional rights violation."); ***Peabody v. Perry Tp., Ohio***, No. 2:10–cv–1078, 2013 WL 1327026, *10-*12 (S.D. Ohio Mar. 29, 2013) ("As Plaintiffs correctly point out, because the Policy allows intermediate force to be deployed against a fleeing suspect and the Taser is defined exclusively as an intermediate weapon, Officer Bean felt justified, as did his superiors, in using the Taser, without consideration that the force could constitute deadly force. Based on the foregoing, the Court concludes that the evidence presents a sufficient disagreement as to whether the Perry Township's Use of Force Policy was the 'moving force' behind Officer Bean's alleged unconstitutional use of deadly force that submission to a jury is required. . . . Plaintiffs assert that it was Perry Township's failure to train Officer Bean regarding the Taser's potential as a deadly weapon when used against persons on elevated surfaces that was the moving force behind the Officer's alleged violation of Hook's constitutional rights. . . . In the instant action, Plaintiffs do not support their claim with evidence of a pattern of similar alleged constitutional violations. Instead, Plaintiffs rely on the 'single-incident' liability that the Supreme Court hypothesized in *City of Canton.* That type of liability attaches when the alleged constitutional violation was the 'obvious' consequence of failing to provide specific training, and that this showing of 'obviousness' can substitute for the pattern of violations ordinarily necessary to establish municipal culpability. . . In *Connick,* the Court explained that it did not foreclose the rare possibility that the unconstitutional consequences of failing to train could be so patently obvious that it would subject the municipality to § 1983 liability. . . . The case *sub judice* is simply not that rare case where the alleged failure to train was so patently obvious that Perry Township would be liable under § 1983 without proof of a preexisting pattern of violations. Unlike the *City of Canton* hypothetical, Officer Bean was trained on Taser use and the training material included information on the risks of tasing individuals on elevated surfaces. Plaintiffs' arguments are more accurately

described as complaints about the alleged unsatisfactory training of Officer Bean and how that training could have been better. . . However, as the Township correctly asserts, Plaintiffs '"must do more than point to something the [Township] could have done to prevent the unfortunate incident."'. . .Viewing the evidence in the light most favorable to Plaintiffs, and drawing all justifiable inferences in their favor, the Court concludes that they have failed to raise any genuine issue of material fact as to whether Perry Township's alleged failure to train Officer Bean amounted to deliberate indifference to the rights of persons with whom he would come into contact."); ***Davis v. City of New York***, 959 F.Supp.2d 324, 332, 338 n.51, 342, 349 & n.107, 350 & n.108, 355, 356 (S.D.N.Y. 2013) ("This case, filed in 2010, is one of three cases currently before this Court challenging aspects of the City of New York's 'stop and frisk' practices. . .What distinguishes this case from the other two is its focus on stop and frisk practices at public housing properties owned and operated by the New York City Housing Authority ('NYCHA'). . . .Though the Second Circuit has not explicitly reaffirmed the 'constructive acquiescence' theory *of Monell* liability articulated in *Sorlucco* since the Supreme Court decided *Connick,* the Second Circuit continues to hold that if a practice of misconduct is sufficiently widespread, the municipality may be assumed to have acquiesced in it, even in the absence of direct evidence of such acquiescence. . . Whether or not the phrase 'constructive acquiescence' persists in Second Circuit case law, the theory remains valid under the terms of *Connick:* 'practices so persistent and widespread as to practically have the force of law' represent official municipal policy for the purpose of *Monell* liability. . . .The City and plaintiffs have both moved for summary judgment on plaintiffs' claim that the City's written trespass enforcement *policies* (as opposed to the City's unwritten *practices*) violate the Fourth Amendment. . . . In *Connick,* the Supreme Court stated: 'A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train.'. . This rule has no bearing on the current discussion, which addresses plaintiffs' *policy* theory *of Monell* liability, not its *deliberate indifference* theory. '[O]nce a municipal policy is established, "it requires only one application ... to satisfy fully *Monell'* s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy."'. . . The City contends that plaintiffs waived some or all of their 'custom' theory *of Monell* liability by not including the phrase 'constructive acquiescence' in their Amended Complaint. . . However, plaintiffs clearly pleaded both policy-based and custom-based *Monell* claims, and the parties have argued these claims throughout the years of litigation. . . The City has cited no basis for concluding that the term 'constructive acquiescence' must be recited in every custom-based claim of *Monell* liability based on the prevalence of unconstitutional practices. As noted above, if a municipality engages in sufficiently persistent and widespread unconstitutional practices, *Monell* liability will attach, even in the absence of direct evidence of acquiescence by policymakers. . . . In sum, based on plaintiffs' documentary and testimonial evidence, as well as Dr. Fagan's opinions, a reasonable juror could conclude that the City has engaged in a practice of making unconstitutional stops and arrests in and around NYCHA buildings as part of its trespass enforcement practices, and that this practice is sufficiently persistent and widespread to serve as a basis for *Monell* liability. Plaintiffs have raised genuine issues of material fact regarding their widespread practice claim. Thus, the City's motion for partial summary judgment on this claim is denied. . . . If a jury were to find either

that the City has a *policy* of making unconstitutional stops and arrests in NYCHA buildings, or that the City has a sufficiently persistent and widespread *practice* of making such stops and arrests to establish *Monell* liability, it would be unnecessary to reach the issue of deliberate indifference. At the same time, in turning to this issue, I must draw all reasonable inferences in favor of plaintiffs. As a result, I will assume in the following analysis, as I did earlier, that a reasonable juror could conclude that IO 23 and its associated training materials represent an unconstitutional trespass enforcement policy, and that the widespread practice of making unconstitutional trespass stops and arrests in NYCHA buildings both preceded and followed the introduction of IO 23. The only questions remaining under the deliberate indifference analysis would be (1) whether the City had sufficient notice of the unconstitutionality of its practices, either constructively through the obviousness of the unconstitutionality, or based on actual notice, . . . and (2) whether the City failed '"to make meaningful efforts to address the risk of harm to plaintiffs."'. . .Drawing all reasonable inferences in favor of plaintiffs, both questions raise triable issues of fact."); ***Campbell v. City of Philadelphia***, 927 F.Supp.2d 148, 173, 174 & n.9 (E.D. Pa. 2013) ("[I]n *Connick*, the Supreme Court recently clarified the 'narrow range of circumstances' in which 'a pattern of similar violations might not be necessary to show deliberate indifference.'. . The Supreme Court explained that the *Canton* 'single-incident liability' hypothetical assumes a complete lack of training . . . Plaintiff here does not identify a pattern of instances—or, indeed, *any* other instance—in which the City's failure to train officers for non-routine, non-felony traffic stops led to constitutional violations. . . . Instead, by suggesting that 'where the need for adequate training is so obvious, the lack of training ... constituted a policy of the municipality under *Monell'*,. . . plaintiff appears to argue for single-incident liability. Plaintiff cannot sustain a claim of single-incident liability against the City because he has failed to demonstrate causation. . . Whether a plaintiff alleges failure-to-train liability based on a pattern of similar incidents or a single incident, he must still demonstrate a causal link between the deficiency in training and the constitutional injury. . . . We note that the allegations regarding training here differ in an important respect from the hypothetically-deficient training the Supreme Court discussed in *Canton.* While the *Canton* hypothetical posited no training at all for officers regarding the constitutional limits of force, here plaintiff alleges that the training for traffic stops was deficient because although the Philadelphia Police Department did provide training in routine and felony traffic stops, it did not provide training for 'hybrid' stops such as the one plaintiff alleges occurred here. This categorical training, even if its implementation required officers to adapt, differs from the total lack of training *Canton* contemplated. Nevertheless, we need not reach the question of whether the lack of training identified here could give rise to single-incident liability, because, as we discuss above, plaintiff has failed to demonstrate a causal link between training deficiencies and the injury sufficient to sustain a claim against the City. . . .Plaintiff does not explain how training in non-routine, non-felony stops would have prevented the constitutional injury. . . Plaintiff suggests that the cause of Campbell's injury was Luca's decision to walk in front of the car. Plaintiff relies on Dr. McCauley's assessment that 'the deficient tactics created this very dangerous situation that resulted in the use of deadly force.'. . But as the deposition testimony shows beyond any doubt, the officers *were* trained to approach the vehicle from behind. . . Plaintiff concedes as much in saying that, by walking in front of the car, Luca 'violated his basic training as to staying out of

harm's way even for a routine traffic stop', . . . Luca's decision to walk in front of the car was not based on a gap in training, but instead was a deviation from that training. The thrust of plaintiff's argument with regard to failure-to-train liability appears to be that the officers violated the very training they in fact received. . . .But a police officer's non-compliance with training is an individual fault and does not demonstrate the requisite deliberate indifference needed to sustain a claim of municipal liability for failure to train. . . . Plaintiff's allegations can sustain individual claims, but they cannot here sustain a claim of *municipal* liability for failure to train."); ***Ligon v. City of New York***, 925 F.Supp.2d 478, 532, 533 (S.D.N.Y. 2013) ("Stated in terms of *Connick*'s general standard for failure-to-train claims, plaintiffs have shown a clear likelihood of proving that city policymakers were on actual notice by 2011, and constructive notice prior to then, that the failure to train NYPD officers regarding the legal standard for trespass stops outside TAP buildings in the Bronx was causing city employees to violate the constitutional rights of a large number of individuals. . . Stated in terms of the three-part *Walker* test for deliberate indifference through failure to train, plaintiffs have shown a clear likelihood of proving (1) city policymakers knew to a moral certainty that NYPD officers, who regularly patrol in and around TAP buildings in the Bronx, would confront the question of when it was legally permissible to stop people outside those buildings; (2) the decline to prosecute forms, ADA Rucker's letters, and the hundreds of UF–250 forms that failed to articulate reasonable suspicion for trespass stops outside TAP buildings provided an extensive record of NYPD officers mishandling these stops; and (3) when NYPD officers made the wrong choice in these stops, the deprivation of constitutional rights frequently resulted. . . Thus, plaintiffs have shown a clear likelihood of proving that city policymakers should have known that their inadequate training and supervision regarding trespass stops outside TAP buildings in the Bronx was '"so likely to result in the violation of constitutional rights,"' that their failure to train constituted deliberate indifference. . . Stated in terms of the constructive acquiescence standard, plaintiffs have shown a clear likelihood of proving that there was 'a sufficiently widespread practice among police officers' of unlawful trespass stops outside TAP buildings 'to support reasonably the conclusion that such abuse was the custom of the officers,' and that 'supervisory personnel must have been aware of it but took no adequate corrective or preventive measures.' In fact, plaintiffs presented some evidence suggesting that the practice of making stops outside TAP buildings without regard for reasonable suspicion might have been 'so persistent and widespread as to practically have the force of law.'. . In addition to the sheer magnitude of apparently unlawful stops, ADA Rucker offered testimony suggesting that prior to her legal research into the standards governing stops outside TAP buildings, she had been explicitly advising officers that it was permissible to stop a person simply because he had exited a TAP building, so long as the officer had observed the person in the vestibule first. . . Even defendants seemed to recognize that the similarities among the stops described in this case support the conclusion that officers' behaviors were the result of uniform training."); ***Sonia v. Town of Brookline***, 914 F.Supp.2d 36, 45-47 (D. Mass. 2012) ("The Supreme Court has recently stated that failure to train claims present the 'most tenuous' form of claims brought under § 1983 because the municipality's culpability is at its lowest. . . Taken in this light, the plaintiff's claim for relief based upon a failure to train the Officers clearly fails because the allegations lack either a pattern of similar constitutional violations or a 'patently obvious' risk created by the 'always on duty' policy

that would transform the Town's inaction into deliberate indifference. First, the plaintiff makes no reference to any incidents beyond the one at issue in this case. There is no suggestion in the pleadings that there has been a rash of incidents of personally involved or intoxicated off-duty cops making unlawful arrests or using excessive force. Even assuming that the Town has no training program to teach its officers as to the circumstances under which they may activate themselves from off-duty to on-duty, the Town cannot be held responsible for the Officers' actions absent a pattern of constitutional violations putting them on notice of the problem. Second, absent a pattern of similar incidents, the plaintiff's claim rests upon a 'single incident' theory of municipal liability. Plaintiff alleges that the Town's failure to train officers regarding the 'always on duty' policy created a risk of constitutional violation so patently obvious that the Town should have known that an incident like the one at issue here would occur. As discussed *supra,* it is extremely difficult to sustain a failure to train claim based upon a single incident of misconduct and the instant case does not rise to that level. The Supreme Court case that generated the 'single incident' theory envisioned consequences more probable and more dire than even a simple assault. . . .The instant case does not present the risk of such predictable or egregious consequences identified in *Canton* or confronted in *Young.* While there is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force, *Connick,* 131 S.Ct. at 1361, the failure to train Brookline cadets concerning the meaning of 'personally involved' does not predict constitutional violations because cadets possess the tools to determine when they are off-duty and when they are engaged in a dispute. Nor does it predict that cadets who are personally involved in a dispute will then assault those individuals who the conflicted police officer wrongfully arrested. Unlike the policy at issue in *Young,* the Town's 'always on duty' policy permits intervention by off-duty police but does not mandate it, and, far from requiring officers to carry their firearms, states that officers will never be disciplined for declining to intervene in a situation because they are not armed. While the plaintiff argues that the Town's policy is problematic because it allows activation under certain circumstances or does not expressly prohibit any activation when an off-duty officer has been drinking, 'the fact that training is imperfect or not in the precise form a plaintiff would prefer is insufficient' to establish deliberate indifference. . . Accordingly, plaintiff's allegations fail to establish that the Town's inaction amounted to deliberate indifference toward the rights of its citizens and cannot render it liable for the Officers' actions."); ***Patterson v. City of Akron***, No. 5:08CV1300, 2012 WL 3913082, *6, *7 (N.D. Ohio Sept. 7, 2012) ("[I]f, for the sake of argument, this Court were to conclude *both* that there was a constitutional violation *and* that Lt. Schnee's investigation of that violation was inadequate, that would still not preclude summary judgment for the City. As noted by the very case plaintiff relies upon to prove municipal liability under an 'inaction' or ratification theory, plaintiff would also have to 'show not only that the investigation was inadequate, but that the flaws in this particular investigation were representative of (1) a clear and persistent pattern of illegal activity, (2) which the Department knew or should have known about, (3) yet remained deliberately indifferent about, and (4) that the Department's custom was the cause of the [constitutional violation] here.'. . As noted by the court in *Thomas,* there is danger in 'attempting to infer a municipal-wide policy based solely on one instance of potential misconduct.'. . . Here, plaintiff has presented no evidence of the City failing to act or inadequately investigating the use of force or the use of tasers by other

officers. Without any citation to record evidence, plaintiff merely asserts in his opposition brief that '[t]his is not the first time that Akron's Police Department failed to adequately investigate its police officers' arguably excessive use of force on citizens whot [sic] had not committed a serious offense, were unarmed and posed no threat of physical harm to the officers or anyone else.'. . The Court concludes that the City is entitled to summary judgment on Count One of the complaint given the absence of this critical evidence."); ***Ostling v. City of Bainbridge Island***, 872 F.Supp.2d 1117, 1131 (W.D. Wash. 2012) ("Plaintiffs have presented evidence that fewer than all officers receive training in dealing with mentally-ill persons, despite the likelihood of regularly confronting them. . . Further, they have argued that proper training, as presented in the Bainbridge Island Police Department's manual, would have led an officer to de-escalate the situation, which may have avoided Douglas's death. . . Plaintiffs also present testimony by D.P. Van Blaricom, a retired Bellevue police captain, suggesting that proper training would have led the officers to avoid physical contact with Douglas and request a mental health professional attend to the situation. . . While the Court considers Plaintiffs' claim indeed tenuous, they have presented evidence as to each element of a failure-to-train claim, and the Court cannot therefore decide the claim on summary judgment."); ***Ruiz v. County of Suffolk***, No. 03–CV–3545(DLI)(ETB), 2012 WL 1118605, at *6-*9 (E.D.N.Y. Apr. 3, 2012) ("Several sister circuits have analyzed claims like that raised in *Bryan County*, in which the plaintiff asserted that a particular hiring decision was inadequate. In each of those cases, summary judgment was resolved in the municipality's favor. . . . Unsavory information in an applicant's past, such as prior arrests, even a prior arrest for a violent felony, and the municipality's failure to uncover that background information, is insufficient to establish an inadequate hiring claim against a municipality. . . . It is clear that these decisions indicate reluctance to hold municipalities liable for challenges to particular hiring decisions. The only circuit to address challenges to hiring procedures in general, dismissed the claim for failing to meet the strict standards for municipal liability articulated in *Bryan County*.[discussing *Young v. City of Providence*, 404 F.3d 4 (1st Cir.2005)] The First Circuit concluded that the municipality was not liable for the deficient hiring of a police officer who engaged in excessive force. . . . [P]laintiff seeks to hold Suffolk County liable for deficient hiring procedures, generally, as opposed to the deficient hiring of Lorenz and Urban as individual incidents. In doing so, plaintiff attempts to take his claim outside the *Bryan County*, single-incident analysis. In support of his claim, plaintiff has submitted reports from the preemployment psychological examinations given to Lorenz and Urban, which indicate that the psychologist had a number of concerns regarding their ability to handle the stresses of working in a prison. Plaintiff submitted the records associated with their appeals to the appeals committee and the cursory notes taken during the appeal interview by the only psychologist present, Dr. Gallagher. Dr. Gallagher's notes and testimony indicate that he informed the applicants of the areas of concern regarding their psychological suitability, asked them for explanations, and discussed incidents in their backgrounds, such as motor vehicle accidents and violations, prior acts of violence, and financial strains. Although the Court is troubled by the lack of standardized procedures for the appeals committee and the brief and unstructured nature of the interviews of the candidates appealing psychological reports, the Court is unable to distinguish the facts of plaintiff's claim from those in *Young*. If anything, the challenge to the hiring procedures that was asserted in *Young* was supported by stronger evidence of a pattern

of deficient hiring practices than that submitted by plaintiff in this case. The plaintiff in *Young* was closer to establishing the causal link between systematic inadequate hiring procedures and the constitutional harm suffered by the plaintiff than the claim in this case, and yet that claim did not survive summary judgment. The Court is not bound by *Young*, but *Young* suggests that even when greater evidence of causality is provided, plaintiffs cannot sustain a challenge to general hiring procedures absent '[a] pattern of previous bad hiring decisions leading to constitutional violations.'. . .[E]ven if plaintiff's claim is analyzed under the single-incident analysis of *Bryan County,* this Court must grant summary judgment in favor of Suffolk County, as plaintiff has failed to 'satisfy *Bryan County'*s requirement of a "strong" causal connection between [the correction officer's] background and the specific constitutional violation alleged.'. . Plaintiff is unable to establish *Monell* liability, whether under the analysis for single-incident claims or general hiring procedure claims. The Court has not reached this conclusion lightly, but as the case law in this circuit and other circuits indicates, plaintiffs asserting such claims must overcome a very high evidentiary burden to survive summary judgment. The evidence in this case did not meet the Supreme Court's heightened standard. Accordingly, Suffolk County's summary judgment motion is granted."); ***Gaymon v. Esposito***, No. 11–4170 (JLL), 2012 WL 1068750, at *9 (D.N.J. Mar. 29, 2012) ("*Connick* . . . strongly supports the need for police training in the constitutional limits of the use of deadly force. However, even assuming that the need for such training in this case was as obvious as under the facts alluded to in *Connick* and as stated in *Canton,* there are no facts in Plaintiffs' Complaint that allege anything whatsoever about the nature and extent of training on the part of ECSO regarding the constitutional limits of the use of deadly force with its police officers. Plaintiffs make no factual allegations in their Complaint regarding training, or more specifically, facts regarding the existence or lack thereof of a training program for Essex County police officers, the nature of the deficiencies of said program, for example in light of comparators such as training given by other municipalities or counties in handling weapons in public spaces or recognized standards for training police officers in such areas. Given that a municipality's culpability for a deprivation of rights 'is at its most tenuous where a claim turns on a failure to train,' this Court finds that, given the limited factual support for Plaintiffs' failure to train claim, it cannot survive a motion for judgment on the pleadings."); ***Sallie v. Lynk***, No. 2:10cv456, 2012 WL 995245, at *10, *11 (W.D. Pa. Mar. 23, 2012) ("Plaintiffs' effort to shoehorn their claim into the 'single-incident' exception to *Monell's* notice and deliberate indifference requirements equally is misplaced. . . . In light of the initial and ongoing Act 120, firearms, and taser training that Borough officers undergo, the record is woefully deficient of evidence showing that First and Fourth Amendment violations like those in question are an 'obvious consequence' of the Borough's decision not to provide additional and more nuanced training, supervision or on-the-job review. That an officer with such training might be called upon to arrest an individual for public intoxication in front of a crowd of onlookers while another individual was being critical of the decision to do so does not present a scenario involving a 'highly predictable' danger of violating citizens' constitutional rights. Thus, in the absence of a pattern of violations in such a setting the Borough was and remains entitled to rely on the training regime in place. . . . That the Borough's officers might confront situations where they must arrest individuals in public while maintaining officer safety and handling vocal criticism of their behavior could certainly be

recognized as a scenario where grey areas involving First and Fourth Amendment rights might arise. But arguing that more nuanced or better training and supervision might have produced a different outcome is not sufficient. To maintain a 'single-incident' basis for *Monell* liability, plaintiffs must point to a scenario or situation where it was patently obvious that the lack of pre-hiring investigation, training or supervision (or the lack of more nuanced or better investigation, training or supervision) would result in the constitutional violation of citizens' rights in the manner alleged by plaintiffs. In other words, it must be shown that it was so predictable that failing to provide such investigation, training or supervision would result in a violation of constitutional rights, that doing so amounted to a conscious disregard for plaintiffs' First and/or Fourth Amendment rights. *See Connick*, 131 S.Ct. at 1365. Their evidence in opposition to the Borough's motion simply fails to rise to this level. Consequently, they cannot proceed under the narrow range of 'single-incident' liability that the Court left open in *Canton.*"); ***Zenquis v. City of Philadelphia***, 861 F.Supp.2d 522, 533 & n.9 (E.D. Pa. 2012) ("Although a pattern of prior constitutional violations by untrained employees is ordinarily necessary to show that a municipality was deliberately indifferent to the need for training, such a pattern is not always necessary. . . Indeed, Zenquis argues that the City's putative failure to train police officers about the danger of encouraging untrained private citizens to use force to apprehend a suspect was so obviously likely to lead to a constitutional violation that a single incident of harm would suffice to establish a basis for municipal liability. . . . It is unnecessary to determine at this time whether 'single-incident liability' for a failure to train may or should apply in this case. The amended complaint alleges sufficient facts to justify further discovery as to the police conduct in this and other cases and the awareness and/or tolerance of that conduct by City policymakers. Many of the 'single-incident' cases relied upon by the City to justify dismissal of the complaint were decided upon a far more developed factual record."); ***Bertuglia v. City of New York***, 839 F.Supp.2d 703, 737-39 (S.D.N.Y. 2012) ("The plaintiffs have alleged two bases for their *Monell* claim: first, the City's failure to train prosecutors to avoid various forms of misconduct, including threatening witnesses, *Brady* violations, and introducing inadmissible 'bad act evidence' and other improper conduct before grand juries; and second, the City's policy of lax discipline with regard to prosecutors who did commit such acts of misconduct. . . Both are viable theories of a policy or custom that can satisfy the first requirement for a *Monell* claim. . . The plaintiffs cite at least 15 reported cases, as well as Justice Zweibel's decision in this case, that they claim evidence a pattern of constitutional violations by prosecutors for the City of which the violations the plaintiffs suffered were allegedly a part. . . They allege that many more such decisions indicating an even broader pattern of constitutional violations are evidenced by unreported decisions that the City alone possesses. . . They allege that, as a matter of policy, the city never disciplines prosecutors for the types of misconduct alleged. . .The City in its opening brief did not address the plaintiffs' 'lax discipline' argument, focusing exclusively on the 'failure to train' argument. While the City did address the plaintiffs' lax discipline argument in its reply papers, arguments raised for the first time in reply should not be considered, because the plaintiffs had no opportunity to respond to those new arguments. . .The City argues that the plaintiffs have not pleaded sufficient facts to state a failure to train claim under the Supreme Court's decision in *Connick v. Thompson*, 131 S.Ct. 1350 (2011). However, the Court in *Connick* plainly acknowledged that, '[i]n limited

circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983.'. . The *Connick* Court did note that failure to train claims are a particularly 'tenuous' species of municipal liability action, and held that they require that the 'municipality's failure to train its employees in a relevant respect must amount to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'. . The procedural context of *Connick* is very different from the procedural context of the present motion. In *Connick*, the plaintiff had obtained a substantial jury verdict against a prosecutor's office based on a failure to train prosecutors on their obligations to comply with *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court refused to set aside the jury verdict and the Court of Appeals for the Fifth Circuit affirmed. The Supreme Court found that the evidence was insufficient to support the jury's verdict, and the trial judge erred in not granting judgment as a matter of law to the defendant. . . The Court found that a history of four prior *Brady* violations did not constitute a pattern and that the case did not fall within the narrow range of a possible 'single incident liability.'. . This case, by contrast, is at the pleadings stage. To plead a *Monell* claim based on a failure to train, a plaintiff must plead (1) that 'a [municipality] knows "to a moral certainty" that her employees will confront a given situation,' (2) 'that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation,' and (3) 'that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.' *Walker*, 974 F.2d at 297–98. As the Supreme Court explained in *Connick*, a 'pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of a failure to train.'. . The plaintiffs have pleaded that the City has a longstanding, de facto policy of *never* disciplining prosecutors who commit specified types of prosecutorial misconduct and not otherwise training them to avoid misconduct. The City and the District Attorney's office plainly know, to a moral certainty, that assistant district attorneys will find themselves questioning witnesses before grand juries, interviewing witnesses beforehand, and being in possession of *Brady* material, because these are basic facets of an ADA's job. . . The Amended Complaint points to over fifteen cases where City prosecutors allegedly committed misconduct, and alleges the existence of many more such cases in the form of unpublished opinions like Justice Zweibel's. The plaintiffs rely in addition upon Justice Zweibel's forty page opinion that, they argue, documents the misconduct that took place in this case. The City has distinguished many, but not all, of the cases cited by the plaintiffs as evidence of a pattern or practice that has resulted in constitutional violations, but the City does not address the allegation that a far larger number of unreported decisions evidencing this pattern are in its possession. These allegations may be difficult to prove. But at this stage, the issue is only whether the factual content alleged by the plaintiffs, accepted as true, 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'. . Here, the Complaint alleges sufficient facts to allow the Court to draw the inference that there is a history of mishandling grand jury presentations. With regard to the third prong, there is no dispute at this stage that, where an assistant district attorney commits misconduct before a grand jury that results in an indictment based on insufficient evidence, or violates their obligations under *Brady*, those actions will frequently result in the violation of citizens' constitutional rights. Accordingly,

the City's motion to dismiss the *Monell* claim is denied."); ***Tandel v. County of Sacramento***, Nos. 2:11–cv–00353–MCE–GGH, 2:09–cv–00842–MCE–GGH, 2012 WL 602981, at *19 (E.D. Cal. Feb. 23, 2012) ("Although Plaintiff's allegations concerning the County's policy of failure to provide proper psychiatric treatment for suicidal inmates who require catheters is based on a single incident, the Court believes that the Plaintiff has made the requisite showing of 'obviousness' of the constitutional violation, such that it can be substituted for the pattern of violations ordinarily required to establish municipal liability. . . Further, Plaintiff's allegation that the Jail 'has a history of failing to respond to the urgent medical needs of its inmates'. . . is supported not only by Plaintiff's own experience during two separate instances of detention, which were three years apart, but also by Plaintiff's reference to a different case pending in this court, *Hewitt v. County of Sacramento,* No. 2:07–cv–01037. Plaintiff alleges that *Hewitt* demonstrates that the County has a custom and policy of failing to provide necessary medical care to inmates. Thus, Plaintiff has plausibly demonstrated the 'practices of sufficient duration, frequency and consistency' to state a viable *Monell* claim against the County. . .In sum, the Court concludes that, at this point in the litigation, without substantial discovery, and where the Court must draw all inferences in favor of Plaintiff, the FAC contains sufficient allegations for the Court to infer that the County plausibly has a policy or custom of delaying medical assistance to inmates and failure to properly observe and treat inmates. Accordingly, the Court declines Defendants' motion to dismiss Plaintiff's second claim for relief."); ***Schwartz v. Lassen County ex rel. Lassen County Jail***, 838 F.Supp.2d 1045, 1058 (E.D. Cal. 2012) ("In this case, the Court finds that, based on the allegations in the complaint, it is plausible that the failure to train was so obviously deficient that it could lead to liability resulting from the single constitutional deprivation at issue here. . . .In other words, the court can reasonably infer that, based on the particular circumstances as alleged, the facility's employees so obviously lacked training in providing proper medical care that it resulted in Decedent's death and, consequently, Plaintiff's loss of her son's companionship. Specifically, as alleged, Decedent visibly lost forty pounds; directly requested, and was refused, medical care; and previously had medical complications while detained at the Facility. These allegations are compounded by Plaintiff's assertion that Decedent's physician sent a letter explaining that, because of Decedent's severe medical condition, he should not be detained at the Facility, but rather should be placed in the care of his mother. Thus, at this stage of the litigation, absent more fully-developed facts, the Court declines to dismiss Plaintiff's § 1983 claims on the basis that Plaintiff has only alleged a single incident of failure to provide medical care."); ***Cardall v. Thompson***, No. 2:10–cv–305 CW, 2012 WL 90417, at *8, *9 (D. Utah Jan. 11, 2012) ("Anna has argued that Hurricane City failed to adequately train its officers on excessive force, taser use, and mental health issues. She cannot point to a single constitutional violation, other than those alleged in this case, which may have arisen from Hurricane City's training deficiencies. At the same time, however, those deficiencies were arguably obvious. The evidence suggests that Hurricane City provided absolutely no training to its law enforcement on mental health issues. This is particularly troubling in light of the Tenth Circuit's recognition that mental health is an important factor to evaluate when determining the appropriate use of force. Anna also argues that Hurricane City's established policy on taser use was unconstitutional both because it left too much discretion to officers and also because it authorized unconstitutional tasings. Case law from this court states that

a policy 'in which officers were trained to use only their own subjective judgment when firing a taser' would be unconstitutional. *Cavanaugh v. Woods Cross City*, 1:08–cv–32, 2009 WL 4981591 at *5 (D.Utah Dec. 14, 2009). Although deposition testimony by Hurricane City officers mentions that officers were instructed to rely on their 'discretion' in determining when to deploy their tasers, it is clear that the exercise of this discretion was dependent on the situation and the subject's actions. . . Such a policy, which recognizes that a broad array of factors affect what level of force is appropriate in a given situation, is not unconstitutional. There is evidence, however, to support Plaintiffs' argument that the policy was unconstitutional because it authorized unconstitutional use of force. Deposition testimony states that Hurricane City policy allowed the use of a taser when an individual was simply not responding to an officer's verbal commands. . . If this assertion is true, the policy may have been deliberately indifferent to the *Graham* standard. Furthermore, Defendants have stated that the tasing of Brian was fully in compliance with city policy. . . If the facts are taken in favor of Anna, this means that the policy authorized the almost immediate and repeated tasing of a nonthreatening and confused individual, which would be plainly unconstitutional. Furthermore, even in the absence of an unconstitutional written or established policy, a municipality may be held liable for actions of a policy maker. . . .Excell, as Chief of Police, was responsible for Hurricane's police policies. Therefore, to the extent that he authorized the tasings by Thompson, the city may be held liable for his decision. Hurricane City must remain a party to the case. Viewing the evidence in a light most favorable to Anna, the city's policy on tasing and trainings on mental health and tasers may have been constitutionally inadequate. Furthermore, if Excell, the final policymaker for the Hurricane police, allowed or encouraged the use of excessive force, the city can be held responsible for that action."); ***Wereb v. Maui County***, 830 F. Supp.2d 1026, 1029, 1030, 1033-37 (D. Hawai'i 2011) ("[T]his Order is restricted solely to the question of whether an intervening change in law requires the court to reconsider its July 28, 2010 Order as to potential County liability. . . . Although the court did not specifically state it as such, the court was applying the single-incident theory recognized in *Canton* as a method of proving 'deliberate indifference' in a municipality's failure to train employees. . . .Much of the County's Motion argues that, after *Connick,* municipal liability for deliberate indifference based on a failure-to-train for serious medical needs requires a prior 'pattern or practice' of violations. But nothing in *Connick* itself suggests that the single-incident theory cannot apply outside the deadly-force circumstances noted in *Canton.* Instead, the County relies on language in *Craig v. Floyd County,* 643 F.3d 1306 (11th Cir.2011), that simply states ' "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability" against a municipality.'. . *Craig,* however, is easily distinguishable − it is not a failure-to-train case. That is, although *Craig* cites *Connick* for the established proposition that '[a] pattern of similar constitutional violations ... is "ordinarily necessary,"' it nowhere purports to read *Connick* as narrowing a single-incident, failure-to-train theory. In fact, courts continue to recognize a training deficiency as a possible basis for finding deliberate indifference in a medical-needs context after *Connick.* [citing cases] In response to the court's request for Plaintiffs to articulate their specific failure-to-train theory (or theories), Plaintiffs set forth two: (1) 'Maui County failed to train its employees on how to monitor detainees to determine if they needed medical care' (the 'Monitoring Theory"), and (2) Maui County 'failed to train its employees on the risks, signs, and symptoms of alcohol withdrawal' (the

'Alcohol Withdrawal Theory"). . .The court discusses each theory in turn, mindful that '[w]hether a local government has displayed a policy of deliberate indifference to the constitutional rights of its citizens is generally a jury question.'. . That is, where the evidentiary record contains genuine disputes of material fact, a jury is to decide whether a local government acted with deliberate indifference. . . . The court concludes that Plaintiffs' Monitoring Theory remains viable, even after *Connick,* and is supported by sufficient evidence in the record to create a genuine issue of material fact for trial. . . Under this theory, County PSAs had no knowledge or familiarity with their relevant constitutional duties. They had no basic medical training, and no prior background in law enforcement or in prisons. . . Unlike *Connick,* this theory does not challenge subtleties in the County's training program and thus does not implicate *Connick's* concerns about 'micromanaging local governments.'. . Under Plaintiffs' Monitoring Theory, the County gave its PSAs *no* training on how to monitor detainees, . . . and *no* training on how to monitor for deprivation of 'serious medical needs.'. . Plaintiffs challenge the 'substance' of the training, not the 'format.'. . As argued by Plaintiffs, the result of this failure to train led to a practice − arguably contrary to the County's written policy . . . of not conducting any in-person physical checks of detainees, and relying on a video monitoring system that was inadequate to detect signs and symptoms of medical distress. . . Viewing the evidence in the light most favorable to Plaintiffs, the result of lack of training here was PSAs with 'the utter lack of an ability to cope with constitutional situations.' *Connick,* 131 S.Ct. at 1363. . . . Plaintiffs' Alcohol Withdrawal Theory, however, runs afoul of *Connick.* Simply put, it is too specialized and narrow − it could not have been 'patently obvious' that unconstitutional consequences would be a highly predicable result of a failure to train specifically on alcohol withdrawal. The Alcohol Withdrawal Theory is not of the same character as exemplified in *Canton's* hypothetical, and as reemphasized and distinguished in *Connick.* That apparently no prisoner at the Lahaina Police Station has suffered injury from alcohol withdrawal from 1993 until Wereb's death (assuming he died of withdrawal) suggests an unconstitutional result was not obvious. . .Post-*Connick* caselaw supports this conclusion. [citing cases] Allowing Plaintiffs' Alcohol Withdrawal Theory (as a stand alone theory of single-incident deliberate indifference) to be presented to a jury would raise the potential of requiring municipalities to train and screen for virtually any medical situation that might arise − diabetes, drug withdrawal, alcohol withdrawal, pneumonia, schizophrenia, hypertension, positional asphyxia, excited delirium syndrome, agorophobia (the list might not end) − and face potential liability for any gap in training on medical conditions with no prior notice of a constitutional problem. . . . [P]recluding this narrow Alcohol Withdrawal theory comports with the same policy concerns expressed in *Connick* when the Supreme Court explained that attacking particular 'nuances' in training 'simply cannot support an inference of deliberate indifference.'. . .Accordingly, the court will allow Plaintiffs' Monitoring Theory to continue, but not Plaintiffs' Alcohol Withdrawal Theory."); ***Barrios-Barrios v. Clipps***, 825 F.Supp.2d 730, 752 (E.D. La. 2011)("To the extent that plaintiffs have produced particular evidence concerning Clipps's pre-recruitment arrests and traffic citations, his statements during the background check, his Field Officer Training record and his post-academy reprimand, nothing in this evidence creates any inference that Clipps had a propensity for or probability of committing constitutionally unlawful home invasion, unlawful detention, sexual assault or excessive force. . . .Plaintiffs simply 'did not produce evidence to meet the high hurdle of showing

that [home invasion, detention, sexual assault or] excessive force was an obvious consequence of' the allegedly inadequate hiring, training or supervisory practices. . .Nor is there any evidence that the City Defendants actually drew such an inference, even if one might have been drawn."); ***Pauls v. Green***, 816 F.Supp.2d 961, 972, 973 (D. Idaho 2011) ("[A]ny failure to train jailers to refrain from sexually assaulting inmates does not fall within the narrow range of *Canton's* hypothesized single-incident liability. The obvious need for specific training that was present in the *Canton* hypothesis is absent here: as discussed, jailers do not need specific, structured training to know they should refrain from sexually assaulting inmates. . . . [T]here was no pattern of incidents at Adams County Jail that would provide actual or constructive notice that allowing a non-POST-certified employee to operate the jail alone would obviously result in the sexual assault of an inmate."); ***Dillingham v. Millsaps***, 809 F.Supp.2d 820, 848-50 (E.D. Tenn. 2011) ("In this case, there is no evidence of 'repeated complaints' about the use of tasers (or force more generally) by law enforcement officers in the Monroe County Sheriff's Department. Consequently, Dillingham must proceed under a 'single incident' theory. The Supreme Court recently affirmed that 'deliberative indifference' is 'a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.' *Connick v. Thompson* , 131 S.Ct. 1350, 1360 (2011) (citation and alteration omitted). Like his claim against Sheriff Bivens in his individual capacity, . . . Dillingham relies entirely upon one fact: that Deputy Millsaps did not receive a copy of the Policy Manual. This, however, is not a significant fact. In reviewing Dillingham's 'failure to train' claim, the focus should be on whether Deputy Millsaps . . . received adequate training on how to use a taser. . . . As the Supreme Court has instructed, the focus should be on the training program 'in relation to the tasks the particular officers must perform.'. . In other words, did Deputy Millsaps receive adequate training on how to use tasers, and the use of force more generally? Having reviewed the record, there is absolutely nothing that suggests otherwise. . . . In addition, it is significant that there is no evidence of past complaints against Deputy Millsaps, or other deputy sheriffs. The record does not contain any past allegations, complaints, or suits regarding force or misconduct by Monroe County deputy sheriffs prior to May 11, 2007 (the date of the car accident). While a history of past conduct is not necessary to establish municipal liability, courts are more inclined to find a 'custom' when there has been a history of complaints or similar behavior."); ***Tobey v. Napolitano***, 808 F.Supp.2d 830, 843 (E.D. Va. 2011) ("Plaintiff has not identified any case in which *Canton*'s single-incident theory has been actively applied to support a claim of municipal liability. Plaintiff's First Amendment claim is likewise beyond the narrow set of circumstances contemplated by the *Canton* Court. Plaintiff has not alleged any facts suggesting that protests in the form of passengers removing their clothes in the screening area would be recurring, or that the failure to train officers in some unidentified respect would likely lead to First Amendment violations. Nor can Plaintiff establish such likelihood based solely on his own experience or subsequent screening-area protests."); ***Ickes v. Borough of Bedford***, 807 F.Supp.2d 306, 327, 328 (W.D. Pa. 2011) ("In order to hold Bedford liable for the constitutional violation allegedly committed by Kinsinger, Ickes must show that Bedford was deliberately indifferent to the risk that a violation of the *particular constitutional right* at issue would result from its training regimen. . . It is not enough for him to demonstrate that Sigler's instructions exhibited a 'deliberate indifference' as to whether Bedford's own internal requirements would be followed. . . Finally, it

is undisputed that Kinsinger attempted to apprehend Ickes with his hands *before* using the taser. . . . Even if it is assumed that Sigler's instructions were erroneous (and that they were likely to cause Bedford's officers to use their tasers prematurely), Kinsinger did not follow those instructions when he arrested Ickes. Instead of tasering Ickes before engaging him with his hands, Kinsinger attempted to make the arrest with his hands (and sustained a minor injury to his right hand) before deploying the taser. . . Under these circumstances, there is no conceivable way that Ickes can establish that Sigler's statements pertaining to the use-of-force continuum 'actually caused' Kinsinger to violate the Fourth Amendment. . . . Ickes' attempt to categorically require arresting officers to make contact with their hands before deploying tasers against resisting suspects has no basis in constitutional law. The Fourth Amendment's standard of objective reasonableness cannot be reduced to a series of inflexible rules."); ***Btesh v. City of Maitland, Fla.***, No. 6:10-cv-71-Orl-19DAB, 2011 WL 3269647, at *32, *34 (M.D. Fla. July 29, 2011) ("The need for training of police officers carrying firearms in the use of deadly force has been found to be obvious, while a need for training to recognize mental illness requiring hospitalization or to dispense medication as prescribed is not sufficiently obvious to warrant municipal liability absent a prior history of factually similar violations of constitutional rights. . . . If the risks of failing to train law enforcement officials 'to recognize the need to remove a mentally ill inmate to a hospital or to dispense medication as prescribed' are not sufficiently obvious in the abstract, . . . it follows that the risk of failing to train police officers to flag the addresses of mentally ill persons is also insufficiently obvious in the abstract to impose municipal liability under Section 1983 absent a prior history of injuries resulting from a failure to flag residences. [citing *Connick*]"); ***George v. Sonoma County Sheriff's Dept***., No. C-08-2675 EDL, 2011 WL 2975850, at *7-*9 (N.D. Cal. July 22, 2011) ("Here, there is no evidence of a prior history of violations of the kind alleged by Plaintiffs, so Plaintiffs must rely on the single incident theory. Defendant argues that the same reasoning applied in *Connick* should apply to the medical professionals in this case and in light of the extensive professional training of the doctors and nurses, Defendant cannot be liable for a failure to train. Plaintiffs argue that the fact that treatment and discharge of inmates was a common occurrence and involved unique issues demonstrates that the need to train was obvious within the meaning of *Canton* and the lack of training or policies constituted deliberate indifference. . . .Medical care of inmates who are discharged to a jail environment is quite different from that of the unincarcerated who can seek medical care on their own or get help from family and friends, and Defendant does not contend that such training is a standard part of the curriculum at medical school, in contrast to the teaching of the *Brady* obligation at law school. . . .Viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could conclude that the single incident of a constitutional violation here was a 'highly predictable' consequence of the failure to train because Defendant treats all inmates from the prison and there were *no* policies or training on how to handle their discharge. Defendant argues that one incident out of 1,500 instances of treating inmates at Sutter [Hospital] over a thirty-year period does not constitute a highly predictable consequence. However, hindsight is not the proper measure for predictability. As other courts have held, *Connick* did not foreclose liability based on a single incident as set forth in *Canton.* [citing *Ramirez v. Ferguson*, 2011 U.S. Dist. LEXIS 34625, at * 72-73 (W.D.Ark., Mar. 29, 2011) (finding that Sheriff and Captain supervisors of correctional officers were liable for a "woeful"

failure to train on the handling of inmates with mental health needs) and *Meogrossi v. Aubrey*, 2011 U.S. Dist. LEXIS 35254, at *36 (W.D.Ky, Mar. 31, 2011) (obvious and predictable need for even Sheriff's deputies to know how to properly conduct a warrantless search or seizure of evidence.)]"); ***Barker v. City of Boston***, 795 F.Supp.2d 117, 123 (D. Mass. 2011) ("Based on the events that transpired in this case, the Plaintiff must show that Boston was deliberately indifferent to a known risk that its officers would use excessive force against a mentally ill individual. The facts in the Amended Complaint themselves refute any such showing. Each year, the Boston police respond to seven thousand calls involving mentally ill individuals. . . Yet, from 1992 to the present, the Plaintiff identifies only two incidents in which Boston police officers killed a mentally ill individual. . . Thus, over the course of nineteen years, or approximately 133,000 calls involving a mentally ill person, only two were killed by police officers. Moreover, the Plaintiff does not allege that the use of force in either of those two prior incidents was excessive. Such evidence cannot support the conclusion that Boston was deliberately indifferent to an obvious risk that its officers would use excessive force against mentally ill individuals."); ***Stefan v. Olson***, No. 1:10 CV 671, 2011 WL 2621251, at *14-*16 (N.D. Ohio July 5, 2011) ("Plaintiff has presented ample evidence of customs at the Richland County Jail which served to deprive Michael Reid of his constitutional rights on the night of April 2, 2009 and the morning of April 3, 2009, the most significant example being the jail's custom of not following the written alcohol withdrawal protocol established by Dr. Williams. Had the jail followed this protocol, Reid likely would have received adequate medical treatment, thus averting the seizure that ultimately led to his death. Plaintiff, however, has provided no evidence of 'a clear and persistent pattern of mishandled medical emergencies for pre-arraignment detainees' by the Richland County Jail. . . After months of discovery, there is no evidence that anything like what happened to Reid has happened to any other inmate at the jail. As such, Plaintiff is unable to satisfy the first part of the test laid out in *Garretson, supra,* and thus cannot prove that Richland County is liable for the Richland County Jail's unconstitutional custom of inaction. Therefore, Richland County's Motion as it pertains to the deprivation of Michael Reid's rights through a municipal custom of inaction is hereby **GRANTED**. . . . Plaintiff has presented enough evidence to create a genuine issue of material fact as to whether Richland County is liable for the death of Michael Reid as the result of failing to adequately train the employees of the Richland County Jail on how to deal with inmates going through alcohol withdrawal. . . . Although corrections officers were required to monitor inmates like Reid for alcohol withdrawal (especially during the night shift when no medical personnel were scheduled), the jail spent *no* money on training its corrections officers on how to deal with 1) intoxicated inmates, 2) alcohol withdrawal, 3) recognizing the signs and the symptoms of alcohol withdrawal or 4) assessing inmates at risk for seizures. . . . Plaintiff has also presented evidence from which a reasonable juror could conclude that the training of Richland County Jail's medical staff 'was inadequate for the tasks [they] were required to perform,' i.e., administering Dr. Williams' alcohol withdrawal protocol. . . . Sheriff Sheldon and Major Paxton each recognized that alcohol withdrawal was a serious problem the jail faced but did nothing to train jail staff on how to handle that problem. . . Since the decisions of these two men represent official Richland County policy, deliberate indifference on their part is equivalent to deliberate indifference on the part of the county."); ***Carter v. City of Carlsbad***, 799 F.Supp.2d 1147, 1160, 1161 (S.D. Cal. 2011) ("Viewing the

evidence in the light most favorable to Carter, a material factual dispute exists as to whether the City customarily issued tasers to untrained officers. The City's official policy states that no officer may be issued a taser unless he has been trained to use it properly. . . . However, the City has failed to provide evidence that any but a small minority of its officers were actually trained to use the X26 taser: though it is standard issue equipment, the City's records list only fifteen of its 115 officers as being trained and certified to use the X26 taser. . . . The alleged practice in this case mirrors the paradigmatic example provided by the Supreme Court in *Canton* of a practice so obviously likely to result in constitutional deprivations that the municipality's policymakers must have been aware of, and deliberately indifferent to, that risk . . . . The City provides tasers to its officers for the very purpose of inflicting force upon criminal suspects when necessary to effect an arrest. To issue weapons without educating officers of the constitutional limitations on the use of force creates an obvious risk that the City's officers will violate people's constitutional rights, and therefore satisfies the deliberate indifference standard. . . . For Carter to show the City's alleged practice of issuing tasers to untrained officers caused his injury, he must establish that the officer who tased him was untrained. Carter's claim fails on this third prong."); ***Doe v. Miami-Dade County,*** 797 F.Supp.2d 1296, 1310, 1311 (S.D. Fla. 2011) ("Conspicuously absent from the summary judgment record is evidence of a single instance in which the County hired a police officer applicant who was known to exhibit dangerous sexual aggression issues, or a single instance in which the County tolerated or approved of such misconduct by police officers. The plaintiff attempts to impute knowledge on the County by drawing attention to the 51 instances of sexual misconduct reported over four years. But three principal considerations cause this Court to conclude that the 51 sexual misconduct accusations are insufficient to establish deliberate indifference. For one, the undisputed factual record shows that allegations of police misconduct, including sexual misconduct, automatically triggers a formal investigation by the Professional Compliance Bureau. . . . For two, although the County concedes that at least some of the sexual misconduct complaints were sustained, it is undisputed that many or most of the claims were, after investigation, unsustained. In judging the scope or existence of a pattern of constitutional violations, the Court requires more than evidence of accusations. . . . For three, at the hearing, counsel for the County represented there are slightly more than 3,000 sworn police officers presently employed by the County. Because of officer turnover, the total number of sworn police serving at *some point* during the four-year span of the 51 sexual misconduct reports would have been even larger. The Court does not find that 51 sexual misconduct claims over four years − in an extremely large police force, and including many claims that were never supported − establishes a widespread pattern of constitutional abuses directly caused by the County's failure to implement different screening measures."); ***Adams v. City of Laredo***, No. L-08-165, 2011 WL 1988750, at *10 (S.D. Tex. May 19, 2011) ("Adams has not alleged or produced any evidence of a pattern, or even another instance, of Laredo police officers using excessive force on a suspect suffering from hypoglycemia. Furthermore, this case does not fall within the 'narrow range of circumstances' where a single incident will suffice for a showing of deliberate indifference. Adams has provided no evidence that the use of excessive force is an 'obvious,' 'highly predictable' consequence of not training police officers to recognize suspects suffering from hypoglycemia. Adams has also failed to allege or demonstrate any causal link between the officers' lack of hypoglycemia training

and the alleged use of excessive force during his arrest. According to Adams, when his vehicle finally stopped, the officers pulled him from his truck and immediately struck him on the head and then began to beat him while he lay on the ground helpless in a nonadversarial position. . . If true, it would certainly appear that the officers used excessive force. Adams's theory seems to be that these officers had a general propensity to use excessive force. If so, it would seem highly unlikely that prior training on hypoglycemia would deter them from using excessive force on this occasion. Even if one could postulate a remote connection between the absence of hypoglycemia training and use of excessive force by these officers on this occasion, that connection is too tenuous to satisfy the heightened standard required to hold a municipality liable under § 1983."); ***Langweiler v. Borough of Newtown***, No. 10-3210, 2011 WL 1809264, at *6 (E.D. Pa. May 12, 2011) ("The Court concludes that Langweiler failed to adequately plead a failure to supervise claim because he did not allege any facts which could plausibly give rise to an inference that the Borough or Wojciechowski communicated their approval of Matthews's conduct. Just because Wojciechowski was responsible for supervising Matthews does not mean that he approved of Matthews's conduct. And his failure to supervise Matthews on a daily basis alone does not communicate approval. . . . On the other hand, Langweiler did sufficiently plead a claim for failure to train. He identified a certification that was a condition of Matthews's employment and alleges that Matthews did not complete the certification. Further, Langweiler alleges that he fell victim to Matthews's prior misconduct, i.e. stopping vehicles without probable cause, on several occasions, which the purported certification may have prevented. And because the Borough and Wojciechowski knew about Matthews's history, their failure to ensure Matthews obtained the certification raises an inference of deliberate indifference. Thus, unlike the supervisor in *Connick,* Langweiler alleges the Borough and Wojciechowski had knowledge of a pattern of similar violations. . . Accordingly, Langweiler has sufficiently pled a claim for failure to train. For these reasons, Langweiler's claim for failure to supervise is dismissed with prejudice, but Defendants' Motion is denied with respect to the failure to train claim."); ***Harris v. Paige***, No. 08-2126, 2011 WL 1755646, at *7 (E.D. Pa. May 9, 2011) ("Although it is certainly acknowledged that Officer Paige has an extensive disciplinary record, accusations of crimes such as robbery, rape, and murder are not supported by the existing police disciplinary record. As outlined above, Officer Paige's disciplinary violations speak for themselves. They include: numerous instances of sleeping on the job, an unexplained pursuit of a motorist out of the district, wrongfully transporting a civilian home, engaging in outside employment, and other similar violations for which he was suspended for periods of time. Officer Paige's disciplinary record does include offenses which involve serious offenses such as theft and assault. However, none of these more serious allegations were substantiated by corroborating witnesses during IA's investigations of these incidents. . . Moreover, there is also no history in this record that indicates that Officer Paige had a propensity to commit the type of heinous sexual assault that he is alleged to have committed here. . . . [A]s bad as Officer Paige's disciplinary record is, it is devoid of any sexual assaults or even sexual misconduct. Thus, we conclude that Officer Paige's disciplinary record does not support a finding that the City was aware or should have been aware of similar unlawful conduct in the past, but failed to take precautions against future violations."); ***Young v. Village of Romeoville***, No. 10 C 1737, 2011 WL 1575512, at *4 (N.D. Ill. Apr. 27, 2011) ("The Supreme Court in *Connick* recognized that deliberate

indifference in a failure-to-train case also can rest on a 'single-incident' theory of liability. . . . *Connick* held that the narrow range of circumstances in which a 'single-incident' theory of liability could prevail did not encompass the failure to train prosecutors in their obligations under *Brady* . . . It is unclear whether, after *Connick*, a municipality's failure to train officers in non-lethal handcuffing techniques theoretically could lead to 'single-incident' liability in a failure-to-train case. Even if it could, Young has not made her case. . . . Young offers no evidence regarding the particulars of the training or of the supervision and discipline of Romeoville police officers, much less evidence that would permit a reasonable jury to conclude 'that such training, supervision, and discipline are so obviously inadequate as to result in the violation of constitutional rights.'. . As a result, Young cannot prevail on a 'single-incident' theory of failure-to-train liability."); ***Hill v. Robeson County, N.C.***, No. 7:09-CV-5-D, 2010 WL 2104168, at *7 (E.D.N.C. May 20, 2010) ("Robeson County's decision to hire Britt in March 2006 as an Offender Center Resource Officer was itself legal, and Robeson County did not authorize Britt to sexually abuse Hill or otherwise violate her constitutional rights. Although Britt was convicted in 1981 of manslaughter for killing his wife and served approximately five years in prison, Hill has not alleged that Britt engaged in any other unlawful or violent conduct during the two decades between Britt's release from prison and Robeson County's hiring of him in March 2006. . . Furthermore, Hill acknowledges that Robeson County hired Britt, because, *inter alia*, Robeson County believed that Britt had reformed and 'could identify with the people he was trying to help.'. . Accordingly, the amended complaint lacks the strong causal connection between Britt's 1981 manslaughter conviction and Britt's alleged constitutional violations in 2007. . . In opposition to this conclusion, Hill argues that *Brown* requires a strong causal connection only when the acts in the defendant's background are less serious than the alleged constitutional violations. . .Stated differently, Hill contends that because Britt killed his wife in 1979 and was convicted of manslaughter in 1981, Robeson County necessarily should have foreseen the alleged sexual abuse in 2007. The court rejects Hill's creative interpretation of *Brown*. Nothing in *Brown* or its progeny creates Hill's proposed per se rule of foreseeability. Rather, *Brown* and its progeny demonstrate that the alleged constitutional violations and the municipal official's prior conduct must be nearly identical in order to support municipal liability based on a claim of inadequate hiring."); ***Sexton v. Kenton County Detention Center***, No. 2007-130 (WOB), 2010 WL 1050058, at *5 (E.D. Ky. Mar. 18, 2010) ("Plaintiffs argue that the county defendants are liable for their injuries because the county defendants hired Stokes without properly performing a background check, which plaintiffs argue demonstrates a propensity toward violence against women. . . . Despite defendant Stokes' criminal record, which included several convictions for non-support, driving infractions, and one misdemeanor assault charge, involving a domestic situation, plaintiffs fail to demonstrate that the county defendants knew that Stokes was highly likely to inflict the particular injuries suffered by them. . . None of Stokes' prior misdemeanor offenses demonstrated a propensity to commit rape. Thus, plaintiffs have not established that the county defendants were deliberately indifferent to their rights by improperly hiring Stokes."); ***M.C. v. Pavlovich,*** No. 4:07-cv-2060, 2008 WL 2944886, at * 6 (M.D. Pa. July 25, 2008) ("In this case, the allegations of the plaintiff's complaint, assumed to be true, suffice to meet the admittedly high burden of establishing deliberate indifference and causation. The complaint alleges a pattern of similar violations that began before Pavlovich's employment with

the Marysville Police Department and continued thereafter. Pavlovich's continuing pattern of conduct involved not just M.C., but fourteen other minor girls. Pavlovich used Borough equipment and his position as a police officer to directly accomplish his illegal ends. M.C. alleges that, prior to hiring Pavlovich, the Borough and Chief Stoss were aware of this pattern, which had resulted in his prior termination from two other police departments. Further, the complaint alleges that the Borough and Chief Stoss personally became aware of Pavlovich's continuing pattern of conduct through the complaints of the parents of at least three of the minor victims. These facts establish that the defendants were confronted with information which made it obvious that Pavlovich would likely inflict the particular injury suffered by M.C., and yet made the decision to hire Pavlovich. In the face of this clear and unreasonable risk, the defendants took no action to adequately supervise Pavlovich despite his repeated misconduct and the multiple complaints which should have made his constitutional violations obvious. Accordingly, M.C. has stated a claim under § 1983 against the Borough and Chief Stoss in his personal capacity."); ***Teasley v. Forler***, No. 4:06-CV-773 (JCH), 2008 WL 686322, at * 10 (E.D. Mo. Mar. 10, 2008) ("The Eighth Circuit notes that Courts have closely adhered to the requirements of *Bryan County*. . . It held that a county is not liable for the excessive force of its officer where his employment records from a prior law enforcement job indicated that he had slapped an inmate, disobeyed orders, cursed at other employees, and been accused of beating his wife. . . Specifically, the Court found that the nature of these complaints did not satisfy the 'strong' causal connection needed to find that it was obvious risk that he would use excessive force. . . Other circuits also closely adhere to the requirements of *Bryan County*. [collecting cases] . . . . Upon consideration, the Court finds that Plaintiffs' evidence does not satisfy the strong causal connection required by *Bryan County* and its progeny. Here, an adequate investigation into Forler's past would have uncovered his convictions for driving while intoxicated and minor in possession of alcohol as well as his assault arrest. Many courts have held that prior incidents involving assault and alcohol do not make it plainly obvious that an officer would improperly use deadly force. [citing cases] An adequate investigation would have also uncovered that he failed the Academy psychological exam because he showed a willingness to disregard safety procedures. Complaints about ignoring safety protocols do not make it obvious that an officer will use excessive force. . . Similarly, prior issues concerning communicating with the public, as well as earning poor grades in college, do not satisfy the strong causal connection required by *Bryan County*. As such, Lincoln County and Torres cannot be liable based on the decision to hire Forler."); ***Wilhelm v. Clemens***, No. 3:04 CV 7562, 2006 WL 2619995, at *9 (N.D. Ohio Sept. 13, 2006) ("In the instant action, Plaintiff claims that Carr failed to contact George Clemens's former employer, the Village of Paulding, which terminated his employment as a police officer after eight separate occasions of discipline. . . Plaintiff, however, fails to provide any evidence that had Carr contacted the Village of Paulding, she would have discovered that George Clemens would likely use excessive force or otherwise violate the constitutional rights of the citizens of Antwerp. It does not appear that Clemens was ever disciplined for the use or misuse of force. Plaintiff further contends that George Clemens's prior convictions for misdemeanor assault, criminal trespass, and driving under the influence of alcohol should have 'tipped off' Carr. While his prior convictions may make George Clemens a peculiar choice for a position as a police officer, they are not sufficient to impose liability on the Village. . . . Here, George Clemens's criminal

record is similar to the deputy in *Brown*. Just as the deputy's assault conviction was not sufficient to impose liability in *Brown*, Clemens's record is not sufficient to impose liability here. Had Joyce Carr adequately reviewed George Clemens's criminal record, it would not have been 'plainly obvious' that he would use excessive force. Accordingly, Joyce Carr did not act with deliberate indifference to Plaintiff's right to be free from excessive force, and summary judgment is granted as to Plaintiff's failure-to-screen claim."); ***Atwood v. Town of Ellington***, 427 F.Supp.2d 136, 148, 149 (D. Conn. 2006) ("The evidence in this case cannot reasonably support a finding that the Town was deliberately indifferent to the likelihood that Nieliwocki would violate plaintiff's constitutional rights by sexually assaulting her. A report of the August 2001 complaints from the two female ambulance staff members was placed in Nieliwocki's personnel file by the investigating state trooper. While it is perplexing why Stupinski failed to review the file before reappointing Nieliwocki in November 2001, particularly as he acknowledged 'he would have taken [the report] into consideration' in his reappointment decision, . . .mere negligence does not amount to deliberate indifference to plaintiff Atwood's constitutional right against unreasonable force or substantive due process violations. It is clear that Stupinski did not know about Nieliwocki's troubling behavior toward females in the preceding months when he decided to reappoint Nieliwocki. Additionally, the misconduct reported in August 2001 − which may have been suggestive of aggressive or violent tendencies toward women − was factually distinct from the February 2002 incident and would not necessarily have made it 'plainly obvious' to the Town at the time that Nieliwocki might have had sexually abusive propensities. . . Plaintiff has profferred no expert or other testimony linking the previous incident of what Nieliwocki characterized as 'mutual horse play' to a future likelihood to commit sexual assault. Moreover, plaintiff has proffered no evidence that Stupinski's practice of not reviewing personnel files when reappointing constables ever led to previous deprivations of the constitutional rights at issue here, and therefore plaintiff cannot show that the Town was deliberately indifferent to the consequences of Stupinski's hiring practices."); ***Estate of Smith v. Silvas***, 414 F.Supp.2d 1015, 1019-21 (D. Colo. 2006) ("In addition to their failure to train claim, the Estate also asserts that the city is liable for failure to properly supervise Officer Silvas throughout his career. This claim requires essentially the same showing of deliberate indifference and direct causation as discussed above. . . In support of its claim, the Estate argues that Officer Silvas has engaged in numerous acts of misconduct throughout his long career..However, the issue always remains whether, viewing the evidence in the light most favorable to the Estate, does it give rise to a reasonable inference that the City was deliberately indifferent to the risk that Silvas would improperly shoot the decedent in the circumstances. . . Specifically, the issue is whether the City had notice that its actions or inactions will likely result in the constitutional violation, namely an unconstitutional or improper shooting, not simply a shooting. . . Officer Silvas has an extensive history of incidents involving guns. Plaintiff provides a litany of various events which bear repeating to the extent they are acknowledged by defendants or are supported by appropriate Rule 56(c) evidence: [court lists nine incidents involving guns, five of which resulted in deaths] . . . . With particular regard to the incidents involving shootings, the defense emphasizes that the Estate does not make any claim that the Silvas's decision to shoot in any case was unwarranted and there is no admissible evidence that any constituted an improper or unconstitutional use of deadly force. This factual background in a summary judgment context

presents a difficult issue: Can a reasonable jury infer that the City was deliberately indifferent to the risk that Officer Silvas would use constitutionally excessive force by improperly shooting Mr. Smith? On the one hand it is undisputed that the City has institutional knowledge of Silvas's history of at least eight shootings, resulting in five deaths, in four separate events, as well as a record of threats and abuse. On the other hand, it is also undisputed that: (1) no shooting was ever found to be improper; (2) Silvas was disciplined; (3) he was required to take additional training concerning the use of firearms; (4) he had a history of commendable restraint in the face of two serious threats; and (5) several years had passed since his last discharge of a firearm. The bar for such supervisory liability is quite high. In *City of Canton, Ohio v. Harris*, Justice White noted that a showing concerning the need for more or different training must be 'so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the City can reasonably be said to have been deliberately indifferent to the need.' . . The same standard would be applicable as to the need for more or different supervisory action in this case. . . .The issue can thus be restated: did the City of Denver have notice that its failure to further supervise was substantially certain to result in an unconstitutional shooting and choose to consciously or deliberately disregard that risk? Certainly a reasonable jury could conclude from Officer Silvas's history of shooting (and killing) individuals in the course of his police service that the City had notice that he may use deadly force. Beyond that, however, can a reasonable juror infer that the City had notice that Silvas's use of force would be so excessive as to be unconstitutional? There is no evidence that he ever improperly fired his weapon. Further, considering the discipline imposed, additional training required, and the significant temporal separation from the last shooting involving Officer Silvas, evidence is lacking to show a 'direct causal link' between the shooting and inadequate supervision. I find that, considering the evidence as a whole and drawing all reasonable inferences in favor of the Estate, the City did not have notice that it was substantially certain that a constitutional violation would occur.' [footnotes omitted]); ***Ice v. Dixon***, No. 4:03CV2281, 2005 WL 1593899, at *9 (N.D. Ohio July 6, 2005) ("Plaintiff presents no legal support for a finding that knowledge of an investigation into the possible use of excessive force against a male inmate suffices to establish knowledge and indifference to unknown risks of sexual assault or sexual contact with female inmates. As previously stated, a finding of municipal liability 'must depend on a finding that this officer was highly likely to inflict the particular injury suffered by the plaintiff.'"); ***Perrin v. City of Elberton, Georgia***, No. 3:03-CV-106(CDL), 2005 WL 1563530, at *11 (M.D. Ga. July 1, 2005) (not reported) ("For the decision to hire Kupkowski to give rise to a § 1983 claim, Plaintiff must show that Kupkowski was highly likely to inflict the particular injury suffered by Plaintiff. . . This connection must be strong − the specific constitutional violation must be a 'plainly obvious consequence of the hiring decision.' . . In this case, Plaintiff has accused Kupkowski of violating his federal rights by applying for the warrant using an unsworn warrant application. No reasonable juror could find that Plaintiff's evidence regarding Kupkowski's prior employment establishes that the specific constitutional violation alleged by Plaintiff would be an obvious consequence of hiring Kupkowski. Therefore, municipal liability cannot be based upon Welsh's decision to hire Kupkowski, and Defendants' Motion for Summary Judgment is granted as to Plaintiff's federal claims based upon the decision to hire Kupkowski."); ***Christopher v. Nestlerode***, 373 F.Supp.2d 503, 522 (M.D. Pa. 2005) ("Nothing

in these officers' personnel records would put a supervisor on notice that Nestlerode or Kerr were likely to effect stops without probable cause or to engage in racial profiling. . . It may be true, as noted in plaintiff's briefs, that Nestlerode has a less than exemplary law enforcement record. He was admonished by his previous employer, a municipal police department, for misusing resources for his own benefit and for misconduct during citizen encounters. He lost property of a Hispanic individual who was taken into custody. . . He admitted during testimony that, if stopped by another officer, he would 'flash his badge' to avoid a citation, in violation of standard policy. Nevertheless, Hose was not informed of these incidents. . . Even if he had been, this misconduct is indicative of a propensity to violate standard procedures, not to violate the Fourth and Fourteenth Amendment rights of citizens. However unfavorably these infractions reflect on Nestlerode's professionalism, none of them would have alerted Hose to the potential for biased policing. . . Hose had no reason to assume that officials in the department were prone to engage in such conduct, particularly in light of the training requirements relating to cultural diversity and his admonitions concerning the need for equal treatment under the law. . . . The record does not reflect a history of similar violations in the sheriff's department, the presence of racial animus among deputies, or reports of race-based offenses in the personnel records of Nestlerode and Kerr. Deputy sheriffs were trained on issues of cultural diversity, and were taught to enforce laws equally regardless of ethnicity or race. Neither Hose nor the County of York had any reason to suspect that an incident of this type would arise or that additional training was necessary."); ***Crumes v. Myers Protective Services, Inc.***, No. 1:03CV1135DFHTAB, 2005 WL 1025784, at *1, **6-8 (S.D. Ind. Apr. 22, 2005) (not reported) ("Constitutional claims of improper hiring or appointment like this are difficult to prove. They require the plaintiff to meet 'rigorous requirements of culpability and causation.' *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 415 (1997). . . . The information actually known to Sheriff Cottey and his department showed that Myers had a prior felony conviction for theft that had later been reduced to a misdemeanor. That information was not sufficient to signal, in the words of *Brown*, 'that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff.' . . Crumes' arguments to the contrary amount to a sweeping indictment of Myers' character for honesty and obeying the law. The evidence still lacks a sufficiently specific link between Myers' background and the particular injuries suffered by Crumes. . . . In this case, Myers' appointment was contrary to state law. Myers was convicted of felony theft in 1995, which was changed to misdemeanor theft in 1996. Crumes has come forward with evidence showing that the sheriff's appointment of Myers was contrary to state law and to the local written policy. Even giving effect to the *post hoc* discount of the theft conviction from felony to misdemeanor, the misdemeanor conviction was still for a crime of moral turpitude. . . . The alleged violations of both state law and the sheriff's written policy are not conclusive on the federal constitutional question, but they are evidence that tends to support plaintiff's claim of deliberate indifference to the threat Myers posed to constitutional rights. . . . Sheriff Cottey appointed Myers as a special deputy in the face of a state law prohibiting the appointment, and despite the terms of his own policy prohibiting the appointment. From this evidence, a reasonable jury could find that Sheriff Cottey acted with deliberate indifference to the public welfare and to the general risk that Myers would violate constitutional rights. . . . The information known to the Sheriff's Department in this case − Myers' theft conviction and the events reported in the arrest

report − presents a weaker case for causation than the evidence in *Brown* . In *Brown*, the reserve deputy was accused of excessive force. His prior criminal record included at least misdemeanor convictions for assault, battery, and resisting arrest (all in connection with a fight on a college campus). . . In other words, there was at least the common thread of force or violence linking the criminal history to the events in suit. Here, even that modest and insufficient thread is lacking. Here, the sheriff's department knew that Myers had stolen property from a store and had pursued a fraudulent scheme to exchange it for cash. That crime bears no specific connection to the constitutional violations in this case: unreasonable seizure of the person, use of excessive force, and causing unfounded criminal charges to be filed. . . . A reasonable jury could not find that an 'obvious consequence' of deputizing a shoplifter would be that the shoplifter would eventually use excessive force in the course of an invalid arrest. As a matter of law, the evidence of the special deputy's prior criminal conduct was not tied sufficiently to the use of excessive force against Crumes to allow a reasonable jury to find municipal liability."); ***Doggett v. Perez***, 348 F.Supp.2d 1179, 1195 (E.D. Wash. 2004)("In sum, plaintiffs' evidence does not establish that Perez was less than forthright with the Wenatchee Police Department about his previous encounters with the law. Furthermore, a reckless driving conviction, a petty theft conviction later expunged, and a charge of possession of amphetamine would not have made it 'plainly obvious' to Badgley and the City of Wenatchee that 25 years later Perez might deliberately fabricate evidence against criminal defendants."); ***Perez v. Miami-Dade County,*** 348 F.Supp.2d 1343, 1353, 1354 (S.D. Fla. 2004) ("*Bd. of County Comm'rs. of Bryan County* is illustrative of the difficulty of proving deliberate indifference based on one single action and the rigorous standards applied. . . . Plaintiff cannot establish that it was highly likely that Defendant's failure to terminate Alsbury would lead to Plaintiff's injury even if it is assumed Alsbury struck Plaintiff on purpose. First, Plaintiff's attempt to argue that Alsbury's actions were racially motivated does not further his burden of proof. Certainly Alsbury was a racist who disliked African-Americans. He admitted this. Also, Plaintiff has presented adequate evidence demonstrating that some fellow officers in the force knew that Plaintiff was a racist. However, the Court cannot assume that persons with policy-making authority in Defendant's Police Department knew he was a racist; leap from the fact of racism to the conclusion that Alsbury intentionally hit African-American suspects with his car; or find that Defendant should have known Alsbury was likely to hit African-American suspects with his car. Simply put, while it might be unwise policy to permit racists to serve as County officers, Plaintiff has not presented evidence that a 'plainly obvious consequence' of employing Alsbury would be the intentional unlawful use of force against African-Americans. If such a consequence were really so obvious, one would expect Plaintiff to have evidence of multiple racially motivated incidences of unlawful force over the course of Alsbury's twenty-five-plus year career."); ***Adams v. City of Balcones Heights***, No. Civ.A.SA-03-CA-0219-, 2004 WL 1925444, at *6 (W.D. Tex. Aug. 27, 2004) ("The Plaintiffs' complaint has not alleged the requisite strong connection between Guidry's or Trevino's background and the particular injury suffered. In Plaintiffs' Third Amended Original Complaint, the Plaintiffs allege that the Defendants were aware that Guidry's employment file showed that he had been 'rough with inmates' and had 'got friendly with' female inmates at his previous job. The Plaintiffs fail, however, to allege anything in either Guidry's. . .background along the same lines as the background of the lieutenant in *Kesler*. In fact, the allegations as to

Guidry's record fall short of what the Fifth Circuit found insufficient to support liability in *Gros*. The Plaintiffs' allegations as to Guidry show that, at the time of the decision to hire him, Guidry may not have been the perfect candidate for a police officer. The allegations do not, however, state a claim against the Defendants for liability based on the decision to hire Guidry. . . There are no allegations that would make it plainly obvious to an official screening his background that Guidry would be likely to commit the acts in question."); ***Cain v. Rock***, 67 F. Supp.2d 544, 549-50 (D. Md. 1999) ("Given that the policy of cross-gender guarding did not violate Cain's constitutional rights, Cain will need to follow the more typical route to proving a Section 1983 violation. . . First she must point to an underlying violation of her constitutional rights. For present purposes, the court assumes arguendo that if Rock sexually assaulted Cain, that act would suffice as a violation of Cain's constitutional rights as a prisoner. . . Second, Cain must meet the strict standards of fault and causation to link the facially constitutional municipal policy to the alleged assault. . . . In this case, Cain has failed to demonstrate that the County's policy was the direct cause of the alleged assault. Indeed, Cain has provided little more than allegations and legal conclusions about how the policy made her more vulnerable to assaults. It is simply not sufficient, for § 1983 purposes, to show that a municipal policy put an employee in the position to commit a constitutional tort. More evidence of causation is necessary. . . . In sum, the Court finds that the County's official policies were not the cause of Rock's alleged sexual assault on the Plaintiff, and the County did not act with deliberate indifference toward violations of this type. It follows that Cain has failed to establish municipal liability for the County's official policy of cross-gender guarding."); ***Doe v. Granbury ISD***, 19 F. Supp.2d 667, 676 & n.4 (N.D. Tex. 1998) ("To prevail on their negligent hiring theory, plaintiffs must show that Granbury ISD was deliberately indifferent to the risk that a violation of the particular constitutional rights at issue here would follow the decision to hire Talmage and Lee. . . . The only summary judgment evidence offered by plaintiffs to support this claim is hearsay testimony of Jane Doe that, at some unidentified point in time, Granbury ISD had a policy not to check into the background of employment candidates prior to hiring them. They present no competent summary judgment evidence with regard to any policy, much less any evidence that adequate scrutiny of the backgrounds of Talmage and Lee would have led to the conclusion that they would have violated Jane Doe II's rights in the manner alleged in this lawsuit. . . . Although plaintiffs present evidence that Talmage sexually abused students in Mansfield, they present no evidence that a background check of Talmage would have revealed such conduct."); ***Doe I v. Bd. of Educ. of Consolidated School District 230***, 18 F. Supp.2d 954, 960, 961 (N.D. Ill. 1998) ("In discussing the elements of culpability and causation, the Court stated that although inadequate screening of an applicant's record may reflect indifference to an applicant's background, that is not the indifference relevant for purposes of a legal inquiry into municipal liability under § 1983. To establish such liability, a plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of a decision to hire the applicant would constitute the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute deliberate indifference. . . Therefore, for municipal liability there must be a definite connection

between the background of the applicant and the specific constitutional violation alleged. . . . In the instant case, there is evidence in the record to suggest that the District decided to rehire Vasquez with some knowledge that he may have engaged in an extramarital sexual relationship with a student ("my). If plaintiffs can prove that to be true, Vasquez would have been violating Amy's constitutional rights. From that, a jury could conclude that a decision to ignore Vasquez' relationship with Amy would reflect more than just an indifference to Vasquez' record, but a deliberate indifference to plaintiffs' constitutional rights, and that it was highly likely that Vasquez would do the same thing with other students that he had done with Amy. Thus, as alleged by plaintiffs, this instructor was highly likely to inflict the particular injury suffered by plaintiffs. What exactly the District knew about Vasquez's relationship with Amy when it rehired him is in dispute. Both Vasquez and Amy have denied having a sexual relationship while Amy was a student. Nevertheless, if plaintiffs can prove that upon proper inquiry the District could have discovered that Vasquez had abused Amy, it may be able to establish that his abuse of plaintiffs would have been a plainly obvious consequence of the hiring decision. Accordingly, the District's motion for summary judgment on Count II is denied."); ***Mirelez v. Bay City Independent School Dist.***, 992 F. Supp. 916, 920 (S.D. Tex. 1998) ("Plaintiff argues that Defendant's policies violate § 1983 because they do not require a background check for substitute teachers. However, it is undisputed in this case that, even if it were checked, no information could have been garnered from Garcia's criminal record that would have prevented his employment. Without such causation, Plaintiff's argument is fatally flawed."); ***Morrissey v. City of New York***, 963 F. Supp. 270, 275-76 (S.D.N.Y. 1997) ("While there is certainly a genuine issue of material fact as to whether a failure to supervise cooperators could conceivably lead to a deprivation similar to that which plaintiff allegedly suffered, it is clear that such a deprivation is not 'highly predictable.' There can be little doubt that cooperators are under some stress, but it cannot be said that such stress is in any way closely linked to the arbitrary shooting of other individuals. This is particularly so where defendants already had a policy of not permitting officers known for violent behavior to become cooperators. . . . While training an officer not to shoot other officers may not be particularly useful, supervising him while he is in a situation generally acknowledged as stressful could prevent him from making choices which might deprive others of their constitutional rights. However, in this case, . . . there is a great deal of evidence that such supervision was undertaken. . . . [E]ven if the court were to assume that there was a pervasive failure by defendants to train and supervise their officers properly, no liability could attach to their conduct in this instance because even an extraordinary amount of supervision could not have prevented the shooting of plaintiff.").

But see ***Griffin v. City of Opa-Locka,*** 261 F.3d 1295, 1313 (11th Cir. 2001) ("Construing all inferences in favor of Griffin, we believe the evidence was sufficient for a finding that the City's inadequate screening of Neal's background was so likely to result in sexual harassment that the City could reasonably be said to have been deliberately indifferent to Griffin's constitutional rights."); ***McHenry v. City of Ottawa***, No. 16-2736-DDC-JPO, 2017 WL 4269903, at *11 (D. Kan. Sept. 26, 2017) ("Here, plaintiff asserts deliberate indifference based on the allegation that there are a 'high frequency of encounters between law enforcement officers and persons who are suicidal, mentally ill, or in other crisis situations and how traditional law enforcement techniques

are wholly inadequate to diffuse the dangerousness of such situations.'. . In addition, plaintiff alleges that Ottawa and Franklin County deliberately have chosen to ignore the need to train their officers to cope with the mentally ill. . . Thus, plaintiff has alleged facts that, if supported by evidence and believed by the factfinder, could support a reasonable inference that Ottawa and Franklin County deliberately chose to ignore the need for training."); ***Brown v. Winders***, No. 5:11–CV–176–FL, 2011 WL 4828840, at *6 (E.D.N.C. Oct. 11, 2011) ("Failure to train police officers regarding the requirement of probable cause for an arrest may fall within the narrow range of *Harris's* hypothesized single-incident liability. Plaintiff alleges that 'the illegal actions of [Pierce] demonstrate that he is completely devoid of adequate training in law enforcement ... The basic concept that forms the foundation for police action, probable cause, is either unknown to [Pierce] or simply not a consideration in the performance of his duties.'. . Plaintiff alleges that Pierce did not fully comprehend the definition, importance, or requirement of probable cause. The need to train officers about probable cause, like the need to train officers in the constitutional limitations on the use of deadly force, is 'so obvious' that failure to do so amounts to deliberate indifference to constitutional rights. . . At this early stage, plaintiff has sufficiently alleged that Wayne County Sheriff's Office's failure to train amounts to deliberate indifference. Accordingly, plaintiff has stated a § 1983 claim against Winders, in his official capacity, for unreasonable seizure in violation of plaintiff's Fourth Amendment rights."); ***Peart v. Seneca County***, 808 F.Supp.2d 1028, 1037, 1038 (N.D. Ohio 2011) ("Ohio sheriffs are the final county policy makers in the area of jail administration. . . .Peart has presented evidence indicating that Sheriff Steyer implemented an informal classification system that failed to segregate non-criminal detainees from violent inmates. . . . This evidence creates a genuine issue of material fact, such that a reasonable jury could conclude that Sheriff Steyer, by statute responsible for the safe operation of the jail, was the final decision-maker for the County as to operational policies within Seneca County Jail. A rational jury could also find that, in that capacity he knowingly implemented a policy of informal, subjective and standard-less classification that created a substantial and readily apparent risk of injury to the plaintiff. Finally, a jury could also find that, in violation of Peart's constitutional rights, Sheriif Steyer was deliberately indifferent to the danger that this conduct created. . . .As discussed above, inmate-on-inmate violence is a foreseeable and serious consequence of inadequate classification of prisoners. . . There is an undeniable link between the inadequate classification decisions here and the injury alleged, and this case falls into the narrow range of circumstances under which a 'single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability.'. . .A jury could find that failure to classify these inmates goes beyond mere carelessness. As discussed above, Sheriff Steyer was aware that classification forms were not being completed. He did not supervise classifications or ensure that jail officers had appropriate training. He testified that he did not give classification any priority. Peart has thus submitted evidence that Sheriff Steyer 'at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'"); ***Marcelle v. City of Allentown***, No. 07-CV-4376, 2010 WL 3606405, at *5 (E.D. Pa. Sept. 16, 2010) ("The following controlling question of law is certified for interlocutory appeal: Whether the court properly applied the United States Supreme Court's decision in *Bd. of County Comm'rs of Bryan County v. Brown*,

520 U.S. 397, 404 (1997) in concluding that a reasonable jury could find from the record in this case that the City of Allentown's actions in hiring Officer Brett M. Guth, despite being aware of his previous driving record and then in retaining him despite the tailgating incident in 2006, constitutes deliberate indifference to the safety of the public, particularly pedestrian bystanders."); ***Ramirez v. Jim Wells County, Tex***., Civil No. CC-09-209, 2010 WL 2598304, at *3 (S.D. Tex. June 25, 2010) ("Here, Plaintiff alleges Sheriff Lopez and Deputy Valadez referred to Deputy Martinez as 'Taser Joe,' failed to monitor the amount of taser cartridges he used, and failed to train him on under what circumstances use of a taser gun is appropriate. From these alleged facts, it is reasonable to infer that Sheriff Lopez and Deputy Valadez were deliberately indifferent to citizens' constitutional rights. [citing *City of Canton*] The possibility that Deputy Martinez may use excessive force against other citizens' is plausibly a 'highly predictable' consequence of failing to monitor his use of taser cartridges or instructing him on the appropriate use of a taser gun."); ***Montes v. County of El Paso, Tex.***, No. EP-09-CV-82-KC, 2010 WL 2035821, at *19 (W.D. Tex. May 18, 2010) ("In light of the evidence submitted by the Plaintiffs, a jury could reasonably conclude that, had the County undertaken an adequate investigation of Ramos's background, it would have learned the incidents discussed here, which were all witnessed by other local police offers, and which were made the subject of official complaints and federal lawsuits. . . Moreover, a jury could easily conclude that, had the County learned of some or all of these incidents, it would have realized that *'this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff.'. . The earlier allegations of misconduct leveled at Ramos bear an eerie similarity to the allegations in the instant case. In each case, an innocent person was allegedly beaten, without cause, during the course of a routine police patrol. Thus, Plaintiffs have submitted evidence supporting municipal liability for inadequate screening upon hiring, under the standards articulated by the Supreme Court in *Bryan County.* Summary judgment is thus inappropriate."); ***Kincheloe v. Caudle***, No. A-09-CA-010 LY, 2010 WL 1170604, at *6 (W.D. Tex. Mar. 22, 2010) ("There is no evidence that the City ever requested a termination report from the Texas Commission on Law Enforcement Standards (TCLEOSE) . . . before it decided to hire Caudle as a police officer. The failure to investigate or follow up in any manner a police applicant's admission that he was terminated for using excessive force could also support a finding that the City was deliberately indifferent in this case. Plaintiffs have presented the Court with sufficient evidence to create a fact issue as to whether a full review of Caudle's record should have prompted the City to conclude that Caudle's constitutional violations in this case 'would be a plainly obvious consequence of the hiring decision.'"); ***Birdwell v. Corso***, No. 3:07-0629, 2009 WL 1471155, at *7 (M.D. Tenn. May 21, 2009) ("Here, Plaintiffs have established a link between Chief Adcock's decision to hire Corso and the assault on Ms. Birdwell. Corso's Millersville personnel record contains a complaint about sexual harassment of a female motorist on two occasions after she was stopped for a minor traffic violation, and complaints about sexual harassment by him and another officer at a local business which resulted in the Chief of Police ordering Corso to undergo psychological counseling. Corso was suspended and an investigation was underway when Corso resigned from the Millersville police department because of 'complaints' made against him. Chief of Police Williams of Millersville testified at his deposition that he told Chief Adcock of Ridgetop that Corso had 'issues with women' and there were 'several instances in his personnel file.' Notwithstanding that record,

and notwithstanding that Corso resigned while an investigation into sexual harassment was ongoing, Ridgetop, through its Police Chief, hired Corso. A jury could conclude that Corso was likely to engage in sexual harassment were he allowed to patrol the streets as a police officer after he left Millersville, and could further conclude that a 'plainly obvious consequence of the ... decision' to hire Corso would be that he would engage in sexual harassment of a female motorist."); ***Abdi v. Karnes***, 556 F.Supp.2d 804, 818, 819 (S.D. Ohio 2008) ("As explained in *Soward*, proof of a constitutional violation does not establish that the deprivation caused injury. 125 F. App'x at 42. The *Soward* decision cited as an example a hypothetical situation in which officers enter a house without a warrant thereby violating the Constitution. The suspect is found in the house, breaks away, shoots one of the officers and is then killed by a second officer. The antecedent unlawful entry was wholly superceded by the intervening conduct of the suspect, thereby breaking any causal link to the original entry. . . Likewise, in *Soward*, the decedent pointed a gun at the officers, who responded with deadly force. The decedent's conduct broke any causal link connecting his death to any failure to adequately train the officers. Put another way, the plaintiffs could not demonstrate that a properly trained officer would not have also responded with deadly force had the decedent pointed a gun at him or her.In this Court's view, Plaintiff must show that the deficiency in a city's training actually caused the death of Abdi. . . All of the Sixth Circuit cases following *Russo*, involved an unexpected, potentially lethal attack upon an officer. . . The common thread in these cases is that a sudden, unprovoked, unanticipated violent assault by a mentally ill person breaks any casual link between resulting injury or death and a claim of inadequate training. All of these cases involved patrol-type officers or deputies. All were responding to exigent circumstances. In this case, the deputies routinely arrested mentally ill individuals and had reason to take precaution. Unlike the officers in the cases described, the deputies in this case had time to plan for the encounter with a mentally ill individual. This opportunity to actually use specialized techniques in encountering Abdi was absent in the other cases. As noted in *City of Canton*, 489 U.S. at 391, the issue of proximate cause is a question of fact and not law. The trier of fact must determine from a review of all the evidence whether the failure to train was closely related to' or 'actually caused the ... injury.'. . At this juncture, the Plaintiff has produced sufficient evidence demonstrating a genuine issue of material fact as to the issue of causation."); ***Pirolozzi v. Stanbro,*** No. 5:07-CV-798, 2008 WL 1977504, at *9-*11 (N.D. Ohio May 1, 2008) ("In this case, the Court finds that the Plaintiff has presented sufficient evidence to show that the City of Canton's police training program is inadequate to the tasks that its officers must perform. The City of Canton requires its new police officers to complete the state-mandated Ohio Peace Officer's Training curriculum and requires all of its officers to attend an annual 40-hour in-service training program, with the content to be determined by the City. . . Despite this general instructional program, however, it is undisputed that the City of Canton does not train its police officers regarding the existence of, or the risks and dangers associated with, positional asphyxia. David Clouse ("Clouse"), one of the City's police training officers, testified that, at least since 1998, Canton police officers have not been trained about positional or compression asphyxia. . . Rather than arguing that the City was unaware of this cause of death in police custody cases, Clouse attempted to justify this lack of training by stating, '[W]e don't recognize it. It's not a recognized problem. There's documentation that says there's other things going on out there, and

it's not because they're in the position or it's not because officers are putting weight on them. . . . Positional asphyxia is a well-known cause of death in many police custody cases throughout the nation. . . . Courts in the Sixth Circuit have also repeatedly dealt with several cases involving compression or positional asphyxia. . . . Finally, the Court concludes that there is sufficient evidence that a jury could find that the inadequacy of the City of Canton's police training regarding the forcible restraint and its association with positional asphyxia is closely related to or actually caused Pirolozzi's death. The Defendant Officers testified as to their lack of awareness that the manner in which they restrained and held Pirolozzi, even without additional force, may have caused his death. . . .The Court therefore denies summary judgment to the City of Canton as to the Plaintiff's § 1983 failure to train claim."); ***Gaston v. Ploeger***, 399 F.Supp.2d 1211, 1219, 1220 (D. Kan. 2005) ("To the extent that Plaintiff argues Shoemaker failed to adequately train jail personnel, Plaintiff (1) must identify a specific deficiency in Shoemaker's training that is closely related to Belden's ultimate injury; and (2) must prove that the deficiency in training actually caused jail personnel to act with deliberate indifference to Belden's safety. In this case, the Court finds Plaintiff has presented sufficient evidence that a jury could find an affirmative link between the constitutional deprivation alleged and Shoemaker's training practices and general exercise of control over the jail. Sheriff Shoemaker is responsible for all aspects of the Brown County Jail. Brandon Roberts testified that he did not receive any formal training of any type at the Brown County Jail and he specifically did not receive any formal suicide prevention training. Roberts further states that he was never given any training formally or informally relating to clues to look for to determine if an inmate was at risk for suicide. Roberts indicated that any information he did learn about suicide prevention and actions, he learned from other officers at the jail while on the job. Roberts testified that he was informally told that suicidal inmates might act depressed. Other than depression, however, Brandon Roberts does not remember any other signs to look for to determine if an inmate is suicidal. In this case, Plaintiff has presented sufficient evidence of constitutional violations by Sergeant Hollister and Brandon Roberts. Moreover, Plaintiff has presented sufficient evidence to demonstrate that the policies and practices promulgated by Sheriff Shoemaker with regard to training could very well have been the moving force behind these alleged constitutional violations. In other words, a jury could find from the evidence presented that Sheriff Shoemaker's policies, procedures, and practices reflect deliberate indifference to the . . . known risk that the jail will inevitably house suicidal inmates."); ***Cahill v. Walker***, No. 3:03-CV-00257, 2005 WL 1566494, at *5 (E.D. Tenn. July 5, 2005) (not reported) ("Here, the five prior complaints against Officer Walker alleging misconduct of a sexual nature arguably establish a 'clear and persistent pattern of sexual misconduct.' . . A material issue of fact exists as to whether the City of Gatlinburg had actual or constructive notice of this misconduct. Because the court cannot determine whether the city government was 'deliberately indifferent' without first deciding whether the government knew of the sexual nature of the complaints, the City of Gatlinburg is not entitled to summary judgment on the issue of its alleged failure to investigate."); ***Jones v. James***, No. Civ.02-4131 JNE/RLE, 2005 WL 459652, at *4 (D. Minn. Feb. 24, 2005) (not reported) ("Considering the Affidavits, and viewing this evidence in the light most favorable to Jones, the Court concludes that there is a genuine issue of material fact with respect to whether Sheriff Fisher acted with deliberate indifference by hiring Stoneking to transport female prisoners without

conducting any further background check into Stoneking's past and whether Jones's alleged injuries were caused by Cass County's inadequate hiring. A reasonable juror could find that the plainly obvious consequence of hiring Stoneking would be the deprivation of Jones's rights."); ***Kesler v. King***, 29 F. Supp.2d 356, 369 (S.D. Tex. 1998) ("An official may be subject to liability under § 1983 for an employment decision that 'reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision.' [citing *Bryan County*] In Defendant King's case, the decision to 'recommend' the hiring of Lieutenant Wallace, a former Texas Department of Corrections officer who had actually been convicted of beating an inmate in violation of his civil rights, carried a substantial risk that some inmate's right to be free from excessive force would be violated. No reasonable, similarly situated official in Defendant King's position would believe that hiring a man who had been convicted for beating an inmate is an acceptable risk in this context. Accordingly, the Court concludes that Defendant King is not entitled to qualified immunity with respect to Plaintiffs' allegation of failure to screen."); ***Raby v. Baptist Medical Center***, 21 F. Supp.2d 1341, 1354, 1355 (M.D. Ala. 1998) ("The evidence indicates that Alford failed to investigate [defendant officer's] background even though he was told the police department would not again hire [officer] and even though he knew that [officer] had been terminated and that complaints, whether substantiated or not, had been made against him, and even though he had access to [officer's] personnel files. Beyond showing that Alford failed to fully look into Mangum's background, however, Raby has also pointed to evidence that Mangum had been confronted about his allegedly aggressive behavior and that a person Mangum had arrested in the past needed hospitalization. Evidence of aggressiveness, especially in the context of a suspect who required hospitalization, is tied to the constitutional right at issue here. . . . The court concludes that the evidence provided by Raby meets the causal connection requirement to impose liability upon Baptist Medical Center based on deliberate indifference under [*Brown*]. . . . [T]he court concludes that the evidence presented as to Alford's deliberate indifference for purposes of holding Baptist Medical Center responsible for Mangum's actions is also evidence which supports a claim against Alford individually."); ***Owens v. City of Philadelphia***, 6 F. Supp.2d 373, 391-92 (E.D. Pa. 1998) ("On the whole, the record of this particular incident, viewed, as it must be on summary judgment, in plaintiffs' favor, would support a fact-finder in drawing an inference that a systemic problem existed: that is, the record would lend support to a finding that none of the officers involved, either before or after the incident, followed the instructions contained in the training materials proffered by the City. At the very least, these failures suggest the possibility that the 1988 memorandum and the academy training had not been deployed in an effective manner. To be sure, the Supreme Court has cautioned against creating an inference of failure to train from an isolated incident. [*citing Bryan County* and *City of Canton*] However, the record in this case would support an inference that the events leading up to and following Gaudreau's suicide amounted to a good deal more than an isolated instance that could be attributed to the negligence of, or the failure to train, one employee. . . . Plaintiffs' unrebutted expert testimony and the very course of events in this case would permit a reasonable fact-finder to conclude that the City, although aware of the problem of suicide within City correctional facilities, failed to do more than go through the motions of training its correctional officers in suicide prevention and in administering first aid to a person found hanging."); ***Foote v. Spiegel***, 995 F.

Supp. 1347, 1357-58 (D. Utah 1998) (on remand) ("Throughout the deposition testimony quoted above, not one person believed the policy required, as a prerequisite to a strip search, that a jailer possess reasonable suspicion of concealed contraband that would not be discovered through a rub search. And the reason that none of the jailers ever considers the constitutional touchstone of reasonable suspicion is that the policy clearly does not require it. There is simply no mention of 'reasonable suspicion' as a factor to be considered by jailers prior to commencing a strip search of a detainee who is not entering the general jail population. This glaring omission is, in itself, a policy decision made by the county which is sufficient to subject it to liability in this case. . . . In this case, there is a basis for municipal liability under both the prior occurrences theory articulated in *Canton* and the first occurrence theory advanced in *Brown*. The constitutional flaws with the County's strip search policy were known as early as the *Cottrell* decision in 1993. That case put the County on warning that gross constitutional violations were occurring under the strip search policy then in existence. Despite this knowledge, the County refused to change the policy, thereby exhibiting 'deliberate indifference' to the likelihood of future violations. In truth, however, the court believes that the County should have been aware of potential problems with its strip search policy even prior to the *Cottrell* case. Jail officials must search detainees many times every day. The temptation to strip search each and every such detainee is great because it may provide marginal increases in jail security. Such blanket policies are also attractive to jail administrators because they make it unnecessary to determine the existence of reasonable suspicion on a case-by-case basis. . . Davis County should therefore have realized that, if it did not explicitly forbid strip searches of detainees absent reasonable suspicion of drugs or other contraband, that sooner or later the constitutional rights of detainees would be violated. The court therefore holds Davis County liable for its failure to formulate a detainee strip search policy which incorporates the constitutional imperatives identified by each and every Court of Appeals to date.").

See also ***Valenzuela for the Estate of Santos v. Roselle***, No. 5:20-CV-03638-JMG, 2021 WL 1667473, at *5 (E.D. Pa. Apr. 28, 2021) ("With respect to a failure to train theory, the defendants again maintain that the complaint is 'replete with conclusory,' not factual, allegations. . . Though the Court agrees that many of the complaint's allegations are either legal conclusions or conclusory statements, the plaintiff has included sufficient factual allegations to plausibly state a failure to train claim under the single-incident theory. Specifically, the plaintiff alleges that Roselle admitted immediately after the shooting that he 'didn't know what to do,' suggesting that the municipality may not have trained its officers on the constitutional limitations of the use of deadly force. Moreover, the need for training on deadly force in scenarios such as those faced by Roselle may be 'so obvious' that the failure to do so can be inferred as deliberate indifference. Notably, the Supreme Court's single-incident hypothetical—that city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons, and therefore need to train officers in the constitutional limitations on the use of deadly force—is not all that different from the scenario presented here. Based on these allegations, the Court concludes that the plaintiff has sufficiently alleged a municipal liability claim against South Whitehall Township."); ***Rossi v. Town of Pelham***, No. CIV. 96-139-SD, 1997 WL 816160, at *16, *17, *21 n.* (D.N.H. Sept. 29, 1997) (not reported) ("This court believes that *Brown* has no application to the facts of this case.

Rather, *Brown* was intended to govern cases where the municipal policy is not itself unconstitutional, but rather is said to cause a downstream constitutional violation. . . . The heightened deliberate indifference standard enunciated by the *Brown* court was intended to ensure that a strong causal link existed between a municipal policy, by itself constitutional, and the underlying constitutional violation in order to preclude a pure respondeat superior theory of the municipality's liability. When, as here, the policymaker specifically directs or orders the conduct resulting in deprivation of constitutional rights, there is a straightforward causal connection between the municipal policy and the constitutional violation. The municipal policymakers in this case, the selectmen and Police Chief Rowell, directed Officer Cunha to engage in the conduct that constituted a violation of Rossi's constitutional rights. Even under the most rigorous standards of causation, the causal connection between the municipal policy and violation of Rossi's constitutional rights is plain and obvious; therefore, there is no need to inquire whether the heightened deliberate indifference standard enunciated by the *Brown* court is met. . . . [F]or municipal policy that is either facially unlawful or directs unlawful conduct, plaintiffs need not further establish 'deliberate indifference.'. . The 'deliberate indifference' standard is a mens rea requirement that is unnecessary and redundant when a plaintiff establishes an intentional constitutional violation caused by facially unlawful policy."); ***Richardson v. City of Leeds***, 990 F. Supp. 1331, 1336 (N.D. Ala. 1997) (concluding that "[t]he majority in *Board of Commissioners* definitely intended drastically to narrow the *Pembaur* opening.").

Compare ***Sassak v. City of Park Ridge***, No. 05 C 3029, 2006 WL 560579, at **3-5 (N.D. Ill. Mar. 2, 2006) ("Lake Zurich argues that plaintiffs cannot state a claim based on a failure-to-train theory because on the night McGannon arrested plaintiffs he was a Park Ridge, not a Lake Zurich, police officer. Thus, Lake Zurich continues, it had no obligation or ability to train, control or discipline McGannon, and it cannot be held responsible for actions taken by former officers who are in the employ of other police departments. . . . [E]even though no Lake Zurich police officer came into contact with plaintiffs, Lake Zurich could still face municipal liability. . . . However, under the facts alleged, plaintiffs fail to state a claim based on the alleged policies, customs and practices of failing to properly train, discipline, and control officers engaged in illegal conduct. . . . With respect to the failure-to-train allegations, any link between Lake Zurich's failure to train and McGannon's arrest of plaintiffs was severed by McGannon's subsequent employment by Park Ridge. . . . Lake Zurich and Park Ridge are distinct municipalities and it cannot be said that the policies and customs of the former motivated plaintiff when he was employed by the latter. Lake Zurich's failure to discipline and control its police officers could provide no incentives for McGannon to engage in illegal activity as a Park Ridge police officer. Further, Lake Zurich could not ratify or condone McGannon's arrest of plaintiffs. . . . In contrast, even if Lake Zurich adequately trained or disciplined its police officers, that training would not prevent an officer from committing acts of abuse when subsequently employed by another jurisdiction. . . . Unlike the first alleged policy, plaintiffs' second policy, which involved Lake Zurich's concealing of criminal conduct and providing false job references to prospective employers, states a claim upon which relief can be granted. According to plaintiffs, had Lake Zurich fired McGannon, which it allegedly had ample cause to do, instead of hiding his criminal and disciplinary record, he would not have

been in a position to violate their rights as a Park Ridge police officer. As alleged, Lake Zurich's manipulation of McGannon's employment record and false statements to Park Ridge and other prospective employers is more severe than official inaction in the face of a known danger. . . . Plaintiffs have adequately alleged that the Lake Zurich defendants' policy, custom or practice of concealing its officers' criminal conduct, misrepresenting their employment records and providing knowingly false job references, caused their injuries. . . . The passing of time between the effectuating of the municipal policy and the constitutional deprivation may be so great that it severs the causal link between policy and harm, but the impact of that time presents questions of degree and fact that cannot be answered on a motion to dismiss. . . In sum, plaintiffs do state a *Monell* claim against Lake Zurich, but only to the extent that they allege Lake Zurich hid information about officers' known misconduct and provided positive references on behalf of those officers.") *with* ***Roach v. Schutze,*** No. CIV.A.7:02-CV-110-R, 2003 WL 21210445, at *3 (N.D. Tex. Mar. 21, 2003) (not reported) ("Here, the plaintiffs allege that the City of Iowa Park 'knew or should have known' that withholding information about McGuinn in accord with the [Settlement] Agreement would allow him to gain employment in the future. . . The plaintiffs allege that this constituted a policy of the City of Iowa Park and was a proximate cause of their injuries. Plaintiffs fail, however, to cite any case law in support of their position that a former employer of a police officer can be held liable for constitutional violations that allegedly occurred after the police officer resigned from that department and was hired by another law enforcement agency. At most, Plaintiffs are alleging a negligence claim against Iowa Park. Plaintiffs have not stated facts sufficient to support a claim for deliberate indifference. Moreover, McGuinn was no longer employed by Iowa Park when the Plaintiffs allege that their constitutional rights were violated; McGuinn was employed by Electra at that time.").

See also ***Pascocciello v. Interboro School District***, No. 05-5039, 2006 WL 1284964, at *6 (E.D. Pa. May 8, 2006) ("Plaintiffs argue that Interboro clearly created a danger to Michael by concealing Friedrichs's pedophilia and aiding Friedrichs in finding a new teaching position. In the complaint, Plaintiffs allege that the Fayette County school district relied upon the 1974 and 1975 correspondence from Interboro to hire Friedrichs. That correspondence failed to disclose Friedrichs's prior pedophilia. Plaintiffs argue that, if Interboro had revealed Friedrichs's pedophilia, Friedrichs would not have been hired by the Fayette County school district, let alone any other school district. In the Court's view, the allegations in the complaint allow for the reasonable inference that Friedrichs was hired by the Fayette County school district because Interboro concealed his past pedophilia. Whether the Fayette County school district actually would have hired Friedrichs if Interboro had revealed his past pedophilia seems unlikely but it is an issue that may be pursued in discovery. Therefore, the court declines to dismiss the Due Process claim on this ground.").

8. Note on "Deliberate Indifference"

In ***Farmer v. Brennan***, 511 U.S. 825 (1994), the Supreme Court distinguished the test for "deliberate indifference" established in *City of Canton* from the test required for culpability under the Eighth Amendment in prison conditions cases:

> It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective. *Canton's* objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases.

Id. at 841. The Court held "that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847. *See also* ***Wade v. McDade***, 106 F.4th 1251, 1264 (11th Cir. 2024) (en banc) (Jordan, J., joined by Rosenbaum, Jill Pryor, and Abudu, JJ., concurring) ("[T]oday's opinion does not concern the Eighth Amendment deliberate indifference standard for municipalities under *Monell v. Department of Social Services of the City of New York*. . . and *City of Canton v. Harris*[.] . . *Farmer* set out the deliberate indifference standard for individuals who are sued for Eighth Amendment violations, and today's opinion does the same. In setting out the standard for individuals, the Supreme Court in *Farmer* explained that the deliberate indifference standard for municipal liability is objective, and then rejected the use of that standard for individuals. . . Our cases view the Eighth Amendment deliberate indifference standard for municipalities as objective. [citing cases]"); ***George, on behalf of Bradshaw v. Beaver County***, 32 F.4th 1246, 1258 n.3 (10th Cir. 2022) ("'Deliberate indifference ... is defined differently for Eighth Amendment and municipal liability purposes.'. . 'In the prison conditions context, deliberate indifference is a subjective standard requiring actual knowledge of a risk by the official' while, '[i]n the municipal liability context, deliberate indifference is an objective standard which is satisfied if the risk is so obvious that the official should have known of it.'. . We do not equate the two deliberate-indifference standards here. We note only that Plaintiff cannot show the County was deliberately indifferent (under the municipal-liability standard) in failing to train its corrections officers on preventing suicide and preparing shift-change reports. Plaintiff is therefore unable to show the County had a widespread custom or policy of failing to train on suicide prevention and shift-change reports. As a result, Plaintiff cannot rely on that policy or custom to raise a fact issue concerning whether Noel was deliberately indifferent (under the Eighth or Fourteenth Amendment standard) to a substantial risk of suicide to prison inmates.")

Compare ***Korthals v. County of Huron***, 797 F. App'x 967, ___ n.3 (6th Cir. 2020) ("It is possible that even this ordinary application of deliberate indifference might not apply to the present circumstances, given *Farmer*'s admonition against the use of the deliberate-indifference theory in excessive force cases, asserting that 'where the decisions of prison officials are typically made in

haste, under pressure, and frequently without the luxury of a second chance, [the plaintiff] must show more than indifference, deliberate or otherwise. The [plaintiff] must show that officials [acted] maliciously and sadistically for the very purpose of causing harm or ... that officials [acted] with a knowing willingness that harm occur.'. . This case is not about an excessive-force incident, but an argument could be made that the challenged conduct was 'made in haste, under pressure, and [ ] without the luxury of' contemplation or a reasoned decision. Therefore, under this reasoning, the deliberate-indifference analysis might be inapt.") *with* ***Korthals v. County of Huron***, 797 F. App'x 967, ___ (6th Cir. 2020) (White, J., concurring) ("I write separately because, although I agree that we must reverse as to Deputy Strozeski, I am not in complete agreement with the majority opinion. The majority suggests in footnote 3 that *Farmer*'s deliberate indifference standard may not apply in this case in light of the Supreme Court's recognition of a more demanding malicious/sadistic/willing-harm test in Eighth Amendment excessive force claims against prison officials whose decisions 'are typically made in haste, under pressure, and frequently without the luxury of a second chance.' . . I do not agree that Deputy Strozeski's situation is comparable to that of a prison official acting in haste and under pressure. Deputy Strozeski was under no immediate pressure and had hours to consider the appropriate means of escorting Korthals into the booking area.")

Compare ***Vandevender v. Sass***, 970 F.3d 972, 976-78 (8th Cir. 2020) ("The Supreme Court in *Farmer* did not address '[a]t what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes.'. . Our cases both before and after *Farmer* have addressed the question. To establish defendants' deliberate indifference in failing to protect from assault by another inmate, Vandevender 'must show that he was faced with a pervasive risk of harm and that the prison officials failed to respond reasonably to that risk.'. . . This standard has been adopted by other circuits. . . To our knowledge, no case has held that it is an improper interpretation of the general standard in *Farmer*, 'substantial risk of serious harm.' Indeed, the pervasive risk standard is consistent with the Court's statement in *Farmer* that a failure-to-protect plaintiff must show that prison officials 'knowingly and unreasonably disregard[ed] an objectively intolerable risk of harm.'. . . Thus, an issue on this appeal is whether Vandevender's Amended Complaint plausibly alleged that he and other MCF-Rush City inmates faced a pervasive risk of harm from assaults by other inmates using the stored wooden boards as a weapon. The Amended Complaint contains no plausible allegation that Latimer's unprovoked assault on Vandevender was anything other than a single isolated incident. . . . Finally, Vandevender argues that the district court erred in dismissing his damage claims before discovery could be conducted. However, to avoid dismissal for failure to state a claim, he must plausibly allege failure to protect from a pervasive risk of serious harm as defined in our cases, for example, by alleging prior incidents where unsecured tools or implements that serve a useful purpose have been used as weapons for inmate-on-inmate assaults, or previous inmate requests for protection from the risk of inmate assaults that prison officials ignored.") *with* ***Vandevender v. Sass***, 970 F.3d 972, 978-79 (8th Cir. 2020) (Kelly, J., concurring in the judgment) ("I agree that the district court properly dismissed Vandevender's complaint because he failed to sufficiently plead a deprivation of a constitutional right. I write separately, however, because I would decide the case on whether the defendant prison officials were

deliberately indifferent, like the district court did, and not on whether Vandevender plausibly alleged a substantial risk of serious harm. . . . Our caselaw may set the bar too high for the typical inmate to sufficiently plead prison officials were deliberately indifferent to a substantial risk of serious harm in a case like this one. But because we are bound by precedent, I concur in the court's judgment.").

See ***Wade v. McDade***, 106 F.4th 1251, 1255, 1260-62 (11th Cir. 2024) (en banc) ("In light of the intracircuit split, we granted rehearing en banc to clarify 'the standard for establishing liability on an Eighth Amendment deliberate-indifference claim.' Having reconsidered the issue, we now repudiate our dueling 'more than' formulations and hold instead that a deliberate-indifference plaintiff must prove that the defendant acted with 'subjective recklessness as used in the criminal law,' *Farmer*, 511 U.S. at 839, 114 S.Ct. 1970, and that in order to do so, the plaintiff must show that the defendant was subjectively aware that his own conduct put the plaintiff at substantial risk of serious harm—with the caveat that, in any event, a defendant who 'respond[s] reasonably' to a risk, . . . even a known risk, 'cannot be found liable' under the Eighth Amendment[.] . . . [A]ccording to the allegations here, Henegar's epilepsy went untreated because the prison officials at Walker failed to procure his Dilantin—that is, because the officials misstepped. So even here, where the deliberate-indifference claim can be cast in 'inaction' terms, the relevant risk is inextricably tied to the defendants' own conduct. . . . [F]ocusing on a prison official's subjective awareness of the risk posed by his own conduct—rather than more vaguely on some allegedly preexisting risk—best squares with how courts and commentators have historically understood and explained criminal recklessness, even outside the Eighth Amendment context. . . . For all these reasons, we hold that in order to show that a defendant acted with 'subjective recklessness as used in the criminal law,'. . . a deliberate-indifference plaintiff must demonstrate that the defendant was actually aware that his own conduct caused a substantial risk of serious harm to the plaintiff. . . .So, in sum, to the question we posed to the parties, 'What is the standard for establishing liability on an Eighth Amendment deliberate-indifference claim?', we answer as follows:
1. *First*, of course, the plaintiff must demonstrate, as a threshold matter, that he suffered a deprivation that was, 'objectively, "sufficiently serious."'. . .
2. *Second*, the plaintiff must demonstrate that the defendant acted with 'subjective recklessness as used in the criminal law,'. . . and to do so he must show that the defendant was actually, subjectively aware that his own conduct caused a substantial risk of serious harm to the plaintiff—with the caveat, again, that even if the defendant 'actually knew of a substantial risk to inmate health or safety,' he 'cannot be found liable under the Cruel and Unusual Punishments Clause if he 'responded reasonably to the risk.'. . .We remand to the panel for application of this standard to the facts of this case."); ***Wade v. McDade***, 106 F.4th 1251, 1263 (11th Cir. 2024) (en banc) (Jordan, J., joined by Rosenbaum, Jill Pryor, and Abudu, JJ., concurring) ("[D]efendant's subjective knowledge need not be established by direct evidence or admissions. As with knowledge in other areas of the law, subjective awareness of a substantial risk of harm can be proven (or an issue of material fact created) through circumstantial evidence."); ***Wade v. McDade***, 106 F.4th 1251, 1266-69 (11th Cir. 2024) (en banc) (Rosenbaum, J., joined by Jill Pryor, and

Abudu, JJ., concurring) ("[W]hile I concur in today's opinion for the Court, I disagree strongly with the Newsom Concurrence. And I write separately to point out the errors and dangers in that Concurrence's theory. Section I of this Concurrence explains why the Newsom Concurrence fails to account for the nature of 'punishment' in its Eighth Amendment analysis. And Section II shows that the Newsom Concurrence improperly reads 'cruel and unusual' out of its Eighth Amendment interpretation. . . . The Newsom Concurrence says that 'punishment' requires an 'element of intentionality.'. . But the state's 'punishment' is prison, and the state very much intends prisoners to stay there. (Watch what happens when one tries to leave.) The Newsom Concurrence doesn't explain why this isn't enough intent for known life- or human-rights-threatening conditions accompanying a prison sentence to be part of the punishment. . . .The Newsom Concurrence's crabbed misunderstanding of 'punishment' is related to its other analytic error: reading 'cruel and unusual' out of the Cruel and Unusual Punishments Clause. The Concurrence has little to say about the 'cruel and unusual' part of the Eighth Amendment. But the phrase preceding 'punishments' is critical to its meaning, not least because 'cruel' seems a more natural place to find a scienter requirement than 'punishment.'. . .Why deliberate indifference as the standard, rather than negligence or intent? The Supreme Court has suggested that mere accidents, the products of negligence, do not result from 'the culpable state of mind necessary for the punishment to be regarded as "cruel."'. . That's because cruelty inheres in not only an action's physical effects but also its emotional content. Everyone—and maybe especially a prisoner—knows the difference between an accident and the type of deliberately indifferent conduct revealing a deep disregard for his basic wellbeing. When that disregard comes from someone who is both responsible for and in control of another's health, it can only be described as cruel. Indeed, the message sent by a prison guard who repeatedly ignores his ward's pleas for necessary medical attention is not unlike the one the torturer sends to his victim upon the rack: 'I see your pain but I don't care.'. . But this also shows why prison officials' actions need not be intentional to be cruel and unusual. Imprisonment punishes by substituting control for liberty. Ordinarily, that control is accompanied by some degree of care, including medical care. But when one's captor opts not to provide necessary and available medical care, he turns the punishment of imprisonment into a cruel one—regardless of his purpose or intent in not providing treatment. After all, what difference does it make to the prisoner whether the official who controls his wellbeing *intends* him to suffer or simply *does not care* if he does? Either way, his outcome will be the same, and there is little he can do to change it. And the prisoner will, by state mandate, remain dependent for his basic needs on someone who is at best indifferent to those needs. To impose upon someone that sort of existential uncertainty is cruel and unusual; when the state does it to a prisoner, it is cruel and unusual punishment. . . . Our justice system routinely asks lawbreakers to 'take responsibility for their actions.' But the Newsom Concurrence's view of the Eighth Amendment would allow prison officials to avoid responsibility for theirs. And by letting off the hook those who actually administer the state's punishments, this view seeks to absolve all of us—judges, legislators, citizens—of responsibility for what happens in the state-run facilities we call prisons. As today's decision reiterates, our Constitution demands more."); ***Wade v. McDade***, 106 F.4th 1251, 1271-73 (11th Cir. 2024) (en banc) (Newsom, J., concurring) ("The unmistakable linguistic fact that the term 'punishment' entails an intentionality element would seem to preclude *any* legal standard that imposes Eighth Amendment liability for

unintentional conduct, no matter how negligent (whether 'mere[ly]' or 'gross[ly]' so) or even criminally reckless. Negligence and recklessness, after all, are expressly defined *in contradistinction to* intentional conduct. . . .So on a plain reading, the Cruel and Unusual Punishments Clause applies *only* to penalties that are imposed intentionally and purposefully. . . How is it, then, that we now find ourselves grinding over which among several negligence- or recklessness-based standards should govern a particular species of Eighth Amendment claim? When and where did things go so wrong? It started innocently enough, with *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), in which the Supreme Court minted what it dubbed (and we still call) a 'deliberate indifference' claim under the Eighth Amendment. . . . With *Farmer*, the retreat from the Eighth Amendment's 'punishment' requirement—and the intentionality criterion that it indicates—was complete. And our own post-*Farmer* decisions only widened the gap between text and doctrine. For nearly three decades, we messed around with negligence-based tests—'more than mere,' 'more than gross,' etc. Today, we have wisely—and finally—brought ourselves into compliance with *Farmer*'s criminal-recklessness criterion. It's an important step, but we—as what the Constitution calls an 'inferior [c]ourt'—have now gone as far as we can go. If Eighth Amendment *doctrine* is to be brought into compliance with the Eighth Amendment's *text*, it'll be up to the Supreme Court. As I see it, though, there's simply no denying that, as a matter of both language and logic, the Amendment's 'punishment' requirement demands proof of intentionality. . . Maybe it makes sense to hold prison officials liable for negligently or recklessly denying inmates appropriate medical care. Maybe not. But any such liability, should we choose to recognize it, must find a home somewhere other than the Eighth Amendment. We—by which I mean the courts generally—have been ignoring that provision's text long enough. Whether we like it or not, the Cruel and Unusual Punishments Clause applies, as its moniker suggests, only to 'punishments.' And whether we like it or not, 'punishment[ ]' occurs only when a government official acts intentionally and with a specific purpose to discipline or deter.").

See also ***Wade v. McDade***, 106 F.4th 1251, 1265 (11th Cir. 2024) (en banc) (Jordan, J., joined by Rosenbaum, Jill Pryor, and Abudu, JJ., concurring) ("[T]here remains an important practical point. What is one to do with our post-*Farmer* cases using the 'more than mere negligence'/'more than gross negligence' formulations that we now discard? Despite today's opinion, district courts and attorneys will, out of necessity, continue to turn for guidance to our deliberate indifference cases from the last 30 years. They will not be able to pretend that Eleventh Circuit jurisprudence constituted a vast Eighth Amendment lacuna during that period. For example, they will look to earlier cases to try to figure out whether a right was clearly established for purposes of qualified immunity. My suggestion, for whatever it might be worth, is that courts and attorneys look carefully at prior Eleventh Circuit cases to see if they are consistent with the subjective component of deliberate indifference set out in *Farmer*. If they are consistent, then they should continue to be cited as binding precedent. If they are not, then they probably have been abrogated to at least some degree by today's decision.")

See also ***Stalley v. Cumbie***, 124 F.4th 1273, 1288-92 (11th Cir. 2024) (Carnes, J., concurring) ("I join the majority opinion in full. I write separately to add to what it says about why

we reject our dissenting colleague's position that the defendant officers were deliberately indifferent to the medical needs of a violent inmate whom they had finally been able to subdue. Immediately after the inmate was restrained the officers rushed him in a wheelchair at a rapid pace to the prison medical treatment room in a nearby dorm where they believed he could get the best treatment. It took less than five-and-a-half minutes to get him there. . . . They were not deliberately indifferent to his medical needs, they did not violate his constitutional rights at all, and they certainly did not violate any of his clearly established constitutional rights. . . .If there were any doubt about the deliberate indifference standard being subjective, it was settled by the en banc Court only a few months ago. . . . [T]he dissent fails to honor and apply *Wade*'s crystal-clear holding that the plaintiff must establish that the 'defendant actually knew' — actually knew — that the defendant's own acts or omissions put the plaintiff at 'substantial risk of serious harm.'. . [T]here is no evidence at all in this case that any of the officers was 'actually, subjectively aware' that rushing the prisoner to what they believed was the best medical facility to treat him was conduct that would 'cause[ ] a substantial risk of serious harm' to him. . . . The dissent is mistaken to skip so lightly over the subjective requirement. We don't get to the objective measure exception from liability of acting reasonably unless and until the plaintiff has proven that the defendant subjectively knew that there was a substantial risk that his conduct would cause harm. And the plaintiff hasn't made that showing here. He has not shown that the correctional officers, none of whom was a doctor, or nurse, or paramedic, knew they were causing Villegas a substantial risk of harm by rushing him to the medical treatment facility that they thought was best equipped to provide him with care. If a defendant did not know — actually realize and know, as we required in *Wade* — that his conduct would cause or threaten a substantial risk of serious harm, he was not deliberately indifferent. And if he is not liable for that reason, we have no need to reach the question of whether he would be excepted from liability anyway because he acted in an objectively reasonable way. . . In any event, in the quarter of a century since the Supreme Court's *Farmer* decision, it has been settled that the second element an inmate plaintiff must prove to have a valid deliberate indifference claim is that the defendant prison official or officer had 'a sufficiently culpable state of mind,' which is 'one of deliberate indifference to inmate health or safety.'. . In the period between the *Farmer* decision and our *Wade* decision, we articulated the standard for that second element, the sufficiently culpable state of mind, as being something more than negligence. . . Whether the standard was more than mere negligence or more than gross negligence our decisions did not, to put it charitably, make clear. . . But our decision in *Wade* mooted all of that lack of clarity by adopting the criminal recklessness standard and tossing out the negligence-based standards that had plagued our circuit law for years.")

See also ***Sconiers v. Lockhart***, 946 F.3d 1256, 1267 (11th Cir. 2020) ("Although *Boxer X*'s holding that 'severe or repetitive sexual abuse of a prisoner by a prison official can violate the Eighth Amendment,' remains good law, *Wilkins* clarified that courts cannot find excessive force claims not 'actionable' because the prisoner did not suffer 'more than *de minimis* injury.'. . As we had not previously announced this abrogation, the district court here understandably relied on *Boxer X*. For the reasons we have explained, though, we must now retire the abrogated portion of *Boxer X*. The lack of serious physical injury, considered in a vacuum, cannot snuff out Eighth

Amendment sexual-assault claims. If Sconiers can prove to a reasonable jury's satisfaction that Lockhart sadistically and maliciously forced his finger into Sconiers's anus, Lockhart's actions violate the Eighth Amendment because they constitute severe sexual abuse of a prisoner. And to the extent that the question remains, such claims are also specifically allowed in the absence of a physical injury under the current version of the PLRA."); ***Sconiers v. Lockhart***, 946 F.3d 1256, 1270-72 (11th Cir. 2020) (Rosenbaum, J., concurring) ("I write separately to comment further on why 'contemporary standards of decency' do not tolerate corrections officials' sexual abuse of prisoners. By 'sexual abuse,' I mean coerced sexual contact that is engaged in by a correctional official to humiliate a prisoner, to maliciously and sadistically harm a prisoner, or to sexually gratify a correctional official (or some combination of these reasons). . . As we have noted, the Supreme Court has explained that 'the Eighth Amendment's prohibition of cruel and unusual punishments draws it meaning from the evolving standards of decency that mark the progress of a maturing society, and so admits of few absolute limitations.'. . As a result, contemporary standards of decency demarcate when a prisoner has satisfied the objective element of an Eighth Amendment claim. . . For this reason, we must measure claims of a correctional officer's sexual abuse of an inmate by contemporary standards of decency to ascertain whether such claims are cognizable under the Eighth Amendment's objective element. Identifying contemporary standards of decency requires us to review objective indicia of society's standards, as expressed in legislative enactments and state practice' to see whether they show a 'national consensus' against a particular type of behavior. . . As it turns out, in *Crawford*, . . . the Second Circuit already did much of the heavy lifting on this inquiry when it conducted a thorough survey of state legislative enactments. Rather than reinventing the wheel, we lean on the Second Circuit's state-law analysis, which we summarize here. In particular, the Second Circuit noted that, as of 2015, when it issued *Crawford*, state legislatures had nearly uniformly criminalized sexual contact between corrections officers and inmates—the only exceptions at that time being Oklahoma and Delaware, which criminalized only sexual intercourse or penetration, and not sexual contact broadly. . . Since then, Delaware has joined the other 48 states in the majority, leaving but a lone state that has not outlawed the type of conduct Sconiers alleges Lockhart engaged in. . . And at a federal level, in 2003, Congress unanimously passed the Prison Rape Elimination Act ("PREA"), now found at 34 U.S.C. §§ 30301, *et. seq.* That statute represents the first piece of federal legislation aimed at the problem of sexual abuse of prisoners. . . It seeks to 'establish a zero-tolerance standard' for such sexual abuse in prison. . . . Similarly, the PLRA, as amended in 2013, expressly declines to preclude federal civil actions by prisoners seeking damages 'for mental or emotional injury suffered while in custody' if the injury was precipitated by 'the commission of a sexual act.'. . And 'sexual act,' in turn, includes, among other things, 'the penetration, however slight, of the anal ... opening of another by a ... finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.'. . . So now, unlike in 2006, a federal cause of action for a correctional officer's sexual abuse of a prisoner is recognized, even in the absence of a physical injury. For good reason. Groping, fondling, or touching of an inmate's private parts—as well as a whole host of other physical sexual invasions—that do nothing other than to gratify the guard's sexual desires or to dehumanize the victim can leave no lasting external physical traces. But the internal scars of such trauma can produce 'significant distress and often lasting ... harm.'. . So

physical sexual assaults by correctional officers of inmates violate the Eighth Amendment because no matter how difficult the inmate is, the official is never justified in punishing him in this manner. And sexual assault is not part of the penalty we impose for conviction of a crime.")

Compare ***Marbury v. Warden***, 936 F.3d 1227, 1233-38 (11th Cir. 2019) ("As we explain, Marbury's deliberate-indifference claim fails because he has not demonstrated a genuine factual issue as to whether the defendants were deliberately indifferent to a substantial risk of serious harm to Marbury. Since Marbury has not met his burden to show the violation of a constitutional right, we need not proceed past step one of the qualified-immunity analysis. . . . Moreover, when we have held that a generalized risk of violence from a prison population could support a claim of deliberate indifference to a substantial risk of serious harm, the plaintiff has pointed to specific features of a facility or its population rendering it particularly violent. This evidence has included pervasive staffing and logistical issues rendering prison officials unable to address near-constant violence, tensions between different subsets of a prison population, and unique risks posed by individual prisoners or groups of prisoners due to characteristics like mental illness. Even if Marbury had shown a risk of generalized prison violence, he has made no allegations regarding the specific features of the prison that would make it particularly violent. . . . While we are sensitive to Marbury's pro se status before the district court, the evidence Marbury has presented regarding a general risk of inmate-on-inmate violence does not rise to the level necessary to show deliberate indifference to a substantial risk of serious harm required by our caselaw. This sparse record at most shows that inmates at St. Clair faced some risk of assaults by fellow prisoners, but we have said that some risk of harm is insufficient. Marbury has thus failed to produce evidence that he was in an environment so beset by violence that confinement, by its nature, threatened him with the substantial risk of serious harm. . . . We must therefore decide whether a reasonable jury could find Marbury's statement that he had heard from a friend that an unnamed prisoner intended to hurt him, and that he was afraid of being hurt or killed, without any further details, sufficient to make the defendants aware of a substantial risk of serious harm. While this question is a close one, we conclude that our precedent does not allow Marbury's deliberate-indifference claim to proceed. On the one hand, it is settled that 'a prison official [cannot] escape liability for deliberate indifference by showing that ... he did not know that the complainant was especially likely to be assaulted *by the specific prisoner who eventually committed the assault*,' as long as the official was otherwise aware that the victim faced a substantial risk of serious harm. Our caselaw also establishes, however, that officials must possess enough details about a threat to enable them to conclude that it presents a 'strong likelihood' of injury, not a 'mere possibility.' The unfortunate reality is that 'threats between inmates are common and do not, under all circumstances, serve to impute actual knowledge of a substantial risk of harm.'. . .Marbury's argument is essentially that every prisoner who tells prison officials about an unspecified threat from an unspecified inmate without more is entitled to protective custody or a transfer. But, as already explained, our caselaw establishes a higher standard for deliberate indifference. To be clear, Marbury was not required to identify the person who was threatening him by name, or even necessarily to give the defendants advance notice of a potential attack, so long as other facts put the defendants on notice that he faced a substantial risk of serious harm. It may be possible for a general threat of inmate-on-inmate

violence in a prison to bolster an otherwise insufficient unspecified threat of harm. But, as already discussed, Marbury has not shown anything close to such a substantial threat from the generally violent nature of the prison environment. And because Marbury has not presented anything else that would bolster the unspecified threat, he has not met the requirement of showing deliberate indifference to a substantial risk of serious harm. . . . To allow Marbury's deliberate-indifference claim to proceed absent sufficient evidence that the defendants were subjectively aware that he faced a substantial risk of serious harm would elide the 'subtle distinction' between deliberate indifference and mere negligence. We cannot condone the failure to investigate inmates' allegations of threats or to follow policy in reporting potential threats up the chain of command. But our caselaw does not allow these failures, without corresponding subjective awareness of a serious risk of harm, to establish deliberate indifference.") *with* ***Marbury v. Warden***, 936 F.3d 1227, 1238, 1243-45, 1248-52 (11th Cir. 2019) (Rosenbaum, J., dissenting) ("We do not sentence people to be stabbed and beaten. But we might as well, if the Majority Opinion is correct. . . . [A]t bottom, Marbury alleged that stabbings were the norm at St. Clair, that the prison was understaffed, that inmates were out of control and could stab guards and even the warden, that he had been expressly threatened and had reported that threat to prison officials, and that the one prison official directly responsible for helping him specifically refused to do so and instead goaded him to get a 'shank.'. . . As the Supreme Court has explained, when prison conditions allow for violence and terror to reign, 'it [is] obviously ... irrelevant to liability that the officials could not guess beforehand precisely who would attack whom.'. . Based on this principle, we have rejected the notion that a prisoner must identify his attacker to receive protection. . . . Marbury also averred many facts that showed a prison culture of unchecked violence: consistent inmate-on-inmate stabbing attacks requiring medical attention, understaffing of guards, ineffective guarding where even guards were attacked, and no corrective response to these conditions from prison officials. These allegations are enough under our precedent to establish a serious risk of harm, so 'it [was] obviously ... irrelevant to liability that the officials could not guess beforehand precisely who would attack whom.'. . . In sum, both Estes and Warren knew that Marbury was in danger and yet did nothing to help. That was objectively not reasonable. As a result, a jury could find that they both engaged in deliberate indifference. . . . Estes and Warren thus failed to take steps that could have averted the attack on Marbury, despite their being in a position to take those steps. Under our caselaw, a jury could reasonably find from this evidence that Estes and Warren caused Marbury's injuries. . . . Because Marbury satisfied all the elements for proving a successful deliberate-indifference claim, I next consider whether qualified immunity nonetheless shields Estes and Warren from suit. . . . Here, our long-standing precedent gave Estes and Warren fair notice that their inaction was unconstitutional. In *Purcell*, we explained that an inmate faces a substantial risk of harm if 'serious inmate-on-inmate violence was the norm or something close to it.'. . In *Lane*, we found that violent prison conditions could pose a substantial risk of serious harm to an inmate, even when the complaining prisoner was not expressly threatened. . . And when a prisoner is threatened, we have held in *Rodriguez* that even a vague threat should be taken seriously if prison conditions corroborate the weight of that threat. . . We have also noted that regular inmate-on-inmate violence requiring medical attention creates a substantial risk of serious harm. . . And for over a decade, we have maintained the commonsense notion that 'it is an unreasonable response

for an official to do nothing when confronted with prison conditions ... that pose a risk of serious physical harm to inmates.'. . Given the preexisting caselaw, it is certainly fair to say that Estes and Warren had notice that in a violent environment where stabbings were the norm, it was unreasonable to do absolutely *nothing* in the face of a prisoner's report that he was being targeted for attack. For this reason, qualified immunity does not protect Estes and Warren. . . . Clearly, this is not a case where the good-faith efforts of an official charged with making tough decisions turned out, in hindsight, to be insufficient. When I make all reasonable inferences for Marbury, I must conclude Warren's actions were not only reckless, they were malicious. And no reasonable prison official could have believed that maliciously refusing to protect a prisoner from a known threat comports with her Eighth Amendment duty to protect prisoners from harm. Qualified immunity was never designed to protect actions like these. So Warren is not entitled to qualified immunity on this ground as well. . . The Eighth Amendment does not allow prisons to be modern-day settings for *Lord of the Flies*. When a prison official knows of a substantial threat of serious harm to an inmate, she must undertake reasonable action to protect that inmate. It should go without saying that refusing to help in any way—and worse yet, laughing at the prisoner's predicament and telling him to get a 'shank'—is simply not an option. Yet by declining to allow Marbury to hold Warren and Estes responsible here, the Majority Opinion condones this behavior and ensures it will occur again. I therefore dissent.")

Compare ***Williams v. Hampton***, 797 F.3d 276, 290-92 (5th Cir. 2015) (en banc) ("If we were to accept the plaintiffs' argument that the foregoing evidence of a history of violence and the conditions within Unit 32, generally, permits a factfinder to draw the conclusion that when Hampton failed to give the two extra pellets to Taylor as she left the exercise yard, she appreciated that there was an excessive risk of harm to inmates and knowingly disregarded that risk, then liability for acts or omissions that would otherwise constitute negligence can be imposed whenever a corrections officer at Hampton's level knows that she is working in a prison with a similar history. That is analogous to a form of strict liability for corrections officers such as Hampton, and the Eighth Amendment does not support such a theory of culpability. Imposing liability because an officer such as Hampton is aware that inmates have attacked other inmates in the past would demand near-perfect foresight from prison guards. Hampton had no means of controlling how Unit 32 was used, the classification of inmates housed there, or the general policies and procedures implemented at Unit 32. Those matters were within the hands of official beyond her pay grade. . . . We agree with the Eleventh Circuit's analysis. As in *Campbell v. Sikes,* since the facts and circumstances of this case do not allow an inference that Hampton actually perceived the risk, the opinion testimony by the plaintiffs' expert that she did perceive or must have perceived the risk based on those same facts and circumstances does not 'provide the missing *Farmer* link.'. . The record is devoid of facts to support the expert's opinion regarding subjective awareness.") *with* ***Williams v. Hampton***, 797 F.3d 276, 296, 299 (5th Cir. 2015) (en banc) (Elrod, J., joined by Haynes and Higginson, JJ., concurring in the judgment) ("As reflected by the superb majority and dissenting opinions, the question of whether the record contains sufficient evidence to support a finding of deliberate indifference is a close and difficult one. In my view, this case can be resolved more easily by focusing on the issue of causation, as the evidence is insufficient to support a

finding that Hampton's actions caused plaintiffs' injuries. Accordingly, I concur only in the judgment. . . . Here, the causal link between Hampton's actions and the close-in-time assaults was severed not once, but twice. Hampton's failure to provide Taylor with ammunition did not influence the inmates' or Taylor's actions in any way, and even if it did, Taylor's dropping the keys was a superseding cause. Accordingly, I would reverse the judgment of the district court.") *and* ***Williams v. Hampton***, 797 F.3d 276, 299, 303-04, 306-07 (5th Cir. 2015) (en banc) (Graves, J., joined by Dennis, Southwick, and Costa, JJ., dissenting) ("The question in this case is whether there is sufficient evidence supporting the jury's verdict that prison guard Sharon Hampton was deliberately indifferent when she knowingly took multiple actions that created an obvious and substantial risk of attack and injury to the inmates she was charged with protecting. Were the majority the jury in this case, I would likely conclude that there was sufficient evidence to support its verdict. But because we are prohibited from substituting our own fact-finding for that of the jury, I would affirm the decision of the district court. . . . Here, the record is replete with evidence allowing the jury to find that leaving Taylor with insufficient ammunition created a substantial and obvious risk of inmate-on-inmate violence in the yard, and that Hampton knowingly took several actions that showed deliberate disregard of that risk. . . .Hampton argues, essentially, that the jury could not find that she was aware of a risk of harm unless an identical incident in which inmates broke out of their pens had previously occurred. But *Farmer* makes clear that a prison official need not anticipate the specific way an attack will unfold in order for that risk to be substantial enough to incur liability. . . .Lastly, I note that this is not a qualified immunity case. Hampton pleaded the affirmative defense of qualified immunity in her answer, but she never moved for summary judgment based on qualified immunity, she did not mention qualified immunity in her motion for judgment as a matter of law, and she made only thinly-briefed arguments regarding qualified immunity in her initial panel briefs. She did not even mention qualified immunity in her supplemental en banc brief. Thus, qualified immunity could not be grounds for reversal.").

Compare ***McCottrell v. White***, 933 F.3d 651, 670-71 (7th Cir. 2019) ("The facts, construed in favor of the plaintiffs, support an inference that the defendants acted maliciously and sadistically rather than in good faith to restore order. If the jury found both that the brawling inmates were subdued before the shots were fired *and* that the defendants perceived as much, then the jury could find that by purposely discharging shotguns toward the crowd or into the ceiling (rather than toward the shot box), the defendants acted maliciously and sadistically for the purpose of causing harm, and did so at a time when there was no need for any force. The jury would have to focus on what the defendants could see and actually did see before they discharged their firearms. But on this record, we cannot rule out the possibility that the defendants saw that the fight was over, and that the combatants had been separated and subdued before the shots were fired. Failing to accurately depict the event in official reports and failing to aim for the very device intended to protect bystanders are facts that weigh in favor of the plaintiffs' view that the officers' actions were not a good faith effort to restore order but rather were undertaken maliciously and sadistically for the very purpose of causing harm. . . A jury would not be compelled to find that the officers acted with that intent, but it could so find. . . We acknowledge that the Supreme Court called for deference to prison officials making split-second decisions during disturbances. But a jury must

determine whether the shots were fired during an ongoing struggle that threatened staff and other prisoners, or after the struggle was over. . . And a jury must determine why the officers chose to fire toward the crowd or into the ceiling rather than the shot box. In short, there are significant factual disputes that affect the analysis of every one of the five *Whitley* factors. We may not simply credit the claims of White and Williams that they believed the shots were necessary to restore order and defer to that claim when there is evidence that appears to contradict their assertion of good faith.") *with* ***McCottrell v. White***, 933 F.3d 651, 671-75 (7th Cir. 2019) (Barrett, J., dissenting) ("The guards may have acted with deliberate indifference to inmate safety by firing warning shots into the ceiling of a crowded cafeteria in the wake of the disturbance. In the context of prison discipline, however, 'deliberate indifference' is not enough. The Supreme Court has drawn a clear distinction between the standard applicable to claims challenging the conditions of confinement and the standard applicable to claims challenging the use of excessive force. . . . An inmate cannot satisfy the 'malicious and sadistic' standard without showing that a guard intended to hit or harm someone with his application of force. . . . If the plaintiffs could win by showing that the guards recklessly put them at risk by firing warning shots into the ceiling after the fight on the floor was under control, I would agree that they could survive summary judgment. But because that is not the standard, I respectfully dissent.").

Compare ***Petties v. Carter***, 836 F.3d 722, 726, 728-31 (7th Cir. 2016) (en banc) ("We heard this case *en banc* to clarify when a doctor's rationale for his treatment decisions supports a triable issue as to whether that doctor acted with deliberate indifference under the Eighth Amendment. We conclude that even if a doctor denies knowing that he was exposing a plaintiff to a substantial risk of serious harm, evidence from which a reasonable jury could infer a doctor knew he was providing deficient treatment is sufficient to survive summary judgment. Because we find that Petties has produced sufficient evidence for a jury to conclude that the doctors knew the care they were providing was insufficient, we reverse the district court's grant of summary judgment to the defendants. . . .[T]he Supreme Court has instructed us that a plaintiff must provide evidence that an official *actually* knew of and disregarded a substantial risk of harm. . . Officials can avoid liability by proving they were unaware even of an obvious risk to inmate health or safety. . . The difficulty is that except in the most egregious cases, plaintiffs generally lack direct evidence of actual knowledge. Rarely if ever will an official declare, 'I knew this would probably harm you, and I did it anyway!' Most cases turn on circumstantial evidence, often originating in a doctor's failure to conform to basic standards of care. While evidence of medical malpractice often forms the basis of a deliberate indifference claim, the Supreme Court has determined that plaintiffs must show more than mere evidence of malpractice to prove deliberate indifference. . . But blatant disregard for medical standards could support a finding of mere medical malpractice, or it could rise to the level of deliberate indifference, depending on the circumstances. And that is the question we are faced with today—how bad does an inmate's care have to be to create a reasonable inference that a doctor did not just slip up, but was aware of, and disregarded, a substantial risk of harm? We must determine what kind of evidence is adequate for a jury to draw a reasonable inference that a prison official acted with deliberate indifference. . . . . [I]t can be challenging to draw a line between an acceptable difference of opinion (especially because even admitted medical

malpractice does not automatically give rise to a constitutional violation), and an action that reflects sub-minimal competence. . . and crosses the threshold into deliberate indifference. One hint of such a departure is when a doctor refuses to take instructions from a specialist. . . Another is when he or she fails to follow an existing protocol. . . . Another situation that might establish a departure from minimally competent medical judgment is where a prison official persists in a course of treatment known to be ineffective. . . .If a prison doctor chooses an 'easier and less efficacious treatment' without exercising professional judgment, such a decision can also constitute deliberate indifference. . . .Yet another type of evidence that can support an inference of deliberate indifference is an inexplicable delay in treatment which serves no penological interest. . . .To show that a delay in providing treatment is actionable under the Eighth Amendment, a plaintiff must also provide independent evidence that the delay exacerbated the injury or unnecessarily prolonged pain. . . . [R]epeatedly, we have rejected the notion that the provision of some care means the doctor provided medical treatment which meets the basic requirements of the Eighth Amendment. Rather, the context surrounding a doctor's treatment decision can sometimes override his claimed ignorance of the risks stemming from that decision. When a doctor says he did not realize his treatment decisions (or lack thereof) could cause serious harm to a plaintiff, a jury is entitled to weigh that explanation against certain clues that the doctor *did* know. Those context clues might include the existence of documents the doctor regularly consulted which advised against his course of treatment, evidence that the patient repeatedly complained of enduring pain with no modifications in care, inexplicable delays or departures from common medical standards, or of course, the doctor's own testimony that indicates knowledge of necessary treatment he failed to provide. While evidence of malpractice is not enough for a plaintiff to survive summary judgment on an Eighth Amendment claim, nor is a doctor's claim he did not know any better sufficient to immunize him from liability in every circumstance. Otherwise, prison doctors would get a free pass to ignore prisoners' medical needs by hiding behind the precedent that medical malpractice is not actionable under the Eighth Amendment. Prisoners are not entitled to state-of-the art medical treatment. But where evidence exists that the defendants knew better than to make the medical decisions that they did, a jury should decide whether or not the defendants were actually ignorant to risk of the harm that they caused.") *with* ***Petties v. Carter***, 836 F.3d 722, 734-36 (7th Cir. 2016) (en banc) (Easterbrook, J., joined by Flaum and Kanne, JJ., dissenting) ("My colleagues take it as established that the Constitution entitled Petties to an orthopedic boot, or some other means to immobilize his foot, immediately after his injury. They remand for a trial at which a jury must determine whether the defendants were deliberately indifferent to the pain his ruptured Achilles tendon caused. This approach effectively bypasses one of the two issues that matter to any claim under the Cruel and Unusual Punishments Clause: first there must *be* a cruel and unusual punishment, and only then does it matter whether the defendant acted with the mental state necessary for liability in damages. . . A court should begin with the conduct issue and turn to mental states only if the behavior was objectively cruel and unusual. And *Estelle v. Gamble*, 429 U.S. 97 (1976), the Supreme Court's sole decision addressing the question whether palliative medical treatment (pain relief without an effort at cure) violates the Eighth Amendment, holds that palliation suffices even if the care is woefully deficient. . . . *Estelle* holds that a claim of deficient medical care must proceed under state law rather than the Constitution. When the prison provides

no care for a serious medical condition, that counts as cruel and unusual punishment if the physicians or other responsible actors are deliberately indifferent to the condition. . . . At least three circuits ask whether the prisoner received some treatment, rather than whether the treatment was inferior (even grossly deficient). See, e.g., *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979); *Durmer v. O'Carroll*, 991 F.2d 64, 68–69 (3d Cir. 1993); *Self v. Crum*, 439 F.3d 1227, 1230–33 (10th Cir. 2006) (discussing other cases in the circuit); *Farmer v. Moritsugu*, 163 F.3d 610, 614–16 (D.C. Cir. 1998). Today's decision is incompatible with the approach of those circuits, though it has support in decisions of the Ninth Circuit. See, e.g., *Snow v. McDaniel*, 681 F.3d 978 (9th Cir. 2012); *Hamilton v. Endell*, 981 F.2d 1062, 1066–67 (9th Cir. 1992). The First Circuit may have an intra-circuit conflict. Compare *Perry v. Roy*, 782 F.3d 73 (1st Cir. 2015), with *Feeney v. Correctional Medical Services, Inc*., 464 F.3d 158 (1st Cir. 2006). Still other circuits are hard to classify. My colleagues say that prisoners are entitled to relief under the Eighth Amendment when prison physicians do not employ 'competent medical judgment'. . or 'minimally competent medical judgment'. . . . That tracks state tort law and is incompatible with *Estelle*. Other phrases in the opinion, such as 'professional judgment'. . . and 'reasonable medical judgment'. . . also seem to be proxies for the law of medical malpractice and equally at odds with *Estelle*. And if we were authorized to find a 'competent medical judgment' standard in the Constitution, why should we *want* to federalize the law of medical malpractice? Prisoners such as Petties have a tort remedy under state law. Carter and Obaisi were employed by Wexford rather than the state. They owe prisoners the same duties as any physician owes to private patients and are subject to the same remedies under Illinois law. . . Even physicians employed by the state are subject to the normal rules of tort law. . . . Perhaps prisoners hope that constitutional claims will produce awards of attorneys' fees under 42 U.S.C. § 1988(b), while Illinois requires plaintiffs to bear their own fees, but § 1988 is not a good reason to constitutionalize tort law. And federal law comes with complications, such as qualified immunity and the deliberate-indifference standard, missing from state law. *Estelle* told the courts of appeals to relegate bad-treatment situations to state law, and we should carry out its approach.")

See also ***Robinson v. Midland County, Texas***, 80 F.4th 704, 711-12 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1010 (2024) ("Assuming the facts as alleged, 'Stickel observed Hall experiencing a critical medical crisis over the course of six and a half hours and in response made the conscious decision not to request emergency assistance for Hall unless Hall lost consciousness or stopped breathing.' We conclude that Stickel's actions were not so deliberately indifferent to Hall's need for emergency assistance that it amounts to a constitutional violation. We compare *Cope v. Codgill*, *Allen v. Hays*,and *Dyer v. Houston*, [footnotes omitted] each of which found a constitutional violation where an officer failed to call for emergency medical care. In *Cope*, an officer failed to call for medical services when a prisoner strangled himself with a phone cord until he lost consciousness directly in front of the officer's eyes. . . In *Allen*, an officer shot the victim five times at point-blank range, watched him crash his car into a tree, and did not call emergency medical services for six minutes, despite taking the time to call for back-up. . . In *Dyer*, we found a plausible constitutional violation would exist if officers 'were aware that [the prisoner], in the grip of a drug-induced psychosis, struck his head violently against the interior of [the patrol car]

over 40 times' and sustained a traumatic head injury, yet failed to alert anyone. . . We have similarly found a constitutional violation predicated on a failure to provide medical care or assistance where the officer deliberately broke with the standard course of treatment. In *Alderson,* a guard refused to provide prescribed antibiotics and painkillers for his broken ribs; in *Easter,* a nurse refused to provide an inmate's prescribed medication for heart attacks. [footnotes omitted] But Stickel's situation is distinguishable from those showings of deliberate indifference. Hall was known to have breathing problems, and Stickel knew there was a prescribed course of treatment. Stickel confirmed that Hall had access to his inhaler and was within the bounds of his prescribed breathing treatments. Stickel informed his relieving officer of Hall's situation. Stickel's actions, though regrettable, are far from the indifference shown in the above-cited cases. Plaintiffs have not plausibly pleaded deliberate indifference predicated on a delay in medical treatment. The dismissal was not in error); ***Howell v. Wexford Health Sources, Inc.***, 987 F.3d 647, 660-61 (7th Cir. 2021) ("Even considering the evidence in the light most favorable to Howell, the delay of his ACL reconstruction surgery caused by the collegial review process cannot be attributed to deliberate indifference. A negligent exercise of medical judgment is not enough to show deliberate indifference. Plaintiff must show a failure to exercise medical judgment at all. . . And Howell has not shown even negligence here. It is not unusual outside of prisons for patients with painful orthopedic problems to be told to try more conservative treatment, delaying surgery until it appears that nothing less will offer effective relief. Given Dr. Koth's advice to use ACL surgery as a last resort, the Wexford doctors at worst disagreed about whether the surgery was medically appropriate. A jury could not reasonably find that this choice amounted to a failure to exercise medical judgment. . . Howell argues that the collegial review process delayed his ability to receive treatment and that this delay itself was unconstitutional. . . . The problem for Howell is factual. From the very beginning, the outside specialist (Dr. Koth) was reluctant to proceed with ACL surgery based on his medical judgment concerning Howell's limited ability to recover from the surgery while in prison. Throughout the months following Howell's meniscus surgery, Dr. Trost regularly submitted requests for outside treatment and diagnosis on Howell's behalf. The reviewing doctors regularly assessed whether it was yet medically appropriate or 'absolutely necessary' for him to receive ACL surgery, frequently advising instead that Howell continue with the recommended physical therapy. Howell's situation is distinguishable from *Shields,* where delay made the necessary shoulder surgery impossible and resulted in a serious and permanent impairment that could have been avoided. . . Howell ultimately did receive ACL reconstruction surgery. There is no evidence that the delay resulted in permanent impairment. Not treating pain *can* be an Eighth Amendment violation, of course, even if it is a matter of only minutes or hours. . . But the evidence shows beyond reasonable dispute here that decisions about how best to treat Howell's knee were based on medical judgment, primarily Dr. Koth's recommendation to proceed to ACL surgery only if and when it became 'absolutely necessary.' With that in mind, the delays caused by Wexford's collegial review process do not show deliberate indifference to Howell's medical needs."); ***Dyer v. Houston***, 964 F.3d 374, 380-81 (5th Cir. 2020) ("The Fourteenth Amendment guarantees pretrial detainees a right 'not to have their serious medical needs met with deliberate indifference on the part of the confining officials.'. . To succeed on a deliberate-indifference claim, plaintiffs must show that (1) the official was 'aware of facts from

which the inference could be drawn that a substantial risk of serious harm exists,' and (2) the official actually drew that inference. . . 'Deliberate indifference is an extremely high standard to meet.'. . We note that some of our cases have posited a third element—that the official 'subjectively intended that harm occur.'. . A panel of our court, however, recently wrote that it 'cannot endorse [this] analysis' because it 'depart[s] from controlling Supreme Court and Fifth Circuit law.'. . In this case, the district court invoked this additional 'subjective intent' element, but that does not affect our disposition of the motion to dismiss. As we explain, the allegations against the Paramedics would fail under the established two-part standard. . . The district court's invocation of the subjective intent element, however, does affect our disposition of the summary judgment for the Officers. . . . We agree with the district court that the Dyers' complaint fails to allege facts that plausibly show the Paramedics' deliberate indifference. The thrust of the complaint is that, after examining Graham and observing his head injury and drug-induced behavior, the Paramedics should have provided additional care—such as sending Graham to the hospital, accompanying him to jail, providing 'further assessment or monitoring,' or sedating him. At most, these are allegations that the Paramedics acted with negligence in not taking further steps to treat Graham after examining him. Our cases have consistently recognized, however, that 'deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm.'. . .Measured against these standards, we cannot say the complaint plausibly states a deliberate-indifference claim against the Paramedics. We therefore affirm the district court's dismissal of those claims."); ***Knight v. Grossman***, 942 F.3d 336, 341-44 (7th Cir. 2019), *cert. denied,* 141 S. Ct. 233 (2020) ("The Fourteenth Amendment protects against deprivations of life, liberty, and property without due process of law. The Supreme Court has recognized that 'a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.'. . So, too, has the Court held that prisoners retain a liberty interest in refusing forced medical treatment while incarcerated. . . From the interest in refusing unwanted treatment, some courts have inferred the existence of a corollary right—the right to receive information required to decide whether to refuse treatment. See, *e.g.*, *Pabon v. Wright,* 459 F.3d 241, 249–50 (2d Cir. 2006); *Benson v. Terhune,* 304 F.3d 874, 884 (9th Cir. 2002); *White v. Napoleon,* 897 F.2d 103, 113 (3d Cir. 1990). On at least two occasions we have reserved judgment on the existence of this right. See *Cox v. Brubaker*, 558 F. App'x 677, 678–79 (7th Cir. 2014); *Phillips v. Wexford Health Sources, Inc.*, 522 F. App'x 364, 367 (7th Cir. 2013). We now join all other circuits to have considered the question in holding that prisoners have a Fourteenth Amendment right to informed consent. The right to refuse medical treatment carries with it an implied right to the information necessary to make an informed decision about whether to refuse the treatment. Without crucial information about the risks and benefits of a procedure, the right to refuse would ring hollow. Together, the right to refuse treatment and the right to information required to do so constitute a right to informed consent. . . . The Second Circuit confronted the requirements for what it termed a Fourteenth Amendment 'right to medical information' claim in its 2006 decision in *Pabon v. Wright,* 459 F.3d 241. . . . The court highlighted four limitations on the right. The first three limitations address what the prisoner must prove to establish a violation of his right to medical information. Two of the limitations are necessary because the logical source of the right to medical information is the right to refuse treatment, so the right to medical

information exists only as far as needed to effectuate the right of refusal. . . *First*, the prisoner 'must show that, had he received information that was not given to him, he would have exercised his right to refuse the proposed treatment.'. . *Second*, '[t]he prisoner is entitled only to such information as a reasonable patient would deem necessary to make an informed decision.'. . . *Third*, the prisoner must prove that the defendant acted with deliberate indifference to his right to refuse medical treatment. . . Neither negligence nor gross negligence is enough to support a substantive due process claim, which must be so egregious as to 'shock the conscience.' . . . This element is the one Knight more vigorously contests, arguing that imposing a deliberate indifference requirement inappropriately 'collapses the distinct right to informed consent granted under the Fourteenth Amendment into the prohibition against deliberate indifference to a prisoner's serious medical needs provided for under the Eighth Amendment.' We disagree. Knight's position misses a key distinction, which hinges on what the defendant must be deliberately indifferent to. In an Eighth Amendment claim, the question is whether the defendant was deliberately indifferent to the prisoner's serious medical need. But here, in a Fourteenth Amendment due process claim, we ask whether the defendant was deliberately indifferent to the prisoner's right to refuse treatment. Though both require deliberate indifference, the inquiries are distinct. . . . . Knight's express position below was that he 'may well have' chosen a different treatment. Even if he had submitted that view in a sworn affidavit, which he did not, it would have fallen short: saying he may have refused treatment is not the same as saying he would have. With this failure of proof, the district court properly granted Dr. Grossman summary judgment."); ***Garza v. City of Donna***, 922 F.3d 626, 634-35 (5th Cir. 2019) ("To establish municipal liability in an episodic-act case, a plaintiff must show '(1) that the municipal employee violated the pretrial detainee's clearly established constitutional rights with subjective deliberate indifference; and (2) that this violation resulted from a municipal policy or custom adopted and maintained with objective deliberate indifference.'. . . Our court has based its Fourteenth Amendment case law concerning pretrial detainees on the Supreme Court's Eighth Amendment precedent concerning prisoners. . .Among those borrowings is our understanding of subjective deliberate indifference. In *Farmer*, the Supreme Court distinguished that culpable mental state from negligence, on the one hand, and knowledge and intent, on the other . . . . The Court ultimately held that an official cannot be found liable 'unless the official knows of and disregards an excessive risk to inmate safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'. . *Farmer* therefore provides the first two elements of the deliberate-indifference standard applied by the district court, but not its third, that there be a 'subjective intention that the harm occur.'"); ***S.M. v. Lincoln Cty. Missouri***, 874 F.3d 581, 585 (8th Cir. 2017) ("'When the issue is qualified immunity from individual liability for failure to train or supervise, deliberate indifference is a subjective standard' that requires personal knowledge of the constitutional risk posed by inadequate supervision, the basis for our conclusion that Sheriff Krigbaum was entitled to qualified immunity in *Krigbaum*, . . But an objective standard of deliberate indifference applies to plaintiffs' failure-to-supervise claims against the County."); ***Mendiola-Martinez v. Arpaio***, 836 F.3d 1239, 1248-49 & n.11 (9th Cir. 2016) ("While a claim of deliberate indifference against a prison *official* employs a subjective standard, *Farmer*, 511 U.S. at 837, we recently held that an objective standard applies to

municipalities 'for the practical reason that government entities, unlike individuals, do not themselves have states of mind,' *Castro*, 2016 WL 4268955, at*11. . . This *Castro* objective standard is satisfied when 'a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission [or act] is substantially certain to result in the violation of the constitutional rights of their citizens.'. . .We recognize that the reason Mendiola-Martinez must show 'deliberate indifference' here (to prove her Eighth Amendment claim under § 1983) differs from the reason 'deliberate indifference' was required in *Canton* (to hold a municipality liable for its failure to train police officers). . . . Although *Castro* relied on *Canton*'s discussion of municipal liability under *Monell*, rather than an Eighth Amendment claim that requires deliberate indifference, we see no reason why the objective standard of deliberate indifference we adopted in *Castro* should not apply to constitutional claims against a municipality like Mendiola-Martinez's. The same 'conceptual difficulty' of searching for the 'subjective state of mind of a government entity' applies."); ***Castro v. County of Los Angeles***, 833 F.3d 1060, 1076-78 (9th Cir. 2016) (en banc) ("The Supreme Court has strongly suggested that the deliberate indifference standard for municipalities is always an objective inquiry. [discussing *City of Canton* and comparing with *Farmer*] We, too, have recognized that an objective standard applies. *Gibson v. County of Washoe*, 290 F.3d 1175, 1195 (9th Cir. 2002). To the extent that *Gibson* or our other cases suggest otherwise, we now overrule those holdings. . . .The County Board of Supervisors' affirmative adoption of regulations aimed at mitigating the risk of serious injury to individuals housed in sobering cells, and a statement to the same effect in the station's manual, conclusively prove that the County knew of the risk of the very type of harm that befell Castro. . . The adoption of a regulation by the County's legislative body suffices as proof of notice because the County necessarily has knowledge of its own ordinances. We have said that 'a municipality's policies [that] explicitly acknowledge that substantial risks of serious harm exist' may demonstrate municipal knowledge of that risk for the purposes of a Fourteenth Amendment failure-to-protect claim. . . Here, the ordinance adopted by the County is a policy that explicitly acknowledges the relevant substantial risks of serious harm. Accordingly, the entity defendants had notice that their customs or policies posed a substantial risk of serious harm to persons detained in the West Hollywood sobering cell and were deliberately indifferent to that risk. Therefore, we affirm the judgment against the entity defendants."); ***Walton v. Dawson***, 752 F.3d 1109, 1117-18 (8th Cir. 2014) ("'Deliberate indifference' is a polysemous phrase. As applied to a prison official in the Eighth Amendment context, the Supreme Court has made it clear 'deliberate indifference' requires subjective knowledge: no liability attaches 'unless the official *knows of* and disregards an excessive risk to inmate health and safety.'. . However, as applied to a municipality in the Fourteenth Amendment context, 'deliberate indifference' is purely objective: 'liability [may] be premised on obviousness or *constructive notice.*'. . But the Supreme Court has never specified whether 'deliberate indifference' is subjective or objective in the context of a Fourteenth Amendment claim against a municipal prison official. . .Without expressly answering this question, . . . we have used *Farmer's* subjective measure of deliberate indifference to evaluate Fourteenth Amendment claims by pretrial detainees against prison officials. . . We recognize the potential inconsistency this approach creates: the same claim (failure to train) by the same plaintiff (a pretrial detainee) arising under the same constitutional provision (the Due Process Clause of the

Fourteenth Amendment) uses the same standard (deliberate indifference) in different ways depending on whether the defendant is the municipality or its employee. Theoretically, this could make a municipality liable for a risk it *should have* known even if all of its employees in supervisory roles *did not* know of the risk and are thus not liable.Despite this theoretical concern, our repeated practice of using *Farmer* in the Fourteenth Amendment context has been followed too long to be reconsidered here. . . We therefore conclude Walton's failure to train and supervise claims must be judged by *Farmer's* subjective deliberate indifference standard. Which is to say, Walton must prove the prison officials *personally knew* of the constitutional risk posed by their inadequate training or supervision and proximately caused him injury by failing to take sufficient remedial action."); ***Cash v. County of Erie***, 654 F.3d 324, 341 n.8 (2d Cir. 2011) ("We note. . .that the district court did err when it instructed the jury that Gallivan must have been *subjectively* aware of a risk of sexual assault to find deliberate indifference in this context. . . 'Deliberate indifference' is defined differently for purposes of proving a prison conditions claim under the Eighth or Fourteenth Amendment in the first instance, and for establishing municipal liability for that violation thereafter. In the former context, deliberate indifference is a *subjective* standard requiring proof of actual knowledge of risk by the prison official. *See, e.g., Caiozzo v. Koreman,* 581 F.3d at 70-71. By contrast, for purposes of establishing municipal liability, deliberate indifference is an *objective* standard that is satisfied if the risk is so obvious that the official should have known of it. *See Vann v. City of New York,* 72 F.3d at 1049; *see generally Farmer v. Brennan,* 511 U.S. at 840-42 (explaining 'deliberate indifference' standard in these different contexts). Because the jury returned a verdict in favor of Cash on the § 1983 claim notwithstanding the fact that the district court's charge on deliberate indifference held her to a higher subjective standard of proof, any error in this regard was necessarily harmless."); ***Thomas v. Bryant***, 614 F.3d 1288, 1312, 1314-17, 1326 (11th Cir. 2010) ("In our circuit, to find deliberate indifference on the part of a prison official, a plaintiff inmate must show: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than gross negligence. . . That is, the evidence must demonstrate that 'with knowledge of the infirm conditions, [the official] knowingly or recklessly declined to take actions that would have improved the conditions.'. . A prison official's deliberate indifference is a question of fact which we review for clear error. . . . The record . . . supports the district court's finding that the Secretary of the DOC and the Warden of FSP recklessly disregarded the risk of psychological harm to inmates like McKinney. Despite repeated notice from the CMA Reports of a risk of harm to inmates with mental illness, the DOC chose not to adopt their recommendation to take into consideration an inmate's mental health history, through a pre-use-of-force mental health consultation or some other means, prior to administering chemical agents. . . In light of the apparent feasibility of adopting some type of pre-force mental health consultation, as evidenced by the Federal Bureau of Prisons' use of such a procedure, and the CMA's efforts to highlight the seriousness of the problem of the improper use of chemical agents on mentally ill inmates, the DOC's refusal to modify its non-spontaneous use-of-force policy provides support for the district court's finding of more than mere or even gross negligence on the part of the DOC. . . . In sum, we cannot conclude that the district court was clearly erroneous in finding that the record demonstrates that 'DOC officials turned a blind eye' to McKinney's mental health needs and the obvious danger that the use of chemical agents presented to his

psychological well-being. . . Turning a blind eye to such obvious danger provides ample support for the finding of the requisite recklessness. Even though there are ambiguities present in McKinney's record − his mental illness was often characterized by anger, maladjustment, and violence as opposed to psychosis, and many treating professionals found that McKinney suffered no acute impairment − an examination of his entire record demonstrates that the district court did not commit clear error in finding the defendants' deliberate indifference. Concluding that McKinney satisfied both the objective and subjective prongs of his Eighth Amendment conditions-of-confinement claim at trial, . . . we affirm the district court's declaratory judgment in his favor and turn to the defendants' challenges to the district court's permanent injunction. . . In sum, creating an additional requirement that corrections staff consult with mental health staff prior to spraying McKinney with chemical agents adds but one layer to a long list of existing prerequisites to the use of non-spontaneous force at FSP that will at most affect only a few isolated decisions over the course of McKinney's future incarceration. . . . For the foregoing reasons, we reject the defendants' arguments that the district court abused its discretion in entering the underlying injunction and uphold the district court's award of injunctive relief to McKinney."); ***Whitson v. Stone County Jail***, 602 F.3d 920, 925, 927 (8th Cir. 2010) ("Assuming the truth of her allegations, as we must, Whitson has sufficiently stated a 'deliberate indifference' claim. . . . She claims that this rape was foreseeable: two inmates of the opposite sex were isolated and placed next to each other in the back of a dark van; there was loud music; and the officers did not adequately observe, nor were they particularly concerned about, the nefarious goings-on in the second caged compartment, which was accessible only from the rear of the vehicle. Whitson alleges that by failing to provide adequate attention to security during transfers of this nature where male and female inmates are placed in a remote compartment where the safety, security and welfare of the female inmate were not and could not be adequately maintained, the defendants were deliberately indifferent to a risk of harm to her. . . . We do not resolve the ultimate issue of whether Whitson can prevail on her § 1983 claims. We are remanding so that the district court can apply the proper test. We simply hold that, assuming the truth of plaintiff's substantiated assertions, she has sufficiently *alleged* a deliberate indifference claim, and the defendants' lack of knowledge that the particular attack would occur does not extinguish the legal existence of her claim. . . Because the disposition of this case was fundamentally flawed, remand is the proper course. Hand in hand with this conclusion, we likewise reverse the district court's grant of qualified immunity as it was premised on the court's ruling that there was no constitutional violation."); ***Gonzales v. Martinez***, 403 F.3d 1179, 1187 (10th Cir. 2005) ("First, Sheriff Salazar explicitly stated his Jail Administrator did not want to investigate allegations of problems at the Jail. Second, the evidence indicates the sheriff's consistent willingness to ignore inmate complaints by attributing them to attitudes of the complainants, characterizing them as 'troublemakers' or 'conjuring up' incidents to 'discredit' his deputies,' allowed him to excuse his failure to pursue the issues any further. Finally, and most astonishing, when first advised two visibly 'upset' female inmates accused two of his jailers of sexually assaulting them, he not only left the prisoners unprotected in the jail, but also in the custody and control of the very men accused of the assaults. When the women were removed for their protection, the decision to do so was not made by Sheriff Salazar, but by the District Attorney. None of this evidence is controverted, and its significance was seemingly

ignored by the district court. Finally, we are constrained to note the district court misread *Farmer*, believing it required Ms. Gonzales to show Sheriff Salazar specifically knew Major Bob posed a substantial risk of harm to her. Rather, the *Farmer* Court noted a prison official could not escape liability by showing although 'he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. . . . The undisputed evidence of the physical assaults on inmates set against the facts of Sheriff Salazar's knowledge of reported risks to inmate health or safety, including the documented lapse of security in the control room, complaints of sexual harassment and intimidation, Dominick's demotion for, as Sergeant Zudar characterized it, 'a combination of things,' as well as the presence in the record of Ms. Tefteller's letter, which she attested was handed to Major Bob, surely raise a reasonable inference that Sheriff Salazar knew of and disregarded an excessive risk to Ms. Gonzales."); ***Parrish ex rel Lee v. Cleveland***, 372 F.3d 294, 306, 307, 309 (4th Cir. 2004) ("In the absence of particularized evidence showing that the officers actually had training or experience with the TranZport Hood and therefore were familiar with the manner in which it fit and the uses for which it was designed, it is difficult to conclude that this particular risk was obvious to the officers. Finally, and most importantly, EMT Earl, a trained medical professional, observed the placement of Lee in the van with the spit mask over his head and expressed no concern . . . . While the EMT's presence by no means immunizes the officers from liability, the fact that a trained medical technician did not recognize the risk associated with transporting a handcuffed inebriated person wearing a spit mask strongly suggests that the risk was something less than obvious. . . .[W]e have noted that an officer's response to a perceived risk must be more than merely negligent or simply unreasonable. . . If a negligent response were sufficient to show deliberate indifference, the Supreme Court's explicit decision in *Farmer* to incorporate the subjective recklessness standard of culpability from the criminal law would be effectively negated.. . . . Accordingly, where the evidence shows, at most, that an officer's response to a perceived substantial risk was unreasonable under the circumstances, a claim of deliberate indifference cannot succeed. [citing cases in support and in opposition] . . . . In short, the evidence shows that the officers took precautions that they believed (albeit erroneously) were sufficient to prevent the harm that befell Lee. There simply is no evidence in the record, in the form of contemporaneous statements or otherwise, to justify an inference that the officers subjectively recognized that their precautions would prove to be inadequate."); ***Greene v. Bowles***, 361 F.3d 290, 294 (6th Cir. 2004) ("[W]here a specific individual poses a risk to a large class of inmates, that risk can also support a finding of liability even where the particular prisoner at risk is not known in advance. . . . Greene has raised an issue of fact as to Warden Brigano's knowledge of a risk to her safety because of her status as a vulnerable inmate and because of Frezzell's status as a predatory inmate."); ***Taylor v. Michigan Dep't of Corrections***, 69 F.3d 76, 81 (6th Cir. 1995) ("*Farmer* makes it clear that the correct inquiry is whether he had knowledge about the substantial risk of serious harm to a particular class of persons, not whether he knew who the particular victim turned out to be.").

But see ***Greene v. Bowles***, 361 F.3d 290, 296, 297 (6th Cir. 2004) (Rogers, J., dissenting) ("The fact that Warden Brigano recognized the existence of certain risks attendant with the

placement of certain categories of inmates in protective custody, however, does not amount to an awareness of a significant risk of harm to Greene's health or safety. The Eighth Amendment requires, instead, that a warden actually recognize a significant risk of harm arising from particular facts. While the majority properly states that, in some contexts, a particular victim, or a particular perpetrator, need not be known, general recognition of some risks is not enough. . . . The effect of the majority's opinion in this case is to impose an objective standard of deliberate indifference − a position explicitly rejected by the Supreme Court. . . Although a reasonable person may well have reached the conclusion based on this body of facts that Greene was in danger, the appropriate test is whether *Warden Brigano* reached the conclusion that Greene was in particular danger. Greene has clearly failed to establish a triable issue as to Warden Brigano's awareness in this case.").

See also ***Finn v. Warren Cnty., Ky.,*** 768 F.3d 441, 452 n.2 (6th Cir. 2014) ("We comment briefly on another jury instruction issue that was not raised below or on appeal. The elements instruction relating to the § 1983 claim did not properly instruct the jury on the subjective component of deliberate indifference, which is equivalent to 'recklessly disregarding' the risk of harm. . . Instead, the instruction told the jury that it could find deliberate indifference if it determined that the deputy jailer 'intentionally refused or failed to take reasonable measures to address Mr. Finn's serious medical need.'. . The instruction then added that '[m]ere negligence or a lack of reasonable care on the part of the deputy jailer does not constitute deliberate indifference.'. . As written, the instruction erroneously mixed the concepts of intentional and negligent conduct without ever instructing the jury on reckless disregard."); ***Baker v. District of Columbia,*** 326 F.3d 1302, 1305, 1306, 1308 (D.C. Cir. 2003) ("On appeal, Baker . . . contends that the district court incorrectly analyzed his claim against the District of Columbia under *Monell* . . . . Essentially, he contends that the district court erred by confusing the 'deliberate indifference' required to find an underlying Eighth Amendment violation by the Virginia defendants, which does require subjective knowledge, with the 'deliberate indifference' required to find that the District of Columbia ignored the unconstitutional conduct of the Virginia prison officials to whom it had entrusted its prisoners, which only requires objective knowledge. He contends that under *Monell* he may state a claim against the District of Columbia based on a policy or custom without any analysis of the subjective state of mind of District of Columbia officials.The distinction between the two 'deliberate indifference' standards was drawn by the Supreme Court in *Collins* . . . . Accordingly, in considering whether a plaintiff has stated a claim for municipal liability, the district court must conduct a two-step inquiry . . . First, the court must determine whether the complaint states a claim for a predicate constitutional violation. . . Second, if so, then the court must determine whether the complaint states a claim that a custom or policy of the municipality caused the violation. . . [B]ecause the district court erred by applying a subjective standard to Baker's *Monell* claim and resolution of his claim against the District of Columbia may depend on additional pleadings and discovery in light of the records of the Virginia proceedings, we reverse and remand the case to the district court."); ***Gibson v. County of Washoe,*** 290 F.3d 1175, 1188 n.8 (9th Cir. 2002) ("Because the Eighth Amendment's deliberate indifference standard looks to the subjective mental state of the person charged with violating a detainee's right to medical

treatment, it − somewhat confusingly − differs from the *Canton* deliberate indifference standard, which we also apply in this opinion. The *Canton* deliberate indifference standard does not 'turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation;' instead it is used to determine when a municipality's omissions expose it to liability for the federal torts committed by its employees. . . As opposed to the *Farmer* standard, which does not impose liability unless a person has actual notice of conditions that pose a substantial risk of serious harm, the *Canton* standard assigns liability even when a municipality has constructive notice that it needs to remedy its omissions in order to avoid violations of constitutional rights."); ***Marsh v. Butler County,*** 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc) ("We accept that conditions in a jail facility that allow prisoners ready access to weapons, fail to provide an ability to lock down inmates, and fail to allow for surveillance of inmates pose a substantial risk of serious harm to inmates. In addition, Plaintiffs' allegations that the County received many reports of the conditions but took no remedial measures is sufficient to allege deliberate indifference to the substantial risk of serious harm faced by inmates in the Jail."); ***Marsh v. Butler County,*** 268 F.3d 1014, 1036 n.17 (11th Cir. 2001) (en banc) ("In considering the Sheriff's potential personal liability as a policymaker, we have looked at decisions involving the liability of local governments as policymakers. The local government precedents are not directly on point. The reason is that the standard for imposing policymaker liability on a local government is more favorable to plaintiffs than is the standard for imposing policymaker liability on a Sheriff or other jail official in his personal capacity in a case like this one. [citing *Farmer*] Still, the local government cases can guide us by analogy; if a local government would not be liable as a policymaker *a fortiori* there is no personal liability."); ***Doe v. Washington County***, 150 F.3d 920, 923 (8th Cir. 1998) (noting that "the Court has not directly addressed the question of how *Monell*'s standard for municipal liability meshes with *Farmer*'s requirement of subjective knowledge.").

See also ***Bolden v. City of Chicago***, No. 17 CV 417, 2019 WL 3766104, at *13-14 (N.D. Ill. Aug. 9, 2019) ("But though there is no mental state requirement for a constitutional *Brady* violation, there is one for a § 1983 violation, and it is something more than negligence. . . . Other circuits have held that 'the no-fault standard of care *Brady* imposes on prosecutors in the criminal or habeas context has no place in a § 1983 damages action against a law enforcement official in which the plaintiff alleges a violation of due process.'. . Some courts require proof of intent or bad faith. *See Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014); *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004). Others require only recklessness. *See Tennison v. City & Cty. of San Francisco*, 570 F.3d 1078, 1089 (9th Cir. 2009) ("[A] § 1983 plaintiff must show that police officers acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence from prosecutors."). One circuit has declined to impose a state-of-mind requirement on § 1983 plaintiffs. *See Moldowan v. City of Warren*, 578 F.3d 351, 386 (6th Cir. 2009). The Seventh Circuit has not directly addressed the state of mind required to sustain a § 1983 *Brady* claim. In *Steidl*, the court rejected the notion that 'police officers violate due process only if they deliberately withhold or conceal exculpatory evidence from the prosecutor.'. . It pointed instead to its decision in *Jones v. City of Chicago*, 856 F.2d 985, 992–93 (7th Cir. 1988), in which it said that to be personally

responsible under § 1983, defendants 'must … act either knowingly or with deliberate, reckless indifference.' More recently, the court noted that '[t]he *Brady* constitutional standard in a criminal case applies to both willful and negligent failures to disclose exculpatory evidence. For civil claims for due-process violations, though, the general rule is that the defendant must have acted intentionally or at least recklessly,' but the court found it unnecessary to decide the required state of mind to resolve that appeal. *Cairel v. Alderden*, 821 F.3d 823, 832 n.2 (7th Cir. 2016). Though the Seventh Circuit has not definitively held that at least recklessness is required for a § 1983 *Brady* claim, *Steidl* and *Cairel* give me enough reason to believe that it would."); ***Sanders v. City of Chicago Heights,*** No. 13 C 0221, 2016 WL 2866097, at *10-11 (N.D. Ill. May 17, 2016) (" 'Deliberate indifference' is a term used in both Eighth Amendment claims and constitutional actions against municipalities. . . Specifically, 'deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability.'. . On the other hand, the 'term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents.'. . Proof of deliberate indifference in the context of a failure to train case 'can take the form of either (1) failure to provide adequate training in light of foreseeable consequences; or (2) failure to act in response to repeated complaints of constitutional violations by its officers.'. . . Construing the facts and all reasonable inferences in his favor, Sanders has presented sufficient evidence to survive summary judgment that Defendant Officers violated his right to due process when Defendants withheld material exculpatory and impeachment evidence, employed unduly suggestive identification procedures to induce Armstrong's false identification, and fabricated evidence in an effort to frame him. Sanders has also offered facts that there was a history of corruption within the Chicago Heights Police Department, as evidenced by an FBI investigation into the department during the relevant time period, putting City officials on notice of the police department's inadequate training. . . Further, Sanders provides expert evidence that the City's failure to train resulted in and fostered a widespread practice upon which a reasonable, properly instructed jury could infer that the City's conduct evinces a deliberate indifference to the rights of its citizens and was the moving force behind the deprivation of Sanders' due process rights. Because Sanders has submitted specific evidence showing that there are material factual issues for trial as to Defendant Chicago Heights' liability under *Monell*, the Court denies Chicago Heights' summary judgment motion."); ***Foy ex rel Haynie, Jr.,*** No. 15 C 3720, 2016 WL 2770880, at *3-4 (N.D. Ill. May 12, 2016) ("Simply put, a party cannot pursue a *Monell* claim against an officer in his individual capacity. Thus, to the extent that Plaintiff is attempting to assert a *Monell* claim against the defendant officers in their individual capacities, this cause of action is not cognizable. . . . Defendants argue that even if count seven is improperly titled, '[i]t is unclear if a cause of action called "deliberate indifference" can be made against individuals.'. . The Court is uncertain if Defendants' contention is that this cause of action does not exist at all or if they are arguing that Plaintiff has failed to state a claim for deliberate indifference against the officers in their individual capacities. As discussed below, any argument that a claim for deliberate indifference does not exist ignores decades of established case law. In addition, affording Plaintiff all favorable inferences, the Court determines that Plaintiff states a claim for deliberate indifference of a serious medical need against the three officers on duty at the Harrison Police Station on the day of Haynie's death.

However, to the extent that Plaintiff is asserting a claim for failure to provide adequate medical care against the two arresting officers in their individual capacities, Plaintiff's claim fails."); ***Giamboi v. Prison Health Services, Inc.***, No. 3:11-CV-00159, 2011 WL 5322769, at *12, *13 (M.D. Pa. June 2, 2011) ("The Court in *City of Canton* noted that the deliberate indifference standard in the municipal liability context 'does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation.'. . In other words 'the proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines when such wrongs have occurred.'. . Defendants PHS and PHS Correctional contend that the subjective recklessness standard of deliberate indifference adopted in *Farmer, supra,* is applicable to the plaintiff's claims against them. But the Court in *Farmer* indicated that it was not adopting the same deliberate indifference standard as the deliberate indifference standard set forth in *City of Canton* for municipal liability. . . Because it would permit liability when a municipality disregards obvious needs, the Court in *Farmer* described the deliberate indifference standard set forth in *City of Canton* as an objective standard. . . The Court in *Farmer* contrasted it with the subjective recklessness standard of deliberate indifference that it was adopting for an Eighth Amendment violation. Thus, contrary to the defendants' argument, the complaint does not fail to state a claim upon which relief can be granted because it does not allege that they knew that their policies or customs presented a substantial risk to the plaintiff."); ***Pauls v. Green***, 816 F.Supp.2d 961, 974 n.6 (D. Idaho 2011) ("The deliberate-indifference standard applied here differs from the deliberate-indifference standard applied in the entity-liability context. . . For individuals, the standard is a subjective one. *See Farmer,* 511 U.S. at 840-41. For entities, it is an objective standard. *See Canton,* 489 U.S. at 389-90."); ***Simmons v. Bd of County Commissioners for Jackson County***, No. CIV-06-79-F, 2006 WL 3611821, at *5, *6 (W.D. Okla. Dec. 11, 2006) ("The plaintiff asserts that her claims against Jackson County may be established without recourse to the second, subjective prong of the deliberate indifference test. She cites *Berry v. City of Muskogee, Okl.*, 900 F.2d 1489, 1498 (10th Cir.1990), for the proposition that only the objective prong is relevant when a plaintiff seeks to hold a municipality liable for constitutional violations under § 1983. It appears the plaintiff may understandably confuse the deliberate indifference test set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994), for establishing Eighth Amendment (or in this instance Fourteenth Amendment) violations, and the deliberate indifference test set forth in *Canton* for establishing a municipality's § 1983 liability for the constitutional violations of its agents and employees. . . . The objective *Canton* test is only implicated in this case only to the extent that the plaintiff seeks to hold Jackson County liable for the conduct of the jail's non-policy making employees. To the extent that she is seeking to hold Jackson County liable for Sheriff Roberts' official acts, it is well established that such acts are binding upon the county. . . If a jury determines that Sheriff Roberts was responsible for policies or customs evidencing deliberate indifference to jail inmates' serious medical needs, his deliberate indifference may be attributed to Jackson County. . . The defendants' argument that the Board of County Commissioners cannot be held liable absent a showing that its members themselves acted with deliberate indifference is without merit. Before the plaintiff can establish Jackson County's liability for the official acts of Sheriff Roberts, she must first establish that Sheriff Roberts was deliberately indifferent to Ms. Biddy's serious medical needs and this

requires that she satisfy not only the objective prong of the Farmer test, but also its subjective prong. As discussed above, the court concludes that the plaintiff's evidence that Sheriff Roberts maintained policies and customs subjecting inmates to unconstitutional delays of medical care and failed to train jail personnel to recognize emergency medical conditions raises genuine issues of material fact with regard to the subjective prong of the deliberate indifference test.") Because numerous material factual issues remain to be resolved by the trier of fact, including issues regarding the extent to which the jail's alleged failure to provide timely medical attention actually caused the harm suffered by Ms. Biddy, summary judgment in the plaintiff's favor must be denied."); ***Ginest v. Bd. of County Commissioners of Carbon County***, 333 F.Supp.2d 1190, 1204 (D. Wyo. 2004) ("A difference exists, however, regarding *burden of proof* in those Eighth Amendment cases where, as here, the plaintiffs claim that their rights were violated due to a supervisor's failure to train subordinates. In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court held that the 'deliberate indifference' test to determine municipal liability differs from the one applicable in individual liability cases; in municipal liability cases, there is no subjective component, and the plaintiff need only show an objective risk of injury and a failure to train. . . . In short, to win their case against Sheriff Colson, the plaintiffs need to show both an objective risk of substantial harm and subjective intent − on a par with criminal recklessness − to cause injury. To win their claim against Carbon County, however, the plaintiffs need only to show an objective risk of substantial harm and the Sheriff's failure to train staff in how to reasonably address and abate that risk."); ***Vinson v. Clarke County***, 10 F. Supp.2d 1282, 1300 (S.D. Ala. 1998) ("As a preliminary matter, it is important to note that the court's inquiry into defendant Clarke County's alleged deliberate indifference cannot take the form of the traditional, subjective analysis as established in the governing case law. . . .Proving such subjective awareness on the part of a governmental entity is not practical, and, therefore, it is necessary to apply a more awkward objective analysis to the deliberate indifference factor. . . . . Under this objective approach to deliberate indifference, the court must consider whether the substantial risks associated with unreasonably unsafe conditions of confinement were 'so obvious' that the county's policymakers 'can reasonably be said to have been deliberately indifferent to the need.'[citing *Canton*]"); ***Earrey v. Chickasaw County***, 965 F. Supp. 870, 877 (N.D. Miss. 1997) ("The actions of governmental officials, who are fully capable of subjective deliberate indifference, serve as the basis of governmental liability for Eighth Amendment violations. While the governmental entity may only need be shown to be objectively deliberately indifferent to the known or obvious consequences of a custom or policy which does not itself violate federal law, it cannot be held liable unless the plaintiff shows that a constitutional violation has in fact occurred. In the Eighth Amendment context, in order for a violation to occur, a prison official must know 'that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it.'"); ***Lowrance v. Coughlin***, 862 F. Supp. 1090, 1115 (S.D.N.Y. 1994) ("Adopting a subjective standard, the Court in *Farmer* held that a prison official may be held liable under the Eighth Amendment for acting with deliberate indifference to prisoner health or safety only if the official has actual knowledge that the prisoner faced a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. . .The *Farmer* Court was careful to explain that this result was not inconsistent with the objective standard applied in [*City*

of Canton] . . . . Under the objective test, municipal liability attaches when policymakers have actual or constructive notice of the constitutional violation.").

See generally the lengthy discussion of the "deliberate indifference" standard in ***Paiva v. City of Reno***, 939 F. Supp. 1474, 1494 n.27 (D.Nev. 1996):

> The ongoing judicial struggle to explain the concept of deliberate indifference has produced intolerable confusion, the words "reckless," "conscious," "willful," and "negligent" being defined only recursively. This infinitely regressive process, with which this court has previously expressed its exasperation, *Dorris v. County of Washoe*, 885 F.Supp. 1383, 1386 n. 3 (D.Nev.1995) (Reed, J.), adds nothing to our understanding of the words which are our crude attempts to convey complex and subtle ideas. [citing cases] Effective communication requires some consensus as to the meaning of the words we use. The Model Penal Code, while perhaps not the model of clarity, at least approaches a useful differentiation between the various states of mind upon which our legal system relies: To act "purposely" requires the actor to envision some objective, and to act intending to achieve that objective or accomplish some result; to act "knowingly" requires an awareness by the actor of the nature and therefore the probable consequences of her conduct, or certainty as to the result of that conduct; to act "recklessly" requires an awareness by the actor of some unacceptably grave risk of injury entailed by her conduct and a decision to proceed despite her awareness of the existence of such a risk; to act "negligently requires a normative judgment by the community that the actor should have been aware of the unacceptably grave risk entailed by her conduct. Model Penal Code's 2.02(2) (Proposed Official Draft 1962). Although at first glance the concept of "deliberate indifference" seems to embody most of the same requirements as the Model Penal Code's "recklessness," the words chosen by Mr. Justice White, writing for the Supreme Court in *City of Canton v. Harris*, appear explicitly to reject a requirement of subjective awareness of the risk encountered by the defendant. . . To whom must the risk be "so obvious?" By whom may it "reasonably be said" that the defendant acted recklessly, or with conscious disregard for a known risk, or with deliberate indifference to the constitutional risks encountered? This is the language of negligence, requiring proof not that the defendant actually knew of the risk, but only that she "must have been aware of it." *Davis v. Macon County*, 927 F.2d 1473, 1482 (9th Cir.1991). Whether denominated "deliberate indifference," "conscious disregard," "recklessness," or "gross negligence," the concept is the same: In some situations, civil rights plaintiffs will not have to show subjective awareness by the defendant of the risk encountered; it is enough if the community, as represented by a jury, determines that the defendant's failure to apprise herself of the nature and degree of the risk to be encountered was itself so unacceptable as to justify the imposition of Section 1983 liability. The *Harris* Court itself approved the imposition of supervisory liability where, for example, city policymakers know

> to a moral certainty that their police officers will be required to arrest fleeing felons [and have] armed [their] officers with firearms. Thus, the need to train officers in the constitutional limitations on the use of deadly force ... can be said to be 'so obvious' that failure to do so could be properly characterized as 'deliberate indifference' to constitutional rights." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 n. 10 (1989). There exists a sharp distinction between *Harris*' "constructive notice" basis for local government liability in the context of a failure to train claim and, for example, the requirement of some subjective awareness of a particular risk of constitutional injury in the context of a claim of deliberate indifference by prison officials to harm inflicted on inmates by other inmates. The Supreme Court itself recognized the distinction in *Farmer v. Brennan*. . . .

See also ***West by and through Norris v. Waymire***, 114 F.3d 646, 651 (7th Cir. 1997) ("[*Board of County Commissioners v.*] *Brown* suggests as we have seen that a deliberate choice to avoid an obvious danger (or 'plainly obvious,' as the Court put it, no doubt for emphasis, 117 S. Ct. at 1392) is actionable under 42 U.S.C. § 1983 if the choice results in harm to a protected interest, even though the defendant obtusely lacks actual knowledge of the danger. Granted, there may be less here than meets the eye. The difference between a 'plainly obvious' and an actually known danger − the critical difference between the criminal and tort standards of recklessness − may have little significance in practice, given the difficulty of peering into minds, especially when the 'person' whose mind would have to be plumbed is an institution rather than an individual.").

See also ***Pearson v. Prison Health Service***, 850 F.3d 526, 535, 537-38 (3d Cir. 2017) ("Because the parties agree that Pearson's medical need was serious, this appeal requires us to resolve an issue of first impression in this Circuit. We must decide for the first time whether and when medical expert testimony may be necessary to create a triable issue on the subjective prong of a deliberate indifference case. In answering this question, three principles guide our analysis. The first is that deliberate indifference is a subjective state of mind that can, like any other form of scienter, be proven through circumstantial evidence and witness testimony. . . .The second principle is that there is a critical distinction 'between cases where the complaint alleges a complete denial of medical care and those alleging inadequate medical treatment.'. . .The third and final principle is that the mere receipt of inadequate medical care does not itself amount to deliberate indifference—the defendant must also act with the requisite state of mind when providing that inadequate care. . . . In sum, because it is just as difficult for a layperson to assess the adequacy of medical care as it is for them to assess the seriousness of a medical condition, we hold that medical expert testimony may be necessary in some adequacy of care cases when the propriety of a particular diagnosis or course of treatment would not be apparent to a layperson. Nonetheless, we disagree with the District Court's conclusion that expert testimony was necessary in this case because we are not satisfied that medical expert testimony would be necessary for all of Pearson's claims, nor are we satisfied that other forms of extrinsic proof would not have sufficed.")

9. Note on *Kingsley v. Hendrickson*

The Supreme Court has recently addressed the question of what standard applies to claims of excessive force brought by pretrial detainees under the Fourteenth Amendment. *See* ***Kingsley v. Hendrickson***, 135 S. Ct. 2466, 2470, 2472-73 (2015) ("The question before us is whether, to prove an excessive force claim, a pretrial detainee must show that the officers were *subjectively* aware that their use of force was unreasonable, or only that the officers' use of that force was *objectively* unreasonable. We conclude that the latter standard is the correct one. . . . In deciding whether the force deliberately used is, constitutionally speaking, 'excessive,' should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to *this* question that we hold that courts must use an objective standard. In short, we agree with the dissenting appeals court judge, the Seventh Circuit's jury instruction committee, and Kingsley, that a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.").

The Court suggested a number of factors that would be relevant to the determination of reasonableness of the force used, including: "the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Id.* at 2473. The majority in *Kingsley* defended the adoption of the objective standard as consistent with *Bell v. Wolfish*, 441 U.S. 520 (1979), which the majority said established that "in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" 135 S. Ct. at 2473.

The Court stressed that an important aspect of the objective reasonableness analysis is the "deference to policies and practices needed to maintain order and institutional security." *Id.* at 2474. The majority also noted that "an officer enjoys qualified immunity and is not liable for excessive force unless he has violated a 'clearly established' right, such that 'it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . .[and that i]t is unlikely (though theoretically possible) that a plaintiff could overcome these hurdles where an officer acted in good faith." *Id.* at 2474-75.

Finally, the majority "acknowledge[d] that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners[,]" but left that issue for another case and another day. *Id.* at 2476. The decision was vacated and the case was remanded to the Court of Appeals for a determination of whether the erroneous jury instructions, suggesting a requirement that the jury consider the subjective reasons for the use of force, were prejudicial. *Id.* at 2477.

Justice Scalia, in a dissent joined by Chief Justice Roberts and Justice Thomas, concluded that "*Bell* makes intent to punish the focus of its due-process analysis. Objective reasonableness of the force used is nothing more than a heuristic for identifying this intent. That heuristic makes good sense for considered decisions by the detaining authority, but is much weaker in the context of excessive-force claims. Kingsley does not argue that respondents actually intended to punish him, and his reliance on *Bell* to infer such an intent is misplaced." *Id.*at 2478 (Scalia, J., joined by Roberts, C.J., and Thomas, J., dissenting). The dissent reminded that "[t]he Due Process Clause is not 'a font of tort law to be superimposed upon' th[e] state system[,]" and criticized the majority for its "tender-hearted desire to tortify the Fourteenth Amendment." *Id.* at 2479.

Justice Alito dissented on the ground that the case should have been dismissed as improvidently granted. He argued that the Court should first decide whether a pretrial detainee's claim of excessive force is governed by the Fourth Amendment. If it is, then the standard would be objective reasonableness, the Fourth Amendment would control, and no Fourteenth Amendment claim would be needed. *Id.* at 2479 (Alito, J., dissenting).

a. Pre-*Kingsley* Decisions

See ***Dawson v. Anderson Cnty., Tex.***, 769 F.3d 326, 328-30 (5th Cir. 2014) (Haynes, J., joined by Dennis and Graves, JJ., dissenting from denial of rehearing en banc) (Judge Dennis joins this dissent for the reasons set forth herein and for the reasons set forth in his dissent from the panel opinion. *Dawson v. Anderson Cnty.*, 566 F. App'x 369, 371–79 (5th Cir.2013) (Dennis, J., dissenting)) ("[W]e lack clarity as to which standard should apply to determine whether the use of force was excessive in this case. When a plaintiff alleges that a government official has employed 'excessive force' in violation of the Constitution, several constitutional standards are potentially applicable (the Fourth, Eighth, and Fourteenth Amendments). Whether a particular standard applies turns on the plaintiff's status during the relevant time period. At one end of the timing spectrum are excessive force claims arising during the initial arrest or apprehension of a free citizen, which are governed by the Fourth Amendment. . . . At the other end of the spectrum are excessive force claims arising during incarceration, after criminal prosecution is complete. A convicted inmate's excessive force claim is governed by the Eighth Amendment. . . . Between these two periods, *i.e.,* between the time a suspect is initially arrested and then is incarcerated after being prosecuted, is pretrial detainment. The Due Process Clause of the Fourteenth Amendment protects pretrial detainees from excessive force. . . Although the Due Process Clause of the Fourteenth Amendment protects pretrial detainees from excessive force, we have held that excessive force claims arising during a plaintiff's pretrial detainment are also governed by the Supreme Court's test from *Hudson.* . . . Less clear is the person who, like Dawson, has been arrested but not yet processed for pretrial detainment. We should take this case en banc to announce clearly which of these standards applies to such a person. For its part, the majority opinion does not announce or follow any standard whatsoever. It rests, instead, on the seemingly unassailable notion that law enforcement officers are entitled to use force to obtain compliance with necessary commands. . . The problem here is that this analysis overlooks a significant factual dispute between

the officers, who contend that Dawson did not comply at all (thus, she refused a 'necessary command'), and Dawson, who contends that she did comply and that the further commands to 'squat and cough' 'all night long' were issued merely for sport. . . . The *Hudson* test considers the subjective intent of the jailers. . . Dawson alleged that the jailers laughed at her and were verbally abusive throughout the strip search. In this regard, the majority opinion misapprehended the import of the laughing and harassing. The majority opinion stated that verbal abuse by a jailer does not give rise to a Section 1983 claim. . . While I agree that verbal abuse, alone, is not actionable, the alleged statements inform the question of whether or not the commands were legitimate or for harassment and, in turn, whether force was justified to obtain compliance. In examining the 'totality of the circumstances' and whether the commands were consistent with a need for security or simply done for sport, the alleged contemporaneous comments support a conclusion that it was the latter, not the former. The facts as alleged by Dawson—which must be taken as true at this stage (even if ultimately a jury concluded they were greatly exaggerated)-suggest a level of sadism and brutality that is totally unacceptable. The majority vote of this court not to take this case en banc should not be viewed as condoning the conduct alleged here. It is not even necessarily an endorsement of the panel majority opinion. Judges vote against a grant of en banc rehearing for a variety of reasons that can include a conclusion that the particular issue is not squarely presented by the facts of the particular case. Nonetheless, this case raises serious questions that deserve clarity from this court. I therefore respectfully dissent from the court's decision to deny rehearing en banc."); ***Kitchen v. Dallas Cnty., Tex.,*** 759 F.3d 468, 477 (5th Cir. 2014) ("[W]here a pretrial detainee is allegedly the victim of a detention officer's use of excessive force, as explained in *Valencia v. Wiggins,* 981 F.2d 1440, 1446 (5th Cir.1993), . . . such a claim is subject to the same analysis as a convicted prisoner's claim for use of excessive force under the Eighth Amendment."); ***Keith v. DeKalb County, Ga.***, 749 F.3d 1034, 1045 n.35 (11th Cir. 2014) ("Because Cook was a pretrial detainee who had not been convicted of the crime with which he was charged, the Eighth Amendment does not apply. . . Instead, Keith's claim is properly analyzed under the Substantive Due Process Clause of the Fourteenth Amendment. . . However, 'the due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner.'. . Thus, 'the standard for providing basic human needs to those incarcerated or in detention is the same under both the Eighth and Fourteenth Amendments,' *Marsh v. Butler Cnty., Ala.,* 268 F.3d 1014, 1024 n .5 (11th Cir.2001) (en banc), and 'it makes no difference whether [Cook] was a pretrial detainee or a convicted prisoner because "the applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving ... pretrial detainees."'"); ***Shreve v. Franklin County, Ohio***, 743 F.3d 126, 133-35, 137, 138 (6th Cir. 2014) ("An excessive-force claim under the Eighth Amendment requires that the plaintiff show that force was not 'applied in a good-faith effort to maintain or restore discipline,' but instead applied 'maliciously and sadistically to cause harm.'. . But an excessive-force claim under the Fourteenth Amendment operates on a sliding scale. Generally, to constitute a Fourteenth Amendment violation, an official's conduct must 'shock[ ] the conscience.'. . When officials respond to 'a rapidly evolving, fluid, and dangerous predicament,'. . the Fourteenth Amendment's excessive-force standard is the same as the Eighth Amendment's. . . . The video recording in this case provides sufficient evidence for a jury to find that the situation in the cell afforded the deputies 'a

reasonable opportunity to deliberate various alternatives prior to electing a course of action.'. . . But these same facts also compel the conclusion that the deputies did not act with 'deliberate indifference towards [Reed's] federally protected rights.'. . That they tried to handcuff him several times before using the Taser shows that they sought to minimize the Taser's use. The deputies also warned Reed that the Taser would hurt and that he did not want to be Tased, which showed that they were trying to avoid unnecessary harm. . . . We decline to put the onus on the deputies to assess at their risk the seriousness of Reed's seizure in order to determine whether it warranted immediate medical treatment. Their decision to use a Taser to subdue Reed before taking him to the hospital might have been unwise, but it was not unconstitutional."); ***Scott v. Benson***, 742 F.3d 335, 339 (8th Cir. 2014) ("As a resident of CCUSO, Scott was a civilly committed individual, meaning any right to medical care arises under the Due Process Clause of the Fourteenth Amendment. . . Both parties argued to the district court that the deliberate indifference standard from the Eighth Amendment should govern Scott's Fourteenth Amendment claim. Relying on a non-binding case, *McDonald v. Eilers,* Civ. No. 88–2751, 1988 WL 131360, at *2 (E.D.Pa. Dec. 7, 1988), the district court instead analyzed Scott's claim under the professional judgment standard from *Youngberg v. Romeo*. . . .[W]here a patient's Fourteenth Amendment claim is for constitutionally deficient medical care, we apply the deliberate indifference standard from the Eighth Amendment. . . Accordingly, the district court should have applied the deliberate indifference standard to Scott's claim."); ***Bistrian v. Levi***, 696 F.3d 352, 367 (3d Cir. 2012) ("The Cruel and Unusual Punishments Clause, however, does not apply until an inmate has been both convicted of and sentenced for his crimes. . . Thus, an inmate awaiting sentencing must look to either the Fifth Amendment's or the Fourteenth Amendment's Due Process Clause for protection. . . We have not yet in a precedential opinion recognized that an unsentenced inmate may bring a due process-grounded failure-to-protect claim of the sort that a sentenced inmate can bring under the Eighth Amendment. But it is well established that, under the Constitution's guarantees of due process, an unsentenced inmate 'is entitled[,] at a minimum, to no less protection than a sentenced inmate is entitled to under the Eighth Amendment.'. . Therefore, Bistrian—as an inmate who at all relevant times was either not yet convicted or convicted but not yet sentenced—had a clearly established constitutional right to have prison officials protect him from inmate violence."); ***Burton v. Kindle***, No. 10-2915, 2010 WL 4487121, at *3 (3d Cir. Nov. 10, 2010) (not published) (concluding "that a pretrial detainee presenting a failure-to-protect claim must plead that the prison official acted with deliberate indifference to the detainee's health or safety."); ***Porro v. Barnes***, 624 F.3d 1322, 1324 (10th Cir. 2010) ("holding "that the due process guarantee is the proper doctrinal prism through which to analyze the claims of federal immigration detainees who don't challenge the lawfulness of their detention but only the force used during that detention."); ***Clouthier v. County of Contra Costa***, 591 F.3d 1232, 1243 (9th Cir. 2010) ("The Clouthiers invite us to adapt the standard suggested by *Youngberg v. Romeo*, 457 U.S. 307 (1982), and hold that mentally ill detainees have a constitutional right to mental health care that does not substantially depart from accepted professional judgment, practice, or standards. Under such a standard, the Clouthiers could prosecute their § 1983 action without carrying the burden of showing that the individual defendants subjectively acted with deliberate indifference to a substantial risk of serious harm to Clouthier. We must decline this invitation. The cases cited by the Clouthiers considered

the substantive due process rights of individuals detained by the state for the purpose of addressing issues associated with their mental incapacity; they do not address the liberty interests of pretrial detainees who are confined to ensure their presence at trial, as in *Bell*."); ***Lewis v. Downey***, 581 F.3d 467, 473, 474 (7th Cir. 2009) ("In some contexts, such as claims of deliberate indifference to medical needs, the Eighth and Fourteenth Amendment standards are essentially interchangeable. . . . But the distinction between the two constitutional protections assumes some importance for excessive force claims because the Due Process Clause, which prohibits all 'punishment,' affords broader protection than the Eighth Amendment's protection against only punishment that is 'cruel and unusual.'. . Although the exact contours of any additional safeguards remain undefined, . . . it is nonetheless important that we identify the appropriate source of Lewis's constitutional protection against the use of excessive force . . . . At the time of relevant events, Lewis was neither a pretrial detainee nor a sentenced prisoner. He had been found guilty in a federal court and was in a county jail awaiting sentencing and the entry of final judgment. The question is whether a person in this purgatory within our criminal justice system is cloaked with the Eighth Amendment's limited safeguards against only 'cruel and unusual' punishment or the Fourteenth Amendment's broader protections against punishment 'in any way.'. . The Supreme Court has not directly addressed whether the Eighth Amendment is applicable to pre *sentencing* detainees, but it has indicated that the answer is no. According to the Court, 'the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.' *Ingraham v. Wright*, 430 U.S. 651, 671 n. 40 (1977). The Court later confirmed that such a 'formal adjudication' includes both conviction and sentence. . .This would mean that Eighth Amendment rights had not yet vested in Lewis, who had not been sentenced. . . The problem is that Lewis, acting *pro se,* alleged violations of only the Eighth Amendment, a line of argument that his appointed counsel maintains on appeal. Further complicating the issue is that defendants have not objected to the improper basis for Lewis's action − a calculated move perhaps, given that Lewis is seeking more limited protection than he might otherwise deserve. . . As we have made clear, anything that would violate the Eighth Amendment would also violate the Fourteenth Amendment. . . Thus, we conclude that although we must evaluate Lewis's claims under what we believe is the proper basis − here, the Fourteenth Amendment − we will do so only insofar as the alleged conduct would have violated the Eighth Amendment as well; we will not consider any safeguards the Fourteenth Amendment provides beyond those it shares with the Eighth Amendment. Lewis has argued only for these more limited protections."); ***Butler v. Fletcher***, 465 F.3d 340, 343, 344 (8th Cir. 2006) ("On appeal, relying on *Bell v. Wolfish*, 441 U.S. 520 (1979), Butler primarily argues that the district court erred in applying the Eighth Amendment standard of deliberate indifference because, as a pretrial detainee, Butler was protected by the Fourteenth Amendment's guarantee of substantive due process. . . . After *Bell* noted the difference between Substantive Due Process and Eighth Amendment protections, we have recognized it is an open question but have repeatedly applied the deliberate indifference standard of *Estelle* to pretrial detainee claims that prison officials unconstitutionally ignored a serious medical need or failed to protect the detainee from a serious risk of harm. . . Later Supreme Court decisions, while not resolving the issue, are consistent with this approach. . . . . [W]e hold that deliberate indifference is the appropriate standard of culpability for all claims

that prison officials failed to provide pretrial detainees with adequate food, clothing, shelter, medical care, and reasonable safety."); ***Hubbard v. Taylor,*** 399 F.3d 150, 166 (3d Cir. 2005) ("The district court then erred in concluding that 'pretrial detainees are afforded essentially the same protection as convicted prisoners and that an Eighth Amendment analysis is appropriate for determining if the conditions of confinement rise to the level of a constitutional violation.'. . . The district court's error is understandable given our discussion in *Kost.* There, we were discussing medical and nonmedical conditions of confinement. Although we specifically stated that the Eighth Amendment provided a floor for our due process inquiry into the medical and nonmedical issues, much of our discussion focused on whether the plaintiffs had established the 'deliberate indifference' that is the hallmark of cruel and unusual punishment under the Eighth Amendment. . . Moreover, we failed to cite *Bell v. Wolfish* which, as we have explained, distinguishes between pretrial detainees' protection from 'punishment' under the Fourteenth Amendment, and convicted inmates' protection from punishment that is 'cruel and unusual' under the Eighth Amendment. . . Nevertheless, it is clear that plaintiffs here 'are not within the ambit of the Eighth Amendment['s],' prohibition against cruel and unusual *punishment*. . . They are not yet at a stage of the criminal process where they can be punished because they have not as yet been convicted of anything. As the Supreme Court explained in *Bell*, pre-trial detainees cannot be punished at all under the Due Process Clause."); ***Board v. Farnham***, 394 F.3d 469, 478 (7th Cir. 2005) ("[W]e have found it convenient and entirely appropriate to apply the same standard to claims arising under the Fourteenth Amendment (detainees) and Eighth Amendment (convicted prisoners) 'without differentiation.'"); ***A.M. v. Luzerne County Juvenile Detention Center,*** 372 F.3d 572, 584 (3d Cir. 2004) ("Given his status as a detainee, A.M. maintains his claims must be assessed under the Fourteenth Amendment. We do not dispute that A.M.'s claims are appropriately analyzed under the Fourteenth Amendment since he was a detainee and not a convicted prisoner. However, the contours of a state's due process obligations to detainees with respect to medical care have not been defined by the Supreme Court. . . Yet, it is clear that detainees are entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment.); ***Gibson v. County of Washoe,*** 290 F.3d 1175, 1189 n.9 (9th Cir. 2002) ("It is quite possible, therefore, that the protections provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted prisoners by the Eighth Amendment."); ***Patten v. Nichols,*** 274 F.3d 829, 834 (4th Cir. 2001) ("As to denial-of-medical-care claims asserted by pre-trial detainees, whose claims arise under the Fourteenth Amendment rather than the Eighth Amendment, the Supreme Court has yet to decide what standard should govern, thus far observing only that the Fourteenth Amendment rights of pre-trial detainees 'are at least as great as the Eighth Amendment protections available to a convicted prisoner.'").

See also ***Ewing v. Cumberland Cnty.,*** No. CIV. 09-5432 JBS/AMD, 2015 WL 1384374, at *13-15 (D.N.J. Mar. 25, 2015) ("The question of whether the Fifth or Eighth Amendment standard applies to a pre-trial detainee's claim of excessive force is not settled. . . Traditionally, a person who has not been convicted has 'federally protected liberty interests that are different in kind from those of sentenced inmates.'. . .Under this distinction, Plaintiff, who had just been arrested that day, should be afforded the greater constitutional protection that is offered by the Due

Process Clause. . . The Court, however, must also be guided by *Fuentes v. Wagner,* 206 F.3d 335 (3d Cir.2000), which controls in this Circuit. In *Fuentes,* the plaintiff, a pretrial detainee, brought a § 1983 claim arguing that placing him in a restraint chair for eight hours after he engaged in a physical fight with correctional officers constituted excessive force. The Third Circuit held that the Eighth Amendment's cruel and unusual punishment standard, not the due process standard, governed the plaintiff's claim. . . The Court made a distinction between cases involving excessive force and those challenging a detainee's conditions of confinement, noting that excessive force claims against prison guards should be subject to the more stringent standard when those claims arise in the context of a prison disturbance. . . Many courts in this Circuit have followed *Fuentes* and evaluated a pre-trial detainee's claim of excessive force under the standard of cruel and unusual punishment. . . And the Third Circuit has recently examined *Fuentes* and affirmed the distinction between a detainee's excessive force claim and a claim challenging prison conditions. . . Plaintiff argues that *Fuentes* does not control in the present case because force was not used in the context of a prison riot. Plaintiff cites to *Jackson v. Phelps,* 575 Fed. App'x 79 (3d Cir.2014), in which the Court applied the due process standard to an excessive force claim because the detainee was 'effectively immobilized' in handcuffs, foot shackles, and a padlock, and posed no safety threat to the prison guards who beat him up. . . The Court finds *Jackson* instructive. There is a significant distinction between using force to quell a prison riot or to stop violence from spreading, and using force when there is no real emergency. Like the detainee in *Jackson,* Plaintiff was by himself when he was approached by correctional officers. Although he was not handcuffed or shackled, the threat he posed was minimized by the fact that he was unarmed and surrounded by five correctional officers. Plaintiff was also beaten in a closed room; there is little evidence to suggest that he was in danger of escaping or that Defendants were acting to prevent a disturbance from spreading. In *Fuentes,* the court noted that a more rigorous standard applied in the context of a prison riot, because guards in such cases must react to unpredictable, spontaneous, and rapidly changing events and cannot 'be expected to draw such precise distinctions between classes of inmates when those guards are trying to stop a prison disturbance.'. . Those concerns are absent in this case. Here, five correctional officers took an unarmed man inside a secure room for a routine strip search, before the man had even been properly admitted to the general prison population, and beat him. Nothing in the record suggests that the force used against Plaintiff arose out of a true emergency situation . . .Plaintiff was in the booking process when this violence occurred, preliminary to his being held on a disorderly persons offense, still accompanied by an officer of the arresting department. Given these particular facts, the Due Process Clause appears to be the more appropriate standard by which to evaluate Plaintiff's claim of excessive force. The Due Process Clause permits reasonable restraint upon liberty as the jail admissions process is undertaken; it does not allow infliction of punishment, excessive or not. Regardless of which standard applies, pretrial detainees 'are entitled to at least as much protection as convicted prisoners, so the protections of the Eighth Amendment would seem to establish a floor of sorts.'. . The Court believes that the Fifth Amendment standard should control in this case, but it will deny summary judgment on both Fifth and Eighth Amendment grounds because even under the Eighth Amendment's 'cruel and unusual standard,' a reasonable jury could find on the evidence presented that Defendants' use of force was imposed 'maliciously and sadistically to cause harm.'").

See also ***Cotton v. County of Santa Barbara***, 286 F. App'x 402, 2008 WL 2812581, at *3 n.1 (9th Cir. July 22, 2008) (Tallman, J., dissenting) ("The majority's citation to *Graham*, 490 U.S. at 399 n. 11, in an attempt to argue that officers in this case had a duty to use less force simply because Cotton was in custody is misleading. First, I cite to *Whitley* for the unremarkable proposition that the custodial setting raises considerations not accounted for by the *Graham* factors. Nothing in *Graham* undermines that statement. In the footnote cited by the majority, the Supreme Court explained why its endorsement of Judge Friendly's partially subjective test in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.1973), was limited to the Eighth Amendment context and did not extend to an excessive force analysis under the Fourth Amendment. Our court's holding that the Fourth Amendment sets the applicable standards for an excessive force claim raised by a pretrial detainee, *see Gibson*, 290 F.3d at 1197, does not mandate that we turn a blind eye to the volatile conditions inherent in custodial settings, particularly when dealing with a mentally ill, violent offender who refused to comply with lawful directives of the jailers. The importance of maintaining institutional security should be a significant factor we consider in determining whether the officer's actions were objectively reasonable.").

Compare ***Hare v. City of Corinth***, 74 F.3d 633, 643 (5th Cir. 1996) (en banc) (concluding that "a state jail official's constitutional liability to pretrial detainees for episodic acts or omissions should be measured by a standard of subjective deliberate indifference as enunciated by the Supreme Court in *Farmer*.") *with* ***Neely v. Feinstein***, 50 F.3d 1502, 1508 (9th Cir. 1995) ("[O]ur Fourteenth Amendment jurisprudence has never required officials to have a subjective awareness of the risk of harm in order to be deemed 'deliberately indifferent.'"). *But see* ***L.W. v. Grubbs*** (**L.W. II**), 92 F.3d 894, 897 (9th Cir. 1996) ("While *Neely* can be distinguished on its facts from the present case, its language (which was not necessary to the decision) is either incorrect to the extent that it approves the gross negligence standard, or it must be limited to the claims of inmate plaintiffs injured because of a miscarriage of the 'professional judgment of a [government] hospital official' in the context of a captive plaintiff.").

Compare ***Cope v. Coleman County (Cope II)***, No. 23-10414, 2024 WL 3177781, at *1, *4-9 (5th Cir. June 26, 2024) (per curiam) (not reported) ("This is the second appeal in this case, which concerns Derrek Monroe's suicide at the Coleman County Jail in 2017. In the first appeal, we held that the individual defendants—Coleman County Sheriff Leslie Cogdill, Jail Administrator Mary Jo Brixey, and Jailer Jessie Laws—were entitled to qualified immunity. *Cope v. Cogdill*, 3 F.4th 198, 207 (5th Cir. 2021) ("*Cope I*"), *cert. denied*, 142 S. Ct. 2573 (2022). Plaintiffs now return to this court to appeal the district court's grant of summary judgment on their municipal liability claims against Coleman County. For the reasons below, the district court's judgment regarding Plaintiffs' episodic-acts-or-omissions claim is AFFIRMED, but the judgment is VACATED and REMANDED for further proceedings regarding whether Plaintiffs have raised a genuine dispute of material fact as to their conditions-of-confinement claim. . . The County argues—and the district court agreed—that *Cope I* concluded none of the Individual Defendants violated the Constitution, so *Heller* and its progeny resolve this case. . . .The problem for the County is that it misreads *Cope I.* In order to overcome qualified immunity, a plaintiff must show: (1) the defendant violated the

plaintiff's constitutional rights, and (2) 'the right at issue was clearly established at the time of [the] defendant's alleged misconduct.'. . The Supreme Court has made clear that courts may assess only the second prong if that resolves the issue, meaning we need not reach the question of constitutionality if we conclude there has been no violation of clearly established law. . .In *Cope I*, we reached the question of constitutionality only on the issue of Laws's failure to call EMS. . . On every other alleged constitutional violation for each Individual Defendant, we held *only* that the defendant had not violated clearly established law. . . Accordingly, with the exception of Laws's failure to call EMS, we have never before decided the constitutionality of the Individual Defendants' actions in this case, which distinguishes this case from *Heller* and its progeny. . . The district court therefore erred in holding that *Cope I* was fatal to Plaintiffs' *Monell* claims. Nevertheless, we 'may affirm on any ground raised below and supported by the record, even if the district court did not reach it.'. . . Accordingly, we turn next to the question of whether Plaintiffs have otherwise raised a genuine dispute of material fact as to their claims. . . . When determining the appropriate standard for analyzing an alleged violation of a pretrial detainee's constitutional rights, 'we must first classify the challenge as an attack on a "condition of confinement" or as an "episodic act or omission."'. . In this case, Plaintiffs assert both theories in the alternative, so we address each in turn. . . . Plaintiffs assert that Cogdill, Brixey, and Laws violated Monroe's constitutional rights, and those violations resulted from County policy. . . Thus, the question of the County's liability under an episodic-acts-or-omissions theory turns on the subjective deliberate indifference of the same officials granted qualified immunity in *Cope I* . . . Under the law of the case doctrine, we generally cannot reexamine any issue of fact or law decided in *Cope I.* . . But, as discussed previously, *Cope I* did not reach the ultimate conclusion of whether the Individual Defendants violated Monroe's constitutional rights, with the exception of Laws's failure to call EMS. Plaintiffs also supplemented the record after *Cope I* with additional evidence regarding subjective deliberate indifference, which we must consider. . . Still, *Cope I*'s analysis remains highly relevant. We turn to an assessment of whether any County employee exhibited subjective deliberate indifference to Monroe's safety, analyzing the actions of Cogdill, Brixey, and Laws in turn. . . . Cogdill knew that Monroe had attempted suicide on Saturday. There is also evidence that Cogdill knew about Monroe's risk of suicide based on conversations with Deputy Tucker and the MHMR crisis worker. Accordingly, we conclude that Plaintiffs have raised a fact dispute regarding Cogdill's subjective knowledge of Monroe's risk of suicide. But that does not end the inquiry. Another key question in this and the prior appeal is whether Cogdill knew about the risk that long telephone cords pose to detainees at risk of suicide. In *Cope I*, we concluded that the existence of the Phone Cord Memorandum, by itself, was insufficient to create a fact dispute as to Cogdill's subjective knowledge of the risk posed by the cord in Monroe's cell. . . . There is still no record evidence that Cogdill had actual knowledge of the risk of the cord in Monroe's cell. To the contrary, Cogdill testified that he did not see the Phone Cord Memorandum until after Monroe's suicide. He also testified that he never paid attention to the cord in the cell or thought that it would be a safety risk before Monroe's suicide. Nor is there evidence in the record that anyone in the Coleman County Jail had ever previously attempted suicide by strangulation with a telephone cord. . . After *Cope I*, Plaintiffs supplemented the record with additional evidence that they argue raises a fact dispute regarding whether Cogdill 'must have known' about the substantial risk posed by

the phone cord. . . . Plaintiffs must raise a fact dispute under a heavy burden, and the new evidence, even viewed in the light most favorable to Plaintiffs, does not sufficiently demonstrate *Cogdill*'s knowledge. . . .Nor have Plaintiffs succeeded in demonstrating that the phone cord was such an obvious risk that Cogdill must have known about it. Many of the public documents submitted by Plaintiffs highlight isolated incidents of violence involving electronic cords occurring in places far from Coleman County, Texas. A subset of the documents pertains to suicides in Texas jails, but those reports are not numerous enough or otherwise so pervasive and relevant as to show that Cogdill must have known about the risk of the phone cord in Monroe's cell. As we said in *Cope I,* 'just because information is *available* to a defendant does not mean [ ]he has been *exposed* to it.'. . Lastly, we cannot conclude that Cogdill's actions clearly demonstrate a wanton disregard for Monroe's safety. . . . [R]easonable responses to Monroe's risk of suicide, along with Cogdill's belief—albeit unsound—that Monroe's new cell contained no obvious ligatures, preclude a finding that Cogdill exhibited subjective deliberate indifference. . . . In *Cope I,* we determined that Laws's failure to call EMS violated the Constitution. . . However, we do not consider that constitutional violation here because it did not 'result[ ] from a municipal policy or custom adopted with objective deliberate indifference.'. . To the contrary, the County's Suicide Plan states that '[i]f a Suicide attempt is in progress, the correctional officer or jailer will ... call the Emergency Medical Service.' Because Laws's failure to call EMS violated County policy, it cannot serve as a basis for municipal liability. . . . We note that 'taking some reasonable precautions does not mean the officer, on the whole, behaved reasonably.'. . Nevertheless, in light of the reasonable measures Laws took to prevent Monroe's suicide and his promptness in calling for backup, we conclude that his decision to follow County policy and wait for another officer to arrive before entering Monroe's cell does not evince a wanton disregard for Monroe's safety. Moreover, Laws's failure to retrieve the breathing machine while waiting for backup can only be classified as negligence, . . . which is insufficient to support a deliberate indifference claim[.] . . Accordingly, outside of Laws's failure to call EMS, he did not demonstrate subjective deliberate indifference to Monroe's safety. . . Plaintiffs have failed to identify any constitutional violation committed by a County employee that resulted from County policy. Thus, we affirm the district court's grant of summary judgment on Plaintiffs' episodic claim. . . . Here, Plaintiffs argue that several unconstitutional County policies caused Monroe's death, including: (1) staffing only one jailer on nights and weekends ("Staffing Policy"); (2) instructing jailers not to enter an occupied cell alone and to wait to intervene until help arrives ("Do-Not-Enter Policy"); and (3) maintaining lengthy phone cords in jail cells ("Phone Cord Policy"). . . According to Plaintiffs, the Staffing and Do-Not-Enter Policies create conditions at the Coleman County Jail under which no at-risk detainee experiencing a medical emergency at night or over the weekend can receive immediate attention, and the Phone Cord Policy increases the likelihood of a suicidal detainee experiencing a medical emergency under such conditions. Plaintiffs thus argue that these three County policies have a 'mutually enforcing effect' resulting in the deprival of *all* pretrial detainees' constitutional rights to adequate medical care and protection from known suicidal tendencies. . . In other words, 'the conditions themselves constitute the harm,' *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997) (en banc), regardless of any individual's act or omission. . . Under that theory, as in other conditions cases, the Staffing, Do-Not-Enter, and Phone Cord Policies impose 'durable restraints or impositions on inmates' lives' that transcend a

single act or omission by an officer. . . Plaintiffs seek damages for the harm to a single detainee, but—in contrast to episodic claims—the alleged cause of the harm is the broader 'conditions, practices, rules, or restrictions.'. . We thus conclude that Plaintiffs properly asserted a conditions claim, and the district court should have considered it as such. . . Accordingly, we vacate and remand for the district court to consider in the first instance whether Plaintiffs have raised a genuine dispute of material fact on their conditions claim. . . . The district court erred in concluding that *Cope I* foreclosed Plaintiffs' claims against the County in this case. Nevertheless, for the reasons set forth herein, the district court's judgment regarding Plaintiffs' episodic-acts-or-omissions claim is AFFIRMED. However, we VACATE and REMAND the district court's judgment for further proceedings regarding whether Plaintiffs have raised a genuine dispute of material fact as to their conditions-of-confinement claim.") *with* ***Cope v. Coleman County***, No. 23-10414, 2024 WL 3177781, at *9-13 (5th Cir. June 26, 2024) (per curiam) (not reported) (Smith, J., dissenting) ("The majority correctly affirms the summary judgment for plaintiffs' 'episodic act or omission' claims. But it commits egregious error in vacating the summary judgment on the so-called 'conditions-of-confinement' claim. That claim, as a matter of law, does not exist, and the summary judgment should be affirmed in full. I respectfully dissent. Derrek Monroe attempted suicide by strangulation and died after jailers failed to render timely emergency assistance. Given those facts, plaintiffs' *Monell* claim can be classified as nothing other than an attack on 'episodic acts or omissions.'. . . Under the majority's new rule, a conditions claim can rest on any policy that merely 'imposes durable restraints or impositions on inmates' lives that transcend a single act or omission.'. . Events are characterized based on the alleged 'focus of the claim'—i.e., per its theory, a claim is episodic if the allegations 'focus' on 'one individual's misconduct.'. . That is grave error. . . . None of the three policies identified in the complaint—in isolation or combination—was sufficient to cause Monroe's harm by virtue of its 'very promulgation and maintenance. . . . In *Cope I*, this court considered plaintiffs' episodic claims alleging the *exact same* harm before us now. *Cope I* held, under an episodic-acts theory of liability, that such harm was the result of Laws's failing timely "to call for emergency assistance [for] a detainee ... suffering from a suicide attempt." The upshot is blissfully ironic. Under the majority's reasoning, *Cope I*'s holding—which is binding on this panel as law of the case—would *foreclose* the possibility of plaintiffs' conditions-of-confinement claim. . . . The destruction that is sown by the majority extends well beyond the facts of this case. Its reasoning effectively eliminates the objective deliberate-indifference requirement for episodic claims. . . . Under the majority's newly-announced rule, claimants are but one artful pleading away from recasting their episodic claims into ones challenging conditions of confinement. The majority has therefore granted claimants, armed with nothing but their own *ipse dixit*, the benefit of presuming that the governmental body intended *any and all* harms caused by *any and all* of its employees' episodic acts and omissions. That is plainly impermissible, as it holds municipalities liable for the constitutional violations of its employees *absent* any showing of its acting with 'objective deliberate indifference to the detainee's constitutional rights.'. . . In sum, the majority has gone out of its way to keep on life-support plaintiffs' supposed conditions-of-confinement claim—notwithstanding its obvious lack of merit. Worse, the majority disposes of longstanding and well-established Fifth Circuit precedent and runs amok on the rule of orderliness. Worse still, it leaves us with an inscrutably vague rule

that holds governmental entities liable for the subjective deliberate indifference of its employees. I respectfully dissent.")

See also ***Estate of Henson v. Wichita Cnty.,*** Tex., 795 F.3d 456, 463-70 (5th Cir. 2015) ("When a plaintiff is challenging a condition of confinement, this court applies the test established by the Supreme Court in *Bell v. Wolfish,* and asks whether the condition is 'reasonably related to a legitimate governmental objective.'. . .An episodic-acts-or-omissions claim, by contrast, 'faults specific jail officials for their acts or omissions.'. . In such a case, an actor is 'interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission.'. . The relevant question becomes 'whether that official breached his constitutional duty to tend to the basic human needs of persons in his charge,' and intentionality is no longer presumed. . . A jail official violates a pretrial detainee's constitutional right to be secure in his basic human needs only when the official had 'subjective knowledge of a substantial risk of serious harm' to the detainee and responded to that risk with deliberate indifference. . . In other words, the state official must know of and disregard an excessive risk to inmate health or safety. . . .[W]e find that as to Dr. Bolin, Plaintiffs challenged only episodic acts and omissions by him and the nurses that he supervised, rather than conditions of Henson's confinement. Because Plaintiffs on appeal have abandoned a theory of liability against Dr. Bolin based on episodic acts or omissions, no viable claims are left against him. . . .Because Plaintiffs did not assert a conditions-of-confinement claim against Dr. Bolin, and because, even if they had, such claim would fail, we find that Dr. Bolin is entitled to summary judgment and the district court's order is affirmed with respect to Plaintiffs' claims against him. . . .To assess Plaintiffs' conditions-of-confinement claim against Wichita County, we apply the test established by the Supreme Court in *Bell v. Wolfish.* . . .With the goal of the *Bell* test—to identify conditions that amount to punishment—in mind, we turn to the conditions that Plaintiffs have challenged in the present case. In order to succeed on their conditions-of-confinement claim against Wichita County, Plaintiffs need to show: (1) 'a rule or restriction or ... the existence of an identifiable intended condition or practice ... [or] that the jail official's acts or omissions were sufficiently extended or pervasive'; (2) which was not reasonably related to a legitimate governmental objective; and (3) which caused the violation of [the inmate's] constitutional rights. . . .Our court does not downplay the tragic death of Wilbert Henson, . . .however, 'the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution.'. . Plaintiffs' evidence falls short of proving that the Wichita County jail's medical system and staffing policies amounted to punishment, in violation of Henson's constitutional rights."); ***Anderson v. Dallas County Texas***, 286 F. App'x 850, 2008 WL 2645657, at **8-10, *12 (5th Cir. 2008) ("The plaintiffs admit that the defendant had policies in place that, if followed, would have prevented Baines's suicide. Fundamentally, the plaintiffs assert that Baines would not have been able to commit suicide if suicide precautions had been enacted in accordance with Jail policy. The plaintiffs ultimately take issue with the DSOs' and physician assistants' failure to follow those policies and procedures. This is a classic episodic-act-or-omission case. . . . Because the plaintiffs cannot prove that Baines was subjected

to cruel and unusual punishment without first proving that a state actor deprived him of his constitutional rights, the plaintiffs' case is an episodic-act-or-omission case [not a conditions of confinement case]. To establish county liability for a failure to protect under an episodic-act-or-omission theory, a plaintiff must show that: (1) a county employee violated his clearly established constitutional rights with subjective deliberate indifference; and (2) the violation resulted from a county policy or custom adopted or maintained with objective deliberate indifference. . . . If a plaintiff is unable to show that a county employee acted with subjective deliberate indifference, the county cannot be held liable for an episodic act or omission. . . Even if an officer acted with subjective deliberate indifference, however, the plaintiff must still show that the county employee's act resulted from a county policy adopted or maintained with objective deliberate indifference to the inmate's rights. . . .The failure to fully staff the Jail, even if true, cannot be said to be the reason CPR was not performed because the undisputed facts show that medical officials promptly responded to the discovery of Baines. The only theory that might be connected is the failure to train adequately Jail officials, but there is no evidence in the record indicating that Jail officials failed to perform CPR due to inadequate training. Nor is there evidence in the record that the defendant should have known that its training inadequately instructed its employees either how or when to perform CPR on inmates.").

See also ***Serna v. Goodno***, 567 F.3d 944, 949 (8th Cir. 2009) ("[W]e can discern no justification for treating a Fourth Amendment claim based upon a search differently than a claim based upon a seizure. Thus, *Andrews* [see *infra*], which addresses a seizure claim, articulates the appropriate standard for considering whether an involuntarily committed person has been subjected to an unconstitutional search."); ***Richman v. Sheahan,*** 512 F.3d 876, 882, 883 (7th Cir. 2008) ("But can a Fourth Amendment and an Eighth Amendment claim of excessive force be raised in the same case? Often no. If you are beaten to a pulp before you are convicted, your remedy is under the Fourth Amendment; after, under the Eighth Amendment. But when as in this case it is uncertain whether the act complained of is punishment, deciding which remedy is available must wait upon the determination of the facts. If the officers were removing Jack Richman from the courtroom because he refused to leave under his own steam, the Fourth Amendment governs; if they were punishing him for his contempt of court (an inference for which there is some evidence, as we have just seen), the Eighth."); ***Wever v. Lincoln County, Nebraska***, 388 F.3d 601, 606 n.6 (8th Cir. 2004) ("While *Yellow Horse* involved an Eighth Amendment claim, it is well established that pretrial detainees such as Wever are 'accorded the due process protections of the Fourteenth Amendment, protections Aat least as great' as those the Eighth Amendment affords a convicted prisoner.' *Boswell v. Sherburne County*, 849 F.2d 1117, 1121 (8th Cir.1988). We have previously suggested that the burden of showing a constitutional violation is lighter for a pretrial detainee under the Fourteenth Amendment than for a post-conviction prisoner under the Eighth Amendment. *Smith v. Copeland*,87 F.3d 265, 268 n. 4 (8th Cir.1996)."); ***Oregon Advocacy Center v. Mink***, 322 F.3d 1101, 1121 (9th Cir.2003) (holding that "the substantive due process rights of incapacitated criminal defendants are not governed solely by the deliberate indifference standard"); ***Patten v. Nichols,*** 274 F.3d 829, 841, 842 (4th Cir. 2001) ("[E]ven though pre-trial detainees and involuntarily committed patients both look to the Fourteenth Amendment for

protection and neither group may be punished (in the Eighth Amendment sense), it can hardly be said that the groups are similarly situated. The differences in the purposes for which the groups are confined and the nature of the confinement itself are more than enough to warrant treating their denial-of-medical-care claims under different standards . . . . We therefore conclude that denial-of-medical-care claims asserted by involuntarily committed psychiatric patients must be measured under *Youngberg*'s 'professional judgment' standard."); ***Davis v. Rennie,*** 264 F.3d 86, 99, 100, 108 (1st Cir. 2001) ("[T]here is precedent for subjecting the conduct of a mental health worker to a more exacting standard than that of a prison guard controlling a riot or a police officer chasing a fleeing car. . . . Davis was in the state's custody because of mental illness, not culpable conduct, and the trial court's decision to reject the "shocks the conscience" standard is consistent with this distinction. [citing *Andrews v. Neer*] We agree . . . with the Eighth Circuit that the usual standard for an excessive force claim brought by an involuntarily committed mental patient is whether the force used was 'objectively reasonable' under all the circumstances."); ***Andrews v. Neer***, 253 F.3d 1052, 1060, 1061 (8th Cir. 2001) ("This Circuit has not addressed the constitutional standard applicable to § 1983 excessive-force claims in the context of involuntarily committed state hospital patients. In other situations in which excessive force is alleged by a person in custody, the constitutional standard applied may vary depending upon whether the victim is an arrestee, a pretrial detainee, or a convicted inmate of a penal institution. If the victim is an arrestee, the Fourth Amendment's 'objective reasonableness' standard controls.. . . The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard. . . .Excessive-force claims brought by prisoners fall under the protections provided by the Eighth Amendment's prohibition of cruel and unusual punishment. . . . Andrews's excessive force claim does not fit neatly into an analysis based on status as an arrestee, a pre-trial detainee, or a prisoner. Bobby Andrews was held in Fulton after having been found not guilty of murder by reason of insanity, and thus he was not a 'prisoner' subject to punishment. . .The Eighth Amendment excessive-force standard provides too little protection to a person whom the state is not allowed to punish. On the other hand, the state of Missouri was entitled to hold Bobby Andrews in custody. His confinement in a state institution raised concerns similar to those raised by the housing of pretrial detainees, such as the legitimate institutional interest in the safety and security of guards and other individuals in the facility, order within the facility, and the efficiency of the facility's operations. . . Accordingly, we conclude that Andrews's excessive-force claim should be evaluated under the objective reasonableness standard usually applied to excessive-force claims brought by pretrial detainees. "); ***Fuentes v. Wagner***, 206 F.3d 335, 347, 348 (3d Cir. 2000) ("[W]e hold that the Eighth Amendment cruel and unusual punishments standards found in *Whitley v. Albers* . . . and *Hudson v. McMillian* . . . apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance. We can draw no logical or practical distinction between a prison disturbance involving pretrial detainees, convicted but unsentenced inmates, or sentenced inmates. Nor can prison guards be expected to draw such precise distinctions between classes of inmates when those guards are trying to stop a prison disturbance."); ***United States v. Walsh***, 194 F.3d 37, 48 (2d Cir. 1999) ("Because all excessive force claims in the prison context are qualified, . . . we conclude that the *Hudson* analysis is applicable to excessive force claims brought under the

Fourteenth Amendment as well."); ***Tesch v. County of Green Lake***, 157 F.3d 465, 474 (7th Cir. 1998) ("[T]he Supreme Court and this Court have applied the *Bell* test to analyze constitutional attacks on the general practices, rules, and restrictions of pretrial confinement. . . . However, a second line of cases exists which establishes a different state of mind standard from the *Bell* test when the State denies a pretrial detainee his basic human necessities. Since *Archie v. City of Racine*, 847 F.2d 1211, 1218-19 (7th Cir.1988) (en banc), we have required plaintiffs to establish that officials acted intentionally or in a criminally reckless manner in order to sustain a substantive due process claim for their specific acts or failures to act. Under the alternative description 'deliberate indifference,' we have required plaintiffs to establish that a jail official acted with this level of intent in relation to a pretrial detainee's need for medical care, . . . risk of suicide, . . . risk of harm from other inmates, . . . and need for food and shelter."); ***Scott v. Moore***, 114 F.3d 51, 53-55 (5th Cir. 1997) (en banc) ("In an 'episodic act or omission' case, an actor usually is interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission. Although, in her amended state petition, Scott complains generally of inadequate staffing, . . . the actual harm of which she complains is the sexual assaults committed by Moore during the one eight-hour shift − an episodic event perpetrated by an actor interposed between Scott and the city, but allegedly caused or permitted by the aforesaid general conditions. . . . [A]s to the discrete, episodic act, the detainee must establish only that the constitutional violation complained of was done with subjective deliberate indifference to that detainee's constitutional rights. . . In the instant case, Scott has met that burden. Accordingly, we next must determine whether the city may be held accountable for that violation. Under *Hare*, as we have stated, this latter burden may be met by putting forth facts sufficient to demonstrate that the predicate episodic act or omission resulted from a municipal custom, rule, or policy adopted or maintained with objective deliberate indifference to the detainee's constitutional rights. . . . At best, the evidence proffered by Scott may be construed to suggest that the jail could have been managed better, or that the city lacked sufficient prescience to anticipate that a well-trained jailer would, without warning, assault a female detainee. In either event, they do not reflect objective deliberate indifference to Scott's constitutional rights."); ***Rushing v. Simpson***, No. 4:08CV1338 CDP, 2009 WL 4825196, at **5-7 (E.D. Mo. Dec. 11, 2009) ("The evaluation of excessive force claims brought by pre-trial detainees also relies upon the objective reasonableness standard. *Andrews,* 253 F.3d at 1060. Rushing is neither an arrestee, pre-trial detainee, nor prisoner. As a detainee at MSOTC, awaiting a determination of whether he is a sexually violent predator under Missouri law, Rushing stands in a different position. In *Andrews,* the Eighth Circuit determined that claims of excessive force brought by involuntarily committed state mental patients should be analyzed under the 'objective reasonableness' standard typically applied to pretrial detainees. . . I have previously held that a person involuntarily confined because there is probable cause to believe he is a sexually violent predator stands before the law in much the same way as a person involuntarily confined because there is reason to believe that he has committed a crime. . . Thus, the rights of pretrial detainees serve as a guide to determining the rights of a civil detainee such as Rushing. Because Rushing was a detainee at MSOTC, his allegations of excessive use of force are analyzed under the 'objective reasonableness' standard of

the Fourth Amendment, rather than the Eighth Amendment. Under this standard, the use of force must be necessary to achieve a legitimate institutional interest, such as safety, security, or efficiency. . . The amount of force used must not be in excess of that reasonably believed necessary to achieve those goals. . . The relevant inquiry is whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them. . . . Two recent Eighth Circuit cases have held that the opportunity to comply with an order is a key moment in Fourth Amendment excessive force analysis. . . . Refusal to comply with an officer's orders, when given an opportunity to do so, makes the officer's use of force more reasonable. . . Here, Rushing refused to comply with defendants' orders to return to the dining hall for seven minutes."); ***Clarke v. Blais***, Civil No. 05-177-P-H, 2006 WL 3691478, at *7 & n.7 (D. Me. Dec. 12, 2006) ("Assuming the objective reasonableness standard [footnote omitted] of the Supreme Court precedent extends to claims involving the use of force to control a perceived threat or an outburst by a pretrial detainee, at least where the disturbance is limited to conduct on the part of the pretrial detainee acting alone and not part of a general prison riot, I conclude Clarke has not presented sufficient evidence to survive summary judgment. . . . This approach has not been universally adopted by the circuit courts of appeals, at least three of which have imposed the malicious and sadistic standard to claims of excessive force brought by pretrial detainees where the force was used to suppress a 'disturbance.'[citing cases from 3d, 4th and 5th Circuits] Some courts treat denial of medical care claims the same under either the Eighth Amendment or the Fourteenth Amendment regardless of whether the claimant is a pretrial detainee or an inmate serving a sentence of incarceration. . . . Conceivably, the subjective component might be lowered when it comes to the medical needs of a pretrial detainee. . . However, it does not appear that the objective component would be lowered for pretrial detainees; they would still need to demonstrate the existence of a 'serious' medical need."); ***Guerts v. Piccinni,*** No. C 00-3588 PJH (PR), 2002 WL 467709, at *4 (N.D.Cal. March 25, 2002) (not reported) ("Several circuits have held that the *Hudson* analysis also applies to excessive force claims brought by pretrial detainees under the Fourteenth Amendment. [citing cases] Although the Ninth Circuit has not addressed the issue, it has used the Eighth Amendment as a benchmark for evaluating claims brought by pretrial detainees. . . The court need not resolve the question of whether the *Hudson* standard also applies when considering an excessive force due process claim brought by a pretrial detainee. The actions of defendants were reasonably related to the facility's interest in maintaining jail security, and given plaintiff's agitated condition and refusal to comply with orders to stand still, were not an excessive response. Defendants' actions hence did not constitute 'punishment' in the Fourteenth Amendment sense. They certainly did not rise to the level of malicious and sadistic actions taken for the purpose of causing harm, the *Hudson* standard."); ***Thornhill v. Breazeale***, 88 F. Supp.2d 647, 651 (S.D. Miss. 2000) ("Through a long line of cases involving both convicted prisoners and pretrial detainees, the Fifth Circuit has fashioned two different standards of care that the State owes to a pretrial detainee. A Section 1983 challenge of a jail official's episodic acts or omissions evokes the application of one standard while a challenge of the general conditions, practices, rules, or restrictions of pretrial confinement evokes another. . . A jailer's constitutional liability to a pretrial detainee for episodic acts or omissions is measured by a standard of deliberate indifference. . . Constitutional attacks on general conditions, practices, rules, or restrictions, otherwise known as jail condition cases, are subject to the *Bell* test

which is premised on a reasonable relationship between the condition, practice, rule, or restriction and a legitimate governmental interest.").

See also ***Jones v. Blanas,*** 393 F.3d 918, 931-34 (9th Cir. 2004) ("Jones claims that Blanas and the County violated his substantive due process rights by confining him for a year among the general criminal inmate population of the Sacramento County Jail and for another year in T-Sep, an administrative segregation unit where Jones experienced substantially more restrictive conditions than those prevailing in the Main Jail. While in T-Sep, Jones was afforded substantially less exercise time, phone and visiting privileges, and out-of-cell time than inmates in the general population. Jones was completely cut off from recreational activities, religious services, and physical access to the law library. Jones continued to be subjected to strip searches during this time. . . . Though it purported to analyze Jones's conditions of confinement claim under the Fourteenth Amendment, the district court actually applied the standards that govern a claim of cruel and unusual punishment under the Eighth Amendment. The court mistook the amendment that was to be applied. . . . The case of the individual confined awaiting civil commitment proceedings implicates the intersection between two distinct Fourteenth Amendment imperatives. First, '[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.' *Youngberg*, 457 U.S. at 321-22. Second, when the state detains an individual on a criminal charge, that person, unlike a criminal convict, 'may not be *punished* prior to an adjudication of guilt in accordance with due process of law.' *Bell*, 441 U.S. at 535 (emphasis added). . . As civil detainees retain greater liberty protections than individuals detained under criminal process, *see Youngberg*, 457 U.S. at 321-24, and pre-adjudication detainees retain greater liberty protections than convicted ones, *see Bell*, 441 U.S. at 535-36, it stands to reason that an individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual and at least as great as those afforded to an individual accused but not convicted of a crime. . . . In addition to comparing the conditions of confinement of pre-adjudication *civil* detainees to those of pre-trial *criminal* detainees, it is also relevant to compare confinement conditions of civil detainees *pre-adjudication* to conditions *post-commitment.* As the Eleventh Circuit has persuasively reasoned, '[i]f pretrial detainees cannot be punished because they have not yet been convicted, [citing *Bell*], then [civil] detainees cannot be subjected to conditions of confinement substantially worse than they would face upon commitment.' *Lynch*, 744 F.2d at 1461. Or, to put it more colorfully, purgatory cannot be worse than hell. Therefore when an individual awaiting SVPA adjudication is detained under conditions more restrictive than those the individual would face following SVPA commitment, we presume the treatment is punitive. . . . In sum, a civil detainee awaiting adjudication is entitled to conditions of confinement that are not punitive. . . . With respect to an individual confined awaiting adjudication under civil process, a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held, or where the individual is detained under conditions more restrictive than those he or she would face upon commitment. Finally, to prevail on a Fourteenth Amendment claim

regarding conditions of confinement, the confined individual need not prove 'deliberate indifference' on the part of government officials.").

b. Post-*Kingsley* Decisions

SUPREME COURT

Ziglar v. Abbasi, 137 S. Ct. 1843, 1864-65 (2017) ("The constitutional right is different here, since *Carlson* was predicated on the Eighth Amendment and this claim is predicated on the Fifth. . .And the judicial guidance available to this warden, with respect to his supervisory duties, was less developed. The Court has long made clear the standard for claims alleging failure to provide medical treatment to a prisoner—'deliberate indifference to serious medical needs.' *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The standard for a claim alleging that a warden allowed guards to abuse pre-trial detainees is less clear under the Court's precedents.")

D.C. CIRCUIT

Bah v. District of Columbia, No. CV 23-1248 (JDB), 2024 WL 983329, at *4–5 & n.6 (D.D.C. Mar. 7, 2024) ("*Kingsley* involved an excessive force claim, not a deliberate indifference claim. But a majority of the circuits to consider the question have read *Kingsley* to modify the subjective component of pretrial detainees' deliberate indifference claims, including failure-to-protect claims. [collecting cases] These cases generally reason that a subjective rather than objective requirement as to correctional officers' knowledge of a substantial risk to a pretrial detainee 'cannot be reconciled with *Kingsley'*s language, reasoning, and [emphasis on] the different status of pretrial detainees.'. . The D.C. Circuit has yet to weigh in. However, every judge in this District to consider the matter has agreed with the majority view and extended *Kingsley's* objective standard to other claims by pretrial detainees. [collecting cases] The District attempts to distinguish these cases as involving conditions-of-confinement claims generally, not failure-to-protect claims specifically. . . Yet the District offers no reason why the same reasoning does not apply to failure-to-protect claims, and various of these cases favorably cited failure-to-protect precedents in support of their reasoning. . .The District also cites Fifth Circuit cases that declined to extend *Kingsley*'s objective standard. . . Importantly, however, these cases relied on preexisting Fifth Circuit precedent specifically addressing deliberate-indifference claims brought by pretrial detainees. . . The District has not cited, and this Court is not aware of, comparable precedent in this circuit. To the contrary, the D.C. Circuit has, albeit in a slightly different context, recognized important distinctions between pretrial detainees' Fifth Amendment rights and convicted prisoners' Eighth Amendment rights. . .The Court joins the majority view of the circuits and the judges in this District that, post-*Kingsley*, pretrial detainees' deliberate indifference claims should be analyzed under an objective rather than subjective standard. And the parties' sparring is limited to this purely legal question; the District assumes that Bah has otherwise plausibly alleged a predicate Fifth Amendment violation. . . Hence, the District's sole contention as to why Bah has failed to plausibly allege a predicate constitutional violation is unavailing. . . .The Eighth, Tenth,

and Eleventh Circuits have also declined to extend *Kingsley*. The Eleventh Circuit did so based solely on existing circuit precedent, . . . while the Tenth Circuit did so in part based on existing precedent, *see Strain v. Regalado*, 977 F.3d 984, 989–93 (10th Cir. 2020). The Eighth Circuit's analysis consisted of a single sentence in a footnote. *See Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) ("*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case.").

United States v. Worrell, No. 1:21-CR-00292-RCL, 2021 WL 2366934, at *10 (D.D.C. June 9, 2021) ("A pretrial detainee's claims of unconstitutional conditions of confinement are governed by the Due Process Clause of the Fifth Amendment, rather than Cruel and Unusual Punishments Clause of the Eighth Amendment. *See Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). To evaluate whether the conditions of pretrial detention violate the Fifth Amendment's Due Process Clause, the Supreme Court has stated that a court must determine whether the challenged condition amounts to 'punishment.'. . Government actions taken with an 'expressed intent to punish' clearly constitute punishment. . . When there is no 'expressed intent to punish,' the Court engages in a two-step inquiry. First, the detainee must show an objective deprivation of his constitutional rights. To do so he must show 'that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health.'. . Second, the defendant must show that the official either 'acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety.'. . 'A pretrial detainee thus can prevail if she either introduces evidence of a subjective intent to punish or demonstrates that a restriction is objectively unreasonable or excessive relative to the Government's proffered justification.' *United States v. Moore*, No. 18-CR-198, 2019 WL 2569659, at *2 (D.D.C. June 21, 2019) (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015)).")

D.A.M. v. Barr, No. 20-CV-1321 (CRC), 2020 WL 4218003, at *11, *13 (D.D.C. July 23, 2020) ("To assess whether conditions of confinement violates due process, courts consider whether the conditions 'amount to punishment of the detainee.'. . Because civil immigration detainees, like pretrial criminal detainees, have not been convicted of any present crime, they 'may not be subjected to punishment of any description.'. . In determining whether conditions of confinement amount to punishment, '[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.'. . Because petitioners would remain in ICE's custody during the deportation process up to the point of their release into their home countries, the Court will apply this standard to their challenge to the conditions attendant to that process. . . The relevant inquiry, therefore, is whether the manner in which their deportations would be carried out is 'rationally related to a legitimate nonpunitive governmental purpose or ... appear[s] excessive in relation to that purpose.'. . . The bottom line is that the risks of the removal process cannot be assessed a vacuum. Rather, the Court must ask whether it is reasonable for ICE to expose petitioners to the temporary risks of traveling as compared to the indefinite risks of remaining in congregate detention facilities with transient

detainee populations who have not all been tested for the virus and staff entering and leaving every day. Viewed from that perspective, the Court has little difficulty concluding that petitioners are not likely to show that ICE will subject them to an unreasonable health risk by carrying out their removals with the precautionary measures ICE has committed to taking.")

O.M.G. v. Wolf, No. CV 20-786 (JEB), 2020 WL 4201635, at *9-12 (D.D.C. July 22, 2020) ("Because Petitioners are civil immigration detainees and have not been convicted of any crime, the Due Process Clause 'requires that [they] not be punished.'. . . A detainee can establish unconstitutional punishment in two ways: 1) by showing that 'the disability is imposed for the purpose of punishment'; or 2) by showing that the challenged condition is either not 'reasonably related to a legitimate goal' or 'appears excessive in relation to' that purpose. . . Petitioners make no claim that ICE detains them with the intent of punishing them. It is well established, moreover, that the Government has a legitimate interest in the enforcement of immigration laws, and that such interest is furthered by detaining certain noncitizens. . . . Petitioners' claims therefore turn on whether their detention in current FRC conditions is either 'objectively unreasonable' or 'excessive in relation' to those objectives. . . . The Court agrees with Judge Cooper and other federal district judges around the country, however, that the government's obligation to provide 'reasonable safety' does not 'require that detention facilities reduce the risk of harm to zero' during the COVID-19 pandemic. . . . At this point, ICE's performance seems to be somewhere between 'room for improvement' and 'reasonably successful,' but plenty of daylight — and likely the constitutional line — lies between those two answers. As discussed above, ICE has implemented many COVID-prevention measures, including greatly reducing the detainee population. . . . At a minimum, Petitioners have not demonstrated an obvious violation of their due-process rights. As explained below, even assuming current conditions do cross the line into unconstitutional territory, Petitioners have failed to make the necessary showing that no remedy short of wholesale release will redress their injuries. . . .Petitioners cite several out-of-circuit cases in which they claim district courts ordered release of ICE detainees in response to COVID-19. *See Yanes v. Martin*, No. 20-216, 2020 WL 3047515 (D.R.I. June 2, 2020); *Zepeda Rivas v. Jennings*, No. 20-2731, 2020 WL 2059848 (N.D. Cal. Apr. 29, 2020); *Savino v. Sousa*, No. 20-10617, 2020 WL 1703844 (D. Mass. Apr. 8, 2020). None of those decisions is apposite, however, because none enjoined ICE to categorically release detainees. Instead, each court held that detainees were entitled to individualized bail determinations during which the court would scrutinize 'medical risks, ... criminal and immigration history, [and] the danger if any to public safety presented by the release of that particular detainee.'")

C.G.B. v. Wolf, No. 20-CV-1072 (CRC), 2020 WL 2935111, at *22 n.31 (D.D.C. June 2, 2020) ("The parties dispute whether the standard for sustaining a conditions-of-confinement claim under the Fifth Amendment Due Process Clause is the same as the Eighth Amendment excessive punishment standard. The Government maintains that Plaintiffs are required to show that government officials imposed a punitive conditions of confinement with 'deliberate indifference' to the risks posed by such confinement. Plaintiffs respond that the standard is purely objective—*i.e.*, they need only show that the conditions of confinement are not reasonably related to a

legitimate governmental objective or is excessive in relation to the legitimate governmental objective. In *Kingsley*, the Supreme Court construed *Bell v. Wolfish* in determining the standard that applies to a pre-trial detainee's claim of excessive force. Although a post-conviction detainee is required to show deliberate indifference to the force used against her, a pre-conviction detainee, who may not be constitutionally subjected to punishment before a conviction, need only show that the force used was objectively unreasonable. Does *Kingsley* apply here? While the D.C. Circuit has not addressed the issue, 'many circuit courts have extended *Kingsley*'s objective standard to apply to ... due process claims by pre-trial detainees.' [collecting cases] At least two district courts in this jurisdiction have extended *Kingsley* to due process claims brought by pre-trial criminal detainees. *See, e.g.*, *Banks*, 2020 WL 1914896, at *5–6; *United States v. Moore*, Case No. 18-cr-198 (JEB), 2019 WL 2569659, at *2 (D.D.C. June 21, 2019). The Court is persuaded, both by the language of *Kingsley* and by its fellow courts, to apply the *Kingsley* standard here as well. Accordingly, Plaintiffs need not prove deliberate indifference.")

Jalloh v. Underwood, No. CV 16-1613 (TJK), 2020 WL 2615522, at *3 n.3 (D.D.C. May 22, 2020) ("[S]ome courts have . . . applied *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015)—which removed the subjective component of the standard used to evaluate claims of excessive force by pretrial detainees under the Fourteenth Amendment—to claims of failure to provide medical assistance as well. *See Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (canvassing circuit split and joining the Second and Ninth Circuits in applying *Kingsley* to medical assistance claims while acknowledging that the Fifth, Eighth, and Eleventh Circuits have not); *Banks v. Booth*, No. 20-cv-849 (CKK), 2020 WL 1914896, at *5–6 (D.D.C. Apr. 19, 2020) (applying *Kingsley* to medical assistance claims). If *Kingsley* applies to medical assistance claims, then the liability standards under the Fourth and Fourteenth Amendments would be the same, mooting the question of which amendment governs.")

United States v. Otunyo, No. CR 18-251 (BAH), 2020 WL 2065041, at *12–13 & n.11 (D.D.C. Apr. 28, 2020) ("Several circuits have applied *Kingsley*'s logic beyond the excessive-force context. The D.C. Circuit has not yet considered *Kingsley*'s ramifications, but the Second, Seventh, and Ninth Circuits have uniformly applied the objective 'deliberate indifference' standard broadly to claims challenging conditions of pretrial confinement. [collecting cases] The Sixth Circuit, similarly, has 'noted that *Kingsley* "calls into serious doubt"' the application of the subjective component of the deliberate-indifference test usually applied to pretrial detainees' claims.' *Martin v. Warren Cty.*, No. 19-5132, 2020 WL 360436, at *4 n.4 (6th Cir. Jan. 22, 2020) (quoting *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018)).[11] **[fn. 11:** The Fifth, Eighth, and Eleventh Circuits have declined to extend *Kingsley*, but these decisions—each of which devoted only a footnote to this question—provide little reason to deviate from the path set by the other circuits discussed above. The Fifth and Eleventh Circuits declined to extend *Kingsley* because doing so conflicted with those circuits' existing precedents. *See Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017); *Nam Dang* ex rel. *Vina Dang v. Sheriff*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017). The Eighth Circuit's analysis, meanwhile, consisted of a single sentence, which focused narrowly on *Kingsley*'s holding without

addressing the broad reasoning underlying that holding. *See Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) ("*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case.").**]** Decisions from this Court have also applied the objective version of the 'deliberate indifference' standard to due process challenges to pretrial conditions of confinement. *See, e.g.*, *Banks*, 2020 WL 1914896, at *6; *United States v. Moore*, 18-cr-198 (JEB), 2019 WL 2569659, at *2 (D.D.C. June 21, 2019). *But see, e.g.*, *Lee*, 2020 WL 1541049, at *5 (applying the subjective version of the "deliberate indifference" standard). The reasoning of such cases is persuasive. . . Accordingly, to establish that conditions of confinement violate due process, a defendant need establish only that detaining officials know or should know that those conditions objectively constitute a serious risk to the defendant's health.")

Banks v. Booth, No. CV 20-849(CKK), 2020 WL 1914896, at *5–6 (D.D.C. Apr. 19, 2020) ("While *Kingsley* relates to excessive force rather than prison conditions, in making its decision, the *Kingsley* court relied on *Bell v. Wolfish*, 441 U.S. 520 (1979), a case pertaining to prison conditions. According to the *Kingsley* court, 'as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.'. . Together *Kingsley* and *Bell* provide persuasive authority that a pre-trial detainee need only show that prison conditions are objectively unreasonable in order to state a claim under the due process clause. The parties did not cite and the Court could not find a D.C. Circuit case interpreting *Kingsley* in the context of a claim for deficient prison conditions. However, many circuit courts have extended *Kingsley's* objective standard to apply to other due process claims by pre-trial detainees. For example, the United States Court of Appeals for the Second Circuit has held that, following *Kingsley*, in the context of challenged prison conditions for pre-trial detainees, 'the Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm.' *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d 2017); *see also Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (applying *Kingsley* standard to failure to protect claims by pre-trial detainees); *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019) (finding that "*Kingsley's* objective inquiry applies to all Fourteenth Amendment conditions-of-confinement claims brought by pretrial detainees"). And, at least one district court within this Circuit has also applied *Kingsley's* objective standard to due process claims brought by pre-trial detainees. *See United States v. Moore*, Case No. 18-198-JEB, 2019 WL 2569659, *2 (D.D.C. June 21, 2019) (explaining that a pretrial detainee could prevail on a due process claim "if she either introduces evidence of a subjective intent to punish or demonstrates that a restriction is objectively unreasonable or excessive relative to the Government's proffered justification"). Based on the pertinent reasoning of *Kingsley* and the persuasive authority of other courts, the Court concludes that pre-trial detainee Plaintiffs Phillips and Smith do not need to show deliberate indifference in order to state a due process claim for inadequate conditions of confinement. As such, under the due process clause, pre-trial detainee Plaintiffs Phillips and Smith are likely to succeed on the merits by showing that the Defendants knew or should have known that the jail conditions posed an excessive risk to their health. And, under the Eighth Amendment, post-conviction detainee

Plaintiff Banks must show that the jail conditions exposed him to an unreasonable risk of serious damage to his health and that Defendants acted with deliberate indifference in posing such a risk.")

FIRST CIRCUIT

Miranda-Rivera v. Toledo-Davila, 813 F.3d 64, 70-73 (1st Cir. 2016) ("The Supreme Court has historically reserved the question of whether the Fourth Amendment standard of objective reasonableness or a Fourteenth Amendment substantive due process standard requiring a defendant to have a 'sufficiently culpable state of mind,' . . . applies to persons who have been arrested but who are not yet 'pretrial detainees' because they have not yet gone before a magistrate judge for a probable cause hearing. . . At the time of the district court's decision, other circuits were split over this question. [collecting cases]The First Circuit has not yet answered the question, although some district courts within the First Circuit have applied the majority rule. . . Since then, the Supreme Court has held that the appropriate standard for a pretrial detainee's Fourteenth Amendment excessive force claim is simply objective reasonableness. . . . Since *Kingsley* has extended the objective reasonableness standard for use of force from the arrest stage through the probable cause hearing, whether the Fourth or Fourteenth Amendment standard applies presents less of a problem in cases like this one than before. In this case, the district court 'identif[ied] the specific constitutional right allegedly infringed by the challenged application of force,'. . . as the Fourth Amendment's protection against unreasonable seizures. The parties do not challenge that holding, and we have no reason to do so as the alleged use of excessive force here occurred while Officers Pérez and Rivera were transporting Rojas to the police station and then to a jail cell. Given these facts, and given the authority favoring the application of the Fourth Amendment to similar factual scenarios, we apply the Fourth Amendment standard to Rojas's excessive force claim. . . . Since there is sufficient evidence to make out an excessive force claim, Pérez is not entitled to qualified immunity on the first ground. Nor is Officer Pérez entitled to qualified immunity on the 'clearly established' ground. The district court stated in a footnote that Defendants may be entitled to qualified immunity because it was unclear in 2007 which constitutional standard governed arrestees' excessive force claims in the First Circuit. We are not persuaded. The main difference between the Fourth and Fourteenth Amendment excessive force standards prior to *Kingsley* was whether, in retrospect, we inquire into an officer's subjective mindset. However, at their core, both the Fourth and Fourteenth Amendments are concerned with whether an officer's actions depart from what a reasonable officer would do, and whether those actions serve some legitimate governmental purpose. . . A reasonable officer faced with the question of what to do with Rojas would have known that using more force than necessary violated both of those standards and therefore a clearly established constitutional rule to use force in the way that the officers here appear to have done. Here, during the entire time period in which the officers are alleged to have applied excessive force to Rojas (i.e., from Rojas's arrest to his death in the holding cell), Rojas was handcuffed and did not pose a great physical threat to the officers. The record suggests that Rojas initially appeared paranoid, screaming incoherently, and that, while handcuffed, he attempted to resist being transported to the police station and being incarcerated. There is sufficient evidence for a reasonable jury to conclude that the officers used force that resulted in

disproportionately severe injuries to Rojas—e.g., multiple lacerations, contusions, and abrasions throughout his body—and ultimately in his death. We therefore conclude that, regardless of whether the Fourth or Fourteenth Amendment applied after his arrest, a reasonable officer would have known that using force in the way that the officers here appear to have done in the particular factual circumstances that they encountered violated Rojas's constitutional rights. . . Accordingly, Pérez is not entitled to qualified immunity on the excessive force claim.")

Smart v. Strafford County, No. 22-CV-00436-PB, 2024 WL 4751400, at *7 (D.N.H. Nov. 12, 2024) ("Since *Kingsley*, several circuit courts have held that a Fourteenth Amendment medical care claim must be evaluated using an objective deliberate indifference standard, which has generally been understood to require proof only that the defendant acted recklessly rather than negligently with respect to a detainee's serious medical needs. . . Plaintiffs rely on *Kingsley* in asking me to follow the path established by these circuits. As I explain, however, I need not stake out a position on the issue because, even if I were to conclude that such a claim does not require proof of subjective deliberate indifference, plaintiffs do not have a triable Fourteenth Amendment medical care claim against any of the individual defendants.")

Thompson v. Howry, No. 22-CV-00151-PB, 2024 WL 4350214, at *7–8 (D.N.H. Sept. 30, 2024) ("In practice, . . . the First Circuit has consistently applied the Eighth Amendment test to medical care claims by pretrial detainees without further elaboration. . .Other circuits that have addressed the legal standard for medical treatment claims by pretrial detainees have split over whether the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389, 395 (2015), entitles pretrial detainees to greater protection than the Eighth Amendment provides to post-conviction inmates. . . In particular, the Second, Seventh, and Ninth Circuits have held that the Fourteenth Amendment protects pretrial detainees from objective 'deliberate indifference' to their need for medical care. . . Under this purely objective standard, a constitutional violation can be found when an official 'recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official[...] should have known[ ] that the condition posed an excessive risk to health or safety.'. . Declining the *Kingsley* invitation, though, the Fifth, Eighth, and Eleventh Circuits have held that the subjective 'deliberate indifference' test should apply for both pretrial and post-conviction inmates. . . In other words, these circuits have held that proving a claim for failure to provide adequate medical attention for a pretrial detainee requires a showing both of an objectively serious medical need and of a subjective deliberate indifference to that need. The First Circuit has not addressed the post-*Kingsley* circuit split as to whether a due process medical treatment claim can be established without proof of subjective deliberate indifference. Nor have the parties presented developed arguments on this important legal question. And, even if I were to be persuaded that a medical treatment claim by a pretrial detainee does not require proof of subjective deliberate indifference, I would need to determine whether the individual defendants were nevertheless entitled to qualified immunity on such claims. Because the First Circuit has never held that a due process medical treatment claim can be established without proof of subjective deliberate indifference, a question arises as to whether the law on this point was clearly established when the defendants failed to treat Thompson. In *Sandoval v. County*

of San Diego, 985 F.3d 657 (9th Cir. 2021), the majority held that 'because the clearly established law prong [of the qualified immunity analysis] focuses objectively on whether it would be clear that the defendant's conduct violated the constitution, lack of notice regarding the mental state required to establish liability has no bearing on the [qualified immunity] analysis.'. . In contrast, the partial dissent in *Sandoval* concluded that a court was not free to ignore a change in the law as to whether subjective deliberate indifference was required to prove a due process medical treatment claim when conducting a qualified immunity analysis. . . Because this difficult issue was also not briefed by the parties, I am unable to determine on the present record whether any of the individual defendants are entitled to summary judgment on Thompson's medical treatment claims. Accordingly, I deny the defendants' motion for summary judgment with respect to these claims.")

Cox v. City of Boston, No. CV 22-11009-RGS, 2024 WL 4608587, at *2 (D. Mass. Oct. 29, 2024) ("Cox argues that the court erred in ruling that it was bound by prior First Circuit decisions in refusing to apply the objective-reasonableness standard that the Supreme Court adopted in § 1983 Fourteenth Amendment excessive force cases in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). . . As the court pointed out, the First Circuit *in Zingg v. Groblewski*, 907 F.3d 630, 634-635 (1st Cir. 2018), and *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 74 (1st Cir. 2016), despite the *Kingsley* holding, had adhered to the deliberate-indifference standard in non-excessive force cases involving the Fourteenth Amendment rights of pretrial detainees. While the Supreme Court in the nine years since the *Kingsley* decision has chosen not to extend the objective-unreasonableness standard beyond its facts, the argument that it should do so is not frivolous. Indeed, the Circuits since *Kingsley* have found themselves at odds over the issue, with the Second, Seventh, and Ninth Circuits aligned with the objective test, while the First, Fifth, Eighth, and Eleventh Circuits have held *Kingsley* to be confined to excessive force claims. . . Whatever the merits of the debate, and accepting Cox's argument that the First Circuit in *Zingg* and *Miranda-Rivera* did not explicitly reject *Kingsley's* objective-unreasonableness test, in the absence of a squarely binding Supreme Court decision mandating a divergence, it is not within the authority of a district court to blaze trails contrary to existing First Circuit precedent.")

Cox v. City of Boston, No. CV 22-11009-RGS, 2024 WL 2186840, at *4 & n.6 (D. Mass. May 14, 2024) ("The parties dispute whether the court should apply a deliberate indifference or objective reasonableness standard in analyzing Count I. In *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), the Supreme Court held that an objective test applies to Fourteenth Amendment excessive force claims brought by pretrial detainees. . . In the wake of *Kingsley*, the federal circuits are split on whether the objective test also applies to claims of failure to provide adequate medical care brought by pretrial detainees.[6] **[fn. 6:** Five Circuits have adopted an objective test. *See, e.g.*, *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Short v. Hartman*, 87 F.4th 593, 609-612 (4th Cir. 2023); *Brawner v. Scott Cnty.*, 14 F.4th 585, 596-597 (6th Cir. 2021); *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352-353 (7th Cir. 2018); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1124-1125 (9th Cir. 2018). Four Circuits have continued to apply a deliberate indifference standard. *See Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 (5th Cir. 2017); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984, 989 (10th Cir.

2020); *Dang ex rel. Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).**]** The First Circuit has not directly joined the issue but, post-*Kingsley*, has iterated that due process protections for pretrial detainees 'extend at least as far as the protection that the Eighth Amendment gives to a convicted prisoner.'. . Because Cox could prevail under either standard, this court need not attempt to resolve the issue.")

Glennie v. Garland, No. CV 21-231JJM, 2023 WL 2265247, at *6 n.14 (D.R.I. Feb. 28, 2023) ("Since *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), some courts have questioned whether a Due Process Clause claim of inadequate medical care requires an affirmative showing of deliberate indifference as required by the Eighth Amendment or whether it requires merely that the conduct 'purposely or knowingly used against [the claimant] was objectively unreasonable.'. . However, following *Kingsley*, the First Circuit has continued to apply the Eighth Amendment test to detainee claims of inadequate medical care. [collecting cases] Guided by this precedent and mindful that neither Plaintiff nor Defendants have argued that the Court should apply an objective reasonableness test to the aspects of the claims that arise under the Fifth/Fourteenth Amendments' Due Process Clauses, my analysis is grounded in traditional Eighth Amendment jurisprudence.")

Silva v. Clarke, No. CV 19-568JJM, 2022 WL 1091336, at *8 (D.R.I. Apr. 12, 2022) (" While this Court has applied the objective reasonableness standard to a *civil* detainee's medical claim, . . . following *Kingsley*, the First Circuit has continued to apply the Eighth Amendment test to detainee claims of inadequate medical care. . . District courts in this Circuit have done the same. . . In light of controlling precedent (*Zingg* and *Miranda-Rivera*) and mindful that neither Mr. Silva nor Dr. Clarke has argued that the Court should apply the objective test, . . . the Court will apply the traditional Eighth Amendment two-part objective/subjective standard.")

Rancourt v. Hillsborough County, No. 20-CV-351-PB, 2022 WL 344812, at *3 (D.N.H. Feb. 4, 2022) ("Because Rancourt was a pretrial detainee, her § 1983 claims for constitutionally inadequate medical care are rooted in the due process clause of the Fourteenth Amendment. . . The circuit courts disagree whether such claims are subject to the Eighth Amendment's two-part subjective and objective deliberate indifference test or the purely objective test that the Supreme Court applied to pretrial detainees' excessive force claims in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). . . As Judge Laplante recently noted in analyzing this issue, the First Circuit has continued to apply the Eighth Amendment test post-*Kingsley* to detainee claims of constitutionally inadequate medical care. . . Accordingly, I agree with defendants that I must apply the Eighth Amendment test to Rancourt's claims.")

Estate of Sacco v. Hillsborough County House of Corrections, No. 1:20-CV-447-JL, 2021 WL 2012639, at *5 & nn. 42, 43 (D.N.H. May 20, 2021) ("Neither the Supreme Court nor the First Circuit Court of Appeals has extended the *Kingsley* holding to other contexts. In the absence of authority explicitly changing the standard, the court must rely on existing First Circuit precedent in deliberate indifference cases, which includes 'both objective and subjective components.' [collecting cases] Indeed, following *Kingsley*, the First Circuit Court of Appeals has continued to

apply the two-part objective and subjective test to deliberately indifferent medical care claims by pretrial detainees. . . Notably, the *Miranda-Rivera* court acknowledged that *Kingsley* changed the standard for excessive force claims and proceeded to apply an objective reasonableness standard to the plaintiff's excessive force claim, but did not apply it to his deliberate indifference claim. . . Courts in this district have similarly applied *Kingsley* to excessive force claims, but not deliberate indifference claims. . . The court will accordingly apply the traditional two-part standard here. . . . The court recognizes there is a circuit split on whether *Kingsley's* objective unreasonableness standard should extend to deliberately indifferent medical care claims, with the Ninth, Second, and Seventh Circuits applying the objective standard, and the Fifth, Eighth, and Eleventh Circuits declining to apply *Kingsley's* objective standard to detainee medical care claims. . . The court also acknowledges Chief Judge McCafferty's prediction that based on *Kingsley* 'it is likely that civil detainees no longer need to show subjective deliberate indifference in order to state a due process claim for inadequate conditions of confinement.' *Gomes v. US Dep't of Homeland Sec., Acting Sec'y*, 460 F. Supp. 3d 132, 148 (D.N.H. 2020). This statement, however, was dicta because the outcome in *Gomes* was the same under either standard and Judge McCafferty later 'decline[d] to resolve whether *Kingsley* changed the applicable standard for due process claims brought by civil detainees.'. . Absent controlling authority from the Supreme Court or First Circuit Court of Appeals, this court will not attempt to predict whether *Kingsley's* objective standard applies to deliberately indifferent medical care claims under the Due Process Clause of the Fourteenth Amendment by criminal pretrial detainees. . . . Despite urging the court to apply *Kingsley's* objective unreasonableness standard to this case, the Plaintiff does not explain how that standard should be applied to its deliberate indifference claim. Perhaps for good reason, as the *Kingsley* court merely held that 'a pretrial detainee must show only that the force purposefully or knowingly used against him was objectively unreasonable,' and noted that this is not a mechanical standard but one that turns on the facts and circumstances of each case, and depends on a number of non-exclusive factors. . . The Plaintiff also cites *Youngberg v. Romeo*, 457 U.S. 307 (1982) for the proposition that criminal pretrial detainees are entitled to more considerate treatment and conditions of confinement than convicted criminals. . . But *Youngberg* involved a civilly committed individual and the quote that the Plaintiff relies on actually starts with 'Persons who have been involuntarily committed' *not* 'criminal pretrial detainees.'. . Quoted accurately, *Youngberg* does not help the Plaintiff here.")

Dunn v. Barry, No. CV 18-10581-MPK, 2021 WL 1967883, at *9 n.31 (D. Mass. May 17, 2021) ("The parties disagree on the proper standard to be applied in a medical care case: the stricter Eighth Amendment 'deliberate indifference' standard or the 'objectively unreasonable' standard articulated in *Kingsley v. Hendrickson*, 576 U.S. 389, 396-400 (2015), an excessive force case. The First Circuit has yet to weigh in on the debate. The court need not resolve the issue since plaintiffs' claim passes muster at this juncture, depending how the facts are ultimately determined, under either standard.")

Silva v. State of Rhode Island, No. CV 19-568JJM, 2021 WL 1326885, at *4-5 (D.R.I. Apr. 9, 2021) ("Since *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), it has been unclear whether this right

means that a pretrial detainee asserting that he has been denied adequate medical care must show deliberate indifference as required by the Eighth Amendment, or merely that the conduct 'purposely or knowingly used against him was objectively unreasonable.'. . Notably, while this Court has applied the objective reasonableness standard to a *civil* detainee's medical claim, *Medeiros v. Martin*, 458 F. Supp. 3d 122, 128 & 128 n.1 (D.R.I. May 1, 2020), and courts generally apply the same standard for civil detainees as for pretrial criminal detainees, . . . post-*Kingsley*, the overwhelming majority of district courts in the First Circuit have continued to apply the Eighth Amendment standard to criminal detainees' claims of inadequate medical care. [collecting cases] . . . .With regard to medical care, the Court need not resolve whether the applicable standard is Eighth-Amendment deliberate indifference or objective reasonableness – the evidence is clear that Plaintiff's medical claim fails to meet the threshold for an interim mandatory injunction even under the more lenient standard. That is, Plaintiff has not sustained his burden of proving that he has a serious unmet medical need *or* that RIDOC's ongoing approach to his medical issues is objectively unreasonable.")

Dorce v. Wolf, 506 F. Supp.3d 142, ___ (D. Mass. 2020) ("[P]laintiff in this case does not challenge a discretionary decision concerning his eligibility for removal. He claims instead that the circumstances of his transfer violated his right to substantive due process under the Fifth Amendment. . . . To establish a likelihood of success on the merits, he must show that defendants' conduct was objectively unreasonable— that it was not rationally related to a legitimate government objective or that it was excessive in relation to that purpose. *See Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979); *see also Kingsley v. Hendrickson*, 576 U.S. 389, 396-97 (2015). Based on exhibits A, B, C, and F attached to the complaint, petitioner is likely to succeed in establishing that the risk was 'so grave that it violates contemporary standards of decency to expose anyone *unwillingly* to such a risk.'. ._ On March 13, 2020, the federal government declared a national emergency due to the novel coronavirus. . . In response, the Centers for Disease Control urged the public to observe social distancing guidelines and limit nonessential travel. Nonetheless, between June 9 and June 10, 2020, petitioner made no fewer than four stops on the journey to ECDC. He was forced to comingle with detainees from other facilities on the aircraft and during the overnight stay at the LaSalle ICE Processing Center (LaSalle). He alleges that he had no opportunity to social distance or to disinfect his surroundings despite foul sanitary conditions at LaSalle and on the eight-hour van ride to Etowah. He explains that it was 'impossible to avoid coming into contact with other people's bodily fluids in the van's bathroom because they were shackled so tightly.'. . These circumstances substantially increased petitioner's risk of COVID-19 exposure. By ICE's own admission, transfer 'creates a greater risk of detainees being exposed to, or exposing others to, COVID-19.'. . Petitioner points to news reports finding that transfer of ICE COVID-19 at detention centers throughout the country. . . He is thus likely to succeed in proving that defendants' actions were objectively unreasonable because defendants knew or should have known that the transfer posed an excessive risk to his health.")

Gomes v. U.S. Dep't of Homeland Security, No. 20-CV-453-LM, 2020 WL 3577302, at *2–3 (D.N.H. July 1, 2020) ("The First Circuit has yet to address whether *Kingsley*'s objective test is

limited to excessive force claims or applies to other due process claims brought by civil detainees. District courts within the First Circuit have reached different conclusions on this question. . . The court need not resolve this question because even applying an 'objective reasonableness' test, the lower-risk petitioners have not met their burden. The court reaches this conclusion despite the lack of any meaningful dispute that COVID-19 presents a substantial risk of serious harm to the health of even lower-risk detainees, as it does members of the society at large. . . Although 'the harm of a COVID-19 infection will generally be more serious for some petitioners than for others' it 'cannot be denied that the virus is gravely dangerous to all of us.'. . . The question is whether petitioners have carried their burden and demonstrated that—with regard to lower-risk detainees—they are likely to succeed on their claim that conditions at SCHOC remain objectively unreasonable. . . While the respondents' approach to reducing the risks of COVID-19 has not been flawless, it has been, on balance, objectively reasonable.")

Yanes v. Martin, 464 F.Supp.3d 467, ___ n. 3 (D.R.I. 2020) ("*Kingsley* appeared to do away, with respect to detainees, with the need to show the subjective state of mind that is a hallmark of the 'deliberate indifference' or 'reckless disregard' formulations. . . While the First Circuit has not ruled on this precise issue since *Kingsley*, the *Kingsley* standard of 'objective reasonableness' is the appropriate one to be applied to an action like this brought by civil detainees such as the petitioners. That is consistent with the determination of another judge in this district, ruling on a motion for release of specific ICE detainees. *Medeiros v. Martin*, C.A. No. 20-178 WES, 2020 WL 2104897, at *4 (D.R.I. May 1, 2020). In fact, the Court is perplexed by the government's assertion in its filings in this case that the appropriate standard of review is that of 'deliberate indifference.' In *Medeiros*, the government apparently conceded that the more generous standard of objectively unreasonable is the appropriate standard of review. . . The respondents have cited *Medeiros* and that exact order with approval at various points in its filing. . . The First Circuit has recently found the *Kingsley* 'objective unreasonableness' standard appropriate for an arrestee's Fourth Amendment excessive force claim, while applying an Eighth Amendment 'deliberate indifference' standard to medical care. *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 71 (1st Cir. 2016). *But see Fraihat v. U.S. Immig'n & Customs Enforcement*, Case No. EDCV 19-1546 JGB (SHKx), 2020 WL 1932570 at *22 (C.D. Cal. Apr. 20, 2020) (applying 'objective unreasonableness' standard to due process claims by ICE detainees about dangerous medical conditions). In truth, a purely objective reasonableness test and one with a subjective element of 'deliberate indifference' are likely to lead to similar places. There can be no real dispute that the respondents are and have been aware of the risks of the virus and its horrifying infectiousness. ICE, the CDC, the White House, and all manner of state and federal agencies have bombarded the public and institutions with warnings. The respondents' conduct at the facility, in taking some precautionary measures but not others, has presumably been intentional. Both formulations look at what the respondents knew, what they did, and what they should have done.")

Gomes v. U.S. Dep't of Homeland Security, No. 20-CV-453-LM, 2020 WL 2514541, at *1, *11-12 (D.N.H. May 14, 2020) ("The most pressing question at the outset of this case is whether the detainees are entitled to bail hearings pending a ruling on the merits of their constitutional claims.

The court has answered that question in the affirmative for those detainees who have medical conditions (or are of an age) that render them particularly vulnerable to COVID-19. As of May 14, the court has conducted 11 bail hearings and released 7 detainees on conditions. With respect to the lower-risk detainees, the court explains in this order why it is not yet prepared to answer the question of whether they are entitled to bail hearings. . . . The Supreme Court has not issued any decision since *Kingsley* directly addressing whether the purposeful or knowing, objective unreasonableness standard applied in *Kingsley* also applies to claims brought by pretrial detainees about government acts or omissions that deny them medical care or expose them to substantial health and safety risks. There is a circuit split on that question. [collecting cases] Nearly all of the First Circuit cases that have looked to the Eighth Amendment for guidance in evaluating pretrial detainee due process deliberate indifference claims predate *Kingsley*. . . Only twice since *Kingsley* has the First Circuit issued an opinion concerning a pretrial detainee medical care claim, and in both cases, the court applied the Eighth Amendment standard. *See Zingg v. Groblewski*, 907 F.3d 630, 634-35 (1st Cir. 2018); *Miranda-Rivera*, 813 F.3d at 74. But the First Circuit's approach to the deliberate indifference claims in those cases does not appear to foreclose a ruling that *Kingsley* has changed the standard. . . In the absence of binding, post-*Kingsley* authority, district courts within the First Circuit do not agree whether the subjective prong of a deliberate indifference claim still applies to due process claims brought by civil detainees. Some courts have continued to analyze deliberate indifference claims without considering whether *Kingsley* altered the applicable standard. . . One court reasoned there was 'much to be said' for extending *Kingsley* to pretrial detainee due process claims but declined to do so given pre-*Kingsley* First Circuit precedent . . . and the fact that 'whether *Kingsley* will ultimately be extended by the First Circuit to encompass conditions of confinement claims has no bearing on the outcome.' [citing cases] Magistrate Judge Nivison has consistently held that post-*Kingsley*, an objective standard is sufficient to establish defendant liability for deliberate indifference claims brought by pretrial detainees. [citing cases] Most recently, in a case in which three ICE detainees at Wyatt Detention Center brought habeas corpus petitions alleging that their conditions of confinement violated their due process rights, Judge Smith accepted both parties' agreement that 'objective unreasonableness' was the appropriate post-*Kingsley* standard and analyzed the case through an 'objective unreasonableness prism.' *Medeiros v. Martin*, No. CV 20-178 WES, 2020 WL 2104897, at *4, n.1 (D.R.I. May 1, 2020). Based on the pertinent reasoning of *Kingsley* and the persuasive authority of other courts, it is likely that civil detainees no longer need to show subjective deliberate indifference in order to state a due process claim for inadequate conditions of confinement. However, whether the court analyzes petitioners' due process claim through a traditional Eighth Amendment deliberate indifference standard—which includes a subjective prong—or interprets *Kingsley* as having altered the standard, the result is the same. Detainees who have medical conditions that place them at higher risk for serious illness from exposure to COVID-19 have demonstrated that they are likely to succeed on the merits of their due process claim. It is a close call whether lower-risk detainees are likely to succeed under either standard given the lack of COVID-19 at the facility and the steps SCHOC has taken to reduce the risk. Therefore, because the outcome is the same under either standard, at this preliminary phase of the case, the court

declines to resolve whether *Kingsley* changed the applicable standard for due process claims brought by civil detainees.")

Medeiros v. Martin, 458 F.Supp.3d 122, ___ (D.R.I. 2020) ("Each Petitioner is diagnosed with a CDC-recognized underlying health condition that makes him especially susceptible to risks associated with complications of COVID-19. . . . It is also well known that congregate living, such as nursing homes, cruise ships, aircraft carriers, and that at Wyatt and other detention facilities and prisons, magnifies the risk of contracting COVID-19. . . . The Court does not doubt that Wyatt's precautions may be adequate to ensure the safety of many if not most detainees, but that is not the question presently before the Court. Because these Petitioners' health issues distinguish them from a typical detainee, . . . measures designed to mitigate the spread of infection, even perfectly executed, are inadequate to protect vulnerable persons like them. . . The Court thus concludes that Petitioners, absent the requested relief, are at a significant risk of irreparable harm. . . . Without a conviction, conditions of confinement may not 'amount to punishment of the detainee.'. . Conditions are constitutional, and not an unconstitutional punishment, so long as they are 'reasonably related to a legitimate governmental objective.'. . Petitioners must prove that Respondents' conduct is '"not rationally related to a legitimate governmental objective or that it [was] excessive in relation to that purpose."' *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 70 (1st Cir. 2016) (quoting *Kingsley*, 135 S. Ct. at 2473-74) (analyzing claim of excessive force); *see also Banks*, 2020 WL 1914896, at *5. At this stage, Petitioners have the burden of showing a likelihood of success in proving that Respondents' conduct is 'objectively unreasonable'. *Kingsley*, 135 S. Ct. at 2473-74. Both parties agree that 'objective unreasonableness' is the appropriate benchmark. . . .Viewed through this 'objective unreasonableness' prism, the Court finds that Petitioners have met their burden. As detailed above, Petitioners have established not only that Wyatt's congregate living increases Petitioners' risk of contracting COVID-19, but also, and of greater constitutional significance, that their underlying medical conditions increase their risk of severe complications of COVID-19. . . At this point, '[t]he risk of contracting COVID-19 in tightly-confined spaces, especially jails, [is] "exceedingly obvious."'. . Moreover, courts have held that precautions failing to ensure reasonable safety cannot be reasonable. . . To be clear, the Court is not holding that 'the fact of detention itself [is] an "excessive" condition solely due to the risk of a communicable disease outbreak ....' *Dawson*, 2020 WL 1304557, at *2. Rather, the Court is persuaded by Petitioners' evidence that COVID-19 has infiltrated Wyatt, and that Wyatt's increased precautions, although addressing generalized needs of detainees, 'do nothing to alleviate the *specific*, *serious*, and *unmet* medical needs of the[se] high-risk detainees, who require greater precautions in light of their correspondingly greater risk of *severe* illness if they contract COVID-19.'. . Accordingly, the Court is satisfied that Petitioners have shown a likelihood of success of showing Respondents' COVID-19 precautions are objectively unreasonable as to these particular Petitioners.")

Vick v. Moore, No. 19-CV-267-SJM-AKJ, 2019 WL 2325996, at *2 n.3 (D.R.I. May 31, 2019) ("As the question is not squarely presented, this court does not express any opinion as to whether a pretrial detainee could plead a viable Fourteenth Amendment medical care claim based on facts

showing defendants' purposeful, knowing, or reckless disregard of an excessive risk to a serious medical need. *See Miranda v. Cty. of Lake*, 900 F.3d 335, 354 (7th Cir. 2018). *Cf. Estate of Vallina v. Cty. of Teller Sheriff's Office*, 757 F. App'x 643, 646 (10th Cir. 2018) (noting Circuit split as to whether *Kingsley*, 135 S. Ct. at 2472-74, alters the mens rea standard required for detainee medical care claims).")

Wallace v. Cousins, No. CV 14-14767-GAO, 2017 WL 551816, at *3 (D. Mass. Feb. 8, 2017) (applied *Kingsley* to excessive force claim but not to medical needs claim) ("Correctional officials violate the Eighth Amendment prohibition of cruel and unusual punishment of prisoners if their 'acts or omissions [are] sufficiently harmful to evidence deliberate indifference to serious medical needs.' . . The same standard applies to pretrial detainees by reason of the Due Process Clause of the Fourteenth Amendment. Ruiz-Rosa v. Rullan, 485 F.3d 150, 155 (1st Cir. 2007) (citing Burrell v. Hampshire Cnty., 307 F.3d 1, 7 (1st Cir. 2002)).")

McKenney v. Joyce, 2016 WL 6304678, at *4 & n.4 (D. Me. Oct. 27, 2016) ("The First Circuit has describe a pretrial detainee's liberty interest in non-punitive conditions of confinement as 'coextensive with those of the Eighth Amendment's prohibition against cruel and unusual punishment.' *Surprenant*, 424 F.3d at 18. Conditions are thus punitive if they are below the 'minimal measure of necessities required for civilized living.'. . A pretrial detainee can also establish that he has been punished 'by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.' *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015). . . . Concerning the Supreme Court's use of the phrase 'only objective evidence,' a condition of confinement claim against a particular individual defendant often will include an additional, subjective component (proof of deliberate indifference) in order to establish that particular defendant's liability. . . However, where the conduct in question is 'purposefully or knowingly' applied, satisfaction of an objective standard is sufficient to establish liability. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015). This discussion assumes, *arguendo*, that Plaintiff's allegations describe a condition purposefully or knowingly applied by the named Defendants.")

Doan v. Bergeron, No. 15-CV-11725-IT, 2016 WL 5346935, at *4 (D. Mass. Sept. 23, 2016) ("Immigration detainees' constitutional claims status is akin to that of pretrial detainees. . . 'Pretrial detainees are protected under the ... Due Process Clause rather than the Eighth Amendment; however, the standard to be applied is the same as that used in Eighth Amendment cases.' *Burrell v. Hampshire Ctv.*, 307 F.3d 1, 7 (1st Cir. 2002) (citing *Bell v. Wolfish*, 441 U.S. 520, 545 (1979)). Under the Eighth Amendment standard, a detainee must prove that defendants' withholding of 'essential health care ... amounted to "deliberate indifference to a serious medical need."'. . Mere 'substandard care, malpractice, negligence, inadvertent failure to provide care, and disagreement as to the appropriate course of treatment' is 'insufficient to prove a constitutional violation.'. . Instead, deliberate indifference may be established 'by decisions about medical care made recklessly with "actual knowledge of impending harm, easily preventable."'")

Holloman v. Clarke, No. 14-12594-NMG, 2016 WL 5339721, at *2–3 (D. Mass. Sept. 22, 2016) ("[C]ases before 2012, when the conduct here allegedly occurred, clearly establish that an officer has a duty to intervene when another officer uses excessive force against a pretrial detainee. . . Even though the Supreme Court held in 2015 that the Fourteenth Amendment objective standard applies to pretrial detainees in excessive force cases, both the Fourteenth Amendment and the standard for failure to intervene turn on the reasonableness of the circumstances. As a result, the standard was clearly established in 2012. . . Because Holloman has alleged a constitutional violation that was clearly established at the time of the alleged conduct of Ferrarra and Maine, they are not entitled to qualified immunity.")

SECOND CIRCUIT

Lara-Grimaldi v. County of Putnam, No. 23-0040, 2025 WL 922897, at *17, *24 (2d Cir. Mar. 27, 2025) ("[T]he 'or should have known' prong of the objective standard for assessing deliberate indifference means that an officer's *lack* of actual knowledge is not to be considered. The district court here, in concluding that no reasonable juror could find Jackson, Napolitano, or Nigro to have been deliberately indifferent to the risk of a Grimaldi suicide attempt, appeared to find relevant the descriptions by these defendants as to their lack of knowledge or lack of belief in any such risk. The court noted testimony by 'Napolitano, Jackson, and Nigro ... suggesting that they *did not believe* Grimaldi was a suicide risk'; that 'Jackson *at no point thought* Grimaldi needed more than routine supervision;' and that 'Nigro "*never knew* that [Grimaldi's suicide attempt] could happen."'. . In *Kingsley*, the Supreme Court viewed instructions containing such references to the defendant officers' state of mind as erroneous because 'the jury was instructed to consider ... [w]hether [respondents] reasonably believed there was a threat,' which helped to 'suggest[that] the jury should weigh respondents' subjective reasons ... and subjective views about' their conduct. . . As 'that was error' as a jury instruction for determinations of fact, . . . even less is it appropriate as an element in the court's consideration of whether to grant judgment for the defendants as a matter of law. . . .In sum, a rational juror could find that Nigro testified falsely at her deposition in (a) denying her knowledge of any of Grimaldi's three risk indicia, and (b) insisting that she had performed the required routine care check on Grimaldi on the afternoon of October 28. And it could find that she falsely indicated to others that she had asked Grimaldi about her condition and expectations when in fact she had not. With the record viewed as a whole, and with permissible inferences drawn in favor of Plaintiff, a rational juror--finding that Nigro had falsely denied having knowledge of Grimaldi's three risk indicia, had falsely stated to a coworker and the Sheriff that she had asked Grimaldi about her expectation of withdrawal symptoms, and had falsely claimed orally, and in writing, and under oath at her deposition that she had performed the required routine check--could find (a) that Nigro either knew or should have known that Grimaldi was expecting withdrawal symptoms, and (b) that, by not performing the required routine check, Nigro deliberately disregarded a significant risk that Grimaldi might attempt to commit suicide. We conclude that the district court's grant of summary judgment dismissing Plaintiff's § 1983 deliberate indifference claim against Nigro was error.")

Callwood v. Meyer, No. 20-2091-CV, 2022 WL 1642558, at *3 & n.2 (2d Cir. May 24, 2022) (not reported) ("At the time of the events in this case (February 2014), this Court's standard as to the relevant prong of a Fourteenth Amendment deliberate indifference claim employed a subjective perspective, *i.e.*, whether the defendant 'was both aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and also drew the inference.'. . On the merits, the Plaintiffs point to no record evidence that Strand—who was told merely that Hardaway was 'faking' an unidentified medical issue and who was provided with no additional detail about Hardaway's condition—was aware of facts from which an inference of substantial risk of harm to Hardaway could be drawn, or that Strand drew such an inference. . . Nor have we been pointed to evidence that Strand either observed or had reason to know that 'any constitutional violation [was being] committed by a law enforcement official' against Hardaway. . . The Plaintiffs have thus failed to show that Strand 'acted with deliberate indifference' to Hardaway's medical need. . . . Since *Darnell*, in *Charles v. Orange Cty.*, 925 F.3d 73 (2d Cir. 2019), we explained that:
[A] detainee asserting a Fourteenth Amendment claim for deliberate indifference to his medical needs can allege either that the defendants *knew* that failing to provide the complained of medical treatment would pose a substantial risk to his health or that the defendants *should have known* that failing to provide the omitted medical treatment would pose a substantial risk to the detainee's health.
Id. at 87. Even under the standard announced in *Charles* and *Darnell*, however, the result would remain the same. Strand's information, provided by the officers on the scene, furnished no reason for concern about Hardaway's health. Accordingly, there is no basis for finding that Strand 'should have known[ ] that [Hardaway's] condition posed an excessive risk to [his] health or safety,'. . . or that his failure to intervene was a violation of Hardaway's constitutional rights.")

Darby v. Greenman, 14 F.4th 124, 132, 139-41 (2d Cir. 2021) (Carney, J., dissenting) ("Darby's claims arose during his time in custody, first in a pretrial setting and then after his conviction. His § 1983 claims therefore implicate the protections of both the Fourteenth Amendment, as to his pretrial detention, and the Eighth Amendment, as to his posttrial incarceration. To state a claim under § 1983 as to either, Darby must allege that he was denied treatment for an objectively 'serious medical condition.'. . He must also plausibly allege that the defendants acted with 'deliberate indifference' to his serious medical needs. . . With regard to his Fourteenth Amendment pretrial-detention claim, Darby must allege facts sufficient to support an inference that the relevant defendants acted with deliberate indifference under the objective standard: that is, that Dr. Greenman and the Doe Defendants knew or should have known that they exposed Darby to an objectively serious harm or risk of harm. . . With regard to his Eighth Amendment post-conviction claim, in contrast, Darby must allege facts sufficient to demonstrate deliberate indifference on the part of Dr. Hamilton under the subjective standard, meaning that Dr. Hamilton was aware of and consciously disregarded a substantial risk of serious harm. . . . Unfortunately, Darby's experience with such patently inadequate dental care does not appear to be unusual for many incarcerated individuals. Our Court and courts in our Circuit are all too familiar with troubling claims from inmates regarding inadequate dental care. [collecting cases] In my view, we owe incarcerated persons such as Darby care that is, at the very least, not deliberately indifferent to their serious

medical and dental conditions. . . .For over four months while incarcerated at Rikers Island, Darby experienced severe gum pain from an almost golf-ball sized abscess in his mouth. He had trouble sleeping, eating, and talking, and lost twenty pounds as a result. As we have commented before, 'Any person who has spent a night tossing and turning in suffering from an abscessed tooth knows that dental pain can be excru[c]iatingly severe.'. . Although he saw two prison dentists and filed over 15 sick call requests that described his symptoms in detail, Darby received no real care for a condition that was eminently treatable by gum surgery. Instead, one dentist offered a tooth extraction; the other, a dental cleaning. I am concerned that the Majority's decision affirming the district court's dismissal of Darby's complaint may work to immunize the relevant prison officials from liability in Darby's and in other cases. In my view, the course of events specifically alleged by Darby could—if borne out by evidence—reasonably support a determination that the officials and dentists were deliberately indifferent to his serious medical needs. The district court erred by dismissing his complaint under Rule 12(b)(6), and I believe the Majority errs now by affirming that dismissal. I respectfully dissent.")

Charles v. Orange County, 925 F.3d 73, 85-90 (2d Cir. 2019) ("As discussed above, pursuant to the Due Process Clause of the Fourteenth Amendment, the Supreme Court has extended to civil detainees *Estelle's* protection for prisoners under the Eighth Amendment. . . Thus, those in civil detention, as were Plaintiffs in this case, are also afforded a right to be free from deliberate indifference to their serious medical needs. . . . In *Darnell,* we clarified that deliberate indifference, in the context of a Fourteenth Amendment due process claim, can be shown by something akin to recklessness, and does not require proof of a malicious or callous state of mind. . . Deliberate indifference, we held, can be established by either a subjective or objective standard: A plaintiff can prove deliberate indifference by showing that the defendant official 'recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, *or should have known*, that the condition posed an excessive risk to [the plaintiff's] health or safety.'. . This formulation of the deliberate indifference standard was developed in cases involving unconstitutional conditions of confinement. In *Darnell*, the plaintiffs complained, *inter alia*, that the facility where they were detained was unsafe and unsanitary. . . Although *Darnell* did not specifically address medical treatment, the same principle applies here. . . A plaintiff must show 'something more than mere negligence' to establish deliberate indifference in the Fourteenth Amendment context. . . . Thus, a detainee asserting a Fourteenth Amendment claim for deliberate indifference to his medical needs can allege either that the defendants *knew* that failing to provide the complained of medical treatment would pose a substantial risk to his health or that the defendants *should have known* that failing to provide the omitted medical treatment would pose a substantial risk to the detainee's health. Whether the state knew or should have known of the substantial risk of harm to the detainee is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. . . . Plaintiffs have plausibly alleged that Defendants were fully aware of, and violated, both Orange County and ICE policies by failing to provide them with discharge planning as part of their care. Plaintiffs' allegations, if proven true, are sufficient to establish that Defendants knew, or should have known, of the substantial risk that Plaintiffs would relapse and suffer serious adverse health

consequences if they were not provided with necessary discharge planning, such that a fact-finder could infer 'reckless disregard' beyond mere negligence or medical malpractice. . . .After discovery, the district court will be in a better position to determine the precise parameters of the treatment that should have been provided; whether the failure to provide any mandated care was attributable to Defendants' deliberate indifference, mere negligence, or unforeseen and unforeseeable circumstances; and what, if any, damages were caused by any dereliction on the part of Defendants. . . But, at the pleading stage, we hold that Plaintiffs have adequately stated a Fourteenth Amendment substantive due process claim.")

Valdiviezo v. Boyer, No. 17-1093, 2018 WL 5096345, at * (2d Cir. Oct. 18, 2018) (not reported) ("[T]he allegations are sufficient to plausibly raise an inference that the medical staff had the requisite mens rea for a Fourteenth Amendment deliberate-indifference claim. Under the Fourteenth Amendment, the defendant's state of mind is evaluated objectively. *Darnell*, 849 F.3d at 36. A plaintiff must show "that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." *Id*. at 35. Here, after Valdiviezo was dropped once, causing him to cry out in pain, the medical staff was aware that there was a risk that Valdiviezo would be dropped again. Accordingly, Valdiviezo sufficiently alleged that the two members of the medical staff acted recklessly when they ordered the detainees to pick him up again. We therefore vacate and remand with regard to this claim.")

Edrei v. Maguire, 892 F.3d 525, 529-38 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 2614 (2019) ("In a narrow ruling, we hold that purposefully using a LRAD in a manner capable of causing serious injury to move non-violent protesters to the sidewalks violates the Fourteenth Amendment under clearly established law. . . . Like the district court, we begin with the first prong. . . . While the parties agree that the Fourteenth Amendment establishes a right against excessive force, they disagree about the relevant test. Defendants maintain that the proper inquiry is whether the conduct shocks the conscience. . . They argue that this standard includes a subjective element—whether the officers behaved 'maliciously and sadistically for the very purpose of causing harm.'. . . Plaintiffs counter that conduct shocks the conscience when the use of force was both 'objectively unreasonable' and 'intentional, as opposed to negligent.'. . . *Kingsley* offers two important insights. First, the objective standard it announced confirms that the subjective mental state referenced in *Glick* and some of this Court's other precedents is not a necessary showing. Second, and more significantly, *Kingsley* used modified terminology to describe the Fourteenth Amendment standard. Although prior excessive force cases spoke of whether the official's conduct 'shocks the conscience,' *Lewis*, 523 U.S. at 846 (collecting cases), *Kingsley* asked whether the force was 'objectively unreasonable[.]' . . . [W]e have not treated the precise factual context at issue in *Kingsley*—a pretrial detainee claiming excessive force—as a limitation on the Fourteenth Amendment standard announced therein. In our one case to engage closely with *Kingsley*, we held that its standard applied not just to excessive force claims, but also to those alleging deliberate indifference toward pretrial detainees. *Darnell v. Pineiro*, 849 F.3d 17, 33–34 (2d Cir. 2017). In

reaching this conclusion, the *Darnell* Court did not apply *Kingsley*'s language mechanically. Instead it looked to the sweep and substance of the Supreme Court's reasoning. We do the same. . . . The distinction *Kingsley* drew was not between pretrial detainees and nondetainees. Instead, it was between claims brought under the Eighth Amendment's Cruel and Unusual Punishment Clause and those brought under the Fourteenth Amendment's Due Process Clause. . . . *Kingsley* held that excessiveness is measured objectively and then identified various considerations that inform the ultimate Fourteenth Amendment inquiry: whether the governmental action was rationally related to a legitimate governmental objective. . . To put a finer point on it, *Kingsley* teaches that purposeful, knowing or (perhaps) reckless action that uses an objectively unreasonable degree of force *is* conscience shocking. . . Although we now hold that *Kingsley* provides the appropriate standard for all excessive force claims brought under the Fourteenth Amendment, it bears emphasizing that this new formulation is but a modest refinement of *Glick*'s four factor test, on which this Court has long relied. . . . Applying *Kingsley*'s analysis to the allegations at hand, we conclude that the plaintiffs' complaint states a Fourteenth Amendment violation. . . . [P]laintiffs' allegations indicate that the officers' use of the LRAD's area denial function was disproportionate to the limited security risk posed by the non-violent protest and caused substantial physical injuries. Or, stated somewhat differently, the defendants' use of a device capable of causing pain and hearing loss was an 'exercise of power without any reasonable justification in the service of a legitimate government objective.'. . Because defendants have chosen to appeal the denial of a motion to dismiss, we are compelled to accept the allegations as true and must therefore conclude that the complaint adequately states a Fourteenth Amendment claim.")

Monaco v. Sullivan, No. 16-3537-CV, 2018 WL 2670506, at *6 (2d Cir. June 5, 2018) (not reported) ("The district court held that Monaco failed to make an adequate showing to survive summary judgment on either the objective or the subjective prongs. When assessing the subjective prong, the district court applied *Caiozzo*, where we held that a plaintiff must show 'that the government-employed defendant disregarded a risk of harm to the plaintiff *of which the defendant was aware*.'. . Monaco failed to meet this standard, the court concluded, because the record contained no evidence suggesting that Packard *knew* that his failure to prescribe Lithium posed a threat to Monaco. On appeal, Monaco does not dispute that he would not meet the *Caiozzo* test. He instead points out that this Court overruled *Caiozzo*. In *Darnell*, decided a year after the district court's decision in this case, we held that a plaintiff can meet the subjective prong of the deliberate indifference test as long as the defendant 'should have known' that his action 'posed an excessive risk to [the plaintiff's] health or safety.'. . Monaco therefore argues on appeal that we should vacate the district court's grant of summary judgment because it applied the now-defunct *Caiozzo* standard, and a jury could reasonably conclude that Packard acted recklessly under *Darnell*. We disagree. Assuming *arguendo* that Monaco is correct that Packard's failure to prescribe Lithium was reckless, Packard would still be entitled to qualified immunity. *Darnell* was decided in 2017 and thus could not have clearly established that reckless medical treatment amounts to deliberate indifference at the time Packard treated Monaco. Indeed, before *Caiozzo*, we had never decided this issue at all. . . Because Packard did not violate clearly established law

when he treated Monaco in 1998, the district court did not err in granting summary judgment on this claim.")

Bruno v. City of Schenectady, No. 16-1131, 2018 WL 1357377 (2d Cir. Mar. 16, 2018) (not reported) ("The district court's decision dismissing Bruno's deliberate indifference claim predated our decision in *Darnell* and therefore utilized a 'subjective' rather than 'objective' standard. . . Because this standard focused purely on the mindset of the defendants, rather than on what a 'reasonable person' would have believed under the circumstances, it is now erroneous. . . We thus vacate and remand the district court's decision dismissing Bruno's deliberate indifference claim so that it can be adjudicated under the standard adopted in *Darnell*.")

Darnell v. Pineiro, 849 F.3d 17, 21, 27-36 & n.15 (2d Cir. 2017) ("Among other issues, this case requires us to consider whether, consistent with *Willey*, and the precedents on which it is based, appalling conditions of confinement cannot rise to an objective violation of the Fourteenth Amendment's Due Process Clause so long as the detainee is subjected to those conditions for no more than twenty-four hours, and the detainee does not suffer an actual, serious injury during that time. This case also requires us to consider whether *Kingsley* altered the standard for conditions of confinement claims under the Fourteenth Amendment's Due Process Clause. . . .Relying on this Court's decision in *Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir. 2009), the District Court concluded that the elements for establishing deliberate indifference under the Fourteenth Amendment were the same as under the Eighth Amendment. . . Therefore, the District Court required the plaintiffs to prove that, '(1) objectively, the deprivation the [detainee] suffered was "sufficiently serious that he was denied the minimal civilized measure of life's necessities," and (2) subjectively, the defendant official acted with "a sufficiently culpable state of mind ..., such as deliberate indifference to [detainee] health or safety."'. . In applying this test, the District Court erred in two respects. First, the District Court misapplied this Court's precedents in assessing whether the plaintiffs had established an objectively serious deprivation. Second, we conclude that the Supreme Court's decision in *Kingsley* altered the standard for deliberate indifference claims under the Due Process Clause. . . .In *Willey v. Kirkpatrick*, 801 F.3d 51, 68 (2d Cir. 2015), this Court recently reiterated that the proper lens through which to analyze allegedly unconstitutional unsanitary conditions of confinement is with reference to their severity and duration, not the detainee's resulting injury. . . .The standards for evaluating objective deprivations, as articulated in *Willey*, thus extend to each of the nine challenged conditions of confinement at issue in this case---(1) Overcrowding; (2) Unusable Toilets; (3) Garbage and Inadequate Sanitation; (4) Infestation; (5) Lack of Toiletries and Other Hygienic Items; (6) Inadequate Nutrition; (7) Extreme Temperatures and Poor Ventilation; (8) Deprivation of Sleep; and (9) Crime and Intimidation---regardless of whether those conditions relate to a deprivation involving sanitation or inadequate nutrition. Each of these conditions must be measured by its severity and duration, not the resulting injury, and none of these conditions is subject to a bright-line durational or severity threshold. Moreover, the conditions must be analyzed in combination, not in isolation, at least where one alleged deprivation has a bearing on another. . . .The second element of a conditions of confinement claim brought under the Due Process Clause of the Fourteenth Amendment is the defendant's

'deliberate indifference' to any objectively serious condition of confinement. Courts have traditionally referred to this second element as the 'subjective prong.' But 'deliberate indifference,' which is roughly synonymous with "recklessness," can be defined either "subjectively" in a criminal sense, or 'objectively' in a civil sense. As such, the 'subjective prong' might better be described as the '*mens rea* prong' or 'mental element prong.'. . .The Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015)---in which the Supreme Court concluded that excessive force claims brought under the Fourteenth Amendment do not require the same subjective intent standard as excessive force claims brought under the Eighth Amendment---has undercut the reasoning in *Caiozzo*. . . . Following the Supreme Court's analysis in *Kingsley*, there is no basis for the reasoning in *Caiozzo* that the subjective intent requirement for deliberate indifference claims under the Eighth Amendment, as articulated in *Farmer*, must apply to deliberate indifference claims under the Fourteenth Amendment. *Caiozzo* is thus overruled to the extent that it determined that the standard for deliberate indifference is the same under the Fourteenth Amendment as it is under the Eighth Amendment. . . .After *Kingsley*, it is plain that punishment has no place in defining the *mens rea* element of a pretrial detainee's claim under the Due Process Clause. Unlike a violation of the Cruel and Unusual Punishments Clause, an official can violate the Due Process Clause of the Fourteenth Amendment without meting out any punishment, which means that the Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm. *Kingsley* held that an officer's appreciation of the officer's application of excessive force against a pretrial detainee in violation of the detainee's due process rights should be viewed objectively. The same objective analysis should apply to an officer's appreciation of the risks associated with an unlawful condition of confinement in a claim for deliberate indifference under the Fourteenth Amendment. A pretrial detainee may not be punished at all under the Fourteenth Amendment, whether through the use of excessive force, by deliberate indifference to conditions of confinement, or otherwise. Therefore, to establish a claim for deliberate indifference to conditions of confinement under the Due Process Clause of the Fourteenth Amendment, the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety. In other words, the 'subjective prong' (or '*mens rea* prong') of a deliberate indifference claim is defined objectively. In concluding that deliberate indifference should be defined objectively for a claim of a due process violation, we join the Court of Appeals for the Ninth Circuit, which, sitting *en banc* in *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc), cert. denied, No. 16-655, 2017 WL 276190 (U.S. Jan. 23, 2017), likewise interpreted *Kingsley* as standing for the proposition that deliberate indifference for due process purposes should be measured by an objective standard. . . The Court of Appeals for the Ninth Circuit concluded that *Kingsley*'s broad reasoning extends beyond the excessive force context in which it arose. . . .Consistency with the Supreme Court's decision in *Kingsley* now dictates that deliberate indifference be measured objectively in due process cases. . . . The defendants cite several decisions by other Courts of Appeals that have continued to apply a subjective standard to deliberate indifference claims for pretrial detainees after *Kingsley*. But none

of those cases considered whether *Kingsley* had altered the standard for deliberate indifference for pretrial detainees. *See, e.g., Brown v. Chapman*, No. 15-3506, 2016 WL 683260 (6th Cir. Feb. 19, 2016); *Moore v. Diggins*, 633 F. App'x 672 (10th Cir. 2015) (summary opinion); Mason v.Lafayette City-Par. Consol. Gov't, 806 F.3d 268 (5th Cir. 2015*); Smith v. Dart*, 803 F.3d 304, 310 n.2 (7th Cir. 2015) (noting, in light of *Kingsley*, that the parties argued the state of mind element but that "it is not at issue in this appeal").")

Dancy v. McGinley, 843 F.3d 93, 117-19 (2d Cir. 2016) ("Williams argues that, under Section 1983, a plaintiff 'must establish that the force used was purposeful or intentional, and not accidental,' citing the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). . . But *Kingsley* addressed only the legally requisite state of mind required for a pretrial detainee's excessive force claims under the Due Process Clause of the Fourteenth Amendment. . . What mental state a § 1983 plaintiff is required to prove depends on the right at issue. . . . In *Hudson*, we 'readily' 'assum[ed]' that '*all* Fourth Amendment violations require intentional *actions* by officers, rather than "the accidental effects of otherwise lawful government conduct."'. . But in the excessive force context, the intent in question can only be the intent to perform some action, not that a particular result be achieved. So long as the plaintiff can point to unreasonable intentional action taken that proximately caused the injury after the seizure is initiated, no additional intent to injure is required. . . .Instructing that a plaintiff must show that 'the defendant acted intentionally or recklessly' and that if 'the defendant's acts were merely negligent ... [the jury] must find that the plaintiff has not established his claim' could be understood to suggest incorrectly that an officer must have intended the *results* of his actions or consciously disregarded their *consequences*. The district court's instruction thus may have led the jury to erroneously believe that it was required to find that Williams intended to hit Dancy's face against the car and/or to injure him. . . .[T]o the extent Dancy was required to prove any intent at all, it was satisfied by Williams's admission that he applied some degree of force and did so deliberately. It was that force that Dancy claims was both objectively unreasonable and caused his injuries. The jury could find either that the injury did not actually occur as a result of the force Williams applied, meaning that Williams did not proximately cause Dancy's injury, *or* that the amount of force used was reasonable. What it could *not* do was conclude that Williams intentionally used force, but was not liable because he did not intend that the force result in the injury Dancy suffered.")

Ross v. Correction Officers John & Jane Does 1-5, 610 F. App'x 75, 77 n.1 (2d Cir. 2015) ("At the time of the challenged conduct, we analyzed claims alleging deliberate indifference under the same standard irrespective of whether they were brought by prisoners pursuant to the Eighth Amendment or by pretrial detainees under the Fourteenth Amendment. . . The Supreme Court recently distinguished between Eighth and Fourteenth Amendment claims in holding that a pretrial detainee alleging that an officer used excessive force against him in violation of the Fourteenth Amendment need not demonstrate that such officer was subjectively aware that his use of force was unreasonable. [citing *Kingsley*] Because our focus, in analyzing whether qualified immunity applies, is on whether the right asserted by Ross was clearly established at the time of the alleged

violation, we need not address *Kingsley's* possible implications for deliberate indifference claims brought by pre-trial detainees.")

Murrell v. Sheron, No. 21-CV-6576-EAW, 2023 WL 1970487, at *4 (W.D.N.Y. Feb. 13, 2023) (Wolford, C.J.) ("The Court found initially that Plaintiff (1) failed to plausibly allege both the objective and subjective (*mens rea*) prongs of a due process violation regarding his slip-and-fall at the Jail, and (2) even if he had plausibly alleged those two prongs, he did not allege that Sheron was personally involved in the alleged due process violation. . . The Court concluded that '[a]t most, Plaintiff allege[d] that Sheron was negligent in not ensuring that safety bars or mats were installed in the shower area at the Jail.'. . The amended complaint does not allege any additional facts to alter this conclusion. Plaintiff alleges only that the lack of rubber mats and safety bars 'related to the plaintiff slipped and fell [sic] coming out of the shower' and that Sheron failed 'to secure safety equipment within the shower area....'. . . This fails to plausibly allege that the lack of rubber mats and safety bars posed an unreasonable risk of harm to Plaintiff's health or safety and that Sheron knew of or should have known of that risk. The amended complaint, again, at most alleges negligence, which does not state a constitutional violation. . . Plaintiff's status as a pretrial detainee does not transform a state law tort claim into a constitutional violation actionable under § 1983.")

Bogan v. Westchester County Correction, No. 20-CV-2143 (LLS), 2020 WL 1330442, at *3 (S.D.N.Y. Mar. 20, 2020) ("For pretrial detainees, the standard articulated in *Darnell* applies to *all* types of deliberate indifference claims, including claims for deliberate indifference to serious medical needs.")

Gilliam v. Black, No. 3:18CV1740 (SRU), 2019 WL 3716545, at *10-11 (D. Conn. Aug. 7, 2019) ("Although, as indicated above, the Supreme Court has ruled in *Kingsley* that only an objective standard is appropriate when analyzing claims of excessive force brought by pre-trial detainees, it is unclear to what extent this ruling is applicable to a pretrial detainee's claims of sexual abuse under the Fourteenth Amendment. . . I conclude that under either the Eighth Amendment standard set forth in *Crawford* that involves both objective and subjective prongs or under the Fourteenth Amendment post-*Kinglsey* excessive force standard that involves only an objective prong, Gilliam's allegations state a plausible claim of sexual abuse. . . . Following the Supreme Court's decision in *Kingsley*, the Second Circuit clarified the legal standard to be applied to a pretrial detainee's claims of deliberate indifference under the Fourteenth Amendment. *See Darnell*, 849 F.3d at 29. . . There are two prongs to the standard governing a conditions of confinement claim under the Fourteenth Amendment. Although *Darnell* involved a conditions of confinement claim, I conclude that the same standard is applicable to a deliberate indifference to medical needs claim. . . Under the first prong, a detainee must allege that 'the conditions, either alone or in combination, pose[d] an unreasonable risk of serious damage to his health ... which includes the risk of serious damage to physical and mental soundness.'. . The second or subjective prong, also called 'the *mens rea* prong, of [the] deliberate indifference [standard] is defined objectively.'. . Thus, 'the Due Process Clause can be violated when an official does not have subjective awareness that the

official's acts (or omissions) have' created a condition that poses 'a substantial risk of harm' to a detainee. . . To meet the second prong of a Fourteenth Amendment conditions claim, a detainee must allege that the prison official 'acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to [him or her] even though the [prison] official knew, or should have known, that the condition posed an excessive risk to health or safety.'")

Granger v. Santiago, No. 3:19CV60(MPS), 2019 WL 1644237, at *6–7 (D. Conn. Apr. 16, 2019) ("Although, as indicated above, the Supreme Court has ruled in *Kingsley* that only an objective standard is appropriate when analyzing claims of excessive force brought by pre-trial detainees, it is unclear to what extent this ruling is applicable to a pretrial detainee's claims of sexual abuse under the Fourteenth Amendment. . . The court concludes that under either the Eighth Amendment standard set forth in *Crawford* that involves both objective and subjective prongs or under the Fourteenth Amendment post-*Kinglsey* excessive force standard that involves only an objective prong, the plaintiff's allegations state a plausible claim of sexual abuse. The plaintiff has alleged facts to suggest that Lieutenant Tosses conducted the manual body cavity search for the purpose of humiliating him rather than for a legitimate penological purpose and that he suffered physical and possibly psychological harm as a result of the search. The court concludes that the plaintiff has articulated a sufficiently serious deprivation to satisfy the objective prong of an Eighth Amendment claim under *Crawford*. Furthermore, if 'no legitimate law enforcement or penological purpose can be inferred from the defendant's alleged conduct, the abuse itself may, in some circumstances, be sufficient evidence of a culpable state of mind.'. . The court concludes that the plaintiff has plausibly alleged that a legitimate penological purpose may not be inferred from the manual body cavity search given the circumstances under which it was performed. Thus, the search itself may constitute evidence of a culpable state of mind and meet the subjective prong of the Eighth Amendment standard. Thus, the facts as alleged plausibly meet the subjective requirement of a sexual abuse claim under the Eighth Amendment standard. Applying the objective Fourteenth Amendment excessive force standard, as described by the United States Supreme Court in *Kingsley*, to the claim of sexual abuse asserted by the plaintiff, a pretrial detainee, the court concludes that the plaintiff has alleged sufficient facts to state a claim that the force used by Lieutenant Tosses in conducting the body cavity search was unreasonable. . . Although the plaintiff's concession that he had ingested contraband was a serious security concern, there was at least one alternative to a manual body cavity search that was delineated under Department of Correction Administrative Directive 6.7 – placement of the plaintiff in a dry cell. Further, the plaintiff had willingly consented to that alternative, another officer or official had suggested the alternative during the search, and Lieutenant Tosses made no attempt to temper his use of force given the information available to him. Accordingly, the Fourteenth Amendment sexual assault claim against Lieutenant Tosses and Correctional Officer Evans will proceed.")

Vann v. City of Rochester, No. 6:18-CV-06464(MAT), 2019 WL 1331572, at *6 (W.D.N.Y. Mar. 25, 2019) ("'While the Second Circuit's holding in *Darnell* was applied to a claim of deliberate indifference to unconstitutional conditions of confinement, a footnote in *Darnell* indicates that

"deliberate indifference means the same thing for each type of claim under the Fourteenth Amendment."' . . Consequently, district courts in this Circuit have 'applied *Darnell*'s objective "mens rea" prong to claims of deliberate indifference to serious medical needs under the Fourteenth Amendment.'")

Swinton v. Livingston County, No. 15-CV-00053A(F), 2018 WL 4637376, at *15 (W.D.N.Y. Sept. 27, 2018) ("[A]s of 2014, the legal standard applicable to Plaintiff's medical indifference claim was not so clearly established. In particular, prior to the Supreme Court's pronouncement in *Kingsley*, . . . decided in 2015, that mandated the second element of a pretrial detainee's conditions of confinement claim as an objective standard, at issue in *Kingsley* was a claim of excessive force, not medical indifference. Significantly, the Supreme Court has yet to apply *Kingsley* to a medical indifference claim, and the Second Circuit did not do so until this year when it construed the second element of such claim as 'whether a "reasonable person" would appreciate the risk to which the detainee was subjected,' *Bruno*, 727 Fed.Appx. at 720 (quoting *Darnell*, 849 F.3d at 29). Accordingly, because the second element of a medical indifference claim was not clearly decided at the time relevant to Plaintiff's claim regarding his abscessed tooth, Moving Defendants would be qualifiedly immune from liability on such claim.")

Sandford v. Rugar, No. 16-CV-6187-FPG, 2018 WL 3069107, at *3 (W.D.N.Y. June 21, 2018) ("Plaintiff was a pre-trial detainee at the time of the complained-of events, and so the Court reviews his inadequate medical care claims under the more forgiving Fourteenth Amendment due process standard for a pretrial detainee, rather than as an Eighth Amendment claim appropriate for a sentenced prisoner. *See Darnell v Pineiro*, 849 F3d 17, 33 (2d Cir. 2017) (discussing the impact of *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), on Eighth Amendment claims). The Second Circuit, construing the Supreme Court's decision in *Kingsley*, held that a plaintiff asserting a deliberate indifference claim under the Due Process Clause must show that the official intentionally imposed the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the official knew, or should have known, that the condition posed an excessive risk to health or safety. . . This intentional or reckless conduct standard requires more than mere negligence.")

Walker v. Wright, No. 3:17-CV-425 (JCH), 2018 WL 2225009, at *5 (D. Conn. May 15, 2018) ("While the Second Circuit's holding in *Darnell* was applied to a claim of deliberate indifference to unconstitutional conditions of confinement, a footnote in *Darnell* indicates that 'deliberate indifference means the same thing for each type of claim under the Fourteenth Amendment.'. . . District courts in this Circuit have therefore applied *Darnell's* objective '*mens rea*' prong to claims of deliberate indifference to serious medical needs under the Fourteenth Amendment. [collecting cases]")

Jeffers v. City of New York, No. 14CV6173CBAST, 2018 WL 904230, at *30 (E.D.N.Y. Feb. 13, 2018) ("In deciding whether plaintiffs have satisfied this standard, courts must be cognizant that the standard for assessing culpability has recently changed in this Circuit. Until recently, the

standard for assessing the defendant's state-of-mind under the under the Fourteenth Amendment was identical to the standard governing convicted inmates under the Eighth Amendment. Under that standard, plaintiffs had to prove that the defendant was subjectively aware of the risk posed to the plaintiff and deliberately chose to ignore it. But in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), the Supreme Court held that this subjective standard did not apply to excessive force claims brought by pretrial detainees. The logic of that decision naturally extends to other claims brought by pretrial detainees, and so the Second Circuit held in *Darnell v. Pineiro* that a pretrial detainee need not prove that the defendant was actually aware of the risk of constitutional injury. Thus, opinions prior to that decision may lack authority, as they may apply an inappropriately strict standard to the claims of pretrial detainees." Footnotes omitted)

Shakir v. Derby Police Dep't., No. 3:11-CV-1940 (JCH), 2018 WL 306700, at *30–31& n.33 (D. Conn. Jan. 5, 2018) ("[T]he Fourth Amendment standard of objective reasonableness differs from the Eighth and Fourteenth Amendment standards. The Fourth Amendment inquiry is objective and does not look to the officer's mental state. . . To the contrary, the Eighth and Fourteenth Amendment standards require that the officer acted with the necessary level of culpability regarding the unconstitutional condition. . . Additionally, the objective component under the Eighth and Fourteenth Amendments enunciate a stricter standard than the Fourth Amendment. . . Therefore, the precedents finding no constitutional violation under the Eighth and Fourteenth Amendments are not dispositive of Shakir's claim evaluated under the Fourth Amendment. In this case, construing the facts in the light most favorable to Shakir, a reasonable jury could conclude that Stankye's conduct toward Shakir created conditions of confinement that were objectively unreasonable. . . As noted previously, the Fourth Amendment requires balancing the 'nature and quality of the intrusion' with the 'countervailing governmental interests at stake.'. . Although countervailing government interests in maintaining security may require a strip search for weapons or contraband under certain conditions, a jury could reasonably conclude that, even if the strip search was objectively reasonable, the security interest does not extend after the search has been completed and no weapons have been found. Therefore, a jury could find that it was objectively unreasonable to continue to deprive an arrestee of his clothing in a cold cell during the New England winter. Notably, Stankye does not identify a countervailing interest justifying his conduct because he asserts that he did not have any contact with Shakir at the police station at all on the day in question. . . Such issues of fact are appropriately determined by the jury, not by the court on summary judgment. . . . The *Darnell* court notes that the Supreme Court in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), defined deliberate indifference objectively in the Fourteenth Amendment context. . . *Kingsley* overruled prior Second Circuit precedent that treated the Eighth and Fourteenth Amendment standards the same for the purposes of deliberate indifference to unconstitutional conditions of confinement. . . Some of the cases addressing stripping and cold temperatures under the Fourteenth Amendment were decided under the prior rule treating Eighth and Fourteenth Amendment claims the same. . . However, even with the Supreme Court's change to the Fourteenth Amendment standard, it nonetheless remains distinct from a Fourth Amendment inquiry because the Fourteenth Amendment continues to require deliberate indifference, albeit defined differently.")

Davis v. McCready, No. 1:14-CV-6405-GHW, 2017 WL 4803918, at *5 (S.D.N.Y. Oct. 23, 2017) (medical needs case) ("Until very recently, the second, or *mens rea*, prong—the defendant's 'sufficiently culpable state of mind'—was assessed subjectively in claims brought under both the Eighth and the Fourteenth Amendments. . . Earlier this year, the Second Circuit held that, in light of the Supreme Court's ruling in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety. . . Accordingly, the *mens rea* prong of a deliberate indifference claim brought by a pretrial detainee is now to be assessed objectively.")

Torrez v. Semple, No. 3:17-CV-01211 (SRU), 2017 WL 3841686, at *3 (D. Conn. Sept. 1, 2017) ("The Second Circuit has applied *Kinglsey*—which expressly dealt with an excessive use of force claim—to claims of unconstitutional conditions of confinement by pretrial detainees, and has indicated that *Kingsley* should be applied to all deliberate indifference claims by pretrial detainees, as well. . . . Accordingly, for a claim of deliberate indifference to mental health needs or unconstitutional conditions of confinement under the Fourteenth Amendment, a pretrial detainee can satisfy the subjective element by showing that the defendants 'knew, or should have known, that the condition posed an excessive risk to health or safety.'. . At the same time, negligent actions alone do not rise to the level of deliberate indifference and are not cognizable under section 1983.")

Youngblood v. City of New York, No. 15-CV-3541 (RA), 2017 WL 3176002, at *4 & n.5 (S.D.N.Y. July 24, 2017) (" 'Although *Darnell* involved a challenge to conditions of confinement, the holding of the decision is broad enough to extend to medical deliberate-indifference claims.' *Feliciano v. Anderson*, No. 15-CV-4106, 2017 WL 1189747, at *13 (S.D.N.Y. Mar. 30, 2017); *see also Darnell*, 849 F.3d at 33 n.9 ("[D]eliberate indifference means the same thing for each type of claim under the Fourteenth Amendment."). . . . [A]fter *Darnell*, a plaintiff suing under the Fourteenth Amendment can establish a claim based on a defendant's recklessness—*i.e.*, that he 'knew, or should have known' that 'an excessive risk to health or safety' would result. . . As before, however, more than negligence is required to hold a defendant liable.")

Wilson v. Calderon, No. 14CIV6209GBDGWG, 2017 WL 2881153, at *9 (S.D.N.Y. July 6, 2017) ("It is not necessary to reach the issue of whether the officers' conduct here should be evaluated under the pre-*Kingsley* standard for qualified immunity purposes. Because disputed issues of material fact exist regarding the objective reasonableness of the officers' use of force, and because the same disputed issues of fact exist on the question of whether the officers' actions subjectively demonstrated the necessary level of culpability, the officers cannot be granted summary judgment on their qualified immunity defense.")

Gonzalez-Torres v. Newson, No. 3:17-CV-00455 (SRU), 2017 WL 2369369, at *3 (D. Conn. May 31, 2017) ("The Second Circuit has specifically applied *Kingsley* to claims of unconstitutional conditions of confinement by pretrial detainees and implied that *Kingsley* should be applied to all

deliberate indifference claims of pretrial detainees. *See Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) ("A pretrial detainee may not be punished at all under the Fourteenth Amendment, whether through the use of excessive force, by deliberate indifference to the conditions of confinement, or otherwise."). The Second Circuit determined that 'the Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm.'. .Thus, the court defined the subjective prong of the deliberate indifference standard objectively.")

Hulett v. City of Syracuse, 253 F.Supp.3d 462, 489 (N.D.N.Y. 2017) ("In *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017), the Court overruled in part *Caiozzo*, observing that the 'subjective prong' of a § 1983 deliberate indifference claim asserted by a pre-trial detainee is 'perhaps better classified as a "*mens rea* prong" or "mental element prong."'. . Accordingly, the Court concluded that 'deliberate indifference' in the Fourteenth Amendment context should be 'defined objectively,' meaning that the 'Due Process Clause can be violated [even] when an official does not have subjective awareness that the officials acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm.'. . In other words, rather than ask whether the defendant 'kn[ew] of and disregard[ed] an excessive risk to [ ] health or safety,' the appropriate inquiry under the Fourteenth Amendment is whether the defendant 'knew, or should have known' that his conduct 'posed an excessive risk to health or safety.'. . After carefully considering the parties' briefing in light of this standard, the § 1983 claim against Sup'r Robinson will be dismissed. Centro is a public benefit corporation, N.Y. PUB. AUTH. LAW § 1328(a), and is therefore considered a municipal entity for purposes of § 1983. . . It would therefore follow that Sup'r Robinson, a Centro employee, acted 'under color of state law' during the incident. . . But both parties' accounts of events, considered in conjunction with the surveillance video, confirm that by the time Sup'r Robinson finally exited bus 1249 to observe the aftermath of Hulett's removal, SPD had taken control over the area by calling in additional officers as well as an ambulance. Importantly, even though plaintiff contends the Rural/Metro defendants were medically negligent and/or constitutionally indifferent to his needs, there is no factual dispute over whether Paramedic Maule and EMT Dreverman actually arrived in response to that call for assistance. Therefore, under either version of the facts, no reasonable jury could conclude that it was *constitutionally* unreasonable for Sup'r Robinson, at that point, to stand by and/or defer to the on-scene police and medical professionals. Simply put, plaintiff cannot demonstrate that, under these circumstances, Sup'r Robinson 'knew, or should have known' that his failure to take additional action under those particular circumstances 'posed an excessive risk' to plaintiff's immediate health or safety. . . Accordingly, the § 1983 medical indifference claim against Sup'r Robinson will be dismissed.")

Daly v. N.Y. City, No. 16CIV6521PAEJCF, 2017 WL 2364360, at *4 (S.D.N.Y. May 30, 2017) ("In the past, in order to make out a successful conditions of confinement claim, both pre-trial detainees and convicted prisoners were required to show that a defendant subjectively knew of a risk and disregarded it. . . Recently however, the Second Circuit has lowered this burden for pre-trial detainees in response to the Supreme Court's decision in *Kingsley v. Hendrickson,* —— U.S. ——, 135 S. Ct. 2466 (2015). *Darnell,* 849 F.3d at 29-36. Now, a pre-trial detainee can meet this

prong by showing objectively that a reasonable person should have known of the risk of deprivation.")

Grimmett v. Corizon Medical Associates of New York, No. 15CV7351JPOSN, 2017 WL 2274485, at *4 (S.D.N.Y. May 24, 2017) ("Under the second prong of the deliberate indifference standard, a plaintiff must show that a defendant acted with a sufficiently culpable state of mind. Until recently, the analysis under this prong was identical whether the claim was brought under the Eighth Amendment or the Fourteenth Amendment. . . In February 2017, however, following the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and while the parties were briefing the instant motion, the Second Circuit held that the analysis differs depending on whether the inmate is a convicted prisoner or a pretrial detainee. [citing *Darnell*] In particular, under the Eighth Amendment, deliberate indifference is equivalent to recklessness 'according to a more exacting subjective standard akin to that used in the criminal context, which would require proof of ... subjective awareness' on the part of the defendant. . . Deliberate indifference under the Eighth Amendment, therefore, means that a prison official 'appreciate[d] the risk to which a prisoner was subjected.'. . In contrast, after *Darnell*, a plaintiff suing under the Fourteenth Amendment is required to show only that the prison official acted with objective recklessness, or that the defendant 'knew, or should have known' that 'an excessive risk to health or safety' would result. . . As before, however, more than negligence is required to hold a defendant liable for violating either constitutional provision.")

Brown v. City of New York, No. 13-CV-06912, 2017 WL 1390678, at *10-11 (S.D.N.Y. Apr. 17, 2017) ("In his first cause of action pursuant to § 1983, Brown alleges, among other things, that Warden Suprenant, Deputy Warden Laboriel, Deputy Warden O'Connell, Assistant Deputy Warden Beltz, Captain Skepple, and CO Tietjen engaged in conduct that amounted to deliberate indifference to his health or safety. Brown's deliberate indifference claims arise under the Due Process Clause of the Fourteenth Amendment because he was a pretrial detainee at the time of the incident. *See Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). While a convicted prisoner's claim of deliberate indifference arises under the Eighth Amendment's prohibition on cruel and unusual punishment, this proscription does not apply to a pretrial detainee because a pretrial detainee is not being punished. . . . To show deliberate indifference under the subjective prong, 'the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety.'. . Therefore, the pretrial detainee must prove that the prison official acted with 'a *mens rea* greater than mere negligence,'. . . because 'liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process,' *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015). . . . Here, Brown has not pled facts to establish that Warden Suprenant, Deputy Warden Laboriel, Deputy Warden O'Connell, Assistant Deputy Warden Beltz, Captain Skepple, and CO Tietjen acted with the state of mind necessary to establish deliberate indifference. None of these individuals was present at the time of the attack, and thus none of them could have actually intervened to stop it.

Further, none of these defendants was on notice that an attack was imminent because there had been no prior altercations involving Brown, and Brown had not complained to any prison officials that he was in danger.")

Lloyd v. City of N.Y., 246 F.Supp.3d 704, 718-19 (S.D.N.Y. 2017) ("The reasoning of *Darnell* applies equally to claims of deliberate indifference to serious medical needs under the Fourteenth Amendment. *Darnell* involved claims of deliberate indifference in the context of a challenge to conditions of confinement. However, as the Second Circuit noted there, *Caiozzo*, the case which *Darnell* overruled in part involved a claim for deliberate indifference to medcial needs under the Fourteenth Amendment. Nevertheless, the Court's interpretation of "deliberate indifference" applied to any pretrial detainee claim for deliberate indifference to "serious threat to ... health or safety"—such as from unconstitutional conditions of confinement, or the failure-to-protect—because deliberate indifference means the same thing for each type of claim under the Fourteenth Amendment. . . The Court therefore reads *Darnell* to require that the '*mens rea* prong' of deliberate indifference to serious medical needs claims under the Fourteenth Amendment be analyzed objectively: rather than ask whether the charged official 'kn[ew] of and disregard[ed] an excessive risk to inmate health or safety,' courts are to instead determine whether the official 'knew, or should have known' that his or her conduct 'posed an excessive risk to health or safety.'")

Feliciano v. Anderson, No. 15CV4106LTSJLC, 2017 WL 1189747, *9-13 (S.D.N.Y. Mar. 30, 2017) ("After *Darnell*, the so-called subjective prong of the deliberate-indifference test under the Fourteenth Amendment has become a misnomer, as it is now 'defined objectively.'. . Consequently, as the Second Circuit itself observed, the prong 'might better be described as the "*mens rea* prong" or "mental element prong."'. . Although *Darnell* involved a challenge to conditions of confinement, the holding of the decision is broad enough to extend to medical deliberate-indifference claims. Indeed, the Second Circuit stated that 'deliberate indifference means the same thing for each type of claim under the Fourteenth Amendment.'. . Further, the appellate court noted that its decision overruled its previous decision in *Caiozzo* 'to the extent that it determined that the standard for deliberate indifference is the same under the Fourteenth Amendment as it is under the Eighth Amendment.'. . And *Caiozzo* involved a claim of deliberate indifference to medical needs. . . Consequently, even though *Darnell* did not involve claims of deliberate indifference to serious medical needs, the Court concludes that *Darnell's* holding with respect to the so-called subjective prong of the deliberate-indifference test applies here. For this reason, when deciding whether Feliciano has met this prong (which the Court will refer to as the *mens rea* or mental-element prong as suggested by the Second Circuit), the Court will employ an objective analysis. . . . To the Court's knowledge, no other decisions in this Circuit have yet applied *Darnell* to a claim of deliberate indifference to serious medical needs. . . Before *Darnell*, to satisfy the subjective prong of the deliberate-indifference test, a pretrial detainee, like a convicted prisoner, was required to demonstrate that 'the charged official ... act[ed] with a sufficiently culpable state of mind.'. . The official's mental state did not have to 'reach the level of knowing and purposeful infliction of harm; it suffice[d] if the plaintiff prove[d] that the official acted with deliberate indifference to inmate health.'. . This mental state, which was akin to 'subjective

recklessness, as the term is used in criminal law,' 'require [d] that the charged official act or fail to act while actually aware of a substantial risk that serious inmate harm [would] result.'. .After *Darnell,* the requisite *mens rea* more closely resembles recklessness as the term is used in the civil context, which does not require the defendant to be subjectively aware of the harm resulting from his acts or omissions. . . Applying *Darnell* to claims of deliberate indifference to serious medical needs, the Court concludes that a defendant possesses the requisite *mens rea* when he acts or fails to act under circumstances in which he knew, or should have known, that a substantial risk of serious harm to the pretrial detainee would result. . . As was the case before *Darnell,* the defendants' 'actions [must be] more than merely negligent.'")

Little v. Mun. Corp., No. 12-CV-5851 (KMK), 2017 WL 1184326, at *8 (S.D.N.Y. Mar. 29, 2017) ("The Court recognizes that this recent body of case law [*Kingsley, Willey, Darnell*] has significantly altered the judicial landscape since the Parties submitted their briefing on the instant Motion. Therefore, in light of the Second Circuit's decision in *Darnell*, Defendants' Motion To Dismiss Plaintiffs' conditions-of-confinement claims is denied without prejudice. Should Defendants wish to file a renewed Motion that addresses Plaintiffs' allegations of excessive confinement, unsanitary housing conditions, denial of food, exposure to extreme temperatures, and denial of laundry services, they may file a pre-motion letter with the Court detailing the merits of any such motion. Additionally, as the Supreme Court's decision in *Kingsley* revised the applicable standard for excessive force claims, Defendants' Motion is dismissed without prejudice as to the claims for the use of chemical agent 'O.C.,'. . . as well as Little's allegations that he was 'pushed in the back by [Defendant] Spears and landed on his hands and knees into the water filled with bodily waste[.]' . . . Defendants may address these claims in any renewed motion to dismiss.")

Roldan v. Kang, No. 13-CV-6889 (JGK), 2016 WL 4625688, at *3 (S.D.N.Y. Sept. 6, 2016) ("The Second Circuit Court of Appeals has acknowledged that the distinction outlined in *Kingsley* applies to excessive force claims under § 1983, but has not addressed the possible implications of *Kingsley* for claims of deliberate indifference to medical needs that are brought by pre-trial detainees. *See Ross v. Corr. Officers John & Jane Does 1-5*, 610 Fed.Appx. 75, 76 n.1 (2d Cir. 2015) (summary order). In this case, the plaintiff's claim is one for deliberate indifference to medical needs and not for the use of excessive force. It is unnecessary in this case to decide whether a subjective component is still required for a deliberate indifference to medical needs claim under either the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment because it is clear that the plaintiff has failed to allege a sufficiently serious deprivation of medical care that would satisfy the objective prong of violation of either Amendment.")

Cruz v. Corizon Health Inc., No. 13-CV-2563 (CS), 2016 WL 4535040, at *3 n.7 (S.D.N.Y. Aug. 29, 2016) ("The Supreme Court in *Kingsley v. Hendrickson* held that a pretrial detainee alleging excessive force under the Fourteenth Amendment was subject to a lighter burden than a convicted prisoner alleging excessive force under the Eighth Amendment. 135 S. Ct. 2466, 2475-76 (2015). The Second Circuit has not addressed whether the *Kingsley* decision affects its holding that the Fourteenth Amendment and Eighth Amendment standards are the same when the claim is of

deliberate indifference to medical needs, and since *Kingsley* courts in the Circuit have continued to follow that rule. *See, e.g., Jabot v. Rench*, No. 15-CV-725, 2016 WL 1128091, at *5 n.8 (N.D.N.Y. Jan. 12, 2016), *report and recommendation adopted*, 2016 WL 1122057 (N.D.N.Y. Mar. 22, 2016); *Moran v. Livingston*, 155 F. Supp. 3d 278, 287 n.1 (W.D.N.Y. 2016); *Roberts v. C-73 Med. Dir.*, No. 14-CV-5198, 2015 WL 4253796, at *3 n.3 (S.D.N.Y. July 13, 2015). I will do so as well although, as discussed below, the outcome would be the same even if, as in *Kingsley*, *see* 135 S. Ct. at 2472-73, Plaintiff's burden were only to prove Defendants' liability objectively, not subjectively.")

Holland v. City of New York, 197 F.Supp.3d 529, 546 & n.17 (S.D.N.Y. 2016) ("In addition, insofar as Holland is also claiming sexual abuse or harassment by Jennings, the Second Circuit has concluded that 'sexual abuse of a prisoner by a corrections officer may in some circumstances violate the prisoner's right to be free from cruel and unusual punishment.' *Boddie v. Schnieder*, 105 F.3d 857, 860-61 (2d Cir. 1997). Although it is unclear whether, post-*Kingsley*, the sexual abuse claims of a pretrial detainee must still meet both the objective and subjective prongs of the traditional Eighth Amendment analysis,[17] the Court holds that Holland's allegations fail to meet both. . . . [fn17]*See Harry v. Suarez*, No. 10 Civ. 6756, 2012 WL 2053533, at *2 n.3 (S.D.N.Y. June 4, 2012) (recognizing, pre–*Kingsley*, that for pretrial detainees, 'the established Eighth Amendment framework for claims of sexual abuse by prison officials would still provide the appropriate standards for resolving plaintiff's claims').")

Colbert v. Gumusdere, No. 15CV1537-LTS-DCF, 2016 WL 1181726, at *4 n.4 (S.D.N.Y. Mar. 25, 2016) ("The Court acknowledges that the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which held that 'the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one,'. . . may have implications for cases such as this one, in which a pretrial detainee has asserted a deliberate indifference claim. The *Kingsley* holding has not yet, however, been applied beyond the context of excessive force cases. Moreover, even if *Kingsley*'s purely objective analysis were applied here, the Court's analysis would remain unchanged because Plaintiff has failed to allege facts that satisfy the objective prong of the deliberate indifference inquiry.")

Woodhouse v. City of Mt. Vernon, No. 113CV00189ALCHBP, 2016 WL 354896, at *10 n.4 (S.D.N.Y. Jan. 27, 2016) ("This Court applies a subjective standard to Woodhouse's Fourteenth Amendment claim of deliberate indifference to his serious medical needs, just as it would to an Eighth Amendment claim brought by a convicted prisoner. . . This is so despite the Supreme Court's recent decision in *Kingsley v. Hendrickson*, holding that 'the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one,'. . . rather than the subjective standard that a convicted prisoner bringing an excessive force claim must meet under *Hudson v. McMillian*. . . However, the Second Circuit has held that 'due process does not require more than the Eighth Amendment.'. . Because 'the Eighth Amendment still requires intent[,] the Fourteenth Amendment requires no more. The Fourteenth Amendment standard here only changes if the Supreme Court changes the Eighth Amendment floor.'")

Moran v. Livingston, No. 6:10-CV-6178 EAW, 2016 WL 93402, *__ (W.D.N.Y. Jan. 7, 2016) ("The decision in *Kingsley* only expressly dealt with an excessive use of force claim, and existing Second Circuit precedent requires a pretrial detainee to establish both subjective and objective elements to support a claim for deliberate indifference to medical needs under the Fourteenth Amendment. . . To date, the Second Circuit has declined to expressly address whether the deliberate indifference standard has changed for pretrial detainees in light of the *Kingsley* decision. *See Ross v. Correction Officers John & Jane Does 1–5,* 610 F. App'x , 76 (2d Cir.2015) ("Because our focus, in analyzing whether qualified immunity applies, is on whether the right asserted by Ross was clearly established at the time of the alleged violation, we need not address *Kingsley*'s possible implication for deliberate indifference claims brought by pre-trial detainees."). As a result, the Court will follow existing Second Circuit precedent and analyze Plaintiff's deliberate indifference claims under both a subjective and objective standard.")

Gutierrez v. City of New York, No. 13 CIV. 3502 JGK, 2015 WL 5559498, at *7 n.2 (S.D.N.Y. Sept. 21, 2015) ("The Supreme Court recently clarified that a pretrial detainee needs to show only that the officers' use of force was objectively unreasonable to prove an excessive force claim under § 1983 and does not need to show that the officers were subjectively aware of the unreasonableness of their use of force. *See Kingsley v. Hendrickson,* 135 S.Ct. 2466, 2472–73 (2015). The Supreme Court has not resolved the issue of whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee. *See id.* at 2479 (Alito, J., dissenting).")

Zikianda v. Cty. of Albany, No. 1:12-CV-1194, 2015 WL 5510956, at *14 n.5 (N.D.N.Y. Sept. 15, 2015) ("Plaintiff contends that a recent Supreme Court holding requires the Court to apply a standard other than deliberate indifference here; Defendants disagree. *Kingsley v. Hendrickson,* decided this year, concerned the standard for determining whether officers used excessive force, violating the constitutional rights of a pre-trial detainee. . . The Court concluded that-unlike a prisoner after conviction, who must show that an officer subjectively knew that the force used was excessive to obtain Eighth–Amendment relief-'a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable' to prevail under the due process clause. . . The crucial distinction for the Court was the nature of the detainee's claims: they were Fourteenth Amendment Due Process claims, as opposed to the Eighth Amendment cruel and unusual punishment claims convicted prisoners bring in the excessive force context. . . The Court did not need to determine under the circumstances whether a 'punishment [was] unconstitutional,' and thus an objective standard could apply. . . Plaintiff asserts that a similar, less demanding, standard should apply to medical treatment claims. He points to no case law that establishes this standard, but instead contends that the Supreme Court's determination that a clear distinction exists between Eighth Amendment and Fourteenth Amendment Due Process claims mandates that a new standard be applied because prisoners are subject to punishment and detainees are not. A case cited by the Plaintiff, *Turkmen v. Hasty,* No. 13–1002, 2015 U.S.App. LEXIS 10160 at *77 n. 34, 2015 WL 3756331 (2d Cir. June 17, 2015), noted that the 'deliberate indifference' applied to both prisoners and pre-trial detainees, but declined to address whether 'civil immigration detainees

should be governed by an even more protective standard than pretrial criminal detainees.' *Turkmen* was decided a week before *Kingsley.* The Court is unconvinced that *Kingsley* mandates a different standard for immigration detainees than for pre-trial detainees. *Kingsley* did not address that question, and could not have, since the detainee alleging excessive force in that case was 'detained in jail prior to trial [.]' *Kingsley,* 192 L.Ed.2d at 423. Thus, the question for the Court in *Kinglsey* was how (and whether) to distinguish between excessive-force claims brought under the Eighth and Fourteenth Amendments, not the general standard to be applied to constitutional claims brought by immigration detainees. As explained above, the Second Circuit has already answered the question of whether the deliberate indifference standard applies to pre-trial detainees asserting medical claims and concluded that it does. Nothing in *Kingsley* undermines that holding. Moreover, the Second Circuit in *Turkmen* did not decide that civil immigration status disrupted the deliberate indifference standard, and the Court sees no reason to abandon a standard that Courts have determined applies to persons in detention, whether convicted of a crime and thus subject to punishment or held prior to trial, and thus eligible for more extensive protection. The deliberate indifference standard recognizes the unique demands for health care in jails, and the same logic that would apply that standard to pre-trial detainees counsels that the standard apply to civil immigration detainees like the Decedent. In any case, the Court concludes that Plaintiff may prevail under the deliberate indifference standard. The Court will of course permit the parties to argue about the proper standard before trial-any changes in the controlling law should be argued by the parties in proposing jury instructions.")

Radin v. Tun, No. 12-CV-1393 ARR VMS, 2015 WL 4645255, at *9 n.18 (E.D.N.Y. Aug. 4, 2015) ("Prior to *Kingsley,* courts in this Circuit required the plaintiff to establish both an objective and a subjective element to an excessive force claim, *see, e.g., Benjamin v. Flores,* No. 11 Civ. 4216(ARR), 2012 WL 5289513, at *3 (E.D.N.Y. Oct. 23, 2012) (citing *United States v. Walsh,* 194 F.3d 37, 49–50 (2d Cir.1999)), and these courts held that, to satisfy the objective element, the force used must be 'more than *de minimis,' id.* (citing *Walsh,* 194 F.3d at 50); *see Wilkins v. Gaddy,* 559 U.S. 34, 39 (2010) (stating that the force used must be "nontrivial").")

Roberts v. C-73 Med. Dir., No. 1:14-CV-5198-GHW, 2015 WL 4253796, at *3 n.3 (S.D.N.Y. July 13, 2015) ("In its recent decision in *Kingsley v. Hendrickson,* the Supreme Court held that a pretrial detainee bringing a claim for excessive force under the Fourteenth Amendment must meet an *objective* standard by showing 'only that the force purposely or knowingly used against him was objectively unreasonable.'. . (abrogating *Murray v. Johnson No. 260,* 367 F. App'x 196, 198 (2d Cir.2010)). In contrast, a convicted prisoner bringing a claim for excessive force under the Eighth Amendment must meet a *subjective* standard by showing that the force was applied 'maliciously and sadistically to cause harm,' and not 'in a good-faith effort to maintain or restore discipline.'. . The decision in *Kingsley* dealt only with excessive force claims, thus the Court continues to abide by Second Circuit precedent setting forth a subjective standard for cases involving allegations of deliberate indifference to a pretrial detainee's serious medical needs, which is identical to the standard for convicted prisoners under the Eighth Amendment. *See Caiozzo v. Koreman,* 581 F.3d 63, 69 (2d Cir.2009). In *Arroyo v. Schaefer,* the Second Circuit noted that due process does not

require more than the Eighth Amendment. 548 F.2d 47, 50 (2d Cir.1977). That premise did not change in this context-the Eighth Amendment still requires intent; the Fourteenth Amendment requires no more. The Fourteenth Amendment standard here only changes if the Supreme Court changes the Eighth Amendment floor.")

THIRD CIRCUIT

Moy v. DeParlos, No. 22-1723, 2023 WL 3717517, at *1 (3d Cir. May 30, 2023) (not reported) ("There is some question as to which legal standard applies to Moy's medical-needs claim. Although pretrial detainees' constitutional claims arise under the Due Process clause, we have traditionally assessed their medical-needs claims under the Eighth Amendment's familiar two-prong inquiry – i.e., whether the medical needs are objectively serious, and whether the prison medical staff acted with deliberate indifference in treating such needs. . . However, in *Kingsley v. Hendrickson*, a case involving a pretrial detainee's excessive force claim, the Supreme Court determined that a detainee only needed to show that the use of force was objectively unreasonable. . . Since *Kingsley*, courts have reached conflicting conclusions about whether that objective-only inquiry applies with equal force to a pretrial detainee's medical-needs claim. *See Helphenstine v. Lewis Cnty., Ky.*, 60 F.4th 305, 316 (6th Cir. 2023) (collecting cases and noting that courts are 'all over the map' on the issue of whether and to what extent Kingsley applies to a pretrial detainee's medical-needs claim). We need not resolve this issue, however, because Moy's medical-needs claims fail under any conceivable standard. On this record, it is clear that the prison physician (Dr. Keenan), and the prison nurses provided constitutionally adequate care.")

Rosser v. Donovan, No. 20-3278, 2021 WL 5055837, at *2 (3d Cir. Nov. 1, 2021) (not reported) ("The District Court considered the officers' use of force under the Fourth Amendment, because they were seeking to execute a search warrant. . . and under the Fourteenth Amendment's Due Process clause, because Rosser was a pretrial detainee[.] . . The District Court determined that '[t]he reasonableness factors under the Fourth Amendment are the same as those under the Due Process clause for pretrial detainee claims.'. .Rosser argues that only the Fourth Amendment standard should apply, because at the time of the incident he was merely an arrestee and had not yet had a probable cause hearing. We need not resolve that question because, for an arrestee like Rosser, '[w]hatever the source of law, in analyzing an excessive force claim, a court must determine whether the force was objectively unreasonable in light of the facts and circumstances of each particular case.' *Lombardo v. City of St. Louis, Missouri*, 141 S. Ct. 2239, 2241 n.2 (2021) (per curiam) (internal quotation marks omitted) (citing *Kingsley*, 576 U.S. at 397); *see also Jacobs v. Cumberland Cnty.*, 8 F.4th 187, 195 n.6 (3d Cir. 2021) ("Although the factual scenarios in the two contexts may differ, the Fourteenth Amendment standard is now almost identical to the Fourth Amendment standard.")")

Hope v. Warden York County Prison, 972 F.3d 310, 324-29 (3d Cir. 2020) ("Given the extraordinary circumstances that existed in March 2020 because of the COVID-19 pandemic, we are satisfied that their § 2241 claim seeking only release on the basis that unconstitutional

confinement conditions require it is not improper. . . For these reasons, we hold that Petitioners' claim that unconstitutional conditions of confinement at York and Pike require their release is cognizable in habeas. . . .We turn now to likelihood of success on the merits. Petitioners claim their conditions of confinement violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. As immigration detainees, Petitioners are entitled to the same due process protections as pretrial detainees. . . Petitioners are in federal custody pursuant to the INA and housed in state facilities, so they are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. . . Although the Eighth Amendment does not apply here, . . . the substantive due process guarantees afforded detainees like Petitioners are at least as robust as Eighth Amendment protections afforded prisoners[.] . . Applying this framework, we conclude the District Court abused its discretion when it held that Petitioners showed a substantial likelihood of success on the merits of their claims. . . . Though not a convicted prisoner, a detainee 'simply does not possess the full range of freedoms of an unincarcerated individual.'. . Thus, '[t]he fact of confinement as well as the legitimate goals and policies of the [ ] institution limits [Petitioners'] retained constitutional rights.'. .Important here—and largely ignored by the District Court and Petitioners—are the legitimate objectives and difficulties of managing a detention facility, . . . and the objectives of immigration detention: ensuring appearance at detention proceedings and protecting the public from harm. . . . Considering all the responsive measures specifically implemented to detect and to prevent spread of the virus, the challenges of facility administration during an unprecedented situation, and the purposes served by detention—Petitioners did not show a substantial likelihood of success on their claim that the conditions of their confinement constitute unconstitutional punishment. We therefore hold the District Court erred as to its punishment determination.")

Moore v. Luffey, No. 18-1716, 2019 WL 1766047, at *3 n.2 (3d Cir. Apr. 19, 2019) (not reported) ("In his opening brief, Moore argues that this Court 'should apply the objective unreasonableness standard adopted by the Supreme Court in [*Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015)]' rather than the Eighth Amendment's deliberate indifference standard. . . However, Moore does not cite to any cases of this Court applying *Kingsley* to a claim of deliberate indifference to a detainee's serious medical needs. Moore also fails to explain how applying an objective unreasonableness standard instead of the deliberate indifference standard would affect the outcome of his appeal. Both standards require the plaintiff to show that the defendant was more than negligent in addressing the plaintiff's serious medical needs. . . Because Moore's claims fail under both standards, we decline to address whether we should apply the new standard here.")

Wharton v. Danberg, 854 F.3d 234, 243, 247 (3d Cir. 2017) ("Suits against high-level government officials must satisfy the general requirements for supervisory liability. In particular, supervisors are liable only for their own acts; in this case, they are liable only if they, 'with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm.' *A.M. ex rel. J.M.K. v. Luzerne Cty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004) (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989)) (alteration in original). This standard for supervisory liability largely overlaps

with the over-detention standard—both require a showing of deliberate indifference and causation—but centers the inquiry around a policy or practice. . . . Our precedent is clear that while the detention of sentenced inmates is governed by the Eighth Amendment, the treatment of pretrial detainees is governed by the Due Process Clause. . . For pretrial detainees, therefore, there is no applicable provision more specific than the Due Process Clause and the more-specific-provision rule does not apply. A separate due process analysis is required. The protections of the Eighth Amendment and Due Process Clauses are sometimes, but not always, the same. . . We need not delve into the differences between those two analyses in this context, however. This is a suit against supervisory officials, for the creation of policies and practices. Supervisory policy-and-practice liability requires deliberate indifference. *A.M. ex rel. J.M.K.*, 372 F.3d at 586. Thus, for the same reasons as in our Eighth Amendment analysis, we conclude that there is no genuine dispute of material fact as to deliberate indifference under the Fourteenth Amendment.")

Tressler v. Centre County, No. 1:24-CV-00456, 2024 WL 4989315, at *9 (M.D. Pa. Dec. 5, 2024) ("Recognizing that medical claims brought by pretrial detainees are substantive due process claims, not Eighth Amendment claims, judges in this district have nevertheless generally continued to apply Eighth Amendment standards to such claims. [collecting cases] Similarly, the Third Circuit has continued to rely on Eighth Amendment standards when addressing medical claims of pretrial detainees. [citing cases] Considering the above and given that both Tressler and the Individual County Defendants rely on Eighth Amendment standards, we will apply the Eighth Amendment standards to Tressler's denial-of-medical-care claims against the Individual County Defendants.")

Sanabria v. Brackett, No. CV 22-1012-CJB, 2024 WL 4827320, at *4 n.5 (D. Del. Nov. 19, 2024)("In 2014 and again in 2019, the United States Court of Appeals for the Third Circuit affirmatively stated that it applies the same standard to a failure to protect claim made pursuant to the Fourteenth Amendment as it does to a failure to protect claim brought under the Eighth Amendment—including the use of a subjective standard for the deliberate indifference element. *See Travillion v. Wetzel*, 765 F. App'x 785, 788, 790 (3d Cir. 2019); *Thomas*, 749 F.3d at 217 n.4. In his briefing, however, Plaintiff argued that in light of the Supreme Court's 2015 decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), the elements of a failure to protect claim made pursuant to the Fourteenth Amendment are now different from those as to such a claim brought pursuant to the Eighth Amendment in one respect: i.e., that a Fourteenth Amendment claim requires only the use of an *objective* state of mind standard as to knowledge of the risk in question (that the prison official *knew or should have known* of the substantial risk), not a *subjective* state of mind standard (that the official *actually did know* of the risk). . . Again, the Court need not definitively resolve this issue now, because the outcome of this Motion would not be impacted by any such decision. In other words, when the Court concludes below that Plaintiff has sufficient evidence to withstand summary judgment regarding his Fourteenth Amendment failure to protect claim as to Brackett, that conclusion would be the same regardless of whether a subjective or an objective standard was utilized regarding Brackett's state of mind as to knowledge of the risk in question. And below, when the Court concludes that Plaintiff has insufficient evidence to

withstand summary judgment as to such a claim against Vanes, the decision would not differ regardless of which state of mind standard is used.")

McLaughlin v. Zavada, No. CV 19-422, 2022 WL 409492, at *3–5 (W.D. Pa. Feb. 10, 2022) ("The circuits are split on whether *Kingsley's* holding applies to other conditions of confinement claims. Some circuits have held that the same objective standard applies in other pretrial detainee Fourteenth Amendment contexts, including denial of medical care and conditions of confinement claims. *See Brawner v. Scott Cty.*, 14 F.4th 585, 593 (6th Cir. 2021) (medical care); *Hardeman v. Curran*, 933 F.3d 816, 822-23 (7th Cir. 2019) (lack of access to water); *Colbruno v. Kessler*, 928 F.3d 1155, 1161-63 (10th Cir. 2019); *Gordon v. County of Orange*, 888 F.3d 1118, 1120, 1122-25 (9th Cir. 2018) (medical needs); *Darnell v. Pineiro*, 849 F.3d 17, 34-35 (2d Cir. 2017) (overcrowding and eight other types of degrading conditions of confinement); *Castro v. County of L.A.*, 833 F.3d 1060, 1070-71 (9th Cir. 2016) (en banc). Others have declined to do so. *See, e.g., Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020), *cert. denied*, 142 S. Ct. 312 (2021). The Third Circuit has not decided this issue. In support of their motion for reconsideration about this issue, Defendants contend that this Court strayed from 'binding Third Circuit precedent'. . . that is set forth in *Edwards v. Northampton County*, 663 F. App'x 132 (3d Cir. 2016) . . . . There are several flaws in Defendants' argument. First, *Edwards* is not a precedential opinion and the Court of Appeals explicitly states that it has *not* addressed the standard governing a pretrial detainee's conditions of confinement claim in a precedential opinion. Moreover, although *Edwards* was decided after *Kingsley*, it includes no reference or discussion of it. Further, with respect to some of the case law from other circuits that the Third Circuit cited with approval in *Edwards*, the Second Circuit overruled *Caiozzo* in *Darnell* and in *Hardeman*, the Seventh Circuit distinguished *Tesch*, noting that it 'applied the more demanding Eighth Amendment deliberate-indifference standard, as opposed to the objective inquiry that we apply here.' 933 F.3d at 824. Defendants also attempt to rely on *Bistrian v. Levi*, 696 F.3d 352 (3d Cir. 2012), in which the Third Circuit stated that '"[d]eliberate indifference" in this context is a subjective standard.'. . *Bistrian* was not a Fourteenth Amendment due process case, however; it was a Fifth Amendment case arising out of prison officials' alleged failure to protect an inmate from violence at the hands of another inmate. The contention that the *Bistrian* case established the standard for Fourteenth Amendment conditions of confinement claims by pretrial detainees is directly refuted by the Third Circuit's later statement in *Edwards* that it had not previously addressed the standard governing a pretrial detainee's conditions of confinement claim in a precedential opinion. Defendants also cite two other Third Circuit non-precedential cases, but neither of them cites *Kingsley* or is on point. . . . In the Memorandum Opinion issued in this case, the Court predicted that, if presented with this specific question, the Court of Appeals for the Third Circuit would conclude that the *Kingsley* standard applies to conditions of confinement claims by pretrial detainees. However, as noted the Court's opinion, the application of either of these standards leads to the same result--the denial of Defendant's motion for summary judgment. As noted in the Memorandum Opinion, there are genuine issues of material fact regarding the conditions at the FCP if the subjective deliberate indifference standard is applied. Defendants contend that there is no evidence that Miller and Zavada knew of the conditions about which Plaintiff complains and there is no evidence that

Smith and Lenkey—both of whom Plaintiff described as 'great guys'—failed to act to improve the situation. As noted in the Memorandum Opinion, however, while Defendants claim that Plaintiff never saw Miller or Zavada during his incarceration at the FCP, this contention is not responsive to the question of whether these individuals knew about the conditions at the prison. Defendants submitted no evidence to show that they had no knowledge of these conditions. As noted in the previous opinion, in the absence of any evidence to the contrary, it defies logic to suggest that neither Miller nor Zavada was aware of the conditions in the FCP that allegedly had existed for months. Among other things, Plaintiff testified under oath that while he was in the SMU, raw sewage came up through the drains. His toilet constantly leaked and could not be used for 'days on end.' Problems were temporarily fixed but then recurred. After he was moved back to the C Range, he had to relieve himself in plastic bags and sewage repeatedly ran from the upstairs cell down to C block and across the floor. According to Plaintiff, this had been going on for quite some time and was constant. The smell in the C Range was foul. At times the floors were covered with feces, that there was standing water consisting of urine in his cell and that the union asked for new boots due the existence of feces and urine on the floor. Thus, at least as described by Plaintiff, the conditions were sufficiently obvious that even in the absence of direct evidence of deliberate indifference, the circumstantial evidence in the record creates an issue of fact for the jury. Moreover, as Plaintiff argued, there is some evidence that Miller and Zavada were aware of the conditions to which he was allegedly subjected through personal observation, notices and grievances, and still took no action. Plaintiff also noted that Miller posted several video recordings on the internet detailing the conditions at the FCP, including some of the issues Plaintiff has raised here. . . The Court concluded in its opinion that whether either defendant could have acted to remedy Plaintiff's conditions remains a contested issue. Thus, regardless of the standard applied, there are genuine issues of material fact about Defendants' conduct that preclude summary judgment in their favor.")

Andrews v. Harper, No. 2:19-CV-00670-CCW, 2021 WL 6051441, at *5-8 (W.D. Pa. Dec. 20, 2021) ("Seeking to apply the rationale of *Kingsley* to her other Fourteenth Amendment claims, Ms. Andrews contends that she can prevail on her conditions of confinement claim (Count I) and adequate medical care claim (Count VII) by showing that Defendants acted in an objectively unreasonable manner rather than showing that Defendants were deliberately indifferent. . . Defendants, however, assert that the Court should continue to apply the deliberate indifference standard—meaning that the defendant 'must actually have known or been aware of the excessive risk to inmate safety.'. . Both parties acknowledge that federal courts are split . . . on whether *Kingsley*'s holding with respect to the objectively unreasonable standard in Fourteenth Amendment pretrial detainee excessive force claims applies to other pretrial detainee conditions of confinement claims. . . . The Third Circuit has not decided whether *Kingsley*'s rationale extends to other Fourteenth Amendment claims by pretrial detainees outside of the excessive force context. In *Moore v. Luffey*, a non-precedential opinion, the Third Circuit declined to address whether *Kingsley*'s objective unreasonableness standard should apply instead of the deliberate indifference standard because the pretrial detainee's claims of inadequate medical care failed under both the objectively unreasonable standard and the deliberate indifference standard. . . In applying

the Fourteenth Amendment to pretrial detainee claims, the Third Circuit has ruled that 'the Fourteenth Amendment affords pretrial detainees protections at least as great as the Eighth Amendment.'. . As such, even after *Kingsley*, courts in this Circuit have generally continued to apply the deliberate indifference standard when analyzing certain types of Fourteenth Amendment claims raised by pretrial detainees. [collecting cases] In the context of inadequate medical care claims under the Fourteenth Amendment, district courts in this Circuit that have explicitly considered *Kingsley* have nonetheless continued to apply the deliberate indifference standard. . . . The Third Circuit has considered the appropriate standard to be applied when a pretrial detainee asserts a conditions of confinement claim based on a failure to protect theory. *Edwards v. Northampton Cnty.*, 663 F. App'x 132, 135–36 (3d Cir. 2016). Although it did not address *Kingsley* specifically, the Third Circuit noted that while 'we have not previously addressed the standard governing a pretrial detainee's conditions of confinement claim … in a precedential opinion, *we have stated in dicta that the state of mind requirement for prisoners' failure to protect claims —"deliberate indifference"— applies also to pretrial detainees' claims…. and find no reason to apply a different standard here* as we have applied the "deliberate indifference" standard both in cases involving prisoners … and pretrial detainees.'. . The Third Circuit proceeded to apply the deliberate indifference standard to the detainee's conditions of confinement claims with respect to the hygienic issues in his cell and the failure to implement and enforce adequate MRSA precautions. . . . Ms. Andrews' Motion in Limine seeks to extend *Kingsley*'s rationale beyond Fourteenth Amendment excessive force claims to encompass her conditions of confinement (Count I) and adequate medical care (Count VII) claims. However, the Third Circuit has not applied *Kingsley*'s rationale beyond the scope of excessive force claims and district courts in this Circuit have continued to apply the deliberate indifference standard to the types of Fourteenth Amendment claims at issue here. Accordingly, Ms. Andrews' Motion in Limine to Apply the Objectively Unreasonable Standard to Her Fourteenth Amendment Claims will be **DENIED**.")

Waters v. State of Delaware, No. 18-CV-266-RGA, 2020 WL 4501945, at *7 (D. Del. Aug. 5, 2020) ("The Supreme Court has recently applied an 'objectively unreasonable' standard to analyze an excessive force claim under the Fourteenth Amendment. *Kingsley v. Hendrickson*, 576 US 389, 398 (2015). However, the Third Circuit has declined to address whether the 'objectively unreasonable' standard applies to a deliberate indifference to medical need analysis. *Moore v. Luffey*, 2019 WL 1766047 at *3 n.2 (3d Cir. Apr. 19, 2019).")

Williams v. Robinson, No. CV165930RBKAMD, 2018 WL 4489670, at *2 (D.N.J. Sept. 19, 2018) ("The Court notes the recent Supreme Court decision, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which called into question the propriety of applying the Eighth Amendment analysis to a pretrial detainee in an excessive force case. Post-*Kingsley*, many courts have limited its holding only to excessive force claims, and those courts continue to apply the Eighth Amendment analysis in other contexts for pretrial detainees, such as denial of medical services claims. . . Third Circuit decisions seem to suggest that the Eighth Amendment is still the continuing standard for denial of medical care claims in this circuit. *See Miller v. Steele-Smith*, 713 F. App's 74, 76 n.1 (3d Cir. 2017) ("[A] Fourteenth Amendment claim for inadequate medical care is analyzed

pursuant to the same standard applied to an Eighth Amendment claim"); *Gerholt v. Orr*, 624 F. App'x 799, 801 n.3 (3d Cir. 2015) ("We have made clear, however, that the Due Process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner.") (citation and quotation omitted). As the Third Circuit has not announced a different test for pretrial detainees, this Court applies the Eighth Amendment test to Plaintiff's claims.")

Quinones v. County of Camden, No. CV1713769RBKKMW, 2018 WL 3586270, at *3 n.2 (D.N.J. July 26, 2018) ("The Court notes the recent Supreme Court decision, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which called into question the propriety of applying the Eighth Amendment analysis to a pretrial detainee in an excessive force case. Post-*Kingsley*, many courts have limited its holding only to excessive force claims, and those courts continue to apply the Eighth Amendment analysis in other contexts for pretrial detainees, such as denial of medical services claims. . . Third Circuit decisions seem to suggest that the Eighth Amendment is still the continuing standard for denial of medical care claims in this circuit. . . As the Third Circuit has not announced a different test for pretrial detainees, this Court applies the Eighth Amendment test to Plaintiff's claims.")

Stevenson v. County Sheriff's Office of Monmouth, No. 13-5953 (MAS) (TJB), 2018 WL 797425, at *3 (D.N.J. Feb. 8, 2018) ("Here, Defendants' qualified immunity argument requires analysis under the Eighth Amendment because *Kingsley* was not decided at the time the alleged incident occurred—to wit, a violation under the Eighth Amendment would certainly be a violation under the less stringent Fourteenth Amendment standard. Based on the prevailing case law in this district and the Third Circuit at the time, it was reasonable for Defendants to believe that their conduct toward Plaintiff was governed by the Eighth Amendment standard for excessive force, not the Fourteenth Amendment. *See, e.g.*, *Everett v. Nort*, 547 F. App'x 117, 121 (3d Cir. 2013); *Bornstein v. Cty. of Monmouth*, No. 11-5336, 2014 WL 4824462, at *6 (D.N.J. Sept. 25, 2014). On the other hand, the same case law also clearly established that every reasonable officer would have understood, on the date of the alleged incident, that he or she cannot apply excessive force on a prisoner in violation of the Eighth Amendment.")

Davis v. City of Philadelphia, No. CV 17-1381, 2018 WL 319348, at *6 (E.D. Pa. Jan. 5, 2018) ("Nearly four decades ago, the Supreme Court held in *Wolfish* that '[i]n evaluating the conditions or restrictions of pretrial detention ... the proper inquiry is whether those conditions amount to punishment of the detainee.'. . Although there is some disagreement among the Circuits. . . over the scope of detainees' right to be free from punishment—specifically, how the Eighth Amendment deliberate indifference standard from *Estelle*. . . interacts with *Wolfish* in claims by detainees for inadequate medical treatment—the law in this circuit is well-settled. . . The Third Circuit has drawn a clear distinction between the controlling standards under the Eighth and Fourteenth Amendments, holding that 'pretrial detainees are entitled to greater constitutional protection than that provided by the Eighth Amendment.' [citing *Hubbard v. Taylor*, 399 F.3d 150, 167 n.23 (3d Cir. 2005)] The *Hubbard* Court made clear that the Eighth Amendment's deliberate

indifference standard is relevant to claims by pretrial detainees 'only because it establishe[s] a floor.'. . .[T]o determine when inadequate medical treatment amounts to punishment, courts in the Third Circuit engage in a two-step test 'distilled [from] *Wolfish* 's teachings.'. . First, the court must ask whether the complained of conditions serve 'any legitimate purpose.'. . If so, the court must next determine whether the conditions are 'rationally related' to that purpose. . . The second step considers whether the conditions cause the detainee to endure such 'genuine hardship' that the conditions are 'excessive in relation to the purposes assigned to them.'")

Dewald v. Jenkins, No. CV 16-04597, 2017 WL 1364673, at *4 (E.D. Pa. Apr. 13, 2017) ("Dewald contends that being denied use of a toilet amounted to cruel and unusual punishment under the Eighth Amendment. Again, given his pretrial status, the Fourteenth Amendment governs his claim. While the Eighth Amendment bars cruel and unusual punishment—typically deprivations of 'the minimal civilized measure of life's necessities,' *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)—the Fourteenth Amendment's due process clause protects pretrial detainees from being punished *at all*. *Hubbard*, 399 F.3d at 166 (citing *Bell*, 441 U.S. at 536). Thus while violations of the Eighth Amendment will amount to violations of the Fourteenth Amendment, conditions that do not violate the Eighth Amendment may nonetheless violate a pretrial detainee's due process rights.")

Moore v. Wright, No. CV 14-991-RGA, 2017 WL 729553, at *4 (D. Del. Feb. 24, 2017) ("As a pretrial detainee, the Due Process Clause of the Fourteenth Amendment affords Plaintiff a vehicle for his medical needs claim. *Bell v. Wolfish*, 441 U.S. at 535 n.16. When evaluating whether a claim for inadequate medical care by a pre-trial detainee is sufficient under the Fourteenth Amendment, the Third Circuit has found no reason to apply a different standard than that set forth in *Estelle v. Gamble*, 429 U.S. 97 (1976). *See Natale v. Camden Cnty. Correc. Facility*, 318 F.3d 575, 581 (3d Cir. 2003). To evaluate a medical needs claim, the Court determines if there is evidence of a serious medical need and acts or omissions by prison officials indicating deliberate indifference to those needs.")

Coward v. Lanigan, No. CV132222MASTJB, 2016 WL 1229074, at *4 (D.N.J. Mar. 29, 2016) ("The Court makes note of a recent Supreme Court decision, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which calls into question the propriety of applying the Eighth Amendment analysis to pretrial detainees. In *Kingsley*, the Supreme Court held that the standard applied to an excessive force claim for prisoners under the Eighth Amendment, which requires the state actor to have acted with a reckless disregard of the plaintiff's rights—a subjective standard—is incompatible with a claim of excessive force under the Fourteenth Amendment for a pretrial detainee. . . Instead, objective reasonableness is the proper standard for such claims. . . Post-*Kingsley*, some courts have limited its holding only to excessive force claims, and those courts continue to apply the Eighth Amendment analysis in other contexts for pretrial detainees, such as denial of medical services claims. . . A post-*Kingsley* Third Circuit decision seems to suggest that the Eighth Amendment may still be the continuing standard in this circuit. *See Gerholt v. Orr*, 624 F. App'x 799, 801 n.3 (3d Cir. 2015) ("We have made clear, however, that the Due Process rights of a pretrial detainee are at least as great as the Eighth Amendment protections available to a convicted prisoner.")

(citation and quotation omitted). As the Third Circuit has not announced a different test for pretrial detainees, this Court applies the Eighth Amendment test to Plaintiff's claims.")

Mattern v. City of Sea Isle, No. CIV. 14-7231 JBS/AMD, 2015 WL 5445042, at *6-7 (D.N.J. Sept. 15, 2015) ("The Supreme Court recently affirmed this distinction in *Kingsley v. Hendrickson,* noting that while the Eighth Amendment applies to convicted prisoners, claims brought by pretrial detainees fall under the Fourteenth Amendment's Due Process Clause. 135 S.Ct. 2466, 2475 (2015). Consistent with the law in this Circuit, the Court will 'evaluate [Andrew Mattern's] Fourteenth Amendment claim for inadequate medical care under the standard used to evaluate similar claims brought under the Eighth Amendment.' *Natale v. Camden Cnty. Corr. Facility,* 318 F.3d 575, 581 (3d Cir.2003).")

FOURTH CIRCUIT

Simmons v. Whitaker, 106 F.4th 379, 387-88 (4th Cir. 2024) ("Although Simmons was a pre-trial detainee whose claims were therefore governed by the Fourteenth Amendment, the district court applied the Eighth Amendment standard and granted summary judgment because it found that '[t]he actions of the officers d[id] not evince ay [sic] malice or ill will.'. . The court determined that 'the officers used minimal force to get Plaintiff back to his cell, and used reasonable force to prevent Plaintiff from in jurying [sic] himself and to regain control.'. . That constitutes legal error. We recognize that Simmons's *pro se* complaint references Eighth Amendment caselaw, but *pro se* documents are to be liberally construed. . . .Therefore, the district court had a duty to look beyond the legal standards Simmons produced in his complaint and instead apply the law applicable to his essential grievance: the excessive force he suffered as a pre-trial detainee. The Officers argue there is no reversible error because the *Kingsley* and *Whitley* factors are substantially the same. This argument is unpersuasive. Although the factors appear similar, they can achieve different ends. Take, for instance, the district court's focus on what it considered a lack of malice. From the *Whitley* factors, the district court concluded that '[t]he actions of the officers do not evince ay [sic] malice or ill will' because they 'used reasonable force to prevent [Simmons] from in jurying [sic] himself and to regain control.'. . That analysis justified the district court's grant of summary judgment under *Whitley*, but it does not necessarily foreclose a finding of objective reasonableness under *Kingsley.* In other words, the court committed reversible error because it did not address the relevant inquiry.")

Short v. Hartman, 87 F.4th 593, 603-12 & nn. 7, 8 (4th Cir. 2023), *cert. denied,* 144 S. Ct. 2631 (2024) ("Several cases have squarely presented this Court with the opportunity to decide whether *Kingsley* applies to pretrial detainees' claims for deliberate indifference to an excessive risk of harm. So far, though, we have not reached the issue, instead resolving each case on alternative grounds. . . Leaving this question unresolved creates uncertainty in our jurisprudence and allows the issue to slip past both practitioners and courts, as happened in this case below. More than eight years after *Kingsley*, it is time we lay this issue to rest. . . .The Supreme Court has long recognized that a 'court may consider an issue "antecedent to ... and ultimately dispositive of" the dispute

before it, even an issue the parties fail to identify and brief.'. . The question we have raised—whether *Kingsley* applies to the type of claim asserted in this case—is antecedent to our consideration of the district court's disposition of Mr. Short's claims. Accordingly, this issue is properly before us. . . .We now turn to whether *Kingsley* abrogates our Circuit's prior precedent and requires us to recognize that pretrial detainees can state a claim under the Fourteenth Amendment, based on a purely objective standard, for prison officials' deliberate indifference to excessive risks of harm.[7] **[fn. 7:** The Tenth Circuit has observed that 'a deliberate indifference claim presupposes a subjective component.' *Strain v. Regalado*, 977 F.3d 984, 992 (10th Cir. 2020). But the Supreme Court has recognized that, outside of the Eighth Amendment context, the term 'deliberate indifference' is not necessarily subjective. Instead, it is 'the equivalent of reckless[ness],' which is an objective standard in the civil law context, but a subjective standard in the criminal law context. *Farmer v. Brennan*, 511 U.S. 825, 836–37, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Indeed, in the context of municipal liability, the same term is used to describe a purely objective test. . . As the Sixth Circuit noted, 'the *Farmer* Court adopted the subjective component of the test for deliberate indifference under the Eighth Amendment based on the language and purposes of that amendment, focusing particularly on "punishments," and not on any intrinsic meaning of the term.' *Brawner v. Scott County*, 14 F.4th 585, 595 (6th Cir. 2021). Accordingly, like the Second, Sixth, Seventh, and Ninth Circuits we retain the term 'deliberate indifference' despite adopting *Kingsley*'s purely objective standard. We nonetheless acknowledge that, to the average reader, the term 'deliberate indifference' suggests subjectivity, and that an alternative term such as 'objective indifference' may be preferable if we were writing on a clean slate.**]** Like the Second, Sixth, Seventh, and Ninth Circuits, we find that it does. . . . [W]e hold, as four of our sister circuits[8] **[fn. 8:** Notably, these four circuits all adopted *Kingsley*'s purely objective test, without considering the question en banc. *See Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Gordon v. County of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018); *Miranda v. County of Lake*, 900 F.3d 335, 352–53 (7th Cir. 2018); *Brawner v. Scott County*, 14 F.4th 585, 596–97 (6th Cir. 2021). They thus recognized, as we do here, that *Kingsley* mandates a departure from prior circuit precedent and eliminates the need for en banc consideration of the issue.**]** have previously, that *Kingsley* is irreconcilable with precedent requiring pretrial detainees to meet a subjective standard to succeed on claims under the Fourteenth Amendment for prison officials' deliberate indifference to excessive risks of harm to the inmate. The fact that *Kingsley* refers broadly to 'challenged governmental action' and speaks of claims under the Fourteenth Amendment generally, coupled with its heavy reliance on *Bell v. Wolfish*, demonstrate that *Kingsley*'s objective standard extends not just to excessive force claims; it applies equally to deliberate indifference claims. . . . The Supreme Court's ruling in *Kingsley v. Hendrickson* upends the assumption that Fourteenth Amendment Due Process Clause claims should be treated the same as Eighth Amendment claims. In *Kingsley*, the Supreme Court held that, to state a Fourteenth Amendment Due Process Clause claim for excessive use of force, a pretrial detainee need allege only that the officer used objectively unreasonable force. . . . *Kingsley* is clear: The Fourteenth Amendment Due Process Clause protects pretrial detainees from 'governmental action' that is not 'rationally related to a legitimate nonpunitive governmental purpose' or that is 'excessive in relation to that purpose.'. . .Our subjective deliberate indifference test for pretrial detainees'

Fourteenth Amendment claims is irreconcilable with the *Kingsley–Bell* objective test. . . . Further, *Kingsley* repudiated the reasoning we followed in adopting the subjective test for deliberate indifference claims in the first place. Our precedent extended *Farmer*'s Eighth Amendment test to Fourteenth Amendment claims by dismissing the distinction between the two amendments as a distinction without a difference. . . *Kingsley* commands the opposite. 'The language of the two Clauses differs, and the nature of the claims often differs.'. . . Now that *Kingsley* requires us to properly distinguish Eighth Amendment claims from Fourteenth Amendment claims, our prior precedent applying a subjective deliberate indifference standard is 'no longer tenable.'. . We cannot harmonize *Kingsley* with our prior Fourteenth Amendment deliberate indifference precedent. The only way to respect the distinction *Kingsley* drew between the Eighth and Fourteenth Amendments is to recognize that *Kingsley*'s objective test extends to all pretrial detainee claims under the Fourteenth Amendment claims for deliberate indifference to an excessive risk of harm. We therefore conclude that *Kingsley* abrogated our prior precedent. . . . To state a claim for deliberate indifference to a medical need, the specific type of deliberate indifference claim at issue in this case, a pretrial detainee must plead that (1) they had a medical condition or injury that posed a substantial risk of serious harm; (2) the defendant intentionally, knowingly, or recklessly acted or failed to act to appropriately address the risk that the condition posed; (3) the defendant knew or should have known (a) that the detainee had that condition and (b) that the defendant's action or inaction posed an unjustifiably high risk of harm; and (4) as a result, the detainee was harmed. We take this test to be the same test our sister circuits have adopted. *See Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Gordon v. County of Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018); *Miranda v. County of Lake*, 900 F.3d 335, 352–53 (7th Cir. 2018); *Brawner v. Scott County*, 14 F.4th 585, 596–97 (6th Cir. 2021). The objective test we adopt today differs from our prior subjective test in one respect only. The plaintiff no longer has to show that the defendant had actual knowledge of the detainee's serious medical condition and consciously disregarded the risk that their action or failure to act would result in harm. That showing remains sufficient, but it is no longer necessary. Now, it is sufficient that the plaintiff show that the defendant's action or inaction was, in *Kingsley*'s words, 'objectively unreasonable,'. . . that is, the plaintiff must show that the defendant should have known of that condition and that risk, and acted accordingly. . . We go no further. To be clear, it is still not enough for the plaintiff to allege that the defendant negligently or accidentally failed to do right by the detainee. . . Negligence was not enough before, . . . and it is not enough now.")

Stevens v. Holler, 68 F.4th 921, 930-31, 933 (4th Cir. 2023) ("'[D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," ... proscribed by the Eighth Amendment.'. . However, a pretrial detainee's claim of constitutionally inadequate medical care is governed by the Fourteenth Amendment, rather than the Eighth Amendment. *Mays v. Sprinkle*, 992 F.3d 295, 300 (4th Cir. 2021). Although 'the precise scope of this Fourteenth Amendment right remains unclear[,] ... a pretrial detainee makes out a violation at least where [the detainee] shows deliberate indifference to serious medical needs under cases interpreting the Eighth Amendment.'. .To state such a claim, the detainee 'must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.'. .

Deliberate indifference is a high standard and 'the mere negligent or inadvertent failure to provide adequate care is not enough.'. .The test for deliberate indifference is two-pronged and includes both objective and subjective elements. . . Appellant must demonstrate that (1) Decedent was exposed to a substantial risk of serious harm (the objective prong); and (2) the prison official knew of and disregarded that substantial risk to the inmate's health or safety (the subjective prong). *Farmer v. Brennan*, 511 U.S. 825, 837–38, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Here, Appellees do not dispute prong one. . . Therefore, this case turns on the subjective prong; that is, whether the Individual Medical Defendants acted with a 'sufficiently culpable state of mind,' specifically, deliberate indifference to Decedent's health. . . . Significantly, we have rejected the notion that simply because medical staff have provided an inmate with '*some* treatment' that 'they have necessarily provided [the inmate] with *constitutionally adequate* treatment.'. . Rather, 'the treatment a prison facility [provides] must ... be adequate to address the prisoner's serious medical need.'. . And 'government officials who ignore indications that a prisoner's or pretrial detainee's initial medical treatment was inadequate can be liable for deliberate indifference to medical needs.'. .This is precisely what Appellant has alleged here -- that the care Decedent received was constitutionally inadequate. Appellant has sufficiently alleged that the Individual Medical Defendants' treatment and/or attempts at treatment, were not 'adequate to address [Decedent's] serious medical needs,' that Decedent's deterioration was persistent and obvious, and that the factual allegations allege more than mere disagreements regarding Decedent's medical care. . . Indeed, Appellant alleges treatment, or a lack thereof, that was 'grossly incompetent, inadequate or excessive as to shock the conscience.'. . As such, Appellant has plausibly alleged a Fourteenth Amendment violation.")

Moss v. Harwood, 19 F.4th 614, 624 n.4 (4th Cir. 2021) ("As the district court recognized, under *Kingsley v. Hendrickson*, . . . pretrial detainees bringing excessive force claims under the Fourteenth Amendment are no longer required to satisfy the analogous subjective component that governs the Eighth Amendment excessive force claims of convicted prisoners. . . But as the district court also noted, the Supreme Court has not extended *Kingsley* beyond the excessive force context to deliberate indifference claims, . . . and neither has our court[.] [citing *Mays v. Sprinkle*] Because Moss has expressly endorsed application of the Eighth Amendment standard – including its subjective component – to his Fourteenth Amendment claim, we have no occasion to consider that question today.")

Michelson v. Coon, No. 20-6480, 2021 WL 2981501 (4th Cir. July 15, 2021) (not reported) ("Generally, a prisoner asserting a claim for failure to protect must prove that he was 'incarcerated under conditions posing a substantial risk of serious harm, . . . and that the prison official knew of and disregarded the risk[.] . . In *Kingsley*, however, the Supreme Court held that a pretrial detainee bringing an excessive force claim must prove that the prison official's actions were objectively unreasonable but need not prove that the official acted with a subjectively culpable state of mind. . . Some other circuits to have examined failure to protect claims following *Kingsley* have determined that this standard for excessive force claims extends to failure to protect claims under the Fourteenth Amendment. *See Castro v. County of Los Angeles*, 833 F.3d 1060, 1069-71 (9th

Cir. 2016) (finding *Kingsley*'s purely objective standard for excessive force claims extends to failure to protect claims by pretrial detainees); *see also Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (same). We need not resolve this issue here because, even if a purely objective standard applies to a pretrial detainee's failure to protect claim, Michelson failed to state such a claim against Coon.")

Mays v. Sprinkle, 992 F.3d 295, 300-03 & n.4, 305 (4th Cir. 2021) ("[E]ven though Mays's claim arises under the Fourteenth Amendment, we have traditionally looked to Eighth Amendment precedents in considering a Fourteenth Amendment claim of deliberate indifference to serious medical needs. . . . Mays now argues that the Supreme Court's decision in *Kingsley*. . . altered this deliberate-indifference standard when applied to pretrial detainees. *Kingsley*, he claims, requires turning the subjective element into a purely objective one. . .We need not resolve this argument as that standard would make no difference here because of qualified immunity. . . . On the night of Mays's death, it was clearly established that 'a pretrial detainee ha[d] a right to be free from any form of punishment under the Due Process Clause of the Fourteenth Amendment.'. . And that right required 'that government officials not be deliberately indifferent to any serious medical needs of the detainee.'. . At that time, our caselaw considered a deliberate-indifference claim to require both an objectively serious medical condition and subjective knowledge by a prison official of both the 'serious medical condition and the excessive risk posed by the official's action or inaction.'. . . In the wake of *Kingsley*, the Second, Seventh, and Ninth Circuits adopted a completely objective standard for pretrial-detainee-medical-deliberate-indifference claims that requires showing that a reasonable officer would have recognized the serious medical condition and appreciated the excessive risk to the detainee's health. [citing cases] The Fifth, Eighth, and Eleventh Circuits cabined *Kingsley* to its facts—pretrial-detainee-excessive-force claims—and continue to require subjective knowledge of the condition and risk for pretrial-detainee-deliberate-indifference claims. [citing cases] While we have not directly addressed the import of *Kingsley*, we did recently state that a pretrial detainee's claim of inadequate medical care requires proof '(1) that the detainee had an objectively serious medical need; and (2) that the official subjectively knew of the need and disregarded it.' *Doe 4 ex rel. Lopez*, 985 F.3d at 340. But there, neither party raised *Kingsley* and the discussion should not be read to resolve this issue. . . .The clearly established inquiry asks whether 'any reasonable official in the defendant's shoes would have understood that he was violating' then-existing law, including any then-existing objective or subjective elements. . . . We had not decided whether *Kingsley*'s excessive-force-claim rationale extended to deliberate-indifference claims by the time Mays died. And we still have not. Both before and after Mays's death, we said a pretrial-detainee-medical-deliberate-indifference claim required both an objectively serious medical condition and subjective knowledge of the condition and the excessive risk posed from inaction. . . So regardless of *Kingsley*, qualified immunity turns on whether 'any reasonable official in the defendant's shoes would have understood that he was violating' that objective and subjective standard. . . Without allegations that plausibly satisfy both the objective and subjective elements, the officers would have a right to dismissal based on qualified immunity. . . Said another way, if the allegations show that the officers lacked the required subjective knowledge, then the officers would not have violated *clearly established* law. Only if the

allegations plausibly show an objectively serious medical condition and subjective knowledge by the officers will Mays's claim clear the qualified-immunity hurdle. And by clearing the qualified-immunity hurdle, Mays would have also plausibly alleged a violation of his rights under the Fourteenth Amendment, whatever the standard. The officers' subjective knowledge necessarily establishes any post-*Kingsley* objective standard (that is, whether every reasonable officer would have recognized the serious medical condition and appreciated the excessive risk to the detainee's health. . . If the deliberate-indifference standard for pretrial detainees continues to include a subjective component (and is thus unchanged by *Kingsley*), then the qualified-immunity finding satisfies the constitutional-violation standard as well. So no matter if the deliberate-indifference standard for pretrial detainees continues to include a subjective component, the qualified-immunity determination resolves whether Mays's allegations establish a plausible claim. . . So this appeal hinges on whether Mays pleaded sufficient facts to show both that he had an objectively serious medical condition and that the officers had subjective knowledge of the condition and the excessive risk posed by inaction. . . .[W]e conclude that the complaint plausibly alleges that Mays had an objectively serious medical condition requiring medical attention and that the officers subjectively knew of that need and the excessive risk of their inaction. That is enough to overcome qualified immunity and survive a motion to dismiss.")

Dilworth v. Adams, 841 F.3d 246, 255-56 (4th Cir. 2016) ("After the district court issued its ruling, the Supreme Court held in *Kingsley v. Hendrickson* that 'the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one.'. . It is enough, the Supreme Court concluded, that a pretrial detainee show that the 'force purposely or knowingly used against him was objectively unreasonable,'. . . regardless of an officer's state of mind[.]. . .The parties agree that the district court has not evaluated Dilworth's claim under the standard set out by the intervening decision in *Kingsley*. Accordingly, we remand so that the district court may consider, in the first instance, whether under the 'facts and circumstances' of this particular case, and from the 'perspective of a reasonable officer on the scene,' the force used against Dilworth was objectively excessive. . . In deciding whether summary judgment may be granted to the defendants under that objective standard, the district court should view the video of the July 5 incident and consider it along with other relevant evidence bearing on objective reasonableness.")

Rhoads v. S. Health Partners, No. 8:22-CV-1409-SAL, 2024 WL 3873760, at *10–11 (D.S.C. Aug. 20, 2024) ("In her objections, Plaintiff offers that she has sufficiently shown that Defendants Riddell and Whitaker violated her Fourteenth Amendment rights, and, thus, they are not entitled to qualified immunity. . . Indeed, under Fourth Circuit precedent for deliberate indifference claims, the violation of a constitutional right and the denial of qualified immunity usually go hand-in-hand. 87 F.4th at 615 (explaining that 'under [Fourth Circuit] precedent, qualified immunity is generally not available at all for deliberate indifference claims' since the Fourth Circuit has held '"when plaintiffs have made a showing sufficient to demonstrate an intentional violation of the Eighth Amendment, they have also made a showing sufficient to overcome any claim to qualified immunity"'. . .). However, as already discussed above, here, Plaintiff has not demonstrated a genuine issue of material fact as to whether Defendants Riddell and Whitaker were deliberately

indifferent. Consequently, they are entitled to qualified immunity. In their response to Plaintiff's objections, the ACDC Defendants also point out that, at the time of Defendants' conduct, the *Short* test for deliberate indifference did not exist. And the qualified immunity analysis 'requires looking to the law *at the time* of the conduct in question.' *Mays v. Sprinkle*, 992 F.3d 295, 301 (4th Cir. 2021) (emphasis in original). In 2019, '[a]n official [was] deliberately indifferent to an inmate's serious medical needs only when he or she subjectively knows of and disregards an excessive risk to inmate health or safety.' *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014). Other courts in this Circuit have found that, for activity that pre-dates *Short*, officials are entitled to qualified immunity absent an adequate showing on the subjective prong of the prior test-- 'b]ecause ... plaintiff fails to show any individual defendant acted with a culpable state of mind, reasonable officers in defendants' positions would not have recognized that their actions violated plaintiff's clearly established constitutional rights.' *Wright v. Granville Cnty.*, No. 5:20-CT-03362-M, 2024 WL 1376486 at *21 (E.D.N.C. Mar. 29, 2024); *see also Patterson v. Stanly Cnty. Det. Ctr.*, 2024 WL 1936499 at *10–11 (M.D.N.C. May 2, 2024) (find that to preclude qualified immunity pre-*Short* it was not enough that a defendant '*should have* recognized their actions were inappropriate; they actually *must have* recognized their actions were insufficient' and their response 'must be more than merely negligent or simply unreasonable'). The court finds persuasive that reasoning and concludes, when looking at the facts of this case in the light most favorable to Plaintiff, the absence of evidence on the subjective prong of the pre-*Short* deliberate indifference test entitles Defendants Riddell and Whitaker to a qualified immunity, as well.")

Wright v. Granville County, No. 5:20-CT-03362-M, 2024 WL 1376486, at *21 (E.D.N.C. Mar. 29, 2024) ("In sum after reviewing the evidence and reasonable inferences in the light most favorable to plaintiff, . . . defendants have met their burden of showing the absence of a genuine issue of material fact as to plaintiff's claims against the individual defendants, . . . but plaintiff fails to 'come forward with specific facts showing that there is a genuine issue for trial[.]' . . Thus, the individual defendants are entitled to summary judgment. . . Alternatively, as government officials, defendants are entitled to qualified immunity from civil damages if their 'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . In other words, defendants are entitled to qualified immunity when (1) the plaintiff has not demonstrated a violation of a constitutional right, or (2) the court concludes that the right at issue was not clearly established at the time of the official's alleged misconduct. . . As noted above, *Short* announces a new standard for pretrial detainee claims of deliberate indifference in the Fourth Circuit. At the time the events in question occurred, such claims, like those of convicted prisoners, required a subjective showing that the official acted with a 'sufficiently culpable state of mind,' . . .such that the *Short* standard was not 'clearly established[.]'. . Because, as noted above, plaintiff fails to show any individual defendant acted with a culpable state of mind, reasonable officers in defendants' positions would not have recognized that their actions violated plaintiff's clearly established constitutional rights. . . Thus, the individual defendants also are entitled to a finding of qualified immunity.")

FIFTH CIRCUIT

Carmona v. City of Brownsville, 126 F.4th 1091, 1096-97, 1099-1100 (5th Cir. 2025) ("We have discretion as to which of the two prongs should be analyzed first; but, 'often the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a [federal] right at all'. . . For the reasons that follow, Plaintiff fails to plausibly allege violation of the claimed constitutional right. Therefore, we do not reach the second prong (whether right clearly-established). . . .Where the claimed constitutional violation involves the Fourteenth Amendment right to medical care, Plaintiff must allege facts, which, if proved, would show Officers exhibited deliberate indifference to Carmona's serious medical needs. . . . To show deliberate indifference, Plaintiff must plausibly allege that Officers '(1) w[ere] aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and (2) actually drew the inference'. . . .Plaintiff was required to plead facts which, if proved, showed Officers were 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists',—the serious harm being internal bleeding in this instance—'and actually drew the inference'. . . Viewing the well-pleaded facts in the light most favorable to Plaintiff—*i.e.*, Officers were aware Carmona was involved in multiple automobile collisions, and she had visible abrasions and contusions on her extremities—Plaintiff, at most, alleged that Officers *should have known* Carmona was at-risk for internal bleeding. But, as discussed *supra*, actual knowledge is required for liability to attach. . . Because Plaintiff fails to allege sufficient facts to plausibly show Officers were subjectively aware of the risk of internal bleeding, her allegations do not state a deliberate-indifference claim. And, as noted, because Plaintiff fails to allege violation of a constitutional right, we do not reach the second prong of the qualified-immunity test—whether that right was clearly established at the time of the violation.")

Carmona v. City of Brownsville, 126 F.4th 1091, 1100 (5th Cir. 2025) (Ho, J., concurring in the judgment) ("I agree that Plaintiff has failed to adequately allege Defendants' actual knowledge of the risk of serious medical harm presented in this case. I write separately to note that, under our circuit precedent, actual knowledge is not the only way that Plaintiff could have survived dismissal. '[O]ur court has emphasized that an "official's knowledge of a substantial risk of harm may be inferred if the risk was obvious."'. . But Plaintiff fails to make this argument, so I express no view on it.")

San Miguel v. McLane, No. 22-10517, 2024 WL 747232, at *5 (5th Cir. Feb. 23, 2024) (not reported) ("[O]ur court has not decided whether the deliberate indifference or professional judgment standard applies to claims brought by civilly committed individuals alleging that they received inadequate medical care. . . Furthermore, other federal circuits are divided on the issue. . . . As a result, we cannot say that the magistrate judge plainly erred by applying the deliberate indifference standard when analyzing the claims against Bearden.")

Edmiston v. Borrego, 75 F.4th 551, 559 (5th Cir. 2023) ("Plaintiffs. . .maintain this court should . . . apply the objective-unreasonableness standard the Court adopted in *Kingsley v. Hendrickson* for *claims of excessive force* (*not failure to protect*) by officers against a pretrial detainee. . . But,

we are bound by our rule of orderliness. . . This rule renders this objective-unreasonableness assertion meritless.")

Crandel v. Hall, 75 F.4th 537, 544 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1002 (2024) ("Plaintiffs . . maintain this court should instead apply the objective-unreasonableness standard the Court adopted in *Kingsley v. Hendrickson* for *claims of excessive force* (*not failure to protect*) by officers against a pretrial detainee. 576 U.S. 389, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015). But, we are bound by our rule of orderliness. . . This rule renders this assertion meritless.")

Williams by and through Smith v. City of Yazoo, 41 F.4th 416, 423 n.4 (5th Cir. 2022) ("The Supreme Court recognizes that pretrial detainees' right to medical care is 'at least as great' as that of convicted prisoners, *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983), but has never defined the contours of that right[.] . . . We are in the 'slight majority' of circuits that apply the Eighth Amendment standard equally to denial-of-care claims by pre-and post-trial detainees. . . The minority approach grants pretrial detainees broader protections because they have not yet been found guilty.")

Cope v. Cogdill, 3 F.4th 198, 207 n.7 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2573 (2022) ("Cope argues that the Supreme Court announced an objective standard for pretrial detainees and that the standard of reasonableness employed here should be objective, not subjective. She relies on *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). But *Kingsley* did not address claims regarding medical treatment. Rather, the Supreme Court held that plaintiffs alleging excessive force must show that the force was objectively excessive. . . Since *Kingsley* discussed a different type of constitutional claim, it did not abrogate our deliberate-indifference precedent. Thus, Cope must prove subjective knowledge. . . We recently clarified, however, that subjective intent of harm does not have to be proven.")

Batyukova v. Doege, 994 F.3d 717, 732-33 (5th Cir. 2021) ("Deputy Doege had 'subjective knowledge of a substantial risk of serious medical harm.'. . Deputy Doege shot Batyukova several times. Batyukova fell to the ground and lay motionless. Deputy Doege immediately requested assistance, which evinces his awareness of Batyukova's need for medical care. At issue is whether Deputy Doege responded with deliberate indifference. . . Viewing the facts in the light most favorable to Batyukova, even though Deputy Doege did not personally render medical treatment to Batyukova, he immediately informed emergency dispatch that shots had been fired, that Batyukova was injured, and that she needed assistance. We cannot say he ignored Batyukova, refused to treat her, or displayed wanton disregard for her medical needs. . . In contrast is one of our decisions in which deliberate-indifference claims arose from officers' failure to inform jail personnel of a pretrial detainee's injuries when they delivered him to the jail. . . . Here, Deputy Doege immediately sought medical attention. Batyukova relies on the fact that Deputy Doege did not 'individually' provide medical care. Although that is true, a Medina County deputy did render aid. That deputy approached Batyukova, determined that she was breathing and responsive, and stayed with her until EMS arrived. . . .Accordingly, that Deputy Doege was not the officer

personally to approach Batyukova does not amount to deliberate indifference. The only possibly meaningful difference between *Mason* and this case is the delay between the shooting and the moment the Medina County deputy approached Batyukova. At most, the delay was 15 minutes, which is the amount of time between Batyukova being shot and EMS arriving. We acknowledge that 15 minutes appears to be a long time to be left on the ground while bleeding from gunshot wounds. It does not, however, amount to a legally cognizable claim for deliberate indifference because Batyukova has not presented any evidence that the delay resulted in 'substantial harm.'. .There is no indication that the delay between being shot and being approached, either by the Medina County deputy or EMS, increased Batyukova's risk of bodily harm or death. . . Nor is there any indication that the delay caused pain that would have been alleviated had she been approached by an on-scene deputy at an earlier time. Further, the time taken to clear the scene, both initially and subsequently, is a 'legitimate governmental objective' preventing that delay from being a basis for deliberate indifference. . . Finally, EMS arrived within 15 minutes of the shooting, and there is no indication that it could have arrived any sooner. Batyukova has not shown that Deputy Doege responded to her medical needs with deliberate indifference.")

Martinez v. City of North Richland Hills, No. 20-10521, 2021 WL 742662, at *3–4 & n.2 (5th Cir. Feb. 25, 2021) (not reported) ("A challenge to a condition of confinement is a challenge to 'general conditions, practices, rules, or restrictions of pretrial confinement.' *Hare*, 74 F.3d at 644. When a plaintiff is challenging a condition of confinement, this court applies the test established by the Supreme Court in *Bell,* and asks whether the condition is 'reasonably related to a legitimate governmental objective.'. . '[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.'. . Because '[a] State's imposition of a rule or restriction during pretrial confinement manifests an avowed intent to subject a pretrial detainee to that rule or restriction,' the plaintiff need not demonstrate that the state actor or municipal entity acted with intent to punish. . . Thus, 'a true jail condition case starts with the assumption that the State intended to cause the pretrial detainee's alleged constitutional deprivation.'. . .An episodic-acts-or-omissions claim, by contrast, 'faults specific jail officials for their acts or omissions.'. . In an episodic act or omission case, courts employ different standards depending on whether the liability of the individual defendant or the municipal defendant is at issue. . . Martinez 'must establish that the official(s) acted with subjective deliberate indifference to prove a violation of [her] constitutional rights.'. . 'Deliberate indifference in the context of an episodic failure to provide reasonable medical care to a pretrial detainee means that: (1) the official was aware of facts from which an inference of substantial risk of serious harm could be drawn; (2) the official actually drew that inference; and (3) the official's response indicates the official subjectively intended that harm occur.'. . Martinez's Fourteenth Amendment claim is a medical-inattention claim. When officials demonstrate deliberate indifference to a pretrial detainee's serious medical needs, they violate the Fourteenth Amendment. . . .The deliberate-indifference analysis under the Eighth and Fourteenth Amendments are the same. Therefore, cases discussing deliberate indifference in the Eighth Amendment context are applicable in this analysis.")

Baldwin v. Dorsey, 964 F.3d 320, 326 (5th Cir. 2020), 141 S. Ct. 1379 (2021) ("[T]he Fourteenth Amendment protects pretrial detainees' right to medical care and to 'protection from known suicidal tendencies.'. . A government official violates a Fourteenth Amendment right when the official acts with deliberate indifference to a detainee's serious medical needs. To prove deliberate indifference, Baldwin must show that Dorsey was 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,' that Dorsey actually 'dr[e]w the inference,' and that Dorsey 'disregard[ed] that risk by failing to take reasonable measures to abate it.'. . Finally, Baldwin must show that 'substantial harm' resulted from Dorsey's alleged deliberately indifferent conduct.")

Converse v. City of Kemah, Texas, 961 F.3d 771, 775-76 & n.2 (5th Cir. 2020) ("Since at least 1989, it has been clearly established that officials may be held liable for their acts or omissions that result in a detainee's suicide if they 'had subjective knowledge of a substantial risk of harm to a pretrial detainee but responded with deliberate indifference to that risk.'. . The sometimes confusing relationship between these two standards—qualified immunity's 'objective reasonableness' standard and the Fourteenth Amendment's 'subjective deliberate indifference' standard—has been distilled as follows: '[W]e are to determine whether, in light of the facts as viewed in the light most favorable to the plaintiffs, the conduct of the individual defendants was objectively unreasonable when applied against the deliberate indifference standard.'. . A prison official will not be held liable if he merely 'should have known' of a risk; instead, to satisfy this high standard, a prison official 'must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'. . An official shows a deliberate indifference to that risk 'by failing to take reasonable measures to abate it.'. . . *Farmer v. Brennan* analyzed deliberate indifference as applied to federal prisoners, which is proscribed by the Eighth Amendment. . . We have held that the State owes the same duty to pretrial detainees under the Fourteenth Amendment as it owes prisoners under the Eighth Amendment—that is, to provide them 'with basic human needs, including medical care and protection from harm, during their confinement.'")

Baughman v. Hickman, 935 F.3d 302, 306-09 (5th Cir. 2019) ("We classify a pretrial detention due process claim according to whether it concerns a 'condition of confinement' or an 'episodic act or omission.'. . As is clear from our earlier explanation of the facts underlying Baughman's suit, he is making claims based on episodic acts or omissions. For such claims, 'we employ different standards depending on whether the liability of the individual defendant or the municipal defendant is at issue.'. . Both standards require Baughman to 'establish that the official(s) acted with subjective deliberate indifference.'. . . Subjective deliberate indifference 'is an extremely high standard to meet.'. . County as opposed to individual liability has the additional requirement that the 'violation resulted from a [county] policy or custom adopted and maintained with objective deliberate indifference.'. . . We conclude that there is insufficient information about Pruitt's driving and no evidence to allow a finding of Pruitt's actual knowledge that the manner in which he was driving created a substantial risk of harm. Merely negligent driving by Deputy Pruitt would not support a violation of a constitutional right. . . .For an episodic act claim relying on an alleged

denial or delay of medical care, Baughman can show deliberate indifference by demonstrating that an official 'refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.' [citing *Perniciaro v. Lea*]")

Johnson v. Johnson, No. 15-60665, 2017 WL 2390592, at *1 (5th Cir. June 1, 2017) (not published) ("The rights of pretrial detainees are protected by the Fourteenth Amendment's Due Process Clause. *Cupit v. Jones*, 835 F.2d 82, 84 (5th Cir. 1987). 'It is well established that prison officials have a constitutional duty to protect prisoners from violence at the hands of their fellow inmates.' *Longoria v. Texas*, 473 F.3d 586, 592 (5th Cir. 2006) (citing *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994)). In this case, the standard of subjective deliberate indifference enunciated in *Farmer*, 511 U.S. at 825, 832-33, is the measure of culpability.")

Alderson v. Concordia Parish Correctional Facility, 848 F.3d 415, 419-20 & n.4 (5th Cir. 2017) (per curiam) ("To succeed in a § 1983 action based on 'episodic acts or omissions' in violation of Fourteenth Amendment rights, a pretrial detainee must show subjective deliberate indifference by the defendants. . .That is, the plaintiff must show that the official knew of and disregarded a substantial risk of serious harm. . . .The concurring opinion suggests that our *en banc* court should reconsider *Hare* in light of the Supreme Court's opinion in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). Because the Fifth Circuit has continued to rely on *Hare* and to apply a subjective standard post-*Kingsley*, this panel is bound by our rule of orderliness. . . Moreover, the Ninth Circuit is the only circuit to have extended *Kingsley*'s objective standard to failure-to-protect claims. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016). Even if *Kingsley* did require us to adopt a new standard for failure-to-protect claims, this would not change the outcome of the case because Alderson has not stated a failure-to-protect claim by alleging that any specific defendant made an intentional decision with respect to the conditions of his confinement, that a reasonable officer in the circumstances would have appreciated the high degree of risk involved, and that any defendant failed to take reasonably available measures to abate the risks associated with housing pre-trial detainees and DOC inmates together. . . . Alderson's allegation that CPCF had knowledge of his danger is not a sufficient allegation that any specific defendant had knowledge of a substantial risk of serious harm to Alderson based upon his classification. Because he has not alleged that Byrnes and Spinner had knowledge of such a risk, Alderson has not linked their alleged misclassification to deliberate indifference toward that risk. Accordingly, Alderson has failed to state a claim based on their misclassification. . .Alderson has similarly failed to state a claim for supervisory liability against Byrnes, Spinner, Lance Moore, Kelly Moore, and Johnson. To hold any of these defendants liable as supervisory officials under § 1983, Alderson must allege either that they participated in acts that caused constitutional deprivation or that they implemented unconstitutional policies causally related to his injuries.")

Alderson v. Concordia Parish Correctional Facility, 848 F.3d 415, 424-25 (5th Cir. 2017) (per curiam) (Graves, J., specially concurring in part and dissenting as to footnote 4) ("I write separately because the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), appears

to call into question this court's holding in *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996). In *Kingsley*, which was an excessive force case, the Supreme Court indeed said: 'Whether that standard might suffice for liability in the case of an alleged mistreatment of a pretrial detainee need not be decided here; for the officers do not dispute that they acted purposefully or knowingly with respect to the force they used against Kingsley.' *Kingsley*, 135 S.Ct. at 2472. However, that appears to be an acknowledgment that, even in such a case, there is no established subjective standard as the majority determined in *Hare*. Also, the analysis in *Kingsley* appears to support the conclusion that an objective standard would apply in a failure-to-protect case. . . Additionally, the Supreme Court said:

We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.

Id. at 2476. This indicates that there are still different standards for pretrial detainees and DOC inmates, contrary to at least some of the language in *Hare*, 74 F.3d at 650, and that, if the standards were to be commingled, it would be toward an objective standard as to both on at least some claims. Further, the Ninth Circuit granted en banc rehearing in *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016), after a partially dissenting panel judge wrote separately to point out that *Kingsley* 'calls into question our precedent on the appropriate state-of-mind inquiry in failure-to-protect claims brought by pretrial detainees.'. . The en banc court concluded that *Kingsley* applies to failure-to-protect claims and that an objective standard is appropriate. *Castro*, 833 F.3d at 1068-1073. In *Estate of Henson v. Wichita County*, 795 F.3d 456 (5th Cir. 2014), decided just one month after *Kingsley*, this court did not address any application of *Kingsley*. Likewise, the two subsequent cases also cited by the majority did not address or distinguish *Kingsley*. . . Because I read *Kingsley* as the Ninth Circuit did and would revisit the deliberate indifference standard, I write separately.")

Crandel on behalf of Worl v. Callahan County, Texas, No. 1:21-CV-075-C, 2022 WL 1114405, at *3 (N.D. Tex. Mar. 14, 2022) ("Like the Plaintiffs in *Cope*, who argued that certain defendants in that case were deliberately indifferent by housing the detainee in a cell with the means of committing suicide readily available to the detainee in the form of a lengthy phone cord, Plaintiffs here also contend the same. Here, however, there is no evidence before the Court, beyond speculative evidence, to raise a genuine issue of material fact as to whether Hastings or Piper appreciated that Worl was a suicide risk or that the phone cord would likely be an instrument of suicide by Worl. Thus, the admissible evidence relied upon by Plaintiffs to attempt to show what the individual Defendants *should have* appreciated a risk of the phone cords is insufficient under the circumstances to show a violation of clearly established rights at the time Worl committed suicide or that either was deliberately indifferent. . . Negligence, and even gross negligence, is insufficient to show deliberate indifference. As stated above, 'an official's failure to alleviate a significant risk that he should have perceived but did not' cannot amount to deliberate indifference.")

J.H., by and through N.H. v. Edwards, No. CV 20-293-JWD-EWD, 2020 WL 3448087, at *31–33 (M.D. La. June 24, 2020) ("[W]hile Plaintiffs urge that the 'objectively unreasonable' or 'rational relationship' test discussed by *Kingsley v. Hendrickson* . . . applies, Defendants are correct that the Fifth Circuit has limited *Kingsley's* 'objectively unreasonable' standard to cases involving excessive force against pretrial detainees. . . Moreover, Defendants urge that this case is more akin to a failure to protect or failure to provide basic needs case,[.] . . 'The State owes the same duty under the Due Process Clause and the Eighth Amendment to provide both pretrial detainees and convicted inmates with basic human needs, including medical care and protection from harm during their confinement.'. . A prison official is not liable under § 1983 unless the prisoner shows that the official exhibited deliberate indifference to his conditions of confinement or serious medical needs. . . The prisoner must show that the official: (1) was aware of facts from which an inference of an excessive risk to the prisoner's health or safety could be drawn; (2) drew an inference that such potential for harm existed; and (3) disregarded that risk by failing to take reasonable measures to abate it. . . A pretrial detainee's claim based upon a jail official's 'episodic act or omission' is also evaluated under the standard of subjective deliberate indifference enunciated in *Farmer*. . . Defendants also cite certain cases from around the country where courts have evaluated facilities' responses to COVID-19, and these courts have applied the deliberate indifference standard. [collecting cases] Plaintiffs, on the other hand, urge that their claims are more appropriately analyzed under the Fourteenth Amendment. . . . Plaintiffs urge that, in light of *Youngberg*, the conditions of confinement for juvenile offenders—who, like the mentally ill, are not confined to punish—must comport with the purpose of the confinement, which, under Louisiana law, are rehabilitation and individual treatment. . . .Plaintiffs also urge that this is a conditions of confinement case under the Fourteenth Amendment, not an episodic acts or omissions case, so Plaintiffs need only satisfy the 'rational relationship' test, not the 'deliberate indifference' test. There is a split in the case law in the circuits on the issue of whether juvenile offenders are judged under the Fourteenth or Eighth Amendments. . . The Fifth Circuit's position in *Morales* appears to be the minority. . . However, the Fifth Circuit has not overruled *Morales* or revisited the issue. Thus, while undermined, *Morales* appears to be the correct standard in this circuit. Further, *Swain, Archilla, Mohammed, Sacal-Micha*, and *Polk* are strong authority that the Court should apply the deliberate indifference standard for claims brought in response to the threat of COVID-19, even for those brought under the Fourteenth Amendment. Ultimately, however, the Court need not resolve this question. Regardless of which standard to apply—the Eighth Amendment's deliberate indifference standard or the Fourteen Amendment's 'reasonably related to a legitimate interest' standard—the Court finds that the Plaintiffs have failed to meet their burden of clearly demonstrating a substantial likelihood of success on the merits.")

Umarbaev v. Moore, No. 3:20-CV-1279-B-BN, 2020 WL 3051448, at *7 (N.D. Tex. June 6, 2020) ("As numerous federal courts have recognized, 'the COVID-19 pandemic presents an extraordinary and unique public-health risk to society, as evidenced by the unprecedented protective measures that local, state, and national governmental authorities have implemented to stem the spread of the virus.'. . But, simply put, after considering the record here and with the

benefit of oral argument, Petitioners have not shown that the Respondents' response to the pandemic is, objectively speaking, 'not rationally related to a legitimate governmental objective.'. . That is, they have failed to show that Prairieland's implementation of CDC or other guidance (or its failure to implement further measures that Petitioners argue are needed) is 'unreasonable in light of the COVID-19 pandemic.'")

Joyner v. Grenada County, Mississippi, No. 4:19CV27-M-P, 2020 WL 2298553, at *2–4 (N.D. Miss. May 7, 2020) ("In arguing that *Kingsley*'s objective standard should apply here, . . . plaintiffs fail to acknowledge that this is not an excessive force case, but, rather, a so-called 'failure to protect' case in which they allege deliberate indifference in the provision of medical treatment to Joyner. Clearly, a case in which a jailer is alleged to have deliberately used excessive force against an inmate is quite different from one in which she is alleged to have provided inadequate medical treatment, and it does not necessarily follow from *Kingsley*'s holding that the Supreme Court would also apply an objective deliberate indifference standard in failure to protect cases. Indeed, the Fifth Circuit has, as discussed below, thus far declined to apply *Kingsley* in this context. In their brief, plaintiffs acknowledge that the Fifth Circuit has continued to apply its subjective deliberate indifference standard in Fourteenth Amendment cases brought by pretrial detainees outside the excessive force context, and they chide the Fifth Circuit for 'ignoring' *Kingsley*, and for failing to overrule the subjective deliberate indifference standard set forth in *Hare* and similar cases. . . . In criticizing the Fifth Circuit for 'ignoring' *Kingsley*, however, plaintiffs themselves ignore the fact that this is not an excessive force case, and their own (accurate) description of *Kingsley*'s holding is that it established an objective deliberate indifference standard only in such excessive force cases. . . It is thus clear that the Fifth Circuit has not chosen to 'ignore' *Kingsley* by declining to expand that opinion's holding to other types of Fourteenth Amendment claims. . . . In their brief, plaintiffs note that Judge Graves wrote a concurrence in *Alderson* in which he argued that *Kingsley*'s objective deliberate indifference standard should, in fact, apply in the failure-to-protect context, but, crucially, none of the other Fifth Circuit judges on the panel joined his concurrence. The fact that Judge Graves raised the issue in a concurrence makes it clear that the Fifth Circuit is well aware of the argument that *Kingsley*'s analysis should apply in the failure-to-protect context, but it is likewise clear that an insufficient number of Fifth Circuit judges have been persuaded by that argument. In the court's view, the Fifth Circuit was well within its authority in interpreting the law in this manner, since, once again, *Kingsley*'s actual holding only applies in the excessive force context, as plaintiffs themselves acknowledge. As a district court, this court is, of course, bound by the Fifth Circuit's published precedent, and *Alderson* makes it clear that, in cases such as this one, a subjective deliberate indifference standard applies and that the 'plaintiff must show that the official knew of and disregarded a substantial risk of serious harm.' *Alderson*, 848 F.3d at 419. In spite of *Alderson*'s clear holding that a subjective deliberate indifference standard applies in the failure-to-protect context, plaintiffs essentially ignore that standard in their brief and instead frame their arguments only in terms of the objective deliberate indifference standard which Judge Graves unsuccessfully sought to persuade his fellow judges to adopt.")

Tolbert v. Gusman, No. CV 18-10053, 2020 WL 1892590, at *4–5 (E.D. La. Apr. 16, 2020) ("Plaintiffs argue that the holding in *Kingsley* applies broadly to any constitutional claim brought by a pretrial detainee. This position, however, conflicts with binding Fifth Circuit law. After *Kingsley*, the Fifth Circuit applied a subjective deliberate indifference standard to a § 1983 claim by a pretrial detainee. [citing *Alderson*] . . . Accordingly, this Court is bound to apply a subjective standard here.")

Nichols for the Estate of LeJunie v. Brazos County, No. CV H-19-2820, 2020 WL 956239, at *6-9 (S.D. Tex. Feb. 26, 2020) ("In the Fifth Circuit, as the parties' arguments suggest, the court's analysis in § 1983 cases varies depending on whether a plaintiff is alleging that an alleged deprivation of rights was caused by an episodic act or omission of an individual state official or by the conditions of confinement. . . . If the facts of a case are appropriately considered under a conditions-of-confinement framework, courts apply the test found in *Bell v. Wolfish*. . . The question under *Bell v. Wolfish* is 'whether those conditions amount to punishment of the detainee.'. . The court must therefore determine 'whether the [conditions or restrictions were] imposed for the purpose of punishment or whether [they were] but incident to some other legitimate governmental purpose.' . . . In determining whether an interest is legitimate, courts must keep in mind that the government's interests include not only its need to insure the detainee's presence at trial but also its legitimate interests in managing the facility. . . Sometimes challenged conditions are explicit, and sometimes they reflect a *de facto* policy. . . Here, since the parties dispute whether the *Bell* test should apply or whether, like in *Hare*, the court must find deliberate indifference for discrete acts or omissions, it is helpful to review the facts and legal conclusions of the primary cases upon which they rely. . . .Here, the case is at the motion to dismiss stage, and the allegations in the amended complaint indicate that a policy, or lack thereof, is to blame for the failure of the nurses to give LeJunie his medication, even after receiving his medical records, or refer him to a physician to get the medication. This seems to be an attack the 'general conditions, practices, rules, or restrictions of pretrial confinement.' Whether the evidence rises to the type of pervasive pattern the Fifth Circuit required in *Shepherd* or should only be analyzed under the acts-or-omissions framework like in *Scott*, *Flores*, and *Olabisiomotosho* will likely be determined at the summary judgment stage. The court finds that Nichols has plausibly pled that arbitrary and purposeless conditions-of-confinement led to LeJunie's death. The motion to dismiss this claim for failure to state a claim is DENIED.")

Molina v. Wise County, Texas, No. 4:17-CV-00809-P, 2020 WL 758723, at *4 (N.D. Tex. Feb. 14, 2020) ("In *Kingsley v. Hendrickson*, the Supreme Court held that courts must apply an objective test to excessive force claims brought by pretrial detainees. . . The Ninth Circuit later extended *Kingsley's* objective standard to a pretrial detainee's failure-to-protect claim. *See Castro v. City of L.A.*, 833 F.3d 1060, 1070-71 (9th Cir. 2016). The Fifth Circuit subsequently distinguished *Castro*, noting that the Ninth Circuit was the only circuit to have extended *Kingsley* to a pretrial detainees's failure-to-protect claims. *See Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419-20 & n. 4 (5th Cir. 2017). Instead, the Fifth Circuit reaffirmed the holding of *Hare v. City of Corinth*, which applies a 'subjective deliberate

indifference' standard to all failure-to-protect claims, regardless of whether the plaintiff is a pretrial detainee or a prisoner. . . Under this Fifth Circuit controlling authority, this Court will apply the subjective deliberate indifference standard under *Hare* to Molina's failure-to-protect claim.")

Ybarra-Fuentes v. City of Rosenberg, No. CV H-18-1824, 2018 WL 6019177, at *3 (S.D. Tex. Nov. 16, 2018) ("Complaints alleging violations of a pretrial detainee's Fourteenth Amendment rights are evaluated 'under one of two rubrics, "jail conditions" or "episodic acts or omission."'. . In jail-conditions cases, courts 'determine "[i]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective."'. . Challenges to episodic acts or omissions, by contrast, 'require the plaintiff to prove that the official "acted or failed to act with subjective deliberate indifference to the detainee's needs."'. . Although plaintiffs prefer the jail-conditions theory because no mens rea is required to establish a claim, . . . these claims are 'rare[.]' They are limited to 'attacks on general conditions, practices, rules, or restrictions of pretrial confinement[.]' A 'plaintiff's claim [usually] faults specific jail officials for their acts or omissions because the plaintiff cannot establish the existence of an officially sanctioned unlawful condition.'. .Ybarra-Fuentes and Reyes have asserted claims based on an episodic act or omission. . . The complaint centers on the individual defendants, who allegedly failed to screen Gunter for mental illness, place him on suicide watch and continuously monitor him, confiscate his belt, or give him medications. Because Ybarra-Fuentes and Reyes challenge episodic acts or omissions, they must allege an 'objective exposure to a substantial risk of serious harm' and that jail 'officials acted or failed to act with deliberate indifference to that risk.'")

Rodriguez v. Bexar County, No. SA-18-CV-248-XR, 2018 WL 4431433, at *4 n.2 (W.D. Tex. Sept. 17, 2018) ("The Court notes that a Fifth Circuit panel has held that the rule of orderliness requires the courts in this Circuit to continue to apply this standard post-*Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), unless and until the en banc Court decides otherwise. *Alderson*, 848 F.3d at 419 n.4. In light of this, this Court agrees with a recent decision from the Northern District of Texas concluding that the applicable standard remains the *Farmer v. Brennan*, 511 U.S. 825 (1994) subjective deliberate indifference standard (without any intent-to-harm requirement). *See Dyer v. Fyall*, __ F. Supp. 3d __, No. 3:15-CV-2638-B, 2018 WL 2739025 (N.D. Tex. 2018). However, this Court disagrees that the law concerning Fourteenth Amendment medical inattention claims is not clearly established in this Circuit 'given that some Fifth Circuit cases require plaintiffs to show intent to cause harm in medical-inattention cases and others do not.' Moreover, Scogin does not argue in her briefing that the law in this area is not clearly established.")

Dyer v. Fyall, No. 3:15-CV-2638-B, 2018 WL 2739025, at *8 (N.D. Tex. June 6, 2018) ("The Second and Ninth Circuits have applied the *Kinglsey* standard in Fourteenth Amendment medical-inattention cases. . . The Court must therefore determine which of three possible standards governs the Dyers' medical-inattention claim: (1) the objective recklessness standard from *Kinglsey*; (2) the subjective recklessness standard from *Farmer*; or (3) the subjective recklessness standard

from *Farmer* with the actual-intent-to-harm requirement imposed in some Fifth Circuit cases. The Court finds that the correct standard is the *Farmer* subjective recklessness standard without the intent-to-harm requirement. As to the *Kinglsey* objective standard, the Fifth Circuit has continued to apply a subjective standard post-*Kinglsey*, which led one panel to hold that the rule of orderliness prevents panels from applying the *Kinglsey* standard in medical-inattention cases until the en banc Fifth Circuit decides otherwise. . . And as to the intent-to-harm requirement, although the Fifth Circuit has required intent to harm in some cases, . . . Fifth Circuit cases more often lack the intent requirement,[.] The Seventh Circuit has undermined the *Gibbs* case on which the Fifth Circuit relied in *Hare*. . . And the Supreme Court in *Farmer* cast doubt on the intent-to-harm requirement. . . Thus, to survive summary judgment, the Dyers must present evidence that the officers 'kn[ew] of and disregard[ed] an excessive risk to [Graham's health or safety].'")

Dyer v. Fyall, No. 3:15-CV-2638-B, 2018 WL 2739025, at *9 (N.D. Tex. June 6, 2018) ("The confusion surrounding medical-inattention claims in the Fifth Circuit dooms the Dyers' medical-inattention claim. The officers in this case have qualified immunity, which means the Dyers can hold them liable for violations of only clearly established rights. A right is clearly established only if 'the contours of the right [are] sufficiently clear that a reasonable officer would understand what he is doing violates that right.'. . So, given that some Fifth Circuit cases require plaintiffs to show intent to cause harm in medical-inattention cases and other do not, there is no clearly established right in the Fifth Circuit to be free from medical inattention by officers who do not actually intend to cause harm.")

Guillory v. Louisiana Dep't of Health and Hospitals, No. CV 16-787-JWD-RLB, 2018 WL 1404277, at *8-9 (M.D. La. Mar. 20, 2018) ("The Court also notes that, while not raised by Guillory, the deliberate indifference standard remains a subjective one as set out in *Hare* despite the intervening case of *Kingsley v. Hendrickson*. . . In *Alderson v. Concordia Parish Correctional Facility*, . . . the Fifth Circuit relied upon *Hare* and applied the subjective standard. Despite a concurring judge's call for the Court to 'revisit the deliberate indifference standard' in light of *Kingsley*, . . . the Court rejected that argument. . . Here, Guillory's second through fourth claims (failure to supervise, inadequate medical care, and failure to protect) allege episodic acts or omissions. Each claim alleges specific acts by individual Defendants, each of which resulted in harm. Guillory fails to allege any facts that indicate that his harm resulted from an explicit policy or restriction imposed upon him as a condition of confinement. At best, Guillory attempts to demonstrate an unstated or *de facto* policy or restriction; however, he fails to allege any facts that establish an extended or pervasive pattern of misconduct required to prove an intended condition or practice. . . Accordingly, the Court finds that the deliberate indifference standard of care is the appropriate measure of the constitutional duty owed by state officials with regard to Guillory's second through fourth claims. . . . Guillory's first Section 1983 claim alleges that the Defendants acted individually and together to establish and maintain a system they knew would result in the effective denial of care to patients with serious medical conditions. . . This claim amounts to a challenge on his conditions of confinement because his allegations are not based on the specific acts or omissions of individuals, but rather on a systemic failure affecting all patients. . .In *Hare*,

the Fifth Circuit held that a different standard applied to conditions of confinement challenges because 'a State's imposition of a rule or restriction during pretrial confinement manifests an avowed intent to subject a pretrial detainee to that rule or restriction.'. . The *Hare* court held that, when considering a condition of confinement, the reasonable-relationship test outlined in the Supreme Court case of *Bell v. Wolfish* . . . was preferable to the deliberate indifference standard used when analyzing a claim based on an official's episodic acts or omissions. . . The Fifth Circuit explained, '[f]or the *Bell* test to apply, a jailer's acts or omissions must implement a rule or restriction or otherwise demonstrate the existence of an identifiable intended condition or practice.'. . After reviewing his complaints, the Court finds that Guillory has failed to allege or identify any specific policy, practice, or custom that was the 'moving force' behind the events of which he complains of. Guillory has not identified any written or informal policies that reflect the existence of unconstitutional patterns or practices. Guillory alleges no facts to suggest that any other inmate suffered as a result of a systemic failure to provide medical care. Guillory's conclusory allegations are based solely on the events in the aftermath of his attack. . .The Court finds that Guillory's allegations of systemic denial of access to medical care are not sufficient to reflect the sort of systemic deficiencies which the courts have found to warrant relief in other cases. Accordingly, the Court finds that the Defendants' *Motion* shall be granted with respect to the Section 1983 Systemic Denial of Access to Medical Care claim asserted against the Defendants. However, Guillory will be given leave to amend to allege, if he can, facts sufficient to support this allegation.")

Lindsey v. Hubbard, No. 1:15CV357-LG-RHW, 2017 WL 2727093, at *5 (S.D. Miss. June 23, 2017) ("Lindsey's challenge to the constitutionality of his conditions of confinement is determined by application of the test in *Bell v. Wolfish*, 99 S. Ct. 1861 (1979). The test asks 'whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word.'. . In determining whether a particular condition amounts to punishment, the court considers whether 'the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.' *Harris v. Angelina Cty.*, 31 F.3d 331, 334 (5th Cir. 1994) (quoting *Bell*, 99 S. Ct. at 1873). Courts may infer a punitive purpose if the challenged condition is not 'reasonably related to a legitimate governmental objective.'")

Cry v. Dilliard, No. 3:15CV318-DPJ-FKB, 2017 WL 2172944, at *3 (S.D. Miss. May 16, 2017) ("A slightly different standard governs the objective reasonableness of Defendants' actions for purposes of the qualified-immunity analysis here, because *Kingsley v. Hendrickson* abrogated the rule previously followed by the Fifth Circuit. Under the law as it existed in January 2015, a pre-trial detainee alleging an excessive-force claim had to prove the force was applied 'maliciously and sadistically for the very purpose of causing harm to the pretrial detainee, rather than in a good faith effort to maintain or restore discipline.'")

Robertson v. Gautreaux, No. CV 16-341-JJB-RLB, 2017 WL 690542, at *4 & n.31 (M.D. La. Feb. 21, 2017) ("The Defendants argue that the *Kingsley* decision, a case about excessive force

claims, does not apply to the Plaintiff's claims. They urge this Court to follow the Fifth Circuit case, *Hare*, which held that regardless of whether an inmate is a pretrial detainee or a convicted inmate, the standard for holding a government official liable for failing to protect him from inmate violence is the same—the deliberate indifference standard. . . The Court agrees with the Defendants and declines to apply a new objective standard to failure to protect claims brought by pretrial detainees. Recently the Fifth Circuit reaffirmed the *Hare* holding in light of *Kingsley*. [*Alderson v. Concordia Parish Corr. Facility*, Civil Action No. 15-30610, 2017 WL 541006, at *2 n. 4 (5th Cir. Feb. 9, 2017) ("The concurring opinion suggests that our *en banc* court should reconsider *Hare* in light of the Supreme Court's opinion in *Kingsley* ... Because the Fifth Circuit has continued to rely on *Hare* and to apply a subjective standard post-*Kingsley*, this panel is bound by our rule of orderliness.").]")

Bishop v. City of Denton, No. 4:14-CV-608, 2015 WL 8273986, at *4 (E.D. Tex. Dec. 8, 2015)("As discussed above, the Court concludes that Bishop has presented sufficient evidence to establish that a question of fact exists as to whether Porter violated Bishop's right to be free from the use of excessive force. However, Porter argues that his conduct was not a violation of clearly established law. To support this contention, Porter cites Justice Alito's dissent in *Kingsley v. Hendrickson,* which states that it has not been determined whether a pretrial detainee may bring a Fourth Amendment excessive force claim against a detention facility employee. . . However, the Fifth Circuit has allowed pretrial detainees to assert Fourth Amendment excessive force claims against detention facility employees. . . . If bystander liability for excessive force based on the Fourth Amendment was clearly established law as of January 2010, direct liability for excessive force was also clearly established. Therefore, within the Fifth Circuit, there was clearly established law at the time the event at issue occurred that detention facility employees could be held liable under the Fourth Amendment for using excessive force against pretrial detainees.")

Rodriguez v. Bexar County Hospital District, No. SA-14-CA-861-OG, 2015 WL 7760209, at *36 (W.D. Tex. Nov. 30, 2015) ("Recently, the Supreme Court has declared that claims of excessive force brought under Section 1983 by pretrial detainees must be reviewed under an objective standard. . . As explained above, however, defendant Garcia is entitled to the protection afforded by the doctrine of qualified immunity, which protects public officers and employees from liability for conduct which was objectively reasonable under then-clearly established federal law. At the time of the altercation between plaintiff and defendant Garcia, the officer's conduct must have demonstrated a subjective awareness of a substantial risk of serious harm and a failure to take reasonable measures to abate this risk. . . The Court agrees with defendant Garcia's expert witness that the conduct of defendant Garcia, which is substantiated by the video recording, appears in all respects to have been objectively reasonable in view of the legitimate governmental interest in maintaining order and decorum inside the University Hospital's controlled access unit and in preventing plaintiff, an actively psychotic patient, from obtaining control over defendant Garcia's weapon (something plaintiff candidly admits he attempted to accomplish during his fight with defendant Garcia). Plaintiff's uncorroborated self-serving assertions are not enough to raise a genuine issue of material fact when the remainder of the record fully supports defendant Garcia's

assertions and refutes plaintiff's version of the events. . . Given plaintiff's psychotic condition, suicidal ideation, and clearly demonstrated propensity for violent conduct, this Court concludes the conduct of defendant Garcia did not violate the standard of subjective unreasonableness required under clearly established federal law in this Circuit for an excessive force claim at the time of the altercation between the two men on September 25, 2012. Defendant Garcia correctly argues plaintiff was experiencing a psychotic episode, actively hallucinating, and intent upon committing suicide by officer at the time of the incident on September 25, 2012. . . The undisputed video evidence shows: (1) plaintiff clearly instigated the incident by hopping around his bed and closing his hospital room door, something he acknowledges he was not authorized to do and (2) defendant Garcia's actions in attempting to gain control of plaintiff and keep plaintiff from gaining control over defendant Garcia's firearm were all eminently reasonable under the circumstances. Plaintiff had no right to close his hospital room door or to seek to gain control of defendant Garcia's weapon. Nothing in the video recording properly before the Court shows defendant Garcia employing anything other than reasonable force to subdue plaintiff, who not only actively resisted defendant Garcia throughout their altercation but attempted to gain control of defendant Garcia's weapon. Confronted with a psychotic, suicidal patient, defendant Garcia's conduct did not exceed the level of subjective reasonableness applicable at the time of the incident in question. Defendant Garcia is entitled to the protection afforded by the doctrine of qualified immunity and to a summary judgment on plaintiffs excessive force claim.")

Brown v. Gusman, No. CIV.A. 15-1491-DEK, 2015 WL 6827260, at *4-5, *7 (E.D. La. Nov. 6, 2015) ("[W]hatever the ultimate impact of *Kingsley* may be on this Circuit's traditional analysis, one thing is clear: the foregoing *Hudson* factors still play a role in a court's analysis of a Fourteenth Amendment excessive force claim. This is apparent from the fact that the *Kingsley* court referenced similar factors to be considered in resolving the objective reasonableness of an action on which a Fourteenth Amendment claim is based[.] . . . Finding Judge Brown's reasoning [in *Thompson v. Beasley*] persuasive, the undersigned will proceed by analyzing plaintiff's excessive force by considering the *Hudson* factors. . . . [T]he Court finds that all of the *Hudson* factors weigh in the defendants' favor and, as a result, plaintiff cannot show that Adams' use of Mace was 'objectively unreasonable.'")

Cauley v. Walker, No. CV 1:10CV326, 2015 WL 5521972, at *6 & n.4 (E.D. Tex. Sept. 16, 2015) ("Plaintiff has presented competent summary judgment showing that the amount of force used against him was objectively unreasonable and that he suffered more than a *de minimis* injury. Moreover, plaintiff's right to be free from having excessive force used against him was clearly established at the time of the incident in question. . . .The right of a pretrial detainee to be free from the use of excessive force was clearly established at the time of the incident in question. However, as indicated above, at that time courts considering an excessive use of force claim against a pretrial detainee asked whether force was used maliciously and sadistically, for the very purpose of causing harm, or in a good faith effort to maintain and restore discipline, rather than whether the force used was objectively unreasonable. As stated above, plaintiff's testimony at his deposition indicates that he was not presenting any threat while in the defendant's office and,

accordingly, there was no need for any force to be used to maintain or restore discipline. Plaintiff has therefore demonstrated excessive force was used against him even under the test previously applied.")

Callaway v. City of Austin, No. A-15-CV-00103-SS, 2015 WL 4323174, at *3 n.1 (W.D. Tex. July 14, 2015) ("Some courts have interpreted *Graham* to hold that, where the Fourth Amendment applies to a plaintiff's Section 1983 claims, the plaintiff may not also state a claim under the Fourteenth Amendment. . . In this case, however, Callaway has alleged excessive force claims incident to her arrest, but which took place after she had been 'processed' at the Travis County Jail. . . 'Whether a particular standard applies turns on the plaintiff's status during the relevant time period.'. . The Fourteenth Amendment applies to claims of excessive force by pretrial detainees. . . Therefore, the Court will not dismiss Callaway's Section 1983 claims based on the Fourteenth Amendment. To the extent Callaway characterizes her Section 1983 claim as one for excessive force against a pretrial detainee under the Fourteenth Amendment, however, the Supreme Court has recently clarified that the same 'objective reasonableness' standard used in analyzing Fourth Amendment claims applies. *Kingsley v. Hendrickson,* No. 14–6368, 2015 U.S. LEXIS 4073, *12–13 (U.S. June 22, 2015) (citing *Graham,* 490 U.S. at 396). Given this clarification, *id.,* along with the Supreme Court's repeated pronouncements that the Fourth Amendment applies to excessive force claims relating to involuntary blood draws from arrestees, *see Missouri v. McNeely,* 133 S.Ct. 1552, 1559–60 (2013), and *Schmerber,* 384 U.S. at 767, this Court will analyze all of Callaway's excessive force claims under the objectively reasonable standard articulated in *Graham,* 490 U.S. at 394–95.")

Thompson v. Beasley, 309 F.R.D. 236, 247 (N.D. Miss. 2015) ("In the approximately three weeks since *Kingsley* was decided, only one court in this circuit has addressed the Supreme Court's *Kingsley* opinion's impact on a Fourteenth Amendment excessive force claim in the Fifth Circuit. In *Clark v. Anderson,* a Texas District Court followed the Fifth Circuit rule that Fourteenth and Eighth Amendment claims are analyzed under the same framework, although it allowed that 'this holding is called into question by the Supreme Court's recent decision in *Kingsley* ....' No. 4:15–cv–360, 2015 WL 3960886, at *3, 3 n. 3 (N.D. Tex. June 29, 2015). While *Clark* stopped short of recognizing that *Kingsley* overruled the *Kitchen* and *Valencia* line of cases, a reading of *Kingsley* compels such a conclusion. *Kingsley* held that Fourteenth Amendment claims, unlike Eighth Amendment claims, must be decided under an objective standard. . . *Kitchen* and *Valencia* held that Fourteenth Amendment claims, like Eighth Amendment claims, must be decided under a subjective standard. . . These holdings cannot be squared. Accordingly, this Court follows the Supreme Court's direction and holds that Plaintiff's Fourteenth Amendment claim must be evaluated under an objective standard—that is, the Court must ask whether, from an objective point of view, Beasley's actions were rationally related to a legitimate, nonpunitive governmental purpose and whether his actions were excessive in relation to that purpose. . .There can be no serious dispute that Beasley's use of force during the incident was rationally related to the legitimate, non-punitive governmental purpose of moving to lockdown an inmate involved in a physical altercation, pending the completion of an investigation. Accordingly, the question

becomes whether Beasley's use of force was excessive in relation to that purpose. In answering this question, the Court turns to the *Hudson* inquiry, which has been used for nearly twenty-five years to determine whether a corrections officer's use of force was 'wanton and unnecessary,' that is, whether force was excessive. . . However, in a departure from the pre-*Kingsley* jurisprudence, the Court need only ask whether the force was unnecessary—not whether the use of force was so unnecessary as to show the requisite state of mind to support an Eighth Amendment excessive force claim.")

SIXTH CIRCUIT

Hulon v. City of Lansing, Michigan, No. 23-1937, 2025 WL 554201, at *3–4 (6th Cir. Feb. 19, 2025) (not reported) ("*Lawler*. . . appears to conflict with *Helphenstine*, which applied the new reckless disregard standard to a pre-*Brawner* deliberate indifference claim. . . In other words, *Helphenstine* used the new standard to deny qualified immunity after it framed the clearly established right as the 'right to be free from deliberate indifference,'. . . while *Lawler*—much like *Trozzi* before it—used the old standard to grant qualified immunity after it focused on whether the *contours* of the right to be free from deliberate indifference had been clearly established. . . . We need not reconcile these decisions in this interlocutory appeal because the practical result is the same either way: qualified immunity must be denied in this case because a genuine dispute of material fact remains.")

Hulon v. City of Lansing, Michigan, No. 23-1937, 2025 WL 554201, at *4-5 (6th Cir. Feb. 19, 2025) (not reported) (Readler, J., concurring) ('I share the majority opinion's puzzlement over the state of our circuit's deliberate indifference law. And I join its thoughtful criticisms of the inconsistencies in that case law, which begin with the altered deliberate indifference standard announced in *Brawner v. Scott County*, 14 F.4th 585 (6th Cir. 2021). . . *Brawner* was misguided as an original matter. . . But even setting that objection aside, all should agree that the standard articulated there was 'anything but clear.'. . So the ensuing decision in *Trozzi v. Lake County*, 29 F.4th 745 (6th Cir. 2022), 'tried to clarify' it. . . In the end, *Trozzi* was consistent with *Brawner*. And so it remains the law of the circuit, subsequent inconsistent panel opinions notwithstanding. . . As others have observed, *Brawner*'s wake left unanswered questions over the contours of our deliberate indifference standard for pretrial detainees. . . When that happens, future panels are left to provide answers. *Trozzi* honored that task, articulating *Brawner*'s holding in a judicially administrable three-part test. . . And it did so after engaging in a detailed exploration of *Brawner*, the opinion that inspired *Brawner*, *see Kingsley v. Hendrickson,* 576 U.S. 389 (2015), our Court's subsequent precedents, and other background principles. In the end, *Trozzi*'s analysis of the issue spanned eight double-columned pages of the Federal Reporter. . . There, the unanimous *Trozzi* panel faithfully advanced *Brawner*'s holding, while adhering to the understanding that a substantive due process claim cannot be grounded in a standard of culpability lower than a conscious disregard to the plaintiff's safety. . . *Trozzi*'s 'interpretation of *Brawner* was not only possible but indeed necessary.'. . Our en banc court, it bears noting, was content to leave *Trozzi*'s holding in place, implicitly rejecting any notion that it created an intra-circuit conflict with

Brawner. . . Yet a subsequent panel decision seemingly sought to achieve what the en banc court could not. Our decision in *Helphenstine v. Lewis County* purported to invalidate *Trozzi*. . . To *Helphenstine*'s mind, *Brawner* itself spawned no questions, but only answers. At the outset, it bears asking how *Helphenstine* had the power to purport to nullify *Trozzi*. Traditionally, our Court applies the prior panel rule when '[b]oth rulings cannot be right,'. . . because the second case reaches a holding that is '[o]pposite to,' 'contrary to, or 'in conflict with' the first. . . Most often, this occurs when two lines of precedent arise oblivious of each other and eventually butt heads. . . In such cases, the rule from the first-decided case stands. . . This command sensibly 'promotes consistency and reliability' in our law. . . by establishing a default rule when two lines of precedent cannot both be right—the eldest controls. But this practice does not limit a panel's constitutional and statutory authority to interpret prior case law in deciding a future case. . . After all, we interpret our precedents in every case we decide. If a panel could invoke the prior panel rule to avoid an earlier holding any time it believed a prior decision incorrectly interpreted a prior case, nothing would remain of horizontal stare decisis. That is likely why Congress implemented a mechanism for our Court to revisit purportedly incorrect panel interpretations of precedent in the form of en banc review. . . What is more, our case law on the prior panel rule explicitly accounts for a subsequent panel's ability to interpret precedent. . . Judged by these benchmarks, *Trozzi*'s interpretation and clarification of *Brawner* presented no occasion for *Helphenstine* to deploy the prior panel rule.")

Hulon v. City of Lansing, Michigan, No. 23-1937, 2025 WL 554201, at *7-10 (6th Cir. Feb. 19, 2025) (not reported) (Stranch, J., dissenting) ("This is a straightforward interlocutory appeal that turns entirely on disputed facts. Our precedent provides a straightforward resolution—dismissal for lack of jurisdiction. But the majority, in a confusing deviation, resolves to hear the case while readily acknowledging that the appeal boils down to disputes of fact. Equally troubling is the majority's use of this case to cast doubt on our governing and settled caselaw by offering unwarranted commentary on an issue that neither party raised. The concurrence goes even further and explicitly seeks to relitigate that governing caselaw. I therefore respectfully dissent. . . .I also cannot sign on to the majority's (and concurrence's) commentary regarding our recent caselaw on deliberate indifference. . . Both proffer a discussion of our precedent that is, by their own admission, unnecessary to resolve this appeal. . . The graver concern, however, is that their commentary effectively invites the district court to adopt a legal test that our circuit has repeatedly rejected. All our writings in this case agree that this appeal turns on disputes of material fact, which is all that is needed to dispose of it. But the majority and concurrence go further, using this case as an opportunity to air grievances with *Brawner v. Scott County*, 14 F.4th 585 (6th Cir. 2021), and *Helphenstine v. Lewis County*, 60 F.4th 305 (6th Cir. 2023). . . The majority suggests, and the concurrence explicitly asserts, that *Trozzi v. Lake County*, 29 F.4th 745 (6th Cir. 2022), provides the correct test for evaluating a pretrial detainee's deliberate indifference claim pursuant to *Brawner*. . . This commentary is unsolicited—neither party argued on appeal that *Trozzi*, and not *Helphenstine*, should apply in assessing whether the defendants were deliberately indifferent. And even if they had, that issue would have been immaterial to the resolution of this appeal. The majority and concurrence essentially urge district courts to embrace a legal test that is not good

law in this circuit. There is no dispute that, prior to *Brawner*, we required pretrial detainees to prove not only that the detainee had a sufficiently serious medical need, but also that the official subjectively 'kn[ew] of and disregard[ed] an excessive risk to [the detainee's] health or safety.'. . In 2021, *Brawner* 'modifi[ed] ... the subjective prong of the deliberate-indifference test for pretrial detainees' from actual knowledge to 'reckless disregard.'. . One year later, despite *Brawner*'s modification of the subjective prong, the *Trozzi* panel held that courts were still required to consider 'an official's actual knowledge of the relevant circumstances.'. . *Helphenstine* subsequently rejected the deliberate indifference test articulated in *Trozzi* as 'irreconcilable with *Brawner*.'. . As *Helphenstine* recognized, *Trozzi*'s attempt to reimpose an actual-knowledge requirement directly contradicted *Brawner*, which had framed the subjective inquiry as follows: What then is required to establish deliberate indifference in [the pretrial detainee] context? Mere negligence is insufficient. A defendant must have not only acted deliberately (not accidentally), but also recklessly 'in the face of an unjustifiably high risk of harm that is either known *or so obvious that it should be known*.'. . Instead of applying *Brawner*, *Trozzi* sought to substantively alter the controlling legal standard that *Brawner* set forth. Faced with a clear conflict between *Brawner* and *Trozzi*, the *Helphenstine* court hewed to the well-established principle that when two cases 'look in opposite directions,' we must 'look to the oldest decision on point.'. . Finding the matter settled, *Helphenstine* applied *Brawner* and assessed whether the defendants acted recklessly, without requiring a showing of actual knowledge. . .Since *Helphenstine*, our circuit's view of the matter has remained unchanged. We have repeatedly and consistently adhered to *Helphenstine*'s rejection of *Trozzi*. Most recently, in *Lawler v. Hardeman County*, we reaffirmed that *Helphenstine*—not *Trozzi*—provides the correct legal framework for analyzing a pretrial detainee's deliberate indifference claim under *Brawner*. . . *Lawler* adhered to an ever-growing list of published cases in which our court agreed with *Helphenstine* and expressly rejected *Trozzi*'s attempt to alter *Brawner*. . . Indeed, since *Helphenstine*, every published case to address the issue has followed *Helphenstine*'s rejection of *Trozzi*. . . Given this overwhelming authority, I agree with *Lawler* that our law on this matter is 'settled.'. . Because I believe the proper disposition of this appeal was dismissal for lack of jurisdiction—without relitigating our now-settled caselaw—I respectfully dissent.")

Whyde v. Sigsworth, No. 22-3581, 2024 WL 4719649 (6th Cir. Nov. 8, 2024) (not reported) ("Whyde tries to overcome qualified immunity by relying on *Brawner v. Scott County*, which lowered the standard for deliberate-indifference claims by pretrial detainees like Whyde. . . Before *Brawner*, a detainee had to show that an official 'kn[ew] of and disregard[ed] an excessive risk to inmate health or safety.'. . But after *Brawner*, a detainee need only show that an official acted with 'something akin to reckless disregard'—a lower standard that doesn't require actual knowledge of a serious risk of harm. . . Whyde can't benefit from *Brawner*. Our court decided that case in September 2021—more than four years after Whyde's stay in the Erie County Jail. And to overcome qualified immunity, Whyde must show that officials violated law that was clearly established *at the time of the alleged misconduct. Lawler*, 93 F.4th at 926. *Brawner* didn't control in 2017; the Supreme Court's decision in *Farmer* did. . . And under the *Farmer* standard, the officials here aren't liable unless Whyde can show they 'kn[ew] of and disregard[ed]' an 'excessive

risk' to his health. . . The officials (a) must have known facts from which they could infer that Whyde was at a substantial risk of serious harm, *and* (b) must have actually drawn that inference for themselves. . .The dissent suggests that we should conduct the qualified immunity analysis under the *Brawner* standard because that's how the parties briefed the case. . . But regardless of what the parties think the law is, 'courts have an independent obligation to get the law right.'. . That means we must apply the correct governing law, even if the parties urge otherwise. And the correct law is clear: the qualified immunity analysis turns on precedent that applied at the time of the alleged misconduct. . . Here, Whyde can't overcome the defendants' assertion of qualified immunity.")

Campbell v. Riahi, 109 F.4th 854, 860-62 (6th Cir. 2024) ("We skip to the question whether Riahi's action violated any clearly established right. . . The Fourteenth Amendment requires (among other things) that jail officials take reasonable measures 'to protect pretrial detainees from harm.'. . At the time of the alleged constitutional violation here, a plaintiff alleging a Fourteenth Amendment deliberate-indifference claim needed to prove two elements: first, that the detainee faced a 'substantial risk of serious of harm'; and second, that the defendant understood yet 'consciously disregarded' that risk—meaning the defendant knew of the risk and responded unreasonably to it. . . . Here, regardless of whether Riahi subjectively perceived the potential risk that Baker would commit suicide, Baker's mother has not cited—nor have we found—any case that would have put Riahi on notice that her decision to close Baker's cell door was 'so unreasonable as to violate the Fourteenth Amendment.'. . At that time, Riahi was responding to an ongoing altercation between two cellmates, which had escalated over the course of nearly thirty minutes. Twice Riahi tried to defuse the altercation; but when Baker and Herbert started 'going in and out' of their cells attempting 'to get' each other, Riahi closed each of their cell doors 'to avoid a physical altercation.' At that moment—as the sole corrections officer on duty—Riahi was forced to balance competing exigencies: the potential risk that Baker might harm herself, on the one hand, and the risk that Baker and Herbert might harm each other (or another inmate), on the other. No 'clearly established law' from our court or the Supreme Court 'prohibited' Riahi from balancing those considerations by closing Baker's cell door for ten minutes while seeking assistance from her supervising officer. . . .At the time of Baker's suicide, no case from the Supreme Court or this court established that Riahi's actions were unconstitutional at the time she took them. Riahi is therefore entitled to qualified immunity as to the federal claim against her.")

Heeter v. Bowers, 99 F.4th 900, 916-19 (6th Cir. 2024) ("We previously applied the same standard to medical-care claims by pretrial detainees alleging due process violations under the Fourteenth Amendment and to claims by inmates alleging unconstitutional punishment under the Eighth Amendment. . . That 'deliberate indifference' standard required the officer not only to know the facts giving rise to the medical risk, but also to subjectively know the risk of harm, and then respond unreasonably. . . Following Supreme Court precedent, we changed the mental state for the due process claims. For a Fourteenth Amendment claim, as the Heeters assert, we no longer require that the officer *knew* the risk of harm from failure to provide medical care; an officer is still liable for *recklessly* disregarding the risk. . . We clarified this new standard in *Helphenstine v. Lewis*

County just a month before the district court issued its decision. . . As neither party raised the case, the district court applied the prior standard. . . The change makes no difference in this case, however, because the Heeters meet the stricter, older standard. . . There is no dispute that Officer Bowers subjectively knew the risk of harm—death—to Mr. Heeter from shooting him five times in the center of his body. Neither is there a dispute that Officer Bowers knew Mr. Heeter was bleeding profusely and that without immediate medical attention he had a high risk of dying. The question we face, then, turns not on whether Officer Bowers knew or should have known the risk to Mr. Heeter, but instead on whether he 'responded reasonably' to the risk. . . He didn't. As Mr. Heeter lay face down, bleeding from multiple gunshot wounds, it was unreasonable for Officer Bowers to stand idle—even for a few minutes and even while paramedics were on their way—rather than administer the first aid he was trained to provide. Our court has repeatedly held that officers violate a pretrial detainee's right to adequate medical care when, despite knowing of an emergent risk of harm, they stand idle and fail to provide immediately necessary medical care that they have been trained to administer. . . . Despite his training and police department policy, Officer Bowers did not even try to provide Mr. Heeter first aid as he lay moaning and bleeding and as his breathing became increasingly labored. The district court was therefore correct in finding Officer Bowers violated the Constitution when he 'knowingly left a mortally wounded suspect lying face down on the ground while handcuffed without administering aid during the critical moments following injury.'. .In response, the defendants tell us there is a bright-line rule that after summoning the paramedics, officers have no further duty to provide medical care to pretrial detainees. Citing *Stevens-Rucker v. City of Columbus*, they contend that Officer Bowers responded reasonably because he knew the paramedics had been called, and the Constitution 'does not require [an] officer to intervene personally' or 'exhaust[ ] every medical option' so long as they call for care and do not delay it from reaching the suspect. . . To the extent we suggested in *Stevens-Rucker* and other cases that officers do not have to 'intervene personally' when they believe medical aid is en route, it was because there we accepted or presumed that the officers reasonably believed 'their individual intervention would not have helped.'. . That is not the case here. Given Mr. Heeter's moans and labored breathing, it was clear he was still alive, and a jury could conclude that a reasonable officer trained in basic first aid would have tried to use that training to help Mr. Heeter. Officer Bowers overreads our fact-bound cases. As a matter of common sense and precedent, there is no bright-line rule that officers never have to provide care after calling for help. We have never held that calling for a paramedic always terminates a police officer's constitutional obligations to a pretrial detainee—irrespective of the time it will take for help to arrive, how urgently help is needed, how the officer has been trained, or even how easy it would be for the officer to help. Under the defendants' view, a trained correctional officer has no obligation to administer the Heimlich maneuver to help a choking inmate, and a prison guard has no obligation to cut down a detainee who has attempted suicide by hanging. That's not just contrary to *Heflin*, but to myriad other precedents where we've held that calling the paramedics does not guarantee an officer qualified immunity from like Fourteenth Amendment claims. . . .To summarize, it is undisputed that Officer Bowers focused on ordering an officer to handcuff Mr. Heeter, then stood idle as Mr. Heeter bled out, moaned, and struggled to breathe. A reasonable jury could find that Mr. Heeter's critical injury called for immediate first aid before professional paramedics arrived,

and that Officer Bowers—trained in first aid and unoccupied by police duties—could and should have rendered that care. Therefore, a reasonable jury could find Officer Bowers violated Mr. Heeter's Fourteenth Amendment right to adequate medical care.")

Little v. City of Morristown, Tennessee, No. 23-5302, 2024 WL 1530468, at *2–3 (6th Cir. Apr. 9, 2024) (not reported) ("[O]ur 2021 decision in *Brawner v. Scott County*, 14 F.4th 585, 596 (6th Cir. 2021), altered our approach for pretrial detainees. *Brawner* reduced the level of mental culpability with which a defendant must act from 'knowing' to 'reckless disregard.'. .When it comes to qualified immunity, the timing of this change matters. That is because the 'clearly established' prong of the qualified-immunity inquiry focuses on 'whether the officer had fair notice that her conduct was unlawful' based on 'the law at the time of the conduct.'. .In several qualified-immunity appeals following *Brawner*, we apparently assumed that the new standard applied, even when the conduct at issue pre-dated *Brawner*'s publication. *See, e.g.*, *Greene v. Crawford Cnty.*, 22 F.4th 593, 603–04, 606–07, 614–15 (6th Cir. 2022) (applying *Brawner* standard in qualified-immunity context for conduct that occurred in 2017); *Helphenstine v. Lewis Cnty.*, 60 F.4th 305, 311, 316–17, 326–27 (6th Cir. 2023) (same); *Howell v. NaphCare, Inc.*, 67 F.4th 302, 308, 311–12, 317–18 (6th Cir. 2023) (applying *Brawner* in qualified-immunity context for conduct that occurred in 2018); *Mercer v. Athens Cnty.*, 72 F.4th 152, 156–57, 160–61, 164 (6th Cir. 2023) (same). These opinions do not reflect consideration of—let alone a conscious conclusion about. . . one of the legal issues defendants raise here: whether a pretrial detainee's right to be free from reckless, rather than knowing, disregard of a risk to serious harm was clearly established before *Brawner*'s publication. While this appeal was pending, another panel of this court resolved that question. In *Lawler*, we held that pretrial detainees' right to be free from reckless, rather than knowing, disregard to a serious risk of harm was not clearly established until, at the earliest, *Brawner*'s publication in 2021. . . When the date of the conduct at issue predates *Brawner*, 'our older decisions applying *Farmer* to the claims of pretrial detainees provide the only clearly established law' as of that time. . .Without the benefit of *Lawler*'s clarification, the district court applied *Brawner*'s standard—not *Farmer*'s—when analyzing whether defendants were entitled to qualified immunity. Because we are 'a court of review, not of first view,' we vacate the district court's denials of qualified immunity to Officers Gillett, McFarland, and Smith for the failure-to-provide-medical-care claim and remand for its consideration under *Farmer* in the first instance. . . In addition, the district court analyzed the clearly established prong of the defendants' immunity claims collectively. On remand, it should instead analyze that prong defendant by defendant.")

Batton, for the Estate of Witbeck v. Sandusky County, Ohio, No. 23-3168, 2024 WL 1480522, at *____ (6th Cir. Apr. 5, 2024) (not reported) ("In response to recent Supreme Court precedent, . . . this circuit has modified the subjective component of the deliberate indifference inquiry for pretrial detainees. *See Helphenstine v. Lewis Cnty.*, 60 F.4th 305, 316–17 (6th Cir. 2023) (explaining the divergence in the Fourteenth and Eighth Amendment analysis articulated in *Brawner v. Scott Cnty*., 14 F.4th 585 (6th Cir. 2021) in response to *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)). After *Brawner*, the subjective element has been modified to 'lower the subjective component from actual knowledge to recklessness.'. . So, a plaintiff making out a deliberate

indifference claim under the Fourteenth Amendment must now show: (1) that the detainee possessed a sufficiently serious medical need; and (2) that the officer 'acted deliberately (not accidentally), [and] also recklessly "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known."'. . . Here, the district court noted that neither party attempted to apply the new standard at the district court level. On appeal, the parties likewise cite to pre-*Brawner* cases assessing the obviousness of Witbeck's suicidal tendencies. Indeed, it does not appear that this circuit has addressed the risk of suicide necessary for a plaintiff to make out a deliberate indifference claim under the Fourteenth Amendment post-*Brawner*. Because the obviousness of a risk of suicide remains central to a finding of an officer's reckless disregard of that risk, these cases seem to remain relevant under the new standard. . . But the shift in analysis post-*Brawner* appears to make it easier for a plaintiff to make out this claim, as '[r]eckless inaction in the face of [an] obvious need is enough to proceed to a jury under *Brawner*.'. . Accordingly, we cite to pre-*Brawner* case law assessing whether a detainee's actions made obvious a strong likelihood that the detainee would attempt suicide but note that the shift to recklessness indicates a lessened showing that a detainee plaintiff must make in this context. But, while we note this change in legal landscape concerning the constitutional violation, we continue to apply the law as it existed in 2019—when the conduct occurred—to determine whether any constitutional violation was clearly established at the time. *See Lawler ex rel. Lawler v. Hardeman Cnty.*, 93 F.4th 919, 927–28 (6th Cir. 2024).")

Lawler ex rel Lawler v. Hardeman County, Tennessee, 93 F.4th 919, 921-22, 925-28, 936 (6th Cir. 2024) ("In July 2018, Brian Lawler tragically committed suicide at a county jail. To hold officers liable for failing to prevent a pretrial detainee's death at that time, our caselaw required proof that the officers *subjectively believed* that there was a strong likelihood the inmate would commit suicide. . . Today, however, our court would hold officers liable if they *recklessly overlooked* a pretrial detainee's strong likelihood of suicide—even if they did not subjectively recognize it. *See Helphenstine v. Lewis County*, 60 F.4th 305, 316–17 (6th Cir. 2023). When denying qualified immunity to the officers sued in this case, the district court held that a reasonable jury could find that they 'recklessly disregarded' the strong risk that Lawler would commit suicide. But that standard governs today; it did not govern when Lawler committed suicide in 2018. And when we apply the correct test, the evidence shows that the officers did not subjectively believe that Lawler was likely to take his life. We thus reverse the district court's denial of qualified immunity to the officers. . . . Here, given that the controlling legal rules have recently changed, we find it easiest to resolve the Officers' appeal by jumping immediately to the 'clearly established' requirement. We need not (and do not) decide whether the Officers violated today's legal rules because Lawler's father has not shown that they violated the rules in place when Lawler committed suicide. Qualified immunity thus insulates the Officers from this damages suit. . . Because the district court invoked the wrong set of legal rules (understandably so, given our evolving caselaw), we begin by clarifying the law that applies here. . . . [C]ourts evaluating a qualified-immunity defense may consider only the legal rules existing when 'the challenged conduct' occurred, not legal rules adopted by later caselaw. . . Under this framework, we must identify the rules that governed in July 2018 when Lawler took his life. This inquiry starts by identifying the

constitutional right at issue. Lawler was a pretrial detainee at the time of his death, meaning that a court had yet to try or punish him. Lawler's father thus cannot invoke the Eighth Amendment right against 'cruel and unusual punishments' because that right kicks in only after a conviction. . . Still, pretrial detainees like Lawler do have a Fourteenth Amendment right not to be 'deprive[d]' of their 'life' 'without due process of law.'. . And the Supreme Court has long held that the Due Process Clause offers protections to pretrial detainees that at least match those afforded convicted prisoners under the Eighth Amendment. . . Having identified the right, we next must identify the claim at issue. This case implicates the legal rules that apply to claims that jail staff violated the Due Process Clause by failing to protect pretrial detainees from harm. These types of claims can arise in a variety of circumstances. Sometimes, a correctional officer might fail to protect the detainee from violence by other inmates. . . Other times, a prison doctor might fail to treat the detainee for a harmful medical condition. . . At still other times, jail staff might fail to thwart a detainee's suicide. . . In the Eighth Amendment context, the Supreme Court has held that the failure to protect prisoners from harm violates the ban on cruel and unusual punishment only if the prisoners prove both objective and subjective elements. . . Objectively, prisoners must have faced a 'substantial risk of serious harm.'. . Subjectively, officers must have acted with 'deliberate indifference' to this risk. . . Under this test, an inmate must prove both that an officer subjectively knew of facts that created a substantial risk of serious harm to the inmate and that the officer subjectively concluded that this risk existed. . . Because officers must consciously *know* of the risk, then, they do not violate the Eighth Amendment merely by negligently or recklessly overlooking it. . . Should these Eighth Amendment rules for failure-to-protect claims by prisoners extend to similar claims by pretrial detainees under the Due Process Clause? For years, we answered "yes" to this question. . . But the ground underlying our traditional approach began to shift in 2015 when the Supreme Court decided *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). That case concerned an excessive-force claim (not a failure-to-protect claim). . . . In the ensuing years, circuit courts disagreed over whether *Kingsley*'s decision to jettison the Eighth Amendment's subjective element for a pretrial detainee's excessive-force claim also modified the subjective element for a pretrial detainee's failure-to-protect claim. . . In 2021, we sided with the courts that extended *Kingsley* to this failure-to-protect context. . . After initial disagreement over what *Brawner* required, we settled on a test that reduced *Farmer*'s subjective element from 'actual knowledge to recklessness.'. . Today, officers can face liability even if they did not *actually know* of a risk of harm to a pretrial detainee. Pretrial detainees need only prove that the officers *recklessly disregarded* a risk so obvious that they either knew or should have known of it. . . What do these recent legal changes mean for the claims here? The changes do not affect our resolution because Lawler's father must overcome qualified immunity's 'clearly established' prong. Our recent cases that depart from *Farmer* in this pretrial-detainee context came out between 2021 and 2023. Because they postdate Lawler's suicide, they do not clearly establish anything 'at the time' the Officers acted. . . Admittedly, the Supreme Court decided *Kingsley* before Lawler took his life. But *Kingsley*, a decision about excessive force, did not clearly apply to this failure-to-protect context. The circuit split about *Kingsley*'s scope confirms this point. . . In short, our older decisions applying *Farmer* to the claims of pretrial detainees provide the only clearly established law in 2018. This difference matters. To be sure, the district court suggested that it need not decide whether *Brawner* modified *Farmer*

because Lawler's father had created a genuine dispute of fact even under *Farmer*'s more demanding test. . . But the court actually invoked *Brawner*'s more lenient test in all but name when applying the law to the facts. It reasoned that a jury could find that the Officers had '*recklessly* disregarded' a significant risk that Lawler would take his life. . . *Farmer*, however, requires the Officers to have '*consciously*' (not recklessly) disregarded that risk. . . That is, they must have 'draw[n] the inference' that the risk existed. . . The district court thus applied the wrong law to deny the Officers qualified immunity. . . Given the date of the conduct at issue, we instead must apply *Farmer*'s standards. . . . Our conclusion that Lawler's father cannot hold the Officers liable under § 1983's qualified-immunity test says nothing about whether he could have held them liable under today's standards. It also 'says nothing about whether [the Officers'] conduct was proper as a matter of good policy.'. . And nothing we say here bars Tennessee or its jail administrators from holding correctional officers to more demanding standards of conduct as a matter of state law. . . But Lawler's father lacks the type of evidence that we have traditionally required to meet the stringent constitutional test that applied when Lawler tragically committed suicide. We thus reverse the district court's denial of qualified immunity to the Officers and remand for further proceedings consistent with this opinion.")

Grote v. Kenton County, Kentucky, 85 F.4th 397, 405-06 (6th Cir. 2023) ("The standard in this circuit to prove a deliberate-indifference claim brought under the Fourteenth Amendment by a pretrial detainee is clear. To make out such a claim, a plaintiff must demonstrate (1) an objectively serious medical need; and (2) that the defendants, analyzed individually, acted (or failed to act) intentionally and either ignored the serious medical need or 'recklessly failed to act reasonably to mitigate the risk the serious medical need posed.'. . Stated differently, a pretrial detainee must have a serious medical need, and the defendant must act, whether through intentional action or omission, recklessly in response to the need and the risk it presented to the detainee. . .This has been the law of the circuit since at least 2021, when we explained that the Supreme Court's decision in *Kingsley v. Hendrickson* . . . necessarily alters our approach to deliberate-indifference claims for pretrial detainees. *See Brawner*, 14 F.4th at 596. Specifically and in line with *Kingsley*, we held in *Brawner* that the level of culpability with which a defendant must act to establish deliberate indifference to pretrial detainees is lower than that necessary for convicted incarcerated individuals. . .This is so because a pretrial detainee's claims derive not from the Eighth Amendment, with its focus on punishment, but instead from the Fourteenth Amendment, which can be violated without respect to an official's state of mind. . . Contrary to deliberate-indifference claims brought under the Eighth Amendment, which requires both an official's awareness of facts suggesting a likelihood of substantial harm to an incarcerated person and an official actually connecting such facts to an inference of harm, . . . a pretrial detainee need only prove 'something akin to reckless disregard' to satisfy the second element of a deliberate-indifference claim[.] . .Through no fault of its own, the district court applied the discussion from *Trozzi v. Lake County*, 29 F.4th 745 (6th Cir. 2022), in analyzing Grote's deliberate-indifference claims. . . . But *Trozzi* is at odds with the precedent that precedes it, and thus does not control. . . Contrary to *Brawner*, *Trozzi*, with its focus on what an official actually knew and whether the official ignored known risks, attempted to resurrect the pre-*Brawner* (and pre-*Kingsley*) treatment of pretrial detainees' deliberate-indifference claims. . .

Trozzi stands alone in this regard, and we have rightfully rejected it. . . In line with *Brawner*, *Helphenstine*, and *Howell*, we analyze the claims on appeal under the proper Fourteenth Amendment test.")

Mercer v. Athens County, Ohio, 72 F.4th 152, 160-61 (6th Cir. 2023) ("'After *Brawner*, to survive summary judgment on a deliberate indifference claim, a pretrial detainee must 'present evidence from which a reasonable jury could find (1) that she had an objectively serious medical need; and (2) that [the defendant's] action (or lack of action) was intentional (not accidental) and [the defendant] either (a) acted intentionally to ignore [the detainee's] serious medical need, or (b) recklessly failed to act reasonably to mitigate the risk the serious medical need posed to [the detainee.]'. .Months later, a panel of this court purported to modify the second element of the *Brawner* test and added a third element: that 'the prison official knew that his failure to respond would pose a serious risk to the pretrial detainee and ignored that risk.' *Trozzi v. Lake Cnty.*, 29 F.4th 745, 757–58 (6th Cir. 2022). A subsequent panel held that '[*Trozzi*'s] framing of the elements is irreconcilable with *Brawner*.' *Helphenstine v. Lewis Cnty.*, 60 F.4th 305, 316 (6th Cir. 2023). The *Howell* court agreed with *Helphenstine*. 67 F.4th at 311 n.3 ('[*Trozzi*'s] language is nearly identical in substance to *Farmer*'s subjective requirement ... [and] *Brawner* expressly departed from that standard.'). And now, so do we. The district court relied on *Trozzi* to analyze Mercer's deliberate indifference claim. So we repeat: '[b]ecause *Brawner* was decided before *Trozzi*, *Brawner* controls.' *Helphenstine*, 60 F.4th at 317. And we apply *Brawner* in analyzing Mercer's deliberate indifference claim.")

Howell v. NaphCare, Inc., 67 F.4th 302, 310 & n.3, 313-14 (6th Cir. 2023) ("Applying *Kingsley*'s reasoning, *Brawner* held that a pretrial detainee must make a showing (1) that he had an objectively serious medical need and (2) that each defendant 'acted deliberately [and] also recklessly "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known."'[3] **[fn. 3:** After *Brawner*, a panel of this court held that a pretrial detainee must satisfy a third element: that 'the prison official knew that his failure to respond [to an excessive risk of harm] would pose a serious risk to the pretrial detainee and ignored that risk.' *Trozzi v. Lake County*, 29 F.4th 745, 757-58 (6th Cir. 2022). But that language is nearly identical in substance to *Farmer*'s subjective requirement for convicted prisoners: that an 'official kn[ew] of and disregard[ed] an excessive risk to inmate health or safety; the official must both [have been] aware of facts from which the inference could be drawn that a substantial risk of harm exist[ed], and he must also [have] draw[n] the inference.' 511 U.S. at 837, 114 S.Ct. 1970. *Brawner* expressly departed from that standard. We agree with the panel in *Helphenstine v. Lewis County* that *Trozzi*'s 'framing of the elements is irreconcilable with *Brawner*,' and '[b]ecause *Brawner* was decided before *Trozzi*, *Brawner* controls.'"**]** . . . .There is no dispute that Jordan subjectively believed Howell was experiencing a psychiatric episode. But after *Brawner*, subjective belief is not the end of the analysis. *Brawner* is satisfied if a jury could find that Jordan acted recklessly by failing to treat Howell's sickle cell disease when it was obvious that he faced an unjustifiably high risk of harm. A jury could make that finding here based on the following facts: (1) Jordan knew Howell had sickle cell; (2) she knew he had previously been transported to a local hospital for sickle cell

complications while incarcerated; (3) she observed his inability to stand and saw him fall out of a wheelchair; (4) she heard his complaints about pain in his legs and back and numbness in his legs—common sickle-cell symptoms; (5) she read Howell's irregular vitals; and (6) as expert testimony established, a sickle cell patient complaining of severe pain represents a medical emergency that would have made it apparent to a layperson that Howell needed to go to the emergency department. Yet Jordan never took further action to rule out a sickle cell crisis. Accordingly, the district court erred in granting summary judgment to Nurse Jordan. . . . In the light most favorable to the Estate, a jury could find that Jordan was reckless by failing to act in the face of an obvious, unjustifiably high risk of harm, amounting to deliberate indifference to Howell's serious medical need.")

Helphenstine v. Lewis Count., Kentucky, 66 F.4th 794, 795-802 (6th Cir. 2023) (Readler, J., statement respecting denial of rehearing en banc) ("As an inferior court, *see* U.S. Const. art. III, § 1, we must be attentive to the pronouncements of the Supreme Court. Sometimes, a fresh decision requires us to grapple with how broadly the opinion sweeps. But that was not the case for *Kingsley v. Hendrickson*[.]. . In *Kingsley*, the Supreme Court told us it was deciding a narrow issue: whether federal courts should consider a defendant's subjective intent in 'the context of excessive force claims brought by pretrial detainees.'. .Yet rather than ending the legal debate, *Kingsley* marked just the beginning. In a classic example of mission creep, at least four circuit courts (arguably five, depending on who you ask) read *Kingsley* as requiring a change to the circuit's law for Fourteenth Amendment pre-trial conditions of confinement claims, otherwise known as deliberate indifference claims. *Compare Kemp v. Fulton County*, 27 F.4th 491, 495 (7th Cir. 2022) (counting five), *with Helphenstine v. Lewis County*, 60 F.4th 305, 316 (6th Cir. 2023) (counting four). An odd conclusion, one has to say, when excessive force by definition involves active misconduct while deliberate indifference concerns inaction. . . That is likely why the Supreme Court tailored *Kingsley* as it did. . . This frolic led to even other detours. In the circuits that upended the law for deliberate indifference post-*Kingsley*, those courts have split internally across the board over how to apply these new standards. [collecting cases] Still other circuits have rejected the idea that *Kingsley*'s resolution of excessive force claims has anything to say about deliberate indifference claims, given the obvious difference between the conduct underlying the two. [collecting cases] Our Court was one that took *Kingsley* as a veiled call to action to rewrite our deliberate indifference standard. . . How to do so, however, has divided us once again. All agree that a deliberate indifference plaintiff must prove an objectively serious harm. But what about the claim's state of mind component? The *Brawner* majority opinion concluded that *Kingsley* 'modifi[ed]' our former subjective standard so that the defendant's inaction had to be 'deliberate[ ] (not accidental[ ])' and 'reckless[ ] in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.' . . At least three of us understood that standard to require a plaintiff to prove an objectively serious harm and two states of mind—one with respect to the harm suffered by the plaintiff and one with respect to the defendant's response to that harm. *Trozzi v. Lake County*, 29 F.4th 745, 757–58 (6th Cir. 2022). Now, a separate panel of our Court reads *Trozzi* as in tension with *Brawner*, meaning *Brawner* controls. . . And still other members of our Court have confessed understandable confusion over the issue. . . Simply put, that so many have said so much in so little

time is both an acknowledgement that *Brawner* has left ample room for debate over its holding as well as a recognition of the frequency with which these cases appear on our docket. . . In an area of law that deserves precision, our approach reflects more of a shotgun blast. The original sin in this legal drama, it bears noting, was not ours. It was the Supreme Court's decision to divine constitutional rights for inmates who have been harmed in prison. [citing *Estelle v. Gamble*] . . . . No one condones mistreating prisoners, no matter their underlying offense. But state law can easily account for that mistreatment, with both causes of action and remedies. . . Yet for many years now, these garden variety tort claims have also been deemed matters of constitutional significance. The Supreme Court could return all of these actions to state court. . . And there are grounds to do so. . . . With precedents pointing in all directions, the disharmony in the case law in this setting is as extreme as any. Especially when the standard is more or less reduced to 'reasonableness,' this legal regime lacks any manner of predictability for officers and detainees alike. Given this state of affairs, and with state law as an adequate backdrop against which to litigate deliberate indifference claims, reliance interests are minimal at best. . . . Following a thorough discussion, *Trozzi* adopted a confined understanding of *Brawner*. And for good reason. Reading *Brawner* as eliminating any state-of-mind inquiry would ignore language in *Brawner* itself requiring that the actor's 'lack of action' be 'intentional (not accidental).'. . A nebulous 'reasonableness' approach would likewise turn a blind eye to *Brawner*'s repeated assertions that it was not imposing a negligence standard, but merely 'modif[ying]' *Farmer*'s subjective prong. . . Above all, *Brawner*'s raison d'être, *Kingsley*, itself maintained the foundational rule that a constitutional tort must take into consideration the subjective state of mind at play. . . Accepting *Brawner*'s conclusion that *Kingsley* governs, *Trozzi* attempted to translate the 'two separate state-of-mind questions' in the excessive force context to this new frontier. . . It did so by explaining that civil recklessness governs the external question of the degree of harm facing the detainee, while criminal recklessness, at the very least, governs the behavior of the government official. . .Any other understanding of *Brawner* would simply adopt the plaintiff-friendly part of *Kingsley* and omit the rest, contrary to longstanding precedent restraining our substantive due process jurisprudence. . . That takes us to today's case. The panel opinion read the three-part test from *Trozzi* as 'irreconcilable with *Brawner*.'. . I, of course, disagree. Either way, *Helphenstine*'s main point of emphasis was to recite the various disagreements among the circuits on the *Kingsley* question. . . After having done so, the panel concluded that *Brawner* settled all of these disagreements by 'requir[ing] us to lower the subjective component from actual knowledge to recklessness.'. . In many respects, this feels like two ships passing in the night. *Trozzi* did not hold that *Brawner* refrained from lowering the subjective component. Instead, *Trozzi*'s second prong expressly incorporated the civil recklessness standard from *Brawner*'s modified subjective approach with a caveat about its appropriate focus. . . What *Brawner* (and, more to the point, *Kingsley*) did not do was say that the *only* state of mind at issue was with respect to the risks to the detainee. There still needed to be an examination of whether the defendant's inaction was accidental, . . . which *Trozzi* held cannot be supported tautologically by simply pointing to the inaction itself[.] . . That approach also bears out in the analogous failure-to-protect claim, where we require an intentional state of mind concerning the officer's 'decision,' separate and apart from the *Brawner* inquiry. . . . Three judges in *Trozzi* thought a narrow interpretation of *Brawner* was not only possible but indeed

necessary. Prior opinions had largely said the same. . . Then, in response to an en banc petition asserting that *Trozzi* was irreconcilable with *Brawner*, '[l]ess than a majority of the judges' ultimately voted in favor of rehearing. . . And now a different panel reads *Trozzi* as irreconcilable with *Brawner*, yet laments the deep confusion these issues have caused 'all over the map.'. . Meanwhile, all sides to the en banc briefing in this case—including the detainee's estate—agree that *Brawner* was wrongly decided and confusing. . . With signs pointing in all directions, even the most careful reader would likely find herself at a crossroads. For judges and academics, these are theoretical concepts to debate. But for prison officials, these decisions—as incongruent as they are—govern their everyday conduct. . . And as we continue to lower the bar for liability, we increasingly put these officials in impossible situations, ones the Constitution surely was never contemplated to resolve. . . For all involved, we must do better. . . A year and a half into the experience, *Brawner*'s promise that '[m]ere negligence is insufficient' appears to be an empty one. . . I can understand our en banc court's reluctance to take up the issue here, given the many competing views on the underlying legal standard in our circuit and others along with the high bar for convening en banc proceedings. But at some point, intervention is needed. With confusion rampant coast-to-coast, the Supreme Court would appear to be the proper forum. For the sake of litigants and courts alike, the Supreme Court should soon grant certiorari in a case involving allegedly unconstitutional deliberate indifference toward a pretrial detainee. It may be too much to ask for the Supreme Court to revisit the application of substantive due process principles in this context, but reconsidering *Estelle* would not be a bad place to start. At the very least, the Supreme Court can resolve whether *Kingsley*'s excessive force analysis should be grafted on to deliberate indifference claims. And, if *Kingsley* sweeps so broadly, what test are the inferior courts to use in resolving those cases? As both *Trozzi* and this panel decision recognize, the *Kingsley* circuit split is more than mature—it is having offspring. . . Disagreements abound, from whether to apply *Kingsley* to deliberate indifference claims, to the test to apply if so, to whether the same test applies in various settings for conditions of confinement claims. This is no small matter. As court records reflect, these cases populate every docket across the federal courts. *See IDB Appeals 2008–Present*, Fed. Jud. Ctr., https://www.fjc.gov/research/idb/interactive/21/IDB-appeals-since-2008 (last visited Apr. 18, 2023) (listing more than 76,000 "prisoner civil rights" and "prison condition" claims in the federal appellate courts since 2008, approximately 16.8% of all civil appeals); *see also* Zhen Zeng, Bureau of Justice Statistics, NCJ 251774, Jail Inmates in 2017, at 1 (2019) (reporting that almost two-thirds of jail inmates were "unconvicted"). But until Supreme Court intervention comes to pass, we are left to muddle on, following paths leading in any and all directions.")

Helphenstine v. Lewis County, Kentucky, 60 F.4th 305, 315-17 (6th Cir. 2023), *reh'g en banc denied*, 65 F.4th 794 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 692 (2024) ("*Brawner* answered the question left open by *Kingsley*, holding that *Kingsley* required modification of the subjective component of a pretrial detainee's deliberate indifference claim: 'Given *Kingsley*'s clear delineation between claims brought by convicted prisoners under the Eighth Amendment and claims brought by pretrial detainees under the Fourteenth Amendment, applying the same analysis to these constitutionally distinct groups is no longer tenable.'. . We modified the subjective prong

as follows: 'A pretrial detainee must prove more than negligence but less than subjective intent—something akin to reckless disregard.'. . In other words, a plaintiff must prove that a defendant 'acted deliberately (not accidentally), [and] also recklessly "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known."'. . Recently, however, a panel of this court called this reading of *Brawner* into question. *See Trozzi v. Lake Cnty.*, 29 F.4th 745 (6th Cir. 2022). In *Trozzi*, the panel agreed that *Brawner* modified the subjective element. . . But based on the *Brawner* opinion itself, 'post-*Brawner* decisions, and background principles,'. . . it concluded that the subjective inquiry 'still requires consideration of an official's actual knowledge of the relevant circumstances.'. . It then framed the test this way: 'Reading *Farmer*, *Kingsley*, *Brawner*, and *Greene* [*v. Crawford Cnty.*, 22 F.4th 593 (6th Cir. 2022)] together, a plaintiff must satisfy three elements for an inadequate-medical-care claim under the Fourteenth Amendment: (1) the plaintiff had an objectively serious medical need; (2) a reasonable officer at the scene (knowing what the particular jail official knew at the time of the incident) would have understood that the detainee's medical needs subjected the detainee to an excessive risk of harm; and (3) the prison official *knew* that his failure to respond would pose a serious risk to the pretrial detainee and *ignored* that risk.'. . We hold that this framing of the elements is irreconcilable with *Brawner*. We appreciate that our sister circuits are all over the map on this issue. As an initial matter, four circuits have rejected the extension of *Kingsley* to deliberate indifference claims. *See Cope v. Cogdill*, 3 F.4th 198, 207 n.7 (5th Cir. 2021); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Strain v. Regalado*, 977 F.3d 984, 989–93 (10th Cir. 2020); *Dang by & through Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017). Three more circuits continue applying the pre-*Kingsley* framework, though without ruling out a future switch. *See Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 74 (1st Cir. 2016); *Moore v. Luffey*, 767 F. App'x 335, 340 n.2 (3d Cir. 2019); *Mays v. Sprinkle*, 992 F.3d 295, 300–01 (4th Cir. 2021). As to the circuits that extend *Kingsley*'s objective inquiry to deliberate indifference, they disagree on the question to ask. One circuit asks what 'a reasonable official in the [defendant's] circumstances would have appreciated' about the risks facing a detainee. *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018). One circuit asks what the defendant himself knew or should have known about the risks. *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017). And a third circuit asks if the defendant displayed 'purposeful, knowing, or reckless disregard of the consequences.' *Miranda v. Cnty. of Lake*, 900 F.3d 335, 354 (7th Cir. 2018); *Pittman by & through Hamilton v. Cnty. of Madison*, 970 F.3d 823, 827 (7th Cir. 2020) (same). Whatever the merits of these approaches to *Kingsley*, we do not think that *Brawner* leaves the question open. Simply put, *Brawner* held that *Kingsley* required us to lower the subjective component from actual knowledge to recklessness. Indeed, several panels of our court have interpreted *Brawner* in this way. [citing cases] Because *Brawner* was decided before *Trozzi*, *Brawner* controls. . . Accordingly, plaintiff must show (1) that Helphenstine had a sufficiently serious medical need and (2) that each defendant 'acted deliberately (not accidentally), [and] also recklessly "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known."'")

Schoonover v. Rogers, No. 21-3970, 2022 WL 12258998, at *___ n.1 (6th Cir. Oct. 21, 2022) (not reported) ("The Fourteenth Amendment protects pretrial detainees under a framework that is similar to that of the Eighth Amendment. . . After the Supreme Court held in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), that an officer violates a pretrial detainee's Fourteenth Amendment rights if the officer uses force in an objectively unreasonable manner, some panels of this court have modified the subjective component of the standard for deliberate-indifference claims. *Compare Brawner v. Scott County*, 14 F.4th 585, 596–97 (6th Cir. 2021), *with Trozzi v. Lake County*, 29 F.4th 745, 753 (6th Cir. 2022). We need not wade into this issue, however, because Schoonover was not a pretrial detainee, and his claims fall squarely within the ambit of the Eighth Amendment.")

Stein v. Gunkel, 43 F.4th 633, 638 -41 (6th Cir. 2022) ("The district court analyzed the failure-to-protect claim under *Brawner* and concluded that Stein had failed to establish a violation. . . It also determined that the law was not clearly established, as *Brawner* constituted a sufficient change in the law such that pre-*Brawner* caselaw could not clearly establish a deliberate indifference claim analyzed under the new test. . . Thus, summary judgment was also supported on the alternate ground that Sterling and Gunkel were owed qualified immunity. . . This timely appeal followed. . . . During the pendency of this litigation, the standard that this circuit applies to a pretrial detainee's claim of deliberate indifference changed. We previously analyzed pretrial detainees' deliberate indifference claims under the standard applied in *Farmer v. Brennan* . . . to Eighth Amendment claims brought by convicted prisoners. *Farmer* requires that a prisoner prove both that there was an objective risk of serious harm and that a defendant official subjectively knew of and disregarded that risk. . . . After *Kingsley,* this court altered the test for a pretrial detainee alleging that jail officials were deliberately indifferent to medical needs. . . Recognizing that *Brawner* changed the applicable test for a deliberate-indifference claim brought by a pretrial detainee, the district court analyzed Stein's failure-to-protect claim under the *Brawner* test . . . Since the district court's decision, we have applied *Brawner* to a deliberate-indifference claim for failure to protect. . . Under *Westmoreland,* to establish deliberate indifference for failure to protect, 'a defendant officer must [1] act intentionally in a manner that [2] puts the plaintiff at a substantial risk of harm, [3] without taking reasonable steps to abate that risk, [4] and by failing to do so actually cause the plaintiff's injuries.'. .Even assuming Stein can satisfy the first two elements, his case falters at the third *Westmoreland* element. The third element requires more than negligence because 'liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.'. . Thus, to establish the third element, Stein must prove that each officer 'was more than merely negligent; the officer must have acted with "reckless disregard" in the face of "an unjustifiably high risk of harm."'. . Stein fails to do so. . . .Because Stein does not establish that either Sterling or Gunkel violated his constitutional rights, we AFFIRM.")

Westmoreland v. Butler County, Kentucky, 35 F.4th 1051, 1051-53 (6th Cir. 2022) (Bush, J., dissenting from the denial of rehearing en banc) ("For many years, our circuit has applied the deliberate-indifference standard as set forth in *Farmer v. Brennan* . . . to evaluate pretrial detainees' claims under the Fourteenth Amendment. . . Last year, however, a split panel

in *Brawner v. Scott County*, 14 F.4th 585 (6th Cir. 2021), determined that the Supreme Court's decision in *Kingsley v. Hendrickson* . . . permitted deviation from our circuit precedent and thus an abandonment of the *Farmer* deliberate-indifference standard in the medical-needs context. . . Since then, our circuit has struggled with how to apply the *Brawner* test in medical-needs cases. *See, e.g.*, *Hyman v. Lewis*, 27 F.4th 1233, 1237 (6th Cir. 2022); *Smith v. Boyd Cnty. Fiscal Ct.*, No. CV 20-14-HRW, 2022 WL 992768, at *7 (E.D. Ky. Mar. 31, 2022). Did *Brawner* obviate an inquiry into defendants' mental states? *See Britt v. Hamilton County*, No. 21-3424, 2022 WL 405847, at *6–7 (6th Cir. Feb. 10, 2022) (Clay, J., dissenting). Did it merely modify that inquiry? *See Greene v. Crawford County*, 22 F.4th 593, 606 (6th Cir. 2022). And in so doing, did *Brawner* leave a subjective inquiry in place? *See Trozzi v. Lake County*, 29 F.4th 745, 754–55 (6th Cir. 2022). The panel majority's decision in this case represents only the latest example of the post-*Brawner* confusion. *See generally Westmoreland v. Butler County*, 29 F.4th 721 (6th Cir. 2022). Much as *Brawner* itself abrogated circuit precedent to reject the deliberate-indifference standard in the medical-needs context, so too the panel majority here abrogated circuit precedent to reject the standard in the failure-to-protect context. . . And it did so with a novel and ambiguous test that may substantially expand officials' liability and render the law more difficult for them to discern. The jail administration problem is exacerbated because many pretrial detainees and post-conviction prisoners are housed in the same facilities. . . I query the workability of a standard that changes an official's liability for the same action for two individuals with differing trial statuses housed in the same facility. And I fear that our current trajectory will soon undermine the Eighth Amendment. Moreover, the panel majority never defined its vague requirement of an 'intentional' (but not deliberately indifferent) decision by the defendant regarding the 'conditions' under which a plaintiff was confined, . . . whether liability may flow from merely but-for causation or, if proximate causation is required, whether the liability extends to multiple officials, . . . or how this new test differs from a de facto (and impermissible) negligence standard under the color of 'civil recklessness[.]' . . . The panel majority compounded this confusion by 'holding' that a plaintiff must show that 'a defendant officer [ ] act[ed] intentionally in a manner that puts the plaintiff at substantial risk of harm, without taking reasonable steps to abate that risk, and by failing to do so actually cause[d] the plaintiff's injuries.'. . Because the panel majority declined to clarify these ambiguous elements and statements, I fear that the *Westmoreland* test will add to the muddle that is our current Fourteenth Amendment deliberate-indifference jurisprudence. The Supreme Court has not addressed the deliberate-indifference issue since its 2015 *Kingsley* decision, and it has declined petitions to do so. *See, e.g.*, *Strain v. Regalado*, 977 F.3d 984 (10th Cir. 2020), *cert. denied*, —— U.S. ——, 142 S. Ct. 312, 211 L.Ed.2d 147 (2021); *Castro v. County of L.A.*, 833 F.3d 1060 (9th Cir. 2016) (en banc), *cert. denied*, —— U.S. ——, 137 S. Ct. 831, 197 L.Ed.2d 69 (2017). This appears to be despite the development of a sizable circuit split on the question whether *Kingsley* abrogated the deliberate-indifference standard for pretrial detainees' claims. [collecting cases] I thus share the hope of Judge Readler, *see Brawner v. Scott County*, 18 F.4th at 557 (Readler, J., dissenting from the denial of rehearing en banc), that the Court will soon step in to clarify the proper standard under the Fourteenth Amendment. And it indeed may be soon, as there are currently petitions for writs of certiorari pending before the Court in *Brawner* and *Cope*. *Brawner v. Scott County*, petition for cert. pending, No. 21-1210 (filed Mar.

4, 2022); *Cope v. Cogdill*, petition for cert. pending, No. 21-783 (filed Nov. 24, 2021). **[My note: *cert.* was denied in *Cope*]** Our circuit's decision to deny rehearing en banc in this case, like the similar decision made in *Brawner*, highlights the need for the Supreme Court to provide guidance. I respectfully dissent.")

Morgan by next friend Morgan v. Wayne County, Michigan, 33 F.4th 320, 326-28 (6th Cir. 2022) ("An inmate's right to be free from prison violence under the Eighth Amendment was clearly established at the time of defendants' alleged misconduct. . . To show that Clark and Davis violated this constitutional right, Morgan must show that '(1) the alleged mistreatment was objectively serious; and (2) [one or both] defendant[s] subjectively ignored the risk to [her] safety.'. . In this regard, we recently held that a pretrial detainee's right to be free from deliberate indifference arises from the Fourteenth Amendment, rather than the Eighth Amendment, which modifies or eliminates the showing a plaintiff must make on the subjective component. *Brawner v. Scott Cnty.*, 14 F.4th 585, 596 (6th Cir. 2021); *see Trozzi v. Lake Cnty.*, 29 F.4th 745, 753 (6th Cir. 2022) (discussing *Brawner*'s "modified subjective standard"). *But see Westmoreland v. Butler Cnty.*, 29 F.4th 721, 728 (6th Cir. 2022) (noting that after *Brawner*, "our Circuit has explicitly taken the position that a failure-to-protect claim by a pretrial detainee requires *only* an objective showing that an individual defendant acted (or failed to act) deliberately or recklessly" (emphasis added)). At the time of the alleged assault, Morgan was both a pretrial detainee (on the assault of a prison officer charge) and a convicted prisoner (on the unrelated charge). However, she has pleaded and argued this case solely under the Eighth Amendment standard. We agree with Morgan that under these circumstances, the more demanding Eighth Amendment standard is applicable. . . The district court concluded that even if Morgan had met her burden on the objective component, she had not met it on the subjective component, so she had not demonstrated that her constitutional rights were violated. We agree. Like the district court, we assume for the purpose of this analysis that Morgan has met her burden on the objective component and begin with the subjective component. To establish a constitutional violation based on failure to protect, Morgan must show that defendants acted with 'deliberate indifference' to her safety. . . An official is deliberately indifferent if he 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'. . . We must evaluate the liability of each deputy individually. *Id*. And it is Morgan's burden to demonstrate that defendants possessed a sufficiently culpable state of mind. . . .Because Morgan has not met her burden on the subjective component of her claim, we need not evaluate the objective component. The district court properly granted summary judgment in favor of Deputies Clark and Davis.")

Trozzi v. Lake County, Ohio, 29 F.4th 745, 752-58 (6th Cir. 2022) ("For many years, *Farmer*'s two-prong test governed claims of inadequate medical care brought by pretrial detainees as well as convicted prisoners in this Circuit. . . But we recently shifted course in *Brawner v. Scott County*, 14 F.4th 585 (6th Cir. 2021). . . . On page 597, *Brawner* addresses the plaintiff's specific claims. And in so doing, the opinion articulates the modified subjective standard in a sentence only a lawyer could love: the jail official must either act intentionally or 'recklessly fail[ ] to act

reasonably to mitigate the risk the serious medical need posed ... even though a reasonable official ... would have known that the serious medical need posed an excessive risk ....'. . . In the absence of any further explanation on how *Brawner* modified the *Farmer* test, our focus, it seems, should be on this sentence. At the risk of 'treat[ing] a judicial opinion as if it were a statute,'. . . we start with what is obvious about the sentence at hand: the legally requisite state of mind is recklessness. There is no instruction as to whether civil or criminal recklessness is at play, but the opinion does state that the recklessness must concern a failure to act with respect to mitigating certain medical risks. The standard also introduces an objective inquiry through the rubric of a 'reasonable official.'. . The 'reasonable official' standard, however, does not directly modify the conduct of failing to act; instead, it is separately introduced as a measure of the nature of the underlying medical need. . . All said, *Brawner*'s modification could fairly be read to suggest one of two things: either (1) subjective considerations should be entirely ignored; or (2) the jail official's actual knowledge remains relevant, both as to his mindset with respect to his decision making and as to whether a reasonable official, armed with that knowledge, would have known of a risk to the detainee. Which is it? In this setting, we ordinarily might turn to sister circuits whom we joined in holding that *Kingsley* altered the *Farmer* test for pretrial detainees. But they are all over the map on this front. Some are even split within their own circuits on the relevance of the jail official's subjective mindset post-*Kingsley*. [collecting and comparing cases] That leaves us to rely on any hints we can gather from *Brawner*, our post-*Brawner* decisions, and background principles. Doing so leads to an approach that takes account of a jail official's actual knowledge. Ignoring as much cannot be reconciled with *Brawner*'s assertion that it was merely *modifying Farmer*'s subjective prong for pretrial detainee claims. 14 F.4th at 593, 596. After all, if *Brawner* had adopted an unvarnished, objective-only inquiry, it would not have listed a two-part test, where part one is whether the detainee had an 'objectively serious medical need' requiring medical attention. . . Understandably then, our post-*Brawner* precedent continues to consider the jail official's personal knowledge when applying the deliberate indifference prong. . . . Perhaps most importantly, a stand-alone reasonable-prison-official standard that wholly ignored the defendant's specific knowledge would be 'tantamount to determining whether that official was negligent.' . . Yet both *Brawner* and *Kingsley* squarely rejected such a standard. . . In fact, *Kingsley* recognized that the defendant's state of mind remains relevant with regard to the defendant's conduct, in contrast to the results of his conduct, which are judged under an objective-reasonableness test. . . . For these reasons, the post-*Brawner* deliberate indifference inquiry still requires consideration of an official's actual knowledge of the relevant circumstances. . . . Closing one door, however, opens another: when evaluating deliberate indifference, when and how should we consider what the jail official knew? *Brawner* partially answers that question; it disavowed our prior focus on whether the jail official actually knew that the pretrial detainee faced a risk of harm from a serious medical need. . . Modifying the standard, *Brawner* added an objective consideration. Borrowing from *Kingsley*, *Brawner* explained that a detainee raising a Fourteenth Amendment medical deprivation claim must show that a reasonable officer at the scene—not one 'with the 20/20 vision of hindsight'—would have known the detainee's medical needs posed an excessive risk. . . But otherwise, *Brawner* stopped short of fully articulating the deliberate-indifference inquiry. . . In fact, *Brawner* acknowledged as much. Rather than purporting to flesh out the revised deliberate

indifference prong, the opinion instead merely provided its thoughts on what might be 'relevant on remand' for the district court. . . *Greene v. Crawford County*, the decision that formally adopted *Brawner*'s standard as the law of the circuit, starts where *Brawner* stops. . . *Greene* considered inadequate-medical-care claims brought by a pretrial detainee who, while in custody, had exhibited obvious symptoms of delirium tremens before ultimately dying of respiratory failure. . . In assessing whether a reasonable officer at the scene would have known the detainee's medical needs posed an excessive risk, we repeatedly considered, among other things, what the jail official knew about the detainee's condition. . . *Greene*'s approach is consistent with *Brawner*. Recall that *Brawner*'s standard for deliberate indifference contemplates separate inquiries into whether the jail official (1) 'recklessly failed to act' (2) 'even though' a 'reasonable official' 'would have known' there was a serious medical need. . . And this view—bifurcating knowledge of the underlying conduct from knowledge about the detainee's medical needs—has its genesis in *Kingsley*, which recognized that constitutional due process claims include 'two separate state-of-mind questions.'. . One inquiry entails an objective inquiry into a 'series of events in the world,' while the other considers the defendant's actual intentions as to his own conduct. . . Applying *Kingsley* in the context of an inadequate medical care claim, the latter state-of-mind question includes an inquiry into whether the defendant actually understood the consequences of failing to act. In other words, just as a use of force in and of itself is insufficient to demonstrate a constitutional tort, so too is simple inaction in the face of an objectively serious medical need insufficient to demonstrate deliberate indifference in violation of the Fourteenth Amendment. (And we recently imposed an even higher standard than criminal recklessness for failure-to-protect claims, requiring that a defendant officer "act intentionally." (*See Westmoreland*) Reading *Farmer*, *Kingsley*, *Brawner*, and *Greene* together, a plaintiff must satisfy three elements for an inadequate-medical-care claim under the Fourteenth Amendment: (1) the plaintiff had an objectively serious medical need; (2) a reasonable officer at the scene (knowing what the particular jail official knew at the time of the incident) would have understood that the detainee's medical needs subjected the detainee to an excessive risk of harm; and (3) the prison official knew that his failure to respond would pose a serious risk to the pretrial detainee and ignored that risk. This third inquiry faithfully applies *Kingsley*, . . . ensuring that there is a sufficiently culpable mental state to satisfy the 'high bar' for constitutional torts grounded in a substantive due process violation. . . In practice, that may mean that a prison official who lacks an awareness of the risks of her inaction (because, for example, another official takes responsibility for medical care, a medical professional reasonably advised the official to not act, the official lacked authority to act, etc.) cannot have violated the detainee's constitutional rights.")

Trozzi v. Lake County, Ohio, 29 F.4th 745, 760-61 (6th Cir. 2022) ([W]e need not decide whether Snow's decision not to seek immediate emergency help for Trozzi amounted to a constitutional violation. For when that same conduct 'does not violate clearly established ... [federal] rights of which a reasonable person would have known,' it is not necessary to decide whether a constitutional violation occurred. . . In other words, finding that Snow did not violate a clearly established right is a separate ground by which we may affirm the district court. . . Turning, then, to the clearly established inquiry, qualified immunity is appropriate unless the officer in question

had 'fair notice' that her conduct was unlawful. . . To provide such notice, the scope of the constitutional right must be 'sufficiently clear that every reasonable official would have understood that what [she] is doing violates that right.'. . Whether the official had such notice is 'judged against the backdrop of the law at the time of the conduct.'. . Critically, we do not define clearly established law at a 'high ... level of generality.'. . While a case need not be 'directly on point for a right to be clearly established,' the burden is on the plaintiff to show that closely analogous precedent has placed the 'constitutional question beyond debate.'. . As an initial observation, we agree with Trozzi that pre-*Brawner* case law—that is, cases that consider whether the government official was subjectively aware of the detainee's serious medical issues—is the appropriate focus for determining what constitutional rights are clearly established. After all, a change in the law (such as *Brawner*) that occurs after the official's conduct is 'of no use in the clearly established inquiry.'. . This view joins that of the majority of our sister circuits who have held that *Kingsley* modifies the *Farmer* test. *See Balsewicz v. Pawlyk*, 963 F.3d 650, 657 & n.5 (7th Cir. 2020); *Ross v. Corr. Officers John & Jane Does 1-5*, 610 F. App'x 75, 77 n.1 (2d Cir. 2015). *But see Sandoval v. County of San Diego*, 985 F.3d 657, 672 (9th Cir. 2021).")

Westmoreland v. Butler County, Kentucky, 29 F.4th 721, 728-30 (6th Cir. 2022), *reh'g en banc denied*, 35 F.4th 1051 (6th Cir. 2022) ("Here, the district court analyzed Westmoreland's claims against Tyree and BCJ under the Eighth Amendment deliberate indifference standard with both an objective and a subjective prong. The district court rejected Westmoreland's argument that *Kingsley* changed the standard from deliberate indifference to 'objective unreasonableness,' noting the Sixth Circuit had not yet adopted either view in the existing circuit split on the issue. But our Circuit has now explicitly taken the position that a failure-to-protect claim by a pretrial detainee requires only an objective showing that an individual defendant acted (or failed to act) deliberately and recklessly. . . *Brawner* did not address the application of this standard to individual officers, however, as the county was the only remaining party in that case. Our court has not yet applied the objective standard to a failure-to-protect claim against an individual officer, but it has done so for claims against individual officers for deliberate indifference to an inmate's serious medical needs. *See Greene*, 22 F.4th at 609–14; *Britt v. Hamilton Cnty., et al.*, 2022 WL 405847, at *3 (6th Cir. Feb. 10, 2022); *Hyman v. Lewis*, —— F.4th ——, ——, 2022 WL 682543, at *2 (6th Cir. Mar. 8, 2022). . . . Like the Ninth and Seventh Circuits, and following our own circuit's post-*Kingsley* line of cases, we hold that a defendant officer must act intentionally in a manner that puts the plaintiff at substantial risk of harm, without taking reasonable steps to abate that risk, and by failing to do so actually cause the plaintiff's injuries. . . . A pretrial detainee need not prove subjective elements about an officer's actual awareness of the level of risk, but he must prove the officer was more than merely negligent; the officer must have acted with 'reckless disregard' in the face of 'an unjustifiably high risk of harm.'. . . We vacate the district court's grant of summary judgment because the analysis of whether Tyree was deliberately indifferent should be solely an objective consideration. . . The outcome of this analysis is necessary to determine whether Tyree violated a clearly established constitutional right, or whether he is entitled to qualified immunity.")

Westmoreland v. Butler County, Kentucky, 29 F.4th 721, 734-44 (6th Cir. 2022) (Bush, J., dissenting), *reh'g en banc denied*, 35 F.4th 1051 (6th Cir. 2022) ("The standard for evaluating medical-needs claims as announced in *Brawner* should now be considered binding precedent. However, I fear that *Brawner*, as applied by the majority opinion, will compound the conflict in our Fourteenth Amendment jurisprudence. The majority opinion apparently views *Brawner*, using a civil-law recklessness standard, as permitting a path to recovery that is wholly objective, i.e., not contingent on a finding that an official was subjectively aware of some asserted risk. . . But this interpretation is inconsistent with *Farmer* and our longstanding adoption of the *Farmer* test for pretrial detainees' failure-to-protect claims. . . . True, the *Brawner* test may not facially look like a mere negligence standard because it requires an 'excessive risk.' But this hedging makes little difference in practice. Jails are inherently risky places to be. . . . Pretrial detainees in *every* case will now argue that jailers 'should have known' some harm would materialize. Setting aside those concerns for now, though, this case does not present immediately analogous circumstances to those in *Brawner*, which involved a medical-needs claim. Here, a failure-to-protect claim is at issue. There is no compelling reason why the former must govern the latter. As Westmoreland's counsel conceded at oral argument, a medical-needs claim 'differs from [ ] an excessive-force and failure-to-protect claim.' . . No Supreme Court precedent—certainly not *Kingsley* itself—authorizes reimagination of our failure-to-protect analysis. And we have never applied *Kingsley* outside of the medical-needs context. So, *Brawner* does not govern here. . . .*Brawner* does not compel us to ignore binding precedents for a type of claim—failure-to-protect—that was not at issue in *Brawner*. The discussion below first explains why the majority's new test is not mandated by Supreme Court precedent. The discussion then describes why the new test is unworkable and logically inconsistent. . . . .The Supreme Court also was clear that liability of an official under *Kingsley* is limited to only those situations involving 'an intentional and knowing *act*.'. . So, as a purely common-sense matter, it is not clear how *Kingsley*—a case involving an *action*—necessarily applies to cases involving *inaction*. . . It is true that the *Brawner* majority did apply *Kingsley* in the medical-needs context, which could involve alleged governmental inaction. But I would not extend *Kingsley* further to apply to a failure-to-protect claim in the absence of a clear Supreme Court directive that we do so. . . . [T]he majority's new test is not workable as applied to failure-to-protect claims. . . It purports to implement *Kingsley*, but that case involved alleged *action*—that is, excessive force—not alleged *inaction*, which underlies a failure-to-protect claim. . . When the affirmative act of excessive force is alleged, as the Supreme Court explained, it does not matter if the official intended to punish a detainee by his actions. The question is if 'the force purposefully or knowingly used against him was objectively unreasonable.'. . In other words, we can infer punitive intent based on an affirmative act's relationship to a legitimate government objective. . . But *inaction*—when an official *fails* to act—does not raise such an inference. If an official unknowingly fails to act, even if the failure is objectively unreasonable, the official does not violate the Fourteenth Amendment. . . . Under the majority's new test, Westmoreland would need to prove each of the four elements of that test in order to show that Tyree violated his 'clearly established' constitutional right. . . Yet his claim fails to satisfy at least elements 1, 3, and 4. [discussion follows on each element] Even assuming Westmoreland could meet each of the majority's four elements to show that Tyree violated his constitutional right, he would still need

to show that such a right was 'clearly established at the time' of the alleged violation. . . . As my colleagues concede, the standard under which we analyze pretrial detainees' failure-to-protect claims under the Fourteenth Amendment is anything but clear. . . The federal appellate circuits are split on the applicability of *Kingsley*. Our own circuit has never 'applied the objective standard to a failure-to-protect claim against an individual officer[.]'. . And, as the district court accurately explained, we had 'yet to alter the standard for failure to protect claims and [ ] continued to apply the deliberate indifference standard.'. . Westmoreland cannot show that his right was clearly established at the time of Tyree's alleged inactions. 'So long as the alleged violation has not been clearly established, the officers receive qualified immunity and the suit can be dismissed.'. . Indeed, it is definitionally impossible to deny qualified immunity to Tyree when adopting a new test on appeal. . . . The Supreme Court has reminded us time-and-time again that we ignore this requirement at our own peril. . . It is time we heed its warning.")

Hyman v. Lewis, 27 F.4th 1233, 1237-39 (6th Cir. 2022) ("Following our recent decision in *Brawner v. Scott County*, a plaintiff must show '(1) that [the detainee] had an objectively serious medical need; and (2) that [the defendant's] action (or lack of action) was intentional (not accidental) and [that] she ... recklessly failed to act reasonably to mitigate the risk the serious medical need posed to [the detainee], even though a reasonable official in [the defendant's] position would have known' of that risk. . . While *Brawner* is far from clear, we can distill a couple of principles from it. First, *Brawner* left the 'objectively serious medical need' prong untouched. . . Second, under the modified second prong, we know that Hyman must prove 'more than negligence but less than subjective intent—something akin to reckless disregard.'. . And third, we know that the modified second prong asks whether the defendant acted ' "recklessly in the face of an unjustifiably high risk" that is either "known or so obvious that it should be known"' to a reasonable official in the defendant's position. . . . Lewis's admitted intentional violation of jail operating procedures does not mean he intentionally ignored Lipford's needs. Hyman also argues that 'Recklessnes [sic] equals gross negligence' under Michigan law. . . . On the facts before us, Lewis was at most negligent, not grossly negligent or reckless. His failure to open the doors to the video-arraignment room to check on detainees individually violated operating procedures. When asked why he did not physically enter the arraignment room, Lewis provided several reasons, chief among them that officers did not want to irritate inmates by repeatedly waking them up while they were sleeping. While Lewis's actions might have been imprudent, they do not show that Lewis was acting "in the face of an unjustifiably high risk" that any reasonable officer would have known. Lewis made his rounds, looking into the video-arraignment room and monitoring the inmates inside. He had no reason to know that Lipford had concealed narcotics in his body. Lewis no doubt violated the jail's operating procedures. But 'failure to follow internal policies, without more,' does not equal deliberate indifference. . . And even in a post-*Brawner* world, Lewis's violation of the operating procedures does not rise above negligence to become a constitutional violation under the Fourteenth Amendment. . . . Hyman has not shown that any reasonable officer in Lewis's position would have known that Lipford's undisclosed, concealed drugs created an 'obvious' and unjustifiably high risk of harm.")

Britt v. Hamilton County, No. 21-3424, 2022 WL 405847, at *2–3, *6 (6th Cir. Feb. 10, 2022) (not reported) (" The Fourteenth Amendment requires corrections officials to provide adequate medical care to pretrial detainees. . . Officers violate that right when they display 'deliberate indifference to serious medical needs.'. . The key question in this case goes to deliberate indifference: Did the officers act 'recklessly in the face of an unjustifiably high risk' that is either 'known or so obvious that it should be known'? [citing *Brawner* and *Greene*] This is an objective inquiry, as *Brawner* and *Greene* note, one that asks whether the defendants acted recklessly in response to a danger, 'even though a reasonable official' in their position would have known about an 'excessive risk.'. . In answering this question, all agree that 'negligence is insufficient.'. . Instead, the standard requires objectively established 'recklessness.' . . . A few words are in order in response to the dissent. It claims that we have 'misapplie[d] the applicable law' by failing to apply the *Brawner* recklessness standard and by citing pre-*Brawner* cases in our decision. . . But from beginning to end, we have applied the recklessness test for determining the existence of deliberate indifference. That we have relied on pre-*Brawner* cases for *other* aspects of the deliberate-indifference inquiry is hardly unusual. What would be unusual would be to assume that *Brawner* overruled all of these cases, even those that dealt with other issues and even those that relied on alternative grounds when they addressed the state-of-mind inquiry. . . The dissent also claims that we should rely on the district court's one-sentence statement that it would have handled the claims against the nurses differently if recklessness were the test. . . But we look at a district court's summary judgment decisions with fresh eyes. That indeed is just what the dissent has done. It would reverse not just the district court's resolution of the claims against the *nurses* but also its resolution of the claims against Sergeant Kilday, even though the district court never said a recklessness test would affect its decision as to *that defendant.*For these reasons, we affirm the grant of summary judgment.")

Britt v. Hamilton County, No. 21-3424, 2022 WL 405847, at *6-7 (6th Cir. Feb. 10, 2022) (not reported) (Clay, J., dissenting) ("In granting Defendants' motions for summary judgment, the district court concluded as follows: '[I]f analyzed under *Kingsley*'s solely objective test, Plaintiff has presented sufficient evidence to raise at least one genuine dispute of material fact that would allow her to escape summary judgment: a juror *could* find that a reasonable nurse in [Defendants'] position *should* have concluded that Britt was suffering from an infection or endocarditis.'. . . [T]he majority analyzes Plaintiff's claims in light of prior, now obsolete, cases that relied on a subjective test analysis. . . In predicating its analysis on the subjective test, while denying that it is doing so, the majority effectively ignores the district court's assertion that it never would have granted summary judgment in the first place based upon the majority's approach. The majority also minimizes the extent of material disputed facts between the parties and, contrary to the standards governing summary judgment motions, repeatedly draws favorable inferences regarding disputed facts in favor of Defendants instead of Plaintiff. . . Because the record raises genuine and material factual disputes as to Defendants' alleged deliberate indifference to the deceased's medical needs in violation of the Fourteenth Amendment, I would reverse the district court's order granting Defendants' motions for summary judgment and remand Plaintiff's claims so they can be heard by a jury. . . . In this case, the district court explicitly concluded that if we eliminated the

subjective prong of the now-obsolete deliberate indifference test, 'Plaintiff has presented sufficient evidence to raise at least one genuine dispute of material fact that would allow her to escape summary judgment....'. . . Consequently, the majority upholds entry of summary judgment by a district court which itself stated that, under the applicable current legal authority, it would have been inappropriate to enter summary judgment in the first place.")

Greene v. Crawford County, Michigan, 22 F.4th 593, 606-07 (6th Cir. 2022) ("*Brawner* answered the question that *Kingsley* left open. The majority opinion concluded that *Kingsley*'s reasoning required 'modification of the subjective prong of the deliberate-indifference test for pretrial detainees.'. . *Brawner* modified the second prong of the deliberate indifference test applied to pretrial detainees to require only recklessness. . . .Judge Readler dissented in part from the *Brawner* majority. He wrote that, 'because resolving the *Kingsley* question [was] not essential to support [the] judgment, the majority opinion's conclusion on the issue is not [a] holding.'. . Whether *Brawner*'s extension of *Kingsley* to deliberate indifference claims was a holding—and not mere dictum—is important for today's case because, '[l]ike most circuits, this circuit follows the rule that the holding of a published panel opinion binds all later panels unless overruled or abrogated en banc or by the Supreme Court.' *Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019). A 'conclusion that does nothing to determine the outcome is dictum and has no binding force' on a future panel. . .Counsel for County Defendants urged us at oral argument to interpret *Brawner*'s extension of *Kingsley* as non-binding dictum and to apply the traditional subjective standard. . . We decline to take that interpretation of *Brawner*. The *Brawner* majority expressly considered and rejected the suggestion that its extension of *Kingsley* was dictum. . . Although it concluded that the facts 'support[ed] a finding of deliberate indifference under either' the Eighth-Amendment subjective standard or *Kingsley*'s modified objective standard, it reasoned that 'deciding the issue [was] necessary so the jury can be properly instructed on remand' and that there were 'no statutory or alternative grounds on which to decide this case.'. . We are bound by that decision.")

Hale v. Boyle County, 18 F.4th 845, 852-53 (6th Cir. 2021) ("*Kingsley*'s objective test applies to Hale's claims against Pennington. Both parties have framed Hale's claim as an excessive-force claim. . . That framing comports with how other courts have treated similar claims. . . And that framing is also consistent with the facts of this case. The Tenth Circuit appears to be the only federal appellate court that has encountered a detained person's allegation that they were sexually abused by a prison guard post-*Kingsley*. In *Brown*, the court applied *Kingsley* to a detained woman's lawsuit against a guard who allegedly abused her, reasoning that an analysis of Fourteenth Amendment claims cannot track the Eighth Amendment after *Kingsley*. . . Consistent with the Tenth Circuit, we conclude that Hale's assertions against Pennington are properly viewed as an excessive-force claim that should be evaluated under *Kingsley*'s objective test.")

Brawner v. Scott County, Tennessee, 18 F.4th 551, 551-52, 555-56 (6th Cir. 2021) (Readler, J., joined by Thapar, Bush, Nalbandian, and Murphy, JJ., dissenting from the denial of rehearing en banc) ("We should not be enlisting a case about excessive force to disturb our deliberate

indifference to medical needs jurisprudence. *Brawner v. Scott County*, 14 F.4th 585, 605 (6th Cir. 2021) (Readler, J., concurring in part and dissenting in part) ("*Kingsley* [*v. Hendrickson*] would be the quintessential stalking horse if invoked as grounds to overrule our current deliberate indifference precedent."). For that and other reasons, I continue to see *Brawner* as a flawed decision. . . . The majority opinion is yet another example of our Circuit transforming constitutional prohibitions against punishment into a 'freestanding right to be free from jailhouse medical malpractice.'. . The *Brawner* majority opinion did so by forgoing any examination of the Fourteenth Amendment's text or original public meaning. Instead, it turned to *Kingsley v. Hendrickson*, . . . an excessive force decision that, all agree, did not address 'other Fourteenth Amendment pretrial-detainment contexts.'. . Despite *Kingsley*'s express limits, *Brawner* used *Kingsley* to jettison our traditional inquiry in the deliberate indifference setting. Rather than asking whether the defendant was subjectively aware of the serious medical risks facing the detainee, *Brawner* adopted a reckless disregard standard, a benchmark we are told should be viewed through the eyes of a 'reasonable official in the defendant's position.'. . In that world, if a plaintiff can muster more than a scintilla of evidence to suggest that an official acted with objectively unreasonable reckless indifference to a detainee's medical condition, it is left to the jury—effectively acting as both doctor and warden—to decide whether the official's actions were reasonable. . . . [E]ven before *Brawner*, we had already diluted the traditional deliberate indifference inquiry merely to ask whether an official should have known of and inferred (rather than *actually* knew and *actually* inferred) that the detainee faced a substantial risk of harm. This objective-only inquiry for constitutional deliberate indifference claims pays no heed to the subjective inquiry we traditionally required. . . . And query how our decaying standard is any different from a state law negligence claim. On that front, it bears reminding that a detainee, just like an individual not in official custody, may bring a state tort claim should she be the victim of negligent medical care. But why has our Court allowed the detainee to also pursue a constitutional claim to seek compensation for negligent care (unencumbered by the liability-reducing damages caps and limits on attorneys' fees that often accompany a state law claim)? And why are medical providers who work in detention facilities subject to the risk of both state and constitutional theories of liability for providing negligent care? . . . Our precedent answers those questions only with silence. All of this is to say that, over time, we have seized on *Farmer*'s aside functionally to rid any serious inquiry into the subjective intentions of the sued government official. Yet what took decades to achieve, *Brawner* aims to accomplish more rapidly. What began as a requirement that the government official 'both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and ... draw the inference,' *Farmer*, 511 U.S. at 837, 114 S.Ct. 1970, has devolved into a nebulous consideration of whether 'a reasonable official in [the official's] position would have known that the serious medical need posed an excessive risk to [the detainee's] health or safety,' *Brawner*, 14 F.4th at 597. As we long ago abandoned the text and history of the Eighth and Fourteenth Amendments in favor of a 'tender-hearted desire to tortify' the Constitution, such a departure is perhaps unsurprising. . . But it is no less regrettable. . . So far, we have been unwilling to reconsider these developments. In fact, more than two decades have passed since the en banc Court last considered a detainee's deliberate indifference claim. . . Given the ensuing dilution of the governing standard, it is exceptionally important that we reconsider our

precedent in this area. . . Otherwise, the lesson for future panels is obvious: fortune favors the bold.")

Brawner v. Scott County, Tennessee, 14 F.4th 585, 591-96 (6th Cir. 2021), *rehearing en banc denied*, 18 F.4th 551| (6th Cir. 2021), *cert. denied*, 143 S. Ct. 84 (2022) ("We have 'historically analyzed Fourteenth Amendment pretrial detainee claims and Eighth Amendment prisoner claims "under the same rubric."'. . Brawner argues, however, that the Supreme Court's decision in *Kingsley* . . . eliminates the subjective element of a pretrial detainee's deliberate-indifference claim. . . . However, *Kingsley* did not address whether an objective standard applies in other [than excessive force] Fourteenth Amendment pretrial-detainment contexts. Although the facts here, viewed in the light most favorable to Brawner, support a finding of deliberate indifference under either *Farmer*'s subjective . . . or *Kingsley*'s objective standard, we must address the issue because the standard will be relevant on remand. . . The Second, Seventh, and Ninth Circuits have held that *Kingsley* requires modification of the subjective component for pretrial detainees bringing Fourteenth Amendment deliberate-indifference claims. [collecting cases] On the other hand, the Fifth, Eighth, and Eleventh Circuits have retained, with minimal analysis, the subjective component for deliberate-indifference Fourteenth Amendment claims despite *Kingsley*. [collecting cases] More recently, the Tenth Circuit joined the Fifth, Eighth, and Eleventh Circuits. *Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020). . . . Our circuit has not yet decided this issue, but some members of this court have expressed 'serious doubt' whether a deliberate-indifference claim under the Fourteenth Amendment retains a subjective component in light of *Kingsley*, . . . or have expressly found that the subjective component no longer applies to these claims in light of *Kingsley*[.] . . . Because the question is whether *Kingsley* renders *Farmer*'s subjective prong of the deliberate indifference test inapplicable to claims brought by pretrial detainees under the Fourteenth Amendment, it is useful to examine the Court's decision in *Farmer*. . . . It is clear. . . that the *Farmer* Court adopted the subjective component of the test for deliberate indifference under the Eighth Amendment based on the language and purposes of that amendment, focusing particularly on 'punishments,' and not on any intrinsic meaning of the term. We thus reject the Tenth Circuit's argument that the term 'deliberate indifference' itself demands a subjective standard. . . We also reject any argument that *Farmer* controls here until the Supreme Court tells us otherwise, because *Farmer* cannot fairly be read to require subjective knowledge where the Eighth Amendment does not apply, and the Supreme Court has not held that *Farmer*'s subjective standard applies to Fourteenth Amendment pretrial-detainee medical-care claims. Scott County additionally argues that we are bound by our own precedent applying a subjective standard to deliberate-indifference claims by pretrial detainees both before and after *Kingsley*. We disagree. As other circuits have recognized, *Kingsley* is an inconsistent Supreme Court decision that requires modification of our caselaw . . . and therefore we may amend our standard to be consistent with *Kingsley*[.] Further, the post-*Kingsley* decisions the County cites expressly reserved the question whether *Kingsley* requires modification of the deliberate-indifference standard. . . And other panels of this court that have recognized the issue have declined to resolve it without suggesting that they could not do so absent rehearing en banc. . . Given *Kingsley*'s clear delineation between claims brought by convicted prisoners under the Eighth Amendment and claims brought

by pretrial detainees under the Fourteenth Amendment, applying the same analysis to these constitutionally distinct groups is no longer tenable. . . Accordingly, we agree with the Second, Seventh, and Ninth Circuits that *Kingsley* requires modification of the subjective prong of the deliberate-indifference test for pretrial detainees. What then is required to establish deliberate indifference in this context? Mere negligence is insufficient. A defendant must have not only acted deliberately (not accidentally), but also recklessly 'in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.'. . A pretrial detainee must prove 'more than negligence but less than subjective intent—something akin to reckless disregard.'")

Brawner v. Scott County, Tennessee, 14 F.4th 585, 603-11 (6th Cir. 2021) (Readler, J., concurring in part and dissenting in part), *rehearing en banc denied*, 18 F.4th 551| (6th Cir. 2021), *cert. denied*, 143 S. Ct. 84 (2022) ("Every other time a party has asked us to apply the *Kingsley* framework to deliberate indifference claims, we have rightly acknowledged there was no need to do so when the case could be decided on alternative grounds. [collecting cases] Exercising judicial modesty, judges across our Court have 'reserve[d] the [*Kingsley*] question for another day' when the outcome on appeal would be the same 'under either test'—the traditional subjective deliberate indifference standard or *Kingsley*'s objective reasonableness standard. . . We have faithfully done so out of respect for the federal constitution, for which we prize restraint by deferring contentious constitutional questions unless 'unavoidable' or 'absolutely necessary' to the appeal's disposition. . . That is wise counsel again today, where resolving the *Kingsley* issue is neither 'absolutely necessary' to the appeal's outcome nor 'unavoidable' in ways not previously faced by many past panels. We have likewise refrained from addressing *Kingsley*'s purported applicability to deliberate indifference claims in recognition of our established rules governing a decision's holding, as contrasted with dicta that might accompany a holding. A case's holding is binding on future panels of our Court. . . But dicta—that is, anything 'not necessary to the determination of the issue on appeal'—is not. . . That latter principle is central to today's case. When, as here, a party can prevail under both a higher standard and a lower standard, 'selecting one standard or the other would "not [be] necessary to the determination of the issue on appeal."'. . For purposes of this appeal, where the question is whether Brawner alleged sufficient evidence to make out a violation of her Fourteenth Amendment rights, '[t]he preference of a particular standard would ... be dicta.'. . Demonstrating the point, remove mention of *Kingsley* from the majority opinion and its judgment stands unaffected. . . . Today, the majority opinion, noting the district court's comments about instructions the jury never received, suggests that it might be appropriate to resolve the *Kingsley* question because our answer to that question theoretically will be 'relevant on remand' and at trial. . . The same could be said, of course, about a great many other issues as well, given the inherent unpredictability a trial brings. But because resolving the *Kingsley* question is not essential to support today's judgment, the majority opinion's conclusion on the issue is not today's holding. As all of this abundantly demonstrates, constitutional avoidance, judicial modesty, past practice, binding precedent, and respect for the role of the district court all confirm why any discussion of *Kingsley* here is unnecessary. That last point bears particular emphasis. The district court, as is the customary practice, can resolve on remand any outstanding issues as needed. That includes the *Kingsley* issue, for which the proper solution is to wait for the issue to be teed

up during trial. Using a special verdict form with tailored interrogatories, the trial court can easily deduce whether the prison officials' actions met the objective and/or subjective standards. . . In fact, Brawner has already indicated that she will propose such a verdict form to allow the jury to determine whether she satisfied the objective-only component. . . The district court seemingly can add a second question, one that asks whether the County also acted with conventional subjective indifference. If both answers come back in the affirmative, not even the district court will need to resolve the *Kingsley* issue, let alone this Court. . . Nor do I believe that the majority opinion, even in the capacity of an advisory opinion, articulates the proper reading of *Kingsley*. For when properly presented with the opportunity to extend *Kingsley* in a future case, we should decline that invitation. At best, *Kingsley*'s relinquishment of the subjective inquiry applies only to a pretrial detainee's excessive force claims. It does not extend to claims premised on a failure to act, the essence of a deliberate indifference claim. . . .[I]t is difficult to see how *Kingsley*'s holding as to excessive force abrogates the subjective component of our Fourteenth Amendment deliberate indifference standard. For starters, nothing in *Kingsley* purports to address, let alone modify, deliberate indifference standards. . . . [I]t would be peculiar to seize on *Kingsley*'s general pronouncements as to excessive force claims as a basis for rewriting our deliberate indifference jurisprudence. . . Neither the language nor logic of *Kingsley* suggests a broader application beyond the excessive force setting, a fact recognized by other circuits that wisely have refused to chart the majority opinion's proposed course. [collecting cases] . . . . All this to say that *Kingsley*'s 'delineation' between prisoners and pretrial detainees, which is not a new concept, surely does not compel a sea change in our *Farmer*-inspired deliberate indifference jurisprudence. . . . As explained in *Bell*, in analyzing a pretrial detainee's Fourteenth Amendment claim, the key question is whether the situation at issue amounts to a punishment of the detainee. While punitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference. Rather, a person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most. And the Supreme Court has made clear that liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. . . . Without any manner of inquiry into a party's intent, courts cannot fairly distinguish negligent deprivation of care—which does not give rise to a constitutional claim—from an intentional deprivation of care that amounts to punishment—which violates the Fourteenth Amendment. . . How does the majority opinion purport to grapple with this distinction? It would erect a novel third standard—'something akin to reckless disregard.'. . That standard, according to the majority opinion, purportedly is lower than our subjective Eighth Amendment deliberate indifference standard, yet higher than the negligence standard that *Kingsley* reaffirmed is out of bounds for any Fourteenth Amendment claim. . . . At bottom, *Kingsley*'s test (which applies to affirmative acts) is irreconcilable with the majority opinion's test (which applies to failures to act), a tension other courts have acknowledged in criticizing this 'entirely new standard of constitutional liability: reckless indifference.'. . When the *Kingsley* issue is properly presented in a future case, our Court should forgo following this unmerited and unwise path. . . . . Curiously, the majority opinion may be fonder of the standard it purports to reject than meets the eye. . . . Rightly or wrongly, we seemingly already allow jurors to conclude that an officer satisfies the subjective component whenever a plaintiff pleads facts

sufficient to suggest a 'conscious disregard' for a pretrial detainee's substantial health risk. . . And 'a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.'. . In failing to articulate a true point of departure from our conventional *Farmer* test, the majority opinion arguably 'has simply dressed up the *Farmer* test in *Kingsley* language for no apparent reason[,] ... conflat[ing] the two standards only to end up where we started.' That test, if adopted, may well yield results largely the same as the conventional subjective test it purports to overrule. So, to recap, the majority opinion reads *Kingsley*'s excessive force holding as a basis for rewriting our traditional standard for a different claim—deliberate indifference. Yet it then crafts a legal standard for objective indifference that fails to track the test articulated in *Kingsley* (and, in so doing, prefers a novel and seemingly unusual 'reckless indifference' standard). And it does all of this only to foster a standard that, in practice, looks more and more like the standard the majority opinion is so eager to abandon. If this winding jurisprudential path has left you feeling a bit lost, you are not alone. There is a better way. I remain unconvinced that the Fourteenth Amendment confers any freestanding right to be free from jailhouse medical malpractice. . . But that does not mean that detainees who suffer harm at the hands of incompetent officers have no means for legal redress. . . Rather than taking further steps to 'tortify the Fourteenth Amendment,'. . . contorted in this case even more than usual, pretrial detainees like Brawner can draw on a rich body of state negligence law for recompense. . . That field of law, after all, is a traditional area of focus for state legislatures and state courts. I would not further expand the Fourteenth Amendment to swallow up matters better left to those able bodies.")

Burwell v. City of Lansing, Michigan, 7 F.4th 456, 465-66 (6th Cir. 2021) ("According to Burwell, *Kingsley*'s reasoning is not confined to excessive force cases and should apply with equal measure to deliberate indifference claims brought by pretrial detainees. Our sister circuits are divided on whether *Kingsley* abrogates the subjective intent requirement of a Fourteenth Amendment deliberate indifference claim. . . This court has not resolved that question, although we have said in dicta 'that this shift in Fourteenth Amendment deliberate indifference jurisprudence calls into serious doubt whether [pretrial detainees] need even show that the individual defendant-officials were subjectively aware of [their] serious medical conditions and nonetheless wantonly disregarded them.'. .However, we need not take a position here on whether *Kingsley* extends to deliberate indifference claims. We have historically declined to resolve this issue when, as here, the plaintiff failed to argue it before the district court. . . Our usual rule is 'that an issue not raised before the district court is not properly before us.'. . .We see no reason to deviate from that path here, particularly when Burwell failed to respond to the defendants' argument that she waived the issue. Thus, for now, we stick with the conventional test. 'To satisfy the subjective component, the plaintiff must allege facts which, if true, would show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk.'")

Bowles v. Bourbon County, Kentucky, No. 21-5012, 2021 WL 3028128, at *5, *7-8 (6th Cir. July 19, 2021) (not reported) ("Plaintiffs admit that they cannot satisfy the deliberate-indifference test

under the Eighth Amendment and do not press this argument on appeal. . . Instead, Plaintiffs contend that *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015), requires that the district court apply an objective-unreasonableness test to Plaintiffs' claim of constitutionally inadequate medical care. Defendants counter that the objective-unreasonableness test articulated in *Kingsley* is limited to claims of excessive force and should not extend to claims of constitutionally inadequate medical care. Moreover, Defendants contend that Plaintiffs' claims do not satisfy even the objective-unreasonableness standard. We need not resolve the proper standard after *Kingsley* to evaluate claims of constitutionally inadequate medical care made by pretrial detainees, for the record shows that Plaintiffs cannot satisfy their preferred objective-unreasonableness standard. . . . *Kingsley* . . . did not explicitly decide whether the objective-unreasonableness standard applied to all § 1983 claims made by pretrial detainees. As a circuit, we have not squarely resolved whether the objective-unreasonableness test of *Kingsley* extends to claims by pretrial detainees of constitutionally inadequate medical care. In *Richmond*, we 'recognize[d] that this shift in Fourteenth Amendment deliberate indifference jurisprudence' as a result of *Kingsley* 'calls into serious doubt whether [the pretrial detainee] need even show that the individual defendant-officials were subjectively aware of her serious medical conditions and nonetheless wantonly disregarded them.'. . Nonetheless, we did not decide whether *Kingsley* altered the standard for claims of constitutionally inadequate medical care because 'neither party cite[d] *Kingsley* or addresse[d] its potential effect in their briefing.'. . In subsequent cases, we have 'stayed out of the fray,' and 'found it unnecessary to answer the question each time we have confronted the issue' because the 'same result would obtain under either the subjective test dictated by *Farmer* or by a purely objective test derived from *Kingsley*.'. . In a handful of cases, plaintiffs have neglected to mention that *Kingsley* might warrant an objective analysis only, and we have applied the subjective deliberate-indifference standard without reflection. . . Although we have not had occasion to resolve the proper standard for claims of constitutionally inadequate medical care brought by pretrial detainees after *Kingsley*, other circuits have considered the question and have come to different conclusions. On one side, a slim majority of circuits have limited *Kingsley* to excessive-force claims. In most cases where a circuit has declined to extend *Kingsley* to claims of constitutionally inadequate medical care, the court's analysis is sparse and confined to a footnote. [collecting cases from First, Fifth, Eighth, Tenth, and Eleventh Circuits] The Second, Seventh, and Ninth Circuits, by contrast, have extended *Kingsley* to claims by pretrial detainees of constitutionally inadequate medical care. [citing cases] Regardless of whether we analyze Plaintiffs' claims under the objective-unreasonableness standard, as Plaintiffs here request, or under the more stringent subjective deliberate-indifference standard, Plaintiffs' claims fail because they cannot establish more than negligence by Defendants. Accordingly, we do not contribute to the circuit split on the relevant test.")

Moderwell v. Cuyahoga County, Ohio, 997 F.3d 653, 662 (6th Cir. 2021) ("[T]his Court has held that '"claims of excessive force do not necessarily require allegations of assault," but rather can consist of the physical structure and conditions of the place of detention.'. . . Therefore, Plaintiff's claims of excessive force based on the Corrections Defendants subjecting Johnson to the horrible conditions of CCCC's Red Zone, despite his suicidal condition and in response to a non-violent

minor infraction, are not categorically barred by the Amended Complaint's failure to allege that the Corrections Defendants assaulted Johnson. Because it was unnecessary for Plaintiff to allege an assault in conjunction with her excessive force claim, there is no reason to depart from 'our general preference' not to grant qualified immunity based only on the pleadings. . . To understand 'the "facts and circumstances of [this] particular case,"' and to decide whether, faced with those facts and circumstances, a reasonable official would have understood that placing Johnson in CCCC's Red Zone constituted objectively unreasonable force, Plaintiff must be provided the opportunity to develop the factual record. *Kingsley*, 576 U.S. at 397, 135 S.Ct. 2466 (quoting *Graham*, 490 U.S. at 396, 109 S.Ct. 1865). Although there is limited precedent addressing claims of excessive force without an assault, at this stage, we cannot determine whether discovery will nonetheless establish that the Corrections Defendants' actions were so 'egregious' that 'any reasonable officer should have realized that' the force used against Johnson 'offended the Constitution.' *Taylor*, 141 S. Ct. at 54.")

Moderwell v. Cuyahoga County, Ohio, 997 F.3d 653, 663 n.6 (6th Cir. 2021) ("Because none of the Executive Defendants' arguments implicate the deliberate indifference standard, we need not decide whether, pursuant to *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015), the test for deliberate indifference claims brought under the Fourteenth Amendment retains a subjective component. *See Griffith v. Franklin County*, 975 F.3d 554, 570 (6th Cir. 2020) (declining to address this issue because the claim failed whether or not there was a subjective component); *see also id.* at 588–89 (Clay, J., concurring in part and dissenting part) (concluding "that *Kingsley* is applicable to the deliberate indifference context" and, accordingly, "that a pretrial detainee must only prove that a defendant-official acted intentionally to ignore their serious medical need or recklessly failed to act with reasonable care to mitigate the risk that the serious medical need posed to the pretrial detainee, even though a reasonable official in the defendant's position would have known, or should have known, that the serious medical need posed an excessive risk to the pretrial detainee's health or safety.").")

Roberts v. Coffee County, No. 20-5194, 2020 WL 6156707, at *3 n.2 (6th Cir. Oct. 21, 2020) (not reported) ("Although we recently noted that the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), 'calls into serious doubt' whether a subjective-intent requirement applies to a deliberate-indifference claim by a pretrial detainee under the Fourteenth Amendment, because neither party discusses *Kingsley*'s potential effect on Roberts's deliberate-indifference claim, we do not address that issue here.")

Troutman v. Louisville Metro Dep't of Corr., 979 F.3d 472, 482 n.8 (6th Cir. 2020) ("Plaintiffs and their amici assert that we should adopt the standard used by the Second, Seventh, and Ninth Circuits which applies *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015) to claims of inadequate medical treatment claims raised by pretrial detainees. This case does not present the opportunity to do so, though the question remains open whether *Kingsley* applies beyond excessive-force claims.")

Griffith v. Franklin County, Kentucky, 975 F.3d 554, 556-71 (6th Cir. 2020) ("'The Eighth Amendment's prohibition on cruel and unusual punishment generally provides the basis to assert a § 1983 claim of deliberate indifference to serious medical needs, but where that claim is asserted on behalf of a pre-trial detainee, the Due Process Clause of the Fourteenth Amendment is the proper starting point.'. . . This court has consistently applied the same 'deliberate indifference' framework to Eighth-Amendment claims brought by prisoners as Fourteenth-Amendment claims brought by pretrial detainees. . . This two-part framework contains both an objective component—a ' "sufficiently serious' medical need'—and a subjective component—a 'sufficiently culpable state of mind.'. . . The text of the Eighth Amendment mandates this showing of subjective knowledge for claims brought by prisoners: '[t]he Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments."'. . . The Fourteenth Amendment, of course, does not contain the word 'punishment.'. . . Indeed, pretrial detainees cannot be punished at all, and there is accordingly 'no need, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional.'. . Accordingly, the 'proper inquiry' to evaluate the conditions of confinement for a pretrial detainee is 'whether those conditions amount to punishment.'. . . Despite these differences, we have nevertheless explained that it is appropriate to apply the Eighth Amendment standard to pretrial detainees because applying the *Wolfish* test would yield the same deliberate-indifference standard. *See Roberts v. City of Troy*, 773 F.2d 720, 724–25 (6th Cir. 1985). In *Roberts*, we explained that the appropriate test under *Wolfish* is whether the challenged condition is reasonably related to a legitimate government objective. . .We reasoned that this test is applied to determine whether prison officials are acting with improper punitive intent or pursuant to proper regulatory goals; thus, we concluded that '*Bell v. Wolfish* requires an intent to punish.'. . Based on that straightforward logic—that the punitive intent required under *Wolfish* is the same 'punishment' governed by the Eighth Amendment—we adopted the deliberate-indifference test wholesale for purposes of the Fourteenth Amendment. . . Griffith argues, and the district court held, that this approach is no longer appropriate in light of *Kingsley*. . . . Following *Kingsley*, the circuits have divided on whether an objective test similarly governs conditions-of-confinement claims brought under the Fourteenth Amendment. [collecting cases] Our court has generally stayed out of the fray. We have found it unnecessary to answer the question each time we have confronted the issue, instead holding that the same result would obtain under either the subjective test dictated by *Farmer* or by a purely objective test derived from *Kingsley*. . . The district court adopted the test from the Second Circuit and held that Griffith could prevail simply by showing that the defendants 'recklessly failed to act with reasonable care to mitigate the risk that the [medical] condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety.'. . It nevertheless held that Griffith failed to satisfy this lower requirement. . .We agree that Griffith cannot prevail under either test, and therefore reserve the question for another day. . . As we explain below, Griffith's proof establishes, at most, a negligence claim sounding in state tort law.")

Griffith v. Franklin County, Kentucky, 975 F.3d 554, 585-90 (6th Cir. 2020) (Clay, J., concurring in part and dissenting in part) ("I write separately to explain how I would decide the Fourteenth

Amendment deliberate indifference claim presented by this appeal and why I would hold that Nurses Sherrow, Trivette, and Mundine were not entitled to summary judgment. . . . Under the standard for deliberate indifference claims brought by pretrial detainees which, in light of recent Supreme Court precedent, only requires an objective showing of deliberate indifference, a reasonable jury could find that the nurses were deliberately indifferent to Griffith's serious medical needs. Because the majority reaches the opposite conclusion, and declines to adopt the correct standard, I respectfully dissent. Our current test for deliberate indifference under the Fourteenth Amendment mirrors similar claims brought under the Eighth Amendment and contains an objective and subjective component. . . .Recent Supreme Court precedent, however, demands that our standard governing Fourteenth Amendment deliberate indifference claims must be altered. . . . I would hold that *Kingsley* is applicable to the deliberate indifference context. Subjectivity has no place in a Fourteenth Amendment deliberate indifference claim because pretrial detainees are in a categorically different situation than convicted prisoners. Deliberate indifference claims brought under the Eighth Amendment require an inquiry into the official's state-of-mind because 'an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.'. . However, *Kingsley* affirmed that 'pretrial detainees (unlike convicted prisoners) cannot be punished at all.'. .Moreover, the Supreme Court in *Kingsley* largely relied on its earlier decision in *Bell v. Wolfish*, which held that pretrial detainees may prevail in Fourteenth Amendment challenges to conditions of their confinement even in the absence of an intent to punish, 'by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose."'. . The Court held that this is an objective standard and proceeded to adapt it to the context of excessive force. . . This indicates that *Kingsley* simply acknowledged the breadth of a pretrial detainee's Fourteenth Amendment rights and affirmed that an objective inquiry into a defendant's state of mind is the appropriate standard by which to judge a defendant's intentional conduct. . . The majority acknowledges much of this but declines to give effect to this recent Supreme Court precedent because it would not change the outcome in the present case. Whether or not this is correct, we may not simply ignore Supreme Court precedent. . . . *Kingsley* is an inconsistent decision issued by the Supreme Court, and it requires modification of our Fourteenth Amendment deliberate indifference standard. Therefore, I would hold that a pretrial detainee must only prove that a defendant-official acted intentionally to ignore their serious medical need or recklessly failed to act with reasonable care to mitigate the risk that the serious medical need posed to the pretrial detainee, even though a reasonable official in the defendant's position would have known, or should have known, that the serious medical need posed an excessive risk to the pretrial detainee's health or safety. This change in our law necessitates a slight adjustment to the nomenclature we use in deliberate indifference cases. *Kingsley* had no impact on the 'objective' component of a deliberate indifference claim—a pretrial detainee must still prove that their medical need was sufficiently serious. However, the 'subjective' component is no longer subjective. I will instead refer to this component as the "*mens rea*" component because it still requires a court to determine whether the defendant acted with a sufficiently culpable state of mind to establish deliberate indifference. To do so, we must examine the recklessness of a defendant from the perspective of a

reasonable official. . . . Griffith has satisfied the objective component of a deliberate indifference claim because he plainly suffered from a sufficiently serious medical condition in FCRJ. . . . However, the majority mistakenly concludes that Griffith has not met the *mens rea* prong with respect to Nurses Trivette, Sherrow, and Mundine. It holds that regardless of which standard we apply—either our obsolete subjective standard or the objective test in light of *Kingsley*—Griffith cannot prevail because his proof only demonstrates that the nurses were negligent in their care of him. But under the correct, objective standard for deliberate indifference, Griffith has demonstrated several genuine issues of material fact which preclude judgment as a matter of law for the nurses. A reasonable jury could find that each nurse recklessly failed to act with reasonable care to mitigate the risk that Griffith's serious medical need posed to him, even though a reasonable nurse in Defendants' positions would have known, or should have known, that Griffith's serious medical need posed an excessive risk to his health and safety.")

Cameron v. Bouchard, 815 F. App'x 978, ___ (6th Cir. 2020) ("Plaintiffs and their amici argue that we should adopt a new standard for pretrial detainees in light of *Kingsley v. Hendrickson*. . . . Since *Kingsley*, the circuits have split on whether deliberate indifference claims arising under the Fourteenth Amendment are still governed by *Farmer* (requiring a subjective inquiry for an officer's state of mind), or instead are governed by *Kingsley* (requiring an objective inquiry for an officer's state of mind). *Compare Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc) (adopting a new objective standard for deliberate indifference claims brought by pretrial detainees); *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (same); *Miranda v. Cty. of Lake*, 900 F.3d 335, 351–52 (7th Cir. 2018) (same) *with Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 419 n. 4 (5th Cir. 2017) (declining to reconsider its earlier precedent treating Eighth and Fourteenth Amendment claims alike); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) (same); *Nam Dang by and through Vina Dang v. Sheriff, Seminole Cty. Florida*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (same). We have not ruled on the issue. *See Richardson v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (declining to address the issue because it was not raised by either party). We need not resolve the issue today, because no matter the approach we adopt, the outcome is the same. Even if the pretrial detainees do not need to introduce evidence of subjective recklessness in light of *Kingsley*, they acknowledge that they still must prove something more than that the Defendants acted unreasonably. A 'claim for a violation of due process requires proof of a *mens rea* greater than mere negligence.'. . The test they propose would still require either 'something akin to reckless disregard,'. . . or that they 'knew or should have known' of the risk and nonetheless 'recklessly failed to act'[.] . . . The evidence Plaintiffs presented is insufficient to demonstrate that the jail officials acted with reckless disregard to the serious risk COVID-19 poses. Indeed, the steps that jail officials took to prevent the spread of COVID-19 were reasonable. Given the similarity of the BOP's response in *Wilson* and Defendants' response here, *Wilson* controls the outcome of this case, even if *Farmer*'s subjective component does not apply to Plaintiffs' Fourteenth Amendment claims.")

Cameron v. Bouchard, 815 F. App'x 978, ___ (6th Cir. 2020) (Cole, C.J., dissenting) ("To me, the district court's findings, which we adopt absent clear error, show serious deficiencies on the

part of the defendants in responding to the COVD-19 pandemic. I therefore depart from the majority and would find that the plaintiffs have demonstrated a likelihood of success on the merits of their claims. As such, I respectfully dissent. . . . As the majority acknowledges, the question of how to analyze the pretrial detainees' Fourteenth Amendment claims—specifically whether they include a deliberate indifference element—is an open one after the Supreme Court's decision in *Kingsley v. Hendrickson*, where the Supreme Court held that it was inappropriate to apply the same mental culpability requirement to excessive force claims brought by pretrial detainees as the one applied in those brought by convicted inmates. . . The majority assumes, for purposes of this case, that pretrial detainees do not need to prove a subjective component and says that it is proceeding under the Ninth Circuit's approach of requiring such plaintiffs to prove only 'objective recklessness' on the part of jail officials. . . The Ninth Circuit explained that the 'objective recklessness' standard requires plaintiffs to prove that '[t]he defendant did not take reasonable available measures to abate [a substantial risk of harm facing the plaintiff], even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious.'. . By contrast, plaintiffs seeking vindication of their Eighth Amendment right against cruel and unusual punishment face a steeper climb and must prove that a defendant 'knows of and disregards an excessive risk to inmate health or safety.'. . Despite the majority's representation that it is applying the *Castro* Fourteenth Amendment standard for purposes of this case, however, it in effect still holds all plaintiffs to the Eighth Amendment's deliberate indifference standard. We know this to be true because the majority cites a single case to support its analysis of the plaintiffs' constitutional claims: our recent decision in *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020). That case was brought by prisoners at a federal prison, none of whom were pretrial detainees. . . As their claims all arose under the Eighth Amendment, we applied the Eighth Amendment test, and, indeed, our decision turned on the prisoners' ability to prove deliberate indifference under the subjective prong. . . Our consideration of this Fourteenth Amendment claim should not be bound by a case where we used an Eighth Amendment analysis. For today's purposes, though, I will not further explore the issue of the proper standard for reviewing Fourteenth Amendment claims of pretrial detainees, as I conclude that the plaintiffs are likely to succeed on the merits even under the more-stringent Eighth Amendment review that all parties agree applies to the claims of the convicted inmates at the jail. . . . The majority finds that the plaintiffs cannot demonstrate a likelihood of success on the merits largely based on our decision in *Wilson*. I remain unconvinced that *Wilson* properly adjudicated the claims before it. *See Wilson*, 961 F.3d at 845–50 (Cole, C.J., dissenting in part). But I do not dissent from today's decision because I think *Wilson* was wrongly decided; I recognize that it carries the same precedential value of any published decision of our court. Rather, I conclude that the decision does not stretch so far as to foreclose a constitutional claim based on the record before us today, both because the record contains evidence adverse to the defendants that was not present in *Wilson* and because the evidence in favor of the defendants that appears at first glance to be similar to that which we credited in *Wilson* suffers from serious reliability issues. . . . In sum, the record reveals differences in degree and in kind between this case and *Wilson*. I find that by demonstrating that the defendants deployed transfers to COVID-infected areas punitively, temporarily adopted better practices only for purposes of passing inspection, repeatedly provided

inadequate medical care, failed to consistently quarantine symptomatic inmates, and did not take advantage of opportunities for increased social distancing, the plaintiffs have shown that they are likely to succeed on the merits of their claims.")

Cameron v. Bouchard, 815 F. App'x 978, ___ (6th Cir. 2020) ("Given our intervening decision in *Wilson*, a case that is binding on us, we now agree with Defendants that Plaintiffs are unlikely to succeed on the merits of their Eighth and Fourteenth Amendment claims. '[W]hile the harm imposed by COVID-19 on inmates at [the Jail] "ultimately [is] not averted," [Defendants have] "responded reasonably to the risk" and therefore ha[ve] [likely] not been deliberately indifferent to the inmates" Eighth Amendment rights.'. . Our conclusion that Plaintiffs are unlikely to succeed on the merits challenge is dispositive, because '[o]ur cases warn that a court must not issue a preliminary injunction where the movant presents no likelihood of merits success.'. .We **GRANT** Defendants' renewed emergency motion to stay the preliminary injunction pending resolution of Defendants' appeal.")

Cameron v. Bouchard, 815 F. App'x 978, ___ (6th Cir. 2020) (Cole, C.J., dissenting) ("Largely for the reasons stated in the May 26, 2020, order in this case, I would deny the defendants' renewed emergency motion for a stay. *See Cameron, et al. v. Bouchard, et al.*, No. 20-1469 (6th Cir. May 26, 2020) (order denying motion to stay) ("May 26 Order"). The preliminary injunction is a modest order entered to maintain the health and safety of the inmates incarcerated at the Jail while this litigation proceeds. It does not order the release of a single inmate and only requires the defendants to take measures such as providing soap and disinfectant to inmates, performing regular cleaning of the facility, and establishing detailed protocols to address the spread of COVID-19 within the Jail. I do not believe that *Wilson v. Williams*, No. 20-3447, 2020 WL 3056217 (6th Cir. June 9, 2020), changes the analysis that led us to deny the defendants' request for a stay last month. In particular, I would note that the district court, following submissions by the parties and a multi-day hearing, made several findings of fact regarding deficits in the defendants' response to the COVID-19 pandemic at the Jail, findings that were not part of the record in *Wilson*. The record contains, for example, evidence that officials altered their practices for the sole purpose of an inspection of the Jail only to return to unsafe practices when the inspection concluded. It also reveals that inmates are unable to use disinfectant in their bunks and common areas, and that those common areas are rarely—if ever—cleaned. It shows that use of personal protective equipment by Jail officials has been, at best, sporadic, that officials move inmates between cells without regard for whether an inmate is symptomatic, and that there have been completely inadequate medical responses to inmates who do experience symptoms. Most concerningly, the record shows that officials threatened to punish complaining inmates by transferring them to areas of the Jail that are infested with COVID-19. *Wilson*, like all Eighth Amendment cases, required a detailed examination of a distinct factual record. I do not view the result of that examination as dispositive of our inquiry here. Moreover, the pretrial detainees at the Jail bring their claims under the Fourteenth Amendment, and, as such, I am not convinced that they must satisfy the deliberate indifference standard that doomed the petitioners' Eighth Amendment claims in *Wilson*. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015); *see also J.H. v. Williamson*

Cty., 591 F.3d 709, 717 (6th Cir. 2020) (citing *Bell v. Wolfish*, 441 U.S. 520, 535, 538–39 (1979)).")

J.H. v. Williamson County, Tennessee, 951 F.3d 709, 716-20 (6th Cir. 2020) ("Because we can answer the qualified immunity questions in any order, . . . we begin with the question of whether McMahan violated a constitutional right and then turn to whether that right was clearly established. . . . Under *Bell*, a pretrial detainee can demonstrate that he was subjected to unconstitutional punishment in either of two ways: (1) by showing 'an expressed intent to punish on the part of the detention facility officials,' or (2) by showing that a restriction or condition is not rationally related to a legitimate government objective or is excessive in relation to that purpose. *Id.* at 538–39, 99 S.Ct. 1861; *see also Kingsley v. Hendrickson*, —— U.S. ——, 135 S. Ct. 2466, 2473, 192 L.Ed.2d 416 (2015). . . .The 'expressed intent to punish' prong proscribes an intent to punish for the alleged crime causing incarceration prior to an adjudication of guilt. . . It also prohibits officials from subjectively seeking to punish detainees simply because they are detainees, . . or on the basis of vengeful or other illegitimate interests[.]. . This prong does not, however, categorically prohibit discipline imposed by jail officials for infractions committed while in pretrial detention. . . Here, J.H. alleges that he was placed in solitary confinement in direct response to the November 17 disciplinary incident. This alleged action, without more, does not run afoul of the first prong of *Bell*. The relevant question is thus under *Bell*'s second prong: whether J.H.'s placement in segregation was 'rationally related to a legitimate nonpunitive governmental purpose and whether [it] appear[s] excessive in relation to that purpose.'. . In answering the first part of this question, we agree that McMahan has put forth a legitimate governmental purpose: 'maintain[ing] safety and security in the facility.' . . As the Supreme Court explained in *Bell*, 'maintaining institutional security and preserving internal order and discipline are essential goals' of a detention facility. . .Temporary placement of J.H. in solitary confinement, given his accused disciplinary infraction, appears rationally related to this purpose. Yet where McMahan's argument falters is on the question of whether the discipline here was excessive. . . . In considering whether the discipline imposed on J.H. was excessive, we are mindful of J.H.'s age; his known mental health issues; and the duration and nature of his confinement. We weigh these factors against the disciplinary infraction of which J.H. was accused and the governmental purpose for which the discipline was imposed. When considering 'the totality of [these] circumstances,' we conclude that the discipline imposed was excessive relative to its purpose and thus violated J.H.'s Fourteenth Amendment rights as described in *Bell*. . . . As a 14-year-old, J.H. was uniquely vulnerable to the harmful effects of solitary confinement, and thus his placement in segregation was a particularly harsh form of discipline. Second, it was well-known to McMahan before placing J.H. in solitary confinement that J.H. had been diagnosed with and required treatment for PANDAS, which is associated with several psychiatric symptoms. . . . In sum, considering J.H.'s age, mental health, and the duration and nature of his confinement, we conclude that the punishment imposed on J.H. was excessive. When weighing the penalty imposed against his disciplinary infraction—in which he made verbal threats but did not physically injure another detainee—it is apparent that his punishment was disproportionate in light of the stated purpose of maintaining institutional security. . . Any momentary need to separate J.H. from the specific detainees whom he had threatened on November

17 does not justify the extended duration in which McMahan subjected J.H. to solitary confinement and completely isolated him from all contact with other juveniles. This discipline was excessive given the infraction that J.H. was accused of and the unique vulnerabilities he possessed—namely his age and mental health status. . . We therefore hold that, assuming J.H.'s allegations to be true, his Fourteenth Amendment substantive due process rights were violated when he was held in solitary confinement from November 17 to December 8, 2013. . . . The second question is whether the constitutional right in question was clearly established at the time of the alleged violation. . . .We cannot say that the right at issue was established with sufficient specificity as to hold it clearly established as of 2013, the time of these incidents. Many of the cases recognizing what a punishing experience placement in solitary confinement can be—especially for juveniles and those with mental health issues—have been issued after 2013. Thus, McMahan is entitled to qualified immunity, and we are obliged to affirm the district court's grant of summary judgment on this claim.")

J.H. v. Williamson County, Tennessee, 951 F.3d 709, 722-23 (6th Cir. 2020) ("To prove deliberate indifference to his serious medical needs, J.H. must 'demonstrate both: (1) the existence of a "sufficiently serious' medical need; and (2) that defendants 'perceived facts from which to infer substantial risk to the prisoner, that [they] did in fact draw the inference, and that [they] then disregarded that risk."' [citing *Hopper v. Plummer*, 887 F.3d 744, 756 (6th Cir. 2018)]")

Martin v. Warren County, Kentucky, 799 F. App'x 329, ___ & n.4 (6th Cir. 2020) ("An amicus brief was filed by the Roderick and Solange MacArthur Justice Center, addressing the proper standard for deliberate-indifference claims brought by pretrial detainees in the wake of *Kingsley*. . . .As our precedent stands, we analyze pretrial detainees' Fourteenth Amendment claims of deliberate indifference under the same framework for deliberate-indifference claims brought by prisoners pursuant to the Eighth Amendment, including claims of inadequate medical care. . . .On appeal, Martin argues that the district court applied the wrong standard to her deliberate-indifference claims in light of *Kingsley*, but she does not meet her burden at summary judgment for reasons that do not depend on the standard for evaluating pretrial detainees' deliberate-indifference claims. . . . Martin argues that *Kingsley* requires an objective reasonableness standard. . . In *Kingsley*, the Court held that a pretrial detainee's Fourteenth Amendment excessive-force claim was governed by an objective standard, specifically objective reasonableness. . . Whether an objective standard applies to pretrial detainee claims of deliberate indifference and what the standard entails are open questions, though we have noted that *Kingsley* 'calls into serious doubt' the application of the subjective component of the deliberate-indifference test usually applied to pretrial detainees' claims. *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018). *But see Winkler*, 893 F.3d at 890 (failing to address *Kingsley*). Whatever *Kingsley* requires, it is more than negligence. . . Because Martin at best shows negligent conduct when she does not otherwise fail to make a showing of causation, we leave the *Kingsley* question for another day.")

Baker-Schneider v. Napoleon, 769 F. App'x 189, ___ (6th Cir. 2019) ("The Supreme Court has held that a prison official violates the Eighth Amendment when he acts with 'deliberate

indifference' to an inmate's 'serious medical needs.'. . Of course, Schneider was a pretrial detainee, not a prisoner, but that distinction is immaterial here because the Fourteenth Amendment's Due Process Clause extends the same protections to pretrial detainees as the Eighth Amendment does to prisoners. . . . Because the record contains no evidence that Schneider showed before Huq a strong likelihood that he would commit suicide, nor evidence that Huq disregarded that risk, we conclude as a matter of law that Huq is entitled to qualified immunity.")

Winkler v. Madison County, 893 F.3d 877, 890-91 (6th Cir. 2018) ("'The Eighth Amendment's prohibition on cruel and unusual punishment generally provides the basis to assert a § 1983 claim of deliberate indifference to serious medical needs, but where that claim is asserted on behalf of a pre-trial detainee, the Due Process Clause of the Fourteenth Amendment is the proper starting point.'. . 'There are two parts to the claim, one objective, one subjective. For the objective component, the detainee must demonstrate the existence of a sufficiently serious medical need.'. . There is no question that Hacker's perforated duodenal ulcer, which ultimately caused his death, met this objective component. . . 'For the subjective component, the detainee must demonstrate that the defendant possessed a sufficiently culpable state of mind in denying medical care.'. . A defendant has a sufficiently culpable state of mind if he 'knows of and disregards an excessive risk to inmate health or safety.'. . This means that 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'. . A plaintiff need not show that the defendant acted with the very purpose of causing harm, but must show something greater than negligence or malpractice.")

Hanson v. Madison County Det. Ctr., No. 17-5209, 2018 WL 2324252, at *5 n. 4 (6th Cir. May 22, 2018) (unreported) ("In *Kingsley*, Justice Alito noted in dissent that 'whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee' remains an open question. *Kingsley*, 135 S. Ct. at 2472 (Alito, J., dissenting) (citing *Graham*, 490 U.S. at 395 n.10). But it is not an open question in the Sixth Circuit. *See Aldini v. Johnson*, 609 F.3d 858, 865 (6th Cir. 2010).")

Hopper v. Plummer, 887 F.3d 744, 756 (6th Cir. 2018) ("Defendants argue they are also entitled to qualified immunity on plaintiff's deliberate-indifference claim. We analyze a Fourteenth Amendment claim for deliberate indifference to a serious medical need 'under the same rubric as Eighth Amendment claims brought by prisoners.' *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013). Proving deliberate indifference requires that plaintiff demonstrate both: (1) the existence of a "sufficiently serious" medical need; and (2) that defendants 'perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk.'")

Richmond v. Huq, 885 F.3d 928, 937-38 & n.3 (6th Cir. 2018) ("This Court has historically analyzed Fourteenth Amendment pretrial detainee claims and Eighth Amendment prisoner claims 'under the same rubric.' *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013). '[A] prisoner's Eighth Amendment right is violated when prison doctors or officials are

deliberately indifferent to the prisoner's serious medical needs.'. . .The Supreme Court in *Kingsley v. Hendrickson*, __ U.S. __, 135 S. Ct. 2466 (2015), held that a pretrial detainee's Fourteenth Amendment excessive force claim need only meet the objective component by showing that 'the force purposely or knowingly used against him was objectively unreasonable.'. . This Court has not yet considered whether *Kingsley* similarly abrogates the subjective intent requirement of a Fourteenth Amendment deliberate indifference claim. Several of our sister courts have and are split. *Compare Darnell v. Pineiro*, 849 F.3d 17, 34-35 (2d Cir. 2017) (holding that the "subjective prong" of a claim of deliberate indifference to conditions of confinement under the Fourteenth Amendment must be "defined objectively" in light of *Kingsley*) *and Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc), *cert. denied sub nom. Los Angeles Cty. v. Castro*, 137 S. Ct. 831 (2017) (interpreting *Kingsley* to mean that a failure-to-protect claim brought by a pretrial detainee under the Fourteenth Amendment does not include a subjective intent element), *with Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (finding that because the Fifth Circuit continued "to apply a subjective standard [in failure-to-protect claims] post-*Kingsley*, this panel is bound by our rule of orderliness"). We find no circuit applying *Kingsley* specifically to a deliberate indifference to a detainee's serious medical needs claim. *But see Alderson*, 848 F.3d at 424-45 (Graves, J., specially concurring in part) (calling into question whether that court should have reconsidered the deliberate indifference standard in light of *Kingsley*). Yet, neither party cites *Kingsley* or addresses its potential effect in their briefing. Nonetheless, we recognize that this shift in Fourteenth Amendment deliberate indifference jurisprudence calls into serious doubt whether Richmond need even show that the individual defendant-officials were subjectively aware of her serious medical conditions and nonetheless wantonly disregarded them.")

Bays v. Montmorency Cty., 874 F.3d 264, 268-70 (6th Cir. 2017) ("Prison officials violate the Eighth Amendment when they act with 'deliberate indifference' to the 'serious medical needs' of inmates committed to their charge. . . The Due Process Clause of the Fourteenth Amendment provides the same guarantee to pretrial detainees. . . Two inquiries loom over every deliberate indifference case: Was the ailment a serious one? And was the official 'subjective[ly] reckless[ ],' such that she was actually 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and ... also [drew] the inference'? . . . . Sigler adds that nothing in the record shows that she subjectively knew, then disregarded, that Shane was at risk of suicide. But the relevant question is not whether Sigler recognized that Shane might kill himself. It is whether Sigler recognized that Shane was suffering from a serious mental illness creating a host of risks and requiring immediate treatment during the fourteen days that Sigler treated him. . . Sigler argues that while she may have committed malpractice, her conduct was not deliberately indifferent to Shane's plight. If a prison medical official provides treatment, it is true, constitutional liability attaches only if the treatment is 'so cursory as to amount to a conscious disregard for [the inmate's] needs.'. . Taking the Bays' allegations as true, Sigler's care fell below this admittedly low bar. She scheduled an appointment weeks in the future despite symptoms that she, Nurse Pilarski, and the Bays' expert now all agree required immediate or near-immediate care. Yes, she eventually did try to schedule an earlier appointment. But the sum total of her efforts were two

phone calls and a message, all while she had the option of getting immediate emergency room treatment or at least putting him on a watch list, and yet she chose to do neither. Sigler looks to *Taylor v. Burkes*, which held that inmates have no clearly established right to the proper implementation of suicide prevention procedures. . . But the Bays do not argue that Sigler violated Shane's right to procedures that might have prevented his suicide. They argue that Sigler violated Shane's right to have a serious psychological illness treated seriously. And that right is clearly established.")

Kulpa for Kulpa v. Cantea, 708 F. App'x 846, ___ (6th Cir. 2017) ("Cantea argues that even if his conduct was objectively unreasonable, the law's contours were not clearly established at the time of the alleged violation with respect to the restraint of pretrial detainees. The gist of his argument is that because the events in this case took place before the Supreme Court adopted the objective reasonableness standard in *Kingsley*, no clearly established law barred unreasonable force against pretrial detainees. At the time of Kulpa's death in October 2011, we evaluated a pretrial detainee's excessive-force claim by asking 'whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'. . . Our pre-*Kingsley* caselaw put Cantea on notice 'that his conduct was unlawful in the situation he confronted.'. . *Champion*, decided seven years before Kulpa's death, clearly articulated that driving heavy pressure into a prone, handcuffed, incapacitated detainee's back was constitutionally impermissible because it posed a serious risk of asphyxiation to the arrestee and was unnecessary to protect the officers. . . . Although *Champion* arose in the context of an arrest, the conduct at issue, the risk of death to the detainee, and the minimal threat posed by a bound and incapacitated detainee to officer safety is the same in a pretrial detention center. Furthermore, it was clearly established in 2011 that 'pretrial detainees had a clearly established right not to be gratuitously assaulted while fully restrained and subdued.'. . Cantea argues that—notwithstanding *Champion*'s clear admonition about this precise conduct—the law permitted him to plant significant weight into a prone, handcuffed detainee's back so long as he lacked malicious intent. For the reasons explained above, however, sufficient evidence exists that Cantea acted with malicious intent, given the extent of Kulpa's injury, the minimal threat Kulpa posed to officer safety, and Cantea's application of unnecessary force. In addition, as the Seventh Circuit recently explained, to buy Cantea's argument 'we would have to accept the dubious proposition that, at the time the officers acted, they were on notice only that they could not have a reckless or malicious intent and that, as long as they acted without such an intent, they could apply any degree of force they chose.' *Kingsley v. Hendrickson*, 801 F.3d 828, 833 (7th Cir. 2015). As we have noted, however, the law clearly established that the 'amount of force that was used' must be roughly proportionate to the 'need for the application of force.'").

Evans v. Plummer, No. 16-3826, 2017 WL 1400495, at *4 (6th Cir. Apr. 19, 2017) (not reported) ("We apply the Fourth Amendment's 'objective reasonableness' test to allegations that government officials used excessive force during the booking process, not the Fourteenth Amendment's 'shocks the conscience' test or the Eighth Amendment's 'cruel and unusual punishment' test. *Burgess v. Fischer*, 735 F.3d 462, 472–73 (6th Cir. 2013). The Supreme Court

recently approved of this approach by 'adopt[ing] a bright line rule that "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."' *Morabito v. Holmes*, 628 F. App'x 353, 357 (6th Cir. 2015) (quoting *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015)). In assessing objective reasonableness, we look 'to the reasonableness of the force in light of the totality of the circumstances confronting the defendants, and not to the underlying intent or motivation of the defendants.' *Burgess*, 735 F.3d at 472; *see Kingsley*, 135 S. Ct. at 2475–76 (rejecting a subjective standard).")

Guy v. Nashville, No. 16-6100, 2017 WL 1476896, at *3–4 (6th Cir. Apr. 25, 2017) (not reported) ("Taking a different tack on appeal, Romines argues that this right was not clearly established at the time of the alleged violation. Although this argument was not made in the district court, we exercise our discretion to consider the issue because it is a legal question within our jurisdiction and resolution of the defendant's asserted qualified-immunity defense would further the progress of the litigation. . . The essence of this argument is that the use of force in this case occurred prior to the Supreme Court's adoption of the objective reasonableness standard in *Kingsley*. It is true that there was disagreement among the circuits prior to *Kingsley* about whether a claim of excessive force 'brought by a pretrial detainee must satisfy the subjective standard or only the objective standard.'. . But, a defendant is not entitled to qualified immunity 'simply because the courts have not 'agreed upon the precise formulation of the [applicable] standard.' *Harris v. City of Circleville*, 583 F.3d 356, 367 (6th Cir. 2009) (alteration in original) (quoting *Saucier v. Katz*, 533 U.S. 194, 202-03 (2001)). Rather, the question under the second prong of the qualified-immunity analysis 'is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . Although there need not be a case directly on point, 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . The right must not be defined at a 'high level of generality,' and the 'dispositive question is "whether the violative nature of *particular* conduct is clearly established."'. . . At the time of the use-of-force incident in September 2013, this court applied analogous standards to excessive-force claims brought under the Eighth and Fourteenth Amendments. . . That is, under either amendment the question was whether the use of force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically for the purpose of causing harm. . . The force need not have been absolutely necessary, but we asked in *Griffin* 'whether the use of force could plausibly have been thought necessary.'. . In *Griffin*, this court held that the prison officials' use of a leg-sweep maneuver to gain control over a pretrial detainee who created a disturbance, resisted being moved, and struggled as two officers tried to guide her away from a nurse's station did not violate this standard. . . In *Williams*, prison officials used a chemical agent and assault team on an inmate who was ordered to 'pack up' his cell and responded by asking, 'What for, sir?' *Williams v. Curtin*, 631 F.3d 380, 384 (6th Cir. 2011). We concluded in *Williams* that the facts, if true, could permit a finding that the use of force was unnecessary, was not applied in a good-faith effort to maintain or restore discipline, and was possibly motivated by malicious purpose. . . Viewing the evidence in the light most favorable to plaintiff, we conclude that a reasonable officer would have been on notice in September 2013 that use of a chemical agent on a non-threatening pretrial detainee who did not comply with the officer's verbal orders and then passively resisted an open-handed escort

by hesitating and stopping to turn to ask again about seeing a nurse would amount to constitutionally excessive force. The denial of qualified immunity with respect to this claim was not error.")

Nallani v. Wayne County, 665 F. App'x 498, 506 (6th Cir. 2016) (In medical needs case, Court notes that "[W]e have held consistently that pretrial detainees 'are ... entitled to the same Eighth Amendment rights as other inmates.' *Thompson v. Cty. of Medina*, 29 F.3d 238, 242 (6th Cir. 1994). 'The analysis set forth in *Farmer*, although rooted in the Eighth Amendment, therefore applies with equal force to a pretrial detainee's Fourteenth Amendment claims.'")

Morabito v. Holmes, 628 F. App'x 353, 356-58 (6th Cir. 2015) (applying the objective reasonableness standard to pretrial detainee's excessive force claims and deliberate indifference standard to medical needs claim)

Richko v. Wayne Cty., Mich., 819 F.3d 907, 915-16, 919-20 (6th Cir. 2016) ("We begin by clarifying the specific source of the constitutional right to be free from inmate-on-inmate violence. In denying the defendants' motion for summary judgment, the district court appears to have based its holding solely on the Eighth Amendment right to be free from cruel and unusual punishment. . . . But the Eighth Amendment applies only to those individuals who have been tried, convicted, and sentenced. . . Pretrial detainees like Horvath, on the other hand, are protected by the Fourteenth Amendment's Due Process Clause. . . .But such a misstatement by the district court is inconsequential because this court has made clear that, under the Fourteenth Amendment, pretrial detainees are 'entitled to the same Eighth Amendment rights as other inmates.' . . . . . Applying the above analysis to the present case, Richko had the burden of presenting evidence from which a reasonable juror could conclude that the individual defendants were deliberately indifferent to a substantial risk of serious harm to Horvath and that they disregarded that risk by failing to take reasonable measures to protect him. . . . Viewing the present case in the abstract, the risk to Horvath of being housed with and attacked by an inmate who had recently been arrested for violent assault and had a history of serious mental illness was sufficient to fulfill the objective component of this analysis. Because the analysis of the facts below establishes, for the purpose of overcoming the defendants' motion for summary judgment, that Richko has satisfied the subjective component of *Farmer*'s test, the objective component is likewise satisfied based on the same factual analysis. . . . Construing the facts in the light most favorable to Richko, a reasonable juror could infer that Stinson heard the banging, yelling, and pounding from the duty station, that he simply chose not to respond, and that he further delayed responding for 10 minutes even after being notified by Nurse Williams that Horvath was missing. All of Stinson's arguments are thus best left to a jury, which will be tasked with weighing the evidence presented by Stinson against that proffered by Richko. We therefore conclude that the district court properly denied Stinson's motion for summary judgment that was based on his claim of qualified immunity.")

Coley v. Lucas Cnty., Ohio, 799 F.3d 530, 537-38 (6th Cir. 2015) ("When a free citizen claims that a government actor used excessive force during the process of an arrest, seizure, or

investigatory stop, we perform a Fourth Amendment inquiry into what was objectively 'reasonable' under the circumstances. . . These Fourth Amendment protections extend through police booking until the completion of a probable cause hearing. *Aldini v. Johnson,* 609 F.3d 858, 866–67 (6th Cir.2010). When convicted prisoners bring claims of excessive force, we turn to the Eighth Amendment, which forbids the 'unnecessary and wanton infliction of pain' that constitutes 'cruel and unusual punishment,' and specifically conduct that is malicious and sadistic. . . .Until very recently, it was unclear which standard applied to excessive force claims brought by pretrial detainees. The Supreme Court has recently clarified, however, that when assessing pretrial detainees' excessive force claims we must inquire into whether the plaintiff shows 'that the force purposely or knowingly used against him was objectively unreasonable.' [citing *Kingsley*] The inquiry is highly fact-dependent, and must take into account the 'perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.'. . It should also account for 'the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,"'. . . and defer when appropriate to '"policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security."'. . .In light of this Fourteenth Amendment standard and the facts alleged in the complaint, Plaintiffs' excessive force claims should proceed. The alleged conduct of Schmeltz and Gray was knowing or purposeful and 'objectively unreasonable,' and each used force that 'amount[ed] to punishment' of Benton. . . Taking into account all of the circumstances of that day, including the legitimate interests of law enforcement in preserving order and discipline, the allegations that Schmeltz and Gray inflicted gratuitous pain on Benton while he was handcuffed, culminating in his death, establish valid claims that both officers violated Benton's Fourteenth Amendment rights.")

Clay v. Emmi, 797 F.3d 364, 369-70 (6th Cir. 2015) ("Officer Emmi argues that the district court mistakenly applied the Fourth Amendment's objective use of force standard to this case rather than the Fourteenth Amendment's subjective use of force standard. Following the parties' briefing on appeal, the Supreme Court rendered this issue purely academic in *Kingsley v. Hendrickson* by holding that a pretrial detainee's excessive force claim brought under the Fourteenth Amendment's Due Process Clause is subject to the same objective standard as an excessive force claim brought under the Fourth Amendment. 135 S. Ct. 2466 (2015). In light of *Kingsley,* under either amendment, the court would employ the same objective test for excessive force. . . The district court's application of the Fourth Amendment rather than the Fourteenth Amendment, moreover, is warranted based on the facts in this record. The Fourth Amendment applies to the seizure of individuals due to mental health concerns, *Ziegler v. Aukerman,* 512 F.3d 777, 783–84 (6th Cir.2008), and to excessive force claims alleged within the context of that seizure, *Monday v. Oullette,* 118 F.3d 1099, 1104 (6th Cir.1997). As with pretrial detainees, once a plaintiff finds himself in ongoing state custody after an initial mental health seizure, his excessive force claims generally. . . fall under the Fourteenth Amendment rather than the Fourth Amendment. *Lanman v. Hinson,* 529 F.3d 673, 683 (6th Cir.2008). Here, there is no indication that Clay was seized before he refused to put on the dressing gown because he voluntarily rode to the hospital to 'talk to somebody' and was not restrained. . . . Under the Fourth Amendment—and since *Kingsley,* also

the Fourteenth Amendment—the test for whether officers' use of force violated the Constitution is 'whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.'. . Among the factors to be considered are whether the person being seized 'poses an immediate threat to the safety of officers or others' and 'whether he is actively resisting.'")

Berrier for Estate of Trowbridge . Lake County, Ohio, No. 1:22 CV 813, 2024 WL 4591816, at *8 (N.D. Ohio Oct. 28, 2024) ("When determining whether an defendant had fair notice that their conduct was unlawful, the court must consider 'the law at the time of the conduct.'. . The conduct that gave rise to this action occurred in June of 2020, which was before the 2021 *Brawner* decision changed the test for deliberate indifference to the medical needs of a pretrial detainee. . . The only clearly established law at the time of the conduct was established by *Farmer*, which held that a defendant could only be liable for deliberate indifference to the medical needs of a detainee if they were subjectively aware of facts that established a substantial risk of serious harm to the inmate and the defendant actually concluded that the risk existed. . . It would not have been enough, under the standard in existence at the time of the conduct, that the defendants acted recklessly. . . . Plaintiff has failed to meet their burden of establishing that withholding Ms. Trowbridge's Suboxone prescription violated a sufficiently particularized constitutional right that was clearly established in June of 2020. They point to no cases prior to June of 2020 that have found officials could be held to be deliberately indifferent to medical needs when the inmate had neither complained of nor outwardly exhibited any associated symptoms or signs of serious risk. Further, Plaintiff has not pointed to any case law that would have clearly informed a reasonable official that allowing an inmate to go through withdrawal, without Suboxone, but with the support of comfort medications when necessary, constitutes deliberate indifference, absent manifestation of some specific symptom or serious condition that arises during that process.")

Smallwood v. Highland County Sheriff, No. 1:24-CV-76, 2024 WL 4302354, at *2–3 (S.D. Ohio Sept. 26, 2024) ("The undersigned finds it necessary to write further to clarify the constitutional underpinnings of Claim 3 - the denial or delay of medical care claim. . . Plaintiff originally articulated Claim 3 as the '[d]enial or delay of medical treatment' by two jail employees for 'a serious medical need for a life threatening injury' that he experienced shortly after his arrest and detention at the Highland County Jail. . . The complaint relates that Plaintiff was arrested for a probation violation on February 8, 2022. . . Previously, the undersigned assumed without discussion that, as a convicted individual accused of a probation violation, Plaintiff's claims of 'cruel and unusual punishment,' (Claim 2) and of deliberate indifference to his serious medical needs, (Claim 3), arose under the Eighth Amendment. Consistent with that analysis, Plaintiff's most recent 'Addendum' repeatedly refers to the standards of the Eighth Amendment. . . But in considering Plaintiff's construed motion to supplement his complaint, the undersigned reconsiders a threshold question of whether Plaintiff was a pretrial detainee or a convicted prisoner at the time his claims arose. The answer to that determination impacts the constitutional analysis. The Eighth Amendment applies only to convicted prisoners, not to pretrial detainees. The claims of a pretrial detainee are reviewed under the Due Process Clause of the Fourteenth Amendment. The Sixth

Circuit has never explicitly decided whether someone detained for a probation violation is a pretrial detainee or convicted prisoner, and courts across the country have grappled with the difficulty of this question. [collecting cases] Until recently, the referenced threshold question was of little import. That is because for many years, the Sixth Circuit analyzed both Eighth Amendment and Fourteenth Amendment 'deliberate indifference' claims under the same two-part test, requiring a plaintiff to show both an objective component (a medical need that was 'sufficiently serious') and a subjective component (that the official knew of and disregarded an excessive risk to inmate health or safety). But in *Brawner v. Scott Cnty., Tennessee*, 14 F.4th 585, 596 (6th Cir. 2021), the Sixth Circuit joined the Second, Seventh and Ninth Circuits in holding that *Kingsley* . . . requires modification of the 'subjective' standard for a deliberate indifference claim brought by a pretrial detainee. *Brawner* reasoned that instead of the higher standard akin to 'criminal recklessness' adopted in *Farmer* for Eighth Amendment claims, a lower 'civil recklessness' standard should apply for Fourteenth Amendment claims. . . Thus, whether Plaintiff was a convicted prisoner or merely a pretrial detainee at the time of the events in question significantly impacts the constitutional analysis. . . Considering this issue, the undersigned finds the reasoning of *Bond v. Moore* to be highly persuasive. In short, absent controlling authority, Plaintiff will be considered to be a pretrial detainee at the time of the events in question. *See Bond v. Moore*, 672 F. Supp.3d at 369 (concluding that an arrestee on a probation violation is a pretrial detainee, discussing unpublished Sixth Circuit cases and similarly persuasive authority); *Jones v. Kenton Cnty., Kentucky*, No.2:23-cv-164-DCR, 2024 WL 1705210 at *3-4 (E.D .Ky. Apr. 19, 2024) (same); *but contrast Peterson v. Heinen*, 89 F.4th 628, 635 (8th Cir. 2023). The references in Plaintiff's Addendum to the Eighth Amendment do not alter the undersigned's conclusion on this issue, because those references merely parrot the Court's prior assumption that the Eighth Amendment applied. Accordingly, Defendants should formulate any response to Plaintiff's construed motion to supplement Claim 3 as if pleaded as a violation of the Due Process Clause of the Fourteenth Amendment.")

Thomas v. S. Health Partners, Inc., No. 221CV012WOBCJS, 2023 WL 3935047, at *6 (E.D. Ky. June 9, 2023) ("Thomas was incarcerated for a probation violation subsequent to previous convictions and for new charges of possessing methamphetamine and drug paraphernalia. . . Although it is clear that Thomas was a pretrial detainee with respect to her new charges, courts have struggled to decide whether a plaintiff's suspected probation violation makes them a pretrial detainee or a convicted prisoner. *See, e.g., Green v. Taylor*, No. 1:22-CV-1007, 2023 WL 415502, at *4 n.2 (W.D. Mich. Jan. 26, 2023) (collecting cases); *Johnson v. NaphCare, Inc.*, No. 3:19-CV-054, 2022 WL 306981, at *13 (S.D. Ohio Feb. 2, 2022) (collecting cases); *Walker v. S. Health Partners*, 576 F. Supp. 3d 516, 538–39 (E.D. Ky. 2021) (applying the Fourteenth Amendment because the defendants had not argued that the more stringent Eighth Amendment approach should apply). It does not appear that the Sixth Circuit has directly addressed the issue. . . and the parties have applied both tests in their analyses. . .Thomas's classification is further complicated by the fact that she stipulated to violating the terms of her probation at a hearing on February 18, 2020. . . Accordingly, to the extent Thomas was a 'pretrial detainee' during the pendency of her probation violation proceedings, she likely lost that status upon admitting that violation to the court. . . Other

courts in this Circuit have applied both the Eighth and Fourteenth Amendment standards where it was unclear whether the plaintiff was a pretrial detainee or a convicted prisoner. . .Accordingly, this Court will also apply both standards. As discussed below, the outcome for each Defendant is the same regardless of which standard is used.")

Bond v. Moore, No. 7:20-CV-20-REW-MAS, 2023 WL 3451208, at *6–7 (E.D. Ky. May 9, 2023) ("The Sixth Circuit has never explicitly decided whether someone detained for a probation violation is a pretrial detainee or convicted prisoner, and courts across the country have grappled with the difficulty of this question. [collecting cases] The Court concludes that Kinney was a pretrial detainee during his stay at PCDC. Though Kinney was previously convicted of robbery charges (hence the existence of a probation period), the alleged offense for which he was jailed was the unresolved probation violation. . . At no point between arriving at PCDC and his death was Kinney's violation adjudicated. In *Bell v. Wolfish*, the Supreme Court held that 'under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.'. . It follows that Kinney should not be treated as a convicted prisoner for an alleged probation violation prior to a guilt determination on that status. . . Relevant case law reinforces this logic and determination. Multiple circuits have applied 'pretrial detainee' status to prisoners arrested for probation violations. [citing cases from 8th, 9th, and 10th Circuits] Sixth Circuit precedent also supports the Court's conclusion. . . These cases, while they do not directly address the question, present examples of the Sixth Circuit classifying persons detained for unadjudicated conduct as pretrial detainees and, therefore, bolster the conclusion that Kinney should be analyzed as such. Further, the Sixth Circuit routinely treats jailed arrestees as pretrial detainees protected by the Fourteenth Amendment. . . While individuals jailed for unadjudicated probation violations have been 'tried, convicted, and sentenced' of the underlying offense giving rise to a probation period, they have not been tried, convicted, or sentenced, that is, not adjudicated, for the conduct giving rise to the violation of the probation period. Therefore, Kinney is properly categorized as a pretrial detainee.")

Little v. City of Morristown, Tennessee, No. 221CV00047DCLCCRW, 2023 WL 2769633, at *6 & n.7 (E.D. Tenn. Mar. 31, 2023) ("Ultimately, rather than eliminate the subjective prong, the Sixth Circuit 'lower[ed] the subjective component from actual knowledge to recklessness.' *Helphenstine v. Lewis Cnty.*, 60 F.4th 305, 316 (6th Cir. 2023). . . . Although the County Defendants maintain that the Court should employ pre-*Brawner* law in analyzing Plaintiffs' claims because 'this incident occurred more than a year before *Brawner* was decided'. . . , Brawner is controlling precedent. . . Pre-*Brawner* case law, however, is properly examined in conducting the clearly established inquiry for incidents that occurred prior to the *Brawner* decision. . . Thus, the Court applies the modified subjective standard in analyzing the existence of a constitutional violation but will look to case law in existence prior to the incident at issue to determine if such constitutional right was clearly established.")

Chapple v. Granklin County Sheriff's Officers FCCC 1 & 2, No. 2:21-CV-05086, 2022 WL 16734656, at *4–7 (S.D. Ohio Nov. 7, 2022) ("Conditions of confinement claims are typically

scrutinized under the Eighth Amendment, which 'imposes duties on [prison] officials, who must provide humane conditions of confinement[,]...must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must "take reasonable measures to guarantee the safety of the inmates."'. . Of course, Chapple is a pretrial detainee, not a prisoner whose guilt has already been adjudicated, and so he is protected from cruel and unusual punishments by the Fourteenth Amendment's Due Process Clause, rather than by the Eighth Amendment. . . Although the Fourteenth Amendment's Due Process Clause provides protections 'at least as great as' the Cruel and Unusual Punishments Clause, . . . courts have typically applied the same Eighth Amendment conditions of confinement analysis to claims by pretrial detainees. . . Traditionally, such claims have had an objective and a subjective component, wherein the prisoner or pretrial detainee must show both that 'he is incarcerated under conditions posing a substantial risk of serious harm,'. . . and that the defendants '(1) were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists"; (2) actually drew the inference; and (3) consciously disregarded the risk.'. . But, in the aftermath of the Supreme Court's decision in *Kingsley v. Hendrickson,* 576 U.S. 389 (2015), the Sixth Circuit held that the traditional subjective prong was no longer appropriate in analyzing claims by pretrial detainees. [citing *Brawner v. Scott County*] Instead, a pretrial detainee seeking to establish deliberate indifference need not show that 'the officers were subjectively aware their use of force was unreasonable,' but must only prove that 'a defendant...acted deliberately (not accidentally), but also recklessly "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known."'. . A pretrial detainee, in other words, must demonstrate 'something akin to reckless disregard,' which is 'more than negligence but less than subjective intent.'. .Of course, a pretrial detainee who seeks to allege a conditions of confinement claim must still demonstrate a sufficiently serious deprivation: that he was denied 'the minimal civilized measure of life's necessities.'. . That prong of the *Farmer* test has not changed. Whether a deprivation meets the sufficiently serious standard depends on both the severity of the deprivation. . . and the duration. . . . Whether *Kingsley* requires the modification of the traditional subjective prong of deliberate indifference claims with respect to environmental hazards is unknown, *see supra* Part III.C, but Chapple's water issue claim falls short under either the subjective or modified standards. There is no doubt that exposure to lead in drinking water would pose a 'substantial risk of serious harm.'. . Chapple has not, however, provided factual allegations, in the Complaint or in his Objections, that any of the defendants either had knowledge about the presence of lead in the FCCC water or should have known about the lead.")

Montgomery v. Wellpath Medical, No. 3:19-CV-00675, 2022 WL 3589571, at *5 n.4 (M.D. Tenn. Aug. 22, 2022) ("One Sixth Circuit judge recently noted ongoing intra-circuit confusion in employing *Brawner*'s modification of the deliberate indifference standard under the Fourteenth Amendment: [referencing language from *Westmoreland v. Butler Cnty.*, 35 F.4th 1051, 1052 (6th Cir. 2022) (Bush, J., dissenting from denial of rehearing en banc).] While questions may remain as to how *Brawner* applies in particular factual contexts, there is no question that *Brawner* is binding precedent and must be applied to deliberate indifference claims brought under the

Fourteenth Amendment. . . The Court will therefore apply the Fourteenth Amendment deliberate indifference standard as articulated in *Brawner* and adopted in *Greene* to Montgomery's claims.")

Brown v. Clark, No. 3:22-CV-21-BJB, 2022 WL 3355805, at *2–3 (W.D. Ky. Aug. 12, 2022) ("In *Kingsley v. Hendrickson,* . . . the Supreme Court held that a Fourteenth (rather than Eighth) Amendment excessive-force claim by a pretrial detainee needn't establish that the officer was subjectively aware that the use of force was unreasonable. Did that decision also jettison the subjective-intent element for all Fourteenth Amendment deliberate-indifference claims brought by pretrial detainees in other contexts? The courts are deeply split on this question. *See Westmoreland v. Butler County*, 29 F.4th 721, 727 (6th Cir. 2022) (gathering cases). The Sixth Circuit recently decided that the Supreme Court indeed replaced the former test with an objective inquiry that asks whether an official 'acted deliberately (not accidentally) and "recklessly in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known."'. . This reckless-disregard standard is still higher than negligence, but lower than criminal recklessness; like civil recklessness, the official doesn't have to actually be aware of the harm. . . This difference, however, should rarely matter in the Covid context: what prison official has been hiding under a rock since March 2020 and remains unaware of the risks Covid poses to prisoners? . . . Instead, the analysis turns on whether the officials responded to that risk in an objectively reasonable manner. . . Officials may have acted reasonably even if the harm later materializes and more effective approaches were available. . . . Under pandemic circumstances, however, does denying a vaccine amount to 'deliberate indifference'? That is a difficult standard to meet in the prison context, even under *Kingsley*'s modified standard. . . Courts of appeals have repeatedly declined to conclude that prison officials' responses to the risks of Covid were deliberately indifferent—even if the case numbers are high and the officials could have done more. . . This is partially because courts shouldn't make a habit of second-guessing prison administrators, especially in their handling of an evolving public health crisis.")

Prince v. Scioto County Common Pleas Court, No. 1:20-CV-652, 2022 WL 1569868, at *5 (S.D. Ohio May 18, 2022) ("Each Defendant's 'liability must be assessed individually based on his own actions.'. . To prove his claim, Plaintiff must present evidence from which a reasonable jury could find that *each* Defendant had notice of his medical need and took some action that 'was intentional (not accidental)' and 'either (a) acted intentionally to ignore [the] serious medical need, or (b) recklessly failed to act reasonably to mitigate the risk the serious medical need posed to [Plaintiff], even though a reasonable official… would have known that the serious medical need posed an excessive risk to [Plaintiff's] health or safety.' *Brawner*, 14 F.4th at 597. On the record presented, the evidence unequivocally demonstrates that the individuals' actions were reasonable, while Plaintiff has utterly failed to present evidence that could overcome their assertions of qualified immunity. Even if a reviewing court were to decide that issue differently, any such right was not clearly established at the time of the alleged violation. This is true even if this Court considers the new deliberate indifference standard applicable in the Sixth Circuit under the Due Process Clause. In short, no genuine issues of material fact remain and Defendants are entitled to judgment as a matter of law even if the lower standard applies.")

Walker v. Southern Health Parners, No. CV 5:20-397-DCR, 2021 WL 5988359, at *13–14 (E.D. Ky. Dec. 17, 2021) ("In *Brawner v. Scott Cnty., Tenn.*, the Sixth Circuit extended *Kingsley* to deliberate-indifference claims, concluding that it is inappropriate to apply the same test to cases involving pretrial detainees and convicted prisoners. . . In clarifying what is required to establish deliberate indifference to a serious medical need in light of *Kingsley*, the court stated that '[m]ere negligence is insufficient.' Further, the court determined, '[a] defendant must have not only acted deliberately (not accidentally), but also recklessly 'in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.'". . The *Brawner* court set out the following elements: (1) an objectively serious medical need; and (2) that the defendant's action (or lack of action) was intentional (not accidental) and the defendant either (a) acted intentionally to ignore the plaintiff's serious medical need, or (b) recklessly failed to act reasonably to mitigate the risk the serious medical need posed to the plaintiff, even though a reasonable official in the defendant's position would have known that the serious medical need posed an excessive risk to the plaintiff's health or safety. . . Of course *Brawner* only applies if Walker is considered a pretrial detainee. Courts have struggled with the question of whether a prisoner detained for a suspected probation violation is a pretrial detainee. . . And it does not appear that the Sixth Circuit has directly addressed the issue. *But see Ford v. Grand Traverse Cnty.*, 2005 WL 2572025, at *1 n.1 (W.D. Mich. Oct. 12, 2005) (concluding that defendant being held for suspected parole violation was imprisoned in connection with a convicted offense and, therefore, was not a pretrial detainee). Because the defendants have not made any effort to argue that the more stringent approach under the Eighth Amendment should apply, the Court will apply the test announced in *Brawner*.")

Huntley v. Fuller, No. 1:21-CV-350, 2021 WL 4621777, at *5–6 (W.D. Mich. Oct. 7, 2021) ("[I]n *Brawner v. Scott Cnty.*, ___ F.4th ___, 2021 WL 4304754 (6th Cir. Sept. 22, 2021), in a published decision, the Sixth Circuit considered if and how *Kingsley* applied in a case involving allegations of inadequate medical care for a pretrial detainee. The court held that *Kingsley* required a modification of the deliberate-indifference standard for pretrial detainees, because the deliberate-indifference standard flowed from the Eighth Amendment's prohibition on cruel and unusual *punishments*. . . In applying *Kingsley*, however, the Sixth Circuit did not impose a strictly objective test for conditions-of-confinement claims; it modified the subjective component of the test. The court held that, as with Eighth Amendment claims, negligence is not enough. . . Instead, a recklessness standard applies. . . Nevertheless, that recklessness standard is different than the recklessness standard observed in Eighth Amendment cases, which is taken from the criminal law and applies '"only when a person disregards a risk of harm *of which he is aware*."'. . In contrast, in Fourteenth Amendment claims by pretrial detainees, the court adopted the civil recklessness standard observed by the Second, Seventh, and Ninth Circuits. . . . In other words, recklessness under the Fourteenth Amendment's substantive due process standard exists where a defendant disregards a risk of which *he is aware or should have been aware*—a 'knew or should have known' standard of disregard. . . . In the instant case, Plaintiff utterly fails to allege that he faced a serious risk to his health or safety. He merely had to remain in segregation for a few extra days. Plaintiff makes no allegations that the conditions of segregation placed him at any risk, much less a serious risk, to his health or safety; indeed, he makes no factual allegations about the conditions in the

segregation unit. He therefore fails to meet the objective component of the Fourteenth Amendment standard. Moreover, given that failure, Plaintiff cannot demonstrate that any reasonable prison official knew or should have known that Plaintiff faced an excessive risk to his health or safety, yet failed to act. Plaintiff's claim therefore fails on the subjective prong as well. Plaintiff's Eighth Amendment claim, properly construed as a substantive due process claim, therefore will be dismissed for failure to state a claim.")

SEVENTH CIRCUIT

Pittman by and through Hamilton v. Madison County, Illinois (Pittman IV), 108 F.4th 561, 566, 569-74 (7th Cir. 2024), *pet. for cert. filed*, No. 24-572 (U.S. Nov. 19, 2024) ("Over Pittman's objection, the district court instructed the jury in line with our ruling in *Pittman III*, using materially identical language to that which we approved in *Pittman III*. The jury returned a verdict for defendants, and this appeal followed. . . . We have canvassed these post-*Kingsley* decisions in order to reveal the tension, if not inconsistency, in our case law. *Miranda* and *Pittman III* can be read as requiring pretrial detainees alleging inadequate medical care claims to prove defendants' subjective awareness of the risk of harm. . . Yet in *Kemp* and *Thomas* we retreated from any such requirement in evaluating the requirements for failure-to-protect claims. . . The confusion and discrepancy arise from our interpretation of *Kingsley*'s first state-of-mind inquiry: 'the defendant's state of mind with respect to his physical acts.'. . *Pittman III*, and to a lesser extent *Miranda*, conceptualize this inquiry as requiring proof of both intentional physical action *and* awareness of the consequences of that action. . . Under this interpretation, a defendant must subjectively know the consequences of their action or inaction to act purposefully, knowingly, or recklessly. On the other hand, our failure-to-protect cases perceive the first inquiry as a lower bar, requiring proof only that a defendant 'intended to carry out a certain course of actions.'. . In these cases, once a defendant deliberately acts, their awareness of the risk of harm, or lack thereof, goes only to objective reasonableness. . . We owe it to our case law and litigants alike to resolve this confusion. Given the volume and importance of § 1983 pretrial detainee litigation, now is the time to resolve any inconsistency within our case law. The circumstance before us is one of our own making, as we (like many other courts) have struggled to implement *Kingsley*'s standards outside the context of a pretrial detainee's claim of excessive force. In light of today's clarification of our case law, we circulated this opinion to the full court under Circuit Rule 40(e). No judge in active service requested to hear this case *en banc*. . . As difficult as it is to acknowledge, we have a hard time squaring *Pittman III* with our post-*Pittman III* precedent interpreting and applying *Kingsley*. With the benefit of multiple cases in multiple contexts requiring application of this Circuit's and our sister circuits' analyses of *Kingsley*, we are left with the firm conviction that a pretrial detainee in a medical care case need not prove a defendant's subjective awareness of the risk of harm to prevail on a Fourteenth Amendment Due Process claim. To the extent *Pittman III* concluded otherwise, it is overruled on this particular point. . . . While recognizing our error, we acknowledge the difficulty we faced in *Pittman III*. This is a very complicated area of law, and in no way are we alone in struggling to discern the appropriate mental state standard for judging pretrial detainees' claims. . . .At the time of *Pittman III*, few courts had weighed in on these issues. But that has changed.

Several of our fellow circuits now agree that a pretrial detainee does not have to prove a defendant's subjective awareness of a serious risk of harm. [collecting cases] We know of no circuit court that has reached a contrary conclusion. And our post-*Pittman III* failure-to-protect cases have explained the *Kingsley* standard in cases of inaction. Leaning on *Kingsley*, we have concluded that *Kingsley*'s first inquiry requires proof only that a defendant made an intentional decision about the plaintiff's conditions. . . . With the benefit of these developments, we recognize our error in *Pittman III.* By requiring proof that 'the defendants were aware of ... or strongly suspected facts showing' a strong likelihood of harm, . . . we introduced a subjective component into *Kingsley*'s otherwise objective inquiry. The district court, following our guidance in *Pittman III*, thus erred (through no fault of its own) by instructing the jury in this most recent trial that Pittman must prove that the defendants 'were aware ... or strongly suspected facts showing a strong likelihood that [Pittman] would be seriously harmed.' Instead, on the mental-state element in question, the district court should have instructed the jury that, to prevail, Pittman must prove that the defendants did not take reasonable available measures to abate the risk of serious harm to Pittman, even though *reasonable officers under the circumstances would have understood the high degree of risk involved*, making the consequences of the defendants' conduct obvious. That is the essential objective inquiry. . . . Because we conclude *Pittman III* would be decided differently given our current understanding of *Kingsley*, adherence to that decision risks a manifest injustice and the law of the case doctrine does not apply. . . . Pittman's task on appeal is not yet over. We must still assess whether the jury instruction error prejudiced him. . . . On this trial record—and especially mindful of the evidence and arguments by both parties—we conclude that the erroneous instruction did not impact the jury's verdict. . . .Because of the way the parties presented this case, we conclude that the erroneous jury instruction did not steer the jury toward a verdict that turned on defendants' subjective awareness of the risk of harm to Pittman. . . .While we hold that the district court erred when instructing the jury that a pretrial detainee must show a defendant was subjectively aware of the risk of harm, we do not fault the district court or parties for this error. As the record reveals, the district court and parties handled this case and the jury instructions with care. The district court faithfully applied our guidance in *Pittman III* and ultimately, the legal mistake we recognize today did not prejudice Pittman. In the final analysis, then, we AFFIRM.")

Davis v. Rook, 107 F.4th 777, 780-82 (7th Cir. 2024) ("The Fourteenth Amendment standard does not require a pretrial detainee to prove the defendant's subjective awareness of the risk of harm to establish liability. See *Kemp*, 27 F.4th at 497 (explaining that such a requirement 'cannot be reconciled' with the Supreme Court's instruction in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) to 'pay careful attention to the different status of pretrial detainees' (internal quotations omitted)). The detainee must prove only that a reasonable officer under the circumstances would have appreciated the risk of harm to the detainee, and, from there, that the defendant acted in an objectively unreasonable way in addressing that risk. See *Echols v. Johnson*, --- F.4th ----, 2024 WL 3197540 at *1 (7th Cir. June 27, 2024)*; Kemp*, 27 F.4th at 497*; Thomas v. Dart*, 39 F.4th 835, 841 (7th Cir. 2022). Do not read us to be saying that the defendant's personal knowledge plays no role in the objective reasonableness analysis. Far from it: the defendant's knowledge of the *factual circumstances* informs whether a reasonable officer under the same circumstances would have

developed subjective or personal awareness of the *risk of harm* to the plaintiff. Or, as the Supreme Court put the point in *Kingsley*, the district court must assess the objective reasonableness of the defendant's action or inaction 'from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.'. . To demonstrate that a reasonable officer in the defendant's shoes would have 'put the puzzle pieces together' about the risk of harm, the detainee must show that the defendant actually received 'all the information about a potential health or safety risk.' . . . In short, we do not assume that a reasonable officer is omniscient. Instead, the first step in evaluating whether the defendant should have appreciated the risk of harm is to take inventory of the factual information that he received. . . . Davis insists that the district court's reliance on Officer Gibson's many years of experience and other bits of his personal knowledge shows that the district court rejected his failure-to-protect claim under an improper subjective standard. We disagree. The objective analysis mandated by *Kingsley* and our related precedent begins with the defendant's knowledge of the factual context and then asks whether a reasonable officer with that knowledge would appreciate the risk of harm and still engage in the same conduct. The district court charted that precise course of reasoning here by ascertaining 'what [Officer Gibson] knew at the time' before concluding that a reasonable officer in his shoes would not have perceived the risk of assault to Davis. . . A reasonable officer who had never seen cleaning supplies used as weapons in 26 years of correctional experience would have had no reason to suspect that Davis, of all inmates, would suddenly be attacked during the cleaning period on April 12 with a broomstick and mop.")

Echols v. Johnson, 105 F.4th 973, 977-78 (7th Cir. 2024) ("Echols is right that the district court's instruction misstated the law. The beginning point is recognizing that the Constitution confers a right on anyone incarcerated to be free from physical harm inflicted by others in the institution. For persons convicted of a crime and serving a sentence, the right comes from the Eighth Amendment's prohibition on cruel and unusual punishment. . . But for persons not convicted of a crime, including pretrial detainees and those like Echols who are in the civil custody of a state, the right to protection comes from the Fourteenth Amendment's Due Process Clause. . . The source of the right matters. '[D]ifferent constitutional provisions, and thus different standards, govern depending on the relationship between the state and the person in the state's custody.'. . Federal courts disagreed for years as to the standard for judging pretrial detainees' claims under the Fourteenth Amendment. The Supreme Court granted review in *Kingsley v. Hendrickson* to resolve the issue in the excessive-force context, clarifying that a pretrial detainee need show only that the force used was objectively unreasonable. . . In so holding, the Court found legal error with a jury instruction that required proof of 'reckless disregard of [the plaintiff's] rights' and a showing that the defendants 'reasonably believed there was a threat to the safety of staff or prisoners.'. . Put another way, the Court disapproved of a jury instruction that required the jury to 'weigh [a correctional officer's] subjective reasons for using force and subjective views about the excessiveness of the force.'. . In *Kingsley*'s wake, we decided two cases in 2022 that provide substantial direction for resolving this appeal. First came *Kemp v. Fulton County*, where we expressly extended the objective reasonableness inquiry for pretrial detainees to the failure-to-protect context. . . Relying at every turn on *Kingsley*, we explained that a defendant officer need

not have subjectively perceived the risk of harm particular actions or conditions of confinement presented to a plaintiff detainee. . . A subjective risk of harm requirement, we underscored, 'cannot be reconciled with *Kingsley*'s language, reasoning, and reminder to pay careful attention to the different status of pretrial detainees.'. . Next came *Thomas v. Dart*, where we expanded on our reasoning in *Kemp* by articulating in these terms the elements of a due process-based failure-to-protect claim:

(1) the defendant made an intentional decision regarding the conditions of the plaintiff's confinement; (2) those conditions put the plaintiff at substantial risk of suffering serious harm; (3) the defendant did not take reasonable available measures to abate the risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved, making the consequences of the defendant's inaction obvious; and (4) the defendant, by not taking such measures, caused the plaintiff's injuries.

39 F.4th at 841.

As *Thomas* makes clear, a pretrial or civil detainee pressing a failure-to-protect claim must have been placed at or exposed to a substantial risk of suffering serious harm with the defendant then acting in an objectively unreasonable way in response to that risk of harm. . . That brings us to the instruction the district court provided to the jury on the elements of Echols's failure-to-protect claim. The legal error in the jury instruction came with the second element, which required Echols to prove that '[t]he defendant under consideration was aware of th[e] strong likelihood that Plaintiff would be seriously harmed as the result of an assault.' By its terms—and as both parties agree—this instruction required Echols to prove that the defendant in question was aware of the strong likelihood that Rexroat would assault Echols in the dayroom. That requirement conflicts with the direction from *Kingsley*, *Kemp*, and *Thomas* because it impermissibly introduced a subjective state-of-mind component into what should have been an objective reasonableness inquiry. The jury instead should have been instructed to assess whether a reasonable officer, situated within the dayroom as the defendant at issue was situated before the attack, acted in an objectively reasonable way in taking or failing to take action to mitigate the risk of harm that Paul Rexroat presented to Minosa Echols.")

Chilcutt v. Santiago, No. 22-2916, 2023 WL 4678583 (7th Cir. July 21, 2023) (not reported) ("The estate contends Tabisz and Santiago violated Chilcutt's rights under the Fourteenth Amendment when they failed to provide the booking officer with information about the October 7 incident and took no steps to prevent him from harming himself. Santiago even gave Chilcutt the blanket with which he hanged himself. To prevail on the merits, the estate must show that the officers acted in an objectively unreasonable manner. *See Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (denial of medical care); *Kemp v. Fulton County*, 27 F.4th 491, 497 (7th Cir. 2022) (failure to protect). A wrinkle here is that, in 2017, objective unreasonableness was not the standard applicable to pretrial detainees' claims about their conditions of confinement; they were still treated as deliberate indifference claims, which come with a higher burden of proof. . . We have not explicitly addressed how the change in the standard affects the qualified-immunity analysis. In prior cases, we have applied current law (objective unreasonableness) to determine on the merits whether there was a violation of a constitutional right, and, for purposes of qualified immunity,

looked to our deliberate indifference cases to determine if the right was clearly established at the time. *See, e.g.*, *Hardeman v. Curran*, 933 F.3d 816, 820–22 (7th Cir. 2019). We need not decide the issue here, though, because either way, the estate must show that the officers knew or had notice that Chilcutt was at risk of suicide.")

Stockton v. Milwaukee County, 44 F.4th 605, 614 n.3 (7th Cir. 2022) ("Until oral argument, both parties apparently presumed the Eighth Amendment provided the proper standard for evaluating Stockton's deliberate indifference claim. We are not so certain. In *Miranda v. County of Lake*, we held the standard for pretrial detainees challenging their medical care under the Fourteenth Amendment is lower than that for post-conviction prisoners proceeding under the Eighth Amendment. . . It is not entirely clear whether Madden-incarcerated at the MCJ on an unadjudicated probation violation-fits within the Eighth Amendment or the Fourteenth Amendment framework. We need not resolve this issue, however, as Stockton failed to advocate for Fourteenth Amendment treatment, thereby waiving the question. . . For purposes of this appeal, we assume without concluding the Eighth Amendment applies.")

Thomas v. Dart, 39 F.4th 835, 842-43 (7th Cir. 2022) ("Without more, . . . simply being housed in the Jail's general population, even while suffering from PTSD, is not a particular enough risk in the failure-to-protect context. The unfortunate reality is that jails and prisons are dangerous places inhabited by violent people. . . The constitutional expectation 'is that guards act responsibly under the circumstances that confront them,' not that they anticipate every potential danger facing a detainee. . . As the Supreme Court cautioned in *Kingsley*, an assessment of objective reasonableness must be made 'on the facts and circumstances of each particular case' and 'from the perspective of a reasonable officer on the scene, including what the officer knew at the time.'. .To be sure, the specific risk a reasonable officer would appreciate need not be uniquely associated with the plaintiff or his attacker. The risk can be based on 'a victim's particular vulnerability' (even though the identity of the assailant is not known before the attack), or it can be based on 'an assailant's predatory nature' (even though the identity of the victim is not known before the attack). . . But either way, the risk must be somehow 'specific to a detainee, and not a mere general risk of violence.'. . Thomas cannot assert an appreciable risk of harm based solely on his placement in the Jail's general population because the 'general risks of violence in prison' confront virtually every detainee. . . Nor has Thomas offered a plausible reason why the intake clerks should have been on notice that placing him in the Jail's general population *with PTSD* created a substantial risk. He does not suggest that his having PTSD provoked, encouraged, or made more likely his assault by another Jail inmate. And he does not suggest that the inmate who assaulted him had a known propensity for violence against detainees like Thomas. This case, then, resembles *In re Estate of Rice*, 675 F.3d 650 (7th Cir. 2012). There we held that a valid failure-to-protect claim was not alleged when a mentally ill detainee was assaulted by another inmate over the detainee's hygiene problem because jail personnel—though aware of the hygiene problem—had no notice that he was at risk of assault because of that problem.'")

Kemp v. Fulton County, 27 F.4th 491, 495-97 (7th Cir. 2022) ("While *Kingsley* was specifically about excessive-force claims, we have recognized that '[n]either the Supreme Court's logic nor its language' is limited to that context. . . Recognizing the Supreme Court's 'signal[ ] that courts must pay careful attention to the different status of pretrial detainees' as compared with convicted offenders, we have applied *Kingsley*'s objective unreasonableness test to other Fourteenth Amendment claims, including challenges to inadequate medical care and other conditions of pretrial confinement. . . Other circuits, including the Second, Sixth, Ninth, and Tenth, have similarly concluded that *Kingsley*'s objective standard applies to some or all conditions-of-confinement cases brought by pretrial detainees. See *Brawner v. Scott Cnty.*, 14 F.4th 585, 596 (6th Cir. 2021) (medical need); *Colbruno v. Kessler*, 928 F.3d 1155, 1161–63 (10th Cir. 2019) (general conditions of confinement); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018) (medical need); *Darnell v. Pineiro*, 849 F.3d 14, 34–35 (2d Cir. 2017) (general conditions of confinement). But see *Strain v. Regalado*, 977 F.3d 894 (10th Cir. 2020) (holding that *Kingsley* is limited to excessive-force cases and applying both a subjective and objective standard to medical-care cases). Following *Kingsley, Miranda*, and *Hardeman*, a plaintiff such as Kemp challenging the conditions of his pretrial detention need show only that a defendant's conduct was 'objectively unreasonable.'. . Burget thus would be liable if he 'acted purposefully, knowingly, or perhaps even recklessly' in coming to work without his hearing aid, but not if he were no more than negligent. . . .We have not yet had the occasion to consider how *Kingsley, Miranda*, and *Hardeman* apply to a failure-to-protect claim. Our pre-*Kingsley* cases follow the Eighth Amendment's approach (*i.e.*, objective harm plus subjective intent) to pretrial settings. . . But, just as we have done with medical-care and excessive-force cases, we must now take *Kingsley* into account. We begin by recalling that in *Kingsley*, the Supreme Court explained that an excessive-force claim raises two distinct state-of-mind issues:

The first concerns the defendant's state of mind with respect to his physical acts—*i.e.*, his state of mind with respect to the bringing about of certain physical consequences in the world. The second question concerns the defendant's state of mind with respect to whether his use of force was 'excessive.' ... We conclude with respect to that question that the relevant standard is objective not subjective.

Kingsley, 576 U.S. at 395. . . . The Ninth Circuit, sitting *en banc*, applied these principles to failure-to-protect claims in *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (7th Cir. 2016) (*en banc*). It held there that a pretrial detainee does not need to show that an officer with all the information about a potential health or safety risk actually did put the puzzle pieces together. In doing so, it contrasted the test in Fourteenth Amendment cases with the Eighth Amendment's requirement to show subjective deliberate indifference. . . At the same time, as we have done, it acknowledged that 'negligent conduct does not offend the Due Process Clause.'. . . Like the Ninth Circuit, and following our own post-*Kingsley* line of cases, we now hold that *Kingsley* abrogates *Guzman, Butera*, and their kin to the extent that they require pretrial detainees to show, in a failure-to-protect case, that a defendant was subjectively 'aware of a substantial risk of serious injury.'. . This requirement cannot be reconciled with *Kingsley*'s language, reasoning, and reminder to 'pay careful attention to the different status of pretrial detainees.'. . We hold, as the Ninth Circuit did in *Castro*, that the defendant officer must intend to carry out a certain course of actions; negligence

is not enough. At that point, the remaining question is whether that course is objectively reasonable. If not, there is a Fourteenth Amendment violation.")

Redman v. Downs, No. 20-1655, 2021 WL 1889749, at *2 (7th Cir. May 11, 2021) (not reported) ("We agree that the district court erred by dismissing [the claims] at screening under a deliberate-indifference standard. To state a claim under the Fourteenth Amendment, a pretrial detainee must allege only that the defendants purposefully, knowingly, or recklessly created conditions that were objectively unreasonable. . . Redman did so. Jails must provide detainees with 'basic human needs,' including clothing and hygiene products. . . Here, Redman alleged that he was not provided with soap, a toothbrush, and toothpaste for at least 51 days. Further, he allegedly lacked something to cover himself (even a suicide smock) for at least 10 days after his suicide attempt and had to walk the halls naked, past jail staff, to get his meals. Although Officers Finley and Harper taunted him as he did so, they never gave him another smock and neither did any other officer. Finally, Redman alleged that the deprivations of clothing and hygiene products were demeaning and humiliating. . . We note that 'officials must be free to take appropriate action to ensure the safety of inmates.'. . But that potential explanation for the deprivation did not provide a basis to dismiss Redman's claim at the pleadings stage. Further, it does not follow from the need to keep hygiene items out of the cell to prevent self-harm—*if* that is why Redman did not have soap or dental hygiene products—that a detainee may be altogether deprived of opportunities to wash himself or brush his teeth.")

Mays v. Dart, 974 F.3d 810, 819 n.1, 819-21, 824 (7th Cir. 2020) ("Both the Sixth Circuit and the Eleventh Circuit have recently addressed conditions of confinement claims involving the coronavirus in prison settings. *See Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020), in *Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020). These Circuits, however, apply an Eighth Amendment deliberate indifference standard to pretrial detainee conditions of confinement claims rather than the objectively unreasonable claim that we apply, and thus focus on a subjective element that is not at issue here. . . . The district court erred by narrowly focusing its objective reasonableness analysis almost exclusively on social distancing instead of considering the totality of facts and circumstances, including all of the Sheriff's conduct in responding to and managing COVID-19. Citing *McCann*, the district court wrote, 'To succeed on their claim, the plaintiffs must show that the Sheriff's conduct in addressing the risks posed by exposure to coronavirus is objectively unreasonable *in one or more respects*.'. . The district court then went on to emphasize social distancing and the Sheriff's efforts to implement social distancing to the exclusion of the Sheriff's other actions. This analysis incorrectly ignored the totality of the circumstances. It may very well be the case that a particular aspect of an action is so lacking that the failing on this one factor will lead a court to correctly conclude the entire course of challenged conduct was objectively unreasonable. It may also be that some actions or inactions are more consequential than others. But that does not mean that the court should evaluate each aspect of the disputed actions in a vacuum, especially in a case involving a systemic claim like here. Rather, the court must consider the total of the circumstances surrounding the challenged action. In addition, the district court hinged its decision to impose a social distancing directive on the basis of one, and only one, key

factual finding: 'At the current stage of the pandemic, group housing and double celling subject detainees to a heightened ... risk of contracting and transmitting the coronavirus.' We do not suggest that this finding was erroneous: the district court had before it a voluminous evidentiary record about the importance of social distancing to reducing transmission of COVID-19. Instead, we take issue with what was missing: absent from the district court's reasoning was any mention of the totality of the measures the Sheriff already had taken to combat the spread of COVID-19, including those regarding social distancing. By the time the district court issued the preliminary injunction, the Sheriff had already implemented several such measures. Notably, and as the district court initially acknowledged in its temporary restraining order, these included substantial efforts to increase social distancing, such as opening shuttered divisions of the Jail, creating new single-cell housing, and decreasing the capacity of dormitories. The Sheriff had also undertaken extensive other measures to prevent and manage the spread of COVID-19 at the Jail. By failing to evaluate the request for a policy precluding double celling and group housing in light of the other aspects of the Sheriff's COVID response, the district court did not properly consider the totality of the facts and circumstances when evaluating the objective unreasonableness of the Sheriff's actions. . . .When evaluating Plaintiffs' request for a policy precluding group housing and double celling, the district court made a passing reference to its obligation to 'account for and give deference to the Sheriff's interest in managing the Jail facilities and to practices that are needed to preserve order and discipline and maintain security.' The district court, however, did not discuss in a meaningful way how, if at all, the considerable deference it owed to the judgment of prison administrators impacted its analysis. Undoubtedly, safety and security concerns play a significant role in a correctional administrator's housing decisions: jails and prisons require some degree of flexibility in choosing cell assignments, as they need to ensure, for example, that detainees are assigned to the living quarters corresponding with their security classifications and factoring in particular vulnerabilities that increase security risks. This is especially true at the Jail where the population fluctuates daily given the number of bookings and releases that take place. Correctional officers similarly must have the freedom to quickly reassign inmates when fights or other emergency situations occur that threaten the safety of staff and inmates. This is perhaps no more important than at a facility like the Cook County Jail, which houses a wide range of detainees accused of committing up to the most serious of violent offenses. Given the deference courts owe to correctional administrators on matters implicating safety concerns and the substantial role that security interests play in housing assignments, the failure to consider these interests was a legal error. . . .We commend Judge Kennelly for his handling of the motion, particularly in light of the many novel issues posed by the onset of COVID-19 and the case's emergent nature. We nevertheless REVERSE in part and VACATE the portion of the preliminary injunction precluding double celling and group housing because of the legal errors that arose as the district court applied the objective reasonableness standard recently announced in *Kingsley*.")

Pittman by and through Hamilton v. County of Madison, Illinois (Pittman III), 970 F.3d 823, 827-28 (7th Cir. 2020) ("The challenged jury instruction required the jury to make four findings: (1) '[t]here was a strong likelihood that [Pittman] would seriously harm himself,' (2) the defendants 'were aware of ... or strongly suspected facts showing [this] strong likelihood,' (3) they

'consciously failed to take reasonable measures to prevent [Pittman] from harming himself,' and (4) Pittman 'would have suffered less harm if [the defendants] had not disregarded the risk.' Pittman argues that the instruction is inconsistent with the objectively reasonable standard that we recently articulated in *Miranda v. County of Lake*, 900 F.3d 335 (7th Cir. 2018). Before *Miranda,* this circuit evaluated a Fourteenth Amendment due process claim brought by a pretrial detainee under the deliberate indifference standard, which 'requires a showing that the defendant had a "sufficiently culpable state of mind" and asks whether the official actually believed there was a significant risk of harm.'. . This standard tracked the subjective inquiry employed for Eighth Amendment claims—and that made it a misfit. 'Pretrial detainees stand in a different position' than convicted prisoners, so 'the punishment model is inappropriate for them.'. . Moreover, our approach was undercut by the Supreme Court's decision in *Kingsley v. Hendrickson,* which held that an excessive-force claim brought by a pretrial detainee under the Fourteenth Amendment must be evaluated under an objective test rather than the subjective deliberate indifference standard. . . So in *Miranda,* we changed course. Taking our cue from *Kingsley,* we held that an objective standard applies to medical-needs claims brought by pretrial detainees such as the one brought by Pittman. . . Under this standard, the jury must answer two questions. First, it must decide whether the 'defendants acted purposefully, knowingly, or perhaps even recklessly.'. . Second, it must determine whether the defendants' actions were 'objectively reasonable.'. . Pittman argues that the jury instruction conflicts with this test because the jury was told to consider whether the defendants '*were aware of ... or strongly suspected*' facts showing a likelihood that Pittman would harm himself and whether the defendants '*consciously* failed to take reasonable measures' to avert that harm. . . According to Pittman, this language directed the jury to apply the now defunct subjective test rather than the objective test that governs under *Miranda*. Pittman's argument fails as to the instruction that the jury decide whether the defendants 'were aware of ... or strongly suspected facts showing' a strong likelihood that Pittman would harm himself. This language goes to *Miranda*'s first inquiry: whether the defendants acted 'purposefully, knowingly, or perhaps even recklessly.' At bottom, *Miranda*'s first inquiry encompasses all states of mind except for negligence and gross negligence. . . The challenged language accurately conveyed this standard to the jury: if the defendants 'were aware' that their actions would be harmful, then they acted 'purposefully' or 'knowingly'; if they were not necessarily 'aware' but nevertheless 'strongly suspected' that their actions would lead to harmful results, then they acted 'recklessly.' This much is consistent with *Miranda*. But the district court erred by telling the jury to determine whether the defendants '*consciously* failed to take reasonable measures to prevent [Pittman] from harming himself.' . . This language conflicts with *Miranda*'s second inquiry: whether the defendants acted in an 'objectively reasonable' manner. By using the word 'consciously,' the instruction erroneously introduced a subjective element into the inquiry. Under *Miranda*'s standard, whether the defendants' failure to take reasonable measures was the result of a *conscious* decision is irrelevant; they are liable if their actions (or lack thereof) were *objectively* unreasonable. . . Because the word 'consciously' rendered the jury instruction impermissibly subjective, the jury instruction misstated the law. This error likely 'confused or misled' the jury. . . Although the word 'consciously' is the only aspect of the instruction that conflicts with *Miranda*, we consider 'the instructions as a whole, along with all of the evidence and arguments.'. . Here, the evidence and

arguments presented at trial by both Pittman and the defendants reveal that the word 'consciously' was likely prejudicial. . . . In light of the evidence presented at trial and the arguments made by the defendants, the use of the word 'consciously' likely steered the jury toward the subjective deliberate indifference standard. And that error 'likely made [a] difference in the outcome,'. . . because a reasonable jury could conclude that the defendants' failure to provide medical care for Pittman was objectively unreasonable, but not a conscious failure. In sum, because the jury instruction misstated *Miranda*'s objective standard and the error was likely prejudicial, we reverse the judgment and remand the case for a new trial.")

Pulera v. Sarzant, 966 F.3d 540, 550 (7th Cir. 2020) ("Pulera maintains that he was an arrestee subject to the Fourth Amendment. In the non-medical defendants' contrary view, Pulera was properly classified as a pretrial detainee. Although a judge conducted a *Gerstein* hearing for Pulera's bail jumping charge the day after his suicide attempt, they argue that another judge found probable cause to arrest him for battery in 2011 and that this qualifies him as a pretrial detainee. At oral argument, though, the parties all agreed that the standards are now effectively the same for judging the adequacy of custodial medical care under either Amendment. Under the Fourth Amendment, an arrestee must demonstrate that an official's actions were 'objectively unreasonable under the circumstances.'. . This objective rule is easier for a plaintiff to meet than the subjective deliberate-indifference standard used under the Eighth Amendment. . . For years, we also used the more onerous subjective approach for Fourteenth Amendment claims relating to conditions of pretrial detention. . . In 2018, however, we clarified that pretrial detainees' medical-care claims are now governed by an 'objective unreasonableness inquiry.' *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018). Both standards, then, are objective, and the non-medical defendants identify no practical difference between them.")

Hardeman v. Curran, 933 F.3d 816, 822-23 (7th Cir. 2019) ("It is true that *Kingsley* directly addressed only claims of excessive force, and so some circuits have understood its holding to be confined to those facts. See *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (collecting cases). We, however, have not taken that approach. Recognizing 'that the Supreme Court has been signaling that courts must pay careful attention to the different status of pretrial detainees,' we have held that a pretrial detainee's claims of inadequate medical care 'are subject only to the objective unreasonableness inquiry identified in *Kingsley*.'. . The plaintiffs in this case suggest that we should extend *Kingsley* further from the medical context to the general conditions-of-confinement problem we have here. We see no principled reason not to do so. To the contrary, as we recognized in *Miranda*, there is 'nothing in the logic the Supreme Court used in *Kingsley* that would support this kind of dissection of the different types of claims that arise under the Fourteenth Amendment's Due Process Clause.'. . The Supreme Court has also said that medical care is simply one of the many conditions of confinement to which an imprisoned person is subjected. . . As we recognized in *Miranda*, several of our sister circuits have viewed *Kingsley*'s holding as establishing that an objective inquiry applies to a variety of conditions-of-confinement claims, not just those involving excessive force. *Miranda*, 900 F.3d at 351–52; see also *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018) (medical-need claim); *Darnell v. Pineiro*,

849 F.3d 17, 34–35 (2d Cir. 2017) (conditions of confinement generally); *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1070–71 (9th Cir. 2016) (*en banc*), *cert. denied*, —— U.S. ——, 137 S. Ct. 831, 197 L.Ed.2d 69 (2017) (failure-to-protect claim). Since *Miranda* was decided, the Tenth Circuit has joined those that apply *Kingsley*'s objective inquiry to a claim other than excessive use of force. See *Colbruno v. Kessler*, 928 F.3d 1155, 1161–63 (10th Cir. 2019). . . . Like the Second and Tenth Circuits, we see no doctrinal reason to distinguish among different types of conditions-of-confinement claims for purposes of applying *Kingsley*'s objective standard. Neither the Supreme Court's logic nor its language suggests that such a distinction is proper. . .We therefore hold that *Kingsley*'s objective inquiry applies to all Fourteenth Amendment conditions-of-confinement claims brought by pretrial detainees.")

Hardeman v. Curran, 933 F.3d 816, 823-24 (7th Cir. 2019) ("A single clogged toilet does not violate the Constitution, and prisoners are not entitled to Fiji Water on demand. But on the other end of the spectrum, a defendant cannot purposefully deny water until a prisoner is on the brink of death or force a prisoner permanently to live surrounded by her own excrement and that of others. The latter actions would be so obviously unconstitutional that qualified immunity could not protect the perpetrators.")

Hardeman v. Curran, 933 F.2d 816, 825-27 (7th Cir. 2019) (Sykes, J., concurring in the judgment) ("After *Miranda v. County of Lake*, 900 F.3d 335 (7th Cir. 2018), it makes sense as a doctrinal matter to extend *Kingsley*'s objective standard to all conditions-of-confinement claims by pretrial detainees. . . . In *Miranda* we extended *Kingsley*'s 'objective unreasonableness' standard to a claim that a pretrial detainee received constitutionally inadequate medical care. . . We emphasized, however, that *Kingsley* retained the rule that mere negligence is not a constitutional violation. . . . Like my colleagues, I see no principled reason to treat general conditions-of-confinement claims differently than medical conditions-of-confinement claims. I therefore agree that this case is governed by *Kingsley*'s objective standard—but importantly, only at the step in the liability framework that requires an *interpretation* of the conditions to which the plaintiffs were subjected during the three-day water shutoff. As I've just explained, under *Kingsley* the constitutional claim still carries a subjective component. To prevail, the plaintiffs must prove that the defendants acted purposefully, knowingly, or recklessly; negligence is not enough. In addition, nothing in *Kingsley* removed the threshold requirement in every conditions-of-confinement claim: 'the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.'. . .So to prevail on a claim alleging unconstitutional conditions of pretrial confinement, the plaintiff must prove three elements: (1) the conditions in question are or were objectively serious (or if the claim is for inadequate medical care, his medical condition is or was objectively serious); (2) the defendant acted purposefully, knowingly, or recklessly with respect to the consequences of his actions; and (3) the defendant's actions were objectively unreasonable—that is, 'not rationally related to a legitimate governmental objective or ... excessive in relation to that purpose.'")

McCann v. Ogle County, Illinois, 909 F.3d 881, 886-87 (7th Cir. 2018) ("After the district court ruled on the defendants' motions for summary judgment, we decided *Miranda v. County of Lake*,

900 F.3d 335 (7th Cir. 2018), holding that a standard of objective reasonableness, and not deliberate indifference, governs claims under the Fourteenth Amendment's Due Process Clause for inadequate medical care provided to pretrial detainees. Our decision in *Miranda* hewed closely to *Kingsley v. Hendrickson*, where the Supreme Court held that the due process standard for assessing a pretrial detainee's claim of excessive force should be 'objective not subjective.'. . A pretrial detainee 'needed only to show that the defendant's conduct was *objectively* unreasonable,' without any accompanying requirement to demonstrate, as would be the case in a claim brought under the Eighth Amendment's Cruel and Unusual Punishment Clause by an inmate serving a sentence, 'that the defendant was *subjectively* aware that the amount of force being used was unreasonable.'. . After *Miranda*, then, the controlling inquiry for assessing a due process challenge to a pretrial detainee's medical care proceeds in two steps. The first step, which focuses on the intentionality of the individual defendant's conduct, remains unchanged and 'asks whether the medical defendants acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of their handling of [plaintiff's] case.'. . A showing of negligence or even gross negligence will not suffice. . . At the second step, and now aligned with *Kingsley*, we ask whether the challenged conduct was objectively reasonable. . .This standard requires courts to focus on the totality of facts and circumstances faced by the individual alleged to have provided inadequate medical care and to gauge objectively—without regard to any subjective belief held by the individual—whether the response was reasonable. . . . Like the district court, we cannot say on the record before us that Nurse Mongan's administration of the methadone dosages prescribed by Dr. Cullinan was objectively unreasonable.")

Miranda v. County of Lake, 900 F.3d 335, 350-54 (7th Cir. 2018) ("[W]e have typically assessed pretrial detainees' medical care (and other) claims under the Eighth Amendment's standards, reasoning that pretrial detainees are entitled to at least that much protection. . . In conducting this borrowing exercise, we have grafted the Eighth Amendment's deliberate indifference requirement onto the pretrial detainee situation. . . Missing from this picture has been any attention to the difference that exists between the Eighth and the Fourteenth Amendment standards. The Supreme Court recently disapproved the uncritical extension of Eighth Amendment jurisprudence to the pretrial setting in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). . . .Though *Kingsley*'s direct holding spoke only of excessive-force claims, two of our sister circuits have held that its logic is not so constrained. The Ninth Circuit first extended *Kingsley*'s objective inquiry to detainees' Fourteenth-Amendment failure-to-protect claims. [citing *Castro v. Cnty. of L.A.*] Since then, that court has applied the *Kingsley* holding more broadly to a medical-need claim brought by a pretrial detainee. [citing *Gordon v. Cnty. of Orange*] The Second Circuit followed suit, applying the objective standard to detainees' Fourteenth-Amendment complaints about their conditions of confinement; in the process it overruled a decision applying a subjective test to a medical-care claim. [citing *Darnell v. Pineiro*] Later, the Second Circuit expressly applied an objective standard to a claim of deliberate indifference to a serious medical condition. [citing *Bruno v. City of Schenectady*] Other courts of appeals have contemplated the same reading of *Kingsley*. [citing *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018)] The Eighth, Eleventh, and Fifth Circuits have chosen to confine *Kingsley* to its facts—that is, to Fourteenth-Amendment claims based on

excessive-force allegations in a pretrial setting. [citing cases] Some circuits have continued to analyze inadequate medical treatment claims under the deliberate indifference standard without grappling with the potential implications of *Kingsley*. . . We have not yet expressly weighed in on the debate. Since *Kingsley*, we have continued to duplicate the Eighth Amendment inquiry for claims of deficient medical treatment. *E.g.*, *Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 554 n.31 (7th Cir. 2016). But we have acknowledged that *Kingsley* has 'called into question' our case law treating the 'protections afforded by' the Eighth and Fourteenth Amendments as ' "functionally indistinguishable" in the context of a claim about inadequate medical care.' *Smego v. Jumper*, 707 F. App'x 411, 412 (7th Cir. 2017). . . Because the answer may make a difference in the retrial of Gomes's claims, we think it appropriate to address the proper standard at this time. We begin with the fact that the Supreme Court has been signaling that courts must pay careful attention to the different status of pretrial detainees. In this respect, *Kingsley* does not stand alone. . . The Court has cautioned that the Eighth Amendment and Due Process analyses are not coextensive. . . We see nothing in the logic the Supreme Court used in *Kingsley* that would support this kind of dissection of the different types of claims that arise under the Fourteenth Amendment's Due Process Clause. To the contrary, the Court said that '[t]he language of the [Eighth and Fourteenth Amendments] differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less "maliciously and sadistically."'. . We thus conclude, along with the Ninth and Second Circuits, that medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*. . . . The defendants here worry that an objective-reasonableness standard will impermissibly constitutionalize medical malpractice claims, because it would allow mere negligence to suffice for liability. A careful look at *Kingsley*, however, shows that this is not the case; the state-of-mind requirement for constitutional cases remains higher. . . . The allegations here easily fit the mold of *Gordon*, *Darnell*, and *Castro*. A properly instructed jury could find that Drs. Elazegui and Singh made the decision to continue observing Gomes in the jail, rather than transporting her to the hospital, with purposeful, knowing, or reckless disregard of the consequences. (The jury could also reject such a conclusion.) It would be a different matter if, for example, the medical defendants had forgotten that Gomes was in the jail, or mixed up her chart with that of another detainee, or if Dr. Elazegui forgot to take over coverage for Dr. Kim when he went on vacation. Such negligence would be insufficient to support liability under the Fourteenth Amendment, even though it might support state-law liability. Here, there is evidence that Drs. Elazegui and Singh deliberately chose a 'wait and see' monitoring plan, knowing that Gomes was neither eating nor drinking nor competent to care for herself. . . Because the Estate does not claim merely negligent conduct, a jury must decide whether the doctors' deliberate failure to act was objectively reasonable. . . . Any death is a great loss, but one as preventable as Gomes's is especially disturbing. On this record, a jury could have found that the intentional and knowing inaction of Drs. Elazegui and Singh caused Gomes's death. We therefore Reverse and Remand for new trial of the Estate's claim against them, as it relates to Gomes's death. We Affirm the district court's grant of summary judgment to the County defendants.")

Smego v. Jumper, 707 F. App'x 411, 412 (7th Cir. 2017) ("Because Smego is a civil detainee—not a prisoner—his claims derive from the Fourteenth Amendment's guarantee of due process, not the Eighth Amendment's right to be free from cruel and unusual punishment. . . In prior cases we have said that the protections afforded by these constitutional amendments are 'functionally indistinguishable' in the context of a claim about inadequate medical care. . . But these cases have been called into question by *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015), which applied a purely objective standard to a detainee's excessive-force claim without regard to any subjective component. See *Collins v. Al-Shami*, 851 F.3d 727, 731 (7th Cir. 2017). We have not decided whether the reasoning in *Kinglsey* extends beyond claims of excessive force. See *Collins*, 851 F.3d at 731; but see *Darnell v. Pineiro*, 849 F.3d 17, 36 (2d Cir. 2017) (applying objective-reasonableness standard to detainee's conditions-of-confinement claim); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc) (same with failure-to-protect claim). But we need not resolve this issue now, because even under the less demanding objective-reasonableness standard, Smego would not prevail.")

Collins v. Al-Shami, 851 F.3d 727, 731 (7th Cir. 2017) ("The Fourth Amendment applies to the period of confinement between a warrantless arrest and the probable-cause determination . . . the Due Process Clause of the Fourteenth Amendment governs after the probable-cause determination has been made. . . and the Eighth Amendment applies after a conviction[.] . . The parties in this case agree that Collins's federal claims are subject to the Due Process Clause, but disagree on what that Clause entails. In the past, we have applied to due-process claims of inadequate medical care the deliberate-indifference standard derived from the Eighth Amendment. . . That standard includes both an objective and subjective component . . . and thus is more difficult to satisfy than its Fourth Amendment counterpart, which requires only that the defendant have been objectively unreasonable under the circumstances[.] . . . Collins argues that under *Kingsley v. Hendrickson*, — U.S. —, 135 S. Ct. 2466 (2015), it is the objective-unreasonableness standard that governs here . . . but *Kingsley* was an excessive-force case, and we have not yet addressed whether its reasoning extends to claims of allegedly inadequate medical care, *cf. Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 554 n.31 (7th Cir. 2016). We need not (and do not) resolve that issue here, however, as even under the less-demanding standard, Collins's federal claims still cannot succeed.")

Mulvania v. Sheriff of Rock Island County, 850 F.3d 849, 856-58 (7th Cir. 2017) ("Because plaintiffs were pretrial detainees, not convicted prisoners, we assess their claim under the Fourteenth Amendment instead of the Eighth Amendment. In *Bell v. Wolfish*, the Supreme Court held that the Fourteenth Amendment's Due Process Clause prohibits holding pretrial detainees in conditions that 'amount to punishment.'. . A pretrial condition can amount to punishment in two ways: first, if it is 'imposed for the purpose of punishment,' or second, if the condition 'is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment.'. . The Supreme Court recently explained that 'a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.'. . .Giving plaintiffs the benefit of favorable

inferences from this record, a reasonable trier of fact could find that the white underwear policy is not rationally related to a legitimate governmental objective, or is at least excessive in relation to such a purpose. This conclusion, without more, supports an inference that the policy punishes pretrial detainees in violation of the Fourteenth Amendment. . . We therefore reverse the district court's grant of summary judgment against the plaintiffs on their challenge to the white underwear policy. . . .Even if the jail's policy might ultimately be found to be rationally related to a legitimate governmental objective, the deprivation it imposes must not be excessive in relation to that purpose. . . .Dignity serves an important balancing function alongside the legitimate safety and management concerns of jails and prisons. . . .Without the counterweight of dignity, a jail could presumably set forth security reasons to require detainees to remain naked throughout their detention or other such unseemly measures. The Constitution forbids such tactics. It requires consideration of individual dignity interests when assessing the permissibility of restrictive custodial policies. . . . Here, the plaintiff–detainees allege a credible dignitary harm. They describe their experiences being deprived of their underwear as 'very uncomfortable,' 'embarrassing,' 'humiliating,' and 'upsetting.' In addition, the policy resulted in detainees attending their own court hearings without underwear. At least one plaintiff was deprived of her underwear during her menstrual cycle. This indignity lasted for indeterminate periods of time. The district court found that detainees would be deprived of underwear for at most one day, but we have not found support for that finding. Defendants appear to concede this point in their brief. Thus, even if the white underwear policy turns out to be rationally related to a legitimate interest, the dignitary harm imposed by the policy might still be excessive in relation to that interest.")

Phillips v. Sheriff of Cook Cty., 828 F.3d 541, 554 n.31 (7th Cir. 2016) ("'The Eighth Amendment's ban on 'cruel and unusual punishments' requires prison officials to take reasonable measures to guarantee the safety of inmates, including the provision of adequate medical care.' *Minix v. Canarecci*, 597 F.3d 824, 830 (7th Cir. 2010). We note that some members of the class are pretrial detainees and that 'the Eighth Amendment applies only to convicted persons.'. . However, in this context, the present case law holds that 'pretrial detainees ... are entitled to the same basic protections under the Fourteenth Amendment's due process clause. Accordingly, we apply the same legal standards to deliberate indifference claims brought under either the Eighth or Fourteenth Amendment.'. . *But see Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015) (holding that there are different standards for sentenced prisoners and pretrial detainees in the case of excessive force claims).")

Smith v. Dart, 803 F.3d 304, 309-10 & n.2 (7th Cir. 2015) ("At the outset, we note that Smith's constitutional rights as a pretrial detainee are derived from the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment, which is applicable to convicted prisoners. *See, e.g., Kingsley v. Hendrickson,* —— U.S. ——, 135 S.Ct. 2466, 2475, 192 L.Ed.2d 416 (2015); *Budd v. Motley,* 711 F.3d 840, 842 (7th Cir.2013). In the context of a conditions of confinement claim, a pretrial detainee is entitled to be free from conditions that amount to 'punishment,'. . . while a convicted prisoner is entitled to be free from conditions that constitute 'cruel and unusual punishment.'. . In both cases, however, the alleged conditions must be

objectively serious enough to amount to a constitutional deprivation, and the defendant prison official must possess a sufficiently culpable state of mind. . . .With respect to this second, subjective element, an inmate must 'prove that the defendant "possess[ed] a purposeful, a knowing, or possibly a reckless state of mind" with respect to the defendant's actions (or inaction) toward the plaintiff.' *Davis v. Wessel,* 782 F.3d 793, 801 (7th Cir.2015) (quoting *Kingsley,* 135 S.Ct. at 2472). Although the parties argue this element in their briefs, it is not at issue in this appeal. As the district court correctly noted, the personal involvement of senior jail officials, such as Dart, can be inferred at the motion to dismiss stage, where, as here, the plaintiff alleges 'potentially systemic,' as opposed to 'clearly localized,' constitutional violations. *See Antonelli v. Sheahan,* 81 F.3d 1422, 1428–29 (7th Cir.1996). . . .Smith first contends that, in dismissing his conditions of confinement claims, the district court conflated the Fourteenth Amendment with the Eighth Amendment, and thus failed to consider whether his claims fell somewhere within the 'gray area' that exists between them. First, the district court acknowledged Smith's status as a pretrial detainee and that his rights are derived from the Fourteenth Amendment. The district court also recognized the Supreme Court's holding in *Bell v. Wolfish* that due process protects pretrial detainees from being subjected to conditions of confinement that amount to punishment. The court determined, however, that Smith failed to allege facts indicating that he was subjected to such grave conditions. Second, the district court did not err by relying on Eighth Amendment cases or by failing to consider whether Smith's conditions of confinement claims fell within some 'gray area' that exists between the Eighth and Fourteenth Amendments. We have held that there is little practical difference, if any, between the standards applicable to pretrial detainees and convicted inmates when it comes to conditions of confinement claims, and that such claims brought under the Fourteenth Amendment are appropriately analyzed under the Eighth Amendment test.")

Smith v. Dart, 803 F.3d 304, 316-17 (7th Cir. 2015) (Posner, J., concurring and dissenting) ("The majority opinion upholds some of his claims, rejects others, and for the most part I agree with its rulings. But not with respect to the alleged infestation of his cell by mice and cockroaches, and the inadequate heating of his cell (although footnote 4 of the majority opinion leaves some room for him to renew the heating complaint on remand). The district judge directed this pro se plaintiff to file an amended complaint specifying whether the infestation of his cell by mice and cockroaches was 'so profound as to rise to the level of a constitutional violation.' How could a pro se jail detainee be expected to answer such a question? He had alleged that the mice and cockroaches were in his food and that he developed scabies—a highly contagious skin infestation, productive of severe itching, and sometimes referred to as 'the seven-year itch'—from the unsanitary conditions. What more should be required to state a claim of punishment? That he keep a record of the number of his meals that he shared with the vermin? He alleged that his cell was inadequately heated during the winter; again, what more should he have been required to allege—does the jail give him a thermometer and a calendar, so that he can keep a written record of the temperature in his cell day by day to submit to a judge? Smith responded to the defendants' request for more information about the pest and heating allegations. That should have been enough to convince the district court to deny the motion to dismiss. The jail's counsel would then have deposed the plaintiff and maybe other inmates and also jail employees and on the basis of the testimony elicited

in those depositions might have moved successfully for summary judgment. Because the district judge terminated the case prematurely, no one will ever know whether the plaintiff's rejected claims concerning pest infestation and (subject to the qualification in footnote 4) inadequate heating are indeed meritless.")

Kingsley v. Hendrickson, 801 F.3d 828, 831 (7th Cir. 2015) (on remand) ("We have undertaken the required scrutiny of the record and are convinced that the error in this case cannot be characterized as harmless. True, many of the factors to which the district court invited the jury's attention were the same factors that a jury would assess under the objective standard now mandated by the Supreme Court. Nevertheless, those factors were suggested to the jury not in the context of applying them to an objective test but as circumstantial evidence from which an inference of reckless or malicious intent *might* be drawn. Moreover, given the evidence of record, the jurors might well have decided that, although the officers had acted in an objectively unreasonable manner, they did not have the subjective intent required by the erroneous instruction. That is, the jurors might well have concluded that the officers acted in an objectively unreasonable manner in their effort to handle a manacled prisoner, a conclusion supported by the testimony of Mr. Kingsley's expert. Nevertheless, the jury *also* might have concluded that the officers, while unreasonable in their approach, did not have a reckless or malicious intent. Under the Supreme Court's holding, Mr. Kingsley should prevail if he is able to establish that the officers acted in an unreasonable manner—without regard to their subjective intent. The evidence of record would have supported a finding for him under that theory, but the jury was told that it also had to find the officers had a proscribed intent. This last requirement increased, significantly, his burden of proof. The error was not harmless.").

Kingsley v. Hendrickson, 801 F.3d 828, 831-33 (7th Cir. 2015) (on remand) ("The defendants next suggest that they should be able to avoid retrial because they are entitled to qualified immunity. Their argument is a nuanced one. In their view, the decision of the Supreme Court, resolving a circuit split in its decision in this case, altered the substantive law of liability. Because there was a division among the circuits on the state of the law at the time that they acted, they contend that they cannot be held liable for their actions. Although the matter of qualified immunity was brought to the attention of the Court, its instructions to us make no mention of our returning to this issue. In any event, we do not believe that this defense is a viable one here. . . .[I]n this case, the scope of the right in issue must be drawn more narrowly than the right of a pretrial detainee to be free from excessive force during his detention; instead, we must examine whether the law clearly established that the use of a Taser on a non-resisting detainee, lying prone and handcuffed behind his back, was constitutionally excessive. Here, the facts surrounding the underlying incident are in sharp dispute. When those facts are construed in the light most favorable to Mr. Kingsley, *see Saucier v. Katz*, 533 U.S. 194, 201 (2001), a reasonable officer was certainly on notice at the time of the occurrence that Mr. Kingsley's conduct did not justify the sort of force described in his account. According to Mr. Kingsley, he was not resisting the officers in a manner that justified slamming his head into the wall, using a Taser while he was manacled, and leaving him alone after use of that instrument. Our precedent makes clear that when the officers applied

the Taser to Mr. Kingsley in May 2010, use of the Taser violated Mr. Kingsley's right to be free from excessive force if he was not resisting. . . If we were to accept the defendants' argument here, we would untether the qualified immunity defense from its moorings of protecting those acting in reliance on a standard that is later determined to be infirm. Here, *before and after* the Supreme Court's decision in this case, the standards for the amount of force that can be permissibly employed remain the same. To accept the defense of qualified immunity here, we would have to accept the dubious proposition that, at the time the officers acted, they were on notice only that they could not have a reckless or malicious intent and that, as long as they acted without such an intent, they could apply any degree of force they chose. As we have noted, however, the law clearly established that the amount of force had to be reasonable in light of the legitimate objectives of the institution. Accordingly, the judgment of the district court is reversed, and the case is remanded for further proceedings in accordance with this opinion.")

Price on behalf of J.K. v. Mueller-Owens, No. 19-CV-854-BBC, 2021 WL 354190, at *8–9 (W.D. Wis. Feb. 2, 2021) ("The Court of Appeals for the Seventh Circuit has not yet considered how the *Kingsley* standard would apply in school cases, but even before *Kingsley*, the court criticized the 'shocks the conscience' phraseology and did not require a showing of malice, brutality or sadism in all substantive due process cases. . . And at least one circuit court has held that the *Kinglsey* standard applies to all excessive force claims brought under the Fourteenth Amendment, not just those brought by pretrial detainees. *Edrei v. Maguire*, 892 F.3d 525, 537 (2d Cir. 2018). . . For these reasons, I will apply the Fourth Amendment objective reasonableness standard set forth in *Wallace* to plaintiff's unlawful seizure and excessive force claims.")

Galan-Reyes v. Acoff, No. 20-CV-345-SMY, 2020 WL 2497133, at *4 (S.D. Ill. May 14, 2020) ("[D]espite the best efforts of Respondent Acuff and Pulaski staff, COVID-19 infections persist at the facility. . . According to Acuff's Supplemental Declaration, as of May 9, 2020, 15 Pulaski staff members have tested positive for COVID-19 (14 of whom have been cleared by the Illinois Department of Public Health (IDPH) to return to work) and 17 detainees have tested positive (10 of those have recovered per IDPH and have been returned to general population). . . Under the circumstances, Galan-Reyes' detention at Pulaski – where he shares dormitory-style living quarters with up to 50 other detainees – which obviously places him at risk for contracting this serious and potentially deadly illness, is tantamount to punishment. *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2473 (2015) (a detainee who has not been convicted of a crime may not be held under conditions that amount to punishment); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). For the foregoing reasons, in the absence of clear and convincing evidence that his release would endanger the public or that he is a flight risk, coupled with the known risks associated with the presence of COVID-19 at Pulaski, this Court concludes that Galan-Reyes' continued indefinite detention violates his Fifth Amendment right to due process. The government's interests in continuing his detention must therefore yield to his liberty and safety interests.")

Lentz v. Marion County Sheriff's Office, No. 118CV03938TABTWP, 2020 WL 2097801, at *6–8 (S.D. Ind. May 1, 2020) ("Although *Kingsley* dealt with a pretrial detainee's claim for excessive

force, the Seventh Circuit recently held that this objective inquiry also applies to pretrial detainees' medical claims. *Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018). Following *Miranda*, the Seventh Circuit held that '*Kingsley*'s objective inquiry applies to all Fourteenth Amendment conditions-of-confinement claims brought by pretrial detainees.' *Hardeman*, 933 F.3d at 823. The parties analyze Lentz's claim under the Eighth Amendment's two-prong deliberate indifference standard. . . . Given the holdings in *Kingsley*, *Miranda*, and *Hardeman*, Lentz's failure to protect claim must be analyzed under *Kingsley*'s objective standard. Viewed in the light most favorable to Lentz, the evidence shows that MCSO has a policy, practice, or custom of holding newly arrested detainees charged with non-violent misdemeanors in the same large holding cells as newly arrested detainees charged with serious violent felonies (with the exception of murder); holding newly arrested detainees charged with non-violent misdemeanors in the same large cells as newly arrested detainees with prior violent felony convictions; and only segregating for infirmity those detainees who require a wheelchair, a walker, crutches, or other mobility device. These polices, practices, or customs, however, are largely irrelevant to Lentz's claim. There is no evidence that Maclean or Galarza were being held on violent felony charges on November 15, 2017. To the contrary, Maclean was being held on four misdemeanor charges, and Galarza was held on three non-violent felony charges. Although Maclean has prior convictions for low-level, violent felonies, Galarza does not appear to have any prior convictions for crimes of violence. The evidence does not support a reasonable inference that Lentz was 'frail' at the time of his arrest, and Lentz concedes that he concealed potentially relevant information about his health from the nursing staff during his medical evaluation. Given this evidence, Lentz's due process claim against MCSO may only survive summary judgment if the evidence creates a reasonable inference that MCSO's policy of temporarily holding newly arrested detainees charged with non-violent misdemeanors in the same cells as other detainees with prior violent felony convictions is unconstitutional. To meet this burden, the evidence must show that the policy is not rationally related to a legitimate, non-punitive purpose or that the policy is excessive in relation to that purpose. . . . MCSO has the difficult task of processing and securing a high volume of newly arrested detainees in a safe and efficient manner. It prioritizes its limited resources to providing segregated holding cells to detainees charged with murder, detainees confined to wheelchairs and other mobility devices, and detainees at risk of suicide. Deputies frequently perform in-person clock rounds of detainees who are held together, and a security camera records video footage that can be reviewed during subsequent investigations and prosecutions. Under these circumstances, MCSO's policies were not objectively unreasonable. Lentz was the victim of a random and brutal act of violence by two fellow detainees. However, there is no material evidence that this attack was caused by an unconstitutional policy, practice, or custom of MCSO. Accordingly, the defendants' motion for summary judgment on Lentz's Fourteenth Amendment due process claim is granted.")

Johnson v. Schuyler County, No. 16-4204, 2019 WL 2778084, at *2–3 (C.D. Ill. July 2, 2019) ("In *Miranda v. Cty. of Lake*, 900 F.3d 335 (7th Cir. 2018), the Seventh Circuit extended the Supreme Court's reasoning in *Kingsley* to hold that courts must analyze a detainee's medical-care claims under an objective reasonableness standard, rather than the Eighth Amendment's deliberate

indifference standard. . . *Miranda* appears to limit its holding to 'medical-care claims,' while suggesting that courts should apply the objective reasonableness standard to all conditions-of-confinement claims brought by a detainee. *Id.* at 352 ("We see nothing in the logic the Supreme Court used in *Kingsley* that would support ... dissection of the different types of claims that arise under the Fourteenth Amendment's Due Process Clause. . . Regardless of the standard the Court applies to Plaintiff's claim arising from the car ride from the TDF to the Schuyler County Jail, Plaintiff's claims cannot survive. Under the objective reasonableness standard, a plaintiff must show that: (1) the official 'acted purposefully, knowingly, or perhaps even recklessly' when taking the actions at issue—negligence, or even gross negligence, will not suffice; and (2) that those actions were objectively unreasonable. . . The deliberate indifference standard focuses on whether an official acted with deliberate indifference towards an objectively serious risk of harm. . . The outside temperatures at the time of Plaintiff's transport were not extreme, and nothing suggests that Plaintiff was forced to remain outside for a duration longer than it would have taken him to walk from a building to the vehicle and visa-versa. Plaintiff does not allege that Defendants Rose and Wear attempted to increase his discomfort (e.g. by opening a window during the ride, taking an unnecessarily long detour for no legitimate reason) or otherwise subjected Plaintiff to an excessive risk to his health or safety. At worst, Plaintiff had to endure a three-to-four (3-4) minute drive in temperatures he did not find comfortable. A reasonable officer in Defendants' positions could not have appreciated that a short vehicle ride under those circumstances would have presented an excessive risk to Plaintiff's health or safety, and Plaintiff has not presented evidence to show that limiting his clothing to a jumpsuit under those circumstances was objectively unreasonable. Accordingly, the Court finds that no reasonable juror could find that Defendants subjected Plaintiff to inhumane conditions of confinement.")

Hyche v. Wisconsin, No. 17-482-WMC, 2019 WL 1866315, at *1 (W.D. Wis. Apr. 25, 2019) ("Historically, the Seventh Circuit has applied the Eighth Amendment standard to detainee's constitutional claims related to conditions of confinement, but it recently changed course based on the Supreme Court's reasoning in *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015), that excessive force claims by pretrial detainees are governed by the due process clause of the Fourteenth Amendment. . . Specifically, in *Miranda v. Cty. of Lake*, 900 F.3d 335 (7th Cir. 2018), the Seventh Circuit extended the holding in *Kingsley* to medical care claims. . . Given that a prisoner's medical care is just one subset of a conditions of confinement claim, it is reasonable to infer that *Kingsley* applies with equal force to the type of conditions of confinement claims plaintiff outlines here. Indeed, other courts in this circuit have assumed the same. [collecting cases]")

Romero-Arrizabal v. Ramos, No. 16-CV-5967, 2019 WL 1281968, at *4–5 (N.D. Ill. Mar. 20, 2019) ("On its face, the holding in *Miranda* was limited to 'medical-care claims.'. . Since medical claims are a subset of conditions-of-confinement claims, this Court concludes, as other judges in this circuit have, that the objective reasonableness standard announced in *Miranda* applies generally to conditions-of-confinement claims brought by detainees. . . The Court also finds the analysis in these cases, and particularly in *Sibley*, regarding ***how*** *Miranda* should be understood to affect the inquiry into conditions of confinement for detainees to be persuasive. When a prisoner

challenges his conditions of confinement, two elements are required to establish that the Eighth Amendment has been violated. First, there must be 'an objective showing that the conditions are sufficiently serious—*i.e.*, that they deny the inmate "the minimal civilized measure of life's necessities."'. . Second, there must be 'a subjective showing of a defendant's culpable state of mind.'. . For suits by prisoners under the Eighth Amendment, 'the mental state of the prison official must have been one of deliberate indifference to inmate health or safety.'. . For detainees, however, the analysis is now different. After *Miranda*, a detainee bringing a conditions-of-confinement claim under the Due Process Clause 'need only allege that "defendant's conduct was objectively unreasonable"—***in addition to*** alleging that the conditions of confinement were sufficiently serious.'. . In other words, for detainees, the conditions-of-confinement inquiry remains a two-part test, and *Miranda* altered only one of the two prongs. *Miranda* modified the requirement for what the defendant's mental state must be with respect to the detainee's conditions of confinement, replacing the deliberate-indifference standard with one of objective unreasonableness. But it did not change the governing standards regarding the severity of the conditions that would qualify as a constitutional violation under the Due Process Clause. A detainee must still demonstrate that the conditions of confinement are 'sufficiently serious,' which is to say that they must deny the detainee 'the minimal civilized measure of life's necessities.'")

Corbier v. Watson, No. 16-CV-257-SMY-MAB, 2019 WL 351498, at *5 (S.D. Ill. Jan. 29, 2019) ("Under *Kingsley* and *Miranda*, in order to prove a failure to protect claim, a plaintiff need only establish that the defendant's conduct was objectively unreasonable – not that the defendant was subjectively aware that it was unreasonable. *Miranda*, 900 F.3d at 352-53. In other words, a plaintiff must show that a defendant 'knew, or should have known, that [a] condition posed an excessive risk to health or safety' of the detainee and 'failed to act with reasonable care to mitigate the risk.'. . This is a more exacting standard than that required to prove negligence, or even gross negligence and is 'akin to reckless disregard.'")

Terry v. County of Milwaukee, No. 17-CV-1112-JPS, 2019 WL 181329, at *6-9 (E.D. Wis. Jan. 11, 2019) ("In extending *Kingsley* to a pretrial detainee's claim of medical mistreatment, the Court of Appeals balanced two competing considerations. First, consistent with *Kingsley*, pretrial detainees should be afforded the benefit of objectively reasonable conduct by their custodians. . . Second, consistent with longstanding precedent concerning constitutional claims of medical misconduct, the jail officials' failure to properly recognize or treat the plaintiff's illness must have been the result of something more than negligence, or even gross negligence. . . In fashioning a legal standard that accommodates these competing concerns, the Seventh Circuit created a doctrine that is difficult to apply. The Court of Appeals held that the standard for medical care under the Fourteenth Amendment consists of two questions. First, did the medical defendants act 'purposefully, knowingly, or perhaps even recklessly when they considered the consequences' of their actions? . . . Second, if so, was their conduct objectively reasonable, without consideration for their subjective intent? . . . These elements are not clearly aligned with *Kingsley*. In *Kingsley*, the Supreme Court stated that the intent element is intended to foreclose accidents. . . *Miranda*'s intent element initially appears to correlate with this threshold question in *Kingsley* as to whether

the defendant's conduct was volitional. But asking whether the defendant acted purposefully, knowingly, or recklessly with respect to 'the consequences of [his actions]' goes well beyond asking whether he performed volitional acts. . . For instance, it is indisputable that a doctor who performs a surgical removal of a limb engaged in volitional acts to bring about that removal—he did not cut off the patient's leg by accident. It is a far different question to ask whether he performed those acts with purposeful, knowing, or reckless indifference to the consequences of the removal—i.e., future infection, removing the wrong leg, permanent handicap or disfigurement, or other medical problems. When read this way, *Kingsley*'s first element, which is intended to exclude those claims where the harm caused was a complete accident, . . . does not align with the first element set forth in *Miranda*. This is to say, *Miranda*'s volitional element probes the defendant's appreciation of the consequences of his actions, while *Kingsley*'s does not. On the other hand, the examples in *Kingsley* that illustrate intentional conduct consist entirely of the defendant acting in ways that result in harm. One does not purposefully, knowingly, or recklessly punch/push/tase someone without knowing, on some level, that there is a high risk that the subject is going to get hit/pushed/stunned. Thus, despite the Supreme Court's assertion to the contrary, perhaps the first element in *Kingsley* is intended to probe the defendant's appreciation of the consequences of his action. If that is the case, then the subjective element in *Kingsley* is less at odds with *Miranda*, but no easier to apply in the medical context, for the reasons discussed below. . . In essence, *Miranda*'s attempt to harmonize *Kingsley* with the negligence-is-not-enough principle has created an entirely new standard of constitutional liability: reckless indifference. Doctrinal concerns with *Miranda* aside, the Court is left to apply the law to the case before it. Thus, a pretrial detainee's Fourteenth Amendment right to medical care is violated if: (1) there was an objectively serious medical need; (2) the defendant made a volitional act with regard to the plaintiff's medical need; (3) that act was objectively unreasonable under the circumstances in terms of treating or assessing the patient's serious medical need; and (4) the defendant 'acted purposefully, knowingly, or perhaps even recklessly' with respect to the risk of harm. . . Even with the rule articulated above, is difficult to envision a world in which a defendant acted reasonably under the circumstances, but also acted purposefully, knowingly, or recklessly with regard to a high risk of harm. In any application, the Court will be ultimately applying a recklessness test. The 'objective' prong functions primarily as a gatekeeper for the intent prong. . . . As explained above, there is evidence to support a reasonable jury's conclusion that Wenzel and Bevenue violated Terry's Fourteenth Amendment right because they acted unreasonably under the circumstances and purposefully, knowingly, or recklessly ignored that Terry was in labor, causing her to give birth alone in a filthy cell. The cases against them will move forward unless qualified immunity applies.")

Terry v. County of Milwaukee, No. 17-CV-1112-JPS, 2019 WL 181329, at *9-10 (E.D. Wis. Jan. 11, 2019) ([T]he 'objectively unreasonable' standard for pretrial detainees that was announced in *Miranda* is not entirely new. It is well-established in this circuit that arrestees awaiting their probable cause hearings have a right to medical care that is protected under the Fourth Amendment's 'objectively unreasonable' standard. *Currie v. Chhabra*, 728 F.3d 626, 629–30 (7th Cir. 2013); *Ortiz v. City of Chicago*, 656 F.3d 523 (7th Cir. 2011). In *Ortiz*, the Seventh Circuit

denied qualified immunity despite uncertainty over whether the 'deliberately indifferent' or objectively unreasonable' standard governed medical care claims for arrestees because it was clear that the Fourth Amendment protected arrestees at the time of the plaintiff's death. *Id.* at 538. The Court of Appeals further held that qualified immunity was inappropriate because defendants' conduct would not have been entitled to qualified immunity under the deliberate indifference standard anyway. . . Thus, *Miranda* does not change the qualified immunity standard. The defendants may argue that they believed they were held to the deliberate indifference standard and did not realize that they would be subject to the objectively unreasonable standard of care. This is, in effect, an argument that defendants were unaware that they had to act a modicum more humanely towards Terry. Such a miserable contention is not persuasive. . . Although mistakes of fact may sometimes give rise to qualified immunity, . . it was well established at the time that the Fourteenth Amendment protected pretrial detainees. [citing *Wolfish*] Moreover, Terry's arguments, 'if credited by a jury, satisf[y] the deliberate indifference standard because she argues that the defendants were subjectively aware that she had a serious medical condition...and failed to respond.'. . Therefore, even if the Court applied the old standard, qualified immunity would not be appropriate. As discussed below, Wenzel and Bevenue knew, without a doubt, that detainees had a constitutional right to medical care, and they also knew that they were not allowed to ignore serious medical risks. That was true under the deliberate indifference standard, and it remains true under the new standard.")

Scott Peters, Plaintiff, v. Dr. Young Sun Kim, Defendants., No. 15 CV 7236, 2018 WL 6398915, at *5-6 (N.D. Ill. Dec. 6, 2018) ("In the light most favorable to plaintiff, the court will analyze his claims under the Fourteenth Amendment standard and under the guidance of *Miranda* regarding all of his contacts with defendant. *Miranda* teaches the proper inquiry is two-step. 'The first step, which focuses on the intentionality of the individual defendant's conduct, remains unchanged.'. . The question is 'whether the medical defendant[ ] acted purposefully, knowingly, or perhaps even recklessly when [he] considered the consequences of [his] handling of [plaintiff's]' medical care. . . A showing of negligence or gross negligence will not be enough - plaintiff must prove 'something akin to reckless disregard.'. . In the second step, aligned with *Kingsley*, plaintiff must demonstrate defendant's conduct was objectively unreasonable - not that defendant was subjectively aware that it was unreasonable. . . In other words, plaintiff must show that defendant acted intentionally or recklessly - a more 'exacting standard' than that required to prove negligence. . . Defendant argues he is entitled to summary judgment as a matter of law because, regardless of which standard (objective or subjective) is applied, plaintiff's claims fail because defendant, in his care and treatment of plaintiff, did not violate plaintiff's constitutional rights. . . . The court's review of the record, including the videotaped evidence of defendant's and plaintiff's interactions in the medical unit, show that defendant's care and conduct was proper and objectively reasonable.")

Stidimire v. Watson, No. 17-CV-1183-SMY-SCW, 2018 WL 4680666, at *4 (S.D. Ill. Sept. 28, 2018) ("Under *Kingsley* and *Miranda* then, a pretrial detainee need only establish that the defendant's conduct was objectively unreasonable – not that the defendant was subjectively aware

that it was unreasonable. . . In other words, a plaintiff must show that a defendant acted intentionally or recklessly as he 'knew, or should have known, that the condition posed an excessive risk to health or safety' and 'failed to act with reasonable care to mitigate the risk.'. . This is a more exacting standard than that required to prove negligence, or even gross negligence and is 'akin to reckless disregard.'. .Applying the *Miranda* standard, the Court finds that Plaintiff's allegations plausibly suggest that Defendants Walter, Knyff, and Ripperda acted purposefully, knowingly or recklessly regarding Stidimire's risk of suicide, and that their conduct was objectively unreasonable. During booking, 19-year old Stidimire was visibly disturbed, scared, and concerned that something improper was occurring. Despite Stidimire's obvious fear and signs of distress, Walter did not ask him any questions regarding his current mental state, his mental health history, nor did he refer him to mental health for further evaluation. On the day he committed suicide, Stidimire appeared seriously and visibly distraught throughout the day. Thus, it is plausible that Knyff and Ripperada, who were responsible for conducting cell checks in Stidimire's block that day, were aware that Stidimire was exhibiting signs of distress, was at a high risk for suicide, and did nothing. Accordingly, Defendants' Motion is denied as to the claims asserted in Count I against Defendants Walter, Knyff, and Ripperda.")

Moore v. Germaine, No. 18-CV-01378-JPG, 2018 WL 4027575, at *2 (S.D. Ill. Aug. 23, 2018) ("In *Kingsley,* the United States Supreme Court held that the due process standard for excessive force claims of pretrial detainees is less demanding than the Eighth Amendment standard for claims brought by convicted persons. . . The Seventh Circuit recently extended the same logic to a medical claim brought by a pretrial detainee in *Miranda* and analyzed the defendants' conduct under an objective reasonableness standard, instead of a deliberate indifference standard. [citing *Miranda*] Given that medical claims are a subset of conditions-of-confinement claims, it stands to reason that the same objective reasonableness standard would apply to Plaintiff's claim if he was a pretrial detainee during the relevant time period. . . Count 3 survives screening against all four defendants under this less demanding standing.")

McWilliams v. Cook County, No. 15 C 53, 2018 WL 3970145, at *5 (N.D. Ill. Aug. 20, 2018) ("The Seventh Circuit recently held in *Miranda* that *Kingsley*'s logic applies as well to medical treatment claims. . . In turn, *Miranda*'s logic reaches the broader genus of conditions of confinement claims, of which medical treatment claims are merely a species. . . . Under *Kingsley* and *Miranda*, then, a plaintiff states a Fourteenth Amendment conditions of confinement claim by alleging that (1) the defendant 'acted purposefully, knowingly, or perhaps even recklessly' and (2) the defendant's conduct was objectively unreasonable. . . Unlike in the Eighth Amendment context, deliberate indifference—the defendant's subjective awareness that her conduct was unreasonable—is not required.")

Phillips v. People of Illinois, No. 18-CV-01058-JPG, 2018 WL 2412400, at *3 (S.D. Ill. May 29, 2018) ("It is still unclear whether the reasoning of *Kingsley* extends beyond claims of excessive force to claims based on unconstitutional conditions of confinement. . . The Court nevertheless finds that the conditions described in the Complaint are sufficiently serious under both the

Fourteenth and Eighth Amendments to warrant further review of this matter. These conditions include, but are not limited to, a lack of adequate bedding, exercise, and sanitary living conditions. . . The Complaint describes conditions that may 'violate the Constitution in combination when they have a "mutually enforcing effect that produces the deprivation of a single, identifiable human need."'. . For screening purposes, the Court finds that the conditions at issue are sufficiently 'serious' to trigger constitutional concerns under the Eighth and Fourteenth Amendments.")

Murphy v. Allen, No. 18-CV-00957-JPG, 2018 WL 2329743, at *3 (S.D. Ill. May 23, 2018) ("The Seventh Circuit has not decided whether the reasoning in *Kingsley* extends beyond claims of excessive force to claims for unconstitutional conditions of confinement, including medical care. *See Smego v. Jumper*, 707 F. App'x 411, 412 (7th Cir. Dec. 29, 2017) (citing *Collins*, 851 F.3d at 731; *but see Darnell v. Pineiro*, 849 F.3d 17, 36 (2d Cir. 2017) (applying objective-reasonableness standard to detainee's conditions-of-confinement claim); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc) (same with failure-to-protect claim)). However, this question is not one that must be resolved for purposes of this screening order. Plaintiff's inadequate medical care claim survives review under both standards, including the more demanding Eighth Amendment standard.")

Benson v. Geiger, No. 3:17-CV-865-JD-MGG, 2018 WL 2299245, at *1 n.1 (N.D. Ind. May 21, 2018) ("This is an Eighth Amendment test. 'Although the Eighth Amendment applies only to convicted persons, pretrial detainees...are entitled to the same basic protections under the Fourteenth Amendment's due process clause. Accordingly, [courts] apply the same legal standards to deliberate indifference claims brought under either the Eighth or Fourteenth Amendment.' *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010). *See also Phillips v. Sheriff of Cook Cty*., 828 F.3d 541, 554 n. 31 (7th Cir. 2016) (clarifying that *Kingsley v. Hendrickson*, 576 U.S. __, __; 135 S.Ct. 2466 (2015) did not change the applicability of the Eighth Amendment standard to pre-trial detainee deliberate indifference claims).")

Teen v. Germaine, No. 18-CV-996-JPG, 2018 WL 2299231, at *2–3 (S.D. Ill. May 21, 2018) ("The propriety of applying the more stringent standard to pretrial detainees' conditions of confinement claims was recently called into question by *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). . . However, *Kingsley* was an excessive force case, and it is not yet clear that the objective standard applies in other types of pretrial detention conditions cases. In 2016, the Seventh Circuit suggested that the deliberate indifference standard still applies to other types of claims by pretrial detainees. *See Phillips v. Sheriff of Cook Cnty*., 828 F.3d 541, 554 n.31 (7th Cir. 2016) (acknowledging *Kingsley* but applying deliberate indifference standard to medical claim brought by pretrial detainee). In a subsequent decision, however, the Court of Appeals applied the objective unreasonableness standard to a conditions of confinement claim raised by several pretrial detainees. *Mulvania v. Sheriff of Rock Island Cty*., 850 F.3d 849, 856-58 (7th Cir. 2017). After *Mulvania*, the Seventh Circuit has acknowledged, but declined to decide the issue on two occasions. In *Collins v. Al-Shami*, 851 F.3d 727, (7th Cir. 2017), a conditions case involving

medical care, the Seventh Circuit expressly declined to address whether *Kingsley* applied to the plaintiff's claims because resolution of the issue was unnecessary to the case before it. *Collins,* 851 F.3d at 731. The Appellate Court took the same route in *Smego v. Jumper,* 707 F. App'x 411 (7th Cir. 2017) (unpublished) . . . . Most recently, however, the Seventh Circuit stated as follows, with regard to a pretrial detainee's claim involving deficient medical care:

As a pretrial detainee, [plaintiff's] constitutional rights are derived from the Fourteenth Amendment's due-process clause rather than the Eighth Amendment, which applies to convicted inmates. *Smith v. Dart,* 803 F.3d 304, 309 (7th Cir. 2015). But the standards are virtually indistinguishable. A detainee must have a medical condition 'objectively serious enough to amount to a constitutional deprivation,' and 'the defendant prison official must possess a sufficiently culpable state of mind.'. .

Ayoubi v. Dart, 2018 WL 1445986, *3 (7th Cir. March 23, 2018) (unpublished).

In the instant case, the Court need not resolve any uncertainty pertaining to *Kingsley*. As is set forth more fully below, the Court finds that Count 9 survives even under the more stringent deliberate indifference standard.")

Newsome v. Madison County, Illinois, No. 316CV01103JPGDGW, 2018 WL 2064989, at *2–3 (S.D. Ill. May 3, 2018) ("Mr. Newsome died at the jail shortly after he was arrested and before his probable cause hearing. Accordingly, Mr. Newsome is what is known as a pre-*Gerstein* arrestee. When a pre-*Gerstein* arrestee brings a constitutional claim arising from his conditions of confinement, it is typically covered by the Fourth Amendment's reasonableness test—a more stringent standard than Eighth Amendment deliberate indifference. . . And that makes perfect sense: if the police arrest a man and toss him in jail, and that man has not yet appeared before a judge to determine whether there was probable cause for the arrest in the first place, surely the jail should exercise even more caution than usual to ensure that they are not violating that man's rights. . . While the Seventh Circuit has not yet had the opportunity to apply this rationale to failure to protect claims, they have already done so with Eighth Amendment inadequate medical care cases. *See, e.g., Ortiz v. City of Chicago,* 656 F.3d 523, 530 (7th Cir. 2011) ("Because Molina had not yet benefitted from a judicial determination of probable cause, otherwise known as a *Gerstein* hearing, we agree that the Fourth Amendment applies."); *King v. Kramer,* 763 F.3d 635, 641–48 (7th Cir. 2014) (reversing and remanding when the district court incorrectly applied the Eighth Amendment standard instead of the Fourth Amendment's reasonableness test). And considering the Supreme Court has recently extended the doctrine to excessive force claims by pre-trial detainees, it is logical to also apply the doctrine to failure to protect claims in the same manner. . . Both parties recognized this distinction in their briefs. Newsome claims that she pled her Fourteenth and Fourth Amendment claims in the alternative so that she may proceed on whichever the Court deems correct. The defendants, however, assert that the Fourteenth/Eighth Amendment deliberate indifference standard should apply here—but they are incorrect in light of *Kingsley, Lopez*, *Williams*, *Ortiz*, and *King*. The defendants also argue that 'the Fourth Amendment does not provide remedies for failure to protect claims' at all, but that is wrong. Failure to protect claims arising under the Fourth Amendment focus on an individual's right to be free from an unreasonable seizure, and the Seventh Circuit has long recognized that theory as

valid. *Yang v. Hardin*, 37 F.3d 282, 284–86 (7th Cir. 1994). Accordingly, the Court will dismiss the 14th Amendment claims—Counts II, IV, and VI—for failure to state a claim for relief, and proceed on the Fourth Amendment claims.")

White on behalf of Scarpi v. Watson, No. 16-CV-560-JPG-DGW, 2018 WL 2047934, at *6 n.2 (S.D. Ill. May 2, 2018) ("There is some uncertainty about whether *Kingsley* changed the standard applicable to suits by pretrial detainees. In *Kingsley*, a pretrial detainee sued for excessive force, and the Supreme Court held that the appropriate standard was whether the officers' purposeful or knowing use of force was objectively unreasonable, not whether the officers were subjectively aware that their use of force was unreasonable. . . *Kingsley* calls into question whether deliberate indifference is the correct standard for a pretrial detainee's conditions of confinement claim, but the Seventh Circuit Court of Appeals has suggested the Eighth Amendment standard still applies. *See Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 554 n. 31 (7th Cir. 2016). *But see Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 856-58 (7th Cir.), *cert. denied*, 138 S. Ct. 361 (2017) (applying objective unreasonableness standard to conditions of confinement claim). However, it has declined to decide definitively whether *Kingsley* changed the applicable standard in claims other than excessive force claims. *See Collins v. Al-Shami*, 851 F.3d 727, 731 (7th Cir. 2017); *Smego v. Jumper*, 707 F. App'x 411, 412 (7th Cir. 2017).")

Garrett v. McLauren, No. 17-CV-871-JPG, 2018 WL 1706380, at *4–5 (S.D. Ill. Apr. 9, 2018) ("*Kingsley* was an excessive force case, and it is not yet clear the objective standard applies in other types of pretrial detention conditions cases. In 2016, the Seventh Circuit suggested that the deliberate indifference standard still applies to other types of claims by pretrial detainees. *See Phillips v. Sheriff of Cook Cnty*., 828 F.3d 541, 554 n.31 (7th Cir. 2016) (acknowledging *Kingsley* but applying deliberate indifference standard to medical claim brought by pretrial detainee). In a subsequent decision, however, the Seventh Circuit applied the objective unreasonableness standard to a claim raised by several pretrial detainees based on a jail's policy that deprived inmates of their underwear if it was not white. *Mulvania v. Sheriff of Rock Island Cty*., 850 F.3d 849, 856-58 (7th Cir. 2017). After *Mulvania*, the Seventh Circuit has acknowledged, but declined to decide the issue on two occasions. *See Collins v. Al-Shami*, 851 F.3d 727, (7th Cir. 2017) (conditions of confinement case where Seventh Circuit expressly declined to address whether *Kingsley* applied to plaintiff's claims); *Smego v. Jumper*, 707 F. App'x 411 (7th Cir. 2017) ("We have not decided whether the reasoning in *Kingsley* extends beyond claims of excessive force. *See Collins*, 851 F.3d at 731; *but see Darnell v. Pineiro*, 849 F.3d 17, 36 (2d Cir. 2017) (applying objective-reasonableness standard to detainee's conditions-of-confinement claim); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc) (same with failure-to-protect claim)."). In the instant case, the Court need not resolve any uncertainty pertaining to *Kingsley* and Plaintiff's conditions of confinement claim. Plaintiff's allegations regarding mold in the showers are incredibly general and do not address how Plaintiff, personally, has been affected by the mold.")

Nichols v. St. Clair County Jail, No. 18-CV-572-JPG, 2018 WL 1617820, at *3 (S.D. Ill. Apr. 4,

2018) ("The propriety of applying this more stringent standard to Fourteenth Amendment claims was recently called into question by *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015), 'which applied a purely objective standard to a detainee's excessive- force claim without regard to any subjective component.'. . However, *Kingsley* was an excessive force case, and the Seventh Circuit has not decided whether the objective reasonableness standard applies to cases involving inadequate medical care. . . In the instant case, at screening, the Court need not resolve which standard is applicable to Plaintiff's medical claims. This is because, as is set forth more fully below, the Court finds that Count 1 survives under the more-demanding deliberate indifference standard, and the Court finds that Count 2 fails to state a claim regardless of which standard applies.")

Teen v. Smith, No. 17-CV-916-JPG, 2018 WL 1407201, at *3–4 (S.D. Ill. Mar. 21, 2018) ("The propriety of applying the more stringent standard to pretrial detainees' conditions of confinement claims was recently called into question by *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015). . . . However, *Kingsley* was an excessive force case, and it is not yet clear that the objective standard applies in other types of pretrial detention conditions cases. In 2016, the Seventh Circuit suggested that the deliberate indifference standard still applies to other types of claims by pretrial detainees. *See Phillips v. Sheriff of Cook Cnty*., 828 F.3d 541, 554 n.31 (7th Cir. 2016) (acknowledging *Kingsley* but applying deliberate indifference standard to medical claim brought by pretrial detainee). In a subsequent decision, however, the Court of Appeals applied the objective unreasonableness standard to a conditions of confinement claim raised by several pretrial detainees. *Mulvania v. Sheriff of Rock Island Cty*., 850 F.3d 849, 856-58 (7th Cir. 2017). . . After *Mulvania*, the Seventh Circuit has acknowledged, but declined to decide the issue on two occasions. In *Collins v. Al-Shami,* 851 F.3d 727, (7th Cir. 2017), a conditions case involving medical care, the Seventh Circuit expressly declined to address whether *Kingsley* applied to the plaintiff's claims because resolution of the issue was unnecessary to the case before it. *Collins,* 851 F.3d at 731. The Appellate Court took the same route in *Smego v. Jumper,* 707 F. App'x 411 (7th Cir. 2017)[.] . . . In the instant case, the Court need not resolve any uncertainty pertaining to *Kingsley* and Plaintiff's conditions of confinement claims (Counts 1 through 5). As is set forth more fully below, the Court finds that Count 4 survives even under the more stringent deliberate indifference standard.")

Sill v. Moore, No. 18-CV-405-JPG, 2018 WL 1407188, at *2 (S.D. Ill. Mar. 21, 2018) ("In the past, the Seventh Circuit applied the deliberate-indifference standard derived from the Eighth Amendment to Fourteenth Amendment inadequate medical care claims. *Collins v. Al-Shami,* 851 F.3d 727, 731 (7th Cir. 2017). The deliberate indifference standard 'includes both an objective and subjective component and thus is more difficult to satisfy than its Fourth Amendment counterpart, which requires only that the defendant have been objectively unreasonable under the circumstances.'. . The propriety of applying this more stringent standard to Fourteenth Amendment claims was recently called into question by *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015), 'which applied a purely objective standard to a detainee's excessive-force claim without regard to any subjective component.' *Smego v. Jumper*, 707 F. App'x 411, 412 (7th Cir. 2017)

(citing *Collins*, 851 F.3d at 731). However, *Kingsley* was an excessive force case, and the Seventh Circuit has not decided whether the objective reasonableness standard applies to cases involving inadequate medical care. *See Collins*, 851 F.3d at 731 (expressly declining to resolve the issue); *Smego*, 707 F. App'x at 412 (same). In the instant case, at screening, the Court need not resolve (1) whether Plaintiff was an arrestee or pretrial detainee at the time of the alleged constitutional violations or (2) whether, if Plaintiff was a detainee, the standard applicable to Plaintiff's medical claim. This is because, as is set forth more fully below, the Court finds that Count 1 fails to state a claim regardless of which standard applies.")

Swisher v. Porter County Sheriff's Dep't., No. 3:10-CV-337-MGG, 2018 WL 1400889, at *8 n. 15 (N.D. Ind. Mar. 20, 2018) ("Swisher was a pre-trial detainee when these events occurred. 'Although the Eighth Amendment applies only to convicted persons, pretrial detainees...are entitled to the same basic protections under the Fourteenth Amendment's due process clause. Accordingly, [courts] apply the same legal standards to deliberate indifference claims brought under either the Eighth or Fourteenth Amendment.' *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010). *See also Phillips v. Sheriff of Cook Cty*., 828 F.3d 541, 554 n. 31 (7th Cir. 2016) (clarifying that *Kingsley v. Hendrickson*, 576 U.S. __, __; 135 S.Ct. 2466 (2015) did not change the applicability of the Eighth Amendment standard to pre-trial detainee deliberate indifference claims).")

Stewart v. Lakin, No. 15-CV-974-JPG-DGW, 2018 WL 1181312, at *2 (S.D. Ill. Mar. 7, 2018) ("*Kingsley* calls into question whether deliberate indifference is the correct standard for a pretrial detainee's conditions of confinement claim, but the Seventh Circuit Court of Appeals has left open the question of whether the Eighth Amendment standard still applies. *Smego v. Jumper*, 707 F. App'x 411, 412 (7th Cir. 2017); *see Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 554 n. 31 (7th Cir. 2016) (applying Eighth Amendment standard to inadequate medical treatment claim). *But see Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 856-58 (7th Cir. 2017) (applying objective unreasonableness standard to conditions of confinement claim). However, whether the objective reasonableness or deliberate indifference standard applies, the result is the same: Lakin and Bost are entitled to summary judgment on Count 2. The Court has reviewed the matter *de novo* and has determined that there is no evidence from which a reasonable jury could find that they enacted or implemented the policy of requiring observation rounds at least every thirty minutes unreasonably or with deliberate indifference to the risk it posed to Stewart between the observation times.")

Fennell v. Dickson, No. 17-CV-00961-JPG, 2018 WL 1124506, at *3 (S.D. Ill. Mar. 1, 2018) ("If Plaintiff was a detainee, his claims derive from the Fourteenth Amendment's guarantee of due process. . . In the past, the Seventh Circuit applied the deliberate-indifference standard derived from the Eighth Amendment to Fourteenth Amendment inadequate medical care claims. . . . The propriety of applying this more stringent standard to Fourteenth Amendment claims was recently called into question by *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), 'which applied a purely objective standard to a detainee's excessive-force claim without regard to any subjective

component.'. . . However, *Kingsley* was an excessive force case, and the Seventh Circuit has not decided whether the objective reasonableness standard applies to cases involving inadequate medical care. . . In the instant case, at screening, the Court need not resolve (1) whether Plaintiff was an arrestee or pretrial detainee at the time of the alleged constitutional violations or (2) whether, if Plaintiff was a detainee, the standard applicable to Plaintiff's medical claims. This is because, as is set forth more fully below, the Court finds that Count 1 (as to Dickson and John Doe 2) and Count 2 (as to Blankenship) survive under the more-demanding deliberate indifference standard, and the Court finds that Count 1 (as to John Doe 1) fails to state a claim under the less-demanding objective reasonableness standard.")

Rees v. Corizon Medical Services, No. 3:17-CV-588-JD-MGG, 2018 WL 1014232, at *2 & n.3 (N.D. Ind. Feb. 22, 2018) ("In medical cases, the Constitution is violated only when a defendant was deliberately indifferent to an inmate's serious medical needs. . . .Although Rees claims that the defendants have violated his Eighth Amendment rights, he was a pre-trial detainee when these events occurred. 'Although the Eighth Amendment applies only to convicted persons, pretrial detainees...are entitled to the same basic protections under the Fourteenth Amendment's due process clause. Accordingly, [courts] apply the same legal standards to deliberate indifference claims brought under either the Eighth or Fourteenth Amendment.' *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010). *See also Phillips v. Sheriff of Cook Cty*., 828 F.3d 541, 554 n. 31 (7th Cir. 2016) (clarifying that *Kingsley v. Hendrickson*, 576 U.S. __, __; 135 S.Ct. 2466 (2015) did not change the applicability of the Eighth Amendment standard to pre-trial detainee deliberate indifference claims).")

Medford v. Smith, No. 17-CV-243-JPG, 2018 WL 889042, at *3 (S.D. Ill. Feb. 14, 2018) ("There is little practical difference between the standards that are applicable to pretrial detainees and convicted prisoners for claims involving the conditions of confinement. Claims brought under the Fourteenth Amendment are 'appropriately analyzed under the Eighth Amendment.' *Dart*, 803 F.3d at 310 (citing *Smego v. Mitchell*, 723 F.3d 752, 756 (7th Cir. 2013) ("[T]he protection afforded under [the Due Process Clause] is functionally indistinguishable from the Eighth Amendment's protection for convicted prisoners.")).")

Bartlett v. Winans, No. 16-CV-1185, 2018 WL 297566, at *3 n.3 (C.D. Ill. Jan. 4, 2018) ("The Seventh Circuit Court of Appeals has not addressed whether the Supreme Court case of *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), which applied an objective standard to a detainee's excessive force claim, applies to a detainee's medical claim. *Collins v. Al-Shami*, 851 F.3d 727, 731 (7th Cir. 2017). As of this writing, the deliberate indifference standard appears to still apply. *See Phillips v. Sheriff of Cook County*, 828 F.3d 541 n. 31 (7th Cir. 2016)")

Pratt v. Lawson, No. 3:17-CV-436 RLM, 2017 WL 6446662, at *1 n.1 (N.D. Ind. Dec. 18, 2017) ("Mr. Pratt was a pre-trial detainee when these events occurred. 'Although the Eighth Amendment applies only to convicted persons, pretrial detainees...are entitled to the same basic protections under the Fourteenth Amendment's due process clause. Accordingly, [courts] apply the same legal

standards to deliberate indifference claims brought under either the Eighth or Fourteenth Amendment.' *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010). *See also Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 554 n. 31 (7th Cir. 2016) (clarifying that *Kingsley v. Hendrickson*, 576 U.S. __, __; 135 S.Ct. 2466 (2015) didn't change the applicability of the Eighth Amendment standard to pre-trial detainee deliberate indifference claims).")

Turner v. Waldera, No. 16-CV-384-WMC, 2017 WL 5991840, at *4 (W.D. Wis. Dec. 1, 2017) ("Claims by *pretrial* detainees regarding deliberate indifference and conditions of confinement are governed by the due process clause of the Fourteenth Amendment. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015); *Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650, 664 (7th Cir. 2012). However, the Seventh Circuit has applied the same standard to conditions of confinement claims under both the Eighth Amendment and Fourteenth Amendment. *See Smith v. Dart*, 803 F.3d 304, 310 (7th Cir. 2015).")

Baker v. Hertz, No. 15-CV-600-JPG-DGW, 2017 WL 5591485, at *2 n.1 (S.D. Ill. Nov. 21, 2017) ("Magistrate Judge Wilkerson applied the Eighth Amendment standard for inadequate medical care to this case. However, there has been some uncertainty about whether *Kingsley v. Hendrickson* . . . changed this standard for pretrial detainees. In *Kingsley*, a pretrial detainee sued for excessive force, and the Supreme Court held that the appropriate standard was whether the officers' purposeful or knowing use of force was objectively unreasonable, not whether the officers were subjectively aware that their use of force was unreasonable. . . . *Kingsley* calls into question whether deliberate indifference is the correct standard for a pretrial detainee's conditions of confinement claim, but the Seventh Circuit Court of Appeals has suggested the Eighth Amendment standard still applies. *See Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 554 n. 31 (7th Cir. 2016). *But see Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 856-58 (7th Cir. 2017) (applying objective unreasonableness standard to conditions of confinement claim).")

Mann v. Burns, No. 14-CV-1358-JPG-SCW, 2017 WL 5573958, at *1 (S.D. Ill. Nov. 20, 2017) ("In the Report, Magistrate Judge Williams set forth the Eighth Amendment standard for cruel and unusual conditions of confinement for convicted prisoners, which has historically been applied to pretrial detainees' conditions of confinement claims under the Fourteenth Amendment Due Process Clause. . . However, as noted in Chief Judge Michael J. Reagan's August 5, 2015, order reviewing this case under 28 U.S.C. § 1915A (Doc. 24), the Supreme Court's ruling in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), has created some uncertainty. . . . *Kingsley* calls into question whether deliberate indifference is the correct standard for a pretrial detainee's conditions of confinement claim, but the Seventh Circuit Court of Appeals has suggested the Eighth Amendment standard still applies. *See Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 554 n. 31 (7th Cir. 2016). *But see Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 856-58 (7th Cir. 2017) (applying objective unreasonableness standard to conditions of confinement claim). However, even if the correct standard is objective reasonableness, the Court finds that no reasonable jury hearing the facts of this case could conclude that any defendant's

conduct was objectively unreasonable in light of the legitimate interest in managing the jail. Their treatment of Mann did not amount to punishment, so they did not violate the Due Process Clause.")

Cozart v. Aramark Correctional Services, LLC, No. 12-CV-3150, 2017 WL 5585714, at *2 (C.D. Ill. Nov. 20, 2017) ("After *Kingsley*, . . . the Seventh Circuit has continued to rely on the deliberate indifference standard to pretrial detainees' claims for lack of medical care. *See, e.g.*, *Daniel v. Cook County*, 833 F.3d 728, 732-33 (2016). At this point, the Court can avoid trying to define what greater protection is afforded civil detainees as compared to prisoners. Plaintiff's claim survives summary judgment even under the Eighth Amendment standard. Avoidance may no longer be possible when faced with how the jury should be instructed, but that is a discussion for another day.")

More v. Michek, No. 17-CV-401-JDP, 2017 WL 3995641, at *2 (W.D. Wis. Sept. 8, 2017) ("The Supreme Court in *Kingsley v. Hendrickson* explained that the applicable standard is objective reasonableness for a pretrial detainee asserting a Fourteenth Amendment claim. . . *Kingsley* was an excessive force case, and the Seventh Circuit has not decided whether the objective unreasonableness standard applies to cases involving inadequate medical care, but it has not foreclosed that possibility either. . . So for the time being, I would allow More to proceed on a Fourteenth Amendment claim if her medical care was objectively unreasonable. The objective unreasonableness standard does not require a plaintiff to show 'expressed intent to punish.'. . . Although the label 'objective reasonableness' brings tort concepts to mind, a garden-variety negligence claim does not make out a Fourteenth Amendment claim. . . So to establish the objective unreasonableness of the challenged medical care, the plaintiff must show some error beyond ordinary malpractice but not necessarily an error that 'departs radically from "accepted professional practice,"' which would be a way to show deliberate indifference. . . This is a fine line for which courts have not articulated a precise standard, and I need not do so here because More states, at most, a negligence claim.")

Bartlett v. Inoue, No. 15-CV-1466, 2017 WL 2872366, at *4 (C.D. Ill. July 5, 2017) ("Plaintiff was a detainee during the relevant time, so his claim is governed by the Fourteenth Amendment, not the Eighth Amendment. As of this writing, though, the Eighth Amendment and Fourteenth Amendment standard for medical claims is indistinguishable. . . .The Seventh Circuit has indicated that the standard on detainee medical claims may need to be revisited in light of a relatively recent Supreme Court case, but as of now the subjective requirement remains deliberate indifference. *Collins v. Al-Shami*, 851 F.3d 727, 731 (7th Cir. 2017) (declining to decide whether *Kingsley v. Hendrickson,* 135 S.Ct. 2466 (2105) requires, for detainee's medical claims, an objective reasonableness standard versus a deliberate indifference standard); *Phillips v. Sheriff of Cook County*, 828 F.3d 541, 544 (7th Cir. 2016) (applying deliberate indifference standard to detainees' claims of lack of medical care, but acknowledging *Kingsley*).")

Rogers v. Crow, No. 16-CV-01353-JPG, 2017 WL 2418726, at *2 (S.D. Ill. June 5, 2017) ("The legal standard that governs this claim depends on Plaintiff's status as a pretrial detainee or a

convicted prisoner during the relevant time period. The Fourteenth Amendment Due Process Clause applies to claims of pretrial detainees, and the Eighth Amendment governs claims brought by prisoners. *See Smith v. Dart*, 803 F.3d 304, 312 (7th Cir. 2015) (citing *Kingsley v. Hendrickson*, ––– U.S. ––––, 135 S. Ct. 2466, 2475 (2015); *Budd v. Motley*, 711 F.3d 840, 842 (7th Cir. 2013)). A pretrial detainee is entitled to freedom from conditions that constitute 'punishment' under the Fourteenth Amendment, while a convicted prisoner is entitled to freedom from 'cruel and unusual punishment' under the Eighth Amendment. . . With that said, there is little practical difference between the two standards in the context of medical claims.")

Lancour v. Parshall, No. 15-CV-105-WMC, 2017 WL 2198195, at *3 (W.D. Wis. May 18, 2017) ("While there is a point at which, after a person is arrested, claims relating to the constitutionality of confinement and treatment pass from the Fourth to the Fourteenth Amendment's Due Process Clause, and even later after a conviction to the Eighth Amendment's Cruel and Unusual Punishment Clause, the Seventh Circuit has explained that in cases in which the arrest was warrantless, the Fourth Amendment generally governs the period of confinement between the arrest and the preliminary hearing at which a determination of probable cause is made, while due process regulates the period of confinement after the initial determination of probable cause. . . Here, defendant has submitted no evidence that plaintiff was arrested pursuant to a warrant or that there was ever any judicial determination of probable cause to arrest. Indeed, the *only* support defendant offers for his argument that plaintiff's claim is governed by the Fourteenth Amendment is a citation to *Wilkins v. May*, 872 F.2d 190, 193–95 (7th Cir. 1989), but here, too, defendant is in error. Although *Wilkins* held that the period between an arrest and a formal charge falls under the rubric of due process rather than the Fourth Amendment, the Seventh Circuit limited this holding in subsequent cases. *See Lopez*, 464 F.3d at 719 (discussing how *Wilkins* has been limited by later Seventh Circuit case law). All that being said, it does not really matter to the outcome of defendant's pending summary judgment motion whether the Fourth or Fourteenth Amendment applies. As the Supreme Court explained in *Kingsley v. Hendrickson*, ––U.S. ––––, 135 S. Ct. 2466 (2015), an objective reasonableness standard applies to excessive force claims brought under both the Fourth and Fourteenth Amendments. . . Under the objective reasonableness standard, force is excessive if it is unreasonable in light of the 'facts and circumstances of the particular case.'. . Factors that may be relevant to this determination include: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. . . When this standard is applied to the present case, it is clear that summary judgment is not appropriate.")

Silliman v. Davis, No. 17-CV-00301-JPG, 2017 WL 1908521, at *3 (S.D. Ill. May 10, 2017) ("In the context of medical claims, there is little practical difference between the standards that apply to convicted prisoners and pretrial detainees. *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010); *Smentek v. Dart*, 683 F.3d 373, 374 (7th Cir. 2012). In this context, Fourteenth Amendment claims are 'appropriately analyzed under the Eighth Amendment.' *Smith v. Dart*, 803 F.3d at 310

(citing *Smego v. Mitchell*, 723 F.3d 752, 756 (7th Cir. 2013)) ("[T]he protection afforded under [the Due Process Clause] is functionally indistinguishable from the Eighth Amendment's protection for convicted prisoners.").")

Harden v. Aramark Food Services Corp., No. 11-CV-3238, 2017 WL 1658812, at *2 (C.D. Ill. May 1, 2017)("After *Kingsley*, though, the Seventh Circuit has continued to rely on the deliberate indifference standard to pretrial detainees' claims for lack of medical care. *See, e.g.*, Daniel v. Cook County, 833 F.3d 728, 732-33 (2016). At this point, the Court can avoid trying to define what greater protection is afforded civil detainees as compared to prisoners. Plaintiff's claims survive summary judgment even under the Eighth Amendment standard. Avoidance may no longer be possible when faced with how the jury should be instructed, but that is a discussion for another day.")

Outlaw v. City of Cahokia, No. 16-CV-456-JPG-SCW, 2017 WL 1491836, at *3 & n.2 (S.D. Ill. Apr. 26, 2017) ("Because Outlaw was a pretrial detainee, his claim falls under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment Cruel and Unusual Punishment Clause. However, the legal standards are essentially the same. . . The test for an Eighth Amendment violation has two components, an objective and a subjective one. . . First, the condition of confinement about which the inmate complains must be objectively serious; it must result in the denial of '"the minimal civilized measure of life's necessities."'. . Second, the official must have a sufficiently culpable state of mind, that is, he must at a minimum be deliberately indifferent. . .An official is deliberately indifferent if he 'knows of and disregards an excessive risk to inmate health or safety.'. . . There has been some uncertainty about whether *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015), changed this standard for pretrial detainees. In *Kingsley*, a pretrial detainee sued for excessive force, and the Supreme Court held that the appropriate standard was whether the officers' use of force was objectively unreasonable, not whether the officers were subjectively aware that their use of force was unreasonable. . . *Kingsley* calls into question whether deliberate indifference is the correct standard for a pretrial detainee's conditions of confinement claim, but the Seventh Circuit Court of Appeals has suggested the Eighth Amendment standard still applies. *See Phillips v. Sheriff of Cook Cty.*, 828 F.3d 541, 554 n. 31 (7th Cir. 2016).")

T.S. v. Twentieth Century Fox Television, No. 16 C 8303, 2017 WL 1425596, at *5 (N.D. Ill. Apr. 20, 2017) In the alternative to their Fourteenth Amendment due process claim, in Count II, Plaintiffs bring a Fourth Amendment claim against all of the Defendants arguing that the Supreme Court has not definitely determined whether the Fourth Amendment continues to provide protection against the use of excessive force beyond arrest. *See Graham v. Connor,* 490 U.S. 386, 395 n.10, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989); *see also Kingsley*, 135 S.Ct. at 2479 (Alito, J., dissenting) ("we should decide whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee," because "[w]e have not yet decided that question."). Plaintiffs' argument is misplaced because the Supreme Court has repeatedly recognized that 'the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.'. . . The Court grants, with prejudice, Defendants'

motions to dismiss Plaintiffs' Fourth Amendment claim as alleged in Count II.")

Cruz v. Dart, No. 12-CV-6665, 2017 WL 1021992, at *6 (N.D. Ill. Mar. 16, 2017) (" 'The Due Process Clause of the Fourteenth Amendment prohibits 'deliberate indifference to the serious medical needs of pretrial detainees.'". . . To show deliberate indifference, the plaintiff 'must show that his medical condition was objectively serious.'. . The plaintiff must also make a subjective showing. . . The 'official must be "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and the official "must also draw the inference."'")

Estate of Adams v. Christian Cty., No. 13-3300, 2017 WL 937146, at *6 (C.D. Ill. Mar. 9, 2017) ("The Defendants contend the rule in *Kingsley* should be held to apply only to excessive force claims and not deliberate indifference claims, as alleged here. Under a subjective standard, 'a plaintiff must put forth evidence to establish that the defendant knew of a serious risk to the prisoner's health and consciously disregarded that risk.' *Holloway v. Delaware County Sheriff*, 700 F.3d 1063, 1073 (7th Cir. 2012). This requires 'more than negligence and it approaches intentional wrongdoing.'. . The subjective deliberate indifference standard is analogous to criminal recklessness. . .The Court believes that, because the same language of the Fourteenth Amendment would apply to either claim, it is likely that the rule in *Kingsley* will be held to apply to medical care or conditions of confinement cases such as this one. Even though Defendant Nelson does not allege that qualified immunity applies, however, the Court does not believe it would be appropriate to hold a Defendant sued in his individual capacity to a standard that did not apply when he committed acts which are alleged to violate one's constitutional rights. Accordingly, the Court believes that the subjective standard is most appropriate in this case.")

Akindele v. Arce, No. 15 C 3081, 2017 WL 698679, at *3 (N.D. Ill. Feb. 22, 2017) ("Akindele claims that Reyes and Arce failed to protect him from an attack by his fellow detainees. 'Because [Akindele] was a pretrial detainee, his deliberate-indifference claim arises under the Fourteenth Amendment's Due Process Clause but is governed by the same standards as a claim for violation of the Eighth Amendment's prohibition against cruel and unusual punishment.' *Smith v. Sangamon Cnty. Sheriff's Dep't*, 715 F.3d 188, 191 (7th Cir. 2013); *see also Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 554 n.31 (7th Cir. 2016) (reaffirming this due process standard for deliberate indifference claims by pretrial detainees notwithstanding *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015), which holds that the due process standard for excessive force claims by pretrial detainees is less demanding than the Eighth Amendment standard for excessive force claims by convicted inmates).")

Hughes v. Dredge, No. 11-CV-3320, 2017 WL 637677, at *2 (C.D. Ill. Feb. 16, 2017) ("After *Kingsley*, . . .the Seventh Circuit has continued to rely on the deliberate indifference standard to pretrial detainees' claims for lack of medical care. *See, e.g.*, Daniel v. Cook County, 833 F.3d 728, 732–33 (2016).")

Godfrey v. Shrestha, No. 15 C 11284, 2017 WL 635149, at *2 (N.D. Ill. Feb. 16, 2017) ("A section

1983 claim by a pretrial detainee alleging that jail officials failed to protect her from harm is analyzed under the Fourteenth Amendment's Due Process Clause. . . A jail official (such as a correctional officer) is liable under section 1983 for failing to protect a detainee 'only when [she] is deliberately indifferent to a substantial risk of serious harm' to the detainee. . . 'A finding of deliberate indifference requires a showing that the [correctional officer] was aware of a substantial risk of serious injury to [the detainee] but nevertheless failed to take appropriate steps to protect [the detainee] from a known danger.'. .Thus, to show that a jail official acted with deliberate indifference, an injured party must show that 1) she was exposed to a substantial risk of serious harm, 2) the jail official had actual knowledge of the threat, and 3) the jail official acted unreasonably in light of the known risk.")

Satterly v. Land, No. 3:14-CV-1588, 2017 WL 633852, at *1 (N.D. Ind. Feb. 15, 2017) ("After this motion was fully briefed, the Seventh Circuit clarified that *Kingsley* only applies to excessive force claims and did not change the test for denial of medical treatment claims such as this one. . . Therefore the court will apply the same Eighth Amendment standards to this Fourteenth Amendment claim that were cited in the screening order.")

Akindele v. Arce, No. 15 C 5952, 2017 WL 467683, at *3 (N.D. Ill. Feb. 3, 2017) ("The Fourteenth Amendment's Due Process Clause governs a pretrial detainee's claim based on unconstitutional conditions of confinement. *See Smith v. Dart*, 803 F.3d 304, 309 (7th Cir. 2015). That said, 'there is little practical difference, if any, between the standards applicable to pretrial detainees and convicted inmates when it comes to conditions-of-confinement claims, and ... such claims brought under the Fourteenth Amendment are appropriately analyzed under the Eighth Amendment test.'. . To prevail on his conditions of confinement claim, Akindele must establish that: (1) he was housed under conditions that were 'sufficiently serious so that a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities'; and (2) Defendants were deliberately indifferent to that deprivation.")

Kozar v. Munoz, No. 14 C 2634, 2017 WL 413605, at *2 (N.D. Ill. Jan. 31, 2017) (" 'Because [Kozar] was a pretrial detainee, his deliberate-indifference claim arises under the Fourteenth Amendment's Due Process Clause but is governed by the same standards as a claim for violation of the Eighth Amendment's prohibition against cruel and unusual punishment.'" *Smith v. Sangamon Cnty. Sheriff's Dep't*, 715 F.3d 188, 191 (7th Cir. 2013); *see also Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 554 n.31 (7th Cir. 2016) (reaffirming this due process standard for deliberate indifference claims by pretrial detainees notwithstanding *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which holds that the due process standard for excessive force claims by pretrial detainees is less demanding than the Eighth Amendment standard for excessive force claims by convicted inmates).")

Miller v. Ninkovic, No. 14-CV-1603, 2017 WL 244846, at *1 (E.D. Wis. Jan. 20, 2017) ("After reviewing the clarified chronology of the revocation of Miller's extended supervision, there is no doubt that Miller was a convicted prisoner as of December 5, 2013. Miller concedes as much. And

the law is clear that the Eighth Amendment applies to claims of excessive force made by convicted prisoners. *See Kinney v. Indiana Youth Center*, 950 F.2d 462, 465 (7th Cir. 1991). The question is thus whether the fact that Miller was at Milwaukee County Jail for a case he had not been convicted of change this. While Miller's argument that a uniform pretrial detainee standard should apply at the jail has its appeal, it would in essence create a dual status for Miller and similarly situated persons. Miller has cited to no cases and I have found none supporting such a position. As defendants point out, Miller did not lose his status as a convicted prisoner merely because he was transferred to a different location, nor does he get enhanced constitutional rights simply because he is alleged to have committed *additional* crimes for which he had not yet been tried. . . Accordingly, I will grant defendants' motion *in limine* requesting that I instruct the jury to apply the Eight Amendment standard to Miller's excessive force claim.")

Becerra v. Kramer, No. 16 C 1408, 2017 WL 85447, at *5 (N.D. Ill. Jan. 10, 2017) ("Although the Fourteenth Amendment provides pretrial detainees with greater protection than convicted prisoners at least with respect to excessive force claims, *see Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), the Seventh Circuit has continued to apply the same standard to deliberate indifference claims brought by pretrial detainees as to those brought by convicted prisoners protected by the Eighth Amendment. *See Phillips v. Sheriff of Cook County*, 828 F.3d 541, 554 n.31 (7th Cir. 2016).")

White v. Watson, No. 16-CV-560-JPG-DGW, 2016 WL 6277601, at *3 (S.D. Ill. Oct. 27, 2016) ("The plaintiff claims the individual defendants were deliberately indifferent to the serious risk that Scarpi would commit suicide when they failed to place him in a suicide-proof cell, obtain mental health services for him, and regularly check on him in his cell. Because Scarpi was a pretrial detainee, these claims fall under the Fourteenth Amendment due process clause rather than the Eighth Amendment cruel and unusual punishment clause, which applies only to convicted prisoners. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015); *Burton v. Downey*, 805 F.3d 776, 784 (7th Cir. 2015). Nevertheless, the standard under the Fourteenth Amendment is essentially the same as the Eighth Amendment standard for cruel and unusual punishment.")

Mulder v. Clayton, No. 14-CV-3274, 2016 WL 5929217, at *4 n.5 (C.D. Ill. Oct. 11, 2016) (a failure to protect case) ("Reasonable minds might debate whether the subjective element is or is becoming something less than deliberate indifference, but at this point the difference is immaterial because Plaintiff's claims survive even under the deliberate indifference standard. In *Kingsley v. Hendrickson,* 135 S.Ct. 2466, 2473 (2015), the Supreme Court held that a defendant's subjective state of mind in a pretrial detainee's excessive force claim was relevant only to the extent that the defendant's actions were 'purposeful or knowing.'. . In *Smith v. Dart*, 803 F.3d 304, n. 2 (7th Cir. 2015), a pretrial detainee conditions of confinement claim, the Seventh Circuit cited *Kingsley* for the proposition that the subjective element required 'a purposeful, a knowing, or possibly a reckless state of mind.' The Seventh Circuit has recently remarked on the "shifting sands of present-day case authority' for the constitutional claims of detainees. *Werner v. Wall,* —— F.3d—— –, 2016 WL 4555610 (7th Cir. 2016).")

Shultz v. Dart, No. 13 C 3641, 2016 WL 212930, at *5 (N.D. Ill. Jan. 19, 2016) ("The parties treat Shultz as a pretrial detainee and thus analyze his deliberate indifference claim under the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment's Cruel and Unusual Punishment Clause, which applies only to convicted prisoners. As a practical matter, that distinction is of little consequence, as the Seventh Circuit has consistently held in the context of deliberate indifference claims that the two standards are 'essentially the same.'. . True, the Supreme Court held last year that a pretrial detainee bringing a § 1983 *excessive force* claim under the Due Process Clause need show only that the amount of force used against him was objectively unreasonable, by contrast to an inmate bringing an Eighth Amendment excessive force claim, who must show that a prison official subjectively applied the force to maliciously and sadistically cause harm. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-75 (2015). But *Burton*, which the Seventh Circuit decided after *Kingsley*, holds that the Due Process Clause and Eighth Amendment standards remain 'essentially the same' in the context of deliberate indifference claims. Accordingly, this court will rely on deliberate indifference cases decided under both provisions; even if the Seventh Circuit ultimately decides that the Eighth Amendment deliberate indifference standard is more difficult to meet, the difference does not matter because Shultz's claim survives summary judgment even under the Eighth Amendment standard.").

Karkoszka v. Dart, No. 13 C 1635, 2016 WL 164331, at *4 (N.D. Ill. Jan. 14, 2016) ("After the Supreme Court's remand in *Kingsley*, the Seventh Circuit rejected the defendant jail officials' qualified immunity argument in the context of the jail guards using Tasers on a non-resisting detainee, who was handcuffed and lying prone. *See Kingsley*, 801 F.3d at 832-33. In this context, the Seventh Circuit concluded that before and after the Supreme Court's *Kingsley* decision, it was clearly established that 'the amount of force had to be reasonable in light of the legitimate objectives of the institution.'. . Here, viewing the facts and reasonable inferences in Plaintiff's favor, although Plaintiff initially resisted being handcuffed, evidence in the record reveals that Officer Navarro took him to the ground after which Officers Webb, Malloy, and Leinweber successfully handcuffed him. It is reasonable to infer based on the extent and severity of Plaintiff's injuries and the fact that Officer Navarro got Plaintiff to the ground at the beginning of the altercation that certain Defendant Officers continued to hit, beat, or kick Plaintiff when he was on the ground of the bullpen and after he was handcuffed and subdued. There is also evidence in the record creating a triable issue that Officer Young used pepper spray after Plaintiff had already been handcuffed. Moreover, it was clearly established at the time of the incident on October 12, 2012 that a reasonable officer would be on notice that this use of force was unnecessary and excessive due to the lack of a legitimate security interest once Plaintiff was handcuffed and on the ground. . . In addition, a reasonable officer observing this excessive and unreasonable force would know that the other officers were violating Plaintiff's rights so that intervention was warranted. . . Accordingly, Defendant Officers' qualified immunity argument fails.")

Coleman v. City of Chicago, No. 12 C 10061, 2015 WL 8601702, at *2-3 (N.D. Ill. Dec. 14, 2015) ("The propriety of an officer's use of force against an arrestee or pretrial detainee is governed by

an objective reasonableness standard. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). The objective reasonableness of an officer's use of force turns on the facts and circumstances of the particular case. . . It is determined from the perspective of a reasonable police officer on the scene, including what the officer knew at the time. . . Considerations that may bear on the reasonableness or unreasonableness of force used include, among other factors, the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. . . There is no question that Officer Kirkland's dragging of Mr. Coleman along the floor by his handcuffs constituted intentional use of force; defendants do not argue otherwise. It is also plainly apparent from the video that before Officer Kirkland dragged Mr. Coleman by his handcuffs out of his cell and down the hallway, Mr. Coleman was no longer offering resistance. He had been subdued by the use of a taser and other officers' application of force, and he had been restrained by the application of handcuffs and shackles. It is well established that a police officer may not use significant force on a non-resisting or passively resisting subject. . . .Once the officers had subdued and restrained Mr. Coleman, they, and in particular Officer Kirkland, had a choice about how to get him out of the cell. Because Mr. Coleman was subdued and restrained, this was, most emphatically, not a situation where things were still evolving or Officer Kirkland had to make a decision on the fly. . . . Whatever the propriety of the use of a taser and the ensuing efforts to subdue Mr. Coleman, once the officers had his hands cuffed and his legs shackled, he was under control and on the floor. Given those circumstances, there is no viable claim, and no reasonable jury could find, that Officer Kirkland had to make a split-second decision on what to do next. There is no basis for a contention that the officers had no time to 'recalibrate' how much force was needed to get Mr. Coleman out of his cell and wherever he had to go next. No effort was made in this case to temper the use of force in removing Mr. Coleman from the cell. Rather, Officer Kirkland chose to use brute force when it was no longer necessary. Sergeant Walker conceded during his deposition that the officers could have stood Mr. Coleman up and told him to walk. If such an instruction had been given and refused, that might have justified some alternative means of removal from the cell—such as carrying him—but it is undisputed that no attempt was made to remove Mr. Coleman from the cell in a way that did not require additional force. Defendants contend in their brief that 'Coleman could have walked if he wanted to walk but he chose not to walk, . . . but that is a misstatement of the record— defendants have offered no evidence that Mr. Coleman was given the opportunity to leave the cell under his own power after he was tasered, handcuffed, and shackled.")

Swisher v. Porter Cnty. Sheriff's Dep't, No. 3:10-CV-337, 2015 WL 6738601, at *2 (N.D. Ind. Nov. 4, 2015) ("Swisher is suing Dr. Nadir H. Al–Shami, Sheriff David Lain, and Warden John Widup for denying him medical treatment. Here, Swisher's allegations plausibly allege that the denial of medical treatment was excessive or not rationally related to a legitimate nonpunitive governmental purpose. Therefore Swisher will be granted leave to proceed against Dr. Nadir H. Al–Shami, Sheriff David Lain, and Warden John Widup for denying him medical treatment for his hernia, back pain, sinus headaches, foot pain, and post-traumatic stress disorder caused by his

reaction to skin cancer and surgeries.")

Gilbert v. Rohana, No. 1:14-CV-00630-RLY, 2015 WL 6442289, at *4 (S.D. Ind. Oct. 23, 2015) ("The court finds *Kinglsey* did not alter the legal standard for denial of medical treatment claims brought by pretrial detainees like Plaintiff. *Kingsley* was limited to excessive force claims brought by pretrial detainees; the Court did not comment on the appropriate standard for denial of medical treatment claims brought by such detainees. Further, since *Kingsley*, district courts have continued to use the deliberate indifference standard in denial of medical treatment claims. [collecting cases] Accordingly, the court will follow well-settled Seventh Circuit precedent, which requires the court to analyze Plaintiff's claim under the deliberate indifference standard.")

Harper v. Dart, No. 14 C 01237, 2015 WL 6407577, at *3 & n.2 (N.D. Ill. Oct. 21, 2015) ("To state a claim for unlawful restraint (again, under the Due Process Clause of the Fourteenth Amendment), Harper must allege that the use of bodily restraints is not rationally related to a legitimate non-punitive government purpose or that their use appears excessive and objectively unreasonable in relation to the purpose they serve. . . .Restraint claims by pretrial detainees, like Harper's, have traditionally been evaluated under this standard, which originated in *Bell v. Wolfish,* 441 U.S. 520, 561 (1979), and *Youngberg v. Romero,* 457 U.S. 307, 324 (1982). But there is an argument that *Kingsley v. Hendrickson,* 135 S.Ct. 2466 (2015), which adopted an objective standard for excessive force claims brought by pretrial detainees, . . . may be a better fit. . . The parties here have not raised that possibility but should consider whether to do so at the summary judgment stage.")

Carter v. Huntington Cnty. Sheriff*,* No. 1:15-CV-246 TLS, 2015 WL 5252211, at *2 (N.D. Ind. Sept. 9, 2015) ("It appears that Carter is a pretrial detainee and that his claims arise under the Fourteenth Amendment. 'In evaluating the constitutionality of conditions or restrictions of pretrial detention ... the proper inquiry is whether those conditions amount to punishment of the detainee.' *Bell v. Wolfish,* 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). '[I]n the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose."' *Kingsley v. Hendrickson,* —— U.S. ——, ——, 135 S.Ct. 2466, 2473, 192 L.Ed.2d 416 (2015) (quoting *Bell,* 441 U.S. at 561). However, when judging what is rationally related or what is excessive, 'prison administrators [are] accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' *Bell,* 441 U.S. at 547. Here, Carter's allegation that he has been denied any medical treatment for serious medical needs plausibly alleges that the denial of medical treatment is excessive and not rationally related to a legitimate nonpunitive governmental purpose.")

Collins v. Al-Shami*,* No. 1:13-CV-01838-TWP, 2015 WL 5098533, at *8 (S.D. Ind. Aug. 31, 2015) ("Based on [*Kingsley*], Mr. Collins argues that Fourteenth Amendment claims of inadequate medical care are now analyzed using the objectively unreasonable standard, not the heightened

deliberately indifferent standard. Mr. Collins position is well taken, however, the Court need not address whether *Kingsley* requires that the objectively unreasonable standard be used in this case because under either standard—deliberate indifference or objective unreasonableness—Mr. Collins's claims cannot survive summary judgment.")

Green v. Watson, No. 3:15-CV-00621-MJR, 2015 WL 4609977, at *1 n.2 (S.D. Ill. July 31, 2015) ("The Supreme Court's recent decision in *Kingsley v. Hendrickson* does not change this analysis. *Kingsley* held that, in an excessive force case, a plaintiff need only prove that the force 'knowingly used against him was objectively unreasonable'—he did not *need* to prove a separate subjective element that the force was applied 'maliciously and sadistically.'. . However, *Kingsley* reaffirmed that a defendant 'must possess a purposeful, a knowing, or possibly a reckless state of mind,' as the Fourteenth Amendment does not 'impose liability for *negligently* inflicted harm.'. . After *Kingsley,* the Seventh Circuit has held fast to this state of mind requirement, noting that officials do not violate the due process clause when they act 'negligent[ly]' or make 'an accidental mistake.' *Davis v. Wessel,* —— F.3d ——, 2015 WL 4095358, at *5–7 (7th Cir. July 7, 2015).")

Hoffman v. Lakin, No. 15-CV-00648-NJR, 2015 WL 4090451, at *2 n.1 (S.D. Ill. July 6, 2015) ("Following the United States Supreme Court's *Kingsley* decision, it is unclear whether a detainee challenging the conditions of his confinement must also allege that the defendant acted with a certain state of mind, namely maliciously and sadistically with the intent to cause harm, or whether an allegation that defendant's actions were objectively unreasonable will suffice. In *Kingsley,* the Court adopted an objective standard for pretrial detainees' excessive force claims, but did not explicitly state that this is the standard for conditions claims under the Fourteenth Amendment. Until this Court receives further guidance on the appropriate standard to be applied in these cases, the Court will allow claims that otherwise state a conditions of confinement claim under the Fourteenth Amendment to pass its threshold screening under 28 U.S.C. § 1915A(a).")

Baker v. Hertz, No. 15-CV-600-JPG, 2015 WL 4052366, at *8 n.3 (S.D. Ill. July 2, 2015) ("In *Kingsley v. Hendrickson,* . . . the Supreme Court ruled just days ago that a pretrial detainee's Fourteenth Amendment due process claim regarding the use of excessive force turned on the objective reasonableness of the use of force, and proof as to the defendants' mental state was not required. . . However, the high court specifically declined to decide whether such an objective standard might suffice in a case involving mistreatment of a detainee, as the defendants in that case did not dispute that they had acted purposefully or knowingly. Nevertheless, the *Kingsley* Court noted that an objective standard had been applied in *Bell v. Wolfish,* 441 U.S. 520, 541–43 (1979), relative to a variety of prison conditions, including double-bunking. . . *Bell* did not specifically state that an objective standard applied; rather, the *Kingsley* Court characterized the 'rationally related' and 'appears excessive in relation to a legitimate nonpunitive governmental purpose' standards as being objective. Plaintiff's complaint herein has alleged both the objective and subjective factors with respect to the claims that survive threshold review.")

EIGHTH CIRCUIT

Jones v. Faulkner County, Arkansas, No. 23-1367, 2025 WL 866053, at *3 (8th Cir. Mar. 20, 2025) ("We analyze Jones's deliberate indifference claims against Grant and Dixon under the Fourteenth Amendment's due process clause, . . . relying on Fourteenth and Eighth Amendment cases alike[.] . . 'A plaintiff claiming deliberate indifference must establish objective and subjective components.'. . 'The objective component requires a plaintiff to demonstrate an objectively serious medical need,' while '[t]he subjective component requires a plaintiff to show that the defendant actually knew of, but deliberately disregarded, such need.'. . This latter component requires the official to 'be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and ... draw the inference.'. . However, 'the district court can infer knowledge if the risk was obvious.'")

Peterson v. Heinen, 89 F.4th 628, 634-35 (8th Cir. 2023) ("The parties spar over whether the Eighth Amendment or the Fourteenth Amendment applies to Peterson's excessive force claims. And understandably so: if the Fourteenth Amendment applies, Peterson has 'a lighter burden to show a constitutional violation.'. .The issue boils down to whether someone detained awaiting adjudication of a probation violation is more like a pretrial detainee or a convicted prisoner. Pretrial detainees seeking to vindicate their rights to be free from excessive force find shelter in the Fourteenth Amendment's Due Process Clause. . . Convicted prisoners seeking the same must turn to the Eighth Amendment's Cruel and Unusual Punishments Clause. . . When Peterson first arrived at WCJ, he was being held on unadjudicated probation violation charges tied to a state conviction for disorderly conduct. He received 90 days in prison, with 60 days suspended, for that conviction, as well as one year of probation, revocable if Peterson 'fail[ed] to abide by the rules.'. . If Peterson violated any conditions of his probation, the sentencing order states that the court could order him to serve 'the balance of the [original] sentence.' So while on probation and before being held at WCJ, Peterson was unlike 'pretrial detainees or persons enjoying unrestricted liberty.'. . Nevertheless, Peterson latches onto how, like criminal charges against pretrial detainees, his probation violation charge was 'unadjudicated,' so he says the Fourteenth Amendment applies. . . We are unconvinced. While alleged probation violators are afforded certain protections under the Due Process Clause, . . . neither we nor the Supreme Court have afforded alleged probation violators 'a substantive "liberty" interest' to be free from excessive force under the Fourteenth Amendment while detained[.] . . We decline 'to expand the concept of substantive due process' unnecessarily, . . . as the Eighth Amendment provides the 'explicit textual source of constitutional protection' against excessive force applied to an individual incarcerated on an unadjudicated probation violation[.] Unlike a pretrial detainee, Peterson finds himself outside any 'stage of a criminal prosecution.'. . In other words, Peterson is 'in wholly different circumstances' than those of a pretrial detainee, 'separated by the harsh facts of criminal conviction,' and held instead incident to the state's ongoing punishment following adjudication of his criminal culpability. . . His detention is part and parcel of the state's successful criminal conviction and ensuing punishment, . . . where any alleged excessive force claim incurred during consequent incarceration is analyzed under the Eighth Amendment[.]")

Reece v. Hale, 58 F.4th 1027, 1033-34 (8th Cir. 2023) ("We last consider McCain's entitlement to qualified immunity, which probably presents the closest question given that she was present throughout Amos's [pre-trial detainee] detention in BCDC and therefore witnessed his medical condition deteriorate. But for the same reasons that Hobelmann and Smith were entitled to rely on the medical team's assessment and supervision of Amos, it was reasonable for McCain to rely on the medical team as well once they arrived on scene. There is some question, though, whether she should have contacted medical staff earlier in the morning (assuming that would've helped Amos anyway), but we don't think the record shows that she was deliberately indifferent to a serious medical need. This isn't a situation where officers essentially ignored an injured inmate for hours as he lay motionless and unresponsive, *see Letterman v. Does*, 789 F.3d 856, 864 (8th Cir. 2015), or failed to seek medical attention even though an inmate had 'screamed, howled, and banged his head against the door of his cell for some eight hours.' *See Ryan v. Armstrong*, 850 F.3d 419, 425–26 (8th Cir. 2017). The incident report reflects that members of the jail staff, including McCain, checked on Amos at least eleven times in the two-and-a-half hours between booking and McCain's decision to place him in a restraint chair. . . Even though Amos's behavior during that time may have been odd, none of the other five nonparty officers who checked on him requested a medical evaluation either. And even though Amos was making absurd, random comments and was 'obnoxious' and sweating profusely at this time, that doesn't serve to distinguish him from many others who enter the jail under the influence of alcohol or drugs. . . He also had no external injuries, nor was he struggling to breathe, bleeding, vomiting, or choking. . . Up to the point a medical evaluation was requested, moreover, Amos complied with instructions. Perhaps McCain could have done more. But we cannot consider Donna's claim through the lens of 'hindsight's perfect vision,' as she must demonstrate more than mere negligence or 'ordinary lack of due care for the prisoner's safety' to succeed on her claim. . . The record would not support a finding that McCain's failure to act differently was a product of deliberate indifference. She is therefore entitled to qualified immunity.")

Buckley v. Hennepin County, 9 F.4th 757, 763-64 (8th Cir. 2021) ("Buckley alleges the paramedics were deliberately indifferent to the substantial risk of serious medical complications they knew ketamine sedation posed when they injected her with that sedative. Though Buckley was not imprisoned at the time, and therefore the Fourteenth Amendment rather than the Eighth Amendment governs her claim, we agree with the parties that the Eighth Amendment deliberate indifference standard applies. '[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders [her] unable to care for [herself], and at the same time fails to provide for [her] basic human needs [such as medical care,] it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.'. . To state a claim, Buckley must plausibly allege that the paramedics' conduct, viewed objectively, deprived her of a 'minimal civilized measure of life's necessities' when they injected her with the ketamine sedative knowing of but disregarding an excessive risk to her health or safety. . . Placing a person in need of emergency medical care on a medical transportation hold and transporting her to a hospital 'demonstrates a deliberate concern for [her] well-being, and not an indifference.'. . Likewise, sedating an agitated patient during the trip to the hospital to protect the patient and her

emergency medical providers is not deliberate indifference. Quite the contrary. Buckley's Complaint alleged simply that the paramedics knew, 'when they administered the ketamine, that there was a substantial risk that [she] would develop respiratory difficulties and require intubation.' There were no allegations of what the paramedics subjectively knew about the County's 'ketamine trials,' or why administering a commonly used sedative evidenced deliberate indifference. The district court properly dismissed these implausible substantive due process claims.")

Karsjens v. Lourey, 988 F.3d 1047, 1051-53 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 232 (2021) ("In *Karsjens I*, the claims and allegations in Counts 1 and 2—and subsequent bench trial and findings—focused on the statutory scheme itself and the officials' implementation thereof, specifically the indefinite nature of Appellants' confinement; the lack of automatic periodic review; and the administration of the treatment program. By contrast, the present claims and allegations focus squarely on the conditions of confinement, including the inadequacy of meals, double-bunking, overly harsh punishment for rules violations, property being taken and destroyed before any hearing, the lack of less restrictive alternatives, and the inadequacy of medical care. . . In other words, in Counts 5, 6, and 7, Appellants do not challenge their inability to be released from the facility but rather the conditions within the facility. They contend that, considered as a whole, their conditions of confinement amount to punishment in violation of the Fourteenth Amendment. . . . We previously found that the 'deliberate indifference' standard applied to a civilly committed individual's claim of inadequate medical care. . . To prevail under that standard, a plaintiff must show that 'officials knew about excessive risks to his health but disregarded them, and that their unconstitutional actions in fact caused his injuries.'. . We conclude that the district court should have applied the deliberate indifference standard, rather than the 'shocks the conscience' standard, to Appellants' inadequate medical care claim. . . .We now turn to the remaining claims in Counts 5, 6, and 7, in which Appellants allege that they were subjected to punitive conditions of confinement. Neither pretrial detainees nor civilly committed individuals may be punished without running afoul of the Fourteenth Amendment. . . Unless the detainee can show 'an expressed intent to punish ..., that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation"' to such alternative purpose. . . Although the Supreme Court has not established a constitutional standard for evaluating the conditions of a civilly committed individual's confinement, it has stated that '[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'. . In *Beaulieu v. Ludeman*, we applied the *Bell* standard to a claim brought by an individual who alleged that the MSOP's practice of double-bunking was punitive. . .Although we have not yet considered other allegedly punitive conditions in the context of civil commitment, we find our decisions regarding pretrial detainees to be instructive. . . 'Since *Bell* became law, we have applied its standard to conditions-of-confinement claims brought by pretrial detainees.'. . Indeed, we have applied *Bell* to a variety of conditions of confinement claims[.] [collecting cases] Based on the Supreme Court's pronouncements in *Bell* and *Youngberg*, we conclude that the *Bell* standard applies equally to conditions of confinement claims brought by pretrial detainees and civilly committed individuals, as neither

group may be punished. This conclusion is further supported by our consistent application of the *Bell* standard to such claims brought by pretrial detainees. Moreover, several circuits have applied *Bell* to conditions of confinement claims brought by individuals in civil commitment. *See Matherly v. Andrews*, 859 F.3d 264, 274-76 (4th Cir. 2017); *Healey v. Spencer*, 765 F.3d 65, 78-79 (1st Cir. 2014); *Allison v. Snyder*, 332 F.3d 1076, 1079 (7th Cir. 2003). In light of Supreme Court precedent, our own precedent governing pretrial detainees, and persuasive authority from our sister circuits, we hold that the *Bell* standard governs the claims in Counts 5, 6, and 7 (except the claim of inadequate medical care) that allege punitive conditions of confinement.")

Briesemeister v. Johnston, No. 20-1607, 2020 WL 6266453, at *1 n.2 (8th Cir. Oct. 26, 2020) (not reported) ("Briesemeister relies on *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), for the proposition that the standard for deliberate indifference claims under the Due Process Clause has been altered, and thus he had to prove only that the defendants' actions were not objectively reasonable. However, this court has continued to apply the deliberate indifference standard to claims for denial of medical care for pretrial detainees and thus for civilly committed patients.")

Stearns v. Inmate Services Corp., 957 F.3d 902, 906-08 & n.6 (8th Cir. 2020) ("The parties argue as to what Stearns must prove under *Bell*. They point out possible inconsistencies within our precedent and ask for clarification as to the appropriate standards. ISC argues that Stearns must show deliberate indifference. Stearns argues that *Bell* requires an objective showing. In *Bell v. Wolfish*, the Supreme Court articulated the standard governing pretrial detainees' claims related to conditions of confinement. . . . The Court articulated two ways to determine whether conditions rise to the level of punishment. A plaintiff could show that the conditions were intentionally punitive. . . Alternatively, if there is no expressly demonstrated intent to punish, the plaintiff could also show that the conditions were not reasonably related to a legitimate governmental purpose or were excessive in relation to that purpose. . . Stearns does not allege ISC's policies or customs were intentionally punitive. Therefore, to succeed on his conditions-of-confinement claim, he must show that ISC's policies or customs caused conditions that were not reasonably related to a legitimate governmental purpose or were excessive in relation to that purpose. . . .ISC argues that instead of applying *Bell* to Stearns's claim, we should apply a subjective deliberate indifference standard. ISC relies on isolated dicta to argue that we should effectively ignore the clear command of *Bell*. Specifically, in *Morris*, we stated that '[a]lthough this court has yet to establish a clear standard for pretrial detainees, we repeatedly have applied the same "deliberate indifference" standard as is applied to Eighth Amendment claims made by convicted inmates.'. . Despite this dicta, we applied *Bell* in *Morris* because the case involved a conditions-of-confinement claim. . . There is simply no need to rely upon dicta to determine the standard applicable to Stearns's claim. Since *Bell* became law, we have applied its standard to conditions-of-confinement claims brought by pretrial detainees. . . . Stearns's claim is based on his allegations that he was affirmatively subjected to conditions—by way of ISC's policies or customs—that were punitive. In particular, he alleges he was shackled and transported for eight days in foul conditions resulting in sores, infections, and loss of liberty, when all that was necessary was a 17 hour drive. Therefore, the

objective[5] standard of *Bell* controls.[6] **[fn.6:** The parties cite *Kingsley_v. Hendrickson*, . . . which clarified that the standard for a pretrial detainee's excessive force claim is objective reasonableness. The parties argue over *Kingsley*'s impact on all pretrial-detainee claims. Without deciding the impact of *Kingsley*, we decline to address it here.**]**")

Whitney v. City of St. Louis, Missouri, 887 F.3d 857, 860 & n.4 (8th Cir. 2018) ("Our precedent establishes that '[w]hether an official was deliberately indifferent requires both an objective and a subjective analysis.'. . .Whitney Sr. asserts that the Supreme Court's conclusion in *Kingsley v. Hendrickson*, . . . that 'the relevant standard is objective not subjective' should apply here. *Kingsley* does not control because it was an excessive force case, not a deliberate indifference case.")

Ryan v. Armstrong, 850 F.3d 419, 424-25 & nn. 2 & 3 (8th Cir. 2017) ("The trustee first claims that the district court erred by granting summary judgment to defendants Armstrong and Culloton. . . on the claim that they were deliberately indifferent to Harrell's serious medical need by failing to seek treatment for him during their shift. The parties agree that Harrell was a pretrial detainee during his time at the jail and that his deliberate indifference claim is based on the due process clause of the Fourteenth Amendment.[2] [fn.2 We have previously noted that in this circuit it is an open question whether the standard of the Fourth or the Fourteenth Amendment applies to medical care claims of arrestees. *See Bailey v. Feltmann*, 810 F.3d 589, 593 (8th Cir. 2016). Since the trustee asserts here that Harrell was a pretrial detainee and 'cites authorities applying due process analysis,' we address his arguments accordingly. *Carpenter v. Gage*, 686 F.3d 644, 650 (8th Cir. 2012).] The standard we apply in this context 'borrow[s] from the Eighth Amendment deliberate-indifference standard applicable to claims of prison inmates.' *Bailey v. Feltmann*, 810 F.3d 589, 593 (8th Cir. 2016).[3] [fn.3 In *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), the Supreme Court rejected analysis of a defendant's subjective state of mind in excessive force cases and concluded 'the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one.'. . *see also Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1069–71 (9th Cir. 2016) (en banc) (applying *Kingsley* to deliberate indifference claims). We need not decide the applicability of *Kingsley* to deliberate indifference claims here; even if subjective analysis of these claims is still warranted we conclude the district court erred in granting summary judgment to the defendants.])

Barton v. Taber, 820 F.3d 958, 964 & n.3 (8th Cir. 2016) ("To determine whether Owens's failure to seek medical care for Barton [a pre-trial detainee] violated Barton's constitutional rights, we apply the Eighth Amendment 'deliberate indifference' standard. . . . We note that in our recent decision, *Bailey v. Feltmann*, No. 14–3859, 2016 WL 191929 (8th Cir. Jan.15, 2016), we acknowledged disagreement regarding the proper standard to apply in denial-of-medical-care claims brought by arrestees. *See Bailey*, 810 F.3d 589, 2016 WL 191929, at *2; *see also Kingsley v. Hendrickson*, —— U.S. ——, ——, 135 S.Ct. 2466, 2473, 192 L.Ed.2d 416 (2015) (holding that the Fourteenth Amendment's objective reasonableness standard governs excessive-force claims brought by pretrial detainees).")

Bailey v. Feltmann, 810 F.3d 589, 593 (8th Cir. 2016) ("Bailey first argues that we should analyze his § 1983 claim against Feltmann for denial of medical care under the objective reasonableness standard of the Fourth Amendment. The Fourth Amendment governs an arrestee's claim alleging excessive use of force, *Graham v. Connor,* 490 U.S. 386, 395 (1989), but this court has not resolved whether an arrestee's claim alleging denial of medical care is analyzed under the Due Process Clause or the Fourth Amendment. One recent decision, *Carpenter v. Gage,* 686 F .3d 644, 650 (8th Cir.2012), applied due process analysis to the claim of an arrestee, but the plaintiff there did not invoke the Fourth Amendment, and the issue was not joined. Earlier cases seem to imply—also without discussion of the Fourth Amendment—that the Due Process Clause may govern, *e.g., Spencer v. Knapheide Truck Equip. Co.,* 183 F.3d 902, 905 & n. 3 (8th Cir.1999), and there is a conflict in authority elsewhere about how to evaluate this type of claim. *Compare Ortiz v. City of Chicago,* 656 F.3d 523, 530 (7th Cir.2011) (applying Fourth Amendment), *with Barrie v. Grand Cty.,* 119 F.3d 862, 865–69 (10th Cir.1997) (applying Due Process Clause). For present purposes, it is enough to acknowledge that a right under the Fourth Amendment against unreasonable delay in medical care for an arrestee was not clearly established in March 2012. Neither the Supreme Court nor this circuit had announced such a right, and there is no uniform body of authority that might allow us to conclude that the right was clearly established. Nor was it clearly established that a standard of objective reasonableness applies under the Due Process Clause. *Cf. Kingsley v. Hendrickson,* 135 S.Ct. 2466, 2473 (2015). Feltmann is therefore entitled to qualified immunity on Bailey's claim that Feltmann acted unreasonably, and the district court properly dismissed that portion of the complaint. We think it prudent to avoid addressing the proper constitutional standard unnecessarily. *See Camreta v. Greene,* 131 S.Ct. 2020, 2031 (2011). Bailey argues in the alternative that Feltmann's decision to proceed to the jail rather than to a hospital exhibited deliberate indifference to his need for medical attention in violation of his clearly established constitutional rights under the Due Process Clause. Regardless of whether an 'unreasonable' decision to forego treatment would violate the Constitution, this court deemed it clearly established by 2008 that a pretrial detainee (or an arrestee, *see Spencer,* 183 F.3d at 905 n. 3) has a right to be free from deliberately indifferent denials of emergency medical care. *See Thompson v. King,* 730 F.3d 742, 750 (8th Cir.2013). Bailey's claim fails, however, because he has not produced sufficient evidence to support a finding that Feltmann violated that right.")

Hall v. Ramsey County, 801 F.3d 912, 917 n.3, 918-20 (8th Cir. 2015) ("The Supreme Court recently published its decision in *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015), holding a pretrial detainee need only show a government official's use of force was objectively unreasonable in a section 1983 case premised upon excessive force. Prior to the publication of *Kingsley*, the parties did not dispute the requisite state of mind required for Hall's excessive force claim. . . Further, any constitutional rights afforded to Hall under *Kingsley* were not 'clearly established' at the time of Hall's detention. . . Therefore, *Kingsley* does not effect [sic] the standard against which we evaluate the Aides[']conduct in the qualified immunity analysis. . . . The conduct of the Aides and Leifeld shows an error in judgment and carelessness because Hall was likely injured by the Aides' actions. But this is a plain case of 'unwise excess of zeal' that, while disturbing, does not literally shock the conscience such that the behavior meets the heavy burden of violating

substantive due process. *See Moran,* 296 F.3d at 647 (citation omitted) (internal quotation marks omitted). Thus, Hall failed to show a constitutional violation as required to recover for the use of excessive force. We would be remiss, however, if we failed to acknowledge that government officials have "an unquestioned duty to provide reasonable safety for all residents and personnel within [an] institution" where people are involuntarily committed. *Youngberg v. Romeo,* 457 U.S. 307, 324, 102 S.Ct. 2452, 2462, 73 L.Ed.2d 28 (1982). Here, government officials failed to provide reasonable safety to Hall. Instead, Hall's elbow and wrist were likely injured during the escort to seclusion. The behavior on the part of the Aides, and Leifeld's supervision of such conduct, is unacceptable. Yet, this is not the egregious case that rises to the level of violating substantive due process under the Fourteenth Amendment. Instead, state-law claims still exist that may be a more appropriate remedy for the harm caused to Hall. . . . Sworn statements by Leifeld state Hall was placed in seclusion 'because he was uncooperative and unable to follow directions.' Further, Hall's seclusion lasted for less than two hours. Based upon the record, the Detox Center had a legitimate governmental interest in maintaining order and efficiently managing the facility. Placement of Hall in seclusion for a short period of time was a reasonable means of meeting the objective. Therefore, Hall failed to show his seclusion was a form of 'punishment' violating his constitutional rights under the Due Process Clause of the Fourteenth Amendment. Hall finally argues the Appellees unconstitutionally denied Hall medical care when Leifeld failed to immediately send Hall to the hospital for his injured leg. Again, we disagree. Hall's right to medical care arises under the Due Process Clause of the Fourteenth Amendment. . . To analyze denial of medical care claims, however, 'we apply the deliberate-indifference standard that governs claims brought ... under the Eighth Amendment.'. . . According to the video footage and other evidence, Hall did not appear to need medical attention. Throughout the video footage, Hall walks without a noticeable limp and does not appear to favor either leg. There is also no evidence in the record showing harm to Hall by the delay. Thus, Hall failed to establish a due process violation. . . . Accordingly, for the reasons set forth above, we affirm the district court's determination that Appellees were entitled to qualified immunity. . . Hall failed to show a violation of his procedural or substantive due process rights under the Fourteenth Amendment.")

Hollingsworth v. City of St. Ann, 800 F.3d 985, 989 (8th Cir. 2015) ("The parties agree that the conduct of the officers at issue here was governed by the Fourth Amendment. Their submission is consistent with our precedents, which have applied the Fourth Amendment when resolving excessive force claims arising during transportation, booking, and initial detention of recently arrested persons. *See Chambers v. Pennycook,* 641 F.3d 898, 905 (8th Cir.2011) (citing cases); *cf. Kingsley v. Hendrickson,* No. 14–6368, 2015 WL 2473447, at *13 (U.S. June 22, 2015) (Alito, J., dissenting).")

Davis v. White, 794 F.3d 1008, 1011-12 & n.1 (8th Cir. 2015) ("Davis was a post-arrest detainee at the time of the incident. He alleged that White, Beaird, and Tihen used excessive force in violation of the Fourth Amendment, consistent with our cases holding that the Fourth Amendment's 'objective reasonableness' standard applies to excessive-force claims that arise before the end of a detainee's booking process. *See, e.g., Hicks v. Norwood,* 640 F.3d 839, 842

(8th Cir.2011). In *Kingsley v. Hendrickson*, the Supreme Court recently held that the objective reasonableness standard applies to excessive force *due process* claims by pretrial detainees. . .The Court has not decided whether the Fourth Amendment applies to claims by detainees in custody. . . But *Kingsley* confirms that we have properly applied the objective reasonableness standard to these claims. . . .In applying the objective reasonableness standard to detainees in jail, the Court 'explained that a court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate.'. . *Kingsley* did not overrule cases applying a different, subjective standard to Eighth Amendment excessive force claims by convicted prisoners. . . .There is one further aspect of this problem that warrants consideration at this time. The decision in *Kingsley* turned on the Supreme Court's conclusion that the district court erred in defining 'excessive force' in its jury instructions. . . But the Court did not overrule its prior decision that, '[i]n determining whether a Fourth Amendment violation occurred we draw all reasonable factual inferences in favor of the jury verdict, but ... we do not defer to the jury's legal conclusion that those facts violate the Constitution.' *Muehler v. Mena*, 544 U.S. 93, 98 n. 1 (2005). None of the four separate opinions in *Kingsley* mentioned this issue. Both *Muehler* and *Kingsley* were 5–4 decisions. Justice Kennedy was the only Justice in both majorities. We see nothing in the *Kingsley* opinion suggesting that Justice Kennedy has departed from his concurring opinion in *Muehler*, which we read as treating the question of whether force was constitutionally excessive as an issue of law. . . Obviously, this is a question of great significance in deciding issues of qualified immunity and in conducting trials of Fourth Amendment excessive force claims.")

Smith on behalf of Estate of Hill v. Lisenbe, No. 4:20 CV 804 JMB, 2022 WL 407142, at *7 n.20 (E.D. Mo. Feb. 10, 2022) ("In the context of an excessive force claim filed pursuant to § 1983, the Supreme Court has held that 'a pretrial detainee can prevail [on a due process claim] by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.'. . This ruling has been extended to pretrial detainee's medical needs claims in the Second, Sixth, Seventh, and Ninth Circuits. . . The Eighth Circuit, however, has explicitly confined *Kingsley* to excessive force claims. [collecting cases] The Third and Fourth Circuits have declined to address the issue and there is no First Circuit case on point.")

Ivey v. Williams, No. CV 12-30 (DWF/TNL), 2019 WL 669805, at *4 (D. Minn. Feb. 19, 2019) ("Defendants argue further that the *Kingsley* analysis is not appropriate in the context of qualified immunity because the decision was released in 2015, while Defendants' alleged actions took place in 2011. . . They cite *Hall v. Ramsey County* to contend that the relevant question for excessive force in the context of qualified immunity is whether the plaintiff can demonstrate 'both that the official's conduct was conscience shocking, and that the official violated one or more fundamental rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty.'. . . The Court is unpersuaded. The Eighth Circuit applied the objective reasonableness standard to both qualified immunity and excessive force claims long before the *Kingsley* decision was released. *See e.g., Wilson v. Spain*, 20 F.3d 713, 716 (8th Cir. 2000)

(asserting that "[t]he linchpin of qualified immunity is the objective reasonableness of the officer's actions; objective reasonableness is also applied in analyzing the merits of Fourth Amendment excessive-force claims); *Nelson v. County of Wright*, 162 F.3d 986, 989-990, 990 n.5 (8th Cir. 1998) (observing that the standard for determining qualified immunity is identical to the standard for deciding if the use of force was excessive and that both involve considerations of objective reasonableness). . . The Court finds that whether or not the Magistrate Judge relied on *Kingsley*, the objective reasonableness standard applies; because reasonable officers in Defendants' position would have likely understood that their conduct was violating Plaintiff's clearly established right to be free from excessive force, the Defendants are not entitled to qualified immunity. . . . Even if the 'shocks the conscience' standard applied, the result is the same. The Supreme Court has observed, the measure of what is conscience shocking is no calibrated yard stick,' but it does 'point the way.' . . *Kingsley* held that excessiveness is measured objectively and then identified various considerations to inform whether the governmental action was rationally related to a legitimate governmental objective. . . Therefore, '*Kingsley* teaches that purposeful, knowing or (perhaps) reckless action that uses an objectively unreasonable degree of force *is* conscience shocking.'. . Here, a reasonable factfinder could conclude under both an objective reasonableness' or 'shocks the conscience' standard that Defendants' alleged actions were unnecessary and excessive, considering Plaintiff was already subdued and restrained when Defendants entered his room.")

Jones v. Briggs, No. 4: 16CV00593 BSM/JTR, 2018 WL 662362, at *4 n.5 (E.D. Ark. Feb. 1, 2018) ("Currently, the Eighth Circuit applies the same deliberate indifference standard to inhumane conditions of confinement claims brought by pretrial detainees, under the Fourteenth Amendment, and convicted prisoners, under the Eighth Amendment. *Butler*, 465 F.3d at 345. In *Ingram v. Cole Cnty*, 846 F.3d 282 (8th Cir. 2017), the Eighth Circuit heard arguments, *en banc*, on whether the deliberate indifference standard still applies to conditions of confinement claims asserted by pretrial detainees, based on the Court's holding in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). As of the date of this Recommended Disposition, no opinion has been entered in the *Ingram* case. However, even if the Eighth Circuit decides to extend *Kingsley* to conditions of confinement claims asserted by pretrial detainees, Defendants in this case would be entitled to qualified immunity from a retroactive application of that *new legal standard.*")

Muckenfuss v. Arrington, No. 5:16-CV-00023-JTR, 2017 WL 6542753, at *1 n.3 (E.D. Ark. Dec. 21, 2017) ("It appears Muckenfuss was a pre-trial detainee at the time his inadequate medical care claim arose. Currently, the Eighth Circuit applies the same deliberate indifference standard to an inadequate medical care brought by a pretrial detainee, under the Fourteenth Amendment, or a convicted prisoner, under the Eighth Amendment. *See Vaughn v. Greene County, Ark.*, 438 F.3d 845, 850 (8th Cir. 2006). In *Ingram v. Cole Cnty*, 846 F.3d 282 (8th Cir. 2017), the Eighth Circuit recently heard arguments, *en banc*, as to whether the deliberate indifference standard still applies to pretrial detainees in the light of the Supreme Court's holding in *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015). However, as of the date of this Recommendation, no opinion has been entered in the *Ingram* case.")

Beck v. Richards, No. 4:16-CV-00495 KGB, 2017 WL 3326969, at *3 (E.D. Ark. Aug. 3, 2017) ("In their motions for summary judgment, defendants argue that this Court must analyze Mr. Beck's claim under the Fourteenth Amendment's deliberate indifference standard . . . . The Court rejects this argument, as the Eighth Circuit Court of Appeals 'has not resolved whether an arrestee's claim alleging denial of medical care is analyzed under the Due Process Clause or the Fourth Amendment.'. .Despite this, the Court concludes that defendants are entitled to summary judgment on Mr. Beck's Fourth Amendment claims. Defendants are entitled to qualified immunity on these claims, as 'a right under the Fourth Amendment against unreasonable delay in medical care for an arrestee was not clearly established' when the underlying events occurred in early 2014. . . It also was not 'clearly established that a standard of objective reasonableness applies under the Due Process Clause.'")

McAdoo v. Martin, No. 6:13-CV-06088, 2017 WL 1091348, at *6 (W.D. Ark. Mar. 21, 2017) (applying *Kingsley* to excessive force claim but deliberate indifference to medical needs claim)

Swington v. City of Waterloo, Iowa, No. C15-0125-LRR, 2017 WL 427495, at *15 (N.D. Iowa Jan. 31, 2017) ("The plaintiff's right to medical care arises under the Due Process Clause of the Fourteenth Amendment. . .To analyze denial of medical care claims, however, 'the deliberate-indifference standard that governs claims brought ... under the Eighth Amendment' is applied.")

Ellingson v. Piercy, No. 2:14-CV-04316-NKL, 2016 WL 2745868, at *7 n.3 (W.D. Mo. May 11, 2016) ("In *Kingsley*, the United States Supreme Court held that Fourteenth Amendment excessive force claims are properly analyzed under the 'objective reasonableness' standard. . . However, it remains an open question whether *Kingsley*'s standard also applies to conditions of confinement claims under the Fourteenth Amendment. The question is not one the Court must presently decide. Even if the Brandon's Fourteenth Amendment claim is analyzed under the deliberate indifference standard, . . . Plaintiffs have offered sufficient allegations to survive a motion for judgment on the pleadings. Plaintiffs allege that Piercy knew Brandon was handcuffed when he placed Brandon against a flipped-up seat and then operated the patrol boat at high speeds across crowded, choppy water. Plaintiffs further allege that after Brandon fell into the lake, Piercy did not seek assistance or attempt a water rescue until nearby witnesses urged him to do so, despite knowing that Brandon was handcuffed and knowing he could not grab the dock hook Piercy initially fished into the water. These allegations are sufficient at this stage to establish that Piercy knew of an excessive risk—that a handcuffed, potentially inebriated person in his custody may drown if ejected into the water—and then proceeded to disregard this risk by leaning Brandon against a flipped-up seat, driving at high speeds across the lake, and delaying a water rescue after Brandon was ejected from the patrol boat. As in the case of a medical emergency, these risks are obvious even to a layperson such that a jury could find deliberate indifference.")

Oliver v. County of Gregory, No. 3:14-CV-03013-RAL, 2016 WL 70824, at *6 n.12 (D.S.D. Jan. 6, 2016) ("In *Kingsley v. Hendrickson*, the Supreme Court of the United States held that a pretrial detainee need only show that the defendant-official's use of force was objectively unreasonable in

a § 1983 case alleging excessive force. . . That holding, however, was limited to excessive force cases under the Fourteenth Amendment. . . Thus, the Eighth Circuit still utilizes the subjective measure of deliberate indifference as set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994), for pretrial detainees in Fourteenth Amendment cases involving an allegation of deprivation of medical care. [citing *Hall*]")

Townsend v. Summerville, No. 4:12-CV-04072, 2015 WL 5163052, at *9 (W.D. Ark. Sept. 3, 2015) ("The United States Supreme Court recently confirmed the Eighth Circuit's application of the objectively reasonable standard to excessive force claims by pretrial detainees in *Kingsley v. Hendrickson*, __ US __, 135 S.Ct. 2466, 2473 (2015). *See Davis v. White*, __ F.3d __, 2015 WL 4528367 at *2 (July 28, 2015).")

Nattress v. Lancaster Cnty., Neb., No. 4:14-CV-3161, 2015 WL 4249493, at *5-7 (D. Neb. July 13, 2015) ("[A]s a preliminary matter, it is necessary to consider what constitutional standard is applicable to the unique circumstance of a plaintiff who alleges that excessive force was applied *after* his acquittal, but *before* he was released from custody or charged with another offense. . . . The plaintiff, as in *Andrews*, might fairly be characterized as a 'post-trial detainee.' And as in *Andrews*, the same governmental concerns are implicated. Guided by the Eighth Circuit's reasoning in *Andrews*, the Court will apply a Fourteenth Amendment standard to the plaintiff's excessive force claim. Under that standard, the plaintiff must show that force was purposely or knowingly used against him. . . and that the force used was objectively unreasonable. [citing *Kingsley*] Objective reasonableness turns on the facts and circumstances of each particular case. . . A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight. . . A court must also account for the legitimate interests that stem from the government's need to manage the facility in which the individual is detained, appropriately deferring to policies and practices that in the judgment of jail officials are needed to preserve internal order and discipline and to maintain institutional security. . .Considerations that bear on the reasonableness or unreasonableness of the force used may include the relationship between the need for the use of force and the amount of force used, the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force, the severity of the security problem at issue, the threat reasonably perceived by the officer, and whether the plaintiff was actively resisting. . . . A plaintiff can prevail by providing objective evidence that the challenged government action was not rationally related to a legitimate government purpose or that it was excessive in relation to that purpose.")

NINTH CIRCUIT

Alexander v. Nguyen, 78 F.4th 1140, 1144 (9th Cir. 2023) ("This court tends 'to address both prongs of qualified immunity where the two-step procedure promotes the development of constitutional precedent in an area where this court's guidance is ... needed.'. . Because the law governing pretrial detainees' claims of inadequate medical care and other dangerous conditions of confinement is still developing in the wake of the Supreme Court's decision in *Kingsley v.*

Hendrickson, 576 U.S. 389 (2015), we address the first prong, which is decisive here. We need not discuss qualified immunity separately. Alexander argues that he can prove that Dr. Nguyen denied him appropriate medical care in violation of his Fourteenth Amendment rights under the test set forth in *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018). Dr. Nguyen argues that the proper inquiry is whether Alexander was deprived of safe conditions under the test in *Youngberg v. Romeo*, 457 U.S. 307 (1982). These tests differ only slightly. Both ask whether Dr. Nguyen's conduct was reasonable, and both require Alexander to show that Dr. Nguyen's conduct was worse than negligent. The undisputed facts show that Alexander cannot meet this burden under either phrasing.")

Polanco v. Diaz, 76 F.4th 918, 928 n.7 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 2520 (2024) ("In a different context, we held that the requisite mental state for a Fourteenth Amendment due process claim is an objective form of deliberate indifference. *See Castro v. County of Los Angeles*, 833 F.3d 1060, 1069–70 (9th Cir. 2016) (en banc). But we have continued to apply a purely subjective test to state-created-danger claims. *See Herrera*, 18 F.4th at 1160–61 (recognizing a tension between the requisite mental states in *Castro* and post-*Castro* state-created-danger cases but holding that it was bound by the latter cases).")

Russell v. Lumitap, 31 F.4th 729, 738-45 (9th Cir. 2022) ("[T]he standard governing claims for inadequate medical care has changed since Russell's death. After our decision in *Clouthier*, the Supreme Court cautioned in *Kingsley v. Hendrickson*. . . that claims brought by pretrial detainees under the Fourteenth Amendment should not necessarily be evaluated under the same standard as claims brought by convicted prisoners under the Eighth Amendment. . . *Kingsley* addressed a claim brought by a pretrial detainee that jail officers had used excessive force against him. . .The Court held that a defendant bringing such a claim need not show subjective deliberate indifference; he need only demonstrate 'that the force purposely or knowingly used against him was objectively unreasonable.'. . In *Gordon v. County of Orange*, we extended the Supreme Court's reasoning in *Kingsley* to claims for inadequate medical care brought by pretrial detainees. . . . Thus the subjective second prong of *Clouthier* has been replaced by an objective standard: A defendant can be liable even if he did not actually draw the inference that the plaintiff was at a substantial risk of suffering serious harm, so long as a reasonable official in his circumstances would have drawn that inference. Under this objective reasonableness standard, a plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.'. . . The primary issue in this case is the third prong of the *Gordon* test. As we explained, the subjective deliberate indifference prong of the *Clouthier* test that governed inadequate medical care claims at the time of Russell's death has since been replaced by *Gordon*'s objective prong. An officer is entitled to qualified immunity unless the unlawfulness of his conduct was clearly established at the time that he acted . . . and the law at the time that the defendants acted was different than it is now. However, we held in *Sandoval v. County of San Diego* that 'when we assess qualified immunity for a claim of inadequate medical care of a pre-trial detainee arising out of an incident that took place prior to *Gordon*, we ... "concentrate on the objective aspects of the [pre-*Gordon*] constitutional standard" to evaluate whether the law was clearly established.'. . Thus,

to determine whether the defendants are entitled to qualified immunity, we do not consider whether they subjectively understood that Russell faced a substantial risk of serious harm. . . Rather, we conduct 'an objective examination of whether established case law would make clear to every reasonable official that the defendant's *conduct* was unlawful in the situation he confronted.'. . Applying *Sandoval*'s approach here, to defeat qualified immunity the plaintiffs must show that, given the available case law at the time, a reasonable official, knowing what Dr. Le, Nurse Teofilo, Nurse Trout, and Nurse Lumitap knew, would have understood that their actions 'presented such a substantial risk of harm to [Russell] that the failure to act was unconstitutional.'. . Their 'actual subjective appreciation of the risk is not an element of the established-law inquiry.'. . . Like the plaintiffs in *Plemmons, Tlamka,* and *Estate of Carter,* Russell was displaying 'classic' and 'obviously severe'. . . symptoms of a heart attack. And like the officials in *Tlamka*, Dr. Le and the nurses halted treatment 'with no good or apparent explanation for the delay ....'. . . Dr. Le knew that the intervention plan under the Standardized Procedures for angina pectoris had been initiated when Russell was given a first dose of nitroglycerin, yet he did not recommend continuing this line of treatment—which called for the administration of up to two more doses of nitroglycerin within as little as five minutes after the first dose, and hospitalization. As in *Clouthier*, it should have been clear to Dr. Le that Russell was at severe risk based on Nurse Trout's call relaying his symptoms and the recommendation of the Standardized Procedures to hospitalize Russell under these circumstances. . . Unlike *Simmons,* it is reasonable to infer—and so, again, at this stage we must . . . that a reasonable person in Dr. Le's position would have been aware that the risk to Russell was '*imminent*'. . . due to the severity and nature of the symptoms and the 'obvious'. . . nature of the risk, as demonstrated in part by the fact that the Standardized Procedures called for an immediate call to paramedics under these circumstances. Nevertheless, without explanation or examination, Dr. Le did not recommend that Nurse Trout conform her treatment to the Standardized Procedures. As in *Ortiz*, Dr. Le made his recommendation without examining his patient despite his knowledge of Russell's ominous symptoms, and disregarded a clear signal—the ineffectiveness of the dose of nitroglycerin—that Russell's condition was potentially fatal. . . While Dr. Le recommended Motrin and a mental-health screening, clearly established law at the time provided that Russell need not 'prove complete failure to treat' because 'access to medical staff is meaningless unless that staff is competent and can render competent care.'. . A reasonable jury could conclude that Dr. Le had been deliberately indifferent. Under these circumstances, taking the facts most favorably to the plaintiffs, Dr. Le could not have reasonably believed based on the clearly established law as it stood then that he could provide constitutionally adequate care without even examining a patient with Russell's symptoms who had not responded to a dose of nitroglycerin. Therefore, the district court was correct in denying summary judgment on qualified immunity to Dr. Le. . . . However, when Nurse Trout called Dr. Le and told him all of the symptoms that Russell had been experiencing, Dr. Le did not recommend hospitalizing him. Even though Russell was experiencing classic symptoms of a heart attack, Dr. Le recommended Motrin and a mental-health screening. No clearly established law would have put a reasonable nurse in Nurse Trout's position on notice that she could violate Russell's constitutional rights even while relying on Dr. Le's evaluation and recommendation. Therefore, Nurse Trout is entitled to summary judgment on qualified immunity. A jury could not, on the facts

pleaded, reasonably conclude that Nurse Trout was deliberately indifferent. Though perhaps she should have called paramedics, her having promptly called the physician on call and followed his instructions cannot be categorized as deliberate indifference. . . . Drawing all inferences in plaintiff's favor, a reasonable person in Nurse Lumitap's position would have inferred that Russell was at serious risk if not hospitalized. By the time she came on duty at 7:00 am, Dr. Le's advice was 5½ hours old and Russell's symptoms were much worse than when Dr. Le had been called. The record shows that, like Nurses Teofilo and Trout, Nurse Lumitap knew that Dr. Le had evaluated Russell over the phone and had not recommended hospitalization. However, Nurse Lumitap was responsible for Russell's care from around 7:00 am until 12:20 pm, between 5½ to 11 hours after Dr. Le had made his recommendation to administer Motrin. A reasonable factfinder could conclude that, after so much time had elapsed, and in the face of Russell's rapidly deteriorating condition, Nurse Lumitap was no longer in a position to reasonably rely on Dr. Le's recommendation from the night before without calling him again. She did not call for paramedics until Russell was unresponsive, and at no point did she call Dr. Le or any other physician for an updated recommendation in light of Russell's worsening symptoms. Her decision not to call Dr. Le (or whichever physician was then on call) at any point during that period suffices to raise a genuine dispute over whether it was clearly established that the care she provided was constitutionally adequate. Therefore, the district court was correct in denying qualified immunity to Nurse Lumitap. . . Although Nurse Trout is shielded by qualified immunity because her actions did not violate then-existing clearly established law, there is at least a genuine dispute of material fact over whether Dr. Le's and Nurses Teofilo's and Lumitap's conduct violated clearly established law as it then stood. Therefore, we reverse the district court's denial of qualified immunity to Nurse Trout, and we affirm its denial of qualified immunity to Dr. Le and Nurses Teofilo and Lumitap.")

Fraihat v. United States Immigration & Customs Enforcement, 16 F.4th 613, 659-60 & n.7 (9th Cir. 2021) (Berzon, J., dissenting) ("Even though the proper standard 'is one of *objective* indifference, not *subjective* indifference,'. . . the majority substantiates its analysis with cases that additionally require subjective indifference. It does so primarily by relying on cases that predate *Kingsley v. Hendrickson*[.] . . *Kingsley* held the proper standard for evaluating a detainee's excessive force claim is purely objective. . . Applying *Kingsley*, *Gordon* 'conclude[d] that the proper standard of review' for 'right to adequate medical care' claims 'is one of objective indifference, not subjective indifference.'. . . [T]he *Kingsley*/*Gordon* reckless disregard standard is not satisfied by simply recognizing a risk to health and safety, expressing concern, and taking *some* measures to decrease the risk. Instead, the officials responsible for the conditions must take 'reasonable available measures to abate that risk'; the degree of risk presented necessarily informs which 'reasonable available measures' are needed 'to abate' them. . . Plaintiffs have presented evidence which, viewed through an objective standard, strongly suggesting the government did not prescribe such measures, whether it meant to do so or not. Distracted, I submit, by its evaluation of whether ICE was acting in good faith, the majority holds that ICE's policy about detention conditions is not 'objectively unreasonable[.]' . . I disagree. Given the degree of irreparable harm to which the Plaintiff subclasses of medically vulnerable detainees were

exposed, *Roman* makes clear that the district court did not abuse its discretion in concluding that the Plaintiffs at least demonstrated a serious legal question on the merits of their claim, sufficient to support the grant of a preliminary injunction. The majority holds, for example, that '[P]laintiffs did not demonstrate that the mere fact of their detention amounted to deliberate indifference[.]'. . . The post-*Kingsley* case law continues to use the term 'deliberate indifference,'. . . despite its origination in the Eighth Amendment subjective standard cases, . . . and even though the term seems to incorporate the subjective component (that the 'indifference' was 'deliberate'). I use 'reckless disregard' here and suggest that we stop using the misleading 'deliberate indifference' rubric in cases involving pretrial or civil detention Fifth or Fourteenth Amendment challenges.")

Sandoval v. County of San Diego, 985 F.3d 657, 671-78 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 711 (2021) ("We begin with whether the shift in the legal framework governing Plaintiff's claims—from subjective deliberate indifference to objective unreasonableness—has any bearing on the qualified immunity analysis. The nurses argue, and the dissent agrees, that in determining whether the nurses are entitled to qualified immunity, we must apply all elements of an inadequate medical care claim exactly as they stood at the time of the incident at issue here, including the subjective deliberate indifference requirement. But we have already rejected this approach in *Horton by Horton v. City of Santa Maria*. 915 F.3d at 599–603. Under *Horton*, when we assess qualified immunity for a claim of inadequate medical care of a pre-trial detainee arising out of an incident that took place prior to *Gordon*, we apply the current objective deliberate indifference standard to analyze whether there was a constitutional violation. . . and 'concentrate on the objective aspects of the [pre-*Gordon*] constitutional standard' to evaluate whether the law was clearly established[.] . . .To fully understand *Horton*, we must first address *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043 (9th Cir. 2002). [court discusses *Estate of Ford* and *Horton*] The rule of *Horton*, aside from the fact that it is controlling precedent, makes sense. The purpose of determining whether there has been a constitutional violation has always been to 'further the development of constitutional precedent.'. . It would run counter to that goal to apply the pre-*Gordon* standard now, because 'no purpose would be served for future cases from delineating the application of that standard to the constitutional merits of this case.'. .Horton's recognition that the objective deliberate indifference standard applies even when the incident occurred pre-*Gordon* comports with the purpose underlying the clearly established law requirement. As the Supreme Court has explained, this requirement is designed to 'give[ ] government officials breathing room to make reasonable but mistaken judgments about open legal questions.'. .Because the premise of qualified immunity is that state officials should not be held liable for money damages absent fair warning that their actions were unconstitutional, the clearly established law standard 'requires that the legal principle clearly prohibit the [defendant's] conduct in the particular circumstances before him.'. . This inquiry is an objective one that compares the factual circumstances faced by the defendant to the factual circumstances of prior cases to determine whether the decisions in the earlier cases would have made clear to the defendant that his conduct violated the law. . . The focus is on the standards governing the defendant's conduct, not legal arcana. . . Consistent with this purpose, the qualified immunity analysis remains objective even when the constitutional claim at issue involves subjective elements. . . Thus, in the Eighth

Amendment deliberate indifference context, we have recognized that 'a reasonable prison official understanding that he cannot recklessly disregard a substantial risk of serious harm, could know all of the facts yet mistakenly, but reasonably, perceive that the exposure in any given situation was not that high. In these circumstances, he would be entitled to qualified immunity.'. . We are not aware of a single case in which we have examined the defendant's mental state in assessing the clearly established law prong of qualified immunity. Several other circuits have concluded, as we did in *Horton*, that because the clearly established law prong focuses objectively on whether it would be clear that the defendant's conduct violated the Constitution, lack of notice regarding the mental state required to establish liability has no bearing on the analysis. Take, for example, the Seventh Circuit's decision on remand from the Supreme Court in *Kingsley* itself. *See Kingsley v. Hendrickson*, 801 F.3d 828 (7th Cir. 2015) (per curiam) ("*Kingsley II*"). . . On remand, the *Kingsley* defendants advanced a view of qualified immunity similar to the one the nurses offer here. They argued that because the Supreme Court's decision had 'altered the substantive law of liability,' their liability should not be assessed under the new objective unreasonableness standard, which had not been clearly established at the time of the incident in the case. . .In addressing this argument, the Seventh Circuit first concluded that prior cases had clearly established that the force used by the officers was excessive—i.e., that their *conduct* was unlawful. . It then turned to the defendants' argument that they were nevertheless entitled to qualified immunity because the standard had changed from subjective awareness to objective unreasonableness during the course of the litigation. . . Rejecting this position, the Seventh Circuit explained that it 'would untether the qualified immunity defense from its moorings of protecting those acting in reliance on a standard that is later determined to be infirm.'. . Reliance interests were not implicated there, it said, because before and after the Supreme Court's decision, 'the standards for the amount of force that c[ould] be permissibly employed remain[ed] the same.'. . The Seventh Circuit concluded that to decide otherwise would require it 'to accept the dubious proposition that, at the time the officers acted, they were on notice only that they could not have a reckless or malicious intent and that, as long as they acted without such an intent, they could apply any degree of force they chose.'. . It declined to do so. . .Like the Seventh Circuit, the Sixth Circuit has rejected the argument that defendants facing claims of excessive force based on pre-*Kingsley* conduct are entitled to qualified immunity simply because it would not have been clear at the time of their unconstitutional conduct that any claims against them would be governed by an objective standard. *Hopper v. Plummer*, 887 F.3d 744, 755–56 (6th Cir. 2018). . . The First and Fifth Circuits have reached similar conclusions. [citing cases] Rather than sticking to our settled approach, the dissent would, for the first time, drag a subjective element into the question of whether a defendant violated clearly established law. For example, the dissent concludes Nurse de Guzman is entitled to qualified immunity—regardless of whether it would have been clear to every reasonable nurse that his conduct was unlawful—because there is, supposedly, insufficient evidence that de Guzman subjectively understood that Sandoval faced a serious medical need. . . This radical reimagination of qualified immunity would produce results directly contrary to the purposes served by the doctrine—giving 'government officials breathing room to make reasonable but mistaken judgments about open legal questions,'. . . while at the same time ensuring that a plaintiff can recover damages from a defendant who acts so unreasonably in light of established case law that

he is appropriately described as 'plainly incompetent[.]'. . Consider how the dissent's approach would play out in practice. Here, there is no dispute that the objective unreasonableness standard from *Gordon* governs the merits of Plaintiff's claims. Thus, had the nurses not raised a qualified immunity defense, presumably even the dissent would agree that objective unreasonableness alone would be sufficient to establish their liability. . . Yet the dissent would use qualified immunity, a defense designed 'to shield officials ... when they perform their duties *reasonably*,'. . . to require Plaintiff to satisfy a standard under which the nurses would be protected from liability—no matter how *un*reasonable their conduct—as long as they did not *subjectively appreciate* that their actions put Sandoval at a substantial risk of suffering serious harm. We cannot accept this extraordinary proposition, which would transform a defense that protects 'all but the plainly incompetent,' into one that provides immunity to defendants *precisely because* they were so incompetent that they did not understand the patent unreasonableness of their conduct as already established by law. . . The dissent's position might be justified if we could somehow conclude that the nurses relied on the subjective deliberate indifference standard in determining how to treat Sandoval. But to speak the thought is to recognize that it makes little sense. As the clearly established law prong of qualified immunity is typically applied, we impute to the defendant knowledge of the relevant case law governing his conduct. Thus, if there is binding precedent holding that a police officer may not use deadly force against an unarmed fleeing suspect, . . . future officers are expected to tailor their conduct accordingly. Those who fail to do so are not entitled to qualified immunity. . . They have received their 'fair notice' and squandered it. . . But how would an official who believes any claims against him would be tried under a subjective deliberate indifference standard act any differently than one who knows that an objective unreasonableness standard applies? It is not as if an individual can consciously control the extent to which he is subjectively aware of the wrongfulness of his conduct. It therefore seems likely that officials responsible for providing medical care to inmates will act in exactly the same manner after *Gordon* as they did before. They will provide the treatment they think necessary under the circumstances, mindful of what our cases dictate is appropriate conduct in different factual scenarios, and, in the event they subjectively believe the treatment they are providing is inadequate, they will, we would hope, adjust their conduct accordingly. It is true that after *Gordon*, state officials may now be held liable for providing inadequate medical care even when they were not subjectively aware of the unreasonableness of their conduct. But as the Seventh Circuit has explained, this change could affect an official's on-the-ground actions only if we were to assume that before *Gordon*, officials acted in reliance on the belief that as long as they were not subjectively aware that their conduct created a substantial risk of serious harm to an inmate, they could provide any level of medical care they so chose, no matter how obviously deficient. . . Like the Sixth and Seventh Circuits, we refuse to accept this 'dubious proposition.'. . In sum, as we previously concluded in *Horton*, when the governing law has changed since the time of the incident, we apply the current law to determine if a constitutional violation took place under the first prong of qualified immunity analysis, and the second prong remains what it has always been: an objective examination of whether established case law would make clear to every reasonable official that the defendant's *conduct* was unlawful in the situation he confronted. . . We will approach our analysis accordingly. We have already determined that there is a triable issue of fact

whether the nurses committed constitutional violations under the *Gordon* standard, which governs the violation prong of our qualified immunity analysis. . . We turn now to whether the right was clearly established at the time. . . Applying *Horton*'s approach here, to defeat qualified immunity for the Officers, Plaintiff must show that, given the available case law at the time, a reasonable nurse, knowing what Llamado, Harris, and de Guzman knew, would have understood that failing to call paramedics (Llamdo and Harris), or failing to check on Sandoval for hours and failing to pass on information about his condition (de Guzman), 'presented such a substantial risk of harm to [Sandoval] that the failure to act was unconstitutional.'. . The nurses' actual subjective appreciation of the risk is not an element of the established-law inquiry. We conclude that Sandoval has demonstrated that the available law was clearly established as to the unreasonableness of the nurses' conduct.")

Sandoval v. County of San Diego, 985 F.3d 657, 685-91 (9th Cir. 2021) (Collins, J., concurring in the judgment in part and dissenting in part), *cert. denied*, 142 S. Ct. 711 (2021) ("In reversing the judgment as to the Nurses, the majority applies the wrong legal standards to the qualified immunity inquiry and, as to Nurse de Guzman, reaches the wrong result. . . In opposing the Nurses' claim of qualified immunity, Plaintiff had to show that the Nurses violated clearly established law as it stood in 2014, when they acted. Because the then-controlling deliberate-indifference liability standards included a *subjective* element, Plaintiff therefore had to make a showing of subjective deliberate indifference to defeat qualified immunity, and she had to do so even though that subjective element of the test for liability has since been overruled. The majority errs—and expressly creates a circuit split—in reaching the oxymoronic conclusion that a county employee who did not even violate the law at the time he or she acted can nonetheless be said to have violated *clearly established* law at that time. . . . Because the qualified immunity issue turns on whether '"any reasonable official in the defendant's shoes would have understood that he [or she] was violating"' *then-existing* law, . . . and because then-existing law required subjective awareness of a serious medical need, . . . it follows that a nurse who, at the time, did not *subjectively* apprehend Sandoval's serious medical needs is entitled to qualified immunity. Put simply, a nurse who did not violate then-existing law cannot possibly be said to have violated clearly established law, and such a nurse is therefore entitled to qualified immunity. Consequently, unless Plaintiff presented sufficient evidence to raise a triable issue with respect to (*inter alia*) a given nurse's subjective awareness of Sandoval's serious medical needs, that nurse would be entitled to qualified immunity. . . The majority nonetheless contends that the qualified immunity inquiry in this case is governed by a purely *objective* standard, *viz.*, whether 'a reasonable nurse, knowing what Llamado, Harris, and de Guzman knew, would have understood that [his or her actions] "presented such a substantial risk of harm to [Sandoval] that the failure to act was unconstitutional."'. . According to the majority, the qualified immunity inquiry requires an *exclusively* objective focus that effectively shears off any subjective element of the previously existing liability standard. As explained above, this position cannot be correct, because it rests on the self-contradictory premise that one can violate the clearly established law at the time without even violating the law at the time. . . Although the majority argues that its position is required by Ninth Circuit precedent, its ruling here is both

contrary to our caselaw and creates a split with at least three other circuits. . . . In addition to being inconsistent with our precedent, the majority's ruling creates a clear split with the decisions of at least three other circuits. Indeed, the majority opinion candidly acknowledges that the Third, Eighth, and Tenth Circuits have held that courts addressing comparable claims must 'apply a *subjective* framework for purposes of qualified immunity, even though it ha[s] since been replaced by an objective standard.'. . . Although the majority's position is directly contrary to that of the Third, Eighth, and Tenth Circuits, the majority claims that its approach is supported by the decisions of several other circuits. . . That is doubtful. Only two of these cases involved a claim of deliberate indifference to the serious medical needs of a pretrial detainee, and the court in both cases applied the subjective test in addressing qualified immunity. *Dyer v. Houston*, 964 F.3d 374, 383–84 (5th Cir. 2020) (holding that confusion over the exact nature of the subjective element did not absolve the district court of having to decide whether the defendants were liable under the then-clearly established standards); *Hopper v. Plummer*, 887 F.3d 744, 756–57 (6th Cir. 2018) (declining to disturb district court's denial of qualified immunity in light of its "finding of a genuine issue of material fact as to defendants' 'knowledge of a substantial risk of serious harm'"). The majority instead cites the portion of *Hopper* that involved an *excessive force* claim, as well as two other decisions involving such claims. *Hopper*, 887 F.3d at 755–56; *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64 (1st Cir. 2016); *Kingsley v. Hendrickson*, 801 F.3d 828 (7th Cir. 2015) (decision on remand from the Supreme Court's *Kingsley* decision). The courts in all three of these cases dismissed the notion that any previously applicable subjective element of the excessive force test provided any basis for granting qualified immunity, and to that extent those cases bear some arguable similarity to the majority's conclusion here. . . But there is a critical difference between the role of the subjective element in an excessive force claim (in which the officer *affirmatively* applies force, . . . and a claim of deliberate indifference to serious medical needs (in which the official *fails to act*). In excessive force cases in which the objective component of the qualified immunity inquiry is met—meaning that the officer has applied an objective level of force that *any* reasonable officer would know is excessive—there are likely to be few, if any, cases in which the officer who is *knowingly and affirmatively applying that force* could plausibly assert that he did not simultaneously act with the requisite subjective intent of 'at least recklessness.'. . In other words, satisfying the objective standard for qualified immunity in such excessive force cases almost certainly means that the subjective element is met as well. By contrast, where the gravamen of the violation is a failure to act (as in the context of deliberate indifference to serious medical needs), the objective unreasonableness of a nurse's failure to detect a serious medical risk does not similarly lead to an inescapable conclusion that the nurse *must* have *actually* subjectively appreciated that risk. People can, and do, sometimes subjectively overlook what they should obviously detect. These three cases thus supply little support for the majority's sweeping rule that the qualified immunity inquiry is exclusively objective and requires courts to affirmatively and always disregard any subjective elements of the previously clearly established law. In all events, to the extent that these cases could be read to endorse the majority's flawed analysis, then they are wrong as well. . . Accordingly, each of the Nurses here is entitled to qualified immunity unless Plaintiff presented sufficient evidence to show (*inter alia*) that that Nurse was subjectively '"aware of facts from which the inference could be

drawn that a substantial risk of serious harm [to Sandoval] exists,"' and that he or she actually '"dr[e]w the inference."'")

Smith v. Washington, No. 18-35263, 2019 WL 3099387, at *2 (9th Cir. July 15, 2019) (not reported) ("[T]he district court improperly imported Eighth Amendment jurisprudence into the Fourteenth Amendment context. Although a plaintiff must establish under the Eighth Amendment that the defendant official demonstrated 'a *subjective awareness* of the risk of harm,'. . . under the Fourteenth Amendment a pre-trial detainee need only prove that the official's conduct was 'objectively unreasonable.'. . . We do not address here whether the current Fourteenth Amendment standard should apply during the qualified immunity analysis.")

Hoard v. Hartman, 904 F.3d 780, 788-90 (9th Cir. 2018) ("In the decades since *Whitley* was decided, the Supreme Court has consistently emphasized that the 'core judicial inquiry' in excessive force cases is 'whether force was applied in a good-faith effort to maintain or restore discipline, *or* maliciously and sadistically to cause harm.'. . The contrast is clear: an officer who harms an inmate as part of a good-faith effort to maintain security has acted constitutionally, but an officer who harms an inmate 'for the very purpose of causing harm,'. . has engaged in excessive force, provided that the other elements of excessive force have been met. . . Put simply, officer intent—not officer enjoyment—serves as the core dividing factor between constitutional and unconstitutional applications of force. . . . Defendants nonetheless urge us to conclude that the district court did not err in instructing the jury on the meaning of 'sadistically' because *Whitley* established that only force applied 'maliciously and sadistically to cause harm' constitutes excessive force. In support of their argument, Defendants point to a string of Eighth Circuit decisions explaining that '[t]he word "sadistically" is not surplusage[.]' . . . . We decline to follow our sister circuit's interpretation of *Whitley*. . . . Sometimes, a word is just a word. And there is ample evidence here that the Supreme Court did not intend its use of 'maliciously and sadistically' in *Whitley* to work a substantive change in the law on excessive force beyond requiring intent to cause harm. Chief among this evidence is the fact that the Supreme Court has never addressed 'maliciously and sadistically *separately* from the specific intent to cause harm. It has even, on one occasion, omitted any mention of 'maliciously and sadistically' altogether and simply explained that 'a purpose to cause harm is needed for Eighth Amendment liability in a [prison] riot case.'. . Indeed, as recently as *Kingsley v. Hendrickson*, —— U.S. ——, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015), the Supreme Court referred to this factor of the excessive force test as the 'malicious and sadistic purpose *to cause harm*.'. . The Court's characterization of this standard in *Kingsley* comports with our understanding that the phrase 'maliciously and sadistically' serves a predominantly rhetorical function. Rather than create additional elements for plaintiffs to satisfy, the use of these two terms emphasizes the cruelty inherent in harming an inmate for no other reason than to cause harm. . . .Consistent with *Whitley* and its progeny, an officer's subjective enjoyment is not a necessary element of an Eighth Amendment excessive force claim. Of course, an officer who harms an inmate for his or her personal enjoyment has engaged in excessive force, but that is not the question before us: the question is whether proof of sadism is *required* for excessive force claims. We hold that it is not. . . .By instructing the jury that

'maliciously and sadistically for the very purpose of causing harm' required 'having or deriving pleasure from extreme cruelty,' the district court required Hoard to prove that Officer Hartman acted with a subjective state of mind far more demanding than that of intent to harm. This was error.")

Shorter v. Baca, 895 F.3d 1176, 1190-91 (9th Cir. 2018) ("In *Gordon*, we concluded that 'claims for violations of the right to adequate medical care "brought by pretrial detainees against individuals under the Fourteenth Amendment" must be evaluated under an objective deliberate indifference standard,' and we set forth the elements of a medical care claim under the due process clause of the Fourteenth Amendment. . . Not having the benefit of *Gordon*, the district court evaluated Shorter's inadequate medical care claim under the Eighth Amendment's subjective deliberate indifference standard. Because the pretrial grant of summary judgment was based on an erroneous legal standard, we vacate and remand the judgment in favor of County Defendants on Shorter's § 1983 inadequate medical care claim for further proceedings consistent with *Gordon*.")

Gordon v. County of Orange, 888 F.3d 1118, 1120-25 (9th Cir. 2018), *cert. denied,* 139 S. Ct. 794 (2019) ("Given developments in Section 1983 jurisprudence, including the Supreme Court's decision in *Kingsley v. Hendrickson* . . . and our *en banc* decision in *Castro v. County of Los Angeles*, . . . we conclude that the proper standard of review for such claims is one of objective indifference, not subjective indifference. Accordingly, summary judgment is vacated and the case is remanded to the district court for further proceedings consistent with this decision. . . . With this Court's *en banc* decision in *Castro*, we rejected the notion that a subjective deliberate indifference standard applied globally to all section 1983 claims, whether brought by pretrial detainees or by convicted prisoners. . . This decision addresses the standard for claims brought by pretrial detainees for inadequate medical care. . . . While *Kingsley* did 'not necessarily answer the broader question of whether the objective standard applies to all Section § 1983 claims brought under the Fourteenth Amendment against individual defendants[,]'. . . logic dictates extending the objective deliberative indifference standard articulated in *Castro* to medical care claims. . . First, the landscape remains the same. As noted, we remain in a realm where 'Section 1983 itself 'contains no state-of-mind requirement independent of that necessary to state a violation' of the underlying federal right" (*id*.) and here, the medical care claims brought by pretrial detainees also 'arise under the Fourteenth Amendment's Due Process Clause, rather than under the Eighth Amendment's Cruel and Unusual Punishment Clause'. . . . Notably, the 'broad wording of *Kingsley*.... did not limit its holding to "force" but spoke to "the challenged governmental action" generally.'. . . Second, the Supreme Court has treated medical care claims substantially the same as other conditions of confinement violations including failure-to-protect claims. For instance in 1991, in *Wilson v. Seiter*, the Supreme Court saw 'no significant distinction between claims alleging inadequate medical care and those alleging inadequate "conditions of confinement." Indeed, the medical care a prisoner receives is just as much a "condition" of his confinement as ... the protection he is afforded against other inmates.'. . . Third, we have long analyzed claims that government officials failed to address pretrial detainees' medical needs using the same standard as cases alleging that officials failed to protect pretrial detainees in some other way. . . Accordingly, we hold that claims for violations of

the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard. . . Based thereon, the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. 'With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily "turn[ ] on the facts and circumstances of each particular case."'. . The ' "mere lack of due care by a state official" does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.'. . Thus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.'. .Because the district court applied a subjective standard to the plaintiff's claim of inadequate medical care, the grant of summary judgment was in error.")

White v. Baca, 676 F. App'x 724, 725 (9th Cir. 2017) ("We review a claim that a jury instruction is an incorrect statement of the law de novo, reversing only where there was a prejudicial error. . . The jury instructions erroneously stated that the jury needed to find the defendants acted maliciously and sadistically for the purpose of causing harm. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472-73 (2015) (holding that the factfinder need only decide whether the force the officer used against the pretrial detainee was objectively unreasonable). Because the jury instructions included a particular state of mind requirement, they failed to properly state the law. . . The failure to properly instruct the jury was not harmless. . . White is entitled to a new trial because the defendants have failed to identify any evidence to support a harmless error finding, and it is unlikely that adding an extra element to White's burden of proof would be harmless. . . Moreover, given the evidence in the record, it cannot be said that it is more likely than not that the jury would have reached the same verdict had it been properly instructed. . . Although it is plausible that the jury determined the defendants acted in a reasonable manner, it is also plausible that the jury concluded the defendants acted in an unreasonable manner, but they did not act maliciously and sadistically for the purpose of causing harm. . . Lastly, the jury verdict form is of no moment because it does not separate the elements that the jury had to find in order to establish liability; the first question, which is the only question the jury answered, subsumes all of the excessive force elements, including the erroneous requirement that White establish the subjective intent of the defendants.")

Castro v. County of Los Angeles, 833 F.3d 1060, 1069-72 (9th Cir. 2016) (en banc) ("In sum, *Kingsley* rejected the notion that there exists a single 'deliberate indifference' standard applicable to *all* § 1983 claims, whether brought by pretrial detainees or by convicted prisoners. *Kingsley* did not squarely address whether the objective standard applies to all kinds of claims by pretrial detainees, including both excessive force claims and failure-to-protect claims. An excessive force

claim, like the one at issue in *Kingsley*, differs in some ways from a failure-to-protect claim, like the one at issue here. An excessive force claim requires an affirmative act; a failure-to-protect claim does not require an affirmative act. And *Kingsley*'s holding concerned whether the 'force deliberately used is, constitutionally speaking, "excessive,"'. . . which does not necessarily answer the broader question whether the objective standard applies to all § 1983 claims brought under the Fourteenth Amendment against individual defendants. On the other hand, there are significant reasons to hold that the objective standard applies to failure-to-protect claims as well. 'Section 1983 itself "contains no state-of-mind requirement independent of that necessary to state a violation" of the underlying federal right.' . . The underlying federal right, as well as the nature of the harm suffered, is the same for pretrial detainees' excessive force and failure-to-protect claims. Both categories of claims arise under the Fourteenth Amendment's Due Process Clause, rather than under the Eighth Amendment's Cruel and Unusual Punishment Clause. . . . We note, too, the broad wording of *Kingsley*. In rejecting the interpretation of *Bell* on which we relied in *Clouthier*, the Court wrote that 'a pretrial detainee can prevail by providing only objective evidence that *the challenged governmental action* is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.' *Kingsley*, 135 S. Ct. at 2473–74 (emphasis added). The Court did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally. We therefore overrule *Clouthier* to the extent that it identified a single deliberate indifference standard for all § 1983 claims and to the extent that it required a plaintiff to prove an individual defendant's subjective intent to punish in the context of a pretrial detainee's failure-to-protect claim. On balance, we are persuaded that *Kingsley* applies, as well, to failure-to-protect claims brought by pretrial detainees against individual defendants under the Fourteenth Amendment. Excessive force applied directly by an individual jailer and force applied by a fellow inmate can cause the same injuries, both physical and constitutional. Jailers have a duty to protect pretrial detainees from violence at the hands of other inmates, just as they have a duty to use only appropriate force themselves. Because of the differences between failure-to-protect claims and claims of excessive force, though, applying *Kingsley*'s holding to failure-to-protect claims requires further analysis. As explained above, *Kingsley* recognized that there are two state-of-mind issues at play in an excessive force claim. The first—the officer's state of mind with respect to his physical acts—was undisputedly an intentional one there, because the officer had taken the affirmative act of using force knowingly and purposefully. In the failure-to-protect context, in which the issue is usually inaction rather than action, the equivalent is that the officer's conduct with respect to the plaintiff was intentional. For example, if the claim relates to housing two individuals together, the inquiry at this step would be whether the placement decision was intentional. Or, if the claim relates to inadequate monitoring of the cell, the inquiry would be whether the officer chose the monitoring practices rather than, for example, having just suffered an accident or sudden illness that rendered him unconscious and thus unable to monitor the cell. . . . Under *Kingsley*, the second question in the failure-to-protect context would then be purely objective: Was there a substantial risk of serious harm to the plaintiff that could have been eliminated through reasonable and available measures that the officer did not take, thus causing the injury that the plaintiff suffered? That inquiry differs from the inquiry with respect to an Eighth Amendment failure-to-protect claim: There, 'the deprivation alleged must *objectively* be

sufficiently serious; and the prison official must *subjectively* have a sufficiently culpable state of mind.'. . . [T]he test to be applied under *Kingsley* must require a pretrial detainee who asserts a due process claim for failure to protect to prove more than negligence but less than subjective intent—something akin to reckless disregard. Putting these principles together, the elements of a pretrial detainee's Fourteenth Amendment failure-to-protect claim against an individual officer are:

(1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
(2) Those conditions put the plaintiff at substantial risk of suffering serious harm;
(3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and
(4) By not taking such measures, the defendant caused the plaintiff's injuries. . .

With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily 'turn[ ] on the "facts and circumstances of each particular case."'. . . Here, the individual defendants do not claim that there was any miscommunication about the placement of Gonzalez in Castro's cell or that some other unintentional act created the jail conditions at issue. Nor do the individual defendants dispute that Castro faced a substantial risk of serious harm at the hands of Gonzalez or that they failed to take reasonable measures to mitigate that risk. Rather, the individual defendants argue that there was insufficient evidence to establish their subjective awareness of the danger that Castro faced and their knowing disregard of it, or to establish that their conduct caused Castro's injuries. In light of the analysis above, to affirm the jury's verdict we need only determine that there was substantial evidence that a reasonable officer in the circumstances would have appreciated the high degree of risk involved and that the officers' failure to take reasonable measures to protect Castro caused his injuries. The jury here found that the officers knew of the substantial risk of serious harm to Castro, which necessarily implies that the jury found that a reasonable officer would have appreciated the risk.")

Castro v. County of Los Angeles, 833 F.3d 1060, 1084-87 (9th Cir. 2016) (en banc) (Ikuta, J., with whom Callahan and Bea, JJ., join dissenting) ("I join Judge Callahan's dissent in full, but I write separately to express my dismay that the majority has misinterpreted *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and made a mess of the Supreme Court's framework for determining when pretrial detainees have suffered punishment in violation of their Fourteenth Amendment due process rights. . . A pretrial detainee has a constitutional right under the Fourteenth Amendment to be free from punishment without due process of law. . . According to *Bell*, when a pretrial detainee alleges a violation of a constitutional right (and does not point to a violation of any 'express guarantee of the Constitution'), the only question is whether the situation at issue amounts to punishment of the detainee. . . This right to be free from punishment under the Due Process Clause is the only constitutional right at issue in this case; neither Castro nor the majority claims that any other constitutional right is at issue. Under Supreme Court precedent, there are four ways

for pretrial detainees to establish that they were unconstitutionally punished. First, and most obviously, a pretrial detainee can show that a government official's action was taken with an 'expressed intent to punish.'. .Second, a pretrial detainee can show that a government official's deliberate action was objectively unreasonable. . . An objectively unreasonable action is one that is not reasonably related to the government's legitimate interests, like interests in managing the detention facility and maintaining order. . . Because an objectively unreasonable action has no 'legitimate nonpunitive governmental purpose,' it indicates an intent to punish. . . A claim that an official used excessive force, rather than reasonable force necessary to maintain order, falls into this category. . . Third, a pretrial detainee can establish that a restriction or condition of confinement, such as a strip search requirement, is not reasonably related to a legitimate government purpose, which indicates that the purpose behind the condition is punishment. . . . Finally, a pretrial detainee can show that a governmental official's failure to act constituted punishment if the detainee can establish that the official was deliberately indifferent to a substantial risk of harm. The Supreme Court has made clear that a failure to act is not punishment at all unless the government official actually knew of a substantial risk and consciously disregarded it. *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994). This standard follows from the 'intent requirement' implicit in the word 'punishment,' *Wilson v. Seiter*, 501 U.S. 294, 298–300 (1991); the unintentional or accidental infliction of harm amounts at most to negligence, which is not a due process violation, *Kingsley*, 135 S. Ct. at 2472. We have long applied this deliberate indifference standard to claims that a government official failed to address medical needs or otherwise protect pretrial detainees. [citing cases] Castro's claim falls into this last category. He alleges that a government official actually knew of a substantial risk of serious harm by putting Gonzalez in his cell and failed to protect him from that risk. As stated in Judge Callahan's dissent, we can affirm the judgment against the individual defendants on this ground. . . Rather than apply this well-established framework, the majority inexplicably holds that we must analyze a claim that a government official's failure to act constituted punishment under the standard applicable to excessive force claims, relying on the Supreme Court's recent decision in *Kingsley*. A description of *Kingsley* shows it is entirely inapposite. In that case, when a detainee refused to remove a piece of paper covering his light fixture, four officers handcuffed him, forcibly removed him from the cell, and applied a Taser to his back for about five seconds. . . The detainee brought an action under § 1983 claiming that the officers used excessive force against him in violation of the Fourteenth Amendment's Due Process Clause. . . The Court held that where officers deliberately use force against a pretrial detainee, the standard to determine whether the force is excessive is an objective one. . . . *Kingsley* is consistent with the Supreme Court cases establishing that where the government official's affirmative acts are shown to be 'excessive in relation' to any 'legitimate governmental objective,' a court 'permissibly may infer' that they are punitive in nature. . . But the *Kingsley* standard is not applicable to cases where a government official fails to act. As explained in *Bell*, in analyzing a pretrial detainee's Fourteenth Amendment claim, the key question is whether the situation at issue amounts to a punishment of the detainee. . . While punitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference. . . Rather, a person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at

most. . . And the Supreme Court has made clear that 'liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.'. .Realizing this difficulty, the majority fiddles with the standard applicable to failure-to-act claims to create a new test: It holds that a pretrial detainee can state a due process violation for an official's failure to act by showing that (i) the official made an intentional decision with respect to the plaintiff's conditions of confinement; (ii) the decision put the detainee at substantial risk of suffering serious harm; (iii) the official was objectively unreasonable in not fixing the risk; and (iv) the failure to undertake a fix caused the detainee's injuries. . . This test simply doesn't fit a failure-to-act claim. . . .[T]he majority has simply dressed up the *Farmer* test in *Kingsley* language for no apparent reason; it conflates the two standards only to end up where we started. In sum, the majority unnecessarily muddles our longstanding test for claims alleging that an officer's failure to act amounted to punishment based on its mistaken assumption that it must achieve consistency with the test enunciated in *Kingsley*. But *Kingsley* applies to a different category of claims: those involving intentional, objectively unreasonable actions. Because the majority's reasoning is both mistaken and unnecessary, I dissent.")

Rettew v. Cassia County, No. 1:20-CV-00386-BLW, 2022 WL 623206, at *5–6 (D. Idaho Mar. 3, 2022) ("A determination of 'deliberate indifference' involves an examination of two elements: the seriousness of the pre-trial detainee's medical need and the nature of the defendant's response to that need. . . The plaintiff 'must first show a serious medical need by demonstrating that failure to treat [the plaintiff's] condition could result in further significant injury or the unnecessary and wanton infliction of pain.'. . Upon demonstration of a serious medical need, the plaintiff must then show that the defendant's response was objectively deliberately indifferent. . . The Ninth Circuit recently enumerated the objective deliberate indifference components as:
(1) the defendant made an intentional decision regarding the denial of medical care; (2) those conditions put the detainee at substantial risk of suffering serious harm; (3) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (4) by not taking such measures, the defendant caused the detainee's injuries.
Sandoval, 985 F.3d at 669. To satisfy the third element, Plaintiffs must show that the defendant's actions were 'objectively unreasonable' – a test that necessarily turns on the facts and circumstances of each case. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1067-68 (9th Cir. 2016) (en banc). The objective unreasonableness standard requires a showing of 'more than negligence but less than subjective intent—something akin to reckless disregard.'. . 'The mere lack of due care by a state official does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.'. . 'A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.' [citing *Kingsley v. Hendrickson*]")

Gutierrez-Lopez v. Figueroa, No. CV2000732PHXSPLJFM, 2020 WL 2781722 (D. Ariz. May 27, 2020) (applying *Kingsley* to conditions of confinement) ("Despite knowledge of the serious

risks posed to vulnerable detainees by COVID-19, and knowledge of Petitioner's high-risk medical condition, Respondents have not implemented recommended or required measures through which Petitioner could maintain a safe distance from other detainees who may or may not be contagious; measures that would provide Petitioner with the ability to adequately clean and disinfect herself and her immediate surroundings if exposed; measures that would provide Petitioner with the means to protect herself from exposure during her interactions with staff; or measures that would allow Petitioner to seek medical care without risking exposure. Respondents do not claim that measures facilitating social distancing, hygiene, self-protection, and medical care are unreasonable or unnecessary for preventing and managing transmission of COVID-19. Nor do Respondents claim that such measures are not feasible or that they are incompatible with EDC operations. By failing to take these recommended, reasonable, and available measures, Respondents have fostered conditions that pose an objectively unreasonable risk of transmission of COVID-19 and a resulting substantial risk of serious harm to Petitioner's health and ultimate safety. While Respondents may have legitimate objectives for detaining Petitioner, they have identified no single legitimate purpose served by detaining Petitioner under conditions that pose an objectively unreasonable risk of harm to her. That is because these conditions serve no legitimate government objective. The conditions under which Petitioner is detained therefore amount to punishment and violate the Due Process Clause of the Fifth Amendment.")

Ahlman v. Barnes, No. SACV20835JGBSHKX, 2020 WL 2754938, at *13 (C.D. Cal. May 26, 2020) ("Plaintiffs. . . have not met their burden to prove that the balance of equities tilts in favor of releasing all medically vulnerable and disabled inmates. There are myriad risks of releasing incarcerated individuals without any consideration of crime committed, propensity to violence, or flight risk. Concerns that released inmates would commit crimes is far from 'speculative'—many of the individuals in the proposed class have committed or are charged with violent crimes. Moreover, some pre-trail inmates may pose a flight risk. Such a haphazard release of inmates could present a threat to public safety. Because it is plausible that the Jail could mitigate many of the risks presented by COVID-19 with better compliance with the CDC Guidelines, Plaintiffs have not met their burden to demonstrate that the need for release outweighs the risks of releasing of 488 inmates without individualized assessments.")

Pimentel-Estrada v. Barr, No. C20-495 RSM-BAT, 2020 WL 2092430, at *14-17 (W.D. Wash. Apr. 28, 2020) ("As summarized above, Respondents have taken numerous actions in response to the COVID-19 outbreak. . . There are, however, several glaring deficiencies. First, ICE has not reduced or rearranged the population at the NWIPC such that appropriate and meaningful social distancing is possible. As of April 18, 2020, 13,287 of the 30,737 individuals held in ICE custody nation-wide had no criminal convictions and no criminal charges pending against them. ICE, Detention Management, *available at* https://www.ice.gov/detention-management (last visited on Apr. 22, 2020). Given the risks posed by the COVID-19 pandemic, it would be reasonable for ICE to exercise its discretion to release a significant number of these noncitizens to create safer conditions for those who remain in detention. ICE has failed to do so. Second, Respondents have not established social distancing protocols outside of the medical clinic. . . .Third, Respondents

have not taken any steps to protect Petitioner, who they know is a high-risk individual. . . . Given these deficiencies, the Court concludes Petitioner has established a likelihood that Respondents have acted with reckless disregard to the significant risk of serious harm to Petitioner. . . . Conditions of confinement violate a civil detainee's Fifth Amendment due process rights when the conditions 'amount to punishment of the detainee.' *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Kingsley*, 135 S. Ct. at 2473–74. A petitioner can demonstrate punitive conditions by showing that the challenged condition is: (1) expressly intended to punish or (2) not rationally related to a legitimate government objective or is excessive to that purpose. . . Petitioner raises only the second test, arguing that the risk he faces of serious illness or death from COVID-19 is not reasonably related to or is excessive in relation to a legitimate governmental interest. . . The Supreme Court has recognized that detention pending removal proceedings is rationally related to the legitimate governmental interest of ensuring noncitizens appear for their removal proceedings and preventing danger to the community. . . Petitioner does not dispute that these are legitimate governmental interests; however, he argues that continued detention ceases to be reasonably related to these objectives when it threatens imminent illness and death. . . Respondents counter that the COVID-19 outbreak does not alter the conclusion that Petitioner's detention is rationally related to the government's non-punitive responsibilities and administrative purposes. . .Petitioner has been a lawful permanent resident of the United States for over 20 years. He was convicted in 2013 of a serious, nonviolent drug-related crime. He served his criminal sentence and in fact was released early because of his behavior. Petitioner is being held only to face a civil violation, placing him in a materially different position than those who are being held to answer criminal charges. Although Petitioner's initial detention could not be described as punitive, the situation has drastically changed given the unique and unprecedented threat posed by COVID-19. As discussed above, Petitioner has established a likelihood that he is being held in conditions that create a substantial risk of serious and potentially permanent, irreparable harm due to his age and underlying health conditions. These conditions create far more serious consequences for Petitioner than are justified by Respondent's need to ensure his presence at removal, should that be the ultimate outcome of his proceedings. . .Likewise, the risk to Petitioner of continued detention is excessive in relation to Respondent's need to protect the community. Petitioner has been convicted of only one crime in the last 66 years, and although it was serious, he successfully completed his prison sentence, was released early to a halfway house, and then began home confinement—all without incident. Under these circumstances, the Court concludes that Petitioner has established a likelihood that the conditions of his detention are not reasonably related to the legitimate governmental interests such that his continued detention is punitive in violation of his due process rights.")

Robinson v. County of Shasta, No. 214CV02910KJMKJN, 2019 WL 1931879, at *7–8 (E.D. Cal. May 1, 2019) ("With Matthew's status as a mental health patient involuntarily committed under § 5150 and in transit to a mental health facility, and with police called upon for assistance in providing Matthew with access to mental health care and not in apprehending him as a suspect, none of the case law appears to have contemplated the precise circumstances presented here. Matthew was not a free citizen subjected to excessive force in an 'arrest, investigatory stop, or other "seizure" of his person,'. . . nor was he a pretrial detainee in pre-arraignment custody[.] . .

The Fourth Amendment rights that apply in those circumstances therefore do not control here. Further, because Matthew was already committed under § 5150, the Fourth Amendment's 'distinct right to be free from an unreasonable governmental seizure of the person for whatever purpose' seems inapplicable, unless the events at issue here somehow constituted a second and distinct seizure. . . There is also a line of authority holding that involuntarily civilly committed individuals retain the right to safe conditions and the right to freedom from bodily restraint, both of which are liberty interests protected by the due process clause of the Fourteenth Amendment. . . Here, too, the fit is imperfect, as Matthew was committed under § 5150 but was not in a facility and the alleged use of force was not committed by facility employees, but by law enforcement officers. . . Nonetheless, and ultimately, the Fourteenth Amendment appears to be the proper vehicle for plaintiffs' excessive force claim in the absence of clear authority to the contrary. Notably, following the Supreme Court's decision in *Kingsley*, the court will apply the same objective reasonableness standard here regardless of whether plaintiffs' claim arises under the Fourth or Fourteenth Amendment, as 'a pretrial detainee [pursuing an excessive force claim under the Fourteenth Amendment] must show only that the force purposely or knowingly used against him was objectively unreasonable.'. . Evaluating an excessive force claim brought by an involuntarily committed mental health patient, the Sixth Circuit explained, *Kingsley* rendered any distinction between the Fourth and Fourteenth Amendments' excessive force standards 'purely academic' because, [i]n light of *Kingsley*, under either amendment, the court would employ the same objective test for excessive force.'. . Expressing these reservations and finding the substantive outcome will be the same regardless, the court proceeds under a Fourteenth Amendment analysis. Claims of excessive force brought by involuntarily detained individuals are analyzed under the 'objective reasonableness' standard, which considers whether the officers' actions were objectively reasonable in light of the facts and circumstances confronting them, regardless of the officer's underlying intent or motive.")

Gohranson v. Snohomish County, NO. C16-1124RSL, 2018 WL 5921012, at *1-2 & n.2 (W.D. Wash. Nov. 13, 2018) ("Until 2015, a detainee alleging that the government had been deliberately indifferent to her medical needs had to show that defendants were subjectively aware of a substantial risk of serious harm when they failed to provide medical care. The Court previously found that plaintiffs' medical care claim would fail under that standard 'because they have not produced evidence that any of the corrections officers or nurses who interacted with Ms. Kronberger in the week before her death recognized that her medical condition had transitioned from the horror that is opiate withdrawal to a life-threatening electrolyte imbalance.'. . The contours of a pretrial detainee's medical care claims under the Due Process Clause have changed since 2015, however, such that custodians can now be liable in the absence of subjective knowledge if a 'reasonable official in the circumstances would have appreciated the high degree of risk involved.'. . That fact is dispositive of the claims against the individual defendants. . . . As discussed above, defendants' conduct was not unconstitutional in 2014 because they were not subjectively aware that Ms. Kronberger was suffering from life-threatening dehydration and electrolyte imbalance. The announcement of an objective standard for judging defendants' conduct post-dated the events that gave rise to this litigation and imposed additional requirements on

defendants. Previously, custodial and medical staff were required to respond to the facts of which they were aware: now they must consider the possibility that additional inquiry, evaluation, or testing is necessary to ensure that they are correctly apprehending the risks involved and are being reasonably responsive to those risks. Because there was no clearly established right to medical attention from jail staff who did not actually perceive the need for such attention in 2014, qualified immunity bars plaintiffs' Fourteenth Amendment claim for lack of adequate medical care. . . . The Court declines to decide the first part of the qualified immunity analysis, namely whether the individual defendants' conduct violated Ms. Kronberger's constitutional rights under *Kingsley* and *Gordon*. Individual defendants made efforts to monitor Ms. Kronberger's situation and responded to her needs with differing degrees of care. Taken together, those efforts were insufficient to avert the detainee's death, but determining whether a particular defendant was simply negligent or was objectively and deliberately indifferent in the context of a not-enough-medical-care claim is extremely challenging on both the facts and the law. The Court therefore exercises its discretion to address the 'clearly established' prongs of the qualified immunity analysis first.")

Turano v. County of Alameda, No. 17-CV-06953-KAW, 2018 WL 3054853, at *6 (N.D. Cal. June 20, 2018) ("At the hearing, Plaintiff clarified that she is bringing a conditions of confinement claim. The Ninth Circuit has held that a pretrial detainee's medical care claim and a failure to protect claim are evaluated under an objective deliberative indifference standard. *Gordan*, 888 F.3d at 1124-25; *Castro*, 833 F.3d at 1069-70. Medical care and failure to protect claims, in turn, fall under the ambit of conditions of confinement claims generally, which would support applying the objective deliberative indifference standard to conditions of confinement claims. . . The Ninth Circuit's reasoning in *Gordan* also applies to conditions of confinement claims; § 1983 does not include a state-of-mind requirement, the claim arises under the Fourteenth Amendment rather than the Eighth Amendment, and *Kingsley* was not limited to force claims. . . The Court, therefore, concludes that Plaintiff is not required to plead facts demonstrating subjective intent to punish.")

Jacobsen v. Curran, No. 116CV01050LJOMJSPC, 2018 WL 1693382, at *9 (E.D. Cal. Apr. 6, 2018) ("Plaintiff's complaint contains sufficient allegations that, if taken as true, would entitle Plaintiff to a legal remedy. As a pretrial detainee in order to state a legal claim, Plaintiff must allege that: '(1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) Those conditions put the plaintiff at substantial risk of suffering serious harm; (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (4) By not taking such measures, the defendant caused the plaintiff's injuries.'. . With respect to the third element, the defendant's conduct must be 'objectively unreasonable.'. . . Here, Plaintiff alleges that Defendant Gonzalez removed his PIC line and discontinued Plaintiff's antibiotics against the orders of Plaintiff's doctor. This is sufficient to find that Plaintiff was at risk of serious harm, Defendant Gonzalez did not take reasonable measures to abate that risk, and that this caused Plaintiff injuries.")

TENTH CIRCUIT

Wise v. Caffey, 72 F.4th 1199, 1209-10 (10th Cir. 2023) ("Officer Caffey argues that the law within this circuit, as it relates to a resisting detainee under the Fourteenth Amendment, was not clearly established on the date of the incident (October 14, 2018) as opposed to the Fourth Amendment context. Officer Caffey frames the evaluation regarding whether a right is clearly established far more literally than we require. According to Officer Caffey, the only cases that could have provided him notice that kneeing a subdued inmate in the face was a violation of the inmate's constitutional rights would have to come after the Supreme Court's holding in *Kingsley* (2015) and before the subject incident (2018). . . But as we explained above, the notice requirement can be discerned from a range of excessive-force cases that 'illustrate the types of objective circumstances potentially relevant to a determination of excessive force.'. . Our precedent clearly establishes that in this circuit 'officers may not continue to use force against a suspect who is effectively subdued.'. . This clearly-established principle is confirmed by a number of our cases. . . . Because the law was clearly established when Officer Caffey used objectively unreasonable force in striking Mr. Wise—a subdued pretrial detainee who posed no immediate security threat—Officer Caffey is not entitled to qualified immunity.")

Geddes v. Weber County, No. 20-4083, 2022 WL 3371010, at *1, *5-*9 & n.4 (10th Cir. Aug. 16, 2022) (not reported), *cert. denied*, 143 S. Ct. 778 (2023) ("Mr. Geddes brought his claim pursuant to 42 U.S.C. § 1983 and alleged the officers had violated his Fourteenth Amendment rights. The question before us is not whether the officers' actions indeed constituted excessive force. It is instead whether Mr. Geddes can bring an excessive-force claim—as an arrestee—under the Fourteenth Amendment. We conclude that he cannot. And we, therefore, agree with the district court's grant of summary judgment and conclusion that Mr. Geddes did not have 'a cognizable claim under the Fourteenth Amendment' because the alleged excessive force did not occur 'after a determination of probable cause and before conviction.'. . Only the Fourth Amendment supplied a valid legal basis for Mr. Geddes's § 1983 claim[.] . . . [N]ot only do the different amendments provide protection at different parts of the criminal justice process, but more importantly for present purposes, the different amendments protect against unique forms of potential governmental intrusion on the protected right. This underscores the need for litigants to identify the correct amendment under which they seek relief. . . . [B]ecause Mr. Geddes was an arrestee, only the Fourth Amendment can supply the basis for his § 1983 excessive-force claim. . . . Mr. Geddes continues to cling to a constitutional amendment that provides him—as an arrestee—with no cognizable basis for a § 1983 excessive-force claim. 'The choice of amendment matters,'. . . and the amendment Mr. Geddes has chosen and has persisted in choosing dooms his § 1983 action. . . . Mr. Geddes says it does not matter whether he pleaded his excessive-force claim as a Fourth Amendment or Fourteenth Amendment violation. Either way, he insists, the outcome of his suit would be the same because the applicable standard would be the same.[4] **[fn.4:** Although Mr. Geddes suggests that we should not 'reach the issue of where a precise dividing line lies' between the amendments and notes the Supreme Court has not actually resolved this question, . . . he does not acknowledge that we have already drawn this line. We have explained that 'the Fourth

Amendment not only bars the use of excessive force during the making of an arrest, but such also bars the use of excessive force during a period of detention immediately following arrest and before the person is taken before a magistrate judge, or other judicial official, to determine whether the arrest and continued detention were based on probable cause.'. . The Supreme Court's decision in *Kingsley* did not alter or disturb our precedent on this point. The Court in *Kingsley* spoke to the standard under which excessive-force claims should be analyzed—it did not consider where the Fourth Amendment begins and ends. Although Mr. Geddes is correct that the Supreme Court has not directly opined on 'whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins,'. . . most circuits have joined us in answering in the affirmative that Fourth Amendment protections continue up until a probable cause determination[.] [collecting cases] Therefore, Mr. Geddes's argument that he could seek the protection of the Fourteenth Amendment before a probable cause hearing is also meritless.**]** Not so. The Fourth Amendment and Fourteenth Amendment excessive-force standards are not identical. As Mr. Geddes rightly notes, both standards assess the objective reasonableness of the use of force. . . But beyond that, the two standards differ. . . . Consistent with our previous discussion of the stages of the criminal justice system and the corresponding constitutional rights that attach at each stage, the considerations identified in the Fourth Amendment and Fourteenth Amendment contexts, although similar, differ in important ways. Namely, they protect against different types of infringements upon constitutional rights. And although both are now evaluated under an objective standard, the Fourth Amendment inquiry is arguably more favorable to a plaintiff because it protects from unreasonable seizures of *free citizens*. . . On the other hand, the balance is recalibrated in the pre-trial detainee context in a manner arguably less favorable to the plaintiff; there, the inquiry is whether the conduct was related to 'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,' so long as that conduct is not punitive in character. . . This distinction is made more apparent when comparing the factors themselves. Most notably, under the *Kingsley* test, courts are to consider '[1] the relationship between the need for the use of force and the amount of force used; [2] the extent of the plaintiff's injury; [and] [3] any effort made by the officer to temper or to limit the amount of force.'. . These additional factors supplement the *Graham* analysis with an additional deference 'to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security."'. . In sum, then, we and the Supreme Court have never suggested that precisely the same standard applies when assessing the objective reasonableness of the use of force under the Fourth and Fourteenth Amendments. . . . Mr. Geddes's complaint only provided fair notice that the basis for his § 1983 action was a purported Fourteenth Amendment violation. The complaint nowhere indicated that the basis of his claim instead might be the Fourth Amendment. Yet, as we have now explained, different legal frameworks govern our analysis of Fourth Amendment and Fourteenth Amendment excessive-force claims. Pleading one type of excessive-force claim cannot put defendants on notice of the other type of claim.")

Geddes v. Weber County, No. 20-4083, 2022 WL 3371010, at *13-14 (10th Cir. Aug. 16, 2022) (not reported) (Bacharach, J., dissenting), *cert. denied*, 143 S. Ct. 778 (2023) ("In this appeal, the

main issue is whether two jailers should obtain summary judgment based on the plaintiff's omission of the applicable constitutional amendment in his complaint. The majority answers *yes*, and I would answer *no*. So I respectfully dissent as to the jailers' liability. . . . The jailers used force before a finding of probable cause. So the Fourth Amendment (not the Fourteenth) provided the applicable test for Mr. Geddes's claim. . . Though the applicable test came from the Fourth Amendment, the claim itself arose under the Fourteenth Amendment. 'In a technical sense, a Fourth Amendment claim against [state] officers is also a Fourteenth Amendment claim, because that is the amendment that incorporates the Fourth Amendment's protections against the states.' . . Though we commonly refer to claims against state officers as Fourth Amendment claims, these claims are 'strictly speaking ... claim[s] under the Fourteenth Amendment.'. . So in the complaint, Mr. Geddes correctly invoked the Fourteenth Amendment as the constitutional source for his protection against excessive force. The district court and the majority point out that the test for the claim comes from the Fourth Amendment. But 'the Fourteenth Amendment standard is ... almost identical to the Fourth Amendment standard.'. . The standard under the Fourteenth Amendment is whether 'the force purposely or knowingly used against [the claimant] was *objectively unreasonable* ... from the perspective of a reasonable officer on the scene.' *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (emphasis added). The standard under the Fourth Amendment is whether the force was *objectively unreasonable* 'in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation.' *Graham v. Connor*, 490 U.S. 386, 397 (1989). We've thus concluded that the 'same objective standard ... applies to excessive-force claims brought under either the Fourth or the Fourteenth Amendment.'. . Given the similarity between the tests under the Fourth and Fourteenth Amendments, the complaint supplied all of the notice that the jailers needed.")

Hooks v. Atoki, 983 F.3d 1193, 1203 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 2764 (2021) ("Although our opinion in *Strain* addressed a claim of medical indifference, every aspect of its reasoning applies more broadly, to Fourteenth Amendment deliberate indifference claims, including those based on a failure to prevent jailhouse violence.")

Strain v. Regaldo, 977 F.3d 974, 990-93 & n.6 (10th Cir. 2020), *cert. denied*, 142 S. Ct. 312 (2021) ("Plaintiff argues that the Supreme Court's *Kingsley* decision alters the standard for pretrial detainees' Fourteenth Amendment claims. In *Kingsley*, the Court held that a plaintiff may establish an excessive force claim under the Fourteenth Amendment based exclusively on objective evidence. . . But *Kingsley* did not address the standard for deliberate indifference to serious medical needs. And the circuits are split on whether *Kingsley* eliminated the subjective component of the deliberate indifference standard by extending to Fourteenth Amendment claims outside the excessive force context. [collecting cases in footnote] Although we have continued to apply a two-prong test, we have not yet addressed *Kingsley* head-on. . . We do so today. We decline to extend *Kingsley* to Fourteenth Amendment deliberate indifference claims for several reasons. First, *Kingsley* turned on considerations unique to excessive force claims: whether the use of force amounted to punishment, not on the status of the detainee. Next, the nature of a deliberate indifference claim infers a subjective component. Finally, principles of *stare decisis* weigh against

overruling precedent to extend a Supreme Court holding to a new context or new category of claims. . . . Even though both causes of action arise under the Fourteenth Amendment, a pretrial detainee's cause of action for excessive force serves a different purpose than that for deliberate indifference. . . . Excessive force requires an affirmative act, while deliberate indifference often stems from inaction. . . . Because the two categories of claims protect different rights for different purposes, the claims require different state-of-mind inquiries. . . .[T]he force of *Kingsley* does not apply to the deliberate indifference context, where the claim generally involves inaction divorced from punishment. Next, we observe that a deliberate indifference claim presupposes a subjective component. . . . Removing the subjective component from deliberate indifference claims would thus erode the intent requirement inherent in the claim. . . . Finally, the Supreme Court has cautioned against reaching the resolution that Plaintiff seeks. Extending *Kingsley* to eliminate the subjective component of the deliberate indifference standard in the Tenth Circuit would contradict the Supreme Court's rejection of a purely objective test in *Farmer* and our longstanding precedent. . . . Although other circuits have relied on the 'broad language' of *Kingsley* to apply a purely objective standard to Fourteenth Amendment deliberate indifference claims, . . . we choose forbearance. . .At no point did *Kingsley* pronounce its application to Fourteenth Amendment deliberate indifference claims or otherwise state that we should adopt a purely objective standard for such claims, so we cannot overrule our precedent on this issue. **[fn.6:** Plaintiff also contends that we recently applied a purely objective test for the mistreatment of a pretrial detainee outside the excessive force context. *Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019) (applying the *Kingsley* standard to claims against law enforcement officers who *punished* a pretrial detainee by publicly displaying his nude body through the public areas of a hospital). Even if not a classic excessive force case, *Colbruno* may otherwise be categorized as a conditions of confinement case. . . And because that case dealt with the appropriateness of punishment, we saw fit to apply the *Kingsley* standard to the plaintiff's claims. . . In any event, *Colbruno* did not address deliberate indifference, so it does not influence our analysis in this case.**]** We therefore join our sister circuits that have declined to extend *Kingsley* to deliberate indifference claims and will apply our two-prong test to Plaintiff's claims.")

Brown v. Flowers, 974 F.3d 1178, 1182-83 (10th Cir. 2020) ("As a preliminary matter, we note that because Brown was a pretrial detainee, she was protected by the Fourteenth Amendment. *See Colbruno v. Kessler*, 928 F.3d 1155, 1162 (10th Cir. 2019). And although the district court stated as much, it analyzed her claim as an Eighth Amendment violation. As such, it considered both prongs of the Eighth Amendment test: the objective component, or whether 'the alleged wrongdoing was objectively harmful enough,' and the subjective component, or whether 'the officials act[ed] with a sufficiently culpable state of mind.'. . And on appeal, the parties likewise consider both prongs. Such an analysis is in line with our previous statement that the Eighth and Fourteenth Amendment analyses are 'identical.'. . But this statement is no longer good law after the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 192 L.Ed.2d 416 (2015). There, the Court held that 'the appropriate standard for a pretrial detainee's excessive[-]force claim is solely an objective one' and that therefore 'a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not

rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.'. . And because we 'treat sexual abuse of prisoners as a species of excessive-force claim,'. . . after *Kingsley*, a pretrial detainee bringing such claim is not required to meet the 'subjective element' required of Eighth Amendment excessive-force claims[.] Thus, to make out a constitutional violation, Brown must only demonstrate that Flowers's conduct 'was objectively harmful enough to establish a constitutional violation.'")

Quintana v. Santa Fe County Board of Commissioners, 973 F.3d 1022, 1028-29 & n.1 (10th Cir. 2020) ("In assessing the plaintiff's contention that the individual defendants violated Ortiz's Fourteenth Amendment rights, we apply the two-part Eighth Amendment inquiry when a pretrial detainee alleges deliberate indifference to serious medical needs. . . .We also endorse Judge Bacharach's rejection of the argument that *Kingsley v. Hendrickson*. . . requires us to conduct only an objective inquiry. . . . In our view, frequent vomiting alone does not present an obvious risk of severe and dangerous withdrawal. . . For clarity, as further explained below, we agree that the *bloody* vomiting Officer Chavez allegedly knew of does present an obvious risk. After all, blood would imply to a reasonable detention official that there is an actual internal injury. But since the complaint limits this allegation to Officer Chavez, we see no reason to export allegations of this knowledge onto the other individual defendants.")

Quintana v. Santa Fe County Board of Commissioners, 973 F.3d 1022, 1035, 1049-57 (10th Cir. 2020) (Bacharach, J., concurring in part and dissenting in part) ("Mr. Ricardo Ortiz was arrested for stealing a handbag and booked into Santa Fe County's detention facility. When he was booked, Mr. Ortiz had a heroin addiction and expected to experience severe withdrawal. And he did. As Mr. Ortiz's withdrawal spiraled, officials allegedly failed to provide treatment. He died three days later. . . . I would conclude that the second amended complaint adequately alleges a constitutional violation by each of the six employees. So even if the first amended complaint had been deficient, these deficiencies would have been cured in the second amended complaint. The resulting issue is whether that constitutional right was clearly established at the time of Mr. Ortiz's detention. I would answer 'yes.'. . . We must determine the contours of the constitutional right that was clearly established during Mr. Ortiz's detention. The plaintiffs argue that the district court misapplied the subjective prong in light of the Supreme Court's opinion in *Kingsley v. Hendrickson*[.] . . There the Supreme Court held that for excessive-force claims by pretrial detainees, the test for deliberate indifference was objective rather than subjective. . . But *Kingsley* did not clearly apply to pretrial detainees' claims of inadequate medical care, so the district court did not err in applying the subjective prong for purposes of qualified immunity. Though *Kingsley* modified the test for deliberate indifference for pretrial detainees' claims of excessive force, the scope of this modification did not become clear until after Mr. Ortiz had died. At the time of his detention, no circuit court had applied *Kingsley* outside of the excessive-force context. Absent such case law, the objective test of deliberate indifference could have been clearly established only if *Kingsley* itself had spelled out its applicability outside of the excessive-force context. *Kingsley*, however, had not spoken to this question. Circuit courts have thus disagreed over its reach. For example, after Mr. Ortiz's detention, some circuits have concluded that *Kingsley* extends beyond

excessive-force claims, effectively abrogating the subjective prong of deliberate indifference whenever pretrial detainees claim a denial of due process.[7] But other circuits have limited *Kingsley* to excessive-force claims. . . This circuit split suggests that *Kingsley* did not definitively settle the issue. After Mr. Ortiz's death, we applied *Kingsley* outside of the excessive-force context in *Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019). *Colbruno* involved a conditions-of-confinement claim, and we held that *Kingsley* had eliminated the need for a pretrial detainee to show an intent to punish. . . According to the plaintiffs, *Colbruno* shows that *Kingsley* abrogated the need for pretrial detainees to satisfy a subjective test for deliberate indifference. But *Colbruno* did not address *Kingsley* in the discussion of a clearly established right. . . And even after Mr. Ortiz's detention, many Tenth Circuit opinions before *Colbruno* had expressly declined to address *Kingsley*'s applicability to pretrial detainees outside of excessive-force cases. . . Given the existence of a circuit split and our circuit's frequent avoidance of the issue even after Mr. Ortiz's detention, we conclude that *Kingsley* itself did not clearly establish a purely objective test for all pretrial detainees' claims of deliberate indifference. So even if *Kingsley* applies to medical-care claims, the six employees would have lacked notice of a purely objective test for deliberate indifference. . . Given the lack of notice, the clearly established right in January 2016 included a subjective test for deliberate indifference. . . . Because a fact finder could reasonably infer that Mr. Ortiz had obviously needed medical attention, nurses couldn't reasonably think that the Constitution would permit them to do nothing. So if a nurse chose not to respond to an obvious medical need, the nurse would have violated a clearly established constitutional right. . . . The majority argues that only a few circuit cases have recognized a constitutional violation in similar circumstances. But the majority concedes that a fact finder could reasonably infer an obvious medical need. . . Given this concession, what more did the plaintiffs need to allege to defeat qualified immunity? Surely employees in a detention unit didn't need a precedent to tell them that the Constitution prohibited them from ignoring an inmate's frequent and bloody vomiting over a three-day period? . . . .In sum, the plaintiffs adequately allege in the second amended complaint that

• Mr. Ortiz suffered an objectively serious medical need consisting of frequent vomiting (sometimes with blood) and

• Nurse Robinson, Officer Chavez, Officer Valdo, Officer Lopez, Officer Garcia, and Corporal Gallegos knowingly disregarded a risk of serious harm to Mr. Ortiz.

These employees' alleged disregard of Mr. Ortiz's medical need would have violated a clearly established constitutional right. I would thus reverse the district court's dismissal and the denial of leave to file the second amended complaint to supplement the allegations against the six employees.")

Contreras on behalf of A.L. v. Doña Ana County Bd. of County Commissioners, 965 F.3d 1114, 1129-30 & n.3 (10th Cir. 2020) (Baldock, J., concurring in part, dissenting in part), *cert. denied*, 141 S. Ct. 1382 (2021) ("[A]bsent a formal adjudication of guilt against A.L., the Eighth Amendment has no application. . . Nevertheless, '[i]n evaluating the constitutionality of conditions ... of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, ... the proper inquiry is whether those conditions amount to punishment of the

detainee.'. . To determine whether the evidence is sufficient for a jury to find any or all of the individual Defendants 'punished' A.L. and deprived him of liberty without due process of law in violation of the Fourteenth Amendment, Tenth Circuit precedent requires us to employ an analysis identical to the analysis we employ in Eighth Amendment cases challenging a prisoner's conditions of confinement under a failure-to-protect theory. . . Before a jury may find an individual Defendant violated A.L.'s right to due process, Plaintiff must satisfy two elements: one objective and one subjective. . . To satisfy the objective component, Plaintiff must show A.L. was detained 'under conditions posing a substantial risk of serious harm.'. . If Plaintiff satisfies this objective prong, she must then establish that at least one of the individual Defendants was deliberately indifferent to the substantial risk A.L. faced. . . This is a subjective inquiry. . . . In *Kingsley v. Hendrickson*, . . . the Supreme Court held an objective reasonableness standard governs excessive force claims brought by pretrial detainees under the Fourteenth Amendment. In *Castro v. Cty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc), the Ninth Circuit imaginatively interpreted *Kingsley* and held an objective standard also governs failure-to-protect claims of pretrial detainees raised under the Fourteenth Amendment. And In *Darnell v. Pineiro*, 849 F.3d 17 (2d Cir. 2017), the Second Circuit followed suit. For years, however, federal courts across the land, including the Tenth Circuit, have relied on *Wolfish* to apply *Farmer*'s subjective deliberate-indifference standard to claims that state actors failed to protect pretrial detainees in violation of the Fourteenth Amendment. . . To suggest *Kingsley* overturned such long-standing precedent, uninvited and *sub silentio*, simply proves too much. Absent the Supreme Court overturning its own precedent or our own, we are bound by it. And I suspect the Court may never do so because, as Judge Ikuta ably points out in her dissent to *Castro*, a fundamental difference exists between the *action* underlying an excessive force claim and the *inaction* underlying a deliberate-indifference claim[.]")

Sawyers v. Norton, 962 F.3d 1270, 1282 n.11 (10th Cir. 2020) ("As recognized in *Burke*, 'the Supreme Court said the Eighth Amendment standard for excessive force claims brought by prisoners, which requires that defendants act "maliciously and sadistically to cause harm," does not apply to Fourteenth Amendment excessive force claims brought by pretrial detainees, which require showing only that the defendants' use of force was "objectively unreasonable."'. . We noted 'the circuits are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees.'. . Neither party here argues that *Kingsley* alters the deliberate indifference standard for pretrial detainees. As in *Burke*, we need not resolve this question for our circuit because we can affirm under the Eighth Amendment deliberate indifference standard, which is more favorable to the three officers.")

Khan v. Barela, 808 F. App'x 602, ___ n.8 (10th Cir. 2020) ("As noted above, '[p]retrial detainees are protected [against punishment] under the Due Process Clause rather than the Eighth Amendment,' but 'in determining whether [a detainee's] rights were violated, ... we apply an analysis identical to that applied in Eighth Amendment cases.'. . In *Kingsley*, 135 S. Ct. at 2473, the Supreme Court ruled that for a claim of excessive force, 'a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.' In this

circuit, there is an open question whether, in light of *Kingsley*'s pronouncement regarding excessive-force claims, the subjective component of the *Farmer* test applies to a pretrial detainee's claims regarding conditions of confinement and inadequate medical care. *See, e.g.*, *Burke v. Regalado*, 935 F.3d 960, 991 n.9 (10th Cir. 2019) (recognizing issue but declining to resolve it). We need not answer that question today because all of Khan's preserved Eighth Amendment claims stand or fall under either standard.")

Turner v. Oklahoma County Bd. of Cty. Commissioners, 804 F. App'x 921, ___(10th Cir. 2020) ("Because Mr. Turner's claims arose when he was a pretrial detainee, the Due Process Clause of the Fourteenth Amendment governs. *See Burke v. Regalado*, 935 F.3d 960, 991 (10th Cir. 2019). 'In evaluating such Fourteenth Amendment claims, we apply an analysis identical to that applied in Eighth Amendment cases.'")

McCowan v. Morales, 945 F.3d 1276, 1283 n.6 (10th Cir. 2019) ("The Fourteenth, instead of the Fourth, Amendment, applies to an excessive-force claim brought by a pretrial detainee—'one who has had a "judicial determination of probable cause as a prerequisite to [the] extended restraint of [his]liberty following arrest."'. . Applying that definition of pretrial detainee, this court, in *Estate of Booker*, explained that the Fourth Amendment applied to an excessive-force claim brought by an individual like McCowan, who complained of force used after his warrantless arrest but *before* any probable-cause determination has been made because that person was still an arrestee and not yet a pretrial detainee. . . The distinction we drew in *Estate of Booker* between an arrestee and a pretrial detainee was critical in that case because, while we apply only an objective standard to an arrestee's Fourth Amendment excessive-force claim, at the time we decided *Estate of Booker*, we applied both an objective and subjective test to a pretrial detainee's Fourteenth Amendment excessive-force claim. . . The distinction between arrestee and pretrial detainee is less important in this case because the Supreme Court has now clarified that only the objective (and not a subjective) standard applies to a pretrial detainee's Fourteenth Amendment excessive-force claim. . . Thus, the same objective standard now applies to excessive-force claims brought under either the Fourth or the Fourteenth Amendment. In the case before us, the district court, declining to decide which amendment governed McCowan's excessive-force claim, considered Officer Moralez's subjective intent by noting that, as alleged, the officer's conduct in laughing at McCowan as he was flung about the back seat was 'malicious and sadistic' . . That was error under a purely objective analysis. In conducting our de novo review, therefore, we do not consider Officer Moralez's subjective intent here.")

McCowan v. Morales, , 945 F.3d 1276, 1290-91 & n.12 (10th Cir. 2019) ("[T]he claim we address here is that Officer Moralez was deliberately indifferent to McCowan's serious medical needs—his injured shoulders—while the officer held McCowan at the police station and before the officer delivered McCowan to the detention center. But because medical care was available to McCowan at the detention center, even though he chose not to avail himself of it, and because McCowan asserts no deliberate-indifference claims against the detention center or any of its employees, his claim at issue here is that Officer Moralez was deliberately indifferent when

he *delayed* McCowan's access to medical care during the time Moralez held McCowan at the police station (up to 150 minutes, according to McCowan), before transporting him to the detention center (which took between six and fifteen minutes). As our starting point for considering this deliberate-indifference claim, it is the Fourteenth Amendment that applies to McCowan's claim alleging the denial of medical care after his warrantless arrest and before he was taken to be booked into the county detention center. . . The Fourteenth Amendment 'entitles pretrial detainees to the same standard of medical care owed to convicted inmates under the Eighth Amendment.'. . To succeed on his Fourteenth Amendment claim, then, McCowan 'must show "deliberate indifference to his serious medical needs."'. . 'The Supreme Court has established a two-pronged test for deliberate indifference claims. Under this test, a plaintiff must satisfy an objective prong and a subjective prong.' *Rife*, 854 F.3d at 647 (citing *Farmer v. Brennan*, 511 U.S. 825, 834, 837-40 (1994)). . . . Recently this court noted that, after the Supreme Court's decision in *Kingsley*, . . . holding a Fourteenth Amendment *excessive-force* claim brought by a pretrial detainee is governed only by an objective reasonableness standard, . . . a split among circuits developed 'on whether *Kingsley* [also] alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees.' *Burke*, 935 F.3d 960, 991 n.9 (10th Cir. 2019). We have no occasion here to address that question, however, because no one makes such an argument. . . Instead, even after *Kingsley*, both parties here applied the two-pronged objective/subjective test to McCowan's claim alleging that Officer Moralez was deliberately indifferent to McCowan's serious medical needs. In light of that, we follow suit. *See Burke*, 935 F.3d at 991 n.9 (declining, 'in the absence of briefing from either party,' to decide whether *Kingsley* has eliminated the subjective inquiry previously applicable to deliberate indifference claims brought by pretrial detainees). We do note, however, that a claim of *deliberate* indifference to *serious* medical needs by its very terminology seems to require both a subjective and an objective test. 'Deliberate' certainly invokes a subjective analysis and 'serious medical needs' invokes an objective analysis. In any event, the objective/subjective standard that we apply 'is more favorable' to Officer Moralez. . . Even so, we conclude, under that objective/subjective standard, that McCowan has sufficiently supported a claim alleging that Officer Moralez was deliberately indifferent to McCowan's serious medical needs.") [no mention of *Colbruno*]

Burke v. Regalado, 935 F.3d 960, 991 n.9 (10th Cir. 2019) ("Six years after *Lopez*, the Supreme Court said the Eighth Amendment standard for excessive force claims brought by prisoners, which requires that defendants act 'maliciously and sadistically to cause harm,' does not apply to Fourteenth Amendment excessive force claims brought by pretrial detainees, which require showing only that the defendants' use of force was 'objectively unreasonable.' [citing *Kingsley v. Hendrickson*] As this court recently noted, the '[c]ircuits are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees.' *Estate of Vallina v. County of Teller Sheriff's Office*, 757 F. App'x 643, 646 (10th Cir. 2018) (unpublished). The Sheriffs argue that *Kingsley* does not apply to this case. . . But we need not resolve this question for our circuit here because we can affirm under the Eighth Amendment standard, which is more favorable to the Sheriffs. . . And in the

absence of briefing from either party, we decline to do so here, where resolution of the issue would have no impact on the result of this appeal."). [no mention of *Colbruno*]

Colbruno v. Kessler, 928 F.3d 1155, 1161-66 & n.3 (10th Cir. 2019) ("Even one who has been properly searched or seized by police authorities (say, arrested on probable cause), can claim that the search or seizure was unreasonable because of unreasonable treatment by officers in effecting the search or seizure. Typically, the mistreatment has been the use of excessive force; but 'the interests protected by the Fourth Amendment are not confined to the right to be secure against physical harm; they include liberty, property and privacy interests—a person's sense of security and individual dignity.' *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1195 (10th Cir. 2001) . . . . *Bell* and *Blackmon* are not entirely clear about whether a pretrial detainee could sustain a due-process claim for mistreatment without showing that the custodians intended their actions as punishment. Both opinions could be read as requiring an intent to punish the pretrial detainee although allowing such intent to be inferred from the absence of a legitimate purpose behind the offensive conduct. . . But the Supreme Court in *Kingsley* eliminated any ambiguity. Reviewing a claim of excessive force brought by a pretrial detainee, the Court declined to read *Bell* as meaning 'that proof of intent (or motive) to punish is required for a pretrial detainee to prevail on a claim that his due process rights were violated.'. . Rather, a pretrial detainee can establish a due-process violation by 'providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.'[3] [fn3: The dissent argues that the proper approach to Fourteenth Amendment claims against executive action would be to determine whether the action shocks the conscience. *Kingsley*, however, is to the contrary for claims relating to the treatment of pretrial detainees.] In particular, there is no subjective element of an excessive-force claim brought by a pretrial detainee. . . . In our view, any reasonable adult in our society would understand that the involuntary exposure of an adult's nude body is a significant imposition on the victim. And law-enforcement officers in this circuit have been taught this lesson repeatedly. . . . All we need to take from these cases is a conclusion that was obvious without them: exposing a person's naked body involuntarily is a severe invasion of personal privacy. The conclusion that Defendants' alleged conduct constituted a violation of the Fourteenth Amendment readily follows. The only issue is whether the exposure of Plaintiff's body was 'not rationally related to a legitimate governmental objective or [was] excessive in relation to that purpose.'. . In our view, the facts alleged in the Complaint satisfy this condition. . . . We agree with the district court. It is common sense that acquiring some replacement clothing at a hospital would be at most a matter of minutes, and we can reasonably infer from the long delay in transporting Plaintiff that Defendants' actions were not based on a medical need so pressing that they could not spare a little time to obtain a dignified covering. . . . There remains the question whether Defendants are entitled to qualified immunity. Was the law clearly established that their conduct (as alleged by Plaintiff) violated the Fourteenth Amendment? Ordinarily the answer is no unless there is precedent of the Supreme Court or of this court declaring that there would be a violation under closely similar facts. Fortunately, however, not every constitutional violation has factual antecedents. We can occasionally rely on the general proposition that it would be 'clear to a reasonable officer that his conduct was unlawful in the

situation he confronted ... even though existing precedent does not address similar circumstances.'. . We must be careful not to do so when there are any relevant ambiguities, such as whether physical force is justified for a particular purpose or in a particular context, *see Aldaba v. Pickens*, 844 F.3d 870, 879 (10th Cir. 2016) (use of taser to subdue person needing medical care), or whether force used constituted deadly force, *see Thomson v. Salt Lake County*, 584 F.3d 1304, 1315–17 (10th Cir. 2009) (whether use of police dog constituted deadly force); *Wilson v. City of Lafayette*, 510 F. App'x 775, 778 (10th Cir. 2013) (Gorsuch, J.) (whether tasing amounted to use of deadly force). Here, however, there are no relevant ambiguities regarding the manner in which Defendants allegedly took Plaintiff from the police vehicle to his hospital room. The Fourteenth Amendment is violated if a pretrial detainee is subjected to 'a restriction or condition ... not reasonably related to a legitimate goal.' *Bell*, 441 U.S. at 539, 99 S.Ct. 1861; *see Kingsley*, 135 S. Ct. at 2473–74. To be sure, some restrictions or conditions may be too insignificant to be the predicate for a Fourteenth Amendment violation. But common sense tells us that parading someone nude in public is not so insignificant, and the above-referenced Fourth Amendment jurisprudence makes the point crystal clear. . . . *Bell* in itself sufficed as clearly established law in that context. There is little subtlety in a standard requiring merely a rational relationship to a legitimate objective. In our view, *Bell* suffices here as well, particularly given the additional precedential authority of *Blackmon*. On one possible aspect of Plaintiff's claim, however, we do not think Defendants' actions were governed by clearly established law. To the extent that Plaintiff claims that his constitutional rights were violated by being chained in the hospital bed to which he was taken, we dismiss the claim as barred by qualified immunity. Given Plaintiff's status as one facing criminal charges, and the apparent risk he posed to himself, there was certainly a legitimate purpose for the constraints. Also, his nude body was presumably then exposed only to his hospital caregivers, who could best determine what, if any, garb or covering was appropriate for his treatment and care. Given the much more limited nature of Plaintiff's exposure, the legitimate reasons for the restraint, and the change in caretaker upon Plaintiff's delivery to the room, it is not obvious that Defendants denied him due process in the manner that they left him in the hospital bed.")

Colbruno v. Kessler, 928 F.3d 1155, 1166-71 & n.3 (10th Cir. 2019) (Tymkovich, C.J., dissenting) ("This case presents a classic variation on the theme that 'bad facts make bad law.' The experiences alleged by Mr. Colbruno, if inflicted with malice, would trouble anyone. If, on the other hand, deputies sought only to make the best of a bad situation in obtaining emergency medical care for him, few would be alarmed. In my view, Mr. Colbruno has not adequately alleged malicious conduct. Applying the appropriate legal framework under the Fourteenth Amendment, the deputies should therefore be entitled to qualified immunity. As the majority explains, Mr. Colbruno must allege some violation of a clearly established constitutional right. But the complaint fails to allege facts sufficient to state a claim for substantive due process under the Fourteenth Amendment, let alone one that was clearly established at the time of the events in question. . . . Mr. Colbruno alleges the deputies moved him from the ambulance bay to his hospital room without clothing or otherwise covering his body. This contention supports an inference of indifference or callousness, but no more. Mr. Colbruno does not allege any intent to humiliate or punish lay behind this decision. Nor does he contend the deputies prolonged his exposure to potential onlookers, either

through needless delay or circuitous travel through the hospital. Nor, lastly, does he allege that anyone beyond hospital personnel witnessed any of these events. All of which presumably transpired within seconds. In short, as the complaint now stands, we know the deputies were responding to a medical emergency; we know Mr. Colbruno—after ingesting metal objects in the midst of a pyschotic episode—had soiled himself while in transit from pretrial detention to the hospital; and we know the deputies decided to rush him into the emergency room, unclothed. We do not know why they made the decisions they did; we do not know whether a suitable gown was readily available; and we do not know whether time was really of the essence. Perhaps further investigation prior to filing this lawsuit would have shed light upon some of these missing facts. Taken together, the answers to the questions could very well allow for a permissible inference of conscience-shocking conduct. . . But in the absence of such additional factual context, I would conclude the complaint fails to allege the requisite inference of malice that is necessary to conclude the deputies might have engaged in conduct that shocks the conscience. In sum, Mr. Colbruno has not adequately alleged a violation of his constitutional rights to substantive due process under the Fourteenth Amendment. . . .Given the limitations of the complaint, the majority acknowledges difficulty in identifying which constitutional provision should entitle Mr. Colbruno to relief. He alleged violations of both his Fourth Amendment right to be free of unreasonable searches and his Fourteenth Amendment right to bodily integrity. The district court, in turn, accepted the Fourth Amendment rationale and did not conduct an independent analysis of the Fourteenth Amendment claim. But because Mr. Colbruno was neither searched nor seized in *any* conventional sense, it is obvious—as explained above—that any relief must stem from the Fourteenth Amendment's protections against official misconduct; and not the Fourth Amendment's familiar assurances against unreasonable search or seizure. The majority understandably turns to a line of cases involving the rights of pre-trial detainees. Relying upon *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and *Kingsley v. Hendrickson*, —— U.S. ——, 135 S. Ct. 2466, 192 L.Ed.2d 416 (2015),[3] [fn.3: Because *Kingsley* was decided after the events alleged in the complaint, *Bell* remains the applicable Supreme Court precedent. *Kingsley* likewise addressed the state-of-mind requirement for an excessive-force claim brought under the Fourteenth Amendment. Because the complaint does not allege excessive force, the relevance of *Kingsley*—beyond its restatement of the general principles articulated in *Bell*—is not obvious.] . . . [T]he majority concludes '[a] detainee may not be *punished* prior to an adjudication of guilt in accordance with due process of law.'. . In *Bell*, the Supreme Court explained that—when a person is confined while awaiting trial—the government must respect the presumption of his innocence. Accordingly, only those restraints against liberty that advance legitimate institutional interests will be constitutionally permissible. But 'if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.'. .The majority also points to a case not briefed by either party to apply the principles outlined in *Bell*. Relying on *Blackmon v. Sutton*, 734 F.3d 1237 (10th Cir. 2013), the majority concludes Mr. Colbruno's treatment as detailed in his complaint was tantamount to punishment. . . .No matter how we analyze his claims, Mr. Colbruno has failed to allege the violation of a *clearly established* constitutional right. The Supreme Court has explained that '[a] clearly established right

is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'. . Although we need not 'require a case directly on point,' it is nonetheless the case that 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . . The violation proposed by the majority—of a right to be free from 'a restriction or condition ... not reasonably related to a legitimate goal'. . . is far too broad. While I am certainly sympathetic to the privacy interests asserted by Mr. Colbruno, no precedential case has clearly established a constitutional violation at the appropriate level of specificity under the facts alleged here. To avoid this conclusion, the majority asserts the deputies' violation of Mr. Colbruno's rights was so obvious that we need not point to a closely aligned case. It is, of course, correct that some 'constitutional violation[s] may be so obvious that similar conduct seldom arises in our cases,' such that 'it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare attempt.'. . But this exception is exceedingly narrow, as we must effectively conclude 'our precedents render the legality of the conduct undebatable.'. . In its effort to clear this hurdle, the majority again looks to *Blackmon*. But the circumstances depicted there could not credibly alert the deputies of misconduct, absent some punitive intent. Whereas punishment sat at the center of the dispute in *Blackmon*, Mr. Colbruno has not alleged facts that would suggest the deputies intended to punish him; or, for that matter, any other state of mind that would meet the constitutional standard for egregiousness. And whereas at least one official in *Blackmon* engaged in repeated, systematic, and gratuitous misconduct, Mr. Colbruno details what would be—at most—a single discrete incident that lasted only for a matter of moments. In sum, absent plausible allegations of intentional and abusive misconduct, clearly-established law could not have alerted the deputies they were violating Mr. Colbruno's right to substantive due process. As troubling as these allegations—if true—would be, the complaint fails to tie the invasion of Mr. Colbruno's privacy to the constitutional requirement for intent.")

Estate of Vallina v. County of Teller Sheriff's Office, 757 F. App'x 643, ___ (10th Cir. 2018) ("Circuits are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees. The Second, Seventh, and Ninth Circuits have interpreted *Kingsley* as displacing prior subjective requirements. [collecting cases] These courts have adopted an objective test requiring reckless disregard. . . In contrast, the Fifth, Eighth, and Eleventh Circuits have held that *Kingsley* applies only to excessive force claims and does not extend to claims related to conditions of confinement or inadequate medical care. [collecting cases] As noted *supra*, however, plaintiffs did not raise the *Kingsley* issue below. We generally do not review issues advanced for the first time on appeal. . . Further, plaintiffs affirmatively argued the subjective prong of the deliberate indifference test before the district court. Accordingly, plaintiffs may not have merely forfeited the issue, but invited error. . . And in any event, we conclude that plaintiffs' claim would fail under either standard. That is, they have shown neither subjective disregard of a known risk, . . . nor objectively reckless disregard of a serious medical concern[.] . . A prison official does not act recklessly or with deliberate indifference by failing to act to avert the suicide of a detainee who displays no outward indicators

of suicidal ideation, . . . actively denies suicidal ideation, and has been cleared by a psychologist, a psychiatrist, and other medical professionals to be detained in general population.")

Crocker v. Glanz, 752 F. App'x 564, ___ (10th Cir. 2018) ("The analysis in *Kingsley* may not apply to a failure to provide adequate medical care or screening, where there is no such intentional action. Indeed, the Court reiterated the proposition that 'liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process.' . . Second, even if we ultimately decided that *Kingsley* changed the law in the way proposed by Grant, his theory (which is, at the least, an expansion of *Kingsley*) would not afford him relief because it was not clearly established law at the time of the events in question. Although it may be that Glanz did not adequately preserve the clearly-established argument in district court, Grant undeniably did not preserve the *Kingsley* argument. We would be loath to excuse Grant's forfeiture but not Glanz's. Therefore, we will not address the *Kingsley* issue.")

Crocker v. Glanz, 752 F. App'x 564, ___ (10th Cir. 2018) (Holmes, J., concurring) ("I concur in the judgment and join in the lion's share of the analysis of the majority's well-written and thoughtful order and judgment. I decline, however, to join the majority's recitation of two ostensible reasons 'for uncertainty' about whether Mr. Grant may secure relief under the Supreme Court's decision in *Kingsley v. Hendrickson*, --- U.S. ----, 135 S. Ct. 2466 (2015). As the majority correctly observes, Mr. Grant presents his *Kingsley*-based argument for the first time on appeal and that argument is therefore forfeited. At least under the unremarkable circumstances here, the appropriate course is for us to decline to consider that argument on the merits and go no further. . . Instead, the majority offers observations regarding the reasons 'for uncertainty' concerning whether Mr. Grant could prevail on his *Kingsley*-based argument. Such observations are purely dicta. I respectfully decline to join my esteemed colleagues in this unnecessary analysis. For these reasons, I write separately.")

Clark v. Colbert, 895 F.3d 1258, 1269 (10th Cir. 2018) ("Clark contends the Supreme Court's decision in *Kingsley v. Hendrickson*. . . 'held open the possibility that an objective-only standard should apply to' his medical needs claim. . .Yet he does not argue that *Kingsley* actually displaced any precedent regarding medical care during pretrial detention. We thus have no occasion to revisit the applicable law.")

Perry v. Durborow, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018) ("Because Perry was a pretrial detainee at the time of the alleged rape, we question whether, in light of the Supreme Court's decision in *Kingsley v. Hendrickson*, —— U.S. ——, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015), she had to demonstrate that Durborow 'acted with subjective deliberate indifference, as opposed to objective deliberate indifference,' to establish that he violated her constitutional rights. . . . We haven't yet addressed *Kingsley*'s impact on Fourteenth Amendment claims like this one. And in the absence of briefing from either party, we decline to do so here, where resolution of the issue would have no impact on the result of this appeal. Even assuming Perry had to demonstrate that Durborow acted with subjective deliberate indifference, we must accept as true the district court's

finding that he did so. . . Conversely, even assuming Perry only had to demonstrate that Durborow acted with objective deliberate indifference, this lower standard wasn't clearly established as of February 25, 2013.")

Rife v. Oklahoma Dep't of Public Safety, 854 F.3d 637, 647 (10th Cir. 2017) (amended opinion) ("The Fourteenth Amendment's Due Process Clause entitles pretrial detainees to the same standard of medical care owed to convicted inmates under the Eighth Amendment. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002). Thus, the Fourteenth Amendment is violated if state officials are deliberately indifferent to a pretrial detainee's serious medical needs.")

Wright v. Collison, 651 F. App'x 745, 748 (10th Cir. 2016) ("Mr. Wright's claims are governed by the Due Process Clause rather than the Eighth Amendment because Mr. Wright was a pretrial detainee. . . Even so, to determine whether Mr. Wright's constitutional rights were violated, 'we apply an analysis identical to that applied in Eighth Amendment cases brought pursuant to § 1983.'. . 'To establish a cognizable Eighth Amendment claim for failure to protect an inmate from harm by other inmates, the plaintiff must show that he [was] incarcerated under conditions posing a substantial risk of serious harm, the objective component, and that the prison official was deliberately indifferent to his safety, the subjective component.'. . Regarding the subjective component, the plaintiff bears the burden to show that the defendants responded in an 'objectively unreasonable manner'—that is, they 'knew of ways to reduce the harm but knowingly or recklessly declined to act.'")

United States v. Brown, 654 F. App'x 896, 906 n.6 (10th Cir. 2016) ("Barnes is correct in noting that because pretrial detainees have not yet been convicted, they 'cannot be punished at all,' let alone in a cruel and unusual manner. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015). Accordingly, their Eighth Amendment rights are not implicated. . . That does not, however, mean that the conditions of a pretrial detainee's confinement are not constitutionally protected; that protection derives instead from the Due Process Clause of the Fourteenth (or Fifth) Amendment. . . Although the constitutional sources of these protections are different, the legal standards are similar. *See Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) ("Although the Due Process Clause governs a pretrial detainee's claim of unconstitutional conditions of confinement, the Eighth Amendment standard provides the benchmark for such claims." (citation omitted)). For our purposes here, we need not flesh out the extent to which the two standards differ.")

Sexton v. Faris, No. 22-CV-1927-WJM-MEH, 2023 WL 5671492, at *5-6 (D. Colo. Sept. 1, 2023) ("Despite the Tenth Circuit's clarifying language concerning what *Kingsley* did and did not hold, Plaintiff now argues that in *Kingsley*, 'the Supreme Court extended the objective reasonable standard generally applied to Fourth Amendment seizures to a Fourteenth Amendment excessive force claim.'. . He cites no other cases whatsoever on this point, much less any cases extending *Kingsley* beyond pretrial detainees in the manner he suggests. . . Defendants argue that Plaintiff's interpretation 'stretches the reasoning in *Kingsley* beyond the Court's intention,' observing that the Supreme Court did not address whether the 'shock[s] the conscience' standard or the 'objective

reasonableness' standard applied to Fourteenth Amendment excessive force claims. . . The Court agrees. Plaintiff cites no case law extending *Kingsley* in the manner he suggests (to plaintiffs who are not pretrial detainees), and the Court is unaware of any such ruling in the Tenth Circuit. Application of *Kingsley* by the Tenth Circuit appears limited to cases involving pretrial detainees. . . Rather, in cases like this one where the Fourth or Eighth Amendments do not apply, District of Colorado judges routinely apply the shocks the conscience standard. . . Therefore, the Court rejects Plaintiff's suggestion that the objective reasonableness standard applies. Instead, the Court will apply the substantive due process analytical framework.")

Antonio for the Estate of Toledo v. Board of County Commissioners for the County of Cibola, No. CV 19-572 KG/JFR, 2020 WL 5232392, at *5 (D.N.M. Sept. 2, 2020) ("Plaintiff observes that 'various circuits have interpreted *Kingsley* to apply to conditions of confinement and/or inadequate medical care claims under the Fourteenth Amendment rather than just excessive force claims.'. . Plaintiff relies on *Colbruno v. Kessler* to project that the Tenth Circuit will join those circuits in applying *Kingsley* to conditions of confinement claims, including inadequate medical care claims. 928 F.3d 1155 (10th Cir. 2019) (applying *Kingsley* to case involving pretrial detainee taken to hospital without clothing). After *Colbruno* was decided, the Tenth Circuit 'noted "the circuits are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees."'. . Even so, and given existing Tenth Circuit precedent, this Court will apply the subjective standard to conditions of confinement claims, including inadequate medical care claims. . . . Plaintiff acknowledges that the Fifth and Eighth Circuits confine the holding in *Kingsley* to excessive force cases.")

Ortega v. ICE, No. 220CV00522KWRKBM, 2020 WL 4816373, at *5–6 (D.N.M. Aug. 19, 2020) ("The parties appear to agree that Fifth Amendment Due Process law applies to this condition of confinement claim brought by a civil detainee. . . The Due Process Clause of the Fifth Amendment forbids the government from depriving a person of life, liberty, or property without due process of law. . . Civil detainees such as Petitioner are protected by the Fifth Amendment Due Process clause. . . To evaluate the constitutionality of pretrial detention under the Fifth Amendment, the Court must determine whether the conditions 'amount to punishment of the detainee.'. . In the absence of an expressed intent to punish, Petitioner can prevail by showing that the conditions are not 'rationally related to a legitimate nonpunitive governmental purpose or that the conditions 'appear excessive in relation to that purpose.' *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2473, 192 L.Ed.2d 416 (2015) (quoting *Bell*, 441 U.S. at 561, 99 S.Ct. 1861); *See also Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019) ("Persons who are civilly detained "can establish a due-process violation by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose."). '[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.' *Bell v. Wolfish,* 441 U.S. 520, 539, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

The Government has a legitimate interest in enforcing immigration laws and detaining persons pending removal. . . Here, the Government has a legitimate interest in detaining Petitioner pending his fourth removal and the reinstatement of his standing removal order. If the Government could not detain persons pending removal, its ability to enforce immigration laws and remove persons would be thwarted by individuals such as Petitioner, who repeatedly ignores immigration and criminal laws. Moreover, the government has a legitimate interest in managing detention facilities, . . . and allocating scarce resources. . . However, the Government has no legitimate interest in punishing civil detainees or denying necessary medical care. . . The Government must also provide for the basic needs of civil detainees. . . 'Therefore, conditions which pose an objectively unreasonable and substantial risk of serious harm to detainee health or safety are not rationally related to a legitimate nonpunitive government purpose.'. . However, Respondents are not obligated to provide perfect conditions. Rather, to constitute a constitutional violation conditions must be 'objectively unreasonable.'. . The Fifth Amendment does not require detention facilities to reduce the risk of harm to zero. . . . Even if Petitioner's conditions of confinement claim could properly be considered in a habeas petition, Petitioner has not shown that Otero failed to take adequate steps to ensure Petitioner's health and safety in light of the COVID-19 pandemic. Considering the law above in Section II(B), the Court concludes that the COVID-19 measures and conditions at Otero are objectively reasonable and rationally related to legitimate government interests.")

Barco v. Price, No. 2:20-CV-350-WJ-CG, 2020 WL 2099890, at *1, *6-10 & n.2 (D.N.M. May 1, 2020) ("Plaintiffs are noncitizen detainees who are in the process of being removed from the United States. They are detained at the Otero County Processing Center ("Otero"). Plaintiffs request that the Court issue a temporary restraining order releasing them from Otero because they have medical conditions that make them vulnerable to serious illness or death should they contract Coronavirus Disease 2019 (COVID-19) and that there are no adequate measures that can ensure they avoid exposure to COVID-19 at Otero. Plaintiffs are seeking relief under 28 U.S.C. § 2241 as a habeas corpus petition and 28 U.S.C. § 1331 as an independent cause of action for injunctive relief under the Fifth Amendment's Due Process Clause. The Court has reviewed the briefing, exhibits, and applicable law and finds that Plaintiffs have not met their heightened burden to demonstrate that the extraordinary remedy of a temporary restraining order is warranted. For the reasons explained in this Memorandum Opinion and Order, the Court denies Plaintiffs' motion. . . . Although Plaintiffs are requesting immediate release, they are not challenging the legality or duration of their detention. At the core of their argument, they contend that the conditions of their detention at Otero are inadequate to protect them from exposure to COVID-19. For example, Plaintiffs allege that they 'are in close quarters on a near constant basis, making it virtually impossible to adhere to social distancing guidelines,' 'inadequate hygienic and sanitation practices have continued amidst the COVID-19 pandemic,' 'they are not provided with sufficient cleaning supplies or hand soap,' and that the 'guards do not wear masks or gloves.'. . Plaintiffs do not allege that the fact that they are detained for removal proceedings or that the length of their detention is illegal. Accordingly, the Court finds that Plaintiffs are challenging the conditions of their detention, as opposed to its fact or duration, which is not appropriate under 28 U.S.C. § 2241. . .

. Federal immigration detention is a form of civil detention that must comply with the Fifth Amendment's Due Process Clause. . . To evaluate the constitutionality of pretrial detention under the Fifth Amendment, the Court must determine whether the conditions 'amount to punishment of the detainee.' *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). In the absence of an expressed intent to punish, Plaintiffs can prevail by showing that the conditions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the conditions 'appear excessive in relation to that purpose.' *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (quoting *Bell*, 441 U.S. at 561).[2] **[fn. 2:** The parties seem to treat Plaintiffs' claims, in part, as a denial of medical care. Even if Plaintiffs' claims were treated as a denial of medical care, the analysis and result would be the same. In *Colbruno v. Kessler*, a case Plaintiffs cited, the Tenth Circuit explained that 'when a "plaintiff finds himself in the criminal justice system somewhere between the two stools of an initial seizure and post-conviction punishment[,] we turn to the due process clauses of the Fifth or Fourteenth Amendment and their protection against arbitrary governmental action by federal or state authorities' to evaluate claims of mistreatment.' 928 F.3d 1155, 1162 (10th Cir. 2019) (quoting *Porro v. Barnes*, 624 F.3d 1322, 1326 (10th Cir. 2010)).**]** Plaintiffs do not allege that Defendants have an expressed intent to punish. Plaintiffs argue that '[k]eeping medically-vulnerable people detained in such close proximity to one another and without testing or screening or the sanitation or protective equipment necessary to combat the spread of [COVID-19] is "not rationally related to a legitimate governmental objective" and thus constitutes illegitimate punishment in violation of Plaintiffs' due process rights.'. . Plaintiffs' argument relies on two unproven factual premises: that they have medical conditions that put them at a higher risk of serious illness or death should they contract COVID-19 and that there are no adequate measures that can ensure they avoid exposure to COVID-19 while detained at Otero. . . . The Supreme Court has consistently held that detaining aliens to prevent them from absconding and ensuring that they appear for removal proceedings is a legitimate governmental purpose. . . Plaintiffs have not shown that their detention at Otero is not rationally related to that legitimate governmental purpose or is excessive in relation to that purpose because they have failed to demonstrate that they have medical conditions that put them at a higher risk of serious illness or death should they contract COVID-19 and that there are no adequate measures that can ensure they avoid exposure to COVID-19 while detained at Otero. *See Kingsley*, 135 S. Ct. at 2473 (2015) (quoting *Bell*, 441 U.S. at 561). Accordingly, the Court finds that Plaintiffs have not shown a substantial likelihood of prevailing on the merits. . . .A preliminary injunction of the type requested by Plaintiffs is an extraordinary remedy, and to obtain one Plaintiffs must show a substantial likelihood of prevailing on the merits; irreparable harm unless the injunction is issued; that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and that the injunction, if issued, will not adversely affect the public interest. Plaintiffs have not met their burden in establishing any of these factors. For the reasons explained in this Memorandum Opinion and Order, Plaintiffs' Motion for a Temporary Restraining Order . . . is **DENIED**.")

Essien v. Barr, No. 20-CV-1034-WJM, 2020 WL 1974761, at *4 & n.5 (D. Colo. Apr. 24, 2020) ("The reasoning in *Kingsley* holds even more true in the *civil* detention context, such as immigration detention. Moreover, in this respect, the Court sees no distinction between an

excessive force claim and a conditions-of-confinement claim. There is no justification for an inquiry into a subjective state of mind. Accordingly, the only elements the Court must consider are whether there was an expressed intent to punish, whether the restriction in question bears no reasonable relationship to any legitimate governmental objective, or whether the restriction is excessive as compared to a legitimate government objective. . . .The Court's holding is limited only to dangerous conditions of confinement in civil detention. The Court recognizes that a denial-of-medical-care claim (sometimes categorized as a conditions-of-confinement claim) raises special concerns because eliminating the subjective component might make the government liable for mere medical negligence, yet 'liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.'. . The Court therefore expresses no opinion about denial-of-medical-care claims.")

Wright on behalf of Salgado v. Glanz, No. 13-CV-315-JED-JFJ, 2020 WL 1663356, at *6 (N.D. Okla. Apr. 3, 2020) ("Without guidance from the Tenth Circuit, the undersigned declines to extend *Kingsley*'s excessive force, objective-only standard to pretrial detainee claims of inadequate medical care.")

Parks v. Taylor, No. CIV-18-968-D, 2020 WL 1271587, at *3-4 & n.8 (W.D. Okla. Mar. 17, 2020) ("Lt. Carter first objects to Judge Erwin's finding regarding the standard of liability applicable to Count I. Based on recent legal developments regarding the constitutional rights of pretrial detainees under the Due Process Clause of the Fourteenth Amendment, Judge Erwin concludes that an objective standard recognized by the Supreme Court for excessive force claims in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), should govern liability under Count I. Judge Erwin reaches this conclusion based on *Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019), which he views as signaling that the Tenth Circuit has 'join[ed] the Second, Seventh, and Ninth Circuits in determining that the *Kingsley* standard should apply to due process claims brought by pretrial detainees.'. . Lt. Carter contends this conclusion is simply wrong, citing recent cases in which the Tenth Circuit has acknowledged a circuit split 'on whether *Kingsley* alters the standard for conditions of confinement ... claims brought by pretrial detainees' and has declined to 'resolve this question for our circuit.'. . . The Court finds persuasive Lt. Carter's argument that the Tenth Circuit has not decided whether *Kingsley*'s objective reasonableness standard should apply to a pretrial detainee's conditions-of-confinement claim and that, absent a Tenth Circuit decision, this Court should continue to apply existing precedent. This approach has been adopted by other district courts in this circuit. . . In numerous unpublished opinions issued after *Kingsley* and *Colbruno*, the Tenth Circuit has continued to apply the Eighth Amendment standard to pretrial detainees' claims regarding their conditions of confinement. . . . In short, Plaintiff has not pleaded sufficient facts to show that Lt. Carter was deliberately indifferent to an unsanitary condition in Plaintiff's cell, and therefore, has failed to state a plausible § 1983 claim against Lt. Carter in Count I. . . .
One could reasonably question whether, even utilizing a lesser standard required by *Kingsley*, Plaintiff's factual allegations are sufficient to state a plausible claim against Lt. Carter. Circuits that interpret *Kingsley* as requiring an objective standard for a pretrial detainee's claim have adopted an 'objectively reckless disregard' standard. *See Estate of Vallina v. Cty. of Teller*

Sheriff's Office, 757 F. App'x 643, 647 (10th Cir. 2018) (discussing Second, Seventh, and Ninth Circuit cases). To show that Lt. Carter acted with reckless disregard of a risk to Plaintiff's health by failing to provide cleaning supplies, Plaintiff would still need to allege some facts regarding Lt. Carter's knowledge of and responsibility for the problem.")

Bowlds v. Turn Key Health, No. CIV-19-726-SLP, 2020 WL 730876, at *2 & n.1 (W.D. Okla. Feb. 13, 2020) ("As a pretrial detainee, Plaintiff's claims are governed by the Fourteenth Amendment's Due Process Clause. . . The Tenth Circuit continues to evaluate such claims applying 'an analysis identical to that applied in Eighth Amendment cases.'. . . The Tenth Circuit has yet to decide whether *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015) alters this analysis. *See Burke*,935 F.3d at 991, n. 9; *see also McCowan v. Morales*, 945 F.3d 1276, 1291 n. 12 (10th Cir. 2019) (declining to decide issue but noting that "a claim of deliberate indifference to serious medical needs by its very terminology seems to require both a subjective and objective test" and applying the two-prong test where the parties did not address the impact of *Kingsley*). Because here, as in *McCowan*, the parties do not address *Kingsley* the Court applies the Eighth Amendment deliberate indifference standard.")

Bush for the Estate of Garland v. Bowling, No. 19-CV-00098-GKF-FHM, 2020 WL 265201, at *3 (N.D. Okla. Jan. 17, 2020) ("The Tenth Circuit has noted that other '[c]ircuits are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees.' *Burke v. Regalado*, 935 F.3d 960, 991-92 n.9 (10th Cir. 2019) (quoting *Estate of Vallina v. Cty. of Teller Sheriff's Office*, No. 17-1361, 2018 WL 6331595, at *2 (10th Cir. Dec. 4, 2018)). In an unpublished decision, the Tenth Circuit observed that the claim in *Kingsley* was 'an excessive-force claim where there was no question about the intentional use of force against the prisoner.' *Crocker v. Glanz*, 752 F. App'x 564, 569 (10th Cir. 2018). The panel majority in *Crocker* suggested that the analysis in *Kingsley* may not apply to a failure to provide adequate medical care or screening, where there is no such intentional action.'. . But the Tenth Circuit has not yet ruled directly on this issue. *See McCowan v. Morales*, — F.3d —, 2019 WL 7206045, at *11 n.12 (10th Cir. Dec. 27, 2019) (declining to address the question as the argument was not raised by the parties); *Clark*, 895 F.3d at 1269 (expressly declining to revisit the law applicable to medical care during pretrial detention in light of *Kingsley*); *Perry v. Durborow*, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018) (expressly declining to address *Kingley*'s impact on a pretrial detainee's claim of supervisory liability premised on deliberate indifference). Because *Kingsley* did not address the standard applicable to a pretrial detainee's denial of medical care claim, this court follows existing Tenth Circuit precedent as to the appropriate standard.")

Kerns v. Southwest Colorado Mental Health Center, Inc., No. 18-CV-2962-WJM-SKC, 2019 WL 6893022, at *10 (D. Colo. Dec. 18, 2019) ("In the absence of clear guidance from the Tenth Circuit that *Kingsley* should be extended to apply also to deliberate indifference claims, the Court will follow existing precedent from that court on the elements of a deliberate indifference claim brought by a pretrial detainee.")

Holland v. Glanz, No. 16-CV-349-JED-JFJ, 2019 WL 4781869, at *5 n.1 (N.D. Okla. Sept. 30, 2019) ("In 2015, in *Kingsley v. Hendrickson*, the Supreme Court 'held that the Eighth Amendment standard for excessive force claims brought by prisoners, which requires that defendants act "maliciously and sadistically to cause harm," does not apply to Fourteenth Amendment excessive force claims brought by pretrial detainees.' *Estate of Vallina v. Cty. of Teller Sherriff's Office & Its Det. Facility*, 757 Fed. App'x. 643, 646 (10th Cir. 2018); *see Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). Since then, the 'Second, Seventh, and Ninth Circuits have interpreted *Kingsley* as displacing prior subjective requirements' for 'inadequate medical care claims brought by pretrial detainees.' *Estate of Vallina*, 757 Fed. App'x. at 646. 'Those courts have adopted [a purely] objective test requiring reckless disregard.'. . The Fifth, Eighth, and Eleventh Circuits have declined to extend *Kingsley*. . .The Tenth Circuit has thus far declined to address the application of *Kingsley*. *E.g., Crocker v. Glanz*, 752 Fed. App'x. 564, 569 (10th Cir. 2018).")

Pendleton v. Board of County Commissioners for Oklahoma County, No. CIV-18-707-G, 2019 WL 4752269, at *5 & n.4 (W.D. Okla. Sept. 30, 2019) ("Although Mr. Pendleton was a pretrial detainee and therefore subject to protection under the Fourteenth Amendment's Due Process Clause, the Court applies an analysis identical to that applied to the Eighth Amendment claims brought by convicted prisoners. . . . Plaintiff argues that for pretrial detainees the traditional deliberate-indifference standard should be abandoned in favor of an objective-only standard. . . *Kingsley*, an excessive-force case, did not directly address the standard applicable to a pretrial detainee's conditions-of-confinement claim, and the Tenth Circuit has noted that circuits 'are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees.' *Estate of Vallina v. Cty. of Teller Sheriff's Office*, 757 F. App'x 643, 646 (10th Cir. 2018). Further, the Tenth Circuit 'has not yet ruled directly on this issue.' *Burke v. Regalado*, No. 18-CV-231-GKF-FHM, 2019 WL 1371144, at *4 (N.D. Okla. Mar. 26, 2019). The Court therefore follows established Tenth Circuit precedent in evaluating this claim (which survives even under the dual-prong standard, as discussed below).

Lance v. Board of County Commissioners of Pittsburg County, Okla., No. CIV-17-378-RAW, 2019 WL 4581351, at *13 & n. 22 (E.D. Okla. Sept. 20, 2019) ("While the Tenth Circuit has not yet definitively ruled on the issue,[22] [fn.22: The Tenth Circuit has since noted the split amongst the Circuits on this issue, but has not yet definitively ruled on it. *Burke v. Regalado*, --- F.3d ---, No. 18-5042 and 18-5043, 2019 WL 3938633 at * 14, n. 9 (10th Cir. Aug. 20, 2019); *Estate of Vallina v. County of Teller Sheriff's Office*, 757 Fed.Appx. 643, 646-47 (10th Cir. 2018) (unpublished).] the court believes that the subjective element – the defendant's state of mind, that he acted *deliberately* – is necessary to prove a claim of *deliberate indifference* to serious medical needs under either a Fourteenth Amendment or an Eighth Amendment analysis. Like the Northern District of Oklahoma, this court will follow existing Tenth Circuit precedent. *See Burke v. Regalado*, No. 18-CV-231-GKF-FHM, 2019 WL 1371144, *4 (N.D. Okla. Mar. 26, 2019) ("Because *Kingsley* did not address the standard applicable to a pretrial detainee's denial of medical care claim, this court follows existing Tenth Circuit precedent as to the appropriate

standard.").")

Thurman v. County Commissioners of Oklahoma County, No. CIV-17-950-G, 2019 WL 3318120, at *2 (W.D. Okla. July 24, 2019) ("[A]s Judge Erwin thoroughly explained in his Report, *Kingsley*—an excessive-force case—did not directly address the standard applicable to a pretrial detainee's inadequate medical care claim, and while the Tenth Circuit has noted that circuits 'are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees,' the Tenth Circuit 'has not yet ruled directly on this issue.' *Estate of Vallina v. Cty. of Teller Sheriff's Office*, 757 F. App'x 643, 646 (10th Cir. 2018); *Burke v. Regalado*, No. 18-CV-231-GKF-FHM, 2019 WL 1371144, at *4 (N.D. Okla. Mar. 26, 2019); *see also Rife v. Okla. Dep't of Pub. Safety*, 854 F.3d 637, 647 (10th Cir. 2017) (discussing the traditional two-prong standard for a pretrial detainee's inadequate medical care claim post-*Kingsley*). The Court fully concurs with Judge Erwin's determination that, in the absence of a clear directive on the issue from the Tenth Circuit, this Court should follow established Tenth Circuit precedent in evaluating Plaintiff's claim.") [**My note**: *But see* ***Colbruno v. Kessler***, 928 F.3d 1155 (10th Cir. 2019), *supra*]

Ramsey v. Southwest Correctional Medical Group, Inc., No. 18-CV-1845-WJM-KLM, 2019 WL 3252181, at *8 n.13 (D. Colo. July 19, 2019) ("The Tenth Circuit applies the same test for deliberate indifference to serious medical needs to both Eighth Amendment claims brought by prisoners and Fourteenth Amendment claims brought by pretrial detainees. *See, e.g.*, *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002). In *Estate of Vallina v. County of Teller Sheriff's Office*, 757 F. App'x 643, 646–47 (10th Cir. 2018), the Tenth Circuit noted a developing circuit split regarding whether a recent Supreme Court decision abrogating the subjective component in a pretrial detention use-of-force claim also calls for abrogating the subjective component in a pretrial detention denial-of-medical-care claim. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). But the plaintiff in *Estate of Vallina* did not argue for such abrogation, so the Tenth Circuit continued to follow its prior precedent. *See* 757 F. App'x at 647. Likewise, Ramsey does not argue for such abrogation, so the Court will continue to apply the Eighth Amendment standard.") .") [**My note**: *But see* ***Colbruno v. Kessler***, 928 F.3d 1155 (10th Cir. 2019), *supra*]

Hernandez v. Board of County Commissioners of Oklahoma County, No. CIV-18-606-R, 2019 WL 3069430, at *3 (W.D. Okla. July 12, 2019) ("There is the potential for debate over what standard applies to a pretrial detainee following the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015), holding that the Eighth Amendment standard for excessive force claims brought by prisoners, requiring proof that a defendant acted with a culpable state of mind, does not apply to Fourteenth Amendment excessive force claims brought by pretrial detainees. . . Rather, a pretrial detainee is only required to show that the force purposely or knowingly used against him was 'objectively unreasonable.'. . The parties have not addressed the issue, and in an unpublished decision, the Tenth Circuit noted that other circuits 'are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical

care claims brought by pretrial detainees.' *Estate of Vallina v. Cty. of Teller Sheriff's Office*, 757 F. App'x 643, 646 (10th Cir. 2018); *see also Crocker v. Glanz*, 752 F. App'x at 569 (noting *Kingsley* was an excessive-force claim where there was no question about the intentional use of force against the prisoner and suggesting that its analysis may not apply to a failure to provide adequate medical care or screening). However, given that the parties have not raised this issue, and the Tenth Circuit's last published statement on the appropriate test indicates that the standard has not changed at this time (*see Perry v. Durborow*, 892 F.3d 1116, 1121 (10th Cir. 2018)), the Court proceeds on the basis that the Fourteenth and Eighth Amendment standards are identical for purposes of Plaintiff's claims.") .") [**My note**: *But see* ***Colbruno v. Kessler***, 928 F.3d 1155 (10th Cir. 2019), *supra*]

Turner v. Bd. of County Commissioners of County of Oklahoma, No. CIV-18-36-SLP, 2019 WL 1997474, at *3 n.3 (W.D. Okla. May 6, 2019) ("As a pretrial detainee, Plaintiff's claims are governed by the Due Process Clause of the Fourteenth Amendment. However, under Tenth Circuit precedent, the same Eighth Amendment standard governs this claim. . . In a recent unpublished opinion, the Tenth Circuit noted that circuit courts are split as to whether the Supreme Court's decision in *Kingsley v. Hendrickson*, —— U.S. ——, 135 S.Ct. 2466 (2015), alters this standard or whether the holding in *Kingsley* is limited to claims of excessive force brought by pretrial detainees. *See Estate of Vallina v. Cty. of Teller Sheriff's Office*, 757 F. App'x 643, 646-47 (10th Cir. 2018). But the Tenth Circuit declined to decide the issue. The parties do not argue for application of a different standard and based on existing Tenth Circuit precedent, the Court deems the appropriate standard governing Plaintiff's claims remains unchanged by *Kingsley*.")

Estate of Bradshaw v. Armor Correctional Health Services, Inc., No. 17-CV-615-TCK-FHM, 2019 WL 1675148, at *6 n.3 (N.D. Okla. Apr. 17, 2019) ("Citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) and *Castro v. Los Angeles Cty.*, 833 F.3d 1060 (9th Cir. 2016) Plaintiff argues that the appropriate standard for evaluating her claims is one of 'objective reasonableness.' In *Kingsley*, the Supreme Court ruled that the proper standard for evaluating *excessive force* claims by pretrial detainees is an objective reasonableness test similar to the standard used to evaluate on-the-street claims of excessive force by arrestees. . . Subsequently, the Ninth Circuit—citing *Kingsley*—followed the *Kingsley* rationale and applied the objective reasonableness standard to a failure-to-protect claim brought by a pretrial detainee. *Castro v. Los Angeles Cty.*, 833 F.3d 1060, 1069 (9th Cir. 2016). Plaintiff has cited no authority for her argument that the objective reasonableness standard applies in the context of claim arising from alleged failure to provide adequate medical care to a pretrial detainee, and as noted above the appropriate standard in this circuit is 'deliberate indifference.'")

Weitzman v. City and County of Denver, No. 17-CV-02703-KLM, 2019 WL 1438072, at *6 n.8 (D. Colo. Mar. 31, 2019) ("The Tenth Circuit Court of Appeals, in a recent, unpublished opinion, has noted that circuit courts 'are split on whether [*Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015),] alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees,' with the Second, Seventh, and Ninth Circuits saying it has done so

and with the Fifth, Eighth, and Eleventh Circuits saying it has not done so and that *Kingsley* applies only to excessive force claims. *Estate of Vallina v. Cty. of Teller Sheriff's Office*, __ F. App'x __, __, No. 17-1361, 2018 WL 6331595, at *2 (10th Cir. Dec. 4, 2018). The Tenth Circuit has not yet directly determined this issue. . .However, given that the parties have not raised this issue, and the Tenth Circuit's last published statement on the appropriate test indicates that the standard has not changed at this time, *see Perry*, 892 F.3d at 1121, the Court proceeds on the basis that the Fourteenth and Eighth Amendment standards are identical for purposes of Plaintiff's claims.")

Burke for the Estate of Godsey v. Regalado, No. 18-CV-231-GKF-FHM, 2019 WL 1371144, at *4 (N.D. Okla. Mar. 26, 2019) ("In an unpublished decision, the Tenth Circuit noted that other circuits 'are split on whether *Kingsley* alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees. *Estate of Vallina v. Cty. of Teller Sheriff's Office*, No. 17-1361, 2018 WL 6331595, at *2 (10th Cir. Dec. 4, 2018). In another unpublished decision, the Tenth Circuit observed that the claim in *Kingsley* was 'an excessive-force claim where there was no question about the intentional use of force against the prisoner.' *Crocker v. Glanz*, 752 F. App'x 564, 569 (10th Cir. 2018). The panel majority in *Crocker* suggested that the 'analysis in *Kingsley* may not apply to a failure to provide adequate medical care or screening, where there is no such intentional action.'. . But the Tenth Circuit has not yet ruled directly on this issue. *See Clark*, 895 F.3d at 1269 (expressly declining to revisit the law applicable to medical care during pretrial detention in light of *Kingsley*); *Perry v. Durborow*, 892 F.3d 1116, 1122 n.1 (10th Cir. 2018) (expressly declining to address *Kingley*'s impact on a pretrial detainee's claim of supervisory liability premised on deliberate indifference). Because *Kingsley* did not address the standard applicable to a pretrial detainee's denial of medical care claim, this court follows existing Tenth Circuit precedent as to the appropriate standard.")

Ueding v. Border, No. 18-CV-00778-KLM, 2019 WL 1077367, at *7 (D. Colo. Mar. 7, 2019) ("The Tenth Circuit Court of Appeals, in a recent, unpublished opinion, has noted that circuit courts 'are split on whether [*Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015),] alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees,' with the Second, Seventh, and Ninth Circuits saying it has and with the Fifth, Eighth, and Eleventh Circuits saying it has not and that *Kingsley* applies only to excessive force claims. *Estate of Vallina v. Cty. of Teller Sheriff's Office*, __ F. App'x __, __, No. 17-1361, 2018 WL 6331595, at *2 (10th Cir. Dec. 4, 2018). The Tenth Circuit has not yet directly determined this issue. . . However, given that (1) the parties have not raised this issue, (2) the Tenth Circuit's last published statement on the appropriate test indicates that the standard has not changed at this time, *see Perry v. Durborow*, 892 F.3d 1116, 1121 (10th Cir. 2018), and (3) Plaintiff's claims would fail under either standard, the Court proceeds on the basis that the Fourteenth and Eighth Amendment standards are identical for purposes of Plaintiff's claim.")

Partridge v. Pell, No. 17-CV-02941-CMA-STV, 2019 WL 1045840, at *6 (D. Colo. Mar. 5, 2019) ("After *Kinglsey*, the Courts of Appeal for the Second Circuit and the Ninth Circuit have held that '[**t]he same objective analysis**' the Supreme Court sanctioned in *Kingsley* '**should apply** to an

officer's appreciation of the risks associated with an unlawful condition of confinement **in a claim for deliberate indifference under the Fourteenth Amendment**.'. . The Tenth Circuit discussed these cases in *Perry*[.] . . .The case presently before this Court may be an opportunity to analyze *Kingsley's* impact on a Fourteenth Amendment deliberate indifference claim. However, just as the Tenth Circuit did in *Perry*, . . . and Magistrate Judge Varholak did in the Recommendation, . . . the Court declines to conduct that analysis here. Both parties have made their arguments in the context of the subjective standard. The Court will therefore use the subjective deliberate indifference standard that arises under the Eighth Amendment.")

Scott v. Montoya, No. 17-CV-01364-KLM, 2019 WL 688053, at *3 n.10 (D. Colo. Feb. 15, 2019) ("The Tenth Circuit Court of Appeals, in a recent, unpublished opinion, has noted that circuit courts 'are split on whether [*Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015),] alters the standard for conditions of confinement and inadequate medical care claims brought by pretrial detainees,' with the Second, Seventh, and Ninth Circuits saying it has and with the Fifth, Eighth, and Eleventh Circuits saying it has not and that *Kingsley* applies only to excessive force claims. *Estate of Vallina v. Cty. of Teller Sheriff's Office*, __ F. App'x __, __, No. 17-1361, 2018 WL 6331595, at *2 (10th Cir. Dec. 4, 2018). The Tenth Circuit has not yet directly determined this issue. . . However, given that (1) the parties have not raised this issue, (2) the Tenth Circuit's last published statement on the appropriate test indicates that the standard has not changed at this time, *see Perry v. Durborow*, 892 F.3d 1116, 1121 (10th Cir. 2018), and (3) Plaintiff's claims would fail under either standard, the Court proceeds on the basis that the Fourteenth and Eighth Amendment standards are identical for purposes of Plaintiff's claims.")

Thomas v. Lester, No. CIV-17-90-D, 2018 WL 3954851, at *3-4 (W.D. Okla. Aug. 17, 2018) ("Recently, in adopting an objective standard to govern a pretrial detainee's excessive force claim in *Kingsley*, the Supreme Court found support in precedents like *Bell*. The Court reaffirmed that even 'in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose."'. . The Court observed that the objective standard endorsed in *Bell* can be used to evaluate a variety of prison conditions or practices, and need 'not consider the prison officials' subjective beliefs about the policy.'. . Here, Plaintiff alleges no facts to suggest that Defendants' decision to prohibit juvenile visitation in the Cleveland County jail was intended as punishment, but this lack of subjective evidence is not dispositive. . . The question becomes whether Plaintiff has alleged facts that would show, objectively, the juvenile visitation ban lacked a rational relationship to a legitimate governmental objective or purpose. . . . In short, Plaintiff provides sufficient factual allegations from which to conclude that Defendants' juvenile visitation ban for pretrial detainees was not reasonably tailored to its purpose. For these reasons, the Court finds that Plaintiff has stated a plausible § 1983 claim that Defendants' ban on juvenile visitation in the Cleveland County jail constituted punishment of a pretrial detainee in violation of the Fourteenth Amendment. Thus, the Court finds that Defendants are not entitled to dismissal of the Amended Complaint with respect to this claim.")

Estate of Walter v. Correctional Healthcare Companies, Inc., No. 16-CV-0629-WJM-MEH, 2018 WL 2414865, at *8 (D. Colo. May 29, 2018) ("Although the Estate no longer pursues an excessive force claim, it highlights *Kingsley* as something 'the Court should keep in mind, because it has prompted other courts to question whether *any* Fourteenth Amendment cause of action arising from alleged mistreatment in pretrial detention contains a subjective component. . . In the present context, this argument could have interesting consequences. Under the Eighth Amendment test for delay or denial of medical care, a prisoner must prove that (1) objectively, he or she had a serious illness or injury, (2) the defendant was aware of facts from which the inference could be drawn that the prisoner faced a substantial risk of serious harm, (3) the defendant subjectively drew the inference, but (4) the defendant did not act, and (5) the failure to act caused harm to the prisoner. . . The second, third, and fourth elements comprise 'deliberate indifference' to an inmate's medical needs. . . If *Kingsley* applies in the present circumstance, then a plaintiff would no longer need to prove deliberate indifference, but only knowledge of the relevant facts and an objectively unreasonable failure to act. . . The Estate, however, takes the position that 'the Court need not address this issue because [the Estate] has ample evidence to satisfy the subjective deliberate indifference standard under the pre-*Kingsley* state of the law.'. . The Court takes the Estate at its word and therefore does not explore the effect of *Kingsley*, particularly because removing the subjective component from deliberate indifference in the medical context comes very close to creating a federal constitutional cause of action simply for medical negligence—something against which the Supreme Court has counseled. . . Thus, to restate the standard of liability, the Estate must prove: (1) objectively, Walter had a serious illness or injury, (2) the defendant in question was aware of facts from which the inference could be drawn that Walter faced a substantial risk of serious harm, (3) the defendant subjectively drew the inference, but (4) the defendant did not act, and (5) the failure to act caused harm to Walter.")

Schabow v. Steggs, No. 16-CV-02232-RBJ-KLM, 2018 WL 1014140, at *3-5 (D. Colo. Feb. 21, 2018) ("Plaintiff was a pretrial detainee at the time of the events underlying this lawsuit, and pretrial detainees are protected under the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment's proscription against cruel and unusual punishment. . . However, the Eighth Amendment still provides the benchmark for claims of excessive force and cruel and unusual punishment. . .Therefore, the Court analyzes Plaintiff's claims under the Fourteenth Amendment, which incorporates the Eighth Amendment framework, and the *Kingsley* 'objectively reasonable' test for excessive force against pretrial detainees. . . .Defendants argue that Plaintiff fails to adequately assert a constitutional violation because his allegations do not satisfy both the objective and subjective prongs of the excessive force test under the Eighth Amendment. . . However, Defendants are applying an outdated standard. . . According to *Kingsley*, to successfully allege a 42 U.S.C. § 1983 claim of excessive force under the Fourteenth Amendment, a pretrial detainee plaintiff must allege two elements: (1) that the defendant possessed a 'purposeful, a knowing, or possibly a reckless state of mind,'. . . and (2) that the defendant's actions were objectively unreasonable in light of facts and circumstances of that particular case.")

Schabow v. Steggs, No. 16-CV-02232-RBJ-KLM, 2018 WL 1014140, at *9 &n.7 (D. Colo. Feb. 21, 2018) ("Plaintiff alleges that Defendants Stob, Rogers, and Eugene violated his Eighth and Fourteenth Amendment rights through their deliberate indifference to his medical needs. . . . Pretrial detainees are protected by the Fourteenth Amendment rather than the Eighth Amendment, however, the degree of protection and the analysis is the same under both Amendments.")

Moore v. Goodman, No. 17-CV-196-CVE-JFJ, 2017 WL 4079401, at *3 n.1 (N.D. Okla. Sept. 14, 2017) ("The Court notes that the Supreme Court has ruled that a pretrial detainee's excessive force claim brought pursuant to the Due Process Clause is governed by an objective standard and differentiated review of that claim from one brought by a convicted prisoner. . . But the *Kingsley* decision did not address the standard applicable to a pretrial detainee's denial of medical care claim and, therefore, the Court follows existing Tenth Circuit precedent as to the appropriate standard governing an inadequate medical care claim.")

Abila v. Funk, 220 F.Supp.3d 1121, 1180-81 (D.N.M. 2016) ("In *Kingsley v. Hendrickson*, 135 S. Ct. at 2473, the Supreme Court ruled that a pretrial detainee's Fourteenth Amendment due-process claim regarding the use of excessive force turns on the objective reasonableness of the use of force, and proof as to the defendants' mental state is not required. . . The Supreme Court did not specifically decide whether that objective standard might suffice in cases involving mistreatment of detainees, as the defendants in that case had not disputed that they acted purposefully and knowingly. . . Nevertheless, the Supreme Court in *Kingsley v. Hendrickson* noted that an objective standard had been applied in *Bell v. Wolfish*, 441 U.S. at 541-43, relative to a variety of prison conditions, including double bunking. . . *Bell v. Wolfish* did not specifically state that an objective standard applied; rather, the Supreme Court in *Kingsley v. Hendrickson* characterized *Bell v. Wolfish's* 'rationally related' and 'appears excessive in relation to a legitimate nonpunitive governmental purpose' standard as being objective. . . . No Court yet, in the wake of *Kingsley v. Hendrickson*, has explicitly applied this standard to a claim, such as Abila's, alleging inhumane conditions of confinement. *But see Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016)(applying the 'broad' wording of the *Kingsley v. Hendrickson* standard, which the Supreme Court was applying in the context of an excessive-force claim, to a failure-to-protect claim, because '[t]he Court did not limit its holding to "force" but spoke to "the challenged governmental action" generally'). The Supreme Court premised its holding in *Kingsley v. Hendrickson*, however, with respect to pretrial detainees, on the longstanding Supreme Court precedent of *Bell v. Wolfish*, 441 U.S. at 541-43. In sum, the Court concludes that *Kingsley v. Hendrickson* held that there does not exist a single 'deliberate indifference' standard applicable to all § 1983 claims, whether pretrial detainees or convicted prisoners bring the claim. . . The parties to this case confirm the Court's conclusion. . . Accordingly, 'the Due Process Clause protects a pretrial detainee from ... punishment.'. . '[S]uch "punishment" can consist of actions taken with an "expressed intent to punish."'". . In the absence of an expressed intent to punish, however, 'a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that

purpose."'. . The Supreme Court, in *Bell v. Wolfish*, applied this latter objective standard to evaluate a variety of prison conditions, including a prison's practice of double bunking.")

Smith v. DuBoise, No. 14-CV-511-GKF-PJC, 2015 WL 9275005, at *7 (N.D. Okla. Dec. 18, 2015) ("To the extent Plaintiff raises a separate claim challenging the conditions of the holding cell, the claim fails. Although the Fourteenth Amendment governs this claim due to Plaintiff's status as a pretrial detainee, the standards are the same as those under the Eighth Amendment.")

Salazar v. White, No. 14-CV-02081-RM-CBS, 2015 WL 5781650, at *4-5 & n.3 (D. Colo. Oct. 5, 2015) ("[A]s to the sufficiency of Plaintiff's allegations, Defendant argues that the 'new "objective reasonableness"' standard under *Kingsley, supra,* announced in 2015 was not clearly established at the time of the alleged incident in 2014. Instead, Defendant contends the *subjective* reasonable standard applies and Plaintiff has failed to sufficiently allege facts to meet this standard. The Court agrees that the 'motives of the state actor' (what Defendant refers to as 'subjective reasonableness component') requirement set forth in *Estate of Booker*, 745 F.3d at 426, should be considered to evaluate Defendant's conduct which allegedly occurred in 2014. . . The Court finds, however, that Plaintiff has sufficiently alleged facts to meet this requirement. . . . In light of the Court's determination, it need not address the possible implications of *Kingsley*. . . .The subjective intent standard for an excessive force due process violation has been described as ' "force inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience, or by malice rather than mere carelessness."'. . . In this case, Plaintiff's allegations that Defendant attacked Plaintiff, threw him on the ground, 'savagely and maliciously beat and kicked' him, while he was in handcuffs and not resisting are sufficient to support that the force was inspired by malice or excessive zeal that shocks the conscience.")

Kennedy v. Bd. of Cnty. Commissioners For Oklahoma Cnty., No. CIV-15-398-D, 2015 WL 4078177, at *1 n.6 (W.D. Okla. July 6, 2015) ("The Supreme Court recently decided the appropriate Due Process Clause standard for a pretrial detainee's excessive force claim. *See Kingsley v. Hendrickson,* 576 U.S. ——, 2015 WL 2473447, (June 22, 2015). This decision does not alter the standard applicable to medical care claims.")

ELEVENTH CIRCUIT

Myrick v. Fulton County, Georgia, 69 F.4th 1277, 1302-05 (11th Cir. 2023) ("There may be a question as to whether May stepped toward Officer Cook. Appellants are correct that none of the officers mentioned the alleged step in their incident reports. But we need not address whether May stepped toward Officer Cook. Even assuming that he *didn't*, it was reasonable under the circumstances for Officer Cook to tase May. The undisputed record, when viewed in the light most favorable to Appellants, shows that (1) May was naked in his cell in violation of jail policy and state law; (2) Officer Cook repeatedly instructed May to put his clothes on; (3) May refused to comply; (4) May was defiant and took an aggressive stance; (5) Officer Cook tased May; (6) the taser was only partially effective; and (7) May jumped back up almost immediately and continued

to resist. These facts, when viewed through the lens of the *Kingsley* factors, do not suggest that Officer Cook's initial use of his taser on May was objectively unreasonable, so we cannot say that Officer Cook violated May's Fourteenth Amendment rights. . . .Under our precedent, and given the situation that he confronted, Officer Cook was within his rights to tase May. We have declined to find a Fourth Amendment violation in similar circumstances. In *Draper v. Reynolds*, we held that it was reasonable to tase a suspect who defied lawful orders, 'used profanity, moved around and paced in agitation, and repeatedly yelled' at law enforcement. . . All that was also true here. If anything, May's aggressive stance made the situation here more volatile, in that it gave the officers reason to believe that a brawl might ensue. So if it was reasonable to tase the suspect in *Draper*, it was reasonable to tase May here. . . As such, the District Court properly granted Officer Cook summary judgment based on qualified immunity. . . . Even under the most favorable version of events, there is simply no dispute that an active struggle was ensuing in the holding cell. Under the *Kingsley* factors, Officer Strowder's punches were not objectively unreasonable given the struggle between May and the Officers—regardless of whether he grabbed her handcuffs. May actively resisted. Officer Strowder gave May verbal warnings. Her closed-fist strikes were in response to that resistance and the safety and security risks May posed. The injury resulting from the punches was relatively minimal. Because Officer Strowder's use of force was not clearly unreasonable, she did not violate May's Fourteenth Amendment rights. The District Court properly granted her summary judgment as well. . . . Even if we assume that the Officers had subjective knowledge of the serious risk of medical harm, we cannot say that they disregarded that risk or that they acted with more than gross negligence. . . . Because Appellants cannot show that the Officers were deliberately indifferent to May's serious medical need, they cannot show his Fourteenth Amendment rights were violated. As such, the Officers are entitled to qualified immunity and the District Court did not err in granting them summary judgment.")

Pullen v. Osceola County, 861 F. App'x 284, ___ n.7 (11th Cir. 2021) ("Although *Skrtich* involved a convicted prisoner and the Eighth Amendment standard for excessive force, we have repeatedly held that the use of force 'maliciously and sadistically for the very purpose of causing harm' violates clearly established law '[i]n both the Fourteenth and the Eighth Amendment [contexts].' *Cockrell v. Sparks*, 510 F.3d 1307, 1311 (11th Cir. 2007). We do not believe that the Supreme Court's subsequent decision in *Kingsley*, which lowered the requirements for an excessive force claim under the Fourteenth Amendment, disturbs this precedent.")

Crocker v. Beatty, 995 F.3d 1232, 1246-50 (11th Cir. 2021), *cert. denied,* 142 S. Ct. 845 (2022) ("[U]nder the Supreme Court's current framework, the Fourth Amendment covers arrestees, the Eighth Amendment covers prisoners, and the Fourteenth Amendment covers 'those who exist in the in-between—pretrial detainees.'. . . The Supreme Court has long taught that '[i]n addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.'. . So, exactly what kind of excessive-force claim has Crocker alleged? Not entirely clear. Crocker's filings before the district court could be read as raising either a Fourth Amendment claim, a Fourteenth Amendment

claim, or perhaps both. . . But Crocker's counsel later clarified that his hot-car excessive-force claim relied *solely* on the Fourteenth Amendment. And in his opening brief to this Court, Crocker expressly cast his claim in Fourteenth Amendment terms. But as you might suspect from Crocker's shape-shifting arguments, the Fourteenth Amendment doesn't offer a perfect fit for the facts here. As we said in *Piazza*, the Fourteenth Amendment has been interpreted to protect 'pretrial detainees' from excessive force. . . And it's not obvious that Crocker was a pretrial detainee. The Supreme Court long ago described a pretrial detainee as a person who had received 'a "judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest."'. . Because Crocker never made it to the probable-cause-determination stage, calling him a 'pretrial detainee' is hard to square with *Bell*. Accordingly, it's not clear that the Fourteenth Amendment provides the appropriate framework for Crocker's excessive-force claim. *Bell*'s suggestion notwithstanding, we've acknowledged that 'the line is not always clear as to when an arrest ends and pretrial detainment begins.'. . As a result, the line—for excessive-force purposes—between an arrestee and a pretrial detainee isn't always clear, either. . . And the definitional problem creates a follow-on analytical issue: For someone who could plausibly be characterized as either an arrestee or a pretrial detainee, it's hard to say whether the Fourth or Fourteenth Amendment should govern the analysis. . . The day may well come when we need to clarify the distinction. Today, though, isn't that day. Whether framed in terms of the Fourth or Fourteenth Amendment, Crocker's claim fails. . . . We will start with the Fourteenth Amendment analysis since that's the framework that Crocker has invoked before us. First, we'll articulate the governing standard—which the district court misapprehended and our dissenting colleague disputes—and then, having done so, we'll apply that standard to Crocker's case. . .We recently laid out the proper Fourteenth Amendment excessive-force framework and applied it in a 'hot car' case in *Patel*. There, we began by explaining that claims of excessive force under the Fourteenth Amendment *used to be* analyzed like excessive-force claims under the Eighth Amendment, such that we had to undertake a subjective inquiry into whether an officer applied force 'maliciously and sadistically.'. . If so, then there was excessive force. If not, then there wasn't. Not anymore. In *Kingsley v. Hendrickson*, the Supreme Court held that for Fourteenth Amendment excessive-force claims 'the relevant standard is objective not subjective.'. . . Here, the district court erroneously applied the old malicious-and-sadistic standard and, on that basis, granted summary judgment on Crocker's excessive-force claim. Before applying *Kingsley*'s 'objective not subjective' standard to the facts of Crocker's case, we must say a few words in response to our dissenting colleague's reading of that decision. On the dissent's view, both before and after *Kingsley*, a viable excessive-force claim can be based even on 'objectively reasonable force' provided that the officer-defendant acted with a sufficiently sinister state of mind—what the dissent calls 'an express intent to punish.'. . That, the dissent says, is because under *Bell v. Wolfish*, . . . 'pretrial detainees can establish a violation of their Fourteenth Amendment rights by showing that an official inflicted force with an express intent to punish.'. . And, the dissent maintains, *Kingsley* shouldn't be read to have done 'away with this method of proving Fourteenth Amendment violations for excessive force claims when it said nothing about having done so.'. . On that theory, both before and after *Kingsley*, 'proof of express intent to punish is alone sufficient' to support an excessive-force claim. . . Several responses. First, while *Kingsley* certainly

discusses *Bell*'s subjective standard for punishment, we don't draw from that discussion the dissent's two-track treatment of excessive-force claims. Consider, for instance, how the *Kingsley* Court framed the case: 'The question before us is whether, to prove an excessive force claim, a pretrial detainee must show that the officers were *subjectively* aware that their use of force was unreasonable, *or only* that the officers' use of that force was *objectively* unreasonable.'. . As the Court's phrasing indicates, proof of objectively unreasonable force has always been *necessary* to a pretrial detainee's excessive-force claim. . . Post-*Kingsley*, such proof is sufficient. . . But in becoming sufficient, it didn't cease to be necessary. Second, we don't think that the dissent's assertion that, as a general matter, unconstitutional 'punishment' can be proven based on 'an express intent to punish,'. . . demonstrates, more particularly, that proof of objectively unreasonable force is unnecessary to an excessive-force claim. Here, we think it important to distinguish between and among punishment and its specific instantiations. We agree, of course, that the Constitution prohibits any 'punishment' of pretrial detainees, . . . including the 'use of excessive force that amounts to punishment[.]'. . But not all punishment involves excessive force. Indeed, neither *Bell* nor *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996)—the two cases on which the dissent principally relies—mention 'excessive force' at all. Rather, both involved what we've called 'conditions-of-confinement' claims. . . And although the genus 'punishment' contains several species, including both excessive-force and conditions-of-confinement claims, the standard by which one might discern the one won't necessarily reveal the other. We don't think, then, that an express intent to punish alone, coupled with an objectively reasonable use of force, can sustain an excessive-force claim. . . .Although the district court erroneously invoked the malicious-and-sadistic standard, rather than *Kingsley*'s 'objective not subjective' standard, it landed on the right answer. As an initial matter, there was (under the proper framework) no constitutional violation. Moreover, and in any event, even if there had been, the law wasn't so clearly established that Beatty should have known better.")

Crocker v. Beatty, 995 F.3d 1232, 1250-52 & n.16 (11th Cir. 2021), *cert. denied,* 142 S. Ct. 845 (2022) ("We begin with the constitutional question.[16] **[fn 16:** The Supreme Court has said that 'courts should think hard, and then think hard again' before addressing the merits of an underlying constitutional claim as well as whether the law is clearly established. . . Having done our due diligence, we conclude that addressing the constitutional claim here will 'clarify the legal standards governing public officials.'. . Paired with *Patel*, this case helps illustrate what kind of conduct does and doesn't cross a constitutional line in the context of hot-car cases.**]** Officer Beatty's alleged conduct wasn't objectively unreasonable. The Supreme Court has given us six factors to consider in making a Fourteenth Amendment excessive-force determination, and although the Court cautioned that these factors aren't exhaustive or exclusive, they're sufficient here. . . . Considering all the *Kingsley* factors, it seems most important there was very little 'force' used and essentially no harm done. . . . [I]t's hard to imagine how we could find a constitutional violation here without making a federal case of just about every 'hot car' incident in Alabama, Florida, and Georgia, which we (once again) decline to do.")

Crocker v. Beatty, 995 F.3d 1232, 1261-64 (11th Cir. 2021) (Martin, J., concurring in part and dissenting in part), *cert. denied,* 142 S. Ct. 845 (2022) ("Despite the majority's discussion to the contrary, Mr. Crocker made clear, both before the District Court and now on appeal, that he is bringing his excessive force claim solely under the Fourteenth Amendment. And while Deputy Beatty notes that the line between arrest and pretrial detention is not clear, he makes no argument that the Fourth Amendment, rather than the Fourteenth, should govern. Despite acknowledging that application of one amendment over the other does not change the outcome of Mr. Crocker's excessive force claim under its interpretation, the majority opinion analyzes Crocker's claim under both the Fourth and Fourteenth Amendments. . . In addition to authoring the majority opinion, Judge Newsom also writes a separate concurrence to say that, in his view, it is the Fourth Amendment that should apply in these post-arrest, pre-custody situations. . . .Here, however, we have no briefing on the question and both parties have understood Mr. Crocker's excessive force claim to travel under the Fourteenth Amendment. I would therefore analyze whether Deputy Beatty used excessive force against Mr. Crocker when he locked him in a hot patrol car and left him there, as the parties did, under the Fourteenth Amendment alone. . . . I agree with the majority that the District Court's analysis of this claim was wrong because the court failed to apply the Supreme Court's decision in *Kingsley v. Hendrickson*[.]. . I also agree that the force used here was not objectively unreasonable. . . But again, I part ways with the majority insofar as I do not read *Kingsley* to do away with Fourteenth Amendment liability where an officer applies objectively reasonable force with an express intent to punish. I say Mr. Crocker presented sufficient evidence to create a dispute of fact about whether Deputy Beatty acted with express intent to punish him. . . And since it was clearly established at the time of Mr. Crocker's arrest that applying force with the express intent to punish a pretrial detainee violated the Fourteenth Amendment, Deputy Beatty is not entitled to qualified immunity on this claim. . . . According to the majority opinion, *Kinglsey*'s holding that pretrial detainees *can* prove excessive force simply by establishing that an official used objectively unreasonable force means that proof of objectively unreasonable force is the *only* way pretrial detainees can prove excessive force in violation of the Fourteenth Amendment. . . In the majority's view, *Kingsley* forecloses 'the possibility of an excessive-force violation, even in circumstances where the use of force is objectively reasonable, on the ground that some sinister purpose is allegedly afoot.'. . But the majority misreads *Kingsley*. *Kingsley* did nothing to disallow Fourteenth Amendment claims based on express intent to punish, and those claims remain viable today. . . .The Court never said it was doing away with *Bell*'s subjective standard, under which pretrial detainees can establish a violation of their Fourteenth Amendment rights by showing that an official inflicted force with an express intent to punish. . . Much less did the Court say it was doing away with *Bell*'s subjective standard solely for excessive force claims while leaving it in place for other claims of punishment, as the majority opinion suggests. . . . It has thus long been understood, prior to *Kingsley*, that proof of express intent to punish is alone sufficient to establish a Fourteenth Amendment violation. . . *Kingsley*—a decision that sought to make it easier for pretrial detainees to vindicate their rights—cannot properly be read to do away with this method of proving Fourteenth Amendment violations for excessive force claims when it said nothing about having done so. Based on my reading of *Kingsley*, I would ask whether the evidence in this case demonstrates that Deputy Beatty locked

Mr. Crocker in the back of a hot car for nearly half an hour with the goal of punishing him. . . And I see sufficient evidence here to create a dispute of fact about whether Deputy Beatty locked Mr. Crocker in the hot car with an express intent to punish him.")

Patel v. Lanier County, Georgia, 969 F.3d 1173, 1181-91 (11th Cir. 2020) ("By adopting an objective-reasonableness criterion, the *Kingsley* Court indicated a connection between the Fourteenth Amendment's excessive-force standard and the Fourth Amendment's standard, rather than the Eighth Amendment's. . . . Notwithstanding *Kingsley*, the district court here pointedly distinguished Fourth Amendment precedent, citing our pre-*Kingsley* cases for the proposition that '[t]he standard for showing excessive force in violation of the Fourteenth Amendment ... is higher than that required to show excessive force in violation of the Fourth Amendment.'. . But as we clarified in *Piazza*—which came down after the district court here issued its decision—that's no longer true. After *Kingsley*, the Fourteenth Amendment's standard is analogous to the Fourth Amendment's. Had the district court applied the correct standard—*Kingsley*'s Fourth-Amendment-like objective-reasonableness test, informed by several contextual considerations—we think it would have concluded, as we do, that Deputy Smith violated Patel's Fourteenth Amendment right to be free from excessive force. . .We haven't directly confronted a 'hot car' case before now, but variations of this fact pattern are understandably common. To try to bring clarity to the law governing such circumstances, we'll identify the considerations that inform our decision, but we can't hope to lay down a neat rule; as the Supreme Court has explained—for better or worse—'objective reasonableness turns on the "facts and circumstances of each particular case."'. . . Whenever the force used against a pretrial detainee consists in his subjection to hazardous conditions, the 'amount of force used' is a function of two component factors—(1) the severity of those conditions and (2) the duration of his subjection to them. These two considerations combine to create a sliding scale: The more severe the conditions, the shorter the detention need be before it amounts to excessive force—and vice versa. Now, how about 'need'? In cases involving pretrial detainees, there is always (by definition) some need to detain, at least until a judge authorizes a release. But, it seems to us, the need for detention *in relatively harsh conditions* depends both on the threat that the detainee poses and on the feasibility of alternative means of holding him. Again, a sliding scale: Detention in harsher conditions may be justified where alternative modes of detention are not readily available, especially if the detainee poses a heightened risk of danger to police or the public; by contrast, where the detainee poses no particular risk or where an alternative is at hand, the 'need' for harsher modes of detention dissipates. Here, Patel was kept in a hot transport van—without any ventilation or air conditioning—for a period of approximately two hours. While those facts alone don't entitle Patel to a trial on his excessive-force claim, we note that detentions of comparable duration and severity have been held to create jury questions. . . Moreover, for nearly half of Patel's detention—the 55 minutes during which he was left unattended in the sally port—Deputy Smith presumably could have moved him inside the Lowndes County jail while he made arrangements to transport Grant. Hence, it seems to us that a significant fraction of the force applied to Patel was not just harsh but also unnecessary. . . . Although *Kingsley*'s list isn't 'exclusive,' its factors suffice to resolve the constitutional question here. Construing the facts and accompanying inferences in his favor, the *Kingsley* factors tilt

decisively toward Patel. Accordingly, we conclude that in the particular circumstances of this case, Patel's detention and transport were 'more severe than [was] necessary to ... achieve a permissible governmental objective.'. . Because the force Deputy Smith applied was not 'objectively reasonable,' it violated Patel's Fourteenth Amendment rights. . . .That's the good news for Patel on excessive force. Now the bad: Although we conclude that Deputy Smith violated Patel's constitutional rights, we cannot say that the underlying law applicable to Patel's excessive-force claim was sufficiently 'clearly established' to defeat qualified immunity. Before explaining why, we must first address Patel's threshold contention that, in the context of a Fourteenth Amendment excessive-force claim, he doesn't have to show a clearly established right. . . . The usual rule in a qualified-immunity case is that, in addition to proving a constitutional violation, the plaintiff must demonstrate that the law underlying his claim was 'clearly established' at the time of the incident in question. . . It is true, as Patel says, that in *Johnson v. Breeden*, 280 F.3d 1308, 1321–22 (11th Cir. 2002), and *Fennell*, 559 F.3d at 1216–17, we articulated a sui generis exception to that general rule for Eighth and Fourteenth Amendment excessive-force claims. But that exception was justified only by an idiosyncrasy of those claims—an idiosyncrasy that, with respect to those arising under the Fourteenth Amendment, *Kingsley* eliminated. As a result, Patel can no longer rely on our previous holdings but, rather, must prove that his right not to be subjected to prolonged detention in the hot transport van was clearly established. . . . The *Johnson*/*Fennel* exception rested entirely on the 'extreme' subjective-intent element of Eighth and (then) Fourteenth Amendment excessive-force claims. *Kingsley*, though, expressly eliminated *any* subjective element for such claims arising under the Fourteenth Amendment—at least as to the excessiveness of the force. . . . In so doing, the Supreme Court likewise eliminated the justification for the *Johnson/Fennel* exception itself—effectively undermining that special rule 'to the point of abrogation,' at least as to Fourteenth Amendment excessive-force claims. . . And if that weren't enough, the *Kingsley* Court expressly acknowledged that the clearly-established prong of the qualified-immunity inquiry would govern such claims. . . As a result, although the *Johnson*/*Fennel* exception continues to apply to Eighth Amendment claims, we must abandon it as applied in the Fourteenth Amendment context. . . . Applying the ordinary qualified-immunity framework, we conclude that Patel's constitutional rights here were not clearly established at the time of his transport between Cook, Lowndes, and Lanier Counties. . . . At the time of the constitutional violation here, there existed no clearly established law that could have given Deputy Smith fair notice that confining Patel as he did amounted to excessive force. For starters, Patel can point to no 'materially similar case.'. . .[O]ur holding that the pepper-spray incident in *Danley* was unconstitutional didn't give Deputy Smith fair notice that his treatment of Patel was excessive. Although our precedent clearly establishes that environmental conditions can amount to excessive force in violation of the Fourteenth Amendment, our previous cases would not have put Deputy Smith on notice that the particular conditions he caused were sufficiently harsh. We note that *Danley* cites *Burchett*—a Sixth Circuit case with facts quite similar to this one—for the proposition 'that confining ... an arrestee, in a "police car with the windows rolled up in ninety degree heat for three hours constituted excessive force" in violation of the Fourth Amendment.'. . But a mere citation to an out-of-circuit decision—even with approval, and even with an accompanying factual précis—cannot clearly establish the law for qualified-

immunity purposes. . . . Moreover, and in any event, even if *Burchett*—or *Danley*'s citation of it—could clearly establish the law in general, it wouldn't clearly establish that Deputy Smith's particular conduct violated Patel's constitutional rights. The detention in *Burchett* was both (1) somewhat longer—three hours with no ventilation, as compared to two hours here, less than half of which was wholly unventilated—and (2) somewhat more severe—a 90 degree ambient temperature, as compared to 85 degrees. . . Close, but not close enough—because all agree that confining a pretrial detainee in a hot vehicle for just a short time wouldn't be unreasonable, law-enforcement officials need some leeway in this area. Accordingly, we will not impute notice in a hot-car case unless the analogy to preexisting case law is clear. . . . Although *Kingsley* established that all objectively unreasonable applications of force against pretrial detainees violate the Fourteenth Amendment, . . . confining a prisoner in a hot transport van, even for a couple of hours, is not so obviously unreasonable that Deputy Smith should have known better in the absence of case law more closely on point. Patel doesn't point to any other case that established 'a broad[ ], clearly established principle that should govern the novel facts of the situation,'. . . and we aren't aware of any. Nor, finally, was Deputy Smith's conduct so egregious 'that prior case law is unnecessary' to establish a clear violation of the Fourteenth Amendment. . . Although Patel's detention and transport were no doubt exceedingly uncomfortable—and as it turns out, dangerous—Deputy Smith's conduct was not akin to those instances 'so far beyond the hazy border between excessive and acceptable force that [the officer] had to know he was violating the Constitution even without caselaw on point.'. . . The basic standards governing Patel's Fourteenth Amendment deliberate-indifference claim are uncontested and, here, are 'identical to those under the Eighth.'. . . Here, the circumstantial evidence would allow a jury to infer 'subjective knowledge of a risk of serious harm' because (1) Deputy Smith witnessed symptoms that even a layperson could recognize as indicating that risk and (2) Smith wasn't any ordinary layperson—he was trained as a medical first responder. . . A jury could also find 'disregard' of the risk based on the fact that Deputy Smith provided no intervention until after he delivered Patel to the Lanier County Sheriff's Office, and then only reluctantly. . . Finally, the conduct here was worse 'than gross negligence' because Deputy Smith utterly refused to respond to the severe symptoms that he saw. . . Deputy Smith's *total* inaction is telling; he not only failed to enlist the help of a medical professional in the face of a serious medical need, but he failed even to provide water on request and made no attempt to treat Patel himself despite having first-responder training. And of course it was Deputy Smith's neglect—leaving Patel in a hot, unventilated, un-air-conditioned transport van—that created the danger in the first place. Finally, the evidence amply supports the conclusion that Deputy Smith's deliberate indifference caused Patel harm. Patel's hospitalization and diagnoses alone suffice to establish a jury question as to injury. And the very identity of his diagnosed conditions—heat exhaustion and heat syncope—indicate heat exposure as their most likely cause. . . . For all these reasons, we conclude that Patel has presented sufficient evidence to prove every element of a Fourteenth Amendment deliberate-indifference claim. . . .We turn once more, then, to the second step of qualified immunity—that is, whether the right that Patel alleges was clearly established. Although we haven't identified any controlling case with closely analogous facts, we think 'the novel facts of the situation' are obviously governed by a 'broader, clearly established principle.'. . 'The knowledge of the need for medical care and intentional

refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference.'. . Both aspects of this articulation—knowledge and intentional refusal—are on full display here. This broad principle has put all law-enforcement officials on notice that if they actually know about a condition that poses a substantial risk of serious harm and yet do *nothing* to address it, they violate the Constitution. No more notice was necessary because 'the assumed circumstances here are stark and simple, and the [preexisting] decisional language ... obviously and clearly applies.'. . This is not a case in which a law-enforcement officer provided inadequate aid, the reasonableness of which can be fairly disputed. Here, at least on the facts as we must take them, Deputy Smith provided no timely aid—he was confronted with a serious medical need and did *nothing*. Because we have made clear that such complete abdication in the face of a known serious need is unconstitutional, Deputy Smith is not entitled to qualified immunity.")

> *See also* ***Rodriguez-Bonilla v. Ivey***, No. 6:21-CV-428-JA-DAB, 2023 WL 2375217, at *12 (M.D. Fla. Mar. 6, 2023) ("'The usual rule in a qualified-immunity case is that, in addition to proving a constitutional violation, the plaintiff must demonstrate that the law underlying [her] claim was "clearly established" at the time of the incident in question.'. . The purpose of this rule is to 'ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful.'. . Before *Kingsley*, there was an exception to this requirement for excessive-force claims brought under the Fourteenth Amendment based on the simple fact that the old malicious-and-sadistic standard was 'so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution.'. . After *Kingsley*, however, this exception no longer applies. *Patel*, 969 F.3d at 1183 ("[A]lthough the *Johnson/Fennel* exception continues to apply to Eighth Amendment claims, we must abandon it as applied in the Fourteenth Amendment context.").")

Grochowski v. Clayton County, Georgia, 961 F.3d 1311, 318 & n.4 (11th Cir. 2020) ("When analyzing claims under the Due Process Clause, the Eleventh Circuit often refers to precedent under the Eighth Amendment's Cruel and Unusual Punishment Clause. . . The Eleventh Circuit has thus recognized that '[a] prison official's deliberate indifference to a known, substantial risk of serious harm to an inmate violates the Fourteenth Amendment.'. . 'Whether a risk of harm is substantial is an objective inquiry.'. . The 'deliberate indifference' component is a subjective inquiry that requires a plaintiff to show that the defendants 'acted with a sufficiently culpable state of mind.'. . .Plaintiffs urge us to dispense with the subjective component, as the Supreme Court did in *Kingsley*. . . for excessive force claims arising under the Fourteenth Amendment. We decline to apply *Kingsley* because Grochowski's death occurred in 2012 and *Kingsley* was decided in 2015. We are not aware of any court that has ruled that *Kingsley* has retroactive effect. We therefore do not consider whether *Kingsley* would otherwise be applicable.")

Swain v. Junior, 961 F.3d 1276, 1285 & n.4, 1294 (11th Cir. 2020) ("The plaintiffs contend that the defendants have been 'deliberately indifferent' to the serious risk that COVID-19 poses to

them, in violation of the Fourteenth Amendment to the U.S. Constitution. Although the plaintiffs' claim technically arises under the Fourteenth Amendment because they are pretrial detainees rather than convicted prisoners, it is 'evaluated under the same standard as a prisoner's claim of inadequate care under the Eighth Amendment.' *Dang ex rel. Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1279 (11th Cir. 2017). The Eighth Amendment—and therefore the Fourteenth also—is violated when a jailer 'is deliberately indifferent to a substantial risk of serious harm to an inmate who suffers injury.'. .To establish a deliberate-indifference claim, a plaintiff must make both an objective and a subjective showing. . . . The Supreme Court's decision in *Kingsley v. Hendrickson*, which held that pretrial detainees alleging excessive force need only show objective unreasonableness, doesn't change our analysis here. . . This case doesn't arise in the excessive-force context, and we have otherwise continued to require detainees to prove subjective deliberate indifference. [citing cases] . . . .While COVID-19 poses novel health risks to incarcerated inmates—and novel administrative challenges for jail and prison administrators—the law that the district court was bound to apply is well established. In order to obtain a preliminary injunction, the plaintiffs had to show a substantial likelihood of success on the merits of their constitutional claim, which means that they had to demonstrate the defendants' deliberate indifference—which is to say their utter recklessness. Because the district court erred, among other ways, in erroneously concluding that the plaintiffs had met that requirement, we conclude that it abused its discretion in granting the preliminary injunction.")

Swain v. Junior, 961 F.3d 1276, 1294-96, 1303 (11th Cir. 2020) (Martin, J., dissenting) ("The COVID-19 pandemic is a health crisis without precedent in living memory. At the time we heard oral argument in this case, the virus had already claimed the lives of over 100,000 Americans. . . COVID-19 is highly infectious and easily communicable. Of those infected, approximately 20% will become seriously ill and 1 to 3% will die. People with common health conditions including lung or heart disease, diabetes, and chronic liver or kidney conditions are at much greater risk of death. About 15% of them will die if they contract COVID-19. Those who survive may nonetheless experience permanent organ and neurological damage. There is no known vaccine or effective antiviral medication to prevent or treat infection from COVID-19. The only effective way to protect people is to take precautionary measures to avoid infection. Against this background, seven pretrial detainees held at the Miami-Dade Metro West Detention Center ("Metro West") brought suit against Daniel Junior, the director of the Miami-Dade Corrections and Rehabilitation Department ("MDCR"), and Miami-Dade County. They sued on behalf of a putative class of people detained at Metro West during the COVID-19 pandemic, as well as a subset of people in pretrial custody at Metro West who are particularly vulnerable to injury or death if they contract the virus. The named plaintiffs all have preexisting medical conditions that place them among those at highest risk of death or serious illness if they are infected. They sought emergency declaratory and injunctive relief that would compel Metro West to take steps to reduce the risk of transmission of COVID-19 at the facility. . . . My review of this record amply supports the District Court's holding that Plaintiffs are likely to show their treatment amounted to deliberate indifference. Defendants acknowledge their subjective awareness of the objectively grave risk the COVID-19 pandemic poses to the safety of those detained at Metro West. But Defendants say they

took reasonable steps, within the limits of their legal authority, to ensure detainee safety in the face of the COVID-19 threat. Unlike the majority, I see no abuse of discretion in the District Court's finding to the contrary. This record shows that Defendants knowingly maintained conditions that placed detainees at an impermissibly high risk of illness and death in two ways: first, by maintaining a dangerously high jail population; and second, by failing to implement needed safety measures that would reduce the risk of infection in that already unsafe population level. . . .The COVID-19 pandemic is a global health crisis that has taken the lives of thousands and strained every level of our society and government. But crises do not lower the constitutional limits on the conditions in which people may be confined against their will. People held in prisons and detention centers are among the most vulnerable to the ravages of this devastating illness. I do not understand the Fourteenth Amendment to permit the knowing and willful detention of human beings in circumstances that place them at great risk of death or grave illness. I would affirm the District Court Order granting Plaintiffs' motion for a preliminary injunction. I respectfully dissent.")

Piazza v. Jefferson County, Alabama, 923 F.3d 947, 952-55 (11th Cir. 2019) ("While the Fourth Amendment prevents the use of excessive force during arrests, . . . and the Eighth Amendment serves as the primary source of protection against excessive force after conviction, . . . it is the Fourteenth Amendment that protects those who exist in the in-between—pretrial detainees. . . That pretrial detainees fall within the Fourteenth Amendment's ambit dates to the Supreme Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The Court explained there that the 'proper inquiry' when 'evaluating the constitutionality of conditions or restrictions of pretrial detention' is 'whether those conditions amount to punishment of the detainee.'. . . Although pretrial detainees' excessive-force claims have been analyzed under the Fourteenth Amendment since *Bell*, the constitutional inquiry—at least in this Circuit—has long resembled the one that governs prisoners' excessive-force claims under the Eighth Amendment. Historically, both prisoners and pretrial detainees needed to show not only that a jail official deliberately used excessive force, but also that the official did so 'maliciously or sadistically for the very purpose of causing harm.'. . All that changed a few years back, though, when the Supreme Court clarified that, unlike a prisoner bringing an Eighth Amendment excessive-force claim, a pretrial detainee raising a Fourteenth Amendment claim needn't prove an officer's subjective intent to harm but instead need show only that 'the force purposely or knowingly used against him was objectively unreasonable.'. . Harking back to *Bell*, the *Kingsley* Court explained that, unlike in Eighth Amendment cases, there is no need in the pretrial-detainee context to determine '*when* punishment is unconstitutional' because a pretrial detainee has not yet been adjudicated guilty and thus may not be punished at all. . . Although, under *Bell*, impermissible 'punishment' could mean force deployed with a subjective, 'expressed intent to punish,' it also could mean force that, as an *objective* matter, is 'not rationally related to a legitimate governmental' purpose or is 'excessive in relation to that purpose.'. . After *Kingsley*, then, if force used against a pretrial detainee is more severe than is necessary to subdue him or otherwise achieve a permissible governmental objective, it constitutes 'punishment' and is therefore unconstitutional. Notably, inasmuch as it entails an inquiry into the objective reasonableness of the officers' actions, the Fourteenth Amendment standard has come to resemble the test that governs excessive-force claims

brought by arrestees under the Fourth Amendment. . . Obviously, 'legitimate interests'—including the need to 'preserve internal order and discipline' and 'maintain institutional security'—may at times require jail officers to use force. . . And of course, officers facing disturbances are often forced to make 'split-second judgments' about the need for such force 'in circumstances that are tense, uncertain, and rapidly evolving.'. . Because of this, we can't (and won't) evaluate a pretrial detainee's excessive-force challenge in a glib, post-hoc fashion or 'with the 20/20 vision of hindsight.'. . Instead, we must do our best to consider the situation through the lens of 'a reasonable officer on the scene.'. .How do we know, then, when force is reasonable and when it is 'excessive in relation to its purpose'? Well, as relevant to this case, our decisions make one thing clear: 'Once a prisoner has *stopped resisting* there is no longer a need for force, so the use of force thereafter is disproportionate to the need.'. . . In other words, because force in the pretrial detainee context may be defensive or preventative—but never punitive—the continuing use of force is impermissible when a detainee is complying, has been forced to comply, or is clearly unable to comply. . . . Although we don't for a minute discount the difficult decisions that jail officers must make in the heat of a tussle, simply counting to eight aloud reveals the problem with Dukuzumuremyi's argument. In eight seconds, you can tie a shoe, sing the chorus of "Row, Row, Row Your Boat," or complete a qualified rodeo bull ride. And in eight seconds, we believe, any reasonable officer would have concluded that a detainee who lay inert on the floor, having soiled himself, was no longer putting up a fight. . . . At the end of the day the question before us is this: Is it excessive to tase for a second time a man who, as a result of an initial shock, is lying motionless on the floor and has wet himself, and who presented only a minimal threat to begin with? Undoubtedly, yes. We hold that, based on the allegations in Hunter's complaint, the force used against Hinkle was excessive, and thus unconstitutional.")

Jacoby v. Mack, 755 F. App'x 888, ___ (11th Cir. 2018) ("Because *Kingsley* was issued after the events underlying this litigation took place, it will not be considered in determining whether the conduct violated clearly established law at the time it occurred. . . . *Danley* makes clear that jailers cannot use force in the form of continued confinement that causes a compliant detainee to suffer continued effects of pepper spray. This preexisting precedent clearly established the unlawfulness of Appellees' conduct at the time it occurred. . . Because we conclude that McCants and Winky violated Mr. Jacoby's clearly established constitutional right, the district court erred in concluding that they were entitled to qualified immunity.")

Robinson v. Lambert, 753 F. App'x 777, ___ (11th Cir. 2018) ("At the time of the alleged conduct, the standard for excessive force was 'whether that force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm.'. . But the factors used to assess whether force was excessive were the same. . . It is well established in our case law that an officer cannot continue to use force after there is no longer a need for it. . . .And we have made clear that if a detainee stops resisting, the use of force is no longer justified. . . . We find that this well-established principle applies to this case with obvious clarity. Based on Robinson's version of the facts, he was pinned against the wall with his arms behind his back while Officers Lambert and Peterkin pushed him back and forth for approximately 30 to 45 seconds. At

no point during this interaction did he resist. After Robinson had been pinned against the wall for at least 30 seconds without resisting, any objectively reasonable officer would know that Robinson had been subdued. The continued use of force became unnecessary and unjustified. But Lambert proceeded to push Robinson face-down on the desk, and then shove him with enough force to break his arm. Based on then current law, this gratuitous display of force allows us to 'draw a reasonable inference' that Lambert acted with 'the very purpose of causing harm' and was consequently excessive. . . . We conclude that Lambert's use of force was a clearly established violation of Robinson's constitutional right. The law provided that the continued use of force after there is no longer a need for it is excessive. And the law provided that threatening to cause further injury indicates sadistic intent. Coupling Lambert's continued use of force after Robinson was subdued with his threat to inflict further injury, it is plain as a matter of obvious clarity that Lambert used force 'maliciously and sadistically with the very purpose of causing harm.'. .Thus, he is not entitled to qualified immunity.")

Kraus v. Martin County Sheriff's Office, 753 F. App'x 668, ___ (11th Cir. 2018) ("Kraus misreads the district court's order. Although it is true that the court cited *Shuford,* it did so merely to state that '[i]n looking at what is clearly established, the Court is bound by the law at the time of the incident,' *Shuford*, 666 F. App'x at 817, which is clearly correct. . . The district court went on to state that, because the incident giving rise to this suit occurred before the Supreme Court's ruling in *Kingsley*, Kraus would have to show that it was clearly established that the officers' actions were unlawful under the pre-*Kingsley* 'sadistic and malicious' standard. That is a correct statement of the then-prevailing law, and we will not disturb the court's ruling on this ground.")

Johnson v. City of Bessemer, Alabama, No. 17-13122, 2018 WL 3359672, at *3 n.5 (11th Cir. July 10, 2018) (not reported) ("Johnson argues that she need only satisfy the objective component because of the Supreme Court's holding in *Kingsley v. Hendrickson,* 576 U.S. ——, 135 S. Ct. 2466, 2473 (2015), 'that the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one.' But *Kingsley* involved an excessive force claim, not a deliberate indifference to serious medical need claim. *Id.*; *see also Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (refusing to reach the issue of whether *Kingsley* requires a pretrial detainee to satisfy only the objective component in a deliberate indifference claim, but stating that because '*Kingsley* involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference,' it is not 'squarely on point with and does not actually abrogate or directly conflict with' our prior panel precedent on deliberate indifference claims) (quotation marks omitted). *Kingsley* does not undermine our earlier Eighth Amendment deliberate indifference precedents.")

Thomas v. City of Jacksonville, 731 F. App'x 877, ___ (11th Cir. 2018) ("Plaintiffs allege under 42 U.S.C. § 1983 that Defendants were deliberately indifferent to Thomas' medical needs, thus violating his constitutional rights. A pretrial detainee's deliberate-indifference claims '[arise] under the due process clause of the Fourteenth Amendment rather than the Eighth Amendment,' but are nevertheless 'subject to the same scrutiny as if they had been brought as deliberate

indifference claims under the Eighth Amendment.'")

McCroden v. County of Volusia, No. 17-12331, 2018 WL 817869, at *1 & n.1 (11th Cir. Feb. 12, 2018) (not reported) ("McCroden alleges that the Officers used excessive force against him in violation of his Fourteenth Amendment rights. In deciding whether force deliberately used against a pretrial detainee is constitutionally excessive, 'a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.'. . *Kingsley* abrogated the standard we previously used, which required the plaintiff to show that the defendant applied the force 'maliciously or sadistically for the very purpose of causing harm,' *see Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005). . . .On remand in *Kingsley*, the Seventh Circuit correctly noted that '*before and after* the Supreme Court's decision in [*Kingsley*], the standards for the amount of force that can be permissibly employed remain the same.' *Kingsley v. Hendrickson*, 801 F.3d 828, 832 (7th Cir. 2015) (per curiam). '[T]he law clearly established that the amount of force had to be reasonable ....' *Id.* at 833.")

Nam Dang, by and through Vina Dang v. Sheriff, Seminole Cty. Florida, 871 F.3d 1272, 1279 & n.2 (11th Cir. 2017) ("As a pretrial detainee, Dang alleges inadequate medical care under the Fourteenth Amendment rather than the Eighth Amendment. . . Nevertheless, Dang's claims are evaluated under the same standard as a prisoner's claim of inadequate care under the Eighth Amendment. . . . Dang argues that following *Kingsley v. Hendrickson*, . . . a pretrial detainee alleging constitutionally deficient medical care need not show deliberate indifference. We cannot and need not reach this question. First, *Kingsley* involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference. Therefore, it is not 'squarely on point' with and does not 'actually abrogate or directly conflict with,' *United States v. Kaley*, . . . our prior precedent identifying the standard we apply in this opinion to Dang's claim. Second, even if we were free to consider what, if any, implications *Kingsley* might have for the claims of pretrial detainees involving inadequate medical treatment due to deliberate indifference, *Kingsley* could not help Dang. *Kingsley* itself notes that even when it comes to pretrial detainees, 'liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process.'. . In *Dang*'s case, as tragic as the facts are, all we have is, at most, negligence. So regardless of whether *Kingsley* could be construed to have affected the standard for pretrial detainees' claims involving inadequate medical treatment due to deliberate indifference, whatever any resulting standard might be, it could not affect Dang's case.")

Johnson v. Conway, 688 F. App'x 700, 706, 709, 707 n.2 (11th Cir. 2017) ("Here, like the district court, albeit for different reasons, we do not reach the question of whether Johnson's constitutional rights were violated because he has not shown that the detention officers violated a clearly established right. . . . It bears repeating that 'generally no bright line exists for identifying when force is excessive; we have therefore concluded that unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is usually entitled to qualified immunity.'. . No 'materially similar case' declares the detention officers' conduct unconstitutional, and the broad principles of law on which Johnson relies do not apply with 'obvious clarity' to the

specific situation facing the detention officers. . . Because Johnson has not shown that the detention officers violated a clearly established right in the specific context of this case, we affirm the grant of qualified immunity to Revels, Bailey, and Davis. . . .*Kingsley* was decided after the incident giving rise to this case and so is not directly relevant to the inquiry of whether the law was 'clearly established at the time of the misconduct.'. . For this inquiry we look to our pre-existing law, which applied the subjective-malice standard abrogated by *Kingsley*. . . The district court concluded that, because the evidence was insufficient to meet the subjective standard (and therefore to prove a constitutional violation under the prior precedent), the officers could not have been on notice that their conduct was unlawful. Appearing to concede that he cannot meet the subjective-malice standard, Johnson contends that *Kingsley* 'did nothing to change the standard of conduct for detention officers' and that pre-existing law in this Circuit clearly established an objective standard of conduct that applies with obvious clarity in this case. *See Kingsley v. Hendrickson*, 801 F.3d 828, 832–33 (7th Cir. 2015) (holding that "*before and after* the Supreme Court's decision in [*Kingsley*], the standards for the amount of force that can be permissibly employed remain the same"). For instance, since before the time of this incident, as both parties appear to agree, this Circuit applied the same objective factors to Fourteenth Amendment excessive-force claims as the Supreme Court articulated in *Kingsley*. *See Cockrell v. Sparks*, 510 F.3d 1307, 1311 (11th Cir. 2007). Likewise, the broad principles of law articulated in *Ort*, *Danley*, and *Williams*, are largely the same as those articulated in *Kingsley*. Accordingly, we assume without deciding that Johnson is correct that an objective standard of conduct was clearly established by pre-existing case law. *Cf. Kingsley*, 135 S. Ct. at 2474–75 (explaining that "the use of an objective standard adequately protects an officer who acts in good faith"). It makes no difference to the ultimate outcome, however, because Johnson has not shown that the broad principles of law on which he relies clearly established the objective unreasonableness of the detention officers' conduct, nor has he shown that the evidence is sufficient to meet the subjective 'malicious or sadistic' standard.")

Shuford v. Conway, 666 F. App'x 811, 817 & n.1 (11th Cir. 2016) (per curiam) ("*Kingsley*'s 2015 ruling requiring a pretrial detainee to show that the force purposely or knowingly used against him was objectively unreasonable, came after the incidents that are the subject of this suit, so it does not govern our 'clearly-established' analysis here. However, since before the time of these incidents, this Circuit applied the same objective factors to Fourteenth Amendment excessive force claims as the Supreme Court articulated in *Kingsley*. . . *See Cockrell v. Sparks*, 510 F.3d 1307, 1311 (11th Cir. 2007) (per curiam). . . . We agree with what the Seventh Circuit noted on remand in *Kingsley*—that the Supreme Court's holding only eliminated the requirement that a plaintiff show the official acted with subjective malice, not 'the standard[ ] for the amount of force that can be permissibly employed.' *Kingsley v. Hendrickson*, 801 F.3d 828, 832–33 (7th Cir. 2015). '[*B*]*efore and after* the Supreme Court's decision in this case, the standards for the amount of force that can be permissibly employed remain the same .... the law clearly established that the amount of force had to be reasonable ....'(emphasis in orginal). . . . And in any event, the Supreme Court reminded us that the central holding of *Kingsley*— that 'a pretrial detainee can prevail by providing only objective evidence'— had been the law since *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979).")

Jacoby v. Baldwin County, 666 F. App'x 759, 764-66 (11th Cir. 2016) ("The standard we previously used to determine whether a defendant used excessive force under the Fourteenth Amendment — which required the plaintiff to show that the defendant applied the force 'maliciously or sadistically for the very purpose of causing harm,' *see Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) — has been abrogated by *Kingsley v. Hendrickson*, 576 U.S. —, 135 S. Ct. 2466 (2015). In that opinion, the Supreme Court held that 'a pretrial detainee must show only that the force ... used against him was objectively unreasonable.'. . As a result, we proceed with the Fourteenth Amendment violation inquiry of the qualified immunity analysis under *Kingsley's* objective unreasonableness standard. The evidence construed in Jacoby's favor shows that after he was pepper sprayed, his face was rubbed in pepper spray on the floor, washed with water for two to three seconds and then he was left alone in the restraint chair for more than eight hours while still in his pepper-sprayed clothes. During that time he urinated on himself and cried for help because he burned from his pepper-sprayed and urine-soaked clothing. . . . Viewing the facts in the light most favorable to Jacoby, as we must at this stage, there is a genuine issue of material fact about whether Rowell and Keers' actions were objectively unreasonable and in violation of Jacoby's Fourteenth Amendment right to be free from excessive force. . . Rowell and Keers contend that even if there is a question of fact about whether they violated Jacoby's constitutional rights, they are still entitled to qualified immunity because the alleged unlawfulness of their conduct was not clearly established at the time it occurred. While *Kingsley*'s objective unreasonableness standard governs the existence of a constitutional violation, that decision was issued after the restraint chair incident took place, so it plays no part in our determining whether the unlawfulness of Rowell and Keers' conduct was clearly established at the time it occurred. . . Instead, in order to determine whether the clearly established requirement is met in this case, we look to *pre-Kingsley* case law, which applied the old 'sadistic or malicious' standard for excessive force. Our analysis here is governed by our decision in *Danley v. Allen*, 540 F.3d 1298 (11th Cir. 2008), *overruled on other grounds as recognized in Randall v. Scott*, 610 F.3d 701, 709–10 (11th Cir. 2010). In the *Danley* case, the defendant-officers sprayed the plaintiff with pepper spray for three to five seconds, pushed him into a small, poorly ventilated cell, and closed the door. . . After twenty minutes (ten of which the plaintiff spent begging to be let out), the jailers removed him from the cell, allowed him to take a two minute shower, and then placed him in a larger, but still poorly ventilated, group cell. . . The plaintiff continued to suffer from the pepper spray's effects and eventually 'almost blacked out' from breathing difficulties. . . After at least twelve hours of suffering, the plaintiff was released from the jail. . . This Court held that the officers' use of force against the *Danley* plaintiff was excessive and in violation of the Fourteenth Amendment, noting that '[w]hen jailers continue to use substantial force against a prisoner who has clearly stopped resisting — whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated — that use of force is excessive.'. . And when an inmate has stopped resisting 'there is no longer a need for force, so the use of force thereafter is disproportionate to the need.'. . The *Danley* decision's legal principle that jailers cannot continue to use force against a compliant inmate clearly established the unlawfulness of Rowell and Keers' alleged conduct. . . The facts as they stand at this point in the proceedings are that Rowell and Keers left Jacoby

unattended in the restraint chair after pepper-spraying him, rubbing his face in pepper spray on the floor, and providing clearly inadequate decontamination. They left him there for more than eight hours in his pepper-sprayed and urine-soaked clothes with no opportunity for relief. . . Those circumstances create a fact question about whether there was an excessive continuation of the use of force after Jacoby was already subdued or restrained, and our decision in *Danley* clearly establishes the right to be free from that kind of excessive force. The district court erred in granting summary judgment to Rowell and Keers on Jacoby's excessive force claims against Rowell and Keers.")

Melton v. Abston, 841 F.3d 1207, 1220, 1223 & n.2 (11th Cir. 2016) ("As a pretrial detainee at Pickens County Jail, Melton's rights arose under the due process clause of the Fourteenth Amendment rather than the Eighth Amendment. . . Nonetheless, Melton's claims are 'subject to the same scrutiny as if they had been brought as deliberate indifference claims under the Eighth Amendment.'. . . A plaintiff claiming deliberate indifference to a serious medical need must prove: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence. . . . In *Townsend v. Jefferson Cty.*, 601 F.3d 1152, 1158 (11th Cir. 2010), a panel of this Court stated that under *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) and *Farmer v. Brennan*, 511 U.S. 825, 847 (1994), 'a claim of deliberate indifference requires proof of more than gross negligence.' We disagree with that conclusion for three main reasons. First, the 'more than mere negligence' standard in *McElligott* is more consistent with *Farmer* than the 'more than gross negligence' standard in *Townsend*. *Farmer*, 511 U.S. at 847 (holding that deliberate indifference requires subjective risk of serious harm and disregard of that risk by 'failing to take reasonable measures to abate it'). Second, the phrase 'more than gross negligence' is not found in either *Cottrell* or *Farmer*. Third, the panel in *Cottrell* found no deliberate indifference where the plaintiff failed to prove the 'subjective intent element prescribed in *Farmer*' and, therefore, did not reach whether *Farmer* requires 'more than mere negligence' or 'more than gross negligence.'. . Because *McElligott* is the earliest Eleventh Circuit case after *Farmer* to directly address the degree of culpability required under *Farmer*, we must follow it.")

Jacoby v. Baldwin County, 666 F. App'x 759, 764-66 (11th Cir. 2016) ("The standard we previously used to determine whether a defendant used excessive force under the Fourteenth Amendment — which required the plaintiff to show that the defendant applied the force 'maliciously or sadistically for the very purpose of causing harm,' *see Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) — has been abrogated by *Kingsley v. Hendrickson*, 576 U.S. —, 135 S. Ct. 2466 (2015). In that opinion, the Supreme Court held that 'a pretrial detainee must show only that the force ... used against him was objectively unreasonable.'. . As a result, we proceed with the Fourteenth Amendment violation inquiry of the qualified immunity analysis under *Kingsley's* objective unreasonableness standard. The evidence construed in Jacoby's favor shows that after he was pepper sprayed, his face was rubbed in pepper spray on the floor, washed with water for two to three seconds and then he was left alone in the restraint chair for more than eight hours while still in his pepper-sprayed clothes. During that time he urinated on himself and cried for help because he burned from his pepper-sprayed and urine-soaked clothing. . . . Viewing the

facts in the light most favorable to Jacoby, as we must at this stage, there is a genuine issue of material fact about whether Rowell and Keers' actions were objectively unreasonable and in violation of Jacoby's Fourteenth Amendment right to be free from excessive force. . . Rowell and Keers contend that even if there is a question of fact about whether they violated Jacoby's constitutional rights, they are still entitled to qualified immunity because the alleged unlawfulness of their conduct was not clearly established at the time it occurred. While *Kingsley*'s objective unreasonableness standard governs the existence of a constitutional violation, that decision was issued after the restraint chair incident took place, so it plays no part in our determining whether the unlawfulness of Rowell and Keers' conduct was clearly established at the time it occurred. . . Instead, in order to determine whether the clearly established requirement is met in this case, we look to *pre-Kingsley* case law, which applied the old 'sadistic or malicious' standard for excessive force. Our analysis here is governed by our decision in *Danley v. Allen*, 540 F.3d 1298 (11th Cir. 2008), *overruled on other grounds as recognized in Randall v. Scott*, 610 F.3d 701, 709–10 (11th Cir. 2010). In the *Danley* case, the defendant-officers sprayed the plaintiff with pepper spray for three to five seconds, pushed him into a small, poorly ventilated cell, and closed the door. . . After twenty minutes (ten of which the plaintiff spent begging to be let out), the jailers removed him from the cell, allowed him to take a two minute shower, and then placed him in a larger, but still poorly ventilated, group cell. . . The plaintiff continued to suffer from the pepper spray's effects and eventually 'almost blacked out' from breathing difficulties. . . After at least twelve hours of suffering, the plaintiff was released from the jail. . . This Court held that the officers' use of force against the *Danley* plaintiff was excessive and in violation of the Fourteenth Amendment, noting that '[w]hen jailers continue to use substantial force against a prisoner who has clearly stopped resisting — whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated — that use of force is excessive.'. . And when an inmate has stopped resisting 'there is no longer a need for force, so the use of force thereafter is disproportionate to the need.'. . The *Danley* decision's legal principle that jailers cannot continue to use force against a compliant inmate clearly established the unlawfulness of Rowell and Keers' alleged conduct. . . The facts as they stand at this point in the proceedings are that Rowell and Keers left Jacoby unattended in the restraint chair after pepper-spraying him, rubbing his face in pepper spray on the floor, and providing clearly inadequate decontamination. They left him there for more than eight hours in his pepper-sprayed and urine-soaked clothes with no opportunity for relief. . . Those circumstances create a fact question about whether there was an excessive continuation of the use of force after Jacoby was already subdued or restrained, and our decision in *Danley* clearly establishes the right to be free from that kind of excessive force. The district court erred in granting summary judgment to Rowell and Keers on Jacoby's excessive force claims against Rowell and Keers.")

McBride v. Houston County Health Care Authority, 658 F. App'x 991, 996 n.5 (11th Cir. 2016) ("The standard for deliberate indifference claims under the Fourteenth Amendment is the same as the standard applicable for prison inmates under the Eighth Amendment. *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996). Thus, "decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees.")

Jacoby v. Baldwin County, 835 F.3d 1338, 1345-46 & n.3 (11th Cir. 2016) ("*Bell* effectively creates a two-part test. First, a court must ask whether any 'legitimate goal' was served by the prison conditions. Second, it must ask whether the conditions are 'reasonably related' to that goal. And, to defeat Sheriff Mack's claim of qualified immunity, Mr. Jacoby must point to precedent that would give Sheriff Mack 'fair warning' that these requirements would not be met under the conditions of confinement Mr. Jacoby says he experienced. . . .[fn.3 In *Hamm v. DeKalb County*, 774 F.2d 1567 (11th Cir. 1985), this Court held that 'in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons.'. . Relying on *Hamm*, the Magistrate Judge's Report and Recommendation (which the District Court adopted) applied the Eighth Amendment's subjective deliberate indifference standard to Mr. Jacoby's due process claim. That is, the District Court found that Mr. Jacoby had not established: (1) an 'objective[ ], sufficiently serious' risk of harm, and (2) 'deliberate indifference' to that risk by prison officials. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977 (1994) (quotations omitted). We conclude that the outcome in this case is the same under either *Hamm* or *Bell*, and so apply the Supreme Court's articulation of the standard for pretrial detainees from *Bell* on appeal. However, we need not decide Mr. Jacoby's claim that the Eighth Amendment's subjective deliberate indifference standard conflicts with *Bell*'s objective 'punishment' standard]. . . . We hold that Mr. Jacoby has failed to make this showing. He has pointed to no caselaw clearly establishing that putting him in a cell with two other inmates was unconstitutional punishment in violation of *Bell*. To the contrary, in *Bell* itself the Supreme Court held that 'double-bunking' (placing two inmates in a cell intended for one) does not constitute punishment. . . Neither has Mr. Jacoby pointed to any caselaw clearly establishing that having to sleep on a mattress on the floor violated his constitutional rights. In fact, in *Hamm*, this Court held that '[t]he fact that [a pretrial detainee] temporarily had to sleep upon a mattress on the floor or on a table is not necessarily a constitutional violation.'. . .Taken in the light most favorable to him, Mr. Jacoby's allegations establish that he was temporarily forced to sleep on a mattress on the floor near the toilet. . . His circumstances are not enough like those described in *Chandler*, *Brooks*, and *Jordan* for those cases to clearly establish that his conditions of confinement were unconstitutional. We therefore affirm the District Court's ruling on Mr. Jacoby's substantive due process claim.")

Cole v. Esely, No. 3:20-CV-935-MMH-PDB, 2022 WL 218483, at *4 n.7 (M.D. Fla. Jan. 25, 2022) ("In *Johnson v. Breeden* and *Fennell v. Gilstrap*, . . . the Eleventh Circuit concluded that qualified immunity is not available for excessive force claims arising under the Eighth and Fourteenth Amendments, reasoning that '"the subjective element required to establish it is so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution…."'. . . Recently, in light of *Kingsley v. Hendrickson*, . . . the Eleventh Circuit abrogated this exception for excessive force claims under the Fourteenth Amendment, but said that 'the *Johnson/Fennel* exception continues to apply to Eighth Amendment claims' such as the one here. *Patel v. Lanier Cnty., Ga.*, 969 F.3d 1173, 1185–86 (11th Cir. 2020).")

Howard v. Wilkinson, No. 617CV1473ORL40GJK, 2018 WL 1583638, at *7-8 & n.6 (M.D. Fla. Apr. 2, 2018) ("The Officer Defendants next argue that there 'was no clearly established law proscribing a takedown of a resisting detainee.'. . They insist that, in the aftermath of the *Kingsley* decision clarifying the elements of a Fourteenth Amendment excessive force claim, there was 'a dearth of on-point factual law in the pretrial detainee context' informing officers of what they can and cannot do. . .That is, in the absence of opinions applying *Kingsley* in factually similar cases, there was no 'clearly established' use of force law the Officer Defendants could have violated. This argument is, of course, absurd. 'For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."'. . Even in novel factual circumstances, 'officials can still be on notice that their conduct violates established law....' . . . So a right can be clearly established before a Court speaks directly to the precise factual circumstances. At the time of the incident, the Eleventh Circuit had firmly established the right of a non-resisting individual to (i) be free from being pepper sprayed gratuitously, and (ii) not be slammed head first into a hard floor. . . Furthermore, the Officer Defendants overstate the 'upheaval' in use of force caselaw occasioned by the Supreme Court's decision in *Kingsley*. . . That case merely eliminated the requirement imposed by several Circuit Courts—including the Eleventh—that plaintiffs prove an officer's subjective awareness that their use of force was unreasonable to make out an excessive force claim. . . It did not otherwise abrogate the decisional excessive force law in this Circuit. In light of the continued viability of excessive force cases pre-dating *Kingsley*, a reasonable official occupying the Officer Defendants' position would understand that their actions violated Mr. Howard's Fourteenth Amendment rights. . . This conclusion is fortified by the extreme force alleged in the Complaint and lack of a compelling justification to use such force. . . .It is worth noting that the allegations of the Complaint might plausibly state a claim for excessive use of force under the pre-*Kingsley* Eleventh Circuit law, which required that officials act 'maliciously and sadistically to cause harm.'. . In such an inquiry, *Fennell* instructed courts to consider factors similar to the *Kingsley* factors. . . ("[1] the need for the application of force; [2] the relationship between the need and the amount of force that was used; [3] the extent of the injury inflicted upon the prisoner; [4] the extent of the threat to the safety of staff and inmates; and [5] any efforts made to temper the severity of a forceful response."). That is to say, even under pre-*Kingsley* law (which was more favorable to officer-defendants), reasonable officials in the Officer Defendants' shoes would have been on notice that their conduct violated Mr. Howard's Fourteenth Amendment rights. The Court therefore has no difficulty finding that they would have been on notice post-*Kingsley*.")

Hutchinson v. Cunningham, No. 2:17-CV-185-WKW, 2018 WL 1474532, at *4 n.5 (M.D. Ala. Mar. 26, 2018) ("Mr. Hutchinson asserts that the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2446 (2015), abrogates this line of case law and contends that an objective standard should apply to his Fourteenth Amendment claims. . . But he also correctly notes that the Eleventh Circuit has stated, albeit in dictum, that *Kingsley* does not affect medical care cases. *See Dang v. Sheriff, Seminole Cnty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).")

Grawbadger v. Geo Care, LLC, No. 214CV432FTM29MRM, 2017 WL 2600718, at *3 (M.D. Fla. June 15, 2017) ("The Court recognizes that the FCCC is not a prison and Plaintiff is not a prisoner. . . Instead, an individual who has been involuntarily civilly committed has 'liberty interests under the due process clause of the Fourteenth Amendment to safety, freedom from bodily restraint, and minimally adequate or reasonable training' as required to ensure safety and freedom from restraint. . . Indeed, the Court recognizes that residents at the FCCC are afforded a higher standard of care than those who are criminally committed. . .Nonetheless, 'the Eighth Amendment's deliberate indifference jurisprudence is applicable to the Fourteenth Amendment due process rights of pre-trial detainees.'. . Consequently, the Court examines cases addressing medical deliberate indifference claims under the Eighth Amendment for guidance in evaluating Plaintiff's claims.")

Bell v. Advanced Corr. Healthcare, Inc., No. 2:16-CV-278-TMP, 2016 WL 7242170, at *3 n.6 (N.D. Ala. Dec. 15, 2016) ("Because the plaintiff was a pretrial detainee at the time in question, her claims are analyzed under the Fourteenth Amendment. *See, e.g., Cottrell v. Caldwell,* 85 F.3d 1480, 1490 (11th Cir. 1996) ("Claims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause"). Nevertheless, in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care, the minimum standard allowed by the due process clause is the same as that allowed by the Eighth Amendment for convicted persons, which is 'deliberate indifference' to the need for medical care. *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986); *Melton v. Abston*, ––F.3d ––, 2016 WL 6819670, at *6 (11th Cir. Nov. 18, 2016). Her claims related to the use of excessive force, however, are analyzed under an 'objective reasonableness' standard. *Kingsley v. Hendrick*son, ––U.S. ––, 135 S. Ct. 2466, 2473, 192 L.Ed. 2d 416 (2015).")

Rojo v. Holderbaum, No. 8:15-CV-1982-T-33JSS, 2016 WL 7116207, at *8 (M.D. Fla. Dec. 7, 2016) ("[T]he Court notes that, '[w]hile *Kingsley*'s objective unreasonableness standard governs the existence of a constitutional violation, that decision was issued after the [alleged violation] took place, so it plays no part in [the Court's] determin[ation of] whether the unlawfulness of [Holderbaum's] conduct was clearly established at the time it occurred.' *Jacoby v. Baldwin Cty.*, No. 14-12773, 2016 WL 6575054, at *5 (11th Cir. Nov. 7, 2016) (citing *Belcher v. City of Foley*, 30 F.3d 1390, 1400 n.9 (11th Cir. 1994)). 'Instead, in order to determine whether the clearly established requirement is met in this case, [the Court] look[s] to pre-*Kingsley* case law, which applied the old 'sadistic or malicious' standard for excessive force.'")

Baker v. Jump, No. 2:16-CV-37, 2016 WL 4468559, at *4–5 (S.D. Ga. Aug. 23, 2016) ("Prior to the United States Supreme Court's recent decision in *Kingsley v. Hendrickson*, ___ U.S. ____, 135 S. Ct. 2466 (Aug. 11, 2015), it was well-settled in the Eleventh Circuit that the same standards applied to a denial of adequate medical care claim brought by a pretrial detainee under the Due Process Clause as a claim brought by a convicted prisoner under the Eighth Amendment. . .

However, in *Kingsley*, an excessive force case, the Supreme Court rejected the defendant officers' application of a subjective standard and reliance upon a pair of Eighth Amendment decisions. ___ U.S. at ___, 135 S. Ct. at 2475. The Court noted that the language of the Cruel and Unusual Punishment Clause 'differs' from the Due Process Clause and that 'pretrial detainees (unlike convicted prisoners) cannot be punished at all[.]'. . Since the Supreme Court decided *Kingsley*, lower courts have struggled with the question of whether Eighth Amendment standards apply to a pretrial detainee's claim of inadequate medical care. . .The Court need not resolve these questions in this case. Regardless of the application of a subjective or objective standard, Plaintiff has plausibly stated that Defendants Gunderson, Brooks, Hall, and Juran failed to provide Plaintiff medical care and were deliberately indifferent to his health and safety. Plaintiff contends that, on February 11, 2016, all of these Defendants allowed Plaintiff to lie on the floor in his own urine while Plaintiff was in intense pain for over an hour. It appears that Plaintiff suffered from a serious medical need during this time, as he states he had a broken hip and fractured elbow. . . Further, his injuries required treatment at two hospitals and surgery. Additionally, as to Defendant Hall, Plaintiff claims that she was deliberately indifferent to Plaintiff's serious medical conditions on March 4, 2016, by forcibly removing his sling from his shoulder causing Plaintiff increased pain and injury. Thus, accepting Plaintiff's allegations as true, as it must at this stage, the Court finds that Plaintiff has stated plausible claims against Defendants Gunderson, Brooks, Hall, and Juran.")

Queen v. Collier, No. 5:15-CV-01109-MHH, 2016 WL 4073946, at *3-4 (N.D. Ala. Aug. 1, 2016) ("Relying on the Supreme Court's recent decision, *Kingsley v. Hendrickson*, --- U.S. ---, 135 S. Ct. 2466 (2015), Mr. Queen argues that the Court need not decide which constitutional amendment applies to his excessive force claim because a claim under either amendment is measured against an objective reasonableness standard. The Court disagrees. In *Kingsley*, the Supreme Court stated that for a pretrial detainee to prove an excessive force claim, he must show that the officer's use of force was objectively unreasonable. Although *Kingsley* provided that excessive force claims under the Fourteenth Amendment are governed by an objective reasonableness standard, the Court did not collapse the standard for arrestee and pretrial detainee excessive force cases into a single standard. Instead, the *Kingsley* Court stated that in applying the 'objectively unreasonable' aspect of the pretrial detainee standard, courts must not only look to *Graham*'s 'facts and circumstances' inquiry, but also account for the 'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,' appropriately deferring to 'policies and practices that in th[e] judgment' of jail officials 'are needed to preserve internal order and discipline and to maintain institutional security.'. . Therefore, the Court must identify which constitutional standard applies to Mr. Queen's excessive force claim. . . In the Eleventh Circuit, '[t]he precise point at which a seizure ends (for purposes of Fourth Amendment coverage) and at which pretrial detention begins [for purposes of Fourteenth Amendment coverage] is not settled....' *Hicks v. Moore*, 422 F.3d 1246, 1254 (11th Cir. 2005). The period of time between an arrest and the beginning of pretrial detention is known as the 'twilight zone.' . . Because Officer Collier's use of force occurred after the arresting officers surrendered Mr. Queen to jail personnel but before detention officers finished the booking process, this case falls squarely in the twilight zone. In twilight zone cases, to identify the applicable constitutional standard, a court must decide whether

the force occurred closer to the arrest or the detention end of the spectrum. . . . The *Garrett* and *Fennell* opinions demonstrate that the role of the arresting officer weighs heavily in the constitutional analysis of an arrestee's claim. In this case, the officers who arrested Mr. Queen had surrendered Mr. Queen to the custody of Officer Collier at the Morgan County Jail before the confrontation at issue occurred. Although Mr. Queen had not been fully processed at the jail when Officer Collier restrained him and took him to the ground, Mr. Queen had been in detention for a significant period of time. The force in the instant case occurred almost two hours after Mr. Queen arrived at the jail. (In contrast, the force at issue in *Fennell* occurred just moments after the plaintiff arrived at the jail.) The arrest was over; detention had begun. Considering the foregoing, the Court finds that Mr. Queen was a pretrial detainee at the time of the confrontation with Officer Collier and that the Fourteenth Amendment governs Mr. Queen's excessive force claim.")

Perez v. Wicker, No. 2:14-CV-558-FTM-29CM, 2016 WL 3543502, at *3 (M.D. Fla. June 29, 2016) ("The analysis under the Fourteenth Amendment is the same for both pretrial detainees and those civilly committed. . . Accordingly, the Supreme Court's recent decision in *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015), provides the applicable standard for claims of excessive force against a civilly committed detainee.")

Crowley v. Scott, No. 5:14-CV-326 (MTT), 2016 WL 2993174, at *7 (M.D. Ga. May 23, 2016) ("It is undisputed that Scott was acting within his discretionary authority, and the Court has concluded that a reasonable jury could find that Scott violated Crowley's constitutional rights by using excessive force. Thus, Scott is entitled to qualified immunity only if the law was not clearly established that his conduct was unlawful. To overcome Scott's qualified immunity defense, Crowley cites the former rule for Fourteenth Amendment excessive force cases: a plaintiff can overcome the defense of qualified immunity simply by establishing the violation of his constitutional rights. . . This *was* the rule because 'the subjective element required to establish [a Fourteenth Amendment excessive force claim was] so extreme that every conceivable set of circumstances in which this constitutional violations occurs is clearly established to be a violation of the Constitution.'. . However, because the Supreme Court's decision in *Kingsley* eliminated the subjective element in Fourteenth Amendment excessive force claims, a plaintiff asserting the claim must establish a constitutional violation *and* that the defendant violated clearly established law. . . Scott argues 'the law was not clearly established that the amount of force used was excessive in response to the resistance [Crowley] offered in response to the directions Scott had given him.'. . At the time of the events in this case, the law was clearly established that a handcuffed, non-resisting, and otherwise compliant person has a 'right to be free from excessive force.'. . Therefore, if a jury credits Crowley's version that Scott used a leg sweep while Crowley was handcuffed, non-resistant, and otherwise not creating the disturbance that Scott described, then no reasonable officer in Scott's position could have believed that Scott's use of force was lawful. . . . Accordingly, Scott is not entitled to qualified immunity.")

Tims v. Golden, No. CV 15-0516-WS-B, 2016 WL 1312585, at *8 (S.D. Ala. Apr. 4, 2016) ("The Court concludes that *Kingsley* applies retroactively. The *Acoff* Court stressed that *Garner*

overruled none of the Supreme Court's prior precedents and that it did not contradict near-unanimous lower court authority. . . So here, *Kingsley* did not overrule any Supreme Court precedent; on the contrary, the Court emphasized that its ruling 'is consistent with our precedent.' . . Moreover, far from upsetting nearly unanimous appellate rulings, the *Kingsley* Court noted the split of appellate authority as to the proper standard. . . It is thus the objective *Kingsley* standard that must be applied to the plaintiff's claim of excessive force under the Fourteenth Amendment. And because that standard applies, the burden on the plaintiff is to show that it was clearly established, in October 2013, that Officer Golden's tasing of the plaintiff was objectively unreasonable under the circumstances then presented. As with her privacy claim, this is a most formidable hurdle, given the circumstances she alleges in her complaint, . . . and it is made even more so by the absence of Eleventh Circuit authority employing the objective standard before *Kingsley* introduced that standard in 2015. At any rate, the plaintiff's complete failure to address her burden is fatal to her claim.")

Thomley, II v. Bennett, No. 5:14-CV-73, 2016 WL 498436, at *7-8 (S.D. Ga. Feb. 8, 2016) ("In light of the *Kingsley* decision, several courts have discussed its application to claims made by pretrial detainees involving deliberate indifference allegations. . . However, it does not appear that *Kingsley* provides the standard which is to be applied in this case. . . . The Eleventh Circuit has yet to issue a ruling on the proper standard to employ in analyzing a pretrial detainee's deliberate indifference claim in light of the *Kingsley* decision. Because of this, the Court applies the standards in place at the time giving rise to the events set forth in Plaintiff's Complaint. First, the parties have not been put on notice the Court would apply a different standard to Plaintiff's deliberate indifference claims and thus, have not briefed the issue on the basis of an objective reasonableness test. See *Hentschel v. Rockingham Cty. Dep't of Corr.*, Case No. 15-cv-215-SM, 2015 WL 8489610, at *1 n.1 (D.N.H. Nov. 20, 2015) (noting it is unclear what standard to use for a pretrial detainee's deliberate indifference claim in *Kingsley*'s wake but declining to apply *Kingsley* because the parties had not briefed that issue). In addition, even if a pretrial detainee's deliberate indifference claims are to be analyzed using the Fourteenth Amendment's due process clause rather than the Eighth Amendment's deliberate indifference standard, the facts of this case lead to the conclusion Defendants nevertheless would be entitled to summary judgment. As discussed in this Report, *infra.*, Plaintiff fails to establish genuine disputes as to any fact material to his deliberate indifference claims under an objectively reasonable standard. Further, because the standard applicable at the time giving rise to Plaintiff's Complaint was the Eighth Amendment's deliberate indifference standard, Defendants would likely be entitled to qualified immunity, as *Kingsley* was not the clearly established law at that time. *Ross v. Corr. Officers John &Jane Does 1–5*, 610 F. App'x 75, 77 n.1 (2d Cir. 2015) ("Because our focus, in analyzing whether qualified immunity applies, is on whether the right asserted by Ross was clearly established at the time of the alleged violation, we need not address *Kingsley*'s possible implications for deliberate indifference claims brought by pre-trial detainees."); see also *Bilal v. Geo Care*, LLC, Case No. 2:14-cv-422-FtM-38MRM, 2016 WL 345514, at *6 (M.D. Fla. Jan. 28, 2016) (recognizing the *Kingsley* decision and stating, "[i]n the context of conditions of confinement cases, the Eighth Amendment is concerned with deprivations of essentials, food, medical care, or sanitation or other

conditions intolerable for prison confinement. ... The relevant state of mind for a condition claim is deliberate indifference.") (citations omitted).")

Rojo v. Holderbaum, No. 8:15-CV-1982-T-33JSS, 2015 WL 9302844, at *3-5 (M.D. Fla. Dec. 22, 2015) ("A brief discussion of the impact of the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2472-73 (2015), abrogating *Bozeman v. Orum*, 422 F.3d 1265 (11th Cir. 2005), is required. Eleventh Circuit precedent allowed a plaintiff alleging excessive force under the Fourteenth Amendment to overcome qualified immunity by only satisfying the first prong, i.e., that a constitutional violation occurred. *Fennell v. Gilstrap*, 559 F.3d 1212, 1216-17 (11th Cir. 2009) (citing *Johnson v. Breeden*, 280 F.3d 1308, 1321-22 (11th Cir. 2002)). This rule was created 'because, for an excessive-force violation of the Eighth or Fourteenth Amendments, "the subjective element required to establish it is so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution."'. . However, the Supreme Court in *Kingsley* held 'that a pretrial detainee must show only that the force purposely or knowingly used against him was objectively reasonable.'. . Thus, now that the subjective inquiry is no longer a part of an excessive-force claim under the Fourteenth Amendment, a plaintiff alleging such a claim must satisfy both prongs. . . . Upon review of the Amended Complaint, the Court determines Rojo has sufficiently alleged facts demonstrating that the right was clearly established. The Amended Complaint alleges, and again this Court must accept the allegations as true at this stage, that Rojo was not actively resisting . . . Eleventh Circuit case law holds that using force on a non-resisting person is excessive. . . Therefore, for purposes of the pending Motion to Dismiss, the Court determines Rojo has sufficiently alleged facts to carry his burden.")

Esposito v. Stone, No. 8:14-CV-2414-T-33EAJ, 2015 WL 5440599, at *8-9 (M.D. Fla. Sept. 15, 2015) (Applying the *Kingsley* factors, "[t]he Court has determined that a reasonable jury could find that a constitutional violation occurred. The next inquiry is whether the constitutional violation was clearly established. In determining whether a right is clearly established, '[t]he relevant, dispositive inquiry ... is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . .The Eleventh Circuit has explained, 'Claims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause instead of the Eighth Amendment's Cruel and Unusual Punishment Clause, which applies to such claims by convicted prisoners.'. . 'However, the applicable standard is the same, so decision law involving prison inmates applies equally to cases involving arrestees or pretrial detainees.'. .These cases uniformly hold that gratuitous use of force against an individual who is not resisting is excessive. [collecting cases] After considering the numerous authorities explaining that police officers may not punch non-resisting arrestees and that unnecessary and gratuitous use of force is unconstitutional, and considering the evidence in the light most favorable to Esposito, the Court must conclude that the constitutional violation alleged was clearly established. Defendants' motion for summary judgment, including Defendants' request for qualified immunity, is accordingly denied. In denying summary judgment, the Court underscores that its analysis is based on the version of the facts set forth by Esposito,

which drastically and irreconcilably clashes with the version of the facts described by the Defendant Officers.")

10. Note on Fourth vs. Fourteenth Amendment

It is clear that the Eighth Amendment applies to claims of excessive force by convicted prisoners. *See Whitley v. Albers*, 475 U.S. 312 (1986). *See also* ***Simpson v. Cisneros***, 129 F.4th 901, 904-06 (5th Cir. 2025) ("The Magistrate Judge recommended the grant of summary judgment to the Defendant under the Eighth Amendment—but not under the Fourteenth Amendment—with the assumed facts. A failed summary judgment motion denying qualified immunity is appealable under the collateral-order doctrine. . . We turn to whether the Fourteenth Amendment's substantive due process doctrine protects inmates. It does not. Cisneros argues that the district court erred in determining that the plaintiffs pled a substantive due process claim under the Fourteenth Amendment, as it is the Eighth Amendment—not the Fourteenth Amendment—that protects incarcerated individuals. We construe the facts in favor of the Plaintiffs and conclude that the Plaintiffs did assert a Fourteenth Amendment substantive due process claim in their initial complaint. . . We now turn to whether the Plaintiffs—as inmates—could proceed under the Fourteenth Amendment. . . In general, the 'substantive component of the Due Process Clause under the Fourteenth Amendment secures the right to be free of state-occasioned damage to a person's bodily integrity.'. . But when a particular constitutional amendment 'provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'. . And, the Prison Rape Elimination Act of 2003 ("PREA") notes that sexual assault in prison implicates the Eighth Amendment. . . Here, 'the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive due process under the Fourteenth Amendment.'. . As the Eighth Amendment gives 'an explicit textual source of protection,'. . . the Plaintiffs here have no claim under the Fourteenth Amendment. . . The district court erred in applying a Fourteenth Amendment framework. . .The Eighth Amendment, *not* the Fourteenth Amendment, protects prisoners from mistreatment and malfeasance. The district court in its rulings held back final judgment against the Warden and the Assistant Warden. . . It is now in its hands to deal with what remains in this case. As the Fourteenth Amendment claim is the only live issue on appeal here, we REVERSE that ruling, GRANT summary judgment on the Fourteenth Amendment, and REMAND the case for further proceedings."); ***Hughes v. Rodriguez***, 31 F.4th 1211, 1220-21 (9th Cir. 2022) ("To determine the applicable constitutional right in this case requires us to place escaped prisoners, like Hughes, on the custodial continuum, with free citizens on one end and convicted prisoners on the other. We conclude that the Eighth Amendment applies equally to convicted prisoners inside or outside the walls of the penal institution. The logic of *Whitley* applies with equal force even in the case of an escaped convict, as 'the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'. . And although claims of excessive force brought by escaped prisoners are rare, our conclusion conforms to the law of our sister circuits. *See Gravely v. Madden*, 142 F.3d 345, 346–48 (6th Cir. 1998) (holding

that the Eighth Amendment applied to an excessive force claim brought by an escaped convict because '[t]he Fourth Amendment is not triggered anew by attempts at recapture because the convict has already been "seized," tried, convicted, and incarcerated.').

As noted, *supra*, in ***Kingsley v. Hendrickson***, 135 S. Ct. 2466, 2479 (2015) (Alito, J., dissenting), Justice Alito pointed out that the Supreme Court has not decided whether the Fourth Amendment applies in the context of a pretrial detainee's excessive force claim.

Compare ***Geddes v. Weber County***, No. 20-4083, 2022 WL 3371010, at *1, *5-*9 & n.4(10th Cir. Aug. 16, 2022) (not reported), *cert. denied*, 143 S. Ct. 778 (2023) ("Mr. Geddes brought his claim pursuant to 42 U.S.C. § 1983 and alleged the officers had violated his Fourteenth Amendment rights. The question before us is not whether the officers' actions indeed constituted excessive force. It is instead whether Mr. Geddes can bring an excessive-force claim—as an arrestee—under the Fourteenth Amendment. We conclude that he cannot. And we, therefore, agree with the district court's grant of summary judgment and conclusion that Mr. Geddes did not have 'a cognizable claim under the Fourteenth Amendment' because the alleged excessive force did not occur 'after a determination of probable cause and before conviction.'. . Only the Fourth Amendment supplied a valid legal basis for Mr. Geddes's § 1983 claim[.] . . . [N]ot only do the different amendments provide protection at different parts of the criminal justice process, but more importantly for present purposes, the different amendments protect against unique forms of potential governmental intrusion on the protected right. This underscores the need for litigants to identify the correct amendment under which they seek relief. . . . [B]ecause Mr. Geddes was an arrestee, only the Fourth Amendment can supply the basis for his § 1983 excessive-force claim. . . . Mr. Geddes continues to cling to a constitutional amendment that provides him—as an arrestee—with no cognizable basis for a § 1983 excessive-force claim. 'The choice of amendment matters,'. . . and the amendment Mr. Geddes has chosen and has persisted in choosing dooms his § 1983 action. . . . Mr. Geddes says it does not matter whether he pleaded his excessive-force claim as a Fourth Amendment or Fourteenth Amendment violation. Either way, he insists, the outcome of his suit would be the same because the applicable standard would be the same.[4] **[fn.4:** Although Mr. Geddes suggests that we should not 'reach the issue of where a precise dividing line lies' between the amendments and notes the Supreme Court has not actually resolved this question, . . . he does not acknowledge that we have already drawn this line. We have explained that 'the Fourth Amendment not only bars the use of excessive force during the making of an arrest, but such also bars the use of excessive force during a period of detention immediately following arrest and before the person is taken before a magistrate judge, or other judicial official, to determine whether the arrest and continued detention were based on probable cause.'. . The Supreme Court's decision in *Kingsley* did not alter or disturb our precedent on this point. The Court in *Kingsley* spoke to the standard under which excessive-force claims should be analyzed—it did not consider where the Fourth Amendment begins and ends. Although Mr. Geddes is correct that the Supreme Court has not directly opined on 'whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins,'. . . most circuits have joined us in

answering in the affirmative that Fourth Amendment protections continue up until a probable cause determination[.] [collecting cases] Therefore, Mr. Geddes's argument that he could seek the protection of the Fourteenth Amendment before a probable cause hearing is also meritless.**]** Not so. The Fourth Amendment and Fourteenth Amendment excessive-force standards are not identical. As Mr. Geddes rightly notes, both standards assess the objective reasonableness of the use of force. . . But beyond that, the two standards differ. . . . Consistent with our previous discussion of the stages of the criminal justice system and the corresponding constitutional rights that attach at each stage, the considerations identified in the Fourth Amendment and Fourteenth Amendment contexts, although similar, differ in important ways. Namely, they protect against different types of infringements upon constitutional rights. And although both are now evaluated under an objective standard, the Fourth Amendment inquiry is arguably more favorable to a plaintiff because it protects from unreasonable seizures of *free citizens*. . . On the other hand, the balance is recalibrated in the pre-trial detainee context in a manner arguably less favorable to the plaintiff; there, the inquiry is whether the conduct was related to 'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,' so long as that conduct is not punitive in character. . . This distinction is made more apparent when comparing the factors themselves. Most notably, under the *Kingsley* test, courts are to consider '[1] the relationship between the need for the use of force and the amount of force used; [2] the extent of the plaintiff's injury; [and] [3] any effort made by the officer to temper or to limit the amount of force.'. . These additional factors supplement the *Graham* analysis with an additional deference 'to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security."'. . In sum, then, we and the Supreme Court have never suggested that precisely the same standard applies when assessing the objective reasonableness of the use of force under the Fourth and Fourteenth Amendments. . . . Mr. Geddes's complaint only provided fair notice that the basis for his § 1983 action was a purported Fourteenth Amendment violation. The complaint nowhere indicated that the basis of his claim instead might be the Fourth Amendment. Yet, as we have now explained, different legal frameworks govern our analysis of Fourth Amendment and Fourteenth Amendment excessive-force claims. Pleading one type of excessive-force claim cannot put defendants on notice of the other type of claim.") *with* ***Geddes v. Weber County***, No. 20-4083, 2022 WL 3371010, at *13-14 (10th Cir. Aug. 16, 2022) (not reported) (Bacharach, J., dissenting), *cert. denied*, 143 S. Ct. 778 (2023) ("In this appeal, the main issue is whether two jailers should obtain summary judgment based on the plaintiff's omission of the applicable constitutional amendment in his complaint. The majority answers *yes*, and I would answer *no*. So I respectfully dissent as to the jailers' liability. . . . The jailers used force before a finding of probable cause. So the Fourth Amendment (not the Fourteenth) provided the applicable test for Mr. Geddes's claim. . . Though the applicable test came from the Fourth Amendment, the claim itself arose under the Fourteenth Amendment. 'In a technical sense, a Fourth Amendment claim against [state] officers is also a Fourteenth Amendment claim, because that is the amendment that incorporates the Fourth Amendment's protections against the states.' . . Though we commonly refer to claims against state officers as Fourth Amendment claims, these claims are 'strictly speaking ... claim[s] under the Fourteenth Amendment.'. . So in the complaint, Mr. Geddes correctly invoked the Fourteenth Amendment

as the constitutional source for his protection against excessive force. The district court and the majority point out that the test for the claim comes from the Fourth Amendment. But 'the Fourteenth Amendment standard is ... almost identical to the Fourth Amendment standard.'. . The standard under the Fourteenth Amendment is whether 'the force purposely or knowingly used against [the claimant] was *objectively unreasonable* ... from the perspective of a reasonable officer on the scene.' *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (emphasis added). The standard under the Fourth Amendment is whether the force was *objectively unreasonable* 'in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation.' *Graham v. Connor*, 490 U.S. 386, 397 (1989). We've thus concluded that the 'same objective standard ... applies to excessive-force claims brought under either the Fourth or the Fourteenth Amendment.'. . Given the similarity between the tests under the Fourth and Fourteenth Amendments, the complaint supplied all of the notice that the jailers needed.").

There is some disagreement among the Circuits as to when the Fourth Amendment or arrest context ends and the Fourteenth Amendment pre-trial detainee context begins. A majority of Circuits apply, regardless of one's status as an "arrestee" or "pre-trial detainee," the Fourteenth Amendment to medical care claims.

Compare ***Awnings v. Fullerton***, 912 F.3d 1089, 1094-1102 (8th Cir. 2019) ("The parties do not dispute that Officer Banks neglected to inform jail personnel of Awnings's need for a follow-up medical appointment. Awnings argues that his transport from the Hospital to the jail was part of his arrest; therefore his claim against Officer Banks necessarily implicates the Fourth Amendment. But, historically, in this circuit, claims of deliberate indifference to an arrestee's medical needs are 'properly analyzed under the Due Process Clause of the Fourteenth Amendment.'. . Unresolved is 'the question whether the Fourth Amendment continues to provide individuals with protection against the *deliberate use of excessive physical force* beyond the point at which arrest ends and pretrial detention begins.'. . Awnings's claim against Officer Banks is a failure to provide adequate medical services—not an excessive force claim related to his arrest. Instead, Awnings claim against Officer Banks relates to the sufficiency of his post-arrest, post-medical examination, medical care. It is true that we have not as yet 'resolved whether an arrestee's claim alleging denial of medical care is analyzed under the Due Process Clause or the Fourth Amendment. . . We need not do so here. The facts distinguish this case from those arising from an allegation of excessive force. Factually, any alleged denial of medical care incident to Awnings's arrest ended when he actually received medical attention at the hospital. Awnings's claim against Officer Banks relates to Officer Banks's omission to convey the follow-up medical appointment ordered by the doctor—not from his participation in Awnings's arrest. In fact, Officer Banks did not participate in the arrest of Awnings. Unlike the plaintiff in *Carpenter*, Awnings was first transported for medical treatment before being taken to jail. On this record, our precedents favor analyzing Awnings's medical needs claim under Fourteenth Amendment standards. . . . Here, Awnings sustained a small laceration, and his examining physician post-arrest declared Awnings fit for incarceration. Further, a chest X-ray showed no fractured ribs or lung damages. Under these circumstances, it cannot be said that Officer Banks's failure to inform the jail staff of Awnings's

follow-up medical visit rises to the level of conduct that 'shocks the contemporary conscience.'. . The district court correctly dismissed Awnings's claim against Officer Banks under Rule 12(b)(6).") *with* ***Awnings v. Fullerton***, 912 F.3d 1089, 1103-04 (8th Cir. 2019) (Colloton, J., concurring in part and concurring in the judgment) ("As to Awnings's claim against Officer Banks, I disagree with the court's decision to declare that the claim is governed by the Due Process Clause. Whether the Fourth Amendment or the Due Process Clause governs the actions of Officer Banks during the period after Awnings was arrested but before a judicial officer determined probable cause to detain him is important doctrinally. The issue was not thoroughly briefed in this case. The answer is unnecessary to resolving this appeal. I would therefore refrain from deciding the point. We said in *Bailey v. Feltmann*, 810 F.3d 589 (8th Cir. 2016), that 'this court has not resolved whether an arrestee's claim alleging denial of medical care is analyzed under the Due Process Clause or the Fourth Amendment and noted 'a conflict in authority' on the question. . . . In this case, Awnings loses under either approach. An arrestee's asserted Fourth Amendment right to be free from unreasonable neglect in communicating a need for medical care was not clearly established in July 2013 when Awnings was seized, so Banks is entitled to qualified immunity on that claim. . . If the more demanding deliberate indifference standard of the Due Process Clause applies, then Awnings's claim fails for lack of alleged conscience-shocking conduct. . . We need not say more to resolve the appeal. The court goes further, however, and says that 'our precedents favor analyzing Awnings's medical needs claim under Fourteenth Amendment standards.'. . But our decisions do not resolve which constitutional provision applies. . . . The court disclaims any decision about whether 'an arrestee's claim alleging denial of medical care is analyzed under the Due Process Clause or the Fourth Amendment,'. . . but then decides the issue anyway as to an arrestee like Awnings. The doctrinal debate cited in *Bailey* concerns whether claims arising after arrest but before a judicial determination of probable cause are governed by the Fourth Amendment. Awnings's claim against Banks arose before a probable-cause determination, so the court necessarily rejects one of the two conflicting lines of authority cited in *Bailey* by declaring that the Due Process Clause governs Awnings's claim. I would reserve judgment on that significant question where it was not thoroughly briefed and is unnecessary to a decision.").

See ***Colson v. City of Alcoa, Tennessee***, 37 F.4th 1182, 1187 (6th Cir. 2022) ("For claims concerning injuries sustained while in police custody, there is sometimes a dispute over whether the Fourth or Fourteenth Amendment governs the constitutionality of the officer's conduct. After all, the point at which the Fourth Amendment's prohibition against unreasonable seizures ends and the Fourteenth Amendment's substantive due process right begins is not always obvious. . . For instance, in *Aldini*, we held that when a person in custody asserts an excessive force claim against an officer, a judicial determination of probable cause is the 'dividing line' between application of the two amendments. . . Under the *Aldini* paradigm, the Fourth Amendment governs an excessive force claim brought by an 'arrestee'—one who has been arrested but has not yet received a judicial determination of probable cause, either through an arrest warrant or a post-arrest probable cause hearing. . . The Fourteenth Amendment, on the other hand, provides the same protection for a 'pretrial detainee'—a person who has received a judicial determination of probable cause but has not yet been adjudicated guilty of a crime. . .We hold that Colson's medical care right is governed

by the Fourteenth Amendment. That is the straightforward conclusion from a series of decisions in which the Supreme Court applied the Fourteenth Amendment to analyze medical care claims arising out of events as early as the time of apprehension by police, *see City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983), and as late as the period of pretrial detention, *see Bell*, 441 U.S. at 523, 545, 99 S.Ct. 1861. Additionally, in *DeShaney*, the Supreme Court explained that the Fourteenth Amendment imposes on the government an affirmative duty to provide medical care to all those it takes into its custody, regardless of the person's precise legal status. . .That includes, as the facts of this case present, the period after arrest but before a judicial finding of probable cause. . . . More broadly, eight other courts of appeals also apply the Fourteenth Amendment to arrestees' claims for failure to provide medical care. *See, e.g.*, *Tardif v. City of New York*, 991 F.3d 394, 398–99, 405 n.9 (2d Cir. 2021); *Mays v. Sprinkle*, 992 F.3d 295, 298–300 (4th Cir. 2021); *Batyukova v. Doege*, 994 F.3d 717, 722–24, 732–33 (5th Cir. 2021); *Smith v. Kilgore*, 926 F.3d 479, 486 (8th Cir. 2019); *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 74 (1st Cir. 2016); *Valderrama v. Rousseau*, 780 F.3d 1108, 1116 (11th Cir. 2015); *Barrie v. Grand County*, 119 F.3d 862, 863–64, 867–69 (10th Cir. 1997); *Groman v. Township of Manalapan*, 47 F.3d 628, 632–33, 636–37 (3d Cir. 1995). And the Supreme Court has cited with approval two decisions of this ilk. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (first citing *Barrie*, 119 F.3d at 867–69; and then citing *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996)). Precedent to the contrary is scant. The Ninth Circuit has flagged the issue but has yet to decide which right applied to an arrestee's failure to provide medical care claim. *J. K. J. v. City of San Diego*, 17 F.4th 1247, 1257 (9th Cir. 2021). Only the Seventh Circuit, it appears, has concluded that the Fourth Amendment governs a failure to provide medical care to an arrestee. *See, e.g.*, *Currie v. Chhabra*, 728 F.3d 626, 630–31 (7th Cir. 2013). . . . A failure to provide medical care is not a seizure, as it is not an affirmative act to restrain another. Rather, it is inaction in the face of a duty to provide adequate care. . . And, by definition, the right to medical care is triggered only once a person is in the government's custody, which follows a seizure. . . So the right to medical care and the Fourth Amendment's right to be free from unreasonable seizures are distinct, both conceptually and temporally. . . . True, as Colson emphasizes, *Aldini* held that the Fourth Amendment applies to excessive force claims for incidents arising before a probable cause determination. . . But we have never extended *Aldini* to hold that the Fourth Amendment governs an arrestee's claim of inadequate medical care. At times, we have suggested in dicta that there is 'an open question' on the matter. *E.g.*, *Esch v. County of Kent*, 699 F. App'x 509, 514–15 (6th Cir. 2017); *Smith*, 603 F. App'x at 418–22; *Shaver v. Brimfield Township*, 628 F. App'x 378, 381 n.3 (6th Cir. 2015); *Bonner-Turner v. City of Ecorse*, 627 F. App'x 400, 406 n.2 (6th Cir. 2015); *Estate of Carter v. City of Detroit*, 408 F.3d 305, 311 n.3 (6th Cir. 2005); *Boone v. Spurgess*, 385 F.3d 923, 934 (6th Cir. 2004). But at other times, members of our circuit have said the question has been answered, in light of both Supreme Court precedent as well as our own. [collecting cases] To clear up any lingering uncertainty, we hold that there is no Fourth Amendment right to medical care.")

See also ***Mosier v. Evans***, 90 F.4th 541, 546 (6th Cir. 2024) ("At the time of the events in question, Evans had 'been arrested but ha[d] not yet received a judicial determination of probable

cause, either through an arrest warrant or a post-arrest probable cause hearing.'. . So the Fourth Amendment governs his claims. . .The operative question is whether the force used was '"objectively reasonable" in light of the facts and circumstances confronting' the officer."); ***Kelson v. Clark***, 1 F.4th 411, 417-18, 421 (5th Cir. 2021) ("As a threshold matter, the parties dispute whether plaintiffs adequately allege that Fletcher was in police custody as an arrestee or pretrial detainee. The parties agree that the paramedics' obligations under the Fourteenth Amendment began only once Fletcher was detained by the police. However, Clark and Cox assert that the 'pleadings fail to establish that Fletcher was in custody at the time that Clark and Cox allegedly failed to treat him.' 'After the initial incidents of a seizure have concluded and an individual is being detained by police officials but has yet to be booked, an arrestee's right to medical attention, like that of a pretrial detainee, derives from the Fourteenth Amendment.' *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 473 (5th Cir. 1996). In the Fourth Amendment context, 'a seizure occurs when, under the totality of the circumstances, a reasonable person would have thought he was not free to leave.'. . 'Physical force is not required to effect a seizure; however, absent physical force, "*submission* to the assertion of authority" is necessary.'. . Clark and Cox principally argue that the complaint does not allege that Fletcher was physically restrained at the time they arrived on the scene, and that after their alleged failure to treat Fletcher, he was '*thereafter*' arrested and taken to the detention facility. Clark and Cox concede, as they must, that 'a reasonable person would not have thought that Fletcher was free to leave once Fletcher was being transported to the City's detention facility in Officer Morales' patrol car,' but that 'prior to that point, Fletcher was neither an arrestee nor pretrial detainee ... [while] just sitting on the sidewalk talking with the officers and paramedics.' By contrast, the plaintiffs argue that Fletcher was detained earlier: he 'submitted to police authority and reasonably believed [he] was not free to leave [ ] while on the street before being transported to the Detention Center.'. .While we agree with Clark and Cox that the precise timeline of events is underdeveloped, 'detailed factual allegations' are not required at the pleadings stage. . . Mindful of the standards governing Clark and Cox's motion to dismiss, and drawing all reasonable inferences in favor of the nonmoving party, the plaintiffs have pleaded sufficient factual material to allege that Fletcher was detained. . . . It is undisputed that, at the time Clark and Cox allegedly failed to treat Fletcher, the law was clearly established that pretrial detainees have a Fourteenth Amendment right to medical care. . . . Clark and Cox argue that clearly established law does not require them to provide medical care to an individual who is '*not* a pretrial detainee.' This is irrelevant; for the reasons previously stated, Fletcher was allegedly detained at the relevant time."); ***Crocker v. Beatty***, 995 F.3d 1232, 1253-58 & n.3 (11th Cir. 2021) (Newsom, J., concurring) ("The main opinion finds it unnecessary to decide whether someone in Crocker's position—*i.e.*, one who has been arrested but has not yet been taken before a magistrate for a probable-cause determination—is (1) an *arrestee* whose excessive-force claim should be analyzed under the Fourth Amendment or instead (2) a *pretrial detainee* whose excessive-force claim should be analyzed under the Fourteenth Amendment. . . I write separately to suggest two things: first, that this Court hasn't (to my mind) committed itself to any particular position on that issue, which has generated a circuit split; and second, that if another panel confronts this question, it should draw the line between arrestees and pretrial detainees in accordance with *Bell v. Wolfish*, . . .such that the probable-cause determination is the divider. . . . [W]hat about individuals—like

Crocker here—who bring excessive-force claims based on events that occur after the initial act of arrest but before they've received a judicial determination of probable cause? . . . Courts have disagreed about whether the Fourth or Fourteenth Amendment governs in this legal limbo. *See, e.g.*, *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 70 (1st Cir. 2016) (collecting cases). . . . If we're counting noses, it seems fair to say that most circuits to have answered this question have lined up behind the Fourth Amendment. *See Miranda-Rivera*, 813 F.3d at 70 (collecting cases). So what about us—where are we? On the basis of our decision in *Cottrell v. Caldwell*, 85 F.3d 1480 (11th Cir. 1996), some have placed us in the minority camp, lumping us in with those courts that rely on the Fourteenth Amendment to analyze excessive-force claims brought by those whose arrest is complete but who haven't yet been had a probable-cause hearing. *See, e.g.*, *Wilson v. Spain*, 209 F.3d 713, 716 n.2 (8th Cir. 2000). Respectfully, I don't think that either *Cottrell* or our subsequent interpretations of it compel that reading. . . .To sum up: Other circuits disagree about whether claims like Crocker's—brought by an individual who has been arrested but hasn't yet received a judicial determination of probable cause—arise under the Fourth or Fourteenth Amendment.[3] **[fn 3:** Note that because the practical consequences of the split aren't what they used to be pre-*Kingsley*, the Supreme Court may have less reason to step in and resolve any conflict between the circuits. . . For that matter, I suppose that insofar as the so-what factor isn't what it used to be, our en banc court may have less incentive to untangle any knots in our precedent in this area.**]** Our own precedent hasn't settled the issue, either. If I'm right about that, then a future panel might have to answer the questions this case only caused us to ask. . .If and when that happens, I'd recommend that we (1) draw the line between arrestees and pretrial detainees in accord with *Bell v. Wolfish*, . . . and thus (2) analyze the excessive-force claims of all pre-probable-cause-determination arrestees under the Fourth Amendment. . . .Taken together, I understand *Bell* and *Gerstein* to mean that until a judge has weighed in on whether probable cause exists to detain someone, he remains an arrestee and is thus entitled to (but only to) Fourth-Amendment protection from excessive force. . . . One might object to this general approach on the ground that it necessarily embodies a 'continuing seizure' theory, about which we (and others) have expressed 'doubts[.]' . . Our reticence is well-founded; the Supreme Court has said, after all, that '[a] seizure is a single act, and not a continuous fact.'. . And that view finds support in the original public meaning of the Fourth Amendment. . . There's good reason, then, to be suspicious of a flabby conception of 'seizure.' Even so, it seems to me that what transpires between the initial act of a warrantless arrest and the subsequent probable-cause determination may be considered a 'seizure' without doing violence to the Fourth Amendment—or, for that matter, even requiring the 'continuing' modifier. . . .And happily, that understanding of 'seizure' supports drawing a nice, bright line between the Fourth and Fourteenth Amendments at the probable-cause hearing. . . .Our duty to follow the Constitution and the Supreme Court's decisions requires us to reject an in-there-somewhere approach to excessive-force claims brought under § 1983. We didn't have to go to the roots of Crocker's claim to know that it could bear no fruit, but in another case, our court may need to dig deeper. If so, I hope that panel will distinguish between arrestees and pretrial detainees and clarify the analytical framework that applies to the excessive-force claims of both."); ***Quinette v. Reed***, 805 F. App'x 696, ___ (11th Cir. 2020) ("In this Circuit, '[t]he precise point at which a seizure ends (for purposes of the Fourth Amendment coverage) and at which pretrial detention

begins (governed until conviction by the Fourteenth Amendment) is not settled.' *Hicks v. Moore*, 422 F.3d 1246, 1253 n.7 (11th Cir. 2005). We need not delineate that point now, because even though the district court concluded that the Fourteenth Amendment applied, Quinette has pled facts that support a violation of either the Fourth or the Fourteenth Amendment. In *Kingsley v. Hendrickson*, the Supreme Court clarified that to prove an excessive force claim in violation of the Fourteenth Amendment, a 'pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.'. . This objective reasonableness standard mirrors the standard an arrestee must meet to plead a violation of the Fourth Amendment. . . So we turn to the question of whether Reed's force was objectively reasonable. . . .Reed's application of a two-handed shove to a non-resistant detainee, with sufficient force to knock that detainee to the ground and to break his hip, constituted unreasonable force in violation of Quinette's constitutional right under the Fourth or Fourteenth Amendment."); ***McCowan v. Morales***, 945 F.3d 1276, 1290 n.11 (10th Cir. 2019) ("We. . . reject Officer Moralez's assertion that it is. . . the Fourth Amendment that should govern here. In making that assertion, Officer Moralez relies on several district court decisions from the Ninth Circuit. But those cases address situations where officers injured or killed a suspect *while seizing him* and the suspect, or his survivors, then sued officers alleging they failed either to summon medical care promptly or to perform first aid. . . Here, instead, McCowan claimed that Officer Moralez deprived him of needed medical attention while at the police station for injuries McCowan allegedly suffered *after* his arrest and before the officer delivered McCowan to the detention center. This situation is more analogous to *Rife*, where the Tenth Circuit applied the Fourteenth Amendment to a claim alleging an officer deprived an arrestee of necessary medical care after his warrantless arrest and while the officer transported the arrestee to the jail."); ***Piazza v. Jefferson County, Alabama***, 923 F.3d 947, 952 n.6 (11th Cir. 2019) ("Although some courts have extended Fourth Amendment protections into the pretrial detention phase, *see, e.g.*, *Aldini v. Johnson*, 609 F.3d 858, 866 (6th Cir. 2010), '[n]either [this Court] nor the Supreme Court has decided whether the Fourth Amendment continues to provide individuals with protection from excessive force beyond the point at which an arrest ends and pretrial detention begins,' *J W by & through Tammy Williams v. Birmingham Board of Education*, 904 F.3d 1248, 1259 (11th Cir. 2018)."); ***Parrish v. Dingman***, 912 F.3d 464, 467 (8th Cir. 2019) ("Parrish's excessive-force claim is governed by the Fourth Amendment's objective reasonableness standard. *Hicks v. Norwood*, 640 F.3d 839, 842 (8th Cir. 2011) ("It is settled in this circuit that the Fourth Amendment's 'objective reasonableness' standard for arrestees governs excessive-force claims arising during the booking process.")."); ***Alcocer v. Mills***, 906 F.3d 944, 952-55 (11th Cir. 2018) ("[W]e agree with the district court's determination that the right at issue here arises under the Fourth Amendment, not the Fourteenth Amendment, as Defendants assert. In any § 1983 case, we must begin our analysis by identifying 'the precise constitutional violation' the defendant has allegedly committed. . . This step requires us, viewing the facts in the light most favorable to Alcocer, to establish the cause of her continued detention after posting bond. Here, the district court noted that Alcocer obtained a bond for her misdemeanor suspended-license offense and would have been released on January 30, immediately upon securing her bond, had it not been for the alleged ICE detainer. Viewing the facts in the light most favorable to Alcocer, the district court concluded that Alcocer remained incarcerated because Defendants engaged in a second detention

of her for being an illegally present alien. This fact pattern potentially presents two possible rights as candidates for driving our analysis: (1) the Fourth Amendment right to be free from unreasonable seizures, *Case v. Eslinger*, 555 F.3d 1317, 1326 (11th Cir. 2009), and (2) the Fourteenth Amendment due-process right to be free from continued detention after law enforcement should have known that the detained person was entitled to release, *West v. Tillman*, 496 F.3d 1321, 1327 (11th Cir. 2007) (per curiam). . . .Here, viewed in the light most favorable to Alcocer, the facts reflect that she continued to be detained after satisfying the bond requirements, solely because of suspicion that she might be illegally present in the United States. This overnight detention plainly was not 'brief,' so it could not have been a *Terry* stop. Nor did Alcocer consent to her overnight detention. Indeed, she protested it. So if the Fourth Amendment governs the analysis here, to the extent that Defendants were causally involved in Alcocer's overnight detention, they must show they had probable cause (or in the qualified-immunity analysis, arguable probable cause) to believe that Alcocer was illegally present in the United States. We turn now to the Fourteenth Amendment. That amendment applies when an individual alleges an 'over-detention,' or a continued detention after a right to release, where probable cause supported the charge for which the person was detained. . . When an over-detention occurs and the Fourteenth Amendment governs the analysis, a plaintiff must demonstrate that the defendant acted with deliberate indifference to her due-process rights. . . That requires her to show three things: (1) the defendant had subjective knowledge of a risk of serious harm, consisting of continued detention when the plaintiff was entitled to be released; (2) he disregarded that risk; and (3) he did so by conduct that is more than mere negligence. . .As we have noted, we have applied the Fourteenth Amendment analysis in cases involving over-detentions. . . .In all of these cases, we held that the right at issue was the Fourteenth Amendment due-process right to be free from continued detention after law enforcement should have known that the detained person was entitled to release. . . That right, we said, is protected by the Fourteenth Amendment's guarantee of substantive due process. . . After careful consideration of these cases, we conclude that the precise right implicated by the facts Alcocer alleges is the Fourth Amendment right to be free from unreasonable seizures. That is so for two reasons. First, the facts here require this conclusion. In explaining why, we look at the reason for Alcocer's continued detention after she satisfied her bond requirements. Viewing facts in the light most favorable to Alcocer, she remained in jail solely because of suspicion that she was in the United States illegally. The Sheriff's Office staff told Alcocer's sister that she was not being released due to an ICE hold; statements in Alcocer's file, mentioning Defendant Staten, show that her continued detainment was related to an ICE hold; and Alcocer was released almost immediately after an ICE agent notified the Sheriff's Office that Alcocer was in fact a citizen. Any facts that might have underpinned the conclusion that Alcocer was in the United States illegally were not a part of the probable cause that supported Alcocer's original detention, which was for the misdemeanor of driving with a suspended license. For this reason, independent probable cause was required to warrant Alcocer's continued detention after she had satisfied all conditions of her bond on her original detention. . . Second, the law similarly demands this result. The Fourth Amendment provides an explicit source of protection for the right that Defendants allegedly violated. The Fourteenth Amendment does not. Rather, as we have noted, the Fourteenth Amendment right to be free from continued detention after law enforcement should have known

that the person was entitled to release is a substantive-due-process right. . . Where the Constitution 'provides an explicit textual source of constitutional protection' for the violation alleged, we apply the analysis that constitutional provision requires, rather than the analysis dictated by 'the more generalized notion of "substantive due process."'. . Because the Fourth Amendment provides 'an explicit textual source for constitutional protection' under the factual scenario here, it governs. For these reasons, we hold that the district court correctly determined that this case involves the Fourth Amendment right to be free from unreasonable seizures."); ***J W by & through Tammy Williams v. Birmingham Bd. of Educ.***, 904 F.3d 1248, 1259 (11th Cir. 2018) ("The SROs argue that the students improperly asserted their decontamination claims under the Fourth Amendment. As the SROs see it, the students should have proceeded under the Fourteenth Amendment because they were arrestees and/or pre-trial detainees after they were sprayed. . . The students respond that the Fourth Amendment provides the correct framework to analyze their excessive force claims because the inadequate decontamination occurred during the process of arrest, 'moments after the seizure began[,] ... prior to any formal booking, and before pretrial detention began.' . .Generally, the Fourth Amendment protects against the use of excessive force during investigatory stops and arrests, while the Fourteenth Amendment guards against the use of excessive force against arrestees and pretrial detainees. . . Although the Supreme Court has held that 'all claims that law enforcement officers have used excessive force ... in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment,'. . . neither we nor the Supreme Court has decided whether the Fourth Amendment continues to provide individuals with protection from excessive force beyond the point at which an arrest ends and pretrial detention begins, let alone in the school context[.] We need not decide whether the Fourth Amendment or the Fourteenth Amendment governs the students' decontamination claims to resolve the SROs' qualified immunity arguments. Assuming that those claims are properly brought under the Fourth Amendment, and that the SROs violated the Fourth Amendment by not adequately decontaminating the students, the relevant law was not clearly established at the time of the SROs' conduct."); ***Hopper v. Plummer***, 887 F.3d 744, 751-53 (6th Cir. 2018) ("First, we must decide which constitutional guarantee plaintiff's excessive-force claim implicates. An excessive-force claim may arise under the Fourth, Eighth, or Fourteenth Amendments. While the Fourth Amendment's prohibition against unreasonable seizures bars excessive force against free citizens, *see Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989), the Eighth Amendment's ban on cruel and unusual punishment bars excessive force against convicted persons. *See Whitley v. Albers*, 475 U.S. 312, 318–19, 106 S. Ct. 1078, 89 L.Ed.2d 251 (1986). When an individual does not clearly fall within either category, the Fourteenth Amendment's Due Process Clause prohibits a governmental official's excessive use of force. *See Phelps v. Coy*, 286 F.3d 295, 299–300 (6th Cir. 2002). The question is not merely academic because the standards of liability differ depending upon which amendment applies. . . . Richardson was . . . the classic civil contemnor detainee in that he 'carrie[d] the keys of his prison in his own pocket' and could 'end the sentence and discharge himself at any moment by doing what he had previously refused to do' for the benefit of the complainant. . . The Fourteenth Amendment therefore governs plaintiff's excessive-force claim."); ***Otis v. Demarasse***, 886 F.3d 639, 645 (7th Cir. 2018) ("The parties and the district court assumed that Ms. Otis's claim is governed by the Fourteenth Amendment. The

district court viewed Ms. Otis's claim through the lens of *Chapman v. Keltner*, 241 F.3d 842 (7th Cir. 2001). In that decision, we relied on the right to due process and its 'deliberate indifference' standard in analyzing the claims of a plaintiff who was arrested on a warrant. . . We have said, however, that the deliberate indifference standard applies only to persons who have received a judicial determination of probable cause, not to persons arrested without a warrant and waiting to be taken to a judge. *See Ortiz v. City of Chicago*, 656 F.3d 523, 530 (7th Cir. 2011); *Williams v. Rodriguez*, 509 F.3d 392, 403 (7th Cir. 2007); *Lopez v. City of Chicago*, 464 F.3d 711, 718–19 (7th Cir. 2006). . . Ms. Otis was arrested without a warrant, and she had not appeared before a judicial officer for a determination of probable cause for that arrest. Under our cases, therefore, her claim is controlled not by the Fourteenth Amendment but the Fourth. . . . Under the Fourth Amendment, Ms. Otis must show only that Officer Demarasse's conduct was 'objectively unreasonable under the circumstances.'"); ***Estate of Perry v. Wenzel***, 872 F.3d 439, 452-53 (7th Cir. 2017) ("Perry's Amended Complaint contends that he is entitled to relief because the defendants violated his Eighth Amendment rights when they acted with deliberate indifference to his medical needs. But, Perry, who had been in custody for less than 24 hours when he died, never received a probable cause hearing. Therefore, the district court properly concluded that it is the Fourth Amendment, and not the Eighth, that governs Perry's claims. . . So, to succeed on his claim, Perry must demonstrate that the officers' actions were 'objectively unreasonable under the circumstances,' a less demanding standard than the Eighth Amendment's deliberate indifference standard."); ***Bailey v. Feltmann***, 810 F.3d 589, 593 (8th Cir. 2016) ("Bailey first argues that we should analyze his § 1983 claim against Feltmann for denial of medical care under the objective reasonableness standard of the Fourth Amendment. The Fourth Amendment governs an arrestee's claim alleging excessive use of force, *Graham v. Connor,* 490 U.S. 386, 395 (1989), but this court has not resolved whether an arrestee's claim alleging denial of medical care is analyzed under the Due Process Clause or the Fourth Amendment. One recent decision, *Carpenter v. Gage,* 686 F .3d 644, 650 (8th Cir.2012), applied due process analysis to the claim of an arrestee, but the plaintiff there did not invoke the Fourth Amendment, and the issue was not joined. Earlier cases seem to imply—also without discussion of the Fourth Amendment—that the Due Process Clause may govern, *e.g., Spencer v. Knapheide Truck Equip. Co.,* 183 F.3d 902, 905 & n. 3 (8th Cir.1999), and there is a conflict in authority elsewhere about how to evaluate this type of claim. *Compare Ortiz v. City of Chicago,* 656 F.3d 523, 530 (7th Cir.2011) (applying Fourth Amendment), *with Barrie v. Grand Cty.,* 119 F.3d 862, 865–69 (10th Cir.1997) (applying Due Process Clause). For present purposes, it is enough to acknowledge that a right under the Fourth Amendment against unreasonable delay in medical care for an arrestee was not clearly established in March 2012. Neither the Supreme Court nor this circuit had announced such a right, and there is no uniform body of authority that might allow us to conclude that the right was clearly established. Nor was it clearly established that a standard of objective reasonableness applies under the Due Process Clause. *Cf. Kingsley v. Hendrickson,* 135 S.Ct. 2466, 2473 (2015). Feltmann is therefore entitled to qualified immunity on Bailey's claim that Feltmann acted unreasonably, and the district court properly dismissed that portion of the complaint. We think it prudent to avoid addressing the proper constitutional standard unnecessarily. *See Camreta v. Greene,* 131 S.Ct. 2020, 2031 (2011). Bailey argues in the alternative that Feltmann's decision to proceed to the jail rather than to a hospital

exhibited deliberate indifference to his need for medical attention in violation of his clearly established constitutional rights under the Due Process Clause. Regardless of whether an 'unreasonable' decision to forego treatment would violate the Constitution, this court deemed it clearly established by 2008 that a pretrial detainee (or an arrestee, *see Spencer,* 183 F.3d at 905 n. 3) has a right to be free from deliberately indifferent denials of emergency medical care. *See Thompson v. King,* 730 F.3d 742, 750 (8th Cir.2013). Bailey's claim fails, however, because he has not produced sufficient evidence to support a finding that Feltmann violated that right."); ***J.H. ex rel. J.P. v. Bernalillo Cty.,*** 806 F.3d 1255, 1259-60 (10th Cir. 2015) ("J.H.'s Fourteenth Amendment claims are identical to her two Fourth Amendment claims: excessive force and unlawful arrest without probable cause. But the Fourteenth Amendment does not support these claims. We addressed the effect of the Fourteenth Amendment in *Estate of Booker v. Gomez,* 745 F.3d 405 (10th Cir.2014), holding that excessive force claims are governed by the Fourth Amendment, rather than the Fourteenth Amendment, when force is used between a warrantless arrest and a probable cause hearing. . . This holding governs here, for J.H. alleges that Deputy Sharkey arrested J.P. without a warrant and the state courts never provided a hearing on probable cause. Therefore, *Estate of Booker* prevents J.H. from relying on the Fourteenth Amendment for her claim of excessive force."); ***Morabito v. Holmes***, 628 F. App'x 353, 357-58 (6th Cir. 2015) ("Circuits have been divided as to what standard applies, and when, for cases in the 'gray area.' The Sixth Circuit previously set 'the dividing line between the Fourth and Fourteenth Amendment zones of protection at the probable-cause hearing.' *Aldini v. Johnson,* 609 F.3d 858, 867 (6th Cir.2010) (footnote omitted). However, the Supreme Court has recently clarified that no dividing line is necessary. Instead, the Court adopted a bright line rule that 'a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.'. . . Accepting Plaintiff's version of the facts, as we are required to at this stage, provoking an altercation with Morabito out of frustration with his repeated verbal outbursts and demands for medical treatment, ultimately slapping, tasing, and punching Morabito while he was pinned under two officers, does not constitute an objectively reasonable use of force. Further, the constitutional right to be free from such treatment was clearly established long ago."); ***Bonner-Turner v. City of Ecorse***, No. 14-2337, 2015 WL 5332465, at **5 n.2, *10 (6th Cir. Sept. 14, 2015) (not reported) ("Plaintiff asks this court to analyze the medical care claims under the Fourth Amendment's objective reasonableness standard because Turner was a warrantless arrestee who had yet to have a probable cause hearing. Our court has not resolved whether the Fourth Amendment's objective reasonableness standard or the more onerous Fourteenth Amendment deliberate indifference standard governs claims for failure to provide medical care prior to a probable cause determination. *See Boone v. Spurgess,* 385 F.3d 923, 933–34 (6th Cir.2004); *Estate of Carter v. City of Detroit,* 408 F.3d 305, 311 n.3 (6th Cir.2005); *Smith v. Erie Cnty. Sheriff's Dep't,* 603 F. App'x 414, 418–19 (6th Cir.2015); *see also Aldini v. Johnson,* 609 F.3d 858, 864 (6th Cir.2010) (holding that the Fourth Amendment governs excessive force claims arising beyond the time of arrest until a probable cause hearing). In this case, because plaintiff survives summary judgment under the more demanding deliberate indifference standard, we do not resolve which standard governs. . . . The Fourth Amendment's objective reasonableness standard governs claims for excessive physical force during the course of an arrest, booking, and until a probable cause determination."); ***Schoettle***

v. Jefferson Cnty., 788 F.3d 855, 861 n.4 (8th Cir. 2015) ("We analyzed Carpenter's deliberate indifference claim under the Due Process Clause of the Fourteenth Amendment and under the Eighth Amendment, because the deliberate indifference was alleged to have occurred *after* Carpenter's arrest. . . Schoettle's excessive force claim is properly brought under the Fourth Amendment as it concerns *pre*-arrest conduct, and is therefore governed by the *Graham* standard enunciated *supra.*"); ***Valderrama v. Rousseau***, 780 F.3d 1108, 1121 n.16 (11th Cir. 2015) ("Although *Lancaster* involved an inmate, not an arrestee, 'decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees.' *Cottrell v. Caldwell,* 85 F.3d 1480, 1490 (11th Cir.1996)."); ***Smith v. Erie Cnty. Sheriff's Dep't,*** 603 F. App'x 414, 425 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result) ("The Fourteenth Amendment controls here. Stallard had not received a probable cause hearing, and the district court erred by applying a formalistic chronological approach to hold that the Fourth Amendment applied. The Fourth Amendment provides in part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' U.S. Const. amend. IV. However, the interaction here between state agents and the decedent had nothing to do with either a 'search' or a 'seizure.' So the officers' conduct pertaining to any medical matters is examined under the Fourteenth Amendment Due Process Clause, which provides, that '[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.'. . The Due Process Clause requires police officers to provide adequate medical care to individuals in police custody prior to a criminal conviction. *See Revere v. Mass. Gen. Hosp.,* 463 U.S. 239, 244 (1983); *Phillips v. Roane Cnty.,* 534 F.3d 531, 539 (6th Cir.2008). A person's right to adequate medical care is violated if the police acted with 'deliberate indifference to serious medical needs.'"); ***Tatum v. Moody***, 768 F.3d 806, 814-21 (9th Cir. 2014) ("We hold that the Constitution does protect Walker from prolonged detention when the police, with deliberate indifference to, or in the face of a perceived risk that, their actions will violate the plaintiff's right to be free of unjustified pretrial detention, withhold from the prosecutors information strongly indicative of his innocence, and so affirm. . . Moody and Pulido first assert that 'the Fourth Amendment, not the Due Process Clause of the Fourteenth Amendment[,] governs a pretrial loss of liberty.' Not so. *Rivera v. County of Los Angeles* squarely rejected that proposition earlier this year. 745 F.3d 384 (9th Cir.2014). As *Rivera* explained, '[p]recedent demonstrates ... that postarrest incarceration is analyzed under the Fourteenth Amendment alone.' *Id.* 389–90 (citing *Baker v. McCollan,* 443 U.S. 137, 145 (1979); *Lee v. City of L.A.,* 250 F.3d 668, 683–85 (9th Cir.2001)). . . On that ground, *Rivera* rejected a claim, brought under § 1983, that the plaintiff's post-arrest incarceration on the basis of a warrant naming another man, after jailors should have known of the error, violated the Fourth Amendment. . . *Rivera* forecloses Moody and Pulido's Fourth Amendment-based argument here. . . . To resolve this appeal, we need not decide the scope of the protections established by *Brady* and its progeny, because Walker's claim sounds in the right first alluded to in *Baker,* 443 U.S. 137, not *Brady.* Where, as here, investigating officers, acting with deliberate indifference or reckless disregard for a suspect's right to freedom from unjustified loss of liberty, fail to disclose potentially dispositive exculpatory evidence to the prosecutors, leading to the lengthy detention of an innocent man, they violate the due process guarantees of the Fourteenth Amendment. . . . We emphasize the narrowness of the constitutional

rule we enforce today, which is restricted to detentions of (1) unusual length, (2) caused by the investigating officers' failure to disclose highly significant exculpatory evidence to prosecutors, and (3) due to conduct that is culpable in that the officers understood the risks to the plaintiff's rights from withholding the information or were completely indifferent to those risks. . . . Here, Walker was detained for 27 months after preliminary hearings that, as noted, offered him no protection from Moody and Pulido's misconduct, because the exculpatory information was withheld both before and after the hearings. That period of time, under any measure, is sufficiently lengthy to trigger the narrow due process right at issue here. . . . We can assume here that this sort of due process claim is actually triggered by the failure to disclose evidence that is not merely material but *strongly* indicative of the plaintiff's innocence. . . . In the context of a § 1983 suit against police officers for a due process violation, official conduct violates due process 'only when [it] "shocks the conscience,"' a standard satisfied in circumstances such as these by conduct that either consciously or through complete indifference disregards the risk of an unjustified deprivation of liberty.); ***King v. Kramer***, 763 F.3d 635, 648 (7th Cir. 2014) (In case regarding medical care provided to a pretrial detainee awaiting a probable cause determination, court finds "that the district court abused its discretion in ordering that the case be tried under the incorrect Eighth Amendment [deliberate indifference] standard." Court reversed, and directed that the motion for a new trial be granted and jury be instructed under standard of objective reasonableness.); ***Estate of Booker v. Gomez***, 745 F.3d 405, 419-21 (10th Cir. 2014) ("Determining which amendment applies to an allegation of excessive force requires consideration of 'where the [plaintiff] finds himself in the criminal justice system.'. . Any force used 'leading up to and including an arrest' may be actionable under the Fourth Amendment's prohibition against unreasonable seizures. . . By contrast, claims of excessive force involving convicted prisoners arise under the Eighth Amendment. . . 'And when neither the Fourth nor Eighth Amendment applies—when the plaintiff finds himself in the criminal justice system somewhere between the two stools of an initial seizure and post-conviction punishment—we turn to the due process clauses of the Fifth or Fourteenth Amendment and their protection against arbitrary governmental action by federal or state authorities.'. .It is therefore well-established that the Fourteenth Amendment governs any claim of excessive force brought by a 'pretrial detainee'—one who has had a 'judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.'. . For similar reasons, we have also concluded that the Fourteenth Amendment standard 'controls excessive force claims brought by federal immigration detainees.'. .On the other hand, we have held that the Fourth Amendment, not the Fourteenth, governs excessive force claims arising from 'treatment of [an] arrestee detained *without a warrant* ' and '*prior to* any probable cause hearing.'. . .In this case, unlike the plaintiff in *Austin*—where the excessive force occurred before a probable cause determination and thus constituted a continuing seizure under the Fourth Amendment, . . . Mr. Booker was arrested pursuant to a warrant based on probable cause for failing to appear at a court proceeding in conjunction with drug charges. Although there was no probable cause determination on the drug charges, there was a probable cause determination for Mr. Booker's failure to appear. In this important respect, our holding in *Austin* does not control this case. After the officers arrested Mr. Booker and brought him into the 'cooperative seating area' for booking, he was a 'pretrial detainee.' Like the immigration detainee in *Porro* whose excessive

force claim arose under the Fourteenth Amendment because he did not 'dispute that he had been lawfully seized and detained,'. . . Mr. Booker's claim is governed by the Fourteenth Amendment's Due Process Clause. Accordingly, we hold the Fourteenth Amendment standard governs excessive force claims arising from post-arrest and pre-conviction treatment if the arrestee has been taken into custody pursuant to a warrant supported by probable cause."); ***Blackmon v. Sutton***, 734 F.3d 1237, 1239-43 (10th Cir. 2013) ("The jurisprudential terrain between arrest and conviction remains today only partially charted. Over the last several decades, the Supreme Court has elaborated in considerable detail the standards of care prison administrators must satisfy to avoid inflicting 'cruel and unusual' punishment on convicted prisoners in violation of the Eighth Amendment. . . The Court has, as well, expounded on what force officers may and may not use to effect an arrest consistent with the Fourth Amendment and its prohibition of 'unreasonable searches and seizures.'. . But at least so far the Court has done comparatively little to clarify the standards of care due to those who find themselves between these stools—held by the government after arrest but before conviction at trial. . .We know that after the Fourth Amendment leaves off and before the Eighth Amendment picks up, the Fourteenth Amendment's due process guarantee offers detainees some protection while they remain in the government's custody awaiting trial. . . But we do not know where exactly the Fourth Amendment's protections against unreasonable searches and seizures end and the Fourteenth Amendment's due process detainee protections begin. Is it immediately after arrest? Or does the Fourth Amendment continue to apply, say, until arraignment? Neither do we know with certainty whether a single standard of care applies to all pretrial detainees—or whether different standards apply depending where the detainee stands in his progress through the criminal justice system. Might, for example, the accused enjoy more due process protection before a probable cause hearing than after? All these questions remain very much in play. . .The defendants make much of these lingering questions, going so far as to suggest they preclude the possibility they could have violated the clearly established legal right of any pretrial detainee in 1997, the time of the events in question in this lawsuit. But that argument proves a good deal too much. In the defendants' world, officials who engaged in sadistic and malicious conduct in 1997 would have violated the defined rights of convicted inmates, but the same conduct would not have violated the rights of pretrial detainees because of the comparative ambiguity surrounding their rights. Though the law of pretrial detention may not have been precise in all its particulars in 1997, though it may remain comparatively ambiguous today, things have never been quite as topsy turvy as that. Pretrial detainees are not men without countries, persons without *any* clearly defined legal rights. By 1997, it was beyond debate that a pretrial detainee enjoys *at least* the same constitutional protections as a convicted criminal. . . Conduct that violates the clearly established rights of convicts necessarily violates the clearly established rights of pretrial detainees. By 1997, it was clearly established as well that prison officials run afoul of the Eighth Amendment's prohibition of cruel and unusual punishments when they exhibit 'deliberate indifference' to a convicted inmate's 'serious medical needs.'. . It was clearly established, too, that *Estelle's* standard gives way to a more onerous test when 'guards use force to keep order.'. . In deference to the need to maintain order in a prison environment, liability will not attach in these particular circumstances unless the challenged force is 'applied ... maliciously and sadistically for the very purpose of causing harm.'. .Neither is this the end to what we know with certainty about

the state of the law in 1997 regarding pretrial detainees. By then the Supreme Court had held that the Fourteenth Amendment's guarantee of due process prohibits *any* punishment of those awaiting trial. Punishment may be constitutionally acceptable for persons convicted of crimes—at least so long as it doesn't amount to 'cruel and unusual' punishment as defined by *Estelle* and *Hudson.* But punishment is *never* constitutionally permissible for presumptively innocent individuals awaiting trial. . . Where exactly do we draw the line between what does and doesn't constitute 'punishment'? Historically, the government has enjoyed the authority to detain until trial those defendants who pose a flight risk. And no doubt those who find themselves detained in this manner experience a great many restrictions on their liberty—restrictions many of us would regard as punishment in themselves. But when do these restrictions pass, as a matter of law, from constitutionally acceptable to constitutionally impermissible? *Bell* tells us the answer turns on the answers to two questions. First, we must ask whether an 'expressed intent to punish on the part of detention facility officials' exists. . . If so, liability may attach. If not, a plaintiff may still prove unconstitutional punishment by showing that the restriction in question bears no reasonable relationship to any legitimate governmental objective. . . .With these (clearly established) legal principles in hand, we can now turn to Mr. Blackmon's primary complaint: the many hours he spent shackled to the Pro–Straint chair. The district court analyzed his claim under *Hudson's* demanding Eighth Amendment 'malicious and sadistic' test for cruel and unusual punishments—and, even then, it found that Mr. Blackmon succeeded in stating a triable claim. We don't need to travel so far, however, to reach the same destination. While *Hudson* forbids a certain class of punishments for convicted prisoners (cruel and unusual ones), *Bell* forbids punishment altogether for pretrial detainees like Mr. Blackmon. And there is ample evidence in this case that the defendants at least sometimes used the Pro–Straint chair to punish their young charge. To be very clear, we do not doubt that the defendants often had a legitimate (nonpunitive) purpose for using the chair, or that its use was often reasonably related to that purpose. While awaiting trial—on charges of rape that were eventually thrown out—Mr. Blackmon was deeply distraught. The eleven-year-old attempted suicide and repeatedly banged his head dangerously against walls. No one disputes that the defendants had a legitimate interest in restraining him from these attempts at self-harm. Neither do we understand Mr. Blackmon to suggest that the use of restraints like the Pro–Straint chair is never a reasonable way to achieve this legitimate purpose. Indeed, we are confident Mr. Blackmon remains alive today thanks to the intervention of facility staff and they are due no small measure of credit for that. The problem is that the factual record in this case points in more than one direction. Much of it suggests that the defendants usually used the restraint chair in a reasonable effort to prevent Mr. Blackmon from killing or seriously injuring himself. But viewing the record in the light most favorable to Mr. Blackmon as we must, it *also* suggests the defendants *sometimes* shackled him with the express purpose of punishing him, in clear violation of *Bell's* first test. At least one defendant allegedly instructed others—openly—to use the chair as 'punishment.' The record evidence suggests the possibility, too, that on other occasions officials shackled Mr. Blackmon without *any* legitimate penological purpose, in clear violation of *Bell's* second test. Sometimes, Mr. Blackmon alleges, he was shackled to the chair for long stretches when there was no hint he posed a threat of harming himself or anyone else. Other times, Mr. Blackmon was placed in the chair because of a legitimate threat of self-harm but then arguably kept there for extensive

periods after any threat of self-harm had dissipated. On one occasion, too, the boy was stripped out of his clothes and forced to wear a paper gown while restrained in the chair. All of this, says Mr. Blackmon's expert, left him with severe mental health problems. And in *none* of these instances does the record appear to reveal a legitimate penological reason for the defendants' actions. The district court held that facts like these preclude the entry of qualified immunity at summary judgment and we cannot disagree. By 1997, the defendants were on notice that they could not use restraints with the express purpose of punishing or without *some* legitimate penological purpose in mind. Yet the record here suggests they may have used restraints in both forbidden ways at least some of the time. In fact, as the district court observed, by 1997 this court had already held that the use of force without any 'disciplinary rationale' runs afoul even of the Eighth Amendment's protections for convicted prisoners. . . Under *Bell* and the Fourteenth Amendment, surely no less could have been said by then for pretrial detainees."); ***Currie v. Chhabra***, 728 F.3d 626, 628-32 (7th Cir. 2013) ("Currie filed her initial complaint on October 14, 2009, naming as defendants various jail officials, Williamson County, Chhabra and Reynolds, and Health Professionals, Ltd. The initial iterations of her complaint alleged that the defendants acted with 'deliberate indifference' to Okoro's medical needs, suggesting a claim that the defendants violated Okoro's due process rights under the Fourteenth Amendment. . . At the close of discovery, however, in response to the defendants' motion for summary judgment, Currie argued for the first time that the Fourth Amendment's 'objectively unreasonable' standard should govern. . . . Upon receipt of Currie's revised complaint alleging 'objectively unreasonable' conduct, Chhabra, Reynolds, and Health Professionals filed a motion to dismiss, asserting qualified immunity 'because the Fourth Amendment has not been applied to licensed medical professional[s] subcontracted to care for state detainees.' The court denied this motion. Only Chhabra and Reynolds are before us on appeal. . . . The defendants' real argument is that the Fourth Amendment *never* governs constitutional claims alleging inadequate provision of medical care to an arrestee by a nurse or doctor, regardless of the defendant's employment arrangement. Although the Supreme Court has provided relatively little guidance regarding the constitutional rights of arrestees and pretrial detainees, . . . this court's cases foreclose the defendants' argument. [discussing cases] The defendants attempt to distinguish *Ortiz, Williams,* and *Sides* as cases involving the objectively unreasonable denial of medical care by *jailers,* not the objectively unreasonable provision of medical care by *doctors and nurses.* A jailer might violate an arrestee's Fourth Amendment rights by unreasonably denying the arrestee access to insulin, the defendants urge, but a health care professional who unreasonably withholds insulin does not. This argument lacks support in law or logic. . . . True, the named defendants in our earlier Fourth Amendment medical-care cases were 'lockup keepers' (*Ortiz* and *William*) and police detectives (*Lopez*), but from the perspective of the arrestee, it matters not a whit whether it is the jailer or the doctor whose conduct deprives him of life-saving medical care. This is why our Fourth Amendment cases speak broadly of claims involving the '*provision* of medical care,'. . . not simply the '*denial* of medical care by a jailer' (as the defendants would have it). . . . The defendants next argue that even if their conduct violated Okoro's Fourth Amendment rights, qualified immunity is proper because no previous decision 'applied the Fourth Amendment to analyze the reasonableness of health care provided by contracted medical professionals to arrestees being held by the police in jail.' If there

is any lack of clarity in our previous cases, however, it is only with respect to the threshold issue whether the defense of qualified immunity is *ever* available to private medical care providers like the defendants. . . .The Supreme Court recently considered the question whether 'an individual hired by the government to do its work is prohibited from seeking [absolute or qualified] immunity, solely because he works for the government on something other than a permanent or full-time basis.'. . It held that 'immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.'. . On the other hand, the *Filarsky* Court reaffirmed the holding of *Richardson* categorically rejecting immunity for the private prison employees there; in so doing, the Court emphasized that the incentives of the private market suffice to protect employees when 'a private firm, systematically organized to assume a major lengthy administrative task ... for profit and potentially in competition with other firms,' assumes responsibility for managing an institution. . . In a detailed opinion tracking the Court's analysis in *Filarsky,* the Sixth Circuit recently held that a doctor providing psychiatric services to inmates at a state prison is not entitled to assert qualified immunity. *McCullum v. Tepe,* 693 F.3d 696 (6th Cir. 2012) (discussing the historical roots of immunity for similarly situated parties and the history and purpose of § 1983); see also *Hasher v. Hayman,* 2013 WL 1288205 (D.N.J. Mar. 27, 2013) (private medical employees failed to establish that they are entitled to assert a qualified immunity defense, 'even after *Filarsky*'). We find the Sixth Circuit's reasoning persuasive, though we need not definitively decide the issue today; even if our defendants were entitled to seek qualified immunity as a general matter, we would conclude that the defense is not applicable here. The contours of Okoro's Fourth Amendment rights were 'sufficiently clear that a reasonable official would understand that what he is doing violates that right' throughout the period of Okoro's detention. . . . As we already have explained, nothing in our opinions hints at some special Fourth Amendment exemption for health care professionals . . . . It was 'quite clear' in 2004, we said, 'that the Fourth Amendment protects a person's rights until she has had a probable cause hearing.'. . It was no less clear in December 2008, when Okoro collapsed in his cell, that the same Fourth Amendment standard applies to the wrongdoing alleged here."); ***Carpenter v. Gage***, 686 F.3d 644, 650 (8th Cir. 2012) ("Carpenter also argues that the deputies exhibited deliberate indifference to his medical needs in violation of his constitutional rights. Because the alleged violation occurred after Carpenter was arrested, our cases suggest that it is properly analyzed under the Due Process Clause of the Fourteenth Amendment. *McRaven v. Sanders,* 577 F.3d 974, 979 (8th Cir.2009); *Spencer v. Knapheide Truck Equipment Co.,* 183 F.3d 902, 905 & n. 3 (8th Cir.1999); *cf. Graham,* 490 U.S. at 395 n. 10 (noting an unresolved question whether the Fourth Amendment applies to an excessive force claim after an arrest ends and pretrial detention begins). Carpenter cites authorities applying due process analysis, and he does not invoke the Fourth Amendment, so we consider his argument on that basis. *But cf. Ortiz v. City of Chi.,* 656 F.3d 523, 530 (7th Cir.2011); *Barrie v. Grand County, Utah,* 119 F.3d 862, 870–71 (10th Cir.1997) (Briscoe, J., dissenting)."); ***Ortiz v. City of Chicago***, 656 F.3d 523, 530, 531 (7th Cir. 2011) ("Before delving into the facts, the court determined that the Fourth Amendment's reasonableness standard governs this inquiry, rather than the deliberate indifference standard derived from the Eighth Amendment and applied to claims from detainees awaiting a trial by virtue of the Due Process Clause. Because Molina had not yet benefitted from a judicial determination

of probable cause, otherwise known as a *Gerstein* hearing, we agree that the Fourth Amendment applies. . . . Each state actor who encounters a detainee must reasonably respond to medical complaints; a detainee cannot be treated like a hot potato, to be passed along as quickly as possible to the next holder. The duty to respond reasonably to an arrestee's medical needs is affected by any police policies that may endanger the well-being of those in custody. Here, the CPD's policy of prohibiting detainees from taking medication in lockup unless the individual is transported to Cermak Hospital is central to our inquiry. We have no occasion to comment on whether that policy is wise as a general matter, but its existence cannot be ignored. When a state actor detains a known diabetic in a facility that separates her from the drugs that keep her alive, it must take her medical needs into account in deciding what justifies a trip to the hospital. Presumably, at least part of the function served by creating a screening record for each detainee upon arrival is to gain the information about her health status that is needed to ensure that she remains safe while in custody. In short, in cases like this we must consider everything that each officer knew about Molina's deteriorating health in light of the amount of time she was in custody and the CPD's policy that detainees could not obtain any medication unless they were sent to the hospital."); ***Chambers v. Pennycook***, 641 F.3d 898, 905 (8th Cir. 2011) ("At oral argument, counsel for two of the officers asserted that Chambers's claim against them does not arise under the Fourth Amendment, because the Fourth Amendment applies only up to the point of arrest. We have noted the existence of a 'legal twilight zone' between arrest and sentencing, where it is unclear whether excessive force claims are governed by the Fourth Amendment or cases decided based on the Fourteenth Amendment and substantive due process. [citing *Wilson v. Spain*] This court has ruled, however, that it is appropriate to use a Fourth Amendment framework to analyze excessive force claims arising out of incidents occurring shortly after arrest, apparently because those incidents still occur 'in [the] course of' a seizure of a free citizen. . . In particular, we have applied Fourth Amendment excessive force standards to incidents occurring during the transportation, booking, and initial detention of recently arrested persons. . . The alleged excessive force here occurred during and shortly after Chambers's arrest, while he was on the floor of the apartment where police encountered him and while he was transported to the hospital for a medical evaluation as part of the detainee intake process. Our cases therefore dictate that the claims against the officers are governed by the Fourth Amendment."); ***Sallenger v. City of Springfield, Ill***., 630 F.3d 499, 503 (7th Cir. 2010) ("The Estate claimed that Officers Zimmerman, Oakes, and Oliver failed to adequately respond when Sallenger stopped breathing after being hobbled. The Fourth Amendment's objective reasonableness standard applies; the Estate's claim pertains to the medical needs of a person under arrest who has not yet had a judicial determination of probable cause."); ***Aldini v. Johnson***, 609 F.3d 858, 860, 865 n.6, 867 (6th Cir. 2010) ("The most important question before us is whether the Fourth or the Fourteenth Amendment applies to pre-trial detainees in the process of booking but after they are no longer in the custody of the arresting officer. The Supreme Court has deliberately left the question of what law protects these post-arrest, pre-conviction detainees vague, and we have never addressed this precise question. We find that the Fourth Amendment protects pre-trial detainees arrested without a warrant through the completion of their probable-cause hearings and thus find that the district court erred in applying the Fourteenth Amendment. . . . . The majority of circuits hold that the Fourth Amendment applies until an

individual arrested without a warrant appears before a neutral magistrate for arraignment or for a probable cause hearing or until the arrestee leaves the joint or sole custody of the arresting officer or officers. [collecting cases] . . . . Placing the dividing line at the probable-cause hearing for those arrested without a warrant does. . . have a basis in Supreme Court precedent. The Court noted in *dicta* in *Wolfish* that individuals who have *not* had a probable-cause hearing are not yet pretrial detainees for constitutional purposes. . .Thus, unlike the arrestee's transfer out of the arresting officer's custody or the completion of booking procedures, the probable-cause hearing is a judicial proceeding that affects the 'legal status' of the arrestee, constitutionally authorizing his detention throughout the proceedings against him, just as a guilty verdict affects his 'legal status' by authorizing his detention for the duration of his sentence. . . . We therefore join the Ninth and Tenth Circuits in setting the dividing line between the Fourth and Fourteenth Amendment zones of protection at the probable-cause hearing. . . .In this case, it is undisputed that the beating and tasing took place in the middle of the booking procedure, because Aldini's photograph had not yet been taken, and prior to a probable-cause hearing. Thus, the district court erred in applying the Fourteenth Amendment standard to an arrestee detained following a warrantless arrest prior to a probable-cause hearing."); ***Hill v. Carroll County, Miss***., 587 F.3d 230, 237, 238 (5th Cir. 2009) ("Hill includes failing to monitor Loggins within her Fourth Amendment unreasonable seizure claim. . . .This claim sounds not in the Fourth Amendment but in the Fourteenth. *See Nerren v. Livingston Police Department,* 86 F.3d 469, 473 (5th Cir.1996) ("[a]fter the initial incidents of a seizure have concluded and an individual is being detained by police officials but has yet to be booked, an arrestee's right to medical attention, like that of a pre-trial detainee, derives from the Fourteenth Amendment"). Although the panel in *Gutierrez* suggests otherwise, 139 F.3d at 452, a later panel of this court cannot overrule an earlier panel decision. *Harvey v. Blake*, 913 F.2d 226, 228 n. 2 (5th Cir.1990); *see also Wagner*, 227 F.3d at 324-25 (applying Fourteenth Amendment). *Nerren,* as the earlier decision, therefore controls. The claim for failure to monitor is, at its heart, the failure to provide medical attention due to insufficient monitoring."); ***Drogosch v. Metcalf***, 557 F.3d 372, 378 (6th Cir. 2009) ("But it is the Fourth, rather than the Fourteenth, Amendment that applies to this case because 'the Fourth Amendment governs the period of confinement between arrest without a warrant and the preliminary hearing at which a determination of probable cause is made, while due process regulates the period of confinement after the initial determination of probable cause.' *Villanova v. Abrams*, 972 F.2d 792, 797 (7th Cir.1992). Because Drogosch was never provided with an initial determination of probable cause, we conclude that the Fourth Amendment governs the rights at stake in the present case."); ***Orem v. Rephann***, 523 F.3d 442, 445, 446 (4th Cir. 2008) ("Here, the district court analyzed Orem's claim that Deputy Rephann used excessive force under the Fourth Amendment's 'objective reasonableness standard.' However, we have made clear that Fourth Amendment protections do not extend to arrestees or pretrial detainees. *Riley v. Dorton*, 115 F.3d 1159 (4th Cir.1997) (*en banc*). Indeed, in *Riley*, we held that '[t]he Fourth Amendment [only] governs claims of excessive force during the course of an arrest, investigatory stop, or other'seizure' of a person.'. . Whereas, 'excessive force claims of a pretrial detainee [or arrestee] are governed by the Due Process Clause of the Fourteenth Amendment.'. . The point at which Fourth Amendment protections end and Fourteenth Amendment protections begin is often murky. But here, Orem's excessive force claim arises

during her transport to EJR, after she was arrested. While she had not been formally charged, her status as an arrestee requires application of the Fourteenth Amendment to her claim. The district court erred in applying the Fourth Amendment."); ***Williams v. Rodriguez***, 509 F.3d 392, 402, 403 (7th Cir. 2007) ("Although Williams's deliberate indifference claim fails under the Fourteenth Amendment analysis, it is worth noting that while this suit was before the district court, this court recognized in *Lopez v. City of Chicago* that the Fourteenth Amendment's due process protections only apply to a pretrial detainee's confinement conditions after he has received a judicial determination of probable cause. *Lopez v. City of Chicago*, 464 F.3d 711, 719 (7th Cir.2006). Claims regarding conditions of confinement for pretrial detainees such as *Williams*, who have not yet had a judicial determination of probable cause (a *Gerstein* hearing), are instead governed by the Fourth Amendment and its objectively unreasonable standard. . . . The *Lopez* decision came out nearly two months before the district court granted defendants' summary judgment motion in this case, and *Williams* has waived any Fourth Amendment claim by failing to amend or supplement his motion for summary judgment or raise the issue on appeal Without offering any opinion as to whether Williams's deliberate indifference claim would have been successful under a Fourth Amendment analysis, we do note that the deliberate indifference standard under the Eighth and Fourteenth Amendments requires a higher showing on a plaintiff's part than is necessary to prove an officer's conduct was 'objectively unreasonable under the circumstances.' . . . What is 'objectively unreasonable' in the context of a medical needs case has been further clarified by this court in *Sides v. City of Champaign*, 496 F.3d 820 (7th Cir.2007). In that case, the plaintiff was ordered out of his vehicle by police and made to stand against the fender of his car, which was hot, on a ninety degree day for approximately one hour. . . This led the plaintiff to complain to the officers of dizziness, dehydration, and soreness, but the officers did not permit the plaintiff to move. . . The reasoning underlying this court's determination that the officers did not violate the plaintiff's Fourth Amendment rights implicitly identified four factors that are relevant for ascertaining whether a defendant's conduct was objectively unreasonable. . . The first is that the officer be given notice of the arrestee's medical need, whether by word as occurred in *Sides*, or through observation of the arrestee's physical symptoms. . . Second, the court in *Sides* considered the seriousness of the medical need, in that case noting that the plaintiff's complaints were not accompanied by any physical symptoms. . . The severity of the medical condition under this standard need not, on its own, rise to the level of objective seriousness required under the Eighth and Fourteenth Amendment. Instead, the Fourth Amendment's reasonableness analysis operates on a sliding scale, balancing the seriousness of the medical need with the third factor − the scope of the requested treatment. In *Sides* for example, the court noted that the plaintiff was partially responsible for his lengthy detention outdoors, since he insisted that the officers not charge him at all, rather than requesting that the officers take him to the station house or write him a citation immediately. . . Finally, police interests also factor into the reasonableness determination. This factor is wide-ranging in scope and can include administrative, penological, or investigatory concerns. *Sides* reflected the latter of these interests, with the court emphasizing the importance of an on-site investigation and noting that the officers did not prolong the plaintiff's detention once this investigation was completed. . . Again, we offer no opinion as to whether defendants' conduct violated Williams's Fourth Amendment rights under this multi-factor

analysis, but for the reasons discussed above, Williams has failed to meet the higher burden of showing that Officer Rodriguez was deliberately indifferent to an objectively serious medical condition."); ***Sides v. City of Champaign***, 496 F.3d 820, 827, 828 (7th Cir. 2007) ("Sides claims that the officers were deliberately indifferent to his serious medical needs during his detention in the parking lot. All of the briefs use the 'deliberate indifference' approach from jurisprudence under the Eighth Amendment, . . . but that provision does not apply until a suspect has been convicted. The governing standard at the time of arrest is the Fourth Amendment's ban on unreasonable seizures. . . . . Although *Chapman v. Keltner*, 241 F.3d 842, 845 (7th Cir.2001), asks whether the officers' conduct at the time of arrest evinced 'deliberate indifference to a serious injury or medical need,' the parties to *Chapman* did not join issue on the proper standard or discuss the bearing of *Graham* and *Bell* on contentions of this kind. A decision that employs a mutual (and mutually mistaken) assumption of the parties without subjecting it to independent analysis does not constitute a holding on the subject. *Chapman* should not be understood as extending the domain of Eighth Amendment analysis beyond the bounds set by *Graham* and *Bell*."); ***Tatum v. City & Cty. of San Francisco***, 441 F.3d 1090, 1098-99 (9th Cir. 2006) ("Just as the Fourth Amendment does not require a police officer to use the least intrusive method of arrest, . . . neither does it require an officer to provide what hindsight reveals to be the most effective medical care for an arrested suspect. Prior to its holding in *Graham,* that '*all* claims that law enforcement officers have used excessive force ... should be analyzed under the Fourth Amendment,'. . . the Supreme Court said that the Due Process Clause requires the provision of medical care to 'persons ... who have been injured while being apprehended by the police.' *City of Revere v. Mass. Gen. Hosp.,* 463 U.S. 239, 244, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983) (holding that city had a constitutional obligation to provide medical care to a person injured during an arrest, and that the city satisfied its duty to provide medical care by taking an injured suspect to a hospital). Likewise, before *Graham,* we said that '[d]ue process requires that police officers seek the necessary medical attention for a detainee when he or she has been injured while being apprehended by either promptly summoning the necessary medical help or by taking the injured detainee to a hospital.' *Maddox v. City of Los Angeles,* 792 F.2d 1408, 1415 (9th Cir.1986). Although it was decided before *Graham,* we think that *Maddox* sets the standard for objectively reasonable post-arrest care. Accordingly, we hold that a police officer who promptly summons the necessary medical assistance has acted reasonably for purposes of the Fourth Amendment, even if the officer did not administer CPR. *See Maddox,* 792 F.2d at 1415 ('We have found no authority suggesting that the due process clause establishes an affirmative duty on the part of police officers to render CPR in any and all circumstances.')."); ***Hicks v. Moore***, 422 F.3d 1246, 1254 n.7 (11th Cir. 2005)("'Claims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause,' and require a showing of deliberate indifference to a substantial risk of serious harm. . .Plaintiff asserts protection under the Fourth Amendment standard, which is commonly an easier standard for a plaintiff to meet. At the time of the fingerprinting, Plaintiff had already been arrested, delivered to the Jail, and had begun − but not completed − the booking process. The original arresting officer had turned Plaintiff over to jailers, and he was not present during and did not participate in the events underlying the complaint. The precise point at which a seizure ends (for purposes of Fourth Amendment

coverage) and at which pretrial detention begins (governed until a conviction by the Fourteenth Amendment) is not settled in this Circuit. We underline that Defendants never argue that the strip search or fingerprinting was separate from Plaintiff's seizure; so we − will assume (for this case) Plaintiff was still being seized and − analyze the claim under the Fourth Amendment."); ***Bryant v. City of New York,*** 404 F.3d 128, 136 (2d Cir. 2005) ("The Fourth Amendment, which applies to the states through the Fourteenth Amendment. . . prohibits 'unreasonable ... seizures,' U.S. Const. amend IV. Indisputably, an arrest is a seizure. Further, although plaintiffs would have us rule that a 'seizure' within the meaning of the Fourth Amendment consists only of the initial act of physical restraint, and nothing thereafter . . . , it is well established that the Fourth Amendment governs the procedures applied during some period following an arrest. . . . . Accordingly, given that plaintiffs complain that defendants' failure to issue them desk appearance tickets unconstitutionally prolonged their respective periods of postarrest detention, we turn to Fourth Amendment principles."); ***Boone v. Spurgess,*** 385 F.3d 923, 933, 934 (6th Cir. 2004) ("An allegation by Boone that Moyer had used excessive force against him after his arrest would therefore be a Fourth Amendment question: was the continuing seizure of Boone reasonable? A seizure can be 'unreasonable' for any number of reasons, and the guarantee of reasonableness in the manner of a seizure does not seem to allow for a distinction between a claim that an officer used excessive force and a claim that the same officer denied medical care to a detainee. In *Graham* itself, the excessive force claim was partially based on the officers' refusal to provide medical care to a handcuffed suspect suffering from a diabetic attack. . . At least one circuit has therefore applied the Fourth Amendment's guarantee of 'reasonable' seizures to a claim that police failed to provide adequate medical care to a suspect in their custody. *See Estate of Phillips v. City of Milwaukee,* 123 F.3d 586, 595-96 (7th Cir.1997). *But see Barrie v. Grand County*, 119 F.3d 862, 865-69 (10th Cir.1997). None of our prior cases speak directly to this issue, although we have in the past used the Fourteenth Amendment even where the suspect was still technically 'seized' under the continuing seizure doctrine, without noting the conflict. *See, e.g., Weaver,* 340 F.3d at 410; *Lily v. Watkins,* 273 F.3d 682, 685-86 (6th Cir.2001). District courts in the circuit have split on the issue. *Compare Estate of Owensby v. City of Cincinnati,* No. 1:01-CV-00769, 2004 U.S. Dist. LEXIS 9444, *42-*60 (S.D.Ohio May 19, 2004) (using substantive due process) *with Alexander v. Beale St. Blues Co.,* 108 F.Supp.2d 934, 940-41 (W.D.Tenn.1999) (using reasonableness standard and relying on *Estate of Phillips,* 123 F.3d at 595-96). Ultimately, there seems to be no logical distinction between excessive force claims and denial of medical care claims when determining the applicability of the Fourth Amendment. Because we conclude that under either standard, Boone has not made out a claim, we do not decide this issue, but instead reserve it for a more appropriate case."); ***Garrett v. Athens-Clarke County***, 378 F.3d 1274, 1279 n.11 (11th Cir. 2004) ("Defendants argue we should analyze the excessive force claims under the rubric of the Fourteenth Amendment, not the Fourth Amendment. We disagree. The excessive force claims arise from events happening in the course of the arrest. . . . Although the line is not always clear as to when an arrest ends and pretrial detainment begins, the facts here fall on the arrest end. *See Gutierrez v. City of San Antonio,* 139 F.3d 441, 452 (5th Cir.1998) (stating Fourteenth Amendment analysis does not begin until "after the incidents of arrest are completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention awaiting

trial for a significant period of time") (quotation and citation omitted)."); ***Gibson v. County of Washoe,*** 290 F.3d 1175, 1197 (9th Cir. 2002) ("Although the Supreme Court has not expressly decided whether the Fourth Amendment's prohibition on unreasonable searches and seizures continues to protect individuals during pretrial detention, . . we have determined that the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention. . . *Graham* therefore explicates the standards applicable to a pretrial detention excessive force claim in this circuit."); ***Phelps v. Coy,*** 286 F.3d 295, 299, 300 (6th Cir. 2002) ("The question of which amendment supplies Phelps's rights is not merely academic, for the standards of liability vary significantly according to which amendment applies. . . . Which amendment applies depends on the status of the plaintiff at the time of the incident, whether free citizen, convicted prisoner, or something in between. . . . If the plaintiff was a free person at the time of the incident and the use of force occurred in the course of an arrest or other seizure of the plaintiff, the plaintiff's claim arises under the Fourth Amendment and its reasonableness standard . . . . For a plaintiff who was a convicted prisoner at the time of the incident, the Eighth Amendment sets the standard for an excessive force claim. . . . Finally, if a plaintiff is not in a situation where his rights are governed by the particular provisions of the Fourth or Eighth Amendments, the more generally applicable due process clause of the Fourteenth Amendment still provides the individual some protection against physical abuse by officials . . . . Coy contends that the Fourth Amendment does not apply to Phelps's case because Phelps had already been arrested when the incident took place. Our cases refute the idea that the protection of the Fourth Amendment disappears so suddenly. At the time of the incident, Phelps was still in the custody of Coy and Stutes, the arresting officers. Stutes was booking Phelps when he asked Phelps to raise his foot, and this was the gesture which Coy mistook for aggression. After the incident, Phelps was booked and released, rather than being incarcerated as a pretrial detainee. We have explicitly held that the Fourth Amendment reasonableness standard governs throughout the seizure of a person. . . . Whatever arguments can be made about pretrial detainees' rights are beside the point in this case, in which the plaintiff was still in the custody of the arresting officers and was never incarcerated. The 'murky area' does not begin until the protection of the Fourth Amendment ends, and our precedent establishes that an arrestee in the custody of the arresting officers is still sheltered by the Fourth Amendment."); ***Fontana v. Haskin,*** 262 F.3d 871, 878, 879 & n.5 (9th Cir. 2001) ("At the outset, we make two related points about the scope of the Fourth Amendment. (1) Fontana's claim is a Fourth Amendment claim for unreasonable seizure and intrusion on one's bodily integrity, and (2) the Fourth Amendment protects a criminal defendant after arrest on the trip to the police station. First, even though this case does not involve excessive force in the traditional sense, it still falls within the Fourth Amendment. The Fourth Amendment's requirement that a seizure be reasonable prohibits more than the unnecessary strike of a nightstick, sting of a bullet, and thud of a boot. . . . Second, we have held that 'once a seizure has occurred, it continues throughout the time the arrestee is in the custody of the arresting officers.... Therefore, excessive use of force by a law enforcement officer in the course of transporting an arrestee gives rise to a section 1983 claim based upon a violation of the Fourth Amendment.' *Robins v. Harum,* 773 F.2d 1004, 1010 (9th Cir.1985). . . . . We note that the circuits are split on this issue. *Compare Wilson v. Spain,* 209 F.3d 713, 715-16 (8th Cir.2000) (adopting continuing seizure approach); *United States v.*

Johnstone, 107 F.3d 200, 206-07 (3d Cir.1997) (same), *and Frohmader v. Wayne,* 958 F.2d 1024, 1026 (10th Cir.1992) (same), *and Powell v. Gardner,* 891 F.2d 1039, 1044 (2d Cir.1989) (same), *and McDowell v. Rogers,* 863 F.2d 1302, 1306 (6th Cir.1988), *with Riley v. Dorton,* 115 F.3d 1159, 1164 (4th Cir.1997) (declining to adopt a 'continuing seizure' conception of the Fourth Amendment, and listing cases from circuits rejecting and adopting the rule), *and Cottrell v. Caldwell,* 85 F.3d 1480, 1490 (11th Cir.1996) (analyzing claims of pretrial detainees under Fourteenth Amendment's due process clause), *and Brothers v. Klevenhagen,* 28 F.3d 452, 456 (5th Cir.1994) (same), *and Wilkins v. May,* 872 F.2d 190 (7th Cir.1989) (same)."); ***Wilson v. Spain***, 209 F.3d 713, 715 & n.2 (8th Cir. 2000) ("Between arrest and sentencing lies something of a legal twilight zone. The Supreme Court has left open the question of how to analyze a claim concerning the use of excessive force by law enforcement 'beyond the point at which arrest ends and pretrial detention begins,' *Graham*, 490 U.S. at 395 n. 10, and the circuits are split. . . . Some circuits hold that after the act of arrest, substantive due process is the proper constitutional provision because the Fourth Amendment is no longer relevant. *See Riley v. Dorton*, 115 F.3d 1159, 1161-64 (4th Cir.) (en banc), *cert. denied*, 522 U.S. 1030 (1997); *Cottrel v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir.1996); *Wilkins v. May*, 872 F.2d 190, 192-95 (7th Cir.), *cert. denied*, 493 U.S. 1026 (1989). Other circuits hold that the Fourth Amendment applies until an individual arrested without a warrant appears before a neutral magistrate for arraignment or for a probable cause hearing, or until the arrestee leaves the joint or sole custody of the arresting officer or officers. *See Barrie v. Grand County*, 119 F.3d 862, 866 (10th Cir.1997); *Pierce v. Multnomah County*, 76 F.3d 1032, 1042-43 (9th Cir.), *cert. denied*, 519 U.S. 1006 (1996); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir.1989); *McDowell v. Rogers*, 863 F.2d 1302, 1306-07 (6th Cir.1988). The Fifth Circuit, while generally taking the position that substantive due process applies after the act of arrest, *see Valencia v. Wiggins*, 981 F.2d 1440, 1443-45 (5th Cir .), *cert. denied*, 509 U.S. 905 (1993), has concluded that the relevant constitutional provisions overlap and blur in certain factual contexts. *See Petta v. Rivera*, 143 F.3d 895, 910-914 (5th Cir.1998) (noting that Fourth Amendment standards are sometimes used in analyzing claims technically governed by substantive due process). . . . This Court previously has applied the Fourth Amendment to situations very similar to this case. In *Moore v. Novak*, 146 F.3d 531 (8th Cir.1998), law enforcement officers at a jail used force against an arrestee who was being violent and disruptive during the booking process. See id. at 532-33. We held that the district court appropriately applied Fourth Amendment standards to Moore's excessive-force claims. *See id*. at 535. Similarly, in *Mayard v. Hopwood*, 105 F.3d 1226 (8th Cir.1997), we applied Fourth Amendment standards not only to the act of arrest, but also to use of force against an arrestee who was restrained in the back of a police car. *See id*. at 1228. We therefore shall use the Fourth Amendment to analyze Wilson's federal claims. In doing so, we observe that if Wilson cannot win his case under Fourth Amendment standards, it is a certainty he cannot win it under the seemingly more burdensome, and clearly no less burdensome, standards that must be met to establish a Fourteenth Amendment substantive due process claim.").

See also ***Wilbourn v. Sheriff of Cook County***, No. 23 CV 1782, 2024 WL 897463, at *3 (N.D. Ill. Mar. 1, 2024) ("Wilbourn alleges that the Sheriff's policy to arrest pre-trial detainees for

violations of electronic monitoring without first obtaining an order from a court violates the due process clause of the Fourteenth Amendment. . . He argues that a hearing was required *before* the Sheriff effectively revoked his release on electronic monitoring by arresting him and holding him at the Cook County jail. . . But pre-trial detention, including the detention of an individual granted bail, is governed by the Fourth Amendment. . .Wilbourn brings two Fourth Amendment claims and those are the appropriate vehicles for his complaint about his arrest and detention. [citing *Manuel*] Wilbourn doesn't explain why the Fourteenth Amendment's due process clause grants him different or additional protection than the Fourth Amendment's requirement of a 'neutral decision-maker between unchecked official discretion and invasions of private liberty by search or seizure.'. . When the Fourth Amendment provides constitutional protection against intrusive state action, it provides the guide for analyzing the plaintiff's claims instead of 'the more generalized notion of substantive due process.'. . The cases Wilbourn cites to support his invocation of the Fourteenth Amendment involve people who were on parole after serving a custodial sentence. . . or serving probation as their criminal sentence. . . [T]heir guilt had been adjudicated and different constitutional rights were at stake than for a pre-trial detainee. Wilbourn's Fourteenth Amendment claim does not advance a different set of rights than those contained in his Fourth Amendment claim—his right to remain free from seizure absent a judicial finding that he violated the terms of electronic monitoring or probable cause that he committed another crime; his Fourteenth Amendment claim is dismissed."); ***Jalloh v. Underwood***, No. 16-1613 (TJK), 2020 WL 2615522, at *3 & n.3 (D.D.C. May 22, 2020) ("[W]hether Count II may be brought under the Fourth Amendment against either the Maryland Defendants or the District Defendants is an unsettled question that the parties have not briefed. After *Revere*, which said nothing about the Fourth Amendment, the Supreme Court clarified that the Fourth Amendment, not the Fourteenth Amendment, governs an arrestee's excessive force claims. . . Since then, the D.C. Circuit has not addressed whether an arrestee's claim that authorities failed to provide him medical assistance may be grounded in the Fourth Amendment. Several courts in this District have analyzed such claims (against police officers employed by the District of Columbia, to whom the Fourteenth Amendment does not apply) under the Due Process Clause of the Fifth Amendment, without addressing whether the Fourth Amendment may apply. . . And courts of appeals outside this jurisdiction appear to have split on whether the Fourth or Fourteenth Amendment governs an arrestee's claim that a police officer employed by a state failed to provide medical assistance. . . Notably, this 'is not a purely academic question' because 'the standards of liability vary significantly according to which amendment applies,' which the Court need not recount here. . . . [S]ome courts have also applied *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015)—which removed the subjective component of the standard used to evaluate claims of excessive force by pretrial detainees under the Fourteenth Amendment—to claims of failure to provide medical assistance as well. *See Miranda v. County of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (canvassing circuit split and joining the Second and Ninth Circuits in applying *Kingsley* to medical assistance claims while acknowledging that the Fifth, Eighth, and Eleventh Circuits have not); *Banks v. Booth*, No. 20-cv-849 (CKK), 2020 WL 1914896, at *5–6 (D.D.C. Apr. 19, 2020) (applying *Kingsley* to medical assistance claims). If *Kingsley* applies to medical assistance claims, then the liability standards under the Fourth and Fourteenth Amendments would be the same,

mooting the question of which amendment governs. . . . For these reasons, the Court will deny the motion for summary judgment without prejudice as to Count II. The Court will grant Jalloh leave to amend Count II, if he wishes, either to clarify the legal basis for his claim or the Defendants against whom he asserts it. Then Defendants may, if they wish, move again for summary judgment on Count II."); ***Bishop v. White***, No. 16 C 6040, 2019 WL 5550576, at *4 (N.D. Ill. Oct. 28, 2019) ("'Deliberate indifference' is the standard for claims of denial of medical care brought under the Fourteenth and Eighth Amendment, but '[t]he relevant legal standard for arrestees who have been seized but who have not yet had their probable cause hearing...comes from the Fourth Amendment, not the Fourteenth.' *Currie v. Chhabra*, 728 F.3d 626, 631 (7th Cir. 2013). Under the Fourth Amendment, in such circumstances, '[t]he issue is whether the state actor's "response to [the arrestee]'s medical needs was objectively unreasonable" and "caused the harm of which [the arrestee] complains."'"); ***Shoffler v. City of Wildwood***, No. CV 17-4859 (NLH)(JS), 2019 WL 4165305, at *9–10 (D.N.J. Sept. 3, 2019) ("The Third Circuit has noted that the exact point at which an individual transitions from arrestee to pretrial detainee has not been expressly ruled upon by the Circuit. . . Under Third Circuit law, force used by a police officer 'in the police station garage, after [the arrestee] had been transported from the scene of the initial beating' although, 'the closest – both temporally and spatially – to pre-trial detention at the station house ... [was found to have] occurred during the course of [a] defendant's arrest.' *United States v. Johnstone*, 107 F.3d 200 (3d Cir. 1997). Recently, this district, relying on *Johnstone*, found that alleged excessive force against an individual 'during his transport to the police station must be analyzed under the Fourth Amendment.' *Panarello v. City of Vineland*, 160 F. Supp. 3d 734, 756 (D.N.J. Feb. 8, 2016). Because the claims relating to the Wildwood Defendants occurred either during the arrest, during transport after the arrest, or while the Plaintiff was being processed at the police station, the Court will analyze these claims under the Fourth Amendment. No party has argued that the Fourteenth Amendment's analysis should apply given the circumstances surrounding Plaintiff's claims or that the analysis would materially differ from the analysis under the Fourth Amendment."); ***Collett v. Hamilton County, Ohio***, No. 1:17-CV-295, 2019 WL 121360, at *4-5 (S.D. Ohio Jan. 7, 2019) ("Plaintiff argues that because he was an 'arrestee' rather than a prisoner or pretrial detainee at the time he was injured, his excessive force claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, so that the standards for claims brought under the Eighth or Fourteenth Amendments do not apply here. . . In support of his argument, plaintiff relies on a 2003 case from the Third Circuit, *Hughes v. Shestakov*, 76 F. App'x 450 (3d Cir. 2003), which held that the proper test in analyzing an excessive force claim is 'objective reasonableness.'. . . In their reply, defendants again cite *Hopper* . . . for the proposition that the Fourteenth Amendment applies here but they no longer advocate for application of the 'objective reasonableness' standard that has long been applied in excessive force cases involving a search or seizure. . . Defendants adopt the position that at the time of plaintiff's injuries, he had already been seized (arrested), and his truck had already been searched, so his claims do not arise in the context of a search of seizure. However, they acknowledge that plaintiff was not yet a convicted prisoner protected by the Eighth Amendment. Defendants contend that plaintiff therefore fell into a 'gray area' between free citizen and convicted criminal that is not governed by the 'objective reasonableness' standard of the Fourth Amendment. . . Defendants instead argue

that plaintiff's claims are appropriately analyzed under the Fourteenth Amendment 'shocks the conscience' standard. . . . It is clear that the Fourth Amendment applies to plaintiff's excessive force claims. The Sixth Circuit follows a 'continuing seizure rule' under which 'the seizure that occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers,' and the Fourth Amendment 'objective reasonableness' standard controls. . . The Sixth Circuit has 'acknowledged that Fourth Amendment protections do not vanish at the moment of arrest' and that its prior cases 'refute the idea that the protection of the Fourth Amendment disappears so suddenly.'. . The Sixth Circuit found that such protections apply at least through the completion of the booking procedure, which is typically handled by jailers. . . The Court in *Aldini* confirmed the applicability of the Fourth Amendment from the time of arrest through at least the booking process and answered the question of how far the protection extends. . . The Sixth Circuit held that the dividing line was the probable cause hearing, so that the protections of the Fourth Amendment apply to a detainee arrested without a warrant between the time of the arrest and the probable-cause hearing. . . The alleged excessive force in this case occurred after plaintiff's warrantless arrest and before he was booked on the charges against him. Thus, the Fourth Amendment governs plaintiff's excessive force claims."); ***Newsome v. Madison County, Illinois***, No. 316CV01103JPGDGW, 2018 WL 2064989, at *2–3 (S.D. Ill. May 3, 2018) ("Mr. Newsome died at the jail shortly after he was arrested and before his probable cause hearing. Accordingly, Mr. Newsome is what is known as a pre-*Gerstein* arrestee. When a pre-*Gerstein* arrestee brings a constitutional claim arising from his conditions of confinement, it is typically covered by the Fourth Amendment's reasonableness test—a more stringent standard than Eighth Amendment deliberate indifference. . . And that makes perfect sense: if the police arrest a man and toss him in jail, and that man has not yet appeared before a judge to determine whether there was probable cause for the arrest in the first place, surely the jail should exercise even more caution than usual to ensure that they are not violating that man's rights. . . While the Seventh Circuit has not yet had the opportunity to apply this rationale to failure to protect claims, they have already done so with Eighth Amendment inadequate medical care cases. *See, e.g., Ortiz v. City of Chicago,* 656 F.3d 523, 530 (7th Cir. 2011) ("Because Molina had not yet benefitted from a judicial determination of probable cause, otherwise known as a *Gerstein* hearing, we agree that the Fourth Amendment applies."); *King v. Kramer*, 763 F.3d 635, 641–48 (7th Cir. 2014) (reversing and remanding when the district court incorrectly applied the Eighth Amendment standard instead of the Fourth Amendment's reasonableness test). And considering the Supreme Court has recently extended the doctrine to excessive force claims by pre-trial detainees, it is logical to also apply the doctrine to failure to protect claims in the same manner. . . Both parties recognized this distinction in their briefs. Newsome claims that she pled her Fourteenth and Fourth Amendment claims in the alternative so that she may proceed on whichever the Court deems correct. The defendants, however, assert that the Fourteenth/Eighth Amendment deliberate indifference standard should apply here—but they are incorrect in light of *Kingsley, Lopez*, *Williams*, *Ortiz*, and *King*. The defendants also argue that 'the Fourth Amendment does not provide remedies for failure to protect claims' at all, but that is wrong. Failure to protect claims arising under the Fourth Amendment focus on an individual's right to be free from an unreasonable seizure, and the Seventh Circuit has long recognized that theory as valid. *Yang v. Hardin*, 37 F.3d 282, 284–86 (7th Cir. 1994).

Accordingly, the Court will dismiss the 14th Amendment claims—Counts II, IV, and VI—for failure to state a claim for relief, and proceed on the Fourth Amendment claims."); ***Saintcome v. Tully***, No. CV 16-12490-NMG, 2017 WL 5178033, at *2–3 (D. Mass. Nov. 8, 2017) ("When a pretrial detainee makes an allegation of excessive force, there is an open question concerning the specific civil right which has been infringed. . . The Court in *Graham* reserved the question of whether the Fourth Amendment's protection of arrestees against excessive force extends to pretrial detainees, or whether such claims should be analyzed under Fourteenth Amendment due process. . . The 1st Circuit has yet to resolve the question but some district courts within the Circuit have analyzed the issue under the Fourth Amendment's protection against unreasonable seizures. . . For the purpose of this motion, we accept as pled the plaintiff's uncontested claim that the civil right implicated in this instance of purported excessive force was his right to be free of unreasonable seizure. Defendants maintain that the use of force described in the complaint cannot rise to the level of a constitutional violation because the quantum of force used was *de minimis*. To support that contention, they cite the Supreme Court's holding in *Hudson* v. *McMillian*, 503 U.S. 1, 9–10, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) and a string of subsequent cases. Those cases are inapposite, however, because they deal with the Eighth Amendment's bar on corrective punishment of convicts. Because, at the time of the incident, plaintiff was not convicted of a crime but rather was a pre-trial detainee, it is the Fourth, not the Eighth, Amendment that is implicated. The proper standard in this case is to examine whether, in the context of the incident, the level of force used against Saintcome was objectively reasonable. See *Kingsley*, 135 S.Ct. at 2473. An attempt to quantify the harm suffered by plaintiff has little bearing on whether the force was necessary or reasonable. Taking these facts as true, plaintiff has pled facts that plausibly constitute a claim of excessive force. Accordingly, plaintiff's cause of action will not be dismissed on these grounds."); ***Bryant v. Meriden Police Dep't***, No. 3:13-CV-449 (SRU), 2017 WL 1217090, at *6 (D. Conn. Mar. 31, 2017) ("Though circuits remain split on the issue, the Second Circuit has held that 'the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer.'. . . Courts within the circuit generally apply the Fourth Amendment to all claims of excessive force prior to the individual being arraigned or formally charged. . . In the instant case, the alleged use of excessive force in the Meriden Police Department holding cell occurred following Bryant's arrest and before he was arraigned or formally charged. Accordingly, Bryant's excessive force claim is appropriately analyzed under the Fourth Amendment."); ***Queen v. Collier***, No. 5:15-CV-01109-MHH, 2016 WL 4073946, at *3-4 (N.D. Ala. Aug. 1, 2016) ("Relying on the Supreme Court's recent decision, *Kingsley v. Hendrickson*, ---- U.S. ---, 135 S. Ct. 2466 (2015), Mr. Queen argues that the Court need not decide which constitutional amendment applies to his excessive force claim because a claim under either amendment is measured against an objective reasonableness standard. The Court disagrees. In *Kingsley*, the Supreme Court stated that for a pretrial detainee to prove an excessive force claim, he must show that the officer's use of force was objectively unreasonable. Although *Kingsley* provided that excessive force claims under the Fourteenth Amendment are governed by an objective reasonableness standard, the Court did not collapse the standard for arrestee and pretrial detainee excessive force cases into a single standard. Instead, the *Kingsley* Court stated that in

applying the 'objectively unreasonable' aspect of the pretrial detainee standard, courts must not only look to *Graham*'s 'facts and circumstances' inquiry, but also account for the 'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,' appropriately deferring to 'policies and practices that in th[e] judgment' of jail officials 'are needed to preserve internal order and discipline and to maintain institutional security.'. . Therefore, the Court must identify which constitutional standard applies to Mr. Queen's excessive force claim. . . In the Eleventh Circuit, '[t]he precise point at which a seizure ends (for purposes of Fourth Amendment coverage) and at which pretrial detention begins [for purposes of Fourteenth Amendment coverage] is not settled....' *Hicks v. Moore*, 422 F.3d 1246, 1254 (11th Cir. 2005). The period of time between an arrest and the beginning of pretrial detention is known as the 'twilight zone.' . . Because Officer Collier's use of force occurred after the arresting officers surrendered Mr. Queen to jail personnel but before detention officers finished the booking process, this case falls squarely in the twilight zone. In twilight zone cases, to identify the applicable constitutional standard, a court must decide whether the force occurred closer to the arrest or the detention end of the spectrum. . . . The *Garrett* and *Fennell* opinions demonstrate that the role of the arresting officer weighs heavily in the constitutional analysis of an arrestee's claim. In this case, the officers who arrested Mr. Queen had surrendered Mr. Queen to the custody of Officer Collier at the Morgan County Jail before the confrontation at issue occurred. Although Mr. Queen had not been fully processed at the jail when Officer Collier restrained him and took him to the ground, Mr. Queen had been in detention for a significant period of time. The force in the instant case occurred almost two hours after Mr. Queen arrived at the jail. (In contrast, the force at issue in *Fennell* occurred just moments after the plaintiff arrived at the jail.) The arrest was over; detention had begun. Considering the foregoing, the Court finds that Mr. Queen was a pretrial detainee at the time of the confrontation with Officer Collier and that the Fourteenth Amendment governs Mr. Queen's excessive force claim."); ***Foy ex rel Haynie, Jr.,*** No. 15 C 3720, 2016 WL 2770880, at *4 n.3 (N.D. Ill. May 12, 2016) ("The sixth amended complaint does not indicate whether the defendant officers' conduct at the Harrison Police Station occurred before Haynie was given a probable cause hearing pursuant to *Gerstein v. Pugh*, 420 U.S. 103 (1975). If Haynie's arrest was warrantless and the alleged events took place before Haynie was given a probable cause hearing, then Plaintiff's allegations of failure to provide medical care must be analyzed under the Fourth Amendment. . . A claim for failure to provide medical care to an arrestee that is brought under the Fourth Amendment is governed by an 'objectively unreasonable standard.'. . The standard for establishing a Fourth Amendment medical-care claim is lower than that needed to establish deliberate indifference under either the Eighth or Fourteenth Amendments. . . Because the sixth amended complaint gives no indication as to whether Haynie was arrested pursuant to a warrant or had received a *Gerstein* hearing, it is unclear whether the Fourth Amendment or Fourteenth Amendment governs count seven. However, because Plaintiff's claim against Officers Johnson, Philbin, and Banks is sufficient under the Fourteenth Amendment's more stringent deliberate indifference standard, Plaintiff's claim also passes muster under the Fourth Amendment's objectively unreasonable standard."); ***Panarello v. Cit of Vineland***, 160 F.Supp.3d 734, 755-56 (D.N.J. 2016) ("The force used by the Officer Defendants at the time of arrest must be analyzed under the Fourth Amendment. . . However, it is not clear what standard applies to the

use of force during Panarello's transportation to the police station and the use of force at the police station. . . The Supreme Court, first in *Graham v. Connor*, 490 U.S. 386 (1989) and most recently in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), made clear that excessive force claims made by pretrial detainees in state facilities are to be evaluated under the Fourteenth Amendment Due Process Clause. . . Those cases have specifically left open the issue of when the subject of a criminal case transitions from the status of an arrestee—whose claims are evaluated under the Fourth Amendment—to a pretrial detainee—whose claims are evaluated under the Fifth or Fourteenth Amendment, as appropriate. . . The Third Circuit has also not clarified the issue, but has found that the use of force by a police officer in the station house garage occurred during an arrest, and so would be analyzed under the Fourth Amendment, '[w]ithout deciding where an arrest ends and pretrial detention begins.'. . Other regional circuit courts have determined that the Fourth Amendment continues to apply beyond even this point. *See, e.g.*, *Estate of Booker v. Gomez*, 745 F.3d 405, 419 (10th Cir. 2014) (applying the Fourth Amendment to a plaintiff arrested without a warrant prior to any probable cause hearing); *Chambers v. Pennycook*, 641 F.3d 898, 905 (8th Cir. 2011) (applying the Fourth Amendment "to incidents occurring during the transportation, booking, and initial detention of a recently arrested person"); *Aldini v. Johnson*, 609 F.3d 858, 865–67 (6th Cir. 2010) (applying the Fourth Amendment for warrantless arrestees prior to a probable-cause hearing, relying on dicta in *Bell v. Wolfish*, 441 U.S. 520, 536 (1979)). . . Based on the Third Circuit's holding in *Johnstone*, this Court finds that any alleged use of force against Panarello during his transport to the police station must be analyzed under the Fourth Amendment. This Court also finds that because Panarello was arrested without a warrant, relying on the weight of authority from the other regional circuits, the Fourth Amendment applies to the alleged use of force while in the police station booking room."); ***Otero v. Dart***, No. 12 C 3148, 2016 WL 74667, at *5 (N.D. Ill. Jan. 7, 2016) ("The Court first examines Defendant's argument that the Fourteenth Amendment applies under the circumstances and not the Fourth Amendment's protections against unreasonable searches and seizure. Defendant specifically argues that Fourth Amendment protections only apply to detainees during the period of confinement between their arrest and the judicial determination of probable cause. *See Ortiz v. City of Chicago*, 656 F.3d 523, 530 (7th Cir. 2011); *Lopez v. City of Chicago*, 464 F.3d 711, 719 (7th Cir. 2006). Plaintiff's claim, however, is based on his post-acquittal confinement, and thus he was 'a free citizen protected by the Fourth Amendment.'. . . The Court therefore turns to Plaintiff's argument that he has presented sufficient evidence creating an issue of material fact for trial that Defendant's policy is unreasonable in violation of the Fourth Amendment."); ***Acevedo v. City of Anaheim***, No. 8:14-CV-01147-ODW(E), 2016 WL 79786, at *5 (C.D. Cal. Jan. 6, 2016) ("'The Ninth Circuit analyzes claims regarding deficient medical care during and immediately following an arrest under the Fourth Amendment.' *Mejia v. City of San Bernardino*, No. EDCV 11-00452 VAP, 2012 WL 1079341, at *5 (C.D. Cal. Mar. 30, 2012) (citing *Tatum v. City and Cnty. of S.F.*, 441 F.3d 1090, 1098–99 (9th Cir. 2006) (explaining that while the Supreme Court has analyzed such claims under the Due Process Clause of the Fourteenth Amendment in the past, it appears that the Fourth Amendment is the proper authority following the decision in *Graham v. Connor*, 490 U.S. 386 (1989))). The Fourth Amendment requires law enforcement officers to provide objectively reasonable post-arrest care to an apprehended suspect. *Tatum*, 441 F.3d 1099. Though the precise contours of this

objectivity test are unclear, it is clear that 'a police officer who promptly summons ... necessary medical assistance has acted reasonably for purposes of the Fourth Amendment[.]'"); ***Estate of Redd v. Love,*** No. 2:11-CV-00478-RJS, 2015 WL 8665348, at *9 (D. Utah Dec. 11, 2015) ("The Estate's articulated Fourth Amendment excessive force claim against Agent Love purports to be based on events that occurred at the Redd home throughout the day. But Dr. Redd was an arrestee from only 6:55 a.m. until he arrived at the BLM office in Monticello for booking. Upon his arrival at the BLM office, Dr. Redd became a pretrial detainee. And when Dr. Redd returned home later that evening, he was no longer 'seized' under the Fourth Amendment—he was free to come and go as he pleased. . . The potential reach of the Estate's Fourth Amendment claim legally concluded upon Dr. Redd's arrival at the BLM office, meaning the Estate's claim is necessarily confined to events that occurred before Dr. Redd arrived at the BLM office. Further, because the Estate's claim focuses only on events that occurred at Dr. Redd's home, the Estate's claim can relate only to events that occurred before Dr. Redd was removed at 10:34 a.m."); ***Hammond v. Lapeer Cnty.,*** 133 F.Supp.3d 899, (E.D. Mich. 2015) ("The legal status of a victim of excessive force is, of course, significant because the conduct of the offending officer must be analyzed under the standard appropriate to the applicable constitutional provision. 'Under the Fourth Amendment, we apply an objective reasonableness test, looking to the reasonableness of the force in light of the totality of the circumstances confronting the defendants, and not to the underlying intent or motivation of the defendants.'. . As the Supreme Court has recently confirmed, a claim of excessive force under the Fourteenth Amendment is also analyzed under an 'objective reasonableness' standard. [citing *Kingsley*] *See also Coley v. Lucas County, Ohio*, __F.3d__, 2015 WL 4978463, at *4 (6th Cir. 2015) ("The Supreme Court has recently clarified...that when assessing pretrial detainees excessive force claims we must inquire into whether the plaintiff shows 'that the force purposely or knowingly used against him was objectively unreasonable.' ") . . . . Under the Eighth Amendment, which applies to a convicted prisoner, an official's conduct will be found to amount to cruel and unusual punishment 'when their "offending conduct reflects an unnecessary and wanton infliction of pain."'. . In examining an excessive force claim under the Eighth Amendment, the constitutional analysis has both a subjective and an objective component, requiring the court to determine 'whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm,' and whether 'the pain inflicted [is] sufficiently serious.'. . . Notwithstanding the parties' apparent agreement as to Plaintiff's legal status as a convicted individual who had been sentenced to jail and remanded to the custody of the sheriff for transport to jail, neither party addressed the issue of which constitutional amendment governed the Plaintiff's claims of excessive force. This Court questioned the parties' mutual assumption that the Fourth Amendment applied and therefore required supplemental briefing on the issue of which constitutional right was implicated by the alleged acts of excessive force in this case. In his supplemental brief, Plaintiff argued for application of the Fourth Amendment to his claims because Plaintiff had not been 'booked' when the alleged acts of excessive force occurred and, according to Plaintiff, the Fourth Amendment applies 'through the booking process.'. . .The critical dividing line, however, discussed in *Burgess* and established in *Aldini*, is not the 'booking process' but the probable cause hearing. 'We find that the Fourth Amendment protects pre-trial detainees arrested without a warrant through the completion of their probable-cause hearings and

thus find that the district court erred in applying the Fourteenth Amendment.'. . Until the probable cause hearing occurs, Plaintiff remains a free citizen entitled to the broad constitutional protections of the Fourth Amendment. In this case, Plaintiff was not awaiting a probable cause determination – he was arrested on a warrant issued on a finding of probable cause, arraigned and sentenced before the alleged acts of excessive force occurred. Plaintiff's supplemental brief improperly focused on the 'booking process,' which of course can occur either before or after a determination of probable cause, rather than the Plaintiff's legal status as a post-probable cause, convicted and sentenced individual. Defendants argue in their supplemental brief for application of the Fourteenth Amendment, noting that unlike the plaintiff in *Burgess*, Plaintiff in this case was arrested on a warrant, appeared before Judge Scott and was found in contempt of court and immediately remanded to the custody of the jailers. . . Defendants conclude that because Judge Scott 'had already issued his sentence, the appropriate legal standard is the 14th Amendment.'. . The Fourteenth Amendment applies to pretrial detainees including, as *Aldini* suggests, individuals arrested on a warrant issued on probable cause. *See also Booker v. Gomez*, 745 F.3d 405, 420-21 (10th Cir. 2014) ("[W]e hold the Fourteenth Amendment standard governs excessive force claims arising from post-arrest and pre-conviction treatment if the arrestee has been taken into custody pursuant to a warrant supported by probable cause."). As the Tenth Circuit noted in *Gomez*, when an individual is arrested pursuant to a warrant issued on probable cause, that individual is a pre-trial detainee at the time he is presented for booking. . . In this case, following his arrest on a bench warrant and at the arraignment on that warrant, Judge Scott found Plaintiff in contempt of court, ordered him immediately detained and sentenced him to a term of 30 days in jail or a fine of $866 . . . .Following the imposition of this sentence, while being escorted to the basement of the courthouse and while awaiting transportation to the jail, Plaintiff claims he was subject to excessive force. A threshold question the Court must address is what was Plaintiff's legal status at that time? . . ..While neither party in this case advocated in their supplemental brief for the Eighth Amendment, the Court finds the argument for application of the Eighth Amendment here compelling. As in *Lewis*, Plaintiff was not a free citizen, nor was he a pretrial detainee 'awaiting an adjudication of charge[]'. . . after Judge Scott found Plaintiff in contempt of court and ordered him immediately held in custody. He was a convicted prisoner in the custody of the sheriff awaiting transport to jail and, as Judge Steeh concluded in *Lewis*, his excessive force claim therefore should be analyzed under the Eighth Amendment. . . .In this case, there is no evidence that Plaintiff had escaped the custody of the officers who were escorting him following Judge Scott's finding of contempt and imposition of sentence. Like the plaintiffs in *Lewis* and *Sharp*, Plaintiff here was 'was not a suspect, detainee or fugitive; [he] was a convicted person in the custody of [officers]. Because [he] was a prisoner in the custody of [officers], any treatment [he] received on the way to a jail cell is governed by the Eighth Amendment.'. . . . Plaintiff's claims that he was (1) forcefully driven head first into the wall of the elevator, forced to the floor and threatened with a taser, all while handcuffed behind his back and (2) ignored by officers when he persistently complained of excessively tight handcuffs. All of these events, which occurred after Judge Scott had imposed a contempt sentence, are appropriately analyzed under the Eighth Amendment."); ***Laury v. Rodriguez***, No. 13-15059, 2015 WL 2405648, at *6 (E.D. Mich. May 20, 2015) ("The parties appear to agree that Plaintiff Laury's claims regarding Defendants' use of excessive force during

his booking procedure are governed by the Fourth Amendment. However, despite only setting forth a claim pursuant to the Fourth Amendment in his Complaint, Plaintiff Laury makes references to the Fourteenth Amendment in his Response brief. . . To the extent that Plaintiff Laury could be attempting to assert a Fourteenth Amendment claim for excessive force, such a claim fails. It is well settled that the Fourth Amendment's protections extend through the booking process. [citing *Aldini*]. Indeed, the Sixth Circuit has explained that '[t]he Fourth Amendment of the United States Constitution protects a person from being subjected to excessive physical force during the course of an arrest, a booking, or other police seizure.' *Malory v. Whiting,* 489 F. App'x. 78, 81 (6th Cir.2012) (citing *Drogosch v. Metcalf,* 557 F.3d 372, 378 (6th Cir.2009); ***Lamb v. Telle***, No. 5:12–CV–00070–TBR, 2013 WL 5970422, *2-*5 (W.D. Ky. Nov. 8, 2013) ("Section 1983 does not confer substantive rights but merely provides a means to vindicate rights conferred by the Constitution or laws of the United States. . . 'In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.'. . The three constitutional provisions for analyzing an excessive force claim brought under § 1983 are the Fourth, Eighth, and Fourteenth Amendments. As will become apparent, the Fourteenth Amendment is the appropriate constitutional provision for analyzing Plaintiff's claims. . . . Plaintiff was arrested pursuant to a warrant. The Fourth Amendment protects detainees arrested without a warrant through completion of their probable cause hearing. Since Plaintiff was arrested pursuant to a warrant, the Fourth Amendment does not apply to his claims. . . . At the time of the January 17, 2012 incident, Plaintiff had not been convicted of any crime and was merely a pretrial detainee arrested pursuant to a warrant. Therefore, the Eighth Amendment does not apply to his claims. . . . Plaintiff was a pre-trial detainee arrested pursuant to a warrant. Accordingly, the Fourteenth Amendment applies to Plaintiff's claims, not the Fourth or Eighth Amendment. . . .Since Plaintiff was arrested pursuant to a warrant and therefore was a pretrial detainee rather than an arrestee or convicted prisoner, his excessive force claim will be analyzed under the Fourteenth Amendment. . . . In the Sixth Circuit 'the law is unsettled. . . as to whether the analysis for a Fourteenth Amendment excessive-force claim and an Eighth Amendment excessive-force claim is the same.'. . At the least, pretrial detainees are guaranteed the same level of protection guaranteed by the Eighth Amendment."); ***Briggs v. Edwards***, Nos. 12–2145, 13–5335, 13–5342, 2013 WL 5960676, *6 & n.10 (E.D. La. Nov. 6, 2013) ("In his Complaint, Mr. Galmon asserts a claim under section § 1983 based on a denial of medical treatment. . . 'After the initial incidents of a seizure have concluded and an individual is being detained by police officials but has yet to be booked, an arrestee's right to medical attention, like that of a pretrial detainee, derives from the Fourteenth Amendment.'. . .Though some Circuits recognize a Fourth Amendment right to medical treatment, the Court will construe the claim contained in Paragraph 47 of Mr. Galmon's Complaint as a Fourteenth, and not a Fourth, Amendment claim, as it appears that the Fifth Circuit analyzes an arrestee's right to medical care under the Substantive Due Process Clause of the Fourteenth Amendment. *Nerren,* 86 F.3d at 473; *compare to Legg v. Pappas,* 383 F. App'x 547 (7th Cir.2010) (recognizing Fourth Amendment right to medical care)."); ***Peters v. Woodbury County, Iowa***, 979 F.Supp.2d 901, 930, 931, 949 (N.D. Iowa 2013) ("[T]he defendants assert that, after an individual becomes a pretrial detainee, the 'due process' standard of the Fifth and Fourteenth Amendments applies, citing *Johnson–El v.*

Schoemehl, 878 F.2d 1043, 1048–49 (9th Cir.1989), but *Johnson–El* is a 'conditions of confinement' case, not a case involving allegations of improper searches or other violation of privacy rights. . . . Neither *Johnson–El* nor *Morris* can be read for the blanket proposition that *all* claims by a pretrial detainee are governed by a Fifth and Fourteenth Amendment 'due process' standard that considers whether the officers' conduct amounted to 'punishment,' but only that *conditions of confinement* claims by pretrial detainees are governed by such a standard, rather than the Eighth Amendment 'cruel and unusual punishment' standard. Although the defendants acknowledge that, in *Moore v. Novak*, 146 F.3d 531 (8th Cir.1998), the Eighth Circuit Court of Appeals has applied a Fourth Amendment 'objective reasonableness' test to the claim of an arrestee who became disruptive during the booking process, that case is also inapposite, because the claim at issue concerned use of 'excessive force,' not a search or other violation of privacy rights. . . More apposite are decisions of the Supreme Court and the Eighth Circuit Court of Appeals concluding that claims arising from intrusions on the privacy rights of an arrestee or a pretrial detainee during booking or detention are governed by a Fourth Amendment 'reasonableness' standard. . . . Thus, Fourth Amendment 'reasonableness" standards are applicable to Peters's claim in Count I, rather than other 'due process' or 'punishment' standards, even if the applicability of a Fourth Amendment 'reasonableness' standard is via the Fourteenth Amendment. . . . [W]hile the constitutional *source* of the right at issue on an 'excessive force' claim arising during booking or initial detention is not altogether clear, the *standard* for such a claim under Eighth Circuit precedent is clearly one of 'objective reasonableness' analogous to a Fourth Amendment standard."); ***Smith v. County of Isabella***, No. 2:12–cv–11333, 2013 WL 4550163, *5 (E.D. Mich. Aug. 28, 2013) ("As a preliminary matter, the Court must determine whether Plaintiff's excessive force claim falls under the Fourth or Fourteenth Amendment. . .While excessive force claims are often brought under the Fourth Amendment's protection against unreasonable searches and seizures, when no search or seizure is involved in a given case, the Supreme Court has indicated 'that the substantive component of the Fourteenth Amendment's due process clause is the most appropriate lens with which to view an excessive force claim.'. .In the Sixth Circuit, the applicable amendment 'depends on the status of the plaintiff at the time of the incident, whether free citizen, convicted prisoner, or something in between.'. . 'Because the Fourth Amendment's protection against unreasonable seizures seems primarily directed to the *initial* act of restraining an individual's liberty,' the Sixth Circuit holds that a pretrial detainee's excessive force claim is governed by the Fourteenth Amendment's due process clause. . . In this case then, Plaintiff, who was detained at the Isabella County Jail following her arrest for simple assault and disorderly conduct, was a pretrial detainee and the Fourteenth Amendment, not the Fourth, supplies the appropriate analytical framework for her excessive force claim against the Deputy Defendants. As such, Plaintiff's Fourth Amendment excessive force claim fails as a matter of law and is accordingly dismissed with prejudice."); ***Rivera-Garcia v. Roman-Carrero***, 938 F.Supp.2d 189, 198, 199 (D.P.R. 2013) ("Since Rivera–García purportedly claims post-arrest, pre-arraignment mistreatment, Sosa–Vega concludes that only the Fourteenth Amendment right to due process applies, and that his Fourth Amendment claims fail. . .Both parts of this argument are too clever by half. First, notwithstanding Rivera–García's off-the-cuff testimony about what 'excessive force' subjectively means to him, neither the complaint nor the summary judgment

papers draw any distinction between claims for use of force before versus after the instant in time Rivera–García considered himself 'neutralized.' He complains that he was thrown to the ground, *then* kicked, *then* cuffed, and *then* kicked again. . . On this nonmovant-friendly view of the facts, giving SosaVega's legal analysis its full weight would only cut off Fourth Amendment liability at the conceptual moment his seizure was complete, leaving other claims for trial. Yet even that rule would not dispose of the balance of Rivera–García's excessive force case. True, the Supreme Court pronounced in *Graham* that it had 'not resolved the question [of] whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins....' 490 U.S. at 395 n. 10. And Sosa–Vega correctly notes at least three circuits holding that only a Fourteenth Amendment due process right prohibits excessive force after the time of arrest. . . But prior to that 'point at which arrest ends and pretrial detention begins,' the Supreme Court's holding is clear: the Fourth Amendment protects 'free citizen[s]' from excessive force '*in the course of* an arrest, investigatory stop, or other 'seizure.'. . Sosa–Vega's argument therefore must turn on the proposition that Rivera–García became a 'pretrial detainee' before his claims arose. . . That would be a colorable legal conclusion if Rivera–García were complaining of his treatment at the stationhouse as in *Wilkins* and *Brothers,* or perhaps even in the police cruiser as in *Cottrell.* But here, he complains of abuse before he was even moved from the spot he was handcuffed. . . Whatever hairs might be split over doctrinal labels, it is hard to conceive of a justification for *why* the mere attachment of handcuffs at the scene alters the standard measuring an officer's use of force, particularly when the arrestee has not been significantly moved and essentially no time has passed. Indeed, *Graham's* language itself reflects a common-sense understanding that the Fourth Amendment applies 'in the course of an arrest,' not some more technical span of time such as 'preceding the neutralization of an arrestee.' . . There is undoubtedly a point where the 'free citizen' becomes a 'pretrial detainee' and *Graham* ceases to control, and the Court expressly decided not to decide what constitutional guarantees apply at that time. But Sosa–Vega never shows why the point converting Rivera–García into a 'pretrial detainee' occurred when he says it did, and his assumption is not rooted in any doctrinal grounds."); ***Ramirez v. County of Los Angeles***, No. CV 11–5370 AHM (MANx), 2012 WL 2574826, at *3 n.3 (C.D. Cal. July 3, 2012) ("Although neither party raises this issue, it is likely that where the alleged excessive force occurred post-arraignment but prior to trial, as was the case here, the applicable constitutional provision is the Fourteenth Amendment, not the Fourth."); ***Ostling v. City of Bainbridge Island***, 872 F.Supp.2d 1117, 1129 (W.D. Wash. 2012) ("Claims that officers have failed to provide medical care were previously analyzed under the due-process clause of the Fourteenth Amendment. [citing *City of Revere v. Mass. Gen. Hosp.*]. In *Graham v. Connor*, . . . however, the court held that '*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.'. . Thus, courts now sensibly analyze both claims of excessive force and failure to render post-arrest medical aid under the same reasonableness standard of the Fourth Amendment."); ***Polanco v. City of Marco Island***, No. 2:10-cv-605-FtM-29DNF, 2011 WL 2911002, at *3 (M.D. Fla. July 19, 2011) ("The Eleventh Circuit . . . has analyzed situations similar to the present case [use of pepper spray on

arrested suspects while in police vehicle on way to booking] under both the Fourth Amendment's objective reasonableness standard and, occasionally, under the Fourteenth Amendment's Due Process Clause. [discussing *Vinyard, Mercado, Cottrell,* and *Hicks*] The Eleventh Circuit has twice cited *Gutierrez v. City of San Antonio,* 139 F.3d 441, 452 (5th Cir.1998) for the correct standard to determine the line between when an arrest ends and pretrial detention begins. *Reese v. Herbert,* 527 F.3d 1253, 1262 n. 11 (11th Cir.2008); *Garrett v. Athens-Clarke County, Ga.,* 378 F.3d 1274, 1279 n. 11 (11th Cir.2004). *Gutierrez* found that the Fourteenth Amendment analysis does not begin until 'after the incidents of arrest are completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention awaiting trial for a significant period of time'. . . . Under this standard, the facts alleged in the Amended Complaint establish that only a Fourth Amendment claim is cognizable in this case."); ***LaJocies v. City of North Las Vegas***, No. 2:08-cv-00606-GMN-GWF, 2011 WL 2036972, at *4 (D. Nev. May 24, 2011) ("Plaintiff was being held as a pre-trial detainee at the North Las Vegas Detention Center at the time of the incident. However he was also serving time as a convicted prisoner on a federal weapons charge. . . The Fourth Amendment's protection of unreasonable searches and seizures applies to situations where excessive force used during the arrest of a person and when an arrestee is kept at a facility for booking procedures without a probable cause of arraignment hearing. . . This protection is not implicated in this case, because Plaintiff was already serving time as a convicted prisoner. Likewise, the Fourteenth Amendment's due process protection that a person suspected of a crime should not be subject to punishment does not apply. Plaintiff may be correct in arguing that while he was under a sentence of imprisonment for his federal conviction, he was likely only being held in the jail and not a federal prison due to his pretrial detainee status. However, regardless of why he was located at the North Las Vegas Detention Center, it is uncontested that Plaintiff was also already serving time for the federal weapons charge and was thus subject to the Federal Government's power of punishment. . . Thus the Court finds that the Eighth Amendment's prohibition against cruel and unusual punishment sets the applicable constitutional limitations to be applied to Plaintiff in this case."); ***Kalinkin v. Robinson***, No. 09-CV-1058-BR, 2010 WL 5158386, at *6, *7 (D. Or. Dec. 14, 2010) ("[W]hether claims of excessive force by individuals in post-arraignment, pretrial custody should be analyzed under the Fourth, Eighth, or Fourteenth Amendments remains an open question in the Ninth Circuit. The Court notes, however, that a number of district courts within the Ninth Circuit have held the Due Process Clause of the Fourteenth Amendment protects post-arraignment, pretrial detainees from the use of excessive force. [collecting cases] Even though Plaintiff was a pretrial, postarraignment detainee and, therefore, the question whether the Court should analyze his claim under the Fourth, Eighth, or Fourteenth Amendments is unresolved in the Ninth Circuit, it is unnecessary for this Court to choose which of these standards ultimately applies to Plaintiff's claim. As explained below, Plaintiff's proposed claim against Sergeant Scott fails even under the Fourth Amendment's least-burdensome standard that courts have applied to pretrial detainees' excessive-force claims."); ***Moreau v. Gerardi***, No. 08-40117-FDS, 2010 WL 4961676, at *6-*11 (D. Mass. Nov. 24, 2010) ("Although it is beyond dispute that custodial detainees have a constitutional right not to be subjected to excessive force, the source of that right is surprisingly unclear. Both the Fourth and the Eighth Amendments provide protection against excessive force in certain contexts. . .

Excessive force claims arising in the context of an arrest are governed by the Fourth Amendment, and are evaluated under an 'objective reasonableness' standard. . . Excessive force claims brought by convicted and sentenced inmates are governed by the Eighth Amendment, and are evaluated under a 'malicious or sadistic use of force' standard. . . The incident in this case arose after arrest but before sentencing, during a time in which Moreau was a custodial detainee. This time period has been termed a 'legal twilight zone,' as the Constitution does not clearly indicate the source of protection against the use of excessive force against such persons. . . Although it is clear that the Eighth Amendment does not apply, whether the Fourth Amendment should apply, or whether the issue should be analyzed under the Due Process Clause of the Fourteenth Amendment, is a matter of some dispute. . . . This lack of constitutional clarity has led to a circuit split. Four circuits have held that the Fourth Amendment provides the constitutional standard of review for claims of intentional excessive force that arise after a warrantless arrest but before a probable cause hearing or arraignment. [citing cases from 6th, 9th, 10th, and 2d Circuits] Four other circuits have held that the Fourth Amendment becomes inapplicable after the act of arrest, and instead analyze post-arrest claims of excessive force as substantive due process claims under the Fourteenth Amendment. [citing cases from 4th, 11th, 5th, and 7th Circuits] The First Circuit has not yet determined what constitutional provision provides the source of protection and the applicable standard of review in this context. . . .Determining the applicable constitutional provision is not a merely technical exercise, as the burden that the plaintiff must meet is substantially different under the Fourth and Fourteenth Amendments. . . . An excessive force analysis under the Fourth Amendment looks to the objective reasonableness of the officer's actions, without inquiring into the subjective motivations of the officer. . . By contrast, when conducting a substantive due process analysis, courts ask whether an officer's conduct 'is so beyond the norm of proper police procedure as to shock the conscience.'. . Several courts have noted that the Fourteenth Amendment analyses are more burdensome to plaintiffs than the Fourth Amendment analysis. . . . From a practical standpoint, however, it is not clear why a plaintiff should be held to a higher standard of proof depending on his claim arises at the moment of arrest, as he is an arrestee in police custody, or as he is a pretrial detainee after a probable cause hearing. Indeed, it makes little sense to do so. Consider three different scenarios of police brutality: Person A is beaten excessively by the police on a sidewalk in the course of an otherwise-lawful arrest; Person B is beaten excessively in the police station lockup, after arrest but before any appearance before a judicial officer; and Person C is beaten excessively in the police station lockup after a judicial officer has made a probable cause determination. Why should A have an easier standard of proof than C? And why should B and C have different standards of proof, simply because the detention has been found to be lawful? Either the use of force under the circumstances is justifiable, or it is not. The factual circumstances might change from scenario to scenario, but the ultimate question ought to remain the same: was the use of force, viewed objectively, excessive under the circumstances? Requiring one plaintiff to meet a higher standard of proof than another elevates doctrine over fairness and common sense. . . .Taking all these considerations into account, the Court concludes that Moreau's § 1983 claim is most appropriately analyzed under the Fourth Amendment. From a practical standpoint, employing the Fourth Amendment has the virtue of the 'objective reasonableness' standard and provides of consistency and fairness among similarly-situated individuals. And as a matter of

doctrine, this approach is more consistent with the relevant Supreme Court cases. . . . An arrestee is still effectively 'seized' by police when he is brought to the police station, booked, and detained before a probable cause hearing or before arraignment. . . Within the comparatively safer conditions of a police station as opposed to the conditions surrounding the moment of arrest, it is more constitutionally incumbent on officers restraining individuals' liberty to be reasonable in their use of force. For the purposes of this case, the Court need not explore the outer bounds of where Fourth Amendment protection ends and Fourteenth Amendment protection begins. It is enough to conclude that the Fourth Amendment governs Gerardi's treatment of Moreau, who had only been in custody for a few hours after his arrest, had just completed the booking process, and had not been arraigned or received a probable-cause determination. The question on summary judgment, then, is whether the facts, viewed in the light most favorable to Moreau, could lead a reasonable jury to conclude that Gerardi's treatment of Moreau was objectively unreasonable."); ***Cobige v. City of Chicago***, No. 06 C 3807, 2010 WL 4340653, at *4 n.2, *14 (N.D. Ill. Oct. 25, 2010) ("Although the facts underlying Plaintiff's conditions of confinement claim occurred while Cobige was a pretrial detainee, there had been no judicial determination of probable cause before her death. Accordingly, the applicable standard for Plaintiff's Failure to Provide Medical Care claim is pursuant to the Fourth Amendment. *See Williams v. Rodriguez*, 509 F.3d 392, 403 (7th Cir.2007); *Lopez v. City of Chicago*, 464 F.3d 711, 718-19 (7th Cir.2006). . . . In their motion, Defendants argue that because the Seventh Circuit had not decided *Lopez* until September 2006 and the conduct surrounding Cobige's death occurred in June 2006, *Lopez* does not apply because it was not the clearly established standard during the relevant time period. . . Instead, Defendants argue that the deliberate indifference standard pursuant to the Fourteenth Amendment applies. . . Defendants' argument is without merit. In holding that the Fourth Amendment standard applied to pretrial detainees who have not had a probable cause determination, the *Lopez* court relied on case law from as early as 1992. . . . Because the Fourth Amendment standard was the controlling standard at the time of Defendants' conduct in June 2006, Defendants' argument fails."); ***Castellar v. Caporale***, No. CV-04-3402 (DGT), 2010 WL 3522814, at *6 (E.D.N.Y. Sept. 2, 2010) ("Accordingly, given that plaintiff had not yet been arraigned or formally charged during Svinos' alleged conduct at 500 Pearl, plaintiff's excessive force claim should be analyzed under the Fourth Amendment."); ***Walters v. Prince George's County***, No. AW-08-711, 2010 WL 2858442, at *6 (D. Md. July 19, 2010) ("At the outset, the Court finds that Plaintiff is a pretrial detainee, whose claims of excessive force are properly governed by the Due Process Clause of the Fourteenth Amendment. Pretrial detainees are persons who have been 'lawfully arrested and [are] being held prior to a formal adjudication of guilt.'. . People who are involuntarily taken into police custody are pretrial detainees. . . Here, Plaintiff is properly classified as a pretrial detainee because she was handcuffed and involuntarily taken into police custody by Officers Swonger and Matthews. Since Plaintiff does not allege that Officers Swonger and Matthews used excessive force in handcuffing her, her Fourth Amendment rights were not violated. Plaintiff complains of events that occurred after Defendants Davis and Kelly took custody of her, when the Fourth Amendment had ceased to apply because the single act of detaining Plaintiff had already been completed and she was already in police custody. As the Fourth Circuit does not recognize continuing seizure, Plaintiff's argument to this effect is unavailing. Since Plaintiff was not an arrestee subject to Fourth Amendment

protections, the Court will accordingly grant Defendant's Motion for Summary Judgment on the Fourth Amendment violation of the § 1983 claim."); ***Aponte v. City of Chicago***, No. 08 C 6893, 2010 WL 2774095, at *9 (N.D. Ill. July 14, 2010) ("[P]retrial detainees who have not received probable cause determinations may bring claims regarding the conditions of their confinement under the Fourth Amendment, which protects against unreasonable seizures."); ***Valind v. Retzer***, No. 05-C-0702, 2009 WL 3805518, at *6, *7 (E.D. Wis. Mar. 10, 2009) ("The parties briefed Valind's medical care claim based on the Due Process clause of the Fourteenth Amendment, which is the same standard used to evaluate Eighth Amendment claims. In the court's screening order dated November 4, 2005, the court also considered the plaintiff's medical care claim under the Due Process Clause. However, after the screening order in this case, the Seventh Circuit 'recognized in *Lopez v. City of Chicago* that the Fourteenth Amendment's due process protections only apply to a pretrial detainee's confinement conditions after he has received a judicial determination of probable cause.' *Williams v. Rodriguez*, 509 F.3d 392, 403 (7th Cir.2007) (citing *Lopez v. City of Chicago*, 464 F.3d 711, 719 (7th Cir.2006)). Claims regarding conditions of confinement by pretrial detainees such as Valind, who have not yet had a judicial determination of probable cause, are instead governed by the Fourth Amendment and its objectively unreasonable standard. . . In *Sides v. City of Champaign*, 496 F.3d 820 (7th Cir.2007), the Seventh Circuit clarified what is 'objectively unreasonable' in the context of a medical needs case. There are four factors that influence the analysis of a plaintiff's claims of inadequate medical care under the Fourth Amendment: (1) whether the officer had notice of the arrestee's medical need, either through words or observation; (2) the seriousness of the medical need, including whether complaints are accompanied by any physical symptoms; (3) the scope of the requested treatment, which is to be balanced against the second factor; and (4) police interests. . . Moreover, 'the deliberate indifference standard under the Eighth and Fourteenth Amendments requires a higher showing on a plaintiff's part than is necessary to prove an officer's conduct was Aobjectively unreasonable under the circumstances'' under the Fourth Amendment."); ***Davis v. Peoria County***, No. 08-cv-1118, 2009 WL 3258318, at *4 n.4, *5 (C.D.Ill. Oct. 8, 2009) ("Here, at the time of the alleged abuse, Plaintiff was being held in a cell, but had been arrested without a warrant, had not been booked, and had not been subject to a judicial determination of probable cause. . . . The Court need not decide at this point whether Plaintiff was an arrestee or a pretrial detainee. Whether she had crossed this line or not, '[i]t does not follow that the officers acquired greater ability to assault and batter' her even if she was a pretrial detainee rather than an arrestee. *Titran*, 893 F.2d at 147. Indeed, the Seventh Circuit Jury Instructions concerning excessive force do not distinguish between the Fourth and the Fourteenth Amendment analyses: the same instructions are applied to both categories of persons, and the Instructions are titled 'Fourth/Fourteenth Amendment − Excessive Force Against Arrestee or Pretrial Detainee' FED. CIV. JURY INSTR. 7th Cir. 7.08 (2005). As discussed above, reasonableness in the circumstances is the key analysis for both stages."); ***Adams v. City Of Orlando***, No. 6:08-cv-30-Orl-28GJK, 2009 WL 2634339, at *7, *8 (M.D. Fla. Aug. 24, 2009) ("The matter of whether the officers used excessive force in their treatment of Plaintiff in handcuffing him and placing him in the squad car is properly analyzed under the Fourth Amendment because during that time he was being seized and placed under arrest. Thus, the officer's actions are analyzed under an 'objective reasonableness' standard. . . . While

the Fourth Amendment plainly governs the handcuffing and placing into the police car, the issue of whether the Fourth Amendment of the Fourteenth applies to Plaintiff's assertions regarding use of the Ripp-Hobble restraint while he was in the holding cell at the substation requires brief discussion. As noted earlier, the Fourth Amendment governs seizures, including arrests, but the Fourteenth Amendment governs claims of mistreatment of arrestees and pretrial detainees in custody. . . . Although in their motion papers the parties discuss the Fourth Amendment with regard to all aspects of Plaintiff's excessive force claim, this Court is compelled to find that the Fourteenth Amendment, not the Fourth, applies to the Ripp-Hobble portion of the case. The Eleventh Circuit Court of Appeals has acknowledged that the precise line between excessive force claims governed by the Fourth Amendment and excessive force claims governed by the Fourteenth Amendment is not well-defined, but in a recent case that court analyzed an excessive force claim under the Fourteenth Amendment rather than the Fourth where the force occurred in a context similar to that involved in the instant case. In *Fennell v. Gilstrap*, 559 F.3d 1212 (11th Cir.2009), the plaintiff had been arrested and transported in a police car to the jail; the allegedly excessive force occurred in the 'pat-down room' shortly after his arrival there. . . This Court finds that if the chain of events in *Fennell* is sufficient to transfer the source of the right at issue from the Fourth Amendment to the Fourteenth Amendment in this circuit, then the circumstances of the instant case certainly are-here, there was a lapse of time from Plaintiff being placed in the holding cell until the Ripp-Hobble was applied, whereas in *Fennell* the events from the outset of the arrest to the application of the force are described as essentially a continuous sequence. Thus, this portion of Plaintiff's excessive force claim is analyzed under the Fourteenth Amendment rather than the Fourth."); ***Perez v. City of New York,*** No. 07 Civ. 10319(RJS)(KNF), 2009 WL 1616374, at *7 (S.D.N.Y. June 8, 2009) ("The Second Circuit, post-*Graham*, has opined that 'the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer.' *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir.1989). . . . Accordingly, the Court finds that the plaintiff's excessive force claim should be analyzed under the Fourth Amendment."); ***Ramos v. Lucio***, No. B-08-122, 2009 WL 700635, at *8 (S.D. Tex. Mar. 17, 2009) ("The failure to monitor claim arises from the course of the arrest. Plaintiffs allege the failure to monitor occurred before Ramos was released from the arresting officer's custody. Therefore, it is analyzed using the Fourth Amendment standard. *Gutierrez*, 139 F.3d at 452 (quoting *Valencia v. Wiggins*, 981 F.2d 1440, 1445 (5th Cir.1993)). Therefore, under the Fourth Amendment's reasonableness standard, this court will apply an excessive force analysis. . . . Again, this Court analyzes the Plaintiffs' Fourth Amendment claim to proper and timely medical care to determine whether the individual officers actions were objectively unreasonable and amount to excessive force."); ***Holmberg v. Tieber***, No. 1:07 CV 1849, 2008 WL 1930089, at * 6 (N.D. Ohio Apr. 29, 2008) ("The Sixth Circuit has recently recognized that under the Fourth Amendment, 'a governmental seizure of an individual must be reasonable, a rule that applies to an officer's use of force during a booking procedure. Force in this setting becomes constitutionally excessive if it is objectively unreasonable in light of the facts and circumstances confronting the officer.' *Lawler v. City of Taylor*, 2008 WL 624770 (6th Cir. March 5, 2008) (*citing Phelps v.. Coy*, 286 F.3d 295 (6th Cir.2002) and *Graham*, 490 U.S. at 397)."); ***Evans v. Multnomah County***, No. 07-CV-1532-

BR, 2009 WL 1011580, at *5 (D. Or. Apr. 15, 2009) ("Here Plaintiff's excessive-force claim arises from actions occurring after his warrantless arrest, during the booking process, and before a Magistrate determined there was probable cause for the initial arrest. Consistent with the Ninth Circuit's decisions in *Pierce* and *Gibson*, the Court applies the Fourth Amendment standard to Plaintiff's § 1983 claims for excessive force."); ***Ratliff v. City of Houston*** 2008 WL 910205, at *1, *2 (S.D. Tex. Apr. 3, 2008) ("[C]ourts in this Circuit have indicated that the point at which Constitutional protections for detainees shift from the Fourth Amendment to the Due Process Clause of the Fifth or Fourteenth Amendment is the point at which an individual is placed into secure custody in a jail cell. . . Indeed, to hold otherwise would create an unnecessarily complicated inquiry, especially in the context of this case, where there are well over one hundred plaintiffs, each complaining of similar, yet factually distinct conduct by police. More importantly, the protections of the Fourth Amendment necessarily cede to the protections afforded under Due Process once a seizure − whether lawful or not − has been completed. . . Due Process tests contemplate the needs of law enforcement and jail personnel to protect the safety and security of police, correctional officers, and detainees. . . These needs exist regardless whether a detainee is in a cell for one hour, or for weeks."); ***Rosa v. City of Fort Myers***, 2007 WL 3012650, at *12, *14 (M.D. Fla. Oct. 12, 2007) ("In this case, plaintiff had been arrested and brought to the police station where she was detained as the booking process took place. Plaintiff had clearly been seized within the meaning of the Fourth Amendment by virtue of her arrest, but her status had evolved into that of an arrestee in custody. The Eleventh Circuit has analyzed such 'custody' situations under different constitutional amendments. In *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir.2002), the Court analyzed an excessive force claim during arrestee's ride to the jail under the Fourth Amendment. In *Mercado v. City of Orlando*, 407 F.3d 1152, 1154 n. 1 (11th Cir.2005), the Court rejected a Fourteenth Amendment analysis in favor of a Fourth Amendment analysis where a suspect was 'in custody' by virtue of being surrounded by officers. On the other hand, in *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir.1996), a suspect was arrested and transported in the back of a police car in a position which led to his asphyxiation. The Eleventh Circuit stated that excessive force claims 'involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause ...' *See also Redd v. R.L. Conway*, 160 F. App'x 858, 860 (11th Cir.2005) (applying Fourteenth Amendment substantive due process analysis to claims of excessive force during arrest and booking process).' Analyzing claim under both Fourth and Fourteenth Amendment standards, court concluded "plaintiff has presented sufficient evidence to show either a Fourth Amendment or a Fourteenth Amendment excessive force claim."); ***Stephens v. City of Butler, Ala***, 509 F.Supp.2d 1098, 1108, 1109 (S.D.Ala.,2007) ("[T]his case presents an additional issue which also has not been settled in this Circuit. '[T]he line is not always clear as to when an arrest ends and pretrial detainment begins.' *Garrett v. Athens-Clarke County, Georgia*, 378 F.3d 1274, 1279 n. 11 (11th Cir.2004). Even under standardized police procedures, there is a practical gap, a 'legal twilight zone,' between the completion of the arrest as that term is commonly used and the beginning of pretrial detainment. . . The procedures utilized in this case-in which the seizure began at the apartment complex but the arrest did not occur until after plaintiff had already been booked . . . are far from standardized. Other Circuits have taken divergent approaches to the issue. [collecting cases] The authority in

this Circuit establishes no clear cut-off point beyond which the Fourth Amendment ceases to apply. . . .At the hearing, the court noted the evidence − principally in the form of deposition testimony from the arresting officer, defendant Lovette − that plaintiff was not arrested until he was already in the jail and the booking process was underway. . . . As set forth above, plaintiff has offered sufficient evidence that a reasonable jury could find that Lovette first arrested plaintiff immediately prior to the tasing. Moreover, at the time of the tasing the plaintiff had not been searched or fingerprinted and the arresting officer continued to command plaintiff.Based on these facts, the court finds that the tasing occurred incident to the arrest and thus the Fourth Amendment is applicable."); ***Miller v. City of Columbus***, No. 2:05-CV-425, 2007 WL 915180, at *10 (S.D. Ohio Mar. 26, 2007) ("Miller was convicted of a Fifth Degree Felony and sentenced to two years of community control. Defendants allege that Miller fled before completing his sentence, and was not a free citizen; therefore, the Fourth Amendment's objective reasonableness standard is not applicable to Defendants' encounter with Miller. Defendants are correct that the Fourth Amendment does not apply post-conviction, *Johnson v. City of Cincinnati*, 310 F.3d 484, 491 (6th Cir. 2002), however, at the time of this encounter, Miller had not yet been convicted of violating his supervised release.Neither party has provided any Sixth Circuit law on point on this issue, . . . however the Court notes that other federal appellate and district courts have not applied the Eighth Amendment to persons who are not incarcerated or imprisoned at the time of the encounter despite the plaintiff's status as a parolee. . . The Ninth and Tenth Circuits have applied the Fourth Amendment's objective reasonableness standard to excessive force claims by individuals on parol or on supervised release. [citing cases] Accordingly, this Court will apply the Fourth Amendment's objective reasonableness standard to Plaintiff's excessive force claims."); ***Rose v. City of Lafayette,*** No. 05-cv-00311-WDM-MJW, 2007 WL 485228, at *4 (D. Colo. Feb. 12, 2007) ("Plaintiff is correct that 'following arrest the due process protections of the Fourteenth Amendment are triggered to protect a pretrial detainee from excessive force approaching punishment.' . . However, the Tenth Circuit has ruled that claims based on physical assaults by police on a person arrested but not yet presented to a judicial officer are subject to the Fourth Amendment objectively reasonable framework, not substantive due process. . . Other types of claims of mistreatment in the post-arrest context may fall under due process considerations . . . but Plaintiff's do not."); ***Stewart v. Beaufort County***, 481 F.Supp.2d 483, 490 (D.S.C. 2007) ("The court notes that it is often not clear when an arrestee becomes a pretrial detainee for purposes of determining the applicable constitutional protection. . . . For purposes of determining constitutional protections, the holding in *Riley* [*v. Dorton*, 115 F.3d 1159 (4th Cir.1997)] instructs the court that a person is an 'arrestee' when an officer decides to detain, and that the Fourth Amendment applies only to the single act of the arrest. Applying this rule to the case at hand, it follows that Stewart was an arrestee during his arrest in the parking lot of Smoker's Express. By the time he arrived in the sally port of the Beaufort County Detention Center, however, he was lawfully arrested and being held prior to a formal adjudication of guilt, and was therefore a pretrial detainee."); ***St. Amant v. Taylor Police Department***, No. 05-CV-72900, 2006 WL 2365007, at *4 (E.D. Mich. Aug. 14, 2006) ("However, Plaintiff does not claim that he was still in the custody of the arresting officers at the time of the incident, nor has he named either of the arresting officers as defendants. Yet it is also unclear whether Plaintiff would fall under the definition of a 'pretrial detainee' for

purposes of substantive due process analysis, since he was only being held at the police station for the night and was released the next morning. On the other hand, Plaintiff was under arrest for his third drunk driving violation and was not necessarily entitled to nominal bond inasmuch as he was chargeable with a felony offense. In short, neither the facts nor the case law are developed enough to conclude whether Plaintiff's exact status at the time of this incident was that of a 'pretrial detainee' or simply 'in custody.' Nevertheless, for purposes of the Fourteenth Amendment substantive due process claim advanced by the Plaintiff, the Defendants' actions clearly do not 'shock the conscience,' as set forth in the analysis below. Moreover, even under the less forgiving standard applied under Fourth Amendment analysis, the actions of the Defendants were not unreasonable. Plaintiff's claim would therefore fail under either standard."); ***McBride v. Clark***, No. 04-03307-CV-S-REL, 2006 WL 581139, at *22, *23 (W.D. Mo. Mar. 8, 2006) (not reported) ("In this case, the parties disagree on the appropriate governing standard. That is, Plaintiff argues that the Fourth Amendment's objective reasonableness standard applies; Defendant contends that the Eighth Amendment governs Plaintiff's excessive force claim. It is clear that the Eighth Amendment does not apply, as Plaintiff had not yet been convicted of a crime and was not serving a sentence at the time of the alleged violation. . . It is less clear, however, whether Plaintiff's claim is governed by the Fourth Amendment standard for arrestees or the Fourteenth Amendment standard for pretrial detainees. Here, Plaintiff was being held on a warrant for suspicion of a drug-related offense. Although both parties categorize Plaintiff as a 'pretrial detainee,' merely labeling him as such does not make it so. Under factually analogous circumstances, courts of this circuit have applied − and the Eighth Circuit has upheld − the Fourth Amendment standard rather than the Fourteenth Amendment standard. . . As a result, I find that the Fourth Amendment governs Plaintiff's excessive force claim."); ***Turner v. White,*** 443 F.Supp.2d 288, 294 (E.D.N.Y. 2006) (" The status of a parolee who seeks to bring claims of excessive force against his parole officer is unsettled in this Circuit. . . Courts in the Fifth Circuit have held that constitutional claims by parolees are governed by an Eighth and Fourteenth Amendment analysis. [citing cases]These cases, however, are not binding on this Court . . . and appear to be contrary to the approach followed by district courts in this Circuit. . . . In *Blake v. Base*, the district court, after distinguishing the cases that applied an Eighth Amendment analysis to claims brought by parolees, concluded that a parolee's claim that he was subjected to excessive force while in detention at a time prior to the time he had been arraigned on the new charges for which he was being detained is more properly analyzed under the Fourth Amendment. 1998 WL 642621, at *10 n. 21. This Court finds this analysis to be persuasive. Just because an individual has been convicted of a crime in the past and is on parole does not deprive him of his Fourth Amendment constitutional right to be free from excessive force if arrested on another crime."); ***Bornstad v. Honey Brook Township***, No. C.A.03-CV-3822, 2005 WL 2212359, at *19 n.47 (E.D. Pa. Sept. 9, 2005) ("Some courts have evaluated a claim for failure to render medical assistance during the course of an arrest using a Fourth Amendment excessive force analysis. *Price*, 990 F.Supp. at 1241 n. 22. Here, Plaintiff does not argue that the Defendants' failure to offer medical assistance constituted excessive force. Rather, he relies solely on the protections afforded by the Fourteenth Amendment."); ***Calhoun v. Thomas,*** 360 F.Supp.2d 1264, 1271-74 (M.D. Ala. 2005) ("[W]hile it is clear that Calhoun had already been 'seized' and, for all intents and purposes, arrested at the time of the alleged abuses,

it is equally plain that he had not yet acquired the status of a pretrial detainee. As a formal matter, Calhoun had not yet been officially arrested at the time the alleged abuses occurred. In addition, he was in the custody of the officers who eventually arrested him at all times during the interrogation process. He had not been booked into the Pike County Jail, and had not yet made an initial appearance before a judge. . . Furthermore, at that point in time, Calhoun had not been charged with any crime. Thus, the alleged application of excessive force in this case occurred while Calhoun was in a 'legal twilight zone,' the legal implications of which were left unclear by *Graham*. . . Since *Graham* was decided, lower courts have grappled with the issue of which constitutional provision provides protection from excessive force during this period of detention following an arrest or seizure, but prior to a judicial determination of probable cause. . . While some federal appellate courts have continued to apply the Fourteenth Amendment Due Process Clause to excessive force claims occurring during this post-arrest, pre-custody time period, a number of appellate courts have applied the Fourth Amendment to incidents of excessive force occurring after the moment of arrest by adopting the 'continuing seizure' approach to defining when seizure ends and pretrial detention begins. Under this analysis, a Fourth Amendment seizure is treated as extending beyond the actual moment of arrest to the ensuing period of intermittent custody in the hands of the arresting officers. [citing cases] The Eleventh Circuit Court of Appeals has not explicitly adopted this 'continuing seizure' test. However, it has indirectly countenanced the application of the Fourth Amendment to post-arrest, pre-detention excessive-force claims in several cases. [discussing cases] . . . . Most recently, the Eleventh Circuit touched upon the issue in *Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir.2004), another §1983 excessive-force case alleging a Fourth Amendment violation of an arrestee's rights. As in *Cottrell*, the arrestee in *Garrett* died from positional asphyxia. In this case, arresting officers had pepper-sprayed him and bound his feet and ankles together during the course of arresting him. He died while lying in the road behind the squad car, moments after he had been physically subdued. In noting that Garrett's claim was properly analyzed under the rubric of the Fourth Amendment, the court stated in a footnote, 'Although the line is not always clear as to when an arrest ends and pretrial detention begins, the facts here fall on the arrest end. *See Gutierrez v. City of San Antonio*, 139 F.3d 441, 452 (5th Cir.1998) (stating Fourteeenth Amendment analysis does not begin until 'after the incidents of arrest are completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention awaiting trial for a significant period of time") (quotation and citation ommitted).' . . . By citing to a Fifth Circuit Court of Appeals case that emphasized the specific limits of the Fourteenth Amendment in excessive-force cases, the court again implied that the Fourth Amendment provides a more appropriate framework of analysis for post-arrest, pre-detention cases. . . . Thus, the Eleventh Circuit's own case law, in addition to the case law of a number of other circuits and the Supreme Court, suggests that an analysis under the Fourth Amendment is appropriate, if not required, in post-seizure, pre-detention allegations of excessive force such as Calhoun's. Accordingly, this court finds that the Fourth Amendment is the specific constitutional right allegedly infringed by the challenged application of force in this case."); ***Whiting v. Tunica County,*** 222 F. Supp.2d 809, 822, 823 (N.D. Miss. 2002) ("Some Circuits, for example, apply the Fourth Amendment reasonableness standard to excessive force claims arising post-arrest, setting arraignment as the line of demarcation between the Fourth and

Fourteenth Amendments. In these circuits, the Fourth Amendment reasonableness standard applies until the arrestee appears before a neutral magistrate for arraignment or probable cause hearing, or until the individual leaves the joint custody of the arresting officers. [citing cases] Other Circuits focus on the Due Process Clause of the Fourteenth Amendment and apply a substantive due process standard at the moment the incidents of arrest are complete. [citing cases] On facts similar to the instant case, the Eighth Circuit has applied Fourth Amendment standards to a claim of excessive force allegedly suffered by an individual in being restrained in the back of a police car post-arrest. . . The Fifth Circuit has taken a somewhat hybrid approach. As a general rule, substantive due process applies in the Fifth Circuit after the fact of arrest. [citing cases] On these facts, the Court concludes that the Fourth Amendment applies to Whiting's claim arising out of the post-arrest events in the police car. . . . The proximity to the arrest in this case, unlike in *Valencia*, transpired so closely to the actual arrest, that, under *Graham*, the most reasoned approach is to apply the Fourth Amendment. This is especially so since Whiting was still in the custody of the arresting officer, having never left that custody."); ***Carlson v. Mordt,*** No. 00 C 50252, 2002 WL 1160115, at *4, *5 (N.D.Ill. May 29, 2002) (not reported) ("The Seventh Circuit has not made clear at precisely what point an arrest ends, and pretrial detention begins. *See, e.g.*, *Proffitt v. Ridgway*, 279 F.3d 503, 506 (7th Cir.2002) (analyzing excessive force claim under due process standard where action occurred en route to jail following arrest); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 596 (7th Cir.1997) (acknowledging struggle with the issue, and analyzing excessive force claim under Fourth Amendment where conduct in question occurred shortly after arrestee was handcuffed) . . . The court concludes that in this case, when the police dog was dropped from the attic, Carlson's arrest was still ongoing. At that time, Carlson had not been removed from his house, where he had been apprehended. The attack occurred immediately after Carlson was handcuffed, while he was still on the floor. . . . [C]onsequently the court must analyze Carlson's excessive force claim as to that incident under the Fourth Amendment."); ***Bartram v. Wolfe,*** 152 F. Supp.2d 898, 910 & n.8 (S.D.W.Va. 2001) (noting that the Fourth Circuit in *Riley v. Dorton*, 115 F.3d 1159, 1161 (4th Cir.1997), rejected concept of a 'continuing seizure' but provided no simple rule for determining when Fourth Amendment protection ends; suggesting "[a] simple rule would be that a person is an arrestee until the person has made an initial appearance before a judicial officer, and then the person becomes a pretrial detainee. Such a rule would have the added benefit of discouraging the use of force and intimidation by police officers in the obtaining of a statement from an accused who has not appeared in court and has not obtained counsel."); ***Hill v. Algor***, 85 F. Supp.2d 391, 402, 403 (D.N.J. 2000) ("[T]he Supreme Court [in *Graham*] left unanswered (1) the particular moment in time at which arrest or seizure ends and pretrial detention begins; and (2) whether the Fourth Amendment applies beyond arrest into the period of pretrial detention. . . . [I]t is clear from *Bell* that one who remains in detention after formal charge and while awaiting trial is a pretrial detainee subject to Due Process protection. The question now plaguing the courts of appeals, however, concerns whether the starting point of pretrial detention, as determined by the termination of a Fourth Amendment 'seizure', precedes post-charge detention as acknowledged in *Bell*. . . .At least three circuits have declined to extend the Fourth Amendment beyond the initial arrest or seizure. [citing cases from Fourth, Fifth and Seventh Circuits] Disagreeing with these courts, the Ninth and Tenth Circuits have applied the

Fourth Amendment to post-arrest, pre-arraignment custody obtained without a warrant. [citing cases] In line with the Ninth and Tenth Circuits, the Second Circuit has concluded, 'the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned, or formally charged, and remains in the custody ... of the arresting officer.' *Powell v. Gardner*, 891 F.2d 1039, 1043 (2nd Cir.1989). . . . This Court agrees with the Ninth and Tenth Circuits that a person continues to be an arrestee subject to Fourth Amendment protection through the period of post-arrest but prearraignment detention. Stated differently, this Court declines to extend pretrial detention beyond the circumstances in *Bell*, concluding that such detention does not begin until an arrestee is at least formally charged and his release or continued detainment is determined.").

See also ***Johnson v. City of Cincinnati,*** 310 F.3d 484, 492, 493 (6th Cir. 2002) ("To be sure, application of the Ordinance's post-arrest provision resembles a seizure in that it is a show of government authority and a restraint on a freedom of movement. . . But in each of the cases addressed by our sister circuits, the government not only curtailed the suspect's right to interstate travel, it also imposed additional restrictions designed to compel an ultimate court appearance, such as obligations to post bond, attend court hearings, and contact pretrial services. [citing cases] In contrast, (1) the Ordinance imposes solely travel restrictions; (2) the ninety day exclusion is not bounded by an eventual court appearance; and, (3) the stated purpose of these restrictions is to combat drug crime in Over the Rhine. Thus, we conclude that the Fourth Amendment's prohibition against unreasonable seizures does not provide the appropriate analytical framework for evaluating the constitutionality of such restrictions.").

In ***Brown v. Phelan***, No. 93 C 4636, 1993 WL 364842, *3 (N.D. Ill. Sept. 14, 1993) (not reported), the court found no basis for ascribing deliberate indifference to the conduct of a Sheriff who was "responsible by statute for operation of the County Jail, [where he] was inherently limited by the funds and facilities that had been made available to him...." *See also* ***Watson v. Sheahan***, No. 93 C 6671, 1994 WL 130759, *3 (N.D. Ill. April 14, 1994) (not reported) ("[I]n all the respects about which [plaintiff] complains both [defendants] are simply limited to doing the best that they can with what they are given to work with. That being the case, both [defendants] are unquestionably chargeable with knowledge of the adverse conditions, but they cannot be said − given the limitations on their power − to have 'acquiesced' in them. In sum, it is not possible to characterize either of the named defendants with 'deliberate indifference' so as to subject them to ['] 1983 liability.").

But see ***Brown v. Mitchell,*** 308 F.Supp.2d 682, 700, 701 (E.D.Va. 2004) ("Considering the . . . fact that a Virginia sheriff has no authority to construct or modify local jail facilities, Mitchell argues that, because she is required to accept 'all persons' committed to the Jail, she cannot have been deliberately indifferent or grossly negligent as to the alleged overcrowding conditions at the Jail. It is true that, by statute, the locality, not the sheriff, is required to build and maintain a jail of a reasonable size to house the inmate population. . . . A Virginia sheriff, by contrast, has no duty or ability to build, expand, or otherwise improve the structural facilities of a

jail. As discussed above, as a constitutional officer, Mitchell's duties and responsibilities are created solely by statute.. . Her statutory duties include maintaining records on all prisoners, formulating and enforcing jail rules, providing security in the jail, and keeping inmates clothed and fed. . . There is no statute, however, requiring or allowing a sheriff to build, add to, or otherwise improve the physical structure of a jail. Thus, Mitchell is correct respecting her inability to remedy the problem of overcrowding by building a new jail or modifying the existing one. Her failure, therefore, to build a new jail or remedy the existing one cannot be considered gross negligence or deliberate indifference. However, Mitchell's argument that, as a matter of law, she is exonerated from either a state-law wrongful death action or an action under Section 1983 by virtue of Va.Code Ann. § 53.1-119 et seq. is misplaced because the argument simply ignores the remainder of the statutory scheme of which Va.Code Ann. § 53.1-119 et seq. is a part. . . . Under § 53.1-74, which also is a part of Chapter 3 of Title 53: 'When a ... city is without an adequate jail ... the circuit court thereof shall adopt as its jail, the jail of another county or city until it can obtain an adequate jail.' The ensuing sections of Chapter 3 provide for the procedures that are to be followed after such an adoption and set forth mechanisms for providing payment to the adopted jurisdiction. Thus, the General Assembly has provided a means for eliminating overcrowding when overcrowding would render a jail inadequate other than the structural remedies of constructing a new jail facility or expanding an existing one. And, although the authority for arranging for the use of other facilities lies in the local circuit courts, . . . Chapter 3 requires the sheriff to know, and keep records reflecting, the population of the local jail. . . Indeed, the sheriff must report thereon to the Compensation Board and, if asked, to the local circuit court. . . Thus, when a Virginia sheriff knows that a local jail is so overcrowded as to render it inadequate, that sheriff is not, contrary to Mitchell's arguments, without recourse or ability to remedy the overcrowding because, under Virginia's statutory scheme, alternate arrangements can be made by informing the local circuit court of the fact of overcrowding. Indeed, the Virginia legislature provides, quite clearly, that when so informed, the circuit court 'shall adopt as its jail, the jail of another county or city until it can obtain an adequate jail.' . . . Additionally, under another section of the statute, the circuit court can, upon Petition for Writ of Mandamus, command a governing body to put its own jail in good repair and be made otherwise adequate. . . Mitchell, whose job includes the operation of the Jail in accord with the dictates of Title 53, is charged with knowledge of these statutes. And, she is charged with knowledge of conditions in the Jail over which she has charge. Her failure to use these statutory mechanisms in the face of known overcrowding to the extent of the inadequacy as alleged in the Complaint certainly can be considered 'deliberate indifference' within the meaning of Eighth Amendment jurisprudence or gross negligence under Virginia's wrongful death jurisprudence."); ***Laube v. Haley,*** 234 F.Supp.2d 1227, 1249, 1250 (M.D. Ala. 2002) ("Here, the defendants urge the court to consider the reasonableness of each official's response with respect to his or her ability to act within budgetary constraints. In other words, the defendants ask the court to consider whether each official's response was reasonable given the lack of funds available to him or her. The lack-of-funds defense is common in prison suits, and precedent clearly establishes that this defense is available to officials only when they are sued in their individual capacities.").

See also ***Henry v. Hulett***, 969 F.3d 769, 777-84 (7th Cir. 2020) (en banc) ("We do not think it naturally follows that, because the Court created a categorical exception to a prisoner's Fourth Amendment rights in her cell, the Court intended to expand that rule to also deprive a prisoner of all Fourth Amendment protections in her body. Indeed, the Supreme Court has indicated several times that the privacy interest in one's body is more acute than the interest in one's property. . . .[W]hile prison security requires officials to constantly monitor prisoners' cells, the same is not true of their unclothed persons. We conclude that a diminished right to privacy in one's body, unlike a right to privacy in one's property and surroundings, is not fundamentally incompatible with imprisonment and is an expectation of privacy that society would recognize as reasonable. We therefore join every other circuit to have addressed the question and hold that the Fourth Amendment protects (in a severely limited way) an inmate's right to bodily privacy during visual inspections, subject to reasonable intrusions that the realities of incarceration often demand. . . . Thus, when evaluating a prisoner's Fourth Amendment claim regarding a strip or body cavity search, courts must assess that search for its reasonableness, considering 'the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'. . We highlight that our holding today—that inmates maintain a privacy interest, although diminished, in their bodies—pertains to pretrial detainees and convicted prisoners alike. Importantly, *Hudson* drew no distinction between these two categories in its analysis; rather, the Court focused on the heightened concerns over safety and security emblematic of any detention facility. . . . Contrary to the assertion of our dissenting colleague, neither *Bell* nor *Florence* limited its holding solely to pretrial detainees. As stated above, *Bell* expressly assumed that convicted prisoners retain Fourth Amendment rights. . . .We conclude that the applicability of the Fourth Amendment does not compromise the heightened standard of the Eighth. . . . True, the Supreme Court has held *unenumerated* rights—such as those arising from the due process clause—do not afford a prisoner greater protection than the Eighth Amendment. . . But this conclusion is specific to the Court's substantive due process jurisprudence—claims 'covered by a specific constitutional provision, such as the Fourth or Eighth Amendment ... must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.'. . . Importantly, the Fourth and Eighth Amendments have different roles to play with respect to bodily searches and protect different categories of constitutional rights. The Eighth Amendment safeguards prisoners against the use of searches that correctional officers subjectively intend as a form of punishment. . . . Because reasonableness is an objective test, a defendant's subjective state of mind is irrelevant to a court's Fourth Amendment analysis. . . The Fourth Amendment thus protects prisoners from searches that may be related to or serve some institutional objective, but where guards nevertheless perform the searches in an unreasonable manner, in an unreasonable place, or for an unreasonable purpose. . . This last consideration is particularly salient in the case before us: certainly, a court need not give as much deference to a prison administrator's assessment of the necessity of a training exercise as it does to measures taken in response to the actual presence of weapons, contraband, or other immediate security concerns. . . . In *Johnson*, we broadly announced that *Hudson* held that any Fourth Amendment right to privacy extinguished upon conviction, and we affirmed the dismissal of an inmate's Fourth Amendment claim regarding observation of his naked body on that basis. .

. Thus, in *King*, we attempted to reconcile this inconsistency in our case law with a bright-line rule: that prisoners retain an expectation of privacy regarding physical intrusions *into* their bodies—such as during digital rectal probes and forced catheterizations—but not visual inspections of them. . . As our colleague initially explained in his concurrence in *King*, this rule is untenable. . . To begin, it draws no support from Supreme Court precedent. Indeed, the strip searches the Court evaluated using a reasonableness analysis in *Bell* and *Florence* were visual. . . No other circuit has announced (nor ever entertained the notion) that the Fourth Amendment reaches only searches that involve a physical intrusion by a searching official. This is for good reason, as searches may be attributed to law enforcement when they do not physically do the searching, but it occurs at their command. . . This is consistent with the overarching focus of the Fourth Amendment reasonableness analysis, which evaluates an individual's expectation of privacy 'in *what was searched*,' not who did the searching. . . To conclude otherwise promotes a distinction without a difference: whereas a manual body cavity search conducted by a prison official would fall within the domain of the Fourth Amendment, a search in which an officer orders a prisoner to manipulate her own body and merely looks on would avoid review. In light of these considerations, we thus overrule the section of *King* addressing the plaintiff's Fourth Amendment claim and the bright-line rule it announced. Likewise, we overrule our decision in *Johnson* to the extent it deems the Fourth Amendment inapplicable to visual inspections during bodily searches. . . . Consistent with the principle of deference to the judgment of prison administrators, several of our sister circuits, after undertaking a reasonableness analysis of prison strip searches, have concluded that these searches do not violate the Fourth Amendment where the level of intrusion does not outweigh the purported justification for the search. . . . Finally, although we have concluded that the Fourth Amendment applies to the strip and body cavity searches at issue, this does not mean that Plaintiffs are necessarily entitled to a trial on their Fourth Amendment claim. They still must provide sufficient evidence that the searches were unreasonable, considering 'the scope of the particular intrusion[s], the manner in which [they were] conducted, the justification for initiating [them], and the place in which [they were] conducted.'. .Citing security concerns and the need for cadet training, Defendants argue that the searches at issue were reasonable. We do not resolve today, however, whether Plaintiffs have demonstrated a genuine dispute regarding the reasonableness of the searches. Because the district court concluded the Fourth Amendment did not cover the searches at issue here, it did not perform a reasonableness analysis. Indeed, Defendants, in their motion to strike Plaintiffs' response to their motion for summary judgment, conceded that '[t]he nature of the searches and whether they were conducted in the manner claimed by Plaintiffs are clearly in dispute.' On this record, we cannot determine whether the searches were, in fact, reasonable. We thus leave that analysis to the district court to perform in the first instance on remand.")

But see ***Henry v. Hulett***, 969 F.3d 769, 788-91 (7th Cir. 2020) (en banc) (Easterbrook, Circuit Judge, dissenting) ("My colleagues are right to say that prisoners are entitled to protection from abusive guards. Misbehaving guards can be and are criminally prosecuted, as the guard was in *J.K.J. v. Polk County*, 960 F.3d 367 (7th Cir. 2020) (en banc), and many prisoners have tort claims. But our plaintiffs invoke the Constitution rather than other sources of law. Constitutional

protection for persons serving sentences following convictions comes from the Cruel and Unusual Punishments Clause of the Eighth Amendment, not the Fourth Amendment. The difference between the two is that liability under the Eighth Amendment depends on showing an intent to punish improperly, not simply on taking an action that a court deems unreasonable. . . . In recent years the Court has repeatedly addressed the question: How long after arrest does the Fourth Amendment remain applicable? Although some decisions suggested that the Fourth Amendment's protections lapse when an arrested person is presented to a judge, see, e.g., *Wallace v. Kato*, 549 U.S. 384, 389–92, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007), more recent decisions have drawn the line at conviction. A detainee retains rights under the Fourth Amendment until conviction. See *Manuel v. Joliet*, —— U.S. ——, 137 S. Ct. 911, 197 L.Ed.2d 312 (2017); *McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 204 L.Ed.2d 506 (2019). After that, the Eighth Amendment sets the limits on institutional management. . . . If prisons are to enjoy the scope of discretion that is essential to sound administration, while protecting prisoners from sadistic conduct, the Eighth Amendment is the right tool for the job.")

See also ***Fugate v. Erdos***, No. 21-4025, 2022 WL 3536295, at *13-14 (6th Cir. Aug. 18, 2022) (not reported) ("While we did not parse the distinction in *Cornwell*, the en banc Seventh Circuit recently articulated the distinction between the Eighth Amendment and the Fourth Amendment as they relate to prison strip searches: The Fourth Amendment, as discussed earlier, 'protects prisoners from searches that may be related to or serve some institutional objective, but where guards nevertheless perform the searches in an unreasonable manner, in an unreasonable place, or for an unreasonable purpose.' *Henry v. Hulett*, 969 F.3d 769, 781 (7th Cir. 2020) (en banc). The Eighth Amendment, on the other hand, 'safeguards prisoners against the use of searches that correctional officers subjectively intend as a form of punishment.'. . With these standards in mind, Fugate has come forward with evidence that the warden maliciously ordered the third daily strip search as punishment.")

11. Note on "Shocks the Conscience"

In ***County of Sacramento v. Lewis***, 523 U.S. 833 (1998), the Court granted certiorari "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Id.* at 839. The decedent in *Lewis* was a sixteen-year-old passenger on a motorcycle driven by a friend. A pursuit took place when the driver of the motorcycle ignored an officer's attempt to stop him for speeding. The chase reached speeds of up to 100 miles per hour and ended when the motorcycle failed to maneuver a turn, resulting in both the driver and passenger falling off the cycle. The police officer in pursuit skidded into Lewis, propelling him 70 feet down the road. Lewis died as a result of his injuries.

Because Supreme Court precedent precluded application of the Fourth Amendment to the facts of the case, *see* ***California v. Hodari***, 499 U. S. 621, 626 (1991) (police pursuit does not amount to "seizure" within meaning of Fourth Amendment) and ***Brower v. County of Inyo***, 489

U. S. 593, 596-597 (1989) (Fourth Amendment seizure occurs only when there is a governmental termination of freedom of movement through means intentionally applied), the Court first had to resolve whether the plaintiff could state a claim under the substantive due process clause of the Fourteenth Amendment in the pursuit context, and, if so, whether the allegations set out by the plaintiff were sufficient to establish such a claim.

Justice Souter, writing the majority opinion, noted that the Court had recently expressed its view on the first question and pointed to the following language in ***United States v. Lanier***, 520 U.S. 259, 272 n.7 (1997):

Graham v. Connor, 490 U.S. 386, 394,109 S.Ct. 1865, 1870-1871, 104 L.Ed.2d 443 (1989), does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

Thus, given the facts of *Lewis* and the inapplicability of a more specific constitutional provision, the plaintiff could assert a claim under the substantive due process clause. *See also* ***Moran v. Clarke (Moran I),*** 296 F.3d 638, 646 (8th Cir. 2002) (en banc) ("[W]hen a person is damaged by outrageous police misconduct but the resulting injury does not neatly fit within a specific constitutional remedy, the injured party may, depending upon the circumstances, pursue a substantive due process claim under section 1983."); ***Petta v. Rivera***, 143 F.3d 895, 901 (5th Cir. 1998) ("[W]e conclude, as have all of the courts of appeals that have addressed the issue, that a plaintiff whose claim is not susceptible to proper analysis with reference to a specific constitutional right may still state a claim under § 1983 for a violation of his or her Fourteenth Amendment substantive due process right, and have the claim judged by the constitutional standard which governs that right."); ***Hemphill v. Schott***, 141 F.3d 412, 418-19 (2d Cir. 1998) ("This court has held that outside the context of an arrest, a plaintiff may make claims of excessive force under § 1983 under the Due Process Clause of the Fourteenth Amendment. . . . One embodiment of this still extant claim for relief from excessive force based in Due Process is the situation in which a state actor aids and abets a private party in subjecting a citizen to unwarranted physical harm. . . . *Graham*'s holding that excessive force claims in the context of an arrest are to be analyzed under the Fourth Amendment's objective standards does not extend to this unusual situation in which the police officers allegedly engaged in a deprivation of rights coincident with, but distinct from, their arrest of the suspect. Not only did the alleged aid necessarily begin before the Officers and Torrado reached the scene of the arrest, but Torrado, as a civilian, was not himself arresting Hemphill."); ***Sanchez v. Figueroa***, 996 F. Supp. 143, 147 (D.P.R. 1998) ("While substantive due process analysis has been rendered inapposite to situations to which specific constitutional amendments apply, . . . the factors set forth by Judge Friendly in *Glick* remain useful in analyzing claims of excessive force by innocent bystanders who have no Fourth or Eighth Amendment claims.").

See also ***Betts v. New Castle Youth Development Center***, 621 F.3d 249, 260, 261 (3d Cir. 2010) ("Although we have not previously applied the more-specific-provision rule in a precedential opinion, at least four of our sister circuit courts of appeals have done so. [collecting cases] Betts does not cite any case law for the proposition that he may bring both substantive due process and Eighth Amendment claims challenging the same conduct. Moreover, Betts's claims concern his conditions of confinement and an alleged failure by Defendants to ensure his safety. Because these allegations fit squarely within the Eighth Amendment's prohibition on cruel and unusual punishment, we hold that the more-specific-provision rule forecloses Betts's substantive due process claims."); ***Cain v. Rock***, 67 F. Supp.2d 544, 552-53 (D. Md. 1999) ("Whether a random act of violence by a prison guard constitutes 'cruel and unusual punishment' for Eighth Amendment purposes is a question of first impression in the Fourth Circuit. . . . This Court agrees with the reasoning of the Second and Fifth Circuits. The assault at issue in the present case plainly falls outside of 'cruel and unusual punishment' jurisprudence. Rock's alleged sexual acts were in direct violation of prison regulations, neither authorized nor condoned by prison officials, and completely removed from the purposes of the correctional facility. These acts, though regrettable, were random, and the Court holds that a random sexual assault by a prison guard − while cruel and not ordinary − does not qualify as 'punishment' for Eighth Amendment purposes. Accordingly, the Court rejects Cain's Eighth Amendment claim. Prisoners who are the subject of unauthorized assaults, however, may still have a claim under the Fourteenth Amendment's Due Process Clause. . . . In the present case, the Court finds that Cain's allegations and evidence, if true, set forth a scenario that could shock the judicial conscience. Given the 'power arrangements' in the prison environment, . . . and the custodial role of correctional officers, a sexual assault by a guard is a shocking abuse of power, particularly where the inmate is mentally or physically incapacitated.").

See also ***Simi Investment Company, Inc. v. Harris County***, 236 F.3d 240, 248, 249 (5th Cir. 2000) ("*John Corp.* found that under *Albright /Graham*, a more explicit provision does not necessarily preempt due process protections, and that substantive due process claims can survive a related takings argument . . . . Our limited holding in *John Corp*. is similarly limited here; we find only that when a state interferes with property interests, a substantive due process claim may survive a takings analysis and, therefore, provide jurisdiction for a federal court.").

The Court expressly rejected as "unsound," 523 U.S. at 843, the contrary position taken by the Seventh Circuit in ***Mays v. City of East St. Louis***, 123 F.3d 999, 1002 (7th Cir. 1997) (where passengers in suspect's car sued for injuries sustained in context of high-speed pursuit, court held that "[c]aution in the creation of new rights leads us to conclude that the sort of claim plaintiffs make is not a proper invocation of substantive due process. . . .[O]nce the substantive criteria of the fourth amendment have been applied, there is neither need nor justification for another substantive inquiry − one based not on constitutional text but on an inference from structure.").

The more difficult question was the standard of culpability plaintiff would have to demonstrate to make out a substantive due process claim in the pursuit context. In *Lewis*, the Ninth Circuit had held that "deliberate indifference or reckless disregard" was the appropriate standard

for a substantive due process claim arising from a high-speed pursuit. ***Lewis v. Sacramento County***, 98 F.3d 434, 441 (9th Cir.1996). The Ninth Circuit's holding was in direct conflict with decisions of other Circuits requiring conduct that "shocks the conscience" in high-speed pursuit cases. *See, e.g.*, ***Evans v. Avery***, 100 F.3d 1033, 1038 (1st Cir. 1996) (holding that "police officers' deliberate indifference to a victim's rights, standing alone, is not a sufficient predicate for a substantive due process claim in a police pursuit case. Rather, in such a case, the plaintiff must also show that the officers' conduct shocks the conscience."); ***Williams v. City and County of Denver***, 99 F.3d 1009, 1017 (10th Cir. 1996) (concluding that officer's "decision to speed against a red light through an intersection on a major boulevard in Denver without slowing down or activating his siren in non-emergency circumstances . . . could be viewed as reckless and conscience-shocking."), *vacated and remanded for further proceedings in light of County of Sacramento v. Lewis and Bd. of County Comm'rs of Bryan County v. Brown*, ***Williams v. City and County of Denver***, 153 F.3d 730 (10th Cir. 1998) (per curiam) (en banc); ***Fagan v. City of Vineland***, 22 F.3d 1296, 1303 (3d Cir. 1994) (en banc) (holding that "the appropriate standard by which to judge the police conduct [in a high speed pursuit case] is the 'shocks the conscience' standard.").

The Court first observed that "the core of the concept" of due process has always been the notion of "protection against arbitrary action." 523 U.S. at 845. What will be considered "fatally arbitrary," however, will "differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Id*. To establish an executive abuse of power that is "fatally arbitrary," the plaintiff will have to demonstrate conduct that "shocks the conscience." The Court acknowledged that "the measure of what is conscience-shocking is no calibrated yard stick," and "that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault." *Id.* at 848. Most likely to reach the conscience-shocking level would be "conduct intended to injure in some way unjustifiable by any government interest." *Id*. at 849.

Approving of the deliberate indifference standard applied to substantive due process claims of pretrial detainees complaining of inadequate attention to health and safety needs, the Court distinguished high-speed pursuits by law enforcement officers as presenting "markedly different circumstances." *Id.* at 851. The Court noted substantial authority for different standards of culpability being applied to the same constitutional provision. Thus, in the Eighth Amendment prison context, while deliberate indifference to medical needs may establish constitutional liability, the Court has required prisoners asserting excessive force claims in the context of a prison riot to show that the force was used "maliciously and sadistically for the very purpose of causing harm." ***Whitley v. Albers***, 475 U.S. 312, 320-21 (1986). The Court analogized police officers engaged in sudden police chases to prison officials facing a riot and concluded:

Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for Due Process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.

523 U.S. at 854. With no suggestion of improper or malicious motive on the part of the officer in *Lewis*, the alleged conduct could not be found "conscience-shocking." Thus, the Court reversed the judgment of the Court of Appeals.

While six of the Justices concurred in the judgment and opinion of the Court, Justices Stevens, Scalia and Thomas concurred only in the judgment. Justice Stevens would have reinstated the judgment of district court which had disposed of the case on qualified immunity grounds on the basis that the law was not clearly established at the time. He would have left resolution of the difficult constitutional question for a case against a municipality. 523 U.S. at 859 (Stevens, J., concurring in the judgment).

Justice Scalia, joined by Justice Thomas, suggested that the appropriate test for a substantive due process claim was "whether our Nation has traditionally protected the right respondents assert" rather than "whether the police conduct here at issue shocks my unelected conscience." *Id*. at 862 (Scalia, J., joined by Thomas, J., concurring in the judgment). Justice Scalia "would reverse the judgment of the Ninth Circuit, not on the ground that petitioners have failed to shock my still, soft voice within, but on the ground that respondents offer no textual or historical support for their alleged due process right." *Id.* at 865.

See ***Washington v. Housing Authority of the City of Columbia***, 58 F.4th 170, 178-82 (4th Cir. 2023) ("Here, deliberate indifference is the correct standard to measure the Housing Authority's conduct. Unlike cases involving emergency, split-second decisions, Plaintiff alleges years of choices by the Housing Authority that led to the tragic circumstances of this case. . . . Additionally, the Housing Authority adopted a specific policy in 2017 to ensure that missing carbon monoxide detectors, which it considered to be 'life-threatening conditions,' were installed in *some* (privately owned) properties. . . But two years later—and with time to reflect that such 'life-threatening conditions' from carbon monoxide threatened *all* of its properties—the Housing Authority had chosen not to apply the same policy to its *own* housing. Thus, the facts alleged show there was ample time to deliberate and reflect on those choices. Accordingly, deliberate indifference is the correct standard to apply here. Next, we consider whether the Housing Authority's alleged conduct constitutes deliberate indifference to Witherspoon's life and safety. . . .The Housing Authority argues that Plaintiff failed to allege that the Housing Authority recognized the risk of carbon monoxide poisoning. Specifically, the Housing Authority posits that without prior knowledge of past complaints relating to carbon monoxide leaks or other similar dangerous conditions, it could not have known the danger here. . . . Plaintiff has alleged enough facts at this early stage to establish that the Housing Authority recognized the risk of carbon monoxide poisoning and acted inappropriately in light of that risk. . . .Taken to its logical conclusion, the Housing Authority's argument would amount to a 'one free death' card. . . That's because, where a landlord fails to install carbon monoxide detectors or inspect a furnace, the most likely way they will discover any dangerous emissions will be a person's very serious illness or death. . . . Critically, too, Plaintiff alleged this policy of willful neglect in the apartment's maintenance was a *conscious choice* by the Housing Authority. By engaging in a pattern of

mismanagement and poor maintenance, the Housing Authority allegedly hoped to allow its properties to become 'so dangerously unsafe and uninhabitable that they became eligible for federal grants,' such as the HOPE VI grant. . . . Such blatant disregard for tenant safety in order to obtain federal funding, if proven to be true, would be conscience shocking, as it lacks any 'reasonable justification in the service of a legitimate governmental objective.'. . .At bottom, the facts alleged in this case shock the conscience: a public housing authority's deliberate indifference to a risk of harm that threatened numerous families living in low-income housing. What is more, two men died because of that indifference, several more were hospitalized, and an entire community was evacuated. Substantive due process exists as the 'last line of defense' against such official abuses of power that are so arbitrary as to shock the conscience of the court. . . These grave facts are surely even more egregious than those in *Dean*—accordingly, we find that Plaintiff's complaint sufficiently alleges that the Housing Authority acted with deliberate indifference to Witherspoon's bodily integrity, thereby violating his substantive-due-process rights."); ***Braun v. Burke***, 983 F.3d 999, 1003 (8th Cir. 2020), *cert. denied*, 142 S. Ct. 215 (2021) ("[O]ur decision in *Sitzes* is generally instructive. There, an officer learned from a police dispatcher that someone had been assaulted and robbed of $55 in a Wal-Mart parking lot. . . The officer responded (even though another officer was already en route), driving at speeds of at least eighty miles per hour in a thirty mile-per-hour zone on the wrong side of the road. . . We seriously doubted the parking lot heist constituted an actual emergency. . . Still, we held that the officer's affidavit stating he believed he was responding to an emergency was not so preposterous as to reflect bad faith. . . Even more so here, where the officer was facing an active threat to public safety, we are unwilling to find Trooper Burke's belief preposterous. Finally, Braun insists that speeding does not constitute an actual emergency. This argument goes nowhere. Again, the emergency inquiry is a subjective, not objective, one. In sum, Trooper Burke believed he was responding to an emergency, and thus we apply the intent-to-harm standard. This resolves Braun's claim against him, as she does not even argue, much less present any evidence, that he intended to harm anyone. Therefore, the district court correctly granted summary judgment for Trooper Burke on Braun's substantive due process claim because she failed to establish a constitutional violation."); ***Braun v. Burke***, 983 F.3d 999, 1004 (8th Cir. 2020) ("Colloton, J., concurring), *cert. denied*, 142 S. Ct. 215 (2021) ("I join the opinion of the court and submit these observations regarding the separate concurring opinion that follows. In *Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005) (en banc), this court held that in determining the requisite level of culpability to prove a substantive due process claim against a law enforcement officer, there is no legally significant distinction between high-speed driving in pursuit of a suspect and high-speed driving in response to other types of emergencies. . . The court rejected the use of an objective standard to determine whether a particular situation constitutes an emergency that triggers the 'intent-to-harm' standard of fault that applies to high-speed pursuits under *County of Sacramento v. Lewis*[.] . .Because 'substantive due process liability is grounded on a government official's subjective intent, and because the intent-to-harm standard applies "when unforeseen circumstances demand an officer's instant judgment" and "decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance,"' the court ruled that 'this issue turns on whether the deputies subjectively believed that they were responding to an emergency.'. . The 'intent-to-harm' standard thus applies to a

substantive due process claim both when an officer believes that he is pursuing a suspect and when an officer believes that he is responding to another type of emergency. The suggestion of the concurrence. . . that there is a 'legally significant' distinction between the two types of cases runs counter to *Terrell*. More significantly, the concurrence asserts that our decision in this case 'helps illustrate a growing circuit split' on the level of culpability required to establish a substantive due process claim. . . The suggested conflict in authority, however, is illusory. In *Dean v. McKinney*, 976 F.3d 407 (4th Cir. 2020), the defendant officer acknowledged that an 'emergency' call had been cancelled, and stated affirmatively that he was 'backing down' to a non-emergency response. . . At a minimum, there was a factual dispute about whether the officer believed in good faith that he was responding to an emergency. In *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018), which involved a motion to dismiss a complaint, the officer allegedly observed only a 'summary' or 'minor' traffic offense, and then pursued the violator at over 100 miles per hour. . . The complaint alleged that there was no emergency, and there was no allegation that the officer believed he was responding to an emergency. . . Neither of the cited cases, therefore, applied a 'deliberate indifference' standard of fault in a case where it was undisputed that the officer believed he was responding to an emergency."); ***Braun v. Burke***, 983 F.3d 999, 1005-06 (8th Cir. 2020) (Grasz, J., concurring), *cert. denied*, 142 S. Ct. 215 (2021) ("I concur with the court's opinion. Precedent requires it. But if the outcome also seems unjust, I can understand why. Two people tragically died after a state trooper sped and endangered the public in order to try to locate a car previously seen speeding. I write separately to address two points. One is a point of factual emphasis and the other is simply an observation related to the need for clarity in the interest of public understanding as well as the preservation of respect for the rule of law. First the point of factual emphasis. This is not a case involving a high-speed pursuit of a fleeing suspect. . . The facts, when viewed in the light most favorable to Braun, show that this was instead a hunt for a suspect whose whereabouts were unclear. That distinction is legally significant. It matters because when an officer is not in pursuit of a fleeing suspect, our precedent requires the district court to engage in an additional step: determining whether the officer subjectively believed he was responding to an 'emergency.'. . While that difference is important for future cases, the result here is the same. That is because no facts were presented to create a triable fact on the trooper's subjective belief under *Sitzes v. City of West Memphis*. . . As a consequence, in this case we must accept the trooper's affidavit stating he believed there was an emergency that required him, after concluding his work at the scene of a hit and run accident, to drive ninety-eight miles per hour on a public highway without emergency lights or sirens to try to locate a car he had earlier seen ... speeding. Now to the observation. This case helps illustrate a growing circuit split on when and how to apply the requisite level of culpability under *County of Sacramento v. Lewis*[.]. . *Compare Dean v. McKinney*, 976 F.3d 407, 414–16 (4th Cir. 2020) (en banc) (looking at objective facts beyond the officer's subjective arguments to decide that deliberate indifference applied), *and Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 715, 717–18 (3d Cir. 2018) (deciding that deliberate indifference applied after using objective factors to determine that no emergency existed), *with Bingue v. Prunchak*, 512 F.3d 1169 1176–78 (9th Cir. 2008) (applying an intent-to-harm standard), *and Terrell*, 396 F.3d at 980 ("[T]his issue turns on whether the deputies subjectively believed that they were responding to an emergency."). A uniform standard,

or at least more clarity on when each standard applies, would advance respect for the rule of law in this area. This is especially true when, as here, there was time to deliberate before engaging in the high-speed driving that caused the accident and it was not a situation where the circumstances demanded an officer's instant judgment or a decision under pressure.").

See also ***Ellis ex rel. Estate of Ellis v. Ogden City***, 589 F.3d 1099, 1103 n.3 (10th Cir. 2009) ("The fact that Mr. Ellis was a bystander and not the suspect being pursued does not change our view of the controlling effect of *Lewis* here. Arguably an innocent bystander presents a stronger case for liability against the pursuing officers than does a fleeing suspect. But we perceive no difference in the strength of *Lewis* as a defense against a bystander's claim or other persons pursued. *See Bingue v. Prunchak*, 512 F.3d 1169, 1175 (9th Cir.2008) ("*Lewis* applies to injuries resulting from a high-speed police chase regardless of whether the injured victim was a fleeing suspect or an innocent bystander."); *See also Helseth v. Burch*, 258 F.3d 867, 872 (8th Cir.2001); *Davis v. Township of Hillside*, 190 F.3d 167, 170 n.2 (3rd Cir.1999). The Court in *Lewis*, grouped together 'suspects, their passengers, other drivers, or *bystanders.'* 523 U.S. at 853 (emphasis added)."); ***Daniels v. City of Dallas***, 272 F. App'x 321, 323 (5th Cir. 2008) ("It matters not here whether we apply an intent-to-harm standard for chases or a lower standard of deliberate indifference; Wolverton's actions do not fall within the ambit of either. This is a case that, although tragic, involves negligence or even gross negligence but not deliberate indifference . . . The fact that a public official committed a common law tort with tragic results fails to rise to the level of a violation of substantive due process . . . . [M]otor vehicle accidents caused by public officials or employees do not rise to the threshold of a constitutional violation actionable under § 1983, absent a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it. It is insufficient to show that a public official acted in the face of a recognizable but generic risk to the public at large. . . . In an unpublished opinion in *Smith v. Walden*, we similarly affirmed a deliberate indifference holding in the police context. The district court held that a police officer who was speeding without lights or a siren in response to a non-emergency call and killed an innocent passenger did not act with 'the level of arbitrary or intentional conduct that shocks the conscience in the constitutional sense.'. . We find no facts in the pleadings or the record, viewed in the light most favorable to Plaintiffs, showing that Wolverton acted with the recklessness required for deliberate indifference. . . Nor do we find error in the district court's treatment of Plaintiffs' facts and pleadings. No matter how favorably a court treats the Plaintiffs' facts and pleadings, they do not demonstrate the requisite factors for deliberate indifference."); ***Bingue v. Prunchak***, 512 F.3d 1169, 1177 (9th Cir. 2008) ("We agree with the Eighth Circuit and decline to try to draw a distinction between 'emergency' and 'non-emergency' situations involving high-speed chases aimed at apprehending a fleeing suspect. . . We, therefore, hold that the *Lewis* standard of 'intent to harm' applies to all high-speed police chases. . . . We conclude that high-speed police chases, by their very nature, do not give the officers involved adequate time to deliberate in either deciding to join the chase or how to drive while in pursuit of the fleeing suspect. We hold, therefore, that *Lewis* requires us to apply the 'intent to harm' standard to all high-speed chases."); ***Meals v. City of Memphis, Tenn***., 493 F.3d 720, 730 (6th Cir. 2007) ("It is clear from the record that Officer King did not intentionally cause Mr. Harris's vehicle to crash. Moreover,

Officer King argues persuasively that even when the facts are viewed in the light most favorable to the appellee, they do not meet the shocks-the-conscience test. Although the police expert, Mr. Waller, opined that the pursuit reached an unacceptable level when Mr. Harris crossed into oncoming traffic when he first turned onto Covington Pike, and despite the fact that Officer King violated the police pursuit policy, the record does not establish that Officer King intended to harm the occupant of the vehicle being pursued − or the victims of her actions. . . . We are therefore compelled to conclude, despite the tragic results stemming from Officer King's violation of the City's policy, that the facts in the present case do not make out a substantive due process violation under *Lewis*, *supra.*"); ***Terrell v. Larson,*** 396 F.3d 975, 978-81 & n.2 (8th Cir. 2005) (en banc) ("In determining the requisite level of culpability in this case, we reject the panel majority's conclusion that the controlling force of *Lewis* is limited to high-speed police driving aimed at apprehending a suspected offender. The Supreme Court's analysis of the culpability issue in *Lewis* was framed in far broader terms. . . [W]e hold that the intent-to-harm standard of *Lewis* applies to an officer's decision to engage in high-speed driving in response to other types of emergencies, and to the manner in which the police car is then driven in proceeding to the scene of the emergency. . . . Because substantive due process liability is grounded on a government official's subjective intent, and because the intent-to-harm standard applies 'when unforeseen circumstances demand an officer's instant judgment' and 'decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance,' *Lewis*, 523 U.S. at 853, we conclude that this issue turns on whether the deputies subjectively believed that they were responding to an emergency. . . .We need not consider whether a different rule should apply if an official's claim of perceived emergency is so preposterous as to reflect bad faith. Here, it is undisputed that, prior to the accident, Larson and Longen only heard the initial dispatch that a young mother had locked herself in a bedroom and was threatening to harm her three-year-old child. From the perspective of a police officer deciding whether to respond, the dispatch without question described an emergency, that is, a situation needing the presence of law enforcement officers as rapidly as they could arrive, even if that entailed the risks inherent in high-speed driving. . . . On appeal, plaintiffs argue, as they did in the district court, that a jury could find that the situation was not reasonably regarded as an emergency by Larson and Longen because they 'volunteered' to provide back-up and then persisted in responding after being advised they were 'covered' and could 'cancel.' But whether Larson and Longen could reasonably have decided that they were not needed as additional back-up is irrelevant. Under *Lewis*, the intent-to-harm culpability standard applies if they believed they were responding to an emergency call. . . . Alternatively, we conclude that Deputies Larson and Longen are entitled to summary judgment even under the deliberate indifference standard of fault adopted by the panel majority and the district court. To prevail on their substantive due process claim, plaintiffs must prove, not only that the deputies' behavior reflected deliberate indifference, but also that it was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' . . Not all deliberately indifferent conduct is conscience shocking in the constitutional sense of the term."); ***Slusarchuk v. Hoff,*** 346 F.3d 1178, 1183 (8th Cir. 2003) ("Appellees argue that officers Hoff and Faust evidenced the requisite intent to harm in pursuing Howard because they did not have probable cause to stop him and therefore the pursuit was unrelated to a legitimate object of arrest. This contention is without merit. When Howard refused

to stop after the officers activated their emergency lights, they had probable cause to arrest him for committing a felony in their presence, regardless of their initial reasons for the attempted stop. . . . Alternatively, appellees argue that the officers are not entitled to qualified immunity because they intended 'to worsen [Howard's] legal plight.' . . . We decline to read the term expansively, as appellees urge, because every police pursuit is intended to 'worsen [the] legal plight' of the suspect by arresting him. Thus, a broad reading would eviscerate the intent-to-harm standard that the Court adopted, at least in part, to sharply limit substantive due process liability. Rather, we construe the term as applying only to a narrow category of pursuits that reflect a conscience-shocking motive beyond the realm of legitimate government action but do not involve an intent to inflict physical harm. The pursuit in this case reflects no such motive."); ***Helseth v. Burch***, 258 F.3d 867, 871 (8th Cir. 2001) (en banc) ("Since *Lewis,* all other circuits that have examined the issue have applied the intent-to-harm standard in high-speed police pursuits cases, without regard to . . .the length of the pursuit, the officer's training and experience, the severity of the suspect's misconduct, or the perceived danger to the public in continuing the pursuit.[citing cases] We now join those circuits and. . .hold that the intent-to-harm standard of *Lewis* applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender.").

Compare ***Browder v. City of Albuquerque (Browder I)***, 787 F.3d 1076, 1080-81 (10th Cir. 2015) ("Attempting to follow as best we can what guidance we've received in this murky area, we believe we can say this much about the case at hand. No one before us disputes that Ashley's death and the damage done to Lindsay's person count as direct and substantial impairments of their fundamental right to life, so we can and do take that much as given. And while the line that separates executive actions that are 'reasonably justified' in the service of a 'legitimate governmental objective' and those that are 'arbitrary or conscience shocking' appears anything but clearly defined, this case does not seem to us to implicate any serious borderline disputes. 'Arbitrary' actions are those performed capriciously or at one's pleasure and without good reason. . . And on the complaint's telling at least, Sergeant Casaus's actions appear the very model of that. He used his official squad car and activated its emergency lights and proceeded to speed through surface city streets at more than 60 miles per hour over 8.8 miles through eleven city intersections and at least one red light—all for his personal pleasure, on no governmental business of any kind. . . .Speeding and jumping red lights often may signify no more than negligence—the failure to do what a reasonably prudent person would do. Even in this case we acknowledge a jury might find Sergeant Casaus guilty of no more than that. But on the facts pleaded a reasonable jury could infer something more, a conscious contempt of the lives of others and thus a form of reckless indifference to a fundamental right—precisely the sort of mens rea *Lewis* says will normally suffice to establish liability.") *and* ***Sitzes v. City of West Memphis Ark.***, 606 F.3d 461, 480 (8th Cir. 2010) (Lange, J., dissenting) ("Without question, law enforcement officers deserve protection from Section 1983 suits for conduct that is taken without an opportunity to deliberate under situations that are actual emergencies. However, the situation in this case was not an emergency. Officer Wright's affidavit alone does not transform the situation into an emergency. This is not to imply that an objective standard should govern whether an emergency exists. Rather, when there

is substantial evidence to create a question of fact as to whether the officer legitimately believed there to be an emergency such that the officer's credibility is in doubt, then summary judgment is inappropriate. Because issues of fact inappropriate for summary judgment exist here, I dissent with respect to summary judgment on the Section 1983 claim.") *with* ***Sitzes v. City of West Memphis Ark.***, 606 F.3d 461, 469, 470 (8th Cir. 2010) ("Although Officer Wright's failure to engage his emergency lights and siren is arguably incompatible with a belief that he was responding to an emergency, we conclude that an inquiry into the objective reasonableness of Officer Wright's belief is contrary to the intent of *Terrell,* which is to insulate police officers from liability when they believe they are responding to an emergency call. *Terrell* implied, but did not explicitly hold, that a different rule might apply 'if an official's claim of perceived emergency is so preposterous as to reflect bad faith.' 396 F.3d at 980 n. 2. In essence, this requires us to take at face value an officer's characterization of a situation as an emergency in all but the most egregious cases. Although this case approaches that bad faith line, it does not cross it. Viewing the record in the light most favorable to the plaintiffs, Officer Wright's belief that the theft of property and assault that occurred in the Wal-Mart parking lot constituted an emergency was likely mistaken and perhaps even unreasonable. Were it not for the language in *Terrell,* this unreasonableness might be enough to remove this case from the intent-to-harm realm of cases. However, we are bound by *Terrell,* and we find that Officer Wright's belief is not so preposterous as to reflect bad faith. . . . As such, the unreasonableness of Officer Wright's belief is not enough to render the intent-to-harm standard inapplicable here. We agree with the dissent that our opinion should not be read to establish a rule that an officer can insulate himself from substantive due process liability, no matter the circumstances, by simply averring that he subjectively believed the situation to which he was responding was an emergency. . . . In sum, we do not understand this case to establish a per se rule that an officer's self-serving affidavit will always insulate that officer from substantive due process liability. Instead, we simply hold that the plaintiffs have failed to create a genuine issue of fact as to Officer Wright's subjective belief and that this belief is not so preposterous as to reflect bad faith on the part of Officer Wright."). *Lewis* has been applied in other Fourteenth Amendment contexts where officers are confronted with sudden, tense, rapidly developing or emergency-type situations.

Compare ***Chambers v. Sanders***, 63 F.4th 1092, 1097-1101 (6th Cir. 2023) ("This circuit has not previously decided whether the right to family integrity is implicated whenever the state deprives a child of routine interaction with a parent through wrongful incarceration. . . We address the issue now and hold that it is not. . .We may assume for purposes of this case that plaintiffs have identified a liberty interest protected by the Fourteenth Amendment. Even so, it would not be violated here because plaintiffs have not alleged that any state actor intruded on that right with the culpability required to state a due process violation. . . This conclusion is supported by the majority of our sibling circuits and our own precedent. . . . The only circuit to agree with the plaintiffs' approach is the Ninth Circuit, which allows children to claim violation of their right to family integrity against state actions which incidentally impact their relationship with their parents. . . The Ninth Circuit's view is based primarily on a broad reading of the substantive due process right to family association and the legislative history of the Ku Klux Klan Act of 1871, the precursor to 42

U.S.C. § 1983. . . The Ninth Circuit's analysis is flawed in both respects. First, as already discussed, the Supreme Court has cautioned against such broad interpretations of rights under the due process clause. . . Second, the Ninth Circuit mischaracterizes the legislative history on which it relies. . . . Analogous cases from this circuit confirm that no constitutional violation of the right to family association exists without a state action directed at the family relationship. In § 1983 cases where family members of those wrongfully killed by police claim infringement of the right to familial association, we have rejected such claims as collateral. . . . Even more recently in *LeFever*, we again rejected a family-integrity claim by children whose parents were killed by state police officers. . . In that opinion, the panel majority—like that in *Foos*—expressly declined to follow the Ninth Circuit's approach of allowing claims by children who are deprived of their familial relationships because their parent is wrongfully killed by a state actor. . . *LeFever* stands alongside *Foos* and *Claybrook* in rejecting similar claims to those brought by Chambers and Smith. Our precedent and that of most other circuits lead us to conclude that substantive due process claims based on the right to family integrity require that the state official act with a culpable state of mind directed at the family relationship. The due process right of familial association does not protect against all forms of state action that impact parent-child relationships. . . . To clarify this rule, two points must be made. First, the standard we adopt today will not be met simply because a government official acted intentionally. A government official can make a wrongful, intentional decision, as the alleged facts here demonstrate, without that intent or the decision itself being aimed at the family relationship. Instead, as with any due process violation, stating a claim in this context requires that the state actor act with a culpable state of mind with respect to the plaintiffs themselves and their own alleged constitutional rights. . . . Second, it will admittedly be a rare case in the wrongful incarceration context that meets this standard. That rarity is appropriate in light of both the narrow scope of substantive due process generally and our case law and that of other circuits consistently rejecting such claims in the Fourteenth Amendment context. On the other hand, were we to dispense with the requirement that the government action at issue target the family relationship, then every close family member of a wrongfully incarcerated individual would have a constitutional claim based on the incidental, even unknowing, impact of that individual's incarceration on the family relationship. As discussed above, that conclusion cannot be squared with the Supreme Court's case law, or that of this circuit and nearly all of our sister circuits. . . . Applying this framework to the instant case, Chambers and Smith have not pled facts to state a claim that Sanders's conduct was directed at interfering with their parent-child relationship. We cannot conclude that Sanders's investigative misconduct and deliberate indifference toward *Burton's* federally protected rights also amounts to 'conscience shocking' treatment of *his children's* federally protected rights.") *with* ***Chambers v. Sanders***, 63 F.4th 1092, 1102, 1106-07, 1112 (6th Cir. 2023) (Moore, J., dissenting) ("I disagree with the majority that a state official deprives a person of their due-process right to family association and integrity only when the state official 'acted with a culpable state of mind directed at the plaintiff's family relationship or a decision traditionally within the ambit of the family.'. . I believe that this new requirement lacks support in our controlling precedent. Instead, I believe that we should apply the shocks-the-conscience standard to the official's conduct. Therefore, I would measure whether Appellees' conduct towards the Appellants—intentionally and deliberately procuring a wrongful

conviction against their father and depriving them of their father—shocks the conscience. I would hold that when the child loses this relationship to the perpetual absence of their parent because a state official deliberately and intentionally procured a wrongful conviction, the official deprives the child of their due-process right to family association and integrity. But even under the majority's test, I nonetheless believe that Appellants' allegations and the reasonable inferences drawn from those allegations are sufficient at the pleading stage to demonstrate that Sanders's decision was aimed at the family relationship. . . .The majority's introduction of a 'state of mind' requirement lacks a basis in our precedent and conflates the required degree of culpability of an official's actions with a state-of-mind requirement. First, § 1983 itself 'contains no independent state-of-mind requirement.'. . Second, the Supreme Court's precedent instructs that we ask whether the official's *conduct* shocks the conscience to determine whether an executive official violated a person's substantive-due-process rights. But the majority looks outside this framework and instead turns to other sibling circuits to impose a state-of-mind requirement—a requirement with an outdated and mooted rationale. . . .Like *City of Fontana*, I agree that a pre-*Daniels* and pre-*Lewis* justification for such an intent requirement no longer remains applicable. Contrary to the majority's assertion, nothing about applying the shocks-the-conscience standard would 'impose[ ] strict liability' and hold[ ] a government actor automatically responsible for incidental harms flowing from his actions.' . . They would face liability only when their conduct shocks the conscience—'a tough test' '[t]o say the least,'. . . and when they caused the plaintiff's injury[.] . . Further, that other circuit courts followed *Trujillo* is not a reason to adopt an outdated and moot requirement. . . .Sanders engaged in conscience-shocking conduct when he intentionally and deliberately procured a wrongful conviction that incarcerated Appellants' father for thirty-two years, directly depriving Appellants of their family association. It does not matter that Sanders's primary motivation may not have been to harm the relationship. Thus, I would hold that Sanders violated Appellants' rights to family association and integrity because his conduct shocks the conscience.")

Compare ***Napouk v. Las Vegas Metropolitan Police Department***, 123 F.4th 906, 923 (9th Cir. 2024) ("Plaintiffs' Fourteenth Amendment deprivation of a familial relationship claim also fails. In the Ninth Circuit, an adult decedent's parents have the right to assert a substantive due process claim for the deprivation of the companionship of their child. *Sinclair v. City of Seattle*, 61 F.4th 674, 678–79 (9th Cir. 2023). Even assuming arguendo that such a claim exists based on these facts, where Napouk was an adult in his forties, . . . only '[o]fficial conduct that "shocks the conscience" in depriving parents of that interest is cognizable as a violation of due process.' *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1132–33 (9th Cir. 2017) (alterations in original) (quoting *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010)). 'Where actual deliberation [by the officers] is practical, then an officer's "deliberate indifference" may suffice to shock the conscience.'. . But where, as here, 'a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives.'. . Here, assuming Plaintiffs could assert a substantive due process claim based on the death of their forty-four-year-old son, and that they could succeed in making out an excessive force claim, there is no evidence that the

officers acted with anything other than the legitimate law enforcement objectives of self-defense and defense of each other. . . Thus, the Fourteenth Amendment claim fails.") *with* ***Napouk v. Las Vegas Metropolitan Police Department***, 123 F.4th 906, 924-27 (9th Cir. 2024) (Nelson, J., concurring) ("I concur in the majority opinion and the conclusion to affirm the district court's dismissal of Plaintiffs' substantive due process claim. In my view, however, substantive due process does not extend to the Napouks' relationship with their forty-four-year-old son. Our circuit has recognized a substantive due process right to the companionship of one's adult children in limited circumstances. *See, e.g.*, *Sinclair v. City of Seattle*, 61 F.4th 674, 679 (9th Cir. 2023). In doing so, we have created a split with other circuits. . . And our holding that plaintiffs have such a right finds no basis in the text, history, or tradition of the Fourteenth Amendment. Our ahistorical precedent should not be extended beyond the narrow circumstances in those prior cases. . . .George Lloyd Napouk was forty-four years old when he died. His parents live thousands of miles from where Napouk resided. Thus, while their grief is justifiably still great, they lack the custodial parent-child relationship that we held in *Sinclair* was constitutionally protected. I would not extend *Sinclair* to these circumstances.")

See also ***Peck v. Montoya***, 51 F.4th 877, 893-94 (9th Cir. 2022) ("This case involves a familial-association claim asserted by a spouse, rather than a parent or child. We have not previously held whether a substantive due process right exists in that context, and other courts of appeals have reached conflicting conclusions. [citing cases] Were we to confront the question, we would have to consider not only the language from *Graham* quoted above but also the standards of *Glucksberg*, which counsel caution in the extension of substantive due process rights. . . We need not consider those issues, however, because even under our case law relating to familial-association claims asserted by parents and children, the claim here fails. . . . Peck argues that the deputies made flawed tactical choices early in the encounter, thereby creating a more lethal environment. But the purpose-to-harm standard can apply even where 'the officer may have helped to create an emergency situation by his own excessive actions.'. . Under the purpose-to-harm standard, Peck's claim fails because no showing of such a purpose has been made or even attempted. No evidence suggests that the deputies shot Mono for any other purpose than their (possibly mistaken) perception of the need for self-defense. Consequently, there was no Fourteenth Amendment violation, and the deputies are entitled to qualified immunity on this claim."); ***Ochoa v. City of Mesa***, 26 F.4th 1050, 1056-59 (9th Cir. 2022) ("Whether evaluated under the deliberate-indifference test or the purpose-to-harm test, the Fourteenth Amendment 'shocks the conscience' standard is not the standard that typically comes to mind in police shooting cases. Another standard—the standard applicable to Fourth Amendment excessive-force claims—is more familiar in this context. That standard asks whether the officers' conduct was 'objectively unreasonable.'. . We have previously recognized that applying the Fourth Amendment excessive-force standard to a Fourteenth Amendment claim for loss of companionship and familial association following a fatal police shooting might have 'surface appeal.'. . The gist of the two claims is the same: an officer is accused of improperly using police power to kill someone. But the Fourteenth Amendment standard applicable to a claim by a relative demands more of such a plaintiff than a Fourth Amendment claim by the victim of an officer's actions. *Moreland v. Las Vegas Metro.*

Police Dep't, 159 F.3d 365, 371 n.4 (9th Cir. 1998), *as amended* (Nov. 24, 1998). The Supreme Court has held that 'Fourth Amendment rights are personal rights which ... may not be vicariously asserted.'. . The plaintiffs here cannot sidestep this prohibition and assert Ochoa's Fourth Amendment rights through a Fourteenth Amendment claim. . . Instead, they must show more: not just that the officers' actions were objectively unreasonable and thus violated Ochoa's Fourth Amendment rights, but that the officers' actions 'shock[ed] the conscience' and thus violated the plaintiffs' Fourteenth Amendment rights. . . This difference in standards can be dispositive where relatives assert Fourteenth Amendment claims but there is no Fourth Amendment claim. Indeed, 'it may be possible for an officer's conduct to be objectively unreasonable [under the Fourth Amendment] yet still not infringe the more demanding standard that governs substantive due process claims [under the Fourteenth Amendment].'. . . In sum, the record does not show that the officers acted with a purpose to harm unrelated to a legitimate law enforcement objective. Rather, it reflects that the officers took steps to ensure that a fleeing, armed, and noncompliant suspect would not further endanger the officers, the home's inhabitants, and the public. On this record, the officers' conduct does not shock the conscience and the officers did not violate the plaintiffs' rights under the Fourteenth Amendment. . . .The plaintiffs' Fourteenth Amendment claim requires that the officers' conduct 'shocks the conscience'—a standard that is more demanding of the plaintiffs than the Fourth Amendment standard typically applicable in police shooting cases. Because the officers here did not have time to deliberate before firing, the district court correctly applied the purpose-to-harm test to determine if the officers' conduct shocks the conscience. The court correctly concluded that under that test, the conduct did not violate the plaintiffs' Fourteenth Amendment rights. The officers' actions instead reflect their attempts to satisfy legitimate law enforcement objectives: apprehension of an armed, dangerous suspect and protection of the safety of the officers, the home's inhabitants, and the public."); ***Van Orden v. Stringer***, 937 F.3d 1162, 1169-70 (8th Cir. 2019) ("[W]e agree with the district court that the rationale of our decision in *Karsjens* that Minnesota's commitment scheme did not shock the conscience dictates the same outcome here. . . .To avoid this conclusion, the residents argue that the court in *Karsjens* incorrectly applied an intent-to-harm standard for conscience-shocking conduct, and that 'deliberate indifference' to liberty is the proper standard. *Karsjens* is not entirely clear on this point. The issue was not raised in briefs before the *Karsjens* panel because the plaintiffs disputed that the conscience-shocking standard applied at all. The *Karsjens* opinion. . . did refer to conduct inspired by 'malice or sadism' (language associated with intent to harm), but it also framed the issue as whether the defendants' actions were 'egregious or outrageous,' a phrase that aligns with the understanding that deliberate indifference involves 'patently egregious' conduct. . . The residents submit that a deliberate indifference standard must apply here, because the defendant officials had sufficient time to reflect and deliberate about their actions. They point to the statement in *Lewis* that the deliberate indifference standard 'is sensibly employed only when actual deliberation is practical.'. . The State responds that decisions from other circuits have suggested that something more akin to an intent-to-harm standard may apply when officials, after deliberating, are forced to choose among competing, legitimate interests. . . The State suggests that the need for officials to balance the competing obligations of community safety and proper treatment makes the intent-to-harm standard appropriate here. We need not resolve the dispute

over the applicable standard. We reject the residents' argument because the alleged actions of the defendant officials do not shock the conscience under either standard. There is no showing of malicious or sadistic intent to harm, and what was not 'egregious' conduct in *Karsjens*. . . is not 'patently egregious' deliberate indifference here. The director's alleged failure to authorize petitions for release does not amount to conscience-shocking deliberate indifference to liberty when a resident may petition a court directly for release and trigger the same type of proceeding on whether commitment is still justified. . . The nonexistence of less restrictive housing options, the district court explained, stems largely from inadequate funding. Since at least 2010, state officials have 'requested money to be placed in the state's budget for establishing cottages in the community, in order to implement the community reintegration phase,' but the governor has not proposed that funding to the state legislature. Those efforts by state officials to secure funding run counter to a conclusion of deliberate indifference by the defendants. . . The district court traced the problem of annual reviewers applying incorrect standards to a lack of legal training. This fault is hardly commendable, but it is insufficient to prove conscience-shocking deliberate indifference to a resident's liberty when the annual review is presented to a state court that is charged with reviewing the matter independently under correct legal standards. As in *Karsjens*, we conclude that the alleged shortcomings in the State's sexually violent offender program do not shock the conscience."); ***Porter v. Osborn***, 546 F.3d 1131, 1133, 1137-40 (9th Cir. 2008) ("[I]n an urgent situation of the kind involved here, the established standard is whether Osborn acted with a purpose to harm Casey without regard to legitimate law enforcement objectives. Whether a jury could find Osborn violated that standard is not clear on the record before us. Although Osborn appears to have helped create and even exacerbate the confrontation he then ended by deadly force, the parties and the district court will need to readdress Osborn's summary judgment motion under the more stringent purpose to harm standard.. . . . We begin by clarifying the standard of culpability for a due process right to familial association claim. The parties mistakenly suggest that the choice is between 'shocks the conscience' and 'deliberate indifference' as the governing standard, when in fact the latter is one subset of the former. The Supreme Court has made it clear, as the district court correctly recognized, that only official conduct that 'shocks the conscience' is cognizable as a due process violation. . . The relevant question on the facts here is whether the shocks the conscience standard is met by showing that Trooper Osborn acted with *deliberate indifference* or requires a more demanding showing that he acted with a *purpose to harm* Casey for reasons unrelated to legitimate law enforcement objectives. . . . We hold, following Supreme Court precedent and our cases, that the purpose to harm standard must govern Osborn's conduct. . . . We recognize that the district court drew a principled distinction between police chase cases and the much less obvious public safety threat Casey posed during Osborn's roadside investigation, but our precedent entitles Osborn to the purpose to harm standard of culpability because the 'critical consideration [is] whether the circumstances are such that "actual deliberation is practical.''. . Due to the rapidly escalating nature of the confrontation between Osborn and Casey, we respectfully disagree with the district court that Osborn had an opportunity for the kind of deliberation that has been articulated by *Lewis* and its progeny. . . . We agree with Judge McKee's concurring opinion in *Davis*, a Third Circuit police chase case, which reasons that where force against a suspect is meant only to 'teach him a lesson' or to 'get even' then '*Lewis* would not shield the officers from liability

even though they were ultimately effectuating an arrest.'"); ***Perez v. Unified Government of Wyandotte County/Kansas City, Kansas***, 432 F.3d 1163, 1167, 1168 (10th Cir. 2005) ("We have not had occasion to apply *Lewis* to a situation where a firefighter or police officer is involved in an automobile accident while responding to an emergency call. . . However, it is clear from *Lewis* that the intent to harm standard applies in this case. A firefighter responding to a house fire has no time to pause. He has no time to engage in calm, reflective deliberation in deciding how to respond to an emergency call. Doing so would risk lives. This case presents a paradigmatic example of a decision that must be made in haste and under pressure. Two other circuits and one state supreme court have addressed cases nearly identical to this one and have applied *Lewis'*s intent to harm standard as well. [citing *Carter v. Simpson*, 328 F.3d 948, 949 (7th Cir.2003) ; *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir.2005) (*en banc*); *Norton v. Hall*, 834 A.3d 928 (Me.2003)]. . . . In holding that there was a question of material fact as to whether the deliberate indifference standard should apply the district court committed a mistake of law. . . Under *Lewis*, the court should have applied the intent to harm standard. We may have remanded the case to the district court for application of the proper standard, but Becerra conceded at oral argument that there were no allegations and no facts in this case that supported a claim that Mots had an intent to harm. Because there is no such allegation in the complaint, we need not reach the question of what showing is necessary to evince an intent to harm. We simply hold that a bystander hit by an emergency response vehicle in the process of responding to an emergency call cannot sustain a claim under the substantive due process clause without alleging an intent to harm. As such, Mots should be granted qualified immunity."); ***Dillon v. Brown County***, 380 F.3d 360, 364, 365 (8th Cir. 2004) ("In practice, therefore, the 'intent to harm' standard has not been confined to high-speed police chases aimed at apprehending a suspect. . . .It is undisputed that the officers in this case were confronted with a rapidly developing situation that arose quickly after their arrival on the property of the manufacturing plant. Whether or not they technically were in 'pursuit' of Dillon for purposes of Nebraska law, or whether they intended to make a formal arrest, there is no doubt that the officers were seeking to make investigative contact with Dillon concerning the alleged shoplifting and stolen license plates, and in response to the complaints from Dillon's mother. All agree that when Dillon appeared on the ATV from behind a building, the officers were afforded no more than ten seconds to react to the approaching vehicle. That the officers may have been driving at 'medium-speed' rather than 'high-speed' is not a constitutionally significant distinction. We believe the scenario plainly qualifies as a 'rapidly evolving, fluid, and dangerous situation[ ],' rather than one which allows for 'calm and reflective deliberation,' . . . and that the plaintiff must show an intent to harm in order to establish a violation of substantive due process."); ***Rivas v. City of Passaic,*** 365 F.3d 181, 195, 196 (3d Cir. 2004) ("Because conduct that 'shocks the conscience' under one set of circumstances may not have the same effect under a different set of circumstances, the standard of culpability for a substantive due process violation can vary depending on the situation. . . . We [have] held that the 'shock-the-conscience' standard 'applied to the actions of emergency medical personnel-who likewise have little time for reflection, typically making decisions in haste and under pressure.'. . Thus, the Rivas family can only meet the second element of the *Kneipp* test by presenting evidence that Garcia's and Rodriguez's conduct shocks the conscience by consciously disregarding a substantial risk that Mr. Rivas would

be seriously harmed by their actions."); ***Bublitz v. Cottey,*** 327 F.3d 485, 490, 491 (7th Cir. 2003) (In this case, much of the argument goes to whether the shocks-the-conscience or the deliberate-indifference standard is the appropriate benchmark by which to determine if the defendant officers' conduct violates the Fourteenth Amendment. Mr. Bublitz attempts to distinguish *Lewis* by noting that Officer Durant had at least three to five minutes in which he had to decide whether to deploy the spikes, giving him adequate time to deliberate. The officers counter that the circumstances of a high-speed police pursuit − which entail constantly changing conditions − do not lend themselves to careful and considered deliberation. But we need not choose between the two formulations of the constitutional standard (even assuming they present different inquiries), as we believe that Mr. Bublitz has not presented facts which rise to either level. At most, Mr. Bublitz has described a scenario in which Durant may have been negligent in deciding to deploy his Stinger Spike System, but mere negligence is insufficient to give rise to a constitutional violation under the Fourteenth Amendment."); ***Brown v. Commonwealth of Pennsylvania Dept. of Health Emergency Medical Services Training Institute***, 318 F.3d 473, 480, 481(3d Cir. 2003) ("We derive from these cases the principle that the 'shocks the conscience' standard should apply in all substantive due process cases if the state actor had to act with urgency. This has been the law for police pursuit cases, *see, e.g., Fagan II,* and, social workers when they are acting with urgency to protect a child, *see, e.g., Miller; Croft v. Westmoreland County Children & Youth Services,* 103 F.3d 1123 (3d Cir.1997). We now hold that the same 'conscience shocking' standard applies to the actions of emergency medical personnel-who likewise have little time for reflection, typically making decisions in haste and under pressure. . . . Although Stewart and Caffey may have ultimately failed to rescue Shacquiel successfully from a pre-existing danger, we have already said that they had no constitutional obligation to do so. We cannot say that their actions in attempting a failed rescue shocks the conscience. Thus, Appellants have not demonstrated a viable state-created danger claim."); ***Darrah v. City of Oak Park,*** 255 F.3d 301, 306, 307 (6th Cir. 2001) ("[T]he Supreme Court has held that different conscience-shocking standards should be applied depending on the circumstances in which the governmental action occurred. . . . Officer Bragg, when grabbed from behind in a loud and unruly crowd of people, did not have time to deliberate the best possible course of action. Just the opposite is the case. . . . Given the facts of this case, the plaintiff simply cannot show that any reasonable jury could find that Officer Bragg's conduct was malicious, sadistic, and imposed not to restore order, but only to cause harm."); ***Neal v. St. Louis County Board of Police Commissioners***, 217 F.3d 955, 958, 959 (8th Cir. 2000) ("[I]n rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation, a state actor's action will shock the conscience only if the actor intended to cause harm. . . . Plaintiffs attempt to redirect this Court's focus to the hour and a half before the shootout to show that Officer Peterson had time to deliberate departmental policies and practices designed to protect officers involved in undercover operations. . . . Given the facts of this case, we believe that it is inappropriate to look outside the time period immediately preceding Peterson's decision to fire his gun to determine whether Peterson's conduct was truly conscience shocking."); ***Claybrook v. Birchwell***, 199 F.3d 350, 360 (6th Cir. 2000) ("[E]ven if, as the plaintiffs have argued, the actions of the three defendant patrolmen violated departmental policy or were otherwise negligent, no rational fact finder could conclude, even after considering the evidence in

the light most favorable to Quintana, that those peace enforcement operatives acted with conscience-shocking malice or sadism towards the unintended shooting victim."); ***Moreland v. Las Vegas Metropolitan Police Department***, 159 F.3d 365, 372-73 (9th Cir. 1998) ("The question we face today is whether [the *Lewis*] newly minted explanation of the 'shocks the conscience' standard also controls in cases where it is alleged that an officer inadvertently harmed a bystander while responding to a situation in which the officer was required to act quickly to prevent an individual from threatening the lives of others. We conclude that it does. While the Supreme Court limited its holding in *Lewis* to the facts of that case (i.e., to high-speed police chases), there is no principled way to distinguish such circumstances from this case. Reasoning by analogy from its previous recognition that different types of conduct implicate different culpability standards under the Eighth Amendment, the Court extensively discussed the question of what states of mind trigger the 'shocks the conscience' standard that governs substantive due process claims arising from executive action. . . . Expressly declining to draw a bright line rule, the Court described the critical consideration as whether the circumstances are such that 'actual deliberation is practical.'. . . [E]ach of the circuits that has interpreted and applied this aspect of the *Lewis* decision has recognized that the critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct. . . . Appellants do not contend Burns intended to harm Douglas, physically or otherwise. Nor do Appellants dispute that Burns was entitled to use deadly force to halt the gunfight occurring in the Chances Arr parking lot. Instead, Appellants simply contend that the officers shot a bystander, and that this creates a triable issue as to whether the officers acted recklessly or with gross negligence. Even if all this is true, Appellants have failed to state a viable substantive due process claim because these matters are not material to the controlling question of whether Burns acted with a purpose to harm Douglas that was unrelated to his attempt to stop the male in the parking lot from endangering others."); ***Schaefer v. Goch***, 153 F.3d 793, 798 (7th Cir. 1998) ("In our case . . . the officers who fired their weapons did intend to harm the suspect, John Nieslowski, but it is not John on whose behalf this suit was brought. . . . Nobody has suggested that the officers intended to harm Kathy Nieslowski, and so the straightforward application of the *Lewis* analysis yields a verdict in favor of defendants. On the other hand, firing a gun when an innocent party who has just attempted to surrender is standing, by most accounts, only inches from the intended target seems even more dangerous a course than pursuing a suspect at high speeds through city or suburban streets. Under the analysis employed in *Lewis*, however, the officers' decision to fire does not 'inch close enough to harmful purpose' to shock the conscience, even assuming that John never swung his weapon in the direction of the officers. . . . The situation was fluid, uncertain, and above all dangerous, and the officers' decision to shoot, regrettable though its results turned out to be, does not shock the conscience."); ***Medeiros v. O'Connell***, 150 F.3d 164, 170 (2d Cir. 1998) (*Lewis* "shocks the conscience" standard not satisfied where bullet intended for suspect deflected and hit hostage); ***Radecki v. Barela***, 146 F.3d 1227, 1231-32 (10th Cir. 1998) ("[I]n assessing the constitutionality of law enforcement actions, we now distinguish between emergency action and actions taken after opportunity for reflection. Appropriately, we are required to give great deference to the decisions that necessarily occur in emergency situations. . . . Henceforth, we look to the nature of the official conduct on the spectrum of culpability that has

tort liability at one end. On the opposite, far side of that spectrum is conduct in which the government official intended to cause harm and in which the state lacks any justifiable interest. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.").

See also ***Donahue for Estate of McIntyre v. Borough of Collingdale***, No. CV 22-1695, 2024 WL 387455, at *3, *6-7 (E.D. Pa. Feb. 1, 2024) ("The Third Circuit is no stranger to this variety of claim. Both the appellate court and many in-circuit district courts have addressed officer and government liability to bystanders during vehicle pursuits. . . In short, this Court writes upon well-trod principles. The analysis centers on the second prong: when does a police chase 'shock the conscience?'. . . The critical question is when an officer runs afoul of the Constitution while attempting to capture a fleeing suspect. That 'level of culpability required to shock the contemporary conscience falls along a spectrum,' depending on the facts of each case. . . There are three potential standards, varying based on 'how much time a police officer has to make a decision.'. . First, in a 'hyperpressurized environment,' an action cannot shock the conscience unless the officer harbored 'an intent to harm.'. . Second, when the scenario allows an officer 'a matter of hours or minutes before taking action,' he is liable when he 'disregard[s] a great risk of serious harm.'. . Finally, when the officer has time to make 'an unhurried judgment,' the plaintiff need only show the officer acted with 'deliberate indifference' to a plaintiff's rights. . . Under binding precedent, high-speed police chases are 'hyperpressurized environments requiring a snap judgment.'. . This is so because weighing 'the need to stop a suspect's flight from the law against the threat a high-speed chase poses to others demand[s] an officer's instant judgment,' lest the wrongdoer escape. . . Thus, '[i]n the circumstances of a high-speed chase aimed at apprehending a suspected offender ... only a purpose to cause harm unrelated to the legitimate object of arrest will' shock the conscience. . . . The rule is clear—an 'intent to harm', not 'disregard of great risk' mens rea applies to high-speed chases. . . . There is no genuine issue of fact to show that Lyons, Lynch, or Richers intended any harm distinct from apprehending Jones. . . .Therefore, this Court will grant summary judgment for the officers on the § 1983 claims."); ***Estate of Brower by O'Brien v. Charleston County***, No. 2:23-CV-0216, 2023 WL 5960098, at *4 (D.S.C. Sept. 13, 2023) ("The Court . . . finds that, at this stage, the deliberate indifference standard applies because Plaintiff has alleged facts tending to show that Taylor was facing a non-emergency situation in which he had time to deliberate on his actions. . . .The Court turns next to consider whether Defendant Kendall's conduct, based on the facts viewed in the most favorable light to Plaintiff, could reflect deliberate indifference to a 'great risk of serious injury to someone in Plaintiff's position.'. .The 'deliberate indifference' standard imposes liability where the evidence shows (1) the officer subjectively recognized a substantial risk of harm, and (2) the officer subjectively recognized that his actions were inappropriate in light of that risk. . . .The complaint alleges that Defendant Kendall began driving at 85 mph through a Mt. Pleasant neighborhood. . . The complaint further alleges that Defendant Kendall turned right onto US Highway 17 North and drove at speeds exceeding 100 mph as he weaved around heavy traffic and between lanes. . . In

addition to attempting dangerous maneuvers between lanes, the complaint further alleges that Defendant Kendall eventually reached speeds of over 130 mph while traveling down Highway 17. . . The Complaint alleges that Defendant Kendall drove in this behavior after dispatch told him the call involved no danger. . .The Court finds that Plaintiff has plausibly alleged that Defendant Kendall recognized the substantial risk to bystanders and other drivers around him and recognized that his actions were inappropriate in light of that risk. Accordingly, the Court concludes that Plaintiff has properly pled its § 1983 claim against Defendant Kendall.") and ***Eisner on behalf of Estate of Eisner v. Charleston County***, No. 2:23-CV-0217, 2023 WL 5960353, at *4 (D.S.C. Sept. 13, 2023) (same); ***Aracena v. Gruler***, 347 F.Supp.3d 1107, 1117 (M.D. Fla. 2018) ("Like the officers in *Lewis*, Officer Gruler was faced with a sudden emergency and had no time to deliberate. He could have gone in immediately to face an uncertain threat, potentially harming those inside in an attempt to neutralize the suspect, or alternatively stayed outside Pulse, called for backup, or set up a perimeter to secure the structure. He chose to momentarily leave his post and stayed outside when the gunshots began. In these circumstances, Officer Gruler's conduct does not 'shock the conscience.' Assuming the truth of the SAC's allegations and viewing the SAC in the light most favorable to Plaintiff, Officer Gruler's conduct can conceivably be characterized as negligent—perhaps even reckless. But as noted above, even 'precipitate recklessness' is insufficient to support a substantive due process claim.");***White v. Polk County***, No. 8:04-cv-1227-T-26EAJ, 2006 WL 1063336, at *7 (M.D. Fla. Apr. 21, 2006) ("At some point, there comes a time, even in a high-speed chase, at which the abuse of the law enforcement officer is so clear that the judicial conscience is shocked. This Court will leave that determination for another day and another case with more egregious facts than this one. Here, there is no indication in the record that Jacoby or White had any idea Lawson intended to commit a crime on them, nor did Lawson admit that he intended to commit any crime upon them. Plaintiffs contend that the accident could have been avoided had Deputy Lawson simply turned on his lights and siren and pulled Jacoby over. Such is noted by a captain of the sheriff's office in his report. Whether the accident could have been avoided, however, is not part of the analysis with respect to shocking the conscience."); ***Logan v. City of Pullman***, 392 F.Supp.2d 1246, 1264, 1265 (E.D. Wash. 2005) ("Here, the Defendant Officers certainly weren't facing the 'extreme emergency of public gunfire' like the officers faced in *Moreland*. Therefore, arguably, the Defendant Officers had time to deliberate about how they were going to break up the fight before opening the door and spraying O.C. However, in *Lewis*, the Supreme Court held that actual deliberation was not practical where the defendant officer, driving a patrol car, was simply pursuing a motorcyclist in a high-speed chase whose only offense was speeding. Further, the concerns of the Defendant Officers at the time of the incident were similar to those concerns of officers involved in dispersing a prison riot. Therefore, since 'deliberate indifference' was insufficient to show officer liability in both a prison riot and a high-speed chase of a motorcyclist who was speeding, the Court concludes that it is also insufficient to show officer liability in a situation such as that confronted by the Defendant Officers in this case. Consequently, the Court concludes that actual 'purpose to cause harm' unrelated to any legitimate use of O.C. must be shown to satisfy the 'shocks the conscience' standard necessary for a due process violation in this case. The Defendant Officers' use of O.C. inside the Top of China Restaurant and the fact that it dispersed throughout the building and affected the individuals inside does not meet the

'purpose to cause harm' standard. . . However, Plaintiffs have produced evidence that if proven, is adequate to meet this standard. Specifically, Plaintiffs allege the Defendant Officers refused to provide assistance to the injured Plaintiffs, refused to allow the Plaintiffs to assist one another, and tried to keep the Plaintiffs from exiting the building after O.C. was sprayed. . . If proven, these facts evidence a purpose to cause harm against all of the Plaintiffs unrelated to any legitimate use of force by the Defendant Officers, thereby satisfying the 'shocks the conscience' standard necessary for a substantive due process violation in this case."); ***White v. City of Philadelphia,*** 118 F. Supp.2d 564, 570, 572 (E.D. Pa. 2000) ("The Officers in this case were . . . facing conflicting responsibilities: on the one hand, according to the complaint, the Officers were being pressured by neighbors to break the door down; on the other hand, the Officers' reluctance to invade a seemingly peaceful residence pulled in the other direction. Under these circumstances, the Court concludes as a matter of law that the Officers' behavior was not conscience-shocking. . . . In response to the 911 call placed by Nadine White's neighbors, the Officers knocked on Nadine White's door several times. . .Upon hearing no response, the Officers refused the neighbors' request to break down the door and left the scene. . . .The Officers did nothing to place Nadine White in jeopardy − they only failed to protect Nadine White from private violence. Such inaction does not create liability."); ***Lizardo v. Denny's Inc.***, No. 97-CV-1234 FJS GKD, 2000 WL 976808, at *12 (N.D.N.Y. July 13, 2000) (not reported)("At the time of the brawl, the parking lot was a volatile, violent environment. In that environment, Adams and Paninski were forced to decide whether it was best to call 911 and wait for back-up, and therefore expose the combatants to harm at the hands of other combatants, or to intervene in the numerous altercations, and therefore risk harm to themselves and others should they lose possession of their firearms. In making that decision, Adams and Paninski were not afforded an opportunity to deliberate; rather, they were required to make a split-second decision under high pressure. In light of those circumstances, the Asian-American Plaintiffs must demonstrate that Adams' and Paninski's actions were motivated by an intent to harm."); ***Gillyard v. Stylios***, No. Civ.A. 97-6555, 1998 WL 966010, at *4, *5 (E.D. Pa. Dec. 23, 1998)(not reported)("Every court addressing police conduct since *Lewis* has found its reasoning extends beyond high-speed pursuit of suspected criminals. [citing cases]. . . . Plaintiff claims that the conduct of police officers responding to a fellow officer's radio call and killing two innocent bystanders differs from officers killing a suspect in a high-speed pursuit as in *Lewis*. Officers Stylios and Fussell were assisting a fellow officer they erroneously believed to be in peril; the officers were on-duty and responding to a police radio request. The fact that they were not pursuing a suspect does not foreclose the application of *Lewis*."); ***White v. Williams***, No. 94 C 3836, 1998 WL 729643, *5 (N.D. Ill. Oct. 16, 1998) (not reported) ("There are two substantive due process standards that have been applied to the conduct of law enforcement officers. The first is the deliberate indifference standard, which is generally applied to prison officials who 'subject an inmate under their authority to dangers that [the officials] might have prevented.'. . . The second is the 'shocks the conscience' standard, which is applied to situations like high-speed car chases in which actual deliberation is impractical. . . Though the situation in this case does not fall neatly into either category, it seems closer to the high-speed chase setting than to the prison setting. It is undisputed that Williams believed it was appropriate to arrest White, that Williams was attempting to do so when he leaned into White's car with his gun drawn, that White attempted to get away

from Williams, rather than surrendering to him, and that Williams' gun accidentally fired in the process. . . It is also undisputed that all of these events 'happened really quickly.'. . Given the pace of these events and the unpredictability of White's reaction, Williams had little opportunity for deliberation before he leaned into White's car. As a result, we hold that the 'shocks the conscience' standard is more appropriate for this case than the deliberate indifference standard. . . . Because Williams did not intend to harm White, Williams' behavior does not shock the conscience."); ***Smith v. City of Plantation***, 19 F. Supp.2d 1323, 1330 (S.D. Fla. 1998) (Applying *Lewis* to find no substantive due process violation arising from hostage situation, where officer "was confronted by an emergency situation that he did not precipitate."), *aff'd*, 198 F.3d 262 (11th Cir. 1999); ***Jarrett v. Schubert***, No. 97-2628-GTV, 1998 WL 471992, *5 (D. Kan. July 31, 1998) (not reported) ("To help sort through the quagmire, the Supreme Court has adopted a fluctuating standard of review. In emergency situations, a government official will be liable only if he intended to inflict harm on the plaintiff and the government has no justifiable interest in his particular conduct. . . If, on the other hand, the government official has the luxury of deliberating about the decision he is making, 'something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.'").

See also ***Range v. Douglas***, 763 F.3d 573, 591, 592 (6th Cir. 2014) ("[T]he type of harm, the level of risk of the harm occurring, and the time available to consider the risk of harm are all necessary factors in determining whether an official was deliberately indifferent. We are not convinced by Plaintiffs' argument that 'any touching' of the bodies without a forensic purpose amounts to a 'serious harm' in the constitutional sense. If a drunk person moves a dead body's arm, it may amount to inappropriate behavior or even a tort violation. If done intentionally by a government actor, it's even arguable that it's a constitutional violation. . . But we cannot say that protection against the possible *risk* of such an occurrence is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'. . Nor can we agree that a jury could find that Kersker and Dr. Cleveland were aware of a 'substantial risk' of what might be a more serious constitutional harm such as desecrating a body. While we agree that lapses in judgment by people under the influence are generally recognized, Plaintiffs have pointed to no cases, scientific or sociological knowledge, or literature suggesting that there is a substantial risk that an inebriated person will desecrate a body. Nor is there evidence that these Defendants knew of such a risk. Viewing the facts in the light most favorable to Plaintiffs, a jury could find much to condemn in the conduct of Kersker and Dr. Cleveland, perhaps even recklessness. But a jury could not conclude that these Defendants were aware of facts from which they could infer a substantial risk of the kind of serious harm that occurred here, that they did infer it, and that they acted with indifference toward the rights of the families involved. We simply cannot say that the behavior of these Defendants could show deliberate indifference to Plaintiffs' constitutionally protected rights such that their actions 'shock the conscience.' The district court did not err in concluding that there was no violation of Plaintiffs' clearly established rights by Kersker or Dr. Cleveland."); ***Davis v. Carter***, 555 F.3d 979, 984 (11th Cir. 2009) ("In this case, Tyler Davis voluntarily participated in an extracurricular after-school activity, so no custodial relationship existed between himself and the school. Plaintiffs did not allege the coaches engaged in corporal punishment or physically

contacted Davis. The allegations in the complaint do not support a finding that the coaches acted willfully or maliciously with an intent to injure Davis. Rather, the facts allege that the coaches were deliberately indifferent to the safety risks posed by their conduct to Davis. In this school setting case, the complaint's allegations of deliberate indifference, without more, do not rise to the conscience-shocking level required for a constitutional violation. While the circumstances of this case are truly unfortunate, Plaintiffs' claims are properly confined to the realm of torts. We need not reach the second part of the qualified immunity analysis."); ***Hunt v. Sycamore Community School Dist. Bd. of Educ***., 542 F.3d 529, 536, 541 (6th Cir. 2008) ("[W]hen executive action is worse than negligent but was not done for the purpose of injuring someone or in furtherance of invidious discrimination, . . . *Lewis* and later cases interpreting it have identified several considerations that bear on whether the action will be considered arbitrary, including: (1) the voluntariness of the relationship between the government and the plaintiff, especially whether the plaintiff was involuntarily in government custody or was voluntarily a government employee; (2) whether the executive actor was required to act in haste or had time for deliberation; and (3) whether the government actor was pursuing a legitimate governmental purpose. . . . Some authority from this Circuit indicates that whether the required culpability level is 'intent to harm' or subjective deliberate indifference depends entirely on whether the situation is an emergency or allows time to deliberate. . . . As the rule is articulated in these cases, if the situation is an emergency, the heightened intent standard would apply, and if there is time to deliberate, the lower deliberate indifference standard would apply. . . Superficially, this haste/leisure dichotomy might seem to preclude taking account of whether or not the government actor is or is not motivated by a countervailing legitimate purpose. If countervailing purposes could not be taken into account, in non-custodial, non-crisis situations, a government actor's choice could shock the conscience because he knowingly risked a person's life, even where he picked the lesser of two evils. By this reasoning, a policeman could not risk one person's life to save ten others. . . . The outcomes in our cases do not support such an interpretation. . . . Thus, even where the governmental actor is subjectively aware of a substantial risk of serious harm, we will be unlikely to find deliberate indifference if his action was motivated by a countervailing, legitimate governmental purpose."); ***Marino v. Mayger***, 118 F. App'x 393, 402, 403, 2004 WL 2801795, at *8 (10th Cir. Dec. 7, 2004) ("[E]ven if sufficient affirmative conduct had been alleged, the ultimate measure of whether conduct by state actors violates due process is whether 'the challenged government action Ashocks the conscience' of federal judges.' . . We consider the following three factors in making such a determination: '(1) the need for restraint in defining the scope of substantive due process claims; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policymaking bodies in making decisions impacting public safety.'. . 'These factors counsel that application of danger creation as a basis for § 1983 claims is reserved for exceptional circumstances.'. . Lastly, '[w]e have noted that ordinary negligence does not shock the conscience, and that even permitting unreasonable risks to continue is not necessarily conscience shocking[.] Rather, a plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.'. . While we agree that the sheriff defendants' alleged conduct in this case, if accurately portrayed, was inconsistent with what we expect from public officials, we cannot conclude that their actions were so egregious or fraught with

unreasonable risk as to 'shock the conscience.' To the extent that Hill, Waterman, and Hiler permitted a potentially volatile situation to persist, we do not believe their cumulative inaction rises above the level of negligence. Nor do we believe that the sheriff defendants created the danger that Michael Marino would be assaulted by Francis Hiemer with a shovel on that particular day. Therefore, because the Marinos have failed to allege affirmative conduct that shocks the conscience, we conclude that the district court properly dismissed the Marinos' substantive due process claim."); ***Coyne v. Cronin***, 386 F.3d 280, 288, 289 (1st Cir. 2004) ("The conscience-shocking standard is not a monolith; its rigorousness varies from context to context. . . . In situations where a substantive due process claim might lie but where government officials must act in haste, under pressure, and without an opportunity for reflection, even applications of deadly force by those officials cannot be conscience-shocking unless undertaken maliciously and sadistically for the very purpose of causing harm. . .By contrast, in situations where a substantive due process claim might lie and where actual deliberation on the part of a governmental defendant is practical, the defendant may be held to have engaged in conscience-shocking activity even without actual malice (to take one familiar example, if a government official assumes custody of a person and then displays deliberate indifference to his ward's basic human needs). . . The spectrum is wide because substantive due process violations tend to come in various shapes and sizes and in a multitude of configurations. We need not probe too deeply where along this spectrum of levels of fault Coyne's claim against Cronin may lie because the complaint does not fairly allege deliberate indifference, let alone any more serious level of scienter. . . . If matters were at all different or there were any concrete suggestion as to what might plausibly be developed against Cronin that would suggest conscience-shocking behavior, we would be sympathetic to discovery. But everything we know from the complaint and Coyne's own allegations show that this is basically a negligence case to which the government must respond but for which Cronin may not be sued under the Due Process Clause."); ***Upsher v. Grosse Pointe Public School Systerm,*** 285 F.3d 448, 453, 454 (6th Cir. 2002) ("This court made clear in *Lewellen* . . .that in a non-custodial setting, in order to establish liability for violations of substantive due process under § 1983, a plaintiff must prove that the governmental actor either intentionally injured the plaintiff or acted arbitrarily in the constitutional sense. . . The *Lewellen* court expressed doubt as to whether, in a non-custodial case, 'deliberate indifference' could give rise to a violation of substantive due process. . . . Similarly, here, we cannot find, nor was our attention invited to, any evidence in the record which suggests that any of the defendants made a deliberate decision to inflict pain or bodily injury on any of the plaintiffs. Neither is there proof that the defendants engaged in arbitrary conduct intentionally designed to punish the plaintiffs − conduct which we have recognized may result in the deprivation of a constitutionally protected interest. . .. Without more, we conclude that the plaintiffs' evidence establishes, at best, a case sounding in negligence and not a constitutional tort under § 1983."); ***Cummings v. McIntire,*** 271 F.3d 341, 345, 346 (1st Cir. 2001) (" This is a case whose factual context falls within the middle ground, neither so tense and rapidly evolving as a high-speed police pursuit nor so unhurried and predictable as the ordinary custodial situation. Some courts approach such cases by assessing the facts pursuant to a test formulated by Judge Friendly in *Johnson*, 481 F.2d at 1033, with which we substantially agree: In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the

application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. . . . While there is no doubt that McIntire unnecessarily utilized physical force, we agree with the district court that the record does not permit a finding that he did so 'maliciously and sadistically for the very purpose of causing harm,' . . . At the time he acted, McIntire was juggling drivers and runners in a busy location, swiveling his head to be sure no problems arose. . . In such circumstances, a hard shove accompanied by abusive language, whose evident purpose − as even appellant acknowledges − was to get Cummings out of the way, . . . does not in our view constitute the 'brutal' and 'inhumane' conduct necessary to establish a due process violation. The Due Process Clause is intended to prevent government officials 'from abusing [their] power, or employing it as an instrument of oppression,' . . . here, the officer's action was reactive rather than reflective, seemingly inspired by a 'careless or unwise excess of zeal' in communicating his displeasure with Cummings' interruption, rather than by a purpose to harm."); ***Burga v. City of Plainfield***, No. CV171655KMJBC, 2020 WL 2316583, at *9-11 (D.N.J. May 11, 2020) ("I find. . . that the deliberate intent standard, not the conscious disregard standard, applies here. The court may even assume for purposes of argument that these officers conducted the pursuit in a negligent or reckless manner, or that they violated the AG's guidelines by exceeding the permitted number of vehicles and failing to use their sirens and lights. Even so, this conduct would fail to rise to the required level of intent for a constitutional violation. . . .The record establishes beyond doubt that this was a high-speed chase of a dangerous fleeing suspect. The Supreme Court held in *Lewis* that in such a case, an intent-to-harm standard applies. . . . The record is clear that the pursuit took place at high speed, developed rapidly, and lasted at most 5 minutes. The circumstances here are thus akin to those in *Lewis.* As *Lewis* and *Sauers* establish, an officer can only be liable for a substantive due process violation resulting from a high-speed pursuit of a dangerously fleeing suspect if the officer intended to cause harm. . . As to defendants Black, McCall, and Kennovin, there is no evidence of intent to cause harm to plaintiffs. Failure to use lights or comply with AG guidelines, if it occurred, was perhaps negligent. But not even plaintiffs contend that this evidence amounts to an 'intent to harm'; rather, plaintiffs assert that this behavior, if proven, amounts to 'a conscious disregard of a great risk of serious harm.'. . That, as I have held, is not the standard; intent is required. This was an accident, created by Mr. Ward's reckless and criminal behavior; the plaintiffs, innocent bystanders, were unfortunately victims of it. The evidence is insufficient to establish that it was any officer's intent to harm plaintiffs. Therefore, I find that plaintiffs have not established that defendants violated their constitutional rights under Section 1983. . . . As stated above, no private constitutional right has been violated. Thus plaintiffs cannot overcome the first prong required to pierce qualified immunity. Nevertheless, I will, as required, consider the second prong, *i.e.*, whether the right allegedly violated was clearly established. . . . [E]ven assuming there was an error in judgment, it would not have been clear to a reasonable officer in this high-pressure situation that he should not chase this fleeing gunman. Nor would knowledge of potential liability for negligence or violations of the AG guidelines have put the officers on notice that their conduct violated the Constitution. The Supreme Court had already held long ago in *Lewis* that '[r]egardless of whether [the officer's] behavior offended the reasonableness held up by tort law or the balance

struck in law enforcement's own codes of sound practice,' it does not shock the conscience for purposes of a § 1983 claim."); ***Aracena v. Gruler***, 347 F.Supp.3d 1107, 1117-18 (M.D. Fla. 2018) ("[T]he 'deliberate indifference' standard for substantive due process claims is inapplicable to this case of unforeseen circumstances where actual deliberation was impractical. . . But even if the deliberate indifference standard were applicable to this case, the Amended Complaint is bereft of factual allegations showing that Officer Gruler was aware of a risk that was 'extremely great.'. . It does not allege any foreknowledge of the Pulse attack by any Defendants and offers no factual allegations establishing that nightclubs lacking visible security are under an 'extremely great risk' of attack. . . Thus, Officer Gruler's conduct was not deliberately indifferent to Plaintiff's constitutional rights."); ***Winter v. City of Westlake, Ohio***, No. 1:16CV1753, 2018 WL 838283, at *4–6 (N.D. Ohio Feb. 13, 2018) ("The Sixth Circuit has . . . applied this intent-to-harm framework to high-speed chases, ruling rather conclusively that absent intent to harm, pursuing officers in a high-speed chase do not violate the Fourteenth Amendment rights of a fleeing suspect. . . However, the instant case presents the distinct question of whether the same Fourteenth Amendment analysis should apply to officers responding to, but not directly involved in police chases. More specifically, it poses a question of whether police road blocks or stop sticks deployment may violate the Fourteenth Amendment rights of innocent third parties. While the Sixth Circuit applies an intent to harm standard to high speed chases, it takes a different stance for circumstances where state actors have time for deliberation. . . .Although Arcuri had previous experience using stop sticks, where the fleeing vehicle lost control into a ravine, this prior conduct is not enough by itself to show deliberate indifference. While Arcuri's action here did involve some risk, he was not deliberately *indifferent* to the risk. Defendant officers deployed the tire deflation device with the hope that Pawlak's truck would be stopped. Though neither Arcuri nor Fox personally witnessed Pawlak's erratic operation of the truck, with the information they were given they could reasonably infer that Pawlak presented a danger to the public as long as he was permitted to continue on his perilous path. Neither officer had the luxury of 'reflection' or 'unhurried judgment.'. . .Upon review of Sixth Circuit case law following *Nishiyama* and *Reed*, the Court finds that the *Nishiyama* standard of culpability is no longer correct. In *Lewellen v. Metropolitan Gov't of Nashville & Davidson County*, 34 F.3d 345 (1994), the Sixth Circuit held that '[g]ross negligence is not actionable under § 1983, because it is not "arbitrary in the constitutional sense."'. . .Plaintiffs have not met their burden of demonstrating that the Westlake Defendants are not entitled to the qualified immunity defense. Plaintiffs have failed to show that Arcuri and Fox acted with an intent to harm or with deliberate indifference. Even if Plaintiffs could demonstrate that Defendants' actions were grossly negligent or reckless, their claims still would not be actionable under § 1983. Viewed in a light most favorable to Plaintiffs, the facts do not show that these Defendants violated Plaintiffs' constitutional rights. Thus, the Court echoes the sentiments of the Sixth Circuit in *Lewellen*: 'When all is said and done, this case,..., amounts to nothing more than a non-intentional tort case the facts of which give the plaintiff a strong claim on our sympathies.'"); ***Cutter v. Metro Fugitive Squad***, No. CIV-06-1158-GKF, 2008 WL 4068188, at **18-20 (W.D. Okla. Aug. 29, 2008) ("Here, the defendants' conduct must be analyzed with respect to the particular circumstances the officers faced at the time. Based on the authorities discussed above, it is inappropriate for the court to apply a blanket 'shock the conscience' standard to all of the defendants' conduct because some of the

circumstances allowed for actual deliberation or reflection, while other circumstances required instant reactions. The conduct of the defendants, which allegedly placed Harris in danger, can be broken down into three general categories: (1) the defendants' decision to engage Harris as a civilian operative and the actual planning of the operation itself; (2) the defendants' decision to converge on Harris's vehicle 'swat-team' style soon after Barnett got inside and Harris drove away; and (3) the defendants' decision to engage in gunfire with Barnett in Harris's presence. The court concludes that the first category of conduct − i.e., the defendants' decision to engage Harris, a civilian, in an operation to apprehend Barnett and the plans underlying the operation − involved actual deliberation. . . . Where the defendants had the opportunity to truly deliberate, as they did here, deliberate indifference may suffice to shock the conscience. . ..With respect to the second category of conduct − i.e., converging on Harris's vehicle 'swat-team' style with guns drawn after the vehicle had traveled a short distance − the court concludes that this conduct also involved time for actual deliberation and should be analyzed under the deliberate indifference standard. . . . .Finally, the deliberative judgments in planning the operation and surrounding Harris's vehicle are distinguishable from the decisions the defendants had to make at the time they were faced with emergency circumstances. In considering the actions of the Sheriff Defendants after they converged on the vehicle, the court must apply the 'intent to harm' standard. . . .To the extent the plaintiffs' state-created danger claim is based on the defendants' decision to engage in gunfire with Barnett, such claims must be dismissed as to the Sheriff Defendants."); ***Purvis v. City of Orlando,*** 273 F.Supp.2d 1321, 1327, 1328 (M.D. Fla. 2003) ("Even though Reeve reacted to a situation that he allegedly caused, the Court cannot properly analogize Reeve to a prison official enjoying the luxuries of unhurried judgments. Logan was not detained in a jail cell. Similarly, given Reeve's knowledge of Logan's suicidal state, the flight risk he posed, and his alleged willingness to let him flee, the Court cannot properly analogize Reeve to an officer in the midst of a completely unexpected high-speed car chase. The Court, unable to find a situation in existing case law analogous to the instant case, finds that Logan's situation falls somewhere between these situations. Viewing the facts in the light most favorable to Plaintiff, Reeve allowed Logan to escape. This implies some degree of forethought by Reeve. Nevertheless, Reeve cannot be held accountable for Logan's actions subsequent to his escape. Reeve had no way of knowing Logan would jump the fences he jumped, or enter the retention pond where he drowned. There are no allegations that Reeve herded Logan over the fences and into the pond, or that he released Logan with the specific intention of causing Logan's death. The allegations are simply that Reeve pursued Logan to the retention pond and failed to aid him. The question before the Court is one of Reeve's intent. . . . Plaintiff makes no specific factual allegations concerning Reeve's actions or intent in allowing Logan to escape. In the absence of such allegations, the Court cannot assume that Plaintiff can prove facts that she has not alleged. . . . Consequently, the Court finds that Plaintiff has not stated a Fourteenth Amendment violation. . . . If Reeve indeed herded or forced Logan into the pond, it could constitute conscience-shocking behavior. In the absence of such allegations, however, the Court will not hold that Reeve's failure to wade into a pond to apprehend a 'struggling' escaped prisoner violates the Constitution.").

Compare ***T.W. ex rel. Wilson v. School Bd. of Seminole County,Fla.***, 610 F.3d 588, 602 (11th Cir. 2010) ("We need not decide whether corporal punishment that causes only psychological harm is categorically below the constitutional threshold. After considering the totality of the circumstances, including T.W.'s psychological injuries, we conclude that Garrett's conduct was not so arbitrary and egregious as to support a complaint of a violation of substantive due process. We do not condone the use of force against a vulnerable student on several occasions over a period of months, but no reasonable jury could conclude that Garrett's use of force was obviously excessive in the constitutional sense. . . Because Garrett's use of force was not obviously excessive, we need not consider whether the force Garrett used presented a reasonably foreseeable risk of serious bodily injury.") *with* ***T.W. ex rel. Wilson v. School Bd. of Seminole County,Fla.***, 610 F.3d 588, 605, 613 n.14 (11th Cir. 2010) (Barkett, J., dissenting) ("There is no dispute that a student's right to be free from gratuitous violence or from excessive corporal punishment inflicted by teachers at public schools is protected by substantive due process under the Fourteenth Amendment. A claim alleging an infringement of this right requires a showing that the state conduct 'can properly be characterized as arbitrary, or conscience shocking in a constitutional sense.'. . I believe that this record, when considered in its totality and viewed in the light most favorable to T.W., more than adequately supports a conclusion that Garrett's repeated physical restraints and excessive force against T.W. 'shocks the conscience' and thus violated his constitutional rights. . . . The only amendment other than the Fourteenth that arguably applies to the use of excessive force against a student is the Fourth. At least two circuits have applied the Fourth Amendment to a teacher's use of excessive corporal punishment against a student. *See Doe ex rel. Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir.2003); *Wallace ex rel. Wallace v. Batavia Sch. Dist.*, 68 F.3d 1010, 1016 (7th Cir.1995). The Fourth Amendment standard is one of 'objective reasonableness' under the circumstances, without regard to the official's underlying intent or motivation. . . Garrett's alleged actions easily satisfy this standard because there was no need for force and as such, her use of force was objectively unreasonable. In any event, under either a Fourth or Fourteenth Amendment analysis, Garrett's alleged conduct was clearly unlawful.")

Compare ***Siefert v. Hamilton County***, 951 F.3d 753, 767 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 896 (2020) ("Based on the facts as alleged in the complaint, these Defendants were between a rock and a hard place: they could either ensure that the parents were not deprived of their fundamental liberty interest and risk failing to protect the child if the allegations of abuse were legitimate, or they could ensure that the minor child was protected from alleged abuse and risk depriving the parents of their liberty interest. Even if we disagree with the choice the Defendants made, we cannot say that when faced with that choice, the Defendants' opting to err on the side of protecting the child at the expense of depriving the parents of their parental rights for a period of a month is conduct that shocks the conscience. Thus, the complaint fails to establish behavior that shocks the conscience, so we **AFFIRM** the district court's holding that the Sieferts failed to state a claim under substantive due process.") *with* ***Siefert v. Hamilton County***, 951 F.3d 753, 768-69 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 896 (2020) (Donald, J., dissenting) ("While I agree with most of the majority's analysis, I would reverse the district court's holding that the Sieferts failed

to state a claim under substantive due process. As the majority points out, there are two categories of substantive due process claims: those alleging a 'deprivation of a particular constitutional guarantee' and those alleging actions that 'shock the conscience.' Op. at —— (citing *Pittman v. Cuyahoga Cty. Dep't of Children & Family Servs.*, 640 F.3d 716, 728 (6th Cir. 2011)). In *Pittman*, however, we clarified that we apply different standards to those two types of claims. . . Where the plaintiff *does not* assert the deprivation of a particular constitutional guarantee, we review the claim under the shock the conscience standard. . . In contrast, where a plaintiff *does* assert a deprivation of a particular constitutional guarantee—such as that alleged here, deprivation of familial association—we analyze whether 'the [challenged] action [was] necessary and animated by a compelling purpose.'. . I believe the district court correctly determined that the Sieferts premise their substantive due process claim on the deprivation of their right to familial association. . . . The Sieferts allege that the defendants interfered with their right to associate with their child for over four weeks. Under the particular-constitutional-guarantee standard, we have suggested that similar conduct could constitute a substantive due process violation. . . Therefore, contrary to the majority, I would reverse the district court with respect to this claim as well.").

See also ***Adams v. Demopolis City School***, 80 F.4th 1259, 1274 (11th Cir. 2023) ("In non-custodial settings, such as in public schools, conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience-shocking in a constitutional sense. . . To rise to the 'conscience-shocking level, conduct most likely must be intended to injure in some way unjustifiable by any government interest.'. . . In considering whether conduct raises to the level of arbitrary or conscience-shocking, deliberate indifference, without more, is rarely a basis for substantive due process liability in cases arising in the school context. . . . Even if we assume that deliberate indifference can rise to the level of arbitrary or conscience-shocking conduct—an issue we do not decide today—the evidence simply does not support a finding that the defendants were deliberately indifferent."); ***Domingo v. Kowalski***, 810 F.3d 403, 416 (6th Cir. 2016) ("Kowalski's educational and disciplinary methods, as reported by Brant, may have been inappropriate, insensitive, and even tortious. This does not, however, render them unconstitutional. . . . The evidence establishes that Kowalski attempted to toilet-train and control her special-education students in furtherance of valid pedagogical goals. The methods she employed to accomplish these goals do not shock the conscience. Moreover, Appellants produced no evidence that Kowalski acted out of malice, callousness, or deliberate indifference. Appellants also produced no evidence that any student suffered a serious physical or psychological injury. Therefore, the district court did not err in granting summary judgment to Kowalski on Appellants' substantive due process claims.")

But see ***Flores v. City of South Bend***, 997 F.3d 725, 729-30 (7th Cir. 2021) ("The deliberate-indifference standard demands close attention to the particulars of the case. Identical behavior considered reasonable in an emergency situation might be criminally reckless when state actors have time to appreciate the effects of their actions. . . This is why officers giving chase, who 'are supposed to act decisively and to show restraint at the same moment,' have more latitude to balance these competing directives. . . Officers responding to a nonemergency situation or

inserting themselves into a situation that is already under control face a different set of constraints. They cannot reasonably expect to engage in the same conduct considered acceptable in the heat of an emergency. The key question is whether the officer 'ha[d] sufficient knowledge of the danger such that 'one can infer he intended to inflict the resultant injury.'. . In *Hill*, we confronted a case superficially similar to the one now before us. There, a police officer who was not responding to an emergency situation sped 'well over the speed limit' through a red light and crashed into the decedent's car, killing him. . . We concluded that this bare factual allegation allowed at most the inference that the officer created a 'generic risk to the public at large' that 'd[id] not rise to the threshold of a constitutional violation actionable under § 1983.'. .The district court found *Hill* dispositive and concluded that Flores's complaint similarly failed to allege sufficient facts to permit the inference that Gorny subjectively knew of the danger he created and consciously disregarded it. Gorny's actions, the court thought, supported at most a reasonable inference that he created a generic risk to the general public through his reckless speeding and disregard of traffic signals. In our view, however, the facts alleged here go well beyond those in *Hill*, and the difference matters. An officer who is not responding to an emergency can act so recklessly that a trier of fact would be entitled to find subjective knowledge of an unjustifiable risk to human life and conscious disregard of that risk. Our sister circuits have encountered similar factual allegations, and we find their opinions to be instructive. [discussing *Sauers* and *Browder*] . . .Here, Gorny's reckless conduct, unjustified by any emergency or even an order to assist in a routine traffic stop that five officers had under control, allows the inference that he subjectively knew about the risk he created and consciously disregarded it. Unlike the minimally detailed complaint in *Hill*, which again was limited to an accusation of speeding, the complaint here paints a far more troubling picture. Gorny, who was not assigned to the hot-spot area, overheard Hipakka, Howard, and O'Blenis communicate their assent to Alfrey and Wagner's request for assistance specifically from the other members of their team. At no point did Gorny hear any officer indicate that he or she needed external back-up or that the traffic stop presented an emergency. With no justification, Gorny chose to race through a residential area with a posted speed limit of 30 miles per hour at rates of speed between 78 and 98 miles per hour, two-to-three times the limit. It was too late to control the car when he reached the intersection of Kaley Avenue and charged through, despite the obstructed view. The result, as we have said, was that Flores, innocently driving in accordance with the traffic signals, was hit and killed. A jury could find, based on these allegations, that he displayed criminal recklessness (or deliberate indifference) to the known risk."); ***Dean for and on behalf of Harkness v. McKinney***, 976 F.3d 407, 414-20 (4th Cir. 2020) ("The parties disagree as to what standard of culpability should apply in this case. McKinney argues that the district court should have applied the higher standard of 'intent to harm' to his actions because he was responding to what he believed to be an emergency, and the plaintiff presented no evidence that he intended to harm Harkness. But even if the lesser 'deliberate indifference' standard applies, he contends his actions did not demonstrate deliberate indifference and were not conscience-shocking. The plaintiff asserts that there was no emergency, and that McKinney's conduct was so egregious that it undoubtedly establishes that he acted with deliberate indifference to Harkness's life and safety. We have examined each standard in light of the facts and circumstances in this case and conclude that for purposes of summary judgment, deliberate indifference is the standard by

which McKinney's conduct should be measured. . . . [U]nder *Lewis*, the intent-to-harm culpability standard applies to officers responding to an emergency call. . . . [W]hen an officer is able to make unhurried judgments with time to deliberate, such as in the case of a non-emergency, deliberate indifference is the applicable culpability standard for substantive due process claims involving driving decisions. . . Under this legal framework and viewing the facts in the light most favorable to the plaintiff, . . . we find that a jury could conclude that McKinney was not responding to an emergency and had time to deliberate his actions. . . .An officer's actions demonstrate deliberate indifference where the evidence shows that the officer subjectively recognized a substantial risk of harm and that his actions were inappropriate in light of the risk. . . A defendant's subjective knowledge of the risk may be inferred from circumstantial evidence. . . . [A] reasonable jury could conclude that McKinney knowingly disregarded a substantial risk of serious harm, and that his deliberate indifference to life and safety was conscience-shocking, in violation of Harkness's Fourteenth Amendment substantive due process rights. *See Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 718 (3d Cir. 2018) (responding to non-emergency call at over 100 mph demonstrates conscious disregard for a great risk of serious harm); *Browder*, 787 F.3d at 1081 (where off-duty officer was not chasing suspect or responding to an emergency, "a reasonable jury could infer ... a conscious contempt of the lives of others and thus a form of reckless indifference to a fundamental right"). . . . That there is little precedent imposing liability under these specific circumstances does not necessarily mean that an officer lacks notice that his conduct is unlawful. As then-Judge Gorsuch wrote for the panel in *Browder*:

> [S]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.

Browder, 787 F.3d at 1082–83 (citations omitted). . . Further, this Court has found that 'we need not—and should not—assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense. In some cases, government officials can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two.'. . With this legal framework in mind, the question to be resolved is whether a reasonable officer in McKinney's position would have known that his conduct—driving a police vehicle without activating his emergency lights and siren at over 80 miles per hour on a curved, unlit road at night while not responding to an emergency or pursuing a suspect—could give rise to a claim for a Fourteenth Amendment violation. As the district court noted, 'there is relatively scant caselaw imposing liability in these specific circumstances.'. . Neither the Supreme Court nor this Court has considered the exact conduct presented here. McKinney urges that the facts of this case are most similar to the circumstances presented in *Lewis*, where the Court declined to find a constitutional violation. But *Lewis*, . . . as well as this Circuit's opinion in *Temkin*, . . . involved officers who caused injuries while actively pursuing a fleeing suspect. We have already established here that the facts, viewed in the light most favorable to the plaintiff, do not support a conclusion that these circumstances are akin to a high-speed chase or that McKinney was responding to an emergency. Beyond this, the parties concede that no other court decisions

have addressed the factual circumstances upon which we must make a determination. But while there is no case directly on point factually to inform our analysis, core constitutional principles set forth in numerous cases lead us to the conclusion that Harkness's substantive due process right was clearly established. . . *Lewis* is not factually analogous to our case, but the Supreme Court did find that an officer not actively pursuing a suspect or responding to an emergency requiring quick decision-making, *i.e.*, where 'deliberation is practical,' may be liable based on a deliberate indifference standard for unintentional conduct. . . . After *Lewis*, two Tenth Circuit cases adopted the view that an officer can be liable for a substantive due process violation under a deliberate indifference standard when not responding to an emergency or chasing a suspect. . . .Thus, while the courts have yet to consider a case where an officer engaged in the same conduct as McKinney, he is not absolved of liability solely because the court has not adjudicated the exact circumstances of his case. We find that a reasonable officer in McKinney's position would have known, based on rights 'manifestly included within more general applications of the core constitutional principles invoked,'. . . that an officer may be subject to a claim under the Fourteenth Amendment under a deliberate indifference standard for unintentional injuries caused when not responding to an emergency or chasing a suspect. This substantive due process right was clearly established at the time McKinney engaged in the conduct that caused Harkness's injuries. A reasonable officer in McKinney's position would have known his conduct was not only unlawful, but that it created a substantial risk of serious harm to those around him. As the court stated in *Browder*, some conduct is so obviously unlawful that an officer does not need a detailed explanation. . . Thus, we affirm the district court's finding that 'in October 2016, it was clearly established that an officer driving more than 80 mph at night, on a curved section of an unlit road, in a non-emergency, non-pursuit situation could be subject to liability under the Fourteenth Amendment for deliberate indifference to a substantial risk of harm to those around him' and that '[a] reasonable officer in McKinney's position would have realized such conduct was unlawful.'. . Accordingly, taking the facts in the light most favorable to the plaintiff, we find that McKinney's actions were deliberately indifferent to Harkness's life and safety such that it shocks the conscience and rises to the level of a violation of a constitutional right that was clearly established at the time of the collision. We acknowledge that in the context of qualified immunity, officials are not liable for 'bad guesses in gray areas.'. . But McKinney's actions, construed in the light most favorable to the plaintiff, do not constitute a 'bad guess in a gray area' that qualified immunity protects. . . Thus, McKinney is not entitled to qualified immunity and his motion for summary judgment on that basis must be denied."); ***Sauers v. Borough of Nesquehoning***, 905 F.3d 711, 715-19 (3d Cir. 2018) ("Because we conclude that it was not clearly established at the time of the crash that Homanko's conduct, as alleged in the complaint, could give rise to constitutional liability under the Fourteenth Amendment, we will vacate the District Court's denial of qualified immunity. We hope, however, to establish the law clearly now. . . .We accordingly define the right at issue here as one not to be injured or killed as a result of a police officer's reckless pursuit of an individual suspected of a summary traffic offense when there is no pending emergency and when the suspect is not actively fleeing the police. . . . The level of culpability required 'to shock the contemporary conscience' falls along a spectrum dictated by the circumstances of each case. . . Our case law establishes three distinct categories of culpability depending on how much time a police officer has to make a

decision. . . In one category are actions taken in a 'hyperpressurized environment[.]'. . They will not be held to shock the conscience unless the officer has 'an intent to cause harm.'. . Next are actions taken within a time frame that allows an officer to engage in 'hurried deliberation.'. . When those actions reveal a conscious disregard of a great risk of serious harm' they will be sufficient to shock the conscience. . . Finally, actions undertaken with 'unhurried judgments,' with time for 'careful deliberation,' will be held to shock the conscience if they are 'done with deliberate indifference.'. . Our case law is clear that this 'shocks the conscience' framework for analysis applies to police-pursuit cases. . . The District Court rightly interpreted the complaint to allege that Homanko 'had at least some time to deliberate' before deciding whether and how to pursue the traffic offender. . . That places the fact-pattern in the second category of culpability, requiring inferences or allegations of a conscious disregard of a great risk of serious harm. . . . The liability question thus becomes whether deciding to pursue a potential summary traffic offender at speeds of over 100 miles-per-hour, after radioing for assistance from the neighboring jurisdiction where the potential offender was headed, demonstrates a conscious disregard of a great risk of serious harm. We have no difficulty in concluding that it does. . . . In sum, Sauers adequately pled that Homanko's conduct was conscience-shocking under our state-created danger framework. The complaint therefore contains a plausible claim that Homanko violated Sauers's and his wife's Fourteenth Amendment substantive due process rights. . . .At the time of the crash in May 2014, the state of the law was such that police officers may have understood they could be exposed to constitutional liability for actions taken during a police pursuit only when they had an intent to harm. Thus, it was not at that time clearly established that Homanko's actions could violate the substantive due process rights of Sauers and his wife."); ***Bolmer v. Oliveira***, 594 F.3d 134, 143-45 (2d Cir. 2010) ("In this case, Oliveira contends that the district court erred by applying *Rodriguez's* medical-standards test instead of determining whether Oliveira's conduct shocked the conscience under *Lewis.* We conclude that the district court did not err by applying *Rodriguez*, as that case imposed a rule for determining when an involuntary commitment violates substantive due process that is consistent with *Lewis's* shocks-the-conscience framework. In other words, a physician's decision to involuntarily commit a mentally ill person because he poses a danger to himself or others shocks the conscience, thereby violating substantive due process, when the decision is based on 'substantive and procedural criteria that are ... substantially below the standards generally accepted in the medical community.' *Rodriguez*, 72 F.3d at 1063. The principles enunciated in *Lewis* support our conclusion. First, *Rodriguez's* medical-standards test does not impose constitutional liability for conduct that is merely negligent. In requiring that the commitment decision be the product of criteria *substantially* below those generally accepted in the medical community, *Rodriguez* imposes liability for conduct that is at least grossly negligent. *Lewis* does not preclude liability for such middle-range culpability. . . . .Second, the circumstances of an involuntary commitment support the application of *Rodriguez's* medical-standards test. . . . Finally, the post-*Lewis* case law does not convince us that *Rodriguez* should be overruled. . . We are aware that other circuits have employed different analyses. *See Benn v. Univ. Health Sys., Inc.*, 371 F.3d 165, 174-75 (3d Cir.2004) (explaining that, "in view of the events that led to [the plaintiff's] commitment and the steps taken after his arrival at [the psychiatric hospital, the doctors'] conduct was not conscience-shocking"); *James v. Grand Lake Mental Health Ctr., Inc.*,

No. 97-5157, 1998 WL 664315, at *7, *10 (10th Cir. Sept. 24, 1998) (order and judgment). However, the reasoning of those cases does not persuade us that *Rodriguez* is no longer good law. . . . We do not read *Lewis* to require a subjective analysis of the physician's state of mind."); ***McQueen v. Beecher Community Schools,*** 433 F.3d 460,469 (6th Cir. 2006)("Here, deliberate indifference is the appropriate standard because Judd had the opportunity to reflect and to deliberate before deciding to leave Smith and several children unsupervised in the classroom. Although public schools are busy places, Judd did not need to make a split-second decision that merits applying a higher standard."); ***Pena v. DePrisco***, 432 F.3d 98, 113, 114 (2d Cir. 2005) ("The case before us does not involve a chase of a suspect or a prison riot where we need to 'capture the importance of [state officials'] competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.' . . Not condoning egregious drunk driving 'does not ordinarily clash with other equally important governmental responsibilities.'. . The defendants here, on the facts as alleged, had ample opportunity, not only during the day in question, but also during the days, weeks and months that preceded it, in which to decide what to do and say in response to the alleged practice of drinking and driving by off-duty officers. Nor does it require a sophisticated exercise in judicial notice for us to acknowledge that the extreme danger of drinking and driving is widely known. We conclude that the alleged behavior of the pre-accident individual defendants here, over an extended period of time and in the face of action that presented obvious risk of severe consequences and extreme danger, falls within the realm of behavior that 'can properly be characterized as ... conscience shocking, in a constitutional sense.' . . . Accordingly, we think that the allegations in the complaints before us, even if they do not accuse the defendants of acting with specific intent or desire to cause physical injury, are sufficient to assert that the defendants created a serious danger by acting with deliberate indifference to it. Whether termed 'deliberate indifference' or 'recklessness,' this mental state is sufficient to establish liability in such cases 'because it requires proof that the defendant focused upon the risk of unconstitutional conduct and deliberately assumed or acquiesced in such risk.'"); ***Estate of Owensby v. City of Cincinnati***, 414 F.3d 596, 603 (6th Cir. 2005) ("The Cincinnati police officers argue that this case is more analogous to vehicular chase cases than traditional prisoner or pretrial detainee cases, essentially because only about six minutes passed between the time Owensby was taken into custody and the time medical care was provided. This argument assumes, however, that actual deliberation was not possible within those six minutes. That assumption is erroneous. During the six minutes that Owensby was denied medical care after being taken into custody, the officers had time to do such things as greet each other, prepare for the arrival of their superiors, pick up dropped items and straighten their uniforms; some officers even had time to observe and discuss the apparent severity of Owensby's injuries. Under these circumstances, there is no question that the officers had 'time to fully consider the potential consequences of their conduct.'. . Accordingly, the district court properly applied the traditional deliberate indifference standard."); ***Terrell v. Larson,*** 396 F.3d 975, 981, 984 (8th Cir. 2005) (en banc) (Lay, J., joined by Heaney, J., and Bye, J., dissenting) ("Today's decision has the effect of giving police officers *un* qualified immunity when they demonstrate deliberate indifference to the safety of the general public. A police officer may now kill innocent bystanders through criminally reckless driving that blatantly violates state law, police

department regulations, accepted professional standards of police conduct, and the community's traditional ideas of fair play and decency so long as the officer subjectively, though unreasonably, believed an emergency existed. The majority's holding extends *Lewis*'s high-speed pursuit rule from its intended purpose of protecting officers forced to make split-second decisions in the *field* to a per se rule that now shields officers even after they have had an actual opportunity to deliberate at the *police station.* Believing that 28 U.S.C. § 1983 gives citizens a remedy for egregious abuses of executive power that deprive citizens of their constitutional right to life, we dissent. . . . We submit there are significant distinctions between this high-speed response case and suspect pursuit cases such as *Lewis* and *Helseth.* First, while officers pursuing suspected offenders generally find themselves, when acting in their official duties, in situations which are thrust upon them, *see Lewis*, 523 U.S. at 853, here Larson made a conscious, voluntary decision to respond to the domestic disturbance call even after he was informed that other deputies were responding and he could cancel. Second, while suspect pursuits require instantaneous decisions and on-the-spot reactions, *see id.*, Larson and Longen were eating dinner and doing paperwork when they received the call and were afforded the opportunity to deliberate their response before leaving the police station. Finally, officers involved in suspect pursuits may be required to violate traffic laws or risk losing the suspect. In contrast, Larson and Longen were not in danger of losing a suspect or of leaving the primary officers in this case without adequate backup, as they were aware other deputies were on their way to the scene. In view of these distinctions, we conclude the obvious lack of exigent circumstances convince us that the intent-to-harm standard is inappropriate in non-emergency response situations."); ***A.M. v. Luzerne County Juvenile Detention Center,*** 372 F.3d 572, 579 (3d Cir. 2004) ("As in a prison setting, we believe the custodial setting of a juvenile detention center presents a situation where 'forethought about [a resident's] welfare is not only feasible but obligatory.'. . We therefore conclude that this case is properly analyzed using the deliberate indifference standard. The circumstances of this case present a situation where the persons responsible for A.M. during his detention at the Center had time to deliberate concerning his welfare."); ***Bukowski v. City of Akron,*** 326 F.3d 702, 710(6th Cir. 2003) ("After reviewing the Supreme Court's decision in *City of Sacramento v. Lewis,*. . .we have come to view the justification for a heightened standard in noncustodial cases as coming from the fact that the reasoning in noncustodial situations is often, by necessity, rushed. . . The guiding principle seems to be that a deliberate-indifference standard is appropriate in 'settings [that] provide the opportunity for reflection and unhurried judgments,' but that a higher bar may be necessary when opportunities for reasoned deliberation are not present. . . For the case at bar, a deliberate-indifference standard is clearly the appropriate one, given the fact that the defendants not only had time to deliberate on what to do with Bukowski but actually did deliberate on this point. The plaintiffs here, however, cannot meet that standard."); ***Estate of Smith v. Marasco,*** 318 F.3d 497, 508, 509 (3d Cir. 2003) (***Smith I***) ("In this case, the officers were confronted with what Fetterolf described as a 'barricaded gunman'situation. This case, however, did not involve the 'hyperpressurized environment' of an in-progress prison riot or a high-speed chase. . . Indeed, the official incident report shows that at least one hour passed between the time Marasco and Scianna approached Smith's residence and the time Fetterolf authorized a request to activate SERT. During that time no shots were fired and the officers did not see a firearm brandished. Moreover, at least after the police arrived at the Smith

residence, the police had no reason to be concerned about the safety of third parties. Thus, this case does not involve a 'hyperpressurized environment'such that the Smiths to recover would have to demonstrate that the defendants had an actual purpose to cause harm. At the same time, however, this case is not one in which the police had 'the luxury of proceeding in a deliberate fashion, as prison medical officials can.' . . Because the urgency and timing involved in this case is more like the situation in *Miller*, the Smiths here must demonstrate 'a level of gross negligence or arbitrariness that indeed Ashocks the conscience .''. . . We think based on our reading of the precedents in this elusive area of the law that, except in those cases involving either true split-second decisions or, on the other end of the spectrum, those in which officials have the luxury of relaxed deliberation, an official's conduct may create state-created danger liability if it exhibits a level of gross negligence or arbitrariness that shocks the conscience."); ***Ewolski v. City of Brunswick,*** 287 F.3d 492, 511 & n.5, 513 (6th Cir. 2002) ("Applying this framework, we agree with the district court that this case 'falls within the Amiddle-range' between custodial settings and high-speed chases,' and likewise conclude that, on balance, 'the more appropriate standard of review is Adeliberate indifference.'' . . . Although the Brunswick police officers conducting the standoff undoubtedly faced competing obligations and intense pressures in making their decisions, the facts viewed most favorably to the plaintiffs reveal that this was a situation where actual deliberation was practical. The police waited five hours to initiate the first 'tactical solution,' which strongly suggests that split-second decision making was not required. Many more hours passed before the decision was made to deploy the armored vehicle. Indeed, in his deposition, Chief Beyer indicated that the decision to initiate a tactical assault was made after consulting two mental health professionals and requesting input from the officers on the scene. Beyer also indicated that he discussed the pros and cons of using tear gas. Clearly, this testimony demonstrates not only that deliberation was practical, but that some effort at deliberation was in fact made. . . . . Nevertheless, even under the more exacting deliberate indifference standard, we conclude that the Appellant has not shown a genuine issue of material fact as to whether the conduct of the police rose to the level of the conscience shocking under the particular circumstances presented. . . . We note that although the issue has never been decided, cases from this circuit decided before *Lewis* have 'expressed doubt' as to whether the deliberate indifference standard should apply in noncustodial settings. . . Such doubt, we believe, has been resolved by the Court's opinion in *Lewis,* which made clear that the key variable is whether actual deliberation is practical, not whether the claimant was in state custody. As the Court explained, deliberate indifference applies in custodial settings because these settings provide the opportunity for reflection and unhurried judgments. . . Custodial settings, however, are not the only situations in which officials may have a reasonable opportunity to deliberate."); ***Wilson v. Lawrence County,*** 260 F.3d 946, 956 & n.9 (8th Cir. 2001) ("The general test of whether executive action denying a liberty interest [footnote omitted] is egregious enough to violate due process is whether it shocks the conscience. . . The Supreme Court has taken a context specific approach to determining whether intermediate culpable states of mind, such as recklessness, support a section 1983 claim by shocking the conscience and, thus, violating due process. . . . In *Neal . . . ,* we stated, based on *Lewis,* that in situations where state actors have the opportunity to deliberate various alternatives prior to selecting a course of conduct, such action violates due process if it is done recklessly. . . This statement from *Neal* certainly applies to the

present claim. . . . In the present situation, officers conducting the post-arrest investigation certainly had the luxury of unhurried judgments and repeated reflections, which make a reckless standard appropriate. . . . It is important to recall that this reckless standard normally contains a subjective component similar to criminal recklessness."); ***Young v. City of Mount Ranier***, 238 F.3d 567, 574-77 (4th Cir. 2001) ("Although the original complaint refers to 'malicious abuse' by the law enforcement officers, the Parents' claims are not grounded in the Fourth Amendment − in their brief and during oral argument they specifically disavowed any contention that the law enforcement officers improperly took Young into custody or that they used excessive force when taking him into custody. Instead, the Parents proceed solely under the Fourteenth Amendment, contending that the defendants violated Young's constitutional rights by failing to protect him from a known risk of harm (the risk of asphyxiation when restrained in a prone position, particularly after being sprayed with pepper spray), or, stated somewhat differently, that the defendants violated Young's constitutional rights by their indifference to his serious medical needs brought about by the pepper spray, restraints, and face-down positioning. . . . These claims fall within the limited circumstances where conduct in the 'middle range' of culpability − specifically, conduct that amounts to 'deliberate indifference' − is viewed as sufficiently shocking to the conscience that it can support a Fourteenth Amendment claim. . . . Reading the original complaint in the light most favorable to the Parents and giving the Parents the benefit of all reasonable inferences, . . . the complaint simply establishes that Young struggled with law enforcement officers, was sprayed with pepper spray, restrained, transported to a hospital in a prone position, and died sometime thereafter. While the complaint alleges that the officers knew or should have known about the potential problems with the use of pepper spray and restraints on PCP users, these allegations, particularly absent any suggestion that Young exhibited any distress during the time he was in the custody of the officers, at most support an inference that the defendants were negligent in some unidentified way. Negligence, however, is insufficient to support a claim of a Fourteenth Amendment violation."); ***Butera v. District of Columbia,*** 235 F.3d 637, 652 (D.C. Cir. 2001) ("As in the context of State custody, the State also owes a duty of protection when its agents create or increase the danger to an individual. Like prison officials who are charged with overseeing an inmate's welfare, State officials who create or enhance danger to citizens may also be in a position where 'actual deliberation is practical.'. . . In the instant case, the officers had the opportunity to plan the undercover operation with care. In view of the officers' duty to protect Eric Butera, he may prove that the officers' treatment of him in connection with the attempted undercover drug buy 'shocked the conscience' by meeting the lower threshold of 'deliberate indifference.'"); ***Claybrook v. Birchwell***, 199 F.3d 350, 362, 363 (6th Cir. 2000) (Clay, J., concurring in part and dissenting in part) ("When conducting an 'exact analysis' of the facts of this case in the light most favorable to Ms. Claybrook, it is clear that the officers had sufficient time to make an unhurried judgment about their conduct upon seeing Mr. Claybrook with his weapon such that a lower level of fault should be applied. As the officers testified, they were aware of department rules requiring them to radio for a marked car and uniformed officers, and they made a conscious decision to request such support. The officers were also aware that the department rules mandated that they refrain from investigating the situation unless emergency circumstances arose. Significantly, at the point when they discovered Mr. Claybrook standing

outside with this gun, Officer Birchwell testified that he did not believe that the officers were in imminent danger or that exigent circumstances requiring the use of force existed. However, after having made a decision to request backup, the officers inexplicably proceeded to engage Mr. Claybrook in a violent confrontation without awaiting the arrival of the uniformed officers. Contrary to the majority's assertion, the officers here were hardly involved in a high-speed pursuit or any high-pressure confrontation at the time that they decided to act, as were the officers in Lewis. . . As such, Ms. Claybook's claims should be analyzed using the 'deliberate indifference' standard; which is to say, her claim should be viewed in the context of whether the officers had time to make a reasoned judgment about their conduct. . . . Notably, there were no emergency circumstances present so as to require the officers to begin shooting without following protocol and without making a reasoned decision as to whether the vehicle was occupied. Accordingly, under these circumstances, a jury should decide whether the officers acted with deliberate indifference to Ms. Claybrook's rights."); ***Brown v. Nationsbank Corp.***, 188 F.3d 579, 592 (5th Cir. 1999) ("Applying the *Lewis* analysis to the FBI's alleged activity in this case, we conclude that the FBI made decisions which harmed the Plaintiffs after ample opportunity for cool reflection. In fact, they invested almost two years and thousands of man hours in developing the sting operation. Thus, the due process clause protects the Plaintiffs from any harm that arose from the officers' deliberate indifference. The facts, as pleaded, establish at least that level of federal agent culpability as Operation Lightning Strike evolved into a disastrous boondoggle. We therefore hold that Hodgson's allegations that federal agents inflicted damages on him, an innocent non-target, during this particular undercover operation and refused him compensation states a claim under *Bivens*."); ***Armstrong v. Squadrito***, 152 F.3d 564, 576 (7th Cir. 1998) ("[T]he Court [in *Lewis*] endorsed the use of the deliberately indifferent standard for cases in which the defendants have the luxury of forethought . . . . The Court explained that prison is the quintessential setting for the deliberately indifferent standard.").

See also ***Napper v. Hankison***, No. 3:20-CV-764-BJB, 2022 WL 3008809 (W.D. Ky. July 28, 2022) ("After a state-court grand jury indicted Hankison for his role in these events, the Court stayed the civil claims against him. . . Since then, the Commonwealth tried Hankison for wanton endangerment and a jury acquitted him. . . So at this juncture the Court does not face the question whether the Plaintiffs stated a plausible claim against Hankison—the only Defendant whose bullets allegedly entered the Plaintiffs' apartment. Instead, this Order addresses the motions to dismiss filed by Louisville Metro Government and the individual defendants aside from Hankison. . . . The Supreme Court and the Sixth Circuit have long distinguished between force *directed* at a *particular person* and force that *incidentally* restricts a *third-party's* movement. . . .The Plaintiffs describe themselves as 'innocent bystanders,'. . . and expressly acknowledge that their 'Unit 3 ... was not the target of the Search Warrant[.]' . . Nor do they say Hankison intended to fire at them or their apartment. . . Rather, the 'Defendants were executing ... search warrants that night at ... 3003 Springfield Drive *Unit 4*' which was 'occup[ied]' by 'Breonna Taylor and Kenneth Walker.'. . As explained by Plaintiffs' own pleadings, the decision to knock and search Unit 4 was intentional; the shots that entered Unit 3 were not. . . . The Plaintiffs ask the Court to ignore *Claybrook* as inconsistent with *Brower*, or at least read *Claybrook* narrowly to apply only

to purely inadvertent uses of force, like a slipped parking brake, as opposed to intentional uses of force that inadvertently injure a third party. . . But *Claybrook* is binding, published precedent that discussed and followed *Brower*, not earlier precedent that a subsequent Supreme Court decision might theoretically have abrogated. So a district court has no basis to ignore it. And the reasoning of the many precedents cited above reject Plaintiffs' reading of 'seizures' to include any volitional force, as opposed to force specific to the plaintiff. Plaintiffs are simply wrong that '[i]t doesn't matter who you seize.'. . The Fourth Amendment does not provide a claim to *any* aggrieved person (target and bystander alike) harmed when an officer uses objectively unreasonable force in an attempt to seize someone. . . Instead the Fourth Amendment protects someone intentionally seized by government officials. . . Contrary arguments are best addressed to the Sixth Circuit sitting en banc or to the Supreme Court, not to a single district judge. . . .The upshot of *Claybrook* is that courts examine use-of-force claims brought by bystanders under the Fourteenth Amendment instead of the Fourth. . . .Even if 'the actions of the [officers] violated departmental policy or were otherwise negligent,' that could not establish 'conscience-shocking malice or sadism toward the unintended shooting victim.'. . Both the Sixth Circuit and the Supreme Court have dismissed claims that rest solely on violations of local regulations. . . To be sure, the LMPD regulations expressly call for "reasonableness" in the use of force in the execution of a search warrant, considered in light of the individual circumstances known before and during the execution. . . But while standard operating procedures may of course call for a higher or different standard of care than does the Constitution, that does not supplant the Constitution as the source of legal liability under § 1983. Congress made states and localities liable for constitutional violations, not violations of state and local policies. A plaintiff asserting a *Lewis* claim must allege the violation of 'the plaintiff's *federally protected rights.*'. .These Plaintiffs haven't. They ignore the law's clear teaching on *when* to assess liability for the use of force: when the officer 'react[ed] to the dangerous actions of [an] armed man.'. . The use of force Plaintiffs complain about—the bullets that flew into their apartment—occurred in the context of a fast-evolving firefight following Walker's shooting at police officers. . . . A '[w]ild gunfight' not planned or intended by law enforcement is the sort of prototypical 'dangerous action[ ]' for which the heightened malicious-or-sadistic standard applies."); ***Clark v. Merrell***, No. CV 19-1579, 2021 WL 288791, at *5 (E.D. Pa. Jan. 28, 2021) ("Officer Merrell's dangerous pursuit of Douglass in defiance of a direct order from his supervisors earlier that day to not pursue any dirt bikes could support an inference that Officer Merrell acted with intent to harm. Undeterred by his supervisors' direct order, Officer Merrell pursued Douglass for eight to ten minutes, at 60 miles per hour, in the middle of the afternoon, near a major transportation center, and through densely populated areas with clearly marked pedestrian crosswalks. There was no urgency to pursue Douglass. In fact, Officer Merrell was specifically ordered *not* to pursue him. Officer Merrell's dangerous and unauthorized pursuit of Douglass could support an inference that Officer Merrell acted with the requisite intent to harm. . . . Officer Merrell's repeated attempts to conceal, coverup or simply lie about the circumstances of his unauthorized pursuit of Douglass also support an inference that he acted with a purpose to cause harm.") [*See also* ***Clark v. Merrell***, No. CV 19-1579, 2025 WL 565822, at *7 (E.D. Pa. Feb. 19, 2025) (denying summary judgment for defendant)]; ***Thomas v. Town of Chelmsford***, 267 F.Supp.3d 279, ___ (D. Mass. 2017) ("While the students' Lord-of-the-Flies behavior shocks the

conscience, that is not the issue; the relevant inquiry is whether there was any conscience-shocking behavior by the state defendants that led to the bodily injury. The Court finds that the answer is no. Although there is a plausible argument that the defendants' failure to supervise the bunkhouse was negligent, the defendants' conduct does not rise to the level of deliberate indifference. The defendants knew that bullying took place at previous football camps at Camp Robindel, but none of the previous incidents of bullying were anywhere near as serious as the broomstick rape. Similarly, while the defendants knew of one previous occasion in which Matthew was bullied in football practice—urination in his cleats—that incident was much less serious. There was no reason for any of the defendants to have believed that the students, if left unsupervised, would have inflicted violence of this magnitude on Matthew."); ***Wells v. Bisard***, No. 1:11-cv-1049-WTL-DML, 2011 WL 5827213, at *2, *3 (S.D. Ind. Nov. 18, 2011) ("Where, as here, a police motor vehicle accident occurs in a non-emergency setting, such an accident offends the Constitution if the defendant was criminally reckless. *Hill v. Shobe,* 93 F.3d 418, 421 (7th Cir.1996). 'Criminal recklessness-which is the same as deliberate indifference-is a proxy for intent' and the test for criminal recklessness is a subjective standard. *Id.* Under the subjective standard, the plaintiff is required to 'demonstrate that [the defendant] was willing to let a fatal collision occur.' *Id.* Thus, in order to withstand a motion to dismiss, the plaintiff 'must demonstrate that the defendant had actual knowledge of impending harm which he consciously refused to prevent. In other words, the state actor must have sufficient knowledge of the danger that one can infer he intended to inflict the resultant injury.' *Id.* However, '[i]t is insufficient to show that a public official acted in the face of a recognizable but generic risk to the public at large.' *Id.* Rather, the reckless conduct must be directed toward the plaintiff. . . .Conduct can be directed toward the plaintiff even if the defendant does not know the specific identity of each person within the group. . . . Wells has pled sufficient facts that, if proved, would support a finding that Bisard had sufficient knowledge of danger to a specific group of persons caused by his actions. From this, a jury could reasonably find that Bisard acted recklessly in conscious disregard of that risk. Specifically, Wells has alleged that Bisard put pedestrians and motorists in his path in danger when he reported to work intoxicated and/or drank while on duty such that he drove under the influence of alcohol and had a blood alcohol level of .19 two hours after the collision, drove 73 miles per hour in a 40 mile-per-hour zone during lunch time on a work day where there was significant traffic on the roadway, and used the police car's laptop computer to instant message another officer about non-police matters while driving, in violation of IMPD General Orders. For this reason, the Defendant's motion to dismiss Wells' claim for failure to state a constitutional violation under § 1983 is **DENIED**. . . . The right at issue in this case is clearly established. *Hill* established that, in the context of non-emergency police motor vehicle accidents, a criminal recklessness-deliberate indifference standard would apply. While articulating a higher standard for police motor vehicle accidents in which a police officer must make the split-second decision whether to give chase, *Lewis* bolstered the holding in *Hill* by specifically contemplating that situations not marked by such urgency be measured by the lesser, deliberate indifference standard. Based on *Hill* and bolstered by *Lewis* , the Court finds that a reasonable official, acting as Bisard is alleged to have acted, would have understood that what he was doing violated Wells' substantive due process rights. The Defendants' motion to dismiss based on qualified immunity is therefore **DENIED.**");

Leisure v. City of Cincinnati, 267 F. Supp.2d 848, 853, 854 (S.D. Ohio 2003) ("The Court . . . finds that Plaintiffs have also sufficiently alleged a violation of Thomas' due process rights. Such allegation can also serve as the basis for the case to proceed on an alternatively pleaded constitutional violation. The Supreme Court, in *County of Sacramento v. Lewis*, established that although substantive due process claims based upon clearly deliberate decisions intended to harm or injure are 'most likely to rise to the conscience-shocking level,' those claims are not exclusive. . . . Claims based upon 'something more than negligence but less than intentional conduct, such as recklessness or gross negligence' or 'mid-level fault' could also be actionable in some circumstances. . . . Plaintiffs allege that Defendant Roach pursued Thomas with 'his gun out and his hand on the trigger'. . ., contrary to the policy of the Cincinnati Police Department . . . Such conduct, even if only the result of 'mid-level fault,' inches close enough to harmful purpose to spark shock under *County of Sacramento.* Though Defendants read *County of Sacramento* to foreclose due process liability in a pursuit case absent purpose to cause harm . . . , the Court finds that the specific holding of the case pertains to high-speed chases. . . Defendants further try to frame a pursuit on foot as high-speed, but the Court does not find this proposition convincing, as a person on foot cannot travel as fast as a person on a motorcycle. The urgency and the obvious danger to the public is not the same. For these reasons, the Court finds that consonant with *County of Sacramento,* Plaintiffs' allegations of violation of due process can serve as an alternative basis for a constitutional violation."); ***Sanders v. Bd. Of County Commissioners of Jefferson County,*** 192 F. Supp.2d 1094**,** 1114, 1115 (D. Colo. 2001) ("[I]n assessing the constitutionality of law enforcement actions, I must distinguish between emergency action and actions taken after opportunity for reflection. Appropriately, I must give great deference to the decisions that necessarily occur in emergency situations. With that caveat in mind, I look to the nature of the official conduct on the spectrum of culpability that has tort liability at one end; conduct in which the state actor intended to cause harm and in which the state lacks any justifiable interest on the other. In emergency situations, only conduct that reaches that far point will shock the conscience and result in constitutional liability. Where the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience. . . . The result here comes clear when focused through the lens of the *Lewis* standard. From the time when the attack on Columbine High School began on April 20, 1999 at approximately 11:15 a.m. until approximately 12:30 p.m. when the hostile gunfire ceased and the Command Defendants knew that Harris and Klebold were dead, the competing interests of public and officer safety outweighed the rescue needs of the students and staff inside Columbine High School, including Dave Sanders. This first hour and fifteen minutes of the attack is closely analogous to the prison riot discussed in *Lewis* during which state officials were forced to make 'split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving.' . . . Under such circumstances, unless an intent to harm a victim is alleged, there is no liability under the Fourteenth Amendment redressible by an action under § 1983. . . . In this case, the pertinent time frame falls between approximately 12:30 p.m. when the Command Defendants learned that Harris and Klebold were dead and 4:00 p.m. when a SWAT team finally reached Dave Sanders in Science Room 3. Pursuant to Plaintiff's allegations, during that time, the Command Defendants knew Dave Sanders' exact location and the nature of his wounds. Yet they

took repeated affirmative actions to block access to or rescue of Dave Sanders by private citizens or other state actors not withstanding his readily-accessible location. Under the factual allegations of Plaintiff's complaint I cannot say precisely at what moment between 12:30 p.m. and 4:00 p.m., the circumstances facing the Command Defendants changed. I do conclude that at some point during the afternoon, the Command Defendants gained the time to reflect and deliberate on their decisions. At that point, the Command Defendants demonstrated a deliberate indifference towards Dave Sanders' plight shocking to the conscience of this federal court."); ***Glaspy v. Malicoat,*** 134 F. Supp.2d 890, 896 (W.D. Mich. 2001) ("The Court concludes that the deliberate indifference test rather than the higher 'malicious or sadistic' test is appropriate in this case because Glaspy's request to Malicoat to use the restroom did not involve a 'rapidly evolving, fluid, and dangerous predicament which preclude[d] the luxury of calm and reflective pre-response deliberation.' [citing *Claybrook*] Rather, Malicoat had sufficient time to consider different alternatives and act on them. While it is true that prisoner count, an important prison function, was being conducted at the time, unlike a prison riot, prisoner count is a routine procedure that does not require snap judgments requiring balancing of competing interests. Furthermore, although no more than 22-24 minutes elapsed between William's first request that Glaspy be permitted to use the restroom and the end of count, Malicoat had sufficient time to determine how to accommodate Glaspy's need. Applying the deliberate indifference standard to the facts of this case, the Court concludes that Malicoat's conduct shocks the conscience because Malicoat was deliberately indifferent to Glaspy's federally protected rights."); ***Williams v. City and County of Denver***, No. 90 N 1176, slip op. at *17 (D. Colo. Sept. 27, 1999) (on remand) ("I find that a reasonable juror could conclude that Murawski's back-up call did not require an emergency response and, thus, Williams need not satisfy the intent to harm culpability requirement. Further, I find that a reasonable juror could conclude that, under the totality of the circumstances, Farr's conduct was sufficiently reckless to shock the conscience.").

See also ***Childress v. City of Arapaho***, 210 F.3d 1154, 1157, 1158 (10th Cir. 2000) ("The *Lewis* principles therefore apply whether the claimant is a police suspect or an innocent victim."); ***Onossian v. Block***, 175 F.3d 1169, 1171 (9th Cir. 1999) ("As we read the Court's opinion [in *Lewis*], if a police officer is justified in giving chase, that justification insulates the officer from constitutional attack, irrespective of who might be harmed or killed as a consequence of the chase."). *See also* ***L.S., ex rel. Hernandez v. Peterson***, 982 F.3d 1323, 1330-31 (11th Cir. 2020) ("To succeed on their theory of deliberate indifference, the students must allege both that the officials acted with deliberate indifference and that their indifference was 'arbitrary' or 'conscience shocking.'. . . We doubt that deliberate indifference can ever be 'arbitrary' or 'conscience shocking' in a non-custodial setting. We stated in dicta in *Nix* that we 'ha[ve] been explicit' that it cannot. . . Yet, we later suggested that deliberate indifference might be sufficient in a non-custodial setting if, 'at the very least,' it involved 'deliberate indifference to an extremely great risk of serious injury.'. . But *Waddell* then suggested that 'the correct legal threshold for substantive due process liability' might be much higher than deliberate indifference. . . Although neither *Nix* nor *Waddell* created a binding rule, . . . the weight of authority lies with *Nix*. 'No case in the Supreme Court, or in this Circuit, ... has held that ... deliberate indifference is a sufficient

level of culpability to state a claim of violation of substantive due process rights in a non-custodial context.' *Waldron v. Spicher*, 954 F.3d 1297, 1310 (11th Cir. 2020). Indeed, in the public-school setting, we have allowed substantive-due-process claims to proceed only when they involved intentional, obviously excessive corporal punishment. . . Even if we assume that a non-custodial claim of deliberate indifference may be cognizable as a matter of substantive due process, the students' claim is not. The students allege that the officials' actions were 'arbitrary' or 'conscience shocking' in two ways. First, Israel, Runcie, Medina, Peterson, and Broward County knew that Cruz was a danger but failed to intervene during the shooting. Second, Jordan prevented lifesaving care by blocking medics from entering the school during the shooting. The students argue that these choices, in the totality of the circumstances, were 'arbitrary' or 'conscience shocking.' The students are right that we must evaluate the totality of the circumstances, . . .but they ignore the key circumstance. A shooting is 'an occasion calling for fast action,' where officials must 'make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.'. . When split-second judgments are required, an official's conduct will shock the conscience only when it stems from a 'purpose to cause harm.'. . Outside of their since-abandoned and conclusory claim of retaliation against Medina, the students fail to allege that any official acted with the purpose of causing harm. . . The students have not alleged 'arbitrary' or 'conscience shocking' conduct by any official. The 'purpose to cause harm' requirement applies even if the officials or Broward County had notice of the danger that Cruz posed. This requirement controls whenever rapid judgments are necessary. . . Conduct that is not intentionally harmful can violate substantive due process only in contexts 'when actual deliberation is practical.'. .*Lewis* makes clear that this appeal involves rapid judgments in a dangerous and unpredictable circumstance. In *Lewis*, the Supreme Court distinguished, for example, between the day-to-day operations of a prison, where actual deliberation is practical, and a prison riot, where it is not. . . In a school shooting, as with a prison riot, officials might be able to prepare in the abstract. But when a violent and chaotic circumstance comes to pass, officials must make decisions 'in haste, under pressure, and frequently without the luxury of a second chance.'. . Absent intentional wrongdoing, we cannot review those split-second decisions under the Due Process Clause."); ***J.R. v. Gloria***, 593 F.3d 73, 79, 80 (1st Cir. 2010) ("The mere creation of a special relationship, even if placing young children into foster care created such a relationship, is not enough to make out a due process claim for any harm that may follow. Even then, the claim against the defendants must also involve 'conscience-shocking' conduct by state officials. . . and 'the official conduct "most likely to rise to the conscience-shocking level" is the "conduct intended to injure in some way unjustifiable by any government interest."'. . .The Supreme Court has also repeatedly 'expressed [its] reluctance to expand the doctrine of substantive due process.'. . In particular, the Court has made it clear that state officials' negligence, without more, is simply insufficient to meet the conscience-shocking standard. . . We assume arguendo that DCYF created a 'special relationship' because it affirmatively took responsibility for protecting the twins from harm while they remained in foster care. Even so, plaintiffs, on all of their evidence, did not make out a substantive due process claim. The evidence they put forward alleges troubling lapses in DCYF's supervision of the twins' foster care environment. But it does not allege any behavior by defendants that would meet the legal definition of conscience-shocking conduct. Plaintiffs argue that the legal standard for defining conduct that

'shocks the conscience' is whether the state has acted with 'deliberate indifference.' That is not entirely correct. As we stated in *Rivera,* deliberately indifferent behavior does not per se shock the conscience. Indeed, we suggested that it is only '[i]n situations where actors have an opportunity to reflect and make reasoned and rational decisions' that 'deliberately indifferent behavior *may* suffice to shock the conscience.'. . The burden to show state conduct that 'shocks the conscience' is extremely high, requiring 'stunning' evidence of 'arbitrariness and caprice' that extends beyond '[m]ere violations of state law, even violations resulting from bad faith' to 'something more egregious and more extreme.' *DePoutot v. Raffaelly,* 424 F.3d 112, 119 (1st Cir.2005). Gloria and Terry do not defend their actions on the basis that they were responding to an emergency, with no time to reflect, but on the basis that even if their conduct fell short of regulatory requirements, it did not come close to shocking the conscience. Plaintiffs' evidence did not show the defendants acted even with deliberate indifference. Though other circuits have varied in their formulations of when 'deliberate indifference' rises to conscience-shocking conduct in the foster care context, state officials must have been at least aware of known or likely injuries or abuse and have chosen to ignore the danger to the child. . . Even when the evidence is viewed in the light most favorable to plaintiffs, no rational trier of fact could conclude that the defendants were aware that the twins were in danger of being abused or otherwise harmed by Stevens."); ***Phillips v. County of Allegheny***, 515 F.3d 224, 241 (3rd Cir. 2008) ("[U]nder *Sanford,* three possible standards can be used to determine whether state action shocked the conscience: (1) deliberate indifference; (2) gross negligence or arbitrariness that indeed shocks the conscience; or (3) intent to cause harm. . . . Taking the allegations as true, the complaint leads us to conclude that defendants Tush and Craig were not acting in a 'hyperpressurized environment.' Instead, they had sufficient time to proceed deliberately. . . . Hence, to 'shock the conscience,' they have to have behaved with deliberate indifference to the results of their actions."); ***Sanford v. Stiles***, 456 F.3d 298, 310 & n.15 (3d Cir. 2006) ("[I]n a state-created danger case, when a state actor is not confronted with a 'hyperpressurized environment' but nonetheless does not have the luxury of proceeding in a deliberate fashion, the relevant question is whether the officer consciously disregarded a great risk of harm. Again, it is possible that actual knowledge of the risk may not be necessary where the risk is 'obvious.' . . . We recognize that in some instances these standards may become arduous to apply. Other circuits have taken a more straightforward approach to the fault requirement. For example, the Ninth Circuit has held that 'deliberate indifference to [a] known or obvious danger' is the uniform standard in all state-created danger cases. . . The Sixth and Eighth Circuits have suggested a two-tiered standard under which deliberate indifference will apply if an opportunity for reflection exists while intent to harm will apply to 'split-second decision[s] .' . . However, unlike these courts, we are constrained by *Miller* and subsequent cases to recognize our three existing tests to identify conscience-shocking behavior."); ***Fraternal Order of Police Department of Corrections Labor Committee v. Williams***, 375 F.3d 1141, 1145, 1146 (D.C. Cir. 2004) ("As we explained in *Butera*, . . . the 'lower threshold' for meeting the shock the conscience test by showing deliberately indifferent as opposed to intentional conduct applies only in 'circumstances where the State has a heightened obligation toward the individual.' . . . . The opportunity for deliberation alone is not sufficient to apply the lower threshold to substantive due process claims. Instead, it is '[b]ecause of ... special circumstances' like custody that 'a State official's deliberate

indifference ... can be Atruly shocking.'"); ***Waddell v. Hendry County Sheriff's Office,*** 329 F.3d 1300, 1306 & n.5, 1309 (11th Cir. 2003) ("In this non-custodial setting, a substantive due process violation would, at the very least, require a showing of deliberate indifference to an extremely great risk of serious injury to someone in Plaintiffs' position. . . . We stress the phrase 'at the very least.' We do not rule out today that the correct legal threshold for substantive due process liability in a case like this one is actually far higher. For example, the standard could be that the government official acted with 'deliberate indifference to a substantial certainty of serious injury' or maybe that the government official acted 'maliciously and sadistically for the very purpose of creating a serious injury' or perhaps some different standard. We feel comfortable today that the standard we use today is the low point − may well be too low a point − for a possible standard in a case like this one and that we can decide this case without being more definite about the law as an academic matter. . . . To act with deliberate indifference, a state actor must know of and disregard an excessive − that is, an extremely great − risk to the victim's health or safety. . . . In summary, we, in circumstances such as these, are unwilling to expand constitutional law to hold police departments responsible for the tortious acts of their confidential informants. No decision by Defendants in this case involved such an obviously extremely great risk that Garnto would become intoxicated and then drive an automobile and then crash into another automobile causing serious injury as to shock the conscience. We conclude that the district court properly determined that Plaintiffs failed to establish a substantive due process violation."); ***Schieber v. City of Philadelphia,*** 320 F.3d 409, 417, 420, 423 (3d Cir. 2003) ("Whether executive action is conscience shocking and thus 'arbitrary in the constitutional sense' depends on the context in which the action takes place. In particular, the degree of culpability required to meet the 'shock the conscience' standard depends upon the particular circumstances that confront those acting on the state's behalf. . . . While it is true that Woods and Scherff were not required to exercise an instantaneous judgment, like an officer in a chase situation, this was nevertheless far from the situation of prison doctors where 'extended opportunities to do better [may be] teamed with protracted failure even to care.' . . Woods and Scherff were required to make a decision without delay and under the pressure that comes from knowing that the decision must be made on necessarily limited information. . . . I believe that a comparison of the situation confronting Officers Woods and Scherff with those confronting the social worker in *Miller* and the paramedics in *Ziccardi* suggests that liability could exist here only if Woods and Scherff subjectively appreciated and consciously ignored a great, i.e., more than substantial, risk that the failure to break down Schieber's door would result in significant harm to her. Clearly, the record would not support such a finding. Nevertheless, just as I have found it unnecessary to determine whether the Lewis 'intent to harm' standard is applicable, I also find it unnecessary to adopt the *Miller/Ziccardi* standard. Because the record would not support a finding of more than negligence on the part of Woods and Scherff, the result we reach follows a fortiori from that reached in *Miller* and *Ziccardi*."); ***Ziccardi v. City of Philadelphia,*** 288 F.3d 57, 66, 67 (3d Cir. 2002) ("In summary, then, we understand *Miller* to require in a case such as the one before us, proof that the defendants consciously disregarded, not just a substantial risk, but a great risk that serious harm would result if, knowing Smith was seriously injured, they moved Smith without support for his back and neck. On remand in the present case, we believe that the district court should apply this standard and instruct the jury

accordingly if one is empaneled."); ***Gottlieb v. Laurel Highlands School District,*** 272 F.3d 168, 173 (3d Cir. 2001) (applying Ashocks the conscience' standard to claim of excessive force in school context and analyzing claim in terms of following four elements: Aa) Was there a pedagogical justification for the use of force?; b) Was the force utilized excessive to meet the legitimate objective in this situation?; c) Was the force applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm?; and d) Was there a serious injury?"); ***Shrum v. Kluck,*** 249 F.3d 773, 778, 779 (8th Cir. 2001) ("Shrum accuses Elwood of maintaining a policy or custom which deprived her son of his constitutional right to bodily integrity. She defines that infringing policy or custom as Elwood's official decision to terminate Kluck and enter into a confidential settlement agreement with him, even though Kluck should have been terminated for his sexually inappropriate behavior with students. Because Shrum's claim against Elwood depends upon her son's constitutionally-protected liberty interest in his bodily integrity − a substantive due process theory − the district court correctly applied the culpability standard for a § 1983 substantive due process claim as mandated by *Lewis.* . . . [I]n some circumstances, official policy that is deliberately indifferent to unconstitutional conduct may satisfy the 'shocks the conscience' standard required by *Lewis.* . . . We therefore must consider whether Elwood's official decision to enter into the confidential settlement agreement with Kluck is a policy that is so deliberately indifferent to a predictable constitutional violation that it shocks the conscience. . . . In the present case, Elwood's actions − entering into a confidential settlement agreement with Kluck rather than terminating him outright, and providing him with a neutral letter of recommendation − do not rise to the level of deliberate indifference. . . . We agree with the district court that Kluck's subsequent sexual misconduct was not so obvious a consequence as to impute § 1983 liability to Elwood for its deliberate indifference to that consequence."); ***Neal v. Fulton County Bd. of Educ.,*** 229 F.3d 1069, 1074-76 (11th Cir. 2000) ("[W]e think for a number of reasons that a student-plaintiff alleging excessive corporal punishment can in certain circumstances assert a cause of action for a violation of his rights under the Fourteenth Amendment's Due Process Clause. . . .[A]lmost all of the Courts of Appeals to address the issue squarely have said that a plaintiff alleging excessive corporal punishment may in certain circumstances state a claim under the substantive Due Process Clause. [citing cases] We agree, and join the vast majority of Circuits in confirming that excessive corporal punishment, at least where not administered in conformity with a valid school policy authorizing corporal punishment as in *Ingraham*, may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking behavior. . . . Consistent with the cases, we hold that, at a minimum, the plaintiff must allege facts demonstrating that (1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury. . . In determining whether the amount of force used is obviously excessive, we consider the totality of the circumstances. In particular, we examine: (1) the need for the application of corporal punishment, (2) the relationship between the need and amount of punishment administered, and (3) the extent of the injury inflicted. . . We need not decide today how 'serious' an injury must be to support a claim. The injury alleged by Plaintiff here − the utter destruction of an eye − clearly was serious. Moreover, courts elsewhere treat the extent and nature of the injury as simply one factor (although an important one) to be

considered in the totality of the circumstances. . . . The test we adopt today will, we think, properly ensure that students will be able to state a claim only where the alleged corporal punishment truly reflects the kind of egregious official abuse of force that would violate substantive due process protections in other, non-school contexts. We do not open the door to a flood of complaints by students objecting to traditional and reasonable corporal punishment."); ***Nicini v. Morra***, 212 F.3d 798, 810-12 (3d Cir. 2000) ("*Lewis* therefore makes clear that a plaintiff seeking to establish a constitutional violation must demonstrate that the official's conduct 'shocks the conscience' in the particular setting in which that conduct occurred. In some circumstances, conduct that is deliberately indifferent will shock the conscience. Indeed, in the foster care context, most of the courts of appeals have applied the deliberate indifference standard, although they have defined that standard in slightly different ways. . . . Cyrus, unlike the social worker in *Miller*, had time 'to make unhurried judgments' in investigating whether to permit Nicini to remain with the Morras. . . In the context of this case, we agree that Cyrus's actions in investigating the Morra home should be judged under the deliberate indifference standard. . . . This case does not require us to determine whether an official's failure to act in light of a risk of which the official should have known, as opposed to failure to act in light of an actually known risk, constitutes deliberately indifferent conduct in this setting. We will assume arguendo that Nicini's proposed standard of 'should have known' is applicable. Nevertheless, as *Lewis* makes clear, the relevant inquiry is whether the defendant's conduct 'shocks the conscience.' Under the circumstances of this case, we cannot agree that Cyrus's conduct meets that standard. To the contrary, we conclude that Cyrus's conduct in investigating the Morras amounted, at most, to negligence. For the same reason, we need not consider whether failure to perform a specific duty can ever amount to deliberate indifference, . . . as there is no evidence that Cyrus failed to perform any required duty."); ***Davis v. Township of Hillside***, 190 F.3d 167, 171 (3d Cir. 1999) ("Here, the chase ended when the pursuing police car bumped into the rear of Cook's car, causing him to lose control of the car, which led to the collision in which plaintiff was injured. Plaintiff argues that the deliberate ramming of Cook's car by the police vehicle amounted to use of a deadly weapon, which permits the drawing of an inference that the police acted with the intent to cause physical injury. We disagree. *Lewis* does not permit an inference of intent to harm simply because a chase eventuates in deliberate physical contact causing injury. Rather, it is 'conduct intended to injure in some way unjustifiable by any government interest [that] is the sort of official action most likely to rise to the conscienceshocking level.'"); ***White v. Lemacks***, 183 F.3d 1253, 1258 (11th Cir. 1999) ("Although *Lewis* leaves open the possibility that deliberate indifference on the part of the state will 'shock the conscience' in some circumstances, . . . it is clear after *Collins* that such indifference in the context of routine decisions about employee or workplace safety cannot carry a plaintiff's case across that high threshold."); ***Miller v. City of Philadelphia***, 174 F.3d 368, 375 (3d Cir. 1999) ("We recognize that a social worker acting to separate parent and child does not usually act in the hyperpressurized environment of a prison riot or a high- speed chase. However, he or she rarely will have the luxury of proceeding in a deliberate fashion, as prison medical officials can. As a result, in order for liability to attach, a social worker need not have acted with the 'purpose to cause harm,' but the standard of culpability for substantive due process purposes must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed 'shocks

the conscience.'"); ***Culberson v. Doan***, 125 F. Supp.2d 252, 272 (S.D. Ohio 2000) ("Having reviewed this matter, the Court finds that the 'shocks the conscience' test is applicable to Chief Payton's alleged conduct, and that Chief Payton's alleged intentional or reckless actions in allowing the pond in question to be unguarded for 24 hours, in order to allow the Baker Family or Doan enough time to permanently remove and secrete Carrie's body, are sufficiently brutal, demeaning, and harmful as to 'shock the conscience' of this Court."); ***Leddy v. Township of Lower Merion***, 114 F. Supp.2d 372, 376 (E.D. Pa. 2000) ("The circumstances of the present case lie between the parameters of deliberate and spontaneous. Unlike the police officer in *Lewis* who was engaged in a pursuit, Officer Bedzela was on a non-emergency call, albeit one that required immediate attention. Also unlike the *Nicini* caseworker, he did not have time to make unhurried judgments. More akin to *Miller* and *Cannon*, while full deliberation may not have been practicable, the needs of the situation were not so exigent that only a purpose to cause harm would shock the conscience. As articulated in *Miller*, culpability in an intermediate setting requires at least 'gross negligence or arbitrariness.' . . . Under this criterion, if Officer Bedzela was driving between 57 and 61 miles per hour without lights and sirens, his conduct, while not condonable, cannot be said to have shocked the conscience."); ***Cannon v. City of Philadelphia***, 86 F. Supp. 2d 460, 469-71 (E.D. Pa. 2000) ("*Lewis* and *Miller* require that the actions of the state actor must shock the conscience to trigger § 1983 liability. Therefore, under *Lewis* and *Miller*, in order for the plaintiff to prevail on the second *Kneipp* prong, a plaintiff must prove that the state actor's behavior shocks the conscience. A determination of whether the actions of the state actor shock the conscience requires an evaluation of the context in which they acted. In other words, because *Lewis* and *Miller* hold that a determination of what shocks the conscience depends on the circumstances in which the incident occurred, identical actions of a state actor may be sufficient to set forth a state-created danger claim in one context, while it will not suffice in another context. . . . As in *Lewis* and *Miller*, the officers in this case did not have the luxury of proceeding in a deliberate fashion. Although the police activity in this case may not rise to the level of the 'hyperpressurized' environment of a police chase, the situation did not unfold in a vacuum. The police radio transmissions during the relevant time reveal that the events took place while officers were searching for alleged suspects and while officers were attempting to secure a crime scene. The officers' actions must be considered within the context of this surrounding police activity. As *Lewis* indicates, police officers frequently have obligations that tug in different directions. . . Here, the officers were attempting to apprehend a suspect and secure a crime scene and at the same time address the plaintiff's request for transportation to the hospital."), *aff'd by Cannon v. Beal*, 261 F.3d 490 (3d Cir. 2001); ***Pickard v. City of Girard***, 70 F. Supp.2d 802, 808 (N.D. Ohio 1999) ("[T]he Sixth Circuit has cautioned against applying the 'shocks the conscience' standard for cases not involving physical abuse or excessive force. *Cassady v. Tackett*, 938 F.2d 693, 698 (6th Cir.1991) . . . Consequently, Plaintiffs' remaining claims that the Girard Defendants did not subject Estes to a field sobriety test, or arrest Estes for assault, simply do not rise to the level of 'physical abuse' and, thus, do not state a substantive due process claim.").

See also ***City of Cuyahoga Falls v. Buckeye Community Hope Foundation,*** 123 S.Ct. 1389, 1396 (2003) ("The subjection of the site-plan ordinance to the City's referendum process,

regardless of whether that ordinance reflected an administrative or legislative decision, did not constitute *per se* arbitrary government conduct in violation of [substantive] due process."); ***Pittman v. Cuyahoga County Dept. of Children and Family Services***, 640 F.3d 716, 729 n.6 (6th Cir. 2011) ("The district court improperly analyzed Pittman's substantive due process claim under the 'shock the conscience' standard. . . In the past, this Court has used both the 'shock the conscience' rubric and the deprivation of fundamental rights theory to assess substantive due process claims against social workers. . . Nonetheless, Pittman clearly claims a substantive due process violation based on the alleged deprivation of his fundamental liberty interest in family integrity, not on allegedly conscience-shocking conduct."); ***Chambers ex rel. Chambers v. School Dist. of Philadelphia Bd of Educ.***, 587 F.3d 176, 192 (3rd Cir. 2009) ("In light of the Supreme Court's clear statements that only deliberate conduct implicates due process, we now extend our holding in *McCurdy* to situations involving minor and unemancipated children. In doing so, we reiterate that only deliberate executive conduct in such instances may give rise to a substantive due process violation. The Chambers have failed to allege, much less adduce competent evidence, that the School District deliberately sought to harm their relationship with Ferren, and thus their substantive due process claim fails as a matter of law."); ***Clark v. Boscher***, 514 F.3d 107, 112 , 113 (1st Cir. 2008) ("In order to assert a valid substantive due process claim, Appellants have to prove that they suffered the deprivation of an established life, liberty, or property interest, and that such deprivation occurred through governmental action that shocks the conscience. . . In the instant case, whether Appellants have a recognized property interest in developing their land is ultimately immaterial because they have failed to prove that Westfield engaged in behavior that shocks the conscience. . . . [A] run-of-the-mill land-use case such as this one does not rise to the level of behavior that shocks the conscience. Here, Appellants do not allege any 'fundamental procedural irregularity, racial animus, or the like.'. . Nor do they contend that a fundamental principle has been violated. . . Appellants merely complain that they were denied the necessary permits to develop residential subdivisions on the Clark and Pérez land, and that the City of Westfield denied such permits in furtherance of its own interests.Indeed, the regulatory actions Appellants complain of are virtually indistinguishable from others we have declined to find actionable in the past."); ***Aguilar v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec.***, 510 F.3d 1, 23, 24 (1st Cir. 2007) ("While the 'shock the conscience' test comprises the threshold inquiry with respect to substantive due process violations, the petitioners also must show that the government deprived them of a protected interest in life, liberty, or property. . . Here, the nature of the underlying right asserted by the petitioners reinforces our conclusion that they have not stated a viable substantive due process claim. We see the matter this way. Although the interest of parents in the care, custody, and control of their offspring is among the most venerable of the liberty interests protected by the Fifth Amendment, . . . the petitioners have not demonstrated that this guarantee of substantive due process encompasses their assertions. After all, the right to family integrity has been recognized in only a narrow subset of circumstances. To be sure, the petitioners cite cursorily to cases that deal with this right but they conspicuously fail to build any bridge between these cases and the facts that they allege. We do not think that this is an accident. The petitioners' claims seem markedly different from those scenarios that courts heretofore have recognized under the rubric of family integrity. They have not alleged that the government has

interfered permanently with their custodial rights. . . Nor have they alleged that the government has meddled with their right to make fundamental decisions regarding their children's education, . . . or religious affiliation . . . .Taken most favorably to the petitioners, the interference alleged here is transitory in nature and in no way impinges on parental prerogatives to direct the upbringing of their children. We have scoured the case law for any authority suggesting that claims similar to those asserted here are actionable under the substantive component of the Due Process Clause, and we have found none. . . That chasm is important because, given the scarcity of 'guideposts for responsible decisionmaking in this unchartered area,' courts must be 'reluctant to expand the concept of substantive due process.' . . This unfortunate case is a paradigmatic example of an instance in which the prudential principle announced by the *Collins* Court should be heeded. Accordingly, we dismiss the petitioners' substantive due process claims for failure to satisfy the prerequisites of Federal Rule of Civil Procedure 12(b)(6)."); ***Mongeau v. City of Marlborough***,492 F.3d 14, 18, 19 (1st Cir. 2007) ("We have never precluded a plaintiff from arguing that conduct that is the product of a deliberate and premeditated decision might be conscience-shocking whereas the same conduct might not be if it was undertaken in the heat of the moment. Ultimately such an argument would not affect our conclusion that only conscience-shocking behavior will constitute a substantive due process violation. . . . [O]ur precedent on this issue is both clear and binding on this case: in order to state a substantive due process claim of any ilk, a plaintiff must allege behavior on the part of the defendant that is so outrageous that it shocks the conscience. . . . Taking all of Mongeau's allegations as true, we do not see such a conscience-shocking situation; we can discern nothing more than a run-of-the-mill dispute between a developer and a town official."); ***Marco Outdoor Advertising, Inc. v. Regional Transit Authority***, 2007 WL 1723107, at * (5th Cir. 2007) (Wiener J., dissenting) ("It smacks of Lewis Carroll to say that the RTA did not act arbitrarily and capriciously despite (1) self-servingly declaring itself free of the restrictions of the bid laws, (2) conducting its bid process in knowing disregard of its own announced procedures, (3) colluding with the third best of six bidders to enhance that bidder's proposal post-submission, i.e., after 'going to school' on Marco's bid, and (4) ultimately awarding the contract to its favored bidder, regardless of its own pre-award guidelines. I cannot see how this willful − and thus arbitrary and capricious – behavior does not shock the majority's conscience: Even as jaded as I have become from living in New Orleans and seeing almost daily media reports of this kind of behavior by local agencies, the RTA has managed to shock my conscience in this instance."); ***Pagan v. Calderon***, 448 F.3d 16, 32 (1st Cir. 2006) ("ARCAM is in error when it posits that it can prevail on its substantive due process claim either by showing that Calderon's conduct was conscience-shocking or by showing that her conduct deprived it of a protected liberty or property interest. This disjunctive proposition is incorrect. Where, as here, a plaintiff's substantive due process claim challenges the specific acts of a state officer, the plaintiff must show both that the acts were so egregious as to shock the conscience and that they deprived him of a protected interest in life, liberty, or property."); ***O'Connor v. Pierson***, 426 F.3d 187, 204 (2d Cir. 2005) ("*County of Sacramento* did not distinguish between different types of substantive due process claims, so 'constitutionally arbitrary' action for purposes of a property-based substantive due process claim is action that shocks the conscience."); ***DePoutot v. Raffaelly***, 424 F.3d 112, 118 & n.4 (1st Cir.2005) ("This case involves executive branch action.

Thus, we must proceed incrementally. First, we must determine whether the official's conduct shocks the conscience. . . Only if we answer that question affirmatively can we examine what, if any, constitutional right may have been violated by the conscience-shocking conduct and identify the level of protection afforded to that right by the Due Process Clause. . . . The parties correctly note that our pre-*Lewis* jurisprudence paved two avenues that a plaintiff might travel in pursuing a substantive due process claim. *See, e.g., Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 531 (1st Cir.1995) (indicating that a plaintiff may establish a violation of substantive due process by showing either the deprivation of a fundamental right or conduct that shocks the conscience). *Lewis*, however, clarified the law of substantive due process and made pellucid that conscience-shocking conduct is an indispensable element of a substantive due process challenge to executive action."); ***Eichenlaub v. Township of Indiana***, 385 F.3d 274, 286 (3d Cir. 2004) ("[T]he misconduct alleged here does not rise sufficiently above that at issue in a normal zoning dispute to pass the 'shocks the conscience test.'"); ***Levin v. Upper Makefield Township,*** No. 03-1860, 90 F. App'x 653, 2004 WL 449189, at *7 n.2 (3d Cir. Mar. 8, 2004) ("Levin argues that the 'shocks the conscience' test only applies where the state executive actor had to act with urgency. . .But, says Levin, because the Township did not have to act, and did not in fact act, with any urgency, the 'shocks the conscience' test does not apply to his substantive due process claim. Consequently, the less-stringent *Bello* 'improper motive' test applies. However, there's nothing in *United Artist* that supports the distinction Levin urges upon us. In fact, *United Artist* makes it clear that the 'shocks the conscience' test applies to all substantive due process claims. Levin also 'takes issue' with the *United Artist* decision, claiming that it does not afford an individual any 'protection from the irrational and arbitrary actions of the government and its officials.'. . However, *United Artist* is the law of this circuit and, therefore, his distaste for it is irrelevant. Moreover, the *United Artist* 'shocks the conscience standard' is precisely designed to protect an individual from arbitrary and irrational executive action."); ***Galdikas v. Fagan***, 342 F.3d 684, 690 n.3 (7th Cir. 2003) ("As noted by many courts and commentators, the majority opinion in *Lewis* leaves a number of questions unresolved. The principal ambiguity is whether the 'shocks the conscience' standard replaces the fundamental rights analysis set forth in *Glucksberg* whenever executive conduct is challenged or whether the 'shocks the conscience' standard supplements or informs the *Glucksberg* paradigm in such situations. Certain language in the majority opinion in *Lewis* suggests that the 'shocks theconscience' standard should be applied as an antecedent or threshold inquiry in all cases of executive conduct. . . Other passages suggest that the 'shocks the conscience' inquiry may be employed to inform the historical inquiry into the nature of the asserted liberty interest. . . .This ambiguity has been noted as well in our own earlier cases. [discussing cases]Our case law on this point seems to reflect a more generally perceived confusion as to the interrelationship of *Lewis* and *Glucksberg*. . . Resolution of this ambiguity is not necessary to our decision today. For the reasons set forth in the text, the plaintiffs' substantive due process claim fails under any reading of *Lewis*. The Supreme Court has not recognized a fundamental right to education. It certainly has not recognized a fundamental right to a post-secondary accredited degree program. Taking the plaintiffs' allegations that the defendants acted improperly by misleading them about the accreditation status of the MSW program as true, such conduct is not sufficiently egregious to shock the conscience."); ***Bowers v. City of Flint,*** 325 F.3d 758, 764 (6th

Cir. 2003) (Moore, J., concurring) ("[T]his court should undertake a three-step analysis of the residents' substantive due process claim. First, we should consider whether the asserted interest constitutes a fundamental constitutional right. [footnote omitted] If the asserted interest is not a fundamental right, we then must evaluate whether Flint's conduct depriving the residents of that interest shocks the conscience. Finally, if Flint's conduct does not shock the conscience, then this court must consider whether that conduct is rationally related to a legitimate state interest."); ***United Artists Theatre Circuit, Inc. v. Township of Warrington,*** 316 F.3d 392, 400, 401 (3d Cir. 2003) ("Despite *Lewis* and the post-*Lewis* Third Circuit cases cited above, United Artists maintains that this case is not governed by the 'shocks the conscience' standard, but by the less demanding 'improper motive' test that originated with *Bello v. Walker*, 840 F.2d 1124 (3d Cir.1988), and was subsequently applied by our court in a line of land-use cases. In these cases, we held that a municipal land use decision violates substantive due process if it was made for any reason 'unrelated to the merits,' *Herr v. Pequea Township*, 274 F.3d 109, 111 (3d Cir.2001) (citing cases), or with any 'improper motive.'[citing cases] These cases, however, cannot be reconciled with *Lewis*'s explanation of substantive due process analysis. Instead of demanding conscience-shocking conduct, the *Bello* line of cases endorses a much less demanding 'improper motive' test for governmental behavior. Although the District Court opined that there are 'few differences between the [shocks the conscience] standard and improper motive standard,' we must respectfully disagree. . . The 'shocks the conscience' standard encompasses 'only the most egregious official conduct.' . . In ordinary parlance, the term 'improper' sweeps much more broadly, and neither *Bello* nor the cases that it spawned ever suggested that conduct could be 'improper' only if it shocked the conscience. We thus agree with the Supervisors that the *Bello* line of cases is in direct conflict with *Lewis*. . . . [W]e see no reason why the present case should be exempted from the *Lewis* shocks-the-conscience test simply because the case concerns a land use dispute. . . . . We thus hold that, in light of *Lewis*, *Bello* and its progeny are no longer good law."), *reh'g en banc denied*, 324 F.3d 133 (3d Cir. 2003); ***Moran v. Clarke (Moran I),*** 296 F.3d 638, 651 (8th Cir. 2002) (en banc) (Bye, J., concurring) ("In *County of Sacramento v. Lewis*, the Court held that all substantive due process claims against executive officials proceed under one theory, not two separate theories. . . In every case in which a plaintiff challenges the actions of an executive official under the substantive component of the Due Process Clause, he must demonstrate both that the official's conduct was conscience-shocking, . . . and that the official violated one or more fundamental rights that are 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'"); ***Gurik v. Mitchell,*** No. 00-4068, 2002 WL 59641, at *4 (6th Cir. Jan. 15, 2002) (not published) ("Our requirement that terminated public employees allege violations of fundamental rights in order to allege violation of a substantive due process property interest in their employment simply standardizes the 'shocks the conscience' test for purposes of termination from public employment. In other words, a public employee's termination does not 'shock the conscience' in this court if it was not based on the violation of some fundamental right. Thus, Gurik's criticism of this court's precedent based on *Lewis* is inappropriate, and Gurik must allege violation of a fundamental right in order to allege violation of his substantive due process interest in public employment."); ***Hawkins v. Freeman***, 195 F.3d 732, 738, 739, 741, 750 (4th Cir.

1999) (en banc) ("Depending upon whether the claimed violation is by executive act or legislative enactment, different methods of judicial analysis are appropriate. . . This is so because there are different 'criteria' for determining whether executive acts and legislative enactments are 'fatally arbitrary,' an essential element of any substantive due process claim. . . In executive act cases, the issue of fatal arbitrariness should be addressed as a 'threshold question,' asking whether the challenged conduct was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' . . If it does not meet that test, the claim fails on that account, with no need to inquire into the nature of the asserted liberty interest. If it does meet the threshold test of culpability, inquiry must turn to the nature of the asserted interest, hence to the level of protection to which it is entitled. . . If the claimed violation is by legislative enactment (either facially or as applied), analysis proceeds by a different two-step process that does not involve any threshold 'conscience-shocking' inquiry. The first step in this process is to determine whether the claimed violation involves one of 'those fundamental rights and liberties which are, objectively, Adeeply rooted in this Nation's history and tradition,'' [citing *Glucksberg*], and ' Aimplicit in the concept of ordered liberty,' such that Aneither liberty nor justice would exist if they were sacrificed.'' . . The next step depends for its nature upon the result of the first. If the asserted interest has been determined to be 'fundamental,' it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation. . . . If the interest is determined not to be 'fundamental,' it is entitled only to the protection of rational-basis judicial review. . . . [W]e are satisfied that whether the claim is analyzed under the *Lewis* or *Glucksberg* methodologies, it fails as a matter of law. . . . Specifically, we hold that the precise liberty interest asserted here − that of continuing in a state of freedom erroneously granted by government and enjoyed for a significant time by a convict who yet remains under an unexpired lawful sentence − cannot be found one of 'those fundamental rights and liberties which are objectively "deeply rooted in this Nation's history and tradition.'' . . . Nor, unless possibly when solely animated by a vindictive or oppressive purpose that is not suggested here, could the executive act of re-imprisoning under such circumstances be declared 'shock[ing to] the contemporary conscience.'").

See also ***Cherry Hill Towers, LLC v. Township of Cherry Hill,*** 407 F.Supp.2d 648, 655, 656 (D.N.J. 2006) ("Even if the Court accepts Plaintiff's statement of the facts as true, what happened here does not rise to the level of 'the kinds of gross misconduct that have shocked the judicial conscience.'. . Whether union officials unconnected to the Township attempted to persuade, or even threaten, the parties involved in the Cherry Hill Towers project to use union labor is not relevant to the question of whether these Defendants deprived Plaintiff of a property right in a manner that shocks the conscience. Nor is it surprising that a high-profile project such as this would attract the attention of the unions, or that Township officials would recognize this and point it out to Plaintiff. Defendants' actions do not reflect the egregious abuse of power that substantive due process was intended to correct."); ***Robinson v. Limerick Township,*** No. 04-3758, 005 WL 15469, at * (E.D. Pa. Jan. 4, 2005) (not reported) ("The Robinsons allege the Township has taken action motivated by bias, bad faith, and improper motives and intended to threaten, intimidate, and harass them. There are no allegations of self dealing, or unjust enrichment of the Township Supervisors or anyone related to them. . . Instead, the Robinsons argue that the

Township's conduct is automatically conscience shocking due to its improper motive. I am unable to agree. . . . [T]he Robinsons must go considerably further than mere allegations that the Township's conduct was taken with an improper motive. . . . The latest jurisprudence of the Third Circuit Court of Appeals evinces a preference for evidence of self dealing or other unjust enrichment of the municipal decision makers as a way to meet the shocks the conscience standard."); ***Nicolette v. Caruso,*** Civil Action 02-1368, 2003 WL 23475027, at *9 (W.D. Pa. Nov. 4, 2003) ("The United States Court of Appeals for the Third Circuit specifically extended the *Lewis* 'shocks the conscience' test to cases alleging that a municipal land-use decision violated substantive due process. . . *United Artists* was decided in January, 2003 and there have not been many subsequent municipal land-use decisions applying the new 'shocks the conscience' standard. There, however, is at least one court which dealt with that standard. In *Associates in Obstetrics & Gynecology v. Upper Merion Township*, 270 F.Supp.2d 633, 656 (E.D .Pa.2003), the court held that the plaintiff stated a claim under section 1983 that met the 'shocks the conscience' standard by alleging that zoning regulations were enforced with the intent to harm and/or restrict the business interests of the plaintiff who was a lessee. . . . [T]he court finds that, albeit this is a close question, plaintiff's complaint implicated the 'shocks the conscience' test sufficiently to survive the motion to dismiss."). *But see* ***Kamaole Pointe Development LP v. Hokama***, 2008 WL 2622819, at *21 (D. Hawai'i July 3, 2008) ("Plaintiffs are correct that County Defendants misapprehend the relevant standard for a due process challenge to legislation. This standard is not, as County Defendants urge, whether the legislation 'shocks the conscience.' As mentioned above, this standard applies in situations of allegedly abusive executive actions, such as police abuse cases. . . Rather, a substantive due process challenge to legislation that neither utilizes a suspect classification nor draws distinctions implicating fundamental rights is reviewed pursuant to the 'arbitrary and irrational' standard. *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir.1997). County Defendants' reliance on the incorrect standard as a basis for the Motion on Plaintiffs' substantive due process claim renders their argument legally unsound. As such, County Defendants' Motion is DENIED as to Plaintiffs' substantive due process claim.").

See also ***Williams v. Berney***, 519 F.3d 1216, 1221, 1223-25 (10th Cir. 2008) ("Plaintiffs' case presents a narrow issue that has generated a surprising dearth of reported authority: whether a § 1983 plaintiff can successfully assert a substantive due process right to be free from intentional use of force by a state actor *not authorized* to use force. . . .The inquiry is thus in what circumstances will a physical assault transcend ordinary state tort law and rise to the level of a constitutional tort. . . . An assault − standing alone − does not suffice to make out a constitutional substantive due process claim. But an assault under a stated threat, a threat the victim knows an assaulting government official has the authority to carry out, can separate the ordinary common law tort from the substantive due process claim. The combination of serious physical abuse and the assaulting official's use of official authority to force the victim to submit can shock the conscience. . . . Combining these principles, the following legal framework emerges: to state a substantive due process claim against government officials not authorized to use force, litigants must show an abuse of governmental authority as an integral element of the attack.. . . .Berney was not authorized to use force, whether reasonably or not. Denver does not represent to licensees that

its inspectors can lawfully use force against non-compliant business owners. . . . Berney, in other words, did not have *discretion* to use force. . . . His only responsibilities were to inspect and enforce dog kennel regulations. Based on the undisputed facts in this record, Berney's assault appeared to be an emotional overreaction made in anger. But nothing about Berney's position with the City or his duties as an inspector authorized him to use force − rather, he lost it on the job. While deplorable, this assault is not obviously distinguishable from an ordinary tort in myriad situations. It was not a situation where Plaintiffs' injuries were caused by an abuse of Berney's authority as a license inspector. And, as we have said, Berney's official position alone is not enough to create a substantive due process claim. As a result, we cannot conclude Berney's conduct violated Plaintiffs' constitutional rights.").

Lewis did not settle the question of who makes the determination of "conscience-shocking." *See, e.g.*, ***Galaviz v. Reyes***, 95 F.4th 246, 253 (5th Cir. 2024) ("The Supreme Court has applied a 'shock the conscience' standard to determine—as a question of law not fact—whether, for example, the Due Process Clause was violated in questioning a witness. . . and whether an officer's conduct during a high-speed chase violated the Fourteenth Amendment's guarantee of substantive due process and would therefore be actionable under § 1983. . . In those cases and other cases cited in those opinions, it appears that whether particular conduct occurred was a question of fact, but whether that conduct shocked the conscience was a question of law."); ***Terrell v. Larson,*** 396 F.3d 975, 981 (8th Cir. 2005) (en banc) ("Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury."); ***Moran v. Clarke (Moran I),*** 296 F.3d 638, 643 (8th Cir. 2002) (en banc) ("[W]hether the plaintiff has presented sufficient evidence to support a claimed violation of a substantive due process right is a question for the fact-finder, here the jury."); ***Armstrong v. Squadrito***, 152 F.3d 564, 577 (7th Cir. 1998) ("[T]he question of whether the defendants' conduct constituted deliberate indifference is a classic issue for the fact finder. We know that the submission of the issue to the fact finder may create some confusion because, technically, the question is the second consideration in our inquiry into the existence of a violation of substantive due process. Nevertheless, because this question is a factual mainstay of actions under § 1983, we do not believe it should receive consideration as a question of law. Any concern about allowing the fact finder to determine a constitutional question is ameliorated by the overlap between this inquiry and the third step in our analysis − an examination of the totality of the circumstances − which is a question of law."); ***Bovari v. Town of Saugus***, 113 F.3d 4, 6 (1st Cir. 1997) ("Under *Evans* [*v. Avery*], the question is not whether the officers' decision to dog the Honda was sound − decisions of this sort always involve matters of degree − but, rather, whether a rational jury could say it was conscience-shocking."); ***CBS Outdoor Inc. v. New Jersey Transit Corp***., 2007 WL 2509633, at *19 (D.N.J. 2007) ("At the outset, CBS Outdoor argues that whether the alleged conduct shocks the conscience should at least be a factual issue for a jury and therefore is inappropriate to resolve on a motion to dismiss. However, '[b]ecause the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.' *Terrell v. Larson*, 396 F.3d 975, 981 (8th Cir.2005); *see also United States v. Engler*, 806 F.2d 425, 430 (3d Cir.1986) ("The question whether government

conduct was so outrageous as to constitute a violation of due process is a question of law to be determined by the court, not the jury.")"); ***Busch v. City of New York,*** No. 00 CV 5211(SJ), 2003 WL 22171896, at *6 (E.D.N.Y. Sept. 11, 2003) (not reported) (whether conduct shocks the conscience is a question for jury); ***Johnson v. Freeburn,*** No. 96-74996, 2002 WL 1009572, at *4, *5 (E.D. Mich. April 24, 2002) (not reported) ("The concerns of Justices O'Connor, Scalia, and Thomas, suggest that the risks of unrestrained and unelected subjectivity − the antithesis of a rule of law − would be far greater if the nearly unreviewable personal sentiments of jurors are added to the mix in the application of this substantive due process standard. While courts have routinely submitted this standard to juries, *see, e.g., Walker v. Bain*, 257 F.3d 660, 671-73 (6th Cir.2001); *United States v. Walsh*, 194 F.3d 37 (2d Cir.1999); *Boveri v. Town of Saugus*, 113 F.3d 4, 6-7 (1st Cir.1997), much can be said that this should be accompanied by judicial guidance, if not preempted totally by judges once a jury has resolved all the material disputed issues of fact, as is often done in the qualified immunity area under [*Harlow*]. . . . It may be that the tradition of generally giving 'shocks the conscience' issues to the jury will continue notwithstanding many arguments against it. Nonetheless, on facts such as those in this case, a judge would have been warranted in directing the jury that after ruling for Plaintiff on the disputed factual questions (answered in jury question 1), the gratuitous threat or instruction to armed guards to have an inmate shot if he moves − given by a corrections officer who earlier that day threatened to have the inmate killed, and given for no legitimate penological purpose, but to retaliate against the inmate for reporting to authorities the correction officer's earlier threat on the inmate's life − does 'shock the conscience' as a matter of law."); ***Escatel v. Atherton,*** No. 96 C 8589, 2001 WL 755280, at *6 n. 14 (N.D. Ill. July 2, 2001) (not reported) ("The Supreme Court has not made clear whether the 'shocks the conscience' analysis is normally a question for the jury or whether it is a question of law for the court. . . The Seventh Circuit has said that it is a question of law. . . Other courts have indicated it is a decision for the court, not the jury, to decide."); ***Mason v. Stock***, 955 F. Supp. 1293, 1308-09 (D. Kan. 1997) ("[T]he "shock the conscience" determination is not a jury question. . . . Under the rules pertaining to summary judgment, a plaintiff who wishes to assert a *Collins*' claim must, at minimum, point to conduct or policies which would require the court to make a 'conscience shocking' determination."); ***Mellott v. Heemer***, 1997 WL 447844, *15 (M.D. Pa. July 23, 1997) (not reported) ("The question of whether conduct is 'truly conscience shocking' is one for the jury."), *rev'd on other grounds*, 161 F.3d 117 (3d Cir. 1998).

NOTE: *See* ***Thaddeus-X v. Blatter***, 175 F.3d 378, 387, 388 (6th Cir. 1999) (en banc) ("In various instances since *Graham*, this circuit (mainly in unpublished opinions) has subjected prisoners claiming retaliation in violation of an enumerated constitutional right to a heightened requirement that the retaliatory act 'shock the conscience.' *See McLaurin v. Cole*, 115 F.3d 408, 411 (6th Cir.1997). . . . To the extent that our prior decisions have imposed the 'shocks the conscience' test when prisoners claim retaliation in violation of an enumerated constitutional right, they are in conflict with the Supreme Court's decisions in *Graham* and its progeny and are no longer the law of this Circuit.").

12. Note on ***Torres v. Madrid*** **and What Constitutes a Seizure**

The Court recently addressed the question of "whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting."

Torres v. Madrid, 141 S. Ct. 989, 993-1003 (2021) ("The question in this case is whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting. The answer is yes: The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person. . . . We stress, however, that the application of the common law rule does not transform every physical contact between a government employee and a member of the public into a Fourth Amendment seizure. A seizure requires the use of force *with intent to restrain*. Accidental force will not qualify. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 844 (1998). Nor will force intentionally applied for some other purpose satisfy this rule. In this opinion, we consider only force used to apprehend. We do not accept the dissent's invitation to opine on matters not presented here—pepper spray, flash-bang grenades, lasers, and more. . . Moreover, the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context. [citing *Nieves* v. *Bartlett*] . . . While a mere touch can be enough for a seizure, the amount of force remains pertinent in assessing the objective intent to restrain. A tap on the shoulder to get one's attention will rarely exhibit such an intent. Nor does the seizure depend on the subjective perceptions of the seized person. Here, for example, Torres claims to have perceived the officers' actions as an attempted carjacking. But the conduct of the officers—ordering Torres to stop and then shooting to restrain her movement—satisfies the objective test for a seizure, regardless whether Torres comprehended the governmental character of their actions. The rule we announce today is narrow. In addition to the requirement of intent to restrain, a seizure by force—absent submission—lasts only as long as the application of force. That is to say that the Fourth Amendment does not recognize any '*continuing* arrest during the period of fugitivity.'. . The fleeting nature of some seizures by force undoubtedly may inform what damages a civil plaintiff may recover, and what evidence a criminal defendant may exclude from trial. . . But brief seizures are seizures all the same. Applying these principles to the facts viewed in the light most favorable to Torres, the officers' shooting applied physical force to her body and objectively manifested an intent to restrain her from driving away. We therefore conclude that the officers seized Torres for the instant that the bullets struck her. . . .The officers and the dissent derive from our cases a different touchstone for the seizure of a person: 'an intentional acquisition of physical control.' *Brower* v. *County of Inyo*, 489 U. S. 593, 596 (1989). Under their alternative rule, the use of force becomes a seizure 'only when there is a governmental termination of freedom of movement through means intentionally applied.'. .This approach improperly erases the distinction between seizures by *control* and seizures by *force*. In all fairness, we too have not always been attentive to this distinction when a case did not implicate the issue. . . But each type of seizure enjoys a separate common law pedigree that gives rise to a separate rule. . . Unlike a seizure by force, a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement. A prime example of the latter comes

from *Brower*, where the police seized a driver when he crashed into their roadblock. . . Under the common law rules of arrest, actual control is a necessary element for this type of seizure. . . Such a seizure requires that 'a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.'. . But that requirement of control or submission never extended to seizures by force. . . As common law courts recognized, any such requirement of control would be difficult to apply in cases involving the application of force. . . At the most basic level, it will often be unclear when an officer succeeds in gaining control over a struggling suspect. Courts will puzzle over whether an officer exercises control when he grabs a suspect, when he tackles him, or only when he slaps on the cuffs. Neither the officers nor the dissent explains how long the control must be maintained—only for a moment, into the squad car, or all the way to the station house. To cite another example, counsel for the officers speculated that the shooting would have been a seizure if Torres stopped 'maybe 50 feet' or 'half a block' from the scene of the shooting to allow the officers to promptly acquire control. . . None of this squares with our recognition that ' "[a] seizure is a single act, and not a continuous fact."'. . For centuries, the common law rule has avoided such line-drawing problems by clearly fixing the moment of the seizure. . . . We hold that the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued. Of course, a seizure is just the first step in the analysis. The Fourth Amendment does not forbid all or even most seizures—only unreasonable ones. All we decide today is that the officers seized Torres by shooting her with intent to restrain her movement. We leave open on remand any questions regarding the reasonableness of the seizure, the damages caused by the seizure, and the officers' entitlement to qualified immunity. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.").

Torres v. Madrid, 141 S. Ct. 989, 1003-17 (2021) (Gorsuch, J., with whom Thomas, J. and Alito, J., join, dissenting) ("The majority holds that a criminal suspect can be simultaneously seized and roaming at large. On the majority's account, a Fourth Amendment 'seizure' takes place whenever an officer 'merely touches' a suspect. It's a seizure even if the suspect refuses to stop, evades capture, and rides off into the sunset never to be seen again. That view is as mistaken as it is novel. . . . Imagine that, with an objective intent to detain a suspect, officers deploy pepper spray that enters a suspect's lungs as he sprints away. Does the application of the pepper spray count? Suppose that, intending to capture a fleeing suspect, officers detonate flash-bang grenades that are so loud they damage the suspect's eardrum, even though he manages to run off. Or imagine an officer shines a laser into a suspect's eyes to get him to stop, but the suspect is able to drive away with now-damaged retinas. Are these 'touchings'? What about an officer's bullet that shatters the driver's windshield, a piece of which cuts her as she speeds away? Maybe the officer didn't touch the suspect, but he set in motion a series of events that yielded a touching. Does that count? While assuring us that its new rule will prove easy to administer, the majority refuses to confront its certain complications. Lower courts and law enforcement won't have that luxury. If efficiency cannot explain today's decision, what's left? Maybe it is an impulse that individuals like Ms. Torres *should* be able to sue for damages. Sometimes police shootings are justified, but other times they cry out for a remedy. The majority seems to give voice to this sentiment when it disparages

the traditional possession rule as 'artificial' and promotes its alternative as more sensitive to 'personal security' and 'new' policing realities. . . It takes pains to explain, too, that its new rule will provide greater protection for personal 'privacy' interests, which we're told make up the 'essence' of the Fourth Amendment. . . But tasked only with applying the Constitution's terms, we have no authority to posit penumbras of 'privacy' and 'personal security' and devise whatever rules we think might best serve the Amendment's 'essence.' The Fourth Amendment allows this Court to protect against specific governmental actions—unreasonable searches and seizures of persons, houses, papers, and effects—and that is the limit of our license. Besides, it's hard to see why we should stretch to invent a new remedy here. Ms. Torres had ready-made claims for assault and battery under New Mexico law to test the officers' actions. . . The only reason this case comes before us under § 1983 and the Fourth Amendment rather than before a New Mexico court under state tort law seems to be that Ms. Torres (or her lawyers) missed the State's two-year statutory filing deadline. . . That may be a misfortune for her, but it is hardly a reason to upend a 230 year-old understanding of our Constitution. Nor, if we are honest, does today's decision promise much help to anyone else. Like Ms. Torres, many seeking to sue officers will be able to bring state tort claims. Even for those whose only recourse is a federal lawsuit, the majority's new rule seems likely to accomplish little. This Court has already said that a remedy lies under § 1983 and the Fourteenth Amendment for police conduct that 'shocks the conscience.'. . At the same time, qualified immunity poses a daunting hurdle for those seeking to recover for less egregious police behavior. In our own case, Ms. Torres has yet to clear that bar and still faces it on remand. So, at the end of it all, the majority's new rule will help only those who (1) lack a state-law remedy, (2) evade custody, (3) after some physical contact by the police, (4) where the contact was sufficient to show an objective intent to restrain, (5) and where the police acted 'unreasonably' in light of clearly established law, (6) but the police conduct was *not* 'conscience shocking.' With qualification heaped on qualification, that can describe only a vanishingly small number of cases. Even if its holding offers little practical assistance to anyone, perhaps the majority at least hopes to be seen as trying to vindicate 'personal security' and the 'essence' of 'privacy' when it derides the traditional possession rule as 'artificial.' But an attractive narrative cannot obscure the hard truth. Not only does the majority's 'mere touch' rule allow a new cause of action in exceedingly few cases (non-conscience-shocking-but-still-unreasonable batteries intended to result in possession that don't achieve it). It supplies no path to relief for otherwise identical near-misses (assaults). A fleeing suspect briefly touched by pursuing officers may have a claim. But a suspect who evades a hail of bullets unscathed, or one who endures a series of flash-bang grenades untouched, is out of luck. That distinction is no less 'artificial' than the one the law has recognized for centuries. And the majority's new rule promises such scarce relief that it can hardly claim more sensitivity to 'personal security' than the rule the Constitution has long enshrined. In the face of these concerns, the majority replies by denying their relevance. It says there is 'no call' to 'surmise' that its decision rests on anything beyond an 'analysis of the common law of arrest.'. . But there is no surmise about it. The majority itself tells us that its decision is *also* justified by the need to 'avoi[d] ... line-drawing problems,' protect 'personal security,' and advance the 'privacy' interests that form the 'essence' of the Fourth Amendment. Having invoked these sundry considerations, it's hard to see how the majority might disown them.").

Post-*Torres* Cases

D.C. CIRCUIT

Asinor v. District of Columbia, 111 F.4th 1249, 1252, 1254-59 (D.C. Cir. 2024) ("All agree that the MPD's arrest of the plaintiffs was reasonable under the Fourth Amendment. And it is blackletter law that, during an arrest, police may seize personal property held by the arrestee without a warrant. . . So the District's initial seizure of the plaintiffs' effects did not violate the Fourth Amendment. The question before us is whether the Fourth Amendment has anything to say about the many months in which the MPD allegedly continued to hold the plaintiffs' effects with no legitimate investigatory or protective purpose. The District answers no. It contends that the Fourth Amendment governs the government's taking of possession of an individual's personal property, but not the government's continued possession of the property. We disagree. When the government seizes property incident to a lawful arrest, the Fourth Amendment requires that any continued possession of the property must be reasonable. We reach this conclusion based on the Fourth Amendment's text and history, as well as modern Supreme Court precedents regarding the constitutionally permissible duration of seizures, whether of property or persons. . . . [T]he common law recognized that property interests are impaired not only at the instant when an owner loses possession, but also for as long as the owner cannot get the property back. And it provided remedies for wrongful interference with possessory rights regardless of whether the interference became wrongful at the moment of the initial seizure or only later. This history indicates that the Fourth Amendment governs the MPD's continued retention, as well as its taking possession, of the plaintiffs' property. . . . The MPD's initial seizure of the plaintiffs' effects was lawful because it was incident to their arrests. Such seizures are reasonable to protect the safety of arresting officers and to prevent any destruction of evidence. . . But here, the plaintiffs allege that the government continued to possess their property for many months after it lacked any legitimate interest in protecting officers or investigating possible criminal behavior. And after the government's legitimate interests dissipated, harm to the plaintiffs continued to accrue: It is one thing not to have access to a cell phone while spending a night in jail. It is quite another not to have access to it for the following year. Some plaintiffs allege that they had to replace their phones, a significant financial harm. And some allege that they lost access to important information like passwords, photographs, and contact information for friends and family. So the plaintiffs have alleged that the seizures at issue, though lawful at their inception, later came to unreasonably interfere with their protected possessory interests in their own property. . . . In *Manuel v. City of Joliet*, . . . the Supreme Court held that after a person is arrested, the Fourth Amendment requires any pretrial detention to remain reasonable even after the commencement of formal legal process. . . The Court explained that the continued detention of an individual is an ongoing 'seizure'. . . . The same logic applies here. The plaintiffs allege that MPD retained—which is to say, 'seized'—their property for over eight months after their arrests. And they allege that this continued seizure was unreasonable because it served no legitimate investigatory or protective purpose. By its terms, the Fourth Amendment prohibits unreasonable seizures of 'persons, houses, papers, and effects,'

which suggests that the four listed terms receive analogous protection. Neither text, grammar, nor history suggest that seizures are ongoing events when directed at 'persons' but mere snapshots when directed at 'houses, papers, and effects.' Likewise, this Court has held that the Fourth Amendment requires officers to release an arrestee from custody—that is, to end their seizure of a person—if new facts dissipate the probable cause that justified a warrantless arrest. . . This principle also covers the claims here. If the rationales that justified the initial retention of the plaintiffs' effects dissipated, and if no new justification for retaining the effects arose, then the Fourth Amendment obliged the MPD to return the plaintiffs' effects. The District counters that *Torres v. Madrid*. . . distinguishes seizures of persons and effects. True enough, *Torres* did hold that a person, but not an effect, is 'seized' if shot by a government official. . . This distinction was based on the 'unremarkable proposition that the nature of a seizure can depend on the nature of the object being seized.'. . The proposition mattered because the seizure of a person implicates the common law of arrest, while the seizure of an effect does not. . . But while *Torres* thus explained *why* people and effects are different in the specific context of a shooting, the District offers no good reason why people and effects are different with respect to ongoing seizures in general. . . . More narrowly, the District argues that governments must apply continuing force to seized persons, who would often wish to flee, which is why *Manuel* recognized the need for ongoing reasonableness of the detention. In contrast, the District argues, there is no continuing application of force against an inanimate object, and thus no need for its prolonged retention to be reasonable. This argument misses the point. Of course, the government does not use force against a cell phone, just as it does not infringe upon the property interests of a cell phone. But it infringes upon a *person*'s possessory property interests *in* a cell phone. And whether the government infringes upon a liberty or property interest, it hopes to avoid using force, but will do so if necessary. An arrested individual will be subjected to force if he tries to walk out of his jail cell. But so too will a cell phone owner who tries to walk into police headquarters to remove the phone from an evidence locker. In both instances, the government is prepared to use force to prolong an ongoing deprivation of liberty or property. If the Fourth Amendment addresses the former, we see no reason why it does not also address the latter. . . . *Hodari D.* and *Torres* show that the government 'takes possession' of a person or object at a single moment in time. The other cases show that, once the government has taken possession of a person or object, its conduct must remain reasonable over time. At both the moment of seizure and throughout its duration, the government's conduct must be reasonable—consistent with both founding-era meanings of the word 'seizure.'. . . The District acknowledges a constitutional obligation to return the plaintiffs' property, but it locates the duty in the Fifth Amendment's guarantee that no person shall be 'deprived of ... property, without due process of law.'. . In other words, because the Fifth Amendment protects the plaintiffs' ongoing possessory interests, the Fourth Amendment does not. But constitutional provisions do not preempt one another like that. Indeed, the Supreme Court has already rejected the argument that the Fourth Amendment does not apply to interferences with property rights just because the Fifth Amendment does. *Soldal v. Cook County*, 506 U.S. 56, 70–71, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). . . So, the question whether this case implicates procedural due process, substantive due process, or the Takings Clause is irrelevant to the question whether it also implicates the Fourth Amendment. Even if we had to pick between constitutional provisions, we do not share the District's confidence

that the Fifth Amendment fits the plaintiffs' claims better than the Fourth. The District argues that a hearing under D.C. Criminal Rule 41(g)—which allows a 'person aggrieved' by a property deprivation to 'move for the property's return'—affords constitutionally sufficient process for the adjudication of the plaintiffs' claims. But even if a hearing under Rule 41(g) provides adequate process, the question remains what substantive law would require the District to return property held without justification. We are reluctant to reduce this entirely to a question of D.C. law, which would eliminate substantive constitutional protection for the property rights at issue. As for other portions of the Fifth Amendment, it is unclear whether the government's continued retention of lawfully seized property would constitute an unconstitutional taking. . . . An argument that we need not consider the Fourth Amendment because of substantive due process thus gets things backward; instead, we need not consider substantive due process because of the Fourth Amendment.")

Asinor v. District of Columbia, 111 F.4th 1249, 1261, 1264 n.4 (D.C. Cir. 2024) (Henderson, J., concurring) ("I join the majority opinion in full. The Fourth Amendment's protections do not cease once the government takes possession of an individual's property. I write separately to explain why I believe we correctly part ways with many of our sister circuits. Five circuits — the First, Second, Sixth, Seventh and Eleventh — have held in precedential opinions that the Fourth Amendment does not support a claim for the government's retention of legally seized property. [collecting cases] Granted, we should hesitate before rejecting a robust consensus from our sister circuits but here, I believe, their reasoning lacks the power to persuade because they fail to discuss the key Supreme Court precedent, *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). . . . As my colleagues note, . . . the Supreme Court's more recent decision in *Manuel v. City of Joliet*. . . lends further support to our conclusion. There, the Court held that the Fourth Amendment applies throughout the duration of a person's pretrial detention. . . Under the most natural reading of the Fourth Amendment, we should give analogous protection against the seizure of 'persons' and 'effects,' at least absent a well-defined historical tradition to the contrary. *See Torres v. Madrid*, 592 U.S. 306, 324, 141 S.Ct. 989, 209 L.Ed.2d 190 (2021). To me, *Manuel* suggests as a corollary that Fourth Amendment protections for property endure over time, too.")

Fischer v. District of Columbia, No. 24-CV-00044 (CRC), 2025 WL 894445, at *11 (D.D.C. Mar. 24, 2025) ("Fischer alleges a Fourth Amendment violation because the officers' '[i]ndiscriminate[ ] shooting' of 'munitions into a crowd' was an unreasonable use of force. . . A Fourth Amendment seizure 'requires the use of force with intent to restrain.'. . . Here, however, Fischer is explicit that the MPD officers deployed force 'with no intent to arrest.'. . Instead, he contends, 'the intent of the police was certainly to disburse [sic] the crowd.' This concession is fatal to Fischer's Fourth Amendment claim: The MPD officers' use of force for this 'other purpose' of dispersing the crowd does not qualify as a seizure. Because Fischer has not alleged a Fourth Amendment seizure, his claim cannot proceed. Again, however, even if the complaint could be construed to state such a claim, given the 'unprecedented' circumstances surrounding the violent encroachment of the U.S. Capitol, Fischer has not demonstrated that 'every "reasonable official"' would have understood

the MPD officers' conduct to violate the Fourth Amendment. . . Accordingly, they are entitled to qualified immunity on this claim.")

Goodwin v. District of Columbia, No. CV 21-806 (BAH), 2025 WL 637467, at *10 (D.D.C. Feb. 27, 2025) ("This use of pepper spray against these plaintiffs, who each testified about feeling the ill effects of the spray, was a direct 'application of physical force to the body' of the individuals directly sprayed 'with intent to restrain' their movements and therefore constitutes a seizure. . . The circumstances further demonstrate an objective intent to restrain these individuals, since the decision to close the kettle on Swann Street was made to effectuate arrests, rather than disperse the group, . . . and Commander Glover had already stated that members of the encircled group were not free to leave, because they were "under arrest[.]". . Indeed, defendant Crisman testified about his personal intent to restrain the protesters by using pepper spray, though he stated that he was trying to 'stop two individuals from going up the stairs' into Mr. Dubey's home and deployed the pepper spray because he felt he 'had to stop them somehow.'. . Whatever the specific focus for defendant Crisman's use of the pepper spray, in examining whether an officer had an intent to restrain for the purposes of determining whether a Fourth Amendment seizure occurred, 'the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain,' and courts 'rarely probe the subjective motivations of police officers in the Fourth Amendment context.'")

Ferris v. District of Columbia, No. 1:23-CV-481-RCL, 2023 WL 8697854, at *8–11 (D.D.C. Dec. 15, 2023) ("The Plaintiffs have failed to allege that the Individual Defendants possessed a prerequisite for a seizure, and thus excessive force: the intent to restrain. For that reason, they have not alleged a violation of the Fourth Amendment. And even if Plaintiffs have alleged a violation, they have failed to allege a violation of a *clearly established* right, meaning the Individual Defendants would be entitled to qualified immunity. . . Plaintiffs argue that the Individual Defendants violated their Fourth Amendment rights because their use of less lethal munitions constituted an unreasonable seizure and excessive force. . . Defendants contend that the Plaintiffs have failed to plausibly allege a seizure or unreasonable force. . . Defendants also argue Plaintiffs cannot overcome qualified immunity because there was no violation of the Plaintiffs' *clearly established* Fourth Amendment rights. . . Defendants have the better argument. . . . Plaintiffs allege a seizure by physical force, not show of authority. . . This sort of seizure 'requires the use of force *with intent to restrain*.' *Torres v. Madrid*, 141 S. Ct. 989, 998 (2021). The intent to restrain is indispensable: 'force intentionally applied for some other purpose' is no seizure. . . In considering whether an officer had an intent to restrain, a court does not examine 'the subjective motivations of police officers' or the 'subjective perceptions of the seized person.'. . '[T]he appropriate inquiry is' instead 'whether the challenged conduct *objectively* manifests an intent to restrain.'. . The fatal flaw in the Amended Complaint is its failure to allege that the Individual Defendants acted with the 'intent to restrain' required by *Torres*. On the facts alleged by Plaintiff, the conduct of the MPD officers does not '*objectively* manifest[ ] an intent to restrain.'. . Plaintiffs state that one purpose for the officers' deployment of less lethal munitions 'was to incapacitate those struck to facilitate custodial false arrest.'. . But Plaintiffs have failed to plausibly establish this purpose for two

reasons. First, the assertion that the officers sought to incapacitate protestors is simply not supported by the facts alleged, and 'the Court need not accept inferences or conclusory allegations that are unsupported by the facts set forth in the complaint.'. . Actually, Plaintiffs' facts suggest the opposite: if the officers really had this purpose, surely the use of less lethal munitions would have been followed by large-scale arrests of protestors. But Plaintiffs allege only two actual or attempted arrests after only one of the four incidents. . . Second, there is an 'obvious alternative explanation,'. . . for the Defendants' conduct: that because of their animus toward the protestors, the officers sought to *disperse*, rather than restrain, the protestors. Indeed, Plaintiffs describe MPD as forcing protestors to leave particular areas, not remain there. . . Another obvious alternative explanation in the Amended Complaint is that '[a] purpose' of the officers' use of force was to 'retaliate, chill the message, and deter further protests through infliction of pain.'. . In light of these alternative explanations, Plaintiffs' factually unadorned assertion about the officer's purpose of restraining protestors does not establish a claim for unreasonable seizure. Looking past Plaintiffs' conclusory allegation of an intent to restrain, neither of the two factually grounded purposes attributed to the police evidences an intent to restrain. Intent to retaliate is obviously different. The harder question is whether intent to *disperse* counts as intent to restrain. *Torres* considered 'only force used to apprehend' and declined 'to opine on matters not presented here—pepper spray, flash-bang grenades, lasers, and more.'. . That decision therefore 'did not address whether force used only to compel departure from an area constitutes a seizure.' *Dundon v. Kirchmeier*, 85 F.4th 1250, 1256 (8th Cir. 2023). Before *Torres*, several circuits indicated that the Fourth Amendment does reach forceful dispersal. *See Bennett v. City of Eastpointe*, 410 F.3d 810, 834 (6th Cir. 2005) ("Fourth Amendment jurisprudence suggests a person is seized ... when a reasonable person would not feel free to remain somewhere, by virtue of some official action."); *Nelson v. City of Davis*, 685 F.3d 867, 873, 877–78 (9th Cir. 2012) (finding a seizure when police officer shot plaintiff in the eye with a pepperball projectile as part of an effort to disperse a crowd). Since *Torres*'s gloss that seizure requires intent to restrain, several courts have considered whether police have an intent to restrain when they use force to block or disperse but not apprehend an individual. The only courts in this district to have considered the question have concluded that force used to block or redirect a person does not constitute a seizure under *Torres*. . . .This Court agrees with the other courts in this district that an intent to 'keep out or to redirect,'. .is different from an intent to restrain. One might argue that the police 'restrain' people when they use force to limit their freedom of movement. But distinguishing an intent to disperse from an intent to restrain gives effect to the *Torres* Court's understanding of the Fourth Amendment as historically focusing on *arrests*. The Supreme Court explained that '[t]he "seizure" of a "person" plainly refers to an arrest' and this 'linkage existed at the founding.'. . .To be sure, a seizure can occur without an arrest. But keeping a person in place remains essential. . . . Taking Plaintiffs' facts as true, the circumstances objectively demonstrate officers intended to expel protestors from particular areas, not restrain them. Since Plaintiffs have failed to adequately allege that the Individual Defendants possessed an intent to restrain, they have failed to allege a Fourth Amendment seizure.")

Black Lives Matter D.C. v. Trump, 544 F.Supp.3d 15, 48-49 (D.D.C. 2021) ("The plaintiffs also bring Fourth Amendment claims against the D.C. and Arlington defendants for unreasonable

seizures conducted with excessive force. The plaintiffs have not, however, pointed to a violation of any clearly established Fourth Amendment right that can overcome the defendants' entitlement to qualified immunity. Taking the facts in the light most favorable to the plaintiffs, the officers attacked and improperly *dispersed* the protesters—they did not restrain them or attempt to seize them in place. . . Indeed, quite the opposite was true—the officers attempted to cause the protestors and fleeing crowd to leave their location, rather than cause them to remain there. . . And the plaintiffs allege that they all did in fact leave Lafayette Square. . . These alleged facts lie in stark contrast to the Supreme Court's recent holding that 'the application of physical force to the body of a person *with intent to restrain* is a seizure even if the person does not submit and is not subdued.' *Torres v. Madrid*, 141 S. Ct. 989, 1003 (2021) (emphasis added). One could make the argument that, although the plaintiffs were not physically restrained, their freedom of movement was restrained because the defendants sought to route them in certain directions. But even assuming that the plaintiffs were seized by being forced to leave Lafayette Square, the plaintiffs have not pointed to a case clearly establishing that attempting to move members of a crowd (rather than keep them in a location) can constitute a seizure. And where assessing qualified immunity in the context of the Fourth Amendment, the Supreme Court has repeatedly 'stressed the need to *identify a case* where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.'. .In an effort to ground their claim in relevant precedent, the plaintiffs point out that 'Supreme Court and Circuit precedent hold[s] that even a momentary limitation of a person's freedom of movement is a seizure if it results from means intentionally applied.'. . But this frames the issue at far too high a level of generality, which the Supreme Court has repeatedly instructed against. . . The relevant question is not whether a momentary use of force can constitute a seizure—of course, it can—but whether the use of tear gas to move members of a crowd can constitute a seizure. Because the plaintiffs have pointed to no case clearly establishing an answer to that question, the defendant officials are entitled to qualified immunity.")

FOURTH CIRCUIT

Thompson on behalf of the Estate of White v. Badgujar, No. 20-CV-1272-PWG, 2021 WL 3472130, at *5 (D. Md. Aug. 6, 2021) ("A review of Fourth Amendment precedent. . . makes clear that Mr. White was not seized for purposes of a Fourth Amendment violation until Officer Badgujar shot Mr. White. That Officer Badgujar employed a show of authority does not alone give rise to Fourth Amendment protections. . . . Seizure requires submission 'to that show of authority.'. . And, critically, 'without actual submission to the police, there is at most an attempted seizure, which is not subject to Fourth Amendment protection.'. . Under this framework, the complaint fails to allege a critical component of its Fourth Amendment causes of action prior to the shooting—that Mr. White submitted to Officer Badgujar. The complaint and video show just the opposite. . . .Therefore, under the binding precedents cited above, I must find that the Fourth Amendment is not implicated at the time Plaintiffs allege the violation started, and that the Plaintiffs have failed to state a cause of action in Count 1 for an illegal Fourth Amendment seizure prior to the time of the shooting.");

FIFTH CIRCUIT

Vardeman v. City of Houston, 55 F.4th1045, 1052 (5th Cir. 2022) ("The allegations that Simpson punched Vardeman in the face so hard that he fell to the ground, and then Simpson hovered over him for a time in a menacing manner, would, if supported by evidence, allow jurors to find that for some period of time at least, a reasonable person would not believe he was free to leave. The Supreme Court has not required a finding that the officer intended to arrest the person, only that an objective person would perceive that at least briefly, there was no freedom to go. *Torres*, 141 S. Ct. at 998–99. Though the earlier alleged profane insistence by the officer was for Vardeman to move his vehicle, we see a fact dispute as to whether the encounter had become something of longer duration and for a different purpose, such as at least for being issued a ticket. Respectfully, we conclude the district court erred in holding the complaint did not set out sufficient facts for a claim of excessive force in making a seizure.")

SIXTH CIRCUIT

Kilnapp v. City of Cleveland, Ohio, No. 22-4059, 2023 WL 4678994 (6th Cir. July 21, 2023) (not reported) ("In this case, there is no doubt that the law is clearly established. '[D]eadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment,'. . . and the individual injured need not be the intended target of the force to be seized[.] . . Gannon applied deadly force with the intent to seize Borden. Kilnapp was shot instead. Although Kilnapp was not the intended target, she was still seized under the Fourth Amendment. Further, viewed in that light most favorable to Kilnapp, Gannon acted unreasonably by blindly deploying a firearm over his head when no suspect posed a threat to him. The law is sufficiently clear, that in this case, based on the facts alleged in the complaint, 'every reasonable official would have understood' that Gannon's actions violated Kilnapp's Fourth Amendment rights. . . Therefore, Gannon is not entitled to a judgment as a matter of law. Accordingly, this Court affirms the district court's decision to allow Kilnapp's excessive force claims against Gannon to proceed to discovery.")

Campbell v. Cheatham County Sheriff's Dep't, 47 F.4th 468, 476-79 (6th Cir. 2022), *cert. denied sub nom* ***Fox v. Campbell***, 144 S. Ct. 70 (2023) ("The parties do not dispute that Fox showed authority by firing eight shots into the Campbells' home, but Fox contends that the Campbells did not submit to this show of authority, and thus were not seized. What constitutes a submission to a show of authority or a termination of freedom of movement? If an officer rams a suspect's car off the road or locks a suspect in a room, the officer has terminated the suspect's freedom of movement and seized the suspect under the Fourth Amendment. . . Alternatively, if an officer orders an individual to stop but the individual continues running away, then there has been no seizure, because there has been no submission to authority or termination of movement. . . As the Supreme Court has recognized, 'when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not.'. . The Court explained that 'a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed

that he was not free to leave."'. . . In view of all the circumstances here, a reasonable person would not believe that he or she was free to leave a house while an officer repeatedly fired at the front door. . . . In this case, when Fox fired immediately and repeatedly upon Mark opening the door, Fox terminated the Campbells' movement and 'a reasonable person would have believed that he was not free to leave.'. . Therefore, the Campbells were seized within the meaning of the Fourth Amendment. . . . It also makes no difference whether Fox knew Sherrie was also inside the home. We have explained that when an officer seizes one person by shooting at a car, for example, the officer seizes everyone in the car, even if the officer is unaware of the presence of passengers. . . The same logic extends to the home: just as shooting at a car and causing it to stop terminates the freedom of movement of everyone in the car, so does shooting into a house in a manner that prevents occupants from leaving constitutes a seizure of the occupants. By shooting at the house, Fox seized everyone inside, including Sherrie. . . .By firing at the Campbells' home, Fox made a show of authority. This show of authority restricted the Campbells' movement such that a reasonable person, under these circumstances, would not feel free to leave. . . Therefore, Fox seized the Campbells under the Fourth Amendment.")

Hopkins v. Nichols, 37 F.4th 1110, 1117 (6th Cir. 2022) ("*Mendenhall* and *Saari* establish that words that compel compliance with the officer's orders to exit a house constitute a seizure. Thus, when taking the facts in the light most favorable to the Hopkinses, Nichols's commands to Mrs. Hopkins may have amounted to a clearly established constitutional violation. For those reasons, we conclude that the district court properly denied qualified immunity to defendants for the alleged seizure of Mrs. Hopkins.")

Treadway v. City of Columbus., No. 2:22-CV-2287, 2025 WL 689317, at *8 n.2 , *9-11 (S.D. Ohio Mar. 4, 2025) ("This Court previously examined whether officers seized protestors under the Fourth Amendment when officers used chemical agents, less-lethal projectiles such as wooden knockers, and physical force. *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 263 (S.D. Ohio 2021). This Court noted that the dispositive question is one of control: Did the police control Plaintiffs' and protestors' movement through the use of force intentionally applied? . . The case *sub judice* involves the use of chemical agents during one of the protests reviewed in *Alsada*. Treadway does not argue that the use of the chemical agents was excessive, nor does he argue that he was seized based on the use of the chemical agents. As such, this Court will address the removal of the gas mask and the arrest as the alleged seizures. . . . The facts and inferences here indicate that officers sprayed chemical agents towards Plaintiff during the protest. . . Plaintiff raised his middle finger at the officers, and Ramsey subsequently approached Plaintiff from behind, grabbed Plaintiff by the shoulder, and removed Plaintiff's mask strapped to Plaintiff's head. . . Plaintiff alleges these events occurred as he was attempting to comply with officer orders to leave the area where officers were spraying chemical agents. . . That Plaintiff had a 'violent reaction to Ramsey' has no bearing on whether Ramsey objectively manifests an intent to restrain. . . Force 'with intent to restrain is a seizure, even if the force does not succeed in subduing the person.'. .Further, Ramsey's conduct of removing the gas mask is not as simple as lifting up Plaintiff's gas mask but includes grabbing Plaintiff's shoulder from behind as Ramsey removed the gas mask strapped to

Plaintiff's head. . . Defendant's argument regarding Plaintiff's freedom of movement seems to be limited to before and after Ramsey lifted the gas mask. . . What about while the gas mask was being lifted? This Court finds there is sufficient evidence favoring Plaintiff's assertion that the removal of the gas mask was a seizure. Ramsey's conduct of grabbing Plaintiff's shoulder and removing the gas mask viewed in the light most favorable to Plaintiff, manifests an intent to restrain Plaintiff. . . . Ramsey intentionally grabbed Plaintiff by the shoulder as Ramsey removed the mask strapped to Plaintiff's head. . . This grab is more than the 'tap on the shoulder to get one's attention' which would 'rarely exhibit' an intent to restrain. . . Ramsey grabbed Plaintiff's shoulder while pulling up the mask with an intent at least to restrain Plaintiff long enough to remove the mask strapped to Plaintiff's head. . . . There is sufficient evidence favoring Plaintiff's assertion that the removal of the gas mask was a seizure. Even so, this is just the first step of this Court's Fourth Amendment claim analysis. The seizure must be unreasonable to violate the Fourth Amendment. . . . Because of the sufficient evidence to support that Plaintiff was complying with orders to disperse, this Court finds Ramsey's conduct of removing the mask was not objectively reasonable when viewing evidence in light favorable to Plaintiff.")

Alsaada v. City of Columbus, 536 F.Supp.3d 216, ___ (S.D. Ohio 2021) ("Whether a constitutionally cognizable seizure by control can occur in protest scenarios is a murkier landscape. The question before this Court is: Was there a seizure by control when the police used less-lethal force, including pepper spray, tear gas, and physical force, to disperse— rather than detain— activists, protestors, and congregants? Some courts answer this question in the affirmative and others in the negative. Others do not answer it at all and instead assume the Fourth Amendment applies. But there is a body of authority suggesting that the use of a chemical agent or other less-lethal crowd control tactics over a demonstrating crowd constitutes a seizure within the meaning of the Fourth Amendment. This Court finds three cases persuasive. [Court discusses *Marbet v. City of Portland*, No. CV 02-1448-HA, 2003 WL 23540258, at *10 (D. Or. Sept. 8, 2003), *Jennings v. City of Miami*, No. 07-23008-CIV, 2009 WL 413110, at *8 (S.D. Fla. Jan. 27, 2009) and *Downes-Covington v. Las Vegas Metropolitan Police Department*, No. 220CV01790, 2020 WL 7408725, at *10 (D. Nev., Dec. 17, 2020)] As analyzed below, in the cases, the courts considered similar facts and reasoned that officers' use of chemical irritants and physical force could amount to a constitutionally redressable seizure. . . .Thus, a constitutionally redressable seizure can occur where officers use physical force to prevent protestors from coming any closer, such as by herding protestors, forming a skirmish line, or failing to provide a means of egress— where such governmental action is intentional and results in the termination of freedom of movement. . . This Court now asks whether the type of force used—chemical agents, less-lethal projectiles such as wooden knockers, and physical force—militates in favor of finding that a seizure occurred. The dispositive question is one of control: Did the police control Plaintiffs' and protestors' movement through the use of force intentionally applied? . . . Relevant factors that weigh in favor of a finding of a seizure of a person include the officer's tone of voice, whether the officer displayed a weapon or handcuffs, wore a uniform, touched the individual without permission, or threatened or physically intimidated him. . . Plaintiffs allege that throughout last summer's protests, they were peacefully observing, providing medical aid, or protesting when

Defendants, often clad in riot gear, exercised an indiscriminate use of chemical irritants, physical force, and other weapons. Given that the standard for injunctive relief is a likelihood of success, the Court finds that the evidence and testimony from last year's protests—explored summarily—suggest that Plaintiffs have met their burden as to the elements of a Fourth Amendment claim. . . . Accordingly, even absent an arrest, the use of chemical spray and less-lethal projectiles can amount to . . .a cognizable restraint under the Fourth Amendment where the 'clear[ ]' effect of officers' use of pepper spray 'was to control plaintiffs' movement.' . . . This Court finds that Plaintiffs' allegations are sufficient to set forth a likelihood of success on the merits that the deployment of less-lethal munitions constituted physical force that temporarily restrained the protestors. . . The intentionality requirement of the Fourth Amendment seizure analysis is fulfilled since there is no dispute that the protestors were the target of police conduct when the officers held out their hands and sprayed the protestors indiscriminately. . . Regardless of officers' motives, their application of force terminated the protestors' freedom of movement and constituted a seizure under the Fourth Amendment." [footnotes omitted])

EIGHTH CIRCUIT

Stearns v. Wagner, 122 F.4th 699, 703-04 (8th Cir. 2024) ("Here, Stearns's First Amendment retaliation claim fails because, viewing the record in the light most favorable to him, he fails to demonstrate a causal connection between his injury and a retaliatory animus. Unlike the police in *Quraishi*, Sergeant Spire did not single out a particular group of people. And unlike the relatively small group in *Green* who were attempting to peacefully depart the scene an hour after a protest had ended, Stearns was in the midst of a crowd where—he admits—only minutes before officers were required to deploy 'handheld munitions' to 'effectively and safely start[ ] to control the protestors.' This case is closer to *Molina*, where officers 'were dodging rocks and bottles just a few minutes earlier' than to *Green*, where the protest had dispersed an hour earlier. . . And, like the officers in *Aldridge* and *De Mian*, Stearns concedes that Sergeant Spire 'did not fire at a specific person, but indiscriminately fired into a group of people.' 'One cannot simultaneously single out the appellants and "indiscriminately" spray the crowd.'. . Thus, Stearns has failed to allege that Seargent Spire violated a constitutional right. Sergeant Spire is therefore entitled to qualified immunity on Stearns's First Amendment retaliation claim. Stearns also appeals the dismissal of his excessive force claim under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. With respect to his Fourth Amendment claim, Stearns fails to'"provide a meaningful explanation of the argument' and neglects any 'citation to relevant authority.'. . Therefore, his Fourth Amendment claim is waived. As to his Fourteenth Amendment excessive force claim, to prove a violation of substantive due process, Stearns 'must show (1) that [Sergeant Spire] violated one or more fundamental constitutional rights, and (2) that the conduct of [Sergeant Spire] was shocking to the contemporary conscience.'. . 'Proof of intent to harm is usually required,' though, 'in some cases, proof of deliberate indifference' may satisfy the standard. . . 'The lower deliberate indifference standard is sensibly employed only when actual deliberation is practical.'. . . Here, Stearns argues that Sergeant Spire's deployment of projectile shells after the crowd was beyond throwing distance was 'a brutal and inhumane abuse of official power.' But—

even assuming that Sergeant Spire used crowd control measures longer and more aggressively than was required. . .there is no evidence that Sergeant Spire intended harm. And the lower 'deliberate indifference' standard does not apply because Sergeant Spire lacked 'the benefit of time to make [an] unhurried judgment[ ].'. . Altogether, Sergeant Spire's actions fall far short of shocking the conscience. Therefore, Stearns has not shown a substantive due process violation and Sergeant Spire is entitled to qualified immunity on Stearns's Fourteenth Amendment claim.")

Irish v. McNamara, 108 F.4th 715, 719-20 (8th Cir. 2024) ("We have already recognized that even after *Brower* and *Brendlin*, the law is not clearly established in this area. As of 2007, it was not clearly established that an officer "could effect a seizure under the Fourth Amendment without subjectively intending to do so." . . . Officer Irish says things have changed since *Gardner*, pointing to *Torres v. Madrid*, which held that police seized a suspect 'for the instant th[eir] bullets struck her,' even though she temporarily eluded arrest afterward. . . *Torres* observed that 'the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain,'. . . a snippet of the opinion that Officer Irish says leaves 'no confusion' that an officer's subjective intent is irrelevant to whether a seizure occurred. Setting aside the myriad ways *Torres* is factually distinguishable, we cannot ignore that in the very same sentence Officer Irish quotes, the Court said that it '*rarely probe*[*s*] the subjective motivations of police officers in the Fourth Amendment context.'. . Rarely, not never. This qualified language is consistent with the Court's repeated observation that officers' subjective intent '*is relevant* to an assessment of the Fourth Amendment implications of police conduct' insofar as 'that intent has been conveyed to the person confronted.'. . Like *Brendlin*, *Torres* focused on 'objective intent,' but it didn't disavow the Court's prior statements or end any 'debate' on subjective intent's role in whether a seizure occurred. . . . In the end, this is a 'narrow and specialized Fourth Amendment problem,'. . . where we must ask 'whether the violative nature of *particular* conduct is clearly established[.]'. . We are not dealing with the use of a K9 against either a suspect or even a traditional bystander, but rather against a fellow officer who was also involved in the chase. . . . All told, we cannot say that it was 'sufficiently clear that every reasonable official [in Deputy McNamara's shoes] would understand' that he acted unlawfully—or even within the scope of the Fourth Amendment. . . Contrary to Officer Irish's warning, our decision today does not mean that one police officer could never seize another. . . We hold only that it was not clearly established as of March 2022 that an officer in Minnesota could seize a fellow officer with a K9 without subjectively intending to do so. . . Because Officer Irish has not plausibly pleaded any facts suggesting that Deputy McNamara subjectively intended to seize him, Deputy McNamara is 'entitled to qualified immunity on the face of the complaint.'")

Wolk v. City of Brooklyn Center, 107 F.4th 854, 859 (8th Cir. 2024) ("Wolk alleged that the Supervisory Defendants directed law enforcement's response to the protests and authorized the indiscriminate use of tear gas, flashbang grenades, pepper spray, and rubber bullets to disperse the crowds, which ultimately resulted in Wolk's injuries. However, this Court concluded last year—more than two years after the incident giving rise to the claims in this case—that it was not clearly established that the use of force with the intent to disperse or repel a crowd constituted a seizure

under the Fourth Amendment. *See Dundon v. Kirchmeier*, 85 F.4th 1250, 1256-57 (8th Cir. 2023) (distinguishing force used by officers with intent to apprehend with force used by officers with intent to disperse or repel). Wolk has not shown it was clearly established as of April 2021 that officers effect a seizure when they use force to disperse protestors. And while Wolk's complaint generally alleges that some protesters were thrown to the ground for arrest, which tends to show an intent to apprehend rather than disperse, Wolk does not allege that these actions caused Wolk's injuries. The Supervisory Defendants are entitled to qualified immunity on Wolk's Fourth Amendment excessive force and failure to intervene claims, and we reverse the district court's denial of their motion to dismiss on this basis.")

Marks v. Bauer, 107 F.4th 840, 842, 845-46 (8th Cir. 2024) ("Ethan Marks, who was 19 years old at the time, sustained a ruptured eyeball, a fractured eye socket, and a traumatic brain injury when Minneapolis Police Officer Benjamin Bauer shot him with a chemical-filled projectile from approximately five to ten feet away. Marks sued Officer Bauer under 42 U.S.C. § 1983, alleging violations of the Fourth and Fourteenth Amendments. The district court . . . denied Officer Bauer's motion for summary judgment on Marks' excessive force claim, finding that genuine issues of material fact precluded a grant of qualified immunity. This interlocutory appeal followed. We affirm. . . . Officer Bauer contends deploying a projectile against an 'assaultive protestor' is insufficient force to constitute a seizure under the Fourth Amendment. To establish a Fourth Amendment violation, Marks must show both that a seizure occurred and the seizure was unreasonable. . . While we have noted that '[prior] decisions did not place officers on notice that the existence of a seizure depends on the type of force applied for the purpose of dispersing a crowd,' . . . Officer Bauer was not dispersing a crowd the moment he aimed and shot Marks. The video footage shows that, before Marks was shot, Officer Bauer's general deployment of projectiles allowed officers to form a perimeter and evacuate the stabbing victim. It also shows the officers were able to form a second perimeter around another injured individual. By this time, most of the crowd had retreated and only a couple dozen individuals remained around the second individual who needed medical attention. . . .The projectile aimed and purposefully deployed at Marks by Officer Bauer stopped Marks and achieved the result Officer Bauer intended. The record demonstrates that Officer Bauer applied force to restrain and stop Marks. That Marks was not arrested does not change the analysis. . . . Under the facts and circumstances of this case, Marks was seized when Officer Bauer shot him with a projectile.")

Dundon v. Kirchmeier, 85 F.4th 1250, 1255-57 (8th Cir. 2023) ("To establish a Fourth Amendment violation, the claimant must demonstrate that a seizure occurred and that the seizure was unreasonable. . . The threshold question here is whether the protestors were seized within the meaning of the Fourth Amendment. The protestors maintain that the officers effected a seizure when they used force against them with an intent to disperse the crowd. The municipalities argue, however, that when an officer's use of force is designed to disperse a crowd, there is no seizure. Even assuming that the plaintiffs could proceed against unnamed police officers, . . . the protestors have not shown that it was clearly established as of November 2016 that a use of force designed to disperse a crowd constituted a seizure. The protestors maintain that the officers used force to

restrain their 'freedom of movement' because the force 'knocked most of the Appellants and many of the other assembled persons off their feet or otherwise restricted their freedom of movement by stopping them in their tracks.' They rely primarily on *Torres v. Madrid*, 141 S. Ct. 989 (2021), which held that police seized a suspect for the instant that police bullets struck her, even though the suspect temporarily eluded arrest thereafter. . . *Torres* was decided after the encounter at issue here, so it does not constitute clearly established law for purposes of this case. In any event, *Torres* involved force used to *apprehend* a suspect . . . and did not address whether force used only to compel departure from an area constitutes a seizure. This court has recognized that the law is not clearly established in this area. As of 2014, it was not clearly established that the use of tear gas by police to disperse news reporters from the site of public unrest and protests was a seizure. *Quraishi v. St. Charles County*, 986 F.3d 831, 839-40 (8th Cir. 2021). As of 2018, it was not clearly established that a push used to repel a subject seeking to enter a government facility was a seizure. *Martinez v. Sasse*, 37 F.4th 506, 510 (8th Cir. 2022). The protestors here suggest a legally significant difference between the use of tear gas or pepper spray, which disperses through the air, and the deployment of munitions such as rubber bullets or bean bags. Our decisions, however, have recognized a potential distinction between force used with intent to apprehend and force used with intent to disperse or repel. Those decisions did not place officers on notice that the existence of a seizure depends on the type of force applied for the purpose of dispersing a crowd. The protestors invoke *Mitchell v. Kirchmeier*, 28 F.4th 888 (8th Cir. 2022), where a protestor alleged that he was injured by lead-filled bean bags during another protest at the Backwater Bridge. This court concluded that the protestor's claim alleging excessive force survived a motion to dismiss. But the protestor in that case 'was arrested,' so the court had no occasion to consider whether a use of force to disperse rather than to apprehend constituted a seizure. . . Other cited authorities are similarly inapposite because the officer used force to apprehend a suspect. . .The protestors rely on a decision from the Ninth Circuit about the use of 'pepperballs' to disperse students from an unruly party. *Nelson v. City of Davis*, 685 F.3d 867, 877 (9th Cir. 2012). Although the use of force was designed to disperse the students, the court concluded that the student was seized because the 'application of force was a knowing and wilful act that terminated Nelson's freedom of movement.'. . While *Nelson* may lend support to the protestors' theory, it does not demonstrate clearly established law as of November 2016 that the officers' use of force to disperse the protestors was a seizure. One decision from another court of appeals falls short of a 'robust consensus of authority' clearly establishing that the use of force to disperse is a seizure under the Fourth Amendment. Indeed, after *Nelson* was decided, this court in *Quraishi* and *Martinez* concluded that the law was not clearly established on the relevant point. . . . We conclude that the protestors have not established that the individual officers violated a clearly established right under the Fourth Amendment, because it was not clearly established as of November 2016 that use of force to disperse the crowd was a seizure. The protestors do not develop an argument that the actions of the officers clearly 'shocked the conscience,' *see County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998), or otherwise violated a clearly established right of the protestors under the Due Process Clause. The district court properly dismissed the claims against the officers under the Fourth and Fourteenth Amendments.")

Pollreis v. Marzolf, 66 F.4th 726, 731 (8th Cir. 2023) ("The seizure of a person often occurs in the context of an arrest or detainment. Here, Pollreis was neither arrested nor detained. Neither was she told she was 'not free to leave[.]'. . Nonetheless, we conclude Pollreis was seized, even if for only a moment. For a brief time, Pollreis stood, with a taser pointed at her. She then asked, 'Where do you want me to go?' and was told, after more back and forth, to 'go back to your house.' Viewed in the light most favorable to Pollreis, when Officer Marzolf aimed his taser at her, he restricted her freedom of movement while displaying a weapon. . . Officer Marzolf reiterated his command to 'get back in a 'tone of voice indicating that compliance ... might be compelled,'. . . while also aiming a taser. A reasonable person in Pollreis's shoes would not believe she was free to ignore Officer Marzolf's commands. This is further evidenced through the fact that Pollreis submitted to Officer Marzolf's show of authority by leaving the scene even though her children were being detained at gunpoint. Considering the circumstances, we hold Officer Marzolf briefly seized Pollreis through a show of his authority.")

Martinez v. Sasse, 37 F.4th 506, 509-10 (8th Cir. 2022) ("Although the claim here alleges use of excessive force, the parties dispute the threshold question whether Sasse seized Martinez at all within the meaning of the Fourth Amendment. Martinez argues that Sasse effected a seizure when she pushed Martinez to the ground before locking the doors to the ICE facility. Sasse maintains, however, that when an officer's use of force is designed only to repel a person from entering a facility, there is no seizure. On that view, Martinez may have a tort claim against Sasse for assault or battery if the officer used unjustified force, but Sasse did not violate the Fourth Amendment. As of June 2018, the Supreme Court had explained that a seizure occurs 'when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.'. . Sasse maintains that her alleged push of Martinez did not 'restrain' the lawyer, but served instead to 'repel' her from entering the federal facility. . . . Martinez responds that a seizure occurs where an officer restrains a person even briefly. She relies on *Torres v. Madrid*, —— U.S. ——, 141 S. Ct. 989, 209 L.Ed.2d 190 (2021), which held that police seized a suspect for the instant that police bullets struck her, even though the suspect temporarily eluded capture thereafter. . . *Torres*, however, was decided after the encounter at issue here, so cannot be clearly established law for purposes of this case. In any event, *Torres* involved force used to apprehend a suspect, and did not address whether force used only to repel constitutes a seizure. . . . As with the force used to repel Martinez in this case, the force in *Quraishi* was not employed to apprehend a subject. If there is a constitutional distinction between force used for repulsion that momentarily restricts forward movement and force used for dispersion that impels retreat, the distinction is not so readily apparent that every reasonable officer would have understood it. For these reasons, we conclude that Martinez has not adequately pleaded that Sasse violated a clearly established right, because it was not clearly established as of June 2018 that Sasse's alleged push was a seizure under the Fourth Amendment.")

Steed, by and through Steed v. Missouri State Highway Patrol, 2 F.4th 767, 770 (8th Cir. 2021) ("Steed next argues that Lavoy's Fourth Amendment rights were violated when Trooper Ashby deployed the spike strips. A failed attempt to restrain a suspect is not a 'seizure' within the meaning

of the Fourth Amendment unless there is some application of physical force. *See Torres v. Madrid*, ––– U.S. ––––, 141 S. Ct. 989, 995, 209 L.Ed.2d 190 (2021) (seizure only for the moment that the officer's bullet struck the plaintiff). Here, the officers tried to stop the Explorer with the spike strips—physical force—but were unsuccessful. Steed says that a reasonable jury could find that the Explorer drove over the spike strips. But again, that argument is 'blatantly contradicted by the record.'. . The dashcam footage shows the strips on the two left lanes, and the Explorer drove in the far-right lane. Plus, the Explorer continued the chase afterwards—likely impossible to do with punctured tires. We conclude that the record clearly establishes that the troopers did not apply physical force by trying to use the spike strips, so there was no seizure.")

Quraishi v. St. Charles County, Missouri, 986 F.3d 831, 840 (8th Cir. 2021) ("Neither the district court nor the reporters cite authority that gave 'fair warning' to Anderson that deploying one canister of tear-gas was a seizure. . . The district court relied on inapposite law. True, use of pepper spray to arrest an unarmed, compliant suspect can be excessive force. . . *Peterson* is distinguishable, because it focused on the officer's behavior after the individual was already seized. This court did not consider whether the use of chemical agents *alone* is a seizure. . . Here, the issue is whether deploying tear gas is a seizure.The reporters cite Supreme Court cases to argue they were restrained because they could not stay in their chosen location. . . But these cases did not give fair warning. *Brendlin* held that, during traffic stops, passengers are seized. . . *Brower* held that setting up a roadblock that stops a fleeing suspect is a seizure. . . *Brendlin* and *Brower* are inapposite because both involve police action that terminated or restricted freedom of movement. . . Here, the reporters' freedom to move was not terminated or restricted. *See Johnson*, 926 F.3d at 506 (no seizure where plaintiff was not "ordered to stop and remain in place" and "was able to leave the scene"). They were dispersed. The reporters cite no 'precedent,' 'controlling authority' or 'robust consensus of cases of persuasive authority' to show it was clearly established that tear-gassing was a seizure. . . When Anderson deployed the tear-gas, it was not clearly established that his acts were a seizure. The district court should have granted qualified immunity to Anderson on the Fourth Amendment claim.").

Hollamon v. County of Wright, No. 22-CV-2246 (KMM/LIB), 2024 WL 3653092, at *9, *12 & n.16, (D. Minn. Aug. 5, 2024) ("The threshold question here is whether Sergeant Miller's use of force constituted a seizure. As discussed, for a seizure to occur within the meaning of the Fourth Amendment as a result of an officer's application of physical force, there must be a '"use of force with intent to restrain."'. . This issue is determined by '"whether the challenged conduct *objectively* manifests an intent to restrain."'. . 'Accidental force will not qualify. Nor will force intentionally applied for some other purpose.'. . Based on the summary judgment record, a reasonable jury could not conclude that Sergeant Miller's use of the pepperball launcher objectively manifested an intent to restrain. Start with the undisputed material facts. There is no dispute that the fenced area contained no trespassing signage. The evidence shows that officers shouted warnings at the protestors not to cross into the fenced area and that doing so would constitute trespassing. The video evidence, specifically Officer Berg's bodycam footage, confirms that as protestors approached the fenced area, they were told to stop and not to cross the outer

fence. After several protestors began coming over the outer fence and entering the No Man's Land, Hollamon points to no evidence indicating that he was told to remain in place, nor that officers physically prohibited the protesters from leaving through use of pepperball rounds or otherwise. And during the entire period in which Sergeant Miller fired pepperball rounds in Mr. Hollamon's direction, no officer entered the No Man's Land between the fences to apprehend any of the trespassing protestors. . . . Deterred from trying to enter the construction site by this stand-off with the officers, Mr. Hollamon and other protestors retreated away from the inner fence. Some, like Mr. Hollamon, took cover behind the berm, but many of the protestors went back over the outer fence and left the construction site. The officers did not prevent any of those protestors from leaving and made no effort to arrest any of them. Nor did the officers enter the No Man's Land to arrest those, like Hollamon, who had remained at the construction site. . . . Given these circumstances, Sergeant Miller did not seize Mr. Hollamon by firing pepperballs at him. . . . During this period of the encounter, no action of the officers, including the firing of pepperballs, prevented Mr. Hollamon or anyone else, from turning around, going back to the outer fence, or leaving the area entirely. Indeed, the only reasonable inference is that the use of these munitions was to deter the protestors from breaching the inner fence and get them to turn around and leave the no-trespassing area. . . .In sum, the Court concludes that a reasonable jury could not find that Hollamon was seized, so he cannot demonstrate that there was a constitutional violation.[16] **[fn. 16:** This Court shares Chief Judge Patrick Schiltz's 'reservations about the "legal black hole" created by distinguishing protestors being "free to leave" and being "free to stay,"' including the implication that if force is used to disperse, there would be no Fourth Amendment seizure regardless of the level of force used 'to disperse or repel a crowd—including fire hoses, police dogs, live ammunition, and even flame throwers.'. . In *Cole*, Judge Schiltz avoided the need to resolve this tension because the plaintiffs 'submitted evidence to allow a reasonable jury to find that [the defendants'] use of pepper spray did, in fact, objectively manifest an intent to restrain the plaintiffs.'. . Mr. Hollamon did not present such evidence, so the question is closer to the surface here. Of course, this case does not involve the use of force akin to the examples identified in *Cole*. But it is difficult to imagine the situation in which the use of live ammunition or a flame thrower would not implicate the Fourth Amendment even if a government official were brazen enough to suggest that such methods were legitimate crowd dispersal techniques.**]** In addition, the Court finds that Sergeant Miller is entitled to qualified immunity because it was not clearly established, as of July 29, 2021, that firing pepperball rounds to disperse a group of protestors engaged in a trespass constituted a seizure, even if an argument can now be made that it did. Mr. Hollamon does not point to any controlling authority, nor a robust consensus of persuasive authority, that would have given fair warning to Sergeant Miller that his conduct violated the constitution.")

Cole v. Lockman, No. 21-CV-1282 (PJS/DLM), 2024 WL 328976, at *5–6, *8, (D. Minn. Jan. 29, 2024) ("Defendants argue that Eck and Lockman did not seize Cole, Hennessy-Fiske, or the other occupants of the alcove because the officers deployed pepper spray for the purpose of *dispersing* the occupants, not *restraining* them. In support of their argument, defendants cite a number of excessive-force cases that have distinguished between force used to disperse (not a seizure) and force used to restrain (a seizure). [collecting cases] The Court has reservations about

the 'legal black hole' created by distinguishing between protestors being 'free to leave' and being 'free to stay.' Shawn E. Fields, *Protest Policing and the Fourth Amendment*, 55 U.C. Davis L. Rev. 347, 361, 364 (2021). For example, defendants' theory would seem to empower police officers to use *any* level of force to disperse or repel a crowd—including fire hoses, police dogs, live ammunition, and even flame throwers. Because no 'seizure' would occur, it *would not matter* for purposes of the Fourth Amendment whether the force applied was reasonable. In any event, the Court need not grapple with the implications of defendants' theory, because Cole and Hennessy-Fiske have submitted sufficient evidence to allow a reasonable jury to find that Eck's and Lockman's use of pepper spray did, in fact, objectively manifest an intent to restrain the plaintiffs. . . Defendants claim that it is undisputed that Eck and Lockman used their pepper spray to disperse Cole, Hennessy-Fiske, and the others gathered in the alcove, but video of the incident suggests otherwise (or at least would allow a reasonable jury to conclude otherwise). For one thing, at the moment when Eck and Lockman deployed their pepper spray, plaintiffs were surrounded in the alcove by riot police, . . . in other words, plaintiffs had nowhere to *go*, or to be dispersed *to*. In this respect, this case resembles *Ludwig v. Anderson*, in which the Eighth Circuit found that police had seized the decedent when several officers 'formed a semicircle' around him and maced . . . him in the face. . . Moreover, the video shows Eck deploying his pepper spray at the same time that other officers were pointing to the ground and yelling 'get down.'. . A reasonable jury could conclude that the objective intent behind Eck's use of pepper spray under those circumstances was to force those in the alcove to get to the ground—i.e., to *stay*, not to *go*. . . . Particularly given the testimony in the record that the MSP's plan was for a team of officers to follow behind the skirmish line, a reasonable jury could conclude that Eck's and Lockman's use of pepper spray was an act of restraint rather than dispersal and thus that Cole and Hennessy-Fiske were seized for purposes of the Fourth Amendment. . . Eck and Lockman have countered with declarations stating that they deployed pepper spray to get the group in the alcove to disperse. . . That may be true, but it is also irrelevant, as courts 'rarely probe the subjective motivations of police officers in the Fourth Amendment context.'. . The only objective evidence to which defendants point is that Eck and possibly other riot police were yelling 'move' while using their pepper spray. The problem for defendants, though, is that the command to 'move' cannot be heard on the video of the incident until two seconds *after* Eck initially deployed his pepper spray. At the moment that Eck started deploying pepper spray, the only thing his targets had been told was to get down on the ground. Finally, the fact that plaintiffs were not actually arrested and were allowed to move north *after* being pepper sprayed is not determinative. The seizure may have been brief, but 'brief seizures are seizures all the same.'. . .Altogether, a jury could readily find that a reasonable officer in the position of Eck and Lockman would have known (1) that Cole, Hennessy-Fiske, and the rest of the group in the alcove were journalists, (2) that those journalists were not subject to the curfew or the curfew-based dispersal order (i.e., were not breaking any law), and (3) that those journalists posed no threat to the officers or anyone else. And based on these findings, a reasonable jury could hold Eck and Lockman liable for pepper spraying Cole and Hennessy-Fiske just a couple of seconds after they had been commanded to get on the ground. . . That is particularly true given that Eck and Lockman were surrounded by other officers and had lesser means of force at their disposal. . . And that is also true given that the amount of force used against Cole was severe

enough to cause chemical burns to her eye, which required continuing medical supervision. . . Put differently, if a reasonable jury resolved the disputes of fact in plaintiffs' favor, that jury could conclude that not a single one of the *Graham* factors weighs in favor of defendants—i.e., that plaintiffs were not violating any law, posed no immediate threat to officer safety, and were not resisting or fleeing. . . The Court therefore declines to hold that Eck's and Lockman's use of force was reasonable as a matter of law.")

Perkins v. City of Des Moines, Iowa, 712 F. Supp. 3d 1159, 1172-75 (S.D. Iowa 2024) ("Under *Torres* and *Quraishi*, an individual is not seized under the Fourth Amendment when an officer objectively manifests an intent to disperse rather than restrain. . . Here, the record contains no evidence from which a reasonable jury could conclude an objective intent to restrain rather than disperse Perkins. . . Upon arriving in the Merle Hay Mall area, Perkins was aware of the large crowds and looting going on in the area. . . She was also aware law enforcement officers and a SWAT team were present in the area and that tear gas was being deployed. . . When Perkins attempted to speak with one of the officers whose car was blocking an entrance to the mall parking lot, she was instructed to '[m]ove along.'. . Thus, Perkins was aware of the volatile situation going on around her and had been instructed by an officer to leave the area. Nevertheless, Perkins exited her daughter's car shortly after interacting with the officer and began walking back and forth in the street amid traffic in the lane adjacent to the mall parking lot. . . It was at this point—with Perkins walking back and forth through the street amid traffic—that the Bearcat drove by Perkins's location and Detective Tart deployed the impact round that struck Perkins. . . Perkins argues the fact she was struck 'while moving away from [Detective] Tart and the parking lot' demonstrates Detective Tart intended to restrain her. . . Seconds before being struck by the impact round, however, Perkins was walking towards the Bearcat and mall parking lot. . . And unlike the cases Perkins cites for support, there is no evidence Perkins was moving away from the mall parking lot in an attempt to flee or run away from Detective Tart or another officer. . . Perkins also argues the fact Detective Tart did not order her to disperse prior to deploying the impact round demonstrates he intended to restrain her. . . Even assuming for purposes of summary judgment that Detective Tart did not order Perkins to disperse prior to deploying the impact round or that Perkins did not hear Detective Tart issue such an order, Perkins had already been instructed by another officer to 'm]ove along' from the area. . . Finally, Perkins asserts that other than the fact she was walking away from Detective Tart and that he did not order her to disperse, 'the only objectively manifested conveyance of [Detective] Tart's intent' was the fact he struck her with the impact round. . . That Perkins was struck by the impact round fails to indicate, however, why Detective Tart deployed the impact round, including whether he intended to restrain or disperse her or whether he intended to strike her with the impact round at all. . . Furthermore, none of the events after Perkins was struck by the impact round objectively manifest an intent to restrain. Perkins was not arrested after being struck. Instead, she drove away in her daughter's car unimpeded by law enforcement. . . Based upon such evidence, no reasonable jury could conclude Detective Tart objectively manifested an intent to restrain Perkins at the time she was struck by the impact round such that she was seized for purposes of the Fourth Amendment. . . Because the Fourth Amendment is implicated only when a seizure has occurred, Perkins's Fourth Amendment excessive force claim

fails as a matter of law. . . . Absent 'precedent, controlling authority, or a robust consensus of cases of persuasive authority' showing it was clearly established as of May 2020 that striking an individual who was walking back and forth in a street during a protest with a single, less-lethal impact round constituted a seizure, the Court finds Detective Tart is entitled to qualified immunity on Perkins's Fourth Amendment claim. . . On this alternative ground, the Court grants Detective Tart's motion for summary judgment as to Perkins's Fourth Amendment excessive force claim.")

Keup v. Sarpy County, No. 8:21-CV-312, 2023 WL 8829298, at *16-19 (D. Neb. Dec. 21, 2023) ("Because the Court holds that neither of Deputy Palmer's actions—firing a pepper ball at Keup and using force when transporting him to get medical attention—constitute 'seizures' within the meaning of the Fourth Amendment, there is no need to consider the 'reasonableness' of those actions. . . . Regarding Keup's first Fourth Amendment theory—that use of the pepper ball constituted a seizure—the Court holds that Palmer is entitled to qualified immunity because it was not 'clearly established' at the time of the alleged misconduct that 'a use of force to disperse rather than to apprehend constituted a seizure.' . . The reasoning in *Dundon* applies equally to this case because there is no genuine dispute that Deputy Palmer was trying to disperse rather than arrest Keup. . . . All of this undisputed evidence indicates that the Sarpy County SWAT Team in general and Deputy Palmer in particular were trying to clear an area in Omaha by dispersing (not arresting) individuals within the area. This belies Keup's contention that '[w]hen Palmer shot Keup at least twice with PepperBalls, he seized Keup' within the clearly established definition of 'seizure' at the time, which as discussed above included use of force to arrest but not to disperse. Deputy Palmer clearly intended to disperse Keup when he fired pepper balls at him. The notion that Deputy Palmer was trying to arrest rather than disperse Keup, who all parties agree 'did not commit a crime,'. . . is farfetched: right before encountering Keup, Deputy Palmer had been actively engaged in the dispersal of several crowds which undisputedly included 'violent protestors,'. . . without attempting to arrest any of them. Deputy Palmer also had no cause to arrest Keup, given that all parties agree that 'Keup did not commit a crime.' Indeed, Keup was never placed under arrest. . . However, Deputy Palmer did have cause to disperse Keup, who was present near the protest at the 'intersection of 72nd and Dodge,' which undisputedly 'was closed to the public by law enforcement,'. . . and 'had been declared an unlawful assembly by law enforcement.'. . Thus, the evidence forecloses the possibility that Deputy Palmer deployed pepper balls at Keup in order to apprehend him. Therefore, Keup has failed to adduce sufficient evidence to 'persuade a jury[]'. . . that Deputy Palmer used force to apprehend rather than disperse Keup. Accordingly, the Fourth Amendment rights claimed by Keup as they pertain to Deputy Palmer's use of pepper balls were not 'clearly established at the time of the defendant's alleged misconduct.'")

Franks v. City of St. Louis, Missouri, No. 4:19 CV 2663 RWS, 2022 WL 1062035, at *8 (E.D. Mo. Apr. 8, 2022) ("To establish a Fourth Amendment violation, a plaintiff must demonstrate that 'a seizure occurred and the seizure was unreasonable.' [citing *Quraishi*] A seizure occurs when an officer 'restrains the liberty of an individual through physical force or show of authority.'. . An officer's use of force or show of authority must have been such that '"a reasonable person would have believed that [she] was not free to leave."'. . In determining whether a seizure occurred

through a use of force, 'the appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain.' *Torres v. Madrid*, 141 S.Ct. 989, 998 (2021). Here, the record does not support a finding that Franks was seized. There is no evidence that Officer Olsten ordered Franks to remain in place or that Franks was unable to leave the scene at any point. *See Johnson v. City of Ferguson*, 926 F.3d 504, 506 (8th Cir. 2019) (finding no seizure where plaintiff was not 'ordered to stop and to remain in place' and was 'able to leave the scene'). To the contrary, the evidence shows that Officer Olsten and the other officers did not attempt to make any arrests after Officer Olsten deployed pepper spray. . . There is also no evidence indicating that Officer Olsten deployed pepper spray with an intent to restrain Franks. According to Franks, Officer Olsten deployed pepper spray in retaliation against her for exercising her First Amendment rights. According to Officer Olsten, he deployed pepper spray to stop Brandy and to disperse the protestors. . . In either case, such a use of force is not a seizure. . . Because Franks must show that she was seized in order to establish a claim for excessive force in violation of the Fourth Amendment, and the record does not support a finding that Franks was seized, Officer Olsten is entitled to qualified immunity on Franks' excessive force claim. Furthermore, even if the record did contain evidence of a seizure under *Torres*, Officer Olsten would still be entitled to qualified immunity because it was not clearly established in 2017 that use of pepper spray alone was a seizure. *Cf. Quraishi*, 986 F.3d at 840 (concluding it was not clearly established in 2014 that deploying tear-gas alone was a seizure). Accordingly, summary judgment will be granted to Officer Olsten on Count IV.");

NINTH CIRCUIT

Puente v. City of Phoenix, 123 F.4th 1035, 1050-56 (9th Cir. 2024) ("[W]e agree with the district court that the PPD's dispersal of class members by the *airborne* transmission of chemical irritants (such as tear gas and pepper spray) and auditory or visual irritants (such as the sound and flash produced by flash-bang grenades) does not constitute a seizure within the meaning of the Fourth Amendment. . . . The Court in *Torres* underscored the importance of the common law's intent-to-restrain requirement to any finding of a 'seizure' based on the 'application of physical force to the body of a person.'. . . The Court further explained that, with respect to this element, 'the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for [the courts] rarely probe the subjective motivations of police officers in the Fourth Amendment context.'. . And just as an officer's purely subjective intent is not relevant, so too the inquiry does not 'depend on the subjective perceptions of the seized person.'. .Plaintiffs do not contend that they were seized by a 'show of authority' to which they submitted, but only that they were seized by an application of physical force with an objective intent to restrain. We will assume, without deciding, that the diffuse airborne transmission of chemical irritants or intense flashes or sounds at a group of persons may constitute an 'application of physical force to the body of [those] person[s].'. . But even on that assumption, Defendants' use of such irritants to *disperse* the crowd from the Free Speech Zone does not constitute a seizure because there is no basis in the record for concluding that it was undertaken with the necessary objective intent to *restrain*. . .*Torres* makes clear that an objective intent to 'restrain,' for Fourth Amendment purposes, refers to measures that

objectively aim to *detain* or *confine* the person, even if only temporarily or even if only through a 'mere touch.'. . . Because an objective intent to assert custody over a person, or to confine the person, was required for any form of 'arrest,' the requisite intent to restrain is present only when the force applied objectively aims at detaining or confining the person. It follows that an application of force with an objective intent merely to *disperse* or *exclude* persons from an area—and *without* any measures objectively aimed at detaining or confining them in the process—does not involve the necessary 'intent to *restrain*' that might give rise to a 'seizure.'. . . With these principles in mind, we conclude that Plaintiffs failed to produce sufficient evidence to establish that, in the course of attempting to disperse and exclude class members from the Free Speech Zone, the Defendant officers' application of force through the use of various diffusely-applied airborne irritants involved measures that objectively aimed at *detaining* or *confining* them, even temporarily. . . . In nonetheless arguing that the Defendant officers here effectuated a seizure, Plaintiffs rely on a variety of clearly distinguishable cases, all of which involved scenarios where the defendant officers *did* detain or confine persons, even if only briefly, or applied force objectively aimed at restraint or confinement in the course of attempting to disperse them. . . . Because the record shows that the Defendant officers' use of airborne irritants here was not objectively aimed at restraining the class members, even temporarily, there was no 'seizure' of the class members within the meaning of the Fourth Amendment. . .Having found that the class's excessive-force claims arose 'outside the context of a seizure,' we evaluate those claims under the Fourteenth Amendment 'shocks-the-conscience test.'. . .We conclude that the situation in this case is one that escalated quickly, requiring officers to respond promptly without 'the luxury ... of having time to make unhurried judgments.'. . It is therefore governed by the 'purpose to harm' standard. . . . Because the Fourteenth Amendment's 'purpose to harm' standard (rather than the Fourth Amendment's reasonableness standard) governs the Defendant officers' use of chemical irritants and flash-bangs against the class members, and because there is no triable issue of such a purpose to harm, the district court correctly granted summary judgment against the class on its claims of excessive force in violation of the Fourth and Fourteenth Amendments.")

Puente v. City of Phoenix, 123 F.4th 1035, 1057-62 (9th Cir. 2024) ("To the extent that these Plaintiffs' individual excessive-force claims overlap with the class's claims, our earlier analysis governs as well, and those claims fail at the first prong of the qualified immunity analysis. However, each of these three Plaintiffs' situations differs from the class claims in that each of them individually experienced a direct physical impact from a munition fired by a PPD officer. Our earlier analysis finding no 'seizure' with respect to the class claims therefore does not carry over to these Plaintiffs' individual claims based on such physical impacts. However, we need not resolve whether these individual Plaintiffs experienced a temporary 'seizure' when they were directly impacted by physical objects that were potentially momentarily disabling. . . Even assuming that they were, we conclude that, based on the undisputed facts, the Defendant officers were entitled to qualified immunity because they acted reasonably under the circumstances or violated no clearly established law. . . .Examining the totality of the circumstances, we conclude that, as a matter of law, Defendants' use of intermediate force against Yedlin was a reasonable response that was 'commensurate[ ]' to the PPD's strong interest in avoiding any breach of the

fence. . . Consequently, Yedlin's Fourth and Fourteenth Amendment rights were not violated. We therefore conclude that the relevant individual Defendants were entitled to qualified immunity on Yedlin's claim and that the district court erred in concluding otherwise. . . .We conclude that Defendants' use of force against Travis was objectively reasonable. As with Yedlin, Travis's actual injuries were nowhere near as serious as those in *Nelson,* and we view the force deployed against her as intermediate. . . Like Yedlin, Travis was not being arrested and was not resisting arrest. However, unlike Yedlin's situation, Travis was struck after she remained in the area in clear disregard of the repeated announcement that an unlawful assembly had been declared and after multiple orders to disperse had been issued. . . . Viewing all of the circumstances in context, the repeated applications of force made by the advancing officers, including the particular blast that impacted Travis, were reasonable measures to accomplish the PPD's substantial interests in public safety. . . But even if we were to assume that the Defendant officers violated Travis's Fourth Amendment rights, they are nevertheless entitled to qualified immunity because the relevant right asserted by Travis was not clearly established. . . . Here, Plaintiffs do not cite any case that could have 'clearly establish[ed]' that Defendants' use of force against Travis was objectively unreasonable. . . . And this is plainly not an 'obvious' case in which every reasonable officer would have recognized that the Defendant officers' conduct was unlawful. For these reasons, we conclude that the district court erred in failing to grant summary judgment, on qualified immunity grounds, to the relevant individual Defendants with respect to Travis's excessive-force claims. . . . Viewing the record in the light most favorable to Guillen, the PPD's use of force against her constituted a seizure, and we conclude that there is a triable issue as to whether that use of force was objectively unreasonable. There are a number of features surrounding the particular use of force that struck Guillen that distinguish it from the uses of force against Yedlin and Travis. In particular, in contrast to Travis's situation, the video evidence does not show any obviously unlawful or threatening conduct occurring in Guillen's immediate vicinity prior to the relevant Defendants' use of force. Nor did Guillen engage in any personal conduct, as Yedlin had done, that itself presented a risk to public safety. Guillen was also not disobeying any orders—at the time, no announcement of an unlawful assembly had been made, and the video evidence indicates that she was confused as to what she was supposed to do. But in the absence of the sort of factors we noted with respect to Yedlin and Travis, we conclude that, even if Guillen *had* 'heard and was in non-compliance with the officers' orders to disperse, this single act of non-compliance, without any attempt to threaten the officers or place them at risk,' would not make reasonable the particular use of chemical projectiles against her, causing the moderately serious injuries she experienced. . . Nonetheless, we conclude that *Nelson* is 'materially distinguishable' in several respects and that it therefore did not 'clearly establish' that the relevant Defendants' actions violated Guillen's rights. . . . Because no precedent '"squarely governs"' the specific facts at issue' and because this is not an 'obvious case,'. . . we conclude that the relevant Defendants are entitled to qualified immunity with respect to the force used against Guillen. Accordingly, on that basis, we reverse the district court's denial of summary judgment to the relevant individual Defendants.")

Sanderlin v. Dwyer, 116 F.4th 905, 912-13 (9th Cir. 2024) ("Here, Panighetti intentionally used physical force by directly firing a foam baton round at Sanderlin. According to Sanderlin's

declaration, after he was struck with the foam baton, he fell to the ground unable to move. The video footage from Panighetti's body camera provides some corroboration for this claim, as Sanderlin can be seen staggering from the impact, unable to stand or walk properly. In other words, Panighetti intentionally applied physical force, and as a result, Sanderlin's 'freedom of movement [was] restrained.'. . Viewing the evidence in the light most favorable to Sanderlin, we conclude that a reasonable factfinder could determine that he was seized within the meaning of the Fourth Amendment. . . The fact that Panighetti's incapacitation of Sanderlin may have been limited in duration does not alter this conclusion, because a 'meaningful interference' with an individual's freedom of movement, even if brief, constitutes a seizure. . . Nor is it relevant that Sanderlin was ultimately able to walk away, because 'the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.'. . Panighetti argues that he could not have seized Sanderlin because his actual intent in firing the foam baton was to force him to leave the area, not to restrain Sanderlin or apprehend him. Panighetti is correct that under the Supreme Court's recent decision in *Torres*, '[a] seizure requires the use of force *with intent to restrain.*'. . But *Torres* is equally clear that our inquiry centers on 'whether the challenged conduct *objectively* manifests an intent to restrain.'. . Viewing the facts in the light most favorable to Sanderlin, we conclude that a reasonable factfinder could find that Panighetti *objectively* manifested an intent to restrain Sanderlin and prevent Sanderlin from freely walking away. Record evidence suggests that the 40mm launcher that Panighetti used is chiefly designed, intended, and used for the purpose of incapacitating its target—and there can be no reasonable dispute that 'incapacitating' an individual by firing a projectile at them is an act that 'meaningful[ly] interfere[es]' with their freedom of movement. . . .A reasonable trier of fact viewing this evidence could conclude that by firing a 40mm projectile at Sanderlin's groin, Panighetti objectively manifested an intent to restrain Sanderlin. Whether Panighetti may have subjectively intended to repel Sanderlin rather than restrain him is irrelevant to the analysis. We therefore conclude that Panighetti's act of firing a projectile at Sanderlin constituted a seizure under the Fourth Amendment.")

Cuevas v. City of Tulare, 107 F.4th 894, 899 (9th Cir. 2024) ("[W]hen a person is pulled over by the police, that person is seized because she complied with a show of authority. Passengers in the car are seized together with the driver. . . In 2021, we held that, as of 2016, it was established 'that a passenger struck by a bullet intended to stop the driver of a vehicle' has been seized. *Villanueva v. California*, 986 F.3d 1158, 1165 (9th Cir. 2021). Under these clearly established principles, the officers seized Castro. True, Castro was not seized when he first got stuck in the mud. His repeated attempts to flee suggest that he did not consider himself restrained and belie that he submitted to the officers. But there are multiple points at which Castro—and therefore Cuevas—was seized after he became stuck in the mud. The exact point at which the seizure occurred is less important. Castro was seized, at the very least, when K-9 Officer Garcia put Bane through the broken window instructing him to bite Castro. This was a use of force. So too were the shots that the officers fired at Castro after he shot Bane and his handler. . . Since Cuevas was Castro's passenger, she too was seized. The district court's contrary conclusion was incorrect.")

Cullinan v. City of Los Angeles, 752 F. Supp. 3d 1180, 1184 (C.D. Cal. 2024) ("Here, Defendants concede that Officer Hunter's use of the 40 mm launcher was 'intended to prevent [another individual] from harming the officers and other protestors.' Defendants do not argue that Officer Hunter did not intend to seize *someone*—only that he did not intend to seize Plaintiff. But case law is clear that so long as Officer Hunter intentionally deployed the 40 mm launcher and the 'intent conveyed' was to restrain a person's movement (*see Villanueva*, 986 F.3d at 1166), his actions constitute a seizure. ")

Baca v. Anderson, No. 22-CV-02461-WHO, 2024 WL 2868145, at *8 (N.D. Cal. June 6, 2024) ("Defendants argue that no seizure occurred because Anderson's baton strike was a mere attempt to repel and push Baca back from the police line. They point to Anderson's deposition testimony that at the time he used his baton, he did not intend to seize or arrest Baca but was acting to protect Simonini. . . Anderson's subjective intent is irrelevant, however. The question is whether Anderson's conduct 'objectively manifests and intent to restrain.'. .Baca argues that the slightest use of force can constitute a seizure. . . He contends that in addition to the baton strike, additional objective evidence of an intent to seize is that Anderson did not object to and simply watched the other officers drag Baca behind the line and then attempt to subdue and bring him down to the ground after the baton hit. Baca also argues that he was not free to leave or given the opportunity to move back from the police line after the baton strike. Once the baton strike occurred, however, it is undisputed that Baca grabbed the baton and made a fist. Seeing that conduct (which we assume was involuntary, construing the evidence in the light most favorable to Baca), Simonini was objectively justified in moving to seize Baca. That Anderson, at that point, did not attempt to disrupt the seizure is irrelevant. The only point of possibly unreasonable seizure then is the initial baton strike. Viewing the evidence in the light most favorable to Baca, and considering that the 'back up' warning given by an officer (perhaps Anderson) occurred at essentially the same time as the baton strike, the question remains whether the baton strike was aimed at and hit Baca on his head or neck, as Baca contends. For the same reasons that summary judgment cannot be granted to Anderson on the excessive force claim, it cannot be granted based on the unlawful seizure claim.")

Cheairs v. City of Seattle, No. 2:21-CV-01343-LK, 2024 WL 1765663, at *12 (W.D. Wash. Apr. 24, 2024) ("The undisputed facts are as follows. As violence directed at the police from protestors escalated, . . . the SPD 'broadcast messages to try and move the crow[d]s' away from the area. . . Although Cheairs heard an order to disperse and had ample time to comply, he chose not to do so. . . After Captain Brooks issued an order to deploy OC blast balls, Officer Anderson threw four blast balls from behind a line of other officers without any concomitant effort to apprehend or otherwise restrain any member of the crowd, including Cheairs. . . In his use of force report, Officer Anderson stated that he deployed the blast balls to create space between the police line and protestors and cause people to leave the area in accordance with the dispersal orders. . . Unlike the plaintiff in *Nelson v. City of Davis*, . . . Cheairs was not immobilized after one of these blast balls ricocheted and hit him[.] . . Indeed, he does not dispute the City's contention that his freedom of movement was not restricted by Officer Anderson's use of force. . . Furthermore, Cheairs was not

stopped or arrested by any officer. . . These undisputed facts do not objectively manifest an intent to restrain. Rather, they are entirely consistent with an intent to prompt the crowd to leave without attempting to apprehend or otherwise restrain anyone. Therefore, Cheairs has failed to rebut the City's showing that no seizure occurred.")

Johnson v. City of San Jose, No. 21-CV-01849-BLF, 2023 WL 7513670, at *8–10 (N.D. Cal. Nov. 13, 2023) ("First, Defendants argue that the undisputed evidence shows that even if Officer Adgar fired a projectile that struck Mr. Johnson, such conduct 'was plainly an accident,' so that Mr. Johnson was not seized within the meaning of the Fourth Amendment. . . That is, Defendants contend that each PIW fired by Officer Adgar on May 30, 2020 was intended to restrain one of three specific individuals who had thrown a glass bottle at police officers—thereby excluding Mr. Johnson, who did not throw any object at the officers—so that Mr. Johnson was in effect a bystander inadvertently harmed during the attempted seizure of a third party. . . Mr. Johnson counters that Officer Adgar seized him within the meaning of the Fourth Amendment, regardless of whether he was the deliberate object of Officer Adgar's force, because Officer Adgar volitionally fired 40mm PIWs at undifferentiated individuals in the crowd and struck Mr. Johnson. . . Defendants respond that *Nelson* is inapposite because the court there held that the plaintiff was intentionally seized under the Fourth Amendment where officers intentionally fired at the plaintiff as one member of the group against which they intended to use undifferentiated force, which is a separate issue from the question of 'whether the *accidental* striking of a person while targeting a *different suspect* can constitute a seizure.'. . .Defendants argued at the hearing on this Motion that the only—and therefore undisputed—evidence of Officer Adgar's intent is Officer Adgar's police report, which indicates that Officer Adgar fired each of his 40mm PIWs at one of three specific individuals he believed had thrown glass bottles at police officers. . . However, as noted in the Opposition, 'the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context.'. . Accordingly, the evidence of Officer Adgar's intent therefore also includes the video evidence on record, as well as expert analyses of that video evidence. The evidence before the Court on the question of whether Mr. Johnson was intentionally seized under the *Nelson* framework—*i.e.*, as a member of a crowd at which Officer Adgar fired without aiming at a specific target other than Mr. Johnson—is as follows. [court reviews evidence] Viewing this evidence in the light most favorable to Mr. Johnson, as the nonmoving party, the Court finds that a rational jury could conclude that Officer Adgar struck Mr. Johnson with a 40mm PIW after firing into the crowd without a specific target, and thereby seized Mr. Johnson within the meaning of the Fourth Amendment. The Court will therefore deny Defendants' Motion on this ground. . . . Defendants next argue that Mr. Johnson's own allegations and theory establish that Officer Adgar did not display the requisite objective intent to restrain because Officer Adgar's actions 'objectively evinced the opposite: an intent to repel assaultive suspects and deter them from remaining in the area.'. . . The Court . . . finds that Mr. Johnson's allegations are sufficient to support a theory of seizure under *Nelson*. . . Under *Nelson*, to establish a seizure, Mr. Johnson must prove that he was subject to an intentional application of force evincing an objective intent to restrain, regardless of whether Officer Adgar subjectively intended to repel him and whether he

was in fact subdued or restrained. . . . Drawing all inferences in favor of Mr. Johnson on this motion for summary judgment, the Court finds that this evidence is sufficient to create a disputed issue of fact as to whether a reasonable person would find that Officer Adgar objectively intended to restrain Mr. Johnson by firing at him.")

Hawatmeh v. City of Henderson, No. 222CV01786APGDJA, 2023 WL 5796641, at *4–5 (D. Nev. Sept. 6, 2023) ("The Hawatmehs first argue that Joseph was seized when HPD officers surrounded the Escalade, citing the many officers in the area and the mention of stop sticks to immobilize the vehicle. But that argument is predicated on the idea that officers seized the Escalade's occupants by acquisition of control, and 'actual control is a necessary element for this type of seizure.'. . Bourne, not the officers, had actual control of Joseph in the Escalade. The 911 call transcript reflects Bourne telling Joseph what to say and do, pointing a gun at him, and threatening to shoot him in the head. . . A seizure by control requires 'that a person be stopped by the very instrumentality set in motion ... to achieve that result.'. . The complaint does not allege that the stop sticks or any other mechanism stopped the vehicle, nor is it clear how 'surrounded' the Escalade was. . . And for seizures by control, a 'show of authority' without a corresponding termination of freedom of movement is not a seizure. . . Nor could Joseph have been seized through voluntary submission to a show of authority. A person is seized after an intentional show of authority when 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'. . Joseph would have believed he was not free to leave because of Bourne, not because of the officers there to rescue him. Joseph was not seized when officers surrounded the vehicle. The Hawatmehs next argue Joseph was seized when officers shot him. They argue a 'seizure occurs even when an unintended person or thing is the object of the detention or taking,' so long as the taking is 'willful.'. . Because officers willfully fired on the Escalade, the Hawatmehs argue, officers seized Joseph when they shot him even if they did not mean to shoot him specifically. But because officers intended to seize Bourne, not Joseph or the vehicle, Joseph was not seized under the Fourth Amendment. A seizure by force requires 'the use of force *with intent to restrain*. Accidental force will not qualify.' [citing *Torres*] 'Nor will force intentionally applied for some other purpose satisfy this rule.'. . The question is therefore not whether officers used intentional force, but rather whether they used force 'with intent to restrain.'. . An officer who intentionally fires at a suspect but hits an innocent bystander does not seize the bystander, because the bystander was not the intended object of the force. . . By contrast, an officer who intentionally fires at a victim they mistook for a suspect has seized the victim, because the victim was the intended object of the officer's force. . . And an officer who intentionally shoots at a group of students and hits one has seized the student, even if the officer did not intend to seize that specific student, because the officer intended to apply force to the group. *Nelson v. City of Davis*, 685 F.3d 867, 877 (9th Cir. 2012). Finally, officers who intentionally shoot at a truck slowly moving towards them seize the truck's passenger, even if they are unaware of the passenger's presence, because they intentionally fired at the truck to stop its movement. *Villanueva*, 986 F.3d at 1167-69. These cases make clear that the force required for a Fourth Amendment seizure is not just force intentionally applied, but rather force intentionally applied to the target that officers sought to restrain. Joseph was not seized when he was shot because unlike in *Villanueva*, where

officers intended to restrain the truck (and incidentally anyone in it), or *Nelson*, where officers intended to restrain the group (and incidentally anyone in it), officers shot at the Escalade exclusively to restrain Bourne. The complaint indicates Bourne put a gun to Joseph's head and then officers fired. While it states that officers on scene failed to deescalate the situation or communicate with other officers to prevent contagious gunfire, it does not allege facts indicating an intent to restrain anyone or anything other than Bourne. . . The Hawatmehs also argue that after Bourne was initially shot, Joseph became a passenger, not a hostage, and per *Villanueva*, a passenger shot when officers attempt to stop a vehicle is seized. . . But as discussed, officers were trying to stop Bourne, not the vehicle, and *Villanueva* itself distinguishes 'the very different situation where the passenger was also a hostage and the officers were trying to rescue the passenger, not arrest him.'. . The great weight of authority indicates a hostage accidentally injured by police force aimed at their captor is not seized within the meaning of the Fourth Amendment. *See, e.g.*, *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795 (1st Cir. 1990); *Medeiros v. O'Connell*, 150 F.3d 164, 168 (2d Cir. 1998); *Childress v. City of Arapaho*, 210 F.3d 1154, 1156-57 (10th Cir. 2000). Even viewing the allegations in the light most favorable to the plaintiffs, Joseph was neither seized when officers surrounded the Escalade nor when he was shot. But even if he was seized, the officers would be entitled to qualified immunity. The Hawatmehs do not identify, nor can I find, clearly established law that a hostage in either circumstance is seized under the Fourth Amendment. To the extent the Hawatmehs contend that *Villanueva* clearly establishes that a hostage-passenger is seized when officers intentionally shoot at a vehicle such that every reasonable official would know their conduct was a Fourth Amendment seizure (a proposition with which I disagree), that proposition was not clearly established in November 2020. I therefore dismiss the excessive force claim asserted by Iehab as the appointed administrator of Joseph's estate with leave to amend. It does not appear there are facts under these circumstances that would plausibly allege a Fourth Amendment violation. Nevertheless, out of an abundance of caution, if Iehab as the appointed administrator of Joseph's estate can allege sufficient facts to state a claim, then I give him the opportunity to do so.")

Tuggle v. City of Tulare, No. 119CV01525JLTSAB, 2023 WL 4273900, at *15–16 (E.D. Cal. June 29, 2023) ("Cuevas argues that she was seized by the officers' 'intentional gunshots into the car.'. . She relies on, *Villanueva v. California*, 986 F.3d 1158 (9th Cir. 2021), to argue that when 'officers fired shots at the driver of a vehicle following a pursuit, killing the driver and injuring the passenger,' the passenger is also seized by those gunshots. . . In *Villanueva*, the Ninth Circuit held that a passenger injured by officers who shot at a vehicle while attempting to stop the vehicle from escaping have a cognizable Fourth Amendment claim. . . The Ninth Circuit explained that whether officers knew passengers were in the vehicle was irrelevant because the injured passenger was the 'subject to the Officers' "intentional action to stop the car"—and with it the "objectively manifested' restraint on his movement—whether the Officers knew he was a passenger when they fired or not.'. . Critically, however, the officers in *Villanueva* shot at the vehicle 'with the intent of stopping the Silverado from moving, effecting a traffic stop by force' and seizing all occupants of the car in the process. . . In this case, the officers shot at the vehicle not to stop it—it had already stopped when it skidded into the mud embankment—and after Castro had stopped his attempts to

escape the police. . . Then, Officer Bradley, Sgt. Garcia, and Officer Puente discharged their weapons in response to Castro shooting Officer Garcia and the K9. . . Even assuming the officers did not know precisely *who* was firing, the evidence shows they directed their shots at the shooter, whom they believed to be the driver, and not at the car in general. . . In contrast to *Villanueva*, instances where the police shoot at a vehicle to neutralize a safety threat posed by the driver, the officers do not intentionally seize the accidently injured passengers.");

TENTH CIRCUIT

Packard v. Budaj, 86 F.4th 859, 867, 869-70 (10th Cir. 2023) ("[Defendants] contend there is no evidence Plaintiffs were intentionally targeted. They explain less-lethal munitions are not implements of 'seizure,' but 'tool[s] to disperse crowds.'. . And they argue *Graham* is a framework ill-suited for protest cases like this, where 'it was a practical impossibility for the Aurora Officers here to assess an individualized threat in the circumstances presented to them.'. . But construing the evidence in the light most favorable to the Plaintiffs, the district court rejected these contentions. 'A reasonable juror,' the district court explained, 'could ... infer ... that Officer McNamee shot Mr. Packard intentionally, and Officer Budaj shot Mr. Duran intentionally.'. . We are bound by this inference and the facts supporting it. And based on this finding, we reject Defendants' suggestion that Messrs. Packard and Duran were simply unintended victims of an effort to disperse protesters. . . . Defendants resist the import of *Fogarty* and *Buck* by contending neither case involved plaintiffs shot while 'in the vicinity of other individuals against whom officers *were* justifiably using force.'. . Defendants suggest, then, that Messrs. Duran and Packard were *accidentally* shot based on their proximity to others. . . But as we have explained, the district court affirmatively found, based on the evidence properly construed in favor of the non-movant, that a reasonable jury could find the shootings here were *intentional*. Again, that view of the facts is not blatantly contradicted by the record, and we will not displace it. . . . By May of 2020, when the incidents here occurred, it had been clearly established for (at least) twelve years that the deployment of less-lethal munitions on an unthreatening protester who is neither committing a serious offense nor seeking to flee is unconstitutionally excessive force.")

Bjelland v. City and County of Denver, No. 1:22-CV-01338-SKC-SBP, 2024 WL 4165428, at *4-6 (D. Colo. Sept. 12, 2024) ("Defendants' primary argument with respect to Plaintiffs' Fourth Amendment claims is that Plaintiffs were not seized because the 'chemical agents or exploded pepper balls [ ] did not physically touch [them] and did not cause them to submit to any officer's authority.'. . Defendants also contend they are entitled to summary judgment because Plaintiffs cannot show any officer intentionally applied force to seize them. These arguments are not persuasive. . . . The Court can discern no logical reason why the use of chemical agents might constitute a use of physical force under the law when used on incarcerated persons, but not when used on peaceful protestors in the context alleged here. . . Thus, whether any 'physical' force was deployed in this case is at best a disputed issue of material fact. . . .A seizure by force. . . does not require control. Instead, it 'requires the use of force with intent to restrain,' as opposed to force applied by accident or for some other purpose. . . .The Court is persuaded that 'even absent an

arrest, the use of chemical spray and less-lethal projectiles can [ ] amount to a cognizable restraint under the Fourth Amendment where the clear effect of officers' use of pepper spray was to control plaintiffs' movement.'. . Here, there is evidence that nearly all the Plaintiffs came into physical contact with chemical agents that effectively restrained their freedom of movement and constituted more than a minimal intrusion on their bodily integrity. To be sure, many of the Plaintiffs were disoriented, momentarily blinded, and unable to breathe, while at least one was incapacitated completely. . . Thus, the Court is satisfied there is sufficient evidence for a reasonable jury to conclude Plaintiffs were seized within the meaning of the Fourth Amendment. Defendants also contend Plaintiffs cannot show any officer *intentionally* applied force to seize them. But this imposes a subjective standard on an otherwise objective inquiry. Courts 'rarely probe the subjective motivations of police officers in the Fourth Amendment context,'. . . and therefore, the question is whether 'the challenged conduct *objectively* manifests an intent to restrain.'. . But Defendants do not argue this legal standard. They instead argue an incorrect subjective standard on this claim. And because Defendants have not addressed the appropriate legal standard, the Court concludes they have failed to meet their burden. Consequently, their request for summary judgment on this basis is denied.")

Dayton v. City & County of Denver, Colorado, 649 F. Supp. 3d 1124, 1137 (D. Colo. 2023) ("Guided by *Torres*, this Court finds that the Complaint plausibly alleges a Fourth Amendment excessive force claim. The allegations show that Defendants John Does 1-4 'began advancing on the crowd' and one of them 'threw a flash-bang grenade directly at Mr. Dayton, who was still sitting in the middle of the crowd.'. . The flash-bang grenade 'struck Mr. Dayton directly in his left elbow' and exploded, searing Mr. Dayton's eyes.'. . The Complaint further alleges that flash-bang grenades 'are hand-thrown explosive devices that emit a bright flash and a loud noise' and which 'are designed to disorient' and 'can cause temporary blindness and deafness.'. . Applying the *Graham* factors, the Court finds that these allegations are sufficient to show that Defendants unreasonably seized Mr. Dayton by advancing on him and throwing a flash-bang grenade at him while he was peacefully sitting on the ground. . . Stated differently, Defendants' conduct 'objectively manifested an intent' to restrain and incapacitate Mr. Dayton while he was peacefully protesting. *Torres*, 141 S. Ct. at 999. As such, the Complaint plausibly states a Fourth Amendment claim.")

ELEVENTH CIRCUIT

Ratlieff v. City of Fort Lauderdale, 748 F.Supp.3d 1202, ____ (S.D. Fla. 2024) ("In opposition to summary judgment, Ratlieff dedicates little more than a page to defending her claim that there remains a genuine dispute of material fact as to whether she was unreasonably seized. . . In doing so, she largely rehashes the same argument this Court already rejected at the dismissal stage. . . Essentially, Ratlieff claims that, because the undisputed facts confirm she was tear gassed repeatedly and ultimately struck with an FLPD-deployed KIP that incapacitated her, her freedom of movement was therefore restricted by means intentionally applied and she was thus unreasonably seized within the ambit of the Fourth Amendment. . . Ratlieff's reprised argument is

equally unavailing. At the outset, the Court notes that Ratlieff has identified no new evidence during discovery that otherwise alters her original Fourth Amendment seizure theory, which the Court has already rejected. Order at 15–17. She has once again failed to demonstrate how FLPD's deployment of tear gas and KIPs 'objectively manifest[ed]' an intent to restrain her—as opposed to being accidental or intentional force applied for some other purpose. . . Ratlieff's § 1983 theory maintains that FLPD officers deployed tear gas and KIPs against peaceful demonstrators without a dispersal order and with the specific intention to unlawfully disperse them for voicing anti-police-brutality views. . . But under Ratlieff's unlawful-dispersal theory, FLPD's deployment of tear gas and KIPs amount to intentional force applied *for some other purpose*. . . Ratlieff's Fourth Amendment claims thus fail the objective-intent-to-restrain test under *Torres*—a conclusion similarly reached by other courts. [collecting cases] . . . .Thus, after considering the parties' arguments and the undisputed facts, including the parties' video evidence, the Court concludes that Ratlieff has failed to create a genuine dispute of material fact as to whether she was unreasonably seized. . . Accordingly, Ratlieff's Fourth Amendment claims fail as a matter of law. Defendants are entitled to summary judgment on Count VIII. . . . In Counts V and VI, Ratlieff advances a § 1983 claim against all individual Defendants and the City, respectively, for violations of her substantive due process rights under a non-custodial excessive force theory. . . . [T]he Eleventh Circuit has recognized 'that under some circumstances, an individual not actually seized by an officer may have a Fourteenth Amendment substantive due process right to be free from excessive force used on them by the officer.'. . To establish a substantive due process violation based on excessive force in a non-custodial setting such as this, the standard is the same: '[a] [p]laintiff must allege facts showing the [defendant's] conduct was "arbitrary or conscience-shocking."'. . . As noted above, there is no genuine dispute of material fact that Ratlieff was not subjected to a seizure within the meaning of the Fourth Amendment on May 31, 2020. Accordingly, in order for her substantive due process claims based upon excessive force to survive summary judgment, Ratlieff must identify a genuine dispute of material fact that Defendants' conduct was 'arbitrary or conscience-shocking, in a constitutional sense.'. . She has not done so.")

See also ***Plumhoff v. Rickard***, 134 S. Ct. 2012, 2022 n.4 (2014) ("There seems to be some disagreement among lower courts as to whether a passenger in Allen's situation can recover under a Fourth Amendment theory. Compare *Vaughan v. Cox,* 343 F.3d 1323 (C.A.11 2003) (suggesting yes), and *Fisher v. Memphis,* 234 F.3d 312 (C.A.6 2000) (same), with *Milstead v. Kibler*, 243 F.3d 157 (C.A.4 2001) (suggesting no), and *Landol–Rivera v. Cruz Cosme,* 906 F.2d 791 (C.A.1 1990) (same). We express no view on this question. We also note that in *County of Sacramento v. Lewis,* 523 U.S. 833, 836, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), the Court held that a passenger killed as a result of a police chase could recover under a substantive due process theory only if the officer had 'a purpose to cause harm unrelated to the legitimate object of arrest.'"); ***Mahdi v. Salt Lake Police Dep't***, 54 F.4th 1232, 1236-39 (10th Cir. 2022) ("In cases of alleged excessive force by a state actor, we use two different standards to apply the shocks-the-conscience test. Selection of the appropriate standard turns on whether the state actor had time to deliberate before engaging in the complained-of conduct. When the state actor has the opportunity 'to engage in actual deliberation, conduct that shows deliberate indifference to a person's life or security will shock the

conscience[.]'. . But if there is no such opportunity, conduct will shock the conscience only if it is done with the intent to harm the injured party. . . Mr. Mahdi proposes that we apply the deliberate-indifference standard in his case. We disagree. *Time to engage in actual deliberation* means time to *really* deliberate. *Actual deliberation* means 'more than having a few seconds to think.'. . It 'do[es] not mean "deliberation" in the narrow, technical sense in which it has sometimes been used in traditional homicide law.'. . Rather, it implies 'the luxury ... of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations.'. . Thus, there are two elements to the requisite deliberation. The first is time—time for 'unhurried judgments' and 'repeated reflection.' The other is the opportunity for attention—with no substantial 'pulls of competing obligations.' In other words, the intent-to-harm standard 'is not limited to situations calling for split-second reactions'; instead, it applies more broadly to scenarios where state actors make decisions 'in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation.'. . . [W]e apply the intent-to-harm standard to resolve substantive-due-process issues arising from police motor-vehicle pursuits. . . There may be police-chase cases in which the deliberate-indifference standard applies—and we do not rule out the possibility—but we are aware of none. . . . The officers' decision to open fire following the crash was a direct response to the circumstances they faced at that particular moment. They had only one or two seconds after arriving on scene to act and, as a matter of law, two seconds is inadequate for 'unhurried judgments [and] repeated reflection.'. . As for supervisors at headquarters, they may not be burdened by the moment-to-moment decisionmaking necessary while engaged in the pursuit; but they would be burdened by the lack of reliable information concerning ongoing events and the locations of the officers under their command. They, too, could not anticipate how the chase would end or create a decision tree addressing all reasonably possible scenarios, much less communicate it to over 15 officers engaged in the pursuit. . . . We do not foreclose the possibility that in some exceptional circumstances (shooting at someone in a parade?) an innocent bystander inadvertently harmed by force directed at a suspect could have a cause of action under § 1983. But this is certainly not one of them. . . . We conclude that Mr. Mahdi was required to, but did not, allege that the officers intended to harm him. Therefore, neither his first nor his second amended complaint states a claim of a violation of his substantive-due-process rights."); ***Pearce v. Doe***, 849 F. App'x 472, ___ (5th Cir. 2021) ("Here, the only plausible reading of the allegations is that Doe accidentally shot Ulises while trying to help him by ending the hostage situation. Such accidental conduct does not result in a Fourth Amendment seizure. . . As a result, Plaintiffs have not alleged a violation of the Fourth Amendment. And even if *arguendo* Plaintiffs could allege a violation of the Fourth Amendment, . . . they have not come close to doing so in a way that overcomes Agent Doe's qualified immunity."); ***Villanueva v. California***, 986 F.3d 1158, 1167-69 (9th Cir. 2021) ("Here, the Officers shot at Villanueva and the Silverado with the intent of stopping the Silverado from moving, effecting a traffic stop by force and seizing Orozco in the process, just as the *Brower* roadblock would have constituted a seizure of the driver, as well as of any passengers in the car. . . Thus, Orozco was seized under clearly established law as soon as the Officers intentionally fired at the Silverado to effect the stop. The Officers also dispute that they knew Orozco was in the Silverado. But under *Brendlin*'s logic, it is irrelevant whether they knew any

passengers were in the car, because they stopped the car and all its possible occupants when they shot at it. Here, Orozco was subject to the Officers' 'intentional action to stop the car'—and with it the 'objectively manifested' restraint on his movement—whether the Officers knew he was a passenger when they fired or not. . . The Third Circuit agrees that *Brendlin* 'ma[kes] clear that an officer's knowledge of a passenger's presence in the vehicle is not dispositive' to the question of seizure 'so long as the detention is willful and not merely the consequence of an unknowing act.' *Davenport v. Borough of Homestead*, 870 F.3d 273, 279 (3d Cir. 2017) (internal quotation marks and citation omitted). Indeed, all of the other circuits that have addressed whether a passenger struck by a stray bullet aimed at the vehicle or driver has a cognizable Fourth Amendment claim agree with our conclusion that such a passenger does have a Fourth Amendment claim in these circumstances. The Third, Sixth, and Eleventh Circuits have all concluded that by intentionally stopping a vehicle, an officer subjects the vehicle's passenger to a Fourth Amendment seizure. *See Davenport*, 870 F.3d at 279 ("[A] passenger shot by an officer during the course of a vehicular pursuit may seek relief under the Fourth Amendment."); *Vaughan v. Cox*, 343 F.3d 1323, 1328 (11th Cir. 2003) ("[B]ecause he did not intend to shoot [the passenger], [the officer] contends that [the passenger] did not suffer a Fourth Amendment seizure. We disagree."); *Fisher v. City of Memphis*, 234 F.3d 312, 318–19 (6th Cir. 2000) ("By shooting at the driver of the moving car, [the officer] intended to stop the car, effectively seizing everyone inside, including the Plaintiff."); *see also Lytle v. Bexar Ctny., Tex.*, 560 F.3d 404, 410 (5th Cir. 2009) (no dispute that the passenger was " 'seized' within the meaning of the Fourth Amendment"). No other Circuit has addressed the question. The Officers cite cases from the First, Second, and Tenth Circuits, arguing for a contrary result, but those cases were all pre-*Brendlin*, and address the very different situation where the passenger was also a hostage and the officers were trying to rescue the passenger, not arrest him. *See Childress v. City of Arapaho*, 210 F.3d 1154, 1157 (10th Cir. 2000) ("The police officers in the instant case did not 'seize' plaintiffs within the meaning of the Fourth Amendment but rather made every effort to deliver them from unlawful abduction."); *Medeiros v. O'Connell*, 150 F.3d 164, 168 (2d Cir. 1998) ("[F]ar from seeking to restrain [the injured hostage's] freedom, the troopers' every effort was bent on delivering all the hostages from deadly peril."); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795 (1st Cir. 1990) ("A police officer's deliberate decision to shoot at a car containing a robber and a hostage *for the purpose of stopping the robber's flight* does not result in the sort of willful detention of the hostage that the Fourth Amendment was designed to govern."). . . Moreover, as of the time of the events here, we had already applied *Brendlin* and *Brower* to hold that a Fourth Amendment seizure occurred where the officers intentionally used force that injured an individual in a crowd. *Nelson v. City of Davis*, 685 F.3d 867, 876 (9th Cir. 2012). There, we concluded that Nelson was 'unquestionably seized under the Fourth Amendment,'. . . by officers who intentionally shot pepperballs into a large college party they wished to disperse, even though the officers did not specifically intend to target Nelson, who was hit in the eye with one of the projectiles[.] . .As here, we rejected the officers' argument that because Nelson was not individually the target of their use of force, his injury was unintentional and thus not in violation of the Fourth Amendment. . . . We therefore conclude that under *Brower*, *Brendlin*, and *Nelson*, because Orozco's freedom of movement was terminated when the Officers intentionally shot at the Silverado in which he was a passenger to stop its

movement, Orozco was seized within the meaning of the Fourth Amendment. It matters not whether the Officers intended to shoot Orozco or whether they even knew he was present as a passenger. Under clearly established precedent at the time, Orozco was seized."); ***Fagre v. Parks***, 985 F.3d 16, 22 n.2 (1st Cir. 2021) ("In *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990), we held that a hostage was not 'seized' within the meaning of the Fourth Amendment when a police officer shot the hostage while firing into a car containing both the hostage and a fleeing suspect). . . Fagre argues that *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007), requires us to revisit our holding in *Landol-Rivera* because *Brendlin* says that when a police officer intentionally stops a vehicle, the officer subjects all of the vehicle's occupants to a Fourth Amendment seizure. . . Because we hold that Trooper Parks's actions were objectively reasonable, we do not need to reach this issue."); ***Davenport v. Borough of Homestead***, 870 F.3d 273, 279 (3d Cir. 2017) ("The Supreme Court has 'express[ed] no view' on whether a passenger in Davenport's position may recover under a Fourth Amendment theory. *Plumhoff v. Rickard*, ––– U.S. ––––, 134 S.Ct. 2012, 2022 n.4, 188 L.Ed.2d 1056 (2014). And the federal appellate courts appear divided on the issue. [citing cases] Nevertheless, the majority of circuits have suggested that a passenger in Davenport's position may seek relief under the Fourth Amendment; those circuits that have suggested otherwise reached their decisions on this issue before the Supreme Court decided *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007). . . . Accordingly, even if the officers' intended application of force would have only incidentally seized Davenport, because her freedom of movement was terminated 'by the very instrumentality set in motion or put in place in order to achieve' Burris's and her detention, . . . there is no set of facts that precludes a finding of a Fourth Amendment seizure. Today we join the majority of circuits in holding that a passenger shot by an officer during the course of a vehicular pursuit may seek relief under the Fourth Amendment. Because Davenport may do so, the Fourth Amendment, 'not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'. . Consequently, the District Court erred in independently analyzing Davenport's Fourth and Fourteenth Amendment claims."); ***Nakagawa v. County of Maui***, No. 111CV00130DKWBMK, 2017 WL 1192209, at *1 (9th Cir. Mar. 31, 2017) (not reported) ("Because appellants admitted that the defendant officers intentionally directed their force towards the driver (and not towards the appellants, any passenger in the vehicle, or the vehicle in general), the district court concluded properly as a matter of law that no Fourth Amendment seizure occurred. Because no Fourth Amendment seizure occurred, appellants' Fourth Amendment claims fail as a matter of law."); ***Tubar v. Clift***, 286 F. App'x 348, 351 (9th Cir. 2008) ("Because both Morehouse and Tubar were suspects at the time that Clift shot at the vehicle, Clift's intent to stop the vehicle also constituted intent to seize both of them. Accordingly, we conclude that by shooting Tubar, Clift seized Tubar for purposes of the Fourth Amendment."); ***Fisher v. City of Memphis,*** 234 F.3d 312, 318, 319 (6th Cir. 2001) ("Here, Becton's car was the intended target of Defendant's intentionally applied exertion of force. By shooting at the driver of the moving car, he intended to stop the car, effectively seizing everyone inside, including the Plaintiff. Thus, because the Defendant 'seized' the Plaintiff by shooting at the car, the district court did not err in analyzing the Defendant's actions under the Fourth Amendment.").

See also ***Williamson v. Edgley***, No. 4:19-CV-00099-BLW, 2020 WL 6531010, at *6–7 (D. Idaho Nov. 4, 2020) ("The Ninth Circuit has not directly decided whether a passenger in a car struck by a bullet, fired at the vehicle by police, may pursue an excessive force claim under the Fourth Amendment, instead of a due process claim under the Fourteenth Amendment. However, the majority of circuits that have reached the issue have held that a passenger, in Williamson's position, may seek relief under the Fourth Amendment. *Davenport v. Borough of Homestead*, 870 F.3d 273, 279 (3d Cir. 2017) (collecting cases). The circuits that have held otherwise reached their decisions before *Brendlin v. California*, 551 U.S. 249 (2007) was decided. . . '[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.' *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). A person is 'seized' under the Fourth Amendment 'when [an] officer, by means of physical force or show of authority, terminates or restrains his freedom of movement, though means intentionally applied.' *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal quotations and citations omitted). Both the driver and passenger of a car are seized when police stop a car, and 'an unintended person may be the object of the detention, so long as the detention is willful and not merely the consequence of an unknowing act.'. . The Supreme Court in *Brendlin* held that what matters in determining whether a seizure has occurred is the 'intent [that] has been conveyed to the person confronted,' not the 'subjective intent' of the officer. . . In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the Court held that the plaintiff was seized when the car he was driving crashed into a roadblock officers had set to stop him. . . *Brendlin* explained that 'if the car had had another occupant, it would have made sense to hold that he too had been seized when the car collided with the roadblock,' rejecting the defendant's argument that 'for a specific occupant of the car to be seized he must be the motivating target of an officer's show of authority.'. .Likewise, in *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), the Ninth Circuit held that a student was seized when officers fired pepperballs at a group of partygoers, striking the student in the eye. Although the officers made no further contact with the student – he fell to the ground, heard officers pass by him, and then was transported to the hospital – the Court held that the officers' intentional act of firing pepperballs toward the crowd was sufficient 'intentional governmental force' to constitute a seizure. . . In *Nelson*, the Court contrasted intentional conduct with unintentional or accidental conduct of the officer. . . 'For an act to be unintentional, the governmental conduct must lack the element of volition; an absence of concern regarding the ultimate recipient of the government's use of force does not negate volition.'. . Here, the officers intentionally stopped Chacon's car, in which Williamson was a passenger. The officers knew that Williamson was in the car with Chacon. Williamson put her hands up, demonstrating her understanding that she was not free to leave. When Chacon started driving forward the officers intentionally fired at the vehicle, striking Williamson. . .The officers stated that it was their intent to fire at Chacon, or Chacon's general location, however even taking this as true, the officers' subjective intent is irrelevant. . . 'The intent that counts under the Fourth Amendment is the intent [that] has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized.'. .The Court therefore finds that Williamson was seized and may pursue her claims against the officers under the Fourth Amendment."); ***Littlejohn v. New Orleans City***, 493 F. Supp. 3d 509

(E.D. La. 2020) ("Littlejohn argues that C.K.'s position as the vehicle's passenger, rather than the driver, should influence this analysis. . . Specifically, she argues that C.K., as a passenger, 'had no role in the decision to flee or be pursued[.]'. . Assuming, as we must, that this is true, the police did not intentionally stop C.K. any more than they intentionally stopped B.W. That C.K.'s "flight" was not his choice but B.W.'s is tragic, but it does not change the legal analysis. The pursuing officers violated neither occupants' Fourth Amendment right to freedom from unreasonable seizure. . . The Court finds that plaintiff has failed to plausibly allege a violation of the Fourth Amendment protection against unreasonable seizure. Accordingly, the claim against the City based on same must be dismissed."); ***Mondragon v. City of Fremont***, No. 18-CV-01605-NC, 2020 WL 5106928, at *6 (N.D. Cal. Aug. 31, 2020) ("Defendants argue that Plaintiff's Fourth Amendment claims fail because in other cases where bystanders were accidentally shot by police officers, those shootings did not constitute a 'seizure' under the Fourth Amendment. . . Their argument is essentially that because officers were aiming at Rico Tiger and only accidentally shot Elena Mondragon, Elena was not 'the object of the detention or taking.'. . But Defendants miss the much more obvious seizure that clearly occurred in this case: the felony traffic stop. Here, the officers blocked the BMW into the cul-de-sac, turned on their lights and sirens, yelled at the BMW's driver to exit the vehicle, and tried to prevent the car from leaving using both their vehicles and their AR-15s. It is well established that a traffic stop is a seizure, and that such a seizure applies to all occupants of the vehicle. *Heien v. North Carolina*, 572 U.S. 54, 60 (2014); *Brendlin v. California*, 551 U.S. 249, 255–259 (2007). When the officers initiated the felony traffic stop on the BMW as Elena Mondragon sat in its front passenger seat, she was seized for purposes of the Fourth Amendment."); ***Ortiz on behalf of L.J. v. Mora***, No. 118CV00713JCHKRS, 2019 WL 6717184, at *6 n.4 (D.N.M. Dec. 10, 2019) ("The parties dispute whether Jim was 'seized' in the first place. Defendants say that Jim was the unintentional victim of Mora's otherwise intentional shooting at the Dodge. The majority of federal circuits have ruled that a passenger shot by an officer during the course of a vehicle chase is 'seized.' Apparently the Tenth Circuit has acknowledged, but not decided the issue. *See Carabajal*, 847 F.3d at 1212 (declining to address issue, and instead holding that qualified immunity shielded officer who fired his weapon at a car full of people because the law was unclearly established as to whether a passenger could be seized). But in *Carabajal*, the Tenth Circuit also suggested that if an officer reasonably seized the driver of a car, then it 'follows' that any seizure of a passenger is also reasonable. . . Thus, the starting point for the Court's analysis is whether Mora acted reasonably. If so, it follows that any seizure of Jim was reasonable."); ***M.J.L.H. v. City of Pasadena***, No. CV 18-3249-JFW(SSX), 2019 WL 2249545, at *9-10 (C.D. Cal. May 24, 2019) ("In *Plumhoff*, . . . the Supreme Court recognized a circuit split 'as to whether a passenger [in a shooting] ... can recover under a Fourth Amendment theory,' but declined to express a view on the issue. Although the Ninth Circuit has yet to address this issue in a published decision, the Ninth Circuit did address the issue in the unpublished decision of *Arruda ex rel. Arruda v. County of Los Angeles*, 373 Fed. Appx. 798 (9th Cir. 2010). In *Arruda*, an officer accidentally struck a fellow officer with a stray bullet when that officer was standing outside of the room where the shooting occurred. . . Because the injured officer was not the 'object' shot at by the officer, the Ninth Circuit held that there was no seizure under the Fourth Amendment. . . The Ninth Circuit in *Arruda* cited to *Landol–Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990),

where an officer who shot at a car to protect a hostage and unintentionally hit the hostage and the First Circuit held that there was no seizure of the hostage under the Fourth Amendment. . . In addition, in *Fletes v. City of San Diego*, 2015 WL 13326240 (S.D. Cal. Sep. 30, 2015), the district court applied *Arruda* and *Landol* in a case where officers shot at the driver of a car, fearing that he would run them over, and inadvertently hit the passenger. . . In deciding a motion for summary judgment, the district court held that the passenger was not seized because the officer who knew the passenger was in the car only shot at the driver, and other two officers were unaware of the passenger's presence. . . The Ninth Circuit subsequently affirmed the district court's decision in an unpublished opinion. *Fletes v. City of San Diego*, 687 Fed. Appx. 640 (9th Cir. 2017). Thus, the Court concludes, in light of *Arruda*, *Landol*, and *Fletes*, and the evidence that the Individual Defendants did not intentionally shoot at Strohm that Strohm was not seized under the Fourth Amendment. . . Although Strohm was not seized under the Fourth Amendment, the Supreme Court has held that where there has been no 'seizure' under the Fourth Amendment, a claim may proceed under the more general contours of the Fourteenth Amendment. . . . When viewed in the light most favorable to Plaintiffs, the undisputed facts in this case establish that Strohm's injuries were the direct result of the Individual Defendants' legitimate law enforcement objective and efforts and, therefore, the Individual Defendants' conduct does not shock the conscience. Accordingly, the Individual Defendants are entitled to summary judgment on Strohm's Fourteenth Amendment claim."); ***Hernandez v. Parker***, No. 217CV01218KRSGJF, 2018 WL 6441030, at *3–6 (D.N.M. Dec. 7, 2018) ("Under *Lewis*, the question is whether Sheriff Parker terminated Hernandez's 'freedom of movement through means intentionally applied.' In *Scott v. Harris*, the Supreme Court explained a botched PIT maneuver satisfied this standard. . . Drawing all reasonable inferences in the Estate's favor, Sheriff Parker attempted a PIT maneuver whereby his truck bumped the Lincoln to end the pursuit. Lopez described the end of the pursuit in that manner, and two witnesses testified that that Sheriff Parker bumped or pushed Hernandez's car with his patrol vehicle. Taking the Estate's contention that the bumping was intentional and designed to end the chase, that bumping action by Sheriff Parker amounts to a seizure of Hernandez under the Fourth Amendment. Hernandez's status a passenger, and arguably not the object of Sheriff Parker's use of force, does not change the analysis. While the Tenth Circuit has not spoken directly to this issue, . . . the Supreme Court held in *Brendlin v. California*, that a traffic stop seizes both the driver and any passenger. . . The Third Circuit has extended *Brendlin*'s logic to a passenger in a police-pursuit scenario that ended when a police officer fired into the fleeing car. *Davenport v. Borough of Homestead*, 870 F.3d 273, 279 (3d Cir. 2017). Although the court identified a circuit split as to whether a passenger is seized along with a driver, the court observed that 'those circuits that have suggested otherwise reached their decisions on this issue before the Supreme Court decided *Brendlin*[.]'. . . In line with *Brendlin* and *Davenport*, the Court concludes that the Fourth Amendment applies to the Estate's federal claims. . . . It is hard to see how *Scott*'s holding does not dictate the outcome in this case. Here, upon arrival at the motel and exiting his truck, Sheriff Parker observed Lopez and Hernandez in Hernandez's vehicle. It appeared that Hernandez was reaching for something while Lopez started the Lincoln. Although Sheriff Parker was dressed in a hoodie, Lieutenant Sanchez was in full uniform as the two stood on either side of the town car. Sheriff Parker and Lieutenant Sanchez drew their guns, but Lopez backed up and maneuvered

around Sheriff Parker's pickup, striking Sheriff Parker in the process, a felony under New Mexico law. . . Sheriff Parker, of course, pursued Lopez, at this point a fleeing suspect. It is true Sheriff Parker's duty vehicle was unmarked, but it was equipped with internal lights and sirens, which Sheriff Parker says he engaged. Lopez concedes he heard the siren. Nonetheless, Lopez did not stop, and a chase ensued that reached speeds of over 100 miles per hour. Lopez drove through residential neighborhoods, near schools and a university, and nearly collided with another vehicle, and ran stop signs. The pursuit terminated when Sheriff Parker employed a PIT or similar maneuver. Sheriff Parker's truck struck the Lincoln sending the Lincoln into the ditch and culminating in Hernandez's death. As in *Scott*, Lopez was the catalyst of entire chain of events. Viewed objectively, from Sheriff Parker's perspective, Lopez battered a police officer, intentionally placed himself, Hernandez, and the public in danger by fleeing and not stopping in response to sirens and lights, nearly colliding with a car, and running stop signs. As in *Scott*, it was reasonable to end the pursuit and the danger it posed by bumping the back of the sedan. Although Hernandez died, her rights under the Fourth Amendment were not violated. The Estate argues that Lopez thought he was being mugged because Sheriff Parker was in a hoodie. What Lopez thought, however is irrelevant to the governing, objective standard of reasonableness. . . Even if it was initially unclear to Lopez, Lieutenant Sanchez was in full uniform and Lopez concedes he heard the siren from Sheriff Parker's unmarked police truck. Lopez also made comments subsequent to the incident that he fled from the motel because he wanted to protect Hernandez from being charged for possession of drugs, which suggests he knew that Sheriff Parker was a law enforcement officer when he fled. . . The Estate also suggests Sheriff Parker had a duty to retreat from 'harm's way' but instead stood in front of the Lincoln where he could be hit. Putting aside the underlying assumption that Sheriff Parker would have had to know that Lopez would drive into him, Sheriff Parker's position directly in front of the car Lopez was driving is of no constitutional significance. The Estate points to no case law, and the Court could not find any, requiring Sheriff Parker to move out of the way. The Estate also insists Sheriff Parker did not know that Lopez intended to injure others and 'the Sheriff's own investigator [determined] bumping Mr. Lopez off the road was an inappropriate use of deadly force because of the circumstances surrounding the possible charges or crime committed didn't warrant deadly force.'. . The Fourth Amendment, however, does not require Sheriff Parker to divine Lopez's intentions at all. Instead, Sheriff Parker was required to examine the totality of the circumstances and use force that was objectively reasonable. It is undisputed that Lopez nearly struck another driver during the pursuit, drove at very high rates of speed in residential areas and near schools and a university, and ran stop signs. Protecting the public from further harm featured prominently in the Supreme Court's determination that the officer's PIT-like maneuver in *Scott* was reasonable under the Fourth Amendment. . . .The Estate's underlying assumption that Sheriff Parker should have simply stopped chasing Lopez and thereby ended the threat to Lopez, Hernandez, and the public does not withstand scrutiny. As the Supreme Court explained in *Scott*, 'there would have been no way to convey convincingly to [Lopez] that the chase was off, and that he was free to go.'. . . Additionally, requiring Sheriff Parker to capitulate would create obvious, 'perverse incentives' that a 'fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few

times, and runs a few red lights.'. . As did the Supreme Court in *Scott*, the Court here rejects the Estate's implication that Sheriff Parker was required to stop the chase and give up.")

Compare ***Johnson v. City of Ferguson, Missouri***, 926 F.3d 504, 505-07 (8th Cir. 2019) (en banc), *cert. denied*, 140 S. Ct. 553 (2019) ("We agree with the panel opinion's identification of the governing issue in this case: 'The crux of the motion to dismiss and this resulting appeal centers on the issue of whether there was a seizure. Johnson concedes that if there was no seizure virtually all of his claims fall away.'. . We disagree with the panel's ruling that a seizure occurred, and thus we hold that the district court erred in not granting the defendants' motion to dismiss based upon their claim of qualified immunity. Whatever one might say about Wilson's expletive-expressed directive that Brown and Johnson move from the street to the sidewalk, Johnson's complaint concedes that neither he nor Brown was ordered to stop and to remain in place. Johnson's decision to remain by Brown's side during Brown's altercation with Wilson rather than complying with Wilson's lawful command to return to the sidewalk was that of his own choosing. That he was able to leave the scene following the discharge of Wilson's weapon gives the lie to his argument that the placement of Wilson's vehicle prevented him from doing so. As was the case in *United States v. Hayden*, 759 F.3d 842, 847 (8th Cir. 2014), Wilson's police vehicle constituted no barrier to Johnson's ability to cross to the sidewalk. Any physical or weapon-related contact by Wilson was directed towards Brown alone in the first instance. . . . Because there was no verbal or physical impediment to Johnson's freedom of movement, there was no submission to authority on his part even in a metaphysical sense of the meaning of that word. Accordingly, in the absence of any intentional acquisition of physical control terminating Johnson's freedom of movement through means intentionally applied, as occurred in both *Brower v. County of Inyo* . . . and in *Tennessee v. Garner*, . . . we conclude that no seizure occurred in this case. . . .In light of our holding that no seizure and thus no constitutional violation occurred in this case, Johnson's claim of supervisory liability against Chief Jackson necessarily fails, as perforce does any claim of municipal liability against the City of Ferguson.") *with* ***Johnson v. City of Ferguson, Missouri***, 926 F.3d 504, 508-11(8th Cir. 2019) (en banc) (Melloy, J., with whom Smith, C.J., Kelly and Erickson, JJ., join, dissenting), *cert. denied*, 140 S. Ct. 553 (2019) ("Here, I believe that Officer Wilson made a show of authority communicating that Johnson 'was not at liberty to ignore the police presence and go about his business.' *Bostick*, 501 U.S. at 437, 111 S.Ct. 2382. As stated above, the only facts relevant at this procedural posture are those alleged in the complaint. And the Court must accept those facts as true and view them in the light most favorable to Johnson. . . .By crudely ordering Johnson to move and then abruptly reversing his vehicle and stopping it inches away and directly in Johnson's path, Officer Wilson communicated an intent to use a roadblock to stop Johnson's movement. Despite Defendants' (and amicus curiae's) argument that the roadblock did not foreclose *all* of Johnson's avenues of travel, a reasonable person would understand the roadblock's purpose was to serve as a 'physical obstacle' conveying an order to stop—not an order to go around the vehicle and continue on one's way. . . ..Officer Wilson's abrupt stopping of his vehicle inches away from Johnson, thereby creating a roadblock, coupled with the threat of using his service weapon, was a show of force communicating to a reasonable person the necessity to stop and not continue on one's way. . . . The majority seems to imply that Officer

Wilson's use of a weapon was directed at Brown only and that, while Brown may have been seized, Johnson was not. I do not believe the complaint can be parsed that finely. Both Brown and Johnson were walking together, Officer Wilson pulled his vehicle in front of both, both eventually fled, and Officer Wilson fired his weapon in the direction of both, striking and killing Brown but missing Johnson. In short, I do not believe that from the perspective of a reasonable person encountering Officer Wilson, it can be reasonably said Officer Wilson intended to seize Brown but not Johnson. If one of the two were seized, both were seized. One difficulty surrounding this issue is whether Johnson's 'submission to [the] show of governmental authority takes the form of passive acquiescence' that rises to the level of a submission to authority. . . The Supreme Court in *Brendlin* held that 'what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away.'. . There, the Court considered 'whether a traffic stop subjects a passenger,' who merely remained in the car throughout the traffic stop, 'to Fourth Amendment seizure.'. . The Court held that the passenger was seized. . . In so holding, the Court adopted a test for determining whether a claimant's passive acquiescence to a show of authority qualifies as submission to that show of authority: 'We resolve this question by asking whether a reasonable person in [the claimant's] position ... would have believed himself free to "terminate the encounter" between the police and himself.'. . .Johnson's stop was not passive acquiescence to a show of authority. For one, Johnson did take some action to actively acquiesce to Officer Wilson's show of authority: Johnson *stopped* walking. This is more than the passive acquiescence in *Brendlin* where the defendant, a passenger, merely remained in his seat as the driver pulled over the vehicle. . . Also, even assuming Johnson passively acquiesced to the show of authority by merely remaining throughout the encounter, 'a reasonable person in [Johnson's] position ... would [not] have believed himself free to "terminate the encounter" between the police and himself,'. . . for the reasons discussed above.").

13. Derivative Nature of Liability

In ***City of Los Angeles v. Heller***, 475 U.S. 796 (1986), the Court held that if there is no constitutional violation, there can be no liability on the part of the individual officer or the government body. "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Id*. at 799 (emphasis in original). To borrow an analogy from Judge Rosenn, where there is no "kick," neither the foot nor the head can be inculpated. ***Andrews v. City of Philadelphia***, 895 F.2d 1469, 1481 (3d Cir. 1990). *See also* ***Vasquez v. District of Columbia***, 110 F.4th 282, 289 (D.C. Cir. 2024) ("On appeal, Mr. Vasquez attacks two MPD policies: (1) its protocols for handling teletype messages and (2) its protocols (or lack thereof) for determining whether a person has been correctly identified as a fugitive from justice. In so doing, Mr. Vasquez attempts to make the general point that if MPD had better policies and protocols in place, Mr. Vasquez would not have been misidentified and wrongly detained. Maybe so. But municipalities are not liable under Section 1983 for all 'harm-causing ... policies,' and Mr. Vasquez does not cite to a single case that explains how MPD's alleged negligence is

unconstitutional. . . Thus, we reiterate one of *Lane*'s closing takeaways, it is 'inconceivable' that a municipality is liable under *Monell* where the plaintiff fails to show a 'predicate constitutional violation.'. . To the extent that Mr. Vasquez alleges that the District of Columbia violated the Fourth Amendment based on the actions of MPD officers, that argument is foreclosed by *Monell* itself: 'a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under [Section] 1983 on a *respondeat superior* theory.'"); ***Cohen as next friend of Cohen v. City of Portland***, 110 F.4th 400, 407-08 (1st Cir. 2024) ("A municipality is liable under 42 U.S.C. § 1983 'if [an] employee has not been adequately trained and [a] constitutional wrong has been caused by that failure to train.'. . Thus, a finding of municipal liability under a failure-to-train theory requires a predicate constitutional violation by an individual defendant. . . The municipality's liability must 'run through' the unconstitutional actions of its untrained employee. . . Here, the only employees that the estate says were untrained are Rand and Gervais. The estate notes that both officers were behind on their required annual crisis intervention training. And the estate argues that both officers violated Cohen's due process rights by failing to employ crisis intervention techniques to rescue him. Basically, in the estate's view, the City's failure to train those two officers caused Cohen's eventual death. . . As we have explained, the district court correctly dismissed the complaint against both officers. This meant that, at the summary judgment stage, there was no longer an individual defendant through whom municipal liability for allegedly deficient police training could 'run.'. . This fundamental defect dooms the estate's failure-to-train claim. We therefore affirm the district court's grant of summary judgment without analyzing its remaining reasoning.")

Compare ***Nichols v. Wayne County, Michigan***, 822 F. App'x 445, ___ n.4 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2716 (2021) ("It is an open question in this circuit 'whether a municipality's liability under § 1983 is predicated on first finding that an individual officer or employee is also liable.' *Rayfield*, 768 F. App'x at 511 n.12 (noting conflicts in our caselaw). We need not resolve this question here because we ultimately conclude that Nichols fails to state a claim under Rule 12(b)(6) on other grounds. We do note our confusion, however, at the ire this brief footnote draws from our dissenting colleague. *Rayfield* ably documented 'our unsettled precedent on this issue,'. . . and though the dissent strives to untangle our caselaw, we reiterate that we are not resolving the question here.") *with* ***Nichols v. Wayne County, Michigan***, 822 F. App'x 445, ___ (6th Cir. 2020) (Moore, J., dissenting in part), *cert. denied*, 141 S. Ct. 2716 (2021) ("[T]he majority states that '[i]t is an open question in this circuit "whether a municipality's liability under § 1983 is predicated on first finding that an individual officer or employee is also liable."'. . The majority's statement is erroneous, but it is true that several opinions issued after the first published one resolving this question have muddied the waters. Originally, we stated that 'it is possible that city officials may be entitled to qualified immunity for certain actions while the municipality may nevertheless be held liable for the same actions.'. . This scenario could arise if a municipal employee, acting pursuant to a municipal policy or custom, committed a constitutional violation, but escaped personal liability because the plaintiff's constitutional right was not clearly established at the time of the violation. But in *Winkler v. Madison County*, 893 F.3d 877 (6th Cir. 2018), the panel mistakenly said that our decision in *Watkins v. City of Battle Creek*, 273 F.3d 682

(6th Cir. 2001), 'broadly state[d] that the imposition of municipal liability is contingent on a finding of individual liability under § 1983.'. . Yet *Watkins* does not say this. It says only that '[i]f no *constitutional violation* by the individual defendants is established, the municipal defendants cannot be held liable under § 1983.'. . *Winkler*'s gloss on *Watkins* was plainly incompatible with our prior, published holdings—that the precondition for municipal liability is the presence of a constitutional violation, not a finding of individual liability. On this specific issue regarding municipal liability, there was no confusion until *Winkler* introduced it. Thus, citing to *Winkler*, we uttered the line that the majority now quotes: 'It is undecided whether a municipality's liability under § 1983 is predicated on first finding that an individual officer or employee is also liable.' *Rayfield*, 768 F. App'x at 511 n.12. It should be clear, by now, that this statement was in error. There is no 'open question in this circuit,'. . . about whether a plaintiff must first show individual liability in order to show municipal liability. Our controlling precedent says that there is no such requirement. . . Beyond the qualified-immunity escape hatch, there are still other instances in which a lack of individual liability will not foreclose a municipal-liability claim. As Judge Cole's thoughtful concurrence in *Epps v. Lauderdale County*, 45 F. App'x 332 (6th Cir. 2002), lays out, there are numerous ways in which municipalities themselves may be held responsible for constitutional violations, including when 'a government actor in good faith follows a faulty municipal policy,' when 'municipal liability is based on the actions of individual government actors other than those who are named as parties,' and when 'no one individual government actor ... violate[s] a victim's constitutional rights,' but the combined acts of a group of actors cause such a violation.")

See also ***Johnson v. City of Cheyenne***, 99 F.4th 1206, 1233 (10th Cir. 2024) ("We last turn to whether the district court erred in dismissing Mr. Johnson's § 1983 claims against the City of Cheyenne. Mr. Johnson 'asserts that the City's customs, or written policies or procedures (or lack thereof), regarding handling and disclosure of crime scene photos caused' the alleged violations of his constitutional rights under *Brady* and *Trombetta*/*Youngblood*. . . We cannot agree. 'A municipality may not be held liable where there was no underlying constitutional violation by any of its officers.'. . 'If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized [unconstitutional conduct] is quite beside the point.'. . Mr. Johnson has failed to demonstrate that Officer Spencer or Detective Stanford—or any other person within the Cheyenne Police Department for that matter—violated his constitutional rights. It therefore follows that his '§ 1983 municipal liability claim against the City necessarily fails.'. . Therefore, the district court correctly dismissed Mr. Johnson's § 1983 claim against the City of Cheyenne."); ***Teel v. Lozada***, 99 F.4th 1273, 1288 (11th Cir. 2024) ("At oral argument, . . . the Estate conceded that if we allow the jury's verdict to stand, the *Monell* claim necessarily fails under the first element. This concession is correct in light of controlling precedent. '[N]either *Monell* ..., nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm.' [citing cases] To be clear, when the district court granted summary judgment to the Sheriff after remand, it correctly refrained from granting judgment under the first element of *Monell*. At that time, we had determined on

appeal that there was a material dispute of fact as to whether there was an underlying constitutional violation. *See Teel I*, 826 F. App'x at 889. But now, the jury has spoken, finding that Deputy Lozada did not violate the Fourth Amendment by shooting Mrs. Teel. Because there is no underlying constitutional violation, '[w]e may affirm the judgment below on any ground supported by the record.'. . We thus affirm the district court's grant of summary judgment in favor of the Sheriff on the Estate's *Monell* claim based on the first element of *Monell*."); ***Smith-Dandridge v. Geanolous***, 97 F.4th 569, 579 (8th Cir. 2024) ("Smith-Dandridge must show that the deficient training caused WCDC defendants to be deliberately indifferent to Bell's substantial risk of suicide. . . The basis for the municipality's liability—here, failure to train—must be the 'moving force' that led to the alleged deprivation of a constitutional right. . . In this case, Smith-Dandridge's theory of municipal liability is 'entirely dependent on the [County's] responsibility for the [individual defendants'] alleged unconstitutional acts.'. . As a result, Smith-Dandridge's failure-to-train claim falls with the individual claims."); ***Grote v. Kenton County, Kentucky***, 85 F.4th 397, 414-16 (6th Cir. 2023) ("[W]e note that it is proper to consider possible constitutional violations committed by a municipality *qua* municipality, even in the absence of a showing of a constitutional violation by any one individual officer. In *City of Los Angeles v. Heller*, the Supreme Court stated that a damages award against a municipality is unwarranted 'based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm.'. . But we, as well as circuits across the country, have recognized that *Heller* does not preclude a finding of municipal liability even if no individual officer violated the Constitution where constitutional harm has nonetheless 'been inflicted upon the victim' and the municipality is responsible for that harm. [collecting cases] Our precedent has not been a model of consistency on this point. In *Winkler v. Madison County*, a panel, though considering the possibility of municipal liability despite no constitutional violations by individuals, raised the issue whether 'a municipality's liability under § 1983 is always contingent on a finding that an individual defendant is *liable* for having committed a constitutional violation.'. . This statement is imprecise; the potential for municipal liability notwithstanding an individual's lack of liability has always existed, as in cases when an individual officer receives qualified immunity. . . Instead, the question is whether a municipality may be liable when no individual has committed a constitutional *violation*. Moving past qualified immunity, there are still scenarios when no officer may have acted unconstitutionally, but the municipality has nonetheless inflicted constitutional harm on a victim. 'In many cases, a finding that no individual defendant violated the plaintiff's constitutional rights will also mean that the plaintiff has suffered no constitutional violation.'. . But, as here, when the constitutional harm complained of relates to lack of action due to a failure to train, the municipality may still be liable. . . Rightfully, the parties, as well as the district court, did not simply conclude that Kenton County is not liable despite the lack of a constitutional violation by any individual defendant. Applied here, Grote fails adequately to show that Kenton County is liable under *Monell*. As it relates to the 911 policy enshrined in the Policy and Procedures for the Kenton County Detention Center, Grote submits no evidence that Kenton County officials were inadequately trained on the policy or that they failed to follow the policy in this case. Instead, he appears to contend that the policy itself—which in the first instance directs officers to contact supervisors or medical staff in the event of an emergency—is unreasonable. . . But this argument shows neither

that the officers' training was inadequate for tasks that they needed to perform (tasks which, as the district court notes, Grote failed to identify), nor that the alleged inadequacy resulted from deliberate indifference. Moreover, because Grote relies on a failure-to-train theory and does not identify a pattern of similar constitutional violations, he can prove such deliberate indifference only by showing ' "a single violation of federal rights, accompanied by a showing that [Kenton County] has failed to train its employees to handle recurring situations presenting an obvious potential" for a constitutional violation.'. . Though Kenton County could certainly better prepare officers for situations in which not running medical emergencies up the chain is warranted, as in *Winkler* Grote does not explain how the officers' training was deficient or how such training would have made the possibility for a constitutional violation obvious. . . Finally, we previously noted that Grote erroneously directed a failure-to-train claim against Carl, when in actuality such claim is one for municipal liability. The premise of this claim is that officers did not receive adequate training on treating and recognizing drug overdoses. . . But here again, Grote runs into the same issues. The record appears muddled with respect to whether the individual Kenton County Defendants in fact received training related to substance abuse and overdose. . . . Grote, however, does not contest the Kenton County Defendants' argument (accepted by the district court), that officers were adequately trained in recognizing basic medical emergencies and seeking medical attention when necessary. Brown sought medical attention for Grote, although Brand failed to provide adequate care. Lack of overdose and drug-related training can certainly create municipal liability where, for instance, officers are principally responsible for handling medical care. . . But in circumstances like here, where officials are trained to recognize medical issues and have access to and do access medical providers, we have not held that a lack of more specific training with respect to medical issues presents an obvious risk of a constitutional violation. . . At least in this particular instance, holding otherwise would contradict the general (though limited) principle that officers may reasonably rely on a medical provider's opinion. . . There is a certain risk that finding no municipal liability in a case such as this one may appear to condone a municipality's practices. This should not be the message. This case lays bare myriad issues in our jails and prisons even if in this narrow instance they do not rise to a constitutional dimension for the Kenton County Defendants. Undoubtedly, people will continue to die or be seriously injured in our jails and prisons without better training and greater resources for staff. The municipal defendants in this case recognize that overdoses and other drug-related issues are rampant in our jails and prisons. But those same facilities appear woefully unprepared to handle such issues, at least to a degree that would prevent needless death. Under a different set of facts, a municipality may be constitutionally liable."); ***Colemon on behalf of Virgil v. City of Cincinnati***, No. 21-5968, 2023 WL 5095804 (6th Cir. Aug. 9, 2023) (not reported) ("Although Virgil continues to allege that Cincinnati is liable for violations of his rights by its officers, he has voluntarily dismissed his *Brady* claim against the individual officers themselves. Supreme Court and Sixth Circuit precedent holds that a constitutional *injury* is required to pursue a *Monell* claim. . . But '[i]t is undecided whether a municipality's liability under § 1983 is predicated on first finding that an individual officer or employee is also liable.'. . As we held in *Winkler v. Madison County*, municipalities 'may be held liable under § 1983 in certain cases where no individual liability is shown,' including when the municipality itself directly caused the violation, or the violation was caused by a combination of

government-sponsored conduct not easily traceable to one individual official, 'where municipal liability is based on the actions of individual government actors other than those who are named as parties'—a situation that would be functionally similar to Virgil's voluntary dismissal of the individual government actors here. . . Our Circuit has previously determined a defendant municipality's *Monell* liability by evaluating only a non-party's actions, suggesting that a party's liability is not required, as long as the court finds a constitutional violation occurred. . . But we need not decide whether a municipality's *Monell* liability is always contingent on finding an individual defendant liable for a constitutional violation. As explained below, even assuming that Virgil may proceed with his § 1983 claim against the City of Cincinnati without also suing the individual Cincinnati officers, he has not presented facts from which a jury could find that the officers violated his due process rights under *Brady*."); ***Baker v. City of Madison, Alabama***, 67 F.4th 1268, 1282 (11th Cir. 2023) ("Here, because there was no underlying constitutional violation, Baker's municipal liability claim against the City fails as a matter of law. "); ***Clugston v. City of Garden Grove***, No. 22-55203, 2023 WL 2400876, at *1 (9th Cir. Mar. 8, 2023) (not reported) ("Plaintiffs alleged the City failed to adequately train its police officers on the proper conduct of high-speed pursuits, allows pursuits for minor traffic violations, and failed to discipline officers who 'recklessly place innocent bystanders in harm's way by initiating unjustifiable high-speed pursuits.' In such cases hinging on an individual officer's conduct, the plaintiff must establish both a deprivation of a constitutional right and that a municipal policy, custom or practice was the cause in fact of that deprivation. . . As we explained in *Quintanilla v. City of Downey*, a public entity cannot be liable under § 1983 'under a policy that can cause constitutional deprivations, when the factfinder concludes that an individual officer, acting pursuant to the policy, inflicted no constitutional harm to the plaintiff.'. . We therefore agree with our sister circuits which have held in the specific context of police pursuits that there can be no municipal liability without an underlying constitutional violation by the officers. *See, e.g., Graves v. Thomas*, 450 F.3d 1215, 1225 (10th Cir. 2006); *Sitzes v. City of W. Memphis Ark.*, 606 F.3d 461, 470–71 (8th Cir. 2010); *Evans v. Avery*, 100 F.3d 1033, 1039–40 (1st Cir. 1996); *S.P. v. City of Takoma Park*, 134 F.3d 260, 272 (4th Cir. 1998); *Scott v. Clay Cnty.*, 205 F.3d 867, 879 (6th Cir. 2000). The district court correctly dismissed the claim against the City because there was no underlying constitutional violation by Officer Hadden."); ***Harmon v. City of Norman, Oklahoma***, 61 F.4th 779, 794-95 (10th Cir. 2023) ("Our precedent disposes of the demonstrators' failure-to-train claim. . . 'A municipality may not be held liable where there was no underlying constitutional violation by any of its officers.'. . As Robertson committed no constitutional violation, Norman cannot be liable for a purported failure to train. And even if the demonstrators could clear that hurdle, they'd immediately run into another one: nothing in the record establishes that Norman was deliberately indifferent. At best, the demonstrators point to inadequate First Amendment training for Norman police officers. That is not enough to show 'a pattern of tortious conduct' or an 'obvious potential for constitutional violations.'. . . Particularly on this enforcement record of § 15-503(3), we agree with the district court that the demonstrators' failure-to-train claim must fail."); ***Frey v. Town of Jackson, Wyoming***, 41 F.4th 1223, 1239 (10th Cir. 2022) ("The crux of a municipal-liability claim is that a municipal policy or custom caused the plaintiff to suffer a constitutional injury. . . Without a constitutional violation, Plaintiff has suffered no injury for which a municipality can be liable.

As explained above, Plaintiff's allegations reveal that Karnes had probable cause to arrest Plaintiff, meaning that the arrest did not violate the First or Fourth Amendments. Plaintiff also suffered no constitutional violation from Officer Karnes's search of his person incident to the arrest. Even if Plaintiff is correct that Jackson and the Airport have policies authorizing or requiring unconstitutional searches, the only search Plaintiff experienced was incident to a lawful arrest and therefore constitutional. Plaintiff alleged no constitutional injury. Finally, Plaintiff argues that the district court should not have dismissed his First Amendment retaliation claim arising from his detention at the Teton County Jail. Plaintiff claims that Jackson and Teton County have a policy or custom of prolonging detention for those who engage in protected speech—specifically, those who request legal counsel. But, as with his claims arising out of the arrest and search, Plaintiff did not plead a First Amendment violation because he failed to allege that probable cause did not support his detention or that jail officials treated him differently than similarly situated arrestees not engaged in the same speech. . . Thus, Plaintiff alleged no constitutional injury."); ***Doxtator v. O'Brien***, 39 F.4th 852, 864 (7th Cir. 2022) ("With respect to the *Monell* claim, 'a municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee.' *Sallenger v. City of Springfield, Ill.*, 630 F.3d 499, 504 (7th Cir. 2010). With respect to the failure-to-train claim, '[a] failure to train theory or a failure to institute a municipal policy theory requires a finding that the individual officers are liable on the underlying substantive claim.' *Tesch v. Cty. of Green Lake*, 157 F.3d 465, 477 (7th Cir. 1998). Because we affirm the dismissal of the § 1983 claim against O'Brien, we also affirm the dismissal of the failure-to-train and *Monell* claims against the City of Green Bay and Chief Smith."); ***Estate of Burgaz by & through Zommer v. Bd. of County Commissioners for Jefferson County, Colorado***, 30 F.4th 1181, 1190 (10th Cir. 2022) ("In other types of *Monell* claims, such as those alleging an unconstitutional policy or custom, plaintiffs need not demonstrate an individual officer committed a constitutional violation. Instead, 'the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights.'. . In situations where 'the municipal [customs] devolve[ ] responsibility across multiple officers,' the customs 'may be unconstitutional precisely because they fail to ensure that any single officer is positioned to prevent the constitutional violation.'. . Even so, the Estate's last remaining basis for its *Monell* claim—the sheriff's alleged custom of ignoring safety policy violations—also fails. The Estate argued that a *Monell* claim requires 'a municipal employee [have] committed a constitutional violation.'. . It failed to raise the argument that the combined actions of deputies can suffice for certain *Monell* claims. Because the Estate predicates its unconstitutional-custom claim on the existence of an individual constitutional violation, and no individual deputy committed a constitutional violation here, the claim fails. To be sure, the Estate could have argued that the deputies' combined actions or omissions somehow violated Ms. Burgaz's rights. . . But the Estate failed to do so, and instead only made the general allegation that '[Ms.] Burgaz would still be alive' had the sheriff 'actually enforced [the corrective] policies.'. . Thus, that argument is waived before this court. . .For those reasons, we conclude the dismissal of the *Monell* claim was proper."); ***Buckley v. Hennepin County***, 9 F.4th 757, 765 (8th Cir. 2021) ("Buckley alleges a *Monell* claim against Hennepin County, its hospitals, and all individual defendants. She argues these claims were improperly dismissed because she plausibly alleged that the paramedics violated

her constitutional rights by sedating her with ketamine, and those violations resulted from Hennepin County's ketamine policy. We agree with the district court that these claims must be dismissed because Buckley failed to establish that the paramedics violated her Fourth Amendment or substantive due process rights."); ***M.J. by & through S.J. v. Akron City School District Bd. of Educ.***, 1 F.4th 436, 452 (6th Cir. 2021) ("A municipality 'can only be held liable if there is a showing of an underlying constitutional violation by' its officials. . . In other words, '[t]here can be no ... municipal liability under § 1983 unless there is an underlying unconstitutional act.' *Wilson v. Morgan,* 477 F.3d 326, 340 (6th Cir. 2007). And here, none of the school employees is liable under plaintiffs' substantive due process theory. So the district court correctly granted summary judgment for defendants on this claim."); ***Lachance v. Town of Charlton***, 990 F.3d 14, 30-31 (1st Cir. 2021) ("Unlike public officials, municipalities do not enjoy qualified immunity, so the fact that officers may be entitled to such immunity for some action does not automatically absolve their municipal employer from being liable for that same action. . . .The district court's order was based on the premise that, because the defendant officers enjoyed federal qualified immunity on the excessive force claim as to the push, the town could not be liable under *Monell* and the individual officers could not be liable under state tort law for injuries that might have resulted from the push. This was error. . . . We have in the past held that '[w]here a plaintiff alleges both a § 1983 excessive force claim and common law claims for assault and battery, our determination of the reasonableness of the force used under § 1983 controls our determination of the reasonableness of the force used under the common law assault and battery claims.'. . That rule is inapposite here where the district court did not assess the reasonableness of the officers' actions in granting the defendants' motion. . . .[T]he district court ruled only that no reasonable jury could find a constitutional violation as to the kneel due to the lack of evidence of causation; it did not rule at summary judgment or after the trial that no reasonable jury could find that the push was not a constitutional violation. The defendants offer numerous alternative bases for affirmance. We decline to exercise our discretion to affirm on any of those bases, finding it "appropriate to leave such a matter for the district court to address in the first instance on remand, especially when the grounds are not fully developed or fairly contested on appeal," as is the case here. . . Accordingly, we vacate the district court's order granting the defendants' motion for judgment as a matter of law."); ***First Midwest Bank Guardian of Estate of LaPorta v. City of Chicago***, 988 F.3d 978, 987, 989-93 (7th Cir. 2021) ("A *Monell* plaintiff must establish that he suffered a deprivation of a federal right *before* municipal fault, deliberate indifference, and causation come into play. LaPorta's claim fails at this first step. He did not suffer a deprivation of a right secured by the federal Constitution or laws. It's undisputed that Kelly was not acting under color of state law when he shot LaPorta. His actions were wholly unconnected to his duties as a Chicago police officer. He was off duty. He shot LaPorta after they spent a night out drinking together and had returned to his home to continue socializing at the end of the evening. Kelly's actions were those of a private citizen in the course of a purely private social interaction. This was, in short, an act of private violence. . . .[W]e have repeatedly applied *DeShaney*'s holding that the state has no due-process duty to prevent harm from private actors unless one of the limited exceptions applies. [collecting cases] This rule is not controversial. All circuits read *DeShaney* the same way. [collecting cases] . . . . LaPorta resists application of *DeShaney* by shifting the focus to

the *Monell* framework for municipal liability. The judge agreed with this approach, reasoning that because the jury found that the City's policy failures 'caused' Kelly to shoot LaPorta, *DeShaney* was inapplicable. Other judges in the Northern District of Illinois have issued similar rulings. [collecting cases] These decisions reflect a basic misunderstanding of the relationship between *Monell* and *DeShaney*. *Monell* and *DeShaney* are not competing frameworks for liability. The two cases concern fundamentally distinct subjects. *Monell* interpreted § 1983 and addressed the issue of who can be sued under the statute; the Court held that a municipality is a 'person' under § 1983 and may be liable—just like an individual public official—for its own violations of federal rights. . . *Monell* did *not* address the substance of any right under the federal Constitution or laws. It has nothing to say on that subject. It's a statutory-interpretation decision. *DeShaney*, on the other hand, addressed the substance of the constitutional right to due process. . .The Court interpreted the Due Process Clause and defined its scope, strictly limiting the circumstances under which a privately inflicted injury is cognizable as a due-process violation. LaPorta had the burden to prove a constitutional violation *in addition to* the requirements for municipal liability under *Monell*. . . . Applying *DeShaney*, as we must, it's clear that the City is entitled to judgment as a matter of law. It had no due-process duty to protect LaPorta from Kelly's act of private violence. LaPorta has never argued that one of the *DeShaney* exceptions applies. Rightly so; he was not in state custody at the time of his injury, and no evidence supports the exception for state-created dangers. And because LaPorta was not deprived of his right to due process, the City cannot be held liable for his injuries under § 1983—and that is so *even if* the requirements of *Monell* are established. Simply put, LaPorta suffered a common-law injury, not a constitutional one. . . . As we've noted, the judge relied heavily on our decision in *Gibson*, both at summary judgment and in rejecting the City's motion for judgment as a matter of law. *Gibson* involved a Chicago police officer who was found mentally unfit for duty and placed on medical leave. . . The Chicago Police Department prohibited him from carrying his gun or exercising any police authority; it also collected his star, shield, and identification card—but not his gun. . . . [In *Gibson*] we held that the estate's factual allegations were sufficient to permit the *Monell* claim to proceed beyond the pleading stage under the *DeShaney* exception for state-created dangers. This case is different. LaPorta never invoked the *DeShaney* exception for state-created dangers. He neither pleaded nor attempted to prove up a state-created danger, and the jury was not instructed on the legal elements of that type of due-process violation. So the judge simply misapplied *Gibson*. We did *not* hold that a *Monell* claim is exempt from *DeShaney*'s general rule that the state has no constitutional duty to prevent acts of private violence. Nor could we. Nothing in *Gibson* suspended the *DeShaney* rule for *Monell* plaintiffs. The judge's misreading of *Gibson* led him to overlook a fundamental defect in LaPorta's *Monell* claim, both at summary judgment and in rejecting the City's posttrial motion. Under *DeShaney* the City had no due-process duty to protect LaPorta from Kelly's act of private violence. . . . LaPorta suggests that his novel theory against the City finds support in *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293 (7th Cir. 2010), but that case does not help him. *Thomas* involved a pretrial detainee who died in jail from pneumococcal meningitis. A jury cleared the individual defendants but found the sheriff's department liable for failing to adequately respond to Thomas's medical needs. . . We concluded that 'a municipality can be held liable under *Monell*, even when its officers are not,

unless such a finding would create an *inconsistent* verdict.'. . The verdicts in *Thomas* were easily reconcilable. The jury found that the sheriff's department was deliberately indifferent to the detainee's medical needs—a constitutional violation—because its policies for processing medical-request forms were clearly insufficient. That finding was not at all inconsistent with its exoneration of the individual officers. . . Nothing in our decision in *Thomas* lifted the plaintiff's burden to prove a predicate constitutional violation. To the contrary, because pretrial detainees have a constitutional right to medical care while in custody, the sheriff's department could be found liable for violating that right even though the individual defendants were not. . . LaPorta also relies on *Glisson v. Indiana Department of Corrections*, 849 F.3d 372 (7th Cir. 2017) (en banc), but that case too is distinguishable. There, a state prisoner died from acute renal failure. We concluded that a jury could find that the prison's failure to enact a coordinated-care policy for prisoners with chronic illnesses amounted to deliberate indifference to the high likelihood that prisoners would die. . . It did not matter that no individual medical provider could be found liable; the problem was that 'no one was responsible for coordinating [Glisson's] overall care.'. . Again, nothing in our decision in *Glisson* removed the plaintiff's burden to prove an underlying constitutional violation. The case involved the prisoner's Eighth Amendment right to adequate medical care. . . This case is fundamentally different. Here there was no constitutional violation because the City had no due-process duty to protect LaPorta from Kelly's private violence. . . . LaPorta's case is tragic. His injuries are among the gravest imaginable. His life will never be the same. But § 1983 imposes liability only when a municipality has violated a federal right. Because none of LaPorta's federal rights were violated, the verdict against the City of Chicago cannot stand. We REVERSE and REMAND for entry of judgment for the City."); ***Pulera v. Sarzant***, 966 F.3d 540, 555 (7th Cir. 2020) ("Because Pulera's individual claims against the nurses fail, so too must his *Monell* claims against VNCC and the county. Although individual liability is not always a prerequisite for municipal liability, *see Glisson v. Ind. Dep't of Corr.*, 849 F.3d 372, 378 (7th Cir. 2017) (en banc), Pulera argues only that the facility inadequately trained its nurses and had a de facto policy permitting them to delegate all their duties to correctional officers. Even assuming Pulera could prove the training inadequate or the lax policy unconstitutional, he cannot show causation. . . The nurses acted appropriately under the circumstances, both generally and to the extent they relied on correctional officers, so their alleged lack of training and overreliance on officers could not have caused Pulera's injuries. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (per curiam) ("If a person has suffered no constitutional injury ... the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.")."); ***King v. Hendricks County Commissioners***, 954 F.3d 981, 987 (7th Cir. 2020) ("As discussed above, King has not established facts sufficient to allow a fact-finder to conclude that Hays's use of deadly force violated Bradley's Fourth Amendment rights. There is thus no constitutional violation for which the institutional defendants and Sheriff Clark may be liable. Unlike in the Eighth Amendment context, where we have said that an agency may be subject to *Monell* liability for deliberate indifference at the policy level to prisoners' serious medical needs even when its individual agents did not act with deliberate indifference, see *Glisson v. Indiana Dep't of Corrs.*, 849 F.3d 372, 378 (7th Cir. 2017), a government entity cannot passively commit a Fourth Amendment violation. This is the case even

if we accept, for purposes of argument, King's assertion that Hendricks County fails to give reserve police officers such as Hays and Thomas adequate training in how to deal with the mentally ill and how to de-escalate situations so that the use of deadly force can be avoided. Even supposing that the county would have been better advised to respond to persons experiencing mental-health crises with medical personnel or social workers, rather than armed police officers, its failure to do so does not automatically lead to liability. For liability to attach, there must be an unreasonable search or seizure, not just negligence or a failure to choose the best option. Because there was no underlying Fourth Amendment violation, summary judgment for the Municipal Defendants on the section 1983 claim against them was proper."); ***Meier v. City of St. Louis, Missouri***, 934 F.3d 824, 829 (8th Cir. 2019) ("St. Louis also argues that regardless of its policy, it cannot be held liable because Meier has not brought claims against any individual SLMPD employee. It relies on *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018), in which we stated that 'absent a constitutional violation by a city employee, there can be no § 1983 or *Monell* liability for the City.'. . This argument misreads *Whitney*. Municipal liability requires a *constitutional violation* by a municipal employee, but it does not require the plaintiff to bring suit against the individual employee. *See Webb v. City of Maplewood*, 889 F.3d 483, 487–88 (8th Cir.) ("[O]ur case law has been clear ... that although there must be an unconstitutional act by a municipal employee before a municipality can be held liable, there need not be a finding that a municipal employee is liable in his or her individual capacity." (cleaned up)), *cert. denied*, —— U.S. ——, 139 S. Ct. 389, 202 L.Ed.2d 289 (2018). Assuming that the seizure of Meier's truck violated her constitutional rights—an assumption that St. Louis does not dispute at this juncture—Meier has adduced evidence sufficient to establish St. Louis's liability for that violation."); ***Cook v. Hopkins***, 795 F. App'x 906, ___ (5th Cir. 2019) ("We agree with the district court that Plaintiffs are mistaken as to the City's argument: 'The City does not argue that the law requires that once all personal capacity claims are dismissed, the municipal-liability claims must also be dismissed.' Instead, the City argues that because we have 'unambiguously determined' that the Individual Defendants did not violate Deanna's or Vickie's equal protection rights, we must affirm the City's motion for summary judgment under *Heller* as no constitutional deprivation occurred. In sum, we agree with the district court and the City that the *Brown v. Lyford* footnote is sufficient to support our holding here that, under *Heller*, because we have found no constitutional violations on the part of the Individual Defendants, the City cannot be subjected to municipal liability."); ***Edwards v. Jolliff-Blake***, 907 F.3d 1052, 1062 (7th Cir. 2018) ("The district court properly entered judgment for the City of Chicago on the *Monell* claim. The *Monell* claim arises out of the Chicago Police Department's policy and practice of using John Doe informants and, most importantly, is premised on the same conduct upon which the Edwardses base their claims against the individual officers. Because the Edwardses cannot make out a constitutional violation in their claim against the individual officers, there can be no viable *Monell* claim based on the same allegations. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986); see also *White v. City of Chicago*, 829 F.3d 837, 844 (7th Cir. 2016) ("Probable cause also establishes that White did not suffer a constitutional injury, which is a necessary element of a *Monell* claim.")."); ***Medrano-Arzate v. Sheriff of Okeechobee County***, 691 F. App'x 603, 604 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 658 (2018) ("The complaint arises out of the death of Hilda Medrano on

December 1, 2013, when the vehicle in which she was a passenger collided with a vehicle driven by Deputy Joseph Anthony Gracie of the Okeechobee County Sheriff's Office. Appellants filed suit against May, individually and in his capacity as Sheriff, and Okeechobee County, but did not file suit against Deputy Gracie. Appellants alleged that certain policies implemented by the Appellees, pursuant to which Deputy Gracie was unable to operate his lights and sirens while responding to an emergency call, caused the collision and Hilda Medrano's death. While we agree with the district court that Hilda Medrano's death was tragic, we also agree that the Appellants have failed to state a claim against the Appellees under § 1983. As Appellants do not allege that Deputy Gracie's conduct amounted to a deprivation of Hilda Medrano's constitutional rights, Appellants cannot maintain an action against Appellees under § 1983 based upon the policies alleged to have caused Hilda Medrano's death."); ***Lowry v. City of San Diego***, 858 F.3d 1248, 1255-56, 1260 (9th Cir. 2017) (en banc) ("Lowry has not sued the police officers but only the City, asserting a single cause of action seeking to establish the City's liability under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). To prevail on her *Monell* claim, Lowry must establish that (1) SDPD's use of Bak amounted to an unconstitutional application of excessive force, and (2) the City's policy caused the constitutional wrong. . . Lowry contends that summary judgment should not have been granted to the City because there were genuine disputes of material fact and because the district court abused its discretion in excluding evidence that could have established a genuine dispute of fact. She argues that the force used against her was unreasonable and excessive, in violation of the Fourth Amendment. She further asserts that the City's policy regarding the use of police dogs was itself unconstitutional and that it caused her injury. We disagree. . . . Because there are no genuine issues of material fact and 'the relevant set of facts' has been determined, the reasonableness of the use of force is 'a pure question of law. . . Although Lowry has not sued the individual police officers, her *Monell* claim against the City first requires her to establish that the force used against her was unconstitutionally excessive. . . . Here, the force used was not severe, and the officers had a compelling interest in protecting themselves against foreseeable danger in an uncertain situation, which they reasonably suspected to be an ongoing burglary. We conclude that the use of Bak under these circumstances did not violate Lowry's rights under the Fourth Amendment. . . .Because we conclude that Lowry did not suffer a constitutional injury, she cannot establish liability on the part of the City. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). As a result, we do not reach the issue of whether the district court properly granted summary judgment on the alternative ground that Lowry failed to satisfy the additional requirements for municipal liability under *Monell*."); ***D.S. v. E. Porter Cnty. Sch. Corp.***, 799 F.3d 793, 800 (7th Cir. 2015) ("[A] municipality cannot be found liable under *Monell* when there is no underlying constitutional violation by a municipal employee. *Sallenger v. City of Springfield, Ill.,* 630 F.3d 499, 504 (7th Cir.2010). Since D.S. cannot show a violation of her constitutional rights under either the Due Process or Equal Protection clauses of the Fourteenth Amendment, the defendants cannot be held liable under *Monell*."); ***Stricker v. Township of Cambridge***, 710 F.3d 350, 365 (6th Cir. 2013) ("The standard for municipal liability in negligent hiring, training, and retention is deliberate indifference. . . However, '[e]ven before reaching the issue of whether the municipality was deliberately indifferent ... the plaintiff must demonstrate a constitutional violation at the hands of an agent or employee of the municipality.'. . Because

Plaintiffs did not demonstrate that there were any constitutional violations, their municipal liability claim fails as well."); ***Evans v. Chalmers***, 703 F.3d 636, 654, 655 & n.11 (4th Cir. 2012) ("We recognize that because cities do not possess qualified immunity from § 1983 claims, *Owen v. City of Independence*, 445 U .S. 622, 638 (1980), we do not have appellate jurisdiction under the collateral order doctrine to hear the City's appeal of the *Monell* claims. However, because our determinations of the individual officers' qualified immunities fully resolve the issue of the City's *Monell* liability, we exercise pendent appellate jurisdiction over these claims. . . . All of these claims require a predicate constitutional violation to proceed. For 'supervisors and municipalities cannot be liable under § 1983 without some predicate "constitutional injury at the hands of the individual [state] officer," at least in suits for damages.'. . Similarly, a plaintiff bringing a 'stigma-plus' claim under *Paul* must allege both a stigmatic statement and a 'state action that "distinctly altered or extinguished"' his legal status. . . Because we hold that all plaintiffs failed to state predicate § 1983 claims against the individual officers, we must also hold that all plaintiffs have failed to state supervisory liability, *Monell* liability, and 'stigma-plus' claims. . . Thus, we reverse the district court's denial of the defendants' motions to dismiss these derivative claims."); ***Cutlip v. City of Toledo***, No. 10–4350, 2012 WL 2580818, at *4 (6th Cir. July 5, 2012) (not reported) ("Cutlip has sued only the City of Toledo, a municipality, but he must still show that the police officers involved with Rocky's death violated Rocky's constitutional rights under one of the exceptions to the *DeShaney* rule."); ***Matthews v. City of East St. Louis***, 675 F.3d 703, 709 (7th Cir. 2012) ("Matthews and Gillespie argue that even if the officers are not liable for false arrest, the City may still be, citing *Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293 (7th Cir.2009). *Thomas* is quite instructive in this instance. There, Cook County argued it could not be liable if all its employees were acquitted, relying on *Los Angeles v. Heller*, 475 U.S. 796 (1986), for that proposition. . . The Court disagreed, noting that *Los Angeles* was a case in which the municipality could not be found liable when its officers committed no constitutional violation in arresting the plaintiff. . . We specifically noted that the situation would differ if the officers were acquitted based on a defense of good faith, because there is still an argument that the city's policies caused the harm, though the officer was acting in good faith. Here, there was no constitutional violation, therefore no municipal liability."); ***Carnaby v. City of Houston***, 636 F.3d 183, 189, 190 (5th Cir. 2011) ("In support of her claim that the city's policymaker was deliberately indifferent in adopting the high-risk-vehicle-approach ('HRVA') training policy, . . . Mrs. Carnaby points to two pieces of evidence, neither of which is sufficient to defeat summary judgment. First, she points to a high-profile incident that occurred in 1998: the shooting of Derek Kaeseman. . . In that case, there was evidence that the HRVA training received by the officers was deficient. Yet, the mandatory training in 2004 occurred after the Kaeseman shooting, and Mrs. Carnaby has produced no evidence that shows that HPD failed to modify its training protocols after the Kaeseman incident. Even if the Kaeseman shooting put policymakers on notice that their training methods were deficient, the 2004 training could be viewed as a response to those possible deficiencies. Thus, Mrs. Carnaby must show—but has not shown—that the policymakers were deliberately indifferent to the deficiencies of the 2004 training, not the prior training. . . .Second, Mrs. Carnaby claims that in HPD there is a pattern of violating the HRVA policy, which would suggest deliberate indifference to the weaknesses of the training given to officers. In support of that claim, Mrs.

Carnaby points to a series of Internal Affairs Division reports that she claims show possible violations of the HRVA policy that were not adequately investigated. Many of the incidents Mrs. Carnaby cites to, however, occurred before the mandatory training given in 2004 and are thus irrelevant to the question whether the policymakers were deliberately indifferent to the training given in 2004. Of the remaining incidents, many are factually distinguishable from the facts of this case. Reading all the reports in a manner favorable to Mrs. Carnaby, only two reports appear to address incidents that could be construed as a possible violation of the HRVA policy comparable to the violation that occurred here. Two reports over a period of four years, in a city the size of Houston, do not constitute a pattern of violating the HRVA policy. . . Mrs. Carnaby can point to no concrete evidence that any of the relevant policymakers were deliberately indifferent to any possible weaknesses in the HRVA training."); ***Claudio v. Sawyer***, No. 10-0145-cv., 2011 WL 454515, at *1 (2d Cir. Feb. 10, 2011) (not published) ("Like the district court, we conclude that plaintiffs failed sufficiently to allege that Sawyer, an off-duty police officer, acted under color of state law in shooting Jayson Tirado, as required for a § 1983 claim. . . Nothing in plaintiffs' complaint suggests that Sawyer identified himself or was recognizable as a police officer, or otherwise engaged in *any* conduct arguably invoking 'the real or apparent power of the police department.'. . Thus, plaintiffs' § 1983 claim against Sawyer was properly dismissed. This pleading defect further doomed plaintiffs' *Monell* claim against the City for failure to properly train its officers regarding off-duty weapons use as such a claim must be based on an independent constitutional violation by a state actor. . . . In urging otherwise, plaintiffs assert that even if Sawyer was not a state actor, the City is liable because its purported failure to train off-duty officers and encouragement of them carrying weapons increased the likelihood of Sawyer privately inflicting harm on Jayson Tirado. We are not persuaded. The 'state-created danger' doctrine holds government officials liable for private harms if their 'affirmative conduct ... communicates, explicitly or implicitly, official sanction of private violence.'. . Although liability under this doctrine may extend to a municipality if its policy or custom causes an official's unconstitutional encouragement of private harm, plaintiffs do not here allege that any official affirmatively condoned Sawyer's tragic actions. . . Put another way, absent *some* individual state actor whose unconstitutional conduct might be traceable to the City's alleged lack of training, plaintiffs' claims impermissibly seek to create 'a separate cause of action for the failure by the government to train its employees' under the guise of a state-created danger. Accordingly, dismissal was warranted."); ***Sallenger v. City of Springfield, Ill***., 630 F.3d 499, 504, 505 (7th Cir. 2010) ("The Estate's failure-to-train claim is premised mainly on the fact that the City permitted its officers to use hobbles but did not train them in the proper use of this device. But a municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee. . . Two alleged constitutional violations might have formed the basis for *Monell* liability: (1) the claim that the officers used excessive force against Sallenger, resulting primarily from their alleged misuse of the hobble; and (2) the claim that the officers inadequately responded to his medical needs during the arrest. But all three officers were cleared of any constitutional wrongdoing on the excessive-force claim following jury trials; the Estate does not challenge these verdicts on appeal. It is true as a general matter that we review the district court's entry of summary judgment on the *Monell* claim by reference to the evidentiary record made on summary judgment, not at trial. . . But the

jury *verdicts* are now the law of this case, and they conclusively establish that no excessive force occurred. . . Nor can the medical-care claim against the officers provide an alternative basis for *Monell* municipal liability. For reasons we have already explained, the officers' conduct did not violate the Fourth Amendment. Accordingly, because there is no underlying constitutional violation, the City cannot be liable under *Monell*."); ***Kennedy v. Town Of Billerica***, 617 F.3d 520, 536 (1st Cir. 2010) ("[T]he Town may be liable even if individual officers are ultimately exonerated, for instance because the officers are granted qualified immunity or for failure of proof, but plaintiffs must still show some underlying constitutional tort attributable to the Town."); ***Martinez v. Beggs***, 563 F.3d 1082, 1091, 1092 (10th Cir. 2009) ("A county or sheriff in his official capacity cannot be held 'liable for constitutional violations when there was no underlying constitutional violation by any of its officers.'. . . Likewise, Beggs cannot be held liable in his individual capacity for implementing county policies or for the actions of county officers under a theory of supervisory liability, when there was no violation of Ginn's constitutional rights. . . . Martinez finally argues that if no single individual county employee is found liable, the county may still be liable for a 'systemic injury' caused by 'the interactive behavior of several government officials, each of whom may be acting in good faith.'. . .To the extent this argument suggests that the county can be liable, even if no individual government actor is liable, it is precluded by our prior precedent."); ***Estate of Bennett v. Wainwright***, 548 F.3d 155, 177 (1st Cir. 2008) ("With respect to the County, it is worth noting as a threshold matter that 'it is not impossible for a municipality to be held liable for the actions of lower-level officers who are themselves entitled to qualified immunity.' . . . The establishment of § 1983 liability against either Herrick or the County would ultimately depend on plaintiff proving the commission of an underlying constitutional violation by the subordinate officers. . . Because we hold that the subordinate officers are entitled to qualified immunity under the third prong of the *Saucier* analysis, we did not reach, in our foregoing analysis, the merits of whether actions taken during the attempt to place Bennett in protective custody amounted to a constitutional violation. We need not reach this question here either. Even if an underlying substantive constitutional violation by subordinate officers were stated by plaintiffs, we nevertheless agree with the district court that plaintiffs offer insufficient evidence to allow a reasonable factfinder to find a policy, custom, practice or any deliberate indifference on the part of either Herrick or the County that bears the requisite causal relationship to the alleged constitutional deprivation to establish liability under a supervisory theory. . . The estate can point to no proper record evidence that suggests deficient training or supervision."); ***Willis v. Neal***, 2007 WL 2616918, at *5, *6 (6th Cir. 2007) ("The conclusion that Willis's arrest was supported by probable cause necessarily means that her § 1983 claim against all of the defendants fails because she has not established that her constitutional rights were violated, and the district court properly granted the defendants' summary judgment motions. Because Willis has failed to establish a deprivation of her constitutional rights, she cannot establish liability against the defendant municipalities. . . Our judgment in the case should not be read as condoning either the actions of the Task Force or the apparent willingness of the defendant municipalities to participate in Task Force operations based on little information in cases where time is not of the essence. However, Willis has not presented any argument to this court other than one based on the physical participation of the individual officers in her arrest."); ***Best v. Cobb County, Ga.***, 239 F.

App'x 501, ____ (11th Cir. 2007) ("The plaintiffs presented expert testimony regarding police pursuits in Cobb County. Their expert testified that 87.5% of all pursuits in Cobb County involve misdemeanor offenses or traffic violations. Out of more than 650 pursuits initiated, officers terminated only 11 during the course of the pursuit. The expert also testified that Cobb County officers are not required to balance the need to apprehend a suspect against the public's safety, and no action is taken against them for policy violations during pursuits. Of the 650 pursuits reviewed, 380(58%) resulted in accidents, including 93(14%) with injuries and at least 4 fatalities. In 2001, a Cobb County grand jury recommended that the county revise its vehicle pursuit policy to make the safety of the public and police officers a top priority. The grand jury noted that if the suspect's identity is readily ascertainable through a license tag or other means and the suspect is not a dangerous felon, police should discontinue the pursuit. The grand jury also recommended that the county use helicopters to aid in vehicle pursuits. Cobb County did not implement any of the grand jury's specific recommendations. The preamble to the county's vehicle pursuit policy provides:

> The Department recognizes that it is the duty and responsibility of an officer to apprehend a violator. Criminals often attempt to flee to escape apprehension for their crime. The exact crime for which the violator is fleeing from, may or may not be known to the pursuing officer. The policy of the Department is to use all reasonable means to apprehend a fleeing violator. The primary consideration during a vehicle pursuit will be that of safety, both the officer and the community.

The plaintiffs assert that Cobb County has a 'pursue at all costs' policy. They further assert that, while the county may teach pursuit maneuvers, it does not properly train officers on when to initiate and when to call off a pursuit or give corrective instruction when accidents occur. In sum, the plaintiffs contend that Cobb County was deliberately indifferent in training its officers because its policy does not require officers to limit pursuits to situations where the need to apprehend the suspect justifies the grave risk to innocent motorists and pedestrians. . . . This case is unique because the plaintiffs did not name the police officer involved in the pursuit as a defendant, nor do they claim that he personally violated their constitutional rights. Instead, the plaintiffs focus on the county's vehicle pursuit policy, arguing that the defendants were deliberately indifferent to their constitutional rights, and therefore the county is responsible for their injuries. . . . .[I]n order to hold Cobb County liable for the plaintiffs' injuries, the plaintiffs must establish a constitutional violation, municipal culpability, and causation. If the plaintiffs are unable to prove any of the three, their challenge necessarily fails. The plaintiffs rightfully concede that under the facts of this case Officer Smith did not violate their Fourth Amendment or Fourteenth Amendment rights. . . Although the police pursuit ended tragically, there was no constitutional violation. Consequently, the plaintiffs' claim against the county cannot survive summary judgment."); ***Segal v. City of New York***, 459 F.3d 207, 219 (2d Cir.2006) ("*Monell* does not provide a separate cause of action for the failure by the government to train its employees; it *extends* liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation."); ***Hicks v. Moore***, 422 F.3d 1246, 1251, 1252 (11th Cir. 2005) ("Plaintiff contends Clouatre (pursuant to the Jail's practice) violated Plaintiff's rights under the Fourth Amendment by strip searching her without reasonable suspicion. She also claims that Sheriff Moore, Captain Ausburn, and Sergeant Gosnell are liable to her based on a theory of

supervisory liability because they failed to train jailers properly about when to conduct strip searches, instead adhering to the general practice that required strip searches of all detainees regardless of the charge or circumstances. We will assume that it was the practice of Habersham County to strip search every detainee who was to be placed in the general population of the Jail. . . And given the Circuit's precedent, we must conclude the search of Plaintiff cannot be justified under the Constitution on the single ground that Plaintiff was about to be placed in the Jail's general population. . .That conclusion, however, does not mean that Plaintiff's own constitutional rights were violated when she was searched: just because she was strip searched at a jail that had a search practice that would generally violate the Constitution does not mean every search that was conducted actually violated the Constitution. . . We said in *Skurstenis* that ' Areasonable suspicion' may justify a strip search of a pretrial detainee.'. . Because we conclude that reasonable suspicion existed for this particular strip search, we also must conclude that no constitutional right was violated by the search."); ***Young v. City of Providence***, 404 F.3d 4, 26, 27 (1st Cir. 2005) ("At the outset, we agree with the district court's reasoning that any proper allegation of failure to train must be aimed at Solitro's lack of training and not at the deficiencies in Saraiva's or Cornel's training, and must allege that Solitro's lack of training caused him to take actions that were objectively unreasonable and constituted excessive force on the night he shot Cornel. Such a theory, when the evidence is looked at most favorably to the plaintiff, can be made out in this case: a jury could find that Solitro's shooting of Cornel was unreasonable, *inter alia,* because he should have recognized Cornel as an off-duty officer (due to Cornel's demeanor and verbal commands) or not shot Cornel so rapidly without making sure of his identity. A jury could find that Solitro made such mistakes because of the PPD's lack of training on on-duty/off-duty interactions, avoiding misidentifications of off-duty officers, and other issues relating to the City's always armed/always on-duty policy. Further, a jury could find that this training deficiency constituted deliberate indifference to Cornel's rights."); ***Crocker v. County of Macomb***, No. 03-2423, 2005 WL 19473, at *5, *6 (6th Cir. Jan. 4, 2005) (unpublished) ("If the plaintiff fails to establish a constitutional violation by an individual officer, the local government unit cannot be held liable for a failure to train under § 1983. . . More specifically, where there exists no constitutional violation for failure to take special precautions to prevent suicide, then there can be no constitutional violation on the part of a local government unit based on its failure to promulgate policies and to better train personnel to detect and deter jail suicides. . .Because no individual defendant violated Tarzwell's constitutional rights, Macomb County necessarily is not liable to plaintiff under a failure to train theory or on the theory that the County failed to promulgate effective policies for suicide prevention. Even if the County could be held liable absent liability on the part of an individual defendant, plaintiff has not identified any policy or custom that evidences deliberate indifference on the County's part either to the risk that Tarzwell would try to kill himself or to the problem of suicide attempts by pretrial detainees in general. The court notes in this regard that the alleged failure to comply with a regulation governing the visibility of holding cells alone does not rise to the level of a constitutional violation. . . Finally, plaintiff has not shown that defendant had a deliberate and discernible county policy to maintain a jail that was inadequately designed and equipped for the prevention of suicides. For these reasons, the district court did not err by granting summary judgment in favor of Macomb County."); ***Bowman v.***

Corrections Corporation of America, 350 F.3d 537, 546, 547 (6th Cir. 2003) ("In *Speer*, the Eighth Circuit held that there must be a violation of the plaintiff's constitutional rights in order for liability to attach to either the individual defendants or to the municipal authority under § 1983. In *Speer*, the plaintiff's constitutional rights were violated, but not by the Mayor. Here, if we uphold the jury's findings as to Dr. Coble and Warden Myers, there was no violation of Bowman's rights by anyone, even if CCA's policy implicitly authorized such a violation. The similarity between this case and *Heller* is that the constitutional violation claimed either occurred or did not occur as a direct result of the actions of at least one person, in this case Dr. Coble. This is not a scenario in which the 'combined actions of multiple officials' could give rise to the violation at issue. For these reasons, we affirm the district court's denial of Bowman's motion for a judgment as a matter of law against the defendants in this case."); ***Jarrett v. Town of Yarmouth,*** 331 F.3d140, 151 (1st Cir. 2003) (per curiam) ("[I]t appears that the jury initially concluded that the Town of Yarmouth's bite and hold policy was unconstitutional, and reasoned that any application of that policy must be unconstitutional per se. Their reasoning was erroneous as a matter of law. We conclude after conducting the *Graham* balancing test that Officer McClelland's release of a dog trained to bite and hold did not violate Jarrett's Fourth Amendment rights as a matter of law. Our determination that Jarrett suffered no constitutional injury is dispositive of his municipal liability claim against the Town of Yarmouth."); ***Cuesta v. School Bd. Of Miami Dade County,*** 285 F.3d 962, 970 n.8 (11th Cir. 2002) ("Because we hold that Cuesta suffered no deprivation of her constitutional rights, we need not decide the question of whether the County's policy, in which all felony arrestees are strip searched, might deprive others of their constitutional rights."); ***Curley v. Village of Suffern,*** 268 F.3d 65, 71 (2d Cir.2001) ("Following *Heller*, we have recognized that a municipality cannot be liable for inadequate training or supervision when the officers involved in making an arrest did not violate the plaintiff's constitutional rights. . . . Further, the verdict form in this case reveals the jury found no deprivation of rights in the first instance, without ever reaching the question of whether qualified immunity insulated defendants' conduct as objectively legally reasonable. This point is significant because case law further suggests *Heller* will not save a defendant municipality from liability where an individual officer is found not liable because of qualified immunity."); ***Trigalet v. City of Tulsa***, 239 F.3d 1150, 1154-56 (10th Cir. 2001) ("[W]e consider whether a municipality can be held liable for the actions of its employees if those actions do not constitute a violation of a plaintiff's constitutional rights. We conclude, based on *Lewis* and *Brown*, as well as decisions from this and other circuits, . . . that a municipality cannot be held liable under these circumstances. . . . Here, the threshold issue is whether the action causing the harm (police pursuit resulting in death of innocent bystander) states a constitutional violation at all. Because there was no evidence that the officer intended to harm the decedents, *Lewis* dictates that no constitutional harm has been committed. Therefore, plaintiffs cannot meet the first prong of the test set forth in *Collins v. City of Harker Heights*. . . . Thus, even if it could be said that Tulsa's policies, training, and supervision were unconstitutional, the City cannot be held liable where, as here, the officers did not commit a constitutional violation. . . . In sum, we hold that absent a constitutional violation by the individual police officers whose conduct directly caused plaintiffs' injuries, there can be no municipal liability imposed on the City of Tulsa on account of its policies, customs, and/or supervision with regard to the individual defendants."); ***Young v. City of Mount Ranier***, 238 F.3d

567, 579 (4th Cir. 2001) ("The law is quite clear in this circuit that a section 1983 failure-to-train claim cannot be maintained against a governmental employer in a case where there is no underlying constitutional violation by the employee. . . . Because the Parents have failed to allege a constitutional violation on the part of any law enforcement officer, the district court properly dismissed the failure-to-train claims asserted against the governmental employers."); ***Treece v. Hochstetler***, 213 F.3d 360, 364 (7th Cir. 2000) ("[B]ecause a jury has determined that Hochstetler was not liable for committing a constitutional deprivation (tort) against Treece, it is impossible under existing case law for the City to be held liable for its knowledge or inaction concerning its officer's activity."); ***Hayden v. Grayson***, 134 F.3d 449, 455 (1st Cir. 1998) ("Normally . . . a municipality cannot be held liable unless its agent actually violated the victim's constitutional rights."); ***S.P. v. City of Takoma Park***, 134 F.3d 260, 272, 274 (4th Cir. 1998) ("Even assuming for the purposes of summary judgment that the training of its officers was unconstitutional, Takoma Park cannot be held liable when, as here, no constitutional violation occurred because the officers had probable cause to detain Peller. . . . Because the officers had probable cause to detain Peller for the limited purpose of transporting her to WAH for an emergency mental evaluation, no constitutional violation occurred. As such, Takoma Park necessarily is not liable for any alleged injuries."); ***Wyke v. Polk County School Board***, 129 F.3d 560, 568-69 (11th Cir. 1997) ("[T]o prevail on a § 1983 claim against a local government entity, a plaintiff must prove both that her harm was caused by a constitutional violation and that the government entity is responsible for that violation. . . *Canton* discussed only the second issue, i.e., whether the city's 'policy' was responsible for its employee's violation of the plaintiff's constitutional rights. For purposes of its discussion, the Court assumed that those rights had indeed been violated. . . . We cannot make the same assumption. Before addressing whether the School Board can be held liable for a failure to train its employees, we must first determine whether those employees violated any of Wyke's constitutional rights by failing to discharge some constitutional duty owed directly to Shawn (and thus indirectly owed to Wyke), or some constitutional duty owed directly to Wyke. . . *DeShaney*, at least in part, mandates that we answer that question in the negative."); ***Estate of Phillips v. City of Milwaukee***, 123 F.3d 586, 597 (7th Cir. 1997) ("Neither the City nor the police officers' supervisor can be held liable on a failure to train theory or on a municipal policy theory absent a finding that the individual police officers are liable on the underlying substantive claim."); ***Hunt v. Applegate***, No. 95-1062, 1996 WL 748158, *2 (6th Cir. Dec. 31, 1996) (unpublished) (Panel decision on petition to rehear) ("It is impossible to establish deliberate indifference to a constitutional violation through the failure to train when the constitutional violation itself does not exist or is left completely undefined and unformed and when the municipal policy makers at fault are not identified. Thus, in the absence of a constitutional injury committed by municipal employees and caused by a lack of training, there is no viable 'failure to train' theory under *City of Canton v. Harris*."); ***Wilson v. Meeks***, 98 F.3d 1247, 1255 (10th Cir. 1996) ("The district court correctly concluded no municipal liability could be found in this case because there was no constitutional violation committed by any of the individual defendants."); ***Quintanilla v. City of Downey***, 84 F.3d 353, 355 (9th Cir. 1996) ("Plaintiff cites [*Chew* and *Hopkins v. Andaya*] for the proposition that a police department may be liable under § 1983 for damages caused by unconstitutional policies notwithstanding the exoneration of the individual officer whose actions

were the immediate cause of the constitutional injury. While this may be true if the plaintiff established that he suffered a constitutional injury, and the officer's exoneration resulted from qualified immunity, . . . this proposition has no applicability here. Plaintiff failed to establish that he suffered a constitutional injury."); ***Hinkle v. City of Clarksburg***, 81 F.3d 416, 420 (4th Cir. 1996) ("In the absence of any underlying use of excessive force against [plaintiff], liability cannot be placed on either the non-shooting officers, a supervisor, or the City."); ***Thompson v. City of Lawrence***, 58 F.3d 1511, 1517 (10th Cir. 1995) (no municipal liability where no underlying constitutional violation by officers); ***Webber v. Mefford***, 43 F.3d 1340, 1344 (10th Cir. 1994) ("Because Defendant Griffin did not violate Plaintiffs' constitutional rights, the district court correctly dismissed Plaintiffs' claims against the City of Sapulpa for inadequate training, supervision, and pursuit policies. A claim of inadequate training, supervision, and policies under § 1983 cannot be made out against a supervisory authority absent a finding of constitutional violation by the person supervised."); ***Scott v. Henrich***, 39 F.3d 912, 916 (9th Cir. 1994) ("[Plaintiff] contends that even if the conduct of the individual officers was objectively reasonable, the municipal defendants may still face liability under *City of Canton v. Harris*, 489 U.S. 378 (1989). While the liability of municipalities doesn't turn on the liability of individual officers, it is contingent on a violation of constitutional rights. Here, the municipal defendants cannot be held liable because no constitutional violation occurred."); ***Thompson v. Boggs***, 33 F.3d 847, 859 (7th Cir. 1994) (where no underlying constitutional violation by officer, no liability on the part of the City or Police Chief); ***Abbott v. City of Crocker***, 30 F.3d 994, 998 (8th Cir. 1994) ("The City cannot be liable in connection with either the excessive force claim or the invalid arrest claim, whether on a failure to train theory or a municipal custom or policy theory, unless Officer Stone is found liable on the underlying substantive claim."); ***Spears v. City of Louisville***, 27 F.3d 567 (Table), 1994 WL 262054, *3 (6th Cir. June 14, 1994) ("[T]here must be a constitutional violation for there to be § 1983 municipal liability ... Because there was no deprivation of constitutional rights here, there is no basis for liability under § 1983, municipal or otherwise. Whether Louisville had an 'informal' policy of permitting its police officers to engage in high-speed pursuits for non-hazardous misdemeanors is irrelevant to the question of whether there was a deprivation of constitutional rights, a prerequisite to the imposition of § 1983 liability."); ***Temkin v. Frederick County Commissioners***, 945 F.2d 716, 724 (4th Cir. 1991) (no claim of inadequate training can be made against supervisory authority, absent finding of constitutional wrong on part of person being supervised); ***Apodaca v. Rio Arriba County Sheriff's Dept.***, 905 F.2d 1445, 1447 (10th Cir. 1990) (when no underlying constitutional violation by a county officer, no action for failing to train or supervise the officer); ***Belcher v. Oliver***, 898 F.2d 32, 36 (4th Cir. 1990) (where it was clear there was no constitutional violation, no need to reach question of whether a municipal policy was responsible for the officers' action); ***Williams v. Borough of West Chester***, 891 F.2d 458, 467 (3d Cir. 1989) (where no viable claim against any individual officer, no *Monell* claim against the Borough).

See also ***Wells for Estate of Locke v. Hanneman***, No. 23-CV-273 (ECT/DLM), 2024 WL 3326070, at *6 (D. Minn. July 8, 2024) ("The City's only argument against Count Two is that Officer Hanneman's qualified immunity precludes the claim. The determination that Officer

Hanneman is not entitled to qualified immunity defeats this contention. Regardless, whether Officer Hanneman has qualified immunity for Plaintiffs' Fourth Amendment claim is not dispositive of the claim that City practices and customs violate the Equal Protection Clause. '[A] municipality may be held liable for its unconstitutional policy or custom even when no official has been found personally liable for his conduct under the policy or custom.'*Webb v. City of Maplewood*, 889 F.3d 483, 486 (8th Cir. 2018)."); ***Cruz v. Guevara***, No. 23 C 4268, 2023 WL 8934940, at *10-11 (N.D. Ill. Dec. 27, 2023) ("The City has stated correctly the legal rule for what happens to Section 1983 *Monell* claims if a plaintiff does not prove constitutional torts by the individual officers. In *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), the Supreme Court held that municipal liability is contingent on officer liability. But our court of appeals has noted a narrow exception to the rule in *Heller* where the *Monell* claim is factually distinct from the claims against the individual officers. *See Thomas v. Cook County Sheriff's Dep't,* 604 F.3d 293, 305 (7th Cir. 2009) ("a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict"). The possibility that Plaintiff may retain a *Monell* claim factually distinct from the claims against the individual officers weighs against staying *Monell* discovery in this case."); ***Bentler v. Nederostek***, No. CV 3:22-1107, 2023 WL 3510822, at *8 (M.D. Pa. May 17, 2023) ("While it is true, as Bentler points out, the Third Circuit has stated in several cases that '[i]t is possible for a municipality to be held independently liable for a substantive due process violation even in situations where none of its employees are liable,' the Court in those cases 'note[d] that, for *Monell* liability to attach, "there must still be a violation of the plaintiff's constitutional rights."'. . Here, for the reasons articulated above, Bentler's substantive due process rights were not violated when the County Dispatchers left out important details when relaying the substance of his 911 call to emergency personnel. Accordingly, 'there can be no derivative municipal claim.'. . And thus, the court will dismiss Bentler's municipal liability claim against Susquehanna County."); ***Enoch v. Hamilton County Sheriff's Office***, No. 1:16-CV-661, 2021 WL 2223894, at *7, *10, *12 (S.D. Ohio June 2, 2021) ("This Court disagrees with plaintiffs' interpretation of the Sixth Circuit's findings and decision in *Enoch II* and how they impact this Court's findings on remand. The Sixth Circuit did not 'assume' in *Enoch II* that an underlying constitutional violation occurred, as plaintiffs claim. . . Rather, the Sixth Circuit considered the record evidence and explicitly found that plaintiffs' arrests were supported by probable cause because the deputies reasonably believed that Rule 33(D)(6) prohibited recording in the hallway outside Judge Nadel's courtroom. . . The court found, 'To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them "fair leeway for enforcing the law in the community's protection."'. . The Sixth Circuit found, based on the record before it, that '[Nobles and Hogan] had probable cause to arrest Enoch and Corbin for violating Rule 33(D)(6).'. . The Sixth Circuit also found that because there was probable cause for the arrests, there was no wrongful arrest in violation of the Fourth Amendment. . . Having found that a constitutional violation was not established, the Sixth Circuit concluded that defendants Nobles and Hogan were entitled to qualified immunity on the wrongful arrest claims brought against them in their individual capacity. . . The Sixth Circuit's findings and decisions are binding on this Court. Consistent with those findings and conclusions, plaintiffs cannot show that their arrests and seizures violated the Fourth Amendment. . . . [I]t

follows from the Sixth Circuit's finding of no Fourth Amendment violation that liability cannot be imposed on defendants in their official capacity on the Fourth Amendment claims. The Sixth Circuit found unequivocally that there was probable cause for plaintiffs' arrests and there was no wrongful arrest, and defendants were therefore entitled to qualified immunity. The court in *Lane* acknowledged that in a situation like this, where there has been no violation of a constitutional right and the individual defendants are entitled to qualified immunity, then the city or county 'cannot be held liable for violating that right any more than the individual defendants can.'. . Thus, even though Nobles and Hogan acted pursuant to a 'common practice' of the County in arresting plaintiffs, the County cannot be held liable for a Fourth Amendment violation because the Sixth Circuit found one did not occur. . . Plaintiffs' Fourth Amendment claims against defendants in their official capacity must be dismissed."); ***Harell v. City of Chicago***, No. 18 C 7781, 2019 WL 2611036, at *3-4 (N.D. Ill. June 25, 2019) ("[T]he question on Plaintiffs' claims as Plaintiffs frame them is whether the City can be held liable under Section 1983 in the absence of a constitutional violation by any of its officers. Plaintiffs argue that *Fagan* authorizes the suit that they envision. . . .The problem for Plaintiffs, however, is that the Seventh Circuit quickly and resoundingly rejected the rule of *Fagan. Thompson v. Boggs,* 33 F.3d 847, 859 n.11 (7th Cir. 1994). Disagreeing with the Third Circuit's interpretation of *Heller,* the Seventh Circuit explained in *Thompson* that it 'follow[s] the clear holding of *Heller* that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."'. . Accordingly, to establish municipal liability and prevail on their *Monell* claim, it is not enough for Plaintiffs to allege that an alleged policy or procedure of the City injured them. . . Instead, Plaintiffs must allege both that they suffered a constitutional injury and that the City authorized or maintained a policy, procedure, or custom allowing or approving of the unconstitutional conduct. . . . Plaintiffs' *Monell* claims fail for an additional reason. Despite Plaintiffs' allegations about a host of policies and practices that Plaintiffs ascribe to the City, Plaintiffs allege no facts that suggest that any particular one of them caused the injuries complain of here. . . . The Court is sympathetic to the tragedy suffered by the plaintiffs. Yet, this Court is required to follow the Seventh Circuit's decision in *Thompson* which under the circumstances presented means that Counts IV and V must be dismissed."); ***Shanaberg v. Licking County,*** No. 2:16-CV-1209, 2018 WL 4334632, at *10–11 (S.D. Ohio Sept. 11, 2018) ("Plaintiff concedes that this is not a case where the officers went rogue, '[r]ather, they did exactly what they were supposed to do—they followed their "Use of Force" policy to the letter.'. . Licking County's taser policy states: 'Personal weapons or empty-hand self-defense is encouraged after verbal orders/warnings have been ignored. . . Plaintiff asserts that this policy on its face violates clearly established Sixth Circuit case law. Plaintiff states that the 'Officers were not just permitted, but "***encouraged***," to use tasers when confronted with "passive resistance"—i.e. noncompliance with verbal instructions.'. . The Court agrees that the risk of this policy is that an officer is empowered to use personal weapons, including a taser, stun devices, and expandable batons, when the suspect is ignoring verbal orders/warnings, rather than when a suspect actually posed an immediate threat to the officer's safety or the safety of others. However, in this case, the Court has already found that Plaintiff posed a potential threat to the officers involved. The officers had to make a split-second

decision when faced with a suspect who was becoming increasingly agitated and defiant. The officers were forewarned that the suspect was armed and dangerous. Plaintiff repeatedly ignored the officers' warnings. There was a threat that the suspect could have a weapon, or obtained a weapon nearby. In short, the officers had reason to believe the situation could have escalated quickly. Plaintiff's claim that Licking County's use of force policy is unconstitutional must fail because the Court held that no constitutional violations occurred. Accordingly, Defendants are entitled to summary judgment on Plaintiff claim that Licking County's use of force is unconstitutional and all other claims related to Licking County and Coshocton County's policies, customs, or practices."); ***Boddie v. City of Lima***, No. 16-CV-1850, 2018 WL 1847934, at *5 (N.D. Ohio Apr. 18, 2018) ("Here, there was no constitutional violation. As noted above, there are no facts to indicate Patrolman Montgomery violated Williams' Fourteenth Amendment substantive due process rights by pursuing the high-speed chase with intent to cause harm. Therefore, there is no basis for the failure to train or failure to promulgate policies claims against the City of Lima and Lima Police Department Chief Kevin Martin. Accordingly, all § 1983 claims are dismissed."); ***Jones v. Chapman***, No. CV ELH-14-2627, 2017 WL 2472220, at *44–45 (D. Md. June 7, 2017) ("To be sure, '*Monell* ... and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on [a] local government.' *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985). There are some narrow circumstances in which 'a finding of no liability on the part of the individual municipal actors can co-exist with a finding of liability on the part of the municipality.' *Int'l Ground Transp., Inc.*, 475 F.3d at 219; *see also, e.g.*, *Thomas v. Cook Cnty. Sheriff's Dept.*, 604 F.3d 293, 305 (7th Cir. 2010). But, in such cases, municipal liability under *Monell* is limited to situations in which 'such a finding would not create an *inconsistent* verdict' as to the individual defendants. . . For example, 'the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights,' even if the conduct of 'no one employee may violate' those rights. [citing *Garcia v. Salt Lake Cnty.*, 768 F.2d 303, 310 (10th Cir. 1985) and *Speer v. City of Wynne, Arkansas*, 276 F.3d 980, 986 (8th Cir. 2002)] But, these situations most often arise in cases where a plaintiff alleges understaffing by the municipality. Courts have also determined that municipal liability under *Monell* is appropriate in the absence of liability for individual officers where 'the injuries complained of are not solely attributable to the actions of named individual defendants.' *Barrett v. Orange Cnty. Human Rights Comm'n*, 194 F.3d 341, 350 (2d Cir. 1999). Such a theory is appropriate, for example, where there are unknown defendants. Moreover, courts have determined that municipal liability is appropriate in the absence of a finding of individual officer liability under § 1983 where the individual officers are entitled to qualified immunity. . . None of these circumstances is applicable here. I have concluded that, as to the traffic stop and the arrest, and as to any claim regarding deliberate indifference to a serious medical need, none of the individual officers violated the constitutional rights of Mr. West. 'As such, there [are] no underlying constitutional violation[s] that can serve as the basis for ... derivative § 1983 *Monell* or supervisory liability claim [s]....'. . . Accordingly, as to the Fourth Amendment claim regarding the traffic stop and Mr. West's arrest, and as to the Fourteenth Amendment deliberate indifference claim, the § 1983 *Monell* and supervisory liability claims against the BPD Defendants fail as a matter as law. But, because I have concluded that the BPD Officers are not entitled to summary

judgment as to the use of force claim or the claim related to the search of the passenger compartment of Mr. West's vehicle, the BPD Defendants are not entitled to summary judgment as to these claims."); ***Garcia v. Bloomberg***, No. 11-CV-6957 JSR, 2015 WL 5444122, at *2-3 (S.D.N.Y. Sept. 10, 2015) ("[B]ecause *Monell* does not provide a separate cause of action but rather extends the liability of individual municipals [sic] actors to the municipality, if a plaintiff cannot show she has been a victim of a tort committed by municipal actors, the municipality cannot be held liable. . . Here, if plaintiffs cannot show that they were falsely arrested, then they cannot established [sic] municipal liability. . . .Plaintiffs argue that the Second Circuit did not adjudicate whether their constitutional rights were violated but only addressed the qualified immunity issue. . . It is true that the ultimate issue on appeal was whether the individual NYPD officers were entitled to qualified immunity. However, to reach its conclusion, the Second Circuit repeatedly made clear that its analysis applied to the law of probable cause, as well as the law of qualified immunity. . . Plaintiffs and this Court are bound by the Second Circuit's holdings on probable cause and, consequently, its impact on municipal liability under *Monell*."), *aff'd,* 662 F. App'x 50 (2d Cir. 2016); ***White v. City of Trenton***, 848 F.Supp.2d 497, 501-06 (D.N.J. 2012) ("As explained by the First Circuit in *Wilson v. Town of Mendon,* '[t]here is ... nothing to prevent a plaintiff from foregoing the naming of an individual officer as a defendant and proceeding directly to trial against the municipality....' . . . Plaintiffs do not often choose this route because '[t]he predicate burden of proving a constitutional harm on the part of a municipal employee remains an element of the case regardless of the route chosen and is much easier to flesh out when the tortfeasor is a party amenable to the full powers of discovery.'. . Moreover, proving a *Monell* claim based on constitutional harm inflicted by unnamed officers is difficult; a plaintiff must show not only that he suffered constitutional harm but also that the municipality had a policy or custom that encouraged excessive force and that said policy or custom was a motivating factor in the officers' unconstitutional conduct. . . . Here, Plaintiff does not dispute that his *Monell* claim is predicated on Officers Kurfuss' and Kmiec's conduct, nor that he failed to name these officers as defendants. .. However, the record in this case does not suggest that Plaintiff engaged in pleading gamesmanship. As noted, Plaintiff attempted to amend his First Amended Complaint to substitute the officers names for the 'John Doe' defendants he originally named. Unlike the plaintiff in *Wilson,* Plaintiff sought to name the individuals officers but simply failed to do so in timely fashion. There is no indication in the record that Plaintiff sought some sort of competitive advantage in not naming the officers as defendants. . . . Because Plaintiff was not permitted to substitute the unnamed officers for the John Doe defendants, no judicial determination as to the officers' liability has been made. This distinguishes *Heller* and its progeny because, in those cases, there had been a judicial determination that the officers did not inflict constitutional harm. So, while the general rule is that 'municipal liability will only lie where municipal action actually caused an injury,' *Grazier,* 328 F.3d at 124, see also *Simmons v. City of Philadelphia,* 947 F.2d 1042, 1064 (3d Cir.1991), until a judicial determination as to whether Officers Kurfuss and Kmiec inflicted constitutional harm is made on summary judgment or at trial, there is no basis for granting summary judgment at this juncture on Plaintiff's *Monell* claim. . . . In the event the City Defendants do not successfully move for summary judgment on whether Plaintiff has proven constitutional harm and this matter advances to trial, I may exercise my discretion to bifurcate the trial. . . Should

the Court bifurcate, Plaintiff will first be required to establish that Officers Kurfuss and Kmiec used excessive force and that he suffered constitutional harm during the November 2004 incident. Only after a jury returns a verdict in his favor will Plaintiff then be allowed to present evidence on the *Monell* claim and submit that claim to the jury. Even if I elect not to bifurcate the trial, Plaintiff is reminded that he will be required to first establish he suffered constitutional harm in order for his claim against the municipality to succeed. . . . The Court further reiterates that, in addition to the constitutional harm element of his *Monell* claim, Plaintiff must establish existence of the custom that implicitly encouraged excessive force and that the custom was a motivating factor in the officers' use of excessive force in the November 2004 incident."); ***Barham v. Town of Greybull Wyo***., No. 10-CV-261-D, 2011 WL 2710319, at *16 (D. Wyo. July 11, 2011) ("The Tenth Circuit has specifically held that a county cannot be held liable for constitutional violations if there is no underlying constitutional violation by any of its officers. *Martinez v. Beggs,* 563 F.3d 1082, 1091 (10th Cir.2009) *(quoting Olsen v. Layton Hills Mall,* 312 F.3d 1304, 1317-18 (10th Cir.2002)). . . . The Court finds that the *Martinez* holding is material to Plaintiff's claims against the Town of Greybull, Wyoming and the Greybull Police Department in this case. Because the Court finds the Police Officer Defendants had probable cause to arrest Plaintiff and search his property, therefore Plaintiff's constitutional rights were not violated. It follows that the Town of Greybull, Wyoming or the Greybull Police Department cannot be held liable where a constitutional violation was not committed."); ***Claudio v. Sawyer***, 675 F.Supp.2d 403, 410 (S.D.N.Y. 2009) ("In their opposition memorandum, plaintiffs argue that even if Sawyer was not acting under color of law, the City was 'undeniably a state actor' when it promulgated customs and policies that led to Tirado's death. . . Plaintiffs allege that the City failed to properly train and supervise Sawyer, and that it encouraged its officers to carry guns off-duty, even while drinking alcohol. Despite the tragic facts alleged in the complaint, Second Circuit case law holds that where an off-duty officer did not act under color of law, the injury inflicted on the victim is one of private violence. . . Without a state actor, there can be no 'independent constitutional violation.' If there is no 'independent constitutional violation,' a *Monell* claim against the City will necessarily fail. . . That is the case here. Because Sawyer did not act under color of law, there was no independent constitutional violation, and the shooting death of Tirado was an act of private violence. The City is not liable under *Monell* for the private acts of its employees."); ***Wilkins v. City of Oakland***, No. C 01-1402 MMC, 2006 WL 305972, at *1 n.2 (N.D. Cal. Feb. 8, 2006) ("Relying on *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir.1992), plaintiffs argue that even if an individual officer is found not to have committed a Fourth Amendment violation, a municipality nevertheless can be held liable on an improper training and/or supervision theory. The language in *Hopkins* on which plaintiffs rely is dicta, however, as the individual officer therein was not exonerated. Moreover, in light of the Supreme Court's decision in *Heller* as well as the Ninth Circuit cases, cited *infra*, expressly holding to the contrary, *Hopkins* should not be read as standing for the proposition that a municipality may be held liable in the absence of a constitutional violation by the individual defendant."); ***Dye v. City of Warren,*** 367 F.Supp.2d 1175, 1189, 1190 (N.D. Ohio 2005) ("As the United States Supreme Court explained in *City of Canton v. Harris*,. . . a municipality's failure to train is in general not enough to prove a constitutional violation. . . Instead, Section 1983 plaintiffs can use a municipality's failure to train as one way to make the required showing that a

municipal policy or custom was the 'moving force' behind an already established constitutional deprivation. . . Therefore, Mr. Dye's failure-to-train claim, like his basic excessive force claim against the Chief, requires a predicate showing that Chief Mandopoulos did violate Mr. Dye's Fourth Amendment right to be free from excessive force. Accordingly, this Court's finding that the Chief was not liable for any constitutional deprivation against Mr. Dye forecloses the plaintiff's Fourth Amendment claims against the City."); ***Butler v. Coitsville Township Police Dep't***, 93 F. Supp.2d 862, 868 (N.D. Ohio 2000) ("Because the Court has found insufficient evidence of any constitutional violation by the defendant law enforcement officers, the defendant government entities cannot be held liable under § 1983 and are therefore entitled to judgment as a matter of law."); ***Sanchez v. Figueroa***, 996 F. Supp. 143, 147 (D.P.R. 1998) (In action against supervisory official for failure to train and failure to screen/supervise, plaintiff must first establish that non-supervisory officer violated plaintiff's decedent's constitutional rights.); ***Friedman v. City of Overland***, 935 F. Supp. 1015, 1018 (E.D. Mo. 1996) ("It is clearly established that a municipality cannot be held liable under § 1983, whether on a failure to train theory or a municipal custom and policy theory, unless the municipal/state employee is found liable on the underlying substantive constitutional claim."); ***Dismukes v. Hackathorn***, 802 F. Supp. 1442, 1448 (N.D. Miss. 1992) ("[T]he court's conclusion that there is insufficient evidence to raise a factual issue as to the officer's recklessness [in high speed pursuit] requires summary judgment in the claims against Starkville and the police chief. If Officer...did not violate plaintiffs' constitutional rights, the same applies to the police chief and the city of Starkville."); ***Montgomery v. County of Clinton, Michigan***, 743 F. Supp. 1253, 1257 (W.D. Mich. 1990) ("If [officers] inflicted no constitutional injury, though their conduct was enabled by policy, custom or deficient training, the County and Sheriff could bear no liability."), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (Table).

But see ***Griffith v. El Paso County, Colorado***, 129 F.4th 790, 822-23 (10th Cir. 2025) ("Ms. Griffith's claim is Sheriff Elder's policies caused unconstitutional conditions of confinement through a number of channels, none of which necessarily depends on particular subordinates' actions. . . The law permits this kind of *Monell* claim. . . We thus agree with Ms. Griffith that her claim against Sheriff Elder in his official capacity does not necessarily depend on unconstitutional conduct by a subordinate named in the same suit, as the magistrate judge seemed to conclude. Still, affirmance is required because Ms. Griffith has not plausibly alleged deliberate indifference by Sheriff Elder or stated facts to support that his policy was the legally relevant cause of the harassment, assaults, and other mistreatment—carried out by others—underlying this claim. . . Under these circumstances, we affirm the district court's dismissal of Ms. Griffith's Fourteenth Amendment conditions of confinement claim."); ***Stucker v. Louisville Metro Government***, No. 23-5214, 2024 WL 2135407, at *5–6 (6th Cir. May 13, 2024) (not published) ("Our sister circuits have expressly and widely held that a municipality may be liable for constitutional violations even absent a successful claim against an offending officer if the outcome is not inconsistent with *Monell*'s holding. [collecting cases] *Monell* requires a constitutional injury, not the joinder of an officer acting unconstitutionally. . . . Given the language of *Monell*, *Colemon*, and other circuit precedent, a *Monell* claim against a municipality may proceed without a claim against the offending officer, so long as it remains consistent with finding a constitutional violation. The

district court's ruling here did not absolve Troutman of constitutional wrongdoing; it merely dismissed the claims against him based on the statute of limitations. Thus, recovery can be had against LMPD in Troutman's absence, provided Plaintiffs can prove a constitutional violation caused by LMPD's policy or customs."); ***Mervilus v. Union County***, 73 F.4th 185, 196-97 (3d Cir. 2023) ("'[A] municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict.'. . Where it is possible for the *Monell* defendant to cause constitutional harm without any individual defendant violating the plaintiff's rights, it is not inconsistent for a jury to find only the *Monell* defendant liable. [collecting cases] But where a finding for the individual defendant necessarily means the plaintiff suffered no constitutional deprivation, there is no basis for a *Monell* claim, and thus it too must fall. . . Here, it would be consistent for the jury to find Kaminskas not liable because he lacked bad faith in conducting the exam, while simultaneously holding the County liable for failing to train or supervise him. . . Thus, Mervilus may ultimately prevail on his failure to train and supervise theory against Union County even if Kaminskas avoids liability. On the other hand, Mervilus's second *Monell* theory—that the County customarily fabricated exams—depends on Kaminskas being complicit in that scheme, and thus would be untenable if the jury finds for Kaminskas. To be clear, our analysis is limited to determining whether either of Mervilus's *Monell* theories depends on his claim against Kaminskas. We express no view on whether his claims based on these theories are triable. The result is a remand for the District Court to decide in the first instance as to Union County."); ***Rogers v. Sheriff of Santa Rosa County, Florida***, No. 21-13994, 2023 WL 2566087, at *6–7 (11th Cir. Mar. 20, 2023) (not reported), *cert. denied*, 144 S. Ct. 377 (2023) ("The Sheriff asserts that the jury was required to find either Gaddis or Bauman liable under § 1983 as an element of *Monell* liability. He is incorrect. We begin by briefly explaining the Sheriff's argument. As stated previously, a plaintiff bringing a *Monell* claim must show (1) the violation of a constitutional right, (2) that a municipality had a custom or policy of deliberate indifference to that right and (3) that the custom or policy caused the violation. . . In the Sheriff's view, the first component—a constitutional violation—requires a plaintiff to establish the same elements that form an individual § 1983 claim. That is, to show a constitutional violation for the purposes of *Monell* liability, a plaintiff must establish, as to an individual, '(1) a substantial risk of serious harm; (2) the [individual's] deliberate indifference to that risk; and (3) causation.'. . But in this case, the jury found only (1) and (2) as to Gaddis and Bauman and attributed (3), causation, to the Sheriff instead. According to the Sheriff, because the jury found that Gaddis and Bauman were not liable under § 1983, no constitutional violation occurred, and Rogers' *Monell* claim necessarily failed. The issue before us, then, is whether individual liability under § 1983 is a necessary element of municipal liability under *Monell*. We addressed this question in *Barnett v. MacArthur*, 956 F.3d 1291 (11th Cir. 2020). [Court discusses *Barnett*] The jury's verdict represents a finding that the Jail's policies—not the actions of the individual deputies—were the '"moving force"' [behind] the constitutional violation.'. . The Sheriff conflates the elements of a § 1983 claim against an individual officer with *Monell*'s requirement of a constitutional violation. They are not one and the same. *Barnett* forecloses the Sheriff's argument, and accordingly, we find no abuse of discretion in the district court's denial of relief under Rule 59(e)."); ***Richards v. County of San Bernardino***, 39 F.4th 562, 574 (9th Cir. 2022) ("[T]his Court has rejected the view that municipal

liability is precluded as a matter of law under § 1983 when the individual officers are exonerated of constitutional wrongdoing. *See Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002). Instead, '[i]f a plaintiff established he suffered constitutional injury *by the County*, the fact that individual officers are exonerated is immaterial to liability under § 1983.'. . 'This is true whether the officers are exonerated on the basis of qualified immunity, because they were merely negligent, or for other failure of proof.'. . Here, Richards puts forth at least two *Monell* claims that are not premised on a theory of liability that first requires a finding of liability on the part of the individual officers: (1) that the County's policy of prohibiting coroner investigators from entering a crime scene until cleared by homicide detectives resulted in the loss of exculpatory time-of-death evidence, and (2) that the lack of any training or policy on *Brady* by SBSD resulted in critical exculpatory evidence being withheld by the prosecution. Irrespective of the merits of these claims, the district court erred by not addressing whether Richards could show that he suffered a constitutional injury by the County unrelated to the individual officers' liability under § 1983."); ***Crowson v. Washington County State of Utah***, 983 F.3d 1166, 1187-92 & n.10 (10th Cir. 2020) ("In *Williams v. City & County of Denver*, we 'emphasize[d] the distinction between cases in which a plaintiff seeks to hold a municipality liable for failing to train an employee who as a result acts unconstitutionally, and cases in which the city's failure is itself an unconstitutional denial of substantive due process.'[10] **[fn.10:** Although the opinion in *Williams* was vacated, it was not reversed by the en banc court. . . Thus, its expressions on the merits may have at least persuasive value.**]** We explained that a city may not be held liable for failure to train 'when there has been no underlying constitutional violation by one of its employees.'. . By contrast, where the claim is premised upon a formally promulgated policy, well-settled custom or practice, or final decision by a policymaker, we held 'the inquiry is whether the policy or custom itself is unconstitutional so as to impose liability on the city for its own unconstitutional conduct in implementing an unconstitutional policy.' . . Although *Williams* has a complex subsequent history, nothing in that history casts doubt on the determination that a failure-to-train claim may not be maintained without a showing of a constitutional violation by the allegedly un-, under-, or improperly-trained officer. . . Thus, under *Williams*, our conclusion that the claim against Nurse Johnson fails on summary judgment necessarily also defeats the failure-to-train claim against the County, which is premised only upon the County's failure to train its nurses. Where the claim against the municipality is not dependent upon the liability of any individual actor, however, our precedent is less clear. Recall that in *Garcia*, we held: 'Deliberate indifference to serious medical needs may be shown by proving there are such gross deficiencies in staffing, facilities, equipment, or procedures that the inmate is effectively denied access to adequate medical care.'. . More recently, however, we reached a contrary conclusion. *See Martinez v. Beggs*, 563 F.3d 1082 (10th Cir. 2009). . . . In *Martinez* . . . we went beyond *Olsen* in holding that a § 1983 deliberate indifference claim against a municipality based on systemic failures cannot survive in the absence of a constitutional violation by at least one individual defendant. . . . We are unable to reconcile the holdings in *Martinez* and *Garcia*. However, *Garcia* is the earlier published decision, and 'when faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom.' . . . The subsequent development of our municipal liability caselaw confirms that *Heller* did not undermine *Garcia*. [discussing cases] As previously discussed, in *Collins* the Supreme Court

recognized a type of § 1983 claim against a municipality that may survive even in the absence of a constitutional violation by a municipal employee. [discussing *Collins*] We dissected the meaning of *Collins* for § 1983 municipal liability in *Williams*. [discussing *Williams*] We returned to the relevant question in *Trigalet v. City of Tulsa*. . . There, 'we consider[ed] whether a municipality can be held liable for the actions of its employees if those actions do not constitute a violation of a plaintiff's constitutional rights.'. . We held 'even if it could be said that Tulsa's policies, training, and supervision were unconstitutional, the City cannot be held liable where, as here, the officers did not commit a constitutional violation.'. . . Under *Trigalet*, there is no question that where the actions of a municipality's officers do not rise to the level of a constitutional violation and the claim against the municipality is based on it serving as the driving force behind those actions, liability cannot lie. But the question here, and in *Garcia*, is different: whether, even where no individual action by a single officer rises to a constitutional violation, a municipality may be held liable where the sum of actions nonetheless violates the plaintiff's constitutional rights. *Garcia* answers that question in the affirmative. And the Supreme Court's subsequent decision in *Heller* does not cast doubt on *Garcia*; in *Heller* the theory of municipality liability was predicated on the actions of one officer who was determined not to have violated the plaintiff's constitutional rights. Because *Garcia* is not undermined by a subsequent Supreme Court decision, and it also predates *Martinez*, *Garcia* is controlling here. . . . Because municipalities act through officers, ordinarily there will be a municipal violation only where an individual officer commits a constitutional violation. But, as in *Garcia*, sometimes the municipal policy devolves responsibility across multiple officers. In those situations, the policies may be unconstitutional precisely because they fail to ensure that any single officer is positioned to prevent the constitutional violation. Where the sum of multiple officers' actions taken pursuant to municipal policy results in a constitutional violation, the municipality may be directly liable. That is, the municipality may not escape liability by acting through twenty hands rather than two. The general rule in *Trigalet* is that there must be a constitutional violation, not just an unconstitutional policy, for a municipality to be held liable. In most cases, this makes the question of whether a municipality is liable dependent on whether a specific municipal officer violated an individual's constitutional rights. But *Garcia* remains as a limited exception where the alleged violation occurred as a result of multiple officials' actions or inactions. With this legal background in place, we now proceed to the question of whether our resolution of the claims against the individual defendants forecloses the County's liability. We conclude that it does with respect to the failure-to-train claim, but not as to the theory based on a systemic failure of medical policies and procedures. Accordingly, we reverse the district court's denial of summary judgment to the County on the failure-to-train claim, but we lack jurisdiction over the claim against the County based on its allegedly deficient policies and procedures."); ***Ouellette v. Beaupre***, 977 F.3d 127, 144-45 (1st Cir. 2020) ("It is well established that, without a finding of a constitutional violation on the part of a municipal employee, there cannot be a finding of § 1983 liability on the part of a supervisor or municipality. . . However, contrary to appellees' assertion, we have never held that the dismissal of a § 1983 claim against an individual officer on the basis of the statute of limitations compels dismissal of timely supervisory and municipal liability claims premised on that officer's alleged constitutional violations. . .Indeed, in *Wilson v. Town of Mendon*, we explicitly held that '[t]here is ... nothing to prevent a plaintiff

from foregoing the naming of an individual officer as a defendant and proceeding directly to trial against the municipality.'. . In reaching that conclusion, we rejected the argument that such a scenario would require a court to adjudicate the rights of an individual not before it. . . Rather, we held that, for a plaintiff to prevail under such circumstances, a jury would merely have to make 'a factual finding regarding the implications of [the individual officer's] conduct for the possible liability of the [municipality] as her employer.'. . In this case, if Ouellette is to prevail on his § 1983 claims against appellees, he will have to convince a jury to make a preliminary factual finding that Gaudette violated his constitutional rights. Of course, that finding will not be binding on Gaudette or subject him to damages liability, given that the constitutional claims against him are barred by the statute of limitations. . . Rather, such a finding will merely establish the possibility that appellees may be held responsible for Gaudette's allegedly unconstitutional conduct under Ouellette's theory of deliberate indifference."); ***Quintana v. Santa Fe County Board of Commissioners***, 973 F.3d 1022, 1033-34 (10th Cir. 2020) ("In this case, the plaintiffs sought leave to amend to add a *Monell* claim under § 1983 against Santa Fe County for its allegedly deficient medical intake protocol. . . The district court concluded that amendment would be futile because the plaintiffs could not state a *Monell* claim without a viable claim against an individual defendant. But that blanket justification does not square with circuit precedent holding that municipal liability under *Monell* may exist without individual liability. . . Indeed, we concluded in *Garcia* that even where 'the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights.'. . Thus, in light of *Garcia*, the district court's legal basis for its finding of futility is contrary to our circuit's precedent. But that does not end the inquiry. Although the district court's finding of futility is not consistent with *Garcia*, the proposed amended complaint must still allege facts that, under *Garcia* and *Monell*, plausibly state a cause of action against Santa Fe County. To state a claim against the County, the plaintiffs must allege facts showing: (1) an official policy or custom, (2) causation, and (3) deliberate indifference. . . The plaintiffs' proposed amendment alleges: (1) Santa Fe County maintained an unconstitutional custom of failing to treat detainees for withdrawal, which resulted in a deficient medical intake protocol, (2) that custom caused Ortiz's injury, and (3) the County's actions (or inaction) stemmed from deliberate indifference. Although we are not sure whether the plaintiffs can prove each of those elements at trial or even survive summary judgment, they allege sufficient facts supporting each element for their claim to proceed past the motion-to-dismiss stage. . . . The plaintiffs pleaded facts indicating that Ortiz never received or did not take the kick kit withdrawal medications. That allegation supports the plaintiffs' claim that the jail had a process problem—even though we cannot pin the failure to administer the kick kit on any one individual. The plaintiffs also pleaded that three other inmates at the same jail recently experienced withdrawal-related deaths. And a 2003 Department of Justice study put Santa Fe County on notice about deficiencies in the jail's 'intake medical screening, assessment, and referral process.'. .The plaintiffs further allege that these deficiencies contributed to Ortiz's death. Finally, the plaintiffs alleged that the jail previously provided Ortiz with deficient intakes over the course of eight separate incidents of incarceration at the jail. Altogether, the allegations of intake failures preceding Ortiz's death and past process failures sufficiently state a *Monell* claim at this early stage

in the proceedings. . . Thus, we conclude that the proposed amendment would not be entirely futile in this case."); ***Barnett v. MacArthur***, 956 F.3d 1291, 1301-03 (11th Cir. 2020), *cert. denied sub nom Lemma v. Barnett*, 141 S. Ct. 1373 (2021) (" One final matter warrants discussion. The Sheriff contends that he cannot be liable under *Monell* because the jury found in favor of Deputy MacArthur on the individual Fourth Amendment detention claim against her. As the Sheriff sees things, the jury verdict means that there was no Fourth Amendment violation, and without a Fourth Amendment violation there cannot be municipal liability under *Monell*. . . The syllogism is superficially seductive, but on this record it does not work. It is true, as the Sheriff says, that 'an inquiry into a governmental entity's custom or policy is relevant only when a constitutional deprivation has occurred.' *Rooney v. Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996). But the problem for the Sheriff is that the jury verdict in favor of Deputy MacArthur does not constitute a finding that Ms. Barnett suffered no Fourth Amendment violation as a result of the detention. We have held that '*Monell* ... and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government.' *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985). For example, municipal liability can exist if a jury finds that a constitutional injury is due to a municipal policy, custom, or practice, but also finds that no officer is individually liable for the violation. . . This is not a controversial concept, as many of our sister circuits have come to the same conclusion. [collecting cases] Where, as here, a jury has returned a verdict in favor of an individual defendant on a § 1983 claim, the question is whether that verdict 'can be harmonized with a concomitant verdict or decision imposing liability on the municipal entity. The outcome of the inquiry depends on the nature of the constitutional violation alleged, the theory of municipal liability asserted by the plaintiff, and the defenses set forth by individual actors.'. . We conclude that the jury verdict in favor of Deputy MacArthur does not preclude a finding of municipal liability due to the Sheriff's mandatory eight-hour hold policy. . . .Because the jury found only that Deputy MacArthur had not 'intentionally committed acts that violated [Ms.] Barnett's Fourth Amendment right ... not to be arrested or detained without probable cause,'. . . its verdict says nothing about whether the continued detention of Ms. Barnett—after her breathalyzer tests and after posting bond—due to the Sheriff's hold policy violated the Fourth Amendment. Stated differently, the jury was asked to decide only whether Deputy MacArthur was personally responsible (due to 'intentionally committed acts') for any Fourth Amendment violations, and not whether Ms. Barnett suffered a Fourth Amendment violation due to her continued detention. Under the circumstances—including the evidence presented, the defense theory, the jury instructions, and the verdict form—the jury's verdict in favor of Deputy MacArthur does not insulate the Sheriff from a § 1983 claim under *Monell* for Ms. Barnett's continued detention pursuant to the eight-hour mandatory hold policy."); ***Rayfield v. City of Grand Rapids, Michigan***, 768 F. App'x 495, 511 n.12 (6th Cir. Apr. 15, 2019) ("It is undecided whether a municipality's liability under § 1983 is predicated on first finding that an individual officer or employee is also liable. *See, e.g.*, *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the department regulations might have *authorized* the use of constitutionally excessive force is quite beside the point."); *accord Watkins v. City of Battle Creek*, 273 F.3d 682, 687 (6th Cir. 2001); *but see Winkler v. Madison County*, 893 F.3d 877, 899–901 (6th Cir. 2018) (noting

that *Heller* and *Watkins* did not consider instances in which the municipality directly caused the violation, the violation was caused by government officials not named in the complaint, or the violation was caused by a combination of government-sponsored conduct that is not easily traceable to one individual official). Recognizing our unsettled precedent on this issue, because we ultimately conclude that Rayfield's *Monell* claim fails to state a claim under Rule 12(b)(6), we need not resolve this issue as it applies to Rayfield's appeal."); ***Horton by Horton v. City of Santa Maria***, 915 F.3d 592, 604-05 (9th Cir. 2019) ("[M]unicipal defendants may be liable under § 1983 even in situations in which no individual officer is held liable for violating a plaintiff's constitutional rights. As we have previously acknowledged, constitutional deprivations may occur 'not ... as a result of actions of the individual officers, but as a result of the collective inaction' of the municipal defendant. . . Here, a reasonable jury might be able to conclude that Horton suffered a constitutional deprivation 'as a result of the collective inaction' of the Santa Maria Police Department, . . . or of officers' adherence to departmental customs or practices[.] . . . For example, taking the facts in the light most favorable to the plaintiff, a jury might find that the Santa Maria Police Department failed to ensure compliance with its written policy of removing belts from detainees. . . . Second, a reasonable jury might find that the Police Department failed to assure proper monitoring of its security cameras. . . . We do not decide whether any of these specific acts or omissions, or any other, if proven, would give rise to a municipal constitutional violation. Rather, our inquiry into the *Monell* claims at this stage is purely jurisdictional. For that purpose, we conclude that our holding that Officer Brice is entitled to qualified immunity does not preclude the possibility that a constitutional violation may nonetheless have taken place, including as a result of the collective acts or omissions of Santa Maria Police Department officers."); ***Evans v. City of Helena-West Helena, Arkansas***, 912 F.3d 1145, 1146 (8th Cir. 2019) ("While a municipality cannot be held liable without an unconstitutional act by a municipal employee, there is no requirement that the plaintiff establish that an employee who acted unconstitutionally is personally liable. . . So even if the clerk personally has absolute or qualified immunity from suit and damages, that immunity does not foreclose an action against the City if the complaint adequately alleges an unconstitutional policy or custom and an unconstitutional act by the clerk as a city employee."); ***North v. Cuyahoga County***, 754 F. App'x 380, 389-94 (6th Cir. 2018) ("Even if no individual violated North's Eighth Amendment rights, North argues that the County can still be held liable for his injury because its policies and customs caused North to be denied constitutionally adequate medical care. There must be a constitutional violation for a § 1983 claim against a municipality to succeed—if the plaintiff has suffered no constitutional injury, his *Monell* claim fails. . . A court's finding that an individual defendant is not liable because of qualified immunity, however, does not necessarily foreclose municipal liability. . . .Several other circuits have interpreted *Heller* to permit municipal liability in certain circumstances where no individual liability is shown. . . . In many cases, a finding that no individual defendant violated the plaintiff's constitutional rights will also mean that the plaintiff has suffered no constitutional violation. In a subset of § 1983 cases, however, the fact that no individual defendant committed a constitutional violation—e.g., acted with deliberate indifference to an inmate's serious medical need—might not necessarily 'require a finding that no constitutional harm has been inflicted upon the victim, nor that the municipality is not responsible for that constitutional harm.'. . .The type of

claim North advances—one premised on failure to act rather than affirmative wrongdoing—might fit within this analysis. Assuming that our caselaw allows for such an approach, we consider his affirmative policy or custom and failure-to-train claims in turn. . . . As discussed above, in addition to demonstrating a constitutional violation, a plaintiff pursuing an affirmative policy or custom claim against a municipal entity must (1) show the existence of a policy, (2) connect that policy to the municipality, and (3) demonstrate that his injury was caused by the execution of that policy. . . . This does not require a showing that the municipality acted with deliberate indifference to the risk of constitutional violations. . . Here, however, because North has not demonstrated that any individual jail employee violated his Eighth Amendment right to adequate medical care by acting with deliberate indifference, he must show that the municipality itself, through its acts, policies, or customs, violated his Eighth Amendment rights by manifesting deliberate indifference to his serious medical needs. . . . On this record, North has not demonstrated systemic County deficiencies that rise to the level of deliberate indifference to serious medical needs in violation of the Eighth Amendment. . . . Although some of the factors relevant in *Shadrick* are present here, there are also some important differences. In addition to LPNs, the jail employed nurses and medical providers with more advanced training and certifications (e.g., registered nurses (RNs), nurse practitioners (NPs), and physicians) to treat inmates. NPs, like Mirolovich, have Master's degrees in nursing, may assess and treat patients, and practice under a 'collaborative agreement' with a physician. Mirolovich did not recall receiving or reviewing jail policies, but he did receive some training on providing care in the correctional setting during staff meetings. Nurses typically went through a two-week orientation training program when they began working at the jail and received and signed off on having reviewed a copy of the jail policies; policy updates were provided and discussed at staff meetings. There is no evidence that nurses were permitted to use the policies at their discretion or to define the scope of their practice and no indication that nurses or providers refused to provide care unless an inmate requested it. In sum, the County's training program is not so inadequate that failing to provide additional training constitutes deliberate indifference to an obvious risk of injury."); ***Winkler v. Madison County***, 893 F.3d 877, 900-01 (6th Cir. 2018) ("Despite the fact that *Watkins* [*v. City of Battle Creek*, 273 F.3d 682 (6th Cir. 2001)] broadly states that the imposition of municipal liability is contingent on a finding of individual liability under § 1983, other cases from this circuit have indicated that the principle might have a narrower application. [Court discusses *Epps v. Lauderdale County*, 45 F. App'x 332 (6th Cir. 2002) and *Garner v. Memphis Police Dep't*, 8 F.3d 358, 365 (6th Cir. 1993)] There is no indication that *Watkins* considered any of the situations discussed in *Epps* or *Garner* when it stated that municipal liability is contingent on a finding of individual liability. And the only case relied on by *Watkins* for that proposition, *City of Los Angeles v. Heller*, . . is not nearly so sweeping regarding the scope of *Monell* liability. . . In fact, several other circuits have considered *Heller* and concluded that a municipality may be held liable under § 1983 in certain cases where no individual liability is shown. [collecting cases] But we need not decide whether, under our court's precedent, a municipality's liability under § 1983 is always contingent on a finding that an individual defendant is liable for having committed a constitutional violation. Even if we assume a negative answer to that question, Winkler has not presented facts from which a jury could find that the County had a policy or custom that caused a violation of Hacker's constitutional

right to adequate medical care."); ***Winger v. City of Garden Grove***, 690 F. App'x 561, 563 (9th Cir. 2017) ("We affirm the district court's grant of summary judgment to the City of Garden Grove on Winger's *Monell* claim. . . The district court erred in concluding that municipalities can never be held liable absent constitutional violations by the individual defendants. *See Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1186 n.7 (9th Cir. 2002) *overruled on other grounds by Castro,* 833 F.3d at 1076. We nonetheless affirm, as Winger provided little evidence that the city's training of police and fire personnel were inadequate. Winger relies almost exclusively on the report of her expert, which criticized the behavior of the individual officers, not the city's policies. The alleged inadequacies of the city do not rise to the level of unconstitutional deliberate indifference for a failure to train."); ***Thomas v. Cook County Sheriff's Dept***., 604 F.3d 293, 304, 305 (7th Cir. 2009) ("The testimony at trial leads us to conclude that the jury had a sufficient basis to find a widespread practice of CMTs failing to collect medical request forms, and that this failure caused Smith's death. Furthermore, we find unpersuasive the County's argument that it cannot be held liable under *Monell* because none of its employees were found to have violated Smith's constitutional rights. In support of its argument, the County cites *Los Angeles v. Heller*, 475 U.S. 796 (1986). . . . The County, in this case, appears to push for a rule that requires individual officer liability before a municipality can ever be held liable for damages under *Monell.* This is an unreasonable extension of *Heller.* What if the plaintiff here had only sued the County, or didn't know, because of some breakdown in recording shifts, who the CMTs on duty were? The actual rule, as we interpret it, is much narrower: a municipality can be held liable under *Monell,* even when its officers are not, unless such a finding would create an *inconsistent* verdict. . . So, to determine whether the County's liability is dependent on its officers, we look to the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth. . . The plaintiff in this case alleged that the failure to respond to Smith's medical requests caused his death and violated his right to due process. The jury instructions on the claim listed three elements, each of which the jury had to find by a preponderance of the evidence: "1. Norman Smith had a serious medical need; 2. *[t]he [d]efendant was deliberately indifferent to Norman Smith's serious medical need;* and 3.[t]he [d]efendant's conduct caused harm to Norman Smith." (emphasis added). Based on these instructions, the jury could have found that the CMTs were not *deliberately indifferent* to Smith's medical needs, but simply could not respond adequately because of the well-documented breakdowns in the County's policies for retrieving medical request forms. It is not difficult to reconcile the verdicts in this instance, and we see nothing amiss in holding the County liable even though none of the CMTs were individually responsible."); ***Willis v. Neal***, 2007 WL 2616918, at *8, *9 (6th Cir. 2007)(Dowd, J., dissenting) ("I read *Heller* to prohibit municipal liability only when the victim suffers no constitutional injury at all, not when the victim fails to trace that constitutional injury to an individual police officer. . . . My concern is focused on what may be the separate official policies of the *City of Dunlap*, *Sequatchie County*, and *Rhea County*, to permit their law enforcement personnel to participate in 'takedowns' by the Task Force without any attempt to ascertain for themselves whether there is a factual basis to believe there is probable cause for an arrest. . . . In my view, the problem here is not so much what happened at the airport but what happened at a policy level before October 7, 2003. As explained above, it is the apparent policy of these governmental entities to permit their officers and deputies to rather blindly participate in activities

initiated by the Task Force without any independent assurance that there is a factual basis for those activities."); ***Gray v. City of Detroit,*** 399 F.3d 612, 617-19 (6th Cir. 2005) ("When an officer violates a plaintiff's rights that are not 'clearly established,' but a city's policy was the 'moving force' behind the constitutional violation, the municipality may be liable even though the individual officer is immune. . . . It is arguable, therefore, that the District Court erred in its conclusion that '[i]f no constitutional violation by the individual defendants is established, the municipal defendants cannot be held liable under § 1983.' Assuming for the sake of argument that this Circuit permits a municipality to be held liable in the absence of any employee's committing a constitutional violation, the remaining question for us then is whether the City's policy makers' decisions regarding suicide prevention were themselves constitutional violations, as plaintiff contends. . . . A municipality may be liable under § 1983 where the risks from its decision not to train its officers were 'so obvious' as to constitute deliberate indifference to the rights of its citizens. . . As applied to suicide claims, the case law imposes a duty on the part of municipalities to recognize, or at least not to ignore, obvious risks of suicide that are foreseeable. Where such a risk is clear, the municipality has a duty to take reasonable steps to prevent the suicide. Very few cases have upheld municipality liability for the suicide of a pre-trial detainee. . . . Pre-trial detainees do not have a constitutional right for cities to ensure, through supervision and discipline, that every possible measure be taken to prevent their suicidal efforts. Detainees have a right that city policies, training and discipline do not result in deliberate indifference to foreseeable and preventable suicide attempts. Here, the plaintiff never made any statements that could reasonably be interpreted as threatening to harm himself, and none of his destructive acts were self-directed. There was no indication that he would turn his anger and agitation upon himself. The city's agents complied with city policies regarding medical care. Gray was transferred to the Receiving Hospital because of his physical complaints. He was screened by an intake nurse before being placed in a cell. . . . Plaintiff has documented twenty in-custody deaths, other than Gray's, that occurred in the city's various holding facilities over the eight year period between June 24, 1993, and August 3, 2001. Of these, only two were suicides, with one occurring in 1998 and one in 1999. Plaintiff argues that policymakers failed to adequately discipline or enforce their policies with respect to monitoring, but as of Gray's death no other inmate had ever committed suicide in a Receiving Hospital cell."); ***Epps v. Lauderdale County,*** No. 00-6737, 2002 WL 1869434, at *2, *3 (6th Cir. Aug. 13, 2002) (Cole, J., concurring)(unpublished) ("I concur with the majority that this high speed pursuit is governed by *County of Sacramento v. Lewis,* 523 U.S. 833 (1998), and that Appellants fail to allege facts sufficient to establish individual officer liability for injuries pursuant to the substantive due process doctrine. I also agree that no municipal liability exists in the present case. I write separately, however, to clarify my understanding of *City of Los Angeles v. Heller,* 475 U.S. 796 (1986) (per curiam), that a municipality may still be held liable for a substantive due process violation even when the individual officer is absolved of liability. . . . I read *Heller* to prohibit municipal liability only when the victim suffers no constitutional injury at all, not when the victim fails to trace that constitutional injury to an individual police officer. . . . A given constitutional violation may be attributable to a municipality's acts alone and not to those of its employees − as when a government actor in good faith follows a faulty municipal policy. . . A municipality also may be liable even when the individual government actor is exonerated, including where municipal

liability is based on the actions of individual government actors other than those who are named as parties. . . Moreover, it is possible that no one individual government actor may violate a victim's constitutional rights, but that the 'combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights.'"); ***Gibson v. County of Washoe,*** 290 F.3d 1175, 1186 n.7, 1188, 1189 n.9 & n.10 (9th Cir. 2002) ("The municipal defendants . . . assert that if we conclude, as we do, . . . that the individual deputy defendants are not liable for violating Gibson's constitutional rights, then they are correspondingly absolved of liability. Although there are certainly circumstances in which this proposition is correct, . . . it has been rejected as an inflexible requirement by both this court and the Supreme Court. For example, a municipality may be liable if an individual officer is exonerated on the basis of the defense of qualified immunity, because even if an officer is entitled to immunity a constitutional violation might still have occurred. . . Or a municipality may be liable even if liability cannot be ascribed to a single individual officer. . . And in *Fairley v. Luman*, 281 F.3d 913 (9th Cir.2002), we explicitly rejected a municipality's argument that it could not be held liable as a matter of law because the jury had determined that the individual officers had inflicted no constitutional injury. . .In any event, in this case, the constitutional violations for which we hold the County may be liable occurred *before* the actions of the individual defendants at the jail, so the County is not being held liable for what those deputies did. The County's violations . . . involved the decision to commit Gibson to the custody of the jail deputies despite his mental illness, and to do so with no direction to treat that illness while he was in jail or to handle him specially because of it. . . . When viewed in the light most favorable to Ms. Gibson, the record demonstrates that the County's failure to respond to Gibson's urgent need for medical attention was a direct result of an affirmative County policy that was deliberately indifferent, under the *Farmer* standard, to this need. . . Because that is so, we do not address whether it is necessary to prove the subjective *Farmer* state of mind in suits against entities rather than individuals. . . . [T]he Supreme Court has commented that it is difficult to determine the subjective state of mind of a government entity. . . This statement does not, however, preclude the possibility that a municipality can possess the subjective state of mind required by *Farmer*. First, it is certainly possible that a municipality's policies explicitly acknowledge that substantial risks of serious harm exist. Second, numerous cases have held that municipalities act through their policymakers, who are, of course, natural persons, whose state of mind can be determined. . . .To find the County liable under *Farmer*, the County must have (1) had a policy that posed a substantial risk of serious harm to Gibson; and (2) known that its policy posed this risk."); ***Fairley v. Luman***, 281 F.3d 913, 916, 917 (9th Cir. 2002) (per curiam) ("The City claims the Supreme Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), and this court's decisions in *Scott v. Henrich*, 39 F.3d 912 (9th Cir.1994), and *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir.1996), preclude municipal liability as a matter of law under § 1983 when the jury exonerates the individual officers of constitutional wrongdoing. . . . *Heller, Scott* and *Quintanilla* control John's excessive force claim. Exoneration of Officer Romero of the charge of excessive force precludes municipal liability for the alleged unconstitutional use of such force. To hold the City liable for Officer Romero's actions, we would have to rely on the § 1983 *respondeat superior* liability specifically rejected by *Monell.* However, these decisions have no bearing on John's Fourth and Fourteenth Amendment claims against the

City for arrest without probable cause and deprivation of liberty without due process. These alleged constitutional deprivations were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department. . . . The district court did not err by denying the City's motion for' judgment as a matter of law on the *Monell* claim based on the jury's exoneration of the individual officers alone. If a plaintiff establishes he suffered a constitutional injury *by the City,* the fact that individual officers are exonerated is immaterial to liability under § 1983. . . Otherwise, municipal liability may attach where a constitutional deprivation is suffered as a result of an official city policy but no individual officer is named as a defendant, *see City of Canton,* but not where named individual officers are exonerated but a constitutional deprivation was in fact suffered. In either case, a constitutional deprivation − the touchstone of § 1983 liability − was a consequence of city policy."); ***Speer v. City of Wynne,*** 276 F.3d 980, 985-87 (8th Cir. 2002) ("Our court has previously rejected the argument that *Heller* establishes a rule that there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability. . . . The appropriate question under *Heller* is whether a verdict or decision exonerating the individual governmental actors can be harmonized with a concomitant verdict or decision imposing liability on the municipal entity. The outcome of the inquiry depends on the nature of the constitutional violation alleged, the theory of municipal liability asserted by the plaintiff, and the defenses set forth by the individual actors. We do not suggest that municipal liability may be sustained where there has been no violation of the plaintiff's constitutional rights as a result of action by the municipality's officials or employees. *Cf. Trigalet v. City of Tulsa,* 239 F.3d 1150, 1156 (10th Cir.2001) (concluding that a municipality may be held liable only if the conduct of its employees directly caused a violation of a plaintiff's constitutional rights); *Schulz v. Long,* 44 F.3d 643, 650 (8th Cir.1995) ("It is the law in this circuit ... that a municipality may not be held liable on a failure to train theory unless an underlying Constitutional violation is located."). After all, a municipality can act only through its officials and employees. However, situations may arise where the combined actions of multiple officials or employees may give rise to a constitutional violation, supporting municipal liability, but where no one individual's actions are sufficient to establish personal liability for the violation. . . . The district court's decision to impose liability on the City here is *potentially* reconcilable with its judgment in favor of Mayor Green. The district court found that Mayor Green publicized the allegations against Speer, but the constitutional violation accrues only when an employee is denied the opportunity to clear his name. It is possible, for instance, that the district court relied on the fact that some other city official or officials with final employment-policymaking authority (such as the city council) refused Speer the opportunity to clear his name. If so, Mayor Green's conduct would have been insufficient to support individual liability, yet the City would be liable for the act of its policymaker who did deny Speer that opportunity. Municipal liability may attach based on the single act or decision of a municipal decisionmaker if the decisionmaker possesses final authority to establish municipal policy over the subject matter in question. . . It may also be possible that the district court found that a final policymaker ratified the decision to discharge Speer without a hearing, which could also form the basis for municipal liability. . . . Because the district court did not make findings concerning which City policymakers violated Speer's rights and did not make specific conclusions of law concerning the theory of municipal liability

supporting its judgment against the City, we cannot say with any certainty that the court's decisions can or cannot be harmonized. We therefore find it necessary to remand this case to the district court to make specific findings of fact and conclusions of law explaining the basis for the City's liability and explaining the basis for Mayor Green's dismissal."); ***Kneipp v. Tedder***, 95 F.3d 1199, 1213 (3d Cir. 1996) ("The precedent in our circuit requires the district court to review the plaintiffs' municipal liability claims independently of the section 1983 claims against the individual police officers, as the City's liability for a substantive due process violation does not depend upon the liability of any police officer."); ***Chew v. Gates***, 27 F.3d 1432, 1438 (9th Cir. 1994) ("A judgment that [police officer] is not liable for releasing [police dog], given all of the circumstances, would not preclude a judgment that by implementing a policy of training and using the police dogs to attack unarmed, non-resisting suspects, including [plaintiff], the remaining defendants caused a violation of [plaintiff's] constitutional rights. Supervisorial liability may be imposed under section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury."); ***Fagan v. City of Vineland***, 22 F.3d 1283, 1292 (3d Cir. 1994) ***(Fagan I)*** (holding, in context of "a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution . . . . A finding of municipal liability does not depend automatically or necessarily on the liability of any police officer. Even if an officer's actions caused death or injury, he can only be liable under section 1983 and the Fourteenth Amendment if his conduct 'shocks the conscience.' [footnote omitted] The fact that the officer's conduct may not meet that standard does not negate the injury suffered by the plaintiff as a result. If it can be shown that the plaintiff suffered that injury, which amounts to deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights. The pursuing police officer is merely the causal conduit for the constitutional violation committed by the City."); ***Simmons v. City of Philadelphia***, 947 F.2d 1042, 1058-65 (3d Cir. 1991) (no inconsistency in jury's determination that police officer's actions did not amount to constitutional violation, while city was found liable under § 1983 on theory of policy of deliberate indifference to serious medical needs of intoxicated and potentially suicidal detainees and failure to train officers to detect and meet such needs); ***Parrish v. Luckie***, 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be liable under § 1983, even though no government individuals were personally liable."); ***Rivas v. Freeman***, 940 F.2d 1491, 1495-96 (11th Cir. 1991) (Sheriff found liable in his official capacity for failure to train officers regarding identification techniques and failure to properly account for incarcerated suspects, while deputies' actions which flowed from lack of procedures were deemed mere negligence); ***Gibson v. City of Chicago***, 910 F.2d 1510, 1519 (7th Cir. 1990) (dismissal of claim against officer on grounds that he did not act under color of state law not dispositive of claim against City where allegations of municipal policy of allowing mentally unfit officers to retain service revolvers).

See also ***Donahue for Estate of McIntyre v. Borough of Collingdale***, No. CV 22-1695, 2024 WL 387455, at *1, *7, *9, *11-12 (E.D. Pa. Feb. 1, 2024) ("High-speed police pursuits,

however necessary for law enforcement, also pose an incredible danger to the public. This danger is not new. In the last forty-five years over 11,500 people have lost their lives as a result of a pursuit, . . . averaging several hundred deaths per year . . . The need for police training and proper departmental policy is self-evident, reported, . . . and of great concern to law enforcement. . . At summary judgment, this Court confronts two distinct questions. First, did the officers' behavior, in choosing to engage in this high-speed pursuit, 'shock the conscience?' And second, regardless of officer liability, did the municipalities demonstrate deliberate indifference to the public, by allowing a custom of reckless pursuits or failing to train officers on police pursuits, that caused Plaintiffs' injuries? As to question one, the officers are entitled to summary judgment because they did not intend to harm McIntyre or Munafo while pursuing an actively fleeing suspect. However, the claims against the municipal Defendants will proceed to trial. Genuine disputes over three material facts require this decision. Because the municipalities were on notice of prior dangerous pursuits that may have violated their pursuit policies, the municipalities took no remedial action—investigation, discipline, or retraining—after these prior pursuits, and the municipalities may have failed to provide any meaningful training to their officers for when to engage in high-speed pursuits, a jury must decide if their actions, as established at a trial in this case, constituted deliberate indifference to the public's wellbeing. . . . This Court recognizes that *Fagan I* has triggered much commentary, including from the Third Circuit, since its publication. . . Yet grumblings are not grounds for reversal. To the contrary, the Third Circuit has confirmed that a municipality may be 'independently liable for a substantive due process violation' even when no officer is liable since *Fagan I*. . . And most recently, the Court reaffirmed that municipal liability is cognizable, even when officer liability is not, so long as its finding would not create an '*inconsistent* verdict.' . . Following *Fagan I*, because the level of 'shocks the conscience' culpability is different for officers and municipalities in police pursuit cases, municipal liability is not inconsistent with granting summary judgment for the officers. . . . Between 2013 and this incident, Collingdale disclosed involvement in 26 vehicle pursuits. . . Darby disclosed involvement 30 to 35 vehicle pursuits. . . . Moreover, Darby designee and current Police Chief Joseph Gabe testified that the several of Darby's past incidents, based on the police reports transcribing the events, violated the pursuit policy. . . . Neither Collingdale nor Darby recalled providing any formal training on pursuit decision-making or driving beyond giving officers the written policies. . . In Police Academy officers learned how to maneuver their vehicles, including how to pursue suspects. . . However, the State training did not include, and the Boroughs could remember, conducting any training for deciding when to pursue beyond providing the written policy. . . Neither Borough could recall any post-pursuit reviews, investigation, or discipline for any of the pursuits between 2013 and 2020. . . Additionally, both Boroughs had failed to follow Pennsylvania law that requires police departments report all vehicle pursuits to a state-wide database prior to this incident. . . Darby did not report any of its pursuits. . . Collingdale reported four. . . . [V]iewing the record in the light most favorable to Plaintiffs, the Boroughs failed to provide any training on when or how to conduct vehicle pursuits beyond, at most, providing officers with the written documents. Collingdale and Darby's pursuit policy 'training' consisted of handing officers hundreds of pages of police procedure, which included the pursuit policy, and telling them to read it. . . While officers received classroom training on *how* to operate a vehicle during a pursuit at

police academy, no evidence suggests they received any corresponding training for *when* to initiate a pursuit. Justice O'Connor's oft-repeated scenario reflects this exact point. In *Harris*, she explained that a municipality, 'arm[ing] its officers with firearms,' would be liable if they did not also train them on *when* to deploy force. . . Considering the uncontested danger high-speed pursuits pose to the public, no matter how deftly an officer operates his vehicle, inadequate training on when to pursue predictably leads to injury. . . .Altogether, a reasonable jury could find the past pursuits, and the Boroughs' lack of remedial actions in their wake, established a custom of authorizing pursuits with a deliberate indifference to the dangers they presented. Similarly, the history of pursuits and resulting damage may have put the Boroughs on notice that training was woefully inadequate to protect the publics' constitutional rights, such that failure to act evinced a deliberate indifference to them. Based on this same history of potential violations, their predictable recurrence, and the Boroughs' refusal to take any remediation, a jury could conclude the custom and failure to train caused and were the moving forces behind the officers' policy violations, and, consequently, Plaintiffs' injuries."); ***Taylor v. Comanche County Facilities Authority***, No. CIV-18-55-G, 2020 WL 6991010, at *5 n.5 (W.D. Okla. Nov. 25, 2020) ("Contrary to Defendants' suggestion, there is no per se rule 'requir[ing] individual officer liability before a municipality can ... be held liable for damages under *Monell*.' *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 305 (7th Cir. 2010); *see also Cordova v. City of Albuquerque*, No. Civ. 11-806-GBW/ACT, 2013 WL 12040727, at *4 (D.N.M. Feb. 22, 2013). Indeed, 'municipal liability can exist if a jury finds that a constitutional injury is due to a municipal policy, custom, or practice, but also finds that no officer is individually liable for the violation.' *Barnett v. MacArthur*, 956 F.3d 1291, 1301 (11th Cir. 2020), *petition for cert. filed*, No. 20-595 (U.S. Nov. 5, 2020); *accord Garcia v. Salt Lake Cnty.*, 768 F.2d 303, 310 (10th Cir. 1985)."); ***Byrne v. City of Chicago***, 447 F.Supp.3d 707, 712-13 (N.D. Ill. 2019) ("The complaint alleges a constitutional violation. The Due Process Clause protects bodily integrity against 'very serious battery.'. . Byrne alleges that she was shot, . . . resulting in 'serious and permanent … traumatic facial injuries,'. . . with 'pieces of [her] jaw, tongue, teeth, and cheek … splattered' about[.]. . That qualifies as a 'very serious battery' for purposes of the due process component of her *Monell* claim. . . . As the City observes, Byrne alleges in the alternative that she shot herself at Schuler's prodding. . . But even if it would not have violated due process or the Fourth Amendment to prod Byrne to shoot herself, Rule 8(d)(2) allows Byrne to plead in the alternative and provides that where, as here, 'a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.'. . .The complaint also adequately alleges that an official policy or custom of the City was the moving force behind the constitutional violation. Byrne alleges that the City failed (1) to discourage and to disallow a code of silence amongst CPD officers . . . ; (2) to investigate CPD misconduct adequately and impartially. . . ; (3) to implement an early warning system to detect and intervene with corrective measures for potentially dangerous officers. . . ; (4) to re-train or to discipline officers accused of misconduct. . . ; and (5) to terminate problematic officers[.] The complaint further alleges that those policies and practices were the moving force behind Byrne's injuries because they 'caused [Schuler] to act with impunity and to feel and act as though his acts of misconduct would go unpunished and uninvestigated.'. . These allegations suffice to forestall dismissal at the pleading stage. . . . The City retorts that it cannot be held liable under *Monell* because Schuler did not act

under color of state law. . . This argument fails to recognize that, for purposes of *Monell* liability, the pertinent state action is the City's, not Schuler's. That is precisely why the 'conclusion that [an officer] did not act under color of state law does not permit summary judgment on [a] municipal liability claim.' *Gibson*, 910 F.2d at 1519. As the Seventh Circuit explained: 'On a municipal liability claim, the City policy itself must cause the constitutional deprivation. Therefore, the municipality itself is the state actor and its action in maintaining the alleged policy at issue supplies the "color of law" requirement under § 1983.'. . . *DeShaney* is inapposite. While the municipality in *DeShaney* was alleged to have *failed to act* to prevent private violence, Byrne alleges that the City *acted* by implementing unofficial policies and customs that put Schuler in a position to injure her. . . In any event, *DeShaney* acknowledged that it had nothing to say about *Monell*. . . In the end, the complaint alleges 'that an official policy or custom … caused [a] constitutional violation, [and] was the moving force behind [the violation].'. . That suffices to state a *Monell* claim."); ***Gardner v. Las Vegas Metropolitan Police Dept.***, No. 2:17-CV-00352-PAL, 2019 WL 1923634, at *13 (D. Nev. Apr. 29, 2019) ("In this case, NaphCare argues that *Gordon* does not apply because the newly announced standard only applies to claims against individual defendants. However, *Gordon* explicitly rejected this argument. *Gordon* involved claims against both individuals and municipal entities, and it overturned summary judgment on the *Monell* claim as improper in light of the new standard. The Ninth Circuit recently addressed *Gordon*'s applicability to municipal entities in *Crowell v. Cowlitz County*, 726 F. App'x. 593 (9th Cir. 2018) (unpublished). *Crowell* noted that *Gordon*'s new standard for deliberate indifference claims against individual defendants bears on a municipal liability claim 'because, under its newly-announced standard for individual liability, [plaintiffs] may be able to show that one or more individuals violated their rights by exhibiting "reckless disregard" for their well-being, and that those violations are attributable to Defendants.'. . As *Crowell* explained, a municipal entity can be liable under § 1983 even when a plaintiff does not sue an individual defendant if the plaintiff shows (1) one or more individuals violated his rights by exhibiting 'reckless disregard' for his well-being, and (2) those violations are attributable to the municipal entity."); ***Igwe v. Skaggs***, 258 F.Supp.3d 596, 609 (W.D. Pa. 2017) ("In this Circuit, a municipality may be independently liable even where none of its employees are liable. . . Under *Fagan*, a municipality 'can independently violate the Constitution if it has a policy, practice, or custom of deliberate indifference that causes the deprivation of some constitutional right through the actions of an officer, the "causal conduit."'. . Mr. Igwe bases his *Monell* claim on a failure to train and failure to supervise based on Officer Skaggs's culpability as well as under a *Fagan* theory of liability. We find genuine issues of material fact preclude summary judgment including Officer Skaggs's subjective belief to determine the culpability standard for conscience shocking behavior required to prove a *Monell* claim and whether Monroeville failed to train its officers on how to operate their police vehicles when responding in 'Emergency Response mode' as distinguished from pursuit."); ***Igwe v. Skaggs***, 2017 WL 395745, at *7-8 (W.D. Pa. Jan. 30, 2017) ("While Officer Skaggs is entitled to qualified immunity from the § 1983 substantive due process claim, our Court of Appeals requires we independently review Monroeville's liability in the context of a substantive due process claim for injuries sustained in high-speed police chases. . . The Court of Appeals adopts this independent standard with the understanding '[a] municipality would escape liability whenever the conduct of

the acting police officer did not meet the "shocks the conscience" standard, even though municipal policymakers, acting with deliberate indifference or even malice, implemented a policy which dictated his injury-causing actions.'. . Mr. Igwe's claims arise directly from injuries arising out of a high-speed police pursuit. Our Court of Appeals holds, in the police pursuit context, a municipality may be held independently liable 'for a substantive due process violation even in situations where none of its employees are liable.'. . Monroeville can independently violate the Constitution if it 'has a policy, practice or custom of deliberate indifference that causes the deprivation of some constitutional right through the actions of an officer, the "causal conduit."'. .Mr. Igwe alleges Monroeville had a policy, practice or custom resulting in it being deliberately indifferent to a serious risk of Officers Skaggs, Supancic or others of depriving other individuals of their life or liberty interest. An officer depriving an individual of such an interest may act as a conduit through which Monroeville caused constitutional harm. . . We recognize our Court of Appeals' view in *Fagan* is not followed by other Courts of Appeals, . . . but we are guided by our Court of Appeals and its specific direction the '[c]ity's policymakers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training. The officer may escape liability because this conduct did not "shock the conscience." It does not follow, however, that the city should also escape liability. The city caused the officer to deprive the plaintiff of his liberty; the city therefore has violated the plaintiff's Fourteenth Amendment rights.'. . Mr. Igwe specifically alleges Monroeville, while implementing a pursuit policy, did not implement or provide training on how its officers should operate their police cars when responding to an incident which does not involve pursuit. He further alleges, even if they were in a high-speed police pursuit, the officers through custom and habit, routinely ignore Monroeville's written pursuit policy and Monroeville does not supervise, enforce or discipline officers who 'routinely flouted and ignored the written policies with impunity....'. . .Igwe also pleads Monroeville's § 1983 *Monell* liability extends to failing to implement a policy which established the maximum speed of which it was safe for police vehicles to approach an Opticom controlled intersection to ensure the Opticom system operated as designed. Igwe further pleads Monroeville failed to train its officers to proceed at an appropriate speed to guarantee the Opticom system would pre-empt the traffic signal and turn the signal green in favor of the emergency vehicle as it approached the intersection. Igwe specifically pleads Officer Supancic proceeded through at least seven (7) intersections against red traffic signals and Officer Skaggs proceeded through at least two (2) intersections against red traffic signals and, as of December 8, 2014, Monroeville had exhibited a custom and practice of acquiescing such conduct resulting in a failure to properly supervise and arguing Monroeville's conduct is deliberately indifferent to Ms. Robinson's life and well-being. These specific allegations under our Court of Appeals' guidance in *Fagan*, require further discovery into Igwe's *Monell* supervisory liability claim against Monroeville."); ***Smith v. Burge***, 222 F.Supp.3d 669, 689-90 (N.D. Ill. 2016) ("Plaintiff has plausibly alleged violations of his Fourteenth Amendment and Fifth Amendment rights under the federal pleading standards. Moreover, Plaintiff alleges that the CPD had a de facto pattern and practice of systemic torture and physical abuse of African-American suspects at Area 2, including the use of cattle prods, electric shock boxes, plastic bags, telephone books, nightsticks, and shotguns; that certain Defendants supervised, encouraged, sanctioned, condoned, and ratified

brutality and torture by other CPD detectives; and that Defendants' torture and abuse caused Plaintiff to falsely confess to crimes that he did not commit. . . Examining these facts and all reasonable inferences in Plaintiff's favor, he has plausibly alleged a *Monell* claim under the dictates of *Iqbal* and *Twombly*. Despite Plaintiff's well-pleaded allegations, the City argues that because Plaintiff has failed to state an actionable constitutional violation, it cannot be liable under *Monell* citing *Los Angeles v. Heller,* 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986). Over six years ago, the Seventh Circuit rejected the argument that *Heller* requires individual officer liability before a municipality can ever be held liable for under *Monell*. *See Thomas v. Cook County Sheriff's Dept.*, 604 F.3d 293, 305 (7th Cir. 2010). Instead, the Seventh Circuit construed the *Heller* holding more narrowly, namely, 'a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an inconsistent verdict.'. . The City has failed to address this distinction. Because Plaintiff has plausibly alleged his *Monell* claim under the federal pleading standards and the City has failed to address the *Thomas* distinction, the Court denies the City's motion to dismiss Count IV of the Complaint."); ***Brown v. Novacek***, No. 1:14-CV-00988, 2014 WL 5762952, at *7-8 (M.D. Pa. Nov. 5, 2014) ("According to Defendants, Plaintiff must show that Novacek's actions 'shocked the conscience' in order to establish a constitutional violation, and that absent a showing that Novacek himself committed a constitutional violation, the municipality cannot be held liable under Section 1983. . . Defendants' position, while consistent with the law in other jurisdictions, is not an accurate statement of jurisprudence in the Third Circuit. Elsewhere, the United States Court of Appeals for the Fourth Circuit has held that a Section 1983 substantive due process claim for failure-to-train 'cannot be maintained against a governmental employer in a case where there is no underlying constitutional violation by the employee.' *Young v. City of Mt. Ranier,* 238 F.3d 567, 579 (4th Cir.2001). The United States Court of Appeals for the Third Circuit, however, has repeatedly come to the opposite conclusion . . . . Because the law in the Third Circuit does not require a plaintiff to show a constitutional violation on the part of the individual employee in substantive due process failure-to-train claims based on Section 1983, Plaintiff need not do so here."); ***Barrow v. City of Chicago***, 13 C 8779, 2014 WL 4477945, *3 (N.D. Ill. Sept. 11, 2014) ("The City specifically argues that because the Court dismissed Plaintiff's Fourth Amendment claims as untimely and Plaintiff's *Brady* claim as untenable, there is no underlying constitutional violations supporting Plaintiff's *Monell* claim. It appears that the City is arguing that the Court must dismiss Plaintiff's *Monell* claim because the City's liability is contingent on the individual officers' liability, an argument the Seventh Circuit rejected in *Thomas v. Cook County Sheriff's Dep't* . . . . That being said, accepting Plaintiff's well-pleaded facts and all reasonable inferences as true, Plaintiff has failed to cure the pleading deficiencies that the Court pointed out in its April 21, 2014, Order. In particular, although Plaintiff sets forth general allegations for a failure to train claim pursuant to *City of Canton*. . . a failure to train claim is not a stand alone constitutional violation. . . Instead, allegations of a failure to train supply a basis for municipal liability claims. . . As such, Plaintiff must sufficiently allege an underlying constitutional deprivation connected with the City's failure to train, which he has failed to do. Specifically, although Plaintiff alleges police misconduct in relation to security guards arrested for AUUW, he does not supply any details or explain how this misconduct constitutes a constitutional deprivation. The Court therefore grants the City's motion

to dismiss Plaintiff's *Monell* claim without prejudice and grants Plaintiff leave to file an amended *Monell* claim. The Court will not grant Plaintiff further leave to amend this claim if Plaintiff does not properly allege a *Monell* claim in his Second Amended Complaint."); ***Washington-Pope v. City of Philadelphia***, 979 F.Supp.2d 544, 573-80 (E.D. Pa. 2013) ("The issue that the Supreme Court has not addressed . . . is whether municipal liability may lie independent of proof that a municipal employee violated the plaintiff's constitutional rights. In the Third Circuit, it may: 'It is possible for a municipality to be held independently liable for a substantive due process violation even in situations where none of its employees are liable.' *Brown v. Commw. of Pa. Dep't of Health Emergency Med. Servs. Training Inst.,* 318 F.3d 473, 482 (3d Cir.2003) (citing *Fagan v. City of Vineland (Fagan I),* 22 F.3d 1283, 1292 (3d Cir.1994)). . . .Ms. Washington–Pope has argued that *Fagan* applies to her facts. At this stage of the litigation, without more, the Court must agree and allow discovery to continue. If Officer Bailey's conduct deprived Ms. Washington–Pope of her liberty (not to mention the obvious—that it risked her life), then even if Officer Bailey was in a diabetic trance precluding him from developing any intent, and so did not himself violate Ms. Washington–Pope's constitutional rights, the City's potential independent liability must be evaluated. The theory, as explained by the *Fagan I* Court, is that the perpetrating officer, although he does not commit a violation himself, acts as a 'causal conduit for the constitutional violation committed by the City.'. . . The question is whether the City itself has committed an independent constitutional violation. . . Indeed, *Fagan I* stands for the proposition that the City can independently violate the Constitution if it has a policy, practice, or custom of deliberate indifference that causes the deprivation of some constitutional right through the actions of an officer, the 'causal conduit.' If, as Ms. Washington–Pope alleges, the City had a policy, practice, or custom pursuant to which it was deliberately indifferent to a serious risk that Officer Bailey or diabetic officers like him might deprive other individuals of their life or liberty interests, and an officer does deprive an individual of such an interest, then those officers will have acted as a conduit through which the City caused constitutional harm. . . . Even if Ms. Washington–Pope, like the plaintiffs in *Heller* and *Grazier,* had not presented substantive due process claims against both Officer Bailey and the City, *Grazier* is at best inapposite. It is difficult to escape the tautological maze of the *Grazier* opinion—because there is no constitutional violation, there can be no constitutional violation. *Grazier* thus stands for the proposition that if the police officers did not use Fourth Amendment excessive force, the City cannot be liable for causing them to use excessive force (or, presumably, for using excessive force through them). But the case that the *Grazier* Court did not confront, and which would be analogous here, would be if the police officers there had, in a health-related trance, used excessive force but had done so unintentionally, such that they could not be individually liable, whereas the City had a custom, policy, or practice pursuant to which it was deliberately indifferent to the known risk of such conduct by officers with such significant chronic conditions, including the named individual defendants, under its command. That this scenario may sound *factually unlikely* does not mean it would not lead to liability as a matter of law under *Fagan I.* By contrast, the *Fagan I* Court was dealing with a more plausible scenario, in which the distance between what the officers had done and what the City had done could render the City liable even if the officers were not. Indeed, the ostensible reason that an officer can serve as a causal conduit while not committing a constitutional violation in his

own right is that the standards for individual officers and municipalities differ—'shocks the conscience' for the former and deliberate indifference for the latter. . . Although the *Fagan I* Court was not confronted with a scenario, like the one here, in which the individual officer did not violate the Constitution because he did not act under color of law (or, if a jury were to so find, because he lacked the requisite intent to effectuate a Fourth Amendment seizure or even 'shock the conscience'), its rationale is broad enough to encompass Ms. Washington–Pope's claim, where there was no violation by an individual officer because he did not act under color of law. . . .[T]he Third Circuit Court of Appeals appears not to have been confronted with a case in which a constitutional harm cognizable under any other amendment (say, the Fourth) has been established in all respects except for an intent or color of law element. Such cases would be distinct from *Heller* and *Grazier,* in which juries found that no constitutional harm at all was caused because space for independent municipal liability would potentially exist for a finding that the City's deliberate indifference, through a policy, custom, or practice, caused the constitutionally violative behavior by the individual officers. In any case, notwithstanding any persuasive power the City's effort to distinguish *Fagan I* might have, Ms. Washington–Pope's Fourteenth Amendment substantive due process claim against Officer Bailey also means that even if the Third Circuit Court of Appeals would limit the *Fagan* doctrine in the hypothetical circumstances described above, it still applies here. Though *Fagan I* has been criticized, . . . and several other courts of appeals, declining to follow it, have thereby created a circuit split,. . . *Fagan I* remains the law of this Circuit. . . .For these reasons, the Court denies the City's Motion for Summary Judgment—more specifically, Section C of its Motion—with prejudice because it is an incorrect account of the governing law. Further discovery will determine whether Ms. Washington–Pope has raised a triable issue of fact. To prevail on her Fourteenth Amendment independent municipal liability claim, she will ultimately have to prove that the City had a policy or custom of failing to train or supervise as well as 'a direct causal link between [that] municipal policy or custom and the alleged constitutional deprivation.'"); ***Pacheco v. Toledo-Davila***, No. 10–1480 (ADC), 2013 WL 4017885, *5 (D.P.R. Aug. 6, 2013) ("Here, Sgt. Rosario, at the time of Andrades's murder, had been summarily suspended from his position with the POPR. He, like the officer in *Gibson*, thus lacked the authority to use any police power, much less *misuse* it. As such, he was not acting under color of state law, and his actions cannot form the basis for the Supervisory Defendants' liability. . . In *Gibson*, the court, though it dismissed the cause of action against the line officer on 'color of law' grounds, it reversed the district court's grant of summary judgment against the municipality. *Gibson v. City of Chicago*, 910 F.2d 1510, 1519–20 (7th Cir.1990). It reversed, however, because the plaintiff's theory of municipal liability was premised on a municipal policy claim, not a failure to supervise. . . As to the policy claim, the court correctly held that 'the municipality itself is the state actor,' and there was therefore no 'color of law' problem with regard to the municipality. . .The matter is discussed in more detail below, but, among other problems, Plaintiffs never make a policy-type claim that effectively explains how the supposed policy could have actually prevented Sgt. Rosario from committing the crime against Andrades given that Sgt. Rosario had already essentially been removed from the POPR; thus, the claim would fail because no issue of material fact exists as to whether there was an 'affirmative link' between the policy and the harm."); ***Ott v. City of Milwaukee***, No. 09-C-870, 2010 WL 5095305, at *2 (E.D. Wis. Dec. 8, 2010) ("A

municipality can be held liable even if its individual officers are not liable or if the officers are granted an affirmative defense, such as qualified immunity. . . *Thomas* specifically states that a rule requiring individual officer liability before a municipality can ever be held liable for damages under *Monell* is an unreasonable extension of *Heller*. . . Even if the individual officers are granted qualified immunity, a municipality may be liable if its customs, policies, or practices may have caused a violation of a plaintiff's constitutional rights. . .The rule in *Thomas* is narrower than the rule the Defendants adopt from *Heller*. *Thomas* states, 'a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict.'. . Therefore, to determine whether the City could be liable in this case, even if the individual Defendants are not, the Court must consider the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth. . .Ott alleges that his constitutional rights were violated by employees and agents of the City, including individual Defendants, by withholding exculpatory evidence and fabricating other evidence pursuant to the policies and practices of the City. . . Pursuant to *Thomas*, it is plausible that the individual Defendants may not be liable, but the City could be held liable if the customs and policies of the municipality were the cause of Ott's constitutional rights being violated. The Defendants have not provided an adequate reason to hold otherwise."); ***Hunt ex rel. Chiovari v. Dart***, 754 F.Supp.2d 952, 974-76, 981 (N.D. Ill. 2010) ("[T]he defendant argues that since the plaintiff hasn't identified any responsible individuals, there can be no constitutional injury and no *Monell* claim. But there are situations in which a *Monell* claim can be maintained even when there are no liable officers. An officer might plead qualified immunity as a defense. If successful, it could be found that a 'plaintiff's constitutional rights were indeed violated, but that the officer could not be held liable. In [such a] case, one can still argue that the ... policies caused the harm, even if the officer was not individually culpable.'. . In *Thomas*, which was a failure-to-provide-medical-treatment case, the jury found the County liable even though it found the medical technicians were not. . . . The Seventh Circuit rejected the County's championing of a rule that would require individual liability before there could be municipal liability in light of just such potentialities. . . The actual rule to be derived from *Heller*, the court explained, was 'much narrower: a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict.'. . The question then becomes whether there was a constitutional injury − or more accurately, whether plaintiff can prove Mr. Hunt suffered a constitutional injury − even though there is no evidence of who, if anyone, caused Mr. Hunt to collapse. . . . [F]or the plaintiff to succeed on the excessive force claim, he must demonstrate that the unidentified Cook County Correctional officers acted 'maliciously and sadistically' to cause Mr. Hunt harm. . . . Without identifying any responsible officer, or providing any admissible evidence regarding what happened to Mr. Hunt or what Mr. Hunt or any officers in the vicinity were doing at the time of Mr. Hunt's collapse, the plaintiff cannot possibly stave off summary judgment on the excessive force claim. There is no way to assess the phantom officer's mental state or the circumstances of the purported use of excessive force. Plaintiff was earlier able to withstand a motion to dismiss premised on this very basis, simply because the time had not yet come to present evidence. It has now. . . . We simply cannot take the leap from Mr. Hunt collapsing and later dying with multiple bruises on his body to an unconstitutional policy of understaffing − or any policy − on the part of the Sheriff without more from plaintiff to fill in the

gap. This is especially true in light of the extensive injuries suffered by the plaintiff five months earlier which resulted in traumatic brain injury, skull fracture, facial fracture, aphasia, and impaired cognition. The Sheriff is entitled to summary judgment on plaintiff's failure to intervene claim."); ***Marcelle v. City of Allentown***, No. 07-CV-4376, 2010 WL 3606405, at *4 n.2 (E.D. Pa. Sept. 16, 2010) ("The City also takes issue with the fact that the court allowed the hiring claim to proceed to a jury even though it found Mr. Guth himself had not engaged in conscience shocking conduct. The court reminds the City that, pursuant to well-settled jurisprudence, the conduct of Mr. Guth was evaluated under a strict 'intent to harm' standard, while the conduct of the City was evaluated under the less demanding 'deliberate indifference' standard."); ***Wells v. Bureau County***, 723 F.Supp.2d 1061, 1083, 1084 (C.D. Ill. 2010) ("The Court is unpersuaded by Defendants argument that there can be no official liability under *Monell* because none of its employees were found to have violated Wells' constitutional rights. First, allegations that individual officers were deliberately indifferent are evaluated under a subjective awareness standard, while allegations that a municipality was deliberately indifferent are considered under an objective analysis. *Farmer*, 511 U.S. at 841. Second, the Seventh Circuit has held that 'a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an inconsistent verdict.' *Thomas*, 604 F.3d at 305. Here, it would not be unreasonable to conclude that the individual defendants were not deliberately indifferent to Wells' safety because they lacked actual knowledge of his imminent intent to harm himself and could not have responded differently because of Sheriff Thompson's policy directing that they not conduct personal observations of the rear cells during the overnight shift or at any other time that there were not two correctional officers on duty. . . This conclusion would be supported by evidence indicating that timely cell-checks were done during the time that at least two correctional officers were present, suggesting that officers would have performed timely cell checks on the overnight shift if staffing had been adequate. . . . It would likewise not be unreasonable to conclude that there was, or should have been, an objective awareness of the risk of harm even if there was no subjective awareness; while insufficient to establish individual liability, objective awareness can form the basis for municipal liability where a risk is obvious. There is arguably a link between the Sheriff's policy and Wells' suicide, as he was left alone and unsupervised for almost eight hours. . . .Where an existing, unconstitutional official policy attributable to a municipal policymaker itself causes injury, proof of a single incident is sufficient to support a finding of liability under *Monell*. . . After careful consideration, the Court finds that while the causal link is somewhat tenuous, the record is sufficient to create a genuine issue of material fact with respect to whether Sheriff Thompson maintained a policy that sanctioned that maintenance of conditions that infringed upon the constitutional right of prisoners to reasonable safety during their detention. . . In other words, a jury must decide whether Sheriff Thompson's policy was 'deliberately indifferent to [the] known or obvious consequences' of prohibiting correctional officers from observing or checking on detainees for up to eight hours or more at a time."); ***Bell v. City of Chicago***, No. 09 C 4537, 2010 WL 432310, at *2 (N.D. Ill. Feb. 3, 2010) ("The City's reliance on *Heller* in the instant case is misplaced. In *Thomas*, the Seventh Circuit specifically addressed the holding in *Heller* and stated that to interpret the holding in *Heller* to constitute a 'rule that requires individual officer liability before a municipality can ever be held liable for damages under *Monell*' is 'an unreasonable extension of *Heller.*' 588 F.3d

at 455. . . . Thus, as Bell correctly points out, it is possible for there to be municipal liability even in the absence of underlying individual liability."); ***Morales v. City of Jersey City***, No. 05-5423 (SRC), 2009 WL 1974164, at *11 (D.N.J July 7, 2009) ("Even if an officer's actions caused death or injury, he can only be liable under section 1983 and the Fourteenth Amendment if his conduct 'shocks the conscience.' The fact that the officer's conduct may not meet that standard does not negate the injury suffered by the plaintiff as a result. If it can be shown that the plaintiff suffered that injury, which amounts to deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights. The pursuing police officer is merely the causal conduit for the constitutional violation committed by the City. *Id.* (internal citation and footnote omitted). Thus, this Court's finding that, as a matter of law, Plaintiff cannot establish that Officers Sarao and Cook violated the Fourteenth Amendment in failing to provide the medical assistance to which Plaintiff claims a constitutional right does not automatically result in a similar finding that Jersey City cannot be liable for a due process violation in failing to train the officers appropriately."); ***Arnold v. City of York***, 340 F.Supp.2d 550, 552, 553 (M.D. Pa.2004) ("We find that Plaintiffs have properly pled a Section 1983 claim against Defendants by alleging that they acted with deliberate indifference in failing to provide adequate training for handling encounters with mentally ill and emotionally disturbed persons, and that this failure to train resulted in Decedent's death. . . Defendants argue that because Plaintiffs are not suing the individual officers involved in the incident, this fact somehow establishes that the officers did not violate Decedent's constitutional rights and, in turn, the City and its Police Chief cannot be held liable. We disagree. As Magistrate Judge Mannion correctly noted, the Third Circuit has held that a municipality can be liable under Section 1983 and the Fourteenth Amendment for a failure to train its police officers, even if no individual officer violated the Constitution. . . The Third Circuit so held because claims against officers at the scene differ from claims against a municipality in that they 'require proof of different actions and mental states.'. . Even if we were to agree with Defendants' argument that *Fagan's* holding is on dubious grounds,. . . based on Plaintiffs' allegations and at this early stage in the litigation, we are unwilling to hold that no constitutional violation occurred."); ***Thomas v. City of Philadelphia,*** No. Civ.A. 01-CV-2572, 2002 WL 32350019, at *3, *4 (E.D. Pa. Feb. 7, 2002) (not reported) ("In this case, the fact that no individual police officer may be liable under § 1983 for lack of the requisite intent under *Lewis* does not necessarily mean that Plaintiff has not suffered a constitutional injury for which the municipality may be held independently liable. . . . Other circuit courts have explicitly disagreed with the decision in *Fagan* regarding independent municipal liability, and some Third Circuit case law subsequent to *Fagan* appears to cast doubt upon its analysis.Until the Court of Appeals decides to the contrary, however, the Court must follow the law in this circuit as laid out in *Fagan*.' [footnotes omitted])); ***Estate of Cills v. Kaftan***, 105 F. Supp.2d 391, 402, 403 (D.N.J. 2000) (In the context of a prison suicide case, the court relied on *Simmons* and *Fagan* to conclude that Ain the present case, the fact that the Court finds that none of the Low-Level Employees violated Cills' constitutional rights does not preclude the Court from finding that the Department may be independently liable for an unconstitutional policy. . . . A reasonable factfinder could conclude that the absence of qualified mental health personnel who could assist the Department

employees in making an assessment of an inmate's suicidal vulnerability was a serious deficiency in the Department's suicide policy that created a serious risk that injury or death would result from an inmate's attempted or successful suicide."); ***Kurilla v. Callahan***, 68 F. Supp.2d 556, 557, 565 (M.D. Pa. 1999) ("I find that the momentary use of force by a school teacher is to be judged by the shocks the conscience standard. I also find that Callahan's conduct, which consisted of striking a blow to Kurilla's chest that resulted in bruising but otherwise did not require medical care, was not so '"brutal" and "offensive to human dignity"' as to shock the judicial conscience. . . . While Callahan's conduct did not violate substantive due [process] standards, Mid-Valley School District may nonetheless be held accountable for having established a policy or custom that caused the injury allegedly sustained by Kurilla. . . . . Consistent with the reasoning of *Fagan*, *Kneipp*, and *Simmons*, Mid-Valley School District may be held liable if it had a custom or policy condoning use of excessive force by teachers that evidenced a deliberate indifference to the student's constitutional rights in bodily integrity protected by the Due Process Clause of the Fourteenth Amendment."); ***Burke v. Mahanoy City***, 40 F. Supp.2d 274, 285, 286 (E.D. Pa. 1999) ("This court finds that we are required to follow Third Circuit law and examine the possibility of municipal liability under § 1983, although the individual officers have not been held liable in this situation. The present case is close in identity to *Fagan* because Plaintiff has alleged substantive due process claims. . . Moreover, Plaintiff has also independently alleged constitutional claims against the City, Police Department and Chief of Police. . . . Under either scenario for municipal liability, the deliberate indifference or policy and custom of the municipality must inflict constitutional injury. . . . Thus, the mere existence of a policy of inaction or inadequate training of officers with respect to drinking and disorderly conduct is not actionable under § 1983 if such conduct does not inflict constitutional injury. . . . Even if we accept that the existence of a municipal policy or custom resulted in the failure of individual officers to address the city's problems of underage drinking, loitering and fighting, such municipal inaction cannot be said to inflict constitutional injury. Thus, we need not reach the issue of whether Defendants are subject to *Monell* liability where, as here, we have concluded that no constitutional right was violated."), *aff'd*, 213 F.3d 628 (3d Cir. 2000); ***Gillyard v. Stylios***, No. Civ.A. 97-6555, 1998 WL 966010, at **6-8 (E.D. Pa. Dec. 23, 1998) (not reported) ("The City maintains that, if the individual officers are not liable under § 1983, then the municipality is not liable. [citing cases] But in the Third Circuit a municipality can be liable for 'failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution,' [*citing Kneipp* and *Fagan*] The City of Philadelphia may be liable for its failure to train police officers with respect to emergency use of their vehicles even if Stylios and Fussell did not individually violate the Constitution for lack of the requisite intent. The Court of Appeals may reexamine municipal liability; language in *Lewis* casts doubt on the continued tenability of this position. . . But until the Court of Appeals decides to the contrary, this court must follow the clearly established law in this circuit. Defendants correctly assert that there is no municipal liability absent a constitutional violation but that does not mean an individual officer must be liable for that violation. . .A municipal body may violate the Constitution if its policies reflect deliberate indifference towards the constitutional rights of those with whom its agents have contact. . . . The court cannot say that a reasonable jury could not find the City of Philadelphia deliberately

indifferent to the harm to private citizens caused by its failure to prevent the reckless driving of its police officers; summary judgment will be denied."); ***Lawson v. Walp***, 4:CV-94-1629, 1995 WL 355733, *4 (M.D. Pa. June 6, 1995) (not reported) ("[A] municipality may be held liable for a policy or failure to train which causes one of its employees to deprive a person of a constitutional right. Regardless of whether the individual employee is liable for the independent constitutional tort or whether the policy itself is unconstitutional, the municipality may be liable under a theory of a substantive due process violation for its policy or failure to train. The elements of the cause of action are: (1) an individual is deprived of a constitutional right (2) through the action of an officer or employee of the municipality (3) caused by (4) a policy or failure to train on the part of the municipality (5) if the policy was implemented with deliberate indifference to constitutional rights."); ***Carroll v. Borough of State College***, 854 F. Supp. 1184, 1195 (M.D. Pa. 1994) ("The absence of individual liability on the part of [defendant police officer] is not a bar to plaintiff's proceeding with his claim against the Borough."), *aff'd*, 47 F.3d 1160 (3d Cir. 1995); ***Plasko v. City of Pottsville***, 852 F. Supp. 1258, 1265 (E.D. Pa. 1994) ("Although we acknowledge that plaintiff can fail to state a cause of action under Section 1983 as to individual municipal employees while properly pleading a case with respect to the municipality directly, we nonetheless find that this action cannot be maintained against the City on the basis of the bare allegations that Pottsville's safety policies and failure to train officers amount to deliberate indifference to the needs of a detainee."); ***Andrade v. City of Burlingame***, 847 F. Supp. 760, 767 (N.D. Cal. 1994) ("In certain circumstances, a municipality may also be held liable under section 1983 even if no individual employee can be held liable."), *aff'd by Marquez v. Andrade*, 79 F.3d 1153 (9th Cir. 1996); ***Fulkerson v. City of Lancester***, 801 F. Supp. 1476, 1485 (E.D. Pa. 1992) (acknowledging in high speed pursuit context that "the individual police officer named as a defendant could be a causal conduit for the constitutional violation, without committing such a violation himself."), *aff'd*, 993 F.2d 876 (3d Cir. 1993) (Table).

Compare ***Sarmiento v. County of Orange***, No. 09–55512, 2012 WL 5838393, *1, *2 & n.2 (9th Cir. Oct. 22, 2012) (not reported) ("Although the jury found that LeFlore and Hernandez did not use excessive force against Sarmiento, this finding does not rule out Orange County's liability under *Monell* as evidenced by the actions of the other deputies involved. . . The dissent seems to suggest that Sarmiento's inability to identify specifically the agents who harmed him undermines his claim that the County is liable under *Monell.* Our precedent does not support this view. While we have recognized that a plaintiff cannot establish municipal liability for excessive force 'when the jury exonerates the individual officers of constitutional wrongdoing,' *Fairley v. Luman,* 281 F.3d 913, 916 (9th Cir.2002), this rule is inapplicable here precisely because the 'exoneration' of LeFlore and Hernandez does not bear on whether the County may be responsible for constitutional wrongdoing by other officers. . . . We disagree with the dissent's apparent conclusion that, because other parts of Sarmiento's proposed verdict form may have contained legal errors, the district court was free to reject it. The question we must address is 'whether the questions in the form were adequate to obtain a jury determination of the factual issues essential to judgment.'. . The district court abused its discretion by preventing the jury from considering plaintiff's argument that the County was liable for the actions of unnamed officers under a 'custom,

practice or policy' theory. If Sarmiento's proposed form was indeed 'error-laden,' the appropriate course of action would have been for the district court to correct the errors while leaving intact the correct *Monell* inquiries—not to substitute its own erroneous form. Because we reverse the judgment in favor of Orange County, the award of costs in favor of Orange County is also reversed.") *with* ***Sarmiento v. County of Orange***, No. 09–55512, 2012 WL 5838393, *2-*4 (9th Cir. Oct. 22, 2012) (not reported) (Leavy, J., concurring in part, dissenting in part) (I concur in that portion of the majority's disposition that affirms as to certain defendants. I dissent from that portion that reverses as to the County of Orange. I disagree with the majority's conclusion that the district court committed error in rejecting Sarmiento's proposed verdict form. The majority remands for a new trial against Orange County on Sarmiento's claim that 'unnamed deputies,' while acting pursuant to a custom, practice or policy, used unreasonable force. Sarmiento did not articulate this theory of harm by 'unnamed deputies' in the final pretrial order nor did he present this theory at trial. Sarmiento's proposed verdict form contained erroneous questions for the jury. Therefore, the district court properly rejected Sarmiento's proposed verdict form. . . .Plaintiff's first claim is that deputies acted under color of law and that unreasonable force was used. The only persons identified as 'deputies' are Hernandez and LeFlore. No reference is made to unnamed persons in the recitation of plaintiff's first claim for unreasonable force. The second claim is plaintiff's custom, practice, or policy claim against County of Orange, the Orange County Sheriff's Department, and former Sheriff Carona. No deputy is named as an actor, nor is it contended that an unnamed person used unreasonable force. After the allegation that the defendants had a policy of causing, permitting, and/or condoning the use of unreasonable force against jail inmates, it is simply contended that plaintiff sustained damages as a proximate result of defendant County of Orange's custom, practice, or policies. I disagree with the majority's holding that plaintiff should be given a new trial so he can attempt to prove that someone he cannot identify, and never described in the final pretrial order as an unknown person, inflicted unreasonable force on him. . . . If, as the majority holds, plaintiff could recover on the custom, practice, or policy claim by proving that an agent of Orange County *other than* Hernandez or LeFlore used unreasonable force, it would have been necessary to instruct the jury that plaintiff could recover only if the excessive force was the result of a custom, practice, or policy, and *not* because of a failure to train, because plaintiff's failure to train claim was limited to damages sustained 'as a proximate result of defendant's failure to train defendant officers.' . . . [A] remand for further proceedings in accordance with the disposition will pose a quandary for the district court because footnote 1 says that Sarmiento intended to pursue the theory that Orange County failed to train its employees. The final pretrial order, however, provides that one of the facts required to be established on plaintiff's failure to train claim is'"that plaintiff sustained damages as a proximate result of defendant's failure to train defendant officers.' Plaintiff does not claim he was damaged as a result of the failure to train anyone else.")

See also ***Barrett v. Orange County Human Rights Commission***, 194 F.3d 341, 349, 350 (2d Cir. 1999) ("Barrett argues that under the Supreme Court's decision in *Monell* a municipality may be found liable for constitutional violations under 42 U.S.C. § 1983 even if no named individual defendants are found to be liable. He asserts that it was therefore error for the district

court to remove the question of municipal liability from the jury once the jury determined that Lee and Colonna were not liable. We agree. Other circuits have recognized that a municipality may be found liable under § 1983 even in the absence of individual liability. [citing cases] We agree with our sister circuits that under *Monell* municipal liability for constitutional injuries may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are not solely attributable to the actions of named individual defendants. *Cf. City of Los Angeles v. Heller*, 475 U.S. 796, 798-99, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (per curiam) (where alleged constitutional injury is caused solely by named individual defendant who is found not liable, municipal liability cannot lie). It is therefore possible that a jury could find the Commission and the County of Orange liable for the alleged violations of Barrett's First Amendment rights even after finding that Lee and Colonna are not liable. Lee and Colonna may have been the most prominent figures in Barrett's termination; they may have issued plaintiff's termination letter. But the Commission is a multi- member body that makes its determinations as a group, and many of the adverse employment actions complained of by Barrett, including the decision to terminate him as Executive Director of the Commission, were taken by the Commission as a whole, not by Lee and Colonna by themselves. It is therefore possible that the defendant commissioners did not as individuals violate Barrett's rights, but that the Commission did."); ***Sforza v. City of New York***, No. 07 Civ. 6122(DLC), 2009 WL 857496, at *9 n.11, *10, *11 (S.D.N.Y. Mar. 31, 2009) ("Despite the City's argument, 'municipal liability for constitutional injuries may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are not solely attributable to the actions of named individual defendants.' *Barrett v. Orange County Human Rights Comm'n,* 194 F.3d 341, 350 (2d Cir.1999). In *Barrett,* the Second Circuit held that the Human Rights Commission could be liable for infringing Barrett's constitutional rights even though the most prominent members of the Commission, who were named as individual defendants, were found not to be liable. *Id.* The court reasoned that the Commission was a multi-member body whose decisions were made by a vote of all the members; therefore, its acts could be independent of two of its members and Barrett's alleged injuries were not solely attributable to the actions of the named defendants. *Id.* . . . . [W]here claims against the individual officers have been dismissed without reaching their merits, it is still possible for a jury to find a constitutional violation for which a municipality may, though its policies, practices, or customs, be liable. . . . The plaintiff has adequately identified a municipal policy and practice for at least some of her claims. The Third Amended Complaint alleges that the customs, policies, usages, practices, procedures and rules of the City of New York and the New York City Police Department included, but were not limited to, *arresting and prosecuting individuals solely because they are transgender*, manufacturing false charges against such individuals, *using excessive force against such individuals, and allowing members of the opposite sex to search such individuals.* (Emphasis supplied). The City's argument that plaintiff alleges only one incident in support of her *Monell* claim, and that one incident is insufficient evidence of a City policy, is similarly unpersuasive. *Monell* liability may spring from a single violation, as long as the conduct causing the violation was undertaken pursuant to a City-wide custom, practice, or procedure."); ***Phillips ex rel. Green v. City of New York***, No. 03 Civ. 4887(VM), 2006 WL 2739321, at *26 ((S.D.N.Y. Sept. 25, 2006) ("The Court first must address an erroneous contention by the City Defendants. The City

Defendants argue that because Plaintiffs have failed to establish a constitutional violation by any of the named individual City defendants, the City itself cannot be liable. According to the City Defendants, absent a constitutional violation by a named defendant, there can be no municipal liability under *Monell*. In support of this argument, the City Defendants cite *City of Los Angeles v. Heller*, which held that a municipality could not be liable for the actions of one of its officers when the jury concluded that the officer inflicted no constitutional harm. . . However, the Second Circuit has, since *Heller*, expressly held that 'under *Monell* municipal liability for constitutional injuries may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are not solely attributable to the actions of named individual defendants.' *Barrett v. Orange County Human Rights Comm'n*, 194 F.3d 341, 350 (2d Cir.1999) (emphasis added). . . Thus, the absence of a constitutional violation by a named defendant does not mandate summary judgment for the City if the allegedly unconstitutional injuries Antonia, Green, and Phillip complain of were based in part on the actions of other persons under the City's employ or control but not named as defendants. Here, Plaintiffs have alleged that Antonia was injured while at the ACS pre-placement facility . . .and that those involved in Antonia's care − including those not named as defendants − collectively failed to supervise, protect, or provide adequate medical treatment, causing Antonia's injuries. Thus, the injuries Plaintiffs complain of are not solely attributable to the named individual defendants, but instead arise from all those involved in Antonia's care while she was at the ACS facility. As a result, Plaintiffs' *Monell* claim against the City cannot be dismissed on this basis.").

See also ***Lopez v. LeMaster***, 172 F.3d 756, 763 (10th Cir. 1999) ("The district court determined that appellant failed to establish causation sufficient to hold the county liable for conditions at the jail. The district court relied on the principle that to hold the county liable, a plaintiff must demonstrate that its policy was the moving force behind the injury alleged; that is, that the county took official action with a requisite degree of culpability and there is a direct causal link between the action and deprivation of federal rights. [citing *Brown*] While these rigid standards of proof clearly apply to appellant's claim that an improperly-trained jailer returned him to a cell with inmates who attacked him, they do not govern his claim that the county maintained a policy of understaffing its jails which resulted in his injury. If appellant's summary judgment materials demonstrate the existence of an official municipal policy which itself violated federal law, this will satisfy his burden as to culpability, and the heightened standard applicable to causation for unauthorized actions by a municipal employee will not apply . . . .Appellant has made a sufficient showing, for purposes of summary judgment, that the county maintains an unconstitutional policy of understaffing its jail and of failing to monitor inmates. He must also show, however, that this policy is maintained with the requisite degree of culpable intent. . . The requisite degree of intent in this case is, of course, deliberate indifference to inmate health or safety. . . Appellant has shown the requisite deliberate indifference in this case in two different ways. First, there is evidence that the county's legislative body was itself deliberately indifferent to conditions at the jail. As mentioned, Sheriff LeMaster told a jail investigator that the county commissioners failed to provide funding for correction of deficiencies at the jail likely to lead to assaults against inmates even though such funding was required by the Oklahoma statutes. . . .

Alternatively, the county may be liable on the basis that Sheriff LeMaster is a final policymaker with regard to its jail, such that his actions 'may fairly be said to be those of the municipality.'. . There is evidence sufficient to survive summary judgment showing that Sheriff LeMaster's failure to provide adequate staffing and monitoring of inmates constitutes a policy attributable to the county, and that he was deliberately indifferent to conditions at the jail.").

See generally the following discussion of this problem in ***Mark v. Borough of Hatboro***, 51 F.3d 1137, 1153 (3d Cir. 1995):

> In *Monell*, the Supreme Court held that "when execution of a government's policy or custom, whether by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury then the government as an entity is responsible under § 1983." [cite omitted] Post-*Monell* cases often have reflected confusion with the actual standard governing the imposition of liability, but two subsequent Supreme Court cases have delineated those situations more clearly. In *City of Canton v. Harris*, ... the Court held that 'the inadequacy of police training may serve as the basis for § 1983 liability ... where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.' In that case, however, the Court 'assume[d] that respondent's constitutional right ... was denied by city employees,' ... and went on to assess whether the failure to train ever could give rise to municipal responsibility. Thus, the case cannot be read to stand for the proposition that a policy evincing willful disregard, though not causing a constitutional violation, can be the basis for section 1983 liability. In short, *City of Canton* dealt with responsibility for an assumed constitutional violation. In *Collins v. City of Harker Heights* ... the Court clarified still further the issue of when a municipality may be liable. In that case, the plaintiff's decedent, a city employee, died of asphyxia after entering a manhole. The plaintiff claimed that her decedent 'had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.'... The Court this time assumed that the municipality was responsible for the injury and asked whether the injury was of constitutional proportions. Thus, it reversed its focus from that in *City of Canton*. In so doing, it inquired into: (1) whether 'the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause,'...; and (2) whether 'the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense.'... Reasoning that there was no affirmative constitutional duty, and that the city's actions were not conscience-shocking or arbitrary, a unanimous Court held that there could be no section 1983 liability. It did not matter whether a policy

> enacted with deliberate indifference to city employees caused the injury, because the injury could not be characterized as constitutional in scope. Thus, *Collins* made clear that in a *Monell* case, the 'proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and if so, (2) whether the city is responsible for that violation.'

The panel opinion in *Mark* made this observation about *Fagan*:

> [T]he *Fagan* panel opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policymakers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the 'deliberate indifference' prong of the *Collins* test, the panel opinion did not apply the first prong-establishing an underlying constitutional violation.

51 F.3d at 1153 n.13.

See also ***Johnson v. City of Philadelphia***, 975 F.3d 394, 403 n.13 (3d Cir. 2020) ("The District Court believed that Appellant's inability to state a claim against an individual City employee meant that she could not state a *Monell* claim against the City. In *Fagan v. City of Vineland*, we held that 'an underlying constitutional tort can still exist even if no individual [employee] violated the Constitution.'. . But we later 'carefully confined *Fagan* to its facts: a substantive due process claim resulting from a police pursuit.'. . At least two of our post-*Grazier* opinions have continued to assert that a municipality may be 'independently liable for a substantive due process violation' even if no municipal employee is liable. *See Sanford v. Stiles*, 456 F.3d 298, 314 (3d Cir. 2006) (per curiam); *Brown v. Pa. Dep't of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 482 (3d Cir. 2003). But both opinions note that, for *Monell* liability to attach, 'there must still be a violation of the plaintiff's constitutional rights.'. . As Appellant's *Monell* claim fails in any event, we need not wade into this discussion."); ***Grazier v. City of Philadelphia,*** 328 F.3d 120, 124 n.5 (3d Cir. 2003) ("Our Court has distinguished *Heller* in a substantive due process context, *Fagan v. City of Vineland*, 22 F.3d 1283, 1291-94 (3d Cir.1994), but not in a way relevant to this case. In *Fagan*, we observed that a municipality could remain liable, even though its employees are not, where the City's action itself is independently alleged as a violation and the officer is merely the conduit for causing constitutional harm. . . We were concerned in *Fagan* that, where the standard for liability is whether state action 'shocks the conscience,' a city could escape liability for deliberately malicious conduct by carrying out its misdeeds through officers who do not recognize that their orders are unconstitutional and whose actions therefore do not shock the conscience. . . Here, however, like *Heller* and unlike *Fagan*, the question is whether the City is liable for causing its officers to commit constitutional violations, albeit no one contends that the City directly ordered the constitutional violations. Therefore, once

the jury found that Hood and Swinton did not cause any constitutional harm, it no longer makes sense to ask whether the City caused them to do it. Additionally, recognizing that *Heller* had addressed a closely related issue, we carefully confined *Fagan* to its facts: a substantive due process claim resulting from a police pursuit. . . By contrast, both this case and *Heller* involve primarily a Fourth Amendment excessive force claim."); ***Brown v. Commonwealth of Pennsylvania Dept. of Health Emergency Medical Services Training Institute***, 318 F.3d 473, 482 & n.3, 483 (3d Cir. 2003) ("It is possible for a municipality to be held independently liable for a substantive due process violation even in situations where none of its employees are liable. [citing *Fagan* and noting in footnote that there is a split among the courts of appeals on this issue] . . . . However, for there to be municipal liability, there still must be a violation of the plaintiff's constitutional rights. . . . It is not enough that a municipality adopted with deliberate indifference a policy of inadequately training its officers. There must be a 'direct causal link' between the policy and a constitutional violation. . . This is where Appellants' municipal liability claim fails. They allege that the City of Philadelphia had a number of policies involving EMTs which were enacted with deliberate indifference and which caused harm to them and their son. Even if we accept everything Appellants allege as true, they will have still failed to establish that the City's policies caused *constitutional* harm. The City was under no constitutional obligation to provide competent rescue services. The failure of the City and its EMTs to rescue Shacquiel Douglas from privately-caused harm was not an infringement of Appellants' constitutional rights. [footnote omitted] There has been no constitutional harm alleged. Hence, there is no municipal liability under § 1983."); ***Hansberry v. City of Philadelphia,*** 232 F. Supp.2d 404, 412, 413 (E.D. Pa. 2002) ("[L]ocal government bodies may be held liable if a state actor acts unconstitutionally pursuant to a government policy or custom. . . Plaintiffs do not, however, have to demonstrate unconstitutional actions by Lt. Herring or Officers Schneider and Hood to make our their claim under § 1983. The Third Circuit has held that plaintiffs can establish liability based solely on a municipal policy or custom if the plaintiffs have both connected the policy to a constitutional injury and 'adduced evidence of scienter on the part of a municipal actor [with] final policymaking authority in the areas in question.' *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1062 (3d Cir.1991). . . . Plaintiffs cannot establish municipal liability based on *Monell* for two reasons. First, they cannot demonstrate that a municipal policy or custom, as carried out by the individual defendants, inflicted an unconstitutional injury because they have presented no evidence that the officers violated Raymond's 14th Amendment rights. Second, were they to argue under *Simmons* that a municipal policy by itself deprived Raymond of his substantive due process rights, they would have needed to present evidence of a constitutional violation, a particular policy, and an identifiable policymaker. *See Simmons,* 947 F.2d at 1062. They have presented no such evidence. Consequently, they cannot satisfy the requirements of *Monell*."); ***White v. City of Philadelphia,*** 118 F. Supp.2d 564, 575, 576 (E.D. Pa. 2000) ("In this case, plaintiffs allege separate, independent claims against the City, claiming that the City was deliberately indifferent in its (1) failure to adopt and implement a 911 policy to handle Priority 1 calls and (2) failure to train. . . . Regardless of the theory under which suit is brought against the City, the first inquiry in any § 1983 claim 'is to identify the specific constitutional right allegedly infringed.' [citing *Albright* and *Collins*] . . . .As the Court determined above, this claim fails to identify a cognizable constitutional injury because

the Officers' conduct did not satisfy the four part test set forth in *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir.1995). In addition, even if the Court assumes that the City has a policy or custom of providing poor 911 service or failing to train officers to perform adequate rescue services, this failure did not inflict constitutional injury − substantive due process under the Fourteenth Amendment does not secure a right to rescue services under the facts of this case."); ***Russoli v. Salisbury Tp.***, 126 F. Supp.2d 821, 863 n.26 (E.D. Pa. 2000) (*Fagan* applies only to "acts challenged under substantive due process."); ***Leddy v. Township of Lower Merion***, 114 F. Supp.2d 372, 377 (E.D. Pa. 2000) ("As *Mark* suggests, the first prong is essential to the rationale of *Monell* − that a municipality should be held accountable not on the basis of vicarious liability, but only for misconduct it has approved or fostered. Or as succinctly and metaphorically couched in *Andrews*: [I]t is impossible on the delivery of a kick to inculpate the head and find no fault with the foot." Andrews, 895 F.2d at 1481."); ***Cannon v. City of Philadelphia***, 86 F. Supp. 2d 460, 475, 476 (E.D. Pa. 2000)("In sum, I am presented with various conflicting interpretations of the appropriate level of culpability applicable in a § 1983 case against a municipality in which the individual state actors are not liable. The confusion regarding how to evaluate a municipality's liability is buttressed by the seeming disagreement between present Chief Judge Becker and past Chief Judge Sloviter in *Simmons* and the Third Circuit's recognition in *Mark* of *Fagan* I's failure to evaluate the applicable standard for the underlying constitutional violation. . . . While *Lewis* did not address municipal liability, the instruction of *Lewis* arguably intimates that a contextual approach may be applied in evaluating a municipality's liability in the absence of an individual state actor's liability. In order for a municipality to commit the necessary underlying constitutional tort, an expansive reading of *Lewis* may suggest that the municipality's policy, custom or failure to train, viewed contextually, must shock the conscience. The conduct that satisfies this standard may differ depending on the circumstances. Therefore, while a state actor's behavior may not shock the conscience, the municipality's policy, custom or failure to train may be conscience shocking. . . . [R]egardless of which standard applies plaintiff fails to demonstrate that the City's policies, customs, or failure to train are deliberately indifferent or shock the conscience. Therefore, even assuming the existence of an underlying constitutional violation and that the City need only be deliberately indifferent to trigger municipal liability, I will grant the defendants' summary judgment motion.").

See also ***Contreras v. City of Chicago***, 119 F.3d 1286, 1294 (7th Cir. 1997) ("We would first note that much of the plaintiffs' argument reflects a confusion between what constitutes a constitutional violation and what makes a municipality liable for constitutional violations. Both in the District Court and here on appeal, the plaintiffs invoked 'failure to train' and 'deliberate indifference' theories as the basis for the substantive due process claim. . . . Notions of 'deliberate indifference' and 'failure to train,' however, are derived from municipal liability cases such as [*Monell*, *Canton*] and most recently [*Bryan County.]* Those cases presume that a constitutional violation has occurred (typically by a municipal employee) and then ask whether the municipality itself may be liable for the violations. . . . The liability of the City of Chicago for any deliberate indifference or for failing to train DCS inspectors is therefore secondary to the basic issue of whether a constitutional guarantee has been violated."); ***Evans v. Avery***, 100 F.3d 1033, 1039 (1st

Cir. 1996) (declining invitation to adopt *Fagan* analysis "because we believe that the *Fagan* panel improperly applied the Supreme Court's teachings."); ***Regalbuto v. City of Philadelphia***, No. CIV. A. 95-5629, 1995 WL 739501, *4 (E.D. Pa. Dec. 12, 1995) (not reported) ("In [*Mark*], . . . the [Court] reiterated the *Collins* standard that unless plaintiff first establishes that he or she has suffered a constitutional injury, it is irrelevant for purposes of § 1983 liability whether the city's policies, enacted with deliberate indifference, caused an injury.").

See also ***Williams v. City and County of Denver***, 99 F.3d 1009, 1019 (10th Cir. 1996), *vacated and remanded for further proceedings in light of County of Sacramento v. Lewis and Bd. of County Comm'rs of Bryan County v. Brown*, ***Williams v. City and County of Denver***, 153 F.3d 730 (10th Cir. 1998) (per curiam) (en banc), where the court explains:

> In holding that the City may be liable for its own unconstitutional policy even if Officer Farr is ultimately exonerated, we emphasize the distinction between cases in which a plaintiff seeks to hold a municipality liable for failing to train an employee who as a result acts unconstitutionally, and cases in which the city's failure is itself an unconstitutional denial of substantive due process. *Heller* and *Hinton* are cases belonging in the first category. In those cases, the unconstitutional acts were committed by individual officers. Derivative liability against the city was predicated upon a municipal policy under which the city was allegedly legally responsible for the individual officer's unconstitutional conduct. In order to impose liability in such cases, the policy need not itself be unconstitutional. . . Rather, the inquiry is whether an otherwise constitutional policy is the moving force behind unconstitutional conduct by a municipal employee. . .In the second category of cases, liability against the city is sought not derivatively on the basis of unconstitutional conduct by an individual officer, but directly on the basis of the unconstitutional nature of the city's policy itself. *Collins* belongs in this category. . . . Municipal policy thus performs two separate functions, as the court in *Collins* attempted to clarify. In a *Heller/Hinton* case and in *Canton*, the inquiry is whether the policy may impose liability on the city solely for the unconstitutional acts of its employee. In such cases, the policy, even if constitutional, will nonetheless be a basis for municipal liability if that policy amounts to deliberate indifference to the rights of the public with whom the municipal employee comes in contact. In a *Collins* case, on the other hand, the inquiry is whether the policy or custom itself is unconstitutional so as to impose liability on the city for its own unconstitutional conduct in implementing an unconstitutional policy.

See also ***Williams v. City and County of Denver***, No. 90 N 1176, slip op. at *28, *29 (D. Colo. Sept. 27, 1999) (on remand):

> Williams renews her argument that the City's policies are unconstitutional by asserting that (1) the Supreme Court's decisions in *Lewis* and *Brown* mandate that the City's liability must be considered under the less stringent standard of deliberate

> indifference . . . . I disagree. First, neither *Lewis* nor *Brown* alters the conscience-shocking standard required to establish direct municipal liability. *Brown* dealt with whether a municipality could be held liable on a single decision to hire when the hired employee violated the plaintiff's constitutional rights. . . *Lewis*, on the other hand, did not even deal with direct municipal liability. To the contrary, the issue before the *Lewis* court was whether an individual police officer's deliberate or reckless indifference to life in a high-speed automobile chase which caused a death amounted to violation of substantive due process under the Fourteenth Amendment. . . . [W]hile Williams may pursue her deliberate-indifference claims against the City under *Canton* based on the unconstitutional conduct of Farr, she may not pursue her deliberate-indifference claims under a *Collins* theory of direct municipal liability.

See also ***Crowson v. Washington County State of Utah***, 983 F.3d 1166, 1187 n.10 (10th Cir. 2020) ("Although the opinion in *Williams* was vacated, it was not reversed by the en banc court. *See* 153 F.3d 730 (10th Cir. 1998) (unpublished). Thus, its expressions on the merits may have at least persuasive value.") (*Crowson* appears in more detail in this outline, *supra*).

14. Impact of Qualified Immunity on *Monell* Liability

Although local governments have no qualified immunity under § 1983, the court in ***Watson v. Sexton***, 755 F. Supp. 583 (S.D.N.Y. 1991), dismissed plaintiff's claim against the City Department of Sanitation for failure to train its employees in proper administration of a substance abuse policy, where individual defendants had prevailed on qualified immunity grounds.

The court held that "[t]o be 'deliberately indifferent' to rights requires that those rights be clearly established. Therefore, even if plaintiff could prove that her Fourth Amendment rights were violated by current standards because the City inadequately trained its employees, plaintiff cannot show that the City was deliberately indifferent to rights that were not clearly established [at the time the challenged actions were taken]...." *Id*. at 588.

See, e.g., ***Campbell v. Riahi***, 109 F.4th 854, 862 (6th Cir. 2024) ("[A] municipality 'cannot exhibit fault rising to the level of deliberate indifference to a constitutional right when that right has not yet been clearly established.'. . Thus—because Officer Riahi did not violate a clearly established right—it follows that her employer, Butler County, was not deliberately indifferent to such a right. . . Butler County is entitled to summary judgment on these claims."); ***Atkinson v. Godfrey***, 100 F.4th 498, 509 (4th Cir. 2024) ("[W]e have not concluded that Godfrey did not violate Atkinson's Fourth Amendment rights. Instead, under prong two of the qualified immunity analysis, we held that the constitutional rights Atkinson claimed Godfrey violated were not clearly established at the time of Godfrey's conduct. And since we have not held that Godfrey did not violate Atkinson's constitutional rights, our disposition of the claim against Godfrey does not necessarily resolve the claim against Coats. While it may be less likely that a municipality may be

found liable when the constitutional terrain was as murky as that here, the rules of pendent jurisdiction counsel staying our hand. For that reason, we decline to exercise jurisdiction over the appeal with respect to Coats as the issues it presents are not inextricably intertwined with our resolution of the qualified immunity issues."); ***Atkinson v. Godfrey***, 100 F.4th 498, 510 (4th Cir. 2024) (Wilkinson, J., concurring) ("Municipalities, of course, do not have qualified immunity. Yet the whole idea of fair notice that lies at the heart of qualified immunity for individuals need not be wholly abandoned when policymakers are concerned. In other words, it is not immediately apparent why the municipal fisc should be burdened in the absence of any ascertainable federal standards by which municipal policies can be gauged. While municipal bodies may have more time or legal advice at their disposal than individual officials do, they are also uniquely taxed with devising workable and even novel solutions to their own sets of pressing problems. The majority notes, 'While it may be less likely that a municipality may be found liable when the constitutional terrain was as murky as that here, the rules of pendent jurisdiction counsel staying our hand.' . . I agree with that statement and I thus concur in Judge Quattlebaum's excellent opinion for the majority."); ***Dundon v. Kirchmeier***, 85 F.4th 1250, 1257-58 (8th Cir. 2023) ("The protestors also maintain that the municipalities failed to train their officers in how to use force in the context of crowd control, and failed to supervise their officers during the protest. Municipal liability may be established where a constitutional violation is accompanied by a showing that the municipality 'failed to train its employees to handle recurring situations presenting an obvious potential for such a violation.'. . To determine whether the need for training and supervision was obvious, we consider whether the officers violated a 'clear constitutional duty.'. . '[A] municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.' [citing *Szabla*] That is because the 'absence of clearly established constitutional rights ... undermines the assertion that a municipality *deliberately* ignored an *obvious* need for additional safeguards to augment its facially constitutional policy.'. . It was not clearly established in November 2016 that the officers' use of force to disperse protestors violated a constitutional right under the Fourth Amendment. Thus, the need for training and supervision on dispersal of protestors was not so obvious that it can be characterized as *deliberate* indifference to the protestors' rights to be free from unreasonable seizures. The protestors similarly contend that Sheriff Kirchmeier, Sheriff Kaiser, and Chief of Police Ziegler are liable as supervisors under 42 U.S.C. § 1983. In § 1983 actions, however, a supervisor is liable only for his or her own misconduct. . . When a claim is premised on the conduct of subordinates, a supervisor may be liable only upon a showing of deliberate indifference to the offensive conduct. . . As with the municipalities, there is insufficient evidence here of deliberate indifference by supervisors where the alleged constitutional right was not clearly established."); ***Vanegas v. City of Pasadena***, 46 F.4th 1159, 1167 (9th Cir. 2022) ("Vanegas alleged a failure to train and argues that factual disputes exist on whether the City of Pasadena failed to train its officers on the 'well-established' right to refuse to identify oneself prior to arrest. But, as we discussed above, we doubt that any such right is so 'well established' that its alleged omission from training would constitute deliberate indifference on the part of the City."); ***Lombardo v. City of St. Louis***, 38 F.4th 684, 692 (8th Cir. 2022) (on remand from the Supreme Court), *cert. denied*, 143 S. Ct. 2419 (2023) ("Lombardo . . . argues that the district court erred in granting summary judgment to the City on

the unconstitutional-policy and failure-to-train claims. Lombardo alleges that the City's policy for restraining detainees in holding cells is facially unconstitutional and caused a violation of Gilbert's rights and that the City's failure to train its officers or enact constitutional policies amounts to deliberate indifference. We apply a de novo standard of review to a district court's grant of summary judgment even where qualified immunity is not involved. . . 'Where the municipality has not directly inflicted an injury, however, "rigorous standards of culpability and causation must be applied," and a showing of deliberate indifference is required.'. . And a deliberate indifference claim fails in '[t]he absence of clearly established constitutional rights,' so-called '"clear constitutional guideposts" for municipalities in the area.'. . '[T]he lack of clarity in the law precludes a finding that the municipality had an unconstitutional policy at all, because its policymakers cannot properly be said to have exhibited a policy of *deliberate* indifference to constitutional rights that were not clearly established.'. . Because we have concluded that the constitutional right at issue here was not clearly established, Lombardo cannot prevail on her claims against the City. The district court thus did not err in granting summary judgment to the City."); ***Graham v. Barnette***, 5 F.4th 872, 891-92 (8th Cir. 2021) (on remand from Supreme Court) ("'[T]he lack of clarity in the law' concerning the appropriate standard of cause needed to justify a mental-health hold 'precludes a finding that the municipality had an unconstitutional policy at all, because its policymakers cannot properly be said to have exhibited a policy of *deliberate* indifference to constitutional rights that were not clearly established.'. . In other words, because the right at issue was not clearly established, Graham cannot meet the 'demand that deliberate indifference in fact be deliberate.' *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 995 (6th Cir. 2017) (discussing and adopting the Eighth Circuit's approach)."); ***Nichols v. Wayne County, Michigan***, 822 F. App'x 445, ___ (6th Cir. 2020), *cert. denied,* 141 S. Ct. 2716 (2021) ("We begin with Nichols' allegation that the county prosecutor 'failed to train and supervise attorneys acting for the defendants in the need to ... provide for prompt post-seizure, pre-forfeiture hearings in front of neutral decision maker.' This allegation fails to state a claim. When a plaintiff attempts to establish municipal liability based on a 'failure to train employees,' he must show the municipality's 'deliberate indifference to constitutional rights.'. . But 'a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.'. . Nichols has not directed us to any 'Supreme Court or Sixth Circuit case that' establishes his right to the initiation of forfeiture proceedings within 50 days of notice, or indeed within any particular time frame. . . He refers us only to two out-of-circuit decisions, which is alone insufficient to 'clearly establish' a constitutional right. . . . Rather than point us to any clearly established time frame within which post-seizure hearings must be initiated, Nichols asks us to draw that line for the first time in his case. That is fatal to his failure-to-train claim."); ***Stewart v. City of Euclid, Ohio***, 970 F.3d 667, 675–76 (6th Cir. 2020), *cert. denied,* 141 S. Ct. 2690 (2021) ("The Euclid Police Department's deadly force training program involved inappropriate and tasteless elements. The presentation materials included jokes trivializing the use of force, such as a graphic showing an officer beating a prone and unarmed suspect with the caption '[p]rotecting and serving the poop out of you.' The presentation linked to a Chris Rock comedy routine in which Rock repeatedly jokes about police beating citizens on grounds of race and shows clips of officers beating suspects. Even the components of the program that can be stomached

appear skimped, such as the single genre of factual scenarios used to test officers. But Stewart cannot sue the City of Euclid for its distasteful, perhaps inadequate, training program. A municipality may be held liable for the constitutional violations of its employees when the municipality's custom or policy led to the violation. . . . Here, Stewart's rights were not clearly established in the precedent of this circuit or otherwise. Thus, violation of his rights cannot be the 'known or obvious consequence' disregarded by the City of Euclid through its training program and the *Monell* claim fails."); ***Tlapanco v. Elges***, 969 F.3d 638, 657-58 (6th Cir. 2020) ("This court has consistently held that a municipality cannot be held liable on a failure to train theory where a right was not clearly established. . . Because there was no clearly established right not to have an electronic device seized pursuant to a search warrant, mirrored, and the forensic mirror retained, Oakland County was not deliberately indifferent to the potential constitutional violation."); ***Contreras on behalf of A.L. v. Doña Ana County Bd. of County Commissioners***, 965 F.3d 1114, 1123-25 (10th Cir. 2020) (Carson, J., concurring in part and concurring in the judgment), *cert. denied*, 141 S. Ct. 1382 (2021) ("The district court determined that Plaintiff's claim against the Board failed as a matter of law because she did not satisfy the third element for municipal liability—deliberate indifference. The district court determined that the Board could not be *deliberately* indifferent to a constitutional right unless the right is clearly established. *See, e.g.*, *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 994 (6th Cir. 2017). And because the district court found the right was not clearly established, it ruled the Board could not have been deliberately indifferent to A.L.'s rights. I agree. Whether a municipal policymaker can be liable for deliberate indifference to a constitutional right that has not yet been established is an interesting one. And the answer depends on the type of claim alleged against the municipality. Consider first a claim based directly on a municipal act such as the termination of a municipal employee without due process. In that case, 'the violated right need not be clearly established because fault and causation obviously belong to the city.'. . But then consider a claim based on a municipality's failure to properly train its employees. There, the theory stems from the municipality's failure to teach its employees not to violate a person's constitutional rights. In that posture, the 'municipality's alleged responsibility for a constitutional violation stems from an *employee*'s unconstitutional act [and the municipality's] failure to prevent the harm must be shown to be deliberate under "rigorous requirements of culpability and causation."'. . Thus, the violated right in a failure to train case 'must be clearly established because a municipality cannot *deliberately* shirk a constitutional duty unless that duty is clear. . . The Second, Sixth, and Eighth Circuits have each reached this conclusion. *Townes v. City of New York*, 176 F.3d 138, 143–44 (2d Cir. 1999); *Arrington-Bey*, 858 F.3d at 995; *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (en banc). Judge Baldock believes that in application this means the district court inappropriately granted the Board qualified immunity. I agree that municipalities cannot invoke the doctrine of qualified immunity. . . But this case differs remarkably from *Owen*. *Owen* arose from a claim of deliberate municipal indifference where the municipality directly caused the constitutional injury. . . Here, by contrast, Plaintiff advances a failure to train theory in which she 'must show not only that an employee's act caused a constitutional tort, but also that the city's failure to train its employees caused the employee's violation *and* that the city culpably declined to train its "employees to handle recurring situations presenting an obvious

potential for such a violation."'. . The Supreme Court's statement 'obvious potential for such a violation' requires that the constitutional violation be obvious (i.e., clearly established). Requiring that the right be clearly established in this context does not give qualified immunity to municipalities; it simply follows the Supreme Court's demand 'that deliberate indifference in fact be deliberate.'. . Plaintiff alleged the County engaged in deliberate indifference by failing to adequately train its correction officers. For the reasons discussed above, however, Plaintiff's claim must fail because she cannot show the right the Board violated was obvious. I would therefore affirm the district court's order granting summary judgment to the Board on the *Monell* claim. I thus concur in the judgment on the *Monell* claim, although on a different ground than Chief Judge Tymkovich who concluded no constitutional violation occurred."); ***J.H. v. Williamson County, Tennessee***, 951 F.3d 709, 721 (6th Cir. 2020) ("Having already concluded that J.H.'s substantive due process right was not clearly established as of 2013, we must also conclude that J.H.'s *Monell* claim against Williamson County cannot succeed. [citing *Arrington-Bey*] We thus affirm the district court on this claim."); ***Vaduva v. City of Xenia***, 780 F. App'x 331, ___ (6th Cir. 2019) ("[W]hen the harm is the result of a failure to train, we apply '"rigorous requirements of culpability and causation"—holding a municipality liable if it has been deliberately indifferent to constitutional rights.' . . In contrast, when the harm is the result of 'the straightforward carrying out of a municipal policy or custom, the determination of causation is easy.'. . In this case, Plaintiff alleges only that his harm is the result of a failure to train. . . . Deliberate indifference also requires that '[t]he violated right ... be clearly established because a municipality cannot *deliberately* shirk a constitutional duty unless that duty is clear.' *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 995 (6th Cir. 2017); *see also Sumpter*, 868 F.3d at 490 n.8. *But see Garner v. Memphis Police Dep't*, 8 F.3d 358, 366 (6th Cir. 1993). And as discussed above, Officer Defendants did not violate Plaintiff's clearly established constitutional rights because, at the time that they issued Plaintiff a citation for soliciting donations for charity, they were enforcing a properly enacted ordinance that was not grossly and flagrantly unconstitutional. Thus, there is no genuine dispute of material fact regarding whether the City is responsible for the alleged violation of Plaintiff's constitutional rights. Accordingly, we hold that the City is entitled to summary judgment with regard to Plaintiff's challenges to the constitutionality of XCO § 648.12 based on lack of standing, and is entitled to summary judgment with regard to Plaintiff's claim that the City executed an unlawful policy or custom based on failure to demonstrate deliberate indifference."); ***Rayfield v. City of Grand Rapids, Michigan***, 768 F. App'x 495, 510-12 (6th Cir. 2019) ("Rayfield bases his *Monell* claim on the City's alleged failure to train City officials on how to ensure that, following an individual's arrest by City police officers, a person is not detained in excess of 48 hours if he is transferred to the County's custody. . . . A *Monell* claim for failure to train may be brought '[o]nly where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants,' thereby showing the necessary 'policy or custom' to establish § 1983 liability. . . Thus, Rayfield must show: '(1) that a training program is inadequate to the tasks that the officers must perform; (2) that the inadequacy is the result of the [municipality's] deliberate indifference; and (3) that the inadequacy is closely related to or actually caused [his] injury.' . . Finally, in the context of a deliberate-indifference *Monell* claim, a plaintiff must also show that the right underlying the failure-to-train claim is clearly established. . . As an

initial matter, and assuming we can consider the merits of Rayfield's *Monell* claim after finding that the individual defendants are entitled to qualified immunity, . . . it is easily conceivable that, when two municipalities share custody over a pre-hearing detainee and fail to train their officials to ensure compliance with *County of Riverside*, a detainee's Fourth Amendment rights may well be violated. . . This possibility is particularly heightened for individuals who are arrested by one municipality and transferred to the custody of another, as the likelihood of miscommunication or administrative delays when more than one governmental entity is involved may well extend a person's detention beyond the time frame established in *County of Riverside*. Despite this constitutionally precarious system, Rayfield's claim fails. Specifically, because we have already concluded that, even assuming Rayfield has plausibly alleged a constitutional violation, Rayfield's particular constitutional rights were not 'clearly established,' we must affirm the district court's dismissal of Rayfield's *Monell* claims for failure to state a claim. . . And although Rayfield contends that the City 'had a nondelegable duty to ensure that the County of Kent did not violate the constitutional rights of arrestees,'. . . Rayfield cites only one out-of-Circuit appellate court and various district courts for support[.] . . . Moreover, to the extent the Eighth Circuit's decision in *Young v. City of Little Rock*, 249 F.3d 730 (8th Cir. 2001), is instructive on the issue of delegable duties between municipalities, we have previously suggested a difference in opinion. . . Given this Circuit's case law, as well as the limited authority identified by Rayfield, we cannot say that, as applied to the City, Rayfield's constitutional rights were 'clearly established' in October 2014. We thus affirm the district court's dismissal of Rayfield's *Monell* claims."); ***Brennan v. Dawson***752 F. App'x 276, 287 (6th Cir. 2018) ("A municipality cannot be deliberately indifferent to the violation of a constitutional right—and thus liable under § 1983—if that right is not clearly established. . . .In *Arrington-Bey*, we clarified the apparent conflict between *Hagans* and *Scott*. . . We explained that there is a significant difference between a *Monell* claim alleging that a municipal policy or custom caused a constitutional violation—as in *Scott*—and a *Monell* claim alleging that the municipality's failure to train amounted to deliberate indifference—as in *Hagans*. . . When a constitutional injury arises directly from municipal action, 'such as firing a city official without due process ... or ordering police to enter a private business without a warrant ... the violated right need not be clearly established because fault and causation obviously belong to the city....'. . . . But if the constitutional injury arises from an employee's unconstitutional act, 'the city's failure to prevent the harm must be shown to be deliberate....'. . . . If a plaintiff alleges that the municipality acted with deliberate indifference, the violated right 'must be clearly established because a municipality cannot *deliberately* shirk a constitutional duty unless that duty is clear.'. . Brennan's *Monell* claim alleges that the County was deliberately indifferent to individuals' constitutional rights, meaning that *Hagans* governs our analysis. Because we hold that the scope of Dawson's implied license was not clearly established at the time of the alleged misconduct, Brennan's claim against the County fails. The County could not have been deliberately indifferent to a right that was not clearly established when the alleged misconduct occurred. We also note that Brennan advanced no facts at summary judgment to establish a pattern of constitutional violations committed by the County deputies. This alone is fatal to Brennan's claim. [citing *Connick*] As a result, we affirm the district court's decision to grant the County's summary judgment motion."); ***Alvarez v. City of Brownsville***, 904 F.3d 382, 391-94 (5th Cir. 2018) (en banc), *cert. denied*, 139

S. Ct. 2690 (2019) ("Alvarez points to no case from any circuit that premises § 1983 municipal liability on a policymaker's deliberate indifference to a constitutional right that a circuit court has expressly held does not exist—e.g., the defendant's right to be presented with *Brady* material before entering a guilty plea. No deliberate indifference was shown to establish municipal liability under this alternative theory proposed by Alvarez. In conclusion, the City of Brownsville should not have been liable as a matter of law for Alvarez's § 1983 action. . . . Prior to this court granting Alvarez's petition for rehearing en banc, settled precedent in this circuit held that there was no constitutional right to *Brady* material prior to a guilty plea. . . Alvarez argues that under *Brady* the videos of the incident between him and Officer Arias constituted exculpatory evidence that he was constitutionally entitled to before the entry of his guilty plea. . . This court declines the invitation to uproot its precedent. . . .The First, Second, and Fourth Circuits also seem to have doubts about a defendant's constitutional entitlement to exculpatory *Brady* material before entering a guilty plea. . . .The Seventh, Ninth, and Tenth Circuits, however, recognized the possible distinction noted by the Supreme Court in *Ruiz* between impeachment and exculpatory evidence in the guilty plea context. . . . In sum, case law from the Supreme Court, this circuit, and other circuits does not affirmatively establish that a constitutional violation occurs when *Brady* material is not shared during the plea bargaining process. The en banc court will not disturb this circuit's settled precedent and abstains from expanding the *Brady* right to the pretrial plea bargaining context for Alvarez."); ***Bustillos v. El Paso Cty. Hosp. Dist.,*** 891 F.3d 214, 222 (5th Cir. 2018) ("The Amended Complaint's county liability theory is premised on the District's 'deliberate indifference' to the need 'to train its personnel in how to handle government request[s] for body cavity searches.' However, a 'policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.' *Hagans v. Franklin Cty. Sheriff's Office*, 695 F.3d 505, 511 (6th Cir. 2012) (quoting *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (*en banc*)). The district court properly dismissed the county liability claim."); ***Sumpter v. Wayne County***, 868 F.3d 473, 490 n.8 (6th Cir. 2017) ("We also note that, because Sumpter has not shown that the group Registry searches violated clearly established law, Wayne County cannot be liable for failing to train its officers to avoid them. Municipalities are liable for a failure to train when the failure amounts to a deliberate indifference to the rights of persons with whom its officers come into contact. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). But a municipality cannot be deliberately indifferent for failing to train officers to avoid constitutional violations that have not been clearly established as such. *Hagans v. Franklin Cty. Sheriff's Office*, 695 F.3d 505, 511 (6th Cir. 2012); *Arrington-Bey v. City of Bedford Heights, Ohio*, 858 F.3d 988, 995 (6th Cir. 2017)."); ***Arrington-Bey v. City of Bedford Heights***, 858 F.3d 988, 994-96 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018) ("Arrington-Bey must show that the City's 'failure to train' officers to properly identify and secure treatment for mental conditions like Omar's 'amounts to deliberate indifference.'. . But 'a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.'. . The absence of a clearly established right spells the end of this *Monell* claim. . . . Police officers face tough judgment calls about what to do with the mentally ill. Arrestees do not normally arrive at jail toting their medical records. Psychiatric problems do not always manifest themselves with clarity. And not even clear psychiatric problems always reveal

their potential for serious harm—as here a heart attack. Perhaps those truths counsel in favor of more policies and training designed to minimize tragic injuries and deaths like Omar's. And perhaps police would be wise to err on the side of calling a doctor in cases like this one. But the United States Constitution and Ohio law do not elevate any deviation from wise policy into a cognizable lawsuit for money damages against the City or the relevant law enforcement officers."); ***Hollingsworth v. City of St. Ann***, 800 F.3d 985, 992 (8th Cir. 2015) ("While a single constitutional violation arising out of a lack of safeguards or training may be sufficient to establish deliberate indifference where the need for such safeguards or training is 'obvious,' a municipality 'cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.' *Szabla,* 486 F.3d at 393. As it was not clearly established in July 2009 that force resulting in only *de minimis* injury could violate the Fourth Amendment, the City did not act with deliberate indifference by failing to train its officers that use of a Taser in these circumstances was impermissible."); ***Rodgers v. Knight***, 781 F.3d 932, 942-43 (8th Cir. 2015) ("Greg has not established a submissible claim that the municipalities were deliberately indifferent to the rights of citizens to carry concealed weapons. It was not clearly established that a citizen without a permit is permitted to carry a concealed weapon in common areas of an apartment complex or other leasehold. The lack of clarity regarding the scope of Mo.Rev.Stat. § 571.030 .3 'undermines the assertion that a municipality *deliberately* ignored an *obvious* need for additional safeguards.' *Szabla,* 486 F.3d at 394."); ***Roberts v. City of Omaha***, 723 F.3d 966, 975, 976 (8th Cir. 2013) ("The district court also denied summary judgment to the city, reasoning '[t]here are ... issues of fact with respect to the adequacy of the City's training.' We ordinarily only have '"jurisdiction on interlocutory appeal ... [to resolve] the issue of qualified immunity."'. . However, we have pendent appellate jurisdiction over certain claims that are 'inextricably intertwined' with the qualified immunity analysis. . . . Roberts alleged the city deprived him of the benefits of a public service—safe and lawful police detention—because the city failed properly to train its employees under the ADA and Rehabilitation Act. As is the case for failure to train claims arising under § 1983, actions under the ADA and the Rehabilitation Act require proof of deliberate indifference. . . In *Szabla*, we held, where the constitutional right allegedly violated by individual officers was not clearly established at the time of the occurrence, the municipality could not be liable for failure to train because the risk of harm 'was not so obvious at the time of th[e] incident that [the municipality's] actions [could] properly be characterized as deliberate indifference.'. .Roberts can only prevail on his ADA and Rehabilitation Act claims by showing the city's deliberate indifference to his alleged right to be free from discrimination in the circumstances of this case, but the city, like the individual officers, lacked notice the officers' actions might have violated Roberts's asserted rights. . . Our decision granting qualified immunity to the individual officers necessarily forecloses liability against the municipality on Roberts's failure to train claims as well. . . The issue of the city's liability therefore is 'inextricably intertwined' with the qualified immunity issues in this appeal. . . Having jurisdiction over this pendent appellate claim, we reverse the district court's denial of the city's motion for summary judgment on Roberts's ADA and Rehabilitation Act failure to train claims against the city."); ***Hagans v. Franklin County Sheriff's Office***, 695 F.3d 505, 511 (6th Cir. 2012) ("To hold the Sheriff's Office liable, Hagans must show that its 'failure to train' officers on the proper use of tasers 'amounts to deliberate indifference.'. .

But 'a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.' *Szabla v. City of Brooklyn Park,* 486 F.3d 385, 393 (8th Cir.2007) (en banc)"); ***Szabla v. City of Brooklyn Park***, 486 F.3d 385, 393, 394 (8th Cir. 2007) (en banc) ("In this case, a constitutional requirement that an officer in Baker's situation give advance warning before commanding a canine to bite and hold a suspect was not clearly established as of August 2000. . . The need for training or other safeguards relating to warnings, therefore, was not so obvious at the time of this incident that Brooklyn Park's actions can properly be characterized as deliberate indifference to Szabla's constitutional rights. While a municipality does not enjoy qualified immunity from damages liability that results from a policy that is itself unconstitutional or from an unconstitutional decision by municipal policymakers, . . . we agree with the Second Circuit and several district courts that a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established. . . . [T]he lack of clarity in the law precludes a finding that the municipality had an unconstitutional policy at all, because its policymakers cannot properly be said to have exhibited a policy of *deliberate* indifference to constitutional rights that were not clearly established..").

See also ***Brown v. City of St. Louis, Missouri***, No. 4:18 CV 1676 JMB, 2022 WL 1501368, at *6 (E.D. Mo. May 12, 2022) ("[T]he Eighth Circuit has 'consistently recognized a general rule that, in order for municipal liability to attach, individual liability first must be found on an underlying substantive claim.'. . Both Olsten and Hayden are entitled to qualified immunity on plaintiff's individual constitutional claims against them. Therefore, the City is entitled to summary judgment on her claim of municipal liability."); ***Ogrod v. City of Philadelphia***, No. CV 21-2499, 2022 WL 1093128, at *15 (E.D. Pa. Apr. 12, 2022) ("Courts of Appeals in other Circuits have held that a municipality cannot be deliberately indifferent to a right that is not clearly established. [collecting cases] While the Third Circuit has not yet addressed this same issue, district courts in this District have similarly concluded that where rights are not clearly established, there can be no municipal liability under *Monell* for violations of those rights because there can be no deliberate indifference. . . Here, the *Monell* claim against the City for municipal liability is grounded in part on the City's alleged failure to exercise sufficient oversight over, or to investigate and/or discipline, officers who used unconstitutional coercive techniques in interrogations, withheld exculpatory evidence, and 'pursue[d] profoundly flawed investigations and prosecutions,' as well as the City's alleged failure to train officers regarding their duties under *Brady* and other constitutional obligations. . . The precise contours of this claim are not clear, but, based on the caselaw above, we conclude that the claim fails to state a claim upon which relief can be granted to the extent that it seeks to impose municipal liability for violations of rights that we have already found were not clearly established in 1996, because the City cannot be deliberately indifferent to such unestablished rights. Thus, we grant the City's Motion to Dismiss the *Monell* claim in Count IX insofar as it asserts that the City is liable for failure to train, oversee, or punish officers concerning *Brady* violations, the failure to intervene, the failure to conduct 'constitutionally adequate' investigations, and malicious prosecution in violation of the Fourteenth Amendment. In other respects, however, the *Monell* claim will proceed."); ***Wiley for Thomas v. City of***

Columbus, No. 2:17-CV-888, 2021 WL 2634860, at *14 (S.D. Ohio June 25, 2021) ("[T]he Sixth Circuit 'has consistently held that a municipality cannot be held liable on a failure to train theory where a right was not clearly established.' *Tlapanco v. Elges*, 969 F.3d 638, 657 (6th Cir. 2020) (collecting cases); *see also Stewart v. City of Euclid*, 970 F.3d 667, 676 (6th Cir. 2020) ("[The decedent's] rights were not clearly established in the precedent of this circuit or otherwise. Thus, violation of his rights cannot be the 'known or obvious consequence' disregarded by the City of Euclid through its training program and the *Monell* claim fails.") Because it was not clearly established that police officers responding to a medical emergency call could not apply pressure to the legs and lower back/hip area of a combative, non-compliant person in order to facilitate emergency medical treatment, the City of Columbus 'cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.'"); ***Shields-Nordness v. Galindo***, No. 18-CV-1426 (PJS/DTS), 2019 WL 1003114, at *8–9 & n.5 (D. Minn. Mar. 1, 2019) ("[A] municipality 'cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.'. . That is 'because a municipality cannot *deliberately* shirk a constitutional duty unless that duty is clear.' *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 995 (6th Cir. 2017) (citing *Szabla*, 486 F.3d at 393). . . The Court has already held that, if Shields-Nordness had a constitutional right not to be strip searched and transferred to the general population, that right was not clearly established. In light of that fact, Ramsey County could not have 'exhibit[ed] fault rising to the level of *deliberate* indifference to [that] constitutional right ....' . . . Because Shields-Nordness has not plausibly pleaded deliberate indifference, she has not plausibly pleaded conduct that would shock the conscience—and because she has not plausibly pleaded conduct that would shock the conscience, she has not plausibly pleaded that Ramsey County deprived her of substantive due process. For that reason, her substantive-due-process claim against Ramsey County is dismissed. . . . In *Szabla*, the Eighth Circuit was addressing a claim that a municipality should be held liable because it adopted a policy that was constitutional on its face but that 'fail[ed] to give detailed guidance that might have averted a constitutional violation' by a municipal employee. . . Municipal liability attaches in such a case only when a 'city's inaction reflects a deliberate indifference to the constitutional rights of the citizenry ....' . . . The Eighth Circuit explained that a municipality cannot act with deliberate indifference to constitutional rights that have not yet been clearly established. . .Here, by contrast, Shields-Nordness is alleging that the conduct of Ramsey County in adopting a facially unconstitutional policy was conscience-shocking and therefore deprived her of substantive due process. In order to hold Ramsey County liable, however, Shields-Nordness must establish that Ramsey County acted with deliberate indifference to her constitutional rights. Thus, *Szabla*'s reasoning appears to apply with equal force in this context: Ramsey County could not have acted with deliberate indifference to a constitutional right of Shields-Nordness unless that right had been clearly established."); ***Thomas v. City of Philadelphia***, 290 F.Supp.3d 371, 387 (E.D. Pa. 2018) ("Though no court within the Third Circuit has weighed in, several courts have held that a municipality cannot be deliberately indifferent to a right that is not clearly established. *See Szabla v. City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) ("[A] municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established."); *see*

also Townes v. City of New York, 176 F.3d 138, 143–44 (2d Cir. 1999); *Williamson v. City of Virginia Beach*, 786 F. Supp. 1238, 1264-65 (E.D. Va. 1992); *Zwalesky v. Manistee County*, 749 F. Supp. 815, 820 (W.D. Mich. 1990). Because the rights at issue in the claims for Fourteenth Amendment malicious prosecution, *Brady* violations, and failure to investigate were not clearly established in 1994, the Court dismisses the *Monell* count as to these claims. The Court notes the narrowness of this conclusion: because the City concedes that Mr. Thomas has articulated a *Monell* claim for Fourth Amendment malicious prosecution and for Fourteenth Amendment fabrication of evidence, the *Monell* count itself survives.").

See also ***Jones v. City of St. Louis***, 104 F.4th 1043, 1051 (8th Cir. 2024) ("Municipal entities are not entitled to qualified immunity. . . But our jurisdiction to review the denial of qualified immunity to individual supervisory Defendants Carson and Glass includes jurisdiction over pendent claims against the City that are 'inextricably intertwined' with the qualified immunity claims. . . A pendent claim is inextricably intertwined 'if resolution of the qualified immunity claim "necessarily resolves the pendent claim[ ] as well."'. . It is well established that 'there must be an unconstitutional act by a municipal employee before a municipality can be held liable.'. . Our conclusion that Jones has not plausibly alleged that his right not to be detained was violated by any City employee means that the alleged municipal policies and practices did not cause the constitutional injury Jones alleges. Jones's allegations that Defendants 'should have known' that he was incarcerated despite the criminal charges being dismissed fail to state a claim under either the Fourth Amendment or the Due Process Clause. Therefore, our conclusion that Count I must be dismissed for failure to state a claim 'necessarily resolves' the municipal liability issues.")

But see ***Watson v. Boyd***, 119 F.4th 539, 562 (8th Cir. 2024) ("The defendants nonetheless assert that '*even if* Officer Boyd's actions did violate Watson's constitutional rights, Officer Boyd is still entitled to qualified immunity because those claimed rights were not "clearly established."'. . 'As a result,' the City argues, it 'is entitled to summary judgment on its *Monell* claims because where a right is not clearly established, Watson cannot show the City's fault rose to the level of deliberate indifference.'. We disagree. It was clearly established at the time of the event that 'the First Amendment prohibits government officials from subjecting an individual to retaliatory actions ... for speaking out.'. . As a result, we reverse the grant of summary judgment on Watson's *Monell* claim. . . .Accordingly, we affirm the district court's grant of summary judgment on all claims except Watson's First Amendment retaliatory use-of-force claim and remand for further proceedings on that claim."); ***Nichols v. Wayne County, Michigan***, 822 F. App'x 445, ___ (6th Cir. 2020) (Moore, J., dissenting in part), *cert. denied*, 141 S. Ct. 2716 (2021) ("The majority suggests that . . . Nichols's claim is barred for failure to allege the violation of a clearly established right. But this clearly-established-right defense does not apply '[w]hen an injury arises directly from a municipal act, ... because fault and causation obviously belong to the city.' *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 994–95 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018). . . '[T]here is a significant difference between a *Monell* claim alleging that a municipal policy or custom caused a constitutional violation ... and a *Monell* claim alleging that a municipality's failure to train amounted to deliberate indifference.'. . When the first type

of *Monell* claim is at issue, as is the case here, the violated right need not be clearly established. . . The majority argues that, as in *Arrington-Bey*, the policy-based *Monell* claim here is actually a failure-to-train claim, so the clearly-established-right defense applies. But we said nowhere in *Arrington-Bey* that claims based on a municipality's failure to institute a policy were per se identical to claims based on municipality's failure to train their employees. All we said in that case was that a plaintiff relying on a deliberate-indifference theory of municipal liability had to do more than show the lack of a policy. . . This case, unlike *Arrington-Bey*, is not about the actions of individual municipal employees and whether a municipality's deliberate indifference in training them is what led to the alleged harm. Rather, Nichols alleges that the City and County had a policy of failing to provide retention hearings for owners of vehicles seized pursuant to the MITPA. This claim does not involve failure-to-train allegations, and therefore Nichols need not demonstrate that these municipal defendants violated a clearly established right."); ***Contreras on behalf of A.L. v. Doña Ana County Bd. of County Commissioners***, 965 F.3d 1114, 1139-41 (10th Cir. 2020) (Baldock, J., concurring in part, dissenting in part), *cert. denied*, 141 S. Ct. 1382 (2021) ("Relying on cases from our sister circuits, the district court alternatively concluded that because a failure-to-train claim requires a showing of deliberate indifference on the part of the DACDC, Plaintiff must also show the asserted right was clearly established at the time of the attack. *See Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988 (6th Cir. 2017); *Szabla v. City of Brooklyn Park*, 486 F.3d 385 (8th Cir. 2007) (en banc); *Townes v. City of New York*, 176 F.3d 138, 143 (2d Cir. 1999). Judge Carson accepts this approach. I have my doubts. To be sure, not all *Monell* claims are created equal. But neither are all failure-to-train theories. As explained above, the Supreme Court has distinguished deliberate-indifference claims based on 'a pattern of tortious conduct by inadequately trained employees' from those based on 'evidence of a single violation of federal rights.'. . *Brown*'s statement regarding an 'obvious potential for such a violation' concerned the latter. . . As this Court has explained, 'deliberate indifference may be found *absent a pattern of unconstitutional behavior* if a violation of federal rights is a highly predictable or *plainly obvious consequence* of a municipality's action or inaction.'. . Conversely, when a deliberate-indifference claim is based on a pattern of tortious conduct by inadequately trained employees, a plaintiff need not also prove the underlying violation was obvious (i.e., clearly established). This is because the pattern of unlawful behavior puts a municipal policymaker on sufficient 'notice that its action or failure to act is substantially certain to result in a constitutional violation[.]'. . Thus, a municipality can manifest deliberate indifference even when its employee (i.e., the individual defendant) did not violate clearly established law. The out-of-circuit authorities Judge Carson cites do not compel a contrary conclusion. In each of these cases, the plaintiff's deliberate-indifference claim was based on evidence of a single violation of federal rights, not a pattern of past tortious conduct by municipal employees. . .Perhaps requiring the violated right to be clearly established is the proper approach when dealing with deliberate-indifference claims premised on an isolated constitutional violation. On the other hand, maybe not. Consider the following hypothetical, which is based on a recent Eleventh Circuit decision:

> A municipal policymaker arms its police officers with firearms because it knows the officers will sometimes need to arrest dangerous individuals. Yet, the municipality fails to

> train the officers regarding the lawful use of deadly force. During an investigation, an officer shoots a ten-year-old child lying on the ground within arm's reach of the officer, while repeatedly attempting to shoot a pet dog that wasn't posing any threat. The child's mother sues the officer for excessive force and also brings a *Monell* claim against the municipality for its failure to train the officer. A court holds, as the Eleventh Circuit did, that the officer is entitled to qualified immunity because his actions did not violate any clearly established rights. *See Corbitt v. Vickers*, 929 F.3d 1304, 1323 (11th Cir. 2019) ("Because we find no violation of a clearly established right, we need not reach the other qualified immunity question of whether a constitutional violation occurred in the first place."), *cert. denied*, No. 19-679, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 3146693 (U.S. June 15, 2020).

Applying the rule Judge Carson champions today, does this also 'spell the end of th[e] *Monell* claim' against the municipality? . . . If the answer is 'yes,' I fail to see how this deliberate-indifference standard doesn't effectively afford a form of vicarious immunity to municipalities. . . In my view, these are dangerous waters. . . Fortunately, we have no occasion in this case to lay down a categorical rule one way or the other because Plaintiff's deliberate-indifference claim against the DACDC is based on a pattern of tortious conduct by inadequately trained employees. Both the Supreme Court and this Court have unequivocally held such evidence may satisfy the deliberate-indifference element of a *Monell* claim. . . Because that settles the issue before us, I would leave for another day the question whether a deliberate-indifference claim based on a single violation of federal rights necessarily requires the asserted right to be clearly established."); ***Alvarez v. City of Brownsville***, 904 F.3d 382, 404-06 (5th Cir. 2018) (en banc), *cert. denied*, 139 S. Ct. 2690 (2019) (Graves, J., joined by Costa, J., dissenting) ("I also disagree with the majority opinion's conclusion that a deliberate indifference theory of municipal liability was not viable because at the time we had not recognized a pre-plea right to *Brady* material. The City never made this 'clearly established' argument in the district court or in our court. By adopting it sua sponte, the court repeats the mistake we recently made in *Hernandez v. Mesa*, 785 F.3d 117 (5th Cir. 2015) (en banc). We held that a border patrol agent was entitled to qualified immunity for shooting a Mexican national because the law was not clearly established that the Fifth Amendment applied to a foreign citizen injured outside the United States. The Supreme Court reversed, explaining that the agent did not know at the time of the shooting whether the victim was a U.S. citizen. —— U.S. ——, 137 S.Ct. 2003, 2007, 198 L.Ed.2d 625 (2017). The same is true for the similar deliberate indifference inquiry here. When he failed to disclose the exculpatory video, Police Chief Garcia did not know that Alvarez was pleading guilty. Even more than in *Mesa*, he could not have known as that fact did not yet exist (that is, the plea decision had not yet been made). But Garcia knew that the way to comply with the *Brady* obligation that has long existed for cases that go to trial is to notify the criminal investigations division of exculpatory material in the IA file so it becomes part of the prosecutor's file later disclosed to the defense. There was not one procedure for transferring exculpatory evidence from the IAD side to the investigations side for 'trial' cases and a separate procedure for 'plea' cases. Because that transfer of the video to the investigations division did not happen, Garcia was deliberately indifferent to the long

recognized *Brady* right for cases that get tried. It is true that some caselaw suggests that deliberate indifference liability applies only when the indifference is to a clearly established right. The idea, the same rationale for qualified immunity, is that liability should attach based on an individual's conduct only if there is a knowing violation of constitutional law. That culpability exists here because Garcia was deliberately indifferent to his constitutional obligation to turn over exculpatory evidence for a case that, like any other, could have resulted in a trial with the long recognized *Brady* right. Once that deliberate indifference to a clear constitutional right is established, it is just a matter of causation to show that the deliberate indifference to ensuring the criminal file contained exculpatory material led to Alvarez's constitutional injury that Judge Costa's opinion recognizes. . . .That such a complete failure to train on *Brady* rights is 'likely to result in the violation of constitutional rights' is 'obvious,'. . . because 'in the absence of training, there is no way for novice officers to obtain the legal knowledge they require.'. . Naturally, the resulting '[w]idespread officer ignorance on the proper handling of exculpatory materials would have the "highly predictable consequence" of due process violations.'. . Brownsville's complete lack of training on *Brady* rights evidences 'deliberate indifference to the [constitutional] rights of persons with whom the police come into contact.'. . .The district court thought the evidence showing municipal liability was so strong that it granted summary judgment on that issue in favor of the plaintiff. The majority opinion does a 180-degree turn and holds there is no municipal liability as a matter of law. For the reasons I have discussed, at a minimum, there are factual disputes that a jury should resolve on municipal liability. I respectfully dissent."); ***Szabla v. City of Brooklyn Park***, 486 F.3d 385, 403, 404 (8th Cir. 2007) (en banc) (Gibson, J., with whom Wollman, Bye, and Melloy, JJ., join dissenting) ("In the face of these two Supreme Court holdings [*Owen* and *Pembaur*], our court today holds that in cases of municipal liability that depend on a showing of deliberate indifference (i.e., most of them), a municipality cannot be liable unless the law was clearly established at the time of its action. . . Thus, via the words 'deliberate indifference,' our court imports the qualified immunity standard into municipal liability.").

See also ***Molina v. City of St. Louis, Missouri***, No. 4:17-CV-2498-AGF, 2025 WL 506548, at *8-9, *11-12 (E.D. Mo. Feb. 14, 2025) ("The City argues that it cannot be liable for any violation of a constitutional right that was not clearly established. According to the City, because the Eighth Circuit held that Plaintiffs' First Amendment rights were not clearly established in 2015, the City could not have been deliberately indifferent to any violations of those rights. Plaintiffs argue that the City can still be held liable for tacitly authorizing an unconstitutional custom because failing to hold municipalities accountable for constitutional violations solely because a constitutional right was not clearly established at the time of an incident would de facto grant municipalities qualified immunity. While the Eighth Circuit has not always been clear in discussing the relationship between individual and municipal liability, the Court finds Plaintiffs' arguments more persuasive and consistent with prior Eighth Circuit precedent. . . The City relies principally on *Lombardo v. City of St. Louis*, 38 F.4th 684 (8th Cir. 2022) and *Graham v. Barnette*, 5 F.4th 872 (8th Cir. 2021). In both *Lombardo* and *Graham*, the Eighth Circuit held that '[w]here the municipality has not directly inflicted an injury… "rigorous standards of culpability and causation must be applied" and a showing of deliberate indifference is required.'. . Furthermore,

'a deliberate indifference claim fails in [t]he absence of clearly established constitutional rights, so-called clear constitutional guideposts for municipalities in the area.'. . This 'lack of clarity in the law precludes a finding that the municipality had an unconstitutional policy at all, because its policymakers cannot properly be said to have exhibited a policy of *deliberate* indifference to constitutional rights that were not clearly established.'. . *Lombardo* and *Graham*, however, address claims of liability based upon municipal policy and a failure to train, not based on custom. Both *Lombardo* and *Graham* rely on *Szabla v. City of Brooklyn Park*, 486 F.3d 385 (8th Cir. 2007) (en banc). . . In *Szabla*, however, the Eighth Circuit explicitly stated that '[t]he separate doctrine providing for municipal liability in a case of widespread unconstitutional practices that constitute a "custom" or usage with the force of law' was not at issue in the case. . . Plaintiffs argue that the claims in this case are distinguishable from *Lombardo* and *Graham* precisely because the City tacitly authorized a custom of unconstitutional conduct. . . They rely principally on *Webb v. City of Maplewood* for their argument that an unconstitutional custom can be found—and a city held liable—even in cases where 'officials all enjoy personal immunity from suit, [because] it hardly follows that they did not engage in any unlawful acts or that the City is thereby immune as well.'. . Even absent individual liability, '[w]hether the challenged acts occurred, whether they were unlawful, and whether the City is liable for them under [*Monell*] would still be open questions.'. . The Eighth Circuit has 'long held for that reason that a municipality may be held liable for its unconstitutional policy or custom even when no official has been found personally liable for his conduct under the policy or custom.'. . The City's and Plaintiffs' arguments address two separate concerns in the case law stemming from *Monell*: (1) ensuring that a finding of municipal liability does not de facto create *respondeat superior* liability; and (2) ensuring that a finding of qualified immunity for an individual does not create de facto immunity for the municipality. . . . The City has not cited to any case holding that a right must be clearly established before a plaintiff can demonstrate municipal liability based on a custom. . . On the contrary, the Eighth Circuit's test for unconstitutional custom does not require deliberate indifference to a constitutional right. Rather, the custom test requires deliberate indifference to or tacit authorization of *unconstitutional misconduct* by municipal employees. . . Indeed, in other cases where individual officers were found to have qualified immunity, the Eighth Circuit has not adopted the City's proposed standard and test, but instead has addressed the merits of the claim. *See Cartia v. Beeman*, 122 F,4th 1036, 1045 (8th Cir. 2024) (applying the Eighth Circuit's typical custom test and analysis even after finding that the officers at issue did not violate a clearly established right); *see also Leonard v. St. Charles Cnty. Police Dep't.*, 59 F.4th 355 (8th Cir. 2023) (same). Under the City's analysis, the finding that the law was not clearly established would make any further analysis unnecessary. . . . Here, Plaintiffs have alleged and presented evidence that creates a question of fact regarding whether the City tacitly approved an unconstitutional custom, that is, that Defendant sanctioned a continuing, widespread, and consistent pattern of unconstitutional misconduct, and that pattern of sanctioned unconstitutional misconduct led to Plaintiffs' injuries. To hold that the City cannot, as a matter of law, be liable for unconstitutional custom merely because the individual officers at issue were entitled to qualified immunity would risk granting the City de facto qualified immunity. Such a reading would be fundamentally inconsistent with *Monell* and with Eighth Circuit precedent. . . . the existence of a municipal custom is a fact question for the jury. *Mettler v. Whitledge*, 165 F.3d

1197, 1204 (8th Cir. 1999). Applying the Eighth Circuit's decision and viewing the totality of the evidence in the present record, including the new evidence presented by the City, in a light most favorable to Plaintiffs, the Court believes that a jury could still find that the City's customs and practices permitted officers to deploy chemical munitions in an indiscriminate and retaliatory manner in violation of citizens' First Amendment rights, that the City's officials were notified of unconstitutional misconduct and were deliberately indifferent to it or tacitly authorized it, and that the City's customs and practices were the moving force behind the deprivation of Plaintiffs' rights on August 19, 2015. Because genuine issues of material fact must be resolved by a jury, the City is not entitled to summary judgment on Count IV as it relates to Plaintiffs' First Amendment claims."); ***Pena v. City of Lancaster***, No. CV 21-590, 2023 WL 5807005, at *13 (E.D. Pa. Sept. 7, 2023) ("Defendants argue that for liability to attach to the City, 'Plaintiff must first establish that one of its employees is primarily liable under § 1983.'. . Because this Court found that Officer Arnold is entitled to qualified immunity as to the shooting of Mr. Muñoz, Defendants would have the Court find that there can be no *Monell* liability for the City as well for purposes of Count II. The case law on this point is not as clear as Defendants would have it. One the one hand, the Third Circuit has held that because the *Monell* court rejected municipal liability on a theory of *respondeat superior*, a municipality 'cannot be vicariously liable under *Monell* unless one of [its] employees is primarily liable under section 1983 itself.' *Williams v. Borough of W. Chester, Pa.*, 891 F.2d 458, 467 (3d Cir. 1989). But on the other hand, a lack of primary liability for a police officer would not necessarily preclude finding, pursuant to *Monell*, that a municipality maintained a policy or custom that resulted in a constitutional violation, and the Third Circuit has since recognized as much. [citing *Kneipp* and *Simmons*] Further complicating the picture, certain courts in this District have endorsed the view—shared by various circuit courts but not addressed by the Third Circuit—that '[i]f the right at issue is not "clearly established" [for purposes of qualified immunity], then any assertion of deliberate indifference is substantially undercut because, by definition, there are no "clear constitutional guideposts" for the municipality to follow in developing policy.', , This Court agrees that the lack of a clearly established right 'undercuts' the likelihood that a municipality was deliberately indifferent to that right, but the Court will not treat such a lack as a *per se* bar to *Monell* liability."); ***Crosland v. City of Philadelphia***, No. CV 22-2416, 2023 WL 3898855, at *12-13 & n.17 (E.D. Pa. June 8, 2023) ("Unlike individual government officials, municipalities are not entitled to qualified immunity under § 1983. . . Nonetheless, municipal liability under a 'failure to train, discipline, or supervise' theory requires a showing that the municipality was 'deliberate[ly] indifferen[t]' to the underlying constitutional violation. . . Relying on several out-of-circuit cases and decisions from this district adopting their reasoning, Philadelphia argues that a municipality can only be 'deliberately indifferent' to a constitutional violation if the underlying right was clearly established at the time. Phila. Mot. (ECF 36) at 20.[17] **[fn. 17:** There is an unresolved circuit split on this question. The First, Fifth, Sixth, and Eighth Circuits have held that a municipality can only be deliberately indifferent to a clearly established right. [collecting cases] Several courts in this district have adopted the reasoning of these decisions. [collecting cases] The Ninth and Tenth Circuits, in contrast, have rejected this categorical rule. [collecting cases] Panels of the Second Circuit have gone both ways. [comparing cases]**]** Adopting the city's analysis would import the 'clearly established' inquiry from qualified immunity doctrine

into the municipal liability standard. . . *See* Joanna C. Schwartz, *Backdoor Municipal Immunity*, 132 Yale L.J. F. 136, 138 (2022). I reject this 'conflation' of qualified immunity and municipal liability standards. . .While the Third Circuit has not squarely addressed this question in a precedential opinion, its caselaw suggests that municipal liability should remain untethered to the 'clearly established' qualified immunity standard. In two recent cases, the court found that individual defendants were entitled to qualified immunity because the relevant right was not clearly established, but nonetheless remanded the municipal liability issue to the district court. *Fields v. City of Phila.*, 862 F.3d 353, 362 (3d Cir. 2017); *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 150 (3d Cir. 2017). This approach accords with prior circuit precedent, which 'requires the district court to review the plaintiffs' municipal liability claims independently of the section 1983 claims against the individual police officers, as the City's liability ... does not depend upon the liability of any police officer.'. . Requiring that a right be clearly established in a municipal liability claim would also contravene the Supreme Court's decision in *Owen v. City of Independence*, 445 U.S. 622 (1980). In that case, the Court held that 'municipalities have no immunity from damages liability flowing from their constitutional violations.' . . Transposing the 'clearly established' inquiry—the crux of the qualified immunity defense—onto the municipal liability standard would 'cut away the core principle of *Monell* and *Owen*: [that l]ocal governments ... should be held liable for the losses they cause.'. . And there is simply no need to do so. The Supreme Court and Third Circuit have laid out, in great detail, the standards governing municipal liability claims under § 1983. . . These standards are already demanding. *See* Fred Smith, *Local Sovereign Immunity*, 116 Colum. L. Rev. 409, 430-38 (2016); Joanna C. Schwartz, *Municipal Immunity*, 109 Va. L. Rev. (forthcoming 2023). Absent binding authority from either court, I decline to impose additional requirements on Crosland. The motion to dismiss the municipal liability claim to the extent it relies on rights that were not clearly established at the time of the alleged misconduct will therefore be denied."); ***Quintana v. City and County of Denver***, No. 20-CV-0214-WJM-KLM, 2021 WL 2913044, at *5 (D. Colo. July 12, 2021) ("[U]nder Tenth Circuit precedent, a *Monell* claim is not automatically subject to dismissal upon a determination that the law is not clearly established for purposes of qualified immunity. As the Tenth Circuit ruled in *Hinton v. City of Elwood, Kansas*,

When a finding of qualified immunity is predicated on the basis that the law is not clearly established, it is indeed correct that there is nothing anomalous about allowing [a suit against a municipality] to proceed when immunity shields the individual defendants, for the availability of qualified immunity does not depend on whether a constitutional violation has occurred.

997 F.2d 774, 783 (10th Cir. 1993) . . . Defendants do not contend that Plaintiff's proposed Second Amended Complaint does not plausibly allege constitutional violations under the Fourth or Fourteenth Amendment. . . Nor do they argue that Plaintiff has failed to plausibly allege a policy or custom giving rise to *Monell* liability. . .Because Defendants have failed to demonstrate that amendment as to Plaintiff's Fourth and Fourteenth Amendment claims against Denver would be futile, the Court grants this portion of the Motion.").

See also ***Estate of Walker v. Wallace***, 881 F.3d 1056, 1062 (8th Cir. 2018) (Kelly, J., concurring) ("I agree that Hershell Wallace is entitled to qualified immunity. I write to note that

St. Louis's municipal liability is not before us on this appeal. The plaintiffs made three claims relating to Wallace's Project 87 inspection. One of those claims sought to hold Wallace personally liable—this appeal disposes of that claim. The remaining two claims seek to hold the City of St. Louis liable for an unconstitutional policy under *Monell v. Dep't of Social Servs. of N.Y.C.,* 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978). We express no opinion on the district court's denial of summary judgment on these *Monell* claims. And, because we grant Wallace qualified immunity based on a lack of clearly-established law, our ruling is not determinative of whether his employer is liable for effectuating an unconstitutional policy. . . Thus, our opinion does not foreclose the plaintiffs from pursuing their *Monell* claims based on Project 87 searches.")

See also ***Ziegler v. Martin Cty. Sch. Dist.***, 831 F.3d 1309, 1326-27 (11th Cir. 2016) ("[W]e have determined Officer Brush is entitled to qualified immunity, because holding students from the party bus after they had passed the breathalyzer test until all the student passengers had been breathalyzed was not [contrary to] clearly established law at that time. Consequently, there can be no liability for Sheriff Snyder for failing to train Officer Brush in this regard."); ***Fletcher v. Town of Clinton***, 196 F.3d 41, 56 (1st Cir. 1999) ("While a finding that the law was not clearly established may foreclose municipal liability for failure to train, *see Joyce*, 112 F.3d at 23, a finding that the law was clearly established does not dispose of the municipality's motion for summary judgment. Rather, the court must go on to consider whether allegations of a municipal policy or practice have been made that are sufficient to survive summary judgment."); ***Joyce v. Town of Tewksbury***, 112 F.3d 19, 23 (1st Cir. 1997) ("[O]ur rationale here for granting qualified immunity to the officers − that the unsettled state of the law made it reasonable to believe the conduct in this case constitutional − also precludes municipal liability. Tewksbury could not have been 'deliberately indifferent' to citizens' rights . . . in failing to teach the officers that their conduct was unconstitutional."); ***Gonzalez v. Ysleta Independent School District***, 996 F.2d 745, 760 (5th Cir. 1993) ("It therefore may well be, as several district courts have held, that 'to be deliberately indifferent to rights requires that those rights be clearly established.'" [citing *Watson*]); ***Barber v. City of Salem***, 953 F.2d 232, 240 (6th Cir. 1992) ("[W]here no constitutional violation exists for failure to take special precautions, none exists for failure to promulgate policies and to better train personnel to detect and deter jail suicides."); ***Zappala v. Albicelli***, 980 F. Supp. 635, 639 (N.D.N.Y. 1997) ("In the present case, the Court notes that its finding that the individual Defendants are entitled to qualified immunity probably precludes municipal liability for a related 'failure to train' claim. That is because if the independent actors' conduct was objectively reasonable given the circumstances, it logically follows that the unconstitutional nature of the resulting conduct could not have been 'highly predictable' to the Liverpool School District."), *aff'd*, 173 F.3d 848 (2d Cir. 1999); ***Mason v. Stock***, 955 F. Supp. 1293, 1304 n.9 (D. Kan. 1997) ("A finding that an officer is entitled to qualified immunity because the officer's conduct did not violate the law is equivalent to a decision on the merits of the claim and precludes the imposition of any municipal liability. On the other hand, when qualified immunity is predicated on the basis that the law is not clearly established, the corresponding claim against a municipality may proceed."); ***B.M.H. v. The School Board of the City of Chesapeake***, 833 F. Supp. 560, 572 (E.D. Va. 1993) ("[T]he Court is of the opinion that a § 1983 action based on a 'deliberately indifferent'

policy or custom of the School Board first requires an underlying constitutional deprivation in order to stand."); ***Williamson v. City of Virginia Beach***, 786 F. Supp. 1238, 1264-65 (E.D. Va. 1992) ("[T]he conclusion that [constitutional rights] were not clearly established negates the proposition that the city acted with deliberate indifference."), *aff'd*, 991 F.2d 793 (4th Cir. 1993).

See also ***Triolo v. Nassau County***, 24 F.4th 98, 110-13 (2d Cir. 2022) ("The County is not entitled to qualified immunity, and, despite defendants' contentions otherwise, Lee's immunity does not somehow transfer to his municipal employer. The Supreme Court has explicitly rejected the idea that municipalities are entitled to qualified immunity under federal law. . . . We turn then to the issue of whether the County may be vicariously liable for damages caused by its employee under New York state law, even though that employee is entitled to individual immunity. . . . We agree, as does Triolo, that a municipal employer cannot be vicariously liable in the absence of unlawful conduct. Here, however, Lee engaged in unlawful conduct when he arrested Triolo without probable cause. Thus, the question is whether a municipal employer can be held vicariously liable for its individually immune employee under New York state law when that employee has been found liable for an underlying wrong. It can.New York law is clear that municipalities can be liable for the actions of police officers on false arrest claims under a theory of *respondeat superior*. . . . The next question is whether New York law categorically bars a principal's vicarious liability when an agent is individually immune. It does not. New York courts have addressed this question in the context of spousal and other immunities. . . And although these cases are plainly distinguishable in that they did not involve municipal liability, they do support the conclusion that an agent's immunity is not a categorical bar to the principal's vicarious liability. Basic agency principles outlined in the Restatement (Second) of Agency (the "Restatement") provide similar guidance. . . Lee was acting within the scope of employment when he arrested Triolo. Defendants do not directly respond to Triolo's argument that the County, just like any other principal-employer, has *respondeat superior* liability for its agent-employee's wrongdoing, even when that agent is entitled to personal immunity from damages. We see no reason why those basic agency principles would not apply here. . . . In sum, the County remains vicariously liable under New York law for the compensatory damages because (1) municipalities are not entitled to qualified immunity, (2) municipal employers may be vicariously liable on state law claims brought against their police officer employees, (3) a principal remains liable for damages caused by its agent, even when that agent is individually immune, and (4) Lee was acting within the scope of his employment when he arrested Triolo. Thus, even though Lee is shielded from personally paying for the damages he caused by falsely arresting Triolo, the County remains liable for those damages under New York state law.")

See also ***Chinaryan v. City of Los Angeles***, 113 F.4th 888, 893, 902 (9th Cir. 2024) ("It was clearly established in *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996), and *Green v. City & County of San Francisco*, 751 F.3d 1039 (9th Cir. 2014), that officers can be held liable for conducting a high-risk vehicle stop based on nothing more than a reasonable suspicion that the vehicle was stolen. Viewing the facts in the light most favorable to plaintiffs, the officers were not entitled to qualified immunity on plaintiffs' Fourth Amendment claims. . . . Defendants are correct

that *Washington* and *Green* 'did not establish bright-line rules on the reasonableness of high-risk stops.' Nonetheless, these cases established that for summary judgment purposes, reasonable suspicion of vehicle theft alone is not enough to justify the intrusive tactics used here absent some case-specific need for them. . . Because a jury could find that the totality of the circumstances here did not justify the officers' tactics, the district court erred in ruling that the officer defendants are entitled to qualified immunity. . . .Taking a different tack, defendants attempt to distinguish *Green* procedurally. They assert that '[t]his case, unlike *Green*, is ... on appeal from a jury verdict,' and '[t]here is no question what a reasonable jury might do, because a reasonable jury has already ruled in [defendants'] favor.' But defendants do not explain how the jury verdict in favor of the City and the LAPD bears on whether the district court earlier erred in granting summary judgment to the individual officers. Because it was clearly established under *Washington* and *Green* that the officers' conduct, viewed in the light most favorable to plaintiffs, constituted excessive force, we reverse the grant of summary judgment in favor of the individual officers on plaintiffs' § 1983 claims.")

15. Note on Bifurcation

Heller is often cited as support for motions to bifurcate in police misconduct cases where recovery is sought against both the individual officer[s] involved, as well as the government entity. *See generally* Colbert, *Bifurcation of Civil Rights Defendants*: *Undermining* Monell *in Police Brutality Cases*, 44 Hastings L.J. 499 (1993). *See* ***Lund v. Henderson***, 807 F.3d 6, 12 (1st Cir. 2015) ("Given our conclusion that the district court did not abuse its discretion in excluding evidence of other allegations against Henderson, Lund's remaining challenges to the district court's trial rulings fall like dominoes. Excluding evidence in the trial against the two officers of complaints against officers other than Henderson and Walcek was, *a fortiori,* well within the trial court's discretion. And the decision to hold for a second phase the claims against the Town, in which such evidence might be admissible, was a classic exercise of the trial court's management discretion, *see* Fed.R.Civ.P. 42(b), especially where there was the possibility that the resolution of the first phase would moot the need for the second phase, *Wilson v. Town of Mendon,* 294 F.3d 1, 7 (1st Cir.2002) (discussing how bifurcating trials is common when litigation of one issue may eliminate the need to try another issue). Lund is unable to cite to a case in which we have overturned a district court's grant or denial of a Rule 42 motion to consolidate or bifurcate trials. *See, e.g., Gonzalez–Marin,* 845 F.2d at 1145 (noting the appellant's "fail[ure] to cite a single case in which an appellate court has reversed a decision for failure to bifurcate" and its own inability "to find any"). The record provides no cause to deviate from that pattern."); ***Wilson v. Morgan***, 477 F.3d 326, 339, 340 (6th Cir. 2007) ("Plaintiffs moved to bifurcate the second trial to separate their claims against the individual defendants from their claims against the county, but argued that the claims against the county should proceed first. Plaintiffs argued that the county had a custom and practice of using investigative detentions that amounted to arrest without probable cause that was itself a violation of federal law sufficient to establish municipal liability under *Monell* . . . . Defendants agreed that separate trials were appropriate, but argued that the claims against the individual officers should proceed first instead. The magistrate judge determined that bifurcation would be

an expeditious way to proceed, but decided that, in light of *Monell*, trial should proceed first on the claims against the individual officers. We find no abuse of discretion in this regard. There can be no *Monell* municipal liability under § 1983 unless there is an underlying unconstitutional act. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986). [citing *Heller*] . . . . The magistrate judge's decision to bifurcate the trial was eminently reasonable in the interests of judicial economy and avoiding possible juror confusion. It was not an abuse of discretion to bifurcate individual liability from municipal liability, and it would be illogical to try the municipality first since its liability under § 1983 could not be determined without a determination of the lawfulness of the individuals' actions. . . . In fact, because the jury found no constitutional violation by the individual defendants, the county could not have been found liable under *Monell* for an allegedly unconstitutional custom or policy. Plaintiffs also argue that trying the claims against the individual officers first was prejudicial because it deprived them of the opportunity to present 'habit and practice' evidence that would have shown a practice of investigative detentions and allowed plaintiffs to argue that the officers were acting in conformity with that practice. Bifurcation, however, did not prevent plaintiffs from presenting that evidence. It was rather the magistrate judge's ruling that the evidence was not relevant to the question of individual liability. Plaintiffs attempted to introduce the evidence under Fed.R.Evid. 406, which provides: 'Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.' The magistrate judge did not err in excluding the evidence under Fed.R.Evid. 401 and 403 because even if the department had a practice of investigative detentions (i.e., arrests based on less than probable cause), such a practice would be irrelevant if the officers had probable cause to arrest."); ***Wilson v. Town of Mendon,*** 294 F.3d 1, 7 (1st Cir. 2002) ("Without a finding of a constitutional violation on the part of a municipal employee, there cannot be a finding of section 1983 damages liability on the part of the municipality. [citing *Heller*] Thus, a defendant's verdict in a bifurcated trial forecloses any further action against the municipality, resulting in less expense for the litigants, and a lighter burden on the court. . . On the other hand, a verdict against the municipal employee will almost always result in satisfaction of the judgment by the municipality because of the indemnification provisions typically found in bargaining agreements between municipalities and their employee unions. There is, however, nothing to prevent a plaintiff from foregoing the naming of an individual officer as a defendant and proceeding directly to trial against the municipality. . . . The added expense aside, the reasons that plaintiffs almost never choose to proceed against the municipality directly are self-evident. The predicate burden of proving a constitutional harm on the part of a municipal employee remains an element of the case regardless of the route chosen and is much easier to flesh out when the tortfeasor is a party amenable to the full powers of discovery. The burden of placing that harm in the context of a causative municipal custom and policy is significantly more onerous than the task of simply proving that an actionable wrong occurred. And finally, an abstract entity like a municipality may present a much less compelling face to a jury than a flesh and blood defendant."); ***Treece v. Hochstetler***, 213 F.3d 360, 365 (7th Cir. 2000) (upholding trial judge's discretion to bifurcate especially in light of fact that City agreed to entry of judgment against itself should jury find

individual officer liable); ***Amato v. City of Saratoga Springs***, 170 F.3d 311, 318, 321 (2d Cir. 1999) (upholding bifurcation and plaintiff's right to proceed against the municipality for nominal damages, noting "a finding against officers in their individual capacities does not serve all the purposes of, and is not the equivalent of, a judgment against the municipality.").

See also ***Tserkis v. Baltimore County***, No. CV ELH-19-202, 2019 WL 4932596, at *5–8 (D. Md. Oct. 4, 2019) ("Cases that contain *Monell* claims 'are good candidates for bifurcation.'. . Bifurcation can advance the efficient and convenient resolution of the case because where there is no 'initial finding that a government employee violated a plaintiff's constitutional rights,....no subsequent trial of the municipality is necessary.'. . In addition, bifurcation might spare the parties from expending valuable resources in discovery, because resolution of the claims as to the individual defendants may obviate the need to litigate the *Monell* claim. . . Equally important, bifurcation prevents the potential prejudice to individual defendants that may result from the introduction of inflammatory evidence concerning the municipality's policies, practices, or customs. . . This is especially true in excessive force cases, where the *Monell* evidence would include 'prior incidents of police brutality and policymakers' reactions to such incidents.'. . Although such evidence 'is relevant under the *Monell* analysis,' it might unfairly bias the jury as to the liability of the individual defendants. . .Courts in this district have consistently ruled that in cases such as this one bifurcation 'is appropriate and often desirable.'. . .Defendants argue that bifurcation of the *Monell* claim against the County is warranted 'to prevent the [Officers] from suffering unfair prejudice by the introduction of" evidence concerning other instances of police misconduct, and because 'discovery into such "policies or practices" would be unduly burdensome unless and until a constitutional violation is proven in the first place.'. . Plaintiffs disagree. They contend that determining the liability of the Officers first will not expedite the resolution of this lawsuit. They posit that, even if the Officers are found not liable, plaintiffs may nonetheless have a viable *Monell* claim against the County. . . Further, plaintiffs maintain that bifurcation is unnecessary to prevent prejudice to the Officers because, 'as in criminal trials, the Court can administer "limiting jury instructions"....'. . . In my view, bifurcation is appropriate in this case because it will prevent prejudice to the individual defendants and because it best serves judicial economy. First, bifurcation will protect against the risk of unfair prejudice to the Officer Defendants. . . . As discussed, '[e]vidence of the County's custom, practice or policy may include evidence of "prior incidents of police brutality, the nature of such incidents, and the municipal policy-makers' reaction to them."'. . . . Plaintiffs assert that, in the event this case proceeded to trial, a limiting instruction would easily cure any potential prejudice to the defendants caused by the introduction of *Monell* evidence against the County. . . But, the introduction of *Monell* evidence in a trial involving the Officers would inject an issue not necessarily relevant to the individual defendants; it is potentially inflammatory; and the reality is that it would be difficult for the jury to compartmentalize such evidence. . . In short, a limiting instruction is not as effective as bifurcation in guarding against the concerns outlined above. . . Given the far-reaching scope of *Monell* discovery, it makes good sense to establish first whether a constitutional violation occurred. This is because the absence of such a violation might well make discovery unnecessary with respect to the County. Moreover, bifurcating the claims against the County and the Officer

Defendants would promote judicial economy. . . Determining whether the Officer Defendants violated the Decedent's constitutional rights is a prerequisite to establishing liability against the County. . . Failure to bifurcate the *Monell* claim would prolong the trial, because plaintiffs would necessarily have to present evidence pertinent to the *Monell* claim, while also producing evidence as to the Officers. Bifurcation 'preserves scarce judicial and party resources by avoiding expenses related to [plaintiffs'] *Monell* claims until [they] ha[ve] established the existence of an underlying constitutional violation.'. .In other words, bifurcation will facilitate an expeditious trial as to the individual defendants by avoiding the delay inherent in the discovery process as to the *Monell* claim. It would also narrow the issues for trial. This would lead to a reduction of costs, without any real prejudice to plaintiff. . . Nonetheless, plaintiffs insist that bifurcating the *Monell* claim is inefficient because the County could still be liable under § 1983 even if the Officer Defendants are not. To be sure, '*Monell*...and its progeny do not require that a jury must first find an individual defendant *liable* before imposing liability on [a] local government.'. . There are some narrow circumstances in which 'a finding of no liability on the part of the individual municipal actors can co-exist with a finding of liability on the part of the municipality.'. . One such situation is when the individual defendants are entitled to qualified immunity. . . . Thus, plaintiffs are correct that bifurcation could theoretically result in two trials, rather than one. However, this possibility does not alter my calculus. The key question is whether the Officers committed constitutional violations, not whether they can be held liable for them. Plaintiffs will have a viable *Monell* claim against the County, despite the Officers being found not liable, if the fact-finder concludes that the Officers violated Mr. Evans' constitutional rights, and that those rights were not clearly established, such that the Officers are entitled to qualified immunity. On the other hand, if the fact-finder concludes that the Officers are not liable under § 1983 on the ground that they did not violate Mr. Evans' constitutional rights, then plaintiffs' *Monell* claim would founder as a matter of law. In either circumstance, the question of whether any police officer committed a constitutional violation is central to plaintiffs' claims against the County. . . .In my view, bifurcation is appropriate because it will promote judicial economy, conserve the parties' resources, prevent prejudice to the Officers, and will not prejudice the plaintiffs."); ***Hutchins v. McKay***, No. 3:16-CV-30008-MAP, 2018 WL 443446, at *9–10 (D. Mass. Jan. 16, 2018) ("Defendant's concern about the potential prejudice faced by individual police officers where claims against them and the City are tried jointly is reasonable. It is likely that evidence of 'prior bad acts' by the individual officers may be relevant to the *Monell* claim but excluded entirely in a separate trial against the officers. On the other hand, Plaintiff's concerns are also legitimate. Where a plaintiff does not prevail in his suit against the named officers, the *Monell* claim falls away. . . But even where a plaintiff does prevail in the first suit, and receives a full and fair measure of damages, that plaintiff has little incentive to pursue his claim against the City in a second trial. . . The reality is that allowance of a motion for bifurcation, where the trial against the officers proceeds first, can in effect mean that a *Monell* claim disappears irrespective of its merits. The solution to all these concerns is to allow the motion to bifurcate, but proceed with trial of the *Monell* claim first. Relevant evidence of prior bad acts may be weighed by the jury in the trial against the City, without risk of prejudice to Defendant officers. Of course, Plaintiff will bear the burden of proving at this trial both the existence of a custom or policy, and a causal connection

between the custom or policy and his injuries. Put differently, even if Plaintiff can prove an unconstitutional custom or policy, he will not be entitled to recover unless he can prove a violation of his constitutional rights by the officers stemming from that policy. Admittedly, some considerations of economy may weigh in favor of trying the claims against the individual officers first. If, for example, Plaintiff fails to prove the existence of an unconstitutional custom or policy, or a causal link between that policy and his injury, then the jury will return a verdict for the City on the *Monell* claim. A trial against the individual officers will thereafter be necessary, with much of the same evidence regarding the January 20, 2013, incident. This, however, is a bearable (and not inevitable) imposition, in order to permit Plaintiff to have his day in court on his *Monell* claim and to protect the important policy considerations underlying such a claim."); ***Cordero v. City of New York***, No. 15-CV-3436, 2017 WL 4685544, at *2-4 (E.D.N.Y. Oct. 17, 2017) ("In the present case the court will allow the plaintiff to proceed against the City of New York on *Monell* grounds that allege the failure to take reasonable steps to control lying by police officers is a policy of the NYPD. . . His theory is that the police department has long been aware of a wide-spread practice of false arrests at the end of tours of duty in order to obtain overtime and that it has failed to sufficiently address this practice. . . Plaintiff argues that the city's policy is not to track or adequately discipline policemen for testifying falsely. And that it has failed to supervise or properly discipline police officers with a record of being unsuccessful defendants in Title 42 U.S. Code Section 1983 cases because they fabricated evidence. . . . The city is being sued on the theory that its overtime policy and policy on lying by its officers encouraged their unlawful action. . . One difficulty in administering such a case if it goes to a joint trial on individual and *Monell* claims is that the City of New York will be prejudiced in defending its liability by evidence about the individual officers' lack of veracity. The individual defendants will suffer prejudice by the introduction of wide-spread municipal misconduct—lying by police officers—needed to prove a municipal policy. Plaintiff may be inhibited by exclusion of relevant evidence prejudicial to the defendants. . . To avoid these evidentiary problems, the court has ordered a bifurcated trial. The first phase will be against the officer defendants, the second phase on the *Monell* issue will only need to go forward if the jury finds against the individual defendants in the first phase. . . The city, at a hearing on the defendants' summary judgment motion, has in effect admitted liability on the *Monell* claim if an individual defendant is found liable by stating: 'If plaintiff wins [on the individual claim], we will consent. You can throw the City in the judgment and we will throw a dollar to it and we will avoid the second trial.'. . The dollar damages suggested somewhat contemptuously by the city's counsel is not a convincing argument for rejecting a trial of the *Monell* phase. Even if the city's damages, whether or not the *Monell* phase goes forward, will be the same, a finding by a petty jury that a municipal policy encouraged widespread police officer misconduct can be significant. It may indicate the need for more careful tracking of individual police officer's litigation history and a more effective discipline policy to avoid repeated lying by a number of officers. . . . The following claims will be tried in phase I: (1) false arrest against Officer Hugasian; (2) malicious prosecution against Officer Hugasian; (3) denial of a right to a fair trial against Officer Hugasian; (4) unlawful strip search against Officer Rubin; (5) failure to intervene, by Officer Essig, in the alleged strip-search; and (6) supervisory liability against Lieutenant Moran. In phase II *Monell* claims against the City of New York will be tried, if any of

individual claims 1 to 6 are found proven by the jury."); ***Harrison v. City of Atlantic City***, No. 114CV06292NLHAMD, 2017 WL 2256961, at *7–8 (D.N.J. May 23, 2017) ("In this case, if, after a jury has answered its special interrogatories as to Plaintiff's excessive force claims, the Court concludes that none of the defendant officers violated Plaintiff's Fourth Amendment rights and they are entitled to qualified immunity, the principle announced in *Heller* and applied by the Third Circuit would appear to warrant the dismissal of Plaintiff's municipal liability claims against Atlantic City. It would seem to be, at a minimum, a waste of judicial resources to assess Plaintiff's *Monell* claims against Atlantic City now if such claims ultimately may not be viable. . . Accordingly, the Court will direct the parties to show cause as to why Plaintiff's claims against the officers and Plaintiff's claims against Atlantic City should not be bifurcated, where the Court will consider Atlantic City's motion for summary judgment only if Plaintiff prevails on his excessive force claims against at least one defendant officer."); ***Dickerson v. Rock Island Police Officer Ramirez***, No. 413CV04003JESJEH, 2015 WL 5297516, at *3 (C.D. Ill. Sept. 10, 2015) ("The nature of the constitutional violation considered together with the theory of municipal liability as alleged in the Amended Complaint suggest that an inconsistent verdict may be created if the claims are not bifurcated. The Plaintiff alleges that Defendant Ramirez used excessive force and that Defendant City has a pervasive practice and custom of failing to adequately train, supervise, control, discipline, and dismiss its officers concerning the use of excessive force, as well as a policy of inadequately reporting, reviewing, and investigating use of force and excessive force incidents, and finally a code of silence. To hold Defendant City liable under *Monell* while holding Defendant Ramirez *not* liable for excessive force would create an inconsistent verdict, at least insofar as the Plaintiff alleges City liability based upon failure to train. . . Stated differently, the Plaintiff's claim against Defendant Ramirez is not sufficiently independent of his claim against Defendant City that a 'not liable' verdict for Ramirez would be consistent with a 'liable' verdict against the City."); ***Anthony v. City of Bridgeport***, No. 3:12CV619 WIG, 2015 WL 3745302, at *1-2 (D. Conn. June 15, 2015) ("Courts in the Second Circuit are generally in favor of bifurcating *Monell* claims. [citing cases] Here, bifurcation would promote efficiency in that litigating the claims against Officer Lattanzio may obviate the need to try the case against the City. . . 'A jury's conclusion that a plaintiff has suffered no constitutional violation at the hands of an individual defendant generally forecloses a *Monell* claim.'. . In other words, when a plaintiff's claim 'is caused solely by a named individual defendant who is found not liable, the municipal government cannot be held liable.'. . Because the issue of Officer Lattanzio's liability could be dispositive of the *Monell* claim, it would save the Court's and the parties' time and resources to bifurcate. Bifurcation in this instance would also protect against unfair prejudice. The type of evidence that Plaintiff would have to present in order to prevail on his *Monell* claims—evidence showing that the City had a practice of condoning or encouraging civil rights violations—could create undue prejudice against Officer Lattanzio. Specially, Plaintiff intends to offer complaints filed by any third party against any Bridgeport police officer or against the Department as a whole. . . Plaintiff has not persuaded the Court that the instant case differs in any material way from *Amato* such that bifurcation would not be appropriate. As such, the Court grants Defendants' motion."); ***Cayo v. Fitzpatrick***, No. CIV.A. 13-30113-TSH, 2015 WL 1307319, at *6 (D. Mass. Mar. 24, 2015) ('The Court does not find that on this record, it would be beneficial to undertake an analysis of the

municipal and supervisory claims against the City and Commissioner Fitchet. It is the Court's intent to bifurcate the trial. The Section 1983 claim against the Individual Officers will be tried first. If the jury finds that any Individual Officer committed a constitutional violation, the Court will then schedule a separate trial on the supervisory and municipal claims. Prior to such trial, the Court will allow the City and Commissioner Fitchet to renew their motion for summary judgment."); ***Bombard v. Volp***, 44 F.Supp.3d 514, 528-29 (D. Vt. 2014) ("Courts in the Second Circuit generally 'favor bifurcating Monell claims.' *Mineo v. City of New York*, 2013 WL 1334322, at *1 (E.D.N.Y. Mar. 29, 2013) (citations omitted)). In this case, if the jury decides that Officer Volp did use excessive force, Bombard will indeed be required to litigate a second time, and will likely repeat evidence. However, given that the claims against the City may be moot after the jury resolves the first constitutional question, and that evidence of five years of excessive force claims against Burlington police officers would likely prejudice Officer Volp's efforts to defend his specific actions, the motion to bifurcate is GRANTED. As to the motion to stay discovery, the procedural history of the case suggests that Bombard is still pursuing documentation pertaining to municipal liability. Although the Court has decided to bifurcate the trial in this case, it sees no need at this time to delay discovery with regard to the City. The motion to stay discovery is therefore DENIED."); ***Martinez v. Cook County***, No. 11 C 1794, 2011 WL 4686438, at *1, *2 (N.D. Ill. Oct. 4, 2011) ("Under the doctrine of *Monell*, a plaintiff in a § 1983 suit may assert charges against the individual actors whom he claims violated his constitutional rights as well as against the relevant municipality. . . . As this Court has said before, a plaintiff can succeed against a municipality under a *Monell* claim despite failing to prove that any particular individual defendant is liable for violating the plaintiff's constitutional rights so long as the two results are compatible. . . Here, Officer Hopkins has asserted the affirmative defense of qualified immunity. . . This leaves open the real possibility that a jury could find the County liable under *Monell* while holding Officer Hopkins not liable. If the proceedings were bifurcated, and Officer Hopkins to prevail in asserting her qualified immunity defense, it would be impossible to conclude whether the jury found that she acted in good faith despite having violated Martinez's constitutional rights or if the jury found no constitutional violation at all. If this hypothetical outcome were to occur in a bifurcated case, then the case would have to be relitigated on the *Monell* claims. Such an outcome would be a waste of judicial resources. Put another way, Martinez's constitutional claims against the County will not be disposed of irrespective of the outcome of a bifurcated case pursued in the first instance against Officer Hopkins individually. It is therefore in the interest of expediency, economy and convenience that Martinez's claims proceed together as a single unified cause of action against all of the Defendants."); ***Davila-Lynch v. City of Brockton***, No. 09-10817-RGS, 2011 WL 4072092, at *6 (D. Mass. Sept. 12, 2011) ("[W]here there is a finding of no liability on the part of the municipal actor, there can be no finding of liability against the municipality itself. . . In recognition of this principle, courts will commonly bifurcate the consideration of any municipal claim until after the trial of the underlying claim of a constitutional violation. As a matter of judicial economy, this makes sense: a second trial is necessary only if a violation is established and then, only if the municipality declines to satisfy the underlying judgment (which in the court's experience is rarely, if ever, the case). *See Wilson v. Town of Mendon,* 294 F.3d 1, 7 (1st Cir.2002). This 'familiar path' is the one the court will trod in this case."); ***Cole v. Morgan***, No.

3:10cv288/MCR/MD, 2010 WL 4038607, at *3 (N.D. Fla. Oct. 14, 2010) ("A *Monell* claim may be a good candidate for bifurcation because if the individual government employee is found not to be liable, no subsequent trial of the municipality is necessary. . . Also, bifurcation permits the court to isolate evidence regarding municipal policies and customs (for example, prior incidents of excessive force and the policymaker's response) which would be relevant to a *Monell* analysis but could be prejudicial to the individual employee. . . Accordingly, courts may sever *Monell* claims against a municipality from claims against individual police officers . . . and stay litigation of the *Monell* claims until the rest of the case has been resolved. . . . In this case, the court concludes that conducting discovery into the *Monell* claim against Morgan likely will be a burdensome and expensive process for Escambia County, and one that will outweigh its probable benefit at this stage of the litigation, given that if a finding of no liability against Coxwell and the other deputies is made with respect to the individual capacity claims, there will be no need to conduct discovery with respect to the official capacity claim against Morgan."); ***Adams v. City of Boston***, No. 07-10698-RGS, 2008 WL 4186275, at *2 (D. Mass. Sept. 9, 2008) ("For the reasons set out in *Town of Mendon*, the court will ALLOW the City of Boston's motion to bifurcate on condition that the City file with the court within fourteen (14) days a declaration that it will satisfy a judgment returned against one or more of its officers for violation of Adams's constitutional rights, should such be proven at trial."); ***Ojeda-Beltran v. Lucio***, No. 07 C 6667, 2008 WL 2782815, at *4 (N.D. Ill. July 16, 2008) ("Here, we find that bifurcation of the *Monell* claim is appropriate because: (1) it will promote efficiency and economy both for the parties and for the Court; (2) it will protect Defendant Officers from potential undue prejudice at trial; and (3) it will not be prejudicial to Plaintiffs. Although the City did not specifically request to stay the discovery and trial of the *Monell* claim as part of its motion to bifurcate, because bifurcation in the absence of a corresponding stay would render many of the City's arguments inapposite, we will assume that the City is seeking such a stay. Armed with this assumption, we address each of the three arguments in support of bifurcation. . . . While the City's stipulation does remove the potential for any economic benefit to Plaintiffs through pursuit of their *Monell* claim, our inclination is to agree with Plaintiffs that there are non-economic benefits that can be obtained through suing the City that are unavailable through the suit of Defendant Officers. However, we decline to engage in this debate. A necessary premise of the City's and Plaintiffs' arguments on this topic is that bifurcation of Plaintiffs' *Monell* claim means that the claim cannot go forward. This is a premise that we do not accept. If Plaintiffs are successful in their claims against Defendant Officers, they are free to pursue their *Monell* claim against the City. In ordering the bifurcation and stay of Plaintiffs' *Monell* claim against the City, we have simply attempted to balance party convenience, judicial economy, prejudice against Defendant Officers, and prejudice against Plaintiffs. Bifurcation of the *Monell* claim is not dismissal of the *Monell* claim."); ***Wells v. City of Dayton***, 495 F.Supp.2d 793, 794-97 (S.D. Ohio 2006) (" The Court concludes that separate trials of Plaintiffs' claims against Cornwell and McCall and their claim under *Monell* against Dayton are necessary in order to avoid prejudice.' Court engages in discussion similar to that in *Brunson*, *infra*.); ***Lopez v. City of Chicago,*** No. 01 C 1823, 2002 WL 335346, at *2, *3 (N.D. Ill. Mar. 1, 2002) (not reported) (discussing advantages and disadvantages of bifurcation; concluding bifurcation not appropriate at time where "individual police officers have not offered to waive the defense of qualified immunity and the City has not

offered to stipulate to a judgment against the City for any compensatory damages awarded against the individual police officers."); ***Brunson v. City of Dayton,*** 163 F.Supp.2d 919, 924, 925, 929 (S.D. Ohio 2001) ("The Court concludes that separate trials of Plaintiff's claims against the individual Defendants and her claim under *Monell* against Dayton are necessary in order to avoid prejudice. If a single trial were held on all of the claims in this case, evidence offered against Dayton regarding incidents of alleged misconduct by police officers, unrelated to the incident in question in this case but relevant to the question of municipal liability for a policy or practice, would be highly prejudicial to the individual Defendants. The questions regarding the liability of these individual Defendants must be decided by the jury only on the facts of the particular encounter on which this case is based. That is to say, these individual Defendants cannot be made to bear the burden of answering for all of the alleged misdeeds of every past and current Dayton police officer, when defending against the allegations of the Plaintiff as to the incidents that occurred in this case. A jury must be allowed to consider the evidence regarding *this incident,* with its focus on that evidence unimpaired by a torrent of information concerning the conduct of police officers in other unrelated situations at other times. . . . . The first trial will most probably moot the need for a second trial. A finding by the jury in the first trial, during which the Plaintiff's claims against the individual Defendants will be resolved, that those Defendants had not violated Brunson's constitutional rights, would resolve Plaintiff's claims against Dayton. When the jury finds that an officer did not deprive the plaintiff of her constitutional rights, *Monell* liability cannot be imposed upon his governmental employer. . . On the other hand, if the first trial were to result in a verdict in favor of the Plaintiff, and Dayton agreed to pay the amount of that verdict, i.e., to indemnify the individual officers for the amount of the jury's verdicts, there would be no need for a second trial to resolve the Plaintiff's *Monell* claim against Dayton, since she is only entitled to a single recovery for her damages, which would have been accomplished as a result of the jury's verdict in the first trial and the City's agreement to indemnify. If Dayton were to refuse to indemnify the individual Defendants for the amount of the verdict and the Plaintiff could not secure satisfaction of that verdict from payment by the individual officers, then a second trial would be necessary. . . . It is, however, possible that the first trial will not eliminate the need for a second trial. A second trial would be required to resolve Plaintiff's *Monell* claim against Dayton, if the jury were to find that, although the individual Defendants violated Brunson's constitutional rights, they were protected from liability by qualified immunity. . .However, in this Court's experience, the possibility that the jury will find both that the individual Defendants violated Brunson's rights and that qualified immunity prevents liability from being imposed upon them is quite remote. . . . With this motion, the Defendants request that the Court delay discovery on the Plaintiff's *Monell* claim against Dayton until such time as the Plaintiffs' claims against the individual Defendants have been resolved. . . This Court will deny that request. Allowing all discovery to be conducted before the initial trial will avoid delaying the ultimate resolution of this litigation. For instance, in the event that the individual Defendants were to be granted summary judgment on the basis of qualified immunity, a trial of the Plaintiff's claims against Dayton could proceed expeditiously, if the Plaintiff had already conducted discovery on her *Monell* claim. In addition, permitting all discovery to be conducted before the first trial will allow the second trial to commence quickly, in the event that such a trial becomes necessary, perhaps even before the same jury which heard the

first phase of this litigation. Accordingly, the Court overrules Defendants' Motion to Bifurcate or to Stay Discovery"); ***Medina v. City of Chicago***, 100 F. Supp.2d 893, 896-98 (N.D. Ill. 2000) (noting advantages of bifurcation and fact that Afrom an economic standpoint, a prevailing plaintiff in a § 1983 excessive force case against police officers in Illinois gets nothing more from suing the municipality under *Monell* than he would get from suing just the officers,' but also noting that bifurcation will not avoid a second trial where individual officer prevails on qualified immunity; refusing to bifurcate while issues of qualified immunity and City's willingness to have judgment entered against it if officer found liable were still on the table, but deferring discovery on *Monell* claim). *See also* ***Quintanilla v. City of Downey***, 84 F.3d 353 (9th Cir. 1996); ***Carson v. City of Syracuse***, No. 92-CV-777, 1993 WL 260676 (N.D.N.Y. July 7, 1993) (not reported); ***Myatt v. City of Chicago***, 1992 WL 370240 (N.D. Ill. Dec. 3, 1992) (not reported); ***Marryshow v. Bladensburg***, 139 F.R.D. 318 (D. Md. 1991).

See also ***Swanigan v. City of Chicago***, 775 F.3d 953, 955-64 (7th Cir. 2015) ("Swanigan's *Monell* suit may indeed face some jurisdictional and merits hurdles, but the judge jumped the gun in dismissing it. The case was stayed in its infancy while the claims against the individual officers proceeded, and Swanigan was entitled to revive it and amend his complaint to try to plead a justiciable claim once the court and the parties returned to it. . . . More specifically, the 'stipulation'—proposed and prepared by the judge—was titled 'Defendant City of Chicago'[s] Certification of Indemnification' and provided that

1. The City of Chicago agrees to indemnify the individual defendant Chicago police officers for any judgment of compensatory damages that may be entered against them in this case.

2. If [Swanigan] prevails in his section 1983 action against individual defendant Chicago police officers, the City of Chicago agrees to indemnify the individual defendants for reasonable attorney fees and costs that [Swanigan] may be entitled to recover pursuant to 42 U.S.C. § 1988. This agreement is exclusive of such fees and costs that may be attributable to an award of punitive damages against the individual defendants.

3. The City also undertakes to pay nominal damages (not to exceed one dollar) if any compensatory damage award is entered against the individual defendants.

A week later the court entered a minute order stating that '[t]he City informs the Court that it has accepted the stipulation to indemnify the defendant officers.' The first suit proceeded to motions for summary judgment. The judge granted summary judgment in favor of the defendants on all counts except for two of Swanigan's claims under § 1983. On the surviving counts, the judge (1) denied the officers' motion for summary judgment on Swanigan's claim for false arrest; (2) found four officers liable on the claim related to Swanigan's extended detention;. . . and (3) held that the liability of four other officers on the extended-detention claim would be determined at trial, as would the issue of damages. After a five-day trial, a jury rejected Swanigan's claim for false arrest and found three more officers liable for Swanigan's extended detention. The latter finding meant

that Swanigan prevailed against seven individual officers on his claim for an unlawfully extended detention. The jury awarded Swanigan $60,000 in compensatory damages and no punitive damages, and the court later awarded Swanigan his costs and attorney's fees as the prevailing party. As posttrial proceedings were underway in the first case, Swanigan turned his attention back to the *Monell* suit. He moved to lift the stay and explained that he intended to amend his complaint 'in order to narrow the issues, consistent with the jury verdict in [the first suit].' He also said he wanted to 'amend the remedies portion of his complaint in order to clarify that, in addition to damages, nominal or otherwise, he is also seeking declaratory and/or injunctive relief.'. . . He specifically flagged two of the 11 possible theories of liability identified in his original complaint: (1) the officers acted pursuant to a city policy allowing them to 'delay release of a detainee arrested without a warrant solely for the purpose of investigating the detainee for uncharged and unrelated crimes,' even if the delay extends past the next court call at which the suspect could receive a probable-cause determination; and (2) the officers acted pursuant to a city policy allowing them to mark a case report as 'cleared closed,' a designation that listed the suspect as an identified criminal offender even when the State's Attorney refused to prosecute the case. (We'll refer to these as the 'hold claim' and the 'cleared-closed claim.') After briefly touching on the potential viability of these theories, Swanigan again asked that 'the stay of his *Monell* claim be lifted in order that his case may proceed.' The judge denied the motion to lift the stay and dismissed the case in its entirety. . . The judge concluded that based on the City's Certification, Swanigan would receive in the first suit all the monetary relief he could recover on the hold claim or the cleared-closed claim, which meant that any claim for damages in the *Monell* suit was moot. The judge also concluded that Swanigan lacked standing to pursue injunctive relief on either the hold claim or the cleared-closed claim. For these reasons—mootness and lack of standing—the judge held that neither claim presented a justiciable case or controversy. In addition, the judge rejected Swanigan's challenge to the cleared-closed policy for failure to state a claim—an argument that the City never made. Although Swanigan gave no indication that he was waiving any of his other asserted grounds for *Monell* liability, the judge treated the resolution of these two claims as dispositive of the entire suit and entered final judgment dismissing the case. Swanigan appealed. . . . Even assuming that the district court indeed construed the Certification as a Rule 68 offer 'in substance,' the court erred in holding that it mooted Swanigan's case. Municipalities 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief.'. . Swanigan sought the full range of remedies, but the Certification offered only monetary relief in the form of a promise to indemnify the officers for the judgment in the first suit and pay nominal damages of $1 for any *Monell* liability. . . The City acknowledges the point but argues that the Certification offered Swanigan all the relief that he was *entitled to* on the hold claim and the cleared-closed claim. But we repeat: '[T]he defendant must satisfy the plaintiffs' *demands;* only then does no dispute remain between the parties.'. . The City did not do that here. . . .After concluding that the Certification mooted the *Monell* claim for monetary relief, the judge held that Swanigan lacked standing to seek an injunctive remedy against either the hold policy or the cleared-closed policy and on that basis held that the entire case was nonjusticiable. This ruling wrongly assumed that Swanigan had waived all other possible theories of *Monell* liability. He clearly did not. All he said was that he wanted to narrow the *Monell* suit in light of the verdict in the earlier suit, and he mentioned the hold policy and the cleared-closed

policy to illustrate potentially viable claims that he might pursue. But he gave no indication that he was waiving any other aspects of his *Monell* claim. To the contrary, he reiterated his intention to amend his complaint to focus and refine the claim. The procedural challenges in this case stem in part from the complex development of § 1983 doctrine from *Monroe v. Pape,* 365 U.S. 167, 187 (1961) (municipalities not liable under § 1983), to *Monell,* 436 U.S. at 694–95 (municipalities may be liable under § 1983 for injuries caused by municipal policy, custom, or practice), to the establishment of the qualified-immunity defense for individual defendants, *see, e.g., Anderson v. Creighton,* 483 U.S. 635, 641 (1987). If a § 1983 plaintiff seeks only monetary relief, and if a municipal defendant is willing (or required) to indemnify individual defendants for compensatory damages as well as an award of attorney's fees and costs, a *Monell* claim against the municipality will offer a prevailing plaintiff no additional remedy (aside, perhaps, from nominal damages). In such cases there is no need for the parties to spend time and money litigating a *Monell* claim. If the plaintiff fails to prove a violation of his constitutional rights in his claim against the individual defendants, there will be no viable *Monell* claim based on the same allegations. *See, e.g., City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986). Accordingly, the judge's decision to stay the *Monell* suit while the claims against the individual officers were litigated to judgment was sensible, especially in light of the volume of civil-rights litigation that district courts must manage. In some civil-rights cases, however, a verdict in favor of individual defendants would not necessarily be inconsistent with a plaintiff's verdict on a factually distinct *Monell* claim. *See, e.g., Thomas v. Cook Cnty. Sheriff's Dep't,* 604 F.3d 293, 305 (7th Cir.2009). In still other cases, the plaintiff may want an injunction against future constitutional violations or some other equitable remedy, and he may be willing to invest the time and effort needed to prove his entitlement to that relief. In such cases, and this is one, the plaintiff is entitled to try to prove his *Monell* claim. Some cases have remedial import beyond the individual plaintiff's claim for monetary damages, and § 1983 provides a vehicle for obtaining other judicial relief against governmental policies that violate constitutional rights. *See generally* David F. Hamilton, *The Importance and Overuse of Policy and Custom Claims: A View From One Trench,* 48 Depaul L.Rev. 723, 734–35 (1999). District courts, municipal defendants, and even plaintiffs have incentives to minimize duplication of effort in § 1983 cases that combine claims against individual public officials and a municipal defendant. The stipulation and stay of the *Monell* suit in this case achieved the goal of avoiding unnecessary complexity and effort. But district courts cannot prevent plaintiffs from pursuing potentially viable *Monell* claims that seek additional equitable relief or are distinct from the claims against individual defendants. The procedures used in this case prevented a fair test of Swanigan's *Monell* theories, and that necessitates a remand. Recall that the *Monell* suit was stayed from the start. No responsive pleading or motion to dismiss had been filed. Swanigan was simply asking to resuscitate the suit, and under Rule 15(a)(1)(B), once the City filed a responsive pleading or motion to dismiss, Swanigan was entitled to amend his complaint to flesh out his original claims or attempt to cure any jurisdictional or legal defects. . . .After learning that Swanigan wanted to amend his complaint, the district court should have lifted the stay and waited for the amended complaint before evaluating any jurisdictional impediments to hearing the case. We do not doubt that Swanigan's *Monell* claim faces jurisdictional and substantive legal barriers. Principles of double recovery may prevent him from recovering damages to the extent that his injuries are already covered by his

successful claim in the earlier suit. He may not be able to establish standing to sue for injunctive relief. But the time to evaluate any jurisdictional or legal impediments to the *Monell* suit is *after* Swanigan has amended his complaint, as Rule 15(a)(1)(B) entitles him to do. For all the foregoing reasons, the district court erred in dismissing the *Monell* suit. Accordingly, we Vacate the judgment and Remand with instructions to grant Swanigan's motion to lift the stay and accept an amended complaint consistent with Rule 15(a)(1)(B).")

For cases where bifurcation was approved, *see* ***Rose v. Baltimore County***, No. 1:23-CV-02078-JRR, 2025 WL 72669, at *2–4 (D. Md. Jan. 10, 2025) ("While 'the decision of whether to bifurcate is a fact-specific inquiry,'. . . this court has held that '[c]ases that contain *Monell* claims "are good candidates for bifurcation."'. . . 'Judges in this district have repeatedly ruled that bifurcation "is appropriate and often desirable" in cases involving both § 1983 claims against individual police officers and *Monell* claims.'. . A plaintiff's § 1983 *Monell* claim generally 'hinge[s] on his ability to show that [individual defendants] violated his constitutional rights.'. . That notwithstanding, courts have recognized 'narrow circumstances in which "a finding of no liability on the part of the individual municipal actors can co-exist with a finding of liability on the part of the municipality."'. . 'One such situation is when the individual defendants are entitled to qualified immunity.'. . . [W]hile County' liability may co-exist with Officer Defendants non-liability, 'the question of whether any police officer committed a constitutional violation is central to plaintiffs' claims against the County.'. . Moreover, the rationale for bifurcation of *Monell* claims in § 1983 actions is not just that those claims generally, or often, hinge on individual defendant liability for constitutional violations. Bifurcation (and a related stay) also work to 'spare the parties from expending valuable resources in discovery, because resolution of the claims as to the individual defendants may obviate the need to litigate the *Monell* claim.'. . Bifurcation also 'prevent[s] the potential prejudice to individual defendants that might result from the introduction of inflammatory evidence concerning the municipality's policies, practices, or customs.'. . .As in *Tserkis*, bifurcation is appropriate here, because it will 'promote judicial economy, conserve the parties' resources, [and] prevent prejudice to' Officer Defendants. . . .[B]ifurcation will facilitate an expeditious trial as to the individual defendants by avoiding the delay inherent in the discovery process as to the *Monell* claim. It would also narrow the issues for trial. This would lead to a reduction of costs, without any real prejudice to plaintiff. . . The same rationale is compelling here. Plaintiff has asserted *Monell* and *Longtin* claims against the County which Defendants contend, and the court agrees, require 'wide ranging and intensive' discovery. . . Indeed, such claims impose a rather exacting standard. And the risk of prejudice to Officer Defendants is high where Plaintiff's *Monell* and *Longtin* claims will focus on previous instances of alleged excessive force. Plaintiff's allegations refer to incidents aged a near decade; as well as excessive force and false arrests allegations against Officer Defendants' specialized unit and others; and reference formal and informal customs, policies, and practices, as well as internal affairs policies. . . The court agrees that discovery into such matters will be substantial. Contrary to Plaintiff's contention, '[s]treamlining the issues and limiting discovery...initially will curb rather than increase costs, and if a second trial is necessary, any issues litigated in the first trial will be binding upon the parties during the second phase.' . . The extensive discovery associated with a *Monell* (and *Longtin*) claim

would significantly prolong discovery, and therefore delay trial for all parties. Moreover, as Plaintiff acknowledges, bifurcation and a stay will not deprive him of 'discovery regarding any nonprivileged matter that is relevant to any party's claim or defense,' related to his claims against the Officer Defendants, and that is 'proportional to the needs of the case.'. .The court therefore finds bifurcation 'will promote judicial economy, conserve the parties' resources, prevent prejudice to [Officer Defendants],' and will not significantly prejudice Plaintiff."); ***Torres v. City of New York***, No. 21-CV-10832 (LAK), 2023 WL 2775679, at *10 (S.D.N.Y. Apr. 4, 2023) ("In this case, bifurcation is warranted on all three bases. First, as the Court of Appeals has observed, Section 1983 actions 'are particularly well suited for bifurcation because the evidence needed to show a "policy and custom" on behalf of the municipal entity is often unnecessary in the suit against the individual official.'. . Second, bifurcation is appropriate because the City's liability depends upon a finding that the individual defendants violated plaintiff's rights. . .Third, there is a danger that, at trial, the evidence relating to claims against the City or the individual officers 'will contaminate the mind of the finder of fact in its consideration of the liability of the other defendant.' . . For the foregoing reasons, the Court bifurcates all claims against the City and stays discovery concerning those claims with one exception. As set forth in the Court's order dated January 31, 2022, the parties may coordinate discovery in this action with discovery in the cases before Judge McMahon to the extent that such coordination would be helpful and appropriate."); ***Jones v. City of Danville***, No. 4:20-CV-20, 2021 WL 1582774, at *5 (W.D. Va. Apr. 22, 2021) ("It would be unduly prejudicial to the Officers to introduce at trial prior incidents unrelated to them of the excessive use of force by City police officers. While relevant to the issue of custom and practice on the *Monell* claims against the City, such evidence would be unduly prejudicial to the individual Officer defendants in the § 1983 case against them. . . For the foregoing reasons, the court **GRANTS** defendants' motion to bifurcate the claims against the Officers from the *Monell* claims against the City. Discovery regarding plaintiff's claims against the City is **STAYED** to the extent that it does not relate to the claims against the Officers. Discovery is permitted as to the training provided by the City to the Officers on use of force, City policies regarding use of force, and any prior incidents involving use of force by the Officers. An appropriate order will be issued."); ***Blackmon v. City of Chicago***, No. 19 C 767, 2020 WL 1888913, at *4-5 (N.D. Ill. Apr. 16, 2020) ("The City argues that bifurcation would best serve the interests of litigation and judicial economy because the City's liability is entirely dependent on the liability of Officer Defendants. . . .Here, Blackmon alleges the Defendant Officers violated his constitutional rights by depriving him of a fair trial, wrongfully convicting him, fabricating evidence used against him, intentionally ignoring material information or failing to investigate, and concealing exculpatory evidence to which he was lawfully entitled. . . Blackmon's *Monell* claims relate specifically to these allegedly unconstitutional practices. . . Blackmon alleges six *de facto* policies, practices and customs that caused him injury, as well as a failure to properly train, supervise, or discipline the Officer Defendants which 'directly and proximately' caused injury to Blackmon. . . Additionally, as the City points out, Blackmon alleges only '"intentional" misconduct of the Defendant Officers…Based on the nature of these alleged constitutional violations, it is clear the City's potential *Monell* liability is contingent on the officers' liability for the underlying misconduct.'. . Therefore, the City cannot be found liable

under *Monell* unless Blackmon proves that one or more of the Officer Defendants committed a constitutional violation under § 1983 as alleged in Counts I–V. . . . As stated in *Ezell*, the 'question is whether the Officers committed the constitutional violation(s) underlying [Plaintiff's] *Monell* claims, not whether they can be held liable for them.' . . It does not matter for the analysis whether the Officer Defendants have qualified or absolute immunity, as the baseline determination is whether the Officers did, in fact, commit the constitutional violations that form the basis for the *Monell* claims. . . . Here, as in other similar cases, the question of whether the Defendant Officers committed a constitutional violation is dispositive and Blackmon's claims can be resolved without delving into the *Monell* claims."); ***Haughie v. Wexford Health Sources, Inc.***, No. CV ELH-18-3963, 2020 WL 1158568, at *18–20 (D. Md. Mar. 9, 2020) ("In this case, . . . it would appear that the *Monell* claim depends on a finding of liability on the part of the health care providers. Nevertheless, I express no ruling on whether, if a jury were to exonerate the Individual Medical Defendants, plaintiff would be entitled to proceed on his *Monell* claim. Regardless, bifurcation is appropriate. . . In my view, bifurcation is appropriate because it will promote judicial economy, conserve the parties' resources, and avoid prejudice to the Individual Medical Defendants, and will not prejudice the plaintiff. As a practical matter, it would save time and resources, and promote judicial economy, to defer consideration of the *Monell* claim until after a determination of the liability of the Individual Medical Defendants. If Haughie fails to succeed on his claim of constitutionally inadequate medical care, this may obviate altogether the basis for a *Monell* claim. If he does not succeed on the individual claims, he might also choose to forgo the *Monell* claim. And, if he does succeed in the claims against the Individual Medical Defendants, Wexford might consider a resolution of the *Monell* claim, without the need for a trial. Any one of these scenarios would spare the Court and the parties of the burdens and challenges of litigating the *Monell* claim. Moreover, the scope of discovery in a case with a *Monell* Claim is far broader than what is appropriate in an inadequate medical care claim. In a *Monell* case, a plaintiff generally seeks to rely on prior incidents involving other people. . . . Notably, evidence of any prior failures of Wexford to provide adequate care to inmates in unrelated situations may be admissible against Wexford in regard to the *Monell* claim. But, such evidence is not likely to be admissible against the Individual Medical Defendants. Such evidence is also potentially inflammatory in regard to the individual defendants, and it would be difficult for the jury to compartmentalize such evidence. . . Bifurcation of the *Monell* Claim will allow the Court to separate issues and evidence as necessary to avoid prejudice. In addition, bifurcation will facilitate an expeditious trial as to the Individual Medical Defendants (assuming the constitutional claim survives to trial), because it avoids the delay inherent in the extensive discovery that would be required to establish a *Monell* claim. This would lead to a reduction of costs, without any real prejudice to plaintiff. And, if the case goes to trial on the threshold claim, this avoids prolonging the trial. . . And, I am not persuaded by plaintiff's argument that bifurcation would infringe on his Seventh Amendment right to a jury trial. . . . Bifurcation of the *Monell* Claim against Wexford will not abridge plaintiff's Seventh Amendment rights. As defendants point out, the bifurcation plan under consideration would ensure that the first jury's decision is not reexamined by the second jury. . . In particular, the first jury would consider whether one or more of the Individual Medical Defendants violated Haugie's constitutional rights, while the second jury would be asked to determine whether

Wexford's policies, procedures, and customs were the moving force behind the provision of allegedly inadequate medical care. . . If some or all of the Individual Medical Defendants are found to have violated Haugie's constitutional rights, the second jury will be instructed accordingly and informed that it may not reconsider that issue. . .In sum, I am satisfied that the Court can avoid any risk of infringing on plaintiff's Seventh Amendment rights through the careful crafting of jury instructions and verdict forms. By exercising caution, as judges in this District have done many times under similar circumstances, the Court will ensure that any issues considered by the first jury are not reconsidered by the second jury."); ***Grim v. Baltimore Police Department***, No. CV ELH-18-3864, 2020 WL 1063091, at *5-7 (D. Md. Mar. 5, 2020) ("Cases that contain *Monell* claims 'are good candidates for bifurcation.'. . Bifurcation can advance the efficient and convenient resolution of the case because where there is no 'initial finding that a government employee violated a plaintiff's constitutional rights,....no subsequent trial of the municipality is necessary.'. . In addition, bifurcation might spare the parties from expending valuable resources in discovery, because resolution of the claims as to the individual defendants may obviate the need to litigate the *Monell* claim. . .Equally important, bifurcation prevents the potential prejudice to individual defendants that may result from the introduction of inflammatory evidence concerning the municipality's policies, practices, or customs. . . This is especially true in excessive force cases, where the *Monell* evidence would include 'prior incidents of police brutality and policymakers' reactions to such incidents.'. . Although such evidence 'is relevant under the *Monell* analysis,' it might unfairly bias the jury as to the liability of the individual defendants. . . Courts in this district have consistently ruled that in cases such as this one bifurcation 'is appropriate and often desirable.'. . . In my view, bifurcation is appropriate in this case because it will prevent prejudice to Officer Paul and because it best serves judicial economy. . . .In other words, bifurcation will facilitate an expeditious trial as to Officer Paul by avoiding the delay inherent in the discovery process and trial that would be required in regard to the contemporaneous pursuit of the *Monell* Claim. This could lead to a reduction of costs, without any real prejudice to plaintiff. . . Nonetheless, plaintiff insists that bifurcating her *Monell* claim will result in unfair prejudice by precluding her from obtaining discovery from the BPD concerning Officer Paul. . . This argument is without merit. As the BPD points out, bifurcation will stay discovery related to plaintiff's *Monell* claim, *i.e*., evidence of the BPD's policies, practices or customs. It will not, however, effect plaintiff's ability to pursue discovery concerning her claims against Officer Paul. . . Bifurcation therefore erects no barrier to plaintiff's ability to obtain documents pertaining to Officer Paul from the BPD to the extent that the BPD is the custodian of such records. . . In my view, bifurcation is appropriate because it will promote judicial economy, conserve the parties' resources, prevent prejudice to the Officer Paul, and will not prejudice plaintiff. Bifurcation 'streamline[s] the issues for trial [and] it prevents prejudice to the individual defendant that would otherwise arise from the introduction of evidence of prior incidents of police brutality in order to make a case against the municipality.'. . Therefore, I shall grant the Motion to Bifurcate . . . as to Count I. And, discovery pertaining to Count I shall be stayed, pending resolution of plaintiff's claims against Officer Paul."); ***Batchelor v. City of Chicago***, No. 18 C 8513, 2020 WL 509034, at *6–7 (N.D. Ill. Jan. 31, 2020) ("In this case, bifurcation will promote judicial economy. If Batchelor's Section 1983 claims against the individual officers fail, it will likely be unnecessary

to litigate his *Monell* claim. . . Batchelor responds that it may be necessary to litigate his *Monell* claim even if the jury issues a verdict in favor of the individual officers. He points to *Thomas v. Cook County Sheriff's Department*, which held that a 'municipality can be held liable under *Monell* even when its officers are not, unless such a finding would create an *inconsistent* verdict.'. . *Thomas* involved the death of a jailed detainee who was denied medical care. . . The plaintiff brought Section 1983 claims against the individual defendants alleging that they were deliberately indifferent to the detainee's medical condition and *Monell* claims against the County based on its lack of procedures for reviewing detainees' medical requests. . . The court held that there was no inconsistency between the jury reaching a verdict in favor of the individual defendants and against the County because the jury could have concluded that the individual defendants were not deliberately indifferent to the detainee's condition but nonetheless failed to respond to plaintiff's medical needs due to failures of the County's policies. . . Batchelor, however, fails to explain how a jury could consistently find the City liable in this case without finding the individual officers liable. He claims that a jury could conclude that Area 2 detectives extracted a confession from defendant without deciding which individual defendant did so. But, as he does not identify any portion of the complaint or other evidence that would support that conclusion, this argument is too speculative to defeat a motion for bifurcation. . . Batchelor also claims that a jury could conclude that exculpatory evidence about Johnson and the phony polygraph was withheld because of the City's policies rather than any officer misconduct. But his complaint states that individual defendants "deliberately withheld" that exculpatory evidence and makes no mention of that withholding being solely due to the City's policies. . . This case is far afield from the circumstances in *Thomas*. It is not a case where a jury could conclude the City's employees carried out the City's unconstitutional policies but lacked the requisite culpable mindset for individual liability. Rather, Batchelor's Section 1983 claims allege that the individual defendants violated his constitutional rights by coercing his and others' confessions and suppressing and withholding the evidence of such tactics. *Monell* liability cannot be established based on such allegations without a finding that individual defendants violated the plaintiff's constitutional rights. . . In brief, bifurcation will allow the parties to bypass discovery relating to the *Monell* claim, which can add significant time, cost, and complications to the discovery process. As the litigation of Batchelor's *Monell* claim may ultimately prove unnecessary, bifurcation will promote the economical and timely resolution of this case."); ***Bradford for Estate of Bradford v. City of Chicago***, No. 16 CV 1663, 2019 WL 5208852, at *2, *4 (N.D. Ill. Oct. 16, 2019) ("Motions to bifurcate *Monell* claims are frequently granted in this District because such claims typically require a significant amount of work—including expert discovery—that may ultimately be for naught because in 'many if not most cases, disposition of the individual claims will either legally or practically end the litigation.'. . . Indeed, a plaintiff's failure to prove that he suffered a constitutional injury at the hands of an individual employee typically is fatal to his *Monell* claim against the municipality. . . On the other hand, if the plaintiff prevails on his constitutional claim against the municipal employee, he is 'likely not to want or need to proceed any further,'. . . because Illinois law requires a 'local public entity to pay...any tort judgment or settlement for compensatory damages...for which it or an employee while acting within the scope of his employment is liable.'. . . Generally, 'a municipality's liability for a constitutional injury "requires

a finding that the individual officers are liable on the underlying substantive claim."'. . . But 'a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict.'. . . For example, a verdict in favor of individual defendants because of qualified immunity is not inconsistent with a verdict against the municipality (which lacks that defense) . . . This situation is expressly contemplated by the Limited Consent. But *Monell* liability also exists without individual liability where the individual actor thinks that 'her decisions were an appropriate response' and her failure is 'negligent, or even grossly negligent, but not deliberately indifferent,' yet the 'institutional policies themselves are deliberately indifferent.' *Glisson v. Ind. Dep't of Corrs.*, 849 F.3d 372, 378 (7th Cir. 2017). The Limited Consent contemplates no such scenario. Nor does it contemplate a scenario in which the City's policies made it impossible for the Individual Defendants to protect Bradford's constitutional rights, as may be the case here. Accordingly, the possibility for a 'liability gap' in this case does exist should the Court bifurcate the *Monell* claim, because there may be scenarios under which the Individual Defendants are not liable but the City is, and to which the Limited Consent does not apply. But while Plaintiff distinguishes this case from others in which bifurcation was ordered because the *Monell* claim could not proceed absent individual liability (including this Court's opinion in *Arrington v. City of Chicago*, 2018 WL 3861552 (N.D. Ill. Aug. 14, 2018)), Plaintiff misses that prejudice alone can justify bifurcation. . . Accordingly, that this may be a case that falls into the 'liability gap' is of no moment here, where great prejudice to Defendants is possible in a combined trial."); ***Ezell v. City of Chicago***, No. 18 C 1049, 2019 WL 3776616, at *3-4, *6 (N.D. Ill. Aug. 12, 2019) ("Motions for bifurcation are 'now commonplace' and 'there is a growing body of precedent in this district for both granting and denying bifurcation in § 1983 cases.'. . 'Such motions and the inclination of many judges to grant them stems in large part from the recognition that, often, "claims of municipal liability require an extensive amount of work on the part of plaintiff's attorneys and experts, and an extraordinary amount of money must be spent in order to prepare and prove them."'. . Deciding whether to bifurcate a plaintiff's *Monell* claim is left to the Court's sound discretion and 'must be done on case-by-case basis, looking at the specific facts and claims presented.'. . In support its Motion, the City stresses that Plaintiffs' *Monell* claims are dependent first on their claims against the Defendant Officers. . . The City has also offered to consent to a limited entry of judgment against it should the court or a jury find the Defendant Officers committed a violation of Plaintiffs' constitutional rights, even if the Officers are protected from civil liability due to qualified immunity, without Plaintiffs having to prove any of the elements required to hold the City liable under *Monell*. . . Plaintiffs argue in response that their proposed, 'streamlined' approach to the discovery and presentation of their *Monell* claims will avoid the great burden the City claims will be imposed on the court and the parties if its Motion is denied and that the City's Motion ignores the prejudice to Plaintiffs and the public if Plaintiffs are deprived of the opportunity to hold the City directly liable for the systemic failures that result in false confessions and wrongful convictions. . . . [T]he City cannot be found liable under *Monell* unless Plaintiffs prove that one or more of the Defendant Officers committed a constitutional violation under § 1983 as alleged in Counts I–VI. . . . Furthermore, the City has guaranteed that so long as Plaintiffs succeed in showing a constitutional violation occurred, they will recover compensatory damages from the City without anything more—either as

indemnification for a judgment entered against the Defendant Officers. . . or, if the Defendant Officers are found to be immune from liability, against the City pursuant to the proposed Limited Consents. . . In either scenario, the question of whether any Defendant Officer committed a constitutional violation is dispositive; Plaintiffs' claims for compensatory damages can be resolved without ever delving into any *Monell* claim. In fact, having already recovered in their suit against the Officers, Plaintiffs would be barred from then pursuing damages for the same injuries against the City regardless. . . . As both Plaintiffs and the City acknowledge, the case against the Defendant Officers is already complicated, involving four Plaintiffs, more than a dozen named defendants and requiring discovery into events that occurred more than twenty years ago. . . Allowing discovery—much less the presentation of evidence at trial—into Plaintiffs' broad *Monell* allegations will unquestionably complicate matters further and exponentially increase the cost to the parties and burden on the Court, not to mention require Plaintiffs to wait *years* longer than is necessary to resolve their claims for compensatory damages. Accordingly, the interest of litigation and judicial economy weighs in favor of bifurcating the *Monell* claims particularly, whereas here, the costly and time-consuming discovery and litigation of those claims are ultimately unnecessary to Plaintiffs' recovery. . . .Plaintiffs are correct that granting the City's Motion would effectively eliminate any opportunity for Plaintiffs to litigate the merits of their *Monell* claims. This result is not lost on the Court. Moreover, the Court agrees that § 1983 claims are intended not only to compensate victims for past wrongs but also to deter future constitutional deprivations . . . and that bifurcating Plaintiffs' *Monell* claims necessarily forecloses the opportunity for deterrence that may come from those particular § 1983 claim, to the extent there is one. Plaintiffs cite several examples of judgments and settlements paid by the City to resolve claims similar to Plaintiffs' here—all without the City ever admitting its own culpability for the alleged misconduct—as proof that unless the City is held directly liable for these unconstitutional practices, they will continue. . . But Plaintiffs fail to explain how *Monell* liability would necessarily give rise to reform; in fact, Plaintiffs explain that the City will soon adopt a number of police reforms pursuant to a Consent Decree with the Illinois Attorney General—*i.e.* reform achieved without *Monell* liability, albeit more slowly than Plaintiffs and others similarly situated are willing to accept. Ultimately, Plaintiffs provide insufficient reason to find that a judgment entered in this case against the City based on the claims against the Defendant Officers would not serve as an adequate deterrent. . . The Court in no way means to minimize Plaintiffs' interest in pursuing their *Monell* claims for reasons beyond monetary compensation but the Court must consider the issue of bifurcation with a "pragmatic mindset" and, in doing so, finds that bifurcation is appropriate in this case."); ***Williams v. City of Chicago***, No. 17 C 5186, 2018 WL 2561014, at *11-14 (N.D. Ill. June 1, 2018) ("[T]he City claims that bifurcation of (and then staying discovery on) the *Monell* claim is warranted because: (1) Williams must succeed on his claims against the individual Officers before he can prevail on his *Monell* claim; (2) bifurcation would serve the interest of litigation and judicial economy, particularly because Williams's *Monell* claim is so widely pled; (3) and bifurcation will assist in eliminating the risk of unfair prejudice against the parties—that is, prejudice against the Officers.; and (4) bifurcation will not prejudice Williams's recovery of compensatory damages due to the City's contractual obligation to indemnify the Officers. Finally, the City has agreed to the entry of judgment against

it—by way of a Limited Consent Agreement—should Williams prevail on his claims against the Officers. . . According to the City, the Limited Consent Agreement means that discovery and trial on the *Monell* claim may not be necessary and benefits Williams because he would not be required to prove the elements of § 1983 municipal liability. . . . The increasing frequency of bifurcation motions and the willingness of many judges to grant them stems in large part from the recognition that, in many instances, 'claims of municipal liability require an extensive amount of work on the part of plaintiff's attorneys and experts, and an extraordinary amount of money must be spent in order to prepare and prove them.'. . The City first argues that bifurcation is appropriate because Williams must succeed in his action against the individual Officers before he can obtain a judgment against the City pursuant his *Monell* claim. . . . Williams's *Monell* claim relates specifically to the City's alleged practices of coercing false testimony, creating false or misleading investigative reports, and failing to preserve and produce exculpatory evidence at times through the use of 'street files.' The City argues that these theories of municipal liability first require a jury to find that the Officers did in fact violate Williams's constitutional rights. Looking first at the allegations of coerced testimony and false reports, those violations depend on individual Officer actions. . . Even if the City had a policy or practice of permitting its officers' to coerce false testimony or to create false investigative reports, the harm caused by the practice could only manifest itself through the officers' actions. The same conclusion applies to the exculpatory evidence and street files allegations. Any harm caused by a policy or practice to withhold from discovery or not preserve exculpatory evidence or an alleged street-file policy or practice could only manifest itself through the Officers actually withholding such evidence or maintaining such files, and therefore a finding of municipal liability is predicated on a finding first that the Officers themselves were liable. . . As such, this case presents 'a significant possibility that after narrowly litigating the underlying Section 1983 claim, proceeding to the more expansive *Monell* issues may become entirely unnecessary.'. . In response, Williams contends that the Officers' alleged qualified immunity defense creates the possibility that the Officers could be found not liable while the City could be found liable. . . However, whether the Officers can be found liable is beside the point; rather, the issue is 'whether the individual defendants committed a constitutional violation that is a prerequisite for' the City's liability. . . Moreover, the fact that the City has consented to entry of judgment against itself in the event that the Officers are found to have violated Williams's constitutional rights 'even if one or all Defendant Officers is/are further found to be not liable to [Williams] because one or more of the is/are entitled to qualified immunity' undermines Williams's position. . . In sum, because there is no way that a jury could consistently find the City liable without first finding the Officers liable, this factor weighs in favor of bifurcation. . . .Importantly, Williams argues that bifurcation of his *Monell* claim will frustrate his efforts to seek relief beyond money damages, such as deterring future official misconduct and initiating reform in the police department. . . . [A]lthough Williams may seek to deter future official misconduct by way of a substantial judgment against the City, Williams's complaint does not limit any extraordinarily large judgment to his *Monell* claim; instead, it is entirely possible that Williams could be awarded a large judgment against the Officers, which presumably send the same message to the City and police department. This is particularly so here, where the City has admitted that it will pay whatever compensatory damages are awarded against its employees. . . This is not to

minimize Williams's desired non-economic benefit from bringing suit against the City. But after carefully considering the arguments on both sides, the Court finds bifurcation to be appropriate in this case."); ***Lindsey v. Orlando***, No. 16 C 1967, 2017 WL 449180, at *5-7 (N.D. Ill. Feb. 2, 2017) ("Motions to bifurcate *Monell* claims from § 1983 claims against individual defendants have become routine. In making such motions, the municipality typically cites the substantial, potentially unnecessary, cost of litigating the question posed by *Monell*: whether a policy, practice or custom caused a constitutional violation. . . Bifurcating the claims makes particular sense where the *Monell* claim is wholly dependent on the outcome of the cases against the individual defendants. . . There are, however, situations where the *Monell* claim is not dependent on the outcome against the individual defendants. In *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293 (7th Cir. 2009), ... the individual officers were liable only if they were *deliberately* indifferent—a showing negated by the existence of the county policy that prevented the employees from treating Smith. . . In this case, in contrast, individual liability turns on two objective assessments: whether there was probable cause to arrest Lindsey and, if so, whether a reasonable officer could have made a mistake about whether probable cause existed. Lindsey need not make any showing concerning the officers' subjective mental state. Several courts of this district have held that a 'split' result like that in *Thomas* (a verdict in favor of individual officers but against the municipality) cannot occur where individual liability is premised on an objective standard. [collecting cases] Lindsey argues a *Thomas* result is possible here because the officers could be found to have qualified immunity if the false arrest was in accordance with the city's custom or policies (that is, that the officers 'just followed the rules') . . . , but qualified immunity, too, is assessed on an objective standard. . . The court has doubts that the City's failure to train or discipline the officers could make an officer's mistake about the existence of probable cause *objectively* reasonable, thereby causing an officer to have qualified immunity on that basis but leaving the City open to liability for the bad policy. The cases Lindsey produces in support of this proposition do not discuss the basis for the assertion of qualified immunity, and do not support the conclusion that a city's failure to train, discipline or investigate renders an officer immune from liability for an unlawful arrest. . .In a case such as this one, the court believes it is unlikely that the City can be held liable under *Monell* unless the Defendant Officers themselves are found liable. And the City has agreed to entry of judgment against it if the individual officers caused a constitutional injury, regardless of whether the officers are found to have qualified immunity. . . Under that proposal, the City's liability turns on whether the individual officers violated Lindsey's constitutional rights. If they did, the City will pay the judgment; if they did not, the elements of *Monell* are not met and the case will be over. Plaintiff Lindsey will not be required to litigate the issue of whether the officers made a reasonable mistake, driven by City policy or otherwise, in order to recover for the violation of his rights. Other courts of this district have found this concession weighs in favor of bifurcation. . . .The court recognizes that some of its colleagues have denied motions to bifurcate in circumstances like these. Those decisions are, of course, not binding, and the court believes they are distinguishable. [Discussing cases]"); ***Andersen v. City of Chicago***, No. 16 C 1963, 2016 WL 7240765, at *4-6 (N.D. Ill. Dec. 14, 2016) ("Andersen seeks to distinguish *Veal* and *Taylor* on the ground that the Chicago Police Department's history of unconstitutional policies regarding custodial interrogations and street files distinguish it from the

police departments in those cases. . . Yet, Andersen fails to explain how an alleged history of unconstitutional policies is in any way relevant to whether municipal liability is dependent upon officer liability here. Finally, Andersen contends that a jury could consistently find only the unknown individual defendants liable, which would then cause a new round of litigation on the *Monell* claim. Not only is this contention speculative at best, other courts in this district have granted motions to bifurcate where such a possibility existed. . . As such, because there is no way that a jury could consistently find the City liable without first finding the Defendant Officers liable, this factor weighs heavily in favor of bifurcation. . . .Bifurcation can, especially in instances where municipal liability is dependent on individual liability as here, present a number of benefits including the bypassing of significant discovery (and associated discovery complications) related to the municipality's policies and practices and a shorter trial. . . . Accordingly, because the *Monell* claims are reliant on the individual officers' liability and because the City has agreed to accept liability against itself if the individual officers are found liable, judicial economy counsels in favor of bifurcation. . . .[A]lthough the Court acknowledges that Andersen, as the master of his Complaint, brought his *Monell* claim to hold the City accountable for its systemic practices, as discussed above, a stay of discovery of the *Monell* claim does not foreclose him from pursuing his *Monell* claim at a later date if he is successful against the individual officers. . .Given that Andersen does not present any other arguments alleging prejudice and based on the Court's finding that bifurcation would expedite, rather than delay, a conclusion of this litigation, bifurcation is appropriate in this case."); ***Harris v. City of Chicago***, No. 14-CV-4391, 2016 WL 3261522, at *2-4 (N.D. Ill. June 14, 2016) ("Defendant argues that bifurcation of the *Monell* claim is in the best interests of efficiency and judicial economy. Plaintiff responds that there will be a second trial on the *Monell* claim because municipal liability does not depend on a finding of officer liability. . . . The nature of the alleged constitutional violations, fabricating a confession and coercing Plaintiff into making that confession, depends on the individual officers' actions. . . Similarly, the policy of filing false reports and actively covering up illegal interrogations and confessions depends on the actions of individual police officers. The alleged harm to Plaintiff was not caused by any *de facto* policies independent of any officer's actions; thus, a constitutional violation by an individual officer must be found before the City may be held liable under the *Monell* claims. . . .In this case the City has offered to waive a qualified immunity defense for the purposes of municipal liability. As to the failure-to-train policies, the Seventh Circuit has stated specifically that 'there can be no liability under *Monell* for failure to train when there has been no violation of the plaintiff's constitutional rights.'. . For any of the alleged *de facto* policies, individual violations of Plaintiff's constitutional rights would be required for municipal liability. Therefore, disposition of the individual claims will practically end the litigation, and separation would promote judicial economy. . . Defendant City of Chicago also argues that bifurcating the *Monell* claim would significantly reduce the possibility of prejudice to the individual Defendants. . . There is a clear danger of prejudice to the individual defendants from the finder of fact hearing evidence on several instances of alleged misconduct that those defendants were not involved in. Plaintiff counters that any risk of such prejudice can be mitigated by limiting instructions. . . Plaintiff also argues that she will be prejudiced by bifurcation by being forced to wait to pursue her *Monell* claims but does not say how she would be prejudiced. Even with the mitigating factor of limiting instructions and

other methods, 'the individual defendants could face unusual difficulty in distinguishing their own acts that allegedly violated Plaintiff's constitutional rights from evidence that would be introduced to support claims against the [City].'. . Prejudice also favors bifurcating the *Monell* claims. . . . Here, as discussed above, the disposition of the individual claims will essentially end the litigation. Additionally, the offer of judgment would remove the risk to Plaintiff of having to prove the *Monell* claim. The parties dispute the effect on discovery, but at least some discovery is outstanding. This Court in *Lopez* also stated some of the disadvantages to bifurcation: the possibility of a second trial if individual defendants are entitled to qualified immunity; the possible dispute of payment from a municipal defendant arguing that the individual defendant was not acting within the scope of its employment; and a finding of liability against individual public employees, as compared to a finding of liability against a municipality, may decrease the likelihood of the municipality's acting to prevent future violations. . . However, given the City's offer of entry of judgment as set out above, none of the disadvantages are present here. There is no possibility of a second trial. If any Defendant has violated Plaintiff's rights, judgment will enter against the City. The offer of judgment by the City effectively waives the argument that any individual defendant was not acting within the scope of their employment. As to the final disadvantage, the limited consent to entry of judgment would enter a judgment against the City, albeit without admitting Plaintiff's *Monell* allegations. Bifurcation would prevent prejudice against the individual Defendants, promote judicial economy, and would not prejudice Plaintiff."); ***Horton v. City of Chicago***, No. 13-CV-6865, 2016 WL 316878, at *5 (N.D. Ill. Jan. 26, 2016) ("A stay of the *Monell* claim until after the claims against Wilson are resolved may . . . avoid the need for *Monell* discovery. If Plaintiff prevails on his claims against Defendant Walker, then the City's Limited Consent to Entry of Judgment would, as a practical matter, allow Plaintiff to collect judgment from the City without going to the time and expense of litigating the *Monell* claim. Plaintiff 'seeks only monetary relief' and the City has stipulated that it will 'indemnify [Walker] for compensatory damages as well as an award of attorney's fees and costs.'. . Under such circumstances, the Seventh Circuit has observed that bifurcation of *Monell* claims is 'sensible,' especially 'in light of the volume of civil-rights litigation that district courts must manage.' *Swanigan v. City of Chicago*, 775 F.3d 953, 962 (7th Cir. 2015). Both parties recognize that Plaintiff could proceed with his *Monell* claims against the City if he prevails on his constitutional claims against Wilson. But the parties disagree about whether bifurcation would avoid—as opposed to merely delay—discovery on the *Monell* claim (Count X) in the event that Plaintiff fails to establish that Wilson violated Horton's constitutional rights. The City argues that bifurcation would allow it to 'avoid burdensome and potentially unnecessary discovery and litigation costs should Plaintiff fail to establish a constitutional violation and thus, as a matter of law, be unable to prove any *Monell* violation.'. . Plaintiff responds that even if the fact-finder determined that the individual defendants are not liable, Plaintiff still might succeed on his *Monell* claim against the City. Specifically, Plaintiff argues that 'where—like here—Defendant Officers have asserted an affirmative defense such that a jury may find a constitutional violation but decline to find the officers liability, Plaintiff may still obtain a liability finding against the City.'. .The Seventh Circuit has acknowledged that 'a city's liability is derivative of its police officer's liability,' such that 'a municipality's liability for a constitutional injury "requires a finding that the individual officers

are liable on the underlying substantive claim."' . . Nonetheless, the Seventh Circuit has also recognized that 'a municipality can be held liable under *Monell,* even when its officers are not, unless such a finding would create an *inconsistent* verdict.' . . .Here, Plaintiff's *Monell* claim against the City alleges that the City *encouraged* Wilson's excessive use of force by failing to investigate or discipline officers who use excessive force and shoot civilians. A jury could not consistently find that Walker did not use excessive force but that the City's policies encouraged Walker's use of excessive force. However, a jury could consistently find that Walker did use excessive force, but that he was entitled to qualified immunity and therefore not liable for his actions. If that were to occur, and Plaintiff decided to proceed with the *Monell* claim against the City, then Plaintiff would, hypothetically, still need to conduct *Monell* discovery. But here, the City has consented to entry of judgment against it in the event that the trier of fact finds that Defendant Walker violated Horton's constitutional rights but is, nonetheless, 'not liable to Plaintiff because he is entitled to qualified immunity.'. . Thus, on balance, the Court finds that bifurcating the *Monell* claim against the City would promote the goals of efficiency and judicial economy."); ***Saunders v. City of Chicago,*** No. 12-CV-09158, 2015 WL 7251938, at *7-10 (N.D. Ill. Nov. 17, 2015) ("Plaintiffs seek to hold the City of Chicago liable under 42 U.S.C. § 1983 pursuant to *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978), for (1) the City's alleged pattern and practice of using unconstitutional means to obtain confessions from suspects and arrestees, (2) the City's alleged policy and practice of fabricating statements, (3) the City's alleged practice of not recording interrogations, and (4) the City's alleged failure to adequately train, supervise, and discipline officers who engaged in the alleged constitutional violations. The City now seeks to bifurcate Plaintiffs' *Monell* claims against it . . . and to stay discovery and trial on those claims pending resolution of Plaintiffs' § 1983 claims against the individual defendants. . . . The plethora of bifurcation motions and the inclination of many judges to grant them stems in large part from the recognition that, often, 'claims of municipal liability require an extensive amount of work on the part of plaintiff's attorneys and experts, and an extraordinary amount of money must be spent in order to prepare and prove them.'. . But this argument is not always applicable, and so courts must evaluate each motion on its own merits; this Court in particular has both granted and denied motions to bifurcate filed by municipal defendants. Compare *Terry v. Cook Cnty. Dep't of Corr.*, 2010 WL 2720754 (N.D. Ill. July 8, 2010) (denying motion to bifurcate), with *Cruz v. City of Chicago*, 2008 WL 5244616 (N.D. Ill. Dec. 16, 2008) (granting motion to bifurcate). . . .In short, the potentially-avoidable amount of discovery here—pertaining to four separate *Monell* allegations—is vast and would place a considerable burden on the City. Second, the parties dispute whether bifurcation would avoid, as opposed to delay, the *Monell* discovery. Of course, should bifurcation occur and should Plaintiffs succeed in phase one on their individual claims, they would be entitled to proceed with their phase two *Monell* claims, meaning that the *Monell* discovery would still occur at some point in the future (barring a settlement of some kind). But the parties disagree as to the fate of the *Monell* claims should Plaintiffs fail on their phase one claims. The Seventh Circuit has acknowledged that 'a city's liability is derivative of its police officer's liability,' such that 'a municipality's liability for a constitutional injury "requires a finding that the individual officers are liable on the underlying substantive claim."'. . On the other hand, the Seventh Circuit has suggested that 'a municipality can be held liable under *Monell*, even when its

officers are not, unless such a finding would create an *inconsistent* verdict.' *Thomas v. Cook County Sheriff's Dep't*, 604 F.3d 293, 305 (7th Cir. 2010). Presumably such a situation could arise in this case should Plaintiffs be unable to recover from the Defendant Officers because of their qualified immunity, but Plaintiffs could still recover from the municipality, which lacks such a protection. The Court is not persuaded in either direction on this issue. Plaintiffs try to devise hypothetical scenarios in which their *Monell* claims might fall within the so-called *Thomas* "liability gap," warning that in those instances they might be unjustly precluded from litigating their *Monell* claims based on their failure to prove liability on their individual claims. But Plaintiffs' concern is premature. Other than the qualified immunity scenario mentioned above, the Court is unable to determine whether Plaintiffs' hypothetical theories are plausible in light of the allegations in Plaintiffs' complaints, or whether these hypothetical scenarios would create a potential inconsistency with some hypothetical verdict in this case. Faced with four separate *Monell* claims, it is too early for the Court or the parties to presage whether any legitimate 'liability gaps' might exist here; any such determination would need to be made at the conclusion of the trial on individual liability. While this issue may arise again in this litigation, it does not influence the Court's calculus regarding the propriety of bifurcation. Third, the City tries to sweeten the pot by offering a Limited Consent to Entry of Judgment . . . , stating that if the case is bifurcated, and if Plaintiffs were to succeed in establishing that any of the individual police Defendants is liable for violating a Plaintiff's constitutional rights as alleged in the complaint, the City will agree to entry of judgment against it requiring it to indemnify the individual police Defendant(s) for compensatory damages and reasonable attorneys' fees, *even if* the individual is found to have violated a Plaintiff's constitutional rights but is not liable because he or she is entitled to qualified immunity. Plaintiffs are not moved by the City's (increasingly common) gesture, arguing that the Limited Consent does not offer all of the relief they seek and instead offers economic assurances that the City is required to pay anyway. Regarding the City's indemnification requirements, Illinois state law requires local governments 'to pay any tort judgment or settlement for compensatory damages' for which their employees are liable while acting in the scope of their employment. 745 ILL. COMP. STAT. 10/9-102. But Illinois law *permits*, rather than *requires*, indemnification for 'associated attorneys' fees and costs,' meaning that the Limited Consent does go beyond what is required of the City under state law. But ultimately the City's Limited Consent does not factor into the Court's analysis here. Even if the City consents to pay certain monetary liabilities, that does not end the case and controversy as it relates to the City. . . While a Limited Consent such as this might persuade certain plaintiffs to agree to bifurcate or to drop their *Monell* claims altogether (thus promoting judicial efficiency), Plaintiffs here have claimed allegiance to their efforts to hold the City accountable 'for the systemic practices that cause constitutional harms to its citizens,' regardless of the City's indemnification promises. . . . Because the City's Limited Consent presently does not impact the likelihood of phase two litigation in this case, it does not impact the Court's decision regarding bifurcation. . . . Taking all of these factors into consideration, the Court grants the City's motion to bifurcate Plaintiffs' § 1983 *Monell* claims against the City, and stays both discovery and trial on those claims. The Court's decision is based on the potential benefits to efficiency and judicial economy, the potential prejudice to the individual Defendants should these claims be tried together, and the lack of any substantial prejudice to Plaintiffs in delaying the

adjudication of their *Monell* claims."); ***Estate of Paul Heenan ex rel. Heenan v. City of Madison***, 111 F.Supp.3d 929, 948-50 (W.D. Wis. 2015) ("The court agrees with defendants that bifurcation is warranted both to avoid prejudice to Heimsness and for judicial economy, especially in light of the City's stipulation. First, introducing evidence of Heimsness's disciplinary history and the recent MDC messages—both of which would be pertinent to plaintiff's *Monell* claim against the City for deliberate indifference to the need for supervision—in the same phase of the trial in which the jury considers whether Heimsness's use of force was objectively reasonable may well unfairly prejudice Heimsness. . . . Even with a strongly-worded curative instruction that the standard Heimsness must meet is an objective one, the risk is too great that the jury would be unable to ignore the subjective aspects of Heimsness's specific, prior instances of use of force, as well as MDC messages, which arguably reflect a dark humor that sometimes accompanies a very difficult occupation *or* a disturbingly flippant attitude about shooting someone. . . . *Second,* the court also agrees with defendants that bifurcation is warranted in light of judicial economy. While there are circumstances where the jury could find the individual defendant not liable, but the municipality could still be on the hook for a constitutional violation—most notably instances where qualified immunity applies—this is not one of those cases. . . Here, if the jury finds Heimsness not liable, then there will be no need to try a *Monell* claim against the City. In other words, plaintiff's claim against the City is entirely dependent on the success of its claim that Heimsness used excessive force in violation of the Fourth Amendment. . . . *Third* and finally, plaintiff argues that the City's stipulation would defeat important 'societal benefits' derived from a jury's determination of the City's liability. Indeed, plaintiff points out, since the City is required to indemnify Heimsness for any damages here, 'the City's offer to stipulate adds nothing to the equation—a judgment against Heimsness already effectively operates as a judgment against the City.'. . The court certainly appreciates plaintiff's argument, but absent a relevant factual question for the jury to decide on plaintiff's *Monell* liability claim, there is no reason this evidence need be placed before a jury. Of course, a claim for injunctive relief against a municipality under § 1983 might still be ripe. . . The court, therefore, would be open to entertaining requests for an equitable remedy as the evidence may dictate (*e.g.*, requiring different training, methods for supervising officers, etc.). Any disputed facts pertinent to a claim for equitable relief could be heard by the court outside of the jury's presence, while the jury is deliberating on plaintiff's claim against Heimsness. Accordingly, the court will accept the City's stipulation of entry of judgment against it should the jury find in favor of plaintiff on its claim against Heimsness, as well as grant defendants' motion to bifurcate."); ***Fuery v. City of Chicago***, No. 07 C 5428, 2015 WL 715281, at *1-4 (N.D. Ill. Feb. 17, 2015) ("In *Thomas,* the plaintiff claimed deliberate indifference, alleging that the County had a policy or practice of understaffing that caused systemic failures to respond to medical requests. . .The Seventh Circuit concluded that it was not inconsistent for a jury to find that the individual defendants were not deliberately indifferent to the prisoner's medical needs but rather that they 'simply could not respond adequately because of the well-documented breakdowns in the County's policies for retrieving medical request forms.'. . Instead, the jury could find that County's policies were the driving force behind the constitutional violation alleged. . . Typically, however, a plaintiff cannot prevail on a *Monell* claim without first establishing an underlying constitutional violation. . . That is the case presented by Plaintiffs here, who are not alleging that the City has a general

custom or policy carried out by Szura of using excessive force against women or gay women, of falsely arresting women or gay women, or of generally discriminating against women or gay women. Instead, Plaintiffs allege that Szura used excessive force against them, falsely arrested them and caused them to be unlawfully detained, and illegally targeted them by virtue of their being women and gay in violation of the Equal Protection Clause. Their *Monell* claims are premised on allegations that the City allowed Szura's violations to occur through its policies of, among others, concealing and suppressing officer misconduct, investigating complaints against off-duty officers differently than complaints against other citizens, failing to maintain accurate records of complaints, and allowing a 'code of silence' to exist in the Chicago Police Department. But unlike in *Thomas,* the alleged harm to Plaintiffs was not caused independently by these alleged City policies but rather through Szura's actions, and thus Szura must first be found liable before the City may be held liable on Plaintiffs' *Monell* claims. . .To the extent Plaintiffs also allege the City had a policy of failure to train its police officers, the Seventh Circuit has stated since *Thomas* that 'a municipality cannot be liable under *Monell* [for failure to train] where there is no underlying constitutional violation by a municipal employee.' *Sallenger v. City of Springfield, Ill.,* 630 F.3d 499, 504 (7th Cir.2010). And although municipal liability may be possible absent individual liability where the individual has asserted qualified immunity, *Thomas,* 604 F.3d at 304–05, Szura has not asserted a qualified immunity defense. . . .Plaintiffs' reliance on *Obrycka v. City of Chicago,* No. 07 C 2372, 2012 WL 601810 (N.D.Ill. Feb. 23, 2012) is not persuasive. Initially, the court found that the City did not properly develop its *Heller* argument requiring an underlying constitutional violation by the defendant officer prior to a finding of municipal liability by first raising the argument in its reply brief and only in a footnote. *Obrycka,* 2012 WL 601810 at *11. The court summarily rejected the City's argument without discussion and cited to *Thomas*. . . Unlike the factual scenario in *Obrycka* where the plaintiff alleged that her injury was caused by the subsequent cover-up of the incident of which the defendant officer played no part and was the basis of the plaintiff's equal protection claim, here, Plaintiffs allege that their injury directly resulted from Surza targeting them during this violent encounter because they are women and gay. . . . Plaintiffs' claims are factually and legally distinct from those in *Obrycka,* such that the Court finds there would be an inconsistent verdict if the jury found the City liable based on its *de facto* policy, but not Surza for his own conduct. Thus, because Plaintiffs may only proceed on their *Monell* claims against the City if they prevail on their § 1983 claims against Szura, a second trial would not be necessary regardless of the outcome of the first. Substantial time and expense may be saved if a jury finds, for example, that Szura was not acting within the scope of his employment or under color of state law, thus foregoing the need for a trial on the *Monell* claims. Alternatively, if Plaintiffs prevails, the parties may determine after the conclusion of the trial on the individual § 1983 claims to forego the expense of a second trial on the *Monell* claims as Plaintiffs would have obtained the monetary recovery to which they are entitled. Next, Plaintiffs argue that the evidence required to present their claims against Szura will substantially overlap with the evidence required to establish their *Monell* claims against the City. They contend that to prevail on their claims against Szura, they will have to demonstrate that he was acting under color of law and within the scope of his employment, which will necessarily include evidence regarding the scope of authority the City vests in its police officers as a matter of policy or custom. They also maintain that to

present their malicious prosecution claim they will have to present evidence of the City's customs and practices regarding covering up police misconduct. Such evidence, according to Plaintiffs, will overlap significantly with the *Monell* evidence regarding City policies of failing to investigate and discipline and the 'code of silence.' But the presentation of broad evidence of City customs and policies, in the abstract, is not appropriate to prove Plaintiffs' claims against Szura. Introduction of such evidence poses the danger of undue prejudice to Szura and the other individual Defendants, who are not City employees and thus should not be associated with the alleged City policies. . . . Having considered the claims at issue and the possibility of unfair prejudice, the Court fails to see the substantial overlap of evidence that Plaintiffs maintain warrants holding one trial. Third, Plaintiffs argue that no prejudice will result from having the individual and *Monell* claims tried together and instead that they will be prejudiced by the delay in having the claims tried separately. The Court disagrees, however, as already discussed in connection with the alleged overlap of evidence. Introduction of the *Monell* claims will prejudice the individual Defendants, particularly the state police officers, who have no involvement with the alleged City policies. . . Plaintiffs and the City have both proffered experts on the City's policies, and the trial of the *Monell* claims will essentially involve a mini-trial on questions not necessary to the resolution of the remainder of the claims. *Monell* evidence will draw the jury's attention away from resolving the underlying issues of an incident that occurred over seven years ago. Injecting the *Monell* issues into the trial will make the case more complicated and potentially cause juror confusion. And although the City did include *Monell* exhibits and instructions in the proposed pretrial order in response to Plaintiffs' motion to reconsider bifurcation, this does not mean that the City would not be prejudiced by the Court now deciding to try the claims together, particularly as the City had not moved for summary judgment on the *Monell* claims based on Judge Bucklo's bifurcation order. Moreover, any delay in having the *Monell* claims separately tried does not warrant reversing the bifurcation decision. Although the Court was prepared to hold a trial in this case immediately upon transfer, that has not occurred for unforeseen circumstances outside of anyone's control. But the fact that this case was pending for seven years before those circumstances arose does not now warrant changing course on the bifurcation decision, particularly where Plaintiffs only moved for reconsideration of the bifurcation motion approximately three months before the originally scheduled trial date, with full knowledge that the City had made known in its summary judgment motions that it intended to file a summary judgment motion on the *Monell* claims after resolution of the individual claims. Finally, Plaintiffs contend that their Seventh Amendment rights will be violated by a bifurcated trial. Plaintiffs claim that a jury in a second trial on the *Monell* claims would be asked to determine for a second time whether Szura was acting under color of law. But because the only way that the City could be liable under § 1983 is if the jury in the first trial found that Szura was acting under color of law, a jury in the second trial would not be asked to decide this issue again. . . Thus, Plaintiffs' Seventh Amendment rights would not be violated by a bifurcated trial. Because the Court continues to find bifurcation of the *Monell* claims appropriate, Plaintiffs' motion to reconsider bifurcation of discovery and trial . . . is denied."); ***Veal v. Kachiroubas***, No. 12 C 8342, 2014 WL 321708, *3-*7 & n.6 (N.D. Ill. Jan. 29, 2014) ("According to *Thomas*, the court must look to the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth to determine whether a municipality's *Monell* liability is dependent upon that of its

officers. . . The nature of the constitutional violations that Veal alleges against the Village belies his argument that he could prevail against the Village in the absence of officer liability. As set out above, Veal makes three constitutional claims: (1) deprivation of due process; (2) failure to intervene; and (3) conspiracy to deprive Veal of his constitutional rights. For each of these claims, the Village will only be liable if Veal proves injury arising from the individual officers' conduct. . . In other words, even if the absence of policy may be the source of the violation of civil rights, there is no injury to Veal without officer misconduct. Veal's theory of liability against the Village is its failure to institute policies that would have guided the officers engaged in the investigation of the murder, and that the Village could be liable if individual defendants succeed on their asserted defense of qualified immunity. Veal expects that the evidence will show that the Village had no policies or procedures regarding proper investigative techniques or practices regarding exculpatory evidence. It is true that a municipality can be held liable for failure to train and supervise its employees in the appropriate handling of exculpatory evidence, as Veal notes. *See, e.g., Wardell v. City of Chicago,* 75 F.Supp.2d 851, 856 (N.D.Ill.1999). But that does not mean that could occur without officer liability in Veal's case, where the defense of qualified immunity seems most unlikely to prevail. . . The Dixmoor defendants themselves acknowledge the weakness of this defense. (*See* dkt. 75 at 7 ("But if Veal's allegations are accepted as true, the individual defendants coerced confessions, manufactured evidence, and suppressed exculpatory evidence. Does Veal believe these allegations fail to make out a constitutional violation?").) Moreover, the cases upon which Veal relies in making this argument are largely distinguishable because the court in those cases considered qualified immunity a viable defense. . . Thus, the mere fact that Morgan and Falica assert qualified immunity defenses does not weigh so heavily against bifurcation as to persuade the court to allow all issues in this suit to proceed together. . . .Moreover, the Seventh Circuit has pronounced since *Thomas* that 'a municipality cannot be liable under *Monell* [for failure to train] where there is no underlying constitutional violation by a municipal employee.' *Sallenger v. City of Springfield, Ill.,* 630 F.3d 499, 504 (7th Cir.2010) . . . Thus, to the extent that failure to train underlies Veal's assertion of municipal liability, there can be no *Monell* liability in the absence of individual officer liability. . . .Judicial economy in this instance favors bifurcation. . . . Veal disputes the argument that bifurcation would serve the interests of judicial economy, stating that this argument 'rests on the faulty assumption that Mr. Veal's *Monell* [c]laims would not be tried at all if this motion is granted.'. . But, as discussed above, Veal is highly unlikely to succeed on his *Monell* claims in the absence of a finding of individual liability against Morgan and Falica. If the Dixmoor officials are found liable, the court anticipates that they will be indemnified . . . . The Village has not stipulated to entry of judgment against it if the jury finds an individual employee liable. Such a stipulation, for practical purposes, obviates the need for any *Monell* discovery. . . . Lacking a stipulation, the Village conceivably could assert that the officials were not acting within the scope of their employment by the Village. Because the other judges who have considered this issue have not made bifurcation conditional and Veal has not raised the issue, the court does not condition bifurcation on such a stipulation. . . . But even in the unlikely event that the Dixmoor officials prevail on a qualified immunity defense, bifurcation does not mean that Veal will be deprived of his chance to pursue his *Monell* theory or otherwise barred from obtaining compensation if he proves he suffered a constitutional injury. . . If necessary, Veal could pursue

any remaining *Monell* claims after the claims against individual defendants are resolved. . . . Although the court concludes that Veal cannot establish liability of the Village without first showing individual officer liability, in this instance, where the only named individual defendants apparently employed by Dixmoor are former officials of its police department, bifurcation of the claims against them would, in effect, stall Veal's case against Dixmoor. . . . If Veal proves that the supervisors' knowingly or with deliberate, reckless indifference allowed subordinates to violate Veal's constitutional rights, a jury could find them liable without finding the Village liable for failure to implement policy. . . .Since it appears that the Dixmoor officials could be liable even without the Village's being liable, the court concludes that these claims should not be bifurcated. Thus, the court will bifurcate the *Monell* claims against the Village, described further below, but will not bifurcate the supervisory liability claims against Morgan and Falica."); ***Carr v. City of North Chicago***, 908 F.Supp.2d 926, 929, 930, 934, 935 (N.D. Ill. 2012) ("Where a plaintiff brings a *Monell* claim against a municipality based on the specific conduct of a municipality employee, the plaintiff cannot prevail on that *Monell* claim without first showing that the employee violated the plaintiff's constitutional rights. . . Although the Court in *Heller* did not state that the employee must be *liable* for the violation, this became a question in the lower courts. In *Thomas*, the Seventh Circuit addressed whether *Heller* in fact established a rule that a plaintiff must show that the individual employee is not merely the instrument of plaintiff's harm but is also *liable* for that harm before a *Monell* claim can succeed. *Thomas* concluded that *Heller* did not establish such a rule. Rather, the rule in *Heller* is that 'a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict.'. . *Thomas* set forth three factors to consider in determining whether a municipality's liability depends on the actions of its officers: (1) the nature of the constitutional violation that the plaintiff alleges; (2) the theory of municipal liability that supports the *Monell* claim; and (3) the defenses that the individual defendants have asserted. . . A predicate to recovery under *Monell* is, of course, a constitutional injury. . . . If there was no excessive force, there was no injury to constitutional rights. . . Here, all of the claims against the Defendant Officers are contingent on the claim that they used excessive force against Mr. Hanna. If there was no excessive force, Mr. Hanna did not suffer an injury to his constitutional rights. If Mr. Hanna did not suffer an injury to his constitutional rights, then there is no constitutional harm that the Municipal Defendants could be held liable for. Therefore, Plaintiffs' claims against Municipal Defendants are wholly contingent on the excessive force claim against Defendant Officers. If the *Monell* claims are bifurcated and the Defendant Officers prevail, the time and expense involved in litigating the *Monell* claims will be saved. The liability issues in this case therefore favor bifurcating the *Monell* claims. . . . As the Court explained when discussing the certification, *Monell* claims are most often bifurcated in this district when a case is rooted in allegations of excessive force. Plaintiffs' cases to the contrary are not on point and do not reflect the current jurisprudence of this District, where decisions to deny a motion to bifurcate rarely involve excessive force claims. [collecting cases] The Monell discovery burdens in this case are significant and bifurcation is likely to allow some or all of the parties to avoid those burdens. If Monell discovery and litigation is never reached, bifurcation will also serve judicial economy. . .Because the *Monell* claims in this case are entirely dependent on whether Defendant Officers violated Mr. Hanna's constitutional rights, and because the City has submitted a certification of

entry of judgment against itself if a finder of fact or the court on dispositive motion determines that they did so, resolution of the claims against Defendant Officers will obviate the need to litigate the *Monell* claims against Municipal Defendants. It is also apparent that, at this stage, the *Monell* discovery will be a significant burden and that avoiding, or at least delaying, such discovery will serve both convenience and judicial economy. Together, this weighs in favor of the Municipal Defendants' motion to bifurcate and stay discovery on the *Monell* claims, and is enough for the Court to grant the motion to bifurcate. . . . Plaintiffs argue that there are non-economic interests at stake that can only be served by litigating the *Monell* claims, and that their suit is not merely about money damages. This Court recognizes that a plaintiff may feel a greater sense of personal satisfaction in a verdict that holds a municipality directly liable for the conduct at issue. However, Plaintiffs here seek only money damages, and bifurcation will not impede their ability to recover fully with a proper showing of constitutional injury. Since the City will be paying any compensatory damages, the City may feel an incentive to change. . . Plaintiffs are also reminded that bifurcation is not dismissal. They may choose to pursue the *Monell* claims, if there is anything more to pursue, after the claims against Defendant Officers are resolved."); ***Castillo v. City of Chicago*** No. 11 C 7359, 2012 WL 1658350, at *1-6 (N.D. Ill. May 11, 2012) ("If one of the individual defendants is found to have violated Castillo's constitutional rights, the City offers to stipulate to entry of judgment against it for compensatory damages and reasonable attorney's fees. The City's offer applies whether the violation is determined by the court or by a jury and irrespective of whether the individual defendants successfully assert a qualified immunity defense. If Castillo fails to establish a constitutional violation by one of the individual defendants, the City argues he has no *Monell* claim because a constitutional violation is a necessary predicate to the City's liability. In support of its argument, the City cites *Los Angeles v. Heller,* 475 U.S. 796, 799 (1986) (finding excessive force claim not actionable against a municipality based on the conduct of one of its officers where the jury concluded the officer inflicted no constitutional harm). The City contends bifurcation under either scenario serves judicial economy by allowing the parties to avoid burdensome discovery and a lengthy trial associated with Castillo's *Monell* claim. Castillo counters that bifurcation would lead to duplication of effort and unnecessary complexity. . . . The City contends its offer to stipulate to entry of judgment against it if Castillo succeeds against one of the individual defendants on his § 1983 claims also means there is a significant likelihood that bifurcation will fully resolve the case without summary judgment or a lengthier, more complex trial on the *Monell* issues. Castillo counters two trials will be necessary if the case is bifurcated. In support of his argument, Castillo cites *Thomas v. Cook County Sheriff's Department,* 604 F.3d 293 (7th Cir.2010). In *Thomas*, the Seventh Circuit considered whether Los *Angeles v. Heller*, 475 U.S. 796 (1986) established a firm rule requiring a showing of individual officer liability under § 1983 before a municipal liability claim could succeed. . . The *Thomas* court concluded that the actual rule in *Heller* was much narrower: '[A] municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict.'. . To determine whether a municipality's liability depends on the liability of its officers, courts must look to the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth. . . Because *Thomas* involved allegations of deliberate indifference, the court held a jury verdict finding against liability on the part of the individual municipal employees was not inconsistent

with a verdict that the municipality was liable. . . A claim of deliberate indifference requires a showing that an official acted with a sufficiently culpable state of mind. . . This involves a two-part inquiry to determine whether the official had subjective knowledge of the risk to the plaintiff's health and also disregarded that risk. . . The jury 'could have found that the [municipal employees] were not *deliberately indifferent* to Smith's medical needs, but simply could not respond adequately because of well-documented breakdowns in the County's policies....'. . . Neither Castillo nor the City directly address whether the holding in *Thomas* applies to this case. Nevertheless, the court will review each of the *Thomas* elements in turn. . . . Castillo's claims of unreasonable seizure and false arrest/unlawful detention must be brought under the Fourth Amendment because they arise in the context of an arrest by individual police officers. Therefore, the majority of Castillo's claims against the Individual defendants are governed by a standard of objective reasonableness. . . Whereas the individual officers in *Thomas* could possibly rely on municipal polices and practices to negate the element of intent, here the subjective state of mind of the individual defendants is irrelevant to establishing liability. Municipal liability arising in the context of an arrest depends on a determination that one or more municipal employees violated the plaintiff's constitutional rights. . . . The first *Thomas* element suggests the City's liability depends on a finding that individual police officers violated Castillo's constitutional rights. . . . Castillo alleges several theories of municipal liability, including the City's failure to adequately train, supervise, and control its police officers. There can be no municipal liability in a failure to train case without an underlying violation by a municipal employee. . . If his § 1983 claims against the individual defendants fail, so do his failure to train allegations against the City. Accordingly, this theory of municipal liability is inextricably linked with claims of liability against the individual defendants. The second *Thomas* element suggests not all of Castillo's claims against the City are independent of those against the individual defendants. Looking to *Thomas'* third factor, the individual defendants have all asserted qualified immunity as an affirmative defense. Castillo argues the defense raises the possibility that he could proceed against the City under *Monell* even if the individual defendants are not liable for their alleged § 1983 violations. The City does not dispute this, but counters the issue is moot because it will consent to municipal liability if any of the individual defendants violated Castillo's constitutional rights, even if they prevail based on qualified immunity. . . .[T]he City's stipulation explicitly states the City will pay *Monell* damages if a constitutional violation is determined either by the finder of fact or on a motion for summary judgment. . . If the issue of the individual defendants' liability is determined on a motion for summary judgment, a jury verdict may not be required at all. The court finds that Castillo's suit does not satisfy any of the *Thomas* elements. There is no doubt that including the § 1983 claims against the City would add greater length and complexity to trial than if the suit were to proceed against the individual officers alone. . .Similarly, the burdens of *Monell* discovery are also substantial. The realistic potential to avoid these dual burdens serves the interests of judicial economy and weighs in favor of bifurcation. . . . The City argues bifurcation is necessary to prevent undue prejudice that would result from a single trial. . . . Without making relevancy or admissibility determinations at this juncture, the possibility of unlawful seizures by other Chicago police officers raises legitimate concerns about the individual defendants' ability to distinguish their own alleged unconstitutional acts from those of non-party officers. This concern warrants a finding that some

prejudice could result absent bifurcation of the *Monell* claims. . . . Castillo can identify no substantive defect with the stipulation itself. If he establishes a constitutional injury, the City's stipulation requires payment of compensatory damages and reasonable attorney's fees regardless of qualified immunity. The stipulation permits Castillo to recover damages from the City without the need for a trial . . . Further, the stipulation does not bar him from asserting *Monell* claims should he fail to establish individual liability and a valid theory of liability remains against the City. The balance of the equities favors bifurcation."); ***Parker v. Banner***, No. 05 C 6378, 2007 WL 898090, at *2, *5, *6 (N.D. Ill. Mar. 22, 2007) ("In other cases, I have postponed consideration (including discovery) of *Monell* claims against the City. In this case, Plaintiff offers an extensively briefed motion contending that my decisions are in error, so I will re-examine the issue. . . . In short, Plaintiff has not cited authority critical of the idea that discovery of *Monell* claims should come after discovery for other claims. Most of the cases Plaintiff cites severed the *Monell* count. The two judges who did not sever simply reserved the decision for later. . . . In simple terms, if you just want a trial court to say that the City was wrong, you have not presented a case or controversy to that court. . . . The policy claims in this case are legitimate matters of public concern, over which there is already public debate. I do not think Plaintiff argues that Monell discovery is necessary in bringing claims of police abuse to the public consciousness. When an Alderman, the Chairman of the Committee on Police and Fire of the Chicago City Council, states there is 'an environment where police officers ... have ample reason to believe that they will not be held accountable even in instances of egregious misconduct,' as Plaintiff quotes, it is difficult to believe that City policies, customs and practices are not already under scrutiny. Given a choice between having a court hear a single case or having a legislature conduct a hearing (free from ordinary evidentiary constraints) in order to decide whether and how to change policy, practice or custom, the choice ought to be made in favor of leaving it to the legislature. It is the job of the City Council to deal with citywide policies and practices. The court sits to remedy any particular act by a city employee which violates the Constitution, and it will do so regardless of what the City Council may choose to do. Here that remedy would be a damage award which is being paid by the City. That award is a good reason for it to change policies that are unconstitutional. In the absence of claims for equitable relief, and in addition to damages, Plaintiff wants a piece of paper saying that the City acts unconstitutionally. I do not know exactly why he wants that paper, but securing a verdict or opinion for the sole purpose of having those words does not create a case or controversy within the meaning of Article III of the Constitution. All of this is why I will postpone, and perhaps preclude, the extensive *Monell* discovery requested in this case. That discovery may inflict needless, wasteful expense of time and money upon the parties and the court. I would also be inclined to sever the trial of any individuals from a trial of the City. If Plaintiff loses against the officers, the case is over. If Plaintiff prevails, then he can decide whether it is worth pursuing his claim against the City. If he is entitled to try for additional nominal damages, then he clearly has a right to pursue them. The mandate of 'case or controversy' only requires that something concrete be at stake − a dollar will do. Defendant's motion to postpone *Monell* discovery . . . and conditionally sever the trial of the City from the trial of the officers is granted."); ***Clarett v. Suroviak***, No. 09 C 6918, 2011 WL 37838, at *2, *3 (N.D. Ill. Jan. 3, 2011) ("Bifurcation in this case would appear to provide benefits in terms of economy. Clarett has propounded a significant

amount of *Monell* discovery in the form of document requests and interrogatories. Yet if the defendants are able to demonstrate that there was no constitutional violation of Clarett's rights by the individual officers, then there likely would be no basis for *Monell* liability. Although Clarett cites *Thomas v. Cook County Sheriff's Dep't,* 604 F.3d 293 (7th Cir.2010), for the proposition that a municipality may sometimes be found liable even if individual officers are not, she does not explain how such an outcome in this case could avoid inconsistent verdicts. From a review of the complaint, the Village's liability appears to depend upon establishing that one of the individual defendants violated Clarett's rights. Because the Village has agreed to concede its own liability if one of the officers is found liable, a verdict for Clarett would obviate the need for further litigation. There is one significant remaining problem with bifurcation. At this point, the Village has asserted an affirmative defense of qualified immunity. If the individual defendants are able to convince a jury that immunity is warranted in this case, then there would still be a need for a second, duplicative trial as to the Village's liability. The court will follow Judge Darrah's example in *Lopez* and deny defendants' request to bifurcate at this time. However, the court grants defendants' request to stay discovery as to Clarett's *Monell* claim. . . After completing discovery on the claims against the individual officers, the parties may be in a position to resolve the case through settlement or summary judgment motions. If so, then the parties will have saved considerable efforts. Clarett's response brief makes no argument why moving forward now with *Monell* discovery would be important in the particular circumstances of this case."); ***Grant v. City of Chicago,*** No. 04 C 2612, 2006 WL 328265, at *1, *3 (N.D. Ill. Feb. 10, 2006) ("In this case brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, Tammy Faye Grant, the plaintiff administrator of the estate of her son, Cornelius Ware, has alleged that four Chicago police officers violated Ware's constitutional rights in effecting an arrest by using excessive force that caused his death. Plaintiff alleges that at the time he was shot, Ware was unarmed and holding his hands up in a gesture of surrender. Plaintiff also has sued the City of Chicago, alleging that the City has a practice of excusing officers' wrongful use of deadly force by unquestioningly accepting standard but sometimes false assertions that the victim had either pointed a weapon at the officer or attempted to grab the officer's weapon so as to create a defense of justifiable use of force. . . . Although the City denies that the officers acted pursuant to any policy or custom of the City, it has moved to bar the trial of the *Monell* claim by waiving its right to demand proof and stipulating to entry of judgment against the City for any award of damages imposed on the officer defendants. [footnote omitted] The City argues that because the case against it stands or falls on the case against the officers, and because proof of policy and custom cannot add anything to plaintiff's damages, there is no case or controversy between plaintiff and the City. . . . In the final analysis, the plaintiff gains nothing in her pocket from a judgment against the City; neither do her attorneys. There is no case or controversy. The court acknowledges that unconstitutional municipal conduct is more likely to elude justice as a result of decisions like this, but it does not see a principled basis to deny the City's motion.").

For cases where bifurcation has been denied, *see* ***Grant v. Lockett***, No. 19-1558, 2021 WL 5816245, at *1 (2d Cir. Dec. 8, 2021) (not reported) ("We have not . . . mechanically *required* bifurcation in cases featuring claims of both municipal and individual

liability. On the contrary, we have recognized that the decision whether to bifurcate a trial is committed to the 'sound discretion' of the district court. . . Here, the district court permissibly rejected Defendants' contention that bifurcation would promote convenience and efficiency in light of the relationship between Plaintiffs' individual and municipal liability claims. It also reasonably rejected Defendants' contention that they would be prejudiced by the introduction of evidence relevant only to Plaintiffs' claim against the City, given its ability to mitigate prejudice via curative instructions and an appropriate jury charge. The risk of prejudice of which Defendants complained was of the type that could 'be cured with proper instructions, and juries are presumed to follow their instructions[.]'. . . The district court therefore did not abuse its discretion."); ***Hankins v. Wheeler***, No. 21-1129, 2024 WL 4903917, at *2 (E.D. La. Nov. 27, 2024) ("Here, whether an underlying constitutional violation occurred in the present case is dependent upon whether the officers had reasonable suspicion to make the stop, which the Fifth Circuit has concluded is shrouded in facts and must be decided by a jury. If the Court were to bifurcate Plaintiff's claims into two separate trials, the trial against the officers present at the scene would proceed first, and the jury would necessarily have to make a finding as to the existence of a constitutional violation to reach a verdict. The first jury's finding on the existence of a constitutional violation would then presumably inform the second jury's decision in the trial against the supervisors and entities. However, this approach becomes problematic when one considers how inextricably intertwined Plaintiff's claims are with one another. For instance, bifurcation will require the parties here to put forth the same evidence establishing a constitutional violation at both trials: at the first to assess the reasonableness of the officers' actions and at the second to assess the supervisors' and entities' culpability for the actions taken by those same officers. The duplication of this evidence required at both trials indicates the inefficiency of this approach and militates in favor of trying these claims together. Additionally, the Court is concerned that bifurcation in this case may result in undue prejudice. Two different juries analyzing essentially the same evidence in slightly different contexts could breed confusion and result in key differences of interpretation regarding the facts of the case. Accordingly, the Court finds that the more prudent approach is to try these issues all at once before a single jury to avoid the waste of judicial resources and prejudice to the parties."); ***Tupea v. Kline***, No. 2:23CV240, 2024 WL 2874288, at *2-3, *6 (E.D. Va. June 7, 2024) ("[A] government employee defendant can violate a plaintiff's constitutional right without liability, if that right was not 'clearly established' at the time of the alleged conduct. . . Even so, *Monell* liability may attach in that situation due to the employee's underlying constitutional violation, but the absence of a clearly established right precludes individual liability under qualified immunity. . . In sum, Defendant Wyche could be liable under *Monell* even if Kline is not liable under § 1983. Therefore, bifurcating the case to decide Kline's § 1983 liability first in a separate trial would not necessarily be more efficient than deciding Kline's § 1983 liability and Wyche's *Monell* liability in the same trial. . . Admittedly, the *Tserkis* court decided to bifurcate even after considering this interplay between *Monell* liability and qualified immunity. . . But in that case, bifurcation could also make discovery more efficient, which is not the case here as explained above. Further, bifurcation in the instant case would likely prejudice Plaintiff because it is more onerous, and expensive, to litigate two jury trials than one. Holding two trials could also inconvenience witnesses who may have to duplicate testimony.

Finally, holding two trials uses more judicial resources. Consequently, judicial and litigation economy does not warrant bifurcating Plaintiff's claims. . . . In sum, although Defendant Kline's personnel record is prejudicial to him, that prejudice does not merit bifurcating the claims against Kline from the *Monell* claim against Wyche, as one claim ultimately relates to the other. Limiting instructions will more efficiently address any prejudice and ensure that Kline receives a fair trial on the claims against him and that Wyche likewise receives a fair trial on the *Monell* claim."); ***Cummings v. The GEO Group, Inc.***, No. 3:23CV327 (RCY), 2024 WL 330572, at *7 (E.D. Va. Jan. 29, 2024) ("Here, Plaintiff sets forth a single cause of action pertaining to Defendant's alleged policy and custom of understaffing. . . In other words, Plaintiff lodges *only* a *Monell* claim against Defendant. No individual defendants are named in the Complaint, and while some allegations pertain to the actions of individual actors employed by Defendant, the 'overwhelming thrust of the factual allegations ... focus on the broader context of how GEO's ... culture and business model has ... lead[ ] directly the injuries suffered by Plaintiff.'. . Applying the principles outlined above to these circumstances reveals that this case is ill-suited for bifurcation. . . .Preliminarily, the Court notes that Defendant is indeed subject to *Monell* liability. As outlined above, *Monell* liability has been extended to private entities operating under color of state law. . . Here, Defendant is operating under color of state law, insofar as it contracts with VDOC, a state entity, to operate prisons—a power that is 'traditionally the exclusive prerogative of the State.'. . Moreover, Plaintiff's allegations comply with the strictures of *Monell* and its progeny, insofar as Plaintiff alleges both (1) the existence of an unconstitutional policy or custom—understaffing—and (2) that said unconstitutional policy or custom caused his injuries. . .Therefore, the only issue in front of the Court is whether bifurcation is appropriate here. In support of its Motion to Bifurcate, Defendant argues that 'plaintiff has not named as a party a specific individual that violated his constitutional rights. However, [Plaintiff's] allegations ... implicate particularized actions and omissions on the part of individuals such that the first prong of individual liability is a necessary part of Plaintiff's proof to proceed on his *Monell* claim.'. .. Per Defendant, these are 'fact-specific allegations of violations of Plaintiff's constitutional rights that require proof necessary prior to proceeding on Plaintiff's *Monell* claim[ ].'. . Defendant continues by arguing that '[g]iven the breadth of Plaintiff's *Monell* allegations, ... the scope and magnitude of *Monell*-related discovery will be substantial' and necessarily delay trial. . . As such, Defendant argues that bifurcating trial and staying discovery on the *Monell* claim 'would allow the Court to set an expedited trial date on the underlying claims under the normal time constraints of the Court, rather than entertaining a request for extended discovery period and a later trial date on all claims combined.'. .Plaintiff responds first that 'the overwhelming thrust of the factual allegations in the Complaint are not centered around the actions of particular individuals, but rather focus on the broader context of how GEO's profit-drive corporate culture and business model has infected its operations nationally and ... at LVCC, leading directly to [Plaintiff's] injuries.'. . Plaintiff then argues that under such circumstances, 'a *Monell* claim does not have to be tethered to specific individual liability' as Defendant argues. . .This is because '[r]ather than condemning particular individual conduct, the Complaint ... alleges that the unconstitutional conditions at LVCC derived from *who was not there* due to [Defendant's] policy of understaffing.'. . According to Plaintiff, '[t]his case is, therefore, uniquely about [Defendant's] policy that allowed "gangs to virtually ruin the institution." The

Court should not allow [Defendant] to pass the buck to individuals—without adequate corporate support, staffing, or funding—who happened to work there.'. .Ultimately, the Court is not convinced that bifurcation is necessary here. Plainly, the instant allegations do not require Plaintiff to first establish that an individual defendant is liable for violating Plaintiff's rights before *Monell* liability may be imposed. That is because 'a finding of no liability on the part of the individual ... actors can co-exist with a finding of liability on the part of [Defendant].'. . Plaintiff's sole contention is that Defendant's policy or custom of understaffing caused his injuries. By its very language, this allegation does not implicate individual actors. And in fact, the thrust of Plaintiff's Complaint is that the *lack* of individual actors working for Defendant is what caused his injuries. Under such circumstances, a finding of liability on behalf of individual actors is not a prerequisite for a finding of liability as to Defendant. . . Defendant's additional argument that Plaintiff must first prove he suffered a constitutional violation *generally* before he can proceed on his *Monell* claim is similarly misguided. . . Simply, it is near impossible—and certainly impractical—to effectively split the two issues in the way Defendant requests. Plaintiff can only prove his *Monell* claim by establishing the existence of an unconstitutional policy or custom *and* causally connecting said policy or custom to the harm he ultimately suffered. . . And because Plaintiff asserts *only* a *Monell* claim, he needs evidence of both the alleged unconstitutional policy and custom *and* its specific connection to his injury to prove his case. . .In view of the above, it is clear bifurcation is not strictly necessary—nor appropriate—under these circumstance—i.e., a *Monell* claim only alleging understaffing in violation of the Eighth Amendment. That said, the Court must still consider the discretionary factors outlined in Rule 42(b) to determine whether bifurcation is nevertheless appropriate. . . . The Court is simply not persuaded that either bifurcation or a stay of discovery on *Monell*-related issues is warranted—or feasible—in this matter. Preliminarily, Defendant's request that the Court bifurcate Plaintiff's *Monell* claim against it is essentially impossible to do, insofar as Plaintiff *only alleges* a *Monell* claim. Put another way, there is nothing to bifurcate. . . And to the extent bifurcation and a stay of discovery *would* be feasible, practical considerations weigh against bifurcation and a stay of discovery. The issues Defendant seeks to bifurcate are inextricably intertwined with one another, and discovery will inevitably overlap. . . Further, if the Court *did* split the matter (and stay discovery) as Defendant requests, it seems just as likely that discovery disputes will arise as to what exactly constitutes permissible versus impermissible discovery. . . At bottom, while *Monell* claims are generally 'good candidates for bifurcation,'. . . this matter represents an exception insofar as Plaintiff does not allege—and his claim does not depend on—the violation of his constitutional rights by any one individual actor. . . Accordingly, bifurcation of this matter is unnecessary and impractical. Moreover, the Court is not persuaded that the relevant considerations (i.e., efficiency, convenience, or to avoid prejudice) favor bifurcation."); ***Cruz v. Guevara***, No. 23 C 4268, 2023 WL 8934940, at *4–5, *8-14 (N.D. Ill. Dec. 27, 2023) ("By consenting to liability for compensatory damages, the City would foreclose the possibility of Section 1983 plaintiffs having to litigate further to obtain their monetary compensation when officers are found liable. If getting compensated upon a determination of liability is in effect guaranteed, the City posits that no *Monell* litigation is necessary because plaintiffs will obtain nothing for it. Below we address this argument by considering whether the Court is prepared to find that this Plaintiff truly does take nothing from a

judgment against the City under *Monell*, assuming as we must that a *Monell* judgment does not result in his receiving further monetary compensation beyond nominal damages. Preliminarily, we acknowledge that district courts have bifurcated Section 1983 actions (and thus stayed *Monell* discovery) where the City has consented to its liability for compensatory damages against the individuals, under the theory that the consent-to-liability agreement renders a plaintiff's *Monell* claim a superfluous exercise that is a drain on the plaintiff as well. . . Referring to how bifurcation can relieve Section 1983 plaintiffs of the burden of litigating *Monell* claims where doing so will not bring them more monetary compensation, the City calls bifurcation 'no small benefit to Plaintiff.'. .Plaintiff's response to the City's expressed concern for his *Monell* litigation burdens is clear enough: 'Thank you very much, but no thanks at all.'. . . Plaintiff further explains, in his opposition to the Bifurcation Motion, that he has two goals in this litigation: (1) being compensated for his alleged injuries, and (2) having the City 'acknowledge the horrific pattern of violence, torture, perjury, fabricated and withheld evidence that he and others have suffered.'. . Plaintiff's confirmation that he wants a judgment against the City, aside from monetary compensation, for the purpose of holding the City accountable for its alleged unconstitutional policies and practices, distinguishes this case from those on which the City primarily relies for the notion that the City's limited consent to liability for compensatory damages against the Individual Defendants counsels decisively in favor of bifurcation. . . . The City's limited consent to liability for the Individual Defendants is not a consent to *Monell* liability. Nominal damages under *Monell* remain as a remedy against the City if Plaintiff obtains compensatory damage awards against the Individual Defendants, no matter if the City has agreed to pay those damages. And in failing to grasp the availability of a nominal damages award, the City has not accounted for the value a nominal *Monell* judgment may have for Plaintiff and his stated interest in changing what he says is a systemic pattern and practice of abusing criminal suspects and procuring repeated wrongful murder convictions for some 40 years in Chicago. Or, at least, the City invites the Court to value those interests at zero. This we decline to do. . . . *Swanigan I* envisioned multiple circumstances in which *Monell* liability might not overlap with individual officer liability, such as cases with 'factually distinct' *Monell* claims that thus were not precluded by a defense verdict on the individual claims, or cases in which plaintiffs might seek 'an injunction against future constitutional violations or some other equitable remedy, and he may be willing to invest the time and effort needed to prove his entitlement to that relief.'. . In those sorts of cases, the Seventh Circuit said in *Swanigan I*, plaintiffs should be entitled to try to prove their *Monell* claims, as such claims may have 'remedial import' beyond the money damages claims. *Id.*, citing David F. Hamilton, *The Importance and Overuse of Policy and Custom Claims: A View From One Trench,* 48 DePaul L. Rev. 723, 734–35 (1999) ("Hamilton"). . . . In the 24 years since the Judge Hamilton article, many allegations have swirled around certain Chicago police detectives, including Defendant Guevara, whose criminal investigations have led to no less than 40 – and that is a big number – persons being exonerated of the grave offense of murder in Cook County in the past six years, according to an undisputed assertion by Plaintiff. . . In other Section 1983 cases related to these exonerations, Defendant Guevara has invoked his Fifth Amendment right against self-incrimination rather than testify. . . The Court takes not much of a leap in concluding that Plaintiff's *Monell* claim is one of these important *Monell* claims that Judge Hamilton saw as worth closer judicial consideration on

bifurcation motions. In undertaking that closer examination, we are not prepared to second-guess Plaintiff's assertions about the significance of his *Monell* claims and thus the importance of his ability to discover and litigate them just as any other plaintiff might litigate other significant claims, unfettered by bifurcation and the delays it imposes on *Monell* discovery. Likewise, we also find ourselves reluctant to speculate that deterrent effects from liability judgments against cities under *Monell* will be so minimal (or so comparatively less than compensatory damage awards against individual officers where the City pays the awards) that judges should pay little or no heed to a plaintiff's stated interest – as in this case, for example – in obtaining a *Monell* judgment intended to force an acknowledgement of past unconstitutional municipal practices. . . . The City's Limited Consent in this case removes all doubt that the City will pay any compensatory damages, but it does not operate to render 'fruitless' the *Monell* facet of this litigation amid its independent value. . . In view of the availability and possible public import of nominal damages on Plaintiff's *Monell* claim, we follow *Cadiz* in declining to foist a *Monell* discovery stay on this unwilling Plaintiff where bifurcating or staying discovery on the *Monell* claims risks substantially the deprivation of a *Monell* merits determination. . . . In addition, the Court is not prepared to join in the City's assumption that Plaintiff's *Monell* claims will necessarily fail if he does *not* prevail against the Individual Defendants. The City has stated correctly the legal rule for what happens to Section 1983 *Monell* claims if a plaintiff does not prove constitutional torts by the individual officers. In *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), the Supreme Court held that municipal liability is contingent on officer liability. But our court of appeals has noted a narrow exception to the rule in *Heller* where the *Monell* claim is factually distinct from the claims against the individual officers. *See Thomas v. Cook County Sheriff's Dep't,* 604 F.3d 293, 305 (7th Cir. 2009) ("a municipality can be held liable under *Monell,* even when its officers are not, unless such a finding would create an *inconsistent* verdict"). The possibility that Plaintiff may retain a *Monell* claim factually distinct from the claims against the individual officers weighs against staying *Monell* discovery in this case. . . . This Court does not question that the volume of the *Monell* discovery will be very substantial, but that situation is not of this Plaintiff's making. The City takes this Plaintiff as it finds him, and he is alleging a widespread and longstanding set of policies involving Defendant Guevara and other officers at Area 5, implicating numerous other murder exonerations. The Court will not order a discovery stay that stifles the unwilling Plaintiff's litigation of his *Monell* claims simply because those claims – and the discovery that will come with them – are, in a word, big. If that were the rule, *Monell* discovery categorically could not proceed in Section 1983 cases alleging the most significant and far-reaching forms of *Monell* liability. That would be a perverse result. . . . Here, the City's collection, in its briefing on the Bifurcation Motion, of wrongful conviction cases in this district involving Defendant Guevara only confirms that the City as of this writing has undertaken or is undertaking substantial *Monell* discovery in several Guevera Section 1983 matters. The City's list includes *Maysonet* and at least seven other matters in which, according to the City, courts either denied bifurcation or phased the *Monell* discovery by calling for it to be addressed after non-*Monell* fact discovery, without formally staying it. . . From all this, we must conclude that the City has substantial experience in searching for and producing the species of *Monell* discovery that Plaintiff is likely to seek in this matter. And that lessens the City's burden. We thus conclude, in our case-specific analysis, that by virtue of *Monell* discovery having

proceeded in multiple other Guevara-related lawsuits, the City's burden in producing *Monell* discovery in this case is not as great as how the City describes it in the Bifurcation Motion. The progress of *Monell* discovery in other Guevara cases such as *Maysonet* suggests strongly to the Court that producing this discovery will not be the insurmountable hurdle that the City has described."); ***Pearce v. City of Portland***, No. 3:22-CV-00518-HZ, 2023 WL 2182468, at *2-4 (D. Or. Feb. 21, 2023) ("In the Ninth Circuit, 'bifurcation is the exception rather than the rule of normal trial procedure.'. . The moving party has the burden of proving that bifurcation is appropriate. . . . As was the case in *De Anda*, Plaintiff here alleges that along with the other individual Defendants, Defendant Dobson participated in and was directly responsible for the act that caused Plaintiff's constitutional injury. Thus, the Court finds no benefit to a separate proceeding on the claims against Defendant Dobson. Defendants' motion to bifurcate discovery and litigation on the claims against Defendant Dobson from the claims against the other individual Defendants is denied. . . . [I]f Plaintiff suffered no constitutional violation at the hands of the individual Defendants, the City cannot be found liable under *Monell*. . . For this reason, Defendants argue that in the interest of efficiency and judicial economy, Plaintiffs claims against the individual Defendants should be tried first. . . . But Defendants' argument fails for two reasons. First, Defendants ignore the converse situation. If Plaintiff succeeds on his claims against the individual Defendants, significantly more time and judicial resources would be expended litigating the related municipal liability claims in a separate, subsequent proceeding. . . As here, where evidence of individual defendants actions and what a city's policies allow may overlap, 'a judicial efficiency argument does not support bifurcation[.]'. . Second, Defendants erroneously assume that a judgment in favor of the individual Defendants necessarily equates to a finding that Plaintiff suffered no constitutional violation. The individual Defendants may be found to have caused a constitutional injury to Plaintiff but still be shielded from liability through qualified immunity. . . Thus, even if Plaintiff does not prevail on his claims against the individual Defendants, he could potentially still proceed with his claim against the City. And because the issues of individual liability and municipal liability are intertwined and not easily separable in this case, bifurcation would not promote efficiency or preserve judicial economy. . . . Thus, bifurcation is not warranted at this time. As Plaintiff concedes, Defendants' argument in favor of bifurcation 'would likely benefit from further discovery and argument at a later date.'. . The Court agrees. Defendants are not precluded from raising these issues and seeking bifurcation of the proceedings after discovery has been completed and dispositive motions have been resolved."); ***Fleming v. City of New York***, No. 18CV4866GBDJW, 2023 WL 1861223, at *2–3 (S.D.N.Y. Feb. 9, 2023) ("There is competing caselaw regarding whether an action should be bifurcated due to *Monell* claims. On the one hand, some courts have bifurcated discovery until individual defendant liability has been established. [citing cases] On the other hand, courts in this District have held that *Monell* claims do not necessarily warrant bifurcation. 'For municipal liability to attach, the jury need only find that Plaintiff was the "victim of a federal tort committed by persons for whose conduct the municipality can be responsible."'. . 'The law does not require the jury to find any of the named defendants liable. Rather municipal liability can exist "even in the absence of individual liability" so long as "the injuries complained of are not *solely* attributable to the actions of named individual defendants."'. . In *Small*, the Court held that its decision not to bifurcate the trial was not erroneous.

Defendant's 'liability was not "derivative of the individual defendants' liability" because the injuries complained of were not solely attributable to the acts or omissions of the individual [d]efendants.'. . The Court finds the reasoning in *Small* to be particularly convincing here, where the City's liability is similarly not based solely on the acts or omissions of the individually named defendants. Plaintiff asserts *Monell* claims against the City for 'longstanding customs, policies, and practices of using and condoning or turning a blind eye to the use of excessive force against detainees on Rikers Island, ignoring and systematically failing to enforce DOC guidelines, including those relating to the use of force by correctional officers.' . . Therefore, the City may be subject to *Monell* liability even if Plaintiff cannot establish individual defendant liability, whether that be due to individual defendant qualified immunity, an untimely suit against the individual defendants, or because plaintiff settled with or abandoned the suit against individual defendants. . . In her Second Amended Complaint, Plaintiff alleges there was a June 8 Assault involving a claim of excessive force by defendant Williams as well as John Does 1-6. . . Plaintiff alleges that John Does 11-14 failed to follow DOC protocol to refer Patrick to Mental Health Services. . . The Second Amended Complaint alleges an October 20 Assault involving excessive force by John Does 21-26 as well. . . Therefore, the City's *Monell* liability does not turn solely on the conduct or liability of the individually named defendants but rather on others for whose conduct the City may be held responsible. Any concern regarding the relevance, proportionality, burden, and delay of Plaintiff's requested *Monell* discovery will be addressed by the Court through case and discovery management. Further, jury confusion can be avoided with appropriate instructions and jury charges. . . Therefore, bifurcation of discovery is unwarranted. Defendants may renew their request for bifurcation of summary judgment and/or trial at a later point. However, the Court notes it is unconvinced by the City Defendants' present arguments."); ***Trexler v. City of Belvidere***, No. 20 CV 50113, 2021 WL 493039, at *3, *6 (N.D. Ill. Feb. 10, 2021) ("In this case, the constitutional violations alleged are an unconstitutional seizure claim and an excessive force claim. The complaint states that Defendant Parker's actions 'were done pursuant to, and as a result of, one or more of the above de facto policies, practices and customs' of Defendant City of Belvidere. . . The underlying claims are premised on Defendant Parker's actions in part but are also based on the presence of the practices, policies, and customs, which include 'failing to adequately train, supervise and discipline police officers' in areas such as use of excessive force. . . The allegations in the complaint overlap with, but may still be distinct from, the *Monell* allegations, given the early stage of litigation. . . and that Defendant Parker has asserted a qualified immunity defense. . . Additionally, the City's citation of *Sallenger* is not applicable because, in that case, qualified immunity had already been denied and a jury had found the defendant officers not liable. . . Based on this analysis, the Court finds it premature to conclude that Plaintiff must succeed on his claims against Defendant Parker before the City can be held liable. Therefore, bifurcation is not warranted on this basis. . . . The Court concludes that the City's motion to bifurcate Plaintiff's *Monell* claim and stay discovery are not in accordance with Rule 42(b)'s considerations of convenience, economy, expedition, and prejudice. The potential for bifurcation or a stay to serve the interests of judicial economy and avoid unfair prejudice is speculative at this point in the litigation, especially when weighed against the interests of and prejudice to Plaintiff as the non-moving party."); ***Rodriguez v. City of Chicago***, No. 18-CV-7951, 2019 WL 6877598, at *2–5

(N.D. Ill. Dec. 17, 2019) ("The magistrate judge explained that Plaintiff ' "has a profound interest in pursuing his claims with an eye towards institutional reform," and "a judgment naming the City itself and holding it responsible for its policies may have a greater deterrent effect than a judgment against a police officer that is paid by the City."'. . Numerous courts have recognized the importance of weighing such non-monetary considerations in the bifurcation analysis. [collecting cases] Although some courts in this district have found that the City's willingness to consent to a judgment against it for compensatory damages serves as an adequate deterrent, . . . others have found 'such stipulations insufficient to justify bifurcation, noting that the plaintiff is entitled to be the master of her own complaint and pursue claims even if they have a minimal pecuniary reward.'. . Courts have reasoned that there are valid non-economic reasons for pursuing a *Monell* action 'even if she has already won a judgment against individual officers and the municipality has consented to judgment.'. . . Further, courts in this district have taken issue with similar consents as offering little, if any, deterrent effect where, as here, the proposed consent expressly denies any wrongdoing on the part of the City. . . .Plaintiff is the master of his own complaint, and failure to pursue a consent decree or injunctive relief in this case does not foreclose the possibility that he still has significant non-monetary incentives for pursuing a *Monell* claim. Also, even though the policies at issue are 25 years old, the City has not demonstrated that all of the policies at issue have been meaningfully reformed such that a finding of *Monell* liability in this case would have no impact on institutional reform or deterrence. Accordingly, there is no clear error in the magistrate judge's finding that Plaintiff's 'profound' non-economic incentives for pursing his *Monell* claim weigh in favor of denying bifurcation. . . .The magistrate judge's finding that prejudice to the Plaintiff outweighed any burden of responding to *Monell* related discovery requests is also not clearly erroneous. . . . The Court does not find clear error in the Judge Cox's reasoning. As Plaintiff points out, much *Monell* discovery including written policies and training manuals, Rule 30(b)(6) testimony, employee records, and samples of homicide and or CR files have or will be produced in other cases involving a similar group of Chicago Police Officers including *Rivera v. Chicago*, No. 12c4428 (N.D. Ill); *Fields v. Chicago*, No. 10c1168 (N.D. Ill.); *Ryes v. Guevara, et al*, No. 18c1028 (N.D. Ill); *Gomez*, No. 18c335 (N.D. Ill); *Reyes & Solache v. Guevara*, Nos. 18 18c1028 & 18c2312 (N.D. Ill.); *Almodovar v. Guevara*, Nos. 18c2341 & 18c2701 (N.D. Ill); *Sierra v. Guevara*, No. 18c3029 (N.D. Ill.); *Maysonet v. Guevara*, No. 18c2342 (N.D.Ill). (Dkt. 61 at 11–12). . . . Many courts have not been persuaded by a defendant's general assertions about the high costs of *Monell* discovery. . . . Courts in this district have cautioned against bifurcating a *Monell* claim where, as here, the proposed consent to compensatory damages explicitly denies liability on the part of the City, noting that such a consent 'attempts to circumvent the public policy goals of *Monell* claims by insulating the City from litigation and accepting responsibility if their practices and policies result in constitutional injuries.'. .Similarly, the Court is not persuaded by the City's assertion that the magistrate judge's finding of the possible need for two separate trials is 'contrary to law.' The City argues that there is no possibility of a second trial if the Individual Defendants are not found liable because 'the Supreme Court and Seventh Circuit have consistently held, there can be no *Monell* liability without a finding of a constitutional violation by at least one individual defendant officer, especially in a case such as the present one.'. . However, in *Thomas*, the Seventh Circuit held that 'a municipality can be held liable under *Monell*, even when its

officers are not, unless such a finding would create an inconsistent verdict.'. . Plaintiff argues that the *Thomas* exception applies in this case because his complaint specifically pleads that 'police officers placed "discoverable reports, memos and other information in files that were maintained solely at the police department" and that pursuant to the City custom and practice, such files were withheld from prosecutors and criminal defendants.'. . Plaintiff explains that 'a *Monell* verdict reflecting that the City's file-keeping system prevented disclosure of exculpatory investigative materials to Plaintiff would be consistent with a verdict that no individual Defendant bore personal responsibility for evidence suppression.'. .Courts in this district have recognized that under similar facts, *Monell* liability against the City would not necessarily be dependent on a finding of liability of the individual officers."); ***Tate on behalf of Booth v. City of Chicago***, No. 18 C 07439, 2019 WL 2173802, at *4–6 (N.D. Ill. May 20, 2019) ("The Defendants contend that 'unless Plaintiffs prove an underlying constitutional violation against the individual Defendant Officers, the City cannot be held liable.' However, that is not a bright line rule. According to the Seventh Circuit, 'a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an inconsistent verdict.' *Thomas v. Cook Cty. Sherrif's Dep't*, 604 F.3d 293, 305 (7th Cir. 2010). To determine whether the findings would be inconsistent, the Court must 'look to the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth.'. . . The Court first turns to the nature of the constitutional violations and theories of liability asserted. The Plaintiffs' complaint alleges constitutional claims for unlawful search and false arrest pursuant to 42 U.S.C. § 1983 on behalf of all the Plaintiffs. The complaint also alleges a *Monell* claim for use of excessive force on behalf of the Minor Plaintiffs. The complaint is atypical in that there is no accompanying claim against the individual officers for use of excessive force. Given that structure, there is no possibility for inconsistent verdicts, as there is no count other than the *Monell* claim that is predicated on excessive force. . . Therefore, the claims involved do not necessitate the conclusion that liability as to the City and not to the individual officers would be inconsistent. Additionally, the Court needs to consider the defenses set forth by the parties, including the asserted defense of qualified immunity. In cases where qualified immunity is available, the jury could find the City liable for *Monell* violations despite the individual officers being shielded from liability. . . Divergent findings between the individual officers and the City are not necessarily inconsistent of one another. Therefore, the Minor Plaintiffs' asserted *Monell* claim may proceed independent of a finding on the individual officers' liability. Accordingly, bifurcation would not serve the interests of judicial economy on this ground, as the claim could be adjudicated regardless of the outcome in the trial against the individual officers. . . . Although the Court would normally only reach this stage of the inquiry if it found that bifurcation would avoid prejudice to a party or increase judicial economy, the Court sees it fit to explain the prejudice the Minor Plaintiffs would face if their *Monell* claim was bifurcated. The Defendants moved to bifurcate the *Monell* claim in this case and stay all related discovery and trial until the resolution of the claims against the individual officers. In effect, this motion serves to prevent an adjudication of the *Monell* claim's merits regardless of the outcome of the first trial. *Cadiz*, 2007 WL 4293976, at *1. As the Court held in *Cadiz*: The City argues that if plaintiff does not establish Section 1983 liability against the officers, then there can be no *Monell* claim…. The City further suggests that even if plaintiff does establish Section 1983 liability against the officers, trial

of the *Monell* claim will be unnecessary (and thus should not proceed) because it can provide plaintiff with no additional compensatory damages. *Id.* Essentially, the Defendants are asserting the same arguments here to achieve a *de facto* dismissal of the *Monell* claim by way of bifurcation. This would undoubtedly prejudice the Minor Plaintiffs in their efforts to hold the City accountable for its continued use of excessive force against young children. Echoing the holding in *Cadiz*, this Court does 'not believe that the City should be allowed to deprive a plaintiff of a merits determination of a *Monell* claim by the expedient of agreeing to pay a judgment against its officers that the City may be statutorily or contractually obligated to pay anyway.' . . The Minor Plaintiffs have a profound interest in pursuing their claims with an eye toward institutional reform. As the Supreme Court has avowed, '[Section 1983] is designed to provide compensation for injuries arising from the violation of legal duties, and thereby, of course, to deter future violations.'. . As this District has recognized, a judgment naming the city itself and holding it responsible for its policies may have a greater deterrent effect than a judgment against a police officer that is paid by the city. . . The City should not be allowed to strip the Minor Plaintiffs of this opportunity, and as such, must confront the merits of the *Monell* claim. . . For the aforementioned reasons, the Court denies the Defendants' motion to bifurcate. It is so ordered."); ***Love v. City of Chicago***, No. 18 C 2742, 2019 WL 339591, at *5–6 (N.D. Ill. Jan. 28, 2019) ("[T]he City argues that bifurcation furthers judicial economy by allowing it to avoid burdensome discovery and litigation costs that may be unnecessary if Love cannot establish an underlying constitutional violation. Typically, a plaintiff cannot prevail on a *Monell* claim without first establishing an underlying constitutional violation. . . But a *Monell* claim may proceed against a municipality even without its officers being held liable unless doing so would create an inconsistent verdict. . . Here, Love argues that her *Monell* claim does not depend on the use of excessive force and so she need not first establish an underlying constitutional violation. . . The determination of this question, however, does not dispose of the bifurcation issue because, as discussed above, Love also pursues a state law claim based on some of the same City policies and practices. The City has not moved to bifurcate the state law independent claims against the City, meaning that discovery and litigation involving the same conduct would proceed even if the Court bifurcated the *Monell* claim and stayed related discovery. For the same reason, the Court discounts the City's arguments of potentially burdensome and unnecessary discovery. Love indicates that the City has already turned over documents concerning its policies and procedures, with *Monell*-related information exchanged even before the removal of this case to federal court. The City's disclosures of potential witnesses also significantly overlap with those of the Defendant Officers, suggesting bifurcation could be inefficient and require deposing the same individuals twice. And, at least at this point, Love has tailored her additional *Monell*-related discovery to previous incidents involving the Defendant Officers and complaints or charges arising from City police officers planting evidence or receiving self-inflicted wounds. This discovery overlaps with that needed by Love on her state law claims against the City, meaning that bifurcation could result in additional complexity and confusion over what discovery can proceed. . . To the extent the City finds Love's *Monell* discovery requests overly broad or unduly burdensome, after engaging in the required meet and confer process, the parties can seek the Court's assistance in tailoring the requests. As for prejudice, the Court finds the City's concerns premature at this stage, particularly where the City does not contend that the

independent state law claims against it would cause similar prejudice. The Court cannot determine the evidence the parties intend to introduce at trial, making it difficult to assess the potential prejudice the Defendant Officers and the City would face if the individual and municipal liability claims proceeded to trial together. . . Additionally, the Court does not find the City's concerns of potential prejudice to Love proper, where Love is the master of her complaint and has chosen to pursue both individual and municipal liability claims. . . The Court has at its disposal means to address potential prejudice at trial, including through the use of limiting instructions, but it would also consider a renewed motion to bifurcate prior to trial based on specific evidence the parties intend to present on the individual and municipal liability claims. . . Finally, the City argues that bifurcation and entry of the Limited Consent would save Love the burden of litigating a *Monell* claim while still allowing her to obtain the same judgment for compensatory damages. Although bifurcation and the Limited Consent would not affect Love's recovery of compensatory damages, the Court finds this reason does not on its own warrant bifurcation. Non-economic reasons exist for Love to separately pursue her *Monell*-related claims, and she should have the ability to test those claims by presenting evidence that the City's policies and procedures violated Derek's constitutional rights. . . Having considered the relevant factors, the Court does not find bifurcation of the *Monell* claims warranted at this time."); ***Rodriguez v. City of Chicago***, No. 17 CV 7248, 2018 WL 3474538, at *2-4 (N.D. Ill. July 19, 2018) ("In recent years there has been 'a growing body of precedent in this district for both granting and denying bifurcation in § 1983 cases.'. . This body of precedent shows that determining whether to allow bifurcation must be done on a case-by-case basis, looking at the specific facts and claims presented. . . In arguing that bifurcation best serves the interests of judicial economy the City alludes to the idea that a plaintiff in most cases cannot prevail on a *Monell* claim without first establishing that the individual officers named in the complaint violated her constitutional rights, and that bifurcation may allow the parties to bypass expensive and time-consuming discovery and trial relating to the City's policies and practices. But nowhere in its brief does the City develop any argument as to why the complaint in this case supports a conclusion that individual liability is a predicate to the *Monell* claim. . . A *Monell* claim allows a plaintiff to recover relief under Section 1983 against a municipality if it has a widespread or well-settled practice or custom that is responsible for or the moving force behind a constitutional violation. . . Although in many cases a *Monell* claim may hinge on a showing that individual officers are liable for a constitutional violation, 'a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict.'. . The Seventh Circuit has laid out three factors that courts should consider in determining whether the municipality's liability is dependent on the claims against its officers: 'the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth.'. . The City has made no attempt in its motion to address the *Thomas* factors, and those factors do not clearly fall in its favor with respect to Rodriguez's *Monell* claim. As for the nature of the alleged constitutional violation and theory of municipal liability, courts in this circuit most commonly find bifurcation is favored in the excessive force context, where the municipality's liability clearly hinges on whether the individual officers in fact engaged in excessive force. . . But in other contexts, such as where there are allegations of false police reports, the claims may be based both on officers' individual actions and also on underlying policies, and a factual overlap

between the two does not necessarily mean that the officers' actions are a predicate to *Monell* liability. . . Here Rodriguez alleges not only that Defendant Officers retaliated and conspired against her for seeking a criminal investigation against Officer Doe, but also that the retaliation was a natural consequence of the City's widespread policies, practices, and customs, and 'was devised, approved and carried out by individuals with final policymaking authority with respect to the actions taken, including but not limited to, lodging an IPRA investigation against' Rodriguez. . . She also alleges that in furtherance of the alleged code of silence, the City, 'by and through its agents and employees within the [CPD], and IPRA, individually and jointly failed and/or attempted to prevent or suppress the disclosure of the identity of [Officer Doe].'. . Based on these allegations, it is not at all clear that the City's liability hinges on a finding that Defendant Officers committed the constitutional violations Rodriguez attributes to them. Nor does the third factor, the defenses set forth, weigh in favor of bifurcation here, because Defendant Officers have asserted qualified immunity as an affirmative defense. . . In the presence of that defense Defendant Officers might not be liable based on qualified immunity even if they are found to have engaged in constitutional violations, and so bifurcation would not necessarily avoid a second trial on the *Monell* claim should Defendant Officers be found immune. . . The City asserts that because it is willing to consent to a judgment against it for compensatory damages if the finder of fact determines that the individual defendants violated Rodriguez's constitutional rights even if they are immune from judgment, that stipulation 'waives qualified immunity' and would 'practically end the litigation' without having to proceed on the *Monell* claim. . . Although some courts in this circuit have been swayed by these stipulations, which the City seems to propose fairly routinely, . . . others have found such stipulations insufficient to justify bifurcation, noting that the plaintiff is entitled to be the master of her own complaint and pursue claims even if they have a minimal pecuniary reward . . . . That is because there are 'legitimate non-economic motivators to pursue a *Monell* claim against the City,' including deterring future misconduct and shining a light on unconstitutional policies through a judgment finding the City liable based on its policies, practices, or customs. . . A proposed consent judgment is particularly ill-designed to have any deterrent effect where, as here, it expressly denies any wrongdoing on the City's part. . . Turning to the City's efficiency argument, it argues that the breadth of Rodriguez's *Monell* claim justifies bifurcation because litigating that claim would create a heavy discovery burden, expanding the scope of discovery to the production of 'hundreds of thousands of pages of documents,' intrusive depositions of high-ranking officials, and otherwise unnecessary expert discovery, with the result that 'the scope of this discovery will be colossal.'. . This court recognizes that discovery with respect to the *Monell* claim will inevitably be broader than discovery limited to the claims against the individual officers and may increase the amount of work that goes into litigating the case on all sides, . . but that broader scope does not necessarily translates to an undue burden[.] . . And courts in this circuit have been skeptical of the City's speculative assertions about the high costs of *Monell* discovery. . . The City's argument also overlooks the risk that bifurcating the claims could add unnecessary complexity to the discovery process by instigating disputes over whether discovery requests fall within the scope of the individual claims or bleed over into the *Monell* claim. . . Moreover, to the extent that *Monell* discovery becomes overly burdensome, the court can tailor discovery as needed based on appropriate motions. . . For these reasons, and

especially because the City has not developed any argument to persuade the court that a verdict for Defendant Officers and against the City would be inconsistent, . . the court is not persuaded that bypassing the *Monell* claim would create efficiencies. Finally, with respect to bifurcation at least, the City argues that trying all the claims together 'will severely prejudice *all* defendants' because evidence regarding the City's policies and the actions of other CPD officers could invite the jury to find Defendant Officers guilty by association. . . But at this point in the litigation, before discovery has fleshed out the evidence in support of the claims against Defendants, it is premature to determine whether a joint trial would actually cause unfair prejudice. . . Defendants are free to re-raise this issue at the close of discovery should the case proceed to trial and if they believe the potential prejudice cannot be addressed through the proper use of limiting instructions. . . In the meantime, the City's conclusory assertions of prejudice are insufficient to warrant bifurcation."); ***Bonds v. City of Chicago***, No. 16-CV-5112, 2018 WL 1316720, at *3-6 (N.D. Ill. Mar. 14, 2018) ("Bifurcation of *Monell* issues in § 1983 actions frequently expedites the disposition of the case, since the resolution of the claims against the individual officers may end the entire case (either because no infringement of plaintiff's constitutional rights is established or because the plaintiff is able to settle the case in a way that persuades him not to go further), after less complex discovery and a less complex trial. . . . There are considerations that militate against bifurcation, however. There are circumstances where resolution of the claims against the individual officers does not eliminate the need for a trial of the *Monell* claim. . . And if, after discovery and a trial on the individual claims, it is necessary to begin discovery again and try the *Monell* claim, the result of the bifurcation will be a longer and more complex road to the case's disposition, including a second trial that is largely repetitive of the first. Moreover, there are non-economic benefits that flow from discovery (as well as a possible trial) of the *Monell* claim. Chiefly, an airing of the *Monell* claim through discovery assures transparency, and if problems in the City's policies and practices are revealed through discovery or trial, the likelihood of deterring future misconduct is significantly enhanced. . . As is explained below, these non-economic benefits and the particular circumstances of this case lead the court to deny the motion to bifurcate at this stage. As the parties acknowledge, this case is something of a unicorn because, unlike the vast majority of § 1983 excessive-force actions, this case does not, and cannot, involve any claims against the individual officers involved in Harris' shooting. This mitigates two risks of bifurcation—the risk that the officers' qualified immunity defenses will not resolve the *Monell* claims, and the risk that the municipality will not concede the point after the first phase and litigate whether an officer acted in the course and scope of employment. . . On the other hand, bifurcation here will not reap the ordinary benefit of avoiding potential prejudice to the individual officers of airing *Monell* issues in a single trial. . . The absence of individual officers also decreases the likelihood that the first phase will eliminate the need for further discovery and litigation on *Monell* issues. . . .[T]he City proposes a first phase limited to the 'facts and circumstances' of the night of the shooting. But Bonds has demonstrated that questions of causation raised by her *Monell* claims are highly enmeshed with the facts of what happened on the night of the shooting. . . She explains that her § 1983 theories implicate the City's alleged failure to implement the CIT [Crisis Intervention Training] program; the alleged knowledge of the officers present that their use of force would not be seriously scrutinized; and their alleged knowledge that fellow officers would not report their conduct. . . Each of those issues

requires exploring, at a minimum, what individual officers had known about the CIT program and previous use-of-force incidents. A § 1983 plaintiff who sues a municipality based on its employee's conduct usually must show that the employee violated the constitution. . . But in some circumstances, 'a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an inconsistent verdict.'. . .Without a verdict for or against individual officers in the first phase, there is nothing with which a verdict on Bonds' *Monell* claims can conflict. . . In the absence of any contrary authority cited by the City (which bears the burden of persuasion, . . . the court is not sufficiently persuaded that the proposed bifurcation has a good chance of avoiding *Monell* discovery or simplifying the issues. Bifurcation instead seems likely to delay the inevitable, because, in short, Bonds' *Monell* claims embrace theories that what the officers on the scene knew about the CIT program and the other alleged policies and customs is deeply enmeshed with the objective inquiry under the Fourth Amendment. . . This makes the parties' debates over the likely burden of *Monell* discovery and motion practice under the proposal somewhat secondary. . . .The City also makes a remarkable offer in its motion to bifurcate. If the motion is granted, the City offers to 'forego filing any dispositive motion until a jury' has decided the factual question presented in the proposed first phase (though it reserves the right to move for summary judgment based on the timeliness of this suit). . . .The City makes a proposal for disentangling discovery in the two phases that inadvertently demonstrates how difficult separating them would be. Pointing out that the City has disclosed over 100 witnesses with knowledge of the facts of the shooting, Bonds argues that she would be put to the expense of deposing many of them in both phases. . . The City responds by proposing an exception to the phases: let Bonds pose *Monell*-related questions to those witnesses. . . Without documentary discovery and one or more Rule 30(b)(6) depositions on *Monell* issues, Bonds' counsel would be at a serious disadvantage when questioning City personnel about matters relevant to her *Monell* claims. The City suggests no way of preventing *Monell* issues from bleeding completely into the first phase under its scheme. And lastly, but by no means least, the sheer number of witnesses involved counsels against bifurcation because '[d]iscovery in this case will be substantial with or without discovery into the *Monell* claim.'. . . Finally, the City argues that bifurcation will 'avoid[ ] prejudicing the jury against the officers involved in [the] incident.'. . This argument, as the court understands it, concerns the potential prejudice from the presentation of *Monell* issues, which evidence may include other use-of-force incidents and alleged misconduct, at a consolidated trial. But again, no individual officers will be defendants in any trial here, with or without bifurcation. . . .While bifurcation is appropriate in many § 1983 cases, this one is exceptional. There are no individual officers to prejudice with a joint trial or overwhelm with tangential discovery. For the reasons stated, the City has not persuaded the court that the efficiency of a consolidated trial outweighs the potential prejudice to the litigants. . . The City's motion to bifurcate. . . is therefore denied."); ***Estate of Loury by Hudson v. City of Chicago***, No. 16-CV-04452, 2017 WL 1425594, at *3-5 (N.D. Ill. Apr. 20, 2017) ("The Court's reasoning in *McIntosh* is directly applicable in this case. Here, like in *McIntosh*, the City has offered to consent to an entry of judgment and argues that bifurcation will potentially save substantial time and effort because addressing the liability of the individual officers first may prevent the need for discovery and a trial on the *Monell* claims. Like in *McIntosh*, however, the individual officers have asserted immunity defenses, . . . and thus,

it is premature to assume 'that there can be no municipal liability in the absence of underlying individual liability.'. . It is possible that a jury could find the Defendant Officers immune and not individually liable, while also finding that Plaintiff's constitutional rights were indeed violated and that the City's policies caused the harm. If the Court were to grant bifurcation and this situation comes to fruition, where Plaintiff's *Monell* claim is ultimately addressed on the merits after the completion of discovery and a trial of the other claims, bifurcation would in fact 'add unnecessary complexity and confusion,'. . . and 'create additional costs and inefficiencies ... without achieving any offsetting benefit.'. . Even if bifurcation does not result in two separate trials, the Court is still not persuaded, at least at this stage, that it will result in increased judicial economy, cost savings, and efficiency. Given the factual overlap between the *Monell* claims and the constitutional claims, a stay of *Monell* discovery will likely result in continual discovery disputes between the parties about whether Plaintiff's discovery requests invoke her *Monell* claim or her other claims. As several courts in this district have noted, forcing a court to resolve constant disputes about discovery requests' connection to *Monell* liability can introduce additional confusion to a matter and make litigation less efficient. . . Ultimately, at this early stage in litigation, any determination of judicial economy favoring bifurcation is speculative at best. Plaintiff has represented that her *Monell* discovery requests are narrowly tailored and not a fishing expedition, and while Defendants will certainly have to respond to broader *Monell*-related requests in unitary discovery, to the extent that Defendants find Plaintiff's *Monell* discovery requests 'overly broad or imposing undue burden and expense, the parties can seek assistance from the Court to tailor the requests as necessary after making independent good faith attempts to do so.'. . . Defendants next argue that bifurcation will avoid the strong likelihood of undue prejudice to the City or the Officer Defendants because if all the claims are tried together, the jury will be likely to impugn the Officer Defendants with the negative reports about the City while also associating the City with the alleged actions of the Officer Defendants. Plaintiff responds that Defendants' concerns about potential prejudice are premature and any potential prejudice can be cured through instructions to the jury and evidentiary challenges. The Court agrees. . . . In *McIntosh*, this Court rejected the City's nearly identical argument that, due its agreement to indemnify the officers and consent to an entry of judgment on the *Monell* claim, bifurcation would not prejudice the plaintiff because she would still receive complete compensatory damages if she won her suit against the individual officers. . . The Court explained that there were legitimate non-economic motivators to pursue a *Monell* claim against the City. . . A judgment against the City, for example, could be a 'catalyst for change' that encouraged the City to reform the practices that led to constitutional violations. . . Other courts have similarly found that, even if there are no financial benefits to maintaining a *Monell* action, there are other critical reasons the plaintiff may wish to win a judgment against a municipality on her *Monell* claim, even if she has already won a judgment against individual officers and the municipality has consented to judgment. . . Additionally, the Court is not persuaded that the DOJ Report and the City's agreement to work with the DOJ on reforming CPD will result in sufficient reforms such that plaintiffs need not pursue *Monell* claims against the City. As Plaintiff notes in response, there is no consent decree in place requiring the City or CPD to reform its policies and practices. Also, recent public reports suggest that the DOJ may not pursue any reforms of CPD. *See, e.g.*, John Byrne et al., *Concerns Mount Over Chicago Cop Reform as Sessions Vows to 'Pull*

Back', Chi. Trib., Mar. 1, 2017 (discussing DOJ's decision to pull back on reform of police departments). Given this uncertainty, Plaintiff should not be denied the opportunity to seek to deter future official misconduct through her *Monell* claim. In sum, Plaintiff has other important objectives—most notably, deterrence and reform— that would be furthered by a judgment holding the City liable for the Defendant Officers' alleged misconduct. As this Court stated in *McIntosh*, '[a] judgment against a municipality can be a catalyst for change, because it not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue.'. . Accordingly, the Court finds that bifurcation and staying discovery is not warranted at this time. The potential for bifurcation to serve the interests of judicial economy or prevent unfair prejudice is speculative at best, especially when weighed against Plaintiff's legitimate interests in obtaining a *Monell* judgment against the City and the fact that Plaintiff is the master of her complaint."); ***Coleman v. City of Peoria***, No. 115CV01100SLDTSH, 2016 WL 5497363, at *2–6 (C.D. Ill. Sept. 27, 2016) ("Defendant asks that the constitutional claim against the City asserted in Count 1 be severed from the rest of the claims, and proceedings on that claim stayed while litigation proceeds on the other claims. . . Defendants argue that, while Coleman brings federal constitutional claims against individual officer defendants and against the City, the claim against the City cannot succeed unless Coleman first succeeds in showing that at least one individual defendant violated his constitutional rights. . . Since all individual defendants are indemnified by the City, the reasoning goes, Coleman will not get any more or better recovery by proceeding with the claim against the City, and is not any more likely to succeed on that claim than on the claims against the individuals, since success on at least one of those claims is a predicate of success on the claim against the City. The City thus urges that the claim against it is redundant and inefficient; the costs, both to the City in supplying discovery on the claim and to the Court in supervising that discovery, are asserted to be significant. . . Additionally, Defendants argue that if the claim against the City is tried at the same time as those against the individual defendants, prejudice may accrue to the individuals if evidence of the City's hypothetically many other misdeeds is presented to a jury alongside the officers' case. . . Coleman responds that his constitutional claim against the City is not redundant because he could conceivably fail to recover against the individual defendants, who have raised the defense of qualified immunity, but could then still be entitled to recover from the City. . . . He also argues that the age and nature of the conspiracy alleged create the possibility that the City might be found liable without any individual defendant ever being found liable . . . . Coleman further argues that the discovery he seeks against the city is not so burdensome as the City suggests. . . And Coleman contends that the claimed prejudice that might accrue to the individual defendants is too speculative to weigh in favor of separate trials. . . A plaintiff bringing a *Monell* claim against a city often cannot succeed without showing that at least one individual city employee violated his constitutional rights. This is so even though municipal entities cannot be vicariously liable under 42 U.S.C. § 1983 for the constitutional torts of their employees, but rather can only be liable for harms of a constitutional dimension caused by their policies, customs, or practices. . . The injury to a plaintiff for which a municipal entity becomes liable under *Monell* usually has to be inflicted by a person, to whom liability under § 1983 usually also accrues. If, in such a case, all individual defendants are found not to have

inflicted an injury of constitutional dimension against the plaintiff, then the plaintiff was not harmed at all, and suit against the municipality will be unavailing; by the same token, since municipalities are required by law to indemnify their employees against such suits, recovery against an individual defendant will be just as extensive as recovery against the municipal defendant, and the claim against the latter equally unnecessary to make the plaintiff whole. . . In most cases, therefore, the values identified in Rule 42(b)—of convenience, expeditiousness, and economy—work strongly in favor of separating and staying the *Monell* claims. . . However, in some civil-rights cases, a plaintiff alleges harm traceable to the policies of a municipality for which no individual defendant is liable, either because no such defendants are ultimately found to be named, or because no defendant is individually liable for the harm nevertheless worked by the policy. *See, e.g., Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 305 (7th Cir. 2010) (explaining that although plaintiff's decedent died of meningitis while in the care of a the defendant county's jail, the county alone could be liable under § 1983 for its deficient policies even where no individual defendant was liable, so long as there was no "inconsistency" in the verdicts rendered). In other cases, individual defendants may have violated a plaintiff's civil rights, but be themselves shielded from suit by the doctrine of qualified immunity, while their municipal employer enjoys no such protection. . . Here, Defendants' argument that a verdict for the individual officer defendants would be inconsistent with a verdict against the city fails for at least two obvious reasons, observed in detail in Plaintiff's briefing. . . First, the individual officers have asserted qualified immunity as an affirmative defense, . . . and, unlike in other cases where the defense is raised, there is reason to think it likely that Coleman might succeed in showing violations of his rights, but be foiled by the doctrine as against the individual defendants. Qualified immunity is an absolute immunity to suit enjoyed by government officials who violate someone's constitutional rights, but do so in a way that 'could reasonably have been thought consistent with the rights they are alleged to have violated.'. . . Here, the defendant officers are alleged to have pressured or deceived witnesses in an unconstitutional manner at least three times, although the facts alleged also suggest that more such acts might emerge in discovery. The defendant officers have indicated that they intend to assert the defense of qualified immunity and argue that their acts were not contrary to clearly established law. It is unclear at this phase which officers are alleged to have participated in which portions of the conspiracy to implicate Coleman at which times, and what roles each may have played. Moreover, the legal standard surrounding impermissible lineup and photographic identifications is fact-intensive, and police routinely argue, sometimes with success, that they should be protected by the doctrine of qualified immunity for potential civil rights violations resulting from such lineups. . . While it is unlikely that a police officer would enjoy qualified immunity for deliberately attempting to frame a defendant via a manufactured lineup or photo, . . . the facts alleged are murkier here, and it is conceivable, as Coleman suggests, that at least some of the officers involved in the alleged activities might have engaged in activities pursuant to policy or followed orders that violated Coleman's rights in a way that a reasonable officer would not necessarily understand to violate Coleman's rights. These officers could enjoy the protection of qualified immunity, rendering dismissal of claims against them, alongside a judgment against the City on *Monell* grounds, not 'inconsistent' with each other. . . There is a more than nontrivial chance that qualified immunity would prevent Coleman from recovering against

anyone other than the City. This militates against the separation of claims under Rule 42(b). . .The second major reason why separation is inappropriate at this phase of the proceedings is the unusual complexity and age of this case. Part of the reason Coleman may have difficulty recovering against the principle alleged perpetrators of the misconduct in this matter is that the alleged ringleader is unavailable for deposition or other examination because he is deceased. The more minor players are not only more likely to be able to avail themselves of qualified immunity defenses, they are less likely to be found to have violated Coleman's rights—less likely than Rabe, and less likely than they themselves would have been at an earlier date, because of the perishability of human memory. The age of the case has caused at least one (Anderson) to testify that he has no recollection of the actions he is alleged to have taken, and to rely instead on reference to the policies and practices of his employment. . . As particular facts have staled or receded from the memories of the principles, the claims against them as individuals have become less susceptible of proof, rendering the *Monell* claim relatively more viable and attractive to Coleman, relying as it does not on a requirement that any of the particular defendants be able to be shown to have had a certain state of mind at a particular time, or have taken particular actions, but rather on a broader showing that as a result of the City's policies and procedures, Coleman was deprived of his right to due process of law. As explained above, cases where a discrete and recent act of individual misconduct is alleged tend to require a plaintiff to succeed against an individual municipal employee to succeed against the city. This is less true the more time passes, the more complex and diffuse the misconduct alleged is, and the more participants are alleged to have been involved in different capacities. And while the discovery on the *Monell* claim will undoubtedly add expense and time to the discovery, Coleman argues convincingly that there is significant overlap between the discovery sought against the individual defendants and against the City. . . This *Monell* claim is not a good candidate for separation and stay because it would not be convenient, expeditious, or economical in light of the specific facts at issue. . . Finally, Defendants argue that prejudice would accrue to the individual officer defendants if the claims against them were tried alongside evidence of the City's other bad behavior. . . Defendants argue that '[p]resenting evidence to the jury regarding a [city-wide] policy, practice or custom involving multiple improper police actions poses a danger of undue prejudice to the defendant officers by creating the perception that the police department routinely acts improperly, even if the officers acted properly [.]'. . The reasoning is puzzling. Evidence supporting the *Monell* claim would, indeed, have to be evidence tending to show a city-wide policy or practice conducing to police misbehavior. This would be relevant to the actions of the defendant officers, who would, assuredly, claim to have acted in conformity with sanctioned department policies and practices. Defendant municipalities are not people, and the actions of their employees in conformity with a policy tending to produce unconstitutional results is not forbidden propensity evidence pursuant to Federal Rule of Evidence 404(b) (something like this appears to be Defendants' unsupported drift). On the contrary, if the 'perception' is fairly created that the department 'routinely acts improperly,' this routine action, for the reasons just explained, can and should be considered by a jury weighing whether these particular defendant officers acted improperly."); ***Rockett v. Renth***, No. 14-CV-687-DRH, 2016 WL 913262, at *3-4 (S.D. Ill. Mar. 9, 2016) ("[A]n adverse finding as to the plaintiffs' individual claims does not necessarily dispose of the *Monell* claims against the City and Burns. See *Thomas*, 604 F.3d 293.

In a situation where a claim addresses the customary practice as to how the police department trains its officers and disciplines its officers who were shown to have used excessive force, bifurcation may not be warranted. Even when a plaintiff loses his claim against a police officer based on a qualified immunity defense, he may still recover against the municipality if he can prove a constitutional deprivation caused by a municipal policy or custom. In this situation, bifurcation will not avoid a second trial, and that second *Monell* trial would surely contain duplicative evidence and testimony related to the trial of the claims against the individual officer, while still falling within the parameters of *Thomas*. Furthermore, Renth, as an individual defendant, asserts a qualified immunity defense. Defendants argue that that since Renth's likelihood of prevailing on the qualified immunity defense is low, his defense would not prevent bifurcation. However, this argument is unpersuasive. As plaintiffs note, the defendants must believe this defense has some merit, or they would not have raised it in their answer (Doc. 19). In addition, there is no guarantee that severance would avoid the need for two trials. Renth has not offered to waive the defense of qualified immunity; he simply states that his likelihood of success is low regarding the defense. If the *Monell* claims will be tried, then bifurcation of the *Monell* claims and a stay of discovery at this point will prove to be inefficient because it will require that *Monell* discovery be conducted at a later date. Such a stay would in fact delay the resolution of all of the plaintiffs' claims. Plaintiffs argue that the defendants exaggerate the burden of *Monell* discovery in this matter, and that bifurcation would unnecessarily complicate the discovery process. Plaintiffs contend that bifurcation would be inconvenient and inefficient due to the overlap of evidence that is relevant to both the *Monell* claims and the individual claims against Renth. The Court recognizes that allowing the *Monell* discovery to proceed inevitably will increase the scope and cost of discovery. However, a stay of *Monell* discovery does not necessarily eliminate discovery disputes. A stay of *Monell* discovery may give rise to arguments about whether the plaintiff's discovery requests relate to their *Monell* claims or to their individual claims against Defendant Renth. Therefore, bifurcation of discovery would inevitably lead to more litigation about where the line between permissible discovery and deferred discovery should be drawn, and it would create inefficiencies relating to the overlapping testimony and need for multiple depositions. To the extent that the plaintiff's *Monell* discovery requests are overly broad or would impose an undue burden or expense, the Court may tailor the plaintiffs' discovery requests, if necessary. The Court believes this process is better suited to promote judicial economy opposed to staying entirely all *Monell* discovery at this time. As such, the benefits of potentially avoiding the additional scope of *Monell* discovery in this case are not sufficient to outweigh the costs and burden that would be incurred through bifurcation. Therefore, it is clear that bifurcation in this matter would fail to aid in the resolution of this case or promote judicial economy. . . .In support of defendants' second argument, the defendants claim that Renth will likely suffer undue prejudice if bifurcation is denied. At this stage of the litigation, however, concerns about potential prejudice at trial are premature. Additionally, there is no reason to believe that the Court could not implement tactics such as limiting instructions, FEDERAL RULES OF EVIDENCE, and motions *in limine*, to mitigate potential prejudice that may arise at trial. . . In the end, the defendants have not made a clear showing of prejudice to Renth in the event that bifurcation is denied. Therefore, the Court denies the motions to bifurcate on the ground that whatever efficiencies may be gained by

bifurcation are offset by the potential for confusion of issues and discovery, repetition of testimony, and increased inefficiency. Therefore, the defendants' motion to bifurcate must be denied."); ***Marshbanks v. City of Calumet City,*** No. 13 C 2978, 2015 WL 1234930, at *3-5 (N.D. Ill. Mar. 16, 2015) ("Citing to *Los Angeles v. Heller,* . . . Calumet City argues that to establish *Monell* liability under the circumstances, Plaintiff must prove not only that Defendant Officers deprived Chambers of his Fourth Amendment right against unreasonable searches and seizures, but also that the City's policies or customs were the moving force behind the alleged Fourth Amendment violations. Accordingly, Calumet City maintains that because municipal liability is contingent on the individual officers' liability, the Court should allow the parties to address the claims against the individual officers first. . . .In *Thomas v. Cook County Sheriff's Dep't,* 604 F.3d 293, 305 (7th Cir.2010), the Seventh Circuit rejected the argument that *Heller* requires individual officer liability before a municipality can *ever* be held liable for under *Monell*. Instead, the Seventh Circuit construed the *Heller* holding more narrowly, namely, 'a municipality can be held liable under *Monell,* even when its officers are not, unless such a finding would create an inconsistent verdict.' . . .In determining whether a municipality's liability is dependent on individual officers' conduct, the *Thomas* decision directs courts to look to certain factors, including 'the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth.'. . Turning to these factors, the nature of the constitutional violation at issue is a Fourth Amendment excessive force claim and Plaintiff alleges that Calumet City is liable due to its failure to properly train, supervise, review, and discipline its police officers in the use of excessive and deadly force. Under these circumstances, Calumet City argues that 'if Marshbanks fails to prove that Defendant Officers violated Chambers' constitutional rights, then she will not be able to prove that the City is liable for any alleged constitutional deprivation.'. .In response, Plaintiff states that she would 'ordinarily' agree with this proposition, but explains: [H]ere there were three officers who discharged their weapons. Plaintiff believes she will be able to present credible evidence that the fatal shot was fired by Officer Laster because he was the only officer using a .40 caliber gun and the projectile recovered from Decedent's body was from a .40 caliber firearm. However, it is entirely possible that Defendants may argue to a trier of fact that Plaintiff failed to prove by a preponderance of the evidence that a particular officer used excessive force. For example, Officer Gerstner testified that he fired one shot at Decedent when he was a couple of feet from the fence and that Decedent's body did not react in a manner that would indicate Decedent was hit by the bullet. However, when asked to admit that the one shot fired by Officer Gerstner did not strike Decedent, Gerstner objected and asserted a lack of knowledge. It is clear that Defendants want to have it both ways. They want to say that they do not know who shot Archie [Chambers] and that if the officers were not found liable that the City would not be liable. This is precisely the case where there are two gunshot wounds out of the three total that cannot be traced to an officer and Defendants may argue that the .40 caliber bullet did not come from Officer Laster. Under those circumstances, it is possible to have a scenario that was addressed in *Thomas v. Cook County Sheriff's Department,* 604 F.3d 293, 305 (7th Cir.2009) (which held that a municipality may be held liable under *Monell* even when its officers are not, unless such a finding would create an inconsistent verdict). If Defendants are only going to argue that Officer Laster was justified in shooting Decedent off the fence when he was unarmed, then there is no issue, but if Defendants

are going to argue that Plaintiff failed to identify the shooting officer, then the precedent in *Thomas* controls and *Monell* discovery should be allowed. . . .Calumet City does not meaningfully respond to Plaintiff's argument in its reply brief, but merely reiterates the arguments made in its opening memorandum. Calumet City, for example, does not deny that its theory of the case is that Plaintiff cannot prove who shot Chambers, therefore, no one is liable for the deprivation of his Fourth Amendment rights. By not recognizing the nuance of Plaintiff's arguments, Calumet City has not sufficiently explained how the nature of the constitutional violation and the theory of municipal liability necessitate bifurcation under the circumstances. Equally important, the individual Defendant Officers have asserted the affirmative defense of qualified immunity, which is significant to Court's analysis. As the *Thomas* decision explains–in the context of the facts in *Heller* –if the individual officer had asserted an affirmative defense, 'the jury might have found that the plaintiff's constitutional rights were indeed violated, but that the officer could not be held liable' because in 'that case, one can still argue that the City's policies caused the harm, even if the officer was not individually culpable.'. . The Seventh Circuit clarified that '[w]ithout any affirmative defenses, a verdict in favor of the officer necessarily meant that the jury did not believe the officer violated the plaintiff's constitutional rights' and because 'the City's liability was based on the officer's actions, it too was entitled to a verdict in its favor.'. . Here, because the individual Defendant Officers have asserted the affirmative defense of qualified immunity, Plaintiff has shown the possibility that holding Calumet City liable would not create an inconsistent verdict with a jury finding that Defendant Officers are not liable. . . Turning to the Rule 42(b) considerations, Calumet City argues that bifurcation will conserve judicial resources, including the need for extensive *Monell* discovery. As Plaintiff notes, however, the parties have conducted over twenty depositions in this matter, and, according to Plaintiff, some of deposition testimony reveals that certain Defendant Officers may not have adhered to the written general orders concerning the use of force and lethal force. Indeed, Calumet City admits in its opening brief that the parties have already completed extensive fact discovery in this matter. Furthermore, Plaintiff has indicated that *Monell* discovery could be conducted with the use of Rule 30(b)(6) witnesses and any witness who provides officer training. Therefore, Calumet City's argument that *Monell* discovery would require the parties to depose past and present Chiefs of Police, members of the Board of Police and Fire Commissioners, and possibly Calumet City's Mayor, is unavailing. Meanwhile, Plaintiff has propounded four interrogatories and numerous document requests related to *Monell* discovery. After reviewing this written discovery, the Court finds that it is not overly burdensome despite Calumet City's arguments to the contrary. Also, the parties are encouraged to work together during *Monell* discovery in the interests of curbing any burdensome tasks. In addition, Calumet City's judicial economy argument is not persuasive because under the circumstances, bifurcation would result in two trials that would most likely involve many of the same witnesses and evidence. . . Finally, Calumet City's argument that the evidence against Calumet City will prejudice Defendant Officers is best cured by proper jury instructions and pre-trial evidentiary challenges. Accordingly, Calumet City has failed in its burden of demonstrating that the Rule 42(b) factors weigh in favor of bifurcation. . .For these reasons, the Court, in its discretion, denies Calumet City's motion to bifurcate Plaintiff's *Monell* claim from the other claims in this lawsuit for discovery and trial purposes."); ***Awalt v. Marketti***, No. 11 C 6142, 2012 WL 1161500, at *11-*14 & n.2 (N.D. Ill.

Apr. 9, 2012) ("Bifurcation motions, such as the instant Motion, have become routine in § 1983 litigation. . . The reasons for this are obvious-the expenses incurred in trying a case with *Monell* claims are usually much higher than without. . . . Although considerations of the cost of the defense is one concern to take into account, those considerations dissipate if it is determined that the parties may have to litigate the *Monell* claims irrespective of the bifurcation decision, and thus incur the costs nonetheless, just at a later date. It is unsurprising that there is a growing body of law within this District on the subject of *Monell* bifurcation. . . Having surveyed the cases, it is clear that the decision to grant or deny bifurcation is a heavily fact-intensive analysis, dependent upon the costs and benefits of bifurcation under the unique circumstances of each case. . . .The Court has looked at every decision in this District involving bifurcation of *Monell* claims from claims against individual defendants in § 1983 suits since the Seventh Circuit decided *Thomas v. Cook County Sheriff's Dep't,* 604 F.3d 293, 305 (7th Cir.2009). It is clear that the weight of authority holds that bifurcation is now heavily disfavored. [collecting cases] First, Defendants are simply wrong in their contention that in order to prevail on her *Monell* claim Mrs. Awalt must first succeed in proving that the individual Defendants violated Mr. Awalt's constitutional rights. [citing *Thomas*] . . . . The Defendant Medical Care Providers in this case may be found liable for violating § 1983 by maintaining an unconstitutional policy or practice even if none of the individual Grundy County Defendants are found liable under § 1983. . . . A plaintiff alleging a *Monell* claim can succeed against a municipality on that claim despite failing to demonstrate to a jury that a particular individual defendant is liable for the unconstitutional acts alleged, so long as the two results are compatible. . . This case presents a situation in which two such results would be entirely compatible. As the court noted in *Thomas,* a split verdict might result if a jury concluded that the individual officers were not deliberately indifferent to a prisoner's serious medical condition, but rather could not respond to his needs because of the policies in place at the jail. . . . Given the nature and purpose of Rule 42(b) and considering all of the fact and circumstances of the present case, bifurcation is unwarranted and unwise. The Court therefore declines to bifurcate and stay Mrs. Awalt's *Monell* claims against the Defendant Medical Care Providers."); ***Booker v. City of Chicago***, No. 04 C 6371, 2006 WL 4071596, at *1, *2, *5, *6 (N.D. Ill. Dec. 15, 2006) (" The City of Chicago now presents the Court with a stipulation, waiving Mr. Booker's need to prove the remaining *Monell* elements in the event that he successfully demonstrates that the Individual Defendants violated his constitutional rights. The City agrees to entry of judgment against it for compensatory damages based upon these constitutional violations, if proven. The City claims that the stipulation moots Mr. Booker's *Monell* claim, because there is no longer a justiciable case or controversy. . . . The Court finds that, while a true offer of judgment might render Mr. Booker's *Monell* claim moot for lack of a case or controversy Under Article III of the Constitution, the Stipulation offered by the City presents a potential minefield of liability loopholes, rendering its promise of a stipulated judgment illusory. . . . This Court agrees with Judge Lefkow that a stipulation to judgment would moot Plaintiff's *Monell* claims, but further finds, like Judge Gottschall, that the procedurally anomalous stipulation offered here could potentially complicate, as opposed to streamline, these proceedings. . . . The City's briefs oversell what it actually offers in its Stipulation. In its Reply brief, the City argues that the Plaintiff's arguments against the Stipulation are misplaced, because the City is offering to submit to the entry of judgment against

itself, and not merely to the indemnification of a judgment against the Individual Defendants. But the stipulation is not quite an agreement to have judgment entered against the City; instead it merely waives the City's right *not* to have liability imposed against it. . . Specifically, the Stipulation states that 'the City specifically waives its right under *Monell v. New York City Dept. Of Social Services* not to be held liable in damages under section 1983 without proof that the City, by its Apolicy, custom or practice,' and with the requisite degree of culpability, caused the alleged constitutional violation.' Notably, the Stipulation expressly denies such widespread, permanent 'policies, customs or practices,' and that the injuries were caused by a person with final policymaking authority. The Stipulation also retains the City's unidentified defenses, and permits the City to retain the right to alter or amend judgment. Next, the Stipulation limits the City's obligations in a potentially troubling way. The Stipulation states that 'the City agrees to entry of judgment ... if and only if the finder of fact in this case finds that the named individual defendants violated plaintiff's constitutional rights.' If Mr. Booker were to establish a constitutional violation on the part of an as of yet Unnamed Officer Defendant, or other City employee, the Stipulation does not clearly waive the City's right to dispute *Monell* liability. Absent a stipulation to specific elements, as opposed to a waiver of proof under certain circumstances, it is unclear how the district court should proceed in the event that the Individual Officers effectively assert qualified immunity, or if the Individual Officers settle with Mr. Booker. Would the district court be required to reopen discovery and litigate the *Monell* issue at that time? In *Treece v. Hochstetler,* 213 F.3d 360 (7th Cir.2000), a similar stipulation persuaded the district court to grant (and the appellate court to affirm) the bifurcation of the plaintiff's *Monell* claim. The procedurally anomalous submission is far less troubling under such circumstance, because the litigation is in no way hindered or delayed in the event that a dispute arises over the application or interpretation of the stipulation. In this case, however, accepting the stipulation results in either a bar on *Monell* discovery, if all goes smoothly, or an unplanned-for delay, if it does not.")

See also ***Estate of Elijah McClain v. City of Aurora, Colorado****,* No. 20-CV-02389-DDD-NRN*,* 2021 WL 307505, at *2 (D. Colo. Jan. 29, 2021) ("Defendants argue that staying discovery on Plaintiffs' *Monell* claims against the City of Aurora would further the interests of efficiency and judicial economy because '[t]he vast scope of *Monell* discovery could be rendered unnecessary by a finding by the Court or a jury that there was no underlying constitutional violation.' Judge Christine M. Arguello recently rejected an identical argument in *Estate of Melvin by & through Melvin v. City of Colorado Springs, Colorado,* No. 20-cv-00991-CMA-KMT, 2021 WL 50872 (D. Colo. Jan. 5, 2021). After noting that bifurcating discovery in these types of cases 'is uncommon in this jurisdiction,' Judge Arguello reasons that permitting bifurcation 'would allow this case to languish on the Court's docket, potentially for years, and would be inconsistent with the Court's obligation to oversee "the just, speedy, and inexpensive determination of every action and proceeding."'. . She also states that bifurcating discovery would 'merely substitute some discovery disputes for others,' and that 'generic arguments concerning the cost of discovery on Plaintiff's *Monell* claims would apply in any Section 1983 case involving individual and municipal liability claims.'. . Judge Arguello found that bifurcating and staying discovery would prejudice the plaintiff who, like Plaintiffs' [sic] here, alleged grave constitutional violations and had an

interest in expeditiously proceeding with discovery. . . The Court finds this reasoning persuasive and sound. Bifurcating discovery would necessarily entail a lengthy delay in the case's resolution and therefore prejudice Plaintiffs and undermine the Court's ability to efficiently manage its docket. Bifurcation of discovery would also likely result in wasteful and unnecessary disputes regarding what discovery relates to the individual claims as opposed to the *Monell* claims. These burdens outweigh the largely speculative menace of excessive discovery identified by Defendants in their motion. Moreover, Defendants' contention that an underlying constitutional violation by one of the individual Defendants is required in order to impose municipal liability on the City of Aurora is not an accurate reflection of the law. It is true that 'the general rule...is that there must be a constitutional violation, not just an unconstitutional policy, for a municipality to be held liable.' *Crowson v. Washington Cty. Utah*, 983 F.3d 1166, 1191 (10th Cir. 2020) (citing *Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001)). However, sometimes the municipal policy devolves responsibility across multiple officers. In those situations, the policies may be unconstitutional precisely because they fail to ensure that any single officer is positioned to prevent the constitutional violation. Where the sum of multiple officers' actions taken pursuant to municipal policy results in a constitutional violation, the municipality may be directly liable. That is, the municipality may not escape liability by acting through twenty hands rather than two. . . Therefore, the resolution of Plaintiffs' claims against the individual Defendants in the individual Defendants' favor does not necessarily foreclose a finding of municipal liability against the City of Aurora. This also weighs against bifurcating discovery."); ***Tanner v. City of Waukegan***, No. 10 C 1645, 2011 WL 686867, at *3, *5 -*7 (N.D. Ill. Feb. 16, 2011) ("*Thomas* concluded that *Heller* does not mean that a plaintiff can never succeed on a *Monell* claim against a municipality without first showing that an officer is liable to him for violating his rights under § 1983. . . . [T]he Seventh Circuit set forth three factors to consider in determining whether a municipality's liability depends on the actions of its officers: (1) the nature of the constitutional violation that the plaintiff alleges; (2) the theory of municipal liability that supports the *Monell* claim; and, (3) the defenses that the individual defendants have asserted. . . . The Seventh Circuit has been clear since *Thomas* was issued, however, that in a failure-to-train case 'a municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee.' [citing *Sallenger v. City of Springfield, Ill.*] It is not the case, therefore, that all of Mr. Tanner's claims against the City are independent of those asserted against the individual defendants; if his § 1983 claims against the individual defendants fail, his failure-to-train allegations against the City will also fail under *Sallenger.* As a result, this aspect of Mr. Tanner's *Monell* liability theory does not accord with the second of the *Thomas* elements. . . . Here, The individual defendants have asserted the affirmative defense of qualified immunity,. . . thereby raising the concern in *Thomas* that Mr. Tanner could proceed against the City for *Monell* damages even if the officers are not liable for their alleged § 1983 violations. Several factors, nevertheless, lead the Court to conclude that the qualified immunity defense does not warrant bifurcation under the facts presented here. . . . [T]he Court agrees with *Elrod* that qualified immunity does not, in itself, necessarily require the bifurcation of *Monell* claims in all cases. The City takes this argument further by contending that the qualified immunity issue is also distinguishable from the discussion in *Thomas* on other grounds. Unlike in that case, the City has stipulated to pay *Monell* damages if a finder of fact

concludes that the individual defendants violated Mr. Tanner's constitutional rights. . . . In the absence of any argument in the response brief as to why such a result would violate *Thomas,* the Court finds that Mr. Tanner has not demonstrated that he satisfies any of the three *Thomas* elements. Although the City has been largely silent on these issues, it has chosen to focus on the primary concerns of Rule 42(b), the avoidance of prejudice and the parties' convenience. . .As explained more fully below, the Court finds such arguments persuasive under the facts of this case."); ***Almaraz v. Haleas***, 602 F.Supp.2d 920, 925, 926 (N.D. Ill. 2008) ("Plaintiff contends that, even if the City is liable based on the stipulation and a finding of liability against an individual defendant, plaintiff would still want to pursue his *Monell* claim so there is no economy in bifurcating the case. In that circumstance, however, plaintiff would not have a basis for continuing to pursue his *Monell* claim. Plaintiff contends he would still want a finding specifically on his *Monell* claim as a means of preventing future violations by the City. That a liability finding against the City specifically based on *Monell* would be a greater deterrent than a judgment of liability based on the stipulation is a questionable assumption. But even assuming it is a greater deterrent, plaintiff has no right to seek relief preventing future violations. Just as plaintiff would lack standing if he sought injunctive relief, . . . it is inappropriate to allow him to pursue a particular theory solely based on its possible deterrent value when all the actual relief he can be entitled to receive has already been determined. Also, any moral or psychic satisfaction that plaintiff may derive from also showing the City would be liable based on *Monell* is not even a form of relief, . . . let alone relief that plaintiff may continue to seek after all possible compensatory relief has been granted. It is true that plaintiff could be entitled to nominal damages even if he can show no compensatory damages resulting from a violation of his constitutional rights. . . But *Monell* is not proof of a constitutional violation. The constitutional violation alleged by plaintiff is false arrest. If it is proven that Haleas falsely arrested plaintiff, then the City stipulates that it is liable for such violations as well and plaintiff is entitled to appropriate damages for being falsely arrested. *Monell* would only be an alternative means of holding the City liable for the false arrest and would not increase or decrease the damages − nominal or compensatory − that plaintiff is entitled to receive for his injuries."); ***Cruz v. City of Chicago***, No. 08 C 2087, 2008 WL 5244616, at *2, *3 (N.D. Ill. Dec. 16, 2008) ("The spate of bifurcation motions and the willingness of many judges to grant them stems in large part from the recognition that, in many (perhaps most) instances, 'claims of municipal liability require an extensive amount of work on the part of plaintiff's attorneys and experts, and an extraordinary amount of money must be spent in order to prepare and prove them.'. . . In addition, because of state law and the City's frequent practice of offering to stipulate to judgment being entered against it and to pay compensatory damages and reasonable attorneys' fees in the event of a judgment against the individual defendant officer(s) on the plaintiff's constitutional claims, . . . judges in this district have questioned why Section 1983 plaintiffs would 'want or need to proceed any further' after resolution of their claims against the individual officer defendants. . . . On the other side of the ledger, the Court notes that judges in this district have echoed Plaintiffs' concerns about delay of the case and possible prejudice to Plaintiffs from that delay. The Court also recognizes that Plaintiffs have the right to select the claims that they wish to pursue, and that even if pursuing a *Monell* claim may have minimal pecuniary reward, the potential to deter future official misconduct is itself 'a proper object of our system of tort liability.'. . . After

consideration of the arguments of the parties and the pertinent authorities, the Court is persuaded that, on balance, bifurcation of Plaintiffs' *Monell* claim under Rule 42(b) and a stay at least as to 'purely *Monell'* discovery are warranted in the circumstances of this case. . . . Plaintiffs raise concerns about certain aspects of the stipulation that the Court believes merit discussion and clarification. To the extent that the stipulation can be said to suffer from potential vagueness or ambiguity, the Court finds the recent opinion by Judge Hart in *Almaraz* − considering a stipulation offered in support of a motion to bifurcate in another case involving the City and Officer Haleas − to be highly instructive. Both here and in *Almaraz* the stipulations refer to liability findings by 'the finder of fact.' See *Almaraz,* 2008 WL 4868635, at *3. This Court adopts the clarification made by Judge Hart − namely that '[t]he terms of the stipulation will also be applied if an individual is held liable on a motion for summary judgment or any other court procedure not involving a finder of fact .' *Id.* The Court also recognizes the 'exception' noted by Judge Hart for 'liability based on a settlement to which the City is not a party, or a non-court procedure such as arbitration or mediation unless the City agrees to be bound by such proceedings.' *Id.* The Court also notes a discrepancy between the proposed stipulation, which omits any discussion of attorneys' fees, and Defendants' reply brief, which acknowledges up front (at 1) that the City will pay any 'reasonable attorneys' fees' awarded to Plaintiffs. In view of that acknowledgment, the Court directs the City to revise the stipulation to track paragraph 3 of the stipulation in *Almaraz,* which includes the language 'and, to the extent allowed by the Court, reasonable attorneys fees pursuant to 42 U.S.C. § 1988.' *Id.* at *2. Finally, as Judge Hart recently stated, any remaining ambiguities in the document 'would be resolved against the City as the drafter' and 'construed in light of the understanding that the City was attempting to avoid litigating *Monell* issues and instead concede liability if one of its employees is liable.' *Id*."); ***Berardi v. Village of Sauget, Ill***., No. 05-898-CJP, 2008 WL 5221091, at *3 (S.D. Ill Dec. 12, 2008) ("The Court finds the chance for prejudice to the defendants particularly problematic in this case. Confusion of the evidence and the two distinct bases for liability and damages seems unavoidable, where plaintiff intends to present evidence of 12 disputed incidents involving defendant Donahey. Trying the two causes of action together invites the jury to unfairly find defendant Donahey liable due to a virtual tidal wave of evidence of other acts. Plaintiff argues that bifurcation will unfairly prejudice him with respect to the valuation of his damages. Plaintiff fears that if the damages issue is presented to the jury in the Donahey trial, the jury may conclude Donahey is liable to pay any judgment out of his own pocket and the award would be low − which plaintiff asserts cannot be adequately remedied with a jury instruction. That argument is speculative, and plaintiff ignores the equal possibility that the jury will assume Donahey is indemnified in some manner, causing an inflation of any award. The jury's speculation in either direction is not necessarily dependent upon the defendants being tried together. Furthermore, the use of jury instructions to make clear the appropriate parameters of the jury's considerations is preferable and surely more effective than merely trying the two defendants together. With respect to compensatory damages, it appears that Donahey would be indemnified by statute (745 ILCS 10/9-102), but the scope and applicability of the Village's insurance policy is not known to the Court, and may be dependent upon whether there is an award of punitive damages. In any event, the Court does not perceive any unfair prejudice to plaintiff in trying the two defendants separately. Rather, the risk of confusion between the liability of the two defendants

again favors bifurcation.As noted above, questions regarding indemnification and insurance remain. Plaintiff's request for an opportunity to be heard further on how and when the damages will be submitted to the jury is well taken. The parties should raise these issues at the final pretrial conference, if not before then. Neither plaintiff nor the defendants argue that bifurcation would impact their rights under the Seventh Amendment. Because each defendant would still be entitled to trial by jury if there is bifurcation, no one's Seventh Amendment right to trial by jury would be prejudiced. Both causes of action are distinct and fact-specific, and all factual issues will be tried by a jury."); ***Elrod v. City of Chicago***, 2007 WL 3241352, at **1-8 (N.D.Ill. Nov. 1, 2007) ("The issue of whether to bifurcate a *Monell* claim from the discovery and trial of the underlying constitutional tort claim (and the related state law claims) is one that has been addressed by a number of courts in this district. Some judges have exercised their discretion in favor of bifurcating the *Monell* claims from the other claims. . . Other judges have refused to bifurcate *Monell* claims. . . Some of the judges denying motions to bifurcate indicated a willingness to revisit the issue again later or deferred discovery on the *Monell* claims until after the completion of fact discovery on the other claims. . . . Defendants' primary argument is that bifurcation should be ordered because a trial on the *Monell* claims will not be necessary, and therefore, discovery on those claims can be dispensed with. . . . A fundamental issue here is whether the City's proffered Stipulation makes such additional proof, and the related discovery, unnecessary.To start, if Plaintiffs cannot prove that Yerke violated their constitutional rights, their *Monell* claims against the City will fail as a matter of law, and the litigation will be over without the need for a trial on the *Monell* claims. If Plaintiffs prove that Yerke violated their constitutional rights, they are not entitled to recover any *additiona*l compensatory damages from the City because of their *Monell* claims. . . . Here, the City has offered to stipulate to the entry of judgment against it for any compensatory damages awarded against Yerke or any other City employee as a result of a finding of a constitutional violation as alleged by Plaintiffs. . . Thus, if Plaintiffs establish a constitutional injury, the City's Stipulation requires the City to pay any award of compensatory damages without Plaintiffs' proving the *Monell* prerequisites to the City's liability, in other words, without any trial on Plaintiffs' *Monell* claims. The Stipulation is not an admission of liability that the City's policies or practices caused Plaintiffs' injuries; on the contrary, the City denies in its Stipulation that it 'has any "policies, customs or practices" that cause constitutional deprivation' or that 'caused the alleged violations that would give rise to liability under section 1983.'. . However, significantly, the City is not merely waiving Plaintiffs' need to prove certain elements required in a *Monell* claim, it is agreeing to 'entry of judgment against the City for compensatory damages' if the finder of fact finds that 'any City employee violated plaintiffs' constitutional rights as alleged in their Complaints.' . . The City's submission of similar stipulations has been cited as justifying bifurcation orders in several cases. . . . Although Yerke has pleaded the defense of qualified immunity in this case, . . . the likelihood of a defendant prevailing on that defense in the context of an excessive force claim has not been a persuasive argument against bifurcation. . . . In summary, there is no doubt that including the *Monell* claims pleaded by Plaintiffs would add to the length and complexity of the trials of this case. If the *Monell* claims are omitted, the trial of the remaining claims 'is likely to be shorter, and perhaps significantly shorter, than a trial also involving *Monell* claims.'. . To the extent that a successful *Monell* claim serves to ensure payment of the damages to Plaintiffs, that

goal is achieved by the Stipulation. Thus, bifurcation under the condition of the proposed Stipulation would promote the goals of judicial economy, expediency, and convenience. . . . While some courts have considered the potential prejudice to the individual defendant in granting motions to bifurcate, . . . other courts have noted that such prejudice can be cured by limiting instructions. . . . The City's argument could, in theory, apply to virtually every case that involved both individual liability and *Monell* policy claims, because the nature of a *Monell* claim requires evidence that goes beyond the actions of the individual defendant. Generally, the issue of avoiding prejudice at trial is better addressed by application of the Rules of Evidence, rulings in limine, and limiting instructions. This argument is not, in itself, a persuasive reason for bifurcation. . . . Plaintiffs raise one final argument to be considered, namely, that there are non-economic benefits to suing a municipality which may be less likely to occur when a plaintiff pursues only the individual officer in a § 1983 case. Plaintiffs here intend to prove that the City's system for investigating and disciplining shootings is so 'thoroughly broken' that officers can act 'virtually guaranteed of impunity, a climate that encourages the sorts of abuses alleged here.'. . Plaintiffs argue that the goal of deterrence will be lost if they cannot pursue their *Monell* claims against the City, and argue that it is important for them to hold all parties accountable, especially the City. . . There is no doubt that holding municipalities to account for constitutional violations resulting from the municipality's policies, customs or practices is an important goal of § 1983. . . .In its Stipulation here, the City agrees to be liable for any constitutional violation committed by its employees, even without proof that the violation is the result of a policy, custom or practice. Plaintiffs argue that more than mere monetary liability is necessary to deter unconstitutional acts that have their root in the City's policies, customs and practices. Several courts have opined that a judgment against a police officer (even one paid for by the municipality) may be less likely to prompt the municipality to act to prevent future violations than a judgment naming the municipality itself as responsible based on its policies and customs. . . Other courts conclude that an obligation to pay the judgment is sufficient deterrent. . . It is important to remember that bifurcation does not mean dismissal of the *Monell* claims. Plaintiffs retain the right to discover and try their *Monell* claims. Bifurcation in this case means structuring the process to facilitate a more economical and efficient process of discovering the merits of the underlying § 1983 claim, at the conclusion of which the parties will have the opportunity to consider possible settlement or go to trial on the underlying claim, without having incurred the expense of discovery relating to the *Monell* claims. If settlement is not reached and the trial results in a verdict for one or both of the Plaintiffs, the Plaintiffs reserve their right to discover and try the *Monell* claims. The City's Stipulation does not eliminate that right.").

A lengthy discussion of bifurcation and the court's reasons for denying it are set out in ***Cadiz v. Kruger***, 2007 WL 4293976, at *1, *2, **5-11 (N.D. Ill. Nov. 29, 2007) ("In this case, plaintiff asserts a direct Section 1983 claim against the City under *Monell*, alleging that the defendant officers' unlawful search and seizure and use of excessive force were caused, in part, by various customs, policies and practices of the City (Count III). The City has filed a motion to bifurcate the *Monell* claim from the rest of the case, and to stay discovery and trial of the *Monell* claim (doc. # 78). By this motion, the City seeks to put completely on hold the discovery and adjudication of the *Monell* claim until resolution of the Section 1983 claims against the individual officers . . . In fact,

the City's motion seeks far more than this. The City's goal in filing this motion is to prevent any merits adjudication of the *Monell* claim, whatever the outcome of the Section 1983 claims against the individual defendants. The City argues that if plaintiff does not establish Section 1983 liability against the officers, then there can be no *Monell* claim . . . , a proposition that is well settled. . . The City further suggests that even if plaintiff does establish Section 1983 liability against the officers, trial of the *Monell* claim will be unnecessary (and thus should not proceed) because it can provide plaintiff with no additional compensatory damages . . . . The City's motion here is not novel, but rather is one that the City has made (under various labels) in a number of cases within this district during the past several years. As each side has pointed out . . . , there is no shortage of authority within this district both granting and denying motions by the City to bifurcate *Monell* claims. *See also Elrod v. City of Chicago*, 06 C 2505 & 07 C 203, 2007 WL 3241352, * 1 and nn. 2-3 (N.D.Ill. Nov. 1, 2007) (collecting cases). While (as we discuss below) some of these decisions reflect certain philosophical views about the value of *Monell* claims, these decisions in the main reflect a case-specific assessment of the benefits and detriments of bifurcation. That much is evident from the fact that the same judges have both granted and denied requests by the City of Chicago to bifurcate the discovery and/or trial of *Monell* claims from other claims. . . .In this case, the City argues that placing the discovery and trial of the *Monell* claim on hold will advance the interests of all the parties and of the judicial system because: (1) the City will be protected from 'potentially unnecessary litigation expenses'; (2) the individual defendants will be protected from 'undue prejudice'; (3) the plaintiff's interest in 'expediting trial of his constitutional claims' against the individual defendants will be protected, 'without foreclosing unnecessarily the opportunity to establish the City's liability on the *Monell* claims'; and (4) the Court's interest will be served by promoting judicial economy . . . We examine each of these arguments in turn. . . . . [A] stay of *Monell* discovery will achieve cost savings only if one assumes that the parties are never required to go back and conduct *Monell* discovery at some later date. In a case where *Monell* discovery would overwhelm an otherwise small case, it might be prudent to indulge that assumption because, if the assumption proved correct, the benefits of deferring that discovery would be substantial. But, this is not such a case. Discovery in this case will be substantial with or without discovery into the *Monell* claim. And, if the *Monell* claim is ultimately addressed on the merits, the City's proposal to defer discovery and trial of the *Monell* claim until after the individual claims are decided would create additional costs and inefficiencies (which we discuss below) without achieving any offsetting benefit. Thus, we read the City's argument to be that the benefits of deferring *Monell* discovery would not be speculative, because the *Monell* claim never will be addressed on the merits. . . Accepting that proposition would require that we make one of two other assumptions. We could assume that plaintiff will fail to establish a Section 1983 claim against one or more officer defendants. The City's motion does not speak at all to the merits of the individual Section 1983 claim or explain why we should predict the failure of plaintiff's individual claims, and thus we have no reason to conclude that plaintiff's individual Section 1983 claims will fail. . . Failing that assumption, we would have to assume that even if plaintiff succeeds on the his individual Section 1983 claims, the *Monell* claim will never be allowed to proceed because it can add no compensatory relief to that victory. As we explain below, that is not an assumption we are willing to make. To summarize, we are not persuaded that, given the overall scope of the case, the burden

and cost of *Monell* discovery is as great as the City urges; or that the benefits to be achieved by deferring *Monell* discovery are as certain as the City suggests; or that, on the facts of this case, those benefits would significantly outweigh the inefficiencies that would result from pursuing phased discovery. We therefore do not find that the City's understandable desire to defer, and potentially avoid, the cost of *Monell* discovery weighs heavily in favor of the bifurcation that the City seeks here. . . . There are circumstances in which bifurcation of the trial of individual and *Monell* claims is appropriate. But, at this stage, we cannot tell if this is such a case. *Monell* discovery has not yet been fully produced. Thus, 'neither the parties nor the Court has the least idea what evidence actually would be offered at trial on the *Monell* claim or just how prejudicial that evidence might actually be to the officers.' . . . Without that information, the Court cannot evaluate the extent of prejudice that might be created by a unitary trial, or the effectiveness of measures short of bifurcation, or whether the threat of unfair prejudice outweighs the inefficiencies of proceeding in two trials (which, as we discuss below, would be substantial under the City's bifurcation proposal). For these reasons, we conclude that the claim of unfair prejudice to the individual defendants does not weigh in favor of the City's motion for bifurcation. . . . Plaintiff had the choice of pleading only individual claims, or to additionally plead a *Monell* claim. Plaintiff opted for the latter course, thus making a choice that many plaintiffs eschew. Many (indeed, in our observation, most) plaintiffs plead excessive force or other claims of alleged police misconduct without adding *Monell* claims. That is no doubt because litigating a *Monell* claim imposes burdens on a plaintiff as well as on the City. By being prepared to litigate the *Monell* claim vigorously (including by expending the resources to retain experts on the *Monell* claim), plaintiff has signaled that she believes the *Monell* claim is important to her case. If some delay in the commencement of trial were to result from the presence of a *Monell* claim, that is a detriment that plaintiff apparently is prepared to endure in order to have the chance to prove her *Monell* claim. Thus, while in some cases there may be good and compelling reasons for bifurcating *Monell* and non-*Monell* claims, protecting the interests of a plaintiff who wishes to simultaneously pursue both is not one of them. . . . The City urges that all proceedings on the *Monell* claim be stayed until after resolution of the Section 1983 claims against the individual defendants. Under the City's proposal, the *Monell* claim would not be ready for trial (if it survived the summary judgment motion that the City views as inevitable) at the time the individual claims go to trial. As a result, if plaintiff were to prevail on one or more of those claims at trial, then the trial of the *Monell* claim could not commence before the same jury. Rather, we would have to restart the discovery process; subject certain witnesses who already were deposed on the individual claims to an additional deposition on the *Monell* claim; go through summary judgment on the *Monell* claim; and then, if the *Monell* claim goes to trial, empanel an entirely new jury to hear it. The second jury will not have heard the underlying evidence concerning the individual claims. We envision many disputes about how much evidence from the first trial may be rehashed before the new jury, with the result that there likely will be at least some repetition of evidence that would have been unnecessary − even with a bifurcated trial − if both phases had occurred before the same jury. None of this would advance the goals of efficiency and judicial economy. Thus, on the record before the Court at this time, we conclude that these considerations do not weigh in favor of the City's bifurcation proposal. . . . Finally, we turn to the proposition that lies at the heart of the City's motion, which we have identified but not

yet fully addressed: the proposition that plaintiff's *Monell* claim should never be addressed on the merits, even if plaintiff establishes her Section 1983 claims against the individual officers. We have no doubt that this is the true goal of the City's motion, as the City admitted before even filing the motion . . . . The City states that it has a statutory and contractual obligation to indemnify the defendant officers for any judgment against them, because there is no dispute that they were acting within the scope of their employment during their encounter with Michael Cadiz . . . The statutory obligation arises from 745 ILCS 10/9-102, which authorizes a municipality to pay tort judgments of compensatory damages, attorneys' fees and costs against its public officials for acts within the scope of their employment. . . The City does not identify the source of its contractual obligation to indemnify, but we presume it is based on the collective bargaining agreement. The City argues that in light of its obligation to pay a judgment against the officer defendants under Section 1983 , proceeding thereafter on a *Monell* claim would be pointless because plaintiff cannot recover any additional compensatory damages even if she prevailed against the City on that claim. . . . That is where the City's analysis ends. The City does not say that its obligation to pay a judgment against the officer defendants renders the *Monell* claim moot, thereby eliminating any case or controversy. Nor does the City argue that having achieved a monetary award on the individual Section 1983 claims, plaintiff has no further legal interest in the *Monell* claim and thus lacks standing to pursue it. And, indeed, we do not believe such an argument would have merit. While success in establishing a constitutional claim against the officers is essential to establishing a *Monell* claim, the Supreme Court has made clear that this alone is not enough to prove a *Monell* claim. A municipality's liability under *Monell* is not merely derivative of the liability of its employees, but rather stems from the municipality's maintenance of policies, practices or customs that contribute to the unconstitutional conduct of its employees. . . A *Monell* claim thus seeks not merely to vindicate the right of a plaintiff to be free from unconstitutional conduct by municipal employees, but rather to vindicate the independent right of a plaintiff to be free of municipal policies, practices or customs that foster such conduct. When (as here) a plaintiff claims the violation of a constitutional right as a result of a municipality's policies, practices or customs, that claim creates a separate case or controversy from the claims against the individual officers that the plaintiff has standing to pursue. That separate constitutional claim is not legally extinguished merely because the plaintiff obtains full economic recovery through the claim against the individual officers. . . . A plaintiff who succeeds on a *Monell* claim may not recover compensatory damages in excess of those awarded on the individual Section 1983 claims, . . . but we see no bar to the plaintiff recovering nominal damages ($1.00) since no additional compensatory damages cannot be proven. . . . Unable to argue that plaintiff's *Monell* claim would be legally mooted out by the City's payment of a judgment against the officer defendants, the City's argument boils down to one of expedience: that neither the City nor the judicial system should have to spend the time or resources litigating *Monell* claims that have so little economic value. Implicit in that argument is the proposition that there are no non-economic benefits to *Monell* claims that should weigh into the equation. The case law reflects disagreement about the validity of that proposition. Some courts have pointed out that successful *Monell* actions may have the benefit of deterring future official misconduct, which is 'a proper object of our system of tort liability.' . . . A recent decision out of this district has rejected this deterrence rationale. In *Parker,* the court expressed doubt that the

Amato court 'would have contended that an award of $1.00 would alert any city or its citizenry to the issue of police misconduct.' . . . We decline to speculate as to what effect, if any, a finding that the City maintained unconstitutional policies, practices or customs would have on City policymakers. We understand the point of view, expressed in *Parker*, that payment of large awards on Section 1983 judgments against individual officers should provide ample motivation to identify and change any policies, practices or customs that may contribute to unconstitutional conduct and damage awards (or settlements) that create a strain on City coffers. On the other hand, we also understand how one might reasonably conclude, as did the *Amato* court, that a jury verdict that police misconduct stemmed from unconstitutional municipal policies, practices or customs could provide a greater incentive for change than the payment of a damages award that the City then could chalk up to aberrational conduct by a rogue officer. We have no evidence one way or the other about the 'incentive' value of payment of money damages as opposed to findings of *Monell* liability in leading to changes in any unconstitutional municipal policies. It is difficult to envision the real-life laboratory setting in which that question could be studied and answered in any reliable way. To the extent that *Monell* claims might have a salutary effect in changing municipal policies that are unconstitutional, the City's request for bifurcation and ultimate extinguishment of *Monell* claims would render that possible benefit a dead letter. Accepting the City's request for bifurcation would ignore the fact that a plaintiff who succeeds in proving unconstitutional policies, practices or customs has achieved a significant victory 'not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest importance ...' *City of Riverside v. Rivera*, 477 U.S. 561, 577 (1986). On the other hand, there also may be benefits that accrue to the City from defeating a *Monell* claim, and thus vindicating the constitutionality of its polices, practices and customs. If accepted, the City's bifurcation strategy would allow it to avoid the merits of virtually any *Monell* claim alleging police misconduct. . . One may argue that this is not significantly different than the City avoiding a *Monell* claim by settling the case. However, we see a major difference. A settlement is a mutual agreement through which a plaintiff accepts a sum of money to forego litigating the *Monell* claim, but also to avoid the risk of losing that claim after expending substantial resources in the effort to prove it. In some cases, there may be a serious question about scope of employment (unlike here) and thus about the City's obligation to indemnify. That, in turn, could create a serious question about the collectability of any judgment and fee award that a plaintiff may obtain. In that circumstance, a plaintiff may be willing to agree to drop a *Monell* claim in exchange for a stipulation by the City to pay a judgment against the officer defendants, trading the possibility of succeeding on a *Monell* claim (and the risk of losing that claim after spending substantial time and money on it) for the certainty of collectability if the plaintiff succeeds on the individual claims. . . . By contrast, the City proposal would foist upon an unwilling plaintiff the elimination of her *Monell* claim. We do not believe that the City should be allowed to deprive a plaintiff of a merits determination of a *Monell* claim by the expedient of agreeing to pay a judgment against its officers that the City may be statutorily or contractually obligated to pay anyway. . . . For the foregoing reasons, we deny defendant's motion to bifurcate Section 1983 claims and stay discovery and trial on those claims (doc. # 78). In so doing, we express no view as to the merits of plaintiff's *Monell* claim, and do not rule on the scope of the *Monell* discovery that plaintiff may obtain. We simply hold that: (1) plaintiff has a right to pursue

his *Monell* claim notwithstanding the City's willingness to pay any judgment against the officers on the individual Section 1983 claims, and (2) the City has not demonstrated that the bifurcation it seeks is warranted on the facts of this case. Upon a more complete record, we later can revisit the question of whether bifurcation of the trial of the individual and *Monell* claims (in a proceeding before the same jury) is appropriate.").

See also ***Kuri v. Folino***, No. 13-CV-01653, 2019 WL 4201567, at *19–20 (N.D. Ill. Sept. 5, 2019) ("Early on in the litigation, one of the previously assigned judges granted an agreed motion to bifurcate Kuri's claims against the City and stay discovery and trial pending resolution of the claims against the individual defendants. . . Kuri argues that he should now be allowed to pursue his 'independent, non-derivative' claims against the City under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). . .The City opposes the motion and counters that 'there is no remaining case or controversy.'. . The City is correct. Kuri cannot recover anything from the City above what he is able to recover against Folino and McDermott. . . Also, an Illinois statute requires municipalities to indemnify their employees for compensatory damages awarded in tort judgments. . . The Seventh Circuit has held that, under this statute, a plaintiff may seek a judgment against a municipality requiring it to indemnify the officer. *Wilson v. City of Chicago*, 120 F.3d 681, 684–85 (7th Cir. 1997). So, there is no question that the City will pay the compensatory damages award if it is affirmed. In other words, Kuri is virtually certain to collect his compensatory damages award of $4 million against Folino and McDermott (and, eventually, the attorneys' fees) pending any appeals. Indeed, the Court has already entered judgment on the compensatory damages award against the City for those claims on which Kuri was successful. . . Since Kuri is not able to collect anything in addition to that, regardless of any *Monell* claims, and since he has not brought claims against the City for injunctive relief, there is no live case or controversy against the City on which Kuri can move forward. The Court has no subject-matter jurisdiction over Kuri's *Monell* claims. The motion is denied, though it is without prejudice if the City somehow disclaims payment on the compensatory damages award."); ***Schoolcraft v. City of New York***, 133 F.Supp.3d 563, 571 (S.D.N.Y. 2015) ("City Defendants request bifurcation in the interests of efficiency and to avoid prejudice, which they contend would result if a jury were presented extensive evidence of prior bad conduct. . . Plaintiff convincingly argues that there will be significant overlap between the evidence he will offer in support of his *Monell* claims and in support of the other claims that survived summary judgment. . . Consequently, efficiency considerations do not favor bifurcation. Moreover, the substantial prejudice which City Defendants contend will result from permitting the jury to hear evidence regarding quotas or the blue wall of silence, . . . will be adequately mitigated through the ubiquitous and efficacious means of limiting instructions, jury charges and limiting instructions. Consequently, the motion to bifurcate is denied."); ***Estate of McIntosh v. City of Chicago***, No. 15 C 1920, 2015 WL 5164080, at *7-10 (N.D. Ill. Sept. 2, 2015) ("The underlying claims are, in part, premised on the actions of the individual defendants, but are also based on the presence of policies, practices and customs which include 'the failure to properly train and supervise Chicago police officers with regards to discharging their weapons at civilians, particularly at young Black men.'. . Plaintiff's constitutional claim alleging unconstitutional seizure and failure to intervene and eluding to

excessive force and due process violations, although somewhat inartfully pled, . . .refers to various constitutional violations that factually overlap with, but may still be distinct from, the *Monell* allegations. The mere presence of factual overlap, however, does not mandate that the verdict on liability becomes a necessary predicate, dictating the verdict of Plaintiff's *Monell* claim. At this early stage of litigation, prior to depositions of any individual defendants and the production of policy and training documents, it is premature to unequivocally state that there can be no municipal liability in the absence of underlying individual liability. Based on the parties' current positions, however, it is plausible to understand a situation in which differing verdicts of these claims would be compatible–namely based on the Defendants' assertion of immunity. Individual public employees are entitled, where applicable, to the defense of qualified immunity, . . . but municipalities are not. . . Indeed, all Defendants have answered and asserted various forms of immunity from liability–qualified immunity and state-law immunity. . . As such, bifurcation may not avoid a second trial if the officers are immune, and that second trial (of the *Monell* claim) would likely duplicate the first trial against the individual officers. . . In addition, because of the early stage at which Defendants brought this motion, it is premature to speculate on the full breadth of discovery necessary for the constitutional violation and *Monell* claims or on the complexity of a trial over these claims. The factual overlap already apparent between them, however, warrants preservation of duplicating resources by a mutual discovery process related to these claims prior to trial. Indeed, rather than simplifying the discovery process over the course of this litigation, bifurcation at this stage may add unnecessary complexity and confusion. Without reference to any specific concern in Plaintiff's discovery requests, Defendants generally argue that the discovery process will be 'colossal', unduly burdensome, and 'will encompass a significant period of time predating the incident underlying this lawsuit and will involve the systemic policies and practices of the City during the relevant time period, including the Chicago Police Department's Bureau of Internal Affairs, the Personnel Division, the Police Board, the Independent Police Review Authority, and the City Council oversight activity of these municipal entities.'. . Plaintiff responds that *Monell* discovery will be 'straight forward and manageable' and 'categorized and finite' since the requested documents have likely been produced in other litigations and 'are compiled by the [I.P.R.A.] within their investigation files into each "officer involved shooting."'. . Keeping Plaintiff's representations in mind, a denial of bifurcation at this point surely requires Defendants to disclose documents and likely submit to depositions related to various policies and procedures that were maintained and followed at and around the time of McIntosh's shooting. To the extent, however, that Defendants find Plaintiff's *Monell* discovery requests overly broad or imposing undue burden and expense, the parties can seek assistance from the Court to tailor the requests as necessary after making independent good faith attempts to do so. . . Accordingly, the early stage of litigation makes a clear determination of judicial economy favoring bifurcation in this case speculative at best and when weighed against the fact that the plaintiff is the master of her complaint, Defendants speculative assertions of the potentially high costs associated with bringing a claim for municipal liability do not sway the Court's consideration. . . . The Court recognizes, however, that factual overlap exists between Plaintiff's *Monell* claim and the Defendant Officers' individual liability based on unconstitutional seizure, use of deadly force, and failure to intervene. The Court further recognizes that progression of discovery will define the factual contours in this

case and may indicate that a liability determination against Defendant Officers is in fact a necessary predicate for establishing the *Monell* claim. Plaintiff's *Monell* claim is ultimately based on the injury resulting from McIntosh's shooting and death–a single incident that occurred between identified parties, namely, McIntosh and Defendant Officers. Because *Monell* claims carry a heavy burden of discovery and proof, the Court finds that while bifurcation of trial and stay in discovery of the *Monell* claim is not warranted at this early stage, a sequential assignment in the discovery process is. In particular, because a single incident between identifiable parties underlies this case, prioritization of the discovery surrounding that incident is beneficial. Accordingly, the Court directs the parties to defer discovery on the *Monell* claim until after the completion of fact discovery on the claims against Defendant Officers. . .While not foreclosing the opportunity for Plaintiff to further develop her case against the individual Defendant Officers through *Monell* discovery relating to the Defendant City's policies, practices and procedures, this sequential movement of the discovery process will prioritize the claims of a smaller and more manageable dispute between the parties. To the extent that dispute encourages or results in a more narrow focus to the claims against Defendants or even potentially disposes of any portion of the case by agreement, the purposes of Rule 42(b) will have been served. . . For the forgoing reasons, the Court grants in part and denies in part Defendant Officers' partial motion to dismiss. The Court further denies Defendant City's motion to bifurcate Plaintiff's *Monell* claims and stay discovery and trial on those claims pending resolution of the claims against Defendant Officers, without prejudice to a renewed motion for bifurcation of trial after discovery is completed."); ***Costantino v. City of Atl. City***, No. CIV. 13-6667 RBK/JS, 2015 WL 1609693, at *10-11 (D.N.J. Apr. 10, 2015) ("To the extent Atlantic City wants to bifurcate the case the proposal is also rejected. It makes no sense to first try the case against the defendant police officers and then only if a liability verdict is returned does plaintiff get additional *Monell* discovery. This would substantially delay the ultimate resolution of the case and would require duplicative discovery. In fact, the Court previously denied a request to bifurcate a similar case. In *D'Arrigo v. Gloucester City,* C.A. No. 04–5967(JBS), 2007 WL 4440222 (D.N.J. Dec. 17, 2007), the plaintiff brought a § 1983 excessive force case against the Gloucester City Municipal Police Department and individual police officers. Before trial Gloucester City moved to bifurcate the *Monell* claim from the case against the individual defendants Gloucester City argued prejudice would result from a joint trial. It also argued efficacy and judicial economy would result from bifurcation. Like this case the Court soundly rejected the proposal. . . . It is not unusual in § 1983 cases for plaintiffs to pursue claims against individual defendants while at the same time pursuing a *Monell* claim against a municipality. This case presents no unusual or special circumstances that justify bifurcation. If [the] Court granted bifurcation in this case, it would in essence be agreeing that as a matter of routine bifurcation should be granted in cases of this type. This practice is not permitted. . . .The Court recognizes that there are cases around the country that grant bifurcation of *Monell* claims. . . This is not surprising because '[s]ince the decision whether to bifurcate requires a fact-intensive analysis left to the sound discretion of the court, based on the facts in a specific case, different courts are bound to rule that bifurcation is appropriate.'. . Nevertheless, substantial authority exists to deny bifurcation motions. . . Notably, Atlantic City has not cited a single New Jersey District Court police § 1983 case where bifurcation was granted, including the scores of cases where it was a named defendant. The Court

is not surprised by the fact that there is no applicable New Jersey precedent and not one Atlantic City case where bifurcation was ordered. The Court has no intention of breaking this streak."); ***Bell v. City of Chicago***, No. 09 C 4537, 2010 WL 432310, at *3, *4 (N.D. Ill. Feb. 3, 2010) ("In *Thomas*, the Seventh Circuit has provided guidance relating to bifurcation, but the City has argued that *Thomas* may be 'factually and legally distinguishable' from *Heller* and that '[o]n its face, *Thomas* seems at odds with *Heller....'* (Reply 4). . . . The City has not explained why a verdict in favor of Parker and against the City would be an inconsistent verdict in this case, as contemplated by *Thomas.* In addition, we note that although the City cites several district court decisions in which the courts allowed bifurcation, (Mot.5-6), such rulings were made before the Seventh Circuit provided relevant guidance in *Thomas.* Further, all of the time and effort that the City proposes will be saved in discovery, trial preparations, and trial time is purely speculative. If we were to follow the City's proposed schedule, there might be a need for two rounds of discovery, two trials to prepare for, and two trials that would include much redundant evidence. Such a result would excessively prolong this case and would not serve judicial economy. Bell also points out that there are over a dozen similar cases brought against Parker and the City pending in the Northern District of Illinois, and the same law firms represent Defendants in the cases. Bell also contends, and the City concedes, that *Monell* discovery is already underway in at least one of the other cases brought against Parker in which the judge had denied a similar request to stay discovery on the *Monell* issues. ("ns.5); (Reply 6). The City should therefore already have much of the necessary discovery for this case. Thus, judicial economy can be served by conducting *Monell* discovery along with discovery relating to the individual liability claim. To allow this and other cases to proceed to trial on the individual liability claim only to potentially begin anew with the municipal liability claim would not serve the efficient administration of the judicial system. In regards to the City's argument that Parker will be somehow prejudiced by being tried with the City, there is insufficient evidence to show that such prejudice will result or that even if there was potential prejudice that limiting instructions could not cure. In addition, the City mentions a possibility of policies and customs being raised that are not connected to Parker, but the City's concerns as to prejudice are purely speculative. The efficiency factor favors a single trial in this case. Therefore, after considering all of the circumstances in this particular case, we deny the motion to bifurcate."); ***Bradley v. City of Chicago***, No. 09 C 4538, 2010 WL 432313 (N.D. Ill. Feb. 3, 2010) (same as *Bell*); ***Shannon v. Koehler***, 673 F.Supp.2d 758, 770 (N.D. Iowa 2009) (reversing Federal Magistrate Judge's order to bifurcate where court found that separate trials would not increase efficiency and would waste judicial resources); ***Duggan v. The Village of New Albany***, No. 2:08-cv-814, 2009 WL 2132622, * 3, *4 (S.D. Ohio July 10, 2009) (discussing cases and denying defendants' motion to bifurcate and stay discovery against the Village); ***Wilson v. City of Chicago***, No. 07 C 1682, 2008 WL 4874148, at **1-3 (N.D. Ill. July 24, 2008) ("It is now common practice for the City to ask − and for Courts to allow − a delay in the assessment of the challenged municipal policy until alter the plaintiff proves the officers inflicted a constitutional injury. [citing cases] Here, however, the City goes well beyond asking for a mere delay in the examination of its training policies. The City has agreed to the entry of judgment against it for compensatory damages and attorney fees if the Court finds that the responding officers violated Wilson's constitutional rights. . . This stipulation − coupled with the motion to bifurcate − will

short circuit any discovery into the City's training procedures regarding mentally ill detainees. The purpose of bifurcation, however, is not to spare the City the embarrassment of litigating potential training deficiencies. The City argues it has nothing to hide, and simply seeks bifurcation in order to avoid the overwhelming burden associated with *Monell* discovery. The City's concerns, however, are misguided. . . . Wilson's Complaint does not present a run-of-the-mill failure to train allegation. Indeed, Wilson alleges that the City is deficient in a very specific area: training police to deal with mentally ill persons. The Court is confident that Wilson's *Monell* claim is narrowly tailored enough that discovery on these issues will not be a significant burden. Wilson's son was diagnosed with schizophrenia and died during an altercation with the police. Wilson now seeks to uncover the details of how the City trains its officers to interact with people like her son. There is no reason to believe Wilson's *Monell* discovery will be a fishing expedition to unearth hidden claims in order to hit the § 1983 jackpot. Wilson asserts an additional reason why consideration of her claim should not be delayed via bifurcation: a successful *Monell* claim can expose detrimental municipal polices, thus providing an important social benefit. In response, the City contends Wilson's *Monell* claim − even if successful − would have little to no meaningful impact because she only seeks monetary damages. The City's argument is unpersuasive. . . . Simply put, the fact that a plaintiff seeks monetary relief will not preclude a successful *Monell* claim from conferring 'non-economic benefits' such as deterring police misconduct or shining the light on detrimental municipal policies. The City makes one last argument: the Court should exercise judicial restraint and allow the legislative branch to effectuate change in municipal policy, not individual litigants. In particular, the City asserts Section 1983 does not grant courts 'a roving commission to root out and correct whatever municipal transgression they might discover' and that the Court's only task is 'to adjudicate discrete disputes.' . . The Court appreciates the City's concerns. But, a separation of powers argument has no applicability to this case. Lynette Wilson's mentally ill son was killed during an incident with the police. The three responding officers admit they had not been trained to handle mentally ill detainees . . . The Court did not 'rove' the City looking for a plaintiff to challenge police training procedures. Wilson came to the Court with a specific grievance regarding a specific policy in a discrete area; and where a plaintiff brings such a claim − and the allegations are narrowly tailored and would not cause an undue burden during discovery − the Court will not allow bifurcation to be used as a tool for obfuscation. . . . The Court finds that the prejudice, efficiency and economy rationales do not weigh in favor of bifurcation. The City is correct, in most cases, *Monell* claims add substantial time and expense. But, there is no rule or case law requiring bifurcation of all *Monell* claims. Thus, the decision is left to the sound discretion of the Court. . . Here, Wilson's *Monell* claim is narrowly tailored and aimed at an exceedingly specific area of police procedure. If the City has no desire to discuss or litigate its policies in this area, then the proper tack is to pursue settlement, not move for bifurcation."); ***McCoy v. City of New York***, No. CV 07-4143(RJD)(JO), 2008 WL 3884388, at **1-3 (E.D.N.Y. Aug. 13, 2008) ("Courts often assess the factors of convenience and judicial economy together. In cases involving claims against both individual defendants and municipal entities, the argument routinely advanced for bifurcation is that separate trials 'could lead to an earlier and less costly disposition.'. . The basis for that argument is that finding that the plaintiff failed to establish liability on the part of any municipal employee would normally preclude a finding of liability against the municipality itself under

Monell; as a result, a bifurcated trial of the claims against the individual defendants might, depending on the outcome, dispose of the entire case. . . This argument in favor of bifurcation glosses over an important fact: 'under *Monell* municipal liability for constitutional injuries may be found to exist even in the absence of individual liability....' *Barrett v. Orange County Human Rights Comm'n*, 194 F.3d 341, 350 (2d Cir.1999). Such an outcome can be the result of a jury's determination that the individual defendants violated the plaintiff's rights but enjoy qualified immunity , or of a finding that the plaintiff's injuries are not solely attributable to the actions of the named individual defendants. . . Therefore it is simply not an inevitability that a bifurcated trial will promote judicial economy or convenience, even if the individual defendants escape liability in the first trial. Courts that grant bifurcation to avoid prejudice have expressed a concern about the potential unfairness to individual defendants in a joint trial that includes evidence relevant only to the *Monell* claims. . . .The defendants base their motion for bifurcation on 'optimis[m]' that the individual named defendants will prevail at the summary judgment stage, and the municipal claims will therefore be dismissed. . . To the extent the defendants therefore implicitly argue that bifurcation is warranted for purposes of convenience and judicial economy, I disagree for two reasons. First, the individual defendants have asserted a qualified immunity defense. . . .I find more persuasive the decisions of courts that deny bifurcation where an individual defendant asserts a defense of qualified immunity that, if successful, would not obviate trial of the *Monell* claim. . . . Second − although of lesser persuasive value in my view − it is unclear from the face of the Complaint whether the injuries that McCoy alleges are solely attributable to the actions of the named individual defendants. . . . There is thus a real possibility that bifurcation will not obviate the need for a trial of McCoy's Monell claims even if the individual defendants avoid liability. . . If the defendants seek bifurcation to avoid trial prejudice to the named individual officers, they have not said so or explained the basis for any such concern. . . . Should that circumstance change after discovery is completed, the defendants will of course be free to renew their motion on the basis of such new information. In short, the defendants have offered no convincing argument that the bifurcation they seek will advance the interests of the parties' convenience, judicial economy, or the avoidance of unfair prejudice to any party. I therefore deny the motion for bifurcation. I further deny the motion to stay discovery related to the *Monell* claims. I would reach that result even if I were to grant bifurcation, so as to preserve the ability of the assigned district judge to conduct both phases of a bifurcated trial before the same jury."); ***Jeanty v. County of Orange***, 379 F.Supp.2d 533, 549, 550 (S.D.N.Y. 2005) ("Defendants contend that severance of the excessive force claims against the individual defendants from the policy and practice claims against the County is warranted because plaintiff's excessive force claim 'involve[s] different witnesses, different factual circumstances, different claimed uses of force, different claimed injuries, different correctional officer defendants involved, and different claimed incident dates' from the alleged excessive force claims which would be presented by other witnesses to establish plaintiff's *Monell* claim. . . Defendants further maintain that failure to sever the claims would result in prejudice to the individual defendants because the proposed witnesses on the *Monell* claim will be testifying about incidents of alleged excessive force in which the individual defendants had no part. . . Additionally, defendants acknowledge that plaintiff has alleged claims based upon the same general facts and theories of law, but contend that this alone is insufficient to require the

claims against the individual defendants and the County to be tried together. . . Plaintiff, however, contends that severing his claims against the individual defendants from his claims against the County, or holding separate trials, 'would waste judicial resources and further delay resolution of plaintiff's claims.' . . Although we agree with defendants that the individual defendants may be prejudiced [footnote omitted] by the testimony of witnesses in support of the *Monell* claim, we believe any such prejudice could be cured by 'carefully crafted' limiting instructions. . . .[S]everance of the claims or separate trials would not further convenience or be conducive to 'expedition and economy;' rather, it would require the Court to try two cases that are essentially the same except for additional evidence which might be presented in support of plaintiff's *Monell* claim. Such a result, would clearly not further Rule 42(b)'s goals of efficiency and convenience."); ***Rosa v. Town of East Hartford,*** No. 3:00CV1367 ("HN)**,** 2005 WL 752206, at *4, *5 (D.Conn. Mar. 31, 2005) (not reported) ("Defendants move to bifurcate the *Monell* claim from Rosa's other claims on the grounds that separate trials would avoid prejudice to the defendant officers and ensure judicial efficiency. Rosa asserts that bifurcation is not necessary and will hamper his ability to present an effective case. The court agrees. Under Fed.R.Civ.P. 42(b), district courts have broad discretion to try issues and claims separately in order to 'further convenience, avoid prejudice, or promote efficiency.' . . In particular, 'bifurcation may be appropriate where, for example, the litigation of the first issue might eliminate the need to litigate the second issue ... or where one party will be prejudiced by evidence presented against another party[.]' . . Even though bifurcation is not unusual, it nonetheless remains the exception rather than the rule. . . In the present case, bifurcation is not necessary either to avoid prejudice to the defendants or to further convenience. Defendants' concern that evidence Rosa will introduce in support of his *Monell* claim will prejudice the individual officers is exaggerated. Any spillover prejudice to the individual officers that may be caused by the admission of Rule 404(b) evidence to establish the *Monell* claim could be cured by limiting instructions. Moreover, contrary to defendants' assertion, the presence of the *Monell* claim in this action does not create an order of proof that favors bifurcation. That is, the mere fact that the jury might return a verdict on Rosa's § 1983 claim in favor of the police officers and thereby avoid its consideration of the *Monell* claim does not compel bifurcation. There are far less burdensome ways to deal with that situation, including use of a special verdict form, a well-adapted jury charge, and carefully crafted limiting instructions. Contrary to defendants' assertions, separate trials would not be efficient and would inconvenience the court, the jury, and the plaintiff. Accordingly, defendants' motion to bifurcate is denied."); ***Green v. Baca***, 226 F.R.D. 624, 633 (C.D. Cal. 2005) ("As plaintiff notes, cases in which courts have bifurcated whether there has been an underlying constitutional violation from *Monell* liability for trial have all involved claims against individual officers as well as against the municipality. Bifurcation is appropriate in such a situation to protect the individual officer defendants from the prejudice that might result if a jury heard evidence regarding the municipal defendant's allegedly unconstitutional policies. . . .Here, where there are no claims against any officers in their individual capacities, . . .such concerns are not present.").

16. Use of Public Reports and Experts to Establish Custom or Policy of Deliberate Indifference

City of Canton addresses only failure to train but most courts have applied the same standard to claims of failure to supervise or discipline. *See, e.g.*, ***Consolo v. George***, 835 F. Supp. 49, 51 n.1 (D. Mass. 1993).

Plaintiffs may be aided in their attempt to establish a policy or custom of inadequate supervision or discipline, tantamount to deliberate indifference, by the existence of reports made pursuant to governmental or public investigations of police misconduct.

In ***Gentile v. County of Suffolk***, 926 F.2d 142 (2d Cir. 1991), plaintiffs alleged police and prosecutorial misconduct involving a cover-up of police actions during the incident involving plaintiffs, as well as malicious prosecution of plaintiffs following the incident. Plaintiffs' claim against the County was based on a custom or pattern of inadequate investigation and discipline of officers involved in incidents of misconduct, which custom or pattern caused the violation of plaintiffs' rights.

The Second Circuit affirmed the jury's verdict against the County and the district court's denial of a j.n.o.v. The court found no error in Judge Weinstein's decision to admit into evidence selected portions of a report by a state investigatory commission concerned with past misconduct of the County Police Department and the District Attorney's Office.

The court noted that under Fed. Rule Evid. 803(8) (C), government investigatory reports are presumed to be admissible and the party opposing the admission of the report has the burden of going forward with "negative factors" that would outweigh the presumption of admissibility. Furthermore, the presumption of admissibility "extends not merely to factual determinations in the narrow sense, but also to conclusions or opinions that are based upon factual investigation." 926 F.2d at 148.

See also ***Ricciuti v. N.Y.C. Transit Authority***, 941 F.2d 119 (2d Cir. 1991) (amended complaint, summarizing three reports relating to arrest practices of Transit Authority, was sufficient to state a claim against the Authority based on a policy or custom of inadequate training and supervision, whether or not reports would be admissible in evidence).

Judge Kearse suggested that the reports relied on by the plaintiffs might avoid any hearsay problem if they were offered, not for the truth of the matters stated therein, but rather for the purpose of proving notice on the part of the Authority of repeated failures to investigate charges of excessive force used by police officers. *Id*. at 123.

See also ***Stucker v. Louisville Metro Government***, No. 23-5214, 2024 WL 2135407, at *12-13 (6th Cir. May 13, 2024) (not published) ("This court may take judicial notice of public records outside the record on appeal. . . And we 'must take judicial notice if a party requests it and

the court is supplied with the necessary information.'. . The DOJ Report may be judicially noticed under FRE 201(b)(2) because its sources 'cannot reasonably be questioned.' Under our authority to take judicial notice and our caselaw determining that such reports may be relevant to proving a policy or custom under a *Monell* claim, *see, e.g.*, *Simpkins v. Boyd Cnty. Fiscal Ct.*, No. 21-5477, 2022 WL 17748619 (6th Cir. Sept. 2, 2022), we take judicial notice of the Report and address it below.The DOJ opened its investigation of the LMPD on April 26, 2021, following the March 13, 2020 shooting of Breonna Taylor. The DOJ's investigation included obtaining from the LMPD information and evidence dating back to 2016, relying on on-site tours and visits, interviews, extensive document review (including internal affairs and incident report filings, among others), and the review of 'thousands of hours of body-worn camera footage.' The DOJ Report was grounded in data that is relevant to this case. One of the investigative focuses of the DOJ Report was 'whether LMPD engages in unlawful search warrant practices,' and the Report 'sought to identify the root causes of any violations.'. . Like the Heintze Report, the DOJ Report found that LMPD routinely failed to complete risk matrix assessments, record warrant executions, wear body cameras or turn body cameras on, and review warrant executions after-the-fact. . . Relevant to this case, the DOJ Report explains: 'As a matter of best practices, LMPD supervisors should—but do not—ensure that probable cause exists before LMPD seeks a search warrant. When probable cause exists, supervisors should—but do not—ensure that the warrant applications that officers draft set out the facts supporting probable cause.'. . In addition to these findings, the DOJ Report contained pages of incident examples and discussion of LMPD's practices. . . The DOJ Report also includes a section titled 'The inadequacies of LMPD's warrant applications are caused by poor supervision and oversight.'. . In its Executive Summary, the Report states: 'Failures of leadership and accountability have allowed unlawful conduct to continue unchecked. Even when city and police leaders announced solutions, they failed to follow through. In LMPD, officer misconduct too often goes unnoticed and unaddressed. At times, LMPD leaders have endorsed and defended unlawful conduct.'. . Ultimately, the Report found that 'LMPD engages in a pattern or practice of seeking search warrants in ways that deprive individuals of their rights under the Fourth Amendment.'. . In sum, the Stuckers have presented evidence raising questions about the LMPD's deliberate indifference through the Heintze Report, Troutman's testimony, and the data and specific facts contained in the 2023 DOJ Report. Because the district court did not have the Report when it previously rejected Plaintiffs' *Monell* claim, we vacate the district court's decision on this issue and remand for the district court to consider in the first instance whether the evidence, including the 2023 DOJ Report, creates a dispute of material fact as to LMPD's deliberate indifference and whether LMPD has met its burden to qualify for 'judgment as a matter of law'. . . . For a *Monell* claim to succeed, the Stuckers must prove both a constitutional violation *and* municipal responsibility. The district court has not yet had an opportunity to consider inadequate training or acquiescence in light of the 2023 DOJ Report and our finding of constitutional violations. We therefore vacate Part E of the district court's order and remand for the district court to address the Stuckers' theories of municipal responsibility in light of this opinion and the record evidence, including the DOJ Report."); ***Stockton v. Milwaukee County***, 44 F.4th 605, 617-18 (7th Cir. 2022) ("Stockton posits Armor and Milwaukee County's failure to maintain adequate medical staffing levels and process sick call slips amounted to a widespread practice that caused MCJ medical

providers to neglect to respond to Madden's October 25, 2016 sick call slip, thus depriving him of constitutionally adequate medical care. To establish deliberate indifference to the purportedly unconstitutional effects of a widespread practice, Stockton must point to other inmates injured by that practice. . . Absent multiple injuries, Stockton cannot supply adequate evidence from which a jury could reasonably find Armor and Milwaukee County would '"conclude that the plainly obvious consequences"' of the practice 'would result in the deprivation of a federally protected right,' as is required to establish deliberate indifference. . . Stockton does not point to evidence that other inmates were similarly harmed and leans, instead, upon Madden's single, isolated experience. Here, Stockton relies almost exclusively upon the Shansky reports. The parties dispute the propriety of relying upon these reports. Although the district court did not rule upon their admissibility, we have repeatedly held such reports are inadmissible hearsay and thus their contents cannot be offered for the truth of the matter asserted. . . Consequently, we cannot look to the Shansky reports as evidence for the truth of what happened to other inmates. Moreover, even were the Shansky reports fully admissible for the truth of the matter asserted (a finding we do not make here), they still do not adequately support a claim for *Monell* liability. True, the Shansky reports portray the MCJ as persistently struggling to maintain adequate medical staffing levels and appropriately respond to inmate sick call slips. Yet the Shansky reports do not connect this purported municipal practice to any inmate injury. The Shansky reports document three deaths between May 2016 and November 2016. Although Shansky notes inadequate medical staffing levels during this period, he does not attribute any of these deaths, or any serious medical injury, to problems with medical staffing or sick call slip processing."); ***Daniel v. Cook County***, 833 F.3d 728, 730, 742-43 (7th Cir. 2016) ("In this appeal we address a specific piece of evidence that has divided the judges of the Northern District of Illinois. In a number of cases, including this one, plaintiffs have asserted that medical care at the Cook County Jail falls below constitutional standards as a matter of official policy, custom, or practice. The evidence question is whether such plaintiffs may use as evidence the 2008 findings from a U.S. Department of Justice investigation of health care at the Jail. The investigation found systemic flaws in the Jail's scheduling, record-keeping, and grievance procedures that produced health care below the minimal requirements of the United States Constitution. If those findings are admissible for the truth of the matters asserted, they go a long way toward meeting a plaintiff's burden of proving an unconstitutional custom, policy, or practice under *Monell v. Department of Social Services*, 436 U.S. 658, 694–95 (1978). The Department of Justice Report is hearsay if used to assert the truth of its contents, and the district court held that the Report was not admissible to prove the truth of its findings. But we conclude it should be admitted under the hearsay exception for civil cases in Federal Rule of Evidence 803(8)(A)(iii) for factual findings from legally authorized investigations. The district court granted summary judgment for defendants because the plaintiff had not offered evidence of an unconstitutional official custom, policy, or practice. We determine that he has offered sufficient evidence on summary judgment, and we therefore reverse and remand. . . . There is a close fit between the factual and legal issues in a *Monell* claim based on a jail or prison's health care failings and this Report. As noted above, a plaintiff cannot ultimately prove a *Monell* claim at trial based on only his own case or even a handful of others. He must show systemic failings that reflect official deliberate indifference to the serious health needs of inmates. That is intended to be a

demanding standard, and it is difficult, time-consuming, and expensive for most private plaintiffs to meet. Yet such systemic failings are exactly what the Department of Justice experts were looking for and found in Cook County. Compared to other forms of evidence of the overall quality of the jail's health care system, the Department of Justice Report seems likely to deserve considerable weight. The Report is not conclusive, of course. The defendants are entitled to a full opportunity to rebut it. But in litigating the constitutional adequacy of the Jail's health care, this Report would seem to provide a thorough and reasonably trustworthy starting point. It would be difficult to replicate through ordinary processes of litigating individual private cases. There may be individual circumstances that might justify exclusion of the Report, perhaps because it is no longer sufficiently timely or does not fit sufficiently well the issues in a particular case. But the general presumption of admissibility in the text of Rule 803(8) has considerable force. . . . Accordingly, the Department of Justice Report should be admitted for the truth of its substance under Rule 803(8). The 2010 Agreed Order and Shansky Report are inadmissible hearsay to the extent they are offered to prove the truth of the statements they contain, but they may be admissible to show that the defendants were on notice of their contents, or perhaps for other purposes."); ***Blair v. City of Pomona***, 223 F.3d 1074, 1081 (9th Cir. 2000) ("The thorough examination of police practices in Los Angeles after the beating of Rodney King by uniformed police officers described the officers' 'code of silence' as consisting in a single rule: 'an officer does not provide adverse information against a fellow officer.' Report of the Independent Commission on the Los Angeles Police Department 168 (1991) (the Christopher Commission Report). According to the Christopher Commission, all police officers adhere to this rule, even good ones. It is a formidable barrier to the investigation of complaints about the police. . . The Commission cited instances where officers were officially punished for breaking the code. . . We take judicial notice of the report."); ***Montiel v. City of Los Angeles***, 2 F.3d 335, 341 (9th Cir. 1993) ("The district court should have presumed the Christopher Commission Report was trustworthy and, . . . shifted the burden of establishing its untrustworthiness to the City."); ***Fabian v. City of New York***, No. 16-CV-5296-GHW, 2018 WL 2138619, at *7-10 (S.D.N.Y. May 9, 2018) ("The Second Circuit has yet to address the question of whether the 2015 OIG [Office of the Inspector General] Report by itself is sufficient evidence of a failure to train under *Monell*. Although courts in this district have evaluated arguments premised on this report in connection with *Monell* claims, most have done so at the pleading stage. . . While the parties dispute whether this case should be controlled by *Marlin*, which found that allegations based on the OIG Report were sufficient to withstand a motion to dismiss, or *Boddie*, which concluded otherwise, the issue at this stage of litigation is not whether the OIG Report pleads sufficient facts to allow the case to move forward. The question is instead whether the report by itself provides sufficient evidence to demonstrate a dispute of material fact that should be decided by a jury. The Court concludes that on this record, the report is insufficient to create a genuine dispute of material fact in connection with Plaintiffs' *Monell* claim. Assuming for purposes of this motion that the 207 substantiated allegations of excessive force provided the City with notice of excessive force within the NYPD, the report does not establish that the City was deliberately indifferent to any related training deficiencies. Quite the opposite—the report suggests that any deficiencies were not 'so obvious' or 'so likely to result in a deprivation of federal rights' that the City's failure to correct the deficiencies could constitute deliberate indifference. . .

The report's introduction describes the total number of substantiated force allegations, 207, as 'a notably modest number, given the size of the NYPD, and a positive indication of the NYPD's restraint.'. . The report also explains that the total number of substantiated allegations represents a mere two percent of the approximately 10,000 complaints of force lodged with the CCRB between 2010 and 2014. . . Thus, the number of substantiated uses of unlawful force during those years was very small relative to the size of the police force and the number of unsubstantiated complaints. At the time of the alleged use of force here, this report had not been published. Therefore, the report itself is not evidence that any link suggested by the report between the small number of substantiated complaints and the deficient training programs was obvious to the City when, or before, Plaintiffs were pulled over and removed from their truck. Even if the City had been on notice of the deficient use-of-force training program and the deficiency's likelihood to lead to unlawful use of force, summary judgment is still appropriate because Plaintiffs point to no evidence of the causal link between that deficient training and the violations alleged here. . . In both their complaint and their opposition, Plaintiffs state in conclusory fashion that the City's failure to train directly and proximately caused the alleged excessive force used against them. . . However, they point to no record evidence in support of causation. Therefore, to conclude that the OIG Report creates a genuine dispute of fact, the Court must make the inferential leap that, but for the City's failure to properly train its police officers, the alleged constitutional violations would have not occurred. At this stage, the Court must draw all *reasonable* inferences in favor of Plaintiffs as the non-moving party. . . However, based on its own review of the record, the Court is unwilling to make the unreasonable jump required to find evidence of causation. . . . Plaintiffs simply have not developed evidence of the causal connection between any deliberate indifference by the City from 2010 to 2014 and the incidents that occurred here. . . .Were liability to be imposed on the City on the sole basis of a report prepared by a municipal agency—and in this case, a report that was commissioned in an effort to *improve* policing—any plaintiff with a claim arising during or after the period covered by the report could prove municipal liability. Agencies would be discouraged from self-evaluation and proactive improvement programs, and the end result would be the very thing that Section 1983 plaintiffs seek to curb, the City's asserted failure to autocorrect. More than this internal report card is needed to hold the City liable here."); ***Simpson v. Ferry***, 202 F.Supp.3d 444, 451 (E.D. Pa. 2016) ("Ultimately, the applicability of the DOJ Report with respect to assessing the plausibility of a *Monell* claim appears to call for a fact-intensive inquiry based upon the unique circumstances presented in each case. As multiple other courts have recognized, certain findings and conclusions within the Report appear to contemplate *all* use of force concepts and training initiatives within the PPD, not just lethal force. Given this scope of the DOJ Report, the weight of authority cited above, and the additional reasons supporting consideration of the Report (discussed *supra*), I will consider those limited portions of the DOJ Report to which Plaintiff expressly cites in his Second Amended Complaint, and which pertain to excessive force. . . . The alleged misconduct at issue in the case before me, and the municipal custom for which Plaintiff seeks to impose liability upon the City, turns exclusively on whether or not the Defendant officers used excessive force—not lethal force. Therefore, in assessing the plausibility of Plaintiff's *Monell* claim, I will disregard those portions of the DOJ Report and Second Amended Complaint that specifically address shootings by PPD officers."); ***Pipitone v. City of New York***,

57 F. Supp. 3d 173, 191, 193-94 (E.D.N.Y. 2014) ("Here, the Mollen Report provides powerful evidence that there was a custom and practice within the police department of tolerating corruption to avoid bad publicity. It characterizes this custom as persistent, widespread, and emanating 'from top commanders, including the police commissioner.'. . The Mollen Report thus provides evidence that is sufficient to allow a jury to conclude that the supervisory and disciplinary failures described therein constituted a municipal policy for *Monell* purposes and that the City's handling of the Eppolito matter was reflective of that policy. . . . The Mollen Commission report provides an additional basis to find deliberate indifference at the highest levels of the NYPD. It describes a conscious desire among the 'top brass' of the NYPD, including Commissioner Ward, to avoid disclosing corruption or disciplining corrupt officers in order to protect the NYPD's reputation. Based on the report, a jury could reasonably conclude that Ward and other high-level officials were deliberately indifferent to this widespread and persistent practice of tolerating police corruption. In sum, the flawed 1985 disciplinary process and the attitudes and practices described in the Mollen Commission report provide separate grounds upon which a jury might find deliberate indifference. They also reinforce each other. The failure to discipline Eppolito in 1985 can be viewed as evidence of the systemic failure to address corruption that was described in the Mollen Report. And in turn, the Mollen Report suggests a motive for why Ward failed to take action against Eppolito in 1985—his desire to avoid bad press—and thus might also be viewed as evidence of deliberate indifference with respect to that specific disciplinary decision."); ***Pelzer v. City of Philadelphia***, No. 07-38, 2009 WL 2776493, at *14 (E.D. Pa. Aug. 31, 2009) ("The plaintiff has produced evidence highlighting problems with the Academy training program. The IAO [Integrity and Accountability Office] report clearly states that the current training system was inadequate at best. Ceisler, IAO Report at 61. A more negative assessment characterizes the training program as offering 'virtually no training in foot pursuits.' *Id.* at 62. More concrete examples of officer decision-making are evident in the report. While gathering the data and facts for her report, Judge Ceisler [former director of IAO] spoke with Philadelphia police officers and commanders and presented them with certain case studies where officers engaged in pursuit and made decision ultimately increasing the otherwise preventable risks of death or serious bodily injury. *Id.* at 61. When she asked these individuals what they thought of the case study officer's decisions, many of them approved of the officer's tactics, which violated basic safety principles. *Id.* As a result, the report suggests that 'officers and supervisors are not adequately trained or given clear direction on the appropriate response to situations.' *Id.* A reasonable jury could conclude the City ignored a serious and apparent risk resulting from a failure to institute policies addressing deficiencies in existing practices. As the IAO report stated, 'In several cases, where suspects were killed and officers were seriously wounded, the officers took these questionable actions in situations where no crimes had been committed, where no innocent persons were in danger, or where officers had no legal basis for initiating a search or arrest in the first place.' *Id.* at 60. This suggests that even assuming the current use-of-force training is sufficient, it has not been enough to prevent the initial tactical decisions that later placed the officers in situations unnecessarily increasing the danger to all parties. . .Though this evidence falls short of indicating a pattern of constitutional violations, a reasonable jury could find there was a known need for a new policy to counter the emotion-driven aspects of a pursuit, especially when an officer's decisions can directly increase or decrease the

threat of imminent death or serious bodily injury."); ***Rodriguez v. California Highway Patrol***, 89 F. Supp.2d 1131, 1144 (N.D. Cal. 2000) ("Defendants also move to strike references to the report issued by California's Joint Legislative Task Force on Government Oversight on September 29, 1999, regarding alleged racial profiling in Operation Pipeline. Defendants argue that the Task Force report does not relate to this case. However, the Task Force report discusses in detail alleged racial profiling by Defendants and forms part of the factual predicate for Plaintiffs' claim that racial profiling is present here."); ***Yanez v. City of New York***, 29 F. Supp.2d 100, 112 & n.6 (E.D.N.Y. 1998) ("Here, the connection between the Mollen Commission's findings, and the events in the instant case are too remote for me to allow these *Monell* claims to proceed. Yanez tries to use the Mollen report to bolster his *Monell* claims that there was a constructive acquiescence by defendants' superiors to a 'custom' of allowing lower level officers to hide all of their colleagues wrongs. However, plaintiff has not adequately explained the connection between the alleged plot among these police officers and the 'blue wall of silence' described in the Mollen report. While the Mollen Commission found that there was a practice of officers defending each other against charges of corruption, the link in this instance is tenuous at best. If plaintiff's argument is believed, then I would have to equate the serious, criminal behavior described in the Mollen Report, such as retaliation against officers who reported bribe taking, with the behavior of these officers. Taken to its logical conclusion, plaintiff's argument would allow use of the Mollen report to defeat summary judgment in almost any claim of police wrongdoing involving more than one officer. Based upon the record before me, the *Monell* claims cannot proceed with only the Mollen report as evidence of practice or custom by the NYPD of allowing these wrongful acts. . . . Even if I allowed the *Monell* claims to continue, plaintiff would be unable to prove these claims at trial, since the Mollen report would probably be inadmissible evidence. *See, e.g., Jackson v. City of New York,* 93-CV-174, slip op., (E.D.N.Y. Apr. 24, 1996)(rejecting admission of the Mollen report at trial for the purpose of proving *Monell* claims.)."); ***Domenech v. City of New York***, 919 F. Supp. 702, 711 (S.D.N.Y. 1996) ("The Mollen Commission Report did indeed find a culture of retaliation against those reporting criminal corruption within the NYPD, and some testimony was presented to suggest the existence of a "Blue Wall of Silence" within the Department. Even construing the Mollen Commission Report in its most favorable light, however, no reasonable finder of fact could deem it to demonstrate a culture of retaliation for non-criminal activity such as discrimination complaints so pervasive as to constitute a custom or usage amounting to tacit NYPD policy."); ***Ariza v. City of New York***, No. CV-93-5287 (CPS), 1996 WL 118535, *5 (E.D.N.Y. March 7, 1996) (not reported) ("The municipal defendants attempt to distinguish the evidence contained within the Mollen Commission report by arguing that the report does not suggest that the code of silence exists to repress officers from exercising their first amendment rights to speak out against the preferential treatment afforded some religious or ethnic groups at the expense of others. [footnote omitted] The defendants concede, however, that the code exists to prevent other officers from reporting corruption or dishonesty by fellow officers. Regardless of how the municipal defendants wish to construe the instant alleged action, the inference that such a practice, if true, is both dishonest and violative of 'official' police policy cannot be avoided. The principle behind the 'blue wall of silence' is that officers will suffer recrimination for breaking ranks and subjecting police conduct to public scrutiny. That is exactly the scenario plaintiff alleges

here, and he has produced enough evidence such that summary judgment for the defendants is not appropriate."); ***Britton v. Maloney***, 901 F. Supp. 444, 452 (D. Mass. 1995) ("Plaintiffs have not simply imagined that there might be systematically flawed policies and customs behind the incidents of which they complain. Their allegations of unconstitutional policies are based largely on the conclusions of the so-called "St. Clair Report", an independent review of the Boston Police Department conducted at the request of Mayor Flynn. In addition, plaintiffs cite to numerous newspaper articles which suggest other, similar, incidents of misconduct by members of the DCU, and to a list of allegations made to the Massachusetts Attorney General's office concerning allegedly unlawful searches conducted by the Boston Police Department. Although neither the report nor the newspapers articles nor the allegations made to the Attorney General are admissible evidence in this case, they do indicate that plaintiffs' allegations are more than speculative fantasies.").

See also ***Shaw v. City of New York***, No. 95 CIV. 9325 AJP, 1997 WL 187352, **7-10 (S.D.N.Y. Apr. 15, 1997) (not reported) (collecting cases on admissibility of Mollen Commission Report).

In ***Berry v. City of Detroit***, 25 F.3d 1342 (6th Cir. 1994), the court of appeals reversed a jury verdict against the City, and criticized, at great length and in great detail, the use of expert testimony in that case on the matter of deliberate indifference in failing to discipline police officers. The court concluded:

> Plaintiff's evidence was insufficient to enable a reasonable juror to conclude that the City was deliberately indifferent to the rights of its inhabitants. Finally, the jury never found that the alleged failure to discipline properly constituted 'deliberate indifference.' They never reached this conclusion because they never were asked this question. The only question on the verdict form relating to discipline reads as follows:
>
> V.
>
> We, the jury, on the § 1983 federal Civil Rights claim against the City of Detroit for failing to adequately discipline its police officers for the improper use of deadly force find for:
>
> X The Estate of Lee Floyd Berry, Jr.
>
> _____ City of Detroit
>
> Nowhere did the jury conclude in its answers to the verdict form's written interrogatories that the failure to discipline constituted 'deliberate indifference.' Nor was the question of proximate cause put to the jury in any of the verdict form questions. All of this amplifies the error in allowing plaintiff's expert to testify that the failure to discipline constituted 'deliberate indifference.'

25 F.3d at 1355. *Accord* ***Bradley v. City of Ferndale***, 148 F. App'x 499, 04-1474, 2005 WL 2173780, at *6 (6th Cir. Sept. 8, 2005) ("It is the responsibility of the court, not testifying witnesses, to define legal terms.' . . Therefore, while the expert may give his opinion as to whether the defendant's actions complied with Ferndale's internal procedures, he may not testify that the violations of these policies proved that the defendants acted with deliberate indifference to Bradley's suicidal tendencies."); ***West by and through Norris v. Waymire***, 114 F.3d 646, 652 (7th Cir. 1997) ("The affidavit of the plaintiff's expert, a professor of criminal justice, while admissible to show that the Town had been negligent in its supervision of Waymire, was not admissible to show that this negligence constituted a municipal policy of refusing to protect teenage girls from the sexual depredations of the Town's police officers − a legal conclusion that an expert witness is not allowed to draw, . . . and an erroneous legal conclusion to boot, as well as (maybe because) one that exceeded the expert's professional competence, which was limited to describing sound professional standards and identifying departures from them.").

See also ***United States v. Brown***, 871 F.3d 532, 537-39 (7th Cir. 2017) ("[W]e reasoned in *Thompson v. City of Chicago* that a police officer's violation of departmental policy is 'completely immaterial [on] the question ... whether a violation of the federal constitution has been established.'. . . *Thompson* involved an excessive-force claim under 42 U.S.C. § 1983, the civil analogue of § 242. We affirmed the district court's exclusion of the Chicago Police Department's use-of-force orders. . . We also affirmed the court's exclusion of expert testimony from a police sergeant who would have offered an opinion about the reasonableness of the officer's conduct based in part on the use-of-force orders. . . Despite its strong language, *Thompson* should not be understood as establishing a rule that evidence of police policy or procedure will *never* be relevant to the objective-reasonableness inquiry. We recently clarified that expert testimony concerning police policy is not categorically barred. . . Even though jurors can understand the concept of reasonableness, in some cases they may not fully grasp particular techniques or equipment used by police officers in the field. In those instances an expert's specialized knowledge can 'help the trier of fact to understand the evidence or to determine a fact in issue,' as Rule 702 requires. FED. R. EVID. 702(a). Expert testimony of this type may be relevant in cases where specialized knowledge of law-enforcement custom or training would assist the jury in understanding the facts or resolving the contested issue. For example, if it's standard practice across the country to train officers to handle a given situation in a particular way, expert testimony about that training might aid a jury tasked with evaluating the conduct of an officer in that specific situation. The legal standard contemplates a reasonable *officer*, not a reasonable person, so it may be useful in a particular case to know how officers typically act in like cases. . . Evidence of purely localized police procedure is less likely to be helpful than nationally or widely used policy. The jury's task is to determine how a reasonable officer would act in the circumstances, not how an officer in a particular local police department would act. The level of factual complexity in the case may also bear on the relevance of expert testimony about police practices or protocols. In many cases evaluating an officer's conduct will draw primarily on the jury's collective common sense. The everyday experience of lay jurors fully equips them to answer the reasonableness question when a case involves 'facts that people of common understanding can easily comprehend.'. . The jury's

common experience will suffice, for example, when 'police use[ ] their bare hands in making an arrest, the most primitive form of force.'. . But when 'some-thing peculiar about law enforcement (*e.g.*, the tools they use or the circumstances they face) informs the issues to be decided by the finder of fact,' a juror's everyday experience may not be enough to effectively assess reasonableness. . . If a case involves 'a gun, a slapjack, mace, or some other tool, ... the jury may start to ask itself: what is mace? what is an officer's training on using a gun? how much damage can a slapjack do?'. . . Importantly, a per se rule against expert testimony about police policy or procedure is particularly inappropriate in criminal cases. Brown stood accused of violating § 242, which penalizes the *willful* deprivation of another's federal right under color of law. The statute codifies a specific-intent crime; though the officer need not 'have been thinking in constitutional terms,' he can be convicted under § 242 only if he 'is aware that what he does is precisely that which the statute forbids.'. . It might be less likely that an officer knew that his actions would deprive another of a federal right if those actions fell entirely within widely used standardized training or practice. . . . Though it's not correct to read *Thompson* as establishing a per se rule of exclusion, the judge appropriately exercised her discretion in excluding the expert's testimony here. To repeat, the judge receives 'special deference' in making these determinations, and her decision will be upheld unless 'no reasonable person could take [her] view' of the matter. . . That deference is more than enough to carry the day. This case provides a textbook example of easily comprehensible facts. Brown was indicted for punching and kicking Howard. He didn't use a sophisticated tool or technique; he hit a motionless man in the face with his fist and continued to beat and kick him before placing him under arrest. An expert's explanation of the Chicago Police Department's Use of Force Model would have added nothing that the jurors could not ascertain on their own by viewing the surveillance videotape and applying their everyday experience and common sense. And as the district judge concluded, the admission of Farrell's testimony may have induced the jurors to defer to his conclusion rather than drawing their own. . . Accordingly, the judge did not abuse her discretion in excluding Farrell's expert testimony about departmental use-of-force standards."); ***Parker v. Gerrish***, 547 F.3d 1, 9 (1st Cir. 2008) ("The use of expert testimony is permissible in assisting the jury in evaluating claims of excessive force. . . . Here, the facts and circumstances identified in *Jennings* and *Graham* support the jury's conclusion that Gerrish's use of the Taser was not reasonable under the circumstances. First, the seriousness of the offense weighs in favor of Parker. Though driving while intoxicated is a serious offense, it does not present a risk of danger to the arresting officer that is presented when an officer confronts a suspect engaged in an offense like robbery or assault. . . . .As to the second *Graham* factor, the jury could reasonably have concluded that Parker did not pose an immediate threat to the safety of the officers. . . . Finally, as explained above, a jury could have found that Parker was not actively resisting or attempting to flee."); ***Thomas v. City of Chattanooga***, 398 F.3d 426, 431, 432 (6th Cir. 2005) ("The Supreme Court has held that the principles articulated in *Daubert* . . . apply to 'all expert testimony,' although the lower courts have flexibility in the application of the factors, because it may not make sense to apply some of the *Daubert* factors, such as the rate of error analysis, to non-scientific testimony. . . In this case, appellants believe that because we are dealing with non-scientific testimony, Davidson may rely solely on his experience to explain the conclusion he drew from the number of complaints filed against the Police Department, rather than

having to explain to the court why and how he came to those conclusions. An expert may certainly rely on his experience in making conclusions, particularly in this context where an expert is asked to opine about police behavior. . . We need not doubt whether Davidson is qualified to assess police operations. Indeed, Davidson's curriculum vitae suggests that his long career in the fields of criminal justice, the law, and education have all related to police training and operations. However, being an expert does not lessen the burden one has in rebutting a motion for summary judgment. . . . [I]n this case, because Davidson's affidavits provide no rationale for his conclusions, appellants are asking that we take their expert's 'word for it.' We cannot. Davidson himself stated that 'there's no bright line or rule' regarding how many complaints would be excessive, suggesting that an expert would need to conduct a more qualitative analysis. However, Davidson did not conduct such an analysis, and instead, in his deposition he merely mentioned a few cases where the courts have let the jury determine whether the municipality had an unwritten illegal policy. Even then, Davidson offered no qualitative analysis of those cases and how they were similar to the present case. Therefore, Davidson's conclusion, that the Police Department must have an unwritten policy of condoning excessive force because of the mere number of complaints previously filed against it, is insufficient to create a genuine issue of material fact on which a jury could reasonably find that such a policy exists."); ***Johnson v. Hawe***, 388 F.3d 676, 686 (9th Cir. 2004) (amended opinion on denial of reh'g) ("The district court rejected Johnson's municipal liability claim under *Monell*. . .on the basis that Johnson 'had set forth no evidence to support the establishment of a policy or custom' which the Chief followed in arresting Johnson. This ruling is incorrect because Johnson submitted the declaration of law enforcement expert Alan H. Baxter. Baxter opined that the Sequim Police Department's 'self-training' program, which assigned responsibility to the individual officer for keeping abreast of recent court decisions involving law enforcement, amounted to a 'failure to train' Sequim police officers about enforcement of suspected violations of the Privacy Act. . . . In light of the many Washington cases addressing enforcement of the Privacy Act by public officers performing official duties, Johnson's evidence creates at least a genuine issue as to whether 'self-training' in this context amounted to deliberate indifference."); ***Garrett v. Athens-Clarke County***, 378 F.3d 1274, 1279,1280(11th Cir. 2004) ("Plaintiff first argues that fettering Irby was excessive force because the fettering posed a high potential of death, but plaintiff does not point us to competent evidentiary support for that argument. And in our review of the expert medical testimony in this case, we have found no statement quantifying − or even attempting to quantify − the risk of death posed by fettering. No competent evidence in this case supports the view that death or serious injury is a likely consequence of fettering a person as Irby was fettered. . . . Plaintiff does offer expert police testimony and additional materials in an effort to show that a reasonable officer would have known that fettering has a high risk of death for certain persons. But that evidence presumes that fettering is a dangerous practice: that evidence does not − and cannot − establish that fettering in fact poses a high potential for death or serious bodily injury. Unlike the risk of death from firearms, the risk associated with fettering is not of such common knowledge that we could notice − without expert medical testimony − that fettering does indeed pose a high risk of death. Without expert medical testimony quantifying to some degree the risk of death or serious bodily injury, plaintiff cannot establish that fettering under the circumstances in this case posed a high risk of death. Therefore, we conclude that plaintiff's

first argument on excessive force fails for lack of sufficient evidence.' (footnotes omitted)); ***Carr v. Castle,*** 337 F.3d 1221, 1230 (10th Cir. 2003) ("Carr's expert Dr. George Kirkham ("Kirkham") concluded that 'prudent well-trained officers would have realized that Mr. Carr was an emotionally disturbed person, and thus should be approached in as cautious and non-confrontational manner as possible. Instead Officers Bowen and Castle closed the distance between themselves and Mr. Carr, with weapons drawn and shouting commands at him.' But the fact that someone with the opportunity to prepare an expert report at leisure opines that well-trained officers would have performed differently under pressure does not rise to the legal standard of deliberate indifference on the part of the City, for Carr fails to point to any evidence placing the City on actual or constructive notice that the asserted failures to train were substantially certain to result in a constitutional violation."); ***Boncher v. Brown County,*** 272 F.3d 484, 486, 487 (7th Cir. 2001) ("The risk is claimed to have been particularly acute here because there had been five suicides in the Brown County jail in the five years preceding Boncher's suicide. According to the plaintiffs' expert, Lindsay Hayes, a criminologist who specializes in the study of jail suicide, this number of suicides was unusually high. He is a reputable criminologist, but in this case, as in two others we've discovered . . . his evidence was useless and should have been excluded under the *Daubert* standard. . . It is not the number of suicides that is a meaningful index of suicide risk and therefore of governmental responsibility, . . . but the suicide rate, . . . and it is not even the rate by itself, but rather the rate relative to the 'background' suicide rate in the relevant free population (the population of the area from which the jail draws its inmates) and to the rate in other jails. No evidence was presented that would have enabled an estimate of any of these rates − not even the population of Brown County was put into the record. Hayes admitted at his deposition that he had neither conducted nor consulted any studies that would have enabled him to compare the Brown County jail suicide rate with that of the free population in the county or that of other jails."); ***Conner v. Travis County***, 209 F.3d 794, 798 (5th Cir. 2000) ("[T]he Conners' showing of a need to train was premised on the testimony of their expert witness, who claimed, without citing underlying data, that detainees with stroke symptoms would present themselves so frequently that County staff should be trained to recognize them. By itself this is unpersuasive. We have previously noted that plaintiffs generally cannot show deliberate indifference through the opinion of only a single expert . . . ."); ***Snyder v. Trepagnier***, 142 F.3d 791, 799 (5th Cir. 1998) ("[W]e have emphasized that, when seeking to prove a municipality's malevolent motive, plaintiffs must introduce more evidence than merely the opinion of an expert witness."), *cert. dism'd,* 119 S. Ct. 1493 (1999); ***Trent v. Hawkins County***, 1997 WL 35574, No. 96-5025, at *4 (6th Cir. Jan. 29, 1997) (unpublished), where the court made the following observations:

> Dr. Kirkham does not explain the basis for his conclusion that a lack of acceptable training was the proximate cause of the officers' 'reckless' conduct, however, and his affidavit fails to demonstrate that a need for better training was so obvious, and the inadequacy of the training received by the officers so likely to result in violations of constitutional rights, that the policymakers of Hawkins County could reasonably be said to have been 'deliberately indifferent' to the need. * * * * From the vantage point of the policymakers, the somewhat rudimentary tutelage that Sgt.

> Depew and other alumni of the Tennessee Law Enforcement Academy received in 'Handling Abnormal People' did not appear to have caused any difficulty in the past. It is undisputed that every month the Sheriff's Department performed 'many' emergency committals of persons suspected of being mentally ill − yet never before had a serious problem arisen. And so lacking in 'obviousness' was the need for more intensive training that no such training was required by Tennessee law, nor was it offered by the state law enforcement academy. If, under the facts presented here, a jury could be allowed to find the policymakers guilty of 'deliberate indifference' on the strength of Dr. Kirkham's affidavit, virtually any perceived deficiency in training could result in liability in virtually any excessive-use-of-force case, it seems to us. Such a broadening of governmental liability would clearly be inconsistent with the Supreme Court's opinion in City of Canton.

See also ***Lee v. Metropolitan Government of Nashville and Davidson County***, 596 F.Supp.2d 1101, 1119-20 (M.D. Tenn. 2009), aff'd in part on other grounds, 432 F. App'x 435 (6th Cir. 2011) ("The Sixth Circuit has explored the standards that the district courts should use in evaluating whether so-called 'police practices' experts should be allowed to testify at trial. . . In *Champion,* in discussing experts who opine on police practices and procedures, the Sixth Circuit clarified *Berry,* noting that, if the proffered expert had 'specialized knowledge' and 'specific expertise about police activities' with 'experience on the subject of criminology or police actions' such that the proffered expert could opine on 'discrete aspect[s] of police practices [such as] excessive force, based on particularized knowledge about the area,' then the testimony would likely be permissible, particularly if it was supported by strong experiential or educational credentials. . . In sum, the court stated that 'the proper actions of individual officers in one discrete situation' is an appropriate field for expert testimony, so long as the expert has sufficient credentials and the testimony will assist the trier of fact."); ***Hutchison v. Cutliffe,*** 2004 WL 5524566, at *2-3 (D. Me. 2004) ("Reiter is clearly highly qualified to hold opinions about police use of force and his expert report contains information about police practices and procedures, including the'so-called' use of force/control/subject resistance matrix, continuum or graphic' that involves the type of specialized knowledge one attributes to an 'expert.' It seems to me that the dispute in this case centers on the question of whether Reiter's testimony is such as will assist the trier of fact in understanding or determining a *fact* in issue. Specifically, the trier of fact must determine if Cutliffe's use of force was reasonable under the totality of the circumstances test of *Graham v. Connor, . . .* the Supreme Court case that will ultimately guide the court's legal instructions to the jury. In this case, the jury's factual determination of reasonableness is further complicated by the court's own analysis of qualified immunity that will involve a similar, but different test of reasonableness applied to the same set of facts as determined by the jury. . . Clearly the jury's primary role in this case will be to determine what happened behind the closed door. Once those facts are established, if the court determines Cutliffe is not entitled to qualified immunity as a matter of law, then the jury's factual assessment of the reasonableness of the degree of force becomes the ultimate issue in the case. That being said, it seems to me that Reiter's testimony could provide some admissible assistance in determining the subsidiary facts that will

ultimately guide the resolution of this case. I agree with Cutliffe's argument that Reiter should not be allowed to opine about the ultimate reasonableness of the degree of force applied. This is so not because the reasonableness of the degree of force is the ultimate factual determination in the case, but because, as Cutliffe says, 'once a jury decides which set of facts it believes, it will be within their ability as lay persons to decide whether the use of force was reasonable or not.' . . . In the present case, where the facts are very much disputed, an expert's opinion and knowledge could conceivably help the jury determine the underlying facts, even though it would not aid the jury's understanding of the ultimate fact. Hutchison cites four areas where he contends Reiter's testimony could aid the jury. . . . I believe all four of these areas could conceivably provide the jury with information that would assist them in determining which version of events was more likely true than not. For that reason Reiter should not be precluded from testifying, although his proffered testimony about the 'reasonableness' of Cutliffe's actions should be excluded because his opinion on that score depends upon nothing more than a regurgitation of Hutchison's version of the events and his personal conclusion about the reasonableness of Cutliffe's responses.").

See also ***Estate of Brown v. Thomas***, 771 F.3d 1001, 1005-06 (7th Cir. 2014) ("[Expert] Gaut's report severely criticizing the County's search policy might, if admissible (compare *Florek v. Village of Mundelein,* 649 F.3d 594, 601–03 (7th Cir.2011)), entitle the estate to a trial, were it not for a fatal procedural error by its lawyer: failing to authenticate Gaut's expert report. It was filed with the district court but could not be admitted into evidence without an affidavit attesting to its truthfulness. Fed.R.Civ.P. 56(e)(3); Fed.R.Evid. 901(a); *Scott v. Edinburg,* 346 F.3d 752, 759–60 and n. 7 (7th Cir.2003). There was no affidavit. Nor did the plaintiff's lawyer cite Gaut's report in opposing the defendants' motion for summary judgment. On appeal he made the convoluted argument that it was the defendants' burden to depose Gaut and that having failed to do that they admitted that everything in his report was true. Not so. Deposing a witness is optional. Anyway the report could not be used to oppose summary judgment because it was inadmissible. Without the report there is insufficient evidence to justify imposing liability on the County.").

D. Liability Based on Conduct of Policymaking Officials Attributed to Governmental Entity

Under ***Monell***, government liability attaches when the constitutional injury results from the implementation or "execution of a government's policy or custom, whether made by its lawmakers *or by those whose edicts or acts may fairly be said to represent official policy . . . .*" 436 U.S. at 694 (emphasis added).

Since ***Monell***, the Court has struggled with the questions left open by that decision. In subsequent cases, there have been attempts to provide clarification on the important issues of (1) whose "edicts or acts," beyond those of the official lawmakers, may be attributed to the government, and (2) which "edicts or acts" will constitute "policy."

1. In ***Pembaur v. City of Cincinnati***, 475 U.S. 469 (1986), a majority of the Court held that a single decision by an official with policymaking authority in a given area could

constitute official policy and be attributed to the government itself under certain circumstances. Thus, in ***Pembaur***, the County could be held liable for a single decision by a County prosecutor which authorized an unconstitutional entry into the plaintiff's clinic. *See, e.g.,* ***Hampton Co. Nat. Sur., LLC v. Tunica County, Miss.***, 543 F.3d 221, 227 (5th Cir. 2008) **("**As to this Sheriff's policy role in the liability analysis, this Circuit has already held 'Sheriffs in Mississippi are final policymakers with respect to all law enforcement decisions made within their counties.' . . Determining which bonding companies were authorized to write bonds at the Tunica County jail logically is part of that law enforcement authority. The Sheriff's decision to deny the Plaintiffs the right to issue bonds is the kind of single decision by the relevant policymaker that can be the basis of liability."); ***Welch v. Ciampa***, 542 F.3d 927, 942 (1st Cir. 2008) ("We are bound by *Pembaur* and conclude that a single decision by a final policymaker can result in municipal liability. Here, the parties agree that Ciampa, as Chief of Police, is the final policymaking official with respect to the reappointment of specialists. Accepting the parties' representations as true, liability can be imposed on the Town for Ciampa's decision not to reappoint Welch if that decision violated Welch's constitutional rights. Hence, summary judgment for the Town must be reversed."); ***Bruce v. Beary***, 498 F.3d 1232, 1249 (11th Cir. 2007) ("With respect to the failure to return Bruce's property to him after appeal, despite the state court order to do so, we emphasize that even a single decision by its policymaker may subject the county to liability for a constitutional violation. . . As the final decision-maker in the Sheriff's Department, . . . the Sheriff had the responsibility to see that Bruce's property was returned − all of it. As such, the district court erroneously held that Bruce is required to demonstrate that the Sheriff had some policy of retention in order to establish a constitutional violation.").; ***Brooks v. Rothe,*** 2007 WL 3203761, at *7 (E.D. Mich. Oct. 31, 2007) ("Here, the uncontested facts show that final decision makers, the chief of police and the county prosecutor, Defendants Bodis and Gaertner, reached a decision and then directed its execution. Based on the police report, Defendant Bodis consulted with Defendant Gaertner, who advised that Defendant Rothe enter the shelter and arrest Plaintiff. Consequently, under *Pembaur*, Defendants city and county can be held liable for the consequences of their decision makers' directive. Thus, the claim against Defendant city and Defendant county remains.").

But see ***Stockley v. Joyce***, 963 F.3d 809, 823-24 (8th Cir. 2020) ("[W]e did not reach the question of whether Joyce's charging decision resulted in a constitutional deprivation because we determined that she was absolutely immune for such conduct. Because 'the absolute immunity of its policymakers does not shield a city from liability for its policies[,]'. . we must now decide whether Joyce's decision to terminate the FIU investigation and charge Stockley constitutes municipal policy. A municipality may be subject to § 1983 liability if an 'action pursuant to official municipal policy of some nature caused a constitutional tort.'. . 'Although a single unconstitutional act may not always suffice to support a claim of municipal liability, an unconstitutional governmental policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business.'. . A policy is 'a deliberate choice to follow a course of action [ ] made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.'. . This Court has a held that a policy is 'a deliberate choice of a guiding principle or procedure made

by the municipal official who has final authority regarding such matters.'. . Here, Stockley alleges Joyce implemented a policy of terminating a legitimate investigation to cover up her own misrepresentation about Stockley's guilt and to charge him with first-degree murder. However, Joyce's decision to terminate the FIU investigation and charge Stockley was not a 'guiding principle or procedure.' Instead, it was an individual charging decision based upon a particular set of facts supported by arguable probable cause. . . Thus, this conduct does not constitute municipal policy. . . Accordingly, we conclude the district court properly dismissed the *Monell* claim against the City."); ***J.H. v. Williamson County, Tennessee***, 951 F.3d 709, 721-22 (6th Cir. 2020) ("Williamson County does not contend that it is eligible for judicial or quasi-judicial immunity—rather, it correctly argues that no basis for municipal liability remains after the court order on December 9, 2013, because Judge Guffee is not a policymaker whose decisions can create municipal liability. This conforms with our precedent. We have held that the 'alleged unconstitutional actions taken by a juvenile court judge are not "policies" of the county for which liability could attach under *Monell*'; instead, Judge Guffee's order that J.H. remain in segregation was a 'judicial decision[ ]' that was only 'reviewable on appeal to the Tennessee appellate courts.'. . Nor could Adgent's or McMahan's adherence to that order create municipal liability because neither retained final policymaking authority regarding whether to segregate J.H. after the order was issued. . . We therefore affirm the district court on this claim."); ***Teesdale v. City of Chicago***, 690 F.3d 829, 833-37 (7th Cir. 2012) ("Despite the complicated factual and procedural background, the issue before us on appeal is simple: Does the City's legal argument made in its July 2009 TRO response constitute an official policy under *Monell* that gives rise to § 1983 municipal liability? We hold that it does not. A mere legal position, without anything more, is insufficient to constitute an official policy. . . . The plaintiffs argue that a legal argument or a litigation position taken by a municipality can, by itself, constitute an official policy. But there is little case law in support of this position. . . .*Pembaur* is easily distinguishable from our case. In *Pembaur,* the Supreme Court deferred to a previous determination that the final decisionmaker, the County Prosecutor, had the authority to establish county policy. . . Here, there is no indication that the City's attorneys who argued before the district court are final decisionmakers on behalf of the City. Certainly, the City's attorneys have the authority to represent the City in court and to make arguments on behalf of the City as its legal counsel, but that is not the same as being 'responsible for establishing final policy with respect to the subject matter in question.' . . In addition, in *Pembaur,* the final decisionmaker made a definite choice to pursue a course of action, and in doing so, violated the petitioner's constitutional rights. In the case before us, the City's counsel made an incorrect legal argument in a responsive brief. This argument was made one day after the motion for a TRO was filed, and two days after the plaintiffs filed their case against the City. Giving the City the benefit of the doubt, perhaps this litigation position was taken quickly, without adequate preparation, and without a full understanding of the facts and circumstances of the case. . . When the City filed its response, there was no evidence that the City had ever arrested anyone or otherwise acted according to this purported policy. And as the district court held, the City did not have an unconstitutional official policy during Pastor Teesdale's arrest in 2008. But based on the language recited in the City's 2009 response to the plaintiffs' motion for a TRO, the district court concluded that, as of 2009, there was an official policy of the City that threatened the

plaintiffs' future First Amendment rights. We can understand how the district court was misled by the City's persistence in maintaining its errant position, but it was a mistake for the district court to assume that the City's legal argument was a statement of official City policy that would be applied in the future. Unlike the facts of *Pembaur*, the City did not deliberately choose 'a course of action ... from among various alternatives,'. . . and then pursue it. Instead, the City's counsel made a legal argument in opposition to the plaintiffs' assertions that the City was liable under § 1983. Admittedly, this legal argument was deficient and counsel overstated the City's case. But even so, based on *Pembaur*, we hold that the City's improper legal argument is insufficient to constitute an official City policy that establishes municipal liability under § 1983. . . .Besides the City's misguided litigation position, there exists no law, ordinance, code provision, or permitting requirement or regulation that the plaintiffs can identify that they might be found in violation of, and there are no previous instances of arrests or some other customary City practice that portends the future violation of the plaintiffs' rights. There is only the legal argument made by the City, which the City explicitly renounced during the oral argument. The plaintiffs took this renunciation as a reason to argue that the case was moot—but in actuality, it demonstrates the weakness of the plaintiffs' position and the fact that a mere legal argument is too insubstantial to form the basis of municipal liability. Recall that under *Pembaur*, an official municipal policy is a deliberate choice to follow a course of action from among various alternatives made by officials with final policymaking authority and possibly giving rise to liability. It would be very unusual for an official municipal policy to be quickly changed by a lawyer who concedes during the course of litigation that the legal argument he is presenting is without merit when, for example, he is challenged on it by a judge. . . .A mere legal pleading or a litigating position, with nothing more, is insufficient to constitute an official policy under *Monell*. Without such an official policy, these plaintiffs do not have standing to obtain the declaratory judgment. The plaintiffs' motion to dismiss the appeal as moot is Denied, the judgment of the district court is Vacated, and the case is Remanded for dismissal on jurisdictional grounds based on lack of standing."); ***Crosby v. Pickaway County General Health Dist***., 303 F. App'x 251, 2008 WL 5169159, at *7, *8 (6th Cir. Dec. 8, 2008) ("Long's role in this matter is clearly different from that of the prosecutor in *Pembaur* . There, the prosecutor instructed the police to take action; here the Board decided to take action and asked the prosecutor for advice on how it could best execute its decision. Our circuit has not directly addressed the distinction between an attorney's role in creating policy and in giving legal advice, but the Fifth Circuit has examined the issue, concluding that these roles are distinct and that only the former role may give rise to municipal liability. [citing *Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir.1984) (en banc)] Ohio law clearly distinguishes between the role of the County Prosecutor and that of the Health District. Under Ohio law, 'the prosecuting attorney of the county constituting all or a major part of such district shall act as the legal advisor of the board of health.' Ohio Rev.Code ' 3709.33. It is the Health District (acting through the Board of Health), however, that makes the ultimate decision to grant or deny sewage permits. Ohio Rev.Code ' 3718.02(")(3)(d)(5). Regardless of whether the Board listened to the advice of county officials such as the County Prosecutor or County Engineer, the record displays no evidence that the Health District abdicated its ultimate decisionmaking authority or handed over such authority to the County, its Commissioners, or any other county employee. As such, neither the County, its

Commissioners, nor any other county employee can be the source of any official policy that resulted in the suspension or denial of Appellants' sewage permits. The district court was therefore correct to grant summary judgment to these defendants, and we accordingly affirm the district court's decision and order on this point.").

In ***Jones v. Wellham***, 104 F.3d 620, 625 (4th Cir. 1997), the court noted:

> Critically, *Pembaur* dealt only with a "policy" decision by a municipal official that directly commanded a constitutional violation . . . (Fourth Amendment search). Its specific holding did not, therefore, touch official "acts or edicts" that, though not themselves unconstitutional, hence not the immediate cause of constitutional injury, might be shown to have caused a constitutional violation by others. That, of course is the factual situation presented in the case at issue, and for *Pembaur's* theory of municipal liability to apply here, it must be considered to reach such decisions as well as those directly commanding or effecting constitutional violations. We have not, apparently, ever directly addressed that issue, though we have, of course, applied *Pembaur* to single policy decisions that were themselves unconstitutional, hence were the immediate causes of constitutional violations. *See, e.g., Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183 (4th Cir.1994) (unconstitutional firing by school board). Other circuits have, however, simply assumed *Pembaur's* application to single policy maker decisions which though not themselves unconstitutional were the ultimate causes of constitutional violations.
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> Because the Supreme Court recently has granted certiorari in *Bryan County v. Brown* . . . to consider issues that may touch upon whether *Pembaur* applies at all to such situations, we will reserve decision on that threshold question and simply assume for purposes of this case that, in otherwise appropriate circumstances, *Pembaur's* single-decision principle can apply to single policy maker decisions not themselves unconstitutional, such as those of Chief Frye here in issue. In making that assumption, we also assume (as did the district court) that in applying *Pembaur* to this type situation, the imposition of municipal liability would require . . . proof of deliberate indifference of the decision maker to the possible consequences of his decision, hence a "conscious choice" of the course of action taken, . . . and a close causal connection between the decision and the ultimate constitutional injury inflicted.

Justice Brennan, writing for a plurality in *Pembaur*, concluded that "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." 475 U.S. at 483. Whether an official possesses policymaking authority with respect to particular matters will be determined by state law. *Id.* Policymaking authority may be bestowed by legislative enactment or may be delegated by an official possessing such authority under state law. *Id.*

Justice White, wrote separately to make clear his position (concurred in by Justice O'Connor) that a decision of a policymaking official could not result in municipal liability if that decision were contrary to controlling federal, state or local law. *Id*. at 485-87 (White, J., concurring). *See, e.g.*, ***Pineiro v. Gemme***, 937 F.Supp.2d 161, 175 (D. Mass. 2013) ("Although in certain circumstances the single act of an official with final policymaking authority, such as the Chief, can subject the municipality to liability, such a determination is not always warranted. . . . In the absence of evidence to the contrary, the Court is compelled to conclude that Chief Gemme's licensing decision with regard to plaintiff's application did not itself constitute a 'policy' of the City of Worcester within the meaning of § 1983 and *Monell*. . . Accordingly—and regardless of whether plaintiff has a legitimate claim concerning the chief's decision as to the *particular* restrictions placed on his license to carry—the *general* policy of placing some restriction(s) on new licenses did not 'directly cause' a violation of his constitutional rights. Accordingly, the City of Worcester may not be found liable under *Monell*."). Since the law was not settled at the time of the County prosecutor's action in *Pembaur*, the decision of the policymaking official would constitute the official policy for *Monell* purposes.

Justice Powell (joined by Burger, C.J., and Rehnquist, J.) dissented, criticizing the Court for its focus upon the "status of the decisionmaker" rather than "the nature of the decision reached ... and ... the process by which the decision was reached." *Id*. at 492-502. *See also* ***Collins v. Stasiuk***, 56 F. Supp.2d 344, 345 (S.D.N.Y. 1999) (" While [defendants] may well have had final authority to make an individual personnel decision concerning plaintiff (who was himself a relatively high-ranking official at DEP), the hiring, promotion, demotion or termination of a single individual is NOT a 'municipal policy.'. . .The decision to fire one man, for whatever reason, is neither a course or method of action to help guide and determine present and future decisions nor a high-level overall plan. It is a singular act, applicable to one individual, in the unique circumstances of his case. It is, in short, a personnel decision and nothing more. It is hard to imagine any decision that falls farther outside the common understanding of the word 'policy.' Of course, an individual personnel decision carried out by a final policymaker pursuant to a definite course or method of action that was designed to guide future decision making, or in furtherance of some governmental body's high-level overall plan, would qualify for the *Monell* exception. But not every personnel decision made by a senior policymaker falls into that category.").

See also ***Carlson v. Fewins***, 801 F.3d 668, 675-77 (6th Cir. 2015) ("The choice to call for granola bars but not a warrant appears to have been driven by the Sheriff's misunderstanding of the Fourth Amendment. '[I]nconvenience to the officers and some slight delay ... are never very convincing reasons ... to bypass the constitutional [warrant] requirement.'. . Fewins's approach—choosing not to even request a warrant because he thought a misdemeanor arrest warrant would not have been 'handy' or 'put [the Team] in a better bargaining spot'—misses the point entirely. Judicial warrants are not intended to blindly facilitate whatever course of action a sheriff prefers. They are required by the Fourth Amendment 'so that an objective mind might weigh the need to invade th[e] privacy [of the home] in order to enforce the law.'. . The Fourth Amendment thus protects people from the power of the state by requiring judicial preapproval, time permitting, of

intrusive or forceful entrances and seizures. . .Instead of giving a sheriff the discretion to decide whether to seek a warrant from a neutral judicial officer based on how helpful the warrant would be to the sheriff, '[t]he point of the Fourth Amendment' is to vest the discretion to approve or deny an officer's plan to seize a person or search a house in a 'neutral and detached magistrate.'. . The warrant requirement is relaxed when an emergency situation makes it unreasonable to delay long enough to seek one, not when—as Fewins suggests here—a warrant simply would not have been particularly useful in the field. The facts available at summary judgment raise an inference that the Team had the time—and thus the constitutional obligation—to get a warrant from a judge before entering Carlson's house with tear gas and surveillance equipment. . . .The Estate's evidence suggests that in the split second of their choosing and without a warrant of any kind, the Team decided to end hours of tense, quiet waiting by taking the precise action that Carlson had described as 'the start of the war.' A jury could find the totality of the circumstances made this unreasonable, not just with 20/20 hindsight, but from the perspective of any reasonable person responsible for rendering aid to an armed and obviously emotionally disturbed person and that no immediate danger exigency excused the various warrantless actions taken against Carlson while he was taking refuge in his home. In a situation such as this, where various inferences are possible, the courts have decided that the reasonableness of police conduct should be decided by a jury. We therefore reverse the district court's order dismissing the counts against the county and the supervising officers and remand the case so a jury may decide whether the defendants' various warrantless seizures and searches during a standoff that began with requests to save Carlson's life and ended with a sniper shooting him dead were reasonable. We express no position on the merits of the alternative defenses pretermitted by the district court's erroneous conclusion that exigent circumstances excused the warrant requirement—i.e., whether municipal liability attaches to the choices made by Fewins and Drzewiecki.")

2. In ***City of St. Louis v. Praprotnik***, 485 U.S. 112 (1988), the Court made another attempt "to determin[e] when isolated decisions by municipal officials or employees may expose the municipality itself to liability under [section] 1983." 485 U.S. at 113. Seven Justices (J. Kennedy did not participate; J. Stevens dissented) joined in reversing a decision by the Eighth Circuit which had found the City liable for the transfer and layoff of a city architect in violation of his First Amendment rights.

The Court of Appeals had allowed the plaintiff to attribute to the City adverse personnel decisions made by the plaintiff's supervisors where such decisions were considered "final" in the sense that they were not subject to *de novo* review by higher-ranking officials. 798 F.2d 1168, 1173-75 (8th Cir. 1986).

Justice O'Connor reinforced the principle articulated in ***Pembaur***, that state law will be used to determine who are policymaking officials. 485 U.S. at 124. Furthermore, the plurality makes clear its position that the question of who is a policymaking official is one of law, for the court to decide by reference to state law, not one of fact to be submitted to a jury. *Id*.

In ***Praprotnik***, the relevant law was found in the St. Louis City Charter, which gave policymaking authority in matters of personnel to the mayor, aldermen and Civil Service Commission. *Id*. at 126.

See also ***Segler v. City of Detroit***, No. 23-1897, 2024 WL 5135735, at *6 (6th Cir. Dec. 17, 2024) ("We long ago recognized that Detroit's City Charter vests its Board of Police Commissioners with the authority to set the Detroit Police Department's general policies. *Berry v. City of Detroit*, 25 F.3d 1342, 1345 (6th Cir. 1994). The Chief of Police, by contrast, has the authority to run the department in conformity with these policies and to recommend amendments to the Board. . . These provisions of Detroit's City Charter remain in place today. . . Segler identifies no state or local law that gave Craig the unreviewable power to set the policies governing when officers may notify the media about 'people of interest' during a criminal investigation. . . Nor does Segler identify any informal custom delegating this policymaking authority to the Chief of Police. . . Segler's evidence thus fails to create a genuine issue of material fact over whether Craig had 'final policymaking authority' over this general activity. . . Segler responds that Craig (not the Board) chose the *specific* 'policy' to label him a person of interest. . . But we have repeatedly made clear that an official's 'discretion' to make a specific decision pursuant to a general policy does not qualify as final policymaking authority. . . For example, just because a city's policies gave an officer 'discretion' in how to proceed with an investigation does not mean that the officer had general policymaking power over investigations. . . And just because a city's policies gave a shift commander the 'authority to make limited decisions concerning inmate medical care' does not mean that the commander had general policymaking authority over that care. . . This case follows the same path. Even if the Board's policies gave Craig 'discretion' over whether to identify Segler as a person of interest, this fact does not show that Craig exercised general policymaking power over the general activity of communicating with the media."); ***Gustilo v. Hennepin Healthcare System, Inc.***, 122 F.4th 1012, 1018-19 (8th Cir. 2024) ("Municipal liability under § 1983 attaches when a municipal official possessing final authority with respect to the action makes 'a deliberate choice to follow a course of action ... from among various alternatives.'. . When a subordinate makes a decision that is subject to review, and the municipality's authorized policymakers approve the subordinate's decision '*and the basis for it*,' their ratification is 'chargeable to the municipality because their decision is final.'. . The identification of final policymakers is a question of law to be decided before a case is submitted to the jury; ratification is a question of fact for the jury. . . Here, the parties do not dispute that the HHS Board was the final policy maker that approved the subordinate MEC's decision to demote Dr. Gustilo. They dispute whether the Board also approved the basis of the MEC's decision, which included consideration of her Facebook posts, the allegedly protected speech. The district court granted summary judgment dismissing this § 1983 claim. While municipal policymakers can create municipal liability by 'ratifying the actions of a subordinate,' the court acknowledged, 'Gustilo fails to create a genuine issue of material fact regarding whether the HHS Board considered her Facebook posts in making its decision to demote her.'. . On appeal, Dr. Gustilo argues the court erred in finding no material fact dispute regarding the ratification issue. She argues there is substantial evidence in the summary judgment record that the Board approved the MEC

decision *and* the basis for that decision. She points to Dr. Hilden's Rule 30(b)(6) deposition, where he testified that 'the board of directors approved [the MEC's decision] in a roll call vote,' including the basis for that decision. HHS responds that, as Dr. Hilden testified, 'the basis [of the MEC decision] was laid out ... in the [Hilden Memo] we gave to the board of directors ... in five bullet points;' the Hilden Memo did not reference or list Gustilo's Facebook posts as a basis for her demotion; there is no evidence the Board received anything besides the Hilden Memo prior to the meeting; and there is no evidence that Board members considered Gustilo's posts when voting to approve the MEC's decision to demote Dr. Gustilo. Though there is record support for HHS's contention, the difficulty, as we see it, is that ratification is an issue of fact for a jury if there is a material fact dispute. The district court concluded that Dr. Gustilo's evidence did not raise a material fact dispute. The court noted, '[e]ven where there is evidence in the record that members of a board serving as the final decision-maker knew about the plaintiff's at-issue speech, this Court has found such knowledge alone insufficient to imply that the plaintiff's speech was the basis for the decision,' citing its earlier, highly relevant decision in *Benner v. St. Paul Public Schools, I.S.D. #625*, 380 F. Supp. 3d 869, 908-09 (D. Minn. 2019. . . But *Benner* was an interlocutory order granting in part defendants' motion for summary judgment, an order that was subject to reconsideration by the district court as that case progressed, and subject to appellate review if incorporated in a final order or judgment. Here, on a summary judgment record, the fact-based ratification issue is open to question. As previously noted, the second of Dr. Hilden's five 'bullet points' almost certainly referred to issues raised in Dr. Gustilo's Facebook posts. Dr. Hilden's Packet made clear that the Department OBGYN physicians had repeatedly complained about the media posts and Dr. Gustilo's aggressively pursuing those issues at work. Moreover, the district court did not acknowledge, and may not have been aware, that two members of the Board were also members of the MEC and therefore knew from the Hilden Packet that media posts were a significant part of what was viewed as Dr. Gustilo's leadership failures, even though the Hilden Memo carefully avoided any specific mention of the media posts. Thus, the summary judgment record does not support the district court's conclusion that, '[r]egardless of whether the MEC considered Gustilo's Facebook posts, Gustilo fails to create a genuine issue of material fact regarding whether the HHS Board considered her Facebook posts in making its decision to demote her.'. . We conclude that ratification is a fact issue that cannot be decided as a matter of law on this summary judgment record. Therefore, we must remand for further consideration of ratification and other legal issues, beginning with whether Dr. Gustilo's Facebook posts are protected speech, and perhaps the development of a full record if the ratification and other issues require a trial."); ***Jones v. Clark County, Kentucky***, 959 F.3d 748, 762-63 (6th Cir. 2020) ("In *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), the Supreme Court held that when a plaintiff alleges that an unconstitutional municipal policy is evinced by a single decision by a municipal official, 'only those municipal officials who have "final policymaking authority" may by their actions subject the government to § 1983 liability' and that state law determines whether a municipal official has 'final policymaking authority.'. . This Court has distinguished 'between "policymaking" authority, which entails a certain amount of discretion to choose among various plausible alternatives, and "factfinding" authority, which involves assessing the fixed realities of a situation' and held as a result that a coroner's authority to make factual findings

regarding a person's cause of death was not policy-making. . .Jones has established a genuine issue as to the 'prerequisite ... unconstitutional conduct' by a subordinate—Murray—to support a claim of supervisory liability against Sheriff Perdue. . . However, no genuine dispute of material fact remains over whether Perdue, through municipal policy, custom or official action, acted unconstitutionally. Jones has not set forth any facts indicating that Perdue authorized or participated in Murray's arguably unlawful conduct. As in *Gregory*, the record, at the most, indicates that Perdue failed to review Murray's work, not that Perdue lacked 'a reasonable system' to review subordinates work generally. . .Similarly, Plaintiff has failed to demonstrate a genuine dispute as to any material fact regarding Clark County's liability in this matter. On appeal, Jones argues only that 'a county can be liable under 42 U.S.C. § 1983 when it tolerates a custom or practice which causes a constitutional violation' and that 'Murray's power was so absolute, and he was given such free rein over the lives and liberty of people like Jones, that his acts and omissions could fairly be characterized as those of a person to whom the County and its Sheriff had delegated final decision-making authority, and for which they can be properly held liable.'. .His first argument fails because Jones has failed to allege the existence of a 'custom or practice' in Clark County that would warrant a claim of supervisory liability in this suit. He vaguely references 'the lives and liberty of people like Jones,' but his brief provides no further argument or evidence of repeated violations akin to the one against Jones—be they malicious prosecutions generally or those involving child pornography. Even looking at the facts in the light most favorable to Jones, there is nothing in the record or raised in his brief that defeats summary judgment for the County. His second argument, that the County vested Murray with the authority to make municipal policy, fails because Jones has not demonstrated with any argument or facts present in the record that state or local law vested Murray with the authority to make county policy. Arguably Perdue granted Murray significant discretion in his investigations, but that cannot be considered 'policy' for the purposes of § 1983. There is no evidence that Murray attempted to institutionalize any of his allegedly unconstitutional actions as policy or undertook them in conformity with a pre-existing policy. Like the coroner in *Jorg*, Murray was 'assessing the fixed realities of a situation' and finding facts in the course of his police work, not setting policy. . . As such, liability for the County cannot attach. Jones' argument that Murray lacked sufficient training to investigate internet crimes such that Perdue and Clark County 'can reasonably be said to have been deliberately indifferent to the need' for greater training fails as well. . . Jones simply asserts that a lack of training made it likely enough for a constitutional violation to occur that the supervisory Defendants can be held liable. . . But he does not identify any evidence regarding Murray's training. And the record shows that Murray had at least been trained on the fact that an IP address could be hacked."); ***Soltesz v. Rushmore Plaza Civic Ctr.***, 847 F.3d 941, 947-48 (8th Cir. 2017) ("Turning to the claims in this case, the Civic Center contends that no legally sufficient evidentiary basis exists to support the jury verdict. Whether an official possessed final policymaking authority, the Center continues, is a question of law. The district court thus erred in submitting the question to the jury. The Civic Center raised this very issue three times to the district court; the court denied the motion every time. The Civic Center, therefore, has preserved the issue for appellate review. . . We agree with the Civic Center: no legally sufficient evidentiary basis exists to impose liability on a municipality for the decisions of a final policymaker when the district court fails to identify that policymaker.

The district court must identify the final policymaker as a matter of law before the claims reach the jury. . . Even if the plaintiff proceeds on a theory of delegation or ratification, the court must identify the final policymaker. . . Failing to do so raises the risk of respondeat superior liability—a risk we cannot tolerate. For § 1983 liability to attach, the jury must find the decision of a final policymaker caused the constitutional deprivation. . . If the jury is not instructed as to who the final policymaker is, it cannot find that the decision of a final policymaker caused any constitutional deprivation. A verdict imposing municipal liability on the decision of a final policymaker, when the jury receives no instruction on the final policymaker's identity, cannot be affirmed. . . We must therefore vacate the jury verdict. . . .A final policymaker may have deprived Soltesz of his constitutional rights in this case. But if Soltesz wishes to bring his claims to a jury, the district court must identify the final policymaker in accordance with South Dakota state law and local Rapid City ordinances. We therefore reverse the district court's ruling on the Civic Center's renewed motion for JMOL, vacate the jury's verdict, and remand for a new trial."); ***Milligan-Hitt v. Board of Trustees of Sheridan County School Dist. No. 2***, 523 F.3d 1219, 1223-29 (10th Cir. 2008) ("Because the Sheridan County School District had no official policy of sexual-orientation discrimination, these plaintiffs must show that their rights were violated by one of the district's final policymakers. . .Although the board made the final decision not to hire Ms. Milligan-Hitt and Ms. Roberts, the plaintiffs contend that final policymaking authority over the hiring decisions was delegated to the superintendent, who exercised it in an intentionally discriminatory manner. The plaintiffs do not contend that the hiring committees themselves were discriminatory, apart from any involvement from the superintendent. The district court treated the superintendent's policymaking authority as a question of fact and presented it to the jury, which concluded that Mr. Dougherty was the final policymaker of the district. . . We must reverse this judgment because the question of Mr. Dougherty's final policymaking authority is a question of law, which should not have gone to the jury. The district court should have concluded that as a matter of law, Mr. Dougherty did not make district hiring policy. . . . Under Wyoming law, the Board of Trustees is vested with the authority to make personnel decisions. The statute governing school trustees gives them the power to '[e]mploy and determine the salaries and duties of' superintendents, principals, teachers, and all other school personnel. . . The plaintiffs do not dispute this, but argue that because the school board did not adequately supervise Mr. Dougherty, it delegated this authority to him and gave him the school board's status as final policymaker. In light of the legal − not factual − nature of the municipal liability inquiry, however, we are interested only in delegations of legal power, not in whether the board's actual exercise of its power of review was sufficiently aggressive. . .With this in mind, we conclude that the board's delegation of administrative power to the superintendent did not turn him into the final policymaker. The school board has adopted a policy entitled 'Board/Superintendent Relationship' explicitly delegating 'its executive powers' to the school superintendent. . . . The ultimate authority to hire employees and to decide what rules govern hiring is retained by the board. The superintendent's power to recommend is simply a component of the board's hiring power, not a separate source of district policy − indeed, the recommendation power has meaning only within the hiring system run by the board. Thus, any complaint about the superintendent's failure to properly recommend candidates to the board belongs in a suit against him personally, not the district. Alternatively, the plaintiffs complain that

in practice the board's supervision of the superintendent's role in the hiring process was so deferential that he was functionally unreviewed. But this appears to confuse the legal question of the locus of final decisionmaking authority with the factual question of how aggressively or independently the board tends to exercise the power it has. . . . Regardless of whether plaintiffs are right that the board did not aggressively supervise Mr. Dougherty's decisions, the board had the authority to do so. Whether it used it or not, that authority makes the board, not the superintendent, the proper target in a municipal liability suit. To hold otherwise and attempt to dig into the details of the board's supervisory activities in this case would be to make the '[un]justified ... assump[tion] that municipal policymaking authority lies somewhere other than where the applicable law purports to put it.'. . That would subject school boards to 'capricious' review by federal juries for every municipal squabble."); ***Arendale v. City of Memphis***, 519 F.3d 587, 602 & n.12 (6th Cir. 2008) ("[I]it is clear that the City may be held liable for the final decision of Chief Wright. Although the Memphis City Charter allows a disciplined City employee who is suspended for more than ten days to appeal this decision to the Civil Service Commission, neither the charter nor the city code provides an appeal beyond the MPD when a police officer receives a suspension of ten days or less. . . . Although Plaintiff failed to include the MPD's policy manual in the record, 'whether a particular official has final policymaking authority is a question of *state law*,' and thus must be determined by a judge. . . Because the question of whether an official has final policy making authority is a question of law, this Court is no more constrained by the record than it is forbidden to cite a Supreme Court case not relied upon by the parties. . . . As the Appeal Authority, Chief Wright has final decision making power within the Memphis Police Department. . . Furthermore, as neither the Memphis Charter nor the Memphis City Code provide for further review of Plaintiff's suspension, Chief Wright had 'final policy making authority' with respect to Plaintiff's disciplinary charge. . . Accordingly, insofar as Plaintiff's suspension was unconstitutional, the City may be held liable under § 1983 for the final disciplinary decision of Chief Wright."); ***Lytle v. Doyle,*** 326 F.3d 463, 472 (4th Cir. 2003) ("The Norfolk City Charter provides that the City Manager, acting as the director of public safety, is in charge of the police department. All orders, rules, and regulations applicable to the entire police department must be approved by the City Manager. The City Manager is therefore clearly the final policymaker for purposes of § 1983 liability. Some policies for the police department, so called standard operating procedures, may be approved by the Chief of Police rather that the City Manager. At most, then, the Chief of Police could be considered a final policymaker for the police department. And no one lower in rank than the Chief of Police is authorized to issue any written directives."); ***Jeffes v. Barnes***, 208 F.3d 49, 57, 58, 60, 61 (2d Cir. 2000) ("In sum, the question of whether a given official is the municipality's final policymaking official in a given area is a matter of law to be decided by the court. Where a plaintiff relies not on a formally declared or ratified policy, but rather on the theory that the conduct of a given official represents official policy, it is incumbent on the plaintiff to establish that element as a matter of law. We thus reject plaintiffs' contention that the district court erred in imposing that burden on them; and we turn to the question of whether, as to the particular area at issue here, the burden was met. . . . The principal area in question in this suit involves the duties and obligations of the sheriff's staff members toward each other with respect to their exercise of First Amendment rights in breach of the Jail's code of silence. The

following review of New York State ("State") law leads us to the conclusion that the Schenectady County sheriff was the County's final policymaker with respect to most of the conduct that plaintiffs challenge. . . . In sum, State law requires that the Schenectady County sheriff be elected; County law provides that elected officials are not subject to supervision or control by the County's chief executive officer; there is only routine civil service supervision over the sheriff's appointments; State law places the sheriff in charge of the Jail; and the County's chief executive officer, advised by the County's attorneys, treats the sheriff, insofar as Jail operations are concerned, as "autonomous." . . . . The County has pointed us to no provision of State or local law that requires a sheriff to answer to any other entity in the management of his jail staff with respect to the existence or enforcement of a code of silence. We conclude that Sheriff Barnes was, as a matter of law, the County's final policymaking official with respect to the conduct of his staff members toward fellow officers who exercise their First Amendment rights to speak publicly or to inform government investigators of their co-workers' wrongdoing."); ***Dotson v. Chester***, 937 F.2d 920 (4th Cir. 1991) (court examines state law and county code to find Sheriff final policymaker as to operation of county jail).

See also ***Patel v. Hall***, 849 F.3d 970, 979-80 (10th Cir. 2017) ("While we are sympathetic to Plaintiff's concerns about the difficulties of proving who is a final policymaker in a small town with an informally run government, we are not persuaded it would be appropriate or prudent for us to depart from our usual summary judgment and municipal-liability standards in this case, especially in light of the fact that Plaintiff did not even raise this argument until his reply brief. The evidence Plaintiff presented of Officer Hall's position in the police department is both limited and ambiguous, and we are not persuaded that a jury could reasonably find Officer Hall to have final policymaking authority for the Town of Basin based simply on the facts that (1) he was placed temporarily 'in charge' of the police department for the short period of time before the new chief took office and (2) he was described as the acting chief of police by some people. We therefore affirm the district court's grant of summary judgment in favor of Officer Hall on Plaintiff's official-capacity claims."); ***Wilson v. City of Boston***, 421 F.3d 45, 59, 60 (1st Cir. 2005) ("Not every police operation is a municipal policy; Wilson has the burden of establishing that this particular operation was City policy. She argues that Operation Goodwin was City policy because it was (1) a large operation involving arrest warrants from all over Boston, (2) commanded by a high-ranking officer, and (3) videotaped for national distribution. Those facts, however, do not make it an official City policy. Wilson offers no evidence that Dunford − then a captain assigned to a station in Dorchester, subject to the hierarchical supervision of a Deputy Superintendent, Superintendent, and Police Commissioner − had the authority to set municipal policy for the City of Boston. We therefore affirm the district court's grant of summary judgment for the City."); ***Barry v. New York City Police Department,*** No. 01 Civ.10627 CBM, 2004 WL 758299, at *15 (S.D.N.Y. Apr. 7, 2004) ("While it seems likely, therefore, that the Police Commissioner bore final policymaking authority in the areas implicated by the adverse acts taken against plaintiff, and that he would have to have ordered or ratified the adverse acts in question, or at least known that Mullane, Reiss, and Fox had a retaliatory motive for carrying them out, the court needs more information about the power and authority of the police officers in question beyond the information

provided by the parties before it can make a final determination as a matter of law."); ***Stein v. Janos,*** 269 F. Supp.2d 256, 261 (S.D.N.Y. 2003) ("I cannot determine who had final authority to make policy concerning Stein's employment for the Village of Tarrytown, because, as usual, neither party has briefed the issue − not defendants as movants and not plaintiff in rebuttal. Common sense suggests that either the Mayor, Village Trustees, or Village Administrator is likely to have such authority − if not, there would appear to be a gaping hole in the Village's administrative organization. But I cannot make decisions in a vacuum. The Village's motion for summary judgment is denied without prejudice; when someone bothers to direct me to the appropriate law (at trial), I will address it.").

The plurality also underscored the importance of "finality" to the concept of policymaking and reiterated the distinction set out in ***Pembaur*** between authority to make final policy and authority to make discretionary decisions. "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id*. at 127.

See, e.g., ***Monacelli v. City of Dallas, Texas***, No. 24-10067, 2024 WL 4692025, at *3 (5th Cir. Nov. 6, 2024) (not reported) (Wiener, J., concurring) ("I concur in the majority's analysis and in the judgment, and I write separately to address an issue on appeal that the majority does not discuss. Monacelli's first issue on appeal is whether the district court properly rejected his contention that the Dallas city council had delegated policymaking authority to the Dallas Police Chief. Both parties spend a considerable amount of briefing on this issue and I write separately only to acknowledge and dispense with this issue. Monacelli rests his *Monell* claims on the theory that the Dallas Police Department (DPD) General Orders issued by the Police Chief are official policies by a policymaker. Unfortunately for Monacelli, this contention is foreclosed in this circuit, and it is settled law that the Dallas city council is the policymaking authority at issue. . . .I would thus expressly hold that the district court did not err in rejecting Monacelli's delegation theory and his § 1983 claims that rely on this contention fail for this reason alone."); ***Anderson v. Harris County***, 98 F.4th 641, 645-46 (5th Cir. 2024) ("Although Plaintiffs have alleged that Diaz had complete control over employment decisions for Precinct Two, . . . they have not alleged or argued that he made employment decisions for the entire county, nor could they. Accordingly, Diaz, as a constable of a single precinct, is not a final policymaker for Harris County. . . . Plaintiffs alternatively argue that Harris County is liable for Diaz's employment decisions under a delegation or rubber-stamp theory. Both theories fail in this case. First, Plaintiffs improperly rely on *Harris County v. Nagel* for its delegation theory. . . In *Nagel*, the court held that a constable was a policymaker for the county because the Commissioners Court delegated authority to him. . . But there, the Commissioners Court delegated authority over mental-health warrants *in the entire county* to the constable of a single precinct. . . Plaintiffs here have neither alleged nor argued that Diaz received authority over more than his own precinct. We have previously rejected the extension of *Nagel* to employment decisions for individual precincts, and we do so here. . . .Because Harris County did not delegate authority to hire and fire to Diaz over the *entire* county, Plaintiffs' delegation theory fails. Second, Plaintiffs assert that Harris County is liable because the

Commissioners Court rubber stamped Diaz's decisions by accepting them without question. We have not applied a theory that merely failing to disagree with something a constable did (without any allegation that the Commissioners Court knew the details) allows for a rubber-stamp theory of municipal liability. Rather, we have held a plaintiff may establish municipal liability through a ratification theory. *See Young v. Bd. of Supervisors*, 927 F.3d 898, 903 (5th Cir. 2019) ("If the authorized policymakers approve a subordinate's decision *and the basis for it*, their ratification would be chargeable to the municipality because their decision is final." (emphasis added) (quotation omitted)). There are certainly no pleadings of such action. . . .More importantly, Plaintiffs have not alleged that the county maintained a policy authorizing constables to condition employment on campaign contributions. Nor have Plaintiffs alleged that the Commissioners Court had any knowledge of Diaz's employment decisions on that basis, let alone alleged that the Commissioners Court approved Diaz's decisions and his unconstitutional basis for them. Under Plaintiffs' alleged facts, Diaz's actions were based on his own policy (that he likely hid from the Commissioners Court)—not the policy of Harris County. Plaintiffs' claims are thus more appropriately directed at Diaz alone. . . In sum, Plaintiffs have not alleged sufficient facts to plausibly show Harris County adopted a policy that violated their First Amendment rights. Accordingly, Plaintiffs' assertion of municipal liability fails."); ***Felts v. Green***, 91 F.4th 938, 943-44 (8th Cir. 2024) ("The Board's President has far more policymaking authority than the St. Louis County police superintendent—held to have final policymaking authority because he 'was the highest ranking police official in St. Louis County; was responsible for the entire department; and was responsible for drafting and approving many of the department's general orders.'. . Reed not only possessed greater authority but also faced less oversight. The voters elected Reed, while an administrative board appointed the police superintendent. . . The superintendent was removable by a majority vote of that board. . . Reed completely controlled the office of the President of the Board of Aldermen—removable only by a recall vote, the same procedure as for the mayor (the "chief executive officer of the city"). . . When Reed blocked Felts on Twitter, he executed a final municipal policy in his area of the City's business, the office of the President of the Board of Aldermen. Generally, the making of '"[a]n unconstitutional governmental policy can be inferred from a single decision taken by the highest official responsible for setting policy in that area of the government's business."'. . Regardless, while in office, Reed blocked at least five other specific individuals from his account who criticized him as an elected official. Reed's decision to block Felts was a deliberate choice of a guiding principle and procedure to silence online critics. . . . Reed made a deliberate choice to block Felts among various alternatives—ignoring the tweet, muting her account, replying from the account, replying from a pseudonymous "burner" account, or replying from a personal account not administered under color of law as an official governmental account. The City contends that though Reed had *discretion* to block Felts on Twitter, he did not have *authority* to make final policy about who the city of St. Louis blocks on Twitter. By the unique powers that the City charter grants the Board's President, he has authority to establish the final social media policy for the office of the President of the Board of Aldermen. The City's Department of Personnel's Social Media Policy did not apply to Reed or to his staff. No other City social media policy applied to him. Reed was free to make final policy in his area of the City's business, which he did by blocking critics, including Felts. . . Reed's choice to block

Felts on a government account was unilateral, unreviewable, and not subject to other policies. He created municipal policy in his area of the City's business. Because of the unique power of the President of the Board of Aldermen, Reed exercised final policymaking authority when he blocked Felts. The City of St. Louis is liable under 42 U.S.C. § 1983."); ***Doe v. Burleson County, Texas***, 86 F.4th 172, 176-79 (5th Cir. 2023) ("Burleson County, as a municipality, is only liable for the actions of its employees when an official policy or custom causes the plaintiff's injury. . . Accordingly, to succeed on a *Monell* claim, a plaintiff must show 'that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right.'. . In some cases, where there may not be an express policy or custom in place to satisfy the first element of a *Monell* claim, the plaintiff can instead allege that the action of a single 'policymaker' caused the injury. . . . 'A final policymaker is one that has the responsibility for making law or setting policy in any given area of a local government's business'—in other words, 'one that decides the goals for a particular city function and devises the means of achieving those goals.'. . . Accordingly, Doe's claim against Burleson County turns on whether Sutherland possessed final policymaking authority under Texas law for the actions in question. . . . The question, then, is whether the factual scenario here involves an area in which Sutherland 'alone' had the final say over policymaking. The answer is clear: despite his position as County Judge, Sutherland lacked the requisite policymaking authority to hold Burleson County liable for his alleged sexual misconduct. . . . Besides there being no 'policy' to shoehorn Doe's allegations into, it is hard to imagine that Sutherland would be considered the 'ultimate repository of county power' if he engages in independent, private sexual assault against another. . . . Doe's claim seems to sound instead in *respondeat superior*, but this is an impermissible theory upon which to base a *Monell* claim. . . Ultimately, this is a square-peg-round-hole case: Doe simply cannot make the facts fit the theory of liability. In sum, the broad ability to make decisions (along with the rest of the commissioner's court) for the county's business generally is distinguishable from Sutherland's personal responsibility for his alleged sexual misconduct against an employee of the County Attorney's Office. . . Not only is there no Texas law delegating authority to county judges to establish personnel policies in various offices, there is also a complete lack of connection between Sutherland's own alleged misconduct and official policymaking under *Monell*. . . Doe fails to establish that Sutherland had the requisite final policymaking authority to hold Burleson County liable for his actions here, regardless of his general ability to make decisions regarding county business. Thus, the district court correctly dismissed Doe's Section 1983 claim against Burleson County."); ***Guerra v. Castillo***, 82 F.4th 278, 290-91 (5th Cir. 2023) ("In its motion to dismiss below, the City produced parts of the city charter to argue that 'all powers of the City of Alamo [are] vested in [its] Board of Commissioners' and that neither the Chief of Police nor the City Manager has policymaking authority. It also argued, in further briefing, that Guerra failed to 'identify any facts to establish the City ever delegated policymaking authority to Castillo.'In reply, Guerra reproduced the same parts of the city charter, bolding the phrase '[The Board] may pass any ordinances they may desire delegating any part of their authority and duties to any other person, offices or employee, not inconsistent with the Constitution or laws of the State of Texas.' Art. III § 6. But he mentioned no ordinance that delegated that authority. Instead, he reproduced a section of the city charter stating, '[t]he chief of police shall be the chief administrative officer of

the department of police,' and '[t]he chief of police shall be responsible for the administration of the police department.'. . The above does not allow this court to plausibly infer that Castillo had 'more' than either 'complete discretionary authority [ ]or the unreviewability of such authority,' as *Zarnow* requires. . . Next, Guerra argues that Ozuna, the City Manager, had policymaking authority under *Monell*. . . Guerra's complaint noted that he was terminated in a letter from Ozuna. The complaint also claims that Guerra's counsel had requested an administrative hearing from Ozuna 'to discuss the false allegations against Plaintiff that had wrongfully resulted in his dismissal[,] but the hearing was never provided.' Once again, Guerra's complaint does not identify facts that allow this court to plausibly infer that Ozuna had both complete or unreviewable discretionary authority and also 'more.'. . Therefore, we AFFIRM the district court's dismissal of the City under 12(b)(6)."); ***St. Maron Properties, L.L.C. v. City of Houston***, 78 F.4th 754, 760-61 (5th Cir. 2023) ("[Plaintiffs'] allegations establish that the Mayor and City Council made the deliberate decision to use City services to get an injunction based on false information, and then use that injunction to justify entering and modifying Plaintiffs' properties. . . . The Mayor and City Council are final policymakers for the purpose of *Monell* liability. The Houston Charter makes it clear that '[t]he governing body of the City of Houston, Texas, shall be the City Council,' and that it shall be composed of the Mayor and ... Council Members.'. . . Plaintiffs have plausibly alleged that the Mayor and City Council directed and ratified the unconstitutional actions of City departments, and the Houston Charter makes clear the Mayor and City Council have policymaking authority. These allegations are sufficient to establish an official policymaker under *Monell*."); ***G.S. on behalf of S.S. v. Penn-Trafford School District***, No. 20-3281, 2023 WL 4486667, at *3–4 (3d Cir. July 12, 2023) (not reported) ("Under Pennsylvania law, a school board may be the final policymaker with respect to some actions, while the school superintendent may be the final policymaker with regard to other actions. . . The inquiry into whether Harris acted as a policymaker when he agreed to review S.S.'s suspension is resolved by identifying the final policymaker regarding suspensions in Pennsylvania high schools. Section 12.6 of the Pennsylvania Administrative Code. . . governs exclusions from school. It states that suspensions of one to ten school days 'may be given by the principal or person in charge of the public school.'. . The Pennsylvania School Code provides that district superintendents have final discretion to determine the appropriateness of three-day suspensions. . . Another section of the School Code provides that a superintendent supervises all matters relating to discipline and holds final authority on such matters. . . Pennsylvania statutes thus support the conclusion that Harris possesses final authority over student suspensions. In *Andrews v. City of Philadelphia*, we explained that in circumstances such as these, where officials without policymaking authority allegedly violate a plaintiff's constitutional rights, a municipality can be held liable only if the final policymaker either acquiesced in the subordinate's decisions or delegated authority to him or her. . . Here, Defendants acknowledge that Harris is the final policymaker, but they argue that 'the only allegations involving Harris are that he met with [G.S.] and refused to remove S.S.'s suspension."[35] But G.S. does not only allege that Harris met with her and refused to remove S.S.'s suspension. She also alleges that Harris told her that he would (1) review the suspension, and (2) contact her after he and Inglese reached a decision. As we have explained, G.S. alleges that Inglese explicitly relied on S.S's protected conduct to justify her suspension (which Harris apparently reviewed). Once

again construing these allegations in the light most favorable to the plaintiffs, we conclude that the complaint sufficiently pleads that Harris knowingly acquiesced to the justification Inglese communicated to G.S. If so, Harris's ratification may be chargeable to the School District because his decision regarding S.S.'s suspension was final."); ***Friend v. Gasparino***, 61 F.4th 77, 94-95 (2d Cir. 2023) ("As in *Agosto*, in this case Friend 'points to no state authority' indicating that Gasparino has 'final responsibility under state law for making policy.'. . The Connecticut law governing the duties of law enforcement officers in setting the terms and conditions of release of arrestees says nothing to indicate that a single patrol sergeant may set bail policy for the municipality. . .The statute contemplates only that individual *decisions*—including releasing an arrestee with a promise to appear—are within the authority of the police chief or his or her designees. . . That is insufficient to establish that the City vested Gasparino with the 'authority to set final, municipality-wide policy.'. . . Friend adduced testimony that, in practice, desk supervisors routinely permit lower-ranking patrol sergeants such as Gasparino to set bonds as a matter of 'general[ ] defer[ence]' to the patrol sergeant's 'more intimate knowledge of the person that was arrested, and what brought them there.'. . Friend argues that the authority to make policy was thereby devolved, and a 'well-settled custom' empowered Gasparino to make municipal policy when he set Friend's bail. . . Yet even if there were a 'well-settled custom' of 'general[ ] defer[ence]' to the patrol sergeant's bail determinations, that would at most establish that the City '[went] along with discretionary decisions made by its subordinates.'. . Such acquiescence 'is not a delegation ... of the authority to make policy.'. .In this case, Gasparino was not the final decisionmaker because his decision was subject to review by the bail commissioner, who in fact reversed that decision. And even focusing on the period in which Friend awaited the bail commissioner's review, Friend's *Monell* claim fails for the additional reason that Gasparino was not a final policymaker. Were we to 'equat[e] a final decisionmaker with a final policymaker,' we 'would effectively impose *respondeat superior* liability—making the municipality liable for the conduct of its employees—in violation of *Monell*.'. . For these reasons, we affirm the judgment of the district court with respect to Counts Four and Five."); ***Chabad Chayil, Inc. v. School Bd. of Miami-Dade County, Fla.***, 48 F.4th 1222, 1229-30 (11th Cir. 2022) ("Here, Chabad alleges (1) that Superintendent Carvalho's 'single ... decision' to prevent it from using MDCPS's facilities for its after-school programs violated its constitutional rights and (2) that Superintendent Carvalho had the requisite 'final policymaking authority' over school-facility usage. . . With respect to the latter issue, Chabad's complaint says only that Carvalho was 'responsible for the administration and management of MDCPS as set out in Fla. Stat. § 1001.51 and [was] a final decision maker of MDCPS.' . . Neither that conclusory assertion nor the embedded statutory citation is sufficient to show that Carvalho had final policymaking authority over school-facility usage. The standard that governs the *Monell* issue here is straightforward and uncontroversial: '[T]his Court's decisions have consistently recognized and given effect to the principle that a municipal official does not have final policymaking authority over a particular subject matter when that official's decisions are subject to meaningful administrative review.' *Morro v. City of Birmingham*, 117 F.3d 508, 514 (11th Cir. 1997) (collecting cases). The question, therefore, is whether, as Chabad asserts, Carvalho had 'unreviewable' authority over school property. . . Chabad offers no support for that conclusory assertion, and we can find none in the applicable Florida law. To the contrary, whatever

property-related policymaking authority a school superintendent has is subject to the school board's 'meaningful' review—and, accordingly, that it is not 'final' for *Monell* purposes. . . . Nearly everything in Chapter 1001 of the Florida Statutes undermines Chabad's contention that Superintendent Carvalho has *Monell*-qualifying 'final policymaking authority.'"); ***Novak v. City of Parma, Ohio***, 33 F.4th 296, 309 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 773 (2023) ("Novak argues that Parma's Law Director, Timothy Dobeck, set the City's official policy when he determined that Riley and Connor had probable cause to continue investigating Novak. And he contends that because Dobeck had the final say over the City's legal opinions, his advice to the officers set Parma's policy on the matter. . . But by Novak's lights, every city prosecutor would 'set policy' for the municipality several times a day, every time he assessed probable cause. And that cannot be the case. This argument also overstates Dobeck's role in both municipal decisionmaking and Novak's alleged violations. The Supreme Court in *Pembaur* was careful to distinguish mere 'advice' from 'orders.'. . And here, neither Dobeck nor the officers considered his probable-cause determination an order to keep investigating Novak. . . Yet even if Dobeck had made the final municipal determination that the officers had probable cause to arrest Novak, the judges' independent determinations eliminate the causal connection. . . For both of these reasons, Novak's authorized-action theory fails."); ***Edelstein v. City of Brownsville***, No. 20-40211, 2021 WL 4096581, at *4 (5th Cir. Sept. 8, 2021) (not reported) ("Plaintiffs offer two theories why the final policymakers are the City Commissioners instead. Both have been foreclosed by our precedents. First, Plaintiffs appear to argue that the Commissioners' general oversight over the Manager makes them the final policymakers on hiring. It is true that the Manager is 'responsible to the city commission for the proper administration of all affairs of the city in his charge.'. . We have previously held, however, that '[t]he mere existence of oversight ... is not enough' to make an official a final policymaker. . . Instead, that official's oversight must relate to 'the precise action' at issue in the litigation. . . Here, because the Commissioners are forbidden from 'dictat[ing] the appointment' of Municipal Judges 'in any manner,' they cannot overturn the precise action of the Manager's hiring decisions. . . Their general authority over the Manager thus does not make them policymakers *vis-à-vis* those hiring decisions. Plaintiffs' oversight theory fails. Second, Plaintiffs appear to argue that the Commissioners are the final policymakers here because the Manager complied with their instructions to hire only men. But according to our caselaw, it is the *formal* allocation of power—not the way power is exercised 'in practice'—that matters for municipal liability under Section 1983. . . Analyzing the issue any differently would disregard the Supreme Court's instructions to 'respect the decisions, embodied in state and local law, that allocate policymaking authority among particular individuals and bodies.'. . It would also permit municipalities to be held liable under Section 1983 on what would operate in practice as a *respondeat superior* theory—something the Supreme Court has repeatedly forbidden. . . Hence, both the Supreme Court and our court 'have explicitly rejected the concept of *de facto* authority' like the one advanced in this case. . . That means that the City's final policymaker is still the Manager, even if the Commissioners exercised 'personal sway' over him. . . Plaintiffs' command theory thus fails, and the district court therefore properly dismissed their Equal Protection claim."); ***Agosto v. New York City Dep't of Education***, 982 F.3d 86, 91-92, 98-101 (2d Cir. 2020) ("Agosto's *Monell* claim against the Department of Education fails because he has not identified

a municipal policy that allegedly caused a constitutional violation. Agosto seeks *Monell* liability solely on the theory that Ureña's acts set final policy for the Department of Education. The Supreme Court has explained that a single official can create *Monell* liability only if state law provides that official with authority to set final, municipality-wide policy in the relevant area. No state law conferred such power on Ureña, who was one of hundreds of principals within the Department of Education subject to the chancellor's regulations and to statutory authorities regarding teacher discipline and evaluations. Agosto's claim boils down to the theory that Ureña was a final policymaker because his decisions with respect to Agosto were essentially unreviewable. But the Supreme Court has rejected the concept of *de facto* policymaking authority, which erroneously conflates a final decisionmaker (which Ureña may have been) with a final policymaker (which Ureña was not). . . .Agosto points to no state authority indicating that a New York City school principal has final 'responsib[ility] under state law for making policy' in any 'area of the [Department of Education's] business' at issue in this case, . . . such that his 'edicts or acts' would be considered to 'represent official policy' for the entire municipality[.]. . .To the contrary, New York State law establishes that New York City school principals such as Ureña are '[s]ubject to the regulations of the chancellor,' N.Y. Educ. Law § 2590-i, who possesses expansive powers to make policy for and to otherwise govern New York City schools[.] . . . As relevant here, the chancellor has authority to make 'a final determination' when teachers appeal poor ratings, . . . and to resolve formal disciplinary proceedings brought against teachers and staff, including the power to terminate their employment[.] . . . Because state law invests the chancellor with such authority, New York's highest court has held that 'the city board [of education] and the Chancellor are responsible for policy having city-wide impact.'. . Accordingly, state law provides 'that there is a[ ] final policymaker *other than* [Principal Ureña] with respect to' the areas of municipal business for which Agosto claims Ureña was setting policy. . . . Agosto has apparently settled on the theory that Ureña's disciplinary letters and negative evaluations were unreviewable by higher-level officials within the Department of Education, making Ureña the *de facto* final municipal policymaker on those specific matters involving Agosto. Even assuming that Ureña's actions were unreviewable, Agosto's claim still fails because the Supreme Court has rejected the 'concept of "*de facto* final policymaking authority."'. . A municipality's 'going along with discretionary decisions made by [its] subordinates ... is not a delegation to them of the authority to make policy.'. . Agosto must demonstrate that 'through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged,' . . . but he has demonstrated no such deliberate conduct by the municipality here. The only deliberate actor was Ureña. Moreover, by equating a final decisionmaker with a final policymaker, Agosto's approach would effectively impose *respondeat superior* liability—making the municipality liable for the conduct of its employees—in violation of *Monell* itself. . . Agosto responds that even if Ureña were not the final municipal policymaker for teacher discipline and evaluations, he was the final policymaker at least for his own 'discriminatory and harassing behavior towards Mr. Agosto.'. . .But by erroneously equating a principal's final decisions with a municipality's final policies, those cases make the same mistake as Agosto. We do not believe that approach is consistent with *Monell* and accordingly decline to adopt it. Such an approach would risk imposing *Monell* liability for almost every action a principal takes. . . Our conclusion that a New York City principal does not have municipal policymaking

authority for *Monell* purposes here finds additional support in this court's decision in *Hurdle v. Board of Education of City of New York*, 113 F. App'x 423 (2d Cir. 2004). That case is especially instructive because we held that a New York City superintendent's final decision to transfer a principal did not set municipal policy. . . . *Hurdle* involved a superintendent—an official who outranks a principal such as Ureña—but this court explained that even when the official 'is the apex of a bureaucracy,' that merely 'makes the decision "final" but does not forge a link between "finality" and "policy."'. . The ability to make a final transfer decision for one particular employee 'does not establish that [the official] had the authority to set the policy authorizing involuntary employee transfers' for the entire municipality. . . The same is true here. Even assuming Ureña's discipline, evaluations, and harassing behavior were final decisions, those acts did not set final municipal policy because Ureña lacked policymaking authority under state law. Because Agosto's *Monell* claim rests on his erroneous theory that Ureña was a final policymaker for the New York City Department of Education, we affirm the district court's grant of summary judgment to the Department on Agosto's § 1983 claim."); ***Porter v. City of Philadelphia***, 975 F.3d 374, 384-85 (3d Cir. 2020) ("To the extent the District Court suggests that the City is liable for Chew's individual decision-making, we cannot agree. His unendorsed actions, without more, did not become municipal policy or give rise to municipal liability under *Monell*. There is no evidence to suggest that municipal decision-makers were aware of Chew's inconsistent implementation of the no-comment policy or that Chew had previously used force to enforce it with the tacit approval of policymakers. . . To the contrary, trial testimony indicates that the Sheriff's Office's policy was to ask people who tried to make announcements to sit down and, if they did not comply, to escort them out of the hall. . . Furthermore, one Sheriff's Office clerk testified that the violent response was something he '[had] never [seen] ... before' at a sheriff's sale and agreed that it was 'out of character of the normal conduct of business.'. .While the District Court found that the deputies approached Porter 'at the request of Chew'. . . and that 'Chew apparently asked for such a response,'. . . the fact that Chew apparently had the authority to direct the deputies to stop Porter from speaking does not make his decision to do so City policy. 'The fact that a particular official ... has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.'. . Rather, "[t]he official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.'. . Thus, we cannot conclude that Chew's unofficial determination of how and when the policy was to be enforced, in contravention of the City's clear and nondiscriminatory policy prohibiting all comments, gives rise to liability under *Monell*."); ***Tlapanco v. Elges***, 969 F.3d 638, 658 (6th Cir. 2020) ("Whether an individual is a final policymaker for purposes of § 1983 liability is a question of state or local law, and a showing of policymaking authority typically requires specific evidence that the official's decisions were not subject to review or that the official could set policy related to broad goals. . . Tlapanco has not demonstrated that state or local law vested McCabe with the authority to make county policy nor that McCabe's 'decisions are final and unreviewable and are not constrained by the official policies of superior officials.'. . Tlapanco's exclusive reliance on McCabe's deposition testimony regarding his second-in-command duties within OCSO is insufficient to satisfy his burden to provide evidence that McCabe had final policymaking authority to establish particular search and seizure

practices for Oakland County. The district court properly granted summary judgment to Oakland County on Tlapanco's municipal liability claim."); ***Thompson v. District of Columbia (Thompson IV)***, 967 F.3d 804, 813-17 (D.C. Cir. 2020) ("[T]he record in this case shows that King was acting as a final policymaker on behalf of the District when he made 'the types of Lottery personnel decisions that led to Thompson's constructive termination' without notice or a pre-termination hearing. . . The District empowered King to make the final policy judgments for developing and carrying out the reduction in force at the Lottery Board, and he used that authority to take the personnel measures that constructively terminated Thompson without due process. His relevant personnel decisions were (i) unconstrained 'by policies enacted by others,' and (ii) unreviewable by any other authorized policymaker. . . So the District is liable for them under *Monell*. . . .We spilled a great deal of ink in *Thompson III* on King's authority under the reduction-in-force statute as it relates to *Monell* liability. . . . The District's failure to back up its contention that it had an 'established policy' in 1996 of mandating pre-transfer notice under the CMPA if the transfer resulted in a constructive termination closes the door on its argument that King was simply a rogue tortfeasor. . . Because the record in this case demonstrates that King had the sole and unreviewable authority to make the series of personnel decisions, including the transfer, that together amounted to Thompson's constructive termination without due process, he was a final policymaker for the District within the meaning of *Monell*. For that reason, the district court is directed to enter summary judgment in favor of Michelle Thompson on the question of *Monell* liability. . . .As a matter of law, King acted as a final policymaker when he took the series of personnel actions that resulted in Thompson's constructive termination without due process. That means that the District of Columbia is responsible for the wrong. We direct the district court to enter summary judgment for Michelle Thompson on the question of *Monell* liability, and we remand for further proceedings to determine the amount of damages owed, consistent with this opinion."); ***Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.***, 942 F.3d 258, 271-72 (5th Cir. 2019) ("A municipality can be held liable only when it delegates policymaking authority, not when it delegates *decisionmaking* authority. . . Plaintiffs argue that Sanchez exercised policymaking authority when he rendered a final decision on M.L.'s dismissal from the cheerleading team, but the 'finality of an official's action does not ... automatically lend it the character of a policy[.]'. . . The Supreme Court's cases 'sharply distinguish[ ] between decisionmakers and final policymakers.'. . Without additional allegations that demonstrate Sanchez possessed delegated policymaking authority, plaintiffs fail to state a claim for municipal liability. Thus, we affirm the district court's dismissal of this claim."); ***Burke v. Regalado***, 935 F.3d 960, 1001 (10th Cir. 2019) ("For substantially the same reasons that we find sufficient evidence of supervisory liability, a reasonable jury also could find official capacity liability. *See Larez v. City of Los Angeles*, 946 F.2d 630, 646-47 (9th Cir. 1991) (relying on evidence of a police chief's inadequate investigation of officers' use of force to support liability for the chief in his individual and official capacities). Sheriff Glanz—then the Tulsa County official charged with managing the jail—furthered a 'policy or custom,'. . . of deficient medical care at the jail characterized by inadequate training, understaffing, and chronic delays. A reasonable jury could find his continuous neglect of these problems 'was the moving force behind the injury alleged.'. . And as explained above, Sheriff Glanz acted with deliberate indifference

toward the risk that the policy or custom of providing inadequate medical care would result in an injury like Mr. Williams's."); ***Webb v. Town of St. Joseph***, 925 F.3d 209, 215-20 (5th Cir. 2019) ("The Webbs argue that St. Joseph's liability is grounded in the actions of two officials, the Town Attorney and Mayor Brown. We address in turn whether each is a 'final policymaker' whose one-time actions could generate municipal liability. . . .In sum, the Webbs argue that this falls into the narrow range of cases where municipal liability can stem from individual, one-off decisions by an authorized policymaker. They have not shown that the Town Attorney was a final policymaker for these purposes, and therefore have not shown that St. Joseph should be liable as a municipality for *his* discretionary decisions. It is possible that affirmative decisions made by the Mayor, rather than the Town Attorney, could have generated municipal liability. The only affirmative decision by Mayor Brown that the Webbs have adequately substantiated, however, was his initial decision to take efforts to collect on the—at that time, final—judgment. With our focus substantially narrowed, we therefore turn to whether *this decision* was the 'moving force' behind a violation of a constitutional right. . . . After establishing a sufficiently official municipal policy promulgated by an authorized policymaker, a plaintiff must then show that the policy was the 'moving force' behind the constitutional violation. . . This requires showing either that the policy itself was unconstitutional. . . or that it was adopted with deliberate indifference to the 'known or obvious fact that such constitutional violations would result.' . . As we have explained, the only potential municipal policy that could ground the Webbs' claim against St. Joseph arises from Mayor Brown's alleged decision, as a final policymaker, to *initially begin* undertaking efforts to collect on the judgment. . . . A common thread running throughout the Supreme Court's and our own caselaw on municipal liability is that such liability 'is limited to action for which the municipality is actually responsible.'. . The Webbs have painted a picture of poor decisions and bureaucratic dysfunction—but they have not established that *St. Joseph policy* was the moving force behind the violation of any constitutional right. We therefore affirm the district court's grant of summary judgment to St. Joseph on the Webbs' § 1983 claim."); ***Lopez v. Gibson***, 770 F. App'x 982, 992-93 (11th Cir. 2019) ("An official is not a final policymaker where his decisions are subject to 'meaningful administrative review.'. . Generally, the existence of a reviewing body suffices to find that an official whose decisions are subject to review was not a final policymaker. . .This Court has found meaningful administrative review where there was review by a Career Service Council with the authority to order reinstatement or otherwise amend, alter, sustain, or reverse the decision of the employer. . . Also, this Court has found meaningful administrative review where there was review by a Civil Service Board with power to reverse an employer's termination decision. . . However, a plaintiff can attempt to demonstrate that the reviewing body's administrative review is not meaningful, such that the official should be considered the final policymaker. . . To succeed in such an argument, the plaintiff needs to show that the reviewing body has defective procedures, merely 'rubber stamps' the official's decision, or ratifies the official's decision and improper motive. . . It is the plaintiff's burden to show that the official is a final policymaker. . . If the defendant is not a final policymaker, the plaintiff's § 1983 claim fails against a defendant in his official capacity. . . The dispositive issue in this appeal is whether Sheriff Gibson is a final policymaker with respect to employment demotions of employees working for the Osceola County Sheriff's Office. . . . On appeal, Plaintiff Lopez argues that in 2017 Sheriff Gibson in his official

capacity was the final policymaker because he had absolute authority over Lopez's demotion. Lopez contends that Sheriff Gibson has absolute authority over the deputies and the interpretation and application of the Sheriff's Office's policies. He argues that the Appeals Board did not establish any government policy or determine the constitutionality of Sheriff Gibson's interpretation of the conduct policies. Plaintiff Lopez acknowledges that the Sheriff's Office's Standards of Conduct prohibit publicly criticizing the Sheriff's Office, where such speech is defamatory, obscene, unlawful, undermines the effectiveness of the Sheriff's Office, interferes with the maintenance of discipline, or is made with reckless disregard for truth or falsity. Lopez does not challenge the constitutionality of the conduct standards *vel non*. Rather, Lopez contends that Sheriff Gibson should not have applied the existing standards to his conduct and demoted him because it was protected political speech. We need not address whether Lopez's posts on his 'community cop' page on Facebook were protected speech or not because Sheriff Gibson was not the final policymaker in regards to Lopez's demotion in any event. As the district court concluded, Sheriff Gibson was not the final policymaker with respect to Lopez's demotion because Florida law specifically delegated that authority to the Career Service Appeals Board. . . As recounted above, the Appeals Board had the power to review and reverse the Sheriff's discipline, and the Sheriff was bound by the Appeals Board's decision. . . Further, Sheriff Gibson's demotion of Lopez was subject to meaningful administrative review by the Appeals Board, which heard witnesses, deliberated, and issued its own fact findings and decision. . . The district court thus did not err in concluding that Sheriff Gibson in his official capacity was not the final policymaker as to Lopez's demotion."); ***Cherry Knoll, L.L.C. v. Jones***, 922 F.3d 309, 317-18 (5th Cir. 2019) ("Cherry Knoll's well-pleaded factual allegations make it plausible that the City Council made the deliberate decision in 2014 to file the Subdivision Plats over Cherry Knoll's objection and to use the filed plats as leverage in its land-acquisition effort. These allegations satisfy the standard for official municipal policy under *Pembaur*, and the district court erred in finding otherwise."); ***Davison v. Randall***, 912 F.3d 666, 689-90 (4th Cir. 2019) ("Here, Davison failed to put forward evidence establishing that Randall was a final municipal policymaker with regard to her banning of Davison from the Chair's Facebook Page. On the contrary, record evidence establishes that the Loudoun Board retained authority to establish municipal policy with respect to social media pages, as it adopted a social media policy governing the County's official social media pages. Davison concedes as much, arguing that the Loudoun Board 'neglected ... to extend its written guidelines to Board members' official pages.'. . But that argument presupposes that the Loudoun Board—not Randall—had authority to establish municipal policy with respect 'to Board members' official pages.' Davison nevertheless argues that the Loudoun Board 'implicitly' delegated its final policymaking authority to Randall by not addressing individual Loudoun Board members' official pages in its social media policy. Davison is correct that delegation of final policy making authority may be 'implied from a continued course of knowing acquiescence by the governing body in the exercise of policymaking authority by an agency or official.'. . But Davison identifies no evidence that the Loudoun Board knew of the Chair's Facebook Page, let alone that it 'aquiesce[d]' in Randall's administration of the page and banning of Davison, in particular. On the contrary, the district court found that Randall made a one-off, 'unilateral decision to ban [Davison] in the heat of the moment, and reconsidered soon thereafter,'. . . before the Loudoun Board had a chance to

learn of her action. In such circumstances, the district court did not reversibly err in rejecting Davison's official capacity claim."); ***Barone v. City of Springfield, Oregon***, 902 F.3d 1091, 1107-09 (9th Cir. 2018) ("We conclude that the City Manager possessed final policymaking authority, and that there is a triable issue of material fact whether the City Manager delegated his final policymaking authority over employee discipline in the Department to Chief Doney. A municipal policy may arise where a government 'chooses a course of action tailored to a particular situation' that is 'not intended to control decisions in later situations.'. . . The course of action must be 'made from among various alternatives by the official ... responsible for establishing final policy' on the subject matter in question. . . Therefore, we look to whether the individual had final policymaking authority 'in a particular area, or on a particular issue.'. . Oregon law provides that '[t]he powers of the city shall be vested in the [city] council.'. . In turn, the City of Springfield Charter, governing the city council, delegates to the City Manager the authority to 'prescribe rules governing the non-discriminatory recruitment, selection, promotion, compensation, transfer, demotion, suspension, layoff and dismissal of City employees.' The City Charter does not delegate any authority to the Chief of Police. Barone argues that the City Manager was not the final policymaker by reading the City Charter in an unduly narrow fashion. She contends that the City Charter did not grant the City Manager the sole authority over personnel decisions, but rather the authority only to more broadly 'prescribe rules' about personnel decisions. This argument is unconvincing. . . . [T]he City Charter delegated the pertinent final policymaking authority to the City Manager. . . The final policymaker is the individual who had authority in the particular area where the constitutional violation occurred. . . In this case, the relevant area of policymaking is employee discipline because the constitutional violation was requiring Barone to sign the amended Agreement in order to keep her position at the Department. This decision was within the purview of the City Manager under the City Charter—requiring Barone to sign the amended Agreement was a 'rule[ ] governing' her 'suspension, layoff and dismissal.' The City Charter therefore delegated final policymaking authority to the City Manager. Because the City Charter delegated final policymaking authority to the City Manager, we now consider whether he delegated final policymaking authority over employee discipline in the Department to Chief Doney. Appellees liken this case to *Gillette v. Delmore*, wherein we concluded that a fire chief's decision to discipline a fire fighter did not trigger *Monell* liability because the city charter 'grant[ed] authority to make City employment policy only to the City Manager and the City Council.'. . The fire chief possessed 'the discretionary authority to hire and fire employees,' but this authority was 'not sufficient to establish a basis for municipal liability.'. . Appellees argue that, similar to the fire chief in *Gillette,* Chief Doney possessed only discretionary authority. We disagree. The plaintiff in *Gillette* failed to provide evidence that the City Manager delegated final policymaking authority to the fire chief. . . In contrast, the record before us contains evidence that the City Manager delegated his final policymaking authority over employee discipline in the Department to Chief Doney. For example, Chief Doney conceded that 'the buck stops' with him '[w]ithin the department'; Director Utecht admitted that 'whatever decision [Chief Doney] made, the city manager would support in this case'; and the City Manager testified that he had 'no role' in the decision to fire or discipline Barone. These statements create a triable issue of material fact about who possessed final policymaking authority on employee discipline for the Department. Because there is a genuine

issue of material fact about whether the City Manager delegated final policymaking authority to Chief Doney, the district court erred in granting summary judgment in favor of the City. If the City Manager delegated the relevant authority to Chief Doney, the City would be liable under *Monell* for Chief Doney's decision to require Barone to sign the amended Agreement. We therefore reverse and remand for consideration of whether the City can be held liable for Chief Doney's conduct for the reasons herein noted."); ***Hunter v. Town of Mocksville, N. Carolina***, 897 F.3d 538, 555-61 (4th Cir. 2018) ("In concluding that neither Cook nor Bralley was a final policymaker of the Town with regard to the termination of Plaintiffs, the district court looked only to state law—specifically, North Carolina General Statute Section 160A-164, which vests the Mocksville Town Board with discretion to 'adopt or provide' personnel policies for Town employees. . . This was error. Read alone, the state statute does vest authority in the Town Board to make personnel decisions. However, as the Town concedes, . . when determining whether a local official possesses final policymaking authority, the Supreme Court has directed courts to look to 'the relevant legal materials, including state *and local positive law*[.]' [citing *Jett*] And the relevant local positive law in this case makes clear that the Town delegated to Bralley final and unconstrained policymaking authority with regard to the challenged actions at issue. . . . Here, the Town Board has exercised its statutory authority not to adopt its own policies or regulations governing the specific terms of its employees' employment. In particular, the Town Board 'does not have a written personnel policy.'. . Nor does the Town Board have any formal grievance procedure or any 'other requirement which requires the Town to provide an employee in a potential discharge situation with pre-discharge procedural due process ... or post-discharge procedural due process.'. . [U]nder the ordinance's plain language, the Town Board delegated to Bralley, as Town Manager, its statutory authority to set personnel policy for the Town. In particular, the ordinance confers on Bralley unconstrained authority to define nearly all terms of employment for Town personnel, including all matters related to Plaintiffs' hiring, supervision, and discharge. . . . Bralley wielded such authority—free of any constraints on her discretion—when she terminated Plaintiffs in violation of the First Amendment. The Town did not constrain Bralley's authority; indeed, the Town conceded that it has long since repealed all personnel policies that may have constrained Bralley's authority while declining to promulgate new ones. Moreover, the Town concedes that it maintained no formal review process for evaluating Bralley's termination decisions. In light of these concessions and the Town Board's express delegation of final policymaking authority to Bralley, we conclude that the circumstances surrounding Bralley's decision to terminate Plaintiffs present all the hallmarks of a final policymaker wielding her authority. . . .Indeed, our sister circuits have held that municipal officials constitute final policymakers in materially indistinguishable circumstances. [collecting cases] To hold otherwise would insulate the Town from liability in virtually every case—a result contrary to the principles underlying Section 1983. If a municipality, like the Town, could expressly delegate to a municipal official the unfettered authority to make *all* employment decisions (excepting the award of 'fringe benefits') without constraining whatsoever the official's exercise of that authority, then that municipality would have the ability to effectuate employment policy without incurring the risk of liability for any unconstitutional policies the official may effect on its behalf. . . . If Bralley is not the final policymaker for the Town with respect to personnel policy, and the Town has no personnel policies on the books, then

who *is* the final policymaker? And whose policies have governed the employment relationship between the Town and its employees for the past several decades? To hold that Bralley is not a final policymaker with regard to the termination of Plaintiffs would, in effect, mean that the Town had *no* policymakers with regard to those personnel decisions, because the Town Board has delegated final policymaking authority to Bralley, does not routinely review personnel decisions made by Bralley, and has not maintained any personnel policies for at least three decades. . . Such a conclusion would sanction and encourage 'egregious attempts by local governments to insulate themselves from liability for unconstitutional policies[.]'. . This cannot be so. . . . Here, the Town Board chose to confer on Bralley unfettered final policymaking authority with respect to almost all personnel matters—including terminations. . . The Town made no effort to constrain or limit that delegation. And, as a matter of custom, Bralley exercised that delegated authority without oversight by the Board. Accordingly, the Town Board's 'unexercised ultimate authority' to rescind its ordinance conferring such authority does not undermine our conclusion that Bralley constituted a final policymaker of the Town with regard to the conduct at issue—the unlawful termination of Plaintiffs. . . .Finally, although we hold that Bralley, as Town Manager, was a final municipal policymaker with regard to the conduct at issue, we agree with the district court's conclusion that Cook, as Police Chief, was not. In particular, we find that Justice Brennan's hypothetical in *Pembaur* illustrates precisely why Bralley *is* a final policymaker for the Town with respect to establishing personnel policies, and why Cook *is not*: Because the Town Board 'delegated its power to establish final employment policy to the [Town Manager], the [Town Manager's] decisions ... represent [Town] policy and could give rise to municipal liability.'. . And here the record is replete with evidence demonstrating that Cook's personnel decisions were always subject to review by Bralley. . . Plaintiffs concede as much in their briefs. . . Accordingly, we conclude that Cook was not a final policymaker for the Town with respect to personnel policy."); ***Southern Atlantic Companies, LLC v. School Bd. of Orange County, Florida***, No. 16-15446, 2017 WL 2569905, at *3–4 (11th Cir. June 14, 2017) (not published) ('Southern Atlantic maintains that, pursuant to a longstanding Board practice, the general counsel possessed final authority to settle litigation under $50,000, 'as well as other "ministerial functions" like assigning [a] [b]ond.'. . Southern Atlantic asserts that, because the fees and costs sought against the bond totaled less than $50,000, Mr. Rodriguez had final policymaking authority over the alleged unconstitutional actions. Assuming that the general counsel's alleged decision-making authority over settlements and assignments was so 'permanent and well settled as to constitute a "custom or usage" with the force of law,'. . . Southern Atlantic's argument fails because his authority is not plenipotentiary. And that is a problem for Southern Atlantic because, as the district court explained, our precedent makes it clear that a government employee is a final policymaker 'only if his decisions have legal effect without further action by the governing body'—in this case, the Board—'and if the governing body lacks the power to reverse the member or employee's decision.'. . None of the record evidence cited by Southern Atlantic indicates that the School Board lacked the authority to override the general counsel's litigation decisions. To the contrary, the testimony cited by Southern Atlantic, . . . shows that the Board was responsible for setting policy . . . and at all times retained the authority to micromanage litigation and overrule the general counsel's decisions[.] . . . It therefore does not matter that the Board generally did not review the general counsel's litigation

decisions. What matters is that the Board *could* have intervened in the decision-making process and, as the entity vested with final policymaking authority, decided the matter. . . The alleged custom, even as characterized by Southern Atlantic, did not prevent the Board from intervening and overriding the general counsel's decisions, so it remained the final policymaker."); ***Thompson v. Shock***, 852 F.3d 786 (8th Cir. 2017) ("Our review of Arkansas law and the policies promulgated by Faulkner County reveal that Sheriff Shock did not act as a final policymaker in the employment decisions of the Faulkner County Sheriff's Office because employment decisions made by Sheriff Shock were subject to review by the quorum court. We therefore affirm the district court's grant of summary judgment to Sheriff Shock in his official capacity."); ***Vogt v. City of Hays***, 844 F.3d 1235, 1251-52 (10th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1683 (2018) ("Mr. Vogt pleaded facts indicating that the Hays police chief was a final policymaker on the requirements for police employees. This inquiry turns on whether the Hays police chief had authority to establish official policy on discipline of employees within the police department. . . To make this determination, we consider whether the police chief's decisions were constrained by general policies enacted by others, whether the decisions were reviewable by others, and whether the decisions were within the police chief's authority. . .The complaint alleges that the Hays police chief had final policymaking authority for the police department. There is nothing in the complaint to suggest that his decisions were subject to further review up the chain-of-command. Hays argues that final policymaking authority rested with the City Manager and City Commission rather than the Police Chief. For this argument, Hays points to municipal ordinances stating that the city commission must hire a city manager, who appoints the police chief and administers city business. But the city ordinances do not specify who bears ultimate responsibility for discipline of police officers like Mr. Vogt. . . . Under *Dill* and *Flanagan*, we conclude that Mr. Vogt has adequately pleaded final policymaking authority on the part of the Hays police chief. As in *Dill* and *Flanagan,* the city has pointed to general supervisory responsibilities of the city manager. But there is nothing in the municipal ordinances suggesting that the city manager plays a meaningful role in disciplinary decisions within the police department. The absence of such provisions is fatal at this stage, where we must view all of the allegations and draw all reasonable inferences in favor of Mr. Vogt. *See Dias v. City and Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009). As a result, we conclude that Mr. Vogt has adequately pleaded final policymaking authority on the part of the Hays police chief."); ***Liverman v. City of Petersburg***, 844 F.3d 400, 413 (4th Cir. 2016) ("Here the fact that Dixon serves 'under the direction and control of the city manager' does not necessarily establish that he lacked final authority to promulgate the policy whose validity has been successfully challenged herein. We must therefore remand to the district court to undertake a more particularized inquiry into whether Chief Dixon possessed final authority to set policies on the parameters of speech on the part of those law enforcement officers under his command. If so, the City may also be held liable for the injuries that were caused by the applications of that policy."); ***Bolderson v. City of Wentzville***, 840 F.3d 982, 985-86 (8th Cir. 2016) ("The applicable Wentzville ordinance shows unquestionably that the city administrator is not the final municipal authority for present purposes: The ordinance provides that '[t]he City Administrator shall be the chief administrative assistant to the Mayor, and shall have general superintending control of the administration and management of the government business, officers and employees of the City,

subject to the direction and supervision of the Mayor.'. . That the city administrator is deemed an 'administrative assistant to the Mayor' who acts 'subject to the direction and supervision of the Mayor' shows that it is the mayor—not the city administrator—who has ultimate authority to hire and fire employees. We note further that we have adopted the distinction between final policymakers and final decisionmakers that a Supreme Court plurality drew in *Pembaur*: The fact that 'a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.'. . So possessing 'discretion to hire and fire does not necessarily include responsibility for establishing related policy.'. . Therefore, the city administrator's power to hire and fire employees, assuming that power existed here, could not transform him into a policymaker. Bolderson also contends that the mayor's delegation of authority to the city administrator to address Bolderson's criticisms and the mayor's alleged tacit approval of the city administrator's decision to terminate her establishes municipal liability. We disagree again, because, as a plurality of the Supreme Court stated in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988), 'Simply going along with discretionary decisions made by one's subordinates ... is not a delegation to them of the authority to make policy.'. . Bolderson therefore has not shown that the mayor's delegation of authority or tacit approval of the city administrator's decision was the moving force behind her termination. . . In fact, Bolderson says that the city administrator was the sole decisionmaker with regard to her termination. Without a showing that the mayor played a more active role in Bolderson's termination, she cannot demonstrate that the city is liable; otherwise the city could be liable solely as an employer of an alleged tortfeasor."); ***Thompson v. District of Columbia (Thompson III),*** 832 F.3d 339, 347-51 (D.C. Cir. 2016) ("The District asserts that, even if Thompson was denied due process, *Monell v. Department of Social Services*, 436 U.S. 658 (1978), shields the city from liability for his termination. . . Here, the District contends that King was not a final policymaker for the District's personnel decisions. According to the District, King possessed the same authority as the hypothetical Sheriff—*i.e.*, even though King, as the Executive Director of the Lottery, had discretion to hire and fire individual employees, the Lottery Board maintained final authority over both King and his personnel decisions. In support, the District points to a provision of the city code that gave the Board authority to direct and supervise King's employment of others at the Lottery. . . According to the District, this provision cabined King's power to make personnel decisions by subjecting his decisions to oversight from the Board. Further, the District urges that the provision constrained King's discretion by requiring him to comply with the Comprehensive Merit Personnel Act (CMPA), which required that a career civil servant receive notice and a hearing before termination. The District argues that it cannot be subject to liability for King's deviation from that official municipal policy, because, in the Supreme Court's terms, the official 'polic[y], rather than the subordinate's departures from [it], [is] the act of the municipality.'. . If our analysis were constrained to a single provision in the city code, the District's argument would be more persuasive than it is. Looking at this provision in tandem with other parts of the code, we conclude there is significant reason to believe that King *was* a final policymaker with regard to the types of Lottery personnel decisions that led to Thompson's constructive termination. We have already recognized that King had 'absolute discretion "to identify positions for abolishment"' for the purposes of the reduction in force at the time of

Thompson's constructive termination. . . The D.C. Code further provided that King would 'make a *final* determination that a position within the [Lottery] is to be abolished.'. . Moreover, the record is replete with evidence that King exercised his authority over personnel matters without any control by other District officials. . . . Nor is it clear that other policies restricted King's ability to terminate Thompson, such that those policies, 'rather than the subordinate's departures from them,' were the act of the municipality. As Executive Director of the Lottery, King was the designated 'personnel authority' for all Lottery employees except himself and the Deputy Director. . . This meant that King was at least empowered to implement 'rules and regulations' governing Lottery personnel matters. . . In fact, the code presumed that he would also issue rules, regulations, and standards pursuant to this authority. . . Moreover, the District fails to point to evidence in the city's laws that might indicate that the Board ever exercised any of its authority to constrain King's policymaking by passing its own personnel policies to 'direct' him. . . At the time of Thompson's termination, King's personnel policies also seem to have been removed from the ordinary rules of oversight that the District points to as evidence that the Board maintained the ability to direct and supervise King's personnel decisions. . . . Because neither party has fully briefed the impact of these provisions on the *Monell* analysis, however, we remand this issue to the district court for it to consider in the first instance. On remand, Thompson may also present his alternative arguments for the District's liability under *Monell—e.g.*, that the District had developed a 'policy or practice' of unconstitutional terminations at the Lottery."); ***Kristofek v. Village of Orland Hills***, 832 F.3d 785, 799-800 (7th Cir. 2016) ("Here, Scully lacked the requisite independent authority to fire officers. As a part-time Village police officer, Kristofek was subject to a one-year probationary period that was to end in September 2012—approximately five months after he was fired. . . Although Village Code permitted Scully to fire officers within this probationary period, the power to do so was subject to the Village Administrator's consent. . .The decision to terminate Kristofek's employment was made in accordance with § 35.019. It is uncontested that Scully and Daly (the Village Administrator) met to discuss Kristofek shortly before he was terminated. Scully testified that he 'recommended' that Kristofek be terminated, and that Daly agreed (assuming Kristofek subsequently confirmed his official-misconduct statements). Daly not only confirmed this account, but also testified that he had 'always' been advised about employee terminations before they occurred. In addition, shortly after he terminated Kristofek in person, Scully sent a memo to Daly confirming that the termination had occurred. Such an action appears to us unnecessary if Scully had actually had the final say. So Kristofek has failed to show that a genuine factual issue exists regarding Scully's ability to unilaterally fire police officers. Kristofek argues that even if Scully needed Daly's approval to terminate Kristofek, Daly consented 'with full knowledge Scully was terminating Kristofek for his speech regarding corruption.' *Monell* liability, he claims, would attach on this basis alone. Kristofek may be referencing the 'ratification' theory, under which a plaintiff 'must allege that a municipal official with final policymaking authority approved the subordinate's decision *and the basis for it*.'. . Even if we assume Daly believed that Kristofek should have been fired in retaliation for his speech, the ratification theory does not help Kristofek. As a threshold matter, Kristofek does not state or even imply that Daly possessed final authority to set firing policy. So the ratification theory fails on that ground alone. Instead, Kristofek contends that Scully possessed this authority. But that claim lacks support under Illinois law. The Village

police department's policies and procedures manual directs the police chief to 'plan, organize, staff, direct, and control the personnel and resources of the Department.' The references to 'staff[ing]' and to 'control[ling] the personnel,' according to Kristofek, demonstrate that Scully possessed policymaking authority regarding officer firing. But this overlooks the fact that the Village Board is tasked with approving the policies and procedures by which police officers were bound. . . So, while Scully may have exercised authority over the *enforcement* of the policies and procedures the Village Board approved—particularly if they did not involve hiring and firing—he did not possess final authority over policy *creation*."); ***Groden v. City of Dallas , Texas***, 826 F.3d 280, 282, 286 (5th Cir. 2016) ("[F]or purposes of Rule 12(b)(6), we hold that a plaintiff is not required to single out the specific policymaker in his complaint; instead, a plaintiff need only plead *facts* that show that the defendant or defendants acted pursuant to a specific official policy, which was promulgated or ratified by the legally authorized policymaker. Here, the statutorily authorized policymaker is the Dallas city council. Groden pled sufficient facts to show that the city council promulgated or ratified the illegal-arrest policy and thus that this policy was attributable to the city of Dallas. . . . In *Bolton*, we held that under Texas law, the final policymaker for the city of Dallas is the Dallas city council. *Bolton*, 541 F.3d at 550 (citing Texas Local Gov't Code Ann. § 25.029). Thus, to show that the city of Dallas acted unconstitutionally, Groden must show that the city council promulgated or ratified an unconstitutional policy. Accordingly, we now face a single question: whether Groden pled facts that, read in the light most favorable to him, show that the city council promulgated or ratified the challenged policy. We conclude that he did. Groden alleged that the city 'publicly announced a new policy' of cracking down on vendors in Dealey Plaza and that the city's official 'spokesman,' Vincent Golbeck, 'gave media interviews describing the new policy.' The allegation that an official city spokesperson announced an official city policy allows for a reasonable pleading inference that this crackdown policy was attributable to an official policy made by the policymaker of the city (i.e., the city council). As noted above, Groden alleges further that this crackdown policy authorized the illegal arrests of individuals for engaging in annoying speech. Accordingly, Groden has pled sufficient facts to suggest, for the purpose of a 12(b)(6) motion, that the city council promulgated or ratified the crackdown policy of which he complains."); ***Miller v. City of St. Paul***, 823 F.3d 503, 507 (8th Cir. 2016) ("While Miller points out that commander Englund was responsible for drafting the security plan—which he asserts incorporates IFM's [Irish Fair of Minnesota] policy—he has not alleged any facts showing that she was 'responsible for establishing final government policy respecting such activity,' a prerequisite to municipal liability under § 1983. . . Nor has he alleged any 'facts showing that policymaking officials had notice of or authorized [Englund]'s conduct' which could give rise to municipal liability. . . We therefore affirm the dismissal of his claims against the city, its police chief, and Englund in her official capacity."); ***Advanced Tech. Bldg. Sols., L.L.C. v. City of Jackson, Miss.,*** 817 F.3d 163, 166-69 (5th Cir. 2016) ("[B]y ATBS's own admission, the city council holds the power of the purse. The obvious conclusion is that the city is likewise the final policymaker for funding decisions. It is true that the mayor can veto council resolutions (and every ordinance passed by the council must be submitted to the mayor for approval or rejection); nevertheless, the council can override a veto, thus giving the council ultimate say. . . Because the council has the right of final review, it is the final policymaker. This conclusion is consistent with

cases in which we have found reviewability by another political body 'relevant to showing that an official is *not* a final policymaker.'. . .Thus, in multiple cases, we have affirmed that officials are not final policymakers when a supervisory board has the authority to accept or reject their decisions. . . .We reaffirm our conclusion in *Gelin,* which was also stated in *Bolton:* Review procedures are relevant to show that someone 'is *not* a final policymaker.'. . .[H]ere there is no doubt that the city council, which is responsible for approving the issuance of bonds, has final policymaking power with respect to funding decisions, notwithstanding any role the mayor may play in negotiating individual development projects and bringing them to the council's attention. Thus, the mayor's ability to stop a project at lower levels of governance is irrelevant for purposes of liability. Indeed, even if the council lacked the ability to review the mayor's decisions in regard to individual projects, given the council's power over the budget, it is still unlikely that the mayor could be considered the final policymaker in regard to city funding."); ***Bible Believers v. Wayne Cnty., Mich.,*** 805 F.3d 228, 260-61 (6th Cir. 2016) (en banc), *cert. denied,* 136 S. Ct. 2013 (2016) ("We conclude that Wayne County Corporation Counsel's involvement in drafting a letter to the Bible Believers, and in sanctioning the Deputy Chiefs' decision to remove the Bible Believers from the Festival, easily resolves the matter of municipal liability. . . .[W]ith respect to a single decision, municipal liability is appropriate 'where the decisionmaker possesses final authority to establish policy with respect to the action ordered.'. . Corporation Counsel informed the Bible Believers by way of letter that 'under state law and local ordinances, individuals can be held criminally accountable for conduct which has the tendency to incite riotous behavior or otherwise disturb the peace.' Then the Deputy Chiefs consulted Corporation Counsel at the Festival to confirm that they could threaten the Bible Believers with arrest for disorderly conduct because the Bible Believers speech had attracted an unruly crowd of teenagers. As discussed at length, speech cannot be proscribed simply because it has a 'tendency' to cause unrest or because people reacted violently in response to the speech. . .Corporation Counsel's misstatement of the law in a letter may not constitute an official policy, but her direction and authorization for the Deputy Chiefs to threaten the Bible Believers with arrest based on the prevailing circumstances is certainly an action for which she 'possesse[d] final authority to establish municipal policy.'. . The relevant facts in this case bearing on municipal liability are substantially similar to the facts of *Pembaur. . .* Therefore, Wayne County is liable."); ***McDonald v. Wise***, 769 F.3d 1202, 1216 (10th Cir. 2014) ("Defendants deny municipal liability primarily based on their theory that the district court correctly held Mr. McDonald was not deprived of a property or liberty interest. They do not dispute that Mayor Hancock was the final policy maker with respect to the termination of city employees, including Mr. McDonald, which is in accordance with the city charter provisions we referenced above. The City is therefore liable if the Mayor deprived Mr. McDonald of his liberty interest without due process."); ***Singletary v. D.C.,*** 766 F.3d 66, 74 (D.C. Cir. 2014) ("In these circumstances, the decision to revoke Singletary's parole based on evidence falling short of constitutional standards was not 'the action of a policy maker within the government.'. . The Mayor possessed authority to establish rules governing the Board's proceedings, subject to disapproval by the D.C. Council; but there is no suggestion or allegation that the Board acted under direction of any such rule when it revoked Singletary's parole based on unreliable evidence. It is true that the Board possessed authority to render final revocation decisions in individual cases. . . But such

discretion is insufficient to create municipal liability unless the decisionmaker had been granted final policymaking authority under D.C. law in the area of parole revocation. . . . Such authority was lacking here. Neither the Board as a whole nor the three-member quorum that revoked Singletary's parole was authorized to promulgate general rules or other policies. And while the Mayor delegated his rulemaking authority to the Chairperson, we have no reason to suppose that the Chairperson's rulemaking authority was subject to approval by the Board. The Chairperson, moreover, did not promulgate any pertinent rule for review by the D.C. Council. Even if the mere participation of the Chairperson in an individual revocation decision could suffice to constitute action by a District policymaker for purposes of municipal liability—an issue we do not reach—the Chairperson was not one of the three voting Board members in Singletary's case. The Board thus was 'constrained by policies not of [its] making,' and its decision to 'depart[ ]' from those policies by revoking Singletary's parole based on unreliable hearsay was not an 'act of the municipality' for purposes of § 1983. . . .We therefore hold that the District was entitled to summary judgment on the question of its liability. This court previously held that Singletary suffered a violation of his constitutional rights when the Board revoked his parole based on evidence lacking adequate indicia of reliability. He served a lengthy period in confinement pending the resolution of that constitutional claim. The issue we now confront, however, is the distinct one of whether 'a custom or policy of the [District] caused the violation' of his constitutional rights for purposes of attributing the violation to the District. . . Answering that question in the negative, we vacate the judgment of the district court and remand for proceedings consistent with this opinion."); ***Carter v. City of Melbourne, Fla.***, 731 F.3d 1161, 1167, 1168 (11th Cir. 2013) ("Initially, we disagree with the City that that the fact that the collective bargaining agreement gave Carter the right to appeal a disciplinary or personnel decision to an independent arbitrator means that the underlying decision is nonfinal for purposes of *Monell* liability. An independent arbitrator, who is not otherwise an employee of the city, is not vested with final policymaking authority for the city. What our precedents mean by meaningful administrative review is plainly review by a municipal official's superiors. An independent arbitrator's review of a decision by a city employee does not constitute a 'review by the municipality's authorized policymakers,'. . . and the underlying decision reviewed by the arbitrator would be final for the purposes of municipal liability (so long as there are no other forms of meaningful review of the decision by *city policymakers*). As the Ninth Circuit explained, '[t]hat someone outside of the [municipal government] may reverse the ... official's decision does not mean that the official does not speak for the [municipality] when he or she initially makes that decision."'*Lytle v. Carl*, 382 F.3d 978, 986 (9th Cir.2004). Indeed, if the City's position were correct, then an arbitrator's ability to resolve a dispute or even a federal court's jurisdiction to hear employment-related claims, pursuant to Title VII or 42 U.S.C. § 1983, would amount to an additional layer of meaningful review, and there would be no such thing as a final policymaker for a municipality. Municipalities could effectively insulate themselves from any liability under a final-policymaker theory simply by providing for arbitration. We nevertheless conclude that the district court correctly concluded that Carter failed to establish that any of the personnel, internal affairs, or disciplinary decisions about which he complains was made by a final policymaker for the City such that municipal liability attached. Carter failed to present any evidence that Dr. Schluckebier made the decision to fire him or ratified

the decision once made by his subordinates. Carter presented nothing more than conclusory allegations at the summary judgment stage, and those unsupported allegations do not suffice to create a triable issue of fact. . . As a result, Carter's *Monell* claims must fail."); ***Kristofek v. Village of Orland Hills***, 712 F.3d 979, 987, 988 (7th Cir. 2013) (*Kristofek I*) ("We find that Kristofek has stated, albeit barely, a plausible claim that Scully had at least *de facto* authority to set policy for hiring and firing. The complaint suggests Scully was fully in charge of the police department and that his firing decisions were not reviewed. . . The picture painted by the complaint, which includes Scully's angry reaction to Kristofek's speech, 'suggests that [Scully] had the unfettered discretion to hire and fire whomever he pleased.'. . *see also Gschwind*, 692 F.3d at 848 (school board permitted principals to "make evaluation and employment decisions as they see fit," making the principal a final policymaker). And it is plausible that Scully essentially had a *de facto* policy that anyone who made noise about political corruption or favoritism would be fired, especially when he equated 'speaking to other persons about the circumstances of the arrest of the driver' as a breach of trust against Scully, and then suggested that he could not work with anyone whom he could not trust. By firing Kristofek and escorting him out of the building in front of his co-workers, many of whom were well aware of Kristofek's speech, Scully made it clear to his staff that anyone else who complained about the November 2010 incident (or any other incident involving political favoritism) would meet a similar fate. Two other officers involved in the incident have left the force since that time. . . . At oral argument, Orland Hills suggested that the Village Board never formally delegated to Scully the authority to set policy in regards to hiring and firing, rather only to make final hiring and firing decisions. But even if it were appropriate to consider this fact outside the pleadings on a motion to dismiss, that fact alone does not necessarily preclude, or render implausible, the fact that Scully essentially had *de facto* authority to set hiring and firing policy 'without as much as a whisper' from the Village Board. . . Kristofek has thus adequately stated a claim against the Village at this early stage. Orland Hills will, of course, have an opportunity to show through evidence that it has not violated Kristofek's constitutional rights."); ***Gschwind v. Heiden***, 692 F.3d 844, 847, 848 (7th Cir. 2012) ("In Illinois the school board is the ultimate policymaking body with regard to personnel decisions. . . The school district's superintendent, although the highest official of the school district, is not a member of the board and does not have the ultimate responsibility for such decisions. . . The superintendent authorized the principal to fire Gschwind, and the board approved that decision. When Gschwind complained to the superintendent about the decision of the principal and assistant principal to force him to resign, the superintendent replied that 'it was the policy of the school district and the Board of Education to allow principals and assistant principals to make evaluation and employment decisions as they see fit with respect to the teachers they supervise and for the school district and the Board of Education to follow these decisions and recommendations.' This was evidence of a policy of the school district of condoning unconstitutional terminations, since principals and assistant principals might 'see fit' to fire teachers on unconstitutional grounds."); ***Milestone v. City of Monroe, Wis***., 665 F.3d 774, 778, 781 (7th Cir. 2011) ("We agree that the Senior Center director and the Senior Citizens Board were not the City's final policymakers for purposes of enforcing the Code of Conduct. Under state and local law, Milestone had the right to ask the Monroe Common Council to overturn the expulsion order, and her failure to do so precludes municipal liability under *Monell*

to the extent that the claimed constitutional violations stem from the imposition of the ban. This result does not impose a requirement of exhaustion of administrative remedies under § 1983, but follows from the Common Council's role as the relevant policymaker for the sanction imposed on Milestone. . . .In by-passing the Common Council, Milestone deprived the City's final policymaker of the opportunity to review the acts of municipal subordinates, including their compliance with city policy and even the wisdom of city policy itself."); ***Delia v. City of Rialto***, 621 F.3d 1069, 1083 (9th Cir. 2010) ("The facts here mirror the *Pembaur* illustration. Chief Wells clearly had supervisory and final decisionmaking authority over the City's Fire Department. In that capacity, he signed the order requiring Delia to produce the rolls of insulation. The record, however, is devoid of any evidence that Chief Wells's authority included responsibility for establishing final departmental policy. To the contrary, the City's Code of Ordinances places policymaking authority for the fire department in the exclusive hands of the city council. . . Thus, only the city council's decisions would provide a basis for city liability."); ***Zarnow ex rel. Estate of Zarnow v. City Of Wichita Falls Tex.,*** 614 F.3d 161, 167, 168, 170 (5th Cir. 2010) ("There is a fine distinction between a policymaker and a decisionmaker. . . The fact that an official's decisions are final is insufficient to demonstrate policymaker status. . .Relying on Article 12, the City insists that the City Manager has supervisory authority over the police chief. This type of review of the police chief's actions demonstrates, the City argues, that he is not a final policymaker. . . The nature of the administrative oversight is important in determining 'policymaker' status. An official may be a policymaker even if a separate governing body retains some powers. . . . Although the City offered evidence that the City Council periodically authorized the creation of various police task forces, those resolutions have little to do with police policy. There is no evidence that the City Council has ever commented authoritatively on the internal procedures of the department. Consequently, the administrative review process in place here does not conclusively demonstrate that Chief Coughlin is not a policymaker. Still, we have maintained that 'neither complete discretionary authority nor the unreviewability of such authority automatically results in municipal liability. There must be more.' *Bolton v. City of Dallas, Tex.*, 541 F.3d 545, 551 (5th Cir.2008). We agree with the district court that the General Orders promulgated by the police chief sufficed to be the 'more' that is needed to prove policymaking authority in these circumstances. On this evidence, the chief of police is the sole official responsible for internal police policy. Others have only marginal involvement with the internal procedures of the police force. The alleged constitutional violation arose from a peculiar interpretation of a 'plain view' procedure, which was employed only during police activities. Although no General Order was ever entered regarding this policy, it appears that the police chief would have been authorized to speak on the City's behalf if such a policy was created. Accordingly, we hold that the City impliedly delegated its policymaking authority to the chief of police. . . . Here, there was no deliberate indifference. [Chief] Coughlin shared the errant view of the doctrine which caused Zarnow's constitutional deprivation. Negligent misinformation is insufficient to establish supervisory liability. . . Similarly, there is no evidence that Coughlin's failure to supervise the search rose above the level of negligent inaction."); ***Valle v. City of Houston***, 613 F.3d 536, 543, 544 (5th Cir. 2010) ("The Valles contend that when a decision is made under GO 600-05 and SOP 200/1.01 about how to handle a special threat situation, the person who makes that decision is 'making policy for the specific arrest'

because the designated decisionmaker is exercising authority delegated by the chief of police who is the final policymaker for arrest decisions. Although GO 600-05 and SOP 200/1.01 confer decisionmaking or operational command authority on Captain Williams, it does not follow that Captain Williams, or another person to whom such authority is delegated, acts in a policymaking capacity. Captain Williams was afforded a certain measure of discretion in carrying out the City's policy. . . . Assuming that Captain Williams was delegated some level of decisionmaking authority, GO 600-05 and SOP 200/1.01 constrained his authority and set forth the range of choices which he could make in a given situation. The fact that Captain Williams made the final decision in this situation does not mean that he was setting City policy regarding the making of arrests. . . Nor does the fact that Captain Williams's decision violated Esparza's right to be free of an unconstitutional seizure elevate his decision to one attributable to the municipality. . . Although Captain Williams's decision to order entry into the home was arguably the 'moving force' behind the constitutional violations that resulted in Esparza's death, because his decision was not a decision by a final policymaker of the City, the City cannot be liable. Thus, the district court properly granted summary judgment on the Valles' municipal liability claim against the City."); ***Wragg v. Village of Thornton***, 604 F.3d 464, 469-70 (7th Cir. 2010) ("Although the board of trustees had final power to *appoint* and *remove* appointed officers, 65 Ill. Comp. Stat. 5/3.1-30-5, 35-10, there remains an issue of fact as to whether only President Swan had final power to *retain* appointed officers he had not removed. Swan's decision to retain Klaczak by not removing him was solely within his authority, 65 Ill. Comp. Stat. 5/3.1-35-10, and not subject to meaningful review. *Id.* So whether Swan had the final power to retain Klaczak turns on whether his non-removal of Klaczak was constrained by any policy made by others. . . We cannot tell from the record whether Swan was so constrained by the Village's policy against sexual harassment. . . The policy states that those found to be offenders will face 'appropriate disciplinary action,' not necessarily removal. . . Moreover, the Village does not argue that the policy required Swan to actively investigate Klaczak's behavior in lieu of retaining him. Nor can we tell from the written policy whether the duty to investigate fell on Swan or some other official(s) or whether such a duty was triggered by the information Swan received. . . If the Village's sexual harassment policy imposed a duty on Swan to investigate Klaczak after receiving the information he had learned, then the policy's enactor, the board of trustees, was the Village's final policymaker on the decision to retain Klaczak. If it imposed no such duty, Swan was thus unconstrained, so he was the final policymaker. . . In any event, Wragg's claim fails. Wragg presents no evidence from which a reasonable jury could find that either the board of trustees or Swan *knew* that maintaining Klaczak in employment would pose a 'substantial risk' of a constitutional violation. . . . As to the board of trustees, we agree with the district court that there can be no municipal liability for the isolated acts of only one member of a multi-member board. . . Wragg presents evidence relevant to the knowledge only of one trustee, and makes no effort to impute knowledge of Klaczak's prior misbehavior to a quorum of the board. Such evidence is insufficient to find inaction by the board giving rise to the Village's liability. As to Swan, no reasonable jury could find that he acted with such knowledgeable, deliberate indifference that the Village could be liable for his inaction. Swan encountered various storm warnings about Klaczak, but none sufficiently alerted Swan such that Klaczak's propensity to molest minors could be found 'known or obvious' to him. . . . The Village

is not liable for retaining Klaczak because: (1) a quorum of the Village's board of trustees had no knowledge of his prior sexual misconduct; and (2) even if the Village's policy against sexual harassment lacked the teeth to constrain President Swan such that he wielded the Village's ultimate power to retain Klaczak, Wragg presented insufficient evidence for a reasonable jury to find that Swan knew that retaining Klaczak posed a substantial risk to Wragg. Swan might have acted negligently, but Wragg presented insufficient evidence to find that he acted more culpably as is required to find liability against the Village."); ***Doe v. School Bd. of Broward County, Fla***., 604 F.3d 1248, 1264, 1265 (11th Cir. 2010) ("Determining the persons or bodies that have final policymaking authority for the defendant is a matter of state law to be determined by the trial judge and not the jury. . . Doe argues that Dr. Melita has final policymaking authority because the School Board delegated Dr. Melita the discretion to develop disciplinary guidelines and procedures for conducting personnel misconduct investigations. Doe also argues that Principal Scavella is a final policymaker for the School Board because he had the discretion under these procedures to make the initial decision whether or not to investigate a student complaint. This authority, though representing a vesting of discretion in both Melita and Scavella, is insufficient to imbue them with final policymaking authority for purposes of § 1983 municipal liability. . . . Doe has not shown that Melita's and Scavella's decisions are not subject to meaningful administrative review. . . . Because the Superintendent had the authority to veto [Melita's] recommendation, this decision was 'subject to meaningful administrative review' under *Scala*, and Melita was not a final policymaker that can subject the School Board to § 1983 municipal liability. . . .Scavella's authority to make a mere recommendation to a superior, which that superior is free to accept or reject, does not equate to the final authority to make School Board policy. Therefore, the School Board may not be subjected to municipal liability under § 1983 for the single acts of Principal Scavella."); ***Brammer-Hoelter v. Twin Peaks Charter Academy***, 602 F.3d 1175, 1190 (10th Cir. 2010) ("In this case, Colorado law, the charter contract, the Academy's bylaws, and the administrator's employment contract all make clear the Academy Board was the sole final policymaker on school matters and all of Dr. Marlatt's decisions were legally constrained by Board policies. Thus, Dr. Marlatt was not a final policymaker for the Academy. . . .Therefore, the Academy will only be subject to municipal liability if the record supports the conclusion the Academy Board delegated authority to Dr. Marlatt to make decisions on these matters, subject to the Board's final review and approval, and the Board ratified her decisions and the basis for them. . . . We are not persuaded that Dr. Marlatt's non-specific testimony that every act she took in dealing with the teachers was authorized by the Board is sufficient to create a genuine issue of material fact as to whether the Board ratified the directives she denies giving, and no other evidence in the record suggests the Board ratified Dr. Marlatt's directives. We therefore conclude the summary judgment record does not demonstrate a basis for holding the Academy liable under § 1983 on Plaintiffs' prior restraint claim."); ***Darchak v. City of Chicago Bd. of Educ.,*** 580 F.3d 662, 630 (7th Cir. 2009) ("Under the delegation theory, the person or entity with final policymaking authority must delegate the power to make policy, not simply the power to make decisions. . . . Again, policymaking is broader than decisionmaking; the Board's failure to review one personnel recommendation does not mean that the Board systematically allows Acevedo to set policy on employment decisions or to make final decisions without Board review. . . . Nor did

the Board's decision to adopt Acevedo's recommendation without review constitute a ratification of Acevedo's action. . . . The Board approved Acevedo's decision not to renew Darchak's contract, but no evidence demonstrates that the Board was aware of any potential retaliatory basis for the nonrenewal."); ***Waters v. City of Chicago***, 580 F.3d 575, 581, 583 (7th Cir. 2009) ("Waters asserts that the City is subject to § 1983 liability because Commissioner Rice had final policymaking authority for the City for employment matters. State or local law determines whether a person has policymaking authority for purposes of § 1983. . . The Chicago City Council is the City's legislative body with the authority to adopt rules regarding employment policy. The City Council has delegated the authority to promulgate personnel rules to the Commissioner of Human Resources. Chi., Ill. Municipal Code ' 2-74-050. As a result, both the City Council and Commissioner of Human Resources may be considered final policymakers for the City in the area of employment. The Commissioner of Human Resources did exercise his authority and promulgated the City's Personnel Rules. Waters does not dispute any of these points. Instead, he asserts that the Personnel Rules delegate rule making authority over employment matters to department heads. . . . The Commissioner of Human Resources did not delegate the authority to develop employment policy to department heads. While Commissioner Rice had the authority to make the final decision whether to terminate Waters' employment, her decision was constrained by the Personnel Rules. Her decision also was subject to review by the Personnel Board and the Law and Personnel Departments for compliance with City personnel and employment policies. Therefore, Commissioner Rice did not have final authority to make employment policy for the City."); ***Valentino v. Village Of South Chicago Heights***, 575 F.3d 664, 677, 678 (7th Cir. 2009) ("Defendants do not point to any laws, statutes, or ordinances which place policy setting authority in the hands of the Village's board of trustees. To the contrary, all the evidence suggests that Mayor Owen had the unfettered discretion to hire and fire whomever he pleased. . . . Therefore, it is clear to us that Mayor Owen is the *de facto* policymaker for the Village with regard to personnel decisions in his office."); ***Ford v. County of Grand Traverse***, 535 F.3d 483, 496-99 (6th Cir. 2008) ("We recognize that Sheriff Hall's trial testimony is in substantial tension with the plain language of the County's written policy, requiring that corrections officers must 'contact' the medical staff when an inmate claims a need for medication. But Hall testified that he had policymaking authority and that he had the responsibility to 'review and tweak [written policies], where needed.' The County has never challenged Ford's assertion that Hall has final policymaking authority for the jail, and there exists no evidence in the record to suggest otherwise. . . . We therefore conclude that a reasonable juror could find that Sheriff Hall's interpretation represented the County's policy with respect to weekend medical treatment and that, when viewed in the light most favorable to Ford, the County's policy permitted jail officials to 'contact' medical staff by simply leaving a medical form in the nurse's inbox, even though this means that the nurse might not see the form until up to 48 hours later. . . . We believe that, when viewing the evidence in the light most favorable to Ford, a reasonable jury could conclude that there was a direct causal link between the County's policy and the injuries that Ford suffered from her seizure and resulting fall. . . . As a final matter, we feel constrained to note that the County has missed the mark on appeal by focusing on the alleged lack of a causal link between the County's policy and Ford's injuries. A more promising defense would have been to challenge whether there was a direct causal link between

the County's policy and an injury of constitutional magnitude suffered by Ford. . . . [A]lthough we conclude that there is sufficient evidence for a reasonable jury to find that the County's policy caused Ford's injuries, we are much less certain that the policy in question meets the stringent standard of deliberate indifference required to establish municipal liability in the first instance. . .In short, the County abandoned its strongest argument − that the County's policy did not constitute deliberate indifference to Ford's serious medical needs. . . The County instead chose to rest its appeal on the alleged lack of a causal link between its policy and Ford's injuries. But the jury found otherwise, and we decline to disrupt the jury's verdict in the present case."); ***Harper v. City of Los Angeles***, 533 F.3d 1010, 1025, 1026 (9th Cir. 2008) ("The jury reasonably could have concluded that Chief Parks' telephonic statements to District Attorney Garcetti, in which Parks expressed confidence in Perez and pressured Garcetti to file criminal charges without a complete or fully corroborated investigation, were indicative of an official policy whereby the City 'impliedly or tacitly authorized, approved, or encouraged illegal conduct by its police officers.' . . Indeed, the Task Force's chain-of-command reported regularly to Parks and the jury was entitled to believe that Chief Parks' expressions as the official policymaker accurately reflected the direction and quality of the Task Force investigation, which was to ready cases for the filing of charges as quickly as possible, with or without probable cause. . . . The jury also could have supported their determination of an official policy from the failure of Parks to take any remedial steps after the officers were acquitted on all charges related to the Lobos arrest and it became clear that the Task Force investigation was flawed. . . .[T]he jury could have reasonably concluded that this was not a case where Task Force investigators deviated from the official policy, but rather one in which the policy was effectively carried out. . . . There is substantial evidence to support the jury's verdict. . .Chief Parks and the Task Force were instrumental in causing legal proceedings against the Officers and the Task Force's policy of readying cases for the filing of charges as quickly as possible, with or without probable cause had the patently foreseeable consequence of causing the Officers' arrest without probable cause. The unconstitutional policy at issue and the particular injury alleged are not only 'closely related,' *City of Canton v. Harris*, 489 U.S. 378, 391 (1989), they are cause and effect."); ***Davison v. City of Minneapolis, Minn***., 490 F.3d 648, 661 (8th Cir. 2007) ("Our review of the Minneapolis Charter and Code of Ordinances reveals that the Fire Chief has not been delegated final policymaking authority regarding employment practices for the Fire Department. Rather, it reveals that the City Coordinator and Civil Service Commission are vested with final policymaking authority regarding employment practices for the entire city, including the Fire Department."); ***Hill v. Borough of Kutztown***, 455 F.3d 225, 246 (3d Cir. 2006) ("Here, Hill alleges that Marino constructively discharged him. As Hill points out, as a matter of state law, *no* government employee or body *is permitted to* constructively discharge an employee by making his working environment intolerable. As we discussed, however, Hill has alleged that the Mayor *had the power to* constructively discharge him, though he (Marino) lacked the power as Mayor to fire him outright. Moreover, Marino's constructive discharge of Hill was final in the sense that it was not reviewable by any other person or any other body or agency in the Borough. That is, there was no one 'above' the Mayor who had the power to curtail his conduct or prevent him from harassing Hill to the point where Hill had no alternative but to leave his position . . . In this sense, Marino was a final policy-maker for the purpose of constructively discharging Hill.");

Gelin v. Housing Authority of News Orleans, 456 F.3d 525, 527, 528 (5th Cir. 2006) ("The parties have not identified, through citations to state or local law, the entity or individual with final policymaking authority for HANO personnel matters. They both assume that the HANO Board of Commissioners ("Board") had such policymaking authority, but disagree as to whether the Board delegated that authority to Lamberg. We have remanded in similar cases to allow the parties to fully brief the sources of state law. . .We find remand unnecessary here because the evidence of 'custom or usage' provided by the parties − including deposition testimony, personnel manual provisions, and affidavits − establish that Lamberg, at least, did not wield such policymaking authority for the agency. Lamberg was the administrative receiver responsible for the 'day to day operations of HANO.'. . The Board also designated her the 'appointing authority,' with the power to terminate an employee on the agency's behalf. The evidence indicates that these positions do not have an inherent policymaking function. . . . Lamberg may have wielded decisionmaking authority; her position alone, however, did not bestow any final policymaking authority"); ***McGreevy v. Stroup***, 413 F.3d 359, 368, 369 (3d Cir. 2005) ("The fact that the Pennsylvania Code provides that the school board is the final policymaker regarding dismissal of employees does not mean that a school board action is a prerequisite for imposition of liability on the District. . . . In this case, defendants argued, and the District Court agreed, that under *Kneipp* the School Board is the final policymaker because the Board would have had the power to review McGreevy's rating if she had appealed. We disagree. McGreevy did not appeal to the School Board with respect to her 40 rating, and she was not required to take such an appeal under either the Pennsylvania statute or § 1983. There is no exhaustion requirement under § 1983. . . Absent an appeal, the School Board has no input with respect to an employee's rating. In such cases, the superintendent has final unreviewable authority to issue employment ratings, an authority he can, and did in this case, delegate to the principal. . . . A reasonable jury could find that the 40 rating given to McGreevy by the principal and adopted by the Superintendent was in retaliation for the exercise of her First Amendment rights. If the jury so found, the District would be subject to liability."); ***Bennett v. City of Eastpointe***, 410 F.3d 810, 816, 819(6th Cir. 2005) ("The plaintiffs claim that they were subjected to racial discrimination when they crossed Eight Mile Road into Eastpointe. Against the backdrop of each individual Fourteenth Amendment claim is reference to the 'DeWeese Memorandum.' This memorandum was drafted by Eastpointe's current Chief of Police, Fred DeWeese, following a meeting he had with Charles King, Sr., the plaintiff and next friend to his minor-son-plaintiffs in *King.* In that memo, distributed only to the city manager, DeWeese wrote that when he was a Lieutenant, '[f]rom May of 1995 to August of 95 .... I was assigned as a Shift Commander on the Afternoon Shift .... My instructions to the officers were to investigate any black youths riding through our subdivisions .... I would expect that our officers would investigate younger black males riding bicycles.' . . . . Here, the plaintiffs rely on the DeWeese Memorandum as the policy that wrought the constitutional violations upon them. For the plaintiffs to prevail, therefore, they must demonstrate that DeWeese had policymaking authority. The plaintiffs have failed, however, to account for the fact that at the time of the instructions, now-Chief of Police DeWeese was simply a lieutenant, and not a policy-making official. . . The plaintiffs argue that when DeWeese became Chief of Police, he did not rescind his earlier instructions, and therefore the Memorandum became city policy. We decline to adopt such a broad reading of the

Memorandum without any evidence to support the assertion. The Memorandum, though arguably discriminatory, was only memorializing prior and limited instructions, made to four or five officers under his command on an afternoon shift. There is no evidence whatsoever, that after becoming Chief of Police, DeWeese renewed these instructions or that they motivated the conduct of the officers, who were not on the afternoon shift, years later. In sum, we hold that the DeWeese Memorandum did not constitute official city policy and therefore affirm the district court's grant of summary judgment in favor of the City of Eastpointe."); ***Miller v. Calhoun County***, 408 F.3d 803, 816-18 (6th Cir. 2005) ("In the final equation, Miller bases her argument entirely on the circumstances surrounding her brother's death, but a single act may establish municipal liability only where the actor is a municipal 'policymaker'" . . . .Miller argues that Dr. Ismailoglu was a municipal policymaker, and that in holding to the contrary, the District Court focused exclusively on the County's written policies while ignoring *de facto* customs and practices. Accordingly, Miller does not appear to dispute the District Court's finding that state law confers final policymaking authority for county jails on the sheriff and jail administrator. Rather, Miller's position on appeal is that the sheriff and jail administrator 'delegated *de facto* decision-making to the shift commander and on-call doctor.' . . . Miller's argument with respect to Dr. Ismailoglu suffers from the same deficiencies as her argument with respect to Lindsay. In particular, Miller does not differentiate between policymaking and 'mere authority to exercise discretion.'. . . . A policymaker's decisions 'are final and unreviewable and are not constrained by the official policies of superior officials.' . . Miller makes no argument and advances no evidence that Dr. Ismailoglu possessed authority to set broad goals with respect to the medical treatment of inmates at the Correctional Facility. To the contrary, the record reflects that Dr. Ismailoglu contracted to provide on-site services for approximately eight hours per week, and to be on call 24 hours a day. . . .The record leaves no doubt that *de facto* policymaking authority resided with the sheriff, not with Dr. Ismailoglu."); ***Monistere v. City of Memphis,*** 115 F. App'x 845, 2004 WL 2913348, at *5 & n.6, *6 (6th Cir. Dec. 17, 2004) ("Although the City Code arguably establishes that the Director of Police Services has the final policymaking authority for all police department activities, this Court need not end its inquiry here. As we stated in *Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir.1993), in order to determine whether final authority to make municipal policy is vested in a particular official, it is imperative that we examine the applicable state law, including 'statutes, ordinances, and regulations,' as well as 'less formal sources of law, such as local practice and custom.' Notwithstanding the operative language within the Code, this Court concludes that there is sufficient evidence to demonstrate that Embrey had the requisite policymaking authority inasmuch as he had been delegated the authority to control his own investigations. While there were no written procedures which govern these investigations, the Executive Commander of the ISB testified that it was the 'unwritten manner' of her unit to allow the lead investigator to have full control over the conduct of an investigation. Embrey also opined that, although his challenged directive relating to the removal of the officers' clothing was not specifically addressed in the police manual, it was his belief that he, as the lead investigator, had the authority to order the strip search. . . . The City also argues that Embrey did not have final policymaking authority. . . . Contrary to the City's position on this issue, the facts presented during the trial demonstrate that Embrey did not merely exercise discretion but rather acted as a final policymaker within the

context of this case. During the trial, Embrey testified that, in his capacity as the lead investigator, he had the right to make decisions regarding his investigation of Monistere and Jones. His decision was final. There is no evidence in this record that he received any direction from his supervisors until after the strip search had been completed. Pilot neither reviewed nor challenged his decision-making authority. In fact, Embrey testified that she rarely intervened in his investigations. Furthermore, there is no evidence that Embrey was constrained by the City's 'unwritten' policy which governed internal investigations because it was the practice within the Police Department to give unfettered discretion to its ISB members. In sum, the record clearly supports the conclusion that Embrey's decision was (1) final, (2) not reviewable, and (3) unconstrained by the existing policies and practices of his supervisory officers. It is our judgment that, when applying the standards of *Feliciano*, Embrey was delegated final policymaking authority which is sufficient to impose municipal liability upon the City under § 1983. . . .Thus, when evaluating the evidence in the light most favorable to Monistere and Jones, this Court concludes that the City's policy of allowing its sergeants unfettered discretion to conduct administrative investigations directly caused the constitutional deprivations that were suffered by these two officers. For the reasons that are stated above, this Court affirms the district court's denial of the City's motion for judgment as a matter of law. . . . . Since this Court finds that Embrey was delegated final policymaking authority with respect to the conduct of ISB investigations, it need not determine whether the City ratified Embrey's conduct."); ***Lytle v. Carl***, 382 F.3d 978, 985, 986 (9th Cir. 2004) ("The District argues that because Lytle could have filed grievances under the collective bargaining agreement, which would ultimately be subject to review by an arbitrator from the American Arbitration Association, Goldman was not a final policymaker with respect to any decision that could have been the proper subject of a grievance. The first step of the grievance procedure is for an employee to file a grievance with her immediate supervisor and with Goldman, as the 'Assistant Superintendent, Administrative Operations and Staff Relations,' or with his designee. The second step involves filing a grievance with Goldman or his designee and meeting with Goldman to discuss the issue. The third step is to submit the grievance to a neutral outside arbitrator. The District's argument mistakes the meaning of 'final policymaker' and the role of an independent arbitrator. The arbitrator does not work for the District. In determining who was a final policymaker for the District, we focus on whether the official's decisions were subject to review by the District's authorized policymakers. . . . That someone outside of the District may reverse the District official's decision does not mean that the official does not speak for the District when he or she initially makes that decision . . . The delegation of final policymaking authority by the Board in this case distinguishes it from cases in which we and other circuits have found school superintendents and other officials to lack final policymaking authority."); ***Rivera v. Houston Independent School District,***349 F.3d 244, 248 (5th Cir. 2003) (School Board is the Aone and only policymaker for HISD."); ***Quinn v. Monroe County,*** 330 F.3d 1320, 1326-28 (11th Cir. 2003) ("Because the Career Service Council has the power to reverse any termination decision made by Roberts, he is not a final policymaker with respect to termination decisions at the library. . . . Although County Administrator Roberts was not the 'final *policymaker* ' with respect to Quinn's termination, he was clearly the official '*decisionmaker* ' with respect to her termination. The district court did not distinguish between these two concepts. The 'final policymaker' inquiry

addresses who takes actions that may cause the municipality (here, Defendant Monroe County) to be held liable for a custom or policy. The 'decisionmaker' inquiry addresses who has the power to make official decisions and, thus, be held *individually* liable. . . . The district court's conflation of the "final policymaker" and "decisionmaker" inquiries would lead to untenable legal consequences. Under such a theory, a city manager could intentionally discriminate by terminating an employee without fear of liability so long as, at some point, the decision was reviewed by an unbiased board. While such a manager should not be able to create *municipal* liability when violating official policy, he should not be able to elude *individual* liability for his own unlawful actions. The district court erred by concluding to the contrary."); ***Tharling v. City of Port Lavaca,*** 329 F.3d 422, 427 (5th Cir. 2003) (local law requiring approval of City Council for employment decisions made by City Manager rendered City Council the final policymaker); ***Laverdure v. County of Montgomery,*** 324 F.3d 123, 126 (3d Cir. 2003) ("LaVerdure argues that the District Court's holding that Marino was immune under ' 8546, which turns on whether he is a policymaker, is inconsistent with the Court's holding that he was not a policymaker for § 1983 purposes. We perceive no inconsistency. Sections 1983 and 8546 are different statutes, one state and one federal, and they define 'policymaker' differently. To be a policymaker for § 1983 purposes, an official must have *final* policymaking authority. By contrast, to have ' 8546 immunity, one need only be *a* policymaker."); ***Miranda v. Clark County, Nevada***, 319 F.3d 465, 469, 470 (9th Cir. 2003) (en banc) ("We thus conclude that Harris was acting on behalf of Clark County in determining how the overall resources of the [Public Defender's] office were to be spent, and he qualifies as a state actor for purposes of § 1983. . . . Here, according to the plaintiff, if the criminal defendant appeared on the basis of the polygraph test to be guilty, the office sharply curtailed the quality of the representation by limiting the investigatory and legal resources provided. The policy, while falling short of complete denial of counsel, is a policy of deliberate indifference to the requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt."); ***Gernetzke v. Kenosha Unified School District No. 1,*** 274 F.3d 464, 468, 469 (7th Cir. 2001) ("It doesn't matter what form the action of the responsible authority that injures the plaintiff takes. It might be an ordinance, a regulation, an executive policy, or an executive act (such as firing the plaintiff). The question is whether the promulgator, or the actor, as the case may be − in other words, the decisionmaker − was at the apex of authority for the action in question. . . . . The bearing of delegation on the principle of *Monell* turns out to be critical in this case. The final decisionmaking authority of the school district is lodged in the district's school board, but the board has promulgated regulations that delegate the administration of the five high schools in the school district to the principal of each school. This delegation, the plaintiffs argue, makes the principal the final decisionmaker so far as the mural and the request to be allowed to distribute literature are concerned. That cannot be right. It would collapse direct and derivative liability. Every public employee, including the policeman on the beat and the teacher in the public school, exercises authority ultimately delegated to him or her by their public employer's supreme governing organs. A police officer has authority to arrest, and that authority is 'final' in the practical sense that he doesn't have to consult anyone before making an arrest; likewise a teacher does not have to consult anyone before flunking a student. That is a perfectly good use of the word 'final' in ordinary conversation but it does not fit the cases; for if a police department or a school

district were liable for employees' actions that it authorized but did not direct, we would be back in the world of respondeat superior. To avoid this the cases limit municipal liability under section 1983 to situations in which the official who commits the alleged violation of the plaintiff's rights has authority that is final in the special sense that there is no higher authority. . . . Delegation is not direction; authorization is not command; permission does not constitute the permittee the final policymaking authority. . . . The plaintiffs argue that ratification occurred here when after they brought this suit the school board refused to direct the principal of their school to alter his response to their demand. The argument if accepted would convert every public employee's action that a plaintiff wished to challenge into the action of the employer. . . . Deliberate inaction might be convincing evidence of delegation of final decisionmaking authority, or of ratification, . . . but there is no evidence of that here."); ***Seamons v. Snow***, 206 F.3d 1021, 1029 (10th Cir. 2000) ("In this case, the record indicates that Coach Snow, and only Coach Snow, was vested by the school district with the authority to make final decisions regarding membership on the Sky View football team. . . Because of this delegation of authority, the school district can be held liable for Coach Snow's actions on team membership."); ***Robinson v. Balog***, 160 F.3d 183, 190 (4th Cir. 1998) ("The fact that Balog had the power to choose whom to hire, promote, discharge, and transfer within the department he directed simply cannot establish that he had the broader authority to craft municipal policy."); ***Ware v. Jackson County***, 150 F.3d 873, 886 (8th Cir. 1998) ("The County argues that, because Megerman's decisions were subject to review and at times were reviewed by both the County Executive and the Director of Administration, he is not a final policymaker. The County asserts that Megerman merely possessed discretionary authority that was constrained by policies of the County. . . . [W]e hold that the district court correctly identified Megerman as a final policymaker on JCDC personnel matters on the following bases: Megerman's position as director of the JCDC which has approximately 262 employees; his authority to promulgate JCDC policy, which sets forth, among other things, the rules of conduct for JCDC personnel; his authority to implement such policy; his exclusive handling of the disciplinary actions in this case; and the absence of a proven mechanism through which the Jackson County Executive and the Merit System Committee can review his decisions not to discipline officers or fully investigate allegations of misconduct."); ***Brady v. Fort Bend County***, 145 F.3d 691, 700, 702 (5th Cir. 1998) ("Sheriffs under Texas law are unlike the hypothetical sheriff discussed in *Pembaur* because a Texas sheriff is not merely granted 'discretion to hire and fire employees' by the commissioners court. . . Rather, the Texas legislature has vested sheriffs with such discretion, and the sheriff's exercise of that discretion is unreviewable by any other official or governmental body in the county. Texas sheriffs therefore exercise final policymaking authority with respect to the determination of how to fill employment positions in the county sheriff's department. . . . [T]he fact that under Texas law, no other official or governmental entity of the county exerts any control over the sheriff's discretion in filling available deputy positions is what indicates that the sheriff constitutes the county's final policymaker in this area."); ***Adkins v. Board of Education of Magoffin County***, 982 F.2d 952, 959 (6th Cir. 1993) ("The fact that a person who has authority only to recommend, and whose recommendations can be implemented only upon subsequent approval by a governing body, decides to make no recommendation does not convert the recommender into a final policymaker.").

See also ***Sims v. City of Madisonville***, 894 F.3d 632, 638-41 (5th Cir. 2018) ("[I]n overruling the short-lived regime of *Saucier v. Katz*, . . . which required courts to first address the underlying constitutional question, *Pearson* recognized it would still 'often [be] advantageous' to follow the two-step order. . . Doing so is 'beneficial' here for reasons the Supreme Court recognized. . . This is the fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation. [citing cases] Continuing to resolve the question at the clearly established step means the law will never get established. . . Addressing the first-step liability question is 'especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.'. . That is the case here. First Amendment retaliation claims do not arise in criminal litigation (as, for example, a Fourth Amendment claim often would), and this issue of individual liability would not arise in other civil suits, such as those against a municipality, in which qualified immunity does not apply. Because this is a question unique to section 1983 First Amendment claims brought against individual defendants, we conclude that clarifying the liability question is important to provide guidance to public employees who may find themselves on either side of the "v" in these lawsuits that can raise important issues of whether employees who challenge corrupt governmental practices are protected in exercising First Amendment rights. In our recent decision resolving this question on 'clearly established' grounds, we recognized the tension in our caselaw on whether only final decisionmakers can be individually liable for First Amendment retaliation claims. . . . If an individual defendant's animus against a coworker's exercise of First Amendment rights is a link in the causal chain that leads to a plaintiff's firing, the individual may be liable even if she is not the final decisionmaker. . . . In light of *Jett* and the consensus view of other courts of appeals that individual liability is just a matter of causation, why did uncertainty develop in our circuit on this point? *Beattie v. Madison County School District*, 254 F.3d 595 (5th Cir. 2001), unwittingly planted the seeds of confusion that later sprouted on this issue. . . . [T]he focus of the appeal was on the question of municipal liability, which attaches only if final decisionmakers are liable. . . The unconstitutional motives of the principal and superintendent who recommended the termination were not attributed to the school board that made the final decision because the board did not know about the plaintiff's First Amendment activity. . . Not recognizing that *Beattie* was only confronting *Monell* liability, a later case involving individual defendants read *Beattie* for the principle that 'only final decision-makers may be held liable for First Amendment retaliation employment discrimination under § 1983.' *Johnson v. Louisiana*, 369 F.3d 826, 831 (5th Cir. 2004). In reversing a verdict against a supervisor who retaliated against a subordinate for complaining about sexual harassment, *Johnson* ignored *Jett*'s contrary and precedential position that an individual is liable for First Amendment retaliation if her unlawful conduct is a link in the causal chain that resulted in the plaintiff's firing. Some cases have followed *Johnson*'s categorical view that only final decisionmakers can be liable for First Amendment retaliation. . . . Other cases following *Beattie* and *Johnson* have imposed a causation standard that is more stringent than *Jett*'s 'but-for' standard for nonfinal decisionmakers. . . They have done so because they, like Sims, have mistakenly characterized the question as whether the nondecisionmaker can be liable under a cat's paw theory of imputed liability. That turns cat's paw liability on its head, and is another example of relying on the law of *employer* liability for a

question of *employee* liability. As 'cat's paw' liability arose under Title VII in which only employers can be liable, it is not about the liability of individual employees. . . It is instead about whether the employers who are subject to Title VII liability can be held liable by imputing to those entities the unlawful motives of employees who are not final decisionmakers. . . Unlike Title VII, section 1983 applies to individuals. So the question is not whether the metaphorical paw (the City) is liable for carrying out the ill-motivated actions of the metaphorical cat (Covington); it is whether the cat itself can be liable for having unlawful motives that caused the firing. That individual liability turns on traditional tort principles of whether the particular act was a 'causal link' in the termination. . . *Beattie, Johnson,* and subsequent cases thus inadvertently created the uncertainty we have recognized in this area. We now provide the overdue clarification. Because it is at odds with our earlier holding in *Jett, Johnson*'s absolute bar on First Amendment liability for those who are not final decisionmakers is not binding. Nor are the imputation principles of cat's paw liability applicable to an effort to hold a nondecisionmaker liable. *Jett*'s 'causal link' standard sets the causation requirement for a suit against an individual defendant with retaliatory motives who does not make the final employment decision. Although today's decision clarifying that *Jett* controls means the law will no longer be 'unsettled' in this area, . . . it provides no recourse to Sims. That is because of the second part of the qualified immunity inquiry, which requires a plaintiff to show that any violation of rights was clearly established at the time the conduct occurred. . . When Sims was terminated in July 2012 the inconsistency in our law on whether First Amendment liability can attach to a public official who did not make the final employment decision had not been resolved. Indeed, three years after that *Culbertson* recognized the tension in affirming a grant of summary judgment on qualified immunity grounds in favor of a defendant who made a recommendation to fire the plaintiff but did not have the authority to make the ultimate decision. . . If judges have mixed up principles of individual and municipal liability in this area and failed to recognize *Jett* as the controlling decision, law enforcement officials should not be expected to have a more nuanced understanding of section 1983 law. We therefore agree with the district court's holding that Sims's claim is foreclosed by *Culbertson* on immunity grounds."); ***Paterek v. Vill. of Armada, Mich.***, 801 F.3d 630, 651 (6th Cir. 2015) ("Defendants assert that Delecke cannot be held liable because he did not directly cause the injuries. Delecke had no authority to issue tickets, initiate lawsuits, or grant a time-constrained COO. However, the record evidence plainly indicates that Delecke directed LeMieux to undertake the adverse actions at issue. Whether Delecke had ultimate decision-making authority is not dispositive, because LeMieux simply 'acted as the conduit [for Delecke's] prejudice—his cat's paw.' *Kelly v. Warren Cnty. Bd. Of Comm'rs,* 396 F. App'x 246, 255 (6th Cir.2010); *Bobo v. United Parcel Serv., Inc.,* 665 F.3d 741, 756 (6th Cir.2012) ("[T]he 'cat's paw' theory ... refers to a situation in which 'a biased [official], who lacks decision-making power, influences the unbiased decision-maker to [take] an adverse [enforcement action].'" (citation omitted)). In this case, LeMieux testified that he issued the tickets (and forwarded the tickets for prosecution) on Delecke's say so. Delecke, for that reason, is the responsible party.").

See also ***English v. City of Milwaukee***, No. 19-CV-0781-BHL, 2022 WL 3354746, at *14 (E.D. Wis. Aug. 12, 2022) ("Here, McGowan and English point to nothing beyond their own

arrests on a single night. Under Seventh Circuit law, this is insufficient. . . Thus, Plaintiffs' attempt to impose *Monell* liability based on a theory of a widespread practice or custom fails. Plaintiffs do not rely solely on the 'widespread custom or practice' theory, however. Their alternate *Monell* theory is based on allegations that the City adopted an unconstitutional policy through the conduct of high-level actors—Chief Flynn and Asst. Chief Harpole—on August 30, 2016. . . A police superintendent or a chief of police can be considered a person with final policymaking authority when that person is 'at the apex of authority for the action in question.'. . With respect to this theory, Plaintiffs have pointed to sufficient evidence to get past summary judgment. The record shows that Chief Flynn made the decision to carry out the disperse-and-arrest action in Sherman Park, and that Asst. Chief Harpole provided the 'highest level of direct supervision' in operationalizing that decision. . . Chief Flynn emailed Mayor Barrett's chief of staff that '[a] two week mourning period will be deemed enough,'. . . suggesting he intended even peaceful observers and passersby to be removed from Sherman Park. While the evidence is more conflicting concerning Harpole's instructions, officers may have believed they were to make random arrests of anyone who even hesitated to leave so that everyone would clear out. . . Given this record, a reasonable jury could conclude that Flynn and Harpole enacted and executed a policy that caused constitutional violations. This is sufficient for a jury to impose *Monell* liability on the City."); ***Oliver v. Gusman***, No. CV 18-7845, 2020 WL 1303493, at *7–8 (E.D. La. Mar. 19, 2020) ("Defendant Gusman argues that, despite his title, he was not the final policymaker at the time Plaintiff was attacked pursuant to a 'Stipulated Order for Appointment of Independent Jail Compliance Director' in *Jones v. Gusman*, No. 12-859, ECF No. 1082 (E.D. La. June 21, 2016). . . The Stipulated Order provides that the Compliance Director has 'final authority to operate the Orleans Parish Jail ("OJC") and all jail facilities, including authority over the entire prisoner population in the custody of the Orleans Parish Sheriff's Office.'. . It gives the Compliance Director 'final authority to review, investigate, and take corrective action regarding OPSO policies, procedures, and practices that are related to the Consent Judgment,' and 'final authority to direct specific actions to attain or improve compliance levels, or remedy compliance errors, regarding all portions of the Consent Judgment, including but not limited to...changes to Jail policies or standard operating procedures or practices.'. . Plaintiff argues that Gusman is the final policymaker because he retains authority over the Compliance Director in several respects. The Stipulated Order first provides that '[t]he Compliance Director shall seek advice and/or approval from the Sheriff regarding all decisions that materially impact compliance with the Consent Judgment, unless doing so would cause unreasonable delay.'. . The Stipulated Order also gives Sheriff Gusman limited authority to appoint the Compliance Director and approval authority over the initial remedial plan the Compliance Director would submit to the court. . . '[T]he identification of policymaking officials is a question of state law.'. . Louisiana law provides that the sheriff is the final policymaker for a parish jail. . . The Stipulated Order is not state law; it is an order issued by a federal district court at the request of the parties in an action where plaintiffs alleged violations of their federal constitutional rights. . . A close reading of the Stipulated Order reveals that the Compliance Director's authority is limited to implementing the Consent Judgment. . . . Here, the Compliance Director's decisions are constrained by the Consent Judgment, . . . which was agreed to by Sheriff Gusman. While it is true that the Compliance Director is not subordinate to Sheriff

Gusman, . . . he is generally required to 'seek advice and/or approval' from him[.] . . Thus, the Compliance Director derives his authority from Sheriff Gusman or, to put it another way, the Stipulated Order acts as a delegation of authority to the Compliance Director. . . . Further, the Moving Defendants have not cited to *any* case where a court found that Sheriff Gusman was not the final policymaker for OPSO due to the appointment of the Compliance Director. . . . Accordingly, the Court finds that Plaintiff has adequately alleged that Sheriff Gusman was the final policymaker for OPSO at the time he was attacked.") [In alternative, court finds that both Sheriff and Compliance Director were final policymakers]; ***Bledsoe v. Ferry County, Washington***, No. 2:19-CV-227-RMP, 2020 WL 376611, at *8–9 (E.D. Wash. Jan. 23, 2020) ("Ms. Bledsoe alleges that the Commission decided to seek her prosecution because of her political ideas and speech. She alleges that the County Commissioners, who make up the County's legislative body, acted together to censor her and to direct her prosecution. . . Defendants argue that the County Commissioners were not final policymakers with respect to their actions against Ms. Bledsoe. Therefore, those actions cannot be attributed to the County. . . The Court must therefore decide whether the Plaintiff has alleged sufficient facts to support a reasonable inference that the Commissioners were acting as policymakers when requesting, and allegedly directing, Ms. Bledsoe's prosecution. As the Supreme Court has explained, even one decision by a properly constituted legislative body 'unquestionably constitutes an act of official government policy.'. . Additionally, as Ms. Bledsoe points out, Washington law provides that the Commission shall, 'Have the care of the county property ... and in the name of the county prosecute and defend all actions for and against the county ....'. . . Defendants have not pointed to state law indicating that the Commissioners' actions were meaningfully constrained by a superior, or that their decisions with respect to Ms. Bledsoe would be reviewed by a superior policymaking official. By arguing that the County Commissioners were not acting in their role as final policymakers, Defendants seem to suggest that the Prosecuting Attorney's Office had final policymaking authority with respect to the charges brought against Ms. Bledsoe. Therefore, the Court examines the relationship between the Prosecuting Attorney's Office and the County Commissioners' Office in Ferry County. Upon turning to Washington state law, the Court found few cases that illustrate the relationship between prosecuting attorneys' offices and county commissioners' offices in Washington. However, in *State ex rel. Banks v. Drummond*, the Washington State Supreme Court discussed the relationship between the prosecuting attorney and the county commission briefly. . . It appears from *Banks* that the county commissioners' office exercises control over the prosecuting attorney's office through governance of the office's size and budget. . . . The Washington State Supreme Court's discussion in *Banks* indicates that Defendants in this case have the ability to set, or at least influence significantly, policy in the Prosecuting Attorney's Office. Moreover, Washington law dictates that the prosecuting attorney in each county is the 'legal advisor of the legislative authority' who gives 'his or her written opinion when required by the legislative authority,' and who prosecutes 'all criminal and civil actions in which the state or the county may be a party.'. . Therefore, Washington law indicates that the prosecuting attorney in each county, at least to some extent, answers to the legislative authority, the County Commission. The Court notes that the issue of final policymaking authority, and the relationship between the Prosecuting Attorney's Office and Ferry County Commissioners' Office, was not thoroughly briefed.

However, given this Court's review of Washington state law and Ms. Bledsoe's Complaint, the Court finds that Ms. Bledsoe has alleged sufficient facts to demonstrate that the County Commissioners were policymaking officials, whose actions may constitute County policy pursuant to *Monell* in this matter. Therefore, Ms. Bledsoe's *Monell* claim against the County survives Defendants' Motion to Dismiss."); ***Harper v. Flores***, No. 18 CV 6822, 2019 WL 6033597, at *7-8 (N.D. Ill. Nov. 14, 2019) ("[T]he Channahon defendants argue that the Harers fail to state a *Monell* claim against the Town of Channahon. For Channahon to be liable, the alleged denial of access must have been caused by: (1) an official policy; (2) a widespread and well-settled practice or custom; or (3) an official with final policy-making authority. . . The Harers state a *Monell* claim under option three. Whether an official has final policy-making authority depends on state law. . . Under state law, the Channahon Chief of Police has final policy-making authority. According to Channahon's municipal code, the Chief of Police is 'the chief executive officer of the Police Department.'. . The Chief has the duty to 'direct, manage, supervise and control all activities and officers and employees of the Police Department.'. . The Chief also has the duty to 'prescribe and enforce such rules, regulations, orders, instructions and directives as may be necessary and convenient to carry out the provisions of the ordinances of the village and the laws of the state and the United States.'. . These duties give the Chief of Police final policy-making authority over officers and crime investigations. If, as the Harers allege, Channahon's Chief of Police—Shane Casey—led Bogart and McClellan in an investigation designed to conceal the truth about Samantha's death, Casey deprived the Harers of their right to access the courts. Because Casey had final policy-making authority to lead that investigation, his alleged acts—if proven—would subject the Town of Channahon to *Monell* liability."); ***Molloy v. Acero Charter Schools, Inc.***, No. 19 C 785, 2019 WL 5101503, at *5 (N.D. Ill. Oct. 10, 2019) ("The complaint alleges that 'Sweazy possessed and was delegated final policymaking authority for personnel issues arising within the Santiago School,'. . .; that Acero (through Sweazy) fired Molloy in retaliation for protected speech, . . . ; and that Acero ratified Sweazy's conduct in so doing[.] . . Those allegations suffice at the pleading stage to state a *Monell* claim against Acero under a 'final policymaker' theory. . . In pressing the contrary result, Acero argues that a provision of the Illinois School Code, 105 ILCS 5/10-21.4a, divests school principals of personnel-related policymaking authority, and instead vests such power exclusively in the school board. . . Acero's argument fails because 105 ILCS 5/10-21.4a does not govern charter schools like the Santiago School. . . Rather, a charter school principal's authority is governed by the charter school's board or other governing body (here, Acero) consistent with the school's charter. . . The complaint alleges facts suggesting that Acero's governing body administered and governed Santiago School in a manner that granted Sweazy final policymaking authority over personnel decisions like Molloy's termination. . .Absent any argument that Acero's charter rendered that delegation impossible, Molloy's *Monell* claim against Acero survives dismissal under a 'final policymaker' theory."); ***Spainhoward v. White Cty., Tennessee***, No. 2:18-CV-00015, 2019 WL 6468583, at *14–15 (M.D. Tenn. Feb. 1, 2019) ("The Supreme Court has instructed that it is the 'court's task ... to identify those officials or governmental bodies who speak with final policymaking authority' for the municipal entity whose action is alleged to have caused the constitutional violation at issue. . . In Tennessee, a county sheriff is a municipal policymaker as to law enforcement decisions. . . Spainhoward alleges that

Shoupe, acting as 'the ultimate authority on creation, implementation and enforcement of [law enforcement] policy for White County, 'affirmatively ordered the officers present to act in a fashion that violated the federal constitutional rights of citizens, including specifically [Dial],' when, upon hearing the deputies were attempting to use PIT maneuver, 'he communicated to instead use deadly force ... solely to prevent damage to patrol cars.'. . As discussed above, the video exhibit demonstrates that the radio dispatcher stated, 'per 59 [Sheriff Shoupe], take him out by any means necessary including deadly force.' The Court concludes that the Complaint sufficiently alleges that Shoupe, as the final policymaker directing the law enforcement officers involved in the pursuit, made a deliberate choice to follow a course of action from among various alternatives – that is, to issue a blanket order authorizing the use of deadly force to 'take out' Dial – and that he did so without regard for evolving circumstances and driven by a fleeting desire to preserve police property. In other words, she alleges that Shoupe authorized the use of deadly force for improper reasons and in disregard of what else might occur during the pursuit that could affect the legality of the use of deadly force. . . The Complaint further alleges that, despite Dial being pushed off the roadway by Deputy Young in a PIT maneuver and not posing an immediate safety threat to West or others, West (who had unholstered his weapon upon hearing Shoupe's authorization) immediately began firing at Dial 'because he was ordered to do so by' Shoupe . . . and, thus, Shoupe's authorization 'actually caused' the eventual injuries to Dial. Therefore, because Spainhoward alleges that Dial was deprived of his constitutional rights by Shoupe in his role as final policymaker for the Sheriff's Office, municipal liability could attach to White County. . . Accordingly, dismissal of this claim is not appropriate."); ***Fogle v. Sokol***, No. 2:17CV194, 2018 WL 6831137, at *15 (W.D. Pa. Dec. 28, 2018) ("Plaintiff has averred that there was an affirmative County policy established by DA Olson's actions and it was to manufacture evidence where there was otherwise a complete lack of it to support the adopted theory of the case. It is averred as fact that DA Olson made the investigative decision to utilize hypnosis to sure-up what was an otherwise incredible account by an individual whom was unreliable and untrustworthy. It further is alleged as fact that several other techniques known to be unconstitutional or to produce unreliable results were employed at the direction or at least with the knowledge and acquiescence of DA Olson to produce evidence that would support the incredible account of an individual whom everyone involved had reason to believe lacked reliability and/or credibility. Of course, prosecutors have a duty to refrain from improper methods calculated to produce a wrongful conviction.'. . And both the Supreme Court and our Court of Appeals have recognized that engaging in investigative activities such as providing legal advice or guidance to law enforcement during the course of an investigation falls within a district attorney's administrative or managerial functions. . . When a district attorney engages in investigative activities he or she acts as the chief law enforcement officer for the county. And when those activities involve the implementation of techniques or undertakings which are designed to fabricate evidence, a policy that garners constitutional concern has been adopted by a county policymaker with final authority on the matter. And this is so even if it is only in a single case. . . Under these circumstances the county may be understood to be bound by the conduct of the district attorney for the purposes of a motion to dismiss. . . Plaintiff has alleged facts that plausibly set forth the adoption of a policy that was geared toward generating evidence in a manner that violated plaintiff's rights to due process. The

policy was implemented by the individual who had final policymaking authority for the County in the undertakings in question. Facts supporting the inference that discovery will reveal evidence to support a finding that the policy caused plaintiff's wrongful conviction have been alleged. Consequently, Defendant County of Indiana's motion to dismiss this count must be denied."); ***Boston Executive Helicopters, LLC v. Town of Norwood***, No. CV 15-13647-RGS, 2017 WL 5195867, at *7 (D. Mass. Nov. 9, 2017) ("Massachusetts law requires that a plaintiff 'offer in evidence local city ordinances pertaining to the [individual's] position of authority within the city's hierarchy,' or some other 'evidence of custom or usage having the force of law' which is sufficient to establish that that a given defendant was a final policy-maker. . .The court has little difficulty concluding that BEH has met its burden of demonstrating that NAC [Norwood Airport Commission] qualifies as the final decision-making authority within the Town of Norwood with respect to the claims at issue. The parties agree that the NAC is an 'agency of the Town [of Norwood] established as the operating authority of the Airport.'. . The Commission was established pursuant to Mass. Gen. Laws ch. 90, § 51E, which provides that '[i]n any city or town in which an airport is established ... there shall be established a board consisting of an odd number of members ... which shall have the custody, care, and management of the municipal airport.' NAC's responsibility for the promulgation and enforcement of regulations and minimum standards comes from Mass. Gen. Laws ch. 90, § 51J, which requires that that an airport commission 'adopt rules and regulations for the use of municipal airports' and that such regulations 'shall conform to and be consistent with the laws of the commonwealth.' NAC is also delegated the responsibility of compliance with federal law as a condition of receiving federal funds. . . Finally, while the Norwood Town Board of Selectmen appoint the individual NAC members, as defendants concede, the 'Board of Selectmen otherwise has no role in the governance of the Commission' and 'has no role in the day-to-day affairs or operations' of the airport. . . From this, it is clear that the members of the Commission constitute 'the highest officials responsible for setting policy in [this particular] area of the government's business[.]' Thus, BEH may proceed in its suit against the Town and the remaining NAC Commissioners in their official capacities 'under the "single-decision/act" exception to *Monell*'s policy or planning rule.'"); ***Gersbacher v. City of New York***, No. 1:14-CV-7600-GHW, 2017 WL 4402538, at *15–17 (S.D.N.Y. Oct. 2, 2017) ("Gersbacher seeks to establish municipal liability by arguing that Chief Esposito and Lieutenant Albano were 'final municipal policymakers,'. . . whose decision to remove tarps in Zuccotti Park on September 20, 2011, resulted in the various alleged constitutional violations. The Court is unpersuaded. Before a municipality's liability can be implicated, there must have been a violation of the plaintiff's constitutional rights. . . Because the only surviving claim asserted by Gersbacher is that of excessive force premised on a violation of his Fourth Amendment rights, Gersbacher must point to evidence that Chief Esposito and Lieutenant Albano were involved in either the decision to apply such force, or its actual application. . . Gersbacher points to no evidence in the record to support the conclusion that either Chief Esposito or Lieutenant Albano were involved in any force used in the course of his arrest such that their actions could form the basis for *Monell* liability. Nor is there evidence in the record that either official made a decision related to the amount of force to be used in the event of an arrest. The record indicates that Chief Esposito gave orders related to the removal of tarps in the park. . . It is silent, however, as to Chief Esposito's physical location

and actions during Gersbacher's arrest. The record is equally silent as to the whereabouts and activities of Lieutenant Albano at that time. Accordingly, the Court cannot conclude that either official made a decision or took a course of action that led to any excessive force against Gersbacher. . . . Even if Chief Esposito or Lieutenant Albano were involved in arresting and using force on Gersbacher, there is insufficient evidence to conclude that either officer had sufficient authority to give rise to municipal liability. Where the contention is not that the defendants' actions were taken pursuant to a formal policy but rather that they were taken or caused by an official whose decisions represent official policy, the court must determine whether that official had final policymaking authority in the particular area involved. . . . Whether the official in question had final policymaking authority is a legal question, which is to be answered on the basis of state law. . . . The determination of whether the official is a final policymaker under state law is 'to be resolved by the trial judge *before* the case is submitted to the jury.'. . . Defendants contend that the Commissioner of the NYPD is the sole 'final policymaker' for that department. . . . For his part, Gersbacher points to no legislative enactment or other provision of state law that makes either Chief Esposito or Lieutenant Albano the individual with 'final policymaking authority' over the amount of force to be used in effectuating arrests. Nor does he point to any delegation by the Police Commissioner to Chief Esposito or Lieutenant Albano of the authority to make such policy. Instead, to show that Chief Esposito was a final policymaker, Gersbacher relies only on evidence that Chief Esposito was the individual within the department who gave the order to remove the tarps in the park on September 20, 2011. . .That Chief Esposito has the word 'Chief' in his title, or that he ordered the removal of the tarps on September 20, 2011, do not make him a 'final policymaker' for the City as a matter of law. . . . Gersbacher's argument that Lieutenant Albano is a final policymaker because he testified that he was a policymaker during his deposition is also unconvincing. Whether or not an officer has sufficient authority to constitute a final policymaker is determined as a matter of law, not by the relevant officer's self-regard. The City Charter grants authority for 'the execution of ... the rules and regulations of the department' to the Commissioner alone. . . Gersbacher points to no evidence on which the Court could conclude as a matter of law that Chief Esposito or Lieutenant Albano were delegated final policymaking authority in the area of officers' use of force. . . Accordingly, Gersbacher's *Monell* claim is dismissed."); ***T.S. v. Twentieth Century Fox Television***, No. 16 C 8303, 2017 WL 1425596, at *7-9 (N.D. Ill. Apr. 20, 2017) ("Plaintiffs agree that the Eleventh Amendment generally affords Chief Judge Evans immunity from suit. Nevertheless, Plaintiffs seek to establish that the Chief Judge's Office is liable because operation of the JTDC is a county function—as opposed to the Chief Judge's actions taken pursuant to his state-officer judicial powers. In support of their argument, Plaintiffs point to the Illinois County Shelter Care and Detention Home Act ("Detention Home Act"), which allows counties in Illinois to create and operate juvenile detention centers. . .In response, the Chief Judge's Office maintains that Chief Judge Evans' actual function under the Detention Home Act is limited because the Act merely gives the Chief Judge power to 'appoint an administrator to serve as Superintendent,' as well as other 'necessary personnel' to administer the JTDC, along with direct control of the JTDC's budget. . . Accordingly, the Chief Judge's Office argues that—even if administration under the Detention Home Act is a county function—Defendant Superintendent Dixon is the individual with administrative authority over the JTDC pursuant to the Act. . . At this

stage of the proceedings—and in light of the transition of administrators during the relevant time period—whether Superintendent Dixon had administrative authority over the JTDC during the relevant time period and was the governmental official who gave the Fox Defendants permission to film *Empire* at the JTDC is not as clear-cut as the Chief Judge's Office suggests. . . To give context, in 2007, the State of Illinois enacted legislation that transferred the administration of the JTDC from Cook County's executive branch (Board of Commissioners) to the Chief Judge's Office allowing the Chief Judge to appoint and remove administrators to run the JTDC. . .The Chief Judge appointed Superintendent Dixon as JTDC Superintendent in May 2015—one month before the filming of *Empire* began. . . Prior to May 2015, Transitional Administrator Earl Dunlap was tasked with running the JTDC. . . Also, in the First Amended Complaint, Plaintiffs allege that the Chief Judge Timothy Evans knew about and approved the filming of *Empire* at the JTDC, as well as the facility's consequent lockdown, and that the lockdown occurred during the high-profile transition in which the Chief Judge's Office took administrative control of the JTDC. . . Plaintiffs further assert that despite Superintendent Dixon's experience in the field of juvenile corrections, he had just become the JTDC's Superintendent prior to the *Empire* filming raising a reasonable inference that the filming was done with Chief Judge Evans' approval. . . Under these circumstances and allegations, whether someone in the Chief Judge's Office, the Chief Judge, Superintendent Dixon, and/or Transitional Administrator Dunlap was the relevant administrator and/or decision-maker regarding the Fox Defendants filming *Empire* at the JTDC remains unclear. In short, the parties' legal arguments concerning immunity are muddied by this change in administration, as well as Plaintiffs' allegations that the Chief Judge's Office was exercising county administrative authority—not judicial authority. Until the parties take discovery to determine which final policy decision-maker allowed the Fox Defendants to film *Empire* at the JTDC, the Chief Judge's Office remains a Defendant to this lawsuit. . . .Plaintiffs seek to establish *Monell* liability pursuant to the deliberate act of the individual with the 'final policy-making authority' in relation to the administration of the JTDC and the decision to allow the Fox Defendants to film *Empire* there. . . To do so, they allege that Superintendent Dixon, Chief Judge Evans, and/or someone in the Chief Judge's Office knew about and approved the filming of *Empire* at the JTDC, and the facility's consequent lockdowns. . . Although it is undisputed that the Detention Home Act gives the Chief Judge the power to 'appoint an administrator to serve as Superintendent' and that the Chief Judge appointed Superintendent Dixon in May 2015, as discussed above, it is unclear who made the decision to allow the Fox Defendants to film episodes of *Empire* at the JTDC. As such, viewing Plaintiffs' allegations as true and all reasonable inferences in their favor, they have sufficiently stated a claim for *Monell* liability under *Iqbal* and *Twombly* based on a final policy-maker's decision. . . Once the parties conduct discovery and uncover who made the final policy decision to allow the Fox Defendants to film *Empire* at the JTDC, Plaintiffs can narrow their claims. Moreover, although Cook County argues that Plaintiffs have pleaded themselves out of court because they allege that Chief Judge Evans was the decision-maker with final policy-making authority, Plaintiffs have also set forth sufficient allegations that Superintendent Dixon may have also been a final policy decision-maker, and, at this procedural posture, the Court is required to view the allegations and all reasonable inferences in Plaintiffs' favor. . . These allegations include Superintendent Dixon's significant background and experience

in the field of juvenile corrections, that he allegedly entered into the agreement with the other Defendants to permit the crews to film *Empire* at the JTDC, and that he aided the Fox Defendants in filming *Empire* while acting in the scope of his employment. . .The Court therefore denies Defendants Cook County's, Superintendent Dixon's and Chief Judge's Office's motions to dismiss Plaintiffs' *Monell* liability claim."); ***Doe v. Bradshaw***, 203 F.Supp.3d 168, 182 (D. Mass. 2016) ("The acts of Bradshaw and other school officials are not sufficient to constitute a policy or custom giving rise to municipal liability in this case. Specific acts can constitute such a municipal policy when made by officials with 'final policymaking authority.'. . Whether an official has final policymaking authority is a matter of state law. . .That said, even full discretion to act on a particular matter is insufficient to constitute final policymaking authority; only a complete delegation of authority to an official suffices. . . Thus, if an official's decisions are 'constrained by policies not of that official's making' or 'subject to review by the municipality's authorized policymakers,' those decisions are not chargeable to the municipality under § 1983. . . In Massachusetts, the School Committee has final policymaking authority over educational policies. . . The allegedly unconstitutional acts here, however, were performed by school officials, rather than the Committee. Such acts cannot subject the Town to liability without more. Even Superintendent Bradshaw, who possessed significant powers of unilateral action, did not have final policymaking authority over the matters in question. As a matter of policy, the School Committee was informed of and reviewed all hiring decisions, for example, although it only directly made personnel decisions for a small number of positions and did not do so for Weixler's job. As to serious disciplinary matters, Bradshaw routinely reported the allegations made against Weixler and the findings of the school's internal investigations to the Committee. While there is evidence making clear that the Committee generally left personnel issues to Bradshaw and her staff, on the high-stakes issue of how to respond to allegations of abuse, the Committee retained at least some responsibility for ultimate oversight and had not fully delegated the issue to Bradshaw. More importantly, state law requires school committees to 'establish educational goals and policies,' Mass. Gen. Laws ch. 71 § 37, while requiring superintendents to 'manage the system in a fashion consistent with state law and the policy determinations of that school committee,' Mass. Gen. Laws c. 71 § 59. . . State law thus declares the school committee to be the final policymaking body on educational issues. Only the School Committee's own acts, therefore, can subject the Town itself to § 1983 liability."); ***Ores v. Village of Dolton,*** 152 F.Supp.3d 1069, 1090-91 (N.D. Ill. 2015) ("Even though the Court has already decided that Chief Jones did not commit a procedural due process violation, and even though that liability would be a necessary premise for *Monell* liability against the Village of Dolton, the Court will address (again, for the sake of completeness) the parties' remaining arguments on Dolton's liability. The Court grants Dolton's motion for summary judgment on municipal liability for the separate reason that Chief Jones was not a final policymaker, for *Monell* purposes, for the imposed suspension. . . . In this case, Chief Jones was not a final policymaker because his actions were constrained by the Board, as explained earlier in the Opinion. . . . Thus, Chief Jones 'is not the final policymaker regarding employee discipline and discharge, nor does he shape the employment policy for the Department.'. . This is a separate and independent ground for concluding that there is no municipal liability against Dolton."); ***T.E. v. Pine Bush Cent. Sch. Dist.,*** 58 F. Supp. 3d 332, 372-76 (S.D.N.Y. 2014) ("Plaintiffs argue that

Steinberg was a final policymaker within the District, with the authority to 'ensure[ ] students [were] free from harassment and bullying,' and that the principals, including Fisch and Boyle, were final policymakers because the Board delegated disciplinary matters to their discretion. . . Under New York law, however, the Superintendent does not have the authority to '*promulgate* or otherwise create rules, regulations, or policies of his own.'. . Instead, he has the 'power to *enforce* all provisions of law and all rules and regulations relating to the management of the schools and other educational, social and recreational activities *under the direction of the board of education.*'. . There is nothing, in turn, to indicate that principals have rule-making or policymaking authority with respect to discipline under New York law. Rather, New York law provides that the Board of Education 'shall have power, and it shall be its duty ... [t]o establish such rules and regulations concerning the order and discipline of the schools ... as [it] may deem necessary to secure the best educational results.'. .Moreover, although the Board has the power to delegate its authority, . . . Plaintiffs do not point to any 'formally declared or ratified policy' that supports the Board's delegation of its rule-making authority to prevent student-on-student harassment. . .These principles notwithstanding, courts in the Second Circuit are split as to whether a principal may qualify as a final policymaker for purposes of *Monell* liability. [collecting cases] . . . . To support their claim that Steinberg and the principals are final policymakers with respect to how and when to impose discipline or address bullying and harassment in their schools, Plaintiffs rely on Steinberg's testimony that he was the 'person that's in charge of most of the daily operations of the district.'. . Further, Fisch testified that he had authority to decide what discipline was appropriate for certain misconduct. . . Some courts in the Second Circuit have held that similar evidence was enough to suggest that principals have final policymaking authority for *Monell* purposes. [collecting cases] This Court concludes, however, that here Plaintiffs have failed to establish, 'as a matter of law,' that Steinberg or the principals are 'final policymakers' with respect to ensuring that students are free from anti-Semitism and bullying. . . Instead, evidence in the record reveals that Steinberg and the principals had discretion to determine when to investigate bullying and harassment and how to respond to the behavior. The Second Circuit has 'explicitly rejected the view that mere exercise of discretion [is] sufficient to establish municipal liability.'. . Moreover, the record here confirms that the Board had final policymaking authority with respect to discipline. . . . Accordingly, because New York Law provides that the Board, not Steinberg or the principals, has the power to 'establish ... rules and regulations concerning the order and discipline of the schools,' N.Y. Educ. Law § 1709, Plaintiffs point to no formal delegation of the Board's policymaking authority to Steinberg or the principals, and the record demonstrates that the Board has policymaking and oversight authority with respect to the District's disciplinary policies, the Court concludes that Plaintiffs have failed to carry their burden to establish that Steinberg and the principals are 'final policymakers' as a matter of law."); ***Meagher v. Andover Sch. Comm.,*** No. CIV.A. 13-11307-JGD, 2015 WL 1442517, at *21-22 (D. Mass. Mar. 31, 2015) ("This court finds that the municipal defendants are liable because McGrath was the ultimate decision-maker vis-à-vis the decision to terminate Meagher's employment. Therefore, Meagher is entitled to judgment as a matter of law on her claims against those defendants. . . . In order to determine whether McGrath had 'final policymaking authority' with respect to Meagher's termination, it is necessary to look to state and local law. . . Under the Massachusetts Education

Reform Act of 1993, 'the ultimate responsibility' for hiring, firing and demoting public school teachers 'resides ... with the superintendents themselves[.]' *Ciccarelli v. Sch. Dep't of Lowell,* 70 Mass.App.Ct. 787, 792, 877 N.E.2d 609, 615 (2007). *See also* Mass. Gen. Laws ch. 71, § 42 ('A principal may dismiss or demote any teacher or other person assigned full-time to the school, *subject to the review and approval of the superintendent'* (emphasis added)); Mass. Gen. Laws ch. 71, § 59B ('Principals employed under this section shall be responsible, consistent with district personnel policies and budgetary restrictions *and subject to the approval of the superintendent,* for hiring all teachers' (emphasis added)). Accordingly, McGrath was the final decisionmaker with respect to Meagher's dismissal, and the municipal defendants are liable for the violation of Meagher's constitutional rights."); ***P.A. v. City of New York***, 44 F.Supp.3d 287, ___ (E.D.N.Y. 2014) ("Though my conclusion that the individual defendants did not act unlawfully by removing PA precludes the imposition of municipal liability, I write to explain my view that plaintiffs' theory of municipal liability also lacks support in the legal precedents on which it is based. Furthermore, if I am mistaken about the merits decision on the officers' conduct, and the officers are protected only by qualified immunity, the following reasoning explains why the City would still not be liable. . .As alleged against the City, the plaintiffs must demonstrate that the challenged actions represented official policy or custom. PA's principal argument in favor of *Monell* liability is that even if the decision to remove PA was not the result of an oft-repeated, officially promulgated policy or practice of the City, it was nonetheless made by sufficiently high-ranking officials that the acts must be attributed to the City as official action. This form of *Monell* liability was first articulated by the Supreme Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), where the Court held that a municipality could be liable even for a single decision made by a government official, as long as the decision was 'properly made by that government's authorized decisionmakers,' since such an act 'surely represents an act of official government "policy" as that term is commonly understood.'. . . Here, the plaintiffs identify Reinaldo Gibbs, the Child Protective Manager on the case, who made the decision to remove PA on an emergency basis. As a matter of written City policy, '[o]nly the CPM in charge of the case is the decision-maker for each emergency custody decision.'. . .I conclude that Gibbs was not a 'policymaker' within the meaning of the cases interpreting *Pembaur,* nor was his decision one of 'policy,' so the City cannot be held responsible under § 1983 for his actions. As my starting point, I note that *Pembaur* did not intend to turn every exercise of discretion by a higher-ranking municipal official into an act attributable to the municipality . . . . [T]he plaintiffs have not alleged that Gibbs, though empowered to exercise discretion over the final emergency removal decision, was also the official who made City *policy* about the circumstances under which such decisions would be made, the factors that would go into them, and so forth. This case is therefore similar to a line of cases in which courts have held that allegedly discriminatory employment decisions were not attributable to municipalities because the final decisionmakers did not also set employment policy."); ***McGrath v. Town of Sandwich***, 22 F.Supp.3d 58, 66, 67 (D. Mass. 2014) ("In some instances, a municipality may be held liable for an unconstitutional policy based upon a single decision by a policymaker. . .Here, Ty's claim that Superintendent Canfield 'pre-approved' the decision to withhold evidence from Ty constitutes such a policy decision. Moreover, for the purposes of Ty's suspension, Superintendent Canfield was the final policymaker because the SHS Student Handbook did not

permit a student who was suspended for ten days or fewer to appeal that decision to the School Committee."); ***Snyder v. Smith***, 7 F.Supp.3d 842, 869 (S.D. Ind. 2014) ("The only time . . . that a single action suffices to establish a municipal policy is when the action is taken by a person with 'final decision-making authority.'. . In her response to this motion, Plaintiff argues that because Mayor McBarnes is such a figure, evidence of his conduct satisfies *Monell.* As discussed previously, however, Mayor McBarnes is not vested by Indiana law with such authority over the affairs of the city police department. Indiana law controls this question, and it provides that the chief of police, not mayor, is the final decision-making authority with respect to law enforcement policy. . . In the state's second- and third-class cities such as Frankfort, control over personnel matters in police and fire departments, by contrast, is vested in the city's Safety Board; specifically, the Safety Board has authority to 'adopt rules for the government and discipline of the police and fire departments' and to 'adopt general and special orders to the police and fire departments through the chiefs of the departments.'. . The Mayor of Frankfort is thus a final decision-maker with respect to neither law enforcement policy nor police discipline and personnel matters. . . Whatever he said to the Snyders and subsequently did or failed to do, his words and actions on one occasion do not suffice to show that the Mayor of Frankfort 'adopted a policy of knowing about police misconduct and refusing to do anything about it.'. . The municipal liability claim against the City under Section 1983 thus fails."); ***Doe v. Town of Stoughton***, No. 12–10467–PBS, 2013 WL 6498959, *3, *4 (D. Mass. Dec. 10, 2013) ("The Town asserts that in Massachusetts, a School Committee acts as the body with final policymaking authority, and that not even a district superintendent counts as a policymaker under state law. . . As one Massachusetts Superior Court judge summarized these statutes in the context of a school-based civil rights action, 'In short, the school committee makes policy; the school superintendent and principals implement those policies.'. . Federal district courts have split on whether a superintendent counts as a policymaker under Massachusetts state law. [comparing cases] Here, the assistant principal and school guidance counselors addressed the ongoing peer harassment alleged by Plaintiff, and not Stoughton school committee members. Regardless of whether a superintendent can act as a final policymaker under state law, it is clear that an assistant principal or guidance counselor is not one. Further, the record evidences no pattern or practice giving rise to liability under § 1983. Therefore, Plaintiff has not satisfied the *Monell* standard for municipal liability for constitutional violations."); ***Ejchorszt v. Daigle***, No. 3:02CV1350(CFD), 2007 WL 879132, at **3-5 (D. Conn. Mar. 21, 2007) ("Ejchorszt argues that Norwich is liable for Daigle's conduct because it delegated policymaking authority to Daigle for the liquor investigation program, and that, through Daigle, Norwich established a policy or custom of exploiting volunteers. . . . Daigle's decisions cannot be viewed as final because he was still subject to overall supervision by his superiors. Daigle's decisions were at all times subject to review by several layers within his chain of command. Further, Daigle was subject to department policy that was not of his own making. Indeed, after his conduct came to light Daigle was investigated and discharged for violating official policy including the department's strip search policy, the police code and canon of ethics, and for inappropriate use of his official position. . . . It would seem that tactical decisions by unit leaders on operational aspects of law enforcement would not ordinarily confer policymaker status on those unit leaders. . . . Accordingly, Ejchorszt has failed to establish that Daigle was a final policymaker for Norwich concerning the liquor law

enforcement program.")***; Stearns-Groseclose v. Chelan County Sheriff's Dep't.***, No. CV-04-0312-RHW, 2006 WL 195788, at *22 (E.D. Wash. Jan. 17, 2006) (". . . Sheriff Harum and other Washington county sheriffs are the official policymakers for law enforcement and peace officer training, but not for hiring and personnel decisions. That function falls with the Civil Service Commission. Because Sheriff Harum was not the official policymaker for Chelan County regarding hiring decision, but was instead allegedly acting outside and contrary to County policy, municipal liability cannot be imputed to Chelan County for his actions. . . .Sheriff Harum was not the official policymaker of Chelan County for hiring decisions at CCSO, so his decision that Plaintiff failed her background investigation was not a municipal action by the County, let alone deliberate conduct. Moreover, Plaintiff has not established that the County Civil Service Commission 'ratified' Sheriff Harum's decision that Plaintiff failed her background investigation."); ***Cacciatore v. County of Bergen***, No. Civ.02-1404 WGB, 2005 WL 3588489, at *5 (D.N.J. Dec. 30, 2005) ("It is clear under New Jersey law that the Sheriff has the authority to make employment decisions in his office, including hiring, firing and promoting employees. . . .The Sheriff's power pertaining to employees, however, is not beyond review. . . . Plaintiffs maintain that Defendants effectively have decreased Plaintiffs' compensation by transferring them into positions where they do not receive overtime, refusing to offer overtime and forcing them to take compensatory time in lieu of overtime because Plaintiffs refused to provide campaign contributions. The Court finds that the Sheriff's employment decisions regarding these matters are not 'final and unreviewable' to make him a policymaker for the County."); ***Raphael v. County of Nassau***, 387 F.Supp.2d 127, 132 (E.D.N.Y. 2005) ("Even if Sergeant Mulcahy may have been the ranking officer on the scene and thus may have had some decision-making authority over the conduct of the other officers, the mere exercise of discretion is insufficient to establish municipal liability. *See Anthony v. City of New York*, 339 F.3d 129, 139 (2d Cir.2003); *Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir.2000). Moreover, the Second Circuit, in the *Anthony* case, specifically rejected the argument that a Sergeant's orders on the scene constitute official municipal policy. . . Thus the court finds as a matter of law that Sergeant Mulcahy was not a policymaker for purposes of § 1983 municipal liability."); ***Reed v. City of Lavonia***, 390 F.Supp.2d 1347, 1365 (M.D. Ga. 2005) ("Here, Reed seeks to impose liability upon the City of Lavonia for Chief Shirley's actions in hiring and retaining Officer Masionet. Reed argues that Masionet's previous employment history provided Shirley with actual and constructive knowledge Masionet was predisposed to using excessive force during arrests and that Shirley further failed to properly discipline, and thereby negligently retained, Masionet after he was hired − despite disciplinary infractions committed. It is not disputed, however, that the City of Lavonia's Employee Handbook and the Police Department's Policy and Procedures Manual both provide that all disciplinary action taken against City employees is subject to review through a City Grievance Procedure. Thus, apparently, any decisions made by Chief Shirley with respect to disciplinary action taken (or not taken) against Officer Masionet were subject to 'meaningful administrative' review as contemplated by the Eleventh Circuit in *Scala*. It is further undisputed that, pursuant to the Charter for the City of Lavonia, 'all non-department head employees are hired and fired by the City Council of the City of Lavonia, Georgia.' Plaintiffs even concede that 'the mayor and city counsel had authority to review [Shirley's] disciplinary and hiring decisions.'. . In light of these undisputed facts, this

Court must find that, as a matter of law, Chief Shirley may not be considered a 'policymaker possessing the final authority to establish policy' with respect to the hiring, discipline, and retention of his officers. Obviously, the City allows Chief Shirley to make these hiring and disciplinary decisions on a daily basis; yet, as discussed above, this fact alone would not make Shirley the 'final authority' on such decisions. 'The delegation of policymaking authority requires more than a showing of mere discretion or decisionmaking authority on the part of the delegee.' . . Here, because the City undisputedly retains the power to review Chief Shirley's exercise of discretion in hiring and disciplining his officers, Shirley may not be considered 'policymaker possessing the final authority' on such matters, so as to permit the imposition of municipal liability under § 1983."); ***Panaderia La Diana, Inc. v. Salt Lake City Corp.,*** 342 F.Supp.2d 1013, 1037, 1038 (D. Utah 2004) ("In sum, the defendants do not dispute that the search warrant was executed according to standard operating procedure for a Category C warrant; or in other words, according to the policy of the City. Moreover, the final decision to execute the warrant as a Category C warrant was made by Carroll Mayes, who himself testified that he was the tactical commander who had 'overall control' of the operation. As such, Officer Mayes appears to be a person with final policy-making authority on the matters at issue here. The court therefore holds, as a matter of law, that the decision on how to execute the warrant was made by persons with final policy-making authority. This is a question for the court, not the jury. The court also holds that there is a genuine issue of material fact as to whether a City policy or procedure led to the alleged constitutional violations. . . . Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur ... or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government. In sum, a reasonable jury could find that the City is liable for alleged constitutional violations occurring during the raid.' [footnotes omitted]); ***Schroeder v. Maumee Bd. of Educ.,*** 296 F.Supp.2d 869, 875, 876 (N.D. Ohio 2003) ("Defendants argue that the Board of Education had a sexual harassment policy and states that '[o]bviously, the policy of the Board of Education was to eliminate sexual harassment in all forms.' . . However, it is not necessarily dispositive under *Monell* that the Board had a general policy prohibiting sexual harassment. As the Sixth Circuit explained in *Meyers v. City of Cincinnati,* 14 F.3d 1115 (6th Cir.1994), it does not matter if the municipality in question has a general policy disfavoring an action taken by a municipal policy-maker, because 'it is plain that municipal liability may be imposed for a single decision by municipal policy-makers under appropriate circumstances.' . . In the instant case, if the decision to ignore harassment and abuse of plaintiff 'was made by the government's authorized decisionmakers the [Board] is responsible.' [citing *Meyers*] . . . Plaintiff, however, offers no evidence that Defendants Conroy and Wilson were authorized decision makers for the Board of Education or that the Board is 'actually responsible' for their actions. . . Certainly, Conroy and Wilson, as Principal and Assistant Principal of Gateway, were responsible for implementing policies and customs at their school, but it does not appear that their alleged deliberate indifference to plaintiff's complaints of harassment and physical violence represented the policy or custom of the Board of Education. Plaintiff offers no evidence that the Board of Education knew about, condoned, or was deliberately indifferent to Conroy's and Wilson's alleged

discriminatory treatment of plaintiff."); ***Engelleiter v. Brevard County Sheriff's Dep't.,*** 290 F.Supp.2d 1300, 1314 (M.D. Fla. 2003) ("Engelleiter has not proved a 'policy or custom' based on treatment decisions by the Brevard County Sheriff's Office or the nurses at the Detention Center. Nothing in the record shows that Brevard County has made its nurses into 'policy-makers' who possess final authority to establish municipal policy for the Brevard County Sheriff's Office with respect to the care of pretrial detainees. Indeed, Engelleiter has not proved that policymaking authority has been delegated to any nurse. A doctor's delegation of authority to a nurse to exercise nursing discretion is hardly sufficient to give the nurse policy- making authority. Indeed, it would be a severe stretch of the term 'policy or custom' to find that each nurse establishes a 'policy or custom' for the Brevard County Sheriff's Office every time she administers insulin to a detainee. . . . The delegation of nursing care to nurses is very different from asking nurses to establish public policy for a Sheriff's Office. The delegation of policymaking authority described in *Monell* requires delegation such that the subordinate's discretionary decisions are not constrained by official policies, and are not subject to review. Engelleiter has not proved that the nurses at the Brevard County Detention Center were free to ignore the official policies of the Brevard County Sheriff's Office, and were free from review or supervision by the responsible doctor. Engelleiter has submitted absolutely no medical opinion or proof that such a delegation of routine nursing tasks is in any way contrary to the express policy of the Brevard County Sheriff's Office that every inmate receive quality medical care throughout his incarceration and never be denied needed medical care."); ***Lewis v. City of Boston,*** No. CIV.A.00-11548-DPW, 2002 WL 523910, at *10 (D. Mass. March 29, 2002) (not reported) ("I find that the decisions in question − to eliminate the Music Director position and not to hire Lewis as Roland Hayes director − are fairly characterized as municipal actions for which the city itself is liable. It was the City of Boston as employer, and not any particular individual, that eliminated the position of Music Director. The decision was made as part of the budgetary process and constituted a deliberate policy determination with respect to the structure of the music education program in the public schools. Moreover, the decision was made by the City's education policymakers − the superintendent, the deputy superintendent, and the head of the curriculum department − who together act as the municipality itself with respect to issues of education. Thus, the City was the moving force behind the decision and the degree of culpability possessed by these individual policymakers can be attributed to the City itself."); ***Hill v. New York City Bd. of Ed.***, 808 F. Supp. 141, 151 (E.D.N.Y. 1992) ("Although Director of Pupil Transportation had discretion to decertify drivers, he did not have authority to set policies relating to such decertification; since he "was empowered to act only within the parameters of certain policies set by the Chancellor of the Board of Education and the Board itself," he was not a final policymaker.)

For a subordinate's decision to be attributable to the government entity, "the authorized policymakers [must] approve [the] decision and the basis for it. . . .[s]imply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of authority to make policy." 485 U.S. at 129-30.

Compare ***Franklin v. City of Charlotte***, 64 F.4th 519, 536-37 (4th Cir. 2023) ("Under Mrs. Franklin's theory, the City Manager's 'conscious, deliberate choice to approve of the shooting [as] justified under the City's policy on use of deadly force ... subjects the City to liability.'. . She maintains that the district court erred by imposing a causation requirement because the Supreme Court, in *Praprotnik*, 'expressly modified *Monell* to allow for liability by ratification by a final policymaker of the act and the basis for it.'. . However, *Praprotnik* did no such thing. *Praprotnik* involved a St. Louis city employee who was transferred from one city department to another by agreement of the directors of the departments, and then was eventually laid off by the director of the second department. . . The employee brought a § 1983 suit against the city, alleging that the city took these actions in retaliation for his successful appeal of an earlier suspension, in violation of his First Amendment rights. . . A plurality of the Supreme Court held that a municipality can be held liable for a single constitutional violation by a subordinate when an individual with policymaking authority approves the subordinate's action. . . Applying that test to the facts, the plurality determined that the employee failed to demonstrate that any of the directors possessed the final policymaking authority necessary for municipal liability. . . And its conclusion that the directors were not policymakers ended the case and mooted any discussion of causation. Nothing in that decision suggests that it abandoned the requirement that a municipal policy caused the alleged constitutional injury. Indeed, *Praprotnik* acknowledged that a municipality cannot properly be held liable unless the 'injury was inflicted by [its] "lawmakers or by those whose edicts or acts may fairly be said to represent official policy."'. . Here, the parties do not dispute that the City Manager was the final decisionmaker in the review of use of force complaints against CMPD officers under the City's ordinance. Nor is it disputed that the City Manager exercised that authority and declared that Officer Kerl acted in conformity with CMPD's use-of-force policy and applicable law in killing Franklin. But there is a key distinction between this case and those in which a city policymaker may be liable for ratifying an action. A city employee who suffers an adverse employment action that is later ratified by a city policymaker may trace his or her injury back to that ratification. Repealing the ratification potentially could restore the employee back to the pre-injury status quo. But unlike in *Praprotnik*, Franklin's death is not traceable to a subordinate's decision that may be approved as final by a city policymaker. Rather, as the district court concluded, 'the City Manager's post-facto approval of an internal shooting investigation cannot possibly have caused the constitutional violation.'. .. Reversing the City Manager's decision cannot undo what is done. Therefore, we affirm the district court's holding that the City is not liable under § 1983 for Officer Kerl's shooting of Franklin.") *with* ***Starbuck v. Williamsburg James City County School Bd.***, 28 F.4th 529, 533-36 (4th Cir. 2022) ("[U]nder Virginia law, the School Board has final policymaking authority over short-term suspensions. This means that the School Board's actions regarding student suspensions can serve as 'policies' for the purpose of municipal liability under *Monell*. Moreover, when a final policymaker has the authority to review the decision of a subordinate, its approval of that allegedly unconstitutional decision can also give rise to liability under Section 1983. . . Under this theory of liability, if the School Board ratified the suspension of a student by subordinates, the School Board would be liable for any deprivation of constitutional rights caused by that suspension. Imposing liability on a municipality for its ratification of the acts of subordinates accords with the purpose

of municipal liability under Section 1983. That is, it holds municipalities accountable for the 'action[s] for which the municipality is actually responsible.'. . Thus, ratification liability critically differs from respondeat superior liability, the latter of which is impermissible under *Monell*. . . Ratification liability does not hold a municipality liable for the actions of subordinate officials; rather, it holds the municipality liable for *its own decision* to uphold the actions of subordinates. . . . The School Board's approval of a suspension allegedly imposed to punish assertedly protected speech is a decision of a body with final policymaking authority. *Monell* teaches that such a decision gives rise to the School Board's potential liability under 42 U.S.C. § 1983.").

See also ***Saunders v. Town of Hull***, 874 F.3d 324, 331 (1st Cir. 2017) ("Saunders can point to no evidence linking the Board to Billings's purported retaliatory motive, aside from Billings's single statement: 'Town Hall has my back.' Saunders did not depose any Board members to obtain information to substantiate his claim. Nor does he proffer any communications suggesting that the Board members were aware of—let alone expressly approved of—Billings's motive. . . There is nothing in the record, aside from Saunders's own suspicions to suggest that the Board did not simply 'go[ ] along' with Billings's decision or 'mere[ly] fail[ ] to investigate' why he did not affirmatively recommend that the Board promote Saunders to the vacant sergeant position. . . As such, the district court correctly held that Saunders failed to raise a genuine dispute as to whether the Board members 'ratified' Billings's alleged retaliation under *Praprotnik*."); ***Howell v. Town of Ball***, 827 F.3d 515, 527-28 (5th Cir. 2016) ("The town of Ball does not dispute that the Board was the 'official policy maker' for the purposes of municipal liability. Nor can Ball credibly dispute that Howell has offered some evidence suggesting that Police Chief Caldwell harbored retaliatory animus. Thus, the dispositive question is simply whether retaliatory animus is also chargeable to the Board itself. In other words, we must consider whether Howell has offered some evidence establishing that his involvement in the FBI investigation motivated the Board's approval of Caldwell's recommendation that Howell be fired. This motive can be established by offering evidence that the Board itself harbored retaliatory animus, or that it ratified both Caldwell's recommendation for discharge and the retaliatory animus backing it. *See, e.g.*, *Culbertson*, 790 F.3d at 621 ("If a final policymaker approves a subordinate's recommendation and also the subordinate's reasoning, that approval is considered a ratification chargeable to the municipality."); *see also Beattie v. Madison Cty. Sch. Dist*., 254 F.3d 595, 603 (5th Cir. 2001) (stating that a plaintiff "must impute [a subordinate's] allegedly improper motives to the board by demonstrating that the board approved both [the subordinate's] decision and the basis for it"). Our review of the evidence demonstrates a genuine dispute of fact regarding whether Howell's protected activity was a motivating factor in the Board's decision to adopt Caldwell's recommendation. First, the Board had knowledge of Caldwell's retaliatory motive when it approved the recommendation to fire Howell. Howell asserts in his deposition that, when given an opportunity to speak at the hearing, he told the Board that he considered his discharge to be an act of 'revenge.' Although this statement, standing alone, may be too vague to confer upon the Board knowledge of Caldwell's retaliatory motive, the Board defendants' own depositions suggest that Howell's statement was actually more detailed. More importantly, the Board understood Howell's statement to mean that he was being fired for assisting in the FBI investigation. . . The Board,

however, did not inquire further into this allegation; instead the Board reflexively accepted Caldwell's recommendation with no further ado. A jury reasonably could infer the Board's ratification of Caldwell's retaliatory animus from its cursory approval of Caldwell's recommendation that Howell be fired, as the Board, acting as the official policy maker, reflexively approved Howell's discharge with awareness of the alleged retaliatory motive behind it. . . Howell, however, also offers further evidence suggesting the Board's liability. Specifically, Howell has submitted deposition testimony from Vernon Altenberger, a Ball resident who frequently socialized with town officials. Altenberger asserts that he overheard one member of the Board, Alderman Giddings, admit to several townspeople that Howell was fired because he wore a wire for the FBI investigation. Other members of the Board may dispute Giddings's assessment of the Board's rationale for firing Howell; nevertheless, this admission is sufficient here to create a genuine dispute of fact over the motivating factor in the Board's decision. Accordingly, we vacate the district court's summary judgment for the town of Ball and remand for proceedings not inconsistent with this opinion."); ***Fennell v. Marion Indep. Sch. Dist.,*** 804 F.3d 398, 413 (5th Cir. 2015)("As Plaintiffs admit, the final policymaker here is the Marion ISD Board of Trustees, which has 'exclusive policymaking authority under Texas law.'. . Here, the record shows that the grievances at issue were not presented to the Board until May 2012, after all the incidents described above occurred. Although the record indicates that some of the incidents were reported to Marion ISD administrators and the interim superintendent, those individuals have not been delegated policymaking authority under Texas law. . . Thus, even assuming the alleged customs, policies, and failures to train existed among Marion ISD employees, '[t]here is no evidence that the Board knew of this behavior or condoned it.'. . In particular, while the Board may have known about three of the incidents prior to the May 2012 Board meeting, . . . those alone are not sufficient to show the board had knowledge of any discriminatory custom. . . Moreover, the Board had previously implemented official policies prohibiting racial discrimination, bullying, and harassment. . . And after the parking lot noose incident, Marion ISD instituted additional anti-discrimination and anti-harassment training facilitated by the DOJ and provided by an unaffiliated organization. . . The district court therefore did not err in granting summary judgment as to the claim against Marion ISD under § 1983."); ***Culbertson v. Lykos***, 790 F.3d 608, 621-22 (5th Cir. 2015) ("The decision-maker on non-renewal of the Contract was the Harris County Commissioners Court. That 'court' is actually the principal governing body for a Texas county. . . It is comprised of four commissioners elected from districts and a county judge elected countywide. . . The Commissioners Court may contract for law enforcement services. . . It also approves the budget for the county and may make changes in a proposed budget as it finds warranted by the facts and law. . . Neither party disputes that the Commissioners Court is a final policymaker for Harris County in the area of contracting and budgeting. . . . Under the theory of ratification, it is not enough that the Commissioners Court approved Palmer's and Lykos's recommendation. A plaintiff 'must impute [the defendant's] allegedly improper motives to the board by demonstrating that the board approved both [the defendant's] decision and the basis for it.'. . . A plausible claim has been stated that the Commissioners knew about the reasons for Lykos's and Palmer's recommendations, and it then ratified them, *i.e.,* it approved the recommendation and the reasoning. Whether evidence developed through discovery or otherwise

would support the allegations against the County is unknown."); ***Ellins v. City of Sierra Madre***, 710 F.3d 1049, 1066, 1067 (9th Cir. 2013) ("Whether an official is a policymaker for *Monell* purposes is a question governed by state law. . . California state law permits municipalities to enact regulations creating a 'city manager' form of governance. . . The City of Sierra Madre has enacted such regulations. . . The City has delegated to the city manager the 'authority to control, order, and give directions to all heads of departments and to subordinate officers and employees of the city....' Sierra Madre Mun.Code § 2.08.070(B) (2000). More specifically, it is the city manager's duty to 'appoint, discipline, remove, promote, and demote any and all officers and employees of the city except the city clerk, city treasurer, or city attorney....'. . . The Sierra Madre Personnel Rules and Regulations further reinforce these provisions by expressly charging the city manager with administering the City's personnel rules. These local ordinances and regulations establish that city manager Elaine Aguilar, not Diaz, possesses final policymaking authority over police employment decisions. Although it is undisputed that Aguilar approved Diaz's decision to delay signing Ellins's P.O.S.T. application, Ellins does not allege that Aguilar knew that the decision was in retaliation for protected speech or that she ratified the decision despite such knowledge. . . Ellins has thus failed to raise a genuine issue of material fact regarding whether his alleged injury is attributable to the City of Sierra Madre's policymaker."); ***Gillette v. Delmore***, 979 F.2d 1342, 1348 (9th Cir. 1992) (mere inaction does not amount to "ratification"); ***Cepero v. Gillespie***, No. 211CV01421JADNJK, 2020 WL 6173503, at *10 (D. Nev. Oct. 21, 2020) ("Finally, Cepero cannot make out a *Monell* claim based on a ratification theory. He asserts that 'there has been ratification' because the supervisors failed 'to investigate allegations of use of force.'. . But the relevant question for ratification under *Monell* is not whether a supervisor investigated the injury-producing conduct but whether a policymaker approves the unconstitutional decision. . . Cepero does not present evidence that LVMPD knew and approved the use of excessive force, so he cannot state a *Monell* claim based on ratification. LVMPD is therefore entitled to summary judgment in its favor on Cepero's *Monell* claim."); ***Tubar v. Clift***, No. C05-1154-JCC, 2008 WL 5142932, at *7 (W.D. Wash. Dec. 5, 2008) ("Viewed in Plaintiff's favor, the evidence sufficiently establishes that Chief Crawford ratified the alleged unconstitutional conduct when, after reviewing the internal investigation and just like on prior occasions, he expressly approved of and officially endorsed Officer Clift's actions. Because Chief Crawford had final policymaking authority and ratified Officer Clift's use of deadly force, Plaintiff has sufficiently established ratification to avoid summary judgment on municipal liability for his constitutional claims.").

But see ***Kujawski v. Bd. Of Commissioners of Bartholomew County***, 183 F.3d 734, 739, 740 n.4 (7th Cir. 1999) ("[T]he County relies on the well established principle that the mere unreviewed discretion to make hiring and firing decisions does not amount to policymaking authority. There must be a delegation of authority to set policy for hiring and firing, not a delegation of only the final authority to hire and fire. . . We confirm the validity of this principle. Nevertheless, reviewing this record in the context of a summary judgment motion, we believe that there remains a genuine issue of fact as to whether the Board had, as a matter of custom, delegated final policymaking authority to Parker with respect to community corrections employees. . . . The Supreme Court has made it clear that, in examining delegation issues, we must take into account

both state positive law and state custom that has the force of law. . . A municipal body ought not be able to avoid its constitutional responsibilities by delegating, in violation of state law, its responsibilities."); ***Chew v. Gates***, 27 F.3d 1432, 1445 (9th Cir. 1994) ("A city cannot escape liability for the consequences of established and ongoing departmental policy regarding the use of force simply by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers. Los Angeles could not, for example, distance itself from policy regarding the use of firearms by *de facto* delegating the formulation of firearms policy to the commander of the police academy. So too here: if the city in fact permitted departmental policy regarding the use of canine force to be designed and implemented at lower levels of the department, a jury could, and should, nevertheless find that the policy constituted an established municipal 'custom or usage' regarding the use of police dogs for which the city is responsible."); ***Myers v. City of Cincinnati***, 14 F.3d 1115, 1118 (6th Cir. 1994) ("A municipality may not escape *Monell* liability . . . by simply delegating decisionmaking authority to a subordinate official and thereafter studiously refusing to review his unconstitutional action on the merits. That the Commission reached a final conclusion distinguishes this case from *Praprotnik*, in which the local Civil Service Commission stayed any action on the plaintiff's complaint pending the outcome of federal litigation on the matter."); ***Bowler v. Town of Hudson,*** 514 F.Supp.2d 168, 184 (D. Mass. 2007) ("Plaintiffs contend that their § 1983 claims trigger *Monell* liability because the Hudson School Committee adopted policy 1701 (club posters may not include URL's) in July of 2005 in response to the poster controversy. Plaintiffs contend that these policy adoptions constitute ratification of the school's censorship and that municipal liability should therefore attach. . . . Here, the adoption of policies forbidding any web addresses from being listed on posters is, without more, insufficient evidence that the School Committee was ratifying the unconstitutional decision of the principal to censor the posters in violation of the students' First Amendment rights. However, there is also evidence that Superintendent Berman had knowledge of the unconstitutional censorship and ratified it on arguably unconstitutional grounds. Accordingly, summary judgment with respect to the municipality must be DENIED."); ***Albright v. City of New Orleans,*** Nos. Civ.A. 96-0679, 97-2523, 2001 WL 725354, at *10 (E.D.La. June 26, 2001) (not reported) ("While the Court's research revealed no case that discussed *Monell* liability in a context like that of this case, the Court is of the opinion that Superintendent Pennington's decision to rely fully and unquestioningly upon the recommendations of others cannot serve to shelter the City from the liability it would otherwise surely face. Notwithstanding that the deputy chiefs' actions cannot be imputed to Superintendent Pennington for purposes of personal liability, for purposes of *Monell* liability, the Court finds that the acts of the deputy chiefs may be fairly considered as those of Superintendent Pennington rendering the City liable under section 1983.").

Some courts have held that if plaintiff is relying on ***Praprotnik's*** "ratification" theory for attributing liability to the municipality, such ratification must precede the subordinate's unconstitutional conduct. *See, e.g.*, ***Burgess v. Fischer***, 735 F.3d 462, 479 (6th Cir. 2013) ("In the instant case, Fischer did not order the takedown, nor do Plaintiffs assert that a course of action selected by Fischer was the moving force behind Burgess' injury. Fischer's after-the-fact approval of the investigation, which did not itself cause or continue a harm against Burgess, was insufficient

to establish the *Monell* claim. . . Such an outcome would effectively make the Board liable on the basis of *respondeat superior,* which is specifically prohibited by *Monell.* . . In sum, even assuming there was an underlying constitutional violation, we affirm the dismissal of the *Monell* claim because Plaintiffs have failed to set forth sufficient facts to establish an unconstitutional custom or policy."); ***Thomas v. Roberts,*** 261 F.3d 1160, 1174, 1175 (11th Cir. 2001) ("Because the District had no opportunity to ratify the decision to search the children before the searches occurred, the students' reliance on *Praprotnik* to support their claim that the District ratified the unconstitutional conduct is misplaced."), *opinion reinstated and supplemented by* ***Thomas v. Roberts,*** 323 F.3d 950 (11th Cir. 2003); ***Bjelland v. City and County of Denver***, No. 1:22-CV-01338-SKC-SBP, 2024 WL 4165428, at *8 (D. Colo. Sept. 12, 2024) ("[T]he 'Tenth Circuit has instructed that '[f]ailing to adequately...punish does not count as ratification.' *Cousik v. City & Cnty. of Denver*, No. 22-CV-01213-NYW-KAS, 2024 WL 896755, at *15 (D. Colo. Mar. 1, 2024) (citing *Lynch v. Bd. of Cnty. Comm'rs of Muskogee Cnty.*, 786 F. App'x 774, 787 (10th Cir. 2019). Rather, 'the final decisionmakers' approval must *precede* the violative action.' *Huff v. City of Aurora*, No. 21-cv-02715-RMR-NRN, 2022 WL 4131438, at *12 (D. Colo. Sept. 12, 2022) (emphasis added). Here, from the Court's review of the record, the undisputed evidence shows that all of Plaintiffs' evidence (and argument) regarding ratification and a failure to discipline occurred after the relevant events. Plaintiffs have not cited any evidence of failures to discipline that preceded the protests. Consequently, they may not proceed on this theory of ratification and summary judgment is warranted insofar as this theory is concerned."); ***Ratlieff v. City of Fort Lauderdale***, 748 F.Supp.3d 1202, ____ (S.D. Fla. 2024) ("As already noted, all agree that Defendant Maglione was an official FLPD policymaker on May 31, 2020. Accordingly, for Ratlieff's ratification theory to survive summary judgment, she must show that, after viewing the record in the light most favorable to her, Maglione approved the subordinate(s) decision(s) that led to Ratlieff's alleged First Amendment violations, as well as the basis for the decision(s). . . Ratlieff has failed to create a genuine dispute of material fact as to her ratification theory for two reasons. First, the Court's review of the factual record confirms that Maglione was informed of the decision to deploy less-lethals at around 6:54 p.m.—after they had already been deployed—and further, that his decision was based on the representation that less-lethals were needed to support officer rescue. . .While Ratlieff maintains the officer rescue was a pretextual reason for FLPD's deployment of less-lethals, she has adduced no evidence to contest this justification as relayed to Chief Maglione to secure his approval *after* less-lethal deployment had already occurred. . . And because all agree that Maglione was not present at the Intersection at any point from the time less-lethals were first deployed until the time Ratlieff was gassed and struck, there is no way he could ratify this decision based upon any basis other than what his subordinates relayed to him. If subordinates intentionally lie or unintentionally mischaracterize the situation on the ground to gain final policymaker approval for an unconstitutional action, a final policymaker cannot be said to have actually ratified the violation for purposes of establishing *Monell* liability. Second, Ratlieff has not presented any evidence that Chief Maglione continued approving the deployment of less-lethals from 7:01 p.m. to 7:07 p.m., a period during which all agree that Officer Hayes was no longer in need of rescue. And since this is also the period during which all agree Ratlieff's alleged First Amendment violations occurred, she has failed to demonstrate a genuine dispute of material fact that Maglione

ratified the specific subordinate actions that led to her claimed First Amendment violations."); ***Hysell v. Thorp***, 2009 WL 262426, at *23 (S.D. Ohio Feb. 2, 2009) ("[I]t cannot be said that the failure to conduct a meaningful investigation into Plaintiff's complaint was the cause of his constitutional injury. Once an individual's rights have been violated, a subsequent failure to conduct a meaningful investigation cannot logically be the 'moving force' behind the alleged constitutional deprivation. . . For these reasons, the Court finds in favor of Sheriff Thorp on Plaintiff's claim concerning the alleged failure to investigate his complaint."); ***Mitchell v. City of Cleveland***, No. 1:03CV2179, 2005 WL 2233226, at *5 (N.D. Ohio Sept. 12, 2005) ("In the instant case, Plaintiff was interviewed by an OPS individual within two weeks of filing the Complaint form. During the interview, the Plaintiff described the treatment she received from the officers while she was incarcerated, and the officers that were involved. It is undisputed that the OPS then conducted an investigation in which only some of the officers described by the Plaintiff were sent forms to fill out describing the events. Surprisingly, Sergeant Kennedy, the officer in charge of the First District jail where Plaintiff was incarcerated, was not sent a form to fill out, and furthermore, was not even questioned regarding Plaintiff's allegations. Once the investigation was finished, no further action was taken against the officers. The Plaintiff argues that the OPS decision and its inadequate investigation were final actions by a policymaker. Plaintiff is wrong on this point. The City Charter of Cleveland, reveals that the OPS is 'under the general direction' of the Chief of Police who is, in turn, under the direction of the Director of Public Safety. . . . . It is the Director of Public Safety to whom final policymaking authority has been delegated with respect to police matters, including the investigation of allegations of misconduct. . . Given this fact, the Plaintiff must establish that the Director of Public Safety ratified the OPS's actions before she can establish that the City is liable for those actions. . . .To survive summary judgment on this issue, therefore, Plaintiff must offer proof that the official charged with making final policymaking authority regarding police behavior (i.e., the Director of Public Safety) expressly approved the OPS decision. Plaintiff has failed to do so. . . . Even if Plaintiff could prove that the OPS had final policymaking authority in the area of investigations, or that the Director of Public Safety ratified the OPS's actions in this case, moreover, she would still have to prove that the OPS decision was a 'moving force' behind her constitutional violation. . . Here, the violation she alleges arises from her improper treatment while incarcerated. OPS's investigation occurred after-the-fact. Plaintiff has neither alleged nor offered evidence establishing that past OPS investigations or no-fault decisions somehow inspired the officers in this case to act inappropriately, or without fear of reprisal. Indeed, Plaintiff has offered no evidence that the OPS ever investigated complaints regarding jail personnel in the past. Absent this causal link, no claim of municipal liability could lie."); ***Gainor v. Douglas County***, 59 F. Supp.2d 1259, 1293 (N.D. Ga. 1999) ("A post hoc approval of an action already taken could not possibly be the motivating force for causing the action to be taken. . . Thus, in order to impose liability under a ratification based theory, it is necessary to show prior ratification of the policy giving rise to the action alleged to have violated the plaintiff's federal rights, such that the ratification of that policy could be said to be the moving force behind the alleged constitutional violation."); ***Looney v. City of Wilmington, Del.***, 723 F. Supp. 1025 (D. Del. 1989) (Supreme Court's emphasis on element of causation in municipal liability cases, leads to conclusion that ratification must occur *prior* to employee acts).

While Justice Brennan agreed that the supervisors involved possessed no policymaking authority that could be attributed to the City, he disagreed with the plurality on certain key principles of attribution. For Justice Brennan, state law should serve as the "appropriate starting point" in the determination of who is a policymaking official, "but ultimately the factfinder must determine where such policymaking authority actually resides . . . . " 485 U.S. at 143 (Brennan, J., concurring).

Justice Brennan was concerned about the cases that would fall through the "gaping hole" created by the plurality's attribution rules. There would be no government liability in the case of an isolated unconstitutional act by an official who was delegated *de facto* final policymaking authority, but who was not identified under formal state law as a policymaker. *Id*. at 144.

Justice Brennan also criticized the plurality for the adoption of a "mechanical 'finality' test," which would preclude the finding of "final" policymaking authority whenever an official's decisions "are subject to some form of review − however limited." 485 U.S. at 147.

See, e.g., ***Bannum, Inc. v. City of Fort Lauderdale***, 901 F.2d 989, 998-999 (11th Cir. 1990) (decision to abrogate previously issued occupational license and to prohibit continued use of property for community treatment center became official city decision when Board of Adjustment, highest city policymaking body as to zoning matters, affirmed decision of Code Enforcement Board); ***Carr v. Town of Dewey Beach***, 730 F. Supp. 591, 608 (D. Del. 1990) (while Building Inspector and Mayor could issue stop work orders, their actions could not be considered final where, according to Town Charter, Board of Adjustment could hear appeals from any orders).

Justice Brennan would allow a jury to decide whether, despite the availability of some form of review, an official's decision "is in effect the final municipal pronouncement on the subject." 485 U.S. at 145.

See also ***Campion, Barrow & Associates, Inc. v. City of Springfield, Ill.***, 559 F.3d 765, 769, 770 (7th Cir. 2009) ("We do not exclude the possibility that the kind of power-sharing arrangement that Campion postulates might exist in some circumstances, either *de jure* or *de facto.* But Campion has not brought forward any evidence that would permit a finding that this was the way Springfield was handling its psychological testing contract. First, the law is against him. Under Illinois law, only the City Council could authorize the agreement to change the contract from one provider to another. . . Any contract over the amount of $15,000 must be approved by the City Council. . . Notably, Mayor Davlin did not act unilaterally when he set about changing the contract from Campion to Detrick. Instead, he sought the City Council's consent, implying that he did not have the ability to act by himself. Campion responds that the Detrick contract was not complete until Davlin signed it, but even that is not quite accurate. Under the municipal code, if the mayor refuses to sign an ordinance (effectively vetoing it), the ordinance can be passed again by two-thirds of all aldermen holding office. After that vote (which was exceeded here, incidentally), the new rule or, as here, testing arrangement, takes effect. Campion introduced no evidence tending to show that this was not the real process followed by the Council, either in this

particular case or as a rule. He thus cannot prevail on the theory that there was an established municipal custom giving the mayor the *de facto* power to handle matters like this unilaterally or to impose his wishes on the Council and use it as a rubber stamp."); ***Abbott v. Village of Winthrop Harbor***, 205 F.3d 976, 982 (7th Cir. 2000) ("[T]he District Court determined that Miller had final policymaking authority to connect the 3868 line into the 911 system. Relying on a local ordinance which gives the police chief the authority to 'make or describe such rules and regulations for the internal operation of the police department as he sees fit and proper,' the Judge found that the decision to connect the 3868 line to the 911 recording system affected the internal operation of the police department, and was not something that the chief needed to have approved by other Village authorities. The Court cited as support the fact that on neither occasion, either when connecting or disconnecting the 3868 line to the 911 recorder, did Miller seek the Board's approval. The Judge also was persuaded by Miller's testimony that, pursuant to his authority to run the police department, he made decisions on all matters except personnel and the budget. These facts, however, have little to do with where the law places the authority for the decision. . . . Here, the Illinois legislature has placed the final policymaking authority with the ETSB [Emergency Telephone System Board], not with the police chief. . . . [W]e find that the final policymaking authority to authorize the connection of a telephone line to the 911 system rested with the ETSB and not the police chief. Although the police chief may have sweeping powers to conduct his department as he sees fit, those powers are limited, in this case by the Illinois Commerce Commission's and the ETSB's authority to regulate the content of Winthrop Harbor's 911 emergency system."); ***Ashby v. Isle of Wight County School Board***, 354 F.Supp.2d 616, 628, 629 (E.D. Va. 2004) ("Defendant argues that Plaintiff did not follow the proper procedure for raising a complaint to the school board level, in that Plaintiff never asked for Owen's decision to be overturned, did not file a formal appeal, and did not request three days in advance to be placed on the agenda. . .Even if Plaintiff did satisfy the procedural requirements for appealing Owen's decision, Plaintiff did not seek resolution by official action of the Board. The Board acts through votes. The opinions of the individual members of the Board, even as given at a meeting of the Board, do not constitute the opinion of the Board, itself. For the Court to find that there was Board ratification of Principal Owen's actions, there must have been some cognizable action taken by the official body that is the school board. Plaintiff has not provided any evidence that the Board took any action on this matter. The Board did not participate with Owen in reviewing the lyrics to Plaintiff's song or any other student presentation for the graduation. Plaintiff's airing of grievances before the board members is not enough to satisfy the requirements of ratification. While it might be clear how the Board would have voted had it done so, the fact that the Board did not act is the determining factor in this analysis. Any concern that the Board might avoid liability by refusing to vote in such instances is adequately addressed by the 'custom and usage' portion of the *Praprotnik* analysis. The Board's repeated tacit approval of such actions would rise to the level of policy through custom and usage. As noted above, Plaintiff has not shown any facts that would support a finding of a custom or usage in the school district. Defendant did not ratify the decision and basis of Principal Owen's decision, therefore no policy has been made for the school district. To hold Defendant liable under § 1983 in this case would be to do so on a theory of *respondeat superior*, which is clearly not permissible at law").

3. In ***Jett v. Dallas Independent School District***, 491 U.S. 701 (1989), a former athletic director/head football coach at a public high school sued the principal and school district under sections 1981 and 1983, claiming loss of his position due to his race and his exercise of First Amendment rights.

The Fifth Circuit upheld the finding of liability as to the principal, concluding there was sufficient evidence from which the jury could find that he had discriminated against the plaintiff on account of race and in violation of plaintiff's First Amendment rights. 798 F.2d 748, 756-58 (5th Cir. 1986).

As to the school district, however, the court determined there was insufficient evidence of any wrongful motivation on the part of the superintendent whose conduct was being attributed to the school district. Thus, even if the superintendent "had the requisite policymaking authority," there was no wrongful conduct to be attributed to the school district. *Id*. at 760.

In addition, the jury instruction as to municipal liability was found deficient "because it did not state that the city could be bound by the principal or superintendent only if he was delegated policymaking authority (or if he participated in a well settled custom that fairly represented official policy and actual or constructive knowledge of the custom was attributable to the governing body or an official delegated policymaking authority)." *Id*. at 759.

In affirming the Fifth Circuit's determination that the jury instruction was manifest error, the Supreme Court referred to the principles to be applied in deciding whether either the principal or superintendent could be considered a "policymaker" whose acts or edicts might be attributed to the school district.

The Court reaffirmed the view that the identification of final policymaking authority is a question of *state law*. The majority rejected any role for the jury in this identification process, stressing that this is "a legal question to be resolved by the trial judge *before* the case is submitted to the jury." *Id*. at 737. The Court also noted that the "relevant legal materials" to be reviewed by the trial judge in identifying official policymakers included "'custom or usage' having the force of law." *Id*.

See, e.g., ***Atkinson v. City of Mountain View, Mo***., 709 F.3d 1201, 1214, 1215, 1216 (8th Cir. 2013) ("Whether Sanders exercised final policymaking authority for the city is 'a question of state law.'. . We recognize that some language in one of our previous cases may have suggested a role for juries in identifying municipal policymakers. *See Copeland*, 613 F.3d at 882 ("The district court rejected [the] claims for municipal liability because *no reasonable juror* could find that (1) [the police chief] was the 'final policy-maker' [or] (2) the city delegated final authority to [the police chief].... *We agree*." (emphasis added)). To the extent this language implied the identity of a municipality's final policymaker was a question of fact for the jury, it was inconsistent with our earlier cases, *see, e.g., Ware v. Jackson Cnty., Mo.*, 150 F.3d 873, 885 (8th Cir.1998); *Angarita v. St. Louis Cnty.*, 981 F.2d 1537, 1547 (8th Cir.1992), and the Supreme Court's decision in *Jett*, 491

U.S. at 737, *id.* at 738 (Scalia, J., concurring). . . .It is 'the trial judge'—not the jury—who 'must identify those officials ... who speak with final policymaking authority for the local government.'. . Only after the judge identifies an official as a final policymaker is it appropriate 'for the jury to determine whether [that official's] "decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur."'. . The interpretation of *Jett* we adopted in *Angarita* is consistent with the interpretations adopted by every other circuit . . . and the Supreme Court in its later decisions, *see, e.g., McMillian v. Monroe Cnty., Ala.,* 520 U.S. 781, 784–85 (1997). In accordance with *Jett* and *Angarita,* we consult two key sources to determine whether the district court correctly held that Sanders was not a final policymaker: (1) 'state and local positive law' and (2) state and local '"custom or usage" having the force of law.'. . First, as a matter of Missouri positive law, Sanders was not a 'final policymaker' for the city. *See Copeland,* 613 F.3d at 882 ('Under Missouri state law, the mayor and the board of aldermen of a [Fourth Class City] are the final policymakers for the "good government of the city [and] the preservation of peace and good order."'. . . .Second, Atkinson's argument that the city had a custom of delegating final policymaking power to Sanders is unsupported by any evidence in the record. On the contrary, the record evidence indicates the city's mayor and board of aldermen retained final policymaking power over Sanders, the police department, and the department's official policies. Because the identity of the city's final law enforcement policymaker is a legal question, Atkinson's argument that 'the evidence is sufficient to support a *jury* finding that ... Sanders was the policymaker for the City' entirely misses the mark. Having 'review[ed] the relevant legal materials,' *Jett,* 491 U.S. at 737, we agree with the district court that Atkinson cannot establish Sanders was—as a matter of Missouri law—a final policymaker for the city."); ***Gros v. City of Grand Prarie (Gros III)***, 181 F.3d 613, 616, 617 (5th Cir. 1999) ("To the extent that the district court relied upon a presumption concerning the locus of final policymaking authority in the City of Grand Prairie instead of looking to state law as the sole determinant, we find that it erred. . . . It was. . . incumbent upon the district court to consider state and local positive law as well as evidence of the City's customs and usages in determining which City officials or bodies had final policymaking authority over the policies at issue in this case. We also disagree with the district court's assertion that even if Chief Crum did not possess final policymaking authority as a matter of state law, Gros and Sikes could nonetheless survive summary judgment if there was an issue of material fact whether Crum had been delegated final policymaking authority. In *Jett*, . . . the Supreme Court established that whether an official has been delegated final policymaking authority is a question of law for the judge, not of fact for the jury."); ***Robinson v. City of Sikeston, Missouri***, No. 1:19CV41 RLW, 2020 WL 588606, at *10 (E.D. Mo. Feb. 6, 2020) ("The Court finds that the issue of whether Juden should be considered a final policymaker for the City is not properly before the Court in a motion to dismiss. It is clear that the question is one of law for courts to decide. . . . Here, the record has not been developed to know whether the city counsel delegated final policymaking to Juden. The Court also notes that *Copeland* and *Atkinson* concerned fourth class cities and not third class cities like Sikeston. This difference may not ultimately be significant for the final resolution of this case as the statutory structures seem similar; however, the Court does not decide the issue now. At this stage of the litigation, the Court finds Robinson has alleged sufficient facts to plausibly state claims against the City under applicable § 1983 precedent.

Accordingly, the City's motion to dismiss is denied as to the federal claims."); ***Logan v. Sycamore Community School Bd. of Educ.***, No. 1:09–CV–00885, 2012 WL 2011037, at *6, *7 (S.D. Ohio June 5, 2012) ("Plaintiffs have submitted sufficient facts for this Court to deny summary judgment on the Section 1983 claim. Specifically, Plaintiffs assert deprivation of Logan's constitutional right to equal protection by treating her complaints of harassment differently from the complaints of others (doc. 98). In addition, Plaintiffs allege Principal Davis is the final policymaker for implementing the sexual harassment policy at SHS and his actions in implementing the policy bind the Board (doc. 98). The Court has determined that there are material facts in dispute regarding whether a final policymaker executed a policy that resulted in the deprivation of Logan's rights, including questions of which school officials were aware of the harassment, which preclude granting Defendant's motion for summary judgment on this claim."); ***Hailey v. City of Camden***, Civil No. 01-3967 (JBS/JS), 2009 WL 1228492, at *15-*17 (D.N.J. April 29, 2009) ("It is the role of the trial judge to determine, guided by final policymaker jurisprudence and consistent with state law, who was the final policymaker and whether his actions in this case could be ascribed to the City. . . That determination was not made, the error was not harmless, and it requires a new trial. . . .As with Plaintiffs' failure to promote claims, in the event Plaintiff again seeks to pursue municipal liability of Defendant City of Camden under 42 U.S.C. § 1981 and 1983, the determination of the identity and nature of the policymaker responsible for a hostile work environment within the Fire Department can only be made through a new trial, when this Court will be able to weigh the evidence, make credibility determinations, and ultimately decide the issue with the assistance of all counsel (who are by now well-acquainted with the legal principles governing this issue)."); ***Miller v. Kennard***, 74 F. Supp.2d 1050, 1063, 1065 (D. Utah 1999) ("During discovery, Salt Lake County admitted that 'Sheriff Kennard is Salt Lake County's final policy maker regarding employment decisions in the [Sheriff's Office],' and that 'the Sheriff is a policy maker regarding transfers....' . . . . While the admission provides factual evidence supporting Miller's argument that Kennard is a policy maker, the ultimate determination of Kennard's status is a question of law to be determined by the court. . . . Since neither Utah law nor the Merit Commission policies submitted by Salt Lake County, on their face, demonstrate that Kennard is restricted in his ability to transfer or investigate officers or that these decisions are subject to meaningful review, the court cannot determine, as a matter of law, whether or not Kennard is a policy maker in these areas. The court will determine the question of Kennard's policy maker status at trial after a full presentation of the relevant evidence."); ***Mirelez v. Bay City Independent School Dist.***, 992 F. Supp. 916, 919 (S.D. Tex. 1998) ("Under Texas law, final policy-making authority of an independent school district generally rests with the district's Board of Trustees. . . Understanding the general rule, the Court notes that this case presents a unique situation in which the summary judgment evidence overwhelmingly reveals that the District's Board of Trustees expressly delegated final policy-making authority to the District superintendent.").

But see ***Pindak v. Dart***, 125 F.Supp.3d 720, 758 (N.D. Ill. 2015) ("Finally, Plaintiffs may proceed under a final policymaker approach. That approach imposes *Monell* liability where 'the constitutional injury was caused by a person with final policymaking authority.'. . Plaintiffs contend that Tee Coleman, the Security Manager for Securitas, caused Plaintiffs to be removed

from the Plaza by communicating to his employees that panhandlers were unwanted. To establish that Coleman is a final policymaker, Plaintiffs must do more than show that he 'has decisionmaking authority, even unreviewed authority' over a particular decision. . . *Ball v. City of Indianapolis,* 760 F.3d 636, 643 (7th Cir.2014). Rather, '[a] municipality must have delegated authority to the individual to make policy on its behalf.'. . When considering a municipal or state entity, '[t]he determination of whether a person has policymaking authority is a question of state law, and is to be decided by the court,' usually by reference to 'laws, statutes, or ordinances,' which delegate authority to a particular employee. . .As the Seventh Circuit has noted, this standard can be difficult to apply in the context of private contractors . . . . Tee Coleman may be the apex of authority within Securitas, but Securitas responds that Coleman reports to MBRE's Security Director. Accordingly, Securitas maintains it is MBRE that has final authority over the security policies for the building. . . This conflicting evidence creates a dispute of fact regarding whether Tee Coleman has final policymaking authority. Plaintiffs will be free to present evidence supporting an inference that he had final policymaking authority to the jury."); ***Hernandez v. Cook Cnty. Sheriff's Office***, 07 C 855, 2014 WL 3805734, *6 (N.D. Ill. July 31, 2014) ("Whether a particular official is a policymaker can be a question of fact for a jury. . . Here, there is at least a question of fact as to whether the investigation into, and discipline of, Plaintiffs' conduct was caused by 'an official with final policymaking authority.' Michno, Davis, and Bailey have testified that Kaufmann stated that the investigation and discipline was politically motivated. Kaufmann was the Director of Internal Affairs for the DOC and he signed the forms de-deputizing Plaintiffs, firing Davis and Bailey, and suspending Hernandez. Furthermore, Defendants admit that 'Sheriff Sheahan testified that Chief Kaufmann was not required to report to him in any investigation.'. . Based on this evidence, a reasonable juror could conclude that Kaufmann was a policymaker for purposes of the investigation into the jail break because he had the power to both initiate the investigation into Plaintiffs' conduct and to discipline them for it. Thus, summary judgment in Defendants' favor on the issue of the Sheriff's Office's liability for any violation of Plaintiffs' civil rights is not warranted.").

Compare ***Ricketts v. City of Columbia***, 856 F. Supp. 1337, 1344 (W.D. Mo. 1993) ("At trial, plaintiffs produced no evidence which identified the final policymaker for the defendant on these matters . . . . Plaintiffs merely assumed the final policymaker (whoever it was) had actual or constructive knowledge of the de facto policy to treat domestic disputes less seriously. In this regard, the jury instruction identifying the chief of police as the final policymaker was in error. The court implicitly took judicial notice that the chief of police was the city's final policymaker. The court had no authority to do so." footnotes omitted), *aff'd on other grounds*, 36 F.3d 775 (8th Cir. 1994) *with* ***Nichols v. City of Jackson***, 848 F. Supp. 718, 726 (S.D. Miss. 1994) ("[A]lthough plaintiff has failed to identify the state law which grants the fire chief policymaking authority, the court has determined that it exists.").

See also ***Wardell v. City of Chicago,*** No. 98 C 8002, 2001 WL 1345960, at *4 (N.D. Ill. Oct. 31, 2001) (not reported) ("[P]laintiffs ignore the uncontradicted case law of the Seventh Circuit that has consistently held that police superintendents are never policymakers for the

purpose of assigning municipal liability. [citing *Latuszkin* and *Auriemma*] Instead, only the City Council and Chicago Police Board are imbued with authority to make policy for the City of Chicago Police department."); ***Comfort v. Town of Pittsfield***, 924 F. Supp. 1219, 1234-35 (D. Me. 1996) ("While Comfort's pleadings lack both specificity and focus, he nonetheless provides sufficient evidence to cast Chief Lawrence as a policymaker for the purposes of summary judgment. Comfort raises factual issues as to whether Chief Lawrence 'had complete authority and control over the hiring, training and supervision of police officers at the Pittsfield Police Department.' . . . . If Chief Lawrence's decisions were not reviewable by other Pittsfield Officials, a jury could infer that his decisions were attributable to the town itself. The law saddles Pittsfield with the burden of demonstrating the absence of any genuine issues of material fact at summary judgment. The Town has failed in this responsibility. Plaintiff's evidence . . . raises factual disputes as to the constitutionality of Chief Lawrence's policies, and questions remain as to his status as a policymaker.").

Jett also noted that once the court has identified the policymakers in the given area, "it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . . or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." 491 U.S. at 737 (emphasis original). *See, e.g.*, ***Dean v. Cty. of Gage, Neb.,*** 807 F.3d 931, 942-43 (8th Cir. 2015) ("The county 'may only be held liable for constitutional violations which result from a policy or custom of the municipality.'. . It is for the jury to determine whether Sheriff DeWitt's decisions 'caused the deprivation of rights at issue by policies which affirmatively command that it occur.'. . The district court erroneously dismissed the claim against the county believing that 'the plaintiffs failed to present evidence of an official policy, unofficial custom, or a deliberately indifferent failure to train or supervise that could create liability.' To the contrary, the plaintiffs introduced evidence that Sheriff DeWitt made decisions about the investigations in this case. . . . It is for the jury to decide if these decisions (and others) by Sheriff DeWitt constituted Gage County policy that caused the deprivation of rights here.")

NOTE: On remand, the Court of Appeals held "that Superintendent Wright may have been delegated the final decision in the cases of protested individual employee transfers does not mean that he had or had been delegated the status of policymaker, much less final policymaker, respecting employee transfers." ***Jett v. Dallas Independent School District***, 7 F.3d 1241, 1246 (5th Cir. 1993).

In ***Morro v. City of Birmingham***, 117 F.3d 508, 515, 516 & n.3 (11th Cir. 1997), the court made the following observations:

> Based on the City's governing regulations and evidence of its actual practices, it seems that local law makes the Jefferson County Personnel Board, and not the police chief, the final policymaker with respect to police dismissals, demotions, or suspensions. If the City had preserved that issue for trial in the district court, and

> thus for our review on appeal, we have little doubt that the City would be entitled to escape the judgment against it on that basis. However, as the district court noted in its memorandum opinion, the City failed to identify its potentially available *Monell* defense as an issue at the pretrial conference or to obtain a modification of the pretrial order to permit it to raise the issue later in the proceedings.
>
> [W]e cannot say that the district court abused its discretion by failing to modify the pretrial order to accommodate presentation of the *Monell* defense at the late stage of the case at which the City chose to press it. That is particularly so in view of the fact that the City successfully convinced the district court to exclude Morro's pattern and practice witnesses on grounds of relevancy and then stood silent in the face of the district court's observation that the City had conceded at the pretrial conference that the Chief was a final policymaker.
>
> We note that the City's failure to preserve its *Monell* defense for trial is not excused by the fact that. . . the issue of final policymaker status is a legal question for the court, not the jury. Counsel may waive the right to have an issue decided by failing to identify the issue to the court at the pretrial conference, regardless of whether the issue is a legal or factual one.

4. Illustrative Lower Federal Court Cases

The perception that the Supreme Court failed to provide clear guidelines on attribution is illustrated vividly by two Eighth Circuit opinions following ***Praprotnik***. In ***Praprotnik***, **on remand**, 879 F.2d 1573 (8th Cir. 1989), the panel could not agree on who had final policymaking authority. While the majority concluded that under the City's charter, "[o]nly the Civil Service Commission had *final* policymaking authority for that area of the city's business," *id*. at 1576, Chief Judge Lay would have held that Praprotnik's layoff "resulted from the actions of an improperly motivated final policymaker-the mayor." *Id*. at 1581.

See also ***Browning-Ferris Industries v. City of Maryland Heights***, 747 F. Supp. 1340, 1345 (E.D. Mo. 1990) ("Attempts to define the extent of liability in cases before the Supreme Court have met with only mixed results . . . on the crucial question of exactly when municipal liability attaches under § 1983.").

In ***Williams v. Butler***, 863 F.2d 1398 (8th Cir. 1988) (*en banc*), *cert. denied*, 492 U.S. 906 (1989), the Eighth Circuit affirmed, for the third time, a decision of the federal district court holding the City of Little Rock liable for the unconstitutional discharge of a municipal court clerk by a municipal judge. The judgment of the *en banc* court had been twice vacated and remanded by the Supreme Court, once in light of ***Pembaur*** and once in light of ***Praprotnik***.

With five judges dissenting, the majority in ***Williams*** found that under state law, there had been an "absolute delegation of authority" to the municipal judge "[r]egarding employment

matters in his court"; he was exercising final policymaking authoriposty when he hired and fired court clerks. *Id*. at 1402.

The dissent took the position that, while the municipal judge had final decision-making authority with respect to hiring and firing court clerks, he did not possess final policymaking authority in the "employment field." *Id*. at 1405 (Gibson, J., dissenting).

See also ***Hamilton v. City of Hayti, Missouri***, 948 F.3d 921, 929 (8th Cir. 2020) ("Hamilton further appeals the dismissal of his § 1983 damage claim against the City of Hayti because Judge Ragland's 'unconstitutional bond practice is fairly attributable to the City of Hayti.' He argues that bond practices adopted by Judge Ragland, an elected city official, violated the Eighth and Fourteenth Amendments because indigent defendants 'received jail sentences simply because of their lack of financial resources and inability to pay.' The district court dismissed this claim because Judge Ragland's decision to impose a cash-only bond as a condition of Hamilton's pretrial release was a judicial decision subject to review by a higher court, . . . not a policy decision of the City. In *Monell*, the Supreme Court held that a municipality may not be held liable under § 1983 for the constitutional violations of its employees on a theory of *respondeat superior*, but may be liable if 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that [municipality's] officers.'. . Municipal liability 'may be imposed for a single decision by municipal policymakers' who possess 'final authority to establish municipal policy with respect to the action ordered.'. . Under Missouri law, municipal courts are divisions of circuit courts that are state entities. . . If a municipal court judge sets an 'excessive' condition for release, the person accused may file an application in the circuit court, which can 'make an order setting or modifying conditions for the release.'. . Judge Ragland's judicial order establishing a bond schedule was not a City of Hayti policy. . . And the setting of Hamilton's bond in his arrest warrant was a judicial act subject to review or reversal by higher state courts. Therefore, we agree with the district court that neither the adoption of the bond schedule nor the setting of Hamilton's bond was a final decision by a municipal policymaker establishing municipal policy with respect to the action ordered."); ***Granda v. City of St. Louis***, 472 F.3d 565, 569 (8th Cir. 2007) ("Granda asserts that a city can also be held liable for the decision of a municipal judge, relying on *Williams v. Butler*, 863 F.2d 1398. That case involved the administrative decision of a municipal judge to terminate his law clerks, rather than a judicial decision that is subject to review or reversal by higher state courts. . . Granda's argument that the city is liable because the other municipal judges should have prevented her incarceration is unavailing. The municipal court is a division of the state circuit court, and review of a judge's decisions is to be sought in that court. Judge Sullivan's decision to release the minor was a judicial act in recognition of a lack of jurisdiction, and Judge Walsh reassigned Judge Turner after she succeeded her as administrative judge pursuant to the local rules of the 22nd judicial circuit court. Judge Turner's order was a judicial decision made in a case that came before her on a court docket, and Granda does not appeal the district court's holding that the judge was entitled to judicial immunity. Granda fails to cite a single case where a municipality has been held liable for such a decision. We conclude that the judicial order incarcerating Granda was

not a final policy decision of a type creating municipal liability under § 1983.").

In ***Davis v. Mason County***, 927 F.2d 1473 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 275 (1991), there was similar disagreement as to the question of whether a county sheriff was the final policymaker of the County as to the "matter" in issue. While the majority considered the "matter" to be one of training in law enforcement practices, as to which the sheriff would have final authority, *id*. at 1480-81, the dissent saw the "matter" as a more general one of personnel administration, over which the Civil Service Commission had final policymaking authority. *Id*. at 1491.

See also ***Gillette v. Delmore***, 979 F.2d 1342, 1350 (9th Cir. 1992) (Fire Chief's discretionary authority to hire and fire employees did not make him final policymaker with respect to City's employment policy); ***Spina v. Forest Preserve of Cook County,*** No. 98 C 1393, 2001 WL 1491524, at *7 (N.D. Ill. Nov. 23, 2001) (not reported) ("In this case, however, the Chief's ability to hire and fire employees has little bearing on the issue of whether he was a policymaker with respect to the administration of the Department's sexual harassment policy. It is the administration of the sexual harassment policy − or lack thereofthat allegedly caused Officer Spina's injury, not the exercise of authority to hire or fire. Because the evidence demonstrates that the Chief of Police has the authority to investigate and discipline accused harassers, and otherwise set policy with regard to the Department's stance on sexual harassment, the Chief of Police is a policymaker for purposes of this case.").

Comment: The dispute between the majority and the dissent in ***Williams*** does not reflect disagreement as to the *authority* of the judge to make the employment decision made or the *finality* of the decision. Rather, the disagreement seems to turn on the question of when "a decision," even by a final policymaker, is tantamount to "a policy." That this is the real source of contention is apparent from the dissent's acknowledgement that "[e]ven if Butler had somehow been given authority to make employment policy for the City, the facts in this case do not support a conclusion that Butler's vengeful and self-motivated decision to fire Williams actually created employment policy for the City." 863 F.2d at 1409.

See also ***Wooten v. Logan,*** No. 02-5753, 2004 WL 68541, at *3 (6th Cir. Jan. 14, 2004) (unpublished) ("On appeal, Wooten renews her argument that, under *Pembaur*, the County is liable for Logan's conduct. Though opaque, Wooten's argument appears to proceed as follows: (1) as sheriff, Logan was the County's final policymaker with regard to the enforcement of the law: (2) Logan was able to detain and rape Wooten only 'because he was the sheriff of Pickett County' and had access to 'the instruments of his power-his patrol car, his blue lights, his uniform, his badge'; and, therefore, (3) the County is liable for Logan's actions. Fatally, Wooten has not demonstrated that Logan's conduct represented the 'official policy' of the County, as she has not shown that Logan was acting in a policymaking capacity when he detained and assaulted her. Logan conspired with a non-employee to commit a felonious act, and his conduct cannot conceivably be characterized as exercising a power to set policy. Moreover, though he allegedly used his 'blue

lights and police lights' to pull over Dale's car, and utilized his 'uniform, badge, and gun' to effectuate the rape, Logan acted in the guise of a patrol officer making a traffic stop-not as chief law enforcement officer. . . . Given these alleged facts, Wooten can state a claim against the County only if every 'law enforcement' activity (*e.g.*, stop, arrest, etc.) by a sheriff (or other chief law enforcement official)-whether a matter of official business or a misuse of power to advance a private agenda-represents the 'official policy' of the local government. Such a rule would contravene *Pembaur's* attempt 'to distinguish acts of the *municipality* from acts of *employees* of the municipality.' . . . and would institute the doctrine of *respondeat superior*. Accordingly. Logan's conduct cannot represent 'official policy,' and the County is not liable for Logan's conduct."); ***Lankford v. City of Hobart***, 73 F.3d 283, 287 (10th Cir. 1996) (Relying on *Starrett* to conclude that the City could not be held liable for its police chief's "private, rather than public, acts of sexual harassment."); ***Mansfield Apartment Owners Association v. City of Mansfield***, 988 F.2d 1469, 1475 (6th Cir. 1993) ("[T]he City is not liable for the conduct of its non-policymaking employees who act contrary to the policies of the City."); ***Manor Healthcare Corp. v. Lomelo***, 929 F.2d 633, 638 (11th Cir. 1991) (Mayor was not executing municipal policy when he acted contrary to controlling law regarding bribery and extortion); ***Starrett v. Wadley***, 876 F.2d 808, 819-20 (10th Cir. 1989) (where County official had power to establish final policy as to hiring and firing personnel in his department, such decisions would be attributable to the County; official's acts of sexual harassment, however, were "private rather than official acts" and the County would not be liable for them unless so widespread and pervasive so as to establish a "custom" in official's department); ***Carrero v. New York City Housing Authority***, 890 F.2d 569, 576-77 (2d Cir. 1989) (although supervisor could be individually liable for sexual harassment, his actions could not be attributed to Housing Authority policy, particularly where entity's stated policies were expressly non-discriminatory.); ***Van Domelen v. Menominee County***, 935 F. Supp. 918, 923-24 (W.D. Mich. 1996) ("Holding a county liable for any and all unconstitutional acts committed by a person with final policy-making authority would simply reinstate the doctrine of respondeat superior with respect to § 1983, a position which has been flatly rejected by the Supreme Court. . . . Defendant Gurosh's alleged actions were not taken within his role as a policy making official, but were rather isolated acts taken in a private capacity which cannot be attributed to the county."); ***Spratlin v. Montgomery County, Maryland***, 772 F. Supp. 1545, 1553 (D. Md. 1990) ("Liability of the municipality itself does not automatically attach to every decision made by a municipal officer charged with policymaking authority."), *aff'd*, 941 F.2d 1207 (4th Cir. 1991) (Table).

But see ***Howard v. Town of Jonesville***, 935 F. Supp. 855, 860 (W.D. La. 1996) (concluding that municipal liability might be found where "plaintiff has alleged that the Town of Jonesville's ultimate policymaker, the Mayor himself, engaged in acts of sexual harassment and discrimination.").

An important decision addressing the question of "what it means to be a municipal 'policymaker'" is ***Auriemma v. Rice***, 957 F.2d 397 (7th Cir. 1992). Plaintiffs in ***Auriemma*** asserted liability against the City of Chicago based on racially discriminatory promotion and

demotion decisions made by the Superintendent of Police in Chicago. Judge Easterbrook concluded

> [t]hat a particular agent is the apex of a bureaucracy makes the decision 'final' but does not forge a link between 'finality' and 'policy' . . . . Unless today's decision ought to govern tomorrow's case under a law or a custom with the force of law, it cannot be said to carry out the municipality's policy . . . . Liability for unauthorized acts is personal; to hold the municipality liable . . . the agent's action must implement rather than frustrate the government's policy.

977 F.2d at 400.

See also ***McClelland v. Katy Independent School District***, 63 F.4th 996, 1011-12 (5th Cir. 2023) ("The district court correctly concluded that the KISD Board cannot be held liable vicariously for the individual Defendants-Appellees' actions. *Monell* instructs district courts to examine whether the policymaker either adopted an injury-causing policy or delegated the authority to adopt such a policy. . . The policy at issue here is the ACC [Athletic Code of Conduct], a copy of which was attached to McClelland's complaint. McClelland did not allege facts demonstrating that the KISD Board had ratified the ACC, and the ACC itself does not indicate that it was ratified by the Board. In fact, the ACC appears to distinguish itself from 'the board-approved *Discipline Management Plan and Student Code of Conduct.*' McClelland has also failed to show that KISD's signature on its October 4, 2019 announcement constituted ratification or delegation. That announcement simply stated that a student would face consequences pursuant to the ACC and the Katy ISD Discipline Management Student Code of Conduct. McClelland did not allege any other facts that show the KISD Board had delegated policymaking authority to the individual Defendants-Appellees in connection with the disciplinary action. Therefore, McClelland has not shown that the KISD Board promulgated a policy that caused injury, so the KISD Board cannot be held liable for violations of McClelland's free speech under *Monell*."); ***Orduno v. Pietrzak***, 932 F.3d 710, 717-18 (8th Cir. 2019) ("Orduno suggests that Pietrzak, as police chief, was a policymaker for the City, and that his own actions were thus tantamount to unlawful conduct by the City. . . Assuming without deciding that a plaintiff under the DPPA may pursue a claim for municipal liability based on the *Monell* standards that govern municipal liability under 42 U.S.C. § 1983, Pietrzak's clandestine use of the database still cannot 'fairly be said to represent official policy.'. . Pietrzak admitted that the six obtainments within the limitations period 'were not for any use in carrying out any law enforcement, governmental, judicial or litigation-related function.' He accessed the database for personal reasons, not under the auspices of official policymaking authority, so his actions did not represent a policy of the City. . . The district court thus properly refused to entertain direct liability against the City."); ***San Geronimo Caribe Project, Inc. v. Acevedo-Vila***, 687 F.3d 465, 493 (1st Cir. 2012) (en banc) ("SGCP also makes no argument that the *Parratt–Hudson* doctrine should apply differently simply because the Governor is a high-ranking official. If that is the intended argument, we reject it. Nothing in *Parratt*, *Hudson*, *Zinermon*, or this circuit's case law states that there is an exception for high-ranking state officials to the usual method of

determining whether an action is random or unauthorized. In this, we join the views of two other circuits on the matter. [citing cases] To the extent the Second Circuit has adopted such a distinction, we decline to follow it. . . Nor is it clear that the Second Circuit would apply its doctrine here because the Governor, both as a matter of fact and of law, was not the ultimate decision-maker nor did he have the final authority to suspend permits. Simply because an official is high-ranking does not mean that the official's actions are automatically placed outside the scope of *Parratt–Hudson,* so long as those officials are bound by statutory limits on their authority under state law. As a result, the *Parratt–Hudson* doctrine applies to bar SGCP's claim against the Governor, and the procedural due process claim against the Governor was properly dismissed."); ***Roe v. City of Waterbury***, 542 F.3d 31, 40, 41 (2d Cir. 2008) ("Giordano had no authority to make policy authorizing, condoning, or promoting the sexual abuse of children. Regardless of what broad powers he had as a mayor, the state of Connecticut has made the policy (and the laws) prohibiting such conduct. . . . A finding of municipal liability in this case would amount to a finding of *respondeat superior* and would be an unwarranted expansion of the single-act rule set forth in *Pembaur*. It would also conflate the color of law inquiry with the official policy inquiry. An official acts within his official policymaking capacity when he acts in accordance with the responsibility delegated him under state law for making policy in that area of the municipality's business. . .An official acts wholly outside his official policymaking capacity when he misuses his power to advance a purely personal agenda. Here, Giordano acted neither pursuant to nor within the authority delegated to him when he committed the acts of sexual abuse. . . . Although we ruled that Giordano was acting under color of law when he molested the Plaintiffs, the claims here fail under the 'official policy' element."); ***Bolton v. City of Dallas, Tex***., 541 F.3d 545, 551 (5th Cir. 2008) ("Chapter XII, ' 5, of the Charter − the relevant local law quoted earlier − prohibits the specific action taken by Benavides. Thus, absent some contrary custom not shown here, Benavides's action clearly does not represent final policy with respect to the removal of city officials like Bolton. It is the Charter that announces the City's policy in this regard. . . . There is no argument that Benavides was generally free to disregard the Charter, . . . or that the City had a custom of permitting such disregard. And Bolton has not shown that Benavides was vested with policymaking authority such that municipal liability should attach despite the existence of a contrary city policy. . . Benavides was therefore not the final policymaker with respect to his decision to terminate Bolton and municipal liability cannot attach to that decision."); ***Thomas v. Roberts,*** 261 F.3d 1160, 1172, 1173 (11th Cir. 2001) ("Although Roberts was provided with the discretion to order searches within the school, she had no authority to alter the District's explicit policy that searches could not be conducted absent reasonable suspicion. . . . In this case, . . . it is irrelevant that Roberts's decision was not subject to review because it was contrary to the District's official written policy. . . When an official's exercise of her discretionary duties is 'constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the [local government].' [citing *Praprotnik*] Roberts's decision to search the children without reasonable suspicion therefore cannot be said to fairly represent the District's policy."), *opinion reinstated and supplemented by* ***Thomas v. Roberts,*** 323 F.3d 950 (11th Cir. 2003).

See also ***Logan v. City of Evanston***, No. 20 C 1323, 2020 WL 6020487, at *6–7 (N.D. Ill. Oct. 12, 2020) ("The defendants argue that Cook lacked policymaking authority with respect to the matters at issue because the Evanston City Code only authorizes him to administer and enforce the City's affairs and policies. The defendants' second argument is that like the Chicago superintendent of police in *Auriemma v. City of Chicago*, 957 F.3d 397 (7th Cir. 1992), Cook 'violated rather than implemented the policy' of the municipality when he published the plaintiffs' information. . .The Court disagrees. First, the plaintiffs have alleged sufficient facts to make it plausible that Cook, unlike the Chicago police superintendent in *Auriemma*, 'retains complete authority over how criminal investigations are conducted' and that he is therefore a 'final policymaker.'. . At this point it is too early to say definitively whether Cook qualifies in this regard, because the answer 'may turn on' factual questions regarding the extent of Cook's policymaking authority. . . But the plaintiffs' allegations are sufficient to clear the plausibility threshold. The Court notes, in this regard, that there is no question that a chief of police may be a final policymaker in appropriate circumstances. . . The defendants also contend that Cook's actions cannot be characterized as the policy of the City of Evanston because he violated the City's policies prohibiting, among other things, making personal copies of recordings created while on duty or while acting in one's official capacity, duplicating or distributing such recordings, sharing law enforcement information via social media, and releasing protected information. In *Auriemma*, the Seventh Circuit explained that '[l]iability for unauthorized acts is personal; to hold the municipality liable, *Monell* tells us, the agent's actions must implement rather than frustrate the government's policy.'. .Defendants' reliance on *Auriemma* is unavailing, at least at the motion to dismiss stage. In *Auriemma*, the Seventh Circuit found that city ordinances banned race discrimination in the Chicago police department and therefore expressly banned the superintendent's discriminatory conduct. . . In this case, the defendants have not pointed to any Evanston ordinance that limits Cook's authority in conducting police investigations. Although Cook's conduct may have violated the Evanston City Code, a statement issued by Cook himself indicated that his actions occurred 'during the course of a criminal investigation,' which is 'within the realm of the authority granted to the police chief.'. . Finally, Judge Ripple's concurrence in *Auriemma* indicates that the Seventh Circuit's opinion did not foreclose the possibility that the superintendent in that case could have been considered a policymaker on other facts. . . In this case, the plaintiffs plausibly allege that 'no ordinance constrained [Cook]' as it pertained to his alleged role as a policymaker in Evanston police investigations. *Vodak v. City of Chicago*, 639 F.3d 738, 748-49 (7th Cir. 2011). For these reasons, the City of Evanston is not entitled to dismissal of the plaintiffs' *Monell* claims under Rule 12(b)(6)[.]"); ***Myers v. Delaware County, Ohio***, No. 2:07-cv-844, 2008 WL 4862512, at *13 (S.D. Ohio Nov. 7, 2008) ("In the Court's view, because Defendants' discretionary decision to issue the press release was contrary to established county policies that forbid the sheriff from making public comments on a pending investigation, and because Defendants acted contrary to the legal advice of the county prosecutor, the conduct in question cannot be attributable to Delaware County regardless of whether Defendants were the final policymakers with respect to matters of law enforcement. The Court therefore finds that the County Defendants are entitled to judgment on the pleadings with respect to Plaintiff's substantive due process claim."); ***Miller v. City of East Orange***, 509 F.Supp.2d 452, 458, 459 (D.N.J. 2007)

("[T]he fact that Grimes is a policymaker for some purposes, does not mean that all acts committed by Grimes fall within the scope of his final decision-making authority and are City 'policy.' . . . The question is whether when Chief Grimes intentionally lied before the grand jury he was making 'policy' for the City of East Orange. The isolated incident at issue is an intentional tort and a criminal violation of New Jersey law, N.J.S.A 2C:28-1; N.J.S.A. 2C:228-2. It is an act for which, if proven, Chief Grimes could be criminally prosecuted in state court. While neither side has put forth any municipal or state laws setting out the limits of the policymaking authority granted to the East Orange Police Chief, clearly that authority includes an implicit limitation to abide by state and federal law. When Chief Grimes committed this criminal act and lied before the grand jury, he was acting outside the scope of his policymaking authority for the City. Since his act cannot be considered City policy, the City of East Orange is not liable for his conduct."); ***Beal v. City of Chicago***, No. 04 C 2039, 2007 WL 1029364, at *14 (N.D. Ill. Mar. 30, 2007) ("Unlike the practices of a municipality's lower-level employees, the single act of high-level policy maker can render a local government liable under § 1983. . . . Plaintiffs contend that the Command Personnel had policymaking authority. Whether an official has 'final policymaking authority' over a certain issue is a question answered by state or local law. Generally speaking, the City Council and Police Board set municipal policy for the CPD. . . Plaintiffs have not identified any authority for CPD's Command Personnel to 'countermand the statutes regulating the department' or adopt rules for the conduct of the department. . . Accordingly, to the extent that Command Personnel or Officers operated contrary to the express policy and practice of the City, no municipal liability is created."); ***Kohler v. City of Wapakoneta***, 381 F.Supp.2d 692, 712 (N.D. Ohio 2005) ("Kohler cannot show that Harrison had authority to establish a municipal policy that her bathroom activity would be tape recorded for his own, personal use. Harrison's unauthorized, private action frustrated, rather than implemented the City's stated policy regarding appropriate activity in the workplace. His action was not taken in the course of any official function, as were the individual acts found to represent municipal policy in the Sixth Circuit cases Kohler cites. [citing *Monistere* and *O'Brien*] Additionally, as soon as the City's officials learned about Harrison's actions, they decided to suspend him, accepted his resignation when it was proffered, and referred the matter to the state for investigation. Harrison's acts were therefore not 'final and unreviewable' and were subject to the City's superior official policies. Kohler cannot maintain her claim that Harrison's acts rose to the level of official policy."); ***Travis v. The Village of Dobbs Ferry***, 355 F.Supp.2d 740, 755 (S.D.N.Y. 2005) ("Chief Longworth, Lt. Gelardi and Det. Bailey violated their own policy by strip searching plaintiff. Since *Monell* claims are predicated on illegal activity committed pursuant to a policy or practice, no *Monell* claim can lie against the Village for a strip search that violated policy. Nor does the fact that Chief Longworth − the Police Department's highest policy-maker − authorized the search make it 'pursuant to policy.' While even one action by a chief policy maker can constitute a 'policy' for *Monell* purposes, . . . not every action of a chief policy maker automatically becomes 'policy' for *Monell* purposes. This case is the paradigmatic example of that proposition. Longworth had already made a policy concerning strip searches. He then violated his own policy by authorizing a strip search in the absence of reasonable suspicion to believe that Travis was carrying contraband. The only other way Dobbs Ferry could be held liable is if plaintiff adduced evidence showing that the Dobbs Ferry Police Department routinely strip searches

individuals without reasonable suspicion of contraband carriage. But there is no such evidence in the record. Indeed, there is no evidence in the record before me about any strip search except the strip search of plaintiff. That puts this case squarely in the category of cases where we are dealing with a single incident of unconstitutional activity that is not attributable to an existing, unconstitutional municipal policy. . . The fact that it is a particularly outrageous incident does not make the Village liable for it − though it may make the offending officers liable to plaintiff in punitive damages."); ***Zoch v. City of Chicago***, 1997 WL 89231, *43 (N.D. Ill. Feb. 4, 1997) (not reported) ("In *Auriemma*, the Seventh Circuit held that the Superintendent of the CPD was not the final municipal 'policymaker' in the context of the plaintiffs' racial and political discrimination claims under § 1983 in that case. . . In particular, the Seventh Circuit in *Auriemma* reasoned that since the Superintendent of the CPD did not have the power to countermand City ordinances which unequivocally banned racial and political discrimination, he was not the final municipal policymaker in the context of the plaintiffs' claims. . . Similarly, in the instant case, Rodriguez does not have the power to countermand the municipal ordinance which unequivocally bans gender discrimination or the City's official policy against harassing employees because of the person's First Amendment conduct.").

But see ***San Geronimo Caribe Project, Inc. v. Acevedo-Vila***, 687 F.3d 465, 497 (1st Cir. 2012) (en banc) (Lipez, J., concurring) ("Even under a broad construction of the principle espoused in *Parratt* and *Hudson*,. . . actions undertaken by a governor in his or her official capacity should be attributed to the State. . . . With respect to the Governor, however, I think it is plainly unacceptable to say that his conduct, albeit improper under Commonwealth law, was 'unauthorized' in the *Parratt–Hudson* sense, regardless of whether one prefers the Legalist or Governmental model. The Governor is the chief of state and, as such, his official acts are always those of 'the State.' At a minimum, *Monroe* must mean that a viable section 1983 procedural due process claim will arise if the Governor sets in motion the denial of procedural protections to an individual entitled to predeprivation process."); ***Vodak v. City of Chicago***, 639 F.3d 738, 746-48 (7th Cir. 2011) ("The district court dismissed the City of Chicago as a defendant on the ground that it did not participate in the unlawful arrests. For reasons based on what scholars agree are historical misreadings (which are not uncommon when judges play historian), . . . the Supreme Court has held that municipalities are not liable for the torts of their employees under the strict-liability doctrine of respondeat superior, as private employers are. . . A person who wants to impose liability on a municipality for a constitutional tort must show that the tort was committed (that is, authorized or directed) at the policymaking level of government − by the city council, for example, rather than by the police officer who made an illegal arrest. . . The City makes the extravagant claim that the only officials whose tortious conduct can *ever* impose liability on it are the members of the City Council acting through their ordinances. The City denies that the Council has delegated authority to make policy to any official of the City's government. Not even acts of the Mayor are acts of the City, it contends; they are merely acts of an errant employee. However that may be, the only rule governing policies and procedures regarding mass arrests is Chicago Police Department General Order 02-11 (Nov. 1, 2002), issued in the name of the City's Superintendent of Police pursuant to a provision of the Chicago Municipal Code stating that 'the superintendent shall be

responsible for the general management and control of the police department and shall have full and complete authority to administer the department in a manner consistent with the ordinances of the city, the laws of the state, and the rules and regulations of the police board.' § 2-84-040. The City Council can enact ordinances that constrain the Superintendent's authority to make mass arrests in demonstration situations, but it hasn't done so, and thus it has allowed him to be sole policymaker in relation to the events at issue in this case. He alone makes policy for demonstrations that get out of hand. His possession of this policymaking authority is consistent with Illinois state law as well as with the City's ordinances. . . . All that matters in this case is that Chicago's police superintendent has sole responsibility to make policy regarding control of demonstrations. He was in his headquarters throughout the March 20, 2003, demonstration, not only monitoring it but also approving the decisions of his subordinates, specifically their decisions to shield Michigan Avenue from the marchers and to make the mass arrests of the people trapped on Chicago Avenue. The superintendent *was* the City, so far as the demonstration and arrests were concerned. . . .The City argues, on the authority of our decision in *Auriemma v. Rice*. . . that the police superintendent doesn't have authority to make policy for dealing with demonstrations and mass arrests because he is required to act in conformity with the ordinances enacted by the City Council. But no ordinance constrained him."); ***Simmons v. Uintah Health Care Special Dist.***, 506 F.3d 1281, 1283-87 (10th Cir. 2007) ("[W]hile municipalities are rightly held liable for those actions taken by employees in conformance with official policy, this is hardly the only basis available for assigning municipal liability. Municipalities are equally answerable for actions undertaken by their final policymakers, whether or not those actions conform to their own preexisting rules. Were the law otherwise, a municipality's leaders would have the very strange incentive to flout their own policies. Or perhaps even enact policies with the deliberate purpose of disregarding them. While the law is often subtle and sometimes complex, it is rarely so unreasonable. . . . The district court's primary holding turns on a question of law − namely, whether the District may be held liable only for actions by its employees in compliance with official policy − and thus requires *de novo* review in this court. We are in full accord with the District that actions taken by employees in compliance with official policy or custom are one way to establish liability on the part of a municipality. . . . We part ways with the District and the district court, however, when it comes to the question whether showing compliance with a preexisting policy or longstanding custom is the only way to demonstrate that an action is properly viewed as the municipality's own. While *Monell* found liability on the basis of an 'official policy as the moving force of the constitutional violation,' 436 U.S. at 694, it fell to the Court in *Pembaur* to establish that actions taken by a municipality's final policymakers also represent acts of 'official policy' giving rise to municipal liability. . . . Accordingly, a municipality is responsible for *both* actions taken by subordinate employees in conformance with preexisting official policies or customs *and* actions taken by final policymakers, whose conduct can be no less described as the 'official policy' of a municipality. This must include even actions by final policymakers taken in defiance of a policy or custom that they themselves adopted. . . Were the rule of law different, we would invite irrational results. Holding municipalities immune from liability whenever their final policymakers disregard their own written policies would serve to encourage city leaders to flout such rules. Policymakers, like the members of the Board before us, would have little reason to abide by their own mandates, like the

RIF policy, and indeed an incentive to adopt and then proceed deliberately to ignore them. Such a rule of law would thus serve to undermine rather than enhance Section 1983's purposes. Actions taken by a municipality's final policymakers, even in contravention of their own written policies, are fairly attributable to the municipality and can give rise to liability."); ***Spalding v. City of Chicago***, 24 F.Supp.3d 765, 774-75 (N.D. Ill. 2014) ("Unlike the situation in *Auriemma,* Plaintiffs do not allege that Kirby, Rivera, and Roti frustrated any particular City policy. Rather, citing *Vodak v. City of Chicago,* 639 F.3d 738 (7th Cir.2011), Plaintiffs submit that, 'so far as the retaliatory acts against Plaintiffs were concerned,' Kirby, Rivera, and Roti were the City's policymakers. . . In *Vodak,* the Seventh Circuit explained that the relevant question under *Monell* turns not on a general inquiry into the governmental hierarchy, but rather on an examination of whether an individual municipal officer 'was at the apex of authority for the *action in question*.'. . . *Vodak* distinguished *Auriemma* on the ground that no ordinance constrained the Superintendent's authority to make policy regarding demonstrations and mass arrests, while in *Auriemma* there was an ordinance that constrained and in fact eliminated the Superintendent's ability to take the action in question (making employment decisions based on race and politics). . . As in *Vodak,* the actions challenged here are not submitted by either side to have been restricted or prohibited by City ordinance. Defendants retort that this does not matter because *Auriemma* holds that the City Council is the sole policymaker with respect to *all* employment decisions. . . That greatly overreads *Auriemma,* which holds only that the City Council is the sole policymaker with respect to the particular employment decisions challenged in that case—those based on considerations (race and politics) made unlawful by ordinance. . . Accordingly, the *Monell* claim survives dismissal.")

See also ***Greensboro Professional Fire Fighters Ass'n., Local 3157 v. City of Greensboro***, 64 F.3d 962, 965-66 (4th Cir. 1995) ("While it is true that Fire Chief Jones had the authority to select particular individuals for promotion and even to design the procedures governing promotions within his department, this authority did not include responsibility for establishing substantive personnel policy governing the exercise of his authority. His power to appoint and to establish procedures for making appointments was always subject to the parameters established by the City. Appellants confuse the authority to make final policy with the authority to make final implementing decisions."); ***Lawshe v. Simpson***, 16 F.3d 1475, 1484 (7th Cir. 1994) (Gary Health Department Board's termination of plaintiff without due process did not constitute municipal policy where Board's discretion in this area was subordinated to Mayor's policy.); ***Martineau v. Kurland***, 36 F. Supp.2d 39, 43 (D. Mass. 1999) ("[A]uthority to hire and fire in itself does not carry with it the authority to create an employment policy of retaliating against employee exercise of free speech."); ***Izquierdo v. Sills***, 68 F. Supp.2d 392, 408, 409 (D.Del. 1999) ("Izquierdo does not contend that Pratcher acted pursuant to official municipal policy; rather, he contends Pratcher acted pursuant to rules other than those established by the written policies. Thus, if Pratcher were the official policymaker with respect to the areas cited by Izquierdo, the actions and patterns to which Izquierdo points would be official policies of the municipality. However, Izquierdo has not shown Pratcher had final policymaking authority with respect to any aspect of the alleged activities. . . . Thus any actions he allegedly took in contravention of the language of the Manual did not establish a new municipal policy but would be contrary to the written policy.");

McMillan v. City of Chicago, No. 92 C 3746, 1993 WL 462835, *1 (N.D. Ill. Nov. 9, 1993) (not reported) ("Neither Mayor Daley nor Commissioner Carr set policy regarding dismissals or reclassifications of job titles in Chicago. At most, they are alleged to have wielded final authority over the decisions to reclassify and dismiss [plaintiff]. If, in making these decisions, Mayor Daley and Commissioner Carr discriminated on account of politics or in retaliation, Mayor Daley and Commissioner Carr are accountable as individuals for violating not implementing the policy of Chicago."); ***Rubeck v. Sheriff of Wabash County***, 824 F. Supp. 1291, 1301 (N.D. Ind. 1993) ("[S]omeone with executive authority whose actions fly in the face of state or local law is not a policymaker under *Monell* and its progeny.").

See also ***Evans v. City of Chicago***, No. 04C3570, 2006 WL 463041, at *14, *15 (N.D. Ill. Jan. 6, 2006)("The City argues that Plaintiff has no competent evidence to support the alleged municipal policy of systematically suppressing *Brady* material or of framing innocent people and securing false criminal convictions through witness coercion and evidence fabrication. Specifically, the City relies on the Muncipal Code of Chicago, the City of Chicago's Department of Police Rules and Regulations, and training bulletins that were effective in 1976 to demonstrate that the City's express policies contradict Plaintiff's allegations. The CPD Rules and Regulations prohibited police officers from failing to report promptly any information regarding any crime or unlawful action. The inference is that police officers therefore were forbidden from sequestering information or evidence in so-called street files, rather than immediately reporting it through official CPD channels. Police officers thus were likewise forbidden to pursue and secure false criminal convictions. The Standards of Conduct in the CPD Rules and Regulations expressly forbade making a false written or oral report. . . According to the City, there was no evidence that its policymaking authorities knew or should have known of any policy or practice of suppressing exculpatory material or framing innocent people. Plaintiff asserts that the customs or practices of maintaining 'street files' and fabricating evidence to secure false convictions was so wide-spread, of such long-standing, and so well-known throughout the Department that it rose to the level of official policy. Multiple court decisions in this District and the Seventh Circuit have noted that evidence of the street files practice has been clearly established. . . . . Evidence that the CPD had a practice of maintaining street files in 1982 may be suggestive of a similar practice in 1976. This Court notes that the Seventh Circuit has stated that '[t]he Superintendent of Police in Chicago had no power to countermand the statutes regulating the operation of the department.'[citing *Auriemma*] The difference between countermanding a statute and issuing general orders pertaining to daily operations remains an open question, however, not amenable to summary judgment. Neither party has adduced evidence clearly showing what authority the Superintendent or supervisory staff at CPD had over implementing mandates from City Council. Plaintiff has raised questions about the apparent discrepancy between official CPD policy and actual CPD practice with respect to case file creation and maintenance, which the City has failed to address in more than conclusory fashion. Whether CPD followed its official policy − and what that policy specifically meant to the Department − is a key issue in the instant litigation and, based on the evidence before the court at this point, not an issue that can be resolved as a matter of law.").

But see ***Wooten v. Logan,*** No. 02-5753, 2004 WL 68541, at *4 (6th Cir. Jan. 14, 2004) (Moore, J., dissenting) (unpublished) ("That Logan committed the alleged assault himself makes no difference; the chief law- enforcement officer of Pickett County, Tennessee, is alleged to have ratified a policy of using the power of law enforcement to effectuate rape, and the County should be responsible for such a policy."); ***Bennett v. Pippin***, 74 F.3d 578, 586 & n.5 (5th Cir. 1996) ("In this case, the Sheriff's actions were those of the County because his relationship with [Plaintiff] grew out of the attempted murder investigation and because. . . he used his authority over the investigation to coerce sex with her. The fact that rape is not a legitimate law enforcement goal does not prevent the Sheriff's act from falling within his law enforcement function. . . . Under the Archer County power structure, no one had state law authority to contest the Sheriff's use of his power to place himself in a position to rape [Plaintiff]."); ***Gonzalez v. Ysleta Independent School District***, 996 F.2d 745, 754 (5th Cir. 1993) ("[T]he existence of a well-established, officially-adopted policy will not insulate the municipality from liability where the policy-maker herself departs from these formal rules. [cite omitted] The Board of Trustees' conscious decision to transfer [teacher] rather than remove him from the classroom or report the incident to the Department of Human Resources − the response its past practice might have portended and its own sexual abuse policy would seem to have required − plainly constitutes a 'policy' attributable to the school district."); ***Culberson v. Doan***, 125 F. Supp.2d 252, 276 (S.D. Ohio 2000) ("[T]his Court finds Chief Payton is the policymaker for the Village of Blanchester regarding his duties as the municipality's top law enforcement officer and any official actions representing deliberate indifference, a policy or a custom that is promulgated by him, is held to be a policy or custom of the Village of Blanchester, for which liability can be imposed on it."); ***Corp. of Pres. of Church of Jesus Christ of Latter Day Saints v. Environmental Protection Commission of Hillsborough County***, 837 F. Supp. 413, 417 (M.D. Fla. 1993) ("Although [defendant's] action may have only been a one-time deviation from the written rules by which the EPC operates, such deviation could amount to agency policy. . . .").

Compare ***Whitson v. Board of County Commissioners of County of Sedgwick***, 106 F.4th 1063, 1066-72 (10th Cir. 2024) ("The central question before us is whether a final policymaker's assault of a county prisoner in the course of carrying out official duties for which he was charged with setting policy subjects the municipal defendants to liability. We answer yes. A municipal government is not liable for every constitutional violation by one of its officers or employees. Although a municipality is a 'person' subject to suit under § 1983 for constitutional violations, it 'cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.'. . Rather, a municipality is responsible only for (1) actions taken by subordinate employees in conformity with preexisting official policies or customs and (2) actions taken by final policymakers, whose conduct 'can be no less described as the official policy of a municipality.'. . . A municipality is an artificial person. But in certain respects it can be identified with the final policymakers who have authority to control its actions. As we understand controlling precedent, when an official takes action over which he or she has final policymaking authority, the policymaker *is* the municipality, so it is fair to impose liability on that entity for that action. . . . Sheriff Hanna was the final policymaker for the municipal

defendants with respect to the care of county prisoners, including their transportation. By Colorado statute the sheriff 'shall have charge and custody of the jails of the county, and of the prisoners in the jails, and shall supervise them himself or herself or through a deputy or jailer.'. . Hanna's actions with respect to prisoner Biggs were undoubtedly within the scope of activities for which he was to set policy. Our conclusion in this case finds strong support in the decisions by other circuits. Those decisions have repeatedly held that a policymaker need not be motivated by legitimate policy goals for conduct to fall within final policymaking authority. [court discusses decisions] [W]e see no support for the proposition that conduct by a policymaking official that would otherwise lead to municipal liability cannot be attributed to the municipality when the official acts for purely personal reasons. The Supreme Court has spoken forcefully on the issue, saying, 'proof that a municipality's legislative body or *authorized decisionmaker* has intentionally deprived a plaintiff of a federally protected right *necessarily establishes* that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality *or its authorized decisionmaker itself violates federal law* will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains.'. . A rule under which a municipality could escape liability whenever a policymaker motivated by purely personal considerations violates constitutional mandates would 'serve to undermine rather than enhance Section 1983's purposes.'. . The factual context presented by this case is quite different from the contexts of the cases offered to dispute municipal liability. Here the victim was *in the custody* of the official and the official was statutorily charged with supervising the victim's care. . . In this circumstance, we see no escape from the conclusion that Sheriff Hanna possessed 'final authority to establish municipal policy *with respect to the action ordered*.'. . Indeed, he had not only the authority, but the responsibility, to set policy with respect to the treatment of prisoners in his custody. A few words about the dissent. It suggests that it is bad policy to expose a municipality to what could be enormous liability for actions by policymakers who are motivated solely to achieve personal gratification without any intent to serve the municipality's interest. It therefore rejects the appellate decision holding a municipality liable for sexual assaults by a sheriff. And it appears to distinguish the other out-of-circuit decisions cited above in support of our approach on the ground that the misconduct may not have been motivated just by the desire for self-gratification (perhaps because conduct motivated solely by personal reasons is not considered within the scope of employment). But the misconduct in those cases may well have been motivated by purely personal concerns—for example, did the sheriff fabricate evidence because of a personal vendetta against the defendant or did the alderman infringe the free-speech rights of a constituent only to protect his personal reputation—and, more importantly, the opinions in those cases did not address motive, presumably because the motive was irrelevant. If liability depends on whether there is a possible 'proper' motivation for the official's action, the likely unseemly consequence is that the only victims who cannot obtain relief from a municipality for a policymaker's misconduct are victims of sexual assault, for which there could never be a legitimate motive. Would that be such good policy? In any event, the theory of municipal liability we are imposing is hardly a stranger to the law and is fully consistent with *Monell*. *Monell* rejected respondeat superior liability for municipalities. . . . [W]hen the policymaker is the alter ego of the municipality, liability is appropriate, regardless of the miscreant's motives or whether the conduct was within the scope of

employment. The Supreme Court has recognized this narrow basis of liability outside of respondeat superior. . . . This does not mean that a municipality is liable for all misconduct by a sheriff. If Hanna had raped a customer at a bar after work, there would likely be no municipal liability. As explained above, the sheriff must have final policymaking authority with respect to the actions taken. . . Given that Hanna raped a prisoner in his custody while transporting the prisoner to another jail, that requirement was undoubtedly satisfied.") *with* ***Whitson v. Board of County Commissioners of County of Sedgwick***, 106 F.4th 1063, 1073-75, 1079 (10th Cir. 2024) (Phillips, J., dissenting) ("I would affirm the district court's dismissal of the claims against Sedgwick County because Sheriff Hanna did not act as a final policymaker in his decision to sexually abuse Ms. Biggs. I agree with the district court's conclusion that Sheriff Hanna advanced a purely personal agenda in committing the sexual assault and acted outside his authorized law-enforcement 'realm' of setting policy for the transportation of prisoners. . . As the district court put it so well, sexual assault 'is not within the policymaking authority a county sheriff has.'. . . [I]f *Bennett* were a Tenth Circuit case, it might well control the present case. But as an out-of-circuit case, *Bennett* must earn its way into our caselaw by its persuasive value. For me, *Bennett* hasn't earned its place. Other circuits have rejected it, and we should too. I agree with the cases below criticizing *Bennett* and declining to follow it. . . . In my view, the district court got it right by concluding that 'the transportation of prisoners is within the realm of the county sheriff's policymaking authority' but that the municipality defendants 'are not being sued because Mr. Hanna transported Ms. Biggs; they are being sued because he sexually assaulted her. That is not within the policymaking authority a county sheriff has.'. . The district court did not err by concluding that Sheriff Hanna's actions were 'wholly outside' his authority and lawful realm because he 'misuse[d] his power to advance a purely personal agenda.'. . For these reasons I respectfully dissent and would affirm the district court's order granting the motion to dismiss the claims against Sedgwick County. I disagree with the majority opinion's holding that the sheriff can create a municipal policy with his one-time, *illegal*, and *secret* act of sexually assaulting a detainee by interrupting a detainee's jail transport and improperly taking her inside his home to commit a sexual assault. With that as our circuit's new rule, I see no way for a municipality to do anything but write checks—strict liability for the municipality despite its legal inability to constrain a rogue sheriff determined to gratify his sexual desires.")

See also ***Putnam v. Town of Saugus***, 365 F.Supp.2d 151, 189-93 (D. Mass. 2005) ("Despite the appointment authority given to the Town Manager, one could argue that it is not final authority under *Praprotnik* because the Town Manager is constrained by polices not of his or her making. . . That is, because the Town Manager's appointment authority must be exercised based on 'merit and fitness alone,' one could argue that the Town Manager's disregard of that directive is not the Town's final policy but a subordinate's departure from it. . . In *Praprotnik*, the plurality addressed this point in response to Justice Brennan's concern that a municipal charter's inclusion of 'merit and fitness' language would effectively insulate the municipality from liability. . . The plurality denied that assertion and observed that refusals to abide by a 'merit and fitness' standard could help to show that a municipality's policies were in reality, different from those in the charter. . . This seems to suggest that a 'merit and fitness' standard would not preclude a finding

of final policymaking authority in the official to whom that standard applies, if that policy is frequently disregarded. . . One could then argue that Vasapolli's single alleged departure from the 'merit and fitness' policy is insufficient. This reasoning, however, is contradicted by other portions of the plurality's opinion which suggest that a 'merit and fitness' standard does not automatically preclude a finding of final policymaking authority. The town charter involved in *Praprotnik* required appointment decisions as well as 'all measures for the control and regulation of employment' be 'on the sole basis of merit and fitness.' . . Despite its recognition that the mayor was constrained by the directives of the charter, the plurality acknowledged that 'one would have to conclude' that the mayor's policy decisions would be 'attributable to the city itself' so long as applicable law does not make the mayor's decisions reviewable by the municipality's civil service commission. . . Thus, the 'merit and fitness' provision did not automatically preclude a ruling of the mayor had final policymaking authority. . . Rather, the civil service commission must have the power to enforce the 'merit and fitness' provision by reviewing the mayor's decisions in order to prevent such a finding. . . Thus, the plurality's reasoning appears internally contradictory. One portion of the opinion implies that a 'merit and fitness' standard preempts a finding of final authority, . . . while another part suggests it does not so long as the official's decisions are not subject to review by other municipal policymakers. . . One way that this apparent inconsistency can be resolved is through a closer examination of *Praprotnik's* reasoning. Such an examination suggests that the two-step framework for determining final policymaking authority may not have been intended to apply to those policymakers who are legislatively authorized to act but only to those subordinate officials to whom the legislatively empowered decision-makers have delegated their authority. . . . This Court is mindful of the fact that this interpretation has the unusual effect of according different legal significance to the same legislative language depending on the person to whom it is applied. That is, as applied to the official who is legislatively empowered, it does not prevent a ruling that the individual has final policymaking authority; as applied to a subordinate to whom that policymaker delegates her authority, however, it precludes a ruling that the subordinate has final authority. This interpretation, however, avoids reading *Praprotnik* as internally contradictory, a far more unusual result. Moreover, this understanding is better able to comply with the policy underlying municipal liability which seeks to hold the municipality accountable for the conduct of those whose acts may fairly be said to be those of the municipality. . . When a local government official's decisions are unreviewable within the governing structure, those decisions may fairly be said to represent official as well as final policy because within that official's sphere of discretion, she is the vessel through which the municipality acts. . . That authorizing legislation requires an official to make her decisions based on 'merit and fitness alone' makes her authority no less final when that official herself is the sole determiner of whether that standard has been met.. . . When a subordinate has only delegated authority, her acts are not as obviously attributable to the municipality. Presumably, if a subordinate failed to adhere to a 'merit and fitness' standard, the delegating official could easily rescind that authority. Conversely, limiting the scope of a legislatively authorized official's authority would require the more cumbersome process of either amending or repealing the authorizing legislation. Because a subordinate's authority can be more readily taken back, her departures from required standards are not as easily characterized as those of the municipality. . . . . Similar to the issue of *Praprotnik*'s

precedential force, whether its method for determining final policymaking authority applies equally to 'authorized' decision-makers and 'subordinates' is no doubt crucial to the ultimate resolution of this case. At this stage, however, this Court need not determine those issues conclusively. As mentioned above, even if *Praprotnik* is governing precedent and even if its framework applies beyond instances of delegation, *Praprotnik* does not foreclose a finding that the Saugus Town Manager has final policymaking authority so as to warrant summary judgment. It is sufficient that *Praprotnik* can be read to hold that a 'merit and fitness' standard does not by itself cut off an official's final policymaking authority. . . Under this interpretation of *Praprotnik*, foreclosure of final policymaking authority also requires an official's decisions to be reviewable by separate municipal officials.. . Because there has been no indication that the Town Manager's appointment decisions are subject to review by other municipal officials such as the Board of Selectmen, summary judgment is not appropriate. The record includes only a portion of the Saugus Town Charter. Within that portion the charter grants the Town Manager broad authority to 'supervise and direct' the police department's administration. . . The Town Manager is specifically empowered to make personnel decisions including the appointment of police chief. . . Thus far, there has been no indication that other provisions of the charter (or any other source of law) subject the Town Manager's personnel decisions to any type of review within the municipality. To the contrary, the record evidence discussed above indicates the autonomy the Town Manager enjoys in making these decisions. Moreover, the Town has not refuted Putnam's claim that the Town Manager has final policymaking authority and neither party has addressed the requirements of that element. . . Accordingly, given the evidence in the record, this Court finds that the absence of final policymaking authority has not been established as matter of law.").

Note that even where a plaintiff is unsuccessful in making out municipal liability based on a final policymaker theory, on grounds that the policy was contrary to some formal municipal law or ordinance, plaintiff may still successfully plead government liability by alleging a "persistent and widespread practice which was inconsistent with any such announced policy of the city." ***Wetzel v. Hoffman***, 928 F.2d 376, 378 (11th Cir. 1991). *Accord*, ***K.M. v. School Bd. of Lee County Florida***, No. 03-12358, 2005 WL 2475729, at *4 (11th Cir. Oct. 7, 2005) (not published) ("Because Florida law identifies the School Board as the policymaker for the School District, a single decision by the Board may constitute School Board policy, even if not phrased as a formal policy statement. . . If, before a decision becomes final, the School Board ratified the decision of a subordinate who did not have final policymaking authority, the Board will be liable for that decision. . . The School Board will also be responsible for multiple acts by subordinates that constitute a custom, if that custom caused the plaintiff's injury. . . A custom is a practice that has not received official approval, but is 'so settled and permanent that it takes on the force of the law.'"); ***Auriemma***, *supra*, 957 F.2d at 399 ("[E]ven executive action in the teeth of municipal law could be called policy . . . . A practice undertaken by the executive power and suffered by the legislative power may be said to reflect a custom with the force of legislation."); ***Dirksen v. City of Springfield***, 842 F. Supp. 1117, 1123-34 (C.D. Ill. 1994) ("[E]ven though Springfield and the Springfield Police Department had regulations to combat sexual harassment, Plaintiff's allegations suggest that it was the custom or practice of the top officials at the Springfield Police Department

to circumvent these regulations."); ***Lopez v. Shines***, No. 93 C 1243, 1993 WL 437450, *3 (N.D. Ill. Oct. 27, 1993) (not reported) ("[W]hen a city's legislature condones unconstitutional personnel practices of an official, the official's acts regarding the condoned subject matter may constitute the city's policy.... because such acts are permitted, or, . . . encouraged."). Indeed, in ***Mandel v. Doe***, 888 F.2d 783 (11th Cir. 1989), the court read ***Jett*** as requiring the examination of "not only the relevant positive law, including ordinances, rules and regulations, but also the relevant customs and practices having the force of law." *Id*. at 793. The court affirmed the district judge's conclusion that the deliberate indifference of a physician's assistant could be attributed to the County, where it was shown that "[a]lthough it was initially contemplated that the physician's assistant would be supervised by a medical doctor, the evidence revealed that a custom and practice developed so that the policy was that [the physician's assistant] was authorized to function without any supervision or review at all." *Id*. at 794.

See also ***Manor Healthcare Corp. v. Lomelo***, 929 F.2d 633, 638 (11th Cir. 1991) (In rejecting liability of City, court considered whether City had developed custom or practice of allowing mayor to function without any supervision or review as to zoning matters).

In ***Wulf v. City of Wichita***, 883 F.2d 842 (10th Cir. 1989), a former police officer brought a § 1983 action against the city, city manager and chief of police, claiming that his employment was terminated in violation of his first amendment rights. The chief of police had testified that he had been given "carte blanche" authority as to hiring and firing of police officers.

The court affirmed the finding of individual liability on the part of the police chief, where his recommendation of plaintiff's termination was unlawfully motivated, but rejected a finding of municipal liability where the city manager retained the power to make the "actual and ultimate decision" to fire the plaintiff and where the city manager's decision was not unlawfully motivated, and "therefore did not amount to approval of the impermissible basis. . . for [the chief's] decision." *Id*. at 868.

The court felt compelled to reach this result by ***Monell***, which rejects municipal liability on a respondeat superior basis, and ***Praprotnik***, which "directs us to look only at where statutory policymaking authority lies, rather than where *de facto* authority may reside. Thus, a subordinate who wields considerable *actual* power, yet who lacks the legal power to terminate an employee, may, in the circumstances of this case, be liable, while the City is not." *Id*. at 869.

See also ***Feliciano v. City of Cleveland***, 988 F.2d 649, 656 (6th Cir. 1993) ("Although the plaintiffs have shown that Cleveland chiefs of police have issued policy statements on drug use and drug testing, the plaintiffs have not produced evidence to show that there exists a custom with the force of law that makes the chief of police the final policymaking official with respect to the drug testing of police."); ***Payung v. Williamson***, 747 F. Supp. 705, 709 (M.D. Ga. 1990) (Mayor was not final policymaker as to decision to terminate fire chief, when all employment decisions were subject to review by City Council); ***Herhold v. City of Chicago***, 723 F. Supp. 20, 33 (N.D.

Ill. 1989) (refusing to consider "realities of municipal decisionmaking," court looked only to state positive law for the vesting of final policymaking authority).

In ***Flanagan v. Munger***, 890 F.2d 1557, 1567 (10th Cir. 1989), a police chief's reprimand of officers for selling or renting sexually explicit videotapes from a video store in which they had a partial ownership interest, was held to violate the officers' First Amendment rights. Although the Court of Appeals affirmed summary judgment for the police chief on qualified immunity grounds, summary judgment in favor of the City was reversed.

The City argued that it had not delegated *final* disciplinary authority to the Chief because the City Manager had "*general* management and supervision of all matters relating to the police department, its subordinate officers and employees." *Id*. at 1568 Furthermore, the City argued that the Chief was not the final policymaker as to disciplinary matters because his authority was always reviewable by the City Manager and City Council. *Id*.

The court found that, although the City Manager had *general* management and supervision powers, the Chief was *directly* responsible for discipline and supervision over the Department. *Id*. The court was equally unpersuaded by the City's "reviewability" argument. "Although the City argues that departmental decisions *may* ultimately be reviewed by the City Manager or City Council, for all intents and purposes the Chief's discipline decisions are final, and any meaningful administrative review is illusory." *Id*. at 1569. *See also* ***Sivulich-Boddy v. Clearfield City***, 365 F.Supp.2d 1174, 1185 (D. Utah 2005)(" Under Tenth Circuit case law, even if Sparks' actions were subject to review by a committee, facts discovered during this litigation could demonstrate that he has sufficient decision making authority.").

In ***Ware v. Unified School District No. 492***, 902 F.2d 815, 818 (10th Cir. 1990), the court concluded that evidence that the school board had delegated policymaking authority to the superintendent was no longer significant after ***Jett***'s directive to identify the final decisionmaker by consulting local positive law, custom or usage.

Ware was distinguished from ***Flanagan***, where the government admitted delegation of final policymaking authority to the Chief of Police, a provision of the relevant municipal code gave direct authority to the Chief as to disciplinary matters, and discipline decisions of the Chief were unreviewable.

See also ***Randle v. City of Aurora***, 69 F.3d 441, 448 (10th Cir. 1995) ("[W]e can identify three elements that help determine whether an individual is a 'final policymaker': (1) whether the official is meaningfully constrained 'by policies not of that official's own making;' (2) whether the official's decision are final − i.e., are they subject to any meaningful review; and (3) whether the policy decision purportedly made by the official is within the realm of the official's grant of authority." (citations omitted)).

In ***Worsham v. City of Pasadena***, 881 F.2d 1336 (5th Cir. 1989), plaintiff was suspended from his job as construction-site inspector by the Mayor. Although the plaintiff was successful in his appeal to the City Council, and was reinstated within one month of his suspension, plaintiff brought a § 1983 action against the city and other defendants, claiming his constitutional rights were violated by the suspension. Following a complicated procedural path, *see id*. at 1336, the case was finally heard by the Fifth Circuit on the propriety of a 12(b) (6) dismissal of the claim against the only defendant left, the City of Pasadena.The majority of the panel, relying on the plurality opinion in ***Praprotnik***, concluded that "meaningful review by the City Council indicate[d] that the city officials who discharged Worsham were not . . . final policymakers." *Id*. at 1340-41.

See also ***Gros v. City of Grand Prairie***, No. Civ.A. 3:96-CV-2897, 2000 WL 1842421, at *3 (N.D. Tex. Dec. 12, 2000) (not reported) ("The record shows that although the City Manager delegated certain duties to the Police Chief, he maintained responsibility for setting policy for the Police Department. . . Accordingly, the court holds as a matter of law that Chief Crum did not exercise policymaking authority for the City, at least in any respect that would permit plaintiffs' to recover against the City on the claims at issue in this case. Because plaintiffs have not identified any other potential policymaker who participated in the violations of their constitutional rights, the court holds that the City is not liable under § 1983."); ***Smith v. City of Holland Board of Public Works***, 102 F. Supp.2d 422, 427 (W.D. Mich. 2000) ("Morawski had authority to hire and fire BPW employees, those decisions were reviewed by no one at the BPW or the City, and those decisions were not constrained by any mandatory City employment policy. As such, the Court concludes that Morawski possessed official policymaking authority for the BPW and the City. As such, neither the BPW nor Morawski in his official capacity are protected from liability by *Monell*."); ***Vincent v. City of Talledega***, 980 F. Supp. 410, 418 (N.D. Ala. 1997) ("If there is a review board with the power to take another look at the decision, the employee can forget suing the city under § 1983. Whether the review board agrees or disagrees with the discipline meted out makes no difference. Of course, the employee could undertake the Herculean task of suing the city and its review board, challenging the motivation of the board under *Pembaur* and *Praprotnik* as the city's ultimate policymaker. But, having to prove that a quasi-judicial body had a proscribed motive for its deliberative decision does not sound like something that would induce a smart lawyer to jump to the ready. A personnel board does not make an inviting target for alleged constitutional torts. The net effect will be to eliminate § 1983 liability for municipalities, because those cities that don't have a personnel board will establish one. As a practical matter, it will be impossible to prove to a jury that a personnel board that affirms an adverse employment decision did not believe the initiating municipal official's always available, legitimate, articulated non-discriminatory reason for his decision, although the very same jury may have laughed at the articulated reason if expressed on the stand by the municipal official himself.").

In ***Worsham***, Judge Goldberg noted the division of the Court in ***Praprotnik*** on the method of identifying final policymakers, contrasting Justice Brennan's "fact-specific views" with Justice O'Connor's "positive law orientation." *Id*. at 1343. Judge Goldberg then looked to ***Jett*** and concluded:

> ***Jett*** clarifies that the ***Praprotnik*** plurality uses the phrase 'custom or usage' in two contexts in the municipal liability area. First, the plurality uses the phrase . . . in its original meaning: that a city policy giving rise to liability, although not authorized by written law, may exist in the form of a custom, usage or practice having the force of law . . . . In this regard, the focus is upon whether a custom, usage or practice by formally nonpolicymaking officials . . . allows a factfinder to infer that the city's policymakers have acquiesced in such conduct so as to give rise to municipal liability.
>
> The ***Praprotnik*** plurality also uses the phrase 'custom or usage' in a transformative manner as a method of proof. By proving a 'custom or usage,' a plaintiff may demonstrate as a matter of fact that an official is invested with final policymaking authority. This method of proof concerns the official's *status*, which implicates the basis for municipal liability in the executive context addressed in both ***Praprotnik*** and ***Pembaur***.

881 F.2d at 1343 (Goldberg, J., concurring in part and dissenting in part).

Thus, by invoking "custom or usage" as a manner of proof, a plaintiff may be able to avoid ***Praprotnik's*** "gaping hole" if plaintiff can demonstrate that, even in the face of contrary positive law, formal policymakers have in fact delegated final policymaking authority to formal nonpolicymakers. Where such a delegation is made out, "the city may be liable for the delegatee's act on a single occasion that violates federal law." *Id*. at 1344.

Finally, Judge Goldberg noted that ***Jett*** does empower the judge to resolve issues of fact as part of the court's initial inquiry. "***Jett*** thus envisions a role for the trial judge in this context similar ... to the role a judge plays in determining admissibility of certain evidence, or whether a matter is of public concern in the First Amendment context." *Id*.

See also ***Riddick v. School Board of the City of Portsmouth***, 238 F.3d 518, 527, 528 (4th Cir. 2000) (Luttig, J., dissenting) ("In this case, the majority's (and the district court's) inquiry into who could be deemed a policymaker begins and ends with a determination that the School Board never formally delegated its statutorily-conferred final review authority over disciplinary decisions. Based upon this determination of the absence of formal delegation, and this determination alone, the majority concludes that the School Board cannot be liable for the actions of its subordinate employees. However, such is to pretermit the inquiry. For, as explained, even if a governmental entity with final policymaking authority has technically retained its formal policymaking authority, it may yet be liable if, through a custom or practice of acquiescence in the decisions of its subordinates, it has effectively delegated its authority to those subordinates. [citing *Jett* and *Praprotnik*] Were it otherwise, a municipality could essentially insulate itself from all liability merely by vesting ultimate review authority in its governing body, while at the same time surrendering all effective authority to its subordinate officials. . . Most assuredly, this was not congressional intent in enacting section 1983, nor would I so constrict that provision, the very

purpose of which is to ensure accountability for official denial of constitutional right."); ***O'Brien v. City of Grand Rapids***, 23 F.3d 990, 1005 (6th Cir. 1994) ("[O]n the record before us, it is not enough for the city to attempt to negate the official character of the policy in question by pointing to some obscure charter provision that identifies the supervisor of the department whose conduct gave rise to the suit. If there is a genuine issue in dispute, we must not only look at the provisions of the charter, but also must examine the knowledge and actions of these persons in the development of the policies."); ***Bouman v. Block***, 940 F.2d 1211 (9th Cir. 1991) (question of delegation of authority to make employment policy decisions involves unresolved issues of fact).

5. Note on *McMillian v. Monroe County*

An official may be a state official for some purposes and a local government official for others. In ***McMillian v. Monroe County***, 520 U.S. 781 (1997), a five member majority of the Supreme Court affirmed the decision of the Court of Appeals for the Eleventh Circuit that a County Sheriff in Alabama is not a final policymaker for the County in the area of law enforcement, because Counties have no law enforcement authority under state law. *Id.* at 786.

The Court in ***McMillian*** noted that

> the question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, 'all or nothing' manner. Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue. . . . Thus, we are not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action they engage in. We simply ask whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity.

520 U.S. at 785, 786. The Court found the following factors insufficient to tip the balance in favor of the petitioners: (1) the sheriff's salary is paid out of the county treasury; (2) the county provides the sheriff with equipment, including cruisers; (3) the sheriff's jurisdiction is limited to the borders of his county; and (4) the sheriff is elected locally by the voters in his county. *Id.* at 791.

In dissent, Justice Ginsburg wrote:

> A sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he seems to be: a county official. . . . The Court does not appear to question that an Alabama sheriff may still be a county policymaker for some purposes, such as hiring the county's chief jailor. . . . And, as the Court acknowledges, under its approach sheriffs may be policymakers for certain purposes in some States and not in others. . . The Court's opinion does not

> call into question the numerous Court of Appeals decisions, some of them decades old, ranking sheriffs as county, not state, policymakers.

Id. at 804, 805 (Ginsburg, J., joined by Stevens, Souter, and Breyer, JJ., dissenting).

See generally Karen M. Blum, ***Support Your ~~Local~~ Sheriff: Suing Sheriffs Under Section 1983***, 34 Stet. L. Rev. 623 (Spring 2005).

6. Post-*McMillian* Cases by Circuit:

FIRST CIRCUIT

Massachusetts

Doan v. Bergeron, No. 15-CV-11725-IT, 2016 WL 5346935, at *3–5 (D. Mass. Sept. 23, 2016) ("Doan argues that only the contracts with the Sheriff's Office were transferred, and that the contract enlisting the services of "CPS at the Bristol County House of Correction was explicitly between CPS and *Bristol County*. This argument is unavailing. As the contract itself shows, the signatures of the Bristol County Commissioners were pro forma; the responsibilities of monitoring CPS lay with the Bristol County Sheriff's Office, . . . as the Bristol County Sheriff's Office was responsible for administering the medical treatment provided at the Bristol County House of Correction. The monitoring of CPS was thus one such 'responsibilit[y] of the office of' the Sheriff of Bristol County that was transferred to the state. . . .The failure to train and supervise Count against Bristol County must be dismissed. . . .As recounted above, Chapter 61 of the Acts of 2009 transferred the 'office [ ] of the ... Bristol... county sheriff [ ] ... to the [C]ommonwealth' of Massachusetts and stated that all functions and responsibilities of the Sheriff's Office were transferred to the Commonwealth of Massachusetts. . . The Act further provided that 'all employees of the office of a transferred sheriff [were] transferred to that transferred sheriff as employees of the [C]ommonwealth.'. . Because of such language, it 'is well established that "modern Massachusetts Sheriff's Departments [are] arms of the state entitled to sovereign immunity."'. . Thus, '[d]espite its municipal title,' the Bristol County Sheriff's Office 'is controlled directly by the Commonwealth of Massachusetts and all employees ... are employees of the Commonwealth.'. . Accordingly, the Bristol County Sheriff's Office is a state agency, and Hodgson and Borges are state officials, entitled to the sovereign immunity that the Commonwealth of Massachusetts enjoys.")

Morgan v. Middlesex Sheriff's Office, CA 14-10659-IT, 2014 WL 4104173, *4 (D. Mass. Aug. 13, 2014) ("To the extent Morgan brings this action against the Middlesex Sheriff's Office, the complaint fails to state a claim for relief. The Eleventh Amendment of the United States Constitution generally is recognized as a bar to suits in federal courts against a State, its departments and its agencies, unless the State has consented to suit or Congress has overridden the State's immunity. . .The Middlesex Sheriff's Office became a state agency in 1999 when the government of Middlesex County was abolished along with several other counties. . .Under the

Eleventh Amendment, 'an arm of the state government ... enjoys Eleventh Amendment immunity from suits for money damages brought in federal court, absent consent, waiver, or the like.'. .Here, the Middlesex Sheriff's Office is an 'arm' of the Commonwealth and, as such, Eleventh Amendment state sovereign immunity prohibits an individual damages suit against a nonconsenting state in federal court. . . . Thus, plaintiff's claim against the Middlesex Sheriff's Office is subject to dismissal." footnotes omitted)

Canales v. Gatnuzis, 979 F.Supp.2d 164, 171 (D. Mass. 2013) ("On January 1, 2010, the Commonwealth of Massachusetts assumed control of the Suffolk County Sheriff's Department. . . The Sheriff's Department and its employees, acting in their official capacities, are therefore to be treated as the Commonwealth itself for purposes of this suit. Consequently, the claims in Count V must be dismissed against the Sheriff's Department and Defendants Cabral and Horgan to the extent they were acting in their official capacities and against Defendant Gatzunis.")

Broner v. Flynn, 311 F.Supp.2d 227, 233 (D. Mass. 2004) ("Effective July 1, 1998, the government of Worcester County was abolished. Effective September 1, 1998, the Sheriff of Worcester County, who was then and continues to be, John M. Flynn, became an officer and employee of the Commonwealth of Massachusetts and all of the 'functions, duties and responsibilities for the operation and management of' the WCJHC were transferred to the Commonwealth. Mass. Gen. Laws ch. 34(B), '' 1, 12 (2004). Therefore, a Section 1983 suit against Sheriff Flynn in his official capacity is deemed to be a suit against the Commonwealth. Since a state is not a 'person' for purposes, all claims against Sheriff Flynn in his official capacity are barred.")**.**

New Hampshire

Ramsay v. McCormack, No. CIV. 98-408-JD, 1999 WL 814366, at *6 (D.N.H. June 29, 1999) (not reported) ("The court concludes that New Hampshire Supreme Court precedent concerning the authority of the attorney general, establishing the county attorney as the deputy of the attorney general in local criminal proceedings, its expansive interpretation of section 7:11, and the second clause of section 7:6 which broadly states 'the attorney general shall enforce the criminal laws of the state,' compels the conclusion that the county attorney functions under the authority of the attorney general in criminal prosecution in the district courts. Therefore, the court rules that in fulfilling his criminal prosecutorial duties, the county attorney acts pursuant to authority vested by state law in the attorney general and under the control of the attorney general, and does not function as a final policy maker for the county. Moreover, it has previously been determined by this court that county attorneys, when fulfilling their criminal prosecutorial duties under the direction and control of the attorney general, do not act as final policymakers for section 1983 liability purposes.").

SECOND CIRCUIT

New York

Bellamy v. City of New York, 914 F.3d 727, 756-61 (2d Cir. 2019) ("Bellamy proffers two theories of *Monell* liability: (i) the prosecution failed to disclose the full relocation benefits Sanchez received from the QCDA's office, a *Brady* violation that was caused by a deliberate information barrier imposed by the QCDA that purposefully kept prosecutors unaware of the full benefits received by witnesses in its witness protection program ("WPP"); and (ii) ADA Guy's improper summation was a due process violation caused by the QCDA office's failure to discipline summation misconduct. . . The City challenges Bellamy's *Monell* claims on two general grounds: (i) the City is not responsible as a matter of law under *Monell* for the alleged policies of the QCDA; and (ii) regardless, Bellamy did not sufficiently establish underlying due process violations to withstand summary judgment. . . We disagree with both contentions and vacate the district court's dismissal of Bellamy's *Monell* claims. . . . The City argues that it cannot be held liable as a matter of law for any constitutional harms inflicted by the alleged policies of the QCDA's office that give rise to Bellamy's *Monell* claims because those were not policies for which the City is responsible. The district court agreed, but we do not. *Monell* liability attaches only where an infringement of constitutional rights is caused by a local government policy. . . In searching for the proper *local* government that is subject to liability on a given *Monell* claim we look for 'those official or governmental bodies who speak with final policymaking authority ... concerning the action alleged to have caused the particular ... violation at issue.'. . The issue for us is thus whether the City of New York is the 'final policymaking authority' in relation to the alleged QCDA policies at issue here: the WPP information barrier and the failure to discipline summation misconduct. The City argues, as the district court concluded, that pursuant to *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009), the challenged conduct of the QCDA's office is necessarily a function of *state* policies, and therefore the City may not be subject to *Monell* liability as a matter of law. We think this argument overextends *Van de Kamp*, a case assessing the distinct doctrine of prosecutorial immunity, and that our controlling precedent plainly establishes that the City may be held liable under *Monell* for the alleged QCDA policies at issue. On numerous occasions we have been called upon to assess how plaintiffs may pursue claims under *Monell* that allege that policies of prosecutors' offices led to infringements of their constitutional rights. To adequately explain why we conclude that the City is a proper defendant with respect to Bellamy's *Monell* claims here, a brief review of these cases will be helpful. [court engages in discussion of cases] Because we have never doubted the rule stemming from the line of cases extending from *Gentile* and *Walker* to *Myers*, we have been consistent in holding that the actions of county prosecutors in New York are generally controlled by municipal policymakers for purposes of *Monell*, with a narrow exception emanating from *Baez* being the decision of whether, and on what charges, to prosecute. Thus, in this case, the rule from these cases requires the conclusion that the conduct Bellamy challenges is a result of municipal rather than state policymaking. The City does not dispute this reasoning based on our precedents, informed along the way by the Court's decision in *McMillian*. The City's sole contention is that our *Walker* line of cases was implicitly abrogated by the Supreme Court's 2009 decision in *Van de Kamp*, 'requir[ing] a different boundary between prosecutorial and administrative functions than the one [we have] previously set forth.'. . We disagree. . . . Although *Van de Kamp* said nothing about *Monell* or municipal liability, the City argues that *Van de Kamp* affects how *Monell* claims can proceed

against prosecutors' offices specifically. Its argument is as follows. In the *Walker* line of cases, we concluded that inherently prosecutorial functions (*i.e.*, decisions whether to prosecute) are controlled by *state* policies for purposes of *Monell*, and other functions of the prosecutor are controlled by *municipal* policies. For example, in *Baez*, the act of indicting based on a misread grand jury verdict form was inherently prosecutorial and therefore a state function, but, in *Walker*, the failure to train on *Brady* obligations related to the district attorney's management of the office, and we therefore concluded that was a municipal function. Consequently, the argument goes, our *Monell* cases have drawn separate circles around 'prosecutorial' and 'managerial' functions, with the former circle being state-controlled functions and the latter municipally-controlled ones. The argument then goes that although our cases have narrowed the 'prosecutorial' circle such that it includes only the prosecutor's decision to bring charges, *Van de Kamp* expanded the circle of prosecutorial functions to include a failure to train on *Brady* obligations (which, the City argues, is akin to Bellamy's arguments here). Thus, the argument concludes, because Bellamy's claims pertain to conduct that now falls within the 'prosecutorial' circle, and New York concludes 'prosecutorial' conduct is a state function, the conduct supporting Bellamy's *Monell* claims must be a state rather than a municipal function. We are unpersuaded. The key flaw in the City's argument is its unsupported assumption that the circle demarcating what is a 'prosecutorial' function for purposes of prosecutorial immunity is necessarily the same as the circle New York has chosen to demarcate state versus local prosecutorial functions. But, the legal question of when immunity should attach is an entirely separate inquiry from which state entity is a final policymaker for *Monell*. This was the reasoning adopted in *Goldstein v. City of Long Beach*, 715 F.3d 750 (9th Cir. 2013), the lower court decision that followed the Supreme Court's remand in *Van de Kamp*. Although the Court had rejected plaintiff's individual claims, the Ninth Circuit was left to evaluate plaintiff's remaining *Monell* claims. The defendants argued on remand, as the City does here, that '*Van de Kamp* determines the outcome' of the *Monell* claims. . .The Ninth Circuit rejected the argument because 'inquiries of prosecutorial immunity and state or local policymaking ... are separate.'. . . We agree. In contrast to the immunity inquiry, *Monell* addresses not *whether* certain functions can open *individuals* to liability, but simply *which governmental entity* (the state or the municipality) is responsible for a given function. And as we have discussed, the Supreme Court has left no doubt that state law, not federal law, is responsible for demarcating that division of responsibility. The *McMillian* court was worried about imposing 'a uniform, national characterization' of state actors, concerned that 'such a blunderbuss approach would ignore a crucial axiom of our government: the States have wide authority to set up their state and local governments as they wish.'. . Consequently, the responsible entity for purposes of *Monell* liability must be ascertained by looking at how the relevant state elects to allocate responsibilities between itself and its subdivisions. . .The City's contention, if adopted, would turn *McMillian* on its head: it would require courts assessing *Monell* claims that challenge the conduct of prosecutors to consider the way in which the federal system chooses to immunize prosecutors in determining which functions are state functions and which are local ones. Stated differently, under the City's formulation, we would no longer be looking to the intricacies of state law to decide a *Monell* claim against a prosecutor's office, as we did in *Myers* (at the express direction of *McMillian*), but would instead look to *Van de Kamp*, a decision exclusively

assessing *federal* common law and *federal* policy. . . Such a course would adversely affect state reliance interests as well: New York appellate courts have expressly affirmed our conclusions as to the content of New York law in *Walker* and *Myers*. *See Ramos,* 285 A.D.2d at 303 (concluding as 'firmly grounded in New York law,' the conclusion from *Gentile*, *Walker,* and *Myers* that 'where prosecutors, pursuant to policy or custom, conceal exculpatory evidence and commit other wrongs in order to secure a conviction, liability rests with the county (or for New York City's constituent counties, the City)'); *Johnson v. Kings Cnty. Dist. Atty's Office,* 308 A.D.2d 278, 295–96 (2d Dep't 2003) (same). Thus we conclude, consistent with our precedent, that the City is the proper policymaking authority for purposes of Bellamy's *Monell* claims.")

Jeffes v. Barnes, 208 F.3d 49, 57, 58, 60, 61 (2d Cir. 2000) ("In sum, the question of whether a given official is the municipality's final policymaking official in a given area is a matter of law to be decided by the court. Where a plaintiff relies not on a formally declared or ratified policy, but rather on the theory that the conduct of a given official represents official policy, it is incumbent on the plaintiff to establish that element as a matter of law. We thus reject plaintiffs' contention that the district court erred in imposing that burden on them; and we turn to the question of whether, as to the particular area at issue here, the burden was met. . . . The principal area in question in this suit involves the duties and obligations of the sheriff's staff members toward each other with respect to their exercise of First Amendment rights in breach of the Jail's code of silence. The following review of New York State ("State") law leads us to the conclusion that the Schenectady County sheriff was the County's final policymaker with respect to most of the conduct that plaintiffs challenge. . . . In sum, State law requires that the Schenectady County sheriff be elected; County law provides that elected officials are not subject to supervision or control by the County's chief executive officer; there is only routine civil service supervision over the sheriff's appointments; State law places the sheriff in charge of the Jail; and the County's chief executive officer, advised by the County's attorneys, treats the sheriff, insofar as Jail operations are concerned, as "autonomous." . . . . The County has pointed us to no provision of State or local law that requires a sheriff to answer to any other entity in the management of his jail staff with respect to the existence or enforcement of a code of silence. We conclude that Sheriff Barnes was, as a matter of law, the County's final policymaking official with respect to the conduct of his staff members toward fellow officers who exercise their First Amendment rights to speak publicly or to inform government investigators of their co-workers' wrongdoing.")**.**

Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992) (explaining that when prosecuting a criminal matter, a district attorney represents the State not the county, but that in managing the district attorney's office, the district attorney acts as a county policymaker)**.**

Howard v. City of Rochester, No. 23-CV-6561-FPG, 2025 WL 860306, at *6 (W.D.N.Y. Mar. 19, 2025) (" 'Where a district attorney acts as the manager of the district attorney's office, the district attorney acts as a county policymaker' *Walker v. City of New York*, 974 F.2d 293, 301 (2d Cir. 1992) (district attorney's office not immune from municipal liability under *Monell* for managerial functions, such as a 'decision not to supervise or train ADAs on *Brady*' issues).")

Newson v. City of New York, No. 16CV6773ILGJO, 2019 WL 3997466, at *3 n.6 (E.D.N.Y. Aug. 23, 2019) ("The City argues that the Supreme Court's decision in *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) precludes a municipality from being held liable for its prosecutors' decisions concerning the disclosure of exculpatory or impeachment evidence. . . The Second Circuit rejected this precise argument in *Bellamy*, 914 F.3d at 759-760, which was decided after briefing was concluded on this motion. As the Second Circuit noted, '*Van de Kamp* said nothing about *Monell* or municipal liability' and simply held that prosecutorial immunity extends to individual supervisors who 'fail[ ] to train or supervise their prosecutors to prevent violations of the duty to disclose impeachment material.'")

Case v. Anderson, No. 16 CIV. 983 (NSR), 2017 WL 3701863, at *19-20 (S.D.N.Y. Aug. 25, 2017) ("Here, Plaintiff alleges municipality liability on that basis that a municipal 'custom, policy, or usage can be inferred from evidence of deliberate indifference of supervisory officials,' here the Sheriff, 'to such abuses.'. . . . Thus, the Court must determine whether, on the basis of Plaintiff's allegations, the Sheriff can be considered a final policymaker concerning the treatment of detainees at the County jail and the County therefore may be potentially liable for his actions based on the situation Mr. Pankey confronted. . . As Plaintiff alleges the Sheriff has control over the policies at the jail . . . , which is supported by New York law, *see* N.Y. Corr. Law § 500-c ("the sheriff of each county shall have custody of the county jail of such county"), the Court can infer at this stage that the Sheriff is indeed a final policymaker. The required 'nexus' between 'the sheriff's actions and his job functions' can also plausibly be inferred since the alleged deprivations occurred during a standard intake at the jail. . . Moreover, given Plaintiff's allegations that the Sheriff was *directly involved* in transferring Mr. Pankey from the Town Court to the County Jail, . . . his knowledge of Mr. Pankey's mental health issues, and his supervision of the County Deputies once Mr. Pankey was held on the warrant, Plaintiff plausibly alleges the Sheriff should have had enough awareness of these issues that it represents 'a failure by policymakers to provide adequate training or supervision to subordinates to such an extent that it amounts to deliberate indifference to the rights of those who come into contact with the municipal employees.'. . . Plaintiff's additional conclusory arguments, however, that the Sheriff implemented, *e.g.*, a fiscally-driven policy to avoid placing guards on 24-hour watch . . . , fail to plausibly allege either the existence of a municipal policy or the Sheriff's involvement. Therefore, at this stage, Plaintiff plausibly, though only barely, states a claim against the County. . . The Court agrees with the County that 'as [Plaintiff's] claim against [Sheriff Anderson falls, so falls [the] claim against the County.'. . Whether the Sheriff's personal involvement and notice of Mr. Pankey's condition will be borne out by the record is a question for either summary judgment or trial, which will necessarily impact the claim against the County.

Bailey v. City of New York, 79 F.Supp.3d 424, 453-54 (E.D.N.Y. 2015) ("For purposes of determining *Monell* liability, the relationship between the City of New York and district attorneys was explored in *Jones v. City of N.Y.*, 988 F.Supp.2d 305 (E.D.N.Y.2013). *Jones* concluded that the City of New York is not responsible for the training policies or practices of the District Attorney regarding prosecutorial conduct, including the failure to train ADAs not to suppress exculpatory evidence in criminal proceedings. . . But a 'long and persistent history of feckless

training and discipline practices [by a district attorney] ... might give rise to municipal liability.'. . A decision by a district attorney not to train assistants in their legal duty to avoid violating constitutional rights rises to an official government policy for section 1983 purposes only if the failure to train amounts to '"deliberate indifference to the rights of persons with whom the untrained employees come into contact."'. . Three requirements must be met before a district attorney's failure to train or supervise will be considered to amount to deliberate indifference to the constitutional rights of citizens. . .The Court of Appeals for the Second Circuit described these requirements as follows: *First,* the plaintiff must show that a [district attorney] knows ... that her employees will confront a given situation....*Second,* the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation.... Finally, the plaintiff must show that the wrong choice by the [district attorney] employee will frequently cause the deprivation of a citizen's constitutional rights. . . .It is anomalous that under *Monell* and New York law, while the City has no control over what happens in the District Attorney's office respecting prosecutions, it must pay the bill if the prosecutor violates *Monell.* . . Even if the District Attorney's office had a pattern or practice of disclosing *Brady* material at the eleventh hour, or allowed such a pattern or practice to develop knowingly, it is unfair and a 'Catch–22' situation for the City to be held liable. . . Given the materials submitted by plaintiff suggesting a possible pattern and practice by the District Attorney of Kings County in violation of the Constitution, the *Monell* issue cannot be swept under the rug. . . The fact that a new district attorney has been elected by voters, while possibly of political significance, does not bear on the constitutional issue central to this case. . . It is the pattern and practice at the time before the election of a new district attorney of Kings County when events relevant to the present cases were taking place that controls. While discovery on the *Monell* claim is still pending, defendants' motion for summary judgment regarding plaintiff's municipal liability claim is denied.")

Norton v. Town of Brookhaven, 33 F.Supp.3d 215, 243-44 (E.D.N.Y. 2014) ("To the extent the Plaintiff argues that the alleged current practices of the District Attorney is administrative in nature and not related to his prosecutorial function, the Supreme Court has examined, in an immunity context, the issue of supervisory liability and failure to adequately train within the office of a prosecutor, and has held that matters of supervision and training with the prosecutor's basic trial advocacy duties will be considered prosecutorial in nature and not administrative. . . .Here, although the County does not seek to avoid declaratory relief on the grounds of absolute prosecutorial immunity, the Court nonetheless finds that such relief is inappropriate under *Van de Kamp.* In the Court's view, the Plaintiff's allegation that the District Attorney delegates the prosecution of petty Town offenses to the Town Attorney, without sufficient oversight, is simply another way of claiming that the District Attorney has failed to adequately supervise or train those attorneys in their basic trial advocacy duties. As the practice the Plaintiff challenges is directly related to the District Attorney's discretion to prosecute, the County cannot be held to dictate such policies. Accordingly, the Plaintiff's request for declaratory relief against the County is denied and the Second Amended Complaint as against the County is dismissed in its entirety. . . . Here, the Second Amended Complaint alleges that the acts by Quinlan, Moran and Biscardi were acts of

policymakers . . . . [T]he Court finds that the Plaintiff has set forth sufficient allegations to support *Monell* liability against the Town. The Brookhaven Defendants argue that, in the event this Court grants absolute immunity to the Individual Defendants, the *Monell* claims must be dismissed. However, ' "municipalities have no immunity from damages for liability flowing from their constitutional violations."'. . Thus, the Brookhaven Defendants' arguments, which 'reflect[ ] a misunderstanding of the relationship between the liability of individual actors and municipal liability for purposes of *Monell,*' should be rejected.")

Jones v. City of New York, 988 F.Supp.2d 305, 315-17 (E.D.N.Y. 2013) ("*Walker* left unexplained the basis for its assumption that the City of New York is the municipal entity for which the Kings County District Attorney is the policymaker when deciding training policies regarding legal responsibilities of ADAs in their prosecutorial functions. Given the District Attorney's absolute independence with respect to decisions on procedures in prosecuting criminal cases, it seems strange to hold the City responsible for prosecutorial policy choices made by the district attorney. The effect of treating a district attorney as a City policymaker in these situations is to hold the City or county liable for policies made by a district attorney when no officer or agency of the City, including the Mayor, exercises any authority to control the decision. . .Yet, although *Walker* does not spell them out, peculiarities in New York law require this puzzling result. Under New York State law the Office of the District Attorney does not itself have a legal existence separate from the District Attorney. . . The Kings County District Attorney's Office cannot, as such, be the governmental unit liable for a *Monell* claim based on a problematic policy or custom within the Office. The City of New York, by contrast, is a legally distinct, suable municipal entity. It is also the local governmental unit responsible for paying the salaries of the county district attorneys and for any judgments against them or their ADAs. . . Corporation Counsel for the City of New York represents the District Attorney in Section 1983 suits because it is the City office that represents the entity that will ultimately pay damages. . .The peculiar, but necessary, consequence is that the City is a proper municipal party in interest in a *Monell* claim based on policies or customs independently set and executed by the district attorney. Although district attorneys are New York constitutional officers, not employees of the City, in many circumstances they are considered 'local' rather than 'state' officers. . . In some 'managerial' situations it is, accordingly, appropriate to treat district attorneys as municipal policymakers. . . With respect to building management, maintenance decisions, or discrimination against employees, for example, the district attorney can be considered a municipal actor. The case at bar does not deal with such an administrative *municipal* policy or custom. The plaintiff here alleged prosecutorial misconduct resulted from the failure of the Kings County District Attorney to properly train its assistants not to suppress exculpatory evidence in criminal prosecutions. The Supreme Court's *post-Walker* decision in *Van de Kamp v. Goldstein,* 555 U.S. 335 (2009), establishes that the training provided by a district attorney's office to its prosecutors concerning the proper disclosure of exculpatory or impeachment material is a prosecutorial function entitled to absolute prosecutorial immunity. In *Van de Kamp,* the Supreme Court acknowledged that there are administrative acts performed by a prosecutor which are not entitled to absolute prosecutorial immunity, such as 'workplace hiring, payroll administration, the maintenance of physical facilities, and the like,' but it found that

training concerning disclosure obligations in advance of trial—though sometimes characterized as 'administrative'—is sufficiently prosecutorial in nature to warrant the application of absolute prosecutorial immunity. . . Tasks directly connected with the prosecutor's basic trial advocacy and prosecutorial duties—including *Brady* decisions—should under *Van de Kamp* be treated as 'prosecutorial conduct.'. . Here, the function at issue is the training of ADAs in the proper disclosure of exculpatory DNA evidence. This function is inextricably connected with prosecution of criminal cases. It involves 'legal knowledge and the exercise of related discretion.'. . It is prosecutorial in nature. There is no long and persistent history of feckless training and discipline practices regarding personnel that might give rise to municipal liability. . . The City of New York is not a liable party because the instant case does not deal with what can be categorized as municipal policies or customs. The fact that the City would pay any damages assessed against a District Attorney or ADA does not change this conclusion.")

Allen v. Schiff, 908 F.Supp.2d 451, 466 (S.D.N.Y. 2012) ("[Sheriff] Schiff had final policymaking authority on drug testing Department employees, and his decision to have PS observe the Test established County policy. Therefore, the County may be liable, under *Monell,* for that policy.")

Vermont

Huminski v. Corsones, 396 F.3d 53, 70-73 (2d Cir. 2005) (as amended on rehearing) ("Whether a defendant is a state or local official depends on whether the defendant represented a state or a local government entity when engaged in the events at issue. [citing *McMillian*] To answer that question here, we must determine, *inter alia*, whether it was the State of Vermont or Rutland County that controlled Elrick in his involvement in the events leading up to and culminating in his serving Huminski with the trespass notices. . . . We agree with the district court that an analysis of the relevant factors indicates that Sheriff Elrick was a state official with regard to his involvement in the events related to the issuance of the trespass notices. The Rutland County Sheriff's Department, for whom Elrick was employed, had a contract with the State of Vermont through the Vermont Court Administrator's Office to manage security at the Rutland District Court. We think that Elrick was acting as a state official while doing so and when he played a role in the issuance and service of the trespass notices. First, when Elrick was performing the contract, he was acting as a supervisory policymaker for the State of Vermont, irrespective of what his status was when he performed his other duties as a sheriff. Second, it is undisputed that Elrick acted as a state official when he signed the May 27 Notice as the agent of the Commissioner, himself a state official. Third, although it is not necessary to decide the broader issue, we think that in light of the statutory structure under which Elrick acted, he was likely a state official when he was performing his general duties for the sheriff's department, particularly when he was acting pursuant to state law, as he was with respect to the Huminski incident. State statute establishes the most important factor in this inquiry, *see McMillian*, 520 U.S. at 790: Elrick had the authority to investigate and enforce the State of Vermont's criminal law in Rutland County. He was therefore acting for the state when he engaged in the behavior that is at issue here. It follows that Elrick is immune in his official capacity from suit for retrospective relief. Because Elrick is entitled to

sovereign immunity, we also affirm the district court's holding that the Rutland County Sheriff's Department is similarly immune.' [footnotes omitted])

Poleo-Keefe v. Bergeron, No. 2:06-CV-221, 2008 WL 3992636, at *3 (D. Vt. Aug. 28, 2008) ("While Vermont sheriffs have been held to be state actors in other cases, their roles as state actors have been limited to law enforcement and security duties. . . Sheriff Bergeron's supervisory duties here were different in nature from his law enforcement duties. He was not performing the traditional state role of keeping the peace; rather, he was acting as a employee supervisor. . . .Therefore, Sheriff Bergeron acted as a County official and sovereign immunity does not apply.")

THIRD CIRCUIT

New Jersey

Johnson v. Duncan, 719 F. App'x 144 (3d Cir. 2017) ("Hudson County and its Sheriff's Department are agents of the state of New Jersey for Eleventh Amendment purposes and therefore not amenable to suit in federal court, *see Wright v. State*, 778 A.2d 443 (N.J. 2001). . . Accordingly, we uphold the *sua sponte* dismissal of the complaint in its entirety as to Hudson County and its Sheriff's Department and defendants Duncan and Bernouy to the extent that they were sued in their official capacities.")

Estate of Lagano v. Bergen Cnty. Prosecutor's Office, 769 F.3d 850, 856 (3d Cir. 2014) ("These allegations support a reasonable inference that neither Mordaga nor the BCPO acted within their classic investigatory and prosecutorial functions with respect to the state-created danger claim advanced by the Estate. Accordingly, the District Court erred in holding that the amended complaint alleged that the BCPO and Mordaga acted exclusively in classic law enforcement and investigative functions so as to make them part of the State and thus not amenable to suit under §§ 1983 and 1985. Even if the amended complaint could not be viewed as alleging conduct outside classic law enforcement and investigative functions, the dismissal as to Mordaga was incorrect for an additional reason. Mordaga is sued not only in his official capacity, but also in his personal capacity. . . Accordingly, he most certainly is amenable to suit as a 'person' under §§ 1983 and 1985. [citing *Hafer*]")

Estate of Lagano v. Bergen Cnty. Prosecutor's Office, 769 F.3d 850, 857-58 (3d Cir. 2014) ("Sovereign immunity extends to state agencies and state officers, 'as long as the state is the real party in interest.'. . It does not extend to counties and municipalities. . . To determine whether the state is the real party in interest, this Court considers three factors: (1) whether the money to pay for the judgment would come from the state; (2) the status of the agency under state law; and (3) what degree of autonomy the agency has. *Fitchik*, 873 F.2d at 659. Rather than applying *Fitchik* to the facts alleged by the Estate to reach the conclusion that the BCPO was entitled to Eleventh Amendment sovereign immunity, the District Court relied solely on our decision in *Coleman*. The District Court's reading of *Coleman* is erroneous. First, *Coleman* never mentions *Fitchik*. And second, *Coleman* does not address Eleventh Amendment sovereign immunity. Instead, *Coleman*

focuses on the question of what entities and public officials may be regarded as arms and officials of the State for the purpose of determining whether the named entity and public official are to be regarded as 'persons' subject to suit under § 1983. The District Court's analysis improperly conflates the jurisprudence interpreting the term 'person' in the context of § 1983 with the concept of Eleventh Amendment sovereign immunity. Although the existence of Eleventh Amendment sovereign immunity was a factor considered by the Supreme Court in *Will*, the two concepts are analytically distinct. . . Appellees point to our unpublished decision in *Beightler v. Office of Essex Cnty. Prosecutor*, 342 Fed.Appx. 829, 832 (3d Cir.2009) (per curiam), which stated that *Coleman* 'essentially analyzed the same factors presented in *Fitchik*,' as support for the District Court's conclusion that the *Fitchik* factors are met any time a court finds that county prosecutors act as arms of the state by performing classic law enforcement functions. However, we are not bound or persuaded by *Beightler's* statement that the *Fitchik* inquiry is satisfied whenever a county prosecutor engages in classic prosecutorial functions. We therefore conclude that *Fitchik* provides the proper framework for analyzing Eleventh Amendment sovereign immunity as it applies to county prosecutors, and on remand the District Court must apply *Fitchik* to determine whether the BCPO is entitled to Eleventh Amendment sovereign immunity in this case.")

Coleman v. Kaye, 87 F.3d 1491, 1499-1506 (3d Cir.1996) (for § 1983 purposes, New Jersey county prosecutor made policy for county when refusing to promote investigator).

Evans v. City of Newark, No. CV1400120KMMAH, 2016 WL 2742862, at *9-10 (D.N.J. May 10, 2016) ("As stated above, the State and its employees are not 'persons' under § 1983 or the NJCRA. It follows that, if ECPO and its employees (sued in their official capacities) were acting as an arm of the State when performing the acts of which Evans complains, then they are not 'persons' amenable to suit. If acting as local, county officials, however, they may be amenable to suit as 'persons.' *See Lagano*, 769 F.3d at 855. As the preceding paragraph implies, New Jersey county prosecutors' offices sit uneasily astride the division between State and local entities. Sometimes they act in one capacity, and sometimes in the other . . . .To simplify a bit, the prosecutor's staffing and administrative functions flow from the County. Thus, *Coleman* held that, when dealing with personnel matters, a county prosecutor's office acted in its administrative capacity as part of county government. It therefore was a 'person' which could be sued under § 1983 for employment-related discrimination. . . As to enforcement of the criminal law, however, the county prosecutor acts as a State official. The prosecutor is a gubernatorially-appointed official of the State of New Jersey, pursuant to the State Constitution, who acts under the oversight of the State Attorney General. . . Thus, where a county prosecutor and his detectives conducted an allegedly illegal search, they acted as part of the State government, because their conduct arose from their 'investigation of criminal activity.'. . When performing such law enforcement functions, prosecutors act as State officials, and therefore are not 'persons' amenable to suit under § 1983. . . Here, the misconduct alleged against the ECPO defendants in their official capacities arises from their law enforcement and prosecutorial functions. For example, the investigators are alleged to have introduced 'fabricated' evidence for the purpose of obtaining an arrest warrant or indictment. . . The prosecutors are alleged to have presented to the grand jury evidence that was false and

incomplete, in that it omitted exculpatory facts and credulously relied on the testimony of a 'convicted felon.'. . In performing those acts, the ECPO defendants were discharging essential prosecutorial functions; it follows that they were then acting as an arm of the State. ECPO, as well as the individual ECPO defendants insofar as they are sued in their official capacities, are not 'persons' under § 1983 or the NJCRA. The motion to dismiss all § 1983 and NJCRA claims asserted in Counts 1-5 against the ECPO, and against the ECPO defendants in their official capacities, is therefore granted.")

Adams v. City of Atlantic City, No. 13–7133 (JBS/AMD), 2014 WL 2094090, *3-*5, *10 (D.N.J. May 20, 2014) ("Plaintiff concedes that ACPO employees 'were acting in their law enforcement/investigatory capacity when they carried out a policy and practice of failing to conduct meaningful investigations of civilian complaints against Atlantic City Police officers ... and when they failed to supervise and/or discipline said police officers.'. . However, Plaintiff contends that his claim against the County is that the 'the Atlantic County Prosecutor's Office, Investigative Unit has adopted an official policy or custom ... of failing to investigate citizen complaints of police abuse and failing to supervise or discipline officers against whom legitimate complaints of misconduct have been lodged.'. . Plaintiff argues that the County can be held liable for policies or practices at the ACPO. . . In reply, the County argues that it 'is not the policy-maker with regard to law enforcement functions of the Prosecutor's Office.'. . The County contends that the New Jersey Attorney General 'is charged with supervising County Prosecutors in all law enforcement matters,' and if the ACPO 'had a policy of failing to investigate complaints, the municipality of Atlantic County would have no discretion to interfere with those decisions.'. . . Plaintiff concedes that the employees were acting in a law enforcement or investigatory capacity at all relevant times, and, therefore, under New Jersey law, the employees were acting as agents of the state. . . .The Court also agrees that the County is not responsible for, or capable of enacting, policies relating to law enforcement activities at the ACPO. . . . The ACPO is a constitutionally established office, with county prosecutors nominated and appointed by the Governor. . . The New Jersey Attorney General is responsible for supervising the ACPO's law enforcement activities, and, by statute, may supersede the county prosecutor for the purpose of prosecuting all criminal business of the state in that county. . . .Plaintiff concedes that the ACPO employees were acting in a 'law enforcement/investigatory capacity when they carried out [the] policy and practice' at issue here. It follows that the alleged policy itself—concerning investigations of civilian complaints against police officers—relates to the 'law enforcement/investigatory' duties of the ACPO. Indeed, the alleged policy or practice does not relate to the kinds of administrative duties at the prosecutor's office for which counties may be held liable. . . The state, via the Attorney General, is responsible for the law enforcement policies at the ACPO, and therefore, the County is not a proper defendant to claims related to policies concerning the investigation of citizen complaints. Plaintiff's claim against the County for alleged illegal policy or practice will be dismissed with prejudice. Courts likewise have held that 'training and supervisory activities are prosecutorial functions,' and therefore the responsibility of the state, not the county. . . Plaintiff's claims against the County premised on a policy related to the supervision of police officers, or the failure to train and supervise police officers, are dismissed with prejudice. . . .Here, as previously discussed, the

ACPO is a hybrid entity that acts on behalf of, and under the supervision of, the state when its prosecutors act in a law enforcement or investigatory capacity. Plaintiff concedes that the ACPO Defendants were acting in a law enforcement or investigatory capacity. Defendants further represent, without objection by Plaintiff, that the 'State of New Jersey has agreed to defend and indemnify these moving Defendants since they are employees of the Atlantic County Prosecutor's Office.'. . All factors favor holding that the ACPO was acting as an arm of the state, and therefore, without any indication that the state waived immunity in this case, the Court will dismiss with prejudice all claims against the ACPO Defendants in their official capacities.")

Hailey v. City of Camden, Civil No. 01-3967 (JBS/JS), 2009 WL 1228492, at *12, *13, *15 (D.N.J. Apr. 29, 2009) ("Both Plaintiffs and Defendants offer Norton Bonaparte, as the Business Administrator for Camden, as the final policymaker for the City on employment matters. . . . Defendants agree that Mr. Bonaparte was responsible, but argue that the City cannot be held liable for his conduct because he was a State of New Jersey employee over whom they had no control. As previously discussed, the final policymaking official must be considered to be acting as a municipal official rather than a state official in order for municipal liability to attach. . .Rather than look to labeling, the key question is whether the State, rather than the municipality, controlled the official when he was performing the particular function that is alleged to have resulted in an injury under Sections 1981 and 1983. . . .As discussed, under New Jersey law, absent actual exertion of control by the State, the Business Administrator of Camden is most definitely a municipal employee when performing all his functions. . . The mere existence of the State's authority to appoint and remove does not prove that it chose to exercise that authority through Mr. Bonaparte or, in particular, with regards to promotions to the rank of Deputy Chief in the Department of Fire. As the court in *Kenny* observed, all local governments are generally subject to control of the state. . . If the mere prospect of control by the state were sufficient, this would vitiate municipal liability in every instance. . . .It is the role of the trial judge to determine, guided by final policymaker jurisprudence and consistent with state law, who was the final policymaker and whether his actions in this case could be ascribed to the City. . . That determination was not made, the error was not harmless, and it requires a new trial.")

Pennsylvania

Benn v. First Judicial District of Pennsylvania, 426 F.3d 233, 240, 241 (3d Cir. 2005) ("Benn recognizes that neither cities nor counties partake of Pennsylvania's Eleventh Amendment immunity. He thus argues that the Judicial District is 'merely a local entity undeserving of the protection of the Eleventh Amendment,' . . . and notes that his paycheck was issued by the City of Philadelphia; the union to which he belonged negotiated its contracts with the City; he was required to live within Philadelphia city limits; and the car he was given for work assignments was owned by the City. . . . We noted in *Callahan* that the statutory funding scheme for state courts places considerable financial responsibility for the operation of the courts onto the counties. . . . What is significant in County of Allegheny, for the issue before us, is that under the Pennsylvania Supreme Court's interpretation of the state constitution, the Judicial District and its counterparts

are state entities. That they are locally funded may be problematic for a variety of reasons, but it does not transform them into local entities for Eleventh Amendment purposes. Nor is it decisive of the Judicial District's entitlement to immunity that the City may have an agreement for indemnification with the Judicial District, as Benn asserts. That question was decisively answered by the Supreme Court in *Doe*, where the Court stated, '[t]he Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party.'. . The Pennsylvania constitution envisions a unified state judicial system, of which the Judicial District is an integral component. From a holistic analysis of the Judicial District's relationship with the state, it is undeniable that Pennsylvania is the real party in interest in Benn's suit and would be subjected to both indignity and an impermissible risk of legal liability if the suit were allowed to proceed. We agree with the District Court that the Judicial District has Eleventh Amendment immunity which functions as an absolute bar to Benn's ADA claim. We therefore will affirm the order granting summary judgment.")**.**

Carter v. City of Philadelphia, 181 F.3d 339, 352 (3d Cir. 1999) (observing that other courts have noted the hybrid nature of the district attorney's office and concluding that "[t]he recurring theme that emerges from these cases is that county or municipal law enforcement officials may be State officials when they prosecute crimes or otherwise carry out policies established by the State, but serve as local policy makers when they manage or administer their own offices.").

Kitko v. Young, No. 3:10–189, 2012 WL 1969228, at *4 (W.D. Pa. May 31, 2012) ("In Pennsylvania, a district attorney acts as an agent of the county (and hence can be considered a county policymaker) when he or she 'engages in purely administrative tasks unrelated to prosecutorial functions.'. . However, 'when a local government official acts as a *state* policymaker, the local government cannot be responsible for the actions which constitute *state,* and not *local,* government policy.'. . The Third Circuit has made clear that when a district attorney or prosecutor participates in the search warrant process, his or her involvement is properly classified as 'an investigatory and prosecutorial function in which he acts as a state official'—not a local one. . . Accordingly, because count six relates to District Attorney Shaw's approval of the search warrant, Shaw cannot be classified as a 'policymaker' for § 1983 purposes, as he was acting within his prosecutorial function, which does not provide him with *local* policymaking authority. And absent such authority on the part of Shaw, Clearfield County cannot be held liable under § 1983 for his approval of the warrant.")

N.N. v. Tunkhannock Area School Dist., 801 F.Supp.2d 312, 313, 317-19 (M.D. Pa. July 8, 2011) ("This case presents the question of whether an action alleging an unreasonable search and seizure of a student's cell phone containing images protected by the First Amendment states a claim for equitable relief against county officials and a claim for damages against the county. . . . The defendants argue that because Skumanick was acting in his role as prosecutor, he was acting as an agent of the state and not the county. Thus, they argue that the county cannot be liable for his actions. . . . District attorneys act as agents of the state when they "execut[ing] their sworn duties to enforce the law by making use of all the tools lawfully available to them to combat crime."

Coleman, 87 F.3d 1491, 1499 (3d Cir.1996). When a district attorney, however, engages in purely administrative tasks unrelated to prosecutorial functions, he or she 'in effect acts on behalf of the county that is the situs of his or her office.'. . . When the function involves 'local policies relating to training, supervision and discipline,' it is properly characterized as administrative, but when it involves 'decisions about whether and how to prosecute violations of state law,' it is prosecutorial. . . Here, the plaintiff argues that Skumanick acted as a county policymaker by directing the searching of N.N.'s phone; the downloading, printing, and disseminating of N.N.'s photographs; and the interrogation and coercing of N.N. to sign a statement. N.N. argues that these actions constituted policies of improper investigation. The complaint additionally alleges that Skumanick made a policy of 'fail[ing] to require or provide appropriate in-service training or re-training of officers who were known to have improperly investigated' the school's reports of indecent images on student cell phones. The plaintiff further disclaims seeking liability based on the charging decision. The plaintiff argues that searching for evidence and training subordinates in proper search procedures do not qualify as prosecutorial acts. . . . *Buckley's* immunity analysis, however, is not applicable here, because the question before the Court is not whether Skumanick's actions were so closely tied to the judicial phase of criminal proceedings as to render him absolutely immune from money damages. Rather, the inquiry is whether Skumanick was acting as a policymaker for the *state,* in which case the *county* cannot be liable. In threatening prosecution against N.N., Skumanick was acting as a policymaker for the state, and no liability can attach to the county for this action. However, the plaintiff pins liability on a failure to train and supervise. . . . Thus, insofar as N.N. seeks to impose liability on the county for a failure to train related to the investigation of N.N. (as opposed to her prosecution), the claim survives dismissal. . . . Because the plaintiff has alleged liability on the basis of improper training related to investigation, she has properly pleaded a claim of municipal liability under *Monell* against the county. The motion for judgment in the county's favor on the grounds that Skumanick was making policy for the state will be denied.")

Wallace v. Powell, Nos. 3:09-cv-286, 3:09-cv-0291, 3:09-cv-0357, 3:09-cv-0630, 2010 WL 785253, at *6 (M.D. Pa. Mar. 1, 2010) ("In many capacities the district attorney is indeed the 'chief law enforcement officer' for Luzerne County. But after examining Pennsylvania law and in light of the Supreme Court's recent decision in *Van de Kamp,* I find that in making direct prosecutorial decisions in the courtroom, and in training subordinates to do the same, a district attorney is a *state* actor. Plaintiffs' proposed amendments with respect to Luzerne County fail to allege decisions by a final policy-maker for the municipality, and therefore, are futile.").

Jakomas v. McFalls, 229 F. Supp.2d 412, 430 (W.D. Pa. 2002) ("We have no difficulty deciding, under Pennsylvania law, that Judge McFalls was not acting as a policymaker for the County when he discharged his staff. Judge McFalls' authority to hire, supervise, and discharge his personal employees came from the Pennsylvania Supreme Court. It did not − and could not − come from the County because the County has no policymaking authority over the Pennsylvania courts.").

Williams v. Fedor, 69 F. Supp.2d 649, 660, 663 (M.D. Pa. 1999) ("As in *McMillian*, there is some evidence in this case to support the proposition that a Pennsylvania district attorney is a county policy maker when engaged in his law enforcement capacity. Indeed, the constitutional designation of the Pennsylvania district attorney as a county officer is a factor not present in *McMillian* that supports Williams' position. But that factor does not tip the scales in Williams' favor. The historical foundation for the office of district attorney − serving as a replacement for state deputy attorneys' general, with the obligation to perform the duties that had been performed by those deputy attorney's general − coupled with the district attorneys' subordinate relationship to the state's chief law enforcement officer, the Attorney General, compel the conclusion that when engaged in his or her 'basic function − enforcement of the Commonwealth's penal statutes,' . . . a district attorney in Pennsylvania represents the interests of the Commonwealth and not the County. . . . [But] when the focus of the plaintiff's civil rights claims are on the administration of the district attorney's office, the district attorney is regarded as an official of the county so that the county may be held liable where the facts establish a failure to train or supervise that evidences a deliberate indifference to the rights of the plaintiff."), *aff'd*, 211 F.3d 1263 (3d Cir. 2000).

Morgan v. Rossi, No. Civ. A. 96-1536, 1998175604, **9-12 (E.D. Pa. Apr. 15, 1998) (not reported) ("The parties agree that Rossi has 'final policymaking authority' with respect to his decisions regarding the employment of his deputies. The parties, however, disagree about whether he is a policymaker for the Commonwealth of Pennsylvania or for Lehigh County. . . . The question here is whether sheriffs in Pennsylvania act as county or state officials when they decide to dismiss deputies. In contrast to the Alabama Constitution, the Pennsylvania Constitution explicitly states that sheriffs are county officers. . . . Sheriffs and deputies are County employees paid by the County, and the sheriff's office (i.e., equipment, staffing, etc.) is also funded by the County. Sheriffs are elected locally and their jurisdiction is limited to the County in which they serve. . . . As to the actual hiring and firing of individual deputies, neither the Commonwealth nor the County have much input or control over the sheriff's decisions. Both the State and the County, however, have provisions concerning the employment of deputies. . . . [W]hile there are State and County provisions related to the hiring of deputies, there are no such provisions constraining sheriffs' discretion in dismissing deputy sheriffs. . . . After balancing the respective roles of Lehigh County and the Commonwealth of Pennsylvania in Rossi's decision to dismiss plaintiffs, as required by *McMillian*, I conclude that Rossi was acting as a policymaker for the County rather than the Commonwealth. The Pennsylvania Constitution explicitly lists sheriffs as County officials, and they act within their respective counties and on behalf of the County in all respects. They are elected by the County's citizens, and it is those citizens who pay their salaries, buy their patrol cars and fund their offices. In addition, it is the governing body of Lehigh County − the Board of Commissioners − which decides how many deputies are required and what their salaries will be. By contrast, the Commonwealth's connection to Sheriff Rossi is remote, and it has no proactive supervisory role whatsoever. The County contends that because it has no control over the sheriff's decision to dismiss deputies and because it had no policy about dismissing political opponents it cannot be held liable. This argument, however, misinterprets the teaching of *McMillian*. In *McMillian*, Alabama did not have a policy of intimidating witnesses or suppressing

exculpatory evidence and it had no control over the sheriff's murder investigation, yet the Count concluded that the Monroe County Sheriff was a State policymaker. *McMillian* does not ask whether either the County or the State has a policy that plaintiff claims violated his constitutional rights or whether the County or State had control over the action alleged to have violated plaintiff's constitutional rights. Rather, it asks whether the policymaker's actions that are alleged to form the basis for plaintiff's claim are more fairly attributable to the State or to the County based on state law. I conclude, based on my review of Pennsylvania law, that Rossi's dismissal of plaintiffs is more fairly described as an action on behalf of the County rather than the State.").

FOURTH CIRCUIT

Maryland [decision by Delaware Supreme Court]]

Kent County v. Shepherd, 713 A.2d 290, 294, 295 (Del. 1998) (In accordance with *McMillian*, we have analyzed the law of Maryland with regard of the facts of this case. In *Rucker v. Harford County*, [558 A.2d 399, 405 (1989)] the highest court in the State of Maryland held unequivocally, as a matter of Maryland law, that county sheriffs and deputy sheriffs who are engaged in law enforcement activities are 'officials and/or employees of the State of Maryland,' rather than the county. . . . We have concluded that, under Maryland law, the State of Maryland alone is vicariously responsible for Kent County Deputy Sheriff Knapp's negligent conduct because it occurred during the course of his law enforcement duties, while he was operating a motor vehicle within the State of Delaware.")

Maryland [federal]

Holloman v. Markowski, 661 F. App'x 797, 800 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1342 (2017) (Holloman's allegations are too speculative to state a plausible claim for municipal liability. We thus affirm without reaching the City's argument that the police department is a state, not city, agency.")

Lane v. Anderson, 660 F. App'x 185, 197-98 & n.6 (4th Cir. 2016) ("Here, we conclude that, as a matter of Maryland law, Sheriff Anderson is not a final policymaker for Baltimore City. State law, rather than the local government, provides Sheriff Anderson with his power. See Md. Const. art. IV, § 44 (stating that the sheriff 'in each county and in Baltimore City' shall 'exercise such powers and perform such duties as now are or may hereafter be fixed by law'); *Prince George's County v. Aluisi*, 731 A.2d 888, 894 (Md. 1999) (explaining that, pursuant to the Maryland Constitution, 'the duties of the sheriffs are those prescribed by the common law, the enactments of the General Assembly, and the rules of the Court of Appeals'). Moreover, the Court of Appeals of Maryland has explained that the duties of sheriffs 'are determined by state law, not locally enacted ordinances.' *Aluisi*, 731 A.2d at 895. And here, the Charter of Baltimore City does not include the sheriff's department as a principal agency of Baltimore City, or more generally, even reference the sheriff's position or the sheriff's department within its provisions. . .With respect to a sheriff's personnel decision-making authority, state law establishes the authority for hiring and

discipline, including termination processes. . . . Further, although state law does not conclusively establish the state's liability for a judgment against Sheriff Anderson in a § 1983 claim, it indicates that, in a tort claim brought pursuant to state law, the state, as opposed to Baltimore City, would cover a judgment against the sheriff based on his personnel decisions. *See generally* Md. Code Ann., State Fin. & Proc. § 9-108 (providing that, pursuant to the Maryland Tort Claims Act, the state of Maryland, and not Baltimore City, is liable for tort claims against a sheriff for those claims relating to "personnel and other administrative activities"); *Rucker*, 558 A.2d at 401 (though not deciding whether sheriffs were state or local employees for federal purposes, which was not before the court, holding sheriffs are state personnel pursuant to the Maryland Tort Claims Act -- and thus the state bore responsibility for judgments). This suggests that personnel decisions do not create local municipal liability and are not paid by the local government entity. . . In sum, we hold that Sheriff Anderson did not act as a Baltimore City policymaker when making employment and personnel decisions. Accordingly, Appellant's *Monell* claim was properly dismissed. . . .We note that our resolution of the *Monell* liability issue does not resolve the Eleventh Amendment immunity question that the district court will consider on remand.")

Dotson v. Chester, 937 F.2d 920 (4th Cir. 1991) (accepting plaintiff's argument that even if Sheriff was state officer in certain capacities, he was final policymaker for county when operating county jail).

Open Justice Baltimore v. Baltimore City Law Department, No. CV ELH-22-1901, 2023 WL 5153654, at *19–21 (D. Md. Aug. 10, 2023) ("Generally, § 1983 suits against a State for money damages are barred by the sovereign immunity embodied in the Eleventh Amendment. *See Quern v. Jordan*, 440 U.S. 332, 345 (1979). And, since 1867, the BPD has been regarded as a State agency under Maryland law, at least for some purposes. *Mayor & City Council of Balt. v. Clark*, 404 Md. 13, 23, 944 A.2d 1122, 1128 (2008); *Beca v. City of Baltimore*, 279 Md. 177, 180-81, 367 A.2d 478, 480 (1977). To that end, PUB. LOCAL LAWS OF MD. ("PLL"), Art. 4, § 16-2(a) (2021) states: "The Police Department of Baltimore City is hereby constituted and established as an agency and instrumentality of the State of Maryland." In *Clark*, for example, the Maryland high court said, 404 Md. at 28, 944 A.2d at 1131: '[N]otwithstanding the Mayor's role in appointing and removing the City's Police Commissioner, the Baltimore City Police Department is a state agency.'. . Nevertheless, the weight of authority in this District generally holds that, for purposes of § 1983, the BPD is a municipal entity, not protected by sovereign immunity. [collecting cases] Therefore, as a municipal entity, the BPD is subject to suit under § 1983.")

Burley v. Baltimore Police Department, No. CV ELH-18-1743, 2019 WL 4325295, at *28-29 (D. Md. Sept. 12, 2019) ("The question here is whether BPD is a State agency or a local one for purposes of § 1983. To determine whether an entity is sufficiently connected to a state for purposes of immunity, the Fourth Circuit has articulated a nonexclusive list of four factors to be considered: (1) whether the state will pay a judgment against the defendant entity; (2) ' "whether the entity exercises a significant degree of autonomy from the state,"' (3) ' "whether [the entity] is involved with local versus statewide concerns,"' and (4) ' "how [the entity] is treated as a matter of state

law."'. . As indicated, BPD argues that it is not subject to liability with respect to plaintiffs' *Monell* and indemnification claims. . . . To my knowledge, the Fourth Circuit has not directly addressed this issue. In *Wiley v. Mayor and City Council of Baltimore*, 48 F.3d 773 (4th Cir. 1996), the Court assumed that in a § 1983 action, the BPD 'may be held accountable....' . . . However, numerous decisions in this District have said that the BPD is not entitled to Eleventh Amendment immunity in regard to a claim under § 1983. [collecting cases] Accordingly, plaintiffs' § 1983 claims may proceed against BPD. At this juncture, however, the issue of BPD's duty to indemnify is premature.")

Burgess v. Baltimore Police Dep't, No. CV RDB-15-0834, 2016 WL 795975, at *5-6 (D. Md. Mar. 1, 2016) ("A prerequisite for any *Monell* claim. . . is that the targeted entity control the offending actors. In *Estate of Anderson, et al. v. Strohman, et al.*, 6. F. Supp. 3d 639, 644-45 (D. Md. 2014), this Court concluded that BPD officers are not employees of the City, nor did the City possess sufficient control of the officers. As the BPD is a state agency, the City simply does not exert legal control over the BPD within the ambit of Section 1983. *Id.* Earlier opinions of this Court had reached the opposite conclusion. *See, e.g., Brown v. Tshamba*, Civ. A. No. RDB-11-0609, 2011 WL 2935037 (D. Md. July 18, 2011); *Humbert v. O'Malley*, Civ. A. No. WDQ-11-0440, 2011 WL 6019689 (D. Md. Nov. 29, 2011); *Mason v. Mayor & City Council of Baltimore*, Civ. A. No. HAR-95-0041, 1995 WL 168037 (D. Md. Mar. 24, 1995); *Wilcher v. Curley*, 519 F. Supp. 1 (D. Md. 1980). Nevertheless, recent opinions of this Court since *Anderson* have held that the City does not sufficiently control the BPD for purposes of Section 1983. *See, e.g., Holloman v. Rawlings-Blake, et al.*, Civ. A. No. CCB-14-1516, 2014 WL 7146974, at *4 (D. Md. Dec. 12, 2014); *Dale v. Mayor and City Council of Baltimore City, et al.*, Civ. A. No. WDQ-14-2152, 2015 WL 5521815, at *3-4 (D. Md. Sept. 15, 2015). The United States Court of Appeals for the Fourth Circuit has still yet to address this precise question.[6] [fn6: The question of whether the City sufficiently controls BPD for purposes of *Monell* liability is pending on appeal before the Fourth Circuit in *Holloman v. Markowski, et al.*, Case No. 15-1878 (4th Cir. Aug. 6, 2015). Preliminary briefing has concluded, but the Fourth Circuit has yet to schedule oral argument or issue any ruling on the merits or otherwise.] . . . Accordingly, this Court recognizes the weight of precedent concluding that the City of Baltimore does not exert sufficient control for purposes of *Monell* liability under Section 1983. Baltimore police officers are state employees free from the City's control. The City sets no policy nor practices for the BPD. While Plaintiff's proffered links between the City and the BPD—for example, the reports made by the Police Commissioner to the City, and the Mayor's recent firing of former Commissioner Anthony Batts—may demonstrate some *relationship* between the two entities, he has failed to demonstrate any connection between these examples and § 1983 liability. Plaintiff's assertions simply fail to overcome clear Maryland law separating the two entities. Accordingly, the City may not be held liable for the actions of the BPD, the Officer Defendants, or Van Gelder. Plaintiff's claims are thus dismissed with prejudice as to the City.")

Jackson v. Pena, 28 F.Supp.3d 423, 428 (D. Md. 2014) ("As the Court of Appeals of Maryland has noted 'consistent[ly] and unequivocal[ly],' the Baltimore Police Department is an agency of

state government, not of Baltimore City. *See Mayor & City Council of Balt. v. Clark*, 944 A.2d 1122, 1128–30 (Md.2008). Accordingly, Maryland courts have held that the Baltimore Police Department is not an agent of Baltimore City, *id.*, nor is Baltimore City the employer of Baltimore City police officers for tort liability purposes. . . Federal courts have repeatedly hewed to this principle, finding that Baltimore City does not exert sufficient control over the Baltimore Police Department to be held liable under 42 U.S.C. § 1983. *See, e.g., Gray v. Kern,* Civ. No. WMN–13–2270, 2014 WL 61311, at *10 (D. Md. Jan. 7, 2014); *Bradley v. Balt. Police Dep't,* 887 F.Supp.2d 642, 646–49 (D.Md.2012).")

Murphy-Taylor v. Hofmann, 968 F.Supp. 693, 743 (D. Md. 2013) ("This case is not analogous to *Dotson;* it does not involve delegation by a county to a sheriff of the governance of a particular operation that has historically been a county function, such as management of a county jail. Rather, it involves the working environment within the Sheriff's Office and personnel decisions regarding deputy sheriffs made by the Sheriff and his senior staff. As discussed in connection with the Title VII claims, the County retains some control over personnel matters with respect to deputy sheriffs, such as benefits, leave, and establishment of various policies concerning the conditions of employment. In particular, many provisions of the County's Human Resources Ordinance apply to deputy sheriffs. But, this does not indicate that the Sheriff is a County policymaker with respect to such matters. To the contrary, it indicates that the County itself retains policymaking authority within those areas.")

Paulone v. City of Frederick, No. ELH-09-2007, 2011 WL 1675237, at *11-14 (D. Md. May 3, 2011) ("For purposes of civil liability, Maryland courts ordinarily treat sheriffs as state officials. [collecting cases] Moreover, this Court has consistently taken the view that Maryland sheriffs are State, not county, actors. [collecting cases] In *Dotson v. Chester,* 937 F.2d 920 (4th Cir.1991), however, the Fourth Circuit upheld liability of a Maryland county for a judgment against a sheriff. *Dotson* involved an action brought under 42 U.S.C. § 1983 by inmates regarding conditions of confinement at the county jail in Dorchester County, Maryland (which, like Frederick County here, is subject to the county commissioner form of government). . . . Although plaintiff does not cite *Dotson,* she argues that the County is liable for ADA violations at the detention center because 'the obligation imposed by Title II of the ADA to ensure effective communication is not a law enforcement issue.'. . She contends that ADA compliance 'is an obligation of *all* departments of government, not only law enforcement, just like bookkeeping standards or facility maintenance.'. . While *Dotson* suggests that, in some circumstances, a Maryland sheriff's operation of a county detention center may give rise to county liability under § 1983, *Dotson* is distinguishable from this case in several important respects. First, *Dotson* did not concern identification of the proper nominal defendant in a claim based on county detention center management. Rather, the county sheriff was the defendant in *Dotson,* and the plaintiffs had obtained a judgment against him; the question before the Court was whether they could garnish county funds to satisfy that judgment. Here, the parties appear to agree that the County will ultimately be responsible to pay any judgment based on an ADA violation at the detention center. . . But, they disagree as to whether the State or the County is the proper defendant, an issue *Dotson* does not address. Second, and perhaps more

important, *Dotson* was a § 1983 case, while this case arises under the ADA and the Rehabilitation Act. . . . Therefore, the task of the appellate court in *Dotson* was to determine whether, under the Supreme Court's *Monell* doctrine, the county had vested with the sheriff the 'final policymaking authority' regarding the county jail. . . In contrast, public entities are liable under principles of *respondeat superior* for their employees' violations of the ADA and Rehabilitation Act. . . . Accordingly, the 'final policymaking authority' analysis applied in *Dotson* under § 1983 is inapt in the ADA and Rehabilitation Act context. . . For the foregoing reasons, I conclude that, because the Sheriff and his deputies who operate the detention center are State employees, the State is the proper defendant for plaintiff's claims regarding her treatment at the detention center. It follows that the County is entitled to summary judgment as to plaintiff's ADA claim (Count III) and her Rehabilitation Act claim (Count IV).")

Rossignol v. Voorhaar, 321 F.Supp.2d 642, 650, 651 (D. Md. May 5, 2004) ("Both Plaintiff and the County Defendants agree that for purposes of a *Monell* analysis, Sheriff Voorhaar is the final policymaker concerning law enforcement in St. Mary's County. The County Defendants assert, however, that Sheriff Voorhaar and Deputy Alioto are state, not county, officers. See Md.Code Ann., State Gov't § 12-101(a)(6) (defining county sheriffs and deputy sheriffs as state personnel for purposes of the Maryland Tort Claims Act). If the Court were to agree, then the § 1983 claims against Voorhaar and Alioto in their official capacities would be barred by Eleventh Amendment immunity. . . . In concluding that the Monroe County sheriff was a state official when acting in his law enforcement capacity, the Supreme Court minimized the importance of state law provisions establishing that: (1) the sheriff's salary was paid out of the county treasury; (2) the county provided the sheriff with materials and reimbursed him for reasonable expenses; (3) the sheriff's jurisdiction was limited to the county's borders; and (4) the sheriff was elected by county voters. . . In contrast, heavy emphasis was placed on the fact that state officials maintained a degree of control over the Alabama sheriffs while the counties, lacking any law enforcement powers of their own, could not 'instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime.'. . Finally, the *McMillian* Court had the benefit of a persuasive Alabama Supreme Court opinion considering similar issues which held that sheriffs were state officers. . . Here, Maryland county sheriffs are also designated state constitutional officials for purposes of state law, Md. Const. art. IV § 44, with their salaries set by the state rather than the individual counties. . . Maryland's highest court has previously engaged in a detailed analysis of Maryland's Constitution and Code to conclude that a sheriff and his deputies are state employees. *Rucker v. Harford County*, 316 Md. 275 (1989). The same factors pointing toward the sheriff's status as a county official (compensation from country treasury, limitations on some aspects of their jurisdiction, election by county voters, etc.) may be present, but have already been all but discounted by the Supreme Court. The major difference propounded by Plaintiff between *McMillian* and the instant case is that St. Mary's County retains a degree of law enforcement power through its ability 'to provide for the appointment of county police and to prescribe their duties and fix their compensation.' . . This unexercised authority, however, does nothing to change the County's basic impotence to 'directly abridge the functions and duties of a sheriff under the common law and enactments of the General Assembly.' *Rucker*, 316 Md. at 288. Instead, direct

control over the sheriff in St. Mary's and other Maryland counties remains solidly with the State General Assembly and the judiciary. . . Accordingly, this Court concludes that the St. Mary's County Sheriff and his Deputies are state officials when acting in their law enforcement capacities.").

McCauley v. Doe, No. Civ. L-02-684, 2002 WL 32325676, at *4 (D. Md. July 12, 2002) (not reported) ("Defendant Frederick County Sheriff's Office moves to dismiss on the grounds that it is not an entity capable of being sued. Suit must be filed against an entity capable of being sued. Fed.R.Civ.P. 17(b). The capacity of a governmental entity to sue or be sued is determined in accordance with the laws under which it is organized. *Id.* Maryland law did not establish an entity known as the 'Frederick County Sheriff's Office' that is capable of being sued. *See* Boyer v. State, 323 Md. 558, 594 A.2d 121, 128 n. 9 (1991). Accordingly, McCauley's suit against the Frederick County Sheriff's Office cannot be maintained and is hereby DISMISSED."), *aff'd.,* 56 F. App'x 616, 2003 WL 932480 (4th Cir. March 10, 2003).

Kennedy v. Widdowson, 804 F. Supp. 737, 741, 742 (D. Md. 1992) ("Several federal courts have stated that a sheriff may be considered as a state or local official depending on whether his challenged actions arise out of his traditional law enforcement functions, which are considered statewide in nature." (citing cases)).

North Carolina [state]

Boyd v. Robeson County, 621 S.E.2d 1 (N.C. App. 2005) (impugning reasoning of *Buchanan* and holding Athat a North Carolina sheriff is a 'person' subject to suit under 42 U.S.C. § 1983.")

Buchanan v. Hight, 515 S.E.2d 225, 229 (N.C.App. 1999) (Sheriff acting within his statutory authority in terminating employees was a "state official," not a "person" who could be sued for money damages under § 1983).

North Carolina [federal]

Henderson Amusement, Inc. v. Good, No. 01-2462, 2003 WL 932463, at *5 (4th Cir. Mar. 10, 2003) (unpublished) ("Because we conclude that Henderson Amusement's § 1983 claim against Sheriff Good in his personal capacity fails because Henderson Amusement has not adequately alleged the deprivation of a constitutional right, it follows that the complaint does not state a claim against the sheriff in his official capacity. We therefore do not reach the issue of whether the Eleventh Amendment bars the claim against Sheriff Good in his official capacity.")

Cash v. Granville County Bd. of Educ., 242 F.3d 219, 226, 227 (4th Cir. 2001) ("[W]e conclude that upon our consideration of each of the factors identified for determining whether a governmental entity is an arm of the State and therefore one of the United States within the meaning of the Eleventh Amendment, the Granville County Board of Education appears much more akin to a county in North Carolina than to an arm of the State. . . . . In reaching our conclusion

in this case, we continue to follow our jurisprudence, as stated in *Harter*, *Gray*, *Bockes*, and *Ram Ditta*, and in doing so, we believe that we are faithfully applying the relevant Eleventh Amendment jurisprudence announced by the Supreme Court in *Regents*, *Hess*, *Lake Country Estates*, and *Mt. Healthy*. We therefore reject the district court's view that the Supreme Court's recent decisions in *Regents* and *McMillian* overruled our decisions in *Harter*, *Gray*, *Bockes*, and *Ram Ditta*.").

Carter v. Barker, 225 F.3d 653 (Table), 2000 WL 1008794, at *6 (4th Cir. 2000) (indicating that *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996), holding North Carolina sheriff sued in official capacity is not entitled to Eleventh Amendment immunity, is still good law after *McMillian*).

Knight v. Vernon, 214 F.3d 544, 552, 553 (4th Cir. 2000) ("North Carolina law vests the sheriff, not the county, with authority over the personnel decisions of his office. Although the county board of commissioners may fix the number of salaried employees within the sheriff's office, the sheriff 'has the exclusive right' under N.C. Gen.Stat. ' 153A-103 (1998) 'to hire, discharge, and supervise the employees in his office.' North Carolina courts interpret this statute to preclude county liability for personnel decisions made by sheriffs. . . . Because Sheriff Vernon, and not Rockingham County, had exclusive responsibility for discharging Ms. Knight, the district court properly granted summary judgment for the county on the § 1983 claims.").

Worrell v. Bedsole, 110 F.3d 62 (Table), No. 95-2816, 1997 WL 153830, *5 (4th Cir. Apr. 3, 1997) ("In North Carolina, the Office of Sheriff is a legal entity separate and distinct from the Board of County Commissioners because a sheriff is elected by the people, not employed by the county. N.C. Gen.Stat. ' 162-1. The sheriff, not the county, has final policymaking authority over the personnel decisions in his office. [cites omitted] N.C. Gen.Stat. ' 153A-103 provides that each elected sheriff 'has the exclusive right to hire, discharge, and supervise the employees in his office.' This authority may not be delegated to another person or entity. N.C. Gen.Stat. ' 162-24. We agree with the district court's conclusion that 'Bedsole's final policy-making authority over his personnel decisions in the Sheriff's Department is his alone and is not attributable to Cumberland County.'").

Engleman v. Cumberland County, No. 5:12–cv–00147–FL, 2013 WL 157065, *5, *6 (E.D.N.C. Jan. 13, 2013) ("Plaintiff's allegations of a failure by the county to train, supervise, or discipline the deputy defendants are insufficient to establish liability against the county, because it has no policymaking authority over the sheriff's department. . . Under North Carolina law, 'the sheriff, not the county encompassing his jurisdiction, has final policymaking authority over hiring, supervising, and discharging personnel in the sheriff's office.'. . Furthermore, the Supreme Court has rejected plaintiff's argument that the funding of a sheriff's department by a county necessarily equates to control over the sheriff's department. . . Plaintiff has alleged no facts on which liability could be attributed to the county. Accordingly, the claims against the county will be dismissed.").

Parker v. Bladen County, No. 7:08-CV-69-D, 2008 WL 2597654, at **2-4 & n.2 (E.D.N.C. June 27, 2008) ("Data downloaded from the officers' tasers indicated that the officers triggered their tasers a total of 38 times. . . Additionally, the officers had recently been certified to use the tasers,

and use of their tasers upon Cook was the first time any of the officers had used the tasers in a non-training situation. . . . Defendants Bladen County and the Bladen County Sheriff's Department move to dismiss the complaint against them pursuant to Federal Rule of Civil Procedure 12(b)(6). . . . Under North Carolina law, sheriffs have substantial independence from county government. Sheriffs are directly elected, hold office for four-year terms, and are not employed by the Board of County Commissioners. . . Each elected sheriff 'has the exclusive right to hire, discharge, and supervise the employees in his office.' . . The sheriff may not delegate this authority to another person or entity. . . Thus, under North Carolina law, the sheriff, not the county encompassing his jurisdiction, has final policymaking authority over hiring, supervising, and discharging personnel in the sheriff's office. . . . In other words, under North Carolina law, a sheriff's deputy 'is an employee of the sheriff, not the county,' . . . and 'the control of employees hired by the sheriff is vested exclusively in the sheriff.'. . Here, plaintiff alleges that Sergeant Edwards and Deputies Nelson and Smith of the Bladen County Sheriff's Department used excessive force in attempting to detain Cook. Plaintiff also alleges that Sheriff Bunn, Bladen County, and the Bladen County Sheriff's Department failed to train and supervise these employees and acted negligently and in violation of Cook's constitutional rights in failing to have a policy on the use of tasers. These allegations are employment- and training related, and constitute personnel decisions or other law enforcement polices over which the Bladen County Sheriff (not Bladen County) maintains exclusive authority. . . That authority (and any resulting liability) is not attributable to Bladen County. . . Accordingly, defendants' motion to dismiss the amended complaint as to Bladen County is granted. . . . Plaintiff's reliance on *Flood v. Hardy*, 868 F.Supp. 809 (E.D.N.C.1994), which in turn relies on *Dotson v. Chester*, 937 F.2d 920 (4th Cir.1991), is misplaced. *Dotson* and *Flood* held that where a county sheriff serves as the final county policymaker for operating the county-funded county jail, the county may be liable under section 1983. .v.vThis case, of course, is distinguishable. *See, e.g., Harter v. Vernon*, 953 F.Supp. 685, 693 & n. 8 (M.D.N.C.) (drawing distinction between county sheriff's policymaking authority over running a county-funded county jail and sheriff's policymaking authority over employment decisions within the sheriff's office), *aff'd*, 101 F.3d 334 (4th Cir.1996).")

Blair v. County of Davidson, No. 1:05CV00011, 2006 WL 1367420, at *7, *12, *13 (M.D.N.C. May 10, 2006) ("Under state law, it is the sheriff, not the county, that has final decision making authority over the law enforcement policies and personnel of his office, and the sheriff's deputies 'are appointed by and act for the sheriff, who alone is responsible for their conduct.' . . In addition, under North Carolina law, the sheriff has exclusive custody and control of the jail in his county. . . In the present case, all of Plaintiff's allegations relate to alleged conduct by the Sheriff or his Detention Officers while Plaintiff was in their custody at the Davidson County Detention Center. Neither the Sheriff nor his Detention Officers report to the County or County Manager Hyatt, and Plaintiff has not alleged any unconstitutional policy or conduct by the County or County Manager Hyatt. Therefore, the Motion to Dismiss as to Davidson County and County Manager Hyatt will be granted, and all of the claims against Davidson County and County Manager Hyatt will be dismissed. . . . In the present case, Plaintiff brings claims against Sheriff Hedrick in his official capacity based on, inter alia, his failure to adequately supervise and train his Detention Officers

and failure to prevent known constitutional violations. As noted above, North Carolina law establishes that the Sheriff is the sole law-enforcement policymaker for the county, and no other individuals have policy-making or training authority over the Sheriff or his deputies. . . Thus, Sheriff Hedrick, as the Sheriff, is the responsible policymaker who could be held liable for adopting unconstitutional policies or for failing to adopt proper policies or training if that failure amounts to deliberate indifference to the rights of citizens. In this case, viewing the allegations in the Complaint in the light most favorable to Plaintiff, and taking the allegations in the Complaint as a whole, Plaintiff appears to allege that Sheriff Hedrick inadequately trained his deputies and sanctioned unconstitutional conduct with deliberate indifference to the rights of citizens, particularly with regard to the use of tasers and the use of strip searches. Plaintiff also alleges that Sheriff Hedrick was aware of the constitutional violations and refused to prevent them. It will be Plaintiff's burden to establish that this was actually the case, but, at this stage in the litigation, the Court concludes that Plaintiff has sufficiently alleged official capacity claims against Sheriff Hedrick, and those claims will not be dismissed. . . . Finally, with respect to the claims for punitive damages, the Sheriff's Office Defendants contend that Plaintiff's claims for punitive damages should be dismissed because punitive damages are not available from an official capacity or municipal defendant, such as the Sheriff's Office. Defendants also note that under state law, punitive damages may not be awarded against a municipality absent statutory authorization. Having reviewed these contentions, the Court finds that Plaintiff may not recover punitive damages on her 'official capacity' claims, because those claims are analogous to a claim against a municipality or other local government unit, for which punitive damages are not available.").

Davis v. Durham Mental Health Developmental Disabilities Substance Abuse Area Authority, 320 F.Supp.2d 378, 398 n.16 (M.D.N.C. 2004) (In holding was not an arm of the state for Eleventh Amendment purposes, the court observed Athat after the United States Supreme Court's decisions in *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997), and *McMillian v. Monroe County,* 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997), several district courts in this circuit suggested that the impact of a judgment on a State's treasury is no longer the dominant factor in determining Eleventh Amendment immunity. *See, e.g., Conlin v. Southwestern Cmty. College,* No. 2:99CV247-C, 2001 WL 1019918, at *1 (W.D.N.C. Jan. 24, 2001); *Sampson v. Maynor,* No. 7:99- CV-51-F (E.D.N.C. Oct. 6, 1999). In *Cash v. Granville County Board of Education,* however, this circuit's court of appeals expressly rejected the district courts' interpretation of *Regents* and *McMillian* and held that the impact of a judgment on a State treasury is still the dominant factor in determining Eleventh Amendment immunity. 242 F.3d 219, 223- 24 (4th Cir.2001).").

Layman v. Alexander, 294 F.Supp.2d 784, 791, 792 (W.D.N.C. 2003) ("While the undersigned has held previously, and remains convinced, that the creation of the office of sheriff and the historical role of the sheriff in North Carolina in the exercise of his duties of governance and the enforcement of state law is more properly considered an office of the State of North Carolina, entitled to all of the privileges and immunities bestowed upon any office of the State, *see, e.g., Henderson Amusement, Inc. v. Good,* 172 F.Supp.2d 751 (W.D.N.C.2001), *aff'd,* 59 F. App'x 536,

2003 WL 932463 (4th Cir.2003), as explained in two recent decisions, *see Harmon v. Buchanan*, No. 1:00cv28 (W.D.N.C. Aug. 27, 2003); *Jones v. Buchanan*, No. 1:00cv27 (W.D.N.C. Oct. 9, 2003), the Fourth Circuit held in 1996 and has since reaffirmed that 'the Eleventh Amendment does not bar a suit against a North Carolina sheriff in his official capacity,' *Harter v. Vernon*, 101 F.3d 334, 343 (4th Cir.1996); *see also Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 227 (4th Cir.2001). In light of the Fourth Circuit's decision in *Harter* and its clear and unequivocal reaffirmation of its *Harter* decision − both its analysis and its judgment − in *Cash*, this Court is bound to adhere to that decision and, therefore, concludes that North Carolina sheriffs are not entitled to immunity under the Eleventh Amendment, but rather, are subject to suit in federal court.")**.**

North Carolina ex rel Wellington v. Antonelli, No. 1:01CV01088, 2002 WL 31875504, at *3 (M.D.N.C. Dec. 20, 2002) (not reported) ("Where a local government does not have final authority over a particular policy carried out by a sheriff, it cannot be held liable under § 1983 for alleged constitutional violations committed by the sheriff or his deputies. . . Because Guilford County did not have final policymaking authority in the area of law enforcement, it cannot be held liable for the conduct of Sheriff Barnes or Deputies Antonelli and Caliendo.").

Gantt v. Whitaker, 203 F. Supp.2d 503, 508, 509 (M.D. N.C. 2002) ("Defendants also raise the defense of sovereign immunity to the claim against Whitaker, asserting that North Carolina sheriffs are state officials and consequently immune from suit under the Eleventh Amendment. In support of this argument, Defendants offer the recently-decided case of *Henderson Amusement, Inc. v. Good*, 172 F.Supp.2d 751 (W.D.N.C.2001). While the *Henderson Amusement* court did grant immunity to a North Carolina sheriff, *see id.* at 763, it did so in spite of clear Fourth Circuit precedent affirming that North Carolina sheriffs are local, not state, officials and lack Eleventh Amendment immunity. *See Harter v. Vernon*, 101 F.3d 334, 343 (4th Cir.1996). The *Henderson Amusement* court justified its departure from this controlling precedent by citing two post-*Harter* Supreme Court decisions which it argued have overruled the immunity analysis employed by the Court of Appeals in *Harter*. [FN3] However, after examining these Supreme Court decisions in a subsequent case, *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219 (4th Cir.2001), the Fourth Circuit reaffirmed the validity of *Harter* in no uncertain terms. . . . Therefore, in accordance with these controlling authorities, the court hereby finds that Sheriff Whitaker, as a local official, is not entitled to Eleventh Amendment immunity from Plaintiff's official capacity § 1983 claim."), *aff'd on other grounds*, 57 F. App'x 141, 2003 WL 152856 (4th Cir. Jan. 23, 2003) (unpublished).

Henderson Amusement, Inc. v. Good, 172 F. Supp.2d 751, 763 (W.D.N.C. 2001) ("As this court can discern, a decisional rift is growing between state and federal courts in North Carolina in Section 1983 actions, which are actionable in either forum. The potential for inconsistency is most real in such circumstances, inasmuch as federal and state courts share Section 1983 jurisdiction. . . The difficulty arises when on one side of the street (in federal court) a Section 1983 claim against a sheriff is viable, while on the other side (in state court) it is not. Compounding this problem, there is no method in North Carolina for a federal court to certify an issue of state law (whether a

sheriff is considered by the state to be a state official) so that a federal forum can determine the ultimate federal issue (whether eleventh-amendment immunity can be extended to such official). With due deference and the utmost respect for decisions which have reached opposite conclusions in this district, *see Olvera v. Edmundson, supra,* and *Ramsey v. Schauble,* 141 F.Supp.2d 584 (W .D.N.C.2001) (Horn, M.J.), and based upon all the information and precedent available to this court, including the decision of the Supreme Court in *McMillian,* this court finds that the Section 1983 official-capacity claim lodged against the sheriff is not viable, inasmuch as it is a suit against the State of North Carolina, which enjoys eleventh-amendment immunity."), *aff'd on other grounds,* ***Henderson Amusement, Inc. v. Good***, No. 01-2462, 2003 WL 932463, at *5 (4th Cir. Mar. 10, 2003) (unpublished).

Harmon v. Buchanan, 164 F. Supp.2d 649, 656 (W.D.N.C. 2001) ("The court notes a growing dichotomy between federal and state jurisprudence in North Carolina concerning the role of a sheriff − the state courts find, with little explanation, that a sheriff and his deputies are state officials who enjoy the state's eleventh-amendment immunity in Section 1983 actions; however, federal courts, with much explanation, find that they are local officials, who enjoy no immunity. The parties have indicated to the court that they do not wish to enter the fray on such issue. The undersigned is on the record in a number of cases as finding that a North Carolina sheriff is, by mandate of the North Carolina Constitution, which has its origin in English common law, a representative of the state who is now elected locally. The dichotomy that is growing between the federal and state courts in North Carolina could lead to a lessening in the confidence of the judiciary for one reason − federal and state courts have concurrent jurisdiction over Section 1983 actions, and, as it now stands, a plaintiff cannot bring an action in state court against a sheriff under Section 1983, but can walk across the street and do so in the federal forum. Such issue needs resolution by either the highest state court or by legislative action. This court, therefore, does not reach such issue.' [footnotes omitted]).

Wilkerson v. Hester, 114 F. Supp.2d 446, 464, 465 (W.D.N.C. 2000) ("Based upon all the information and law available, including the decision of the Supreme Court in *McMillian*, the undersigned must recommend that the official-capacity claims lodged against the sheriff and his deputy be dismissed, inasmuch as a suit against a North Carolina sheriff and/or his deputy is a suit against the State of North Carolina, which enjoys eleventh- amendment immunity.").

Little v. Smith, 114 F. Supp.2d 437, 446 (W.D.N.C. 2000) ("In North Carolina, the Office of Sheriff is a legal entity, established by the state constitution and state statutes, separate and distinct from the Board of County Commissioners because a sheriff is elected by the people, not employed by the county. . . The sheriff, not the county, has final policymaking authority over the personnel decisions in his office. . . . [I]t is Sheriff Sellers, not Anson County, who has the final decision making authority over law enforcement policies of his office. Indeed, Anson County does not have the power to exercise supervision or control over the law enforcement officers who work for the sheriff who 'are appointed by and act for the sheriff, who alone is responsible for their conduct.' .

. . . In short, Anson County has no authority to control law enforcement policies of the Anson County Sheriff's Office or to control its personnel.").

Flood v. Hardy, 868 F. Supp. 809, 812-13 (E.D.N.C. 1994)("[T]he parties in this action do not dispute that the Sheriff has . . . final policymaking authority. Thus the only question in dispute is whether the Sheriff's policymaking decisions can be imputed to the County. According to the *Dotson* court, where state law makes a county sheriff the final policymaker, with regard to some particular aspect of county operation, his actions can serve to bind the county. [cite omitted] In North Carolina, where the Sheriff is given exclusive control over the supervision of his employees, including deputies and jailers, the Sheriff may bind the county by his actions. The defendant asserts that since the Sheriff is an elected official, the County cannot be bound by his decisions. This assertion is without merit. The fact that the Sheriff is an elected official does not exonerate the County.").

South Carolina

Wall v. Sloan, 135 F.3d 771 (Table), 1998 WL 54938, *1 (4th Cir. Feb. 11, 1998) ("[A] South Carolina sheriff such as Sloan is a state official and therefore is not subject to suit for monetary damages in his official capacity. . . . Wall primarily contends on appeal that because he seeks monetary relief from the county rather than the state, Sloan should not be entitled to Eleventh Amendment immunity. We find this claim unavailing. While the extent of the state treasury's liability is the main consideration in determining immunity, a party cannot file suit under § 1983 and specifically seek money from the county and not the state in an effort to circumvent an official's entitlement to Eleventh Amendment protection. An individual who brings a § 1983 action under these circumstances cannot choose which entity will satisfy any resulting judgment. Accordingly, the district court properly concluded that Sloan is a state official entitled to immunity in his official capacity.").

Landrum v. Spartanburg County, No. 7:10-cv-00007-JMC, 2011 WL 3652291, at *4 (D.S.C. Aug. 18, 2011) ("The South Carolina Supreme Court, United States District Court for the District of South Carolina, and the United States Court of Appeals for the Fourth Circuit have all held that South Carolina sheriffs and deputy sheriffs are state officials. . . .Therefore, when sued pursuant to 42 U.S.C § 1983 in their official capacities, sheriffs are not 'persons' amenable to suit.")

Millmine v. County of Lexington, No. 3:09-1644-CMC, 2011 WL 182875, at *5 (D.S.C. Jan. 20, 2011) ("In South Carolina, a sheriff's department is an agency of the state, not a department under the control of the county. . . As an agency of the state, the Lexington County Sheriff's Department is immune from suit under the Eleventh Amendment. . . . It is well settled, in both South Carolina law and Federal law regarding 42 U.S.C. § 1983 litigation, that a Sheriff in South Carolina is an arm of the State and as such enjoys Eleventh Amendment Immunity in Federal Court when sued in his official capacity. . . .As a result, Sheriff Metts is considered an arm of the State and is entitled to Eleventh Amendment immunity in his official capacity.")

Virginia

Bland v. Roberts, 730 F.3d 368, 390, 391 (4th Cir. 2013) ("Because reinstatement is a form of prospective relief, the refusal to provide that relief when it is requested can constitute an ongoing violation of federal law such that the *Ex Parte Young* exception applies. . . Plaintiffs are therefore correct that the Sheriff is not entitled to Eleventh Amendment immunity to the extent that they seek reinstatement. . . As we have explained, however, to the extent that the claims seek monetary relief, they are claims against an arm of the State. . . Thus, to the extent that the claims seek monetary relief against the Sheriff [of the City of Hampton, Virginia] in his official capacity, the district court correctly ruled that the Sheriff is entitled to Eleventh Amendment immunity.")

Grayson v. Peed, 195 F.3d 692, 697 (4th Cir. 1999) ("[T]here can be no county liability here because under Virginia law Fairfax County has no control over the internal administration of the ADC [Adult Detention Center]. . . Rather, the State Board of Corrections tells Sheriff Peed what he has to do in running the jail, and the State Department of Criminal Justice Services tells the Sheriff what he must do to train his employees. . . As the county has no control over policy within the jail, it bears no concomitant responsibility.").

Bockes v. Fields, 999 F.2d 788, 791 (4th Cir. 1993) ("In Virginia, neither the County nor the local boards have authority to set 'general goals and programs' for social services personnel; that authority is reserved for the State Board. . . . the Grayson County Board enjoyed its discretion to fire [plaintiff] at the prerogative of and within the constraints imposed by the Commonwealth. Such bounded, state-conferred discretion is not the 'policymaking authority' for which a county may be held responsible under § 1983.").

Strickler v. Waters, 989 F.2d 1375, 1390 (4th Cir.), *cert. denied*, 114 S. Ct. 393 (1993) ("The City of Portsmouth is not liable under section 1983 for the actions of its Sheriff in the administration of its jail, because under the law of Virginia those actions do not embody an official policy of the City of Portsmouth. That the city apparently is charged with keeping the jail 'in good order' in no way alters this conclusion. The cited statute at most obligates the city to provide for the jail's physical plant, not to oversee the activities within.").

Zemedagegehu v. Arthur, No. 1:15CV57 JCC/MSN, 2015 WL 1930539, at *5-6 (E.D. Va. Apr. 28, 2015) ("First, under the Virginia Code, local Sheriffs are solely responsible for running the locality's jail. Plaintiff alleges the State Defendants, in their policy-setting role, had constructive knowledge of the deficient accommodations and aids available to deaf detainees in local jails throughout the Commonwealth of Virginia. . . On a Rule 12(b)(6) motion the Court assumes this allegation to be true. Regardless, '[t]he primary responsibility for application of [the Board's] standards shall be with the sheriff or chief executive officer of the jail or lockup.' 6 Va. Admin. Code § 15–40–20; *see also* Va.Code § 53.1–116.2 ('The sheriff of each county or city shall be the keeper of the jail thereof[.]'). Admittedly, the State Defendants are responsible for setting policies and auditing correctional facilities for compliance with those policies. But the Board and the VDOC do not apply or enforce these policies in local jails as Plaintiff alleges. As a matter of

Virginia law, that responsibility resides only with the Sheriff. Instead, state correctional facilities, i.e. state prisons or penitentiaries, house convicted offenders sentenced to a year or more of incarceration and are 'operated by the Department of Corrections[.]' Va.Code § 53.1–1. The Virginia Code expressly distinguishes between state correctional facilities (Chapter 2 under Title 53.1) and local correctional facilities like the jail (Chapter 3 under Title 53.1). *Compare* Va.Code § 51.1–18 through § 53.1–67.8, *with* Va.Code § 53.1–68 through 53.1–133.10. Second, the State Defendants do not supervise the Sheriff in the manner contemplated under the prima facie case of supervisory liability. While the Virginia Code does provide the Board with certain enforcement mechanisms to ensure compliance with standards and policies, the mechanisms are indirect and do not give the Board direct supervisory authority over sheriffs or the operation of the local jail. For one, Sheriffs are not employees of the Commonwealth of Virginia and thus not subject to supervision by Virginia agencies. . . Instead, Virginia sheriffs are independent constitutional officers who are responsible only to the voters . . . As the manager of the jail, the Sheriff is also responsible for the sheriff deputies who work in the jail. . . The Board can indirectly affect the operation of the jail, but not to the degree required for supervisory liability to attach. For instance, the Board may prohibit confinement and require transfer of prisoners in substandard jails. Va.Code § 53.1–69. But only the local circuit court can directly penalize the Sheriff for failure to properly operate the jail. . . Additionally, under the Virginia Code, the Board can file a lawsuit against the Sheriff for failure to comply with any requirements set by the Board. . . Notably, however, the Virginia Code does not provide any other enforcement mechanism, and if the circuit court deems the complaint 'justified, it shall enter an order directing the State Compensation Board to withhold approval of payment of any further salary to the sheriff ... until there has been compliance with specified requirements of the Board.'. . In short, while there are indirect enforcement mechanisms available to the Board and local circuit court to ensure the local jail's compliance with standards and requirements, as a matter of Virginia law, these statutory provisions do not establish the 'affirmative causal link' necessary between the State Defendants and the particular constitutional injury suffered by Plaintiff for supervisory liability to attach. Stated differently, by way of analogy, under Virginia law, assuming the other elements were satisfied, the Sheriff herself could theoretically be liable for any inaction related to her deputies who she directly manages under a theory of supervisory liability. *See* Va.Code § 53.1–68. But the relationship between the State Defendants and the operation of local correctional facilities throughout Virginia is indirect and insufficient as a matter of law. Ultimately, Plaintiff's claims against the State Defendants cannot survive given his inability to establish 'an affirmative causal link between the supervisor's [State Defendants'] inaction and the harm suffered by the plaintiff.'. . Therefore, the Court will grant the State Defendants motion to dismiss and dismiss this matter with prejudice as to them. This result does not totally prevent Plaintiff's potential recovery, because as discussed below, both counts will remain against the Sheriff in her official capacity as keeper of the jail.")

Lavender v. City of Roanoke Sheriff's Office, 826 F.Supp.2d 928, 933 n.3 (W.D. Va. 2011) (noting that "there is considerable authority holding that the 11th Amendment precludes § 1983 official capacity suits against Virginia sheriffs because they are state, not local, officials." [collecting cases])

Smith v. McCarthy, NO. CIV.A.3:08CV00036, 2009 WL 50022, 12 (W.D. Va. Jan 7, 2009) ("In the first instance, the complaint seeks to bring claims against the Nelson Defendants in their official capacities as deputies (and then-Sheriff) of the Nelson County Sheriffs Department. The Nelson Defendants are officers of the Nelson County Sheriff's Department, which is a political subdivision of the Commonwealth of Virginia. As such, a suit against them in their official capacities is a suit against the Commonwealth itself; thus, the court lacks subject matter jurisdiction over Plaintiffs' money damages claim.").

Willis v. Oakes, No. 2:06CV00015, 2006 WL 1589600, at *2 (W.D. Va. June 9, 2006) ("In Virginia, contrary to the plaintiffs' assertions, it is well-established that sheriffs are state officers. Thus, a suit against a sheriff or his deputies in their official capacities is a suit against the state itself. . . . Likewise, the plaintiffs' claims against Wise County are barred. . . . Under Virginia law, sheriffs are independent constitutional officers whose duties and authorities are controlled by statute and who serve independently of the municipal government. . . . Accordingly, a county cannot be held liable for a sheriff's actions.")

Brown v. Mitchell, 308 F.Supp.2d 682, 698 & n.19 (E.D. Va. 2004) ("[A]s a constitutional officer, a Virginia sheriff is separate and distinct from the municipal or local government in which she may operate. . . . The question then becomes what are Mitchell's statutory powers, obligations, and duties respecting the Jail. To begin, it appears that the design, the construction, and apparently the structural maintenance of local jails in Virginia are the responsibilities of local governments − in this case, the City. . . . In other words, those responsibilities are not statutorily allocated to the sheriff. By statute, however, the sheriff is 'the *keeper* of the local jail, and the *legal custodian* of those who are lawfully confined in it.' . . . Thus, 'the final policymaking decision maker in the [daily] operation of the jail' is the sheriff. . . . It is worth noting that even though a Virginia sheriff is a state employee, in the sheriff's operation of a local jail, 'the [locality] may be liable for [the sheriff's] policies where they violate constitutional standards.'"). The court, later in the opinion notes that AWhether, under the decision in *May v. Newhart*, 822 F.Supp. 1233 (E.D.Va.1993), the potential liability under Count I is that of the Sheriff or the City must await further factual development.' 308 F.Supp.2d 682, 701 n.22 (E.D. Va. 2004).

Hussein v. Miller, 232 F. Supp.2d 653, 655 (E.D. Va. 2002) ("Upon consideration of the parties' pleadings, the relevant provisions of the Virginia Code and the Virginia Constitution, and binding case law, the Court holds that the Commissioner of the Revenue for the City of Falls Church is protected by sovereign immunity from claims against him in an official capacity, because any adverse judgment against the Commissioner would be paid in full by the State treasury, and because Commissioners of Revenue are not local officers; rather they are constitutional officers. As such, claims against constitutional officers are essentially claims against the Commonwealth of Virginia, and the Commonwealth has not waived Eleventh Amendment immunity.").

Keathley v. Vitale, 866 F. Supp. 272, 276 (E.D. Va. 1994) ("[W]hile [plaintiff] does provide a lengthy list of state statutes which demonstrate a relationship between local municipalities in

Virginia and their respective sheriff departments, he offers no specific provisions of the Virginia Code which would support his contention that the hiring and firing of VBSD employees should be attributed to Virginia Beach . . . . Plaintiff proffers no authority to support the proposition that the electoral process is a sufficient basis upon which to attribute Drew's acts with respect to employment decisions to Virginia Beach. [footnote omitted] . . . . In essence, [Plaintiff] asks that this Court create a vast "elected official" exception to *Monell*. We decline any such expansion.").

Olivo v. Mapp, 838 F. Supp. 259, 261 (E.D. Va. 1993) ("[T]he employment practices of a sheriff do not involve the exercise of any policymaking authority on behalf of a locality.").

FIFTH CIRCUIT

Louisiana

Cozzo v. Tangipahoa-Parish Council-President Government, 279 F.3d 273, 281-83 (5th Cir. 2002) (concluding Sheriff in Louisiana is not an Aarm of the state' and not entitled to Eleventh Amendment immunity).

Burge v. Parish of St. Tammany, 187 F.3d 452, 470 (5th Cir. 1999) (*Burge III*) ("Considering the Louisiana constitutional and statutory law and tort cases, we conclude that, in a suit against a district attorney in his official capacity under § 1983 for constitutional torts caused by the district attorney's policies regarding the acquisition, security, and disclosure of *Brady* material, a victory for the plaintiff imposes liability on the district attorney's office as an independent local entity. Accordingly, a district attorney cannot be held personally liable in an 'official capacity' suit, and any judgment against a district attorney in his official capacity must be recovered from his liability insurer or the public funds controlled by him or his successor in office.")**.**

Hebert v. Maxwell, No. CV-03-1739-A, 2005 WL 2429174, at *4 (W.D. La. Sept. 30, 2005) ("A sheriff's office is not a state agency under Louisiana state law. La. R.S. 13:5102. Rather, it is a political subdivision. La. R.S. 13:5102. Further, the Sheriff is an 'autonomous local government official separate and apart from the parish he serves.'. . Therefore, a suit against a sheriff is not a suit against the state, but a suit against a political subdivision, the sheriff's office. Because of the unusual treatment given to sheriffs and sheriffs' offices under Louisiana law, when a sheriff is sued in his official capacity, the judgment can only be recovered from the sheriff's liability insurer or the public funds controlled by the sheriff. . . The state of Louisiana is not liable for any damages arising from a sheriff's actions taken within the scope of his official duties. La. R.S. 42:1441. Additionally, a sheriff sued in his official capacity is not personally liable for any damages assessed.").

Porche v. St. Tammany Parish Sheriff's Office, 67 F. Supp.2d 631, 634, 636 (E.D. La. 1999) ("This case calls upon the court to assess whether the sheriffs of Louisiana are arms of the state and thereby entitled to the protection of the Eleventh Amendment. Courts in several other states have resolved this issue with mixed results. [collecting cases] . . . . [A] sheriff in Louisiana may

not be properly characterized as an arm of the state and, therefore, the Eleventh Amendment affords a sheriff in Louisiana no protection against being sued.”)**.**

Mississippi

Waltman v. Payne, 535 F.3d 342, 350 (5th Cir. 2008) (“The district court failed to recognize the single-incident exception to the general rule: a single decision by an individual with ‘final policy-making authority’ can in certain instances be grounds for liability under § 1983. . . In Mississippi, sheriffs are final policymakers for their respective department’s law enforcement decisions made within their counties.”).

Hamilton v. Stafford, No. 1:96CV265- S-D, 1997 WL 786768, at *1 (N.D. Miss. Nov. 26, 1997) (not reported) (“The holding in *McMillian* is quite narrow and limited to Alabama sheriffs, as pointed out in the majority opinion, . . . and indeed, does not even apply to Alabama sheriffs in every instance. . . . In light of the narrow holding in *McMillian*, the validity of prior decisions within the Fifth Circuit regarding Mississippi sheriffs and their status as county officials under section 1983 remain unaffected. . . . Indeed, every court outside of the Eleventh Circuit to address the issue has determined that sheriffs, other than those in Alabama, remain county officials for section 1983 purposes.”).

Texas

Arnone v. County of Dallas County, Texas, 29 F.4th 262, 268-72 (5th Cir. 2022) (“Applying *McMillian* and *Daves*, the district attorney acted as a state—not county—policymaker in promulgating or acquiescing to the polygraph policy. . . Relevant Texas law inescapably points that way. And Arnone offers no persuasive counterargument. . .To begin, the Texas Constitution supports that the district attorney acts for the state. It provides the Legislature—a state entity—with a direct role in regulating both the scope of prosecutorial duties and compensation for district attorneys. . . That is like the sheriff in *McMillian* where the Legislature had a role in determining both the scope of the sheriff’s duties and his compensation. . . .Texas law therefore points one way in this case: district attorneys act for the state when they decide to seek revocation of probation or deferred adjudication. A policy governing when to exercise that power in the future—whether because of a polygraph result, or not—is inextricably linked to that use of state power, just like it was in *Daves.* Therefore, the Dallas County district attorney acted as a *state* policymaker when he decided or acquiesced to the polygraph policy in this case. . . . At end, then, Dallas County’s district attorney may very well be elected only by its voters. He may hold sway only in Dallas County. And he may even have complete dominion over the internal policies and procedures used within his office. But on these facts, the Dallas County district attorney acted for the state—not county—when he promulgated or acquiesced to the polygraph policy. Consequently, there isn’t a county policymaker to support Arnone’s *Monell* claim. Therefore, the district court properly dismissed it.”)

Robinson v. Hunt County, Texas, 921 F.3d 440, 448-49 (5th Cir. 2019) ("Robinson contends that Sheriff Meeks has final policymaking authority over the HCSO Facebook page. Hunt County maintains that the Hunt County Commissioners' Court is the relevant final policymaker. '[I]n Texas, the county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected.'. . Thus, the sheriff's 'actions are as much the actions of the county as the actions of th[e] [county] commissioners.'. . The decision to create a Facebook page falls squarely within the sheriff's power to '"define objectives and choose the means of achieving them" without county supervision.'. . The HCSO Facebook page is described as 'the official Hunt County Sheriff's Office Facebook page,' not as a page for Hunt County generally. It includes contact information for the Sheriff's Office and advises users to dial 911 if they experience an emergency or need police assistance. The HCSO Facebook page also invites input and comments regarding the Sheriff's Office. Hunt County's argument that the Commissioners' Court has not delegated social media authority to Sheriff Meeks is unavailing. The sheriff's authority over the HCSO Facebook page derives from his elected position, 'not by virtue of delegation by the county's governing body.'. . Accordingly, Sheriff Meeks is the final policymaker with regard to the HCSO Facebook page.")

Culbertson v. Lykos, 790 F.3d 608, 623-25 (5th Cir. 2015) ("[W]e are directed to no authority to support that the DA should be considered a state official and not one for the County. The plaintiffs have cited an opinion of this court that held a county potentially responsible for the conduct of the district attorney for the county. *See Turner v. Upton Cnty.*, 915 F.2d 133, 138 (5th Cir.1990). The district covered by that prosecutor included more than one county, but we still held the defendant county potentially liable. . . The issue of whether the district attorney was a county or state official was not discussed and may not have been raised. Still, *Turner* is authority for the proposition that a county can be responsible under Section 1983 for the actions of its district attorney. We will follow *Turner*. The County can be responsible for actions of a final policymaker who has 'the responsibility for making law or setting policy in any given area of a local government's business.'. . . The plaintiffs argue that Lykos's retaliatory actions 'relate to her administrative and managerial duties' and thus 'implicate her role as a final policymaker.' In the complaint, the policy is described as one 'of retaliation for the exercise of lawful rights.' It should go without saying that no state statute or County directive in any form has given district attorneys authority to retaliate against individuals for exercising their First Amendment rights. Still, we have held that improper conduct by a policymaker can be a policy. In a Section 1983 action, the plaintiff sued a county for the alleged conspiracy of the sheriff and district attorney to subject her to a 'sham' trial. *Turner,* 915 F.2d at 134. We held that the '[t]he sheriff's and the district attorney's alleged participation in the conspiracy, if proven, will suffice to impose liability on the county.'. . In doing so, we held that the sheriff was a final policymaker for the county in the area of 'preserving the peace in his jurisdiction and arresting all offenders.'. . We did not hold that the district attorney was a final policymaker for any relevant function but held he was a possible co-conspirator for which the county might be liable. . . In this case, a possible area of policy-making responsibility for a district attorney is to determine what witnesses to use in prosecutions. Arguably, then, Lykos was a final

policymaker for purposes of a retaliation campaign to keep public employee or contractor witnesses who testified in an unsatisfactory way from being used in the future. The complaint alleges that the DA's Office decided no longer to use either plaintiff as witnesses. That possible injury—no longer being able to testify—is not the injury we have held is relevant here. Instead, it was the County's failure to renew the Lone Star Contract and the plaintiffs' consequent loss of their employment. Lykos quite clearly was not the final policymaker on that decision. If she were, no campaign would have been necessary to convince the Commissioners Court of anything. The plaintiffs have not stated a claim against Harris County based on Lykos's actions in her official capacity, as they have not alleged sufficient facts to show Lykos is a final policymaker as to the policy at issue.")

Williams v. Kaufman County, 352 F.3d 994, 1013, 1014 (5th Cir. 2003) ("We have. . . held that sheriffs in Texas are final policymakers in the area of law enforcement. Therefore, it is clear that the County can be held liable for Harris's intentional conduct, to the extent it constitutes the 'moving force' behind the alleged injury. Harris testified that he is the final policymaker for law enforcement matters in the County. Harris and others have testified as well that both the strip search and lengthy detention of the plaintiffs were conducted according to the Sheriff Department's unwritten policy for executing 'hazardous' warrants. As a result, Harris's actions as policymaker were undeniably the moving force behind, and the direct cause of, the violation of plaintiffs' constitutional rights, thereby establishing the County's municipal liability. Finally, we note that the County has not expressly contested its municipal liability, but rather argued only that it is not liable for actions that do not amount to constitutional violations, a truism that none contests.' [footnotes omitted]).

Skelton v. Camp, 234 F.3d 292, 296 (5th Cir. 2000) (concluding that in removal proceeding, alderman represented the municipality, not the State of Texas).

Brady v. Fort Bend County, 145 F.3d 691, 700, 702 (5th Cir. 1998) ("Sheriffs under Texas law are unlike the hypothetical sheriff discussed in *Pembaur* because a Texas sheriff is not merely granted 'discretion to hire and fire employees' by the commissioners court. . . Rather, the Texas legislature has vested sheriffs with such discretion, and the sheriff's exercise of that discretion is unreviewable by any other official or governmental body in the county. Texas sheriffs therefore exercise final policymaking authority with respect to the determination of how to fill employment positions in the county sheriff's department. . . . [T]he fact that under Texas law, no other official or governmental entity of the county exerts any control over the sheriff's discretion in filling available deputy positions is what indicates that the sheriff constitutes the county's final policymaker in this area.")**.**

Roach v. Bandera County, No. Civ.A.SA-02-CA-106XR, 2004 WL 1304952, at *9 (W.D. Tex. June 9, 2004) ("To the extent that the defendants sued in their official capacities assert immunity under the Eleventh Amendment, the Court concludes that the County and the Sheriff's Department are not arms of the state and thus are not entitled to Eleventh Amendment immunity from suit. . .

.Sheriff MacMillan is the County's official policymaker with regard to county-related law enforcement. . . Thus, the County can be held liable for MacMillan's intentional conduct, to the extent it constitutes the 'moving force' behind the alleged injury. . . However, Plaintiff has offered no summary judgment evidence regarding any conduct or policy by Sheriff MacMillan, much less any conduct that was a moving force behind his injuries. Accordingly, summary judgment for Bandera County and the Bandera County Sheriff's Department is granted.").

SIXTH CIRCUIT

Kentucky

Johnson v. Karnes, 398 F.3d 868, 877 (6th Cir. 2005)("A suit against Sheriff Karnes in his official capacity is permissible under § 1983, and is equivalent to a suit against the entity on whose behalf he acts − Franklin County.'[footnote omitted]).

Johnson v. Fink, No. 1:99-CV-35-R, 1999 WL 33603131, at *3 (W.D. Ky. Sept. 17, 1999) (not reported) ("Whether a public employee is a state or county government official is a matter of federal law, informed by provisions of state law involving sheriffs. . . The Court should look at several factors, including 'how state law defines the entity, what degree of control the state maintains over the entity, where funds for the entity are derived, and who is responsible for judgment against the entity.' . . Analyzing these factors, the Court concludes that the sheriffs act as local government officials rather than acting as an arm of the state in their daily operations. The Kentucky Constitution defines sheriffs as county officials. . . The sheriffs are elected by county residents. They act autonomously with little or no state oversight. The sheriffs' autonomy from the county does not preclude county liability. . . Because sheriffs receive most of their funding from the county and its residents, . . . the county presumably will bear financial responsibility for the judgment. . . . There is no evidence that a judgment would be paid from the state treasury. Furthermore, the sheriffs are not defended by attorneys from the state. Kentucky sheriffs are county officials. However, the particular actions at issue are attributable to the state, and thus, the sheriffs were acting as state officials when they were executing the search warrant. 'Where county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the state.' *Brotherton* at 566. In this case, the sheriffs' deputies were executing a search warrant signed by a state judge which stated 'you are commanded to make immediate search of the premises.' . . By acting under the direct order of a state court, the sheriffs and their deputies in this case were acting as state officials. . . Since the deputies were acting as arms of the state, they are entitled to Eleventh Amendment immunity in their official capacities.").

Michigan

Beck v. Haik, 234 F.3d 1267, 2000 WL 1597942, at *4 (6th Cir. Oct. 17, 2000) (Table) ("As a matter of well-settled Michigan law, Sheriff Haik's policies are those of the County.").

Wentzel v. Allegan County Jail, No. 1:13–cv–81, 2013 WL 1442360, *3, *4 (W.D. Mich. Apr. 9, 2013) ("In matters pertaining to the conditions of the jail and to the operation of the deputies, the sheriff is the policymaker for the county. Mich. Comp. Laws § 51.75 (sheriff has the 'charge and custody' of the jails in his county); Mich. Comp. Laws § 51.281 (sheriff prescribes rules and regulations for conduct of prisoners); Mich. Comp. Laws § 51.70 (sheriff may appoint deputies and revoke appointments at any time); *Kroes v. Smith,* 540 F.Supp. 1295, 1298 (E.D.Mich.1982) (the sheriff of 'a given county is the only official with direct control over the duties, responsibilities, and methods of operation of deputy sheriffs' and thus, the sheriff 'establishes the policies and customs described in *Monell'*). Thus, the Court will look to the allegations in Plaintiff's complaint to determine whether Plaintiff has alleged that the sheriff of Allegan County has established a policy or custom which caused Plaintiff to be deprived of a constitutional right. Plaintiff's action fails at this first step because his allegations have not identified a policy or custom that is the source of his injuries. Thus, he fails to state a claim against Allegan County. As a result, he fails to state a claim altogether.")

Bergeron v. Fischer, No. 02-10298-BC, 2004 WL 350577, at *5 (E.D. Mich. Feb. 19, 2004) (not reported) ("The plaintiff here alleges that defendant Fischer, in his official capacity as sheriff of Iosco County and in his individual capacity, was deliberately indifferent to his needs as a diabetic, and that he 'almost died as a result thereof because of the acts and omissions of the jail Booking Officer, and indirectly as the result of Fischer's inaction.'. . The plaintiff also alleges that Fischer failed to enforce county jail policies regarding medical treatment for prisoners and failed to properly supervise his jail staff. . . As the magistrate judge correctly stated, in an official-capacity suit against a local governmental official, the real party in interest is not the named official but the local government entity of which the official is an agent. . . Therefore, the claims asserted against Fischer in his official capacity are duplicative of the claims asserted against Iosco County and these claims will be dismissed. The Court also agrees with the magistrate judge that Fischer is entitled to summary judgment on the claims brought against him in his individual capacity. Fischer has submitted an affidavit in which he avers that not only was he not present at the Iosco County Jail on December 27, 2000, the day the plaintiff arrived, he was not even the county sheriff on that date.").

HRSS, Inc. v. Wayne County Treasurer, 279 F. Supp.2d 846, 857, 858 (E.D. Mich. 2003) ("The Sixth Circuit has looked at several factors to determine whether a local government and its officials acted as arms of the state, and are thus entitled to sovereign immunity from § 1983 claims. . . .These factors include: 'how state law defines the entity, what degree of control the state maintains over the entity, where funds for the entity are derived, and who is responsible for judgment against the entity.' . . The most important factor is whether the county or the state would be financially liable for any judgment that could result from the suit. . . Analyzing the above factors, the court finds that the County, including its Treasurer and Sheriff, acted as a local government in this case rather than an arm of the state. First, under the Michigan Constitution, the Sheriff and Treasurer are treated as elected officials for the county. . . Further, the Sheriff and Treasurer are to hold their principal offices in the county seat. . . Thus, Michigan law clearly

contemplates that the county Sheriff and Treasurer are to be treated as local, rather than state, officials. Second, there is no evidence that the state maintained control over the Sheriff or Treasurer. Although the foreclosure sales are governed by state law, the Sheriff and Treasurer still can act autonomously under the law, just as any other local official that is bound and/or guided by state law. Further, as discussed above, state law is silent with respect to the interest earned on overbid surpluses. Thus, the county officials were not required by the statute to retain the interest. Third, the county pays the salary of the Sheriff and Treasurer from the county treasury. . . Finally, and most importantly, the county will presumably bear financial responsibility for any judgment that may result in this case. Inasmuch as the above factors weigh against treating the County or its officials as arms of the state, Defendants will not be granted sovereign immunity.").

Ohio

Crabbs v. Scott (Crabbs I), 786 F.3d 426, 429-31 (6th Cir. 2015) ("At first blush, then, this case looks easy. Sheriff Scott is an officer of the county, not the State, and accordingly he may not invoke the *State's* sovereign immunity. But law-enforcement officers sometimes wear multiple hats, acting on behalf of the county *and* the State. In that setting—today's setting—the immunity question is not whether the officer acts for the State or county 'in some categorical, "all or nothing" manner.'. . Immunity hinges on whether the officer represents the State in the 'particular area' or on the 'particular issue' in question. . . And that depends on how state and local law treat the officer in that setting. . . Relevant factors include: (1) the State's potential liability for a judgment; (2) how state statutes and courts refer to the officer; (3) who appoints the officer; (4) who pays the officer; (5) the degree of state control over the officer; and (6) whether the functions involved fall within the traditional purview of state or local government. . . . Measured by these six factors, Sheriff Scott acted as a county, not a state, official in this instance.
One: The county, not the State, would satisfy any judgment against the sheriff in this case, as the parties agree.
Two: Ohio law classifies county sheriffs as 'county officials' and 'employees.' Ohio Rev.Code §§ 301.28(A)(3), 2744.01; *see Thurlow v. Bd. of Comm'rs of Guernsey Cnty.*, 91 N.E. 193, 194 (Ohio 1910).
Three: The voters of each county elect their own sheriff. Ohio Rev.Code § 311.01(A).
Four: Each county, not the State, pays the salary of its sheriffs and funds their offices. *Id.* §§ 325.01, 311.06.
Five: Each county board has 'final authority' over the sheriff's budget, *State ex rel. Trussell v. Meigs Cnty. Bd. of Comm'rs,* 800 N.E.2d 381, 386 (Ohio Ct.App.2003), and the sheriff serves as the county's 'chief law enforcement officer' with jurisdiction 'coextensive with' the county's borders, *In re Sulzmann,* 183 N.E. 531, 532 (Ohio 1932).
Six: A sheriff's law enforcement duties at common law represented local functions. *See* 70 Am.Jur.2d Sheriffs, Police, & Constables § 2. To be sure, the governor can initiate removal proceedings against the sheriff and issue some orders to him, Ohio Rev.Code §§ 3.08, 107.04, but that does not outweigh the rest of Ohio law and its treatment of sheriffs as local officials. Nothing in the Ohio Constitution says anything to the contrary. *Cf. McMillian,* 520 U.S. at 787–89. All of

this explains why Ohio county sheriffs generally are treated as county policymakers. . . And all of this explains why official-capacity lawsuits against the Franklin County Sheriff challenging his law-enforcement and jail-maintenance policies normally proceed as suits against the county itself. . . Sheriff Scott tries to fend off this general rule and the application of these considerations by arguing that, for purposes of DNA collection, he serves as an officer of the State. Why? Because state law—in this case, § 2901.07—controls his DNA-collection policies. 'Where county officials are sued simply for complying with state mandates that afford no discretion,' he adds, 'they act as an arm of the State' under the Eleventh Amendment. *Brotherton v. Cleveland,* 173 F.3d 552, 566 (6th Cir.1999); *see also, e.g., Vives v. City of N.Y.,* 524 F.3d 346, 353 (2d Cir.2008) (asking 'whether the City had a meaningful choice' of action under state law); *Richman v. Sheahan,* 270 F.3d 430, 440 (7th Cir.2001) (treating sheriff as county officer because there was 'no state policy directing the sheriff's actions'). The sheriff is right in one respect but not in another. He is right that sovereign immunity would bar this lawsuit if state law *required* him to take the actions he took. *See Gottfried v. Med. Planning Servs., Inc.,* 280 F.3d 684, 692–93 (6th Cir.2002); *Brotherton,* 173 F.3d at 565. But he is wrong to claim that state law required him to swab Crabbs' cheek after his acquittal. '[T]he essential question is the degree of discretion possessed by the official ... implementing the contested policy.' *Cady v. Arenac Cnty.,* 574 F.3d 334, 343 (6th Cir.2009). If Sheriff Scott's policies 'mechanically adopt and enforce' Ohio's DNA-collection law, he may invoke the State's sovereign immunity to deflect Crabbs' suit. . . If not, the State's sovereign immunity offers him no refuge. Scott's application of his DNA-collection policy to Crabbs does not flow inevitably from § 2901.07. For even if Ohio law *permitted* collecting Crabbs' DNA, a point we need not decide, § 2901.07 did not *require* it in his case for two independent reasons. For one reason, Crabbs' March 2012 arrest for violating the conditions of his bond—the only one occurring after mandatory collection of DNA from arrestees began in July 2011—was not an arrest 'for a felony offense.' . . .For another reason, no State law required Sheriff Scott to hold Crabbs for a cheek swab after the jury acquitted him. . . .In no way, then, did Sheriff Scott's DNA-collection and ID-hold policies 'mechanically adopt and enforce' Ohio law. . . Because Scott 'could have opted to act differently, ... he did not act as an arm of Ohio when he formulated and implemented the contested polic[ies].'. . That does not make those policies unconstitutional or otherwise illegal, to be clear. But it does leave the sheriff in his normal capacity as a county officer.")

D'Ambrosio v. Marino, 747 F.3d 378, 386 (6th Cir. 2014) ("D'Ambrosio first asserts that prosecutor Marino was a 'policymaking official' of Cuyahoga County, such that the county may be liable for the decisions that Marino made with respect to D'Ambrosio's prosecution. . . But this court has previously held that Ohio prosecutors act as arms of the state—not of a municipality—when prosecuting state criminal charges, meaning that their 'actions in prosecuting the charge ... [may] not be attributed to the [municipality].'. . Because he was acting as an agent of the state when prosecuting D'Ambrosio, Marino's conduct cannot have established a county policy, unconstitutional or otherwise.")

Petty v. County of Franklin, Ohio, 478 F.3d 341, 347 (6th Cir. 2007) ("Unlike a county sheriff's office, the sheriff himself may be considered a proper legal entity for purposes of suit under § 1983. In fact, that is exactly what the district court did in allowing Petty's suit against Sheriff Karnes to proceed at least to the summary judgment stage. There is no merit, therefore, to Petty's argument that the Franklin County Sheriff's Office be implicated as a separate legal entity in this suit. *See also Batchik v. Summit County Sheriff's Dep't*, No. 13783, 1989 WL 26084, at * 1 (Ohio Ct.App. Mar. 15, 1989) (unreported) (noting that the Summit County Sheriff, but not the Summit County Sheriff's Department, was an entity capable of being sued).")

Loy v. Sexton, No. 04-3971, 2005 WL 1285705, at *2 (6th Cir. May 23, 2005) (unpublished) ([U]nlike *Marchese*, 758 F.2d at 188, where we held that a sheriff, sued in his official capacity, had 'a duty to both know and act,' Sexton is being sued here in his individual capacity. . . Indeed, the Loys could not sue Sexton in his official capacity for money damages. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45, 58 (1989) (holding that state employees acting in their official capacities are insulated from liability for money damages). Accordingly, the Loys' claim against Sexton based on ratification fails.").

Brown v. Karnes, No. 2:05-CV-555, 2005 WL 2230206, at *3 (S.D. Ohio Sept. 13, 2005) (not reported) ("Ohio courts have determined that '[u]nder Ohio law, a county sheriff's office is not a legal entity that is capable of being sued .' [citing cases] The Court finds that Defendants have correctly stated the law and that dismissal of Plaintiff's § 1983 claim against the Franklin County Sheriff's Office is appropriate.").

Tennessee [state]

Spurlock v. Sumner County, 42 S.W.3d 75, 80, 81 (Tenn. 2001) ("Because we find the legislature's statutory grant of law enforcement authority to the sheriff to be of limited significance, we conclude that this argument fails to outweigh the support found in the Tennessee Constitution, case law, and statutes in favor of the proposition that a sheriff acts as a county officer when enforcing the state's laws.")

Tennessee [federal]

Harness v. Anderson County, Tennessee, No. 21-5710, 2023 WL 4482371, at *3–4 (6th Cir. July 12, 2023) (not reported) ("In *Crabbs*, an Ohio sheriff acted as a county official in the domain of law enforcement and jail management because the county would cover a judgment against the sheriff; Ohio law deemed county sheriffs county officials; county voters chose sheriffs; counties paid sheriffs and funded their offices; county boards had final authority over the sheriff's budget; and '[a] sheriff's law enforcement duties at common law represented local functions.'. .There is no dispute that Jones exercised final decision-making authority over personnel matters for the clerk's office. The district court found that Jones exercised final authority, . . . and the county conceded as much when arguing before this court[.] . . . Further, the county's former human-resources director testified that Jones opted out of the county's sexual-harassment policy and so

Jones's policies were 'all that mattered' for his office. . . Accordingly, the question is whether, with regard to personnel matters, Jones acted as a county or state official. If the former, Jones is a final policymaker for the county, and Harness's § 1983 suit can proceed; if the latter, he is a policymaker for the state. We conclude that Jones acted as a county official in the context of personnel management for the circuit-court clerk's office. Most importantly, the Tennessee Supreme Court has already held that circuit-court clerks are county officials and reached this conclusion based on characteristics that Jones shares. *State ex rel. Webster v. La Bonte*, 597 S.W.2d 893, 894 (Tenn. 1980). Specifically, the state court found that several factors mattered: 'who pays the officer's salary; who pays the expenses incurred by the office; who is entitled to any fees collected by the office; whether there was legislative intent that the office have jurisdiction outside the county; and whether the "overall duties are applicable to the people of the county alone."'. . . Comparing that case with this one, just as was true for the circuit-court clerk in *La Bonte*, the county pays Jones's salary and his office's expenses, the county is entitled to his office's fees, and his position is confined to the county. . . Accordingly, *La Bonte* strongly suggests that Jones acted as a county official. . . Tennessee's statutes point in the same direction. Under Tennessee law, circuit-court clerks are listed as county officials, . . . and must work with counties to adopt workplace policies[.] . . . This framework shows that, under state law, Jones acted as a county official because he was both listed as a county official and tasked with developing workplace policies for county employees, subject to county oversight.")

Buchanan v. Williams, 434 F.Supp.2d 521, 531 (M.D. Tenn. 2006) ("Under Tennessee law, the county sheriff has the statutory duty to '[e]xecute and return according to law, the process and orders of the courts of record of this state and of officers of competent authority, with due diligence, when delivered to the Sheriff for that purpose.'. . Yet, this authority extends to execute writs 'within the county.' . . Any legal liability arising out of a deputy sheriff's performance of his duties is legally attributable to the County. Tenn.Code Ann. ' 8-8- 302. . . As applied here, the writ of execution was issued to the Smith County Sheriff's Department. Williams, as a deputy sheriff, executed the writ and his subsequent seizure of Plaintiff's automobile and its contents was an act for the County. Thus, the Court concludes that under state law, Williams' acts were the acts of Smith County and qualify him as the County's decisionmaker in this instance. This single act of a sheriff is sufficient to represent a decision of the County under federal law.").

SEVENTH CIRCUIT

Illinois [State]

Carver v. Sheriff of La Salle County, 787 N.E.2d 127, 515, 516, 522 (Ill. 2003) ("[P]ursuant to section 9-102 of the Tort Immunity Act, a county sheriff, in his or her official capacity, is vested by the General Assembly with the authority to settle litigation filed against the sheriff's office and to direct the office to pay that settlement. However, the dilemma noted by the Seventh Circuit in its opinion in *Carver II* remains: although the sheriff has authority to settle claims filed against the sheriff's office pursuant to section 9-102, the statute is silent with respect to the specific

mechanism for funding the judgment. As stated, although the office of sheriff is constitutionally created (Ill. Const.1970, art. VII, ‘ 4(c)), and the sheriff is an independently elected county officer, the county sheriff lacks the authority to levy taxes or establish a budget. Instead, the General Assembly has determined that the sheriff’s office is to be financed by public funds appropriated to it by the county board. See 55 ILCS 5/4-6003 (West 2000); 55 ILC§ 5/5-1106 (West 2000). We conclude that, under this statutory scheme, the county is obligated to provide funds to the county sheriff to pay official capacity judgments entered against the sheriff’s office. . . . For the foregoing reasons, we answer the question certified to us by the United States Court of Appeals for the Seventh Circuit as follows: we hold that under Illinois law a sheriff, in his or her official capacity, has the authority to settle and compromise claims brought against the sheriff’s office. Because the office of the sheriff is funded by the county, the county is therefore required to pay a judgment entered against a sheriff’s office in an official capacity. We further hold that this conclusion is not affected by whether the case was settled or litigated.”).

Alencastro v. Sheahan, 698 N.E.2d 1095, 1099, 1100 (Ill.App. 1998) (sheriff acts as an arm of the State of Illinois when engaged in nondiscretionary execution of court order for possession)

Illinois [Federal]

Mercado v. Dart, 604 F.3d 360, 364-66 (7th Cir. 2010) (“The Sheriff of Cook County, a local official, is not ‘the state’ for the purpose of either Illinois or federal law, and therefore the Sheriff is a ‘person’ as § 1983 uses that word. . . The Sheriff’s contrary argument proceeds in two steps: first, he contends that Illinois law *requires* all sheriffs to conduct strip searches of all inmates arriving at county jails; second, he maintains that any local official whose conduct is dictated by state law is ‘the state’ to the extent of that obligation. It follows, the Sheriff concludes, that he is not a ‘person’ under *Will* (or, in his own language, that he has ‘eleventh amendment immunity”). Neither premise of this syllogism is sound. . . . Plaintiffs have not contended in this suit that the Jail’s practice of conducting strip searches of detainees first entering the jail violates either the federal Constitution or Illinois law. Rather the plaintiffs contend, and the jury found, that the *manner* of the search is unreasonable and thus violates the fourth amendment as well as § 701.40(f). No matter how favorably to the Sheriff subsection (f) is read, it does not compel him or his staff to perform any of the acts − such as having large numbers of detainees drop their pants simultaneously to raucous hooting and taunts from guards of both sexes − that have led to this litigation and the jury’s verdict. . . . The Sheriff may be confused by the fact that some public officials in Illinois serve in dual capacities. Each county has a State’s Attorney. That official is ‘the state’ when representing the state (all criminal prosecutions are brought in the state’s name) and ‘the county’ when representing the county (which he serves as its lawyer in civil suits). See *National Casualty Co. v. McFatridge*, No. 09-1497 (7th Cir. Apr.28, 2010), slip op. 12-14 (discussing this dual-capacity status). But it does not follow from the fact that one person may be an official of two different public entities that every person who is subject to state or federal law is ‘the sovereign’ whose law he obeys. A sheriff in Illinois may perform some tasks on behalf of the state − so we assumed in *Scott v. O’Grady*, 975 F.2d 366 (7th Cir.1992) − but when running

the county jail he is a county official. *DeGenova v. Sheriff of DuPage County,* 209 F.3d 973, 976-77 (7th Cir.2000); see also Ill. Const. Art. VII § 4(c); *People ex rel. Davis v. Nellis,* 249 Ill. 12, 21, 94 N.E. 165, 169 (1911). That some rules for the conduct of county officials (and private citizens) are set by a state does not make that person 'the state' for the purpose of § 1983, the eleventh amendment, or doctrines of sovereign immunity. Status of an entity as 'the state' depends on the organization chart and not on whose law supplies the substantive rule or who pays the judgments. See *Regents of University of California v. Doe,* 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). . . . The Sheriff is responsible for his own policies − and as a state actor (but not himself 'the state") for any unconstitutional policies that Illinois has directed him to implement.")

DeGenova v. Sheriff of DuPage County, 209 F.3d 973, 975-77 (7th Cir. 2000) ("In *Franklin*, we concluded that the Sheriff is not a State agent when he performs general law enforcement duties. But we have also recognized that sometimes the Sheriff may act on behalf of the State, as when he executes a judicial Writ of Assistance. *Scott*, 975 F.2d at 371. Here, we must decide whether the Sheriff is an officer for the State or a local entity when he manages the jail. . . . Illinois sheriffs have final policymaking authority over jail operations. . . . Illinois statutes make it clear . . . that when the Sheriff manages the jail, he is a county officer. . . . The Sheriff . . . argues that because we have held that Illinois sheriffs are not county employees, by default they must be agents of the State. We rejected this argument in *Franklin*, and do so again today. . . . In conclusion, since Illinois sheriffs are county officers when they manage the jail, the Eleventh Amendment does not bar this official capacity suit.").

Franklin v. Zaruba, 150 F.3d 682, 684-86 (7th Cir. 1998) ("The Sheriff asserted Eleventh Amendment immunity, which the district court refused to grant on the basis that sheriffs in Illinois are county officials, not state officials. The sole issue in this appeal is whether Sheriff Doria was acting as an agent of the state, in which case the Eleventh Amendment would bar the plaintiff's suit, or as the agent of some other governmental entity, in which case the Eleventh Amendment does not apply. . . . We have previously held that sheriffs in Illinois are county officials and therefore generally do not receive immunity under the Eleventh Amendment. . . . Eleventh Amendment immunity will extend to county sheriffs, however, when the sheriff (although a county officer) exercises duties on behalf of the state. . . . In this case, however, the Sheriff does not argue that the deputies who exercised custody over the plaintiffs were executing a state judicial order or performing any similar function for the state that would render them state agents for the limited purposes of that action. Nor does the Sheriff argue that formulating policies to govern the conduct of deputies in their law enforcement functions is an action on behalf of the state akin to enforcing a judicial writ. Rather, the Sheriff contests the general proposition established by *Scott* that sheriffs in Illinois are county officers, not state officers, when performing law enforcement functions. . . . There are numerous differences between the law of Alabama and the law of Illinois, and we point to one that is particularly significant in distinguishing Alabama sheriffs from their Illinois counterparts: the treatment of those officials under the relevant state constitutions, as interpreted by the respective state supreme courts. . . . Indeed, as we noted in *Scott*, . . . a sheriff's status as a county officer is explicitly stated in the Illinois constitution. . . One wrinkle in this analysis is that

the Illinois Supreme Court, like the Alabama Supreme Court in *Parker v. Amerson*, has held that counties may not be held liable under respondeat superior for the actions of their sheriffs even though Illinois sheriffs are county officers. See *Moy*, 203 Ill. Dec. 776, 640 N.E.2d at 931. According to the defendant, if sheriffs in Illinois are not agents of the county for purposes of holding the county liable under respondeat superior, then sheriffs must therefore be agents of the state. This argument overlooks a crucial third possibility that we have found to be dispositive in other cases − namely, that the sheriff is an agent of the county sheriff's department, an independently-elected office that is not subject to the control of the county in most respects. . . . Admittedly, sheriffs occupy a somewhat unique position under Illinois law. As *Moy* indicates, sheriffs are agents of the county, but they are separate from the county boards to such a degree that the county boards cannot be held liable for their actions under respondeat superior. Furthermore, as *Ryan* held, the lack of identity between the county sheriff's department and the general county government indicates that § 1983 suits against sheriffs in their official capacities are in reality suits against the county sheriff's department rather than the county board. Although the relationship between county boards and county sheriffs is a complicated one, the relevant feature of that relationship for purposes of this case is the lack of any suggestion that the sheriff is an agent of the state in performing general law enforcement duties.").

Ryan v. County of DuPage, 45 F.3d 1090, 1092 (7th Cir. 1995) (although sheriff was policymaker for the county sheriff's office, county was properly dismissed because "Illinois sheriffs are independently elected officials not subject to the control of the county.").

McGrath v. Gillis, 44 F.3d 567, 572 (7th Cir. 1995) ("Employees of the state government are not transformed into county employees simply because the county government participates in budgeting and paying of their salaries. . . . that State's Attorneys are elected for and perform their duties within one county does not suggest that they are county employees.")**.**

Ruehman v. Sheahan, 34 F.3d 525, 529 (7th Cir. 1994) ("Sheriff Sheahan contends that in designing and implementing the SPWA system [computer warrant-tracking system] he is equally an agent of Illinois. Well, would holding him liable for errors in the design and operation of the warrant-tracking system interfere with state policy (as opposed to county policy)? . . . . A county agency, under the president of the county board, specified the design of SPWA. The system, then, is designed and supervised from top to bottom by the Sheriff and the county government. State law requires the Sheriff to arrest the right people but says nothing about how he should do it. Design and auditing decisions have been left entirely to him. He could junk SPWA tomorrow, or alter its every detail, without thwarting any state policy or law . . . . It follows that in designing and implementing SPWA the Sheriff is not acting as the State of Illinois.").

Scott v. O'Grady, 975 F.2d 366, 371 (7th Cir. 1992) ("[W]hen a county sheriff in Illinois performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official and does not get the benefit of the Eleventh Amendment. But this conclusion does not end our inquiry. . . . The county sheriff acts as an arm of the Illinois state judicial system

in executing Writs of Assistance and other state court orders. When fulfilling this statutory duty, the sheriff and his deputies must be deemed state officials for the purposes of Eleventh Amendment immunity.").

Herrington for the Estate of Strahan v. Bradford, No. 3:20-CV-00938-NJR, 2023 WL 6276041, at *3 (S.D. Ill. Sept. 26, 2023) ("To the extent that Lakin argues he is the improper party for this suit, he is wrong. It is true that under Illinois law, county sheriffs are agents of the county sheriff's department, not the county itself. *Moy v. County of Cook*, 640 N.E. 2d 926, 929-31 (Ill. 1994). As such, a county cannot be held vicariously liable for a sheriff's conduct, because a traditional employer-employee relationship does not exist between a sheriff and a county. *Id.* Because the county funds the office of the sheriff, however, the county is required to pay a judgment entered against a sheriff's office in an official capacity. *Carver v. Sheriff of LaSalle County*, 787 N.E.2d 127, 129 (Ill. 2003). Accordingly, a county is a necessary party in any suit seeking damages from an independently elected county officer in an official capacity. *Carver v. Sheriff of LaSalle County, Illinois*, 324 F.3d 947, 948 (7th Cir. 2003). To the extent that Herrington seeks damages from Lakin in his official capacity, Madison County is a necessary party only for purposes of indemnification and would need to be added. Even so, Lakin remains an appropriate subject of Herrington's complaint.")

Bergquist v. Milazzo, No. 18-CV-3619, 2020 WL 757902, at *5 (N.D. Ill. Feb. 14, 2020) ("Plaintiff seeks to hold Cook County liable under *Monell* based upon its purported policies, practices, and customs that led to her alleged constitutional deprivations in this case. But in Illinois, the Cook County Sheriff's Office bears the responsibility to appoint and hire deputies and act as custodian of the county courthouse. . . As a result, no liability can attach to Cook County in this case under *Monell*; the county simply lacks the authority to establish and implement any policies regarding the training or performance by the employees of the Cook County Sheriff's Office. . . In light of the foregoing, this Court dismisses all substantive claims against Cook County. But Cook County remains a necessary party to this for one reason: under Illinois law, it must indemnify the Cook County Sheriff's Office for any official capacity claims. . . Because, as discussed below, Plaintiff sufficiently pleads a *Monell* claim against the Cook County Sheriff's Office at this stage of the case, County County remains in this suit solely as a necessary party for potential indemnification purposes.")

Moore v. Sheahan, No. 06 C 5443, 2007 WL 461320, at *3, *4 (N.D. Ill. Feb. 8, 2007) ("Moore seeks to hold Cook County liable under § 1983 as the public employer of Sheahan and the John Doe Sheriffs. However, Sheahan is independently elected and his office is not under the control of the Cook County Board of Commissioners. . . Cook County does not control Sheahan or his department, and because it has no authority to train or set policies for the department, it cannot be liable for the Cook County sheriffs' alleged constitutional wrongs. However, Cook County cannot entirely escape involvement in this lawsuit. The Seventh Circuit has held that, because under state law counties must pay damages or settlements entered into or levied against sheriffs' offices, a county in Illinois is a necessary party in any suit seeking damages from an independently elected

county officer in an official capacity. . . Accordingly, although Cook County is not directly liable under 42 U.S.C. § 1983, we cannot dismiss it from this lawsuit.”**).**

Knapp v. County of Jefferson, Ill., No. 06-cv-4028-JPG, 2006 WL 1663740, at *3 (S.D. Ill. June 13, 2006) (“As a matter of law, a sheriff in Illinois is not a policymaker for the county in which he works, so his decisions cannot be construed as decisions by the county that could subject the county to liability under *Monell*. . . . The Jefferson County Sheriff’s Department, however, is a different story. First, because Mulch is a final policymaker for the Jefferson County Sheriff’s Department, . . .the Jefferson County Sheriff’s Department can be liable under *Monell* for Mulch’s personal involvement discussed in the prior section of this order. Knapp has also alleged a set of facts under which he could prove that the Jefferson County Sheriff’s Department had a policy or custom of not adequately investigating officers before hiring them and not adequately training and supervising them once they were hired. Such failures can amount to a constitutional violation. . . Thus, Knapp has stated a claim against the Jefferson County Sheriff’s Department.”).

Wallace v. Masterson, 345 F.Supp.2d 917, 925-27 (N.D. Ill. 2004) (“The question in this case, then, is whether the *Carver* cases mandate that the County must pay for a tort judgment entered against Masterson for which the Sheriff is directed to pay by ‘ 9-102 or is found vicariously liable under the doctrine *respondeat superior*. If so, the County is a necessary party to the litigation and should not be dismissed from the suit. Defendants seek to distinguish the case at bar from the *Carver* cases because, rather than suing the Sheriff in his official capacity directly, Plaintiff sues Masterson in his personal capacity, seeking compensation by the Sheriff and the County under principles of indirect liability. Ultimately, . . . Plaintiff’s argument that *Carver* should apply to this case prevails. Plaintiff urges the Court to apply *Carver* because a suit or theory imposing liability on the Sheriff for Masterson’s actions (whether under ‘ 9-102 or through *respondeat superior* as to the Sheriff) cannot be anything *other* than a suit or liability against the Sheriff in his official capacity. . . . . Once one concludes that Count V seeks recovery against the Sheriff in his official capacity, the Court cannot, with principle, distinguish *Carver*. The Illinois Supreme Court explicitly held that ‘ 9-102 operates to require the county to pay for judgments entered against a sheriff in his official capacity. Indeed, other courts in this district have already held that *Carver* applies to *respondeat superior* suits against a sheriff. . . .[T]o the extent that Cook County remains in the lawsuit only for the purpose of paying any judgment that may be entered against the Sheriff in his official capacity, the Court grants the County’s request that it not be subject to discovery.”).

Cooper v. Office of the Sheriff of Will County, 333 F.Supp.2d 728, 736, 737 (N.D. Ill. 2004) (“Defendants argue that although Will County may be a named defendant because it has a financial interest in the outcome of the judgment, it cannot be held liable for respondeat superior liability arising from claims against the Sheriff’s Office or the Deputies. Defendants are correct that Will County is a proper defendant in the instant suit. In an answer to a certified question from the Seventh Circuit, the Illinois Supreme Court determined that, ‘[b]ecause the office of the sheriff is funded by the county, the county is therefore required to pay a judgment entered against a sheriff’s office in an official capacity.’ [citing *Carver I*] After the court’s ruling, the Seventh Circuit

additionally noted that the Supreme Court of Illinois' answer 'implie[d] an additional point of federal law: that a county in Illinois is a necessary party in any suit seeking damages from an independently elected county officer (sheriff, assessor, clerk of court, and so on) in an official capacity.'. . Based on *Carver I*, Will County will be obligated to provide funds to pay any judgments that may be entered against the Sheriff's Office. Because Will County has a financial interest in the outcome of the litigation, it is a necessary party to the litigation and must not be dismissed. . . . Although Will County must be a named party, it cannot be liable for claims against the Sheriff's Office on the basis of the respondeat superior doctrine, however.")

McRoy v. Sheahan, No. 03 C 4718, 2004 WL 1375527, at *6 (N.D. Ill. June 17, 2004) ("Under Illinois law, sheriffs are classified as county officials, and when the sheriff 'performs his duties as the principal executive officer or chief law enforcement officer of the county.' he is a suable entity under § 1983.").

Fairley v. Andrews, 300 F.Supp.2d 660, 669, 670 (N.D. Ill. 2004) ("The Cook County Jail, and the Cook County Department of Corrections, are solely under the supervision and control of the Sheriff of Cook County. . . The Sheriff is an independently-elected constitutional officer who answers only to the electorate, not to the Cook County Board of Commissioners. . . . Thus, we find that *Thompson* remains controlling Seventh Circuit law and hold that Cook County cannot be directly liable because it has no authority over the Cook County Sheriff or his deputies.").

Horstman v. County of Dupage, 284 F.Supp.2d 1125, 1130 (N.D. Ill. 2003) ("Mr. Horstman alleges that his injuries came about because the sheriff and state's attorney followed a policy of harassing and arresting law-abiding gun owners. However, even if true, this would not render the county liable. While a sheriff is a county officer, a 'county is given no authority to control the office of the sheriff,' and the Illinois Supreme Court has ruled that the status of sheriffs in relation to their counties is analogous to that of an independent contractor. *Moy v. County of Cook*, 640 N.E.2d 926, 929 (Ill.1994). The Seventh Circuit has explicitly ruled that Illinois counties are not liable for their sheriffs' actions under *Monell*, stating that 'Illinois sheriffs are independently elected officials not subject to the control of the county.' [citing *Ryan v. County of DuPage*]").

Potochney v. Doe, No. 02 C 1484, 2002 WL 31628214, at *2 & n.3 (N.D. Ill. Nov. 21, 2002) (not reported) ("Plaintiffs allege that the County had a policy of failing to train (deputy) sheriffs. This argument fails to state a claim against the County because the Seventh Circuit has ruled that in most circumstances Illinois sheriffs, while agents of the county for which they work, are independently elected officials not subject to a county's respective control. . . . While there may be an argument for liability against the County, the court declines to construct it for the plaintiffs. Rather, it applies the established principle that the Sheriff's Department is a separate entity from the County for purposes of § 1983.").

DeGenova v. Sheriff of Dupage County, No. 97 C 7208, 2001 WL 1345991, at *8 n.8 (N.D. Ill. Oct. 31, 2001) (not reported) ("Plaintiff sues the Sheriff of DuPage County (Richard P. Doria was the sheriff at the time of the incidents in question) in his official capacity. Claims against

government officers in their official capacities are actually claims against the government entity for which they work. . . Thus, a suit against the Sheriff of DuPage County in his official capacity is a suit against the Sheriff's Office. Defendant argues, however, that plaintiff cannot sue the Sheriff's Office because it is not a suable entity. As pointed out by plaintiff, though, the Seventh Circuit already held in this case that 'the Sheriff's office has a legal existence separate from the county and the State, and is thus a suable entity.' *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973, 977 n. 2 (7th Cir.2000) . . . Defendant apparently confuses the Seventh Circuit's recognition that Illinois courts have not yet decided whether a judgment against the Sheriff's Office is collectible (which is a matter of first impression for Illinois courts), *see id.*, with whether the entity is suable. The question of whether a judgment is collectible has been certified to the Illinois Supreme Court. *See Carver v. Sheriff of LaSalle County, Illinois*, 243 F.3d 379, 386 (7th Cir.2001).")

Stewart v. Rouse, No. 97 C 8141, 1999 WL 102774, at *7 (N.D. Ill. Feb. 22, 1999) (not reported) ("Together, *Ruehman* and *McCurdy* indicate that the Eleventh Amendment does not shield the sheriff from liability where a deputy exercising discretion in the execution of a state court warrant exceeds the scope of delegated state authority.")

Buckley v. County of DuPage, No. 88 C 1939, 1997 WL 587594, *5, *6 & n.4 (N.D. Ill. Sept. 17, 1997) (not reported) ("Given that sheriffs are the final policymakers for their counties with respect to their law enforcement functions, the next question is for whom is the sheriff the final policymaker − the state, the county, or the office of the sheriff? Stated differently, may an Illinois county be liable under § 1983 for actions of its sheriff? Two decisions of the Seventh Circuit Court of Appeals have concluded that they cannot. *See Ryan v. County of DuPage*, 45 F.3d 1090, 1092 (7th Cir.1995) (holding that county was properly dismissed from § 1983 complaint because it was not responsible for complained-of conduct of sheriff's employees); *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir.1989) (holding that plaintiff could not maintain § 1983 action against Cook County for policies, practices, and customs of Sheriff of Cook County related to Cook County Jail), *cert. denied*, 495 U.S. 929, 110 S.Ct. 2167, 109 L.Ed.2d 496 (1990). . . . [A]fter consideration of the Supreme Court's recent decision in *McMillian v. Monroe County, Ala.*, __ U.S. __, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997), the court concludes that the question of whether an Illinois sheriff is the final policymaker for the county must be subjected to a more searching analysis than was apparently applied in *Ryan* and *Thompson*. . . . In *McMillian*, it was undisputed that the sheriff was a 'policymaker' for purposes of § 1983; the question before the Court was whether he was a policymaker for the State of Alabama or for Monroe County. Based on an examination of Alabama law, the Court concluded that the sheriff represented the State of Alabama and was not a policymaker for the county. . . . Applying the *McMillian* Court's analysis to Illinois' treatment of the office of county sheriff, the court concludes that Illinois' sheriffs are county officials and that counties are therefore liable for the actions of those sheriffs and their departments. . . . While the court cannot say that Illinois counties exercise a great deal of control over county sheriffs, they clearly exercise more control over county sheriffs than do counties in Alabama. Moreover, the fact that the County Board has little or no direct control over an Illinois sheriff

underscores the latter's role as final policymaker on law enforcement issues. It provides little help on answering the corollary question as to whether he is the final policymaker for the County or for some other entity. The overall organization of the county system in Illinois suggests that sheriffs, as county officials, make policy for the county and not for the State nor simply for their own departments. For these reasons, the court concludes that, based on Illinois law, a sheriff is the final policymaker (on law enforcement issues) for the county in which she is elected. . . . The court reads *McMillian* to hold that the proper analysis relates to whether the State or the County is the entity liable for the complained-of acts of the Sheriff, and not whether an independent third party (i.e., the Sheriff) is the proper *Monell* defendant.").

Woodget v. Cook County Department of Corrections, No. 94 C 3410, 1994 WL 695453, *5 (N.D. Ill. Dec. 10, 1994) (not reported) ("In *Ruehman v. Village of Palos Park*,. . . the court noted that, as the clerk of a circuit court is defined by state law as being an employee of the state, a damages suit against the Clerk of the Circuit Court in her official capacity is essentially a suit against the state despite the fact that Cook County may be required to pay any liability incurred. As the state is not a person suable under § 1983, [cite omitted], the *Ruehman* court concluded that the plaintiff's damages claim against the Circuit Court Clerk was not permitted. . . Given the reasoning of *Ruehman*, this Court grants Defendants' Motion to Dismiss the § 1983 claim for damages against Defendant Pucinski in her official capacity.").

Indiana

Kinder v. Marion County Prosecutor's Office, No. 24-1952, 2025 WL 914342, at *4–6 (7th Cir. Mar. 26, 2025) ("Our court held in *Jones* that an Indiana county prosecutor served as a state official, and was thus not a 'person' under § 1983, when 'prosecuting criminal cases.'. . But because the evaluation is not 'categorical,'. . *Jones* does not necessarily resolve the issue here: Whether the prosecutor's office in its employment function is also an arm of the state. An initial matter requires clarification. Kinder argues *Jones* is distinguishable because she has not sued Mears in his 'official capacity,' but rather the MCPO 'as an employer.' But even as an employer, the MCPO acts in its 'official capacity.' *Jones* dealt with a suit against a prosecutor in his official capacity, yet the Supreme Court has held that 'an official-capacity suit is ... to be treated as a suit against the entity.'. . Accordingly, the lawsuit in *Jones* was against both the prosecutor in his official capacity and the prosecutor's office as an entity. Turning back to the question of the 'person' who can be sued under § 1983, *Jones* dealt extensively with the Indiana laws creating the prosecutor's office. We provide a brief summary here. Prosecutors are constitutional officials, 'removable only by way of impeachment.'. . . No state laws govern the MCPO's employment decisions per se. But Indiana law does contain a requirement for counties to finance prosecutors' offices as to employment. Counties must pay the salaries for non-state-salaried prosecutors, 'investigators, [and] clerical assistance,' as well as other expenses 'necessary for the proper discharge of the duties imposed by law' on the elected prosecutors. . . Kinder's strongest argument is that there is financial interdependence between some of the office's employees and the county, as only the prosecutor and certain deputy prosecutors are paid by the state. . . The remaining

employees are paid by the county. But there are two reasons why Kinder's argument does not require us to treat the office as a county instrumentality. First, the Supreme Court did not find the factor of county funding determinative in *McMillian*, where the county was responsible for paying the sheriff's salary. . . Payment from the county did not 'tip the balance' away from the sheriff being a state official because the county did not have 'the discretion to refuse payment completely.' . . In *McMillian*, Alabama had a funding scheme similar to that here, where the county could not refuse funds below what was 'reasonably necessary' to the sheriff's operations. . . In Indiana, counties may be compelled to remit payment if they are found to have withheld funds below a 'necessary' level. . . Because Indiana law ensures that counties cannot deny prosecutors' offices necessary funds, counties lack 'control over' the offices. . . Albeit in a different context, the Indiana Supreme Court has held that probation officers, even though paid from county treasuries, qualify as state employees. . . These decisions support the conclusion that the MCPO is not excluded from being an arm of the state solely because it receives some county funding. Second, in *Regents* the Supreme Court instructed that when evaluating financial interdependence, courts must consider whether any money judgment 'would be enforceable against the State.'. . Many courts, including ours, have placed special emphasis on this factor. . . Indeed, the Eleventh Circuit has recognized that 'the presence of a state treasury drain alone may trigger Eleventh Amendment immunity and make consideration of the other factors unnecessary.'. . Indiana law provides for just such a drain from the state treasury. The state will 'pay the expenses incurred by' a prosecutor for an action that arises from making or performing 'a decision, a duty, an obligation, a privilege, or a responsibility of the prosecuting attorney's office.'. . These 'expenses' include all costs related to litigation—attorney's fees, judgment or settlement amounts, and costs. . . As the Southern District of Indiana has noted, this indemnification obligation 'draws no distinction between' suits 'based on prosecution of a criminal case' and those 'based on [employment] decisions.'. . So, even though Marion County pays the salaries of some of the MCPO's employees, a significant financial interdependence exists between that prosecutor's office and the State of Indiana. After considering the many laws creating the prosecutor's office, as well as the financial interdependence between that office and the state, we conclude that for Kinder's claim, the MCPO is an arm of the state. It is therefore not a suable "person" under § 1983. We emphasize two additional points. This holding does not, as Kinder argues, 'open[ ] the door for all 91 prosecutors' office[s] in Indiana' to racially discriminate with no recourse available to plaintiffs. Congress may by statute abrogate states' Eleventh Amendment immunity, as it did via Title VII. . . Also, this decision was made more straightforward by the state's indemnifying county prosecutors for all actions taken within the scope of employment. Based on our review of the caselaw and other state statutes, this indemnification is rare—even for Indiana officials. *See* Ind. Code § 36-1-17-3 (establishing that local government officials may be eligible for reimbursement from the county, not the state, and only when proceedings terminate in the official's favor). We offer no opinion on whether a county prosecutor's office would enjoy immunity from a § 1983 claim alleging discriminatory employment practices absent this broad indemnification obligation.")

Kujawski v. Bd. Of Commissioners of Bartholomew County, 183 F.3d 734, 738 (7th Cir. 1999) ("[W]hen Officer Parker promulgated a policy about the confiscation of weapons from those

detained at home, he was acting on authority delegated by the court which is part of the state government. By contrast, here, we must focus on Officer Parker's decisions relating to the employment of community corrections officers. Because the County has personnel authority over community corrections officers, we believe that the district court concluded correctly that, when Officer Parker made employment decisions concerning these employees, he acted as a decisionmaker for the County.").

Luck v. Rovenstine, 168 F.3d 323, 326 (7th Cir. 1999) ("We first address Luck's claim that Sheriff Rovenstine may be liable in his official capacity for the violation of Luck's constitutional rights. This is, in essence, a claim against the office of sheriff rather than a claim against Sheriff Rovenstine himself, and we therefore understand the claim to be directed against the county. . . . Indiana Code ' 36-2-13-5(a) provides without further qualification that it is the sheriff's duty to take care of the jail and its prisoners. Thus, the sheriff's actions are not subject to any further scrutiny or ratification by the county, and the sheriff serves as the county's official decision-maker in matters involving the county jail.")

McCurdy v. Sheriff of Madison County, 128 F.3d 1144, 1145-46 (7th Cir. 1997) ("[T]he sheriff was acting as the agent of the state court system, which is, of course, a part of the state for purposes of the Eleventh Amendment. The warrant was issued by a state court, and merely served by the sheriff. It could as well have been served by a bailiff or other court employee, for the sheriff's duty to serve the warrant was mandatory. . . so the county was not interposed as a decision-making body between the state and him. *Lancaster v. Monroe County*, 116 F.3d 1419, 1429-30 (11th Cir. 1997). As an agent of the state, though not an employee, the sheriff's office . . . was a part of state government rather than county government when serving the state court's warrant. . . . The added wrinkle here, however, is that by delaying the service of the arrest warrant for so long, the sheriff's office may have exceeded the scope of its delegated state authority, may have ceased, therefore, to be an arm of the state . . . . If that is what happened here, this suit would probably be against the deputy in his personal capacity; but it would be (also or instead) against the sheriff in his official capacity if the deputy had been acting pursuant to a policy of the sheriff. . . Conceivably, therefore, if improbably, the delay in serving the warrant on McCurdy was pursuant to official policy, and if so he would have an official-capacity suit that was not barred by the Eleventh Amendment.").

Argandona v. Lake County Sheriff's Department, No. 2:06 cv 259, 2007 WL 518799, at *5, *6 (N.D. Ind. Feb. 13, 2007) ("The court concludes that the Lake County Sheriff's Department, when acting in its law enforcement capacity, is neither an arm of the State nor a mere extension of Lake County. Rather, the Department is a separate municipal entity and subject to suit under § 1983. . . . In his response to Lake County's Motion to Dismiss, Argandona admits that Lake County is not liable for the actions of the Sheriff's Department. Rather, he argues that Lake County is a necessary party because it is responsible for paying any judgment awarded to the plaintiff pursuant to I.C. § 34-13-4-1. Argandona makes the argument without reference to Federal Rule of Civil Procedure 19 or any case applying the rule regarding necessary parties. The section of the Indiana Code cited by Argandona does not create obligations that require Lake County to remain a defendant in this

matter. The section states in pertinent part that when a public employee is subject to civil liability, 'the governmental entity ... shall ... pay any judgment ... if ... the governing body of the political subdivision ... determines that paying the judgment ... is in the best interests of the governmental entity.' I.C. § 34-13-4-1 (2006) This section, formerly I.C. § 34-4-16.7-1, makes the grant of indemnity voluntary on the part of the governmental entity. . . Argandona's reliance on this statute is misplaced. First, the application of the statute regards only the indemnification of an individual employee. The liability that may arise from Mikulich in his official capacity, or any liability otherwise placed on the Sheriff's Department, is outside the scope of this provision. In addition, the statute requires that a decision to indemnify an employee must be made by the 'governing body of the political subdivision.' I.C. § 34-13-4-1(2) As the court already has discussed, the Sheriff's Department is a separate entity. Any decision to indemnify Mikulich under this provision necessarily would be made by the governing body of the Sheriff's Department. Further, the provision regards indemnity for acts or omissions that violate the 'civil rights laws of the United States.' The statute creates no apparent obligation on any political subdivision to indemnify Mikulich from liability he may face under Argandona's state law claims. This indemnity, similar to that described under I .C. § 34-13-4-1, is a product of the Indiana Tort Claims Act and also leaves indemnity to the discretion of the governmental entity. . . Not only do these statutes have limited application to this matter, there is no evidence in the record that Lake County has agreed to indemnification. Because Argandona has admitted there is no other basis for leaving Lake County in this case, the county's motion to dismiss is GRANTED.")

Bibbs v. Newman, 997 F. Supp. 1174, 1176, 1181 (S.D. Ind. 1998) ("[W]hen an Indiana prosecuting attorney makes employment decisions concerning deputy prosecuting attorneys, the prosecuting attorney acts as a state official for purposes of the Eleventh Amendment to the United States Constitution and 42 U.S.C. § 1983. . . . In Indiana, a prosecuting attorney does not exercise county power and does not answer to county authorities except for seeking 'necessary' funds to operate the office. Weighing against the limited significance of the county appropriations for office operations are the prosecuting attorney's role as a state official under the state constitution, as well as the significant fact that any judgment in a lawsuit against a prosecutor would be paid by the State of Indiana. The decision to hire or fire a deputy prosecuting attorney is more of a state action than a county action. Although it is clear that a prosecuting attorney in Indiana does not act as a county official in this situation, it might be possible to argue that the prosecuting attorney holds neither a state nor a county office, but acts as a 'circuit official' for the relevant judicial circuit. A political subdivision cannot invoke a state's sovereign immunity under the Eleventh Amendment. A political subdivision, however, maintains a status independent of the state and generally has the power to levy taxes, pay judgments, and issue bonds. . . A judicial circuit in Indiana has none of these attributes. Plaintiff therefore cannot avoid the Eleventh Amendment problem here by treating the prosecutor as a 'circuit' official.").

Wisconsin

Aleman v. Milwaukee County, 35 F. Supp.2d 710, 717 n.7, 721 (E.D. Wis. 1999) ("The court notes that Judge Adelman of this district court, in a well- reasoned opinion, recently addressed the issue of Wisconsin sheriffs' immunity under the Eleventh Amendment. *See Abraham v. Piechowski*, 13 F.Supp.2d 870 (E.D.Wis.1998). While this court concurs in much of Judge Adelman's reasoning, the sheriff's functions at issue here are distinct from those in *Abraham*, and thus require a separate analysis. . . . If plaintiffs prove their damages, Milwaukee County will have to pick up the Sheriff's share of the judgment. The County Defendants have not presented the court with any evidence that the State of Wisconsin may incur any financial liability for a judgment against the Sheriff. Accordingly, the court finds that the Sheriff is not entitled to Eleventh Amendment immunity for the claims in this action").

Abraham v. Piechowski, 13 F. Supp.2d 870, 871-79 (E.D. Wis. 1998) (concluding that "in view of Wisconsin constitutional and statutory changes, the Seventh Circuit's last pronouncement on the issue [in *Soderbeck v. Burnett County, Wis.*, 821 F.2d 446 (7th Cir.1987) (Soderbeck II)] [no longer] has continuing force[,]" and "that when sheriffs perform law enforcement functions they represent the county not the state, and that sovereign immunity, therefore, does not bar this lawsuit.").

EIGHTH CIRCUIT

Arkansas

Evans v. City of Helena-West Helena, Arkansas, 912 F.3d 1145, 1146-47 (8th Cir. 2019) ("The district court's other rationale—that the clerk is a state government official whose actions are not attributable to the City—is more complicated. Whether the clerk acts on behalf of the State, the City, or the County depends on the definition of the clerk's official functions under relevant state law. *McMillian v. Monroe County*, 520 U.S. 781, 786, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997); *Dean v. County of Gage*, 807 F.3d 931, 942 (8th Cir. 2015). The City defends the district court's conclusion based on Amendment 80 to the Arkansas Constitution. That Amendment, effective in 2001, vests the judicial power in the 'Judicial Department of state government, consisting of a Supreme Court and other courts established by this Constitution.' Ark. Const. amend. 80, § 1. Another section provides that 'District Courts are established as the trial courts of limited jurisdiction.' *Id.* § 7(A). The City maintains that because the Phillips County District Court was part of the judicial department of state government, and the clerk was appointed by a judge of the district court, the clerk's actions against Evans were attributable to the State, not to the City. Amendment 80, however, was not fully implemented immediately as to the Phillips County District Court. The Amendment granted the General Assembly 'the power to establish jurisdiction of all courts ... and the power to establish judicial circuits and districts and the number of judges for Circuit Courts and District Courts.'. . Although the legislature provided in 2003 that Phillips County would have a district court with elected judges, . . . the judges were not state employees. As of 2008, the 'structure of limited jurisdiction courts consist[ed] of a combination of full-time and part-time district and city courts funded by city and county governments[.]' Ark. Code Ann.

§ 16-17-1101(2) (West 2008). The General Assembly then established 'a pilot program that create[d] a limited number of state-funded pilot state district court judgeships,'. . . but Phillips County was not included. . . Judges outside the pilot program, like those in Phillips County, continued to be employees of the cities or counties, or both, that they served. . . It was not until 2017, after the events alleged in Evans's complaint, that Phillips County was one of several counties that were 'reorganized as state district courts and served by a state district court judge.'. . . Until then, Phillips County was among those counties that were 'served by local district courts.'. . . During the relevant period, state law gave cities and counties authority to set salaries for the district court clerk, . . and the complaint alleges that employees of the court were hired by the City and paid by the City, with salaries accounted for in the City's annual budget. The district court resolved the case on a motion to dismiss, so the record has not been developed with respect to the clerk's duties and responsibilities, the source of the clerk's pay, or the degree of control that state or local officials, respectively, exercised over the clerk. . . At this stage of the proceeding, however, we conclude that the complaint states at least a plausible claim that the clerk was a city official at the time of the alleged wrongdoing, in which case the City could be accountable for actions of the clerk that establish or carry out an unconstitutional policy or custom of the municipality. We therefore conclude that the case should not have been dismissed for failure to state a claim on the grounds specified by the district court. We express no view on whether the complaint otherwise is sufficient to state a claim against the City.")

Iowa

Shepard v. Wapello County, 303 F.Supp.2d 1004, 1017, 1018 (S.D. Iowa 2003) ("The Sheriff's statutory authority over the removal of sheriff's department employees, the comprehensive policies adopted by Sheriff Kirkendall with respect to the retention, discipline and discharge of employees of his department, and the testimony of Supervisor Parker and Sheriff Kirkendall establish that the Sheriff was the final policy maker for his department with respect to the discharge of employees. Consequently the retaliatory discharge in violation of Shepard's rights under the First Amendment was, in light of the jury's answer to the special interrogatory, the policy of Wapello County subjecting it to § 1983 liability for the decision.")**.**

Minnesota

Butler v. Fletcher, 465 F.3d 340, 342 (8th Cir. 2006) ("Butler sued Sheriff Fletcher in his official capacity, so in essence, this is a suit against Ramsey County. 'A county is liable [under § 1983] if an action or policy itself violated federal law, or if the action or policy was lawful on its face but led an employee to violate a plaintiff's rights and was taken with deliberate indifference as to its known or obvious consequences.'").

St. James v. City of Minneapolis, No. 05-2348 (DWF/JJG), 2006 WL 2591016, at *3, *4 (D. Minn. June 13, 2006) ("Whether HCAO's prosecutorial decisions represent official County policy for § 1983 purposes is a question of first impression in the District of Minnesota and Eighth Circuit. . . . Applying the *McMillian* framework to the facts of this case, the Court finds that the Hennepin

County Attorney, when acting in its prosecutorial role, is a state actor and not a local government entity subject to § 1983 liability. The office of the county attorney, although identified as a county office by statute, functions as an arm of the state when prosecuting felonies. Minnesota law supports this conclusion. . . . The prosecutorial role of the county attorney, which is independent from the county board, outweighs the fact that the county pays the salaries of the county attorney's employees. Additionally, the fact that the Minnesota constitution does not identify HCAO as a member of the executive department is not determinative of whether county attorneys are state actors when prosecuting cases. The Minnesota Supreme Court has held that the obligation of the county attorney to prosecute criminal cases does, indeed, arise from the Minnesota Constitution.").

Nebraska

Dean v. Cty. of Gage, Neb., 807 F.3d 931, 942 (8th Cir. 2015) ("A comparison of Nebraska and Alabama law demonstrates that Nebraska sheriffs make policy on behalf of their counties. In *McMillian,* the Court examined three compelling authorities: (1) the Alabama constitution lists sheriffs as members of the state executive branch; (2) 'authority to impeach sheriffs was moved from the county courts to the State Supreme Court,' and (3) the Alabama Supreme Court has held that 'tort claims brought against sheriffs based on their official acts ... constitute suits against the State, not suits against the sheriff's county.'. . Nebraska law differs from Alabama law in each area. Neither the Nebraska constitution nor its statutes list sheriffs as members of its executive branch. . . Unlike Alabama, Nebraska district courts have authority to remove county officers, including sheriffs. . . Finally, the Nebraska Supreme Court has held a county liable for the negligent and intentional torts of its sheriff. . . Other Nebraska laws indicate that sheriffs represent the county when acting in a law enforcement capacity. A sheriff is a county officer. . .A sheriff's salary is set by the county board. . . The county provides the sheriff's office with equipment. . . The registered voters elect the county sheriff and may recall the sheriff from office. . . True, some statutes show state influence. For example, sheriffs are required to train in the Nebraska Law Enforcement Training Center. . . Sheriffs 'shall attend upon the district court' and must 'execute or serve all writs and process issued by any county court.'. . The State also empowers sheriffs to act beyond the boundaries of their counties in some circumstances. . . Nowhere has the Nebraska legislature given other county officers the authority to enact policies on criminal investigation and arrests. . . However, based on the *McMillian* factors, Sheriff DeWitt represents the county in the area of law enforcement investigations and arrests.")

Poor Bear v. Nesbitt, 300 F.Supp.2d 904, 916, 917 (D. Neb. 2004) ("Nebraska law does not grant authority to counties or county sheriffs like Robbins to set policy regarding apprehension of individuals who violate the state's criminal laws. Neb.Rev.Stat. Ann. '' 23-103 to -145, 23-1701 to -1737 (LexisNexis 1999 & Cum Supp.2003). To the contrary, county sheriffs like defendant Robbins are bound by state law to exercise only those powers and duties 'conferred and imposed upon him or her by other statutes and by the common law,' including the duty to 'apprehend, on view or warrant, and bring to the court all felons and disturbers and violators of the criminal laws of this state, to suppress all riots, affrays, and unlawful assemblies which may come to his or her

knowledge, and generally to keep the peace in his or her proper city.' Neb.Rev.Stat. Ann. '' 23-1701.02 & 23-1701.03. *See also* Neb.Rev.Stat. Ann. ' 23-1710 (sheriff has duty to preserve peace, ferret out crime, apprehend and arrest all criminals, secure evidence of crimes committed, present evidence to county attorney and grand jury, and file informations 'against all persons who he knows, or has reason to believe, have violated the laws of the state.") In this case, Poor Bear essentially alleges that Robbins violated Poor Bear's constitutional rights when Robbins participated in issuing an order preventing Poor Bear and others from engaging in a protest march down the main street of Whiteclay after having observed violence and destruction during a similar protest just a week earlier, apprehending Poor Bear when he violated such order, and pursuing prosecution for violation of the order, yet failing to zealously pursue crimes that have been committed against the Lakota people. The policies Sheriff Robbins is charged with carrying out − keeping peace, apprehending and arresting violators of the law, and pursuing prosecution of those who have violated state law − are set by the state legislature, and the implementation of these policies by a municipal official does not constitute formulation by a final policy-making body sufficient to impose liability upon the municipality. . . . In short, a 'county sheriff acts pursuant to state-enacted restrictions in enforcing the criminal laws of Nebraska and is not himself a policy maker for the county for which he is sheriff.' *Branting v. Schneiderheinz,* 1996 WL 580457, at *3 (D.Neb.1996). Accordingly, I shall grant defendant Robbins' motion to dismiss the causes of action asserted against him for failure to state a claim.").

NINTH CIRCUIT

Arizona [state]

Flanders v. Maricopa County, 54 P.3d 837, 847 (Ariz.App.Div. 2002) ("The Sheriff set the conditions of Flanders' confinement by establishing policies in his role as chief administrator for County jails. That the Sheriff may also be individually liable for conditions he established at this facility does not negate the County's liability for his actions as the person who exercises the County's governmental authority. . . .Because the judgment against the Sheriff was for constitutional violations committed in his official capacity, the County is liable as a matter of law. . .Such a judgment imposes liability upon the public entity that the official represents, whether or not that entity is joined as a party, provided the public entity received notice and an opportunity to respond.")

Arizona [federal]

Taylor v. County of Pima, 913 F.3d 930, 937-39 (9th Cir. 2019) (Graber, J., concurring) ("Plaintiff Louis Taylor has asserted claims against the County under *Monell v. Department of Social Services,* . . . which requires proof of a policy, practice, or custom by the County. He asserts that the actions of certain government officials amounted to a practice or custom by the County. The County's sole argument on appeal is that the relevant officials were, in fact, working on behalf of the State, so the County cannot be liable. The Supreme Court has recognized the viability of that argument: if the relevant officials were working on behalf of the State, then any practice or custom

was a *State* practice or custom, not a *municipal* practice or custom. *McMillian v. Monroe County*, 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997). But that argument does *not* bear on whether the municipality has Eleventh Amendment immunity. Proof that the relevant officials did not work for the municipality defeats the plaintiff's case but by virtue of an ordinary failure to prove an element of a claim—here, the existence of a *municipal* policy, practice, or custom. If the defendant municipality is correct that the relevant official was a State official, then the plaintiff has failed to state a claim against the municipality. Eleventh Amendment immunity plays no role. . . . Not surprisingly, our cases, too, describe this doctrine in terms of whether the municipality was the actor, rather than in terms of sovereign immunity and the Eleventh Amendment. [collecting cases] . . . .Applying *Swint*, other circuit courts have held, unambiguously, that '[w]hen a county appeals asserting that a sheriff is not a county policymaker under § 1983, that presents a defense to liability issue for the county over which we do not have interlocutory jurisdiction.'. . Applying *Swint*'s rule here, we lack jurisdiction over the County's interlocutory appeal because the County argues solely that the relevant officials were not County policymakers. Our decision in *Cortez* overlooked this fundamental jurisdictional defect. *Cortez*, like this case, was an interlocutory appeal by a county from the denial of Eleventh Amendment immunity. . . We stated, correctly, that we had jurisdiction over the denial of Eleventh Amendment immunity, but we then reached the issue whether the sheriff acted on behalf of the county or the state, incorrectly characterizing that issue as pertaining to the Eleventh Amendment. . . We did not cite *Swint*. Accordingly, the rule in our circuit, unlike the rule in every other circuit, is that interlocutory appeals may be taken from a district court's rejection of a municipality's argument that the relevant government officials acted on behalf of the State and not the municipality. We plainly erred in *Cortez*. In an appropriate case, we should undo this error in our en banc capacity.")

Melendres v. Maricopa County, 897 F.3d 1217, 1223 (9th Cir. 2018), *cert. denied*, 140 S. Ct. 96 (2019) ("We turn now to the County's contention that it is not a proper party to this action because MCSO and its sheriff do not act on behalf of the County. We have already—thrice—rejected this argument. In *Melendres II*, we substituted the County as a defendant in this action in the place of MCSO, relying on a state court case holding that MCSO lacked separate legal status from the County. . . In *Melendres III*, we elaborated on the County's liability for MCSO's actions. We explained that 'under the Supreme Court's decisions interpreting 42 U.S.C. § 1983, "if the sheriff's actions constitute county policy, then the county is liable for them."'. . Applying this rule, we concluded, 'Arizona state law makes clear' that the MCSO sheriff's 'law-enforcement acts' constitute County policy because he has 'final policymaking authority.'. . We recently revisited the issue again, holding that the sheriff acts as a final policymaker for the County on law-enforcement matters. *United States v. County of Maricopa*, 889 F.3d 648, 651 (9th Cir. 2018). Our prior decisions are binding on us now. . . The County is a proper party to this action.")

United States v. County of Maricopa, Arizona, 889 F.3d 648, 650-53 (9th Cir. 2018) ("Throughout the proceedings below, the County argued that it too should be dismissed as a defendant, on two different grounds. First, the County argued that when a sheriff in Arizona adopts policies relating to law-enforcement matters, such as the traffic-stop policies at issue here, he does

not act as a policymaker for the county. He instead acts as a policymaker for his own office, or perhaps for the State. The County contended that, because Arpaio's policies were not policies of the County, it could not be held liable for the constitutional violations caused by execution of them. Second, the County argued that, even if Arpaio acted as a policymaker for the County, neither Title VI nor 34 U.S.C. § 12601 permits a local government to be held liable for the actions of its policymakers. The district court rejected both of the County's arguments. The court then granted the United States' motion for summary judgment with respect to claims predicated on the traffic-stop policies found unlawful in *Melendres*. The court held that the County was barred by the doctrine of issue preclusion from relitigating the issues decided in the *Melendres* action, which by that point had reached final judgment. The County does not contest that if the *Melendres* findings are binding here, they establish violations of Title VI and § 12601. On appeal, Maricopa County advances three arguments: (1) Arpaio did not act as a final policymaker for the County; (2) neither Title VI nor § 12601 renders the County liable for the actions of its policymakers; and (3) the County is not bound by the *Melendres* findings. We address each of these arguments in turn. . . .We have already rejected Maricopa County's first argument—that Arpaio was not a final policymaker for the County. In *Melendres v. Maricopa County*, 815 F.3d 645 (9th Cir. 2016) (*Melendres III*), we noted that 'Arizona state law makes clear that Sheriff Arpaio's law-enforcement acts constitute Maricopa County policy since he "has final policymaking authority."'. . . Because that determination was arguably *dicta*, we have conducted our own analysis of the issue, and we reach the same conclusion. To determine whether Arpaio acted as a final policymaker for the County, we consult Arizona's Constitution and statutes, and the court decisions interpreting them. . . Those sources confirm that, with respect to law-enforcement matters, sheriffs in Arizona act as final policymakers for their respective counties. . . . It is true that sheriffs in Arizona are independently elected and that a county board of supervisors does not exercise complete control over a sheriff's actions. Nonetheless, 'the weight of the evidence' strongly supports the conclusion that sheriffs in Arizona act as final policymakers for their respective counties on law-enforcement matters. . . Because the traffic-stop policies at issue fall within the scope of a sheriff's law-enforcement duties, we conclude that Arpaio acted as a final policymaker for Maricopa County when he instituted those policies. . . .Maricopa County next argues that, even if Arpaio acted as the County's final policymaker, neither Title VI nor 34 U.S.C. § 12601 permits the County to be held liable for his acts. Whether either statute authorizes policymaker liability is an issue of first impression. We conclude, informed by precedent governing the liability of local governments under 42 U.S.C. § 1983, that both statutes authorize policymaker liability. . . .In short, Maricopa County is liable for violations of Title VI and § 12601 stemming from its own official policies. As discussed above, when Arpaio adopted the racially discriminatory traffic-stop policies at issue, he acted as a final policymaker for the County. Those policies were therefore the County's own, and the district court correctly held the County liable for the violations of Title VI and § 12601 caused by those policies.")

California [state]

Venegas v. County of Los Angeles, 11 Cal.Rptr.3d 692, 717, 723 (2004) (Werdegar, J., concurring and dissenting) ("Today's decision creates a direct conflict between this court and the federal Court of Appeals on the immunity of California sheriffs from liability on a federal cause of action. [*citing Brewster v. Shasta County*, 275 F.3d 803 (9th Cir.2001)] Both positions have some support in precedent and logic, suggesting that the anomaly of conflicting decisions is likely to endure until resolved by a higher authority. Although dependent on an understanding of sheriffs' functions under state law, immunity from section 1983 liability is of course a federal question. . . The conflict created today can, therefore, be resolved effectively only by the United States Supreme Court. . . .[T]he disputed point is the relevance and weight, under federal law, to be given a particular aspect of state law defining the relationship of California sheriffs to the state and county governments. Until this question is resolved, federal district courts in California will be required to follow one rule, permitting section 1983 suits against sheriffs' departments, while California superior courts will be required to follow the opposite rule, prohibiting such actions. I urge the United States Supreme Court to consider removing this anomaly by deciding the underlying issue of federal law.")

Venegas v. County of Los Angeles, 11 Cal.Rptr.3d 692, 716 (2004) (Kennard, J., concurring and dissenting) ("Because the Ninth Circuit considers California sheriffs performing law enforcement functions to be county officers, the majority's contrary conclusion here creates a split that results in immunizing sheriffs from section 1983 liability in actions brought in state court while exposing them to liability in identical actions filed in federal court. This effectively drives California civil rights plaintiffs with actions against a county sheriff out of our court system and into federal court. To ensure uniformity in the enforcement of federal civil rights law in both state and federal courts in California, the United States Supreme Court should decide which view is correct.")

Chiaramonte v. Cnty. of Los Angeles, B243215, 2014 WL 4678955, *7, *8 (Cal. Ct. App. Sept. 22, 2014) ("No California case. . . has held that the sheriff acts on behalf of the state in the provision of medical care to inmates of the county jail. Unlike assigning inmates to cells or buildings in the jail, segregating them for security reasons, or determining whether to release them, providing medical care to inmates does not necessarily involve a law enforcement function. . . No case has held that everything the sheriff does in operating the jails qualifies as conduct on behalf of the state. To the contrary, the determination of whether a particular government official acts for the state or the county ' "does not require an 'all-or-nothing' categorization applying to every type of conduct in which the official may engage. Rather, the issue is whether the official is a local policymaker with regard to the particular action alleged to have deprived the plaintiff of civil rights."'. . .Chiaramonte claims that the Los Angeles County Sheriff's Department performed three particular functions or actions, pursuant to policies, that violated section 1983. Chiaramonte alleges that the sheriff's department (1) failed to respond promptly to a medical emergency, (2) did not have a doctor or emergency medical care professional at or near the jail in which he was incarcerated, and (3) employed a (far away) 'Medical Officer of the Day' who had a history of abandoning and ignoring inmates who needed medical attention. We agree with the County that the first claim, regarding the timeliness of the response to Chiaramonte's medical condition,

involves law enforcement activity similar to *Bougere* and *Peters*, because the County submitted evidence that the response time is related to jail, inmate, and staff security. For example, Young, a custody assistant on duty during Chiaramonte's medical emergency, stated that he needs to 'call for deputy back-up, before entering the dorm ... for safety and security reasons,' and that he must wait until 'sufficient custody personnel arrive[s]' before it is safe to enter the dorm. Kim stated that the jail must provide her with a security escort and also secure the infirmary before she can respond to a 'man down' emergency in the dormitory. Deputy Torres, who was working the evening shift, stated that if it is necessary to enter a cell containing other inmates to reach a 'man down,' he must wait for back-up deputies to arrive before entering the cell 'for safety and security reasons.' Thus, policies like the one in this case that affect the time it takes to respond to a medical emergency unquestionably relate to law enforcement activities of the sheriff, and under *Venegas, Bougere,* and *Peters* government officials implementing and executing those policies are entitled to immunity. In contrast, Chiaramonte's second claim, the decision whether and when to have a doctor on the jail premises, does not involve the kind of law enforcement activities that the *Venegas, Bougere,* and *Peters* courts found were actions taken on behalf of the state. In the 'particular action' at issue in this case, the sheriff's department was not investigating criminal activity (*Venegas*), assisting in the prosecution of crimes (*Pitts*), maintaining security in the jail (*Bougere*), or ensuring the safety of the public (*Peters*). The sheriff's department was performing the administrative function of scheduling doctors. The only evidence the County submitted in its motion for summary judgment of why there was no doctor at the jail when Chiaramonte required medical attention was the statement by Dr. Julian Wallace, the Chief Physician of the Sheriff's Department's Medical Services Bureau, that the jail where Chiaramonte was incarcerated had doctors at the facility clinic Monday through Friday from 6:30 a.m. to 2:30 p.m. but not after that. Such a scheduling decision seems reasonable, but it is a scheduling decision, not a law enforcement one. Indeed, the scheduling of doctor shifts at the jail is closer to the employment decision or 'administrative function arguably unrelated to the prosecution of state criminal law violations' that the Supreme Court in *Pitts* suggested was not an action on behalf of the state. . .The County asserts that '[t]here is no authority whatsoever for the County Board of Supervisors to dictate the policies within the jail regarding medical care, including staffing of medical personnel, for the prisoners or to otherwise control the operation of the jail in this regard.' Penal Code section 4015, subdivision (a), however, provides: 'The board of supervisors shall provide the sheriff with necessary food, clothing, and bedding, for those prisoners, which shall be of a quality and quantity at least equal to the minimum standards and requirements prescribed by the Board of Corrections for the feeding, clothing, and care of prisoners in all county, city and other local jails and detention facilities.' Chiaramonte also cites to Government Code sections 29602['[t]he expenses necessarily incurred in the support of persons charged with or convicted of a crime and committed to the county jail ... are county charges'] and 25351 [board of supervisors has the power to construct, expand, and repair jails]. As the court recognized in *Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, Penal Code section 4015, subdivision (a), and Government Code section 29602, as well as 'other statutes[,] establish the duty of the board of supervisors to provide the sheriff with necessities for prisoners.'. . Although this is a close case, the facts and circumstances here do not justify an extension of Eleventh Amendment immunity to all of Chiaramonte's claims. Because

on this record at least one of Chiaramonte's claims is not subject to Eleventh Amendment immunity, the County was not entitled to summary adjudication of his cause of action under section 1983.")

Pierce v. San Mateo Cnty. Sheriff's Dep't, 181 Cal. Rptr. 3d 816 (Ct. App. 2014) ("In sum, the California Supreme Court's decision in *Venegas* is significant and binding on lower California courts with respect to its holding that county sheriffs are arms of the state while performing state law enforcement activities for purposes of damages liability under section 1983. Its immunity dicta, however, should be left to fade into history. In this case, the holding of *Venegas* and the United States Supreme Court's decision in *Will*, conclusively establish that, as to the law enforcement actions alleged, the San Mateo County Sheriff's Department is not a 'person' under section 1983 and therefore not subject to a suit for damages under that federal statutory provision. . . Accordingly, the County's demurrer on behalf of the Sheriff's Department was correctly sustained without leave to amend.")

California [federal]

Buffin v. California, 23 F.4th 951, 962-65 & n.7 (9th Cir. 2022) ("Here, the San Francisco County Sheriff was charged by state law with enforcing a state-mandated bail regime. We must resolve whether the Sheriff was a state or local official for the purposes of this claim. To do so, we must first home in on the challenged actions the Sheriff took. County officials like the Sheriff can act as county or state officials, depending on the particular context. . . For such officials who 'serve two masters,' we examine whether 'the particular acts the official is alleged to have committed fall within the range of his state or county functions.'. . As the district court explained in great depth when it ruled on the County and Sheriff's motions to dismiss, California's statutory bail regime enlisted the County Sheriff and compelled her to set bail in line with a state-created bail schedule. California law permits a sheriff to set bail using *only* a bail schedule set by the state court; she must set bail at the amount listed in that document. . . Moreover, the Sheriff has no discretion over when to release or hold a pre-trial detainee. If the detainee makes bail, the Sheriff must release her; if not, the Sheriff must keep her in jail pending her court proceedings. . . The district court viewed the State as the Sheriff's master as she set bail under the state-mandated bail schedule. The court therefore concluded that the Sheriff 'act[ed] on behalf of the State' when setting bail. . . Thus, 'the Sheriff [wa]s the actor responsible for enforcing the challenged state law in San Francisco,'. . . and the State was 'the relevant actor when the Sheriff detains a person who does not pay bail[.]'. . Given that unchallenged ruling, the district court did not err in concluding that the Sheriff in her official capacity acted as the State's agent for the purposes of assessing attorney's fees. . . For when a state statutory regime comprehensively 'directs the actions of an official, as here, the officer, be he state or local, is acting as a state official,' *i.e.*, a state agent. . . In other words, instead of exercising control over the Sheriff by signing her paycheck, the State here used its plenary power over the structure of California's government to enlist the Sheriff and command her to do its bidding when she set bail using a bail schedule. The State may make that choice. But in doing so, the State makes the Sheriff a state official in this context, and so bears responsibility for the

unconstitutional actions it mandated she take. . . Despite the State's protest, no further factual information was necessary to establish that the Sheriff acted as an agent of the State. California's own bail law—'the official policy of the State,'. . .—was all the evidence the district court needed. The other provisions of California law generally 'labeling' sheriffs 'as local officials' cannot overcome the fact that—in this particular context—the Sheriff acted for the State. . . Indeed, any other conclusion at the attorney's fees stage would have led to an untenable dissonance with the district court's earlier Eleventh Amendment holding. The district court had noted that the Sheriff was 'entitled to immunity from suit for money damages under the Eleventh Amendment.'. . But the Sheriff could possess that immunity only if she was being sued in her official capacity as a state official. For in an official-capacity suit, a defendant can claim only those 'forms of sovereign immunity that the entity' she represents 'may possess, such as the Eleventh Amendment[.]'. . And only a state, its arms and instrumentalities, and its officials (when sued in their official capacities) enjoy that kind of immunity; the county does not. . . In other words, here the Sheriff's successful assertion of Eleventh Amendment immunity was a telltale sign that she was being sued as a state official—*i.e.*, an agent of the State—in her official capacity. . . That principle also sinks the State's main line of attack in this case. The State's argument that the district court 'conflated the Sheriff's entitlement to immunity as a "state actor" with respect to damages, with the Sheriff's purported status as an *agent* of the State' entirely misunderstands the import of an official-capacity defendant successfully invoking Eleventh Amendment immunity. . . Indeed, we struggle to imagine a situation where an official-capacity defendant, entitled to Eleventh Amendment immunity from monetary relief, would not be an agent of the State and thus a state official. Thus, the district court correctly found that the Sheriff acted as a state official for the purposes of this action, subjecting the State to liability for attorney's fees under § 1988. . . Nor will we reverse the district court's award of attorney's fees because the State's attorneys did not represent the Sheriff throughout this case. Whether a county employee is a state or local official turns on what capacity he acts in when he enforces an unconstitutional law or policy—not which legal office represents him in court. . . And it was the Office of the Attorney General that chose not to represent the Sheriff or to intervene to defend the state bail laws—despite knowing the Sheriff's position that the laws were unconstitutional. . . . Despite the State's apprehension, our holding here does not mean that the State will need 'to intervene to defend the [S]tate's interests every time a local official is sued for purportedly enforcing state law.'. . We simply affirm that a county official who enjoys Eleventh Amendment damages immunity and acts as a discretion-less instrument of the State is a state official. If plaintiffs prove that such an official acted unconstitutionally at the State's command—as the Sheriff did here—the State can face § 1988 fees liability. . . .Given our reasoning here, we need not determine what bearing, if any, the 'state policymaker' test under *McMillian* has on sovereign immunity inquiries under the Eleventh Amendment or on determinations of whether an official-capacity suit targets a state official or a local official. This case does not raise, and we do not here decide, whether an official-capacity suit against a hypothetical 'state policymaker' under *McMillian* who is not entitled to Eleventh Amendment immunity from monetary relief would constitute an official-capacity suit against a 'state official.'. . To the extent the *McMillian* merits inquiry plays any role, the district court's ruling on that issue would only further buttress our conclusion that the Sheriff was a state official.")

Sandoval v. County of Sonoma, 599 F. App'x 673, 674 (9th Cir. 2015) ("Defendants also assert that they are not subject to suit under § 1983 because county sheriffs act as state, rather than county, officials when enforcing the California Vehicle Code. In *Brewster v. Shasta County*, 275 F.3d 803 (9th Cir.2001), we held that 'California sheriffs are county actors when investigating crime.'. . Three years later, in *Venegas v. County of Los Angeles*, 87 P.3d 1 (Cal.2004), the California Supreme Court disagreed. Despite these conflicting holdings, interpretation of federal statutes such as § 1983 is a matter of federal law, not state law. . . As we clarified in [*Streit*], *Venegas* 'does not constitute "an intervening decision on controlling state law" that would authorize, let alone require, us to overrule a prior decision.'. . There is no material difference between the criminal investigations at issue in *Brewster* and the California Vehicle Code enforcement actions alleged to be unconstitutional in this suit. The district court correctly denied defendants' motion to dismiss.")

Jackson v. Barnes, 749 F.3d 755, 765, 766 & n.5 (9th Cir. 2014) ("In short, state case law is helpful to the extent that it aids in our understanding of various state constitutional and statutory provisions. Often, as here, some provisions suggest that the actor in question may be a state official, while others suggest that he may be a county official. Once these provisions have been construed by state courts, we must consider them as a whole, and determine under federal law whether an official is a state or county official. State case law does not control our decision; rather, the ultimate decision we must make is one of federal law. . . .Ultimately, the *Venegas* court is clear that its disagreement with *Brewster* is with *Brewster's conclusion* that the provisions that suggest that a California sheriff is a county official *outweigh* the provisions that suggest that a California sheriff is a state official. The *Venegas* court reaches the opposite conclusion. . . . As Justice Werdegar notes in her concurring and dissenting opinion, the "disputed point" between *Brewster* and *Venegas* 'is the relevance and weight, *under federal law,* to be given a particular aspect of state law defining the relationship of California sheriffs to the state and county governments.'. . We are under no obligation, however, to 'blindly accept [the California Supreme Court's] balancing of the different provisions of state law in determining liability under § 1983.'. . Rather, the proper balance of these various provisions is a question of federal law. . . Because *Venegas* disagrees with *Brewster* on a matter of federal law, it does not constitute 'an intervening decision on controlling state law' that would authorize, let alone require, us to overrule a prior decision. . . Thus, we follow our decision in *Brewster:* a sheriff's department is a county actor when it investigates crime. Therefore, the Sheriff's Department is subject to suit under § 1983 for Jackson's claim that it violated his Fifth Amendment rights in the course of its investigative activities. . . . The overwhelming majority of district court decisions involving California sheriff's departments have continued to follow *Brewster* after *Venegas.* In fact, it appears that only three out of approximately thirty cases to have directly addressed this issue have followed *Venegas*. The three were all unpublished decisions in the Northern District of California, and a subsequent, published opinion in that district rejected their holdings. *See Mateos–Sandoval v. Cnty. of Sonoma,* 942 F.Supp.2d 890, 902 (N.D.Cal.2013). The views expressed in the Northern District's published opinion are uniformly joined by the courts of the Central, Eastern, and Southern Districts of California. [collecting cases]. . . .In conclusion, we hold that Jackson has properly pleaded a claim of *Monell* liability against the Sheriff's Department, and that the Sheriff's Department is subject to suit under

§ 1983 for its investigative activities. Therefore, we reverse the district court's dismissal of this claim.")

Jackson v. Barnes, 749 F.3d 755, 767 (9th Cir. 2014) ("With respect to the Ventura County District Attorney's Office, Jackson alleges, in effect, that the District Attorney's Office is liable for Murphy's unlawful prosecutorial conduct. The District Attorney's Office, however, acts as a state office with regard to actions taken in its prosecutorial capacity, and is not subject to suit under § 1983.")

Goldstein v. City of Long Beach, 715 F.3d 750, 751-53, 755-62 (9th Cir. 2013), *cert. denied by County of Los Angeles v. Goldstein,* 134 S. Ct. 906 (2014) ("We consider in this case whether a district attorney acts as a local or a state official when establishing policy and training related to the use of jailhouse informants. We find that, as to the policies at issue here, the district attorney was acting as a final policymaker for the County of Los Angeles. We thus reverse the district court's grant of the motion for judgment on the pleadings and remand the case. . . . [T]he [Supreme] Court held that the Los Angeles County district attorney and chief deputy district attorney were absolutely immune from Goldstein's claims that the prosecution failed to disclose impeachment material due to a failure to properly train prosecutors, failed to properly supervise prosecutors, and failed to establish an information system containing potential impeachment material about informants. . .On remand, the district court entered judgment in favor of Los Angeles County district attorney John Van de Kamp and chief deputy district attorney Curt Livesay. . . As to the County of Los Angeles' motion for judgment on the pleadings, the district court explained that this Court has not had occasion to address the claims at issue here, but 'reluctantly concluded' that the district attorney acts on behalf of the state, rather than the county, in setting policy related to jailhouse informants 'in light of *Weiner* [*v. San Diego County,* 210 F.3d 1025 (9th Cir.2000)] and the two decisions of [the Northern District of California] construing it.' Therefore, the district court granted the County of Los Angeles' motion for judgment on the pleadings. . . . Here, all parties agree that the district attorney is the relevant policymaker. Thus, the viability of Goldstein's claim turns on whether the Los Angeles District Attorney acted here as a policymaker for the state or for the county. This determination is made on a function-by-function approach by analyzing under state law the organizational structure and control over the district attorney. . . .Based on our analysis of the relevant California constitutional and statutory provisions, we conclude that California district attorneys act as local policymakers when adopting and implementing internal policies and procedures related to the use of jailhouse informants. . . . The county's obligation to defend and indemnify the district attorney in an action for damages is a 'crucial factor [that] weighs heavily[.]' *Streit v. Cnty. of Los Angeles,* 236 F .3d 552, 562 (9th Cir.2001) (citation omitted). In *McMillian,* the Court explained that the state's responsibility for judgments against the sheriff was 'critical' for the case and 'strong evidence in favor of the ... conclusion that sheriffs act on behalf of the State.' *McMillian,* 520 U.S. at 789. [court reviews state constitutional and statutory provisions] Taking all of these provisions together, it is clear that the district attorney acts on behalf of the state when conducting prosecutions, but that the local administrative policies challenged by Goldstein are distinct from the prosecutorial act. Most significant is the contrast between the steps

that were taken in Alabama to increase the state's control over the sheriff in *McMillian* and the contrary California trend to categorize district attorneys as county officials; the fact that '[t]he board of supervisors shall supervise the official conduct of all county officers,' Cal. Gov.Code § 25303; and the fact that the county must defend and indemnify the district attorney in an action for damages, which the Supreme Court deemed 'critical' in *McMillian,* 520 U.S. at 789; *see* Cal. Gov.Code §§ 815.2, 825. Even taking into account the control and supervisory powers of the Attorney General, the Los Angeles County District Attorney represents the county when establishing administrative policies and training related to the general operation of the district attorney's office, including the establishment of an index containing information regarding the use of jailhouse informants. . . . The County's contention that the Supreme Court's conclusion in *Van de Kamp* determines the outcome of this case is incorrect. Though the inquiries of prosecutorial immunity and state or local policymaking may be related, they are separate. The prosecutorial immunity inquiry focuses on 'policy considerations which compel civil immunity,' *Imbler v. Pachtman,* 424 U.S. 409, 429 (1976), and is a federal question that will have a consistent answer nationwide. *See Howlett v. Rose,* 496 U.S. 356, 383 (1990). The state-local determination under Section 1983, although also a federal question ultimately, depends on a careful and thorough analysis of state constitutional and statutory provisions, and will vary 'from region to region, and from State to State.' *McMillian v. Monroe Cnty.,* 520 U.S. 781, 795 (1997). In *Van de Kamp,* the Supreme Court did not look to or examine California law, but focused on common-law traditions and policy implications in determining that the district attorney was entitled to absolute immunity. The County similarly asserts, without citation, that California law conflates the two analyses: district attorneys act as State officials in the same instances that they are protected by absolute prosecutorial immunity. However, the California Supreme Court has explained that it is incorrect to 'assume [ ] that the functions for which a prosecutor may obtain absolute, as opposed to qualified, immunity parallel those for which a district attorney represents the state, as opposed to the county.' *Pitts,* 949 P.2d at 935. '[T]hese are in fact separate inquiries.' *Id.; see also Pembaur v. City of Cincinnati,* 475 U.S. 469, 474 n.2 (1986) (holding county liable for prosecutor's actions after petitioner had conceded that prosecutor was absolutely immune). Contrary to the County's argument, our decision in *Weiner* has no bearing on this case. In *Weiner,* we held that a 'district attorney act[s] on behalf of the state, not the county, in deciding to prosecute' a person for a crime, but acknowledged that 'this is not to say that district attorneys in California are state officers for all purposes. To the contrary, California law suggests that a district attorney is a county officer for some purposes.' *Weiner,* 210 F.3d at 1026, 1031. . . .Similarly, the County is incorrect that we are bound by the California Supreme Court's determination in *Pitts* that the district attorney acts on behalf of the state for some purposes. Though we must look at the relevant state law and state courts' characterizations of that law, the final determination under 42 U.S.C. § 1983 is a federal law statutory interpretation question; no deference is due to the ultimate conclusion of the California court that the provisions, taken as a whole, indicate the district attorney was a state actor under Section 1983 for any particular function. . . . Nonetheless, we need not disrupt the California Supreme Court's conclusion because *Pitts* addressed a district attorney function different than the one we confront today. In *Pitts,* the California Supreme Court concluded that 'the district attorney represents the state, not the county, when preparing to prosecute and when prosecuting crimes, and

when establishing policy and training employees in these areas.' . . The California Supreme Court analyzed the provisions of the California Constitution and the statutes discussed above, and based on these considerations, it concluded that 'when preparing to prosecute and when prosecuting criminal violations of state law, a district attorney represents the state and is not a policymaker for the county.'. .That determination is not implicated by Goldstein's claims. . . .In *Pitts,* child witnesses were coerced into testifying falsely that the defendants, their acquaintances or relatives, had sexually abused them. . . Coerced testimony from the alleged victim of a crime is inextricably linked to the prosecution of that crime. The function at issue here, on the other hand, is distinguishable from the question confronted by the California Supreme Court because Goldstein challenges administrative policy and accompanying training, rather than prosecutorial training and policy. Goldstein's challenge focuses on the failure to create an index that includes information about benefits provided to jailhouse informants and other previous knowledge about the informants' reliability, and the failure to train prosecutors to use that index. Goldstein alleges that it was the lack of an index that allowed Fink to lie about the benefits he received for testifying against Goldstein, prevented prosecutors in Goldstein's case from knowing Fink's history, and prevented Goldstein's counsel from impeaching Fink. The conduct at issue here does not involve prosecutorial strategy, but rather administrative oversight of systems used to help prosecutors comply with their constitutional duties. . . .In sum, we conclude that the policies challenged by Goldstein are distinct from the acts the district attorney undertakes on behalf of the state. Even taking into account the control and supervisory powers of the Attorney General, the Los Angeles County District Attorney represents the county when establishing policy and training related to the use of jailhouse informants. Therefore, a cause of action may lie against the County under 42 U.S.C. § 1983. We reverse the judgment of the district court.")

Ceballos v. Garcetti, 361 F.3d 1168, 1182, 1183 (9th Cir. 2004) ("Ordinarily, an official designated as an official of a county − as is the District Attorney of the County of Los Angeles − is a county official for all purposes. Some officials, however, serve two masters. Among them are California's 58 district attorneys: While these officers are elected by and for the counties, they prosecute cases on behalf of the state. In such mixed circumstances, we determine whether the officer is a state or a county official by examining state law to determine whether the particular acts the official is alleged to have committed fall within the range of his state or county functions. [citing *McMillian*] The California Supreme Court has held that a district attorney is a state official when he acts as a public prosecutor, while in other functions he acts on behalf of the county . . . . Whether the District Attorney acted on behalf of the county or the state thus turns on whether the personnel actions alleged by Ceballos are part of the District Attorney's prosecutorial functions or whether he was performing administrative or other non-prosecutorial duties. The California courts have not defined the precise characteristics that distinguish a district attorney's prosecutorial function from his other functions. As *Bishop Paiute Tribe* noted, however, a similar issue as to whether a prosecutor was acting in his prosecutorial capacity, as opposed to an administrative or investigative capacity, arises in determining whether he is entitled to absolute or qualified immunity under § 1983; we may look for guidance to cases addressing that issue. . . . The individual defendants, including Garcetti, do not seek dismissal on the basis of absolute immunity

for the acts they allegedly took against Ceballos. Instead, they seek qualified immunity, implicitly acknowledging that the actions were not prosecutorial, but administrative. In sum, the District Attorney's Office and its thenhead, Garcetti, were carrying out their county functions when they allegedly engaged in the retaliatory acts Ceballos describes. Garcetti is, therefore, not entitled to Eleventh Amendment immunity, and thus the County may not seek summary adjudication on the ground that he was acting on behalf of the state."), *rev'd on other grounds and remanded*, 126 S. Ct. 1951 (2006).

Cortez v. County of Los Angeles, 294 F.3d 1186, 1191 (9th Cir. 2002) ("*Brewster* and *Bishop Paiute Tribe* demonstrate that California sheriffs are final policymakers for the county not only when managing the local jail, but also when performing some law enforcement functions. Therefore, even if we characterized the Sheriff's actions as taken in his law enforcement capacity to keep the peace, we could conclude that the County is subject to § 1983 liability for his actions. However, as previously discussed, we find that the Sheriff was acting in his administrative capacity, rather than as a law enforcement officer. Specifically, we find that the Sheriff's actions were taken pursuant to his policy of segregating inmates identified as gang members, which he established pursuant to his authority as the administrator of the county jail and custodian of the inmates within it. Accordingly, the County can be held liable for his decision to keep Avalos in the gang unit of the jail.").

Bishop Paiute Tribe v. County of Inyo, 291 F.3d 549, 564-66 (9th Cir. 2002) ("[T]o allow the Attorney General's supervisory role to be dispositive on the issue of whether a law enforcement officer acts as a state official would prove too much. The California Constitution grants the Attorney General supervisory authority over all 'other law enforcement officers as may be designated by law.' CAL. CONST. art. V, ' 13. Under this provision, if taken to its logical extreme, *all* local law enforcement agencies in California would be immune from prosecution for civil rights violation, thereby rendering meaningless the decision in *Monell*, which preserves § 1983 actions against local governments. . . . Whether a district attorney engages in prosecutorial conduct when obtaining and executing a search warrant has not been addressed by this Circuit in the context of whether a district attorney is a state or county officer. However, the Ninth Circuit has addressed whether this constitutes prosecutorial conduct as opposed to investigatory conduct in the context of a prosecutor's absolute versus qualified immunity. By analogy, these cases inform our decision . . . . Relying on *Fletcher* and *Buckley*, and recognizing the significant factual distinctions between this case and *Pitts*, we find that the District Attorney was engaging in investigatory, and not prosecutorial, acts when he obtained and executed a search warrant over the Tribe. This conclusion compels our finding that the District Attorney acted as a county officer when obtaining and executing a search warrant against the Tribe. . . . [In addition] we conclude that the Sheriff acted as a county officer when obtaining and executing a search warrant against the Tribe."), *vacated and remanded*, 123 S. Ct. 1887 (2003).

Brewster v. Shasta County, 275 F.3d 803, 807, 808 (9th Cir. 2001) ("It requires little extension of *Streit* for us to conclude that the Shasta County Sheriff acts for the County, not the state, when

investigating crime in the county. . . .[T]he fact that the state legislature has determined that all county officials are to be indemnified by the county government − including the sheriff and the sheriff's department employees, and without exception for their crime investigation functions − indicates that the sheriff is considered a county actor. Further, unlike in *McMillian,* where Alabama sheriffs were required to attend all courts in the state, California sheriffs are required to attend only those courts within their respective counties. . . . We also note that unlike in *McMillian*, in which the Alabama Constitution made a county sheriff subject to impeachment on the authority of the Alabama Supreme Court, not the county, . . . impeachment proceedings against a California county sheriff, as with other county officials, are initiated by a county grand jury, and the sheriff is not included among those officials identified in the California Constitution as subject to impeachment by the state Legislature . . . While this factor may be of somewhat limited weight because a state court appoints the prosecutor to conduct the impeachment proceedings, . . . it nonetheless weighs toward the conclusion that the sheriff acts for the county when investigating crime as well as when administering the jails.").

Streit v. County of Los Angeles, 236 F.3d 552, 564, 565 (9th Cir. 2001) (" Upon examining the precise function at issue in conjunction with the state constitution, codes, and case law, we conclude that the LASD [Los Angeles County Sheriff's Department] acts as the final policymaker for the county when administering the County's release policy and not in its state law enforcement capacity. We therefore affirm the district court's holding that the LASD, when functioning as the administrator of the local jail, is a County actor, and that the County may therefore be subject to liability under 42 U.S.C. § 1983.")**.**

Weiner v. San Diego County, 210 F.3d 1025, 1030, 1031 (9th Cir. 2000) ("Balancing the foregoing constitutional and statutory factors leads us toward the conclusion that under California law a county district attorney acts as a state official when deciding whether to prosecute an individual. The fact that California statutory law lists district attorneys as county officers is not dispositive because, as discussed in *McMillian*, the function of the district attorney, including who can control the district attorney's conduct is the issue. . . . [T]he only significant differences between California law applicable in this case and Alabama law applicable in *McMillian* are that under California law the county sets the district attorney's salary and the district attorney can be removed from office in a fashion similar to other county employees. These differences are not sufficient to produce a result in this case different from the result in *McMillian*. . . . Although a California district attorney is a state officer when deciding whether to prosecute an individual, this is not to say that district attorneys in California are state officers for all purposes. To the contrary, California law suggests that a district attorney is a county officer for some purposes.").

Shilling v. County of San Diego, No. 3:24-CV-01047-CAB-DDL, 2024 WL 5145969, at *4 (S.D. Cal. Dec. 17, 2024) ("Plaintiff has not raised a single case where a court applied then-*Mitchell* or now *Kohn* to determine whether a county sheriff, or similar officer, as a *policymaker*, represented the county or state. Indeed, the Ninth Circuit actually applied *McMillian*, not *Mitchell*, in *Brewster v. Shasta County* when it considered whether a county sheriff represented the state or county when

investigating crime. . . As such, the Court is persuaded that, limited to this inquiry concerning whether a county sheriff as a policymaker represents the county or state in a given function, *McMillian*'s continued use and application is proper. Plaintiff challenged Defendant Martinez, in her official capacity, and her CCW policy, alleging it violated the Second Amendment. . . The Court thus finds that *McMillian*, which *Scocca* relied upon, provides the appropriate and applicable analytical framework in this case, not *Kohn*.")

Puckett v. County of Sacramento, No. 2:22-CV-00350-KJM-DB, 2023 WL 2432919, at *9–10 (E.D. Cal. Mar. 9, 2023) ("Plaintiff alleges the Sacramento District Attorney's Office has a policy of 'selectively withholding exculpatory evidence relevant to criminal prosecutions from defense teams' and 'failing to hold prosecutors accountable' for the ensuing *Brady* violations. . . Thus, plaintiff asserts *Monell* liability against this Office under the same two theories: (1) pervasive customs and policies and (2) failure to train or discipline. The court must first decide if, under each liability theory, the Office acted as an arm of the state or county. Agencies acting as arms of the state are immune from § 1983 claims in federal and state court. . . The status of a District Attorney's Office depends on 'whether the particular acts the official is alleged to have committed fall within the range of his state or county functions.'. . The Ninth Circuit has held that in California, 'prosecutorial functions' are classified as state actions, while 'administrative or other non–prosecutorial duties' are classified as county actions. . . In *Goldstein*, a District Attorney Office's failure to systematically track informant reliability was an administrative failure and not a prosecutorial action. . . The California Supreme Court has drawn a similar distinction, *see Pitts v. Cnty. of Kern*, 17 Cal. 4th 340, 363 (1998) (labeling prosecutor's preparation to prosecute and 'oversight of policies formulated and training conducted in connection with' prosecution as prosecutorial functions). First, plaintiff argues the prosecutor's allegedly pervasive policy encouraging or tolerating *Brady* violations was an administrative decision, akin to the decision in *Goldstein*. . . . As delineated in *Goldstein*, the question here is whether the conduct is part of a prosecutorial strategy or rather properly characterized as 'administrative oversight.'. . Plaintiff's allegations that the Office encouraged or tolerated *Brady* violations is a 'polic[y] or training relating to prosecutorial functions' and is not properly characterized as an administrative action removed from the prosecutorial fray. . . Thus, the district attorney acts on behalf of the state and plaintiff is **barred from bringing this *Monell* claim.** Second, plaintiff argues *Goldstein* supports his position that the district attorney's failure to discipline prosecutors who committed *Brady* violations was administrative and thus the Office acted as an arm of the county. Here, this court agrees. A failure to discipline can expose a failure in oversight and administration. . . Unlike the direct commission of a *Brady* violation, a failure to discipline is not tied directly to 'prosecutorial strategy' but is reflective of administrative policies and oversight of employees. . . In failing to discipline, the District Attorney's Office acted as an arm of the county and is subject to *Monell* liability. . . . Defendants argue plaintiff has not pointed to specific evidence or circumstances in which defendants have failed to discipline prosecutors, or any concrete examples of specific *Brady* violations. . . As explained above, however, plaintiff at this stage cannot be faulted because defendants refuse to search their files or produce detailed information. In showing

46 potential claims over a specific period of time, plaintiff has demonstrated his allegations are sufficiently 'plausible' and therefore defeats the motion to dismiss in this respect.")

Welchen v. County of Sacramento, No. 2:16-CV-00185-TLN-DB, 2018 WL 5617222, at *6-8 (E.D. Cal. Oct. 26, 2018) ("Neither *Streit* nor *Cortez* apply to the facts at hand. The Bail Law is a state law, and the Bail Schedule is set by the Sacramento County Superior Court. . . As such, the Bail Law is not a sheriff-established policy that might be considered an administrative action like the policies at issue in *Streit* or *Cortez*. . . .Moreover, district courts within this circuit have determined that California Sheriffs act as representatives of the state, and not a county, when enforcing state laws, including the Bail Law. . . . Despite Plaintiff's argument that Ninth Circuit precedent bars a finding that the Sheriff is a state actor, Plaintiff's Ninth Circuit cases are distinguishable from the instant case. Further, federal district courts determined sheriffs act on behalf of the state when they are detaining an individual based on court orders. . . Similarly, the Sheriff implements the Bail Law according to the Sacramento County Superior Court's Bail Schedule because he is tasked to do so under state law. . . Thus, the Court determines that Ninth Circuit precedent does not preclude a finding that the Sheriff is a state actor. . . .Despite its title, the Sacramento County Superior Court is an arm of the State. . . . [A]fter carefully analyzing the Bail Law, in *Buffin*, the court determined that 'the Sheriff lacks discretion to release the arrested person outside the bounds of the statute.'. . . As in *McNeely*, where the court found that Cal. Pen. Code § 4004 requires sheriffs to detain arrestees 'until legally discharged,' here, the Sheriff similarly does not have discretion when implementing the Bail Law. . . For these reasons, the Court finds that the Sheriff acts on behalf of the state in implementing the Bail Law. Accordingly, the Eleventh Amendment shields the Sheriff from suit for money damages. However, based on the *Ex Parte Young* exception to sovereign immunity, Plaintiff may seek declaratory or injunctive relief against the Sheriff for allegedly unconstitutional conduct related to the Bail Law. . . . Because the Court has determined that the Sheriff acts on behalf of the state on this issue, the County is not liable for the Sheriff's implementation of the Bail Law.")

Samaan v. County of Sacramento, No. 216CV00789KJMCKD, 2018 WL 4908171, at *6 (E.D. Cal. Oct. 10, 2018) ("This court is not the first to consider whether a California sheriff is an agent of the state or county in the CCW [concealed weapon] licensing arena. In *Scocca v. Smith*, the district court applied the *McMillian* framework in an equal protection challenge to a Sheriff's issuance of CCW permits and determined that the county was 'not an appropriate defendant' because '[the] Sheriff [ ], when making her decisions on granting or denying CCW licenses, acts as a representative of the state of California, and not of the County.'. . .Having considered the California statutory scheme governing the CCW permitting process, this court agrees with the *Scocca* court's sound reasoning and conclusion. Samaan provides no cogent argument to the contrary.")

Branch v. Cty. of San Diego, No. 15-CV-2336 AJB KSC, 2018 WL 1942260, at *5 (S.D. Cal. Apr. 25, 2018) ("Who constitutes the final policymaker on a specific issue is governed by California law. . . . California legal precedent holds that Sheriffs act under State authority when

carrying out law enforcement operations. [collecting cases] Based on this persuasive precedence, the Court finds that affecting an arrest is undoubtedly a law enforcement duty, and one which California law entrusts to Sheriffs. . . Here, when Ward arrested Branch, he was acting as a State law enforcement officer carrying out a State law enforcement function. The final policymaker regarding use of force when affecting an arrest is the Sheriff, as head of the law enforcement department entrusted by State law to affect arrests. A brief examination of the San Diego County Sheriff's Department's Policy & Procedure Manual section 1.2 indicates that '[o]nly the Sheriff may approve Departmental policies and procedures.'. . Thus, Branch's *Monell* claim cannot succeed against Ward, as state officers are immune from *Monell* liability.")

Nelson v. County of Sacramento, 926 F.Supp.2d 1159, 1167-69 (E.D. Cal. 2013) ("This District has . . . steadfastly maintained its adherence to *Brewster*, finding a sheriff is a local actor when investigating crime or running a jail. . .The Eastern District is not alone in its continuing adherence to *Brewster*. [citing *Smith v. Cnty. of Los Angeles*, 535 F.Supp.2d 1033 (C.D.Cal.2008)] Both the Eastern and Central District of California have repeatedly rejected Defendants' arguments, and this Court does the same now. Next, Defendants attempt to distinguish the Ninth Circuit line of cases finding that sheriffs are local actors. Defendants argue that those cases dealt with investigatory duties, while this case involves policies and training methods with regard to the use of force, arrests and the prosecution of criminal activities. . . Defendants' argument finds a hint of support in dicta from two Eastern District cases— *Vega* and *Rainwater*. . .However, Defendants' argument fails for two reasons. First, both *Vega* and *Rainwater* distinguish *Venegas* based on the hypothetical that if *Venegas* controlled, it still would be distinguishable. *Venegas* does not control, and dicta dealing in hypotheticals does not change that. Second, while *Brewster*'s holding addressed crime investigations, its reasoning was not so limited. *Brewster* noted that county boards of supervisors have authority over the 'law enforcement conduct.'. . Furthermore, *Brewster* mentioned that the county controlled the sheriff's salary and would be liable for monetary damages under § 1983 in California. . . These three factors also weigh in favor of finding the sheriff to be a local actor when implementing and overseeing arrest policies. As *Brewster* concluded, 'our own court has long assumed that sheriffs act on behalf of the county, *even* when investigating crime.'. . Crime investigation is but one aspect of a sheriff's 'law enforcement conduct' that falls under the local actor umbrella. . . Defendants cannot point to a single Ninth Circuit or Eastern District of California decision finding a sheriff to be a state actor when it comes to implementing policies regarding arrests and the use of force. . . . This Court finds Jones to be a local actor who is not immune from a § 1983 suit for purposes of this case.")

Ismail v. County of Orange, 917 F.Supp.2d 1060, 1070, 1071 & n.8 (C.D. Cal. 2012) ("Ordinarily, an official designated as an official of a county—as is the District Attorney of the County of Los Angeles—is a county official for all purposes. Some officials, however, serve two masters. Among them are California's 58 district attorneys: While these officers are elected by and for the counties, they prosecute cases on behalf of the state. In such mixed circumstances, we determine whether the officer is a state or a county official by examining state law to determine whether the particular acts the official is alleged to have committed fall within the range of his state or county functions.

. .The California Supreme Court has held that a district attorney is a state official when he acts as a public prosecutor. . . That means that claims against the Deputy D.A. in her official capacity, with regard to acts and omissions by her while acting as a public prosecutor, constitute claims against the State of California. This is significant because States and arms of the State possess immunity from suits authorized by federal law. . . . . *Contrast Webb v. Sloan,* 330 F.3d 1158, 1163–66 (9th Cir.2003) (holding that municipality could be held liable under section 1983 for actions of its deputy district attorneys, because those officials were acting as final policymakers for the municipality, under *Nevada* state law, in deciding whether to prosecute the section 1983 plaintiff); *Streit v. County of Los Angeles,* 236 F.3d 552, 555–56 (9th Cir.2001) ("Because we conclude that the LASD [Los Angeles Sheriff's Department], when implementing its policy of conducting prisoner release records checks, acts for the County in its capacity as administrator of the Los Angeles County jails, we hold both the LASD and the County are subject to liability under section 1983.")."), *aff'd by Ismail v. County of Orange,* 676 F. App'x 690 (9th Cir. 2017).

Nelson v. County of Sacramento, No. 2:12–cv–02040–MCE–GGH., 2013 WL 708541, 7 (E.D. Cal. Feb. 26, 2013) ("Defendants cannot point to a single Ninth Circuit or Eastern District of California decision finding a sheriff to be a state actor when it comes to implementing policies regarding arrests and the use of force. Furthermore, in the same brief in which Defendants argue Jones is a state actor, they also assert the Sheriff's Department and the County are redundant parties. . . It is contradictory, if not disingenuous, to argue the County and the Sheriff's Department are redundant parties, but that the head of the Sheriff's Department is a state actor, not a local actor for the County. In any event, Defendants' arguments fail. This Court finds Jones to be a local actor who is not immune from a § 1983 suit for purposes of this case.")

Mateos-Sandoval v. County of Sonoma, 942 F.Supp.2d 890, 899-902 (N.D. Cal. 2013) ("The more difficult question is whether Sheriff Freitas should be considered part of the state for sovereign immunity purposes—Defendants contend that he should, and Plaintiffs that he should not. Plaintiffs' allegations against Sheriff Freitas, broadly writ, relate to the setting of policy and procedures governing the county's investigation of vehicle code violations and enforcement of the vehicle code. In *Brewster v. Shasta County,* the Ninth Circuit held that California sheriffs act on behalf of the county, not the state, when they investigate crimes, and are therefore not immune from suit under the doctrine of state sovereign immunity. . . Subsequently, in *Venegas,* the California Supreme Court, expressly disagreeing with the Ninth Circuit's analysis and holding in *Brewster,* held that 'California sheriffs act as state officers while performing state law enforcement duties such as investigating possible criminal activity.'. . Since *Venegas,* a division has arisen between district courts within the Circuit about which rule to apply. Many district courts have continued to apply the Ninth Circuit rule, holding that sheriffs performing law enforcement functions are county officers. [collecting cases] Others, however, have applied *Venegas* and held that sheriffs performing law enforcement functions are officers of the state and therefore immune from suit. [collecting cases] The courts that have continued to apply the Ninth Circuit rule have reasoned that municipal liability under § 1983 is a question of federal law, and that, despite what the California Supreme Court may have said, they remain bound by *Brewster*. . .The determination

whether an official acts on behalf of a state or a county is 'dependant on the definition of the official's functions under relevant state law.'. . This does not mean, however, that federal courts are bound by state court interpretations of state law in this context. In determining whether a local officer or entity is performing a state function, a federal court must conduct its own independent analysis of state law. . . In *Brewster,* the Ninth Circuit conducted an analysis of California state law and concluded that California sheriffs act on behalf of the county, not the state, when performing law enforcement functions. . . The court based this conclusion on the following factors: money judgments against sheriffs are satisfied out of county, not state, funds; 'the California Constitution clearly identifies the sheriff as a county officer'; 'California sheriffs are elected county officers'; 'California sheriffs are only obligated to attend courts within their respective counties'; impeachment proceedings against a sheriff are initiated by a county grand jury; county boards of supervisors exercise authority over the sheriff; and the funding for California sheriffs' departments, including funding for the enforcement of state criminal laws, comes from the county, not the state. . . The dissenters in *Venegas* also concluded, based on the same provisions, that sheriffs act on behalf of counties, not the state, when they enforce state law. . .*Venegas* does not provide a basis upon which this Court may reach a conclusion that is contrary to the Ninth Circuit's holding in *Brewster*. There is no indication that the Ninth Circuit's opinion in *Brewster* turned on California decisional law; in fact, the Brewster court considered and rejected the reasoning of the California cases upon which the majority in *Venegas* based its analysis. . . The Ninth Circuit, sitting *en banc,* recently re-affirmed the rule that a published decision of a Ninth Circuit panel must be followed by panels and district courts within the Circuit 'unless and until overruled by a body competent to do so.'. . This Court lacks that particular competence, and therefore denies the motion to dismiss Plaintiffs' official-capacity claims against Sheriff Freitas.")

Bailey v. Clarke, No. 12–CV–1100–IEG (KSC), 2013 WL 6720628, *3, *4 (S.D. Cal. Dec. 21, 2012) ("Defendant Gore also asserts that, in his official capacity as San Diego County Sheriff, he constitutes a state actor and is thus immune from liability under the Eleventh Amendment. . . . Defendant Gore's purported Eleventh Amendment immunity depends on whether, in his official capacity as San Diego County Sheriff, he acts [as] a state or county representative. In *McMillian v. Monroe County*, the United States Supreme Court addressed a similar situation involving a sheriff in Alabama, and instructed that in determining whether a government official is representative of a state or local entity, a court should consider the actual function of the government official as well as pertinent state law, which, though not dispositive, will often provide useful guidance. . . . The Ninth Circuit, in *Brewster v. Shasta County,* applied *McMillian* to a case arising in California and held that sheriffs in California are employees of their local county, not the state. . . Two years after that Ninth Circuit ruling, the California Supreme Court, in *Venegas v. County of Los Angeles,* expressly rejected *Brewster* as wrongly decided and reached the opposite conclusion, finding sheriffs in California to be state actors. . . In light of *McMillian'*s instruction that state law often provides useful guidance, district courts in California are split; some courts following Ninth Circuit authority per *Brewster,* some courts following the more recent California Supreme Court ruling in *Venegas.* . . . Though the United States Supreme Court held that this 'inquiry is dependent on an analysis of state law,' the Court also explicitly termed it a 'federal

question [that] can be answered only after considering [ ] provisions of state law.'. . Moreover, the Ninth Circuit has subsequently emphasized the federal nature of § 1983 claims, regardless of California interpretation. . . Accordingly, although the question of whether sheriffs are state or local actors must be informed by state law, it ultimately remains a federal, not state, question for purposes of precedential authority. . . As such, the Ninth Circuit's holding in *Brewster,* rather than the California Supreme Court's contrary holding in *Venegas,* controls here. Under controlling Ninth Circuit precedent, Sheriff Gore, in his official capacity, represents the county of San Diego, not the State of California, and therefore is not immune here under the Eleventh Amendment.")

Scocca v. Smith, 912 F.Supp.2d 875, 881-84 (N.D. Cal. 2012) ("Since *McMillian,* courts have had to address whether, under the law of a particular state, a sheriff represents the state or the county in a variety of different functions, including but not limited to law enforcement. Notably, the Ninth Circuit and the California Supreme Court have reached conflicting conclusions as to whether, under California law, a sheriff represents the state or county when he or she investigates a crime. In *Brewster v. Shasta County,* 275 F.3d 803 (9th Cir.2001), the Ninth Circuit held that a sheriff is a representative of the county; in *Venegas v. County of Los Angeles,* 32 Cal.4th 820, 11 Cal.Rptr.3d 692, 87 P.3d 1 (2004), the California Supreme Court held that a sheriff is a representative of the state. . . . *Brewster* and *Venegas,* of course, have limited application in the instant case because, here, the Court is not evaluating whether the sheriff acts as an agent of the state or the county when he or she investigates a crime. Rather, the Court is considering whether the sheriff acts as an agent of the state or county when he or she acts as the CCW [license to carry a concealed weapon] licensing authority. . . The Court thus looks to the general analytical framework provided by *McMillian* in deciding this issue— *i.e.,* how does state law treat a sheriff, in particular, when acting as a CCW licensor? . . . . What the Court finds most instructive are the provisions in the California Penal Code that deal with CCW licensing. Notably, these provisions do not suggest that the county board of supervisors or other county administrator (other than the sheriff) exercises control or oversight over CCW licensing. This stands in contrast to the situation in *Streit v. County of Los Angeles,* 236 F.3d 552, 561 (9th Cir.2001) where the court concluded that a sheriff acts for the county and not the state when overseeing and managing a local jail, not only because, *e.g.,* the sheriff is designated a county officer under the California Constitution but also because *'[t]he counties retain the power* to transfer control of a county jail from the sheriff to a county-created department of corrections, suggesting that the counties actually control and operate the jails, and not the state via the sheriffs.' (Emphasis added.) Rather, the relevant code provisions in the case at bar clearly delineate a role for the state with respect to administration and oversight. . . . Accordingly, the Court agrees with Defendants that Santa Clara County is not an appropriate defendant in this action because Sheriff Smith, when making her decisions on granting or denying CCW licenses, acts as a representative of the state of California, and not of the County.")

Rainwater v. McGinniss, No. 2:11–cv–0030 GGH P, 2012 WL 3308894, *18-*20 (E.D. Cal. 2012 Aug. 13, 2012) ("As the court finds that the defendant in this case, the Sheriff, exercises final policymaking authority regarding the holding of SVP inmates at SCMJ, the determinative question before the court is whether the defendant acts for the county or the state in adopting and

implementing such policies. As set forth below, binding circuit precedent compels the conclusion that the defendant acts for the county in setting policy regarding house SVP inmates that are held at SCMJ. Accordingly, the Eleventh Amendment does not immunize the defendant from liability in this action. The Ninth Circuit has twice applied the principles articulated in *McMillian* to the management of county jails by California sheriffs, and in each of these cases it held that the sheriffs are county (not state) actors under § 1983. *See Streit v. County of Los Angeles,* 236 F.3d 552, 561 (9th Cir.2001) (the sheriff acts on behalf of the county in "the oversight and management of the local jail"); *Cortez v. County of Los Angeles,* 294 F.3d 1186, 1191 (9th Cir.2002) ("We ... hold that the County is subject to § 1983 liability for the Sheriff's actions taken here pursuant to his role as administrator of the county jail."). . . . Defendant relies on the California Supreme Court's decision in *Venegas v. County of Los Angeles,* 32 Cal.4th 820, 831 (2004), and the California Court of Appeal's decision in *County of Los Angeles v. Superior Court,* 68 Cal.App. 4th 1166, 1174 (1998) in urging this court to reach a contrary result. . . . Federal case law governs the issue of whether the sheriff is a state or county actor under § 1983. . . . Moreover, even if *Venegas* were binding authority, it is inapplicable to the present case. *Venegas* held that the sheriff acts on behalf of the state "while performing state law enforcement duties such as investigating possible criminal activity." 32 Cal.4th at 839. Because *Venegas* involved an unreasonable search and seizure claim, which arose during the sheriff's performance of a core law-enforcement function, it is wholly dissimilar to the instant case and the housing conditions in the jail. Therefore, the defendant is not entitled to Eleventh Amendment immunity.")

Rojas v. Sonoma County, No. C–11–1358 EMC, 2011 WL 5024551, at *4 (N.D. Cal. Oct. 21, 2011) ("In the wake of *Brewster* and *Venegas,* California district courts have split on whether a sheriff represents the state or the county when conducting a law enforcement investigation. . . In this instant case, however, the Court need not address this split in authority because here, the actual function of the governmental official that the Court is examining is not Deputy Clark's investigatory services but rather his role in providing courtroom security services. Thus, *Brewster* and *Venegas* have limited relevance. *McMillian* remains the critical case. As noted above, under *McMillian,* to determine whether a governmental official should be considered a representative of either a state or a local entity, a court must consider the actual function of the governmental official, and state law will often provide guidance on this matter. In their papers and at oral argument, Defendants pointed out that, under California Government Code § 77200, the state has sole responsibility for the funding of court operations and, under § 72115, court-related services that were formerly provided by marshals are now provided by sheriffs. . . Therefore, state law establishes that sheriffs − and thus deputies as well − function as representatives of the state and not the county when providing courtroom security services. Mr. Rojas has not pointed to any state law or, for that matter, any other authority to the contrary. In the absence of any such authority, the Court concludes that Defendants have adequately established that Deputy Clark, in providing courtroom security services, was acting as a representative of the state, and not Sonoma County, and therefore, a suit against Deputy Clark in his official capacity amounts to a suit against the state, which is barred by the Eleventh Amendment.")

Fontana v. Alpine County, No. 2:10-CV-00710 JAM-KJN, 2010 WL 3834823, at *4 (E.D. Cal. Sept. 30, 2010) ("This Court will follow the Ninth Circuit and other district court precedents and find that when investigating crimes, sheriffs are county actors who are not protected by Eleventh Amendment immunity.")

Prescott v. County of Stanislaus, No. 1:10-CV-00592-OWW-GSA, 2010 WL 3783950, at *6, *10 (E.D. Cal. Sept. 27, 2010) ("To the extent the conduct at issue in this case constitutes 'law enforcement' duties, the court is bound by Ninth Circuit precedent, specifically, *Brewster v. County of Shasta*, 275 F.3d 803. *Venegas* does not overrule Ninth Circuit precedent on this issue. Well-established Supreme Court and Ninth Circuit precedent make clear that federal not state law is supreme on issues of federal law. Until the Ninth Circuit readdresses the issue and abrogates *Brewster*, such authority is controlling. Defendants' motion to dismiss Plaintiffs' federal civil rights claims on the grounds that Sheriff Christianson is immune because he acts on behalf of the State of California is DENIED.")

Pruitt v. County of Sacramento, No. CIV. 2:10-0416 WBS KJN, 2010 WL 3717302, at *1, *2 (E.D. Cal. Sept. 15, 2010) ("Defendants argue that the California Supreme Court's decision in *Venegas v. County of Los Angeles*, 32 Cal4th 820 (2004) overrules *Brewster*. The decisions of the California Supreme Court are entitled to due deference. It is well established, however, that 'the question of municipal liability under section 1983 is one of federal law.'. . . On questions of federal law, this court is bound by the decisions of the Ninth Circuit. The Ninth Circuit has not departed from its analysis in *Brewster* since *Venegas* was decided. District courts in this Circuit have uniformly since *Venegas* continued to follow *Brewster*. [collecting cases] For the foregoing reasons, neither Sheriff John McGinness nor the County of Sacramento are entitled to Eleventh Amendment immunity for the conduct allegedly based upon his policies.")

Committee for Immigrant Rights of Sonoma County v. County of Sonoma, No. C 08-4220 RS, 2010 WL 2465030, at *3 (N.D. Cal. June 11, 2010) ("Although prior Ninth Circuit precedent did not treat sheriffs as state officers for purposes of that constitutional provision, the California Supreme Court has since concluded that sheriffs are state officers in circumstances like these. *Venegas v. County of Los Angeles*, 32 Cal.4th 820 (2004). While some district courts have continued to follow prior circuit law, the more persuasive analysis is that even though the Court need not 'blindly accept' the *Venegas* decision, it represents the correct statement of the function of California sheriffs.")

Lopez v. Youngblood, No. 1:07cv0474 DLB, 2009 WL 909812, at*21 (E.D. Cal. Mar. 31, 2009) ("The *Venegas* decision does not overturn Ninth Circuit precedent on this issue regarding a federal statute and does not control on issues of federal law. . . This Court is bound by Ninth Circuit precedent and declines to hold that the Kern County Sheriffs were acting on behalf of the State of California."). [certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), *see* ***Lopez v. Youngblood***, 2009 WL 2062883 (E.D. Cal. July 15, 2009), but case settled]

Vega v. County of Yolo, No. 2:09-cv-00574-MCE-KJM, 2009 WL 1993522, at *3 (C.D. Cal. July 8, 2009) (following Ninth Circuit precedent and finding Sheriff is final policymaker for county in adopting and implementing medical policies at county jail).

Miller v. Butte County, No. 2:06-CV-0489 JAM KJM, 2008 WL 4287665, at *4 (E.D. Cal. Sept. 17, 2008) ("To the extent Defendants urge this Court to follow *Venegas* instead of Ninth Circuit precedent, the Court declines to do so. Federal, not state law, controls the ultimate issue of whether California sheriff's are subject to liability under § 1983. Accordingly, because under Ninth Circuit precedent Sheriff Reniff was acting on behalf of the County with respect to Miller's incarceration at the Butte County Jail, the County is subject to § 1983 liability for his actions.").

Galati v. County of San Mateo, 2008 WL 1886033, at *6 (N.D.Cal. 2008) ("[O]n this issue of federal law, the Court is bound by the decision of the Ninth Circuit in *Brewster*. Thus, the Court will not grant summary judgment on Plaintiff's claims against the County of San Mateo, the San Mateo County Sheriff's Department or the current and former Sheriffs of San Mateo County, in their official capacities, on the basis of Eleventh Amendment immunity.")

Armstrong v. Siskiyou County Sheriff's Dept., No. CIV-S-07-1046 GEB GGH PS, 2008 WL 686888, at *6 (E.D. Cal. Mar. 13, 2008) ("Notwithstanding their reliance on *Venegas*, defendants acknowledge the Ninth Circuit earlier reached the opposite conclusion in *Brewster v. Shasta County*, 275 F.3d 803 (9th Cir.2001), which held that California sheriffs, their departments and deputies, act on behalf of the county when investigating crimes and enforcing state criminal statutes. . . . Defendants' argument that *Venegas* should control because decided after *Brewster* is without merit. Although the Ninth Circuit has not revisited this matter since *Venegas*, it is clear that federal claims must be ruled by federal law, i.e., that *Brewster* must control in this federal § 1983 action, thus rendering the Siskiyou County Sheriff's Department, its Sheriff and deputies, county actors without Eleventh Amendment immunity.").

Womack v. County of Amador, No. Civ. S-02-1063 RRB DAD, 2008 WL 669811, at *6, *7 (E.D. Cal. Mar. 7, 2008) ("In the present case, the County argues that it is immune from liability under the Eleventh Amendment on the basis that in California, a district attorney and his investigators act on behalf of the state rather than the county when engaged in investigating crime. Womack, for his part, maintains that the County is not immune from liability under the Eleventh Amendment because, under Ninth Circuit precedent, a district attorney (as a policymaker for the County with respect to obtaining and executing warrants) and/or his deputies and investigators (policymakers through delegation) act on behalf of the county rather than the state when investigating crime. Because the County does not dispute that the District Attorney has final policymaking authority over obtaining and executing warrants, . . . the County's § 1983 liability, turns, in part, on whether district attorneys and their investigators, when investigating crime, act on behalf of the state (which would immunize the County from § 1983 liability), or on behalf of the county (which would subject the County to § 1983 liability). Presently, as noted by the parties, there is a split in authority between the Ninth Circuit and the California Supreme Court with respect to whether a district

attorney acts on behalf of the state or the county when investigating crime. . . . Following *Bishop*, the California Supreme Court clarified its holding in *Pitts* by explaining that a district attorney represents the state, and is not considered a policymaker for the county, when prosecuting crimes and when preparing to prosecute crimes, including investigating crimes in advance of prosecution. . . . In *Pitts*, *Bishop* and *Venegas*, both the Ninth Circuit and the California Supreme Court applied the analytical framework set forth in *McMillian*, but nonetheless reached conflicting conclusions. Thus, the question becomes which analysis the court should follow. In the present case, the court finds the Ninth Circuit's reasoning in *Bishop* to be persuasive. . . Although the Ninth Circuit's *McMillian* analysis in *Bishop* pre-dated the California Supreme Court's analysis in *Venegas*, and therefore lacked the benefit of the analysis by the state's highest court, ultimately the holding in *Venegas* is only binding on state courts because the ultimate issue-whether or not California district attorney's are subject to liability under § 1983 when investigating crime-is a question of federal law even though it requires the application of some principles of state law to resolve it. . . Thus, while *Venegas* and *Pitts* are relevant in this court's 'analysis of state law' as required by *McMillian*, these cases do not overturn the Ninth Circuit's reasoning in *Bishop* on the ultimate question under the federal statute. Accordingly, until *Bishop* is overturned by a panel of the Ninth Circuit or the United States Supreme Court, the Ninth Circuit's reasoning in *Bishop* is persuasive authority for this court. Therefore, because the Ninth Circuit in *Bishop* squarely addressed the issue of whether a district attorney acts on behalf of the state rather than the county when investigating crimes, and concluded, after applying the *McMillian* analytical framework, that a district attorney acts for the county when engaging in investigatory acts, . . . the court concludes that the district attorneys and the district attorney investigator in this action are not immune from liability under the Eleventh Amendment and the doctrine of sovereign immunity for their acts in connection with obtaining and executing the search warrants at issue. . . As such, the County is not immune from § 1983 liability.")

Brown v. County of Kern, 2008 WL 544565, at *12 (E.D. Cal. Feb. 26, 2008) ("The *Venegas* decision does not overturn Ninth Circuit precedent on this issue regarding a federal statute and does not control on issues of federal law. . . . Until the Ninth Circuit addresses this issue and abrogates the *Brewster* decision, this Court is bound by Ninth Circuit precedent.").

McNeely v. County of Sacramento, 2008 WL 489893, *4-5 (E.D. Cal. Feb. 20, 2008) ("Whether or not local officials, like Sheriff Blanas, act for the locality of the state in a particular area or on a particular issue depends on an analysis of state law. . . California law deems elected sheriffs as state actors with respect to their law enforcement activities. [citing *Venegas*]While the Ninth Circuit has treated the sheriff as a county actor where his administrative or investigative responsibilities are under scrutiny, those cases are distinguishable from the present case, which concerns conduct arising from simply detaining Plaintiff in jail pending the outcome of ongoing criminal proceedings in Sacramento and Placer Counties. . . . Here, there can be no question that Sheriff Blanas, as well as Sheriff Bonner, were acting in accordance with both facially valid warrants as well as duly authorized criminal proceedings instituted by the District Attorneys of their respective counties and pending before their courts. . . . It follows that both Defendants

Blanas and Bonner are entitled to immunity, in their official capacities as Sheriffs of Sacramento County and Placer County, with respect to the issues raised by Plaintiff's lawsuit with regard to his incarceration. Moreover, because the Court has determined that those issues arise from the sheriffs' status as state, rather than county actors, neither the County of Sacramento or the County of Placer are proper parties to this lawsuit.")

Smith v. County of Los Angeles, 535 F.Supp.2d 1033, 1035-38 (C.D.Cal. 2008) ("On several occasions, after examining California constitutional and statutory authority, the Ninth Circuit has held that 'the Sheriff acts for the County' and not the State when he performs his functions of 'oversight and management of the local jail.'[citing *Streit* and *Cortez*] Oversight and management of a local jail, with respect specifically to the promulgation and application of policies regarding inmate medical care, are the practices challenged in this case. As this Court is bound by Ninth Circuit precedent, these holdings should end the inquiry. Defendant argues, however, that an intervening California Supreme Court decision reveals that the Ninth Circuit's interpretation of California law was incorrect. In *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 839 (2004), the California Supreme Court held that 'California sheriffs act as state officers while performing state law enforcement duties such as investigating possible criminal activity.'. . . *Venegas* misconstrued federal constitutional law. Contrary to Defendant's contention, the question of whether the sheriff is a county or state official is not purely one of state law. Rather, at bottom the question is one of federal law regarding the meaning Eleventh Amendment immunity and section 1983. . . . In elucidating the standard for Eleventh Amendment immunity from section 1983 suits, the Supreme Court has emphasized that a State's financial liability for county torts is a critical factor in justifying an extension of the immunity to a county sheriff. . . . The importance of financial liability as an indicator supporting immunity is confirmed by a string of United States Supreme Court cases holding that protecting the state coffers is of paramount importance in the immunity analysis. . . . As a matter of federal law, this Court finds that California's lack of liability for county torts is dispositive, and rejects the *Venegas* opinion's contrary holding. . . . Accordingly, the Court finds that, under the correct federal framework, even after *Venegas*, California law reveals that sheriffs are county − not state − representatives. . . . There are practical as well as legal reasons for the California Supreme Court to reconsider Venegas. A State that claims Eleventh Amendment immunity for county officials may well reap what it sows. If sheriffs and their departments are state actors, then by all logic the state, not the county, should absorb the liability relating to these cases. In California, public entities . . . are often responsible through *respondeat superior* liability for actions which could otherwise be charged as federal constitutional violations. There are many such cases. . . . Because *Venegas* misapplied federal law, the Court declines to follow its holding and finds instead that Plaintiffs' claims are not barred by the Eleventh Amendment. In so holding, the Court urges the California Supreme Court to reconsider *Venegas* to conform with the federal standard.").

Brockmeier v. Solano County Sheriff's Dep't., No. CIV-S-05-2090 MCE EFB PS, 2006 WL 3760276, at *5, *6, *9, *10 (E.D. Cal. Dec. 18, 2006) ("Defendants have identified Solano County Sheriff Stanton as having final policymaking authority over the actions at issue. . . Plaintiff does

not dispute that contention. Thus, the issue of the county's section 1983 liability turns on whether the sheriff, when investigating crimes in that role as policymaker, acts on behalf of the state (which would immunize the county from section 1983 liability) or on behalf of the county (which would subject the county to section 1983 liability). While the question appears to have an intuitively obvious answer, the Ninth Circuit and the California Supreme Court have squarely addressed this issue and their decisions are in direct conflict. . . . In California, the issue of whether a sheriff is a state or county actor is less clear than in Alabama. There are several provisions, both under the California constitution and the California code, that lend themselves to dueling interpretations under the analytical framework established in *McMillian*. This is evidenced by the California Supreme Court's recent decision in *Venegas*, which directly conflicts with the Ninth Circuit's interpretation of California law in *Brewster*. The question reduces to which forum's law controls here. The Ninth Circuit's interpretation pre-dated the California Supreme Court's analysis in *Venegas*. Thus, it lacked the benefit of the analysis by the state's highest court on what superficially appears to be a question of state law. Although the holding in *Venegas* might be viewed as dispositive state law under *McMillian*, the decision concerns an issue that is ultimately federal in nature. That is, the ultimate issue is whether or not California sheriffs are subject to liability under 42 U.S.C. § 1983 when executing their law enforcement duties. This is an ultimate question of federal law even though it requires the application of some principles of state law to resolve it. . . . Thus, while *Venegas* is relevant in this court's 'analysis of state law' as required by *McMillian*, it does not overturn Ninth Circuit precedent on the ultimate question under the federal statute. Unless overturned by a panel of the Ninth Circuit or the United States Supreme Court, the Ninth Circuit's holding in *Brewster* binds this court. Furthermore, an independent analysis of the issue reveals that the *Brewster* decision reflects a stricter adherence to the *McMillian* framework than the *Venegas* decision, whose holding is based largely on two state court decisions that the *Brewster* court rejected. . . . Even though the Ninth Circuit has yet to reexamine the issue of a California sheriff's official capacity for purposes of section 1983 liability in light of *Venegas*, this court finds that *Brewster* is still controlling within the Ninth Circuit. Therefore, the court declines to follow the holding in *Walker v. County of Santa Clara*, 2005 U.S. Dist. LEXIS 42118 (N.D.Cal. Sept. 30, 2005), as defendants request. . . . This court has duly considered the *Venegas* decision, but finds that it does not militate in favor of a decision contrary to the holding in *Brewster*. . . . Accordingly, this court finds *Brewster* controlling on the issue of whether California sheriffs are subject to section 1983 liability. Consistent with the holding in that case, the court finds that the Solano County Sheriff's Department acts on behalf of the county when investigating crimes, and that the county is therefore subject to section 1983 liability.")**.**

Faulkner v. County of Kern, No. 1:04-CV-05964 OWWTAG, 2006 WL 1795107, at *15, *16 (E.D. Cal. June 28, 2006) ("The County argues that it cannot be liable for the allegedly unlawful official acts of those Defendants who are County Sheriffs, because, according to the County, County Sheriffs in California act on behalf of the State, not the County when investigating crime. The County's defense is based on a recent California Supreme Court case, *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 11 Cal.Rptr.3d 692, 87 P.3d 1 (2004), which examined whether a county sheriff acted as an agent of the state when conducting a criminal investigation. The *Venegas*

court examined applicable provisions of the California Constitution, several relevant California statutes, and prior California cases to reach the conclusion that 'sheriffs act on behalf of the state when performing law enforcement duties.' Application of this seemingly straightforward holding is complicated by the fact that Ninth Circuit decisions do not follow and squarely contradict *Venegas*. . . . *Weiner* cautions against the blind acceptance of the *Venegas* holding, given the existence of a contrary Ninth Circuit rule in *Brewster*, which is binding upon this court. . . .For purposes of this section 1983 case, a federal claim brought in a federal court within the Ninth Circuit, the County of Kern may be liable for the law enforcement-related acts of Sheriff Sparks. It remains to be determined, however, whether any official capacity claim against him (i.e., against the County) survives summary judgment.")**.**

Walker v. County of Santa Clara, No. C 04-02211 RMW, 2005 WL 2437037, at *4 (N.D. Cal. Sept. 30, 2005) ("Plaintiffs contend that the Ninth Circuit's holding in *Brewster v. Shasta County* controls, and therefore that the sheriff, when investigating crime, acts as a final policymaker for the County when investigating crime within the County. . . Defendants counter that *Venegas v. County of Los Angeles* is controlling. . . In *Venegas*, the California Supreme Court expressly disagreed with the Ninth Circuit's decision in *Brewster*, and held that 'California sheriffs act as state officers while performing state law enforcement duties such as investigating possible criminal activity.'. . Thus, there appears to be a split of authority. . . . Here, the Ninth Circuit's decision in *Brewster* is directly at odds with the California Supreme Court's subsequent holding in *Venegas* that California sheriffs are state officers while performing law enforcement duties, and although this court need not 'blindly accept' the *Venegas* court's decision, . . . the California Supreme Court's decision comports with this court's understanding of the function of California sheriffs.").

Thomas v. Baca, No. CV 04-008448 DDP, 2005 WL 1030247, at *3, *4 (C.D. Cal. May 2, 2005) (not reported) ("The supervisors first argue that the Sheriff is a state actor under California law, and that he is thus removed from the supervisory authority of the County Board. They rely on a line of California cases culminating with *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 11 Cal.Rptr.3d 692, 87 P.3d 1 (2004). In *Venegas*, the California Supreme Court held that, for § 1983 purposes, the Los Angeles County Sheriff is a state actor protected by the Eleventh Amendment when he acts in his law enforcement capacity. . . While this is contrary to prior Ninth Circuit holdings that a California county sheriff acts on behalf of the county, *see, e.g., Brewster v. Shasta County*, 275 F.3d 803 (9th Cir.2001), the supervisors point out that those federal court holdings were decided without the benefit of the California Supreme Court's decision in *Venegas*. The framework for determining whether an official qualifies for Eleventh Amendment immunity in § 1983 claims was set forth by the United States Supreme Court in *McMillian v. Monroe County, Alabama*. . . . First, a court should 'ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue.' . . Second, the actual function of a governmental official, in a particular area, depends 'on the definition of the official's functions under relevant state law.' . . While state law serves as valuable evidence for this determination, federal courts need not blindly accept the California Supreme Court's 'balancing of the different provisions of state law in determining liability under § 1983.' *Weiner v. San Diego County*, 210

F.3d 1025, 1029 (9th Cir.2000). *McMillian* instructs that state law cannot 'answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy.' . . The federal analysis of state law to determine § 1983 liability includes an inquiry into the 'state's constitution, statutes, and case law.' . . Therefore, this Court is not bound by the California Supreme Court's recent interpretation of state law regarding § 1983 liability. However, as relevant case law, it is an important part of the analysis. *McMillian* requires courts to inquire 'whether governmental officials are final policymakers for the local government in a particular area or on a particular issue.'. . *McMillian* 'clearly instructs' that resolution of whether a sheriff acts as a state or county official depends on an 'analysis of the precise function at issue.' . . Applying the *McMillian* analysis, the Ninth Circuit held that when administering the county's policy for release from local jails, the Los Angeles County Sheriff acts as an official for the county. '[E]ven if we view the function more broadly as the oversight and management of the local jail, we are compelled to agree with the district court that the Sheriff acts for the County in this management function.' *Streit v. County of Los Angeles*, 236 F.3d 552, 561 (9th Cir.2001). While the California Supreme Court arrived at a different answer in *Venegas*, that case involved a search of the plaintiffs' home and vehicle, acts which clearly fall within the Sheriff's law enforcement authority. The facts in the instant case involve the Sheriff's release and housing practices at the county jails. Given this, the Court finds *Brewster* and *Streit* controlling, the Sheriff is not a state actor for purposes of this § 1983 suit, and the supervisors cannot preclude the plaintiffs' theory of liability with this argument.").

Green v. Baca, 306 F.Supp.2d 903, 907 n.31 (C.D. Cal. 2004) ("Because a state is not amenable to suit under § 1983, an official acting pursuant to a policy of the state government cannot be held liable under the statute. . . The Ninth Circuit has held that, in exercising control of the county jail, the Sheriff acts as an official policy-maker for the County of Los Angeles, not for the state of California. [*citing Streit* and *Cortez*] The California Court of Appeal has reached a contrary result, concluding that the sheriff is not a 'person' under § 1983 because he acts as a state officer in exercising responsibility over the jail. [*citing County of Los Angeles v. Superior Court*, 68 Cal.App.4th 1166, 1176, 80 Cal.Rptr.2d 860 (1998)] The court, however, is bound by the Ninth Circuit's interpretation.")**.**

Benas v. Baca, No. CV-00-11507 LGB (SHX*)*, 2001 WL 485168, at *7 (C.D. Cal. April 23, 2001) (not reported) ("While case law in this area is inconsistent, the Ninth Circuit, both before and after *McMillian*, has found a California sheriff to be a local law enforcement agent, and therefore subject to section 1983 liability.").

Montana

Eggar v. City of Livingston, 40 F.3d 312, 315 (9th Cir. 1994) ("Officials can act on behalf of more than one government entity. [cite omitted] That [municipal judge] allegedly performed his duty to advise indigents of their rights in a way that makes a mockery of those rights does not make that duty administrative. The Judge's failure to follow state law or federal constitutional law does not

transform his 'cattle-call' method of counseling into municipal policymaking. As state law makes clear, the Judge's obligation to address the rights of defendants arises from his membership in the state judiciary. It is lamentable, but irrelevant, that he failed miserably to meet this obligation under both state and federal standards: he simply is not a municipal decision maker in this context.").

Nevada

Botello v. Gammick, 413 F.3d 971, 979 (9th Cir. 2005) ("[T]he County claims that under Nevada law, when Gammick made the decision not to prosecute cases initiated by Botello, he was acting as a policymaker on behalf of the state and not the County. The County's argument is unavailing in two respects. First, it is foreclosed by our holding in *Webb v. Sloan* that, under Nevada law, 'principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions.'. . Accordingly, Gammick was a policymaker for the County when he decided not to prosecute Botello's cases. Second, Botello alleges that other than adopting the nonprosecution policy, Gammick's conduct was administrative, not judicial, in nature. The County offers no argument to rebut the proposition that a district attorney acting in his administrative and investigative capacity is a County policy-maker.")**.**

Webb v. Sloan, 330 F.3d 1158, 1165, 1166 (9th Cir. 2003) ("Nevada district attorneys are final policymakers in the particular area or particular issue relevant here: the decision to continue to imprison and to prosecute. The state attorney general exercises supervisory power over county district attorneys, but this does not remove final policymaking authority even from principal district attorneys. . . . Both this court and the Nevada Supreme Court, however, have emphasized the discretionary and permissive nature of that [supervisory power]. . . . and in the absence of any evidence in the record that the attorney general in fact ever exercises that supervisory power, we hold that principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions. . . . [T]he Nevada legislature confers the same final policymaking authority on deputy district attorneys. . . . Because of the distinctions between Nevada's deputy district attorneys and the Hawaiian deputy prosecutors in Christie, Christie does not control the outcome of this case. The district court correctly held that deputy district attorneys in Nevada are final policymakers whose actions can be the acts of the municipality for the purposes of attaching liability under § 1983.").

Pellerin v. Nevada County, No. CIV S 12–665 KJM CKD, 2013 WL 1284341, *3, *4 (E.D. Cal. Mar. 28, 2013) ("Defendants assert Eleventh Amendment immunity for the District Attorney's office and defendants Weston and Francis, to the extent they are sued in their official capacities as deputy district attorneys. Defendant makes no claim of immunity for either the Sheriff's Department or King as the individually named Sheriff's deputy. In the absence of the state's consent to suit, the Eleventh Amendment bars suits for damages against states, state agencies, and state officials acting in their official capacities. . . In *Weiner v. San Diego County,* 210 F.3d 1025 (9th Cir.2000), the Ninth Circuit explored the application of *McMillian v. Monroe County, Ala.,*

520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997) to the question whether a California district attorney was a state or county official for purposes of county liability under *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Recognizing that the question is of one of federal law, but yet was intimately bound up with state law, the court examined California's constitutional and statutory provisions and held that 'a California district attorney is a state officer when deciding whether to prosecute an individual.'. . The Ninth Circuit has relied on *Weiner* in concluding that prosecutors 'act as state officials, and so possess Eleventh Amendment immunity, when acting in [their] prosecutorial capacity.'. . Defendants Francis and Weston, sued in their official capacity for failing to review the exculpatory evidence on the Flip video camera, are immune from suit. To the extent plaintiff argues that the District Attorney's office itself is liable, his claim also fails, as the office is deemed to be a state agency when involved in prosecutorial activities. . . Finally, the County is also immune. . . . Because members of the District Attorney's office were state officials for purposes of prosecutorial decisions, they cannot be deemed to be policy makers for the County.")

Oregon

Kleinman v.Multnomah County, No. 03-1723-KI, 2004 WL 2359959, at *5 (D. Ore. Oct. 15, 2004) ("In *Bishop*, the Circuit analyzed the California constitution, statutes and case law to determine whether the Inyo County District Attorney was a state or a county official. The court concluded that the district attorney is a county officer when doing certain activities. Notwithstanding the Ninth Circuit's ultimate conclusion in the case, there are several differences between California law and Oregon law that support defendants' position. For example, the California constitution and statutes designate district attorneys as local government officials. . .California district attorneys may not be removed by the legislature, as other California officials are. . . California law gives the counties the authority to supervise the district attorneys' conduct and the use of public funds. . . Under California law, the county sets the salaries for district attorneys. . .These factors cut the other way in Oregon. Plaintiff argues that the court must recognize the dual nature of the district attorneys' offices in both state and county affairs in Oregon and consider the nature of the suit here. Plaintiff contends that the District Attorney's Office in this case is being sued not for prosecutorial functions, but instead in its administrative role of supervising and training county employees. In other words, plaintiff argues that he brings claims against the District Attorney's office in its 'county capacity.' There is some validity to plaintiff's point in that the case law on state immunity and prosecutorial immunity often focuses on the acts at issue, not just on the entity being sued. However, I believe this argument is quite strained under Oregon law, particularly given the lack of authority for this proposition. I conclude that the Multnomah County District Attorney's Office is a state entity. As such, it is entitled to sovereign immunity. Defendants' motion to dismiss is granted and the Multnomah County District Attorney's Office is dismissed from this action. . . . If the District Attorney's office is deemed a state entity, plaintiff cannot sustain a claim for damages against District Attorney Schrunk in his official capacity.")

Washington [state]

Whatcom County v. State of Washington, 993 P.2d 273, 277, 278, 280 (Wash.App.Div. 2000) (involves county prosecutor, but relevant) ("The *McMillian* and *Pitts* decisions provide us with guidance in determining whether the State or the County is responsible for Graham's defense and indemnification. However, there are two notable differences between those cases and the case at bar. First, in *McMillian* and *Pitts*, the issue was whether counties could be held liable under § 1983 for the actions of certain government officials. Thus, the question of whether the officials acted with 'final policymaking authority' was relevant to the decision. Here, we are not concerned with the ultimate question of which government entity (if any) is liable for Graham's acts, but only with the narrow issue of whether Graham is a state officer or employee entitled to a state defense and indemnification. Second, in *McMillian* and *Pitts*, the question of how to properly characterize the officials' functions was not at issue. However, in this case the parties disagree sharply on whether Graham's actions constituted 'advice to a county official' or 'prosecution under state law.' . . . We conclude that (1) Graham was 'prosecuting state law' when he advised Weisenburger that Monroe could be released from jail, and, (2) county prosecutors in Washington represent the State, not their counties, when prosecuting violations of state law. Thus, we hold that Graham is a 'state officer' or 'state employee' employee" under RCW 4.92.060, .070, .075, and .130, entitling him to defense and indemnification from the State. . . . Lastly, we note that Graham should not be deprived of state defense and indemnification merely because there may be questions as to which state fund should be used for that purpose.")

TENTH CIRCUIT

Colorado

Gonzales v. Martinez, 403 F.3d 1179, 1182 n.7 (10th Cir. 2005) ("Curiously, neither the district court nor defendants have challenged Ms. Gonzales' designating 'Huerfano County' as defendant. Under Colo.Rev.Stat. § 30-11-105, 'the name in which the county shall sue or be sued shall be, "The board of county commissioners of the county of ....."' This statutory provision provides the exclusive method by which jurisdiction over a county can be obtained. An action attempted to be brought under any other designation is a nullity, and no valid judgment can enter in such a case.' . . Were we to overlook this jurisdictional flaw, we are still guided by *Bristol v. Bd. of County Comm'rs of Clear Creek*, 312 F.3d 1213, 1215 (10th Cir.2002) (under the Colorado constitution, the County Sheriff is a distinct position, separate from the Board of County Commissioners). The only claims Plaintiff made against the County were based on a faulty premise. She asserted the County owed her a duty 'to employ competent law enforcement officers and to supervise the conduct of its sheriff and Chief Jail Administrator.' That is not a valid premise under Colorado law. . . Had Plaintiff claimed the Sheriff set official policy of the County or was following policy established by the County in the operation of the jail, we might have to reach a different conclusion. *See id.* at 1221 ("counties can be held liable for the misdeeds of Sheriffs and their employees when the Sheriff is held to set 'official policy' for the county."). Yet, whether because of the plain

language of the statute or the Plaintiff's failure to state a valid claim, the action cannot lie against Huerfano County.").

Bristol v. Bd. of Cnty. Commis. of Cnty. of Clear Creek, 312 F.3d 1213, 1221 (10th Cir.2002) (listing cases where the "acts of the Sheriff were held to set the 'official policy' of the County, thus making the County liable under § 1983 for the Sheriff's unconstitutional actions and those of the Sheriff's employees.").

Chavez v. Board of County Commissioners of Lake County, No. 18-CV-3249-WJM-NYW, 2019 WL 5790129, at *7-9 (D. Colo. Nov. 6, 2019) ("Lower courts have nonetheless cited *Bristol* or *Gonzales*, or both, for the notion that county sheriffs in Colorado set policy for the county, so the proper defendant in a § 1983 action based on the sheriff's policies is the board of county commissioners. . . . The Court agrees that *if* a Colorado sheriff is a final policymaker for the entire 'body corporate and politic' known as 'the county,' Colo. Rev. Stat. § 30-11-101(1), then the county may be held liable in a § 1983/*Monell* lawsuit for an injury inflicted by an unconstitutional sheriff-made policy. However, no authority of which the Court is aware has analyzed whether *Colorado law* makes Colorado sheriffs policymakers over the entity dubbed 'the county.' Rather, the relevant cases all trace back to *Bristol*'s dicta concerning the 'suggest[ion]' of extra-circuit authority about the relationship of the sheriffs at issue to their counties. . . The Court thus turns to an examination of relevant Colorado law. . . . [W]hen a *Monell* claim is based on a sheriff-made policy, any distinction between suing the sheriff's office versus suing the county becomes purely theoretical, because the county will pay regardless. . . . The Court recognizes that, by the time of summary judgment and/or trial, Plaintiffs will need to explain clearly the policy at issue and the policymaker(s) to whom the policy is attributable. Even if the County would be responsible for paying any judgment regardless, the Court and the parties cannot evaluate the relevance and probative value of the evidence without knowing Plaintiffs' precise theory. At this stage however, no such evaluations are needed.").

Kansas

Couser v. Gay, 959 F.3d 1018, 1025 n.8, 1026, 1030-31 (10th Cir. 2020) ("Most circuit courts to address the issue have concluded that a sheriff acting in a law enforcement function is a county actor. *See, e.g.*, *Williams v. Kaufman Cty.*, 352 F.3d 994, 1013-14 (5th Cir. 2003) (Texas sheriffs); *Crabbs v. Scott*, 786 F.3d 426, 429 (6th Cir. 2015) (Ohio sheriffs); *Franklin v. Zaruba*, 150 F.3d 682, 685 (7th Cir. 1998) (Illinois sheriffs); *Dean v. Cty. of Gage, Neb.*, 807 F.3d 931, 942 (8th Cir. 2015) (Nebraska sheriffs); *Brewster v. Shasta Cty.*, 275 F.3d 803, 811 (9th Cir. 2001) (California sheriffs); *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298, 1304-05 (11th Cir. 2005) (Florida sheriffs); *but see Grech v. Clayton Cty.*, 335 F.3d 1326, 1327 (11th Cir. 2003) (en banc) (Georgia sheriffs acting in a law enforcement function are state actors). . . .We hold that Sheriff Gay, acting in his law enforcement capacity, is a county actor under Kansas law and thus not entitled to Eleventh Amendment immunity. . . . To determine whether the district court properly held that Sheriff Gay was a county actor not entitled to Eleventh

Amendment immunity, we apply the four factors from *Steadfast*. . . For each factor, we also compare the Kansas sheriff to the Alabama sheriff that the *McMillian* Court deemed a state official. . . . All four factors support finding that Kansas sheriffs are county actors: (1) Kansas law lists sheriffs under county officer provisions; (2) Kansas sheriffs have substantial autonomy from the state in their law enforcement functions compared to their Alabama counterparts; (3) the county controls the sheriff's salary and books; and (4) the sheriff is primarily concerned with local affairs. . . . All four factors point in the same direction. The 'weight of the evidence is strongly on the side' of finding that Kansas sheriffs, when executing their law enforcement duties, represent their counties, not the State of Kansas.")

Seifert v. Unified Gov't of Wyandotte Cnty./Kansas City, 779 F.3d 1141, 1159 (10th Cir. 2015) ("Here, it appears that the actions of Sheriff Ash, in his position as the final policymaker for the Wyandotte County Sheriff's Department, represent the official policy of the Unified Government and subject it to potential liability. *See* Kan. Stat. Ann. §§ 19–805 (West 2008) (sheriff is responsible for conduct of undersheriff and deputies); *Bd. of Cnty. Comm'rs v. Nielander,* 62 P.3d 247, 251 (Kan.2003) ("[T]he sheriff is a state officer whose duties, powers, and obligations derive directly from the legislature and are coextensive with the county board."). Plaintiff argues as much, and the Unified Government offers no argument in response. We therefore need not consider whether the actions of Ash and Roland were in conformity with preexisting official policies or customs. The summary judgment for the Unified Government on the § 1983 claim must be set aside.")

Nielander v. The Board Of County Com'rs, 582 F.3d 1155, 1170 (10th Cir. 2009) ("Though we are doubtful that a prosecutor is a policymaker merely because he has discretion in deciding who to prosecute, we need not decide the issue because, regardless, Attorney Spurney is not a *municipal* policymaker. As noted above, in Kansas, county attorneys are officials of the *state,* not the county. . . Attorney Spurney admits that the County has no authority over how he exercises his law enforcement duties; his discretionary authority does not derive from Republic County, but from the state. . . Thus, the county attorney's actions cannot be attributable to the Board of County Commissioners under a municipal liability theory.").

Wilson v. Sedgwick County Bd. of County Com's, No. 05-1210-MLB, 2006 WL 2850326, at *4 (D. Kan. Oct. 3, 2006) ("It is clear therefore, that only the sheriff, not the commissioners, has the power to set policy and train under Kansas law. . . Thus, plaintiff's claim against defendant based on an execution of policy by defendant that allegedly caused his injuries must fail. Defendant had no authority to make such a policy.")**.**

Gaston v. Ploeger, 399 F.Supp.2d 1211, 1224, 1225 (D. Kan. 2005) ("In conjunction with these allegations, Plaintiff contends the Commissioners are responsible for the funding of the Brown County Jail and its operations, and thus it is incumbent upon the Commissioners to see that the facilities and funding are proper to provide an environment where the inmates of the Brown County Jail are safe and secure. . .Relying on these allegations and contentions, Plaintiff ultimately argues

the Commissioners failed to provide adequate funding for the Brown County Jail as demonstrated by the fact that on the day Belden committed suicide, the sole corrections officer at the Brown County Jail was by himself and thus unable to take appropriate action in removing the paper barrier from Belden's cell window for approximately two hours. The Court is not persuaded by Plaintiff's argument. As a preliminary matter, Plaintiff's reliance on K.S.A. 19-1919 to impose section 1983 liability on the County Commissioners is misplaced. This Kansas statute is simply the funding mechanism for the state's county jails. There is no evidence to demonstrate that the responsibility for funding includes any authority for the running of jails or that the County Commissioners have any connection with the operation of the jail other than with respect to funding. Simply put, Plaintiff identifies no evidence connecting the Brown County Commissioners with Belden's suicide or with any policy bearing on his suicide. Because Plaintiff fails to identify a legal or factual basis for imposing section 1983 liability on the Brown County Commissioners, the Court will enter summary judgment in favor of these Defendants in their official capacity on Plaintiff's section 1983 claims. . . . [T]he Court finds the suit against Shoemaker in his official capacity as Brown County Sheriff must be construed to be a suit against the governing body of Brown County: the Brown County Commissioners. Because the Court already has determined that there is no legal or factual basis for imposing section 1983 liability on the Brown County Commissioners, the Court similarly will enter judgment on Plaintiff's section 1983 claim in favor of Defendant Shoemaker in his official capacity as Sheriff of Brown County.")**.**

Lowery v. County of Riley, No. 04-3101-JTM, 2005 WL 1242376, at **7-9 (D. Kan. May 25, 2005) (not reported) ("Although consolidated into one entity, the RCPD [Riley County Police Department] maintains some of the hallmarks of a city or county law enforcement department. Prior to the consolidation, the RCPD was three separate institutions − the Riley County Sheriff's Office, the Manhattan, Kansas Police Department and the Ogden County Police Department. By state statute, the individual sheriffs and deputies sheriff were relieved of all their powers and authorities, and these powers were vested in the RCPD and its director. . . In essence, the RCPD is the equivalent of a sheriff's department, and the director serves in a capacity commensurate with a sheriff. Since the director stands in the shoes of the sheriff, he or she assumes the sheriff's powers and responsibilities, which by implication includes the power to be sued. *See Sparks v. Reno County Sheriff's Department*, No. 04-3034, 2004 WL 1664007, at *4 (D.Kan. Jan. 26, 2004) (noting that a sheriff is an entity that is subject to suit though the Reno County Sheriff's Department was not subject to suit). Although the RCPD is a subordinate entity to the Law Board, the RCPD director has the implied power to sue based on his freedom to control and supervise the RCPD agents. As a result, plaintiff may not bring suit against the RCPD as a separate legal entity, thought it may bring suit against the director, who serves in a capacity equivalent to a sheriff. In the alternative, plaintiff argues that the RCPD is an unincorporated association that may be sued under Federal Rule of Civil Procedure 17(b). Since the court has already found that the RCPD is a subordinate agency to the Law Board, the RCPD is more appropriately classified as part of a greater municipal entity. Federal Rule of Civil Procedure 17(b) is not applicable here. . . . The Law Board and RCPD have complimentary roles, though structured hierarchically. As already noted, the Law Board is responsible for the adoption of rules and regulations. Yet, the RCPD 'shall be

under the exclusive supervision and control of the director and no member of the agency shall interfere by individual action with the operation of the department or the conduct of any of the officers or other personnel of such department.'. . Although largely autonomous, the director is responsible to the agency for providing police protection 'in conformance with rules and regulations adopted by such agency.' . . The statutory structure simultaneously creates both autonomy and accountability in the RCPD. While the Law Board may create the official policy, the RCPD director has exclusive supervision and control of its members and directs the customs and practices of the RCPD. The interrelation creates potential *Monell* liability for both the Law Board and the RCPD.").

Schroeder v. Kochanowski, 311 F.Supp.2d 1241, 1250 n.23 (D. Kan. 2004) ("The Court disagrees with the Saline County defendants' argument that a county sheriff is a 'state official' and thus plaintiff's claim is barred by the Eleventh Amendment. Defendants fail to cite, nor was the Court able to find, Tenth Circuit cases holding that a county sheriff was a state official.")

Wishom v. Hill, No. Civ.A. 01-3035-KHV, 2004 WL 303571, at *5 (D. Kan. Feb. 13, 2004) ("Defendants admit that plaintiff may sue former Sheriff Hill and current Sheriff Steed, but correctly note that plaintiff may not sue the SCDF because it is a subordinate governmental agency. *Fuguate v. Unified Gov't of Wyandotte County/Kan. City, Kan.,* 161 F.Supp.2d 1261, 1266 (D.Kan.2001) (absent specific statue, subordinate governmental agencies lack capacity to sue or be sued); *Wright v. Wyandotte County Sheriff's Dep't,* 963 F.Supp. 1029, 1034 (D.Kan.1997) (county sheriff's department is agency of county and not capable of being sued); *Murphy v. City of Topeka,* 6 Kan.App.2d 488, 491, 630 P.2d 186, 190 (1981) (absent express statutory or ordinance authority, agency does not have capacity to sue or be sued). The SCDF lacks the capacity to sue or be sued. The Court therefore sustains defendants' motion for summary judgment as to plaintiff's claims against the SCDF.")

Wishom v. Hill, No. Civ.A. 01-3035-KHV, 2004 WL 303571, at *8, *9 (D. Kan. Feb. 13, 2004) ("In seeking summary judgment on plaintiff's official capacity claims, defendant argues that at the time of plaintiff's arrest, the county had a policy and practice which afforded detainees a probable cause hearing within 48 hours of incarceration, as required by *McLaughlin,* 500 U.S. 44. As stated above, however, liability may also arise from the act of an ultimate county decision-maker. *Pembaur,* 475 U.S. at 480. Plaintiff's official capacity claims can therefore survive summary judgment if he can show a genuine issue of material fact that an ultimate county decision-maker caused the violation of his right to be free from unconstitutional detention under the Fourth Amendment. Under Kansas law, the sheriff is responsible for taking care of the jail of his county and its prisoners. K.S.A ' 19-811. He therefore serves as an ultimate county decision-maker in matters involving the county jail. . . . To prevail on his official capacity claim, plaintiff must show a genuine issue of material fact whether Sheriff Hill caused him to be detained without a probable cause hearing. Viewing the evidence in the light most favorable to plaintiff, a reasonable jury could so find. As stated above, the record indicates that Sheriff Hill incarcerated plaintiff for six days without a probable cause hearing or bond.").

Oklahoma

Layton v. Board of County Com'rs of Oklahoma County, 2013 WL 925807, *6 (10th Cir. Mar. 12, 2013) (not reported) ("A 'suit against [the Sheriff] in his official capacity as sheriff is the equivalent of a suit against [the] County.' *Lopez v. LeMaster*, 172 F.3d 756, 762 (10th Cir.1999); *see also Myers v. Okla. Cnty. Bd. of Cnty. Comm'rs*, 151 F.3d 1313, 1316 n. 2 (10th Cir.1998). Thus, we apply the same analysis to Appellants' suit against Sheriff Whetsel in his official capacity as we do to their suit against the County.")

Reid v. Hamby, 124 F.3d 217 (Table), 1997 WL 537909, at *5 n.1, *6 (10th Cir. Sept. 2, 1997) ("We conclude, even under the *McMillian* standard, that an Oklahoma sheriff is the policymaker for his county for law enforcement purposes. . . .We now hold that an Oklahoma 'sheriff's department' is not a proper entity for purposes of a § 1983 suit.").

Winton v. Bd of Commissioners of Tulsa County, 88 F. Supp.2d 1247, 1268 (N.D. Okla. 2000) ("The Court finds that there is evidence in the record from which a reasonable jury could conclude that the County's action or inaction in response to the risk of harm present in the Jail was not reasonable. . . . There is evidence in the record from which a jury could conclude that the only practical way for the County to have significantly abated the risk of violence at the Jail was to build a new facility. There is also evidence in the record that the County was hampered in its efforts to build a new jail by the voters of Tulsa County, who refused to pass bond issues prior to September 1995. While the Court recognizes the plight of the County, '[t]he lack of funding is no excuse for depriving inmates of their constitutional rights.' *Ramos*, 639 F.2d at 573, n. 19 (citing several cases). The voters of Tulsa County had a choice. The County could pay on the front end to protect the constitutional rights of inmates by building a new jail, or the County could pay on the back end by satisfying judgments in meritorious civil rights actions based on unconstitutional conditions at the Jail. Until a new jail was built in 1999, the voters in Tulsa County had necessarily chosen the second of these options as the County's response to violence at the Jail. . . . A reasonable jury could find that the County's inaction or ineffective action was the moving force behind the conditions at the Jail which caused or permitted a serious risk of inmate harm to exist in the Jail. A jury could find that overcrowding, under-staffing, lack of adequate inmate supervision, lack of inmate segregation and classification, lack of inmate exercise time, dormitory-style housing, all of which existed over a long period of time, were all de facto policies of inaction by the County which created and or contributed to the conditions which created a serious risk of harm in the Jail.").

Buchanan v. Bd. of County Commissioners of Muskogee County, No. CV-05-356-JHP, 2006 WL 1705257, at *4 (E.D. Okla. June 16, 2006) ("It is well settled in Oklahoma that the Board of County Commissioners and the Sheriff's office operate autonomously. . . Where the Board does not − and indeed, cannot − enact or enforce law enforcement policy, it cannot be held liable for violations of such policy.").

Beers v. Ballard, No. 04-CV-0860-CVE SAJ, 2005 WL 3578131, at *6 (N.D. Okla. Dec. 29, 2005) ("In his official capacity, Sheriff Ballard represents Washington County. *See Meade* [*v. Grubbs*,

841 F.2d 1512 (10th Cir.1988)] , 841 F.2d at 1529. It is well-settled law that a municipal entity, such as Sheriff Ballard in his official capacity, may be held responsible 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.'").

Utah

Chilcoat v. San Juan County, 41 F.4th 1196, 1216 (10th Cir. 2022) ("Here, the district court correctly looked to Utah law and relied on section 17-18a-401 of the Utah Code to conclude Prosecutor Laws acted for the State. On appeal, Ms. Chilcoat generally contends Prosecutor Laws acted for the County, but she fails to meaningfully challenge the district court's reliance on section 17-18a-401. . . This statute provides that a public prosecutor 'conduct[s], *on behalf of the state*, all prosecutions for a public offense committed within a county.' . . But a public prosecutor 'conduct[s], *on behalf of the county*, all prosecutions for a public offense in violation of a county criminal ordinance.'. . Under Utah law, whether Prosecutor Laws acted for the state or the county depends on what crime he prosecutes: If the crime violates a county criminal ordinance, then Prosecutor Laws prosecutes on behalf of the county. But if the crime violates the state criminal code, then he prosecutes on behalf of the state. Prosecutor Laws made the allegedly false statements while prosecuting Ms. Chilcoat for Retaliation against a Witness, Victim, or Informant—a felony under Utah law. . . Thus, the district court correctly determined Prosecutor Laws acted on behalf of the State under section 17-18a-401, and on that basis, properly dismissed Ms. Chilcoat's municipal liability claim.")

McCubbin v. Weber County, No. 1:15-CV-132, 2017 WL 3394593, at *14–15 (D. Utah Aug. 7, 2017) ("Weber County pursued and obtained a nuisance injunction in its own name that was exclusively enforceable in a specific zone within Weber County and that criminalized many otherwise lawful behaviors. Weber County served the injunction and maintained a gang database pursuant to its own allegedly unlawful policy or practice. In this case, Weber County 'appears much more akin to a county' in Utah than an arm of the state. *Cash v. Granville Cty. Bd. of Educ.*, 242 F.3d 219, 226 (4th Cir. 2001) (finding county board of education was not an arm of the state and denying the county board sovereign immunity). As the *McMillian* Court suggested, many courts have concluded, after reviewing the relevant state law and function at issue, that district attorneys, sheriffs, and other local officials are not state officials. . . Furthermore, one court in this district has previously concluded that a Utah county attorney is not a state officer under Utah law. *Allison v. Utah Cty. Corp.*, 335 F. Supp. 2d 1310, 1316–17 (D. Utah 2004) (holding that, based on its analysis of Utah law relating to the county attorney position, a county attorney was "properly classified as a county officer, rather than a state officer. . . This court has found no Utah case squarely addressing the issue, but finds persuasive *Allison*'s conclusion that a Utah county attorney is not a state officer, at least for the actions identified in this case. The court declines to construe Mr. Allred's prosecutorial acts in this case so broadly as to convert the serving and enforcing of a County-obtained nuisance injunction as action on behalf of the state—particularly where Weber County points to no Utah statute or Utah-specific case law suggesting otherwise. . . . In sum, the

court rejects Weber County's motion to dismiss this action on grounds of Eleventh Amendment, prosecutorial, or quasi-judicial immunity.")

Wyoming

Ginest v. Bd. of County Commissioners of Carbon County, 333 F.Supp.2d 1190, 1195 (D. Wyo. 2004) ("Carbon County is a named defendant in this action for two reasons. First, although the Board's role regarding the jail is quite limited, it has fiscal obligations under state law to adequately fund the jail. . . In addition, Carbon County is a proper defendant whenever one of its policymakers, such as its sheriff, is alleged to have engaged in unconstitutional activity for which the county would bear responsibility. . . . In the present case, the sheriff of Carbon County is such a policymaker, and he is empowered to establish policies that are binding on the County. The Court persists in its conclusion that the Carbon County Board of Commissioners is a proper defendant in this action.")

ELEVENTH CIRCUIT

Alabama

Melton v. Abston, 841 F.3d 1207, 1234-35 (11th Cir. 2016) ("It is well established in this Circuit that Alabama sheriffs and their deputies are state officials and are absolutely immune from suit as an officer of the state under the Eleventh Amendment. . . Consequently, we conclude that Sheriff Abston and the deputy defendants are immune from suit under the Eleventh Amendment for Melton's claims brought against them in their official capacity as state officials. We decline, however, to extend sovereign immunity to Nurse Ray with respect to the claims brought against her in her official capacity. Unlike the other defendants, Nurse Ray is not a sheriff or a deputy. Rather, Nurse Ray is a nurse at Pickens County Jail and was responsible for carrying out 'limited objectives and defined duties,' including 'verifying the various medications prescribed for inmates ... checking does, reviewing inmate medical complaints, responding to minor medical calls, and referring more serious medical calls to a physician.'. . Unlike Sheriff Abston and the defendant deputies, Nurse Ray's actions taken in the scope of her employment do not inherently constitute actions against the state. The Alabama Supreme Court has previously declined to extend sovereign immunity to a jailor, noting that a jailor is not a proper extension of the Sheriff's position because a jailor cannot undertake every act that the sheriff could perform. . . The Alabama Supreme Court has likewise noted that none of its decisions have extended the state immunity afforded a sheriff to any sheriff's employees other than a deputy sheriff. . . We therefore find that Nurse Ray, as an employee of a county jail, does not qualify as an extension of the sheriff for purposes of sovereign immunity. Finally, we note that Alabama officials who have sovereign immunity when sued in their official capacities are not entitled to sovereign immunity when they are sued in their individual capacities under Section 1983. . . As the Supreme Court has held, 'state officials, sued in their individual capacities, are "persons" within the meaning of § 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of the "official" nature of their acts.'. . Based on this clear

precedent, we conclude that Sheriff Abston, the deputy defendants, and Nurse Ray are not entitled to sovereign immunity with respect to the claims brought against them in their individual capacities.")

Turquitt v. Jefferson County, 137 F.3d 1285, 1288, 1291 (11th Cir. 1998) (en banc) ("Alabama law provides that it is the sheriff who has the duty to ensure that inmates do not come to harm, to develop a policy of controlling inmate violence, and to staff the jail with appropriately trained jailors. . .Because the parties agree that the sheriff possesses the authority to make final policy with respect to these actions, the contested issue is whether the sheriff functions as the County's policymaker when he takes those actions. Our answer to this question turns on state law, including state and local positive law, as well as custom and usage having the force of law. . . . Our review of Alabama law persuades us that an Alabama sheriff acts exclusively for the state rather than for the county in operating a county jail. . . . *Parker* is not in accord with controlling § 1983 jurisprudence, and we hereby overrule that decision, and any subsequent decisions following it, insofar as they held that Alabama sheriffs in their daily operation of county jails act as policymakers for the county.").

McClure v. Houston County, 306 F.Supp.2d 1160, 1163, 1166 (M.D. Ala. 2003) ("[T]he specific question in this case is whether the Houston County Sheriff and the Sheriff's Department are 'policymakers' for Houston County in the area of hiring, training, and supervising deputy sheriffs. Under Alabama law, sheriffs are state, and not county, officers. . . . McClure argues that, before granting summary judgment on Eleventh Amendment grounds, the court must determine whether the state or county would pay any damages awarded in this case. *See Carr v. City of Florence,* 916 F.2d 1521, 1527 (11th Cir.1990) (Clark, J., specially concurring). Even if the court were to find McClure's legal argument persuasive, however, summary judgment in Sheriff Glover's favor would still be appropriate because McClure has not offered any evidence to show that Houston County, and not the State, would be liable for any judgment against Sheriff Glover.").

Florida [state]

Jenne v. Maranto, 825 So.2d 409, 416 (Fla.App. 2002) ("Florida is divided into political subdivisions, the several Counties, and the Sheriff is a constitutional officer in each County. Art. VIII, § 1(a), (d), Fla. Const. The Counties are political subdivisions but they are not the State itself. The Florida Constitution names the Sheriff as a county official, not as an official of the State. Art. VIII, § 1(d), Fla. Const. Although the Sheriff performs many functions–e.g., the Sheriff is responsible for serving process within the County -his budget is made up by the County from taxes levied only within the County. Moreover, the Sheriff is authorized to purchase liability insurance for, among other things, 'claims arising out of the performance of the duties of the Sheriff....' Thus any money judgment in this case will be paid from the local county budget or by insurance purchased therefrom by the Sheriff. On balance therefore the Sheriff is an official of local government, rather than an arm of the State. We thus hold for purposes of this case that Sheriff

Jenne is not an arm of the State and is not entitled to claim the constitutional immunity protected by the Eleventh Amendment.' footnotes omitted)

Florida [federal]

Freyre v. Chronister, 910 F.3d 1371, 1381-85 (11th Cir. 2018) ("[O]ur question is not simply whether HCSO acts as an arm of the state generally, but whether it does so when performing child-protective investigations under the Grant Agreement with DCF. . . The first *Manders* factor asks us to determine how state law defines the defendant entity. Two bodies of state law are relevant here: state law concerning the status of the entity generally, and state law concerning the specific function the entity performs in the instant case. . . .Notwithstanding a Florida sheriff's presumptive status as a county officer, we have also held out the possibility that '[w]hen carrying out some ... functions, the sheriff may well be acting as an arm of the state.'. . In contrast to *Abusaid*—where the sheriff was enforcing a *county* ordinance—here HCSO is carrying out state policy. Specifically, HCSO contracted to perform child-protective investigations for DCF, a state agency entitled to sovereign immunity. . . . When HCSO sheltered and transferred MAF, it was acting pursuant to this Grant Agreement. Thus, the question we must answer is whether, under state law, the relationship created by the Grant Agreement between DCF and HCSO weighs in favor of classifying the latter as an arm of the state. . . . While the label of 'independent contractor' serves as persuasive evidence that HCSO did not act as an agent of the state under Florida law, it is not dispositive. . . .In addition to the label, . . the Grant Agreement explains that 'the Grantee [HCSO] shall be considered by the Grantor [DCF] as agent of the Grantor *for the sole and limited purpose* of receiving information obtained from or concerning applicants and recipients of public assistance programs.'. . As if it were concerned that labeling HCSO an independent contractor wouldn't be enough, the Grant Agreement goes out of its way to circumscribe the function in which HCSO serves as an agent of DCF. And notably, the function at issue in this case—child-protective investigations—does not fall into this narrow exception to HCSO's general status as an independent contractor. . . As Sheriff Chronister points out, the Grant Agreement states that HCSO 'may, during the performance of this grant, assert any privileges and immunities which are available as a result of the Grantee performing the state functions required by Chapter 39, F.S., and this Grant Agreement.' Sheriff Chronister attaches much significance to this language. . . But in our estimation, this language simply leaves intact whatever 'privileges and immunities' HCSO might have as a result of performing under the Grant Agreement. Whether there are any such privileges or immunities in the first place is a question we, interpreting the Grant Agreement under Florida law and the law of our Circuit, must decide. All in all, we conclude that this first factor weighs against arm-of-the-state status. . . . The second factor requires us to look at the degree of control the state exercises over the entity generally as well as with respect to the specific function at issue. . . .Considering both the autonomy that the Grant Agreement affords HCSO and the control the state exerts through state-set standards and reporting requirements, we conclude that this factor is neutral. . . .Although Florida sheriff's offices are generally funded entirely by county taxes, . . . DCF provides all funding for child-protective investigations, and Freyre does not contest this. Thus, this factor weighs in favor of arm-of-the-state status. . . .Th[e] final factor, the most

important of the *Manders* calculus, . . asks us to determine whether the state treasury would be burdened by a judgment against HCSO in this matter. . . .[W]e conclude that a judgment against HCSO would not be satisfied with state funds and that this factor weighs against arm-of-the-state status. While this case presents an especially close call, we ultimately conclude that HCSO does not act as an arm of the state when conducting child-protective investigations pursuant to the specific Grant Agreement between HCSO and DCF.")

Stanley v. Israel, 843 F.3d 920, 921-22, 924-26, 931 (11th Cir. 2016) ("This case arises from the Broward County Sheriff's potential liability under § 1983 for failing to rehire a former deputy allegedly due to his political loyalties and in violation of his First Amendment rights. Broward County has expressly designated its sheriff as its CCO; thus, at issue in this case is the basic question whether a Florida county sheriff, acting in his capacity as chief correctional officer in the hiring and firing of his deputies, is an arm of the state entitled to the benefit of the state's Eleventh Amendment immunity from suit in federal court. After careful review, and having the benefit of oral argument, we conclude that a Florida sheriff is not an arm of the state when acting in this capacity. We, therefore, reverse the district court's grant of summary judgment for the Sheriff and remand to the district court for further proceedings consistent with this opinion. . . . We have never addressed the precise question at issue in this case, but a trio of cases -- *Manders*, *Abusaid*, and *Pellitteri* -- bears heavily on our decision. . . .In *Hufford v. Rodgers*, 912 F.2d 1338 (11th Cir. 1990), a panel of this Court held that 'the Eleventh Amendment does not protect Florida sheriffs from liability under section 1983.'. . Cases involving Florida sheriffs after *Hufford* have uniformly followed that decision and have entertained § 1983 suits against sheriffs in various situations. [collecting cases] . . . .*Hufford* and its pre-*Manders* progeny did not undertake the function-by-function analysis mandated by *McMillian* and *Manders*. This Court's lone post-*Manders* case addressing Florida sheriffs is *Abusaid*, which determined that a Florida county sheriff does not act as an arm of the state when enforcing a county ordinance. . . . *Abusaid* did not address the function at issue in this case -- the hiring and firing of deputies while acting in the capacity of chief correctional officer. The closest we have come to addressing that precise function is in *Pellitteri*. In that case, this Court determined that a Georgia sheriff acts as an arm of the state when hiring and firing his deputies. . . .With these cases in mind, we apply the *Manders* analysis to a Florida sheriff acting in his capacity as Chief Correctional Officer (CCO) in the hiring and firing of deputies. Because the overall weight of the factors tips on the side of county status, we conclude that a Florida sheriff acting in this capacity is not entitled to Eleventh Amendment immunity. . . .While the issue of state or county control is a close question, and we commend the district court for the care with which it undertook this analysis, we conclude that the four *Manders* factors taken in concert ultimately indicate that a Florida sheriff is not an arm of the state when he is acting in his capacity of CCO in the hiring and firing of his deputies.")

Abusaid v. Hillsborough County Bd. of County Commissioners, 405 F.3d 1298, 1304 (11th Cir. 2005) (Florida sheriff acts for county and is not arm of the state when enforcing a county ordinance)

Cook v. Sheriff of Monroe County, 402 F.3d 1092, 1115 (11th Cir. 2005) ("When, as here, the defendant is the county sheriff, the suit is effectively an action against the governmental entity he represents − in this case, Monroe County.").

Brown v. Neumann, 188 F.3d 1289, 1290 n.2 (11th Cir. 1999) ("We recognize that our decisions have not been entirely consistent on whether the relevant entity in an official-capacity suit against a sheriff in Florida is the County or the Sheriff's Department (as a unit operating autonomously from the County). *Compare Lucas v. O'Loughlin*, 831 F.2d 232, 235 (11th Cir.1987) (County). . . *with Wright v. Sheppard*, 919 F.2d 665, 674 (11th Cir.1990) (implying that the Sheriff's Department would be the relevant entity). We do not address this point because our holding today is that whatever the relevant entity was, it is not liable under *Monell*.").

Hufford v. Rodgers, 912 F.2d 1338, 1341-42 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991) (suit against Florida sheriff not barred by Eleventh Amendment because the Florida state constitution designates the sheriff as a county officer and the sheriff's budget, salary and any judgment against him is paid by the county).

Dream Defenders v. DeSantis, No. 4:21CV191-MW/MAF, 2021 WL 4099437, at *13 (N.D. Fla. Sept. 9, 2021) ("*Hufford* is no longer controlling after the Eleventh Circuit's en banc decision in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) and the Supreme Court's related decision in *McMillian v. Monroe County,* 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997). Upon review of Defendant Tony's response and the arguments presented at the telephonic hearing with respect to this point, this Court reaffirms that Defendant Sheriffs are properly before this Court as 'state officials' with respect to their state-law function to enforce Florida's anti-riot laws. . . As discussed at the hearing, Florida sheriffs are required by Florida law to command, 'in the name of the state,' that unlawful assemblies are to disperse. . . Indeed, no other crime in Florida is subject to such statewide concern. . . For these reasons, and those set out in this Court's Order on the Motions to Dismiss, this Court concludes that Florida sheriffs act as state officials when enforcing Florida's anti-riot laws, dispersing riots under section 870.04, and quelling riots pursuant to their state-law duty under section 30.15(1)(f).")

Holder v. Gualtieri, No. 8:14-CV-3052-T-33TGW, 2016 WL 1721405, at *10 (M.D. Fla. Apr. 29, 2016) ("The Sheriff comes forward with no evidence suggesting that a judgment would be paid out of the state treasury. And, as explained above, the Legislature left intact the Sheriff's local autonomy when it shifted 'the entire responsibility' for child protective investigations in Pinellas County to the Sheriff. Fla. Stat. § 39.3065(1). As a result of that blanket transfer of responsibility, it is the Sheriff's dignity – not that of DCF or the state – that is threatened by a lawsuit in federal court. The Court therefore concludes that the Sheriff is not an 'arm of the state' for the particular function at issue, and he is not entitled to Eleventh Amendment immunity.")

Wilds v. Seminole County, No. 6:12–cv–1806–Orl–37KRS, 2013 WL 1611334, *1 & n.1 (M.D. Fla. Apr. 15, 2013) ("The parties now jointly move for reconsideration of that part of the Order, bringing to the Court's attention the fact that the County was never intended to be named as a

defendant in this lawsuit and that inclusion of the County in the style of the case was an error. . . Unbeknownst to the Court, the parties also agreed that Plaintiffs' counsel would 'drop any reference to Seminole County' in the amended complaint. . . Given this stipulation, the Court declines to reach a determination on the open issue of the propriety of a § 1983 suit against a Florida charter county for the actions of a sheriff who is arguably an independent constitutional officer over whom the county exercises little to no control. . . Therefore, the portion of the Order finding that the County is the relevant defendant and directing Plaintiffs to refile the amended complaint against only the County rather than the Sheriff . . . is due to be vacated. . . . Though the Sheriff relies on *McMillian v. Monroe County*, 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997), and *Grech v. Clayton County,* 335 F.3d 1326 (11th Cir.2003), the Court notes that those cases are not dispositive of this particular question on these facts. . . *McMillian* was decided under Alabama law, 520 U.S. at 786, and *Grech* under Georgia law, 335 F.3d at 1329. The Court finds that the issue has not been definitively decided under Florida law and more specifically, under Florida law as applied to the charter of Seminole County. *Grech,* interpreting *McMillian,* was decided by a fractured plurality. . .which reached a very narrow holding: that the activities of that particular county sheriff in the specific area of maintaining criminal warrants for Georgia's state database did not constitute final policymaking for Clayton County. . . Whether Sheriff Eslinger, in adopting and enforcing policies in the area of training, supervision, and discipline of deputies for the use of excessive force, was acting under the control of Seminole County such that it could be liable under *Monell* for those activities is a question no longer squarely presented in the instant case due to the parties' stipulation. Nor has this precise question been considered in this District. . . Therefore, resolution of this issue remains for another day.")

Ramirez v. Hillsborough County Sheriff's Office, No. 8:10-cv-1819-T-23TBM, 2011 WL 976380, at *1, *2 (M.D. Fla. Mar. 18, 2011) ("Hillsborough County Sheriff David Gee − and not the 'Hillsborough County Sheriff's Office' − is the proper party to an action against the Sheriff. . . The Sheriff, a human being and not an 'office,' is properly sued in his own name but in his official capacity. Accordingly, the conclusion of this order directs the plaintiffs to correctly identify the Sheriff in an amended complaint and to omit the 'Hillsborough County Sheriff's Office'.")

Gray v. Kohl, 568 F.Supp.2d 1378, 1393 & n.3, 1394 (S.D. Fla. 2008) ("A Deputy or Officer in one of Florida's county Sheriff departments does not constitute a final policymaking authority for the county because he does not stand in the shoes of the Sheriff and is under the chain of command of the Sheriff. . . Therefore, a discretionary act by a Deputy or Officer, of which the County Sheriff does not know about, ratify or consent to, cannot constitute a final policy of the county. . . Here, there is no evidence that Sheriff Roth directed Officer Perez to arrest the individuals handing out Bibles, or that Sheriff Roth knew about or consented to the arrests beforehand. In the absence of any such knowledge by Sheriff Roth, the arrests were a purely discretionary act of Officer Perez, and any chilling of Plaintiff's First Amendment rights must also be attributed to Officer Perez. As such, Officer Perez's decision to enforce the School Safety Zone Statute against the individuals handing out bibles does not constitute a policy of Monroe County. . . . The holding in *Abusaid* that a County Sheriff enforcing a county statute is not entitled to Eleventh Amendment immunity

applies with equal force to a County Sheriff enforcing a state statute. *Abusaid*'s application of the four-factor test in *Hufford* leaves no room for distinguishing between a County Sheriff's enforcement of a county versus a state statute. . . . However, Officer Perez's arrest of the Gideons could become an act attributable to the County if the arrests were ratified by Sheriff Roth after the fact. If an authorized policymaker ratifies a subordinate's decision and the reasons for making the decision, the decision is chargeable to the municipality. . . . Here, there is no evidence that Sheriff Roth, the final policymaking authority in matters of law enforcement for Monroe County , ratified Officer Perez's arrests of the Gideons based on the fact that they were distributing Bibles within the school safety zone. When Sheriff Roth was asked if he thought that handing out Bibles in the school safety zone constitutes 'legitimate business,' he responded that as long as traffic was not disrupted and there were no other safety issues, handing out Bibles would be 'legitimate business.'. . Hence, Monroe County cannot be said to have a policy of arresting citizens handing out Bibles within a school safety zone.").

Jones ex rel. Albert v. Lamberti, No. 07-60839-CIV, 2008 WL 4070293, at *5 (S.D. Fla. Aug. 28, 2008) ("The Sheriff is the final policymaker for the operation of the jails. The County does not control the Sheriff with respect to this function; therefore, the County cannot be liable under § 1983.")**.**

Jeffries v. Sullivan, No. 3:06cv344/MCR/MD, 2008 WL 703818, at *21 (N.D. Fla. Mar. 12, 2008) ("In summary, all four factors yield the conclusion that neither the Escambia County Sheriff nor PHS acts as an arm of the state in providing health care services to county jail inmates.")

White v. Polk County, No. 8:04-cv-1227-T-26EAJ, 2006 WL 1063336, at *4, *5 (M.D. Fla. Apr. 21, 2006) ("Generally, as set forth in great detail in *Abusaid*, Florida law gives sheriffs great independence and counties retain the 'substantial discretion over how to utilize that office' including the constitutional grant of power to the county to decide to abolish the office of sheriff if so desired. . . . If the sheriff, however, is carrying out any one of the enumerated functions listed under section 30.15 of the Florida Statutes, then the sheriff may be acting as an arm of the state, but '[t]he key question is not what arrest and force powers sheriffs have, but for whom sheriffs exercise that power.' . . A review of section 30.15 reveals that the sheriff acts on behalf of the county when executing process of county courts and the board of county commissioners and when maintaining 'the peace in their counties.'. . Nothing in section 30.15 or any other provision of Florida law dictates that the training and supervising of deputies falls under a function required by the state, as opposed to the county. Thus, the actions complained of in this case do not fall under the category of law enforcement for the state, but rather fall under the category of policymaking for the county. . . . Having considered all four factors as dictated by *Abusaid*, the Court concludes at this juncture, that the Sheriff was about the business of the county government in the alleged inadequate training and supervision of his deputies with respect to pursuits, or 'surveillance' if that be the case. In other words, the aspects of policies regarding training and supervision may be considered more along the lines of local, administrative duties as opposed to broad state duties of law enforcement.").

Parilla v. Eslinger, No. 6:05-CV-850-ORL, 2005 WL 3288760, at *8, *9 (M.D.Fla. Dec. 5, 2005) ("The Plaintiffs allege that the County 'has delegated the management and operations of the Jail where the wrongs complained of herein occurred to the Defendant Sheriff of Seminole County.' . . Apparently in response to this alleged delegation, the County complains that the Sheriff is an independent constitutional officer, that he, his deputies, and the corrections officials at the Jail are not employees of the County, and that the County cannot be held responsible for their actions. However, the statutes cited by the County − which mostly deal with the Sheriff's authority to run his office and oversee his deputies − do nothing to establish that the Seminole County Sheriff is 'independent' of Seminole County, at least insofar as it comes to operation of the Seminole County Jail. The County also cites to a Supreme Court decision that found that an Alabama county was not liable under Section 1983 for the actions of the county sheriff. . . . However, *McMillian* was decided on the basis of various provisions of Alabama law, such as a constitutional provision stating that '[t]he executive department shall consist of a governor, lieutenant governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.' . . The County points to no similar constitutional or statutory provisions, instead simply reciting that 'under Florida's statutory framework, the Sheriff is a Constitutionally independent officer who acts independent of the County.'. . This is not sufficient. Moreover, a statutory provision cited by the County at the hearing in this matter − Florida Statute § 951.061 − suggests that Eslinger represents the County in regard to jail operations. The statute provides that a county commission may adopt an ordinance designating the sheriff to be the chief correctional officer of the county correctional system, . . .after which the sheriff would operate and maintain the county's jails. Fla. Stat. § 951.061(1). The statute strongly suggests that, at least in regard to jail operations, a Florida sheriff acts as a county decisionmaker, and his decisions therefore establish the County's policy for purposes of Section 1983. Even in the absence of this statute, however, the County has not shown that, as a matter of law, it cannot be held liable for the actions of the Individual Defendants in operating the Jail.")

Samarco v. Neumann, 44 F. Supp.2d 1276, 1287 (S.D. Fla. 1999) ("In light of Florida statutory authority, which designates county sheriffs as independent constitutional officials, the Court finds that Sheriff Neumann, as the county's chief law enforcement officer, was the final policymaker for matters concerning the Palm Beach County Sheriff's Office. . . Thus, acts of Sheriff Neumann found violative of § 1983 are capable of imputing liability upon the Palm Beach County Sheriff's Office.").

Georgia (state)

Nichols v. Prather, 650 S.E.2d 380, 384, 385 (Ga. App. 2007) ("The appellants argue that, pursuant to *Brown* and the Eleventh Circuit cases, Georgia's sheriffs are always state actors, not county actors. *Brown* and the federal cases are inapplicable to the instant case, however, because they involved the issue of immunity from liability for a sheriff's violations of the federal civil rights statute, 42 USC § 1983 . In contrast, this case involves the sheriff's liability under the doctrine of *respondeat superior* for his deputy's negligence under Georgia's tort laws, as well as

the county's liability under an agency theory. Further, contrary to the appellants' arguments, the cases upon which they rely do not hold that Georgia's sheriffs are always state officers, but stand for the proposition that, depending on the circumstances, sheriffs may be deemed state agents for the purpose of determining liability for constitutional violations under § 1983 . None of the cases hold that Georgia's sheriffs and their employees are 'state officer[s] or employee[s]' under the GTCA. Instead, under the plain language of the Georgia Constitution and the GTCA, sheriffs are county officials, not state officers or employees.")

Brown v. Dorsey, 625 S.E.2d 16, 20-23 (Ga. App.2005) ("No Georgia appellate court has squarely addressed the issue of whether the sheriff acts with final policymaking authority for the county or for the state in the context of a § 1983 action. However, in *Grech v. Clayton County*. . . an exhaustive 6-6 plurality opinion, the Eleventh Circuit Court of Appeals held that although Ga. Const. of 1983, Art. IX, Sec. I, Par. III(a)- (b) designates the sheriff as a 'county officer,' the same paragraph grants the state legislature the exclusive authority to establish and control a sheriff's powers, duties, qualifications, and minimum salary. . . The court also noted that in interpreting this constitutional provision, the Georgia Supreme Court has stated that '[t]he sheriff is an elected, constitutional officer; he is subject to the charge of the General Assembly and is not an employee of the county commission.' . . .Although *Grech* is not binding precedent, we find its reasoning very persuasive. Moreover, the Georgia Supreme Court has recently reaffirmed that '[t]he sheriff is an elected constitutional county officer and not an employee of the county commission.'. . . Nevertheless, the question of whether the sheriff has final policymaking authority for the County for § 1983 purposes must be examined in light of the particular function at issue. . . We thus reexamine the allegations in the complaint. Mrs. Brown asserts that Dorsey was the final policymaker for the county in matters concerning the use of deadly force by sheriff's department personnel, the direction and control of deputies and jailors, and the direction, control, and use of sheriff's department materials, equipment and resources. But, as noted above, the County has no control over the sheriff's department personnel, including its deputies and jailors. Therefore, the County cannot be held liable under § 1983 for Dorsey's use of those personnel in connection with his heinous plot to kill Derwin Brown. Finally, even though the County commission approves the sheriff's budget, . . .and the sheriff has the duty to preserve county property from injury or waste, . . . the county cannot control how the sheriff spends the budget. . . In the absence of the ability to control the funds after they have been allocated, the County cannot be held liable for the sheriff's use of departmental resources to commit a § 1983 violation. It follows that the trial court did not err in dismissing the County as a party to Mrs. Brown's action for the reason that Dorsey was not a final policymaker for the County when he used departmental personnel and resources to kill her husband.. . . We agree with the dissent in *Pembaur v. City of Cincinnati* that the majority's reasoning in that decision is circular. . . *Pembaur* seems to hold that policy is what policymakers make and that policymakers are those who have the authority to make policy; therefore, any decision made by a policymaker is a policy. . . In the case at bar, Mrs. Brown argues that Dorsey was a policymaker for the County and, therefore, his *ad hoc* decision to murder his rival was a policy of the County. We would reject Mrs. Brown's assertion and affirm on this ground the trial court's dismissal of the claims against the County, but *Pembaur* is binding precedent and is

squarely on point. . . . Because Sheriff Dorsey had final authority to make policy regarding the use of deadly force by his subordinates, we are prevented by *Pembaur* from affirming the dismissal on the ground that Dorsey's decision to murder Brown was one discrete decision and not a policy. As argued by the dissent in *Pembaur*, that controlling federal precedent in effect imposes *respondeat superior* liability on local governments for the intentional acts of 'a certain category of employees, i.e., those with final authority to make policy.'. . If Dorsey had had the final authority to make policy on behalf of the County, then the pleadings filed by Mrs. Brown, including the amended complaint, would be sufficient to withstand a motion to dismiss brought by the County. . . However, as explained in Division 1 *infra*, Dorsey was a policymaker for the state and not for the County with regard to the particular functions at issue. For that reason, the trial court properly dismissed the claims against the County.")

Georgia (federal)

Myrick v. Fulton County, Georgia, 69 F.4th 1277, 1295-96 (11th Cir. 2023) ("*Manders* does not speak directly to whether Sheriff Jackson acted as an 'arm of the state' with respect to the provision of medical care, but its discussion of the structure of the sheriff's office, generally speaking, is still instructive. The State still controls, trains, and disciplines the sheriff's office. Our discussion of the third and fourth *Manders* factors apply with equal force here. The third factor tilts in favor of immunity because some state money goes to the sheriff's office, and a state mandate requires the county to fund the sheriff's budget but prohibits the county from dictating how the sheriff spends those funds. . .The fourth factor does not point in either direction—counties are not responsible for adverse judgments against the sheriff in his official capacity, and no state law requires the state to pay those judgments either. . . *Manders'*s discussion of the first and second factors is not directly applicable to the provision of medical care. We address them now. With respect to the second factor, control, Georgia courts have interpreted O.C.G.A. § 42-4-4(a)(2) as 'giving sheriffs exclusive control vis-à-vis the county over choosing vendors for medical care.'. . . Finally, we consider the first factor—how Georgia state law defines the entity. *Manders* clearly stated that in addition to performing common law duties to enforce the law and preserve the peace on behalf of the State, the sheriff's office 'perform[s] specific statutory duties, directly assigned by the *State*.'. . One such statutory duty assigned by the state is furnishing medical aid. . . Further, in *Lake v. Skelton* we discussed O.C.G.A. § 42-5-2, according to which it is 'the responsibility of the governmental unit, subdivision, or agency having the physical custody of an inmate to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention.'. . We stated that Georgia law clearly required the *sheriff* to 'take ... custody of the jail and the bodies of such persons as are confined therein.'. . This meant that the *sheriff*, not the *county*, was the governmental unit with custody of the inmates. . . Thus 'Section 42-5-2 support[ed the] conclusion that Georgia imposes food-service responsibilities directly on the sheriff as part of his custodial duties.'. . If, under § 42-5-2, the sheriff wears a 'state hat' with respect to food-service responsibilities, that same provision must lead to the conclusion that the sheriff wears a 'state hat' with respect to the provision of medical care as well. Indeed, our holding in *Lake* that the sheriff was an arm of the state with respect to providing food relied at least in part on the idea that, under

Georgia law, the sheriff was an arm of the state with respect to providing medical care. . . As in *Manders* and *Lake*, the first three factors here weigh in favor of immunity. The fourth factor does not defeat it. Altogether, we conclude that Sheriff Jackson acted as an 'arm of the state' and is entitled to Eleventh Amendment immunity with respect to the particular function of providing medical care. The District Court correctly dismissed the claims against Sheriff Jackson in his official capacity.")

Andrews v. Biggers, 996 F.3d 1235, 1235-36 (11th Cir. 2021) ("Oqueshia Andrews alleges that Douglas County Sheriff's Deputy Carmel Biggers fondled her, kissed her, and watched her shower, all without her consent, when she was an inmate in the county jail. According to Andrews, the reason Biggers, who is male, could do those things is that Douglas County Sheriff Tim Pounds operates the jail with a policy that allows 'cross-gender supervision of inmates without reasonable safeguards in place.' Andrews sued Pounds in his official capacity under 42 U.S.C. § 1983, and the district court granted Pounds' motion to dismiss, concluding that under *Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313 (11th Cir. 2005), Pounds was due Eleventh Amendment immunity because he acts as an arm of the State 'when promulgating policies and procedures governing conditions of confinement' at the county jail. . . Andrews concedes, as she must, that *Purcell* 'control[s] the outcome of this case because both cases relate to the function of jail operations' and that the district court was 'bound by precedent' to follow it. Since Georgia law as it relates to sheriffs' duties and control has not meaningfully changed since we issued *Purcell*, we agree. But Andrews wants *Purcell* overruled and our Court 'to revisit the factors discussed' in *Manders v. Lee*, . . . the decision on which *Purcell* relies and which she recognizes 'runs contrary to her position.' She believes *Manders* 'misapplies' to Georgia sheriffs the Supreme Court's analysis in *McMillian v. Monroe County*, 520 U.S. 781 (1997). Of course, we as a panel cannot overrule Manders or *Purcell*. . . . Those principles apply as strongly, if not more so, where the earlier precedent is an en banc decision.")

Andrews v. Biggers, 996 F.3d 1235, 1236 (11th Cir. 2021) (Wilson, J., concurring) ("I concur in today's decision because *Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313 (11th Cir. 2005), is binding precedent that controls the outcome of this case. I write separately, however, to express my view that *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc)—which *Purcell* relies on—was incorrectly decided. Judge Anderson and Judge Barkett wrote compelling dissents in *Manders*, both of which I joined. I continue to agree with their criticism of the *Manders* majority. Nonetheless, under our prior-precedent rule, we are bound to follow *Manders* and its progeny unless it 'is overruled en banc or by the Supreme Court.'. . . For this reason alone, I concur.")

Andrews v. Biggers, 996 F.3d 1235, 1236-37, 1242-43 (11th Cir. 2021) (Rosenbaum, J., concurring) ("I concur in the panel's decision to affirm the district court's decision to dismiss Andrews's claim against Sheriff Pounds because he is entitled to sovereign immunity under binding case law. . . I write separately to explain why this Court should reevaluate this case law en banc, and in particular, our decision in *Purcell*. Under the concept of Eleventh

Amendment *state* sovereign immunity, our decisions in *Manders* and *Purcell* effectively insulate *local* governments in Georgia from liability in federal court when county sheriffs violate citizens' constitutional rights. For example, here, Douglas County is protected from liability even though, assuming the truth of Andrews's allegations, a Douglas County deputy sheriff engaged in a pattern and practice of sexually harassing and assaulting women incarcerated in Douglas County Jail. These are horrific and disturbing allegations, but under our precedent, the victims have no recourse against what is, in reality, the local government entity overseeing the county jail. Our case law rests on misinterpretations of Georgia law and the Supreme Court's state sovereign-immunity precedent. My disagreement with this line of cases is not unusual; the sheer number and length of the dissents in these cases attest to that fact. . . Today, I join this chorus of voices raising concerns about our sovereign-immunity doctrine with respect to Georgia sheriffs. In this concurrence, I seek to reiterate some of my colleagues' fundamental concerns with our reasoning in *Manders* and *Purcell*. I also explain why our decision in *Purcell* conflicts with *Manders* and should be abrogated regardless of whether we reconsider the ultimate holding in *Manders*. . . . Even if we ultimately decline to rethink our reasoning and holding in *Manders*, we should still review our holding in *Purcell*—the case the district court relied on here—because *Purcell* is itself inconsistent with our holding in *Manders*. *Manders* holds that the 'arm of the state' analysis must 'focus on the nature of the particular function at issue' in the case. . . And *Manders* is clear that the particular function should not be framed 'too broad[ly].' . . . But where *Manders* takes a scalpel, *Purcell* uses a meat axe. Instead of tailoring the analysis to the precise function at issue—the prevention of inmate-on-inmate violence—*Purcell* broadly declares that sheriffs function as an 'arm of the state' 'when promulgating policies and procedures governing the conditions of confinement' at county jails. . . That 'categorical all or nothing' definition of the function at issue directly contradicts our prior holding in *Manders*. To make matters worse, *Purcell*'s broad definition of the function at issue drastically expands the scope of our limited holding in *Manders*—that sheriffs are an 'arm of the state' when they establish use-of-force policy at county jails. . . But *Purcell* reads *Manders*'s holding to mean that sheriffs are always an 'arm of the state' when they create and enforce 'policies and procedures governing the conditions of confinement' at county jails. . . This expansion of *Manders*'s holding forecloses any case against a Georgia sheriff regarding the operation of county jails, even though *Manders* explicitly rejects that categorical approach. To stay true to our holding in *Manders*, then, at the very least, we should reconsider *Purcell*'s holding that sheriffs act as an 'arm of the state' for any function related to the county jail. Rather, we should drill down on the specific function at issue in each case and determine, based on the four *Manders* factors, whether the sheriff is acting as an 'arm of the state' for that particular function. . . It is time for us to reevaluate our decision in *Manders*. Our holding in that case rests on a misinterpretation of Georgia law and our Eleventh Amendment immunity precedent. And even if we do not revisit *Manders*, we should reconsider our overly broad holding in *Purcell* that sheriffs are immune from all suits 'when promulgating policies and procedures governing conditions of confinement' at the county jail. . . That holding—a drastic expansion of our holding in *Manders*—precludes on the basis of *state* immunity all those incarcerated in Georgia *county* jails from vindicating their rights in federal courts. Our decision in this case only further proves that fact. I respectfully urge the Court to reconsider these cases.")

Lake v. Skelton, 871 F.3d 1340, 1341-44 (11th Cir. 2017) (William Pryor, J., joined by Black, J., respecting the denial of rehearing en banc) ("On appeal, the panel considered only the narrow question whether the sovereign immunity of Georgia extends to Skelton when he is sued in his official capacity for decisions made about the provision of food to inmates. On that question, the panel reversed. . . .Contrary to our colleague's assertions, *Manders* did not decide whether Georgia sheriffs are entitled to sovereign immunity when performing functions other than establishing and implementing force policies. . . .When presented with that question, our panel faithfully applied our precedent. We weighed the four arm-of-the-state factors as dictated by *Manders* and concluded that Georgia sheriffs act as arms of the state when they make decisions about the provision of food. Our colleague argues that the panel incorrectly applied the factors and that its decision was not dictated by precedent. . . . [O]ur colleague misstates the impact of the panel opinion when she contends that it will 'bar[ ] suit against sheriffs for virtually any way they violate a jail inmate's rights—from the use of force to the denial of medical care.'. . As a threshold matter, the panel addressed only the provision of food. The panel did not decide whether the sheriff is entitled to sovereign immunity when he provides medical care, and a review of Georgia law might lead to a different result in a case about the provision of medical care. The panel opinion also addressed only a suit seeking money damages for a decision made by a deputy sheriff in his official capacity. It did not address suits against sheriffs or their deputies in their individual capacities. . . And it does not prevent inmates from seeking injunctive relief against sheriffs or their deputies in their official capacities. . . .Because the panel opinion is correct, we agree with the decision not to rehear this appeal en banc.")

Lake v. Skelton, 871 F.3d 1340, 1345-49, 1353-55 (11th Cir. 2017) (11th Cir. Sept. 28, 2017) (Martin, J., dissenting from the denial of rehearing en banc) ("The *Manders* court took great pains to limit its holding to the particular use-of-force function at issue in that case, and to distinguish that function from the duty to provide basic necessities. . . . Despite this Court's repeated observation in *Manders* that arm-of-the-state status would not be given to a sheriff who failed to give food or the other necessities listed in § 42-5-2, the panel for Mr. Lake's case held that county sheriffs are entitled to Eleventh Amendment immunity in precisely this circumstance. . . .[T]he panel deemed the human being who county voters elect to be their sheriff to be a 'governmental unit,' as that term is used in the statute. Having recrafted the statute in this way, the panel said § 42-5-2 'imposes directly on the sheriff' the 'responsibility ... of providing food to inmates,'. . . and since the panel had already designated the sheriff an officer of the state, it said feeding inmates and the other necessities required by § 42-5-2 are now state functions. So it was by this route the panel arrived at its decision that the first *Manders* factor weighs in favor of granting arm-of-the-state status. . . . Because the Georgia courts have held that § 42-5-2 imposes the duty of furnishing basic necessities (including food) on the county, the function of providing food to inmates is one that the sheriff carries out on the county's behalf, not the state's. . . . I do not quarrel with this Court's ruling in *Manders*. My criticism of the *Lake* panel opinion embraces the holding of *Manders* and demonstrates how the *Lake* opinion flies in the face of what this Court said in *Manders*. But beyond what is wrong with the panel's analysis of each of the four *Manders* factors, there is another, more fundamental flaw that runs throughout the panel

opinion, and that flawed reasoning seems to have begun in the *Manders* opinion. I had therefore hoped that, if this Court undertook to consider Mr. Lake's case en banc, we could have also addressed this flawed logic that first appeared in *Manders*. The *Lake* panel repeatedly emphasizes as weighing in favor of arm-of-the state status that the sheriff is 'independent from [the] [c]ounty.'. . The argument goes like this: because the sheriff is independent from the county, the sheriff must be an arm of the state. This mistaken premise, which (again) first appeared in *Manders*, . . . took hold in the *Lake* panel decision. I had hoped that this mistaken premise would not become a permanent fixture of this Circuit's arm-of-the-state jurisprudence. It is true that the sheriff, as an 'elective county office[r],' occupies a constitutional office that is largely independent from other county governing authority. . . But the county governing authority—which is the county's legislative body and is known as the board of county commissioners— is 'not the only institution that acts *for* the county.'. . Not unlike the federal government's separation of powers among coequal branches, Georgia law creates a separation of powers at the county level: the sheriff is an executive officer of the county, and his authority is largely independent of the county's legislative body. . . 'Thus, the sheriff's independence from the county commission should be interpreted not as independence *from the county*, but rather as *independent authority to act for the county* with respect to the functions entrusted his office.'. . .In any event, the panel's focus on the fact that the sheriff is largely independent of the county governing authority gives no aid in the relevant Eleventh Amendment inquiry. The Eleventh Amendment inquiry is about whether the *state* controls the sheriff and is financially responsible for his actions. . . Wherever the sheriff stands within the hierarchy of county control, it is clear that the state exercises essentially no control over his feeding inmates. The state does not fund the provision of food. The state is not financially responsible for an adverse judgment against the sheriff. There is therefore no legal basis for Georgia county sheriffs to be accorded the state's sovereign immunity when they fail to give food to inmates at the county jail. . . . When *Manders* granted Georgia sheriffs Eleventh Amendment immunity for claims arising out of use-of-force policies in county jails, this Court was careful to narrowly cabin the scope of that immunity. The words this Court used in *Manders* reflected an understanding of what a serious thing it is to expand a doctrine that blocks a whole class of people from vindicating their federal rights in federal court. Every time we expand the list of sheriff's functions that are immune from suit, we impact tens of thousands of people who are detained in county jails across the state of Georgia. . . Most of these people have not yet been convicted of any crime and are presumed innocent. . . Yet even in the face of this Court's express admonitions in *Manders*, the *Lake* panel opinion bars suit against sheriffs for virtually any way they violate a jail inmate's rights—from the use of force to the denial of medical care. If a faithful application of this Court's and the Supreme Court's precedents required this result, I would accept it and move on. But because neither this circuit's precedent nor that of the Supreme Court supports this broad grant of immunity to Georgia county sheriffs, I respectfully dissent.")

Lake v. Skelton, 840 F.3d 1334, 1336-44 (11th Cir. 2016), *reh'g en banc denied,* 871 F.3d 1340 (11th Cir. 2017) ("We conclude that the sovereign immunity of Georgia extends to a deputy sheriff who denies a dietary request of an inmate in a county jail. We reverse the denial of summary judgment against Lake's claims for damages and remand with an instruction to enter judgment for

Skelton on those claims. . . .The Cobb County Sheriff derives his powers from the State and, with the exception of funding, is largely independent of the county. Although this framework informs our analysis by providing evidence of 'the governmental structure of [the sheriff's] office vis-à-vis the State,'. . . all we need to decide today is whether Major Skelton acted as an arm of the State in the function of providing food to inmates. . . .The factors from *Manders* weigh in favor of immunity for Major Skelton. The first three factors—definition in state law, control under state law, and the source of funds—favor immunity. And the fourth factor—responsibility for judgments—'does not defeat immunity.'. . .With respect to county jails, section 42-5-2 imposes two separate duties: the county must fund the provision of medical care, and the sheriff must select an appropriate provider and ensure that inmates receive care when necessary. . . Our dissenting colleague argues that the Georgia Court of Appeals has long construed section 42-5-2 to impose a duty on counties, not sheriffs, to provide medical care. . . He reads sections 42-5-2 and 42-4-32 'harmoniously' to mean that 'the sheriff acts on behalf of the county' when providing food to inmates. . . We respectfully disagree. The Georgia Court of Appeals has never construed section 42-5-2 to mean that a sheriff acts on behalf of the county when he provides medical care. Instead, the Georgia Court of Appeals, like we do, distinguishes between the duty imposed by section 42-5-2 on a county to fund medical care and the duty of a sheriff to provide medical care. . . .Section 42-5-2 regulates both the furnishing of 'food' and the furnishing of 'needed medical and hospital attention,'. . . and we draw the same distinction regarding food that the Georgia Supreme Court and the Georgia Court of Appeals have drawn regarding medical care. Although the Georgia Code may not be a model of clarity when it comes to allocating responsibility in the context of corrections, we conclude that the duty to feed inmates—including the denial of an inmate's dietary request—is not delegated by the county but instead is 'directly assigned by the state.'. . .A deputy's functions are derived from the sheriff's functions, so the deputy's performance of this function is also a state function. Georgia law allows sheriffs 'in their discretion to appoint one or more deputies.'. . . Deputies are employees of the sheriff, and only the sheriff can hire deputies. . .Although the sheriff may place his deputies under a county civil-service system, it is his choice whether to do so. . . And the sheriff trains and supervises deputies. . . Because the sheriff wears a 'state hat,'. . . when he denies an inmate's dietary request, and because a deputy receives all of his powers and obligations with respect to feeding inmates from the sheriff, we conclude that a deputy also wears a 'state hat' when he denies an inmate's dietary request. . . .We acknowledge that we reserved judgment in *Manders* about a 'case of feeding ... inmates, which necessarily occur[s] within the jail.'. . . But we also observed that Georgia law 'regulates the preparation, service, and number of meals,' which we called 'evidence of how the duties of sheriffs in Georgia are governed by the State and not by county governing bodies.'. . To the extent that our dissenting colleague suggests that this appeal should be decided based on 'the Eleventh Amendment's twin reasons for being,'. . . we can only say that we are bound by the test of the en banc majority in *Manders*, not the dissent. . . And under the test announced in *Manders*, Major Skelton is entitled to immunity.")

Lake v. Skelton, 840 F.3d 1334, 1345-51 (11th Cir. 2016) (Parker, J., dissenting), *reh'g en banc denied*, 871 F.3d 1340 (11th Cir. 2017) ("[T]he majority holds that a Georgia deputy sheriff acts on behalf of the State and is thus immune from liability for failing to provide food to inmates in

the county jail. The majority reaches that conclusion based largely on its view that § 42-5-2 does not impose a duty on the counties, even though, as *Manders* recognized, the Georgia Court of Appeals has construed the statute to do just that. The majority then proceeds to an inappropriate application of the *Manders* factors while losing sight of the principal purpose behind the Eleventh Amendment – not implicated here – of protecting the State's purse from federal-court judgments absent consent to suit. The result is a decision that significantly expands the reach of sovereign immunity and will leave Georgia counties unanswerable for constitutional violations predicated on their failure to provide food or any of the other necessities required by § 42-5-2. Because I believe that such an outcome is neither correct as a matter of law nor wise, I respectfully dissent. . . .The Georgia Court of Appeals has construed § 42-5-2 to impose a responsibility on counties to provide food, clothing, and medical care to inmates in the county jail, which makes sense only if the counties are the 'governmental units' upon whom that responsibility falls. Because I see no basis to conclude that the Georgia Supreme Court would interpret the statute differently, we are bound by the Court of Appeals's construction. . . .In sum, because the task of providing food to inmates in the county's physical custody is assigned by statute to the county and is generally limited to the county jail, and because the alternative sources of state law do not clearly indicate that the sheriff acts for the State, I would hold that state law defines the function of providing food to inmates in the county's custody as a county function. Accordingly, I would find that the first factor weighs heavily against immunity. . . .To recapitulate, the first *Manders* factor weighs heavily against immunity. The third and possibly fourth point in the same direction. And while the second factor favors immunity, it is of limited relevance where the factors conflict. I would accordingly hold that a Georgia deputy sheriff is not entitled to immunity for failing to provide food to inmates in the county jail. This should come as little surprise, given the *Manders* court's repeated observation that the provision of food, clothing, and medical care are materially different for purposes of immunity from the force policy functions. . . .To the extent that the *Manders* factors are not conclusive, however, 'the Eleventh Amendment's twin reasons for being remain our prime guide,'. . . and they too weigh against immunity. The first factor is to ensure that we do not offend Georgia's dignity as a sovereign by allowing sheriffs to be sued in federal courts. *Id.* As noted, the Georgia Court of Appeals has held that a county is responsible for the sheriff's failure to comply with § 42-5-2 because the sheriff acts on the county's behalf, *i.e.*, as an arm of the county. . . Indeed, while the Georgia courts have said that a county cannot be held liable for violating § 42-5-2 because the statute does not waive sovereign immunity as a matter of *state* law, they have added that 'this does not mean that plaintiffs seeking recourse based on allegations that a government denied or provided inadequate medical treatment to an inmate are necessarily without recourse because such claims may in some circumstances state a cause of action under 42 U.S.C. § 1983.'. . Thus, not only do we *not* offend Georgia's dignity by permitting suit in these circumstances, Georgia *expects* that § 1983 liability would be available to hold sheriffs and counties accountable. 'It would be every bit as much an affront to [Georgia's] dignity' to ignore those decisions and conclude that the sheriff and his deputies act for the State and are immune from liability for such actions. . .The second purpose of immunity, which is the 'most important,' is to prevent federal-court judgments that would necessarily be paid out of the State's treasury absent consent to suit. . . As *Manders* recognized, a federal judgment would have no direct impact

on Georgia's treasury because it would be paid out of the budget of the sheriff's office, which as previously noted, comes from the county funds. . .While this fact does not necessarily defeat immunity, . . . it certainly weighs against it[.] . . . And even if an indirect impact on the State treasury could theoretically support immunity, which is questionable, . . . that impact is too remote and speculative here because it is the counties who ultimately bear the responsibility for ensuring that the sheriff is adequately funded to perform his duties. . . Both purposes, then, weigh against immunity. For all of these reasons, I would hold that a Georgia deputy sheriff is not entitled to immunity from liability for failing to provide food to inmates at the county jail, and I would affirm the decision of the district court. I therefore respectfully dissent.")

Pellitteri v. Prine, 776 F.3d 777, 779-83 (11th Cir. 2015) ("[W]e do not ask whether a sheriff in Georgia acts as an 'arm of the State' generally. Rather, we must determine whether Sheriff Prine acts as an 'arm of the State' when exercising his power to hire and fire his deputies. . . .Admittedly, we stated in *Keene* that 'sheriffs are largely independent from the State when they make personnel decisions.' 477 F. App'x at 578. We arrived at this conclusion by observing that sheriffs alone have great discretion in choosing who to appoint as their deputies. *Id.* Based in part on this autonomy—both from the State and the county—we concluded that sheriffs do not act as an 'arm of the State' when exercising their discretion to hire and fire deputies. . .Upon further review, however, we believe that this conclusion in *Keene* was mistaken on two fronts. First, the State of Georgia has in fact exercised a great deal of control over the hiring and firing of deputy sheriffs, especially through the certification process for peace officers. . . . And even after meeting all of these requirements, a potential deputy sheriff must still successfully complete an academy entrance examination administered by the State before he or she can be certified to serve in a sheriff's office as a deputy. . . These threshold requirements for serving as a peace officer in Georgia significantly limit a sheriff's discretion when hiring potential deputies. The Georgia legislature has also enacted laws creating a Peace Officer Standards and Training Council to discipline peace officers—including deputy sheriffs—for misconduct. . . This Council has the power to administer reprimands and limit, suspend, or revoke a peace officer's certification. . . Thus, the Council can functionally terminate a deputy sheriff's ability to perform his or her duties, which significantly restricts a sheriff's discretion in personnel matters. Finally, as we mentioned in *Manders,* Georgia's governor also has broad investigation and suspension powers to discipline a sheriff for misconduct. . . These disciplinary powers can be used to check sheriffs when they abuse their appointment or removal powers. Based on these facts, we conclude that Sheriff Prine's power to hire and fire his deputies is subject to a significant amount of oversight by the State. Second, our conclusion in *Keene* was also flawed because it strayed from the 'key question' of the *Manders* function-by-function inquiry, which 'is not what ... powers sheriffs have, but *for whom* sheriffs exercise that power.'. . While it may be true that sheriffs alone are authorized to appoint their deputies, O.C.G.A. § 15–16–23, they do not exercise that authority for themselves. Rather, sheriffs select deputies to assist them in executing their own duties, which have been delegated to them by the State. . . .The third factor in the Eleventh Amendment analysis is where the entity derives its funds. In *Keene,* we found that this factor weighed against immunity because the '[c]ounty is clearly the principal source of funding for the Sheriff's Office, including for personnel expenditures.'. . Here again, we

recognize that our prior unpublished opinion is inconsistent with this Court's published precedent. In *Manders*, we observed that each county in Georgia bears the major burden of providing funds to the sheriff's office, including the salaries of the sheriff and his deputies. . . We did not find this fact to be dispositive, however, because it is the State that mandates that counties set a budget for the sheriff's office. . . More important, although each county sets the total budget for the sheriff's office, it cannot dictate *how* the sheriff spends those funds. . . . Fourth and finally, we consider 'who is responsible for judgments against the entity.'. . The Supreme Court has emphasized that the 'impetus' for the Eleventh Amendment was the 'prevention of federal-court judgments that must be paid out of a State's treasury.'. . As a result, we have stated that 'the presence of a state treasury drain alone may trigger Eleventh Amendment immunity and make consideration of the other factors unnecessary.'. . On this factor, we agree with this Court's conclusion in *Keene* and *Manders* that the financial independence afforded the sheriff's office 'creates something of a lacuna' because neither the State nor the County will be required to directly pay for any adverse judgment against the Sheriff's office. . . Rather, any adverse judgment against Sheriff Prine will be paid out of the budget of the Lowndes County Sheriff's Office, which is composed of both County and State funds. . . Nevertheless, to the extent that the state treasury will be spared here from paying any adverse judgment, this factor weighs in favor of denying immunity. . . .As in *Manders*, the first three factors here weigh in favor of immunity, while the fourth factor weighs against immunity. On balance, we conclude that Sheriff Prine enjoys Eleventh Amendment immunity against Ms. Pellitteri's wrongful termination claims brought against him in his official capacity under § 1983 and the ADA. We reverse the District Court's denial of Sheriff Prine's motion to dismiss and remand for further proceedings consistent with this opinion.")

Gary v. Modena, No. 05-16973, 2006 WL 3741364, at *11 (11th Cir. Nov. 21, 2006) ("While the Georgia Constitution does indicate that a Sheriff occupies a separate constitutional office in the state's governmental hierarchy, Ga. CONST. art. IX, § 2, and that the Georgia legislature alone controls the Sheriff's Office, Ga. CONST. art IX, § 1, P 3(a)(b), Georgia statute requires that governmental units provide medical care to all inmates in their physical custody. O.C.G.A. § 42-5-2 (2006) . . . . Georgia statute imposes the same affirmative duty upon sheriffs, requiring that the sheriff take custody of all inmates in the jail of his county, O.C.G.A. § 42-4-4(a)(1) (2006), and furnish them with medical aid, heat and blankets, to be reimbursed if necessary from the county treasury. O.C.G.A. § 42-4-4(a)(2) (2006). Given that county governments have a statutory obligation to provide inmates in county jails with access to medical care, Bibb County cannot avoid liability under § 1983 simply by arguing that the Sheriff is subject to the exclusive control of the state. *See Manders*, 338 F.3d 1323 n. 43. If Gary could show that Bibb County implemented a policy which promoted deliberate indifference to the medical care of inmates, and that the policy caused Butts death, she could hold the County liable, and we stress the word 'if.' Gary has failed to articulate a County policy that promoted deliberate indifference, and as we have noted previously, she has not provided any evidence from which we could infer that Deputy Hilliard failed to note an obviously serious medical condition on Butts' screening form and that this omission led to Butts' death. Accordingly, we affirm the district court's decision to award Bibb County summary judgment.").

Purcell ex rel. Estate of Morgan v. Toombs County, 400 F.3d 1313, 1325 (11th Cir. 2005) ("Although we declined to determine that a Georgia sheriff wears a 'state hat' for all functions, we decided that a sheriff's 'authority and duty to administer the jail in his jurisdiction flows from the State, not [the] County.'. . Thus *Manders* controls our determination here; Sheriff Kight functions as an arm of the State − not of Toombs County − when promulgating policies and procedures governing conditions of confinement at the Toombs County Jail. Accordingly, even if Purcell had established a constitutional violation, Sheriff Kight would be entitled to Eleventh Amendment immunity from suit in his official capacity.").

Manders v. Lee, 338 F.3d 1304, 1328 & n.54 (11th Cir. 2003) (en banc) ("Having applied the Eleventh Amendment factors, we conclude that Sheriff Peterson in his official capacity is an arm of the State, not Clinch County, in establishing use-of-force policy at the jail and in training and disciplining his deputies in that regard.[footnote omitted] Therefore, Sheriff Peterson is entitled to Eleventh Amendment immunity in this case. [footnote omitted] We need not answer, and do not answer, today whether Sheriff Peterson wears a 'state hat' for any other functions he performs. . . . It has been suggested that the sheriff's office is an independent, constitutional, elected office that is neither the State nor the county. . . Throughout this litigation the parties have briefed and framed the legal issue in this case *solely* as whether Sheriff Peterson in his official capacity acts on behalf of the State *or* Clinch County in the context of the Eleventh Amendment. Thus, we decide that controversy. No other issue is before us. In addition, while we agree that the sheriff's office is independent from and not controlled by the county, we conclude today only that the sheriff acts for the State in performing the particular functions at issue in this case.").

Manders v. Lee, 338 F.3d 1304, 1331, 1332 (11th Cir. 2003) (en banc) (Anderson, J., joined by Tjoflat, Birch and Wilson, J.J., dissenting)("I submit that the proper question is whether the sheriff has carried his burden of proving that he is an arm of the state. In other words, the issue is not the state versus the county; rather, the issue is whether the sheriff is an arm of the state *vel non.* The mere fact that the sheriff is not the policymaker for the county commission, is not controlled by the county commission, and the fact that the county has no *respondeat superior* liability for judgments against the sheriff, do not, either singly or in combination, go very far toward establishing that a Georgia sheriff is an arm of the state. The Seventh Circuit recognized this in *Franklin v. Zaruba,* 150 F.3d 682 (7 th Cir.1998).").

Manders v. Lee, 338 F.3d 1304, 1347, 1348 (11th Cir. 2003) (en banc) (Barkett, J., joined by Tjoflat, Birch and Wilson, J.J., and joined in part by Anderson, J.)("In this case, each of the factors we normally apply to determine whether a defendant is entitled to Eleventh Amendment immunity weighs against extending such protection to Sheriff Peterson. Georgia law clearly defines Sheriff Peterson as a county officer and jails as county institutions; the state's corrections authorities exercise no control over Sheriff Peterson in his operation of the county jail; Clinch County appropriates Sheriff Peterson's operating budget and pays for the jail's construction and upkeep; and there is no indication that a judgment against Sheriff Peterson would operate against the state of Georgia. . . . A correct reading of Georgia law shows that county sheriffs operate county

jails for the counties in which they serve. In every sense, a suit under 42 U.S.C. § 1983 against a county sheriff alleging mistreatment in a county jail is a suit against a local government. The Eleventh Amendment, which protects states, is inapplicable, and the decision of the district court should therefore be affirmed.").

Grech v. Clayton County, Georgia, 335 F.3d 1326, 1331, 1332, 1347 & n.46 (11th Cir. 2003) (en banc) (plurality opinion) ("[T]he appropriate § 1983 inquiry under federal law is whether defendant Clayton County, under Georgia law, has control over the Sheriff in his law enforcement function, particularly for the entry and validation of warrants on the CJIS systems and the training and supervision of his employees in that regard. . . . In Georgia, a county has no authority and control over the sheriff's law enforcement function. Clayton County does not, and cannot, direct the Sheriff how to arrest a criminal, how to hire, train, supervise, or discipline his deputies, what polices to adopt, or how to operate his office, much less how to record criminal information on, or remove it from, the CJIS systems involved in this case. Instead, the sheriff acts on behalf of the State in his function as a law enforcement officer and keeper of the peace in general and in relation to the CJIS systems in particular. . . . Judge Anderson's concurring opinion more narrowly concludes that as 'to the particular function at issue in this case, the Sheriff is acting on behalf of the state, and thus ... Clayton County is not liable in this case.' . . Because no opinion obtained a majority of the Court, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'").

Lange v. Houston County, Georgia, 499 F. Supp. 3d 1258 (M.D. Ga. 2020), *reconsideration denied*, No. 5:19-CV-392 (MTT), 2020 WL 7634054 (M.D. Ga. Dec. 22, 2020) ("[T]he Court turns to the narrow question posed by the Sheriff's Office—whether, based on the allegations of the amended complaint, it has established that it acts as an arm of the state when it provides healthcare benefits to its employees. Although the Eleventh Circuit's significant 'arm of the state' cases have involved Sheriff's Offices, none of those decisions has addressed anything remotely related to that narrow function. Nonetheless, the Sheriff's Office argues that those decisions provide the answer here. It argues that Eleventh Circuit precedent necessarily establishes that *any* personnel decision by the Sheriff's Office is taken as an arm of the state. . . The first *Manders* factor, how state law defines the entity, supports a finding of sovereign immunity. As the Eleventh Circuit has noted, 'sheriffs in Georgia derive their power and duties from the State, are controlled [as to certain functions] by the State, and counties cannot, and do not, delegate any law enforcement power or duties to sheriffs.'. . As the Court in *Manders* stressed, under Georgia law, the Sheriff's Office and the County are independent, separate entities. . . The first factor supports a finding that the Sheriff's Office was acting as an arm of the state. . .As for control, the second factor, the Sheriff's Office has failed to demonstrate that the State exercises any control over the provision of healthcare benefits. Instead, it argues that the State exercises control over peace officer training and certification. . . Though it is true that the State's authority to train and discipline supports a finding that the Sheriff's Office is an arm of the state *for purposes of hiring and firing deputies*, provision of healthcare benefits to employees is a different function. So although '[a sheriff's] power to hire and fire his deputies is subject to a significant amount of

oversight by the State,' nothing in the briefs or record indicates that the Sheriff's Office's provision of benefits to employees is subject to similar oversight. . . Rather, looking to the allegations in the complaint, it appears the Sheriff's Office, not the State, maintains full control over the healthcare benefits it provides its employees. Exercising that control, it delegated the provision of health benefits to the County. But nowhere in the complaint, or even in the Sheriff's Office's brief, is there any indication that the State had any control over the Plan or over employee benefits more generally. Accordingly, looking only to the facts alleged, that factor supports a finding that the Sheriff's Office was not acting as an arm of the state when it performed the function of providing healthcare benefits to its employees. As to the third factor, source of funding, 'each county in Georgia bears the major burden of providing funds to the sheriff's office, including the salaries of the sheriff and his deputies.'. . However, the Eleventh Circuit has held that this factor does not weigh against immunity because (1) state law requires counties to fund sheriff's offices and (2) counties cannot dictate how the funds are spent. . . Similarly, the County here cannot dictate how the Sheriff's Office spends its funds. Accordingly, this factor does not weigh for or against immunity. Fourth, the Court considers monetary liability for a potential judgment against the Sheriff's Office. In Georgia, as a general matter, 'neither the State nor the County will be required to directly pay for any adverse judgment against the Sheriff's office.'. . Typically, therefore, this factor weighs against immunity. . . Here, however, it arguably weighs against immunity even more strongly: not only will the State treasury be unaffected, but also the County may be responsible for an adverse judgment. After all, it is the County's Plan, and Lange alleges the County made the decision to exclude coverage for her needed surgery. . . . In sum, under Eleventh Circuit law, the first factor supports a conclusion that the Sheriff's Office was acting as an arm of the state, the second and fourth support a conclusion that it was not acting as an arm of the state, and the third does not support either conclusion. Looking only to the facts alleged in the complaint, the Sheriff's Office has failed to carry its burden of showing it was acting as an arm of the state.")

Brooks v. Wilkinson Cty., Georgia, No. 5:17-CV-00033-TES, 2019 WL 2236267, at *6 (M.D. Ga. May 23, 2019) ("The Court agrees with the court in *Palmer* that it was probably unnecessary for it to conduct its own *Manders* analysis in light of *Lake*, and, in an effort to avoid reinventing the wheel (particularly a wheel as well made as *Palmer*), the Court will rest its decision on the proposition that 'because the provision of medical care cannot be distinguished from the provision of food for Eleventh Amendment purposes, *Lake* [ ] requires a finding of immunity in this case.'. . Thus, the Court finds that, under Georgia law, a sheriff acts as an arm of the state when he provides medical care to inmates in a county jail and is therefore entitled to Eleventh Amendment immunity. Consequently, Defendant Chatman is entitled to Eleventh Amendment immunity in this case.")

Palmer v. Correct Care Solutions, LLC., No. 4:17-CV-102 (CDL), 2017 WL 6028467, at *1-4 (M.D. Ga. Dec. 5, 2017) ("The undersigned previously rejected the notion that neither the county nor the *county* sheriff could be liable for money damages arising from the failure to provide constitutionally mandated medical care to a *county* detainee in a *county* jail. *See Youngs v.*

Johnson, No. 4:06-CV-19 (CDL), 2008 WL 4816731, at *7-*8 (M.D. Ga. Oct. 30, 2008). But the Eleventh Circuit has laid additional bricks in the 'immunity wall' since the Court rendered that decision, and in light of recent Eleventh Circuit precedent, it appears that the Eleventh Amendment blocks a detainee from vindicating his federal constitutional rights against a Georgia sheriff under such circumstances. *See Lake v. Skelton* (*Lake I*), 840 F.3d 1334, 1339-42, *reh'g denied* 871 F.3d 1340 (2017) (en banc) (holding that a Georgia sheriff acts as an arm of the state when he provides food to county detainees in a county jail). . . Although the Eleventh Circuit has not yet held that a Georgia sheriff is protected by the Eleventh Amendment for his failure to provide constitutionally mandated medical care to county jail detainees, a constitutional claim arising from the failure to provide food, which the Eleventh Circuit held in *Lake I* cannot be asserted against a Georgia sheriff in his official capacity in federal court because of the Eleventh Amendment, appears indistinguishable for Eleventh Amendment purposes from a claim arising from the failure to provide medical care. . . .Palmer makes a compelling argument that the Eleventh Amendment was never intended to shield a county sheriff and his officers from liability arising from their failure to provide adequate, constitutionally mandated medical care to those persons entrusted to their care. But Eleventh Amendment precedent in this Circuit has evolved to provide an almost insurmountable wall protecting Georgia sheriffs sued in their official capacities for violating the federal constitutional rights of county jail detainees. Whether that precedent is well-reasoned is of no concern to this Court; the Court is duty bound to apply it. Based on that precedent, this Court must find that the sheriff and his jail commander are entitled to Eleventh Amendment immunity on Palmer's official capacity claims. . . .Determining whether a *county* sheriff is a *state* official would seem to be a rather straightforward inquiry. But we have learned that it is not enough that the sheriff is the 'Sheriff of Muscogee *County*' or that his law enforcement responsibilities are restricted primarily to the geographic boundaries of the *county* which he serves. It appears to matter little that he is in charge of the *county* jail and that this jail is funded by the *county* taxpayers. In fact, recent precedent suggests that it is not terribly important that the *county* sheriff's budget is funded by the taxpayers who reside within the *county* in which the sheriff serves and who elect the *county* sheriff. Such facts are brushed aside as the product of superficial analysis that must yield, of course, to one of those 'sophisticated' multipart balancing tests loved by law professors and appellate judges. . . . Bound by the holding in *Lake I* and constrained by its rationale, this Court can find no distinction for Eleventh Amendment purposes between a county sheriff feeding county detainees in a county jail and a county sheriff taking care of the medical needs of those same county detainees in that same county jail. Thus, with reservations as to whether this analysis reaches the proper constitutional result but with no hesitation that it is required by current binding precedent in this Circuit, the Court finds that the sheriff and his commander are entitled to Eleventh Amendment immunity here. It is likely sufficient to rest today's holding on a simple proposition: because the provision of medical care cannot be distinguished from the provision of food for Eleventh Amendment purposes, *Lake I* requires a finding of immunity in this case. But for the sake of thoroughness, the Court performs the four part balancing test established by *Manders* as elucidated by *Lake I.*")

Vandiver v. Meriwether County, Georgia, No. 3:17-CV-114-TCB, 2018 WL 3744363, at *5–7 (N.D. Ga. Aug. 7, 2018) ("[A]t the outset, it is fairly well settled that Georgia district attorneys are state, not county, officials when exercising discretion in prosecutorial decisions. . . There is, however, a wrinkle in this case that was not present in *Owens*. The district attorney here was not enforcing state law. He was instead attempting to enforce county ordinances, allegedly at the behest of the County. This distinction could arguably compel a different outcome than *Owens*, i.e., that he was acting on behalf of the County. That is except for the fact that when he sought to enforce the ordinance he did so by *state* indictment, rather than by citation or accusation in the name of the County. The proceedings in the Meriwether Superior Court make clear that the indictment and subsequent proceedings were done in the name of the State of Georgia. . . While the County may have referred the violations to the district attorney, when he drew up the indictment he put on his State of Georgia hat and proceeded in his capacity as an officer of the State. The Court acknowledges that it appears to be somewhat unusual for a Georgia district attorney to enforce a county ordinance (especially by indictment). But it is not clear that such an act is totally foreclosed to the office of district attorney. It is possible that he had *some* authority to attempt to enforce a county ordinance by virtue of his state office, rather than simply as an instrumentality of the County. Under Georgia law, 'a prosecution for the violation of a city ordinance is a quasi-criminal action....'. . . And a municipality only exercises its authority to enforce a violation of its own ordinances by powers delegated to it by the State. . . As averred, it appears that the district attorney, *on behalf of the State*, purported to exercise the State's inceptive law-enforcement power to prosecute a violation of its political subdivision's ordinance. . . And though a proceeding by indictment was foreclosed here by O.C.G.A. § 15-10-62—even by the district attorney—this blunder was effected through exercise of state, rather than county, authority. This conclusion is necessary in light of the Eleventh Circuit's instruction that resolving the issue of final policymaking authority requires a determination as to who is the ultimate repository of county power with respect to the allegedly unlawful action. Vandiver argues that the district attorney was appointed as the County's agent to enforce the county ordinances under O.C.G.A. § 15-10-62(a), and was therefore the ultimate repository of County authority with respect this act. But once again, the complaint shows that the district attorney drew up the indictment in the name of the State. And the power to draw up indictments is vested in the district attorney *by state law*. . . Thus, the district attorney was not acting as the ultimate repository of County authority when he pursued Vandiver by indictment. The Court finds further support for this holding in the Eleventh Circuit's decision in *Turquitt*, which overruled a previous opinion in *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989). *Parker* held a county liable for injuries to an inmate caused by an Alabama chief jailer because the jail was operated in partnership with the county and the sheriffs. Like Georgia, Alabama sheriffs are generally considered state actors. . . The Eleventh Circuit found that *Parker* was wrongly decided in part because the county government had no authority to control the actions of the sheriff that hired the abusive jailer. *Turquitt* reiterated that a 'local government "must have power in an area in order to be held liable for an official's acts in that area."'. . Upon review of Alabama law, the court concluded that the county defendant in *Parker* had no power over the administration of the jail; rather, its power extended only to 'maintaining the jail's physical plant and providing operational funding.'. . This not only affected

the policy or custom issue, but it also defeated *Monell* causation because 'a local government can only be liable under § 1983 for injuries which the government itself caused and causation necessarily implies control.'. . Similarly, the County here has no inherent power over the district attorney when he draws up an indictment in the name of the State. Rather, this function is performed pursuant to his state-derived power, and he is responsible to the State in his performance.")

McDaniel v. Yearwood, No. 2:11–CV–00165–RWS, 2012 WL 526078, at *8 (N.D. Ga. Feb. 16, 2012) ("In sum, Barrow County cannot be held liable under Section 1983 for any violation of Plaintiff's constitutional rights that may have occurred as a result of Plaintiff's arrest. In conducting arrests, Georgia sheriffs and their deputies act on behalf of the state, not the county. Having concluded that the actors in this case were not county policymakers, the Court need not analyze the separate question of whether they acted pursuant to a county policy or custom. Plaintiff's Fourth Amendment claims for unreasonable seizure and malicious prosecution against Barrow County therefore fail. . . .The Court finds it to be a closer question whether Sheriff Smith acted as a state or county policymaker when he denied Plaintiff medical treatment, and thus whether county liability under Section 1983 properly may be predicated on this conduct. Ultimately, however, the Court declines to reach this issue given its conclusion, explained below, that Plaintiff has failed to make a sufficient showing that Sheriff Smith was acting pursuant to an official county policy or custom.")

Keene v. Prine, No. 7:09-cv-141(HL), 2011 WL 2493120, at *10, *11 (M.D. Ga. June 22, 2011) ("All four factors weigh in favor of finding that Sheriff Prine is an arm of the State in relation to making employment decisions for his office. The Court therefore concludes that the claims against Sheriff Prine in his official capacity constitute claims against the State of Georgia. . . . Sheriff Prine is entitled to immunity, in his official capacity, from any § 1983, FMLA, ADEA, or ADA monetary award. The Plaintiffs' Title VII claims for damages may proceed against Sheriff Prine in his official capacity because Title VII is not barred by the Eleventh Amendment. There is one exception. The Plaintiffs' claims for prospective injunctive relief against Sheriff Prine in his official capacity are not barred by the Eleventh Amendment.")

Cassells v. Hill, No. 1:07-CV-2755-TCB, 2010 WL 4616573, at *17 (N.D. Ga. Nov. 8, 2010) ("Considering the significant power given to a Georgia sheriff by the state to operate his office and manage his employees independently of the county, the Court is persuaded that a sheriff acts as an arm of the state when promulgating policies regarding the manner in which employees share internal information with the media or other outside sources.")

Robinson v. Houston County, No. 5:09-CV-156 (CAR), 2010 WL 2464901, at *8 (M.D. Ga. June 14, 2010) ("The Sheriff was the final policymaker, and, as discussed *supra*, the Sheriff acted as an arm of the State, not the county, when he implemented polices to screen, monitor, and protect suicidal detainees. Thus, Houston County cannot be liable for the Sheriff's polices at issue.").

Riley v. Harris County Sheriff's Dept., No. 4:08-CV-62 (CDL), 2009 WL 5216914, at *3 n.6, *4 (M.D. Ga. Dec. 29, 2009) ("Even if Plaintiff's claims against Williamson were construed as official capacity claims such that they are considered claims against his employer, the Harris County Sheriff, the sheriff would be entitled to Eleventh Amendment immunity. It is well settled that Eleventh Amendment immunity bars suits brought in federal court when an 'arm of the State' is sued. *Manders v. Lee* , 338 F.3d 1304, 1308 (11th Cir.2003)(en banc). A Georgia sheriff is considered an 'arm of the state' in discharging his law enforcement functions, such as detaining and arresting suspects.")**.**

Ashley v. Chafin, Civil No. 7:07-cv-177(HL), 2009 WL 3074732, at *13 (M.D. Ga. Sept. 23, 2009) ("This Court finds that all four factors weigh in favor of finding Sheriff Chafin is an arm of the State in relation to making employment decisions for the Sheriff Office. . . Therefore, the Brooks County Sheriff's Office is entitled to sovereign immunity from any Section 1983 monetary award for the purposes of this case.").

Boyd v. Nichols, No. 7:08-cv-26 (HL), 2009 WL 1285958, a *7, *8 (M.D. Ga. May 5, 2009) ("It is Boyd's position that Defendant Brogdon's duty to assume responsibility for her safety and well being while in custody, which would require him to protect her from his employees and to train his employees, is analogous to the duty to provide medical care as discussed in *Dukes.* Like the sheriff in *Dukes,* Boyd contends that Defendant Brogdon should not be considered an 'arm of the State.'. . . There are a number of Georgia state statutes which refer to a sheriff as providing county functions when providing medical necessities to inmates. . . Those statutes led the *Dukes* court to find that the sheriff was not an 'arm of the State' for the particular function of providing medical care. Boyd has not directed the Court to any similar state statutes applicable to this particular function of Defendant Brogdon. Boyd is ultimately complaining about policies implemented by Defendant Brogdon. In her view, his policy of failing to train jailers, policy of understaffing the Jail, and policy of allowing male jailers to handle female inmates without any supervision led to the violation of her rights. The Eleventh Circuit has held on a number of occasions that sheriffs were entitled to Eleventh Amendment immunity as an 'arm of the State' in executing the function of establishing various policies. [citing *Manders* and *Purcell*] . . . . Thus, when Defendant Brogdon administers the Jail through his policies, he is doing so as an 'arm of the State.' Accordingly, Defendant Brogdon is entitled to Eleventh Amendment immunity from suit in his official capacity.").

Youngs v. Johnson, No. 4:06-CV-19 (CDL), 2008 WL 4816731, at *6 n.7 (M.D. Ga. Oct. 30, 2008) ("Plaintiff contends that the Muscogee County Sheriff traded his state hat for a county hat in the operation of the jail when he along with the County entered into an agreement in 1999 with the United States Department of Justice regarding conditions at MCJ. . . The Agreement provides that the 'City/County' shall, *inter alia*, 'develop and implement[ ] appropriate, comprehensive policies and procedures for Jail Operations.'. . Plaintiff argues that this provision establishes that the Sheriff is an 'arm of the county' because the agreement provides Muscogee County with the authority and obligation to promulgate jail policies and procedures-a function that is normally

reserved to the Sheriff acting under powers derived directly from the State. However, the Agreement also provides that the Sheriff in his official capacity is primarily responsible for developing MCJ policies and procedures. . . The Court finds that the Sheriff has not, through this Agreement, sufficiently relinquished to Muscogee County his state-derived authority for the operation of the jail to the extent that he loses his Eleventh Amendment immunity.")

Youngs v. Johnson, No. 4:06-CV-19 (CDL), 2008 WL 4816731, at **6-8 (M.D. Ga. Oct. 30, 2008) ("Sheriff Johnson contends that he is also entitled to Eleventh Amendment immunity as to Plaintiff's § 1983 claim regarding the diagnosis and treatment of Plaintiff's injury. The Eleventh Circuit has not addressed whether a Georgia sheriff wears a 'state hat' or a 'county hat' when providing medical services to county jail inmates. . . The Sheriff suggests that he wears a state for *all* functions at the jail. The Eleventh Circuit, however, has declined to find that a Georgia sheriff wears a 'state hat' for all functions. Therefore, it does not follow that just because the Sheriff acts as an arm of the State with respect to the placement and classification of inmates, he automatically also acts as an arm of the State with respect to the provision of medical care. Instead, the Court reads *Manders* to require it to analyze the four Manders factors to determine whether Sheriff Johnson is entitled to Eleventh Amendment immunity as to Plaintiff's § 1983 claim regarding the provision of medical care. . . . Although the sheriff's obligation to provide county inmates with medical services is directly derived from the State, the provision of medical care is directly delegated through the county entity. '[I]t shall be the responsibility of the governmental unit, subdivision, or agency having the physical custody of an inmate to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention[.]' O.C.G.A. ' 42-5-2(a) . . . . Thus, because the provision of medical care is directly delegated through the county entity, the Court concludes that the first factor favors a finding that the provision of medical care in county jails is a county function. . . . The second factor in the Eleventh Amendment analysis examines where Georgia law vests control. . . . Because of the county's direct involvement in and responsibility for providing medical care for county jail inmates, the Court concludes that this factor also weighs in favor of finding that the provision of medical care in county jails is a county function. . . . The third factor in the Eleventh Amendment analysis is the source of the entity's funds. The Eleventh Circuit, in *Manders*, noted that State funds were involved in the particular function of force policy in county jails because the State provided funding for training of sheriffs, funded the Governor's disciplinary procedure over sheriffs, and paid for certain state offenders assigned to the county jails under the sheriff's supervision. . . However, in this case, examining the particular function of the provision of medical care in county jails, O.C.G.A. ' 42-5-2(a) provides that the county has an obligation to provide funding for jail necessities. Although the Eleventh Circuit, in *Manders*, found that this statute was not dispositive on the issue of force policy, it stressed the fact that the case did not involve medical care. . . Therefore, given this caveat and the clear language of O.C.G.A. ' 42-5-2, the Court concludes that this factor weighs in favor of a finding that the provision of medical care to county jail inmates is a county function. . . . The final factor in the Eleventh Amendment analysis is determining who is responsible for judgments against the entity. In *Manders*, the Eleventh Circuit determined that 'although the State and the county are not required to pay an adverse judgment against the sheriff, both county and state funds

indirectly are implicated.' . . The Eleventh Circuit, however, determined that this factor did not defeat immunity presumably because the first three factors weighed in favor of immunity. . . Here, however, the first three factors weigh heavily in favor of finding that the sheriff is an arm of the county. Thus, the Court finds that the fourth factor does not defeat a finding that the sheriff is an arm of the county when providing medical care to inmates in county jails. Because the Court finds that the sheriff is an arm of the county in providing medical care in a county jail, Sheriff Johnson is not entitled to Eleventh Amendment immunity. . . Therefore, the Court denies his motion for summary judgment as to Plaintiff's § 1983 inadequate medical care claim.").

Youngs v. Johnson, No. 4:06-CV-19 (CDL), 2008 WL 4816731, at *9 (M.D. Ga. Oct. 30, 2008) ("As explained in the Court's previous Eleventh Amendment discussion, the relationship between the County and the Sheriff regarding inmate medical care is different from their relationship regarding inmate classification and placement. Although the Sheriff may be the 'final decisionmaker' at the jail for all aspects of the jail operation, he acts on behalf of the County when making decisions regarding medical care for the county inmates. Under Georgia law, the provision of medical care to county inmates is a county function. The County can certainly delegate that function to the Sheriff, which the record establishes was done here, but when it does so, it does not relinquish its ultimate responsibility for that function. The Sheriff simply becomes the final policymaker for the County regarding the promulgation of appropriate policies and procedures for providing adequate medical care to inmates at the county jail. . . Therefore, Muscogee County is not entitled to summary judgment as to Plaintiff's § 1983 inadequate medical care claim.")

Mia Luna, Inc. v. Hill, No. 1:08-CV-585-TWT, 2008 WL 4002964, at *2, *4 (N.D. Ga. Aug. 22, 2008) ("This case, although it also involves roadblocks, differs because the Plaintiff alleges that the Defendant is not exercising authority derived from the state. The Georgia Constitution forbids any county from exercising the power of police protection within a municipality except by contract with that municipality. . . .The Plaintiff claims that the Defendant Hill has no such contract with the City of Forest Park − and therefore no written consent − allowing his department to conduct law enforcement activities in Forest Park. . . . I fail to see how the narrow holding of *Manders* does not compel immunity in this case. The *Manders* court cautioned against categorically granting Georgia sheriffs Eleventh Amendment immunity in their official capacities. In application, the analysis in *Manders* is so strong it forces a logical conclusion that Eleventh Amendment immunity almost automatically attaches for a Georgia sheriff (even where that sheriff's actions were allegedly *ultra vires*).").

Rylee v. Chapman, No. 2:06-CV-0158-RWS, 2008 WL 3538559, at *6 (N.D. Ga. Aug. 11, 2008) ("[T]he Court concludes that Sheriff Chapman acted as an arm of the State of Georgia − and not Banks County − in both his capacity as a law enforcement officer enacting policies applicable to Plaintiff's arrest and in his capacity as an administrator of the Banks County Jail.").

Bennett v. Chatham County Sheriff's Dept., 2008 WL 628908, at *5 n.2 (S.D. Ga. Mar. 5, 2008) ("Though the Court hesitates to hold that sheriffs and their employees always act as arms of the

state, it is clear that in the context of employment decisions sheriffs and their employees are state officers.").

Lewis v. Wilcox, 2007 WL 3102189, at *9 (M.D. Ga. Oct. 23, 2007) ("[T]his Court finds that Defendant Chapman was acting as an 'arm of the State' when promulgating use-of-force and seizure policies in the context of ordinary law enforcement. States, and arms of States, are not 'persons' who can be sued under § 1983. . . . Moreover, while it appears that the Eleventh Circuit has not confirmed that deputy sheriffs in Georgia are immune from suit under Eleventh Amendment principles, a line of district court cases has 'determined that when a sheriff is acting as an arm of the state, his deputies are also entitled to Eleventh Amendment Immunity.'")

Hooks v. Brogdon, 2007 WL 2904009, at *2 (M.D. Ga .Sept. 29, 2007) ("The Northern District of Georgia's decision in *Dukes*, as well as the Eleventh Circuit's decision in *Manders*, suggest that in providing medical care for jail inmates, a sheriff acts as an arm of the county. . . Therefore, insofar as Plaintiff brings this action against Sheriff Brogdon in his official capacity as Sheriff of Lanier County, Plaintiff must allege and establish that the alleged deprivations resulted from a custom or policy set by Lanier County. . . In making the determination of whether the deprivation resulted from a County's custom or policy, the Eleventh Circuit has held that a single act may be county policy if the action is performed by a county official who is 'the final policymaker ... with respect to the subject matter in question.'. . To determine whether an official is the 'final policymaker,' the court should look to the relevant positive law, including ordinances, rules, and regulations, as well as the relevant customs and practices having the force of law. . . Here, it is clear that under Georgia law Sheriff Brogdon was the final policymaker with respect to providing medical care to inmates at Lanier County Jail.")

Slaughter v. Dooly County, 2007 WL 2908648, at *6, *7 (M.D.Ga. Sept. 28, 2007) ("Here, Plaintiff contends the deprivation of her constitutional rights arising from her placement in the restraint chair was caused by the Jail's official Restraint Chair Policy. However, Dooly County neither adopted nor was permitted to adopt or implement policies concerning use of force or the restraint chair. Dooly County is constitutionally and legally prohibited from performing these law enforcement functions that are specifically delineated by Georgia law as duties of the sheriff . . . . Georgia sheriffs, when acting in the areas of law enforcement, duties in the courts, and corrections, are "state actors," not "county actors." . . Plaintiff also contends Dooly County violated her constitutional rights by failing to provide training and supervision to jail officials. . . . Because Plaintiff's claims against Dooly County involve the corrections/detentions function of the office of the sheriff , which are state, not county, functions, Plaintiff's § 1983 direct liability claims against Dooly County fail. . . . Plaintiff's claims that the County is liable for Plaintiff's inadequate medical treatment during her incarceration must also fail. The provision of medical treatment to inmates and detainees is a function of the sheriffs, not counties. . . . Because the sheriff's " authority and duty to administer the jail in his jurisdiction flows from the State, not [the] County," the County cannot be liable for Plaintiff's claim that she was provided inadequate medical treatment.")

Kicklighter v. Herrin, 2007 WL 2248089, at *8 (S.D.Ga. July 31, 2007) ("The *Manders* decision only considered the narrow function of 'establishing use-of-force policy at the jail,' and the Eleventh Circuit explicitly declined to decide whether county sheriffs are arms of the state for any of their other specific duties. . . The Eleventh Circuit has not extended *Manders* to all sheriff functions. . . The Georgia Constitution designates the sheriff as a 'county officer,' and the Georgia Supreme Court has held that a county sheriff is a separate constitutional entity. . . Therefore, without clear guidance from the Eleventh Circuit, this Court is unwilling to extend *Manders* and hold that a Georgia Sheriff is an 'arm of the state' for the general law enforcement functions at issue in this case.")

Morgan v. Fulton County Sheriff's Dept., 2007 WL 1810217, at *6 (N.D. Ga. June 21, 2007) ([T]he court cannot simply assume that because a county sheriff acts as an arm of the State with respect to conditions of confinement at the jail, he necessarily acts as an arm of the State with respect to the provision of medical care at the jail as well. Indeed, the *Manders* court took great pains to limit its holding to the particular functions at issue in that case and to distinguish those functions from the provision of medical care . . . . In looking at the test set out in *Manders*, two district courts have determined that a Georgia sheriff acts as an arm of the county in providing medical care to inmates. *See Dukes v. Georgia*, 428 F.Supp.2d 1298, 1319-22 (N.D.Ga., 2006) (Forrester J.); *Green v. Glynn County*, 2006 WL 156873, *3 (S.D.Ga. Jan. 16, 2006) ("laimo, J.). As a sheriff acts as an arm of the county in providing medical care to inmates, his deputies are also arms of the county with regard to medical care claims. Therefore, the court finds that Defendant King is not immune to suit in his official capacity under the Eleventh Amendment with regard to Plaintiff's medical care claim.").

United States v. Terrell County, No. 1:04-CV-76 (WLS 2006 WL 2850069, at *8 n.1 & n.3 (M.D. Ga. Sept. 30, 2006) ("Both sets of Defendants have illustrated the unique position that Georgia Counties and Sheriffs find themselves in when it comes to enforcing federal constitutional rights. According to the Eleventh Circuit, the two are separate distinct entities under state law and have no overlapping control over the actions of the other. . . It is argued by the Defendants that the result is that the County cannot enforce policy over the Sheriff and the Sheriff cannot secure funding, and neither takes responsibility for any alleged constitutional violations of the County Jail. The Court notes, however, that the Eleventh Circuit confined the *Manders* decision, and its progeny. It specifically limited the decision/holding to the issue of Eleventh Amendment immunity in the context of Sheriffs being sued for the alleged specific unconstitutional misconduct directed towards an individual or small group usually involving one incident. The *Manders*' court pointed out that it was not deciding the broader question of liability between a Sheriff and County when it came to certain issues such as jail conditions. Neither is the question specifically before the Court at this time, nor does this Court intimate or decide how or if *Manders* will effect [sic] such a question. . . . While funding of the Jail and control of policy are legitimate issues raised by all of the parties, Bowens ignores his responsibilities as Sheriff and Jailor of Terrell County. See O.C.G.A. '' 42-4-1 through 42-4-71 (statutory duties of sheriff as it relates to jails). For example, the Sheriff is responsible for staffing the jail in a manner to ensure the safety of the inmates. If he

concludes it takes a POST certified officer to open a cell door, then he must adjust the scheduling of his POST officers to be on duty at the jail at all times. As argued correctly by the Government, there is no excuse for an inmate to suffer serious harm because the jailor on duty was not authorized to open a cell door to provide assistance. The Government's statement of facts contains a plethora of examples where Bowens could have exercised his duties irrespective of funding issues. . . . Accordingly, the Court finds that the Government has carried its burden of proof of showing (1) the existence of objectively serious and dangerous conditions; (2) that both sets of Defendants (Bowens and TCBOC) have subjective knowledge of these substantial risks to the inmates; and (3) that both sets of Defendants have disregarded these risks in more than a negligent manner. As such, the Court finds that there is no genuine issue of material fact concerning whether the conditions at the Terrell County Jail are unconstitutional and the Government is entitled to judgment as a matter of law. Therefore, the Government's motion for summary judgment for violation of the inmates' rights to be free from serious risks of harm while incarcerated at the Terrell County Jail (Doc. No. 46) is GRANTED. The Court by separate order, shall issue instructions to the parties concerning further proceedings, briefing and hearing on the issues of: (1) the Sheriff's and/or the TCBOC's liability or responsibility for the unconstitutional conduct; (2) the proper remedy; and (3) if necessary, the Sheriff's and/or the TOBOC responsibilities in implementing the Court's remedy, other subsequent necessary orders or appropriate relief.").

Scruggs v. Lee, No. 7:05-cv-95(HL), 2006 WL 2850427, *4, *5 (M.D. Ga. Sept. 30, 2006) ("In this case, Scruggs has not brought a challenge to the use-of-force policies at the Clinch County jail. Thus, the conclusion in *Manders* − that Sheriff Peterson was entitled to Eleventh Amendment immunity − is not directly applicable to this case. Nevertheless, in the Court's view, the same result obtains. Scruggs contends that law enforcement officials violated his rights when they unlawfully seized him at the roadblock, subjected him to a search without a warrant or probable cause and then unlawfully arrested and detained him without due process of the law. These allegations implicate Sheriff Peterson's policies concerning the execution of roadblocks, the use of canine units, and the arrest and booking procedures employed by his deputies at the scene and at the jail. This Court finds that the establishment of policies regarding each of these activities were undertaken by the Sheriff in his capacity as an arm of the state. . . . While the decision in *Manders* does not conclusively compel this Court to find that Sheriff Peterson was acting as an arm of the state in implementing policies pertaining to roadblocks, canine units, searches, seizures, arrests, and detention, it appears to the Court that the policies at issue here flow from the powers granted to sheriffs under state law, rather than from any authority or control derived from Clinch County. Beginning with the policies that led to the initiation of the roadblock and concluding with the policies that resulted in Scruggs' continued detention following his arrest, Sheriff Peterson was acting as an arm of the state. Accordingly, as to any claims against Sheriff Peterson in his official capacity stemming from these activities, he would be entitled to Eleventh Amendment immunity.").

Beaulah v. Muscogee County Sheriff's Deputies, 447 F.Supp.2d 1342, 1356 (M.D. Ga. 2006) ("Plaintiffs have pointed to no evidence suggesting that the sheriff's law enforcement power is

controlled by the Columbus Consolidated Government − or any entity other than the State − simply because the sheriff entered into an agreement to participate in a multi-jurisdictional task force or because some of his deputies were assigned to work on that task force. Moreover, there is no evidence that, in joining Metro, the sheriff was delegated law enforcement powers or duties beyond those delegated to him by the State. Rather, the record establishes that Metro provides a framework for exercising the sheriff's State-delegated law enforcement powers and duties in cooperation with law enforcement officers from other jurisdictions, who are deputized as Muscogee County deputy sheriffs. For these reasons, there is nothing in the record to distinguish this case from *Manders* and *Mladek*. Based upon the rationale of *Manders* and *Mladek*, the Court finds the Muscogee County sheriff's deputies were wearing a 'state hat' when they stopped the Yukon and detained its occupants. Therefore, the sheriff and his deputies are considered to be arms of the state and are thus entitled to Eleventh Amendment immunity in this case.").

Redding v. Tuggle, No. 1:05-cv-2899-WSD, 2006 WL 2166726, at **6-8 (N.D. Ga. July 31, 2006) ("In the instant case, Clayton County's § 1983 liability under federal law hinges on whether under state law Clayton County wields control over the sheriff and CCSO in their employment decision-making functions. . . The Court finds it does not. The Georgia Constitution has established the sheriff and CCSO as independent of the County itself. Structurally, the sheriff's office is not a division or subunit of the county in which it resides or of that county's governing body. . . .Although another provision, ' 36-1-21, allows sheriffs to place their employees under the county civil service system, such a placement does not vest the county with such control over the employment decisions of the sheriff's office as to incur municipal liability. . . . Indeed, civil service rules do not authorize Clayton County to hire, fire, or discipline employees. . . . Absent control over the employment decisions of the sheriff or CCSO, Clayton County cannot be said to be responsible for those decisions and actions and cannot be held liable under § 1983. Plaintiffs, nonetheless, argue that Clayton County is an indispensable party to this lawsuit, because a judgment against the sheriff would make the County financially liable. . . Georgia courts have concluded, however, that 'counties are not liable for, and not required to give sheriffs money to pay judgments against sheriffs in civil rights actions.' *Grech*, 335 F.3d at 1138 (*citing Wayne County Bd. of Comm'rs v.. Warren*, 223 S.E.2d 133, 134 (Ga.1976) . . . In *Warren*, the Georgia Supreme Court explained the county was not liable for the payment of a civil rights violation judgment against a county sheriff, because by state statute '[a] county is not liable to suit for any cause of action unless made so by statute.'. . The Georgia Supreme Court concluded that 'there is no duty of the county to furnish the sheriff with money to settle a civil rights judgment against him.' *Id.* Accordingly, Plaintiffs have failed to show that Clayton County is an indispensable party.").

Bell v. Houston County, Ga., No. 5:04-CV-390 (DF), 2006 WL 1804582, at *12 & n.14 (M.D. Ga. June 27, 2006) ("Consistent with the reasoning of *Manders*, the Court concludes that Sheriff Talton acts as an 'arm of the State' when he promulgates and administers the jail's intake procedures. . . . This Court has determined that, under the reasoning of *Manders*, Talton would be considered an 'arm of the State' for purposes of the Eleventh Amendment. Thus, Bell's

official-capacity claim against Talton is in reality a claim against the State of Georgia, which, under the authority of *Will*, is not a 'person' within the meaning of § 1983 and is therefore not subject to suit for an alleged violation of the statute. . . . The Eleventh Circuit has never held that Georgia deputy sheriffs or jail officials are 'arms of the State' for Eleventh Amendment purposes, but the reasoning underlying *Carr* and *Lancaster* − that deputies and jailers should be viewed as such because the elected sheriff (himself an 'arm of the state") has the power to hire them, fire them, discipline them, and otherwise control their job duties − would appear to apply with equal force in Georgia, given the Eleventh Circuit's discussion in *Manders* about the relationship between Georgia sheriffs and their deputies.").

Dukes v. State of Georgia, No. Civ.A. 1:03-CV-0406J, 2006 WL 839403, at *18 (N.D. Ga. Mar. 30, 2006) ("Here, unlike the situation in *Manders*, the court finds that as to a sheriff's duty to provide medical necessities to inmates, the first three factors do not suggest that he is acting as an arm of the state. This court's application of all four factors used to determine if an entity is an 'arm of the state' for Eleventh Amendment purposes, coupled with the *Manders* court's strong reservations regarding medical necessity cases, lead this court to conclude that Defendant Yeager was not acting as an 'arm of the state' when caring for the medical needs of Plaintiff. Therefore, the sheriff is not entitled to sovereign immunity in his official capacity.")

Sanders v. Langley, No. 1:03-CV-1631-WSD, 2006 WL 826399, at *9, *10 (N.D. Ga. Mar. 29, 2006) ("The Individual Defendants argue dismissal of Plaintiff's claims against Defendant Langley in his official capacity is warranted because, as in *Manders* and *Purcell*, his claims are based on Defendant Langley's and his deputies' exercise of their law enforcement authority derived from the State of Georgia, not Carroll County. . . With respect to Plaintiff's allegations concerning overcrowding at the Carroll County Jail and his physical assault at the hands of other inmates, the Court agrees. This claim relates to conditions of confinement at the Carroll County Jail. In performing his duties related to conditions of confinement at the jail, Defendant Langley acted as an arm of the State, not of Carroll County. Accordingly, Plaintiff's claim against Defendant Langley in his official capacity regarding conditions of confinement at the jail are barred by the Eleventh Amendment. With respect to Plaintiff's claim for deliberate indifference to serious medical needs, however, the Court is not persuaded that Defendant Langley is entitled to Eleventh Amendment immunity. . . . [A]t least one court has addressed this precise issue under *Manders* and determined that a Georgia sheriff acts as an arm of the county in providing medical care to pre-trial detainees and training jail deputies with respect to medical care. [citing *Green v. Glynn County*]In view of the incomplete record before the Court regarding the four factors identified in *Manders*, and the existing case law adverse to the Individual Defendants' position, the Court cannot conclude that Eleventh Amendment immunity bars Plaintiff's Section 1983 claim against Defendant Langley for deliberate indifference to serious medical needs.")**.**

Green v. Glynn County, No. Civ.A. CV201-52, 2006 WL 156873, at *3 (S.D. Ga. Jan. 19, 2006)("Glynn County contends that the relevant inquiry is control and urges the Court to extend the holdings in *Grech* and *Manders* to the administering of medical care to pretrial detainees. Were

the court to adopt the position urged by Glynn County, however, a county sheriff would wear a 'state hat' when performing virtually all functions. Such a position is not supported by the Eleventh Circuit decisions. The *Manders* court specifically rejected this position in noting that it 'need not, and d[id] not, decide today whether Georgia sheriffs wear a Astate hat' for Eleventh Amendment purposes for all of the many specific duties assigned directly by the State.' . . . The Eleventh Circuit's en banc decision in *Manders* and the Supreme Court's related decision in *McMillian* make clear that the arm of the state determination must be made on a function-by-function basis. . . The relevant 'function' in the instant case is the duty to provide medical care to pretrial detainees and train jail personnel in that regard. Although the sheriff has a duty to provide an inmate with access to medical aid pursuant to O.C.G.A. § 42-4-4, ' O.C.G.A. § 42-5- 2(a) imposes the duty and the cost for medical care of inmates in the custody of a county upon the county.'. . Thus, as recognized by the *Manders* decision, the function in the instant case is distinguishable from the law enforcement functions at issue in *Grech* and *Manders*. In light of the county's statutory obligation with regard to providing medical care to inmates in the custody of the county, the Court concludes that, unlike the functions in *Grech* and *Manders*, Sheriff Bennett was acting on behalf of Glynn County with regard to providing medical care to pretrial detainees and training to jail personnel in regard to such care.").

Young v. Graham, No. CV 304-066, 2005 WL 2237634, at *7 (S.D. Ga. Aug. 11, 2005) (concluding Athat the Sheriff of Dodge County acts as an agent of the State in establishing and implementing policy and procedure respecting pretrial detention and conditions of confinement. Thus, Sheriff Lawton in his official capacity is entitled to Eleventh Amendment immunity.").

2025 Emery Highway, L.L.C. v. Bibb County, Georgia, 377 F.Supp.2d 1310, 1360, 1361 (M.D. Ga. 2005) (In this suit, Sheriff Modena is named as a defendant solely in his official capacity; as such, all claims against Sheriff Modena are in actuality claims against the Bibb County Sheriff's Office. . . Such claims would not necessarily implicate Bibb County; in many instances, a county sheriff is deemed to actually be acting as an arm of the State. . . Moreover, in *Manders*, the Eleventh Circuit Court of Appeals held that a county sheriff is entitled to Eleventh Amendment sovereign immunity when sued in his official capacity for acting as an 'arm of the state.' . . Here, evidence before the Court suggests that Sheriff's Modena's decision to conduct the raid and warrantless search of Club Exotica's premises arose not out of his duty to enforce the County's ordinances but out of his power to enforce state law. . . All dancers arrested were in fact charged with violations of the Georgia criminal code; none were issued ordinance citations. . . . This indicates that Sheriff Modena may have been acting as an 'arm of the State' rather than an agent of the County at the time the raid and search were conducted and that he and the State would therefore be entitled to immunity for claims arising out this conduct.").

Bunyon v. Burke County, 306 F.Supp.2d 1240, 1251-55 (S.D. Ga. 2004) ("Even if Burke County may be directly liable for its practice of failing to bring detainees before a judicial officer within three days and of not accepting bail from detainees in violation of Bunyon's constitutional rights, it may be immune from suit under the Eleventh Amendment for Sheriff Coursey's and his deputies'

actions. . . . In this case, the relevant inquiry is whether Sheriff Coursey and his deputies and jailers were acting as agents of the State in establishing and implementing bail and release procedures for inmates being held on charges pending in a municipality . . . .Whether a defendant is an 'arm of the state' is determined by examining his or her function in a particular context. *Id.* This entails analyzing four factors: 1) how state law defines the entity; 2) what degree of control the state maintains over the entity; 3) where the entity derives its funds; and 4) who is responsible for judgments against the entity. *Id.* (citations omitted). After a lengthy review of these factors, the Eleventh Circuit has recently held that Georgia sheriffs act as 'state officers' in a variety of functions. *Id.* In this case, the relevant inquiry is whether Sheriff Coursey and his deputies and jailers were acting as agents of the State in establishing and implementing bail and release procedures for inmates being held on charges pending in a municipality. . . . Based on the fact that Sheriff Coursey's authority over inmates such as Bunyon flow from the State and not Burke County, and those functions and duties pertain chiefly to affairs of the State, *see Manders,* 338 F.3d at 1319 n. 35, I conclude that this first factor weighs strongly in favor of Eleventh Amendment immunity. . . . Because of Georgia's direct control over Sheriff Coursey's duty to accept bail and bring a detainee before a judicial officer within seventy-two hours, and Burke County's total lack thereof, this control factor weighs heavily in favor of Eleventh Amendment immunity. . . . In this case, Bunyon was not a convicted state offender, so state funds would not have been directly involved. Instead, he was a pre-trial offender and detained pursuant to an agreement with the City of Midville whereby Midville paid Burke County a per diem rate for his incarceration. . . . As Burke County has failed to show whether it actually spent any of its own funds on Bunyon's incarceration, as mandated by the state, I am hesitant to find any state involvement as it pertains to this aspect of the *Manders* analysis. . . . The final factor in the Eleventh Amendment analysis is the source of funds that will pay any adverse judgment against Sheriff Coursey or his deputies in their official capacities. . . . Apparently, Sheriff Coursey would have to pay any adverse judgment out of the sheriff's office budget, and as a result, both county and state funds would be implicated by an adverse judgment. Sheriff Coursey would need an increased budget from the county for his office and an increased daily per diem rate for convicted detainees held in the Burke County Jail from Georgia. . . When faced with this dual county/state obligation, the Eleventh Circuit noted that the State's sovereignty and integrity are affected when lawsuits interfere with a state function, and therefore, 'at a minimum, the liability-for-adverse-judgment factor does not defeat [Sheriff Coursey's] immunity claim.'. . . Although not a bright line decision, weighing all of the factors discussed above, I find that Sheriff Coursey is entitled to Eleventh Amendment immunity. His authority over Bunyon flowed directly from the state, his functions and duties pertained chiefly to affairs of the state, and the state directly controlled his duty to accept bail and release prisoners within seventy-two hours of arrest. That the state may not have provided funds for Bunyon's incarceration and may not provide much money for a judgment against him does not preclude this finding. Sheriff Coursey, in his official capacity, was acting as an arm of the state in establishing bail and release policies at the jail, and is therefore entitled to Eleventh Amendment immunity. Like Sheriff Coursey, his deputies are also entitled to Eleventh Amendment immunity. Although *Manders* involved only the immunity of the Sheriff in his official capacity, its factors are similarly applicable to deputy sheriffs as well. . . . Based upon the foregoing, Sheriff Coursey and his

deputies are entitled to Eleventh Amendment immunity. Even if Burke County is directly liable for its unconstitutional policy and practice of denying bail and release to detainees, it is not liable for any constitutional violations related to these policies committed by Sheriff Coursey and the other Burke County defendants.")

Bunyon v. Burke County, 285 F.Supp.2d 1310, 1328, 1329 & n.12 (S.D. Ga. 2003) ("Federal Rule of Civil Procedure 17 states, in pertinent part, the following: **(b) Capacity to Sue or Be Sued.** The capacity of an individual, other than one acting in a representative capacity, to sue or be sued should be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held.... Fed.R.Civ.P. 17(b). In *Georgia Insurers Insolvency Pool v. Elbert County,* 368 S.E.2d 500 (Ga.1988), the Georgia Supreme Court set forth the following explanation of which entities could sue and be sued in Georgia courts: '[T]his court [has] said, in every suit there must be a legal entity as the real plaintiff and the real defendant. This state recognizes only three classes as legal entities, namely: (1) natural persons; (2) an artificial person (a corporation); and (3) such quasi-artificial persons as the law recognizes as being capable to sue.' *Georgia Insurers Insolvency Pool,* 368 S.E.2d at 502 (quoting *Cravey v. Southeastern Underwriters Ass'n,* 105 S.E.2d 497, 500 (Ga.1958)). The Eleventh Circuit has advised that '[s]heriff's departments and police departments are not usually considered legal entities subject to suit....' *Dean v. Barber,* 951 F.2d 1210, 1214 (11th Cir.1992). In *Shelby v. City of Atlanta,* the Northern District of Georgia stated that a claim could not be brought against a police department: Plaintiff cannot state a claim against the City of Atlanta Police Department because the Department is not a proper party defendant. The Department is an integral part of the City of Atlanta government and is merely the vehicle through which the City government fulfills its policing functions. For this reason, the Department is not an entity subject to suit and plaintiff's claim against it is hereby dismissed. . .Based upon Georgia law and cases from this circuit, the Court can find no basis for allowing Plaintiff to sue the Midville Police Department. Therefore, it is DISMISSED. . . . . The Court dismissed the Burke County Sheriff's Department on June 6, 2002 because it is not a legal entity amenable to suit.").

Mladek v. Day, 293 F.Supp.2d 1297, 1304 (M.D. Ga. 2003) ("The Eleventh Circuit has recently held in a divided decision that Georgia sheriffs and their deputies are entitled to official immunity under the Eleventh Amendment to the Constitution for claims arising from their use of 'force policies' in the operation of county jails. *Manders v. Lee,* 338 F.3d 1304 (11th Cir.2003). The Eleventh Circuit's ruling, however, is clearly not limited to the operation of jails. Based upon an exhaustive review of Georgia law, the Eleventh Circuit found that Georgia sheriffs act as 'state officers' in a variety of functions and when they 'wear these state hats,' they are entitled to official immunity. The Eleventh Circuit explained that the proper inquiry is whether the Sheriff (or his deputy) acted for the state in the particular function at issue in the case. *Id.* at 1308-09. Although the precise function at issue in *Manders* was the implementation of a force policy in the operation of a county jail, the Eleventh Circuit made it clear that it found no distinction between that function and the law enforcement function performed by sheriffs when they arrest citizens for violations of

the law. *Id.* at 1310, 1313. Therefore, the Court finds in this case that, based upon the rationale of *Manders,* Defendant Day was wearing a 'state hat' at the time of Mr. Mladek's arrest and subsequent detention. The Court further finds that, insofar as Plaintiffs allege that Sheriff Yarbrough is liable for the manner in which Mr. Mladek was treated by Deputy Day, Sheriff Yarbrough was likewise wearing a 'state hat.' Therefore, both Day and Yarbrough are entitled to official immunity under the Eleventh Amendment for any claims brought against them in their official capacity. Moreover, the Court finds that Walton County is likewise entitled to such immunity based upon the rationale expressed in *Manders.* 338 F.3d at 1308-09. Accordingly, Defendant Walton County's motion to dismiss Plaintiff Michael Mladek's Fourth Amendment claim against it is granted. Plaintiff Michael Mladek's Fourth Amendment claims against Deputy Day and Sheriff Yarbrough in their official capacities are likewise dismissed.").

Neville v. Classic Gardens, 141 F. Supp.2d 1377, 1382 (S.D. Ga. 2001) ("Engaging in a prosecutorial function is the act of a *State,* not a county, official. . . . Accordingly, Neville's claims against Higgins in her official capacity, and thus, the county, face dismissal.").

Frazier v. Smith, 12 F. Supp.2d 1362, 1369 (S.D. Ga. 1998) ("Under Georgia law, sheriffs are vested with ultimate authority in employment decisions. . . . There is no evidence before the Court to support the conclusion that Sheriff Smith is an agent of Camden County, or that the County ultimately is liable for his misconduct. Construing the facts in the light most favorable to Plaintiff, the actions brought against Sheriff Smith, in his official capacity, and the Camden County Board of Commissioners are not redundant, and both should proceed.").

IV. GOVERNMENT LIABILITY FOR VIOLATIONS OF DUE PROCESS: THE IMPACT OF *DESHANEY* ON SUBSTANTIVE DUE PROCESS CLAIMS AND *ZINERMON* ON PROCEDURAL DUE PROCESS CLAIMS

The § 1983 remedy is available, whether against an individual or the governmental entity, only when a person acting under color of state law causes another person to be deprived of a federal right secured by the Constitution or laws of the United States. Very often, the most difficult part of a plaintiff's case will be pleading and proving the requisite underlying constitutional violation.

This section surveys two areas where plaintiffs' underlying constitutional claims are based on violations of substantive or procedural due process, where assertions of government liability are common and where the Supreme Court has been active in recent years in defining the content and scope of the underlying right.

A. Liability Based on Failure to Provide Protective Services

While it is generally"s settled that there is no constitutional duty on the part of the state to protect members of the public at large from crime, *see* ***Martinez v. California***, 444 U.S. 277, 284-85 (1980), there has been considerable disagreement among the lower federal courts as to whether

and when a duty to protect may arise by virtue of a "special relationship," outside of the custodial context, between the state and a particular individual or group.

1. *DeShaney v. Winnebago County Dept. of Social Services*

In ***DeShaney v. Winnebago County Dept. of Social Services***, 489 U.S. 189, 109 S. Ct. 998 (1989), a majority of the Supreme Court held that nothing in the due process clause of the Fourteenth Amendment creates an affirmative duty on the part of the state to "protect the life liberty, and property of its citizens against invasion by private actors." 109 S. Ct. at 1003. The Court concluded that "[a]s a general matter,... a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id*. at 1004. *See also* ***Vielma v. Gruler***, No. 18-15162, 2020 WL 1672778, at *4 (11th Cir. Apr. 6, 2020) (not reported) ("Here, Plaintiffs claim that the injured and murdered victims' Fourteenth Amendment substantive due process rights were violated when, upon hearing the gunshots, Officer Gruler failed to immediately reenter the club to attempt to disarm or shoot Mateen. . . . As the district court correctly observed, Plaintiff's entire claim against Officer Gruler boils down to an argument that the Due Process Clause imposes an affirmative duty on police officers to protect individuals from private acts of violence. But that is precisely the argument that the Supreme Court rejected in *DeShaney v. Winnebago County Department of Social Services*, which held that, outside the custodial context, . . . 'a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.'"); ***Bennett, ex rel. Irvine v. City of Philadelphia***, 499 F.3d 281, 289, 290 (3rd Cir. 2007) ("If a municipality, state or other public body is to be liable under the Constitution for harm caused by private parties to persons not in custody, the liability would be unlimited. There is no legal doctrine that supports imposition of such liability. Without legislative activity, we are not prepared to hold that a city that fails to respond promptly to a 911 call must pay for the harm that befalls the caller as a result of the failure. The fact is that most 911 calls are answered, that the police use their best efforts in many cases, and that they prevent egregious harm. We have less personal experience with DHS but are willing to assume, for this purpose, that this is also true of DHS social workers, notwithstanding the well-publicized cases of failures in that connection. However, it is not the role of the courts, certainly not the federal courts, to rectify the failures that do happen. That is the responsibility of the citizens of the body politic, who elect the leaders of the executive branch of the respective city, state or municipality. If the public raises its voice and demands accountability, and is willing to use the ballot to support those demands, then change and improvement can and will occur. Unfortunately, it will be too late for Porchia Bennett."); ***Aracena v. Gruler***, No. 618CV932ORL40KRS, 2018 WL 5961040, at *5 (M.D. Fla. Nov. 14, 2018) ("[I]t is clear that Count I against Officer Gruler cannot survive. Since this entire circumstance begins and ends with a private actor, Officer Gruler cannot be sued for violating Plaintiff's due process rights. Indeed, Count I boils down to a claim that Gruler initially absconded and then failed to protect Plaintiff after the attack began. . . . Officer Gruler's failure to protect Plaintiff 'against private violence simply does not constitute a violation of the Due Process Clause.'. . The Pulse shooting was a spontaneous act of violence carried out by 'a thug with no regard for human life.'. . With this, Plaintiff's substantive due process claims fail.")

Chief Justice Rehnquist, writing for the majority in *DeShaney*, expressly rejected the argument "that once the State learns that a third party poses a special danger to an identified victim, and indicates its willingness to protect the victim against that danger, a 'special relationship' arises between State and victim, giving rise to an affirmative duty, enforceable through the Due Process Clause, to render adequate protection." 109 S.Ct. at 1004 n.4.

DeShaney may be read narrowly to limit any affirmative duty to protect to situations in which "the State takes a person into its custody and holds him there against his will . . . . [t]he affirmative duty to protect aris[ing] not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id*. at 1005. *See,e.g.*, ***Youngberg v. Romeo***, 457 U.S. 307 (1982) (substantive due process component of Fourteenth Amendment Due Process Clause imposes duty on state to provide for safety and medical needs of involuntarily committed mental patients); ***Estelle v. Gamble***, 429 U.S. 97 (1976) (state has constitutional duty to provide adequate medical care to incarcerated prisoners). *See also* ***Petersen v. Johnson***, 57 F.4th 225, 236 (5th Cir. 2023) ("Petersen committed suicide two days after he was released from custody. Because he was no longer in the state's custody, the 'special relationship' had ended, and the Wellpath Defendants owed him no duty of care. [citing *Walton, Coscia*, and *Collignon*] Consequently, the Plaintiffs cannot state a plausible claim under § 1983, and their §§ 1983 and 1985 claims against the Wellpath Defendants were properly dismissed."); ***Coscia v. Town of Pembroke, Mass.***, 659 F.3d 37, 39, 40 (1st Cir. 2011) ("Like the district judge, we have been apprised of no case recognizing due process liability for suicide based on police conduct except for death during custody, and the defendants have cited one case comparable to this one that found no liability for the reason that the suicide occurred after release. The district court nonetheless decided that a liability claim had been pleaded adequately despite the non-custodial death because a causal relationship (in fact and law) had been plausibly stated between the failure to furnish medical care during the temporary custody and the self-destructive act the next morning. . . . We agree with the district judge that the pleadings raise no claim that the treatment by the police gave rise to a suicidal inclination on the decedent's part when he would otherwise have had none, and nothing in the complaint suggests even in a conclusory way that his self-destructive tendency was intensified by state action, or that anything done or omitted by the police weakened any instinct for self-preservation and made him more dangerous to himself. The causation alleged is not that the absence of medical attention during custody was in any way creative of suicidal vulnerability by working a change in him for the worse, but consists rather of a failure to prevent the consequence of his preexisting suicidal disposition, a failure to intervene in a way that would change him, or his circumstances, for the better in the period after his release. We think this claim of causation leads to a liability beyond what due process imposes, for although the existing law does recognize a custodial duty to take some preventive action, its rationale does not extend official protective responsibility as far as the plaintiff would take it. . . . With the restoration of the detainee's liberty, then, the legal chain of preventive (as distinct from state-created) causation must be taken to have ended. We accordingly hold that in the absence of a risk of harm created or intensified by state action there is no due process liability for harm suffered by a prior detainee

after release from custody in circumstances that do not effectively extend any state impediment to exercising self-help or to receiving whatever aid by others may normally be available."); ***Carver v. City of Cincinnati***, 474 F.3d 283, 286 (6th Cir. 2007) ("The mere fact that the police exercise control over an environment is alone insufficient to demonstrate that a person is seized. . . . Here, there was no physical restraint over Carver by the officers, nor did the officers direct any actions toward him. Carver's incapacity, like that of the plaintiff in *Jackson*, was self-induced. The officers did not place a restraint on Carver's personal liberty when they secured the area to conduct an investigation into the death of Smith-Sandusky. Perhaps the officers had probable cause to restrain Carver if they had wanted, but that is not what happened. The custody exception is inapplicable because the officers never restrained Carver's personal liberty in any fashion."); ***Jackson v. Schultz***, 429 F.3d 586, 590, 591 (6th Cir. 2005) ("It is not a constitutional violation for a state actor to render incompetent medical assistance or fail to rescue those in need. . . . The 'custody exception' does not apply because the decedent was never in custody. The 'custody exception' triggers a constitutional duty to provide adequate medical care to incarcerated prisoners, those involuntarily committed to mental institutions, foster children, pre-trial detainees, and those under 'other similar restraint of personal liberty.'. . . The overarching prerequisite for custody is an affirmative act by the state that restrains the ability of an individual to act on his own behalf.. . The district court improperly held that moving an unconscious patient into an ambulance is custody. This court's precedent has made clear that *DeShaney*'s concept of custody does not extend this far. This court has never held that one merely placed in an ambulance is in custody. . . . Decedent's liberty was 'constrained' by his incapacity, and his incapacity was in no way caused by the defendants. In sum, no set of facts consistent with the allegations shows that the EMTs did anything to restrain the decedent's liberty. Thus, no set of facts consistent with the allegations supports a finding that the EMTs took decedent into custody. Based on the facts alleged, there is no constitutional violation under the custody exception."); ***Hamilton v. Cannon***, 80 F.3d 1525, 1531 n.5 (11th Cir. 1996) ("This Court and others have extended the state custody exception beyond actual incarceration or involuntary institutionalization only when there is some kind of physical restraint by the state that triggers an affirmative constitutional duty of care and protection."); ***Smith v. Myers***, No. 94-3605, 1995 WL 521158, *5 (6th Cir. Sept. 1, 1995) (unpublished) ("[T]his Circuit has held that the state's duty to protect any particular citizen arises only where a 'special relationship' exists between the state and that citizen. [cites omitted] Thus far, we have determined that a 'special relationship' exists only where the state legally restricts the liberty of a person, such as when the state incarcerates someone or involuntary commits a person to a healthcare facility."); ***Foy v. City of Berea***, 58 F.3d 227, 231 (6th Cir. 1995) ("When the state limits an individual's ability to care for himself by, for example, incarceration in a prison or involuntary confinement in a mental hospital, the Constitution does impose an affirmative duty of care and protection. There is no such affirmative duty, however, absent such restraint."); ***Garrett v. Gilless***, 47 F.3d 1168 (Table), 1995 WL 16810, *1 (6th Cir. Jan. 17, 1995) (holding defendants had no duty to provide police protection to victim of domestic violence and her children in absence of special relationship); ***Pinder v. Johnson***, 54 F.3d 1169, 1175 (4th Cir. 1995) (*en banc*) ("Some sort of confinement of the injured party − incarceration, institutionalization, or the like − is needed to trigger the affirmative duty . . . This Court has consistently read *DeShaney* to require a custodial

context before any affirmative duty can arise under the Due Process Clause."); ***Lovins v. Lee***, 53 F.3d 1208, 1210 (11th Cir. 1995) ("Attempting to escape the clear language of *DeShaney*, plaintiff argues that this case fits within the "special relationship" exception to the general rule that the Due Process Clause does not entitle a citizen to be protected from violence at the hands of non-governmental actors. Unfortunately for plaintiff, that exception is limited to circumstances in which there is a special relationship between the government and the victim of violence or mistreatment, a circumstance that is lacking in the present case. Examples of special relationship cases include those involving incarcerated prisoners and involuntarily committed mental patients."); ***Souza v. Pina***, 53 F.3d 423, 426 (1st Cir. 1995) ("Absent the kind of custodial relationship apparently contemplated by the Court [in *DeShaney*], the Due Process Clause does not require the state to protect citizens from 'private violence' in whatever form, including suicide."); ***Ying Jing Gan v. City of New York***, 996 F.2d 522, 534-35 (2d Cir. 1993) (complainant who agreed to identify suspects was owed no duty of protection by City); ***Nobles v. Brown***, 980 F.2d 730 (6th Cir. 1992) (Table) ("[T]he people of Michigan are free to create a system under which the state and its officials would be subjected to liability for failure to accord prison guards reasonable protection against harms inflicted by dangerous prisoners. This court, however, is not free to create such a system by turning the Due Process Clause into a Michigan Tort Claims Act."); ***Salazar v. City of Chicago***, 940 F.2d 233, 237 (7th Cir. 1991) (government has no constitutional duty to provide competent rescue services to people not in its custody); ***Piechowicz v. U.S.***, 885 F.2d 1207, 1215 (4th Cir. 1989) (federal witnesses murdered by hired killer were owed no duty of protection under Fifth Amendment substantive due process where witnesses were not "in custody" of United States); ***de Jesus Benavides v. Santos***, 883 F.2d 385, 388 (5th Cir. 1989) (affirmative duty to protect a prisoner arises from State's restraint on individual's liberty; prison guard injured by prisoner is owed no constitutional duty by the State to protection from inmates' violence); ***Beltran v. City of El Paso,*** 367 F.3d 299, 307 (5th Cir.2004) ("Beltran argues that by encouraging Sonye to stay in the bathroom and telling her that the police were on the way, Amador became the custodian of Sonye's safety. This argument falls outside of the special relationships described by the Supreme Court, which are limited to cases concerning 'incarceration, institutionalization, or other similar restraint of personal liberty.'. . In this case, Amador offered advice to Sonye, but she did not *affirmatively* place Sonye in custody by restraining her in the bathroom."); ***Clarke v. Sweeney,*** 312 F.Supp.2d 277, 296 (D. Conn. 2004) ("As with the state created danger exception to *DeShaney,* the contours of the special relationship exception are not well defined. However, it would not seem to apply when a fact witness to a crime that has already been committed voluntarily approaches the police and makes a statement, and then a subpoena is issued for that witness-even if the police provide the witness with visible police protection that is later withdrawn. Such a circumstance does not constitute a situation where the 'state restrains an individual's freedom to act to protect himself or herself through a restraint on that individual's personal liberty.' Thus, even looking at the facts in a light most favorable to Clarke, the special relationship exception to *DeShaney* is also inapplicable here."); ***Miller v. Hubbard,*** No. NA 022-133-C H/H, 2004 WL 392957, at *5 (S.D. Ind. Feb. 17, 2004) ("In the briefing on the court's order to show cause on the claims against the shooting victim − Officer Dexter − and in the briefing on this summary judgment motion, plaintiff has not yet identified any case law providing support for finding either

(1) that jail officials owe a constitutional duty to inmates to prevent them from escaping, or (2) that jail officials have a constitutional duty to prevent escaped prisoners from committing suicide. In general, there is no constitutional duty on the part of the state to protect someone from private violence. . . The Supreme Court in *DeShaney* recognized an exception to this general rule in situations where the state has custody or is 'restraining the individual's freedom to act on his own behalf,' which can trigger a duty to provide for the individual's safety. . But in this case, Miller did not die while he was in custody. He shot himself after shooting Officer Dexter and escaping from custody. No state officials restrained his individual freedom to act when he pulled the trigger."); ***Ramirez v. City of Chicago***, 82 F. Supp.2d 836, 839 (N.D. Ill. 1999) ("The paramedics cite *DeShaney* . . . for the proposition that there is no federal constitutional duty of care where the plaintiff is not in custody or control of the state actor. The paramedics argue that because Mr. Ramirez was not in their custody but that of the Chicago Police Department, they did not 'suddenly acquire a duty to treat a man who was not in their custody,' an argument of breathtaking cynicism. I agree with the plaintiffs, however, that the paramedics, public employees who were dispatched specifically to aid Mr. Ramirez, 'suddenly acquired' a constitutional obligation to aid him when the police defendants, also public employees, took him into custody on behalf of the City of Chicago, and he was injured in the process. Chicago Fire Department paramedics have a duty to aid persons who are injured while in custody of the Chicago Police, or indeed, the Cook County Sheriff or the Illinois State Police. State action cannot be diluted by being dispersed over several departments.").

See also ***Lipscomb v. Simmons***, 962 F.2d 1374, 1379 (9th Cir. 1992) (*en banc*) ("In our view, custody cases such as *DeShaney* and *Youngberg* stand for the proposition that the government has an affirmative obligation to facilitate the exercise of constitutional rights by those in its custody only when the circumstances of the custodial relationship directly prevent individual exercise of those rights."); ***Harris v. District of Columbia***, 932 F.2d 10 (D.C. Cir. 1991) (suggesting that plaintiff who died of drug overdose while in police custody was owed no constitutional duty by police to refrain from deliberate indifference to his medical needs, where plaintiff "had not been formally committed, either by conviction, involuntary commitment, or arrest, to the charge of the District. . . .").

In ***Shaw by Strain v. Strackhouse***, 920 F.2d 1135 (3d Cir. 1990), a profoundly retarded resident of a state mental institution, brought a § 1983 action against state employees, asserting a failure to protect him from abuse and sexual assault. On appeals from a grant of summary judgment in favor of defendants, the Third Circuit addressed the standard of care owed by state officials to those in their custody, and determined that the standard might vary depending upon the nature of the physical custody involved. *Id*. at 1144.

The court concluded that while a deliberate indifference standard governed the liability of the nonprofessional employee-defendants, "the ***Youngberg*** professional judgment standard should have been applied to the primary care professionals, supervisors and administrators named as defendants." *Id*. at 1139.

In the court's opinion, professional judgment is a relatively deferential standard which, like recklessness and gross negligence, would fall somewhere between simple negligence and intentional misconduct. *Id*. at 1146. The plaintiff's burden is somewhat greater when trying to establish deliberate indifference than when trying to establish a failure to exercise professional judgment. *Id*. at 1150. *But see* ***Collignon v. Milwaukee County***, 163 F.3d 982, 988-89 (7th Cir. 1998) (comparing deliberate indifference and professional judgment standards, concluding that "[i]n the context of a claim for inadequate medical care, the professional judgment standard requires essentially the same analysis as the Eighth Amendment standard."). *See also* ***Mitchell v. Kallas***, 895 F.3d 492, 501 (7th Cir. 2018) ("Dr. Kallas claimed that DOC had an unwritten rule that an inmate may start hormone therapy only if she has *six* months left on her sentence, and he denied her request on that basis. He later explained in an affidavit that this period was intended to allow time to figure out the proper hormone dosage while monitoring both physical and psychological side effects. The first problem is that this requirement appears nowhere in DOC's written policy on gender dysphoria. This conspicuous absence from DOC's freshly-minted policy raises the factual question whether DOC actually had such a practice. Moreover, the question remains whether Dr. Kallas and the Committee exercised medical judgment in applying the policy to Mitchell's request. Neither professional disagreement nor medical malpractice constitutes deliberate indifference. . . Thus, if the trier of fact finds that there was such a policy and that Dr. Kallas and the Committee had a medical basis for deciding not to start Mitchell's hormone treatments, then Dr. Kallas will not be liable. If the factfinder alternatively concludes that there was no such policy, or that Dr. Kallas failed to assess whether application of the policy was appropriate in Mitchell's case, then it would follow that he did not exercise his medical judgment and was deliberately indifferent. 'The denial of hormone therapy based on a blanket rule, rather than an individualized medical determination, constitutes deliberate indifference in violation of the Eighth Amendment.'"); ***Battista v. Clarke***, 645 F.3d 449, 453-55 (1st Cir. 2011) ("Both the *Farmer* and *Youngberg* tests leave ample room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources. . . . It has been fifteen years since Battista first asked for treatment, and for ten years, health professionals have been recommending hormone therapy as a necessary part of the treatment. When during the delay Battista sought to mutilate herself, the Department could be said to have known that Battista was in 'substantial risk of serious harm.'. . But the question remains whether the withholding of hormone therapy was 'wanton' or outside the bounds of 'reasonable professional judgement.' Medical 'need' in real life is an elastic term: security considerations also matter at prisons or civil counterparts, and administrators have to balance conflicting demands. The known risk of harm is not conclusive: so long as the balancing judgments are within the realm of reason and made in good faith, the officials' actions are not 'deliberate indifference,'. . .or beyond 'reasonable professional' limits. . . . Here, despite much early resistance, . . . hormone therapy for GID is now provided in some cases in Massachusetts prisons. The defendants point to this to establish their good faith; Battista, to show that providing her the therapy would be consistent with security needs. Both positions are overstated. Hormone therapy has not been welcomed by the Department, but both the Treatment Center's internal environment and Battista herself arguably presented added risks. . . .In the end, there is enough in

this record to support the district court's conclusion that 'deliberate indifference' has been established − or an unreasonable professional judgment exercised − even though it does not rest on any established sinister motive or 'purpose' to do harm. Rather, the Department's action is undercut by a composite of delays, poor explanations, missteps, changes in position and rigidities − common enough in bureaucratic regimes but here taken to an extreme. This, at least, is how the district court saw it, and it had a reasonable basis for that judgment.).

Compare ***Doe 4 by and through Lopez v. Shenandoah Valley Juvenile Center Comm'n***, 985 F.3d 327, 339-44 (4th Cir. 2020) ("Appellants urge us to apply *Youngberg*'s standard of professional judgment. In *Youngberg*, the Supreme Court considered the Fourteenth Amendment protections guaranteed to a mentally disabled person involuntarily committed to a state institution. The plaintiff claimed that the institution failed to provide safe conditions of confinement, unduly restricted his physical freedom, and failed to adequately train him in necessary skills. . . *Youngberg* held that 'liability may be imposed only when the decision by the professional' represents a 'substantial departure from accepted professional judgment.'. . In *Patten*, this Court applied the *Youngberg* standard to an involuntarily committed psychiatric patient's claim of inadequate medical care. We concluded that there are 'sufficient differences' between 'pre-trial detainees' and 'involuntarily committed psychiatric patients' to justify the application of *Youngberg*'s professional judgment standard for the latter. [court sets out differences] Applying the same analysis, we hold that the *Youngberg* standard governs this case. The statutory and regulatory scheme governing unaccompanied children expressly states that these children are held to give them care. . . .The Commission argues that this Court should (as the trial court did) apply the standard of deliberate indifference used when considering claims of inadequate medical care raised by pretrial detainees. . . Under this standard, a plaintiff must prove: (1) that the detainee had an objectively serious medical need; and (2) that the official subjectively knew of the need and disregarded it. . . The Commission further argues that *Patten*'s reasoning counsels against applying *Youngberg* here. First, the Commission claims that children are placed in SVJC primarily for security reasons, not for treatment. . . But this argument presents a false binary. In *Youngberg*, the plaintiff was likewise institutionalized because his mother could not 'control his violence.'. . Yet, the need to institutionalize the plaintiff for security reasons did not undermine the fact that he also needed to be committed for treatment. The Supreme Court explained that 'the purpose of respondent's commitment was to provide reasonable care *and* safety'—making plain that the two purposes are not mutually exclusive. . . . Next, the Commission argues that *Youngberg* does not apply because SVJC is a juvenile detention center, not a hospital or therapeutic setting. . . But the nature of the facility is not dispositive. In *Matherly v. Andrews*, we applied the *Youngberg* standard to a person involuntarily committed to a prison for a program designed to treat his dangerousness as a sexual offender. . . The nature of the facility is secondary to the reason a person is confined in it. . . . Finally, the Commission asks this Court to follow other circuits that have treated immigrant detainees as equivalent to pretrial detainees, applying the deliberate indifference standard. . . But those cases all dealt with adults detained for enforcement proceedings such as removal. . . None dealt with unaccompanied immigrant children, whom the Government holds for the purpose of providing care. . . Notably, neither the Commission nor the district court grapple with the fact that

this case is about children. The Supreme Court has long recognized that children are psychologically and developmentally different from adults, so much so that in the context of sentencing, 'children are constitutionally different.'. . . Accordingly, we hold that a facility caring for an unaccompanied child fails to provide a constitutionally adequate level of mental health care if it substantially departs from accepted professional standards. To be clear, this standard requires more than negligence. . . . The evidence must show 'such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.'. . Under this standard, courts do not determine the 'correct' or 'most appropriate' medical decision. . . 'Instead, the proper inquiry is whether the decision was so completely out of professional bounds as to make it explicable only as an arbitrary, nonprofessional one.'. . By applying this standard, a court 'defers to the necessarily subjective aspects of the decisional process of institutional medical professionals and accords those decisions the presumption of validity due them.'. . Nonetheless, a decision earns this deference only if it reflects an actual exercise of medical judgment. . . We have not yet explained the precise difference between the standards of professional judgment and deliberate indifference. . . But one difference between the two standards is that *Youngberg* does not require proof of subjective intent. . . Thus, the standard of professional judgment presents a lower standard of culpability compared to the Eighth Amendment standard for deliberate indifference. . . . To apply *Youngberg* to a claim of inadequate medical care, then, a court must do more than determine that some treatment has been provided—it must determine whether the treatment provided is adequate to address a person's needs under a relevant standard of professional judgment.") *with* ***Doe 4 by and through Lopez v. Shenandoah Valley Juvenile Center Comm'n***, 985 F.3d 327, 347-48, 351-52 (4th Cir. 2020) (Wilkinson, J., dissenting) ("We judges should stick to what we are good at: applying precedent, interpreting statutes, and exercising traditional equitable powers. Today's case features an invitation to try our hand at institutional governance and to do something we are utterly unqualified to do—determine what constitutes acceptable mental health care. I respect the majority's sincere and humane concerns. But it is staring at a host of unintended consequences. And under what rock is hidden its holding's relationship to law, I have no idea. . . . By adopting the more intrusive professional judgment standard, the majority also creates a circuit split. *See A.M. v. Luzerne Cty. Med. Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004). After discussing the realities of the institutional context and recognizing the need for deference, the Third Circuit adopted a deliberate indifference standard for claims by juvenile detainees. . . Under this standard, only reckless disregard of a serious medical need is actionable. . . . Other courts have likewise concluded that the deliberate indifference test governs claims of inadequate medical care by juveniles detained for non-rehabilitative purposes. The majority begrudgingly acknowledges that the weight of out-of-circuit authority is against it, failing to cite a single case finding the professional judgment standard applicable in a similar case. . . For example, recognizing that substantive due process doctrine has traditionally been cabined to bar only behavior that 'shocks the conscience,' the Third Circuit has adopted the deliberate indifference test to evaluate claims by juvenile detainees. . . By concluding otherwise the majority, as noted, needlessly creates a circuit split.")

See also ***Davis v. Wessel***, 792 F.3d 793, 797-802 (7th Cir. 2015) ("Wessel and Lay argue that they are entitled to a new trial because the district court erroneously instructed the jury on the elements necessary for Davis to prevail, and this error caused them prejudice. They contend that the court's instructions allowed the jury to hold them liable without any finding of intent. Before the district court, they primarily advocated for the intent standard governing Eighth Amendment claims, and they proposed jury instructions stating that liability depended on the jury finding that Wessel and Lay acted 'maliciously and sadistically' to harm Davis. . . Davis objected to their proposed instructions on the basis that such intent was not required to prove his claims, and the district court agreed with Davis.). . . . We think it should have been adequately clear to Wessel and Lay at trial that they were defending against due process claims of 'freedom from unreasonable restraints,' as recognized by *Youngberg*, 457 U.S. at 321. . . .In Davis's case, if the jury believed that the guards simply did not consider the issue of whether to remove Davis's hand restraints before he used the restroom, then the guards cannot be liable under the Due Process Clause. For example, the jury may have disbelieved Davis's uncorroborated testimony that he requested that the restraints be removed while he was in the courtroom and just prior to using the restroom. Or the jury may have believed the guards' testimony indicating that they would never laugh at a detainee using the restroom and they thought a detainee such as Davis could successfully navigate the restroom process with the restraints attached. In either case, the jury may have nonetheless awarded compensatory damages based upon the district court's instruction because they thought making a relatively old, frail, and diminutive detainee such as Davis use the restroom in hand restraints 'was excessive in relation to [legitimate security] purposes.' Indeed, this scenario would explain the jury's decision to award a relatively small amount of compensatory damages while declining to award any punitive damages; the latter decision indicates that the jury did not find that either guard's conduct was, in the words of the punitive damages instruction, 'malicious or in reckless disregard of Plaintiff's rights.' In short, the jury may well have found Wessel and Lay liable for being negligent or making an accidental mistake, and that is constitutionally insufficient. . . We find that the district court's elements instruction failed to properly state the law. No other instruction clarified the issue or otherwise rectified the error. And as we have discussed, Wessel and Lay were prejudiced because the jury was likely to have been misled or confused. A new trial is required. . . In an effort to salvage the verdict, Davis argues that Wessel and Lay have failed to preserve any argument regarding any intent standard other than the Eighth Amendment's 'malicious and sadistic' standard. . . . Throughout the case (including on appeal), Wessel and Lay argued that the Eighth Amendment's 'malicious and sadistic' intent standard should apply. However, they also argued to the district court during the instructions conference, 'in any event, both the Seventh Circuit and U.S. Supreme Court ha [ve] consistently required *mens rea* of some sort.' In their motion for new trial, they said the district court's instructions 'allowed the jury to return a verdict for Plaintiff without a finding of *mens rea.*' In both instances, they called the district court's attention to the Supreme Court's decision in *Lewis.* It is clear that Wessel and Lay consistently advocated for *some* level of intent to be shown, which is the same argument raised on appeal. We find that Wessel and Lay adequately preserved their objections regarding the lack of any intent requirement in the district court's jury instructions."); ***Lanman v. Hinson***, 529 F.3d 673, 681, 682, 684 (6th Cir. 2008) ("The Fourth Amendment is inapplicable here because

defendants did not 'seize' Lanman when they bodily restrained him. By requesting voluntary admission to Kalamazoo Psychiatric Hospital, Lanman consented to defendants providing him medical treatment. Defendants physically restrained Lanman to prevent him from harming himself or others and to administer medication to calm him down. . . . We find that the appropriate source for Lanman's excessive force claim is the Fourteenth Amendment, which provides him, as a patient of a state care institution, with the constitutional right recognized in *Youngberg* to freedom from undue bodily restraint in the course of his treatment. Basing this right in substantive due process, rather than the Fourth Amendment, allows for balancing the individual's liberty interest against the State's asserted reasons for restraining the individual's liberty while in its care. It also gives proper deference to the decisions of institutional professionals concerning medical treatment. . . . While the actions of professional decisionmakers, defined as 'person[s] competent, whether by education training or experience, to make the particular decision at issue,' *Youngberg*, 457 U.S. at 323 n. 30, are held to this professional judgment standard, the defendant resident care aides are non-professional employees and are held only to a deliberate indifference standard."); ***Estate of Porter by Nelson v. State of Illinois***, 36 F.3d 684, 688 (7th Cir. 1994) ("In determining whether an involuntarily committed patient's right to reasonable safety has been violated, courts may only 'make certain that professional judgment in fact was exercised.'"); ***Yvonne L. v. New Mexico Department of Human Services***, 959 F.2d 883, 893-94 (10th Cir. 1992) (adopting professional judgment standard, rather than deliberate indifference, in foster care setting); ***Clark v. Donahue***, 885 F. Supp. 1164, 1168 (S.D. Ind. 1995) (finding the reasoning of ***Shaw by Strain*** to be persuasive, holding nonprofessional employees subject to deliberate indifference standard); ***Wendy H. v. City of Philadelphia***, 849 F. Supp. 367, 368-69 (E.D. Pa. 1994) (holding minimum standards of "professional judgment" as "standard of care owed to a child in foster care by a city worker responsible for supervising the foster home placement and welfare of the child . . . ."). *Accord* ***K.H. v. Morgan***, 914 F.2d 846 (7th Cir. 1990); ***T.M. by and through Cox v. Carson***, 93 F. Supp.2d 1179, 1187 (D. Wyo. 2000).

2. "Getting Around" *DeShaney*

Plaintiffs have been successful in avoiding dismissals under ***DeShaney*** where the case has been presented as one of the following: (a) **"special relationship" or custody case,** (b) **"state-created-danger" case,** (c) **entitlement case, or** (d) **equal protection case.**

(a) "special relationship" or custody cases

In ***Horton v. Flenory***, 889 F.2d 454 (3d Cir. 1989), plaintiff's decedent died as a result of a severe beating administered by the owner of a private club who was investigating a burglary of the club. The City of New Kensington had an official, written "hands-off" policy with respect to incidents occurring in private clubs. *Id*. at 456. The owner of the club in question was an ex-police officer. He called the police in connection with the reported burglary. The officer who responded ignored pleas of the employee/suspect to provide protection from the club owner, indicating to

both the club owner and the employee that the owner was free to conduct and continue his interrogation. *Id*. at 458. The suspect was beaten to death.

The Court of Appeals affirmed the judgment denying defendants' motion for a j.n.o.v., reasoning that when the police officer affirmed the right of the club owner to detain and question the suspect, the interrogation became "custodial." Furthermore, through the city's delegation of traditional police functions to a private actor, the club owner could be viewed as a state actor.

Thus, the court concluded that when the state is involved, as either a custodian or as an actor, ***DeShaney*** is not controlling. *Id*. at 457. *Accord* ***Nishiyama v. Dickson County***, 814 F.2d 277 (6th Cir. 1987) (prisoner allowed to operate police vehicle unsupervised was clothed with state authority and became *de facto* state actor). *See also* ***Sanders v. Bd. Of County Commissioners of Jefferson County,*** 192 F. Supp.2d 1094, 1119 (D. Colo. 2001) ("Based on Plaintiff's complaint, it is reasonable to infer that from approximately 12:30 p.m. to 4:00 p.m., the Command Defendants acted affirmatively to restrain the freedom of the occupants of Science Room 3, including Dave Sanders, to act on their own behalf. Thus, pursuant to *DeShaney* and *Armijo,* the Command Defendants entered into a special relationship with Dave Sanders during that time giving rise to a constitutional duty to protect and provide care. Therefore, I conclude Ms. Sanders has properly asserted in Claim Two a violation of the Fourteenth Amendment right to substantive due process under the special relationship doctrine."); ***Culberson v. Doan***, 125 F. Supp.2d 252, 270 (S.D. Ohio 2000) ("If Plaintiffs' facts are viewed in a favorable light, it is also reasonable to conclude that, because Chief Payton had 'complete control' of the potential crime scene, he also had 'constructive and functional' possession, control or custody of Carrie's body. By potentially abandoning that control, custody or possession to her murderer and the Baker Family, we conclude that Chief Payton's actions may have violated Plaintiffs' substantive due process.").

See also ***Sexton v. Cernuto***, 18 F.4th 177, 186-92 (6th Cir. 2021) ("Our cases analyzing whether a special relationship exists do not squarely address whether a work program for probationers is custodial in a way that could create such relationships. . . . The work program, however, placed far more restrictions on Sexton's liberty and her ability to care for herself than did the compulsory education laws or involuntary medical care that this court has previously analyzed. Through the probation work program, the state retained authority to physically confine Sexton, even if her liberty as a probationer was greater than that she would have had in prison. That Sexton could leave the work program at the end of the day is not dispositive. . . . The Redford court ordered Sexton to participate in the work program. The program placed further restrictions on her personal liberty: cell phone use was prohibited; she was required to attend the program, wear a yellow vest, and follow Dunn's and Cernuto's orders; she was ordered to ride in state-owned vehicles; and she was taken to and from various worksites. Underlying these restrictions was the threat of incarceration should disobedience be found to violate her probation. These restrictions are sufficient to show a state 'threat of force,'. . . and a restraint on Sexton's ability to provide for her own reasonable safety[.] . . . Looking to *DeShaney*, the restrictions on Sexton's physical movement and personal liberty during her time in the work program were sufficient to

create a special relationship between Cernuto and Sexton. . . . Cernuto concludes with the argument that 'the "special relationship" exception has traditionally been used to impose constitutional liability on the State for the actions of a private party.' He asserts that even if he had a duty to Sexton through a special relationship, that duty to protect applies only to *private* acts of violence, not those of a state actor like Dunn. Cernuto points to language in our opinions specifying that the *DeShaney* exceptions are a means to hold public officials liable 'for private acts of violence.'. . The district court, however, correctly analyzed this private acts issue only in the context of the state created danger exception to *DeShaney*, explaining that while '[i]t is not clear why the distinction between state and private actors exists in the Sixth Circuit,' it was nevertheless necessary to find the state created danger exception inapplicable on that ground. . . Cernuto's argument that the special relationship exception is also limited to protecting against private acts of violence would require an extension of our case law. As shown by the district court's analysis, it is our line of cases on the *state created danger exception*—not the special relationship exception—that includes the requirement that the state must expose the plaintiff 'to private acts of violence.' . . First, case law provides reasons not to apply this distinction to the special relationship exception. Enforcing the distinction between state and private actors does not necessarily follow from *DeShaney*. There, the question before the Court was whether state entities or agents had an obligation to protect a child from an abusive parent. . . The Court did not address violence from a state actor because the violence in that case was by a parent, not a state actor. . . And although *DeShaney* analyzed the duty to protect against private acts of violence, its holding includes the much broader proposition that 'when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety.'. . To require that the violence complained of be private would significantly diminish this responsibility. Second, the special relationship exception and the state created danger exception arise from different relationships, and that difference supports treating the two exceptions as distinct. The state created danger exception, as the Second Circuit has explained, 'arises from the relationship between the state and the private assailant.'. . In contrast, the special relationship exception, by definition, concerns the 'relationship between the state and a particular victim.'. . Paying greater attention to whether the harm arose from a state or private actor in the special relationship analysis would, therefore, introduce a distinction unrelated to the relationship from which the state obligation arises. In keeping with this logic, we have thus far limited the discussion of this apparent distinction between state and private violence to the state created danger exception. . . Analyses of the duty to protect arising from special relationships do not appear to evaluate any public-private harm distinction, and Cernuto points to no cases in which this court or any other has explicitly held that the special relationship exception cannot apply when a state actor is the source of the victim's injury. In evaluating the exceptions to the general rule against a duty to protect, existing precedent and the rationale upon which such cases are based do not support extending the 'private violence' requirement to the special relationship exception. Because the work program placed significant limits on Sexton's personal liberties, she had a special relationship with Cernuto. Therefore, Cernuto had a duty to protect Sexton from harm while she was participating in the work program. When viewing the facts in the light most favorable to Sexton, a reasonable jury could find that Cernuto failed to protect Sexton from the

sexual assaults. The district court did not err in reaching this conclusion. . . As *Stemler* indicates, it was clearly established that given Cernuto's degree of control over Sexton, he had a duty to protect her from harm.")

Some courts have linked the affirmative duty to protect to a requirement that the plaintiff be *involuntarily* in custody. *See, e.g.*, ***Brown v. City of New York***, 786 F. App'x 289, ___ (2d Cir. 2019) ("Brown failed to allege facts showing that Defendants deprived Brown of her liberty. Brown argues that the Defendants established a special relationship by mandating that homeless individuals, like Brown, enter a shelter during inclement weather. New York State laws and regulations, however, do not require clients to remain in homeless shelters. While they require the City to take steps to move individuals into shelters, the City cannot force individuals to stay. . . . Furthermore, once Brown elected to remain in a homeless shelter, she was required to abide by the shelter rules; she cannot establish a special relationship by claiming that the shelter's rules were too restrictive. Second, Brown's reliance on *Soc'y for Good Will* is unpersuasive. That case -- decided five years before the Supreme Court decided *DeShaney* -- is not applicable here. In two decisions following *Soc'y for Good Will*, this Court has distinguished that case and clarified the due process rights protected after *DeShaney*. . . Therefore, this Court has generally 'focused on involuntary custody' in analyzing the special relationship exception. . . Because Brown failed to allege facts showing she was involuntarily held in custody, Brown failed to establish a special relationship."); ***Campbell v. State of Washington Dept. of Social and Health Services***, 671 F.3d 837, 843-47 (9th Cir. 2011) ("Campbell alleges that SOLA careworkers took four affirmative acts, each of which 'imposed on [Justine's] freedom to act [for herself],' *DeShaney*, 489 U.S. at 200, and converted her voluntary custody into involuntary custody. These liberty-restricting acts were SOLA's (1) placing locks on the doors of Justine's home to control her ability to leave; (2) maintaining control over which SOLA home Justine lived in after 1995; (3) maintaining control over Justine's transportation, diet, and wardrobe; and (4) maintaining control over how and when Justine bathed. Even accepting Campbell's version of the facts, these state actions did not convert Justine's voluntary custody into involuntary custody. . . . As the district court noted, what Campbell alleges were Defendants' liberty-restraining acts were merely part of SOLA's efforts to 'ensure[ ] Justine's day-to-day safety and care.' The state's performance of the very acts for which an individual voluntarily enters state care does not transform the custodial relationship into an involuntary one. For similar reasons, we reject Campbell's argument that Justine's mental abilities rendered her under the control of the state. . . . Accordingly, we hold that no special relationship had been created here and that the special relationship exception does not allow Defendants to be held liable under § 1983. . . . Our decisions in *Patel* and *Johnson* and the Supreme Court's decision in *DeShaney* compel the outcome here. Although Defendant Pate was the SOLA manager responsible for coordinating Justine's care, including the annual updating of Justine's PSP, and Defendants Mitchell and McGenty were responsible for monitoring Justine on a daily basis, none of them acted affirmatively to place Justine in the way of a danger they had created. . . . Accordingly, we hold that Defendants did not create the situation − Justine's impairments or her routine bath − that resulted in Justine's death. Their acts were not affirmative acts akin to those found in cases where we recognized a state-created danger."); ***U.S. v. Tennessee***, 615 F.3d 646,

655 (6th Cir. 2010) ("The State argues that the original judgment is no longer good law in the wake of *DeShaney* and its progeny, which the State maintains has been significantly clarified over time. Specifically, the State maintains that a circuit split existed in the early 1990s regarding whether states owed *Youngberg* rights to residents that resided voluntarily in their care. But, the State argues that these circuits have now reached a consensus that states do not owe *Youngberg* rights to MR residents who have been voluntarily placed into state care by a parent or other legal representative. It further asserts that every published circuit court decision to consider this matter post-*DeShaney* has determined that involuntary confinement is required to implicate residents' *Youngberg* rights. . . In making this claim, however, the State misconstrues the relevant question before this court. Our *Rufo* analysis is limited to whether the State can meet its initial burden of pointing to 'new court decisions or statutes that make legal what once had been illegal.' . . Although the parties dispute the holding and relevance of each of these cases, they all agree that these cases are not rulings of the Supreme Court or the Sixth Circuit. In fact, a published decision of this circuit has recently stated that the Sixth Circuit has not weighed in on this purported circuit split: 'At this time, we do not need to decide whether the State owes the same affirmative constitutional duties of care and protection to its voluntarily admitted residents as it owes to its involuntarily committed residents under *Youngberg.*' *Lanman v. Hinson,* 529 F.3d 673, 681 n. 1 (6th Cir.2008). Likewise, the Supreme Court has not squarely addressed this issue. Therefore, although these cases from other circuits could potentially be persuasive if this case were before us in another context, they cannot, either individually or collectively, satisfy the State's initial burden."); ***Lanman v. Hinson***, 529 F.3d 673, 682 n.1(6th Cir. 2008) ("The district court found the involuntariness argument determinative by reading *DeShaney* to mean that the Constitution only imposes a duty on the State to assume responsibility for the safety of an individual when it has 'take[n] a person into its custody and holds him there against his will.'. . But *DeShaney* decided only that the State is not responsible for the actions of third-party private actors against individuals unless it had imposed restraints on the individuals' liberty to render them unable to care for themselves. . . . This is unlike the present case in which Plaintiff alleges that the State, through the affirmative acts of Defendants, infringed on Lanman's substantive due process right in freedom from undue restraint while in the State's custody. His status as voluntary or involuntary is irrelevant as to his constitutional right to be free from the State depriving him of liberty without due process. At this time, we do not need to decide whether the State owes the same affirmative constitutional duties of care and protection to its voluntarily admitted residents as it owes to its involuntarily committed residents under *Youngberg*. In an unpublished disposition, however, a panel of this Court held that because the plaintiff had been voluntarily admitted to the state mental hospital, the State's constitutional duty to protect those it renders helpless by confinement was not triggered. *Higgs v. Latham*, No. 91-5273, 1991 WL 21646, at *4 (6th Cir. Oct. 24, 1991) (unpublished). Our sister circuits are split on this issue."); ***Torisky ex rel. Torisky v. Schweiker***, 446 F.3d 438, 445, 446-48 (3d Cir. 2006) ("In the instant case, the District Court erred in concluding that the voluntary nature of one's custody and continued confinement does not impact the availability of the rights to care and protection mandated by *Youngberg v. Romeo*, 457 U.S. 307 (1982). *Youngberg* dealt with an involuntarily committed inmate, and *Fialkowski* holds that the same principles do not apply to individuals who are free to leave state custody 'if they wish[

].'. . . We conclude that appellants go too far, however, when they insist that a court commitment to state custody is a necessary characteristic of a deprivation of liberty sufficient to trigger *Youngberg*'s protections. . . . The existing case law supports the District Court's approach of looking beyond the label of an individual's confinement to ascertain whether the state has deprived an individual of liberty in such a way as to trigger *Youngberg*'s protections. . . . Count V of the complaint alleges that each plaintiff was in state custody and was injured physically and psychologically in the course, and as a result, of a transfer to an inappropriate institution. It further alleges that the plaintiffs were separated from their guardians and loved ones by a police blockade, and were transferred '[a]gainst their will,' and that '[p]hysical and psychological force was utilized by state employees ... in the course of the transfer.'. . . We conclude that plaintiffs may be able to prove facts consistent with these allegations that would establish a deprivation of liberty and a violation of *Youngberg*'s duty of care and protection."); ***Christiansen v. City of Tulsa***, 332 F.3d 1270, 1281(10th Cir. 2005) ("[T]he TPD's quarantine neither involuntarily restrained Christiansen nor limited his freedom to act on his own behalf. Thus, no special relationship or attendant affirmative duty to protect Christiansen arose under *Armijo* and *Uhlrig.*"); ***DeAnzona v. City and County of Denver***, 222 F.3d 1229, 1234 (10th Cir. 2000) ("A plaintiff must show involuntary restraint by the government to have a claim under a special relationship theory, if there is no custodial relationship there can be no constitutional duty."); ***Santamorena v. Georgia Military College***, 147 F.3d 1337, 1341 & n.10 (11th Cir. 1998) (noting in context of qualified immunity that "some preexisting case law may have particularly suggested to Defendants (or to be more precise, to every reasonable school official standing in Defendants' place) that no duty would arise in a voluntary situation, despite representations by Defendants that protection would be provided." Also noting that "only restraints of freedom imposed by the State, not by a student's parents, can give rise to a constitutional duty requiring the State to protect that student."); ***Randolph v. Cervantes***, 130 F.3d 727, 730-31 (5th Cir. 1997) ("[T]he mere fact that Randolph's mental condition may have made her functionally dependant on Pine Belt and Cervantes does not transform her voluntary tenancy at Pine Hill Apartments into an involuntary confinement creating a 'special relationship.'. . In this case, the defendants never took the affirmative step of restraining Randolph's liberty so that she was rendered unable to care for herself, and the defendants never held her involuntarily or against her will. Accordingly, a 'special relationship' did not exist between Randolph and the defendants."); ***Suffolk Parents of Handicapped Adult v. Wingate***, 101 F.3d 818, 824 (2d Cir. 1996) ("In sum, the plaintiffs here, like the plaintiffs in *Brooks*, are not involuntarily institutionalized. The plaintiffs here have no entitlement under New York law to TCF funding from either Suffolk County or the State Defendants. . . Nor can they claim any such entitlement from any of the defendants under the Due Process Clause of the Fourteenth Amendment."); ***Brooks v. Giuliani***, 84 F.3d 1454, 1466-67 (2d Cir. 1996) ("Plaintiffs here are under no state-imposed restraint. The whole effort of the guardians, here and in state court, has been to prolong the involvement of the City and the State in the funding of institutional placements as to which the City and the State have washed their hands. *DeShaney* therefore subverts the district court's conclusion that the State Defendants had assumed "by word and by deed," . . . a duty to provide plaintiffs a smooth and orderly transition to in-state care, including continuous full funding of out-of-state care prior to their transfer. *DeShaney* flatly rejected as the sole ground for

a due process right an expressed intent to provide assistance, or even a failed initiative to do so. . . . Therefore, the injunction cannot be premised on a duty to 'exercise professional judgment' under *Youngberg* and *Society for Good Will*, because there is no such duty here.); ***Walton v. Alexander***, 44 F.3d 1297, 1304 (5th Cir. 1995) (*en banc*) ("Recurring throughout [the] cases that we have decided since *DeShaney* is the iteration of the principle that if the person claiming the right of state protection is voluntarily within the care or custody of a state agency, he has no substantive due process right to the state's protection from harm inflicted by third party non-state actors. We thus conclude that *DeShaney* stands for the proposition that the state creates a "special relationship" with a person only when the person is involuntarily taken into state custody and held against his will through the affirmative power of the state . . . ."); ***Wilson v. Formigoni***, 42 F.3d 1060, 1067 (7th Cir. 1994) (Wilson does not complain that she was held at [Mental Health Center] against her will, and thus cannot maintain that the state did not do enough to ensure her safety while she was committed there."); ***Monahan v. Dorchester Counseling Center, Inc.***, 961 F.2d 987, 993 (1st Cir. 1992) ("Because the state did not commit [plaintiff] involuntarily, it did not take an 'affirmative act' of restraining his liberty, an act which may trigger a corresponding duty to assume special responsibility for his protection."); ***Higgs v. Latham***, 946 F.2d 895 (6th Cir. 1991) (text in WESTLAW) (If district court was correct in concluding that plaintiff was a voluntary patient at state hospital, then she had no constitutionally based right of action against any defendants under § 1983); ***Fialkowski v. Greenwich Home for Children, Inc.***, 921 F.2d 459, 465 (3d Cir. 1990) (state acquires an affirmative duty under the Fourteenth Amendment to provide safe conditions only where mentally retarded person is taken into custody without his consent); ***Milburn v. Anne Arundel County Dept. of Social Services***, 871 F.2d 474, 476-78 (4th Cir. 1989), *cert. denied*, 493 U.S. 850 (1989) (where child was voluntarily placed by parents in a foster home, court found ***DeShaney*** directly controlling; state had no constitutional duty to protect child against private violence); ***Colbert v. District of Columbia***, 5 F.Supp.3d 44, (D.D.C. 2013) ("While puzzled by the finding in *Harris* that an incapacitated person, in handcuffs and held in a police van, was not 'involuntarily' in police custody, this Court is bound by D.C. Circuit precedent. In light of *Butera*, which recently relied on *Harris* and its very narrow construction of 'custody,' this Court is bound to a narrow interpretation of 'custody' for the purpose of triggering a constitutional duty of care. Therefore, in line with the First, Second, Third, Fifth, and Ninth Circuits and their interpretation of the Supreme Court's decision in *DeShaney*, this Court finds that only involuntary commitment triggers the District's constitutional duty of care to protect an individual from harm caused by non-state actors. The facts alleged here—that KC was a 'ward' of the District, that she was intellectually disabled, unable to attend to her own daily needs, and *encouraged* to have nonconsensual sex with other residents and men she met on a one time basis—do not assert that she was involuntarily committed to District custody, giving rise to a constitutional to prevent harm to her from third persons. The Court is mindful that whether KC's confinement was voluntary or involuntary is question of fact, not of formality. . . Further, a commitment that was initially voluntary 'may, over time, take on the character of an involuntary one.'. .The threshold question in the present case is whether KC was committed to the custody of the District voluntarily or involuntarily. . . Ms. Colbert alleges that KC was a 'ward' but does not assert facts sufficient to show that KC was 'involuntarily' committed to the custody of the District. Count VI, alleging a constitutional

violation under § 1983, will be dismissed without prejudice."); ***Estate of Emmons v. Peet***, 950 F. Supp. 15, 18, 19 (D.Me. 1996) ("For Emmons to have had the substantive due process right to receive adequate medical care ... he must have been an involuntary patient at AMHI who would have been barred from leaving AMHI upon request. . . . The Court is aware of the fact that there may be some circumstances when a patient is labeled voluntary for administrative purposes but is in fact involuntary by virtue of his inability to leave the hospital upon request. Plaintiffs, however, have not raised sufficient facts from which a reasonable factfinder could determine that Emmons was not free to leave AMHI upon request."); ***Bushey v. Derboven***, 946 F. Supp. 96, 99 (D.Me. 1996) ("The sole fact that Dobson was admitted ostensibly as a voluntary patient on the admission form is not determinative. The voluntary or involuntary status of the patient must be determined by the underlying facts. The admission form, in and of itself, is not determinative. Consequently, Dobson may have had the substantive due process right to receive adequate medical care under *Youngberg* and *DeShaney*."); ***K.L. v. Edgar***, 941 F. Supp. 706, 716 (N.D. Ill. 1996) ("When the state discharges patients, it gives up its custody of them. At that point, the state's obligations under *Youngberg* to provide plaintiffs with safe conditions of confinement and freedom from unnecessary bodily restraints end. Moreover, simply because the state once provided plaintiffs with shelter and care does not bind it always to provide them with shelter and care."); ***Duval v. Cabinet for Human Resources***, 920 F. Supp. 111, 114 (E.D. Ky. 1996) ("In contrast to the constitutional protection afforded to individuals who are involuntarily committed to a state mental health facility, patients who have voluntarily placed themselves in such a facility are not afforded the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."); ***Martin v. Voinovich***, 840 F. Supp. 1175, 1207 (S.D. Ohio 1993) (In a class action brought on behalf of people in Ohio with mental retardation or other developmental disabilities, the court concluded "that only those members of the plaintiffs' class who are involuntarily institutionalized may assert a *Youngberg* claim."); ***Rogers v. City of Port Huron***, 833 F. Supp. 1212, 1217 (E.D. Mich. 1993) ("[I]f a person's attendance at an event or area is voluntary, ... , and that person was not physically placed there by the state, the person cannot be considered to be in 'functional custody.'"); ***Jordan v. State of Texas***, 738 F. Supp. 258, 259 (M.D. Tenn. 1990) (mentally retarded child, *voluntarily* committed to state institution, had no substantive due process right to safe conditions).

See also ***Johnson v. Rimmer***, 936 F.3d 695, 707 n.44 (7th Cir. 2019) ("Dr. Macherey and Nurse George argue that we need not consider whether the evidence establishes the special relationship exception to *DeShaney*'s general rule. According to Dr. Macherey and Nurse George, Mr. Johnson voluntarily committed himself to MHC and, therefore, the special relationship exception is inapplicable here. Courts generally agree that individuals who voluntarily admit themselves to a state-run mental health facility do not have substantive due process rights simply because they are in the state's custody. . . We have not addressed directly the extent to which the voluntariness of one's committal to the state's custody bears on due process rights under *DeShaney*. Like the district court, we do not need to determine whether a voluntary commitment can be de facto involuntary for the purposes of the Due Process Clause or whether Mr. Johnson's commitment was functionally involuntary. As we will discuss later, even if Mr.

Johnson has due process rights under the special relationship exception, he cannot show that Dr. Macherey and Nurse George deprived him of those rights."); ***Kennedy v. Schafer***, 71 F.3d 292, 294 (8th Cir. 1995) ("[W]e agree with the District Court that defendants are entitled to the defense of qualified immunity if Kathleen is properly classified as a voluntary patient. We need not and do not decide whether *Parwatikar's* holding in favor of voluntary patients' due-process rights remains good law. We do decide that an action for damages brought by a voluntary patient is subject to a qualified-immunity defense." Case remanded for determination of whether patient's voluntary status had become "involuntary" prior to her suicide). *Kennedy* was distinguished by the court in ***Shelton v. Arkansas Dept. of Human Services***, 677 F.3d 837, 842, 843 (8th Cir. 2012) ("[A]pplying *Kennedy* to the present facts, we may assume without deciding that the governing Arkansas statutes could operate like the Missouri statutes in *Kennedy* and, in limited situations, serve to convert a patient from voluntary status to involuntary status. We may also assume without deciding that the underlying facts could support a substantive due process claim in the event there existed a constitutional-level duty of care. . . Even making these assumptions, Appellant's case fails on three independent grounds. First, because no duty could have arisen prior to the defendants' discovery of Brenda, and because Brenda was wholly incapacitated prior to that time solely by her own actions, it is factually incorrect to assert that, after defendants found Brenda unconscious in her room, she posed some sort of additional risk of self harm. . . .Second, we are simply unwilling to extend *Kennedy* into the context of split-second, emergency-care decisionmaking as urged by Appellant. . . .Finally, even if we were to view the present case as a potentially reasonable setting for the expansion of *Kennedy*, no such rule could have been deemed 'clearly established' at the time of the events alleged in the complaint. . . As such, all defendants would be entitled to qualified immunity on the federal constitutional claims.")

But see ***Charles v. Orange County***, 925 F.3d 73, 80-85 (2d Cir. 2019) ("Plaintiffs filed a complaint . . . on July 12, 2016, asserting violations of the Fourteenth Amendment. They claim that substantive due process requires that civil detainees be afforded adequate medical care during their detention, and that their medical care should have included discharge planning, because of their serious mental illnesses. They allege that discharge planning is regarded by medical and psychological professionals as an essential part of mental health care, especially in institutional settings, where it is necessary to mitigate the risks of interrupted treatment while patients transition from treatment within the institution to other sources of treatment. Plaintiffs contend that by failing to provide them with discharge planning, Defendants were deliberately indifferent to the risk that Plaintiffs would relapse upon release and face mental decompensation and other serious health consequences. On January 30, 2017, Defendants moved to dismiss the entire Complaint for failure to state a claim. Defendants argued that there is no established substantive due process right to the post-release measures inherent in discharge plans. On their view, the government's duty of care ends the instant the inmate walks through the prison gates and into the civilian world, because that is when the inmate's ability to secure medication or care on his own behalf is restored. . . . Because the district court construed Plaintiffs' allegations as regarding deliberate indifference to post-custody medical care, rather than deliberate indifference to needed in-custody medical care, the district court applied the wrong standard in determining whether Plaintiffs adequately pled a

Fourteenth Amendment violation. We therefore vacate the district court's dismissal of the Complaint and remand for further proceedings. . . . Plaintiffs argue that the deprivation of care that they allege in fact occurred *during* their detention, because discharge planning occurs before release from custody. Their argument is consistent with the Complaint, which clearly purports to allege an in-custody deprivation of care. Whether Plaintiffs' claim for deprivation of discharge planning, which negatively affected them after their release from custody, can be considered a claim for in-custody deprivation of care is an important question in this case. This distinction matters because the duties state actors owe to individuals differ depending on whether the complainant was in the state's custody. As a general matter, the state is under no constitutional duty to provide substantive services to free persons within its borders. . . But when a person is involuntarily held in state custody, and thus wholly dependent upon the state, the state takes on an affirmative duty to provide for his or her 'safety and general well-being.'. . This 'special relationship exception' imposes a duty on the state in recognition of 'the limitation which [the state] has imposed on [the person's] freedom to act on his own behalf.'. . . When the state is deliberately indifferent to the medical needs of a person it has taken into custody, it violates the Eighth Amendment's prohibition on cruel and unusual punishment. . . The Supreme Court subsequently extended the protections for prisoners established in *Estelle* to civil detainees under the Due Process Clause of the Fourteenth Amendment, reasoning that persons in civil detention deserve at least as much protection as those who are criminally incarcerated. . . The Ninth Circuit has extended the reasoning of *Estelle* and *DeShaney* beyond the moment of release from custody, holding in *Wakefield v. Thompson*, 177 F.3d 1160, 1164 (9th Cir. 1999), that the state owes an affirmative duty to provide an outgoing prisoner requiring medication with a 'supply sufficient to ensure that he has that medication available during the period of time reasonably necessary to permit him to consult a doctor and obtain a new supply.' The Ninth Circuit based this holding on a matter of common sense: 'that a prisoner's ability to secure medication "on his own behalf" is not necessarily restored the instant he walks through the prison gates and into the civilian world.'. . This Court, however, has never held that the state's duties to an inmate or detainee extend beyond their release. . . . Plaintiffs' theory raises a legal question of first impression in this Circuit: whether a claim of constitutional entitlement to discharge planning, the alleged inadequacy of which causes post-release harm, can be considered a claim to in-custody care cognizable under the 'special relationship' exception. Discharge planning is fundamentally different from other measures or types of care to which detainees may be entitled while in custody, in that its entire purpose is to prevent post-release harm. Given the reality that the tangible harm Plaintiffs suffered was a direct result of their lack of medication and medical records *after* release from custody, the District Court understandably construed the Complaint as asserting 'a right to post-release measures inherent in discharge planning.'. . Nevertheless, discharge planning is not so different from other measures the state takes in providing care to those in its custody as to be categorically beyond the reach of the 'special relationship' exception. If discharge planning is to occur at all, it must, by definition, occur prior to release from custody. Whether the three components of discharge planning that Plaintiffs identify are an 'essential part' of mental healthcare, as Plaintiffs allege, is a factual matter that may be proven at a later stage of litigation by expert testimony. If discharge planning is essential to providing care for mentally ill individuals, the rationale for the 'special relationship'

exception applies to this need no less than the need for other types of care. . . . In this case, furthermore, it cannot be said that when the County released Plaintiffs, it 'placed [them] in no worse position than that in which [they] would have been had it not acted at all ...'. . . That the harmful consequences of a lack of discharge planning occur after release from custody does not remove discharge planning from the purview of the 'special relationship' exception. . . . Thus, taking Plaintiffs' allegations as true and drawing all reasonable inferences in their favor, we find that Plaintiffs have plausibly alleged that discharge planning is an essential part of in-custody care. We conclude that despite the forward-looking nature of discharge planning, a claim for damages caused by the lack of it can be considered a claim for deprivation of in-custody care for purposes of the 'special relationship' exception. It will be for Plaintiffs to prove to a fact-finder, on remand, that the care they complain of is the type that should have been provided to them during their detention."); ***Harvey v. D.C.***, 798 F.3d 1042, 1051 (D.C. Cir. 2015) ("[T]he District argues that once Suggs left Forest Haven and moved into a private home, it was no longer in a special relationship with him. It argues that while living in the group home operated by Symbral, Suggs was in the 'least restrictive conditions necessary to achieve the purposes of habilitation,' D.C.Code § 7–1305.03, such that it no longer deprived Suggs of his liberty in a manner giving rise to a special relationship. We disagree. . . . [T]he fact that Suggs was held in the least restrictive setting does not negate the involuntary nature of his commitment or the District's duty under *Youngberg* to ensure he received adequate medical care."); ***Campbell v. State of Washington Dept. of Social and Health Services***, 671 F.3d 837, 848-51 (9th Cir. 2011) (B. Fletcher, J., dissenting) ("By ordering Justine to take a bath without direct supervision, defendants McGenty and Mitchell committed an affirmative act that increased Justine's likelihood of succumbing to the dangers inherent in her physical condition. . . . Simply put, Justine would not have been in the bath unsupervised at the moment of her death had defendants not ordered her to be there. . . Given that state employees instructed Justine to take a bath and then failed to take even basic precautions necessary to mitigate the risk, the danger creation exception applies. . . . Theoretically, Justine's participation in SOLA was voluntary. . . . But even if initial enrollment in SOLA was voluntary, a jury could conclude that Justine's participation in SOLA became de facto involuntary. . . .A reasonable jury could conclude that Justine was in involuntary custody because the state (1) advocated for and arranged the SOLA placement while Justine was a ward of the state; (2) monitored and controlled every aspect of Justine's daily life; (3) prevented Justine from leaving SOLA; and (4) failed to inform Justine of her ability to terminate her custodial relationship. Because a jury could reasonably conclude that the state exercised involuntary custody over Justine, the trial court should not have concluded that there was no special relationship and no affirmative obligation to protect Justine's constitutional rights."); ***Smith v. District of Columbia***, 413 F.3d 86, 94-97 (D.C. Cir. 2005) ("For starters, the District's legal custody over Tron is a good indicator that it had a duty to look after him. Because the District, rather than Tron's family, had primary legal control over him, the District had legal responsibility for his daily care. . . The District downplays the significance of this point, but our case law recognizes the relevance of formal indicia in assessing whether custody attaches for *DeShaney* purposes. . . . Just as important, the District's control over Tron restrained his liberty against his will. An adjudicated delinquent placed at ESA by a restrictive court order, Tron had to participate in the program. To be sure, Tron had more

freedom than a prisoner − subject to ESA rules, he could come and go, and take ESA-approved weekend home visits. ESA's failure to crack down on Tron's curfew violations also left him with a longer leash than he was formally entitled to under the program's rules. But such flexibility hardly amounts to freedom from state restraints. Tron had to live at Queenstown Apartments. He had no choice. He risked punishment, including the possibility of returning to Oak Hill, when he failed to obey ESA restrictions on how and where he spent his time. . . . [W]here the government assumes full responsibility for a child by stripping control from the family and placing the child in a government-controlled setting, the government has a duty not to treat the child with deliberate indifference. . . . [W]e see no reason to treat Tron differently because he was a juvenile delinquent rather than a foster child. . . . Unhappy with the foster-child analogy, the District urges us to look instead to decisions holding that public schoolchildren, despite compulsory education laws, are not in state custody for *DeShaney* purposes. . . . At least on the surface, we see some tension between the foster care and public school cases. Both involve state constriction of a child's liberty − the child must live with the foster parents and the child must receive schooling − yet only the former triggers *DeShaney* custody. Courts have typically distinguished these cases by treating the custody analysis as an all-or-nothing inquiry: the government has either assumed primary responsibility for controlling and caring for a child (and thus, as in the foster care context, the child is always in government custody) or it has assumed only limited responsibilities for parts of the day (and thus, as in the school cases, the child is never in government custody). . . . But we need not explore the ins and outs of this issue. . . . The District served as Tron's legal custodian and primary caregiver. It placed him in a program that constrained his liberty by limiting, among other things, where he lived and what he could do. Indeed, Tron was murdered while subject to these constraints − at Queenstown Apartments, at night, and during curfew. For *DeShaney* purposes, then, Tron remained in District custody, and if the District was indeed deliberately indifferent to his welfare in a way that led to his murder, then the District committed a constitutional violation − the issue to which we now turn."); ***Camp v. Gregory***, 67 F.3d 1286, 1296 (7th Cir. 1995) ("We are unwilling to decree that simply because Camp, as opposed to the state, initiated the transfer of guardianship, under no set of facts could a state official be liable for a subsequent deprivation of due process."); ***Walton v. Alexander***, 44 F.3d 1297, 1308-09 (5th Cir. 1995) (Parker, Robert. M., J., joined by Politz, C.J., and Stewart, J., concurring specially) ("The majority's holding that custody must be 'involuntary' and 'against [a person's] will' is so restrictive that it precludes any type of custody short of incarceration or institutionalization giving rise to the duty of protection. In effect, the majority has confined the duty of protection to the circumstances found in *Estelle* and *Youngberg*. Such a narrow application of this duty clearly was not contemplated in *DeShaney*. . . .The question is not so much how the individual got into state custody, but to what extent the State exercises dominion and control over that individual."); ***Johnson v. Grinberg***, No. Civ.A. 98CV10662-RGS, 1999 WL 1072645, at *5 (D. Mass. July 2, 1999) (not reported) ("Whether or not Johnson was a custodial patient at the time of the alleged assault is a matter of some significance. . . . Johnson argues that under *DeShaney* and *Zinermon* . . . the DMH was constitutionally obligated to tend to her medical needs. . . . The problem with the argument is plaintiff's misconception (shared by defendants) that the question of custody is in some way definitively answered by an inquiry into Johnson's competence. The one is not necessarily a

function of the other. A person may be incompetent and not necessarily in custody, or in custody and be perfectly competent. Here plaintiff may well have been in custody, or its functional equivalent, whatever form she signed. But this is not an issue that can be decided by her competency alone (although it is certainly relevant)."); ***Buffington v. Baltimore County, Maryland***, 913 F.2d 113, 119 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1106 (1991) (refusing to find that affirmative duty owed to someone in custody turns on either the reason for taking custody or on whether a state or private actor brought the need for custody to the state's attention); ***McMahon v. Tompkins County***, No. 95-CV-1134(RSP/GJD), 1998 WL 187421, *3 (N.D.N.Y. Apr. 14, 1998) (unreported) ("Unlike the situation in *DeShaney*, where the abused child was always in the care of the biological parent, the Department removed the Payne girls from their biological parents' home and controlled their access to their biological parents. While in foster care, the Payne girls had a constitutional right to protection from harm. . . Defendants attempt to avoid this outcome by arguing that the Payne girls were not involuntarily placed in foster care because their court-appointed attorney requested their placement in foster care. . . I reject this argument. To reach the result advocated by defendants would create an alarming precedent in which children involuntarily placed in foster care would be entitled to the full panoply of due process rights, while those voluntarily placed would not. This result is neither acceptable nor constitutionally sound."); ***Brown, by Brown v. Kennedy Kreiger Institute***, 997 F. Supp. 661, 668 (D.Md. 1998) ("It is specious to suggest that Jake, who is severely mentally retarded, could walk out of a KKI home on his own at any time. Moreover, even if Jake could be considered to be technically a 'voluntary' resident of KKI's homes, the jury could reasonably find from the evidence that because of his incompetence, he was a 'de facto involuntary' resident."); ***Miracle v. Spooner***, 978 F. Supp. 1161, 1169-70 (N.D. Ga. 1997) ("Without the protection of the state, a child who is in foster care is at the mercy of the foster parents whether or not its natural parents consented to the placement of the child into foster care. From the child's point of view, foster care will always constitute involuntary custody because the state does not give the child an alternative to the foster home the state has chosen. Accordingly, the Court finds that the state's duty of care recognized in *Taylor* applies in this case notwithstanding the parents's consent to placement of the children into foster care."); ***Ringuette v. City of Fall River***, 888 F. Supp. 258, 268 (D. Mass. 1995) ("This court concludes that the state has a duty under the constitution to protect persons who are taken into protective custody because of incapacitation and who lack the capacity to give knowing, intelligent and voluntary consent to protective custody."); ***Connecticut Traumatic Brain Injury Ass'n v. Hogan***, 161 F.R.D. 8, 10 (D. Conn. 1995) ("The issue is not whether individuals placed in state institutions are within the custody of the State, but once there, with the state in complete control of the environment, whether "voluntarily" placed patients are constitutionally entitled to a level of basic rights. . . . *Deshaney* does not address a situation, as here, in which the State has agreed to provide care for completely dependent individuals. Once the State has accepted this responsibility, and the individual is physically in state custody, it has also agreed to provide an environment that is consistent with and does not transgress the individuals' basic rights. . . . The mechanism which brought the individuals to the various facilities, whether considered "voluntary" or "involuntary," is not controlling; 'in either case they are entitled to safe conditions and freedom from undue restraint.' [cite omitted]"); ***Clark v. Donahue***, 885 F. Supp. 1159, 1162 (S.D. Ind.

1995) (recognizing that several courts have held that "institutionalization which originated voluntarily may at some point involve restraint of personal liberty sufficient to trigger the protections of the due process clause."); ***McNamara v. Dukakis***, 1990 WL 235439 (D. Mass. Dec. 27, 1990) (not reported) (court refused to treat outpatient recipients of mental health care as in "constructive custody," viewed those in community residences as comparable to state-placed foster children, and accepted expert testimony as to the status of "unconditional voluntary patients," suggesting "little practical difference between voluntarily and involuntarily committed patients as to their ability to act on their own behalf.").

See also ***Campbell v. Washington,*** No. C08-0983-JCC, 2009 WL 2985481, at *5 (W.D. Wash. Sept. 14, 2009) ([Collecting cases from circuits] "On balance, these cases suggest that, depending on the facts and circumstances of the case, a voluntarily committed patient can become a *de facto* involuntary patient if her freedom was − or, in some circuits, could have been − curtailed by the power of the State. . . . The State only acquires an affirmative constitutional obligation to provide a safe environment to a developmentally disabled individual when the State prevents that individual from leaving its custody. Justine was neither barred from leaving, nor is there any evidence to suggest that she could have been so barred under Washington law. Involuntary detention in a residential treatment facility is generally prohibited in this state. . . . Plaintiff has presented no evidence, and indeed has not argued, that the state could have involuntarily committed her under Washington law."); ***Estate of Cassara v. State of Illinois***, 853 F. Supp. 273, 279 (N.D. Ill. 1994) ("[T]his court holds that voluntary institutionalization may involve a restraint of personal liberty sufficient to trigger the due process clause. . . . The right to leave . . . does not guaranty the power to leave."); ***United States v. Commonwealth of Pennsylvania***, 832 F. Supp. 122, 125 (E.D. Pa. 1993) ("[T]his court rejects defendants' argument that voluntarily confined patients are not entitled to the constitutional right to treatment and care by virtue of the 'voluntariness' of their initial confinement. Where there is an instance of state-propounded curtailment of liberty, due process standards must be upheld. In this case, the constitutional right to treatment or habilitation extends to both involuntarily and voluntarily confined residents alike."); ***Halderman v. Pennhurst State School and Hospital***, 834 F. Supp. 757, 761-62 (E.D. Pa. 1993) (*DeShaney* supported finding that residents of Pennhurst were involuntary where "the Commonwealth defendants had affirmatively acted in accepting the residents ... and in depriving them of their constitutional right to minimally adequate habilitation....").

At least two circuits have suggested that the concept of "in custody" for *DeShaney* purposes of triggering an affirmative duty to protect entails more than a "simple criminal arrest." *See* ***Gladden v. Richbourg***, 759 F.3d 960, 965 (8th Cir. 2014) ("Police officers have a constitutional duty to ensure the safety and well-being of those in their custody. . . 'Custody' in this context must be something more than an individual's reasonable belief that he is not free to leave, as is the case under the Fourth Amendment. *See Estate of Stevens v. City of Green Bay,* 105 F.3d 1169, 1175 (7th Cir.1997). Rather, custody is effected for purposes of the Fourteenth Amendment only when the state 'so restrains an individual's liberty that it renders him unable to care for himself.'. .Gladden's brief ride in the back of Richbourg's squad car does not satisfy this high standard.");

Estate of Stevens v. City of Green Bay, 105 F.3d 1169, 1175 (7th Cir. 1997) ("In this case, the district court, magistrate judge, and the estate assumed, without citation to authority, that Fourth Amendment criminal case law correctly elucidates the phrase 'in custody.' Given the authority expressly relied upon by the Supreme Court when it recognized this constitutional duty, we are not at all sure this is correct. The Supreme Court's express rationale in *DeShaney* for recognizing a constitutional duty does not match the circumstances of a simple criminal arrest . . . . This rationale on its face requires more than a person riding in the back seat of an unlocked police car for a few minutes."). *See also* ***Schoenfield v. City of Toledo,*** 223 F.Supp.2d 925, 930 (N.D. Ohio 2002) ("In the instant action, decedent did not come to harm through Defendants' actions. This is not an instance in which the Defendants selected an individual from the public at large and placed him in a position of danger. Defendants did not place decedent at the K Mart or at the hotel room. Defendants did not release decedent into greater harm than that in which they found him, nor was decedent in detention, characterized as 'custody' or otherwise, when he committed suicide. The harm to decedent, while perhaps identifiable by Defendants, was not created by Defendants. Nor was decedent's liberty constrained by Defendants so as to eviscerate his own freedom of choice or ability to care for himself. Ultimately, Plaintiff's attempt to characterize the instant investigatory traffic stop as a type of 'custody' giving rise to the alleged constitutional rights and/or obligations of medical care, hospitalization, incarceration, and/or continued detention is unpersuasive in light of *DeShaney* and the Supreme Court's repeated reluctance to further 'expand the concept of substantive due process.'").

But see ***Williams for the Estate of Burns v. City of Georgetown, Ky.,*** No. 18-6182, 2019 WL 2244719, at * (6th Cir. May 24, 2019) (not reported) (Merritt, J., dissenting) ("I agree that the officers did not act with 'deliberate indifference' to Burns' medical needs during the roadside stop of his vehicle because they called paramedics to the scene, but I part ways with the majority about whether plaintiff has adequately alleged that defendants were 'deliberately indifferent' to Burns' welfare when they left him alone at night at a McDonald's in a strange city knowing that he appeared impaired in some way. The complaint adequately alleges that their decision led to Burns wandering out in the roadway and getting killed by a passing vehicle. When the police take an individual into custody—into their control—substantive due process prevents them from intentionally or recklessly injuring the individual, whether that individual has been temporarily seized by an officer or is more permanently housed in a prison. . . Where an arrestee suffers injury at the hands of a private party while detained by the state, 'a constitutional claim arises when the injury occurred as a result of the state's deliberate indifference to the risk of such an injury.'. . Under these principles, the relevant question that should be examined is whether Burns was so obviously impaired when in the officers' custody that the officers acted with deliberate indifference in leaving him unsupervised in the middle of the night in a strange town to await a ride home. Instead, the question the majority asks is whether Burns was safer before the state action than he was after it. . . This is not the correct question because it sets up a false equivalency—as though the police had only a binary choice between putting him back in his car to drive home or bringing him to the McDonald's. Multiple other options were available, including taking Burns into custody to await a family member. The question also reveals the weakness in the argument

because the comparison essentially concedes that the officers likely believed that Burns was too impaired to drive. . . . Taken in the light most favorable to plaintiff, the allegations could support a finding that Burns was in a 'custodial relationship' with officers when he was killed, and his death was caused by the officers' deliberate indifference to his medical condition and their decision to drop him off alone at the McDonald's. A number of factual questions exist about the officers' states of mind that evening, and their knowledge of what happened to Burns that led to his death on a highway miles away from where he was pulled over several hours previously. Even under the circumstances of this case as we know them now, at the motion-to-dismiss stage, a jury could find that the officers increased the risk of harm faced by Burns. The complaint alleges sufficient information to demonstrate that the officers assumed a custodial duty to Burns to avoid acting with deliberate indifference to his safety to survive a motion to dismiss. The law is sufficiently established that a reasonable officer would know not to leave an impaired person alone at night in a strange place. Plaintiff could discover evidence that at least creates a question of fact as to whether the officers violated this duty by acting with deliberate indifference when they dropped Burns off at McDonald's in a strange town late at night. At bottom, this is a case about responsible police action. Once police are involved, they cannot act with indifference to the welfare of the person before them."); ***Family Serv. Ass'n ex rel. Coil v. Wells Twp.***, 783 F.3d 600, 606 (6th Cir. 2015) ("The record in this case permits a reasonable inference of deliberate indifference. Officer Kamerer took Coil into custody. He then left him facedown, pepper-sprayed and handcuffed, in the middle of a lane open to traffic. Why he felt the need to leave him in the middle of the street in such a state is difficult to fathom. The area was dark. Coil wore dark clothing. Kamerer had not turned his police car's regular or flashing lights on. If Coil remained there for any appreciable amount of time, the risk that Coil might get struck by a passing car was painfully obvious. And the 911 dispatch recordings show a two-minute gap between when Kamerer radioed that he had both men 'chemically restrained' and when he called for an ambulance, which occurred 'immediately' after the car struck him and Coil. . . During that window Kamerer faced no threat, and common experience and common sense suggested a strong likelihood that a car might pass—and its driver would not be able to see Coil."); ***Jacobs v. Ramirez***, 400 F.3d 105, 107 (2d Cir. 2005) ("Having agreed to parole Jacobs to the home to which he sought to be paroled, the state assumed the very limited duty of ensuring that it did not require him to remain in a place that turned out, at least according to his allegations, to be uninhabitable. Because we think that Jacobs has stated a claim under Section 1983 with respect to the state's decision to parole him to allegedly unsuitable housing and its alleged refusal to allow him to move, we reverse the district court's dismissal of that portion of his complaint and remand this case for further proceedings with respect thereto."); ***Davis v. Brady***, 143 F.3d 1021, 1027 (6th Cir. 1998) ("When a plaintiff alleges that state actors violated substantive due process by placing him at risk of harm from a third party, he must demonstrate, first, that the defendants owed him a duty not to subject him to danger and, second, that the defendants violated this duty by exhibiting deliberate indifference to the plaintiff's well-being. In this case, the taking of Davis into custody triggered the defendant officers' duty to protect Davis. There is sufficient evidence in the record to demonstrate that the defendant officers violated this duty when they exhibited deliberate indifference to Davis's well-being by abandoning him, in his inebriated state, on an unfamiliar, dark, and busy highway."); ***Stemler v. City of***

Florence, 126 F.3d 856, 868 (6th Cir. 1997) ("In the present case, Black was rendered unable to protect herself by virtue of both the threat of arrest and her physical placement in the truck by the officers. Unlike *Foy*, Black never had the opportunity to make a voluntary choice to continue driving with Kritis beyond the span of time that the police had in effect ordered her to do so; her fatal accident occurred about five minutes after the truck left the police stop. Furthermore, unlike *Walton*, Black was in the custody of the defendant officers in the sense that they had affirmatively acted to deprive her of her liberty, rather than merely negligently refused to act to protect her. . . In sum, neither *Foy* nor *Walton* did anything to alter the clear and simple rule that state actors owe a duty of care to those individuals of whom they deprive their liberty, and a reasonable jury could conclude that the officers had deprived Black of her liberty by placing her in the truck or by threatening her with an arrest that would have been unwarranted under Kentucky law.").

Compare ***Cheeks v. Belmar***, 80 F.4th 872, 875 & n.5, 876-79 (8th Cir. 2023) ("Cheeks asserts Officers Maloy and Jakob breached their duty to stop and attempt to render aid in violation of the Due Process Clause of the Fourteenth Amendment.[5] **[fn.5:** While there are cases analyzing police pursuits under substantive due process, neither party briefed a substantive due process claim.**]** . . . . While the crash itself was not captured on video, Cheeks presented testimony from Lorenzo Johnson who said he witnessed the officers' car bump the side of Neil's car, which caused Neil's car to go into a spin. The district court relied partly on this testimony of contact between vehicles to conclude '[a] reasonable juror could find, based on circumstantial evidence ... that [the officers] had actual knowledge of Neil's serious medical need and disregarded it.' We do not have jurisdiction to second-guess this determination. . . Officers Maloy and Jakob suggest we *do* have jurisdiction to disturb the conclusion because the video recording 'blatantly contradicts' the eyewitness testimony. . . . [T]his exception is not applicable here. The video did not record the accident itself, instead capturing a few moments of the pursuit just prior to the crash. Because the crash itself occurs off screen, Cheeks's contention that Officers Maloy and Jakob performed a PIT maneuver is not so 'blatantly contradicted by the record ... that no reasonable jury could believe it[.]'. .Nonetheless, the officers argue—again for the first time on appeal—that even assuming such contact between the two vehicles, this does not constitute custody as the term is defined in *Gladden*. We disagree. When the state limits an individual's 'freedom to act on his own behalf,'. . . by intentionally conducting a maneuver that causes a vehicle to spin out and collide with a tree, the duty arises 'to provide medical care to persons ... who have been injured while being apprehended by the police.'. . Case law in the context of Fourth Amendment claims supports our conclusion. [discussing *Hodari D.*, *Brower*, *Scott.* . . So, in the Fourth Amendment context, a seizure arises if a police officer intentionally causes a crash to end a police chase whereas no seizure occurs if there is simply an accidental crash. The officers have offered no reason the same would not be true under the Fourteenth Amendment. . . . As discussed above, it is clearly established that a custodial relationship is formed when law enforcement officers limit an individual's 'freedom to act on his own behalf.'. .This is a 'general constitutional rule already identified in the decisional law' that can be applied 'with obvious clarity to the specific conduct in question' today. . . If law enforcement officers intentionally force a suspect to crash his car to facilitate the end of a pursuit, the suspect no longer has the liberty 'to care for himself.'. . When

the state limits an individual's 'freedom to act on his own behalf,'. . . by *purposely causing a car accident*, a clearly established duty arises 'to provide medical care to persons ... who have been injured while being apprehended by the police.'. . The state of the law gave the officers fair warning that failing to render aid or call for medical assistance for an accident they caused was unconstitutional. Cheeks does not argue that the officers simply delayed calling for medical assistance. Instead, she argues the officers never called for medical assistance—thus denying medical aid altogether. In such cases, where no medical aid was provided, there is no need to provide evidence demonstrating the detrimental effect of the lack of aid. . . Because the officers failed to render *any* aid, rather than simply delaying in providing it, our precedent does not require Cheeks to demonstrate the detrimental effect of the lack of aid. Thus, we agree with the district court that, viewed in the light most favorable to Cheeks, she has shown a clearly established constitutional violation.") *with* ***Cheeks v. Belmar***, 80 F.4th 872, 879-80 (8th Cir. 2023) (Stras, J., dissenting) ("Not every tort is a constitutional violation. . . . As the court recognizes, the Constitution only creates a duty to aid once officers 'take[ ] a person into ... *custody* and hold[ ] him there against his will.'. . But I could not locate a single case, much less a 'robust consensus' of them, that extends it to someone they have seized by force but have not taken into custody. . . We can debate whether we *should* extend it to cover this situation, but no officer would be 'on notice' that the Constitution *does*. . . Qualified immunity applies in just these circumstances. . . The court, on the other hand, thinks it is 'obvious' that Neil was in custody. . . In its view, 'rendering [Neil] unable to care for himself' was enough. . . The problem with relying on 'general' rules is that they often fail to 'answer the specific and particularized question[s]' that arise in other situations. . . Here, the question is whether something short of custody creates a duty to aid. *Gladden*, the case that allegedly established the duty, never answered that question. It involved an alcoholic who voluntarily accepted a ride from officers and died of hypothermia several hours later. . . We held that, on those facts, there was no Fourth Amendment seizure, much less the "something more" required for custody. . . *Gladden* simply could not have answered the 'specific and particularized question' presented in this case. . . No seizure meant no holding on whether it created a duty to aid. . . . As the Supreme Court has often reminded us, defeating qualified immunity requires a constitutional rule that was 'clearly established,' not just 'suggested by ... precedent.'").

See also ***Lehre v. Artfitch***, No. 2:22-CV-105, 2023 WL 5663072, at *4–5 (W.D. Mich. Sept. 1, 2023) ("Even if Plaintiff could establish a genuine issue of material fact on the question of custody, Plaintiff had not met his burden to show that the law was clearly established that, on these or similar facts, a passenger is considered 'in custody' for the purpose of the Fourteenth Amendment such that an officer would have notice of a duty to provide medical care. The Court adopts the portion of the Report and Recommendation dismissing Plaintiff's Fourteenth Amendment deliberate indifference to medical needs. Plaintiff has not demonstrated the existence of clearly established law concerning the custody requirement for this claim. . . .Plaintiff has not established that the officers placed Troy in a more dangerous situation than they found him. Literally, the officers kept Troy exactly where they found him. They did not abandon Troy on the side of a highway; Artfitch stayed with Troy until his family arrived. Troy and his brother were

not on the way to the hospital such that the traffic stop prevented Troy from getting to the hospital for medical attention. In addition, Plaintiff's theory for the state-created danger claim confuses and conflates the deliberate indifference cases and the state-created danger cases. The state-created danger line of cases imposes a constitutional duty on officers upon the termination of a custodial relationship. . . In these situations, plaintiffs seek to hold government agents liable for injuries that occur when the individual is no longer in custody. Plaintiff's state-created danger claim fails for one of two reasons. If the Court accepts Plaintiff's allegations, the officers never abandoned Troy and he always remained in their custody. Alternatively, as the Court found above, Troy was never in the officers' custody for the purposes of the Fourteenth Amendment. Plaintiff has not identified any clearly-established law that would support this unique state-created danger claim where the danger arose because the officers kept Troy in their custody. The Court adopts the portion of the Report and Recommendation dismissing Plaintiff's Fourteenth Amendment claim for state-created danger. Plaintiff has not demonstrated a genuine issue of material fact that Defendants' actions placed Troy in greater danger than they found him. And, Plaintiff has not demonstrated that the clearly established law concerning state-created danger extends to a situation where the danger arises during the interaction between the officers and the individual.")

Smith v. City of Greensboro, No. 1:19CV386, 2020 WL 1452114, at *15 (M.D.N.C. Mar. 25, 2020) ("Here, the complaint's allegations show that Smith's personal liberty was sufficiently restrained during the relevant time period to place him in 'custody.' Although he was not under arrest, . . . Smith lay prone on the ground, hands and feet tied together behind his back, with at least four officers and both paramedics surrounding him[.] . . Simply put, Plaintiffs have sufficiently alleged that Smith was in 'custody,' as 'an affirmative act by the state'—tackling him to the ground and restraining him with a hobble—completely extinguished his ability to 'act on his own behalf.'. .In a related argument, the Paramedics contend that, even if Smith was in 'custody,' they were under no affirmative duty to provide him with medical care because he was in *the Officer's* custody, not theirs. . . The Court is not moved by this reasoning. According to the complaint, the Paramedics were the sole government medical team dispatched to aid Smith. . . There may be some instances in which the jurisdictional differences between Guilford County and the City of Greensboro matter with respect to a duty to intervene. However, in this case, where it appears that the Officers themselves called upon the Paramedics to render medical care, any distinction between the two governmental employers becomes much less meaningful. . . The pleadings sufficiently allege that Smith was in custody, and that the Paramedics were the government employees called upon to provide medical care during that time. That they worked for the county, rather than the city, is unimportant.")

(i) public school cases

Some courts have used a functional custody rationale to justify the imposition of a constitutional duty to protect upon school officials.

See e.g., ***Martin v. Brame***, No. 96-5526, 1997 WL 163533 (6th Cir. Apr. 7, 1997) (unpublished) (assuming, without deciding, that child in residential school for the deaf was owed an affirmative duty of protection from sexual assault by other student, but affirming grant of summary judgment for defendants because of lack of any facts from which jury could find deliberate indifference on part of school officials); ***Nabozny v. Podlesny***, 92 F.3d 446, 459 n.13 (7th Cir. 1996) ("[I]n some cases schools arguably serve as temporary custodians of children, limiting parent's ability to care for children, or children's ability to care for themselves. . . . It may be, therefore, that in some cases a school is in a custodial relationship with its students."); ***Johnson v. Dallas Independent School District***, 38 F.3d 198, 208 (5th Cir. 1994) (Goldberg, J., dissenting) ("*DeShaney* does not foreclose the possibility of some obligation to protect students from violence in public schools."); ***Walton v. City of Southfield***, 995 F.2d 1331, 1337 (6th Cir. 1993) ("Although *DeShaney* focuses on conditions during incarceration, an 'other similar restraint' is not necessarily limited to incarceration. The Supreme Court found a deprivation of personal security in a non-incarceration context in *Ingraham v. Wright* [cite omitted], where the Court held that while in school, junior high school students had a protected liberty interest in personal security. [cite omitted] However, *Ingraham* may turn on the fact that public school students are compelled by state law to attend school and are not permitted to withdraw from situations posing the risk of personal injury."); ***Black v. Indiana Area School District***, 985 F.2d 707, 715 (3d Cir. 1993) (Scirica, J., concurring) ("Denying these § 1983 claims . . . ignores the practical realities of this case-the necessity for small school districts to contract out bus service, the reliance of families in rural areas upon school buses, and the defenselessness of young girls riding a school bus. When claims like these fall through the cracks, § 1983 seems less than the powerful tool to vindicate constitutional rights it was designed to be."); ***Maldonado v. Josey***, 975 F.2d 727, 735 (10th Cir. 1992) (Seymour, J., concurring) ("In my judgment, the Fourteenth Amendment requires that we recognize some affirmative duty on the part of public school teachers to protect students who are in the total care of the school during the period of their compulsory attendance."), *cert. denied*, 113 S. Ct. 1266 (1993); ***D.R. v. Middle Bucks Area Vocational Technical School***, 972 F.2d 1364, 1377 (3d Cir. 1992) (Sloviter, C.J., dissenting) ("I would hold, that the state compulsion that students attend school, the status of most students as minors whose judgment is not fully mature, the discretion extended by the state to schools to control student behavior, and the pervasive control exercised by the schools over their students during the period of time they are in school, combine to create the type of special relationship which imposes a constitutional duty on the schools to protect the liberty interests of students while they are in the state's functional custody."), *cert. denied*, 113 S. Ct. 1045 (1993); ., ***Lichtler v. County of Orange***, 813 F. Supp. 1054, 1056 (S.D.N.Y. 1993) ("A state imposing compulsory attendance upon school children must take reasonable steps to protect those required to attend from foreseeable risks of personal injury or death."); ***Pagano by Pagano v. Massapequa Public Schools***, 714 F. Supp. 641, 642-43 (E.D.N.Y. 1989) (elementary school students required to attend school were owed some duty of care by defendants to prevent physical and verbal abuse by other students).

See also ***Johnson v. Dallas Independent School District***, 38 F.3d 198, 203 n.7 (5th Cir. 1994):

> The argument against holding that public schools have 'custody,' at least for some purposes of protecting their physical well-being, appears to derive less from logic than from a pragmatic desire to limit their legal liability. As has been shown, students must attend school and may not leave without permission. To say that student attendance is voluntary because parents may elect to home-school their children or send them to a private school is lamentably, for most parents, a myth. [cite omitted] To intimate that parents retain effective responsibility for their children's well-being when the school alone makes critical decisions regarding student safety and discipline is inaccurate. To suggest that parents somehow are in a better position than the schools to protect their children from the ravages of weapons smuggled onto campus during the school day is cruelly irrational. To hope that students who are unarmed can protect themselves from the depredation of armed criminals in their midst is ridiculous. That parents yield so much of their children's care into the hands of public school officials may well be argued to place upon the officials an obligation to protect students at least from certain kinds of foreseeably dangerous harm during regular school hours. The author of this opinion dissented in *Doe v. Taylor ISD*, [cite omitted]. In suggesting that the 'special relationship' theory of *DeShaney* may logically apply to public schools governed by compulsory attendance laws, I do not retreat from my reticence to expand the scope of constitutional claims, yet I feel compelled to observe the deficiencies of governing circuit caselaw.

Morrow v. Balaski, 719 F.3d 160, 188, 202 (3d Cir. 2013) (en banc) (Fuentes, J., with whom Judges Jordan, Vanaskie, and Nygaard join, and with whom Judge Ambro joins as to part I, dissenting) ("Reconsidering the coercive power that the State exercises over students, and the ways in which the State may restrict a student and his or her parents' ability to protect that student from harm, we would conclude, like Judge Becker in *Middle Bucks,* that a special relationship may exist under certain narrow circumstances. . . .It cannot be denied that schools both create and regulate the conditions to which students are subject during the school day. When a State interrupts even temporarily the provision of care by a parent to a child, steps into the shoes of that parent, and restricts the ability of the child to defend herself from a specific threat, the State ought to be seen as incurring a narrow, concomitant responsibility to act as one would expect the child's parents to act: to protect the child from that danger. The School's explicit refusal to do so should give us more pause than it does today. Moreover, when a school official chooses not to remove a student who has committed violent acts against another student, despite policies that call for such removal, that official has surely placed the victim in a worse position than if the disciplinary policy had run its ordinary course. And when a school creates an atmosphere in which serious violence is tolerated and brings no consequence, it acts in a manner that renders all students more vulnerable."); ***Doe ex rel Magee v. Covington County School Dist. ex rel Keys,*** 675 F.3d 849, 886 (5th Cir. 2012) (en banc) (Weiner, J., joined by Dennis, J., dissenting) ("Any case involving the rape of a child is, of course, a terrible one, so why is this case so shocking? Part of the special horror of this case is the appalling way in which Jane's parents' state-mandated trust in public school officials for the

care and safety of their very young child was rewarded. In a case such as this, in which the alleged actions of state officials 'shock the conscience,'. . . the proper remedy is not merely to compensate the victim in tort, but, additionally, to compensate all of us with a constitutional remedy under 42 U.S.C. § 1983, which is intended 'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.'").

Note the dicta in Justice Scalia's opinion in ***Vernonia School District 47J v. Acton***, 115 S. Ct. 2386, 2392 (U.S. 1995):

> While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect,' *see* [*DeShaney*], we have acknowledged that for many purposes 'school authorities ac[t] in loco parentis,' [cite omitted], with the power and indeed the duty to 'inculcate the habits and manners of civility.'

See also ***Doucette v. Jacobs***, 106 F.4th 156, 172, 175 (1st Cir. 2024) ("The determination as to whether conduct 'shocks the conscience' is 'necessarily fact-specific and unique to the particular circumstances.'. . '[W]here government officials must act in haste,' for instance, only actions 'undertaken maliciously and sadistically for the very purpose of causing harm' will suffice. . . On the other hand, '[w]here actual deliberation on the part of a governmental defendant is practical,' 'deliberate indifference' can constitute 'conscience-shocking activity.'. . To establish deliberate indifference, the plaintiff must show 'at a bare minimum,' that the defendant 'actually knew of a substantial risk of serious harm' but 'disregarded that risk.'. . We have acknowledged that schools may have a duty under the Due Process Clause to protect students when faced with specific known hazards or perils, particularly when it comes to students who are 'manifestly unable to look after themselves,' such as 'very young children.'. . We cautioned, however, that to shock the conscience, only a case with truly 'pungent' or 'outrageous' facts could support a constitutional claim that a school acted with deliberate indifference…Accordingly, in *Hasenfus* we declined to hold a school liable under the Due Process Clause for a high school student's suicide attempt at school after a teacher harshly reprimanded her and sent her to an unsupervised location, finding that these unfortunate facts exhibited no conscious disregard of a known risk to the student, or that the teacher 'acted maliciously to cause harm.'. . . In short, because a reasonable jury could not conclude from this summary judgment record that GPS was so deliberately indifferent to B.D.'s health that it shocks the conscience, we affirm the district court's grant of summary judgment to GPS on the Doucettes' § 1983 claim."); ***Hasenfus v. LaJeunesse***, 175 F.3d 68, 72 (1st Cir. 1999) ("[W]e are loath to conclude now and forever that inaction by a school toward a pupil could never give rise to a due process violation. From a commonsense vantage, Jamie is not just like a prisoner in custody who may be owed broad (but far from absolute) 'duty to protect.' But neither is she just like the young child in *DeShaney* who was at home in his father's custody and merely subject to visits by busy social workers who neglected to intervene. For limited purposes and for a portion of the day, students are entrusted by their parents to control and supervision of teachers in

situations where − at least as to very young children − they are manifestly unable to look after themselves. Thus, when *Vernonia* says that the schools do not 'as a general matter' have a constitutional 'duty to protect,' perhaps in narrow circumstances there might be a 'specific' duty. . . . Yet even if we assume arguendo that in narrow circumstances the Supreme Court might find a due process obligation of the school or school employees to render aid to a student in peril − and *Vernonia* invites some caution − it would require pungent facts. The basic due process constraint, where substance and not procedure is involved, is against behavior so extreme as to 'shock the conscience.' . . . Outside of a few narrow categories, like the safeguarding of prisoners who have been wholly disabled from self-protection, this means conduct that is truly outrageous, uncivilized, and intolerable. . . . The outcome here would be no different under the more plaintiff-friendly standard developed in prison cases. Even under this standard, courts have been very reluctant to find prison guards liable for failing to prevent suicides unless confronted with specific imminent threats."); ***Morgan v. Town of Lexington, MA***, 823 F.3d 737, 744 (1st Cir. 2016) (" An alleged failure of the school to be effective in stopping bullying by other students is not action by the state to create or increase the danger. These routine acts of school discipline, truancy enforcement, and administrator-parent conferences are not the vehicle for a substantive due process constitutional claim. . . . Moreover, viewing these acts as inaction does not help Morgan's argument. *See Hasenfus*, 175 F.3d at 72. The alleged acts in Morgan's complaints here simply do not approach the threshold of a state-created danger. . . *See Rivera*, 402 F.3d at 35 (collecting this circuit's cases finding no actionable set of facts). As such, Morgan's claim fails."); ***Thomas v. Town of Chelmsford***, 267 F.Supp.3d 279, ___ (D. Mass. 2017) ("In short, the First Circuit has suggested that a public school may have an affirmative duty to protect a student in narrow circumstances where the school has actual knowledge that the student is in clear, obvious, and present peril. Even allowing for that narrow exception, the Camp Robindel incident does not qualify. The plaintiffs argue that the school was negligent in leaving students unsupervised when it knew that students had been bullied at previous camps, and it knew that Matthew had previously been bullied by particular students who were also at the camp. But the Camp Robindel incident was not a situation in which school officials knew that students were physically violating Matthew with a broomstick and yet failed to intervene—a situation that might fall into the narrow exception that the First Circuit described in *Hasenfus*. The school's knowledge of the possibility that Matthew might be subjected to more minor levels of bullying (such as urinating in his cleats without his knowledge) falls short of what is necessary to establish a *DeShaney* 'special relationship' affirmative constitutional duty on the school."); ***Morgan v. Driscoll,*** No. CIV.A. 9810766RWZ, 2002 WL 15695, at *4 (D. Mass. Jan.3, 2002) (not reported) ("The vast majority of federal courts have held that schools do not maintain a sufficiently 'custodial special relationship' with their students to give rise to a duty to protect them against injury from third parties. . . While the First Circuit has been disinclined to accept this broad notion that schools have no duty to protect students from the harmful acts of third parties, it has nonetheless recognized that a school has no general duty to protect students, and might only have a 'specific duty' to protect a student in situations where inaction and failure to protect the student would be 'truly outrageous, uncivilized, and intolerable' under the circumstances.' [citing *Hasenfus v. LaJeunesse*]); ***Willhauck v. Town of Mansfield,*** 164 F. Supp.2d 127, 133 (D. Mass. 2001) (noting that "[t]he First Circuit has yet to establish a

firm rule. It has, however, expressed its reluctance to follow its sister circuits in holding without qualification that public schools owe their students no constitutional duty to protect.").

See also ***MGJ, et al. v. School District Of Philadelphia***, No. CV 17-318, 2017 WL 2277276, at *9 (E.D. Pa. May 25, 2017) ("In the school context, students' freedom of movement is subject to the control of school officials. In exercising this authority to control student movement, school officials are reasonably expected to place students in situations where they will not be subject to obvious dangers. This is the status quo. District employees Ms. Lynch, Ms. Langston, and Ms. Roseman allegedly disrupted this status quo by placing MGJ in the same room as her known assailant. These defendants knew MGJ endured sexual harassment in the past at the hands of the assailant. . . They placed MGJ in the same room with the assailant, without adequate supervision, despite knowing the assailant had sexually harassed MGJ in the past. In this context, allowing MGJ to be in the same room as her assailant without supervision is akin to allowing a student to leave the school with a stranger. These allegations are sufficient to show the individual District Defendants affirmatively misused their authority to control student movement. MGJ accordingly pleads a violation of her constitutional right to support her failure to train or supervise claim.")

The majority view rejects the functional custody approach in school cases. *See, e.g.*, ***L.S., ex rel. Hernandez v. Peterson***, 982 F.3d 1323, 1329-30 (11th Cir. 2020) ("Ordinarily there are no custodial relationships in the public-school system, even if officials are aware of potential dangers or have expressed an intent to provide aid on school grounds. . . The students' efforts to avoid this rule are unavailing. They argue that even if there is no custodial relationship 'as a general matter,'. . . their appeal presents an exception. . . But *Nix* forecloses that argument. . . And even if we could contemplate exceptions, there is no reason to do so here. The students identify just one fact that differentiates this appeal from our precedents—the presence of armed school-safety officers—but the students fail to explain how the presence of these officers converts a non-custodial relationship into a custodial one. The officers' presence on school grounds, whether by itself or in combination with truancy and compulsory attendance laws, does not restrain students' freedom to act in a way that is comparable to incarceration or institutional confinement. . . Because the students were not in custody at school, they were not in a custodial relationship with the officials."); ***Doe v. Columbia-Brazoria ISD***, 855 F.3d 681, 688-89 (5th Cir. 2017) ("In this case, Doe's claim does not arise from the abuse itself because no state actor committed it. . . Instead, there must have been some specific and actionable deficiency on the part of the District that allowed the abuse to occur. . . The case from which the special-relationship requirement was drawn stated that 'nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.'. . A complainant and the state have that relationship only 'when the State takes a person into its custody and holds him there against his will[.]'. . . The relationship exists 'when the state incarcerates a prisoner,' 'involuntarily commits someone to an institution,' or places a child in foster care. . . Notably, 'a public school does not have a special relationship with a student that would require the school to protect the student from harm at the hands of a private actor.'. . . .[I]n *Covington*, we declined to adopt the exception as

the law of this Circuit. . . Subsequent panels have 'repeatedly noted' the unavailability of the theory. . . Finally, Doe failed to analyze the theory in a meaningful way in his opening brief. The argument is thus forfeited. . In summary, Doe's claims are not based on the private conduct of his assailant but on the District's shortcomings in monitoring the students, training the teachers, and establishing a reporting system for sexual assault. '[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.'. . . That leaves Doe with only the special-relationship theory, having forfeited the possibility of a state-created-danger argument. There was no special relationship between the plaintiff and the state. Doe has thus failed to prove a constitutional violation. The Section 1983 claims were properly dismissed."); ***K.B. v. Waddle***, 764 F.3d 821, 824 (8th Cir. 2014) ("K.B. was not in state custody when she voluntarily participated in the Center's after-school program. There is no evidence that K.B. or S.H. were even under the supervision of any of the officials or their agencies at the time of the assault at the public pool."); ***Morrow v. Balaski***, 719 F.3d 160, 170, 171 (3d Cir. 2013) (en banc) ("[E]very other Circuit Court of Appeals that has considered this issue in a precedential opinion has rejected the argument that a special relationship generally exists between public schools and their students. [collecting cases] Accordingly, the Supreme Court's *dictum* in *Vernonia* as well as the consensus from our sister Circuit Courts of Appeals both reinforce our conclusion that public schools, as a general matter, do not have a *constitutional* duty to protect students from private actors. We know of nothing that has occurred in the twenty years since we decided *Middle Bucks* that would undermine this conclusion. . . . In holding that public schools do not generally have a constitutional duty to protect students from private actors and that the allegations here are not sufficient to establish a special relationship, we do not foreclose the possibility of a special relationship arising between a *particular* school and *particular* students under certain unique and narrow circumstances. However, any such circumstances must be so significant as to forge a different kind of relationship between a student and a school than that which is inherent in the discretion afforded school administrators as part of the school's traditional *in loco parentis* authority or compulsory attendance laws."); ***Doe ex rel Magee v. Covington County School Dist. ex rel Keys,*** 675 F.3d 849, 857-66 (5th Cir. 2012) (en banc) ("We reaffirm, then, decades of binding precedent: a public school does not have a *DeShaney* special relationship with its students requiring the school to ensure the students' safety from private actors. Public schools do not take students into custody and hold them there against their will in the same way that a state takes prisoners, involuntarily committed mental health patients, and foster children into its custody. . . Without a special relationship, a public school has no *constitutional* duty to ensure that its students are safe from private violence. That is not to say that schools have absolutely no duty to ensure that students are safe during the school day. Schools may have such a duty by virtue of a state's tort or other laws. However, '[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.'. . . No matter the age of the child, parents are the primary providers of food, clothing, shelter, medical care, and reasonable safety for their minor children. Thus, school children are returned to their parents' care at the end of each day, and are able to seek assistance from their families on a daily basis, unlike those who are incarcerated or involuntarily committed. . . . Because we find no special relationship, we do not address whether the school's alleged actions in releasing Jane to Keyes

amounted to 'deliberate indifference.'. . . Without a special relationship, the school had no constitutional duty to protect Jane from private actors such as Keyes, and the question of its alleged deliberate indifference is simply immaterial. Having concluded that the school had no special relationship with Jane that imposed on the school a constitutional duty to protect her from private harm, we now turn to the Does' remaining theories of liability. . . . We decline to use this en banc opportunity to adopt the state-created danger theory in this case because the allegations would not support such a theory. . . . We conclude that the Does' allegations do not support a claim under the state-created danger theory, even if that theory were viable in this circuit."); ***Patel v. Kent School Dist***., 648 F.3d 965, 973, 974 (9th Cir. 2011) ("Although we have not yet applied *DeShaney* to the context of compulsory school attendance, every one of our sister circuits to consider the issue has rejected Patel's argument. At least seven circuits have held that compulsory school attendance alone is insufficient to invoke the special-relationship exception. [collecting cases] Our sister circuits have reasoned that, unlike incarceration or institutionalization, compulsory school attendance does not restrict a student's liberty such that neither the student nor the parents can attend to the student's basic needs. . . Even when school attendance is mandatory, the parents − not the state − remain the student's primary caretakers. . . Going a step further, most of these circuits have expressly held that combining *in loco parentis* duties with compulsory school attendance still does not create a 'special relationship.'. . These decisions have emphasized that a state-law obligation does not necessarily create a duty of care under the Fourteenth Amendment. . . . Applying this bedrock principle, our sister circuits uniformly hold that requiring school attendance does not sufficiently restrict a student's liberty under *DeShaney* to transform the school's *in loco parentis* duties into a constitutional obligation. . . . To the extent Patel argues we should distinguish this case because the IEP obligated KHS to guard against A.H.'s special vulnerabilities, *DeShaney* suggests otherwise. . . . [W]hile the IEP may significantly strengthen Patel's state-law negligence claims, it does not give rise to a constitutional duty."); ***Lee v. Pine Bluff School District,*** 472 F.3d 1026, 1031 (8th Cir. 2007) ("As with compulsory public school attendance in *Dorothy J.*, we cannot say that voluntary participation in an out-of-town extracurricular activity is analogous to confinement in a prison or mental institution, such that the Constitution imposes on state officials an affirmative duty to care for individuals who are participating in the event."); ***Priester v. Lowndes County,*** 354 F.3d 414, 422 (5th Cir.2004) ("[B]ecause no special relationship exists between a school district and its students during a school-sponsored football practice held outside of the time during which students are required to attend school for non-voluntary activities, the district court did not err in finding no requisite state action under section 1983."); ***Nix v. Franklin County School District,*** 311 F.3d 1373, 1378 (11th Cir. 2002) ("From the cases just discussed, two principles emerge: (1) generally, those individuals not in state custody will have no due-process claim for unsafe conditions; and (2) specifically, in a classroom setting, courts have not allowed due-process liability for deliberate indifference, and, moreover, will only allow recovery for intentional conduct under limited circumstances. Examining the Nixes' case in light of those concepts, we conclude that allegations of 'deliberate indifference' do not, in this fact situation, 'shock the conscience' in a way that gives rise to a due-process violation."); ***Shrum v. Kluck,*** 249 F.3d 773, 781 (8th Cir. 2001) ("[S]chool districts are not susceptible to this state-created danger theory of § 1983 liability, because there is no

constitutional duty of care for school districts, as 'state-mandated school attendance does not entail so restrictive a custodial relationship as to impose a duty upon the state.' *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir.1993). Consequently, public schools do not have a duty to protect schoolchildren from private violence."); ***DeAnzona v. City and County of Denver***, 222 F.3d 1229, 1234 (10th Cir. 2000) ("The Tenth Circuit has held repeatedly that because schools do not provide for a child's basic needs, schoolchildren do not have a special relationship with the government. . . . Where the parents are still the primary care givers for the child there is no special relationship and no due process violation."); ***Soper v. Hoben***, 195 F.3d 845, 853 (6th Cir. 1999) (no special relationship created by compulsory school attendance); ***Wyke v. Polk County School Board***, 129 F.3d 560, 569 (11th Cir. 1997) ("Wyke first submits that, because Shawn was a minor child in the custody of the school pursuant to Florida's compulsory school attendance laws, the school had a constitutional duty to protect him from harming himself. We explicitly reject that contention. Compulsory school attendance laws alone are not a 'restraint of personal liberty' sufficient to give rise to an affirmative duty of protection."); ***Doe v. Hillsboro Independent School District***, 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc) ("We join every circuit court that has considered the issue in holding that compulsory school attendance, in Texas to attend seven hours of programmed education on each school day, does not create the custodial relationship envisioned by *DeShaney*. The restrictions imposed by attendance laws upon students and their parents are not analogous to the restraints of prisons and mental institutions. The custody is intermittent and the student returns home each day. Parents remain the primary source for the basic needs of their children."); ***Doe v. Claiborne County***, 103 F.3d 495, 510 (6th Cir. 1996) ("Although, clearly, a school system has an unmistakable duty to create and maintain a safe environment for its students as a matter of common law, its in loco parentis status or a state's compulsory attendance laws do not sufficiently 'restrain' students to raise a school's common law obligation to the rank of a constitutional duty."); ***Nabozny v. Podlesny***, 92 F.3d 458-59 (7th Cir. 1996) ("However untenable it may be to suggest that under the Fourteenth Amendment a state can force a student to attend a school when school officials know that the student will be placed at risk of bodily harm, our court has concluded that local school administrations have no affirmative substantive due process duty to protect students."); ***Seamons v. Snow***, 84 F.3d 1226, 1236 (10th Cir. 1996) ("Compulsory attendance laws for public schools . . . do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school. . . . The school district in this case did not limit Brian's freedom to act on his own behalf, and therefore, no special relationship arose triggering a constitutional obligation to protect Brian from other students."); ***Sargi v. Kent City Board of Education***, 70 F.3d 907, 911 (6th Cir. 1995) ("Although we have not addressed the question of whether compulsory attendance laws create a special relationship between school districts and their students that gives rise to an affirmative duty on the part of the school district to protect its students, a number of other circuits have held that they do not in the factual situations they have reviewed. [*citing* cases] . . . . We find that the reasons given in these cases for the absence of such a duty in the classroom where school attendance is mandatory are even more compelling in the context of a student's presence on a school bus. While on the school bus, decedent was even less affected by state restraints than she was in school. . . . Therefore, we hold that there was no special relationship between decedent and the school district that gave rise

to a constitutional duty on the part of the Board to protect her from the consequences of a seizure while she was on the school bus. We do not hold that school districts have no duty of protection of students in other situations not before us. The nature and extent of such duties will have to be decided case by case."); ***Wright v. Lovin***, 32 F.3d 538, 540 (11th Cir. 1994) ("To date, every federal circuit court of appeal to address the question of whether compulsory school attendance laws create the necessary custodial relationship between school and student to give rise to a constitutional duty to protect students from harm by non-state actors has rejected the existence of any such duty. [citing cases] . . . . Because Daniel's attendance at summer school was voluntary and not compulsory, we need not, and do not, decide whether mandatory school attendance laws impose a constitutional duty on schools to protect students from injury by third parties. However, we find that the reasons given by our sister circuits for the absence of such a duty when school attendance is mandatory are even more compelling when school attendance is voluntary. Therefore, we hold that Daniel's voluntary school attendance did not create a custodial relationship between himself and the school sufficient to give rise to a constitutional duty of protection."); ***Graham v. Independent School District***, 22 F.3d 991, 994 (10th Cir. 1994) ("[W]e have clearly held compulsory school attendance laws do not spawn an affirmative duty to protect under the Fourteenth Amendment. [footnote omitted] Nonetheless, plaintiffs urge *Maldonado's* holding does not foreclose the existence of a constitutional tort where a student is the victim of a foreseeable assault. . . . We hold foreseeability cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship."); ***Dorothy J. v. Little Rock School District***, 7 F.3d 729, 732 (8th Cir. 1993) (agreeing with Third, Seventh and Tenth Circuits that "state-mandated school attendance does not entail so restrictive a custodial relationship as to impose upon the State the same duty to protect it owes to prison inmates . . . or to the involuntarily institutionalized."); ***Black v. Indiana Area School District***, 985 F.2d 707, 714 (3d Cir. 1993) (where neither state compulsory attendance law nor any other state rule required children to ride school bus driven by private independent contractor, and where plaintiffs were not deprived of any avenue of assistance that would have been available absent state involvement, School Superintendent had no affirmative duty to protect six, seven and eight year old girls from acts of sexual molestation committed by bus driver.); ***Maldonado v. Josey***, 975 F.2d 727, 732 (10th Cir. 1992) ("compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school."), *cert. denied*, 113 S. Ct. 1266 (1993); ***D.R. v. Middle Bucks Area Vocational Technical School***, 972 F.2d 1364, 1372 (3d Cir. 1992) (*en banc*) ("[T]he school defendants' authority over D.R. during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in ***DeShaney*** . . . ."), *cert. denied*, 113 S. Ct. 1045 (1993); ***J.O. v. Alton Community Unit School Dist. 11***, 909 F.2d 267, 272-73 (7th Cir. 1990) ("School children are not like mental patients and prisoners such that the state has an affirmative duty to protect them.").

See also ***Lansberry, on behalf of Estate of W.J.L. v. Altoona Area School Dist.***, 356 F.Supp.3d 486, ___ & n.12 (W.D. Pa. 2018) ("Courts within the Third Circuit have confronted *Monell* claims in the context of student-on-student school bullying and have consistently found that the plaintiffs failed to allege the violation of a constitutional right.

[collecting cases] The Third Circuit has held that there was no constitutional violation where a plaintiff brought a *Monell* claim against a school district for failing to prevent student-on-student bullying. . . . In *Morrow*, the Third Circuit held that 'public schools, as a general matter, do not have a *constitutional* duty to protect students from private actors,' including other students. . . Although *Morrow* did not involve a *Monell* claim, the Third Circuit in *Bridges* [*ex rel. D.B. v. Scranton Sch. Dist.*, 644 F. App'x 172 (3d Cir. 2016)] held that its en banc decision in *Morrow* precluded the plaintiffs in *Bridges* from pleading the requisite constitutional violation. . . . Courts within other circuits have reached the same conclusion when dealing with *Monell* claims involving student-on-student bullying. [collecting cases] In these cases, courts have found that school officials did not violate the students' right to bodily integrity under the Fourteenth Amendment of the Constitution by failing to prevent student-on-student bullying or violence.[12] [fn. 12: During the Court's research on *Monell* claims in the school bullying context, the Court only uncovered two district court decisions where a *Monell* claim was allowed to proceed based on a school's alleged violation of a student's constitutional right to bodily integrity by failing to prevent student-on-student bullying. *See Lewis v. Blue Springs Sch. Dist.*, No 4:17-cv-538, 2017 WL 5011893 (W.D. Mo. Nov. 2, 2017); *T.Y. v. Shawnee Mission Sch. Dist. USD 512*, No. 17-2589-DDC-GEB, 2018 WL 2722501, at *10 (D. Kan. June 6, 2018) (citing *Lewis).* In *Lewis*, the court found that the school was on notice of a bullying problem and that the school district 'failed to properly train its employees in effective ways to respond to and prevent bullying.'. . The court in *Lewis* also noted that 'empirical research has shown for the past 20 years that severe, ongoing, targeted bullying in schools is pervasive and routinely results in clinical depression, suicidal thoughts, and suicide among its targeted victims. Anti-bullying policies and law, when complied with, have been proven to reduce and prevent such bullying.'. . The court there ultimately concluded that the school's 'failure to train and supervise ... deprived [the student] of his rights, including his right to bodily integrity, to be secure and to be left alone, to his life, and his rights to substantive due process.'. . The Court firstly notes that the Eighth Circuit, in which the Western District of Missouri lies, has a different standard for failure-to-train *Monell* claims. Second, the Court notes that the court in *Lewis* did not thoroughly analyze the underlying constitutional violation before allowing the student-plaintiff's *Monell* claim to proceed. The same distinctions apply to the *T.Y.* case.] Put differently, the cases are in agreement that students do not have a constitutional right to be free from bullying and harassment from other students. Here, the Court is obligated to reach the same conclusion — Lansberry's Second Amended Complaint does not sufficiently allege the violation of a constitutional right. Lansberry only alleges that AASD officials were deliberately indifferent to W.J.L.'s right to bodily integrity by failing to prevent other students from bullying W.J.L. The Court recognizes that the bullying W.J.L. was subjected to at AASD was appalling and that it created a truly dreadful experience for W.J.L. at Altoona Junior High School. The Court further recognizes that school bullying is a pervasive problem nationally and the possibility that bullying might eventually result, as it did here, in tragic harm to the bullied student. And finally, the Court recognizes that AASD officials have consistently failed to stop bullying and therefore allowed a toxic bullying environment to flourish. If that situation was recognized as a constitutional violation then the ruling of this Court would be contrary to the result of this case. However, harm caused by student-on-student bullying

is not a constitutional harm that *Monell* protects against. Regardless their obligations under school policy and the common sense proposition and public expectation that school officials should keep students safe from known risks, AASD officials had no recognized constitutional obligation to protect W.J.L. from his peers. The Fourteenth Amendment right to bodily integrity protects individuals against harm caused by state actors, and not harm caused by third parties. Here, Lansberry does not allege that AASD officials directly violated W.J.L.'s right to bodily integrity. Rather, Lansberry alleges that AASD officials failed to prevent third parties — W.J.L.'s classmates— from violating W.J.L.'s right to bodily integrity. And while the persistent bullying ultimately resulted in W.J.L.'s deciding to take his own life, Lansberry does not allege that any AASD official played a direct role in this tragic decision, or that any AASD official had notice that W.J.L. planned to harm himself. Therefore, AASD officials' failure to intervene before W.J.L.'s suicide does not establish that those same officials violated W.J.L.'s constitutional right to bodily integrity by failing to protect W.J.L. from bullying at school. Moreover, because at least some of the bullying occurred after school and through electronic means, it is not clear that AASD officials would have been able to prevent the bullying completely, even if they had exercised extreme diligence in enforcing Altoona Junior High School's anti-bullying policy. Lansberry alleges that a portion of the bullying occurred 'off school property while on his walk to his Father's residence and through social media.'. . In his investigation, Detective Worling found messages where other students at Altoona Junior High School sent harassing messages to W.J.L.'s iPhone and iPad. . . These messages could have been sent to W.J.L.'s iPhone and iPad after school hours. Thus, it is not clear that AASD officials could have completely prevented the W.J.L.'s bullying, and the harm that it ultimately caused, even if they had aggressively enforced the school's anti-bullying policies. Accordingly, the Court is obligated to find that Lansberry does not sufficiently allege the violation of a constitutional right. The Court is sensitive to the tragic situation that the Lansberry family has been forced to endure and strongly condemns the repeated failure of AASD officials to prevent bullying in the time leading up to W.J.L.'s death. The Court also believes that bullied students and their families should have some recourse against school officials who fail to create a safe learning environment and repeatedly fail to protect students from known dangers. However, prior case law does not allow bullied students and their families to hold school officials accountable through constitutional litigation in the federal courts. . . Therefore, the Court is obligated to dismiss Lansberry's *Monell* claim."); ***L.S. v. Peterson***, No. 18-CV-61577, 2018 WL 6573124, at *5 (S.D. Fla. Dec. 13, 2018) ("Plaintiffs suggest that the essential nature of a public school's role and control over its students requires that schools provide protection and safety for their students. However, the suggestion that school attendance equates to the level of custody implicating a constitutional obligation to protect has been expressly rejected by the Eleventh Circuit. . . .Therefore, even assuming that Defendants intentionally disregarded warnings about Cruz, Plaintiffs' § 1983 claim fails because they cannot assert the violation of a constitutional right. *See Aracena v. Gruler*, --- F. Supp. 3d ---, 2018 WL 5961040, at *5 (M.D. Fla. Nov. 14, 2018) (finding no due process rights implicated in officer's response to Pulse nightclub shooting because the entire circumstance began and ended with a private actor)."); ***Pope v. Trotwood-Madison City School District Bd of Educ.,*** 162 F.Supp.2d 803, 810 (S.D. Ohio 2001) ("[T]he Court concludes that the facts alleged in the Plaintiff's Complaint fail to demonstrate a violation

of Lamar Pope's substantive due process rights. Lamar Pope was not deprived of his liberty when he voluntarily elected to play basketball during the open-gym tryout. Consequently, the Fourteenth Amendment did not impose upon the Defendants an obligation to assure his safety. . . . Pope's status as a student does nothing to change this conclusion."); ***Oldham v. Cincinnati Public Schools***, 118 F. Supp.2d 867, 875 (S.D. Ohio 2000) ("Although, clearly a school system has an unmistakable duty to create and maintain a safe environment for its students as a matter of common law, its in loco parentis status or a State's compulsory attendance laws do not sufficiently 'restrain' students in a manner that would raise a school's common law obligation to the rank of a constitutional duty toward its students.").

See also ***Stevens v. Umsted***, 131 F.3d 697, 702-03 (7th Cir. 1997) ("Since *DeShaney*, we have found several situations that entail a degree of restraint on an individual's personal liberty that make them sufficiently similar to the situations of incarceration and institutionalization, thereby creating a constitutional duty to protect. . . .In reliance on *K.H., through Murphy*, and *Camp*, Stevens argues that Umsted had a constitutional duty to protect Bradley because he was in state custody or because the state exercised 'de facto custody' over him. However, Bradley's situation is distinguishable from these cases. First and foremost, Bradley was not taken into custody by the state. Quite the contrary, he was voluntarily admitted to the ISVI [Illinois School for the Visually Impaired], either on the application of his school district or directly by his parents, but in either instance it was with the signed consent of his parents. Additionally, the state never became the legal guardian of Bradley, and his father retained legal custody of him. . . Although Bradley could not have packed his bags and left the school on his own volition, Stevens, as Bradley's parent and guardian, could have requested that Bradley be discharged at any time. . . . [W]e need not decide the relevancy of voluntariness in this case, because the state did not have custody of Bradley. Therefore, as Bradley was not in state custody, the complaint fails to allege facts sufficient to outline the existence of a state duty to protect him from private actors under the 'custody' exception as outlined in *DeShaney* and its progeny."); ***Walton v. Alexander***, 44 F.3d 1297, 1305 (5th Cir. 1995) (*en banc*) (where attendance at school was voluntary and there was a right to leave at will, child's "status as a resident student [did not place] him within the narrow class of persons who are entitled to claim from the state a constitutional duty of protection from harm at the hands of private parties."); ***Spivey v. Elliott***, 29 F.3d 1522, 1525 (11th Cir. 1994) (finding duty owed to eight-year-old, hearing impaired residential student in Georgia School of the Deaf; "It is plaintiff's status as a residential student that distinguishes his circumstance from that of the student-plaintiffs in [other cited cases]. Each of those cases involved a day school situation where the students attended school for a set number of hours and returned home to the supervision of their parents and the protection of their homes at the end of the day. Thus, it was still the children's parents who had ultimate control of their basic needs on a daily basis. [Plaintiff] could not go home at the end of the day. [Plaintiff] had only the State upon which to rely for his food, shelter, and safety during the school week."), *opinion withdrawn*, 41 F.3d 1497, 1499 (11th Cir. 1995) ("[I]n the interest of efficiency and collegiality on this Court, where there are differing views as to the substantive right, this panel has chosen to withdraw all of its prior opinion which relates to whether the complaint alleges a constitutional right so that the opinion will serve as no

precedent on that issue. The opinion is fully reaffirmed, however, on the holding that there was no constitutional duty clearly established at the time of the sexual assault, so the defendant officials were properly entitled to qualified immunity."); ***Johnson v. Dallas Independent School District***, 38 F.3d 198, 203 (5th Cir. 1994) ("While a persuasive argument can be made for applying a *DeShaney* 'special relationship' in some measure to public school students who are forced by compulsory education laws to attend school and have no choice among public schools, even under such a legal regime the appellant's claim would not succeed. Andrew Gaston's death is attributable to the fortuity that an armed, violent non-student trespassed on campus. There can be no liability of state actors for this random criminal act unless the fourteenth amendment were to make the schools virtual guarantors of student safety − a rule never yet adopted even for those in society, such as prisoners or the mentally ill or handicapped, who are the beneficiaries of a 'special relationship' with the state.").

See also ***Doe ex rel Magee v. Covington County School Dist. ex rel Keys,*** 675 F.3d 849, 874, 875 (5th Cir. 2012) (en banc) (Higgenson, J., concurring in the judgment) ("To summarize, Section 1983 should be construed literally. Literal application of Section 1983 would narrow only to government custody the *DeShaney* 'special relationship' theory of actionable inaction, as explicitly stated by the late Chief Justice Rehnquist, and literal application of Section 1983 would reduce only to statutory elements the amorphous 'state-created danger' theory we have not endorsed. At the same time, literal application of Section 1983 would (1) acknowledge that the statute protects not just against government persons who subject citizens to a constitutional deprivation but also against government persons who cause citizens to be subjected to such deprivations; (2) avoid government persons (courts) from immunizing other government persons (state or local officials) from liability for wrongdoing which electors, through Congress, have made actionable and which non-government persons (jurors) should resolve; and (3) would apply Section 1983's syntax to comprehend the rare but tragic set of grey zone cases where government persons, intentionally or recklessly or through deliberate indifference, cause, consistent with *Martinez*, a victim to be subjected by a third person to a rights deprivation. Having made the above statutory observation—urging narrowed liability on extra-statutory theories emanating from dicta in *DeShaney*, but recognizing liability for government persons who non-negligently cause in time and circumstance citizens to be subjected to constitutional injury actually inflicted by others—I nonetheless conclude that the instant complaint, put alongside the plain language of Section 1983, is not congruent enough to survive summary dismissal. Instead of setting forth a facially plausible charge of government recklessness or indifference or intentionality in the release of Jane that caused her to be subjected to her injury, the complaint's preliminary statement (paragraph 1), statement of facts (paragraphs 2–7), and above all its '[b]ut for' allegation in its 'action for deprivation of civil rights' (paragraphs 20–25), focus exclusively on the opposite, namely the education defendants' alleged policy of inaction, giving school officials who check out children discretion to verify or not to verify the identification of receiving adults. That contention describes liability non-causally, which is the extra-statutory theory of liability recognized by the Supreme Court to apply only in custodial settings.")

See also ***Levin v. Harleston***, 966 F.2d 85, 90 (2d Cir. 1992) (City College had no constitutional duty to protect Professor from student disruptions and demonstrations); ***Philadelphia Police and Fire Association for Handicapped Children v. City of Philadelphia***, 874 F.2d 156, 166-168 (3d Cir. 1989) (rejecting argument that mentally retarded persons living at home were in "constructive custody" of state and therefore owed an affirmative duty of care under substantive due process); ***Was v. Young***, 796 F. Supp. 1041 (E.D. Mich. 1992) (functional custody concept did not apply to plaintiffs who were attacked by private citizens when they attended fireworks display co-sponsored by City).

See also ***Stoneking v. Bradford Area School District***, 882 F.2d 720, 723 (3d Cir. 1989) (***Stoneking II***) (op. on remand), *cert. denied*, 493 U.S. 1044 (1990) ("Arguably, our earlier discussion noting that 'students are in what may be viewed as functional custody of the school authorities' during their presence at school because they are required to attend under Pennsylvania law...is not inconsistent with the ***DeShaney*** opinion.").

The court in ***Stoneking II*** recognized, however, that the situation in that case was very different from ***DeShaney*** because the injury (sexual molestation) to the plaintiff resulted from the conduct of a state employee, not a private actor. *Id*. at 724. *See also* ***Doxtator v. O'Brien***, 39 F.4th 852, 867 (7th Cir. 2022) ("In sum, the Estate ignores the nuances of *Deshaney* and its outgrowth of exceptions. The Estate attempts to frame the 'state-created danger' exception as a claim unto itself and extracts the applicable elements from their context, copying them into its brief as if they make out a free-standing claim. But *Deshaney* was limited to private acts of harm. Exceptions to *Deshaney*'s holding thus also apply only to instances involving private acts of harm. This case involves harm carried out by public law enforcement officers, and therefore *Deshaney* and the exceptions thereto are wholly inapposite. We therefore affirm the lower court's entry of summary judgment on the Estate's state-created danger claim."); ***Rhodes v. Michigan***, 10 F.4th 665, 684 (6th Cir. 2021) ("We agree with the district court that the state-created-danger doctrine does not apply where a state actor directly causes the plaintiff's asserted injury. . . Applying the state-created-danger doctrine in cases like this one, where a state actor directly causes the plaintiff's injury, would divorce the doctrine from its precedential roots. . . . [T]he state-created-danger doctrine tells us when a state actor can be held accountable for harms caused by some external force but does not provide a vehicle for the plaintiff to hold state actors accountable for injuries suffered as a direct result of state action. . . Because Rhodes is seeking to hold Jones and McPherson accountable for their actions that directly caused her injuries, her state-created-danger claim must fail."); ***Lanman v. Hinson***, 529 F.3d 673, 682-83 (6th Cir. 2008) ("The district court relied on *DeShaney* . . .for the proposition that it was the involuntary nature of the individual's confinement that invoked the Fourteenth Amendment's protections in *Youngberg* and *Terrance*. . . .Therefore, it held, because Lanman voluntarily committed himself to Kalamazoo Regional Psychiatric Hospital ("KPH") by signing an admission application, and was theoretically free to leave at any time, he was not owed any duties under the Fourteenth Amendment. We disagree. *DeShaney* does not address a situation in which the State itself, by the affirmative acts of its agents, infringes on an individual's constitutionally protected liberty interests. The Court in

DeShaney recognized that the protections of the Due Process Clause may be triggered when the State affirmatively acts and subjects an involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement. . . Likewise, the Due Process Clause would protect a voluntarily confined individual from deprivations of liberty by state actors that exceed those authorized by his consent to treatment. The mechanism which brought the individuals to the various facilities, whether considered 'voluntary' or 'involuntary,' is not controlling; in either case they are entitled to freedom from undue restraint at the hands of the State under the Fourteenth Amendment.").

See also ***Doe v. Taylor Independent School District***, 15 F. 3d 443, 454 (5th Cir. 1994) (*en banc*) ("A supervisory school official can be held personally liable for a subordinate's violation of an elementary or secondary school student's constitutional right to bodily integrity in physical sexual abuse cases if the plaintiff establishes that: (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and (3) such failure caused a constitutional injury to the student."), *cert. denied*, 115 S. Ct. 70 (1994); ***C.M. v. Southeast Delco School District***, 828 F. Supp. 1179, 1189 (E.D. Pa. 1993) ("[T]he affirmative-duty line should be drawn at state action. That is, in light of *Stoneking* and *D.R.*, *DeShaney* stands only for the proposition that states have no affirmative duty to protect people from private actors, rather than the broader proposition that states have no duty to protect people from actors who are the state's own."); ***Waechter v. School District No. 14-030***, 773 F. Supp. 1005, 1009 & n.5 (W.D. Mich. 1991) (child was in custodial relationship with teacher).

But see ***Doe v. Rains County Independent School District***, 66 F.3d 1402, 1410 (5th Cir. 1995) ("That a supervisory school official may be held liable under § 1983 for breaching his state-law duty to stop or prevent child abuse thus does not compel the conclusion that a nonsupervisory teacher is responsible for breaching a state-law duty to report the abuse."). ***Accord Doe v. Claiborne County***, 103 F.3d 495, 512 (6th Cir. 1996) (concluding that "to state a claim for a failure to act when the alleged wrongdoer is not a supervisory government official, a plaintiff must separately establish the 'color of law' requirement of section 1983 by identifying some cognizable duty that state or federal law imposes upon the alleged 'enactor.' In the absence of a duty there is no section 1983 liability because the failure to act cannot be said to have occurred under color of law.").

See also ***Torres-Rivera v. O'Neill-Cancel***, 406 F.3d 43, 51 (1st Cir. 2005) ("As *Martinez* explains, the *DeShaney* substantive due process rule . . . does not apply where it is an on-duty police officer acting under color of law whose violence causes the injury."); ***Martinez-Rodriguez v. Colon-Pizarro***, 54 F.3d 980, 986 (1st Cir. 1995) ("[W]hen an on-duty police officer witnesses violence, the existence vel non of a constitutional duty to intervene will most often hinge on whether he is witnessing private violence or violence attributable to state action."), *cert. denied*,

116 S.Ct. 515 (1995); ***D.T. by M.T. v. Independent School District No. 16***, 894 F.2d 1176, 1192 (10th Cir. 1990)(School District not liable for child molestation committed by teacher, where teacher not acting under color of state law), *cert. denied*, 498 U.S. 879 (1990); ***Doe v. Sabine Parish School Board***, 24 F. Supp.2d 655, 664 (W.D. La. 1998) ("[A] district court should be reluctant when addressing sensitive constitutional issues to read appellate decisions in an overly broad fashion. The language in *Becerra* and the *Doe v. Hillsboro* concurrence should, accordingly, be limited to the facts of those cases to the extent that they are controlling law. Both cases involved situations where the school employed an abuser who just happened to not be engaged in state action at the actual moment of the abuse. Subjecting school officials to liability for deliberate indifference to the acts of its employees, whether committed on or off duty, is at least one step away from subjecting officials to liability for failure to supervise purely private persons who harm a student.").

(ii) foster care cases

The Court in ***DeShaney*** expressed no view on whether an affirmative duty to protect might arise in the situation where a state removes a child from "free society" and places him in a **foster home**. The majority acknowledged that such a situation might be "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." *Id*. at 1006 n.9.

See e.g., ***Hunt v. Montano***, 39 F.th 1270, 1282 (10th Cir. 2022) ("We agree with the district court that Montano and Griffin behaved in a manner that shocks the judicial conscience consistent with our earlier cases. Accepting the allegations in the complaint as true, Montano and Griffin licensed Crownover—and Montano circumvented CYFD protocols to permit Barreras, T.B., and F.B. to be repeatedly placed in her care—despite her history of crime, past dangerous relationships, financial situation, alcohol and drug problems, and record of physical abuse against a child in her care. They knew Crownover's home lacked necessary beds and bedding but never followed up to make sure she purchased some before providing care. They allowed Crownover to care for the children even as CYFD investigated reports of abuse by Crownover against T.B. and F.B. The notes hastily entered after Barreras's death suggest a shocking degree of malfeasance when compared with the condition of the home in December 2017. Montano and Griffin consciously placed the children in a perilous environment and ignored signs of continued danger and abuse as time went on. Because of their conduct, toddlers T.B. and F.B. suffered physical abuse and lost their infant sister. Barreras lost her life. The 'cumulative impression' of the conduct in this case is dismal and damning. . . The effects were devastating. The children's representatives have plausibly alleged that Montano and Griffin are responsible. If the allegations in the complaint are substantiated, their actions shock our conscience enough to impose liability under the special relationship doctrine."); ***Estate of Place v. Anderson***, No. 19-1269, 2022 WL 1467645, at *5–6 (10th Cir. May 10, 2022) (not reported) ("We have explicitly recognized that foster children have a substantive due process right to protection while in foster care. . . Thus, 'foster care is recognized as one of the custodial relationships that creates a special relationship.'. . This special relationship 'triggers a continuing duty which is subsequently violated if a state official "knew of the asserted

danger to [a foster child] or failed to exercise professional judgment with respect thereto, ... and if an affirmative link to the injuries [the child] suffered can be shown.'". . But we require more than a state official's mere failure to exercise professional judgment. . . The abdication of her professional duty must be sufficient to shock the conscience. . . We have defined 'conduct that shocks the judicial conscience' as 'deliberate government action that is "arbitrary" and "unrestrained by the established principles of private right and distributive justice."'. . . Indeed, Defendants' behavior must be 'egregious and outrageous.'. . We consider Defendants' 'conduct as a whole'—'both action and inaction'—in assessing whether that behavior is conscience shocking. . . In evaluating substantive due process claims in this context, we consider: '(1) the general need for restraint; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policy decisions impacting public safety.'. . Rather than precisely define the boundaries of conscience-shocking behavior, we have left them to 'evolve over time.'. . We have established, however, that conscience shocking behavior 'requires a high level of outrageousness, because the Supreme Court has specifically admonished that a substantive due process violation requires more than an ordinary tort.'. . Thus, 'liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.'"); ***Tamas v. Department of Social & Health Services***, 630 F.3d 833, 844-46 (9th Cir. 2010) ("[P]rior to Fabregas' adoption of Monica, various Appellants affirmatively created the particular danger that exposed Monica to harm. Despite referrals reporting Fabregas' physical and sexual abuse, Kleinhein, Loeffler and Drake approved Fabregas' foster-care licenses, paving the way for Fabregas to continue abusing Monica after her adoption. The state's approval of Monica's foster care and adoption by Fabregas created a danger of molestation that Monica would not have faced had the state adequately protected her as a result of the referrals. . . .Therefore, we conclude that Monica's liberty interest continued after her adoption under the danger-creation exception to the general rule that state actors are not liable for failure to protect members of the public. . . . In the specific context of cases involving foster care, the Fifth, Sixth, and Eighth Circuits have held that deliberate indifference is established if an 'official [was] both aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed] and [the official] ... also dr[e]w the inference.' [citing cases] . . . . The Second, Third, Fourth, Seventh, Tenth, and Eleventh Circuits have each phrased the deliberate indifference test along the same lines. [citing cases] We are persuaded by our precedent and cases from other circuits analyzing the issue, that the deliberate indifference standard, as applied to foster children, requires a showing of an objectively substantial risk of harm and a showing that the officials were subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed and that either the official actually drew that inference or that a reasonable official would have been compelled to draw that inference. . . We also conclude that the subjective component may be inferred 'from the fact that the risk of harm is obvious.'"); ***Doe ex rel. Johnson v. South Carolina Dept. of Social Services***, 597 F.3d 163, 175-77 (4th Cir. 2010) ("We now hold that when a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause and imposing 'some responsibility for [the child's] safety and general well-being.'. . Such responsibility, in turn, includes a duty not to make a foster care placement that is deliberately indifferent to the child's

right to personal safety and security. . . . [U]nlike the children in *DeShaney, Milburn* and *Weller*, Jane was clearly within the custody and control of the state social services department when foster care placement decisions were made. Accordingly, the state officials responsible for those decisions had a corresponding duty to refrain from placing her in a known, dangerous environment in deliberate indifference to her right to personal safety and security. We affirm the grant of summary judgment, however, under the second prong of the qualified immunity inquiry. Although our precedents do not foreclose a foster child's claim that her substantive due process right to personal safety and security is violated by a foster care placement made in deliberate indifference to a known danger, such a right was not clearly established in this circuit at the time Thompson made her placement decisions regarding Jane. In determining whether there has been a violation of a constitutional right, we must identify the right 'at a high level of particularity.'. . . Here, when the placement decisions were made, there was no authority from the Supreme Court or this circuit that would have put Thompson on fair notice that her actions violated Jane's substantive due process rights. On the contrary, given the precedents that did exist in our circuit on the issue of affirmative state protection of foster children, we think it quite reasonable for jurists and officials to have believed that we would have answered the *DeShaney* question in the negative and foreclosed the existence of such a right. In sum, because it would not have been apparent to a reasonable social worker in Thompson's position that her actions violated the Fourteenth Amendment, she is entitled to qualified immunity."); ***Burton v. Richmond,*** 370 F.3d 723, 728 (8th Cir. 2004) ("Here, DFS never had custody of the plaintiffs, nor can it fairly be said that DFS had control of them. Nor did defendants have a duty to protect plaintiffs under the state-created danger theory. The danger in this case − the placement in the Huffman home − was created by Rhonda and Jean's agreement as to the best custodial arrangement for the family. Neither DFS nor the individual defendants took an active role in creating this placement; they merely helped the family get recognition from the juvenile court of the changed custodial arrangement. The placement was made by the court upon recommendation from the juvenile officer and did not result directly from any action taken by either appellant. Recommending to the juvenile officer the placement agreed to by the plaintiffs' aunt and grandmother was not sufficient to create a duty to protect the children while in the placement."); ***Nicini v. Morra***, 212 F.3d 798, 807, 808 (3d Cir. 2000) ("After *DeShaney*, many of our sister courts of appeals held that foster children have a substantive due process right to be free from harm at the hands of state-regulated foster parents. [citing cases] These courts have accepted the analogy between persons the state places in foster care and those it incarcerates or institutionalizes. . . .We have suggested, although never directly held, that state actors owe a duty to children placed in foster care. . . . We now hold that when the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties. The failure to perform such duties can give rise, under sufficiently culpable circumstances, to liability under section 1983."); ***Doe v. New York City Dept. of Soc. Services***, 649 F.2d 134, 141-42 (2d Cir. 1981), *cert. denied sub. nom.* ***Catholic Home Bureau v. Doe***, 464 U.S. 864 (1983); ***Taylor by and through Walker v. Ledbetter***, 818 F.2d 791, 797 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989) (affirmative duty under substantive due process to provide protection and supervision created by virtue of "special relationship" between state and child placed in foster home).

See also ***D.C. by Cabelka v. County of San Diego***, No. 18-CV-13-WQH-MSB, 2020 WL 1674583, at *12, *14 (S.D. Cal. Apr. 6, 2020) ("The Court has determined that the Minor Plaintiffs have sufficiently alleged that the Social Worker Defendants violated the Minor Plaintiffs' substantive due process rights at this stage in the proceedings. 'It is beyond dispute' that at the time of the Social Worker Defendants' alleged conduct, 'state officials could be held liable where they affirmatively and with deliberate indifference placed an individual in danger she would not otherwise have faced.'"); ***R.F.J. v. Florida Department of Children and Families***, No. 3:15-CV-1184-J-32JBT, 2019 WL 3207334, at *4–7 (M.D. Fla. July 16, 2019) ("Brady and Perry argue that substantive due process is not implicated here because the children were not in foster care. . . They advocate a bright line rule that whenever the state places a child with a relative without first taking custody, the Fourteenth Amendment is not implicated. It follows, according to Brady and Perry, that because the children were never taken into state custody, Brady and Perry could not have violated their rights. . . The Court is unpersuaded. Children do not need to be placed into foster care for a constitutional duty to arise—it is sufficient if the state affirmatively places the children with a person of the state's choosing and restrains the children's freedom to act on their own behalf. . . Thus, Brady and Perry's claim that Swearingen, the grandmother, was 'in no sense a state actor,'. . . is inapposite. Although, Swearingen was not a state actor in the same way a licensed foster parent might be, she was nonetheless the 'person[ ] the state ha[d] chosen' to care for the children. . . If state officials affirmatively act to remove children and place them with an individual the state officials have chosen, they cannot avoid their obligation to ensure reasonably safe living conditions simply because the person chosen is not a state-licensed foster parent. . . . Of course, young children cannot provide food, clothes, or shelter for themselves. Thus, a reasonable government official might ask: under what circumstances does placing young children with relatives restrict the children's freedom to act on their own behalf? The answer is when the state chooses someone different to care for the children. Here, the children's parents left them with Peoples and Woods. Had Brady and Perry allowed Peoples and Woods to continue to care for the children, there likely would be no state action— *DeShaney* would control. But that is not what happened. Instead, Brady exerted his power on behalf of the state and 'directed placement of the Children with Swearingen at a new location.'. . This action imposed on the state the obligation to ensure the children's reasonable safety. . . .Unlike, the county's actions in *DeShaney*, Brady and Perry's actions put the children in a worse position than if they had not acted at all. . . Thus, taking the facts alleged in the light most favorable to Plaintiffs, the children had a constitutional right to be placed in reasonably safe living conditions."); ***Ray v. Foltz***, 354 F.Supp.2d 1309, 1319, 1320, 1322, 1323 (M.D. Fla. 2005) ("In summary, Plaintiffs allege that Foltz (along with Defendants Deborah Jones and Corley)knowing that the Cumberbatches had not completed the required training or the extensive application process, knowing that Mrs. Cumberbatch was secretive and unwilling to allow open conversations between the Department and her own children, knowing that no investigation had been done to support a conclusion that the home was safe for foster children, and knowing that the Cumberbatches had been twice reported to the Florida Abuse Hotline-recommended the Cumberbatch home be licensed for one child, and thereafter, upon placement of four foster children in the home within days of licensure, sought a waiver of the licensed capacity restrictions. After placement of R.M., Foltz allegedly became aware that a

Department employee described Mrs. Cumberbatch as 'one of the worst parents we have' and removed a child from the home; yet, he took no action and engaged in no investigation. Further, despite the knowledge that the home was far overcapacity, Foltz failed to perform required overcapacity visits. It is clear to this Court that such allegations. taken as true, state a claim for deliberately failing to learn of the significant risk of serious harm to R.M. that was created when Foltz recommended the rubber-stamped licensure of the Cumberbatch home and re-licensure of the Joyner home and when Foltz ignored subsequent signs that the homes were unsafe. . . . Defendants point to these allegations and seemingly argue that they are insufficient because at the most they establish a failure to follow Department procedures and guidelines. The Court does not share in Defendants' interpretation. Instead, these allegations concern Defendants' decision to rubber-stamp a family for licensure without engaging in any meaningful investigation as to the safety of the home. This Court refuses to find that by performing no investigation of foster parents and merely issuing licenses to them, Department employees can successfully insulate themselves from liability by asserting that they were unaware of the dangerousness of a situation. In essence, Plaintiffs allege that Deborah Jones and Corley actively and deliberately chose not to learn of the risk of abuse. The fact that this is evidenced by their failure to follow Department guidelines and rules does not necessitate a finding that such failures are insufficient to support a § 1983 claim. Instead, the Court believes that the Eleventh Circuit's comments in *Ray* concerning failures of Department employees to follow procedures as being insufficient to state a § 1983 claim apply when a plaintiff attempts to argue that such failures result in a *per se* constitutional violation and a § 1983 claim. . . Such is not what Plaintiffs allege. Instead, the failures to follow procedures are merely evidence of their intention to ignore the dangers associated with placing children in a given home. This Court finds that a knowing failure to investigate a prospective foster home (or continue to monitor), if proven, evidences a deliberate indifference to the welfare of a child on the part of the responsible Department official, and the resulting injury must be actionable. Any other finding entirely eviscerates the mission of foster placements- to ensure the safety of children- and the constitutional protections afforded foster children."); ***T.M. by and through Cox v. Carson***, 93 F. Supp.2d 1179, 1187 (D. Wyo. 2000) ("The Supreme Court decision in *Youngberg,* our decision in *Milonas* [*v. Williams*, 691 F.2d 931 (10th Cir.1982)], and the Second Circuit decision in *Doe* all were decided before August 1985. We are convinced that these cases clearly alerted persons in the positions of defendants that children in the custody of a state had a constitutional right to be reasonably safe from harm; and that if the persons responsible place children in a foster home or institution that they know or suspect to be dangerous to the children they incur liability if the harm occurs.").

The Fifth Circuit has recognized that a "special relationship" is created when the state removes a child from her natural home and places her under state supervision. ***Griffith v. Johnston***, 899 F.2d 1427, 1439 (5th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1040 (1990). Likewise, the Sixth Circuit has held that "due process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes." ***Meador v. Cabinet for Human Resources***, 902 F.2d 474, 476 (6th Cir. 1990), *cert. denied*, 498 U.S. 867 (1990). Because qualified immunity was not raised in the court below, the Court of Appeals did not address the question in

Meador. *See also* ***Reed v. Knox County Dep't of Human Services***, 968 F. Supp. 1212, 1217 (S.D. Ohio 1997) (noting "circumstances of a foster child who is in the custody of the state differ from those of a child who is in the custody of its natural parents.").

In ***Eugene D. By and Through Olivia D. v. Karman***, 889 F.2d 701 (6th Cir. 1989), *cert. denied*, 496 U.S. 931 (1990), plaintiff claimed that social workers were deliberately indifferent to serious medical and developmental needs of a child placed in a state-licensed foster home. The court disposed of the case on qualified immunity grounds since, at the time of the challenged conduct, it was not clearly established that the state had an affirmative duty to protect children placed in state-licensed foster homes. *Id*. at 711.

In ***Doe v. Bobbitt***, 881 F.2d 510 (7th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990), the Seventh Circuit reversed a denial of summary judgment for the defendant on the grounds of qualified immunity. The question was whether it was clearly established in 1984, the time of the challenged conduct, that state officials would violate a child's constitutional rights by placing that child in a foster home where the child would be at risk of violence by private individuals.

The court concluded that in 1984, only the Second Circuit had recognized such a constitutional right, *See* ***Doe***, *supra*, and that "the decision in ***Doe*** depended upon an absolutely novel analogy between incarceration and placement in a foster home, an analogy that has yet to be endorsed by either the Supreme Court or the Seventh Circuit." *Id*. at 511-12.

In ***K.H. v. Morgan***, 914 F.2d 846 (7th Cir. 1990), the court cited both ***Doe v. New York City Dept. of Social Services***, *supra*, and ***Milburn***, *infra*, approvingly and distinguished ***Bobbitt*** as a case where custody was awarded to a relative. *Id*. at 852-53. *See also* ***S.S., by and through Jervis v. McMullen***, 225 F.3d 960, 962, 963 (8th Cir. 2000) (en banc) ("[I]n returning S.S. to her father, the state did not increase the danger of significant harm to S.S.: It merely placed her back into the situation from which it had originally retrieved her. . . . In other words, the complaint contains no allegations that would justify a conclusion that by returning S.S. to her father the state created greater risks to her than the ones to which she was originally exposed. . . . We are mindful that drawing a distinction between exposing a child to a dangerous environment and returning her to an equally dangerous one may seem to some to be gratuitous. . . . While the state did do something here, or at least in the present procedural posture we assume that it did, in the peculiar circumstances of this case the state's act is the same as if it had done nothing.").

But see ***Reed v. Palmer***, 906 F.3d 540, 551-53 (7th Cir. 2018) ("Plaintiffs have plausibly alleged their constitutional rights were violated at Copper Lake when they were placed in isolation 'without justification.' On the face of plaintiffs' complaints alone, Palmer has not shown he is entitled to qualified immunity. This case involves the added wrinkle that plaintiffs were housed in Wisconsin, not in Iowa. In other words, Palmer was not one of the Copper Lake officials placing plaintiffs in isolation. Rather, plaintiffs allege Palmer only contracted with Wisconsin to send juveniles to Copper Lake and later 'received' and 'monitored' reports regarding the juveniles sent there. According to the district court, this made the claims against Palmer 'completely different'

from other cases where the defendants 'actually controlled and operated the institution in which the abuse had occurred and "oversaw the use of the isolation cells in which [the] plaintiff was confined."'. . In the district court's view, no law clearly establishes what the Constitution requires of an official in Palmer's unique posture. Palmer's additional degree of separation is a distinguishing feature of this litigation, but at the motion to dismiss stage, our conclusion does not change. Under *DeShaney v. Winnebago County Department of Social Services*, it is clearly established that the Due Process Clause 'forbids the State itself to deprive individuals of life, liberty, or property without "due process of law,"' but does not 'impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.'. . It is equally established, however, that an exception to the *DeShaney* principle arises 'if the state has a "special relationship" with a person, that is, if the state has custody of a person, thus cutting off alternate avenues of aid.'. . In such cases, the State 'assumes at least a rudimentary duty of safekeeping.'. .On multiple occasions, we have applied the 'special relationship' exception to cases where 'the State removes a child from her natural parents.'. . Thus, 'once a state removes a child from her parents' custody,' it assumes a duty of safekeeping' due to the restraints it places on the liberty of the child. . . Such a duty is violated when the State 'place[s] a child in custody with foster parents it knows are incompetent or dangerous.'. . This case differs from *Berman* and *Waubanascum*; plaintiffs were placed at an out-of-state institution, not a private foster care home. Nevertheless, in *K.H.*, we defined the relevant constitutional right as 'the right of a child in state custody not to be handed over by state officers to a foster parent *or other custodian, private or public* whom the state knows or suspects to be a child abuser.'. . This language encompasses Palmer's alleged role here. . . Allegations against Palmer are not limited to his role in signing the contract that led to plaintiffs' placement at Copper Lake: Plaintiffs further allege that Palmer retained custody and received reports detailing their excessive isolation, yet took no steps to remove them from the facility and was deliberately indifferent in doing so. The district court critiqued plaintiffs' failure to 'provide any details' about the reports Palmer allegedly received or what his alleged monitoring entailed. However, as noted above, plaintiffs do not need to provide such details to cross the 'plausibility' threshold at this stage: they need only include enough facts in their complaint 'to present a story that holds together.'. . Construing the well-pleaded facts and reasonable inferences in plaintiffs' favor, as we must, it can be reasonably inferred that Palmer had custody of plaintiffs while they were at Copper Lake and that he had the knowledge, responsibility, and influence to request removal of plaintiffs from the facility."); ***T.D. v. Patton***, 868 F.3d 1209, 1212-13 (10th Cir. 2017) ("We agree with the district court that Ms. Patton violated T.D.'s substantive due process right by knowingly placing T.D. in a position of danger and knowingly increasing T.D.'s vulnerability to danger. . . She recommended to the juvenile court that T.D. be placed and remain in Mr. Duerson's temporary custody despite her admitted concerns about T.D.'s safety in the home, her knowledge of Mr. Duerson's criminal history that included a conviction for attempted sexual assault against a minor in his care, and notice of evidence that Mr. Duerson was potentially abusing T.D. She failed to inform the juvenile court about her concerns and knowledge of Mr. Duerson's criminal history and made her affirmative recommendations out of fear of being fired. . . . Ms. Patton acted recklessly and in conscious disregard of a known and substantial risk that T.D. would suffer serious, immediate, and proximate harm in his father's home. Her conduct, taken

as a whole, shocks the conscience and thus amounts to a substantive due process violation under the Fourteenth Amendment. Based on the facts and legal determination in this court's *Currier* decision, a reasonable official in Ms. Patton's shoes would have understood she was violating T.D.'s constitutional rights. In both *Currier* and here, county social workers removed children from their mothers' homes and placed them in their fathers' homes, where the children were abused. The social workers in both cases failed to alert the juvenile court of relevant facts undermining the fathers' fitness as caretakers and recommended that the fathers assume custody of the children—despite being on notice that the fathers' homes were places of danger. And, in both cases, the social workers failed to investigate whether the fathers were abusing their children, despite being on notice of evidence suggesting abuse. Ms. Patton's conduct sufficiently resembles the conduct we held unconstitutional in *Currier* such that a reasonable official in her position would have known that her actions violated T.D.'s clearly established right. She was therefore not entitled to qualified immunity."); ***Currier v. Doran***, 242 F.3d 905, 919 (10th Cir. 2001) ("When the state affirmatively acts to remove a child from the custody of one parent and then places the child with another parent, *DeShaney* does not foreclose constitutional liability."); ***Ford v. Johnson***, 899 F. Supp. 227, 233 (W.D. Pa. 1995) ("The fact that the child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations."). *Compare* ***Estate of B.I.C. v. Gillen***, 761 F.3d 1099, 1107 (10th Cir. 2014) ("Like Sentell in *Currier*, Defendant did not place Brook with Mr. Coons and Ms. Wells, so she had no duty to rescue Brook from that custody. The estate argues that this inaction amounted to action because it was motivated by ill-will. But *Currier* does not support this argument, and the estate cites no authority for the proposition that inaction can be treated as action because of the nonactor's ill-will.").

In ***K.H.***, the court denied qualified immunity to the extent the complaint asserted a "prima facie right not to be placed with a foster parent who the state's caseworkers and supervisors know or suspect is likely to abuse or neglect the foster child." 914 F.2d at 853. The court noted the limitations of the right it was recognizing as clearly established by ***Youngberg***. Child welfare workers and their supervisors face damages liability under § 1983, "[o]nly if without justification based either on financial constraints or on considerations of professional judgment," they place children with foster parents known to be dangerous or unfit." *Id.* at 854.

See also ***P.C. v. McLaughlin***, 913 F.2d 1033, 1043 (2d Cir. 1990) (recognizing that good-faith immunity will bar liability in action for damages against government professional in personal capacity if professional was unable to meet normal professional standards as a result of budgetary constraints); ***Taahira W. v. Travis***, 908 F. Supp. 533, 543 (N.D. Ill. 1995) ("[T]he court holds that a plaintiff may survive a motion to dismiss where she sufficiently pleads that a state official, charged with an affirmative duty to provide for the care of a foster child, is personally liable for abusing professional judgment when placing a ward into a known or suspected abusive foster environment.").

While Judges Posner and Wood refused to recognize as clearly established "the distinct right not to be shifted among foster homes 'too frequently'," 914 F.2d at 853, Judge Coffey would have held that ***Youngberg***, *supra*, clearly established an obligation on the part of the state to exercise reasonable professional judgment in the placement, care and supervision of children who are in the state's custody. *Id*. at 854-55, 865 (Coffey, J., concurring in part and dissenting in part).

The Seventh Circuit has recognized that "when a DCFS caseworker places a child in a home knowing that his caretaker cannot provide reasonable supervision, and the failure to provide that degree of supervision and care results in injury to the child outside of the home, it might be appropriate . . . for the caseworker to be held liable for a deprivation of liberty." ***Camp v. Gregory***, 67 F.3d 1286, 1297 (7th Cir. 1995).

The court stressed that liability would be confined to "a very narrow range of cases." *Id.* at *12. Liability would be appropriate only where (1) the caseworker failed to exercise bona fide professional judgment, (2) the caretaker failed to exercise a reasonable degree of supervision, (3) the resulting injury was foreseeable to the caseworker, and (4) there was a sufficient causal link between the lack of reasonable supervision and the resulting injury. *Id.*

See also ***Lewis v. Anderson,*** 308 F.3d 768, 773, 775, 776 (7th Cir. 2002) ("The standard articulated in *K.H.* does not take the next step and impose some kind of duty of inquiry in these cases. If we are to follow *K.H.*, therefore, the DHSS officials cannot be held liable on the basis of facts they did not actually know or suspect, even if they might have learned about disqualifying information if they had conducted a more thorough inquiry. In order to survive summary judgment, the plaintiffs needed to put forth a case that the DHSS defendants actually knew of or suspected the existence of child abuse in the prospective adoptive family. . . . If state actors are to be held liable for the abuse perpetrated by a screened foster parent, under *K.H.* the plaintiffs must present evidence that the state officials knew or suspected that abuse was occurring or likely.").

Compare ***Forrester v. Bass***, 397 F.3d 1047, 1058 (8th Cir. 2005) ("Even if Forrester could establish a sufficient causal connection between state action and the ensuing private acts of violence, his substantive due process claims still must fail because Forrester cannot demonstrate the requisite degree of offensive conduct or deliberate disregard by Johnson and Rosa necessary to establish substantive due process violations. . . The dreadful abuse suffered by the Bass children was egregious. But private parties, not state actors, inflicted the severe physical abuse that killed Larry and Gary. While we do not condone any official negligence contributing to this tragic case, we conclude Johnson and Rosa did not engage in official conduct so egregious or outrageous as to shock the contemporary conscience. . . The record does not portray Johnson as an apathetic or dilatory social worker who saw and ignored wanton child abuse. Based upon what transpired inside the Bass home on August 17, 1999, Johnson's failure to conduct an investigation, to contact law enforcement, and to verify the whereabouts of the boys, while erroneous, and maybe naive in retrospect, cannot be considered conscience-shocking.") *with* ***J.H. v. Johnson,*** 346 F.3d 788,

792, 793 (7th Cir. 2003) ("The standard set forth in *K.H.* and *Lewis* differs from the 'deliberate indifference' standard only in the sense that it can be satisfied by proof of a state actor's knowledge *or suspicion* of the risk of harm, rather than just knowledge. Both standards are subjective. Though we have described the burden of proof for plaintiffs asserting § 1983 claims against state child welfare employees as 'stringent' and acknowledged that often the underlying facts of cases like this 'portray a sad course of events,' we nevertheless continue to require plaintiffs to demonstrate that the individual defendants had specific 'knowledge or suspicion' of the risk of sexual abuse facing the children in order to hold defendants liable under § 1983. . . . The plaintiffs vigorously argue that the appropriate standard for analyzing this case is the 'professional judgment' standard as articulated in *Youngberg v. Romeo* . . . . A bonafide professional judgment may shield the state's caseworkers and supervisors who acted despite knowledge of a risky placement from liability, but whether such a professional judgment was exercised is not the threshold determination. Knowledge or suspicion that a foster parent is a probable child abuser remains the legal yardstick for measuring the culpability of state actors in § 1983 cases like this one.").

In ***Yvonne L. v. New Mexico Department of Human Services***, 959 F.2d 883, 893 (10th Cir. 1992), the court, in denying qualified immunity to the defendant officials, determined that it was clearly established in 1985 that "children in the custody of a state had a constitutional right to be reasonably safe from harm; and that if the persons responsible place children in a foster home or institution that they know or suspect to be dangerous to the children they incur liability if the harm occurs." *See also* ***Schwartz v. Booker***, 702 F.3d 573, 581-83, 585 (10th Cir. 2012) ("Booker and Peagler present two distinct, but similar, arguments as support for their assertion that the special relationship doctrine does not presently apply: First, they argue that neither of them personally participated in the placement of Chandler and, therefore, did not deprive Chandler of his liberty; and, second, they argue that only JCDHS had a special relationship with Chandler because it was the state agency that initially placed Chandler in Jon Phillips's home. . . .[T]the legal framework for this doctrine does not support limiting the scope of the special relationship doctrine to only those individuals involved in a child's initial placement. In similar custodial relationships, such as involuntary commitment, a state actor's liability for violation of a patient's constitutional right does not turn on whether she participated in the actual confinement or placement of the individual in the institution. . . . Booker and Peagler urge that a placement-participation requirement is necessary to prevent imposition of 'reverse respondeat superior' liability on all state DHS employees. Again, they miss the point. The special relationship between the State and the foster child is a necessary predicate to imposition of liability under this doctrine, but is not sufficient to establish liability. Before any state official may be held liable, her conduct must satisfy the elements outlined in *Yvonne L.:* She must have known of the asserted danger or failed to exercise professional judgment and such conduct must have a causal connection to the ultimate injury incurred; moreover, her conduct must shock the conscience. . . .This involuntary, custodial relationship with the State imposes a continuing constitutional duty on state custodial officials to safeguard individuals in the State's care. Consequently, we are persuaded that plaintiffs sufficiently pled a custodial relationship between the State and Chandler to potentially hold Booker and Peagler individually liable under the special relationship doctrine.").

But see ***Matthews v. Bergdorf***, 889 F.3d 1136, 1146-47 (10th Cir. 2018) ("[A] child while in Oklahoma foster care has the 'special relationship' with the State necessary to give rise to an antecedent duty on the part of the State to protect him or her. But a child alleged to be adopted, living with an adult pursuant to a guardianship, or 'just living' with an adult is not in the custody of the State and, unlike a foster child, does not have a special relationship with the State. An adopted child is in the custody of his or her adoptive parents. Similarly, a child living in Oklahoma pursuant to a court-ordered guardianship is in the custody of his or her guardian. . . . Lastly, we need cite no authority for the proposition that a child 'just living' with an adult is not in the State's custody. Under none of the latter three scenarios does the Constitution permit us to say that ODHS caseworkers may be held responsible pursuant to the special relationship exception for harm the Matthews inflicted upon their victims. Rather, the special relationship exception has no application in these situations, and so far as the exception is concerned, the Fourteenth Amendment has nothing to say about the caseworkers' liability."); ***Gutteridge v. Oklahoma***, 878 F.3d 1233, 1239, 1241, 1246 (10th Cir. 2018) ("[A]s the district court pointed out, it appears this court requires more than a state official's mere failure to exercise professional judgment; instead, to sustain a claim under the special-relationship doctrine, a plaintiff must demonstrate that the defendant 'abdicated her professional duty *sufficient to shock the conscience*.'. . Here, the district court concluded that the individual defendants were '[no] more than negligent' in placing D.C. with LeBarre. . . And it reasoned that they were 'at most reckless or negligent' in their dealings with Funk. . . Thus, the district court ruled, the individual defendants' conduct doesn't 'shock the conscience' and therefore can't form the basis of a special-relationship claim. . . . Taken together, *Johnson*, *J.W.*, and *Schwartz* indicate that a plaintiff must separately demonstrate the conscience-shocking nature of a defendant's conduct in order to mount a successful special-relationship claim. We remain bound by these decisions. . . Accordingly, we hold that the district court didn't err in requiring Gutteridge to show both that (1) the individual defendants failed to exercise professional judgment; and (2) their actions shock the conscience. . . . The facts of this case are undeniably tragic. But we cannot say the individual defendants' conduct—even assuming it amounts to an abdication of professional duty—is so 'outrageous[ ]' as to be 'truly conscience shocking.' *Schwartz*, 702 F.3d at 586 (quoting *Armijo*, 159 F.3d at 1262). Accordingly, we agree with the district court that the individual defendants are entitled to qualified immunity. And we therefore affirm its order granting summary judgment to them on Gutteridge's § 1983 claim."); ***Dahn v. Amedei***, 867 F.3d 1178, 1186-91 & n.12 (10th Cir. 2017) ("The question here is whether a foster child in the custody of one state can, after being placed by a private adoption agency with a foster father in a different state, establish a special custodial relationship with that second state when the second state takes on the duties to investigate evidence suggesting abuse. . . . We decide here only whether Dahn can show that his special relationship with Amedei and Cramer was clearly established under existing law. . . . We do not resolve whether Dahn established a special relationship with Amedei and Cramer; we address only whether that relationship was clearly established under existing precedent. Even if Dahn had a special custodial relationship with Amedei and Cramer—employees of Colorado—*Schwartz* doesn't clearly establish this relationship based on our facts. Here, Dahn was in Oklahoma's custody up until his adoption. The district court extended *Schwartz* in finding that Dahn sufficiently alleged a special relationship with Amedei and Cramer.[8] [Fn 8 Because we

conclude under the facts of this case that clearly established law did not create a special relationship between Dahn and the caseworkers, we need not and do not address the remaining factors of his claim. For this reason, we do not comment on whether Amedei and Cramer violated Dahn's constitutional rights under the Fourteenth Amendment's Due Process Clause by failing to exercise their professional judgment.] Whether or not he was correct to do so, the law up to that point did not clearly establish the requisite special relationship. In *Schwartz*, a young foster child, Chandler, died at the hands of his abusive foster family. . . Chandler's biological parents alleged under § 1983 that employees of the Denver County Department of Human Services (DCDHS) violated, among other laws, Chandler's Fourteenth Amendment substantive-due-process rights. . . The employees claimed that they had no special relationship with Chandler because a different county had placed him in foster care. . . We concluded that the special-relationship doctrine extends beyond the employees in the county that initially placed a child in foster care and reaches county employees actually exercising custody over the child. . . .We also noted that even though the Jefferson County Department of Human Services (JCDHS) initially placed Chandler into foster care, its doing so made him dependent on the state for his basic human needs, not just that one department. . . .Here, Dahn asks us to affirm the district court's extension of *Schwartz* to his claim and hold that even though Oklahoma placed him in foster care and Adoption Alliance monitored his placement, Colorado exercised custody over him because he lived there and because Colorado employees investigated his school's suspected-abuse reports. . . . [T]he second prong of the qualified-immunity analysis determines the outcome of this case. *Schwartz* is the closest case to ours, but no court has extended it so far. In certain circumstances, it would be reasonable and even logical to extend the special-relationship doctrine across state lines as well as county lines, as in *Schwartz*, but our case law doesn't clearly establish this extension. . . . Here, Oklahoma and Colorado are two separate sovereigns. So, Amedei and Cramer argue, it is not enough that Dahn was a ward of *a* state. To overcome qualified immunity and survive their motion to dismiss, Dahn had to allege sufficient facts to show that he had a special relationship with the state whose employees he alleged knew of the danger to him or failed to exercise professional judgment. We can't deem it clearly established under *Schwartz* that a state employee's investigating reports of abuse of a child is enough to create a special custodial relationship with that child. . . .Though *DeShaney* is factually distinct from Dahn's case, it illustrates that the Supreme Court is wary of finding a special relationship whenever a social worker responds to child-abuse reports. So *DeShaney* supports the conclusion that the law doesn't clearly permit extending the special-relationship doctrine to Dahn's circumstances—at least not yet. In sum, the special-relationship doctrine extends beyond just those actors who placed Dahn in Lovato's custody; it includes all state officials in the state with whom he had a special relationship. But, for now, the law doesn't clearly extend constitutional liability under the special-relationship doctrine to employees of a state that didn't deprive Dahn of his liberty or supply his basic needs, even though they were social workers in the county where he resided. . . We note, however, that Amedei and Cramer owed *some* duty to Dahn, and this duty might very well expose them to tort liability. . . .*Schwartz* would not notify Amedei and Cramer that their failure to protect Dahn under the factual circumstances of this case would violate Dahn's Fourteenth Amendment substantive-due-process rights under the special-relationship doctrine. Thus, even accepting all of Dahn's factual allegations as true, Dahn

presents no clearly established law creating a special, custodial relationship between him and Colorado or its employees, and therefore the district court should have awarded Amedei and Cramer qualified immunity on Dahn's special-relationship claims against them.[12] [fn12: Because we conclude, based on this case's facts, that Dahn has failed to show clearly established law creating a special relationship between him, Amedei and Cramer, we decline to address whether the special-relationship doctrine could ever cross state borders. We also decline to address the other element of such claims, which is whether Amedei and Cramer acted in an unprofessional and conscience-shocking manner.]")

See also ***Angela R. v. Clinton***, 999 F.2d 320, 323-24 (8th Cir. 1993) (observing that "class members who are foster children in the State's custody have stronger constitutional claims than abused or neglected children who have not been placed in foster care."); ***Norfleet v. Arkansas Department of Human Services***, 989 F.2d 289, 293 (8th Cir. 1993) ("Cases from this and other circuits clearly demonstrate that imprisonment is not the only custodial relationship in which the state must safeguard an individual's civil rights. In foster care, a child loses his freedom and ability to make decisions about his own welfare, and must rely on the state to take care of his needs." (footnote omitted)); ***Eric L. v. Bird***, 848 F. Supp. 303, 307 (D.N.H. 1994) ("This court finds persuasive the principles adopted in other circuits extending *Youngberg* to the foster care context.").

But see ***D.W. v. Rogers***, 113 F.3d 1214, 1218 (11th Cir. 1997) ("Our recent decision in *Wooten* . . . indicates that the state's affirmative obligation to render services to an individual depends not on whether the state has legal custody of that person, but on whether the state has physically confined or restrained the person."); ***White v. Chambliss***, 112 F.3d 731, 737 (4th Cir. 1997) ("Nothing in *Milburn* limited its application to situations where parents had voluntarily placed their children in foster care, and *Milburn* was not interpreted as being so limited in subsequent Fourth Circuit cases. . . . Given the state of this circuit's law on the issue and the absence of controlling Supreme Court authority, we cannot say that a right to affirmative state protection for children placed in foster care was clearly established at the time of Keena's death."); ***Wooten v. Campbell***, 49 F.3d 696, 699-701 (11th Cir. 1995) (finding no "substantive due process right is implicated where a public agency is awarded legal custody of a child, but does not control that child's physical custody except to arrange court-ordered visitation with the non-custodial parent."); ***A.S., by and through Blalock v. Tellus***, 22 F. Supp.2d 1217, 1221 (D. Kan. 1998) ("This case lies somewhere between *DeShaney* and *Yvonne L.* In this case, the state had legal custody of the plaintiff, but physical custody remained with her mother. The questions before the court, then, are whether this situation constitutes a special relationship entitling A.S. to state protection from harm by third parties and, if so, whether this right was clearly established in 1988 and 1989, when the alleged abuse occurred, so as to defeat the defense of qualified immunity. The court concludes that legal custody without physical custody is insufficient to create a 'special relationship.'. . . This court agrees with the court's analysis in *Wooten*. The Tenth Circuit has stressed that it is the state's taking and holding a person against her will which creates a special relationship. . . In that situation, the person is not able to care for her own needs or, in the case of

a child, the state prevents the parent from taking care of the child's needs. However, where the state merely has legal custody, the parent who retains physical custody has the power to protect the child from harm."); ***Cooper by and through Cotturo v. Montgomery County Office of Children and Youth***, No. 93-3137, 1993 WL 477084, *6 (E.D. Pa. Nov. 16, 1993) (not reported) (foster child's "death caused by being fatally hit by a pick up truck eleventh months after being placed in her foster home is too remote a consequence of any action OCY took or did not take to find OCY liable. . . .").

In ***L.J. by and through Darr v. Massinga***, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989), a pre-***DeShaney*** case, present and former foster children brought a § 1983 action, claiming that as a result of maladministration of Maryland's federally-funded foster care program, they were subjected to physical and sexual abuse and medical neglect.

The court avoided decision on the issue of whether there is a constitutional duty to protect and supervise with respect to children placed in foster homes. Instead, the court disposed of the case by holding that the Adoption Assistance and Child Welfare Act of 1980 imposes supervisory duties on states administering the program, and that the plaintiffs had federal statutory rights which could be enforced under section 1983. *Id*. at 122-23.

But see ***Suter v. Artist M.***, 112 S. Ct. 1360 (1992) (provision of Adoption Assistance and Child Welfare Act of 1980 which requires "reasonable efforts . . . be made (") prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home . . . ." does not create a right enforceable under the Act itself or through section 1983.).

NOTE: Congress responded to *Suter* by passing an amendment to the Social Security Act which provides that in all pending and future actions

> brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.* . . . but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15) [42 U.S.C. § 671(a)(15)] of the Act is not enforceable in a private right of action.

42 U.S.C. 1320a-2 (amended October 20, 1994).

Thus, while the holding of *Suter* with respect to the "reasonable efforts" provision remains good law with respect to the particular provision of the statute involved in that case, "the amendment overrules the general theory in *Suter* that the only private right of action available

under a statute requiring a state plan is an action against the state for not having that plan." ***Jeanine B. v. Thompson***, 877 F. Supp. 1268, 1283 (E.D. Wis. 1995). *See also* ***Henry A v. Willden***, 2012 WL 1561030 (9th Cir. May 4, 2012). *But see* ***White v. Chambliss***, 112 F.3d 731, 739 (4th Cir. 1997) (holding that "*Suter* thus forecloses the argument that section 671(a)(10) of the AACWA provides the source for an enforceable right through section 1983.").

(iii) public housing/workplace

In ***Dawson v. Milwaukee***, 930 F.2d 1283 (7th Cir. 1991), Judge Easterbrook rejected plaintiff's argument that his presence in publicly subsidized housing was the functional equivalent of being in custody, thereby creating a constitutional duty on the part of the Housing Authority to protect him from harm at the hands of private actors. In refusing to equate "subsidy with custody," Judge Easterbrook relied on pre-***DeShaney*** precedent from the Seventh Circuit holding that the due process clause does not guarantee safety in the public workplace. *Id*. at 1285. *Accord* ***Washington v. District of Columbia***, 802 F.2d 1478 (D.C. Cir. 1986); ***McClary v. O'Hare***, 786 F.2d 83 (2d Cir. 1986); ***Rankin v. Wichita Falls***, 762 F.2d 444 (5th Cir. 1985). *See also* ***D.M. ex rel. Ray v. Philadelphia Hous. Auth.***, 613 F. App'x 187, 190-91 (3d Cir. 2015) ("While the PHA subsidized the Property and was allegedly 'aware of the dangers that [Plaintiff] faced ..., it played no part in their creation, nor did it do anything to render [Plaintiff] any more vulnerable to them.' *DeShaney*, 489 U.S. at 201. In short, Plaintiff's allegations fail to show 'that [the PHA] created the danger' Plaintiff faced while living in the Property."); ***Henry v. City of Erie***, 728 F.3d 275, 285, 286 & n.9 (3d Cir. 2013) ("Although the cause of the fire is not known at this stage of the litigation, plaintiffs do not allege that defendants caused the fire or increased the apartment's susceptibility to fire. Nor do plaintiffs contend that defendants failed to install a smoke detector and a fire escape on the third floor of Richardson's apartment. Plaintiffs' allegations against defendants are a step further removed: plaintiffs contend that defendants should have compelled or induced the landlord/owners to install a fire escape and smoke detector (or induced Richardson to live elsewhere), either by not approving the apartment for the Section 8 housing program and/or by terminating the subsidy payments that allowed Richardson to continue to live there. Unfortunately for plaintiffs, their reasoning proves too much. Plaintiffs' complaint makes clear it was the owners' responsibility—not defendants'—to install a smoke detector and fire escape. The regulations cited by plaintiffs confirm the owner is required to maintain the unit in accordance with the Housing Quality Standards. . . Assuming, as we must, that a smoke detector and fire escape could have prevented decedents' deaths, the responsibility (and capability) to install these safety features did not rest with defendants. . . .Under our state-created danger jurisprudence, we cannot find that defendants' failings amount to a state-created danger. We decline to expand the state-created danger doctrine—a narrow exception to the general rule that the state has no duty to protect its citizens from private harms—to embrace this case. . . . We are not aware of a case in which a circuit court extended liability under the state-created danger doctrine to licensing-type activities. Nor have plaintiffs cited such a case. . . . Accordingly, we will reverse the order of the District Court denying qualified immunity to Horan and Angelotti and remand for proceedings consistent with this opinion.")

The Supreme Court has held that "the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace . . . ." ***Collins v. City of Harker Heights, Tex.***, 112 S. Ct. 1061, 1071 (1992).

See also ***Callahan v. North Carolina Dep't of Public Safety***, 18 F.4th 142, 147-49 (4th Cir. 2021) ("Since *Pinder*, 'we have never issued a published opinion recognizing a successful state-created danger claim.'. . In the cases that have followed, we have repeatedly recognized 'the state-created danger doctrine is narrowly drawn, and the bar for what constitutes an "affirmative act" is high.'. . . According to the complaint, '[d]efendants' actions in placing Sergeant Callahan in a dangerous situation with inadequate staffing based on lack of trained and experienced officers to support her consciously disregarded a substantial and great risk of serious harm which was obvious, apparent, and grave.' . . Callahan adds that '[d]efendants were also aware of, or should have been aware of, the imminent threat posed by Inmate Wissink.'. . Callahan argues that these allegations satisfy the pleading requirement for a state-created danger claim. He insists he has alleged the affirmative acts that our precedent requires. More specifically, Callahan argues that the defendants knew about the risks, 'had an affirmative duty to avoid them, and instead affirmatively acted to keep Inmate Wissink [in Callahan's unit] while assigning too few and untrained staff.'. . He also contends that he alleged that the '[d]efendants affirmatively sent Sgt. Callahan, and her coworkers, into [that unit] on April 27 with full knowledge' of two risks—the risk posed by Wissink and the risk of understaffing and improper training. . . According to Callahan, these are affirmative acts that, if accepted as true, would give rise to a state-created danger claim. Callahan's argument, however, misses the point. The question is not how Callahan characterizes the allegations. It is not enough to reframe a failure to protect against a danger into an affirmative act. As we noted in *Doe*, 'inaction can often be artfully recharacterized as "action,"' but we must 'resist the temptation to inject this alternate framework into omission cases.'. . The critical questions are: What is the pertinent danger, and did the state create it? Callahan's allegations make clear that the danger was Wissink, and none of the defendants created that danger. The staffing and training decisions may reflect a failure to adequately respond to the danger posed by Wissink. But under our precedent, such failures do not support a state-created danger claim. They are neither the 'immediate interactions' with the plaintiff called for in *Doe* nor the 'direct cause' of the injuries required by *Graves*. These choices are simply too far down the causal chain of events to result in liability under the Due Process Clause. And without allegations that, if accepted as true, meet these legal requirements, the complaint does not plausibly state a § 1983 substantive due process claim under the state-created danger theory. The Due Process Clause does not convert state-law tort claims into constitutional violations actionable under § 1983. Our precedent is clear: Callahan's allegations do not plausibly state a claim for a state-created danger. . . This case involves tragic circumstances, but it does not involve a due process violation. Callahan failed to meet the pleading requirements for a substantive due process claim. 'In cases like this, it is always easy to second-guess. Tragic circumstances only sharpen our hindsight, and it is tempting to express our sense of outrage at the failure' of the prison staff to protect Sergeant Callahan from a dangerous inmate. . . However, to hold that Callahan's allegations amount to a plausible substantive due process claim would go against our precedent and constitutionalize a state tort claim. That we refuse to do.");

Rhodes v. Michigan, 10 F.4th 665, 686 (6th Cir. 2021) (Thapar, J., dissenting in part) ("No one disputes that Kelly Rhodes was seriously injured. And the record suggests the defendants were at fault. That is why we have state tort law—so people can recover for the injuries they suffer at someone else's hand. And recover Rhodes did: She settled her state tort claims for $50,000 in damages plus the ability to obtain reimbursements for medical expenses related to her head injury. Yet the majority holds that Rhodes's status as an inmate entitles her to special rights. The majority finds this entitlement in the Eighth Amendment's Punishments Clause. But the Eighth Amendment is not a glorified tort statue. *Ramirez v. Guadarrama*, 2 F.4th 506, 512 (5th Cir. 2021) (Oldham, J., concurring in the denial of rehearing en banc). Nor is it a 'National Code of Prison Regulation.'. . . To make out a claim of unconstitutional punishment based on prison conditions, Rhodes needed to show—at a minimum—that the state exposed her to compulsory, involuntary danger. She can't clear this bar because she voluntarily worked in the laundry detail. . . . By reviving Rhodes's Eighth Amendment claim, the majority stretches the Punishments Clause beyond precedent and far beyond its original meaning. Because precedent and history agree that Rhodes's accident was not a punishment, I dissent in part."); ***Nelson v. City of Chicago***, 992 F.3d 599, 605 (7th Cir. 2021) ("Here, the danger was created by an armed robber, not by the government, so it is not covered by the doctrine. . . Under the state-created-danger theory, whether Sergeant Bucki was deliberately indifferent to risks to Officer Nelson is irrelevant. 'Disregarding a known risk to a public employee does not violate the Constitution whether or not the risk comes to pass.' [collecting cases brought by public employees asserting state-created-danger claims]"); ***Russett v. State of Arizona***, No. 17-15709, 2020 WL 236767, at *2 (9th Cir. Jan. 15, 2020) (not reported) ("Although Appellees underscore that the plaintiff in *Grubbs* was employed by a correctional facility, she was employed as a nurse, not a corrections officer. This distinction is key because, unlike nurses, the primary responsibility of corrections officers is to constantly supervise and closely interact with violent inmates. Further, this court emphasized in *Grubbs* that the defendants led the plaintiff 'to believe that she would not be required to work alone with violent sex offenders.'. . Neither this court nor the Supreme Court has ever held that a prison employee whose essential duties involve monitoring inmates can assert a substantive due process claim when he is assaulted by an inmate he was tasked with supervising. We have never before recognized a state-created danger cause of action on facts analogous to the ones asserted by Appellees. Thus, it was not clearly established that Appellants' conduct of assigning corrections officers to work with inmates under dangerous conditions would have violated Appellees' due process rights and we reverse the district court's denial of qualified immunity."); ***In re U.S. Office of Personnel Management Data Security Breach Litigation***, 928 F.3d 42, 75 (D.C. Cir. 2019) ("Like the sanitation worker in *Collins*—and the prison guards in *Williams* and *Washington*—NTEU [National Treasury Employees Union] Plaintiffs 'voluntarily' sought and 'accepted' an 'offer of [government] employment.' *Collins*, 503 U.S. at 128. In doing so, they voluntarily submitted personal information 'as part of a background investigation.'. . In no sense, then, did the government compel NTEU Plaintiffs to seek government employment; it therefore bore no constitutional duty under the Due Process Clause to protect them from the risks associated with applying for such positions. With no triggering deprivation of liberty or property to speak of, there arose no constitutional governmental duty to 'provide [NTEU Plaintiffs] with certain minimal

levels of safety and security,' *Collins*, 503 U.S. at 127—physical or digital."); ***Kulkay v. Roy***, 847 F.3d 637, 645 ("[T]he absence of safety equipment or procedures and an awareness of similar injuries fail to show the Faribault officials were deliberately indifferent to the risk of harm posed to Kulkay by the beam saw. Moreover, we join other circuits in concluding that state and federal safety regulations do not establish a standard for Eighth Amendment violations. *See, e.g.*, *Franklin v. Kan. Dep't of Corr.*, 160 F. App'x 730, 736 (10th Cir. 2005) (unpublished); *French v. Owens*, 777 F.2d 1250, 1257 (7th Cir. 1985). The mere existence of state and federal safety regulations does not charge prison officials with knowledge of potentially unsafe conditions in their facility. The Faribault officials' actions as to potential safety precautions in the workshop at most amount to negligence. But mere negligence is insufficient to state a claim under the Eighth Amendment. Cruel and unusual punishment does not result whenever a prison official may be to blame for an inmate's injuries."); ***Pauluk v. Savage***, 836 F.3d 1117, 1118-19, 1123-26 (9th Cir. 2016) ("This case lies at the intersection of two lines of authority—on the one hand, the state-created danger doctrine under which constitutional due process claims may be brought; on the other, the Supreme Court's decision in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), declining to find a general due process right to a safe workplace. We hold that *Collins* does not bar Plaintiffs' due process claim. Plaintiffs have stated a claim under the state-created danger doctrine, notwithstanding the fact that the danger at issue is a physical condition in the workplace. However, we reverse the district court's denial of summary judgment as to Wojcik and Savage, on the ground that the due process right asserted by Plaintiffs was not clearly established at the time of the violation. . . . The threshold question before us is whether Plaintiffs' claim under the state-created danger doctrine is foreclosed by *Collins*. We conclude that it is not. . . .Other courts agree that *Collins* does not foreclose application of the state-created danger exception in workplace safety cases. . . . To prevail on a state-created danger due process claim, a plaintiff must show more than merely a failure to create or maintain a safe work environment. First, a plaintiff must show that the state engaged in 'affirmative conduct' that placed him or her in danger. . . .Second, the state actor must have acted with 'deliberate indifference' to a 'known or obvious danger.'. . .Plaintiffs' evidence, if true, satisfies both elements of a state-created danger claim. First, Pauluk's 2003 transfer back to Shadow Lane was 'affirmative' conduct. Pauluk clearly did not want to return to Shadow Lane and was transferred 'involuntarily.' There is sufficient evidence in the record that either or both Wojcik and Savage were sufficiently involved in the decision to transfer that a reasonable jury could conclude they should bear some responsibility for that transfer. . . .Second, construing the facts in the light most favorable to Plaintiffs, Wojcik and Savage acted with deliberate indifference in exposing Pauluk to a known and obvious danger. Plaintiffs presented evidence that Wojcik and Savage were both aware of the CCHD's long and tortured history of pervasive mold problems in multiple buildings, including the Shadow Lane facility. . . .The core question in this appeal is whether *Collins* bars the application of the state-created danger doctrine in cases where the danger is a physical condition in the workplace. Because *Wood* did not involve a dangerous workplace, it does not speak to this question. *Grubbs I* presents a closer analogy to this case. However, as recounted above, the danger in *Grubbs I* was a human actor who posed a known threat. In contrast, Pauluk was not harmed by a human agent, but rather by a physical condition in the building where he worked. This case is factually very similar to *Collins*, where,

as here, the danger was a physical danger in the workplace. For the reasons given above, we conclude that Plaintiffs have stated a claim despite the fact that Pauluk's injury was caused by physical conditions in the workplace. But, because the Supreme Court in *Collins* declined to find a due process violation in a case with very similar facts, we cannot say that Wojcik and Savage were 'on notice' that their conduct was unlawful under clearly established law."); ***Pauluk v. Savage***, 836 F.3d 1117, 1126 (9th Cir. 2016) (Murgia, J., concurring in part and dissenting in part) ("I fully agree with the opinion's analysis as to the scope of this court's jurisdiction to review the district court's denial of summary judgment on qualified immunity grounds, and with its conclusion that the district court erred in denying qualified immunity to Wojcik and Savage. However, even accepting as true the plaintiffs' version of events, *see Behrens v. Pelletier*, 516 U.S. 299, 313 (1996), I respectfully disagree that the plaintiffs have presented a cognizable claim that Wojcik and Savage affirmatively acted with deliberate indifference to Pauluk's substantive due process rights under the state-created danger doctrine."); ***Pauluk v. Savage***, 836 F.3d 1117, 1132-34 (9th Cir. 2016) (Noonan, J., dissenting) ("Today, the majority holds that the state-created danger doctrine—a theory of constitutional harm whose contours have been 'clearly established' by at least nine published opinions of this court over the course of two decades—is no longer sufficiently 'clear' in light of a single case which addresses an unrelated legal theory. I respectfully dissent. . . .No basis exists to distinguish this case from *Wood*, *Kennedy*, or any other published opinion of this court upholding the applicability of the state-created danger doctrine. I would affirm the district court's denial of summary judgment. I therefore concur with the majority's conclusion that, viewing the facts in the light most favorable to plaintiffs, they have shown a violation of the Fourteenth Amendment under the state created danger doctrine. . . .Pauluk's case therefore presents the precise facts that the *Collins* Court deemed were inapplicable to its analysis and holding. Accordingly, *Collins* does not counsel against affirming the district court here. Indeed, the majority appears to concede that *Collins* is distinguishable, but concludes that even assuming Pauluk has stated a constitutional violation, the factual circumstances of this case are simply too similar to the facts of *Collins* for the defendants to have been ' "on notice" that their conduct was unlawful under clearly established law.'. . The law governing the state-created danger doctrine is 'clearly established' by the controlling precedent discussed above such that 'any reasonable official in [defendants'] shoes would have understood that [they were] violating it.' *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765 (2015) (citations omitted). Indeed, in light of these cases, the constitutional question has been 'placed...beyond debate.'. . A case which presents some factual similarities but lacks any legal nexus to the state-created danger doctrine cannot revive that debate, nor can it serve to convolute what this court has defined with pellucid clarity. *Collins* does not control here. Accordingly, I dissent.").

See also ***Herrera v. Los Angeles Unified School District***, 18 F.4th 1156, 1160-62 (9th Cir. 2021) ("Because Erick was not detained at the time of his death and his parents' § 1983 claim arises out of Lopez's alleged failure to protect their son, their claim is a non-detainee failure-to-protect claim. We therefore apply a purely subjective standard, consistent with our precedent, requiring the plaintiff to show that the state actor recognized an unreasonable risk and actually intended to expose the plaintiff to such risk. . . Two justifications could be raised in favor or applying a purely

subjective standard in failure-to-protect claims brought by non-detained plaintiffs, but neither is persuasive. First, failure-to-protect claims do not include the kind of affirmative action involved in an excessive force claim. But this is also the case for detainee failure-to-protect claims, to which we apply the objective standard. . . Second, the government does not have an obligation to provide food, medical care, and safety to those not in its custody. Even so, *Castro*'s 'significant reasons' to extend the objective standard apply regardless of that obligation. . . Absent our precedent in *Dent*, *Martinez*, and *Pauluk*, we may have been inclined to interpret *Kingsley* and *Castro* to require Plaintiffs to show (1) that Lopez made an intentional decision to allow Erick to be exposed to the risk posed by the pool without Lopez's supervision, and (2) it was objectively unreasonable to expose Erick to that risk. This formulation of the failure-to-protect test would mirror the logic of *Kingsley* and *Castro*, which looks to whether the defendant intended the physical consequences of his actions and applies the objective deliberate indifference standard only to evaluate whether the action taken, considering what was known to the defendant at the time, was reasonable. . . But because, post-*Kingsley* and post-*Castro*, we have continued to apply a purely subjective deliberate indifference test to non-detainee failure-to-protect claims, we also do so here. . . . Plaintiffs provide no evidence that Lopez knew of an immediate threat to Erick after he watched him enter the locker room area. Even assuming Lopez knew that Erick had asthma and could not swim, and lost sight of Erick while he was in the pool earlier that afternoon, the parties agree that Lopez saw Erick enter the locker room area. Like the teacher in *Patel*, Lopez waited outside the locker room to protect Erick's privacy and foster his independence. It was during that time, when Lopez could not have subjectively expected any immediate danger, that Erick drowned. Under our deliberate indifference analysis, Plaintiffs must proffer facts suggesting that Lopez subjectively recognized the relevant risk that Erick could drown while in the pool area. . . Plaintiffs failed to do so: Lopez had no 'actual knowledge or willful blindness of impending harm,'. . . because he believed that Erick was still in the locker room. He was subjectively unaware that Erick was exposed to the dangers of the pool and therefore cannot be liable for his death."); ***Estate of Her v. Hoeppner***, 939 F.3d 872, 876-77 (7th Cir. 2019) ("In the end, the Estate's argument boils down to the remarkable assertion that a municipal swimming pond is by its nature a state-created danger. That proposition, if adopted, would turn every tort injury at a public pond or pool into a constitutional violation. Federal constitutional claims involving public playgrounds and practice fields wouldn't be far behind. Indeed, the Estate's preferred result 'would potentially set up a federal question whenever an accident happens during activities sponsored by the state.' *Waybright v. Frederick County*, 528 F.3d 199, 208 (4th Cir. 2008). But the Fourteenth Amendment doesn't displace state tort law by transforming accidents at public facilities into federal constitutional claims. . .Perhaps aware that its broad position is untenable, the Estate falls back on a narrower argument that the defendants *increased* a danger to Swannie. But this theory is no stronger because there's no evidence that the defendants actively 'did something that turned a potential danger into an actual one.'. . The Estate argues that the City failed to take proper safety precautions, like dredging the bottom of the pond, and the lifeguards failed to comply with the park's 'mandatory' rules involving small children. And it emphasizes evidence that the pond was especially crowded on the afternoon in question, and at one point a lifeguard admitting to being 'overwhelmed' by the number of swimmers. But we've explained that *DeShaney* draws an 'essential distinction

between *endangering* and *failing to protect*.'. . The former may amount to a constitutional violation if other facts are present; the latter is simple negligence. . . . That Swannie slipped beneath the surface without being noticed by *anyone*—lifeguard, family member, or anybody else at the pond—reflects the heartbreaking reality of childhood drownings. But it's not evidence that the defendants took affirmative steps that created or increased a danger to Swannie.The Estate's difficulty articulating a theory of the case that might situate this claim within the law of state-created dangers reflects the fundamental problem with its position: this is at most a negligence claim."); ***Hernandez v. Ridley***, 734 F.3d 1254, 1262 & n.6 (10th Cir. 2013) ("By seeking to impose liability on Ridley and Henderson, Hernandez is asking us to be the 'Monday morning quarterback' with respect to requiring Duit to perform according to the contract. It is beyond our charge to second-guess 'a rational decision making process that takes account of competing social, political, and economic forces.'. . Here, those forces are nearly palpable. At a minimum, consideration must be given to safety of the public and construction crews, project costs, inconvenience to the travelling public, and the need to assure adequate traffic flow during construction. We focus particularly on the last consideration, adequate traffic flow during construction, because it so dramatically illustrates the need for judicial restraint. The increased dangers of night driving are generally known, as are the increased risks presented as traffic volumes increase, particularly in confined areas. But actually balancing the relative risks and benefits is a challenging task, going well beyond what is generally known or assumed, particularly when even more considerations are in play. A critic's post hoc analysis is no substitute for real time rational decisions. . . . Although Ridley and Henderson were not Jose Jr. and Salvador's direct employers, Hernandez's allegations are akin to claims made against government employers alleging a right to work in a reasonably safe environment. But the Supreme Court has declined to extend substantive due process protection to safe working conditions."); ***Slaughter v. Mayor and City Council of Baltimore***, 682 F.3d 317, 322, 323 (4th Cir. 2012) ("[I]n the voluntary employment context, the plaintiffs have not alleged arbitrary (in the constitutional sense) or conscience-shocking conduct because they did not assert that the Fire Department *intended to harm* Wilson, as would be necessary to establish a substantive due process violation. . . .It is true that in this case, as it was in *Waybright*, the Baltimore City Fire Department created the danger. But this fact does not satisfy any element of the standard that the Supreme Court has articulated for showing a substantive due process violation with respect to a government employee. . . For these reasons, we hold that the Baltimore City Fire Department's constitutional liability in this case turns on whether it *intended to harm* the new recruits."); ***Slaughter v. Mayor and City Council of Baltimore***, 682 F.3d 317, 326 (4th Cir. 2012) (Wynn, J., concurring in the result) ("Following *Collins* and *Waybright*, I agree with affirming the district court's decision to dismiss on the narrow grounds that there is no duty on municipalities to 'provide certain minimal levels of safety and security in the workplace,' *Collins*, 503 U .S. at 130, that 'failure to train or to warn ... employees [is] not arbitrary in a constitutional sense,' *id.*, and that, as a result, the petitioner's factual allegations are not 'arbitrary' or 'shocking to the conscience' in a 'constitutional sense.'. . But, in affirming the district court, we should also recognize that government employees are not categorically excluded from claiming deliberate indifference as a basis for Due Process claims."); ***Fields v. Abbott***, 652 F.3d 886, 891-94 (8th Cir. 2011) ("In this case, the Miller County individual defendants acted under circumstances in which actual

deliberation was arguably practicable because of Fields's allegations that (1) they had been made aware, based on her previous injuries from the same drunk-tank door, that the door was dangerous, and (2) they were previously informed that the jail was understaffed. . .We will thus apply that standard here. In this case, the district court concluded that whether the Miller County individual defendants' conduct is conscience shocking 'is a close question,' but ultimately held that a reasonable jury could find that they acted with conscience-shocking deliberate indifference. . . . Here, none of the Miller County individual defendants made any representations to Fields regarding the types of inmates that she would be dealing with or the safety of her workplace. And unlike L.W., Fields was aware of the potentially dangerous conditions to which she was subject because she had previously complained about, among other things, both the interior handle on the drunk-tank door and the understaffing of the jail. The conduct that Fields complains of here is simply not comparable to the defendants' conscience-shocking actions in *Grubbs.* . . . In this case, Fields asserts that the Miller County individual defendants knew of the dangers that the jail posed, but even with that knowledge neglected to make the jail safer. She alleges that several deficiencies at the jail led to her injuries, including its understaffing, the interior-mounted door handle, an alleged failure to follow the procedures for classifying inmates, an alleged lack of training, and the jail's acceptance of inmates from other counties. Fields argues that the Miller County individual defendants 'were aware of facts from which an inference might have been drawn that a substantial risk of serious harm existed.'. . True enough, Sheriff Abbott testified at his deposition that he knew that the Miller County Jail was understaffed and that he was aware that Fields had complained about the interior-mounted door handle. But even if we assume, as we must for present purposes, that all of the Miller County individual defendants were aware of the facts from which an inference about the jail's possible dangers could be drawn, Fields has presented insufficient evidence to 'show that any of [these defendants] actually drew such an inference.'. . Fields, after all, was equally aware of the two most potentially dangerous conditions-the jail's understaffing and the interior-mounted door handle-and the Miller County individual defendants would have had no reason to believe that Fields would not take these conditions into account in her interactions with the inmates. Moreover, there is no proof in the record that the conditions that Fields complains of were so inherently dangerous that the injuries she sustained were highly likely to occur. . . .This evidence, taken in the light most favorable to Fields, might cause a jury to find that Sheriff Abbott was grossly negligent in failing to address the staffing concerns associated with the jail and in not removing the interior-mounted door handle. Even gross negligence, however, cannot support a § 1983 claim alleging a violation of the Due Process Clause. . . . Because we conclude that the Miller County individual defendants did not violate Fields's substantive due process rights, we need not address the other prong of the qualified-immunity analysis; namely, whether the substantive due process right that Fields asserts was clearly established when the events in this case took place."); ***Hunt v. Sycamore Community School Dist. Bd. of Educ***., 542 F.3d 529, 537, 538, 543, 544 (6th Cir. 2008) ("While it has not proved impossible for government employees to establish arbitrariness of their employer, such claims have, for the most part, not succeeded in this Circuit. In a state-created danger case in which public employees prevailed against their employer, we determined that police had a due process claim against the City for endangering them by releasing information that would make it easier for third persons to harm them. [citing *Kallstrom*] In

contrast, in other cases in which the harm to a government employee was inflicted by third persons, we have held that there was no state-created danger. . . . We believe the more exact standard, announced in *Lewellen*, is that *in order to succeed on a § 1983 claim in a non-custodial setting, a plaintiff must prove either intentional injury or 'arbitrary conduct intentionally designed to punish someone* − e.g., giving a worker a particularly dangerous assignment in retaliation for a political speech ... or because of his or her gender.' Or, as stated in *Stemler*, . . .a plaintiff must prove 'conscience shocking' behavior. . . . Our review of *Lewis* and our own substantive due process cases indicates that where the governmental actor does not intentionally harm the victim or invidiously discriminate against him, conduct endangering the victim will not shock the conscience if the victim has voluntarily undertaken public employment involving the kind of risk at issue and the risk results from the governmental actor's attempt to carry out its mandatory duties to the public. This holds true even where the governmental actor is not forced to act in a crisis, but has time to deliberate. In order to comply with the Individuals with Disabilities Education Act, the school district is, of course, obliged to provide a free appropriate public education to children with disabilities, 20 U.S.C. § 1412(a)(1)."); ***Waybright v. Frederick County, MD***, 528 F.3d 199, 207, 208 (4th Cir. 2008) ("Here, plaintiffs argue, the training session should qualify as a state-created danger because a state actor, Coombe, 'used his authority to create an opportunity for danger that otherwise would not have existed,' and thereby knowingly put Waybright in harm's way. . .To apply the state-created danger theory in this context, however, would run afoul of the Supreme Court's unanimous decision in *Collins*, . . . which held that due process does not impose a duty on municipalities to provide their employees with a safe workplace or warn them against risks of harm (though state tort law may). The case is right on point, for plaintiffs' state-created danger claim, in essence, is that Coombe created an unsafe workplace that caused a prospective employee harm. And while we recognize that *Collins* involved a municipal rather than an individual defendant, the case speaks decisively to the situation here. . . . by finding a state-created danger here, we might well inject federal authority into public school playground incidents, football (or even ballet) practice sessions, and class field trips, not to mention training sessions for government jobs that require some degree of physical fitness."); ***Lombardi v. Whitman***, 485 F.3d 73, 79, 80, 82, 83 (2d Cir. 2007) ("[T]o the extent the plaintiffs here allege that the defendants had an affirmative duty to prevent them from suffering exposure to environmental contaminants, their claims must fail. They cannot rely on the EPA's failure to instruct workers to wear particular equipment, its failure to explain the exact limitations of its knowledge of the health effects of the airborne substances that were present, or its failure to explain the limitations of its testing technologies. But the complaint goes further; it alleges that defendants' affirmative assurances that the air in Lower Manhattan was safe to breathe created a false sense of security that induced site workers to forgo protective measures, thereby creating a danger where otherwise one would not have existed.. . . . The plaintiffs allege no 'special relationship' between them and federal officials. . . They plead that their reliance on the government's misrepresentations induced them to forgo available safeguards, and thus characterize the harm as a state created danger. . . . . The plaintiffs do not allege that the defendants acted with an evil intent to harm; but they argue that the defendants' deliberate indifference shocks the conscience because the defendants made their decisions in an 'unhurried' fashion with 'hours, days, weeks and even months to contemplate, deliberate, discuss

and decide what to do and say about the health hazards posed to thousands of people who were coming onto and working at Ground Zero.' . . . . The decisions alleged were made by the defendants over a period of time rather than in the rush of a car chase; but the decisions cannot on that account be fairly characterized as 'unhurried' or leisured. . . . Accepting as we must the allegation that the defendants made the wrong decision by disclosing information they knew to be inaccurate, and that this had tragic consequences for the plaintiffs, we conclude that a poor choice made by an executive official between or among the harms risked by the available options is not conscience-shocking merely because for some persons it resulted in grave consequences that a correct decision could have avoided. . . . When great harm is likely to befall someone no matter what a government official does, the allocation of risk may be a burden on the conscience of the one who must make such decisions, but does not shock the contemporary conscience. . . . These principles apply notwithstanding the great service rendered by those who repaired New York, the heroism of those who entered the site when it was unstable and on fire, and the serious health consequences that are plausibly alleged in the complaint. . . . Because the conduct at issue here does not shock the conscience, there was no constitutional violation. We therefore need not decide whether the conduct alleged violated law that was then clearly established, or whether any special factors counsel hesitation in the recognition of a *Bivens* action against the defendants."); ***Witkowski v. Milwaukee County***, 480 F.3d 511, 513, 514 (7th Cir. 2007) ("[S]omeone who chooses to enter a snake pit or a lion's den for compensation cannot complain. Powerful evidence shows that higher wages compensate people whose jobs are risky. . . That evidence is not what undercuts Witkowski's claim, however; what is dispositive against him is the fact that he is a volunteer rather than a conscript. The state did not force him into a position of danger.This is not to say that public employees are beyond the Constitution's protection. Suppose Witkowski had alleged that Milwaukee County exposed him to extra risks because he had campaigned against the County's political leaders or because of his race. Such allegations would state a legally sufficient claim under the first amendment or the equal protection clause of the fourteenth. . . That is not Witkowski's theory, however. He invokes only the due process cause, the domain of *Collins*, *DeShaney*, and *Walker*. Allowing Ball into court without the stunbelt imperiled everyone there: judge, jurors, and spectators were at more risk than Witkowski, who could have protected himself (and everyone else) had he kept control of his weapon. All Witkowski meant by alleging that Gunn and Halstead acted intentionally or recklessly is that they knew about Ball's willingness and desire to wreak havoc, not that they had some ulterior motive for wanting Witkowski dead or wounded. Disregarding a known risk to a public employee does not violate the Constitution whether or not the risk comes to pass."); ***Kaucher v. County of Bucks***, 455 F.3d 418, 435, 436 (3d Cir. 2006) ("The Kauchers have not alleged an affirmative, culpable act on the part of defendants sufficient to implicate the state created danger doctrine. Nor have they alleged conscience-shocking conduct on the part of defendants that could transform a workplace safety claim into a substantive due process claim. At base, the Kauchers contend defendants failed to provide a working environment free from risk of infection − a claim precluded by *Collins*. . . .We conclude the Kauchers' claims relate to a failure to remedy conditions at the jail. The Kauchers allege defendants failed to prevent MRSA from spreading through the jail, took insufficient action to protect the jail's corrections officers from contracting an infection, and failed to warn and educate corrections officers in

infection prevention. Despite their attempts to characterize defendants' actions as affirmatively creating dangerous conditions, they allege a failure to act to prevent dangerous conditions. Under *Collins*, this claim must fail."); ***Estate of Phillips v. District of Columbia***,455 F.3d 397, 407, 408 (D.C. Cir. 2006) ("As in *Washington*, Edwards's deliberate indifference may have increased the Firefighters' exposure to risk, but the risk itself − injury or death suffered in a fire − is inherent in their profession. As both *Washington* and *FOP* make clear, the District is not constitutionally obliged by the Due Process Clause to protect public employees from inherent job-related risks. . . . The Firefighters point to a recent case of ours, *Smith v. District of Columbia*, 413 F.3d 86 (D.C.Cir.2005), as a holding counter to our bright-line application of the custody requirement. . . . Emphasizing the *Smith* victim's relative freedom of movement yet restricted place of residence (similar to the restraints the D.C.Code provisions allegedly placed on them), the Firefighters claim that *Smith* supports their contention that a heightened obligation can exist absent custody. But in *Smith* we found that the District had a heightened obligation because its *in loco parentis* status significantly restrained the victim's liberty. . . . The restrictions on his liberty − imposed on him by the District − are plainly distinguishable from those restrictions the D.C.Code imposes on the Firefighters' liberty − restrictions voluntarily assumed by the Firefighters as conditions of employment by the Department."); ***Moore v. Guthrie***, 438 F.3d 1036, 1042, 1043 (10th Cir. 2006) (10th Cir. 2006) ("We have identified the 'classic' danger creation case to be *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), where police officers impounded the plaintiff's car and abandoned her in the middle of the night in a high crime area where she was raped. . . This is a narrow exception, . . . which applies only when a state actor 'affirmatively acts to create, or increases a plaintiff's vulnerability to, danger from private violence,' *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir.2001). It does not apply when the injury occurs due to the action of another state actor. In the instant case, since Plaintiff was injured by a Simunition bullet fired by a fellow police officer and not a private third party, the danger creation doctrine is inapplicable. Plaintiff also contends that he has sufficiently pleaded a violation of his right to bodily integrity under the 'special relationship' doctrine. The special relationship doctrine is another exception to the general principle that government actors are not responsible for private acts of violence. . . As just discussed, however, because this case does not involve a private act of violence by a third party, this theory is also inapplicable to the facts alleged by Plaintiff. More importantly, we have specifically held that the special relationship doctrine is not triggered in an employment relationship, which is presumed consensual. . . Last, it should be noted that, even if either the danger creation or special relationship theory were applicable, it would not relieve Plaintiff of his duty to allege actions that shock the conscience. As required under the second prong to defeat a qualified immunity defense, Plaintiff argues that his violated right was clearly established at the time of his injury. . . . Although Plaintiff does not need to find a case with an identical factual situation, he still must show legal authority which makes it 'apparent' that 'in the light of pre-existing law' a reasonable official, in Chief Guthrie's position, would have known that having police officers wear riot helmets rather than Simunition face masks would violate their substantive due process right of bodily integrity. . . First, as discussed earlier, the Supreme Court has only recognized a right to bodily integrity under the Fourteenth Amendment in very limited circumstances, not including working in a safe environment. Second, courts have declined to find

a violation of substantive due process in circumstances similar to, or more shocking than, that alleged by Plaintiff. Therefore, we cannot say that it was clearly established that Chief Guthrie and the City of Evans violated Plaintiff's constitutional right to bodily integrity by requiring him to wear his riot helmet during training."); ***Young v. City of Providence***, 404 F.3d 4, 27 (1st Cir. 2005) ("The district court is correct in saying that the issue is not whether Cornel's death was caused by his own lack of proper training in identifying himself or otherwise in conducting himself while off-duty. . . *Collins* establishes that a city worker has no constitutional right at all to adequate training; thus, there can be no independent claim of constitutional violation separate from Solitro's use of excessive force."); ***Fraternal Order of Police Department of Corrections Labor Committee v. Williams***, 375 F.3d 1141, 1144 & n.3, 1145 (D.C. Cir. 2004)(relying on *Collins* to reject Union's claim that its members have "a substantive due process right that would compel the District ... to hire additional employees to staff the [D.C.] Jail in order to address what, they assert, is an unreasonably dangerous workplace."); ***McKinney v. Irving Independent School District,*** 309 F.3d 308, 314 (5th Cir. 2002) ("As the district court recognized, there is no doubt that the McKinneys described a dangerous working environment in their pleadings-that of uncontrolled and disruptive special-education students on a moving school bus in heavy traffic. They do not, however, allege any facts showing that defendants took any affirmative action to increase the risk over the dangers inherent in this working environment. . . . McKinney faced nothing more than the ordinary risks of driving the school bus that transported the special-education students to and from Gilbert. The McKinneys' real complaint is that defendants did not take an affirmative step, namely, provide a bus monitor to supervise the students or other safeguards for McKinney's protection while driving the bus. We hold that the due process clause did not require that defendants place a monitor on the school bus."); ***Sperle v. Michigan Dep't of Corrections,*** 297 F.3d 483, 492-93 (6th Cir. 2002) ("The key factor in custodial environments and other situations where deliberate indifference renders state actors liable for substantive due process violations is the ability of the officials to consider their actions in an unhurried, deliberative manner. . . . Tammy Sperle worked in a 'custodial setting,' an environment where the defendants had the opportunity to design the security precautions at the HVMF and to respond to any general dangers that existed. We therefore conclude that the 'deliberate-indifference' standard is an appropriate one for evaluating her § 1983 claim. . . . Even if the individual defendants could have made the working conditions safer for Tammy Sperle by providing PPDs to school building employees, adding extra security guards, or insuring greater supervision of Herndon, they did not act in an arbitrary manner that 'shocks the conscience' or that indicates any intent to injure her. . . . Our conclusion does not change when we apply the deliberate-indifference standard. 'Deliberate indifference has been equated with subjective recklessness, and requires the § 1983 plaintiff to show that the state official knows of and disregards an excessive risk to [the victim's] health or safety.'"); ***White v. Lemacks***, 183 F.3d 1253, 1257 (11th Cir. 1999) ("*Collins* makes it clear that the fact a government employee would risk losing her job if she did not submit to unsafe job conditions does not convert a voluntary employment relationship into a custodial relationship, and therefore does not entitle the employee to constitutional protection from workplace hazards, one of which can be harm caused by third parties. . . . Thus, *Collins* directly conflicts with and overrules the part of *Cornelius* [*v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989)] holding that a government employment

relationship, in and of itself, is a 'special relationship' giving rise to a constitutional duty to protect individuals from harm by third parties. As a result, the part of *Cornelius* adopting, or perpetuating, a 'special relationship' doctrine that guarantees government employees constitutional protection from unreasonable risks of harm in the workplace is no longer good law."); ***Wallace v. Adkins***, 115 F.3d 427, 429 (7th Cir. 1997) ("Unlike a prisoner, a person involuntarily committed to a mental institution, or a child placed by state authorities in a foster home, Wallace was free to walk out the door any time he wanted. This may seem to pose a harsh choice for prison guards, but the consequences of the opposite rule for prison administration generally would be even more unacceptable. . . . We therefore hold that prison guards ordered to stay at their posts are not in the kind of custodial setting required to create a special relationship for 14th Amendment substantive due process purposes."); ***Liebson v. New Mexico Corrections Dep't***, 73 F.3d 274, 276 (10th Cir. 1996) (librarian assigned to provide library services to inmates housed in maximum security unit of the New Mexico State Penitentiary was not in state's custody or held against her will; employment relationship was "completely voluntary."); ***Skinner v. City of Miami***, 62 F.3d 344, 348 n.2 (11th Cir. 1995) (in case involving hazing incident by firefighters, court determined that the "record does not support the dissent's implication that the City committed any deliberate acts to injure [plaintiff]. At most, the evidence suggests that certain fire department officials knew that hazing incidents had occurred at some points in the past. This, however, falls short of demonstrating that the City violated a substantive constitutional right."); ***Lewellen v. Metropolitan Government of Nashville***, 34 F.3d 345 (6th Cir. 1994) (workman accidentally injured on school construction project has no substantive due process claim); ***Figueroa v. United States***, 7 F.3d 1405, 1413 (9th Cir. 1993) ("While we acknowledge that a broader understanding of deprivation of liberty may have emerged later . . .in 1987 there was no clearly established constitutional right not to be placed in a position of danger by a government employer absent some sort of governmental restriction on an individual's physical freedom to act to avert potential harm."); ***Walls v. City of Detroit***, 993 F.2d 1548 (6th Cir. 1993) (Table, Text in Westlaw) ("Plaintiff's artful attempt to recast his complaint in terms distinguishable from *City of Harker Heights* is unavailing, because it misunderstands one of the central tenets of the Supreme Court's holding in that case: the Constitution does not guarantee police officers and other municipal employees a workplace free of unreasonable risks of harm."); ***Searles v. SEPTA***, 990 F.2d 789, 792 (3d Cir. 1993) (rejecting plaintiff's argument "that the Constitution imposes a duty on a municipal transit authority to provide its passengers with minimal levels of safety and security during transportation."); ***Golthy v. Alabama,*** 287 F.Supp.2d 1259, 1265, 1266 (M.D. Ala. 2003) ("The court has been pointed to no, and is not aware of any, cases which stand for the proposition that either equal protection or § 1981 impose a duty in the employment relationship to protect from threats of violence by third parties.. . . The Plaintiff in this case is not asserting. . .that the Individual Defendants violated Freddie Golthy Jr.'s rights because they allowed for the creation of a racially hostile environment which impacted the terms and conditions of his employment. Instead, they are asserting that the Individual Defendants violated Freddie Golthy Jr.'s rights because they did not prevent a racially-based assault. Under *DeShaney* and *White,* such conduct by the Individual Defendants does not violate the constitution."); ***Pahler v. City of Wilkes-Barre,*** 207 F. Supp.2d 341, 349, 351 (M.D. Pa. 2001) ("Regardless of the degree of culpability that should

be applied, the defendants contend that the 'state created danger' theory does not apply to law enforcement officers who are injured while performing duties associated with their employment. . . The court agrees. . . . Drawing on the legal principles set forth in *Collins*, *Rutherford*, and *Hartman*, it is concluded that the 'state created danger' theory, arising out of the substantive due process clause of the Fourteenth Amendment, is inapplicable to law enforcement personnel who are injured during the course of their employment."), *aff'd* , 31 F. App'x 69, 71 (3d Cir. Mar. 12, 2002) (on grounds that even if state created danger doctrine applied to police officers injured on job, conduct of defendants could not be shown to be Aconscience-shocking"); ***Cerka v. Salt Lake County***, 988 F. Supp. 1420, 1424 (D. Utah 1997) ("In the case at bar. . . defendants did not increase plaintiff's vulnerability to the jail's conditions by misrepresenting the risks in the jail. To the contrary, plaintiff and other employees were advised of the Health Department's concerns about the jail's potential sewer and air problems and possible health threats. In addition, unlike *L.W.*, plaintiff is not attempting to recover damages for injuries resulting from actions of a third party. . . . [W]e are not confronted with an intentional government act deliberately calculated to injure plaintiff. The Supreme Court has consistently held that due process is only violated by intentional acts of government officials, not by negligence or carelessness. . . . Based on the principles of *Collins, Lewellen, Daniels,* and *Uhlrig* this Court holds that plaintiff does not have a substantive life, liberty, or property due process claim. There is no constitutionally protected interest in a safe work environment under *Collins* and its progeny."), *aff'd*, 172 F.3d 878 (10th Cir. 1999); ***Rutherford v. City of Newport News***, 919 F. Supp. 885, 895 (E.D. Va. 1996) (rejecting claim "that police officials owe an affirmative duty, based on the Constitution, to ensure that police officers dispatched on dangerous operations are specially trained, fully prepared, and adequately supported in undertaking such a mission."), *aff'd*, 107 F.3d 867 (Table), (4th Cir. 1997); ***Hartman v. Bachert***, 880 F. Supp. 342, 351-52 (E.D. Pa. 1995) (state has no constitutional obligation to protect deputy sheriff from dangers inherent in occupation).

See also ***Benzman v. Whitman***, 523 F.3d 119, 127, 128 (2d Cir. 2008) ("We recently ruled that a claim similar to the Plaintiffs' did not allege the denial of a right to substantive due process. *See Lombardi v. Whitman*, 485 F.3d 73 (2d Cir.2007). The claim in *Lombardi* was brought against Whitman by emergency responders to the ground zero site in the immediate aftermath of the terrorist attack and by workers at the site in the weeks thereafter. Like the Plaintiffs here, they claimed that many of the same statements at issue here violated their right to substantive due process by assuring them that it was safe to work at the site where they were subject to the same dangers from contaminated air alleged in the pending case. We rejected the claim, primarily on the ground that, absent an allegation of intent to harm, a viable substantive due process violation could not be asserted against government officials, who, in the aftermath of an unprecedented disaster, were obliged to make operational decisions in a context where they were subject to competing considerations. . . The Plaintiffs here seek to distinguish *Lombardi* on the ground that the considerations favoring prompt appearance at ground zero by first responders and other workers in order to minimize loss of life and injury and to clear debris find no analogue in the decision of Whitman to assure area residents that it was safe to return. We agree that the considerations weighing upon Government officials in the two cases differ. While it was obviously important to

have the *Lombardi* plaintiffs at ground zero promptly even if health risks would be encountered, the balance of competing governmental interests faced in reassuring people that it was safe to return to their homes and offices was materially different from that faced in *Lombardi*. A flaw in the Plaintiffs' claim, however, is that, from the face of their complaint, it is apparent that Whitman did face a choice between competing considerations, although not the stark choice between telling a deliberate falsehood about health risks and issuing an accurate warning about them. As the Complaint alleges, quoting a report from the EPA's Office of Inspector General, the White House Council on Environmental Quality ("CEQ") ' Ainfluenced, through the collaboration process, the information that EPA communicated to the public through its early press releases when it convinced EPA to add reassuring statements and delete cautionary ones.''. . The realistic choice for Whitman was either to accept the White House guidance and reassure the public or disregard the CEQ's views in communicating with the public. A choice of that sort implicates precisely the competing governmental considerations that *Lombardi* recognized would preclude a valid claim of denial of substantive due process in the absence of an allegation that the Government official acted with intent to harm. Moreover, although the reasons to encourage the return of workers to the site promptly were undoubtedly weightier than any concern to encourage the return of residents to homes and offices, Whitman was subject to an array of competing considerations of the sort identified in *Lombardi*. . . Whether or not Whitman's resolution of such competing considerations was wise, indeed, even if her agency's overall performance was as deficient as the Plaintiffs allege, she has not engaged in conduct that 'shocks the conscience' in the sense necessary to create constitutional liability for damages to thousands of people under the substantive component of the Due Process Clause.").

But see ***Polanco v. Diaz***, 76 F.4th 918, 926-27, 929 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 2520 (2024) ("The transfer of 122 inmates from CIM to San Quentin was plainly affirmative conduct, as was the decision to house the transferred inmates in open-air cells and have them share facilities with the general San Quentin population. And the transfer placed Polanco in a much more dangerous position than he was in before. Prior to the transfer, there were no known cases of COVID-19 at San Quentin; after the transfer, there were many. That harm was foreseeable, because Defendants transferred inmates from a prison experiencing an active COVID-19 outbreak to a prison that had managed to avoid such an outbreak—and did so without properly testing or screening the transferred inmates for COVID-19, revising the plan when inmates fell ill on the buses, or quarantining the inmates upon their arrival. The allegations paint a clear picture: San Quentin had managed to keep COVID-19 out, but Defendants brought it in. . .So too was the danger 'particularized.' Affirmative state action that exposes a broad swath of the public to 'generalized dangers' cannot support a state-created-danger claim. . . But a danger can be 'particularized' even if it is directed toward a group rather than an individual. . .The danger here falls into the latter category because the transfer exposed a 'discrete and identifiable group'—prison guards and inmates at San Quentin—to the dangers of COVID-19. . . Finally, the danger to which Polanco was exposed was sufficiently severe to raise constitutional concerns. Although our precedent has not elaborated on the level of harm required to sustain a state-created-danger claim, it has been implicit in our cases that not any risk will do—the harm must be severe enough to

constitute a 'danger.'. . We do not attempt to delimit here the range of harms that count, but we are confident that exposure to COVID-19, at least in a pre-vaccine world, does. . . .We are sympathetic to the competing priorities that public officials had to navigate during the early days of the COVID-19 pandemic. But the specific tradeoff that Defendants invoke here is incompatible with the Complaint. Taking Plaintiffs' allegations as true and drawing reasonable inferences in their favor, as we must at this stage of the proceedings, properly testing and screening the inmates before the transfer would have made the transfer safer for both San Quentin employees and the transferred inmates. Quarantining the transferred inmates, too, would have benefitted all parties. And when it comes to masks and tests, the Complaint expressly alleges that there was *no* such tradeoff, asserting that masks and other personal protective equipment were "easily obtainable" and highlighting two separate occasions on which Defendants turned down labs' offers to provide COVID-19 testing at San Quentin, at least one of which offered to do so for free. On the face of the Complaint, there is no room for Defendants' version of the events. We therefore hold that Plaintiffs have sufficiently alleged that Defendants acted with deliberate indifference toward the health and safety of San Quentin employees, including Polanco, satisfying the second prong of the state-created-danger claim."); ***Hawkins v. Holloway,*** 316 F.3d 777, 787 (8th Cir. 2003) ("The Supreme Court recognized in *Collins v. City of Harker Heights* that substantive due process does not protect municipal employees from the unreasonable risk of harm in the workplace. . . But the sheriff's alleged conduct cannot be characterized as an unreasonable risk incident to one's service as an employee in a sheriff's department. Instead, the facts demonstrate that the sheriff deliberately abused his power by threatening deadly force as a means of oppressing those employed in his department, thus elevating his conduct to the arbitrary and conscience shocking behavior prohibited by substantive due process."); ***Sherwood v. Oklahoma County,*** No. 01-6194, 2002 WL 1472197, at *6 (10th Cir. July 10, 2002) (not published) ("Concern about Plaintiff's and the inmates' welfare was not only possible, but one would think obligatory, given Defendants' position of authority over Plaintiff and the undisputed information given to Defendants about the serious safety and health hazards posed by the planned painting. Hence, the facts and circumstances presented to the Court evidence the possibility that a reasonable jury could find Defendants' behavior was egregious, outrageous and recklessly indifferent to the serious consequences imposed on Plaintiff. . . . With time to make an unhurried judgment and with accurate information outlining the applicable regulations and attendant risks and dangers involved with the proposed painting operation, Defendants placed their desire to paint old vehicles . . . over the health, safety, and welfare of Plaintiff. Such arbitrary action pursued without any reasonable justification makes the Defendants' deliberate indifference to the rights, health and welfare of the Plaintiff actionable."); ***Eddy v. Virgin Islands Water and Power Authority,*** 256 F.3d 204, 212, 213 (3rd Cir. 2001) ("Unlike the defendants, we do not read this passage or anything else in *Collins* to mean that the plaintiff in that case would not have stated a substantive due process claim if she had alleged conduct on the part of the city that satisfied the demanding shocks the conscience test. Rather, we understand *Collins* to mean that the allegations in that case did not rise to the conscience-shocking level and that the Due Process Clause does not reach a public employer's ordinary breach of its duty of care relative to its employees."); ***Jensen v. City of Oxnard***, 145 F.3d 1078, 1083-84 (9th Cir. 1998) ("Employing *Collins*, Oxnard argues that Officer Jensen could

not have had any of his rights violated because he was injured while performing his duties as a police officer. We reject this argument and Oxnard's attempt to turn this into a safe workplace case. Although this case is similar to the safe workplace cases in that they both concern individuals who 'voluntarily accepted ... an offer of employment,'... this case is different in one significant way − the nature of the injury alleged.... While the safe workplace cases concern the failure of the state adequately to train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless acts of a government employee directed against another government employee."); ***Briscoe v. Potter,*** 355 F.Supp.2d 30, 44-47 (D.D.C. 2004) ("[T]aking the allegations in Plaintiffs' complaint as true, Defendants did not simply 'stand by and do nothing' once it became known that the Brentwood facility was contaminated with anthrax. Defendants are alleged to have engaged in a series of actions which intentionally misled Plaintiffs into believing the facility was safe and prevented them from acting to preserve their own safety. Giving Plaintiffs the benefit of crediting the complaint allegations and all reasonable inferences therefrom, they have sufficiently alleged that Defendants took the requisite affirmative actions to trigger liability under the State Endangerment Theory to withstand dismissal on the pleadings . . .If the facts are as alleged, the conduct of USPS managers would appear commendable for their dedication to getting the mail out but deplorable for not recognizing the potential human risk involved. Just as in *Butera* and *Phillips*, these alleged actions demonstrated a gross disregard for a dangerous situation in which 'actual deliberation [was] practical.' . . It is alleged that Defendants 'had been put on notice of the serious consequences that could result' from Plaintiffs' exposure to anthrax yet, despite such knowledge, Defendants engaged in a campaign of misinformation designed to keep the employees at work. . . . The Court therefore finds that Plaintiffs have sufficiently alleged that Defendants' conduct amounted to deliberate indifference, which violated their substantive due-process rights under the State Endangerment theory. . . . Defendants' reliance on cases such as *Collins* and *Washington* to support their proposition that 'the Astate endangerment' theory of *Butera* cannot be applied to the plaintiffs' allegations concerning a federal workplace,' . . . is misguided. . . . Unlike the plaintiffs in *Washington,*. . .Plaintiffs here are not seeking constitutional redress based on Defendants' failure to protect them from a hazard that was 'inherent' in their occupation. While it is true that Defendants did not force Plaintiffs to become postal workers, potential exposure to anthrax is not a danger that one would reasonably anticipate when accepting employment at a post office. . . Although the *Washington* court severely limited the extent to which government employers can be held constitutionally liable for injuries sustained by their employees, the Supreme Court's subsequent decision in *Collins* flatly rejected the notion that a government employee can never assert a substantive due-process claim against the government. . . Thus, the Court finds that the relevant case law does not preclude Plaintiffs' substantive due-process claims under the State-Endangerment theory.").

In ***Uhlrig v. Harder***, 64 F.3d 567 (10th Cir.1995), a therapist at a state mental hospital was killed by a criminally insane patient who, because of budgetary constraints, was housed with the general population. The court held that to state a claim for damages based on a state-created danger in the workplace:

> Plaintiff must demonstrate that (1) Uhlrig was a member of a limited and specifically definable group; (2) Defendants' conduct put Uhlrig and the other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.

64 F.3d at 574. *See also* ***Estate of Johnson v. Weber***, 785 F.3d 267, 273 (8th Cir. 2015) ("The murder perpetrated on Ronald Johnson shocks the conscience of this Court; however, the record does not demonstrate it was deliberate indifference to not consider Robert and Berget extremely dangerous before the murder of Ronald Johnson. We need not decide whether allowing an extremely dangerous inmate to reside in general population with the opportunity to murder shocks the conscience, because the histories of Robert and Berget do not support deliberate indifference in failing to consider them highly dangerous. Even with vague notice of a planned escape attempt, the defendants were not deliberately indifferent in failing to place Robert and Berget in maximum security. No prior escape attempts included violence and none had been successful after 1987."); ***Martinez v. Uphoff,*** 265 F.3d 1130 (10th Cir. 2001) (rejecting state-created danger theory in case where prison guard was killed by escaping inmates); ***Poe v. Wyandotte County,*** No. 99-2273-JWL, 2002 WL 57257, at *8 (D.Kan. Jan. 9, 2002) (not reported) (Reviewing Tenth Circuit cases involving employees in prison context and concluding A*Liebson, Maine* and *Martinez* illustrate that generalized claims pertaining to unsatisfactory work conditions will not suffice for a danger creation theory claim because they do not meet the shock the conscience standard.")

See also ***L.W. v. Grubbs*** **(L.W. II)**, 92 F.3d 894, 900 (9th Cir. 1996):

> We conclude that in order to establish Section 1983 liability in an action against a state official for an injury to a prison employee caused by an inmate, the plaintiff must show that the state official participated in creating a dangerous condition, and acted with deliberate indifference to the known or obvious danger in subjecting the plaintiff to it. Only if the state official was deliberately indifferent does the analysis then proceed further to decide whether the conduct amounts to a constitutional violation. We have not added a requirement that the conscience of the federal judiciary be shocked by deliberate indifference, because the use of such subjective epithets as "gross" "reckless" and "shocking" sheds more heat than light on the thought processes courts must undertake in cases of this kind. Deliberate indifference to a known, or so obvious as to imply knowledge of, danger, by a supervisor who participated in creating the danger, is enough. Less is not enough.

b. state-created-danger cases

In ***Archie v. City of Racine***, 847 F.2d 1211 (7th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989), a pre-***DeShaney*** decision, the Seventh Circuit concluded that there is no

constitutional duty under the due process clause to provide effective rescue services. 847 F.2d at 1220. The court expressly rejected the concept of a constitutional duty flowing from some sort of "special relationship" outside of the custodial context, and carefully set out the contexts in which the state might be found to have a duty to protect under the Due Process Clause.

"When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk. When the state cuts off sources of private aid, it must provide replacement protection." *Id*. at 1223, distinguishing ***White v. Rochford***, 592 F.2d 381, 382-84 (7th Cir. 1979) (police had affirmative duty to protect children left abandoned in car on busy freeway after police arrested children's uncle).

See ***Bowers v. DeVito***, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons and then fails to protect him... it is as much an active tortfeasor as if it had thrown him into a snake pit.").

Compare ***Murguia v. Langdon***, 73 F.4th 1103, 1104, 1109-18 (9th Cir. 2023) (Bumatay, J., joined by Callahan, Ikuta, and R. Nelson, JJ., dissenting from denial of reh'g en banc), *cert. denied sub nom County of Tulare v. Murguia*, No. 23-270 (U.S Jan. 8, 2024) ("[T]he state-created danger exception finds no support in the text of the Constitution, the historical understanding of the 'due process of law,' or even Supreme Court precedent. And as the Court recently emphasized, we should be reluctant to recognize rights not mentioned in the Constitution to 'guard against the natural human tendency to confuse what [the Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy.' *Dobbs v. Jackson Women's Health Org.*, —– U.S. ——–, 142 S. Ct. 2228, 2247, 213 L.Ed.2d 545 (2022). As such, at least one circuit has questioned the legitimacy of this recent-vintage right. *See Fisher v. Moore*, 62 F.4th 912, 913 (5th Cir. 2023) (declining to adopt state-created danger doctrine because of the Supreme Court's 'forceful pronouncements signaling unease with implied rights not deeply rooted in our Nation's history and tradition'). And given its opaque origins, the doctrine has also caused a split among the other circuits about how to apply it. . . . Whatever the wisdom of the state-created danger doctrine, three related concerns arise from its origin and application. First, we should be wary of recognizing a new constitutional right from such an uncertain source. Second, given the lack of a textual and historical mooring, we should be careful before extending it. From its beginnings in *DeShaney* to *Murguia* today, the doctrine has evolved along a course of repeated expansion—so much so that the Constitution now is the 'font of tort law' the Court has told us to avoid. . . Third, the circuit courts have varied wildly on how to apply the doctrine. With just a couple of lines from *DeShaney* to go on, circuit courts have—predictably—come up with diverging tests for determining when the exception applies. [Dissent sets out tests applied by each circuit] Of course, these varying tests for the same exception are no surprise when you consider the legal foundation on which they rest. A two-sentence aside in a single opinion is not a lot to go on. But like Dr. Frankenstein, courts have cobbled together bits and pieces of standards from other contexts to try to breathe new life into substantive due process after *DeShaney*. . . And like his monster, the state-created danger exception roams menacingly among our circuit courts and is often difficult to

comprehend. We should have done our part to contain this creation. . . . To summarize: plaintiffs can't just point to *any* affirmative act to state a due process claim; they must point to 'the State's affirmative act of restraining the individual's freedom to act on his own behalf to 'trigger[ ] the protections of the Due Process Clause..'. . Only then can we say that there was some 'arbitrary exercise of the powers of government.'. . . Following this limitation would keep federal courts from turning constitutional law into tort law—something the Supreme Court has made clear that we should not do. . .With the proper understanding of the state-created danger exception in mind, we may now turn back to Murguia's claims. While Murguia experienced unspeakable tragedy, under the proper due process analysis, his state-created danger claims against Sergeant Garcia, Torres, Deputy Lewis, and Sergeant Cerda should have been dismissed. . . . We should have seized this opportunity to correct our longstanding errors in applying the state-created danger doctrine. We could have put ourselves back on track with Supreme Court precedent and our Constitution's text. And the solution is a narrow and straightforward one—holding that only affirmative acts that cause the 'deprivation of liberty' may suffice for a state-created danger claim. It is regrettable that our court has declined to take this textual approach.") *with* ***Fisher v. Moore***, 73 F.4th 367, 375 (5th Cir. 2023) (Wiener, J., concurring), *cert. denied*, 144 S. Ct. 569 (2024) ("I concur in the well-written and well-reasoned opinion written by my colleague, Judge Willett, joined by Chief Judge Richman. Although we are bound by this court's precedent, I disagree with its refusal to rehear this case en banc and join the ten other circuits that have now adopted the state-created danger cause of action under 42 U.S.C. § 1983, thereby permitting individuals to sue state actors for damages resulting from their acts or failures to act. I am convinced that it is well past time for this circuit to be dragged screaming into the 21st century by joining all of the other circuits that have now recognized the state-created danger cause of action. It is well past time for this circuit to be dragged screaming into the 21st century by joining all those other circuits that have now unanimously recognized the state-created danger cause of action. I acknowledge that we could only do so by taking this case en banc, but we have yet again failed to do so. The extreme and uncontested facts of this case presented an excellent opportunity for us to join those other circuits. As a senior judge, I could and did participate on the three-judge panel that heard and decided this case. And as a senior judge, I could have participated as a voting member of the en banc court if this case had been reheard en banc. But, as a senior judge, I could not call for an en banc poll or vote in the one that was called for by an active judge of this court. The horrific facts of this case, as reported by Judge Willett in his opinion for this panel, presented an ideal vehicle for this circuit's consideration of joining the ten other circuits that have unanimously recognized the state-created danger cause of action. If we had reheard this case en banc, the parties would have had the opportunity to brief and argue whether the facts alleged in the instant complaint state a plausible claim against school officials for student-on-student violence, and to distinguish the adverse authorities. I saw this case as the perfect vehicle for our circuit to rehear this case en banc and join the other ten circuits that have now recognized the state-created danger cause of action in § 1983 claims against state actors. This is why I respectfully concur.) *and* ***Fisher v. Moore***, 73 F.4th 367, 375-76 (5th Cir. 2023) (Higginson, Douglas, Stewart, Elrod, Haynes, Graves, JJ., dissenting from denial of rehearing en banc), *cert. denied*, 144 S. Ct. 569 (2024) ("This case yet again squarely presents the question of whether a plaintiff may state a claim under 42 U.S.C. §

1983 where a state actor 'created or knew of a dangerous situation and affirmatively placed the plaintiff in that situation.'. . For over a decade, our court has refused to answer. . . To date, ten other circuits have recognized this 'state-created danger doctrine.'. . Our indecision is a disservice to injured plaintiffs who are forced to litigate in endless uncertainty about their federal rights. And if this circuit is inclined to disagree with all others, then our delay is blocking percolation, which 'allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule.'. . Litigants should continue asking this court to decide the state-created danger issue, confident that we will act as a 'responsible agent[ ] in the process of development of national law.'. . Indeed, a future panel could assume this responsibility. . . Because our refusal to take on the mantle here only serves to perpetuate uncertainty, we respectfully dissent from the denial of rehearing en banc.").

The state-created-danger basis for finding a duty to protect on the part of the state appears to remain intact after ***Deshaney***. *See, e.g.,* ***Murguia v. Langdon***, 61 F.4th 1096, 1108-17 (9th Cir. 2023), *pet. for reh'g and reh'g en banc denied,* 73 F.4th 1103 (9th Cir. 2023), *cert. denied sub nom County of Tulare v. Murguia,* No. 23-270 (U.S Jan. 8, 2024) ("Neither *Johnson* nor *Preschooler II* held that the failure to comply with a legally required duty, without more, can give rise to a substantive due process claim. Indeed, such a conclusion is foreclosed by *DeShaney*. In keeping with our well-established case law, we make clear that the only two exceptions to the general rule against failure-to-act liability for § 1983 claims presently recognized by this court are the special-relationship exception and the state-created danger exception. . . .The case law demonstrates that 'custody' for the purposes of the special-relationship exception is a restriction on the plaintiff's liberty that limits the ability of the plaintiff (or the plaintiff's parents) to meet the plaintiff's basic needs (e.g., incarceration, institutionalization, foster care). . . Here, Individual Defendants never formally took the twins into custody; the twins remained with Langdon at all times, and the twins were not institutionalized or placed in foster care. . . The special-relationship exception therefore does not apply in this case. . . . This court and other circuits have applied the state-created danger exception in situations where an officer abandoned the plaintiff in a dangerous situation, separated the plaintiff from a third-party who may have offered assistance, or prevented other individuals from rendering assistance to the plaintiff. . . .Under this case law, if Lewis and Cerda had left the ten-month-old twins alone with Langdon in her dangerous and unstable condition, such conduct would almost certainly have constituted affirmative action enhancing a risk of physical harm to the twins. . . . Given that Lewis and Cerda merely replaced one competent adult—Jose—with another competent adult—Rosa, we are not convinced that 'the officers left the [twins] in a situation that was more dangerous than the one in which they found [them].'. .However, Plaintiffs should have the opportunity to amend their complaint because we cannot say amendment would be futile given their vague allegations and because the district court applied the incorrect 'custody' standard. . . .Plaintiffs have adequately stated their § 1983 claims against TPD Sergeant Garcia under the state-created danger exception. Plaintiffs argue that Garcia increased the risk of physical harm to the twins by arranging a room for them at a motel, transporting Langdon and the twins from Lighthouse to the motel, and leaving them there. We agree. When Garcia left Langdon and the twins at the motel, he removed them from the supervision of the

Lighthouse staff and rendered the twins more vulnerable to physical injury by Langdon as a result of their isolation with her. . . . We conclude that the complaint adequately alleges Garcia knew Langdon's mental health crisis posed a serious risk of physical harm to the twins but nonetheless disregarded this risk and left the twins in a situation that was more dangerous than how he found them. . . . Given the allegations that Torres knew about Langdon's history of abuse—including abuse of her own son—we conclude that the complaint alleges Torres was aware of the obvious risk of harm Langdon presented to the twins. . . . Making all reasonable inferences in favor of Plaintiffs, the FAC alleges that Torres knew about Langdon's history of violence and mental illness, including multiple specific instances of physical violence against her own family members, including her son. A reasonable jury could find that Torres was aware of the risk that Langdon would physically harm the twins and nevertheless lied to Garcia about Langdon's background, and in doing so ignored the consequences of her actions. Our conclusion is bolstered by the young age and utter defenselessness of the ten-month-old twins."); ***Mears v. Connolly***, 24 F.4th 880, 884-86 (3d Cir. 2022) ("The District Court found that Nurse Oglesby had not affirmatively acted to create a danger and that June had not suffered 'foreseeable and fairly direct' harm as a result. . . . On both points, it erred. By leaving the room during June's visit, Nurse Oglesby may have facilitated Brenden's assault. . . . Nurse Oglesby was the head of Brenden's nursing team. While under her care, his mental health had 'deteriorated significantly,' and he had 'bec[o]me progressively more psychotic.'. . Just three days before June's visit, he was 'acting bizarrely' and attacked another patient. . . These facts would have put her on notice of the serious threat Brenden posed to his mother. Indeed, she repeatedly complained to June about Brenden's behavior.The District Court found otherwise because Brenden had not attacked *June* before. But that focus is too narrow. . . . Nurse Oglesby's behavior resembles that of police officers who stopped a drunk couple, separated them, and then let the wife wander off alone. *Kneipp v. Tedder*, 95 F.3d 1199, 1209 (3d Cir. 1996). It was a cold January night, just above freezing. . . The wife fell, was knocked out, and froze. . . The police, we held, had acted affirmatively and 'made [her] more vulnerable to harm.'. . Nurse Oglesby's conduct had a similar effect on June. Nurse Oglesby assumed care but then withdrew it, leaving June alone in a more dangerous position. . .Our holding is narrow. If June had knowingly agreed to an unsupervised visit, the result would likely be different. But on the facts alleged, Nurse Oglesby's departure deprived her of the freedom to avoid an unsupervised visit or to take other precautions. June has thus pleaded an affirmative act that put her in danger. . .June does not plead that Dr. Young took any affirmative act; his assurances do not count. But Nurse Oglesby may be liable for putting June in danger by withdrawing her supervision. So we will reverse in part and remand to let the District Court finish analyzing the other elements of June's state-created-danger claim against Nurse Oglesby."); ***Irish v. Fowler (Irish II)***, 979 F.3d 65, 67, 73-76 (1st Cir. 2020), *cert. denied,* 142 S. Ct. 74 (2021) ("In this opinion, we hold on these facts that a viable substantive due process state-created danger claim has been presented against two Maine State Police ("MSP") officers, and that it was error to grant the officers qualified immunity. Under the state-created danger substantive due process doctrine, officers may be held liable for failing to protect plaintiffs from danger created or enhanced by their affirmative acts. In doing so, we for the first time join nine other circuits in holding such a theory of substantive due process liability is viable. . . . The circuits that recognize the doctrine uniformly require that the defendant

affirmatively acted to create or exacerbate a danger to a specific individual or class of people. . . Each circuit requires that the defendant's acts be highly culpable and go beyond mere negligence. . . The plaintiff also must show a causal connection between the defendant's acts and the harm. . . This circuit has repeatedly outlined the core elements of the state-created danger doctrine as they have been articulated in other circuits. This court has stated that in order to be liable under the state-created danger doctrine, the defendant must 'affirmatively act[ ] to increase the threat to an individual of third-party private harm.'. . A government official must actually have created or escalated the danger to the plaintiff and the plaintiff cannot have 'voluntarily assume[d] those risks.'. . The danger cannot be 'to the general public,' it must be 'specific' in some 'meaningful sense' to the plaintiff. . . The official's acts must cause the plaintiff's injury. . . The defendant's actions must 'shock the conscience,' and where a state actor had the 'opportunity to reflect and make reasoned and rational decisions, deliberately indifferent behavior may suffice to "shock the conscience."'. . To show deliberate indifference, the plaintiff 'must, at a bare minimum, demonstrate that [the defendant] actually knew of a substantial risk of serious harm ... and disregarded that risk.'. . In evaluating whether the defendant's actions shocked the conscience, we also consider whether the defendants violated state law or proper police procedures and training. . . .We now state the necessary components for the viability of such a claim. In order to make out a state-created danger claim in the First Circuit, the plaintiff must establish:

(1) that a state actor or state actors affirmatively acted to create or enhance a danger to the plaintiff;

(2) that the act or acts created or enhanced a danger specific to the plaintiff and distinct from the danger to the general public;

(3) that the act or acts caused the plaintiff's harm; and

(4) that the state actor's conduct, when viewed in total, shocks the conscience.

(i) Where officials have the opportunity to make unhurried judgments, deliberate indifference may shock the conscience, particularly where the state official performs multiple acts of indifference to a rising risk of acute and severe danger. To show deliberate indifference, the plaintiff must, at a bare minimum, demonstrate that the defendant actually knew of a substantial risk of serious harm and disregarded that risk.

(ii) Where state actors must act in a matter of seconds or minutes, a higher level of culpability is required. . . . The defendants next argue that the officers' violations of state law and MSP policy cannot serve as the basis of a state-created danger claim. That is not the plaintiffs' argument. The plaintiffs' argument is that these violations are, at the very least, relevant to determining the conscience-shocking nature of the defendants' conduct and the qualified immunity inquiry. The plaintiffs' position is well based on our prior opinions of which the defendant officers had notice."); ***Lipman v. Budish***, 974 F.3d 726, 742, 746-47 (6th Cir. 2020) ("In this case, Plaintiffs say that their claims fit within both of *DeShaney*'s exceptions, and so the county and its employees should be held responsible for the events leading to Ta'Naejah's death. First, they argue that the county had custody over Ta'Naejah, both during her hospitalization and in the month immediately before she died. Second, even if the county did not have custody over Ta'Naejah, the caseworkers' decision to repeatedly interview her in the presence of Crump and Owens significantly increased her risk of abuse, and so their claims can proceed under the state-created danger doctrine. Plaintiffs arguments about the custody exception fail. Even assuming that Ta'Naejah was ever in state

custody during the period at issue in the complaint, her injuries all occurred outside of that custody when she was returned to Crump and Owens, and under *DeShaney* itself, the act of returning a child to her earlier situation of parental custody cannot give rise to constitutional liability. But Plaintiffs' state-created danger argument is better supported by our case law. Drawing all reasonable inferences in their favor, the decision to repeatedly interview Ta'Naejah in front of her abusers was an affirmative act that increased her risk of private violence, and so can support a claim under the Due Process Clause. Because multiple caseworkers all interviewed Ta'Naejah in the presence of her abusers, and because the right to avoid state-created danger is clearly established in this circuit, Plaintiffs have successfully pleaded a *Monell* claim against the county based on a custom of constitutional violations, and the individual caseworkers are not entitled to qualified immunity at the current stage of this case. . . . That interviewing Ta'Naejah in front of her alleged abusers and asking about the source of her injuries increased her risk of further abuse is . . . a reasonable inference. Not only is this plausible (or at least not implausible) from a common-sense perspective, . . . but this belief is reflected in the state's and county's written policies prohibiting such interviews wherever possible[.] . . Defendants do not argue that the risk to Ta'Naejah was not increased by their actions. Instead, they say that the requirement to privately interview Ta'Naejah cannot give rise to a constitutional duty, and even if it could, the state-created danger exception does not extend to cases where the state only created a motive for private violence, as opposed to a heightened means for violence. For the reasons that follow, both of these arguments fail. First, the fact that a duty exists under state law or regulations does not mean it cannot simultaneously exist under the Constitution. At a fundamental level, the right at issue here is the right articulated in *Youngberg* and before: the right to personal security, perhaps the pinnacle of an individual's interests in life and liberty. . . Such a right is separate and apart from any state regulation or policy, and the adoption of such a policy—reflecting the importance of these interests—cannot serve to demote them from constitutional status. . . . At bottom, the type of state-created danger alleged by Plaintiffs is highly analogous to the danger in *Kallstrom* and *Nelson*: the state took some action that increased the chances that a private actor would cause the plaintiff harm. This is enough to show an affirmative act under the doctrine. To be sure, Defendants may ultimately prevail on this issue at summary judgment or at trial, such as by showing that there was no feasible alternative to interviewing Ta'Naejah in Crump's and Owens's presence, or by showing that her risk was not increased when compared to not interviewing Ta'Naejah at all. But taking the allegations in the complaint as true, and drawing all reasonable inferences in Plaintiffs' favor, compels the conclusion that Plaintiffs have adequately alleged a claim based on state-created danger, and the district court erred in finding otherwise."); ***Hernandez v. City of San Jose***, 897 F.3d 1125, 1134, 1138-39 (9th Cir. 2018) ("Just as in *Wood*, *Penilla*, *Munger*, and *Kennedy*, on the facts alleged, the Officers' affirmative acts created a danger the Rally Attendees otherwise would not have faced. Being attacked by anti-Trump protesters was only a possibility when the Attendees arrived at the Rally. The Officers greatly increased that risk of violence when they shepherded and directed the Attendees towards the unruly mob waiting outside the Convention Center. . . . Here, the Attendees allege the Officers shepherded them into a violent crowd of protesters and actively prevented them from reaching safety. The Officers continued to implement this plan even while witnessing the violence firsthand, and even though they knew the mob had

attacked Trump supporters at the Convention Center earlier that evening, and that similar, violent encounters had occurred in other cities. Viewed in the light most favorable to the Attendees, these allegations establish 'with obvious clarity' that the Officers increased the danger to the Attendees and acted with deliberate indifference to that danger, pursuant to the state-created danger doctrine. . . We therefore hold 'that the operative complaint alleges facts that allow us "to draw the reasonable inference that the [Officers are] liable for the misconduct alleged,"'. . and that the district court properly denied the Officers qualified immunity at this stage of the proceedings.); ***Matthews v. Bergdorf***, 889 F.3d 1136, 1152-53 (10th Cir. 2018) ("Plaintiffs state a cause of action against caseworkers Feather and Schraad-Dahn under the state-created danger exception. This leaves us with the question of whether the law surrounding the state-created danger exception as applied to the alleged facts was clearly established at the time of the two caseworkers' purported malfeasance. To show the law was clearly established, 'the plaintiff does not have to show the specific action at issue had been held unlawful;' rather the alleged unlawful 'conduct must have been apparent in light of preexisting law.'. . In 2001, we held a state caseworker could be held liable under the state-created danger exception for instructing a mother to stop making abuse allegations against the children's father. . . We reasoned that by actively discouraging the mother from reporting suspected wrongdoing, the caseworker increased the children's vulnerability to their father's abuse. . .We see little distinction between the affirmative act of instructing an individual to cease reporting evidence of abuse as occurred in *Currier* and the affirmative act of warning an individual so that the latter might cover up evidence of abuse as alleged here. . . Both acts effectively impede access to protective services, and perhaps additional sources of assistance, otherwise available to the victims. . . After we decided *Currier* in 2001, the law was well established in the Tenth Circuit such that a reasonable caseworker cognizant of the law would have understood the following: A caseworker's affirmative actions allegedly designed to shield and protect the Matthews in light of repeated child abuse and neglect referrals could give rise to constitutional liability under the state-created danger exception. Thus, the district court properly denied caseworker Feather's and Schraad-Dahn's defense of qualified immunity on this particular claim. For the reasons stated, however, the district court erred in denying the remaining named caseworkers qualified immunity on Plaintiffs' state-created danger claims. . . . Today we have pronounced no new law; we have done nothing more than apply binding precedent. To allow Plaintiff's complaint to proceed on claims that have no basis in constitutional jurisprudence would thwart the aims of qualified immunity and impose excessive discovery costs on Defendants absent legal justification."); ***Nelson v. City of Madison Heights***, 845 F.3d 695, 701-03 (6th Cir. 2017) ("Officer Wolowiec suggests that it was Hilliard's decision to continue to engage in prostitution that led to her demise. However, a reasonable jury could find that Hilliard's prostitution was merely the means by which her murderers chose to lure her, not an act that led to her death. Further, a reasonable jury could find that Officer Wolowiec's act of disclosing Hillard's name to the drug dealer's companion 'substantially increas[ed] the likelihood that a private actor would deprive' her of her liberty interest in personal security. . . The district court in this case relied on *Kallstrom* to determine that summary judgment was inappropriate. In *Kallstrom*, the city released private information from undercover police officers' files, including, *inter alia*, addresses, family members' information, and social security numbers, to a criminal defense attorney who then shared

it with his clients who were violent gang members. . . This court held that 'while the state generally does not shoulder an affirmative duty to protect its citizens from private acts of violence, it may not cause or greatly increase the risk of harm to its citizens without due process of law through its own affirmative acts.'. .Additionally, we stated: '[l]iability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence.'. . 'However, because many state activities have the potential to increase an individual's risk of harm, we require plaintiffs alleging a constitutional tort under § 1983 to show "special danger" in the absence of a special relationship between the state and either the victim or the private tortfeaser.'. . 'The victim faces "special danger" where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large.'. . *"The state must have known or clearly should have known that its actions specifically endangered an individual."*. . (emphasis added). In *Kallstrom*, this court held that the state's actions of disclosing the undercover officers' information placed them and their family members in 'special danger' by substantially increasing the likelihood that a private actor would deprive them of their liberty interest in personal security. . . We reasoned that, '[a]nonymity is essential to the safety of undercover officers' investigating gang activity, 'especially where the gang has demonstrated a propensity for violence.'. . Similarly, Officer Wolowiec's act of disclosing Hilliard's identity to the very individual the state was supposed to protect that identity from placed Hilliard in special danger by increasing the likelihood that the private actor would deprive her of her liberty interest in personal security. . . .Like the district court, we must view the evidence in the light most favorable to Nelson. Doing so requires the conclusion that Officer Wolowiec acted with deliberate indifference when he disclosed Hilliard's identity. The evidence shows that neither he nor Hilliard knew much about Raqib other than he was a drug dealer. The evidence also reflects that Officer Wolowiec believed that Raqib could be dangerous because he removed Hilliard from the room in case Raqib showed up. The evidence shows no necessity for Officer Wolowiec to disclose Hilliard's identity during the thirty-minute window between the traffic stop and the disclosure of Hilliard's identity to Clark. Thus, a reasonable jury could find that Officer Wolowiec acted with deliberate indifference when he told Raqib's companion that Hilliard set up Raqib. Accordingly, the district court properly denied Officer Wolowiec's summary judgment motion because a reasonable jury could find that, under the state created danger theory of liability, he engaged in affirmative acts that increased Hilliard's risk of exposure to private acts of violence, which deprived Hilliard of her clearly established Due Process right to personal security and bodily integrity."); ***L.R. v. School District of Philadelphia***, 836 F.3d 235, 244-47 (3d Cir. 2016) ("The state is responsible for the safety of very young children unable to care for themselves. Indeed, it is a responsibility the state undertakes when young children are left in its care. When Littlejohn surrendered that responsibility by releasing Jane to an unidentified adult, thereby terminating her access to the school's care, he affirmatively misused his authority just as culpably as the officers in *Kneipp* misused theirs. . . .The Fifth Circuit [in *Doe ex rel Magee v. Covington County School District*] concluded that, even assuming it recognized a state-created danger theory (to date it has not officially adopted this doctrine), the allegations failed because the complaint did 'not allege that the school knew about an immediate danger to [the student's] safety.'. . By contrast, we are comfortable concluding that Littlejohn's

conduct in releasing Jane to an adult who failed to identify herself demonstrated a 'conscious disregard of a substantial risk of serious harm.'"); ***King ex rel. King v. East St. Louis School Dist. 189***, 496 F.3d 812, 817, 818 (7th Cir. 2007) ("A fair reading of the decisions of this circuit and those of our sister circuits governing the state-created danger doctrine reveal the following three principles that must govern our analysis. . . First, in order for the Due Process Clause to impose upon a state the duty to protect its citizens, the state, by its affirmative acts, must create or increase a danger faced by an individual. . . . Second, the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the individual. . . Third, because the right to protection against state-created dangers is derived from the substantive component of the Due Process Clause, the state's failure to protect the individual must shock the conscience."); ***Kennedy v. City of Ridgefield,*** 439 F.3d 1055, 1065 (9th Cir. 2006) ("Viewing the facts in the light most favorable to Kennedy, we find that, if accepted as true, they are sufficient to establish that Shields acted deliberately and indifferently to the danger he was creating. Kennedy warned Shields repeatedly about Burns and requested that Shields notify her first so she could protect her family. With knowledge of Burns's propensity for violence and of Kennedy's fear, and despite his promise to Kennedy to the contrary, Shields nevertheless notified Burns first. . . . Then, after notifying Burns, Shields allegedly reassured the visibly frightened Kennedy of increased security which was either never provided or plainly ineffective. Given the danger created by Shields that the Kennedys faced, we find such alleged, capricious behavior sufficient evidence of deliberate indifference."), *reh'g en banc denied*, 440 F.3d 1091 (9th Cir. 2006); ***Pena v. DePrisco***, 432 F.3d 98, 108-12 (2d Cir. 2005) ("We have been joined by a majority of our sister circuits in recognizing that a state created danger can be the basis of a substantive due process violation, . . . but in various courts the term 'state created danger' can refer to a wide range of disparate fact patterns. For example, courts have used the 'state created danger' label to describe the state's duty to protect a person from private violence when the state itself has placed that person at risk. . . . This sort of state-created-danger case seems to rely on the existence of a special relationship between the state and the victim. Some courts have, indeed, incorporated the 'special relationship' criterion as a prerequisite to liability. . . We, by contrast, treat special relationships and state created dangers as separate and distinct theories of liability. . . . Our distinction between these categories of cases suggests that 'special relationship' liability arises from the relationship between the state and a particular victim, whereas 'state created danger' liability arises from the relationship between the state and the private assailant. To paraphrase *Bowers*, . . . the police officers in *Dwares* did not bring the victim to the snakes; they let loose the snakes upon the victim. In applying our 'state created danger' principle, we have sought to tread a fine line between conduct that is 'passive' as in *DeShaney* and that which is 'affirmative' as in *Dwares*. . . . It is clear from the cases, we think, that to the extent that the plaintiffs allege merely that the individual defendants failed to intercede on the day of the accident, their complaints do not involve sufficient affirmative acts to violate substantive due process rights. Similarly, to the extent that the plaintiffs allege that Grey's supervisors 'stood by and did nothing' to punish Grey's previous misconduct, we think those allegations are also inadequate to state a substantive due process claim. . . A failure to interfere when misconduct takes place, and no more, is not sufficient to amount to a state created danger. . . . As the plaintiffs' counsel recognized at oral argument before us, the key question is

whether the individual defendants told, or otherwise communicated to, Officer Grey that he could drink excessively and drive while intoxicated without fear of punishment. The plaintiffs argue that a reasonable factfinder could infer that the defendants' behavior constituted an implicit prior assurance to Grey that he could drink and drive with impunity. We agree that to the extent that fellow police officers and some supervisors participated in or condoned Grey's behavior, and even − in Healy's case − invited Grey to drive after drinking heavily, it could be inferred by a reasonable juror that those defendants, by their actions, implicitly but affirmatively condoned Grey's behavior and indicated to Grey that he would not be disciplined for his conduct. . . . We conclude that when, as the plaintiffs allege, state officials communicate to a private person that he or she will not be arrested, punished, or otherwise interfered with while engaging in misconduct that is likely to endanger the life, liberty or property of others, those officials can be held liable under section 1983 for injury caused by the misconduct under *Dwares*. This is so even though none of the defendants are alleged to have communicated the approval explicitly. . . We emphasize that the type of claim we understand the plaintiffs to assert is based on more than a failure to prevent misbehavior and to reprimand or punish the miscreants. The plaintiffs assert that prior assurances of impunity were actually, albeit implicitly, communicated."); ***Caldwell v. City of Louisville,*** No. 03-5342, 2004 WL 2829026, at *8, *9 (6th Cir. Dec. 9, 2004) (not published) ("Under the circumstances which have been placed upon the record, it is our judgment that Christy Caldwell can succeed in establishing that Lett was deliberately indifferent to the risks and dangers that her daughter faced during the mid-months of 2002. The record establishes that the County Attorney called Lett immediately after the State court reissued a warrant for Mills' arrest on September 13th. Her refusal to act upon the warrant and the City's existing internal law enforcement practices and policies resulted in a six day delay in its execution. In refusing to act upon the arrest warrant, Lett demonstrated neither mere negligence nor an actual intent to bring about a specific harm upon Rebecca. Thus, her culpability would appear to fall within the 'middle range,' and require this Court to determine if she was deliberately indifferent under the circumstances. Clearly, Lett had several days in which to fully consider and reflect upon her decision not to serve the warrant on Mills. The evidence also indicates that she was aware of facts from which a reasonable inference could be drawn that Rebecca faced a substantial risk of serious harm. The evidence also suggests that Lett's failure or refusal to process the warrant in a timely manner stemmed from an animus toward Rebecca who had (1) refused to provide the LPD authorities with any semblance of cooperation in dealing with a potentially dangerous situation, and (2) filed allegations of police misconduct against her. In the face of a real danger about which Lett knew or should have known, her adamant refusal to serve the warrant or have it served upon Mills by another law enforcement official clearly equates to the kind of deliberate indifference which is forbidden by the Constitution. Having found the existence of a 'State-created danger' and of deliberate indifference by a State actor, we conclude that Christy Caldwell has asserted a viable claim for a violation of her daughter's constitutional right to substantive due process."); ***Kneipp v. Tedder***, 95 F.3d 1199, 1208 (3d Cir. 1996) ("In the 1995 case of *Mark v. Borough of Hatboro*, . . .we suggested a test for applying the state-created danger theory. We found that cases predicating constitutional liability on a state-created danger theory have four common elements: 1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the

plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. 51 F.3d at 1152."); ***Bank of Illinois v. Over***, 65 F.3d 76, 78 (7th Cir. 1995) ("If the defendants' employees knowingly placed Heather in a position of danger, they would not be shielded from liability by the decision in *DeShaney*. All that *DeShaney* and the cases following it . . . hold is that the Constitution does not impose a legally enforceable duty on state officers to protect people from private violence. If the officers are complicit in the violence, they are liable."); ***Losinski v. County of Trempealeau***, 946 F.2d 544 (7th Cir. 1991) ("The essence of the Court's exception in *DeShaney* is state creation of dangers faced or involuntary subjection to known risks."); ***Ayala v. Mohave County, Ariz***., No. CV-07-8105-PHX-NVW, 2008 WL 4849963, at *4, *5, *7 (D. Ariz. Nov. 7, 2008) ("To conclude that Shamblin's danger was of his own making would require one to ignore several of the most salient facts in this case. Shamblin did not choose to walk along the highway in complete darkness; he repeatedly pleaded with the Officers for a ride. Nor was his walking on the pavement a volitional act; it was dark, he was heavily drunk, and it was a long way to town. A reasonable inference is that conditions in the dirt on the side of the road were so unfavorable or difficult to discern in the dark that he was naturally impelled to the surer footing of the roadway. Construing the facts and drawing all reasonable inferences in favor of Ayala, a reasonable juror could conclude that the Officers' actions, not Shamblin's independent choices, exposed him to a danger that he otherwise would not have faced. . . . The evidence can support a jury verdict that the Officers were deliberately indifferent to the known or obvious consequences of their actions − a collision that killed Shamblin. . . . No reasonable officer would believe that the law permits the abandonment of a person known to have been drinking along the shoulder of an extremely dark highway, miles from the next safe haven. The Officers are not immune from this suit."); ***Was v. Young***, 796 F. Supp. 1041, 1048 (E.D. Mich. 1992) ("Although *DeShaney* made clear that there is no general special relationship doctrine, . . . some lower federal courts have held the state accountable for a victim's injuries even though the victim was not in state custody, where the state has created a danger to the victim."); ***Matican v. City of New York***, 424 F.Supp.2d 497, 505, 506 (E.D.N.Y. 2006) ("In *Pena*, the Second Circuit noted in *dicta* that '[o]ur distinction between [the two exceptions to *DeShaney*] suggests that "special relationship" liability arises from the relationship between the state and a particular victim, whereas Astate created danger' liability arises from the relationship between the state and the private assailant,' 432 F.3d at 109; here, there is no evidence of a relationship between the officers and Delvalle. The Court, however, takes this aspect of *Pena* simply as a passing recognition that many of the circuit's prior state-created danger cases involved a connection between the governmental actor and the private assailant. The Court does not read *Pena* as establishing such a relationship as a *sine qua non* of state-created danger liability; governmental actors may put an individual in harm's way even in the absence of a connection to a private assailant, and the present case is an example. . . Thus, that there is no evidence of a relationship between the defendants and Delvalle is of no consequence. Another aspect of *Pena* provides more significant guidance. *Pena* reiterates that the state-created danger exception applies only when the governmental actor's conduct can be fairly characterized as 'affirmative,' as opposed to 'passive. . . . If Matican claimed only that the officers had failed to follow up on, and apprise him of, Delvalle's violent nature and release from

jail, his claim would fall squarely on the 'passive' side of the line. . . Matican's claims are not so limited, however; he also claims that the officers executed the sting operation in such a way that Delvalle learned that Matican had set him up. Such conduct falls on the 'affirmative' side of the line because, taking the facts in the light most favorable to Matican, it 'assisted in creating or increasing the danger to the victim.'. . . Although the officers' handling of the sting operation can be considered a state-created danger, it does not rise to the level of a substantive due-process violation because, even taking the facts in the light most favorable to Matican, their conduct does not 'shock the conscience.' There is no indication that the officers intentionally exposed Matican to Delvalle's assault. Moreover, although the officers had time to plan the operation, it cannot be concluded that they were deliberately indifferent to Matican's safety in making those plans.").

Compare ***Welch v. City of Biddeford***, 12 F.4th 70, 75-77 (1st Cir. 2021) ("The plaintiffs present several arguments that various acts taken by Officers Wolterbeek and Dexter were affirmative acts that enhanced the danger to them. . . We affirm the district court's decision that Officer Wolterbeek took no affirmative act that enhanced the danger to the plaintiffs. We see no evidence in the record that any of Officer Wolterbeek's actions increased any danger to the plaintiffs. The plaintiffs also do not explain how any of Officer Wolterbeek's actions, on their own, could give rise to a state-created danger claim. Officers are not liable under § 1983 for the actions of other officers. . . As to Officer Dexter, we are disinclined given the changes in the law to ourselves decide the merits of the substantive due process claim. As previously stated, the parties did not have the benefit of *Irish II* in conducting their discovery and presenting evidence in this case. Nor did the district court have the benefit of that opinion, which clarified this circuit's law and now must be applied. *Irish II* is pertinent in at least three important senses and all three lead us to conclude that a remand is appropriate here. . . . First, *Irish II* established that the first prong of the state-created danger claim is whether a state actor's affirmative act 'created or enhanced' a danger to the plaintiffs. . . Without the benefit of our decision, the district court held, contrary to *Irish II*, that under the state-created danger doctrine an affirmative act must 'greatly' enhance the danger to the plaintiffs, rather than simply 'enhance' the danger. . . Second, *Irish II* recognized that, '[w]here officials have the opportunity to make unhurried judgments, deliberate indifference may shock the conscience, particularly where the state official performs multiple acts of indifference to a rising risk of acute and severe danger.'. . This holding may bear on both the parties' argument and the district court's analysis. Finally, *Irish II* established the relevance of state and national policing policies to the state-created danger analysis. It explained that '[a] defendant's adherence to proper police procedure bears on all prongs of the qualified immunity analysis,' including whether an officer's conduct shocked the conscience and whether a reasonable officer 'would have believed that his conduct violated the Constitution.'. . The parties have presented little evidence as to police standards and training in handling disputes between neighbors or landlords and tenants. . . Such evidence may well be important to the disposition of the case. For example, officers are sometimes required to do more than Officer Dexter did here when credible death threats are made in a domestic violence context. . . There may be an analogous duty in cases such as this one. We make no determination as to whether the plaintiffs may prevail on any of the prongs of the *Irish II* state-created danger test. Indeed, it would

be premature to reach the 'shocks the conscience' prong, as we here address only the district court's error in evaluating the danger-enhancing prong. Nor do we suggest that an officer leaving the scene on different facts would amount to or contribute to an affirmative act that created or enhanced the danger to others. Our narrow decision to remand, however, is consonant with the rulings of other federal courts in state-created danger cases. . . . In these circumstances, it is fairer to all concerned to remand to the district court in light of this opinion. This decision makes no new law and does not expand the state-created danger doctrine; it is simply a remand for consideration of the factors identified above. We make no factual findings, and our holding is based on legal error under *Irish II*. The district court may in its discretion permit additional discovery in light of the clarification provided by *Irish II*. The district court should address on remand whether Officer Dexter is entitled to qualified immunity and may choose to address the second step of the qualified immunity inquiry before addressing whether Officer Dexter violated the plaintiffs' substantive due process rights under the state-created danger doctrine.") *with* ***Welch v. City of Biddeford***, 12 F.4th 70, 78-81 (1st Cir. 2021) (Kayatta, J., dissenting) ("A layperson reading the facts of this case as portrayed in the majority opinion could easily conclude that as a matter of good police practice, Officer Dexter should have arrested Pak for criminal threatening (assuming that he could discount Johnson's statement that he felt harassed, but not really threatened). . . And if the people of Maine wish to render law enforcement officers personally liable for failing to make arrests in situations like this one, they may so provide as a matter of state law. . . As the Supreme Court has made clear, however, an officer's failure to arrest does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. . . . By vacating the judgment, the majority suggests that perhaps a jury could hold Officer Dexter liable -- not for failing to arrest, but for affirmatively doing something that increased the likelihood that Pak would kill. But this 'state-created danger' exception only works if what the officer did, other than failing to arrest Pak, is 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'. . . By vacating the judgment, the majority suggests that perhaps a jury could hold Officer Dexter liable -- not for failing to arrest, but for affirmatively doing something that increased the likelihood that Pak would kill. But this 'state-created danger' exception only works if what the officer did, other than failing to arrest Pak, is 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'. . . Aside from detailing certain facts, such as Officer Dexter's failure to arrest, that could potentially support a negligence suit but not a federal claim, the majority never really says what specific facts might be found on remand and how those facts could change the result of the district court's opinion. To the contrary, my colleagues seem to hold their own opinion with pinched noses and at arm's length. So why remand a case that we already know can go nowhere under current legal standards, creating false hope for the plaintiffs? The majority cites two justifications. First, the majority alleges that *Irish v. Fowler* . . . supposedly 'clarified this circuit's law.' But the whole point of *Irish II* was that the law regarding the state-created danger doctrine was already so 'clearly established' that qualified immunity was inapplicable. . . Second, the majority notes that in describing the exception for state-created dangers, the district court asked whether Officer Dexter's actions 'greatly increas[ed] the danger' rather than whether they 'enhanc[ed] the danger.' But this difference in terminology could only matter if a jury could reasonably find that Officer Dexter engaged in affirmative conduct that both

enhanced the danger and was shocking to the conscience. And as I have explained, even the majority avoids saying that Dexter's conduct could be found to have shocked the conscience. If, on remand, the district court reads the majority opinion carefully, it will note that the opinion does not actually preclude the district court from rewording its summary of the applicable enhancement standard and re-entering its order of dismissal. Should the district court so proceed, perhaps no great harm will be done, even if nothing is gained beyond a display of understandable sympathy for the victims. But there is a chance that courts -- including the district court -- will read the majority opinion otherwise. They might sensibly think that no appellate court would remand this case unless, on the present record, it thought that a judgment for plaintiffs was somehow possible. And litigants or potential litigants in other cases in which officers fail to arrest someone will cite this case as watering down the 'shock the conscience' test to a form of relabeled negligence. Such an outcome is contrary to existing law. As the Supreme Court said in *DeShaney*: 'The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to [act], they likely would have been met with charges of improper [behavior], charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.'. . The same point applies here. I must therefore respectfully dissent. Officer Dexter took no affirmative act that could conceivably be said to shock the conscience as that standard is defined in *Lewis*. And whether he should be held personally liable for not doing more is not a concern of the Due Process Clause.")

See also ***Patrick v. Great Valley School Dist***., 296 F. App'x 258, ___ (3rd Cir. 2008) ("Coach Brown's decision to match Rosenberg with a much heavier teammate for live wrestling did not occur in a time-constrained or 'hyperpressurized' environment, and thus culpability should be assessed under the deliberate indifference standard. According to wrestling expert Ken Chertow's testimony, the pairing of Rosenberg, a young and inexperienced wrestler, with a much heavier partner for live wrestling amounted to an unreasonably dangerous practice. Plaintiffs have also introduced evidence suggesting that, despite the risks, Coach Brown matched Rosenberg with his heavier teammate because he wanted to provide the heavier wrestler with a practice partner and there were no wrestlers of comparable weight present at the practice at issue. Finally, Plaintiffs presented evidence that Coach Brown engaged in similar conduct on more than one occasion, providing, at the very least, circumstantial evidence of deliberate indifference. . . .Without deciding the issue, we hold that a rational jury could find that Coach Brown's conduct exhibited a level of culpability that shocks the conscience. Because the District Court rested its holding solely on Plaintiffs' failure to satisfy the culpability element of their state-created danger claim, we need not reach the question of whether Plaintiffs have raised a genuine issue of material fact with respect to the remaining three elements."); ***Rivas v. City of Passaic,*** 365 F.3d 181, 202, 203 (3d Cir. 2004) (Ambro, J., concurring in part) ("Judge Garth has noted the most important of the recent modifications to the *Kneipp* test, which involved its second prong: in light of the Supreme Court's decision in *County of Sacramento v. Lewis* . . . a state actor will be liable only for conduct that 'shocks the conscience'; it is no longer enough that she or he has acted in 'willful disregard' of the plaintiff's safety. . . This modification, however, is not the only one. In *Morse v. Lower Merion*

School District, 132 F.3d 902 (3d Cir.1997), we reconsidered the third prong of the *Kneipp* test and suggested that there may be a 'relationship' between the state and the plaintiff merely because the plaintiff was a foreseeable victim, either individually or as a member of a discrete class. . . Moreover, we have written 'third party' out of the fourth prong of the test. We recently noted, 'The fourth element's reference to a 'third party's crime' arises from the doctrine's origin as an exception to the general rule that the state does not have a general affirmative obligation to protect its citizens from the violent acts of private individuals. The courts, however, have not limited the doctrine to cases where third parties caused the harm....' *Estate of Smith v. Marasco,* 318 F.3d 497, 506 (3d Cir.2003) . . . . In light of these substantial modifications to the *Kneipp* test, *Kneipp* as shorthand is a misnomer. To be sure, Judge Garth has mentioned the relevant refinements and considered this case by reference to the adapted rubric. I nonetheless believe that continuing to cite the *Kneipp* test as 'good law,' as Judge Garth does, minimizes the extent to which the law of state-created danger in our Circuit has changed. And while the changes to the third and fourth prongs have expanded the state-created danger doctrine, the substitution of 'shocks the conscience' for 'willful disregard' is a significant limitation. In this context, our continued adherence to *Kneipp,* if only in name, colors plaintiffs' perception of their burden and tempts them to allege constitutional violations where none exist."); ***L.W. v. Grubbs* (L.W. I)**, 974 F.2d 119, 120-21 (9th Cir. 1992) (plaintiff, a registered nurse, stated a constitutional claim against defendant correctional officers, where defendants knew inmate was violent sex offender, likely to assault plaintiff if alone with her, yet defendants intentionally assigned inmate to work alone with plaintiff in clinic), *cert. denied*, 113 S. Ct. 2442 (1993).

See also ***Estate of Morcho v. Borough***, No. CV 22-3245, 2024 WL 21940, at *4 (E.D. Pa. Jan. 2, 2024) ("Here, it is undisputed that Plaintiffs have alleged facts to substantiate that Shawn was in the physical custody of the state at the time of his death. Notwithstanding, Defendants have pointed to no authority, and this Court is unaware of any such authority, that precludes a plaintiff from pursuing a § 1983 claim under the state-created danger theory for harm suffered while in the physical custody of the state.[3] **[fn. 3:** The Individual Defendants argue that the state-created danger theory is not applicable in a case such as this where the harm was ultimately the result of a suicide. Courts in this circuit, however, have considered § 1983 claims asserted under the state-created danger theory in cases where the harm was the result of a suicide.**]** Accordingly, this Court will address Plaintiffs' § 1983 claims against the Individual Defendants under both the state-created danger theory and the deliberate indifference theory."); ***Martinez v. City of Clovis***, 943 F.3d 1260, 1270, 1272-77 (9th Cir. 2019) ("'Even in difficult cases, our court tends "to address both prongs of qualified immunity where the 'two-step procedure promotes the development of constitutional precedent' in an area where this court's guidance is ... needed."'. . Because guidance is necessary to promote the development of constitutional precedent in this area, we elect to begin with the first part of the qualified immunity inquiry. . . . [T]he record . . . reveals that Hershberger told Pennington about Martinez's testimony relating to his prior abuse, and also stated that Martinez was not 'the right girl' for him. A reasonable jury could find that Hershberger's disclosure provoked Pennington, and that her disparaging comments emboldened Pennington to believe that he could further abuse Martinez, including by retaliating against her for her testimony, with

impunity. The causal link between Hershberger's affirmative conduct and the abuse Martinez suffered that night is supported by Martinez's testimony that Pennington asked Martinez what she had told the officer while he was hitting her. That Martinez was already in danger from Pennington does not obviate a state-created danger when the state actor enhanced the risks. . . Because a reasonable jury could infer that Martinez was placed in greater danger after Hershberger disclosed Martinez's complaint and made comments to Pennington that conveyed contempt for Martinez, the first requirement of the state-created danger doctrine is satisfied. . . . .Viewing the record in the light most favorable to Martinez, a jury could reasonably find that Sanders's positive remarks about the Penningtons placed Martinez in greater danger. The positive remarks were communicated against the backdrop that Sanders knew that Pennington was an officer and that there was probable cause to arrest. . . which the jury could infer Pennington, as a police officer, understood. A reasonable jury could find that Pennington felt emboldened to continue his abuse with impunity. In fact, the following day, Pennington abused Martinez yet again. Under these circumstances, the first requirement of the state-created danger doctrine is satisfied. . . . Given the foreseeability of future domestic abuse here, a reasonable jury could find that disclosing a report of abuse while engaging in disparaging small talk with Pennington, and/or positively remarking on his family while ordering other officers not to make an arrest despite the presence of probable cause, constitutes deliberate indifference to a known or obvious danger. . .That Pennington was already under investigation by the Clovis PD for allegations of abuse against an ex-girlfriend also suggests that future abuse was a known or obvious danger. By ignoring the risk created by Pennington's violent tendencies, the officers acted with deliberate indifference toward the risk of future abuse. We hold that a reasonable jury could find that Hershberger and Sanders violated Martinez's due process right to liberty by affirmatively increasing the known and obvious danger Martinez faced. . . .We next turn to the question whether, at the time of the challenged conduct, the law was sufficiently well defined that every reasonable officer in the officers' shoes would have known that their conduct violated Martinez's right to due process. We conclude it was not. Qualified immunity therefore applies. . . . .To deny immunity, we must conclude that every reasonable official would have understood, beyond debate, that the conduct was a violation of a constitutional right. . . We begin by looking to binding precedent from the Supreme Court or our court. . . Without binding precedent, 'we look to whatever decisional law is available ... including decisions of state courts, other circuits, and district courts.'. . The precedent must be ' "controlling'—from the Ninth Circuit or the Supreme Court—or otherwise be embraced by a "consensus" of courts outside the relevant jurisdiction.'. . . Without binding precedent from our court or the Supreme Court, we may look to decisions from the other circuits. . . But we cannot rely on *Okin*, because it has not been 'embraced by a "consensus" of courts.'. . Notably, the Seventh Circuit has stated that *Okin* may be 'in tension with' *DeShaney* and the Supreme Court's decision in *Town of Castle Rock v. Gonzales*[.] . . In light of this muddled legal terrain, we cannot hold that 'every reasonable official would have understood ... beyond debate,' that the officers' conduct here violated Martinez's right to due process. . .Hershberger and Sanders are entitled to qualified immunity because the due process right conferred in the context before us was not clearly established. Although the application of the state-created danger doctrine to this context was not apparent to every reasonable officer at the time the conduct occurred, we now establish

the contours of the due process protections afforded victims of domestic violence in situations like this one. . . Significantly, 'it is the facts' of this case 'that clearly establish what the law is' going forward. . .We hold today that the state-created danger doctrine applies when an officer reveals a domestic violence complaint made in confidence to an abuser while simultaneously making disparaging comments about the victim in a manner that reasonably emboldens the abuser to continue abusing the victim with impunity. Similarly, we hold that the state-created danger doctrine applies when an officer praises an abuser in the abuser's presence after the abuser has been protected from arrest, in a manner that communicates to the abuser that the abuser may continue abusing the victim with impunity. . . Going forward, the law in this circuit will be clearly established that such conduct is unconstitutional.")

See also ***Estate of Sanchez v. City of Saginaw***, No. 1:20-CV-11684, 2023 WL 4092468, at *9–11 (E.D. Mich. June 20, 2023) ("Seeking qualified immunity, Defendants rely on *Koulta v. Merciez*, 477 F.3d 442 –44 (6th Cir. 2007). But *Koulta* is confined to a negligent police officer who (1) instructed a person who drove drunk and was sitting in a car to leave the area and (2) did not investigate a possible DUI that no evidence or person prompted him to investigate. . .Such negligence is distinct from the reasonably inferable deliberate indifference in this case, which would undoubtedly be an affirmative act for purposes of proving a state-created danger. . . Here, the record reasonably suggests Defendants 'affirmatively encouraged, emboldened, or enabled' Rudy to drive drunk. . . After Rudy informed Defendants he had consumed alcohol, they allegedly threatened to impound his car if he did not drive the group home. . . Then Rudy not only requested Defendants to follow him home but also voluntarily consented to a search of the Malibu, which contained an open bottle of vodka. . . But Defendants declined Rudy's offer, refusing even to glance inside the Malibu, . . . despite their 'responsibility,' as they referred to it, 'to get as much information as possible[.]'. . . Another key difference is that Defendants here ordered the deceased Plaintiffs to enter a car with a drunk driver. Indeed, Babinski said he 'expected the[group] to drive home,'. . . even though Rudy suggested he could not drive, asked for assistance, expressed fear of arrest, and stopped the car due to his reckless driving before the officers ordered him back into it[.] . . Arguably then, as Rudy testified, 'the circumstances changed with the contact with the officers.'. .Based on those affirmative acts, Defendants were deliberately indifferent by consciously disregarding a known risk. . . Since Rudy was outside the Malibu when the group was arguably forced into this intoxicated expedition, Defendants at least *recreated* the danger. . . . If this case does not present a question of fact concerning whether an officer may be liable under the Due Process Clause for the 'decision to permit someone he knows to have been drinking to continue driving without administering a breathalyzer,'. . . then, apart from police begging people to drive drunk, no case ever will. True, Defendants did not provide a fully equipped, clearly marked patrol car to a felon or ignore reports of him pulling people over. . . Nor did they buy Rudy drinks or hand him the keys to the car. . . But they did much more than nothing when nothing was asked. . . They located a drunk driver and his family outside a parked car with the engine off and ordered him to drive them all home after he expressed discomfort with the decision—even threatening to impound the car if he did not do so. In this way, the officers arguably took a deliberate action under color of state law, leaving Plaintiffs vulnerable to death. . . In conclusion, this case presents a

question of fact with respect to whether police officers are liable under the Due Process Clause for ignoring a known drunk driver's reluctance to drive and ordering him and his passengers to enter, to start, and to drive the vehicle home. Because Rudy Sanchez was outside the car, informed the officers he was intoxicated, expressed concerns about driving, asked the officers to follow him home, volunteered for a search, and repeatedly said he believed he was going to jail—where the officers heard all that, refused to investigate, and threatened to impound his car if he did not get in the car and drive drunk—this case falls on the '[ ]action side of the line.'. .For those reasons, it is for the jury to decide whether Defendants were deliberately indifferent to the danger Rudy posed to his passengers and are thus responsible for the wrongful deaths of Lindsey Drake and baby Amiliana. But that is not the end of the analysis. [jury would also have to decide "whether Defendants were the sole proximate cause of the deaths[.]"]); ***Huber v. Beth***, 654 F.Supp.3d 777, ___ (E.D. Wis. 2023) ("The complaint alleges that the law-enforcement defendants increased the danger to protestors such as Huber while cutting off avenues of self-help. According to the complaint, before Rittenhouse killed Huber, Huber and the other protestors were demonstrating in the city park located at 56th and Sheridan, where they were safe from the armed individuals, who had congregated near 60th and Sheridan—four blocks south of the park. The commanders of the law-enforcement presence at the scene of the demonstration then decided to disperse the protest by 'funneling' the demonstrators south on Sheridan Road, in the direction of the armed individuals. . . Such funneling forced the protestors into a 'confined area' with the armed individuals, including defendant Rittenhouse. . . The allegation of forcing protestors into a confined area with the armed individuals creates a reasonable inference that protestors could not disperse without passing through the area patrolled by the armed individuals and that, once they were in that area, their ability to flee was limited. Due to law enforcement's having observed the armed individuals' location earlier in the evening, it is reasonable to infer that the commanders would have known that the armed individuals had gathered near 60th and Sheridan. Further, because Sheriff Beth and Chief Miskinis are alleged to have known that the armed individuals had expressed intentions to harm protestors, it is reasonable to infer that the commanders knew that they were creating a dangerous situation by forcing the protestors and armed individuals to confront each other in a confined area. The risk that members of these antagonistic groups would engage in violence was high, and once violence erupted it would be difficult for protestors to escape or otherwise protect themselves. This was the situation in the moments before Rittenhouse used his rifle. Once the protestors were in the confined area, Rittenhouse encountered Rosenbaum and shot him dead. Witnesses yelled that Rittenhouse had just shot someone, which caused Huber and others to pursue Rittenhouse and attempt to disarm him so that he could not hurt others in the confined area. . . Rittenhouse then killed Huber and wounded Grosskreutz. These acts of violence were a foreseeable result of the defendants' decision to create an explosive situation by forcing protestors into a confined area with hostile armed individuals. . . . The police conduct alleged in the present case . . . involved placing citizens into a dangerous situation and disabling their ability to protect themselves from private violence. Again, the protestors were safe before the police forced them south on Sheridan, into a confined area with armed individuals who were antagonistic and had expressed the intent to use their rifles on protestors. The protestors had no apparent means of protecting themselves from the armed individuals, and, as alleged in the complaint, their ability to

flee was limited. Moreover, the complaint alleges that the law-enforcement officers on the street did not protect protestors from the dangerous situation they created. . . Accordingly, I conclude that the complaint states a claim for a due-process violation based on state-created danger."); ***Seidle v. Neptune Township***, No. CV174428MASLHG, 2021 WL 1720867, at *10-11 (D.N.J. May 1, 2021) ("[T]he Court notes that the Prosecutor Defendants and the Neptune Township Police Department officials are differently situated. In its previous opinion, the Court held that 'the Neptune Defendants allowing Seidle to *retain* his weapon did not put Tamara in a worse situation than had they not acted at all.' . . In the Motion now before the Court, however, the question is whether Plaintiffs have plausibly alleged that the Prosecutor Defendants' decision to *rearm* Seidle with his service weapon placed Tamara in a more vulnerable position than if they had not acted to rearm him. The latter allegation against the Prosecutor Defendants, who were the ultimate decision makers as to whether Seidle would be rearmed, constitutes an affirmative act. The former allegation against Neptune Township Police Department officials is a failure to act that does not allege a state created danger claim. . . Construing the facts alleged in the TAC as true and in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have adequately alleged that the Prosecutor Defendants affirmatively used [their] authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all. . . . In light of Seidle's alleged history of domestic violence, excessive force complaints, and psychological issues, Plaintiffs' allegation that the Prosecutor Defendants placed Tamara in a worse position than if they had not acted to rearm Seidle is plausible. Accordingly, Plaintiffs are entitled to discovery on their state-created danger claim."); ***Alcis v. Sch. Dist. of Philadelphia***, No. CV 16-1684, 2016 WL 7209938, at *5–6 (E.D. Pa. Dec. 13, 2016) ("The Court concludes that Ms. Furley's action in taking Alain and Benjamin to the bathroom was an affirmative use of her authority that created a danger to Alain. While the setting in this case is a middle school, not a kindergarten classroom such as in *L.R.*, plaintiffs allege that, like the students in *L.R.*, Alain and Benjamin were restricted in their movement outside of the classroom—they went to the bathroom under the supervision of a teacher. . . Like the teacher in *L.R.*, Ms. Furley had the authority to supervise students on trips to the bathroom, and she used this authority to escort Alain and Benjamin to the bathroom at the same time while she remained outside, rather than requiring that only one student use the bathroom at a time. Ms. Furley's actions are distinguishable from those of the school officials in *Morrow v. Balaski*, 719 F.3d 160 (3d Cir. 2013), and *Brown v. School District of Philadelphia*, 456 Fed. Appx. 88 (3d Cir. 2011), two cases cited by defendants in support of their Motion. . . In *Morrow*, two students sued the school district under § 1983 for failing to protect them from harassment and physical assault by another student. . . The Third Circuit found that the school district was not liable for permitting the student accused of harassment to return to school after a suspension—despite contrary school policy—because allowing the return was 'passive inaction' rather than an affirmative act. . .In *Brown*, the Third Circuit similarly found no affirmative act by the school district where a special-education student was not provided with one-on-one supervision as promised and the student was sexually assaulted by other students at school. . . In each case, school officials did not intervene to change the environment encountered by the plaintiff students. . . Plaintiffs do not allege that Ms. Furley violated Alain's constitutional rights by not intervening during the assault; rather, plaintiffs allege

that by escorting the two boys to the bathroom together, and allowing them to be in the bathroom together and unsupervised, Ms. Furley created the situation in which Alain was exposed to harm. Because plaintiffs have alleged facts to support each element of a state-created danger claim, the Court concludes that plaintiffs have sufficiently pled that a constitutional violation occurred, the first requirement for a *Monell* claim. The Court need not determine whether qualified immunity would apply to Ms. Furley because she is not a party to this case."); ***Kingsmill v. Szewczak***, 117 F. Supp. 3d 657 (E.D. Pa. 2015) ("Although the parties did not identify, and we were unable to locate, a case with a cognate claim and a constellation of factual averments, this is the type of case where the alleged conduct is outrageous enough, and the broad contours of the constitutional right sufficiently well-known, that Officer Szewczak was on notice that his conduct violated Kingsmill's constitutional rights. Officer Szewczak lured Kingsmill away from a physical altercation, engaged him in conversation, and then watched as Brown hit Kingsmill in the face with a steel pipe. Officer Szewczak reacted by telling Brown to flee the scene, declining to make a police report, and refusing to render assistance to the injured Kingsmill. . .Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. . . Although this particular scenario does not appear to have been considered by our Court of Appeals, the conduct alleged is not the type qualified immunity protects. *Any* reasonable officer at the time of this incident—February 9, 2014—would have known that he had a duty not to place an individual at greater risk of injury from a physical assault by hailing him away from the altercation and then declining to intervene. A reasonable officer would have known that he had a duty not to command such an individual to comply with a directive, so that compliance would increase the risk of harm to him. This is not a case where the 'most that can be said of the state functionaries in this case is that they stood by and did nothing when ... circumstances dictated a more active role for them.'. . . Officer Szewczak exercised his authority to command Kingsmill to disengage from a physical altercation, and, as a result of Kingsmill's compliance, Brown was able to attack him from behind. Officer Szewczak's failure to warn Kingsmill that Brown was approaching from behind might appear more akin to the inaction that prior courts have found insufficient to ground liability under a state-created danger theory. But Officer Szewczak did not just fail to warn: his initial hail and interference with the assault in this circumstance placed Kingsmill at risk of additional serious injury. After placing Kingsmill in greater danger than he had been before, the officer did not bother to warn him of Brown's oncoming assault. Nor is this a case where the exercise of a state actor's discretion did not increase the danger. . . To be sure, Officer Szewczak was not obligated to protect either Kingsmill or Brown, and his knowledge of their altercation was not sufficient to create an affirmative duty to act. But once Officer Szewczak chose to call Kingsmill to his patrol car, and chose to continue their conversation despite Brown's approach, pipe in hand, he put Kingsmill in greater danger of the assault from Brown. . . . Officer Szewczak may not have placed Kingsmill in the physical confrontation with Brown, but observing Kingsmill in such a snake pit, he made it worse by hailing him and commanding him to disengage, leaving him vulnerable to Brown's attack from behind. Such conduct is sufficiently outrageous that a reasonable officer would have known that doing so could violate Kingsmill's constitutional rights. We find that Kingsmill's right to be free from state-created danger in this particular factual circumstance was clearly established when this incident took place in February of 2014, when this incident took place. Officer Szewczak is

therefore not entitled to qualified immunity."); ***Moeck v. Pleasant Valley Sch. Dist.,*** 983 F. Supp. 2d 516, 528 (M.D. Pa. 2013) ("With regard to the four factors necessary to establish a state-created danger, the defendants only challenge one. They assert that the Defendant Getz's actions did not shock the conscience. We disagree. A factfinder could find that Getz acted in such a manner as to shock the conscience. He set up this wrestling practice with a large student, known to lose his temper, with someone who was seventy pounds lighter. He cajoled the plaintiff to continue wrestling the student who outweighed him by seventy pounds even after plaintiff was initially injured. Such conduct may shock the conscience. Accordingly, we find that the plaintiff has made sufficient allegations to support the state-created danger claim against Defendant Getz.").

But see ***Franz v. Oxford Community School District***, No. 23-1483, 2025 WL 865070, at *3 (6th Cir. Mar. 20, 2025) ("At the outset, we agree with the district court that two of the putative acts at issue here cannot support liability. First, the plaintiffs argue that the defendants created a danger when, after the meeting in the office, they returned E.C.'s backpack to him and sent him back to class. But those actions put the plaintiffs 'in no worse position' than the one in which they would have been had the defendants 'not acted at all.'. . E.C. had a backpack containing a gun before the meeting, and afterward he had the same backpack containing the same gun. (To avoid any misimpression: nothing in the record here supports an inference that the defendants knew the gun was in the backpack.) Thus, for purposes of this theory, the act of returning the backpack to E.C. did 'not satisfy the state-action requirement' because merely 'returning someone to the same dangers that existed' before is not enough. . . . The primary question here, instead, is whether Hopkins' warning to E.C.'s parents—that he would call Child Protective Services if they did not get help for their son within 48 hours—satisfied the elements of this theory. The district court thought that warning (made in E.C.'s presence) was an affirmative act because it 'increased the risk that a mentally unstable teenager' would harm other students. . . One could debate that point; but less debatable, in our view, is whether that warning was 'so outrageous' as to violate due process. When—as was likely the case here—a state official can reflect before he acts, he violates due process when he perceives a 'substantial risk of serious harm' and then responds to it in 'a manner demonstrating reckless or callous indifference' toward the plaintiff's rights. . . Here, the defendants' actions (as alleged in the complaint) show they perceived a serious risk: they summoned E.C.'s parents for an urgent meeting, insisted that he receive counseling within 48 hours, and said they would call Child Protective Services if he did not. (We again set to one side whether the risk they perceived was the risk that materialized.) But those same actions show that Hopkins and Ejak displayed the opposite of callous indifference toward the risk they perceived. That is especially true of the very act on which the plaintiffs would ground liability: namely, Hopkins' demand that E.C.'s parents get him counseling within 48 hours. Hopkins made that demand to mitigate risk, not to increase it; and his demand was indisputably made for 'a legitimate governmental purpose,' which all but excludes a finding that it was 'conscience shocking.'. . True, as the plaintiffs emphasize, this case comes to us on the pleadings rather than on summary judgment. But even taking their alleged facts as true, we see nothing in this record that supports an inference that Hopkins or Ejak took any action that shocks the conscience. In substance the plaintiffs' claims sound in tort, not in federal constitutional law. Thus, in these cases, their claims

must be dismissed."); ***Sacramento Homeless Union v. City of Sacramento***, 115 F.4th 1149, 1154-55 (9th Cir. 2024) (Nelson, J., with whom Bumatay, J., and Vandyke, J., join, respecting the denial of rehearing on banc) ("As several judges on our court have noted, the 'state-created danger exception' requires a 'deprivation of liberty.'. . In other words, a constitutional violation occurs only when the state uses its monopoly on physical force to coerce an individual's actions. . . The lawful clearing of encampments does not rise to that level of constitutional deprivation. And by straying from the Fourteenth Amendment's original meaning, the district court turned the Fourteenth Amendment into just another 'font of tort law.'. . The Supreme Court has repeatedly stressed that the Fourteenth Amendment's Due Process Clause 'does not transform every tort committed by a state actor into a constitutional violation.'. . This case is a prime example of how we have interpreted the Clause to do just that. In cases such as *Murguia v. Langdon*, 61 F.4th 1096, and *Kennedy*, 439 F.3d 1055, we have strayed far from an original understanding of the Fourteenth Amendment. Even when bound by precedent, however, such precedent that is not in accordance with original understanding should not be expanded. . . Thus, in future cases, district courts in our circuit should reorient their decisions in this area to a more faithful reading of the original meaning of the Fourteenth Amendment. . . In sum, the panel's decision does not comply with our court's precedent on mootness. And the district court's injunction was issued in error under our precedent and ignores the original public meaning of the Fourteenth Amendment. But our en banc power is meant to allow 'for more effective judicial administration.'. . Here, en banc review—with its considerable expenditure of time and resources—is better reserved for a subsequent case. I hope that future cases correct this course, and further corrective measures, like en banc review, are not necessary."); ***Fisher v. Moore***, 73 F.4th 367, 371-75 (5th Cir. 2023) (*denying reh'g en banc and amending opinion*), *cert. denied*, 144 S. Ct. 569 (2024) ("Appellants contend that as of November 2019, when the events took place, it was not clearly established that plaintiffs have a right to be free from state-created dangers. Appellants are correct. The Due Process Clause of the Fourteenth Amendment provides that '[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.'. . 'The Due Process Clause ... does not, as a general matter, require the government to protect its citizens from the acts of private actors.'. . We have recognized just one exception to this general rule: 'when [a] "special relationship" between the individual and the state imposes upon the state a constitutional duty to protect that individual from known threats of harm by private actors.'. . However, 'a number of our sister circuits have adopted a "state-created danger" exception to the general rule, under which a state actor who knowingly places a citizen in danger may be accountable for the foreseeable injuries that result.'. . M.F. brings her due process claim against Appellants only under the second exception, the state-created danger theory. The problem for M.F. is that 'the Fifth Circuit has never recognized th[e] "state-created-danger" exception.'. . In our published, and thus binding, caselaw, '[w]e have repeatedly declined to recognize the state-created danger doctrine.'. . For this reason, M.F. 'ha[s] not demonstrated a clearly established substantive due process right on the facts [she] allege[s].'. .The district court thus erred in denying qualified immunity to Appellants. Even though we repeat today that the state-created danger doctrine is not clearly established in our circuit, to our knowledge we have not categorically *ruled out* the doctrine either; we have merely declined to adopt this particular theory of liability. To be sure, we have suggested what elements any such theory would include—should

we ever adopt it, of course. For example, on one occasion, we indicated that a state-created danger theory would require 'a plaintiff [to] show [1] the defendants used their authority to create a dangerous environment for the plaintiff and [2] that the defendants acted with deliberate indifference to the plight of the plaintiff.'. .We also stated that the defendant '"must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur."'. . Nonetheless, as we have held time and again, the right to be free from state-created danger is not clearly established in this circuit. We acknowledge that, as of November 2019, a majority of our sister circuits had adopted the state-created danger theory of liability in one form or another. . .And, as M.F. points out, sometimes a 'robust "consensus of persuasive authority"' may suffice to clearly establish a constitutional right. . . But even putting aside our binding precedent that the doctrine is not clearly established in our circuit, our cases foreclose this specific line of reasoning as well. As we have held, 'the mere fact that a large number of courts had recognized the existence of a right to be free from state-created danger in some circumstances ... is insufficient to clearly establish' the theory of liability in our circuit. . . 'We reasoned that, despite widespread acceptance of the [state-created danger] doctrine [in other circuits], the circuits were not unanimous in [the doctrine's] "contours" or its application.'. . We therefore reject M.F.'s argument that out-of-circuit precedent clearly established her substantive due process right to be free from state-created danger. . . Finally, M.F. suggests that '[t]his is the case the Court has been waiting for,' and she invites us to—finally—adopt the state-created danger theory of § 1983 liability. We are reluctant to do so. . . . The facts giving rise to this lawsuit are unquestionably horrific. And Title IX may well provide M.F. a remedy. But § 1983 does not, as the Supreme Court's qualified-immunity doctrine "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."'. . Our precedent has repeatedly declined to adopt the state-created danger doctrine. And a right never established cannot be one clearly established. As we recently put it, 'A claim that we have expressly not recognized is the antithesis of a clearly established one.'"); ***Murguia v. Langdon***, 61 F.4th 1096, 1120, 1122-26 (9th Cir. 2023) (Ikuta, J., dissenting), *pet. for reh'g and reh'g en banc denied,* 73 F.4th 1103 (9th Cir. July 18, 2023), *cert. denied sub nom County of Tulare v. Murguia*, 144 S. Ct. 553 (2024) ("Tragic consequences may flow from negligence, mistakes of judgment, and the failure to provide safety and security to those who need it, as the case before us sadly shows. But victims of such lapses must pursue redress through tort law, because these mistakes do not rise to the level of egregious abuse of government power that violates citizens' constitutional rights. Here, the majority loses sight of the fundamental principles of substantive due process and instead turns the Fourteenth Amendment into a 'font of tort law,'. . . contrary to Supreme Court direction. Therefore, I respectfully dissent. . . .[O]ur cases have generally reflected the Court's principles that the state-created danger doctrine applies only when an injury is caused by a state's abuse of its executive power undertaken with the intent to injure someone in a 'way unjustifiable by any government interest,'. . . not when the injury is the result of mere negligence. The majority of our cases applying the doctrine involved state officials who abused the power entrusted to them as officers of the state by intentionally putting a person in harm's way. . . .We have likewise applied our doctrine when the harm is caused by a third party, but only when state officials exercised their authority to force

an individual into a dangerous situation where injury by the third party was foreseeable. . . .At the furthest reach of this doctrine, we have extended liability to state officials who abused their state authority by intentionally acting in a way they knew would provoke a third party to injure the plaintiff. . . .Today the majority jettisons even these meager limits on our state-created danger doctrine. Contrary to Supreme Court precedent (and our own), the majority finds a substantive due process violation despite the absence of any abuse of power entrusted to the state. Instead, the majority holds that plaintiffs can state a claim for a violation of their due process rights based solely on negligence and mistake, exactly what the Supreme Court has told us not to do. . . . In short, the majority makes three mistakes that conflict with the Supreme Court's doctrine and, in doing so, finally tears our state-created danger doctrine clear of its moorings. First, the majority opinion finds a substantive due process violation in the absence of any abusive exercise of state authority. This is directly contrary to the Supreme Court's rulings that the substantive due process doctrine 'was intended to prevent government from abusing its power, or employing it as an instrument of oppression,'. . . and absent the 'affirmative abuse of power' by the state, there is no substantive due process violation[.] . .Second, the majority opinion indicates that officials may be liable for failing to take affirmative actions to protect children from a dangerous parent. But, as *DeShaney* held, that failure to protect is not an egregious abuse of state-assigned power. . . Moreover, *DeShaney* made clear that the state has 'no constitutional duty to protect [a child] against his [parent's] violence,' and therefore the 'failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause.'. .Finally, the majority imposes liability for substantive due process violations when the plaintiffs' allegations amount to mere negligence. But 'liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.'. .The majority's expansion of our state-created danger doctrine into the realm of tort law conflicts with Supreme Court precedent and is out of step even with our broad state-created danger doctrine. Because the majority erroneously erodes '[t]he guarantee of due process' into a 'guarantee [of] due care,'. . . I respectfully dissent."); ***Sinclair v. City of Seattle***, 61 F.4th 674, 679-84 (9th Cir. 2023) ("Although Sinclair brings this action to vindicate an alleged deprivation of her own right, . . . her theory of liability is a derivative of her son's underlying right: She alleges that the City violated her right to the companionship of her son by violating his right to be free from state-created danger. . . . On the record alleged here, where the official conduct follows an opportunity for actual deliberation, that standard is met by a showing that the defendant acted with deliberate indifference. . . Thus, to make out a successful claim under the state created danger doctrine, a plaintiff must allege facts sufficient to establish that the defendant acted 'with "deliberate indifference" to a "known or obvious danger."'. . . Sinclair has properly alleged that the City was deliberately indifferent to the dangers of CHOP [Capitol Hill Occupied Protest], but not deliberately indifferent in its response to Anderson's ensuing injuries or in the provision of medical care to him. . . . For a plaintiff to prevail on a state-created danger claim, the government must 'affirmatively create[ ] an actual, particularized danger [that the plaintiff] would not otherwise have faced.'. . Sinclair's allegations support a conclusion that the City created an actual danger, but not a particularized one. . .Accepting Sinclair's allegations as true, Sinclair shows that the City affirmatively created the actual danger Anderson—and by extension Sinclair—faced. Most relevant, Sinclair alleges that the City (1) left behind

barriers the CHOP occupiers used to block streets off from general traffic and emergency responders; (2) provided portable toilets, lighting, and other support to the occupiers that allowed the lawless violence to persist; and (3) lured visitors to CHOP with promises of safety and a block-party atmosphere. Construing these allegations in the light most favorable to Sinclair, it is plausible that these actions, combined with the City's withdrawal of law enforcement from CHOP, incubated a more lawless and violent environment compared to the status quo. Sinclair argues that '[h]ad the City not provided barricades and other material support to CHOP .... people like [Anderson]'s murderer would not have been emboldened to undertake in criminal activity.' Her allegations, if proven, support that conclusion. . . . Here, Sinclair alleges more than the sort of police withdrawal to alleviate escalating violence that we considered in *Johnson.* She alleges the City affirmatively provided traffic barriers, lighting, and toilets to encourage the occupation, and portrayed CHOP as a fun, peaceful, cop-free protest, which further incited lawlessness in the area but nonetheless attracted Anderson to CHOP. Sinclair also alleges that the City support for CHOP extended for about a month after it became clear that the City's policies were fostering greater unchecked violence. The City's actions were thus deliberate and not passive or neutral as in *Johnson.* Sinclair's allegations against the City go further and support the inference that the City's actions increased the level of danger CHOP posed to Anderson above the counterfactual baseline level of danger that would have existed without its intervention: It was the City's creation of an opportunity for uncontrolled lawlessness, not just the City's failure to intervene, that endangered Anderson's, and by extension Sinclair's, rights. . . While Sinclair adequately alleges that the City created, or at least significantly contributed to, the danger her son faced, she fails to allege that the danger was sufficiently particularized to support a § 1983 claim. . . . [A]ny danger the City created or contributed to by enabling the CHOP zone affected all CHOP visitors equally; the danger was not specifically directed at Sinclair or Anderson. That is, the dangers that Anderson faced as a result of the City ignoring the lawlessness and crime occurring in CHOP were the same as anyone else; the City did not create a danger that posed a specific risk to Sinclair. . . . Here, Sinclair fails to allege that the City had any previous interactions with her son, directed any actions toward him, or even knew of her son's existence until he was killed. Instead, she 'alleged that the City left *all visitors to CHOP* in a much more dangerous position than it found them in.' Even construed in the light most favorable to Sinclair, her allegations demonstrate that the City-created danger was a generalized danger experienced by all those members of the public who chose to visit the CHOP zone. . . .Sinclair points out that in *Huffman v. County of Los Angeles*, we noted that it is an open question in our circuit whether a plaintiff can bring a state-created danger claim when the danger was not particularized to a specific, known individual. . . She argues that as long as the state-created danger was particularized, a plaintiff may bring a claim even if the individual harmed was an undifferentiated member of the public. And here, she says that the City created the particularized danger of lawlessness. Only one court, the Seventh Circuit, has held that the state-created danger need not be particular to a known plaintiff. . . . We need not definitively resolve whether to adopt the Seventh Circuit's minority rule showcased in *Reed* because it would not change the result. Here, the alleged dangers in CHOP were of unchecked lawlessness and rampant crime affecting everyone. . . . But the dangers alleged are neither specific, nor immediate, nor of limited range or duration. And Anderson's shooting was not as directly or necessarily correlated

to the danger posed by uncontrolled lawlessness as a drunk-driving victim's injuries are to the danger of letting an intoxicated person get behind the wheel. Indeed, Anderson's encounter with Long, with whom he had 'a history of antagonism,' is a significant chink in the causal chain. In sum, while the City created an actual danger of increased crime, that danger was not specific to Anderson or Sinclair. . . Thus, Sinclair's § 1983 claim fails. The City's conduct here was egregious. But because the City's actions were not directed toward Anderson and did not otherwise expose him to a specific risk, the connection between Sinclair's alleged injuries and the City's affirmative actions is too remote to support a § 1983 claim. It is at the ballot box, then, that Sinclair and other Seattleites must hold the City accountable for their deliberately indifferent actions."); ***Burns-Fisher v. Romero-Lehrer***, 57 F.4th 421, 425-26 (4th Cir. 2023) ("Even if Appellee did sufficiently allege that her constitutional rights were violated, we conclude that reversal is still required because Appellee has not demonstrated that it was clearly established at the time of the incident that she had a constitutional right to be protected from a student who was known to have a violent history. 'To determine whether a right was clearly established, we typically ask whether, when the defendant violated the right, there existed either controlling authority—such as a published opinion of this Court—or a robust consensus of persuasive authority, that would have given the defendants fair warning that their conduct was wrongful.'. . In *Turner v. Thomas*, 930 F.3d 640 (4th Cir. 2019) and *Callahan v. N.C. Dep't of Pub. Safety*, 18 F.4th 142 (4th Cir. 2021), we emphasized that since *Pinder v. Johnson*, 54 F.3d 1169, 1174 (4th Cir. 1995), 'we have never issued a published opinion recognizing a successful state-created danger claim.'. . Notably, while we acknowledged in *Pinder* that '[a]t some point on the spectrum between action and inaction, the state's conduct may implicate it in the harm caused,'. . . we nevertheless determined that the defendant was entitled to qualified immunity[.] . . In doing so, we stated that at the time of the incident in question, it was not clearly established that the defendant police officer had an affirmative duty to protect citizens from the actions of a third party. . . This case fits neatly within our jurisprudence on state-created danger claims. As in *Pinder*, *Turner*, and *Callahan*, the injury here was, at best, indirectly caused by Appellant's failure to protect Appellee from TB. . . And as in those cases, we had not made clear at the time of the incident in this case that a defendant's failure to adequately respond to a potentially dangerous situation gives rise to an actionable constitutional claim under the state-created danger doctrine. Because it was not clearly established at the time of the incident that a defendant's failure to act gives rise to a state-created danger claim, we conclude that Appellant is entitled to qualified immunity."); ***Barefield v. Hillman***, No. 20-6002, 2021 WL 3079693, at *3-4 (6th Cir. July 21, 2021) (not reported) ("Barefield alleged claims under both the 'special relationship' and 'state-created-danger' exceptions, but only the latter is at issue in this appeal. . . . In finding that the state's 'affirmative act' of placing T.H. into a Level 1 foster home instead of a Level 3 facility increased the risk that T.H. would be harmed by a third party, the district court analyzed whether T.H. would have been safer at a Level 3 facility than a Level 1 foster home. Under our precedents, this is not the appropriate comparison; rather, the proper comparison is with T.H.'s position before state intervention. . . . Under *Cartwright*, the relevant question is whether T.H. was safer before state intervention than after it—not whether he was safer in one state foster-care placement than another. Thus, the district court should have asked whether T.H. was safer from the risks of gang violence before he was placed into state custody,

when he was living with his mother, than when he was living in Welbeck's foster home. Or, alternatively, whether he was safer when he was at large after escaping the VYA than he was in Welbeck's foster home. Either way, Barefield's claim falls short. Barefield does not argue that T.H. was safer in her custody (or living on the streets while at large) than in state custody, and indeed alleges that when T.H. was living with her, he often 'ran away for extended periods of time and associated with gang members.'. . Barefield also does not dispute that T.H. was originally placed into state custody because a court found him to be dependent and neglected. Under these facts, no reasonable juror could find that T.H. was safer before he was in state custody or when he was at large after escaping the VYA than he was in Welbeck's Level 1 foster home. . . Accordingly, there is no genuine issue of fact regarding whether an affirmative act of the state created or increased the risk that T.H. would be harmed by gang violence. . . Barefield responds that the state has a heightened duty to prevent harm to foster children, which includes a duty to ensure that they are prevented from doing harm to themselves, and that T.H. was effectively in DCS custody the entire time. . . One of our sister circuits held that the state may be liable for a substantive-due-process violation if it places a child into a foster home that it knows is unable to adequately supervise the child. *Camp v. Gregory*, 67 F.3d 1286 (7th Cir. 1995). But *Camp* analogized the state's duty to ensure a foster parent is capable of adequately supervising a child to the state's duty to ensure a child will not be harmed by state foster parents. *See id.* at 1293–97. And we have held that the well-established line of cases dealing with abusive foster homes falls under the special-relationship exception to *DeShaney* and not the state-created-danger exception. . . Barefield's arguments in this regard are therefore not pertinent to a state-created-danger claim."); ***Jane Doe v. Jackson Local Sch. Dist. Bd. of Educ.***, 954 F.3d 925, 932-37 (6th Cir. 2020) ("We have. . . carved out an exception to *DeShaney*'s rule that a state has no constitutional duty to protect individuals who are not in its custody. When rejecting the due-process claim, *DeShaney* described the case's facts as follows: 'While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.'. . We have used this sentence to adopt a 'state-created-danger theory' of substantive due process, and have gradually molded that theory into a three-part test. . . An official must initially take an 'affirmative act ... that either create[s] or increase[s] the risk that the plaintiff [will] be exposed to private acts of violence.'. . Next, this risk of private harm must rise to the level of a 'special danger' to a specific victim that exceeds the general risk of harm the public faces from the private actor. . . Last, when exacerbating this risk of harm, the official must act with a sufficiently culpable mental state. . . We can resolve this case on the third 'culpability' element alone. Our decisions have described this element in different ways. Sometimes we have said that a public official either 'must have known or clearly should have known that [the official's] actions specifically endangered an individual.'. . Other times we have said that a public official must have 'acted with the requisite culpability to establish a substantive due process violation[.]'. . .Which test applies? The latter one more accurately articulates current law. . . . Since *Lewis*, we have recognized that the culpability standard that applies to state actors who indirectly allow a private party to inflict harm should not be lower than the culpability standard that applies to state actors who directly inflict that harm themselves. . . . Our court has imported this deliberate-indifference standard into the state-created-danger context, at least when officials have '"the opportunity for

reflection and unhurried judgments.”’. . The standard has two parts. An official must ‘be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’. . ‘Having drawn the inference,’ the official next must ‘act or fail to act in a manner demonstrating “reckless or callous indifference” toward the individual’s rights.’. . .Measured against these standards, the Does have not created a genuine dispute of material fact over the culpability element of our state-created-danger test. . . .As will often be the case in retrospect, Waltman and Singleton also could have done more when implementing this discipline. Singleton could have ensured that C.T. stayed in his assigned seat. And Waltman could have followed up with Singleton about the discipline. At most, however, the failure to take these additional precautions suggests negligence, which falls well short of establishing the required ‘callous disregard for the safety’ of Minor Doe. . . . While C.T.’s sexual assault of Minor Doe undoubtedly shocks the conscience, the school employees’ responses to C.T.’s earlier actions do not. And it is their conduct that is at issue here.”); ***Cook v. Hopkins***, 795 F. App’x 906, ___ (5th Cir. 2019) (“It’s true that Deanna might have a viable claim for violation of her due process rights if this circuit recognized the ‘state-created danger theory,’ which can make the state liable under § 1983 if ‘it created or exacerbated the danger’ of private violence against an individual. . . Plaintiffs rely heavily on an out-of-circuit opinion, *Okin v. Village of Cornwall-on-Hudson Police Department*, in which the Second Circuit held that the state-created danger theory gave rise to a substantive due process violation where ‘police conduct ... encourage[d] a private citizen to engage in domestic violence, by fostering the belief that his intentionally violent behavior [would] not be confronted by arrest, punishment, or police interference.’. . But, as the district court explained, this circuit does not recognize the state-created danger theory, and we decline to do so today, despite Plaintiffs’ urging that ‘[t]his is that case.’. . In sum, the district court did not err in dismissing Plaintiffs’ due process claims against Defendants.”); ***Turner v. Thomas***, 930 F.3d 640, 644-47 (4th Cir. 2019) (“Before us is Turner’s claim that Thomas and Flaherty violated his substantive due process rights by ordering officers at the rally not to intervene in violence among protesters. In general, a defendant’s mere failure to act does not give rise to liability for a due process violation. . . Turner seeks to avoid that rule by invoking the state-created danger exception, under which state actors may be liable for failing to protect injured parties from dangers which the state actors either created or enhanced. . . But it was not clearly established at the time of the rally that failing to intervene in violence among the protesters would violate any particular protester’s due process rights. Accordingly, we agree with the district court that Thomas and Flaherty are entitled to qualified immunity, and we affirm the dismissal of Turner’s complaint. . . . [W]e must determine whether, at the time of the rally, there existed legal authority giving Thomas and Flaherty fair warning that ordering officers not to intervene in violence among protesters would implicate the state-created danger doctrine and amount to a violation of protesters’ due process rights. . . . Following *Pinder*’s narrow reading of the state-created danger doctrine, we have never issued a published opinion recognizing a successful state-created danger claim. Rather, our precedent on the issue has emphasized the doctrine’s limited reach and the exactingness of the affirmative-conduct standard. . . . Against this background, we conclude that it was not clearly established at the time of the rally that ordering officers *not* to intervene in private violence between protesters was an affirmative act within the meaning of the state-created danger doctrine. Our precedent sets

an exactingly high bar for what constitutes affirmative conduct sufficient to invoke the state-created danger doctrine. Turner has put forth no facts suggesting that a stand-down order crosses the line from inaction to action when the state conduct in *Pinder* and *Doe* did not. Acting under *Pinder*'s teaching that state actors may not be held liable for 'st[anding] by and d[oing] nothing when suspicious circumstances dictated a more active role for them,' Thomas and Flaherty could have reasonably concluded that a stand-down order violated no constitutional right. . . Accordingly, Turner has not alleged a violation of clearly established law, and Thomas and Flaherty are entitled to qualified immunity."); ***Matthews v. Bergdorf***, 889 F.3d 1136, 1150 (10th Cir. 2018) ("[T]he state-created danger exception has no application if Plaintiffs' claims are based on the mere failure of ODHS caseworkers to respond to a referral by removing Plaintiffs from the Matthews' home and placing them in a safe environment. Such claims of inaction, no matter how prolific, are 'insufficient as a matter of law to result in liability' under the state-created danger exception. . . A state-created danger necessarily involves affirmative conduct on the part of a state actor in placing a plaintiff in danger of private violence. . .In addition to adequately pleading affirmative conduct and private violence as part and parcel of any claim arising under the state-created danger exception, a plaintiff must also adequately allege the following: (1) the state actor created the danger or increased the plaintiff's vulnerability to the danger in some way, (2) plaintiff was a member of a limited and specifically definable group, (3) the state actor's conduct put plaintiff at substantial risk of serious, immediate, and proximate harm, (4) the risk was obvious or known, (5) the state actor acted recklessly in conscious disregard of the risk, and (6) such conduct, when viewed in total, was conscience shocking."); ***Wilson-Trattner v. Campbell***, 863 F.3d 589, 594-96 (7th Cir. 2017) ("[E]ven if the appellees' failure to intervene ultimately increased the danger to Wilson-Trattner by indirectly emboldening Roeger to continue to mistreat her, that would not distinguish her case from *DeShaney*. There state officials did not remove a child from an abuser's care despite numerous obvious indications of abuse over a period of about two years. . . The abuse accordingly continued unabated, ultimately resulting in severe brain damage to the child. . .The Supreme Court nevertheless concluded that the inaction of state officials was insufficient to support a claim under the state-created danger doctrine. . . That holding is equally applicable here. The Supreme Court subsequently reaffirmed this principle in *Town of Castle Rock v. Gonzales*, in which it held that there is no due process right to have another arrested for one's own protection. . . . In sum, we find no evidence that any of the appellees created or increased a danger to Wilson-Trattner. Mere indifference or inaction in the face of private violence cannot support a substantive due process claim under *DeShaney* and *Castle Rock*. Further, Wilson-Trattner's theory that Hancock County officers increased a danger to her by implicitly condoning violence against her is both questionable in light of *DeShaney* and *Castle Rock* and unsupported by the facts. As such, the district court correctly granted summary judgment on the Plaintiff's substantive due process claim."); ***Enger v. Arnold***, 862 F.3d 571, 576 (6th Cir. 2017) ("T.F.'s death was a tragedy. Although we are appalled by the sinister acts that led to his death, it was Engler's role, as T.F.'s representative, to present us with all of the facts that support his constitutional claim against Arnold. Plaintiffs who seek to hold state officials constitutionally liable on a 'failure-to-protect' claim face a high burden under *DeShaney*. . . Engler's complaint falls far short. An assertion of a failure to act does not support a state-created-danger theory, and

we may not presume facts not presented. . . Because Engler's complaint fails to state sufficient facts to support his substantive due-process claim, we affirm the district court's dismissal of this claim."); ***Estate of Reat v. Rodriguez***, 824 F.3d 960, 964-67 (10th Cir. 2016) (*amending and superceding opinion on den'l of reh'g en banc*) ("Because there are cases where we can more readily decide the law was not clearly established before reaching the more difficult question of whether there has been a constitutional violation, we may exercise discretion in deciding which prong to address first. . . This is such a case. . . .At the most general level, the parties agree that the state-created danger doctrine is clearly established in this circuit. . . .Though the elements of the state-created danger test are clearly established, it also must be clear to which fact scenarios and government actors we apply the test, and what types of conduct are 'conscience shocking' under the sixth factor. . . .Here, Reat's Estate alleges Rodriguez violated the Fourteenth Amendment by knowingly sending the victims, who had called 911 to report an assault, back into the path of their armed attackers. It contends Rodriguez knew the attackers last had been seen speeding northward on Sheridan Boulevard only minutes earlier, yet he instructed Pal to stop on that road. He then told Pal to pull over and activate his hazard lights at a location nineteen blocks north of the place of the assault. Even after Rodriguez knew the attackers had brandished a gun, he did not suggest that Pal relocate to a less conspicuous place, nor did he send police protection. The district court held 'these factual allegations, accepted as true, are sufficiently shocking to the conscience to state a plausible claim for violation of plaintiffs' substantive due process rights under the state-created danger theory.'. . For a number of reasons, we conclude Rodriguez's conduct does not violate the clearly defined contours of the state-created danger doctrine. First, Reat's Estate cannot point to a Supreme Court or Tenth Circuit case involving misconduct by 911 operators. . . . In all of [the] cases where we found it appropriate to apply the doctrine of state-created danger, the victims were unable to care for themselves or had had limitations imposed on their freedom by state actors. . . .Rodriguez is unlike any of the defendants in our state-created danger cases. Rodriguez was not a police officer, firefighter, or other similar first responder. . . As a 911 operator, he was not present at the scene of the attack, nor could he take physical action in response to the unfolding event. He did not impose any limitation on Reat's freedom to act. Rodriguez merely informed the victims, however incompetently, that to get help from the police, they would have to return to Denver. It cannot be said that any of Rodriguez's actions, as foolish as they were, 'limited in some way the liberty of a citizen to act on his own behalf.' . . Furthermore, Reat is unlike the victims in other state-created danger cases. He was not in the custody of the state in the way that prisoners are, and thus was not deprived in that manner of his freedom to act. Unlike children in school or under the care of social workers, Reat and his companions were not incapable of acting in their own interest at the time of the shooting. Though the state-created danger doctrine itself may be clearly established, it is far from clear that it applies to Rodriguez's conduct in this particular situation. In sum, all cases cited by Reat's Estate 'are simply too factually distinct to speak clearly to the specific circumstances here.' *Mullenix*, 136 S. Ct. at 312. No reasonable 911 operator could have known that these actions would have resulted in liability under the Fourteenth Amendment."), *cert. denied*, 137 S. Ct. 1434 (2017); ***Montgomery v. City of Ames***, 829 F.3d 968, 973 (8th Cir. 2016) ("Montgomery has not established that McPherson or employees of the Center created a new danger to Montgomery or increased the danger that Bailey posed to Montgomery, because the

danger to Montgomery existed before Bailey resided at the Center and would have continued to exist thereafter. Allowing Bailey to visit the Hy-Vee did not create a greater risk to Montgomery than what she would have faced if Bailey had never been assigned to the Center in the first place. . . That Bailey was able to leave the Center during the evening of September 28 simply placed Montgomery back in the same situation that she occupied before Bailey was in custody or resided at the halfway house. Montgomery was not an institutionalized person to whom the State owed a duty, *cf. Youngberg v. Romeo*, 457 U.S. 307, 317 (1982), and the Supreme Court has rejected the notion that a State has an affirmative duty, enforceable through the Due Process Clause, to protect an identified victim when it knows that a person in custody poses a special danger to that victim. . . Montgomery has not presented evidence comparable to the allegations in *Wells v. Walker*, 852 F.2d 368, 371 (8th Cir. 1988), where state officials took action under state law to provide post-release transportation for a prisoner, used a citizen's store as the closest commercial transportation pick-up point, and thus affirmatively placed the citizen in a 'unique, confrontational encounter' with a person known to have exhibited violent propensities."); ***Stiles ex rel. D.S. v. Grainger Cty., Tenn.,*** 819 F.3d 834, 855 (6th Cir. 2016) ("Most of the actions Plaintiffs identify are not affirmative acts. Failing to punish students, failing to enforce the law, failing to enforce school policy, and failing to refer assaults to McGinnis are plainly omissions rather than affirmative acts. As for the remaining actions Plaintiffs cite—blaming DS and Stiles, and misleading Plaintiffs to believe Defendants would help DS—Plaintiffs offer no explanation or evidence of how these actions increased DS's exposure to peer harassment. At most, these acts returned DS to a preexisting situation of danger. Nothing suggests DS 'was safer before' Defendants' accusatory statements and promises to help him than he was afterwards. . . As a result, Plaintiffs' due process claim cannot prevail under a state-created danger theory."); ***Doe v. Rosa***, 795 F.3d 429, 439, 442 (4th Cir. 2015) ("Under the narrow limits set by *DeShaney* and *Pinder,* to establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission. Put another way, 'state actors may not disclaim liability when they themselves throw others to the lions,' but that does not 'entitle persons who rely on promises of aid to some greater degree of protection from lions at large.'. . . Given the clear rule under *DeShaney* and *Pinder,* we conclude that the Does cannot make a § 1983 state-created danger claim against Rosa. As the district court found in granting summary judgment, the Does' claim fails because they 'cannot demonstrate that [Rosa] created or substantially enhanced the danger which resulted in [their] tragic abuse at the hands of ReVille.'. . ReVille began abusing the Does in 2005 and 2006, two years before Rosa could have been aware through the Camper Doe complaint that he was a pedophile. Quite simply, Rosa 'could not have created a danger that already existed.'. .Nor did Rosa create or increase the risk of the Does' abuse specifically during the early summer months of 2007, as the Does posit. As horrific as the abuse of the Does by ReVille was, nothing transpired between them and ReVille in the summer of 2007 that had not been ongoing for two years unrelated to any action by Rosa. As *DeShaney* makes clear, allowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger. . . .For the foregoing reasons, the state-created danger doctrine does not impose liability on Rosa for ReVille's ongoing abuse of the Does. While Rosa's undisputed failure to act

brought dishonor to him and The Citadel, it did not create a constitutional cause of action. . . Rosa's alleged conduct neither created nor increased the danger ReVille already posed to the Does, and in any event, did not constitute cognizable affirmative acts with respect to ReVille's abuse of the Does."); ***Doe v. Vill. of Arlington Heights***, 782 F.3d 911, 918 (7th Cir. 2015) ("This case is not sufficiently similar to those cases in which we have applied the state-created danger exception; it is more like *Windle* and cases in which the exception was inapplicable. Del Boccio did not create the danger to Doe, nor did he do anything to make the danger to her worse. When he left Doe with the three young males, he left her just as he found her, 'plac [ing] [her] in no worse position than that in which [s]he would have been had [he] not acted at all.'. . Not even the allegations that Del Boccio called off Officer Spoerry (or falsely reported to dispatch that the subjects were gone) created or increased the danger to Doe. Had Del Boccio not called off Officer Spoerry or falsely reported to dispatch, we have no way of knowing what would have happened. Officer Spoerry might have failed at protecting Doe. . .This contrasts with *Ross v. United States,* 910 F.2d 1422, 1424–25 (7th Cir.1990), where competent rescuers were on the scene with rescue equipment and ready to begin their efforts to rescue a drowning boy when the police arrived and ordered them to cease their efforts because county policy prohibited civilian rescue attempts. A sheriff's deputy advised the rescuers that he would arrest them upon their entry into the water and even placed his boat so as to prevent their dive. . . About thirty minutes after the boy had fallen into the water, the authorized divers arrived and pulled him out of the water. . . He died the next day. . . We held that plaintiff sufficiently alleged a constitutional injury. . . Significantly, in *Ross* the chances of a successful rescue were high, and there was a direct connection between the deputy's actions and the boy's drowning. Here, we can only speculate whether Del Boccio made Doe worse off, whether by calling off Officer Spoerry or falsely reporting to dispatch. This is not a case in which Doe was safe, or even considerably safer, before Del Boccio acted. His alleged conduct did not turn a potential danger into an actual one; Doe was in actual danger already. Therefore, Del Boccio had no constitutional duty to protect her. But even if calling off Officer Spoerry violated Doe's constitutional rights, it was not clearly established and Del Boccio nonetheless would be entitled to qualified immunity."); ***Estate of Lance v. Lewisville Independent School Dist***., 743 F.3d 982, 1001, 1002 (5th Cir. 2014) ("The *en banc* court in *Covington* also recognized that 'we have never explicitly adopted the state-created danger theory,' and 'decline[d] to use th[e] *en banc* opportunity to adopt the state-created danger theory in this case because the allegations would not support such a theory.'. . Nevertheless, the *en banc* court applied the state-created danger framework to plaintiffs' claim and concluded that plaintiffs' 'allegations do not support a claim under the state-created danger theory, even if that theory were viable in this circuit.'. . In light of *Covington's* express decision not to recognize the state-created danger theory our court has repeatedly noted its unavailability . . .Taking the view most favorable to the Lances-assuming that state-created danger is a viable theory-the evidence does not create a genuine issue of material fact."); ***Estate of C.A. v. Castro***, 547 F. App'x 621, 626, 627 (5th Cir. 2013) ("The Agwuokes ask this court to use this case to expressly adopt the state-created danger theory of liability, claiming it 'is a natural extension of both the text and purpose of Section 1983 and of Supreme Court precedent. And this is the appropriate case to adopt it.' But 'this Court has consistently refused to adopt the state-created danger theory.'. . Contrary to the Agwuokes' assertion, the district court did not hold that

the state-created danger doctrine was 'not viable' in the Fifth Circuit. Rather, it evaluated the doctrine, noted that the circuit has yet to adopt the theory, and concluded that 'the present case would not appear to provide the right vehicle for the Fifth Circuit to adopt the state-created danger doctrine' because '[t]he plaintiffs would fail to satisfy one or more of the necessary elements suggested in *Covington.'* We agree. Even assuming this court recognized the theory of liability, the Agwuokes failed to raise a question of material fact on each element of a § 1983 claim against HISD premised on the state-created danger theory of liability. . . . The Agwuokes fail to establish that C.A. was a known victim, and thus do not make out a prima facie case under the state-created danger theory of liability. As a result, we follow the lead of the en banc court in *Covington* and 'decline to use this ... opportunity to adopt the state-created danger theory in this case because the allegations would not support such a theory.'"); ***Morrow v. Balaski***, 719 F.3d 160, 178 (3d Cir. 2013) (en banc) ("We are not persuaded by the Morrows' argument that the Defendants affirmatively created or enhanced a danger to Brittany and Emily by suspending Anderson and then allowing her to return to school when the suspension ended. . . .While the Morrows make much of the fact that Defendants' failure to expel Anderson after she was adjudicated 'guilty of a crime' may have been contrary to a school policy mandating expulsion in such circumstances, we decline to hold that a school's alleged failure to enforce a disciplinary policy is equivalent to an affirmative act under the circumstances here."); ***Slade v. Board of School Directors of City of Milwaukee***, 702 F.3d 1027, 1033 (7th Cir. 2012) ("Some cases say or assume that due process is violated in a case in which the state endangers a person only if the state's action 'shocks the conscience.'. . . It's not a very illuminating expression, and we don't know what it adds to recklessness. Reckless indifference to a child's safety would doubtless shock the conscience, but *County of Sacramento v. Lewis* . . . says that negligence doesn't. References to 'shocks the conscience' illustrate the tendency of some courts to 'complexify' analysis in this class of cases needlessly, as it seems to us. We have already indicated our unhappiness with the use of 'affirmative act' and 'shocks the conscience' as touchstones of liability. Neither are we happy with the suggestion in *Phillips v. County of Allegheny* . . . —a suggestion in tension with *County of Sacramento v. Lewis*—that due process can be violated by 'gross negligence or arbitrariness that indeed shocks the conscience.'. . And we get little out of the test suggested for cases of this sort in *Currier v. Doran* . . . (and earlier Tenth Circuit cases on which it relies) . . . . Shouldn't it be enough to say that it violates the due process clause for a government employee acting within the scope of his employment to commit a reckless act that by gratuitously endangering a person results in an injury to that person? Are there not virtues in simplicity, even in law? With our simple formula (which incidentally dispenses with the jargony term 'deliberate indifference'), all that remains in doubt is the choice between the civil and criminal standards of recklessness—between the known versus the merely obvious risk—but that difference as we have said has little practical significance in a litigation and none in this litigation."); ***Cutlip v. City of Toledo***, No. 10–4350, 2012 WL 2580818, at *7-*9 (6th Cir. July 5, 2012) (not reported) ("[A] situation where the victim committed suicide does not fit neatly into the state-created-danger doctrine. . . This Circuit has never found liability under the state-created-danger doctrine where the victim committed suicide, and indeed, although a number of courts have considered the state-created-danger doctrine within the context of suicide, the primary cases that have found or seriously entertained liability have involved the

suicide of minors where school officials or police were in some way responsible. . . Nearly all cases that considered the state-created-danger doctrine in the context of suicide have rejected liability on the merits, finding in most cases that the municipality did not create the danger—i.e., the self-destructive impulse—through an affirmative act, and in the balance of cases that the state agents did not act with deliberate indifference or in a way that shocked the conscience. . .The rarity of *Deshaney* liability for suicides can be partially attributed to the high standard of proof in state-created-danger cases, but it is also uniquely difficult to assign constitutional liability to the government when the non-custodial victim harms himself. As a general principle, people cannot violate their own constitutional rights, and where a person makes a free and affirmative choice to end his life, the responsibility for his actions remains with him. That a state official somehow contributed to a person's decision to commit suicide does not transform the victim into the state's agent of his own destruction. . .Given that the Supreme Court 'has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended,' the 'doctrine of judicial self-restraint' cautions us not to automatically extend the state-created-danger exception to suicide, particularly because the Supreme Court has been largely silent on this doctrine. . .Despite our reservations about the applicability of the state-created-danger doctrine to suicide cases, because there is some question in this case about whether Rocky intentionally committed suicide or whether he involuntarily pulled the trigger after the police detonated the flash-bang device, we will accept Cutlip's version of this factual dispute and proceed to apply the state-created-danger doctrine to determine whether the City can be liable under § 1983. In order to show a constitutional violation pursuant to the state-created-danger doctrine, we must find each of the following elements: (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff. *Estate of Smithers v. City of Flint,* 602 F.3d 758, 763 (6th Cir.2010) (citing *Reynolds,* 438 F.3d at 690). The only prong at issue is whether an 'affirmative act' by the police officers increased the risk that Rocky would kill himself; there is no debate that Rocky was specifically at risk and that the police officers knew that he was at risk. Crucially, the police officers' affirmative acts must be made with deliberate indifference, which this Circuit has 'equated with subjective recklessness.'. . . The one affirmative action identified by Cutlip that could have legitimately increased the danger to Rocky was detonating the flash-bang device and initiating the forced entry into Rocky's bedroom. But the record does not support a finding of deliberate indifference on the part of the police officers. . . . Because we do not find any genuine, material, disputed issue of fact and because the police did not display conscious indifference to Rocky's life, we believe that summary judgment is appropriate in this case. The police did not violate Rocky's constitutional rights, and without an underlying constitutional violation, the City is not liable under § 1983."); ***Gray v. University of Colorado Hosp. Authority***, 672 F.3d 909, 927-30 (10th Cir. 2012) ("We conclude our analysis of Plaintiffs' danger creation claim by pointing out its most glaring defect. We have observed throughout this opinion that a precondition to our application of the state-created danger theory is an act of 'private violence.' Quite simply, the complaint does not allege this indispensable

precondition. Instead, the complaint alleges that the immediate or direct cause of decedent's death was negligence on the part of state actors. . . .The state-created danger theory indulges the legal fiction that an act of private violence may deprive the victim of this constitutional guarantee. Before the fiction may operate, however, a state actor must create the danger or render the victim more vulnerable to the danger that occasions the deprivation of life, liberty, or property. The *danger* that the state actor creates or enhances must be differentiated from the *harm* that the private party inflicts. Under the state-created danger theory, a constitutional deprivation is *dependent* on a private act that deprives the victim of life, liberty, or property, even though private action itself is never cognizable under § 1983. The state actor's affirmative act creating the danger or rendering the victim more vulnerable to it does *not* constitute a constitutional deprivation. The Due Process Clause does not provide an individual the right to be free from state-created dangers in a vacuum. This is because 'an increased risk is not *itself* a deprivation of life, liberty, or property.'. . A 'would-be' victim who averts the danger, and thus the harm, may not claim the denial of a constitutional right to be free from state-created dangers. That would be nonsensical. Although the State may incur a constitutional duty to protect the victim from harm its conduct has rendered more likely, the victim has suffered no constitutional deprivation if the victim is not harmed. . . .But not just any private act will suffice. The private act must be a violent one. . . . The view that a private party must act with some degree of deliberateness before a victim's harm is actionable under the state-created danger theory is sound. This is because the harm associated with a negligent act is never constitutionally cognizable under the Due Process Clause. . . . Reason dictates that if state actors are not answerable under § 1983 for their *own* negligent acts, they are not answerable under § 1983 where a private party's underlying negligent act is directly responsible for the harm. The rationale is simple: The victim has not suffered a constitutional deprivation in either case. . . . Plaintiffs' complaint plainly alleges that those individuals in the EMU responsible for monitoring decedent were 'employees and/or agents' of Defendant hospital acting 'under color of state law.' Plaintiffs' complaint also plainly alleges those individuals are responsible for 'negligently causing' decedent's death. A precondition to our application of the state-created danger theory is 'private violence.' The conduct Plaintiffs allege to be directly responsible for decedent's death is neither private nor violent. Accordingly, because the state-created danger theory of constitutional liability has no role to play in a proper resolution of Plaintiffs' grievance, the judgment of the district court is AFFIRMED."); ***Estate of Smithers ex rel. Norris v. City of Flint***, 602 F.3d 758, 764 (6th Cir. 2010) ("Plaintiffs here argue that the officers engaged in an affirmative act that created a danger when they released Washington from custody on the trespassing charge rather than holding her at least overnight on a domestic violence charge, creating an illusion of safety for plaintiffs. They suggest that the officers' decision to release Washington operated as an approval of her threats. However, while this action may have been ill-advised, the officers' failure to hold Washington did not constitute an affirmative act. The officers exercised their discretion in arresting Washington for trespassing, rather than for domestic violence, for which they are protected under *Castle Rock.* Thus, the officers' first affirmative act had the effect of protecting Washington's eventual victims, at least for a short period of time. Their second affirmative act, releasing Washington from custody, did not 'create'" or 'increase' the danger to plaintiffs. The officers did not require or encourage plaintiffs to remain in the unlocked house or suggest that Washington would be held for 20 hours

so as to imply that plaintiffs would be safe. Their actions did not constitute an approval of Washington's threats any more than the return of the children in *DeShaney* or *Bukowski* encouraged that those children should be further harmed. As in those cases, these events were tragic; however, the officers' actions could not have been interpreted by a reasonable juror to have created or increased the danger to plaintiffs."); ***Sandage v. Board of Com'rs of Vanderburgh County***, 548 F.3d 595, 599, 600 (7th Cir. 2008) ("The first principle is thus the key one, and its requirement of 'affirmative acts' distinguishes our case from *Monfils*. We add only that 'create or increase' must not be interpreted so broadly as to erase the essential distinction between endangering and failing to protect. If all that were required was a causal relation between inaction and harm, the rule of *DeShaney* would be undone, . . . since, had it not been for the state's inaction in *DeShaney*, there would have been no injury. The three cases that the opinion in *King* cites for the proposition that the state must by its 'affirmative acts ... create or increase' the danger to the victim − *Windle v. City of Marion*, 321 F.3d 658 (7th Cir.2003); *Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir.2006), and *Monfils* − are either cases, like this one, of inaction by law enforcement personnel (*Windle* and *Bright*), so that there was no liability, or a case (*Monfils*) in which law enforcement personnel were responsible for the danger. When courts speak of the state's 'increasing' the danger of private violence, they mean the state did something that turned a potential danger into an actual one, rather than that it just stood by and did nothing to prevent private violence. That was *Monfils*; it is not this case; and after *Castle Rock* a broken promise − the essential act of which both the plaintiff in that case and the present plaintiffs complain (though there was more in *Monfils* − the handing over of the tape to the murderer) − may very well not be enough."); ***Walter v. Pike County, Pa.***, 544 F.3d 182, 195, 196 (3d Cir. 2008) ("If a state-created danger claim cannot be predicated on a failure to arrest, neither can it be predicated on a failure to provide protection. . . . And if an assurance of well-being despite the presence of a threat is not a sufficiently affirmative act, neither is the mere failure to warn of a threat. . . . Here, the District Court held that a jury could reasonably find that the defendants affirmatively used their authority in 2001, by 'allowing Michael Walter to become involved in eliciting a confession from Joseph Stacy,' . . . and could reasonably find that the defendants were deliberately indifferent in 2002 in their 'failure to warn the Walter family of Joseph Stacy's menacing behavior....'. . . But for the reasons we have articulated above, these findings would not amount to a constitutional violation-they would not establish that the defendants committed a *culpable* act, only that they acted in 2001 and then, months later, shocked the conscience through inaction."); ***Barber v. Overton***, 496 F.3d 449, 456, 457 (6th Cir. 2007) ("We belabor the discussion of *Kallstrom* to emphasize what it did *not* do: It did not create a broad right protecting plaintiffs' personal information. Rather, *Kallstrom* created a narrowly tailored right, limited to circumstances where the information disclosed was particularly sensitive and the persons to whom it was disclosed were particularly dangerous *vis-a-vis the plaintiffs.* We cannot conclude that social security numbers and birth dates are tantamount to the sensitive information disclosed in *Kallstrom.* The court's careful footnote in that case, instructing the district court on remand, should put that to rest. If mere disclosure of social security numbers were sufficient then there was no need for the remand. In addition, *Kallstrom* did not restrict any private information from disclosure to anyone in any circumstances, but rather only *certain* restricted information when the plaintiffs had a reason to

fear retaliation from persons to whom it was disclosed. In light of our narrow reading of the substantive due process right to non-disclosure privacy, we conclude that the release of the social security numbers was not sensitive enough nor the threat of retaliation apparent enough to warrant constitutional protection here. . . First, scary though it may be, the diligent miscreant who wishes to exact vengeance can locate a person with limited information. Plaintiffs' names, general whereabouts (near the IMAX facility), and approximate ages were already known to these prisoners. While the social security numbers and birth dates might have pinpointed the residence of a particular plaintiff, there are other methods of learning where persons reside; several hours in a car or several telephone calls might well provide the very same information. Voter registration records, county property records, and a plethora of other publically available sources exist through which persons can discover the residency of an individual and prisoners' accomplices have as ready access to them as any other citizen. The plaintiffs do not allege that this information allowed the prisoners to discover information that they would have been unable to otherwise. Therefore, this information does not rise to the level of sensitivity we found constitutionally significant in *Kallstrom*."); ***Draw v. City of Lincoln Park***, 491 F.3d 550, 554, 556 (6th Cir. 2007) ("As an initial matter, we first consider whether the instant case is distinguishable from our decision in *Jones* because the Plaintiffs-Appellants' claim here is predicated on a different theory of liability. As noted above, the Plaintiffs-Appellants say that the district court erred in failing to evaluate their § 1983 claim under a 'direct injury' theory of liability rather than according to the 'state created danger' doctrine. . . . Here, the defendant officers' conduct was irresponsible. However, no evidence in the record indicates the officers intended to cause any harm through their actions or otherwise acted in a manner sufficient to transform wrongful behavior into unconstitutional conduct. . . . Here, even if the Court construes the defendant officers' conduct as conspiratorial, there is no evidence that the goal of the purported conspiracy − the facilitation of an illegal drag race − was in and of itself unconstitutional. Although violative of Michigan law, drag racing does not implicate constitutional concerns. Second, the Plaintiffs-Appellants' direct-injury argument ignores the fact that otherwise impermissible police conduct must truly be extraordinary in nature to qualify as 'conscience shocking.' . . . Here, the defendant officers stupidly encouraged third parties to engage in tortious conduct. Without question, such conduct showed incredibly poor judgment. However, the conduct in question does not meet the high threshold set out in *Lewis*. Accordingly, we find that the Plaintiffs-Appellants' claims are unsupportable under a direct-injury theory of liability."); ***Ye v. United States***, 484 F.3d 634, 639-41 (3d Cir. 2007) ("The three necessary conditions to satisfy the fourth element of a state-created danger claim are that: (1) a state actor exercised his or her authority, (2) the state actor took an affirmative action, and (3) this act created a danger to the citizen or rendered the citizen more vulnerable to danger than if the state had not acted at all. . . . Dr. Kim argues that an assurance or misrepresentation, without more, cannot constitute an 'affirmative' act for purposes of the state-created danger inquiry. This Court has never expressly addressed this issue. We hold that a mere assurance cannot form the basis of a state-created danger claim. . . .Although the *DeShaney* Court did not hold that words alone could not rise to the level of affirmative act that works a deprivation of liberty, the Supreme Court did provide two examples, incarceration and institutionalization, to guide our analysis. Ye cannot prevail unless Dr. Kim's misrepresentation that Ye had 'nothing to worry about and that he [was]

fine' falls into the third category of a 'restraint of personal liberty' that is 'similar' to incarceration or institutionalization. *DeShaney* did not conclusively answer this question, nor was the Court focused on state-created liability, giving much greater consideration to circumstances that would give rise to the special relationship exception. However, the Court made clear that a 'deprivation of liberty' is a bedrock requirement of state liability under the substantive due process clause. Ye's claim places before us the question of whether a mere assurance can constitute an affirmative act that invaded Ye's personal liberty. We implicitly rejected this argument in *Bright* and do so expressly now."); ***Koulta v. Merciez***, 477 F.3d 442, 446, 447 (6th Cir. 2007) ("The officers' failure to administer a breathalyzer test (or otherwise to determine the extent of Lucero's drinking) before ordering her to leave the property may well have been negligent, but it did not 'create' or 'increase' the danger − of Lucero drinking and driving − that pre-dated their arrival on the scene. . . . In the final analysis, Lucero's admitted proclivity to drink and drive that evening placed Koulta (and other people using the roadways) in as much danger before the officers arrived as afterwards. And much as the officers were in a position to head off the tragedy that materialized minutes later, a reality (and memory) that no court decision will eliminate, their conduct was no more an affirmative risk-creating act than the conduct of the officers in *DeShaney* (who returned an abused child to the custody of his abusive father) or *Bukowsk*i (who returned a mentally disabled girl to the stranger who had been sexually abusing her).[distinguishing *Pena v. DePrisco*, 432 F.3d 98 (2d Cir.2005) and *Reed v. Gardner*, 986 F.2d 1122 (7th Cir.1993)]"); ***Johnson v. City of Seattle***, 474 F.3d 634, 641 (9th Cir. 2007) ("In contrast to the plaintiffs in *Wood*, *Penilla*, *Munger*, *Grubbs* and *Kennedy*, the Pioneer Square Plaintiffs have failed to offer evidence that the Defendants engaged in affirmative conduct that enhanced the dangers the Pioneer Square Plaintiffs exposed themselves to by participating in the Mardi Gras celebration. The decision to switch from a more aggressive operation plan to a more passive one was not affirmative conduct that placed the Pioneer Square Plaintiffs in danger, because it did not place them in any worse position than they would have been in had the police not come up with any operational plan whatsoever. . . . [T]he fact that the police at one point had an operational plan that might have more effectively controlled the crowds at Pioneer Square does not mean that an alteration to this plan was affirmative conduct that placed the Pioneer Square Plaintiffs in danger. The police did not communicate anything about their plans to the Pioneer Square Plaintiffs prior to the incident. Even if proved not the most effective means to combat the violent conduct of private parties, the more passive operational plan that the police ultimately implemented did not violate substantive due process because it 'placed [the Pioneer Square Plaintiffs] in no worse position than that in which [they] would have been had [the Defendants] not acted at all.'"); ***Carver v. City of Cincinnati***, 474 F.3d 283, 286, 287 (6th Cir. 2007) ("Here, the officers removed everyone from the apartment and they controlled the keys to the apartment. It has not been suggested that anyone tried to enter the apartment to render aid to Carver. Nor has it been established that anyone, whether it be the officers or the people removed from the apartment, knew of Carver's need for assistance. Therefore, there is no 'evidence that any private rescue was available or attempted.'. . The officers' act of closing off the apartment to conduct an investigation into the death of Smith-Sandusky did nothing in and of itself to increase the risk of harm to Carver. No allegation has been made that Carver died while the officers were inside the apartment with him. The fact that Carver died from an apparent self-induced drug

overdose is tragic. This tragedy, however, does not allow us to usurp Supreme Court precedent that the officers were under no general duty to render aid to Carver. . . In the absence of any allegation that a private rescue was attempted, the officers did not commit a constitutional violation by securing the apartment and leaving Carver lying on the couch."); ***Tanner v. County of Lenawee***, 452 F.3d 472, 478, 479 (6th Cir. 2006) (state-created-danger exception has never been extended to cover situations where the police simply respond to the scene of a 911 call); ***Bright v. Westmoreland County,*** 443 F.3d 276, 283, 284 (3d Cir. 2006) ("We conclude that the state cannot 'create danger' giving rise to substantive due process liability by failing to more expeditiously seek someone's detention, by expressing an intention to seek such detention without doing so, or by taking note of a probation violation without taking steps to promptly secure the revocation of the probationer's probation."); ***Jones v. Reynolds,*** 438 F.3d 685, 688, 691, 694, 698, 699 (6th Cir. 2006) ("Because the officers did not have custody of Denise Jones at the time of the accident, because the officers' actions did not place Denise Jones in any more danger than she voluntarily undertook before they arrived and because the officers' participation in this tragedy did not specially place Denise Jones at any more risk than the 150-300 people attending the drag race, all relevant precedent requires us to uphold the judgment of the district court summarily rejecting this constitutional claim. . . . Nothing in the record indicates that the race would not have proceeded if the officers had never arrived at the scene. And nothing in the record indicates that the officers made Jones 'more vulnerable' to the risk that she had already undertaken by voluntarily choosing to watch the race. . . . Even if an officer bet on the drag race, as one spectator alleges, and even if the officers played rap music for 15 minutes rather than 2 minutes, as other spectators allege, that does not change matters. While such conduct certainly would not have discouraged the participants from proceeding with the race, it also cannot be said that it placed the drivers or spectators in greater danger than if the police had never arrived. As deeply regrettable and ultimately tragic as the officers' actions were, no evidence suggests that their conduct altered the risk of harm to Denise Jones. . . . Faced with these kinds of assertions, it is tempting to say that they satisfy the 'state created danger' doctrine. But, to do so, we would have to say that the doctrine covers conduct it does not − that it covers state action that does not create or increase the risk of danger to the victim and that it applies to state action that does not specifically increase the risk of danger to a discrete individual or group of individuals. And even were we to move the doctrine in these directions, that would not advance this claim because the very act of modifying these rules would defeat plaintiff's obligation to show that the officers violated 'clearly established' law. While we decline to extend the doctrine in this case, nothing in our decision prevents future litigants from arguing what the plaintiff has not argued here − that the alleged actions of the officers converted the private misconduct of the drivers into public misconduct and in the process converted this claim into a direct-injury constitutional claim under the *Lewis*, as opposed to *DeShaney*, line of cases."); ***May v. Franklin County Commissioners***, 437 F.3d 579, 585, 586 (6th Cir. 2006) ("In both *Cartwright v. City of Marine City* and *Bukowski v. City of Akron*, we discussed the 'Catch-22' that these sorts of scenarios can create for police officers, where they face a danger of potential liability whether they take action to attempt a rescue or they fail to do so. . . Franklin County would undoubtedly face legal and moral objections, and rightly so, if its Comm Center personnel had failed to dispatch an officer to Kirk's apartment after her repeated calls to 911.

May's proposition that appellees violated Kirk's constitutional rights by sending a police cruiser in response to her 911 calls for help is unsettling, and we decline to interpret the Due Process Clause in such a manner as to discourage law enforcement officers from responding to requests for assistance. May has not produced any evidence that Franklin County's dispatch of police to Kirk's apartment created or increased the risk that Moss would harm Kirk. We therefore affirm the district court's conclusion that the dispatch is not an affirmative act under *Kallstrom*. . . .The inability of the Franklin County authorities to prevent Kirk's murder despite her numerous 911 calls to their emergency call center is deeply troubling. May has produced persuasive evidence that appellees failed to follow their established procedure for domestic violence calls when fielding Kirk's first 911 call, and that appellees may also have underestimated the urgency of Kirk's situation during the second 911 call. Had appellees attempted to obtain more information from Kirk during her phone calls to 911, it is possible that their attempt to intervene would have been more aggressive, and the tragic events of that night might have unfolded differently. While appellees' actions in response to Kirk's calls for assistance may not be faultless, none of appellees' actions directly increased Kirk's vulnerability to danger or placed her in harm's way. . . May has been unable to show that any of appellees' actions constitute affirmative acts as *Kallstrom* requires to sustain her state-created-danger claim."); ***McQueen v. Beecher Community Schools***, 433 F.3d 460, 464-66 (6th Cir. 2006) ("Every regional court of appeals, including this one, has walked through the door left open by the Court and recognized the state-created-danger theory of constitutional liability under § 1983. . . In *Kallstrom*, we recognized the state-created-danger theory of due process liability and laid out three important requirements: an affirmative act that creates or increases the risk, a special danger to the victim as distinguished from the public at large, and the requisite degree of state culpability. . . Although we have sometimes assumed the affirmative-act-plus-risk-creation requirement to be satisfied, . . . *Kallstrom* remains the only time we have explicitly held it to be met. . . . We have not previously considered whether it constitutes an affirmative-act-plus-risk-creation under *Kallstrom* for a teacher to leave students − and more pertinently, the student who ultimately causes the injury − unsupervised. . . The decisions reviewed above, however, provide enough guidance to conclude that Judd's leaving Smith and several of his classmates unsupervised in the classroom was not an affirmative act that created or increased the risk for purposes of *Kallstrom*. The cases most applicable to the situation here are those in which the state officials performed some act, . . .but we held that there was no affirmative act that created or increased the risk because the victim would have been in about the same or even greater danger even if the state officials had done nothing. . . .[J]ust as the plaintiffs in *Cartwright* and *Bukowski* would have faced at least the same danger if the police had not acted, Doe would have faced the danger of Smith drawing his gun and firing at her even if Judd had not acted (i.e., if Judd had remained in the classroom at all relevant times); ***Jackson v. Schultz***, 429 F.3d 586, 591, 592 (6th Cir. 2005) ("Even liberally construing Jackson's allegations, she has also not pled sufficient facts to show a constitutional violation based on the 'stated-created danger' exception. . . . Jackson . . .does not state a constitutional claim that the EMTs hindered third party aid. . . . The EMTs did not discourage others from entering the ambulance. All evidence indicates decedent was free to leave (or be removed from) the ambulance. Furthermore, there is no evidence that any private rescue was available or attempted. No set of facts consistent with the allegations shows that the

EMTs interfered with private aid. Thus, Jackson does not allege sufficient facts to support a claim for a constitutional violation based on cutting off private aid."); ***Cartwright v. City of Marine City***, 336 F.3d 487, 493 (6th Cir. 2003) ("The facts of this case indicate, at most, a failure to act; they do not rise to the level of affirmative acts which created or increased the risk that the plaintiff would be exposed to an act of violence by a third party. Defendant officers took plaintiff from a place of great danger: the shoulder of a dark, foggy, two-lane highway. They placed him in a place of lesser danger: the parking lot of an open convenience store, where telephones, restrooms, and food and drink were available to him. . . . The question is not whether the victim was safer *during* the state action, but whether he was safer *before* the state action than he was *after* it."); ***Bukowski v. City of Akron,*** 326 F.3d 702, 709 (6th Cir. 2003) ("It seems difficult to characterize the actions of the officials as affirmative acts within the meaning of *DeShaney*. The officials arguably did nothing to increase Bukowski's vulnerability to danger. They merely returned her at her request to Hall's residence, where they originally had found her. The Bukowskis argue that the police did not merely refuse to act: instead of simply allowing her to leave the police station, they affirmatively acted by returning her to Hall's residence. Whether or not the defendants 'acted' may be a difficult question in the abstract, but *DeShaney* makes clear that the acts of the officials here clearly fall on the inaction side of the line. Although in *DeShaney* the state returned Joshua to the ultimate aggressor, the *DeShaney* Court explicitly rejected the idea that such acts met the state-action requirement. . . . Examining the quality of governmental involvement here, it is apparent that the government was no more involved in making Bukowski more vulnerable to private violence than it was in *DeShaney* − in both cases, the government was merely returning a person to a situation with a preexisting danger."); ***Hernandez v. City of Goshen,*** 324 F.3d 535, 539 (7th Cir. 2003) ("In this case, the pleadings allege that the Goshen police department learned from Nu-Wood plant manager Greg Oswald's phone call that employee Robert Wissman threatened to do bodily harm to Nu-Wood employees, and that Oswald knew Wissman had access to guns. No other evidence of the City's knowledge or involvement with the situation at Nu-Wood appears on the face of the complaint. This is even less information about the specific danger facing Hernandez and Garza than the police had in *Windle* or the social workers had in *DeShaney*, and we therefore do not find that the City, through its police department's decision not to investigate the phoned-in threat, created or increased the danger faced by the Plaintiffs and their fellow Nu-Wood employees that day."); ***Windle v. City of Marion,*** 321 F.3d 658, 662, 663 (7th Cir. 2003) ("In focusing exclusively on whether the police acted affirmatively, Appellant fails to grasp that she has to establish that the police failed to protect her from a danger they created or made worse. She confuses the inert failure to protect with the proactive creation or exacerbation of danger. In this case the police did nothing to create a danger, nor did they do anything to make worse any danger Chaunce already faced. . . . If the police had never overheard the conversation, and had never been involved at all, the danger faced by Chaunce would likely have been the same or perhaps worse. The police did not place Chaunce in the custody of Rigsbee, and they did nothing to assist Rigsbee. They just failed to intervene until Raymer thought that matters had reached a crisis. This case is indistinguishable from *DeShaney* where the Supreme Court concluded that no constitutional violation had occurred when state actors who may have been aware that a child was being abused by his father did nothing to protect the child. . . . Appellant has not included in this suit a claim

against Rigsbee, who as a teacher could also be considered a state actor. Rigsbee's status as a potential state actor does however raise one important question regarding the duties of the Marion Police. In certain cases liability under § 1983 may exist when one state actor fails to intervene to prevent another state actor from causing direct harm to a victim. *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir.1994). Just such a case can exist when one law enforcement officer has reason to know 'that any constitutional violation has been committed by [another] law enforcement official; and the officer had a realistic opportunity to intervene to prevent the harm from occurring.' *Id*. Liability under this theory is certainly not limited to the context of a police officer's relationship with other officers in her department; but on the other hand the rule is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees. In the instant case there appears no particular governmental connection between Rigsbee and the Marion Police. Appellant has not alleged that the Marion Police have any authority over teachers that they do not have over any other citizen of Marion or that they share any joint responsibility with school officials. To be sure, we are not today deciding a case where an employee of one government entity failed to intervene to prevent harm by an employee of another entity where the two entities shared, in practice, some relationship. Against the background of this case, *Yang* does not apply."); ***Brown v. Commonwealth of Pennsylvania Dept. of Health Emergency Medical Services Training Institute***, 318 F.3d 473, 478 (3d Cir. 2003) ("We have not decided whether the Due Process Clause requires states to provide adequate or competent rescue services when they have chosen to undertake these services. Other appellate courts addressing this question have held that states have no constitutional obligation to provide competent rescue services. [citing cases] We agree with the reasoning of these decisions and join these Circuits in holding that there is no federal constitutional right to rescue services, competent or otherwise. Moreover, because the Due Process Clause does not require the State to provide rescue services, it follows that we cannot interpret that clause so as to place an affirmative obligation on the State to provide competent rescue services if it chooses to provide them."); ***Ruiz v. McDonnell,*** 299 F.3d 1173, 1183 (10th Cir. 2002) ("Here, the crux of Ms. Ruiz's claim is that J.R. suffered injuries of constitutional proportions because the State Defendants improperly licensed Tender Heart after failing to conduct an investigation into the facility. However, we do not view the mere licensure of Tender Heart as constituting the requisite affirmative conduct necessary to state a viable § 1983 claim. Specifically, the improper licensure did not impose an immediate threat of harm. Rather, it presented a threat of an indefinite range and duration. Moreover, the licensure affected the public at large; it was not aimed at J.R. or Ms. Ruiz directly. Unlike the direct placement of a child into an abusive home, the mere licensure of Tender Heart was not an act directed at J.R. which, in and of itself, placed J.R. in danger. For those reasons, we conclude that Ms. Ruiz has failed to allege any affirmative conduct on the part of the State Defendants that created or increased the danger to J.R."); ***White v. Lemacks***, 183 F.3d 1253, 1259 (11th Cir. 1999) ("[T]he 'special relationship' and 'special danger' doctrines applied in our decision in *Cornelius* [*v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989)] are no longer good law, having been superseded by the standard employed by the Supreme Court in *Collins*. Under *Collins*, state and local government officials violate the substantive due process rights of individuals not in custody only when those officials cause harm by engaging in conduct that is 'arbitrary, or conscience shocking, in a constitutional sense,' and that standard is to be

narrowly interpreted and applied. While deliberate indifference to the safety of government employees in the workplace may constitute a tort under state law, it does not rise to the level of a substantive due process violation under the federal Constitution. . . . In the seven years since *Collins*, we have questioned at least five times whether *Cornelius* retains any viability after *Collins*. . . . In the face of the obvious, it seems we have never quite been able to say goodbye to *Cornelius*, always avoiding the question of whether it has actually left the realm of living precedent in the wake of *Collins*. . . . Enough is enough. Like a favorite uncle who has passed away in the parlor, *Cornelius* needs to be interred. We do so now. Recognizing that it was dealt a fatal blow by *Collins*, we pronounce *Cornelius* dead and buried."); ***Davis v. Fulton County***, 90 F.3d 1346, 1352 (8th Cir. 1996) (evidence was insufficient to establish special duty owed to woman raped by inmate; failure to adequately supervise prisoner amounted to negligence which could not be the basis of constitutional tort claim); ***Liebson v. New Mexico Corrections Dep't***, 73 F.3d 275, 277 (10th Cir. 1996) (where prison librarian was kidnapped and raped by inmate, court concluded that, "[a]lthough plaintiffs have alleged that defendants' removal of the security officer was done with 'deliberate indifference and in complete disregard' of Ms. Liebson's rights, they have not alleged any specific facts, as did the plaintiff in *Grubbs*, to indicate that defendants' actions were egregious, outrageous, or fraught with unreasonable risk.").

Compare ***Graves v. Lioi***, 930 F.3d 307, 319-30 (4th Cir. 2019), *reh'g en banc denied*, 777 F. App'x 76 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1118 (2020) ("[T]he state-created doctrine is a 'narrow' exception to the general rule that state actors are not liable for harm caused by third parties. . . It applies only when the state affirmatively acts to create or increase the risk that resulted in the victim's injury. Specifically, 'a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission.'. . . The doctrine's conception of an 'affirmative act' is also quite limited. . . . This narrowly confines the scope of qualifying 'affirmative acts' to those that directly create or increase, i.e., cause, the risk a third party posed to the victim. . . . Contrary to Robinson's argument and the dissent's conclusion, discovery did not strengthen her earlier allegations that BCPD officers actively conspired to help Williams avoid arrest by interfering with the execution of his arrest warrant. Quite to the contrary. Even viewing the evidence in Robinson's favor, none of the 'affirmative acts' she relies on can support a due process claim. Our conclusion follows from a straight-forward application of the Supreme Court's decisions in *DeShaney* and *Town of Castle Rock*, as well as this Court's decisions in *Pinder* and *Doe*. . . . At its core, Robinson's claim suffers the same fundamental problem identified in *Town of Castle Rock*, *DeShaney*, *Pinder*, and *Doe*—an attempt to turn inactions and omissions into affirmative acts and to convert what might be a basis for state tort liability into a federal constitutional violation. As the Supreme Court recognized in *Town of Castle Rock*, even mandatory language in a temporary restraining order—or, here, an arrest warrant—does not strip police officers of enforcement discretion. When Lioi and Russell allowed Williams to self-surrender, they were exercising the long tradition of police discretion concerning the circumstances of enforcing a misdemeanor arrest warrant. . . Exercising this sort of routine police discretion does not give rise to a state-created danger. . . To hold otherwise would turn the thousands of instances where the police agree to allow a charged individual to self-

surrender into a conspiracy to evade arrest. No precedent countenances such a reading. . . .In short, these circumstances do not give rise to liability under the Due Process Clause. Notably, neither Robinson nor the dissenting opinion cites a single case where an officer's failure to serve a misdemeanor arrest warrant or decision to allow an individual to self-surrender constituted an 'affirmative act' establishing liability under the state-created danger theory. Nor could they do so, as such acts fail to meet the high standard of being 'akin to [the state] actor itself directly causing harm to' Mrs. Williams. . . Our reliance on *Town of Castle Rock* and conclusion that many of Robinson's arguments are based on facts that are properly characterized as omissions or failures to act do not constitute an 'about-face,'. . from our prior decision. We previously recognized the Supreme Court's holding in that case that police officers have discretion in such enforcement and service decisions and cannot be liable for exercising that discretion because individuals do not have a property interest in such police enforcement. . . We held that Robinson's allegations were distinguishable from *Town of Castle Rock*, however, because 'Lioi's alleged conduct ... was *not confined to* a failure to execute the arrest warrant' given that Robinson alleged that he '*affirmatively acted to interfere with execution of the warrant by conspiring* with Cleaven Williams to evade capture and remain at large.'. . But after discovery, Robinson has marshaled evidence supporting only conduct that *is* confined to a failure to execute the warrant.") *with* ***Graves v. Lioi***, 930 F.3d 307, 334-50 (4th Cir. 2019), *reh'g en banc denied*, 777 F. App'x 76 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1118 (2020) (Gregory, C.J., dissenting) ("At bottom, Appellants have shown that Deputy Lioi and Major Melvin Russell took affirmative steps to allow Cleaven Williams—a community leader and their acquaintance—to evade arrest until a date deemed most convenient by him, a date after he was able to fatally stab his wife. Although the officers did not know that Williams would kill his wife, they were well aware of the domestic assault charges pending against him and that his wife was afraid of him. The officers' conduct amounts to more than mere negligence, and a jury could find true the complaint's allegations—allegations we have said amount to a constitutional violation. Therefore, I respectfully dissent. . . .I cannot agree . . . that the facts developed in discovery in this case are 'substantially different' such that they warrant a departure from our prior holding that the affirmative acts committed by Deputy Lioi created or enhanced the danger to Mrs. Williams. . . I also cannot agree that Appellants' burden at this stage is to present facts that 'strengthen' their 'earlier allegations.'. . We have already concluded that the allegations as pleaded—absent any strengthening—sufficiently stated a claim. Appellants' burden at this stage, a burden which I believe to be satisfied, is merely to present sufficient evidence from which a reasonable jury could find their pleaded allegations to be true. . . . If this case does not present a jury question under a state-created danger theory, it is hard to imagine what would. Must the officers have placed the knife in Williams's hand, diverted the entire police force from the steps of the courthouse where Mrs. Williams was stabbed, and themselves assisted in the killing of Mrs. Williams, as the State suggested during oral argument? The bar to recovery under the theory is a high one, but surely not that high. . . . Before this case, our Court had not encountered a case in which the line between inaction and action was crossed. It is disheartening to see that, when finally faced with a record that supports a state-created-danger due process claim, the Court casts it aside into the pile of omission claims. I would instead find that the law of the case applies, that Appellants have come forward with sufficient evidence to support their due process claim,

and that they are entitled to have a jury decide whether Deputy Lioi and Major Russell affirmatively enhanced the danger to Mrs. Williams.")

See also ***Okin v. Village of Cornwall-On-Hudson Police Dept***., 577 F.3d 415, 428-32 (2d Cir. 2009) ("Since *Dwares*, we found that repeated, sustained inaction by government officials, in the face of potential acts of violence, might constitute 'prior assurances,' *Dwares*, 985 F.2d at 99, rising to the level of an affirmative condoning of private violence, even if there is no explicit approval or encouragement. . . .Viewing the evidence in the light most favorable to Okin, we find a genuine issue of material fact as to whether defendants implicitly but affirmatively encouraged Sears's domestic violence. . . . We find the record in this case to support the conclusion that Okin raises a genuine issue of material fact as to whether the defendants' affirmative creation or enhancement of the risk of violence to Okin shocks the conscience. . . . Given that domestic violence is a known danger that the officers were prepared to address upon the expected occurrence of incidents, the officers who responded to Okin's complaints had ample time for reflection and for deciding what course of action to take in response to domestic violence. . . This is a case where deliberate indifference is the requisite state of mind for showing that defendants' conduct shocks the conscience."); ***Lawrence v. United States,*** 340 F.3d 952, 957 (9th Cir. 2003) ("[I]n each of the cases in which we have applied the danger-creation exception, ultimate injury to the plaintiff was foreseeable. In the present case, to allege liability based on the danger-creation exception, the Plaintiff must show that Officer Messuri and Inspector Hanrahan acted affirmatively, and with deliberate indifference, in creating a foreseeable injury to Plaintiff. . . . Here, Bello's criminal history consisted of a drug trafficking conviction, but no crimes of violence or sexual abuse. Although it might have been foreseeable that Bello would distribute illegal drugs to the children at CGH, it was not foreseeable that he would sexually abuse them. We affirm the district court's findings that the harm to Jessica Lawrence was not foreseeable and that Plaintiff has failed to show the Defendants' conduct was the proximate cause of her injuries."); ***Jones v. Union County, Tennesse,*** 296 F.3d 417, 430, 431 (6th Cir. 2002) ("In this case, Plaintiff offers no factual support for her claim that Union County created or enhanced the danger to her by failing to serve the *ex parte* order of protection in a timely manner. While the Sheriff's Department was well aware of the seriousness of the domestic problems involving Plaintiff and her ex-husband, its failure to serve the *ex parte* order of protection did not create or increase the danger posed to Plaintiff by her ex-husband, or place her specifically at risk."); ***Beck v. Haik***, 234 F.3d 1267, 2000 WL 1597942, at *4 (6th Cir. Oct. 17, 2000) (Table) ("The Seventh Circuit would not quarrel, we assume, with the proposition that public safety officials should have broad authority to decide when civilian participation in rescue efforts is unwarranted. If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt, for instance, it would certainly be permissible to forbid such an attempt. It would not be irrational, similarly, to prohibit private rescue efforts when a meaningful state-sponsored alternative is available. But *Ross* holds that official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts − and we are constrained to agree."); ***Munger v. City of Glasgow Police Dep't***, 227 F.3d 1082, 1086 (9th Cir. 2000) ("In examining whether an officer affirmatively places an individual in danger, . . . we examine whether

the officers left the person in a situation that was more dangerous than the one in which they found him."); ***Sutton v. Utah State School for the Deaf and Blind***, 173 F.3d 1226, 1238, 1239 (10th Cir. 1999) ("[T]to hold Moore liable for the injuries suffered by James at the hands of a private individual, plaintiff-appellant must demonstrate intentional or reckless, affirmative conduct on the part of Mr. Moore which created the danger, coupled with 'a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.' . . . Because Moore, as the charged defendant, did not affirmatively act so as to create or enhance the danger to James, plaintiff-appellant's claim on this theory fails as a matter of law."); ***Huffman v. County of Los Angeles***, 147 F.3d 1054, 1061 (9th Cir. 1998) ("[T]he danger-creation plaintiff must demonstrate, at the very least, that the state acted affirmatively . . . and with deliberate indifference . . . in creating a foreseeable danger to the plaintiff, . . . leading to the deprivation of the plaintiff's constitutional rights . . . . Whether or not the County's failure specifically to prohibit deputies from carrying guns while drinking was bad policy, it did not violate John Huffman's rights under the Fourteenth Amendment, because the County could not have foreseen Kirsch's actions."); ***Hutchinson v. Spink***, 126 F.3d 895, 900 (7th Cir. 1997) ("Even if the State thought that the Spink household posed fewer dangers to Andrew than his home, Hutchinson has also alleged that the State knowingly passed up the chance to place Andrew in a household with risks far lower than those posed by the Spinks . . . . It was the State's affirmative act that placed Andrew with the Spinks instead of the Halversons, not any omission that would lie beyond the reach of § 1983 under *DeShaney*."); ***Reed v. Gardner***, 986 F.2d 1122, 1126-27 (7th Cir. 1993) ("[P]laintiffs . . . may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been . . . By removing a safe driver from the road and not taking steps to prevent a dangerous driver from taking the wheel, the defendants arguably changed a safe situation into a dangerous one."); ***Dwares v. City of New York***, 985 F.2d 94, 99 (2d Cir. 1993) (***DeShaney*** not controlling where plaintiff alleged that "officers conspired with the 'skinheads' to permit the latter to beat up flag burners with relative impunity, assuring the 'skinheads' that unless they got totally out of control they would not be impeded or arrested. . . . Thus, . . . the complaint asserted that the defendant officers indeed had made the demonstrators more vulnerable to assaults."); ***Freeman v. Ferguson***, 911 F.2d 52, 55 (8th Cir. 1990) ("[***DeShaney***] analysis establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual's danger of or vulnerability to, such violence beyond the level it would have been at absent state action."); ***Gibson v. City of Chicago***, 910 F.2d 1510, 1521 n.19 (7th Cir. 1990) (***DeShaney*** not controlling when City alleged to have played a part in both creating danger and rendering public more vulnerable to danger); ***Ross v. United States***, 910 F.2d 1422, 1431 (7th Cir. 1990) (plaintiff stated a cognizable claim under § 1983 where plaintiff alleged that her son was deprived of life due to County's policy of cutting off private aid to drowning victims without effective replacement protection), *distinguished* in ***Andrews v. Wilkins***, 934 F.2d 1267 (D.C. Cir. 1991) (whereas Deputy in *Ross* used his authority as state actor to intrude into purely private rescue effort, police in *Andrews* enlisted private assistance as part of ongoing police rescue effort); ***Weeks v. Portage County Executive Offices***, 235 F.3d 275, 278, 279 (6th Cir. 2000) ("We have found a deprivation

under the due process clause in situations when the victim was in police custody and the police failed to act or when the police affirmatively acted to put the victim in a more vulnerable position that he would have been in otherwise. . . . [citing cases] In the case before us here, however, Weeks was not and had not been in police custody; it was not Longbottom's actions that caused Weeks' harm; and Longbottom's order to Weeks to move along did not put Weeks in a more vulnerable position than he was in before he encountered Longbottom.").

See also ***J.W. through Williams v. City of Jackson, Mississippi***, No. 3:21-CV-663-CWR-LGI, No. 3:21-CV-667-CWR-LGI, No. 3:22-CV-171-CWR-LGI, 2023 WL 2617395, at *16-20 (S.D.Miss. Mar. 23, 2023) ("Under the precedent in this Circuit, the Plaintiffs' state-created danger claim against the individual Defendants must fail because 'the theory of state-created danger is not clearly established law.'. . . Of course, the reason why the state-created danger claim is 'not clearly established' and 'uncertain' in the Fifth Circuit is because that court has avoided every opportunity to clarify it. While the Fifth Circuit has identified the elements that plaintiffs must satisfy to prove such a claim, every such invocation is accompanied by a statement expressing uncertainty about the claim's core legitimacy. . . At the same time, however, the court has not specifically disclaimed a cause of action under the state-created danger theory. . . This indecision and circularity have left litigants and district courts in the lurch: Supreme Court precedent has recognized the state-created danger cause of action for some purposes and the Fifth Circuit has provided a standard for reviewing those claims, but it remains unclear if or when that standard can be met and what remedy is available when it is. And when presented with persuasive, analogous cases from its sister circuits defining the application of the theory, . . . the Fifth Circuit has simply, to borrow from Justice Scalia, 'fann[ed] [its] fingers ... under [its] chin.'. . It is not only judges and lawyers who have been disadvantaged by this approach. The Fifth Circuit's categorical bar on holding government actors accountable for the dangers they create or enhance has also had nightmarish consequences for ordinary citizens in this Circuit. . . .The Plaintiffs' state-created danger claim against the City of Jackson must also fail. To plead a state-created danger claim in this Circuit, the Plaintiffs would have to demonstrate (1) that the 'defendants used their authority to create a dangerous environment for the plaintiff' and (2) 'that the defendants acted with deliberate indifference to the plight of the plaintiff.'. . The deliberate indifference prong is further divided into three sub-prongs, requiring the Plaintiffs to allege that '(1) the environment created by the state actor is dangerous, (2) the state actor must know it is dangerous (deliberate indifference), and (3) the state actor must have used its authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.'. .The City of Jackson's primary argument concerns an element of the third sub-prong, namely that the Plaintiffs have failed to identify the third-party, non-state actor who is responsible their injuries. . . The City's argument is well-taken. A state-created danger claim requires that a third party—not the defendant state actor—cause the plaintiff's injury. . . The Amended Complaint attributes the Plaintiffs' state-created danger injuries to the City (and its agents) directly, not to any third party. As such, the Plaintiffs have not alleged an essential element of the claim. Additionally, as noted in the Defendants' briefs, the Fifth Circuit requires the Plaintiffs to allege that the Defendants knew of the risk of 'an immediate danger facing a known victim.'. . Under this extraordinarily high standard, a showing of increased 'risk of harm to

unidentified and unidentifiable members of the public' is not enough—even when the Plaintiff themselves are members of the identified group. . .Nothing in the Amended Complaint suggests that the City or State Defendants knew that these specific Plaintiffs would be at an enhanced risk of harm as a result of the Defendants' (in)actions. True, the Amended Complaint goes into detail about the negative effects of lead on children and adults, and avers that the City of Jackson and MSDH knew or should have known of these effects. Those statements, though, do not demonstrate the Defendants' knowledge of the risk of harm to these specific Plaintiffs. And while the Court agrees with the Plaintiffs that such a rule creates unjust and perverse outcomes by allowing officials to 'escape constitutional liability in the most heinous cases, where they knowingly injure entire communities,'. . . such is the law of the Fifth Circuit. For these reasons, the City of Jackson's motion for judgment on the pleadings is **GRANTED** with respect to the state-created danger claim."); ***Rakes v. Roederer***, No. 421CV00114JMSDML, 2022 WL 10542614, at *6 (S.D. Ind. Oct. 18, 2022) ("Ultimately, the Fourth Circuit's decision in *Pinder* relied at least in part on the lack of a custodial relationship between Ms. Pinder and the officers, a relationship the Seventh Circuit does not appear to require for the state-created danger exception to apply. . . Additionally, *Pinder* is not binding on this Court. What *Pinder* and *Monfils* demonstrate, however, is that whether the state-created danger exception to *DeShaney* applies is a highly fact-specific inquiry. And while there are situations where the Court can conclude that a plaintiff has not adequately alleged a constitutional violation at the pleadings stage, this is not one of them. The Court can conceive of facts reasonably drawn from the Complaint which are consistent with Ms. Rakes' allegations, and which may support a viable § 1983 claim for a Fourteenth Amendment violation based on the state-created danger exception in this case. Accordingly, the Court finds that Ms. Rakes has sufficiently alleged a § 1983 claim based on the Fourteenth Amendment and **DENIES** Defendants' Motion for Judgment on the Pleadings on that issue."); ***Barresi v. City of Boston***, No. CV 18-10737-PBS, 2018 WL 4954157, at *4 (D. Mass. Oct. 11, 2018) ("This case is so troubling because the police officers failed to make even a minimal effort of checking whether McMahon had an active restraining order. If the officers had done so, they would have discovered that there was an active order and that, according to Boston Police Department Policy, they were required to arrest Tremblay. While the enforcement of the order via an arrest might have prevented the murder, . . . Plaintiff has not alleged more than the officers' failure to arrest Tremblay. This may violate Boston Police Department Policy, but does not implicate substantive due process rights.[citing *Castle Rock*] Accordingly, the claims are dismissed."); ***Gothberg v. Town of Plainville***, No. 3-13-CV-01121 (CSH), 2015 WL 7785797, at *8-10 (D. Conn. Sept. 3, 2015) ("In the case at bar, the complaint does not include the phrase 'state created danger.'. . But Plaintiff Gothberg's allegations describing the communications between the Southington police and the Plainville police on the subject of Gothberg's requested arrest unmistakably invoke the state created danger doctrine. The complaint casts the Southington police in the roles of state actors, who by their descriptions of Gothberg and his propensities created the danger to Gothberg that ultimately came to pass: the Southington police falsely and intentionally told the Plainville police that Gothberg was armed, dangerous and unstable, inevitably leading the Plainville police to use a degree of force in arresting Gothberg that was unnecessary in the true circumstances and thus constitutionally excessive. These allegations focus principally upon the conduct of defendant

Michael Shanley, a lieutenant in the Southington police department who, according to the complaint, interviewed Gothberg at the Southington police station on July 14, 2011, confiscated Gothberg's only firearm, 'secured' Gothberg's residence by denying Gothberg access to it and its contents, and on July 15 obtained a warrant to arrest Gothberg, which Southington officers, at Shanley's direction, asked Plainville officers to execute during the early morning of July 16. . . .The case against the Southington police comes down to this: The Plainville police officers' use of force in subduing and shooting Gothberg might have been reasonable if what the Southington police said about Gothberg was true, but it was not true, and the force used against Gothberg was objectively excessive in the actual circumstances as they existed. . . This theory of the case states a claim under the state created danger doctrine because the false statements made by the Southington police to the Plainville police 'assisted in creating or increasing the danger' to Gothberg of an excessively forcible arrest. . . . On the basis of this Second Circuit authority [*Dwares*], I conclude that the complaint at bar adequately alleges that the affirmative actions of the Southington Officers—namely their reckless transmission of information designed to make the Plainville Police unduly agitated and excited, respond toward Plaintiff in an unnecessarily aggressive manner, and to deprive him of his civil rights—created an opportunity for the Plainville Police to harm Plaintiff or increased the risk that they would do so."); ***Turczyn ex rel. McGregor v. City of Utica***, No. 6:13-CV-1357 GLS/ATB, 2014 WL 6685476, at *4-5 (N.D.N.Y. Nov. 26, 2014) ("Unlike *Town of Castle Rock v. Gonzales* . . . or *Neal v. Lee County* . . . cases in which police had limited interaction with either the victim or killer prior to the victim's demise, and upon which defendants rely for dismissal of the claim against Shanley, . . . the allegations here go substantially farther. Turczyn alleges several occasions . . . when Shanley knew of Anderson's threatening acts and did nothing, which arguably communicated to him prior assurances that there would be no penalty to pay for his conduct. . . . *Okin* has specifically recognized the liability that may arise under these circumstances. . . .The amended complaint also pleads facts that demonstrate, at this juncture, egregious behavior that shocks the contemporary conscience. As in *Okin*, the allegations here tend to show that Shanley, who was tasked with accomplishing certain goals related to curbing domestic violence, was deliberately indifferent as to whether or not Anderson would make good on his multiple threats against Turczyn's life over a twelve-month-period. . . These allegations sufficiently support that Shanley's affirmative conduct was the product of deliberate indifference that shocks the conscience, and would provide a reasonable jury with a valid basis to so find. . . Finally, Shanley is not entitled to qualified immunity at this juncture. Her argument on this issue is two-fold. First, Shanley asserts that no constitutional violation occurred, and, second, she claims that, even if a constitutional violation occurred, the right was not clearly established. . . The first prong of the argument is easily swept aside by reference to the preceding paragraphs that explain that the amended complaint alleges a cognizable substantive due process violation. As for whether or not the right was clearly established, which is a prerequisite to qualified immunity, . . this question has been resolved by the Second Circuit. On the issue, the court has explained that it is 'clearly established,' under the state-created danger theory, 'that police officers are prohibited from affirmatively contributing to the vulnerability of a known victim by engaging in conduct, whether explicit or implicit, that encourages *intentional* violence against the victim, and as that is the substantive due process violation alleged here, qualified immunity

does not apply.' *Okin*, 577 F.3d at 434. Accordingly, Shanley is not entitled to qualified immunity at this time."); ***Mohat v. Mentor Exempted Village School Dist. Bd. of Educ.***, No. 1:09 CV 688, 2011 WL 2174671, at *7 (N.D. Ohio June 1, 2011) ("Plaintiffs have not made any allegations in their Complaint that would support a finding that anyone acting under the color of state law committed an *affirmative* act that created or increased the risk of harm to Eric. Further, as discussed above, although parents should be able to expect that their children will be kept reasonably safe when under the school's supervision, the school had no constitutional duty to take affirmative action to protect Eric from harm imposed by other students through bullying and emotional and physical harassment, nor did it have a constitutional duty to take affirmative action to prevent the ultimate harm he imposed upon himself through his suicide. Consequently, however tragic and unfair this may seem, based on the actual allegations set forth in the Complaint, and taking into consideration all of the relevant case law, Plaintiffs have not established that the school's failure to stop the bullying Eric suffered, or its failure to prevent his ultimate suicide, constitute a violation of their substantive due process rights under the Fourteenth Amendment to the U.S. Constitution."); ***Sloane v. Kanawha County Sheriff Dep't***, 343 F.Supp.2d 545, 552, 553 (S.D.W.Va. 2004) ("Assuming the truth of the Sloanes' allegations, Crosier and Moore knew that David's emotional difficulties were such that their conduct would increase the risk that he would harm himself. By questioning David in an abusive manner outside his grandparents' presence, they created an environment in which he was far more likely to cause emotional injury to David. Unlike the defendants in *Pinder*, *Shoenfield*, and other cases in which liability under § 1983 has been barred, Crosier and Moore engaged in affirmative conduct that significantly increased the risk that David would be seriously injured or killed. When a state actor takes actions (actions that, as discussed below, may themselves be unconstitutional) against an emotionally disturbed minor that the state actor knows will create or substantially enhance the risk that the minor will harm himself, and then fails to take any steps to mitigate that risk, he is subject to liability under 42 U.S.C. § 1983 pursuant to a theory of causation and duty premised on the state-created danger doctrine. As such, Plaintiffs' allegations are clearly sufficient to withstand a motion to dismiss."); ***Kennerly v. Montgomery County Bd. of Commissioners,*** 257 F.Supp.2d 1037, 1043-45 (S.D. Ohio 2003) ("*DeShaney* and *Kallstrom* make it clear that the government has neither a special relationship with the public nor a general duty to warn the public of potential threats of criminal danger, as a matter of constitutional law, and no such special relationship or duty arises merely on account of the local government having placed a known dangerous individual on house arrest and outfitted him with a monitoring device at a prior point in time. Furthermore, a plaintiff cannot plead around *DeShaney*, and come within the ambit of the result reached in *Kallstrom*, merely by naming a more particular sub-class of the public as the group to which the government owed a duty, such as one's 'neighbors.' Neighbors are still the public. *Kallstrom* is not ambiguous: the government must be aware that its actions will increase the vulnerability of a specific individual to criminal danger. . . . Thus, even assuming the truth of the factual pleadings, which means assuming that the County was in fact aware that Peter Atakpu had removed the monitoring device, and in fact was aware that he posed a grave threat to the public, including his neighbors, and in fact had an official policy which allowed it to disregard the existence of such public threats, or, in the alternative, had an official policy to respond to such public threats to prevent any potential harm flowing therefrom

but nevertheless intentionally disregarded it, the Plaintiff is not entitled to relief under § 1983. Absent the County taking an action that increased Byron Kennerly's vulnerability to danger at the hands of Peter Atakpu in a manner specific to him, in such a way that set him apart from the general public and from all of Peter Atakpu's other neighbors, the County cannot be held liable for the violence that Peter Atakpu committed upon him. . . . Liability under a state-created-danger theory must be predicated upon affirmative acts. There is not a single affirmative act complained of in the First Amended Complaint. The action of which the Plaintiff complains is inaction: the failure of the County to act. That is not enough."); ***Kallstrom v. City of Columbus,*** 165 F. Supp.2d 686, 700-03 (S.D. Ohio 2001) (on remand) (Based on revised findings of fact, court concludes 'plaintiffs did not have a constitutional privacy interest in the information disclosed by the City[,]' that ACity's release of redacted personnel files pursuant to a valid public records request does not 'shock the conscience' or amount to deliberate indifference on the part of defendant[,]' and A[f]or these reasons, the state-created-danger theory does not apply."); ***Wright v. Village of Phoenix***, No. 97 C 8796, 2000 WL 246266, at *6 (N.D. Ill. Feb. 25, 2000) (not reported) ("Here, as in *Sadrud-Din*, Wright is claiming that Berry abused Jackson-Berry while wearing the mantle of a police officer, that her murder was traceable to his status as a state actor, and that other police officers knew of the threat to Jackson-Berry's life and affirmatively furthered that threat by failing to properly respond to the complaints of domestic violence against Jackson-Berry due to Berry's status in the police department. Accordingly, Counts 2 and 6 state a claim under the Due Process Clause."); ***Wyatt v. Krzysiak***, 82 F. Supp.2d 250, 258, 259 (D.Del. 1999) ("Even if the first three prongs [of *Kneipp*] are met, the Court holds that Krzysiak's acts and/or omissions did not increase the risk of injury to Wyatt because she would have been driving under the influence of alcohol had Krzysiak not intervened. The case law from this and other circuits holds that, under the state created danger doctrine, an officer is not liable unless he increases the risk of harm to the victim. . . . At worse, Krzysiak left Wyatt in the same position as she would have been in had he not intervened at all. It follows that Krzysiak did not increase the risk of harm to Wyatt, even if he told her to drive while under the influence of alcohol."); ***Norris v. City of Montgomery***, 29 F. Supp.2d 1292, 1297 (M.D. Ala. 1998) ("In order for the plaintiffs to hold the State liable under the special-danger analysis, they must show that the defendants affirmatively placed them in a position of danger that was distinguishable from that of the general public. . . . Accepting the plaintiffs' allegations as true and construing them in the light most favorable to the plaintiffs, the court still finds that they have failed to present facts sufficient to give rise to liability under the special-danger theory. The plaintiffs claim that Officer Perkins affirmatively endangered the plaintiffs by 'giving' Michael Perkins's car back to him. Regardless of whether one construes Officer Perkins's behavior as an affirmative act or an omission, however, the defendants' actions do not satisfy the special-danger standard, because their actions did not increase the danger posed by Michael Perkins to the plaintiffs. Had the defendants given Michael Perkins the alcoholic beverages that caused his intoxication, the defendants arguably would have increased the danger Michael Perkins posed to the plaintiffs. However, Officer Perkins merely failed to impound Michael Perkins's car. By so doing, Officer Perkins did not alter the danger posed by Michael Perkins to other drivers on the roads. The danger posed by Michael Perkins remained the same as if Officer Perkins had never stopped him. And, as mentioned earlier, the defendants were under no constitutional duty to stop

Michael Perkins, or any other intoxicated driver, at all."), *aff'd*, 194 F.3d 1323 (11th Cir. 1999); ***Tazioly v. City of Philadelphia***, No. CIV.A. 97-CV-1219, 1998 WL 633747, at *11, *12 (E.D. Pa. Sept. 10, 1998) (not reported) ("The Third Circuit has not addressed the question specifically presented by the facts of this case − whether, under the state-created danger theory, an allegation that a government worker acted with willful disregard for the safety of a child by terminating satisfactory foster care and entrusting the child to the custody of a drug-addicted, unfit, and dangerous biological parent, thereby increasing the foreseeable risk of harm to the child, states a viable § 1983 cause of action for a violation of the child's rights under the Fourteenth Amendment. . . . [T]he evidence, viewed in a light most favorable to the Plaintiffs, indicates that the decision to return Michael to his biological mother was made with actual knowledge that she was unfit and dangerous. . . . Under the four-part test articulated in *Kneipp v. Tedder* and *Mark v. Borough of Hatboro*, the record of this case, when viewed in a light most favorable to Plaintiffs, contains sufficient evidence from which a jury could find that Michael's injuries were caused by a state-created danger."); ***Sadrud-Din v. City of Chicago***, 883 F. Supp. 270, 276 (N.D. Ill. 1995) ("By allowing Edward Johnson to continue to carry his police-issued weapon knowing the information provided by Selena Johnson, the City affirmatively contributed to the circumstances which resulted in Edward Johnson murdering Selena Johnson with that weapon."); ***Boyle v. City of Liberty***, 833 F. Supp. 1436, 1448 (W.D. Mo. 1993) (Based on plaintiffs' allegations that the defendants "intentionally placed [plaintiffs] in a position where personal injury was not merely possible but inevitable[,]" the court concluded that plaintiffs had adequately pled both a duty to protect and a breach of that duty. The scope of the duty and the reasonableness of the conduct would remain to be resolved by summary judgment or trial.); ***Muhammad v. City of Chicago***, 1991 WL 5803 (N.D. Ill. Jan. 16, 1991) (not reported) ("A special relationship arises in two situations: when the state places a person in a position of danger or when it deprives her of the means by which to secure help from private sources."); ***Swader v. Commonwealth of Virginia***, 743 F. Supp. 434, 444 (E.D. Va. 1990) (where defendants required prison employees and their families to live on prison property on which inmates were allowed to work, special relationship could be shown).

Compare ***Hart v. City of Little Rock***, 432 F.3d 801, 804-09 (8th Cir. 2005) ("Hart and Dyer allege substantive due process violations, arguing Little Rock's release of their personnel files greatly increased the risk of harm by private individuals who might retaliate against them as police officers. . . . Hart and Dyer rely on the 'state-created danger' theory. We assume without deciding that Little Rock's release of Hart's and Dyer's personnel files created sufficient danger to implicate constitutionally protected privacy interests. Additionally, we conclude element two is satisfied because there is no dispute the alleged constitutional violation was precipitated by state action. Accordingly, our analysis will focus on the third element of their § 1983 claim − whether the evidence proved Little Rock acted with the requisite degree of culpability. . . . In this case, Little Rock acted under circumstances in which actual deliberation was practical. Therefore, its conduct shocks the conscience only if it acted with 'deliberate indifference.'. . . In *Lewis*, the Court equated deliberate indifference for substantive due process with Eighth Amendment deliberate indifference. . . Thus, to sustain the district court's denial of JAML, we must conclude there was

sufficient evidence to find Little Rock acted intentionally or wrongfully in disregarding a known danger. . . Conversely, if we conclude Little Rock's conduct was merely negligent or even grossly negligent, the denial of JAML must be reversed. . . . We conclude the evidence was insufficient to support a finding Witherell ever considered, *at the time she processed the request*, whether the information would be disseminated to a criminal defendant who might use it to harm Hart and Dyer. . . . The mere fact Little Rock made it a practice to release such information does not prove it ever considered the specific risks articulated by Hart and Dyer. Assuming, as argued by Hart and Dyer, the City 'knew or should have known' its actions exposed them to a significant and increased risk of harm, the evidence only proves the City acted negligently − not with deliberate indifference. . . .We are troubled by Little Rock's practice of releasing its employees' personnel files − especially those of police officers − without notice or any attempt to redact sensitive personal information. Nevertheless, we conclude the evidence shows Little Rock's actions constitute at most negligence or gross negligence and do not rise to the level of subjective deliberate indifference necessary to sustain a substantive due process claim. . . . The *Kallstrom* court based its holding on a finding '[t]he City either knew or clearly should have known' releasing the officers' personal information substantially increased their 'vulnerability to private acts of vengeance.'. . In so holding, the *Kallstrom* court erroneously applied a negligence standard instead of the subjective deliberate indifference standard adopted in *Farmer*. . . The district court's reliance on *Kallstrom* indicates it too improperly adopted a negligence standard, making the denial of Little Rock's motion for JAML erroneous.") *with* ***Kallstrom v. City of Columbus***, 136 F.3d 1055, 1066-67 (6th Cir. 1998) ("[W]hile the state generally does not shoulder an affirmative duty to protect its citizens from private acts of violence, it may not cause or greatly increase the risk of harm to its citizens without due process of law through its own affirmative acts. Although our circuit has never held the state or a state actor liable under the Fourteenth Amendment for private acts of violence, we nevertheless have recognized the possibility of doing so under the state-created-danger theory. *See Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 912-13 (6th Cir.1995); *Jones v. City of Carlisle*, 3 F.3d 945, 949-50 (6th Cir.1993). Liability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence. . . . However, because many state activities have the potential to increase an individual's risk of harm, we require plaintiffs alleging a constitutional tort under § 1983 to show 'special danger' in the absence of a special relationship between the state and either the victim or the private tortfeasor. The victim faces 'special danger' where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large. . . . The state must have known or clearly should have known that its actions specifically endangered an individual. . . . Applying the state-created-danger theory to the facts of this case, we hold that the City's actions placed the officers and their family members in 'special danger' by substantially increasing the likelihood that a private actor would deprive them of their liberty interest in personal security. Anonymity is essential to the safety of undercover officers investigating a gang-related drug conspiracy, especially where the gang has demonstrated a propensity for violence. In affirmatively releasing private information from the officers' personnel files to defense counsel in the *Russell* case, the City's actions placed the personal safety of the officers and their family members, as distinguished

from the public at large, in serious jeopardy. The City either knew or clearly should have known that releasing the officers' addresses, phone numbers, and driver's licenses and the officers' families' names, addresses, and phone numbers to defense counsel in the *Russell* case substantially increased the officers' and their families' vulnerability to private acts of vengeance. We therefore hold that the City's policy of freely releasing this information from the undercover officers' personnel files under these circumstances creates a constitutionally cognizable 'special danger,' giving rise to liability under § 1983.").

In ***Wood v. Ostrander***, 879 F.2d 583 (9th Cir. 1989) (opinion after rehearing), *cert. denied*, 498 U.S. 938 (1990), the court held an affirmative duty to protect was owed plaintiff by a police officer who arrested the driver of the car in which plaintiff was a passenger, impounded the vehicle and left plaintiff stranded in a high-crime area at 2:30 a.m. Plaintiff was raped by a man who offered her a ride home. *Id*. at 590.

The court reasoned that the officer's actions of arresting the driver, impounding the car and stranding plaintiff in that area at 2:30 a.m. "distinguishe[d] [plaintiff] from the general public and trigger[ed] a duty of the police to afford her some measure of peace and safety." *Id*.

The dissent in ***Wood*** characterized the majority's conclusion as a "special relationship contention... totally inconsistent with the legal principles enunciated so clearly in ***DeShaney***." 879 F.2d at 600 (Carroll, J., dissenting). *Accord* ***Reeves v. Besonen***, 754 F. Supp. 1135, 1140 n.1 (E.D. Mich. 1991).

In ***D.R. v. Middle Bucks Area Vocational Technical School***, 972 F.2d 1364, 1375 (3d Cir. 1992) (*en banc*), *cert. denied*, 113 S. Ct. 1045 (1993), the court rejected the "state created danger" theory in a case involving sexual assaults upon students by other students. The court noted that "[l]iability under the state-created danger theory is predicated upon the states' affirmative acts which work to plaintiffs' detriments in terms of exposure to danger . . . . Plaintiffs' harm came about solely through the acts of private persons without the level of intermingling of state conduct with private violence that supported liability in *Wood*, *Swader*, and *Cornelius*."

See also ***Doe v. Town of Bourne,*** No. Civ.A.02-11363-DPW, 2004 WL 1212075, at *7, *8 (D. Mass. May 28, 2004) ("Neither the custodial relationship exception nor the state-created danger exception applies in this case. As to the former, the Does have not alleged any specialized facts that give rise to a custodial relationship between themselves and defendants, and while the First Circuit has not addressed the issue, other courts have resoundingly concluded that, as a general matter, students do not stand in a custodial relationship with public schools or their officials for purposes of applying *DeShaney*. . . . The allegations in the Complaint are similarly insufficient to support a state-created danger theory of liability. The only conduct of Grondin and Demitri at issue is their nonaction, including their failure to report the rape to Nicole's parents or the police and their failure to investigate, or more generally to prevent, the rape and harassment. Absent any affirmative action by school officials, the state-created danger theory does not open the door for due process violations for situations in which students are harmed by other students, even where

the school deliberately ignores either a threat or actual prior instances of violence."); ***Carroll K. v. Fayette County Board of Education***, 19 F. Supp.2d 618, 624 (S.D.W.Va. 1998) ("Here, Plaintiffs allege Principal David Perry told Carroll K. that, as a female, she had no right to defend herself against attacks by male students and that she would be punished if she attempted to. Furthermore, they allege there was a longstanding hostile environment toward females so pervasive it had the force and effect of a custom within the school. Assuming these allegations to be true, which the Court must do, the Court cannot conclude there is no set of facts Plaintiffs could prove that would state a claim and entitle them to relief. Thus, Plaintiffs' claim survives the motion to dismiss insofar as it alleges Defendants created a dangerous situation.").

Compare ***Kneipp v. Tedder***, 95 F.3d 1199, 1201, 1209 n.22 (3d Cir. 1996) (In case involving severely inebriated woman who was stopped by police and then allowed to proceed home alone, court "adopt[ed] the "state-created danger" theory as a viable mechanism for establishing a constitutional violation under 42 U.S.C. § 1983. . . .[noting that] the relationship requirement under the state-created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense.") *and* ***Bogle v. City of Warner Robins***, 953 F. Supp. 1563, 1570 (M.D. Ga. 1997) (holding that "Plaintiff was not deprived of her constitutional rights under the Fourteenth Amendment when police officers released her from custody in an impaired state," and Plaintiff was subsequently raped by a third party).

See also ***Sciotto v. Marple Newton School District,*** 81 F. Supp.2d 559, 567 & n.11 (E.D. Pa. 1999) ("A reasonable jury could conclude that Smith and Nathans, by maintaining a tradition of inviting older, heavier, more experienced alumni to participate in wrestling practices, "used their authority to create an opportunity" for Fendler to injury Louis Sciotto that would not have otherwise existed. But for the tradition and Nathans' invitation to Fendler pursuant to that tradition, Fendler would not have been present at practice, and would not have live wrestled Louis Sciotto on January 10, 1997. On the basis of this evidence, I conclude that a genuine issue of material fact exists as to whether the school defendants used their authority to create an opportunity for the events to occur which caused the injury suffered by Louis Sciotto. . . . Defendants contend that the free and voluntary nature of Louis Sciotto's participation in the wrestling program and his choice to wrestle Greg Fendler exonerates them from liability under the 'state-created danger' theory. While freedom and voluntary participation may be persuasive under a 'special relationship' theory, I find no cases holding that voluntary actions by the plaintiff nullify a 'state-created danger' claim. If voluntary actions by the plaintiff contributing to his or her own danger were dispositive, the Court of Appeals for the Third Circuit would have concluded that the plaintiff's voluntarily decision in *Kneipp* to become severely inebriated, and attempt to walk home, which undoubtedly contributed to her eventual fall and consequent injuries, prevented her from asserting a valid 'state-created danger' claim. The Court of Appeals for the Third Circuit did not do so there, and I decline to do so today."); ***Maxwell v. School District of City of Philadelphia***, 53 F. Supp.2d 787, 792, 793 (E.D.Pa. 1999) (applying *Kneipp* and finding allegations sufficient to state claim under state created danger theory where rape of a mentally impaired student by other students in a locked classroom with teacher present was "foreseeable and a fairly direct result of

the state's actions."); ***Apffel v. Huddleston***, 50 F. Supp.2d 1129, 1138 (D. Utah 1999) ("It is persuasive to the court that the cliffs at issue are a natural condition on public land to which Jason Apffel had access at any time. Defendants did not create the cliffs nor the danger posed by climbing them. Furthermore, the court cannot find that the act of a planning a party on state lands near the sandstone cliffs enhanced the danger to decedent. The cases cited by defendants and referenced by the court in this decision compel a conclusion that neither the law as it existed at the time of the accident nor the facts plead in plaintiffs' complaint support finding that the state created the danger to decedent or enhanced the risks that were already in existence."); ***Mason v. Barker***, 977 F. Supp. 941, 945, 947 (E.D. Ark. 1997) ("In the instant case, Plaintiffs contend that Defendants ordered Plaintiffs into Ms. Mason's car and directed them to leave McCrory. The Court believes that such an allegation distinguishes the relatively hands-offs, activity in *Foy* from the affirmative, authoritative conduct at issue here. If police officers compel an individual whom they know to be a danger to herself and others to drive a car out of town, those officers have infringed a constitutionally protected interest under the Due Process Clause. Indeed, such action by police officers presents a perverse scenario in which police officers, clothed with the authority of the State, force a citizen to break the law. . . . Although it is clear that states have no duty to protect citizens from drunk drivers, . . . police officers may not, consistent with the demands of the Constitution, compel individuals whom they know to be heavily medicated to expose themselves and others to danger by ordering them to drive."); ***Estate of Rosenbaum v. City of New York***, 975 F. Supp. 206, 217-18 (E.D.N.Y. 1997) ("If plaintiffs contended simply that the City had failed to respond to requests from the Hasidic community for additional police protection during the Crown Heights disturbances, such a claim would arguably be barred by *DeShaney*, decided two years before the disturbances took place. However, the thrust of plaintiffs' argument is quite different: plaintiffs allege that defendants, by the inappropriate implementation of a policy of restraint, actually exacerbated the danger to the Hasidic community and rendered the community more vulnerable to violence by private actors. . . . The Court concludes, therefore, that plaintiffs have properly set forth a substantive due process basis for relief under § 1983. The jury will determine at trial whether Dinkins or Brown, or any other state actor, had assisted in creating or increasing danger to the plaintiffs and, if so, whether such actions were the proximate cause of any injuries which plaintiffs sustained.").

In ***Johnson v. Dallas Independent School District***, 38 F.3d 198 (5th Cir. 1994), the court concluded that "[e]ven if the state-created danger theory is constitutionally sound, the pleadings in this case fall short of the demanding standard for constitutional liability." The court explained:

> The key to the state-created danger cases, and the essence of their distinction from *Middle Bucks*, lies in the state actors' culpable knowledge and conduct in 'affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.' [cites omitted] Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for

> the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff.

Id. at 201. *See also* ***Robinson v. Webster County, Mississippi***, 825 F. App'x 192, ___ (5th Cir. 2020), *cert. denied,* 141 S. Ct. 1450 (2021) ("Here, Robinson's claims are premised on an act of private violence. She contends that Webster County, via Sheriff Mitchell, violated her Fourteenth Amendment due process rights by releasing Patterson from jail and permitting him to terrorize her. While Robinson recognizes that under the general rule the county is not liable for Patterson's violent acts against her, Robinson contends that the district court erred by (1) finding Webster County did not have a special relationship with her and (2) declining to apply the state-created danger theory. Based on our precedent, we must disagree. . . . [T]his Court has ' "repeatedly noted" the unavailability of the [state-created danger] theory in this circuit.' *Columbia-Brazoria*, 855 F.3d at 688 (citation omitted). The district court correctly declined to stray from circuit precedent. And we decline as well."); ***Doe v. Columbia-Brazoria ISD***, 855 F.3d 681, 688-89 (5th Cir. 2017) ("In this case, Doe's claim does not arise from the abuse itself because no state actor committed it. . . Instead, there must have been some specific and actionable deficiency on the part of the District that allowed the abuse to occur. . . The case from which the special-relationship requirement was drawn stated that 'nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.'. . A complainant and the state have that relationship only 'when the State takes a person into its custody and holds him there against his will[.]'. . . The relationship exists 'when the state incarcerates a prisoner,' 'involuntarily commits someone to an institution,' or places a child in foster care. . . Notably, 'a public school does not have a special relationship with a student that would require the school to protect the student from harm at the hands of a private actor.'. . . .[I]n *Covington*, we declined to adopt the exception as the law of this Circuit. . . Subsequent panels have 'repeatedly noted' the unavailability of the theory. . . Finally, Doe failed to analyze the theory in a meaningful way in his opening brief. The argument is thus forfeited. . In summary, Doe's claims are not based on the private conduct of his assailant but on the District's shortcomings in monitoring the students, training the teachers, and establishing a reporting system for sexual assault. '[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.'. . That leaves Doe with only the special-relationship theory, having forfeited the possibility of a state-created-danger argument. There was no special relationship between the plaintiff and the state. Doe has thus failed to prove a constitutional violation. The Section 1983 claims were properly dismissed."); ***Morin v. Moore,*** F.3d 309 F.3d 316, 323 (5th Cir. 2002) ("Even if we were to consider all of the Morins' allegations, they fail to satisfy the 'state-created-danger' theory because the Morins have failed to demonstrate that the officers acted with deliberate indifference."); ***McClendon v. City of Columbia (McClendon II),*** 305 F.3d 314, 337, 338 (5th Cir. 2002) (en banc) (Robert M. Parker, J., joined by Judges Wiener and Harold R. DeMoss, Jr., dissenting) ("[T]he state-created danger theory is overwhelmingly accepted in today's federal jurisprudence. In the face of such overwhelming authority, the majority cowers. It does not have the courage to be the only federal circuit court of appeals in the nation to explicitly reject the state-created danger theory even though that is clearly what it wants to do. Although the

majority refuses to take the road less traveled in a principled albeit unpopular way, it is perfectly willing to accomplish its objectives through subterfuge. The majority knows only too well how to play the game. If the Circuit never rules on whether this is a viable theory, the Circuit makes it exceedingly difficult for the district courts to rule that the Circuit law in state-created danger cases is 'clearly established' for purposes of a qualified immunity analysis. Thus, state actors who engage in behavior that falls within the confines of the 'state-created danger' theory will always escape liability under the majority's view no matter how egregious their behavior. That is an insidious approach to the law and I reject it outright. The Circuit should quit hiding the ball from the public and make a decision one way or the other. It has refused. [footnote omitted] However, I favor adopting, as has the rest of the country, the state-created danger theory as a viable mechanism for obtaining Section 1983 relief in this Circuit."); ***Martin v. Shawano-Gresham School District,*** 295 F.3d 701, 712 (7th Cir. 2002) ("Because the defendants did not create or increase a risk that Timijane would commit suicide by suspending her and then allowing her to return home at the end of the school day, the Martins' substantive due process claim must fail."); ***Piotrowski v. City of Houston (Piotrowski II)***, 237 F.3d 567, 584, 585 (5th Cir. 2001) ("Although this court has discussed the contours of the 'state-created danger' theory on several occasions, we have never adopted that theory. . . . We need not do so here, since, even if we were to adopt it, Piotrowski could not recover. . . . The initial problem is that no matter what official protection Bell received, the City actors did not create the danger she faced. . . . Unlike other cases in which government officials placed persons in danger, the City at most left her in an already dangerous position. Depending on the facts, some cases interpret the state-created danger theory to result in § 1983 liability if government actors increase the danger of harm to a private citizen by third parties. Measured by this standard, the assistance provided to Bell consisted of furnishing Piotrowski's mug shot and failing to warn her of Waring's tip. Neither of these circumstances, however, actually increased the danger to her. . . . Moreover, the City did not act with deliberate indifference. . . . [T]here is no evidence that City actors knew of or participated in the murder contract, and they did nothing to prevent her from protecting herself."); ***Saenz v. Heldenfels Brothers, Inc.,*** 183 F.3d 389, 391, 392 (5th Cir. 1999) ("[N]either the text nor the history of the Due Process Clause supports holding that an officer who orders another officer to refrain from arresting a suspected drunk driver has committed a constitutional tort. The Due Process Clause is intended to curb governmental abuse of power over the people it governs, not to require state officers to protect the people from each other. . . . Unlike the deputy in *Ross*, Gonzalez was neither aware of an immediate danger facing a known victim, nor did he use his authority to prevent the appellants from receiving aid. This 'state-created danger' theory is inapposite without a known victim. . . . [W]e decline to issue the novel ruling that when one officer exercises his discretion by ordering another officer not to apprehend a drunk driver, a third party unknown to the officer at the time of the order who is later injured by the drunk driver has a constitutional claim against the ordering officer.").

See also ***Johnson v. City of Philadelphia****,* 975 F.3d 394, 399-400, 404 (3d Cir. 2020) ("Several other Circuit Courts have also recognized the state-created danger theory of liability. . . . But the Supreme Court has not. . . And the doctrine has not escaped criticism, since it does not

stem from the text of the Constitution or any other positive law, . . . and consequently vests open-ended lawmaking power in the judiciary. . . Moreover, the 'state-created danger' doctrine offers little help to public employees seeking to better discharge their duties, and does not tell them 'what to do, or avoid, in any situation.'. . But we remain bound to faithfully apply our precedent explaining the scope of the doctrine. As currently formulated, that requires a plaintiff to plead four elements: first, foreseeable and fairly direct harm; second, action marked by 'a degree of culpability that shocks the conscience'; third, a relationship with the state making the plaintiff a foreseeable victim, rather than a member of the public in general; and fourth, an affirmative use of state authority in a way that created a danger, or made others more vulnerable than had the state not acted at all. *See Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717 (3d Cir. 2018). We apply that precedent to the facts Appellant pleads here. . . . Three lives were lost inside a building long-known to flout safety requirements, amid a bungled rescue effort. One hopes their deaths focus the will and resolve of those able to act. But the City and its employees may be held liable under the state-created danger theory, and under Pennsylvania tort law, only in narrowly defined circumstances. Because those circumstances are not met here, we will affirm the District Court's dismissal of Appellant's complaint."); ***Johnson v. City of Philadelphia***, 975 F.3d 394, 404-05 (3d Cir. 2020) (Matey, J. concurring) ("I write separately to join Judge Porter's view that our full Court should revisit the state-created danger doctrine. As our majority opinion states, the doctrine does not 'stem from the text of the Constitution or any other positive law.'. . The doctrine 'offers little help to public employees seeking to better discharge their duties,'. . . but subjects them to lawsuits for alleged constitutional violations. As Judge Porter notes, the doctrine exemplifies a 'troubling' expansion of substantive due process. . . Many state-created danger cases are tragic and unsettling and this matter is no exception. But the Due Process Clause of the Fourteenth Amendment 'does not transform every tort committed by a state actor into a constitutional violation.'. . Because '[t]he place to make new legislation ... lies in Congress,'. . . I join Judge Porter's call for our full Court to revisit the state-created danger doctrine."); ***Johnson v. City of Philadelphia***, 975 F.3d 394, 405-06 (3d Cir. 2020) (Porter, J., concurring) ("I join the majority's opinion in full. But I write separately to explain my view that our full Court should revisit the state-created danger doctrine. First, 'it is troubling how far we have expanded substantive due process' in this area. . . As Judge Fisher noted in his concurrence in *Kedra*, we have gone much further than the Supreme Court by 'fashioning' our own state-created danger doctrine and further still by 'stating that there could be liability in non-custodial situations for gross negligence.'. . As the majority opinion observes, the state-created danger doctrine 'has not escaped criticism, since it does not stem from the text of the Constitution or any other positive law.'. . I agree that, '[g]iven that our substantive due process doctrine has gradually lowered the bar for bringing a [state-created danger] claim, it may be time for this full Court to reexamine the doctrine.'. .Assuming the continuing viability of the state-created danger doctrine in our Circuit, the full Court should nevertheless revisit our test for analyzing whether a state actor's behavior 'shocks the conscience.' In *Kedra*, Judge Krause skillfully synthesized our precedent into a three-part framework. First, '[i]n hyperpressurized environments requiring a snap judgment, an official must actually intend to cause harm in order to be liable.'. . Second, '[i]n situations in which the state actor is required to act in a matter of hours or minutes, we require that the state actor disregard a *great* risk of serious harm.'. . And third,

when 'the [state] actor has time to make an unhurried judgment, a plaintiff need only allege facts supporting an inference that the official acted with a mental state of deliberate indifference.'. . We have described 'deliberate indifference' as a 'conscious disregard of a *substantial* risk of serious harm,'. . . and also as 'a willingness to ignore a *foreseeable* danger or risk.'. . Our precedent asks district courts to differentiate among the three tiers of culpability and apply them to a set of facts. . . That is no simple task. But it is further complicated by the mystifying differences we have drawn between the second and third tiers of culpability. In my view, there is no practical difference between a 'disregard of a *great* risk of serious harm' (the second tier) and a 'conscious disregard of a *substantial* risk of serious harm' (the third tier). . . . Assuming we continue to recognize the state-created danger doctrine at all, I suggest combining the second and third tiers into one and making the inquiry more straightforward: For a state actor to be liable in a 'hyperpressurized environment requiring a snap judgment,' he must actually intend to cause harm. But in any other context, the state actor must act with deliberate indifference that shocks the conscience. This articulation of the standard hews more closely to Supreme Court precedent, . . . is more consistent with the tests established by our sister circuits that have adopted the state-created danger doctrine, . . . and does not ask state actors like the operator and dispatcher in this case to ponder the gradations among a 'substantial risk,' a 'great risk,' and a 'foreseeable danger' before reacting to an urgent 911 call. I respectfully offer these brief observations about our state-created danger doctrine and hope that in an appropriate case we will revisit the doctrine as a full Court.")

See also ***Perry v. Wildes***, No. 97-3372, 1998 WL 199795, *3 (6th Cir. Apr. 15, 1998) (unpublished) ("[W]e are unwilling to say that police response to a citizen's call for assistance subjects the officers to potential liability for creating a 'special danger' premised upon a heightened sense of security. It does not follow from police presence and opinions about the potential for danger that a constitutional violation has occurred absent some action on the part of the responding officers that forcibly prevents the citizen who requested help from acting on his or her own behalf, or creates a special danger by enabling a private actor to do something that puts another specifically at risk."); ***Morse v. Lower Merion School Dist.***, 132 F.3d 902, 913-15 (3d Cir. 1997) ("[I]t would not appear that the state created danger theory of liability under § 1983 always requires knowledge that a specific individual has been placed in harm's way. Although it is appropriate to draw lines here, there would appear to be no principled distinction between a discrete plaintiff and a discrete class of plaintiffs. The ultimate test is one of foreseeability. . . . Whether an affirmative act rather than an act of omission is required under the state-created danger theory appears to have been answered by *Mark*. As the *Mark* court noted, one of the common factors in cases addressing the state created danger is that the state actors 'used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.' *Mark*, 51 F.3d at 1152. Thus, the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission."); ***Randolph v. Cervantes***, 130 F.3d 727, 731 (5th Cir. 1997) ("Viewing the evidence in the light most favorable to Randolph's mother, the defendants allowed and encouraged Randolph to voluntarily reside at Pine Hill Apartments as a tenant having the right to come and go from the premises at any time and having the right to cancel

her lease. This will not trigger a duty under the state-created danger theory, even if we were to adopt such a theory."); ***Doe v. Hillsboro Independent School District***, 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc) ("Viewed in the light most favorable to the plaintiffs, the school district placed the student in the same area as a school custodian who had no known criminal record, sexual or otherwise, with school teachers in the same building but not in the immediate area. This will not trigger a duty under a state-created-danger theory, even if we were to adopt such a theory. Such post hoc attribution of known danger would turn inside out this limited exception to the principle of no duty."); ***Estate of Stevens v. City of Green Bay***, 105 F.3d 1169, 1177 (7th Cir. 1997) ("To recover under this [state-created danger] theory, the estate must demonstrate that the state greatly increased the danger to Stevens while constricting access to self-help; it must cut off all avenues of aid without providing a reasonable alternative. Only then may a constitutional injury have occurred."); ***Seamons v. Snow***, 84 F.3d 1226, 1236 (10th Cir. 1996) ("In addition to the 'special relationship' doctrine, we have held that state officials can be liable for the acts of third parties where those officials 'created the danger' that caused the harm. *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir.1995), *cert. denied*, __ U.S. __, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996). However, we stated that a claim brought under the 'danger creation' theory must be predicated on 'reckless or intentional injury-causing state action which "shocks the conscience."' *Id.*"); ***Pinder v. Johnson***, 54 F.3d 1169, 1177 (4th Cir. 1995) (*en banc*) ("When the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive. In such instances, the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party. [citing cases] At most, these cases stand for the proposition that state actors may not disclaim liability when they themselves throw others to the lions. [cite omitted] They do not, by contrast, entitle persons who rely on promises of aid to some greater degree of protection from lions at large."); ***Piotrowski v. City of Houston (Piotrowski I)***, 51 F.3d 512, 515 (5th Cir. 1995) ("Piotrowski contends that her allegations qualify by satisfying the 'state-created danger' theory of § 1983 liability. [footnote omitted] While this Court has not affirmatively held that this theory is a valid exception to the *DeShaney* rule, . . . it has addressed what a plaintiff would have to demonstrate to qualify for relief under this theory. First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference."); ***Leffall v. Dallas Independent School Dist.***, 28 F.3d 521, 532 (5th Cir. 1994) ("[E]ven assuming that substantive due process imposed some duty on the state to protect [student] from dangers arising out of sponsorship of the dance at Lincoln High School, [plaintiff] failed to allege a violation of [student's] due process rights in her complaint because she did not allege facts that demonstrated deliberate indifference to those dangers on the part of the state actors."); ***Salas v. Carpenter***, 980 F.2d 299, 309, 310 (5th Cir. 1992) ("The Fourteenth Amendment does not require [Sheriff] to train and equip members of the sheriff's department for special SWAT or hostage negotiation duties. . . . It does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations. With no constitutional duty to provide SWAT or hostage negotiation equipment, [Sheriff's] failure to do so does not deny due process."); ***Gregory v. City of Rogers***, 974 F.2d 1006, 1012 (8th Cir. 1992) (*en banc*) (officers who arrested designated driver owed no constitutional duty of protection to intoxicated passengers whom driver left in car, with keys and

unattended, outside police station; "it was [the driver's] abdication that placed [plaintiffs] in danger, not [the officer's] performance of his official duty."), *cert. denied*, 113 S. Ct. 1265 (1993); ***Hilliard v. City and County of Denver***, 930 F.2d 1516, 1520 (10th Cir. 1991) (in a case factually similar to ***Wood***, the court indicated reluctance to find a constitutional right to personal security where there is no element of state-imposed confinement or custody), *cert. denied*, 112 S. Ct. 656 (1991); ***Leidy v. Borough of Glenolden,*** No. CIV.A. 01-4361, 277 F. Supp.2d 547, 561 (E.D. Pa. 2003) ("Illich and Cooke may have taken Bennett into custody. But when they released him he posed no more of a danger than he did before he came into the station. . . . Other cases reinforce our analysis. In some cases where law enforcement officers were held responsible for a state-created danger, the officers acted to instigate private violence. [footnote collecting cases] In others, the officers acted to place people in harm's way who would otherwise not have been at risk. [footnote collecting cases] In others, the conduct of officers investigating crimes set off other hazards. [footnote collecting cases] In a final set of cases, the officers intervened in such a way as to cut people off from their private sources of protection. [footnote collecting cases] In contrast, where police officers took insufficient measures to avert or control private violence, courts have not deemed the loss of life or liberty to be the result of state action. [footnote collecting cases] By foiling Bennett's surrender, the defendants gave inadequate protective service to the community. But inadequate protective services, like the failure to provide protective services at all, constitute only a failure to protect, and without more we must (reluctantly) deny plaintiffs' claim."); ***Pullium v. Ceresini,*** 221 F. Supp.2d 600, 604, 605 (D. Md. 2002) ("[T]he instant case involves affirmative conduct on the part Officer Ceresini (or another officer under his direction). The officer injected Mr. Pulliam into Plaintiff's home, thus creating a danger where previously none existed. According to the allegations in the Complaint, Mr. Pulliam would not have been in a position to assault Plaintiff if he had not been driven to her home by the officer and if the officer had not ordered Plaintiff to admit him, over her repeated and impassioned protestations. While the Fourth Circuit may be reluctant to impose liability on police officers whose omissions create increased dangers from third parties, there is no indication that the court would have the same reluctance where it is an officer's affirmative conduct that creates the danger."); ***Stevens v. Trumbull County Sheriffs' Dep't.***, 63 F. Supp.2d 851, 855 (N.D. Ohio 1999) ("Defendants' response to Plaintiff's 911 call did not create or enhance the danger to her. Defendants did nothing to give Plaintiff a heightened sense of security that subjects them to liability for violating her substantive due process rights. Furthermore, Defendants did not place any restraint on Plaintiff such that she was unable to act to protect herself. Plaintiff did not report a threat of imminent harm to her until it was too late for Defendants to respond. As such, Plaintiff has not established that Defendants' conduct violated her substantive due process rights."); ***Henderson v. City of Philadelphia***, No. CIV. A. 98-3861, 1999 WL 482305, at *11, *12 (E.D. Pa. July 12, 1999) (unpublished) ("The cases in which courts have allowed plaintiffs to proceed on their state-created danger claims all discuss actions taken by the defendants which increase the plaintiffs' risk of harm or subject the plaintiffs to harm that did not exist before they acted. . . . In this case, unlike *Kneipp*, the officers did not intervene to remove Henderson's private source of aid, his mother, and did not restrain her ability to assist her son. . . . The officers cannot be liable for the fact that their presence increased Henderson's agitation and his desire to escape. In the absence of an act by the officers that changed the volatile

circumstances which already surrounded Henderson, they cannot be liable."); ***Pearson v. Miller***, 988 F. Supp. 848, 857 (E.D. Pa. 1997) (rejecting liability under state-created danger theory where "[p]laintiff's allegations [were] not sufficient to support an inference that Luzerne County C & Y workers knew that Miller posed a 'credible danger' to others and could and should have foreseen that he would assault the plaintiff or someone in a discrete class to which she belongs."); ***Johnson v. City of Oakland***, No. C-97-283 JSB, 1997 WL 776368, *5, *6 (N.D. Cal. Dec. 3, 1997) (not published) ("One condition of a valid state-created danger claim is that the danger would not have existed without the state action. . . . Decisions in at least five other circuits condition relief for state-created danger upon a proven claim that the danger would not otherwise have existed. [citing cases] . . . . Neither the officers' failure to rescue Johnson before the fatal collision nor to call off their pursuit created a danger that would not otherwise have existed. Had the officers not pursued the van with Johnson clinging to its roof, Johnson would have been abandoned to the van's occupants who had shown no concern for Johnson's safety."); ***Semple v. City of Moundsville***, 963 F. Supp. 1416, 1428 (N.D.W.Va. 1997) ("[A]bsent a custodial situation, *Pinder II* and *DeShaney* preclude plaintiffs' claims that a 'special relationship' existed that obligated the police department to protect [decedents] from Michael's violence. Further, plaintiffs have not established that the Moundsville Police Department took any affirmative action to create or enhance the danger that existed from Michael's behavior. This Court finds that this case is a quintessential 'failure to act' case."), *aff'd*, 195 F.3d 708 (4th Cir. 1999); ***Park v. City of Atlanta***, 938 F. Supp. 836, 843 (N.D. Ga. 1996) ("Defendants in the instant case were not responsible for creating the mob's violence in the wake of the Rodney King verdict or directing it toward Plaintiffs or their businesses. The city did give assurances and Plaintiffs acted on these assurances, but the city did not limit the Plaintiffs' freedom of action, and that is what prevents this from arising to a constitutional violation."), *rev'd and remanded on other grounds*, 120 F.3d 1157 (11th Cir. 1997); ***Rutherford v. City of Newport News***, 919 F. Supp. 885, 895 (E.D. Va. 1996) ("In sum, the case law makes clear that the affirmative duty to protect under the Due Process Clause arises primarily in the custodial context. The 'danger creation' exception, to the extent it is recognized, still requires some element of custody or control − although in these cases the person in state custody or control is not the victim ..., but the perpetrator who harmed the victim."); ***Plumeau v. Yamhill County School District***, 907 F. Supp. 1423, 1443-44 (D. Ore. 1995) ("In this case, there is no evidence that the District was aware of a specific risk of harm to Memorial School students, much less to a particular child such as Amanda. Nor is there any evidence that the District took any affirmative action that created the danger which caused the specific harm suffered by Amanda. The District did hire and retain Moore. However, the mere fact that the District employed Moore to perform normal and customary janitorial duties which incidentally gave him access to the entire school building is insufficient to show that the District took affirmative action creating a specific danger to a specific individual. Absent some notice to the District of Moore's propensity to sexually abuse children, Amanda may not rely on this theory."), *aff'd by Plumeau v. School Dist. No. 40*, 130 F.3d 432 (9th Cir. 1997); ***Young v. Austin Independent School District***, 885 F. Supp. 972, 979 (W.D. Tex. 1995) (allowing students who had a history of disciplinary problems back in school "does not constitute the type of culpable behavior envisioned in the state-created danger theory."); ***Baby Doe v. Methacton School District***, 880 F. Supp. 380, 386 (E.D. Pa. 1995) ("Cases interpreting the

state-created danger exception have repeatedly held that a state is not liable for a state-created danger if the victim is not known and identified, but simply a member of the greater public. [citing cases] . . . . We find that there are no allegations in the Amended Complaint to indicate that the Methacton Defendants were aware that they had created a danger specifically to Baby Doe. . . Plaintiffs, therefore, cannot make out a state-created danger claim."); ***Thacker v. City of Miamisburg***, No. C-3-92-188, 1994 WL 1631036, at *5 (S.D. Ohio July 14, 1994) ("Even assuming that those officers removed Nick Foote from the home and promised Janice Foote that he would not return, still it does not appear that a relationship 'special' enough was created such that Janice's reliance on their promise could ultimately lay at the feet of the City the responsibility for her death. There is no evidence that the City prevented her from leaving her home that night before her husband returned to murder her. There is no evidence that the City provided Nick Foote with 'the necessary means and the specific opportunity' to kill Janice. . . Short of such evidence, summary judgment is appropriate."); ***Franklin v. City of Boise***, 806 F. Supp. 879, 887 (D. Idaho 1992) (where plaintiff's son exposed himself to danger by resisting arrest and fleeing, no duty to protect arose under *DeShaney*); ***Robbins v. Maine School Administrative District No. 56***, 807 F. Supp. 11, 13 (D. Me. 1992) ("The relationship between a state and its students does not constitute the special custodial relationship referred to in *DeShaney*. The absence of an affirmative constitutional duty to protect its students does not, however, mean that a state may create a dangerous situation and place students in harm's way without acquiring a corresponding duty to protect those students from resulting violations of their constitutional rights. A state may be held liable if it can fairly be said to have affirmatively acted to create or exacerbate a danger to the victims."); ***Was v. Young***, 796 F. Supp. 1041, 1050 (E.D. Mich. 1992) ("Absent some kind of custodial relationship between the state and either Plaintiffs or their attackers, no constitutional duty can be imposed on Defendants.").

See also ***Breen v. Texas A & M University***, 485 F.3d 325, 333-37 (5th Cir. 2007) ("A number of courts, including the majority of the federal circuits, have adopted the state-created danger theory of section 1983 liability in one form or another. . . Prior to the *Scanlan* decision in the present group of cases, this court had often expressed reluctance to embrace the state-created danger theory, while noting its adoption by other courts.. . . Although the *Scanlan* opinion did not expressly announce that it was adopting the state-created danger theory, it explicitly recited the previously recognized essential elements of a state-created danger claim, applied them to the pleadings, and decided that the plaintiffs had stated a claim upon which relief could be granted under the theory. . . Thus, the *Scanlan* panel, unlike earlier panels of this court, was squarely faced with complaints that sufficiently alleged the elements of a state-created danger claim, and, therefore, stated claims under that theory. Consequently, the *Scanlan* court, by holding that the district court erred in dismissing plaintiffs' section 1983 claims, necessarily recognized that the state-created danger theory is a valid legal theory.. . . . The *Scanlan* panel's clearly implied recognition of state-created danger as a valid legal theory applicable to the case is the law of the case with respect to these further appeals in these same cases now before this panel. . . . Because the necessary implication of the *Scanlan* court's decision is that the state-created danger theory is, indeed, a valid basis for a claim on the set of facts alleged in the complaints in these cases, that

clear implied holding is the law of the case in the present group of appeals."), *amended on reh'g in part by* ***Breen v. Texas A & M University***, 494 F.3d 516, 518 (5th Cir. 2007) (withdrawing that part of prior opinion that recognized state-created-danger theory of liability); ***Rios v. City of Del Rio, Texas***, 444 F.3d 417, 422, 423 (5th Cir. 2006) ("Rios contends. . . that *Scanlan v. Texas A & M Univ.*, 343 F.3d 533 (5th Cir.2003), adopted the state-created danger theory. It is certainly not clear that *Scanlan* purports to do so. There the panel primarily addressed the district court's error in considering matters outside the complaint in granting a Rule 12(b)(6) dismissal. The *Scanlan* panel did cite the *Johnson* and *Piotrowsk*i opinions respecting what would be required to make out a state-created danger claim, and stated that the plaintiffs had adequately pled the there referenced required elements thereof; however, this discussion was introduced by the statement that 'this Court has never explicitly adopted the state-created danger theory,' . . . and *nowhere* in the opinion does the court expressly purport to adopt or approve that theory. At least two subsequent panels have construed *Scanlan* as not adopting the state-created danger theory. . . We need not, however, ultimately resolve the meaning of *Scanlan* because, as explained below, prior decisions of this court more specifically on point here than *Scanlan* (and not cited in *Scanlan*) are controlling in the present setting.'[footnotes omitted]); ***Beltran v. City of El Paso,*** 367 F.3d 299, 307 (5th Cir. 2004) ("Beltran alternatively contends that Amador, by providing Sonye with inaccurate information about the status of the patrol units and recommending that she stay in the bathroom, created a dangerous situation for which the state was or should be responsible. This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability even where the question of the theory's viability has been squarely presented. *See, e.g., McClendon,* 305 F.3d at 327-333; *Scanlan v. Texas A & M Univ.,* 343 F.3d 533, 537 (5th Cir.2003) (same). It is unnecessary to do so in this case."); ***Rivera v. Houston Independent School District,*** 349 F.3d 244, 249 & n.5 (5th Cir. 2003) ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause. . . .In *Scanlan v. Texas A & M University,* 343 F.3d 533 (5th Cir.2003), we found that 'this Court has never explicitly adopted the state-created danger theory.' *Id.* at 537. Despite remanding that case to the district court for further proceedings, we did not recognize the state created danger theory. . . . We again decline to do. Even if we were to review this case under the state created danger theory, it would fail. . . . Rather than pointing to an annunciated Board policy that was the 'moving force' behind the alleged due process violation, the Parents argue the Board established a custom of tolerating gang activity such that it constituted official Board policy, and this custom increased the danger to their son. . . .However, even if such a custom existed, there is no evidence showing the Board had actual or constructive knowledge of its existence. . . . Furthermore, even if the Parents could show that the Board was not assiduous at fighting gang activity, this does not demonstrate that it was 'deliberately indifferent' to the danger that gang activity might have posed to Avila. Nor does it show that the Board affirmatively placed Avila in a position of danger, namely in the situation where Balderas was a greater threat to him than he would have been otherwise."); ***Scanlan v. Texas A & M University,*** 343 F.3d 533, 537, 538 (5th Cir. 2003) ("Although this Court has never explicitly adopted the state-created danger theory, the Court set out the elements of a state-created danger cause of action in *Johnson v. Dallas Independent School District,* 38 F.3d 198 (5th Cir.1994). In *Johnson,* the Court explained that a plaintiff must show the defendants used their

authority to create a dangerous environment for the plaintiff and that the defendants acted with deliberate indifference to the plight of the plaintiff. . . Later, the Court explained what is required to establish deliberate indifference. In *Piotrowski v. City of Houston*, the Court explained that to establish deliberate indifference, the plaintiff must show the 'environment created by the state actors must be dangerous; they must know it is dangerous; and ... they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.' . . Even a cursory review of the complaints shows the plaintiffs pleaded facts to establish deliberate indifference. . . . If these allegations were construed in the light most favorable to the plaintiff, the district court should have determined the plaintiffs had pleaded sufficient factual allegations to show the bonfire construction environment was dangerous, the University Officials knew it was dangerous, and the University Officials used their authority to create an opportunity for the resulting harm to occur. As a result, the district court should have concluded that the plaintiffs stated a section 1983 claim under the state-created danger theory."); ***Walding v. U.S.***, No. SA-08-CA-124-XR, 2009 WL 701807, at **11-13 (W.D. Tex. Mar.16, 2009) ("Given the state of the law, this Court is faced with the situation in which the Fifth Circuit either still has not recognized the viability of the state-created danger doctrine or it has done so (in *Scanlan*), but later panels of the Court have expressly stated that it did not. Based on a review of all the cases above, however, the Court concludes, as did the *Breen I* panel, that there are three minimum requirements to invoke the doctrine: the plaintiff must show that the harm to the plaintiff resulted because (1) the defendant's actions created or increased the danger to the plaintiff; and (2) the defendant acted with deliberate indifference toward the plaintiff; and (3) there must be an 'identifiable victim.'. . .The Court concludes that Plaintiffs have failed to establish the violation of a constitutional right. Plaintiffs' first complaint is that Defendants licensed the Nixon Facility initially. However, the Court agrees with Magistrate Judge Primomo that Plaintiffs fail to demonstrate that such an act is a sufficient 'affirmative action' directed to an identifiable victim to trigger the doctrine. . . .[T]he Defendants' failure to take acts, revoke the license, or to otherwise end the abuse is inaction rather than action . . . . This Court agrees with Magistrate Judge Primomo's conclusion that these allegations essentially amount to no more than failing to provide protection from danger."); ***Boudoin v. St. Charles Parish Hosp***., No. 07-68422009, 2009 WL 602961, at **7-10 (E.D. La. Mar. 9, 2009) ("This 'state-created danger' theory of § 1983 liability has charted a tortuous path in the Fifth Circuit, intermittently recognized by panels of the court, only to be rejected by the en banc court soon after. [collecting cases] As a result, the 'state-created danger' doctrine remains inapplicable in the Fifth Circuit, despite the admittedly confusing hodgepodge of decisions on the issue. . . . Plaintiff's claims based on the "state-created danger" doctrine are untenable as a matter of law because the doctrine is not applicable in the Fifth Circuit. Furthermore, to the extent that the doctrine may be applicable, it is certainly not a clearly established constitutional right in light of the Fifth Circuit's inconsistent and sometimes conflicted treatment of the doctrine over the last twenty years. As a result, and to the extent that the 'state-created danger' doctrine might be applicable to this case, Champagne is entitled to qualified immunity."); ***Robinson v. Roberson***, 2009 WL 274133, at *3, *4 (N.D.Tex. Jan. 30, 2009) ("The existence of the [state-created danger] theory in the Fifth Circuit, however, remains doubtful. The Fifth Circuit adopted the state-created danger theory in *McClendon v. City of Columbia*, 258 F.3d

432, 436 (5th Cir.2001), but then, following an *en banc* review, the ruling was vacated, and the Fifth Circuit did not recognize the theory in its opinion following rehearing, *McClendon,* 305 F.3d at 333. More recently, the Fifth Circuit again recognized the state-created danger theory in *Breen v. Texas A & M University*, 485 F.3d 325, 332- 38 (5th Cir.2007), but then voted *sua sponte* to grant rehearing, in part, and withdrew and deleted the portion of the opinion that recognized the theory. *Breen v. Texas A & M University,* 494 F.3d 516 (5th Cir.2007). In between *McClendon* and *Breen*, the Fifth Circuit generally declined to recognize the viability of the theory. [collecting cases] Even if the state-created danger theory were viable in the Fifth Circuit, plaintiff's allegations would fail to state a valid claim."); ***Doe v. Town of Bourne,*** No. Civ.A.02-11363-DPW, 2004 WL 1212075, at *7, *8 (D. Mass. May 28, 2004) ("Neither the custodial relationship exception nor the state-created danger exception applies in this case. As to the former, the Does have not alleged any specialized facts that give rise to a custodial relationship between themselves and defendants, and while the First Circuit has not addressed the issue, other courts have resoundingly concluded that, as a general matter, students do not stand in a custodial relationship with public schools or their officials for purposes of applying *DeShaney*. . . . The allegations in the Complaint are similarly insufficient to support a state-created danger theory of liability. The only conduct of Grondin and Demitri at issue is their nonaction, including their failure to report the rape to Nicole's parents or the police and their failure to investigate, or more generally to prevent, the rape and harassment. Absent any affirmative action by school officials, the state-created danger theory does not open the door for due process violations for situations in which students are harmed by other students, even where the school deliberately ignores either a threat or actual prior instances of violence.").

See also ***Monfils v. Taylor***, 165 F.3d 511, 517 (7th Cir. 1998) ("[W]e note that by having the requirement regarding avenues of self-help included in the instructions, the City received a benefit it was not strictly entitled to. In a claim such as this one based on a state-created danger, there is no absolute requirement that all avenues of self-help be restricted. *Wallace*, the case on which the City relies, involved, as we have said, a prison guard. He was attempting to establish liability by claiming both that he had a 'special relationship' with the state because of his position as a guard and that prison officials placed him in a position of danger he would not otherwise have faced. The requirement that self-help be restricted went only to his claim of a special relationship. The basis of a special relationship is that the state has some sort of control or custody over the individual, as in the case of prisoners, involuntarily committed mentally ill persons, or foster children. The state's duty to protect those persons or to provide services for them arises from that custody or control. For a person not in custody to claim a special relationship, he must at least claim that the state had sufficient control to cut off other avenues of aid. Recently, in a case which seems to merge the two theories, we have required a finding that alternative avenues of aid have been cut off. *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169 (7th Cir.1997). *Wallace*, however, states no such requirement. We think *Wallace* correctly states the law of this circuit: a state can be held to have violated due process by placing a person in a position of heightened danger without cutting off other avenues of aid. As we said in *Wallace*, the elements of the claim

are: 'what actions did the prison officials affirmatively take, and what dangers would Wallace otherwise have faced?'").

In ***G-69 v. Degnan***, 745 F. Supp. 254 (D.N.J. 1990), the court found a "special relationship" between an informant and the state, where "both parties anticipate[d] that the informant's activities . . . could result in a threat to [his] life . . . ." *Id*. at 265. Where the state had made guarantees of personal safety to the informant and where the informant's life and liberty are at risk, "the state may not, consistent with the Constitution, walk away from the bargain." *Id*. *See also* ***Butera v. District of Columbia,*** 235 F.3d 637, 649, 650 (D.C. Cir. 2001) ("The circuit courts have adopted the State endangerment concept in a range of fact patterns concerning alleged misconduct by State officials. Regardless of the conduct at issue, however, the circuits have held that a key requirement for constitutional liability is affirmative conduct by the State to increase or create the danger that results in harm to the individual. . . . We join the other circuits in holding that, under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm."); ***Wang v. Reno***, 81 F.3d 808, 818 (9th Cir. 1996) ("[T]he government argues that Wang's due process rights were not violated because the government 'has no constitutional duty to protect a witness from harm stemming from his or her testimony that may occur after the witness is released from the government's custody.' The government's argument fails to take into account the government's constitutional duty to protect a person when it creates a special relationship with that person, or when it affirmatively places that person in danger. . . . Having placed Wang in custody, the government had an obligation to protect him from liberty deprivations he faced by virtue of his testimony in court.").

But see ***Matican v. City of New York***, 524 F.3d 151, 156-59 (2d Cir. 2008) ("We therefore join several of our sister circuits in holding that a noncustodial relationship between a confidential informant and police, absent more, is not a special relationship. *Accord Velez-Diaz v. Vega-Irizarry*, 421 F.3d 71, 80 (1st Cir.2005); *Dykema v. Skoumal*, 261 F.3d 701, 706 (7th Cir.2001); *Butera v.. District of Columbia*, 235 F.3d 637, 648 (D.C.Cir.2001); *Summar v. Bennett*, 157 F.3d 1054, 1059 (6th Cir.1998). . . . In applying the state-created danger principle, "we have sought to tread a fine line between conduct that is 'passive' " (and therefore outside the exception) "and that which is 'affirmative' " (and therefore covered by the exception). . . . As the district court recognized, Matican's allegation that the officers failed to learn about, or inform him of, Delvalle's violent criminal history or his release on bail fall on the passive side of the line. . . . By contrast, Matican's allegation that the officers planned the sting in a manner that would lead Delvalle to learn about Matican's involvement is sufficiently affirmative to qualify as a state-created danger. . . . Here, . . . the officers had ample opportunity to plan the sting in advance. Matican argues that the district court erred in holding that the officers did not act with deliberate indifference. He proposes a balancing test to help factfinders determine when the conscience is shocked by reckless or deliberately indifferent state action that creates or increases a danger. We need not consider Matican's proposed test, because this court's decision last year in *Lombardi* provides sufficient

guidance to resolve this issue. In that case, we considered the claims of rescue and cleanup workers at the World Trade Center site following the 9/11 attacks. The workers in that case alleged that the defendants, federal environmental and workplace-safety officials, issued intentionally false press releases stating that the air in Lower Manhattan was safe to breathe, and that in reliance on those statements, the workers did not use protective gear. . . We held that, regardless of whether the situation was a time-sensitive emergency, plaintiffs' allegations of deliberate indifference did not shock the conscience. . . . The same considerations lead us to conclude that Matican's allegations of affirmative conduct by the officers, even if true, do not shock the contemporary conscience. In designing the sting, the officers here had two serious competing obligations: Matican's safety and their own. They could reasonably have concluded that the arrest of a potentially violent drug dealer demanded the use of overwhelming force, even if that show of force might jeopardize the informant's identity in the future. We are loath to dictate to the police how best to protect themselves and the public, especially when our ruling could be taken to require officers to use riskier methods than their professional judgment demands. As we explained in *Lombardi*, the defendants in our prior state-created danger cases were not subject to 'the pull of competing obligations.'. . .Because the officers were obliged to protect their own safety as well as Matican's, their design of the sting in this case does not shock the conscience."); ***Velez-Diaz v. Vega-Irizarry***, 421 F.3d 71, 81(1st Cir. 2005) ("We hold that plaintiffs have not alleged facts to support a claim based on the state created danger theory. Plaintiffs' theory may be that the government owes a duty to all cooperating witnesses to protect them from harm. There are risks inherent in being a cooperating witness, but the state does not create those dangers, others do, and the witness voluntarily assumes those risks. . . We leave open the question whether, nonetheless, the state may violate substantive due process as to cooperating witnesses if it takes certain actions, such as sending a cooperating witness to what the state knows would be his certain death. Such action may shock the conscience by demonstrating 'deliberate indifference.' . . This case does not come close. There is no allegation the government knew Velez would be murdered. At most, the allegation is that Velez said that he was tired, not that he said he was under imminent risk. The attempt to show a substantive due process violation based on a claim that some yet unknown regulation required the state to promptly remove 'tired' cooperating witnesses fails. Plaintiffs have therefore failed to carry their burden under the threshold inquiry for qualified immunity. Absent a showing that the agents' conduct violated a constitutional right, qualified immunity applies."); ***Gatlin v. Green,*** 362 F.3d 1089, 1093, 1094 (8th Cir. 2004) ("Gatlin made a courageous decision to leave the MC gang, to cooperate with police, and to start a new life. By cooperating with police in exchange for a reduced sentence and a chance to relocate, Gatlin knowingly assumed a considerable risk that MC gang members would eventually discover his cooperation and seek to avenge him. Gatlin was a twenty-five year MC gang veteran. He could evaluate better than anyone the deadly risk inherent in cooperating with police. The actions of Sergeant Green, fellow police officers, Prosecutor McGlennen, the victim/witness personnel, and the state judiciary were undertaken with a solitary purpose-to minimize the risk of a retaliatory gang 'hit' against Gatlin by providing him with the legal and financial means necessary to flee his would-be avengers. Mrs. Gatlin's contention that more protective measures could have been taken is unavailing based on the record. That Gatlin would ultimately remain in or return to Minneapolis without informing

authorities was unknown to Sergeant Green. Gatlin miscalculated the grave risk of harm he assumed. Tragically, his miscalculation cost him his life."); ***Dykema v. Skoumal,*** 261 F.3d 701, 706 (7th Cir. 2001) (rejecting application of state-created danger or custody theory with respect to informant shot by another drug dealer, where informant was experienced drug dealer, voluntarily cooperating with police for Acash, beer, and to get his driver's license back."); ***Summar v. Bennett***, 157 F.3d 1054, 1058, 1059 (6th Cir. 1998) ("Plaintiff has cited several foreign cases, each of which has purportedly concluded that government officials have a duty to protect certain private citizens from a third party's deprivation of their due process rights when a special relationship exists between the victims and the government officials. [citing cases] It is critical to note that in each of these cited cases, the official defendants created the risk of harm to the plaintiff without the consent of the victim. . . . Accordingly, the present controversy can be distinguished from the others because Summar voluntarily elected to serve as a confidential informant, despite being advised that he would have to testify and reveal his status as an agent of the police. . . . [T]his forum does not adopt the proposition of law articulated by the New Jersey district court in *G-69*, and notes that *DeShaney* neither compels nor foreshadows the conclusion pronounced in that renegade decision."); ***McIntyre v. United States***, 336 F.Supp.2d 87, 113 (D. Mass. 2004) ("[T]he plaintiffs argue that, because McIntyre was a government informant, he was 'owed a constitutionally protected duty of care arising out of a recognized "special relationship."' . . . The plaintiffs' argument fails because, unlike an inmate or involuntarily institutionalized patient, the informant/government relationship is voluntary and does not involve physical restraint by government agents. . . .Whatever metaphorical shackles may be inherent in becoming an informant, or to whatever degree being an informant 'significantly compromises one's ability to protect oneself,' is simply insufficient to cloth the informant with substantive due process rights to protection from the harm he might suffer as a consequence of being an informant. Like the patient in *Monahan*, who voluntarily committed himself to a mental institution, McIntyre chose to be an informant. His freedom to choose whether to cooperate with the government bears no resemblance to the situation of one who, by action of the government, is forced behind locked hospital or prison doors."); ***Williamson v. City of Virginia Beach***, 786 F. Supp. 1238, 1250-55 (E.D. Va. 1992) (situation of seventeen-year-old informant who volunteered his services to police and subsequently committed suicide, not sufficiently analogous to incarceration or institutionalization to create affirmative duty to protect; State did not so restrain his liberty or exercise control so as to render individual incapable of caring for himself). *See also* ***Butera v. District of Columbia,*** 235 F.3d 637, 651 n.16 (D.C. Cir. 2001) ("Because we hold that the right arising from State endangerment was not clearly established in this circuit at the time of Eric Butera's death, we do not address whether the possibly voluntary nature of his conduct would relieve or mitigate the District of Columbia of constitutional liability.").

See also ***Vasquez v. Attorney General of the United States***, 208 F. App'x 184, ___ (3d Cir. 2006) ("Vasquez argues the U.S. government has an affirmative duty to protect him because the risk of his being tortured arises from the assistance he provided to federal agents. Generally, the state has no obligation to protect individuals from harm inflicted by third parties. [citing *DeShaney*] However, as this Court explained in *Kamara v. Attorney General*, 'we have recognized

a 'state-created danger exception,' such that the government has a constitutional duty to protect a person against injuries inflicted by a third-party when it affirmatively places the person in a position of danger the person would not otherwise have faced.' 420 F.3d 202, 216 (3d Cir.2005). Despite Vasquez's contentions, *Kamara* explicitly declined to recognize the state-created danger exception in the immigration context. This Court determined that extending the exception in this way, 'would impermissibly tread upon the Congress' virtually exclusive domain over immigration, and would unduly expand the contours of our immigration statutes and regulations, including the regulations implementing the [Convention Against Torture].'. . Based on this precedent, we reject Vasquez's claim for relief under the state-created danger exception."); ***Guerra v. Gonzales***, No. 04-60650, 2005 WL 1651660, at *2 (5th Cir. July 14, 2005) (not published) ("We have no reason to believe that the Supreme Court would, under any circumstances, apply the state created danger theory in an immigration case unless the petitioner established that the state actors created or increased the danger to the plaintiff. That is the underlying premise upon which the doctrine is based. . . In this case, the IJ [Immigration Judge] found that Guerra failed to establish that his life will be in danger if he is deported to Colombia. The only definitive evidence of danger that was presented to the IJ was evidence of a single phone threat to his wife and a threat in open court by a defendant against whom Guerra was testifying. Both of these threats apparently occurred around the time Guerra was incarcerated in 1999 or 2000. Guerra produced no additional evidence of any continuing threats or other manifestations of danger that may await him if he returns to Colombia. For the above reasons, we conclude that even if the state created danger theory is a viable one in the immigration context, based on the record evidence in this case, it has no application here. We therefore reject Guerra's substantive due process claim."); ***Nora and her Minor Son, Jose v. Wolf***, No. CV 20-0993 (ABJ), 2020 WL 3469670, at *13 (D.D.C. June 25, 2020) ("Plaintiffs have not pointed the Court to any opinion in which this circuit applied the state-created danger doctrine to a non-citizen in immigration proceedings. The doctrine arose in proceedings under 42 U.S.C. § 1983 seeking to hold state actors liable for constitutional violations, and several circuits have expressly rejected the notion that it could be applied in the immigration context. [discussing *Enwonwu v. Gonzales*, 438 F.3d 22 (1st Cir. 2006), *Kamara v. Attorney Gen. of U.S.*, 420 F.3d 202 (3d Cir. 2005), and *Vincent-Elias v. Mukasey*, 532 F.3d 1086 (10th Cir. 2008)] In the absence of clear direction from the D.C. Circuit on the issue, and in light of the persuasive reasoning of the three other circuits cited above, the Court cannot find that plaintiffs have shown that they are likely to be successful on the merits of their constitutional claim.").

See also ***Doe v. City of Phoenix***, Nos. CV-07-1901-PHX-GMS, CV-08-1837-PHX-GMS, 2009 WL 4282275, at *12 (D. Ariz. Nov. 25, 2009) ("[T]hose circuits that had addressed the state-created danger doctrine in the context of confidential sources had uniformly found that liability under § 1983 was inappropriate. [citing cases] Thus, even if Individual Officers acted unconstitutionally, it cannot be said that a reasonable public official would clearly have known that the officers' conduct was prohibited with respect to the uncontested facts presented here.").

For cases involving claims of failure to protect witnesses, *see, e.g.*, ***Rivera v. Rhode Island***, 402 F.3d 27, 35-38 (1st Cir. 2005) ("This court has, to date, discussed the state created danger

theory, but never found it actionable on the facts alleged. [citing cases] Even if there exists a special relationship between the state and the individual or the state plays a role in the creation or enhancement of the danger, under a supposed state created danger theory, there is a further and onerous requirement that the plaintiff must meet in order to prove a constitutional violation: the state actions must shock the conscience of the court. . . In determining whether the state has violated an individual's substantive due process rights, a federal court may elect first to address whether the governmental action at issue is sufficiently conscience shocking. . . . Of course, whether behavior is conscience shocking varies with regard to the circumstances of the case. . . In situations where actors have an opportunity to reflect and make reasoned and rational decisions, deliberately indifferent behavior may suffice to 'shock the conscience.'. . Keeping all of this in mind, we echo the caution articulated in *Soto*: in a state creation of risk situation, where the ultimate harm is caused by a third party, 'courts must be careful to distinguish between conventional torts and constitutional violations, as well as between state inaction and action.' . . .Rivera argues the state's two actions in identifying Jennifer as a witness and taking her witness statement in the course of investigating a murder compelled Jennifer to testify and thus enhanced the danger to Jennifer. Both are necessary law enforcement tools, and cannot be the basis to impose constitutional liability on the state. Rivera also argues issuance of a subpoena enhanced the risk to Jennifer. Issuing a subpoena is also a vital prosecutorial tool. While requiring Jennifer's testimony may in fact have increased her risk, issuance of a subpoena did not do so in the sense of the state created danger doctrine. Every witness involved in a criminal investigation and issued a subpoena to testify in a criminal proceeding faces some risk, and the issuance of a subpoena cannot become the vehicle for a constitutional claim against a state. The only remaining 'affirmative acts' alleged in the complaint are the defendants' assurances of protection. . . There is no doubt that, if accepted as true, the complaint shows that Jennifer may have been subjected to an increased risk, if she was promised protection, not given it, and relied on the promise. The state, in making these promises, may have induced Jennifer into a false sense of security, into thinking she had some degree of protection from the risk, when she had none from the state. While the unkept promises may have rendered her more vulnerable to the danger posed by Charles Pona and his associates, merely rendering a person more vulnerable to risk does not create a constitutional duty to protect. . . In part this is because an increased risk is not itself a deprivation of life, liberty, or property; it must still cause such a deprivation. Ultimately, the claims alleged in the complaint are indistinguishable from those in *DeShaney*.. . . The state's promises, whether false or merely unkept, did not deprive Jennifer of the liberty to act on her own behalf nor did the state force Jennifer, against her will, to become dependent on it.. . Moreover, the state did not take away Jennifer's power to decide whether or not to continue to agree to testify. Merely alleging state actions which render the individual more vulnerable to harm, under a theory of state created danger, cannot be used as an end run around *DeShaney*'s core holding. . . We add a few words about the separate shock the conscience test which plaintiff would also have to meet if she established a duty. In part, the test is meant to give incentives to prevent such gross government abuses of power as are truly outrageous. The facts here do not match the need for such incentives. Intimidation and even murder of witnesses is a growing national problem in major urban areas, plaguing witnesses, law enforcement officers, and the communities. It is in the interests of the police to protect witnesses,

in order to secure convictions. There can be any number of common reasons why police protection of witnesses is ineffectual, none of which involve acts by the police intended to cause the murder of a needed witness. . . Of course, there may be an extreme set of facts involving such deliberate and malevolent actions by police against witnesses as to shock the conscience and implicate a constitutional violation. Those await another day."); ***W.D.G. ex rel Burrell v. City of Oakland***, No. C 03-04283 WHA, C 02-05642 WHA, 2004 WL 1774226, at *9 (N.D.Cal. Aug. 6, 2004) ("[T]his Court held that a jury could reasonably conclude that Cruz had significantly and affirmatively understated the risk to Grundy, a positive act that may have lulled Grundy into a reduced level of caution, and that Cruz had led Grundy to believe that Cruz would warn Grundy of any specific threat learned from Scott's monitored telephone calls. A reasonable jury could also find that Cruz knew of a concrete and specific threat against Grundy's life and failed to communicate that threat. The facts as to Gilbert, however, are different. As mentioned, there was only one meeting with Gilbert. There were no follow-up meetings as in Grundy. At the meeting with Gilbert, Cruz told him of the risk he assumed in incriminating Scott as Abraham's murderer and told him to stay out of Oakland. Gilbert agreed that he was at risk and he gave neither Cruz nor Rullamas reason to think that he would expose himself to harm. Indeed, unlike Chance Grundy, who purportedly dismissed many of the warnings given by Cruz, Gilbert said he was moving to Sacramento and 'was adamant that he wasn't coming back' . . . Furthermore, Cruz did not assure Gilbert that he was going to monitor Scott's telephone calls and then, when Cruz learned of a specific threat, withhold such information from Gilbert. On this record, this order holds that a reasonable jury could not conclude that Cruz or Rullamas affirmatively created the danger that led to Gilbert's death. Hence, plaintiffs cannot succeed."); ***Clarke v. Sweeney,*** 312 F.Supp.2d 277, 290, 294 (D. Conn. 2004) ("The Second Circuit has not specifically considered whether the 'state created danger exception' to *DeShaney* applies to fact witnesses for whom visible police protection was provided and then withdrawn. . . . [I]t seems clear that this exception requires that the state actors do more than simply temporarily assign marked police cars for the protection of witnesses to crimes. This exception requires that the government defendant either be a substantial cause of the danger the witness faces or at least enhance it in a material way. Certainly, the BPD could have provided better protection for B.J. Brown and Karen Clarke. However, that does not mean that a violation of the U.S. Constitution occurred. . . Here, the danger posed by the Peelers was not the creation of the state. Nor did the actions of the police provide the Peelers with an opportunity to harm Karen or B.J. Thus, the Court finds that the state created danger exception to *DeShaney* is inapplicable based on the undisputed facts of this case as well as the disputed facts considered in a light most favorable to the plaintiff.").

c. entitlement cases

The Court in ***DeShaney*** did not address petitioners' argument that state law created an "entitlement" to protective services, any deprivation of which would be subject to Fourteenth Amendment due process constraints. 109 S. Ct. at 1003 n.2.

Compare ***Heykoop v. Michigan State Police***, 838 F. App'x 137, ___ (6th Cir. 2020) ("The takeaway from *Lucas*, beyond the simple holding that the *Lucas* plaintiff could not establish a property interest, is that a plaintiff who can point to an 'ordinance, contract[,] or other "rules of mutually explicit understandings,"' including requirements the towing company must satisfy to be placed on and remain on the list, along with express 'procedures' the Post Commanders must follow in order to remove or suspend the towing company from the list has established a 'legitimate claim of entitlement.'. . Because MSP Order 48 contains express reference to these requirements and procedures, Eagle Towing had a clearly established interest in remaining on the Lists.") *with* ***Heykoop v. Michigan State Police***, 838 F. App'x 137, ___ (6th Cir. 2020) (Sutton, J., dissenting) ("I reluctantly dissent from the majority's thoughtful approach to this difficult case. Even assuming there is a protected property interest in staying on a towing call list, that interest is not clearly established. The only relevant cases *rejected* similar claims. *See Lucas v. Monroe Cnty.*, 203 F.3d 964, 978 (6th Cir. 2000); *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 409–11 (6th Cir. 2002). When cases reject a constitutional claim, they do not clearly establish it. And even when dicta in past cases may suggest how to satisfy the claim in a future case, they do not clearly establish the principle. They just pave the way for a future case—and a future holding—to clearly establish it. Independent of all that, I am skeptical that a discretionary policy 'intended for the guidance of [the Michigan State Police] members,'. . . amounts to the source of a protected property interest. The Constitution does not protect guidelines extinguishable at the whim of state officials. With respect, I would reverse the district court's denial of qualified immunity.")

In ***Meador v. Cabinet for Human Resources***, 902 F.2d 474 (6th Cir. 1990), the court determined that Kentucky state law provided children placed in state-regulated foster homes with a "framework of entitlements," including "an entitlement to protective services of which they may not be deprived without due process of law." *Id*. at 476-77. *See also* ***Sealed v. Sealed,*** 332 F.3d 51, 55 (2d Cir. 2003) ("In this case, plaintiffs do not contend that the state of Connecticut has a constitutional obligation to protect them from child abuse . . . instead they argue that Connecticut's comprehensive child welfare scheme . . . creates an entitlement to protective services subject to Fourteenth Amendment scrutiny."); ***Hilliard v. Walker's Party Store, Inc.***, 903 F. Supp. 1162, 1174 (E.D. Mich. 1995) ("[T]hat plaintiff . . . was ordered to vacate the premises does not constitute a custodial situation giving rise to a special relationship and a duty on the part of the police officers to prevent injury to plaintiff . . . either from himself or third persons . . . Nevertheless, if the Michigan incapacitated persons statute . . . applies, such statute may have given rise to a special relationship through which defendant officers possessed a duty to protect plaintiff['s] well-being. If the statute applies . . . then the question arises whether defendant officers acted with deliberate indifference to plaintiff['s] special needs due to his asserted intoxication.").

In ***Doe by Nelson v. Milwaukee County***, 712 F. Supp. 1370 (E.D. Wis. 1989), *aff'd*, 903 F.2d 499 (7th Cir. 1990), plaintiffs claimed that Wisconsin law created a right to an investigation where there was a report of suspected child abuse and that they had been deprived of this entitlement without due process of law. An examination of state law led the court to conclude there

was no entitlement to a mandatory investigation unless the report came from a law enforcement agency or person *required* to report under the statutory scheme. Thus, with no property interest in the investigation of their report, no due process rights were involved.712 F.Supp. at 1377-78.

The Court of Appeals for the Seventh Circuit affirmed, ***Doe by Nelson v. Milwaukee County***, 903 F.2d 499 (7th Cir. 1990), but went on to hold that even if the Does were required to report and the state investigation procedures were properly triggered under state law, "the procedures themselves are not 'benefits' within the meaning of Fourteenth Amendment jurisprudence." *Id*. at 503. The court noted "the confusion that would result from elevating a state-mandated procedure to the status of a constitutionally protected property interest." *Id*. *See also* ***Catinella v. Cty. of Cook, Illinois***, 881 F.3d 514, 518 (7th Cir. 2018) ("Catinella has not identified any state law, local ordinance, or contract provision that substantively limits Cook County's ability to fire him. He relies solely on his personal 'understanding' that 'pursuant to Cook County policies and procedures,' he 'could not be terminated from his employment *unless* [*certain*] *steps were followed*, which in his case were not.' . . At best, that's an allegation about process, not a property right. 'Process is not an end in itself.'. . An employee manual or policy handbook that specifies a set of pre-termination procedures does not 'create an enforceable property right to a job.'. . Catinella has not stated a plausible claim for deprivation of a property interest in his employment."); ***Kvapil v. Chippewa County, Wis.***, 752 F.3d 708, 715 (7th Cir. 2014) ("Without a property interest in his seasonal employment, this remaining argument boils down to the contention that Chippewa County did not follow its own procedures when it suspended and ultimately terminated Kvapil's employment. A local government's failure to follow its own procedural rules, however, does not violate due process.")

Accord ***Lavite v. Dunstan***, 932 F.3d 1020, 1033 (7th Cir. 2019) ("State and local law can create and confer constitutionally protected liberty and property interests, but state and local procedural protections do not by themselves give rise to federal due process interests. . . .The section of the Madison County Personnel Policy Handbook that Lavite relies upon sets out purely procedural rules. In fact, calling them rules might even be a stretch. The relevant Handbook Policy states that law enforcement *may* investigate, not that it must. Lavite did not identify any substantive liberty or property interest embedded within these procedural regulations."); ***GEFT Outdoors, LLC v. City of Westfield***, 922 F.3d 357, 366 (7th Cir. 2019) ("Even if the Stop Work Notices themselves halted further work on the Billboard, and assuming this work stoppage 'deprived' GEFT of its leasehold interest, GEFT's only complaint about these notices is that they did not comply with the UDO's requirements. But there is no constitutional procedural due process right to state-mandated procedures. *See Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 773 (7th Cir. 2013); *River Park*, 23 F.3d at 166–67 (plaintiff "may not have received the process [the state] directs its municipalities to provide, but the Constitution does not require state and local governments to adhere to their procedural promises"). The fact that the Stop Work Notices did not comply with the UDO's [Unified Development Ordinance] procedures cannot support a procedural due process claim, and GEFT does not raise any other issue with the process it received via the Stop Work Notices beyond their non-compliance with the UDO."); ***Blouin v.***

Spitzer, 356 F.3d 348, 363 (2d Cir. 2004) ("State procedures designed to protect substantive liberty interests entitled to protection under the federal constitution do not themselves give rise to additional substantive liberty interests."); ***Holcomb v. Lykens,*** 337 F.3d 217, 224, 225 (2d Cir. 2003) ("Although state laws may in certain circumstances create a constitutionally protected entitlement to substantive liberty interests, . . . state statutes do not create federally protected due process entitlements to specific state-mandated procedures. . . . Even were we to assume that Vermont law creates a federally protected entitlement to extended furlough, it did not create a similarly protected entitlement to the specific procedures outlined in Vermont Department of Corrections Directive 372.03. Rather, any entitlement to extended furlough would be federally protected by the processes created by the Fourteenth Amendment and outlined in *Morrisey*. These procedures were followed by the defendants when they revoked Holcomb's extended furlough. The defendants may have breached Vermont law or their own procedures, and their conduct may have been deplorable for that reason, but it did not violate the Fourteenth Amendment."); ***Doe by Fein v. District of Columbia***, 93 F.3d 861, 868 (D.C. Cir. 1996) ("In an effort to avoid *DeShaney*, Doe disclaims reliance on 'substantive due process' as such. Rather, she contends that her claim is based on a statutory entitlement to protective services and is thus not governed by *DeShaney* . . . . As noted, however, process alone does not give rise to a protected substantive interest: by codifying procedures for investigating child abuse and neglect reports, D.C. has not assumed a constitutional obligation to protect children from such abuse and neglect. The fact that Doe can point to a D.C. statute mandating investigation does not, therefore, convert a meritless substantive due process claim into a fruitful procedural one."); ***"Tony" L. by and through Simpson v. Childers***, 71 F.3d 1182, 1187 (6th Cir. 1995) (Upon examination of Kentucky's Unified Juvenile Code, the court concluded that "neither the words of the relevant statutes nor the policy goals expressed therein limit the discretion of Defendants enough to create a liberty interest protected by the Due Process Clause of the United States Constitution."); ***Morgan v. Weizbrod***, 17 F.3d 1437, 1994 WL 55607, *2 (10th Cir. Feb. 23, 1994) (Table) (rejecting plaintiff's argument that the Oklahoma child protection statute created a duty to investigate reports of child abuse, which duty was tantamount to an entitlement protected by the Fourteenth Amendment); ***Pusey v. City of Youngstown***, 11 F.3d 652, 656 (6th Cir. 1993) ("The Ohio victim impact law does not create a liberty interest here because it only provides that the victim has the right to be notified. The statute does not specify how the victim's statement must affect the hearing nor does it require a particular outcome based on what the victim has said."); ***Villanova v. Abrams***, 972 F.2d 792, 798 (7th Cir. 1992) (noting "persistent fallacy that procedural requirements create substantive entitlements"); ***Kellas v. Lane***, 923 F.2d 492, 494 (7th Cir. 1990) ("[A] state creates a protected liberty interest only when it establishes 'specific substantive predicates' that limit the discretion of official decisionmakers and mandates a particular outcome to be reached if the relevant criteria have been met."); ***A.S., by and through Blalock v. Tellus***, 22 F. Supp.2d 1217, 1223 (D. Kan. 1998) (concluding no liberty or property interest in enforcement of Kansas Code for the Care of Children); ***Semple v. City of Moundsville***, 963 F. Supp. 1416, 1431 (N.D.W.Va. 1997) ("[A]lthough a statute may prescribe and codify certain procedures for dealing with domestic violence and/or child abuse, the statute does not automatically create an entitlement that can be enforced by individuals. Rather, before the statute can give rise to a constitutionally protected

entitlement it must be based on an independent, substantive constitutional right."), *aff'd*, 195 F.3d 708 (4th Cir. 1999).

See also ***Moya v. Garcia***, 895 F.3d 1229, 1241-42 (10th Cir. 2018) (McHugh, J., concurring in the result in part and dissenting in part) (*amended opinion on denial of rehearing en banc*), *cert. denied*, 139 S. Ct. 1323 (2019) ("[I]t is imperative that we accurately identify the exact nature of the state-created liberty interest Plaintiffs seek to protect. In presenting their case, Plaintiffs have tended to conflate the right to freedom (or bail) with the right to procedures requiring timely bail hearings. Although both are rights created by New Mexico law, . . . only the former can be a protected liberty interest. That is because 'an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause.'. . To the extent Plaintiffs argue that New Mexico's fifteen-day rule 'creates a liberty interest protected by constitutional procedural due process,' their position 'reflects a confusion between what is a liberty interest and what procedures the government must follow before it can restrict or deny that interest.'. . . And Plaintiffs are inconsistent in how they frame their protected liberty interest, sometimes relying on New Mexico's fifteen-day rule as an end unto itself and sometimes hinting at the fundamental underlying right to be free of restraint. . . . I would, accordingly, begin the procedural due process analysis by clarifying that Plaintiffs' only relevant protected liberty interest is in their right to 'freedom pending trial.'. . That right may be duly honored via a timely bail determination, but the timely bail determination is a means, not an end. The source of Plaintiffs' liberty interest does not much matter, but it can be said to arise from either the United States Constitution, *see Baker*, 443 U.S. at 144, 99 S.Ct. 2689; *Dodds*, 614 F.3d at 1192, the New Mexico Constitution, *see Brown*, 338 P.3d at 1282, or both. Although New Mexico is free to create procedural rights protecting the underlying right to bail, as it has done here, *see* Rule 5–303 NMRA, the failure of its state officials to protect *state-law* procedural rights is not a Fourteenth Amendment violation, so long as federal due process requirements (which may well be lower) are satisfied. We would not be the first court to note the irony that, were the rule otherwise, its effect would be to subject states offering *more* procedural protections to stricter federal oversight. . . .The sufficiency of the process afforded Plaintiffs—the adequacy and timeliness of their bail determinations—implicates the second prong of the procedural due process test, not the first. As to this latter question, we ask whether Plaintiffs were afforded all the process that was their due. . . I would have no difficulty holding that Plaintiffs have plausibly alleged that they were not afforded an appropriate level of process."); ***Forrester v. Bass***, 397 F.3d 1047, 1057 (8th Cir. 2005) ("Thus, based on the plain statutory language and court precedent, we hold sections 210.109 and 210.145 of the Missouri Revised Statutes, which were in effect in August 1999, did not create specific, constitutionally protected property or liberty interests in state-created investigative, preventive, and protective social services. Finding no protected interests, we need not decide what, if any, procedural process was due."); ***Bagley v. Rogerson***, 5 F.3d 325, 328 (8th Cir. 1993) ("If a state law gives me the right to a certain outcome in the event of the occurrence of certain facts, I have a right, by virtue of the Fourteenth Amendment, to whatever process is due in connection with the determination of whether those facts exist. This is not at all the same thing as saying that the federal Constitution guarantees me all rights created or conferred upon me by state law."); ***Posr v. City of New York***,

835 F. Supp. 120, 125 (S.D.N.Y. 1993) (Plaintiff's expectation that officers would be disciplined following a finding of excessive force, "did not rise to the level of a constitutionally protected interest. Accordingly, a City decision not to discipline the officers did not violate any of plaintiff's constitutional rights."), *aff'd*, 22 F.3d 1091 (2d Cir. 1994); ***Coker v. Henry***, 813 F. Supp. 567, 570 (W.D. Mich. 1993) ("The Michigan Child Protection Law does not prescribe and mandate compliance with specific procedures substantively limiting the discretion of state officers. It is not sufficiently explicit and mandatory and does not create a legitimate claim of entitlement of the nature here claimed."), *aff'd*, 25 F.3d 1047 (6th Cir. 1994); ***Boston v. Lafayette County, Mississippi***, 743 F. Supp. 462, 472 (N.D. Miss. 1990) (a state statute creating a duty on the part of the sheriff to safely keep prisoners entrusted to his care, could not serve as the source of procedural due process claim).

Compare ***Lee v. Hutchinson***, 854 F.3d 978, 981-82 (8th Cir. 2017) (en banc) (per curiam), ("At the broadest level, the inmates assert that the violations of Arkansas law, regulations, and policy during the clemency process violated the Due Process Clause of the Fourteenth Amendment. As an initial matter, we note that, to the extent the inmates argue that these irregularities *themselves* constitute a violation of their due process rights, this argument fails under well-established law. . . .Based on the record before us, we conclude that the district court was correct in determining that, despite the procedural shortcomings in the clemency process, the inmates received the minimal due process guaranteed by the Fourteenth Amendment."), *cert. denied*, 137 S. Ct. 1623 (2017) *with* ***Lee v. Hutchinson***, 854 F.3d 978, 982-87 (8th Cir. 2017) (en banc) (per curiam) (Kelly, J., dissenting) ("On February 27, 2017, the Governor of Arkansas set execution dates for eight men over the course of eleven days, beginning with two executions on the night of April 17, 2017, and then two more on each of April 20, 24, and 27, 2017. The four appellants here are set to be executed on April 20, 24, and 27. At most, this schedule left appellants with 59 days for their clemency process. The truncated timeframe for appellants to pursue clemency violated numerous provisions of Arkansas law and policies governing the clemency process. Arkansas requires filing deadlines for clemency petitions to be set no later than 40 days prior to the execution. Ark. Admin. Code § 158.00.1-4.8. But here, the district court found that filing deadlines for several appellants were set less than 40 days before execution. This schedule left Lee and Johnson with 11 days to prepare their applications, Marcel Williams with 16 days, and Kenneth Williams with 18 days. Arkansas' statute also states that the Parole Board "shall solicit the written or oral recommendation" from the committing court, the prosecuting attorney, the county sheriff, and, if requested, the victim or victim's next of kin before the Board considers an application. Ark. Code Ann. § 16-93-204(d). The statute additionally requires that the Board 'shall notify the victim or the victim's next of kin' of the clemency hearing. . . The district court held that appellants 'made a substantial showing that the statutorily required notice to stakeholders was ... not made as the law requires.' Although the Parole Board's Policy Manual states that applicants are entitled to two-hour hearings, the district court found appellants were limited to one hour to present their evidence and arguments. Finally, the Parole Board must notify the public and all stakeholders of its recommendation that clemency be granted 30 days before submitting it to the Governor. Ark. Code Ann. § 16-93-204(e). Therefore, the clemency hearing must be held at

least 30 days prior to the execution date. . . None of the appellants' clemency hearings occurred 30 days before their executions dates, leading the district court to conclude that 'the schedule that was followed made it impossible simply in terms of the calendar for the board to comply with this orderly procedure ... that is outlined in the law.' The appellants here argue that Arkansas violated their due process rights by arbitrarily denying them clemency procedures required by Arkansas law, without which they could not meaningfully access the clemency process. They concede that Arkansas' procedures, if followed, comport with the 'minimal procedural safeguards' required by *Woodard*. But, they contend that Arkansas' failure to follow its own procedures constitutes a violation of Due Process because these failures implicate their right to notice and an opportunity to be heard, and make it impossible to benefit from a grant of clemency. Before today, our court had not addressed the specific question presented—namely, whether a clemency applicant facing execution can state a due process claim alleging that the state arbitrarily denied him the procedures explicitly set forth by state law. Justice O'Connor's opinion suggests that compliance with state statutory procedures is a component of the minimal procedural safeguards to which death row clemency applicants are entitled. . . . However, some courts have been hesitant to grant relief based on the contention that the clemency procedure did not accord with state law. . . .Prior to today, our circuit had not explicitly taken a position on the viability of the claim the appellants bring here. However, several cases indicated that such a claim should be available. . . .Although the state standards alone do not dictate the process that is due, . . here, the appellants' claim relies on the violations of state procedural rules to demonstrate that they were arbitrarily denied the ability to benefit from the clemency process. . . Specifically, Arkansas Statute § 16-93-204(e) requires the Parole Board to issue a public notice and notice to all stakeholders of its intention to recommend that the Governor grant an applicant's clemency application at least 30 days or more before submitting said recommendation. Because none of the appellants' clemency hearings were scheduled 30 days before their execution dates, the appellants would have been executed before the Governor could, consistent with the statutorily required procedure, act on their clemency applications. Only a stay of execution from the court, such as the one the district court issued for Jason McGehee, could have ensured appellants' constitutional right to 'any access to [Arkansas'] clemency process.' *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring). The district court was not clearly erroneous in concluding that "'it was impossible from the beginning, once the schedule was laid in, it was impossible for the board to comply. That speaks to me of interference and arbitrariness.'. . .Appellants have also shown that they have a significant possibility of succeeding on their due process claim because the state procedural violations implicate their right to notice and an opportunity to be heard in the clemency process. Such rights are fundamental to due process. . . .I conclude that the lack of notice in combination with the other statutory violations—such as the shortened period to prepare applications, the reduction in the hearing time, and the impossibility that the Governor could act on the recommendation of a grant of clemency in the time allotted—create a significant possibility that the appellants can succeed in showing that the procedure followed in rendering their clemency decisions was wholly arbitrary. . . . The only reason for the expedited clemency process and the abandonment of state clemency procedures was Arkansas' contention that all of the appellants' executions needed to be conducted before April 30 because the execution drugs Arkansas possessed were due to expire. By any measure, the

appellants' interest in their own lives is stronger than the state's interest in their soon-to-expire drugs. Finally, members of the public, and in particular those impacted by appellants' executions, have an interest in notice and an opportunity to be heard during the clemency process. . . . Although the outcome of the clemency process is fully in the discretion of the executive, the clemency procedures cannot be arbitrarily applied against the appellants such that they are denied notice and a fair opportunity to present their application. Because I find that the appellants have made a showing of a significant possibility that they were denied due process in their clemency proceedings and the balance of equities tips in their favor, I would grant the motion to stay the executions."), *cert. denied*, 137 S. Ct. 1623 (2017).

But see ***Powell v. Dep't of Human Resources***, 918 F. Supp. 1575, 1581 (S.D. Ga. 1996) ("Given the comprehensive intent of Georgia lawmakers and the mandatory nature of the [Richmond County Child Abuse] Protocol as it applies to all named agencies, the Protocol vests abused children with an entitlement to the procedures and protection mandated therein. Thus, an abused child may not be deprived of these procedures and protection without procedural due process."), *aff'd on other grounds*, 114 F.3d 1074, 1082 n.10 (11th Cir. 1997) ("Because we ultimately conclude that the appellees are entitled to qualified immunity in any event, we can assume arguendo, without deciding, that Powell's son had such a liberty interest.").

In ***Dawson v. Milwaukee Housing Authority***, 930 F.2d 1283 (7th Cir. 1991), plaintiff argued that Wisconsin state law created an entitlement to safe public housing "that the state could not take away without notice and an opportunity for a hearing." Judge Easterbrook rejected the argument, stating that "the Housing Authority's decision to set a particular target level of safety is not person-specific. It is a legislative rather than adjudicative decision, and the due process clause does not require individual hearings before a governmental body takes decisions that affect the interests of persons in the aggregate." *Id*. at 1286.

The entitlement theory has arisen in domestic violence cases, as well as child abuse cases. The Supreme Court has recently spoken to this issue. *See* ***Town of Castle Rock v. Gonzales***, 125 S. Ct. 2796, 2810 (2005) ("We conclude. . .that respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband. . . . In light of today's decision and that in *DeShaney,* the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as ' "a font of tort law,"' . . .but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871 . . . did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.").

See also ***Burella v. City of Philadelphia***, 501 F.3d 134, 145, 146 (3d Cir. 2007) ("Jill Burella argues that the Supreme Court's decision in *Castle Rock* does not prevent her from succeeding on her procedural due process claim because the Pennsylvania Protection from Abuse Act states that police 'shall arrest a defendant for violating an order.' . . . Therefore, she contends, under the Pennsylvania statute, police officers do not have discretion not to enforce a protection from abuse order. . . . Although the Supreme Court did not specify what language would suffice to strip the police of such discretion, it is clear after *Castle Rock* that the phrase 'shall arrest' is insufficient. . . . . Finally, we cannot ignore that despite framing the issue as one of procedural due process, what Jill Burella appears to seek is a substantive due process remedy: that is, the right to an arrest itself, and not the pre-deprivation notice and hearing that are the hallmarks of a procedural due process claim. In short, whether framed as a substantive due process right under *DeShaney*, or a procedural due process right under *Roth*, Jill Burella does not have a cognizable claim that the officers' failure to enforce the orders of protection violated her due process rights."); ***Burella v. City of Philadelphia***, 501 F.3d 134, 153 (3d Cir. 2007) ("mbro, J., concurring in part) ("Pennsylvania has enacted statutory provisions much stronger than those of Colorado to signal its intent to entitle Ms. Burella and other victims of abuse to redress the lack of enforcement of PFA orders. This laudable effort, which predates *Castle Rock*, does not meet that case's substantial roadblocks. Further revisions to the Protection Act are required, but in no event will they help Ms. Burella. Moreover, I reluctantly concede my colleagues are correct to suggest that a legislature would be hard-pressed to draft around *Castle Rock* in light of the 'well-established tradition of police discretion [that] has long coexisted with apparently mandatory arrest statutes.'. . . Although the Supreme Court has not held explicitly that a state legislature can never mandate arrest or that abuse-protection statutes can never create a constitutionally protected interest, the perception persists that few (if any) paths to those results are available. There is nothing left but to observe that [i]n light of [*Castle Rock*] and ... *DeShaney* ... the benefit that a third party may receive from having someone else arrested for a crime *generally* does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."); ***Hudson v. Hudson***, 475 F.3d 741, 746 (6th Cir. 2007)("We recently applied *Castle Rock* to the enforcement of a Kentucky statute, holding that its enforcement 'cannot be considered mandatory for purposes of creating a protected property interest under the Due Process Clause.' *Howard v. Bayes*, 457 F .3d 568, 576 (6th Cir.2006). Unlike the statute at issue in *Howard* that granted officers 'purely discretionary authority to arrest,' *id.* at 574 n. 6, the Tennessee Supreme Court considers arrests under the statute at issue here 'operational' as opposed to 'discretionary.' . . As we noted, *supra*, this statute grants officers at least some discretion to determine 'reasonable cause.' Tenn.Code Ann. § 36-3-611(a). While *Matthews* may have defined the arrests as 'operational' to remove state immunity for a state-law negligence claim, it did not decide whether Tennessee law creates a property interest in the enforcement of protective orders. Even if Tennessee law might be read to create some type of property interest, that interest must still rise to the level of a constitutionally protected interest under the Due Process Clause of the Fourteenth Amendment. Braddock's interest in the enforcement of the protection order, specifically the arrest of Hudson, would arise incidentally 'out of a function that government actors have always performed − to wit, arresting people who they have probable cause to believe have committed a criminal offense.'. . We share

the Supreme Court's skepticism in *Castle Rock* that this type of entitlement could ever 'constitute a Aproperty' interest for purposes of the Due Process Clause.'. . Imbuing these restraining orders with constitutional property value, protected by the Due Process Clause, would needlessly interfere with Tennessee's choice of how to allocate the resources necessary to enforce its domestic violence laws. We thus hold that the enforcement of Tennessee protective orders does not create a property interest protected by the Due Process Clause of the Fourteenth Amendment."); ***Howard v. Bayes***, 457 F.3d 568, 575, 576 (6th Cir. 2006) (Kentucky statutes did not confer any constitutionally protected property interest upon victim as to arrest of perpetrator); ***Starr v. Price***, 385 F.Supp.2d 502, 509, 510 (M.D. Pa. 2005) ("Plaintiff relies on *Coffman v. Wilson Police Department*, 739 F.Supp. 257 (E.D.Pa.1990), where the court found that a Pennsylvania PFA created a legitimate claim of entitlement. . . . In light of the Supreme Court's recent decision in *Town of Castle Rock, Colorado v. Gonzales*,. . . we find that *Coffman* is not an accurate statement of the law. . . . Plaintiff attempts to distinguish *Castle Rock* by arguing that it holds that the statute did not create an entitlement, whereas her claim is based on the terms of the PFA itself. Plaintiff misconstrues *Castle Rock*, which held that mandatory terms in a restraining order are insufficient to create a property interest protected by the Due Process Clause.").

See also ***Buckley v. Ray***, 848 F.3d 855, 864 (8th Cir. 2017) ("Buckley fails to articulate any legally-cognizable liberty interest created by the Arkansas expungement statute. He contends that the Arkansas expungement statute creates 'liberty and privacy interests.' But he offers no elaboration on what those interests may be, beyond his assertion that the statute 'protect[s] him from unlawful disclosures' of his expunged records. We have previously analyzed the provisions of Arkansas's expungement statute and held that they do not create a liberty interest. *Eagle v. Morgan*, 88 F.3d 620, 626 (8th Cir. 1996). At that time, we observed that the state legislature does not 'possess the Orwellian power to permanently erase from the public record those affairs that take place in open court.'. . Accordingly, Buckley had no state-created liberty interest for the AG Defendants to violate. With no other liberty interest identified, no constitutional violation could have occurred. We therefore affirm the district court's ruling—qualified immunity protects the actions taken by the AG Defendants."); ***Elliott v. Martinez***, 675 F.3d 1241, 1244, 1245, 1247 (10th Cir. 2012) ("Plaintiffs argue that the grand-jury statute creates an entitlement because it mandates notice to the grand-jury target when specified predicates (that notice will not result in flight, obstruction of justice, or danger to another person) are satisfied. But even if notice is an entitlement under state law, Plaintiffs have failed to state a due-process claim. That is because an entitlement is protected by the Due Process Clause only if it is an interest in life, liberty, or property; and not all entitlements are such interests. For example, often a prisoner's entitlements are not liberty interests. A state law may mandate when a prisoner can be segregated from the general prison population or otherwise subject to special conditions of confinement. But the Due Process Clause imposes no procedural constraints on a prison official in ordering special conditions of confinement unless the official 'imposes atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life.'. . Any lesser hardship does not rise to the level of a deprivation of liberty for one whose freedom has already been lost through conviction of a crime. . . . We do not address here the unraised issue of what safeguards are constitutionally

required before a grand jury can issue an indictment. All we say is that the state notice statute does not affect what is required by the Due Process Clause. . . . Our holding is simply that the New Mexico law on which Plaintiffs hinge their argument creates no protected liberty interest.")

d. equal protection cases

Although no such argument was raised in ***DeShaney***, the Court noted that the Equal Protection Clause of the Fourteenth Amendment would be violated by any selective denial of protective services to "certain disfavored minorities." 109 S. Ct. at 1004 n.3. *See, e.g.*, ***Mody v. City of Hoboken***, 959 F.2d 461, 467 (3d Cir. 1992) (rejecting plaintiff's claim where "evidence necessary to show constitutionally discriminatory police action in failing to provide cognizable minorities with protection from crime [was] absent."); ***Baugh v. City of Milwaukee***, 823 F. Supp. 1452, 1460-67 (E.D. Wis. 1993) (rejecting plaintiffs' argument that city had policy of denying equal housing inspection and code enforcement services based on race), *aff'd*, 41 F.3d 1510 (7th Cir. 1994). *See also* ***Estate of Romain v. City of Grosse Pointe Farms***, 935 F.3d 485, 493, 496 (6th Cir. 2019) (Murphy, J., joined by McKeague, J., and Kethledge, J., concurring) ("While not critical to the outcome here, I write to make two additional legal points: Our cases may have overread one statement from *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), while overlooking another statement in that opinion. . . .The Equal Protection Clause's text and history suggest that the right question to ask is: When, if ever, do equal-protection principles give a specific individual the right to challenge a state officer's intentional refusal to provide the protection of the laws that keep the public safe from private violence? Figuring out the right *question* is the easy part; determining the appropriate *answer* is much harder. Thoughtful jurists have suggested a variety of approaches to this class-of-one problem. Perhaps the 'den[ial]' of the 'equal protection of the laws' in the law-enforcement context simply does not occur unless there has been class-based discrimination like the racial discrimination that motivated the clause. . . Or perhaps the clause should reach claims alleging a one-off refusal to provide police protection only if the refusal flows from personal reasons (such as animosity toward the plaintiff) that are unrelated to public duties. . . Or maybe the traditional equal-protection test works just fine here, requiring a party to show that the police have intentionally discriminated against the plaintiff and that the discrimination lacked a rational basis. . . Any approach also must account for the tradition of prosecutorial and law-enforcement discretion. . . I leave the scope of equal protection for other cases. For present purposes, I note only that the equal-protection question strikes me as a more appropriate question to ask for the types of failure-to-protect allegations that are presented in this appeal. That, in turn, indicates that the due-process question is the wrong question to ask. . . So I am inclined to think this area worthy of reexamination in a suitable future case.")

There is an emerging line of cases in which municipal liability is based on policies used in handling domestic abuse cases, where plaintiffs claim that such policies violate their rights under the equal protection clause of the Fourteenth Amendment. *See, e.g.*, ***Soto v. Carrasquillo***, 878 F. Supp. 324, 328 (D.P.R. 1995) (discussing and citing cases where "a growing number of plaintiffs

have turned to section 1983 claims to allege an equal protection violation for a police department's failure to provide protection from domestic violence."), *aff'd sub nom* ***Soto v. Flores***, 103 F.3d 1056 (1st Cir. 1997) ; ***McDonald v. City of Chicago***, Nos. 94 C 3623, 94 C 3624, 1994 WL 732865, *4 (N.D. Ill. Dec. 23, 1994) (not reported) (alleged practice of treating "domestic violence abuse reports from women with less priority than other crimes" sufficient to state equal protection claim); ***Bartalone v. County of Berrien***, 643 F. Supp. 574, 577 (W.D. Mich. 1986); ***Thurman v. City of Torrington***, 595 F. Supp. 1521, 1527-29 (D. Conn. 1984). *See also* ***Hynson v. City of Chester***, 864 F.2d 1026, 1027 n.1 (3d Cir. 1988) (collecting cases).

In ***Balistreri v. Pacifica Police Dept.***, 901 F.2d 696 (9th Cir. 1990), plaintiff was repeatedly abused, harassed and threatened by her estranged husband. Although she obtained a restraining order, the police continued to ignore her requests for protection. *Id*. at 698. In its post-***DeShaney*** second amended opinion, the Court of Appeals affirmed the district court's dismissal of plaintiff's federal due process claim where "Balistreri alleged neither that the State had created or assumed a custodial relationship over her, nor that the state actors had somehow affirmatively placed her in danger." 901 F.2d at 700. *See also* ***Dudosh v. City of Allentown***, 722 F. Supp. 1233, 1235 (E.D. Pa. 1989) (on motion for reconsideration after ***DeShaney***, court relied on ***DeShaney*** to reaffirm finding of no due process violation based on existence of "special relationship" between decedent and police).

Balistreri's complaint also set out an equal protection claim based on discrimination against the plaintiff due to her status as a female victim of domestic violence. The court held that where the allegations in plaintiff's complaint suggested "an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women," the district court should not have dismissed the complaint with prejudice, but should have allowed plaintiff an opportunity to amend in order to properly plead the equal protection claim. 901 F.2d at 701-02.

In ***McKee v. City of Rockwall, Texas***, 877 F.2d 409 (5th Cir. 1989), the court reversed the denial of summary judgment on behalf of individual officers, holding that plaintiff failed to make a sufficient showing on an essential element of her case, in which she asserted that the officers "acted pursuant to a discriminatory policy against making arrests in domestic assault cases." *Id*. at 410.

Plaintiff had introduced a statement made by the Chief of Police, to the effect that his officers "did not like to make arrests" in domestic assault cases. The court refused to treat this statement as having any probative value, distinguishing a "dislike" from a "policy." The statistics introduced by the plaintiff were likewise disregarded, since, "even on their face, [they did not] permit one to infer a disinclination to make arrests in domestic violence cases, much less to infer a policy discouraging such arrests." *Id*. at 415.

Concluding that there was a complete failure of proof on the issue of differential treatment of victims of domestic abuse, the court left undecided the question of whether such differential treatment would constitute intentional gender-based discrimination. *Id*. at 416.

The Fifth Circuit has since adopted the approach taken by the Tenth Circuit in ***Watson, infra.*** *See* ***Shipp v. McMahon***, 234 F.3d 907, 914 (5th Cir. 2000) ("We agree with our sister circuits that the standard articulated in *Watson* represents a coherent approach for courts to review Equal Protection claims pertaining to law enforcement's practices, policies, and customs toward domestic assault cases.").

Compare ***Lefebure v. D'Aquilla***, 15 F.4th 650, 658, 661-62 (5th Cir. 2021) (on denial of rehearing and reh'g en banc) ("In sum, *Shipp* is not about prosecutorial inaction but 'police inaction.'. . . . Here, by contrast, Lefebure does not contend that the police refused to protect her before some future assault by her assailant. Instead, she contends that prosecutors refused to investigate or prosecute him after the assault took place. Here, the appeal concerns only the prosecutor—it does not involve any police officer or other law enforcement official who could have provided her physical protection from an assailant yet failed to do so. . . In sum, none of the cases cited by Lefebure allow a victim to challenge a prosecutor's decision not to investigate or prosecute another person. . . . Our original decision in this case was unanimous. Today the court reaches the same conclusion, based on the same reasoning, but this time by a 2-1 vote. Even so, there is substantial agreement over the substantive legal principles that decide this appeal, not to mention the likely ultimate outcome in this case. To begin with, the dissent 'agree[s] with the majority's view that a victim has no standing to pursue a claim against the district attorney for failure to prosecute her assailant under *Linda R.S.*'. . . In addition, the dissent agrees that 'a dividing line exists between failure-to-protect and failure-to-prosecute claims—that is, claims alleging a failure to protect *before* harm occurs (ex-ante) and a failure to prosecute *after* the fact (ex-post). A plaintiff has standing to pursue the former, but not the latter.'. . That is, of course, precisely our point. . . . The dissent attempts to avoid established precedent by recasting this case as a failure to protect case, rather than as a failure to prosecute case. But the dissent acknowledges that at least 'some of Lefebure's allegations sound in failure to prosecute.'. . And even setting those allegations aside, the dissent's theory is foreclosed by Supreme Court precedent. In essence, the dissent theorizes that D'Aquilla's failure to prosecute might very well have 'led to her assault.'. . And make no mistake—we have no quarrel with this logic as a conceptual matter. Indeed, we have said as much ourselves: Less prosecution can lead to more crime—and liability rules can encourage or deter law enforcement activity and thereby affect crime rates. . . But as we've explained, Supreme Court precedent prevents us from taking the dissent's logic where it wants us to go. After all, the dissent's theory is the same theory of standing that was pressed in the complaint in *Linda R.S.*, and embraced in Justice White's dissent, but rejected in Justice Marshall's majority opinion. Professor Tribe has confirmed this. All agree that causation and redressability are too attenuated and speculative in cases such as this to warrant standing. And no one has cited a single case to the contrary. The cases cited by the dissent, much like the cases cited by Lefebure, involve the failure to protect, not the failure to prosecute recast as a failure to protect.") *with* ***Lefebure v. D'Aquilla***, 15 F.4th 650, 665-70 (5th Cir. 2021) (Graves, J., dissenting from denial of reh'g and reh'g en banc) ("[D]espite the majority's apparent avoidance of it, a dividing line exists between failure-to-protect and failure-to-prosecute claims—that is, claims alleging a failure to protect *before* harm occurs (ex-ante) and a failure to prosecute *after* the fact (ex-post). A plaintiff

has standing to pursue the former, but not the latter. . . In other words, one does not have standing to allege an injury based solely on law enforcement's failure to prosecute someone who has already harmed her, but she does have standing to allege that a discriminatory underenforcement of the law played a part in causing the harm she suffered. . . Unlike in failure-to-prosecute cases, where a third-party wrongdoer is the source of the direct harm the plaintiff suffered as a crime victim, the allegation in failure-to-protect claims is that law enforcement practices played a role in the plaintiff's victimization. . . Such failure-to-protect claims may include allegations that law enforcement's discriminatory inaction increased the likelihood of crimes or even directly led to crimes against a certain group. . . . Although failure-to-protect claims are usually brought against the police, the same logic applies to prosecutors. Prosecutors are, after all, part of law enforcement, and if anything, they may have more power to implement discriminatory policies than the average officer out on patrol. . . The paucity of failure-to-protect cases against prosecutors likely stems in part from absolute prosecutorial immunity. But while prosecutors enjoy immunity from suits filed against them in their individual capacity, . . . Lefebure sued D'Aquilla in both his individual and official capacities. The latter is essentially a *Monell* claim of municipal liability, for which there is not an immunity defense. . . Accordingly, if Lefebure were challenging only the failure to prosecute her attacker, then her claim would be barred by *Linda R.S.* But if Lefebure instead, or additionally, challenges an unconstitutional and discriminatory pattern of conduct that contributed to her assault, she has standing to pursue those allegations. . . . Lefebure raises that prototypical equal protection claim, centered on the injuries she alleges resulted from a discriminatory failure to enforce the law when it comes to rape cases. A right to be free from discriminatory law enforcement policies that enable crime is distinct from an affirmative right to prosecution. As the injury Lefebure asserts is one caused by a policy of discrimination, it implicates the chief original concern of equal protection. This is an injury she has standing to vindicate. For these reasons, Lefebure has alleged the type of failure-to-protect claim that has long been cognizable. Such claims guard against the dangerous and discriminatory underenforcement of the law based on a victim's status. Although it might be difficult for Lefebure to ultimately prove on the merits that the district attorney's policy, custom, or practice played a role in her assault, she does have standing to pursue such a claim. Accordingly, I dissent.")

In ***Watson v. City of Kansas City, Kansas***, 857 F.2d 690 (10th Cir. 1988), the court reversed a grant of summary judgment for the City, holding that the plaintiff's evidence was sufficient to support a jury determination "that the City and Police Department followed a policy or custom of affording less protection to victims of domestic violence than to victims of nondomestic attacks [and] that the City and Police Department acted with a discriminatory motive in pursuing this policy." *Id*. at 696. While plaintiff's evidence was sufficient to make out an equal protection claim based on her status as a victim of domestic violence, the court affirmed the grant of summary judgment for the City to the extent that the plaintiff's claims asserted gender-based discrimination. *Id*. Where the plaintiff presented no evidence of the policy's adverse impact on women and no evidence of a purpose to discriminate against women as a class, she failed to make out a prima facie case of sex-based discrimination. *Id*. at 697.

See also ***Dalton v. Reynolds***, 2 F.4th 1300, 1309-10 (10th Cir. 2021) ("We find that the facts found by the district court support an equal protection claim. Although Ms. Bascom was similarly situated to other domestic violence victims, she was treated differently because her assailant was a police officer with whom she had been in a domestic relationship. When other domestic violence victims reported domestic violence to SCPD, the non-police officer assailant was arrested 94 percent of the time. When Ms. Bascom and her son repeatedly reported Contreras's domestic violence to SCPD, Contreras was never arrested. Instead, the Officers brushed SCPD domestic violence policy aside to protect their fellow police officer. A reasonable jury could conclude these facts demonstrate disparate treatment of domestic violence victims whose assailants were not police officers and whose assailants were police officers with whom they had been in a domestic relationship. And because of this disparate treatment that does not implicate a fundamental right or a suspect class, rational basis review is appropriate. . . Though rational basis review often spells failure for a claimant, it is not toothless. . . Here, the Officers have offered no rational reason to decline police protection to certain domestic violence victims but to afford it to others, and we can think of none. Finally, the Officers' discriminatory intent may be inferred from their actions pursuant to the facially discriminatory SCPD policies. . . SCPD has two domestic violence policies: one for victims whose assailants are SCPD officers, and one for everyone else. SCPD's 'general public' domestic violence policy requires responding officers to arrest the suspect upon a finding of probable cause unless there are extenuating circumstances and the watch commander agrees. . . Based on this policy, nearly all domestic violence calls in 2016 resulted in arrests. . . In contrast, SCPD's Internal Investigations Policy mandates that any 'serious' allegation against an SCPD officer be referred to an outside agency. The policy categorizes 'domestic violence' crimes as 'serious.'. . When such a referral is made, the IIP stipulates that only the name of the complainant and alleged criminal violation be sent to the outside agency. The outside agency does not receive any additional information provided by the victim or gathered by officers during the SCPD investigation. . . The policy does not have an exception for exigent circumstances or any provision for when to arrest an SCPD officer. . . Thus, according to SCPD policies at the time of Ms. Bascom's murder, domestic violence victims of non-SCPD police officers received robust police protection, including mandatory arrests, while domestic violence victims of SCPD police officers did not. Because the Officers admitted they were acting according to these facially discriminatory policies in Ms. Bascom's case, discriminatory intent may properly be inferred. . . On these facts and upon de novo review, then, the Officers violated Ms. Bascom's constitutional right to equal protection of the law because Ms. Bascom's disparate treatment by the Officers is not a legitimate end and we may infer discriminatory intent from the facially discriminatory policies the Officers followed.").

In ***Hynson v. City of Chester***, 864 F.2d 1026 (3d Cir. 1988), defendant police officers appealed from a denial of summary judgment on the issue of qualified immunity in a case where plaintiffs alleged that their decedent's right to equal protection was violated by the officers' adherence to a policy of treating domestic abuse victims differently from other victims of violent crimes. *Id*. at 1027. Noting that such a policy was gender-neutral on its face, the Third Circuit

established the standard to be followed by the district courts in § 1983 cases based on denials of equal protection in domestic violence situations.

Relying on the ***Watson***, the court determined that to survive a motion for summary judgment, "a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom." *Id*. at 1031.

The court remanded on the qualified immunity issue, concluding that, given the standard articulated, a police officer would lose his qualified immunity only if a reasonable officer would know that a policy of treating domestic violence cases differently from other cases of violence "has a discriminatory impact on women, that bias against women was a motivating factor behind the adoption of the policy, and, that there is no important public interest served by the adoption of the policy." *Id*. at 1032.

On remand, plaintiff offered an expert's analysis and statistics reflecting, over a defined period of time, a lower level of police response to female victims of domestic violence. The district court found the evidence sufficient to withstand the City's motion for summary judgment under the Third Circuit's ***Hynson*** standard. ***Hynson v. City of Chester***, 731 F. Supp. 1236, 1240-41 (E.D. Pa. 1990). Summary judgment was granted as to the individual officers on qualified immunity grounds, since the contours of the particular right involved did not become clearly established until the Third Circuit's decision in ***Hynson***.

See also ***Ricketts v. City of Columbia***, 36 F.3d 775, 780-81 (8th Cir. 1994) ("We agree [with *Hynson* and *Watson*] that if discrimination against women were the purpose behind a municipal custom of providing less protection for victims of domestic abuse, then an equal protection claim would arise. In this case, the plaintiffs demonstrated a pattern of fewer arrests in cases of domestic violence, but the plaintiffs failed to produce evidence from which a reasonable jury could determine that this pattern proved a policy which was motivated by an intent to discriminate against women."), *aff'd*, 36 F.3d 775 (8th Cir. 1994).

See also ***Soto v. Flores***, 103 F.3d 1056, 1066 (1st Cir. 1997) ("In a matter of first impression for this court, we adopt the *Watson* standard for section 1983 equal protection claims brought by domestic violence victims. . . Under the standard we adopt today, Soto must show that there is a policy or custom of providing less protection to victims of domestic violence than to victims of other crimes, that gender discrimination is a motivating factor, and that Soto was injured by the practice."); ***Eagleston v. Guido***, 41 F.3d 865, 878 (2d Cir. 1994) ("A directed verdict is appropriate in a domestic violence equal protection claim unless the plaintiff adduces evidence sufficient to sustain the inference that there is a policy or a practice of affording less protection to victims of domestic violence than to other victims of violence in comparable circumstances, that discrimination against one sex was a motivating factor, and that the policy or practice was the proximate cause of plaintiff's injury.").

See also ***Jones v. Union County, Tennesse,*** 296 F.3d 417, 427 (6th Cir. 2002) ("In this case, Union County notes that Plaintiff does not indicate whether her equal protection claim is based upon her status as a victim of domestic violence generally or her status as a woman subject to domestic violence. Whatever her status, Plaintiff has failed to identify any policy of Union County that purposefully and intentionally discriminates against victims of domestic violence specifically or women generally."); ***Navarro v. Block (*****Navarro I),** 72 F.3d 712, 717 (9th Cir. 1996) ("In the present case . . . aside from the conclusory allegation that the County's custom of not classifying domestic violence calls as an emergency discriminates against abused women, the Navarros have failed to offer any evidence of such invidious intent or motive. [citing *Hynson* and *Watson*] Nevertheless, even absent evidence of gender discrimination, the Navarros' equal protection claim still survives because they could prove that the domestic violence/non-domestic violence classification fails even the rationality test."); ***Cooper v. City of Chicago Heights***, No. 09 C 3452, 2011 WL 5104478, at *9-*11 (N.D. Ill. Oct. 27, 2011) ("Here, even assuming that the CHPD failed to follow the requirements of the Illinois Domestic Violence Act or documented the incidents involving Iacovetti inappropriately, Cooper offers only as evidence of a 'pervasive' practice the limited number of incidents involving Iacovetti and Baker's comment about an abuser named 'Claude.' He offers no statistical evidence. Taking the term widepread seriously, these few incidents are simply insufficient under *Phelan, Gable, Palmer, Dieter,* and *Palka* to demonstrate a policy so widespread, pervasive and well-settled that it amounted to a municipal policy decision. . . Because Cooper cannot demonstrate a widespread and well-settled practice that the CHPD treated domestic violence complaints less seriously than other complaints, the actions of the City's agents cannot be considered to be a municipal decision under *Monell* and the City is entitled to summary judgment. . . .Though Cooper has not demonstrated that the Defendants' inaction was a violation of Iacovetti's equal protection rights, her death should certainly spark serious reflection by the CHPD and IDOC's highest-ranking officials about how to prevent such instances in the future. Indeed, Bradley's briefing admits 'a terrible mistake and deficiency' in responding to Iacovetti's complaints. . . However, holding governmental entities responsible for such negligence or poor police work is not permitted by the law and would subject the taxpayer to near limitless liability. For the above reasons, the Court grants the City's and Bradley's motions for summary judgment . . . and enters final judgment in their favor."); ***Cellini v. City of Sterling Heights***, 856 F. Supp. 1215, 1222 (E.D. Mich. 1994) ("While it is beyond question that police need not treat different cases as the same, there still must be a rational relationship between the specific policy adopted and a legitimate governmental interest. Here, the alleged specific policy is one of never arresting in a domestic assault case for misdemeanor assault unless a police officer witnessed the assault. Defendants have not offered any explanation of what governmental interest is served by requiring an officer to have witnessed a domestic misdemeanor assault before making an arrest. The most obvious explanation for such a policy is that Sterling Heights considers a misdemeanor assault less serious when the victim is the assaulter's spouse. Absent an explanation of the governmental interest served by Sterling Heights's policy, defendants fail to satisfy even the relatively permissive rational relationship requirement of the equal protection clause. Such an unexplained discrepancy in the treatment of victims of domestic assault could legitimately give rise to an inference that the police department acted with discriminatory motive in employing its

domestic assault policy."); ***Thacker v. City of Miamisburg***, No. C-3-92-188, 1994 WL 1631036, at *3 (S.D. Ohio July 14, 1994) (In its memorandum in support of the motion for summary judgment, the City cites *Siddle v. City of Cambridge*, 761 F.Supp. 503 (S.D.Ohio 1991), in which the policy of another Ohio city concerning the differential treatment of victims of domestic violence was upheld as rationally related to a legitimate state interest. Aside from the fact that *Siddle* is factually distinguishable from this case (e.g., no one was murdered in *Siddle*), it is still incumbent on the City to produce its own evidence as to why its own policy is justifiable. The City of Miamisburg cannot rely upon a judicial ruling concerning the City of Cambridge in another action to explain the reasonableness of a policy of the City of Miamisburg. . . . Meaning no disrespect to Chief Schenck or to the City, the Court would observe that disjointed generalizations are not the stuff of rationally based policies, especially where the policies are alleged to have resulted in the deprivation of life. It is incumbent upon the City to identify the legitimate state interest that is sought to be advanced, to set forth the policy at issue, and to explain how the policy is rationally related to the legitimate state interest.").

See also ***Fajardo v. County of Los Angeles (*Navarro II*)***, 179 F.3d 698, 699, 700 (9th Cir. 1999) ("On remand, the district court determined that it did not need to decide whether a custom or policy existed because it had 'previously found that such a [policy] meets the rational basis test.' Accordingly, the district court granted Defendants' Rule 12(c) motion for judgment on the pleadings. We again reverse and remand. . . .[T]he district court erred by equating domestic violence calls with not-in-progress calls and equating non-domestic violence calls with in-progress calls, and by assuming that domestic-violence crimes are less injurious than non-domestic-violence crimes. Because these assumptions formed the basis of the district court's conclusion, the district court also erred when it concluded, as a matter of law, that Defendants' domestic-violence/non-domestic-violence classification was rational and reasonable under equal-protection analysis.").

B. Liability Based on Failure to Provide Procedural Due Process

1. In ***Parratt v. Taylor***, 451 U.S. 527 (1981), *overruled in part*, ***Daniels v. Williams***, 474 U.S. 327 (1986), an inmate claimed that he was deprived of property without due process of law when prison officials lost a set of his hobby materials, valued at $23.50. *Id*. at 530. The Court held that a negligent deprivation of property, resulting from random and unauthorized conduct of a state actor, does not give rise to a procedural due process claim under the Fourteenth Amendment so long as the state provides an adequate postdeprivation remedy. *Id*. at 543.

In ***Daniels v. Williams***, *supra*, the Court overruled ***Parratt*** to the extent that the case had held that a deprivation within the meaning of the fourteenth amendment due process clause could be effected by mere negligent conduct. In ***Howard v. Grinage***, 82 F.3d 1343 (6th Cir. 1996), the Sixth Circuit has interpreted *Daniels* "to require that, to state a cognizable section 1983 claim based on the deprivation of procedural due process, conduct must be grossly negligent, deliberately indifferent, or intentional." *Id*. at 1350. The court noted that the relevant conduct in a post-

deprivation case was "the decision effecting the deprivation, and not to the failure to afford adequate procedures." *Id*. Finally, the court made clear that in a post-deprivation procedural due process case, an official's "motivation, or lack thereof, is simply irrelevant. . . ." *Id*. at 1352.

See also ***Streckenbach v. Vandensen***, 868 F.3d 594, 597-98 (7th Cir. 2017) ("[T]he remedy (the 'process due') for careless blunders that destroy property is litigation, under state law, to recover the property's value. . . And that litigation need not be against the person who made the mistake, a person who might have immunity as a matter of state law even if not as a matter of federal law. . . Wisconsin allows many kinds of tort claims against the state. Wis. Stat. § 893.51(1) (claims dealing with destruction of personal property), § 893.80(1d) (waiver of immunity). The state requires a claim to be filed with the Attorney General within 120 days of the loss, Wis. Stat. § 893.82(3), and Streckenbach missed that deadline, but VanDensen cannot be blamed—nor can a would-be plaintiff avoid *Parratt* by waiting until a state deadline has passed before filing a federal suit. . . . Administrators might be deemed liable for the consequences of an unconstitutional policy, but the 2013 policy cannot be condemned on the ground that it authorizes property to be destroyed without notice. The policy itself provides for notice—both general notice by posting and specific notice by calculating shipping costs when property is received for pickup. That it does not provide for a *third* notice (after the 30 days have lapsed) does not call its validity into question. Notice matters only when there are choices to be made. Once 30 days have run, the property has not been picked up, and funds to ship it are unavailable, there's no choice left under the 2013 policy. Counsel for Streckenbach told us at oral argument that the warden could be personally liable because it was foreseeable that subordinates would make operational errors. But that's just an argument for vicarious liability. As we have already explained, the people who make the errors, not the people who devised the policy, are the ones responsible for those errors. *Every* policy, in and out of prison, can be undermined by operational gaffes. . . .All we hold today is that VanDensen, the prison's warden, and the deputy warden are not personally liable in damages under § 1983 for the negligence of other employees, or given *Daniels* even for their own negligence."); ***Brown v. Montoya***, 662 F.3d 1162, 1170 & n.13 (10th Cir. 2011) ("According to the Supreme Court, a plaintiff must show that the defendant was more than simply negligent to make out a procedural due process claim. . . .The circuit courts have responded accordingly in requiring a state of mind element such as recklessness or gross negligence. . . The Tenth Circuit has not resolved this issue. . . .We need not decide the appropriate state of mind test to resolve this appeal because Mr. Brown's Complaint alleges conduct that was 'intentional, malicious, sadistic, willful, wanton, obdurate, and in gross and reckless disregard of [Mr. Brown's] constitutional rights.'. . Viewing the facts alleged in the Complaint 'in the light most favorable to [Mr. Brown],'. . . we conclude that Officer Montoya had a sufficiently culpable state of mind in misclassifying Mr. Brown as a sex offender.")

2. The rationale of ***Parratt*** was extended to intentional deprivations of property in ***Hudson v. Palmer***, 468 U.S. 517 (1984), where an inmate complained of an intentional taking of his personal, noncontraband property during the course of a prison "shakedown" search. *Id*. at 520.

In applying the ***Parratt*** doctrine to the intentional deprivation in ***Hudson***, the Court emphasized that "[t]he controlling inquiry is solely whether the State is in a position to provide for predeprivation process." *Id*. at 534. Where the conduct of state actors is random and unauthorized, the State cannot foresee, predict or prevent deprivations resulting from such conduct and a postdeprivation remedy is all the process a State can be constitutionally required to provide. *Id*. at 531-33. *But see* ***Prude v. Meli***, 76 F.4th 648, 657 n.5 (7th Cir. 2023) ("Meli claims that, because his 'alleged actions in depriving Prude of a neutral decisionmaker would have been "random and unauthorized,"' due process only requires adequate post-deprivation remedies under state law. . . Meli waived this argument on appeal by failing to raise it below. . . But even if we were to consider it, the argument would fail. First, the *Parratt* doctrine does not apply to claims alleging that wrongful conduct corrupted fair fact-finding in the criminal justice system. No court has suggested as much. [Prude's] claims seek to vindicate rights of fundamental fairness and thus differ in kind from procedural due process claims governed by *Parratt*, which seek only notice and a hearing before a deprivation occurs. Second, the defendants' broad reading of *Parratt* cannot stand in light of later limiting cases. Those cases have made clear that *Parratt* is limited to a narrow category of due process cases where the plaintiff claims he was denied a meaningful pre-deprivation hearing, but under circumstances where the very notion of a pre-deprivation hearing would be impractical and even nonsensical, and where the deprivation was not carried out through established state procedures. *Armstrong v. Daily*, 786 F.3d 529, 539 (7th Cir. 2015). Here, the deprivation was not the product of an unpredictable act like that in *Parratt* and was conducted pursuant to established state procedures. . . Because '"the property deprivation is effected pursuant to an established state procedure," *Parratt* is irrelevant.'"); ***Brunson v. Murray***, 843 F.3d 698, 715 n.9 (7th Cir. 2016) ("*Parratt* is a rare exception to due process norms. . . It is 'limited to a narrow category of due process cases where the plaintiff claims he was denied a meaningful pre-deprivation hearing, but under circumstances where the very notion of a pre-deprivation hearing would be impractical and even nonsensical, and where the deprivation was not carried out through established state procedures.' *Armstrong v. Daily*, 786 F.3d 529, 539 (7th Cir. 2015). The procedures to protect Brunson's property interest in his liquor license were available and well-established. A deliberate decision to prevent him from using those procedures does not fit within the narrow *Parratt* doctrine, and certainly not where there is no obvious and sufficient post-deprivation remedy available under state law."); ***Willey v. Kirkpatrick***, 801 F.3d 51, 69 (2d Cir. 2015) ("The district court dismissed this claim [for theft of legal documents] 'because New York state law provides him with an adequate post-deprivation remedy, i.e., § 9 of the Court of Claims Act.'. . In support of this conclusion, the district court cited the Supreme Court's holding that 'even the intentional destruction of an inmate's property by a prison officer does not violate the Due Process Clause if the state provides that inmate with an adequate post-deprivation remedy.'. . If Willey's claim were for the destruction of his television or jewelry, this analysis would suffice. But nowhere does the district court distinguish between replaceable consumer goods and possibly irreplaceable legal documents. Legal documents have characteristics that differentiate them from mere 'property' whose destruction can be adequately remedied by a generic property-deprivation state law. Their theft or destruction, for example, may irrevocably hinder a prisoner's efforts to vindicate legal rights. On remand, the district court should consider this claim as one for impeding access to the

courts[.]")

See also ***Davison v. Rose***, 19 F.4th 626, 642 (4th Cir. 2021) ("We agree with the district court that the post-deprivation remedies provided in this case satisfy due process. As the district court recognized, Davison posed an ongoing threat of disruption to the educational process. Davison also had a number of post-deprivation remedies available to him, including several levels of administrative review, as well as state court review pursuant to Va. Code § 22.1-87. Davison had opportunities to discuss the no-trespass ban with Defendants, which he did in the administrative appeal, and he retained the ability to come to the school, provided that he had consent from Stephens or her designee. Thus, under the facts of this case, the post-deprivation remedies available satisfied any required due process. Thus, we affirm the district court's conclusion that Davison was not deprived of procedural due process."); ***Miranda v. City of Casa Grande***, 15 F.4th 1219, 1225-28 (9th Cir. 2021) ("[T]o say that the deprivation of a driver's license can implicate procedural due process protections does not resolve the level of protection that must be afforded. The touchstone of procedural due process is notice and an opportunity to be heard. . . . The immediate problem Miranda encounters with any procedural due process claim is that he received considerable process. At the police station, Officer Rush read to him from a standardized form designed to confirm that he was not expressly consenting to a blood draw (and to minimize error in that determination). Although many § 1983 litigants justifiably complain about police failing to obtain a warrant, here Rush secured a warrant for a blood draw through a judge on the Casa Grande Justice Court. While Miranda protests that this warrant was unnecessary because he had consented to the blood draw, Rush points out that nothing prevented him from seeking a warrant regardless, and there can be little doubt that the warrant was supported by probable cause.Once Rush determined that Miranda failed expressly to consent to a blood draw and that his license should therefore be suspended, Arizona law afforded Miranda an opportunity to challenge that suspension before a state ALJ. . . Miranda took full advantage of this process, with the assistance of counsel and witnesses. And he raises no due process challenge to Arizona's procedures themselves. Instead, Miranda's contention is that Officer Rush testified falsely at the first ALJ hearing about whether Miranda had recanted his refusal to submit to the blood draw, and that this alleged lie standing alone formed a procedural due process violation when it led to his license being temporarily suspended. Miranda is incorrect. In *Parratt v. Taylor*, . . . the Supreme Court explained that meaningful postdeprivation remedies will suffice when the deprivation was the 'result of a random and unauthorized act by a state employee.'. . When there is a 'necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process,' 'postdeprivation remedies made available by the State can satisfy the Due Process Clause.'. . A state employee acting in an unauthorized manner fits that situation, the Supreme Court held, because '[i]n such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur.'. . *Parratt* involved a state employee's allegedly negligent conduct. In *Hudson v. Palmer* . . . the Supreme Court extended *Parratt*'s logic to an official's intentional misconduct. . . . We think *Hudson* provides the proper fit here. Officer Rush, to be sure, strongly resists Miranda's allegation that he lied in the first ALJ hearing, with Rush maintaining that his perception of the chaotic events was reasonable.

But assuming without deciding that Rush did lie, that conduct can only be described as 'unauthorized' under *Hudson*. . . Miranda himself argues in his briefing that 'Rush abused the authority of his position and undermined the safeguards owed to Miranda,' suggesting Rush did so to 'punish plaintiff for working for the "Feds."' That is akin to the 'unauthorized personal vendetta' at issue in *Hudson*. . . As in *Hudson*, Rush (by Miranda's allegations) was 'bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards.'. . Indeed, the conclusion that Rush's conduct was unauthorized is, if anything, stronger here than in *Hudson* itself because Rush engaged in alleged wrongdoing notwithstanding the fact that Arizona *had* put in place various pre-deprivation safeguards for driver's license suspensions—procedures whose adequacy Miranda does not challenge here. Whereas *Hudson* involved no predeprivation process at all, . . . Rush's alleged misconduct took place within a defined state process that included a neutral arbiter and various other protections traditionally designed to secure the truth (availability of counsel, cross-examination, witnesses under oath, etc.). Rush was not even the final decisionmaker here; the ALJ was. Nor does Miranda suggest additional procedures, much less reasonable ones, that would reliably prevent dishonest testimony. . . In short, Miranda provides no basis to conclude that Rush's alleged intentional misconduct was authorized, much less that it was predictable or reasonably avoidable. . . For unauthorized deprivations like this one, 'the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.'. . To determine whether Miranda has made out a procedural due process claim, the proper inquiry thus turns on the procedures the State afforded Miranda after his initial license suspension. There can be no serious question that those postdeprivation procedures were both meaningful and sufficient under the Due Process Clause. When Miranda discovered the station house videos, he was granted a second administrative hearing. At this hearing, he had the opportunity to present new evidence and arguments before a new ALJ, who ultimately voided the suspension and reinstated Miranda's license. 'A violation of procedural rights requires only a procedural correction, not the reinstatement of a substantive right ....'. . . Here, however, Miranda received both. On top of this, Arizona also allows Miranda to bring state law claims, which he is presently pursuing against Rush and the City of Casa Grande in Arizona state court. . . Whether or not Miranda proves successful in state court, the availability of potential state tort remedies supports our view that Arizona has provided Miranda with adequate postdeprivation process. Miranda protests that punitive damages are not available through his state law claims. But that Miranda 'might not be able to recover under these remedies the full amount which he might receive in a § 1983 action is not ... determinative of the adequacy of the state remedies.'. . Because Arizona has provided Miranda with sufficient post-deprivation mechanisms, Miranda cannot demonstrate a procedural due process violation and has 'received all the process that was due.'. . Accepting Miranda's contrary position, meanwhile, would be both inconsistent with governing precedent and potentially dramatic in its implications, threatening to turn nearly every mishap or misdeed in a state administrative process into a federal constitutional violation. The Supreme Court has long cautioned that we should not make 'the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'. . In the case of a deprivation resulting from a flawed state proceeding of the type at issue here, what matters under the Due Process Clause is not merely the

initial deprivation itself but whether the State has set up adequate procedural protections surrounding it. Here, we conclude that Arizona's post-deprivation processes are sufficient. Miranda's § 1983 claim thus fails."); ***Calderone v. City of Chicago***, 979 F.3d 1156, 1165-67 (7th Cir. 2020) ("As the district court observed, Calderone specifically alleges that the individual defendants acted out of 'negative animus' and 'bias' against her. This is not a challenge to the disciplinary procedures prescribed by municipal law. Rather, Calderone readily admits that she describes a series of 'random and unauthorized' departures from municipal law, resulting in the deprivation of her property interest in continued public employment. These 'allegations of biased decisionmaking suggest only that [Calderone] may have suffered a random and unauthorized deprivation of [her] property interest in public employment.'. . 'In this instance, [Calderone] must avail herself of ... post-deprivation remedies or demonstrate that the available remedies are inadequate.'. . An inadequate remedy, for the purposes of due process, is a 'meaningless or nonexistent' one. . . Conversely, an adequate post-deprivation remedy is one that is promptly able to restore the employee to her post. . . Here, as the district court appreciated, a collective bargaining agreement with 'extensive grievance and arbitration procedures' protected Calderone's employment. Such procedures 'can (and typically do) satisfy the requirements of post-deprivation due process.'. . Calderone does not say that the grievance and arbitration procedures were meaningless. Quite the contrary, the procedures were meaningful because they led to her reinstatement. . . Calderone argues that 'the collective bargaining agreement provides that only the Union and the Employer may submit a grievance to arbitration, which means precisely that Calderone herself had no access to a post-deprivation hearing.' But the Union represented Calderone and was bound by its duty of fair representation to present her side of the story. Without evidence that the Union breached its duty handling her grievance, Calderone cannot state a due process claim on this basis. . . Additionally, Calderone objects to the fact that she has not yet received back pay or otherwise been made whole. She 'wants money. That's what the due process clause does *not* guarantee; the federal entitlement is to process, not to a favorable outcome.'. . It is a far cry from bizarre, as Calderone sees it, to require her to either take advantage of the available post-deprivation remedies or illustrate how exactly those remedies are inadequate. Calderone does not challenge the fundamental fairness of the remedies afforded her under the collective bargaining agreement with the City; instead, she thinks the City has not held up its end of the deal. . . The Constitution leaves such qualms about substance, as opposed to process, to state law. . . The district court properly dismissed this claim."); ***Hudson v. City of Highland Park, Michigan***, 943 F.3d 792, 801 (6th Cir. 2019) ("[D]ue process does not fix every breach of contract or violation of state labor law. . . Before Hudson can use this federal cause of action in this way, he must show that state law remedies cannot help him. . . This he has not done. Michigan affords quite a few remedies in this setting, and Hudson has not shown their inadequacy. He could have brought a breach of contract claim in Michigan courts. . . He could have claimed that his discharge constituted an unfair labor practice under Michigan's Public Employees Relations Act. . . Or he could have filed a charge with the Michigan Employment Relations Commission asking them to investigate the city's alleged misbehavior. . . Hudson does not explain why he never invoked these remedies and why they would not correct his process objections. . . On this record, his claim fails as a matter of law."); ***GEFT Outdoors, LLC v. City of Westfield***, 922 F.3d 357, 367 (7th Cir. 2019) ("GEFT

also says that Westfield 'violated its leasehold interest in the [Esler] Property by threatening GEFT's representatives with arrest and imprisonment.' But GEFT cannot support its claim based on this theory either. When a plaintiff alleges a deprivation based on conduct that is 'random and unauthorized, the state satisfies procedural due process requirements so long as it provides a meaningful post-deprivation remedy.'. .GEFT presented evidence that on December 16, Zaiger came onto the Esler Property, identified himself as the Westfield city attorney, and told Lee and the others on the site that they would be arrested if work was not stopped immediately. According to GEFT, it was only because of these threats that it stopped constructing the Billboard, and it was these threats that therefore deprived it of its leasehold interest. . . But both GEFT and Westfield agree that neither local nor state law authorizes the arrest of anyone violating a municipal ordinance. Even if Zaiger is considered an employee of Westfield (which is an open question as Zaiger worked for a private law firm representing the city), GEFT has not identified any evidence Westfield authorized Zaiger's threats or even could have predicted he would make them that day. . . As Westfield points out, the Indiana Tort Claims Act provides a remedy for any abuse of process that Zaiger's actions represent. . . GEFT has not made any attempt to show that it took advantage of this process or that this remedy would be insufficient to compensate it for what was lost by Zaiger's threats. *See Veterans Legal Defense Fund v. Schwartz*, 330 F.3d 937, 941 (7th Cir. 2003) ("Given the availability of state remedies that have not been shown to be inadequate, plaintiffs have no procedural due process claim."). Because it has not made this showing, GEFT has not demonstrated it is likely to succeed on the merits of its procedural due process claim."); ***Tucker v. City of Chicago***, 907 F.3d 487, 491-93, 495 (7th Cir. 2018) ("While *Parratt* holds that post-deprivation remedies may be sufficient if the deprivation is 'random and unauthorized,' neither *Parratt* nor *Zinermon* stands for the proposition that post-deprivation remedies are otherwise irrelevant to a procedural due process claim. Rather, the adequacy of pre-deprivation proceedings may turn on the availability and nature of post-deprivation remedies. . . . Indeed, a plaintiff who foregoes her right to pursue post-deprivation remedies available under state law faces a high hurdle in establishing a due process violation. . . Such remedies go directly to the question whether a plaintiff has been afforded due process of law. Thus, the district court was correct to consider Tucker's right to pursue judicial review in state court. . . .As this court has recognized, 'Due process does not require notice-on-demand but rather timely notice, and a one month delay in receiving notice does not offend due process.'. . Although the delay in this case is six months, it is still considerably shorter than prosecutorial delays accepted in other contexts. . . . And the interest at stake here is monetary, less significant than (for example) one's liberty interest in a criminal prosecution, or even property interest in continued employment. . . . Even assuming Tucker is right that the city's interpretation of its ordinance is incorrect, federal due process protection is not a guarantee that state governments will apply their own laws accurately. . . . If Tucker believed the administrative law judge's interpretation of the ordinance was legally incorrect, she could have appealed her fine to Illinois's state courts. Her amended complaint makes no attempt to establish the inadequacy of that avenue of redress. . . .Although a six month delay between inspection and citation may not be a model of administrative efficiency, the delay in this case did not violate the Constitution. Similarly, the proper interpretation of a municipal ordinance is a matter of local law for state courts to decide, not constitutionally required procedure.");

Elizarri v. Sheriff of Cook County, 901 F.3d 787, 791 (7th Cir. 2018) ("*Pembaur* does not create the possibility of organizational liability in the absence of individual violations. To the contrary, it is established that a municipality cannot be held liable without an underlying violation of the Constitution by a municipal employee. See, e.g., *Los Angeles v. Heller*, 475 U.S. 796 (1986); *Swanigan v. Chicago*, 881 F.3d 577, 582 (7th Cir. 2018). A distinctive feature of this case—and the reason why we said earlier that we are not deciding whether liability is possible even in theory—is that plaintiffs wanted the jury to find the Sheriff liable without showing that *any* of the Sheriff's subordinates violated the Constitution. Plaintiffs' first argument about the evidence is that the district court should have told the jury about *Black v. Dart*, 2015 IL App (1st) 140402 (2015). This decision holds (according to plaintiffs) that Illinois law never provides inmates of the Jail with financial remedies for lost or stolen goods, but according to defendants it holds only that one plaintiff failed to present his claim for compensation properly. The dispute about the scope of *Black* highlights a contradiction in the Sheriff's legal position. The Sheriff's staff tells inmates that the state courts provide remedies for lost or stolen property, but, when ex-inmates sue, the Sheriff's lawyers tell the state judiciary that no remedy is available. That two-faced approach is hard to justify, but state remedies are a matter of state law rather than constitutional entitlement. The Sheriff's lawyers did not argue to the jury in this suit that Illinois supplies a remedy for lost or stolen property, cf. *Parratt v. Taylor*, 451 U.S. 527 (1981), and it was therefore unnecessary for the judge to tell the jury that state law does not provide a remedy (if that is indeed the right understanding of *Black*); ***Simpson v. Brown County***, 860 F.3d 1001, 1010, 1013 (7th Cir. 2017) ("In those cases where a plaintiff is not entitled to pre-deprivation process (e.g., where state action is random and unauthorized or where a *Hodel*-type emergency warrants summary action), the Constitution still requires an adequate post-deprivation remedy. Such a remedy need not be identical to the remedy otherwise available under § 1983. . . .Though a state remedy need not match in every respect the relief otherwise available under § 1983, such a remedy must still offer meaningful redress for the particular injury suffered by the plaintiff. . . . Like the plaintiff in *Pro's Sports Bar* [*& Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865 (7th Cir. 2009)], Simpson seeks damages to compensate him for income he allegedly lost when his license was terminated. The County proposes a petition for common-law judicial review, but we are aware of no Indiana case (and the County has cited none) where a litigant obtained damages through such an action. The proposed remedy, in other words, cannot address the harm Simpson claims that he suffered, and it is inadequate on the facts of this case as alleged. Reinstatement of a septic license, like reinstatement of a liquor license, does not address the financial losses resulting from an inability to operate one's business for some length of time. We are aware of no alternative state remedy that might redress Simpson's injury."); ***CEnergy-Glenmore Wind Farm No. 1, LLC v. Town of Glenmore***, 769 F.3d 485, 488, 489 (7th Cir. 2014) ("We have held repeatedly that a plaintiff who ignores potential state law remedies cannot state a substantive due process claim based on a state-created property right. . . .Without this requirement, procedural due process claims based on 'random and unauthorized' deprivations of property (which might also be described as 'arbitrary') could be brought as substantive due process claims even when a post-deprivation remedy was available. . . This would undermine the holdings of [*Hudson* and *Parratt*] that a post-deprivation remedy is sufficient to satisfy due process in such situations. The claims would simply

be reframed as substantive due process claims. . . We have similarly held that, regardless of how a plaintiff labels an objectionable land-use decision (i.e., as a taking or as a deprivation without substantive or procedural due process), recourse must be made to state rather than federal court. . .Cenergy had options under state law for obtaining the building permits that it did not use."); ***Tenny v. Blagojevich***, 659 F.3d 578, 583(7th Cir. 2011) ("While the path to relief − including potential monetary awards if and when the current commissary mark-up policy is declared illegal − may be circuitous, this does not make it inadequate. We are thus satisfied that the plaintiffs have adequate post-deprivation remedies in state court, which dooms their constitutional due process claims. Put another way, this case is really about a substantive violation of Illinois law, not about the procedures required before the plaintiffs can be deprived of a property interest. The plaintiffs' grievance is about *what* was done (the mark-up in excess of 25%), not the *procedures* followed to do it. And that is exactly what this court, and the Supreme Court, have worried 'would make of the Fourteenth Amendment a font of tort law,' or in this case administrative law, 'to be superimposed upon whatever systems may already be administered by the States.'. . Federal courts do not sit to compel a state's compliance with its own law. . . Even assuming the plaintiffs were deprived of a property interest created by state law, '[f]ailure to implement state law violates that state law, not the Constitution; the remedy lies in state court.'. . Even assuming that the prison regulation in this case created a protected property interest in a certain cap on the mark-up of commissary goods, the plaintiffs have not alleged that post-deprivation remedies are inadequate to satisfy constitutional due process requirements."); ***Marco Outdoor Advertising, Inc. v. Regional Transit Authority***, 489 F.3d 669, 675 (5th Cir. 2007) ("Because an unsuccessful bidder may seek an immediate injunction through a summary proceeding, and because the injunction may enjoin the execution of the contract, the injunction prevents the deprivation 'of any significant property interest' and is therefore an adequate pre-deprivation remedy. . . . The summary proceeding, together with RTA's announcement of the contract award, satisfies the elements of the due process prong of the Due Process Clause that are at issue in this case. . . . We thus conclude: We assume for the purposes of deciding this appeal that the Public Bid Law applies to Marco's bid and that Marco has properly alleged a property interest in the right to receive the Contract; nevertheless, we conclude that Marco's procedural due process claim fails. The Public Bid Law explicitly authorizes Marco to seek state court injunctive relief to enjoin RTA from awarding the contract to Clear Channel. For the reasons given, we hold that Marco has failed to show that it has been denied due process of law provided in the Fourteenth Amendment."); ***Veterans Legal Defense Fund v. Schwartz,*** 330 F.3d 937, 941 (7th Cir. 2003) ("While a plaintiff is not required to exhaust state remedies to bring a § 1983 claim, this does not change the fact that no due process violation has occurred when adequate state remedies exist. The whole idea of a procedural due process claim is that the plaintiff is suing because the state failed to provide adequate remedies. Therefore, we do not require a plaintiff to pursue those remedies in order to challenge their adequacy, but likewise we do not allow a plaintiff to claim that she was denied due process just because she chose not to pursue remedies that were adequate. Given the availability of state remedies that have not been shown to be inadequate, plaintiffs have no procedural due process claim."); ***Ores v. Village of Dolton,*** 152 F.Supp.3d 1069, 1080-82 (N.D. Ill. 2015) ("Having determined that the notice and interrogation were adequate at the *pre*-suspension phase, the next question is whether Ores was

entitled to some form of *post*-deprivation process. . . It is undisputed that Ores did not go through any post-suspension process with the police department or Board, whether in the form of a hearing in front of the Board, union meeting, or otherwise. . . Ores argues that this violated due process, while Defendants argue that Ores was not due any process in addition to his pre-suspension interrogation. . . Neither side is completely right: despite Defendants' argument to the contrary, the lack of *any* post-suspension process would violate procedural due process because it would deprive Ores of a full opportunity to respond. . . . In sum, Ores's pre-suspension interrogation was not a full opportunity to be heard and an insufficient means to review his imposed punishment. . . . But the analysis is not over yet. Even though Ores was constitutionally entitled to receive some form of post-deprivation process, the question now is whether any post-deprivation remedies were available, regardless of whether Ores actually took advantage of them. . . . Here, Ores argues that Jones exceeded his statutory authority by imposing a fifteen-day suspension when he was only authorized to impose suspensions of no more than five days, and that Jones deprived Ores of a chance to review this decision. . . .[U]ltimately the Court concludes that state-court process—in the form of mandamus, injunctive relief, and declaratory judgment actions—was available to Ores. So there was no procedural due process violation because the state provided adequate remedies to challenge his suspension."); ***Gonzalez v. Dooling***, 98 F.Supp.3d 135, 143-44 (D. Mass. 2015) ("Plaintiff's arguments notwithstanding, it is clear that the *Parratt–Hudson* doctrine applies and bars recovery here. The record shows that the process for determining whether an offender was subject to CPSL was dictated by the Talbot Memo. Defendants had no discretion to determine whether Plaintiff was subject to CPSL. Defendants' actions were circumscribed by state law, SJC case law, and the Talbot Memo. There are no facts to support the allegation that Defendants had authority to *set* the Legal Unit process, only to act pursuant to it. Moreover, Plaintiff's allegations are that Defendants acted *outside* of the established Parole Board Legal Unit procedures in erroneously placing him on lifetime parole, despite the absence of such a sentence on the docket. The record shows that Defendant Hall or Defendant Goldman, or possibly both, committed exactly the type of 'random and unauthorized' mistake that the state cannot guard against with predeprivation process. Accordingly, under *Parratt–Hudson*, the focus is on whether there is adequate postdeprivation process."); ***Learnard v. Inhabitants of the Town of Van Buren,*** 182 F. Supp.2d 115, 125, 126 (D. Maine 2002) ("The Court thus concludes that it must focus on whether official policy that existed at the time of the deprivation would adequately have protected the Plaintiff's interest if followed. If so, then the failure to follow that policy was random and unauthorized. At the time of Plaintiff's termination, both Maine law and the Van Buren Town Charter required that Town employees only be removed 'for cause' and 'after notice and a hearing' . . . . Official policy, therefore, was to provide Town employees with constitutionally adequate procedures before terminating their employment. To the extent that the March 29 hearing did not provide Plaintiff an adequate opportunity to respond in that he was unable to attend, Defendants' conduct in holding the hearing was 'random and unauthorized.' . . . . Finally, then, the Court must address the second *Parratt-Hudson* question: were the state procedures that were available to Plaintiff adequate to remedy the flaws in the pretermination procedure? It is not necessary to linger long on this point. Plaintiff successfully utilized the procedures for reviewing administrative action under Maine Rule 80B and obtained a new hearing in front of the Council. Furthermore, after the

state court ordered a new hearing, the Town reinstated Plaintiff on administrative leave with pay. Finally, there is no evidence that the October hearing was deficient. . . . Therefore, Plaintiff received the procedure he was due in the form of adequate postdeprivation remedies and cannot state a claim for a procedural due process violation."); ***McCall v. Dep't of Human Resources,*** 176 F. Supp.2d 1355, 1369 (M.D. Ga. 2001) ("The Supreme Court has held that, when a state official's random and unauthorized actions deprive a person of a liberty interest protected by the Fourteenth Amendment, a state may satisfy its procedural due process obligations by providing an adequate post-deprivation remedy. . . . Assuming that the conduct of Defendants Almand, Mitchell, and Gibson, as alleged in the complaint, deprived Rayshom of his procedural due process rights created by the Children and Youth Act, it must certainly be described as random and unauthorized. Indeed, it is inconceivable that the state would authorize its officials to violate a foster child's constitutional rights or that the state could foresee that they would do so absent any prior suggestive conduct. Thus, this claim turns on the adequacy of the post-deprivation remedies available under Georgia law. Because the Court finds that the GTCA provides a constitutionally adequate post-deprivation remedy, . . .Rayshom's procedural due process rights were not violated. Essentially, there was no procedural due process violation in this case because the availability of relief under the GTCA means that any potential violation was not complete."); ***Culberson v. Doan***, 125 F. Supp.2d 252, 265, 266 (S.D. Ohio 2000) ("The Court agrees with Defendants in that Plaintiffs have not offered any evidence that Chief Payton or the Village of Blanchester had an established internal office policy or procedure of abandoning criminal investigations, intentionally or recklessly assisting criminal suspects in their disposal of evidence, or depriving the citizens of the Village of Blanchester of their constitutionally protected property right to recover the remains of their deceased relatives.. . . . Having reviewed this matter, the Court finds that Plaintiffs' substantive due process and/or state law claims asserted in their Complaint may provide an adequate remedy to Plaintiffs for the conduct that was allegedly engaged in by Chief Payton and the Village of Blanchester. Therefore, this Court finds that Plaintiffs' procedural due process claim must fail as there exist adequate state law procedures, such as Plaintiffs' state law claims for damages, in order to guarantee due process for any injury sustained as a result of Defendants' alleged conduct in this matter.").

In ***Sturdevant v. Haferman***, 798 F. Supp. 536, 540 (E.D. Wis. 1992), the court found the defendant prison officials' conduct to be random and unauthorized, but concluded that the state postdeprivation remedy was inadequate where the process could result only in expungement of a conduct report, but no damages for being placed in "adjustment segregation." *Accord*, ***Smith v. McCaughtry***, 801 F. Supp. 239, 243 (E.D. Wis. 1992) (even if defendants' conduct considered "random and unauthorized," plaintiff could still seek redress under § 1983 where state law certiorari remedy is inadequate.). *Contra* ***Scott v. McCaughtry***, 810 F. Supp. 1015, 1020 (E.D. Wis. 1992) ("[T]his court concludes that the State has provided adequate post-deprivation remedies in certiorari, in the inmate grievance system and in tort."); ***Duenas v. Nagle***, 765 F. Supp. 1393, 1400 (W.D. Wis. 1991).

See ***Hamlin v. Vaudenberg***, 95 F.3d 580, 585 (7th Cir. 1996) (noting that "[t]he adequacy of Wisconsin post-deprivation remedies is the subject of a federal district court rift in Wisconsin[,]" and concluding that "[i]n this case, the inmate complaint review system and certiorari review allow consideration of alleged due process violations. Both offer relief from liberty deprivations by reinstating prisoner status in the general population (even assuming that disciplinary segregation implicates due process) and expunging the prisoner's disciplinary record. Neither can offer money damages, which would be available in a state law tort action against the prison officials, but these proceedings are neither meaningless nor nonexistent, so they provide all the process that is constitutionally required. We agree with the district court that Wisconsin post-deprivation proceedings are adequate.").

See also ***Harris v. Krasner***, 110 F.4th 192, 199 (3d Cir. 2024) ("Harris. . . argues that the District Court erroneously dismissed her Fourteenth Amendment § 1983 claim. She contends that her placement on the Do Not Call List and inability to testify about her arrests resulted in the deprivation of her public employment without notice or a hearing. The District Court held that the Prosecutors had absolute immunity from this claim because '[t]he decision to include police officers on the Do Not Call List is "directly connected with the conduct of a trial"' and 'require[s] legal knowledge and the exercise of related discretion.'. . We agree. As for Harris's reputational argument, the District Court concluded that the Prosecutors had absolute immunity, so it did not consider whether Harris's placement on the Do Not Call List harmed her reputational interests under the First or Fourteenth Amendment. But 'reputation alone, apart from some more tangible interests such as employment,' does not implicate a liberty or property interest 'by itself sufficient to invoke the procedural protection of the Due Process Clause.'. .In sum, the Prosecutors' disclosure of Harris's IAD file and their decision to place her on the Do Not Call List did not deprive her of any interest protected by the United States Constitution, and Harris cannot sustain her § 1983 claim on reputational harm alone."); ***Meyers v. Village of Oxford***, 739 F. App'x 336, ___ (6th Cir. 2018) ("Though *Mertik* predates the five-factor test enunciated in *Quinn*, this court has consistently stated that '[s]ome alteration of a right or status 'previously recognized by state law,' *such as* employment, must accompany the damage to reputation.'. . .Moreover, we have considered a number of non-employment cases in addition to *Mertik* without declaring that only terminated employees have a right to a name-clearing hearing. . . .The five-factor test that has developed in the employment context can easily be modified for use in non-employment cases. Indeed, the third, fourth, and fifth factors require no modification and, as the district court found, are met here: the alleged stigmatizing statements were made at a public meeting; Appellants claim that the statements are false; and the statements were voluntarily made public. . .. As to the first factor, the stigmatizing statements must have been 'made in connection with "the loss of a governmental right, benefit, or entitlement."'. . Second, the statements must accuse the plaintiff of more than 'merely improper or inadequate performance, incompetence, neglect of duty or malfeasance,'. . .; they must be of the type 'that [would] foreclose[ ] his freedom to take advantage of other employment opportunities.'. . Under this modified test, Appellants' complaint is sufficient: the alleged stigmatizing statements (1) were made in connection with the loss of Appellants' status as reserve officers for the Village of Oxford Police Department and (2) accused

Appellants of illegally impersonating police officers."); ***Gunasekera v. Irwin***, 551 F.3d 461, 470, 471 (6th Cir. 2009) ("Considering the first prong of this test, we believe that it is clear that where, as here, the employer has inflicted a public stigma on an employee, the only way that an employee can clear his name of the public stigma is through publicity. The injury of which Gunasekera complains is the fact that he was publicly associated with and perhaps partially blamed for a plagiarism scandal. As to the second prong of *Mathews*, publicity adds a significant benefit to the hearing, and without publicity the hearing cannot perform its name-clearing function. A name-clearing hearing with no public component would not address this harm because it would not alert members of the public who read the first report that Gunasekera challenged the allegations. Similarly, if Gunasekera's name was cleared at an unpublicized hearing, members of the public who had seen only the stories accusing him would not know that this stigma was undeserved. . . . In order to determine what the name-clearing hearing should entail and what its limits might be in each case, courts should again turn to the *Mathews* balancing test described above. . . . We hold that Gunasekera has sufficiently alleged that he was deprived of a protected liberty interest without due process of law to withstand this Rule 12(b)(6) motion. In order to satisfy due process, the university is required to offer Gunasekera a name-clearing hearing that is adequately publicized to address the stigma the university inflicted on him. The exact nature of that publicity depends on a fact-intensive review of the circumstances attending his case, and we leave to the district court the initial determination regarding the exact parameters of the name-clearing hearing due to Gunasekera."); ***Wojcik v. Massachusetts State Lottery Commission,*** 300 F.3d 92, 103 (1st Cir. 2002) ("In order to successfully establish a claim for the deprivation of a liberty interest without due process, we require the employee to satisfy five elements. First, the alleged statements must level a 'charge against [the employee] that might seriously damage his standing and associations in his community' and place his 'good name, reputation, honor, or integrity ... at stake.' . . . Statements merely indicating the employee's improper or inadequate performance, incompetence, or neglect of duty are not sufficiently serious to trigger the liberty interest protected by the Constitution. Second, the employee must dispute the charges made against him as false. . . Third, the stigmatizing statements or charges must have been intentionally publicized by the government. . . . That is, the defamatory charges must have been aired 'in a formal setting (and not merely the result of unauthorized "leaks").' . . . Fourth, the stigmatizing statements must have been made in conjunction with an alteration of the employee's legal status, such as the termination of his employment. . . Finally, the government must have failed to comply with the employee's request for an adequate name-clearing opportunity."); ***Quinn v. Shirey,*** 293 F.3d 315, 322, 324 (6th Cir. 2002) ("While Plaintiff argues that a different standard may exist in some other circuits and that the Supreme Court has not addressed the issue, this Court has spoken on the issue and does require that an employee request a name-clearing hearing. . . . [T]his Court has never imposed an affirmative duty on an employer to apprize the employee of his right to a name-clearing hearing. . . .[A] plaintiff who fails to allege that he has requested a hearing and was denied the same has no cause of action, whether or not he had been informed of a right to a hearing before filing suit."); ***Sharp v. Lindsay,*** 285 F.3d 479, 489 (6th Cir. 2002) ("Where, as here, the employee's livelihood has not been jeopardized by his allegedly premature dismissal from a fixed-term position, it is even clearer than it might otherwise be that the deprivation of the employee's finite interest is something

that 'can be compensated adequately by an ordinary breach of contract action.' We see no justification for turning Mr. Sharp's ordinary breach of contract action into a federal constitutional case. . . . Given the fixed term of the contract, it is plain under *Ramsey* that Mr. Sharp had no due process right to notice and a hearing before his reassignment − at no loss of pay − to a teaching position. The reassignment may have breached the contract, but Tennessee provides a perfectly adequate procedure for determining whether a breach has occurred and for granting redress if it did. To require Mr. Sharp to avail himself of that procedure by repairing to the courts of Tennessee . . . does no violence to the concept of due process of law."); ***Powell v. Georgia Dep't of Human Resources***, 114 F.3d 1074, 1082 n.11 (11th Cir. 1997) (assuming without deciding that Defendants would be immune from suit under Georgia Tort Claims Act, that immunity does not affect adequacy of post-deprivation process afforded by the state.); ***Thompson v. AOC***, 2009 WL 961167, at *13 n.15 (D. Utah Apr. 8, 2009) ("Although the Tenth Circuit has not yet adopted such a requirement, several circuits have held that to show that a liberty interest in an individual's reputation has been infringed, an employee must show that she has requested and been denied a name-clearing hearing. *See e.g. Bledsoe v. City of Horn Lake*, 449 F.3d 650, 653 (5th Cir.2006); *Quinn v. Shirey*, 293 F.3d 315, 321 (6th Cir.2002)"); ***McCall v. Dep't of Human Resources,*** 176 F. Supp.2d 1355, 1369 (M.D. Ga. 2001) ("Assuming that the conduct of Defendants Almand, Mitchell, and Gibson, as alleged in the complaint, deprived Rayshom of his procedural due process rights created by the Children and Youth Act, it must certainly be described as random and unauthorized. Indeed, it is inconceivable that the state would authorize its officials to violate a foster child's constitutional rights or that the state could foresee that they would do so absent any prior suggestive conduct. Thus, this claim turns on the adequacy of the post-deprivation remedies available under Georgia law. Because the Court finds that the GTCA provides a constitutionally adequate post-deprivation remedy, . . . Rayshom's procedural due process rights were not violated. Essentially, there was no procedural due process violation in this case because the availability of relief under the GTCA means that any potential violation was not complete. There being no violation of Rayshom's procedural due process rights, Defendants Almand, Mitchell, and Gibson are entitled to qualified immunity on this claim. . . . . The Court does not lightly ignore the precedent established in *Taylor* on this point. However, because the GTCA had not been enacted when the Eleventh Circuit decided *Taylor,* the Court concludes that the portion of *Taylor* dealing with procedural due process cannot withstand scrutiny under the *Hudson/Parratt* rule in light of the Georgia General Assembly's enactment of the GTCA in 1992. In fact, the Eleventh Circuit concluded its opinion in *Taylor* with the following observation: 'Since the child's claim ... is a procedural due process claim, the state of Georgia may alter its statutes and ordinances in such a way as to change or eliminate the expectation on which this child had the right to rely.' 818 F.2d at 800. The Georgia General Assembly did just that when it enacted the GTCA in 1992. As a result, Rayshom's right to rely on the Children and Youth Act for procedural due process was eliminated, and he is required to seek relief under the GTCA rather than the procedural component of the Due Process Clause of the Fourteenth Amendment.").

See also ***Belcher v. Norton***, 497 F.3d 742, 753 (7th Cir. 2007) ("Because we conclude that Deputy Marshal Norton is entitled to the broad statutory immunity afforded by ITCA, we also

must conclude that the statute does not provide an adequate state law remedy to the plaintiffs. Relegating the plaintiffs to this state statutory scheme would deprive them of any meaningful avenue to seek redress for the deprivation that they claim to have suffered. Therefore, we must conclude that the district court erred in granting summary judgment in favor of the defendants on the plaintiffs' procedural due process claim."); ***Roy v. City of Augusta, Maine,*** 712 F.2d 1517 (1st Cir. 1983) (state remedy inadequate where absolute immunity available); ***Larramendy v. Newton***, 994 F. Supp. 1211, 1214-16 (E.D. Cal. 1998) ("Plaintiffs argue that an adequate state remedy is unavailable here because a successful state action for malicious prosecution against this defendant is foreclosed by virtue of the state's immunity statutes. . . They maintain that because there is no adequate remedy available under state law they have a right to proceed under § 1983 in this court. . . . The question is whether there is a remedy under state law sufficient to satisfy the requirements of due process, when the state's tort law provides absolute immunity for intentional conduct violating plaintiffs' constitutional rights. As far as the court can determine, neither the United States Supreme Court nor the Ninth Circuit has directly addressed the issue of whether due process is satisfied under these circumstances. . . . The issue is . . . not whether the state may define its tort law without coming into conflict with federal law, but whether, when it defines its law so as to preclude recovery, a plaintiff has a meaningful opportunity to be heard sufficient to comport with the requisites of due process. . . . The statute before the court suffers a defect similar to a statute of limitations which applies as a bar no matter when a plaintiff files. Because under state law plaintiffs are deprived of any remedy whatever the facts, it is clear that plaintiffs' ability to file a complaint is not effective process. Because under state law plaintiffs have no remedy, the state tort law does not provide an adequate postdeprivation process sufficient to satisfy the Fourteenth Amendment."); ***Corp. of Pres. of Church of Jesus Christ of Latter Day Saints v. Environmental Protection Commission of Hillsborough County***, 837 F. Supp. 413, 417 (M.D. Fla. 1993) (state remedy inadequate where compensation not available).

3. The ***Parratt/Hudson*** doctrine does not apply to deprivations by state actors, acting pursuant to established state procedure which failed to provide for predeprivation process where it was possible, practicable and constitutionally required.

In ***Logan v. Zimmerman Brush Co.***, 455 U.S. 422 (1982), the Court upheld plaintiff's claim where a state statutory scheme destroyed plaintiff's property interest without the proper procedural safeguards. *Id*. at 435-36.

See also ***Luster v. Village of Ashmore***, 76 F.4th 535, 537-38 (7th Cir. 2023) ("Under the circumstances Luster alleges here. . . we see no obvious reason why the village could not have provided advance notice and a pre-deprivation hearing before it seized Luster's property interest under his contract to purchase the home. *Parratt* therefore does not apply here. . . Luster's complaint does not allege or permit a reasonable inference that he was deprived of his property interest by the random, unauthorized acts of any village employee. Rather, he consistently alleges that the village, as part of its plan to establish a municipal park, deliberately deprived him of his property interest and attempted to remove him without prior notice and an opportunity to be heard.

Indeed, it is difficult to imagine how unauthorized employees could complete a real estate transaction for the village. The village has not asserted as much. In any event, *Parratt* does not excuse a municipality from its due process violations even though official actions may also violate state laws that offer a meaningful post-deprivation remedy. . . Pre-deprivation notice and hearings are not impractical, and therefore fall outside the narrow *Parratt* exception, for deliberate, planned deprivations of property, like firing the plaintiff in *Bradley* or seizing Luster's property. . . Accordingly, the core principle of federal due process protections applies: 'the Constitution requires some kind of a hearing *before* the State deprives a person of ... property.'. . Construing Luster's pro se complaint liberally, . . . he states a *Monell* claim against the village. . . The village has not disputed that Luster was deprived of his property interest by action under color of law, as the complaint alleges. All he needed to allege further was that he did not receive due process of law. . . He did that."); ***Sterling Hotels, LLC v. McKay***, 71 F.4th 463, 467 (6th Cir. 2023) ("When a deprivation of property 'occurs pursuant to an established state procedure'—as McKay acknowledges it did here—the state must provide adequate notice and an opportunity to respond before the deprivation. *Walsh v. Cuyahoga County*, 424 F.3d 510, 513 (6th Cir. 2005). Here, McKay sealed the elevators without providing any advance notice that the elevators should descend to the basement. Thus, Sterling alleges, McKay failed to provide it with any opportunity to respond to that requirement. That is sufficient to state a due-process claim against McKay. *Cahoo*, 912 F.3d at 900. McKay asserts that the Board's letters announcing the inspection constituted adequate notice. But those letters did not say that Sterling's elevators needed to descend to the basement in emergencies. Nor does McKay point to any regulation that could have put Sterling on notice of that putative requirement. And to the extent McKay relies on notices sent after the inspection, those plainly cannot satisfy the state's obligation to provide notice before it acts."); ***Cahoo v. SAS Analytics Inc.***, 912 F.3d 887, 902-03 (6th Cir. 2019) ("Plaintiffs pleaded a plausible procedural due process claim. First, Plaintiffs have a significant interest in maintaining eligibility for unemployment benefits, receiving ungarnished wages, and obtaining their state and federal income tax refunds. Second, the current system poses a profound possibility of erroneous deprivations—the Auditor General found that MiDAS' error rate exceeded 93%. . . And while the government's legitimate interest in preserving fiscal and administrative resources cannot be ignored, this interest is not so great as to negate the need for adequate notice before interfering with these substantial property interests. Therefore, Plaintiffs adequately alleged that the Individual Agency Defendants did not provide them with sufficient process before depriving them of their protected property interests. The Individual Agency Defendants argue that Plaintiffs failed to allege a plausible due process claim because Agency procedures provided for a pre-deprivation hearing if claimants elected to appeal a fraud determination. The Court is unpersuaded by this argument. Plaintiffs allege that the Agency terminated a claimant's right to benefits *before* any appeal hearing took place; they allege the Agency terminated a claimant's right to benefits immediately once MiDAS made a positive fraud determination. While claimants had the opportunity to appeal a fraud determination, 'postdeprivation remedies alone will not satisfy due process if the deprivation resulted from conduct pursuant to an "established state procedure," rather than random and unauthorized conduct.'. . Accordingly, the adequacy of Plaintiffs' opportunity to appeal their original fraud determinations is immaterial to the question

of whether the Individual Agency Defendants violated Plaintiffs' due process rights. Construing Plaintiffs' Complaint liberally and accepting Plaintiffs' allegations as true, as this Court must do at this stage, Plaintiffs sufficiently alleged that the Individual Agency Defendants violated their rights to due process.") [*But see* ***Cahoo v. SAS Institute, Inc.***, 71 F.4th 401, 406-12 (6th Cir. 2023) ("This appeal comes to us at the summary judgment stage after considerable discovery. With the benefit of discovery comes a burden. The plaintiffs now must identify evidence in the record to substantiate each claim in their complaint. . . In a qualified immunity case like this one, that means the plaintiffs bear the burden of identifying record evidence showing a violation of their clearly established rights. . .The plaintiffs, in other words, must substantiate their theories on both qualified immunity prongs with record support. Instead of merely showing that each claim alleged in the complaint satisfies these two prongs, as we decided the last time we looked at the case, they must point to record-based evidence backing each theory. We need not decide today whether the questionnaires and notices violated the Due Process Clause or whether a reasonable jury could find that Moffett-Massey and Geskey directed the development of them. Either way, the plaintiffs' due process claims do not clear step two of the qualified-immunity test. Consider several key developments since our prior opinion. At the motion to dismiss stage, we assessed a broadly framed, putative class action complaint. . . Focusing on the complaint's allegation that MiDAS failed to provide claimants with pre-deprivation notice or process before automatically shutting off unemployment benefits, garnishing wages, and seizing tax refunds, we held that the claimants had alleged a clearly established right to pre-deprivation notice and a hearing. . . That conclusion stemmed from several Supreme Court cases about the midstream termination of welfare benefit payments and the like. . . .Our holding also hinged on the case's procedural posture. Courts, we pointed out, sometimes benefit from waiting to resolve qualified immunity until summary judgment—with the benefit of discovery—rather than settling the issue immediately through a motion to dismiss. . . Patience can be especially prudent in the due process context, where courts employ a three-part, broadly framed balancing test. . . Discovery sometimes yields new insights about the public and private interests at stake, impacting the qualified immunity inquiry. All things considered, we concluded in the first appeal that 'any reasonable official would have known that depriving Plaintiffs of their protected property interests in the manner alleged violated their due process rights.'. . At the same time, we warned Cahoo that she would 'need to substantiate [her] allegations to survive a motion for summary judgment.'. . We have no second thoughts about these conclusions. . . . We now know that MiDAS did not immediately deprive these plaintiffs of their property rights. No plaintiff lost ongoing benefit payments due to MiDAS. . . . Now that we know MiDAS did not immediately terminate *these plaintiffs'* ongoing benefit payments without pre-deprivation process, cases like *Goldberg* and our prior opinion do not tell us what to do with the remaining claims in the case. What was once relatively easy to answer no longer is. . . . No case put Moffett-Massey and Geskey on notice that these pre-deprivation forms and appeal procedures for these plaintiffs in this context did not stack up. Quite a few cases suggested the contrary. [collecting cases] . . . . Cahoo claims that *Hope v. Pelzer* solves these problems. That case recognized that a novel violation can be 'so obvious' that it nevertheless oversteps clearly established law, it is true. . . And we relied on *Hope* in our prior opinion, it is true too. . . But because our prior opinion focused on the alleged midstream deprivation of property rights without

pre-deprivation notice and a hearing, cases like *Goldberg* naturally extended to the novel MiDAS setting. Those cases, in other words, gave Agency supervisors 'fair warning' that the midstream deprivation of benefits without process 'violated the Constitution.'. . In today's setting, however, Cahoo did not identify any case in her appellee brief that fairly extends to this situation. *Goldberg*'s holding does not 'obvious[ly]' cover after-the-fact fraud findings accompanied by notices of determination and multiple levels of appeal *before* any immediate consequences for property rights. . . . The entire process, including above all the delayed deprivations in this instance, distinguishes the plaintiffs' claims from due process precedent. Any other approach creates notice problems in the other direction. Qualified immunity carefully balances between the 'vindication of citizens' constitutional rights' and 'officials' effective performance of their duties,' a balance maintained only by giving officials fair notice of the wrongfulness of their conduct. . . . Now that the district court has declined to certify a class, each plaintiff's individual due process claim must stand on its own. . . Today's claims rest on theories that we did not consider the last time around. The district court concluded that not one of the remaining four plaintiffs immediately lost her ongoing benefits, immediately had her wages garnished, or immediately had her tax refunds intercepted. . . . Hence the prior opinion's explanation that precedent patently required 'an individual [to] be given an opportunity for a hearing *before* he is deprived of any significant property interest,'. . . remains true but irrelevant to the remaining claims in the case. . . . The missing link, then, is a case that clearly established the inadequacy of the questionnaires, notices of determination, and appeal processes available in the run-up to the property deprivation. To this day, the plaintiffs have not provided that case. What precedent there was would not have clearly alerted Moffett-Massey and Geskey to the constitutional inadequacies of the questionnaires and notices as to these plaintiffs and these property deprivations. . . . All in all, while we share our colleague's concerns about the MiDAS system, we respectfully disagree with her conclusion as to the clearly established prong in this appeal.")]; ***Hoefling v. City of Miami***, 811 F.3d 1271, 1283 (11th Cir. 2016) ("With respect to the procedural due process claim, the district court should analyze whether this is one of those situations where the existence of a post-deprivation remedy is sufficient, as in *Tinney*, 77 F.3d at 380, or whether Mr. Hoefling has sufficiently alleged that the destruction of his sailboat was pursuant to a policy or practice of the City (i.e., the alleged 'cleanup' program) such that pre-deprivation notice was feasible and required under cases like *Hudson v. Palmer*, 468 U.S. 517, 532 (1984) (explaining that, 'where the property deprivation is effected pursuant to an established state procedure,' a post-deprivation state remedy cannot satisfy due process), and *Rittenhouse v. DeKalb Cnty.*, 764 F.2d 1451, 1455 (11th Cir.1985) (holding that the focus on the adequacy of post-deprivation remedies—due to the random, unauthorized act of an employee—does not apply 'where a deprivation occurs pursuant to an established state procedure,' because in those circumstances, a 'predeprivation process is ordinarily feasible'); ***Lane v. City of Pickerington***, 588 F.App'x 456, 466 (6th Cir. 2014) ("This court has applied *Parratt's* rule inconsistently in two 'parallel but contradictory' lines of authority. *Mitchell*, 375 F.3d at 482. We conclude, as we did in *Mitchell* . . . that *Parratt* has no application here because Lane was not deprived of his constitutionally protected property interest due to a random or unauthorized act; Defendants had the opportunity to provide Lane pre-deprivation process pursuant to an established procedure-and indeed did provide a pre-termination hearing, albeit a constitutionally inadequate

one."); ***Catron v. City of St. Petersburg***, 658 F.3d 1260, 1266-69 (11th Cir. 2011) ("Plaintiffs have sufficiently alleged that the City has deprived them of liberty interests in two ways, by 1) enforcing the trespass ordinance to prohibit them from having access to a specific park (Williams Park) as ordinarily used by the public; and 2) carrying out a policy of enforcing the ordinance to prohibit their use of all parks in the City open to the public generally. These allegations satisfy the first element for a procedural due process claim. . . .The ease with which trespass warnings may be issued is particularly problematic here because the trespass ordinance provides no procedural means for a warning-recipient to challenge the warning. An evident process for such challenges has significant value in avoiding mistakes. Even if it is impractical for the City to provide a pre-warning hearing to 'assure that there are reasonable grounds to support' the trespass warning, the City must provide some post-deprivation procedure to satisfy the requirements of the Due Process Clause. . . .[A]s the trespass ordinance is currently written, Catron has been provided by the City with no way to contest the trespass warning or at least the scope of the warning. Catron's only options, it seems, are to relinquish his right to visit city parks altogether or to violate the trespass warning and subject himself to a criminal prosecution for trespass by a different sovereign (the state) or to bring a court action challenging the entire scheme. We conclude that Plaintiffs have stated a claim, facially and as-applied, under the Due Process Clause: Section 20-30 lacks constitutionally adequate procedural protections as the ordinance is presently written and allegedly enforced."); ***Brentwood Academy v. Tennessee Secondary School Athletic Association***, 442 F.3d 410, 433, 434 (6th Cir. 2006) (on remand) ("Under circuit precedent, a § 1983 plaintiff can prevail on a procedural due process claim by demonstrating that the property deprivation resulted from either: (1) an 'established state procedure that itself violates due process rights,' or (2) a 'random and unauthorized act' causing a loss for which available state remedies would not adequately compensate the plaintiff. . . A plaintiff alleging the first element of this test would not need to demonstrate the inadequacy of state remedies. . . If the plaintiff pursues the second line of argument, he must navigate the rule of *Parratt v. Taylor*, 451 U.S. 527, 539 (1981), which holds that a state may satisfy procedural due process with only an adequate postdeprivation procedure when the state action was 'random and unauthorized.'. . In *Zinermon*, . . .the Supreme Court narrowed the *Parratt* rule to apply only to those situations where predeprivation process would have been impossible or impractical. In this context, an 'unauthorized' state action means that the official in question did not have the power or authority to effect the deprivation, not that the act was contrary to law. . . Whether seen as an attack on an established state procedure or as an attack on a 'random and unauthorized' act, Brentwood's claim is not subject to the *Parratt* rule, as it clearly was not 'impossible' for the TSSAA to grant a predeprivation hearing . . . to Brentwood on these facts. . . . It seems clear that Carter and the Board had the authority to impose the penalties against Brentwood; their acts were not 'random and unauthorized.' If, as is more likely, the TSSAA's action was the result of an 'established state procedure,' then the question becomes whether that procedure violated Brentwood's due process rights."); ***Silberstein v. City of Dayton***, 440 F.3d 306, 315, 316 (6th Cir. 2006) ("Appellants do not dispute that the Civil Service Commission denied Silberstein an opportunity to be heard, but argue that this did not constitute a due process violation because an adequate state corrective judicial process existed. Appellants' conclusion is in error. The rule requiring a § 1983 plaintiff to show the inadequacy of a state's

post-deprivation corrective proceedings, articulated by the Supreme Court in *Parratt v. Taylor*, 451 U.S. 527 (1981), applies only where the deprivation complained of is random and unpredictable, such that the state cannot feasibly provide a predeprivation hearing. . . . Silberstein was fired by an official action of the city's Civil Service Board after lengthy deliberation and consultation with attorneys. This was not a random, unauthorized deprivation, and Silberstein need not show that the state's post-deprivation corrective procedures were inadequate in order to allege adequately a deprivation of her due process rights."); ***Allen v. Thomas,*** 388 F.3d 147, 149 (5th Cir. 2004) ("Because the undisputed facts reveal that Allen's word processor and radio were confiscated under the authority of a prison administrative directive, the confiscation was not a random, unauthorized act by a state employee. . . The district court erred in applying the *Parratt/Hudson* doctrine."); ***Mitchell v. Fankhauser***, 375 F.3d 477, 483, 484 (6th Cir. 2004) ("Despite the Supreme Court's and this court's pronouncements that *Parratt* applies only to random, unauthorized deprivations of property, this court has occasionally applied *Parratt*'s requirement of pleading the inadequacy of state-court remedies more broadly [citing cases]. . . . On the other hand, other decisions of this court, in addition to *Carter* and *Watts*, have recognized the distinction between random, unauthorized acts and established state procedures. [citing cases] We are therefore faced with deciding between multiple precedents on both sides − those that apply *Parratt* only to random, unauthorized deprivations of property and those that apply *Parratt* more broadly. Our analysis convinces us that the correct line of authority in the Sixth Circuit is that of *Watts*, *Macene*, *Carter*, and *Moore*. In the present case, Mitchell was not deprived of his property interest in his job pursuant to a random or unauthorized act. Mitchell, therefore, 'was required neither to plead nor prove the inadequacy of post-termination state-law remedies in order to prevail.'. . We therefore decline to apply *Parratt* and *Vicory* to the present case."); ***Higgins v. Beyer,*** 293 F.3d 683, 694 (3d Cir. 2002) (Under *Zinermon*, prisoner was entitled to predeprivation notice and hearing before deduction of funds from his inmate account by prison officials Aacting under the authority of an established state procedure for seizing a prisoner's funds to satisfy court-ordered fines."); ***Zimmerman v. City of Oakland,*** 255 F.3d 734, 739 (9th Cir. 2001) (*Parratt* and *Hudson* did not foreclose a due process challenge to the adequacy of the procedures under which the removal of nuisance automobiles was carried out); ***Stauch v. City of Columbia Heights***, 212 F.3d 425, 432, 433 (8th Cir. 2000) ("The existence of state post-deprivation remedies has been deemed to satisfy procedural due process in situations where the alleged constitutional deprivation was caused by random and unauthorized action. . . The present action does not fall within that paradigm of cases. The actions taken by the City were neither random nor unauthorized and it was certainly feasible for the City to have provided the Stauches with an opportunity to appeal the determination that their units were unlicensed."); ***Moore v. Bd. of Educ. of Johnson City Schools***, 134 F.3d 781, 785 (6th Cir. 1998) ("[T]he district court erred in applying *Parratt* to the present case. Moore was required neither to plead nor prove the inadequacy of post-termination state law remedies in order to prevail. Instead, because the termination hearing conducted by Simmons was neither a random nor unauthorized event, but rather was done pursuant to established procedures, we must 'evaluate the challenged procedures directly to ensure that they comport with due process.'"); ***Seals v. Edwards***, 985 F.2d 561 (6th Cir. 1993) (Table, Text in Westlaw) ("When there is an established state procedure, which is followed, . . . the fact that one decision maker

somewhere in the process allegedly goes astray, does not turn what occurred into a random and unauthorized act. . . . Since a plaintiff always alleges some act of wrongdoing, if wrongdoing is made to equate, *ipso facto*, with random and unauthorized conduct, . . . then every plaintiff would be forced to plead himself out of court in an effort to state a claim."); ***Brotherton v. Cleveland***, 923 F.2d 477, 482 (6th Cir. 1991) (removal of deceased's corneas was pursuant to established state procedure and necessitated predeprivation process); ***Otero v. Dart***, No. 12 C 3148, 2016 WL 74667, at *9 (N.D. Ill. Jan. 7, 2016) ("Because Plaintiff's [procedural due process] claim is based on Defendant's policies and practices, the *Parratt* doctrine does not apply, and thus Defendant's argument is without merit. . . . Plaintiff does not explain what type of notice was required or the nature of the process he was due under the circumstances – nor has Plaintiff cited legal authority lending guidance to this question. After careful research, the Court has not found any legal authority concerning what pre-deprivation process would be appropriate for Plaintiff's overdetention claim – most likely because the protections under substantive due process are a better fit under the circumstances. . . . To clarify, Plaintiff's claim essentially rests on the premise that no matter how much process Defendant could or would provide, the substantive component of due process bars Defendant from unreasonably detaining him after his acquittal. . . In sum, construing the evidence and all reasonable inferences in Plaintiff's favor, he has failed to submit evidence to establish every element that is essential to his procedural due process claim for which he will bear the burden of proof at trial. . .As such, the Court grants Defendant's motion regarding Plaintiff's procedural due process claim."); ***Allen v. Leis,*** 154 F. Supp.2d 1240, 1263, 1267 (S.D. Ohio. 2001) ("Where state actors are following established state procedures that result in the deprivation of an individual's property, the existence of post- deprivation remedies are ordinarily irrelevant and the requirements of prior notice and an opportunity to be heard apply."); ***Leslie v. Lacy***, 91 F. Supp.2d 1182, 1188 (S.D. Ohio 2000) ("Where state actors are following established state procedures that result in the deprivation of an individual's property, the existence of postdeprivation remedies is ordinarily irrelevant and the requirements of prior notice and opportunity to be heard apply, although a postdeprivation hearing may be adequate where a predeprivation hearing is impossible or impracticable, or there is a necessity for quick action."); ***Burton v. Sheahan***, 68 F. Supp.2d 974, 982 (N.D. Ill. 1999) ("[T]he Supreme Court in *Parratt* held that there is no liability for a deprivation of procedural due process if a state remedy exists which adequately supplies the procedures that are necessary to remedy the deprivation. However, *Parratt* does not apply, and a plaintiff need not prove that state law remedies are inadequate, if the harm resulted from an official governmental policy or if the plaintiff is objecting to the failure to provide an adequate post-deprivation remedy.").

But see ***Hughlett v. Romer-Sensky***, 497 F.3d 557, 567, 568 (6th Cir. 2006) ("Plaintiffs argue that the district court misread *Hudson*, because a 'postdeprivation state remedy does not satisfy due process where the property deprivation is effected pursuant to an established procedure.' . . Plaintiffs neglect to consider *Hudson's* instruction that a postdeprivation procedure may remedy 'either the necessity of quick action by the State *or the impracticality of providing any meaningful predeprivation process*. . . .' The district court properly found that a predeprivation notice and hearing requirement would be impractical for this type of administrative

decision.Further, Ohio has established an administrative review process for child support recipients who want to contest the amount or the manner of delivery of their support payments. . . Under the code, a custodial parent may request a hearing if payments have not been properly distributed, or are not issued in a timely fashion. . . The review procedure includes 'the right to an administrative appeal from the decision of the hearing officer and the right to judicial review of the decision rendered in the administrative appeal.'. . The plaintiffs have failed to show that this postdeprivation remedy is inadequate to address their claims.The district court did not err when it found that plaintiffs failed to allege facts sufficient to show that they were entitled to predeprivation notice and hearing, or that postdeprivation remedies supplied by the State are inadequate."); ***Carcamo v. Miami-Dade County***, 375 F.3d 1104, 1106 n.4 (11th Cir. 2004) ("We also note that Appellant is mistaken to assume that the existence of a government 'policy or practice' necessarily bars the application of *Parratt-Hudson*. Rather, post-deprivation remedies may be acceptable even in contexts involving a state policy or procedure. In *Rittenhouse v. DeKalb County*, 764 F.2d 1451 (11th Cir.1985), we concluded that 'the rationale underlying the "established state procedure" exception is that where a deprivation occurs pursuant to an established state procedure, pre-deprivation process is ordinarily feasible.' . .Thus, the acceptability of post-deprivation process turns on the feasibility of pre-deprivation process, not the existence of a policy or practice."); ***Tillman v. Lebanon County Correctional Facility***, 221 F.3d 410, 421 n.12 (3d Cir. 2000) ("We recognize that some cases hold that *Parratt* does not apply where an ' Aestablished state procedure' ' destroys an entitlement without proper procedural safeguards. . . .In such a case, a predeprivation hearing is still required. . . However, the Supreme Court has since noted in an ex parte forfeiture case, i.e., one that involves established state procedures, that in 'extraordinary situations,' predeprivation notice and hearings are unnecessary. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). The case before us presents such an 'extraordinary situation.'"); ***Harris v. City of Akron***, 20 F.3d 1396, 1404-05 (6th Cir. 1994) ("We conclude that the district court correctly granted summary judgment on the plaintiff's procedural due process claim. Although the court incorrectly analyzed the issue under the 'random and unauthorized act' *Parratt* exception, we believe judgment for the defendants was proper under the other *Parratt* rationale. The defendants were faced with a situation that required quick action. The non-emergency procedure for notifying the owner of a building would not have removed the threat to public safety and health perceived by the responsible officials. The state provided a meaningful postdeprivation process to determine the propriety of the demolition decision. Under these circumstances the requirements of procedural due process were satisfied.").

It is also generally settled that ***Parratt/Hudson*** is inapposite where plaintiff is claiming the violation of a constitutional right afforded specific protection by the Bill of Rights or where plaintiff is alleging a violation of substantive due process. *See, e.g.,* ***Zinermon v. Burch***, 110 S. Ct. 975, 983 (1990) (dictum) ("As to these two types of claims....[a] plaintiff may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights."); ***Bledsoe v. Carreno***, 53 F.4th 589, 602-06 (10th Cir. 2022) ("The district court held that Counts I, III, and IV should be allowed to proceed. . . to the extent they

alleged *substantive* due process violations because the court held the *Parratt* abstention doctrine does not apply in the substantive due process context. Appellants challenge that conclusion on appeal. They assert that we should extend *Parratt* to substantive due process claims and thus should 'abstain' from deciding Bledsoe's substantive due process claims as well because, like procedural due process claims, Kansas's malicious prosecution and wrongful conviction torts can adequately compensate Bledsoe for any harm he suffered because of the violation of his substantive due process rights, as well as the procedural due process rights. . . .[T]he application of *Parratt* to substantive due process claims is an 'open question' in our jurisprudence. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1079-81 (10th Cir. 2015). Today, we resolve that question and join other circuits in holding that *Parratt* abstention does not apply to § 1983 substantive due process claims. . . . [A]ll federal courts of appeals to have considered this question have held that *Parratt* abstention does not extend to substantive due process claims. [citing cases] Though not binding, we find their unanimous reasoning persuasive. Against the substantial weight of authority in *Zinermon* and opinions from our sister circuits, Appellants urge the extension of *Parratt* to substantive due process claims. They rely almost exclusively on concurring opinions by then-Judge Gorsuch in two Tenth Circuit cases. *See Browder*, 787 F.3d at 1085 (Gorsuch, J., concurring); *Cordova v. City of Albuquerque*, 816 F.3d 645, 665 (10th Cir. 2016) (Gorsuch, J., concurring), *abrogated on other grounds by Thompson v. Clark*, —— U.S. ——, 142 S. Ct. 1332, 1335–36, 212 L.Ed.2d 382 (2022). [court discusses] Where, as here, the alleged due process violations were concededly substantive in nature, we hold that *Parratt* does not apply and a plaintiff may pursue a § 1983 action in federal court regardless of potential state-law tort remedies."); ***Dean for and on behalf of Harkness v. McKinney***, 976 F.3d 407, 420-21 (4th Cir. 2020) ("*Parratt-Hudson* doctrine does not bar the plaintiff's substantive due process claim. In *Zinermon v. Burch*, . . . the Supreme Court limited the application of the doctrine to procedural due process claims for which the state provides an adequate post-deprivation remedy. As the Court explained, 'the Due Process clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them."'. . In such cases, '[a] plaintiff ... may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.'. . .Our Circuit has adopted the Supreme Court's reasoning, holding that

[S]ome abuses of governmental power may be so egregious or outrageous that no state post-deprivation remedy can adequately serve to preserve a person's constitutional guarantees of freedom from such conduct. Thus, conduct that 'shocks the conscience' ... violates substantive guarantees of the Due Process Clause independent of the absence or presence of post-deprivation remedies available through state tort law.

Temkin, 945 F.2d at 720. . . Here, the plaintiff has made only a substantive due process claim. Such a claim focuses on egregious state conduct rather than unfair procedures. McKinney's argument fails because the availability and adequacy of a post-deprivation state remedy is irrelevant to the analysis for a substantive due process claim. And according to *Zinermon*, the availability of a state law remedy for McKinney's egregious conduct does not impact the plaintiff's § 1983 suit. . . . This Court, relying upon the body of well-reasoned Fourth Circuit precedent and persuasive authority, declines to extend the *Parratt-Hudson* doctrine to the plaintiff's substantive due process claim.

Such an extension would be inconsistent with the jurisprudence that recognizes the fundamental differences between substantive and procedural due process claims. Accordingly, we find that the plaintiff's Fourteenth Amendment substantive due process claim against McKinney is not barred by the *Parratt-Hudson* doctrine."); ***Armstrong v. Daily***, 786 F.3d 529, 539-43, 545 (7th Cir. 2015) ("The defendants argue that Armstrong's claims based on the loss or destruction of exculpatory evidence are procedural due process claims, and procedural due process claims are governed by *Parratt*. . . But no court has applied *Parratt* to claims that the government violated a defendant's right of access to exculpatory evidence. Armstrong's claims do not seek notice and a hearing—like the procedural due process claims addressed in *Parratt* and its progeny—but rather seek to vindicate rights of fundamental fairness in criminal proceedings. . . . No court has accepted the defendants' argument that the *Parratt* analysis applies when the plaintiff is alleging that wrongful conduct corrupted fair fact-finding in the criminal justice system. We will not be the first. . . . When *Parratt* and its progeny are understood properly, it becomes clear that Armstrong can proceed on his claim because the defendants' actions were not 'random and unauthorized' within the meaning of *Parratt* and that state tort law does not provide an adequate remedy. . . . *Parratt* cannot apply simply because the defendant official's actions were prohibited by state law and subject to a tort remedy. A closer reading of *Parratt*, *Hudson*, and later cases shows that the Supreme Court never intended *Parratt* to reach as broadly as the defendants argue. The Court's decisions make clear that *Parratt* is limited in three ways: first, 'random and unauthorized' conduct means unforeseeable misconduct that cannot practicably be preceded by a hearing; second, misconduct that is legally enabled by a state's broad delegation of power is not 'random and unauthorized'; and third, an official's subversion of established state procedures is not 'random and unauthorized' misconduct. . . . The same reasoning applies to Armstrong's claim against lab technicians Daily and Campbell since he alleges that their actions caused him to spend an additional three years in prison, which were also the product of established state procedures."); ***McCullah v. Gadert,*** 344 F.3d 655, 660 (7th Cir. 2003) ("In order to evaluate McCullah's complaint, we must now decide whether the *Parratt* rule must be applied to foreclose all constitutional claims for which there is a parallel remedy under state law, even if they are brought under a textually specific part of the Constitution, or if it applies only in the due process area. Our sister circuits have disagreed about the answer to this question. At least one circuit appears to have adopted a broad reading of *Parratt.* See *Reid v. New Hampshire*, 56 F.3d 332, 341 (1st Cir.1995) (holding that the *Parratt* rule forecloses a claim of false arrest under the Fourth Amendment because of the availability of a parallel cause of action under state law). Three other circuits take a narrower approach. See *Taylor v. Meacham*, 82 F.3d 1556, 1560 (10th Cir.1996); *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1303 (5th Cir.1995); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 114-15 (2d Cir.1995). We agree with the latter group. A more expansive version of the *Parratt* rule would be directly contrary to the teaching of *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), that '[i]n some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right.' *Id.* at 258, 98 S.Ct. 1042. The Court has never held that § 1983 is available only for cases with no state analog; indeed, it has specifically underscored that the contrary is true. . . Furthermore, the core of *Parratt*'s holding is that a post- deprivation hearing (in a court) is

sometimes all the process that is 'due'; in contrast, no amount of process can support an arrest without probable cause. *Parratt* has nothing to say about a Fourth Amendment claim.").

Accord ***Daniels v. Williams***, 474 U.S. 327, 338 (1986) (Stevens, J., concurring in judgments). *See also* ***Soldal v. County of Cook***, 923 F.2d 1241, 1249 (7th Cir. 1991) (panel opinion) ("[A] constitutional right that is not simply the elementary due process right to notice and a hearing is actionable under section 1983 regardless of the adequacy of the plaintiff's remedies under state law."), *reheard en banc*, ***Soldal v. County of Cook***, 942 F.2d 1073 (7th Cir. 1991) (*en banc*), *reversed on other grounds*, 113 S. Ct. 538 (1993).

But see ***Guertin v. Michigan***, 924 F.3d 309, 313-14 (6th Cir. 2019) (Sutton, J., concurring in the denial of rehearing en banc *cert. denied sub nom.* ***City of Flint v. Guertin***, 140 S. Ct. 933 (2020) *and cert. denied sub nom.* ***Busch v. Guertin***, 140 S. Ct. 933 (2020) ("A similar case already exists in state court. Based on the same events, several individuals filed a putative class action in the Michigan courts against most of the same defendants under the substantive due process guarantee of the Michigan Constitution. . . The Michigan Court of Appeals denied the defendants' motions for summary disposition as to the state law due process bodily integrity claims, and that case continues to wind its way through the Michigan court system. . . Would it not make sense for the federal courts to wait and see what relief the Michigan Constitution provides before determining whether the state defendants violated the Due Process Clause of the U.S. Constitution? Before deciding whether someone may sue a State for depriving him of property or liberty or life without due process, the federal courts first consider the judicial process the State provides him to remedy his alleged injuries. . . For that reason, if the underlying state and federal claims in today's case turned on process in its conventional sense, the federal courts presumably would stay their hand to determine what process the State provided. If that approach makes sense in the context of *procedural* due process, it makes doubly good sense in the context of *substantive* due process. Otherwise, we give claimants more leeway when they raise the most inventive of the two claims, rewarding them for asking us to do more of what we should be doing less. This is not a new concept. For some time, the federal courts have tried to avoid federal constitutional questions when they can. . . One way to further that goal is to learn whether the substantive due process protections of the Michigan Constitution or any other state laws redress the plaintiffs' injuries. Because the 'open-ended' nature of substantive due process claims lacks 'guideposts for responsible decisionmaking,'. . . we should welcome input from the Michigan courts about what process, substantive or otherwise, is due under state law. Better under these circumstances, it seems to me, to hold the federal substantive due process claims in abeyance—and avoid prematurely creating new federal constitutional tort regimes—until the plaintiffs have had a chance to vindicate their rights in state court. . .All of this by the way will prove beneficial whether the plaintiffs win or lose in state court. If they win, there will be less, perhaps nothing at all, for the federal courts to remedy under federal substantive due process. If they lose, the state courts' explanation may inform the federal claims."); ***Browder v. City of Albuquerque***, 787 F.3d 1076, 1083-86 (10th Cir. 2015) (Gorsuch, J., concurring) ("We shouldn't be surprised that the common law usually supplies a sound remedy when life, liberty, and property are taken. After all, the whole point of the common

law as it evolved through the centuries was to vindicate fundamental rights like these. That's the insight of *Parratt v. Taylor,* 451 U.S. 527 (1981). While 42 U.S.C. § 1983 authorizes federal courts to remedy constitutional violations by state officials acting under color of state law, and while *Monroe v. Pape,* 365 U.S. 167 (1961), has read this authorization broadly, the authority to remedy a claim doesn't always mean the duty to do so. Federal courts often abstain when they otherwise might proceed out of respect for comity and federalism and the absence of any compelling need for their services. . . *Parratt* explains that this familiar principle applies in the § 1983 context just as it does elsewhere. Often, after all, there's no need to turn federal courts into common law courts and imagine a whole new tort jurisprudence under the rubric of § 1983 and the Constitution in order to vindicate fundamental rights when we have state courts ready and willing to vindicate those same rights using a deep and rich common law that's been battle tested through the centuries. . . Of course, if a plaintiff can establish that state law won't remedy a constitutional injury *Parratt* recognizes that the doors of the federal courthouse should remain open to him. . . . But when a rogue state official acting in defiance of state law causes a constitutional injury there's every reason to suppose an established state tort law remedy would do as much as a novel federal remedy might and no reason exists to duplicate the effort. . .Our case highlights the point. We face a traffic accident, a deeply tragic traffic accident, but also exactly the sort of thing state courts have long and ably redressed. A state court could provide relief using established tort principles (e.g., negligence) and there's little reason to doubt it would—after all, the officer's actions violated state law and he's even been criminally charged. Or a federal court might provide the same relief using primordial constitutional tort principles that must be expounded more or less on the fly—by asking what's 'arbitrary' or what 'shocks the judicial conscience.'. . .To entertain cases like this in federal court as a matter of routine risks inviting precisely the sort of regime the Supreme Court has long warned against—one in which 'any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation' in federal court and thus 'make of the Fourteenth Amendment a font of tort law' needlessly superimposed on perfectly adequate existing state tort law systems. . . True, language in *Zinermon v. Burch,* 494 U.S. 113 (1990), suggests that *Parratt's* abstention principle may apply to procedural and not substantive due process claims like the one in this case. . . But, respectfully, the suggestion along these lines came in dicta and several reasons exist to doubt it. For starters, the distinction between procedural and substantive due process isn't found in the constitutional text and is famously malleable in any event; one might wonder whether a boundary like that offers a stable foundation on which to rest such a weighty distinction. . . One might ask too whether *Parratt* itself might be better understood as a substantive rather than a procedural due process case. . .Then there's the fact the Supreme Court and others have already applied *Parratt* to cases involving the deprivation of substantive rights. *See, e.g., Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 195 (1985); *Newsome v. McCabe,* 256 F.3d 747, 750–51 (7th Cir.2001); *Schaper v. City of Huntsville,* 813 F.2d 709, 718 (5th Cir.1987). And the fact the Supreme Court has repeatedly admonished courts to proceed with special caution when handling substantive due process claims. . . Finally, after *Zinermon* came *Lewis,* a decision in which the Court specifically reserved the question whether *Parratt* applies to substantive due process claims, confirming that the issue remains a live and open one. . . Indeed, it's hard to identify a principled justification for extending *Parratt*

piecemeal to procedural due process claims rather than wholesale to all due process claims. *Zinermon* observed that a substantive due process violation is complete upon a deprivation while a procedural due process violation requires us to wait and see what process the state provides. But it's unclear why that distinction makes a difference when *Parratt's* logic cuts across both kinds of cases, asking in all events whether there's a need for federal intervention or whether state remedial processes might do just as well. Losing a child is a nightmare of the darkest sort and the suffering the Browder family has had to endure is beyond words. But there's little reason to think that state courts would fail to fulfill their oaths to see justice done in this case, at least as well as it can ever be done in a case so tragic. To be sure, a *Parratt* argument wasn't properly presented in this case and so we rightly hold it waived in this instance. But when the issue is raised in appropriate future cases, I believe we would do well to consider closely its invitation to restore the balance between state and federal courts. For we should be able to expect both that justice will be done in cases like this one and that it will be done while exhibiting the sort of cooperative federalism that has traditionally defined our law.")

See also ***Marquez v. Garnett***, 567 F. App'x 214, 217, 218 (5th Cir. 2014) ("Stripped of multiple conclusory statements in the amended complaint, the allegation here is that the student was sliding Garnett's compact disc across a table during class time and Garnett reacted. As in *Fee* and *Moore,* the setting is pedagogical, and C.M.'s action was unwarranted. The inference must be that Garnett acted to discipline C.M., even if she may have overreacted. . . Because Marquez's pleadings demonstrate corporal punishment rather than a mere attack, the only remaining question is the sufficiency of state remedies. The parties do not dispute that, as we found in *Fee* and *Moore,* Texas provides criminal and civil remedies to parents like Marquez. . . In this case, Garnett was charged in state court with assault causing bodily injury, was placed on administrative leave, and was required to surrender her teaching certificate in response to her conduct. Marquez has not shown that C.M.'s substantive due process rights were violated . . .Fifth Circuit law squarely forecloses Marquez's claim against Garnett. Accordingly, she was entitled to qualified immunity."); ***Moore v. Willis Independent School District***, 233 F.3d 871, 874, 875 (5th Cir. 2000) ("We have held consistently that, as long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment, whether it be against the school system, administrators, or the employee who is alleged to have inflicted the damage. . . . By now, every school teacher and coach must know that inflicting pain on a student through, inter alia, unreasonably excessive exercise, violates that student's constitutional right to bodily integrity by posing a risk of significant injury. This right is not implicated, however, when, as in this case, the conduct complained of is corporal punishment − even unreasonably excessive corporal punishment − intended as a disciplinary measure."); ***United of Omaha Life Ins. Co. v. Solomon***, 960 F.2d 31, 35-39 (6th Cir. 1992) (*Parratt* applied to substantive due process claim where Michigan law provided adequate postdeprivation remedy); ***Fee v. Herndon***, 900 F.2d 804, 810 (5th Cir. 1990), *cert. denied*, 498 U.S. 908 (1990) (in case involving corporal punishment of special education student, no substantive due process claim was stated where adequate post-punishment remedy was available under state law); ***Polenz v. Parrott***, 883 F.2d 551, 558 (7th Cir. 1989) (substantive due process claim based on deprivation of property

interest is cognizable where plaintiff claims either violation of some other substantive constitutional right or inadequacy of state law remedies); ***Weimer v. Amen***, 870 F.2d 1400, 1406 (8th Cir. 1989) ("In situations where procedural due process claims alleging property deprivation are prohibited in section 1983 actions by ***Parratt***, claims based on substantive due process should be barred as well."); ***Mann v. City of Tucson***, 782 F.2d 790, 798 (9th Cir. 1986) (Sneed, J., concurring) (***Parratt*** should apply to "all unforeseeable deprivations of life, liberty, and property as well as all unplanned violations of 'substantive' due process rights."); *See also* ***Peterson v. Baker***, 504 F.3d 1331, 1338 (11th Cir. 2007) ("Thus, based on the totality of the circumstances as observed in the light most favorable to Plaintiff, we conclude that the student's punishment was not obviously excessive. . . Our conclusion is not out of line with case law from this circuit as well as other circuits. In short, the standard is shock the conscience and totality of the circumstances; and when some reason exists for the use of force, constitutional violations do not arise unless the teacher inflicts serious physical injury upon the student."). *But see* ***Saldana v. Angleton ISD***, No. 3:16-CV-159, 2017 WL 1498066, at *2–3 (S.D. Tex. Apr. 25, 2017) ("If Saldana's pleadings cannot be said to allege anything more than excessive corporal punishment, and so long as the State of Texas affords 'adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions,' her claims would be subject to dismissal under Fifth Circuit precedent. *See, e.g., Fee v. Herndon,* 900 F.2d 804, 807-08 (5th Cir. 1990); *Flores v. School Board of DeSoto Parish,* 116 Fed. App'x. 504, 509 (5th Cir. 2004) ("[t]his circuit does not permit public school students to bring claims for excessive corporal punishment as substantive due process violations under § 1983 if the State provides an adequate remedy"); *Marquez v. Garnett,* 567 Fed. App'x. 214, 217 (5th Cir. 2014). However, Saldana's allegations plausibly plead acts by a school district employee that could be either 'arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning,' or a 'random, malicious, and unprovoked attack.' Saldana describes actions that can be plausibly described as 'lack[ing] any pedagogical justification.' *Marquez,* 567 Fed. App'x at 217; *see also Jefferson v. Ysleta Independent School District,* 817 F.2d 303, 304 (5th Cir. 1987) (teacher tied a second-grade student to a chair using a jump rope over the course of two school days without any punishment or disciplinary justification.). Taking all of Saldana's well-pleaded allegations as true and drawing all inferences in her favor—as is required at this stage of the litigation—the Court cannot conclude as a matter of law that Saldana has failed to state a constitutional violation. Further, under the authorities cited above, Saldana sufficiently pleads that Hernandez's alleged actions would have violated clearly established law at the time—*i.e.,* that a reasonable school district employee would have understood that a school bus monitor's repeatedly striking a disabled, nonverbal student, without any provocation or justification, violated the child's substantive due process rights and that such conduct was objectively unreasonable in light of the clearly established law at the time. [citing cases]")

Compare ***T.O. v. Fort Bend ISD***, 2 F.4th 407, 413-15 (5th Cir. 2021) ("The Fourth Amendment is applicable in a school context. In this circuit, however, claims involving corporal punishment are generally analyzed under the Fourteenth Amendment. It is well-established in this circuit that 'corporal punishment in public schools implicates a constitutionally protected liberty

interest' under the Fourteenth Amendment. But, 'as long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment.' This rule was developed in *Ingraham v. Wright* and applied in *Fee v. Herndon*. It recognizes that, while 'corporal punishment in public schools "is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning,"' when the state provides alternative post-punishment remedies, the state has 'provided all the process constitutionally due' and thus cannot 'act "arbitrarily," a necessary predicate for substantive due process relief.' Based on the foregoing, we have consistently dismissed substantive due process claims when the offending conduct occurred in a disciplinary, pedagogical setting. [citing examples] In contrast, we have allowed substantive due process claims against public school officials to proceed when the act complained of was 'arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.' [citing examples] We allowed those claims to proceed because, unlike disciplinary measures, these alleged acts were 'unrelated to any legitimate state goal. Fidelity to our precedent requires us to affirm the dismissal of the instant claim of substantive due process. The aide removed T.O. from his classroom for disrupting class, and Abbott used force only after T.O. pushed and hit her. Even if Abbott's intervention were ill-advised and her reaction inappropriate, we cannot say that it did not occur in a disciplinary context. The facts alleged simply do not suggest that T.O. was the subject of a 'random, malicious, and unprovoked attack,' which would justify deviation from *Fee*. To borrow from the unpublished opinion in *Marquez*, in which this court dismissed § 1983 claims brought by an autistic seven-year old whose aide yelled at, grabbed, shoved, and kicked that student for sliding a compact disk across a desk, 'the setting is pedagogical, and [T.O.'s] action was unwarranted.' Furthermore, we have consistently held that Texas law provides adequate, alternative remedies in the form of both criminal and civil liability for school employees whose use of excessive disciplinary force results in injury to students in T.O.'s situation." footnotes omitted) *with* ***T.O. v. Fort Bend ISD***, 2 F.4th 407, 419-21 & n.2 (5th Cir. 2021) (Winer, J., joined by Costa, J., specially concurring) ("Twenty years ago, I called for en banc reconsideration of *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711, and *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990), in which we held that injuries resulting from corporal punishment do not violate the Fourteenth Amendment as long as the forum state provides adequate alternative remedies. . . I write separately today to re-urge the same, hoping that the intervening decades of experience will have persuaded my colleagues that the rule is not only unjust, but is completely out of step with every other circuit court and clear directives from the Supreme Court. At the time I concurred in *Moore*, our circuit was already isolated in its position, with the Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all holding that corporal-punishment-related injuries implicate constitutional rights regardless of the availability of state remedies.[2] **[fn. 2:** Which constitutional rights are violated by excessive corporal punishment is another matter. The Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits analyze such claims under the Fourteenth Amendment and require a student to demonstrate that the punishment 'shocked the conscience' in order to prevail. [collecting cases] The Seventh and Ninth Circuits, in contrast, consider corporal punishment to constitute a 'seizure' and thus ask whether the punishment was objectively

unreasonable under the Fourth Amendment. [citing cases]**]** Since then, the Second Circuit has joined the fray, siding with the majority. . . These cases, like our own, rely on the Supreme Court's acknowledgement in *Ingraham* that 'corporal punishment in public schools implicates a constitutionally protected liberty interest.'. . In *Ingraham*, the Supreme Court held that procedural due process rights were not violated by corporal punishment if alternative remedies existed, but declined to consider whether such punishment implicated substantive due process rights. . . Unlike this court, all other circuit courts have declined to apply *Ingraham*'s procedural due process reasoning to substantive due process claims, instead concluding that under particular circumstances, excessive corporal punishment can violate substantive due process rights (or Fourth Amendment rights), regardless of the availability of alternative remedies. The Supreme Court has yet to be called on to resolve this dramatically lopsided circuit split, but it is only a matter of time. More importantly, subsequent writings by the Supreme Court highlight a major problem in the reasoning we applied in *Ingraham* and *Fee*. Specifically, the Supreme Court has made it clear that the availability of state remedies *does not* replace a cause of action under § 1983. In *Parratt v. Taylor*. . . and *Hudson v. Palmer* . . . the Supreme Court held that an individual deprived of a constitutionally protected property interest by the random and unathorized act of a state actor could not bring procedural due process claims under § 1983 unless the forum state failed to provide adequate post deprivation remedies. Notably, the Supreme Court in *Parratt* approvingly cited its own ruling in *Ingraham*, affirming that *Ingraham*'s reliance on the availability of post-deprivation remedies was properly cabined to procedural due process claims. . . The theory underlying *Parratt*/*Hudson* and their progeny is that a procedural due process violation challenges not the deprivation itself, but merely the procedure (or lack thereof) according to which the deprivation occurs. But a *substantive* due process violation is fundamentally different, insomuch as a § 1983 substantive due process action challenges not the procedure attendant to the deprivation, but the deprivation itself. The Supreme Court stressed this distinction in *Zinermon v. Burch*, . . . in which it explained that, with respect to substantive due process claims, 'the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. A plaintiff ... may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.'. . In other words, while a procedural due process violation may be eliminated by an adequate, state-provided, post-deprivation process, a substantive due process violation occurs at the moment of the deprivation itself, making the availability of alternative remedies wholly irrelevant. *Fee*, decided just three months later, makes no mention of *Zinermon*'s explicit pronouncement, instead citing this circuit's decision in *Ingraham*, among others, for the proposition that the existence of state remedies forecloses any substantive due process violations in an educational context. . . Nevertheless, this circuit has repeatedly recognized that *Parratt*/*Hudson*'s focus on alternative remedies is inapplicable to substantive due process claims in other contexts. . . In other opinions, we have recognized that *Fee*'s reasoning is in conflict with *Zinermon*. . . For the foregoing reasons, I remain firm in my conviction that *Fee* and *Ingraham* were wrongly decided—a conviction that has only grown stronger with the clarity of hindsight and thirty years of watching this rule being applied to the detriment of public school students in Texas, Mississippi, and Louisiana. . . This rule flies in the

face of the many decisions by our colleagues in other circuits and those sitting on the highest court of this land. Let us fix the error before the Supreme Court decides to fix it for us.")

a. Note on *Manuel v. City of Joliet*

Compare ***Manuel v. City of Joliet, Ill.***, 137 S. Ct. 911, 914-22 (2017) ("Petitioner Elijah Manuel was held in jail for some seven weeks after a judge relied on allegedly fabricated evidence to find probable cause that he had committed a crime. The primary question in this case is whether Manuel may bring a claim based on the Fourth Amendment to contest the legality of his pretrial confinement. Our answer follows from settled precedent. The Fourth Amendment, this Court has recognized, establishes 'the standards and procedures' governing pretrial detention. . . And those constitutional protections apply even after the start of 'legal process' in a criminal case—here, that is, after the judge's determination of probable cause. . . Accordingly, we hold today that Manuel may challenge his pretrial detention on the ground that it violated the Fourth Amendment (while we leave all other issues, including one about that claim's timeliness, to the court below). . . . Manuel's complaint alleged that the City violated his Fourth Amendment rights in two ways—first by arresting him at the roadside without any reason, and next by 'detaining him in police custody' for almost seven weeks based entirely on made-up evidence. . . .[T]he Seventh Circuit held that Manuel's complaint, in alleging only a Fourth Amendment violation, rested on the wrong part of the Constitution: A person detained following the onset of legal process could at most (although, the court agreed, *not* in Illinois) challenge his pretrial confinement via the Due Process Clause. . . . The Fourth Amendment protects '[t]he right of the people to be secure in their persons ... against unreasonable ... seizures.' Manuel's complaint seeks just that protection. Government officials, it recounts, detained—which is to say, 'seiz[ed]'—Manuel for 48 days following his arrest. . . .As reflected in *Albright*'s tracking of *Gerstein*'s analysis, pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. . . That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause. . . If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment. For that reason, and contrary to the Seventh Circuit's view, Manuel stated a Fourth Amendment claim when he sought relief not merely for his (pre-legal-process) arrest, but also for his (post-legal-process) pretrial detention. . . . Legal process did not expunge Manuel's Fourth Amendment claim because the process he received failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime. . . .Our holding—that the Fourth Amendment governs a claim for unlawful

pretrial detention even beyond the start of legal process—does not exhaust the disputed legal issues in this case. It addresses only the threshold inquiry in a § 1983 suit, which requires courts to 'identify the specific constitutional right' at issue. . . After pinpointing that right, courts still must determine the elements of, and rules associated with, an action seeking damages for its violation. . . Here, the parties particularly disagree over the accrual date of Manuel's Fourth Amendment claim—that is, the date on which the applicable two-year statute of limitations began to run. The timeliness of Manuel's suit hinges on the choice between their proposed dates. But with the following brief comments, we remand that issue to the court below. In defining the contours and prerequisites of a § 1983 claim, including its rule of accrual, courts are to look first to the common law of torts. . . Sometimes, that review of common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort. . . But not always. . . . In applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue. With these precepts as backdrop, Manuel and the City offer competing views about what accrual rule should govern a § 1983 suit challenging post-legal-process pretrial detention. According to Manuel, that Fourth Amendment claim accrues only upon the dismissal of criminal charges—here, on May 4, 2011, less than two years before he brought his suit. . . Relying on this Court's caselaw, Manuel analogizes his claim to the common-law tort of malicious prosecution. . . An element of that tort is the 'termination of the ... proceeding in favor of the accused'; and accordingly, the statute of limitations does not start to run until that termination takes place. . . Manuel argues that following the same rule in suits like his will avoid 'conflicting resolutions' in § 1983 litigation and criminal proceedings by 'preclud[ing] the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution.'. . In support of Manuel's position, all but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a 'favorable termination' element and so pegged the statute of limitations to the dismissal of the criminal case. . .That means in the great majority of Circuits, Manuel's claim would be timely. The City, however, contends that any such Fourth Amendment claim accrues (and the limitations period starts to run) on the date of the initiation of legal process—here, on March 18, 2011, *more* than two years before Manuel filed suit. . . According to the City, the most analogous tort to Manuel's constitutional claim is not malicious prosecution but false arrest, which accrues when legal process commences. . . And even if malicious prosecution were the better comparison, the City continues, a court should decline to adopt that tort's favorable-termination element and associated accrual rule in adjudicating a § 1983 claim involving pretrial detention. That element, the City argues, 'make[s] little sense' in this context because 'the Fourth Amendment is concerned not with the outcome of a prosecution, but with the legality of searches and seizures.'. . And finally, the City contends that Manuel forfeited an alternative theory for treating his date of release as the date of accrual: to wit, that his pretrial detention 'constitute [d] a continuing Fourth Amendment violation,' each day of which triggered the statute of limitations anew. . . So Manuel, the City concludes, lost the opportunity to recover for his pretrial detention by waiting too long to file suit. We leave consideration of this dispute to the Court of Appeals. . . Because the Seventh Circuit wrongly held that Manuel lacked any Fourth Amendment claim once legal process began, the court never addressed the elements of, or rules applicable to, such a claim. And in particular, the court

never confronted the accrual issue that the parties contest here. . . On remand, the Court of Appeals should decide that question, unless it finds that the City has previously waived its timeliness argument. . . And so too, the court may consider any other still-live issues relating to the contours of Manuel's Fourth Amendment claim for unlawful pretrial detention.") *with* ***Manuel v. City of Joliet, Ill.***, 137 S. Ct. 911, 923-29 (2017) (Alito, J., with whom Thomas, J., joins, dissenting) ("What is perhaps most remarkable about the Court's approach is that it entirely ignores the question that we agreed to decide, *i.e.*, whether a claim of malicious prosecution may be brought under the Fourth Amendment. I would decide that question and hold that the Fourth Amendment cannot house any such claim. If a malicious prosecution claim may be brought under the Constitution, it must find some other home, presumably the Due Process Clause. . . .Although the Court refuses to decide whether Manuel's claim should be so treated, the answer to that question—the one that the Court actually agreed to review—is straightforward: A malicious prosecution claim cannot be based on the Fourth Amendment. . . . [M]alicious prosecution's favorable-termination element makes no sense when the claim is that a seizure violated the Fourth Amendment. The Fourth Amendment, after all, prohibits *all* unreasonable seizures—regardless of whether a prosecution is ever brought or how a prosecution ends. A 'Fourth Amendment wrong' 'is fully accomplished,'. . .when an impermissible seizure occurs. The Amendment is violated and the injury is inflicted no matter what happens in any later proceedings. Our cases concerning Fourth Amendment claims brought under 42 U.S.C. § 1983 prove the point. For example, we have recognized that there is no favorable-termination element for a Fourth Amendment false imprisonment claim. . . An arrestee can file such a claim while his prosecution is pending—and, in at least some situations—will need to do so to ensure that the claim is not time barred. . .. By the same token, an individual may seek damages for pretrial Fourth Amendment violations *even after a valid conviction*. . . . The favorable-termination element is similarly irrelevant to claims like Manuel's. Manuel alleges that he was arrested and held based entirely on falsified evidence. In such a case, it makes no difference whether the prosecution was eventually able to gather and introduce legitimate evidence and to obtain a conviction at trial. The unlawful arrest and detention would still provide grounds for recovery. Accordingly, there is no good reason why the accrual of a claim like Manuel's should have to await a favorable termination of the prosecution. For all these reasons, malicious prosecution is a strikingly inapt 'tort analog[y],'. . . for Fourth Amendment violations. So the answer to the question presented in Manuel's certiorari petition is that the Fourth Amendment does *not* give rise to a malicious prosecution claim, and this means that Manuel's suit is untimely. I would affirm the Seventh Circuit on that basis. . . . Instead of deciding the question on which we granted review, the Court ventures in a different direction. The Court purports to refrain from deciding any issue of timeliness, . . . but the Court's opinion is certain to be read by some to mean that every moment of pretrial confinement without probable cause constitutes a violation of the Fourth Amendment. And if that is so, it would seem to follow that new Fourth Amendment claims continue to accrue as long as the pretrial detention lasts. . . . In my view, a period of detention spanning weeks or months cannot be viewed as one long, continuing seizure, and a pretrial detainee is not 'seized' over and over again as long as he remains in custody. . . Of course, the damages resulting from an unlawful seizure may continue to mount during the period of confinement caused by the seizure, but no new Fourth Amendment seizure claims accrue after

that date. . .Thus, any possible Fourth Amendment claim that Manuel could bring is time barred. . . .The Court reads [*Albright v. Oliver* and *Gerstein v. Pugh*] to mean that the Fourth Amendment can be violated 'when legal process itself goes wrong,'. . . but the accuracy of that interpretation depends on the meaning of 'legal process.' The Court's reading is correct if by 'legal process' the Court means a determination of probable cause at a first or initial appearance. . . When an arrest warrant is obtained, the probable-cause determination is made at that time, and there is thus no need for a repeat determination at the first or initial appearance. But when an arrest is made without a warrant, the arrestee, generally within 48 hours, must be brought before a judicial officer, . . . who then completes the arrest process by making the same determination that would have been made as part of the warrant application process. . . Thus, this appearance is an integral part of the process of taking the arrestee into custody and easily falls within the meaning of the term 'seizure.' But other forms of 'legal process,' for example, a grand jury indictment or a determination of probable cause at a preliminary examination or hearing, do not fit within the concept of a 'seizure,' and the cases cited by the Court do not suggest otherwise. . . .In the end, *Gerstein* stands for the proposition that the Fourth Amendment requires a post-arrest probable cause finding by a neutral magistrate; it says nothing about whether the Fourth Amendment extends beyond that or any other 'legal process.'. . . A well-known medical maxim—'first, do no harm'—is a good rule of thumb for courts as well. The Court's decision today violates that rule by avoiding the question presented in order to *reach* an unnecessary and tricky issue. The resulting opinion will, I fear, inject much confusion into Fourth Amendment law. And it has the potential to do much harm—by dramatically expanding Fourth Amendment liability under § 1983 in a way that does violence to the text of the Fourth Amendment. I respectfully dissent.")

See also ***McDonough v. Smith***, 139 S. Ct. 2149, 2156 n.3 (2019) ("The Second Circuit borrowed the common-law elements of malicious prosecution to govern McDonough's distinct constitutional malicious prosecution claim, which is not before us. . . This Court has not defined the elements of such a § 1983 claim, see *Manuel* v. *Joliet*, 580 U. S. ___, ___–___ (2017) (slip op., at 14–15), and this case provides no occasion to opine on what the elements of a constitutional malicious prosecution action under § 1983 are or how they may or may not differ from those of a fabricated-evidence claim. Similarly, while noting that only McDonough's malicious prosecution claim was barred on absolute-immunity grounds below, we make no statement on whether or how the doctrine of absolute immunity would apply to McDonough's fabricated-evidence claim. Any further consideration of that question is properly addressed by the Second Circuit on remand, subject to ordinary principles of waiver and forfeiture.")

b. Post-*Manuel* Cases:

Supreme Court

Chiaverini v. City of Napoleon, Ohio, 144 S. Ct. 1745, 1749-52 (2024) ("After the District Court granted summary judgment to the officers, the Court of Appeals for the Sixth Circuit affirmed. It did so without addressing either of Chiaverini's arguments about the felony charge's basis. In the

Sixth Circuit's view, there wasclearly probable cause to support the two misdemeanor charges the officers had filed. . . And because that was true, the court thought, the validity of the felony charge did not matter. 'So long as probable cause supports at least one charge against Chiaverini (like his receipt-of-stolen-property violation),' then his malicious-prosecution claim 'based on other charges (like his money-laundering charge) also fail[s].'. . Or said another way, a single valid charge in a proceeding would insulate officers from a Fourth Amendment malicious-prosecution claim relating to any other charges, no matter how baseless. In taking that position, the Sixth Circuit stepped out on its own. Three other Courts of Appeals have held that the presence of probable cause for one charge does not automatically defeat a Fourth Amendment malicious-prosecution claim alleging the absence of probable cause for another charge. See *Williams v. Aguirre*, 965 F.3d 1147, 1159–1162 (CA11 2020); *Johnson v. Knorr*, 477 F.3d 75, 83–85 (CA3 2007); *Posr v. Doherty*, 944 F.2d 91, 100 (CA2 1991). We granted certiorari to resolve that circuit split, 601 U. S. ——, 144 S.Ct. 536, 217 L.Ed.2d 284 (2023), and we now vacate the decision below. . . . The claim Chiaverini brought—a Fourth Amendment malicious-prosecution claim—emerged from that method. The constitutional violation alleged in such a suit is a type of unreasonable seizure—an arrest and detention of a person based on a criminal charge lacking probable cause. In *Thompson v. Clark*, we analogized a suit alleging that Fourth Amendment wrong to the common-law tort of malicious prosecution. . . The 'gravamen' of both, we reasoned, is 'the wrongful initiation of charges without probable cause' (though in the Fourth Amendment context, those charges must cause a seizure as well). . . Because of that similarity, the malicious-prosecution tort can inform a court's understanding of the kind of claim Chiaverini has brought. The question here is whether a Fourth Amendment malicious-prosecution claim may succeed when a baseless charge is accompanied by a valid charge. The Court of Appeals, as described above, answered that question with a categorical no: Even if the felony count lacked probable cause, the Sixth Circuit held, Chiaverini could not recover because the misdemeanor counts were adequately supported. . . But a funny thing happened on the way to this Court. The officers now agree with Chiaverini that there is no such flat bar. . . And the United States as *amicus curiae* also argues that the Sixth Circuit rule is wrong. . . We agree with them all. Consistent with both the Fourth Amendment and traditional common-law practice, courts should evaluate suits like Chiaverini's charge by charge. . . . [E]ven when a detention is justified at the outset, it may become unreasonably prolonged if the reason for it lapses. . . So if an invalid charge—say, one fabricated by police officers—causes a detention either to start or to continue, then the Fourth Amendment is violated. And that is so even when a valid charge has also been brought (although, as soon noted, that charge may well complicate the causation issue, see *infra*, at ——). . . . The parties, almost needless to say, have found a substitute ground of disagreement, involving the element of causation. As noted earlier, a Fourth Amendment malicious-prosecution suit depends not just on an unsupported charge, but on that charge's causing a seizure—like the arrest and three-day detention here. . .The parties and *amicus curiae* offer three different views of how that causation element is met when a valid charge is also in the picture. Chiaverini's test is the easiest to satisfy. On his view, when both valid and invalid charges are brought before a judge for a probable cause determination, the warrant the judge issues is irretrievably tainted; so any detention depending on that warrant is the result of the invalid charge. . . The United States disagrees, arguing for the use

of a but-for test to discover whether the invalid charge, apart from the valid ones, caused a detention. . . The question then would be whether the judge 'in fact [would] have authorized' the detention had the invalid charge not been present. . . And finally, the officers urge a still stricter test. In their view, the question is whether the judge, absent the invalid charge, *could* have legally authorized the detention—regardless of what he really *would* have done. . . But that new dispute is not now fit for our resolution. The test for finding causation is no part of the question we agreed to review. For that reason, it was not fully briefed. And most important, the court below did not address the matter, nor have many others. . . So we leave the causation question in the hands of the Sixth Circuit, as it further considers Chiaverini's Fourth Amendment malicious-prosecution claim. We accordingly vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.")

Chiaverini v. City of Napoleon, Ohio, 144 S. Ct. 1745, 1752-54 (2024) (Thomas, J., with whom Alito, J., joins, dissenting) ("I continue to adhere to my belief that a 'malicious prosecution claim cannot be based on the Fourth Amendment.' *Manuel v. Joliet*, 580 U.S. 357, 378, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017) (ALITO, J., joined by THOMAS, J., dissenting). Accordingly, I would affirm the dismissal of Chiaverini's claim. . . .*Thompson* was wrongly decided. A malicious-prosecution claim bears little resemblance to an unreasonable seizure under the Fourth Amendment. . . . Malicious prosecution is therefore not an appropriate tort analog for a § 1983 claim alleging a seizure in violation of the Fourth Amendment. The Court has never provided a fulsome explanation for why it has concluded otherwise. . . . I would take a far simpler course. Instead of forcing a square peg into a round hole by judging an unreasonable seizure based on the malicious-prosecution tort, I would 'hold that a malicious-prosecution claim may not be brought under the Fourth Amendment.' *Thompson*, 596 U.S., at 60, 142 S.Ct. 1332 (opinion of ALITO, J.). I respectfully dissent.")

Chiaverini v. City of Napoleon, Ohio, 144 S. Ct. 1745, 1754-55 (2024) (Gorsuch, J., dissenting) ("Section 1983 performs vital work by permitting individuals to vindicate their constitutional rights in federal court. But it does not authorize this Court to expound new rights of its own creation. As this Court has put it, § 1983 does not turn the Constitution into a '"'font of tort law.'"'. . Despite that settled rule, the Court today doubles down on a new tort of its own recent invention—what it calls a 'Fourth Amendment malicious-prosecution" cause of action.'. . . [C]onsistent with the common law, many States recognize claims for malicious prosecution. Indeed, the relevant State here (Ohio) permits such a cause of action. Notably, too, unlike the tort this Court seeks to cobble together under the aegis of the Fourth Amendment, Ohio's tort does not require a plaintiff to prove that he was seized. . . Of course, should a State fail to provide a malicious-prosecution claim to secure his procedural due process rights, or a fair forum for entertaining such a claim, a federal court may need to act to vindicate § 1983 and the promise of procedural due process. . . But in many cases (this one included), a State malicious-prosecution claim may be both easier for a plaintiff to prove than anything the Court today provides and sufficient to ensure any process he is due. . . For these reasons, I respectfully dissent.")

First Circuit

See ***Jordan v. Town of Waldoboro***, 943 F.3d 532 (1st Cir. 2019), included *supra*, under post-*McDonough* cases.

Pagán-González v. Moreno, 919 F.3d 582, 590, 599-602 (1st Cir. 2019) ("Because we conclude that the officers' deception invalidated the consent given for their warrantless entry and search, thus rendering those actions unlawful, we must also consider the second prong of the inquiry: whether the defendants are nonetheless entitled to qualified immunity because no reasonable officer would have understood that her conduct violated the Fourth Amendment. . . . The government argues that the defendants in this case are entitled to qualified immunity because there is no consensus on 'what constitutes permissible deception in enforcing the criminal law.'. . Pointing out that the plaintiffs themselves have conceded that 'there is no Supreme Court or First Circuit case forbidding agents from using a ruse,' the government goes on to characterize this case as one in which 'known officers misrepresent[ed] their investigative purpose and claim[ed] to be investigating one crime when they are really investigating another.'. . . But the question on which qualified immunity turns in this case is not whether government agents ever may use a ruse to obtain consent for a warrantless search. Under current law, they clearly may. Hence, plaintiffs' 'concession' that ruses have never been prohibited by the Supreme Court or our court is irrelevant to our inquiry. The government likewise misses the mark in pressing the lack of clarity on the lawfulness of ruses in which officers obtain consent by misrepresenting the crime they are investigating. Importantly, the deception that prompted Pagán-González's consent was not simply a lie about the purpose of the agents' search, but it involved fabrication of an emergency. In other words, the facts as alleged implicate the narrow line of cases described above in Section II.B.2.ii. . . . Hence, the second-prong question we must address is whether the 'robust "consensus of cases"' on fabricated exigent circumstances put the defendants on notice of the unconstitutionality of their particular ruse. . . Even more specifically, we must consider whether a reasonable law enforcement officer would have understood that the false report of a virus threatening computers in Washington, D.C., conveyed to Pagán-González at his home by a force of ten federal agents identified as such, was materially equivalent to the ruses in the fabricated emergency precedent and thus invalidated his consent to search. . . Essentially for the reasons leading us to conclude that Pagán-González's complaint states a claim for an unlawful search under the Fourth Amendment, we also hold that the virus ruse falls squarely within the 'body of relevant case law' in which consent premised on a fabricated emergency was found invalid. . . The clear and primary rationale of this line of precedent is that the consenting individual had no real option to deny access to his home or property because the threat depicted by law enforcement agents was so imminent and consequential that only immediate access could prevent severe harm. In the 'explosion' cases -- involving lies about bombs or a gas leak -- officers used the threat of personal harm and destruction of the individual's residence. . . In the cases involving young girls, the need to find a missing child or the accusation of a rape likewise presented scenarios where time was of the essence. . . No reasonable law enforcement officer could fail to understand the similar compulsion that is inherent in the lie used in this case. . . Indeed, the potential impact of the implied cyberattack carried out in

part via Pagán-González's computer on the nation's capital was broader than the harms presented in the cases described above -- implicating national security -- and, as we have noted, the threat posed by such an attack was a well-known phenomenon by 2013. . . . Here, the severity of the threat was clearly communicated to Pagán-González by the arrival on his doorstep of ten federal agents. Accordingly, every reasonable officer would have understood that the ruse used here, carried out in a manner that signified an emergency, would leave an individual with effectively no choice but to allow law enforcement officers inside his home so they could attempt to alleviate the grave threat. And, in turn, a reasonable officer would have known that thus denying Pagán-González a 'free and unconstrained choice' to forgo the constitutional protection of a warrant was a violation of his Fourth Amendment rights. . . . Defendants are therefore not entitled to qualified immunity on appellant's search-based Fourth Amendment claim. . . . The widespread view that probable cause to arrest or prosecute may be established in civil proceedings with unlawfully seized evidence means that, regardless of our view on the merits of Pagán-González's malicious prosecution claim, the defendants are entitled to qualified immunity on that claim. Put simply, no clearly established law barred the defendants from using evidence obtained in the unlawful search to support probable cause for the criminal charges brought against Pagán-González. In so concluding, we do not reach the first question of the qualified immunity analysis, i.e., whether Pagán-González might in fact have a viable Fourth Amendment claim stemming from his arrest and pre-trial detention. Pagán-González fails to develop fully an argument that he has satisfied the unsupported-by-probable-cause requirement stated in *Hernandez-Cuevas* notwithstanding the 'real,' but unlawfully obtained, evidence of his criminal activity the officers submitted to the magistrate judge. Nor does he suggest an alternative analysis for considering his unlawful detention claim under the Fourth Amendment, such as the forceful theory of relief described by our colleague in his thoughtful concurrence. . . Accordingly, the district court properly dismissed the malicious prosecution claim on the ground that defendants are entitled to qualified immunity.")

Pagán-González v. Moreno, 919 F.3d 582, 602-04, 607-17 (1st Cir. 2019) (Barron, J., concurring) ("I fully agree with the analysis that the majority sets forth to explain why David Pagán-González ("Pagán") states a viable Fourth Amendment claim with respect to the allegedly unconstitutional, warrantless search for which he seeks damages. I do so notwithstanding the defendants' assertion of qualified immunity. I also agree with the majority that Pagán has failed to provide us with a basis for overturning the District Court's order dismissing what he styles as his malicious prosecution claim. In that claim, he seeks damages for the pre-trial detention that he endured and that he contends violated the Fourth Amendment's prohibition against unreasonable seizures. I agree with the majority that Pagán fails to show, with respect to this claim, that he has alleged a violation of clearly established law, and thus I agree that this claim must be dismissed because it cannot survive the second step of the qualified immunity inquiry. The choice to resolve a constitutional tort claim with reference only to the second step of the qualified immunity inquiry -- as we do here with respect to Pagán's claim concerning his detention -- is often a sensible one. There is a risk, however, that such a choice will unduly stunt the development of the law. . . Thus, in what follows, I explain why I am of the view that -- absent qualified immunity's obscuring

screen -- Pagán has stated a viable claim for damages under the Fourth Amendment with respect to his pre-trial detention. . . . In sum, Pagán has clearly alleged that at least one of the agents involved in effecting his detention deliberately or recklessly misled the magistrate judge into thinking that the sole evidence of probable cause -- the computer -- had been acquired through a constitutionally compliant consensual transfer. But, Pagán has plausibly alleged, that agent was in fact aware that this evidence had been acquired through a clearly unconstitutional coercive ruse. The consequence of these allegations is that Pagán's detention-based claim brings to the fore at the first step of the qualified immunity inquiry an important legal question. We must decide, at this first step, whether these allegations about this agent's trickery in securing the arrest warrant describe a constitutional violation, such that Pagán may recover damages for his pre-trial detention. We must decide whether those allegations state such a violation, moreover, notwithstanding that the magistrate judge relied on real evidence of criminal activity to make the probable cause finding that served as the predicate for the issuance of the arrest warrant that resulted in Pagán's seizure and notwithstanding that this real evidence was in fact strong enough to support that probable cause finding. In my view, these allegations do suffice to state such a violation. To explain why, though, I need to wend my way through an unfortunately complex doctrinal thicket. Only then can I adequately explain why, on the one hand, Pagán fails to show that he has alleged a violation of clearly established law, but, on the other, little logic supports the precedential obstacles that potentially stand in the way of his doing so. . . .Pagán's complaint -- unlike the one in *Hernandez-Cuevas* itself, . . . challenges a pre-trial seizure that was based on a finding of probable cause by a magistrate judge that was premised on real and substantial (rather than fabricated) evidence of his criminal activity. To be sure, Pagán does challenge the lawfulness of the means by which law enforcement acquired that evidence -- and the misrepresentations that law enforcement made to the magistrate judge about those means. He does not assert, though, that the evidence itself was fabricated by law enforcement, as was alleged to have been the case in *Hernandez-Cuevas*, . . . or even that the evidence was on its face so patently weak that it was obviously insufficient to make out a finding of probable cause. Nor does Pagán develop any argument as to how, notwithstanding the existence of real and substantial evidence of his criminal conduct, his claim is nonetheless one that clearly satisfies the probable cause element that *Hernandez-Cuevas* appears to have established. . . Nor, moreover, does he even develop any argument as to why his claim does not need to be of that kind in order for it to survive the second step of the qualified immunity inquiry. Thus, I agree with the majority that -- at least given the arguments that Pagán makes to us -- *Hernandez-Cuevas* poses an insuperable obstacle to his claim going forward. Accordingly, I join the majority's holding at step two of the qualified immunity inquiry. . . There has, however, been yet another change in the relevant legal landscape, although this one occurred only after the initiation of Pagán's case. It thus does little to help Pagán meet the 'clearly established law' prong of the qualified immunity inquiry, at least given the arguments that he makes to us. Nevertheless, this change does suggest to me that it would be a mistake to make too much of the obstacle that seemingly stands in the way of Pagán's claim with respect to similar claims that may be brought by others. Thus, in the remainder of my analysis, I explain my reasons for so concluding. . . . The post-*Hernandez-Cuevas* legal change that I have in mind was brought about by the Supreme Court's recent decision in *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911 (2017). An implication that

I draw from *Manuel* is that it does not make sense to continue to treat a Fourth Amendment-based claim for damages resulting from an unlawful seizure effected via pre-trial detention of a criminal defendant as if it were one for 'malicious prosecution.' A further implication that I draw from *Manuel* is that we are not obliged to borrow the elements from the common law -- or substantive due process -- tort of malicious prosecution when considering a Fourth Amendment-based claim that is brought for damages for the harm caused by such pre-trial detention. To support the first of these conclusions, I note that the Supreme Court granted certiorari in *Manuel* on the question of 'whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process *so as to allow a malicious prosecution claim based upon the Fourth Amendment.*'. . Yet, the Court held, 'Manuel may challenge his pretrial detention on the ground that it violated the Fourth Amendment,' even though it occurred 'after the start of "legal process[,]"'. . . without ever referring to such a claim as one for 'malicious prosecution[.]'. . . In addition to the fact that *Manuel* eschews the 'malicious prosecution' label, it also supports the implication that I draw from it that courts need to examine claims such as the one that Pagán brings through the lens of the Fourth Amendment rather than through the lens of the common law tort of malicious prosecution. Although *Manuel* expressly encourages us to 'look first to the common law of torts' to define the elements of a § 1983 claim, it explains that those '[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims, . . . serving "more as a source of inspired examples than of prefabricated components."'. . The Court then proceeds to admonish us to 'closely attend to the values and purposes of the constitutional right at issue' when 'applying, selecting among, or adjusting common law-approaches.'. .Thus, it is with this fresh guidance from *Manuel* in mind that I now consider whether the Fourth Amendment claim that *Manuel* recognizes encompasses a claim like Pagán's. For the reasons set forth below, I conclude that it does. I do so despite the fact that the evidence that the magistrate judge relied upon to issue the arrest warrant that permitted Pagán's seizure was both real and sufficient to establish the requisite probable cause. I do so, as well, even though the analogous evidence of probable cause in *Manuel* allegedly had been fabricated by law enforcement, just as it allegedly had been fabricated in *Hernandez-Cuevas*. . . . As *Manuel* recognizes, a claim of the kind that Pagán brings is necessarily predicated on a challenge to whether the seizure at issue comports with the Fourth Amendment. The focus, therefore, should be on discerning the elements of the constitutional tort that logically relate to the constitutional right -- namely, the Fourth Amendment prohibition against unreasonable seizures -- on which the tort is grounded. . . Such a focus, however, makes it mysterious to me why we would continue to define the elements of the claim as *Hernandez-Cuevas* -- at least at first blush -- presently does. . . I start with the favorable termination element, which *Hernandez-Cuevas* retains from the old, pre-*Albright* constitutional tort of malicious prosecution based on the common law tort. . . I then consider the element concerning probable cause, which *Hernandez-Cuevas* retains from the earlier version of the tort as well. With respect to making favorable termination an element of the Fourth Amendment-based tort, such as the one that Pagán brings, I see little reason to retain that element post-*Manuel*. The termination of the prosecution -- even if unfavorable to the defendant -- cannot render the pre-trial seizure of the defendant constitutional if that seizure was unlawful from the inception. No matter how the prosecution ends -- including if it ends in a conviction -- the defendant still has a right for there to

have been a constitutionally valid basis for the pre-trial detention that he endured. Thus, the favorable termination element -- an artifact of the old, no longer viable substantive due process-based malicious prosecution constitutional tort -- seems to me to be an anachronism. . . I reach the same conclusion with respect to the element concerning probable cause -- at least if we understand that element to require a showing that the magistrate judge's finding of probable cause that grounded the seizure was predicated on evidence that law enforcement fabricated or that was so patently weak that it could not plausibly support a probable cause finding. I add this caveat about whether *Hernandez-Cuevas* actually meant to establish a definitive holding about the requirements of the probable cause element for the following reason. In *Hernandez-Cuevas*, the only evidence of probable cause had -- allegedly -- been fabricated by law enforcement. . . Thus, we had no occasion there to decide -- definitively -- whether the probable cause requirement that we set forth was intended to require the plaintiff to show that there was simply no real evidence sufficient to establish probable cause at all. It was enough to conclude that the claim could go forward when the plaintiff had made that showing by virtue of the allegations concerning fabrication. But, insofar as *Hernandez-Cuevas* does establish a probable cause element of a strict kind, I do not see why it is right to do so given the recent guidance that we have received from *Manuel*. Here, too, my concern is that the element is being defined with reference to the old, now-rejected malicious prosecution constitutional tort, rather than with reference to the Fourth Amendment-based tort, which is the only variant of that tort that remains viable after *Manuel*. There is a logic to requiring the prosecution to have been based on real evidence of a crime at the outset if the constitutional claim targets the bringing of the prosecution itself. There is no similar logic, though, to imposing that requirement if the constitutional claim challenges only the seizure that occurred in connection with that prosecution. To see why, we need only follow *Manuel*'s admonition that, in discerning the elements of this Fourth Amendment-based tort, we must keep our eye on the underlying constitutional right. . . A consideration of that right, as I shall next explain, reveals that even real and substantial evidence of probable cause -- such as is present in Pagán's case -- may be insufficient to render an arrest warrant that is issued based on that evidence one that law enforcement may constitutionally rely upon to carry out the ensuing seizure. . . . An arrest warrant can legitimate a seizure premised on a warrant that in fact lacks probable cause. An arrest warrant cannot legitimate a seizure under the Fourth Amendment if law enforcement precluded the magistrate judge from performing the neutral gatekeeping role required of it by the Warrant Clause. In such circumstances, the warrant cannot provide a good faith basis for law enforcement to think that the seizure was lawful due to the trick on the magistrate judge that was used to secure the warrant. Against this legal background, *Hernandez-Cuevas* and *Manuel* were hardly innovative in permitting Fourth Amendment-based damages claims to proceed where the plaintiff alleged that his pre-trial seizure had been carried out pursuant to an arrest warrant that the magistrate judge issued based on evidence of probable cause that law enforcement had fabricated. . . In such circumstances, the warrant clearly could not legitimate the seizure, given the trick that law enforcement had performed on the magistrate judge that led the magistrate judge to issue the warrant. The question for our purposes, though, is not quite so easily answered as it was in those cases. The trickery in *Manuel* and *Hernandez-Cuevas* led the magistrate judge to issue a warrant based on evidence of probable cause that simply did not exist and that law enforcement knew from

the outset did not exist. In a case like Pagán's, by contrast, law enforcement has not tricked the magistrate judge into believing that there was evidence of probable cause when there in fact was none. There was such evidence all along. Rather, law enforcement has -- allegedly -- merely tricked the magistrate judge into believing that the evidence of probable cause was constitutionally acquired when law enforcement knew it was not. As I read our precedent, however, where officers trick the magistrate judge about the unlawfully acquired nature of the evidence that they have put forward to establish probable cause, the resulting warrant is no less premised on a lie or reckless half-truth that materially taints the magistrate judge's capacity to perform the constitutionally prescribed gatekeeping role than when the deceit concerns the existence of the evidence. Thus, law enforcement's ability to rely on that warrant in good faith to justify the seizure may be limited just as it would be in a case in which the lie or reckless untruth does concern the evidence's existence. Specifically, we have explained that a warrant -- even if predicated on evidence that was itself real -- may not be relied upon by law enforcement, if it had been secured by deliberate lies or reckless omissions that misled the magistrate judge into thinking that critical evidence of probable cause had been acquired constitutionally or with a good faith belief that it had been. . . We have done so, presumably, on the understanding that a fully informed magistrate judge might have exercised its discretion to decline to issue the warrant had it known that the evidence of probable cause had been secured only through law enforcement conduct that was not constitutional or that was not undertaken in good faith that it was. In fact, our precedent, like the precedent of other circuits, makes clear that a magistrate judge may decline to issue a warrant when the evidence forming the basis for probable cause is known to have been acquired in such concerning circumstances. . . Thus, lies or reckless omissions that hide facts that would reveal such problematic means of acquiring such evidence -- like the lies alleged by Pagán -- interfere with the magistrate judge's constitutional role as a gatekeeper. . . . [T]he following would appear to be clear, at least under our precedent. When law enforcement intentionally or recklessly makes false statements to a magistrate judge about the constitutional or good faith means by which law enforcement obtained the evidence that supplies the basis for finding the probable cause necessary to justify the warrant that would permit a pre-trial seizure of a criminal defendant, such lies -- or reckless omissions -- undermine the magistrate judge's ability to perform its constitutional role under the Warrant Clause. . . Such intentionally false statements or reckless omissions thus preclude law enforcement officers from relying in good faith on the arrest warrant that is then issued (at least when the officers know of the lies or reckless omissions). And thus, under our precedent, such lies or reckless omissions prevent that warrant from legitimating the seizure that is carried out in reliance on it, . . . notwithstanding that the lies or reckless falsehoods concerned only the means by which the evidence of probable cause had been acquired and not the existence of the evidence itself. . . . Against this legal backdrop, I do not see why a plaintiff should be barred from seeking damages for his pre-trial seizure, simply because he can show that the lies or the reckless omissions that law enforcement told the magistrate judge to secure the arrest warrant concerned only how real evidence had been acquired and not whether such real evidence existed. The deceit still stripped the magistrate judge of the ability to perform its constitutionally prescribed gatekeeping role. The deceit did so by stripping the magistrate judge of the opportunity to deny law enforcement the ability to exploit the unconstitutional conduct it used to acquire the evidence

that supplies the sole basis for procuring the warrant that would permit a defendant to be seized. Under our precedent, therefore, the seizure would appear to be no less unconstitutional -- insofar as the warrant is necessary in the first place -- for having been carried out pursuant to unconstitutional trickery of that comparatively subtle (but still egregious) sort. . . . Allowing claims like Pagán's to proceed would not mean that constitutional tort suits could be used to attack arrests based on warrants as a general matter. *Leon* still shields officers where they rely on warrants in good faith, except in very limited circumstances, such as *Franks* violations in securing the warrant. . . But, when the officers' reliance on that warrant is in bad faith -- such as when the officer who participates in the seizure is also responsible for the reckless or deliberate misrepresentations that led to the warrant's tainted issuance -- I do not see why the specter of a damages judgment should not be in the offing. This approach is also entirely consistent with the prevailing view that the exclusionary rule does not apply to civil proceedings. . . Under this approach, the inquiry is not whether the evidence shows that there was probable cause to believe the plaintiff had committed a crime. The inquiry is whether law enforcement precluded the magistrate judge from performing its constitutionally assigned gatekeeping role through deliberate lies or reckless omissions about the means used to acquire the evidence of probable cause. Thus, as the Fourth Amendment-based tort claim does not depend on guilt or innocence or on whether the improperly procured evidence was real or fake, the plaintiff does not need to exclude the evidence of probable cause to win. The plaintiff needs only to put forward facts sufficient to show a *Franks* violation. In addition, in all § 1983 cases and *Bivens* actions, plaintiffs must show some causation between the defendant's conduct, the constitutional violation, and the plaintiff's injury. . . As we explained in *Hernandez-Cuevas*, 'in most cases, the neutral magistrate judge's determination that probable cause exists for the individual's arrest is an intervening act that could disrupt any argument that the defendant officer had caused the unlawful seizure.'. . We noted, too, that this 'causation problem' can be overcome only if it is clear that law enforcement officers were 'responsible for [the plaintiff's] continued, unreasonable pretrial detention,' including by 'fail[ing] to disclose exculpatory evidence' or 'l[ying] to or misle[ading] the prosecutors.'. . . For these reasons, I conclude that Pagán has sufficiently stated a claim for damages under the Fourth Amendment -- save, that is, for the qualified immunity defense that bars that claim from surviving here. The lack of clarity in our precedent or the Supreme Court's as to the elements of such a claim precludes him from overcoming that defense -- at least given his arguments to us. I recognize that this caveat concerning qualified immunity is a rather significant one -- and not only in Pagán's case. The defense of qualified immunity is usually invoked in cases like this one, just as it has been invoked here. A plaintiff who loses at the second step of the qualified immunity inquiry is no better off than one who loses at the first step. Still, it is important to address the first step of the qualified immunity inquiry. That step is certainly relevant in cases in which the defense of qualified immunity is not properly invoked -- and, in fact, it was not invoked in either *Hernandez-Cuevas* or *Manuel*. . . With respect to that step, moreover, it is clear to me that, in light of *Manuel*, it is a mistake to attempt to fashion a half-fish, half-fowl, hybrid malicious prosecution/Fourth Amendment based tort. I thus do not see how, post-*Manuel*, we could continue to justify treating a Fourth Amendment-based claim such as Pagán brings here -- targeting, as it does, only the seizure and not the prosecution -- as a species of the old malicious prosecution tort.

Rather, we must understand that tort for what it is -- a Fourth Amendment-based challenge to pre-trial detention that targets law enforcement's efforts to circumvent the warrant requirement through lies or reckless omissions that conceal from the magistrate judge facts material to its ability to perform its constitutionally assigned role. For that reason, I think it important to lay out this analysis here. That way, in a subsequent case we will be better positioned to resolve definitively how *Manuel* bears on -- and, in my view, supersedes -- two of the elements of the constitutional tort that we described in *Hernandez-Cuevas*: the ones concerning favorable termination and probable cause. . . Unless we at some point address step one of the qualified immunity inquiry in a case involving such a claim, or otherwise definitively define the elements of this constitutional tort post-*Manuel*, we will be at risk of leaving the law unclear in key respects. In consequence, we will be permitting our pre-*Manuel* case law to exert an outsized influence on the types of remedies that may be available to those who have been the victims of unlawful law enforcement trickery of the kind that the Fourth Amendment quite clearly condemns. Finally, and relatedly, I would not rule out the possibility that, even before our court does provide clarity to the doctrine in this area, a plaintiff might be able to develop an argument -- which Pagán has not attempted to do here -- as to why such a claim might be viable even in the face of a qualified immunity defense. Our Fourth Amendment precedents in *Bain* and *Diehl* clearly establish that law enforcement officers -- per *Franks* -- may not rely on warrants in good faith that are the product of their own reckless half-truths about the constitutionality (or the officers' good faith belief in the constitutionality) of the means used to acquire the evidence of probable cause on which the magistrate judge relied in issuing the warrant. Nor does *Hernandez-Cuevas* suggest otherwise. Rather, *Hernandez-Cuevas* at most creates doubt about the content of one element of the constitutional tort suit that may be brought to recoup damages for the harm caused by the pre-trial detention that results from such clearly unconstitutional law enforcement conduct. Given that qualified immunity is intended to serve a practical, functional purpose, I am not certain that law enforcement officers should be immune from damages for engaging in conduct that, at the time it was undertaken, was clearly unconstitutional under our precedent, simply because we had not also as of that time clearly described an element of the constitutional tort that may be brought to recover damages for the harm caused by such conduct. We have no occasion, however, to consider such a refined question of qualified immunity law here. I thus leave it for another day. For present purposes, it is enough to lay out the lines along which the relevant doctrine may be reconstructed. Doing so is the first step along the route to ensuring that this body of doctrine is freed from the lingering influence of the pre-*Albright* tort of malicious prosecution and thus may reflect more fully *Manuel*'s suggestion that we 'closely attend to the values and purposes of the constitutional right at issue' when 'applying, selecting among, or adjusting common law-approaches.'")

Denault v. Ahern, 857 F.3d 76, 83-84 (1st Cir. 2017) ("At least three of our sister circuits have expressly rejected Fourth Amendment claims based on a failure to return property after it was lawfully obtained. *See Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004); *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003); *Fox v. Van Oosterum*, 176 F.3d 342, 351 (6th Cir. 1999). They have reached that conclusion in different ways. The Sixth Circuit focused on the definition of 'seizure,' finding that the term has temporal bounds such that

it protects only the interest in retaining property and not the interest in regaining it. . . The Seventh Circuit held that applying the Fourth Amendment in these circumstances stretches its protections too far beyond the amendment's purpose of constraining unlawful intrusions into constitutionally protected areas. . . And the Second Circuit rejected the seizure-includes-retention theory out of hand, writing that '[t]o the extent the Constitution affords [a plaintiff] any right with respect to a government agency's retention of lawfully seized property, it would appear to be procedural due process.'. . The plaintiffs make no effort to address these authorities or explain why the alleged violation of their constitutional rights sounds in the Fourth Amendment. On such a record, we are offered no reason to disagree with our sister circuits that, to the extent a plaintiff may challenge on federal constitutional grounds the government's retention of personal property after a lawful initial seizure in circumstances such as these, that challenge sounds in the Fifth Amendment rather than in the Fourth Amendment. A different result may well obtain when the government seizes a person rather than property. *See Manuel v. City of Joliet*, —— U.S. ——, 137 S.Ct. 911, 919, 197 L.Ed.2d 312 (2017). But where property is concerned, it would seem that the Fifth Amendment's express protections for property provide the appropriate framework. In particular, the Takings Clause provides recourse where 'private property [is] taken for public use, without just compensation.'. . In different circumstances, we might well find that a plaintiff's claims do not necessarily fail merely because the plaintiff wrote 'Fourth' rather than 'Fifth' in his or her briefs. Here, though, substance followed form, as these plaintiffs never provided the evidence that would be required to support a claim that the defendants violated the Fifth Amendment. Most notably, the plaintiffs do not even claim, let alone prove, that they first sought compensation through state procedures or that 'all potential state remedies are "unavailable or inadequate,"' as required to bring a ripe takings claim in federal court. . . We therefore find that the evidence did not support a verdict in favor of the plaintiffs on their preserved federal constitutional claims. Accordingly, the district court's ultimate disposition of the plaintiffs' federal constitutional claims based on the retention and transfer of the plaintiffs' property was correct.")

Jordan v. City of Providence, No. 23-CV-224-MSM-PAS, 2024 WL 4476453, at *4–5 (D.R.I. Oct. 11, 2024) ("Accepting the facts alleged in the complaint as true, which the Court must do at this stage, no 'proper basis' to believe that Mr. Jordan committed a crime existed when he was held on the surety bond, his 'pretrial detention, no less than his original arrest, violated his Fourth Amendment rights.' *Manuel v. City of Joliet, Ill.*, 580 U.S. 357, 368-69 (2017). Officer Moonan's reliance on the arrest report or on his fellow officers' decision to seize Mr. Jordan would not make Mr. Jordan's seizure without probable cause, as effected by Officer Moonan's signing the District Court Complaint, any less unreasonable under the Fourth Amendment. . . Having plausibly alleged that Officer Moonan caused Mr. Jordan to be held under legal process without probable cause, the plaintiffs have stated a claim of malicious prosecution under § 1983. And because Rhode Island law allows malice to be inferred from a lack of probable cause, those allegations also make out a claim for common-law malicious prosecution.")

Watson v. Mita, No. CV 16-40133-TSH, 2017 WL 4365986, at *5 n.3 (D. Mass. Sept. 29, 2017) ("As the Supreme Court recently decided, the Fourth Amendment provides a basis under § 1983

for challenging pre-trial detention. *Manuel v. City of Joliet*, ––U.S. ––––, 137 S.Ct. 911, 914–15, 197 L.Ed.2d 312 (2017). *Manuel* did not address, however, whether the tort of malicious prosecution, as opposed to some other common law cause of action, provides an appropriate framework for these Fourth Amendment § 1983 claims.")

Second Circuit

Barnes v. City of New York, 68 F.4th 123, 128-33 (2d Cir. 2023) ("The district court erred. . . by concluding that Barnes did not sufficiently plead his fabricated-evidence claim because he failed to allege a deprivation of liberty caused by the drug sale charge. While it is true that claims based on a deprivation of liberty under the Fourth Amendment may require custody or conviction, a Fourteenth Amendment claim based on fabricated evidence does not. Because Barnes's fabricated-evidence claim sounds in the Due Process Clause, it is not defeated by the fact that Barnes also was in custody for, convicted of, and sentenced on the drug possession charge. The fabricated-evidence claim seeks redress for Barnes's *prosecution* on the drug sale charge of which he was acquitted and which he plausibly alleges was tainted by fabricated evidence. As discussed below, we hold that Barnes sufficiently pleaded the elements of this claim. 'To succeed on a fabricated-evidence claim, a plaintiff must establish that "an (1) investigating official (2) fabricate[d] information (3) that is likely to influence a jury's verdict, (4) forward[ed] that information to prosecutors, and (5) the plaintiff suffe[red] a deprivation of life, liberty, or property as a result."'. . A § 1983 plaintiff 'may sue for denial of the right to a fair trial based on a police officer's fabrication of information ... when the information fabricated is the officer's own account of his or her observations of alleged criminal activity, which he or she then conveys to a prosecutor.'. . That is what Barnes alleged here. . . . Barnes's allegations regarding the use of fabricated evidence are sufficient as to the fifth element, which requires a deprivation of liberty. . . The district court, applying the same reasoning it used to analyze the malicious prosecution claim, concluded that Barnes failed to allege a deprivation of liberty as to the drug sale charge because he was held in custody for and convicted of the drug possession charge during the same period. Thus, the district court reasoned, because Barnes served no additional time in custody, he could not show a deprivation of liberty that was caused by the allegedly fabricated evidence related to the drug sale. This was error. First, it bears emphasizing that fabricated-evidence and malicious prosecution claims address different rights. While fabricated-evidence claims allege violations of the right to due process under the Fifth and Fourteenth Amendments, malicious prosecution claims essentially allege violations of the Fourth Amendment right to be free from unreasonable seizure. As a result, the claims have different standards. . . Moreover, to insist that a deprivation of liberty requires custody or a conviction overlooks the fact that Barnes's prosecution on the drug sale charge is itself a deprivation of liberty. For fabricated-evidence claims based on due process, we have previously recognized that a plaintiff's 'prosecution' can be a 'deprivation of liberty.'. . The use of fabricated evidence in initiating a prosecution or at trial may amount to a deprivation of liberty even in the absence of a conviction based on the fabricated evidence and even when, as here, a plaintiff simultaneously was charged, detained, tried, and convicted for a separate offense.
Barnes's prosecution for drug sale on the basis of allegedly fabricated evidence deprived him of

liberty in violation of his right to due process. This is true even without reference to the time Barnes spent in pre-trial detention for both the drug sale charge and the drug possession charge. Barnes's *prosecution* for the drug sale charge was a violation of due process because liberty may be deprived by consequences beyond custody. As we have said, 'being framed and falsely charged damages an individual's reputation, requires that individual to mount a defense, and places him in the power of a court of law.'. .These non-custodial 'collateral consequences,'. . . are not the same for every offense in a multi-count prosecution. The reputational damages, defenses that must be mounted, and contours of the court's power over a defendant can all differ when the defendant is prosecuted for a drug sale charge in addition to or instead of being prosecuted for a drug possession charge. . . . Barnes was prosecuted for two different charges and suffered different deprivations of liberty as a result. One of these prosecutions was allegedly based on fabricated evidence, in violation of due process. In fact, we have held that there may be a violation of due process based on fabricated evidence even without the use of fabricated evidence at trial because the 'fair trial right protects against deprivation of liberty that results when a police officer fabricates and forwards evidence to a prosecutor that would be likely to influence a jury's decision, *were that evidence presented to the jury*.' *Frost v. N.Y.C. Police Dep't*, 980 F.3d 231, 250 (2d Cir. 2020), *cert. denied sub nom. City of New York v. Frost*, —— U.S. ——, 142 S. Ct. 1666, 212 L.Ed.2d 577 (2022). . . . Here, not only did Barnes allege that fabricated evidence resulted in his prosecution, but, unlike in *Frost*, the allegedly fabricated evidence was presented to the jury during Barnes's trial for the drug sale charge. This was more than sufficient to allege a deprivation of liberty. In rejecting our conclusion that Barnes has alleged a deprivation of liberty sufficient for his fabricated-evidence claim to proceed, the dissent, despite acknowledging the broad due process foundation of a fabricated-evidence claim, ultimately recognizes only custody as a deprivation of liberty. Thus, for the dissent, the bottom line is that because 'Barnes "would have been held in the same place for the same amount of time,"' even without the fabricated-evidence charge, . . . his claim must fail given that he alleges no 'additional' liberty deprivation traceable to the fabricated evidence, . . . 'that he would not have already suffered based on the possession charge alone[.]' . . Contrary to the dissent's suggestion, that is not the law of this Circuit. Whether the deprivation is custodial or noncustodial, 'we have long held "that Section 1983 liability attaches for knowingly falsifying evidence even where there *simultaneously* exists a lawful basis for the deprivation of liberty" that the plaintiff suffered.' [*Smalls*, 10 F.4th at 132] Applied to Barnes's fair trial claim, this means that even if the simultaneous drug possession charge of which Barnes was convicted provided a lawful basis for some of the deprivations Barnes suffered, it would not sever the causal link between the fabricated evidence and those same deprivations, as well as others, that Barnes suffered as a result of the drug sale prosecution. . . . This court's holding in *Ricciuti* could not have been any clearer: 'When a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages.'. . The instant case fits *Ricciuti* to a tee. Moreover, our recognition that prosecution itself is a deprivation of liberty does not dispense with the causation requirement, as argued by the dissent, but it does make the causation in this case obvious. The allegedly false statement made to the prosecutor—that an officer saw Barnes selling drugs—was indisputably a cause of Barnes's

prosecution for drug sale. Barnes's prosecution for drug sale deprived him of liberty independently of whatever consequences flowed from the drug possession charge. . . . When the police's fabrication of evidence results in a person being charged with a crime, that person's *Fourth Amendment claims* will be defeated if there was independent *probable cause* for the deprivation of liberty. . . Under the dissent's framework, when the police's fabrication of evidence results in a person being charged with a crime, that person's *Fifth Amendment claims* will be defeated if there was an independent *proximate cause* for the deprivation of liberty. However, 'probable cause, which is a Fourth Amendment concept, should not be used to immunize a police officer who violates an arrestee's non-Fourth Amendment constitutional rights.'. . While a malicious prosecution claim will be defeated by a showing of probable cause (that is, by a showing of an independently reasonable basis for the deprivation of liberty), a fabricated-evidence claim will not. . . We have repeatedly rejected the effort to import probable cause into the due process analysis. . . . In sum, Barnes's claim of fabricated evidence seeks redress for an unfair prosecution and trial in violation of his right to due process, and he has sufficiently pleaded the elements of this claim. This claim is distinct from Barnes's Fourth Amendment-based claims, which, as discussed above, were properly dismissed. Nevertheless, in order to sustain a fabricated-evidence claim, Barnes must also show that his acquittal on the drug sale charge qualified as a 'favorable termination,' even though he was also convicted of drug possession. *See McDonough v. Smith*, —— U.S. ——, 139 S. Ct. 2149, 2156–57, 204 L.Ed.2d 506 (2019) (noting a fabricated-evidence claim's "favorable termination" requirement). Because the district court dismissed the fabricated-evidence claim on other grounds, it did not specifically address this requirement, and it should do so in the first instance, particularly in light of our recent opinion in *Smalls*, which was released subsequent to the district court's decision. We note that *Smalls* instructs, for purposes of a fabricated-evidence claim's favorable termination requirement, that 'all that is required is that the underlying criminal proceeding be terminated in such a manner that the lawsuit does not impugn an *ongoing* prosecution or *outstanding* conviction." 10 F.4th at 139.We accordingly vacate the district court's dismissal of Barnes's fabricated-evidence claim and remand for consideration consistent with this Opinion.")

Barnes v. City of New York, 68 F.4th 123, 134-36 (2d Cir. 2023) (Sullivan, J., dissenting in part) ("I agree with the majority on all points except one: I would affirm the dismissal of Barnes's fabricated-evidence claim under 42 U.S.C. § 1983 because he has failed to plausibly allege a deprivation of life, liberty, or property *caused by* the fabricated evidence. Although Barnes alleges that an officer falsely claimed to have seen him sell drugs – resulting in his subsequent prosecution for criminal sale of a controlled substance – officers did in fact find drugs on the scene so that he was simultaneously prosecuted, detained, tried, and convicted of felony drug possession. In other words, he alleges no deprivation of liberty, custodial or non-custodial, resulting from the alleged fabrication that he would not have already suffered based on the possession charge alone. Because the law of this Circuit restricts fabricated-evidence claims to those cases in which a plaintiff 'suffers a deprivation of life, liberty, or property *as a result*' of an officer's forwarding of false information to prosecutors, . . . the district court correctly dismissed Barnes's claim. . . .Though Barnes was ultimately acquitted of drug sale, he was convicted of drug possession with intent to

sell and sentenced to fifteen years in prison. Thus, even absent the alleged fabrication, Barnes 'would have been held in the same place for the same amount of time.'. .Unable to show that Barnes has plausibly alleged a custodial deprivation of liberty as a result of the fabricated evidence, the majority instead concludes that Barnes has adequately pleaded causation because his prosecution for the drug sale resulted in liberty-depriving 'non-custodial collateral consequences.'. . The majority's logic is as follows. First, the majority posits that, even absent pretrial detention, prosecutions deprive defendants of liberty by harming their reputation, forcing them to mount a defense, and placing them in the power of a court of law. . . Next, in its key rhetorical move, the majority conclusorily asserts that these non-custodial liberty deprivations associated with prosecutions are 'different' for a charge for drug sale than for a charge for drug possession with intent to sell. . . Having mechanically separated the non-custodial liberty deprivations for a drug-sale prosecution from the non-custodial liberty deprivations for a drug-possession-with-intent-to-sell prosecution, the majority then concludes that the allegedly fabricated evidence that formed the basis for Barnes's drug-sale charge was the but-for cause of some liberty deprivation. . . I agree with the majority's analysis up to a point. To be sure, the liberty interest safeguarded by the Constitution's Due Process Clauses 'denotes not merely freedom from bodily restraint.'. . And our case law does seem to suggest that the act of prosecution itself amounts to a non-custodial liberty deprivation, since it 'damages an individual's reputation, requires that individual to mount a defense, and places him in the power of a court of law.'. . But even if the non-custodial consequences of a prosecution are potentially liberty depriving, '[t]he question remains whether the liberty deprivations that occurred are *legally traceable* back ... [to the] act of fabrication.'. . And, here, I fail to see plausible allegations in Barnes's complaint that his prosecution for drug sale caused any *additional* non-custodial liberty deprivations – i.e., subjected him to additional reputational damage, added to the defenses he was required to mount, and added to the contours of the court's power – *separate and apart* from the corresponding non-custodial liberty deprivations that would have occurred anyway on account of his prosecution for drug possession with intent to sell.")

Franco v. Gunsalus, No. 22-339, 2023 WL 3590102, at *4 (2d Cir. May 23, 2023) (not reported) ("Because a malicious prosecution claim implicates the Fourth Amendment, '[a] plaintiff asserting a Fourth Amendment malicious prosecution claim under § 1983 must ... show some deprivation of liberty consistent with the concept of "seizure."'. . 'We have consistently held that a post-arraignment defendant who is obligated to appear in court in connection with criminal charges whenever his attendance is required suffers a Fourth Amendment deprivation of liberty.' *Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013) . . . The officers cite a summary order, *Faruki v. City of New York*, 517 F. App'x 1 (2d Cir. 2013), for the proposition that a plaintiff does not suffer a deprivation of liberty when he faces 'no restriction ... other than a requirement [to] appear in court on two occasions.'. . *Faruki* relies on *Burg v. Gosselin*, 591 F.3d 95 (2d Cir. 2010), in which we held that 'the issuance of a pre-arraignment, non-felony summons requiring a later court appearance, without further restrictions, does not constitute a Fourth Amendment seizure.'. . But we need not address how *Faruki* and *Burg* interact with the rule articulated in *Swartz*. To decide this case, it is enough to say that Franco suffered a deprivation of liberty because he faced a

restriction greater than the one at issue in *Faruki*. As the district court observed, the jury was able to conclude that Franco 'continually returned to court on a monthly basis before the case was over' in connection with serious criminal charges. . . That restriction constitutes a sufficient deprivation of liberty under *Swartz*.")

See ***Smalls v. Collins***, 10 F.4th 117 (2d Cir. 2021) in cases under post-*McDonough* heading.

Frost v. New York City Police Dep't, 980 F.3d 231, 250-51 & n.14 (2d Cir. 2020), *cert. denied,* 142 S. Ct. 1666 (2022) ("Taken together, then, *Garnett*, *Zahrey*, and *Ricciuti* establish that the (perhaps imprecisely named) fair trial right protects against deprivation of liberty that results when a police officer fabricates and forwards evidence to a prosecutor that would be likely to influence a jury's decision, *were that evidence presented to the jury*. . . And we have expressly distinguished this right from the separate, although related, right not to be convicted based on the use of false evidence *at trial*. . . In the instant case, Frost raises a genuine dispute of material fact as to whether he was thus deprived of his liberty. As explained above, there is a triable question as to whether Vega's identification of Frost was coerced. Similarly, there is a triable question as to whether Vega's identification would likely have influenced the jury at Frost's criminal trial given that Vega, unlike McLaurin, was not Frost's fellow suspect. These two facts, in turn, create a genuine dispute as to whether Vega's identification 'critically influenced' the decision to prosecute Frost, . . thereby resulting in a deprivation of his liberty. . . . Because we conclude that there is a triable issue as to whether defendants coerced Vega into falsely identifying Frost, and as to whether Vega's identification resulted in Frost's prosecution, Frost's due process claim should not have been dismissed. . . To be clear, we offer no view as to the ultimate outcome. We conclude only that there are triable issues of fact such that resolution at summary judgment is not appropriate. . . . The Supreme Court's holding in *Manuel v. City of Joliet*, . . . relied upon by the dissent, . . . does not compel a different result. In *Manuel*, the Supreme Court held that a § 1983 plaintiff could challenge his pretrial detention based on purportedly fabricated evidence under the Fourth Amendment, even after a judge determined that this evidence constituted probable cause. . . But just as a Fourth Amendment claim survives the initiation of 'legal process,'. . . our precedents establish that a fair trial claim under the Due Process Clause may accrue before the trial itself. Accordingly, the holding of *Manuel* does not preclude Frost's fair trial claim.")

Frost v. New York City Police Dep't, 980 F.3d 231, 259-60, 262-63 (2d Cir. 2020) (Kearse, J., dissenting in part), *cert. denied,* 142 S. Ct. 1666 (2022) ("Most recently, in *Manuel v. City of Joliet*, . . .the Supreme Court confirmed that an accused alleging the fabrication of evidence against him 'may challenge his pretrial detention on the ground that it violated the Fourth Amendment,'. . . and held that lower court decisions that the petitioner should instead have 'challenge[d] his pretrial confinement via the Due Process Clause'. . .were error[.] . . .The majority in the present case, in concluding that summary judgment dismissing Frost's substantive due process fair-trial claims was error, relies principally on two cases, *Zahrey* and *Ricciuti v. N.Y.C. Transit Authority*, 124 F.3d 123, 130 (2d Cir. 1997) ("*Ricciuti*"). I disagree with the majority's view that the claim upheld in *Zahrey* was one for denial of a fair trial; and while I do not disagree with *Ricciuti*'s

conclusion that the plaintiffs there had asserted a viable constitutional claim for unwarranted prolonged pretrial detention, I view its conclusion that the plaintiffs had a viable due process claim for denial of their right to a fair trial--in a case in which the charges against them were dismissed without a trial--as contrary to the Supreme Court's instruction that claims of pretrial deprivations should be analyzed under the Fourth Amendment. . . . I think it clear in light of *Manuel*--which was based on settled Supreme Court precedent, some of which preceded *Ricciuti*--that *Ricciuti* should have addressed the claim it was upholding not as a due process claim for denial of a fair trial, but rather as a Fourth Amendment claim for unduly prolonged deprivation of the plaintiffs' pretrial liberty. The source of plaintiffs' right was the Fourth Amendment since only their pretrial liberty had been curtailed, not their right to fairness in a trial that was not held. . . .In sum, even if it were proven that the Officers fabricated Vega's 2011 identification of Frost as the shooter as alleged, the undisputed evidence without reference to the Vega identification forecloses any claim by Frost for deprivation of his liberty prior to trial. And we are in agreement that it is undisputed here that *Vega's allegedly coerced identification of Frost could not have 'distort[ed] the record' at Frost's trial*, [*Dufort,* 874 F.3d at 355], *because Vega did not repeat this identification in his trial testimony*. . . In my view the majority's reinstatement of Frost's claim that he was denied a fair trial is thus without legal or factual foundation. This case is not meaningfully distinguishable from *Dufort*, and I would affirm the grant of summary judgment dismissing the due process claims of denial of a fair trial.")

Dufort v. City of New York, 874 F.3d 338, 354, 355 n.7 (2d Cir. 2017) ("In the context of false arrest and malicious prosecution claims, an officer is entitled to qualified immunity if he had either probable cause or 'arguable probable cause.'. . Arguable probable cause exists 'if officers of reasonable competence could disagree on whether the probable cause test was met.'. .We conclude that it would be inappropriate to grant qualified immunity to these Defendants at the summary judgment stage. Dufort has established a dispute of material fact as to whether the Defendants intentionally withheld or manipulated key evidence during his arrest and prosecution. He has introduced sufficient evidence from which a reasonable jury could conclude that the Defendants placed him in a deeply defective lineup, extracted an 'identification' from Park that was limited to the color of his clothing, and then withheld the suspect nature of this identification from prosecutors and the grand jury. Such a 'knowing' violation of his Fourth and Fifth Amendment rights would, if proven, be enough to overcome the protection of qualified immunity. Although Dufort has not produced any direct evidence of a malicious intent on the part of the Defendants, he is not required to do so. Circumstantial evidence is generally sufficient to prove intent, and Dufort has introduced enough such evidence to survive summary judgment. . . .Dufort also appears to allege a 'substantive due process' claim, based on his constitutional right not to be arrested or detained without probable cause. Insofar as this claim stems from the Defendants' decision to arrest Dufort and his subsequent five-year detention on Rikers Island, it appears to be entirely coextensive with Dufort's claims for false arrest and malicious prosecution and is therefore subsumed under those claims. *See Manuel*, 137 S. Ct. at 917–19 (noting that claims for pretrial detention based on fabricated or withheld evidence are evaluated as malicious prosecution claims under the Fourth Amendment); *Wallace v. Kato*, 549 U.S. 384, 388–89 (2007) (noting that the

forcible detention of plaintiff without probable cause is conceptualized as a false arrest claim under the Fourth Amendment for § 1983 purposes).")

Newson v. City of New York, No. 16CV6773ILGJO, 2019 WL 3997466, at *4–6 (E.D.N.Y. Aug. 23, 2019) ("The question remains whether this was an injury of constitutional dimension. The City argues that a plaintiff cannot bring a '*Brady*' claim under § 1983 unless he was actually convicted as a result of the *Brady* violation . . . , a rule most courts have concurred with[.] [citing cases] However, the view that the legal effect of a *Brady* violation has significance only upon a conviction has not been definitively embraced by the Second Circuit, and may be persuasively called into doubt. . . In any event, the question of whether a '*Brady*' claim may be brought by an acquitted plaintiff is academic. In cases where a plaintiff has been deprived of his liberty prior to trial due to the State's suppression of exculpatory evidence, courts have recognized that he may bring a § 1983 claim under the Fourth Amendment. The key case on point is *Russo v. City of Bridgeport*, 479 F.3d 196 (2d Cir. 2007), *cert. denied*, 552 U.S. 818 (2007). . . . The *Russo* Court did not mention *Brady*. However, it is clear that the constitutional violation that occurred in *Russo*—namely, the defendant-officers' failure to turn the footage over to prosecutors, which prevented them from discharging their own duty to disclose it to Russo, . . was akin to breach of their *Brady* obligations. *Brady* suppression can occur even 'when the government fails to turn over evidence that is "known only to police investigators and not to the prosecutor,". . . and '[t]he police therefore are under a duty to disclose exculpatory information to the prosecutor[.] . . . Although the '*Brady*' rule is, strictly speaking, a creature of the Due Process Clause, . . . the plaintiff's claim in *Russo* was cognizable under the Fourth Amendment because the officers' failure to forward the video tape to prosecutors resulted in a *pretrial* deprivation of liberty rather than an actual conviction. *See Manuel v. City of Joliet, Ill.*, 137 S.Ct. 911, 920 (2017) (holding that "the Fourth Amendment governs a claim for unlawful pretrial detention...."). It might be argued that *Russo* is distinguishable on the grounds that the misconduct in that case was committed by the police, rather than by prosecutors. However, there is no basis in law or logic to narrow *Russo*'s reasoning to police officers. . . Indeed, at least one court has suggested that a Fourth Amendment *Monell* claim may be brought against the City where a plaintiff's pretrial confinement was prolonged by the prosecution's own suppression of exculpatory evidence. . . . Here, similar to both *Russo* and *Ambrose*, Plaintiff alleges that the QCDA violated *Brady* and withheld evidence which, if disclosed sooner, might have resulted in his earlier release. Thus, Plaintiff has pleaded the first two elements of a *Russo* violation, namely, that he has a right to be free from continued detention stemming from the State's mishandling or suppression of exculpatory evidence, and that the actions of the defendant violated that right. . . As for the third *Russo* element, Plaintiff has adequately pleaded conduct that 'shocks the conscience,'. . . a standard easily satisfied at the motion to dismiss stage where 'all reasonable inferences' must be 'draw[n] ... in favor of the plaintiff[.]'")

Nelson v. County of Suffolk, No. 12CV5678DRHAKT, 2019 WL 3976526, at *10 (E.D.N.Y. Aug. 22, 2019) ("[A] claim for malicious prosecution is grounded in the protections of the Fourth Amendment and an essential element of such a claim is the absence of probable cause. . . In contrast

a claim asserting the denial of a right to a fair trial 'finds it roots in the Sixth Amendment, as well as the due process clauses of the Fifth and Fourteenth Amendments, which secure the fundamental right to a fair trial in criminal proceedings.'. . The existence of probable cause is irrelevant to such a claim. . . Finally, although in the majority of cases 'the question of whether the defendant fabricated evidence becomes synonymous with the question of whether genuine probable cause existed, and accordingly a plaintiff's malicious prosecution and fair trial claims would rise or fall together' nonetheless 'these remain distinct constitutional claims.'")

Hamilton v. City of New York, No. 15-CV-4574 (CBA) (SJB), 2019 WL ____ (E.D.N.Y. Mar. 19, 2019) ("As it had no occasion to reach the issue, the Second Circuit did not address the interaction between *McDonough* and *Heck* for plaintiffs like Hamilton, who were convicted based on the alleged fabricated evidence. This Court is now presented with that issue. Defendants contend that *McDonough* did not limit its holding to plaintiffs who were never convicted, and that under *McDonough*, Hamilton's claims are time-barred and should not be equitably tolled. . . Hamilton knew of Smith's fabricated statements and suffered a liberty deprivation when he was arrested based on those statements in 1991, and thus he was required to commence his claim no later than 1994. . .Hamilton and amicus curiae the Innocence Project argue that *McDonough* is limited to litigants who were never convicted in criminal proceedings, contending that a more expansive reading would undermine the remedial purpose of § 1983. . .Because Hamilton's fabrication of evidence claim would necessarily impugn the validity of his conviction under *Heck*, they contend it did not accrue until his conviction was overturned in 2015. . . Alternatively, if the Court concludes that Hamilton's claim is time-barred under *McDonough*, the Innocence Project urges the Court to apply equitable tolling. . . To resolve this issue, the Court must reconcile the principles enunciated in *McDonough* and *Heck,* which are in some tension in this case. Under a straightforward application of *McDonough*, Hamilton's claim is time-barred: Smith's fabricated and coerced testimony was used to deprive Hamilton of his liberty when he was arrested and subsequently convicted, and he became 'aware of that tainted evidence and its improper use' at the very latest at trial, when his attorney presented Smith's recantation statement attesting that her inculpatory statements were fabricated. . . Hamilton's claim thus accrued by 1992, and the three-year statute of limitations has long since passed. But the Second Circuit explicitly recognized in *McDonough* that 'the *Heck* rule for deferred accrual' was not 'called into play' because *McDonough* was never convicted. . . In this case, however. *Heck* is 'called into play': unlike *McDonough*, Hamilton was subject to 'a conviction or sentence that [had] not been invalidated, that is to say, an outstanding criminal judgment,' from 1992 to 2015. . . Under *Heck*, 'a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.' . . Thus, 'the *Heck* rule for deferred accrual.... delays what would otherwise be the accrual date of a tort action until the setting aside of an extant conviction which success in that tort action would impugn.' . .Under *Heck*, therefore, 'a prisoner-plaintiff may not assert a civil damages claim that necessarily challenges the validity of an outstanding criminal conviction.'. . In this case, the issue is whether Hamilton's fabrication of evidence claim accrued only once his conviction was invalidated in 2015—rendering his claim timely—because it necessarily challenged the validity of his outstanding conviction under *Heck*.

'Unlike malicious prosecutions, many violations of constitutional rights, even during the criminal process, may be remedied without impugning the validity of a conviction.'. . .For example, § 1983 claims alleging excessive force, unlawful arrest without probable cause, or unreasonable searches may accrue before any conviction and 'exist independent of the termination of the criminal proceedings.'. . By contrast, the Second Circuit has held that *Brady*-based § 1983 claims 'necessarily imply the invalidity of the challenged conviction,' because establishing a *Brady* violation requires a plaintiff to demonstrate prejudice, the "'touchstone'" of which is a "'reasonable probability of a different result"' at trial. . . A *Brady* violation warrants a 'vacatur of the judgment of conviction and a new trial in which the defendant now has the *Brady* material available to her.'. . In addition, a § 1983 claim may 'necessarily imply that the plaintiffs criminal conviction was wrongful' if, '[i]n order to prevail in this § 1983 action, [the plaintiff] would have to negate an element of the offense of which he has been convicted.'. .In applying these principles, the Court concludes that Hamilton's fabrication of evidence claim would have necessarily implied the invalidity of his conviction, and under *Heck*, and it did not accrue until his conviction was invalidated in 2015. The gravamen of Hamilton's claim is that Defendants coerced Smith—the sole eyewitness against him at trial—into falsely identifying him as the perpetrator of Cash's murder and testifying to that effect in judicial proceedings, thereby depriving him of his right to a fair trial. This fabrication claim requires Hamilton to prove, among other things, that the fabricated testimony was 'likely to influence a jury's decision,'. . . a showing that—by definition—would cast doubt on the jury's conclusion and 'necessarily imply the invalidity of his conviction or sentence[.]' . . .The Court recognizes that this conclusion is in some tension with the Second Circuit's decision in *McDonough*. Although defendants contend that *McDonough* employs no limiting language and, in fact, specifically contemplates the application of its accrual rule to litigants who were convicted, . . . *McDonough* also explicitly recognized that *Heck* was not 'called into play' in that case. Moreover, its reasoning was drawn principally from *Veal v. Geraci*, 23 F.3d 722 (2d Cir. 1994), a decision that pre-dated the Supreme Court's decision in *Heck*. Therefore, *McDonough*'s applicability to a litigants who fall within *Heck*'s ambit is debatable. . . *Heck* is undoubtedly 'called into play' in this case, and the Court is not at liberty to ignore governing and applicable Supreme Court precedent. Indeed, much as the Second Circuit declined to address *Heck* because the plaintiff was never convicted, citing *Wallace*, *Wallace* compels this Court to consider *Heck*, because Hamilton was convicted. . . As explained above, under *Heck*, the Court concludes that Hamilton's claim did not accrue until his conviction was invalidated in 2015, because his fabrication of evidence claim—if brought earlier—would have necessarily implied the invalidity of his 1992 conviction. Accordingly, Hamilton's claim is timely.")

Lynch v. City of New York, No. 17CV7577, 2018 WL 4660371, at *5-6 (S.D.N.Y. Sept. 28, 2018) ("At the outset, analyzing whether an underlying constitutional violation exists requires some precision in defining the constitutional injury. The Complaint alleges that the City's bail practices result in delays both in accepting bail payments *and* releasing pre-trial detainees after their bail has been paid. Thus, the constitutional inquiry centers on the point at which a delay in accepting bail once it has been fixed or in releasing pre-trial detainees after the legal basis for detention has ended becomes unconstitutional. This inquiry raises the threshold question of the constitutional

provision giving rise to Plaintiffs' claims, which Plaintiffs assert under the Fourth and Fourteenth Amendments. . . . While the authority in this Circuit is sparse, other federal courts of appeals have recognized that the fixing of bail gives rise to a liberty interest in paying bail that is protected by substantive due process. *See, e.g.*, *Steele v. Cicchi*, 855 F.3d 494, 502 (3d Cir. 2017); *Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010); *Campbell v. Johnson*, 586 F.3d 835, 840 (11th Cir. 2009); *Golberg v. Hennepin Cty.*, 417 F.3d 808, 811 (8th Cir. 2005). Similarly, other federal courts have generally used the rubric of substantive due process to analyze claims based on the delayed release of pre-trial detainees after the legal basis for detention has dissolved. *See, e.g.*, *Berry v. Baca*, 379 F.3d 764, 773 (9th Cir. 2004); *Barnes v. Dist. of Columbia*, 793 F. Supp. 2d 260, 274, 275 & n.11 (D.D.C. 2011). To be sure, the Supreme Court has held that an individual may state a Fourth Amendment claim for unlawful pre-trial detention even *after* the initiation of legal process. *Manuel*, 137 S. Ct. at 919. Indeed, the Second Circuit has previously recognized that the Fourth Amendment governs post-arraignment pre-trial detention in light of the Supreme Court's observation that the 'Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.' *Russo v. City of Bridgeport*, 479 F.3d 196, 208 (2d Cir. 2007) (quoting *Albright*, 510 U.S. at 274). But this is not to say that the Fourth Amendment necessarily governs *every* constitutional challenge to pre-trial detention. As explained in *Manuel*, '[l]egal process did not expunge [plaintiff's] Fourth Amendment claim because the process he received failed to establish what that Amendment makes essential for pretrial detention--probable cause to believe he committed a crime.'. . In this context, *Russo*'s conclusion that the Fourth Amendment squarely covers the right to be protected against 'sustained detention stemming directly from law enforcement officials' refusal to investigate available exculpatory evidence' is more akin to detention without probable cause. . . By contrast, Plaintiffs here do not challenge their detentions on the basis that the City lacked a constitutional basis for detention *ab initio*. Instead, their challenges are based on infringements to liberty interests that only ripen *after* bail has been fixed and *after* it has been paid--and after the probable cause determination has been made. Thus, this Court finds substantive due process a more appropriate lens through which to analyze Plaintiffs' claims. . . . Here, Plaintiffs adequately allege that their interest in paying bail and being released after paying bail has been infringed by the City's deliberate indifference. As the Second Circuit recently reiterated, the ' "touchstone of due process" is protection from "the exercise of power without any reasonable justification in service of a legitimate governmental objective."'. . Plaintiffs allege that the City systemically infringes pre-trial detainees' liberty interests in paying bail by routinely removing them from the courthouse before bail can be posted and transferring them to DOC facilities to begin a multi-hour intake procedure during which they are categorically ineligible for release. Construing all inferences in favor of Plaintiffs, the Complaint suggests that there is no reason--aside from accommodating shift changes and bus schedules--that detainees cannot be held at the courthouse to allow bail to be paid; nor is there any reason why bail cannot be accepted during the intake procedure. Ultimately, whether the City can demonstrate a legitimate governmental objective is a matter for summary judgment or trial.")

Butler v. Hesch, No. 1:16-CV-1540, 2018 WL 922187, at *11 n.1 & *12 (N.D.N.Y. Feb. 15, 2018) ("The plaintiff in *Manuel* urged the Court to find that his Fourth Amendment claim accrued only

upon the dismissal of the criminal charges, analogizing the claim to the common-law tort of malicious prosecution. . . The Supreme Court noted that 'all but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a "favorable termination" element and so pegged the statute of limitations to the dismissal of the criminal case.'. . . The defendant, however, argued that the plaintiff's Fourth Amendment claim should be considered most analogous to the tort of false arrest and that it should accrue when legal process commences. . .The Supreme Court declined to decide this issue and remanded the matter back to the Seventh Circuit. . . . Contrary to Plaintiff's position, *Manuel* does not stand for the proposition that false arrest and malicious prosecution may now be morphed into one generic Fourth Amendment claim that does not accrue until the illegal detention ends. False arrest and false imprisonment claims challenge detention without legal process, whereas a malicious prosecution claim challenges allegedly unlawful confinement after the initiation of legal process. The *Manuel* decision does not purport to – nor does it – change existing Supreme Court and Second Circuit jurisprudence with respect to the accrual of a Section 1983 unlawful arrest/unlawful imprisonment claim. Rather, the decision merely corrects the Seventh Circuit's error in precluding the assertion of a Fourth Amendment post-legal-process claim. As discussed above, Plaintiff was transferred to federal custody on June 4, 2013, and had an initial appearance before Magistrate Judge Hummel that same day. . . On June 5, 2013, Plaintiff filed a letter waiving his rights to both a detention and preliminary hearing. . . such, Plaintiff's false arrest and false imprisonment claims accrued no later than June 5, 2013 and Plaintiff's December 28, 2016 complaint is untimely as to these claims. Based on the foregoing, the Court grants Defendants' motions to dismiss as to Plaintiff's false arrest and unlawful imprisonment causes of action.")

Third Circuit

DeLade v. Cargan, 972 F.3d 207, 208-12 (3d Cir. 2020) ("On appeal from the denial of qualified immunity, the question presented is whether DeLade's claim of wrongful arrest and pretrial detention is cognizable under the Due Process Clause of the Fourteenth Amendment. We conclude that a claim alleging unlawful arrest and pretrial detention that occur prior to a detainee's first appearance before a court sounds in the Fourth Amendment—and not the Due Process Clause of the Fourteenth Amendment. . . . Qualified immunity shields a government official from liability unless the official's conduct violated a constitutional right that is clearly established. . . But in this case, we are presented with an antecedent question: whether the Fourteenth Amendment provides DeLade a viable vehicle for relief. More specifically, we must decide whether DeLade's claim of unlawful arrest and pretrial detention against Cargan is cognizable under the Due Process Clause of the Fourteenth Amendment, as DeLade contends, or under the Fourth Amendment only. This distinction matters because of the more-specific-provision rule. Under that rule, 'if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.'. . Simply put, if DeLade's claim of unlawful arrest and pretrial detention sounds in the Fourth Amendment, then it cannot be asserted under the Due Process Clause of the Fourteenth Amendment. . . . After the Supreme Court decided *Manuel*, we

recognized that *Manuel* stands for the proposition that 'the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process.'. . The United States Court of Appeals for the Seventh Circuit agrees. '*Manuel* [ ] makes clear that the Fourth Amendment, *not the [Fourteenth Amendment's] Due Process Clause*, governs a claim for wrongful pretrial detention.' *Lewis v. City of Chicago*, 914 F.3d 472, 475 (7th Cir. 2019) (emphasis added). . . To date, we have not delineated when a claim of unlawful pretrial detention stops implicating the Fourth Amendment and begins to fall under the Due Process Clause of the Fourteenth Amendment. . . . This case requires us to address the question more directly. We conclude that the Fourth Amendment always governs claims of unlawful arrest and pretrial detention when that detention occurs before the detainee's first appearance before a court. Our conclusion is compelled by *Manuel*—even by one of the dissenting opinions. Although Justice Alito, joined by Justice Thomas, . . . dissented in *Manuel*, they 'agree[d] with the Court's holding up to a point: The protection provided by the Fourth Amendment continues to apply after the start of legal process, if legal process is understood to mean the issuance of an arrest warrant or ... an initial appearance under federal law.'. . So the Supreme Court in *Manuel* unanimously agreed that the Fourth Amendment covers a detainee's arrest and pretrial detention *at least* through his initial appearance before a court. . . . [W]e hold that the Fourth Amendment always governs claims of unlawful arrest and pretrial detention when that detention occurs prior to the detainee's first appearance before a court.")

Geness v. Cox, 902 F.3d 344, 355 n.6 (3d Cir. 2018) ("In its recent opinion in *Manuel*, the Supreme Court left unresolved whether a claim for unlawful pretrial detention, i.e., imprisonment that persists without probable cause beyond the onset of legal process, accrues at the onset of that legal process, like a claim of false arrest, . . . or accrues only upon dismissal of the charges, like a claim of malicious prosecution[.] . . In *Manuel*, the Court remanded to the Seventh Circuit to address the issue in the first instance; here, we have no need to address the issue, given both Geness's failure to raise the issue of accrual. . . and our conclusion that Geness, in any event, failed to raise a genuine dispute of material fact as to probable cause[.]")

Geness v. Cox, 902 F.3d 344, 355 n.12 (3d Cir. 2018) ("Under our case law to date, a malicious prosecution claim fails so long as 'the proceeding was *initiated* ... with[ ] probable cause.'. . The Supreme Court has recently stated, though, that, 'those objecting to a pretrial deprivation of liberty may invoke the Fourth Amendment when ... that deprivation occurs [even] after legal process commences,'. . . and some of our Sister Circuits have implicitly authorized a malicious prosecution claim based upon a theory of 'continuing prosecution,' i.e., that the prosecution continued and charges were not dismissed after the revelation of sufficient exculpatory information to undermine a probable cause finding[.] . . . We have no occasion to consider that theory today, as it was not raised by Geness and he states his claim only against Cox, not any other actors responsible for Geness's continued confinement.")

Crosland v. City of Philadelphia, No. CV 22-2416, 2023 WL 3898855, at *6-9 (E.D. Pa. June 8, 2023) ("Though malicious prosecution is a state law tort, 'a claim for malicious prosecution is

actionable under [§ 1983].'. . At its core, 'malicious prosecution ... remedies detention accompanied, not by absence of legal process, but by wrongful institution of legal process.'. . This is precisely what Crosland's SAC alleges—that the individual officers initiated a prosecution against him maliciously and without probable cause. . . The parties disagree, however, about which 'constitutional peg' Crosland can hang his malicious prosecution claim on. . . Philadelphia and Ansel challenge the claim only to the extent that it relies on the Fourteenth Amendment. . . They argue that the viability of a Fourteenth Amendment right to be free from malicious prosecution remains unsettled today and that such a right therefore could not have been clearly established between 1987 and 1991, when Crosland was investigated, arrested, and tried. . . The distinction between Fourth and Fourteenth Amendment theories could prove significant. The Fourth Amendment's protections are limited in scope, 'extend[ing] only until trial.'. . In this case, the Fourth Amendment's limitations could affect both the conduct that Crosland's malicious prosecution claim reaches and the harm it can redress. First, Crosland alleges that the officers' misconduct extended beyond the pretrial phase, through two trials that happened more than two years apart. . . Second, post-trial incarceration 'does not qualify as a Fourth Amendment seizure,' *Torres v. McLaughlin*, 163 F.3d 169, 174 (3d Cir. 1998), meaning that 'damages for post-conviction injuries are not within the purview of the Fourth Amendment.'. . Crosland was, of course, arrested in December 1987—a paradigmatic Fourth Amendment seizure. . . But he also suffered a far greater deprivation of liberty: over thirty-three years of incarceration following his 1988 and 1991 trials. . . Philadelphia and Ansel are right that, as of today, the status of a Fourteenth Amendment right to be free from malicious prosecution is murky. This confusion traces back to the Supreme Court's plurality opinion in *Albright v. Oliver*, 510 U.S. 266 (1994). In a fractured opinion, the plurality held that malicious prosecution claims could not be grounded in substantive due process. . . . The plurality instead suggested—but did not decide—that a malicious prosecution claim could be viable under the Fourth Amendment. . . And it did not address whether such a claim could fall under the Fourteenth Amendment's procedural due process protections because 'the only deprivation of life, liberty or property [in the case], if any, consisted of petitioner's pretrial arrest.' The *Albright* decision upended settled law in this circuit. Before 1994, the Third Circuit entertained malicious prosecution claims under the Fourteenth Amendment. . .In the wake of *Albright*, courts in this circuit struggled to pinpoint how the plurality opinion altered the consensus that prevailed before 1994. . . . While uncertainty still prevails, then, the balance of the Third Circuit's post-*Albright* caselaw indicates that a claim for malicious prosecution grounded in the Fourteenth Amendment's procedural due process protections remains viable. . . . The Third Circuit has drawn a clear temporal line between the Fourth Amendment's protection and the Fourteenth's: while 'the Fourth Amendment forbids a detention without probable cause ... this protection against unlawful seizures extends only until trial.'. . 'The guarantee of due process of law, by contrast, is not so limited as it protects defendants during an entire criminal proceeding through and after trial.'. . Crosland's allegations straddle this temporal line. He claims that the officers not only 'influenced ... the decision to institute criminal proceedings' by 'conceal[ing] and misrepresent[ing] material facts to the district attorney,' but also that they perpetuated those ill-begotten proceedings by threatening a witness and lying about her availability[.] . . . As these allegations make clear, a malicious prosecution—even one that includes an arrest or other Fourth Amendment seizure—

does not always end there. . . And when that prosecution extends beyond the pretrial phase, 'constitutional analysis shifts to the Due Process Clause.'. . This crucial temporal distinction leads me to conclude that Crosland has adequately pled a constitutional claim. . . That leaves the second prong of the qualified immunity analysis: whether the officers' conduct violated clearly established law. At first glance, the fog shrouding a Fourteenth Amendment malicious prosecution claim today appears to resolve the issue in the officers' favor, as several of my colleagues have concluded. [citing cases] But when evaluating a qualified immunity defense, '[t]he state of the law must be considered at the time of the challenged action.'. . The relevant events in this case—Crosland's 1987 arrest, the 1988 trial, and the 1991 trial—all took place before *Albright*, at a time when this circuit unequivocally recognized a right to be free from malicious prosecution grounded in the Fourteenth Amendment's due process protections. During this period, the Third Circuit rejected qualified immunity defenses in cases where police officers initiated prosecutions without probable cause. . . And nothing in those pre-*Albright* cases restricted malicious prosecution claims to the Fourth Amendment's sphere of protection. At the time of the misconduct alleged in this case, therefore, it was clearly established that a malicious prosecution violated the Constitution, and that this right was not limited to the pretrial phase covered by the Fourth Amendment. The intervening change in the doctrinal landscape wrought by *Albright* does not alter the clearly established nature of the right from 1987 to 1991.")

Baskerville v. City of Harrisburg, No. 1:19-CV-420, 2020 WL 108421, at *4–5 (M.D. Pa. Jan. 9, 2020) ("Prior to the Supreme Court's decision in *Manuel*, the dividing line between false imprisonment claims (implicating the Fourth Amendment) and malicious prosecution claims (invoking due process) was institution of legal process. . . However, the *Manuel* Court held that Fourth Amendment protections extend beyond the start of legal process and apply to 'post-legal-process' pretrial detention when that custody suffers from the same constitutional infirmities as unlawful 'pre-legal-process' arrest and detention. . . Such a situation may arise when 'legal process itself goes wrong,' for instance, when 'a judge's probable cause determination is predicated solely on a police officer's false statements.'. . A claim under the Fourth Amendment 'drops out' once trial has occurred, and any allegations of insufficient evidence for conviction and subsequent incarceration implicate the Due Process Clause of the Fourteenth Amendment. . . Baskerville does not contend that his arrest for drug possession was improper. In other words, he does not claim an initial 'false arrest.' Indeed, it is uncontested that his initial arrest and detention were lawful. Baskerville is alleging that his continued pretrial detention based upon the subsequent initiation of firearms charges violates his rights under the Fourth Amendment. That is, Baskerville maintains that state and federal authorities lacked probable cause to bring the firearms charges. Specifically, the amended complaint alleges that defendant officers falsified evidence connecting Baskerville to a handgun he never possessed. Under *Manuel*, these claims arise under the Fourth Amendment and do not sound in Fourteenth Amendment malicious prosecution.[3] [fn. 3: To the extent that Baskerville's amended complaint asserts a Fourteenth Amendment due process claim that state actors intentionally used fabricated evidence to deprive him of liberty without due process, such a claim must be dismissed. *See McDonough v. Smith*, 588 U.S. __, 139 S. Ct. 2149, 2155-59 (2019). The Supreme Court has expressly likened this type of claim to malicious prosecution, thus

requiring—as an element—favorable termination of the related criminal proceedings.] Nevertheless, Baskerville cannot state a civil claim for relief at this time, as he is currently incarcerated pending trial on the related federal felon-in-possession charge. In *Manuel*, on remand from the Supreme Court, the Seventh Circuit held that a Fourth Amendment claim for 'wrongful custody' following initiation of legal process accrues when the unjustified pretrial detention ends. . . We find the Seventh Circuit's analysis to be both logical and persuasive. The wrong asserted by Baskerville, like the claimant in *Manuel*, is post-legal-process pretrial detention without probable cause—a wrong that 'is ongoing rather than discrete.'. . Resolution of this asserted wrong necessarily requires termination of any pretrial custody duly authorized by legal process. . . Moreover, Baskerville's ongoing pretrial detention is properly authorized by legal process. Hence, this detention cannot be attacked through Section 1983. . . For these reasons, we must dismiss Baskerville's Fourth Amendment claims without prejudice; quite simply, his claims have not yet accrued.")

Byrd v. Mangold, No. CV 19-504, 2019 WL 5566752, at *4 (E.D. Pa. Oct. 28, 2019) ("Although it is not clear from the Complaint, it is possible Byrd asserted another Fourth Amendment claim for his post-legal-process pretrial detention without probable cause pursuant to *Manuel v. City of Joliet*, 137 S. Ct. 911, 919–20 (2017). The accrual date for this claim is unsettled, and the Supreme Court and the Third Circuit have both declined to opine on the issue. . . Nevertheless, the two accrual dates considered include either (1) the date one is bound over for legal process, like a claim for false arrest or false imprisonment, or (2) the date upon dismissal of criminal charges, like a claim of malicious prosecution. . . At the latest, this claim accrued at the same time as the malicious prosecution claim. Accordingly, the Court's analysis of the malicious prosecution claim will also decide any alleged post-legal-process pretrial detention claim.")

Fourth Circuit

Harris v. Town of Southern Pines, 110 F.4th 633, 646-48 (4th Cir. 2024) ("In a Fourth Amendment claim, the alleged harm is the plaintiff's wrongful detention without probable cause. . . And for that reason, if there is probable cause to detain the plaintiff, any claim under the Fourth Amendment fails. . . But in a due process fabrication of evidence claim, the alleged harm is that the entire panoply of rights afforded to criminal defendants was infected by the fabricated evidence, thus wrongfully depriving the defendant of their liberty. . . . [S]everal of our sister circuits have held that even if probable cause exists in the absence of the fabricated evidence, that is no defense to a due process claim. . . . A criminal defendant's rights attach as soon as criminal proceedings begin, whether or not the plaintiff is subsequently convicted and whether or not the proceedings are supported by probable cause. Accordingly, the alleged harm in a due process fabrication of evidence case is the 'wrongful initiation of prosecution.'. . Whether the defendant is detained pre-trial or not, he experiences a deprivation of liberty when criminal proceedings against him are initiated. Several other circuits have allowed due process fabrication of evidence claims to proceed where the plaintiffs were never convicted, as is true here. . . We have never expressly held, one way or the other, whether fabrication of evidence claims are available to plaintiffs who

were never convicted. . . . The dissent argues that Harris, Sr.'s fabrication of evidence claim fails because he was detained pretrial. It reasons that the only way to challenge one's pretrial detention is through a Fourth Amendment claim. . . We have already explained that the relevant harm for Harris, Sr.'s fabrication of evidence claim is the initiation of criminal proceedings against him (*i.e.*, his indictment), and not his detention. And it would defy common sense if a plaintiff who is indicted and released on bail but whose indictment is subsequently dismissed could maintain a due process fabrication of evidence claim while a plaintiff who is indicted and detained before his indictment is dismissed could not.")

Harris v. Town of Southern Pines, 110 F.4th 633, 649-53 (4th Cir. 2024) (Rushing, J., dissenting) ("I would affirm in full the district court's order granting summary judgment for the defendants. The defendant police officers had probable cause to arrest plaintiff Lee Marvin Harris, Sr. for drug crimes. And probable cause defeats Harris's malicious prosecution and fabrication of evidence claims, which are both based in the Fourth Amendment. . . . Even setting aside the actual existence of probable cause, the officers were entitled to qualified immunity because, as the district court held in the alternative, the law did not clearly establish that they lacked probable cause to arrest Harris after finding a substantial quantity of cocaine on his property. . . .In brief, the district court correctly granted summary judgment for the officers on Harris's Fourth Amendment malicious prosecution claim because the officers acted with probable cause when they arrested him. The state and federal indictments against Harris separately confirm the existence of probable cause. And, at the very least, the officers were entitled to qualified immunity because the absence of probable cause was not clearly established. . . .Relying on *Manuel v. City of Joliet*, Harris argues that '"[l]egal process did not expunge [his] Fourth Amendment claim"' based on fabricated evidence because '"the process he received failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime."'. . . Harris is correct that the Fourth Amendment governs this claim because 'the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process.'. . . The Supreme Court 'decided some four decades ago that a claim challenging pretrial detention fell within the scope of the Fourth Amendment.'. . And in *Manuel*, the Court clarified that '[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.'. . That includes claims, as in *Manuel*, that police officers fabricated evidence on which a decisionmaker relied to find probable cause supporting further pretrial detention. . . That is precisely the claim Harris brings here. The majority, however, thrusts upon Harris a Fourteenth Amendment due process claim he does not make. . . After raising this argument for Harris, the majority concludes that his claim arises not under the Fourth Amendment as he contends but under the Due Process Clause of the Fourteenth Amendment. . . Respectfully, that contravenes *Manuel*, where the Supreme Court chastised the lower court for 'convert[ing]' the plaintiff's Fourth Amendment claim about pretrial detention 'into one founded on the Due Process Clause.'. . It also ignores that '[t]he Fourth Amendment was tailored explicitly for the criminal justice system, and ... always has been thought to define the "process that is due" for ... the detention of suspects pending trial.'. . Because Harris's fabrication claim is premised on pretrial detention without probable cause, he rightly invokes the Fourth Amendment. . . .Harris's

malicious prosecution and fabrication of evidence claims are both based in the Fourth Amendment and defeated by the existence of probable cause. Because the majority concludes otherwise, I respectfully dissent.")

Hupp v. Cook, 931 F.3d 307, 324-25 (4th Cir. 2019) ("[W]here a police officer takes certain steps, such as first conferring with a prosecutor about moving forward with a criminal prosecution, and a magistrate judge later affirms the officer's determination that probable cause exists for the prosecution, those steps weigh in favor of a finding of qualified immunity. They do not end the qualified immunity inquiry, however, as they 'need only appropriately be taken into account in assessing the reasonableness of [the officer's] actions.'. . A grant of qualified immunity still rests on our determination that an officer acted reasonably under the circumstances. Because a magistrate's finding of probable cause is but a factor in our consideration of the overall reasonableness of the officer's actions, a defendant to a malicious prosecution claim is not absolved from liability when the magistrate's probable-cause finding 'is predicated solely on a police officer's false statements.' *Manuel*, 137 S. Ct. at 918. An officer who lies to secure a probable-cause determination can hardly be called reasonable. Likewise, where an officer provides misleading information to the prosecuting attorney or where probable cause is 'plainly lacking,'. . . the procedural steps taken by an officer no longer afford a shield against a Fourth Amendment claim. This is because '[l]egal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement.'. . .Hupp contends that the magistrate's finding of probable cause does not afford Trooper Cook qualified immunity on her malicious prosecution claim because the probable-cause finding rested on false statements made by Trooper Cook in the criminal complaint against her. Specifically, Hupp asserts that the criminal complaint falsely stated, *inter alia*, that she refused to comply with Trooper Cook's orders to 'step aside,' began cursing at him, 'raised her hands towards' him before he grabbed her arm, and then grabbed at him and 'began cursing' after he grabbed her arm. . . We agree with Hupp that the district court's finding of qualified immunity on this claim was in error. As we have explained, disputes of fact preclude a finding at this stage that a reasonable officer would have believed that probable cause existed for Hupp's arrest. . . . .Given the disputes of the underlying historical facts, the supported assertion that Trooper Cook's statements in the criminal complaint were not entirely truthful, and the lack of undisputed evidence that otherwise would support a probable-cause finding, we cannot find that Trooper Cook is entitled to qualified immunity on Hupp's malicious prosecution claim under section 1983.")

Everette-Oates v. Chapman, No. 5:16-CV-623-FL, 2017 WL 4933048, at *4 (E.D.N.C. Oct. 31, 2017) ("According to the first amended complaint, plaintiff was charged in indictment on August 6, 2013, and that indictment and her arrest on August 7, 2013, procured through fabrication and concealment of evidence, constitute an unlawful seizure in violation of her Fourth Amendment rights. . . Defendants, including defendant Long, allegedly caused defendant Chapman to testify falsely to secure that indictment, and conspired to do so. . . As such, by August 7, 2013, plaintiff possessed sufficient facts about the harm done to her that reasonable inquiry would reveal her cause of action based upon conspiracy to effectuate unlawful seizure in violation of the Fourth

Amendment. Plaintiff argues, nonetheless, that her Fourth Amendment rights continued to be violated during the pendency of her prosecution, citing *Manuel v. City of Joliet*, 137 S.Ct. 911, 918 (2017). *Manuel,* however, expressly reserved the question of the time period for accrual of a Fourth Amendment claim based upon a prosecution commenced through unlawful act of fabrication or concealment of evidence to obtain warrant or indictment. . . In addition, this court previously dismissed plaintiff's claim for 'malicious prosecution,' which claim would have had as an element 'criminal proceedings terminated in plaintiff's favor.'. . Plaintiff's remaining Fourth Amendment claims are premised, by contrast, upon 'additional conduct preceding the indictment' constituting concealment and fabrication of evidence to secure indictment. . . Consistent with the law currently in force, as well as the court's prior rulings, plaintiff's Fourth Amendment claims accrued upon issuance of the indictment secured through fabrication and concealment of evidence.")

Osborne v. Georgiades, No. CV RDB-14-182, 2017 WL 3978485, at *6 (D. Md. Sept. 11, 2017) ("The holding in *Chalmers* is consistent with the recent decision of the United States Supreme Court in *Manuel v. City of Joliet, Ill.*, in which the Court rejected the plaintiff's attempt to frame his complaint based on unlawful pretrial detention within the context of a Fourteenth Amendment due process claim. . . The Court there stated that, '[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.'. . As Osborne similarly alleges that the legal process against him—that is, the arrest warrant application prepared by Georgiades—was unsupported by probable cause, his claims lie within the Fourth Amendment only. In sum, plaintiff's attempt to frame his claims within the context of the Fourteenth Amendment is unavailing and does not excuse his inability to prove an essential element of his § 1983 malicious prosecution claim. Accordingly, Georgiades is entitled to summary judgment.")

Fifth Circuit

Wallace v. Taylor, No. 22-20342, 2023 WL 2964418, at *6 (5th Cir. Apr. 14, 2023) (not reported) ("When Wallace filed his first amended complaint on March 16, 2022, this court did not recognize a freestanding federal claim for malicious prosecution. *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003) (en banc) (holding that " 'malicious prosecution' standing alone is no violation of the United States Constitution."). However, the Supreme Court later held that litigants may bring Fourth Amendment malicious prosecution claims under § 1983. *Thompson v. Clark*, 142 S. Ct. 1332, 1337 (2022). Accordingly, we recently recognized that *Thompson* overruled *Castellano* and reinstated our prior six-element malicious prosecution claim from *Gordy*:
(1) the commencement or continuance of an original criminal proceeding; (2) its legal causation by the present defendant against plaintiff who was defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) malice; and (6) damages.
Armstrong v. Ashley, 60 F.4th 262, 279 (5th Cir. 2023) . . . In addition to proving each of these elements, plaintiffs must also prove 'the threshold element of an unlawful Fourth Amendment seizure.'. . . When there is a change in law during the pendency of an appeal, this court will

generally remand to give the parties and the district court an opportunity to address the new standard. . . However, in order to overcome Taylor's assertion of qualified immunity, Wallace must ultimately show that his Fourth Amendment right to be free from malicious prosecution 'was clearly established at the time of the alleged violation.'. . This court did not recognize a federal malicious prosecution claim at the time Wallace was charged with evading arrest, and '[a] claim that we ha[d] expressly not recognized is the antithesis of a clearly established one.'. . While the Fourth Amendment right to be free from arrest absent probable cause has been clearly established for some time, there was no clearly established Fourth Amendment right to be free from malicious prosecution at the time of Wallace's arrest. Therefore, Taylor is entitled to qualified immunity from Wallace's malicious prosecution claim.")

Armstrong v. Ashley, 60 F.4th 262, 278-79 (5th Cir. 2023) ("The Supreme Court recently held that litigants may bring a Fourth Amendment malicious prosecution claim under § 1983. [citing *Thompson v. Clark*] The Court identified three minimum elements to common law malicious prosecution claims, '(i) the suit or proceeding was "instituted without any probable cause"; (ii) the "motive in instituting" the suit "was malicious," which was often defined in this context as without probable cause and for a purpose other than bringing the defendant to justice; and (iii) the prosecution' terminated in favor of the accused. . . The Supreme Court did not, however, lay out a comprehensive list of the elements for a Fourth Amendment malicious prosecution claim, and largely left the question of elements to the lower courts. Thus, the Court declined to decide 'whether a plaintiff bringing a Fourth Amendment claim under § 1983 for malicious prosecution must establish malice (or some other *mens rea*) in addition to the absence of probable cause.'. . Nonetheless, two elements are required under *Thompson.* The first is that '[b]ecause a [Fourth Amendment malicious prosecution] claim is housed in the Fourth Amendment, the plaintiff also has to prove that the malicious prosecution resulted in a seizure of the plaintiff.'. . The second is that the traditional favorable termination element of a common law malicious prosecution claim 'does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence.'. .The circuit courts have divided on identifying the elements of a Fourth Amendment malicious prosecution claim. One fundamental question in each circuit has been whether all common law malicious prosecution elements must be met, or whether, in the Fourth Amendment context, malice is unnecessary given that '[t]he Fourth Amendment inquiry is one of "objective reasonableness" under the circumstances, and subjective concepts like "malice" and "sadism" have no proper place in that inquiry.". . Following *Thompson*, the circuit split remains in place. Before this court's en banc decision in *Castellano v. Fragozo*, our circuit had determined that 'the elements of the state-law tort of malicious prosecution and the elements of the constitutional tort of "Fourth Amendment malicious prosecution" are coextensive.'. . Consequently, plaintiffs in the Fifth Circuit had to prove six elements to prevail on a constitutionalized malicious prosecution claim. . . The elements included '(1) the commencement or continuance of an original criminal proceeding; (2) its legal causation by the present defendant against plaintiff who was defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) malice; and (6) damages.'. . Given *Thompson*'s clear recognition of the

constitutional tort of malicious prosecution, overruling our precedent in *Castellano*, the rule iterated in *Gordy* is reinstated and parties asserting a Fourth Amendment malicious prosecution claim under § 1983 must prove the above elements, in addition to the threshold element of an unlawful Fourth Amendment seizure. . .But we do not remand for a determination of whether Armstrong's constitutional claim is sufficiently pled because the district court considered and rightly dismissed Armstrong's Louisiana malicious prosecution claim, which requires the same six elements as enumerated in *Gordy*. . . Both claims fail to meet at least elements (2) and (5). Because Armstrong has not plausibly alleged that the defendants suppressed, fabricated, or destroyed evidence, she has not plausibly alleged that the defendants were the cause of Ford's prosecution. Moreover, Armstrong has not plausibly alleged facts showing the malice of any defendant. Accordingly, both her constitutional and her Louisiana malicious prosecution claims were properly dismissed.")

Bradley v. Sheriff's Dep't St. Landry Parish, 958 F.3d 387, 391-93 (5th Cir. 2020) ("The reasoning, and holding, in *Wallace* compels the conclusion that Bradley's wrongful arrest claim is barred by limitations, even if he contends that damages flowed from that false arrest until he was found not guilty. 'If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more.'. . After Bradley's arraignment, 'any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself.'. . Bradley's allegedly false imprisonment ended 'when legal process was initiated against him, and the statute would have begun to run from that date' rather than the date when he was acquitted. . . . The Supreme Court also considered in *Wallace* the argument that *Heck v. Humphrey* should compel the conclusion that a claim for pre-arraignment detention could not accrue until there was a termination of criminal proceedings in the plaintiff's favor. . . . In *Wallace*, the Supreme Court rejected the argument that, because of *Heck*, accrual could not occur until there was a favorable termination of criminal charges, reasoning that 'the impracticality of' a 'rule' that 'an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside ... should be obvious.'. . Among other scenarios, the Court posited 'what if ... the anticipated future conviction never occurs,' or 'what if prosecution never occurs—what will the trigger be then?'. . The Court concluded that the proper course is for the plaintiff to file suit and that a stay could be employed if necessary. . . .Bradley's briefing in our court does not draw any distinction between his claim for wrongful arrest and wrongful detention. He does not argue that the limitations period applicable to a wrongful arrest claim differs from that applicable to a wrongful detention claim. He does not differentiate between detention prior to the commencement of legal process and post-process detention. . . . The Supreme Court's decision in *Manuel v. City of Joliet* expressly left open the question of the date on which limitations begins to run for 'unlawful pretrial detention even beyond the start of legal process.'. . Though Bradley cites *Manuel*, he does so only in connection with claims other than those arising from pretrial detention. He argues only that *Manuel* 'seems to extend pretrial detentions as any impingement on a person's freedom as providing a [§] 1983 claim. Although Plaintiff was released from jail, he was still subjected to additional restrictions (bail, etc.).' Bradley's brief does not cite any of this court's decisions regarding limitations for post-

process pretrial detention claims. His briefing as to the limitations period applicable to wrongful detention is inadequate; he makes no legal argument beyond bare assertions and cites to no applicable cases addressing the question. . . We decline to disturb the district court's ruling that both claims are time-barred.")

Bradley v. Sheriff's Dep't St. Landry Parish, 958 F.3d 387, 395-96 (5th Cir. 2020) ("Suits brought under § 1983 require the deprivation of a right guaranteed under the United States Constitution. . . The magistrate held that '[t]here is no constitutional right to be free from malicious prosecution,' and therefore Bradley 'ha[d] no such federal claim.' While this court's precedent establishes 'that no ... freestanding constitutional right to be free from malicious prosecution exists,'. . . it recognizes the viability of § 1983 prosecution claims rooted in the violation of a specific constitutional right. . . In *Castellano v. Fragozo*, we held that '[Appellant's] contention that the manufacturing of evidence and knowing use of perjured testimony attributable to the state is a violation of due process is correct," and could be brought under § 1983. . . However, Bradley has inadequately briefed the issue. Bradley devotes a single paragraph to his prosecution claims. He states only that 'the constitutional claim centers around a lack of due process under the 5th and 14th Amendments' and that he was deprived of his constitutional rights when Deputy Joshua Godchaux allegedly 'conspir[ed] to unlawfully seize and detain him, coerc[ed] [a co-defendant] to involve Bradley in a crime, provid[ed] false inculpatory evidence, and inflict[ed] emotional distress upon him.' Bradley concludes the paragraph by saying he 'has the right to be free from malicious prosecution.' These are all conclusory assertions devoid of any specifics. Bradley fails to cite to the record. Nor does he cite any case law. . .Under *Wallace*, Bradley's wrongful detention claim is part of a malicious prosecution claim. . . However, Bradley does not discuss the wrongful detention claim as part of his malicious prosecution claim. Though he cites *Manuel,* which held that the 'Fourth Amendment ... establishes "the standards and procedure"' governing pretrial detention ... even after the start of "legal process,"'. . . he asserts only that his 'constitutional claim centers around a lack of due process under the 5th and 14th Amendments.' This does not constitute an argument that a wrongful detention claim, which is based on the Fourth Amendment, was included within the malicious prosecution claim and therefore that the district court erred in dismissing the wrongful detention claim. He fails to mention the Fourth Amendment at all. Bradley has inadequately briefed his 'malicious prosecution' claim. Thus, we need not address Bradley's tolling arguments on this claim. The district court's dismissal of Bradley's 'malicious prosecution' claim is affirmed.")

Fusilier v. Zaunbrecher, No. 19-30657, 2020 WL 1490745, at *2 (5th Cir. Mar. 26, 2020) (not reported) ("Fusilier's allegations in the operative complaint mirror those in *Winfrey*. Fusilier alleged (1) a '48 Hour Warrant' was issued for his arrest, (2) the warrant was signed by a state judge in the usual course, (3) he was arrested pursuant to that warrant, (4) but the officer preparing the warrant knew that there was no probable cause to arrest Fusilier, and (5) Zaunbrecher was not honest in her statements that formed the basis of the warrant affidavit (specifically about Fusilier showing a badge or otherwise pretending to be a peace officer). According to Fusilier, these misstatements show there was no probable cause to have 'detained—which is to say "seiz[ed]"'

—him for 29 days in jail and for months of house arrest. . . As should be apparent, *Winfrey* controls. Since Fusilier is challenging 'an unlawful [detention] pursuant to a warrant' that the defendants caused to be issued because of 'misstatements,' Fusilier's claim best fits with a malicious prosecution analogy. *Winfrey*, 901 F.3d at 493; *see also McDonough*, 139 S. Ct. at 2158. Accordingly, the district court was wrong to conclude his claim accrued when he had his hearing in front of the magistrate judge. Instead, his claim accrued when he was acquitted.")

Garcia v. San Antonio, Texas, No. 18-50274, 2019 WL 3938467, at *2 (5th Cir. Aug. 19, 2019) (not reported) ("The Fourth Amendment protects against pretrial detention instituted pursuant to wrongful legal process. . . Legal process 'goes wrong' when a probable cause determination is baseless, such as when 'a judge's probable-cause determination is predicated solely on a police officer's false statements.'. . Garcia's complaint alleges that he 'was brought before a magistrate judge,' and, based on Officer Orta's 'false police report that [Garcia] drove a vehic[le] while intoxicated which [Officer Orta] had never witnessed,' Garcia 'was given a $75,000 bond.' Garcia then 'lost years and months illegally detained' until 'the prosecutor dismissed the alcohol related charge on Dec. 4, 2015.' These allegations, construed liberally, sufficiently state a claim for pretrial detention pursuant to wrongful legal process under the Fourth Amendment. . .This court has previously addressed the timeliness of a complaint filed by an individual who was detained pursuant to wrongful legal process. . . In *Winfrey*, legal process commenced when the plaintiff was arrested pursuant to an arrest warrant that was based on 'reckless misstatements and omissions' in an officer's probable cause affidavit. . . The court determined that claims for detention pursuant to the 'wrongful institution of legal process' are more akin to malicious prosecution than false arrest, so such claims accrue when criminal proceedings end in a plaintiff's favor. . . Though somewhat distinct in its facts, *Winfrey*'s integrated analysis of *Wallace* and *Manuel* applies here as well: Garcia's claim for detention caused by the wrongful institution of legal process accrued when criminal proceedings ended in his favor on December 4, 2015. Because Garcia filed his complaint less than two years later, this claim was timely.")

Winfrey v. Johnson, No. 18-20022, 2019 WL 1399321, at *4 (5th Cir. Mar. 26, 2019) (not reported) ("Based on *Winfrey II*, the misstatements in Johnson's arrest-warrant affidavit meant it lacked probable cause. The Supreme Court has made clear that pretrial seizures, even if they follow legal process, can violate the Fourth Amendment if the initial seizure occurred without probable cause and nothing later remedied the lack of probable cause. [citing *Manuel v. City of Joliet*] That is the case here – the material misstatements and omissions in the arrest-warrant affidavit led to Winfrey's unlawful arrest and pretrial detainment. But that is not the end of this story, because Megan was reindicted and tried on evidence obtained after further investigation of her case. Megan does not contradict the record evidence that Deputy Johnson's involvement in her investigation ceased following the issuance of the arrest warrant in February 2007, at which point the investigation was taken over by the Texas Rangers and the District Attorney's investigator, James Kirk. The further investigation included follow-up interviews with Campbell and other witnesses. At trial, new and potentially incriminating testimony about an alibi attempt and evidence tampering were offered by her ex-husband Hammond and her boyfriend at the time of the killing,

Jason King. . . Consequently, at the time of reindictment, the initial lack of probable cause ceased being the cause of Winfrey's detention and damages ceased accruing from Johnson's Fourth Amendment violation. Additionally, although the Texas Court of Criminal Appeals ultimately reversed Winfrey's conviction, that court's painstaking review of the totality of the circumstantial evidence underlying her conviction undermines Megan's argument that the initial lack of probable cause supporting her arrest persisted through reindictment, trial, and incarceration, and continued to taint the case against her. In concluding that the evidence was insufficient to prove Megan's guilt beyond a reasonable doubt, the court nowhere suggested that there was no probable cause to indict or try her for murder. In fact, the majority found that the evidence did indeed raise a suspicion of her guilt. The court's analysis further supports the conclusion that the initial lack of probable cause ceased with Megan's reindictment and so did the damages. . . . Megan argues that because her liberty was constrained beyond her initial arrest, and because Texas law provides an insufficient state tort law remedy, she may press a § 1983 federal malicious prosecution claim under procedural due process. She acknowledges, however, that the Supreme Court did not approve a substantive due process claim arising from malicious prosecution, *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807 (1994), and no subsequent decision of that Court or this court has rendered such a claim cognizable, much less 'clearly established.' *See, e.g., Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc). Even if this court accepted Megan's invitation to break new legal ground, which we do not, Johnson would be entitled to qualified immunity. The district court's dismissal of the malicious prosecution claim was correct.")

Winfrey v. Rogers, 901 F.3d 483, 491-93, 496 n.4 (5th Cir. 2018) ("This Court has held that although there is no 'freestanding constitutional right to be free from malicious prosecution,' '[t]he initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example.' *Castellano v. Fragozo*, 352 F.3d 939, 945, 953 (5th Cir. 2003) (en banc). In *Albright v. Oliver*, . . . a plurality of the Supreme Court said that malicious-prosecution claims must be based on the Fourth Amendment, rather than on 'the more generalized notion of "substantive due process,"' because the Fourth Amendment is the explicit textual source against this type of government behavior. . . And recently, in *Manuel v. City of Joliet*, . . . the Supreme Court considered whether a plaintiff had stated a Fourth Amendment claim when he was arrested and charged with unlawful possession of a controlled substance based upon false reports written by a police officer and an evidence technician. . . There, the Court said the plaintiff's 'claim fits the Fourth Amendment, and the Fourth Amendment fits [the plaintiff's] claim, as hand in glove.'. . And it held 'that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process.'. .These cases fully support a finding that the Fourth Amendment is the appropriate constitutional basis for Junior's claim that he was wrongfully arrested due to the knowing or reckless misstatements and omissions in Johnson's affidavits. We, therefore, hold that a Fourth Amendment claim is presented, and we will decide the remainder of the issues based upon this legal conclusion. . . .The accrual date depends on whether Junior's claim more closely resembles one for false imprisonment or one for malicious prosecution. . . A false-imprisonment claim is based upon 'detention without legal process.'. . It 'begins to run at the time the claimant

becomes detained pursuant to legal process.'. . A malicious-prosecution claim is based upon 'detention accompanied ... by *wrongful institution* of legal process.'. . It 'does not accrue until the prosecution ends in the plaintiff's favor.'. . Johnson urges us to find that this case fits within *Wallace v. Kato.* There, the Supreme Court found that the plaintiff's unlawful warrantless-arrest Fourth Amendment claim resembled a false-imprisonment claim, because the constitutional violation occurred when the plaintiff was arrested without a warrant instead of when the conviction was later set aside. . . Law enforcement officers transported the fifteen-year-old plaintiff to a police station—without a warrant or probable cause to arrest him—and interrogated him into the early morning. . . So, the Court found that the plaintiff's claim accrued when he was initially arrested. . . Here, we find that Junior's claim is more like the tort of malicious prosecution, because Junior was arrested through the wrongful institution of legal process: an arrest pursuant to a warrant, issued through the normal legal process, that is alleged to contain numerous material omissions and misstatements. Junior thus alleges a wrongful institution of legal process—an unlawful arrest *pursuant to* a warrant—instead of a detention with no legal process. Because Junior's claim suggests malicious prosecution rather than false imprisonment, his claim accrued when his criminal proceedings ended in his favor on June 12, 2009. He filed his suit well within the two-year limitations period on May 26, 2010. So Junior's claim survives the time bar. . . . Junior urges us to overrule our independent-intermediary doctrine based on *Manuel v. City of Joliet*, but we cannot do that and find it unnecessary. In *Manuel*, the Supreme Court held 'that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process.'. . The Court said that a grand jury indictment that 'was entirely based on false testimony' could not expunge the plaintiff's Fourth Amendment claim. . . But it did not hold that officers can never be insulated from liability based on later determinations by an intermediary when all the necessary information was placed before that intermediary. Instead, the Court affirmed a principle that we have consistently followed: when an intermediary's proceeding is tainted by an officer's unconstitutional conduct, the independent-intermediary doctrine does not apply.")

Jauch v. Choctaw County, 874 F.3d 425, 429-32, 435 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 638 (2018) ("We address only the Fourteenth Amendment and hold that this excessive detention, depriving Jauch of liberty without legal or due process, violated that Amendment; for that reason, her motion for summary judgment should have been granted as to the Fourteenth Amendment Due Process claim. . . . While this appeal was pending, the Supreme Court issued *Manuel v. City of Joliet*, which held that a defendant seized without probable cause could challenge his pretrial detention under the Fourth Amendment. . . *Manuel* does not address the availability of due process challenges after a legal seizure, and it cannot be read to mean, as Defendants contend, that *only* the Fourth Amendment is available to pre-trial detainees. For example, even when the detention is legal, a pre-trial detainee subjected to excessive force properly invokes the Fourteenth Amendment. . . So, too, may a legally seized pre-trial detainee held for an extended period without further process. This Court has already addressed the interplay between the Fourth and Fourteenth Amendment, and *Manuel* fits with these prior cases. In 1996, we held the Fourth Amendment inapplicable to the usual pretrial detainee who was *properly arrested* and awaiting trial. . . When confronted with a defendant held upon probable cause who spent nine months in pretrial detention,

we found the Fourth Amendment inapplicable and the due process clause of the Fourteenth Amendment implicated. *See Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000). The Fourth Amendment could not have been violated, we explained, because the plaintiff was originally arrested 'pursuant to a valid court order,' but the 'alleged nine month detention without proper due process protections' would amount to a due process violation if proven. . . By contrast to these cases, where a claim of unlawful detention was accompanied by allegations that the initial arrest was not supported by valid probable case, we held that analysis was proper 'under the Fourth Amendment and not under the Fourteenth Amendment's Due Process Clause.' *Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 441 (5th Cir. 2015); *see also Castellano v. Fragozo*, 352 F.3d 939, 953 (5th Cir. 2003) (en banc). Just like *Manuel*. . . . *Jones* is binding, but it did not state whether the due process violation was of the procedural or substantive variety. Other circuits appear split on the question. *Compare Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985) (substantive due process); *Hayes v. Faulkner Cnty., Ark.*, 388 F.3d 669 (8th Cir. 2004) (substantive due process), *with Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470 (9th Cir. 1992) (procedural due process); *see also Armstrong v. Squadrito*, 152 F.3d 564, 575 & n.4 (7th Cir. 1998) (specifically rejecting *Oviatt* and its procedural due process approach). We find the answer from Supreme Court cases. 'The touchstone of due process is protection of the individual against arbitrary action of government.' *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974). This is true with respect to both procedural and substantive due process. . . . Here, we deal with a deprivation of a protected liberty interest due to an allegedly unfair procedural scheme. The Constitution itself protects physical liberty. . . As a matter of procedure, defendants held in Choctaw County on capias warrants are held without an arraignment or other court proceeding until the circuit court that issued the capias next convenes. Our task is to determine the constitutionality of this procedure, and we are satisfied that Jauch's right to procedural due process is most squarely implicated. Without deciding whether substantive fundamental unfairness may support a due process holding with little procedural deficiency, we hold that prolonged-detention cases do raise the immediate question of whether the pre-trial detainee's procedural due process rights have been violated. . . . Ordinarily, '[t]he starting point for any inquiry into how much "process" is "due" must be the Supreme Court's opinion in *Mathews v. Eldridge*,' and we would consider the private interest at stake, the risk of erroneous deprivations under existing procedures in light of available alternative or additional procedures, and the government's interest. . . .The Supreme Court subsequently clarified the law, holding "that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which ... are part of the criminal process," reasoning that because the "Bill of Rights speaks in explicit terms to many aspects of criminal procedure," the Due Process Clause "has limited operation" in the field.' *Kaley v. United States*, ——U.S. ——, 134 S.Ct. 1090, 1101, 188 L.Ed.2d 46 (2014) (quoting *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 2576, 120 L.Ed.2d 353 (1992)) (alterations in original). . . . .This is not a case about presumptions, evidence, or any workaday aspect of the process-in-action. This is a case about confinement with process deferred. . . .There is thus room to argue that the *Mathews* test is more appropriate under the circumstances. Ultimately, we again follow the Supreme Court's example, choosing not to decide which test applies 'because we need not do so.'. . The *Medina* test represents the 'narrower inquiry' and is

'far less intrusive than that approved in *Mathews.*'. . 'A rule of criminal procedure usually does not violate the Due Process Clause unless it (i) "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or (ii) "transgresses any recognized principle of "fundamental fairness" in operation."'. . . Even under the deferential *Medina* test, the indefinite-detention procedure violated Jauch's right to procedural due process. . . . For the following reasons, we conclude that indefinite pre-trial detention without an arraignment or other court appearance offends fundamental principles of justice deeply rooted in the traditions and conscience of our people. The same traditions that birthed our Sixth Amendment right to a speedy trial and Eighth Amendment prohibition of excessive bail condemn the procedure at issue. . . . Here, the challenged procedure denies criminal defendants their *enumerated* constitutional rights relating to criminal procedure by cutting them off from the judicial officers charged with implementing constitutional criminal procedure. . . This is unjust and unfair.")

McClin v. Ard, 866 F.3d 682, 692-94 (5th Cir. 2017) ("*Albright*'s statements on the Fourth Amendment seizure issue, which were not essential to that case's outcome, are non-binding though indicative, and our court has never decided whether voluntary surrender to an arrest warrant constitutes a seizure. Several other circuit courts, however, have relied on *Albright* to hold that a state official's acceptance of a voluntary surrender to an arrest warrant constitutes a seizure. . . .The Defendants argue that McLin fails to plead a seizure because he does not allege that his pre-trial liberty was limited. In support, they point to cases where courts have ruled that the issuance and receipt of a criminal summons or citation—without the imposition of additional, pre-trial restrictions—may not implicate the Fourth Amendment. [cases collected in footnote] If, however, the summons or citation is accompanied by more burdensome restrictions—such as restrictions on out-of-state travel and pre-trial reporting requirements—some courts, including this one, have recognized that a seizure may occur incident to a pre-trial release. . . .The Defendants' reliance on cases concerning seizures incident to pretrial release is misplaced. McLin's Fourth Amendment claim does not stem from any conditions imposed on him once he was issued the summons. Indeed, McLin does not plead any pre-trial restrictions at all. Rather, McLin's seizure occurred when he surrendered to the arrest warrants and LPSO exercised authority consistent with the warrants—even if McLin thereafter signed his summons and was allowed to leave. The existence or non-existence of any pretrial restrictions does not impact the analysis of this seizure. . . The Defendants have not pointed to a case in which a court found that a person surrendering to an arrest warrant was *not* seized for Fourth Amendment purposes.")

Harris v. Mamou Police Department, No. 6:18-CV-01024, 2019 WL 4200600, at *2 (W.D. La. Sept. 3, 2019) ("*Manuel*. . . is inapposite here because that case involved a plaintiff subject to detention after legal process had commenced and, according to the court, was grounded on a wrongful arrest and false imprisonment claim that was more like a malicious prosecution claim. The Fifth Circuit has never recognized an independent federal claim for malicious prosecution. *See Castlellano v. Fragazo*, 352 F.3d 939, 942 (5th Cir. 2003) (holding that "malicious prosecution standing alone is no violation of the United States Constitution."). The

Fifth Circuit and the Supreme Court, however, have recognized that a false imprisonment claim that involves 'detention *accompanied...* by wrongful institution of legal process' is more akin to a malicious prosecution claim and should, therefore, accrue only when the prosecution ends in the plaintiff's favor. . . Here, there was no detention accompanied by wrongful institution of legal process because Harris was released from custody prior to arraignment and the commencement of the legal process. Accordingly, the *Manuel* rule for accrual does not apply.")

Sixth Circuit

Lester v. Roberts, 986 F.3d 599, 606-07 (6th Cir. 2021) ("Lester's federal malicious-prosecution claim alleges a violation of the Fourth Amendment under 42 U.S.C. § 1983. Yet neither the Constitution nor § 1983 uses the words 'malicious prosecution.' Perhaps unsurprisingly, then, our justification for this constitutional claim has evolved over time. We once suggested that defendants had a substantive-due-process right under the Fourteenth Amendment to be free from malicious prosecutions that 'shock the conscience.'. . But the Supreme Court rejected our view in *Albright v. Oliver*[.] . . A plurality explained that the 'Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.'. . The plurality, however, opted to leave open the question whether a malicious-prosecution claim could be asserted under the Fourth Amendment. . . We have taken a winding path since *Albright*. Shortly after that decision, we continued to follow our previous malicious-prosecution framework under the Fourteenth Amendment simply by changing the 'label' to the Fourth. *See Spurlock v. Satterfield*, 167 F.3d 995, 1006 & n.19 (6th Cir. 1999). We soon recognized a textual problem: The Fourth Amendment regulates seizures, so we held it does not 'support a separate malicious prosecution claim independent of the underlying illegal seizure.' *Frantz v. Village of Bradford*, 245 F.3d 869, 876 (6th Cir. 2001). But *Frantz*'s reading did not last long. We next held that *Frantz* conflicted with *Spurlock*, which 'obliged' us to 'recognize a separate constitutionally cognizable claim of malicious prosecution under the Fourth Amendment.' *Thacker v. City of Columbus*, 328 F.3d 244, 259 (6th Cir. 2003). Since then, we have acknowledged that our old framework (with its shocks-the-conscience test) does not fit the Fourth Amendment. We have thus changed the elements for a constitutional malicious-prosecution claim. *See Sykes v. Anderson*, 625 F.3d 294, 308–09 (6th Cir. 2010). Today, we require proof that: (1) the defendant 'made, influenced, or participated in the decision to prosecute'; (2) the government lacked probable cause; (3) the proceeding caused the plaintiff to suffer a deprivation of liberty; and (4) the prosecution ended in the plaintiff's favor. *See Jones v. Clark County*, 959 F.3d 748, 756 (6th Cir. 2020). Our current status quo looks no more stable. We have called the malicious-prosecution label an 'unfortunate and confusing' 'misnomer.'. . Consider the text: The Fourth Amendment protects '[t]he right of the people to be secure in their persons ... against unreasonable ... seizures[.]'. . It bars certain kinds of seizures, not prosecutions. *Tlapanco v. Elges*, 969 F.3d 638, 658–59 (6th Cir. 2020) (Thapar, J., concurring). And it establishes an objective reasonableness test, not a subjective maliciousness test. . . Or consider precedent: The Supreme Court has never adopted a malicious-prosecution claim since *Albright*. To the contrary, it has avoided that name. *See Manuel v. City of Joliet*, —— U.S. ——, 137 S. Ct. 911, 919–20, 197 L.Ed.2d 312 (2017). *Manuel* considered a claim that the police

used false evidence to charge and detain the plaintiff before trial. . . Highlighting the Fourth Amendment's text, the Court asked whether the police had caused an 'unreasonable' 'seizure' of the plaintiff. . . And it noted that the pretrial detention qualifies as a 'seizure.'. . Like our earlier decision in *Frantz,* therefore, *Manuel* suggests that we should focus on the *seizure* (Lester's two-year detention) rather than the *prosecution* (Lester's criminal proceedings). Regardless, this distinction between a seizure and a prosecution does not matter here. Whether it should be called a 'malicious-prosecution claim' or simply an 'unreasonable-seizure claim,' the claim has two universally applicable ground rules. As a matter of substance, the Fourth Amendment prohibits only those pretrial seizures (or prosecutions) that lack *probable cause*, and § 1983 grants qualified immunity to defendants who mistakenly but reasonably conclude that probable cause exists. As a matter of procedure, the Fourth Amendment prohibits extended pretrial detentions unless a *neutral decisionmaker* finds that probable cause exists, and § 1983 grants absolute immunity to witnesses who testify before one such decisionmaker (the grand jury).")

Tlapanco v. Elges, 969 F.3d 638, 658-60 (6th Cir. 2020) (Thapar, J., concurring) ("I concur in the thoughtful majority opinion, which correctly resolves the disputed issues before us. I write separately to offer a reminder that 'malicious prosecution' is a troublesome label for claims based on unreasonable pretrial detention. As our court explained years ago, this cause of action is better characterized 'simply as the right under the Fourth Amendment to be free from continued detention without probable cause.'. . In other words, it's 'a plain-vanilla Fourth Amendment claim.'. .While old habits can be hard to break, I encourage parties and judges in this circuit to follow the Supreme Court's lead in *Manuel* and 'eschew[ ] the "malicious prosecution" label.' *Pagán-González v. Moreno*, 919 F.3d 582, 608 (1st Cir. 2019) (Barron, J., concurring) (discussing *Manuel*, 137 S. Ct. 911); *see also Jones v. Clark Cty.*, 959 F.3d 748, 777 (6th Cir. 2020) (Murphy, J., concurring in part and dissenting in part) (noting that *Manuel* "conspicuously avoided that label"). The label serves little purpose and leads only to confusion. If you doubt it, just look at this case. The police arrested Tlapanco pursuant to a warrant after a magistrate judge made a (possibly invalid) probable-cause determination. He was then held on that warrant throughout his detention. Thus, by all appearances, he suffered no more than one unreasonable seizure of his person. Logically, that *one* seizure should give rise to *one* Fourth Amendment claim. Yet Tlapanco brings two—a false-arrest-and-imprisonment claim *and* a 'malicious prosecution' claim, both based on the same seizure and ensuing detention. The majority opinion properly accepts this presentation given that all parties litigated on this basis. Still, it's worth pointing out that the parties' presentation seems duplicative. What explains this redundancy? If you study Tlapanco's pleadings, it's unclear whether he originally intended to bring the 'malicious prosecution' count as a Fourth Amendment claim. Rather, he seems to have pled the false-arrest-and-imprisonment count to cover the Fourth Amendment injury of unreasonable seizure and detention and then to have proffered a 'malicious prosecution' claim based on some independent constitutional right to be free from wrongful criminal charges. But this court has not recognized a freestanding malicious-prosecution claim under due-process principles. Or at any rate, not since before *Albright v. Oliver*, which rejected a substantive-due-process right to be free from unreasonable prosecution. . . What this court has recognized—and repeatedly *called* 'malicious prosecution,' though often with reluctance—is a

Fourth Amendment claim for unreasonable seizures related to prosecutions. . . As we have explained, "malicious prosecution" is a "misnomer" for this kind of claim for at least two reasons: (1) it has no separate "malice" element; and (2) since it's rooted in the Fourth Amendment, it targets the wrong of unreasonable detention, not the wrong of unjustified prosecution as such. . . In other words, both the adjective and the noun in 'malicious prosecution' are misleading. Even so, the label has stuck and is now embedded in our caselaw. So you can hardly blame the parties for their initial assumption that Tlapanco could bring both a 'malicious prosecution' claim and a false-arrest-and-imprisonment claim. . . Later, as the case proceeded, the parties read the fine print and shifted the 'malicious prosecution' count onto a Fourth Amendment footing. But no one seemed to notice that this produced two Fourth Amendment claims for a single Fourth Amendment injury. To avoid this confusion in the future, we should stop calling it 'malicious prosecution' when a plaintiff brings a Fourth Amendment claim based on unreasonable pretrial detention.")

Jones v. Clark County, Kentucky, 959 F.3d 748, 776-77 (6th Cir. 2020) (Murphy, J., concurring in part and dissenting in part) ("Under our precedent, a plaintiff pursuing a claim that a defendant engaged in a 'malicious prosecution' in violation of the Fourth Amendment must satisfy four elements. *See Sykes*, 625 F.3d at 308–09. The plaintiff must show that (1) the defendant made, influenced, or participated in the decision to initiate a criminal prosecution against the plaintiff; (2) probable cause did not exist for the prosecution; (3) the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor. . . We have added that the Fourth Amendment contains 'two types' of these claims. . . One exists for the 'wrongful institution of legal process' without probable cause and the other for the 'continued detention without probable cause' when, for example, new exculpatory evidence comes to light. . . The Supreme Court, however, 'has not yet decided whether there is a cognizable claim for malicious prosecution under the Fourth Amendment.'. . And our cases have long bemoaned the 'malicious-prosecution' label. We have said that this label is 'somewhat of a misnomer,'. . . calling it 'both unfortunate and confusing[.] . . But we found ourselves '"stuck with that label" in part because of its use by the Supreme Court and other circuits.'. . I agree that the common-law elements of this malicious-prosecution tort fit uncomfortably with the Fourth Amendment's text barring 'unreasonable' 'seizures.'. . The tort focuses on a prosecution; the text focuses on a seizure. The tort requires subjective maliciousness; the text requires objective unreasonableness. But it is not clear to me that we are 'stuck' with this label after the Supreme Court's recent *Manuel* decision. There, the plaintiff argued that the government had arrested and detained him for 48 days 'based solely on false evidence' that did not establish probable cause from the outset of his detention. . . The dissent in *Manuel* affirmatively detailed why the Fourth Amendment's text conflicts with the elements of the common-law tort of malicious prosecution. . . The majority conspicuously avoided that label and did not respond to the dissent's arguments when holding that Manuel stated a Fourth Amendment claim. . . It instead reasoned simply that '[t]he Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause.'. . *Manuel* thus might free us of the malicious-prosecution framework. As the Seventh Circuit said on remand in that case: 'After *Manuel*, "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim—the absence

of probable cause that would justify the detention.'. . And while '[t]here is no such thing as a constitutional right not to be prosecuted without probable cause,' 'there *is* a constitutional right not to be held in custody without probable cause.'. . Yet I would leave *Manuel*'s possible effect for another day. Any potential framing of Jones's claim includes a probable-cause element, and Murray is entitled to qualified immunity on that element.")

Howse v. Hodous, 953 F.3d 406, 408-09 & n.2 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1515 (2021) ("Here, Howse himself admitted that he tried to make it more difficult for the officers to arrest him by stiffening up his body and screaming at the top of his lungs. That's enough to provide probable cause for the obstructing-official-business charge. And because there was probable cause for *that* charge, Howse cannot move forward with *any* of his malicious-prosecution claims. According to our circuit, malicious-prosecution claims are based on the Fourth Amendment. *Spurlock v. Satterfield*, 167 F.3d 995, 1006, 1006 n.19 (6th Cir. 1999).[2] **[fn2:** A majority of the Supreme Court has not yet decided whether there is a cognizable claim for malicious prosecution under the Fourth Amendment. Justice Alito, writing in dissent in *Manuel v. City of Joliet*, reasoned that malicious-prosecution claims do not arise under the Fourth Amendment. . . If they are constitutionally cognizable at all, he said, they must arise under another constitutional provision—presumably the Due Process Clause. . . But because our circuit has held that a federal malicious-prosecution claim does arise under the Fourth Amendment (and not the Due Process Clause), we are bound by that decision and must consider Fourth Amendment principles when defining the scope of the claim. *See, e.g.*, *Sykes v. Anderson*, 625 F.3d 294, 310 (6th Cir. 2010) (refusing to import the common-law malice requirement into a federal malicious-prosecution claim because that would conflict with Fourth Amendment principles).**]** Although we call it a claim for malicious prosecution, that's a bit of a misnomer. After all, our circuit doesn't even require a showing of malice to succeed on such a claim. *Sykes v. Anderson*, 625 F.3d 294, 310 (6th Cir. 2010). It's really a claim for an 'unreasonable prosecutorial seizure' governed by Fourth Amendment principles. . . Under the Fourth Amendment, an officer can seize someone so long as he has probable cause that the person has violated the law. . . . [C]laims for false arrest and malicious prosecution both arise under the Fourth Amendment. They both hinge on an alleged unreasonable seizure. And they both rise and fall on whether there was probable cause supporting the detention. Indeed, just like in the context of false arrests, a person is no more seized when he's detained to await prosecution for several charges than if he were seized for just one valid charge. In the end, there's no principled reason for treating a Fourth Amendment malicious-prosecution claim differently than a Fourth Amendment false-arrest claim.")

Howse v. Hodous, 953 F.3d 406, 415-17 (6th Cir. 2020), (Cole, C.J., dissenting in part), *cert. denied*, 141 S. Ct. 1515 (2021) ("The Supreme Court tells us that the tort of malicious prosecution is 'entirely distinct' from the tort of false imprisonment, which includes false arrest, as the former remedies the wrongful institution of legal process and the latter remedies detention in the absence of legal process. . . Here, the majority determines that these 'entirely distinct' claims must necessarily be analyzed in the exact same way, despite myriad reasons to follow the Supreme Court's direction and treat them differently. And it does so sua sponte, absent the urging of any

party, and without the support of a single decision of this court or any other. I decline to join the majority in making this leap to new legal ground. We have never indicated that a malicious prosecution claim fails so long as there is probable cause to prosecute on one of several charges. In every prior case where there were some valid charges on the indictment and we were tasked to consider a malicious prosecution claim on acquitted charges, we separately analyzed whether probable cause supported the charge that was the subject of the claim. . . . [O]ther circuit courts have explicitly rejected the majority's approach, and with good reason. The Second Circuit has concluded that a malicious prosecution claim can proceed even when a separate charge is supported by probable cause. *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991). That court observed that the majority's approach would allow prosecutors to tack on additional meritless charges in any case where they had probable cause to prosecute for a single offense. . . The Seventh Circuit held that 'a malicious prosecution claim is treated differently from one for false arrest[.]' *Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 682 (7th Cir. 2007). . . .Other circuits have joined this conclusion. . . . I join these circuits and dispute the majority's contention that 'there's no principled reason for treating a Fourth Amendment malicious-prosecution claim differently than a Fourth Amendment false arrest claim.'. . . I further believe that when we reach this claim, summary judgment is inappropriate given this record. Perhaps the most ardently disputed fact in this case is whether Howse struck or attempted to strike the officers as they confronted him on his own porch; the officers say he did, while Howse says he did not. Given that we view disputed facts in the light most favorable to Howse, we proceed on the assumption that Howse did not strike either officer. A malicious prosecution claim survives where an officer knowingly or recklessly makes a false statement or falsifies or fabricates evidence. *King v. Harwood*, 852 F.3d 568, 587–88 (6th Cir. 2017). A natural corollary of our assumption that Howse's version of the events is the true one is that Hodous and Middaugh's statements that spurred the prosecution of Howse for assault are false. I would therefore hold that the malicious prosecution claim should proceed.")

Mills v. Barnard, 869 F.3d 473, 480-87 (6th Cir., 2017) ("The prototypical case of malicious prosecution involves an official who fabricates evidence that leads to the wrongful arrest or indictment of an innocent person. In this case, however, the indictment conclusively determines that probable cause existed for Mills's detention, at least before the DNA test. . . But the § 1983 version of 'malicious prosecution' is not limited to the institution of proceedings; it can also support a claim for 'continued detention without probable cause.'. . .The existence of an indictment is thus not a talisman that always wards off a malicious-prosecution claim. Instead, 'even if independent evidence establishes probable cause against a suspect, it would still be unlawful for law-enforcement officers to fabricate evidence in order to strengthen the case against that suspect.'. . We recently held in *King v. Harwood*, 852 F.3d 568 (6th Cir. 2017), that pre-indictment nontestimonial acts that were material to the prosecution of a plaintiff could rebut the presumption of probable cause established by a grand-jury indictment. . . For this exception to apply, a transgressing officer must have acted 'knowingly or recklessly' in making false statements that were material to the prosecution. . . In this case, where the DNA report was the linchpin of the prosecution's probable cause, the fact of a pre-existing indictment does not trump the fact that—

if the complaint's allegations are taken as true, as we must take them—Jenkins termed exculpatory evidence 'inconclusive' 'despite clear evidence that CM's underwear contained semen from multiple men that [were] not Mr. Mills.'. . . Mills's complaint is sufficiently well-pleaded to establish the element that there was a lack of probable cause for the prosecution following Jenkins's DNA analysis. . . . Mills had to state more than the conclusion that 'Jenkins did so intentionally.' But by including in the complaint the facts that the DNA results were clearly exonerating under the analysis used by Jenkins, that Jenkins denied making an error in her analysis, and that the incriminating opposite conclusion was provided to prosecutors, Mills's complaint provides sufficient factual context to support a plausible claim that Jenkins intentionally falsified the report. . . . Because Mills's complaint alleges that Jenkins's intentionally falsified report was material to his prosecution and that the falsities therein provided otherwise lacking probable cause, along with the allegations that he had been deprived of liberty and the criminal proceeding had eventually been resolved in his favor, he sufficiently pleaded a claim of malicious prosecution under 42 U.S.C. § 1983. The district court was in error in holding that the indictment conclusively resolved the issue of probable cause. Accordingly, we reverse the district court's grant of the motion to dismiss with respect to the malicious-prosecution claim. . . .The district court combined the fabrication claim and the withholding claim into one, but this was in error. In *Gregory*, this court analyzed separately claims that a forensic expert withheld evidence and that the expert had fabricated evidence. . . This result is sensible, as the claims have different elements, most notably, that one involves the suppression of favorable evidence and the other the manufacture of damaging evidence. . . Mills has stated a plausible claim that satisfies the elements of a fabrication-of-evidence claim. . . . The source of Mills's *Brady* claim, as distinguished from his fabrication claim, is that there existed additional DNA evidence—classified by Jenkins as 'inconclusive'—that was in fact exculpatory. . . The complaint alleges that Jenkins was responsible for 'the suppression of exonerating exculpatory evidence, including, but not limited to, the DNA evidence that clearly excluded Mr. Mills but was labeled as "inconclusive."' It further claims that the evidence 'was actually exculpatory,' but Jenkins's report was 'incomplete' and that a full report would have proven that DNA in C.M.'s underwear was 'actually conclusively someone else's DNA.' These claims map onto the requirements for a *Brady* violation: (1) evidence favorable to a defendant (results that conclusively excluded Mills as contributor of the DNA); (2) that was suppressed; (3) and would have had a reasonable probability of changing the result of the proceeding (the corroboration of C.M.'s testimony by the DNA evidence was the basis of the jury's guilty verdicts). . . . It is important to note that this appeal comes to us at the motion-to-dismiss stage, rather than at summary judgment where more facts are available to the district court. At the next stage, Jenkins may provide evidence that makes it clear that the DNA analytic methods used by SERI differed, that the evidence available to her was not exculpatory, or that her actions were innocent or negligent at worst. But at this stage, the complaint has stated legally cognizable claims.")

Miller v. Maddox, 866 F.3d 386, 393-94 (6th Cir. 2017) ("Miller's participation in the pretrial release program constitutes a deprivation of liberty separate from the initial seizure. . . .Miller was not only arrested and incarcerated, but also required to pay $35 to be accepted into the pretrial program, could have been required to post a $3,000 bond, was required to attend court appearances,

and required to check in with a case manager once per week. This case involves precisely the factors that were missing in *Noonan* and that *Johnson v. City of Cincinnati* suggested could constitute a deprivation of liberty apart from the initial seizure. . . .To the extent that Miller was detained for any amount of time after being accepted into the pretrial release program, that portion of her detention prolonged the seizure beyond the point necessary to carry out the seizure's purpose. The parties do not point us to any place in the record stating how long, if at all, after acceptance into this program Miller remained detained. Accordingly, we find that there is a genuine dispute of material fact with respect to whether Miller suffered a deprivation of liberty by being detained past the time necessary to enroll her in the pretrial services program.")

Hoskins v. Knox County, No. 6:17-CV-84-REW-HAI, 2020 WL 1442668, at *22-23 & n.36 (E.D. Ky. Mar. 23, 2020) ("The Fourth Amendment prohibits unreasonable seizures. . . Both arrest and pretrial detention are seizures. . . A seizure without probable cause is unreasonable. . . Fabricated evidence cannot satisfy the probable-cause requirement. . . When only fabricated evidence supports a seizure, probable cause is lacking, and the seizure is unreasonable. . . Inversely, when demonstrably untainted proof adequately supports a seizure, the mere existence of fabricated evidence does not constitute a Fourth Amendment violation. . . The distinction is primarily one of causation: in the first scenario, the fabricated evidence undeniably *causes* the seizure, but in the second, seizure follows as a lawful consequence of legitimate evidence, which can elicit no reasonableness-based objection.[36] **[fn. 36:** That is not to say there can be no other objection (legal or otherwise) to an officer's deliberate or reckless fabrication of evidence. But there can be no objection *grounded in the Fourth Amendment*, which (in this context) is satisfied by a reliable showing of untainted probable cause.**]** Any statement to the contrary—namely, the suggestion that a Fourth Amendment claim premised on fabrication may proceed even when probable cause exists—has an explanation that does not spell victory for Plaintiffs on this score. First, as discussed above, evidence fabrication can violate *due-process rights. See Halsey*, 750 F.3d at 292 & n.17 (citing cases from the First, Second, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits). Probable cause is not a defense to a *due-process-based* fabrication claim. *See Spencer v. Peters*, 857 F.3d 789, 801–02 (9th Cir. 2017) (contrasting the role of probable cause in fabrication claims based on the Fourth Amendment and due process). That is of no consequence here because Plaintiffs expressly abandoned any due-process fabrication theory. . . . To the extent Plaintiffs argue that *Webb v. United States*, 789 F.3d 647 (6th Cir. 2015), suggests that independent, untainted probable cause does not foreclose a Fourth Amendment claim based on fabrication, that is wrong, as a logical. . . and precedential. . . matter. Absent further guidance from the *en banc* Sixth Circuit or the Supreme Court, taintless *probable cause* necessarily defeats Fourth Amendment claims for detention *without probable cause.* An allegation of evidence fabrication, which the Court views as intertwined with the probable-cause question in this case, is no elemental kryptonite. Here, Plaintiffs' asserted constitutional injury is 'unlawful post-legal-process pretrial detention.' . . . No one disputes that the Fourth Amendment underlies Plaintiffs' fabrication theory. . . The Fourth Amendment is similarly relevant to Plaintiff's malicious-prosecution count. . . This shared constitutional basis alone does not render one claim subsumed by the other; for example, the Fourth Amendment

applies to both false-arrest and excessive-force claims, but the two violations meaningfully differ from one another and require separate analysis. . . However, that principle does not hold true here. Plaintiffs' wide-ranging allegations. . .reduce to a single foundational inquiry: whether (in material part, by fabricating evidence) Defendants caused Plaintiffs to suffer a Fourth Amendment injury—that is, detention without probable cause. Count I (malicious prosecution) adequately covers this ground because it requires the Court to consider the determinative issue of probable cause. . . Count II does not, in the concrete context of this case, present a separately cognizable Fourth Amendment violation under § 1983.")

Jenkins v. Louisville-Jefferson County Metro Gov't., No. 3:17-CV-00151-RGJ, 2019 WL 1048850, at *2–3 (W.D. Ky. Mar. 5, 2019) ("*Manuel* . . . dictates that an individual may pursue a fabrication-of-evidence claim under § 1983 even though the criminal action against him did not go to trial. To hold otherwise would collapse the two stages of a fabrication-of-evidence claim and bar any plaintiff alleging pretrial fabrication of evidence, as Jenkins does here. . . Sixth Circuit precedent supports this conclusion. Defendants cite *Mills* for the proposition that Jenkins must have been convicted to proceed with a fabrication-of-evidence claim. . . However, *Mills* concerned a Fourteenth Amendment fabrication-of-evidence claim that had proceeded to trial. . . Even so, the Sixth Circuit has consistently recognized fabrication-of-evidence claims by individuals who did not face trial in the underlying criminal proceeding. [citing cases] Defendants' argument is therefore unavailing, and the fact that the state-court action did not go to trial does not bar Jenkins's fabrication-of-evidence claim. . . . In addition, Defendants' argument conflates two separate claims under the Fourth Amendment: a malicious-prosecution claim and a fabrication-of-evidence claim. '[A] malicious-prosecution claim and a fabrication-of-evidence claim have different elements—most notably, that [the former] requires a plaintiff to prove that there was a lack of probable cause to support the criminal charges and the [latter] does not.'. . Thus, while Jenkins's stipulation of probable cause barred his malicious-prosecution claim, . . the stipulation does not similarly bar his fabrication-of-evidence claim. Jenkins may thus proceed with his fabrication-of-evidence claim.")

Allen v. Rucker, No. 5:17-CV-00340-JMH, 2018 WL 1611595, at *4–6 (E.D. Ky. Apr. 3, 2018) ("Citing *Manuel*, the Supreme Court recently granted certiorari, vacated the judgment, and remanded a Sixth Circuit case decided only two months before *Manuel. Sanders v. Jones*, 138 S. Ct. 640 (2018). In the original Sixth Circuit case, *Sanders v. Jones*, 845 F.3d 721 (6th Cir. 2017), the circuit found 'it is well-established in this circuit that an indictment by a grand jury conclusively determines the existence of probable cause unless the defendant-officer "knowingly or recklessly presented false testimony to the grand jury to obtain the indictment."'. . The court further explained that *Rehberg* eliminated plaintiff's ability to rebut probable cause because grand-jury testimony was now untouchable. . . This created a 'harsh' consequence by 'largely foreclosing malicious prosecution claims where the plaintiff was indicted.'. . The circuit has since eased the 'harsh' result recognized in *Sanders.* In *King v. Harwood*, the court created a new exception allowing plaintiffs indicted by a grand jury to rebut probable cause in malicious prosecution cases where:

(1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury), the presumption that the grand-jury indictment is evidence of probable cause is rebuttable and not conclusive.
852 F.3d at 587-88.
The court reasoned that this exception fits *Rehberg*'s framework by allowing actions against 'complaining witnesses' (as opposed to 'testifying witnesses') who 'set the wheels of government in motion by instigating an action.'. . *King* further explains that the new exception aligns with the Supreme Court's decision in *Manuel* and circuit precedent. . . But *King* did not disturb the absolute immunity afforded to officers in malicious prosecution cases "*to the extent that [Plaintiff's] claims are based on [Defendant's] grand-jury testimony.*". . . Accordingly, plaintiffs cannot use grand-jury testimony to rebut probable cause. . . But plaintiffs may use evidence from *outside* the grand-jury room to rebut probable cause. . . Thus, the analysis does not begin and end with grand-jury testimony. To the contrary, 'actions that are prior to, and independent of, [an officer's] grand-jury testimony' may rebut the probable-cause presumption. . . . As such, a grand-jury indictment in the Sixth Circuit is no longer 'a talisman that always wards off a malicious-prosecution claim.'. . A plaintiff can overcome the grand-jury-indictment-created probable cause through 'pre-indictment nontestimonial acts that were material to the prosecution.'. . As such, to state a claim for malicious prosecution in a case where a grand-jury indictment has been issued, a plaintiff must plead specific facts showing a defendant-officer made false statements or fabricated evidence that set the prosecution in motion. Without more, a plaintiff cannot rebut the presumption of probable cause established by a grand-jury indictment. . . .*King* did not alter the federal pleading standard; it established a new route around the probable cause presumption created by a grand jury indictment. To take that route, a plaintiff must show that the officer made false statements or fabricated evidence, and those actions set the wheels of prosecution in motion. . . And to plead that a defendant-officer made false statements or fabricated evidence, a plaintiff must identify *specific* instances of such false statements or fabricated evidence. . . In other words, a plaintiff must tell the court what *particular* evidence was fabricated or what *particular* testimony was falsified. General statements alleging false, misleading, or fabricated evidence, without more, amount to vague conclusory allegations, 'not specific allegations necessary to survive a motion to dismiss.'. . . In sum, although Allen *says* Rucker employed improper tactics, concealed facts, suppressed evidence, omitted material facts, presented false information, and misled prosecutors, Allen fails to explain any of her allegations. She does not point to a single *specific* instance of any of these things happening. Simply saying so does not make it true. Nor does it satisfy the federal pleading standard. Even in her response to Rucker's Motion to Dismiss, Allen fails to include any specific factual allegations supporting her claims. Without *any* factual allegations, Allen's claims fail. Her complaint reads precisely like those in *Meeks, Bickerstaff*, and *Rapp*: general, vague, and conclusory allegations unsupported by specific facts. Without any particular facts, these statements

amount to legal conclusions and do not provide a basis for surviving a motion to dismiss.")

Hoskins v. Knox County, Kentucky, No. CV 17-84-DLB-HAI, 2018 WL 1352163, at *12-15 (E.D. Ky. Mar. 15, 2018) ("Much like the parties in *Manuel*, the parties here attempt to analogize Plaintiffs' Fourth Amendment fabrication-of-evidence claim to common-law torts. Plaintiffs urge the Court to adopt the accrual rule for malicious-prosecution claims, which postpones accrual until the favorable termination of criminal proceedings. . . The Defendants, on the other hand, argue that such a rule makes little sense in the post-legal-process pretrial detention context because there is no 'existing conviction or sentence in jeopardy of being impugned or invalidated.'. . Instead, the Defendants suggest that the Court adopt the accrual rules for unlawful-arrest claims. . . Because the parties rely heavily on the cases that establish the accrual rules for malicious-prosecution claims—*Heck v. Humphrey*, 512 U.S. 477 (1994)—and unlawful-arrest claims—*Wallace v. Kato*, 549 U.S. 384—a review of those cases is warranted. [discussion of cases] [T]he Defendants argue that the lack of a conviction against Plaintiffs prevents *Heck*'s delayed-accrual rule from applying here. . . In its place, Defendants point to *Wallace* as the proper guidepost for the case at bar. . . The Court agrees with the Defendants on the first point—because the Plaintiffs were never convicted, their reliance on *Heck* is unavailing. That *Heck* does not apply, however, does not mean that *Wallace* controls or that *Wallace* establishes the accrual date for Plaintiffs' fabrication-of-evidence claim. . . Rather, *Wallace* simply serves as an example of the type of analysis this Court must undertake—the Court must look to the common law of torts, select the most analogous tort, and fashion an appropriate accrual rule. . . .[T]he *Wallace* Court held that the statute of limitations on plaintiff's § 1983 unlawful-arrest claim 'commenced to run when he appeared before the examining magistrate and was bound over for trial,' and that consequently, plaintiff's claim was time-barred. . . But, *Wallace*'s logic is less persuasive in the fabrication-of-evidence context. Because a false-imprisonment claim is based upon 'detention without legal process,' it makes sense that the claim accrues when the constitutional violation ceases— 'at the time the [plaintiff] becomes detained pursuant to legal process.'. . Pretrial detention, on the other hand, 'can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case.' *Manuel*, 137 S. Ct. at 918. Put another way, the commencement of legal process is of no consequence to a claim challenging pretrial detention if the lack of probable cause continues. . . Why, then, should a Fourth Amendment claim for unlawful pretrial detention accrue—and the statute of limitations begin to run—when legal process commences, an event that the Supreme Court has held has no significance in the pretrial-detention context? The answer is simple—it should not. Accordingly, the Court finds that the common-law tort of malicious prosecution provides the proper analogy to the Plaintiffs' fabrication-of-evidence claim, for much the same reasons as the Supreme Court explained in *Heck*[.] . . . Although not a perfect fit, because a fabrication-of-evidence claim does not require Plaintiffs to prove that the prior criminal proceedings terminated in their favor, the common-law tort of malicious prosecution is the most apt analogy. Both malicious-prosecution and fabrication-of-evidence claims seek recompense for the same injury—unlawful post-legal-process pretrial detention—and permit recovery of the same damages. Essentially, the claims are two sides of the same coin—that is, two theories of liability for unlawful pretrial detention under the Fourth Amendment. By contrast, the common-law tort

of false imprisonment has little in common with Plaintiffs' fabrication-of-evidence claim. The nature of the injuries and the remedies provided are entirely distinct. While an unlawful arrest has a definite duration—from the initial seizure until the start of legal process—fabrication of evidence can occur and give rise to a Fourth Amendment claim at any time—before arrest, after arrest but before legal process, or during post-legal-process pretrial detention. . . Moreover, the wisdom behind the accrual rule for false-imprisonment and wrongful-arrest claims—that the harm is complete and the injury has ended—amounts to sheer folly in the fabrication-of-evidence context. Therefore, Defendants' attempt to fit Plaintiffs' fabrication-of-evidence claim into *Wallace*'s unlawful-arrest accrual rule is akin to shoving a square peg into a round hole. Given the value and purposes of the constitutional right at issue—the right to be free from unlawful pretrial detention based on the fabrication of evidence—the Court finds that the common-law tort of malicious prosecution bears the closest resemblance to Plaintiffs' fabrication-of-evidence claim. Thus, that claim accrued—and the statute of limitations began to run—when the criminal proceedings terminated in Plaintiffs' favor—on June 30, 2016 and August 22, 2016. Accordingly, Plaintiffs' fabrication-of-evidence claim, which was brought within one year of the termination of the underlying criminal proceedings, is not time-barred and the KSP Defendants' Motions to Dismiss (Doc. # 36 and 39) are **denied** with respect to Count Two.")

King v. Harwood, No. 3:15-CV-762-GNS, 2017 WL 6029633, at *4–6, *9 (W.D. Ky. Dec. 5, 2017) ("As the law stands today, the First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits all recognize malicious prosecution as an actionable § 1983 claim under the Fourth Amendment. [collecting cases] On the other hand, the Fifth and Eighth Circuits have either explicitly rejected a Fourth Amendment § 1983 malicious prosecution claim or have declined to rule on the issue. [collecting cases] The current state of the law in the Seventh Circuit is not as clear-cut. Following the Supreme Court's abrogation of the Seventh Circuit's key holding in *Newsome v. McCabe* in its *Manuel* decision, whether a § 1983 malicious prosecution claim may be brought under the Fourth Amendment in the Seventh Circuit is in a state of flux. In *Newsome*, the Seventh Circuit held that a malicious prosecution claim was not an appropriate § 1983 action under the Fourth Amendment. . . But the Supreme Court, as Justice Alito points out in his dissent in *Manuel*, did not rule on whether malicious prosecution claims could be brought under the Fourth Amendment. . . Instead, it remanded the case back to the Seventh Circuit to decide on which date the statute of limitations on the plaintiff's claims began to run. . . This is crucial in determining whether a malicious prosecution claim is viable under the Fourth Amendment, because the plaintiff had analogized his claims of a constitutional violation to the common law tort of malicious prosecution, which has a statute of limitations that begins to run when criminal proceedings are terminated. . . The government, on the other hand, argued that the alleged constitutional violation was most similar to the common law tort of false arrest, with the statute of limitations starting on the date of the initiation of the legal process. . . The Supreme Court's sole holding, however, was that a 'seizure' under the Fourth Amendment can continue past an initial appearance in a criminal case. . . As Justice Alito writes, it is still possible for the Seventh Circuit to find that malicious prosecution is not a valid Fourth Amendment claim and, at the same time, be consistent with the Supreme Court's holding in *Manuel* . . . . Based on the Seventh Circuit's prior holdings and the

fact that the Supreme Court did not hold that its previous position was incorrect, the Court concludes that the Seventh Circuit's prior position of not permitting § 1983 claims under the Fourth amendment is still the law of the circuit. . . At the time of this opinion's entry, the Seventh Circuit has yet to rule on the remanded *Manuel*. . . Three Circuit Courts with precedent different from that of nine Circuit Courts is more than sufficient to constitute a circuit split. . . Therefore, the Court concludes that there is a current circuit split on the issue of malicious prosecution claims under the Fourth Amendment, and this factor weighs in favor of Harwood. . . . [B]ased on the presence of a circuit split regarding the constitutional viability of malicious prosecution claims, the Court believes that there is a reasonable probability that four Justices will grant Harwood's petition for Writ of Certiorari. . . .After reviewing the applicable case law, the undersigned does not believe that there is a 'significant possibility' that the Sixth Circuit's decision will be reversed. The Supreme Court could reverse the Sixth Circuit on two grounds: (1) a § 1983 malicious prosecution claim is not actionable under the Fourth Amendment; or (2) the Sixth Circuit's *King* exception is contrary to Supreme Court precedent. Looking to the former first, the current circuit split is 9-3 in favor of allowing § 1983 malicious prosecution claims under the Fourth Amendment. While the undersigned does not presume to know the minds of any of the Supreme Court Justices, it is important to note that the Sixth Circuit falls into the majority view that malicious prosecution claims are actionable under the Fourth Amendment. It is not an outlier or rogue circuit that has come to a conclusion of law contrary to every other circuit. In the Court's opinion, this fact means that Supreme Court reversal is less likely than if the Sixth Circuit was in the minority. Thus, the Court concludes that reversal on this ground is not a 'significant possibility.' Examining the *King* exception leads to a similar result. As described in greater detail in the preceding section, the Court does not believe that the key holding in *King* goes against Supreme Court precedent, *Rehberg* specifically. Therefore, the Court concludes that reversal on this ground is also not a 'significant possibility.' Thus, the Court cannot conclude that there is a significant possibility that the Sixth Circuit's opinion in *King v. Harwood* will be overturned by the Supreme Court.") [**Note:** Supreme Court denied certiorari in *King v. Harwood.* 138 S. Ct. 640 (2018)]

See also ***King v. Harwood***, No. 3:15-CV-762-CHB, 2020 WL 1578615, at *8 (W.D. Ky. Apr. 1, 2020) ("[W]hile the record has changed, it has not changed in Harwood's favor. The record as a whole even more clearly demonstrates the existence of multiple genuine issues of material fact than it did three years ago when the Sixth Circuit rendered its opinion.")

Seventh Circuit

Moorer v. City of Chicago, 92 F.4th 715, 721 (7th Cir. 2024) ("*Manuel* recognized that a Fourth Amendment challenge based on a lack of probable cause survives a judicial decision holding a suspect in custody, and therefore that 'the right question is whether the arrest and detention are supported by probable cause.'. . Accordingly, the mere existence of legal process in the pretrial detention does not itself defeat a constitutional challenge under the Fourth Amendment. We have recognized that *Manuel* did not *sub silentio* overrule *Kaley v. United States*, 571 U.S. 320, 328 (2014), however, which held that a grand jury indictment cannot be challenged based on whether

the probable cause finding was founded on sufficient proof. . But here, Moorer does not argue that the information presented to the grand jury was insufficient to establish probable cause. Similar to the plaintiff in *Coleman*, he argues that the indictment was obtained through improper or fraudulent means because the defendants withheld information and knew that the identifications were not reliable. . . And as in *Coleman*, to succeed Moorer must demonstrate that the defendants knew they lacked probable cause to arrest him. . . Because the defendants did not lack probable cause here, the claim must fail.")

Mitchell v. Doherty, 37 F.4th 1277, 1283-86 & n.3, 1289 (7th Cir. 2022) ("The Supreme Court's recent decision in *Manuel v. City of Joliet* clarified that the Fourth Amendment extends beyond the start of legal process but left open whether it applies outside some defect in the probable-cause determination. . . Police arrested Elijah Manuel on the suspicion that his vitamin bottle contained illegal drugs despite a negative field test and a negative test from an evidence technician for any controlled substances. . . A judge, relying on the criminal complaint, which was based on fabricated evidence, found probable cause for further detention, thus beginning the 'legal process.'. . Eventually, the Illinois police laboratory analyzed the pills again and concluded that they were not a controlled substance. . . After waiting for more than a month, the state dismissed the drug charge. . . In the end, Manuel was detained for seven weeks. . . Manuel sued the city and several police officers, asserting that they violated his Fourth Amendment rights. . . The district court dismissed the lawsuit because Manuel brought the claim more than two years after his arrest. . . We affirmed under our prior caselaw, which held that once legal process began, the Fourth Amendment 'falls out of the picture,' and the detainee must seek a remedy under the Due Process Clause. . . The Supreme Court rejected our rule and repeated, 'The Fourth Amendment ... establishes the minimum constitutional "standards and procedures" not just for arrest but also for ensuing "detention."'. . Thus, 'pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case.'. . Manuel stated a viable claim under the Fourth Amendment for unlawful detention 'because Manuel's subsequent weeks in custody were [ ] unsupported by probable cause, and so [ ] constitutionally unreasonable.'. . While the Court made clear that the commencement of legal process did not spell the end for a Fourth Amendment claim, its analysis was still tethered to probable cause. When exactly the amendment recedes—and other constitutional protections might begin—remains unanswered.[3] **[fn. 3:** *See also Thompson v. Clark*, —— U.S. ——, 142 S. Ct. 1332, 1337, 212 L.Ed.2d 382 (2022) (holding that the Supreme Court's precedents recognize a malicious-prosecution claim under the Fourth Amendment but again not deciding the scope of the amendment); *id.* at n.2 (noting that a malicious-prosecution claim "is housed in the Fourth Amendment" and that the analysis might be different under the Due Process Clause).**]** Even before *Manuel*, the circuits took divergent approaches as to when Fourth Amendment protections terminate. At least one circuit drew the line at a suspect's arrest, regardless of whether the arrest occurred with a warrant. [citing 4th Circuit case] Other circuits selected the probable-cause determination. [citing cases from 5th, 6th, 8th, and 9th Circuits] The remaining circuits had adopted the 'continuing seizure' theory, which posits a person is still seized within the meaning of the Fourth Amendment after the probable-cause determination, extending into pretrial detention.

[citing cases from 2d and 3d Circuits] After *Manuel*, there is still no consensus. *Compare DeLade v. Cargan*, 972 F.3d 207, 212 (3d Cir. 2020) ("We conclude that the Fourth Amendment always governs claims of unlawful arrest and pretrial detention when that detention occurs before the detainee's first appearance before a court."), *and Lentz v. Taylor*, 2021 WL 5121247, *5 (3d Cir. 2021) (unpublished) ("The Third Circuit has adopted the continuing seizure theory and has further analyzed the parameters of what amounts to a pre-trial seizure."), *with Lester v. Roberts*, 986 F.3d 599, 609 (6th Cir. 2021) ("[T]he presence of probable cause for a prosecution or pretrial detention dooms any Fourth Amendment claim."); *see also Page v. King*, 932 F.3d 898, 905 (9th Cir. 2019) ("In so holding, we do not speak to the merits of Page's due process claim [premised on a thirteen-year detention]. Indeed, the Supreme Court's recent opinion in *Manuel* ... may doom Page's petition unless he is permitted to amend to allege a Fourth Amendment violation."). The Eleventh and Fifth Circuits, for their part, analyzed challenges to bail systems under different constitutional provisions, but both courts based their reasoning on *Gerstein* and *McLaughlin*, cases interpreting the Fourth Amendment. . . Prior to *Manuel*, we charted the middle course: the Fourth Amendment applies until the probable-cause determination, at which point the Fourteenth Amendment governs. [citing 7th Circuit cases] After *Manuel*, our cases are not as clear. We noted, for example, in *Mitchell v. City of Elgin* that the Fourth Amendment might govern the conditions of pretrial release because of the 'significant restrictions on liberty' and that some pre-*Manuel* cases are no longer good law. . . We did not, however, decide the scope of a Fourth Amendment 'seizure' in *Mitchell*. . . In *Pulera v. Sarzant*, we repeated our pre-*Manuel* rule that '[b]efore a finding of probable cause, the Fourth Amendment protects an arrestee; after such a finding, the Fourteenth Amendment protects a pretrial detainee.'. . At the same time, we acknowledged that *Manuel* might require us to reconsider the dividing line, but because the parties did not ask us to, we declined to do so. . . Moreover, the difference between the Fourth Amendment and the Fourteenth Amendment did not matter, as 'the standards [for the issue were] identical in all respects.'. . Shortly after *Pulera*, we were presented with a bail challenge in *Williams v. Dart*. 967 F.3d 625 (7th Cir. 2020). There, the plaintiffs sued over a county's bail system, in part, on a Fourth Amendment theory. . . The district court dismissed the claim, and we reversed. . . The case did not relate to the probable-cause standard—no one disputed that the police had probable cause to detain the plaintiffs. . . Instead, it centered solely on 'the courts' bail orders and on that basis continuing to hold persons already admitted to bail without purpose or plan for their release.'. . We concluded that the plaintiffs' claims, nonetheless, fell under the Fourth Amendment without recognizing the conflict with our prior caselaw. . . The Fourth Amendment, we decided, requires 'that whatever arrangement is adopted [about process bail admissions] not result in seizures that are unreasonable in light of the Fourth Amendment's history and purposes.'. . Because the plaintiffs stated a claim of unlawful detention, they could proceed. . .Ultimately, given the far-reaching implications and the limited briefing on this issue, we need not decide whether the Fourth Amendment applies after a judge has made a probable-cause determination to the timing of a bail hearing because, assuming that it does, plaintiffs' claim still fails. In assessing the constitutionally required timing of a bail hearing under the Fourth Amendment, we consider the traditional interpretive tools: text, history, tradition, and guidance from caselaw. . . .Of course, states can choose to hold all bail hearings within forty-eight hours, which may prove easier with technological advancements. . . But the

Fourth Amendment does not compel them to. Judges should proceed cautiously when asked to step into the shoes of legislators, as we do here. . . In short, we hold that the Fourth Amendment does not require a bail hearing within forty-eight hours after arrest. Furthermore, we conclude that bail hearings held within sixty-eight hours—because suspects were arrested on a Friday (as the suspects held for the longest time in this case were)—are constitutional under the Fourth Amendment. We leave for another day whether a longer detention without a bail hearing violates the Constitution.")

Jones v. York, 34 F.4th 550, 563-64 & n.8 (7th Cir. 2022) ("Jones argues she was wrongfully detained in violation of the Fourth Amendment. In *Manuel v. City of Joliet*, —— U.S. ——, 137 S. Ct. 911, 197 L.Ed.2d 312 (2017), the Supreme Court clarified that 'detention without probable cause violates the Fourth Amendment "when it precedes, but also when it follows, the start of legal process in a criminal case."'. . But 'once a trial has occurred, the Fourth Amendment drops out: A person challenging the sufficiency of the evidence to support both a conviction and any ensuing incarceration does so under the Due Process Clause of the Fourteenth Amendment.'. . Jones admits she was not incarcerated until after her conviction. Thus, the Fourth Amendment does not provide a remedy for her incarceration.[8] **[fn. 8:** Jones would fare no better under a Fourth Amendment malicious prosecution theory, *see Thompson v. Clark*, —— U.S. ——, 142 S. Ct. 1332, —— L.Ed.2d —— (2022), because she would have 'to prove that the malicious prosecution resulted in a seizure.'. . As explained above, Jones was not seized until after her conviction, at which point her claim arises under the Due Process Clause of the Fourteenth Amendment, not the Fourth Amendment. . . Whether the Fourteenth Amendment's procedural due process component ensures a right to be free from malicious prosecution is an open question. *Thompson*, 142 S. Ct. at 1337 n.2. But Jones did not raise such a claim, and the availability of post-deprivation remedies in Wisconsin likely precludes any § 1983 relief under that theory.**]**")

Gupta v. Melloh, 19 F.4th 990, 1001-02 (7th Cir. 2021) ("The district court also granted summary judgment to Melloh on Gupta's claim that Melloh violated his Fourth Amendment rights by falsifying allegations in the probable cause affidavit. The district court called this a claim for 'unreasonable prosecution.' Melloh refers to it as a 'malicious prosecution' claim. We have noted that after the Supreme Court case in *Manuel*, '"Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify the detention.'. . The briefing and discussions of this claim are a bit muddled, perhaps because the law on malicious prosecution was evolving in the Supreme Court and in this court just as this case was progressing. . . Nevertheless, we can boil our conclusions down to a few simple observations. First, the Supreme Court decision in *Manuel*, makes clear that a plaintiff can bring a Fourth Amendment claim for unlawful detention either before or after the start of the legal proceedings. . . Second, falsifying the factual basis for a judicial probable-cause determination violates the Fourth Amendment.")

Conyers v. City of Chicago, 10 F.4th 704, 710 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022) ("Plaintiffs contend that the Supreme Court's later decision in *Manuel v. City of Joliet* . . . shows

that *Lee* wrongly rejected the idea that the Fourth Amendment applies to a continuing seizure. . . But for at least two reasons, *Manuel* does not help them. First, *Manuel* dealt with pretrial confinement, not the retention of property. More importantly, even if we were to equate persons and property for these purposes, it would not help our plaintiffs. *Manuel* was about a defendant's ability to show that a finding of probable cause—necessary to support the detention—was based upon fabricated evidence. . . In other words, were the seizure and detention flawed from the outset? No such question arose in *Lee*, and no such question exists in our case. All we are concerned with is the distinct question whether the City had a duty to release the property sooner, or on more favorable terms. As *Lee* recognized, that issue falls more naturally under the Due Process Clause of the Fourteenth Amendment, or perhaps the Takings Clause of the Fifth Amendment. The district court thus correctly rejected the plaintiffs' Fourth Amendment theory.")

Kuri v. City of Chicago, Illinois, 990 F.3d 573, 575 (7th Cir. 2021) ("Defendants are right to say that the due-process theory is deficient. Before *Manuel v. Joliet* . . . many courts—including the Seventh Circuit—saw claims of wrongful detention pending trial as based on the Due Process Clause. A claim under the Fourth Amendment based on arrest and detention without probable cause ended, these decisions said, when a judge ordered the suspect detained for trial. But *Manuel* held that the Fourth Amendment supplies the basis for a claim until the suspect is either convicted or acquitted. We have since held that *Manuel* abrogated any due-process objection to pretrial detention that has been approved by a judge. If the detention is not supported by probable cause, however, the Fourth Amendment provides a remedy. See, e.g., *Lewis v. Chicago*, 914 F.3d 472 (7th Cir. 2019); *Manuel v. Joliet*, 903 F.3d 667 (7th Cir. 2018). We decline Kuri's invitation to revisit those precedents. This means that the verdict cannot rest on the Due Process Clause. But the Fourth Amendment remains. Once the jury decided to believe Russell and Fernandez that the detectives were lying about their identification of Kuri, that left his arrest and detention without support. Defendants tell us that the Fourth Amendment claim fails as a matter of law because, unless the judicial process has been corrupted, there cannot be a problem given the order detaining Kuri for trial. That understanding may find support in some pre-*Manuel* cases, but it has none afterward. The Supreme Court held that a Fourth Amendment theory based on lack of probable cause survives a judicial decision holding a suspect in custody. The Justices said that the right question is whether the arrest and detention are supported by probable cause.")

Young v. City of Chicago, 987 F.3d 641, 644-46 (7th Cir. 2021) ("Young argues that the police violated his due process rights by both fabricating evidence and withholding exculpatory evidence in order to detain him before trial. But as Young admits, our decision in *Lewis* precludes this claim. *Lewis* was a § 1983 case, like this one, in which the plaintiff argued that 'misconduct by law enforcement—falsifying the police reports that led to his pretrial detention—... violated his right to due process.'. . We rejected this claim because, according to the Supreme Court's decision in *Manuel I*, 'the Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention.'. . If in *Lewis* we did not let the plaintiff's due process claim proceed when the police falsified 'reports that *led* to his pre-trial detention,'. . . we certainly will not let Young's due process claim proceed when the alleged police misconduct did not lead to his pretrial detention.

As explained, the probable cause from his scene of arrest did. Young nevertheless argues that we should overturn *Lewis* because it incorrectly narrowed the scope of the due process clause. He specifically notes that '[w]e have consistently held that a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of her liberty in some way.'. . We reject this call. *Lewis* was based on *Manuel I*—a Supreme Court decision that we are bound to follow. And Young has not demonstrated that *Lewis* misinterpreted *Manuel I*. The Supreme Court there stated that a Fourth Amendment violation can occur 'when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. ... And for that reason, [legal process] cannot extinguish the detainee's Fourth Amendment claim—or somehow ... convert that claim into one founded on the Due Process Clause.'. . The Court then concluded, 'If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.'. . The court did not say that the right 'could lie' in the Fourth Amendment. It said that the right lies there. We will continue to heed that instruction. Young's reliance on *Whitlock* is also unpersuasive. In *Whitlock*, we stated that falsifying evidence 'violates due process *if that evidence is later used to deprive the defendant of her liberty in some way*.'. . As explained, the alleged police misconduct here did not deprive Young of any liberty; his pretrial detention was lawful even if the misconduct occurred. Young claims, though, that he suffered a broader liberty harm than mere pretrial detention. Namely, he argues that the alleged police misconduct influenced his bond amount and his preliminary hearing. But as the district court put it, that's just another way of saying it affected his pretrial detention, which is protected by the Fourth Amendment alone. Young also says that the misconduct affected the prosecutor's charging decision. But that is not a liberty harm. '[T]here is no such thing as a constitutional right not to be prosecuted without probable cause.'. . As a final note, Young is not left in the lurch without a due process claim. He had—and pursued—an avenue for relief under the Fourth Amendment. He just didn't succeed. We will not subvert Supreme Court precedent by adding a due process claim to the mix just so he can have another bite at the apple.")

Williams v. Dart, 967 F.3d 625, 632-37 (7th Cir. 2020) ("The plaintiffs alleged that, by conducting independent reviews of the courts' bail orders and on that basis continuing to hold persons already admitted to bail without purpose or plan for their release, the Sheriff arrogated to himself a decision that was not his to make. These allegations stated a claim under the Fourth Amendment. . . .Wrongful pretrial custody is what plaintiffs complain of here. If plaintiffs' custody was wrongful, it was the Fourth Amendment that made it so, whether for want of probable cause, as in *Manuel*, or for want of a neutral decisionmaker, as in *Gerstein*, where the Court 'decided some four decades ago that a claim challenging pretrial detention fell within the scope of the Fourth Amendment.'. . .In this case, plaintiffs allege that, in place of court-ordered release on specified terms, the Sheriff substituted 'prolonged detentions' as well as 'significant restraints' on pretrial release of his own devising. The practical result was that his sole exercise of discretion caused the jailing of each plaintiff for three to fourteen days. Those decisions, say plaintiffs, imperiled plaintiff Marcus Johnson's education and impaired plaintiff Joshua Atwater's family relationships, for example. The teaching of *Gerstein* is unmistakable: these decisions were not the Sheriff's to make. 'When

the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.'. . .In this case, no one disputes 'the continuing existence of "probable cause"' to believe plaintiffs committed the offenses charged. . . Once plaintiffs appeared before the court, however, such probable cause ceased to be a justification for the Sheriff's unilateral seizure. . . Put differently, the original probable cause was 'exhausted' by the courts' bail orders. . . This is the true sense of plaintiffs' 'degree of seizure' and 'reseizure without probable cause' characterizations. It is only another way of expressing our original conclusion: courts, not sheriffs, make pretrial detention decisions. . . .In this case, the Sheriff argues that plaintiffs had to be jailed because they 'failed to secure enrollment' in his electronic monitoring program and could not be left at liberty without contravening the courts' bail orders. Grant the premises—setting aside the intolerable elision of the agent (plaintiffs did not 'fail to secure enrollment;' the Sheriff denied them enrollment), as well as the irreconcilable conflict with the Sheriff's position on the contempt of court claim (where, as we explain below, the Sheriff argues the courts' bail orders were nullities he was free to disregard). Even so, this argument runs headlong into the limits of the surety's friendly custody. We agree the Fourth Amendment did not oblige the Sheriff or anyone else to act as plaintiffs' surety even under court order. The Fourth Amendment is not a vehicle for enforcing the terms of state law. . . Assuming the Sheriff was thus free to pull the string whenever he pleased, having pulled it he was most certainly not free to keep plaintiffs in custody indefinitely and without explanation. He was free only to deliver plaintiffs at once or to detain them very briefly until it could be done—to return them to court after a brief time needed for administrative purposes, as we would say today. . . As explained above, 'reasonable administrative delay' is not a plausible characterization of the Sheriff's unilateral detention decisions alleged in this case. . . .We emphasize that we have neither the institutional competence nor the desire to manage Cook County's pretrial release program. . . Indeed, this court's scrutiny of proffered administrative justifications for detention could not be called unduly zealous. . . The Fourth Amendment does not require any particular administrative arrangement for processing bail admissions. It does require, however, that whatever arrangement is adopted not result in seizures that are unreasonable in light of the Fourth Amendment's history and purposes. '[I]f the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty,' the Sheriff's flat refusal to heed the courts' bail orders alleged in this case, based on nothing more than a policy disagreement and resulting in unjustified detentions of multiple days, simply will not do. . . Plaintiffs' complaint stated claims for wrongful pretrial detention under the Fourth Amendment.")

Flynn v. Donnelly, No. 18-2590, 2019 WL 6522890, at *3 (7th Cir. Dec. 4, 2019) (not reported) ("After the Illinois trial courts quashed the evidence against Pirro and Flynn in 2013, both plaintiffs were released on bond until the cases against them were dismissed in late 2017. Theoretically, pretrial release could be construed as a seizure, but only if 'the conditions of that release impose[d] significant restrictions on liberty.'. . Before the oral argument in this case, the appellants had never alleged that they were subject to restrictive bond conditions, only that they were unlawfully detained. At oral argument they had nothing to back up the insinuation, contradicted by the defendants, that their bond conditions prevented them from leaving the state. Therefore, the statute

of limitations on any unlawful detention claim began to run when their physical custody ended in 2013.")

Camm v. Faith, 937 F.3d 1096, 1107 (7th Cir. 2019) ("The defendants argue for the first time on appeal that this claim is barred by the two-year statute of limitations applicable to § 1983 suits in Indiana. We held in *Manuel* that a Fourth Amendment claim for wrongful detention accrues when the detention ends. Camm sued one year after his acquittal and release. But there was one time period between 2000 and 2013 in which Camm was arguably free of custody: he was released on bail for six weeks in 2005. At oral argument Camm's counsel told us that he continued to be under restraints during that time—an ankle bracelet and house arrest—which for our purposes arguably would be enough to constitute 'custody.'. . On closer examination, however, the state-court records indicate that the restraints were perhaps less stringent than counsel suggested: Camm did wear an electronic-monitoring device, but he was only confined to his house from the hours of 9 p.m. to 6 a.m. Otherwise, he was free to move about, but only within a two-county area. We have no need to resolve questions about bail conditions or decide the legal significance of this brief break in physical custody. In the district court, the defendants did not mount a limitations defense to the Fourth Amendment claim (or, as everyone characterized it then, the malicious-prosecution claim); they only challenged the timeliness of the *Brady* claim and the state-law claims. The limitations argument is therefore waived.")

Anderson v. City of Rockford, 932 F.3d 494, 512-13 (7th Cir. 2019) ("[T]he plaintiffs' amended complaint alleges that the defendant officers violated their rights under the Fourth and Fourteenth Amendments by improperly subjecting them to judicial proceedings without probable cause. But '[t]here is no such thing as a constitutional right not to be prosecuted without probable cause.'. . There is, however, 'a constitutional right not to be held in custody without probable cause,'. . . and the Supreme Court has 'ma[de] clear that the Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention[.]'. . The plaintiffs do not assert they were subjected to pretrial detention (though evidence in the record suggests they were)—but even if they had, their claim would still fail because it hinges upon showing the absence of probable cause to support their arrests and confinement. The record supports the district court's conclusion that at least some of the defendant officers reasonably believed that the plaintiffs were guilty of murder based on the accounts given by Dowthard and Brown. And it cannot reasonably be disputed that the written statements of Dowthard and Brown provided probable cause to support the arrests. Summary judgment, therefore, was appropriate on the plaintiffs' federal claim.")

Knox v. Curtis, No. 18-2989, 2019 WL 2338525, at *2 (7th Cir. June 3, 2019) (not reported) ("Knox contends that his 'false arrest' claim against Curtis. . . 'should have not been dismissed for time barred reasons.' Based on legal developments that post-date the district court's judgment, we agree with Knox that he stated a timely claim under the Fourth Amendment. About three weeks after the district court dismissed Knox's suit, this court decided *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018), *pet. for cert. filed* (Feb. 21, 2019) ("*Manuel II*"), clarifying the nature and date of accrual of various Fourth Amendment claims. Under *Manuel II*, if a plaintiff complains about

'a search or seizure [that] causes injury independent of time spent in custody,' then his or her claim accrues at the time of the 'pre-custody event[ ].'. . But when a plaintiff challenges 'the propriety of his time in custody,'. . the Fourth Amendment claim accrues only 'when the detention ends.'. . Knox falls into the latter category, which renders his suit timely. Although he asserts that 'there was no probable cause for [the] arrest,'. . . Knox does not complain about any pre-custody injury. Based on his allegations as a whole, it is clear that the real problem is the loss of liberty—specifically, 'the absence of probable cause that would justify [his] detention.'. . Therefore, Knox's claim that he was arrested and detained without probable cause accrued either in August 2017 (when he was released on bond), . . . or in November 2017 (when he was convicted). *See Mitchell v. City of Elgin*, 912 F.3d 1012, 1017 (7th Cir. 2019) (noting we have yet to decide whether pretrial-release conditions constitute a Fourth Amendment seizure). Either way, Knox's original complaint, submitted in January 2018, was filed well within the two-year limitations period, and thus, his Fourth Amendment claim is timely. . . . We reject Curtis's alternate argument that even if Knox's claim is timely, it is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). To the extent that Knox challenges his post-conviction detention, *Heck* indeed bars his § 1983 suit. . . However, Knox also challenges his pretrial (pre-bond) detention, the unlawfulness of which does not have 'any necessary effect on the validity of [his] conviction.' *Mordi v. Zeigler*, 870 F.3d 703, 708 (7th Cir. 2017); *see also Manuel II*, 903 F.3d at 670 (plaintiff's claim that "police hoodwinked the judge" at probable-cause detention hearing was not *Heck*-barred once plaintiff was released from custody). Therefore, dismissal of Knox's suit at this stage was improper.")

Regains v. City of Chicago, 918 F.3d 529, 534-37 (7th Cir. 2019) ("Applying the principle of *Manuel II* to Regains' argument that his seventeen-month detention for a crime that he was misled into committing was unconstitutional, we conclude that his claim accrued when he was released on December 3, 2012, and that his claim was timely filed. . . . [O]n appeal, Regains consistently has characterized his claim as a violation of his Fourteenth Amendment due process rights. At the time he filed the appeal, that was his only option; our decision in *Newsome*. . .precluded the argument that pretrial detention that occurred after the start of the judicial process violated the Fourth Amendment. *Manuel I* since has abrogated *Newsome*, holding that 'the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process.'. . In the post-*Manuel I*/*Manuel II* world, 'the Fourth Amendment, not the Due Process Clause, is the source of the right in a § 1983 claim for unlawful pretrial detention, whether before or after the initiation of formal legal process.'. . .Because Regains timely filed his complaint, we reverse the district court's dismissal of the complaint and remand for further proceedings consistent with this decision.")

Lewis v. City of Chicago, 914 F.3d 472, at 474-80 & n.2 (7th Cir. 2019) ("The combined effect of *Manuel I* and *II* saves part of Lewis's case. Consistent with *Manuel I*, Lewis pleaded a viable Fourth Amendment claim for unlawful pretrial detention. And *Manuel II* confirms that the claim is timely because Lewis filed it within two years of his release from detention. The due-process claim is another matter. *Manuel I* makes clear that the Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention. To the extent *Hurt v. Wise*, 880 F.3d 831,

843–44 (7th Cir. 2018), holds otherwise, it is incompatible with *Manuel I* and *II* and is overruled. . . . *Manuel I* . . . clarified that the constitutional injury arising from a wrongful pretrial detention rests on the fundamental Fourth Amendment principle that a pretrial detention is a 'seizure'—both *before* formal legal process and *after*—and is justified only on probable cause. . . Manuel alleged that his detention was not supported by probable cause because the judge's order holding him for trial was based only on 'police fabrications.'. . If that proved to be true, his detention was unreasonable in violation of the Fourth Amendment. . . Put another way, the initiation of formal legal process 'did not expunge Manuel's Fourth Amendment claim because the process he received failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime.'. . As we explained in our decision on remand in *Manuel II*, a Fourth Amendment claim for wrongful pretrial detention is concerned with 'the detention rather than the existence of criminal charges.'. . . Lewis alleges that the officers falsely asserted, both in their police reports and in testimony at the probable-cause hearing, that he admitted residing at the apartment where the gun was found and that they found evidence showing that he lived there. Accepting these allegations as true, as we must at this stage, no reasonable officer could have thought this conduct was constitutionally permissible. It makes no difference that our circuit caselaw situated the constitutional violation in the Due Process Clause rather than the Fourth Amendment. . . . Under *Manuel II*, Lewis's Fourth Amendment claim is timely. Lewis remained in jail until the charges against him were dropped on September 29, 2015. He filed this § 1983 suit less than a year later on July 26, 2016, well within the two-year statute of limitations.[2] [fn. 2: We note that the Supreme Court has granted certiorari to resolve a circuit split on the claim-accrual question reserved in *Manuel I*. *See McDonough v. Smith*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2019 WL 166879 (2019).] . . . . Lewis argues that this same misconduct by law enforcement—falsifying the police reports that led to his pretrial detention—also violated his right to due process, giving rise to an *additional* constitutional claim under § 1983. *Manuel I* holds otherwise, as does our decision on remand in *Manuel II*. To reiterate, *Manuel I* explained that '[i]f the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.'. . As we've noted above, *Manuel I* clarified that the initiation of formal legal process 'cannot extinguish the detainee's Fourth Amendment claim—*or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause*.'. . It's now clear that a § 1983 claim for unlawful pretrial detention rests *exclusively* on the Fourth Amendment. Lewis relies on *Hurt v. Wise* as support for his position that pretrial detention based on fabricated evidence violates rights secured by *two* constitutional provisions—the Fourth Amendment *and* the Due Process Clause of the Fourteenth—and is actionable under § 1983 as two separate constitutional claims. *Hurt* conflicts with *Manuel I* and *II*, so we take this opportunity to clear up the conflict. . . . In *Manuel II*—decided nine months after *Hurt*—we explained that all § 1983 claims for wrongful pretrial detention—whether based on fabricated evidence or some other defect—sound in the Fourth Amendment. Like the plaintiffs in *Hurt*, Manuel relied on the tort of malicious prosecution as an analogy. . . We explained that while this 'might have seemed sensible before the Supreme Court spoke,' after *Manuel I* it is the 'wrong characterization'; indeed, 'the Justices deprecated the analogy to malicious prosecution.'. . . Instead, the constitutional right in question is the 'right not

to be held in custody without probable cause,' the violation of which gives rise to a 'plain-vanilla Fourth Amendment' claim under § 1983 because the essential constitutional wrong is the 'absence of probable cause that would justify the detention.'. . In other words, the Fourth Amendment, not the Due Process Clause, is the source of the right in a § 1983 claim for unlawful pretrial detention, whether before or after the initiation of formal legal process. We overrule precedent only in limited circumstances; a clear intracircuit conflict is one of them. . . *Manuel II* and *Hurt* cannot be reconciled. Indeed, *Hurt* is hard to square with *Manuel I*. The Supreme Court held that the initiation of formal legal process following an arrest does not convert a Fourth Amendment unreasonable-seizure claim 'into one founded on the Due Process Clause.'. . The injury of wrongful pretrial detention may be remedied under § 1983 as a violation of the Fourth Amendment, not the Due Process Clause. To the extent *Hurt* holds otherwise, it is overruled. We close by noting the important point that a claim for wrongful pretrial detention based on fabricated evidence is distinct from a claim for wrongful *conviction* based on fabricated evidence: '[*C*]*onvictions* premised on deliberately fabricated evidence will always violate the defendant's right to due process.' [citing cases] Moreover, misconduct of this type that results in a conviction might also violate the accused's right to due process under the rubric of *Brady v. Maryland*. . . and *Kyles v. Whitley*. . . if government officials suppressed evidence of the fabrication. . . We reiterate that we deal here only with a claim of wrongful *pretrial detention*, not a claim of wrongful *conviction*.")

Mitchell v. City of Elgin, 912 F.3d 1012, 1013-17 (7th Cir. 2019) ("*Manuel I* clarified that pretrial detention without probable cause is actionable under 42 U.S.C. § 1983 as a violation of the Fourth Amendment. . . But the Court did not decide when the claim accrues. Instead, the Court left that issue open for this court to decide on remand. . . In September a panel of this court answered that lingering question, holding that a Fourth Amendment claim for unlawful pretrial detention accrues when the detention ends. *Manuel v. City of Joliet* ("*Manuel II*"), 903 F.3d 667, 670 (7th Cir. 2018). . . .We asked the parties to file position statements addressing whether Mitchell's claim is timely under *Manuel II*. They have done so. Based on the current state of the record and briefing, however, we find ourselves unable to decide the timeliness question. The parties have not adequately addressed whether and under what circumstances a person who is arrested but released on bond remains 'seized' for Fourth Amendment purposes. Moreover, we do not know what conditions of release, if any, were imposed on Mitchell when she bonded out after her arrest. The most we can say at this juncture is that Mitchell *might* have a viable Fourth Amendment claim under *Manuel I* and *II*. We therefore reverse the judgment on that claim alone and remand to the district court for further proceedings consistent with this opinion. . . . *Manuel I* recasts the legal framework for part of Mitchell's case. To the extent that her claim is one for unlawful detention without probable cause, it may survive beyond the pleading stage—*provided*, however, that she sued on time. . . . Mitchell contends that her Fourth Amendment claim accrued on August 22, 2013, when the state judge entered a verdict of acquittal in her criminal case. She filed suit on May 23, 2014, less than two years later, so if she is correct on the accrual question, her claim is timely. At first blush Mitchell's position is hard to square with *Manuel II*, which as we've noted held that a Fourth Amendment claim for unlawful pretrial detention accrues when

the *detention* ends, *not* when the *prosecution* ends. Mitchell was not detained beyond her initial arrest; she bonded out the same day and suffered no further pretrial detention. To overcome this impediment, Mitchell argues that despite her pretrial release, she remained 'in custody' until she was exonerated at trial. For support she draws on the law of habeas corpus, which considers a person who is released on bail to be 'in custody' for purposes of testing the legality of the custody via the writ. . . We're skeptical about the habeas analogy. . . . [T]here are important differences between modern habeas corpus and the protections of the Fourth Amendment. Habeas corpus has expanded into a statutory framework for federal-court review of state convictions tainted by egregious federal constitutional error. The Fourth Amendment, by contrast, guards against unreasonable seizures. And seizures, whether discrete or continuous, are *events*—not outcomes. Because these bodies of law address different wrongs, we're not ready to assume that 'custody' in the former context necessarily constitutes 'seizure' in the latter. The defendants posit that under *Manuel II* Mitchell's seizure ended when she was released on bond immediately after her arrest on August 17, 2011. This suit came more than two years later, so if they're right, Mitchell's Fourth Amendment claim is untimely. This argument overlooks the possibility that pretrial release might be construed as a 'seizure' for Fourth Amendment purposes if the conditions of that release impose significant restrictions on liberty. Several of our sister circuits have adopted this approach. *See, e.g.*, *Evans v. Ball*, 168 F.3d 856, 861 (5th Cir. 1999) (explaining that a seizure occurred where the plaintiff had to "obtain permission before leaving the state, report regularly to pretrial services, sign a personal recognizance bond, and provide federal officers with financial and identifying information"), *abrogated on other grounds by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003). Two circuits have even gone so far as to characterize the obligation to appear in court, standing alone, as an ongoing seizure. *Black v. Montgomery County*, 835 F.3d 358, 366–67 (3d Cir. 2016); *Swartz v. Insogna*, 704 F.3d 105, 112 (2d Cir. 2013). This appears to be a minority position, however. [citing cases] In any event, there is out-of-circuit support for the proposition that the concept of 'seizure' under the Fourth Amendment extends beyond physical detention. We haven't given a Fourth Amendment 'seizure' quite such a broad construction. . . And until the Supreme Court spoke in *Manuel I*, two aspects of our Fourth Amendment jurisprudence made the prospect of a 'nondetention seizure' quite unlikely in this circuit. First, we rejected the concept of a continuous seizure. . . Second, we characterized Fourth Amendment claims as only viable 'up to the point of arraignment.'. . The latter proposition was plainly abrogated in *Manuel I*. But the effect of *Manuel I* on the Fourth Amendment status of pretrial release conditions is less certain. The panel in *Manuel II* had no occasion to address the question because Elijah Manuel was held in jail until the charges against him were dropped. We have misgivings about construing a simple obligation to appear in court—a uniform condition of any pretrial release—as a 'seizure' for Fourth Amendment purposes. Converting every traffic ticket into a nascent Fourth Amendment claim strikes us as an aggressive reading of the constitutional text. And the canonical test for seizures remains whether a state official has terminate[d] or restrain[ed]' an individual's 'freedom of movement' such that 'a reasonable person would have believed that he was not free to leave.'. . Whether pretrial-release conditions satisfy that standard—and if so, which ones—will have to be resolved in this circuit in the wake of *Manuel I* and *II*. On this record, however, we are unable to decide the matter. The parties haven't briefed the legal

question of the scope of a Fourth Amendment 'seizure' in this context. And even if we decided to reach the merits, we lack sufficient information about Mitchell's conditions of release to determine if she remained 'seized' while on pretrial release. . . . For now, all we can say is that in light of *Manuel I*, Mitchell's Fourth Amendment claim was wrongly dismissed based on our now-abrogated circuit caselaw. But the timeliness of the claim remains an open question, and gaps in the briefing and record preclude our ability to answer it. We therefore reverse and remand for further proceedings consistent with this opinion.")

Fritz v. Evers, 907 F/3d 531, 534 (7th Cir. 2018) ("Probable cause is required to support custody, see *Manuel v. Joliet*, —— U.S. ——, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017), but not to support a public charge of crime. '[T]here is no such thing as a constitutional right not to be prosecuted without probable cause.' *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013). A criminal trial may occur months if not years after charges become public, and in the interim the accused does not have a constitutional right to a hearing at which a judge will determine whether the grand jury should have issued an indictment. See *Kaley v. United States*, 571 U.S. 320, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014).")

Manuel v. City of Joliet, Illinois, 903 F.3d 667, 669-71 (7th Cir. 2018) (on remand from Supreme Court), *cert. denied*, 139 S. Ct. 2777 (2019) ("Defendants contend that Manuel's claim accrued on March 18, when the judge ordered him held pending trial. If that's right, then Manuel sued too late. He maintains that the clock started on May 4, when his position was vindicated by dismissal of the prosecution. We do not accept either approach. We hold that Manuel's claim accrued on May 5, when he was released from custody. That makes this suit timely. Defendants' position relies on *Wallace*, which held that a Fourth Amendment claim accrues (and the period of limitations starts) as soon as the plaintiff has been brought before a judge (or, in the language of both *Wallace* and *Manuel*, has been held pursuant to legal process). . . This position encounters two problems. First, Wallace complained about his arrest rather than the custody that post-dated his appearance before a judge. . . Many violations of the Fourth Amendment concern pre-custody events: a search may invade privacy without the authorization of a warrant, or the police may use excessive force. These events can be litigated without awaiting vindication on the criminal charges, *Wallace* holds, because they do not deny the validity of any ensuing custody. . . Manuel, by contrast, contests the propriety of his time in custody. Second, the line that the Justices drew in *Wallace*—in which a claim accrues no later than the moment a person is bound over by a magistrate or arraigned on charges, . . . and all Fourth Amendment claims are to be treated alike—did not survive *Manuel*. There the Court held that wrongful pretrial custody violates the Fourth Amendment 'not only when it precedes, but also when it follows, the start of legal process in a criminal case.'. . When a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends. . . Notice that we speak of a continuing *wrong*, not of continuing *harm*; once the wrong ends, the claim accrues even if that wrong has caused a lingering injury. . . .When a search or seizure causes injury independent of time spent in custody, the claim accrues immediately; but when the objection is to the custody, a different approach must control. Manuel's position, which relies on an analogy to the tort of malicious prosecution—in which the

claim does not accrue until the plaintiff has prevailed ("been vindicated") in the criminal case—might have seemed sensible before the Supreme Court spoke. As the Supreme Court recounted, it was popular among other courts of appeals, which characterized the claim as 'Fourth Amendment malicious prosecution.'. . If that's the claim, then what could be better than a rule devised for malicious-prosecution suits? Indeed, the defendants themselves conceded when this case was last here that, if the wrong is (as Manuel insisted) 'Fourth Amendment malicious prosecution,' then the accrual date is May 4. But the Justices deprecated the analogy to malicious prosecution. After *Manuel*, 'Fourth Amendment malicious prosecution' is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify the detention. . . The problem is the wrongful custody. '[T]here is no such thing as a constitutional right not to be prosecuted without probable cause.' *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013). But there *is* a constitutional right not to be held in custody without probable cause. Because the wrong is the detention rather than the existence of criminal charges, the period of limitations also should depend on the dates of the detention. The wrong of detention without probable cause continues for the duration of the detention. That's the principal reason why the claim accrues when the detention ends. . .A further consideration supports our conclusion that the end of detention starts the period of limitations: a claim cannot accrue until the would-be plaintiff is entitled to sue, yet the existence of detention forbids a suit for damages contesting that detention's validity. . . . After *Preiser*, *Heck*, and *Edwards*, § 1983 cannot be used to contest ongoing custody that has been properly authorized. Those decisions do not concern the way to deal with executive custody that lacks a judicial imprimatur—for example, detention in a police department's cells before presentation to a judge. But Manuel was held by authority of a judicial decision that probable cause existed to show that he had committed a drug offense. He contends that the police hoodwinked the judge by falsely asserting that the pills he possessed had tested positive for an unlawful drug, and if he is right he is entitled to damages. Still, his detention was judicially authorized, which given *Preiser* means that a § 1983 suit had to wait until his release. *Heck* tells us that a claim does not accrue before it is possible to sue on it. . . Once he was out of custody and could sue, Manuel's claim accrued. He filed this action within two years and is therefore entitled to a decision on the merits. The judgment of the district court is reversed, and the case is remanded for proceedings consistent with this opinion and the Supreme Court's.")

But see Wang v. City of Indianapolis, No. 1:23-CV-01543-TAB-RLY, 2024 WL 1741358, at *6–7 (S.D. Ind. Apr. 23, 2024) ("Defendants . . . argue that Count VII, alleging malicious prosecution in violation of the Fourth Amendment under § 1983, is likewise time-barred. In Count VII, Plaintiff claims his Fourth Amendment rights were violated because he was prosecuted without probable cause based upon false affidavits. . . Defendants cite *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018), in which the Seventh Circuit held that the date *detention* ends, rather than the date criminal proceedings terminate, is the proper measure for determining when a Fourth Amendment claim has accrued. However, in 2019, the Supreme Court expressly held that the statute of limitations for a § 1983 fabricated evidence claim began to run when the criminal proceedings ended without a conviction. *See McDonough v. Smith*, 139 S. Ct. 2149, 2161, 204 L. Ed. 2d 506 (2019) ("The statute of limitations for McDonough's § 1983 claim alleging that he was

prosecuted using fabricated evidence began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial."). *See also Thompson v. Clark*, 596 U.S. 36, 49, 142 S. Ct. 1332, 1341, 212 L. Ed. 2d 382 (2022) ("Fourth Amendment claim under § 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction."). The Seventh Circuit has not explicitly overruled *Manuel* in the context of these Supreme Court decisions, and Plaintiff, proceeding *pro se* at the time the parties briefed this motion, did not cite these specific decisions in arguing that the motion to dismiss should be denied. However, Plaintiff cites to *Heck v. Humphrey*, . . . where the Supreme Court held that a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor. Moreover, district court decisions align with *McDonough* in somewhat similar scenarios. [citing cases] A district court in South Carolina concluded that these more recent Supreme Court decisions superseded *Manuel*. *See Taylor v. Himes*, C/A No. 1:21-4036-MGL-PJG, 2022 WL 4001185, at *2 n.3 (D.S.C. June 13, 2022), *report and recommendation adopted*, 2022 WL 4000843 (D.S.C. Sept. 1, 2022) ("The defendant's reliance on *Manuel v. Joliet*, 903 F.3d 667, 669 (7th Cir. 2018), *on remand from* 137 S. Ct. 911 (2017), is unavailing, as that case has apparently been superseded by the United States Supreme Court's decisions expressly holding that Fourth Amendment malicious prosecution claims do not accrue until the prosecution ends without a conviction."). The state of Indiana dismissed all charges against Plaintiff on December 1, 2022, and Plaintiff initiated this case on August 28, 2023. Thus, because Plaintiff's Fourth Amendment malicious prosecution claim accrued when the prosecution ended without a conviction—in this case, when the charges against Plaintiff were dismissed—Plaintiff timely filed his claim for malicious prosecution.")

Stone v. Wright, No. 17-2905, 2018 WL 3998415, at *1–2 (7th Cir. Aug. 21, 2018) (not reported) ("Well before *Manuel*, this circuit too had held that the Constitution does not create a freestanding malicious-prosecution claim. Although aspects of that state-law tort may play roles in litigation under 42 U.S.C. § 1983, the plaintiff still must show a violation of some specific constitutional right. See, e.g., *Hurt v. Wise*, 880 F.3d 831, 843 (7th Cir. 2018) (citing cases) . . .The district judge's conclusion that Stone could not do this, given her delay in seeking relief for the wrongful arrest and detention, led the court to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). Stone's appellate brief proceeds as if there were a stand-alone federal constitutional right not to be prosecuted without probable cause, despite this court's contrary decisions. She does not ask us to reexamine these decisions; instead she ignores them. Nor does she ask us to treat the Fourth Amendment theory as live to the extent that it is used derivatively (through the lens of malicious prosecution). This strategy cannot succeed. The district court was right to hold, under decisions not questioned here, that Stone lacks a federal, stand-alone claim equivalent to the state-law tort of malicious prosecution. (Stone's reply brief does hint at a challenge to the law of this circuit, but the challenge is not express and at all events comes too late.) The district court's decision sent all of Stone's state-law claims to state court. That is where they belong.")

Hurt v. Wise, 880 F.3d 831, 843 (7th Cir. 2018) ("Deadra and William are also pursuing claims

that they characterize as based on 'malicious prosecution.' For this purpose they are suing only the EPD Defendants. We said in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), that there is no free-standing constitutional tort of malicious prosecution, though there are other constitutional rights (*e.g.*, such as those under the Due Process Clause and the Fourth Amendment) that protect people against abusive arrests, fabrication of evidence, etc. While *Manuel* rejected some aspects of *Newsome*'s holding, nothing in *Manuel* changed the general rule that the federal constitution does not codify state tort law. But in this case, the fact that the plaintiffs have used the terminology 'malicious prosecution' is of no moment. What matters is whether they have identified the constitutional right at issue, and they have done so. The Fourteenth Amendment's Due Process Clause is the relevant constitutional source; it forbids the state from depriving a person of liberty (including by pre-trial detention) based on manufactured evidence. . . As the EPD Defendants conceded in their reply brief, this type of due process claim can be based on false police reports.") [*See also* ***Hurt v. Vantlin***, No. 314CV00092JMSMPB, 2019 WL 3980759, at *3 (S.D. Ind. Aug. 23, 2019) ("The EPD Defendants also argue that because the law is 'unsettled' for a Fourth Amendment wrongful pretrial detention claim, they are entitled to qualified immunity. . . The Seventh Circuit affirmed this Court's denial of qualified immunity related to William and Deadra's wrongful pretrial detention. . . The Court rejects the argument that the same conduct at issue in their former malicious prosecution claim – which the Seventh Circuit found was not subject to immunity – is magically immune because the claim is now labeled a Fourth Amendment claim. The law proscribing detention in the absence of probable cause, and the inapplicability of qualified immunity for detention in the absence of arguable probable cause, however the claim is labeled, has been settled for years.")]

Ewell v. Toney, 853 F.3d 911, 917 (7th Cir. 2017) ("We note in passing that the Supreme Court recently held in *Manuel v. City of Joliet*, . . . that the Fourth Amendment continues to govern at least some claims for unlawful pretrial detention even after the legal process has begun through a judicial probable-cause determination or comparable procedure. The rule in this circuit had been that claims (such as Ewell's) for unlawful detention could be brought only under the Due Process Clause once legal process had begun. See, *e.g.*, *Llovet v. City of Chicago*, 761 F.3d 759, 763 (7th Cir. 2014). Nothing in *Manuel*, however, affects the question now before us, which is whether Ewell is entitled to damages for time spent in custody that was fully credited to her state sentence.")

See also ***Martin v. Marinez***, 934 F.3d 594, 599-600, 602-03 (7th Cir. 2019) ("We have not resolved the specific question whether a plaintiff may recover damages for post-arrest incarceration following a Fourth Amendment violation when probable cause supported the ultimate arrest and initiation of criminal proceedings, but the application of the exclusionary rule spared the plaintiff from the criminal prosecution. As Martin notes, there is a split of authority on the question of whether a defendant whose Fourth or Fifth Amendment rights have been violated can recover damages for incarceration, legal defense fees, or emotional distress in a subsequent civil suit under § 1983. *Compare Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir. 1999) (no damages for costs associated with defending against gun possession charges when evidence for charges arose from unlawful search); *Hector v. Watt*, 235 F.3d 154, 155–59 (3d Cir. 2000) (no

damages for costs incurred in criminal prosecution for drug possession charges arising from unconstitutional search) *with Borunda v. Richmond*, 885 F.2d 1384, 1389–90 (9th Cir. 1988) (allowing admission of acquittal of criminal charges in plaintiffs' subsequent § 1983 suit to recover money spent on attorneys' fees defending criminal charges). . . . In rejecting proximate cause as a theory for recovery, the Third Circuit, like the Second Circuit in *Townes*, concluded that the policy reasons behind the exclusionary rule would not be served by allowing the plaintiff to 'continue to benefit from the exclusionary rule in his § 1983 suit and be relieved of defense costs from a prosecution that was terminated only because of the exclusionary rule.'. . Specifically, the court in *Hector* carefully considered the competing policy concerns that might be served by allowing damages arising from defending a criminal proceeding triggered by the discovery of contraband via an unconstitutional search. Bearing in mind the goal of the exclusionary rule to deter Fourth Amendment violations, the court concluded that policy considerations militated against any incremental contribution to such deterrence that might be had by allowing for civil damages arising well after the initial constitutional privacy violation that led to the discovery of contraband. . .The court in *Hector* thus ultimately concluded that although there would admittedly be some deterrent value to imposing liability for *all* consequences that unfold from a search or seizure unsupported by probable cause, the downsides of such an approach would outweigh its benefits. Specifically, the magnitude of the potential liability would routinely be unrelated to the seriousness of the underlying Fourth Amendment violation, in the sense that the damages award would often turn not on the nature of the unconstitutional invasion of privacy but on whatever contraband officers happened to uncover. . . Noting that it would be irresponsible to impose potential liability so disproportionate to the underlying constitutional violation and that neither the scholarly authority nor any common-law tort supported such a theory of recovery, the Third Circuit concurred with *Townes* to hold that, 'Victims of unreasonable searches or seizures may recover damages directly related to the invasion of their privacy–including (where appropriate) damages for physical injury, property damage, injury to reputation, etc.; but such victims cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution.'")

Wang v. City of Indianapolis, No. 1:23-CV-01543-TAB-RLY, 2024 WL 1741358, at *6–7 (S.D. Ind. Apr. 23, 2024) ("Defendants . . . argue that Count VII, alleging malicious prosecution in violation of the Fourth Amendment under § 1983, is likewise time-barred. In Count VII, Plaintiff claims his Fourth Amendment rights were violated because he was prosecuted without probable cause based upon false affidavits. . . Defendants cite *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018), in which the Seventh Circuit held that the date *detention* ends, rather than the date criminal proceedings terminate, is the proper measure for determining when a Fourth Amendment claim has accrued. However, in 2019, the Supreme Court expressly held that the statute of limitations for a § 1983 fabricated evidence claim began to run when the criminal proceedings ended without a conviction. *See McDonough v. Smith*, 139 S. Ct. 2149, 2161, 204 L. Ed. 2d 506 (2019) ("The statute of limitations for McDonough's § 1983 claim alleging that he was prosecuted using fabricated evidence began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted at the end of his second trial."). *See also Thompson v.*

Clark, 596 U.S. 36, 49, 142 S. Ct. 1332, 1341, 212 L. Ed. 2d 382 (2022) ("Fourth Amendment claim under § 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction."). The Seventh Circuit has not explicitly overruled *Manuel* in the context of these Supreme Court decisions, and Plaintiff, proceeding *pro se* at the time the parties briefed this motion, did not cite these specific decisions in arguing that the motion to dismiss should be denied. However, Plaintiff cites to *Heck v. Humphrey, . . .* where the Supreme Court held that a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor. Moreover, district court decisions align with *McDonough* in somewhat similar scenarios. [citing cases] A district court in South Carolina concluded that these more recent Supreme Court decisions superseded *Manuel*. *See Taylor v. Himes*, C/A No. 1:21-4036-MGL-PJG, 2022 WL 4001185, at *2 n.3 (D.S.C. June 13, 2022), *report and recommendation adopted*, 2022 WL 4000843 (D.S.C. Sept. 1, 2022) ("The defendant's reliance on *Manuel v. Joliet*, 903 F.3d 667, 669 (7th Cir. 2018), *on remand from* 137 S. Ct. 911 (2017), is unavailing, as that case has apparently been superseded by the United States Supreme Court's decisions expressly holding that Fourth Amendment malicious prosecution claims do not accrue until the prosecution ends without a conviction."). The state of Indiana dismissed all charges against Plaintiff on December 1, 2022, and Plaintiff initiated this case on August 28, 2023. Thus, because Plaintiff's Fourth Amendment malicious prosecution claim accrued when the prosecution ended without a conviction—in this case, when the charges against Plaintiff were dismissed—Plaintiff timely filed his claim for malicious prosecution.")

Bolden v. Pesavento, No. 17-CV-417, 2024 WL 1243004, at *28–29 (N.D. Ill. Mar. 23, 2024) ("The Supreme Court addressed the right recognized by *Manuel I* again in *Thompson v. Clark*, 596 U.S. 36 (2022). In *Thompson*, the Supreme Court labeled the right as a 'malicious prosecution' claim. . .Before *Thompson*, the Seventh Circuit recognized a Fourth Amendment 'pretrial detention' claim, but rejected a Fourth Amendment 'malicious prosecution' claim. The Seventh Circuit in *Manuel II* explained the lay of the land: 'After *Manuel I*, "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim – the absence of probable cause that would justify the detention.' *See Manuel v. City of Joliet (Manuel II)*, 903 F.3d 667, 670 (7th Cir. 2018). Terminology aside, the Seventh Circuit has yet to address whether *Thompson* alters the pretrial detention claim on the merits. The Seventh Circuit has not yet clarified whether pretrial detention and malicious prosecution are separate but related actions, or if *Thompson* leaves the same structure in place, while simply resulting in a name change to the *Manuel I* right. . .Under either framing of the Fourth Amendment cause of action (that is, 'pretrial detention' or 'malicious prosecution'), a plaintiff must show a lack of probable cause. . . In the case at hand, any distinction between malicious prosecution and pretrial detention is immaterial. As the Court explained in its previous ruling, Bolden presented evidence of a lack of probable cause at all stages – *i.e.*, for his arrest, pretrial detention, and prosecution. Based on the evidence that Bolden presented at trial, a reasonable jury could find that Defendants lacked probable cause for the whole nine yards, including Bolden's arrest and detention. . . Frazier's identification was the whole ballgame, and Bolden presented evidence that the identification was unreliable. . .

Bolden presented evidence at the civil trial showing that Defendants conducted an incomplete, bad-faith investigation. And he presented evidence that the prosecution relied on the investigation (which they believed to be complete) to bring the charges and secure the convictions. . . They also conveyed the information to Lynda Peters, the prosecutor. . . Both prosecutors relied on Defendants' investigative file, believing it to be 'truthful and correct' and to contain 'complete information.'. . Basically, Bolden offered evidence that the prosecution relied on Defendants' substandard investigation, without knowing about its deficiencies. In light of that evidence, a reasonable jury could find a lack of probable cause for the prosecution. In sum, a reasonable jury could find a lack of probable cause for both the pretrial detention and prosecution. The Court therefore denies Defendants' Rule 50(b) motion to the extent that they claim probable cause existed as a matter of law.")

Ochoa v. City of Chicago, No. 22-CV-2283, 2024 WL 1050239, at *16 n.9 (N.D. Ill. Mar. 11, 2024) ("In Ochoa's brief opposing the motion for summary judgment, he oscillates between referring to Count III as an 'unreasonable pretrial detention' claim and as a 'malicious prosecution' claim. . . In the past, the Seventh Circuit has made clear that ' "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim – the absence of probable cause that would justify the detention.' *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018). Put differently, '[t]he Seventh Circuit ma[de] clear that the Fourth Amendment protects against unreasonable searches and seizures in the absence of probable cause – not against some right not to be prosecuted without probable cause.'. . However, the Supreme Court has recently recognized a Fourth Amendment claim for malicious prosecution (also known as a 'claim for unreasonable seizure pursuant to legal process'). *See Thompson v. Clark*, 596 U.S. 36, 42 (2022). In any event, this distinction is immaterial for purposes of assessing Defendants' summary judgment motion. To simplify things, the Court will refer to Count III as a 'pretrial detention' claim, only.")

Liggins v. City of Chicago, No. 1:20-CV-04085, 2021 WL 2894167, at *3–4 (N.D. Ill. July 9, 2021) ("In 2019 the Seventh Circuit adopted *Manuel's* reasoning in *Lewis v. City of Chicago*, holding that constitutional challenges to pre-trial detention lie in the Fourth Amendment, not the Fourteenth. . . Lewis had spent two years-in pretrial detention because of a falsified police report. The *Lewis* court held that after *Manuel* '*all* § 1983 claims for wrongful pretrial detention—whether based on fabricated evidence or some other defect—sound in the Fourth Amendment' and 'the Fourth Amendment, not the Due Process Clause, is the source of the right in a § 1983 claim for unlawful pretrial detention, whether before or after the initiation of formal legal process.'. . Despite this clear precedent from the Seventh Circuit, Liggins argues that *Lewis* was wrongly decided, because *Manuel* 'did not extinguish due process claims for unlawful pretrial detention.' . . He relies on *McDonough v. Smith*, 139 S. Ct. 2149 (2019), where an election worker was targeted for investigation and prosecution. In *McDonough* the petitioner alleged evidence against him was falsified by the prosecutor because of a political grudge. Although he was indicted by a grand jury using this falsified evidence, he was not detained pending trial and was eventually acquitted. His subsequent § 1983 suit alleged both fabrication of evidence and malicious prosecution without

probable cause. . . The Supreme Court, having granted *certiorari* to resolve a question about the statute of limitations, did not address whether Petitioner's claims should have been brought under the Fourth or Fourteenth Amendments, saying only that it 'assume[d] without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions.'. . The Court agrees that the procedural posture of *McDonough* has created room for some debate. But district courts in the Seventh Circuit have refused to hold that *Lewis* incorrectly interpreted *Manuel* in light of *McDonough*. . . In light of *Manuel* being on all fours with the facts presented here and until the Seventh Circuit says otherwise, *Lewis* is the precedent that binds this Court. Plaintiff's Fourteenth Amendment claims are dismissed, but his Fourth Amendment claims may proceed.")

Grayer v. City of Chicago, No. 20-CV-00157, 2021 WL 2433661, at *1-3 (N.D. Ill. June 15, 2021) ("No party disputes that the Fourth Amendment applies to claims arising from pretrial detention. But the Fourteenth Amendment comes into play only for claims that arise following a criminal conviction. Because Plaintiffs were never convicted of a crime, the Fourteenth Amendment plays no permissible role in Plaintiffs' complaint. Accordingly, Defendants' partial motion to dismiss is granted. . . . Plaintiffs allege they were subjected to pretrial detention without probable cause in violation of their Fourth and Fourteenth Amendment rights. . . No party disputes that a Section 1983 claim alleging wrongful pretrial detention arises under the Fourth Amendment. . . But the question remains: can a challenge to pre-trial incarceration also arise under the Fourteenth Amendment? In short, the answer is no. . . . In the wake of *Manuel I* and *II*, the Seventh Circuit has further clarified that the pre/post-conviction line permits no equivocation: pretrial claims arise under the Fourth Amendment, and post-conviction claims arise under the Fourteenth Amendment. . . . Despite this precedent, Plaintiffs argue that *Lewis* is contrary to the Supreme Court's decision in *McDonough v. Smith*[.] . . This Court respectfully disagrees. Contrary to Plaintiffs' suggestion, *McDonough* did not hold that 'unlawful pretrial detention can also sound in the Fourteenth Amendment.'. . *McDonough*, rather, addressed when the statute of limitations for a fabricated evidence claim begins to run. . . Acknowledging that 'the Second Circuit treated [the plaintiff's claim] as arising under the Due Process Clause,' the Supreme Court pointedly noted that '[w]e assume without deciding that the Second Circuit's articulations of the right at issue and its contours are sound, having not granted certiorari to resolve those separate questions.'. . In view of this qualification, this Court cannot find that *Lewis*—which directly applied *Manuel I*—and later on-point Seventh Circuit cases were abrogated by implication through *McDonough*. . . Moreover, this conclusion is bolstered by the Seventh Circuit's post-*McDonough* application of *Manuel I* and *Lewis* in *Kuri* and *Young*—neither of which mention *McDonough*. . . Plaintiffs attempt to avoid the effect of *Lewis* and related decisions by distinguishing, for claim-accrual purposes, between allegations of fabricated evidence (*e.g.*, *McDonough*) and those involving unlawful detention (*e.g.*, *Lewis* and *Manuel I*). . . This distinction does not make a difference—at least not in this case. Although Plaintiffs cite some decisions explaining that a later date of accrual should apply to fabrication of evidence claims, . . . at issue here is the legal basis of the claimed right of action, not the marker for when that action accrues. And on that score, the law is against Plaintiffs: *Lewis* rejected any distinction between pretrial fabrication of evidence claims and those

based on wrongful pretrial detention. *Lewis*, 914 F.3d at 479 ("all § 1983 claims for wrongful pretrial detention— whether based on fabricated evidence or some other defect—sound in the Fourth Amendment"). . . Because that rule is the controlling law in this circuit, Plaintiffs' reliance upon the Fourteenth Amendment is foreclosed.")

Walker v. White, No. 16 CV 7024, 2021 WL 1058096, at *10–11 (N.D. Ill. Mar. 19, 2021) ("Defendants have preserved their argument that Walker's Fourth Amendment claim is untimely, but I reject it. '[A] Fourth Amendment claim for wrongful pretrial detention accrues when the detention ceases.' *Lewis v. City of Chicago*, 914 F.3d 472, 478 (7th Cir. 2019). And if the pretrial-detention claim implicates the validity of the underlying conviction, as it does here, then the claim doesn't accrue until the plaintiff receives a favorable termination of his case. *Savory v. Cannon*, 947 F.3d 409, 430–31 (2020). Walker's conviction was vacated and he was released from custody in March 2016. He filed his complaint a few months later, on July 7, 2016, well within the two-year time limit. . . The Fourth Amendment prohibits unreasonable searches and seizures. Arrest and pretrial detention are both seizures and are justified only on probable cause. . . . There's a factual dispute about whether the officers saw Russell sell drugs to Brown, saw Walker throw cocaine out the window, and found cocaine in Walker's sock and car. But Walker doesn't dispute that there was marijuana in plain view in the car's ashtray. He makes no attempt to grapple with that fact in his response brief. Because there was undisputed evidence that a crime had occurred in plain view, the officers had probable cause to arrest Walker. No reasonable jury could find otherwise. . . Summary judgment is granted to all defendants on the false-arrest claim. . . Defendants' argument, however, collapses the distinction between false arrest and wrongful pretrial detention. The Supreme Court has recognized a difference between 'pre-legal-process[ ] arrest' and 'post-legal process[ ] pretrial detention.' *Manuel v. City of Joliet*, 137 S. Ct. 911, 919 (2017). The Fourth Amendment governs both. . . Unlawful pretrial detention occurs 'when the police hold someone without any reason before the formal onset of a criminal proceeding,' and also when 'legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements.'. . Walker claims that he was both unlawfully arrested and unlawfully held before trial. Although the marijuana cigarette precludes his false-arrest claim, the record is unclear on whether Walker was detained on that basis as well. The Local Rule 56.1 statements of fact don't mention a judicial probable-cause determination, initial appearance, arraignment, detention hearing, or the like. Nor is there mention of which charges were written up in a criminal complaint. No one disputes that Walker was held pretrial. He testified at his deposition that he was transferred to county jail after the officers processed him at the precinct. . . He went to bond court right after the transfer, and arraignment court three weeks later. . . But the earliest judicial proceeding the parties included as an exhibit in the record is dated April 2006, after Walker was indicted. . . He was indicted only on the cocaine offenses. And there's reason to think he was never charged with the marijuana in the car: in the defendants' Local Rule 56.1 statement, they cite only to Walker's deposition to support the fact that there was marijuana in the car. . . If a judge based the probable-cause determination solely on the cocaine offenses, a jury could find Reyes, White, and Flatley liable for unlawful pretrial detention. In other words, 'legal process itself' may have been compromised if Walker's detention

was based 'solely on a police officer's false statements.'. .Without evidence showing that Walker was detained on the basis of the marijuana in his car, the officers are not entitled to judgment as a matter of law on the pretrial-detention claim—the dispute over the drug evidence creates a material dispute over the wrongfulness of Walker's detention. Summary judgment is granted to all defendants on the false-arrest claim and to all defendants but Flatley, Reyes, and White on the pretrial-detention claim.")

Henderson v. Rangel, No. 19-cv-06380, 2020 WL 5642943, at *3 (N.D. Ill. Sept. 21, 2020) ("Before *Manuel v. City of Joliet*, 137 S.Ct. 911 (2017) (*Manuel I*), and *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018) (*Manuel II*), the Seventh Circuit suggested that wrongful pretrial detention can be a deprivation of liberty cognizable under the Due Process Clause. But following *Manuel I and Manuel II*, the Seventh Circuit has made clear that 'the Fourth Amendment, not the Due Process Clause, is the source of the right in a § 1983 claim for unlawful pretrial detention.'. . Applying *Lewis*, courts in this Circuit have dismissed wrongful pretrial detention claims brought under the Fourteenth Amendment's Due Process Clause by defendants who, like Henderson, were acquitted at trial and did not allege any post-trial deprivation of liberty. . . Henderson acknowledges *Lewis* but argues that it is undermined by the Supreme Court's decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019). In *McDonough*, the Court considered when a claim for fabrication of evidence accrued. . . The Court 'assume[d] without deciding' that the Second Circuit's framing of the claim as implicating the Due Process Clause was appropriate. . . The Court's assumption seems to create some friction with the Seventh Circuit's view that a wrongful pretrial detention claim can be only be brought under the Fourth Amendment. But this Court cannot disregard the Seventh Circuit's pronouncement in *Lewis* based on the Court's 'assumption—rather than holding— that such a claim is viable.'. . Because Counts I and II are brought under the Due Process Clause of the Fifth and Fourteenth Amendments, and because neither govern Henderson's wrongful pretrial detention claim, both counts are dismissed against Officers Rangel and Rosiles with prejudice.")

Baker v. City of Chicago, No. 16-CV-08940, 2020 WL 5110377, at *6 (N.D. Ill. Aug. 31, 2020) ("Despite Plaintiffs' suggestion to the contrary, . . . *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), plainly bars any federal claims that sound in malicious prosecution where, as here, there is an adequate state law remedy. . . Neither the Supreme Court nor the Seventh Circuit has disturbed that status quo with more recent rulings. While it is true that the Supreme Court in *Manuel* partially abrogated *Newsome* in finding that the Fourth Amendment can support a claim for unlawful pretrial detention beyond the start of legal process, *Newsome's* conclusions regarding the viability of federal malicious prosecution claims remain good law in this Circuit. [collecting cases] Accordingly, Plaintiffs cannot proceed with their federal malicious prosecution claims in Count II. Those claims are dismissed.")

McWilliams v. City of Chicago, No. 14 C 3902, 2020 WL 1530747, at *4 (N.D. Ill. Mar. 31, 2020) ("'[A] claim for unlawful pretrial detention accrues when the detention ceases.'. . The issue here is *when* plaintiff's detention ceased. If it ceased when plaintiff was released on bond, then his claim

is not timely. If, however, it ceased when he was released from Jail, then his claim is timely. This issue has not been squarely resolved. In *Mitchell*, the Seventh Circuit determined that 'pretrial release might be construed as a "seizure" for Fourth Amendment purposes if the conditions of that release impose *significant* restrictions on liberty,' but the court went on to say that it had 'misgivings about construing a simple obligation to appear in court—a uniform condition of any pretrial release—as a "seizure" for Fourth Amendment purposes.'. . Ultimately, the court declined to decide the issue because the record did not contain sufficient information about the plaintiff's conditions of release. . . Since this ruling, courts with more robust records have come to different conclusions. Some courts have found that an individual released on bond with minimal restrictions is not seized for purposes of the Fourth Amendment. . . Other courts have found that these minimal requirements do constitute a seizure. . . On this record, the Court finds that plaintiff's claim is timely. While plaintiff initially had minimal bond requirements imposed on him, the requirements placed on him became more restrictive, his bond was later revoked, and he was then detained at the Jail for five months until the CCSAO *nolled* the charges against him. Although plaintiff did not comply with his bond requirements and therefore bears some responsibility for his five-month pretrial detention at the Jail, he ultimately would not have spent the five months in the Jail had it not been for the allegedly unlawful stop and search and fabricated evidence. Because plaintiff's detention ended on February 14, 2014 and he filed his amended complaint naming the Defendant Officers within the two-year statute of limitations on January 29, 2016, the Court finds this claim to be timely.")

Moorer v. Platt, No. 18 CV 3796, 2020 WL 814924, at *2–3 (N.D. Ill. Feb. 19, 2020) ("If probable cause existed to suspect Moorer of murder, then his pretrial detention did not violate the Fourth Amendment. . . In addition to the absence of probable cause, Moorer must also allege that defendants knew they lacked probable cause to arrest him. . . Defendants argue that the complaint pleads the existence of probable cause, because it alleges that eyewitnesses identified Moorer as the shooter. 'Probable cause can be based on a single identification from a credible eyewitness.'. . Although the complaint does not come right out and say it, Moorer's theory is that the defendants knew the eyewitness identifications were false or unreliable and therefore the identifications did not provide probable cause to believe Moorer was the killer. This is a reasonable inference from the allegations. The complaint alleges that the identification procedures were improper and suggestive, the officers knew of Moorer's alibi, they knew his nickname was not Boom, they knew he did not have a matching phone number, and they reported conducting photo arrays at a time when they could not have yet identified Moorer as a suspect. The complaint adequately pleads defendants' knowledge and the absence of a reliable identification. This is enough to get past the pleading stage for a Fourth Amendment claim. Moorer will have to prove that every defendant was personally involved in the wrongful pretrial detention, it was unreasonable to credit the eyewitness identifications, and nothing broke the chain of proximate causation from a defendant's conduct to Moorer's damages. . . But these are issues for another day.")

Blackmon v. City of Chicago, No. 19 C 767, 2020 WL 60188, at *4 (N.D. Ill. Jan. 6, 2020) ("Defendants' argument is straightforward: Blackmon has brought a claim for Fourth Amendment

malicious prosecution and the Seventh Circuit has made it clear that he cannot. Blackmon seems to acknowledge that Defendants are correct on the case law, but he insists that Defendants' arguments are merely semantic and that he actually brought a claim for wrongful seizure, pretrial detention, and deprivation of liberty without probable cause, which was simply mislabeled as a claim for 'federal malicious prosecution.' But as Defendants correctly note, Blackmon's complaint suggests otherwise. Count V makes no mention of any wrongful arrest, pretrial detention, or custody. As pleaded, Count V is clearly based on Blackmon's wrongful prosecution and his being 'improperly subjected to judicial proceedings'—not his wrongful pretrial detention. . . Though Count V does mention that Blackmon 'suffered loss of liberty,' there are no allegations connecting the loss of liberty to any kind of arrest or pretrial detention or custody without probable cause. This can easily be remedied in an amended complaint. Because Count V is based on Blackmon's wrongful prosecution without probable cause, it is dismissed without prejudice.")

Young v. City of Chicago, No. 17 C 4803, 2019 WL 6349892, at *5–6 (N.D. Ill. Nov. 27, 2019) ("Defendants are correct that Young cannot bring a due process claim for unlawful pretrial detention. *Manuel I* abrogated older Seventh Circuit precedent holding that pretrial detention after legal process started did not give rise to a Fourth Amendment claim but could constitute a due process claim if state law failed to provide an adequate remedy. . . After *Manuel I*, the Seventh Circuit explained that all § 1983 claims for wrongful pretrial detention sound in the Fourth Amendment. . . Then, in *Lewis*, the Seventh Circuit applied these decisions to overrule its prior precedent in *Hurt v. Wise*, 880 F.3d 831 (7th Cir. 2018) to the extent it held the injury of wrongful pretrial detention may be remedied under § 1983 as a violation of the Due Process Clause. . . *McDonough* does not limit *Lewis's* application to this case. In *McDonough*, the Court considered when the statute of limitations begins to run for evidence fabrication claims. . . The Court noted that the Second Circuit interpreted the claim as arising under the Due Process Clause and assumed 'without deciding that the Second Circuit's articulations of the right at issue and its contours are sound' as certiorari was not granted on those issues. . . Nor does earlier Seventh Circuit law, explaining that the use of fabricated evidence to deprive a person of liberty is a due process violation, save Young's claim. . . As the *Lewis* panel noted, prior decisions holding that pretrial detention based on police fabrications violates the Due Process Clause 'cannot be reconciled' with *Manuel II*. . . Young's argument that he has a due process claim based on defendant officers' use of false evidence in his pretrial proceedings likewise fails. He contends that false evidence had a 'real life effect on the bond court, preliminary hearing, and trial judge....'[.] . . He does not specify which information was false and the only such effect he identifies is that his bond was set at an amount too high for him to pay. In other words, he complains he was detained due to false evidence. Consequently, Young's claim that false evidence tainted his pretrial proceedings sounds in the Fourth Amendment and fails for the same reasons as his unlawful detention claim.")

Neita v. City of Chicago, No. 19 C 595, 2019 WL 5682838, at *4 (N.D. Ill. Nov. 1, 2019) ("As distinct from a claim of unlawful detention, there is no right of action for malicious prosecution based on the Fourth Amendment. . . The point of these cases, as it relates to Neita, is that his remedy for the alleged Fourth Amendment violations he suffered are the false-arrest and illegal-

search-and-seizure claims he raised above. . . Count III is dismissed.")

Brown v. City of Chicago, No. 18 C 7064, 2019 WL 4694685, at *5–6 (N.D. Ill. Sept. 26, 2019) ("The *Manuel I* Court did not address the availability of a federal claim for malicious prosecution. . . Rather, as the Seventh Circuit observed on remand, '[a]fter *Manuel* [*I*], "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify detention.' *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018) ("*Manuel II*"). Put another way, the constitutional wrong recognized in *Manuel I* and *II* was 'the detention rather than the existence of criminal charges.'. . Plaintiff urges that even if there is no federal malicious prosecution claim, *Manuel I* still allows for a claim under the Fourth Amendment for detention without probable cause. It is true that 'what matters' is not 'terminology' but 'identif[ying] the constitutional right at issue.'. . But as Defendant correctly notes, a claim for detention without probable cause is inconsistent with the allegations in Count VI, all of which concern the institution of judicial proceedings against Plaintiff and not his detention. And even if Plaintiff had identified unlawful detention as the constitutional right at issue, the Fourth Amendment protects only Plaintiff's right to be free from *pretrial* detention; a claim for wrongful conviction sounds in due process.")

Mayo v. Lasalle County, No. 18 CV 01342, 2019 WL 3202809, at *4–7 (N.D. Ill. July 15, 2019) ("The plaintiffs maintain that the fact that the charges against Manuel had been dropped the day ***before*** he was released from custody distinguishes that case from this one, where the charges against Mayo and Burt remained pending for several months after their release. This argument is inconsistent with the Seventh Circuit's holding in *Manuel II*, which 'held that a Fourth Amendment claim for unlawful pretrial detention accrues when the ***detention*** ends, ***not*** when the ***prosecution*** ends.' *Mitchell v. City of Elgin*, 912 F.3d 1012, 1015 (7th Cir. 2019) (describing *Manuel II*'s holding). The plaintiffs nevertheless maintain that *Heck v Humphrey*, 512 U.S. 477 (1994), barred them from bringing an unlawful detention claim while charges were still pending against them. . . . *Heck* poses no impediment to asserting a § 1983 claim while charges are pending, or even following a conviction, where success on the claim is not inherently inconsistent with the validity of the state court charges. That is the case with respect to the plaintiffs' unlawful detention claim. A suit challenging the lawfulness of the plaintiffs' pretrial detention would not be inherently inconsistent with the prosecution of, or conviction on, the drug trafficking charges that were brought against them. Success on a challenge to the lawfulness of their detention would require a determination that there was no probable cause for the detention, and such a finding would imply the invalidity of the state court order authorizing the detention. But a suit challenging the lawfulness of the detention under the Fourth Amendment does not necessarily impugn the propriety of continuing to prosecute the charges that remain pending. Even in a case where it was discovered that probable cause to detain had been lacking, there might otherwise have been developed evidence sufficient to establish probable cause to support the charges going forward. But more fundamentally, as the Seventh Circuit has repeatedly held, lack of probable cause does not preclude a prosecution from going forward: 'there is no such thing as a constitutional right not to be prosecuted without probable cause.'. . For that reason, the Seventh

Circuit expressly rejected Manuel's contention that a Fourth Amendment pretrial detention claim accrues only when the plaintiff's position regarding the charges has been vindicated. The wrong addressed by a Fourth Amendment claim is wrongful detention; a Fourth Amendment claim therefore accrues when the wrongful detention ends, even if the prosecution continues. Relatedly, in *Wallace v. Kato*, 549 U.S. 384, 393 (2007), the Supreme Court held that *Heck* applied only to convicted or sentenced plaintiffs, not to situations where an action would impugn an ***anticipated*** conviction. . . The Court clarified that false arrest claims can be filed while criminal charges are still pending and that district courts can avoid the issue of parallel litigation by staying the civil action until the criminal charges are resolved. At that point, the court can decide if *Heck* requires dismissal of the civil action. . . Read together, *Wallace* and *Manuel II* stand for the proposition that the statute of limitations on a pretrial detention claim begins running as soon as the plaintiff is released from custody, regardless of whether criminal charges remain pending. . . Mayo and Burt also argue their claims could not be filed until the charges against them were dropped because they might have been reincarcerated. But according to *Manuel II*, the original wrong ended once they were released from detention. . . Reincarceration may have constituted a ***new*** Fourth Amendment wrong but would not have extended the original wrong. The Court therefore finds that the claim for unlawful pretrial detention accrued on June 11, 2015 when the plaintiffs were released from custody. Finally, the Court notes that the Seventh Circuit has recently suggested that some restrictions imposed as conditions of pretrial release may constitute seizures for purposes of the Fourth Amendment, *Mitchell v. City of Elgin*, 912 F.3d 1012, 1016 (7th Cir. 2019), and that a Fourth Amendment claim for detention without probable cause may therefore accrue at the time those restrictions are terminated. *Knox v. Curtis*, __ Fed. Appx. __ (7th Cir. 2019). The plaintiffs do not make such an argument here, nor do not allege any facts (beyond a conclusory allegation that their ability to travel while on bond was restricted) which would suggest that they were in fact 'seized' during that time. In any case, a docket entry from the plaintiffs' criminal case dated 6/19/2015 shows that when the plaintiffs were released from custody, the court allowed them to travel back to New Hampshire immediately. The only restriction placed on them was a requirement that they appear at a future date. . . This Court is unwilling to conclude that this obligation constitutes a seizure for Fourth Amendment purposes. A requirement to appear somewhere simply does not fit within the Supreme Court's test for whether a seizure has occurred, which looks to whether a reasonable person would have believed that he was free to leave. . . Accordingly, the clock on Mayo and Burt's pretrial detention claim started running when they were released from physical custody in June 2015.")

Roldan v. Town of Cicero, No. 17-CV-3707, 2019 WL 1382101, at *3-4 (N.D. Ill. Mar. 27, 2019) ("Defendants move to dismiss Plaintiff's Fourth Amendment claim (Count I) as time-barred. In *Manuel v. City of Joliet, Illinois (Manuel II)*, the Seventh Circuit held that a plaintiff's Fourth Amendment wrongful detention claim accrues at the end of the detention. . . Despite this holding, Defendants argue that Plaintiff's Fourth Amendment claim accrued on the date of conviction (at the latest). Defendants appear to be arguing that because the Fourth Amendment drops out once trial occurs, Plaintiff's Fourth Amendment wrongful detention claim accrued when he was convicted. Plaintiff counters that his entire detention was wrongful. Although the Fourteenth

Amendment governs claims for wrongful detention after trial, . . . '§ 1983 cannot be used to contest ongoing custody that has been properly authorized.'. . 'The wrong of detention without probable cause continues for the duration of the detention. That's the principal reason why the claim accrues when the detention ends.'. . Plaintiff therefore could not have challenged his continued detention at the time of his conviction and thereafter. . . . Defendants further argue that Plaintiff fails to allege any pretrial detention beyond his initial arrest. However, Plaintiff alleges that he was detained and prosecuted because of Defendants misconduct. . . Although Plaintiff admits in his supplemental brief that he was released on bond sometime after his arrest and was taken back into custody on January 7, 2013, this is not alleged in Plaintiff's amended complaint and therefore is not properly before the Court on Defendants' motion to dismiss. Regardless, it is unclear whether a person released on bond remains 'seized' for Fourth Amendment purposes. The Seventh Circuit recently declined to decide the issue, concluding that it was unable to do so based on the 'state of the record and briefing' before the court on the issue of first impression. . .In *Mitchell*, the Seventh Circuit recognized that sister circuits have held that 'pretrial release might be construed as a "seizure" for Fourth Amendment purposes if the conditions of that release impose significant restrictions on liberty.'. . Still, the Seventh Circuit recognized that other circuits have held that '[r]un-of-the-mill conditions of pretrial release do not fit comfortably within the recognized parameters of the term [seizure].'. . Because it was not yet known what conditions of release, if any, were imposed on the plaintiff in *Mitchell*, the Seventh Circuit declined to determine whether a person released on bond remains 'seized' for Fourth Amendment purposes. As in *Mitchell*, here too, it is not yet known what conditions of release, if any, were imposed on Plaintiff. In the absence of such information, Plaintiff's claim remains plausible. Defendants imply that it was Plaintiff's obligation to allege such facts in his complaint, but that misapprehends the pleading obligations under Rule 8. Those facts will be necessary to establish the length of Plaintiff's unjustified detention (which is relevant to the statute of limitations defense), but not to show the fact of his unjustified detention of any duration (which is a necessary element of his Fourth Amendment claim). . . .The Fourteenth Amendment's Due Process Clause is the relevant constitutional source for Plaintiff's claim that Defendants violated his right to a fair trial by failing to disclose the fact that Defendants agreed to assist J.T. in obtaining a U-visa in return for her false testimony at Plaintiff's trial.")

Melongo v. Podlasek, No. 13 C 4924, 2019 WL 1254913, at *17 (N.D. Ill. Mar. 19, 2019) ("Melongo acknowledges that *Lewis* limits her due-process claim; she contends, however, that '[f]abricated evidence contributing to an indictment and continued prosecution is an injury distinct from fabricated evidence contributing to pretrial detention.'. . But Melongo cites no case to support such a proposition, and *Lewis* does not appear to contemplate such a distinction. The Court of Appeals clarified in *Lewis* that its decision did not affect the viability of a due-process claim in a case resulting in a *conviction* and recognized that fabricated evidence that results in a conviction may form the basis of a claim under *Brady v. Maryland*, 373 U.S. 83 (1963); but it stopped there. . . Melongo's position ignores the fact that 'there is no such thing as a constitutional right not to be prosecuted without probable cause.'. . Because *Lewis* makes clear that, in cases not involving convictions, a pretrial detention claim sounds only in the Fourth Amendment, Melongo's due-process claim fails as a matter of law.")

Lattimore v. Klein, No. 17-CV-8683, 2019 WL 1028121, at *4–5 (N.D. Ill. Mar. 4, 2019) ("As the Supreme Court and Seventh Circuit have now made clear, . . . there is no such thing as a 'Fourth Amendment malicious prosecution' claim. Rather, to the extent that the plaintiffs allege that they were detained in custody based on fabricated evidence—and they do—they have a Fourth Amendment claim for a seizure unsupported by probable cause, not a 'malicious prosecution' claim. . . The plaintiffs allege that they were both 'transported to jail and were wrongfully incarcerated,'. . . presumably on the days they were arrested, and they supplement that allegation in their brief, noting that the plaintiffs were held in custody until they bonded out, Lattimore on February 13, 2015, and Hutton-Lattimore on February 4, 2015. Those are the dates on which the statute of limitations for the plaintiffs' Fourth Amendment claims for unlawful seizure of their persons began to run. . . As the plaintiffs concede, the applicable limitations period is two years; their Fourth Amendment personal seizure claims were therefore untimely after February 13, 2017 (Lattimore) and February 4, 2017) (Hutton-Lattimore), respectively. The original complaint in this case was not filed until November 30, 2017, however, so the plaintiffs' Fourth Amendment seizure claims set forth in Count II are time-barred. . .The plaintiffs attempt to salvage their 'malicious prosecution' theory by asserting that notwithstanding *Manuel I*, *Manuel II*, and *Lewis*, they have a timely claim based on fabrication of evidence because the 'wrong' caused by the allegedly fabricated evidence continued until the charges against them were dismissed. In other words, they maintain that they have a due process claim based on the fabrication of evidence based not on their unlawful detentions but because they were wrongfully charged. That argument fails, however. As the Seventh Circuit has repeatedly explained, 'there is no such thing as a constitutional right not to be prosecuted without probable cause.'. . Absent a deprivation of liberty (which, per *Manuel I*, would be actionable only under the Fourth Amendment), there can be no due process deprivation caused by the use of fabricated evidence. . . . *Saunders–El* and *Alexander* foreclose the evidence-fabrication claim alleged in this case. Because the plaintiffs suffered no liberty deprivation, they suffered no due-process violation.")

McWilliams v. City of Chicago, No. 14 C 3902, 2018 WL 4404653, at *3, *5 (N.D. Ill. Sept. 17, 2018) ("Since briefing the motion, the Seventh Circuit resolved a similar dispute in *Manuel v. City of Joliet*, Case No. 14-1581, 2018 WL 4292913 (7th Cir. Sept. 10, 2018), holding that the accrual date for a Fourth Amendment claim involving wrongful detention without probable cause accrues on the day the individual is released from custody. Like the plaintiff in *Manuel*, McWilliams is challenging the propriety of his time spent in custody. As the Seventh Circuit observed, this type of claim accrues when the complained-of wrong ends. . . Although McWilliams does not plead precisely when he was released from custody, McWilliams alleges that he remained in jail from October 2013 through at least January 2014. . . McWilliams filed an amended complaint naming the Defendant Officers on January 29, 2016, which was within the two-year statute of limitations. Accordingly, defendant's motion to dismiss this claim as barred by the statute of limitations is denied. . . . Defendants assert that McWilliams's due process claim fails as a matter of law because he suffered no actionable liberty deprivation because the charges against him were *nolle prossed*, the evidence was never used against him at trial, and he was never convicted of any crime.

McWilliams responds that liberty deprivations in fabricated evidence due process claims need not stem from a criminal conviction; pretrial deprivations of liberty are adequate. Since the briefing of this motion, the Supreme Court in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) held that claims of unlawful pretrial detention, including claims of pretrial detention based on fabricated evidence, are covered by the Fourth Amendment. . . Here, McWilliams has plausibly alleged a violation of the Fourth Amendment based on an unlawful pretrial detention. He alleges that the Defendant Officers fabricated evidence against him, particularly that he was obstructing traffic and was in possession of an unlawful weapon that was in plain view at the time of his arrest, and, later, that he had violated a court-imposed curfew by providing a false address. McWilliams also alleges that the use of this fabricated evidence resulted in his pretrial detention. Further, McWilliams alleges that the criminal proceedings were terminated in his favor. In construing these well-pleaded facts as true and in considering all reasonable inferences in McWilliams's favor, the Court finds that McWilliams has sufficiently alleged a Fourth Amendment claim. Defendant's motion to dismiss on this basis is therefore denied.")

Eighth Circuit

Jones v. City of St. Louis, 104 F.4th 1043, 1048 (8th Cir. 2024) ("In *Manuel v. City of Joliet*, police officers arrested the § 1983 plaintiff without a warrant based on fabricated evidence he possessed a controlled substance, evidence that was then used to obtain a judicial determination of probable cause to prosecute. . . Resolving a conflict in the circuits, the Supreme Court held 'that the Fourth Amendment governs a claim for unlawful detention even beyond the start of legal process' and only 'drops out' once trial has occurred. . . On appeal, both parties assume without analysis that *Manuel* decided that a claim challenging prolonged detention falls within the Fourth Amendment, not the Due Process Clause, *whether or not* the initial detention (seizure) was lawful. This issue was not raised nor addressed by the Court in *Manuel*, a case that involved an alleged unlawful initial seizure. The district court did not cite *Manuel* or even acknowledge that this is a serious issue because choosing the Fourth Amendment as 'the specific constitutional right allegedly infringed' by Defendants necessarily implies that the Supreme Court in *Manuel* intended to overrule our otherwise controlling due process precedents, a question the Court did not discuss. Though other circuits have considered prolonged detention claims after *Manuel*, we have not addressed this issue. . . We conclude we need not decide this difficult question in this case because, even if the Fourth Amendment does apply to Jones's prolonged detention claims, we must reverse the denial of the individual Defendants' motion to dismiss because the FAC fails to plausibly allege a Fourth Amendment violation.")

Johnson v. McCarver, 942 F.3d 405, 410-11 (8th Cir. 2019) ("Whether the officers subjectively thought there was probable cause to arrest for trespass is irrelevant. . . We examine only the objective question whether the circumstances known to the officers established a fair probability that Johnson committed an offense. Johnson's refusal to leave after agents of the club revoked his license to remain established arguable probable cause to believe that he trespassed. Arguable probable cause that he had committed an offense inside the club continued to exist fifteen minutes

later when the officers arrested Johnson. Whether the officers exercised poor judgment in electing to arrest Johnson after the original dispute was resolved is not pertinent to the objective probable-cause analysis under the Fourth Amendment. The officers also claim qualified immunity on Johnson's claim under the Due Process Clause. Johnson asserts that the officers deprived him of liberty without due process of law by falsifying a report of his arrest. Any deprivation of Johnson's liberty before his criminal trial, however, is governed by the Fourth Amendment and its prohibition on unreasonable seizures. *Manuel v. City of Joliet*, 137 S. Ct. 911, 917 (2017). (On this issue, *Manuel* abrogated *Moran v. Clarke*, 296 F.3d 638, 646-47 (8th Cir. 2002) (en banc).) Any *post-trial* claim based on the alleged false report requires a showing that the report was used to deprive Johnson of liberty in some way. *See Winslow v. Smith*, 696 F.3d 716, 735 (8th Cir. 2012). The jury acquitted Johnson, and he suffered no deprivation of liberty after the trial. Accordingly, there is insufficient evidence to support a finding that the officers violated Johnson's rights under the Due Process Clause. For these reasons, the officers are entitled to qualified immunity on Johnson's claims alleging false arrest under the Fourth Amendment, retaliatory arrest under the First Amendment, and deprivation of liberty in violation of the Due Process Clause.")

Conway v. Norris, No. 6:15-CV-06028, 2018 WL 1189408, at *4 (W.D. Ark. Mar. 7, 2018) ("The United States Supreme Court recently discussed accrual of a section 1983 claim for unlawful pretrial detention in violation of the Fourth Amendment, stating, '[i]n support of [the plaintiff's] position, all but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a "favorable termination element" and so pegged the statute of limitations to the dismissal of the criminal case.'. . Defendants' reliance upon the *Jones* case is misplaced, and this Court declines to find that Plaintiff's claims are time-barred based on that precedent. Although the Eighth Circuit has not yet had the opportunity to address the recent *Manuel* case, the language used by the Supreme Court in support of the 'favorable termination element' is clear. . . Plaintiff's section 1983 claims accrued when he was acquitted of the murder charge on May 17, 2013. Plaintiff filed his case on May 30, 2015. Thus, the Court finds that his Complaint was filed well within the three-year personal injury statute of limitations set forth by Arkansas law. . . .Since the *Manuel* case was decided, six federal district courts in other jurisdictions have cited it in support of the premise that a Fourth Amendment claim for malicious prosecution accrues when the underlying criminal case is favorably terminated. *See Clark III v. Wills*, Case No. 16-3119-SAC, 2017 WL 5598261 (D. Kan. Nov. 21, 2017); *Watson v. Mita*, Case No. 16-40133-TSH, 2017 WL 4365986 (D. Mass. Sept. 29, 2017); *Brown v. Louisville Jefferson Cnty. Metro Gov't*, Case No. 3:16-cv-460-DJH, 2017 WL 4288886 (W.D. Ky. Sept. 27, 2017); *Quintana v. City of Philadelphia*, Case No. 17-996, 2017 WL 3116265 (E.D. Pa. July 21, 2017); *Annan-Yartey v. Muranaka*, Case No. 16-00590, 2017 WL 1243499 (D. Hawai'i Apr. 3, 2017); *Nowacki v. Town of New Canaan*, Case No. 3:16-cv-00407(JAM), 2017 WL 1158239 (D. Conn. Mar. 28, 2017).")

Ninth Circuit

Brewster v. Beck, 859 F.3d 1194, 1196-97 (9th Cir. 2017) ("Because a 30-day impound is a

'meaningful interference with an individual's possessory interests in [his] property,'. . . the Fourth Amendment is implicated when a vehicle is impounded under section 14602.6(a). The district court found that such a seizure doesn't present a Fourth Amendment problem because 'the state has an important interest in ... keeping unlicensed drivers from driving illegally.' But that is beside the point. The Fourth Amendment 'is implicated by a delay in returning the property, whether the property was seized for a criminal investigation, to protect the public, or to punish the individual.'. . The Fourth Amendment doesn't become irrelevant once an initial seizure has run its course. *See Jacobsen*, 466 U.S. at 124 & n.25; *Lavan* v. *City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012); *see also Manuel* v. *City of Joliet*, 137 S. Ct. 911, 914, 920 (2017) (holding that the Fourth Amendment governed the entirety of plaintiff's 48-day detention). A seizure is justified under the Fourth Amendment only to the extent that the government's justification holds force. Thereafter, the government must cease the seizure or secure a new justification. Appellees have provided no justification here. The only other circuit to address this specific issue is the Seventh. *See Lee*, 330 F.3d at 466. There, the City of Chicago seized Lee's vehicle for evidentiary purposes but failed to return it when it was no longer needed. . . The parties agreed that the initial seizure of the vehicle was reasonable. . . But Lee argued that 'the *continued* possession of the property by the government became a meaningful interference with his possessory interest and, thus, must be interpreted as a Fourth Amendment seizure.'. . The Seventh Circuit disagreed, holding that '[o]nce an individual has been meaningfully dispossessed, the seizure of the property is complete, and once justified by probable cause, that seizure is reasonable.'. . Reasoning that 'Lee's car was seized when it was impounded,' the Seventh Circuit concluded that the City's continued possession of the vehicle 'neither continued the initial seizure nor began another.'. . . The 30-day impound of Brewster's vehicle constituted a seizure that required compliance with the Fourth Amendment. Appellees argue that this result frustrates the state legislature's intent to impose a penalty on unlicensed drivers. We have no occasion to decide whether this objective is lawful. . . The police could impound a vehicle under section 22651(p), which authorizes impoundment when the driver doesn't have a valid license. *See* Cal. Veh. Code § 22651(p). Section 22651(p) doesn't have a mandatory 30-day hold period, thus avoiding the Fourth Amendment problem presented by section 14602.6(a).")

Valle v. Morgado, No. 21-CV-05636-EMC, 2021 WL 5507180, at *3–6 (N.D. Cal. Nov. 24, 2021) ("The parties' competing arguments highlight that the question of the proper accrual date for a Fourth Amendment claim for unlawful post-process detention as recognized in *Manuel* remains an open question. In *Manuel*, the Supreme Court expressly left open the question of what the proper accrual date should be for § 1983 challenging post-process pretrial detention under the Fourth Amendment. The Court examined the rationales and limitations to analogizing to the false arrest context (where the accrual date would be immediately after the arrest) and to the malicious prosecution context (where the accrual date would be upon favorable termination of the underlying proceedings). . . But, the Court declined to answer the question of when a Fourth Amendment post-process claim accrues, and instead, left 'consideration of this dispute to the Court of Appeals.'. . On remand, the Seventh Circuit rejected both analogies, and held that the accrual date for a Fourth Amendment challenge to post-process detention was the date that the plaintiff was released from

custody – in that case, pretrial custody. . . To date, the Seventh Circuit appears to be the only Court of Appeals to have addressed when a Fourth Amendment post-process claims accrues, and it does not appear that any federal district courts in California have opined on the issue. The Seventh Circuit's reasoning is persuasive. The Seventh Circuit reasoned that the *Wallace* rule setting the accrual date for Fourth Amendment claims at the moment that a person is arraigned was based on the premise that Fourth Amendment rights are extinguished once legal process begins—'but that line does not survive *Manuel* [*I]* which held that wrongful pretrial custody violates the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case.'. . Thus, the Seventh Circuit explained, '[w]hen a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends.' Similarly, the *Manuel II* Court rejected the analogy to malicious prosecution, because after the Supreme Court's decision in *Manuel I*, '[t]he problem is the wrongful custody' – '[t]here is no such thing as a constitutional right not to be prosecuted without probable cause.'. . 'But there *is* a constitutional right not to be held in custody without probable cause.'. . The Court continued, 'Because the wrong is the detention rather than the existence of criminal charges, the period of limitations also should depend on the dates of the detention.'. . This conclusion, the Seventh Circuit reasoned, flowed from the Supreme Court's analysis in *Manuel I,* which 'shows that the wrong of detention without probable cause continues for the length of the unjustified detention.'. . Finally, the Seventh Circuit explained that its rule is supported by the Supreme Court's principles, that 'a claim cannot accrue until the would-be plaintiff is entitled to sue, yet the existence of detention forbids a suit for damages contesting that detention's validity.'. . .Importantly, in *Manuel II,* after the Plaintiff was released from pretrial custody, he was not tried and was never convicted or incarcerated. Thus, the Seventh Circuit did not have to address the situation where as here Plaintiff alleges he was unlawfully subjected to pretrial detention under the Fourth Amendment and held through trial where he was maliciously prosecuted and wrongfully convicted in violation of due process. However, these factual difference as to the length of pretrial detention does not alter the fundamental analysis of the accrual date for Plaintiff's Fourth Amendment claim. Since Plaintiff's Fourth Amendment claim is not an assertion of the non-existent 'constitutional right not to be prosecuted without probable cause,' but rather seeks vindication of his 'constitutional right not to be held in custody without probable cause,'. . . the accrual date for his Fourth Amendment claim is the date at which he was no longer detained without probable cause. . . . Here, Plaintiff's detention without probable cause ended when he was convicted on December 9, 2010. . . Once Plaintiff was convicted, his *conviction* became the legal basis for Plaintiff's incarceration; the conviction superseded the prior probable cause determination. While Plaintiff is entitled to challenge – and does challenge – his subsequent incarceration based on his allegedly wrongful conviction, that challenge is based on Due Process, not a Fourth Amendment claim of detention without probable cause. . . In sum, the accrual date of Plaintiff's Fourth Amendment claim runs from December 9, 2010. . . . The problem for Plaintiff, however, is that although he asserts his § 1983 claim would necessarily impugn his criminal conviction and his claim would be barred by *Heck*, he never filed such an action, and, thus, no court ever held that *Heck* applied and tolled the statute of limitations for his claim. The Ninth Circuit has held that tolling under *Heck* is not automatic. In *Mills v. City of Covina*, 921 F.3d 1161, 1168 (9th Cir. 2019), the court held *Heck* did not toll the claims because

the plaintiff never obtained a judicial determination that *Heck* barred his claims. . . .*Mills* controls here. Plaintiff Valle's Fourth Amendment claim challenging his pretrial detention without probable cause accrued upon the date of his conviction, *i.e.,* the date on which he was no longer subject to *pretrial detention*. . . The statute of limitations for Plaintiff's Fourth Amendment Section 1983 claim began to run on the date of his conviction, December 9, 2010. Plaintiff Valle could have filed his Section 1983 claim within the statute of limitations, until December 9, 2012. If Plaintiff's Section 1983 claim impugned his conviction, the district court would have dismissed under *Heck*, and this would likely have tolled his claim until his conviction was reversed. . . If the district court determined that *Heck* did not apply, then Plaintiff could have proceeded to litigate his claim. . . Here, however, like in *Mills*, Plaintiff did not file a § 1983 action alleging violations of the Fourth Amendment until *after* the statute of limitations had run. No determination was ever made that *Heck* applied, and, thus, the claim was not tolled. . .Plaintiff does not distinguish *Mills* and his citations to *McDonough v. Smith*, 139 S. Ct. 2149 (2019) and *Roberts v. County of Riverside*, No. EDCV191877JGBSHKX, 2020 WL 3965027, at *6 (C.D. Cal. June 5, 2020) are inapplicable, as those cases do not analyze the accrual date of a *Fourth Amendment* claim under § 1983 nor the circumstances under which a *Fourth Amendment* claim is tolled. Rather, *McDonough* deals with a claim alleging fabricated evidence leading to conviction under the due process clause, . . . and *Roberts* assessed the accrual and tolling of state law claims[.] . . Plaintiff's Fourth Amendment claim is time-barred. Plaintiff's Count 2 is, thus, dismissed with prejudice.")

Pontillo v. County of Stanislaus, No. 116CV01834DADSKO, 2017 WL 6311663, at *3 (E.D. Cal. Dec. 11, 2017) ("Construing the allegations of plaintiff's SAC in keeping with that standard, the court concludes plaintiff has adequately alleged that defendant Jacobson presented false testimony and in doing so deprived plaintiff of his Fourth Amendment right to be free from detention without probable cause. *See Manuel v. City of Joliet*, ___ U.S. ___, ___, 137 S.Ct. 911, 917–20 (2017) (holding that pre-trial detention based on false evidence can be the basis of a Fourth Amendment violation). This is sufficient to state a cognizable claim for malicious prosecution.")

Garcia v. Cty. Of Riverside, No. EDCV13616JGBSPX, 2017 WL 3052981, at *4–5 & n.1 (C.D. Cal. July 17, 2017) ("[T]he Court reads *Manuel* to make clear that the Fourth Amendment *may* serve as the basis for a claim involving pretrial detention, not that it must or that it always does. Specifically—and the reason that this Court found it important to detail the facts in *Manuel* above—that case involved a situation where the *original arrest* was patently violative of the Fourth Amendment, involving as it did intentional fabrication of evidence (not to mention the potential use of excessive force). The continued detention then exacerbated the earlier deficiencies of the arrest when the government continued to prosecute the plaintiff despite affirmative evidence—i.e., the report concluding that the pills contained no controlled substances—that probable cause was lacking. The facts here are markedly different. As the Court explained in its 2013 order dismissing Plaintiff's Fourth Amendment claim, Plaintiff's original arrest did *not* violate the Fourth Amendment because the warrant was not constitutionally infirm. . . Rather—as the Ninth Circuit emphasized in its 2016 order—the constitutional violation here is predicated specifically on

Plaintiff's incarceration where the County failed after the fact to conduct a reasonable investigation of his identity despite circumstances that demanded it. To put it differently, Manuel's Fourth Amendment claim was predicated on the plaintiff's deficient arrest, which 'contaminated' his later detention; there is no equivalent Fourth Amendment violation upon arrest here that would serve as the necessary hook for such a claim. Moreover, as Defendants point out, there is another—related—distinction that would counsel a different outcome here: the fact that the arresting agency is different from the detaining agency, where only the latter is a defendant. . . This fact bolsters the point above: *even if* the original arrest had violated the Fourth Amendment, this would not make such claims appropriate against Defendants, *who were not responsible for his arrest*. Consequently, even assuming that Plaintiff's detention originated in an unreasonable seizure, the unlawful arrest would not 'contaminate' the subsequent detention in the way that it did in *Manuel*, where the same agency that arrested the plaintiff was also responsible for his detention. Accordingly, the Court agrees with Defendants' conclusion that *Manuel* 'leaves intact well-established Ninth Circuit and Supreme Court authority holding that claims for mistaken pretrial detention on a warrant are governed exclusively by the Fourteenth Amendment.'. . . Neither is this conclusion affected by the Ninth Circuit's recent opinion in *Brewster v. Beck*, No. 15-55479, 2017 WL 2662202 (9th Cir. June 21, 2017), as Plaintiff urges in his supplemental response. . . In that case, the court held that the thirty-day impound of the plaintiff's vehicle constituted a seizure requiring compliance with the Fourth Amendment. . . However, as this Court noted with regard to *Manuel*, this only reaffirms that government conduct *may* constitute a violation of a Fourth Amendment even past the initial seizure—not that it always will, nor that it did under the—markedly different—facts of this case.")

Jones v. Keitz, No. 116CV01725LJOEPG, 2017 WL 1375230, at *8 n.4 (E.D. Cal. Apr. 17, 2017) ("The Supreme Court recently held that legal process does not extinguish a plaintiff's Fourth Amendment rights in a suit brought under § 1983 where plaintiff was arrested pursuant to a warrant issued without probable cause and held pending trial. *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 919-20 (2017). In that case, the judge issued a warrant for plaintiff's arrest based solely on the false statements of law enforcement. . . The Court determined that plaintiff's claim that his subsequent pre-trial detention violated his Fourth Amendment rights could go forward in spite of the intervening legal process – the judge's determination of probable cause. In this case, the arrest followed the filing of a criminal complaint, . . . and was 'subsumed by a claim for malicious prosecution.'. . . As explained above, Plaintiffs failed to state a claim for malicious prosecution against the officers because they did not allege facts to rebut the presumption of prosecutorial independence. That analysis applies with equal force to Plaintiffs' false arrest claim, since the arrests took place after the prosecutor's decision to initiate criminal charges. . .Therefore, the Supreme Court's holding in *Manuel* is not implicated by the Court's analysis.")

Tenth Circuit

Bledsoe v. Carreno, 53 F.4th 589, 614 & n.22 (10th Cir. 2022) ("Bledsoe specifically alleged that Defendants unlawfully detained him pretrial in violation of the Fourth Amendment and deprived

him of substantive due process in violation of the Fourteenth Amendment by maliciously prosecuting him, all without probable cause.[22] **[fn. 22:** Appellants do not challenge the district court's holding that Count IV was pled in part as a Fourth Amendment violation and may proceed on that basis as well. Nor could they. The Supreme Court has recognized a 'malicious prosecution' claim under the Fourth Amendment challenging pretrial detention without probable cause. [citing *Manuel v. City of Joliet*]**]**To state a malicious prosecution claim, Bledsoe had to allege five elements: 1) Defendants caused Bledsoe's continued confinement or prosecution; 2) the original action terminated in Bledsoe's favor; 3) there was no probable cause to support Bledsoe's initial arrest, continued confinement, or prosecution; 4) Defendants acted with malice; and 5) Bledsoe sustained damages.")

Margheim v. Buljko, 855 F.3d 1077, 1084-89 (10th Cir. 2017) ("As the Supreme Court recently reconfirmed, the Fourth Amendment provides a basis under § 1983 for challenging pre-trial detention. *Manuel v. City of Joliet*, 137 S. Ct. 911, 914-15 (2017). *Manuel* did not address whether the tort of malicious prosecution, as opposed to some other common law cause of action, . . . provides an appropriate framework for these Fourth Amendment § 1983 claims. . . *Manuel*'s discussion of Fourth Amendment rights enforceable in a § 1983 action is nevertheless instructive. The Court held that § 1983 can support a Fourth Amendment claim concerning pre-trial detention even after the institution of 'legal process,' which in *Manuel* was a judge's probable cause determination at the first appearance of the defendant (who later became the § 1983 plaintiff). . . We have said 'the issuance of an arrest warrant' is 'a classic example of the institution of legal process.'. .Although the Supreme Court has not addressed whether a § 1983 malicious prosecution claim can be used to enforce Fourth Amendment rights, '[w]e have repeatedly recognized in this circuit that, at least prior to trial, the relevant constitutional underpinning for a claim of malicious prosecution under § 1983 must be the Fourth Amendment's right to be free from unreasonable seizures.' *Becker v. Kroll*, 494 F.3d 904, 914 (10th Cir. 2007) (quotations omitted); *accord Sanchez v. Hartley*, 810 F.3d 750, 755 (10th Cir. 2016) (citing cases). . . Under our case law, whether a malicious prosecution claim for pre-trial detention can be brought depends on the initiation of legal process. 'Unreasonable seizures imposed *without* legal process precipitate Fourth Amendment false imprisonment claims. Unreasonable seizures imposed *with* legal process precipitate Fourth Amendment malicious-prosecution claims.'. . As mentioned above, our precedent recognizes five elements for a Fourth Amendment malicious prosecution claim under § 1983:

(1) the defendant caused the plaintiff's continued confinement or prosecution;
(2) the original action terminated in favor of the plaintiff;
(3) no probable cause supported the original arrest, continued confinement, or prosecution;
(4) the defendant acted with malice; and
(5) the plaintiff sustained damages.

. . . In a case like this one where the arrest was based on a warrant, the third element concerns the probable cause determination at the time the warrant was issued and thus supplies the link to legal process. . . The plaintiff's challenge to the process (not merely the confinement) is the mark of a malicious prosecution claim. . . .[O]ur cases require us to look to the 'stated reasons for the

dismissal as well as to the circumstances surrounding it' to determine if 'the dismissal indicates the accused's innocence.'. . '[A] plaintiff generally cannot maintain a malicious prosecution action unless his charges were dismissed in a manner indicative of innocence, even when he was entitled to dismissal on statutory or constitutional grounds.'. . . Dismissal of the Drug Case was not a favorable termination for malicious prosecution purposes. To count as favorable, 'the termination must in some way indicate the innocence of the accused.'. . Mr. Margheim won a suppression motion to exclude the drug evidence. The prosecutor, lacking this evidence, dismissed the case. Dismissal based on the suppression of evidence 'on "technical" grounds having no or little relation to the evidence's trustworthiness' is not 'favorable' under our case law to support a malicious prosecution claim. . . Mr. Margheim won his suppression motion because the arrest warrant that led to the search was invalid. He has not presented any information questioning whether he actually possessed the drugs or whether the substances found were anything other than illegal narcotics. . . Under these circumstances, the dismissal of the Drug Case was not a favorable termination. . . . Mr. Margheim has thus failed to establish one of the five elements necessary for his malicious prosecution claim.")

Sanchez v. Hartley, No. 13-CV-1945-WJM-CBS, 2017 WL 4838738, at *19–20 (D. Colo. Oct. 26, 2017) ("Through 42 U.S.C. § 1983, an individual may sue government officers for pretrial detention without probable cause, in violation of the Fourth Amendment. *Manuel v. City of Joliet*, 137 S. Ct. 911, 917–20 (2017). The Tenth Circuit refers to this as 'malicious prosecution,' and states that its elements comprise at least the following: '(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages.'. .The Tenth Circuit also holds that 'the Fourth Amendment prohibits officers from knowingly or recklessly relying on false information to institute legal process when that process results in an unreasonable seizure.'. . . The Tenth Circuit has never clearly stated where this requirement fits into the established elements of malicious prosecution. . . This Court has generally treated knowing or reckless reliance on false information as a fact which, if proven, establishes the malice element.")

Eleventh Circuit

Sosa v. Martin County, Florida, 57 F.4th 1297, 1301-03 (11th Cir. 2023) (en banc), *cert.denied*, 144 S. Ct. 88 (2023) ("Like the *Baker* Court, we limit our inquiry to the material facts of the case before us. And as the *Baker* Court was 'quite certain that [Linnie's] detention of three days over a New Year's weekend does not and could not amount to such a deprivation,'. . . we are sure that Sosa's commensurate three-day detention did not violate the Fourteenth Amendment. We need not go any further. That *Baker* did not draw a bright line between lawful and unlawful detentions does not mean that it instituted a fact-intensive, totality-of-the-circumstances analysis for over-detention claims, as our dissenting colleague proposes. . . Of course, there are some factual differences between *Baker* and this case. For example, Linnie was detained over a holiday. . . and Linnie's detention began in 1972, when technology was less advanced and identification may have

taken longer[.]. . But the Court did not treat these facts as material. . . Nor did the Court rely on the unstated 'limiting principle' of reasonableness that our dissenting colleague has discerned from *Baker*. . . . *Baker* controls this case. Unlike the *Cannon* detainee, Sosa was arrested on a valid warrant and held for only three days. So, under *Baker*, Sosa's complaint did not state a claim for a violation of his due-process rights.")

Sosa v. Martin County, Florida, 57 F.4th 1297, 1304-09 (11th Cir. 2023) (en banc) (Newsom, J., joined by William Pryor, C.J., and Lagoa, J., concurring), *cert. denied*, 144 S. Ct. 88 (2023) ("What happened to Sosa was, in a word, awful. Without pre-judging the issue, I'd be willing to assume that the officers' conduct—jailing Sosa for three full days on a warrant issued for someone else, despite his repeated pleas of innocence and without bothering to do much of anything to verify his identity—might even have been tortious. The question before the Court today, though, is whether their conduct violated the United States Constitution—in particular, whether it infringed Sosa's so-called 'substantive due process' rights. The majority quite correctly concludes that it didn't. As its opinion straightforwardly explains, the Supreme Court's decision in *Baker v. McCollan*, . . . which rejected a due-process challenge to a materially identical 'overdetention,' is essentially on point, and our later decision in *Cannon v. Macon County*, . . . which recognized a substantive-due-process claim based on a detention more than twice as long as Sosa's, is eminently distinguishable. . . It really is as simple as that. I therefore concur in the Court's decision and join its opinion in full. I write separately to reiterate (once again) my grave reservations about the role that 'substantive due process' has come to play in constitutional decisionmaking. . . . Long story short: Substantive due process is a doctrine shot through with problems and chock full of risks. . . .I'd be game for ditching substantive due process altogether and exploring what I think to be more promising—and principled—vehicles for protecting individual rights against state interference. . . Short of that, though, what can be done to avert the harm that the doctrine threatens? The Supreme Court has emphasized one important means of cabining substantive due process—one that, as the dissent seems to recognize, has direct application here. . . Reviewing courts, it has said, should be particularly reluctant to indulge substantive-due-process arguments when an *actual* constitutional provision addresses the sort of injury that a complainant alleges. . . . That, it seems to me, is pretty much exactly where we find ourselves today. Sosa complains, in essence—and not without some justification—that he was arrested for a crime that he didn't commit and was then detained in jail for an unfairly long time. As it turns out, the Constitution addresses those types of complaints. The Fourth Amendment, of course, generally prohibits 'unreasonable ... seizures' and, more specifically, requires that warrants be issued only on a showing of 'probable cause.'. . And the Sixth Amendment guarantees every 'accused' the 'right to a speedy ... trial.'. . It's even possible that a complaint like Sosa's could, in extreme circumstances, implicate the Eighth Amendment, which prohibits 'excessive bail.'. .Now, to be sure, as matters currently stand, none of those express textual guarantees provides Sosa a ready remedy. As far as the Fourth Amendment is concerned, Sosa's arrest pursuant to a valid warrant would appear to end the inquiry. The Supreme Court has held that those arrested *without* a warrant must be given a probable-cause hearing before a neutral magistrate, usually within 48 hours, *see County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), but no similar temporal protection applies to those, like Sosa, who were initially arrested

pursuant to a magistrate-issued warrant. The Sixth Amendment would have prohibited Sosa's 'indefinite[ ]' detention, . . . but the Speedy Trial Clause wouldn't itself have imposed any hard outer limit,[.] . . And the Eighth Amendment, while perhaps in the general ballpark, likewise wouldn't have offered Sosa any relief. Although the Supreme Court seems to have been willing to assume that states 'are required by the United States Constitution to release an accused criminal defendant on bail' in appropriate circumstances, . . that right almost certainly wouldn't have attached unless and until Sosa was formally charged[.] . . But—and this is important—from the premise that the Fourth, Sixth, and Eighth Amendments don't provide Sosa any relief, it does *not* follow that 'substantive due process' must do so. To the contrary, the fact that the Constitution expressly addresses specific, discrete issues that arise in criminal investigations and prosecutions is a sufficient reason not to contort the open-textured Due Process Clause to force it to reach other adjacent (but unaddressed) matters. In explaining that substantive due process has no role to play when a party's claim is 'covered' by a specific constitutional provision, . . . the Supreme Court can't have meant that the doctrine takes a back seat *only* when that provision provides a sure-fire winner; that understanding would render the Court's prudent limitation on substantive-due-process decisionmaking wholly superfluous. Rather, as I've explained elsewhere, '[i]f (for whatever reason) the claim can't proceed in its natural textual and doctrinal "home," then, well, it can't proceed'—the claimant 'can't just repackage it in substantive-due-process garb and attempt to relitigate it.'. . So, to be clear, while substantive due process is bad on its best day, this case represents the doctrine at 'its abject worst.'. . We're not *just* being asked to twist the Due Process Clause's plain meaning to incorporate some specific substantive freedom enshrined in the Bill of Rights. And we're not even *just* being asked to plumb the depths of 'history,' 'tradition,' and 'ordered liberty' to identify and protect some favored unenumerated right. Here, rather, we're being asked to use substantive due process as a constitutional gap-filler—to hold, in essence, that because what happened to David Sosa was unfair, it *must* violate the Constitution. That, in short, is 'not how constitutional law works.'. . I'll end where I began: What happened to David Sosa was awful. But as I've said before, '[n]ot everything that s[tink]s violates the Constitution.'. . As soon as courts come to believe that the Constitution must—simply *must*—right every societal wrong and cure every societal ill, they put themselves at grave risk of making it up as they go along, penciling in their reasoning in reverse to justify their preferred outcomes. 'And if there is any fixed star in my own constitutional constellation, it's that unelected, unaccountable federal judges shouldn't make stuff up.'")

Sosa v. Martin County, Florida, 57 F.4th 1297, 1329-34 & n.18 (11th Cir. 2023) (en banc) (Rosenbaum, J., dissenting), *cert. denied*, 144 S. Ct. 88 (2023) ("As I've explained, our precedent long ago clearly established the substantive-due-process right to be free from continued detention when it was known or should have been known that the person was entitled to release. . . But if we were writing on a clean slate, I would conclude that this right finds its home in the Fourth Amendment.[18] **[fn. 18:** As I've noted, it makes no difference to the qualified-immunity analysis where the right lives, as long as the right was clearly established before the deputies' actions (or inactions, in this case). . . The Second and Third Circuits—I believe correctly—root the right in the Fourth Amendment. . . The right more appropriately belongs under the Fourth Amendment

because, as I explain above, it falls naturally within the Fourth Amendment's prohibition against 'unreasonable ... seizures[.]'. . And '[w]here a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."'. . Though, in my view, the Fourth Amendment more appropriately encompasses the right, to be clear, I do not vote to abrogate *Cannon*. That is so because, as I've noted, the specific constitutional source of the right does not affect whether the right is clearly established, and abrogating *Cannon* without recognizing that the right falls under the Fourth Amendment (as the Newsom Concurrence suggests) would wrongly purport to erase the right altogether.**]** . . . .[I]f the Fourth Amendment's reasonableness standard means anything, it cannot tolerate confining an innocent person to a jail cell for three nights and three days (based solely on the fact that he shares common characteristics without thousands of other men), when a ten-second fingerprint comparison could definitively reveal that the arrestee is not the wanted person. By any measure, that is outrageously unreasonable. And it is hard to see how legal process in the form of a valid warrant for some David Sosa—when thousands exist and Sosa matched only the wanted Sosa's name, sex, and race—could satisfy the Fourth Amendment for purposes of continuing to detain Sosa for days after the jail deputies reasonably could have confirmed that Sosa was not the wanted Sosa. . . .Blindly allowing arrestees to be detained for days even though new technology allows a jail deputy to reasonably confirm in less than a minute that the detainee is not the wanted person violates the Fourth Amendment's guarantee of security 'against unreasonable ... seizures.'. . . Ultimately, the Fourth Amendment promises protection 'against unreasonable ... seizures.'. . And by any real-world standard, confining an innocent person to jail for days based on no more than that he shares the same name, sex, and race with thousands of others is an 'unreasonable ... seizure[ ],'. . . when a ten-second fingerprint comparison could definitively show he is entitled to release. So I would join the Second and Third Circuits in concluding that the right to be free from continued detention once it was or should have been known that the detainee was entitled to release dwells within the Fourth Amendment's shelter against 'unreasonable ... seizures.' *See Russo*, 479 F.3d at 209; *Schneyder*, 653 F.3d at 319–22, 330. . .*Cannon* and its progeny make this a very easy case: they require us to conclude that Sanchez and the other jail deputies violated Sosa's clearly established substantive-due-process right to be free from continued detention when they knew or should have known that he was entitled to release. But even in the absence of our binding precedent, the Fourth Amendment cannot tolerate detention for days when jail deputies have the means available to definitively and easily determine that the person in custody is not the wanted person. Any other conclusion reads the Fourth Amendment's prohibition on 'unreasonable' seizures out of the Constitution. I respectfully dissent.")

Washington v. Durand, 25 F.4th 891, 898-908 (11th Cir. 2022) ("We have never addressed the 'contours and prerequisites[]'. . . of a Fourth Amendment claim in this precise circumstance—where a seizure based on a warrant was supported by probable cause but was later undermined by contrary exculpatory evidence. . . For a seizure through process, we have explained that a 'plaintiff must prove (1) that the defendant violated his Fourth Amendment right to be free from seizures pursuant to legal process and (2) that the criminal proceedings against him terminated in his

favor.'. . In defining the 'contours and prerequisites' of these Fourth Amendment claims under section 1983, we are 'guide[d]' by well-settled '[c]ommon-law principles' that governed actions for malicious prosecution when Congress enacted section 1983 in 1871. . . Washington cannot prove that Howard violated her Fourth Amendment right for three reasons. First, probable cause persisted throughout her detention. Second, Howard was entitled to rely on the facially valid and lawfully obtained warrant. And third, Howard did not affirmatively act to continue the prosecution against her. . . . Probable cause renders a seizure pursuant to legal process reasonable under the Fourth Amendment. . . Consequently, 'the presence of probable cause defeats' a claim that an individual was seized pursuant to legal process in violation of the Fourth Amendment. . . So, to prove a Fourth Amendment violation, Washington must prove that there was no probable cause for her continuing detention. . . . We have not always consistently articulated the probable-cause standard in the context of arrests. In 2018, the Supreme Court explained that probable cause exists when the facts, considering the totality of the circumstances and viewed from the perspective of a reasonable officer, establish 'a probability or substantial chance of criminal activity.'. . . We conclude that the correct legal standard to evaluate whether an officer had probable cause to seize a suspect is to 'ask whether a reasonable officer could conclude ... that there was a substantial chance of criminal activity.'. . Here, Washington argues that probable cause dissipated after her encounter with Heard because his later in-person statement negated his earlier photograph identification. She seems to assert that Heard's in-person retraction was, if anything, more reliable than his photograph identification, so the information Howard had gained from Heard up to that point was at most neutral. And analyzing the tip alone, she argues that it was not specific enough to support even arguable probable cause. Although Heard's statement—if true—was exculpatory, Howard was not required to believe it or to weigh the evidence in such a way as to conclude that probable cause did not exist. . . .[E]ven crediting Washington's account that Heard said, '[T]hat's not her,' during their encounter, probable cause supported her continued detainment. . . . On the strength of a tip from a reliable confidential informant and an identification by a co-conspirator who appeared to be fully cooperating with the police before his later in-person contradiction, which there were many reasons to not take at face value, a reasonable officer 'could [have] conclude[d] ... that there was a substantial chance' Washington was involved. . . Because probable cause supported Washington's detention even after Heard's statement, her continued detention was reasonable under the Fourth Amendment. . . . In *Manuel v. City of Joliet*, the Supreme Court held that, 'if the [probable-cause] proceeding is tainted ... by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the' Fourth Amendment. . . . An officer who intentionally or recklessly makes material misstatements or omissions to or fabricates evidence and puts it before a 'neutral and detached magistrate,'. . . violates the Fourth Amendment because '[l]egal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement.'. . An officer might also violate the Fourth Amendment if he "should have known that his application failed to establish probable cause" and nevertheless obtained the warrant. . .In contrast with the invalid probable-cause determination in *Manuel*, a valid and lawfully obtained warrant shields an officer from liability because the officer's reliance on the magistrate's probable-cause determination renders the officer's actions reasonable. . . . To be sure, a police officer cannot lie or omit material evidence in later testimony

to continue detention, such as at an arraignment, indictment, or bond hearing. . . But the discovery of exculpatory evidence after a determination of probable cause does not undermine the validity of a detention based on a judicial order. . .Washington cannot prove that Howard violated her Fourth Amendment right because she cannot prove that the warrant was facially invalid or unlawfully obtained. Washington does not dispute that Howard detained her pursuant to an arrest warrant, and Howard does not dispute that he participated in procuring the warrant by discussing the investigation with Durand who then obtained the warrant. And Washington cannot prove—nor does she argue—that the warrant was facially invalid because it was materially irregular, was issued by a court without jurisdiction, or did not purport to authorize her detention. With respect to obtaining the warrant, Washington's counsel conceded at oral argument that neither Howard nor Durand lied to the magistrate. Washington also makes no argument that there were material omissions or that it was unreasonable for Howard to believe that there was probable cause at the time Durand applied for the warrant. And it is of no moment that she was later exonerated. . . The well-settled common-law principles that governed the tort of malicious prosecution in 1871 when Congress enacted section 1983 and that 'guide' us further support our conclusion. . . At common law, for the tort of malicious prosecution, an officer who detained an individual pursuant to a warrant—with a few exceptions—had a complete defense to liability for the arrest and detention. . . So, unless an accused could prove that one of the exceptions applied, the warrant that caused his detention served as 'a complete bar to the action.'. . .Here, because Howard both procured the warrant and detained Washington pursuant to it, he was justified in detaining her based on that warrant unless it was facially invalid or procured unlawfully. It was neither. Because Howard was entitled to rely on the warrant, Washington cannot prove that Howard 'violated her Fourth Amendment right to be free from seizures pursuant to legal process.'. . . Washington alleges that Howard violated her Fourth Amendment right because he continued to detain her pursuant to a warrant and to investigate the crime after probable cause had dissipated. She contends that Howard should have returned to the magistrate with the new information and requested that the warrant be rescinded. We disagree. The Fourth Amendment imposes no affirmative duty on an investigator to return to the magistrate after every twist and turn of the investigation. . . Instead, the officer is allowed to defer to the prosecutor, who has the power to determine whether to proceed with the prosecution and whether to seek continued pretrial detention based on the evidence collected. At least two of our sister circuits have rejected arguments similar to Washington's. . . To be sure, a police officer cannot intentionally or recklessly make material misstatements or omissions in later testimony to continue detention, such as at an arraignment, indictment, or bond hearing. . . And an officer's failure to disclose exculpatory evidence to the prosecutor might violate the Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). . . But neither of these constitutional requirements impose on investigators a duty to return to the magistrate after discovering exculpatory evidence. Because well-settled principles that governed the common-law tort of malicious prosecution when Congress enacted section 1983 in 1871 'guide' us, *Manuel*, 137 S. Ct. at 921, we add that our conclusion—that the Fourth Amendment requires an affirmative act to continue the prosecution—is supported by a similar requirement at common law. At common law, courts focused primarily on the initiation of a prosecution as the act giving rise to liability for malicious prosecution. A

plaintiff had to prove that the information available and known to the 'prosecutor' at the institution of the proceeding did not provide probable cause. . . Conversely, if the prosecutor had probable cause to initiate the prosecution based on the information then known to him, and information exculpating the accused later came to the prosecutor's attention, the accused could not sustain an action for malicious prosecution based on the initiation of the action. . . To be sure, if, after discovering exculpatory information, the prosecutor continued to prosecute the action, the defendant could, in some circumstances, maintain an action for malicious prosecution.")

Williams v. Aguirre, 965 F.3d 1147, 1159-68 (11th Cir. 2020) ("Whether the any-crime rule extends to malicious prosecution is unsettled. Our sister circuits have split on the question. [collecting cases] And although we have assumed that the any-crime rule applies to malicious prosecution, we did so only under the erroneous premise that a seizure without legal process, which implicates the rule, could sustain a claim of malicious prosecution. . . As we recently explained, the relationship between the any-crime rule and malicious prosecution is 'unresolved in our case law pertaining to § 1983 malicious prosecution claims.'. . The Supreme Court has articulated a two-step approach to 'defining the contours and prerequisites of a § 1983 claim.' *Manuel*, 137 S. Ct. at 920. We first examine the common-law principles that governed the most analogous tort to the constitutional violation at issue. . . Although we have at times looked to modern tort law when adjudicating claims of malicious prosecution under section 1983, . . . the Supreme Court has clarified that the relevant common-law principles are those that were 'well settled at the time of [section 1983's] enactment[.]'. . After identifying the historical common-law rule most analogous to the alleged constitutional violation, we must consider whether that rule is compatible with the constitutional provision at issue. . . Because malicious prosecution is the common-law analogue to the constitutional violation that Williams alleges, . . . we first examine the probable-cause element of malicious prosecution as it existed when Congress enacted section 1983. We then consider, in the light of the Fourth Amendment, whether we should apply that principle to claims of malicious prosecution under section 1983. . . . Regardless of its applicability to warrantless arrests, the any-crime rule does not apply to claims of malicious prosecution under the Fourth Amendment. Centuries of common-law doctrine urge a charge-specific approach, and bedrock Fourth Amendment principles support applying that approach in the context of the charges that justified a defendant's seizure. We reject the officers' argument to the contrary. . . . [W]arrantless arrests concern whether the facts known to the arresting officer establish probable cause, while seizures pursuant to legal process concern whether the judicial officer who approved the seizure had sufficient information to find probable cause. Notwithstanding the distinction between seizures with and without legal process, our malicious-prosecution caselaw is not always consistent about what information is relevant when determining whether probable cause exists for a seizure pursuant to legal process—even before considering whether probable cause would exist without any allegedly false information. [court discusses different lines of precedent] In sum, we can reconcile our precedents by clarifying a plaintiff's burden to prove 'a violation of her Fourth Amendment right to be free of unreasonable seizures.'. . To meet this burden, a plaintiff must establish (1) that the legal process justifying his seizure was constitutionally infirm and (2) that his seizure would not otherwise be justified without legal process. We turn next to the application of

that reconciled rule. . . . We agree with Williams that the record presents a genuine dispute about whether the misstatement in the warrant application was 'made either intentionally or in reckless disregard for the truth.'. . Although the question whether Williams pointed a gun at the officers is distinct from whether the officers lied, the two are closely linked in this appeal. The officers detail a multi-step progression of events between when Williams allegedly drew his gun and when Aguirre shot Williams—under one account, for example, Williams first pointed the gun at each officer, then went on his knees in response to Aguirre's commands, and then pointed his gun again at Aguirre. But almost none of these events could have occurred if Williams is correct that he never drew his gun or pointed it at the officers. And the chances are low that both officers were subjectively mistaken about every event in this series. In other words, the record supports an inference that *someone* is lying. And if the jury credits Williams's testimony that he did not draw his gun, then it could also infer that the officers' accusations were intentionally false. That the officers failed to maintain a consistent narrative reinforces this conclusion. On the day of the shooting, the officers stated that Williams pointed a gun at each of them once before Aguirre shot him—specifically, that Williams first pointed a pistol at Haluska and then at Aguirre, which led Aguirre to shoot Williams. These statements, which reported that Williams 'backed up and pointed a pistol' and later 'went down' or 'fell to the ground' after Aguirre shot him, also could be read to suggest that Williams was standing when shot. The officers' narrative shifted after they saw the video, which revealed that Williams was on his hands and knees when Aguirre shot him. Haluska then stated that Williams pointed the gun at each officer when on his knees or that Williams pointed his gun at each officer when standing and then pointed his gun at Aguirre a second time when he was on his knees. Aguirre stated that he shot Williams after Williams 'sat the bag down' and 'came up with' a pistol that he pointed at both officers, which suggests that Williams was standing. And yet, Aguirre also insisted that Williams was on the ground when the shooting occurred. A reasonable jury could infer from these inconsistencies that the officers' statements were intentionally false. The jury could find that the initial statements differed from the video in ways that suggest more than a reasonable mistake, such as whether Williams was standing when Aguirre shot him. It also might find that the officers' shifting narratives reflected an attempt to reconcile their statements with the video footage. In short, a reasonable jury could find that the officers lied when they accused Williams of pointing a gun at both of them. . . We also agree that the misstatement in the affidavit was necessary to establish probable cause. Indeed, probable cause evaporates 'after deleting the misstatement[ ],'. . . because it was the only fact in the affidavit supporting probable cause for attempted murder. Of course, an affidavit does not support probable cause if it lacks any facts that suggest a crime occurred. . . Williams's pretrial detention also could not be justified as a warrantless arrest. Although the officers argue at length that they had at least arguable probable cause to arrest Williams for attempted murder, we need not resolve whether they are correct. Even if the officers had probable cause to arrest Williams for attempted murder, Williams's seizure was far too long to be justified without legal process. . . And because a genuine dispute of material fact exists about whether the warrant was invalid as to at least one charge in the arrest warrant, we hold that Williams has met his burden to establish a genuine dispute of fact about whether he was seized in violation of the Fourth Amendment. . . . We acknowledge that a grand-jury indictment also justified part of Williams's detention, and we have not resolved whether

an indictment will sever liability for an officer who lied to obtain an arrest warrant. Indeed, dicta in our precedent suggests different conclusions. . . Although grand-jury witnesses are absolutely immune from liability based on their testimony, . . . the Supreme Court has suggested that a plaintiff could maintain a claim under the Fourth Amendment for a seizure that followed an indictment, *see Manuel*, 137 S. Ct. at 920 n.8. Likewise, other circuits allow claims for seizures that follow a grand-jury indictment if the officer's nontestimonial actions tainted the indictment. *See, e.g.*, *King v. Harwood*, 852 F.3d 568, 584 (6th Cir. 2017); *Coggins v. Buonora*, 776 F.3d 108, 113 (2d Cir. 2015). That said, we need not resolve the effect of the indictment in this appeal. Because Williams, like the plaintiff in *Jones*, was seized pursuant to the purportedly invalid warrant *before* the district attorney obtained the indictment, the arrest warrant was the sole justification for his initial seizure pursuant to legal process. So the effect of the indictment is a question of damages, which are not determinative of qualified immunity.")

[Note: the following cases pre-date the Supreme Court's decision in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017), *abrogating Newsome v. McCabe and Llovet v. City of Chicago*]

Cordova v. City of Albuquerque, 816 F.3d 645, 661-66 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) ("The plaintiff seeks damages first and foremost because, he says, local law enforcement officials violated his Fourth or maybe his Fourteenth Amendment rights (we're never told which) by committing the common law tort of malicious prosecution. The defendants accept the premise that the Constitution somewhere (they too never say where) contains something resembling a malicious prosecution tort. Both sides even agree that proof of a 'favorable termination' is an essential element of their constitutionalized tort and they disagree only over how favorable that termination must be. The plaintiff argues that a procedural victory should suffice while the defendants contend that any termination must speak more clearly to the plaintiff's innocence. Respectfully, I would decline the parties' invitation to their fight. We are not in the business of expounding a common law of torts. Ours is the job of interpreting the Constitution. And that document isn't some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law, but a carefully drafted text judges are charged with applying according to its original public meaning. If a party wishes to claim a constitutional right, it is incumbent on him to tell us where it lies, not to assume or stipulate with the other side that it must be in there *someplace.* To be sure, the parties are not the only ones to blame here. The question of malicious prosecution and its place (or not) in the Constitution is 'one on which there is an embarrassing diversity of judicial opinion.'. . One on which this 'circuit has not always written consistently.'. . And one the Supreme Court has only recently agreed to revisit. *Manuel v. City of Joliet*, 590 F. App'x 641 (7th Cir.2015), *cert. granted*, No. 14–9496, 2016 WL 205942 (U.S. Jan. 15, 2016). So the fact the parties tiptoe gingerly around the subject is hardly surprising. Indeed, I respectfully suggest that any effort to enter the arena and consider the question carefully is likely to leave you looking for the exits. Consider the alternatives most frequently offered as contenders, the Fourth and Fourteenth Amendments. In *Albright*, the opinions were various and varied but at least seven justices of the Supreme Court seemed to agree that the 'substantive' component of the Fourteenth Amendment's due process clause contains nothing like this tort. . . Of course, this much might

leave you wondering if the 'procedural' component of the due process guarantee remains a potential candidate after *Albright.* But it's long since settled that even when a state deprives a person of life, liberty, or property, it does not violate an individual's procedural due process rights so long as it provides an adequate remedy for the deprivation. . . And there's no question in our case that state tort law provides adequate remedies to resolve the plaintiff's complaint. Indeed, we know that New Mexico enjoys a rich common law, one that provides a well-defined tort against the 'malicious abuse of process.' We even know that under the terms of New Mexico tort law it's settled that a plaintiff doesn't need to prove any kind of favorable termination at all. . . Given all this, there's just no reason to think a plaintiff might possibly be 'due' any more process than the State of New Mexico already provides. . . That leaves the Fourth Amendment. Here the story is longer but there's strong reason to suspect it ends the same way. The plurality in *Albright* expressly left open the possibility that the Fourth Amendment might provide a home for something like a tort of malicious prosecution. . . But the Amendment as originally understood focused on restraining police action before the invocation of judicial processes. . . And textually the relevant language of the Amendment speaks to 'unreasonable searches and seizures.' Meanwhile, the tort of malicious prosecution has traditionally concerned itself not with police practices—with searches or restraints on physical liberty before the invocation of judicial proceedings—but with the misuse of judicial proceedings. Indeed, many plaintiffs claiming malicious prosecution (including the plaintiff here) seek damages for a defendant's wrongful use of legal processes even many years after any search or seizure and while the plaintiff remains at liberty awaiting trial. So it's just pretty hard to see how you might squeeze anything that looks quite like the common law tort of malicious prosecution into the Fourth Amendment. . . The only apparent way around this problem appears to invite more problems of its own. While the tort of malicious prosecution focuses on the misuse of judicial proceedings, some have suggested the Fourth Amendment might too because a criminal defendant remains 'seized' for Fourth Amendment purposes not just during the pendency of his arrest but throughout the life of a criminal prosecution—even while he is at liberty on bond awaiting trial. *See, e.g., Albright,* 510 U.S. at 277–79 (Ginsburg, J., concurring). But in light of the Amendment's history and text, we've long conceived of seizures as intentional and effectual restraints on liberty that suffice to lead 'a reasonable person ... to conclude that he is not free to "leave."'. . If we were to amend this understanding at this late date, so that someone free to leave on bond remains 'seized' all the same, what about the defendant awaiting trial on his own recognizance? Or someone served only with a petty citation or summons to appear at trial? And what about the victim of maliciously employed civil process? Or the witness served with a subpoena compelling his appearance? No less than the bonded defendant, all these persons are subject to a seizure if they fail to appear at trial. Yet we've never considered any of them 'seized' simply by virtue of a *conditional* threat of a seizure. To do so now would seem (again) to require us to cast a blind eye to the historical (police action) concerns of the Fourth Amendment and the ordinary meaning of its terms. . . Indeed, for reasons like these, several courts of appeals (this one included) have already rejected the continuing seizure theory. . . And I would have thought that enough to resolve this case. For even if we overlook the parties' failure to identify a constitutional home for their putative cause of action, our own precedent would appear to preclude either of the obvious (Fourth or Fourteenth Amendment) alternatives they might pursue. You would have to

wonder, too, if bending the history and language of the Fourth Amendment in new and procrustean ways to embrace a malicious prosecution tort might invite some unintended consequences. What would a Fourth Amendment right look like when expanded to parties and witnesses at liberty awaiting trial? Might every trial subpoena contest now assume constitutional dimension—and if not, why not? Might expanding the Amendment's reach at least marginally disincentivize the use of liberty-protecting, pre-trial citation processes previously thought sufficient to avoid the Amendment's application? . . . And how might this new understanding of the Fourth Amendment be squared with existing Supreme Court jurisprudence, which has traditionally treated the post-arraignment, pre-trial detention process as the province of the Fifth and Fourteenth—and not the Fourth—Amendment? . . Neither is that the end to the nettles lining the Fourth Amendment path. Anyone wanting to claim a place in the Fourth Amendment for something like a malicious prosecution tort would, of course, have to decide its elements. And that task would surely invite disagreement among the circuits and tension with state law. Indeed, it's far from obvious that a Fourth Amendment-based cause of action would wind up looking anything like a common law claim for malicious prosecution, for the tort traditionally has required proof of malice (while the Fourth Amendment has historically been thought to involve objective 'reasonableness' tests) and the institution of legal proceedings (something the Amendment has never demanded before a violation is found). . . These are, as well, hardly the only themes on which we might expect variations and disputes. Our case offers one more example among what are sure to be many. The defendants contend for a rule requiring the plaintiff to prove not just that a prior criminal action against him was terminated in his favor, but that it was terminated in a way suggesting his innocence on the merits. The court today adopts that standard and claims to do so as a matter of constitutional imperative. But no one has directed us to any other circuit to have gone so far as a matter of constitutional law. Meanwhile, many states do not require so much as a matter of common law, holding that terminations won on procedural grounds, like the speedy trial dismissal in this case, suffice. . . Still other states have concluded that speedy trial dismissals may be procedural but *do* reflect the merits—and reflect them in the plaintiff's favor. . . In fact and as we've seen, the very state in which the actions at issue in this case took place (New Mexico) requires no proof of favorable termination at all. And if (as might be hoped) we take seriously the idea that we are expounding the Fourth Amendment's original public meaning, anyone claiming a malicious prosecution tort can be found in the Amendment might at least want to cast a curious eye to the elements of the cause of action as they existed at the time the Amendment was adopted—yet it's something no one has attempted here and something that would not (at least at a glance unaided by any briefing) seem to support the court's decision today. . . If all these brambles lining the Fourth Amendment path don't leave you doubting the wisdom of venturing that way, perhaps they at least leave you wondering about the necessity of the attempt. After all, out of respect for considerations of judicial modesty, efficiency, federalism, and comity, the Supreme Court in procedural due process cases generally encourages federal courts to abstain in favor of state common law remedial processes rather than try to recreate them in the name of the Constitution. And it's pretty hard to see why we should ignore those same considerations and that same option simply because someone might claim something like the malicious prosecution tort might find a home in the Fourth rather than the Fourteenth Amendment. Carefully devised, tested, and often

pretty ancient state tort law is readily available to address the plaintiff's claimed injury in this case. Neither can it come as a surprise that existing state common law courts will usually supply a sound and sufficient remedy when claims (possibly) of constitutional dimension are at stake: the whole point of the common law as it evolved in England and this country through the centuries was to vindicate the rights thought fundamental to the enjoyment of life, liberty, and property. Before barreling down the constitutional road, why not at least pause to consider the possibility of abstaining in favor of common law proceedings? Asking first: is there really a need to decide any matter of constitutional gravity or might the common law already supply whatever remedy the parties seek to project onto the Constitution? To be sure, *Parratt* abstention doctrine is often said to have originated in the procedural due process setting (though there's good reason to question that account, *see Browder v. City of Albuquerque*, 787 F .3d 1076, 1085 (10th Cir.2015) (Gorsuch, J., concurring)). But even accepting the premise I cannot think of a good reason why the doctrine should be limited to that or any particular class of cases—why abstention should turn on the question which amendment the plaintiff might happen to invoke (or hope we might invoke) as the source of his right rather than on the question whether state law is adequate to vindicate the injury he alleges—as it indisputably is here. . . The objections to abstention are familiar but unpersuasive. Some have argued that § 1983 authorizes federal courts to remedy constitutional injuries so federal courts must decide any claim brought under its auspices. . . Some have also seemed to suggest that state courts cannot be trusted to apply their own common law fairly to their own citizens in suits against state officials. . . But, respectfully, it's long since settled that the statutory power to proceed does not always entail the duty to do so, for federal courts not infrequently abstain when they have the power to decide. . . And even if there may be some circumstances when federal courts have to act because state courts are unable or unwilling to intervene, no one suggests anything like that in this case or in the mine run of cases like it. To the contrary, every indication in this case is that the plaintiff would have fared much better under state tort law than he does under our constitutionalized facsimile of state tort law—and it is surely at least a little ironic that in the name of protecting individual rights we not infrequently wind up in cases like this one effectively diminishing them. . .In the end, all the difficulties and doubts associated with finding a home for a tort of malicious prosecution in the Constitution confirm for me the obvious: that 'some questions of ... tort law are best resolved by' tort law. . . When the parties cannot be bothered to identify the source of their supposedly constitutional complaint, when the avenues to a constitutional home are lined with doubt, and when there's a perfectly free and clear common law route available to remedy any wrong alleged in this case, I just do not see the case for entering a fight over an element of a putative constitutional cause of action that may not exist and no one before us needs. Often judges judge best when they judge least—and, respectfully, I believe this is such a case.")

See also ***King v. Harwood***, 852 F.3d 568, 580 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 640 (2018) ("We recognized in *Sykes* that 'malicious prosecution' was a misnomer: unlike the common-law tort of malicious prosecution, which has malice as an element, we noted that the constitutional tort of malicious prosecution that is actionable in our circuit as a Fourth Amendment violation under § 1983 does not require a showing of malice at all, and might more aptly be called 'unreasonable prosecutorial seizure.'. . Nevertheless, we continued to call the constitutional tort

'malicious prosecution,' concluding that we were 'stuck with that label' in part because of its use by the Supreme Court and other circuits."); ***Avery v. City of Milwaukee,*** 847 F.3d 433, 438-39 (7th Cir. 2017) ("We begin with Avery's challenge to the Rule 59(e) ruling. In their motion the detectives argued that the claims on which the jury found them liable were actually impermissible coerced-confession claims, not genuine evidence-fabrication claims. The judge rejected this argument, concluding instead that a due-process claim 'sounds' in malicious prosecution and therefore Avery's claims were 'knocked out' as a matter of law because Wisconsin law provides a remedy for that tort. He also held that the detectives' testimony at trial—and *not* their act of fabricating evidence—caused Avery's injury and that witnesses at a criminal trial are absolutely immune from suit for damages flowing from their testimony. . . .It's clear that Avery's due-process claims are factually grounded in acts of evidence fabrication by the detectives—evidence that was later used to convict and imprison him. 'We have consistently held that a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of [his] liberty in some way.'. . On the other hand, a claim that an officer coerced a witness to give incriminating evidence does not, at least standing alone, violate the wrongly convicted person's due-process rights. . . . Falsified evidence will *never* help a jury perform its essential truth-seeking function. That is why convictions premised on deliberately falsified evidence will always violate the defendant's right to due process. What's relevant is not the label on the claim, but whether the officers 'created evidence that *they knew to be false*.'. . The jury found that Detectives Phillips and Hernandez knew their reports of Avery's confession were false when they wrote them; those reports—and the fake confession—were used at trial to convict him. The detectives can't escape liability for this due-process violation by shifting the focus to the background facts about the tactics they used to interrogate him. This brings us to the two grounds on which the judge actually rested his Rule 59(e) decision. First, and primarily, the judge held that an evidence-fabrication claim 'sounds' in malicious prosecution and therefore Avery's due-process claims were 'knocked out' by Wisconsin's common-law remedy for that tort. This reasoning traces to *Newsome v. McCabe,* 256 F.3d 747 (7th Cir. 2001), which in turn relied on Justice Kennedy's concurring opinion in *Albright v. Oliver,* 510 U.S. 266 (1994). . . . *Newsome* read Justice Kennedy's opinion as the narrowest ground of decision in *Albright*. . . Applying the *Parratt* principle, *Newsome* construed *Albright* as rejecting a constitutional claim of malicious prosecution where state law provides a meaningful remedy for that tort. . . But *Albright* must be understood in the context of its facts. As we explained at length in *Armstrong, Albright* has nothing at all to say about a deprivation of the due-process right to a fair trial. . . That is, *Albright* did not involve a plaintiff who claimed he was wrongfully *convicted* of a crime in a trial tainted by falsified evidence, known perjury, or the deliberate destruction of exculpatory evidence. . . That kind of claim is 'grounded in the due process guarantee of fundamental fairness in criminal prosecutions' and has long been recognized. . . The *Parratt* doctrine, we explained in *Armstrong*, doesn't apply in this context. . . The availability of a state-law remedy for malicious prosecution doesn't defeat a federal due-process claim against an officer who fabricates evidence that is later used to obtain a wrongful conviction. . .So it was a mistake for the judge to set aside the verdict on this ground. That Wisconsin provides a remedy for malicious prosecution is irrelevant to the viability of Avery's § 1983 claims for deprivation of his right to a fair trial. The jury found that Detectives

Phillips and Hernandez manufactured the confession that featured prominently in his trial and contributed to his wrongful conviction for Griffin's murder."); ***Cairel v. Alderden***, 821 F.3d 823, 831, 833 (7th Cir. 2016) ("Even assuming for the purposes of summary judgment that defendants fabricated evidence, plaintiffs still could not prevail on this claim. For such a claim, the plaintiff must have suffered a deprivation of liberty. See *Saunders–El v. Rohde,* 778 F.3d 556, 561 (7th Cir.2015); see also *Alexander v. McKinney,* 692 F.3d 553, 557 (7th Cir.2012). The need to appear in court and attend trial does not constitute such a deprivation. . .We held in *Saunders–El* that a plaintiff who had been released on bond following his arrest and who was later acquitted at trial could not maintain a due process claim for fabrication of evidence. . . Plaintiffs' evidence-fabrication claims are foreclosed by our holding in *Saunders–El.* Plaintiffs were quickly released on bond following their arrests. Of course, they were never actually tried, but this, if anything, reduces any burden plaintiffs may have faced. . . . We assume that civil *Brady* claims will be viable most often when a defendant has been wrongfully convicted and imprisoned as a result of the *Brady* violation. See, e.g., *Bianchi v. McQueen,* No. 14–1635, ––F.3d ——, 2016 WL 1213270, at *8 (7th Cir. March 29, 2016). As we explained in *Armstrong,* however, the key to a civil *Brady* claim is not a conviction or acquittal but a deprivation of liberty. . . Under other circumstances, such as where an accused is held in pretrial custody before acquittal or dismissal, a failure to disclose exculpatory evidence may cause the type of deprivation of liberty required for a *Brady* claim even if the case ends without a trial or conviction."); ***Bianchi v. McQueen***, 818 F.3d 309, 319-20, 323 & n.6 (7th Cir. 2016) ("Bianchi and his colleagues suffered no deprivation of liberty; they were acquitted at trial. That brings this case squarely within the holding of *Saunders–El v. Rohde,* 778 F.3d 556 (7th Cir.2015). . . .*Saunders–El* and *Alexander* foreclose the evidence-fabrication claim alleged in this case. Because the plaintiffs suffered no liberty deprivation, they suffered no due-process violation. When pressed on this point at oral argument, the plaintiffs' attorney conceded the controlling force of *Saunders–El* and grudgingly accepted the impossibility of prevailing on this claim. So even if acts of evidence fabrication could be proved, qualified immunity applies. . . .The Sixth, Tenth, and Eleventh Circuits have definitively held that an acquittal extinguishes a *Brady* claim. . . So even assuming the truth of the allegations about evidence suppression, no *Brady* violation occurred because the plaintiffs suffered no prejudice. Qualified immunity bars this claim too. (Indeed, absolute immunity bars the *Brady* claim against McQueen.) . . . .Importantly, the Court in *Wallace* specifically declined to address whether a malicious-prosecution claim is *ever* cognizable as a Fourth Amendment violation remediable under § 1983. . . The plaintiff in *Wallace* had expressly abandoned that issue, which was left unresolved in the Court's split decision in *Albright v. Oliver* . . . .Although some circuits have recognized such a claim, *see Hernandez–Cuevas v. Taylor,* 723 F.3d 91, 99 (1st Cir.2013) (collecting cases), this circuit has not, *see, e.g., Welton v. Anderson,* 770 F.3d 670, 673–75 (7th Cir.2014); *Bielanski,* 550 F.3d at 638; *Newsome v. McCabe,* 256 F.3d 747, 750–52 (7th Cir.2001). With the law this unsettled, qualified immunity applies.[6] [fn.6 The Supreme Court has recently granted certiorari to address whether a claim for malicious prosecution is cognizable under the Fourth Amendment where the plaintiff alleges that he was held in pretrial detention without probable cause. *See Manuel v. City of Joliet,* 590 F. App'x 641 (7th Cir.2015), *cert. granted* —— U.S. ——, 136 S.Ct. 890, 193 L.Ed.2d 783 (Jan. 15, 2016) (No. 14–9496). *Manuel* will be heard

next term. The Court's decision will not affect this case; here the plaintiffs were not held in pretrial detention.] Finally, *even if* this claim were cognizable as a Fourth Amendment violation, McQueen and the investigators would *still* be entitled to qualified immunity. Because the plaintiffs were immediately released on bond and were neither seized nor detained, they suffered no Fourth Amendment injury. So any way you slice it, the district judge was right to apply the qualified-immunity bar. The Fourth Amendment claim was properly dismissed."); ***Saunders-El v. Rohde***, 778 F.3d 556, 558-62 (7th Cir. 2015) ("A criminal's due process rights may be violated—actionable by way of 42 U.S.C. § 1983—when the evidence against him is fabricated. However, due process is not implicated when, as here, the defendant is released on bond following his arrest and acquitted at trial. And this rule cannot be circumvented, as Saunders–El attempts to do, simply by re-framing such an allegation as a *Brady* claim—that is, by alleging that the police officers who supposedly fabricated the evidence failed to reveal their misconduct to the prosecution. Accordingly, we affirm the judgment of the district court, but on other grounds. . . . In *Newsome,* we established that the existence of a state law claim for malicious prosecution renders unavailable § 1983 as a vehicle for bringing a federal malicious prosecution claim. . . In *Brooks,* we affirmed the dismissal of plaintiff's allegation that 'criminal proceedings were instituted against him based on false evidence or testimony,' remarking that 'such a claim "is, in essence, one for malicious prosecution, rather than a due process violation."'. . Finally, in *Fox,* we counseled against 'shoehorning into the more general protections of the Fourteenth Amendment claims for which another amendment provides more specific protection.'. . There, we deemed the plaintiff's allegation that the defendants violated his due process rights by causing him to be falsely arrested, imprisoned, and prosecuted by 'deliberately fabricat[ing] false statements and ... obstruct[ing] justice' to be a hybrid of a malicious prosecution claim and a Fourth Amendment claim, rather than a due process claim. . .None of these decisions—individually or as a collection—stands for the proposition that fabricating evidence does not violate a defendant's due process, actionable pursuant to § 1983. Instead, they merely establish that allegations that sound in malicious prosecution must be brought pursuant to state law. To the extent that these decisions may have rendered the law in this area uncertain, our more recent decisions have been explicit. In *Whitlock v. Brueggemann,* 682 F.3d 567, 580 (7th Cir.2012), we expressly stated that 'a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of [his] liberty in some way.' We have reiterated this position several times since then. For instance, just two weeks before the district court issued its opinion in this case, we decided *Fields v. Wharrie,* 740 F.3d 1107 (7th Cir.2014) ("*Fields II* "), wherein we made clear that fabricating evidence, including witness testimony, violates a clearly established constitutional right, such that qualified immunity does not shield the manufacturers of such evidence from liability. . . Accordingly, the district court erred in holding, *categorically,* that a claim of evidence fabrication cannot form the basis of a due process claim under § 1983 and must instead be brought as a state law malicious prosecution claim. Not every act of evidence fabrication offends one's due process rights, however-a point we elucidated in *Alexander v. McKinney,* 692 F.3d 553, 557 (7th Cir.2012). . . . Saunders–El, released on bond following his arrest and acquitted at trial, falls squarely within our holding in *Alexander,* and, accordingly, cannot make out an evidence fabrication-based due process violation. He may have an Illinois state law malicious

prosecution claim, the elements of which are: (1) the defendants commenced judicial proceedings, (2) for which there was no probable cause, (3) the proceeding were instituted or continued maliciously, (4) the proceedings were terminated in the plaintiff's favor, and (5) the plaintiff sustained an injury. . . But, as outlined above, that claim must be brought in state court. . . . [O]ur case law makes clear that *Brady* does not require the creation of exculpatory evidence, nor does it compel police officers to accurately disclose the circumstances of their investigations to the prosecution. Accordingly, Saunders–El's *Brady* claim is more appropriately characterized as a claim for malicious prosecution—that is, a claim that the officers commenced his prosecution without probable cause—which cannot form the basis of a constitutional tort. In any event, it would be entirely incongruous for us to endorse Saunders–El's *Brady* theory, in light of our holding in *Alexander*. Since, as *Alexander* holds, a police officer does not violate an acquitted defendant's due process rights when he fabricates evidence, it would defy any semblance of logic to conclude that the same officer subsequently violates the defendant's constitutional rights simply by remaining silent about that fabrication (and thus, without taking any additional affirmative action). In essence, Saunders–El's so-called *Brady* claim is simply a recast of his evidence fabrication claim, and our precedent establishes that such a claim is not cognizable on account of his acquittal.").

See also ***Cruz v. Guevara***, No. 23 CV 4268, 2024 WL 4753672, at *8–9 (N.D. Ill. Nov. 12, 2024) ("Cruz's malicious prosecution claims allege a constitutional harm stemming not just from his arrest, but also from the continuation and perpetuation of judicial proceedings against him without any probable cause. . . But to state a Fourth Amendment malicious prosecution claim, plaintiff must establish an improper seizure—i.e., a seizure wholly unsupported by probable cause. . . Thus, even assuming Jaramillo's and Rodriguez's fabricated statements (which were obtained after Meadors' identification of Cruz . . . were used to secure the subsequent indictment against Cruz, Cruz's allegations that Maloney had a direct hand in generating those statements does not rescue his malicious prosecution claims. From Maloney's perspective, there still would have been probable cause to proceed based on Meadors' identification. . . That leaves for consideration Cruz's malicious prosecution claim under the Fourteenth Amendment. Where an adequate state-law remedy exists for malicious prosecution (as is the case with Illinois), courts have explained that a malicious prosecution claim based on the Fourteenth Amendment's Due Process Clause almost certainly cannot proceed. [citing cases] At the same time, some Seventh Circuit cases appear to exempt from this rule cases—like this one—involving defendants who fabricated evidence or otherwise corrupted the trial process. *See, e.g.*, *Armstrong v. Daily*, 786 F.3d 529, 541 (7th Cir. 2015) ("No court has accepted the defendants' argument that the [*Parratt v. Taylor*, 451 U.S. 527, 544 (1981)] analysis applies when the plaintiff is alleging that wrongful conduct corrupted fair fact-finding in the criminal justice system."); *Avery*, 847 F.3d at 441 ("The availability of a state-law remedy for malicious prosecution doesn't defeat a federal due-process claim against an officer who fabricates evidence that is later used to obtain a wrongful conviction."). Assuming without deciding that Cruz can bring a malicious prosecution claim under the Fourteenth Amendment given his evidence-fabrication allegations against Maloney, Cruz's claim ultimately proves no more viable under this constitutional provision than it did under the

Fourth Amendment. To state a malicious prosecution claim under the Fourteenth Amendment, 'a plaintiff must demonstrate that (1) he has satisfied the elements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty.'. . As already explained, at a minimum, Cruz cannot satisfy the elements of an Illinois cause of action for malicious prosecution because he has not sufficiently alleged that Maloney knew probable cause did not exist for Cruz's arrest. So a Fourteenth Amendment version of his malicious prosecution cannot proceed."); ***Myvett v. Chicago Police Detective Edward Heerdt***, 232 F.Supp.3d 1005, 1015-19 (N.D. Ill. 2017) ("The Court rejected Almdale's challenge to the due process claim in denying the defendants' motion for summary judgment, noting that the Seventh Circuit has repeatedly recognized the viability of a due process claim asserting that a defendant's fabrication of evidence caused a deprivation of liberty. . . In support of his renewed challenge, Almdale relies on the analysis set forth by Judge Feinerman in *White v. City of Chicago*, 149 F. Supp. 3d 974 (N.D. Ill. 2016), which concluded that, notwithstanding these cases, circuit authority does not permit a plaintiff who was not convicted at trial to pursue a due process claim premised on the fabrication of evidence. . . Although the analysis in *White* does an admirable job of attempting to reconcile seemingly divergent lines of authority that bear on the viability of a due process claim premised on the fabrication of evidence, it does not persuade this Court to deviate from the unequivocal direction the Seventh Circuit provided to district courts in *Saunders-El*. In that case, the Court of Appeals expressly rejected any interpretation of circuit precedent suggesting 'that evidence fabrication-based due process claims can never form the basis of a constitutional tort.'. . The Court explained that this erroneous interpretation was 'inaccurate' and based on a misunderstanding of prior cases, such as *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), *Brooks v. City of Chicago*, 564 F.3d 830 (7th Cir. 2009), and *Fox v. Hayes*, 600 F.3d 819 (7th Cir. 2010). Those cases, the Court explained, confirmed only that malicious prosecution claims—that is, claims premised on the initiation of criminal proceedings without probable cause—could not be pursued under § 1983 where state law provides a tort remedy. . . Due process claims premised on post-arrest deprivations of liberty are a different animal, however, and the Seventh Circuit stated that '[n]one of these decisions—individually or as a collection—stands for the proposition that fabricating evidence does not violate a defendant's due process, actionable pursuant to § 1983.'. . The Court of Appeals therefore held in *Saunders-El* that the district court had 'erred in holding, *categorically*, that a claim of evidence fabrication cannot form the basis of a due process claim under § 1983.'. . *White* does not go quite so far as to say that fabrication of evidence claims can never give rise to a due process claim; instead, it sought to reconcile *Whitlock* with *Newsome* and *Fox* by limiting *Whitlock*'s recognition of due process evidence fabrication claims to cases in which 'the deprivation results from a criminal conviction.' . . But, respectfully, that holding rests on a distinction between pre- and post-trial deprivations of liberty that is both untenable as a matter of logic (surely one held in custody on the basis of fabricated evidence used against him before trial is no less aggrieved than one held in custody after a conviction secured with the aid of fabricated evidence) and which was squarely rejected by *Saunders-El.* There, the Seventh Circuit concluded that the plaintiff had no due process claim, but not just because he was acquitted at trial; Saunders-El had no due process claim both because he had been acquitted at trial and because he had been 'released on bond following arrest.'. . *White* does not address this aspect of *Saunders-El*,

citing it only for the uncontroversial, but irrelevant, proposition that a state law malicious prosecution claim renders § 1983 unavailable as a vehicle for bringing a federal malicious prosecution claim. . . The question here is not whether a plaintiff may bring a federal claim for *malicious prosecution*, but for *a violation of due process*. As to that question, *Saunders-El* unequivocally instructs that, when evidence fabrication works a significant deprivation of liberty, the answer is yes. . . Other cases from the Seventh Circuit have made the same point. [discussing cases] Judge Feinerman's opinion in *White* appropriately cautions against concluding that older Circuit precedent has been overruled by more current precedent when the Circuit has not said as much. Respectfully, however, in this instance the Circuit has said as much. In *Saunders-El*, the panel expressly said that its recognition of due process claim predicated upon fabricated evidence that leads to a significant deprivation of liberty was not foreclosed by, or inconsistent with, cases like *Newsome* and *Fox*. In *Bianchi*, the court of appeals similarly confirmed that '[a]llegations of evidence fabrication may state a colorable due-process claim in the wake of our decisions in *Whitlock* and *Fields II*.'. . Due respect for circuit precedent, then, requires this Court to recognize such a cause of action to the extent those cases do so. And those cases recognize that both pre- and post-trial deprivations of liberty occasioned by fabricated evidence give rise to a due process claim which may be pursued under § 1983. What is perhaps this Circuit's most complete exegesis of the rationale for recognizing due process deprivation of liberty claims under § 1983 can be found in *Armstrong v. Daily*, 786 F.3d 529 (7th Cir. 2015). There, the Seventh Circuit expressly rejected the rationale underlying *White*, namely that the *Parrat* doctrine bars due process claims premised on fabricated evidence because state law claims for malicious prosecution provide an adequate remedy. . . . The *Armstrong* plaintiff's claims of fabrication and destruction of evidence fell within Justice Kennedy's recognized limitations of *Parratt* because such claims involved rights essential to the fairness of criminal prosecutions. . .Thus, the underlying justification of *Parratt* discussed previously—that pre-deprivation notice and hearing were simply not feasible in cases of random and unauthorized misconduct—is inapposite where, as here, the plaintiff seeks to vindicate substantive due process protections rather than procedural safeguards. . . *White* rejects *Armstrong*'s relevance because it 'did not even address an evidence fabrication claim,'. . . and because the plaintiff had previously spent some 29 years in prison before his conviction was vacated. But the holding of the case has nothing to do with the prior incarceration; the issue at bar was the viability of the due process claim for Armstrong's continued pretrial detention while the state assessed whether to retry him. The defendants argued that because that second trial never happened, and thus he was only subject to pretrial detention, no due process violation occurred. . .The Seventh Circuit flatly rejected that argument, noting that although 'the most common liberty deprivation cases are based on post-trial incarceration after a wrongful conviction, the essential elements of this constitutional claim are more general and not limited to wrongful convictions.'. . The court went on to add that a '[due process claim] should not be limited to its most common version by a too-narrow requirement that the accused have been tried and convicted.'. . Thus, it follows that if the accused does not need to be tried and convicted for a deprivation to occur, something short of a conviction—such as pretrial detention—is sufficient. Accordingly, this Court concludes that the Seventh Circuit has affirmed, repeatedly, that a due process claim will lie when fabricated evidence is used to deprive a criminal defendant of liberty, even when the prosecution of that defendant is

ultimately unsuccessful. Myvett's due process claim therefore passes muster."); ***Lamb v. Mcmillen***, No. CV 16-3004, 2016 WL 4706926, at *6 (C.D. Ill. Sept. 8, 2016) ("The Seventh Circuit, in *Washington*, cited by Plaintiff, suggests that a federal claim for malicious prosecution may exist under the Fourth Amendment. However, the Seventh Circuit later withdrew that suggestion in *Washington* (and similar dicta in other cases) and affirmatively held that no federal constitutional claim for malicious prosecution exists at all, unless Plaintiff has no such remedy under state law. *See Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001). Still, other circuits do allow such a claim and the United States Supreme Court recently granted certiorari to address the question. *See Manuel*, 590 Fed.Appx. 641. However, even if the Supreme Court overrules *Manuel* and finds that Plaintiff may bring a malicious prosecution claim based on the Fourth Amendment, Plaintiff does not allege facts that state such a claim because Plaintiff does not allege that he was detained after charges were filed. *See Townsend v. Wilson*, ___ Fed.Appx. ____, 2016 WL 3262630, at *3 n.1 (7th Cir. 2016) (noting the possibility that the Supreme Court may find a malicious prosecution claim under the Fourth Amendment but holding that if the plaintiff was 'not detained after charges were filed, he did not suffer a Fourth Amendment injury that would support' such a claim). Therefore, Plaintiff does not state a claim for malicious prosecution under § 1983."); ***Collier v. City of Chicago***, No. 14 C 2157, 2015 WL 5081408, at *6-7 (N.D. Ill. Aug. 26, 2015) ("For a time, it was believed that fabrication of evidence did not give rise a cognizable due process claim in the Seventh Circuit. . .More recently, however, the Seventh Circuit has put that view to rest. As the law now stands in the Seventh Circuit, 'a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of her liberty in some way.'. .That is not to say that 'every act of evidence fabrication offends one's due process rights.'. . To sustain a due process claim based on fabricated evidence, the plaintiff must have been deprived of his liberty in some way, and the Seventh Circuit has said that a plaintiff who was 'released on bond following his arrest and acquitted at trial ... cannot make out an evidence fabrication-based due process violation.'. . If the plaintiff is not released on bond, however, his pretrial detention may satisfy this requirement even if he is ultimately acquitted. . . Collier contends that the defendants fabricated evidence by planting the keys and submitting police reports they knew to be false. Such conduct satisfies the Seventh Circuit's definition of fabrication of evidence. . .Collier has also offered evidence from which a reasonable jury could find that the fabricated evidence resulted in a liberty deprivation. Specifically, he was in custody for 15 months while awaiting trial, and the evidence would permit a reasonable jury to find that absent the allegedly fabricated evidence, he would not have been charged and thus would not have suffered a deprivation of his liberty. The Court therefore denies defendants' request for summary judgment on the fabricated evidence due process claim. Collier also contends that defendants violated due process by 'deliberately exclud[ing] evidence implicating other suspects and exculpating [him].'. . His brief is less than crystal clear on this point, but he appears to be referring to the fact that the police reports do not mention that his personal items indicated that he resided at an address other than 149 W. 74th Street and that there was mail found in the apartment that was addressed to 149 W. 74th Street but did not list Collier as the recipient.The Court understands this to involve a contention that defendants violated Collier's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). .. Although the Seventh Circuit has repeatedly expressed doubt 'that an acquitted

defendant can ever establish the requisite prejudice for a *Brady* violation,' it has not entirely foreclosed a claim in this scenario. . . Specifically, the Seventh Circuit has 'entertained the possibility that prejudice could be established if an acquitted defendant showed that disclosure of the suppressed evidence would have altered the decision to go to trial.'. . But defendants did not advance any argument in their summary judgment brief about the effect of this evidence on the decision to try Collier. Rather, they argued only that Collier's acquittal, without more, undermines a *Brady* claim. Because that appears to be an overstatement of the law as it now stands, and because defendants have made no effort to show the absence of effect of the suppressed evidence on the decision to try Collier, they are not entitled to pare the *Brady* allegations from Collier's due process claim on this basis."); ***Lofton v. Eberle***, No. 14 C 898, 2015 WL 507472, at *3-4 (N.D. Ill. Feb. 5, 2015) ("[T]ogether, *Brooks* and *Alexander* hold that a section 1983 plaintiff may state a due process claim based on the fabrication of evidence only when the fabricated evidence is used at trial and he or she is subsequently convicted. . . As stated succinctly in *Saunders–El v. Rohde,* '[n]ot every act of evidence fabrication offends one's due process rights....'. . . Here, the state dropped the charges against Lofton via a *nolle prosequi* motion prior to trial. Because the purportedly fabricated evidence was never used against Lofton at trial and he was never convicted of the charges, Lofton fails to state a due process claim based on the alleged fabrication of evidence, and the Court grants Defendants' motion to dismiss Count I."); ***Harris v. City of Chicago***, No. 14-CV-4391, 2015 WL 1331101, at *4-5 (N.D. Ill. Mar. 19, 2015) ("Defendants argue that the existence of a state law malicious prosecution claim disposes of any fabrication of evidence claim. That argument is not persuasive. As the Seventh Circuit has recently held, 'fabrication can support a due process claim under § 1983.'. . A due process claim does not arise when criminal proceedings are based on false evidence or testimony because such a claim is one for malicious prosecution. . . . However, when evidence is manufactured against a criminal defendant and used to deprive her liberty, due process rights are violated. . . This applies equally to evidence manufactured by police officers and/or by prosecutors acting in an investigatory capacity. . . Plaintiff alleges that Defendant Officers fabricated a confession and coerced her into making the fabricated confession. Defendants argue that Plaintiff's claim is more accurately portrayed as a coerced confession. The Seventh Circuit has drawn a distinction between coerced testimony and fabricated testimony. 'Coerced testimony is testimony that a witness is forced by improper means to give; the testimony may be true or false. Fabricated testimony is testimony that is made up; it is invariably false.'. . Fabricated testimony is deliberately inaccurate and, therefore, always false. . . A coerced confession does not lead to a cognizable due process claim, as opposed to a fabricated confession where there is a cognizable claim. . . This is not to say that the two are unrelated, indeed 'coercion (which in an extreme case could amount to torture) may be an essential tool in "persuading" a witness to fabricate testimony.'. . Here, Plaintiff alleges that her confession was both fabricated and coerced, the very situation contemplated in *Fields II*. Defendants argue that the situation is more like *Petty*, where the Seventh Circuit held that a witness coerced into falsely identifying a defendant in a lineup was more accurately described as a coercion case and not a fabrication case.")

See also ***Black v. Montgomery County***, 835 F.3d 358, 369-72 & n.12 (3d Cir. 2016) ("The

legal question before us is whether a plaintiff may pursue a fabricated evidence. . . claim against state actors under the due process clause of the Fourteenth Amendment even if the plaintiff was never convicted. While we held in *Halsey* that a fabricated evidence claim could proceed when a plaintiff was convicted at trial, we explicitly left open the question of whether such a claim would be viable if a plaintiff was acquitted. Consistent with other Courts of Appeals that have considered this question, as well as our reasoning in *Halsey*, we now hold that such a stand-alone fabrication of evidence claim can proceed if there is no conviction. . . .We see no reason to require a conviction as a prerequisite to a stand-alone due process claim against a state actor for fabrication of evidence. The harm we were concerned with in *Halsey* — corruption of the trial process — occurs whether or not one is convicted. It would be indeed anomalous if an attentive jury correctly saw through fabricated evidence, and its acquittal categorically barred later relief to the criminal defendant. Such a result would insulate the ineffective fabricator of evidence while holding accountable only the skillful fabricator. Fabricated evidence is an affront to due process of law, and state actors seeking to frame citizens undermine fundamental fairness and are responsible for 'corruption of the truth-seeking function of the trial process.'. . .Others Courts of Appeals have permitted plaintiffs to pursue due process claims predicated on the fabrication of evidence notwithstanding the fact, as here, that the plaintiff was not convicted of criminal charges. [collecting cases] Two Courts of Appeals appear to require a conviction as a prerequisite to a stand-alone due process claim. *See Saunders-El v. Rohde*, 778 F.3d 556, 562 (7th Cir. 2015) ("[A] police officer does not violate an acquitted defendant's due process rights when he fabricates evidence."); *Massey v. Ojaniit*, 759 F.3d 343, 354 (4th Cir. 2014) ("Fabrication of evidence alone is insufficient to state a claim for a due process violation; a plaintiff must plead adequate facts to establish that the loss of liberty — i.e., his conviction and subsequent incarceration — resulted from the fabrication."). While the *Massey* court provided very little analysis to support its holding, the *Saunders-El* court noted that the only ' "liberty deprivation"' in a fabricated evidence case where one is acquitted ' "stems from his initial arrest."'. . . The *Saunders-El* court rejected the view that ' "the burden of appearing in court and attending trial, in and of itself, constitute[s] a deprivation of liberty [because] [i]t would be anomalous to hold that attending a trial deprives a criminal defendant of liberty."'. . As explained in Subsection III(A) supra, however, we take a broader view of the liberty deprivations occasioned by the criminal process. Further, considering our Court's concern in *Halsey* and in this decision with the corruption of the truth-seeking process of trial, we disagree with *Saunders-El*. . . .Accordingly, we hold that an acquitted criminal defendant may have a stand-alone fabricated evidence claim against state actors under the due process clause of the Fourteenth Amendment if there is a reasonable likelihood that, absent that fabricated evidence, the defendant would not have been criminally charged. . . .We conclude that Black's acquittal does not preclude her claim that the defendants intentionally fabricated evidence in violation of the due process clause of the Fourteenth Amendment. Accordingly, we will vacate and remand the District Court's dismissal of Black's fabrication of evidence claim.")

Compare ***Castellano v. Fragozo,*** 352 F.3d 939, 957, 958 (5th Cir. 2003) (en banc) ("At their most fundamental level, the values sought to be vindicated here are core commands of our United States Constitution − undiluted and unblurred by any blend of state tort law that would

either enhance or diminish its force. Unlike defamation and malicious prosecution, this constitutionally secured right of an accused in a criminal case was not seeded in the common law of tort where duties are the product of judicial choice with no roots in the value choices of our organic law. We need not agree with the Seventh Circuit's statement that Justice Kennedy's concurring opinion is the holding of *Albright* to agree that there are fundamental rights, albeit few in number, secured by due process that differ in kind from those at issue in *Albright* and which are beyond the reach of *Parratt.* Justice Stevens made the point as well, observing, '[e]ven if prescribed procedures are followed meticulously, a criminal prosecution based on perjured testimony ... simply does not comport with the requirements of the Due Process Clause.' This is no more than the line drawn by the *Parratt* line of cases and the handful of cases decrying conduct so destructive of a fair trial that it cannot be justified by procedures. As Chief Justice Rehnquist put it in *Daniels,* the Due Process Clause protects against arbitrary acts of government by promoting fairness in procedure and by barring certain government actions regardless of the fairness of the procedures used to implement them.' As we have indicated, we find the reasoning employed in dismissing Castellano's due process claims flawed. Castellano's contention that the manufacturing of evidence and knowing use of perjured testimony attributable to the state is a violation of due process is correct. Nevertheless, on remand Castellano will face the well-established rule that prosecutors and witnesses, including police officers, have absolute immunity for their testimony at trial. Courts have also held that non-testimonial pretrial actions, such as the fabrication of evidence, are not within the scope of absolute immunity because they are not part of the trial. Thus, while Castellano's due process claims are not properly rejected by the principles of *Albright* and *Parratt,* whether they survive the absolute immunity given witnesses in a criminal trial or whether the fabrication of the tapes could have been a legally sufficient cause of the wrongful conviction, we leave to the district court on remand.' [footnotes omitted]) *with* ***Castellano v. Fragozo,*** 352 F.3d 939, 969, 970 (5th Cir. 2003) (en banc) (Barksdale, J., joined by Emilio M. Garza, J., concurring in part and dissenting in part) ("The conduct about which Castellano complained in district court constitutes a procedural due process violation for which state law provides an adequate post-deprivation remedy. Remember, Castellano is not seeking a new criminal trial because his trial was fundamentally unfair. The state courts provided habeas relief, and the State did not re-prosecute. Instead, Castellano is seeking damages for alleged wrongs − now only by Sanchez and Fragozo − that occurred before and during his criminal trial. In such instances, the state post-deprivation remedies are the 'best the state can do' to allow injured individuals recovery after injury has occurred. . . Such state remedies are sufficient to address due process violations that are 'random and unauthorized' and therefore violate procedural due process. . . . Again, the conduct at issue here − alleged witness fabrication of evidence and perjury − is precisely the sort of 'random and unauthorized' conduct to which *Parratt* applies; therefore, the existence of adequate post-deprivation state remedies, such as through a malicious prosecution claim, bars a § 1983 procedural due process claim. . . . [A] due process claim can bypass *Parratt* in only *two* ways: (1) the claim is substantive; or (2) it is procedural, but available state remedies are inadequate. There is no dispute that Castellano has neither pleaded nor proved the inadequacy of state remedies. Apparently this is why the majority finds it necessary to provide cover for the

only possible claim − substantive due process. But, because Castellano argued to the magistrate judge against construing his claim as substantive, the majority labels it, simply, 'due process'.").

See also ***Morgan v. Chapman***, 969 F.3d 238, 245-50 (5th Cir. 2020) ("In *Castellano v. Fragozo*, an *en banc* majority of this court extinguished the constitutional malicious-prosecution theory. . . *Castellano* explained that claims under § 1983 are only 'for violation[s] of rights locatable in constitutional text.'. . This makes sense: the people have a constitutional right to be free from unreasonable searches and unreasonable seizures. In so far as the defendant's bad actions (that happen to correspond to the tort of malicious prosecution) result in an unreasonable search or seizure, those claims may be asserted under § 1983 as violations of the Fourth Amendment. But that makes them Fourth Amendment claims cognizable under § 1983, not malicious prosecution claims. There is a constitutional right to be free of unreasonable searches and seizures. There is no constitutional right to be free from malicious prosecution. Therefore, qualified immunity bars Morgan's § 1983 malicious prosecution claims against Chapman and Kopacz. . . . We recognize that previous decisions of this court may have left open the possibility that the freedom-from-abuse-of-process right lay hidden in the constitutional ether. . . We close the door on that possibility. Putting together *Beker*, *Brown*, and *Castellano*, we observe that facts that constitute the state tort of abuse of process can also constitute an unreasonable search, unreasonable seizure, or violation of another right 'locatable in constitutional text.'. . Such claims, rooted in the violation of constitutional rights, are actionable under § 1983. But those claims 'are not claims for [abuse of process] and labeling them as such only invites confusion.'. . Because there is no constitutional right to be free from abuse of process, the district court erred by failing to grant defendants qualified immunity on that claim. . . . The *Zadeh* search violated the Fourth Amendment even if pain management clinics were a closely regulated industry, we explained. Nonetheless, we concluded that the law was not clearly established at the time, because 'the defendants reasonably could have believed that the administrative scheme here provided a constitutionally adequate substitute for a warrant.'. . The *Zadeh* court also concluded, under an alternative theory, that the searches at issue were not pretextual. . . A search is not really administrative if it is used solely to find evidence of criminal wrongdoing. . . Neither the closely regulated industry holding nor the pretextual search analysis would stop Morgan's claims. In *Zadeh*, the defendants received qualified immunity because the law of *instanter* searches of closely regulated pain management clinics was unclear. . . Here, accepting the plaintiff's allegations as true, it is uncontroverted that Morgan was *not* operating a pain management clinic. Indeed, he alleges that he 'has never obtained, stored, maintained or dispensed any controlled substances of any kind from either medical practice.' Because Morgan was not operating a pain management clinic, the qualified immunity available to the defendants in *Zadeh* would be inapplicable here. The pretext analysis in this case also departs from *Zadeh*. In *Zadeh*, we concluded that the searches were not pretext for criminal investigation because there was no evidence that the 'investigation resulted in a criminal prosecution' and because the TMB took 'subsequent administrative action against' the physician. . . Therefore, we reasoned, the search was not pretextual because it 'was not performed "solely to uncover evidence of criminality."'. . Here, neither of those two facts are present. The search *did* result in a criminal prosecution, and

TMB did *not* take any subsequent administrative action against Morgan. Based on this case law, we cannot say it would be futile for Morgan to add a Fourth Amendment claim for an unreasonable search. . . . A Fourth Amendment unreasonable seizure claim arising from Morgan's arrest on false charges would also be familiar. We recently concluded that an unlawful seizure claim was cognizable and qualified immunity did not apply where a plaintiff 'was wrongfully arrested due to the knowing or reckless misstatements and omissions' in a law enforcement officer's affidavits. . . . We also must address whether it would be futile to remand to allow the district court to consider a due process claim. This court recently announced that there is a 'due process right not to have police deliberately fabricate evidence and use it to frame and bring false charges against a person.' *Cole v. Carson*, 802 F.3d 752, 771 (5th Cir. 2015) ("*Cole I"), cert. granted, judgment vacated sub nom. Hunter v. Cole*, 137 S. Ct. 497 (2016) *and opinion reinstated in part*, 935 F.3d 444 (5th Cir. 2018) (en banc). And, although *Cole* had a peripatetic procedural history, that holding is binding Fifth Circuit precedent today. . . Given the on-point *Cole* holding, the due process claim would similarly not represent a futile amendment. Remand to allow the district court to consider that claim would not be futile. . . It would not be *futile* on the merits for Morgan to pursue an unreasonable search, unreasonable seizure, or due process claim. But the decision as to whether Morgan *should* be allowed to amend is not ours to make. It is unclear what legal theories the plaintiff presented in the district court. And his claims seem to have transformed on appeal. We remand for the district court to consider amendment and, if necessary, issues of waiver and forfeiture."); ***Travis v. City of Grand Prairie***, No. 15-10860, 2016 WL 3181392 (5th Cir. June 7, 2016) (not published) ("We have recognized that the Fourth Amendment's protections extend to preclude unreasonable seizure throughout the pretrial events of a prosecution, although we have discussed it as a Fourth Amendment claim and have rejected the notion that a freestanding malicious prosecution claim absent a Fourth Amendment violation is cognizable under § 1983. *See Castellano v. Fragozo*, 352 F.3d 939, 945-54 (5th Cir. 2003) (en banc). We note that the Supreme Court has granted a petition for a writ of certiorari to review the Seventh Circuit's holding in *Manuel v. City of Joliet*, 590 F. App'x 641 (7th Cir. 2015), *cert. granted*, 136 S. Ct. 890 (2016), that the Fourth Amendment does not give rise to a claim for malicious prosecution.")

In ***McKinney v. Pate***, 20 F.3d 1550 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 898 (1995), the Eleventh Circuit addressed the issue of "whether, under the Fourteenth Amendment, a government employee possessing a state-created property interest in his employment states a substantive due process claim, rather than a procedural due process claim, when he alleges that he was deprived of the employment interest by an arbitrary and capricious non-legislative government action." *Id*. at 1553. The court unanimously held that "in non-legislative cases, only procedural due process claims are available to pretextually terminated employees." *Id*. at 1560. *See also* ***Lewis v. Brown***, 409 F.3d 1271, 1273 (11th Cir. 2005) ("Applying the *McKinney* test, Brown's decision affects only a limited class of persons, namely, the Lewises. The decision to deny the Lewises' application to re-zone their property does not 'generally apply to larger segments of − if not all of − society.'. . Rather, it was an administrative decision by Brown to enforce the current property designation to the economic detriment of the Lewises. This is a textbook 'executive act.'"); ***Nicholas v. Pennsylvania State Univeristy***, 227

F.3d 133, 142 (3d Cir. 2000) (holding tenured public employment is not a fundamental property interest entitled to substantive due process protection); ***Singleton v. Cecil***, 176 F.3d 419, 427 (8th Cir. 1999) (en banc) (agreeing with "sister circuits [that] have refused to allow discharged public employees to proceed with substantive due process claims against their former employers"); ***Zorzi v. County of Putnam***, 30 F.3d 885, 895 (7th Cir. 1994) ("[A]ny cause of action for the deprivation of occupational liberty would be confined to a claim under procedural due process; there is no such cause of action under substantive due process."); ***Kantner v. Martin County***, 929 F. Supp. 1482, 1486-87 (S.D. Fla. 1996) ("The Court finds that *McKinney* is applicable to zoning decisions since the rights created in the zoning context arise under state law rather than the Constitution."), *aff'd*, 142 F.3d 1283 (11th Cir. 1998); ***Sullivan Properties, Inc. v. City of Winter Springs***, 899 F. Supp. 587, 596 (M.D. Fla. 1995) (interpreting *McKinney* "as overruling the cases that provide a substantive due process cause of action for plaintiffs complaining of wrongful executive zoning decisions").

See also ***Hillcrest Property, LLP v. Pasco County***, 915 F.3d 1292, 1293, 1297-98, 1302 (11th Cir. 2019) ("The question before us is whether a litigant in this Circuit has a substantive-due-process claim under the Due Process Clause of the Fourteenth Amendment when the alleged conduct is the unlawful application of a land-use ordinance. The answer to that question is a resounding 'no'—an answer that this Court delivered in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), 24 years ago and has reaffirmed ever since. We held in *McKinney* that executive action never gives rise to a substantive-due-process claim unless it infringes on a fundamental right. A land-use decision is classic executive, rather than legislative, action—action that, at least here, does not implicate a fundamental right under the Constitution. . . . Hillcrest does not allege denial of any fundamental right. As we made clear in *McKinney*, fundamental rights in the constitutional sense do not include 'state-created rights.'. . . *McKinney* applies to Hillcrest's land-use claim that is the subject of this suit. We explained in *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956 (11th Cir. 1997) (per curiam), that 'land use rights, as property rights generally, are state-created rights.'. . Under circuit precedent, then, this seems to be an open-and-shut case. . . . We cannot be clearer on this point: regardless of how arbitrarily or irrationally the County has acted with respect to Hillcrest, Hillcrest has no substantive-due-process claim."); ***Hillcrest Property, LLP v. Pasco County***, 915 F.3d 1292, 1303-04, 1309-11 (11th Cir. 2019) (Newsom, J., concurring in the judgment) ("About 20 years ago now, an insightful (and hilarious) lawyer friend of mine said to me—and because this is a family show, I'll clean it up a bit—'Not everything that s[tink]s violates the Constitution.' If ever a case proved the truth of that little nugget, this is it. . . . By permitting Hillcrest to invoke substantive due process to pursue what was in substance a Takings Clause claim—a claim that, for its own reasons, Hillcrest had dropped from the lawsuit and would eventually settle for good money—the district court clearly erred. . . . Back to the beginning, then: Why aren't we talking about the Takings Clause? And why *are* we talking about substantive due process? Because although Hillcrest initially brought a takings claim, it then dismissed that claim (pending the resolution of parallel litigation in state court) and then eventually settled it for $4.7 million. Having done so, Hillcrest now wants a second bite at the apple—in essence, a chance to recover again—under the auspices of substantive due process. No way. The

way I see it, Hillcrest's substantive-due-process claim fails as a matter of law because, whatever else it may currently be permitted to do, substantive-due-process doctrine cannot be permitted to stand in for a failed or forfeited Takings Clause claim. And it certainly can't be deployed to allow a litigant to double-dip and cash in on a takings claim and then relitigate what is for all intents and purposes the exact same claim under another label. Accordingly, albeit by a different route, I too conclude that the district court's decision must be reversed. . . .I agree that Hillcrest is challenging non-legislative, executive conduct here—it's pressing an as-applied claim against the enforcement of Ordinance No. 11-15. Accordingly, I also agree that under our precedent Hillcrest enjoys no substantive-due-process protection. And of course I've already confessed my view that substantive due process is a dubious doctrine that should be cabined, not expanded. Having said that, though, I further confess that I don't fully understand the distinction that we've drawn between legislative and executive action. . . . What I don't understand is why we should think that the Constitution provides *less* protection against executive than legislative infringements. There's certainly no textual basis for the distinction; the Due Process Clause says that no 'state'—presumably meaning any branch thereof—shall 'deprive any person of life, liberty, or property, without due process of law.'. . Nor, so far as I'm aware, have we ever tried to justify the legislative-executive distinction on historical grounds. And worse, as a practical matter, the distinction that we've drawn—such that the Clause protects against arbitrary and irrational legislative acts, but not against abusive executive conduct—arguably gets matters precisely backwards. As between the two, it seems to me, executive action—which, by its nature, is individual, targeted, and one-off, rather than broadly and generally applicable—holds the greater potential for abuse. If a piece of arbitrary legislation threatens to gore many oxen at once, the ox owners have a fighting chance of exercising enough political muscle to stop it; the lonely individual whose ox is gored by abusive executive action has next to none.")

But see ***Beckwith v. City of Daytona Beach Shores***, 58 F.3d 1554, 1563 (11th Cir. 1995) ("[A]lthough a retaliatory discharge claim by a state employee involves the denial of the state-created benefit of employment, the right upon which a retaliatory government employment decision infringes is the right to free speech, not the right to a job. *McKinney* has no impact on such claims."); ***Noyes v. Moccia***, No. CIV. 98-19-M, 1999 814376, at *8 (D.N.H. June 24, 1999) (not reported) ("A number of other circuits have held that occupational deprivations potentially implicate only procedural, not substantive, due process. [citing cases] The Supreme Court, however, has not expressly addressed the issue, and this court must follow First Circuit precedent which, as it now stands, seems to recognize (albeit hardly unarguably) substantive due process rights in employment-related liberty. *See Aversa* [*v. United States*, 99 F.3d 1200, 1215 (1st Cir.1996)].").

4. While state law may create a property or liberty interest, whether that interest is constitutionally protected and the matter of what procedural safeguards must attend the deprivation of a constitutionally protected interest are matters of federal law. ***Vitek v. Jones***, 445 U.S. 480, 491 (1980). *See, e.g.*, ***Kilborn v. Amiridis***, No. 23-3196, 2025 WL 783357, at *10 (7th Cir. Mar. 12, 2025) ("Kilborn first argues that his suspension with pay was a 'severe sanction' entitling him

to due process protections. But suspension with full pay is not a deprivation of a protected property interest. . . Even if state law entitled him to a certain amount of process for a severe sanction, '[p]rocedural interests under state law are not themselves property rights that will be enforced in the name of the Constitution.'. . And Kilborn has not suggested that his suspension impacted his future job opportunities or income, which could trigger due process protections. . . At most, he alleges that defamatory statements made by the University—not its decision to suspend him—have tainted his career prospects. Kilborn also argues that his loss of a two percent, across-the-board raise is a deprivation of property. But Kilborn acknowledges that this was a merit raise and he does not suggest he was entitled to it, contractually or otherwise. In fact, he concedes that the University did not formally grant him the raise before it was revoked. That is not a protected property interest under our case law. . . We affirm the district court's dismissal of Kilborn's procedural due process claim."); ***Tufaro v. Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma***, 107 F.4th 1121, 1135-36 (10th Cir. 2024) ("[U]nder Oklahoma law, an untenured professor lacks a property interest in continued employment 'absent a specific contractual guarantee to that effect.' *Bunger v. Univ. of Okla. Bd. of Regents*, 95 F.3d 987, 990 (10th Cir. 1996). As we have explained, '[a] property interest includes a "legitimate claim of entitlement" to some benefit created and defined by "existing rules or understandings that stem from an independent source such as state law."'. . Thus, 'it is only after the plaintiff first demonstrates the existence and deprivation of a protected property interest that the plaintiff is constitutionally entitled to an appropriate level of process.'. . Missing here was a specific contractual guarantee."); ***Henderson v. Harmon***, 102 F.4th 242, 252 (4th Cir. 2024) ("Incarcerated persons like Henderson have a protected property interest in their prison trust accounts, which attaches constitutional due-process protections. And the nearly six-year delay between the hearing that adjudicated Henderson's guilt and his opportunity to contest the restitution amount raises serious concerns about the availability of evidence and witnesses. Yet even if we assume that this delay violates due process, that error was harmless because no evidence that could have aided Henderson's ability to contest the amount of restitution was lost to time. We thus affirm the district court's grant of summary judgment on Henderson's federal claim."); ***Navratil v. City of Racine***, 101 F.4th 511, 523-24 (7th Cir. 2024) ("Dimple's LLC also argues that the city's denial of its grant application violated its right to procedural due process. The Fourteenth Amendment's Due Process Clause prohibits the deprivation of life, liberty, or property by the government without due process of law. '[W]e consider first whether the plaintiff has been deprived of a protected interest in property or liberty, and if that is established, we consider whether the state's procedures comport with due process.'. . Here, Dimple's LLC cannot show it had any protected property or liberty interest in the city's COVID-19 emergency grants. It is well-settled that there is no property interest in a purely discretionary government benefit. . . The city's emergency funding program had certain requirements for eligibility, but once those requirements were met, the actual award of funds was left to Mayor Mason's discretion. Neither the city nor any governing legal rules guaranteed that a business meeting the criteria would receive funding because the funds available were limited. Dimple's LLC simply had no constitutionally protected property interest in the emergency funds. Dimple's LLC also argues that the denial of emergency funds deprived it of a liberty interest in its right to run its store. We reject this theory. Denying Dimple's LLC a discretionary grant did not

deprive it of any legal right to continue to operate, unlike the revocation of a business license or a retroactive revision of zoning laws. Cf. *Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865, 870–71 (7th Cir. 2009) (business had protected property interest in liquor license and could not be deprived of renewed license without due process of law). Dimple's LLC was not deprived of any constitutionally protected property or liberty interest, so its procedural due process claim fails at the threshold."); ***LaCoe v. City of Sisseton***, 82 F.4th 580, 582, 585 (8th Cir. 2023) ("An employee must have a protected life, liberty, or property interest in continued employment to maintain a procedural due process claim under 42 U.S.C. § 1983. . . Protected property interests arise not under the Constitution, but rather through an independent source such as state law. . . 'South Dakota is an employment at will state.'. . In an employment at-will state, 'the employer owes no duty of continued employment, and therefore may dismiss the employee at any time, for any reason,' unless an employment contract or public policy says otherwise. . . Thus, an at-will public employee in South Dakota does not have a constitutionally protected property interest. . . . [W]e agree with the district court that LaCoe was an at-will employee under South Dakota law and therefore had no due-process-protected property interest in continued employment. Her allegations that she was wrongfully placed on the *Brady/Giglio* list without an opportunity to respond may support a cause of action under state law -- a question that is not before us and we do not consider -- but absent a protected property interest they do not state a plausible due process claim under 42 U.S.C. § 1983. Thus, the district court did not err in dismissing LaCoe's Fourteenth Amendment due process claims."); ***Radwan v. Manuel***, 55 F.4th 101, 123 (2d Cir. 2022) ("[W]e conclude that because Radwan's scholarship was guaranteed for a fixed term and terminable only for cause, it was a property interest protected by the Constitution. However, because this rule was not clearly established at the time Radwan's scholarship was terminated, we conclude that defendants are entitled to qualified immunity on this claim as well."); ***Van Orden v. Stringer***, 937 F.3d 1162, 1168-69 (8th Cir. 2019) ("The residents insist that once the State adopted the Act, they enjoyed 'state-created liberty interests' that could not be infringed. This argument confuses procedural due process and the concept of substantive due process. '[S]tate statutes may create liberty interests that are entitled to the *procedural* protections of the Due Process Clause of the Fourteenth Amendment.' [citing *Vitek v. Jones*] The residents, however, claim a *substantive* due process right to certain actions by state officials. Fundamental rights or liberties that are protected by substantive due process are those implicit in the concept of ordered liberty or derived from our Nation's history and tradition; they are not created by States. . . The residents also contend that a periodic review requirement under state law was a 'key reason' why the Supreme Court upheld a civil commitment scheme for sexually violent predators in *Hendricks*, so periodic review of the sort they demand must be required by substantive due process. The Court in *Hendricks*, however, cited periodic review as evidence that the Kansas statute was not 'punitive' for purposes of a different claim under the Double Jeopardy Clause. . . The residents here invoke only substantive due process in their appeal, and they have not demonstrated the violation of a fundamental right under that rubric."); ***Forgue v. City of Chicago***, 873 F.3d 962, 970 (7th Cir. 2017) ("Forgue contends that he has a cognizable property interest in receiving a Retirement Card, and that his right to that benefit was deprived without due process. According to CPD policy, a retired employee receives a Card if he retires in good standing. It is undisputed that the

determination as to whether an officer retires in good standing is at the discretion of the CPD Superintendent. This does not mean, however, that such discretion can be arbitrary or totally unfettered. Indeed, Forgue alleges in his complaint that it was 'the policy and practice' of the CPD and the Superintendent to issue Cards to police officers. Making all reasonable inferences in favor of Forgue—as we must when considering a 12(b)(6) motion to dismiss—Forgue pleads a plausible claim that the CPD has an unwritten, *de facto* custom to grant virtually all retiring employees a Card. Thus, Forgue sufficiently alleges that he has a legitimate entitlement and cognizable property interest in receiving a Retirement Card. We must therefore reverse the district court's decision to dismiss Forgue's procedural due process claim."); ***Albrecht v. Treon***, 617 F.3d 890, 892, 893, 896 (6th Cir. 2010) ("The district court was faced with the question of whether the Albrechts had a constitutionally protected property interest in their son's brain after it was removed and retained for legitimate investigative purposes. As this was a question of first impression in Ohio, the district court certified the question to the Ohio Supreme Court. The Ohio Supreme Court answered the question in the negative, stating that there is no constitutionally protected property interest in human remains retained by the state of Ohio for criminal investigation purposes. The district court consequently held that the Albrechts had no property interest in the brain, and, thus, Defendants were entitled to judgment on the pleadings. The Albrechts argue that the Sixth Circuit's ruling in *Brotherton v. Cleveland, M.D.*, 923 F.2d 477 (6th Cir.1991), holding that a spouse had a protected property interest in her husband's corneas, which were removed for donation purposes, should rule this case, as opposed to the Ohio Supreme Court's answer to the certified question. . . . As previously explained above, the states define 'property,' 'property rights,' and 'property interest.'. .Whether that 'property interest' is constitutionally 'protected,' however, is a matter of federal law. . .Thus, there are two questions in determining whether a plaintiff has a constitutionally protected property interest sufficient to support a § 1983 claim: first, is there a property interest, stemming from 'an independent source such as state-law rules' and second, whether that interest, if any, 'rises to the level of a constitutionally protected property interest.'. . Obviously, if the first question is answered in the negative, the second question is moot."). *See also* ***Jones v. Lehmkuhl***, No. 11–cv–02384–WYD–CBS, 2013 WL 6728951, 20 (D. Colo. Dec. 20, 2013) ("Because I find that Colorado's medical marijuana regime does not implicate a fundamental liberty or property right, there is no need to address the due process element.").

See also ***Dorman v. Aronofsky***, 36 F.4th 1306, 1315 (11th Cir. 2022) ("Before addressing what process is due, we first examine whether Mr. Dorman has a liberty interest that triggers due process protections. . . State law can be the source of a liberty interest, and a state 'creates a protected liberty interest by placing substantive limitations on official discretion,' such that 'particularized standards or criteria guide the ... decisionmakers.'. . Florida's Religious Freedom Restoration Act (FRFRA), Fla. Stat. § 761.03(1), provides that the government cannot 'substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability,' unless the application of the burden is in 'furtherance of a compelling governmental interest' and is the 'least restrictive means of furthering that compelling governmental interest.' Because the FRFRA applies to and protects those in custody, . . we assume without deciding that it creates a liberty interest sufficient to trigger due process protections.");

Memphis A. Philip Randolph Inst. v. Hargett, 978 F.3d 378, 410-13, 418 (6th Cir. 2020) (Moore, J., dissenting) ("Having concluded that Plaintiffs are likely to prove that there is a constitutionally protected, Tennessee-law created liberty interest in voting absentee by mail, I would accept Plaintiffs' invitation to address the second step of the procedural due process inquiry, which the district court eschewed. 'Once it is determined that due process applies, the question remains what process is due.'. . Courts answer that question using the familiar balancing test from *Mathews*, which directs us to balance the private interest at stake 'against the government's interest in avoiding additional or substitute process, in light of "the risk of an erroneous deprivation" of a [liberty] interest "and the probable value, if any, of additional or substitute procedural safeguards."'. . These considerations uniformly favor Plaintiffs. . . . Tennessee's absentee voting law fails to provide these fundamental protections against the risk of erroneous rejections of absentee ballots on account of perceived signature invalidity. Presently, Tennessee law requires election officials to notify absentee voters if their ballot is rejected, apparently including where there is a signature verification issue. . . However, *the state does not afford the voter an opportunity to cure* the signature issue before the rejection occurs. . . Plaintiffs seek, primarily, a procedure that would provide for pre-rejection notice, and an opportunity to cure any signature defect before their absentee ballot is rejected. I begin with notice. The Tennessee statute does provide notice, but only after election officials have rejected the ballot. Post-deprivation notice is appropriate in only limited circumstances that do not apply here—this is not an emergency situation requiring immediate action, and Tennessee cannot effectively remedy an erroneously rejected absentee ballot once the election is over. . . Thus, the notice provided by Tennessee law is legally insufficient. As for an opportunity to be heard, Tennessee provides none. . . . In sum, Tennessee's absentee ballot signature verification procedures fail to provide even the baseline protections required by due process. As a result, Plaintiffs would be likely to succeed on the merits even if their liberty interest were minimal and the state's interests were significant. The opposite is true here—Plaintiffs' interests are significant and the state's interests are not substantial—further demonstrating Plaintiffs' likelihood of success on their procedural due process claim. The district court erred in concluding otherwise, and the majority erred further in evading the question. . . . On its own, today's ruling may not—likely *will* not—change the course of this election. But it is another drop in the bucket that is the degradation of the right to vote in this country. . . I fear the day we come out from behind the courthouse doors only to realize these drops have become a flood. I dissent."); ***Richardson v. Texas Sec'y of State***, No. 20-50774, 2020 WL 6127721, at *8–9 (5th Cir. Oct. 19, 2020) ("Given the failure of the plaintiffs and the district court to assert that voting—or, for that matter, voting by mail—constitutes a liberty interest, along with the absence of circuit precedent supporting that position, the Secretary is likely to prevail in showing that the plaintiffs' motion for summary judgment on their due process claim should have been denied. . . Finally, we reject the district court's reasoning regarding any state-created liberty interest. The court concluded that because 'Texas has created a mail-in ballot regime ... the State must provide those voters with constitutionally-sufficient due process protections before rejecting their ballots.'. . That notion originated in *Raetzel*, in which the District of Arizona acknowledged that absentee voting 'is a privilege and a convenience,' and yet concluded—without citation—'[y]et, such a privilege is deserving of due process.'. . In its defense, *Raetzel*'s reasoning resembles the principle

animating *Goss v. Lopez*, 419 U.S. 565 (1975). *Goss* concluded that, '[h]aving chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures ....' . . . Although several district courts have regurgitated *Raetzel*'s reasoning, . . . the plaintiffs and the district court point to no circuit court that has embraced it. And properly so. There is a problem with grafting *Goss*'s reasoning onto the voting context: *Goss* found two cognizable due process interests, namely a 'property interest in educational benefits' and a 'liberty interest in reputation.'. . In context, *Goss*'s language about the state's '[h]aving chosen to extend' benefits and being thus bound by due process came from its analysis of a 'protected *property* interest.'. . *Raetzel*, however, concluded that 'the right to vote is a "*liberty"* interest.'. . Thus, *Raetzel* grafted the Supreme Court's reasoning concerning property interests onto a claimed liberty interest without providing any authority justifying that extension. We decline to adopt *Raetzel*'s extrapolation of Supreme Court precedent. The Secretary is likely to show that the plaintiffs have alleged no cognizable liberty or property interest that could serve to make out a procedural due process claim. The Secretary is therefore likely to succeed in the dismissal of plaintiffs' due process claims. . . Even supposing that voting is a protected liberty or property interest, the Secretary is likely to show that the district court used the wrong test for the due process claim. The court applied *Eldridge*, 424 U.S. at 335, which provides the 'general[ ]' test for determining what process is due. . . On the other hand, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992) announce a test to address '[c]onstitutional challenges to specific provisions of a State's election laws' under 'the First and Fourteenth Amendments.'. . Neither *Anderson* nor *Burdick*, however, dealt with procedural due process claims, and both instead based their approach on the 'fundamental rights strand of equal protection analysis.'")

In ***Mathews v. Eldridge***, 424 U.S. 319 (1976), the Court set out certain factors for consideration on the question of what procedural safeguards must accompany the deprivation of a constitutionally protected interest:

> [I]dentification of the specific dictates of Due Process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Judge Posner describes the ***Mathews*** test as a "cost-benefit approach...which asks essentially whether the particular procedural safeguard that the plaintiff is urging would save more in costs of legal error than it would add in administrative or other costs." ***Tavarez v. O'Malley***, 826 F.2d 671, 676 (7th Cir. 1987).

Compare ***Ingram v. Wayne County, Michigan***, No. 22-1262, 2023 WL 5622914, at *12-15 (6th Cir. Aug. 31, 2023) ("Our circuit requires 'notice and a timely *post-seizure* opportunity to be heard prior to forfeiture.' *Ross*, 402 F.3d at 583–84; *see also Nichols*, 822 F. App'x at 450. But this court has not definitively resolved whether an interim hearing is needed, given the long delay before forfeiture proceedings. [court discusses *Nichols* and *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002)] . . . . In sum, all three [*Mathews*] factors favor plaintiffs. They have easily met the bar to survive a motion to dismiss with respect to the single issue before us. We therefore hold, under our reading of the due process clause, that Wayne County was required to provide a prompt post-seizure hearing for plaintiffs' personal vehicles. . . Still, we are left with the question of what constitutes a timely hearing prior to final disposition of the forfeiture proceeding. We need not answer this question per se. But at the same time, because of the large time gap between seizure and a hearing in Wayne County, holding that a hearing was required under these facts would not give much guidance to district courts. While we have the question before us, we find it prudent to offer some guidance on what would be 'timely.'. . . In this case, all three plaintiffs lost their personal vehicles used for transportation. As such, requiring a post-seizure hearing within a short time frame may be justified because a personal vehicle used for transportation is almost as precious as a home. . . . We . . . hesitate to announce a timeframe, but we are well aware of the important property and liberty interests at stake in a case where people are being deprived of their only vehicle used for transportation. Wayne County's practices drove Ingram into bankruptcy, and they brought hardship on all three plaintiffs. We follow the Supreme Court's lead in *County of Riverside* in remarking that a timeframe is important for predictability. Indeed, if Wayne County provides plaintiffs an opportunity to be heard, it will be faced with answering the very same question—how quickly it must provide a hearing to avoid liability under procedural due process. While that question is fact-dependent, where a person is to be deprived of something so integral and important as here—a vehicle integral to personal transportation and liberty—then a prompt opportunity to be heard to challenge the holding of the vehicle is required. . . If a probable-cause hearing can be heard within 48 hours, and other circuits have found one to three weeks to be excessive in this sort of context, then, taking the factual setting of this case into account, we hold two weeks from the date of the vehicle's seizure to be an appropriate time frame to provide the vehicle owner an opportunity to be heard to contest the holding of a vehicle vital to the owner's transportation and livelihood. . . .At this hearing, the burden of proof will be on the government to show the 'probable validity of continued deprivation.'") *with* ***Ingram v. Wayne County, Michigan***, No. 22-1262, 2023 WL 5622914, at *15, *17-20 (6th Cir. Aug. 31, 2023) (Thapar, J., concurring) ("History links protections for liberty and for property. And when the government arrests someone, depriving them of liberty, Supreme Court precedent requires a preliminary hearing within 48 hours. I would apply the same rule to Wayne County's seizure of the plaintiffs' property. . . . Squishy standards like *Mathews* don't provide sufficient guidance for anyone. Not for government officials. Not for lower courts. And, most importantly, not for the people whose rights the Constitution protects. . . Fortunately, we aren't stuck with *Mathews*. Time and again, the Supreme Court has disregarded balancing tests when history and tradition supply a more rights-protective framework. . . . Informed by our tradition of linking protections for property and for liberty, I would require Wayne County to hold a hearing within 48 hours. Under current law, the government must hold a probable-cause

hearing within 48 hours of arresting someone. *County of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). . . The plaintiffs deserve the same when the government seizes their car. . . . Simply put, if the government wants to take away a piece of property that is essential to the way most of us live, it should provide a hearing within 48 hours. . . When history and tradition establish a right, courts can't balance it away. Applying *Mathews* here risks just that. Instead, informed by our nation's tradition of speedy process for deprivations of property and liberty, I would hold that Wayne County violated due process by failing to provide a hearing within 48 hours of seizing the plaintiffs' cars.")

Compare ***Nichols v. Wayne County, Michigan***, 822 F. App'x 445, ___ (6th Cir. 2020) (McKeague, J., concurring), *cert. denied*, 141 S. Ct. 2716 (2021) ("I join the majority opinion in full. I write separately because I conclude that even if there were no *Monell* problem here, Nichols would still lose on the merits. Nichols asks us to apply the *Mathews* factors to determine whether the municipalities were constitutionally required to provide a continued-detention hearing before the ultimate forfeiture proceedings. . . The Second Circuit applied those factors in *Krimstock v. Kelly* and held that due process required New York City to afford plaintiffs 'a prompt post-seizure, pre-judgment hearing' 'to test the probable validity of the City's deprivation of their vehicles *pendente lite*, including probable cause for the initial warrantless seizure.'. . On the other side, the municipalities argue, and the district court found, that this continued-detention hearing was not constitutionally required under the Supreme Court's decision in *United States v. Von Neumann*, 474 U.S. 242 (1986). . . I think the municipalities have the better argument. Under *Von Neumann*, the municipalities do not need to provide a continued-detention hearing because that hearing is not necessary to a timely forfeiture proceeding. . . . Applying *Von Neumann*, I conclude that the Due Process Clause guarantees only a timely forfeiture hearing, that timeliness being measured, as the Supreme Court has held, by the factors announced in *Barker v. Wingo*. Because Nichols is not constitutionally entitled to an *additional* continued-detention hearing—between the seizure and the forfeiture hearing—there was no due process right for the municipalities to violate.") *with* ***Nichols v. Wayne County, Michigan***, 822 F. App'x 445, ___ (6th Cir. 2020) (Moore, J., dissenting in part), *cert. denied*, 141 S. Ct. 2716 (2021) ("There are many things the majority does not deny about Stephen Nichols's case. It does not deny that he was wrongfully deprived of the use of his car for three years. It does not deny that he had a due-process interest in the use—not just the ownership—of his vehicle. It does not deny that he has plausibly alleged that the municipal defendants failed to afford him any opportunity to seek temporary repossession of his car. It does not deny that these defendants had the discretion to do so under the relevant statutory scheme. Nor does it deny that our caselaw forecloses qualified immunity as a defense for municipal defendants when the injury for which they are allegedly liable was caused by municipal act itself. Yet it denies Nichols recourse because Nichols's lawyer stated at oral argument that there were multiple ways for the government to go about affording his client due process. Even if I were inclined to decide serious constitutional cases based on 'gotcha' moments at oral argument, this would not be one of them. Nichols did not concede a flaw in his claim—to the contrary, he confirmed just how modest a due-process right he seeks. In my view, Nichols has adequately stated a constitutional claim, and we should allow this case to proceed. . . . Without any precedent

resolving the issue before us, I would follow the Second Circuit's unanimous opinion in *Krimstock v. Kelly*—the only published, appellate opinion on point. . . in concluding that the failure to provide some sort of retention hearing for purported owners of seized property violates the Constitution. In *Krimstock*, then-Judge Sotomayor wrote for a unanimous panel that New York City's vehicle-forfeiture scheme, which allowed the city to 'seize a motor vehicle following an arrest for the state-law charge of driving while intoxicated ('DWI') or any other crime for which the vehicle could serve as an instrumentality' without any sort of subsequent retention hearing, violated the Fourteenth Amendment[.] . . Under the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court reasoned that the private interest in the ownership and use of a vehicle was significant, the risk of erroneous deprivation was 'reduced' given the 'context of DWI owner-arrestees,' and the government's interest was low, given alternative methods—such as the posting of bond in exchange for a seized vehicle—in preventing an owner from absconding with this property. . . 'Balancing the *Mathews* factors,' the Second Circuit concluded that due process of law required a hearing in which a claimant could demonstrate that 'means short of retention of the vehicle can satisfy the City's need to preserve it from destruction or sale during the pendency of proceedings.'. . . On balance, here the private interest is substantial, the erroneous risk of deprivation is moderate, there is considerable value in additional safeguards, and the government's interest is low. Accordingly, the *Mathews* balancing test tips in Nichols's favor. For these reasons, I would follow the Second Circuit in holding that vehicle owners must be afforded a prompt, postseizure hearing before a neutral decisionmaker to determine whether 'means short of retention of the vehicle can satisfy the [government's] need to preserve it from destruction or sale during the pendency of proceedings.'")

See also ***Todman v. Mayor & City Council of Baltimore***, 104 F.4th 479, 487-92 (4th Cir. 2024) ("Section 1983 claims against municipalities require that a plaintiff show not only that his rights were violated, but also that the municipality was responsible for that violation. . . Although the Todmans had 'moved for summary judgment only on whether their constitutional rights were violated,' the district court found that they were also 'entitled to summary judgment on the issue of the City's responsibility for the constitutional violation.'. . The City did not object to this *sua sponte* ruling below, and the district court entered judgment against the City and scheduled a trial on damages. After a three-day damages trial, a federal jury awarded the Todmans $36,000 in compensatory damages and $150,000 for emotional distress. The City has not challenged the amount of that award on appeal. The City instead appeals the district court's summary judgment rulings. It argues that neither the Abandonment Ordinance nor its application to the Todmans violated due process, and that even if it did that application cannot be laid at the feet of the City. It also contends that the district court erred procedurally when it granted summary judgment on the City's responsibility without allowing the City to brief the issue first. . . . We start with the City's contention that the Todmans' procedural due process rights were not violated at all. Due process is guaranteed by the Fourteenth Amendment, which prohibits the states from 'depriv[ing] any person of life, liberty, or property, without due process of law.' To establish a procedural due process violation under § 1983, plaintiffs must show (1) that they were deprived of a cognizable liberty or property interest (2) through some form of state action (3) with constitutionally

inadequate procedures. . .The Todmans clearly meet the first two requirements. First, they were deprived of a protected property interest. Ownership interests in personal belongings are protected under the Due Process Clause. . . .Second, the City's Abandonment Ordinance (which is clearly a form of state action) caused that deprivation. . . .We thus conclude that the Todmans were deprived of a cognizable property interest by state action—namely, the operation of the City's Abandonment Ordinance. The first two requirements having been met, we turn to the third: whether the procedures provided here were constitutionally adequate. 'The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it."'. . . The Todmans, however, received neither. . . . Here, the Todmans needed to be notified of the threat of abandonment should their personal possessions be left in the leased premises at eviction. None of the pre-hearing notices given to the Todmans as part of the state-law eviction procedures even mentioned the possibility of personal-property abandonment. So those cannot possibly have provided sufficient notice. The only notice that could even be said to have attempted to inform the Todmans of the possibility of abandonment was the copy of the warrant of restitution in their case sent to them by mail on July 17. But this notice was not sufficient either. While delivery by mail is a constitutionally sufficient method of providing notice, . . . the content of the notice mailed to the Todmans was not reasonably calculated to convey the relevant information. . . .The City points out that the warrant of restitution is a form created by the Maryland judiciary, and that the City has no control over its content. But if the state judiciary is not providing sufficient notice of the City's ordinance, the City must step in to provide that notice if it wants its ordinance to survive a due process challenge. As mentioned above, the Abandonment Ordinance includes just such additional notice requirements for other types of evictions. The City retorts that it is prohibited from requiring additional notice in holdover cases by Maryland law, which says that after satisfying the steps laid out by state law, landlords are entitled to an eviction order 'without any additional notice.' Md. Code, Pub. Local Laws, art. 4 § 9-19. But that law says they are entitled to an *eviction order*, not to their tenants' belongings. The City could still (consistent with state law) condition the triggering of the Abandonment Ordinance on the landlord's providing additional notice. Or it could undertake to provide such notice itself. What it cannot do is evade the requirements of the Due Process Clause by throwing up its hands and saying, 'We don't make the notice form.' Respecting one of the Constitution's most basic guarantees should be simple and straightforward. The notice due plaintiffs such as the Todmans should include the date of the eviction and the threat and consequences of abandonment. Critically, the notice should be readily accessible and easily understood and should be of a form that drafters of the ordinance would appreciate if their own property were at risk. The notice here was not sufficient. . . .Application of the three *Mathews* factors here makes clear that the Todmans were entitled to more process than the City provided before their personal property rights were extinguished. . . . . Given the absence here of any opportunity at all to contest the abandonment, additional safeguards would be quite valuable. Even a short post-deprivation reclamation period could decrease the risk of error significantly. . . .The City has not suggested to us any way in which its interest in keeping eviction chattels off the streets would be harmed by these additional procedures. . . . There are any number of ways, including those adopted by other jurisdictions. . . for the City to achieve its undeniably legitimate aims without extinguishing evicted tenants' entire

property rights with no semblance of proper notice or opportunity for reclamation. The three *Mathews* factors weigh in favor of the Todmans and against the current procedural regime. It is not our job to tell the City how to achieve its objectives. The City must, however, achieve its goals in a way that complies with both state *and* federal law—and that includes the due process protections guaranteed in the United States Constitution."); ***Bethel v. Jenkins***, 988 F.3d 931, 943-44 (6th Cir. 2021) ("We have not yet determined whether *Sandin* applies to property interests, but we have cited *Sandin* to hold that an inmate does not have a protected interest in prison employment. . . But we need not decide whether *Sandin* applies to property interests because, even assuming Bethel had a protected interest, the magistrate judge correctly found in the alternative that Bethel received sufficient process as to that interest. . . . . In the present case, the magistrate judge noted that Bethel received written notice that the books were withheld as well as notice of the reason why they were withheld, that he was able to use CCI's grievance process to seek further review, and that Defendants allowed Bethel to either have the publications destroyed or sent back to the third party who ordered them. Applying the balancing test under *Mathews*, these procedures were adequate as the private interest in receiving the books pursuant to the third-party orders was minimal as compared to the significant government interest in preventing contraband from entering the prison. . . The risk of erroneous deprivation was small because Bethel could acquire the publications through alternate means. The value of additional procedures was also limited given the lack of complexity in the withholding decision, and it was outweighed by the burden on the prison of expending resources on further proceedings. Even assuming Bethel had a protected property interest in receiving the withheld publications, he received sufficient process from CCI regarding the deprivation."); ***Serrano v. Customs & Border Patrol***, 975 F.3d 488, 500-01 & n.17 (5th Cir. 2020) ("Given the broad allegations in the complaint and our balancing of the *Mathews* factors, we conclude that Serrano has failed to state a claim for a procedural due process violation. As identified in the CBP's seizure notice, a claimant is notified of the seizure and provided options for challenging the CBP's action, both administratively and judicially. Serrano has not sufficiently alleged the constitutional inadequacy of the existing procedures, nor has he shown that the available processes are unavailable or patently inadequate. Moreover, our conclusion that the additional process Serrano seeks is not constitutionally required in this context is consistent with *Von Neumann.* There, the Supreme Court recognized that 'implicit' in its 'discussion of timeliness in *$8,850* was the view that the forfeiture proceeding, *without more*, provides the postseizure hearing required by due process to protect [claimant's] property interest in the car.'. . The parties dispute the relevance of *Von Neumann*. . . We agree that *Von Neumann* is not dispositive of Serrano's due process challenge; however, the Court's reasoning is pertinent to our due process analysis. *Von Neumann* specifically notes that a claimant's 'right to a forfeiture proceeding meeting the *Barker*. . . test satisfies any due process right with respect to the car and the money.'. . And neither the Supreme Court nor the Fifth Circuit has held that the Due Process Clause requires an additional post-seizure, pre-forfeiture judicial hearing. . . . The Supreme Court in *$8,850* and *Von Neumann* applied the *Barker* test to a due process challenge to the Government's delay in instituting a civil forfeiture proceeding. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), which addressed a defendant's right to a speedy trial, propounded a four-part test to be used as a guide 'in balancing the interests of the claimant and the

Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.'. . Courts have expressed confusion about whether to analyze a due process challenge to a forfeiture procedure under *Barker* or *Mathews*. . . We agree with the parties that *Mathews* is more applicable here because the harm alleged is the lack of an interim hearing rather than delay preceding an ultimate hearing on the merits."); ***Walsh v. Hodge***, 975 F.3d 475, 482-85 (5th Cir. 2020) ("To assess Walsh's claim, we turn to the *Mathews v. Eldridge* sliding scale. The first *Mathews* factor, Walsh's private interest, is significant: the loss of his employment. . . Moreover, the termination for sexual assault necessarily impacts future employment opportunities as an academic in a medical school, as a charge of sexual harassment inevitably tarnishes Walsh's reputation. . . The third *Mathews* factor, the University's interest, is also significant. . . . In this case, where credibility was critical and the sanction imposed would result in loss of employment and likely future opportunities in academia, it was important for the Committee to hear from Student #1 and Walsh should have had an opportunity to test Student #1's credibility. The University's interests in protecting victims of sexual harassment and assault are important too. But we are persuaded that the substitute to cross-examination the University provided Walsh—snippets of quotes from Student #1, relayed by the University's investigator—was too filtered to allow Walsh to test the testimony of his accuser and to allow the Committee to evaluate her credibility, particularly here where the Committee did not observe Student #1's testimony. We conclude in this circumstance that the Committee should have heard Student #1's testimony. . . As Student #1 was a graduate student presumably in her mid-twenties, we believe that being subjected to additional questions from the Committee would not have been so unreasonable a burden as to deter her and other similar victims of sexual harassment from coming forward. We are not persuaded, however, that cross examination of Student #1 by Walsh personally would have significantly increased the probative value of the hearing. Such an effort might well have led to an unhelpful contentious exchange or even a shouting match. Nonetheless, the Committee or its representative should have directly questioned Student #1, after which Walsh should have been permitted to submit questions to the Committee to propound to Student #1. In this respect, we agree with the position taken by the First Circuit 'that due process in the university disciplinary setting requires "some opportunity for real-time cross-examination, even if only through a hearing panel."'. . We stop short of requiring that the questioning of a complaining witness be done by the accused party, as 'we have no reason to believe that questioning ... by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.'"); ***Worthy v. City of Phenix City, Alabama***, 930 F.3d 1206, 1223-24 (11th Cir. 2019) (After doing *Mathews* balancing test, court concludes that City ordinance establishing enforcement scheme for red-light camera system and civil penalties for violations captured by red-light cameras did not violate procedural due process rights of motorists who received citations for running red lights pursuant to that ordinance); ***Henry v. City of Middletown, Ohio,*** 655 F. App'x 451, 464 (6th Cir. 2016) (applying *Mathews* and concluding that "the City's custom and practice of disposing of vehicles seized under these circumstances and not claimed by payment within ten days under § 4513.62, without offering any post-impoundment process, violates Due Process."); ***Murphy v. Raoul***, No. 16 C 11471, 2019 WL 1437880, at *21–23 (N.D. Ill. Mar. 31, 2019) ("The question becomes. . . whether the language and structure of the supervised release system in Illinois creates

an expectancy of release, which would entitle releasees to conditional liberty. . . Here, the answer is that it is common ground between the parties that the PRB [Prisoner Review Board] in fact granted the plaintiffs their release. . . In so doing, the PRB essentially promised these individuals a form of statutory liberty that the IDOC could not thereafter 'revoke' without appropriate procedures. . . Accounting for *Turner*, the defendants neglected to identify conditions under which their interests outweigh a releasee's conditional liberty. True enough, the government's need to protect the community does not necessarily diminish over time. . . The problem, though, is that the facts here come very close to sounding like preventive detention, which the Supreme Court has sanctioned 'only when limited to specially dangerous individuals and subject to strong procedural protections...In cases in which preventive detention is of potentially indefinite duration, [the Supreme Court] [has] also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.'. . The government cannot hold a citizen indefinitely because he or she at one time committed a crime and therefore remains dangerous. . . It is not difficult to posit that the State's need to pursue legitimate correctional goals may more significantly limit the procedural protections the sooner after the PRB grants an indigent, homeless sex offender release rather than later. . . But here the defendants have detained at least two plaintiffs since their release dates in 2011, or, for over eight years. In other words, the IDOC may elect not to liberate a PRB-approved indigent, homeless sex offender for some period, albeit not indefinitely. . . . Having determined that state law recognizes this liberty interest, the Court must next address what procedural protections are necessary to ensure that IDOC's decision to not release an individual already granted release is neither arbitrary nor incorrect. . . This evaluation requires courts to weigh several factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The utilization of the foregoing analytical model in this setting requires the Court to accommodate the plaintiffs' liberty interests in serving their mandatory supervised release terms in the community and the defendants' interests in facilitating the plaintiffs' reintegration into society while ensuring public safety. . . . The coercive power of the state is awesome, but it is not absolute. The defendants cannot chalk everything up to discretion and call it a day. Discretion without procedure leads to arbitrary governance, and eventually, the loss of liberty. That is what the Due Process Clause guards against. That is also what the separation of powers guards against. . . . Notwithstanding the foregoing discussion, the record still remains riddled with disputed facts, so a trial will be necessary to determine whether the defendants offer the plaintiffs any procedure to determine whether a parole agent's rejection of a proposed host site was proper or not. Only then will the Court be able to decide whether that process is constitutionally sound. Accordingly, the Court denies both parties' cross-motions for summary judgment . . . as to the procedural due process claim (Count III).").

See also ***Mascow v. Bd. of Educ. of Franklin Park Sch. Dist. No. 84***, 950 F.3d 993, 996-

97 (7th Cir. 2020) ("Post-*Arnett* decisions such as *Loudermill* routinely treat substance as a matter of state law and hold that, if state law creates a legitimate claim of entitlement, then federal law alone determines whether a hearing is required. . . . Neither the district judge nor the parties' briefs in this court address just how teachers can obtain review of their ratings and whether those opportunities satisfy the constitutional need for '*some* kind of hearing.'. . Neither the district judge nor the litigants has attempted to apply the approach prescribed by *Mathews v. Eldridge*. . .for determining what kind of process is due in a given situation. It would be inappropriate for an appellate court to try to resolve these subjects without briefs focused on the vital issues. They should be considered first by the district court."); ***Francis v. Fiacco***, 942 F.3d 126, 142, 145 (2d Cir. 2019) ("[W]hile a valid conviction subjects a defendant to a constitutional deprivation of his liberty, the determination of his sentence, and the state's compliance therewith, remain subject to due process protections. It follows naturally that a prisoner's liberty interest in freedom from detention implicates the Due Process Clause not only when a jury convicts him or when a court initially sentences him, but also when prison officials interpret and implement the sentence that the trial court has imposed. In the typical case, implementation of the prisoner's sentence follows straightforwardly from the sentencing court's commitment order. But Francis's was not the typical case. The sentencing court issued a directive that Francis's state sentence should run concurrently with a future sentence from a different jurisdiction. The State Defendants, however, concluded that New York law did not authorize the sentencing court to issue that directive and that they therefore could not follow it. As a result, Francis's sentence as implemented by the State Defendants diverged from the sentence originally pronounced by the sentencing court. Regardless of whether the State Defendants' course of conduct was legally justified (or perhaps even legally required), their decision to implement Francis's sentence in a manner that diverged from the sentence pronounced by the sentencing court implicated a liberty interest of the highest order. Therefore, when the State Defendants declined to implement the sentencing court's directive of concurrency, filed the consecutive detainer with the BOP, and retained custody of Francis upon expiration of his federal sentence, the Due Process Clause required them to provide certain procedural protections to safeguard Francis's liberty interest in avoiding future incarceration. . . .To review our *Mathews* analysis: The private interest at stake here is Francis's interest in freedom from detention, a liberty interest that sits at the very heart of the Due Process Clause. The 'risk of an erroneous deprivation' of that interest under the procedures followed in this case is unacceptably high, and the 'probable value ... of [the] additional or substitute procedural safeguards' we have proposed is substantial. . . Finally, the fiscal or administrative burdens that the government will sustain as a result of this additional process are at most negligible; more likely, assuming future compliance with state law, DOCCS will sustain no burden at all. We thus hold that prison officials implementing a sentence that, as pronounced, appears to be in error under applicable law must, at a minimum, promptly inform the prisoner, the sentencing court and the attorneys for both parties of their determination that the sentence as pronounced by the sentencing court cannot be lawfully implemented. The reasons for this conclusion should also be provided. In the circumstances of Francis's case, the State Defendants violated the Due Process Clause by failing to provide these basic procedural protections.")

Generally, due process requires notice and a meaningful opportunity to be heard prior to the deprivation of a protected interest. ***Cleveland Bd. of Educ. v. Loudermill***, 470 U.S. 532, 542 (1985).

Compare ***Jones v. Governor of Florida***, 975 F.3d 1016, 1048-49 (11th Cir. 2020) (en banc) ("The felons also argue that Florida has denied them procedural due process. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). They assert a liberty interest in the right to vote and argue that Florida has deprived them of that interest without adequate process. We may assume that the right to vote is a liberty interest protected by the Due Process Clause. . . Even so, this argument fails because any deprivation of that right was accomplished through the legislative process and the process for adopting a constitutional amendment, which provide more than adequate procedures for the adoption of generally applicable rules regarding voter qualifications. In deciding what the Due Process Clause requires when the State deprives persons of life, liberty or property, the Supreme Court has long distinguished between legislative and adjudicative action. *See, e.g.*, *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915). The State often deprives persons of liberty or property through legislative action—general laws that apply 'to more than a few people.'. . When the State does so, the affected persons are not entitled to *any* process beyond that provided by the legislative process. . . In contrast, the Due Process Clause may require individual process when a State deprives persons of liberty or property through adjudicative actions—those that concern a 'relatively small number of persons' who are 'exceptionally affected, in each case upon individual grounds,' by the state action. . . To determine the process due for adjudicative deprivations, courts apply the familiar balancing test of *Mathews v. Eldridge*[.] . . The felons were deprived of the right to vote through legislative action, not adjudicative action. Under its Constitution, Florida deprives all felons of the right to vote upon conviction. . . This constitutional provision is a law 'of general applicability' that plainly qualifies as legislative action. . . And even if we accept the argument that Amendment 4 and Senate Bill 7066 deprive felons of the right to vote by conditioning reenfranchisement on the completion of all terms of sentence, those laws also qualify as legislative acts. . . The legislative and constitutional-amendment processes gave the felons all the process they were due before Florida deprived them of the right to vote and conditioned the restoration of that right on completion of their sentences. The felons complain that it is sometimes difficult to ascertain the facts that determine eligibility to vote under Amendment 4 and Senate Bill 7066, but this complaint is only another version of the vagueness argument we have already rejected. The Due Process Clause does not require States to provide individual process to help citizens learn the facts necessary to comply with laws of general application. To avail themselves of the *Mathews v. Eldridge* framework, the felons were obliged to prove a deprivation of liberty based on *adjudicative* action. . . But the felons do not challenge any individual voter-eligibility determinations that could qualify as adjudicative action, so *Mathews* does not apply. And in any event, Florida provides registered voters with adequate process before an individual determination of ineligibility. Before being removed from the voter registration system, voters are entitled to predeprivation notice and a hearing. . . And any voter who is dissatisfied with the result is entitled to *de novo* review of the removal decision in state court. . . These procedures provide more than adequate process to guard against erroneous

ineligibility determinations. . . The injunction the district court entered looks nothing like a remedy for a denial of due process. It does not require additional procedures for any existing adjudicative action that deprives felons of a liberty interest in voting. Instead, it *creates* an adjudicative process to aid felons in complying with nonvague laws of general application. States are certainly free to establish such a process—indeed, Florida has done so through its preregistration advisory-opinion process and accompanying immunity from criminal prosecution. But the notion that due process *mandates* this kind of procedure in the absence of any adjudicative action is unprecedented. The injunction did not remedy any denial of due process, so we cannot affirm it on that ground. A fundamental confusion in this litigation has been the notion that the Due Process Clause somehow makes Florida responsible not only for giving felons notice of the standards that determine their eligibility to vote but also for locating and providing felons with the *facts* necessary to determine whether they have completed their financial terms of sentence. The Due Process Clause imposes no such obligation. States are constitutionally entitled to set legitimate voter qualifications through laws of general application and to require voters to comply with those laws through their own efforts. So long as a State provides adequate procedures to challenge individual determinations of ineligibility—as Florida does—due process requires nothing more.") *with* ***Jones v. Governor of Florida***, 975 F.3d 1016, 1059-60, 1065 (11th Cir. 2020) (en banc) (Martin, J., joined by Wilson, Jordan, and Jill Pryor, J., JJ., dissenting) ("Once a State promises its citizens restoration of their right to vote based on defined, objective criteria, it has created a due-process interest. . . . [W]hen a State promises its citizens an entitlement based upon the satisfaction of objective criteria, it creates a due process right for those citizens. Florida did just that, here. . . . We know, as the Supreme Court has told us, that Florida could have withheld the franchise from people with felony convictions for all eternity. But once 65% of the people of Florida decided that these returning citizens would be allowed to exercise their right to vote upon 'completion of all terms of sentence,'. . . and the Florida Legislature set objective criteria for what it means to 'complet[e] all terms of sentence,' a due-process interest was born. . . . [T]he State confuses the right to enfranchisement with the right to reenfranchisement. Deprivation of enfranchisement was lawfully done upon conviction. But deprivation of the right to reenfranchisement occurs when a returning citizen is stymied in his efforts to vote because he does not know when or how he can complete all terms of his sentence. That is what the Plaintiffs allege happened here, and what they proved in the District Court. . . . Having established allegations amounting to the deprivation of a due-process interest in reenfranchisement, I next examine whether the State's process is, in fact, inadequate. . . Whether the State-provided process is constitutionally adequate requires balancing '(A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake.'. . . Sixty-five percent of Florida voters conferred the right to reenfranchisement upon returning citizens once they completed all terms of their sentence. With its Constitution amended in this way, Florida gained an obligation to establish procedures sufficient to determine the eligibility of returning citizens to vote, and to notify them of their eligibility in a prompt and reliable manner. The majority's decision to vacate the District Court's injunction and reverse its holding on procedural due process grounds relieves the State of Florida of this obligation expected of it by its people. For this reason, as well as those articulated by Judge Jordan, I dissent from the majority's decision.") *and* ***Jones v. Governor of Florida***, 975

F.3d 1016, 1066, 1091-93, 1107 (11th Cir. 2020) (en banc) (Jordan, J., joined by Wilson, Martin, and Jill Pryor, JJ., dissenting) ("The evidence showed, and the district court found, that since the passage of Amendment 4 Florida has demonstrated a 'staggering inability to administer' its LFO [Legal Financial Obligations] requirement. . . That is an understatement. Florida cannot tell felons—the great majority of whom are indigent—how much they owe, has not completed screening a single felon registrant for unpaid LFOs, has processed 0 out of 85,000 pending registrations of felons (that's not a misprint—it really is 0), and has come up with conflicting (and uncodified) methods for determining how LFO payments by felons should be credited. . . To demonstrate the magnitude of the problem, Florida has not even been able to tell the 17 named plaintiffs in this case what their outstanding LFOs are. . . So felons who want to satisfy the LFO requirement are unable to do so, and will be prevented from voting in the 2020 elections and far beyond. Had Florida wanted to create a system to obstruct, impede, and impair the ability of felons to vote under Amendment 4, it could not have come up with a better one. Incredibly, and sadly, the majority says that Florida has complied with the Constitution. So much is profoundly wrong with the majority opinion that it is difficult to know where to begin. . . . Though the Constitution permits states to disenfranchise felons, . . . Florida's citizens chose through Amendment 4 to provide a right to vote for felons who have completed all terms of their sentences, thereby creating a liberty interest. And when a state chooses to create a liberty interest, 'the Due Process Clause requires fair procedures for its vindication.'. . . As the district court found, and Florida does not contest, the Division of Elections has processed 0 out of 85,000 pending registrations of felons. So, for those 85,000 registrants—and all those who will surely follow—the statutory requirement of notice and a hearing is completely illusory. Those appalling numbers, unfortunately, mean nothing to Florida or to the majority.Second, should any of these 85,000 registrants choose to vote in the upcoming election—as they may believe, in good faith, they have a right to do—they risk criminal prosecution if they turn out to be wrong about their eligibility. Given Florida's lack of clarity regarding how to calculate outstanding LFOs, this will surely be the case for at least some felons. The truth is that many of these registrants will not vote to avoid the risk of prosecution, even if they are in fact eligible, creating a de facto denial of the franchise. . . Florida ignores this reality, and the majority is blind to it. Third, there is no procedure for a felon to determine his eligibility to vote *before* registering—even though the voter registration form requires registrants to sign an oath affirming that they are qualified to vote. Florida says that felons who wish to vote may access their records through the county clerk's office or call clerks to obtain information. . . But the record belies that claim, and reflects that such inquiries are usually fruitless. . . . Fourth, if a felon registers based on the belief that he is eligible to vote, and then turns out to be wrong, he may be prosecuted for making a false affirmation in connection with voting. Florida downplays this risk, proclaiming that felons should rest assured that they will not be convicted if they registered in good faith because willfulness must be shown to prove a violation of Fla. Stat. § 104.011. But that comforting assurance—tactically made for an advantage in litigation—is useless, as it does not tell us how the state's prosecutors will choose to prosecute possible or alleged violations of the law. . . .Our predecessor, the former Fifth Circuit, has been rightly praised for its landmark decisions on voting rights in the 1950s and 1960s. *See generally* Jack Bass, Unlikely Heroes: The Dramatic Story of the Southern Judges Who Translated the Supreme

Court's *Brown* Decision Into a Revolution for Equality 259–77 (1981). I doubt that today's decision—which blesses Florida's neutering of Amendment 4—will be viewed as kindly by history.") *and* ***Jones v. Governor of Florida***, 975 F.3d 1016, 1107, 1112 (11th Cir. 2020) (en banc) (Jill Pryor, J., joined by Wilson, Martin, and Jordan, JJ., dissenting) ("Nearly a century has passed since Langston Hughes pined for an America where 'opportunity is real' and '[e]quality is in the air we breathe.'. . In Florida, people convicted of felonies who have paid all the societal debts they can possibly pay were on the threshold of that America, welcomed home by Florida's electorate. Florida's voters had decided on their own initiative that the franchise should be restored to their fellow citizens. But Florida's legislature slammed the door shut, barring perhaps a million would-be voters from any real and equal opportunity to rejoin their fellow Floridians and denying the electorate their choice to grant that opportunity. The legislature's action abrogated the protections of the Fourteenth and Twenty-Fourth Amendments on the right to vote, as Judge Martin and Judge Jordan eloquently explain in their dissents. I join their dissents in full. I write separately only to add context and echo the outrage of my fellow dissenting colleagues. . . . The majority today deprives the plaintiffs and countless others like them of opportunity and equality in voting through its denial of the plaintiffs' due process, Twenty-Fourth Amendment, and equal protection claims. I dissent.")

Compare ***Schultz v. Alabama***, 42 F.4th 1298, 1335 (11th Cir. 2022) ("[P]retrial detainees in Cullman County are not deprived of due process at their bail determinations. They are provided a hearing before an impartial judge, notice of that hearing, and there is no evidence that they are being denied an opportunity to be heard at the hearing. Furthermore, the judge's bail determination may be modified upon a showing of good cause, and the judge must make written findings of fact specifying which factors he considered in setting the amount of bail. This satisfies the Due Process Clause.") *with* ***Schultz v. State of Alabama,*** 42 F.4th 1298, 1357 (11th Cir. 2022) (Rosenbaum, J., dissenting in part) ("In sum, the district court found in Cullman County's bail practices the same process deficiencies the Fifth Circuit found in Harris County's bail practices in *ODonnell*. For the same reasons the Fifth Circuit concluded Harris County's bail practices violated the due-process rights of indigent arrestees, then, Cullman County's bail practices do.")

See also ***K. J. by & through Johnson v. Jackson***, 127 F.4th 1239, 1244, 1248-51 (9th Cir. 2025) ("We write today to stress what has long been clearly established: public school officials must comply with *Goss* when imposing a suspension, including an extension of an existing suspension based on new allegations or new evidence of misconduct. We agree with the district court that Defendants violated K.J.'s due process rights in extending his suspension without giving him an opportunity to be heard on the charges and evidence against him. . . . Even if Defendants violated K.J.'s constitutional rights, they would be entitled to qualified immunity and shielded from personal liability unless their actions violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'. . . We hold that Defendants are not entitled to qualified immunity because the unlawfulness of their conduct was clearly established in *Goss*. The district court held that Defendants were entitled to qualified immunity because there were no precedential cases governing these facts. It held that '*Goss* does not explicitly address the

more precise issue in this case, which is whether students are entitled to a second round of due process protections if an initial suspension is extended.' Similarly, Defendants suggest that there is no clearly established 'legal obligation to allow Appellant to retell his story a second time.' Setting aside that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances,'. . . *Goss* clearly governs these facts. . . . Under *Goss,* K.J. was entitled to hear the new accusation, learn the basis for that accusation, and be given an opportunity to explain his version of the facts as to that accusation. . . . A suspension extension is still a suspension from school, and a suspension extension based on new allegations or new evidence is effectively a second suspension. It is irrelevant that the suspension and suspension extension arose from the same event. . . . In sum, K.J.'s rights were 'sufficiently definite' under *Goss* such that 'any reasonable official in the defendant's shoes would have understood that he was violating [them].' . . . Because *Goss* clearly requires 'the student first be told what he is accused of doing and what the basis of the accusation is,' and it is clear that K.J. never had an opportunity to be heard regarding the new charge underlying the suspension extension, Defendants violated his clearly established rights under *Goss* . . . We therefore reverse the district court's grant of qualified immunity."); ***McIntosh v. City of Madisonville, Kentucky***, 126 F.4th 1141, 1146-48 (6th Cir. 2025) ("The Fourteenth Amendment says that the States may not 'deprive any person of life, liberty, or property, without due process of law.' When it comes to property that a State or city wishes to condemn, the relevant government unit must give the owner 'notice' and the 'opportunity to be heard' before tearing down the property. . . A few words are in order about each component of this standard. As to notice, due process requires a statement 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'. . The idea is to give property owners a meaningful chance to object to the proposed destruction of their property. . . The notice thus must 'inform' the homeowners 'of the availability of an opportunity to present [their] objections.'. . If 'generally available state statutes' detail procedures for obtaining a hearing before the destruction of the property, a municipality typically 'need not take other steps to inform' the property owner of their 'options.' *City of West Covina v. Perkins*, 525 U.S. 234, 241, 119 S.Ct. 678, 142 L.Ed.2d 636 (1999). As to the opportunity to be heard, due process requires 'some kind of a hearing *before* the State' destroys the property, absent an emergency. . . No emergency existed in this instance, as a month passed between the condemnation notice and the actual demolition of the vacant home, precluding the City from claiming a 'necessity of quick action' or other 'impracticability' that might permit only post-deprivation remedies. . . That means the City needed to provide the McIntoshes with a hearing before the demolition. While the hearing requirement remains flexible to account for different situations—hence the reference to 'some kind of a hearing'—it remains an imperative. Measured by these principles, the City met its obligation to provide notice to the property owners but did not meet its obligation to provide a pre-demolition hearing to them. Start with notice. Mr. McIntosh received and read the condemnation notice and letter informing him that he had thirty days to submit his plans for 'renovation' and 'repairs.' His subsequent efforts to repair the property and his serial efforts to contact city officials show that the notice worked. . . . A different conclusion applies to the City's duty to give the McIntoshes an opportunity for a hearing *before* the City destroyed their property. The key problem is that the City Code says that

property owners have a right to a hearing before a Local Appeals Board over a grievance against 'any decision of the Building Inspector'—in this instance, Wallace. . . But the City never delivered on that promise. . . . [N]either the condemnation flyer nor its related letter nor the statements of any official conveyed to the McIntoshes the opportunity to speak with Wallace and the City Attorney about the proposed demolition. Making matters worse, none of those sources ever informed the McIntoshes precisely what provisions of the municipal code their unit violated—and had to be repaired. A reasonable juror could find that no such policy existed or that, even if it did, the City never told the property owners about it."); ***Montemuro v. Jim Thorpe Area School Dist.***, 99 F.4th 639, 642, 645 (3d Cir. 2024) ("A state employee has a constitutionally protected property interest in his job if he can only be terminated for cause. . . We look to 'state law and rules' to determine whether an employee can be fired only for cause, . . .and, in this instance, an answer is there: Pennsylvania law establishes that a school board president can be fired only for cause. . . . Montemuro claims he was not provided due notice or a hearing before the Board elected another president a week after his own election. So, the first qualified immunity prong is satisfied: Montemuro has adequately alleged that the Board violated his property right by removing him from office without a hearing. . . . Three propositions are controlling here: first, employees who can only be removed for cause have a property interest in their employment; second, school board presidents in Pennsylvania can only be dismissed for cause; and third, employees with a property interest in their employment cannot be fired without notice and a hearing. We believe that, under existing precedent, all three were indeed clearly established."); ***Mares v. Miami Valley Hospital***, 96 F.4th 945, 952-53 (6th Cir. 2024) ("This court has not yet opined on the type of process due to medical residents; but, considering the reasoning from our sister circuits and the contents of the WSU Resident Manual, we hold that medical residency is more akin to an educational program than full employment and that Mares's claim should be evaluated as such. To start, every circuit to address the question agrees that medical residents receive the due process protections of students. [collecting cases] . . . . Students dismissed for academic reasons are afforded only minimal due process protections. . . In these situations, 'a student is entitled only to notice that his or her academic performance was not satisfactory and a "careful and deliberate" decision regarding their punishment.'. . 'But the university need not provide a hearing.'. . Here, WSU supplied Mares with more than enough process."); ***Orozco v. Dart***, 64 F.4th 806, 821-22, 826-27 (7th Cir. 2023) ("*Conyers v. City of Chicago* . . . provides a guidepost for what notice is constitutionally required prior to a property deprivation. In *Conyers*, this court reviewed a City of Chicago policy that requires officers to confiscate certain property from arrestees. . . If that property is not claimed within 30 days, the City deems it abandoned and either sells or destroys it. . . The plaintiffs in *Conyers* argued that they received insufficient notice of the policy and the destruction deadline. . . At the time, the City's policy for providing notice was to give each detainee an inventory receipt, which 'included a short note that explained the governing procedures' and 'informed the arrestee that he or she should have received another form entitled "Notice to Property Owner or Claimant."'. . The receipt also told detainees that they could obtain a complete copy of the policy on the Chicago Police Department website or in person at the Chicago Police Department facility. . . Examining that notice framework, we identified no due process violation based on inadequate notice. . . Here, Koger received even more personalized and meaningful notice of the three-book

policy. In addition to notice, Koger had an adequate chance to protect his property interest. *Kelley-Lomax v. City of Chicago*, a recent decision of ours, is instructive on this point. . . There, we again examined a City of Chicago policy for handling arrestee property (apparently the same policy at issue in *Conyers*). . . Under the City's rules, detainees were afforded 30 days to reclaim the property taken from them at time of booking. . . Otherwise, 'Property remaining in the City's hands after 30 days is sold or thrown away.'. . Our decision in *Kelley-Lomax* primarily scrutinized Fourth Amendment and substantive due process considerations, but it also addressed procedural due process. . . On that point, we repeated that '[t]he Due Process Clause requires notice and an *adequate* opportunity to protect one's interests,' and recognized that the 30-day policy is perhaps too short for detainees to get their property back. . . But we also concluded that 'a longer time did not matter to Kelley-Lomax,' because he did not try to retrieve his property during his entire six months in custody. . . Thus, the 30-day limitation was immaterial to him. Though perhaps the property-collection period was short, and 'may matter to other detainees,' it did not matter to Kelley-Lomax. . . *Kelley-Lomax* highlights that an aggrieved party's own actions play a part in the due process analysis. There are similarities between that reasoning and this case. Koger contends the County did not give him a fair chance to protect his property. He claims he had insufficient time to properly relocate his excess books. But, as with the plaintiff in *Kelley-Lomax*, Koger did nothing to protect his interest in the books. It is not as if Koger was scrambling to relocate his books and simply ran out of time. He decided to retain his books in contravention of the Jail's noticed policy: '[T]hey were my books. There was no reason for me to get rid of the books.'Koger received adequate process surrounding the deprivation of his books, so the County is entitled to summary judgment. The district court correctly reached the same conclusion. . . . Procedural due process is 'flexible and calls for such procedural protections as the particular situation demands.'. . The flexibility of procedural due process 'is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.'. . The County afforded Koger constitutionally adequate procedure given the context. 'The essential requirements of due process ... are notice and an opportunity to respond.'. . Koger had the benefit of both. He had notice. The County notified Koger of the three-book policy upon his entry to the Jail. Jail administrators then provided additional warning that they were soon coming to take Koger's excess books. Koger had an opportunity to respond. He could have mailed his books out of the Jail, had them picked up, or given them away. Koger elected not to act. Koger could have also filed a grievance but decided against it. Therefore, even if the County is responsible for depriving Koger of his books as alleged, we find no constitutional violation."); ***Dorman v. Aronofsky***, 36 F.4th 1306, 1315-18 (11th Cir. 2022) ("Here the due process question concerns the adequacy of notice. In this context, we are guided by *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950), and not by *Mathews v. Eldridge*, 424 U.S. 319 (1976). . . *Mullane* requires that notice be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'. . .Chaplains Aronofsky and Jordan placed an electronic announcement regarding the 45-day Passover registration policy on the homepage of the computer kiosk at the Jail. . . . The announcement is clear about the Jail's policy requiring inmates to request participation in Passover by the specified deadline, and thus 'reasonably ... convey[ed] the required information[.]'. . And it was posted on

the homepage of the computer kiosk that inmates, including Mr. Dorman, used to communicate with staff at the Jail. Absent any allegations that the kiosk was inaccessible or did not work, posting the announcement on the kiosk homepage was a 'reasonably calculated' method of notifying inmates of the Passover registration deadline. . . .Actual receipt of notice is not the touchstone of due process, . . . and based on the allegations in complaint the use of the kiosk homepage by Chaplains Aronofsky and Jordan was reasonably calculated to reach interested inmates at the Jail. The kiosk, as best we can tell from the complaint, was accessible to all. . . .This is not one of those rare cases where due process might require actual delivery of notice."); ***Roberts v. Winder***, 16 F.4th 1367, 1380 (10th Cir. 2021) ("Roberts was afforded sufficient pre-deprivation process. As Roberts concedes, Undersheriff Carver and Chief Deputy Hudson informed Roberts that his rank and pay would be reduced and that he would be reassigned to patrol duties. . . That meeting provided the minimal requirements of pre-deprivation notice. . . Sheriff Winder also provided Roberts' counsel a letter rejecting Roberts' grievance and explaining that Roberts was transferred within his merit rank 'under [Winder's] sole discretion as Sheriff.'. . That letter evidenced the minimal requirements of an opportunity to be heard. Thus, Roberts received sufficient pre-deprivation process."); ***Wright v. Beck***, 981 F.3d 719, 730-31, 734 (9th Cir. 2020) ("Despite these minor limitations on the notice requirement, no court has held—at least under the circumstances presented here—that notice can be altogether abandoned. To the contrary, under almost every conceivable scenario, there is 'no doubt' that the government must take reasonable steps to provide notice. . . Given the wealth of precedent—and the safeguards notice provides—the right to notice has been rightfully regarded as 'elementary,' 'fundamental,'. . . and 'rudimentary[.]". . The right cannot reasonably be disputed. Defendants nonetheless argue that the notice requirement was satisfied at the time the firearms were seized, and Wright was not entitled to any further notice thereafter. To address the merits of Defendants' argument, we divide up the chronology and nature of the deprivations. Wright was deprived of his property *twice*. The first occurred when LAPD officers seized his firearms during the execution of a search warrant. That was a temporary deprivation that is not at issue. The second deprivation occurred when the LAPD destroyed Wright's property amid ongoing negotiations between Wright and the LAPD. Key to this claim is that, without notice to Wright, Edwards sought an order from the Los Angeles Court granting permission to destroy Wright's firearms. Wright alleges that Edwards sought this order while the parties were still informally resolving the ownership dispute, as encouraged by the Ventura Court. The subsequent destruction of Wright's firearms constituted a permanent deprivation and underscores the need for notice. We have no problem concluding that a rational trier of fact could find a due process violation under these circumstances. The wealth of precedent suggests that by failing to provide Wright with notice and the opportunity to be heard before the court issued the destruction order, Edwards denied Wright the most basic and fundamental guarantees of due process . . . . In sum, taking the evidence in the light most favorable to Wright, a reasonable jury could find that Edwards violated Wright's due process right to notice when he applied for a destruction order without giving Wright notice."); ***Johnson v. Morales***, 946 F.3d 911, 921-22, 925, 937, 940 (6th Cir. 2020) ("It is the general rule that due process 'requires some kind of a hearing *before* the State deprives a person of liberty or property.'. . But there are exceptions to this rule. . . . None of these exceptions apply to Johnson's case. Defendants do not contend that the

decision to suspend Johnson's license was a 'random' or 'unauthorized' act. And Johnson specifically disputes that, at the time of the suspension, any type of emergency or exigent circumstance required the immediate suspension of her license. But relevant here, we have said that '[t]he failure to provide a hearing prior to a license or permit revocation does not per se violate due process.' [citing *United Pet Supply*] Thus, the balancing test from *Mathews v. Eldridge*. . . determines whether the government must provide some type of hearing before suspending a business license. . . . The government and private interests are both weighty. So this factor tips the *Mathews* balance in Johnson's favor. At this stage of the litigation, we cannot know whether the government ensured that there were reasonable grounds to suspend Johnson's license without affording her a pre-suspension hearing. And, under these circumstances, the value of a pre-suspension hearing in mitigating the risk of an erroneous deprivation was likely high. Thus, we hold that Johnson has stated a viable procedural due process claim based on the government's failure to provide her some type of hearing before suspending her license. . . . Given the nature of the right involved, . . . a post-deprivation hearing in which the suspension is presumed to be warranted and Johnson bore the burden to prove the opposite fails to provide the meaningful procedure mandated by due process. We emphasize that our holding is narrow. Due process does not require that the burden of proof always be placed on the party seeking relief. However, due process does require a meaningful opportunity to be heard in order to 'prevent, to the extent possible, an *erroneous* deprivation of property.'. . Johnson has plausibly alleged that the procedures afforded to her here fell short of those requirements. Accordingly, we reverse the district court's order dismissing Johnson's burden-shifting claim. . . .We emphasize that this is an appeal from a dismissal on the pleadings and a denial of leave to amend. We accept all of Johnson's well-pleaded facts as true and draw all inferences in her favor. We reverse the district court's dismissal of Johnson's burden-shifting, substantive-due-process, and equal-protection claims. We concur in Judge Nalbandian's opinion in all other respects."); ***J. Endres v. Northeast Ohio Medical University Board of Trustees***, 938 F.3d 281, 301-02 (6th Cir. 2019) ("When a university student faces a serious sanction like dismissal over allegations of disciplinary misconduct, he is entitled to a 'fundamentally fair hearing.'. . Endres received a hearing. But his allegations, which we must take as true at this stage, reveal that hearing was far from fair. For one, the student has a 'right to be present for all significant portions of the hearing,' provided the hearing is live. . . And even when the hearing is not live, the university must 'provide the accused with the opportunity to "respond, explain, and defend."'. . Endres, however, alleges he was not allowed in the room while Emerick presented her case to the CAPP panels. That alone establishes a due process violation, but Endres's allegations do not end there. *Doe* also says that the university must provide the student with 'an explanation of the evidence' against him, but Endres's allegations show that NEOMED repeatedly failed on this front. . . .Endres has alleged more than enough to establish a due process violation, but that does not end the matter. Because Emerick has claimed qualified immunity, Endres must also show that the constitutional rights Emerick violated were clearly established when the violation occurred. . . . Emerick alleges that the law defining Endres's due process rights was not clearly established, and on this front, she is correct. To be sure, the Supreme Court's decisions in *Goss* and *Horowitz* make clear that a student facing a serious sanction for disciplinary misconduct is entitled to a fair hearing, but neither those cases nor

our own decisions have articulated a bright-line rule to distinguish academic from disciplinary matters. Moreover, clearly established law 'must be "particularized" to the facts of the case,' yet no case from the Supreme Court or this court has held that cheating is a disciplinary matter warranting more robust procedures under the Due Process Clause. . . And because no precedent clearly established that Endres was even entitled to a hearing, it follows that his right to be present at the hearing and to hear the evidence against him was not clearly established, either. We therefore hold that Emerick is entitled to qualified immunity. We note, however, that qualified immunity '"only immunizes defendants from monetary damages"—not injunctive or declaratory relief.'. . Thus, our ruling shields Emerick from monetary damages. But the qualified immunity doctrine does not preclude Endres from continuing to pursue the injunctive and declaratory relief that he has also requested in his § 1983 claim."); ***Haidak v. University of Massachusetts-Amherst***, 933 F.3d 56, 71-73 (1st Cir. 2019) ("While it lasts, a suspension more or less deprives a student of all the benefits of being enrolled at a university. The Supreme Court has held that a deprivation of this sort requires notice and a hearing. . . What type of notice and what type of hearing turn on the interests implicated in each particular case. . . As a general rule, both notice and a hearing should precede a suspension. . . On occasion, though, exigencies may properly provide an exception to this general rule. . .Here, however, the record belies any claim of exigency. The university waited thirteen days after learning about the continued contact to issue the suspension order. And the university offers no evidence suggesting that it was infeasible to provide some type of process during the available thirteen days before it imposed a suspension. The university did allow Haidak to respond to the charges both orally and in writing fifteen days after Gibney complained and two days after the suspension took effect. Given the apparent absence of any perceived exigency, that process came too late to serve as an opportunity to be heard *before* the suspension began. And it was, in any event, insufficient to provide, by itself, due process in connection with a five-month suspension that ran through most of a semester. Importantly, the university knew that on the key issue justifying a lengthy suspension -- whether the continued communication represented a threat to the university community -- Haidak directly disputed Gibney's account in a manner that could be verified. The university could easily have confronted Gibney with the information provided by Haidak, and even a rudimentary hearing would have revealed that Haidak's contact with Gibney was welcomed and reciprocated. When a state university faces no real exigency and certainly when it seeks to continue a suspension for a lengthy period, due process requires 'something more than an informal interview with an administrative authority of the college.'. . But 'an informal interview' is all Haidak received. Certainly, a university may proceed in stages. A university can first ask a student to respond to the charge. And if the response offers no plausible defense, then the need for further inquiry diminishes, much like the manner in which a guilty plea eliminates the need for further proceedings. But when the response leaves the matter turning on credibility, the interests at stake are as substantial as those implicated by an extended suspension, and no perceived exigency exists, a university must do more than presume one version to be correct."); ***ODonnell v. Harris County, Texas***, 892 F.3d 147, 158-61 (5th Cir. 2018) (on panel rehearing), *overruled on other grounds by Daves v. Dallas County, Texas*, 22 F.4th 522 (5th Cir. 2022) (en banc) ("Texas state law creates a right to bail that appropriately weighs the detainees' interest in pretrial release and the court's

interest in securing the detainee's attendance. Yet, as noted, state law forbids the setting of bail as an "instrument of oppression." Thus, magistrates may not impose a secured bail solely for the purpose of detaining the accused. And, when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order. Accordingly, such decisions must reflect a careful weighing of the individualized factors set forth by both the state Code of Criminal Procedure and Local Rules. Having found a state-created interest, we turn now to whether the procedures in place adequately protect that interest. . . .As the district court found, the current procedures are inadequate—even when applied to our narrower understanding of the liberty interest at stake. The court's factual findings (which are not clearly erroneous) demonstrate that secured bail orders are imposed almost automatically on indigent arrestees. Far from demonstrating sensitivity to the indigent misdemeanor defendants' ability to pay, Hearing Officers and County Judges almost always set a bail amount that detains the indigent. In other words, the current procedure does not sufficiently protect detainees from magistrates imposing bail as an 'instrument of oppression.'. . .The sheer number of bail hearings in Harris County each year—according to the court, over 50,000 people were arrested on misdemeanor charges in 2015—is a significant factor militating against overcorrection. With this in mind, we make two modifications to the district court's conclusions regarding the procedural floor. First, we do not require factfinders to issue a written statement of their reasons. While we acknowledge 'the provision for a written record helps to insure that [such officials], faced with possible scrutiny by state officials ... [and] the courts ... will act fairly,'. . . such a drastic increase in the burden imposed upon Hearing Officers will do more harm than good. We decline to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process. . . . [S]ince the constitutional defect in the process afforded was the *automatic* imposition of pretrial detention on indigent misdemeanor arrestees, requiring magistrates to specifically enunciate their individualized, case-specific reasons for so doing is a sufficient remedy. Second, we find that the district court's 24-hour requirement is too strict under federal constitutional standards. . . .We conclude that the federal due process right entitles detainees to a hearing within 48 hours. Our review of the due process right at issue here counsels against an expansion of the right already afforded detainees under the Fourth Amendment by *McLaughlin*. We note in particular that the heavy administrative burden of a 24-hour requirement on the County is evidenced by the district court's own finding: the fact that 20% of detainees do not receive a probable cause hearing within 24 hours despite the statutory requirement. Imposing the same requirement for bail would only exacerbate such issues. The court's conclusion was also based on its interpretation of state law. But while state law may define liberty interests protected under the procedural due process clause, it does not define the procedure constitutionally required to protect that interest. . . . Accordingly, although the parties contest whether state law imposes a 24- or 48-hour requirement, we need not resolve this issue because state law procedural requirements do not impact our federal due process analysis. The district court's definition of ODonnell's liberty interests is too broad, and the procedural protections it required are too strict. Nevertheless, even under our more forgiving framework, we agree that the County procedures violate ODonnell's due process rights."); ***Cannon v. Vill. of Bald Head Island, N. Carolina***, 891 F.3d 489, 502-06 (4th Cir. 2018) ("In the context of a claim that a governmental defendant violated a former employee's Fourteenth Amendment rights by publicly

disclosing the reasons for the employee's discharge, as here, this Court has held that this opportunity to be heard 'must be granted at a meaningful time.'. . This is because, as we further held, '[a]n opportunity to clear your name *after* it has been ruined by dissemination of false, stigmatizing charges is not "meaningful."'. . .With this legal framework in mind, we now must determine (1) whether, under clearly established law, the Officers were deprived of a protected liberty interest and (2) if so, whether, under clearly established law, the Officers were deprived of that interest without due process of law. . . . '[H]arassment,' 'sexual harassment,' and 'detrimental personal conduct' amount to 'significant character defects,'such as 'immorality,'. . . and therefore stigmatize the Officers' reputation in a constitutionally cognizable manner. Additionally, the Officers' evidence shows that after the Department released the relevant documents, each Officer either had difficulty securing a job or accepted a job with less significant responsibilities and lower pay, thereby creating a reasonable inference that the claims in the termination letters did, in fact, place a stigma on the Officers' reputations with prospective employers. . . . This Court decided *Sciolino*, *Ledford*, *Ridpath*, and the other cases cited above years before the Department discharged the Officers and disclosed the grounds for their termination. Accordingly, under our qualified immunity analysis, it was clearly established at the time of the disclosures that the disclosed allegations would place a constitutionally cognizable stigma on the Officers' reputations. . . .In sum, under our qualified immunity analysis, at the time of the disclosures this Court's precedent clearly established that the allegedly stigmatizing statements were made public by Peck. . . . In sum, we conclude that under clearly established precedent, Peck made public false and stigmatizing charges regarding the grounds for the Officers' termination. This satisfies *Sciolino*'s four prongs, thus demonstrating deprivation of the Officers' constitutionally cognizable liberty interests under clearly established law. . . . Having concluded that this Court's decisions clearly established that Peck deprived the Officers of a liberty interest, we now must determine whether, under clearly established law, the Officers were deprived of that interest 'without due process of law.'. . As explained above, when a governmental employer places an employee's reputation 'at stake' by publicly disclosing defamatory charges, the employee is entitled to a hearing 'to "clear [his] name" against [the] unfounded charges.'. . Here, the Officers *never* received a name-clearing hearing. Accordingly, Peck has denied the Officers due process of law. Peck nonetheless asserts that the failure to afford the Officers a name-clearing hearing does not amount to a violation of clearly established law for two reasons: (1) he 'w[as] not required to provide [the Officers] with an adversarial pre-termination hearing,'. . . and (2) '[the Officers] had alternative processes to contest the contents of the termination letter[s][.]'. . We disagree. . . . In *Sciolino*, this Court clearly established that '[a]n opportunity to clear your name *after* it has been ruined by dissemination of false, stigmatizing charges *is not* "*meaningful*."'. . Accordingly, regardless whether the Fourteenth Amendment obliged Defendants to afford the Officers an adversarial, *pre-termination* name-clearing hearing, *Sciolino* established that the Fourteenth Amendment required Defendants to afford the Officers a constitutionally adequate name-clearing hearing before *publicly disclosing* false information regarding the basis for the Officers' termination that, in fact, restricted their ability to obtain new employment."); ***Breuder v. Bd. of Trustees of Cmty. Coll. Dist. No. 502***, 888 F.3d 266, 270-71 (7th Cir. 2018) ("The Board's members contend that the validity of Breuder's contract was at least uncertain, so that they could not have violated any

clearly established rule. There are two problems with this contention. The first is that, when discharging Breuder without giving him an opportunity for a hearing, the Board issued a statement declaring that he had committed misconduct. *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), holds that even a person who has no property interest in a public job has a constitutional entitlement to a hearing before being defamed as part of a discharge, or at a minimum to a name-clearing hearing after the discharge. See also *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971). The Board has not offered that opportunity to Breuder, and the members insist that they need not do so. The law is clearly established against them. The second is that a hearing is required whenever the officeholder has a 'legitimate claim of entitlement'. . . to keep the job. Breuder, who had a written contract for a term of years, assuredly had a legitimate *claim* of entitlement to have the Board honor its promise. The claim may have failed in the end, but that did not eliminate the claim's existence. . . . When the decision is made by a body's governing board, it would be hard to contend that the action is random and unauthorized for the purpose of *Parratt v. Taylor* . . . and its successors."); ***Mancini v. Northampton County***, 836 F.3d 308, 310, 316-19 (3d Cir. 2016) ("This case requires us to consider whether there is an exception to the ordinary requirements of procedural due process when a government employee with a protected property interest in her job is dismissed as part of a departmental reorganization that results in the elimination of her position. We have not previously considered this so-called 'reorganization exception.' We hold that a reorganization exception to constitutional procedural due process cannot apply as a matter of law where, as here, there is a genuine factual dispute about whether the reorganization was pretext for an unlawful termination. . . . Northampton contends it was not required to provide Mancini with any procedural due process before, or after, it terminated her, because once the reorganization of the Solicitor's Office occurred, Mancini's position no longer existed. Any challenge to the injustice of Mancini's dismissal would have been 'futile,' according to Northampton, because as a factual matter there was no longer room for her in the County government. . . We have not previously considered the existence of this so-called 'reorganization exception' to procedural due process, and we decline to apply any exception to Northampton's conduct in this case. Because the jury could have reasonably concluded that the reorganization of the Solicitor's Office was pretext for unlawfully terminating Mancini, we do not reach the question of whether there are exceptions to the requirements of procedural due process where the government engages in a legitimate person-neutral reorganization. Although the jury was not directed to make a specific finding on pretext, the jury found that Northampton violated Mancini's due process rights, and we agree with the District Court that Mancini presented sufficient evidence of pretext to support that finding. Mancini presented evidence from which a jury could reasonably conclude that the Defendants' purported concern for cost-savings did not actually animate the reorganization. There was ample evidence that the Defendants decided to eliminate the two full-time assistant county solicitor positions, and replace them with part-time positions, based not on identity-neutral, cost-driven reasons, but based on their knowledge of Mancini and the people who would come to occupy the part-time positions. . . .Finally, we reject Northampton's argument that a 'due process claim is not available if a layoff was made pursuant to a reorganization in fact, regardless of a possible improper motive behind the reorganization.'. . We are aware of no court that has permitted the government to subvert the

requirements of the Fourteenth Amendment with a sham reorganization. If the government were allowed to undertake sham reorganizations to dismiss an employee who was otherwise entitled to due process, Northampton's proposed 'reorganization exception' would eviscerate a public employee's procedural due process rights altogether. In conclusion, we will not permit the government to target an individual for dismissal and then violate that individual's procedural due process rights under the guise of a reorganization. . . . There was sufficient evidence from which the jury could conclude that the reorganization was a pretext for targeting Mancini. Northampton was therefore not exempt from providing Mancini, a protected career service employee, with procedural due process when it selected her for dismissal."); ***Rebirth Christian Academy Daycare, Inc. v. Brizzi***, 835 F.3d 742, 746-49 (7th Cir. 2016) ("We. . .begin with the question whether the law clearly established that Rebirth had a property interest in its registration as a child care ministry. We conclude that the answer is yes. This question is not a close one, as the law on this issue has been clearly established for decades. . . . Thus, any reasonable government official would have understood that Rebirth had a property interest in its registration as a child care ministry. . . .Numerous Supreme Court decisions reinforce our conclusion that, because Rebirth was entitled to retain its registration unless it violated state law, Rebirth's ability to operate a registered child care ministry was a clearly protected property right at the time that the defendants revoked its registration. . . .These decisions thus demonstrate that the question whether Rebirth had a protected property interest in its registration was beyond debate. . . . It has long been clearly established that the 'root requirement' of due process is that a person 'be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'. . .Rebirth was clearly entitled to a pre-deprivation opportunity to challenge the proposed loss of its registration. We agree with the district judge's assessment—unchallenged by the appellees—'that the interest at stake here, to wit, [Rebirth's] interest in the continued operation of its child care business, is an important one.'. . Moreover, the appellees have not identified any governmental interest that might have arguably justified their failure to provide Rebirth with an opportunity to be heard *before* depriving it of this significant property interest. The fact that the Bureau did not revoke the registration until two weeks after it gave Rebirth notice of the revocation further undermines any potential argument that the Bureau was responding to some perceived emergency necessitating that it quickly rescind Rebirth's registration without first giving it a chance to challenge the Bureau's allegations. We therefore conclude that, by revoking Rebirth's registration without first providing the organization with an opportunity to be heard, the appellees violated clearly established law and are not entitled to qualified immunity. The appellees argue that the proper inquiry is not whether Rebirth had a clearly established right to be heard before its registration was revoked but whether it had a clearly established right to an administrative appeal of the type available to license holders. We reject this argument. Contrary to the appellees' assertions, this is not a case about 'what amount of process is due.' Rather, this is a case in which due process clearly required *some* pre-deprivation opportunity to be heard and the appellees provided *no* opportunity for a hearing, though nothing prevented them from doing so. . . .[A]lthough the appellees are correct that no statutory provision requires an administrative appeal before the revocation of a registration, this does not mean that Brizzi and Gargano are

excused from providing Rebirth with due process. True, the statutory scheme did not require that registered child care ministries receive an administrative appeal of the type afforded to license-holders, but neither did it prohibit the appellees from providing registered child care ministries with *some* type of pre-deprivation hearing. The issue then is whether Rebirth adequately alleged that the appellees personally decided to withhold from Rebirth the pre-deprivation hearing that they could have provided. We conclude that Rebirth's complaint plausibly alleges that Brizzi and Gargano were personally involved in depriving Rebirth of an opportunity for a pre-deprivation hearing, and thus the complaint satisfies the requirements of notice pleading. . . . In sum, we do not decide the type of pre-deprivation hearing that Rebirth was entitled to or that Rebirth shall now recover damages. We conclude only that Rebirth's complaint alleges that the appellees personally violated clearly established law by depriving Rebirth of a property interest (its registration) without first providing Rebirth with *any* opportunity to be heard. Rebirth will, of course, need more than allegations to prevail on these claims; it will need evidence proving that these defendants were personally involved in the constitutional violation. Given the procedural posture of this case, the district court should, if necessary, provide Rebirth with an opportunity for additional discovery so that it may obtain such evidence."); ***Thompson v. District of Columbia (Thompson III),*** 832 F.3d 339, 345 (D.C. Cir. 2016) ("[T]he argument that Thompson was 'reclassified' rather than 'transferred' rests on a distinction without a difference. The bottom line of our holding in *Thompson II* was that Thompson, as a career civil servant, was stripped of his property interest when he was placed in a position that had previously been marked for elimination. We will not revisit that legal conclusion now. . . Whether Thompson was 'transferred' or 'reclassified' into this position, he was effectively terminated at that time because the Security Officer position had already been slated for elimination. For our purposes, it is the substance of a constructive termination, and not the semantics of a 'transfer' or 'reclassification,' that matters in determining whether Thompson was deprived of his protected property interest in his job. We likewise reject the District's argument that Thompson received all of the process that he was due. In support, the District points to the notice that Thompson received of his right to challenge the elimination of his *new* position in the reduction in force. But, as we explained in *Thompson II*, Thompson was constructively terminated at the time of his transfer, not when this new position was eliminated. He thus had a right to notice of that transfer and a hearing to challenge his transfer before it was made. . . The District does not contend that Thompson received any such notice or opportunity to contest the transfer. And, although the Supreme Court has indicated that a hearing may be postponed in 'extraordinary situations where some valid governmental interest is at stake,'. . . the District does not argue that any such circumstances existed in this case. At a minimum then, Thompson's pre-deprivation right to due process was violated when the District assigned him to a position scheduled for imminent elimination without notice or a hearing."); ***Warren v. Pataki***, 823 F.3d 125, 141 (2d Cir. 2016) ("The plaintiffs were constitutionally entitled only to 'notice and an adversarial hearing prior to civil commitment.'. . Principles of due process did not require the defendants to provide the plaintiffs with a hearing conducted pursuant to Correction Law § 402, nor were they constitutionally entitled to call a physician, psychiatrist, or expert witnesses favorable to them, no matter that their ability to call such witnesses might have rendered the proceedings fairer. Thus, in establishing their 'no harm, no foul' defense, the defendants were not

required to present evidence—either through expert testimony or otherwise—establishing that the plaintiffs would have been confined under Correction Law § 402 or under Article 10, or that the plaintiffs would have been committed in the face of testimony by favorable witnesses. Rather, the defendants needed only to have presented *some* evidence sufficient to enable a jury to conclude that the plaintiffs would have been civilly committed following an adversarial proceeding on notice."); ***Oyama v. Univ. of Hawaii***, 813 F.3d 850, 875 (9th Cir. 2015) ("Here, the University's denial of Oyama's student teaching application satisfied the due process requirements set forth in *Horowitz.* As in *Horowitz*, the University 'fully informed [Oyama] of the faculty's dissatisfaction' with his performance: multiple professors told Oyama about their concerns regarding his suitability for the teaching profession. The University's decision was also 'careful and deliberate.' The University initially explained the reasons for its decision in Dr. Moniz's detailed letter to Oyama. The University then provided Oyama a robust process for appealing its initial decision: Dean Sorensen formed a multidisciplinary committee, which interviewed Oyama and three professors of his choice and prepared a detailed report reviewing the Dr. Moniz's decision. Dean Sorensen then provided Oyama another letter explaining the committee's findings and affirming the University's decision to deny his application. This process was sufficiently careful and deliberate to meet the requirements of the Due Process Clause."); ***Rivera-Corraliza v. Morales***, 794 F.3d 208, 223-24 (1st Cir. 2015) ("Normally due process requires notice and a hearing of some sort before the government takes away property—the state, in other words, usually must say what it intends to do and then give affected persons the chance to speak out against it. . . 'Normally' and 'usually' are words that suggest exceptions. And that is the case in this corner of the law, because due process is a 'flexible' concept not governed by any '[r]igid taxonomy.'. . . Plaintiffs' right to preseizure process—an issue on which they bear the burden, . . . turns on whether the pined-for process is a reasonable requirement to impose. And that requires comparing the benefit of the procedural protection sought—which involves the value of the property interest at issue and the probability of mistaken deprivations if the protection is not provided—with the cost of the protection; this is known in legal circles as the *Mathews* test. . . Dooming plaintiffs' due-process claim is their failure to say anything on this all-important test, giving us zero case analysis to help us see how this benefit/cost comparison would shake out. What they have done is not the type of serious effort needed on a complex issue—especially when their briefs present a slew of other legally intricate claims. And we will not do their work for them. . . So their complaint about not getting preseizure process is waived."); ***Shinault v. Hawks***, 782 F.3d 1053, 1058 (9th Cir. 2015) ("The results of the *Mathews* balancing test point to the need for a pre-deprivation hearing prior to freezing Shinault's funds. Compared to the cases above, the State's interest does not require such prompt action that a pre-deprivation hearing is infeasible. While state officials could temporarily suspend individuals from their jobs without a hearing in order to preserve the integrity of those regulated professions and protect the public, the integrity of Oregon's prison system does not diminish if a hearing precedes a freeze of inmate assets, particularly because the funds in fact remain in the State's control. Nor does the financial viability of the correctional system require immediate recoupment of inmate costs given their insignificance in relation to ODOC's overall budget. In other words, Oregon's interest in administering cost-effective and safe prisons is significant, but recouping incarceration costs does not rise to a level which would obviate the need

for a pre-deprivation hearing in advance of action. Given Shinault's substantial interest, the risk of erroneous deprivation, and the ability to provide a hearing without compromising a significant government interest, we hold that a state must provide a hearing prior to freezing a significant sum in the inmate's account. Thus, we conclude that Shinault received insufficient due process as the result of Oregon's actions."); ***Montanez v. Sec'y Pennsylvania Dep't of Corr.,*** 773 F.3d 472, 484-85 (3d Cir. 2014) ("Unlike the cases in which we have held that pre-deprivation process is unnecessary, there is nothing about the DOC Policy that requires the DOC to take immediate action to deduct funds from inmate accounts to satisfy court-ordered obligations. Any short delay that might result from offering inmates an opportunity to be heard on application of the DOC Policy before it is applied would not seriously undermine the Commonwealth's ability to recover costs. . . . In sum, considering the factors required by *Mathews,* the government's interest in collecting restitution, fines, and other costs from convicted criminals does not overcome the default requirement that inmates be provided with process before being deprived of funds in their inmate accounts. The District Court therefore erred in holding that the DOC's postdeprivation grievance procedures were all that the Constitution required."); ***Schmidt v. Creedon***, 639 F.3d 587, 589, 590 (3d Cir. 2011) ("We now hold that, except for extraordinary situations, under Pennsylvania law, even when union grievance procedures permit a policeman to challenge his suspension after the fact, a brief and informal pre-termination or pre-suspension hearing is necessary. However, because this rule was not clearly established at the time of Schmidt's suspension, we conclude that appellees are entitled to qualified immunity.")

See also ***Grimm v. City of Portland***, 125 F.4th 920, 926-28 (9th Cir. 2025) ("Here, the City provided Grimm with all the notice that the Fourteenth Amendment requires. The red warning slip placed on the car's windshield five days after Grimm had parked the car was reasonably calculated to inform him that the car would be towed. . . Although the subsequent tow slip was placed on the windshield the same day the car was towed, the warning slip provided two days' advance notice that the car would be removed from the city street. . . And, unlike the earlier citations placed on the car, the warning slip explicitly stated that the car would be towed if it were not moved. . . Grimm cites the Supreme Court's decision in *Mennonite Board of Missions v. Adams, . . .* for the proposition that the warning slip placed on the car's windshield was inadequate. And, indeed, the Court held in that case that 'posted notices were inadequate to apprise a property owner of condemnation proceedings when his name and address were readily ascertainable from both deed records and tax rolls.'. . But *Mennonite Board of Missions* is readily distinguishable. There, the Court addressed the notice that a mortgagee must receive before the forced sale of real property. . . At issue here is the notice that an individual must receive before the temporary seizure of a car. Our precedents have already made clear that a ticket placed on a car generally provides adequate notice of an impending tow. . . And while it is undoubtedly the case that an individual has an interest against being even temporarily deprived of a vehicle, . . . that interest is different than an individual's interest against the permanent loss of real property. . . . A tow warning slip—or a similar document or ticket expressly warning of an impending tow—placed on a car two days before a tow takes place is notice reasonably calculated to alert the user of that car to an impending tow. An individual with an interest in preserving uninterrupted access to his car would revisit the

car after his parking session ended or his meter ran, and, seeing such a notice, would either move the vehicle or pay for additional parking time. . . A standard requiring the City to mail out a notice, send an email, or make a phone call in addition to leaving a warning slip would strike the wrong balance between the ' "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment."'. . It is thus perhaps unsurprising that Grimm cannot point to any cases requiring such action before a car is towed. . . . While we do not dictate the precise form of notice that a municipality must provide before towing a vehicle, such notice must contain an express warning that the vehicle may be towed. A citation that lacks an express tow warning would not provide the notice that the Fourteenth Amendment requires. Nor would a warning provided only shortly before towing takes place be constitutionally adequate. . . In the case before us today, Portland complied with these requirements. By placing a warning slip on the windshield of the Accord two days before the car was towed, the City provided notice reasonably calculated to alert Grimm of the impending tow. The fact that the citations and warning slip remained on the car undisturbed did not provide the City with actual knowledge that its attempt to notify Grimm had failed. . . The district court's grant of summary judgment to the City is therefore **AFFIRMED**."); ***Santiago v. City of Chicago***, No. 19 C 4652, 2020 WL 1304753, at *5, *8 (N.D. Ill. Mar. 18, 2020) ("Santiago alleges that the City's practice of sending notice by mail only after it tows and impounds an allegedly abandoned vehicle has deprived her and the proposed Tow Class of their procedural due process rights. The City seeks the dismissal of this claim because, it contends, Santiago has failed to allege that it provided Santiago with sufficient notice; the ordinance is not facially unconstitutional; and she has failed to adequately allege an official policy that deprived her of due process. . . .[After doing *Mathews* analysis, court concludes] Santiago has plausibly alleged that the City denied her and the members of the Tow Class procedural due process by towing their allegedly abandoned vehicles without first providing notification by mail.")

See also ***Fritz v. Evers***, 907 F.3d 531, 535-36 (7th Cir. 2018) (Hamilton, J., concurring) ("Wisconsin's public designation of a teacher as 'under investigation' for suspected 'immoral conduct' can inflict a stigma that makes a teacher unemployable, as a matter of fact if not law, until the investigation is resolved. If that's correct, the teacher may well be entitled at least to notice of the charge being investigated and a name-clearing hearing—and within a reasonable time. . . . Plaintiff Fritz was not charged with or convicted of any such crimes. He resigned from his last teaching job. The only statutory basis for reporting and investigating him was his former employer's 'reasonable suspicion' that his resignation related to his having engaged in 'immoral conduct.' Under the statute, 'immoral conduct' includes a teacher's use of school computers for pornography, assisting child predators with obtaining school positions, or otherwise 'endanger[ing] the health, safety, welfare, or education of any pupil' by violating 'commonly accepted moral or ethical standards.'. . The broad definition is nearly as broad as the allegations that Socrates was corrupting the youth of Athens. But given the statutory emphasis on possible sexual abuse of school children, the stigma of an investigation for someone in Fritz's shoes should be apparent. To use an example from the state's brief, what administrator in her right mind, in deciding to hire a new teacher, would cross her fingers and hope that a teacher under investigation might have only given a cigarette to a high-school student when it is possible he engaged in sexual

activity with a child? When a teacher comes under reasonable suspicion of abusing students, the state's interests are obvious and powerful. Everyone has an interest in resolving the situation accurately, fairly, and quickly. But that leads us to two problems under state law that surfaced in Fritz's case. State law requires that a report be made promptly, within just 15 days after an administrator learns of the basis for the report. . . Once a teacher has been reported, however, the statutes impose no time limit on the department to determine whether probable cause supports the report and whether to initiate license revocation proceedings. . . Also, when the department begins an investigation, it is supposed to 'Notify the licensee that an investigation is proceeding, the specific allegations or complaint against the licensee, and [allow] the licensee [to] respond to the investigator regarding the complaint or allegation.'. . Fritz alleges here that he did not receive the required notice. As a result, Fritz was in limbo indefinitely and did not know why. Wisconsin has the power to suspend a teacher's license, of course. That formal step would require due process, at least in the minimal form of notice and a timely and meaningful opportunity to be heard. . . . Publicly listing accused teachers as 'under investigation' appears to be an easier and cheaper alternative to license suspension, but with similar practical consequences. It effectively suspends some teachers' careers, but without a prompt and fair opportunity to be heard and to clear their names. The reasoning of *DuPuy* may well apply to this system. It is disingenuous for the state to contend here that an 'under investigation' designation is *not* meant to affect a teacher's status. The department tells school administrators to use the designation when making hiring decisions. . . The department assures administrators that its website 'will indicate in red type at the top of the page if a person's license [is] under investigation.'. . The department further encourages administrators to cooperate in investigations so as not to 'allow[ ] potentially dangerous persons to remain in the classroom.'. .Wisconsin undoubtedly has the power and duty to license teachers and so to act as the gatekeeper to state education employment. With that power comes the responsibility to be fair to teachers, too, which includes complying with state law and resolving these cases promptly. If another teacher has an experience under this system similar to Fritz's, it might add up to a federal due process violation, calling at least for timely injunctive relief as in *DuPuy v. Samuels*. But complying with state law would go a long way toward avoiding such problems.")

But see ***Gilbert v. Homar***, 117 S. Ct. 1807 (1997) (holding that a State does not violate the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay.); ***Pinkston v. Kuiper***, 67 F.4th 237, 241-43 (5th Cir. 2023) ("[N]either *Harper* nor *Riggins* articulated constitutional standards governing the isolated administration of a single dose of an antipsychotic in a threatening, time-sensitive prison situation. . . . Even if we did apply the Fourteenth Amendment, the result would not change. Because the parties raise it, we consider the example set by our sister circuit in *Hogan v. Carter*, 85 F.3d 1113 (4th Cir. 1996). That case considered a medical practitioner's choice to administer an emergency dose of antipsychotic Thorazine to an enraged inmate who, like Pinkston, was kicking against his door and behaving aggressively toward staff over a period of several hours. . .Like Pinkston, the plaintiff in *Hogan* argued that he was entitled to a hearing before medication. . . In *Hogan*, the *en banc* Fourth Circuit appeared to frame the question presented as one of

procedural due process. . . . The Fourth Circuit decided that the Supreme Court in *Washington v. Harper* 'did not have before it, and did not address,' what procedure might be required in Hogan's emergency circumstances. . . The Fourth Circuit then concluded that the Constitution does not require 'adversary proceedings at any hour of the night' while 'the very inmates for whose protection the state is constitutionally responsible remain in danger of injury at their own hands.'. .The Fourth Circuit's decision comports with the law in this Circuit, which similarly recognizes that emergency circumstances justify the abbreviation or elimination of pre-deprivation procedures like hearings. . . That's in part because the procedure due in each case varies with the circumstances of that case and the competing interests involved. . . So, if we were to resolve Pinkston's claims using a Fourteenth Amendment procedural due process framework, we would consider not only his liberty and medical interests, but also the significant government interest in 'maintaining institutional security and preserving internal order' within his penitentiary. . . Here, Pinkston received more than the procedure he was due. Pinkston's principal counterargument is that he received no process at all. We disagree. It's not as if Dr. Kuiper suddenly and arbitrarily injected Pinkston. Rather, Dr. Kuiper injected him only after Pinkston precipitated a disturbance that subjectively appeared imminently dangerous, only after multiple rounds of verbal persuasion failed, and only after a licensed medical professional determined that medication was appropriate. . . The district court erred when it declined to apply an Eighth Amendment framework to Pinkston's dispute over medical treatment. And, even if a Fourteenth Amendment framework were apposite, Pinkston received all the process he was due."); ***Cunningham v. Blackwell***, 41 F.4th 530, 536-38 (6th Cir. 2022) ("While notice and an opportunity to be heard remain the hallmarks of due process, they need not necessarily arrive before the deprivation does. . . While 'some kind of a hearing' generally must occur before the State fires a tenured employee, . . . the same is not true for other discipline. When the State imposes a lighter penalty, such as a suspension, a post-deprivation hearing or a combination of pre- and post-deprivation safeguards may suffice. . . . The professors, to start, maintain that our cases clearly establish their right to pre-deprivation notice of the charges and the evidence against them as well as a pre-deprivation hearing. But the Supreme Court has assiduously avoided insisting on pre-deprivation process, especially for suspended employees as opposed to fired ones."); ***Cornel v. Hawaii***, 37 F.4th 527, 534-36 (9th Cir. 2022) ("The parole office's decision to suspend Cornel's parole in 2011—after trying and failing to contact her with the information she provided—did not violate due process because the Fourteenth Amendment does not require notice before a parole suspension hearing. *See Morrissey v. Brewer*, 408 U.S. 471, 485–90 (1972). Indeed, at the earliest available opportunity, Cornel was given due process and a hearing. . . .Nor did the delay in Cornel's arrest violate her due process rights. Fifty years ago, we stated that '[t]here is substantial authority for the position that due process requires reasonable diligence in the issuance and execution of a warrant for arrest for an alleged parole violation.' *McCowan v. Nelson*, 436 F.2d 758, 760 (9th Cir. 1970) (per curiam) (collecting cases). We have never explained what 'reasonable diligence' requires. We now clarify that 'reasonable diligence' is but one factor to consider when evaluating whether a delay in arrest violates due process, and we hold that a delay in a parolee's arrest does not violate due process when the parolee is largely responsible for the delay and cannot demonstrate prejudice. . . . To be sure, notions of fundamental fairness seem to require that the government execute a retake warrant with reasonable

speed. But we have never held that the Due Process Clause requires the government to find and arrest a suspect in a specified amount of time. We would face a thornier question if there were evidence that the parole office had actual knowledge of Cornel's whereabouts. Instead, Cornel gave the parole office new contact information, never responded to the parole office's attempts to contact her with that information, and now blames the parole office for taking too long to figure out where she was. Cornel failed to fulfill her parole obligation to provide the parole office with correct and up-to-date contact information. Even if the parole office should have acted more diligently, Cornel was not deprived of due process when the delay was mainly caused by her failure to inform the parole office of her whereabouts."); ***Lunon v. Botsford***, 946 F.3d 425, 430-32 (8th Cir. 2019) ("Lunon's claim is that defendants had an affirmative constitutional duty to learn that he was Bibi's owner, a duty they breached by failing to scan Bibi's microchip. . . .We conclude that longstanding Arkansas law is highly relevant, indeed arguably controlling on the due process issue in this case. . . .Lunon concedes that defendants had the right to seize Bibi as a stray dog under the Pulaski County ordinance, and to impound, adopt out, and spay the dog under the City of North Little Rock Municipal Code. But, he argues, defendants violated his procedural due process right to affirmative notice before Bibi was adopted out and spayed. The Supreme Court of Arkansas expressly rejected this claimed procedural right in *Howell v. Daughet* and *Fort Smith v. Dodson*. If one views those decisions as defining the dimensions of Lunon's procedural due process property interest under *Board of Regents v. Roth*, then he has no due process claim. If those decisions are instead viewed as declaring 'what process is due,' that is a federal question so they are not controlling precedents. . .We agree with the Supreme Court of Arkansas that affirmative pre-deprivation notice is not constitutionally required in this situation, when an animal shelter holds a stray dog for more than five days and then adopts out and spays the dog after the owner fails to file a claim. . . . [T]here is no *constitutional* duty to scan a stray dog for a microchip, and '[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.'. . Lunon had a claim under state law (barred by statutory immunity) that Dupree's negligent failure to scan Bibi proximately caused Lunon's loss of the dog's substantial economic value, but 'the Due Process Clause is simply not implicated by a *negligent* act of an official.'"); ***Straub v. City of Spokane***, 738 F. App'x 392 (9th Cir. 2018) ("Here, we find that the *timing* of the proposed name-clearing hearing satisfied due process. Straub certainly had an interest in holding such a hearing prior to the press release and the loss of his position. However, Defendants were removing the head of their police department—an important, high-profile position—and had a stronger interest in quickly executing that decision and communicating its rationale to the public. Indeed, if due process required a pre-deprivation hearing in such circumstances, public employers would have an incentive to terminate at-will employees without public explanation. Moreover, there is no merit to Straub's contention that Defendants have failed to establish that the proposed hearing's *content* would have been procedurally adequate. Defendants offered Straub a name-clearing hearing in writing on four occasions, and extended the opportunity, through counsel, to 'discuss timing and appropriate process' for the hearing. The record is devoid of any indication that Straub ever sought to schedule the hearing or negotiate its content. We therefore find that Defendants did not violate Straub's right to due process. In any event, the individual defendants

are entitled to qualified immunity. Straub has failed to cite any precedent that would have, 'beyond debate,' informed them that due process mandated a *pre*-deprivation hearing under these circumstances."); ***Recchia v. City of Los Angeles Dep't of Animal Servs.***, 889 F.3d 553, 561-62 (9th Cir. 2018) ("Recchia's birds were seized under the auspices of California Penal Code § 597.1(a)(1), which provides for the immediate seizure of animals where '[a]ny peace officer, humane society officer, or animal control officer' has 'reasonable grounds to believe that very prompt action is required to protect the health or safety of the animal or the health or safety of others.' Accordingly, the relevant question is whether § 597.1 provides for adequate process, in light of the interests it serves, not whether this particular seizure was proper. . . . It does not matter whether Recchia's pigeons were properly seized under the statute or whether there was an emergency here. . . For the purposes of the Fourteenth Amendment analysis, we are not assessing whether this particular seizure was proper, but instead whether the statute provides due process. . . We hold that it does and so affirm the district court's grant of summary judgment on the Fourteenth Amendment claim as to the Officers."); ***Roybal v. Toppenish Sch. Dist.***, 871 F.3d 927, 933 (9th Cir. 2017) ("In its order, the district court determined Roybal did not receive due process because Toppenish violated state law. Specifically, the district court concluded that Toppenish did not comply with Washington Revised Code § 28A.405.300, which entitles an employee to a predeprivation probable cause hearing. Toppenish's failure to comply with section 28A.405.300 does not resolve the issue currently before us: whether Toppenish violated federal due process, a question of federal, not state, law. . . Federal due process does not necessarily entitle a plaintiff to the same procedures provided by state law. Rather, under federal law, what process is due is determined by context, to be analyzed in accordance with the three-part balancing test described in *Mathews v. Eldridge*[.] . . . We recognize that a violation of state law causing the deprivation of a federally protected right may form the basis of a § 1983 action. But this rule does not apply where, as here, the state-created protections reach beyond that guaranteed by federal law. . . Under Washington law, employees are entitled to notice and a trial-like predeprivation hearing to determine whether the adverse employment action is supported by probable cause. . . As part of the hearing, the parties may conduct discovery and call witnesses. . . To satisfy federal due process minimums, by contrast, employees need only receive notice and an opportunity for a hearing before being deprived of their property interest. . . To that end, employees are entitled to 'oral or written notice of the charges ..., an explanation of the employer's evidence, and an opportunity [for employees] to present [their] side of the story.'. . Washington law, therefore, provides greater protection than federal law and the district court erred in resting its analysis on a violation of state law."); ***Panzella v. Sposato***, 863 F.3d 210, 219 (2d Cir. 2017) ("We conclude that Panzella's proposed alternative to an Article 78 proceeding—a prompt, post-deprivation hearing consistent with the conditions set forth in *Razzano* [*v. Cty. of Nassau,* 765 F. Supp. 2d 176 (E.D.N.Y. 2011)]––would prevent the unjustified deprivation of a person's property interest, and would not be unduly burdensome or costly to the government. Such a hearing would provide Panzella with a timely and inexpensive forum to challenge the County's retention of her longarms and would avoid placing on Panzella the burdens that inhere in an Article 78 proceeding.We therefore hold, consistent with the district court's decision in the instant case, and the decision in *Razzano,* that persons in Panzella's situation are entitled to a prompt post-deprivation hearing under the four conditions set

forth by the district court in this case and in *Razzano*.); ***Mickelson v. Cty. of Ramsey***, 823 F.3d 918, 923-27, 930 (8th Cir. 2016) ("Our court . . . must determine whether the district court correctly held that the county did not violate the arrestees' constitutional rights by collecting the $25 fee at booking without affording a pre-deprivation hearing. . . . Although this booking-fee policy presents an issue of first impression in our circuit, other courts have passed upon the constitutional validity of collecting a similar fee at booking. . . . As written, this policy allows for the correction of any errors inherent in the overinclusive system of upfront collection. If all deprived arrestees who are not convicted can recoup their $25 simply by sending in a form, the risk of error is minimal, limited only to the possibility that some arrestees temporarily will lose the use of $25. We do not discern any constitutionally significant value in the appellants' proposed alternative—delaying collection until after conviction—that would outweigh the state's valid interest in upfront collection of the fee. . . .Although Mickelson and Statham correctly note that the current system places the onus on the deprived arrestee to complete and submit a refund form before the county returns the booking fee, the appellants' complaint contains no allegation that this facially minor imposition is so cumbersome as to undermine the constitutional adequacy of this post-deprivation refund process. . . .With the *Sickles* and *Markadonatos* decisions in mind, we conclude that Mickelson and Statham did not plead facts sufficient to establish that Ramsey County's booking-fee policy fails to pass constitutional muster simply because it provides a post-deprivation remedy instead of a pre-deprivation hearing. The county has in place a coordinated refund process, and the modest private interest at stake does not approach those interests found to warrant a full-fledged pre-deprivation hearing. . . The district court thus correctly concluded that the county's interest in ensuring it can collect the statutorily authorized fee outweighs the minimal paperwork and temporary deprivation imposed on wrongfully deprived arrestees. . . Accordingly, we conclude that the *Mathews* factors show that a pre-deprivation hearing is not required and that a post-deprivation remedy may suffice. . . .In sum, in view of the modest private interests at stake, the substantial state interests in the current withholding system, and the appellants' failure to complete the existing refund process and demonstrate its alleged inadequacies, we conclude that Mickelson and Statham have not stated a plausible claim that the booking fee posed a violation of constitutional rights that is actionable under 42 U.S.C. § 1983."); ***Moody v. Michigan Gaming Control Bd.***, 790 F.3d 669, 678-79 (6th Cir. 2015) ("[A]lthough a state statute 'does not affront the Due Process Clause by authorizing summary suspensions' of horse-racing licenses 'without a presuspension hearing,' *Barry*, 443 U.S. at 63, *we* do not need to apply the *Mathews* criteria to the harness drivers, because the *Supreme Court* already has done so: a suspended harness-horse trainer (and so, we presume, a harness driver) is due the process of 'a prompt postsuspension hearing,' *id.* at 66. The harness drivers received a postsuspension hearing in Michigan state court. Whether or not plaintiffs ought to have received, as matter of Michigan state law, an additional hearing in front of an administrative agency does not affect the federal constitutional analysis. So we affirm the district court's grant of summary judgment insofar as it held that the defendants' suspension of plaintiffs did not violate the plaintiffs' due-process rights."); ***Tucker v. Williams***, 682 F.3d 654, 661 (7th Cir. 2012) ("There is only one property deprivation here: Williams' initial seizure of the backhoe. Due process did not require that Tucker be given a predeprivation hearing; Tucker's consent validated the seizure under the Fourth Amendment. When a predeprivation hearing is not required, due process only requires

that the government provide meaningful procedures to remedy erroneous deprivations. . . .Here, adequate postdeprivation procedures were available to Tucker; he could have brought a claim for conversion or replevin. . . What Tucker was entitled to, and got, was the right to seek relief against that seizure, and he had that by virtue of Illinois tort laws. We do not find a due process violation."); ***Gonzalez-Droz v. Gonzalez-Colon***, 660 F.3d 1, 14 (1st Cir. 2011) ("[W]e give great weight to the proposition that when the state reasonably determines that a license-holder poses a risk to patient safety, pre-deprivation process typically is not required. . . In these circumstances, moreover, the need for a pre-deprivation hearing is further diminished by the state's strong interest in upholding 'the integrity of [a] state-licensed profession[ ].'. . Neither the possible risk of an erroneous deprivation nor the possible benefit of additional safeguards shifts the balance. Especially in cases involving public health and safety and the integrity of professional licensure, the force of these factors is significantly diminished by the ready availability of prompt post-deprivation review. . . In this case, the provisional suspension did not take effect until May 2, 2007. The plaintiff was afforded a hearing roughly two weeks later (prior to the Board's decision to make the suspension final). Given this chronology, we do not believe that the lack of a pre-deprivation hearing offended due process."); ***Smith v. Jefferson County Bd. of School Com'rs***, 641 F.3d 197, 217 (6th Cir. 2011) (en banc) ("Because the Board engaged in legislative activity when it made the budgetary determinations that eliminated the alternative school, we hold that the Board did not violate the teachers' procedural-due-process rights. The Board's decision to abolish the alternative school and contract with Kingswood in order to save money was the result of weighing budgetary priorities, a legislative activity. . . Thus, because the Board was engaged in a legislative activity, there was no requirement that the teachers be given notice or an opportunity to be heard prior to the Board's decision to abolish the alternative school. . . In such circumstances, 'the legislative process provides all the process that is constitutionally due' when a plaintiff's alleged injury results from a legislative act 'of general applicability.'. . Therefore, we hold that the Board's actions did not violate the teachers' procedural-due-process rights."); ***Duncan v. State of Wisconsin Department of Health and Family Services***, 166 F.3d 930, ___ (7th Cir. 1999) ("We find the situation before us to be closely analogous to the one in *Gilbert*: there, the state was vindicating an interest to have only persons of high integrity on the police force; here, the state is trying to employ only individuals who can control their anger and keep a level head working with youthful offenders. In short, the process Duncan received during the period of his suspension without pay complied with the standards set out in *Gilbert*.").

See also ***City of Los Angeles v. David,*** 123 S. Ct. 1895, 1897, 1898 (2003) (per curiam) (30-day delay in holding a hearing after car was towed and stored for alleged parking violation "reflects no more than a routine delay substantially required by administrative needs. Our cases make clear that the Due Process Clause does not prohibit an agency from imposing this kind of procedural delay when holding hearings to consider claims of the kind here at issue."); ***City of West Covina v. Perkins***, 525 U.S. 234, 240, 241(1999) ("When the police seize property for a criminal investigation, . . . due process does not require them to provide the owner with notice of state law remedies. . . . Once the property owner is informed that his property has been seized, he can turn to . . . public sources to learn about the remedial procedures available to him. The City

need not take other steps to inform him of his options."). *See also* ***Gardner v. Evans***, 920 F.3d 1038, 1061-62 (6th Cir. 2019) ("Here, it is undisputed that details concerning the appeals process were available to the public on the City of Lansing's website. But that does not necessarily settle the matter. It is not a foregone conclusion that the mere posting of information on a city's website is a 'reasonably calculated' way, under all the circumstances, to apprise persons evicted from their homes that they may appeal the red tagging. To begin, evictions are a particularly significant deprivation, arguably more so than the temporary deprivation of certain pieces of property contemplated by the Supreme Court in *West Covina*. . . An eviction becomes all the more serious when, as here, a resident is evicted with no prior notice. . . .In this way, the case is more like *Memphis Light* than *West Covina*. Even so, the City points out that the red-tag notices provided the name and phone number of the inspector to call with questions. Thus, according to the City, if plaintiffs were curious about their options after the red tagging, all they needed to do was call the number. . . .We agree that the red tags provided adequate notice to the homeowners but disagree as to the tenants and other occupants of the homes who were forced to immediately evacuate the homes due to the red taggings. . . . On balance, a jury could find that the City's mere reliance on its website and the limited language of the red tag notices was not reasonably calculated to notify evicted tenants of their right to appeal and their 20-day window to do so. We therefore reject the district court's basis for granting summary judgment to the City and the inspectors on the post-deprivation notice claims."); ***Gardner v. Evans***, 811 F.3d 843, 846-48 (6th Cir. 2016) ("First, we address whether a constitutional violation occurred. The Tenants argue that the Inspectors violated their due process rights by failing to provide constitutionally sufficient notice of their ability to appeal the red-tag evictions. . . In response, the Inspectors assert that the telephone number and the offer to answer questions was sufficient to satisfy the constitutional notice requirement. . . They also assert that, because the Lansing Housing and Premises Code was extant and available to the public, the Tenants had constructive notice of the appeals process. . . The district court agreed with the Tenants, holding that our precedent in *Flatford* clearly established that direct and clear notice of an appeals process is necessary to satisfy the constitutional notice requirement. . . .For purposes of deciding this case, we need not determine whether the red-tags provided by the Inspectors meet the constitutional notice standard that we have just outlined. Even if we assume, without deciding, that the Tenants are correct and that the red-tags were constitutionally infirm, the Tenants cannot satisfy the second prong of the qualified immunity analysis, namely, whether this constitutional notice requirement was clearly established. . . .*Flatford* stands for the principle that the tenant is entitled to the same notice that is afforded to the landlord. But it does not clearly establish the particularity or specificity required for such notice. A diversity of precedent highlights this general lack of clarity regarding the notice requirement for a post-deprivation appeals process. . . . *Flatford* did not clearly establish that a notice of eviction must include an explicit reference to the availability of any post-deprivation appeals process and the manner in such an appeal may be pursued. The case law is not so clear on this point as to render the Inspectors' actions unreasonable."); *But see* ***Grayden v. Rhodes,*** 345 F.3d 1225, 1244 (11th Cir. 2003) (Distinguishing *West Covina* and holding "that when the tenants of Lafayette Square were evicted from their leasehold interests based on exigent circumstances and were given less than thirty-six hours to vacate the premises, they were entitled under *Mathews*

and *Mullane* to affirmative, contemporaneous notice of their right to challenge the condemnation order but they were not entitled to a pre-deprivation hearing. By 'affirmative' notice, we mean that they were entitled to notice above and beyond that provided by § 30A.11 of the City Code. By 'contemporaneous' notice, we mean that they were entitled to notice of their right to challenge the condemnation at the same time they were provided with the notice to vacate the premises.").

See also ***Jauch v. Choctaw County***, 874 F.3d 425, 429-32, 435 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 638 (2018) ("We address only the Fourteenth Amendment and hold that this excessive detention, depriving Jauch of liberty without legal or due process, violated that Amendment; for that reason, her motion for summary judgment should have been granted as to the Fourteenth Amendment Due Process claim. . . . While this appeal was pending, the Supreme Court issued *Manuel v. City of Joliet*, which held that a defendant seized without probable cause could challenge his pretrial detention under the Fourth Amendment. . . *Manuel* does not address the availability of due process challenges after a legal seizure, and it cannot be read to mean, as Defendants contend, that *only* the Fourth Amendment is available to pre-trial detainees. For example, even when the detention is legal, a pre-trial detainee subjected to excessive force properly invokes the Fourteenth Amendment. . . So, too, may a legally seized pre-trial detainee held for an extended period without further process. This Court has already addressed the interplay between the Fourth and Fourteenth Amendment, and *Manuel* fits with these prior cases. In 1996, we held the Fourth Amendment inapplicable to the usual pretrial detainee who was *properly arrested* and awaiting trial. . . When confronted with a defendant held upon probable cause who spent nine months in pretrial detention, we found the Fourth Amendment inapplicable and the due process clause of the Fourteenth Amendment implicated. *See Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000). The Fourth Amendment could not have been violated, we explained, because the plaintiff was originally arrested 'pursuant to a valid court order,' but the 'alleged nine month detention without proper due process protections' would amount to a due process violation if proven. . . By contrast to these cases, where a claim of unlawful detention was accompanied by allegations that the initial arrest was not supported by valid probable case, we held that analysis was proper 'under the Fourth Amendment and not under the Fourteenth Amendment's Due Process Clause.' *Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 441 (5th Cir. 2015); *see also Castellano v. Fragozo*, 352 F.3d 939, 953 (5th Cir. 2003) (en banc). Just like *Manuel*. . . . *Jones* is binding, but it did not state whether the due process violation was of the procedural or substantive variety. Other circuits appear split on the question. *Compare Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985) (substantive due process); *Hayes v. Faulkner Cnty., Ark.*, 388 F.3d 669 (8th Cir. 2004) (substantive due process), *with Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470 (9th Cir. 1992) (procedural due process); *see also Armstrong v. Squadrito*, 152 F.3d 564, 575 & n.4 (7th Cir. 1998) (specifically rejecting *Oviatt* and its procedural due process approach). We find the answer from Supreme Court cases. 'The touchstone of due process is protection of the individual against arbitrary action of government.' *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974). This is true with respect to both procedural and substantive due process. . . . Here, we deal with a deprivation of a protected liberty interest due to an allegedly unfair procedural scheme. The Constitution itself protects physical liberty. . . As a

matter of procedure, defendants held in Choctaw County on capias warrants are held without an arraignment or other court proceeding until the circuit court that issued the capias next convenes. Our task is to determine the constitutionality of this procedure, and we are satisfied that Jauch's right to procedural due process is most squarely implicated. Without deciding whether substantive fundamental unfairness may support a due process holding with little procedural deficiency, we hold that prolonged-detention cases do raise the immediate question of whether the pre-trial detainee's procedural due process rights have been violated. . . . Ordinarily, '[t]he starting point for any inquiry into how much "process" is "due" must be the Supreme Court's opinion in *Mathews v. Eldridge*,' and we would consider the private interest at stake, the risk of erroneous deprivations under existing procedures in light of available alternative or additional procedures, and the government's interest. . . .The Supreme Court subsequently clarified the law, holding "that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which ... are part of the criminal process," reasoning that because the "Bill of Rights speaks in explicit terms to many aspects of criminal procedure," the Due Process Clause "has limited operation" in the field.' *Kaley v. United States*, ––U.S. ––––, 134 S.Ct. 1090, 1101, 188 L.Ed.2d 46 (2014) (quoting *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 2576, 120 L.Ed.2d 353 (1992)) (alterations in original). . . . .This is not a case about presumptions, evidence, or any workaday aspect of the process-in-action. This is a case about confinement with process deferred. . . .There is thus room to argue that the *Mathews* test is more appropriate under the circumstances. Ultimately, we again follow the Supreme Court's example, choosing not to decide which test applies 'because we need not do so.'. . The *Medina* test represents the 'narrower inquiry' and is 'far less intrusive than that approved in *Mathews.*'. . 'A rule of criminal procedure usually does not violate the Due Process Clause unless it (i) "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or (ii) "transgresses any recognized principle of "fundamental fairness" in operation."'. . . Even under the deferential *Medina* test, the indefinite-detention procedure violated Jauch's right to procedural due process. . . . For the following reasons, we conclude that indefinite pre-trial detention without an arraignment or other court appearance offends fundamental principles of justice deeply rooted in the traditions and conscience of our people. The same traditions that birthed our Sixth Amendment right to a speedy trial and Eighth Amendment prohibition of excessive bail condemn the procedure at issue. . . . Here, the challenged procedure denies criminal defendants their *enumerated* constitutional rights relating to criminal procedure by cutting them off from the judicial officers charged with implementing constitutional criminal procedure. . . This is unjust and unfair.")

See also ***Moya v. Garcia***, 895 F.3d 1229, 1245-50 (10th Cir. 2018) (McHugh, J., concurring in the result in part and dissenting in part) (*amended opinion on denial of rehearing en banc*), *cert. denied*, 139 S. Ct. 1323 (2019) ("Properly understood, Plaintiffs' alleged injury is the unconstitutional deprivation of their liberty through overdetention. As to causation, Plaintiffs' argument is straightforward: they allege the sheriff and wardens jointly held the keys to their jail cells. By keeping Plaintiffs behind bars—day after day after day—the sheriff and wardens were deliberately indifferent to their constitutional right to freedom pending trial. In finding causation

lacking, the majority focuses on the state court's conduct, rather than the Defendants' conduct. As portrayed by the majority, Mr. Moya and Mr. Petry 'blame the sheriff and wardens for the delays in the arraignments.'. . Because the sheriff and wardens had no power to schedule the arraignments, the majority's thinking goes, the sheriff and wardens had no power to prevent or cure the alleged constitutional violations. . . .On my reading of the complaint, Plaintiffs are not seeking to hold the sheriff and wardens accountable for the court's scheduling decisions; instead, they are seeking to hold them accountable for the lengthy detentions that no court authorized. . . Again, a timely bail hearing is a means to securing Plaintiffs' protected liberty interests, not an end unto itself. . . .By focusing on the arraignment rather than the detention, the majority naturally finds that the causal force lies with the state court's conduct, rather than with the jailers' conduct. And by focusing on the state court's conduct, rather than the jailers' conduct, the majority reaches a result heretofore unseen in an overdetention case. As best I can tell, our decision today puts us at odds with every circuit to consider the apportionment of blame between state courts and state jailers where a § 1983 plaintiff alleges that he or she was overdetained. [collecting cases] The majority's chosen approach, moreover, comes with troubling implications. By (a) looking to state law to determine the scope of state officials' responsibility to ensure prompt bail hearings, and (b) conceptualizing Plaintiffs' liberty interest as an interest in a state court proceeding, rather than in liberty itself, the majority sanctions a system by which states could regularly violate detainees' constitutional rights by holding them indefinitely on account of untimely state courts, without any fear of their collaborating municipalities or state officials ever incurring monetary penalties under § 1983. Such an outcome is not farfetched. We know from *Jauch* that, in at least one part of Mississippi, the only court empowered to set bail would sometimes go months between sessions. And, accepting Plaintiffs' allegations as true, as we must, we can infer that courts in Santa Fe County—New Mexico's third-most populous—routinely fail to schedule arraignments with any earnest. . . . To be sure, I agree with the majority that New Mexico sheriffs and wardens are powerless to force New Mexico courts to schedule bail hearings in a timely fashion. Only New Mexico courts can do that. But the solution is not to grant jailers refuge behind judges cloaked with absolute immunity, enabling the jailers to violate the Constitution with impunity. . . The better solution is to hold state officials and municipalities responsible for the constitutional violations they themselves commit. True, the effect could be that New Mexico sheriffs and wardens respond by releasing pre-trial detainees, some of whom may have been arrested for alleged violent acts or pose a risk of flight, without the deterrence of bail. But it is our role to assure that New Mexico runs its criminal-justice system with the timeliness that the Fourteenth Amendment commands. If it does not, there should be consequences: either pre-trial detainees go free pending trial, or they will be entitled to civil damages against the state's officials and municipalities so that they may be compensated for the violations of their civil rights.")

5. The composite picture of procedural due process doctrine painted by the ***Parratt/Hudson*** and ***Mathews/Logan*** case law requires the State to provide constitutionally sufficient predeprivation procedural safeguards to attend officially sanctioned deprivations, as well as adequate postdeprivation remedies to redress random, unauthorized departures from those safeguards by state actors. Under these cases, only where the established state procedure is

deficient under ***Mathews***, or where constitutionally sufficient procedure is wrongfully ignored or departed from by state actors, and no adequate redress is provided by state law, will a plaintiff have a procedural due process claim. *See, e.g.,* ***Zar v. South Dakota Bd. of Examiners of Psychologists***, 976 F.2d 459, 465 (8th Cir. 1992) ("A state provided post-deprivation remedy is sufficient when the deprivation was unpredictable, when a pre-deprivation process was impossible, and where the conduct of the state actors was unauthorized.").

Under this scheme, a properly pleaded procedural due process claim based on a failure of local government officials to provide constitutionally sufficient predeprivation safeguards, would always involve a ***Monell***-type claim. This unavoidable convergence of procedural due process doctrine with municipal liability doctrine was recognized in ***Wilson v. Civil Town of Clayton, Ind.***, 839 F.2d 375, 380 (7th Cir. 1988):

In a procedural due process case . . . resolution of the ***Monell*** issue will also resolve the ***Parratt*** issue . . . . Therefore, a complaint asserting municipal liability under ***Monell*** by definition states a claim to which ***Parratt*** is inapposite.

See also ***Association for Los Angeles Deputy Sheriffs v. County of Los Angeles***, 648 F.3d 986, 993 (9th Cir. 2011) ("Plaintiffs allege that Defendants have adopted a policy of denying post-suspension hearings to employees who resigned after the suspension was imposed but before the hearing was completed. As discussed above, due process requires that an employee suspended solely on the basis that felony charges were filed against him must be granted a post-suspension hearing. Because plaintiffs Wilkinson and Sherr were denied any post-suspension hearing at all, pursuant to Defendants' policy, they have sufficiently stated a *Monell* claim. . . . Summary suspensions with minimal or no pre-suspension due process are constitutional only if followed by adequate post-suspension procedures. Take away those post-suspension procedures, and the suspensions are no longer constitutional under the Due Process Clause. . . The issue is not whether the Commission had jurisdiction, but whether Wilkinson and Sherr received sufficient post-suspension process to satisfy constitutional requirements. They did not receive such process, based on Defendants' policy to deny hearings to retired employees, and thus Wilkinson and Sherr have successfully stated a *Monell* claim."); ***Woodward v. Andrus***, 419 F.3d 348, 354 (5th Cir. 2005) ("Woodard's well pleaded allegation establish that she was deprived of a property right without due process of law. Woodard has also shown the requisite state actor participation needed to state a due process claim. For the reasons already stated, Woodard has also established that Andrus' conduct was the custom or practice of the local municipality. Thus, Woodard has established that she was deprived of her property without due process of law through the custom or practice of a state agent acting under the color of state law. Because the *Parratt* /*Hudson* doctrine is not applicable and because Woodard has stated a valid due process claim, the district court erred in dismissing Woodard's due process claim under Rule 12(b)(6)."); ***Brooks v. George County***, 84 F.3d 157, 165 (5th Cir. 1996) ("Where a municipal officer operates pursuant to a local custom or procedure, the *Parratt/Hudson* doctrine is inapposite: actions in accordance with an 'official policy' under *Monell* can hardly be labeled 'random and unauthorized.'"); ***Boalbey v. Whiteside***

County Board, 1992 WL 373038, *3 (N.D. Ill. Dec. 4, 1992) (not reported) ("[A] complaint alleging municipal liability by definition states a claim to which *Parratt* is inapposite because a municipality's 'policy' or 'custom' involves conduct that could never be random and unauthorized.").

The logic of this developing "'new' due process methodology," Nahmod, ***Due Process, State Remedies, and Section 1983***, 34 U. Kan. L. Rev. 217, 217 (1985),was arguably upset by ***Zinermon v. Burch***, 110 S. Ct. 975 (1990).

In ***Zinermon***, respondent claimed that he had been deprived of liberty without due process when he was admitted to a state hospital as a "voluntary" patient, under circumstances indicating that he was incompetent to give informed consent. *Id*. at 977-981.

In concluding that respondent's complaint was sufficient to state a procedural due process claim, the majority in ***Zinermon*** first made clear that "the fact that a deprivation of liberty is involved . . . does not automatically preclude application of the ***Parratt*** rule." 110 S. Ct. at 987. The Court went on to hold, however, that the ***Parratt/Hudson*** analysis did not apply where the erroneous deprivation was foreseeable, where predeprivation process was practicable, and where the challenged conduct could be characterized as "authorized," in the sense that it was an abuse by state officials of "broadly delegated, uncircumscribed power to effect the deprivation at issue." 110 S. Ct. at 989.

Justice O'Connor viewed the complaint as asserting conduct that could be characterized only as a random and unauthorized departure from established state law, thus invoking application of ***Parratt*** and ***Hudson***. *Id*. at 990-997 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting).

In ***Zinermon***, the majority explicitly disavowed treating the claim as one for a deprivation of due process pursuant to established state procedure, thus invoking the ***Logan*** exception to the ***Parratt/Hudson*** doctrine, and requiring an assessment of whether the procedural safeguards provided by state law against erroneous deprivations in this context were constitutionally sufficient under ***Mathews***.

The Court noted that "[t]he broader questions of what procedural safeguards the Due Process Clause requires in the context of an admission to a mental hospital, and whether Florida's statutes meet these constitutional requirements, are not presented in this case." *Id.* at 979.

Nor did the majority decide whether the complaint was sufficient to state a custom or practice, since the plurality opinion of the Eleventh Circuit did not rely on such an interpretation in denying the motion to dismiss. *Id*. at 981 n.9.

As the dissent in ***Zinermon*** notes, 110 S. Ct. at 996-97 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting), the Court applied the ***Mathews*** balancing test in

Washington v. Harper, 494 U.S. 210, 110 S. Ct. 1028 (1990), a case decided the same day as ***Zinermon***. In ***Washington***, a mentally ill state prisoner challenged the prison's administration of antipsychotic drugs to him against his will without a judicial hearing to determine the appropriateness of such treatment. The prison policy required the treatment decision to be made by a hearing committee consisting of a psychiatrist, psychologist, and the prison facility's Associate Superintendent. The Court applied the ***Mathews*** balancing test and found the established procedure constitutionally sufficient. 110 S. Ct. at 1040-44.

Recognizing that the application of ***Mathews*** to Florida's admissions procedures "would have required a strained reading of respondent's complaint and arguments . . . ," the dissent in ***Zinermon***, nonetheless, would have preferred to reach the result arrived at by the Court through a straightforward assessment of the constitutionality of Florida's established procedure under ***Mathews***, rather than by way of "the strained reading of controlling procedural due process law that the Court adopts today." 110 S. Ct. at 997 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting). As the dissent concludes, the majority in ***Zinermon*** construes the complaint to state a claim that is governed neither by the ***Mathews*** analysis, nor by the ***Parratt/ Hudson*** doctrine. *Id*. at 995-96.

Zinermon suggests that plaintiffs can make out procedural due process claims even where the deprivation has not been pursuant to any formally established state procedure, indeed, even where the conduct effecting the deprivation arguably is in violation of or contrary to formally enacted state procedures. *See, e.g.,* ***Bradley v. Village of University Park, Illinois (Bradley I)***, 929 F.3d 875, 878-80, 885-86 (7th Cir. 2019) ("The parties agree that Bradley had a protected property interest in his continued employment. They agree that the mayor and the village board are the policymakers for their municipality on the subject. And everyone agrees that although there was ample opportunity for a hearing, Bradley received no pretermination notice or hearing. Those points of agreement suffice to prove a due process claim under § 1983 against the individual officials and the village itself, where the village acted through high-ranking officials with policymaking authority. . . The defendants seek to avoid this straightforward conclusion. They urge us to follow a line of cases that excuses liability for the absence of predeprivation due process if the deprivation is the result of a 'random, unauthorized act by a state employee, rather than an established state procedure,' and 'if a meaningful postdeprivation remedy for the loss is available.'. . Defendants reason that because the village's top officials decided as a matter of village policy to deny an employee due process in a way that also violated state law, their policy decision should be treated as a 'random and unauthorized act ... beyond the control of the State,'. . . leaving Bradley to pursue remedies only under state law. In other words, defendants argue that by intentionally violating plaintiff's federal due process rights in a way that also violated state law, they insulated their actions from federal liability. This argument is foreclosed for several reasons. First, the Supreme Court has never suggested that the pragmatic but narrow rule of *Parratt* applies to employee due process claims where predeprivation notice and an opportunity to be heard could be provided in a practical way. Public employers' decisions to violate both state and federal procedural requirements have never been treated as grounds to excuse federal due process liability.

In addition, in this case, the decision to fire Bradley was made by the top municipal officials. This court has held squarely that 'a complaint asserting municipal liability under *Monell* by definition states a claim to which *Parratt* is inapposite.' *Wilson v. Town of Clayton*, 839 F.2d 375, 380 (7th Cir. 1988). That holding is consistent with other circuits and accords with common sense. A municipality cannot be held liable under a respondeat superior theory of liability. It can be held liable for a constitutional violation only if the violation resulted from a formal policy, an informal custom, or a decision 'made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'. . In cases alleging due process violations by municipal policymakers, there is no need to inquire separately into whether an employee's actions were 'random and unauthorized.' In addition, defendants' expansive interpretation of *Parratt, Hudson* and *Easter House* is at odds with the Supreme Court's explication of *Parratt* and *Hudson* in *Zinermon v. Burch*, . . . which explained that the Court had 'rejected the view that § 1983 ... does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law,' and that 'overlapping remedies are generally irrelevant to the question of the existence of a cause of action under § 1983.' Excusing top municipal officials from federal liability when they violate constitutional due process rights, so long as they also violate state laws and the state provides some post-deprivation recourse, would (1) undermine public employees' due process rights and remedies under *Loudermill* and its progeny; (2) conflict with *Monroe v. Pape*, . . . and its progeny, which hold that a state or local official may be sued under § 1983 for actions taken 'under color of state law' even though the official's actions also violate state or local law and a remedy exists under state law; and (3) conflict with *Patsy v. Board of Regents*, . . . which held that § 1983 plaintiffs need not exhaust state-law remedies before asserting their federal rights. There is no indication in *Parratt, Hudson, Zinermon*, or our en banc decision in *Easter House* of an intention to undermine or overrule so much bedrock § 1983 law or to intrude on *Monell* doctrine in cases against municipalities. Those decisions should not be read to provide a defense to Bradley's due process claim. Where predeprivation procedures are both required and practicable, municipal policymakers expose the municipality and themselves to liability under § 1983 if they deliberately disregard an individual's constitutional due process rights. This is true even when state law also offers postdeprivation remedies. We therefore reverse the judgment of the district court and remand for further proceedings. . . . The mayor and the board concede that they had sole discretion and authority to fire Bradley. . . . Under *Monell*, the actions of the mayor and village board in firing Bradley are, by virtue of the defendants' authority as policymakers, automatically considered actions of the municipality itself under § 1983. Their decision to deprive Bradley of due process is the municipal policy that forms the basis for defendants' liability. . . .It makes no sense to speak of such official policymaking as 'random and unauthorized' in terms of *Parratt*. That's why the Supreme Court has never suggested that *Parratt* can be extended to defend against an otherwise valid *Monell* claim. The defendants' proposed exception is not necessary given *Monell*'s test for liability. And accepting defendants' argument would conflict directly with *Monroe, Monell, Pembaur, Owen,* and *Bryan County*. We would have to reach the improbable conclusion that a municipality is *not* liable for its highest officials' decision to deprive a person of his federal constitutional rights. Finally, even if the *Parratt* exception were relevant here, neither Supreme Court precedent nor our decision in *Easter House* supports defendants'

theory that, so long as municipal policymakers violate both the federal Constitution and state law, and some state remedy exists, the municipality is excused from § 1983 liability. In the past we have disparaged similar attempts to evade municipal liability, dismissing as 'extravagant' a claim that the 'acts of [a] Mayor ... are merely acts of an errant employee.'. . Defendants' proposal would also undermine (1) the constitutional protection for public employees in *Roth*, *Sindermann*, and *Loudermill*, while creating a direct conflict with (2) the *Monroe v. Pape* line of cases recognizing that state or local officials may be liable under § 1983 for actions taken 'under color of state law,' even if the official's actions also violate state or local law, as well as (3) *Patsy v. Board of Regents*' holding that § 1983 plaintiffs need not exhaust state-law remedies before asserting their federal rights. We see no reason to avoid Supreme Court precedent or to read our precedent in such a disruptive manner.") *See also* ***Easter House v. Felder***, 910 F.2d 1387, 1410-13 (7th Cir. 1990) (en banc) (Cudahy, J., joined by Cummings, J., and Posner, J., dissenting). *See also* ***Summers v. State of Utah***, 927 F.2d 1165, 1170 (10th Cir. 1991) (suggesting procedural due process claim may exist against individual officer who had effected deprivation in manner inconsistent with established state procedures).

Nor does ***Zinermon*** require that the deprivation be linked to an official custom, pattern or practice or an established state procedure. Finally, the officials authorized to effect the deprivation need not be policymaking officials whose decisions might be attributable to the entity as official policy. 110 S. Ct. at 994.

The question of whether a "status-conscious exception" to the ***Parratt/ Hudson*** doctrine should be recognized, which would equate conduct and decisions of policymaking officials with established state procedure, has been fully explored in a number of decisions from the Seventh Circuit Court of Appeals.

There is clearly some sentiment on that court for refusing to dismiss on ***Parratt/Hudson*** grounds when the deprivation results from conduct of a final policymaker, even where such conduct might be directly contrary to formally enacted law. *See, e.g.,* ***Swank v. Smart***, 898 F.2d 1247, 1257 (7th Cir. 1990) (*Swank I*) (procedural due process claim stated where discharge of plaintiff took place at policymaking level of town government), *cert. denied*, 498 U.S. 853 (1990); ***Matthiessen v. Board of Education of North Chicago Community High School District 123***, 857 F.2d 404, 407 n. 3 (7th Cir. 1988) ("[T]he single act of a sufficiently highranking policymaker may equate with or be deemed established state procedure . . . .[,]" making ***Parratt*** inapplicable); ***Tavarez v. O'Malley***, 826 F.2d 671, 677 (7th Cir. 1987) (procedural due process claim sufficient to withstand dismissal where deprivation resulted from conduct of senior county and town officials). *Accord* ***Sample v. Diecks***, 885 F.2d 1099, 1114 (3d Cir. 1989) (due process violation stated when policymaking official establishes a constitutionally inadequate state procedure for depriving people of protected interest).

In ***Easter House v. Felder***, 879 F.2d 1458 (7th Cir. 1989) (*en banc*), *vacated and remanded*, 494 U.S. 1014 (1990), *aff'd and modified*, 910 F.2d 1387 (7th Cir. 1990) (*en banc*),

cert. denied, 498 U.S. 1067 (1991), however, the Seventh Circuit clarified the circumstances under which the conduct of a policymaker would be tantamount to established state procedure.

A decision by a policymaker will represent the state's position only where that policymaker "establishes policy and procedure on an informal basis without the aid of formal policy and procedure guidelines . . . ." *Id*. at 1472. Where, however, the state's position is set out in formal rules, regulations, and statutes, a deviation from formally established state procedure, even by a policymaking official, will be viewed as random and unauthorized conduct from the state's perspective. *Id*.

Accord ***Johnson v. Louisiana Department of Agriculture***, 18 F.3d 318, 322 (5th Cir. 1994) ("The State of Louisiana could not predict that [defendant] would violate statutory provisions against bias, ex parte contacts, and solicitation. . . . Simply because [defendant] is a high state official does not mean that his actions are automatically considered established state procedure that would take the case outside of the *Parratt/Hudson* doctrine."); ***Swank v. Smart***, 898 F.2d 1247, 1261-62 (7th Cir. 1990) (*Swank I*) (Manion, J., concurring in part, dissenting in part) (high-ranking officials' deviations from City's formally enacted termination procedures are random and unauthorized); ***Fields v. Durham***, 856 F.2d 655, 657 (4th Cir. 1988), *vacated and remanded*, 494 U.S. 1013 (1990), *affirmed on other grounds*, 909 F.2d 94 (4th Cir. 1990) (fact that high-ranking officials were involved does not by itself make ***Parratt/Hudson*** inapplicable).

See also ***Tri County Industries, Inc. v. District of Columbia***, 104 F.3d 455, 460 (D.C. Cir. 1997) ("In this case . . . the District has not only failed to argue *Parratt* but has explicitly thrown the point away, 'assum[ing], for purposes of this appeal, that the doctrine of *Parratt* ... does not apply to actions by the Director of a government agency acting within the general scope of his authority.' In fact, there is a circuit split on this issue. *Compare Easter House v. Felder*, 910 F.2d 1387, 1400 (7th Cir.1990) (en banc) (*Parratt* does apply to actions of high officials); *id*. at 1408-10 (Easterbrook, J., concurring), with *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir.1985) (en banc) (*Parratt* does not apply). It being inappropriate for us to resolve this sharply contested issue in a case where the parties appear to resolutely agree, we do not take that approach.").

The debate continues in the Seventh Circuit. *Compare* ***Bradley v. Village of University Park, Illinois (Bradley I)***, 929 F.3d 875, 891-94 (7th Cir. 2019) ("Moving forward from *Easter House*, it is important to acknowledge what *Easter House* did not do. It did not address *Monroe v. Pape*'s holding that a state official acts under color of state law for purposes of § 1983 even if he violates state law. It also did not address *Loudermill* or *Roth* or the due process rights of public employees who have property interests in their jobs. The *Easter House* majority did not even mention *Monell* or the major differences under § 1983 between state and local governments. In addition, as explained further below, we and other circuits have squarely rejected efforts to apply *Parratt* to *Monell* claims. *Easter House* did not criticize, let alone overrule, the line of our cases rejecting *Parratt* defenses to due process claims against municipal policymakers, such as *Matthiessen*, *Wilson*, and *Tavarez*. . . .The village contends that Bradley's firing without notice

or opportunity to be heard presents a 'single act of employee misconduct' that cannot 'automatically become[ ] the state's new position' and lead to liability because the State of Illinois has not authorized the action. . . This argument focused on *state* policy might have more force (apart from its conflict with canonical § 1983 precedent such as *Monroe v. Pape*) if the State of Illinois were somehow a defendant here, or perhaps if a village department had been acting as the State's agent in administering a state benefits program (the issue in *Clifton*). But for the last four decades, different rules of liability under § 1983 apply to municipalities making and carrying out their own policies. The Supreme Court has never suggested that *Parratt* could apply to a *Monell* claim. The test for liability under *Monell* is already designed to identify conduct that is attributable to the municipality itself—which includes actions taken by an official with policymaking authority. There is no need to impose a separate inquiry as to whether a municipal policymaker's conduct is 'random and unauthorized.' *Parratt*, *Hudson*, and *Zinermon* were all decided after *Monell*, and they either did not cite *Monell* at all or merely noted that it overruled the portion of *Monroe v. Pape* rejecting any form of municipal liability under § 1983. *Parratt* and its progeny also did not cite any of the Supreme Court cases holding that a single act of a municipality or one of its high-ranking or policy-making officials can be sufficient for § 1983 liability under *Monell*, including *Owen v. City of Independence*, . . . *City of Newport v. Fact Concerts* . . . or *Pembaur v. City of Cincinnati*[.] . . Conversely, the Supreme Court's *Monell* line of jurisprudence, including *Bryan County* and *Pembaur*, has never even suggested importing the *Parratt* framework, despite facts often showing concurrent violations of state law and available state remedies. Because it does not make sense to treat a municipal policymaker's actions as 'random and unauthorized,' and absent any indication from the Supreme Court that *Parratt* and its progeny were intended to upend the *Monell* framework, we have flatly rejected efforts to apply *Parratt* defenses to *Monell* claims. . . . The actions of the defendants as municipal policymakers simply cannot be deemed 'random and unauthorized' within the meaning of *Parratt*. Their actions against Bradley *were* village policy. *Monell* provides the applicable legal standard, and it is satisfied here.") *with* ***Bradley v. Village of University Park, Illinois (Bradley I)***, 929 F.3d 875, 902-14 (7th Cir. 2019) (Manion, J., dissenting) ("*Easter House* established that (1) *Zinermon*'s limitation of the *Parratt* doctrine does not apply when state employees ignore procedural safeguards guaranteed under state law; and (2) when they violate state procedural statutes, even high-ranking officials can commit random and unauthorized acts from the perspective of the State. To put it differently, a wrongful decision may be predictable and authorized from the State's perspective only when state law does not cabin an official's discretion to grant pre-deprivation process. . . . Bradley alleges he was fired from his position as Chief of Police of the Village of University Park without any process. But like the plaintiffs in *Easter House*, *Clifton*, *Germano*, and *Michalowicz*, he has not alleged the mayor and Village Board had unfettered discretion to fire him without a hearing. Rather, his complaint acknowledges the mayor and Board's actions as alleged would violate Illinois law. Put another way, he alleges the mayor and the Village Board did something that, as far as the State is concerned, was random and unauthorized. Nothing the legislature in Springfield could dream up could have stopped this conduct. Illinois law already 'circumscribed any discretion [the Village actors] might have had over the decision' to fire Bradley without process. . . Therefore, Bradley's claim falls within the

scope of *Parratt* and *Easter House*. So long as Illinois provides an adequate post-deprivation remedy, a § 1983 procedural due process claim will not lie. . . . According to the court's decision today, if a municipality is liable for its policymaker's actions under *Monell*, then *Parratt* by definition does not apply. This conclusion can only result, however, from an improper conflation of official municipal policy with established state procedures. . . . While it is true that the actions in cases like *Michalowicz* and this one would certainly rise to the level of a municipal policy under *Monell*, such a policy would still be random and unauthorized as far as the *State* is concerned. Even the official policy of a municipality established through acts of high-ranking officials is unpredictable from the State's perspective if such policy contravenes established state procedures. . . As we said in *Clifton*, 'a single act of a state official—even a high-ranking state official—that violates that established [state] policy is random and unauthorized from the state's perspective.'. . This is especially true when the high-ranking official is a municipal official acting on behalf of the municipality as opposed to a high-ranking state official. We've applied this reasoning to a county board in *Germano* and a village board in *Michalowicz*. The decisionmakers in this case are not materially different from those. . . . It makes no difference whether the defendant is a high-ranking municipal employee creating municipal policy through his action or a state official acting with the authority imbued in his office by state law. The actions may still be random and unauthorized from the State's perspective if the defendant's authority has been circumscribed and regulated by state law. . . .Whoever the 'person' acting under color of state law is—be it a municipality via its policymakers, a prison official, a state agency, or someone else entirely—it is still necessary to determine if the State could have predicted and prevented the deprivation. If not, and if the State has provided sufficient post-deprivation remedies, then there is no justification to supplant the State's authority and subvert federalism by allowing the plaintiff to pursue a federal due process claim instead of the State's provided remedies. . . .In sum, *Monell*'s test for determining whether a high-ranking official's actions amount to official policy such that they are attributable to the municipality is and should be maintained as a separate inquiry from *Parratt*'s question of random and unauthorized acts. The former focuses on the relationship between a municipality and its high-ranking official and answers whether the municipality may be liable for an act. . . The latter focuses on the relationship between the State and a person clothed with state authority and answers whether the State could have predicted or prevented a deprivation caused by such a person. . . Even if some of this circuit's pre-*Easter House* cases and those of other circuits seemingly confuse these two inquiries (in contrast to our more recent cases properly separating the inquiries and focusing on the State's perspective instead of the actor's, such as *Germano* and *Michalowicz*), we should not completely eradicate that distinction as the court does today by proclaiming indelibly that *Parratt* is simply irrelevant to all *Monell*-type claims. The fact that the mayor and Village Board's actions may represent the Village's official policy under *Monell* does not mean those actions were not random and unauthorized from the State of Illinois' perspective. . . . [A] proper understanding of the *Monell* municipal-liability inquiry and the *Parratt* random-and-unauthorized-acts inquiry demonstrates that the one does not foreclose the other. Rather than engage in further refutation of these contentions, I will simply point to *Easter House*'s binding interpretation of *Parratt* and *Zinermon* as the answer to the court's concerns. Applying *Parratt* to *Monell*-type claims would no more eliminate public employees' procedural

protections or municipal liability under § 1983 than *Easter House*'s rule eliminates due process claims against all state agency employees. Instead, where the State has conferred broad, unfettered discretion on an actor (whether that actor is a state employee, municipality, or other person), a deprivation committed by that actor cannot be said to be random and unauthorized. In such a case, the State could predict the deprivation would occur and could have prevented it through additional procedural safeguards. That was the case in *Zinermon* and, as I have pointed out, in *Tavarez, Wilson*, and *Breuder*. That was not the case, however, in *Easter House, Germano*, or *Michalowicz*; nor is it Bradley's case. . . .Since our *en banc* decision in *Easter House*, the law of this circuit has been clear: an individual deprived of property without pre-deprivation process by the random and unauthorized act of a state actor may not maintain a due process action in federal court so long as the State provides an adequate post-deprivation remedy. Whether that state actor is a municipality or some other person clothed with authority by the State does not change the essential inquiry of whether the act was predictable and preventable by the State. We had a chance 28 years ago to adopt the broader reading of *Zinermon* that Judge Cudahy and others. . . advocated, but we rejected it. Today, the court seeks to change direction. Yet we are now bound by *Easter House*. Under that decision—and with a proper understanding of municipal liability under *Monell* and the relevance of the State's perspective under *Parratt*—the outcome of this case is clear: Bradley cannot maintain a due process claim in federal court. Contrary to the court's concerns, the failure of Bradley's federal claim does not mean he has no opportunity for redress. If Bradley's allegations are true, he will have a remedy under the Illinois Administrative Review Act. . . . Today's decision undermines federalism, embraces a misunderstanding of the separate inquiries established by *Monell* and *Parratt*, and will sow confusion among the lower courts by muddying the clear waters of *Easter House* and its progeny. I would instead affirm the judgment below.")

6. Post-*Zinermon* Decisions

In the aftermath of ***Zinermon***, predictable confusion was evident in decisions from the lower courts. As Judge Edith H. Jones put it, "*Zinermon* undoubtedly complicated an already overloaded procedural due process jurisprudence." ***Caine v. Hardy***, 905 F.2d 858, 863 (5th Cir. 1990) (Jones, J., dissenting), *opinion superseded by* ***Caine v. Hardy***, 943 F.2d 1406 (5th Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 1474 (1992).

In ***Caine v. Hardy***, 905 F.2d 858 (5th Cir. 1990), a panel of the Fifth Circuit Court of Appeals, noting that "the controlling constitutional authority has changed . . . . ," found ***Zinermon*** rather than ***Parratt/Hudson*** to be dispositive in upholding the procedural due process claim of a doctor whose staff privileges were terminated by officials who were allegedly motivated by personal animosity against the plaintiff. *Id*. at 861-63. No challenge was made to the hospital's procedural regulations.

The court employed a ***Zinermon*** analysis to conclude that the deprivation effected by the officials was predictable and authorized, since the officials involved were delegated power by the

state to effect the suspension and termination of staff privileges. *Id*.The dissent disagreed that ***Zinermon*** worked a substantial change in the framework of due process analysis and that ***Parratt/ Hudson*** dismissal was inappropriate. *Id*. at 865-67 (Jones, J., dissenting).

On rehearing, *en banc*, the Fifth Circuit adopted the position espoused by Judge Jones in her panel dissent, suggesting that ***Zinermon*** may represent a "sui generis situation." ***Caine v. Hardy***, 943 F.2d 1406, 1415 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1474 (1991). The court found the preconditions for application of the ***Parratt/Hudson*** doctrine to exist: (1) the deprivation alleged was unpredictable or unforeseeable; (2) the state actors' particular conduct in ***Caine*** was wanton and intentional and could not have been countered by predeprivation procedures adopted by the state, and; (3) the conduct was "unauthorized" in that it was not within the officials' express or implied authority. *Id*. at 1413-1414.

As the court observed in ***Caine***, "[N]one of the courts as yet called upon to apply ***Zinermon*** has found a procedural due process violation in claims of particular regulatory abuses carried out within the framework of controlling regulations." *Id*. at 1415.

In ***Charbonnet v. Lee***, 951 F.2d 638 (5th Cir. 1992), *cert. denied*, 112 S. Ct. 2994 (1992), Judge Wisdom, noting that "***Caine*** reads ***Zinermon*** to effect only a 'wrinkle' on the ***Parratt/Hudson*** doctrine," *id*. at 642, acknowledged that ***Caine*** "does much to swing shut the door of the federal courts to suits for individual violations of procedural due process. Yet those doors remain open to a plaintiff...if the actions of the official were the result of some established municipal procedure, or if the state does not offer an adequate remedy elsewhere." *Id*. at 645.

In ***Easter House v. Felder***, 910 F.2d 1387 (7th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 1067 (1991), the court reconsidered its first *en banc* decision, ***Easter House v. Felder***, 879 F.2d 1458 (7th Cir. 1989) (*en banc*), *vacated and remanded*, 494 U.S. 1014 (1990), in light of ***Zinermon***. The court reaffirmed its holding that Easter House had no procedural due process claim based on a decision to withhold renewal of its state operating license by state employees alleged to have acted in concert with a rival adoption agency. *Id*. at 1408.

Relying on ***Zinermon***, Easter House argued that because the officials involved in effecting the deprivation were high-ranking, their conduct must be viewed as both predictable and authorized, as opposed to random and unauthorized.

The Seventh Circuit rejected the "contention that there is a *per se* exception to the application of ***Parratt*** in situations where the state actor occupies a "high ranking" position in the state hierarchy." 910 F.2d at 1400. The court concluded that the predictability of an erroneous deprivation is a function not only of the rank of the official to whom the power to effect the deprivation has been delegated, but also of the degree to which that power or exercise of discretion has been circumscribed by the state. *Id.* at 1400-02.

See also ***Long v. City of Marengo***, No. 93 C 20167, 1994 WL 11719, *5 n.3 (N.D. Ill. Jan. 6, 1994) (not reported) ("After *Zinermon* . . . , the *Parratt* rule only applies where the deprivation of liberty or property is "random and unauthorized" and not where it is "predictable and authorized." [citing *Easter House*] Central to this analysis is determining whether the deprivation was within the discretion given to the actor or whether the actor abused its discretion. [cite omitted] In the former situation, where a deprivation occurs within the actor's discretion, a violation of procedural due process might occur regardless of the adequacy of postdeprivation remedies if that discretion is not found to be circumscribed by adequate statutory or other predeprivation safeguards. [cite omitted] In the present case, [plaintiff] has not made such allegations that the deprivation was predictable and authorized, being within the actor's discretion and that discretion being inadequately circumscribed, and therefore the court applies *Parratt*."); ***Sweeney v.Bausman***, 1992 WL 390773, *5 (N.D. Ill. Dec. 14, 1992) (not reported) ("[T]he key inquiry is not the state official's rank in the state hierarchy; rather, the key ingredient focuses on whether the state official's discretion is 'uncircumscribed.'").

The court in *Easter House* likewise rejected the related argument that conduct or decisions by highranking, policymaking officials should always be equated with "established state procedure," making ***Parratt/Hudson*** inapplicable under the ***Logan*** rationale. Where official policy is established "through a deliberative, or even legislative, process which culminates in a certain concrete position expressed in a formal pronouncement," a single deviation from that formally enacted statement of policy, even by a policymaker, should not be viewed as an embracement of the deviation by the state as a new policy. 910 F.2d at 1402-04.

Thus, the Seventh Circuit concluded that where the state had in place a formally enacted set of procedures designed to protect against the type of deprivation experienced by the plaintiff, procedures intended to carefully define and circumscribe the power delegated to the responsible officials, the only process constitutionally required to be provided by the state for an isolated and unauthorized deviation from these procedures was an adequate postdeprivation remedy. *Id*. at 1405-06.

See also ***Jones v. Doria***, 767 F. Supp. 1432, 1439-40 (N.D. Ill. 1991) (relying on ***Zinermon*** and ***Easter House*** to conclude that § 1983 should not be employed to remedy deprivations which occur at the hands of a state employee who is acting contrary to the state's established policies and procedures); ***Duenas v. Nagle***, 765 F. Supp. 1393, 1399 (W.D. Wis. 1991) (where "Wisconsin established comprehensive disciplinary procedures strictly limiting prison staff discretion .... thirty-one separate alleged violations of [the] established state procedure ... directed at one person over a short period of time ... were ... unpredictable, undiscoverable and unauthorized by the state ....").

Accord ***Raditch v. United States***, 929 F.2d 478, 480 (9th Cir. 1991) (where Office of Workers' Compensation Programs had requisite procedures in place, termination of plaintiff's benefits without those procedures was unauthorized); ***PFZ Properties, Inc. v. Rodriguez***, 928 F.2d

28, 31 (1st Cir. 1991) (where Regulation and Permits Authority of the Commonwealth of Puerto Rico illegally departed from Puerto Rico's proscribed procedures in effecting deprivation of plaintiff's property, adequate postdeprivation remedy was all that was required); ***New Burnham Prairie Homes v. Village of Burnham***, 910 F.2d 1474, 1480 (7th Cir. 1990) (procedural due process claim fails where state provides adequate remedy to cure 'random and unauthorized' denial of permit); ***McClendon v. Turner***, 765 F. Supp. 251, 254 (W.D. Pa. 1991) (whether action belongs in state court will depend on whether conduct was random and unauthorized; "Authorization might depend on number of factors, including...extent of the discretionary or supervisory power invested in the defendant,...the foreseeability of the type of deprivation at issue,...whether the action was taken in departure of procedural rules ...or the existence of a custom or common usage.").

Judge Cudahy, joined by Judges Cummings and Posner, engaged in a vigorous dissent in ***Easter House***, concluding that the majority had "unfortunately misse[d] the point of ***Zinermon***" 910 F.2d at 1410 (Cudahy, J., joined by Cummings, J., and Posner, J., dissenting). According to the dissent, a due process violation can occur even though the challenged conduct is not authorized by state law, indeed, even though the state has laws and regulations which, if followed, would have provided all the process due. *Id*. at 1411-12.

See also ***Johnson v. City of Saginaw***, 980 F.3d 497, 508-09 (6th Cir. 2020) ("Here, the record does not support the conclusion that the deprivation was random or unpredictable. . . . Stemple estimated that he has shut off water service to a dozen businesses in response to similar situations and that no notices or hearings were provided. Stemple testified that the '[p]ractice and policy has been consistent throughout' the water suspensions. . . . Thus, it appears that Johnson's water service was ordered suspended in accordance with an established practice. . . In most cases, '[w]hen a deprivation occurs through an established state procedure, "then it is both practicable and feasible for the state to provide pre-deprivation process, and the state must do so regardless of the adequacy of any post-deprivation remedy."'. . But in some exceptional circumstances—when the 'necessity of quick action' renders pre-deprivation process 'impossible or impracticable'—pre-deprivation process may be excused even when an action is neither random nor unauthorized. . . This is not one of those exceptional cases. As we observed in the context of Johnson's business-license suspension, '[g]iven that the City held a hearing within three days of the shooting (after suspending Johnson's license), it does not appear as though it would have been impractical for the City to have held a hearing before suspending her license.' *Johnson v. Morales*, 946 F.3d 911, 923 (6th Cir. 2020). The record reveals no reason why the same is not true of the water suspension. . . . Here, the circumstances support that Appellants could be reasonably expected to provide predeprivation process. Lastly, the suspension of Johnson's water service was not the type of 'unauthorized' conduct contemplated by *Parratt*. In *Zinermon v. Burch*, the Supreme Court limited the applicability of the *Parratt* doctrine. . . . Similarly, here, Appellants cannot now claim that their actions, which they initially argued were reasonable and in accordance with the City's policies, were random and unauthorized in order to defeat Johnson's procedural due process claim. . . The deprivation was not random, unpredictable, or unauthorized in the *Parratt* sense and pre-deprivation process was not impossible or impracticable. Therefore, the *Parratt* doctrine is

inapplicable."); ***Schulkers v. Kammer***, 955 F.3d 520, 548 & n.6 (6th Cir. 2020) ("Under *Zinermon*, Plaintiffs' procedural due process claim is not barred by the *Parratt-Hudson* doctrine. First, the deprivation that occurred here, as in *Zinermon*, was in no way 'unpredictable.'. . Defendants went to the hospital in order to investigate Holly's presumptive positive test result, and they were aware that they might be imposing a Prevention Plan (as evidenced by their taking the form with them). Moreover, Defendant Campbell testified that the stamped language on the Plan providing that foster care is the planned arrangement absent effective preventative service is stamped on *every* prevention plan that the CHFS provides. Similarly, affording the Schulkers predeprivation procedures before imposing the supervision restrictions, or at the very least once the subsequent negative testing revealed that the initial result was a false positive, would not have been 'impossible.'. . . Defendants in this case have not presented any reason why they were not fully capable of providing the Schulkers with predeprivation procedures. As the district court correctly found, 'the facts do not indicate that any exigency existed.'. . This is especially true after the Schulkers left the hospital and St. Elizabeth notified Defendants that both the confirmatory urine test and the umbilical cord test results were negative. Still, without providing any process, Plaintiffs allege that Defendants left the supervision restrictions in place for approximately two months. Lastly, and for similar reasons to those just discussed, Defendants' choices here do not constitute the type of 'random and unauthorized' conduct that *Parratt* and *Hudson* contemplate. Like the delegation in *Zinermon*, the Commonwealth of Kentucky has delegated to Defendants the authority to inject themselves into the otherwise private realm of family life in order to further the commendable and necessary goals of investigating and ending child maltreatment. . . By such delegation, Defendants at times are required to interfere with family relations, often by justifiably depriving parents and children of certain liberties. Therefore, Defendants cannot now claim that their actions in this case, which they initially argue were reasonable and in accordance with their own policies, were 'random and unauthorized' in order to defeat Plaintiffs' procedural due process claim.[6] **[fn. 6:** For similar reasons, this Court has found that the applicability of the *Parratt-Hudson* doctrine 'is irrelevant to the clearly established prong of the qualified immunity analysis.' *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 901 (6th Cir. 2014). 'Granting immunity based on the lack of clarity as to whether the *State* bears responsibility would turn the qualified immunity doctrine on its head. The official would in effect be seeking immunity based on a "reasonable" belief that his conduct was so wrong—i.e., it was "random and unauthorized"'—that it could not provide the basis for a procedural due process claim.'. . In other words, '[i]t would undermine [qualified immunity's] purpose to find a due process violation but provide no remedy because the defendant could have thought that *Parratt* would let him (and the state) off the hook for his violation of clearly established due process law.'")**]**; ***South Allegheny Pittsburgh Restaurant Enterprises, LLC v. City of Pittsburgh***, 806 F. App'x 134, ___ (3d Cir. 2020) ("Applying *Zinermon*'s three-factor test here, it is plausible that the City's decision to shutter Mother Fletcher's was not a random, unauthorized act by City employees. SAPRE's deprivation occurred at a predictable point in the government's process—when a decision is made whether to invoke the Code's standard or emergency procedures to address a violation (keeping in mind here there was no confirmed violation, but at most the suspicion of a possible violation). And to repeat, there was no competent evidence of exigent

circumstances. Thus pre-deprivation process was possible. In this context—the lack of exigent circumstances, and the Code's established pre-deprivation procedures for non-emergency violations—SAPRE meets *Zinermon*'s first two criteria to establish that pre-deprivation process was required. At the motion-to-dismiss stage, it is also plausible that Mariani was authorized by the Zoning Code to decide whether to invoke emergency procedures. The Code directs 'the Chief of the Bureau of Building Inspection or the appropriate Code Official' to determine reasonably whether an emergency is underway. . . On the night the City closed Mother Fletcher's, the Director of DPLI, Kennedy, instructed Mariani to inspect the business and to 'close [it] if he discovered any dangerous life/safety issues.'. . Given her title and the alleged facts, Kennedy may have been an appropriate 'Code Official' with the authority to cause the deprivation, and her instructions to Mariani may have extended her authority to his action. Hence it is plausible that the Code delegated to Mariani the power and authority 'to effect the very deprivation complained of here, ... and also delegated to [him] the concomitant duty to initiate the procedural safeguards set up by [City] law to guard against unlawful [deprivations].'. . Further, the deployment of considerable City resources to shut down Mother Fletcher's is evidence of state action beyond a rogue employee's 'unauthorized act.' The platoon of police at a place with no commotion (in fact, no patrons)—there have been smaller SWAT teams called in to curb violence—implies a coordinated effort to shut down a business despite the lack of exigent circumstances. In sum, the City 'cannot escape § 1983 liability by characterizing [its employees'] conduct as a "random, unauthorized" violation of [City] law which [it] was not in a position to predict or avert ....'. . . Indeed, there is no competent evidence before us to show that Mariani undertook a random, unauthorized act or reasonably believed that an emergency was underway. Thus, the constitutionally required process—a pre-deprivation hearing—did not occur. We accordingly vacate the District Court's dismissal of SAPRE's due process claim for failing to provide pre-deprivation process as required by the Fourteenth Amendment and remand for further proceedings, including fact-finding regarding whether Mariani and Kennedy are 'appropriate Code Official[s]'."); ***Simpson v. Brown County***, 860 F.3d 1001, 1007-10 (7th Cir. 2017) ("[A]ny license revocation that is 'random and unauthorized' will be an aberration. The existence of a license or permit implies the existence of a legal framework with revocation guidelines, even if those guidelines are unduly broad. To trigger the *Parratt-Hudson* exception in the licensing context, a rogue government official would have to violate the licensing scheme in an unpredictable way. . . .The random, rogue behavior by the licensing officials in *Easter House* distinguished that case from *Zinermon*, where the conduct of the state actors in committing the plaintiff for in-patient mental health treatment was 'not only "authorized", but also, under the circumstances of that case, highly "predictable."'. . . Simpson's third amended complaint, construed in the light most favorable to him, does not allege 'random and unauthorized' actions by County officials. Rather, it alleges official conduct sanctioned by the County. The County had a septic ordinance that plainly described the process for the placement of septic installers on a register and (not so plainly) described the process for their removal. When County Health Officer Page revoked Simpson's license, he acted pursuant to his broadly delegated powers derived from the ordinance. By its terms, the ordinance gave Page as agent for the Board of Health broad discretion to remove any person who had demonstrated "inability or unwillingness to comply" with the ordinance. Page was not acting unpredictably or breaking the rules: he did exactly what

the ordinance told him to do. The possibility of license revocation without due process was not unforeseeable. It was authorized in the ordinance itself. . . .As alleged, there were no random acts by county officials and no public health emergency. There were only County officials acting pursuant to broadly delegated power. Brown County cannot give its Health Officer unfettered discretion to decide when, how, and why he revokes licenses, and then claim that he was acting so unpredictably that it would be impossible to provide pre-revocation notice. . . . Under the *Mathews v. Eldridge* balancing test, Simpson has plausibly alleged that he was denied the pre-deprivation process he was due before his license could be revoked.")

See, e.g., ***Prison Legal News v. Sec'y, Fla. Dep't of Corr.,*** 890 F.3d 954, 976-77 (11th Cir. 2018) ("PLN must receive notice and an opportunity to be heard each time the Department impounds an issue of the magazine. . . .When the Department impounds an issue of a publication, the rule requires that it send the publisher a notice form listing the 'specific reasons' for the impoundment of that issue. . .The Literature Review Committee reviews every impoundment decision, . . . and the publisher can independently appeal an impoundment decision to that committee[.] . .Those procedures, if applied, would have ensured that for each impounded issue PLN received a notice form listing the reasons for the impoundment. As the Department acknowledges, however, that did not happen for 26 out of the 62 monthly issues (42%) impounded between November 2009 and December 2014. That failure rate increases to 87% when we take into account defective notice forms that did not list the reasons for the impoundment. Despite that remarkable failure rate, the Department argues that the Secretary cannot be enjoined because there is no evidence that the failure to send the forms was a result of a Department policy or custom to deprive PLN of notice. . . The Department asserts that PLN should find the mailroom workers who are responsible for the failure to provide notice and sue them. No. PLN doesn't have to hunt and peck throughout Florida's correctional system for negligent mailroom workers to sue. The buck stops with the Secretary. . . This is not a case of one or two notice letters lost in the mail or mailroom. PLN did not receive notice forms for 42% of the impounded issues, and many forms it received for other issues were defective. PLN's effort to enjoin the ongoing violation of its right to due process is appropriate, and it seeks only prospective relief against the Department. . . . The Department's concerns with the ads in *Prison Legal News* are reasonably related to its legitimate interests in prison security and public safety, so we defer to its decision and hold that the impoundments of *Prison Legal News* under Rules (3)(*l*) and 3(m) do not violate the First Amendment. But with the power to impound *Prison Legal News* comes the duty to inform PLN of the reasons for the impoundments. The Department did not do that, which is why the district court did not abuse its discretion in entering an injunction to require the Department to adhere to its own notice rules."); ***Winters v. Board of County Commissioners***, 4 F.3d 848, 857 (10th Cir. 1993) ("Because the Sheriff's Department authorized the release of the ring without adhering to the applicable procedures which would have ensured due process, the pawnshop maintains a viable 1983 action against the Department."); ***Rodi v. Ventetuolo***, 941 F.2d 22, 29 (1st Cir. 1991) (without discussing ***Zinermon***, court found procedural due process claim stated where state law mandated constitutionally sufficient procedures, but procedures were "swept under the rug" in plaintiff's case); ***Anglemyer v. Hamilton County Hospital***, 848 F. Supp. 938, 941 (D. Kan. 1994)

("Some courts have held that if the state mandates procedures for termination of government employees and the relevant state actor fails to follow those procedures, then the *Parratt/Hudson* doctrine applies, and adequate post-deprivation remedies satisfy the requirements of due process ... However, that analysis would not defeat plaintiff's procedural due process claim in this case . . . . [T]he Tenth Circuit has indicated that it will not apply *Parratt/Hudson* merely because the deprivation violated state law." *citing* ***Wolfenbarger v. Williams***, 774 F.2d 358, 363 (10th Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986).); ***Loukas v. Hofbauer***, 784 F. Supp. 377, 382-83 (E.D. Mich. 1992) (prison officials' failure to provide predeprivation hearing as required by regulation gave rise to due process claim); ***Roach v. City of New York***, 782 F.2d 261, 265 (S.D.N.Y. 1992) (claim stated where "a predeprivation procedure was provided for by state law but not followed.").

At the heart of the dispute in ***Easter House*** is the question of whether procedural due process violations require that the challenged action be taken not only *under color of* state law, but also, *pursuant* to state law.

While the majority focuses on the role of the state in authorizing the deprivation without the requisite procedural safeguards, either through formally deficient procedures or through the delegation of uncircumscribed or undefined power to effect the deprivation, the dissent focuses on the abuse of power by one who was given authority and obligated by state law to provide predeprivation process.

In ***Easter House***, where the claims were against state officials, there was no complication involving the convergence of ***Monell*** and ***Parratt*** case law. The question was simply whether there had been a deprivation of procedural due process so as to give rise to a fourteenth amendment right enforceable under § 1983 against the individual state official(s).

If the analysis of the majority and the dissent in ***Easter House*** were applied in a case with a municipal defendant, the majority view would necessitate a finding of local government liability under ***Monell*** in order to establish the underlying due process violation.

The dissent would not find these concepts necessarily intertwined. Instead, the dissent's approach in ***Easter House*** would allow for a procedural due process violation with no municipal liability, where conduct in violation of official law, custom or policy amounts to a denial of predeprivation process by an official entrusted by the government with the authority and responsibility for providing such process.

See ***Sturgess v. Negley***, 761 F. Supp. 1089, 1098-99 (D. Del. 1991) ("[E]ven if [high-ranking officials] did actually violate plaintiffs' constitutional rights by terminating them without providing procedural due process, their actions are not chargeable to the municipality . . . . to the extent that [the officials] departed from official policy . . . ."). *See also* ***DeSouto v. Cooke***, 751 F. Supp. 794, 799 (E.D. Wis. 1990) ("In ***Zinermon***, . . . while the Court did not reject the ***Parratt*** rule, it narrowed its scope; the Court reaffirmed the general rule that the general constitutional requirement is a predeprivation hearing.).

In ***Fields v. Durham***, 856 F.2d 655 (4th Cir. 1988) (***Fields I***), the Fourth Circuit had affirmed the district court's dismissal of a community college dean's claim against certain officials, alleging that he was discharged without due process. The court had concluded that the alleged conduct was a random and unauthorized occurrence and that adequate postdeprivation remedies were available under state law. 856 F.2d at 657.

On remand from the Supreme Court, the court reached the conclusion that although the plaintiff's suit was not barred by ***Parratt***, Fields had been afforded all the process he was due under the Fourteenth Amendment. ***Fields v. Durham***, 909 F.2d 94, 99 (4th Cir. 1990) (***Fields II***), *cert. denied*, 498 U.S. 1068 (1991).

While an erroneous deprivation of a public education official's constitutionally protected job interest was foreseeable, the state of Maryland had prescribed sufficient procedural safeguards to guard against such a deprivation. *Id*. at 98-99.

The Fourth Circuit reached a similar result in ***Plumer v. State of Maryland***, 915 F.2d 927 (4th Cir. 1990), concluding that although ***Parratt*** did not bar plaintiff's claim, Maryland's license revocation procedures provided all the process required. *See also* ***Snider Intern. Corp. v. Town of Forest Heights, Md.***, 739 F.3d 140, 149, 150 (4th Cir. 2014) ("Appellants received constitutionally sufficient notice of the citation and potential penalty, and they could elect a trial prior to being assessed the penalty. The notice set forth the basis for the adverse action. The trial, like the hearing in *Plumer*, permitted Appellants to call witnesses and rebut the state's evidence with their own. Appellants' interest is arguably less than that at stake in *Plumer*—driving privileges cannot be affected under the speed camera program and the $40 civil penalty is not subject to additional monetary penalties for nonpayment. . .It is difficult to see how additional process could significantly reduce the chance of erroneous deprivation, especially given the trial mechanism already in place. The state's interest in efficiently enforcing traffic laws would be greatly burdened were we to require additional procedural safeguards, exhausting significant fiscal and administrative resources, that would provide little, if any, additional protection above and beyond that afforded by a trial in the state courts. In fact, the mere availability of a trial in which to present their grievances undermines Appellants' argument. Notwithstanding the fact that Appellants predicate their challenge on a violation of state law rather than federal law, 'the availability of state procedures [to address Appellants' arguments] is fatal' to their procedural due process claims. . . Appellants had adequate opportunity in the state courts to argue the sufficiency of electronically-signed citations as an affidavit or otherwise admissible evidence. Having forgone the opportunity to object to the use of electronically-signed citations as evidence, Appellants may not first cry foul in a federal court on this issue. . . .We find that the notice and hearing afforded by Maryland's speed camera statute satisfy due process. Notice sent by first-class mail was reasonably calculated to provide actual notice of the speeding violation and civil penalties. The availability of a trial in state court, upon Appellants' election, provided adequate opportunity to be heard on any objections prior to imposition of the statutory penalties. Any flaws in the citation or

enforcement process could have been challenged in the state courts, and Appellants failed to do so.")

See also ***Mananioba v. Fairmont Housing Authority***, 922 F.2d 836 (4th Cir. 1991) (Table) (Where risk of erroneous eviction was foreseeable, where predeprivation process was possible, and where state had delegated to defendants the power to effect the very deprivation complained of, predeprivation process required under ***Zinermon***).

Compare ***Bogart v. Chapell***, 396 F.3d 548, 563 (4th Cir. 2005) ("The teaching of *Zinermon*, it seems, is that where, as in this dispute, state employees do not have broad authority (or, indeed, any authority) to deprive persons of their property or liberty, and do not have a duty to provide the procedural safeguards required before a deprivation occurs, the *Parratt /Hudson* doctrine still bars a § 1983 procedural due process claim based on the employees' random and unauthorized conduct. But where, as in *Zinermon*, state employees do have broad authority to effect deprivations, as well as the duty to provide predeprivation procedural safeguards, the *Parratt /Hudson* doctrine is inapplicable. . . . Therefore, we can only conclude that, under the *Parratt /Hudson* doctrine, the random and unauthorized euthanization of Bogart's animals by the Defendants − however atrocious − did not constitute a violation of Bogart's procedural due process rights because a meaningful postdeprivation remedy for the loss is available.") *with* ***Bogart v. Chapell***, 396 F.3d 548, 568 (4th Cir. 2005) (Williams, J., dissenting) ("Unfortunately, we are bound by the broad interpretation of *Zinermon* contained in *Plumer* and *Fields*. Thus, although I agree that the majority's interpretation of *Zinermon* is the preferable one, and perhaps even 'the best estimate of the course a majority of the [Supreme] Court will take' to resolve the '[i]nconsistent lines of precedent,' . . . I believe that we, as a panel, should refrain from muddying the clear law of this circuit by adding to our body of precedents an opinion that relies upon the legalist model. By doing so today, the majority creates an inconsistent line of precedents in our circuit. If we wish to follow the narrow interpretation of *Zinermon* used in the Fifth and Seventh Circuits, we must first overrule *Plumer* and *Fields* in an en banc session. Because we have not done so, I would reverse the district court and allow Bogart to proceed with her procedural due process claim. Accordingly, I respectfully dissent.").

7. Summary on *Parratt/Hudson* Doctrine

Where state law leaves little latitude in the exercise of discretionary powers and carefully circumscribes the authority and responsibility of an official, decisions made pursuant to that authority will reflect "established state procedure." Isolated departures from the well-defined procedure should be viewed as random, unauthorized conduct, for which adequate postdeprivation state remedies should suffice.

See, e.g., ***S. Commons Condo. Ass'n v. Charlie Arment Trucking, Inc.***, 775 F.3d 82, 86-89 (1st Cir. 2014) ("The need for speed . . . permits the government to take action that may cause a loss to property without first notifying the owner of the property or waiting to hear what that owner has to say, even though the government might have saved itself from making a costly

mistake by taking the time to give notice and to wait for a response. . . . True, this case involves a demolition, which was not at issue in either *Herwins* or *San Gerónimo.* But while a demolition may cause a loss more total (if not always more costly) than a delayed start to construction or a temporary order to vacate, the drastic nature of that response does not make the justification for departing from the ordinary means of ensuring due process any less persuasive. If a building is so badly damaged it must be demolished immediately to protect life and limb, then it surely poses a serious danger to the public safety that must be addressed with dispatch. . . . But section 7 does not confer 'broadly delegated, uncircumscribed power' to proceed in summary fashion. . . The statute instead marks off 'an exception to be used only in emergency situations.'. . The City may carry out a summary demolition only upon a determination a damaged property is so dangerous to life and limb that immediate demolition is required to protect 'the public safety.'. . Section 7 thus renders impractical the provision of advance notice and an opportunity to be heard. Such up-front processes would impede the City from doing what needs to be done to protect the public from the immediate danger the summary demolition procedure is designed to address. Nor, we note, is the application of this triggering standard left solely to the local inspector who—under the statute—first learns of the danger a building presents. Rather, under section 7 and its attendant regulations, a summary demolition may occur only if an actor directly accountable to the voters concludes the standard for summary action has been met. . . For that reason, too, the law considered in *Zinermon* is far removed from the one we consider here. Of course, under Massachusetts law, an official may conclude in a particular case that there is an immediate need to address a danger—and thus proceed in the summary fashion section 7 allows—when, in hindsight, there was no need to rush. But an emergency standard must be written to be of practical use. An official applying that standard must make an on-the-spot judgment about how best to protect the public from the immediate danger a badly damaged building poses. Such a practicably workable standard is sure to be imprecise enough to require the official to make judgment calls about the urgency of the need to act. That some such calls may be mistaken does not show that the process for making them was constitutionally improper. For that reason, it does not matter if the owners are right that the City violated section 7 because the 'public safety' did not in fact require the 'immediate' demolition that occurred. The Supreme Court has made clear that government officials do not commit a federal procedural due process violation simply by erroneously applying a state law that, if followed, would survive a procedural due process challenge. That is because '[t]he state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct.'. . So long as a state has not set up a scheme so open-ended it invites unwarranted uses of summary process, . . . and so long as a state provides an adequate after-the-fact remedy for any wrongful summary action, . . . allegations of the kind of 'random and unauthorized' mistakes in application that those who work in government sometimes make are not enough to state a procedural due process claim. . . . And thus, the alleged state law error—if error it was—cannot save the owners' procedural due process claim, at least so long as an adequate, post-hoc remedy is available. We thus now turn to a consideration of whether Massachusetts makes available an adequate after-the-fact remedy for any wrongs the City may have committed in carrying out the summary demolition. In both *San Gerónimo* and *Herwins,* we found the state did provide such a remedy. . . .And we find the same to be the case here."); ***Connor***

B. ex rel. Vigurs v. Patrick, 774 F.3d 45, 60 (1st Cir. 2014) ("[T]he plaintiffs' evidence does not suffice to establish a violation of any federal procedural due process right. The plaintiffs do not allege that DCF's policies regarding these rights are inadequate. When DCF deviates from those policies, it is a mistake. Such mistakes under state law do not constitute a violation of federal due process, especially in light of the state's fair hearings. *See, e.g., San Gerónimo Caribe Project, Inc. v. Acevedo–Vilá,* 687 F.3d 465, 478–81 (1st Cir.2012) (en banc)."); ***San Geronimo Caribe Project, Inc. v. Acevedo-Vila***, 687 F.3d 465, 486, 490 (1st Cir. 2012) (en banc) ("[W]e reject the argument that the emergency statute allowed such unfettered discretion as to remove this case from the reach of *Parratt–Hudson.* ARPE was not provided with 'broad power and little guidance,' or 'broadly delegated, uncircumscribed power.'. . . Sufficient guidance was provided to ARPE, and ARPE's discretion was so limited, such that this case does not fall within *Zinermon.* . . . Moreover, the view of this court has long been that *Zinermon* is best viewed as a case where the state statutory scheme conferred so much discretion on state officials so as to authorize the state officials' actions in deprivation of procedural rights. [collecting cases] We therefore reject SGCP's opening premise that *Zinermon* involved a case of violation of state law. Here, the state statutory scheme did not authorize ARPE's actions, and a mere mistake by officials in exceeding the limits of their defined authority is not the stuff of a federal due process claim. . . . .In sum, none of the grounds SGCP offers for distinguishing *Parratt–Hudson* has merit. The erroneous judgment by ARPE was exactly the type of 'random and unauthorized conduct' encompassed by *Parratt–Hudson.* The Puerto Rico Supreme Court stated that ARPE simply 'made a mistake' in invoking the emergency provisions. That court did find that the ARPE's judgment was wrong, but that does not remove the case from *Parratt–Hudson;* it instead establishes that this case fits firmly within *Parratt–Hudson.* That is the very kind of unanticipated mistake that is due to individual error, not induced by the statute. . . . We clarify that we do not hold that whenever an official's conduct violates state law the *Parratt–Hudson* doctrine necessarily applies. Under *Zinermon,* there may be certain circumstances warranting the conclusion that such violations do not fall within the *Paratt–Hudson* doctrine. . . . To the extent that dicta in our precedent suggests otherwise, [citing *PFZ Props., Inc.*] that dicta is overruled."); ***Tinney v. Shores***, 77 F.3d 378, 382 n.1 (11th Cir. 1996) (per curiam) ("The question is whether the state can anticipate and therefore control the action of a state employee. [cite omitted] Once a state has established procedures for the effectuation of an attachment − which Alabama undisputedly has − it cannot predict whether or not, in a given situation, those procedures will be followed or ignored. Thus, as with an employee's negligence or an employee's intentional wrongful act, Appellants' actions in this case were not preventable beforehand by the state. Therefore, under *Parratt* and *Hudson*, no procedural due process violation occurs unless the state fails to provide the opportunity to redress the situation after the fact."); ***Copeland v. Machulis***, 57 F.3d 476, 479 (6th Cir. 1995) ("[T]he unpredictable and unauthorized departures from prison policy directives were beyond the State's reasonable control and the state tort remedy is all the process [Plaintiff] is due. Any predeprivation procedural safeguards that Michigan did provide, or could have provided, would not address the risk of this kind of deprivation."); ***Lolling v. Patterson***, 966 F.2d 230, 234 n.6 (7th Cir. 1992) ("[A]lthough Sheriff . . . exercised discretion and authority in disciplining Deputy. . .,that discretion was not 'uncircumscribed' or otherwise unregulated. Unlike the state actors in *Zinermon*, the Sheriff's acts could not have been predicted

by the State or prevented through the implementation of additional predisposition procedural safeguards."); ***Lowe v. Scott***, 959 F.2d 323, 343 (1st Cir. 1992) (defendant, Chief Administrative Officer of Board of Medical Licensure and Discipline, was not authorized to misrepresent the position of the Board, nor did he have discretion to decide whether to follow the procedural safeguards expressly contemplated under the Consent Order); ***Parratt/Hudson*** applied to plaintiff's procedural due process claim); ***G.M. Engineers and Associates v. West Bloomfield Township***, 922 F.2d 328, 331 (6th Cir. 1990) (where state law circumscribes discretion of state officials to point where certain conduct is mandatory, contrary conduct is unauthorized, not pursuant to any established state procedure, and claim is subject to ***Parratt*** doctrine); ***Simmons v. Chemung County Dept. of Social Services***, 770 F. Supp. 795, 800 (W.D.N.Y. 1991), *aff'd*, 948 F.2d 1276 (2d Cir. 1991) (Table) (Where discretion of defendants was not uncircumscribed, the State could not have predicted or prevented alleged transgressions of established procedures defendants were statutorily required to follow).

See also ***Thiel v. Korte***, 954 F.3d 1125, 1129-30 (8th Cir. 2020) ("Thiel claims that Korte violated his procedural-due-process rights when he refused to return seized property. The district court identified a procedure Thiel could invoke to obtain the return of his property—filing a motion under Mo. Rev. Stat. § 542.301. On appeal, Thiel does not contend that a motion under § 542.301 is unavailable to him or would not afford him due process, so we do not consider those questions. He instead argues that he did not need to file such a motion before he could pursue his federal claim. But as the Supreme Court has explained, a procedural-due-process violation does not occur 'unless and until the State fails to provide due process.' *See Zinermon v. Burch*, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Since adequate process was available here, or at least Thiel does not challenge the determination that it was, we reject his claim."); ***Chandler v. Village of Chagrin Falls***, 296 F. App'x 463, ___ (6th Cir. 2008) ("Even assuming all of the facts alleged by Chandler to be true, that in fact the Village violated its ordinances and that she was required to expend time and money to secure her building permit, she has not established, nor does she argue, that process afforded her was insufficient to meet the constitutional mandates of due process. Rather, like *Depiero* and *Eaton*, the sole basis of Chandler's due process claim is that the Village failed to comply with its own ordinances. Like *Depiero* and *Eaton*, such a basis is insufficient to establish that the Village provided insufficient procedural due process when Chandler was otherwise provided notice and an opportunity to be heard."); ***Hadfield v. McDonough***, 407 F.3d 11, 20 (1st Cir. 2005) ("Our cases establish that a government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law. . . In other words, conduct is 'random and unauthorized' within the meaning of *Parratt-Hudson* when the challenged state action is a flaw in the official's conduct rather than a flaw in the state law itself. . . . We have applied this doctrine in the public employment context. [citing cases] Here, Hadfield was denied a hearing because the due process defendants erred (if they erred at all) by misapplying Massachusetts civil service law. This determination was not discretionary or governed by a formal or informal policy. . . Rather, if error, it was simply a missaprehension [sic] of state law. This is the sort of random and unauthorized conduct to which *Parratt-Hudson* applies."); ***Mard v. Town of Amherst,*** 350 F.3d 184, 194 (1st

Cir. 2003) ("We agree with the conclusion of the district court that Dr. Donahue's alleged failure to accept or consider Mard's medical information was random and unauthorized by the Town. Mard does not claim that § 111F delegated to Town-designated physicians broad authority to perform unprofessional or inadequate medical examinations. Nor does she suggest that Dr. Donahue's alleged conduct constituted a form of regular practice among physicians who perform § 111F independent medical examinations at the Town's request. . . As Mard herself suggests, § 111F contemplates that examining physicians will provide injured firefighters with an opportunity to present medical evidence and discuss their condition during the examination in order to guard against an erroneous determination that they are capable of returning to work. Insofar as Dr. Donahue failed to 'initiate procedural safeguards to protect against the unconstitutional deprivation of section § 111F benefits,' his conduct was in breach of the duty that ran 'concomitant' to his statutory authority. This alleged, unprofessional conduct, which was not authorized by the statute and did not form a regular pattern among § 111F physicians, did not violate Mard's due process rights so long as the Town provided an adequate post-deprivation remedy. . . As we have noted, Mard does not challenge the adequacy of the post-termination procedures provided under the collective bargaining agreement. Consequently, with respect to Mard's claims concerning the adequacy of her pre-termination hearing, we find that the post-termination grievance procedures provided Mard all the process that was due."); ***O'Neill v. Baker***, 210 F.3d 41, 50 (1st Cir. 2000) ("The *Parratt-Hudson* doctrine might have been undermined by the Supreme Court's later decision in *Zinermon v. Burch*, . . . but this court has already rejected that view. *See Herwins*, 163 F.3d at 19. In *Herwins*, we viewed *Zinermon* as a case in which state law did authorize the procedure followed (albeit unconstitutionally), so that the act of the officials could not be described as 'random and unauthorized'; *Zinermon* does, however, require that 'courts scrutinize carefully the assertion by state officials that their conduct is Arandom and unauthorized,'' . . . and it is well to remember that the *Parratt-Hudson* doctrine is directed only to claims that due process was denied and not to other kinds of constitutional violations. Nevertheless, the *Parratt-Hudson* doctrine plays an important part in allowing procedural claims to be resolved in state forums where states do provide adequate remedies."); ***Herwins v. City of Revere***, 163 F.3d 15, 19 (1st Cir. 1998) ("[A]s a result of [defendant's] substantive decision, Herwins suffered a wrongful shutdown of his building. But the city provided all of the procedural protection it could in requiring a prior hearing for closures based on non-emergency violations. Where an official errs in declaring an emergency, the only feasible procedure is a post-deprivation remedy, which the city also provided."); ***Brown v. Hot, Sexy and Safer Productions, Inc.***, 68 F.3d 525, 536-37 (1st Cir. 1995) ("The plaintiffs contend that the deprivation cannot be characterized as 'random and unauthorized' because the performance was planned well in advance. This contention ignores both the nature of the deprivation and the relevant caselaw. The deprivation alleged here is not the staging of the Program itself, but rather the defendants' failure to follow the procedures mandated by the Sex Education Policy . . . . [T]he Sex Education Policy states that '[p]ositive subscription, with parental permission, will be a prerequisite to enrolling,' and, accordingly, vested no discretion in school officials. We therefore conclude that the failure to follow the Sex Education Policy was a 'random and unauthorized' act within the confines of the *Parratt-Hudson* doctrine."); ***Pomeroy v. Ashburnham Westminster Regional School District,*** 410 F.Supp.2d 7, 17, 18 (D.Mass. 2006)

("Defendant essentially asks the Court to assume that if the procedures employed in disciplining James violated his due process rights, those procedures were nonetheless a random, isolated, and unauthorized occurrence. However, the Court must view the facts in the light most favorable to the plaintiff. A liberal reading of the complaint suggests that plaintiff alleges that the procedures employed were the standard custom or practice in the Ashburnham-Westminster Regional School District. For the purpose of this motion, plaintiff has satisfied the causation requirement as well, as the alleged denial of procedural protections relates directly to James's inability to rebut the case against him at his expulsion hearing. Defendant further contends that even if a due process violation occurred, plaintiff cannot prevail because state law provides an adequate post-deprivation remedy. . . . But the requirement that the state's conduct be random and unauthorized makes the *Parratt-Hudson* doctrine inapposite to the present claim. Plaintiff's *Monell* claim alleges a policy or custom of unconstitutional conduct; actions that conform with a policy or custom are not 'random or unauthorized.' . . . Accordingly, plaintiff's *Monell* claim will not be dismissed for failure to state a claim."); ***McSorley v. Richmond,*** 242 F. Supp.2d 24, 28 n.4 (D. Me. 2002) ("In *O'Neill v. Baker*, the First Circuit Court of Appeals suggested in dicta that a state actor's failure to follow procedures established by state law might amount to 'random and unauthorized' conduct under the *Parratt-Hudson* doctrine. . . However, the doctrine applies in only two relatively narrow circumstances, where there is 'the necessity of quick action by the State' or where the provision of meaningful predeprivation process is otherwise impractical. . . The facts of this case do not give rise to any exigency, nor would pre-deprivation process be impractical considering that pre-deprivation process was called for by state law. Thus, the point of departure for *Parratt-Hudson* appears to be whether a meaningful pre-deprivation procedure could be followed rather than whether an existing pre-deprivation procedure was followed. If compliance with the due process clause requires that pre-deprivation procedures be provided, the availability of post-deprivation remedies is irrelevant. Thus, in *Zinermon v. Burch*, the Supreme Court recognized a procedural due process claim where pre-deprivation procedures were appropriate and available, but were not provided, even though meaningful post-deprivation remedies may have existed."); ***Learnard v. Inhabitants of the Town of Van Buren,*** 164 F.Supp.2d 35, 42, 43 (D. Me. 2001) ("To invoke the *Parratt-Hudson* defense, it is incumbent upon Defendants to demonstrate that the alleged actions unforeseeably violated 'established procedure.' . . . If the town charter authorizes Defendants to dismiss public employees prior to a hearing, then Defendants cannot argue that their conduct was random or unauthorized. Furthermore, it is not clear that it was random or unauthorized when Defendants rescheduled the first hearing for March 29, 2000; Defendants point to no established procedure compelling town councils to set hearings at times convenient to claimants' lawyers. . . Quite simply, the Court cannot rule that Defendants violated established procedures without the parties informing the Court as to what those established procedures were. . . . If Defendants can demonstrate that the alleged actions were random and unauthorized departures from established procedures, then the *Parratt-Hudson* doctrine may defeat Plaintiff's due process claim.A); ***Lumpkin v. City of Lafayette***, 24 F. Supp.2d 1259, 1264, 1265 (M.D. Ala. 1998) ("If Mr. Lumpkin had alleged that the mayor and council members acted pursuant to the city's procedures, or in the absence of any procedures, the violation of his procedural due process rights would have been complete at the moment of his termination, assuming that due process

entitled him to notice and a hearing. That is not what Mr. Lumpkin alleges. Mr. Lumpkin does not attack the City of Lafayette's established procedure. He asserts that the mayor and council members ignored the city's established procedure when they eliminated his position without notice or a due process hearing. . . . The Alabama courts were available to hear Mr. Lumpkin's claim that the city officials failed to follow established procedures requiring notice and a hearing before his termination.").

But see ***Coggin v. Longview Independent School District,*** 337 F.3d 459, 466 (5th Cir. 2003) (en banc) ("If the Commissioner does not abide the prescribed scheme, Texas gives an aggrieved school employee the right to appeal to a state district court, thereby providing constitutional due process. [footnote omitted] If the mandated procedure is followed, an employee will also have been afforded constitutional due process when a school board makes its final termination decision. When a school board disregards the statutory scheme, here depriving the employee of his right to appeal, however, it may subject itself to liability, not for the act of another but for its own act. To the point, had the school board given Coggin the statutorily allotted time to appeal the Commissioner's decision, there would have been no denial of due process."). *See also* ***Brockton Power LLC v. City of Brockton***, No. 12–11047–LTS, 2013 WL 2407220, *13, *14, *20 (D. Mass. May 30, 2013) ("Although proving a procedural due process violation in the land-use context is no simple task, the plaintiffs have alleged sufficient facts to avoid dismissal at this point in the proceedings. First, this is not a case where the plaintiffs complain about one or two discrete permit denials or other obstructive acts that were subsequently remedied by state courts. . . Instead, the plaintiffs allege repeated summary denial—or refusal to even consider—a series of applications and submissions necessary throughout the course of the project, requiring repeated resort to the state courts to obtain relief. . . The systemic nature of the defendants' refusal to provide any meaningful pre-deprivation process sets this case apart from those previously considered by courts in this jurisdiction, and suggests the defendants were not misinterpreting or misapplying the law, but were collectively determined not to follow it. . . . Such a widespread, concerted effort to ignore the law and defeat the project by consistently denying the plaintiffs proper consideration of their submissions (absent a court order), and then to undermine the fairness of state post-deprivation proceedings—especially in a project requiring numerous permits and approvals—goes beyond the typical circumstances in which the First Circuit previously has rejected procedural due process claims in this context. Accordingly, the defendants' motions are denied with respect to Count I, insofar as it alleges a procedural due process violation. . . . The plaintiffs have done enough, at this stage in the proceedings, to distinguish their allegations from the sort of 'run of the mill' land-use claims often brought by disappointed developers and rejected by federal courts in this jurisdiction. The defendants have cited no decisions—and the Court has located none—in which a court within the First Circuit has confronted a conspiracy involving a pattern of conduct of the magnitude alleged here. The alleged ongoing refusal of the defendants to even consider the plaintiffs' submissions—in other words, the systemic denial of any pre-deprivation process at all despite repeated reversals by the state courts—constitutes the sort of 'fundamental procedural irregularity' that has been absent in many previous cases; it is the very definition of 'arbitrary and capricious' conduct. In particular, the summary denial of the plaintiffs' application for an

extension of the previously granted drinking water approval, and the actions allegedly taken by various moving defendants to secure that denial, rise to the level of a 'truly horrendous situation' which implicates the substantive due process doctrine. The denial of this fundamental right, guaranteed to all property owners under state law, essentially renders the plaintiffs unable to develop their land for any purpose, and not just the lawful use contemplated here. The conscience-shocking nature of the alleged conspiracy as a whole is underscored by allegations that the defendants often acted against the advice of legal counsel, to further their own personal and political interests, and while knowing there was no legal justification for their actions. This adequately alleges government action that the substantive due process clause forbids. . . Under these circumstances, the plaintiffs have pleaded facts sufficient to warrant discovery on their substantive due process claim.")

If departures from the formal procedures are persistent and widespread, then knowledge of and acquiescence in such behavior would be imputed to official policymakers. *Accord*, ***Duenas v. Nagle***, 765 F. Supp. 1393, 1399 (W.D. Wis. 1991) ("If defendants had committed the same rule violations with respect to many prisoners...and there were an indication that the state had an opportunity to learn of the continued violations but ignored them, the argument could be made that the state had permitted the initiation of new policy, rendering the acts neither random nor unauthorized.")

Where an official acts under a "standardless grant of authority," ***Bigford v. Taylor***, 834 F.2d 1213, 1222 (5th Cir. 1988), *cert. denied*, 488 U.S. 851 (1988), such actions may be viewed as official policy if the official is a final policymaker within the meaning of ***Pembaur***, ***Praprotnik***, and ***Jett***. *See, e.g.*, ***Xu v. City of New York***, No. 16-4079, 2017 WL 4994477, at *1–2 (2d Cir. Nov. 2, 2017) (not published) ("Assuming without deciding that Xu possessed a property interest in her position, Xu has stated a plausible claim that her procedural due process rights were violated by Municipal Defendants. Though it is well settled that a postdeprivation hearing may satisfy due process when the claim is 'based on random, unauthorized acts by state employees,'. . . a postdeprivation remedy may not suffice when the alleged violation was perpetrated by 'officials with final authority over significant matters, which contravene the requirements of a written municipal code, [and] can constitute established state procedure[.] We have reasoned that 'categorizing acts of high-level officials as "random and unauthorized" makes little sense because the state acts through its high-level officials.'. . We believe Xu has alleged sufficient facts to state a facially plausible claim that her firing was the result of decisions made by 'officials with final authority over significant matters,' *Burtnieks*, 716 F.2d at 988, who may properly be considered 'high-level officials' for the purposes of that exception, *DiBlasio*, 344 F.3d at 302. Xu was improperly fired without a predeprivation hearing because Municipal Defendants wrongly believed her to be a probationary employee who was not entitled to such a hearing. Xu alleges that her firing was approved by Brenda McIntyre, who was the Assistant Commissioner and Director of the Bureau of Human Resources for the Department of Mental Health and Hygiene. At this early stage of the litigation, these allegations are sufficient to state a facially plausible claim that the 'high-level official' exception should apply to this case."); ***New Windsor Volunteer***

Ambulance Corps, Inc. v. Meyers, 442 F.3d 101, 115, 116 (2d Cir. 2006) ("The Town also contends that even if the ambulances and other equipment were property of the Corps protected by the Due Process Clause, the Corps received all the process it was due because it could have brought a proceeding under Article 78 of New York's C.P.L .R. or 'a plenary contract action' after the seizure . . . . We disagree. In general, 'the Constitution requires some kind of a hearing before the State deprives a person of liberty or property.'. . . Although postdeprivation remedies can provide constitutionally sufficient process in circumstances where the deprivation was caused by a state agent's conduct that was 'random' and 'unauthorized,'. . . on the rationale that the state cannot reasonably anticipate such conduct, . . .the principle does not apply where the deprivation was caused by high-ranking officials who had 'final authority over the decision-making process[.]'. . . Here, the district court found that the seizure was ordered not by any low-ranking employee, but by Meyers, . . . who was the Town's highest ranking official, chairman of the Town's governing body, and a 'policymaking official[.]'. . . Meyers's actions cannot be termed random or unauthorized; his actions with respect to the Corps were the 'actions of the Town itself'. . . . Accordingly, the Corps was entitled to notice and an opportunity to be heard before the Town seized its property. It received neither."); ***Messick v. Leavins***, 811 F.2d 1439, 1442-1443 (11th Cir. 1987) (where final decision as to matter left to discretion of superintendent of public works, his conduct represents official city policy and deprivation of plaintiffs' property was pursuant to established state procedure); ***Kassim v. City of Schenectady,*** 255 F.Supp.2d 32, 39 (N.D.N.Y. 2003) ("Clearly, [Corporation Counsel for City] had the requisite final authority over the decision as to how much notice, if any, was to be given to plaintiff. Thus, his actions were not random and unauthorized within the meaning of *Hudson* and *Parratt*, and instead amount to an established state procedure of using his discretion to determine how much, if any, advance notice is to be given. As such, barring impracticality or emergency circumstances, plaintiff was entitled to pre-deprivation process.").

The Sixth Circuit has interpreted *Zinermon* as creating a category of procedural due process claims that falls outside "two clearly delineated categories: those involving a direct challenge to an established state procedure or those challenging random and unauthorized acts." ***Mertik v. Blalock***, 983 F.2d 1353, 1365 (6th Cir. 1993). The court explained:

> [I]t is not necessarily the case that a due process challenge to state action not involving an 'established state procedure' must automatically come within the *Parratt* and *Hudson* rule governing random and unauthorized acts. . . . *Zinermon* . . . counsels that a court look to the nature of the deprivation complained of and the circumstances under which the deprivation occurred to determine whether the rule of *Parratt* and *Hudson* applies to defeat a procedural due process claim.

Id. at 1365-66. *See also* ***King v. Montgomery County, Tennessee***, 797 F.3d 949, ___ (6th Cir. 2020) ("Deprivations that result from concrete governmental policies require a more demanding due process inquiry. . . But that is not what King alleges. She does not, for instance, cite a Montgomery County policy that provides for impounded animals being given up for adoption

immediately upon seizure. Rather, she characterizes the adoption here as simply occurring before a hearing was possible. In other words, she alleges a one-off instance of purported misconduct the County was largely powerless to anticipate. In that irregular circumstance, one driven more by human error than by adherence to a flawed governmental policy, before we intervene, we require that the plaintiff demonstrate that the state in which the error occurred—here Tennessee—affords her no adequate remedy. . . .King has not shown why she is unable to seek relief under state law to regain possession of the dog, or why such relief, if she could pursue it, would be inadequate under the Fourteenth Amendment. Her claim therefore fails."); ***Daily Services, LLC v. Valentino***, 756 F.3d 893, 907, 909, 910 (6th Cir. 2014) ("Courts may dismiss a procedural due process claim if the state provides an adequate postdeprivation remedy and '(1) the deprivation was unpredictable or "random"; (2) predeprivation process was impossible or impracticable; and (3) the state actor was not authorized to take the action that deprived the plaintiff of property or liberty.'. . Our court has explained that, in this analysis, '"unauthorized" means that the official in question did not have the power or authority to effect the deprivation, not that the act was contrary to law.'. . . Daily Services argues that the defendants' actions were 'authorized' because they were taken by high-ranking officials who abused their positions. But we need not resolve whether acts by certain high-ranking officials should never be considered 'random and unauthorized,' as the Second Circuit has held. . . Regardless of their positions, the defendants were not authorized to effect deprivations in the way the *Zinermon* defendants were. In light of the three *Zinermon* factors, 'postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide.'. . The *Parratt* doctrine therefore applies, and Daily Services' procedural due process claims fail if Ohio provides an adequate postdeprivation remedy. . . Daily Services' complaint does not allege that Ohio's postdeprivation remedies are inadequate. Moreover, '[a]lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.' *Parratt*, 451 U.S. at 544. In other words, Daily Services must explain why the ability to be heard in state court and to vacate the wrongful judgment and liens, even in the absence of damages, is insufficient to remedy the defendants' process violations. A convincing argument on this point might exist, but Daily Services has not offered it. Thus, under *Parratt,* Daily Services' complaint does not state a claim for a procedural due process violation.") *with id.* At 910-11 (Karen Nelson Moore, J., concurring in part and dissenting in part) ("I agree entirely with the majority's well-written and well-reasoned explanation of the relationship between the *Parratt* and qualified-immunity doctrines. However, I cannot concur in the majority's ultimate conclusion that the *Parratt* doctrine applies in this case, because I do not believe that the defendants' actions were 'unauthorized' as defined by the Supreme Court in *Zinermon v. Burch,* 494 U.S. 113, 138 (1990). As a result, I must respectfully dissent from Part II.C.3 of the lead opinion. . . .The case here is similar to *Zinermon.* Section 4123.37 of the Ohio Revised Code grants the Bureau power to present the Court of Common Pleas clerk with the Bureau's assessment of premiums in arrears and to cause a judgment to be entered against the noncompliant employer. Ohio law also imposes upon the Bureau, and its employees, the responsibility to follow the procedural safeguards set forth in § 4123.37 to protect the due-process rights of the noncompliant employers. The fact that the defendants failed to follow the

state-mandated procedures does not mean that they were not legally empowered to effect those deprivations. As a result, I would hold that the defendants' actions were authorized and, therefore, that the *Parratt* doctrine does not apply. Plaintiff should be able to proceed on its claim based on a denial of predeprivation process, and defendants' motion for judgment on the pleadings should be denied. Because the majority sees this close question differently, I must respectfully dissent.")

See also ***DiLuzio v. Vill. of Yorkville, Ohio***, 796 F.3d 604, 614-15 (6th Cir. 2015) ("Mayor DiFilippo responds that if he acted in bad faith, then his decision to demolish DiLuzio's building was a 'random and unauthorized' act, such that predeprivation due process was unnecessary, pursuant to *Parratt.* An official's act is 'random and unauthorized' if it was unpredictable and he was 'not acting pursuant to any established state procedure.'. . Here, Mayor DiFilippo claims to have acted pursuant to Ohio Revised Code § 715.26(B), which authorizes municipalities to demolish private buildings '[i]f an emergency exists, as determined by' the municipality. Thus, DiFilippo's decision was not 'random or unauthorized,' regardless of whether he acted with 'intent to injure' DiLuzio or in bad faith as to whether an emergency actually existed."); ***Stotter v. University of Texas At San Antonio***, 508 F.3d 812,822 (5th Cir. 2007) ("Here, the deprivation was both predictable and foreseeable. In fact, not only was it *possible* for Dr. Bailey to provide a pre-deprivation remedy in this case, he attempted to do so by sending Dr. Stotter a letter giving him an opportunity to remove any personal items from his lab. Moreover, UTSA and Dr. Bailey specifically authorized the deprivation. . . In short, because the alleged deprivation was authorized, the deprivation was foreseeable, Dr. Bailey had an opportunity to provide a pre-deprivation remedy, and he failed to give Dr. Stotter sufficient time to collect his personal items prior to allegedly discarding them, the district court erred in dismissing Dr. Stotter's procedural due process claim on the basis of the availability of an adequate post-deprivation remedy."); ***Women's Medical Professional Corp. v. Baird***, 438 F.3d 595, 613 (6th Cir. 2006) ("In this case, a pre-deprivation hearing would not have been unduly burdensome, especially given the property interest at stake, namely continued operation of business. Further, Ohio cannot argue that it was 'truly unable to anticipate and prevent a random deprivation of a liberty interest' given that it issued a cease-and-desist letter that served to close the Dayton clinic. Under the reasoning in *Zinermon*, the post-deprivation remedy of a hearing on the proposed license denial does not satisfy procedural due process. We conclude that Director Baird violated WMPC's procedural due process rights when he ordered the Dayton clinic closed. Because he issued a cease-and-desist order that required the clinic to immediately cease operations, he effectively prevented WMPC from obtaining a pre-deprivation hearing on the proposed license denial.")***; Warren v. City of Athens***, 411 F.3d 697, 709(6th Cir. 2005) ("Under circuit precedent, a § 1983 plaintiff can prevail on a procedural due process claim by demonstrating that the property deprivation resulted from either: (1) an established state procedure that itself violates due process rights, or (2) a 'random and unauthorized act' causing a loss for which available state remedies would not adequately compensate the plaintiff. . . A plaintiff alleging the first element of this test would not need to demonstrate the inadequacy of state remedies. . . If the plaintiff pursues the second line of argument, he must navigate the rule of *Parratt v. Taylor*, . . . which holds that a state may satisfy procedural due process with only an adequate postdeprivation procedure when the state action was

'random and unauthorized.' . . In this context, 'unauthorized' means that the official in question did not have the power or authority to effect the deprivation, not that the act was contrary to law. . . Whether seen as an attack on an established state procedure or as an attack on a 'random and unauthorized' act, the Warrens' claim is not subject to the *Parratt* rule. It clearly would not have been 'impossible' for the City to grant a predeprivation hearing to the Warrens. . . Moreover, even if the *Parratt* rule did apply, it is not clear that any state remedies were available to the Warrens. . . Thus, if the City's action was a 'random and unauthorized act,' then the Warrens' claim prevails. If, alternatively, the City's action was the result of an established state procedure, then the question would be whether that procedure violated due process rights. The Warrens have shown that the state procedure in this case violated their rights."); ***Honey v. Distelrath***, 195 F.3d 531, 534 (9th Cir. 1999) ("[A]s the *Armendariz* and *Zinermon* courts acknowledged, even acts in violation of established law may be considered 'authorized.' We hold that the acts at issue in this case were not random and unauthorized because the defendants in this case had the authority to effect the very deprivation complained of, and the duty to afford Honey procedural due process. Appellees Distelrath, the Chief of Police, and Starbird, the City Manager, were in positions with substantial discretionary powers. They were responsible for the procedurally deficient termination hearings, and thus the deprivation was foreseeable because it was their intent for it to occur. . . Thus, we find that this case fits squarely within the *Zinermon/Armendariz* exception to the *Parratt* rule. Additionally, this circuit does not apply *Parratt* where a deprivation occurs because officials are acting according to established procedures − even if those established procedures violate other state or federal laws."); ***Hamlin v. Vaudenberg***, 95 F.3d 580, 584 (7th Cir. 1996) ("Evaluating conduct to determine whether it is random and unauthorized involves determining whether the conduct was predictable. . . Predictability is determined by the amount of discretion afforded the state actor, and whether that discretion is uncircumscribed. . . If state procedures allow unfettered discretion by state actors, then an abuse of that discretion may be predictable, authorized, and preventable with pre-deprivation process. Under Wisconsin law, the Committee must follow the applicable procedures and lacks discretion in determining how to carry out those procedures. Thus, given the Committee's failure to adhere to the correct procedures, Hamlin's alleged deprivation was in spite rather than because of state procedures."); ***Alexander v. Ieyoub***, 62 F.3d 709, 712 (5th Cir. 1995) ("We disagree with the Defendants' contention that their actions were unpredictable, intentional violations of state law that fell within the ambit of the *Parratt/Hudson* doctrine and therefore foreclosed [plaintiff's] § 1983 claim. Although the Louisiana statute providing for a forfeiture proceeding gives the DA the authority to institute the proceeding, it does not specify a time period within which the DA should act. [footnote omitted] The Defendants therefore had discretion to institute the proceeding whenever they wanted, and their actions in delaying for nearly three years, although unreasonable, were not in conflict with their authority under state law."); ***Cushing v. City of Chicago***, 3 F.3d 1156, 1165 (7th Cir. 1993) (termination of plaintiff's medical benefits was not random or unauthorized where City did not "disavow knowledge of [defendants'] actions, and [did] not suggest either individual contravened the provisions of the collective bargaining agreement, much less municipal or state law."); ***Ezekwo v. New York City Health & Hospitals Corp.***, 940 F.2d 775, 784 (2d Cir. 1991) (resident, denied Chief Residency position due to changes made in selection procedures, stated procedural due

process claim where directors of program had the authority "to effect the very deprivation complained of here," and possessed "essentially unrestricted" discretion), *cert. denied*, 112 S. Ct. 657 (1991); ***Independent Coin Payphone Association, Inc. v. City of Chicago***, 863 F. Supp. 744, 753 (N.D. Ill. 1994) ("When an official behaves in a random and unauthorized manner during the course of established predeprivation procedures, as alleged here, such conduct may, or may not, fall within the rule of *Parratt* and warrant consideration of the available state remedies. Where the alleged violation is properly considered to be random or unauthorized, additional predeprivation procedure would be irrelevant, and courts should consider the availability of adequate postdeprivation remedies before permitting a due process claim to go forward. [cite omitted] On the other hand, where the wrong is effectively authorized, then the predeprivation process is at issue and the court need not evaluate the postdeprivation options available to plaintiff. [citing *Zinermon*] . . . . In both *Zinermon* and the case at hand, the official who allegedly behaved wrongfully was vested with the power to deprive the plaintiffs of the property at stake. As such, the charged deprivation was foreseeable, occurred at a predictable juncture, and could not be said to be 'unauthorized.'"); ***Arosena v. Coughlin***, No. 92-CV-0589E(F), 1994 WL 118298, *6 and n.5 (W.D.N.Y. March 16, 1994) (not reported) (Noting that *Zinermon* "abandoned the categorical distinction between established procedures and unauthorized acts[,]" the court reads *Zinermon* to hold *Parratt/Hudson* inapplicable where state officials have authority to effect a deprivation and power to provide a pre-deprivation hearing. Fact that defendants failed to follow delineated procedural safeguards did not make conduct "random and unauthorized" for *Parratt* purposes.); ***Crownhart v. Thorp***, 1992 WL 332298, *6, *7 (N.D. Ill. Nov. 9, 1992) (not reported) (removal of plaintiff from wrecker rotational list was not "random and unauthorized" where chief of police had "unbridled discretion to remove wreckers from the list without following any procedure."); ***Smith v. McCaughtry***, 801 F. Supp. 239, 243 (E.D. Wis. 1992) (where state officials had uncircumscribed power to effect the deprivation, state can hardly claim that such an erroneous deprivation was unpredictable or unauthorized).

NOTE on *McKinney:* In *Zinermon*, the Supreme Court stated that in procedural due process cases, "[t]he constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." 494 U.S. at 126. As one court has noted, "[t]his statement by the Supreme Court seems to implicate that procedural due process violations may be 'cured' by the state through a later constitutionally correct procedure." ***Reyes-Pagan v. Benitez***, 910 F. Supp. 38, 44 n.1 (D.P.R. 1995).

In ***McKinney v. Pate***, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc) the court determined that "the state may cure a procedural deprivation by providing a later procedural remedy: only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *See also* ***Lakoskey v. Floro***, No. 19-12401, 2021 WL 5860460 (11th Cir. Dec. 10, 2021) (not reported) (" '[A] [section] 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process.'. . If Ms. Lakoskey had a constitutionally adequate process to remedy the

deprivation of her property interest in her daughter's remains, then she has not been denied procedural due process and we don't have to decide the qualified immunity or municipal liability issue. . . As to the constitutionally inadequate process element, Ms. Lakoskey argues 'that the continued retention of [her] personal property'—her daughter's remains—'violate[d] [her] procedural due process rights.'. . . Ms. Lakoskey 'ha[s] failed to state a valid procedural due process claim because [she] ha[s] not alleged that [Florida] law provided [her] with an inadequate post[ ]deprivation remedy.'. . Her complaint, in fact, alleged the opposite: that she had an adequate postdeprivation remedy for violations of her property interest in her daughter's remains. Ms. Lakoskey alleged that Drs. Floro, Arruza, Walsh-Haney, and Rao's outrageous conduct in keeping the remains caused her severe emotional distress that was actionable under Florida tort law. We've 'held that a judicial post[ ]deprivation cause of action satisfies due process.'. . Even if 'the state's remedial procedure [does] not provide all relief available under section 1983,' 'as long as the remedy "could have fully compensated [Ms. Lakoskey] for the property loss [s]he suffered," the remedy satisfies procedural due process.'. . Ms. Lakoskey's complaint seeks essentially the same relief—mainly compensatory and punitive damages—for her procedural due process claims as she does for her outrageous infliction of emotional distress claims against the same individual defendants for the same conduct. Her complaint shows that she has an adequate postdeprivation remedy available to her: the tort claims she brought alongside her section 1983 claims. And Florida law recognizes the cause of action Ms. Lakoskey alleged in her complaint—outrageous infliction of emotional distress when the alleged misconduct involves a dead body. . . Ms. Lakoskey argues, quoting *Zinermon v. Burch*, 494 U.S. 113 (1990), that '[i]n situations where the [s]tate feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.'. . But, as the Supreme Court explained in *Parratt* and *Hudson*, 'an unauthorized intentional'—or even 'negligent'—'deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the 14th Amendment if a meaningful post[ ]deprivation remedy for the loss is available.'. . 'Pre[ ]deprivation process is impractical "where a loss of property is occasioned by a random, unauthorized act by a state employee, rather than by an established state procedure," because "the state cannot know when such deprivations will occur."'. . Here, Ms. Lakoskey alleged in her complaint that Drs. Floro, Arruza, Walsh-Haney, and Rao acted negligently or intentionally when they deprived her of her daughter's remains. . . . Drs. Floro, Arruza, Walsh-Haney, and Rao were not acting pursuant to an established state procedure when they kept and transferred Tina's remains; Ms. Lakoskey alleged that they were acting outrageously and recklessly and contrary to the established state procedure. . . . Because Ms. Lakoskey alleged that Drs. Floro, Arruza, Walsh-Haney, and Rao negligently or intentionally deprived her of her daughter's remains by violating the Act, predeprivation hearings would have been impracticable. Here, '[a]ll that due process requires ... is a post[ ]deprivation "means of redress for property deprivations satisfying the requirements of procedural due process."'. . Ms. Lakoskey has that in the state tort claims she set out in her complaint. . . .In essence, Ms. Lakoskey argues that the impact rule and sovereign immunity will make her recovery more challenging in state court. But a plaintiff's ability or inability 'to recover under [state law] remedies the full amount which [s]he might receive in a [section] 1983 action is not ... determinative of the adequacy

of the state remedies.'. . While recovery might be challenging, it is not impossible; a plaintiff can still achieve adequate relief. . . . As the Supreme Court explained in *Parratt*, our decision today avoids turning 'the Fourteenth Amendment [into] a font of tort law to be superimposed upon whatever systems may already be administered by the [s]tates.'. . .We agree with the district court that Ms. Lakoskey failed to state a claim for relief under section 1983. She could not establish that she received constitutionally inadequate process because she had an adequate postdeprivation state law remedy. Although we sympathize deeply with her loss and regret the ordeals she experienced surrounding her daughter's remains, we affirm the district court's dismissal of her federal claims."); ***Carruth v. Bentley***, 942 F.3d 1047, 1060 (11th Cir. 2019) ("A terminated government employee cannot bring a procedural due process claim 'before the employee utilizes appropriate, available state remedial procedures.'. . And even '[w]hen a state procedure is inadequate, no procedural due process right has been violated unless and until the state fails to remedy that inadequacy.'. . Assuming that Carruth had a property right in his continued employment . . . Carruth also must show that state law does not afford him an adequate remedial procedure for the deprivation of his rights. To prevail, then, Carruth must allege that he has attempted to make use of whatever state law avenue for relief is available to him and that the remedial procedure is inadequate. By statute, Alabama law provides for judicial review of a conservatorship decision *and* of a decision by the ACUA Board to suspend an employee. . . . Carruth has offered us no reason to conclude or even suspect that this procedure would be inadequate to protect his due process rights. Carruth's claim for reinstatement under Alabama law is being heard in a competent court of law. In short, he has not shown a clearly established violation of his right to due process."); ***Foxy Lady, Inc. v. City of Atlanta,*** 347 F.3d 1232, 1239 (11th Cir. 2003) ("[W]e conclude that sufficient state process exists to correct any alleged deficiency in the City's liquor license revocation process afforded under ' 30-27. Because an adequate post-deprivation process is in place under state law, no federal procedural due process claim exists."); ***Cotton v. Jackson***, 216 F.3d 1328, 1331-33 (11th Cir. 2000) ("Assuming a plaintiff has shown a deprivation of some right protected by the due process clause, we − when determining if a plaintiff has stated a valid procedural due process claim − look to whether the available state procedures were adequate to correct the alleged procedural deficiencies. . . . If adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot rely on that failure to claim that the state deprived him of procedural due process. . . And, to be adequate, the state procedure need not provide all the relief available under section 1983. . .Instead, the state procedure must be able to correct whatever deficiencies exist and to provide plaintiff with whatever process is due. . . . Because we believe that the writ of mandamus would be available under state law to Plaintiff, and because we believe that mandamus would be an adequate remedy to ensure that Plaintiff was not deprived of his due process rights, . . . we conclude that Plaintiff has failed to show that inadequate state remedies were available to him to remedy any alleged procedural deprivations."); ***Bell v. City of Demopolis***, 86 F.3d 191, 192 (11th Cir. 1996) ("The controlling factor in *McKinney* . . . was that the state had a mechanism in place which appears adequate to remedy any procedural due process violations."); ***Wright v. Glynn County Board of Commissioners***, 932 F. Supp. 1476, 1480 (S.D. Ga. 1996) (finding all due process defects cured by later county action); ***Moore v. City of Tallahassee***, 928 F. Supp. 1140, 1145 (N.D. Fla. 1995)

("All that procedural due process requires is a post-deprivation means of redress to correct any error which may have resulted from conflict of interest or bias.").

But see ***Barr v. Johnson***, 777 F. App'x 298, ___ (11th Cir. 2019) ("On appeal, Barr argues that the district court wrongfully applied the Eleventh Circuit's holding in our seminal due process case of *McKinney v. Pate* in finding that the state satisfied its due process obligations by making a postdeprivation remedy available to Barr in the form of judicial review in the state court system. . . . Generally speaking, procedural due process requires that the state give the individual notice and an opportunity to be heard before a deprivation. . . Barr argues that because the decision to shutter her businesses was made in the normal course of the defendants' business, predeprivation notice was practicable and thus required under the Supreme Court's holding in *Zinermon v. Burch*[.] . . Because of this, the exceptions to predeprivation due process recognized by the Supreme Court in the *Parratt/Hudson* doctrine are inapplicable. . . Instead, Barr argues, the district court should have analyzed the three-factor test in *Mathews v. Eldridge* to conclude that the City of Center Point should have provided her with predeprivation procedural due process. . . . The defendants hinge a large portion of their argument on the basis of *McKinney*'s remark that an actionable § 1983 claim requires a refusal of the state to provide a remedy. . . However, *McKinney*'s applicability is limited here: The *McKinney* plaintiff alleged that the board overseeing his predeprivation hearing was biased against him. . . Because bias is an intentional wrong, the *Parratt* rationale applied, and all that was necessary was postdeprivation process. . . By contrast, the Supreme Court has held that the general rule of procedural due process is that the state must attempt to provide a hearing before it deprives one of life, liberty, or property. . . . As the *Zinermon* court went on to note, the *Parratt* test, mentioned at great length in the parties' briefs, is thus an application of the *Mathews* balancing test, which concluded that providing a predeprivation remedy was practically impossible when an employee of the state acted in an unauthorized manner. . . We conclude that *Zinermon* rather than *McKinney* is more illuminating in this case. The defendants fail to rebut the fact that, although the second and third closures of Barr's businesses may have happened after officials provided sufficient due process, the first closure occurred with no predeprivation notice whatsoever. The district court, in fact, made this factual finding as well, noting that the City Council lacked either a resolution or a court order permitting the August 26 closure. Because of this, and because the defendants fail to explain how this deprivation might fall into some sort of exception akin to *Parratt/Hudson*, Barr successfully demonstrates an actionable procedural due process claim. Less clear, however, is what to make of the second and third closures. The record does show that Barr was provided with hearings before the second and third closures, but they may have been constitutionally inadequate, especially given the JCBC's failure to follow state statutory requirements requiring notice and comment. Because we reverse and remand on the basis of the first closure and the defendants' failure to comply with *Zinermon*, we decline to address the merits of the procedures utilized for the second and third closures. More fundamentally, the defendants' proffered application of *McKinney* is largely unworkable. If *McKinney* were directly applicable to this scenario, then we would be gutting any notions of predeprivation due process and blanketly holding that a state can effectuate any and all deprivations under a 'shoot first, ask questions later' mentality, so long as it offers *ex post*

facto recourse. Such a reading would allow the *Parratt/Hudson* exceptions to swallow the rules articulated in *Zinermon* and *Mathews*. The facts of *McKinney* are mostly inapposite to this case, and we decline to apply it in such a manner that eliminates notions of predeprivation procedural due process.")

Compare ***Georgia Muslim Voter Project v. Kemp***, 918 F.3d 1262, 1275-76 (11th Cir. 2019) (Pryor (Jill), J., concurring) ("[T]o my knowledge we have never applied *Parratt* to a facial procedural due process challenge to an existing statutory or administrative scheme, and there is good reason not to, at least in this context. Indeed, my dissenting colleague appears not to disagree: he invokes *Parratt* only after opining (incorrectly, I think) that GMVP's claim can only be construed as an as-applied claim. In *Parratt*, *Hudson*, and their progeny, *see, e.g.*, *McKinney v. Pate*, 20 F.3d 1550, 1562-63 (11th Cir. 1994) (en banc), the state actor whose actions were challenged was acting contrary to established state customs or policies. . . . Here, the state actor whose actions are challenged—the Secretary—is not alleged to have acted contrary to Georgia's customs or policies. Rather, he is alleged to have followed them. . . Second, and relatedly, I disagree with the dissent's characterization of signature mismatch determinations as ' "random and unauthorized act[s] by a state employee."'. . The Supreme Court expressly has stated that *Parratt* does not apply where the state actor—here, the Secretary—'delegated to [its employees] the power and authority to effect the' alleged deprivation and the 'concomitant duty to initiate the [state-law] procedural safeguards.'. . These are precisely the circumstances here. The Secretary has delegated to the county elections officials reviewing absentee ballot application and absentee ballot signatures the power and authority to reject, without predeprivation procedures, perceived signature mismatches. In so doing, the elections officials, rather than engaging in random and unauthorized acts, are following procedures established and authorized by Georgia law—that is, comparing signatures on absentee ballot applications and absentee ballots to the signatures on electors' voter registration cards. . . Those same elections officials initiate the postdeprivation processes in place for rejecting absentee ballot applications and absentee ballots and providing instructions on how to vote despite the rejection. Thus, '[u]nlike in *Parratt* and *Hudson*, this case does not represent the special instance of the *Mathews* due process analysis where postdeprivation process is all that is due because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged.'. . For these reasons, I cannot agree that *Parratt* applies to this case or in any way bars GMVP from obtaining relief.") *with* ***Georgia Muslim Voter Project v. Kemp***, 918 F.3d 1262, 1284-85 (11th Cir. 2019) (Tjoflat, J., dissenting) ("This case falls squarely within *Parratt* because it would be impracticable for Georgia to provide additional pre-deprivation procedures. . . To state the obvious, the Statutes do not authorize election officials to deprive eligible voters of the right to apply for and to vote by mail-in ballot. Indeed, the very fact that the Secretary would remove election officials shown to perform erroneous signature reviews reveals that election officials 'lack[ ] the state-clothed authority to deprive persons of constitutionally protected interests.'. . I have no doubt, of course, that election officials make erroneous determinations. But the relevant question under *Parratt* is whether it is *practicable* for the state to do more. The volume of signatures at issue in this case provides a ready answer to that question. As of November 2, 2018,

184,925 mail-in ballots had been returned statewide. . . And another 85,398 were still outstanding. . . That's 270,323 ballots. Recall, too, that a mail-in ballot does not issue before an application, which also requires a signature review. . . In short, Georgia's election officials were in for 540,646 signature reviews this past election cycle. It is simply not practicable to provide pre-deprivation notice and an opportunity to be heard when so many signature reviews are at issue. . . Plaintiffs have a remedy; it just isn't a federal one. Georgia superior courts, the state's courts of general jurisdiction, provide Plaintiffs a forum in which to sue the election officials. . . Plaintiffs, moreover, have a procedural due process claim under the state constitution, which prohibits the deprivation of 'life, liberty, or property except by due process of law,'. . . and which confers a private right of action[.]In short, I have no doubt that a suit in state court would make Plaintiffs whole—in other words, that they would be able to vote by mail-in ballot. . . When, as here, it is impracticable for a state like Georgia to provide predeprivation process for erroneous signature reviews because the state must conduct over half a million reviews in short order, a post-deprivation suit against election officials in state court is a constitutionally sufficient remedy.")

See also ***Martinez v. City of Cleveland***, No. 16-4200, 2017 WL 5171254, at *2 (6th Cir. Nov. 8, 2017) (not reported) ("The remaining question is whether Martinez received adequate process. Neither side disputes that the department did not give Martinez notice or a hearing before promoting lower-scoring candidates over him. But lack of *pre*-deprivation process is not dispositive—*post*-deprivation process may suffice. . . And in the procedural due process context, an adequate remedy available under state law constitutes post-deprivation process. . . Here, Martinez had numerous state-law remedies available to him. . . For example, he could have brought a declaratory judgment action to determine his rights to a promotion or a breach of contract suit, requested an investigation and hearing before the civil service commission, or sought a writ of mandamus. . . And while Martinez disputes whether some of these remedies were available or adequate, he sought a writ of mandamus in this very action. Because Martinez had at least one adequate state-law remedy available to him, no due-process violation occurred."); ***Figgs v. Dawson***, 829 F.3d 895, 906-07 (7th Cir. 2016) ("Figgs had a constitutionally-protected liberty interest in being released from prison before the end of his term for good behavior. . . To prove a deprivation of procedural due process, Figgs must show: (1) the deprivation occurred; (2) it occurred without due process of law; and (3) Dawson subjected him to the deprivation. . . . Figgs claims that Dawson violated his procedural due process rights by deferring action on Figgs's grievance until resolution of the state-court mandamus proceeding. In granting summary judgment in Dawson's favor, the district court relied on *Toney–El* and *Armato* and held that not only did Figgs have available and adequate state-court remedies, he took advantage of them by filing the mandamus proceeding. Figgs asserts on appeal, as he did before the district court, that the mandamus proceeding was inadequate because it was pending for several months until he was able to obtain a ruling that led to his release. In *Toney–El*, this court found that the state-court habeas corpus remedy was adequate despite the fact that the prisoner plaintiff had been held for 306 days past his lawful term of incarceration. Like Toney-El, Figgs did not utilize his state-court remedy until well after the point in time when he maintains he was deprived of his liberty. Figgs cites no authority for the proposition that because he did not obtain immediate

relief, his mandamus remedy was inadequate. Accordingly, we agree with the district court that the state-court remedy, which Figgs utilized, precludes his claim against Dawson for procedural due process.")

See also ***Horton v. Bd of County Commissioners of Flagler County,*** 202 F.3d 1297, 1299, 1300 & n.3 (11th Cir. 2000) ("The district court mistakenly thought the rule of our *McKinney* decision is based on ripeness or exhaustion principles and turns on whether the federal procedural due process claim in a particular case has been presented to the state courts by the plaintiff seeking to pursue that claim in federal court. But the *McKinney* rule does not turn on whether a plaintiff has presented the claim to the state courts, because the rule is not based on ripeness or exhaustion principles. . . Instead, *McKinney* is based on a recognition that the process a state provides is not only that employed by the board, agency, or other governmental entity whose action is in question, but also includes the remedial process state courts would provide if asked. . . The *McKinney* rule is not micro in its focus, but macro. It does not look to the actual involvement of state courts or whether they were asked to provide a remedy in the specific case now before the federal court. Instead, the *McKinney* rule looks to the existence of an opportunity − to whether the state courts, if asked, generally would provide an adequate remedy for the procedural deprivation the federal court plaintiff claims to have suffered. If state courts would, then there is no federal procedural due process violation regardless of whether the plaintiff has taken advantage of the state remedy or attempted to do so. If state courts generally would not provide an adequate remedy for that type of procedural deprivation, then the federal court determines whether the Fourteenth Amendment Due Process Clause requires such a remedy, and if it does, the federal court remedies the violation. Either way, the federal court decides the federal procedural due process claim; that claim is not sent back to state court. . . . Faced with a § 1983 complaint alleging that a board, agency, or other entity acting under state law has deprived a plaintiff of a procedural guarantee protected by the Fourteenth Amendment, a federal district court could put the following question to the defendants: 'If the evidence proves the claimed deprivation, does the plaintiff have an adequate state law remedy, and if so, what is it?' If the defendants answer 'no,' and the court is convinced that answer is correct, then the court should proceed with adjudication of the federal due process claim just as though *McKinney* had never been decided. If, however, the answer to the question about an adequate state remedy is 'yes,' then the federal district court can proceed to adjudicate the state law claims over which it will have supplemental jurisdiction.").

Compare ***Clukey v. Town of Camden***, No. 12–1555, 2013 WL 2158654, *8-*10 (1st Cir. May 21, 2013) ("Here, we are not dealing with a contractual dispute over compensation for past work performed analogous to *Ramírez* or *Lujan.* The property right at issue in this case is the right to be employed if certain conditions are met. *Lujan* made clear that the right 'to pursue a gainful occupation ... cannot be fully protected by an ordinary breach-of-contract suit.'. . In fact, there is a long history of case law in this circuit holding that public employees who have been deprived of a property interest in employment without due process may bring a § 1983 claim in federal court regardless of the availability of a state law breach-of-contract claim. . . .The Town also argues that the availability of post-deprivation grievance procedures in the CBA forecloses Clukey's claim. It

is true that where the grievance procedures contained in a collective bargaining agreement satisfy constitutional due process minimums, aggrieved employees have little room to claim that they were deprived of a property interest without due process of law. . . The mere fact that a collective bargaining agreement contains a hearing procedure, however, does not mean that constitutional due process minimums are satisfied. Rather, grievance procedures extinguish a plaintiff's due process claim only if the procedures meet or exceed constitutional standards. . .Here, we have already determined that the Town's procedures, as described in the complaint, are constitutionally inadequate insofar as they fail to provide any notice whatsoever to Clukey of recall positions. Thus, the Town cannot use the theoretical availability of grievance procedures to shield themselves from Clukey's claims. . . . In the posture of this case, an appeal from a judgment granting the Town's motion to dismiss, we conclude that Clukey has alleged facts establishing that he had a protected property interest in his right to be recalled to employment with the police department. When a specific position became open within the department, Clukey had a legitimate claim of entitlement to that position, unless he was found to be unqualified. As such, when the Town decided to fill openings in the department with new hires rather than Clukey, the Town had a constitutional obligation to provide Clukey notice that he had been found unqualified and an opportunity to challenge that determination. The Town's alleged failure to provide Clukey with any notice at all, either before or after filling open positions with new hires, states a claim for a procedural due process violation. That injury cannot be fully redressed by recourse to a state law breach of contract claim or the grievance procedures in the Collective Bargaining Agreement. If the specifics of the process required to afford Clukey due process remain in dispute after remand, those specifics can only be determined on the basis of a more fully developed record, analyzed pursuant to the *Mathews* balancing test. For these reasons, we *vacate* the district court's dismissal of Clukey's complaint, and *remand* for further proceedings consistent with this opinion."); ***Christiansen v. West Branch Community School Dist.***, 674 F.3d 927, 935, 936 (8th Cir. 2012) ("[W]e have held that a government employee who chooses not to pursue available post-termination remedies cannot later claim, via a § 1983 suit in federal district court, that he was denied post-termination due process. . . That said, we have also held that 'it is not necessary for a litigant to have exhausted available *postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation* process.'. . Thus, the effect of a government employee's failure to pursue available post-termination remedies depends on whether the employee alleges the deprivation of pre-termination process or post-termination process. In this case, Christiansen failed to pursue available post-termination process. So, the district court properly dismissed Christiansen's procedural due process claims under *Riggins* and *Winskowski* to the extent they allege the denial of *post-termination* due process. But, Christiansen's complaint also alleges the denial of *pre-termination* process and, under *Keating,* the district court should not have dismissed such claims on the basis of Christiansen's failure to pursue post-termination remedies. . . We need not reverse the district court's judgment on this basis, however, because Christiansen's complaint fails to plausibly plead a deprivation of pre-termination process."); ***Baird v. Bd. of Educ. for Warren Community Unit School Dist. No. 205,*** 389 F.3d 685, 689-92, 695 (7th Cir. 2004) ("The issue here is whether a state breach of contract suit provides due process if the pre-deprivation hearing does not. We also turn to the question whether a public employee waives the right to challenge a

pre-termination hearing on due process grounds when he attends the hearing only to object to its procedures. . . . The issue in the case before us is whether a post-termination lawsuit for breach of contract can remedy the full due process deficiency in the pre-termination proceedings. . . . The postdeprivation remedies appropriate to the deprivation of an interest to which there is a present entitlement are characterized by promptness and by the ability to restore the claimant to possession. The underlying concept seems to be that the remedy is available before the loss has become complete and irrevocable. A state law breach of contract action is not an adequate post-termination remedy for a terminated employee who possesses a present entitlement and who has been afforded only a limited pre-termination hearing. . . . Thus, when a public employee terminated for cause has a present entitlement, and when the only available post-termination remedy is the opportunity to bring a state breach of contract suit, the pre-termination hearing to which such an employee is entitled must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirements of notice and an opportunity to be heard. . . . Although the issue may be close, we conclude that Baird did not waive his right to contest the adequacy of the hearing on due process grounds. The obvious deficiency of the procedures offered in the instant case, and the fact that Baird did appear to state his objection to these procedures, distinguishes it from *Fern* and similar cases. Seventh Circuit authority establishes only that the right to object to an arguably deficient hearing is waived when an employer offers a pre-termination hearing and a public employee facing termination fails to accept the offer by failing to appear."); ***Dailey v. Vought Aircraft Company***, 141 F.3d 224, 230 (5th Cir. 1998) ("The record unequivocally shows that the district court did not provide Collie with notice or an opportunity to be heard before disbarring her. . . . Collie's unsuccessful appeal of the disbarment order to the chief judge of the district did not repair the district court's violation of her rights to due process under the Constitution and the court rules. Prior to an attorney's disbarment, he or she is entitled to notice of the charges made and an opportunity to explain or defend (except for extreme misconduct occurring in open court, in the presence of the judge)."); ***Cotnoir v. University of Maine Systems***, 35 F.3d 6, 12-13 (1st Cir.1994) ("Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation. Thus even where a discharged employee receives a post-termination hearing to review adverse personnel action, the pretermination hearing still needs to be extensive enough to guard against mistaken decisions, and accordingly, the employee is entitled to notice, an explanation of the employer's evidence, and an opportunity to present his side of the story. If an employee is fired without these pre-termination protections, normally the constitutional deprivation is then complete. Thus, the post-termination grievance procedures which the individual defendants provided to Cotnoir could not compensate for a lack of pre-termination process afforded Cotnoir." citations omitted) *and* ***Stallworth v. City of Evergreen***, 680 So.2d 229, 234-35 (Ala. 1996) ("[T]he Eleventh Circuit's reliance on [*Parratt*] to buttress its conclusion in *McKinney* that a denial of due process at the pretermination level can be fully remedied by a procedurally adequate post-termination hearing is questionable. . . . To hold that a procedurally adequate post-termination hearing remedies the deprivation inflicted on a discharged employee by an earlier decision based on a pretermination hearing completely devoid of due process of law would be to render the United States Supreme Court's holding in *Cleveland Board of Education* a nullity.

Furthermore, no matter how fair and adequate the procedures at the post-termination hearing may be, the initial decision made after the pretermination hearing inevitably will have diminished significantly the employee's chances of prevailing at the post-termination hearing.") *with* ***Dailey v. Vought Aircraft Company***, 141 F.3d 224, 232 (5th Cir. 1998) (Jerry E. Smith, J., dissenting) ("I agree with the majority that the district court's failure to give Collie a hearing prior to her suspension was constitutionally infirm because due process requires that an attorney be given notice and an opportunity to be heard before he is suspended or disbarred, not after. The majority and I part company, however, when it comes to whether the district court successfully cured that violation through the subsequent hearing before the chief judge. . . . I do not disagree with the majority that Collie was entitled to a hearing before suspension. Had she. . . suffered some distinct, quantifiable harm for the period between deprivation and hearing, she would be entitled to a remedy. . . But the majority appears to hold that a hearing subsequent to suspension can never act as a cure because the cure comes after the deprivation. The very definition of a 'cure,' however, is a procedurally sufficient hearing that comes after a procedural due process violation has occurred, that is, after the deprivation has taken place.").

See also ***Luna v. Valdez***, No. 3:15-CV-3520-D, 2018 WL 684897, at *8 (N.D. Tex. Feb. 2, 2018) ("Defendants move for summary judgment on Luna's procedural due process claim on the ground that he had other remedies available to him, including, *inter alia*, a writ of *habeas corpus*—a remedy he ultimately used to secure his release—and a suit based on the state tort of false imprisonment. They argue that '[g]iven these several remedies available to [Luna] to secure his own release ('he held the keys to his freedom') or obtain compensation, under the *Parratt/Hudson* doctrine he has no claim actionable under the Fourteenth Amendment.'. . The court agrees. Although Luna argues in his response that he 'made several attempts after his court-ordered release date to obtain his freedom, continuously, verbally requesting Defendants' officers for assistance with his release, to which they responded with indifference,'. . . he does not contend or adduce any evidence that the procedures available under Texas law (including a writ of *habeas corpus* or a state tort claim for false imprisonment) would not have afforded him an adequate post-deprivation remedy. Accordingly, the court grants defendants' motion for summary judgment on Luna's Fourteenth Amendment procedural due process claim.")

8. Note on *Sandin v. Conner*

In ***Sandin v. Conner***, 515 U.S. 472 (1995), the Court held, in the context of a procedural due process claim raised by an inmate placed in disciplinary segregation for thirty days, that, despite the mandatory language of the applicable prison regulation, a constitutionally protected liberty interest will generally be "limited to freedom from restraint which. . . imposes atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life." *Id*. at 484.

See also ***Memphis A. Philip Randolph Inst. v. Hargett***, 978 F.3d 378, 406-09 (6th Cir. 2020) (Moore, J., dissenting) ("'Protected liberty interests spring from two possible sources, the due process clause itself and the laws of the state involved.' . . Plaintiffs' primary argument is that

Tennessee law establishes a liberty interest in exercising the right to vote absentee by mail and to have that vote counted. . . Because I agree, I would decline to rule on Plaintiffs' secondary argument: that the Constitution itself establishes a liberty interest in the absentee voting context sufficient to trigger due process requirements. This court synthesized the standard for determining whether state law creates a protected liberty interest in *Tony L. By and Through Simpson v. Childers*:

State-created liberty interests arise when a state places 'substantive limitations on official discretion.' A state substantively limits official discretion 'by establishing "substantive predicates" to govern official decisionmaking ... and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.' The state statutes or regulations in question also must use 'explicitly mandatory language' requiring a particular outcome if the articulated substantive predicates are present. Finally, the statute or regulation must require a particular substantive outcome. State-created procedural rights that do not guarantee a particular substantive outcome are not protected by the Fourteenth Amendment, even where such procedural rights are mandatory. . . . In these circumstances, Tennessee has created a liberty interest in voting absentee by mail sufficient to trigger due process protection. . . . *Sandin* does represent a change in the legal framework for analyzing the existence of state-law created liberty interests in the context of prison regulations, shifting the inquiry from one focused on the language of the regulation (as is the case for the typical state-created interest analysis) back to one focused on the 'nature of the deprivation' relative to the strictures of prison life. . . But *Sandin* did not purport to displace the established standard for determining whether a state law establishes a liberty interest triggering due process requirements outside of the context of prison regulations. Instead, the Court expressly limited its inquiry to 'the circumstances under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause.'. . Indeed, the Court emphasized the unique position of prison litigation, reiterating its view that in the context of prisoner litigation 'federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.'. . Moreover, the considerations that motivated the Court—a desire to avoid 'disincentives for States to codify prison management procedures' while affording state officials the flexibility to 'fine-tun[e] ... the ordinary incidents of prison life'—have no bearing when considering procedural due process claims that do not involve prison regulations or incarcerated prisoners. . . The Court recognized as much, remarking that a focus on mandatory language 'may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public' but that '[i]t is a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison.'. . Although this court has embraced *Sandin* in the context of prisoner litigation, it has done so while reiterating the same unique concerns implicated by prisoner litigation that motivated the Court in *Sandin*. . . Indeed, this court has tacitly rejected the applicability of *Sandin* outside the prison litigation context, applying the usual state-law created interests standard outside of that context.")

One federal district court has predicted that, "[w]hatever else may be said with regard to the *Sandin* majority, it will not take a Brandeis brief to establish that the real workload of the federal trial judiciary will be greatly increased as the result of the *Sandin* decision, although clearly

such was not the intent or purpose of its majority." ***McKinney v. Hanks***, 911 F. Supp. 359, 361 (N.D. Ind. 1995).

See also ***Sealey v. Giltner***, 197 F.3d 578, 585 (2d Cir. 1999) ("We agree with the Magistrate Judge that the ultimate issue of atypicality is one of law, but that does not always mean that it need not be submitted to the jury. The content of the *Sandin* standard of 'atypical and significant hardship' is an issue of law, but if the facts concerning the conditions or the duration of confinement are reasonably in dispute, the jury (where one is claimed) must resolve those disputes and then apply the law of atypicality, as instructed by the Court. In appropriate cases, the trial court might consider submitting interrogatories to the jury and then itself applying the law of atypicality to the facts as found by the jury.").

See also ***Lisle v. Welborn***, 933 F.3d 705, 721 (7th Cir. 2019) ("When considering whether disciplinary segregation imposes atypical and significant hardships, we look to both the duration of the segregation and the conditions endured. . . First, the duration of segregation was not an atypical or significant hardship. We have found that, depending on the conditions of confinement and whether there were any additional punishments, a period of segregation considerably shorter than four months may satisfy this requirement. . . However, we have also found longer durations did not. . . A sentence of four months in segregation for the discovery of contraband is not so atypical and significantly harsh that it creates a liberty interest. Second, Lisle has not shown that the conditions of his confinement in segregation themselves imposed atypical and significant hardships. Lisle needed to show that the conditions of his confinement in his segregated cell deviated substantially from the ordinary conditions of prison life. . . We agree with the district court that Lisle did not offer evidence that would allow a reasonable jury to find the conditions of his segregation imposed atypical and significant hardships. The vague description of his cell, including rust on the bars and 'corroded feces' in the toilet, does not itself reveal much. Regardless, a jury could not reasonably infer that these conditions were unique to cells in the segregation unit or that these conditions caused Lisle any significant hardship. Lisle is correct that we do not find conditions are typical and acceptable merely because they do not rise to the most extreme conditions, but he needed to offer some evidence that would allow a jury to determine that the conditions in segregation deviated substantially from ordinary conditions of his confinement. Lisle further argues that placing an inmate in a cell that exacerbates his depression and suicidal urges without providing a crisis team implicates his liberty interest. We need not decide whether this is correct because the record does not reflect Lisle's mental health crisis was exacerbated by the conditions of his confinement. Instead, the record shows Lisle attributes his frustration with the disciplinary hearing and the grievance process as the trigger for his worsening mental health."); ***Waldman v. Conway***, 871 F.3d 1283, 1290 (11th Cir. 2017) ("A prisoner can be deprived of his liberty such that due process is required in two contexts: (1) 'when a change in the prisoner's conditions of confinement is so severe that it essentially exceeds the sentence imposed by the court'; or (2) 'when the state has consistently bestowed a certain benefit to prisoners, usually through statute or administrative policy, and the deprivation of that benefit imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."'); ***Martin***

v. Duffy, 858 F.3d 239, 253-54 (4th Cir. 2017) ("[A] prisoner claiming a violation of his right to procedural due process must show: (1) that there is a 'state statute, regulation, or policy [that] creates such a liberty interest,' and (2) that 'the denial of such an interest "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."'. . An inmate who fails to satisfy these two requirements '*cannot* "invoke the procedural protections of the Due Process Clause."'. . . In his complaint, Martin alleged that he remained in segregation for 110 days without receiving a hearing. Because South Carolina Department of Corrections procedure mandated review of Martin's placement in pre-hearing detention or 'segregation' within seventy-two hours of his initial placement and prescribed an initial detention of up to thirty days—with the option of a single thirty-day extension. . .—the complaint adequately alleged the existence of a state policy creating a protected liberty interest. . . Turning to the second prong, we observe that '[w]hether confinement conditions are atypical and substantially harsh "in relation to the ordinary incidents of prison life" is a "necessarily ... fact specific" comparative exercise.'". . . Although Martin's complaint included the conclusory allegation that he 'suffered an atypical and significant hardship' as the result of his placement in segregation, . . . the complaint did not identify any conditions Martin experienced that gave rise to his alleged hardship. Such '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice [to state a plausible claim to relief]. ... While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.'. . Because Martin's complaint does not include any factual allegations establishing that he experienced conditions during his temporary placement in segregation that 'were atypical and significantly harsh compared to [those of] the general population,'. . . Martin failed to allege sufficient facts to state a plausible due process claim."); ***Incumaa v. Stirling***, 791 F.3d 517, 527 (4th Cir. 2015) ("Because there is uncontroverted evidence that the Department policy here mandates review of Appellant's security detention every 30 days, we have no trouble concluding that Appellant has met the first prong of his burden under *Sandin* and its progeny. The predominant question in this case, rather, is whether Appellant established that the conditions he experienced during his two decades in solitary confinement present atypical and significant hardship in relation to the ordinary incidents of prison life."); ***Clark v. Wilson***, 625 F.3d 686, 691, 692 (10th Cir. 2010) ("Although *Sandin* addresses liberty interests, we interpret it to extend the same analysis to protected property interest inquiries. . . We have since applied the *Sandin* analysis beyond the context of prison conditions. In *Steffey v. Orman*, for example, we held that a prisoner did not have a protected property interest in a money order sent to him by another prisoner's mother. . . . Because it is based on the 'legitimate expectations' methodology expressly abrogated by *Sandin, Gillihan's* holding that prisoners have a protected property interest in the funds in their prison trust accounts is no longer good law and, hence, not 'clearly established' in this circuit. . . As in *Steffey*, we cannot find Clark had a protected property interest in the frozen funds without first applying the *Sandin* test to his claim. But we have never before addressed the question of whether freezing a prison account in response to a garnishment summons imposes an atypical and significant hardship on an inmate in relation to the ordinary incidents of prison life. Neither did any Supreme Court decision on point or clearly established authority from other circuits exist at the time of Wilson's actions. . . In sum, because neither the Supreme Court nor any court of appeals had applied *Sandin's* 'atypical and significant hardship'

test to the freezing of a prison account by 2007, Wilson did not violate a clearly established constitutional right and hence is entitled to qualified immunity."); ***Steffey v. Orman***, 461 F.3d 1218, 1221, 1222 n.4 (10th Cir. 2006) ("This court has ruled that property interest claims by prisoners are also to be reviewed under *Sandin's* atypical-and-significant-deprivation analysis . . . . The Second and Fifth Circuits have held that *Sandin* applies only to liberty interests claims. [citing cases] As we noted in *Cosco*, the Sixth and Ninth Circuits have suggested, but not explicitly held, that *Sandin* does not govern prisoner property interest claims."); ***Cosco v. Uphoff***, 195 F.3d 1221, 1224 (10th Cir. 1999) ("Appellants claim in the case at hand that mandatory language in the regulations governing what the prisoners could keep in their cells created a property interest or entitlement and ensured them a continuation of the same interest absent due process. That is precisely the methodology rejected by the Supreme Court in *Sandin*. The regulation of type and quantity of individual possession in cells is typical of the kinds of prison conditions that the Court has declared to be subject to the new analysis set forth in *Sandin*. Applying the Court's analysis, we cannot say that the new regulations promulgated in this case present 'the type of atypical, significant deprivation [of their existing cell property privileges] in which a State might create a [property] interest.'"). *See also* ***Henderson v. Harmon***, 102 F.4th 242, 252 (4th Cir. 2024) ("Incarcerated persons like Henderson have a protected property interest in their prison trust accounts, which attaches constitutional due-process protections. And the nearly six-year delay between the hearing that adjudicated Henderson's guilt and his opportunity to contest the restitution amount raises serious concerns about the availability of evidence and witnesses. Yet even if we assume that this delay violates due process, that error was harmless because no evidence that could have aided Henderson's ability to contest the amount of restitution was lost to time. We thus affirm the district court's grant of summary judgment on Henderson's federal claim.")

In ***Keenan v. Hall***, 83 F.3d 1083, 1089 (9th Cir. 1996), a panel of the Ninth Circuit Court of Appeals observed:

> In this case, the district court on remand will be on the cutting edge of this process. We suggest that if it finds conditions in the IMU that violate the Eighth Amendment, the transfer to the IMU would impose "atypical and significant hardship." We do not suggest, however, that the new test is synonymous with Eighth Amendment violation. What less egregious condition or combination of conditions or factors would meet the test requires case by case, fact by fact consideration. The *Sandin* Court seems to suggest that a major difference between the conditions for the general prison population and the segregated population triggers a right to a hearing.

See also ***Wagner v. Hanks***, 128 F.3d 1173, 1175-76 (7th Cir. 1997):

> [U]nder *Sandin* the key comparison is between disciplinary segregation and nondisciplinary segregation rather than between disciplinary segregation and the general prison population. . . . We do not think that comparison can be limited to

> conditions in the same prison, unless it's the state's most secure one. . . . [T]he courts have held that the transfer of a prisoner from one prison to another is not actionable as a deprivation of constitutionally protected liberty even if the conditions of confinement are much more restrictive in the prison to which the prisoner is being transferred. . . . To have held otherwise would as a matter of logic have required the courts to adjudicate transfers within a prison − to determine, for example, whether the petitioner had been deprived of liberty by being transferred from a large cell to a small one. Federal judges would have been plunged deep into the minutiae of prison administration, much as if they were managing a hotel chain. When *Sandin* is interpreted in light of the transfer cases, it becomes apparent that the right to litigate disciplinary confinements has become vanishingly small. . . . The question whether the comparison group includes other prisons did not have to be answered in *Sandin*, and is not discussed in either the majority opinion or any of the separate opinions. We consider ourselves bound by the Court's logic as well as its narrow holding, but we would welcome clarification of the issue by the Court. A subsidiary issue on which authoritative guidance would also be most welcome is whether the comparison group can be confined to a single state. Indiana points out that it frequently swaps prisoners with other states pursuant to an interstate compact to which it is a party. . . The logic of *Sandin* implies that the conditions of Wagner's disciplinary segregation are atypical only if no prison in the United States to which he might be transferred for nondisciplinary reasons is more restrictive.

and ***Bryan v. Duckworth***, 88 F.3d 431, 434 (7th Cir. 1996):

> Read together, *Meachum* and *Sandin* lay the groundwork for an argument that Bryan must show that segregated confinement worked an "atypical, significant deprivation" in comparison with the ordinary conditions of Indiana's most secure prison. Maybe that is where he is, in which event the two approaches collapse into one − as in *Sandin* itself, where the petitioner was a prisoner in a maximum security prison. That is a matter for exploration on remand and a reason for us not to attempt to decide which approach is correct − comparison with the conditions of the general population of the petitioner's prison or comparison with the conditions of the general population of the harshest prison in the state. If the district judge finds on remand either that the conditions of the segregation unit in which Bryan was confined were not substantially harsher than his normal prison environment, or that they were substantially harsher than that of the normal prison environment of Indiana's most secure prison, the judge will not have to decide the proper interpretation of *Sandin*. If, however, she finds that the conditions of Bryan's confinement, while substantially harsher than the normal conditions in his prison, were not substantially harsher than those in Indiana's most secure prison, she will then have to decide what the proper comparison is. We leave that question open

> because it may very well wash out on remand. . . and because it is a difficult question on which the district judge's view may be helpful to us.

In ***Wilkinson v. Austin***, 125 S. Ct. 2384, 2394, 2395 (2005), the Court noted:

> In *Sandin*'s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. . . This divergence indicates the difficulty of locating the appropriate baseline, an issue that was not explored at length in the briefs. We need not resolve the issue here, however, for we are satisfied that assignment to OSP [Ohio State Penitentiary] imposes an atypical and significant hardship under any plausible baseline. . . . For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. . . . While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP.

Compare ***Ashker v. Newsom***, 81 F.4th 863, 887-90 (9th Cir. 2023) ("Both parties maintain that the proper baseline when deciding whether a challenged condition is atypical and significant is fact-specific and varies from case to case. The parties also agree that the baseline here is Level IV general population facilities. . . Given the agreement between the parties, we assume that the conditions in Level IV general population facilities form the appropriate baseline comparator here. Using this baseline, we address whether the conditions of the RCGP are atypical and significant. . . . We conclude that RCGP placement, including walk-alone status, does not 'impose[ ] atypical and significant hardship on the [I]nmate[s] in relation to the ordinary incidents of prison life.' This holding tracks our recent opinion in *Johnson.* . . . The conditions of RCGP walk-alone status are more like the first three phases of the SDP than maximum security confinement in the Browning unit. As described above, walk-alone status conditions are less restrictive than the conditions of maximum security confinement in *Johnson.* . . The privileges that are limited by RCGP walk-alone status are like those privileges we described as 'incidental, fleeting benefits' that do 'not introduce an "atypical and significant hardship" that would trigger a liberty interest.'. . 'Not every transfer accompanied by marginally harsher conditions creates a liberty interest.'. . That is the case here because the conditions of the RCGP and walk-alone status do not impose 'atypical and significant hardship' on inmates 'in relation to the ordinary incidents of prison life.'. . '[T]ransfer of an inmate

to less amenable and more restrictive quarters for non-punitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.'. . So the Inmates have not established a liberty interest.") *with* ***Ashker v. Newsom***, 81 F.4th 863, 895-97 (9th Cir. 2023) (Nelson, J., joined by Gwin, District Judge, concurring) ("In the majority opinion, we identify the inconsistency among courts in 'identifying the baseline from which to measure what is atypical and significant in any particular prison system.'. . We also acknowledge the parties' agreement that the baseline for comparison here is Level IV general population facilities. Given the lack of dispute on the question, we assume the parties' proposed baseline for our analysis. But I believe that is the wrong baseline for this case and for future cases. Thus far, our court has taken a somewhat ad hoc approach without definitively resolving whether the proper baseline is the general prison population or a different form of confinement, such as administrative segregation or protective custody. . . The D.C. Circuit surveyed the landscape on this question in *Aref v. Lynch*, 833 F.3d 242, 253 (D.C. Cir. 2016), noting that 'lower court assessments have diverged.' [setting out survey from *Aref*; *see Aref* in this outline, *infra*] In my view, the conditions of administrative segregation or protective custody are the proper baseline comparators when determining whether a challenged prison condition imposes atypical and significant hardship. . . . Our precedent acknowledges this. In setting forth 'guideposts' for determining whether a condition is atypical and significant, we have said that courts should consider 'whether the challenged condition mirrored those conditions imposed on inmates in administrative segregation and protective custody.'. . This makes sense. Administrative segregation is a form of confinement that prison officials may impose. . . If the challenged condition mirrors conditions that the prison may impose without additional procedures, then the challenged condition is not atypical and significant. . . .In my view, discretionary confinement such as administrative segregation and protective custody constitute the proper baseline for whether a challenged prison condition is atypical and significant.")

Compare ***Apodaca v. Raemisch***, 139 S. Ct. 5, 8, 10 (2018) (Statement of Justice Sotomayor respecting the denial of certiorari) ("Two Justices of this Court have recently called attention to the broader Eighth Amendment concerns raised by long-term solitary confinement. See *Ruiz v. Texas*, 580 U.S. ——, ——-—— (Breyer, J., dissenting from denial of stay of execution); *Davis v. Ayala*, 576 U.S. ——, ——-—— (2015) (Kennedy, J., concurring). Those writings came in cases involving capital prisoners, but it is important to remember that the issue sweeps much more broadly: whereas fewer than 3,000 prisoners are on death row, a recent study estimated that 80,000 to 100,000 people were held in some form of solitary confinement. . . . Courts and corrections officials must accordingly remain alert to the clear constitutional problems raised by keeping prisoners like Apodaca, Vigil, and Lowe in 'near-total isolation' from the living world, . . . in what comes perilously close to a penal tomb.") *and* ***Davis v. Ayala***, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("[P]rison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exacts a terrible price. . . In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine

whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.") *with id.* (Thomas, J., concurring) ("I write separately only to point out, in response to the separate opinion of Justice KENNEDY, that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora, and Jose Luis Rositas, now rest. And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.").

See also ***Johnson v. Prentice***, No. 22-693, 2023 WL 7475168, at *1–4 (U.S. Nov. 13, 2023) (Jackson, J., with whom Sotomayor J. and Kagan, J. join, dissenting from the denial of certiorari) ("As Members of this Court have recognized, the practice of solitary confinement 'exact[s] a terrible price.'. . Indeed, 'serious objections' to this form of imprisonment have been brought to this Court for more than a century. . . In this regard, Johnson's case is not unusual. But Johnson's solitary confinement was unusually severe in another respect. In addition to the typical hardships associated with solitary confinement, prison officials completely deprived Johnson of exercise for nearly all of his incarceration at Pontiac. In the ordinary course, even when in solitary confinement, Pontiac inmates are permitted to have recreation time in the prison yard for at least eight hours per week. . . While in the yard, inmates can access a caged outdoor exercise area that has some basic exercise equipment and enough open space in which to move about. In Johnson's case, however, Pontiac officials refused to provide even this modest relief. Rather, Johnson was repeatedly placed under so-called 'yard restrictions' as punishment for various infractions, most of them minor, which resulted in the denial of any access to recreation outside his cell. Each yard restriction was imposed for a period of between 30 and 90 days, but the restrictions were stacked such that, in total, Johnson received over three years' worth of yard restrictions. The cramped confines of Johnson's cell prevented him from exercising there. Thus, for three years, Johnson had no opportunity at all to stretch his limbs or breathe fresh air. . . The consequences of such a prolonged period of exercise deprivation were predictably severe. Most notably, Johnson's mental state deteriorated rapidly. He suffered from hallucinations, excoriated his own flesh, urinated and defecated on himself, and smeared feces all over his body and cell. Johnson became suicidal and sometimes engaged in misconduct with the hope that prison guards would beat him to death. His muscles also became prone to spasms and cramping, and he often complained of overwhelming fatigue. He developed respiratory difficulties, including painful chest contractions and nosebleeds. Worse still, Johnson's dire physical condition led to further yard restrictions, as prison guards faulted him for being disruptive and having an unclean cell. This vicious cycle continued month after month until Johnson was transferred to a specialized mental-health treatment unit, where his condition improved. . . . In the cumulative no-yard-access context, then, proper application of the deliberate-indifference standard when evaluating a prison official's motion for summary judgment requires consideration of two factbound factors: first, whether the exercise deprivation at issue posed a substantial risk to the prisoner's health or safety, and second, whether prison officials 'knowingly and unreasonably disregard[ed]' that risk of harm. . . In other words, the focus of the correct assessment is on the evidence concerning the risks presented to the inmate and the prison officials' knowledge of and response to those risks. And for summary judgment to be properly

awarded to prison-official defendants, there cannot be any genuine dispute about the insufficiency of the prisoner's showing related to the risks posed by the complained-of condition or the official's knowing and deliberate disregard of them. . . *Pearson*'s 'utterly trivial infraction' test bears no relationship to this legal standard. As noted above, its entire focus is on the reasons the officials imposed the yard restrictions, presumably based on the mistaken view that the Eighth Amendment analysis turns only on a prison official's rationale for imposing the purportedly inhumane condition. The *Pearson* rule pays no attention whatsoever to the indisputable risks to health or safety that a prolonged period of exercise deprivation can cause. . . Moreover, *Pearson*'s conclusion that the way to evaluate a prisoner's complaint about yard restrictions that cumulatively deprive him of exercise—by disaggregating the stacked penalties and examining each one for its unreasonableness relative to what the prisoner has done to warrant that restriction—is plainly contrary to the thrust of a legal standard that requires consideration of 'the sum total of the deprivation,' as Judge Scudder rightly observed. . . The facts and circumstances here further indicate that the Seventh Circuit's erroneous application of the *Pearson* test in lieu of the deliberate-indifference standard was not a harmless error in the context of Johnson's case. The Court of Appeals rejected Johnson's claim by focusing only on the nature and volume of Johnson's infractions. . . It did not consider the impact of cumulative exercise deprivation on Johnson's physical and mental health, or what was known to prison officials about the risks of such deprivation. And there was more than enough evidence to support a reasonable jury finding that the overall 3-year deprivation of yard time that Johnson was subjected to was the result of unconstitutional deliberate indifference. . . . In short, rather than faulting Johnson for failing to present arguments or evidence that established the 'trivial' nature of the behavioral infractions that precipitated the cumulative yard restrictions, the Seventh Circuit should have abandoned *Pearson*'s 'utterly trivial infraction' rule and applied the well-established deliberate-indifference standard to analyze the state of the evidence concerning Johnson's Eighth Amendment cumulative no-yard-access claim. If it had done so, the Circuit panel would have had to acknowledge that, at the very least, the deliberate-indifference inquiry presents a genuine issue of material fact for the jury, under the facts and circumstances presented here, such that summary judgment was not appropriate.")

Compare ***Escobarrivera v. Whitaker***, No. 21-30147, 2022 WL 17352178, at *4–5 (5th Cir. Dec. 1, 2022) (not reported) ("We conclude Escobarrivera has failed to create a fact issue that his confinement as of the date of final judgment in the district court rises to the level of severity articulated in *Wilkinson* and *Bailey*. We recognize that Escobarrivera is confined for twenty-three hours (or at least twenty-two hours) a day in a cell by himself, eats his meals alone, is prevented from attending church services, and his confinement is allegedly 'indefinite.' But important to the Court in *Wilkinson* was the 'depriv[ation] of almost any environmental or sensory stimuli and of almost all human contact.'. . Escobarrivera's confinement does not amount to such a deprivation. Escobarrivera's cell has bars as opposed to a steel door, allowing him the opportunity to communicate with other inmates. He can roam the hall and interact with others during his hour of release; he receives three additional one-hour sessions a week outside; and he has access to visitation twice a month. Accordingly, taking his facts as alleged as true, we cannot conclude that

Escobarrivera's conditions of confinement alone are 'atypical and significant.'. . We now turn to the duration of Escobarrivera's confinement. Confinement in less severe conditions may still give rise to a protected liberty interest if the confinement's duration is excessive. . . In *Wilkerson*, for example, we considered a thirty-nine-year confinement and concluded that such an 'extraordinary duration' diluted the materiality of the less severe confinement conditions. . . The duration of Escobarrivera's confinement—which was three years and three months when the district court entered summary judgment and is now four years and six months—is significantly shorter than the duration at issue in *Wilkerson.* Therefore, Escobarrivera's length of confinement does not, at least at this point, tip the scale towards severity. Moreover, we have noted that a period of eight years in solitary confinement with no prospect of immediate release in the near future is sufficient to give rise to a liberty interest, but a period of two and one-half years in confinement is not. . . Escobarrivera's confinement duration is closer to the two-and-a-half-year mark that we have deemed insufficient to establish a liberty interest than it is to the eight-year mark we have deemed sufficient. Therefore, Escobarrivera's duration of confinement is also not atypical. . . In sum, considering the conditions of Escobarrivera's confinement coupled with its duration, we conclude that Escobarrivera has not articulated a clearly established due process liberty interest at this point. Because Escobarrivera's due process rights in these circumstances were not 'so well defined' that a 'reasonable officer' would understand his conduct to be unlawful, . . . we affirm the district court's grant of summary judgment in favor of Defendants as to the claims asserted against them in their individual capacities as of the date of the final judgment in the district court. That said, this summary judgment affirmance does not preclude what Escobarrivera may be able to assert as time continues.") *with* ***Escobarrivera v. Whitaker***, No. 21-30147, 2022 WL 17352178, at *4–5 (5th Cir. Dec. 1, 2022) (not reported) (Elrod, J., concurring in part and dissenting in part) ("Analyzed under the proper test articulated in *Wilkinson* and *Wilkerson*, and employed by our sister circuits, Mr. Escobarrivera's conditions plainly implicate a clearly established liberty interest. In *Wilkerson* we zeroed-in on the combination of the plaintiff's '23-hour-a-day in-cell confinement, limited physical exercise, limited human contact, and effectively indefinite placement' to determine that a clearly established liberty interest was implicated. . . It is undisputed that all of these factors are present here. The district court's contrary conclusion follows from its error in treating the 'lack of clear guidance regarding terms equivalent to Plaintiff's term' as the beginning and the end of the qualified immunity analysis. . . As we held in *Wilkerson*, a liberty interest can be clearly established despite 'some distinctions between the conditions' that have been held to implicate a liberty interest in previous cases. . . Thus, the district court was obliged to fully consider all of Mr. Escobarrivera's conditions of confinement to determine whether there were 'material and substantial similarities' with conditions that have previously been found to implicate a liberty interest. . . A difference in duration alone does not preclude a finding of clearly established law. . . Moreover, even assuming *arguendo* that claims like Mr. Escobarrivera's cannot be brought until a prisoner has spent a minimum period in solitary confinement, Mr. Escobarrivera has satisfied that prerequisite. As noted, the majority opinion identifies eight years with no prospect of immediate release as 'sufficient,' but two and a half years as 'not.'. . Mr. Escobarrivera is now approaching five years in solitary confinement with no indication of when or how he may ever be released. I would hold that five years is enough, as foreshadowed by our decision in *Bailey*

v. Fisher, 647 F. App'x 472 (5th Cir. 2016).")

Compare ***Prieto v. Clarke***, 780 F.3d 245, 251-54 (4th Cir. 2015) ("The Eighth Amendment requires a court to examine whether prison conditions impose cruel and unusual punishment. The Due Process clause requires a court to determine whether a state has provided prisoners with adequate process in applying prison regulations and policies. Treating *Sandin* and *Wilkinson* as holding that confinement conditions alone trigger a Due Process claim—without regard to whether a state policy or regulation provides the basis to challenge such conditions—would elide that critical distinction. Prieto thus errs in contending that harsh and atypical confinement conditions in and of themselves give rise to a liberty interest in their avoidance. . . .The record is clear that under Virginia law, a capital offender has no expectation or interest in avoiding confinement on death row. A written Virginia policy requires all capital offenders to be housed on death row prior to execution, without any possibility of reclassification. . . .[A] court cannot conclude that death row inmates have a state-created interest in consideration for non-solitary confinement when the State's established written policy expressly precludes such consideration. . . .Nor can Prieto establish that the conditions of his confinement impose an atypical and significant hardship in relation to the ordinary incidents of prison life. . . . [N]either *Wilkinson* nor *Beverati* involved a discrete class of inmates who had been *sentenced to death* and *for that reason* were required by state law to be confined under particular conditions. . . Rather, *Wilkinson* and *Beverati* found confinement conditions that were *not* required by a particular conviction and sentence to impose an atypical and significant hardship. These holdings certainly do not mean that similar conditions pose an atypical and significant hardship where, as here, state law does mandate that a particular conviction and sentence require confinement under such conditions. When determining the baseline for atypicality, a court must consider whether the confinement conditions are imposed on a prisoner *because of* his conviction and sentence. For conditions dictated by a prisoner's conviction and sentence are the conditions constituting the 'ordinary incidents of prison life' for that prisoner. . . .[W]e simply recognize, as we must, that in the unusual instances in which state law mandates the confinement conditions to be imposed on offenders convicted of a certain crime and receiving a certain sentence, those confinement conditions are, by definition, the 'ordinary incidents of prison life' for such offenders. Virginia law mandates that all persons convicted of capital crimes are, upon receipt of a death sentence, automatically confined to death row. Thus, in Virginia the ordinary incidents of prison life for those inmates, including Prieto, include housing on death row.") *with* ***Prieto v. Clarke***, 780 F.3d 245, 255-56, 258-59 (4th Cir. 2015) (Wynn, J., dissenting) ("The Supreme Court found the conditions in *Wilkinson* sufficiently egregious that 'taken together[,] they impose an atypical and significant hardship within the correctional context ... [and thereby] give rise to a liberty interest in their avoidance.'. . In other words, the restrictive conditions could be imposed-but not without procedural safeguards such as notice and an opportunity to be heard. This case presents conditions of confinement strikingly similar to, and arguably more egregious than, those in *Wilkinson*. I would therefore follow *Wilkinson* and find Plaintiff Alfred Prieto entitled to at least some modicum of procedural due process. In my view, the majority opinion reads *Wilkinson* unnecessarily narrowly in signing off on Prieto's automatic, permanent, and unreviewable placement in the highly restrictive conditions of Virginia's death

row. Accordingly, I respectfully dissent. . . .In sum, taking the Supreme Court at its word, it told us that we are not to parse written regulations but rather that the 'touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves in relation to the ordinary incidents of prison life.'. . Here, as in the strikingly similar *Wilkinson,* the conditions are sufficiently egregious that 'taken together[, they] impose an atypical and significant hardship within the correctional context' when compared to 'any plausible baseline' and thus 'give rise to a liberty interest in their avoidance.' . . .At the end of the day, all of this ink is being spilled over whether Virginia needs to provide minimalist procedural safeguards like those in *Wilkinson* to less than ten prisoners—the current number of inmates on Virginia's death row. Again, the 'harsh conditions may well be necessary and appropriate' for these prisoners. . . But that 'does not diminish' the conclusion that 'the conditions give rise to a liberty interest in their avoidance'—and that all that would be required to comport with due process would be informal notice and an informal opportunity to be heard. . . These procedural safeguards, in my view, Prieto should have.").

Compare ***Hamner v. Burls***, 937 F.3d 1171, 1179-80 (8th Cir. 2019) ("Hamner argues that his Fourteenth Amendment rights were violated when prison officials placed him in administrative segregation for 203 days without affording him proper procedural avenues for challenging his classification. Prisoners have a liberty interest in freedom from conditions of confinement that impose 'atypical and significant hardship' relative to 'ordinary incidents of prison life.'. . The duration and degree of restrictions bear on whether a change in conditions imposes such a hardship. . . Hamner contends that the conditions of his confinement in administrative segregation departed materially enough from his experience in general population to trigger a liberty interest. He also claims that prison officials afforded him inadequate process by failing to articulate a clear justification for his placement in administrative segregation and to afford meaningful periodic review of his classification thereafter. Hamner identifies no circuit precedent holding that an inadequate justification for administrative segregation or shortcomings in review of a prisoner's placement violate the Due Process Clause. Instead, he attempts to derive a set of legal rules from cases in which we have held that prisoners did *not* allege a sufficient liberty interest. . . . None of the cited cases, however, clearly establishes the 'violative nature of [the] *particular* conduct' in question here. . . Our precedents have said that 'a demotion to segregation, even without cause, is not itself an atypical and significant hardship,'. . . and held that nine months in administrative segregation did not deprive a mentally ill prisoner of a liberty interest. . . While it is possible in this fact-specific area that a combination of circumstances involving solitary confinement could curtail a liberty interest, *e.g.*, *Incumaa v. Stirling*, 791 F.3d 517, 531-32 (4th Cir. 2015); *Williams v. Norris*, 277 F. App'x 647, 648-49 (8th Cir. 2008) (per curiam), it is not beyond debate that the defendant officials did so by segregating a prisoner with Hamner's particular medical condition for 203 days under the conditions alleged. Where Hamner's only remaining claim is for damages, we conclude that the officials are entitled to qualified immunity.") *with* ***Hamner v. Burls***, 937 F.3d 1171, 1180-81 (8th Cir. 2019) (Erickson, J., concurring) ("I concur in the majority's analysis, but write separately to express my concerns about Hamner's placement in administrative segregation

and our reluctance to meaningfully address the significant hardship imposed on inmates placed in isolation, particularly those with pre-existing mental health issues. In light of the detrimental and devastating effects that placement in administrative segregation has on the human psyche, I am troubled in this case by both the prison administrators' lack of process and their failure to comply with their own policies. While I agree that there is currently no precedent in our court establishing a due process violation for failing to provide adequate procedural protections in the context of administrative segregation, I believe that the Constitution requires, at a minimum, an opportunity for meaningful review when prison administrators impose restrictions on an inmate as significant and as potentially injurious as placement in administrative segregation. I also believe that the time has come to revisit our precedent that ignores the known negative effects of segregation and isolation. Hamner alleged that the Arkansas Department of Corrections violated its own policies and the Due Process Clause by failing to provide an adequate justification for administrative segregation and by allowing a review process that essentially provided no meaningful review. Hamner was denied a probable cause hearing required by prison policy to take place within 72 hours of placement in administrative segregation. When the hearing actually occurred, Hamner was neither given advance notice of it nor an opportunity to appear. By the time Hamner was allowed to appear, more than a dozen days had passed. Hamner further alleged that prison policy provides for review hearings every seven days for the first two months. Documentation of the first seven-day review hearing in the record is dated May 13, 2015, when Hamner had been in administrative segregation for six weeks. It is uncontroverted that the check-the-box form completed by prison officials following the hearing gave no reason for Hamner's initial assessment or continued placement in administrative segregation. In fact, the forms completed following the review hearings contained no rationale for the initial placement or justification for continued placement in administrative segregation until August 12, 2015 (more than four months after Hamner was originally placed in administrative segregation) and then the form only contained the handwritten words 'security concerns.' Hamner disputes that he ever expressed a security concern. No findings were made that evidenced the nature of the alleged security concern. Hamner was inexplicably confined in administrative segregation for nearly five months without any explanation. During the almost seven months he was held in administrative segregation, he was given no meaningful opportunity to challenge his placement in isolation. As noted by the majority, we have consistently said that placement in administrative segregation, even without cause, is not itself an atypical and significant hardship. Given the developing science of mental health and what is now known – that is, the profound detrimental and devastating impact solitary confinement has on an inmate's psyche, particularly an inmate with pre-existing mental illnesses – we can only reach the conclusion that this type of isolation is, as a matter of law, not an atypical and significant hardship if we ignore reality. The majority acknowledges that '[s]cholarly literature about negative effects of segregation may influence prison administrators and future court decisions.' I suggest the time has come to consider that literature and reverse the precedent that stands for the proposition that isolation is not a significant hardship with constitutional implications. If we also factor in the prison administrators' failure to provide any explanation for Hamner's placement in administrative segregation for nearly five months and the hollow review process afforded him, I believe Hamner has shown a sufficient hardship to trigger a liberty interest. But, because I

reluctantly conclude that our precedent precludes a finding of the existence of a clearly established constitutional right giving sufficient notice to prison administrators, I concur.")

See also ***Felton v. Brown***, 129 F.4th 999, 1007-08 (7th Cir. 2025) ("It is well-established that prisoners have a protected liberty interest in avoiding segregated confinement when it 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'. .This turns on 'the duration of the segregation and the conditions endured.'. . Here, Felton was held in administrative confinement from at least July 2013 until October 2015—a period of over two years. . . During this time, Felton was in almost complete solitude, with no human contact or free movement. . . The defendants ask us to ignore Felton's lengthy time in segregation and the harsh conditions therein. As they see it, Felton categorically cannot state a liberty interest because he was in discretionary confinement—that is, 'segregation imposed for administrative, protective, or investigative purposes,' as opposed to segregation imposed for disciplinary purposes. . . We are skeptical of this argument, especially as applied to a confinement as lengthy and severe as Felton's. In such cases, there is a significant risk that the purported administrative purpose is merely 'a pretext for indefinite confinement.'. . We need not decide this issue, however, or delve into the defendants' various arguments against Felton's asserted liberty interest. Even assuming Felton's liberty was implicated by his prolonged administrative segregation, he has not alleged that the process afforded to him was constitutionally deficient. Notably, Felton does not take issue with the procedures surrounding his initial placement in administrative confinement. Instead, he challenges the procedures used to keep him in segregation after his arrival. Specifically, Felton claims that his detention was unlawful after January 10, 2014, because Wisconsin state law entitled him to a six-month committee review on that date, . . . but the review did not take place until five days later. Furthermore, he remained in segregation for several months beyond that date even though he had appealed the confinement order and a state court judge had vacated it in August 2015. The requirements of the Due Process Clause are 'flexible and variable dependent upon the particular situation being examined.'. . In the context of continued administrative confinement, inmates are entitled to 'periodic review,' which—like the initial placement decision—may be 'an informal and nonadversary' process. . . The frequency of this periodic review is generally committed to the discretion of prison officials, but the reviews must 'be sufficiently frequent that administrative segregation does not become "a pretext for indefinite confinement of an inmate."'. . Felton's only challenge to the untimely January 2014 hearing is that it was unlawful under Wisconsin law. Violations of state law, however, do not automatically establish a federal constitutional claim. . . That means Felton must provide some reason why the prison's actions—providing a committee review six months and five days after the prior committee review—did not provide sufficient process. On appeal, *amicus curiae* offers several reasons, but none are persuasive."); ***Ealy v. Watson***, 109 F.4th 958, 964-66 (7th Cir. 2024) ("It is true that under our precedent, five months in segregation, standing alone, is not enough to implicate a liberty interest that triggers due process rights. . . Fewer than six months in segregation, however, may still establish a liberty interest 'depending on the conditions of confinement.'. . So, we look to the conditions of Ealy's confinement to determine whether he had a protected liberty interest. On this front, Ealy asserts—and indeed, defendants *do not dispute*—that he endured cells

in segregation that had poor plumbing and associated odors, were cold and dirty, and contained bugs and spider webs. . . . Ealy testified at his deposition that these conditions differed from those in general population at both Western and Lawrence. Faced with these facts, and drawing all reasonable inferences in Ealy's favor as we must, we decline to decide this case by addressing whether Ealy's segregation amounted to an atypical and significant hardship. We need only address whether Ealy was afforded all the process he was due. . . .Whether Ealy possessed a protected liberty interest here does not dictate the outcome of this appeal, because even if Ealy had established such an interest, he received due process prior to any deprivation. As the district court found, the record below is clear: Ealy did not demonstrate his due process rights were violated during his disciplinary hearing. . . .[T]his court's recent decision in *Adams v. Reagle* crystalized the process owed to inmates facing only disciplinary action like segregation, rather than disciplinary action affecting the length of their carceral sentence, like a reduction in good-time credit. . . As set forth in *Adams*, 'an inmate who is facing transfer to disciplinary segregation is entitled only to "informal, nonadversarial due process," which "leave[s] substantial discretion and flexibility in the hands of the prison administrators."'. . . This 'informal, nonadversarial due process' standard is the correct one to apply here given that Ealy did not face disciplinary action that could affect the length of his sentence. A creature of due process, informal due process requires only that an inmate is provided (1) 'notice of the reasons for the inmate's placement' in segregation and (2) 'an opportunity to present his views,' for instance, in a written statement or at a hearing. . .Applying *Adams*, we reach the same result as the district court did under *Scruggs*. Ealy urges that his due process rights were violated because he (1) was not permitted to view the visiting room video footage, (2) was not allowed to question witnesses, and (3) the adjustment committee's decision lacked a sufficient explanation. We disagree."); ***Nielsen v. Thornell***, 101 F.4th 1164, 1171-72 (9th Cir. 2024) (as amended) ("The plaintiffs bring two procedural due process challenges to Arizona's private prison system: First, they maintain that prisoners have a protected liberty interest in avoiding incarceration at a private facility. Second, they contend that private prison employees are biased by a desire to shore up their employer's bottom line, leading them to make disciplinary decisions that keep prisoners incarcerated for longer. The plaintiffs' complaint does not plausibly allege facts that would support either claim. . . . The Supreme Court has held that a prisoner has a liberty interest in avoiding a prison that 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'. . But 'atypical and significant hardship' is a high bar. We have held that prisons pose such a hardship only where they confine prisoners to their cells for at least twenty-three hours a day and impose additional severe limitations on human contact. . . Placements that pose an automatic bar to early release may also pose atypical and significant hardship, . . . but only where the placement necessarily affects a prisoner's eligibility for release rather than simply increasing the likelihood that he will serve more time[.] . . The plaintiffs' complaint does not plausibly allege that assignment to a private prison in Arizona poses anything close to 'atypical and significant hardship.' The complaint contains a variety of allegations that conditions at private prisons are worse than those at state-run prisons: it maintains that private prisons offer reduced 'programs and services,' impose 'more lockdowns and restrictions on prisoners' freedoms,' and have 'higher levels of incident reporting, violence, [and] lockdowns.' It also alleges that prisoners in private prisons face longer terms of incarceration

because they are disciplined more often, which affects their 'early release time credits, the possibility of clemency, and release from custody.'. .But the complaint lacks any allegation that private prisons deprive prisoners of meaningful interpersonal contact or that they confine prisoners to their cells for twenty-three hours per day—or anything approaching these restrictions. . . The complaint vaguely alleges that private prisons make decisions that can increase the time that inmates spend in prison, but it does not allege that placement at a private facility automatically disqualifies a prisoner from early release. . . In short, the complaint does not plausibly allege that prisoners have a protected liberty interest in avoiding a private prison. The plaintiffs' argument fails for a more fundamental reason as well. Conditions naturally vary from prison to prison within any correctional system, including between state-run prisons. Some may offer more programs and services than others; some may have a history of imposing more severe lockdowns because of disciplinary problems; and other facilities may have a higher rate of incident reporting for varying reasons. If we accepted the plaintiffs' argument, an inmate could challenge his term in any prison (including state-run prisons), asserting that another prison offers better conditions or more programs and services. But the Constitution does not give prisoners a right to demand placement at their preferred facility. We decline the plaintiffs' invitation to meddle in 'a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.'"); ***Finley v. Huss***, 102 F.4th 789, 812-18 (6th Cir. 2024) ("[U]nlike the Eighth Amendment claim, we need not reach the 'clearly established' inquiry—the deputy wardens are entitled to qualified immunity because Finley cannot show a due process violation at all. The Fourteenth Amendment's Due Process Clause constrains governmental decisions that deprive individuals of certain protected interests. . . A procedural due process claim involves two steps. The plaintiff must first demonstrate the presence of a constitutionally protected 'property' or 'liberty' interest. Then, the plaintiff must show that a state actor deprived him of that interest without affording him constitutionally sufficient process. . . Here, Finley's claim proceeds on the theory that Huss and Schroeder unlawfully deprived him of a protected liberty interest by subjecting him to administrative segregation without following the requisite procedures. . . The threshold issue is whether Finley had a protected liberty interest. Generally speaking, inmates lack protected liberty interests in avoiding administrative segregation. . . However, administrative segregation can still implicate a liberty interest when it 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'. . .To be sure, Finley's three months in administrative segregation—without more—cannot implicate a liberty interest. His tenure in segregated housing falls comfortably within the duration that we've deemed part of the ordinary incidents of prison life. . . . That doesn't end the issue. Rather, Finley urges us to consider one additional factor: his severe psychiatric disorders. He argues that the months he spent in an unusually restrictive solitary cell—combined with his mental illness—imposed an atypical and significant hardship on him. Huss and Schroeder disagree. They don't dispute that Finley's mental illness increased his vulnerability to the harms of solitary confinement. But, relying on our decision in *Austin v. Wilkinson*, they argue that such individual vulnerabilities don't matter. . . In their view, *Austin* precludes us from considering disabilities that render inmates uniquely vulnerable to conditions that wouldn't otherwise implicate a liberty interest. We disagree with the deputy wardens' reading of *Austin*. In that case, we considered the appropriate 'baseline' standard (i.e.,

the 'ordinary incidents of prison life') against which a challenged form of confinement should be compared. The prison-official defendants had recommended using other states' supermax facilities—the harshest prisons around the country—to set that baseline. . . *Austin* firmly disagreed. . . . Nothing in *Austin*'s 'baseline' discussion requires courts to disregard inmate-specific factors while gauging the atypicality or significance of a given inmate's hardship. *Austin* made a rather straightforward observation: the 'ordinary incidents of prison life' captures conditions experienced by a relatively broad swath of inmates. . . But when turning to a specific inmate's confinement in any given case, courts don't look for what is 'ordinary.' Quite the opposite—they search for deviations from 'ordinary' by comparing the inmate's actually experienced conditions to the generally applicable baseline. . . Factoring in inmate-specific vulnerabilities is consistent with *Austin*. And no other Sixth Circuit precedent meaningfully addresses this issue. Helpfully, other circuits have already weighed in. And every court to reach the issue has endorsed the consideration of inmate-specific vulnerabilities. . . . In sum, we see no reason to create a circuit split on this issue. Considering an inmate's personal characteristics when determining the presence of an atypical and significant hardship seems both appropriate and intuitive. . . . Applying that standard to Finley's case is straightforward. Huss subjected Finley to indefinite administrative segregation that, under Schroeder, ultimately endured for around three months. The conditions that Finley experienced in his base-level cell were unusually restrictive, even when compared to other forms of administrative segregation at the same high-security prison: He was deprived of almost all human interaction. He had almost zero natural light. And he rarely left his cell. Finally, and most significantly, Finley has severe psychiatric disorders that render him particularly vulnerable to solitary confinement's destructive force. Indeed, those disorders had already prompted repeated instances of self-mutilation—mostly in solitary conditions. Standing alone, any one of these factors might fall short of creating a liberty interest. . . But 'taken together' they amount to an atypical and significant hardship, meaning that Finley possessed a liberty interest against his stay in solitary confinement under the unique facts of this case. . . . The procedural requirements of due process are highly situation dependent. . . When analyzing the sufficiency of procedures for any given situation, courts employ a flexible framework. We balance (1) the private interest at stake, (2) the risk of an erroneous deprivation and the likely value of extra safeguards, and (3) the government's interests, including the fiscal or administrative burdens of implementing more stringent procedures. . . In the correctional context, the Supreme Court instructs us to afford officials particular deference and flexibility. . . . The appropriate level of flexibility depends on the nature of the specific proceeding at issue. Even within prisons, *Wolff v. McDonnell* prescribes relatively rigorous procedural safeguards before officials can punish an inmate for serious alleged misconduct: formal notice of the charges provided in writing 24 hours before a hearing, a written statement describing the factfinder's relied-upon reasons, and—to the extent practicable—an opportunity for the inmate to call witnesses and present exculpatory evidence. . . . By contrast, administrative or managerial decisions, including non-punitive classification to administrative segregation, call for more relaxed procedures. . . .It is unclear precisely what additional procedural safeguards are required where, as here, an inmate's classification to administrative segregation is triggered by the outcome of a formal disciplinary proceeding. But *Hewitt*, which involved placement in administrative segregation before formal adjudication of any misconduct charges, sets the outer boundary. . . To

the extent that an inmate has a liberty interest in avoiding administrative segregation, prison officials satisfy due process by conducting 'an informal, nonadversary evidentiary review.'. . That review process includes giving the inmate 'some notice' and 'an opportunity to present his views'—either orally or in writing—'to the prison official charged with deciding whether to transfer him to administrative segregation.'. . Then, once the inmate is placed in segregated housing, due process further requires 'periodic review' of his confinement to ensure it is supported by 'some evidence.'. .Given that framework, Finley received the process due. [court describes process Finley received] Finley pushes back. He asserts that his process was deficient for four main reasons: he received inadequate notice, officials failed to properly consider his mental illness, his periodic reviews were perfunctory, and he could not participate in the Committee's October reclassification meeting. We are not persuaded. . . . By affording Finley detailed written notice more than 24 hours before his disciplinary hearing, prison officials enabled him to 'marshal the facts and prepare a defense' against the charges and associated consequences. . . And Finley took full advantage. He used the hearing to argue that his mental illness prevented him from controlling his actions and that he needed treatment rather than discipline or segregation. To aid the decisionmaker, Salmi provided a sanction assessment where she flagged the danger of solitary confinement. Ultimately, that disciplinary proceeding created a written record that Huss and the other Committee members reviewed the following day when making their classification decision. To the extent that Finley was also entitled to participate in the Committee's classification proceeding, same-day oral notice sufficed. . . . Assuming that due process required consideration of Finley's mental health, the Committee members cleared that threshold: They reviewed paperwork from his misconduct hearing, which included Finley's statement pertaining to his mental health. Huss, the Committee's chairperson, read Salmi's warning that prolonged confinement in segregation would likely harm Finley's mental health. And the Committee invited Finley to attend its meeting, allowing him to make further arguments about his mental health. That sufficed. The Due Process Clause does not require the active participation of a medical expert on the decisionmaking panel, and it isn't violated by officials' failure to complete each section of a classification form."); ***Perry v. Spencer***, 94 F.4th 136, 143, 146-69 (1st Cir. 2024) (en banc) ("Rehearing the case en banc, we affirm the District Court's grant of summary judgment to the defendants based on qualified immunity. We do so on the ground that, while Perry supportably has shown that his segregated confinement implicated a liberty interest and that the defendants denied him the process that was due to him before depriving him of that interest, there is no basis for concluding on this record that it would have been clear to a reasonable corrections officer that the confinement implicated a liberty interest. In so holding, we clarify both the circumstances in which the use of solitary confinement results in a deprivation of a liberty interest that the Due Process Clause protects and the process that is due in consequence of such a deprivation. . . . We have discretion to bypass the first step if we conclude that the right was not clearly established at the time of its alleged violation. . . We decline to bypass that first step here, however, because of the stakes involved in the use of prolonged solitary confinement and the concomitant need to provide legal clarity in this area. . . . A 'liberty' interest that the Due Process Clause protects 'may arise from two sources -- the Due Process Clause itself and the laws of the States.'. . .The Court has not held that a prison system's segregated confinement of an inmate -- whether for

administrative or disciplinary reasons -- implicates this first kind of liberty interest. . . But the Court has held that the use of segregated confinement in some circumstances implicates the second kind of liberty interest -- that arising 'from an expectation or interest created by state laws or policies.' . . That is the kind of liberty interest that Perry asserts is implicated here. . . . It is clear from . . . precedent, then, that the determination of when, if ever, the imposition of solitary confinement less onerous than that at issue in *Wilkinson* implicates a state-created liberty interest is partly a function of the baseline that the 'ordinary incidents of prison life' establish. We thus need to describe what those 'incidents' are. That is not an easy task, given the available precedent. But, as we will explain, certain clear principles do exist to guide the inquiry. [court discusses approaches taken by various Circuits] We have not purported in the wake of *Skinner* to assess which, if any, of the baselines described above is the proper one for defining the 'ordinary incidents of prison life.' Nor have we identified comprehensively what those 'incidents' are. . .As an initial matter, *Sandin* and *Wilkinson* lead us to conclude that the 'ordinary incidents of prison life' include only the conditions of confinement for inmates within the state prison system at issue, rather than the conditions of confinement that may be imposed by other states on inmates in their custody. . . .Next, a review of *Sandin*, *Wilkinson*, and case law from our sister circuits leads us to the conclusion that, within a given prison system, segregated confinement (even when it amounts to solitary confinement) *may* in some circumstances be an 'ordinary incident of prison life.'. . .On the flip side, however, *Sandin* also indicates that segregation less severe than that involved in *Wilkinson* is not *always* an 'ordinary incident of prison life,' no matter its nature and duration. . . . In fact, no circuit now holds that the bare legal possibility that a prison administrator may impose solitary confinement less severe than that at issue in *Wilkinson* on a member of the general prison population in and of itself makes any form of solitary confinement an 'ordinary incident of prison life' in that prison system regardless of the nature and duration of that confinement. Rather, the circuits agree that even when the conditions of confinement at issue in a given case are no harsher than those that may obtain in 'most solitary confinement facilities,'. . . and even when the regulations in a particular prison system permit officials to subject members of the general population to solitary confinement for administrative rather than only disciplinary reasons, the use of solitary confinement can still constitute an 'atypical and significant hardship' rather than an 'ordinary incident of prison life' in that prison system. . . .The question therefore is this: Under what circumstances does a particular form of segregation -- given its nature, duration, or the combination of its nature and duration -- constitute an 'ordinary incident of prison life' in a particular prison system *rather than* an 'atypical and significant hardship' relative to those incidents? Here, too, *Sandin* is instructive. It indicates that our focus must be on distinguishing what is 'ordinary' and 'normally expected' from what is a 'major disruption' or a 'dramatic departure' from the 'basic conditions' of the inmate's sentence. . . In other words, *Sandin* shows that segregation will constitute an 'ordinary incident of prison life' within a prison system if such confinement (accounting for its specific nature and duration) would be 'normally expected' by such an inmate in the general prison population of that prison system. . . The ordinary incidents of prison life that would be 'normally expected,'. . . are those forms of confinement that would 'likely' be faced[.] . .. And, by 'likely,' we mean 'not that the combination of events must be more probable than not, but that there must be *a substantial chance* of its occurrence.'. . . First, at least

when the solitary confinement that grounds an inmate's procedural due process claim exceeds thirty days, that confinement will constitute an 'atypical and significant hardship' per *Skinner* if, in relation to the reason for that confinement, it is '[ir]rational,' '[in]essential,' or 'excessive' in duration. . . This presumption is warranted because solitary confinement for longer than thirty days imposes a meaningful hardship, and a member of the general prison population would not reasonably expect to be subjected to such unreasoned uses of it. This is not to say, though, that confinement beyond thirty days constitutes a per se due process violation. Second, the length of segregated confinement that amounts to solitary confinement may make that confinement an 'atypical and significant hardship,' based on the length alone, when the inmate can show that 'few' members of the general prison population have experienced similar durations of such confinement. . . . Third, as a matter of procedure and burden allocation, the solitary confinement at issue also may be shown to constitute an 'atypical and significant hardship' based on its prolonged nature even when the inmate makes no empirical showing as to the frequency with which the prison system at issue imposes solitary confinement of comparable length. . . .We do not identify a minimum length for grounding such a solely length-based showing that the segregated confinement constitutes an 'atypical and significant hardship.'. . . Fourth, and again as a matter of procedure and burden allocation, the state's own regulations, while not the source of any liberty interest themselves, can inform the inquiry into whether the solitary confinement at issue persisted long enough to ground such a solely length-based showing that the confinement constituted an 'atypical and significant hardship.' . . . Thus, we conclude, in accord with *LaChance*, that a plaintiff may rely on the state prison system's regulations supportably to show that the solitary confinement at issue is atypical due to its length alone, at least when the challenged confinement is longer than thirty days. A plaintiff may do so by showing that such confinement exceeds the longest defined period of time that the state's own regulations specify as the time by which an inmate subject to comparable confinement must receive notice of the factual basis for it and an opportunity for rebuttal. . . When such a showing has been made, it is fair to proceed on the understanding (if not rebutted) that such solitary confinement is not an 'ordinary incident of prison life' within the state's prison system. . . .None of this is to say that such state regulations necessarily create a liberty interest (regardless of what showing the defendants make) or that no such interest exists in the absence of such regulations. *Sandin*, as we have noted, rejected a purely regulations-based focus in overturning *Hewitt*. In that regard, we agree with the Second Circuit that, wholly apart from what a state's regulations provide, a 'more fully developed record' might show that 'even relatively brief confinements' of more than thirty days 'under normal [segregation] conditions [are], in fact, atypical' in the prison system at issue. . . . Perry has not introduced empirical evidence about how frequently (if at all) inmates under DOC custody are held in administrative segregation for as long as he was. . . But, his fifteen months of solitary confinement -- even prior to his initial out-of-state transfer -- is of such a length that it suffices supportably to show that it imposed on him an 'atypical and significant hardship' in the absence of the defendants making any contrary showing regarding the frequency of use of such prolonged solitary confinement for administrative reasons. This conclusion accords with those conclusions that have been reached by courts that have applied a baseline like the one that we have now adopted. . . .Having established that Perry has supportably shown that his confinement implicated a 'liberty' interest, we next must determine -- still at the

first step of the qualified immunity inquiry -- whether a reasonable juror also could find that Perry was denied the process that he was due in consequence under the Due Process Clause. . . As we will explain, we conclude that a reasonable juror could. . . . Based on the three-factor framework of *Mathews v. Eldridge*, . . .*Wilkinson* held that inmates subjected to solitary confinement in a manner that implicates a liberty interest must be afforded the 'informal, nonadversary procedures' set forth in both *Hewitt* and *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*[.] . . Those procedures require at a minimum '[n]otice of the factual basis' for the confinement. . . and 'an opportunity to present [the inmate's] views' to the official charged with the decision to confine the inmate[.] . . . We thus begin and end our analysis at the first step of the qualified immunity inquiry into the process component of Perry's procedural due process claim with his contention regarding the 'opportunity for rebuttal' afforded to him. For, as we will explain, we conclude that Perry can supportably show on this record that he was denied that opportunity. . . . [D]espite the various forms of process that the record indisputably shows that the defendants offered Perry, the record supportably shows that he was not given the opportunity to contest the factual basis for his confinement in the SMU. Moreover, because of our previous conclusion that Perry has supportably shown that his solitary confinement implicated a state-created liberty interest by virtue of its extended duration (at least given the absence of any showing by the defendants to the contrary), Perry has also supportably shown that he was entitled to such an opportunity to contest the factual basis for his confinement as a matter of procedural due process. Accordingly, a reasonable juror could find that Perry was denied the procedural due process right that he claims. . . . Having specified the contours of the right at issue and the specific grounds on which Perry rests his claim that the record supportably shows that he was deprived of a state-created liberty interest without due process, we are now well-positioned to turn to step two of the qualified immunity inquiry. Here, our focus is on whether the defendants are entitled to summary judgment based on qualified immunity because the law under which a reasonable juror could supportably find that Perry was denied the right to procedural due process was not clearly established at the time of the denial. . . . [W]e conclude, reviewing de novo, . . . that the law was not clearly established that Perry's solitary confinement implicated a liberty interest. . . . Perry certainly cannot show that it was clearly established at the time of his confinement that a reasonable juror could conclude from the nature of the DOC's regulations that solitary confinement of greater than ninety days is excessive in duration and so for that reason alone imposes 'an atypical and significant hardship' on a DOC inmate. Indeed, other courts as of that time had held to the contrary. . . . Nor was it clearly established at the relevant time that the length of the solitary confinement that Perry served -- given the conditions that he endured during it -- made it, even if only when not rebutted, an 'atypical and significant hardship.' As we have seen, length alone can suffice to establish that solitary confinement is a hardship of that sort. Indeed, today no circuit holds otherwise. But we had not made clear prior to 2010 that administrative segregation -- even involving conditions like Perry's -- was an atypical and significant hardship if it persisted for as long as his did. . . Indeed, we had explained, prior to that time, that the baseline from which to measure what is such a hardship was the subject of dispute throughout federal circuits in the wake of *Sandin*. And we had done so in explaining our reasons for rejecting claims that prolonged periods of such confinement were hardships of that kind. . . True, Perry's confinement was quite lengthy. But, even still, the state of

the case law within our own circuit as of the time of Perry's solitary confinement was such that it was not clearly established from our own precedents that his confinement was an 'atypical and significant hardship.'. . .Thus, like the District Court . . . and the panel, . . . we agree that, *Wilkinson* aside, it was not clearly established at the time of the alleged violation of Perry's right to procedural due process that he had been deprived of a liberty interest. He thus needs to show that there is some other basis for concluding that the confinement that he endured implicated a liberty interest in a way that would have been clearly established at the relevant time. . . We did not address at step one of the qualified immunity inquiry whether Perry can supportably show on this record that his confinement is 'on all fours with *Wilkinson*.' But we must address that contention here, given that it is the sole remaining basis on which he may show that he was deprived of a liberty interest under clearly established law. As we will explain, though, Perry's contention falters, notwithstanding that we have no reason to doubt that the conditions in the general prison population in Ohio during the time of the confinement at issue in *Wilkinson* are comparable to those of the general prison population in the DOC during the time of Perry's confinement[, but] . . . [t]he available precedent. . . did not clearly establish that Perry's segregated confinement was 'indefinite' under *Wilkinson*. . . Accordingly, we agree with the defendants that it would not have been clear to a reasonable corrections officer at the time of Perry's confinement that, under *Sandin* and *Wilkinson*, such confinement implicated a state-created liberty interest under the Due Process Clause. The defendants are thus entitled on this ground to summary judgment based on qualified immunity."); ***LaVergne v. Stutes***, 82 F.4th 433, 436-37 (5th Cir. 2023) ("[A]lthough LaVergne alleged he was confined to a cell twenty-three hours per day from August 2012 to June 2017, he was nonetheless 'permitted two contact visits per month,' 'was able to make phone calls, cook food, or exercise' an hour per day, 'was permitted outdoor recreation for three hours per week, albeit in a limited space,' and was not 'deprived of conversation or communication with other inmates.'. . The magistrate judge committed no reversible error in dismissing LaVergne's Fourteenth Amendment due process claim."); ***Carmouche v. Hooper***, 77 F.4th 362, 366-67 (5th Cir. 2023) ("The district court relied heavily on *Wilkerson v. Goodwin* in dismissing Carmouche's procedural due process claim. According to the magistrate judge, this court in *Wilkerson* 'suggested that "two and a half years of segregation is a threshold of sorts for atypicality."' However, *Wilkerson* concerned a solitary confinement of nearly 39 years. . . The two-and-a-half-year threshold was cited only in dicta as an out-of-circuit example of a time period that a federal court had concluded was insufficient to trigger a constitutionally protected liberty interest. . . In now holding that no such threshold exists, we align with the Supreme Court and our own precedent. District courts should apply a nuanced analysis looking at the length and conditions of confinement on a case-by-case basis to determine whether they give rise to a liberty interest — not the application of a 30-month threshold. . . In failing to apply the appropriate, multi-faceted legal test considering the conditions and length of confinement, the district court erred. Accordingly, in dismissing the appeal as frivolous, the district court abused its discretion. Further, because the district court did not apply the correct test, we reserve review of whether Carmouche fails to state a claim for the district court to resolve in the first instance."); ***Prude v. Meli***, 76 F.4th 648, 657 & n.4 (7th Cir. 2023) ("It is well-settled that due process in a prison disciplinary hearing requires advance notice of the charges, a hearing before an impartial decisionmaker, the right to call

witnesses and present evidence (when consistent with institutional safety), and a written explanation of the outcome.[4] **[fn. 4:** Defendants contend that this standard applies only to deprivations of liberty, not deprivations of property. But neither our case law nor the Supreme Court case on which it relies, *Wolff v. McDonnell*, draws such a distinction.**]**"); ***Spann v. Lombardi***, 65 F.4th 987, 992-93 (8th Cir. 2023) ("Spann maintains that *Wilkinson v. Austin*. . . clearly establishes a liberty interest on comparable facts. In *Wilkinson*, the Court held that Ohio prisoners had a liberty interest in avoiding assignment to a maximum-security prison where the inmates experienced indefinite placement with only annual reviews, disqualification from parole consideration, and an environment with little human contact. . . Officials in this case reviewed Spann's status in administrative segregation more frequently, but we need not decide whether *Wilkinson* nonetheless clearly establishes that Spann's transfer to administrative segregation interfered with a liberty interest. Even assuming for the sake of analysis that Spann enjoyed a clearly established liberty interest in avoiding assignment to administrative segregation, it was not clearly established that he was entitled to the procedures set forth in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963. *Wolff* involved the deprivation of good-time credits that resulted in a longer term of imprisonment. . . In *Wilkinson*, however, the Court conducted a procedural due process analysis under *Mathews v. Eldridge*, . . . and concluded that the *Wolff* procedures do not apply when a prisoner is transferred to administrative segregation. . . Instead, a transfer to administrative segregation requires only informal, nonadversary due process procedures like those set forth in *Hewitt v. Helms*. . . and *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*[.] . . In view of *Wilkinson*, *Hewitt*, and *Greenholtz*, a reasonable official could have believed that the procedures applied in Spann's case were constitutionally sufficient. Informal due process requires only 'some notice of the reasons for the inmate's placement ... and enough time to prepare adequately for the administrative review.'. . An inmate must be given 'an opportunity to present his views' to a neutral decisionmaker, but is not entitled to a hearing with the inmate present. . . 'If the prison chooses to hold hearings, inmates do not have a constitutional right to call witnesses or to require prison officials to interview witnesses.'. . Informal due process also requires a periodic review of placement in administrative segregation. . .The procedures applied here meet the informal due process standard. The officials gave Spann adequate notice of the reasons for his placement. The notice informed Spann of his rights and identified the alleged victim, the date of the sexual assault, and the prison rule that he allegedly violated. After receiving notice, Spann had nearly a month before the hearing to prepare a defense, and he was able to present a written statement in his defense. Officials satisfied the periodic review requirement by assessing Spann's status in administrative segregation every ninety days. . . . For these reasons, we conclude that the procedures afforded to Spann were adequate under the standard of informal, non-adversary due process approved in *Wilkinson* for a transfer to administrative segregation. The officials are therefore entitled to qualified immunity on Spann's due process claim."); ***Shaw v. Foreman***, 59 F.4th 121, 127 (4th Cir. 2023) ("Here, Shaw plausibly alleged a violation of his procedural due process rights. He seems to concede on appeal that his temporary assignment to administrative segregation does not give rise to an actionable liberty interest. But avoiding transfer to a maximum-security prison suffices. As recognized by the Supreme Court, maximum-security facilities like Red Onion have 'highly restrictive conditions, designed to segregate the most dangerous prisoners

from the general prison population.'. . Accordingly, incarceration in a maximum-security 'environment [is] so atypical and significant that it would give rise to a liberty interest "under any plausible baseline."'); ***Johnson v. Ryan***, 55 F.4th 1167, 1180-1201 (9th Cir. 2022) ("Johnson has alleged sufficient facts to establish a liberty interest in avoiding maximum security confinement in the Browning Unit as a result of his STG validation. Johnson was not initially placed in the Browning Unit as a consequence of the crimes for which he was convicted and sentenced. . . Johnson's complaint states that after he was validated as an STG member in 2014, he was moved to the Browning Unit, where he is confined to his cell for twenty-four hours per day, strip searched every time he leaves his cell, takes meals in his cell, and has limited access to rehabilitation programs. These conditions are substantially more restrictive than the general population from which he was moved. Johnson also alleges that he was denied the opportunity for restoration of lost earned release credits. The Supreme Court has held that similar conditions in an Ohio Supermax facility created a liberty interest because they 'impose[d] an atypical and significant hardship under any plausible baseline.'. . . Although we find that Johnson has a liberty interest, he fails to state a claim for a due process violation under the *Mathews* three-prong framework. In this appeal, Johnson does not challenge the procedures by which he was initially validated as an STG member. Instead, he argues that ADC's annual reviews of his confinement status do not afford him adequate process because they 'are based solely on Plaintiff's alleged gang affiliation, without regard to his criminal history, propensity of violence, or disciplinary record within his past reclass review[ ] period or Plaintiff's disciplinary record overall.'. . . In this case, ADC has determined that an inmate's STG status—the fact of membership in a gang, irrespective of his prison disciplinary record—is a sufficient indication of that inmate's security risk to justify continuing solitary confinement. . . . In Johnson's case, Arizona has articulated a particular concern. It has not alleged that Johnson has violated disciplinary rules or is an immediate threat to the staff or other inmates. Rather, Arizona is concerned that Johnson's gang membership presents an ongoing threat to the security of the prison, its staff, and its inmates. ADC's immediate concern is not conduct-based. It is based on Johnson's status as a member of the Warrior Society, which ADC has determined is an active prison gang and presents a general threat to the security of the prison. . . . Unless Johnson can show that his initial validation as an STG was in error—a claim Johnson does not make—then his recourse for the time being is to renounce his membership, thereby altering his status as a Warrior Society member. . .Neither Johnson nor the state has anything to gain by conducting monthly, 90-day, or 120-day reviews of Johnson's status as a gang member because nothing about his STG status has changed. Such periodic reviews would be useful to review conduct-based threats to prison security, but that is not the basis for Johnson's segregation. . . .We hold that annual review of Johnson's gang status plus the possibility of the opportunity to renounce and debrief is sufficient to satisfy the demands of the Due Process Clause. . . . That brings us to Johnson's second, and perhaps most important point: Johnson, buoyed by the dissent, believes that, irrespective of his validated membership in a prison gang, Johnson must be given the opportunity to demonstrate that he is not a threat-in-fact. . . But here is the dissent's critical premise: 'gang affiliation, without regard to [Johnson's] criminal history, propensity for violence, or disciplinary record' is not sufficient cause to hold Johnson in segregated housing. . . Thus by 'den[ying Johnson] any "meaningful opportunity" to demonstrate he was no longer a threat,'

Arizona has denied Johnson due process. . .Johnson has framed his argument as a *Mathews v. Eldridge* challenge to Arizona's procedures. Properly considered, his argument does not sound in procedural due process. Rather, it is a fundamental disagreement with ADC's judgment that gang *status* is a sufficient grounds for placing Johnson, or any other gang member, in segregated housing. Johnson and the dissent challenge ADC's judgment about what criteria the prison should consider in determining whether Johnson remains a security risk. Johnson's argument sounds in substantive due process, not procedural due process. . . . So long as Arizona considers his STG status sufficient to merit maximum custody, other factors are irrelevant. The irrelevance of these 'other factors' reflects a substantive judgment about prison conditions and is far from a 'typical procedural due process argument.'. . *Mathews* is of no application to the dissent's argument here. . . . Our review of the three *Mathews* prongs shows that ADC's annual reviews of Johnson's STG status are not constitutionally deficient. ADC is entitled to substantial deference in its determination that an inmate's STG membership and failure to renounce and debrief poses a continuing security threat. Although Johnson disagrees with ADC's judgment, he has failed to plausibly allege how that judgment creates a risk that he will be erroneously classified as a security threat. . . . We are not aware of any principle of constitutional law that would require Arizona to create a program such as SDP to permit a prisoner to exit solitary confinement. Thus, we turn to the doctrine of state-created liberty interests. . . . In sum, although '[a] state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right,'. . . a plaintiff does not have an *independent* right to those procedures. . . Only if a party has shown a liberty interest does the Due Process Clause require procedural protections before the state may deprive the party of his state-conferred interest. . . In this way, the Court's consistent adherence to the distinction between a substantive interest and procedure is consistent with the two-step analysis for the Due Process Clause. At the first step, we must be careful not to confuse procedure with the underlying substantive interest that gives rise to a legitimate claim of entitlement, because we will consider the adequacy of those procedures in protecting that entitlement at the second step. Johnson argues that he has an independent liberty interest in remaining in the SDP under two theories: completion of the SDP is one way for him to secure good-time credits and parole eligibility, and completion of the SDP allows him to return to close custody and avoid the harsh conditions of maximum custody. We will address each theory separately. . . . We disagree that ADC has created a liberty interest in Johnson's participation in the SDP. Completion of the SDP may be a means for acquiring eligibility for good-time credits, parole, and avoiding maximum security, but that does not establish an independent liberty interest in mere participation in the SDP. The SDP is one of several programs that ADC has provided Johnson to permit him to change his confinement status, including renouncing his STG membership and debriefing, which he may do at any time. But the mere fact that ADC has provided Johnson with these programs does not create a liberty interest in them—the SDP 'is not an end in itself.'. . The SDP is no different than the procedures protecting an inmate from transfer in *Wakinekona*, the post-discharge review in *Loudermill*, or the arrest warrant in *Town of Castle Rock*. That is, the SDP is a *process* by which Johnson can leave maximum custody and regain eligibility for good-time credit and parole. It is not itself a liberty interest, but only one means by which Johnson can prove that he is prepared to return to the general prison population. . . . Removal

from the SDP does not itself constitute an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,' for two reasons. . . First, removal from the SDP during Phases I–III does not result in any significant change in an inmate's conditions of confinement. Phases I–III all take place in the Browning Unit, where STG validated inmates are housed. So underlying conditions of confinement are the same throughout these phases. Second, inmates in the general population and in other forms of administrative segregation do not have access to the SDP. The inmate removed from SDP has only lost access to one of several procedures by which he might change his conditions of confinement, and that alone is insufficient to create a liberty interest independent of any underlying change to Johnson's conditions. Our understanding is consistent with *Sandin*'s instruction that state-created liberty interests in the prison context are 'generally limited to freedom from restraint.'. . Our dissenting colleague disagrees. The dissent catalogues changes in an inmate's living conditions as he moves from Phase I to Phase III and concludes that 'participation in *any* stage of the SDP ... entails significantly more freedom from restraint and social exposure than ordinary placement in maximum custody.'. . .We are not persuaded. As we noted *supra,* following *Sandin* and *Wilkinson,* only a change in placement that works an 'atypical and significant hardship' creates a liberty interest protected by the Due Process Clause. . . . In *Ramirez v. Galaza*, . . . we addressed what kinds of circumstances count as 'atypical and significant.'. . Acknowledging that '[t]here is no single standard,' we said that the inquiry should be guided by three considerations: 1) whether the challenged condition 'mirrored those conditions imposed upon inmates in administrative segregation and protective custody,' and thus comported with the prison's discretionary authority; 2) the duration of the condition, and the degree of restraint imposed; and 3) whether the state's action will invariably affect the duration of the prisoner's sentence. . . .We have had few occasions to apply the guideposts we set forth in *Ramirez,* and the cases we have decided are not particularly helpful here. . . Nothing, however, in our cases would suggest that denying an inmate a two-person recreation period, favorable job assignments, unrestrained meals, unrestrained walks and access to the showers and recreation areas, or access to a GED program rises to the level of an 'atypical or significant hardship.'. . . We decline to follow the dissent down that road. We thus disagree with the dissent that removing an inmate from 'any prior phase' implicates a liberty interest under the Due Process Clause. . . . Although we conclude that Johnson has no liberty interest *created by the SDP*, we think that Johnson has adequately stated a liberty interest in avoiding a return to maximum custody from close custody. Once Johnson attained Phase IV, he was moved from maximum custody in the Browning Unit to a close custody facility—and that move constituted a material change in his living conditions. His expulsion from Phase IV of the SDP meant that he was removed from close custody and returned to maximum custody. Johnson's liberty interest in avoiding maximum custody is clearly established. . . . In considering whether conditions of confinement impose an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,'. . . we may consider 'whether the challenged condition mirrored those conditions imposed on inmates in administrative segregation and protective custody'; 'the duration of the condition, and degree of restraint imposed'; and 'whether the state's action will invariably affect the duration of the prisoner's sentence.'. . . Thus, it is not Johnson's removal from the SDP *per se* that creates an atypical and significant hardship, but the change in Johnson's underlying conditions of

confinement when he was moved from close custody and returned to the Browning Unit. . . We conclude that Johnson's return to maximum security from close custody implicates a liberty interest under the Due Process Clause. We so conclude even though the SDP only contemplates a four-week duration for Phase IV. . . Our holding is limited to Johnson's removal from Phase IV of the SDP and consequent return to maximum custody confinement. . . . Because we find that Johnson has alleged a liberty interest in avoiding the conditions of maximum custody, we must determine whether the procedures he was provided when he was moved from the Florence Central Unit to the Browning Unit in April 2018 were constitutionally adequate. We proceed with the *Mathews* analysis. As we noted above, in the prison context, the first and third *Mathews* factors—Johnson's interests and ADC's interests—weigh heavily in favor of ADC. Because this case involves the assignment of an inmate to maximum custody based on his membership in a prison gang, Johnson's private interest is limited, and ADC has a strong interest in mitigating the threat of STGs to prison security. . . . Although annual reviews and the opportunity to renounce and debrief might be adequate to protect an inmate's liberty interest in avoiding *retention* in solitary confinement, we conclude that they are insufficient for protecting a liberty interest in avoiding *reassignment* to such conditions. . . . In light of this record, the procedure that it appears Johnson was given was not adequate to satisfy the Due Process Clause. Johnson was not given a meaningful opportunity to learn of the factual basis for his transfer from close custody to maximum custody or to prepare a defense to the accusations. Johnson may or may not have violated the criteria for remaining in close custody, but the prison officials making that decision should make informed decisions—and the record available to us does not specify whether Johnson was made aware of the allegations against him. Without notice of the evidence against him, Johnson could not meaningfully respond and his hearing could not constitute an informed one. . . .In sum, the district court was correct in finding that Johnson does not have an independent liberty interest in participation in the SDP process, but it erred in concluding that Johnson's liberty interest in avoiding reassignment to the restrictive conditions of the Browning Unit was adequately protected by the procedures he was provided when he was moved from close custody to maximum custody in April 2018. We also conclude that Johnson was likely denied due process in the procedures that resulted in his return to maximum custody. We reverse the district court's grant of summary judgment for Defendants on Johnson's Fourteenth Amendment due process claim and remand for further proceedings."); ***Thorpe v. Clarke***, 37 F.4th 926, 942-45 (4th Cir. 2022) ("In our Circuit, prisoners retain a liberty interest in avoiding confinement conditions that impose 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,' provided they can first establish that interest 'arise[s] from state policies or regulations.'. .Because 'uncontroverted evidence' establishes that Step Down mandates review at least once every 90 days, Defendants sensibly do not dispute that Plaintiffs have adequately traced their interest to state regulations. . . The parties quarrel instead over whether the solitary conditions are sufficiently harsh and atypical. We have no doubt that they are. We also have no doubt their harshness has been clearly established, for confinement conditions here are even more onerous than conditions the Supreme Court unanimously recognized gave rise to this liberty interest in 2005. . . .We hold that by 2012, when VDOC instituted Step Down, case law had clearly established that solitary-confinement conditions comparable to those Plaintiffs allege here engendered a protected liberty

interest under the Fourteenth Amendment. . . . [N]either the Supreme Court nor this Circuit's precedent has clearly established the exact process prisoners must receive while in long-term administrative segregation. *Wilkinson*, for example, only upheld the review the prison provided; it did not establish a floor governing future cases. . . On the opposite end of the spectrum, *Incumaa* allowed a prisoner's challenge to proceed where the supermax provided 'only a single-layered confinement review' that, by regulation, did 'not grant [prisoners] the right to contest the factual bases' for their continued solitary detention. . . Neither case thus 'definitively require[d]' a particular set of procedures. . . But Defendants once again mistake Plaintiffs' arguments. Plaintiffs do not challenge Step Down as failing to live up to *Wilkinson*'s multitiered standard. Nor do they request any discrete procedures like advance notice, an opportunity to offer witnesses, or a possibility of appeal. They assert instead, similar to plaintiffs in *Incumaa*, that the program transgresses even the most foundational building blocks of due process: notice of the charges against them and an opportunity to be heard. That is, although Step Down offers multiple levels of review on paper, some occurring as frequently as every 30 days, not one of those reviews actually lives up to 'basic' due process scrutiny. . . .[I]f the Due Process Clause means anything, it requires at least 'that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.'. . . That is why *Hewitt* demanded corrections officers provide prisoners a notice or explanation 'of the charges against' them and an 'opportunity to present [their] views' through 'written statement' or 'oral presentations,' . . . why *Wilkinson* insisted that officials 'provide a brief summary of the factual basis for the classification review' and allow 'a rebuttal opportunity,'. . . and why *Incumaa* allowed prisoners to prove review committees failed 'to provide a factual basis for' their decisions, 'merely rubber-stamp[ing]' solitary incarceration[.] . . . Absent these elementary requirements, established long ago, prisoners simply do not have 'a meaningful opportunity to present their case.'"); ***Butler v. S. Porter***, 999 F.3d 287, 296-97 (5th Cir. 2021) ("We look specifically at the severity and duration of restrictive conditions to decide whether a prisoner has a liberty interest in his custodial classification. . . The Supreme Court has recognized that there are circumstances where solitary confinement, in conjunction with indefinite duration and disqualification from parole, can constitute such hardship. . . Regarding the duration of the restrictive confinement, we have said 'that two and a half years of segregation is a threshold of sorts for atypicality ... such that 18–19 months of segregation under even the most isolated of conditions may not implicate a liberty interest.'. .In *Wilkinson*, the Supreme Court concluded that the defendant experienced 'atypical and significant hardship' because he was in an Ohio Supermax facility and prohibited from 'almost all human contact,' including communication with other inmates; the lights were on for twenty-four hours per day; he could exercise only one hour per day in a small room; review of placement occurred only annually; and placement in the facility disqualified an inmate from parole consideration. . . Here, in contrast, the magistrate judge found that Butler could take courses, had weekly access to a telephone, and could exercise outside. Moreover, Butler provided documentation showing that prison officials reviewed his SHU stay at least monthly and sometimes weekly. Butler does not challenge the determination that the conditions he faced in the SHU were not onerous enough to constitute an atypical prison situation. . . He has thus abandoned this argument. . . Moreover, Butler is unable to show that the conditions in the SHU were severe enough to implicate due process concerns. Butler instead argues that his

circumstances implicated a liberty interest, relying upon internal regulations. However, '[o]ur case law is clear ... that a prison official's failure to follow the prison's own policies, procedures or regulations does not constitute a violation of due process, if constitutional minima are nevertheless met.'. . Because Butler did not allege a protectable liberty interest, he has not shown that any omissions in process violated the Constitution, . . . regardless of whether the prison did or did not follow its own policies."); ***Porter v. Pennsylvania Dep't of Corrections***, 974 F.3d 431, 437-38, 449-51 (3d Cir. 2020) ("Because we are mindful that 'it is often appropriate and beneficial to define the scope of a constitutional right' to 'promote[ ] the development of constitutional precedent' before deciding whether the right was clearly established, we will begin by evaluating whether Defendants have violated Porter's constitutional rights. . . . Porter first argues that, according to our precedent in *Williams*, Defendants have violated his procedural due process rights by keeping him in solitary confinement for thirty-three years without any regular, individualized determination that he needs to be in solitary confinement, even though he has been granted a resentencing hearing. We agree. . . . *Williams* governs Porter's procedural due process claim. Because Porter's procedural due process rights have been clearly established since we decided *Williams* in 2017, Defendants are not entitled to qualified immunity on this claim. In *Williams*, we explicitly stated:

Our holding today that Plaintiffs had a protected liberty interest provides 'fair and clear warning' that, despite our ruling against Plaintiffs, qualified immunity will not bar such claims in the future. As we have explained, scientific research and the evolving jurisprudence has made the harms of solitary confinement clear: Mental well-being and one's sense of self are at risk. We can think of few values more worthy of constitutional protection than these core facets of human dignity.

848 F.3d at 574 (quoting *Lanier*, 520 U.S. at 271, 117 S.Ct. 1219).

We were not alone in reaching this conclusion. [collecting cases] . . . . There is therefore wide consensus that prolonged and indefinite solitary confinement gives rise to a due process liberty interest for inmates in Porter's circumstances. These cases gave Defendants 'fair warning' that keeping an inmate who has been in solitary confinement for thirty-three years on death row while appeals of his vacatur order proceed violates his procedural due process rights. Defendants therefore are not entitled to qualified immunity as of our decision in *Williams*. . . .On Porter's Eighth Amendment claim, however, we reach a different conclusion. Unlike his procedural due process rights, Porter's Eighth Amendment right has not been clearly established. Porter has correctly pointed out that our Circuit and our sister circuits have held that inmates can bring Eighth Amendment claims based (at least in part) on conditions in solitary confinement. But only one circuit has done so in connection with solitary confinement on death row. Cases that challenge interpretation of death row policy and conditions on death row are distinct from cases brought by inmates in general population subject to solitary confinement. In *Williams*, for example, we considered whether our decision in *Shoats*, 213 F.3d 140, was sufficiently similar to the facts and claims raised by the *Williams* plaintiffs. We decided that, although *Shoats* is analogous and should have 'raised concerns' about whether the treatment of the *Williams* plaintiffs was constitutional, it was not sufficiently similar because Shoats was not on death row and did not directly dispute the death row isolation policy at issue in *Williams*. . . We have not found Eighth Amendment cases with sufficiently similar fact patterns, and the cases that Porter cites in support of his argument are

inapposite. . . .The Fourth Circuit has held that solitary confinement conditions on death row violate the Eighth Amendment. *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019). But a single out-of-circuit case is insufficient to clearly establish a right. Defendants are therefore entitled to qualified immunity on Porter's Eighth Amendment claim. We emphasize, however, that from this point forward, it is well-established in our Circuit that such prolonged solitary confinement satisfies the objective prong of the Eighth Amendment test and may give rise to an Eighth Amendment claim, particularly where, as here, Defendants have failed to provide any meaningful penological justification."); ***Smith v. Collins***, 964 F.3d 266, 269, 275, 278-81 (4th Cir. 2020) ("In line with the Supreme Court's decision in *Wilkinson v. Austin*, 545 U.S. 209 (2005), our atypical-and-significant-hardship analysis turns on three factors: '(1) the magnitude of confinement restrictions; (2) whether the administrative segregation is for an indefinite period; and (3) whether assignment to administrative segregation had any collateral consequences on the inmate's sentence.' [citing *Incumaa v. Stirling*] Here, Smith has presented evidence demonstrating that his confinement conditions were severe in comparison to those that exist in general population (factor one) and that his segregation status may have had collateral consequences relating to the length of his sentence (factor three). Moreover, although the duration of Smith's segregated confinement—a fact we consider in assessing indefiniteness (factor two)—is not as long as the substantial periods of segregated confinement that this Court has found sufficient to support a protected liberty interest in the past, prisoners need not languish in solitary confinement for decades on end in order to possess a cognizable liberty interest under the Due Process Clause of the Fourteenth Amendment. The four-plus years that Smith spent in administrative segregation is significant enough to tip the scales in his favor, particularly in light of the other evidence of indefiniteness that he relies upon in this case. For these reasons, we hold that there is at least a genuine dispute of material fact as to whether Smith's conditions of confinement imposed a significant and atypical hardship in relation to the ordinary incidents of prison life. Therefore, we vacate the district court's summary judgment order and remand the case for further proceedings consistent with this opinion. Specifically, on remand, the district court should consider in the first instance, and after further discovery, whether the process that Smith received was constitutionally adequate and whether the Defendant-Appellees are nevertheless entitled to qualified immunity. . . . Because Smith is a convicted prisoner, he does not have an inherent, constitutionally protected liberty interest in release from solitary confinement. *See Prieto v. Clarke*, 780 F.3d 245, 248–52 (4th Cir. 2015). Thus, he must identify a state-created liberty interest in avoiding solitary confinement. . . To do so, he must be able to show two things: first, that there is 'a basis for an interest or expectation in state regulations' for avoiding such confinement, and second, that the conditions ' "impose[ ] atypical and significant hardship ... in relation to the ordinary incidents of prison life."'. . . The district court held that the first requirement of prong one was satisfied because VDOC policy provides for a security-level review for Level S prisoners in the Step-Down Program every ninety days, . . . and Defendants do not challenge that conclusion on appeal[.] . . . In this case, we must compare the conditions in administrative segregation at Wallens Ridge . . . to the 'ordinary incidents of prison life,' which, for Smith, means the conditions in general population. . . . Drawing on the Supreme Court's reasoning in *Wilkinson*, this Court has construed the atypical-and-significant-hardship analysis as turning on primarily three factors: '(1) the magnitude of confinement restrictions; (2) whether the

administrative segregation is for an indefinite period; and (3) whether assignment to administrative segregation had any collateral consequences on the inmate's sentence.'. . Applying those factors here, we conclude that Smith has at least demonstrated a genuine issue of material fact with regard to the atypicality and harshness of his confinement in administrative segregation at Wallens Ridge, and thus as to the existence of a liberty interest in avoiding such confinement. . . .The duration of Smith's confinement in administrative segregation at Wallens Ridge strengthens his evidentiary showing of indefiniteness. To be sure, Smith's period of segregated confinement is quite shy of the twenty-year period at issue in *Incumaa*. . . But four years and three months is far longer than the thirty-day period at issue in *Sandin*. . . and the six-month period at issue in this Court's decision in *Beverati*[.] . . It also exceeds the length of various periods that other courts have found insufficient to trigger a liberty interest, which 'range[ ] up to two and one-half years.'. . . In sum, we conclude that the three rationales cited throughout Smith's ICA hearing reviews, when taken together, at least establish a genuine issue of fact as to the existence of a viable pathway out of segregation for Smith, especially when coupled with the record evidence of duration. Because indefiniteness is one of the factors that we must consider in assessing the atypicality and harshness of a prisoner's confinement in administrative segregation, this fact is plainly material to Smith's procedural due process claim. . . . That leaves the third factor: 'whether assignment to administrative segregation had any collateral consequences on the inmate's sentence.'. . In *Wilkinson*, the 'collateral consequences' took the form of parole ineligibility. . . Here, Smith points to his inability to earn good-time credits as a collateral consequence of his stalled progress in the Step-Down Program. . . . There is at least a genuine issue of material fact as to whether Smith's conditions of confinement in administrative segregation at Wallens Ridge imposed an atypical and significant hardship, such that he had a protected liberty interest. Smith has presented strong evidence that the conditions he endured in administrative segregation were severe in comparison to the conditions that exist in general population, and he has pointed to collateral consequences that may well be attributable to his segregation status, even if they are perhaps less severe than those contemplated in *Wilkinson*. Finally, although the duration of Smith's confinement in administrative segregation is shorter than the period of confinement that this Court found significant in *Incumaa*, it is not insubstantial, and there are also other indicia of indefiniteness in the record that are sufficient to create a factual dispute as to the existence of any pathway out of segregation at Wallens Ridge. Thus, on the present record, the three *Wilkinson* factors weigh in Smith's favor, and Defendants cannot prevail as a matter of law on the atypical-and-significant-hardship analysis. . . .That there is a genuine dispute as to the existence of a protected liberty interest does not end our inquiry, however. To succeed on his procedural due process claim, Smith must establish not only a liberty interest but also that Defendants failed to afford him adequate process to protect that interest. . . Moreover, even if Smith successfully establishes a procedural due process violation, he cannot recover damages from Defendants if they are entitled to qualified immunity."); ***Smith v. McKinney***, 954 F.3d 1075, 1081-84 (8th Cir. 2020) ("Post-*Sandin*, 'the Court of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system.'. . The Supreme Court has acknowledged 'the difficulty of locating the appropriate baseline' by which to measure what constitutes an atypical and significant hardship, but it has not

resolved the issue. . . Instead, in *Wilkinson*, the Supreme Court held that inmates' assignment to a state supermax prison 'impose[d] an atypical and significant hardship under any plausible baseline.'. . . Despite the lack of an established 'baseline from which to measure what is atypical and significant in any particular prison system,'. . . we have affirmatively held what does *not* constitute an atypical or significant deprivation. 'We have consistently held that a demotion to segregation, even without cause, is not itself an atypical and significant hardship.'. . Indeed, '*Sandin* teaches that [an inmate] has no due process claim based on [a] somewhat more restrictive confinement because he has no protected liberty interest in remaining in the general prison population; his only liberty interest is in not being subjected to "atypical" conditions of confinement.'. . As a result, 'to assert a liberty interest,' the inmate 'must show some difference between his new conditions in segregation and the conditions in the general population which amounts to an atypical and significant hardship.'. . .In the present case, Smith argues that the conditions of confinement he endured while in segregation and upon his transfer to the ISP imposed an atypical and significant hardship on him in relation to the ordinary incidents of prison life. First, he cites as an atypical and significant hardship his transfer from the FDCF, a medium security facility, back to the ISP, a maximum security facility, for an indefinite duration. . . . Because the transfer to a higher security facility alone is insufficient to establish an atypical and significant hardship, we must examine 'whether the conditions of [Smith's] confinement [in administrative segregation at the FDCF and] after his transfer [to the ISP] constituted a hardship that could reasonably be characterized as atypical and significant.'. . . But Smith has failed to set forth facts describing his conditions of confinement while in administrative segregation and disciplinary detention. Smith's reference to disciplinary detention as 'the hole' is not descriptive of what conditions he faced. . . Without a description of the conditions of confinement while in segregation, we are left with our precedent 'that demotion to segregation, even without cause, is not itself an atypical and significant hardship.'. .Smith also cites his loss of employment, wages, security classification, security points, and inmate tier status upon his transfer to the ISP. But none of these losses, individually or collectively, amounts to an atypical and significant hardship under our precedent. . . Because we hold that the conditions of confinement that Smith faced during administrative segregation at the FDCF and upon his transfer to the ISP do not amount to an atypical and significant deprivation when compared to the ordinary incidents of prison life, we affirm the district court's grant of summary judgment to the prison officials on Smith's due process claim."); ***Al-Turki v. Tomsic***, 926 F.3d 610, 614-16 & n.4 (10th Cir. 2019) ("A constitutionally protected liberty or property interest may be a creation of federal law (including the Constitution itself—at least for liberty interests) or of state law. . . .Plaintiff does not argue that he has a constitutionally protected liberty interest in changing his place of incarceration from Colorado to Saudi Arabia. And for good reason: Supreme Court precedent is squarely to the contrary. It is settled law that the federal Constitution in itself does not confer a right to incarceration in a particular institution. . . . The question thus becomes whether *state* law might create a liberty interest in the place of confinement that is protected by constitutional due process. At one time, the Supreme Court indicated that a State conferred a constitutionally protected liberty interest in favor of prisoners if, and only if, state law 'plac[ed] substantive limitations on official discretion.'. . . In *Sandin v. Conner*, 515 U.S. 472 (1995), and *Wilkinson*, 545 U.S. 209, however, the Supreme

Court adopted a different analytic framework for determining whether a prisoner has a constitutionally protected liberty interest. *Sandin* criticized 'the search [undertaken in previous cases] for a negative implication from mandatory language in prisoner regulations.'. . It explained that this test had 'encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges,'. . . even where that language conferred only trivial rights[.]. . As a result, the test created 'disincentives for States to codify prison management procedures,' and it 'led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone.'. . The Court thus reverted to the principles it saw as underlying its decision in *Meachum*, and held that a State could create a constitutionally protected liberty interest for prisoners only insofar as it freed them from restraints that impose an 'atypical and significant hardship ... in relation to the ordinary incidents of prison life.'. . Applying this test, the Court held that no protected liberty interest was implicated in the plaintiff's 30-day confinement in his prison's Special Housing Unit, even though the applicable prison regulation spoke in mandatory terms. . . In contrast, *Wilkinson* held under the same test that prisoner incarceration at an Ohio Supermax facility implicated a liberty interest because of the harshness and duration of the conditions of confinement. . . Although the Court continued to analyze the issue in terms of a 'state-created' interest, it did not clarify how a State creates such an interest or what role (if any) the language of state law has in the *Sandin* inquiry. [fn 4 At least one opinion representing the views of three Justices suggests that a constitutionally protected liberty interest will still require an entitlement mandated by state law. . . . Indeed, requiring a prisoner to show both that state law has created an entitlement through discretion-cabining language and that he meets the *Sandin* test makes good sense. A plaintiff proceeding outside of the prison context must make the former showing; why should not the same be required of a prisoner, whose rights are necessarily limited by his incarceration? . . Nevertheless, we need not decide this question as Plaintiff clearly lacks a liberty interest in his place of confinement under the *Sandin* standard.] Here, unlike the cases to come before the Supreme Court, Plaintiff is not complaining about being transferred to conditions that he considers unconstitutionally harsh. He is the one seeking the transfer. But the same principles apply. To establish a protected liberty interest in a prison transfer, he must be able to show that keeping him in a Colorado prison subjected him to an 'atypical and significant hardship ... in relation to the ordinary incidents of prison life.'. . That, of course, he cannot do. While incarcerated in Colorado, he was, as far as the record shows, subjected to merely those 'ordinary incidents.'"); ***Grissom v. Roberts***, 902 F.3d 1162, 1175-80 (10th Cir. 2018) (Lucero, J., concurring in the judgment) ("I agree with my respected colleagues that our circuit precedents, particularly *Grissom v. Werholtz*, 524 F. App'x 467, 474 (10th Cir. 2013) (unpublished) ("*Grissom II*"), compel the outcome of this case. Nothing has changed in our jurisprudence since *Grissom II* that would mandate a different conclusion, and thus I join in the judgment reached by the majority. I write separately because it is important to establish that the prolonged term of solitary confinement before us—twenty consecutive years—based on what appears to be marginal justification, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. During much of the twenty years Grissom spent in solitary confinement, he received only rote repetition of the reason for his treatment. Prison officials merely indicated that the reason for his initial

placement, suspected involvement in drug trafficking, remained valid. For half the time Grissom was subject to solitary confinement, from 2005 to 2015, he had a single disciplinary report: the control on a hot pot in his cell was set too high. I am disturbed by such flimsy rationale for the extension of the duration of such a term in solitary confinement. . . Assuredly, as the majority notes, Grissom is serving four consecutive life sentences for three separate murder convictions. He has no possibility of parole. Grissom was placed in solitary confinement on August 4, 1996. He did not return to the general prison population until December 5, 2016. Grissom spent more than seven thousand days alone in a cell about the size of a parking space. That cell was constantly illuminated with florescent light. The solid metal doors were intended to block out any sights or sounds, and they remained closed at all times. The walls of his cell were required to be kept plain. During those years, Grissom was permitted to leave his cell for one hour, five days per week, for solitary exercise in an eight-by-twenty foot cage. To participate in the exercise program, he was required to undergo a full strip search. In addition to the exercise program, he was granted three ten-minute showers each week. If a video booth happened to be available, he was allowed two one-hour video visitation sessions per week. . . . In 2016, Grissom was placed in the Behavior Modification Program, and was later returned to general population. He remains there today. Grissom seeks damages for having been kept in solitary confinement for twenty years on what he describes as 'stale' and disproportionate justifications. Noting the limited opportunities he had to leave his cell, the majority states that Grissom's argument paints an incomplete picture of his confinement. . . The majority concludes that Grissom was able to communicate with other inmates through vents in his cell, place phone calls, and had the biweekly video visitations noted above. But what the majority fails to appreciate is that the fundamental parameters of his life remained the same. He lived in a cell designed to maximize sensory deprivation. He spent between 23 and 24 hours a day alone in that cell. . . Our society has long understood that extended periods of isolation take a significant toll on the human psyche. . . . In short, solitary confinement, even over relatively short periods, renders prisoners physically sick and mentally ill. It destroys any ability they may once have had to relate positively to others. These harms, which are persistent and may become permanent, become more severe the longer a person is exposed to solitary confinement. . . .Our court has identified a non-comprehensive set of factors to consider in determining whether conditions qualify as atypical and significant. These factors include: whether (1) segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) conditions of placement are extreme; (3) placement increases the duration of confinement; and (4) placement is indeterminate. . . As the majority opinion recounts, this court ruled in 2013 that the *DiMarco* factors weighed against finding that Grissom possessed a protected liberty interest in avoiding solitary confinement. . . As noted initially, I do not quarrel with the majority's conclusion that defendants are entitled to qualified immunity in light of that decision, albeit an unpublished order and judgment. Notwithstanding my agreement that *Grissom II* renders defendants immune in this case, I cannot agree with the *Grissom II* analysis. The *DiMarco* factors were never intended to provide a static, formal test, and we cannot treat them as such. . . In light of what we now know about the effects of prolonged solitary confinement, it is impossible not to conclude that two decades in solitary confinement 'imposes an atypical and significant hardship under any plausible baseline.'. .There should be no serious doubt that the duration of Grissom's

confinement in solitary renders it extreme. . . .Grissom's conditions of confinement closely match those described in *Wilkinson* as atypical based in part on duration. . . And they are similar to those described by Justice Kennedy as 'exact[ing] a terrible price.' *Davis v. Ayala*, —— U.S. ——, 135 S.Ct. 2187, 2210, 192 L.Ed.2d 323 (2015) (Kennedy, J., concurring). The third and fourth factors could be viewed as balanced. Grissom's placement will not increase the total duration of his sentence. . . But his placement in solitary confinement was indeterminate. . . I recognize that our court has discussed the availability of periodic reviews in considering whether a term of segregation is indeterminate. . . Regardless of the potential that a placement might end at some undefined time, the fact remains that Grissom's placement was for an indefinite and indeterminate period. . .At base, then, the question is whether the extreme nature of Grissom's confinement is justified by legitimate penological interests. . . At the very least, Grissom has created a material dispute of fact on that issue. . . . Given the severe consequences of long-term placement in solitary confinement, such conditions must be treated as a last resort, used in only the most extreme of cases. And even then, prison officials must meaningfully consider on a periodic basis whether solitary remains necessary. There appears to be no evidence of proportionality between the prison's interest in confining Grissom and the length of his solitary confinement. A factfinder could certainly determine that the reviews he received were inconsistent with the Fourteenth Amendment's demand for due process. . . For the foregoing reasons, I am compelled to conclude that the decision in Grissom II, in which Grissom was before us as an indigent without the benefit of counsel, incorrectly analyzed the *DiMarco* factors. The injustice that error has wrought—to wit, Grissom's twenty years of unjustified solitary confinement—is severe. But for our unpublished order and judgment in *Grissom II*, I would conclude that the appellant has shown, under clearly established law and the facts presented in this appeal, that the twenty years he was forced to spend in solitary confinement violated his due process rights."); ***Thompson v. Commonwealth of Virginia***, 878 F.3d 89, 110 (4th Cir. 2017) ("We summarily affirm the district court's grant of summary judgment as to all defendants because administrative segregation from the general population does not implicate a protected liberty interest absent a showing of specific facts that conditions of confinement are significantly more onerous. *Incumaa v. Stirling*, 791 F.3d 517, 531 (4th Cir. 2015). Mr. Thompson's affidavits do not present specific facts demonstrating such hardship. To the extent that Mr. Thompson alleges that segregation was retaliatory punishment, that argument is better addressed under either the First or Eighth Amendment."); ***Williams v. Secretary Pennsylvania DOC***, 848 F.3d 549, 560-70 (3d Cir. 2017), *cert. denied sub nom. Walker v. Farnan*, 138 S. Ct 357 (2017), and *cert. denied sub nom. Williams v. Wetzel*, 138 S. Ct. 357 (2017) ("As *Wilkinson* recognized, '[i]n *Sandin*'s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant.'. . Given *Wilkinson*'s guidance, in *Shoats v. Horn* we established the following two-factor inquiry: (1) the duration of the challenged conditions; and (2) whether the conditions overall imposed a significant hardship in relation to the ordinary incidents of prison life. . . Applying that inquiry in *Shoats*, we concluded that 'virtual isolation for almost eight years' in solitary confinement created a protected liberty interest. . . . Plaintiffs' isolation on death row lasted six and eight years. We see no meaningful distinction between those periods of extreme deprivation and the eight years of solitary confinement that we concluded in *Shoats* was 'not only atypical, but

[ ] indeed "unique."'. . Although we do not suggest that it would be considered atypical under *Sandin*, we do note that researchers have found that even *a few days* in solitary confinement can cause cognitive disturbances. . .Here, as in *Wilkinson* and *Shoats*, Plaintiffs' placements on death row were indefinite. . . .Numerous studies on the impact of solitary confinement show that these conditions are extremely hazardous to well-being. Accordingly, it is precisely this type of isolation that led the courts in *Shoats* and *Wilkinson* to conclude that the deprivations of solitary confinement implicate a protected liberty interest. In *Shoats*, we gave great weight to the fact that the inmate was 'confined in his cell for 23 hours a day, five days a week, and 24 hours a day, two days a week .... [and] eats meals by himself.'. .Similarly, in *Wilkinson* the Supreme Court grounded a liberty interest on its finding that '[i]nmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day' and '[a]ll meals are taken alone in the inmate's cell instead of in a common eating area.'. . These conditions of extreme social isolation cannot be meaningfully distinguished from the deprivations suffered by Plaintiffs here. . . . Defendants assert that the appropriate standard in this case is not the general prison population as in *Wilkinson* and *Shoats*. Instead, they claim the metric we should use is the conditions imposed on 'inmates serving similar sentences' or what Plaintiffs' convictions have 'authorized the State to impose.'. .Defendants thus claim the baseline of comparison here is death row itself . . . because Plaintiffs remain eligible for the death penalty. . . Therefore, Defendants argue that Plaintiffs' continued confinement on death row can hardly be atypical. . . . The terms 'ordinary' and 'routine' direct us to use a general metric (the general population), not one specific to a particular inmate. Second, though some courts have used the metric Defendants propose, it is unworkable in this context. . . We cannot resolve Plaintiffs' claims by reference to 'inmates serving similar sentences' because, during the period at issue, Plaintiffs were not serving any sentence whatsoever. Their sentences had been vacated and resentencing had been ordered. . . . These stories confirm what the scores of studies . . . that have examined this phenomenon tell us: Continued solitary confinement, the experience Plaintiffs complain of here, poses a grave threat to well-being. This data compels us to recognize the similarities between the plight of Plaintiffs, and those of Shoats and the inmates in *Wilkinson*. All were indefinitely subject to isolating conditions that researchers agree cause deep and long-term psychic harm. Such harm is the essence of the atypical and significant hardship inquiry required under *Sandin* and *Wilkinson*. . . . For the reasons we have discussed, we now hold that Plaintiffs had a due process liberty interest in avoiding the extreme sensory deprivation and isolation endemic in confinement on death row after their death sentences had been vacated. . . However, as we explain below, we must nevertheless affirm the district courts' grants of summary judgment in favor of Defendants because we conclude that they are entitled to qualified immunity."); ***Aref v. Lynch***, 833 F.3d 242, 253-57 (D.C. Cir. 2016) ("The Third, Sixth, and Tenth Circuits all generally look to administrative confinement as the baseline. [collecting cases] The Fifth Circuit, on the other hand, has held disciplinary segregation can never implicate a liberty interest unless it 'inevitably' lengthens a prisoner's sentence, *see Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997), and that administrative segregation—being an ordinary incident of prison life—is essentially incapable of creating a liberty interest, *see Orellana v. Kyle*, 65 F.3d 29, 31–32 (5th Cir. 1995). . . The Seventh Circuit also has adopted a high standard, holding the baseline is not just the conditions of confinement within that particular prison, but those at the harshest facility in the

state's most restrictive prison. *See Wagner v. Hanks*, 128 F.3d 1173, 1175 (7th Cir. 1997). By contrast, the Fourth Circuit looks to the general population as the baseline. *See Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997). And the Second Circuit requires a fact-specific determination that compares the duration and conditions of segregation with conditions in both administrative confinement and the general population. *See, e.g.*, *Arce v. Walker*, 139 F.3d 329, 336 (2d Cir. 1998); *Brooks v. DiFasi*, 112 F.3d 46, 48–49 (2d Cir. 1997). As a result, the Second Circuit has found confinements as short as 180 and 305 days create a liberty interest under *Sandin*. *See Colon v. Howard*, 215 F.3d 227, 230–31 (2d Cir. 2000) (305 days); *Kalwasinski v. Morse*, 201 F.3d 103, 106 (2d Cir. 1999) (180 days). In sum, divergences in the baseline often lead to divergences in outcome. We are therefore cautious about relying too heavily on out-of-circuit precedent in evaluating appellants' claims, except to note that courts are generally hesitant to find a liberty interest in the confinement context. Our circuit laid out its approach to the comparative baseline in *Hatch*. The *Hatch* court examined *Sandin*'s language and motivations to conclude a liberty interest arises only when the deprivation 'imposes an "atypical and significant" hardship on an inmate in relation to the most restrictive confinement conditions that prison officials ... *routinely* impose on inmates serving similar sentences.'. . Because administrative segregation is most routinely imposed, the court held it constitutes the proper baseline. . . In doing so, though, the court took pains to emphasize this comparison 'does not end our analysis.'. . We must look 'not only to the nature of the deprivation ... but also to its length' in evaluating atypicality and significance. . . Since *Sandin* noted the thirty-day disciplinary segregation at issue 'was within the range of confinement to be normally expected *for one serving an indeterminate term of [thirty] years to life,*'. . . *Hatch* held atypicality also depends 'in part on the length of the sentence the prisoner is serving.'. . Applying this standard, the *Hatch* court remanded to the district court for further fact-finding to determine whether the inmate's segregation for twenty-nine weeks amounted to a liberty interest. . . Specifically, the district court was to compare the conditions faced by the inmate (who was segregated due to a disciplinary infraction) to the usual conditions of administrative segregation. . . And even if the district court concluded those conditions were 'no more restrictive' than administrative segregation, it was still required to determine whether confinement for twenty-nine weeks was 'atypical' compared to the length of administrative segregation routinely imposed on similarly situated prisoners. . . We conclude, then, that the proper methodology for evaluating deprivation claims under *Sandin* is to consider (i) the conditions of confinement relative to administrative segregation, (ii) the duration of that confinement generally, and (iii) the duration relative to length of administrative segregation routinely imposed on prisoners serving similar sentences. We also emphasize that a liberty interest can potentially arise under less-severe conditions when the deprivation is prolonged or indefinite. . . .Although appellants' deprivations are more akin to transfer based on a non-punitive classification than disciplinary segregation, the *Sandin* framework still guides our analysis of whether these particular conditions can be considered 'atypical and significant.'. . Inmates in administrative segregation must remain in their cells for twenty-three hours a day; they are unable to hold jobs or access most educational opportunities. Their possessions are also limited, and they can exercise only one hour a day, five days a week. By contrast, CMU [Controlled Management Unit] inmates are allowed in common spaces with other CMU inmates for sixteen hours a day. They have access to educational and

professional opportunities, can keep as many possessions as inmates in the general population, and have no added restrictions on exercise. Communication deprivations in administrative segregation are also harsher: those inmates can make only one fifteen-minute phone call per month and are limited to four hours of non-contact visits per month. CMU inmates can make two fifteen-minute calls per week and are allowed two four-hour non-contact visits per month. We therefore conclude CMU confinement involves significantly less deprivation than administrative segregation. On the other hand, CMU designation is indefinite—lasting years in appellants' case—and atypical because even though several thousand inmates could be designated to CMUs based on their commitment offenses, only a handful are placed under these restrictions. The main tension, then, is how atypicality, indefiniteness, and the harshness of the depravations should be weighed. We find three factors significant. Although CMU designation seems analogous to a classification, it is exercised selectively; the duration is indefinite and could be permanent; the deprivations—while not extreme—necessarily increase in severity over time. An inmate placed in administrative segregation may be wholly unable to communicate with his family or the outside world, but that restriction will generally only last for a few weeks. Inmates housed in CMUs, by contrast, may spend years denied contact with their loved ones and with diminished ability to communicate with them. . . .What we think pushes CMU designation over the *Sandin* threshold is its selectivity and duration, not its severity, and BOP's recognition that some process—however *de minimis*—is due. Thus, because we find the designation meets *Sandin*'s requirements, we must consider the sufficiency of BOP's response." [remanding for determination of this issue on the record, but suggesting that only minimal process would likely be due]); ***Ballinger v. Cedar Cty., Mo.***, 810 F.3d 557, 562-63 (8th Cir. 2016) ("[W]e assume Ballinger spent approximately one year in administrative segregation. But any error the district court made by failing to consider the greater length of time Ballinger alleges he was kept in solitary confinement does not change the result. ' "We have consistently held that a demotion to [administrative] segregation, even without cause, is not itself an atypical and significant hardship."'. .There is 'no liberty interest in avoiding administrative segregation unless the conditions of ... confinement "present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest."'. . The conditions Ballinger experienced in solitary confinement were not materially different from other cases in which we have declined to find a liberty interest. [collecting cases] As a prisoner, Ballinger has not sufficiently alleged he was deprived of a liberty interest under the Fourteenth Amendment Due Process clause."); ***Incumaa v. Stirling***, 791 F.3d 517, 527 (4th Cir. 2015) ("Although some of our sister circuits read our decision in *Beverati* to imply that the typical conditions in the general prison population provide the comparative baseline, *see, e.g., Wilkerson v. Goodwin,* 774 F.3d 845, 854 (5th Cir.2014), *Prieto* held that the general prison population is not always the basis for comparison—the 'baseline for atypicality' may shift depending on the 'prisoner's conviction and sentence.'. . Nonetheless, for the reasons explained below, we conclude that the general population is the baseline for atypicality for inmates who are sentenced to confinement in the general prison population and have been transferred to security detention while serving their sentence."); ***Kervin v. Barnes***, 787 F.3d 833, 835-37 (7th Cir. 2015) ("The Supreme Court has noted that 'in *Sandin's* wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. This

divergence indicates the difficulty of locating the appropriate baseline.'. . . *Wilkerson v. Goodwin,* 774 F.3d 845, 853 (5th Cir.2014), and *Brown v. Oregon Department of Corrections,* 751 F.3d 983, 988 (9th Cir.2014), sensibly suggest that the severity of treatment should be combined with its duration in assessing the gravity of the conditions complained of by the prisoner. . . But this need not imply that a rigid six-month period of inhuman confinement is a condition precedent to a deprivation of a prisoner's constitutionally protected liberty. *Marion v. Radtke,* 641 F.3d 874, 876 (7th Cir.2011), points out that that 'the right comparison is between the ordinary conditions of a high-security prison in the state, and the conditions under which a prisoner is actually held.' That doesn't say a great deal, however, because the critical question is how far the treatment of the complaining inmate deviates from those ordinary conditions. And what if the inmate is an elderly person convicted of a nonviolent crime such as bank fraud and serving his prison term in a minimum-security prison; wouldn't it be 'atypical' and 'significant' for him to be sent to a high-security prison for a trivial disciplinary infraction? . . . .The judge made two errors in finding that Kervin could not establish a violation of the *Sandin* standard, though they were not consequential. The first was to evaluate separately the gravity of each punishment meted out to him, thereby failing to assess the aggregate punishments inflicted. . . The judge's second error was to suggest, echoing the *Beverati* decision, that a prisoner must spend at least six months in segregation before he can complain about having been deprived of liberty without due process of law. A considerably shorter period of segregation may, depending on the conditions of confinement and on any additional punishments, establish a violation, as held in such cases as *Palmer v. Richards,* 364 F.3d 60, 65–67 (2d Cir.2004) (77 days); *Mitchell v. Horn,* 318 F.3d 523, 527, 532–33 (3d Cir.2003) (90 days); and *Gaines v. Stenseng,* 292 F.3d 1222, 1225–26 (10th Cir.2002) (75 days). Six months is not an apt presumptive minimum for establishing a violation. Judges who lean toward such a presumption may be unfamiliar with the nature of modern prison segregation and the psychological damage that it can inflict. Segregation isn't just separating a prisoner from one or several other prisoners. As noted by the Supreme Court in the *Wilkinson* case, 'almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room.'. . The serious psychological consequences of such quasi-solitary imprisonment have been documented. . . Kervin, however, was placed in segregation for at most 30 days and, more importantly, does not allege that he suffered any significant psychological or other injury from it. So the judge was right to dismiss his suit. But we take this opportunity to remind both prison officials and judges to be alert for the potentially serious adverse consequences of protracted segregation as punishment for misbehavior in prison, especially the kind of nonviolent misbehavior involved in the present case."); ***Fantone v. Latini***, 780 F.3d 184, 189-91 (3d Cir. 2015) ("Fantone's circumstances do not present hardship that is atypical and significant when compared to the ordinary incidents of prison life, so it cannot be said that defendants' actions infringed his liberty interests. . . The conditions in the RHU at SCI–Pittsburgh are quite different from those in the Supermax facility that the Supreme Court described in *Wilkinson.* As a baseline point of contrast, the RHU offers the inmates confined in it, whether on administrative or disciplinary confinement, markedly more human interaction and bodily movement than is allowed in Ohio's Supermax facility. *Wilkinson* describes how the Supermax facility's prisoners are kept

in a single small cell for 23 hours each day and are permitted to leave only for one hour's exercise. . .Fantone faced far less restrictive constraints in the RHU. Moreover, placement in the Supermax facility is indefinite, and, after an initial 30–day review, the placement is reviewed just annually. Fantone, in contrast, was in the RHU, at least while on disciplinary confinement, for a set term of days, and his confinement in the RHU was subject to regular reviews. . . Finally, unlike the Supermax inmates, Fantone was not disqualified for parole consideration. This last consideration is significant: despite the language with which Fantone describes the rescission of his parole, he did not become ineligible for parole simply because of his placement in the RHU. To the contrary, when the Parole Board rescinded Fantone's parole, it repeated the procedural process that it had followed when it granted him parole as both times it reached its decision by exercising its discretion. Where state law provides parole authorities complete discretion to rescind a grant of parole prior to release, an inmate does not have a constitutionally protected liberty interest in being paroled. . . . Ultimately, we conclude that Fantone's due process argument is unvailing. The combination of his retention in the RHU and the rescission of his parole did not infringe his liberty interests. . . .Fantone did not have a liberty interest that defendants could have infringed because the misconduct determinations, his time in the RHU, and the rescission of his parole did not, either alone or in combination, create atypical and significant hardship in relation to the ordinary incidents of prison life. Accordingly, we will affirm the District Court's order dismissing Fantone's due process claim."); ***Wilkerson v. Goodwin***, 774 F.3d 845, 855-57 (5th Cir. 2014) ("Here, considering the duration of the solitary confinement [39 years], the severity of the restrictions, and their effectively indefinite nature, it is clear that Woodfox's continued detention in CCR constitutes an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life' according to any possible baseline we could consider. . . .[W]e consider the 23–hour–a–day in cell isolation, limited physical exercise, and limited human contact, together with the extraordinary length of time that Woodfox has been held in such conditions. Viewed collectively, there can be no doubt that these conditions are sufficiently severe to give rise to a liberty interest under *Sandin.* . . .Whether we compare Woodfox's nearly thirty-nine years in 23–hour–a–day isolation to other inmates in the general population, other inmates in segregated confinement within the Louisiana system as a whole, or other inmates serving life sentences, these conditions constitute an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'. . Whatever the 'ordinary incidents of prison life' may encompass, they can only be truly 'ordinary' when experienced by some measurable proportion of a baseline prison population. . . .Given the extraordinarily lengthy detention and the isolating, restrictive conditions that we consider here, there is no basis for concluding that prison officials may avoid the established constitutional rights of prisoners by transferring them to a new facility and wiping the slate clean, while continuing all of the conditions that the prisoner has challenged."); ***Brown v. Oregon Dept. of Corrections***, 751 F.3d 983, 988 (9th Cir. 2014) ("[U]nder any plausible baseline, Brown's twenty-seven month confinement in the IMU without meaningful review 'impose[d] atypical and significant hardship on [him] in relation to the ordinary incidents of prison life.'. . As an initial matter, we recognize that the baseline for determining 'atypical and significant hardship' is not entirely clear. We have noted that '[t]he *Sandin* Court seems to suggest that a major difference between the conditions for the general prison population and the segregated population

triggers a right to a hearing,' *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir.1996), but have not clearly held that conditions in the general population, as opposed to those in other forms of administrative segregation or protective custody, form the appropriate baseline comparator. . . The Supreme Court acknowledged this uncertainty in *Wilkinson v. Austin*, noting that '[i]n *Sandin's* wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system.'. . It chose not to resolve the issue, however, concluding, '[W]e are satisfied that [the challenged conditions] impose[ ] an atypical and significant hardship under any plausible baseline.'. .Similarly, we need not locate the appropriate baseline here because Brown's twenty-seven month confinement in the IMU imposed an atypical and significant hardship under any plausible baseline. Confinement in the IMU subjected Brown to solitary confinement for over twenty-three hours each day with almost no interpersonal contact, and denied him most privileges afforded inmates in the general population. While these conditions alone might apply to most solitary-confinement facilities, here there is a crucial factor distinguishing confinement in the IMU: the duration of Brown's confinement. . . Brown was given a fixed and irreducible period of confinement in the IMU for twenty-seven months, in contrast to the limited period of confinement with periodic review afforded inmates in ODOC's other segregated-housing units. Retention in the ASU is limited to no more than thirty days without a hearing or status review. Retention in the DSU—where conditions of confinement generally are similar to conditions in the IMU—is limited by thirty-day assessment reviews, with the maximum period of confinement limited to six months. Brown's conditions of confinement in the IMU thus implicate a protected liberty interest under any plausible baseline."); ***Hardaway v. Meyerhoff***, 734 F.3d 740, 744 (7th Cir. 2013) ("Since Hardaway's confinement was six months and one day in total, the duration of segregation alone is insufficient to rise to the level of a Fourteenth Amendment violation. Therefore, the court must address the conditions of Hardaway's confinement to determine if they were so extreme as to implicate due process considerations. Hardaway argues that the conditions contained in the record that amount to 'atypical and significant hardship' are his placement with a confrontational cell mate, the psychological issues he experienced in connection to his aversion to closed solid metal doors, and his weekly access to the shower and prison yard. . . . None of the circumstances of Hardaway's confinement come close to the harsh conditions described in *Wilkinson*. Hardaway was not deprived of all human contact and was permitted to use the shower and prison yard once every week. While these conditions are more severe than those found in the general prison population, they are hardly analogous to a confinement that deprives a prisoner of all human contact or sensory stimuli. Even reviewing all facts in a light most favorable to him, Hardaway failed to demonstrate a deprivation of rights that could be considered 'atypical and significant hardship.'"); ***Earl v. Racine County Jail***, 718 F.3d 689, 691, 692 (7th Cir. 2013) ("Regardless of why Earl was placed on suicide watch, the district court correctly determined that no liberty interest was implicated by his placement there. When an inmate is placed in conditions more restrictive than those in the general prison population, whether through protective segregation like suicide watch or discretionary administrative segregation, his liberty is affected only if the more restrictive conditions are particularly harsh compared to ordinary prison life or if he remains subject to those conditions for a significantly long time. . . The conditions Earl faced on suicide watch were more

restrictive than ordinary prison life, but—as the district court found—they were not 'unusually harsh.'. . For example, the only changes to meals were the trays upon which food was served (Styrofoam rather than plastic) and the quick removal of the eating utensil after each meal; inmates were not denied bedding but were given a mattress (or two if available) and a 'suicide-proof' blanket; inmates were denied writing materials for only the first 48 hours as a precautionary measure; and rather than prohibiting human contact, deputies were assigned to closely and personally monitor the inmates to ensure their safety. Courts have deemed an inmate's liberty interest implicated only where the conditions are far more restrictive. . . In addition to the conditions of Earl's suicide watch being insignificantly harsh, they also were brief: he was placed on suicide watch for only five days, which generally is too short a time to trigger due-process protection. . .Insofar as Earl challenges his placement in administrative segregation, his argument falls short for the same reasons: his time in segregation was too short to affect his liberty, and he did not point to any conditions of administrative segregation that were any worse than general prison conditions."); ***Rezaq v. Nalley***, 677 F.3d 1001, 1010-17 (10th Cir. 2012) ("A protected liberty interest only arises from a transfer to harsher conditions of confinement when an inmate faces an '"atypical and significant hardship ... in relation to the ordinary incidents of prison life."'. . Courts have struggled to identify the appropriate baseline for assessing what constitutes an 'atypical and significant hardship' on inmates. . . . Our sister circuits are certainly not in agreement regarding the correct approach. While some circuits compare the conditions of confinement at issue to those in the general prison population, . . . others compare them to the conditions typically found in administrative segregation, . . . or 'the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences[.]'. . . *Wilkinson* recognized the divergent views on this issue among the circuit courts, but the Court declined to resolve the baseline question because the conditions at issue in that case 'impose[d] an atypical and significant hardship under any plausible baseline.'. . Most recently, in *DiMarco,* we similarly declined to make 'a rigid either/or assessment' of proper comparator evidence, opting instead to outline four potentially relevant, nondispositive factors. . . We noted that [r]elevant factors might include whether (1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement, as it did in *Wilkinson*; and (4) the placement is indeterminate (in *Wilkinson* the placement was reviewed only annually). . . While courts in this circuit have used these factors to guide the liberty interest analysis, . . . we have never suggested that the factors serve as a constitutional touchstone. . . Rather, we continue to believe that the proper approach is a fact-driven assessment that accounts for the totality of conditions presented by a given inmate's sentence and confinement . . . . [W]e read *Wilkinson* to say that extreme conditions in administrative segregation do not, on their own, constitute an 'atypical and significant hardship' when compared to 'the ordinary incidents of prison life.'. . . Plaintiffs argue that it is improper for the court to consider penological interests in determining whether a liberty interest exists. They contend that any inquiry into the necessity of restrictive confinement should be made at a due process hearing, not in determining at the outset whether a liberty interest exists. . . We disagree. Legitimate penological interests are a relevant consideration under settled Tenth Circuit precedent.

. .. The government opened ADX to house inmates who, like plaintiffs, pose unusual security and safety concerns. These concerns stem from a uniquely federal penological interest in addressing national security risks by segregating inmates with ties to terrorist organizations. The BOP established that continued placement of these inmates in general population units could compromise prison safety or, given the unique criminal backgrounds of these plaintiffs, national security. We conclude that segregated confinement relates to and furthers the penological interests asserted in this case. . . . The conditions at ADX, like those at the Ohio supermax prison in *Wilkinson*, do not, in and of themselves, give rise to a liberty interest because they are substantially similar to conditions experienced in any solitary confinement setting. . . The conditions at ADX are comparable to those routinely imposed in the administrative segregation setting. We conclude that the conditions in the general population unit at ADX are not extreme as a matter of law. . . . While duration is certainly an important consideration, *Wilkinson* emphasized that duration is properly considered in tandem with indeterminacy. . . .Here, the periodic review process at ADX included opportunities for plaintiffs to participate. While plaintiffs were housed at ADX for many years, they were given regular reevaluations of their placement in the form of twice-yearly program reviews. . . . The availability of periodic reviews merely suggests that the confinement was not indefinite. . . This factor weighs against finding a liberty interest. . . .The totality of these factors indicate that the inmates did not have a liberty interest in avoiding confinement at ADX. Because no liberty interest is implicated, we do not reach the question of whether the inmates received adequate process to justify their transfers to ADX.")

See also ***Gillis v. Litscher***, 468 F.3d 488, 492-95 (7th Cir. 2006), where the Court of Appeals does a post-*Wilkinson* analysis as follows:

> After *Wagner* was decided, the Supreme Court determined in *Wilkinson* . . . that there can, in fact, be a liberty interest − short of an Eighth Amendment violation − triggering procedural requirements. . . . . *Wilkinson* turns, however, not on denial of basic life necessities so much as on the extension of incarceration. The determining factors were that placement at the prison is of indefinite duration and it disqualifies an otherwise eligible inmate from consideration for parole. *Wilkinson* does not answer the question as to when the denial of life's necessities alone could give rise to a liberty interest but still fall short of violating the Eighth Amendment. There is, as we said in *Wagner*, a 'small space' between the two. In our case, we must determine whether we are standing in that small space or on either side of it. . . . Gillis's case is one in which the plaintiff is entitled to have the trier of fact determine whether the conditions of his administrative confinement, principally with regard to the cell temperature and the provision of hygiene items, violated the minimal standards required by the Eighth Amendment. . . . Gillis may well be able to convince a jury that the program imposes an atypical and significant hardship even measured against the ordinary incidents of life at Supermax, thus establishing a liberty interest. Also, defendants have not shown that they are entitled to qualified immunity. They cannot show that in 2002, when these events occurred, it was not

> well-established that denial of shelter, heat, and hygiene items implicated an inmate's constitutional rights.

See also ***Incumaa v. Stirling***, 791 F.3d 517, 535 (4th Cir. 2015) ("Appellee . . . argues that its review process 'meets the flexible due process standard' approved in *Wilkinson* because, compared to inmates confined in Ohio's Supermax facility, 'Appellant's custody is reviewed much more frequently'—that is, every 30 days as opposed to once a year. . . However, in view of Appellant's uncontested evidence demonstrating the inadequacy of the Department's confinement review, this argument falls flat. . . .We do not decide whether prison review mechanisms must be as extensive as in *Wilkinson* in order to pass constitutional muster. On the facts presented in this case, however, we conclude that the record establishes a triable question of whether the Department's review process was adequate to protect Appellant's right to procedural due process."); ***Townsend v. Cooper***, 759 F.3d 678, 686-88 (7th Cir. 2014) (noting "similarity between the conditions imposed in *Gillis* under the BMP and Townsend's BAP," court concludes that "both the duration of the BAP and the conditions imposed implicate liberty interests that require procedural protections. At a minimum, those protections should have included notice and an opportunity to object in some fashion."); ***Marion v. Radtke***, 641 F.3d 874, 876, 877 (7th Cir. 2011) ("*Wilkinson* shows that a comparison to a 'supermax' prison (the comparison defendants propose) is not appropriate. Comparison with the sort of secure institution that a judge would have considered when sentencing a prisoner is more apt. Anticipated prison conditions affect the length of sentences: The more onerous a prison system's norm, the shorter a sentence can be and still achieve a desired amount of deterrence and punishment. The due process clause requires hearings when a prisoner loses more liberty than what was taken away by the conviction and original sentence. That's why the right comparison is between the ordinary conditions of a high-security prison in the state, and the conditions under which a prisoner is actually held. . . . Once the custodian contends that the difference between one cell and another does not affect liberty, the prisoner must reply with evidence. When answering Marion's complaint, defendants denied that conditions in DS-1 confinement deprived him of liberty or property. Marion had to come up with evidence to demonstrate otherwise. His status as an inmate does not change that burden. He could have used discovery to gather information bearing on the 'liberty' question but did not try the procedures of Fed.R.Civ.P. 26. When a plaintiff fails to produce evidence, the defendant is entitled to judgment; a defendant moving for summary judgment need not produce evidence of its own. . . Marion failed to meet his burden of production. The answer to the question 'does 240 days of DS-1 confinement at Columbia Correctional Center deprive a prisoner of a liberty interest?' must await another day."); ***Pressley v. Blaine***, No. 08-1517, 2009 WL 3842753, at *4 (3d Cir. Nov. 18, 2009) (not published) ("In this case, the District Court held that Pressley failed to establish that his sentence of 1080 days in disciplinary custody constituted an 'atypical and significant hardship' sufficient to trigger a liberty interest under *Sandin.* In reaching this conclusion, the Court relied on our non-precedential opinion in which we held that a prisoner who was sentenced to 930 days in disciplinary confinement failed to state facts, or submit evidence, showing that he was subject to conditions that met the *Sandin* requirement. The District Court compared the length of Pressley's sentence to the 930-day sentence in that case, and reasoned that '[i]f 930 days does not [constitute]

an atypical and significant hardship, a mere five months more does not either.'. . This analysis does not comport with the fact-specific inquiry required by *Sandin.* As set forth above, to determine whether Pressley endured an atypical and significant hardship, the District Court was required to examine the duration of his disciplinary confinement, and the actual conditions of that confinement, in relation to the hardships endured by other prisoners. . . Instead, the District Court compared the duration of Pressley's sentence to that of another prisoner and presumed that the conditions Pressley faced in disciplinary custody were identical to that inmate's. This analysis did not meet the *Sandin* standard and we will remand the matter to the District Court to conduct a further inquiry."); ***Marion v. Columbia Correction Inst***., 559 F.3d 693, 697-99 (7th Cir. 2009) ("Although the defendants contend that a prisoner's due process protections are triggered only by indefinite segregation and parole disqualification, we have declined to read *Wilkinson's* holding as being limited to its specific facts. . . The Supreme Court's decisions are helpful in setting out the durational parameters of a prison-segregation due process analysis. There nevertheless remains a significant area in which the presence of a cognizable liberty interest is not self-evident from a reading of these cases. In these situations, we must make the necessary determination by analyzing the combined import of the duration of the segregative confinement *and* the conditions endured by the prisoner during that period. . . . Mr. Marion's term of 240 days' segregation is significantly longer than terms of segregation imposed in cases where we have affirmed dismissal without requiring a factual inquiry into the conditions of confinement. . . . Following *Whitford* and later cases, it is clear that a term of segregation as lengthy as Mr. Marion's requires scrutiny of the actual conditions of segregation. . . . As *Wilkinson* and the decisions from our sister circuits also emphasize, we must take into consideration all of the circumstances of a prisoner's confinement in order to ascertain whether a liberty interest is implicated. Without a factual record, we cannot determine whether the actual conditions of Mr. Marion's lengthy segregation are harsher than the conditions found in the most restrictive prison in Wisconsin. We therefore must reverse the dismissal of Mr. Marion's due process claim and remand this case to the district court for further proceedings."); ***Harden-Bey v. Rutter***, 524 F.3d 789, 792, 793 (6th Cir. 2008) ("The question here is whether Harden-Bey's allegedly indefinite confinement in administrative segregation, three years and running as of the time of the complaint, amounts to an 'atypical and significant hardship on [him] in relation to the ordinary incidents of prison life.'. . Relying on Sixth Circuit precedent, the district court held that placement in administrative segregation is never 'atypical and significant' and that the 'length of the placement' does not affect the inquiry. . .In deciding whether changes to an inmate's conditions of confinement implicate a cognizable liberty interest, both *Sandin* and *Austin* considered the nature of the more-restrictive confinement *and* its duration in relation to prison norms and to the terms of the individual's sentence. . . . Consistent with these decisions, most (if not all) of our sister circuits have considered the nature of the more-restrictive confinement *and* its duration in determining whether it imposes an 'atypical and significant hardship.' . . . On remand, the court should consider whether the nature of this placement in administrative segregation together with its duration creates a cognizable liberty interest and, if so, whether the State has given Harden-Bey the protection to which he is due.").

Compare ***Al-Amin v. Donald***, 165 F. App'x 733, 2006 WL 197191, at*5,*6 (11th Cir. Jan. 27, 2006)(confinement in GSP's administrative segregation for a period of approximately three years, in single cell, with five hours of exercise per week rather than the seven hours available to general population inmates "does not constitute an 'atypical and significant hardship ... in relation to the ordinary incidents of prison life.'") *with* ***Fogle v. Pierson***, 435 F.3d 1252, 1259 (10th Cir.2006) ("The district court abused its discretion in concluding that there was no *arguable* basis that a three-year period of administrative segregation − during which time Fogle was confined to his cell for all but five hours each week and denied access to any outdoor recreation − is not 'atypical.'").

See also ***Edwards v. Arocho***, No. 22-585-PR, 2024 WL 5244996, at *9–10 (2d Cir. Dec. 30, 2024) (" 'In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, ... the proper inquiry is whether those conditions amount to punishment of the detainee.'. . This is because 'under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.'. . . Edwards has adequately alleged that the conditions of his confinement amount to punishment within the meaning of the Clause. . .Edwards has also adequately alleged the other due process requirements — a lack of notice, an opportunity to be heard, and meaningful periodic review of Edwards's status relating to his continued placement in 3-East. . . . We also conclude that the complaint, when read liberally, adequately alleges the absence of any meaningful periodic review of his continued detention in 3-East. Although the correctional facility may use an 'informal' procedure to conduct such reviews for a pretrial detainee, the reviews must still 'consider new relevant evidence as it becomes available.'. . It is 'not sufficient for officials to go through the motions of nominally conducting a review meeting when they have developed a pre-review conclusion that the inmate will be confined ... no matter what the evidence shows. Review with a pre-ordained outcome is tantamount to no review at all.'. . Here, Edwards alleges that Middleton ignored the video recordings and decided to keep Edwards in 3-East no matter what the recordings or other evidence showed. . . . A fair reading of these allegations, then, is that Middleton 'developed a pre-review conclusion that [Edwards] will be confined' in 3-East for the duration of his detention. . . Measured against the standards of due process, Edwards has plausibly alleged that he failed to receive all the process that was due at ' "a meaningful time and in a meaningful manner."'. . For these reasons, we vacate the District Court's judgment insofar as it dismissed Edwards's procedural due process claim, and we remand for further proceedings as to that claim."); ***Baltas v. Maiga***, 119 F.4th 255, 264-66 (2d Cir. 2024) ("[I]t is true that CTDOC Administrative Directive 9.4. . . required the Defendants to conduct reviews of Baltas's Connecticut Ad Seg classification every thirty days and that there is neither evidence nor even a claim that they complied with the thirty-day review requirement. But a violation of state regulations is not 'enough generally to establish a constitutional claim.'. . The question before us is whether, despite the regulatory violation, CTDOC's reviews nevertheless comported with due process. . . The Defendants adduced evidence that CTDOC conducted four regular classification reviews of Baltas's status while he was in Virginia. As Jaclyn Osden, a Defendant who oversees the Interstate Corrections Compact Unit, explained, CTDOC conducted

'regular classification reviews' in January 2020, July 2020, January 2021, and July 2021, and 'reviewed any new information regarding Mr. Baltas to determine if any of his scores should be adjusted.'. . Osden added that the classification scores include an assessment of 'risk scores (escape history, severity or violence of current offense, history of violence, length of confinement, presence of pending charges and/or detainers, discipline history, security risk group membership, and overall risk score).'. . We conclude that CTDOC's classification reviews, as described by Osden, satisfy the minimal requirements of due process under the circumstances of this case, where the inmate is incarcerated out of state and where there is no evidence that the inmate's Ad Seg status in the sending state affects his confinement in the receiving state. . . . '[M]indful of the context in which this case arises and the deference we owe prison officials in carrying out their daily tasks,'. . . we conclude that, on this record, Baltas received the process due him as an ICC inmate challenging the sufficiency of reviews of his administrative segregation classification in Connecticut, the sending state. In finding these reviews constitutionally adequate, we again emphasize that Baltas's claim differs from the typical administrative segregation case as illustrated in *Proctor*, in that Baltas was not confined in a Connecticut prison during the time that he alleges that CTDOC failed to review his Connecticut Ad Seg classification. Further, the record demonstrates that Baltas's continued Ad Seg status in Connecticut had little impact on Baltas's restrictive housing in Virginia, given that the ICC and the Implementing Contract assign VADOC the responsibility to confine, discipline, and supervise transferred inmates. . . We thus agree with the District Court that reviews of Baltas's Connecticut Ad Seg status 'did not implicate *Proctor*'s due process concerns' to the same degree as was the case in *Proctor* itself. . . Our analysis does not address whether we would come to the same conclusion had Baltas been confined in Ad Seg at a CTDOC facility at the time of the relevant reviews. We accordingly affirm the District Court's grant of summary judgment for the Defendants on Baltas's due process claim."); ***Isby v. Brown***, 856 F.3d 508, 525-29 (7th Cir. 2017) ("As the district court here rightly explained, we and other circuits have interpreted *Hewitt* as entitling inmates to an 'informal and nonadversary' periodic review (the frequency of which is committed to the discretion of the prison officials) that keeps administrative segregation from becoming a pretext for indefinite confinement. . . . Isby takes issue with the perfunctory nature of his thirty-day reviews, emphasizing that, despite the amount of time that has passed since the 1990 incident, . . . the duration of his confinement in the SCU, and his long stretches without disciplinary charges, he receives the same two-line decision at every review. To evaluate Wabash Valley's procedures in light of *Hewitt*, we consider the three *Mathews v. Eldridge* factors. . . . With respect to the first factor, Isby's private interest is considerably lessened because of his status as an inmate. . . However, whereas the inmate in *Hewitt* spent less than two months in segregation awaiting a hearing, Isby has spent over ten years there, and counting. The extended, indefinite length of his placement in the SCU tips the scale in his favor on this prong of the analysis. . . .Next, we consider the government's interests, which are substantial. Maintaining institutional security and safety are crucial considerations in the management of a prison, and, to the extent that an inmate continues to pose a threat to himself or others, ongoing segregation may well be justified. . . .With no potential end date on Isby's segregation, we confront the third of the *Mathews* factors and note that the boilerplate output of each review seems all the more concerning. Defendants-appellees claim that '[t]here is no mystery as to why Isby remains in the SCU,' and

the undisputed-facts portion of the district court's summary judgment order states that Isby has been kept in segregation because of his extensive conduct-report history, past behavior, violent tendencies, inability to cooperate with Wabash Valley staff, and other factors. However, the first two items in this list are limited to occurrences in the past, and it is unclear whether the other three items occurred in the distant or recent past as opposed to currently affecting Isby's readiness to return to the general prison population. Meanwhile, Lieutenant Nicholson highlighted the 1990 incident as the main reason for Isby's continued placement in segregation. If it is in fact the case, as defendants-appellees suggest, that Isby is still being held in administrative segregation because of his *ongoing* refusal to cooperate with staff and to participate in any of the self-help programs, then it seems easy enough to include that explanation in the output of his thirty-day reviews. . .Even one or two edits or additions along these lines could assuage our concerns and provide helpful notice to Isby as to the reasons for his placement and how he could get out. While defendants-appellees claim that Isby is 'well aware that he has an avenue for release' through the self-help programs, it is uncertain that participation in the IDOC programs would necessarily result in transfer or release from the SCU, and the parties dispute the extent to which such information was communicated to Isby. . . Defendants-appellees emphasize that the law does not require that an inmate receive a statement of reasons for their retention in administrative segregation. . . While such a statement of reasons may not be constitutionally required, however, under *Hewitt*, the periodic review must still be meaningful and non-pretextual. . . . On the record at summary judgment, there is a genuine dispute of fact as to whether the thirty-day reviews take into account any updated circumstances in evaluating the need for continued confinement, given the length of Isby's segregation, his long stretches of time without any disciplinary issues, and the rote repetition of the same two boilerplate sentences following each review. And while submission of new evidence or a full hearing may not be *necessary* to meet the requirements of due process under *Hewitt*, an actual review—*i.e.*, one open to the possibility of a different outcome—certainly is. . . . Several other circuits have also criticized review procedures like those we have here. [collecting cases] Given the long stretches of time during which Isby had no serious disciplinary problems, as well as the conflicting evidence as to the reasons for his ongoing segregation, Isby has raised triable issues of material fact regarding whether his reviews were meaningful or pretextual. . . Here, the repeated issuance of the same uninformative language (without any updates or explanation of why continued placement is necessary) coupled with the length of Isby's confinement, could cause a reasonable trier of fact to conclude that Isby has been deprived of his liberty interest without due process. Moreover, our concerns with the thirty-day review process bring us to the ninety-day reviews, and the parties and the district court agree there is a disputed issue of material fact in Isby's case with respect to these more formal reviews. Further testimony and evidence at trial could clarify the reasons for Isby's ongoing segregation and convince a trier of fact that his reviews were not pretextual. However, his due process claim ought to have survived summary judgment."); ***Proctor v. LeClaire,*** 846 F.3d 597, 608-14 (2d Cir. 2017) ("Proctor raises a view of inmate procedural due process this Court has yet to address. While he acknowledges that Defendants have nominally afforded him sufficient process by conducting regular section 301.4(d) reviews, Proctor argues that those reviews have been in substance 'hollow,' 'perfunctory,' and meaningless. . . A meaningless section 301.4(d) review, Proctor asserts, is the functional equivalent of no review at

all and therefore constitutionally insufficient. Proctor also argues that Defendants have violated the Due Process Clause by using Ad Seg as a means to punish him improperly and as a pretext to confine him in the SHU indefinitely. . . . Proctor's claim seeks to measure what *Hewitt* requires for meaningful periodic review of Ad Seg. Guiding that analysis are the three *Mathews* factors—the government's interest in limited fiscal and administrative burdens, the private interest in freedom from restraint, and 'the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.'. . The state's interest in flexible Ad Seg review procedures—maintaining institutional security—is substantial. Institutional safety and security are perhaps a prison facility's most important considerations. . . Courts must preserve prison officials' 'free[dom] to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape.'. . . However, the private interest implicated by an extended and indefinite stay in Ad Seg is also weighty. *Hewitt* instructs that an inmate in Ad Seg who 'was merely transferred from one extremely restricted environment to an even more confined situation' generally does not have a private interest 'of great consequence.'. . But Helms, the inmate in *Hewitt*, spent less than two months in Ad Seg awaiting his disciplinary hearing. . . Proctor, by contrast, has spent thirteen years in Ad Seg with no release date in sight. Proctor's interest in avoiding an indefinite Ad Seg term is surely substantial, more so than Helms's interest in avoiding a temporary Ad Seg term awaiting a hearing. . . . In light of those counterbalancing interests, we believe that meaningful periodic reviews of Ad Seg must at least satisfy the following criteria:

First, the reviewing prison officials must actually evaluate whether the inmate's continued Ad Seg confinement is justified. . . It is not sufficient for officials to go through the motions of nominally conducting a review meeting when they have developed a pre-review conclusion that the inmate will be confined in Ad Seg no matter what the evidence shows. Review with a pre-ordained outcome is tantamount to no review at all.

Second, the reviewing officials must evaluate whether the justification for Ad Seg exists at the time of the review or will exist in the future, and consider new relevant evidence as it becomes available. It is inherent in *Hewitt*'s use of the term 'periodic' that ongoing Ad Seg reviews may not be frozen in time, forever rehashing information addressed at the inmate's initial Ad Seg determination. . . Rather, reviews must take into account prison conditions and inmate behavior as they change over time; those changes may modify the calculus of whether the inmate presents a current threat to the safety of the facility. The periodic Ad Seg review test announced by the *Hewitt* Court is not whether the confined inmate *was* a threat to the facility when he was confined initially; it is whether the inmate '*remains* a security risk' on the date of the periodic review. . . This is not to say that prison officials are barred from according significant weight to events that occurred in the past. Neither do we suggest that recent events categorically ought to be more salient in periodic reviews than those that occurred long ago. We conclude merely that prison officials must look to the inmate's present and future behavior and consider new events to some degree to ensure that prison officials do not use past events alone to justify indefinite confinement. . . Third and finally, the reviewing officials must maintain institutional safety and security (or another valid

administrative justification) as their guiding principles throughout an inmate's Ad Seg term. SHU confinement that began for proper Ad Seg purposes may not morph into confinement that persists for improper purposes. The state is entitled to the procedural flexibility that *Hewitt* allows because of its manifest interest in maintaining safe detention facilities and other similar administrative concerns; 'the *Mathews* balancing test tips in favor of the inmate's liberty interest' when a state seeks to impose discipline. . . The state may not use Ad Seg as a charade in the name of prison security to mask indefinite punishment for past transgressions. Our resolution of this matter is in accord with the efforts of four of our sister circuits. [discussing cases] In sum, periodic reviews of Ad Seg satisfy procedural due process only when they are meaningful. Reviews are meaningful only when they involve real evaluations of the administrative justification for confinement, they consider all of the relevant evidence that bears on whether that administrative justification remains valid, and they ensure that Ad Seg is used as neither a form of punishment nor a pretext for indefinite confinement. Proctor has produced sufficient evidence to raise factual questions about whether his section 301.4(d) reviews have met that standard."); ***Reynoso v. Selsky***, 292 F. App'x 120, 123 (2d Cir. 2008) ("Aggregative sentences within this range − between 101 and 305 days − as here, require a district court to articulate specific findings of the conditions of the imposed confinement relative to ordinary prison conditions before determining whether such confinement is atypical. . . Accordingly, the district court was required to consider whether the sentences should have been aggregated for this due process inquiry, and if so, to articulate findings as to why the 150-day total sentence was not 'atypical and significant.' Such a determination is anything but simple, and cannot be resolved summarily."); ***Grinter v. Knight***, 532 F.3d 567, 574 (6th Cir. 2008) (no liberty interest in either freedom from four-point restraints for four hours or in applying the restraints only in the presence of a nurse because the restraints were not an "atypical and significant hardship" in prison life); ***DiMarco v. Wyoming Dep't of Corrections***, 473 F.3d 1334, 1340-42, 1344 (10th Cir. 2007) ("We have yet to apply *Wilkinson* to an inmate's placement in administrative segregation in a published opinion. . . . The question that must be answered in this appeal, then, is two-fold. First, what is the appropriate baseline comparison? Second, how significant must the conditions of confinement deviate from the baseline to create a liberty interest in additional procedural protections? Here the baseline comparison question lends itself to several possible solutions. One option is to compare administrative segregation with conditions in the general population. A second option is to compare it with other, typical protective custodies. And a third option is, to compare it with that experienced by other uniquely placed or difficult to place prisoners − i.e., ill inmates, elderly inmates, or inmates with disabilities or under supervision because of mental illness or dependency. In our view, the answer lies somewhere between these choices. It is simplistic to understand the *Sandin* formulation as suggesting a rigid either/or assessment. Rather, it makes sense to look at a few key factors, none dispositive, as the Supreme Court did in *Wilkinson*. . . . Relevant factors might include whether (1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement, as it did in *Wilkinson*; and (4) the placement is indeterminate (in *Wilkinson* the placement was reviewed only annually). . . . Taken together, these factors do not weigh in favor of finding that DiMarco has an enforceable liberty interest. While we are sympathetic with her complaints about the petty

deprivations resulting from her confinement, and are confident prison officials could have done better, we cannot conclude that the prison imposed such an atypical and significant hardship on her as to offend the Due Process Clause of the Constitution."); ***Trujillo v. Williams***, 465 F.3d 1210, 1225 (10th Cir. 2006) ("Thus, we have held that a district court errs in *sua sponte* dismissing a prisoner's due process claim under § 1915 if it does not have sufficient evidence before it to 'fully address both the duration and degree of the plaintiff's restrictions as compared with other inmates.'. . . Here, the district court determined that Mr. Trujillo failed to state a due process claim despite the lack of any evidence addressing whether Mr. Trujillo's confinement was atypical and significant when compared to conditions imposed on other prisoners. Mr. Trujillo's complaint specifically alleges that he spent over 750 days in segregation and that other inmates remain in segregation for the most serious offenses for only 180 days. Where, as here, the prisoner is subjected to a lengthy period of segregation, the duration of that confinement may itself be atypical and significant. . . . We therefore reverse the dismissal of Mr. Trujillo's due process claim against the New Mexico defendants and remand to allow the district court to conduct the required evidentiary analysis."); ***Jordan v. Federal Bureau of Prisons***, No. 04-1104, 2006 WL 2135513, at **9-11 (10th Cir. July 25, 2006)(on rehearing) (not published) ("When considering whether the conditions, duration or restrictions of confinement are atypical as compared with other inmates, this court has inconsistently used comparisons either with inmates in the same segregation or those in the general prison population. . . The Supreme Court has recognized, without deciding the issue, that the circuit courts are split on which baseline comparison to use. While instructive, *Wilkinson* is not dispositive here, as the conditions of Mr. Jordan's administrative detention were obviously not as onerous, given 1) he admittedly had frequent contact with staff; 2) the length of his sentence was not affected by the administrative detention; and 3) his confinement was not indefinite but instead limited to the duration of the pending murder investigation. . . . Based on the circumstances presented, we perceive no constitutional violation occurred with respect to the conditions or restrictions of Mr. Jordan's administrative confinement, and he has otherwise failed to meet his burden of establishing the officials violated a constitutional or statutory right for the purpose of overcoming their defense of qualified immunity. We next turn to the more egregious claim relating to the lengthy five-year or 1,825-day duration of Mr. Jordan's administrative detention to determine if it posed an atypical or significant hardship in relation to the ordinary incidents of prison life. Mr. Jordan claims the duration of his confinement alone created a liberty interest as a matter of law, while the prison officials argue it did not rise to an atypical hardship based on the pending murder investigation and continuing security risk he posed to other inmates and staff before and during that investigation. Clearly, we do not condone a murder investigation which takes almost five years, during which time an inmate is subjected to conditions which are atypical or pose a significant hardship. However, in this case, we have already determined the conditions or restrictions Mr. Jordan encountered did not pose the requisite *Sandin* atypical or significant hardship. Even if we considered the five-year duration of the confinement alone, this court has held certain prison actions which might impinge on an inmate's constitutional rights may be valid if they are reasonably related to legitimate penological interests. . . . . In this case, Mr. Jordan's administrative detention was a result of a justified, ongoing criminal investigation of which prison officials were aware. . . . Thus, while his administrative detention was longer than other instances

this court has considered and arguably atypical in duration, the fact it was commensurate with ongoing security concerns and a pending investigation, during which time Mr. Jordan did not experience atypical conditions or restrictions, provides sufficient extenuating circumstances to convince us no liberty interest was implicated."); ***Hill v. Fleming***, No. 05-2005, 2006 WL 856201, at *4 (10th Cir. Apr. 4, 2006) (not published) ("When considering whether the conditions, duration or restrictions are atypical as compared with other inmates, we have considered as a baseline whether the segregation at issue mirrors that imposed on other inmates in the same segregation, while at other times we have made comparisons with the general prison population. Other circuits grappling with the same baseline issue have had mixed results, either relying squarely on comparisons with other inmates in the same administrative segregation or those in the general population. In this case, despite the parties' opposing contentions on which baseline applies, the result is the same, no matter which baseline is used. We reach this conclusion because regardless of which baseline we previously applied in making comparisons − either segregated or general prison populations − this circuit has never held the conditions, duration or restrictions of the detentions presented on appeal created a liberty interest, even in circumstances where the detention exceeded the 399-day duration of Mr. Hill's detention or restricted some of the same privileges."); ***Skinner v. Cunningham***, 430 F.3d 483, 486, 487 (1st Cir. 2005) ("The hardship test has itself become the source of major disagreement. . . Some circuits compare the confinement conditions to those of the general prison population, while others look to the conditions of nondisciplinary administrative segregation. . . One circuit holds that disciplinary segregation never implicates a liberty interest unless it lengthens a sentence. *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir.1997). Whether *Sandin* should be read as a cookbook recipe for all cases is unclear. We think it is enough here that Skinner's segregation was rational, that its duration was not excessive, and that the central condition − isolation from other prisoners − was essential to its purpose. Skinner was a prisoner serving a sentence for murder who had just killed another inmate. . . . The prison was waiting on the Attorney General, and six weeks is hardly an excessive time to conduct a preliminary inquiry into a possible murder. . . As for Skinner's conditions of confinement, isolation from other prisoners was of the essence, and while it was perhaps needless to have denied Skinner amenities such as television or books, these deprivations are largely incidental to Skinner's main complaint, and were in any case short-term. Taking all the circumstances into account, including the prison's need to manage its own administration, . . .Skinner's temporary isolation without a formal hearing was not unconstitutional either in its essential character or in its duration."); ***Westefer v. Snyder***, 422 F.3d 570, 589, 590 (7th Cir. 2005) ("We believe that the allegations of the complaint, which we must accept as true at this stage of the litigation, preclude dismissal under the now-governing standards of *Wilkinson*. There are some differences between the features of the Ohio supermax at issue in *Wilkinson* and those of the Illinois facility at issue here. It is not at all clear, however, that those differences are so qualitatively different as to require a different characterization of the facility for purposes of due process analysis under *Wilkinson*. Illinois' contention that the liberty interest identified in *Wilkinson* turned exclusively on the absence of parole constitutes, our view, far too crabbed a reading of the decision. . . . We also note that, if, after considering all the evidence submitted by the parties, the district court is not of the view that the Illinois situation is, like the Ohio facility, 'an atypical and significant hardship under

any plausible baseline,' . . . the district court must confront the issue of what does constitute the appropriate baseline for the Illinois system. . . Assuming that a liberty interest is determined to exist, the district court will then have to confront whether the procedures that we have discussed at some length with respect to the exhaustion of administrative remedies provide sufficient process to protect the prisoners' liberty interest in this case."); ***Lekas v. Briley***, 405 F.3d 602, 608, 609 (7th Cir. 2005) ("[C]ourts today charged with assessing whether conditions of confinement pose an atypical and significant hardship are in essence counseled by *Sandin* to (1) compare the conditions of disciplinary segregation to those of discretionary segregation;. . . (2) compare the conditions of disciplinary segregation to those in the general prison population; and (3) determine whether the disciplinary action affects the length of the inmate's sentence. . . . [W]hat continues to be perplexing is the comparison group against which the conditions of disciplinary segregation are to be compared. While *Sandin* suggests the confinement be compared against both discretionary segregation as well as the general prison population, the realities of prison administration suggest that these two control groups are in fact one and the same. . . . This is because, in every state's prison system, any member of the general prison population is subject, without remedy, to assignment to administrative segregation or protective custody at the sole discretion of prison officials. . . . Thus, when a court compares disciplinary segregation to the general prison population, it is effectively comparing disciplinary segregation to discretionary segregation. . . . Indeed, taking *Sandin's* prescribed comparisons to their logical extremes, it is possible that the conditions of discretionary segregation against which the plaintiff's confinement is to be judged are not necessarily those of the prison in which the plaintiff is incarcerated, but rather those of the most restrictive prison in the state penal system . . . and perhaps even those of the most restrictive prison in the entire country. . . . This is a harsh, and perhaps unintentional, result. But it is also inescapable, in light of the fact that a prisoner may be transferred from one state prison to another without implicating the inmate's liberty interest − even where the conditions of the destination prison are 'much more disagreeable' than those of the originating prison."); ***Ortiz v. McBride***, 380 F.3d 649, 655 (2d Cir. 2004) ("The district court in the case before us thus erred when it dismissed Ortiz's due process claim based solely on the fact that his SHU confinement was for fewer than 101 days. We need not delineate the precise contours of 'normal' SHU confinement. For present purposes, it is sufficient to note that, ordinarily, SHU prisoners are kept in solitary confinement for twenty-three hours a day, provided one hour of exercise in the prison yard per day, and permitted two showers per week. . . Ortiz alleges that for at least part of his confinement, he was kept in SHU for twenty-four hours a day, was not permitted an hour of daily exercise, and was prevented from showering 'for weeks at a time.' . . Based on these and Ortiz's other allegations relating to his treatment in SHU, we think that, if proved, they could establish conditions in SHU 'far inferior'. . . to those prevailing in the prison in general. We thus conclude that Ortiz has alleged that the ninety-day SHU sentence imposed on him was, under the circumstances, a hardship sufficiently 'atypical and significant' to withstand a Rule 12(b)(6) motion as to the first part of the due process test."); ***Palmer v. Richards***, 364 F.3d 60, 64-66 & n.4 (2d Cir. 2004) ("[O]ur cases establish the following guidelines for use by district courts in determining whether a prisoner's liberty interest was infringed. Where the plaintiff was confined for an intermediate duration − between 101 and 305 days − 'development of a detailed record' of the conditions of

the confinement relative to ordinary prison conditions is required. . . . A confinement longer than an intermediate one, and under 'normal SHU conditions,' . . . is 'a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*.'. . . And although shorter confinements under normal SHU conditions may not implicate a prisoner's liberty interest, . . .we have explicitly noted that SHU confinements of fewer than 101 days could constitute atypical and significant hardships if the conditions were more severe than the normal SHU conditions of *Sealey* or a more fully developed record showed that even relatively brief confinements under normal SHU conditions were, in fact, atypical. . . . In the absence of a detailed factual record, we have affirmed dismissal of due process claims only in cases where the period of time spent in SHU was exceedingly short − less than the 30 days that the Sandin plaintiff spent in SHU − and there was no indication that the plaintiff endured unusual SHU conditions. . . . .The actual duration of confinement is relevant to determining whether any liberty interest was infringed, . . .but should the analysis proceed to the second prong of the qualified immunity analysis − whether Richards's actions were objectively reasonable in light of the law at the time − the pronounced sentence is the relevant period, *see Hanrahan v. Doling*, 331 F.3d 93, 98 (2d Cir.2003) (per curiam)."); ***Mitchell v. Horn,*** 318 F.3d 523, 531, 532 (3d Cir. 2003) ("*Sandin* did not pronounce a per se rule, as the District Court's opinion implies. In *Sandin*, to determine whether the prisoner's treatment − thirty days disciplinary segregation for resisting a strip search − implicated a liberty interest, the Supreme Court carefully compared the circumstances of the prisoner's confinement with those of other inmates. . . . In deciding whether a protected liberty interest exists under *Sandin*, we consider the duration of the disciplinary confinement and the conditions of that confinement in relation to other prison conditions. . . Not surprisingly, our cases engaging in this inquiry have reached differing outcomes, reflecting the fact-specific nature of the *Sandin* test. [collecting cases]"); ***Sealy v. Giltner***, 197 F.3d 578, 584, 585-89 (2d Cir. 1999) ("The Seventh Circuit has interpreted *Sandin* to mean that 'the key comparison [to determine atypical and significant hardship] is between disciplinary segregation and nondisciplinary segregation,' *Wagner v. Hanks*, 128 F.3d 1173, 1175 (7th Cir.1997), thereby implying that confinement for administrative reasons can never implicate a liberty interest. We think *Sandin* does not go so far. The Court might have assumed that administrative confinement sometimes will not implicate a liberty interest because it might be imposed without the requirement that corrections officers find a substantive factual predicate. . . . But, as we have long recognized, New York has established substantive factual predicates for many instances of administrative confinement. . . . If an inmate is to be placed in atypical confinement (considering both the conditions and the duration) after being determined, for example, to be a threat to prison safety, he should have some procedural due process surrounding the determination that he poses such a threat. That is the teaching of *Hewitt*, and if *Sandin* had meant to overrule *Hewitt* to the extent of precluding a protected liberty interest for all administrative confinements, we would expect to see more pointed language to that effect. . . . [surveying the approach taken by the Circuits on the question of] Ato what type of confinement is the challenged confinement to be compared' and noting that "[t]he relevant comparison in this Circuit has not been definitively settled, although our decision in *Brooks* suggests that, in a disciplinary confinement case, a comparison might be made to both conditions in administrative confinement and in the general prison population."); ***Hatch v. District of Columbia,*** 184 F.3d

846, 847 (D.C. Cir. 1999) ("Considering *Sandin's* language and objectives, we hold that due process is required when segregative confinement imposes an 'atypical and significant hardship' on an inmate in relation to the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences. For appellant, these conditions include the usual conditions of administrative segregation at Lorton. They also include more restrictive conditions at other prisons if it is likely both that inmates serving sentences similar to appellant's will actually be transferred to such prisons and that once transferred they will actually face such conditions."); ***Tyree v. Weld***, Civ. Nos. 93cv12260-NG, 93cv12725-NG, 2010 WL 145882, at *12, *13 (D. Mass. Jan. 11, 2010) (How the 'ordinary incidents of prison life' should be defined is not entirely clear: as the Supreme Court has noted, the courts of appeals have been unable to agree on where to locate that baseline. . .The First Circuit has not yet decided the issue. However, as in *Wilkinson*, which dealt with Ohio's 'Supermax' facility, the conclusion is inescapable that the assignment of prisoners to Phase III and the East Wing clearly 'impose[d] an atypical and significant hardship under any plausible baseline.'. . Plaintiffs had perhaps a total of four hours each week in which they could interact with fellow prisoners. . . They ate alone and received far fewer canteen privileges than other prisoners. . . They had to remain in their cells for approximately 22.5 or 23 hours each day . . . and time spent showering and making phone calls was counted against their out-of-cell time. . . . Minimal jobs or educational programs were available, which meant that prisoners had greatly reduced opportunities to earn good-time credits. . .Finally, as discussed in more detail below, prisoners were assigned to Cedar Junction's restrictive confinement not for a short time, but rather for an indefinite duration. And they could not be reassigned to a less restrictive area for at least six months. . . Indeed, the average duration of assignment to the East Wing was a striking 270 days. Taken together, the deprivations suffered by plaintiffs and the indefinite duration of their stay in restrictive housing constitute an 'atypical and significant hardship' when compared to any reasonable baseline. *Cf. Wilkinson*, 545 U.S. at 223-24. The harsh conditions imposed on plaintiffs 'may well [have been] necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not diminish [the] conclusion that the conditions give rise to a liberty interest in their avoidance.").

But see ***Davis v. Barrett***, 576 F.3d 129, 135 (2d Cir. 2009) ("Even though Davis's confinement was relatively short − lasting at most 55 days − this Court has required a 'detailed factual record,' unless 'the period of time spent in SHU was exceedingly short − less than [ ] 30 days ... − and there [is] no indication that the plaintiff endured unusual SHU conditions .'. . Here, the record lacks any evidence of the conditions for other inmates in administrative confinement, or in the general prison population. To the extent that the magistrate judge conducted any comparison of conditions, he simply noted that, based upon the regulations, the conditions in administrative segregation were no more severe than disciplinary SHU conditions. However, this finding was insufficient under the requirements of *Welch.* A detailed factual record containing information as to the actual conditions in both administrative segregation and for the general population is necessary for the court to make the type of comparison required."); ***Colon v. Howard***, 215 F.3d 227, 231, 232 (2d Cir. 2000) ("Confinement in normal SHU conditions for 305 days is

in our judgment a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*. There are no precise calipers to measure the severity of SHU hardship, but we believe that wherever the durational line is ultimately drawn, 305 days satisfies the standard. . . . Since we can anticipate continuing litigation in this area as the *Sandin* standard is given further content, we think it appropriate to advise the district courts of this Circuit that in cases challenging SHU confinements of durations within the range bracketed by 101 days and 305 days, development of a detailed record will assist appellate review. For instance, the parties might present evidence of the psychological effects of prolonged confinement in isolation and the precise frequency of SHU confinements of varying durations. Such a record will more likely result if counsel is appointed for the prisoner, both sides are given some latitude both in discovery and in presentation of pertinent evidence at trial, and, in cases where the absence of dispute as to relevant facts makes the *Sandin* issue appropriate for court determination, . . . the district judge makes the sort of particularized findings contemplated by our remands in *Welch*, 196 F.3d at 393-95, *Brooks*, 112 F.3d at 48-49, and *Miller*, 111 F.3d at 9-10."); ***Welch v. Bartlett***, 196 F.3d 389, 393, 394 (2d Cir. 1999) ("In our view, these facts do not justify the court's conclusion that the conditions of SHU confinement (considered without regard to duration or frequency of imposition) are not 'atypical' compared to the conditions of general population confinement. Although confinement to one's cell for half the day has some similarity to such confinement for 23 hours a day, the difference seems to us to be great. Furthermore, the fact that general population prisoners' access to programs is sometimes restricted or interrupted does not show either that such limitations occur with sufficient regularity to be considered typical, or that the severity of the conditions faced by a prisoner experiencing such limitations on his programs is comparable. Whether the conditions of Welch's confinement constitute an atypical and significant hardship requires that they be considered in comparison to the hardships endured by prisoners in general population, as well as prisoners in administrative and protective confinement, assuming such confinements are imposed in the ordinary course of prison administration. Further, the duration and the frequency of such deprivations are highly relevant to whether the conditions of a plaintiff's confinement should be considered atypical. The court did not consider the frequency or duration of non-punitive confinements such as administrative and punitive segregation, keeplock and cube confinements. . . Finally, we believe the court erred in concluding that the 90-day duration of Welch's confinement in the SHU did not render it atypical because approximately half the punitive SHU sentences were 90 days or more. In our view, the relevant comparison concerning duration is between the period of deprivation endured by the plaintiff and periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration, including general population prisoners and those in various forms of administrative and protective custody. The theory of *Sandin* is that, notwithstanding a mandatory entitlement, a deprivation is not of sufficient gravity to support a claim of violation of the Due Process Clause if similar deprivations are typically endured by other prisoners, not as a penalty for misbehavior, but simply as the result of ordinary prison administration. . . The comparison required by *Sandin* therefore is not between the duration of plaintiff's SHU sentence and the SHU terms received by others who were convicted of misbehavior. That comparison does not tell whether Welch's deprivation was more serious than typically endured by prisoners as an ordinary incident of prison life.").

See also ***J.S. v. T'Kach***, 714 F.3d 99, 106 (2d Cir. 2013) ("We have held that a prisoner has a liberty interest that is implicated by SHU confinement if it 'imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'. . . In this regard, we consider, among other things, the duration and conditions of confinement. . . . In the absence of factual findings to the contrary, confinement of 188 days is a significant enough hardship to trigger *Sandin*. . . The government contends that JS's confinement was administrative and not punitive in nature. But the record is devoid of any explanation as to why JS was confined to SHU for that period. No one contends that § 3521(f) would permit the government to visit significant, unreviewable punishment on an inmate after his termination from the Program. Thus, without factual findings to the contrary, we have little difficulty concluding that JS's allegation of 188 days of administrative confinement is sufficient to implicate *Sandin*-type liberty interests."); ***Giano v. Selsky***, 238 F.3d 223, 226 (2d Cir. 2001) ("We view such an aggregation as particularly appropriate here, where it is clear that Giano's segregation at Clinton was simply a continuation of his segregation at Attica. A review of the record indicates that the two periods of confinement were based on the same administrative rationale and that the conditions of Giano's confinement were, for all practical purposes, identical at both facilities. Under these circumstances, Giano's two sentences of administrative segregation must be considered cumulatively for purposes of the *Sandin* analysis, although Giano will not be allowed a double recovery for the Attica sentence."); ***Kalwasinski v. Morse***, 201 F.3d 103, 107 (2d Cir. 1999) (" In the decision reviewed here, the district court surveyed other decisions holding that periods of SHU confinement similar in duration to Kalwasinski's did not implicate a liberty interest and therefore concluded that Kalwasinski's SHU penalty did not implicate a liberty interest either. As noted in *Welch*, however, the essential comparison is not to other terms of punitive SHU confinement. Rather, the district court must consider the 'periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration, including general population prisoners and those in various forms of administrative and protective custody.'"); ***Jones v. Baker***, 155 F.3d 810, 812 (6th Cir. 1998) ("Plaintiff contends that the extraordinarily long time during which he has been held in segregation [over two and one half years] establishes the 'atypical and significant' hardship necessary under *Sandin* to create a liberty interest. First, administrative segregations have repeatedly been held not to involve an "atypical and significant" hardship implicating a protected liberty interest without regard to duration. . . . [W]e agree with the district court that under *Sandin* a liberty interest determination is to be made based on whether it will affect the overall duration of the inmate's sentence and there is no evidence here that the segregation will impact plaintiff's sentence."); ***Jones v. Baker***, 155 F.3d 810, 815, 816 (6th Cir. 1998) (Gilman, J., concurring) ("The majority in the present case asserts that administrative segregation in general is "typical" of what can normally be expected as an incident of prison life, so that such confinement does not normally give rise to a liberty interest. Other courts have agreed with this position. . . . Such a broad categorical approach to resolving procedural due process claims, however, is in my opinion out of step with *Sandin's* principal directive that courts should look to see if the particular inmate has been deprived of a state-created interest of 'real substance.'"); ***Gonzalez v. Coughlin***, No. 96-2494, 1998 WL 2410, *2 (2d Cir. Jan. 6, 1998) (unpublished) ("We do not need today to decide whether confinements of sufficient length may exist that, in themselves and without further

examination of the specific circumstances of the punishment, can be deemed atypical. For our circuit's prior cases have made clear that 163 days is not enough, standing by itself, to fall into such a per se category under *Sandin*. Dealing with confinements of up to 180 days, 'we have indicated the desirability of fact-finding before determining whether a prisoner has a liberty interest in remaining free from segregated confinement.'"); ***Wright v. Coughlin***, 132 F.3d 133, 137 (2d Cir. 1998) ("Access to periodic confinement reviews − and thus, for those administratively assigned to SHU, the monthly prospect of being released from SHU − might differentiate disciplinary from administrative confinement. Therefore, despite the similarities of the conditions, the length of disciplinary confinement in the SHU could be meaningful in determining whether the confinement was an 'atypical and significant' hardship as contemplated by *Sandin*. A comparison between administrative and disciplinary confinement is therefore necessary. . . . Because the district court did not consider duration as a factor in its *Sandin* analysis as required by *Brooks* . . . and failed to consider how the lack of access to periodic confinement reviews might differentiate disciplinary from administrative confinement, we vacate and remand for further proceedings."); ***Brown v. Plaut***, 131 F.3d 163, 169-70 (D.C. Cir. 1997) ("Brown's placement in administrative segregation violated the Due Process Clause only if two conditions are met: Brown had a liberty interest in avoiding that term of segregation, and Brown did not receive the process he was due. The first of these questions raises difficult issues of constitutional law; the second, only narrow questions of fact. We therefore discuss the first question only to the extent necessary to explain why we do not decide it, and focus on the second. . . . Applying *Sandin* to this case presents a number of difficulties. First, although *Sandin* clearly dictates that we compare the hardship experienced by the inmate to 'the ordinary incidents of prison life,' it is not clear which prison or part of a prison is to provide the standard of comparison. . . . [Second,] [c]aselaw from the Second and Ninth Circuits suggests that whether a term in segregation amounts to an 'atypical and significant' deprivation turns on its length and on a comparison of conditions in segregation and in the prison's general population. . . Other courts have not adopted so structured an analysis. . . . And, finally, we would need to decide whether *Sandin's* 'atypical and significant' test merely supplements *Hewitt*'s test for the existence of a liberty interest, or supersedes it altogether. . . We do not think it necessary or even useful to resolve so many complex and fact-specific issues in the context of this case which it may be possible to decide on far narrower grounds."); ***Griffin v. Vaughn***, 112 F.3d 703, 707 (3d Cir. 1997) ("It is thus apparent that in the penal system to which Griffin was committed with due process of law, it is not extraordinary for inmates in a myriad of circumstances to find themselves exposed to the conditions to which Griffin was subjected. It is also apparent that it is not atypical for inmates to be exposed to those conditions, like Griffin, for a substantial period of time. Given the considerations that lead to transfers to administrative custody of inmates at risk from others, inmates at risk from themselves, and inmates deemed to be security risks, etc., one can conclude with confidence that stays of many months are not uncommon. For these reasons, we believe that exposure to the conditions of administrative custody for periods as long as 15 months 'falls within the expected parameters of the sentence imposed [on him] by a court of law.' It necessarily follows, in our view, that Griffin's commitment to and confinement in administrative custody did not deprive him of a liberty interest and that he was not entitled to procedural due process protection."); ***Brooks v. DiFasi***, 112 F.3d 46, 49 (2d

Cir. 1997) ("After *Sandin*, in order to determine whether a prisoner has a liberty interest in avoiding disciplinary confinement, a court must examine the specific circumstances of the punishment. . . . The mere fact that prison regulations allow for lengthy administrative confinement in some situations does not obviate this central factual inquiry. First, . . . we have never held that New York prisoners have no liberty interest in avoiding long-term administrative confinement. Second, the fact that administrative or protective custody is subject to periodic review, while disciplinary confinement is not, may be significant in determining whether lengthy disciplinary confinement constitutes an 'atypical and significant hardship.' Furthermore, the district court's approach depended on the observation that New York's prison regulations make little or no distinction between disciplinary and non-disciplinary segregated confinement. While it may be true that the regulations do not distinguish between the conditions of administrative and punitive confinement, it does not necessarily follow that the actual conditions are similar. Finally, the mere fact that New York's prison regulations permit extended administrative segregation does not tell how frequently or for what durations such segregation is imposed."); ***Miller v. Selsky***, 111 F.3d 7, 9 (2d Cir. 1997) ("*Sandin* did not create a per se blanket rule that disciplinary confinement may never implicate a liberty interest. Courts of appeals in other circuits have apparently come to the same conclusion, recognizing that district courts must examine the circumstances of a confinement to determine whether that confinement affected a liberty interest." (citing cases)).

See also ***Gaines v. Stenseng,*** 292 F.3d 1222, 1225, 1226 (10th Cir. 2002) (We conclude that the district court acted precipitately in the instant case and that a '1915(e) dismissal was improper. It is true that *Sandin* held, at the summary judgment stage, that the challenged 'discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest.' . . . But to reach this conclusion the Court carefully examined the conditions of the prisoner's confinement, ultimately determining that his disciplinary segregation 'mirrored those conditions imposed upon inmates in administrative segregation and protective custody.'. . By contrast, in the present case the district court engaged in no such examination of the typical conditions of confinement in Gaines's prison, instead determining in a conclusory fashion that seventy-five days in disciplinary segregation was neither atypical nor significant. Although the court might properly conclude at the summary judgment stage that there is sufficient evidence to establish that such segregation mirrors conditions imposed upon inmates in administrative segregation and protective custody, and that therefore the complaint should be dismissed, it is inappropriate to invoke '1915(e) to dismiss the claim at this stage in the litigation without the benefit of any such evidence. . . . [W]e note that the holding in this case is limited to the length of the seventy-five day disciplinary segregation. Disciplinary segregation for some lesser period could fail as a matter of law to satisfy the 'atypical and significant' requirement in a case in the future, thereby making it futile to allow the pro se plaintiff to amend his complaint."); ***Perkins v. Kansas Dep't of Corrections***, 165 F.3d 803, 809 (10th Cir. 1999) ("Here, the district court did not have evidence before it from which it could engage in the analysis required by *Sandin* and determine whether the conditions of plaintiff's confinement presented the type of atypical, significant deprivation that would implicate a liberty interest. Plaintiff's allegations, accepted as true, showed that he is confined in an eight-foot by fourteen-

foot concrete cell for twenty-three and one-half hours a day. He is permitted to leave his cell for thirty minutes each day, to take a shower, but he must wear the face mask when he is out of his cell. Plaintiff has not been permitted exercise outside his cell for over a year. Plaintiff contends that no other inmates bear similar restrictions, and there is no evidence in the record at present to contradict this allegation. On appeal, appellees argue that the conditions of plaintiff's confinement do not represent an atypical and significant hardship because '[i]t is ordinary for prisoners to be locked down in segregation for various offenses and to be isolated from others due to extreme behavior.' Appellees' Br. at 5. This evidence was not before the district court at the time plaintiff's claim was dismissed, and, in any event, it does not fully address both the duration and degree of plaintiff's restrictions as compared with other inmates. . . Based upon our review, we conclude the district court erred in sua sponte dismissing plaintiff's due process claim."); ***Spaight v. Cinchon***, No. 98-2367, 1998 WL 852553, *2 (2d Cir. Dec. 8, 1998) (unpublished) ("In our view, the record as it currently stands is inadequate to permit effective review of Spaight's procedural due process claim. It is true that we have previously stated in dicta, in *Hynes v. Squillace*, 143 F.3d 653 (2d Cir.1997), that 'in cases involving shorter periods of confinement where the plaintiff has not alleged any unusual conditions, the district court need not provide such detailed explanation of its reasoning.' *Id.* at 658. However, we do not believe that Spaight's 39-day confinement was so short that his claim may be properly dismissed without further analysis. [footnote omitted] Significantly, our conclusion in *Hynes* rested in part on the fact that the defendants in that case had 'submitted detailed evidence on the typicality of Hynes' confinement' and that the magistrate judge's report 'contained a finding that the conditions of Hynes' keeplock confinement mirrored the conditions of other segregated inmates.' *Id*. By contrast, there is insufficient evidence in the record before us to allow an informed assessment of Spaight's confinement and of the relevant prison conditions. Accordingly, we must vacate the district court's judgment dismissing Spaight's procedural due process claim and remand for further fact-finding."); ***Scott v. Albury***, 156 F.3d 283, 287-88 (2d Cir. 1998) ("[W]e hold that in conducting the *Sandin* analysis to determine whether a disciplinary sentence 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,'. . . courts should consider the degree and duration of the sentence actually imposed in the hearing and not the maximum sentence that might have been imposed."); ***Hynes v. Squillace***, 143 F.3d 653, 658 (2d Cir. 1998) ("*Miller, Brooks* and *Wright* all involved relatively long periods of SHU confinement, and specific articulation of the factual findings underlying the district court's liberty interest analysis was necessary. However, in cases involving shorter periods of segregated confinement where the plaintiff has not alleged any unusual conditions, the district court need not provide such detailed explanation of its reasoning. . . . Given plaintiff's failure of proof, including his failure to allege any unusual conditions, the short span of the confinement at issue, and previous decisions (including *Sandin*) holding that comparable periods and conditions of segregation do not amount to a deprivation of a liberty interest, we think the district court sufficiently articulated the factual predicates underlying its liberty interest analysis."); ***Williams v. Benjamin***, 77 F.3d 756, 769 (4th Cir. 1996) (noting plaintiff made "a forceful argument that confinement in four-point restraints poses an atypical and significant hardship."); ***Williams v. Fountain***, 77 F.3d 372, 374 n.3 (11th Cir. 1996) ("Because Williams's sanctions − especially the full year of solitary confinement − represent substantially more 'atypical and significant

hardship[s] ... in relation to the ordinary incidents of prison life,' we assume that he suffered a liberty deprivation and was entitled to due process."); ***Williams v. Ramos***, 71 F.3d 1246, 1249 (7th Cir. 1995) (noting that the Court in *Sandin* relied on three factors in concluding that Conner had no constitutionally protected liberty interest: "1) disciplinary segregation was little different from discretionary forms of segregation; 2) comparison between Conner's confinement and conditions in the general population showed that Conner suffered no 'major disruption in his environment'; and 3) the length of Conner's sentence was not affected." citing *Sandin*, 115 S.Ct. at 2301); ***Rodriguez v. Phillips***, 66 F.3d 470, 480 (2d Cir. 1995) ("*Sandin* may be read as calling into question the continuing viability of our cases holding that New York regulations afford inmates a liberty interest in remaining free from administrative segregation. For purposes of the present appeal, however, we need not resolve whether Rodriguez had a protected liberty interest under the new *Sandin* standard. For we believe that even if he did, it was objectively reasonable for Lt. Alcock to believe Rodriguez had received all the process he was due."); ***Bulger v. United States Bureau of Prisons***, 65 F.3d 48, 50 (5th Cir.1995) (holding that prisoner has no liberty interest in job assignment); ***Orellana v. Kyle***, 65 F.3d 29, 31-32 (5th Cir.1995) ("[I]t is difficult to see that any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement, will henceforth qualify for constitutional liberty status."), *cert. denied*, 116 S. Ct. 736 (1996); ***Whitford v. Boglino***, 63 F.3d 527, 533 (7th Cir. 1995) ("The holding in *Sandin* implies that states may grant prisoners liberty interests in being in the general population only if the conditions of confinement in segregation are significantly more restrictive than those in the general population.").

See ***Toney v. Owens***, 779 F.3d 330, 339-42 (5th Cir. 2015) ("We conclude that neither Toney's classification as a sex offender, nor the consequences flowing from that classification, implicated Toney's liberty interests under the due process clause. . . . .[S]ex offender classification triggers a liberty interest when combined with mandatory sex offender treatment. Toney correctly notes that in these cases, the inmates or parolees had not necessarily undergone sex offender treatment at the time they filed suit. . . But in each of these cases, sex offender treatment was clearly mandated. . . Here, based on the undisputed facts, Toney was never mandated to undergo sex offender treatment. First, it is clear that, unlike the parolees in *Coleman* and *Meza*, sex offender conditions of parole were never imposed on Toney. . . . Second, although Toney contends that he was transferred to the Ellis Unit in 2011 because 'they have Sex Offender Treatment Programs,' there is no evidence that Toney was ever mandated to undergo such treatment while at Ellis. Third, we conclude that Toney's participation in the Static 99 Assessment did not constitute sex offender treatment. The district court correctly noted that this 'one-page worksheet' was merely a 'general risk assessment tool.' The evaluation-which was completed by a parole officer, not a psychiatrist or other mental health professional—consisted only of a handful of questions relating to Toney's history and past convictions. We hold that such a brief, perfunctory evaluation is not so 'stigmatizing and invasive' as to render Toney's conditions of incarceration 'qualitatively different' from those of other inmates. . . Finally, we conclude, based on the undisputed facts, that Toney was never mandated to complete the SOTP 18–month treatment program. . . . The other consequences Toney faced due to his sex offender classification also fail to give rise to a liberty

interest. First, Toney contends that his sex offender status resulted in the repeated denials of his parole. However, even assuming the parole board relied on this factor in deciding to deny his parole, we have consistently held that 'Texas prisoners ... cannot mount a challenge against *any* state parole review procedure on procedural ... Due Process grounds.'. . Accordingly, even if the parole board 'consider[ed] unreliable or even false information' regarding Toney's sex offender status 'in making [its] parole determinations,' this 'simply do[es] not assert a federal constitutional violation.'. . Toney also points to his 2011 transfer to the Ellis unit, but, as discussed above, Toney has provided no evidence suggesting that he was required to undergo sex offender treatment upon his transfer to the Ellis unit. Moreover, an inmate generally 'has no liberty interest in residence in one prison or another. . . Finally, Toney's exclusion from substance abuse treatment and educational/vocational programs while in prison does not implicate a liberty interest, as such restrictions do not impose 'atypical and significant hardship [s] on [Toney] in relation to the ordinary incidents of prison life.'"); ***Gonzalez-Fuentes v. Molina***, 607 F.3d 864, 889, 890 (1st Cir. 2010) ("When we attempted to interpret *Sandin* in our *Dominique* opinion, we did not yet have the benefit of *Young*, which was handed down the following year. We now think that *Young* clarifies *Sandin's* holding. . . It implicitly suggests that the due process analysis depends on whether the baseline liberty being deprived is that of the general prison population or rather of a more parole-like arrangement. When the challenged action concerns what can be fairly described as the transfer of an individual from one imprisonment to another, *Sandin's* 'atypical hardship' standard remains our lodestar; when, on the other hand, it concerns the disqualification of an individual from a supervised release program that begins to more closely resemble parole, *Young* and *Morrissey* will form part of the guiding constellation. The upshot is that in cases in which an individual is not incarcerated in prison, the extent of his existing liberty within the relevant program − and not just the extent of his reduced liberty in a challenged placement − must be taken into account. This is not to question *Dominique's* ultimate holding, as the case before us is distinguishable on at least one critical fact. The transitional work-release program in *Dominique* required the plaintiff to reside in a correctional facility. . . Unlike him, ESP [electronic supervision program] participants reside, indefinitely, in their homes. Other circuits have emphasized the significance of the difference between confinement in an institutional setting and confinement within the home. . . . Taken together, these statements suggest that the Due Process Clause is particularly protective of individuals participating in non-institutional forms of confinement. A halfway house may indeed be a house, but it is not a home. . . . For these reasons, we believe that the appellees' arrangement was sufficiently similar to traditional parole − far more like parole than the work release program in *Dominique* − to merit protection under the Due Process Clause."); ***Kitchen v. Upshaw,*** 286 F.3d 179, 186, 187 (4th Cir. 2002) ("We take judicial notice of the fact that there is nothing atypical about prisoners being denied permission to leave jail in order to work. Thus, we hold that under Virginia law prisoners have no constitutionally protected liberty interest in work release."); ***Asquith v. Department of Corrections,*** 186 F.3d 407, 411 (3d Cir. 1999) (removal from halfway house did not trigger protections of Due Process Clause); ***Callender v. Sioux City Residential Treatment Facility***, 88 F.3d 666, 668 (8th Cir. 1996) (no constitutionally protected interest in remaining in work-release program); ***Dominique v. Weld***, 73 F.3d 1156, 1159 (1st Cir. 1996) ("The question assigned to us is whether plaintiff had a liberty interest in remaining

in work release status, such that under the Fourteenth Amendment he was entitled to due process of law before that privilege could be revoked. We are constrained to agree with defendants that the new threshold test articulated in *Sandin* precludes our finding a liberty interest and bars relief."); ***Grennier v. Nagle***, 73 F.3d 364, No. 94- 3838, 1995 WL 767897, at *1 (7th Cir. Dec. 28, 1995) (unpublished disposition) (prisoner's removal from work release program did not trigger a liberty or property interest under *Sandin*). *But see* ***Anderson v. Recore***, 446 F.3d 324, 328 (2d Cir. 2006) ("There is no question that Anderson had a liberty interest in continuing his participation in the temporary release program."); ***Paige v. Hudson,*** 341 F.3d 642, 643 (7th Cir. 2003) (removal from a home-detention program into jail is sufficient reduction in freedom to constitute deprivation of liberty under *Sandin*); ***Kim v. Hurston***, 182 F.3d 113, 118 (2d Cir. 1999) (Since *Sandin*, the district courts in New York have disagreed on whether an inmate has a liberty interest in continued participation in work release . . . . The work release program in which Kim participated, at least the final phase in which she lived at home and worked at a job, while regularly reporting to Parkside, is virtually indistinguishable from either traditional parole or the Oklahoma program considered in *Young*. While participating in this phase of the TRP, Kim enjoyed a liberty interest, the loss of which imposed a sufficiently 'serious hardship' to require compliance with at least minimal procedural due process.").

See also ***Domka v. Portage County, Wis.***, 523 F.3d 776, 781 (7th Cir. 2008) ("Our analysis . . . must begin with the 'initial question [of] whether being removed from a home-detention program into jail is a sufficiently large incremental reduction in freedom to be classified as a deprivation of liberty under the *Sandin* doctrine, since, if not, [Domka] has no right to due process of law.' *Paige v. Hudson*, 341 F.3d 642, 643 (7th Cir.2003) (citations omitted). The law in a case such as this, where the convict is not technically 'imprisoned,' is still evolving. What is established is that an inmate on parole has a liberty interest in retaining that status, *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and that this right has been extended to pre-parolees, *Young v. Harper*, 520 U.S. 143, 117 S.Ct. 1148, 137 L.Ed.2d 270 (1997). Our recent opinion in *Paige v. Hudson* broadened this principle slightly further, finding that removing a probationer from home detention status fell somewhere on the deprivation spectrum as greater than that at stake in *Sandin* and less than that at issue in *Young*, but qualified nonetheless as a 'sufficient reduction' in freedom to be deemed a 'deprivation of liberty' requiring due process. . .But we are not prepared to say that *Paige* is necessarily controlling here; the fact that Domka was not a probationer but instead a prisoner serving his time outside the jail renders *Paige* distinguishable. The County makes a valid point that revoking probation and returning someone who already served his sentence to incarceration, as was the situation in *Paige*, is arguably a greater loss of freedom than having Domka serve out his remaining time of confinement in a 'different location.'. . Because we agree with the district court's ultimate determination that Domka waived any due process protections that may have been required,. . . we save for another day the narrow question of whether a prisoner − as opposed to a probationer, parolee or pre-parolee − has a liberty interest in a home detention program.").

The Supreme Court has held that a state may create a liberty interest on the part of inmates in the accumulation of good conduct time credits. ***Wolff v. McDonnell***, 418 U.S. 539, 563-71 (1974). Before being deprived of good-time credits an inmate must be afforded: (1) 24-hour advance written notice of the alleged violations; (2) the opportunity to be heard before an impartial decision maker; (3) the opportunity to call witnesses and present documentary evidence (when such presentation is consistent with institutional safety); and (4) a written decision by the fact-finder stating the evidence relied upon and the reasons for the disciplinary action. *Id*. *See also* ***Burns v. PA Dept. of Corrections***, 642 F.3d 163, 174, 175 (3d Cir. 2011) ("We therefore hold that an inmate's right to procedural due process is violated when a hearing examiner simply fails to view available evidence to determine its relevance and suitability for use at a disciplinary hearing. . . . Although the government may have a very real interest in barring an inmate's access to certain documentary evidence, that interest is not implicated when it is provided only to the hearing officer, who can then independently assess its probative value and weigh that against any institutional concerns that may counsel against allowing otherwise probative evidence to be used at the hearing.").

Compare ***Love v. Vanihel***, 73 F.4th 439, 451-52 (7th Cir. 2023) ("Contrary to Love's position, neither the Supreme Court nor our court have held that due process requires prison administrators to hear mitigating arguments before determining whether to revoke good time credit, and if so, how much to revoke. . . . Since *Wolff* and *Hill*, the Supreme Court has not required prison administrators to hear mitigating arguments before determining that revocation of good time credit is an appropriate sanction or deciding how much good time credit to revoke. . . . Love does not argue that his prison discipline procedures lacked the safeguards mandated in *Wolff* and *Hill*. So, he can prevail only if we require prison administrators to afford inmates a new and additional procedure—the right to present mitigating arguments prior to a discretionary decision on good time credit revocation. Scarcely ever has this court added to the *Wolff* and *Hill* protections, and a recent decision probably forecloses doing so again. *Compare Chavis v. Rowe*, 643 F.2d 1281, 1286 (7th Cir. 1981) (requiring prison disciplinary officials to disclose exculpatory materials), *and Whitlock v. Johnson*, 153 F.3d 380, 388 (7th Cir. 1998) (holding that a blanket rule preventing virtually all live witness testimony violated due process), *with Crawford v. Littlejohn*, 963 F.3d 681, 683 (7th Cir. 2020) (holding procedural due process does not prohibit prison officials from revoking good time credit in reliance on uncorroborated hearsay evidence and explaining "[w]e have been told not to add procedures to *Wolff*'s list."); *see also Baxter v. Palmigiano*, 425 U.S. 308, 322–24, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) (reaffirming that the balance struck in *Wolff* between due process and prison needs is proper.); *Rowe v. DeBruyn*, 17 F.3d 1047, 1052–53 (7th Cir. 1994) (declining to recognize a right to raise self-defense as a complete defense in prison disciplinary proceedings); *Montgomery v. Anderson*, 262 F.3d 641, 646 (7th Cir. 2001) (rejecting application of *Miranda* to prison discipline). This case law alone would stop us from recognizing additional procedural requirements. But another issue concerns us as well: The procedural protections identified in *Wolff* and *Hill* involve the determination of guilt—not the later stage when prison officials assign sanctions. Without additional guidance from the Supreme Court, we decline to mandate additional safeguards in a novel context. So, the Department was not required to hear

mitigation before deciding Love's sanctions.") *with* ***Love v. Vanihel***, 73 F.4th 439, 456-60 (7th Cir. 2023) (Hamilton, J., dissenting) ("Petitioner Tony Love was serving a long term in an Indiana prison when he committed a serious new crime, participating in an assault that injured two guards. Love was prosecuted for that assault in a state court. He was convicted and sentenced to an additional four and a half years in prison, consecutive to the sentence he was already serving. That prosecution and sentence, using the extensive procedural protections that apply in ordinary criminal prosecutions in civilian courts, were an entirely proper and constitutional response to Love's new crime. The constitutional problem here arose with the additional punishment imposed on Love by prison officials, who have attempted here an unprecedented extension of Supreme Court jurisprudence on prison disciplinary procedures. A prison disciplinary board added *more than fifteen years* back onto Love's original sentence. Imposing such severe punishment through those minimal and informal procedures is, as best we can tell, literally unprecedented by a factor of ten. Love's punishment went far beyond the limits implicit in the Supreme Court's leading decisions on due process in prison discipline, *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Superintendent v. Hill*, 472 U.S. 445 (1985). This severe punishment violated Love's right not to be further deprived of liberty without due process of law. . . . The State's unprecedented attempt to expand its disciplinary powers requires a fresh and close look at the foundations of the due process jurisprudence on prison discipline. Start with Love's liberty interest. Love was serving a 55-year sentence for murder imposed under state law that allowed him to earn 'one-for-one good time.' One day of good behavior in prison earned one day of credit, reducing Love's sentence by one day. . . Having been in prison for such a long time, Love had earned more than 5,700 days of good-time credit, more than fifteen years, off his original sentence. Earned good-time credits under Indiana law create liberty interests protected by the Due Process Clause of the Fourteenth Amendment. . . Love could not be deprived of those credits without due process of law. But how much process is due? The Supreme Court established the minimum due process requirements for depriving a prisoner of liberty interests provided by good-time credits in *Wolff v. McDonnell* in 1974. The Court's opinion in *Wolff* is a candid exercise in balancing competing interests: institutional needs v. a prisoner's liberty interests. The balance reflects the three-step structure adopted soon after *Wolff* in *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976), weighing the private interest at stake, the public interest at stake, and the potential value of additional procedures. *Wolff* recognized a prisoner's liberty interest in good-time credits, but it also gave substantial weight to the institutional needs of prison officials to punish misconduct much more swiftly than could be imposed through civilian courts, and without undue risks to institutional safety, including the safety of witnesses. . . *Wolff* held that a prisoner facing deprivation of good-time credits is entitled to the following minimal procedural protections: (1) advance written notice of the charges (but 24 hours before a hearing was deemed sufficient); (2) a hearing before a decision-maker who was not involved in the underlying incident; (3) an opportunity to call witnesses and present documents, but only if consistent with institutional safety and correctional goals; and (4) a written statement by the decision-maker of the evidence relied upon and the reasons for the disciplinary action. . . At the same time, *Wolff* rejected further requirements closer to those in criminal prosecutions. The prisoner has no right to confront and cross-examine witnesses. The prisoner has no right to retained counsel, let alone appointed counsel. And the

prisoner has no right to a decision-maker who is a judge or otherwise independent of the prison administration. . . The rules of evidence do not apply in prison discipline hearings. . . As for the standard of proof, the requirement of proof beyond a reasonable doubt is fundamental to due process of law in American criminal cases. . . In *Superintendent v. Hill*, however, the Court held that a prison disciplinary decision depriving a prisoner of liberty needs to be supported only by 'some evidence.'. . This standard may be the least demanding in American law for any purposes, let alone for depriving a person of his liberty. . . . To be clear, my point is not to disagree with or criticize *Wolff* or *Hill.* They have been settled law for decades. My points are instead (a) to emphasize how different these rules are from an ordinary criminal prosecution and (b) to prevent their unprecedented extension to impose punishments far more severe than the Court considered in *Wolff* and *Hill.* A closer look at the due process analysis in those cases shows that neither *Wolff* nor *Hill* offers any support for the result in this case: use of the minimal procedures they accepted to deprive a person of liberty for more than fifteen years. . . . Petitioner Love's loss of liberty in this case is more than ten times greater than the maximum loss considered in *Wolff* and more than fifty times greater than the maximum loss in *Hill.* These order-of-magnitude differences change the due process balance, and do so dramatically. In terms of *Wolff* and *Mathews v. Eldridge*, the private interest at stake here dwarfs the private interests at stake in *Wolff* and *Hill.* Such a dramatic difference should change the balance to require much more robust procedural and substantive protections, like the full set of rights that applied to Love when he was prosecuted for the same assault in a civilian court. Those additional procedural protections are intended to reduce the risk of errors that the Supreme Court deemed tolerable in *Wolff* and *Hill*, where the stakes were so much lower, without indicating that errors with much more serious consequences would be tolerable. To be sure, the Supreme Court's opinions in *Wolff* and *Hill* did not identify any cap on the punishment that could be imposed through the minimal procedures they approved. But neither did they expressly authorize sanctions more severe than those suffered by the prisoners before them. Our court's job is to understand the Court's reasoning in those cases, including limits that were implicit in that reasoning. The Court's decisions expressly balanced private interests against public interests. . . A ten-to fifty-fold increase in the private interest at stake calls for a different outcome. . .As best I can tell, no other State has tried to use the minimal procedures of prison discipline to impose punishments remotely close to the fifteen-plus years of prison Indiana has imposed on petitioner Love. Nor has any court approved of such severe punishment imposed through these minimal procedures. Because the due process balance weighs so heavily in favor of petitioner, we should enforce the Due Process Clause here by granting a writ of habeas corpus setting aside the punishment imposed on petitioner through these minimal processes. . . .The better solution, pending further guidance from the Supreme Court, would be to stick with the maximum eighteen month punishment accepted in *Wolff.* Such swift punishment allows prison officials to protect their institutional interests consistent with *Wolff* and *Hill* while leaving more severe punishments for prosecution and conviction in a civilian court using the full procedural protections in criminal prosecutions.")

In *Sandin*, the Court did not disturb its holding in *Wolff*. Thus, if disciplinary action would inevitably affect the duration of the inmate's confinement, a liberty interest would still be

recognized under *Wolff*. *See* ***Whitford v. Boglino***, 63 F.3d 527, 532 (7th Cir.1995). Note, however, that "the mere opportunity to earn good-time credits" has been held not to "constitute a constitutionally cognizable liberty interest sufficient to trigger the protection of the Due Process Clause." ***Luken v. Scott***, 71 F.3d 192, 193-94 (5th Cir. 1995) (per curiam).

See also ***Santiago v. Blair***, 707 F.3d 984, 993, 994 (8th Cir. 2013) ("Santiago alleges that Blair subjected him to two adverse actions: first, he placed Santiago in a cell without his personal property, bedding, running water, or a working toilet and, second, he threatened him with further retaliation. Blair contends that the conditions of Santiago's cell cannot support a cause of action under § 1983 because they did not create an atypical and significant hardship on Santiago as required under *Sandin*. . . . Blair misconstrues Santiago's claim. *Sandin* would be applicable if Santiago were alleging a conditions of confinement claim under the Due Process Clause. Santiago's claim, however, is clearly one for retaliation under the First Amendment, a claim that *Sandin* specifically left open. . . . We have held that deprivations and threats such as those allegedly made by Blair are sufficient to support a First Amendment retaliation claim. . . . Taken in the light most favorable to Santiago, a reasonable jury could conclude that these facts demonstrate that Blair took the above-described adverse actions because of Santiago's continued use of the prison grievance procedure. Thus, Blair is not entitled to qualified immunity on Santiago's retaliation claim."); ***Allah v. Seiverling,*** 229 F.3d 220, 225 (3d Cir. 2000) ("Our holding that claims alleging retaliation for the exercise of First Amendment rights survive *Sandin* is consistent with those circuits that have considered the issue.")*;* ***Cornell v. Woods***, 69 F.3d 1383, 1388 n.4 (8th Cir. 1995) (concluding *Sandin* does not affect retaliatory transfer or retaliatory discipline cases). *Accord* ***Hines v. Gomez***, 108 F.3d 265, 269 (9th Cir. 1997); ***Pratt v. Rowland***, 65 F.3d 802, 806-07 (9th Cir.1995).

In ***Mitchell v. Dupnik***, 75 F.3d 517 (9th Cir. 1996), the court of appeals held that the rationale of *Sandin* did not apply to a pretrial detainee "who had not been convicted or sentenced at the time he was disciplined." *Id*. at 524. The court concluded that *Sandin* left ***Bell v. Wolfish***, 441 U.S. 520 (1979), untouched and that where the purpose and effect of disciplinary segregation was punishment, a pretrial detainee could not be punished without a due process hearing. *Id*. *Accord,* ***Shorter v. Baca***, 895 F.3d 1176, 1190 (9th Cir. 2018) ("Pretrial detainees have a right to procedural due process before they are subjected to more severe conditions of confinement than other detainees.").

See also ***Welsh v. Lubbock County***, No. 22-10382, 2023 WL 4014178, at *1 (5th Cir. June 15, 2023) (not reported) (Elrod, J., concurring) ("While I agree that the district court did not reversibly err here, I write separately to address the appropriate standard for review of claims brought by pre-trial detainees. . . . Every circuit to consider the issue of the proper standard for review of pre-trial detainee claims has held that *Sandin* does not apply to pre-trial detainee claims. [collecting cases] Although circuits have uniformly held that pre-trial detainees' claims are not governed by *Sandin*, they have reached different conclusions as to whether detainees may continue to rely on *Hewitt* to support their due process claims. *Compare Thorpe v. Clarke*, 37 F.4th 926,

944–46 (4th Cir. 2022) (discussing the baseline procedural requirements for retaining an inmate in administrative segregation under *Hewitt*), *Williamson v. Stirling*, 912 F.3d 154, 174–77 (4th Cir. 2018) (relying on *Hewitt* to determine whether a pre-trial detainee is entitled to procedural due process before and after being placed in administrative segregation), *and Williams v. Hobbs*, 662 F.3d 994, 1006–09 (8th Cir. 2011) (holding post-*Sandin* that prisoners who were confined in non-disciplinary administrative segregation were entitled to meaningful periodic review under *Hewitt*), *with Rapier v. Harris*, 172 F.3d 999, 1004–05 (7th Cir. 1999) ("We are aware that *Sandin* distinguishes between convicted prisoners and pretrial confinees, but we do not believe that the distinction made by the Court, read in context, justifies the continued vitality of the *Hewitt* approach in dealing with pretrial confinees."). In several unpublished cases, we have applied *Sandin* and cases based on *Sandin* to pre-trial detainees, but we have not explicitly addressed whether *Sandin*'s holding applies to pre-trial detainees. [collecting cases] *Sandin* does not apply to pre-trial detainees. For a convicted prisoner, administrative segregation falls under the 'expected perimeters of the sentence imposed by a court of law.'. . But a pre-trial detainee is not subject to such an expectation of punishment. . . Unlike a convicted prisoner, a pre-trial detainee has a liberty interest in freedom from increased restraint, even if that restraint does not exceed the *Sandin* requirements. *Hewitt* continues to provide the correct framework for determining the procedural protections to which a pre-trial detainee is entitled to ensure that solitary confinement is not imposed as punishment."); ***Williamson v. Stirling***, 912 F.3d 154, 169, 175-86 (4th Cir. 2018) ("This appeal implicates important questions concerning the treatment of pretrial detainees, particularly with respect to their placement and holding in solitary confinement. . . . The level of procedural due process to which a pretrial detainee is entitled in a particular situation . . . depends on context. More specifically, a pretrial detainee's procedural protections vary according to whether a restriction was imposed for disciplinary or administrative purposes. If the restriction imposed by jail officials is a disciplinary one — arising from a pretrial detainee's misconduct in custody — the detainee is entitled to notice of the alleged misconduct, a hearing, and a written explanation of the resulting decision. . . If, however, a restriction imposed by the jail officials is for administrative purposes — which include managerial and security needs — the level of process to which the pretrial detainee is entitled is diminished. In those situations, the courts of appeals have generally concluded that some level of process must be afforded to the pretrial detainee, even if the process is provided after the restriction has been imposed. . . As a general proposition, such individualized restrictions — whether disciplinary or administrative — implicate procedural due process concerns. In some circumstances, however, the treatment of a pretrial detainee can be so disproportionate, gratuitous, or arbitrary that it becomes a categorically prohibited punishment that will sustain a substantive due process claim. . . Thus, although jail officials are entitled to impose discipline and promote internal security by placing restrictions on pretrial detainees, such measures must yet be rationally related to a legitimate governmental purpose, regardless of the procedural protections provided. . . . The Supreme Court's decision in *Wolff v. McDonnell* in 1974 recognized that convicted prisoners subject to disciplinary deprivations of liberty or property interests are entitled to notice, a hearing (which may involve witnesses and documentary evidence), and an explanation of the resulting decision. . . Consequently, a jail official that seeks to discipline a pretrial detainee must provide the detainee with at least the procedural protections required by

the *Wolff* decision. . . A similar — but less demanding — standard governs the imposition of administrative restrictions on convicted prisoners. As the Supreme Court ruled in *Hewitt v. Helms* in 1983, if a sentenced prisoner has a viable liberty interest, he must be afforded some minimal procedural protections before being subjected to more restrictive conditions of confinement for administrative purposes. . . That rule extends to the placement of such a prisoner in 'administrative segregation,' a term that generally refers to solitary confinement. . . In such situations, the *Hewitt* decision requires that prison officials provide a convicted prisoner 'some notice of the charges against him and an opportunity to present his views' to the deciding official, although that opportunity may be provided after the fact. . . Prisoners are also entitled to periodic review of their confinement to ensure that administrative segregation is not 'used as a pretext for indefinite confinement.'. . Those principles — as enunciated by the Supreme Court — provide a floor for the rights of pretrial detainees such as Williamson. . . That is, a pretrial detainee with a liberty interest in avoiding administrative restrictions is entitled to at least the *Hewitt* level of procedural protections. . . Although the *Hewitt* principles provide a floor for the rights of pretrial detainees, the precise level of process that is due in a given situation also depends on a balancing of interests, consistent with the test identified by the Court in *Mathews v. Eldridge*[.]. . . Thus, a court evaluating a pretrial detainee's procedural due process claim concerning an administrative restriction must decide whether the procedures provided to the detainee comply with *Hewitt* and satisfy the *Mathews* test. . . . According meaningful consideration to the inquiries identified by the Supreme Court in *Bell*, and accepting the facts in the proper light, Williamson has shown that a genuine issue of material fact exists as to whether his treatment as a pretrial safekeeper actually amounted to punishment that was unconstitutional under *Bell*. More specifically, the evidence would support a jury finding that his extended period of solitary confinement was not attributable to a nonpunitive rationale, or that it was excessive in relation to that purpose. . . . Most strikingly, Williamson was placed in solitary confinement — restricted to his cell twenty-three hours a day, with minimal access to books, phones, or any human contact — for more than three years, because of a single incident of unrealized and unrepeated threats. A reasonable jury could readily find such a response to be excessive — and thus punitive — in relation to the State's interest in preventing Williamson from carrying out the threats. . . . In sum, viewing the evidence in the proper light and making reasonable inferences favorable to Williamson, he has demonstrated that the summary judgment awards to Stirling and Carroll were not warranted as to his substantive due process claim. More specifically, he has presented evidence on which a reasonable factfinder could conclude that his three-and-a-half years of solitary confinement were so excessive relative to his infractions — and the defendants so arbitrary in their actions — that Williamson suffered unconstitutional punishment in violation of his substantive due process rights. . . .Turning to Williamson's procedural due process claim, we must decide whether his detention in solitary confinement as a safekeeper 'implicated a liberty interest triggering procedural due process requirements; and, if so, whether the procedures' afforded him 'satisfied those requirements.'. . The answers to those inquiries depend on the nature and purpose of the solitary confinement, namely, whether it was 'disciplinary' or 'administrative.' In either circumstance, however, we are satisfied that Williamson's pretrial detention in solitary confinement implicated a liberty interest that entitled him to a level of procedural protections. . . . In short, although jail officials are entitled to place

restrictions on pretrial detainees for misconduct committed during their detention, those regulatory types of discipline nevertheless intrude on the detainee's liberty interest in remaining free from punishment. Accordingly, a pretrial detainee may not be disciplined in the absence of some level of due process. . . To determine whether a particular restriction is disciplinary — rather than administrative — the courts again consult the framework of *Bell*, which guides that inquiry for procedural as well as substantive due process claims. Such courts must ask whether the restriction is expressly punitive, or whether a punitive intent may be inferred because the restriction is not reasonably related to a legitimate, nonpunitive purpose. . . As explained heretofore, a triable issue is presented here concerning whether Williamson's prolonged placement in solitary confinement constituted punishment under *Bell*. That issue also bears on whether Williamson's extended period of solitary confinement was 'disciplinary'— rather than 'administrative' — and thus whether it intruded on his liberty interest in remaining free from punishment. . . Such disciplinary measures trigger the procedural protections recognized in the Court's 1974 *Wolff v. McDonnell* decision: that is, notice, a hearing, and a written explanation of the resulting decision. . . Accordingly, if Williamson's conditions of solitary confinement were imposed for a disciplinary purpose, the responsible officials intruded on his liberty interest in being free from punishment. In that event, Williamson was owed the level of process established by *Wolff*. . . .If, on the other hand, Williamson was in solitary confinement for more than three years for 'administrative' reasons, the question is whether, as a pretrial detainee, he nevertheless possessed a liberty interest in avoiding 'administrative segregation.' As explained below, Williamson possessed such a liberty interest. This issue is somewhat complex and our sister circuits seem to have approached it from different perspectives. Some circuits have ruled that pretrial detainees possess a liberty interest in being free from indefinite or prolonged administrative segregation. [citing cases from 7th and 3d Circuits] Another group of circuits has suggested that the liberty interest identified in *Bell* — remaining free from punishment — triggers some minimal procedural protections for administrative actions that further restrict a pretrial detainee's liberty. [citing cases from 2d, 9th and 8th Circuits] A third group of the courts of appeals — addressing short-term periods of confinement — have concluded that pretrial detainees do not have a liberty interest in avoiding limited administrative restrictions. [citing cases from 8th, 7th, and 6th Circuits] We are satisfied, however, to rely on the *Bell* decision and the Supreme Court's subsequent rulings explaining the level of process owed to convicted prisoners. As explained heretofore, the rights accorded convicted prisoners provide a floor for detainee rights. . . And Supreme Court precedent establishes that convicted prisoners possess some procedural due process rights with respect to administrative segregation. . . .The procedural protections afforded convicted prisoners inform the minimum standards for procedures that accompany the administrative segregation of pretrial detainees. . . Although the *Hewitt* decision conditioned those protections on the prisoner's ability to show a liberty interest, that principle does not pose an obstacle to pretrial detainees such as Williamson. . . . Our Court and every circuit to assess the question has rejected the application of *Sandin*'s 'atypical and significant hardship' test to pretrial detainees, whom *Sandin* itself distinguished from convicted prisoners. . . On the other hand, it is clear that a pretrial detainee must yield some of his rights in order for the authorities to effectively manage detention facilities. . . Prior to conviction, however, a pretrial detainee's liberty interests do not categorically yield to the managerial interest of the jail authorities.

The *Bell* decision even acknowledged the 'operational concerns' that inhere in the effective administration of jails, but Justice Rehnquist, in his majority opinion, did not suggest that those concerns should necessarily prevail over a detainee's liberty interests. . . We are therefore satisfied that a pretrial detainee — such as Williamson — has a liberty interest in avoiding the harsh conditions of solitary confinement, and that a detainee confined for administrative purposes is entitled to at least the procedural protections mandated by *Hewitt*. . . . On his procedural due process claim, Williamson similarly has a triable issue concerning the purpose of his solitary confinement. Specifically, a jury must determine whether that confinement was disciplinary or administrative. That determination will delineate whether Williamson was owed the *Wolff* level of process generally applicable to disciplinary measures, or — at minimum — the *Hewitt* level of process that provides the floor for procedures that accompany a pretrial detainee's administrative segregation. The *Bell* inquiry — whether the conditions imposed on a pretrial detainee are rationally and proportionally related to a nonpunitive purpose — should also guide this determination. . . We leave to the remand proceedings the determination of whether the level of process that Williamson was provided satisfies the *Mathews* principles and, as applicable, the minimum procedural protections established by *Wolff* or *Hewitt*."); ***Johnson v. Houston County, Georgia***, 758 F. App'x 911, ___ (11th Cir. 2018) ("Hays presents two arguments in support of her view that the district court erred in finding a constitutional violation. First, she contends that the court erred in finding that she was required to perform a periodic review of Johnson's administrative-segregation classification. She asserts that no periodic review is necessary when an inmate's administrative confinement is unconnected with the disciplinary process. Second, she maintains that the court erred in finding that Johnson had a liberty interest in freedom from administrative segregation, stating that Johnson cannot meet the standard established by the Supreme Court in *Sandin v. Conner*, 515 U.S. 472 (1995). These arguments, however, fail to address the stated ground for the district court's ruling. In finding a constitutional violation, the court did not cite Hays's failure to perform a 'periodic review,' which is a procedural protection sometimes afforded to those confined in administrative segregation. . . Nor did the court find that Johnson met *Sandin*'s standard, which does not, in any event, apply to pretrial detainees like Johnson. . . Instead, the district court concluded that Johnson had established a substantive-due-process violation under *Wolfish* by showing that the more restrictive conditions of administrative segregation were not reasonably related to a legitimate goal. . . .Accordingly, Hays's arguments relating to *Sandin* and periodic review do nothing to convince us that the stated ground for the district court's decision was incorrect."); ***Dilworth v. Adams***, 841 F.3d 246, 251-55 (4th Cir. 2016) ("*Sandin*, which concerned the punishment of convicted prisoners, . . . has no application to pretrial detainees like Dilworth. . . .Every federal court of appeals to consider the question has concluded that *Sandin's* 'atypical and significant hardship' standard does not govern the procedural due process claims of pretrial detainees. *See Jacoby v. Baldwin Cty*., [835 F.3d 1338] (11th Cir. Aug. 29, 2016); *Hanks v. Prachar*, 457 F.3d 774, 776 (8th Cir. 2006) (per curiam); *Surprenant*, 424 F.3d at 17; *Peoples v. CCA Det. Ctrs*., 422 F.3d 1090, 1106 n.12 (10th Cir. 2005); Benjamin v. Fraser, 264 F.3d 175, 188–89 (2d Cir. 2001); *Rapier v. Harris*, 172 F.3d 999, 1004–05 (7th Cir. 1999); *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996); *see also Fuentes v. Wagner*, 206 F.3d 335, 342 n.9 (3rd Cir. 2000) (holding *Sandin* inapplicable to detainee convicted but not yet

sentenced), *cert denied*, 531 U.S. 821 (2000). We join our sister circuits and hold that Dilworth, as a pretrial detainee, was entitled under *Bell* to procedural due process in connection with any 'punishment' imposed on him by the Detention Facility. . . .We, too, conclude that disciplinary segregation of a pretrial detainee, intended as a penalty for disciplinary infractions, implicates a protected liberty interest under the Fourteenth Amendment and may not be imposed without due process. . . .As the defendants concede, the process afforded Dilworth complies with neither the Detention Facility's policy nor the dictates of *Wolff*. There is no factual dispute as to what process Dilworth received: the opportunity to take a written appeal after his sanction was finalized. Nor can there be any question but that this process falls short of what *Wolff* requires. Under *Wolff*, the core component of due process in the prison discipline context is the right to a hearing. . . .That is not to say, of course, that prison or jail officials are barred from taking immediate action, without a prior hearing, in response to altercations like Dilworth's or other disciplinary offenses. On the contrary, it is clear—and Dilworth does not dispute—that for safety or security reasons, a jail may take immediate preventative action to segregate a detainee after a fight or disruption. . . And prisons and jails may and routinely do place inmates charged with disciplinary infractions in 'administrative segregation' pending their disciplinary hearings, allowing both prison officials and inmates time to investigate and prepare for those hearings. . . .But all of this presupposes that there is, in fact, a hearing in connection with the final imposition of disciplinary action, and that is the element that is missing here. On this record, it is plain that Dilworth was not provided a hearing before he was subjected to punishment in the form of disciplinary segregation, and the defendants do not contend otherwise. That is enough to resolve Dilworth's due process claim as a matter of law."); ***Jacoby v. Baldwin County***, 835 F.3d 1338, 1347-51 (11th Cir. 2016) ("*Sandin* recognized this distinction between convicted inmates, who can be punished without a due process hearing, and pretrial detainees, who cannot. . . .*Sandin* leaves intact *Bell*'s holding that 'a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.'. . It's true that Mr. Jacoby's procedural due process claim is different than the substantive due process claims brought in *Bell*. He challenges his being placed in segregation after what he views as an inadequate hearing. He does not challenge the general conditions of his incarceration with this claim. And the jail imposed disciplinary segregation not as punishment for the crime that led to Mr. Jacoby's detention, but rather as punishment for his violation of jail rules. Still, *Bell*'s teachings apply here with equal force. A pretrial detainee like Mr. Jacoby may not be punished for his misconduct while in prison unless he is given a due process hearing. . . A pretrial detainee need not meet the *Sandin* standard to establish his right to a due process hearing before being placed in disciplinary segregation. Specifically, a pretrial detainee is not required to prove that his conditions of confinement either 'exceed[ ] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force' or 'impose[ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,'. . . to be entitled to the process governed by *Wolff*. Rather, a pretrial detainee is entitled to a due process hearing before being subjected to 'conditions [that] amount to punishment.' . . .Of course this does not mean that Mr. Jacoby and his fellow pretrial detainees are free to violate jail rules with impunity. Indeed, *Bell* recognizes the need for 'preserving internal order and discipline' among pretrial detainees and convicted inmates alike. . . What it does mean, however, is that before Mr. Jacoby, as a pretrial

detainee, is punished for violating a jail rule, there must be a due process hearing to determine what rule he violated. This approach is consistent with both *Bell* and *Sandin*. . . . Every other Circuit that has squarely considered this question has concluded that *Bell* creates a due process right for pretrial detainees who are subject to punishment. [collecting cases] We hold that, consistent with *Bell*, Mr. Jacoby was entitled to the due process protections enshrined in *Wolff* before being placed in disciplinary segregation. . . .Because Mr. Jacoby is a pretrial detainee, his substantive and procedural due process claims fall within *Bell*'s ambit. We reiterate *Bell*'s holding that 'a [pretrial] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.'. . For this reason, we hold that Mr. Jacoby was entitled to the due process hearing he received before being punished for his misconduct while in jail. However, because Mr. Jacoby has failed to overcome Sheriff Mack's qualified immunity defense on either of his claims, we affirm the District Court's grant of summary judgment."); ***Surprenant v. Rivas***, 424 F.3d 5, 17 (1st Cir. 2005) ("[T]he *Sandin* Court's rationale applies only to those convicted of crimes − not to pretrial detainees. The courts of appeals that have addressed this question are consentient on the point. [citing cases] We share that view. Pretrial detainees, unlike convicts, have a liberty interest in avoiding punishment − an interest that derives from the Constitution itself. . . Because the plaintiff in this case was a pretrial detainee at and prior to the time of the accusation and the hearing, *Sandin* is inapposite."); ***Rapier v. Harris***, 172 F.3d 999, 1004, 1005 (7th Cir. 1999); ***Whitford v. Boglino***, 63 F.3d 527, 531 n.4 (7th Cir.1995); ***T.S. v. Twentieth Century Fox Television***, No. 16 C 8303, 2017 WL 1425596, at *3–4 (N.D. Ill. Apr. 20, 2017) ("In Count I of the First Amended Complaint, Plaintiffs allege that as juvenile detainees, the Fourteenth Amendment due process clause provides them certain protections in relation to the conditions of their confinement and that all of the Defendants violated these protections. . . As the Seventh Circuit instructs, 'there is little practical difference, if any, between the standards applicable to pretrial detainees and convicted inmates when it comes to conditions of confinement claims, and that such claims brought under the Fourteenth Amendment are appropriately analyzed under the Eighth Amendment test.' *Smith v. Dart*, 803 F.3d 304, 310 (7th Cir. 2015). That being said, under the seminal Supreme Court decision relating to pretrial detainees' due process rights, namely, *Bell v. Wolfish*, the Supreme Court held that 'court [s] must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.'. . More specifically, '[i]n the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose."'. . Here, the challenged governmental action consists of the three lockdowns at the JTDC that occurred in June, July, and August 2015. Plaintiffs argue that these lockdowns, which resulted in the denial of their due process rights, were not rationally related to a legitimate nonpunitive purpose, but rather, the purpose of these lockdowns was to provide the Fox Defendants with a realistic prison facility to film two *Empire* episodes. In response, Defendants Dixon and Cook County argue that Plaintiffs have failed to allege a sufficient deprivation of their liberty interests in the context of substantive due process protections pursuant to *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 415 (1995), and its progeny—which is not Plaintiffs' theory of liability concerning the conditions of their confinement because Plaintiffs are not

incarcerated adult prisoners challenging disciplinary segregation. . . Instead, Plaintiffs' theory of the case is that all of the Defendants violated Plaintiffs' due process rights in relation to the conditions of their confinement as juvenile pretrial detainees in contradiction of *Bell v. Wolfish*.").

See generally ***Carlo v. City of Chino***, 105 F.3d 493, 498-99 (9th Cir. 1997) (noting that "[a] majority of the courts that have addressed this question have held that *Sandin* does not govern the assessment of state-created liberty interests for pretrial detainees[,]" citing cases and concluding that "holding an arrestee incommunicado is a restraint atypical of post-arrest detention."). *But see* ***Anderson v. Chapman***, 604 F. App'x 810, 813 (11th Cir. 2015) ("A convicted inmate's confinement to administrative segregation for non-punitive reasons does not violate due process because such segregation is 'ordinarily contemplated by a prison sentence.' *Sandin v. Conner*, 515 U.S. 472, 480, 115 S.Ct. 2293, 2298, 132 L.Ed.2d 418 (1995). We find no controlling precedent holding that the same is not true with respect to pretrial detainees as well. In short, confinement in administrative segregation under conditions substantially similar to those experienced by the general jail population does not implicate a liberty interest. . . The evidence in this case is that Anderson's placement was similar to the placement of anyone facing charges such as Anderson's. The placement was not for punishment; rather, it was done to ensure Anderson's safety and to minimize the risk of violence between inmates.").

See also ***Tilmon v. Prator,*** 368 F.3d 521, 523 (5th Cir.2004) (per curiam) ("Tilmon had argued that *Sandin* did not apply, citing *Fuentes v. Wagner*, 206 F.3d 335 (3d Cir.2000), in which that court held that a convicted inmate awaiting sentencing has the status of a pretrial detainee. The district court rejected Tilmon's argument that because he was convicted but not sentenced, *Sandin* did not apply. . . . We do not read *Bell v. Wolfish* as suggesting that a convicted but unsentenced prisoner should be treated as a pretrial detainee. . . . In our view, the adjudication of guilt, *i.e.*, the conviction, and not the pronouncement of sentence, is the dispositive fact with regard to punishment in accordance with due process. The Eighth, Ninth, and Tenth Circuits have recognized this principle. [discussing cases]").

See also ***Miller v. Dobier***, 634 F.3d 412, 415 (7th Cir. 2011) (disciplinary measures to which civil detainee was subjected were not so atypical and significant as to constitute deprivation of liberty interest, and thus procedural due process protections of *Sandin* were not triggered); ***Thielman v. Leean,*** 282 F.3d 478 (7th Cir. 2002) (applying *Sandin* in context of mental health facility where sexually violent person is committed for control, care, and treatment until no longer a sexually violent person).

The Court has held that, in certain circumstances, the Constitution itself may give rise to a liberty interest. *See, e.g.*, ***Washington v. Harper***, 494 U.S. 210, 221-222 (1990) (involuntary administration of antipsychotic drugs); ***Vitek v. Jones***, 445 U.S. 480 (1980) (involuntary commitment to a mental hospital). *See also* ***Adams v. Harahan***, 95 F.4th 908, 915-17 (5th Cir. 2024) ("As he did at the district court, Adams maintains that the City deprived him of his right to a career in law enforcement and the armed forces by prompting JPDA to place him on the *Giglio*

list. We disagree. A plaintiff claiming that his right to work in a common occupation must 'plead facts showing that [the defendants] effectively foreclosed him from practicing his chosen profession to show a deprivation.'. . Our precedent makes clear that a plaintiff's liberty interest remains intact when the Government simply makes his efforts to remain in a given vocation more difficult or even 'nearly impossible[.]'. . . To conclude, the City incorrectly insists that the district court created a novel liberty interest in this case. The district court's decision to acknowledge Adams's right to a career in law enforcement is supported by decades of Fifth Circuit jurisprudence. . . We nonetheless hold in the City's favor because Adams has not pleaded that an actual deprivation of this recognized interest occurred by failing to state that the City foreclosed his career in law enforcement or the armed forces. And because the City never violated Adams's liberty interest, we need not address his remaining arguments on the amount and degree of process he received.")

See also ***Capen v. Saginaw County, Michigan***, 103 F.4th 457, 463-64, 466 (6th Cir. 2024) ("Capen does not argue that he has a protected property interest in his employment, that he experienced stigma as a result of his evaluations, or that his right to privacy was violated, unlike in the cases of our sister circuits. Instead, Capen's sole argument on appeal is that that the Due Process Clause's guarantee of liberty protects an individual's ability to refuse unwanted medical treatment, and that this protection extends to his ability to refuse his fitness-for-duty evaluations. However, the liberty interest in refusing medical treatment does not protect Capen's ability to refuse the fitness-for-duty evaluations at issue in this case. The ability to refuse medical treatment is indeed protected by the Due Process Clause. The Supreme Court said so in *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, when it declared that competent individuals 'ha[ve] a constitutionally protected liberty interest in refusing unwanted medical treatment.'. . But we find it significant that Capen was not forced to accept any treatment, the very core of the right the Supreme Court identified in *Cruzan*. Capen attended a brief psychological evaluation and was scheduled for a second psychological evaluation, neither of which required him to receive a particular course of treatment. Instead, the purpose of the evaluations appeared to be descriptive. The evaluations sought to collect information from Capen and render a conclusion based on that information, rather than order him to make particular treatment decisions. While Dr. Zaroff's report summarizing the first evaluation recommended that Capen seek individual counseling because of the stress he was under, nothing in the record suggests that this was anything but a recommendation. Capen was not required to attend counseling, nor was counseling made a condition of Capen's employment. Capen was therefore not forced to seek what we would commonly understand to be treatment. . . Additionally, the Supreme Court has declared that the right to refuse unwanted medical treatment—the only right on which Capen rests his argument—is based 'on well-established, traditional rights to bodily integrity and freedom from unwanted touching.'. . Capen's psychological evaluations to determine whether he was competent to perform his work, while no doubt personal, do not involve comparable intrusions. The fitness-for-duty evaluation Capen attended involved meeting with a psychologist to perform two standardized written and verbal tests that looked at his memory, comprehension, reading, writing, and drawing abilities. Capen does not point to any violation of his person caused by this evaluation or the second

evaluation for which he was scheduled, nor did these limited evaluations encroach on his rights in an analogous manner. From this record, Capen has failed to show that his evaluations implicate the right to refuse treatment. . . .The only right that Capen claims Defendants violated—his ability to refuse his fitness-for-duty evaluations under the circumstances present here—does not furnish to him a protected interest under the Due Process Clause. . . We do not address whether or the extent to which an employee may refuse fitness-for-duty evaluations under circumstances not presented in this case. Suffice it to say that compelling circumstances existed in the instant case which justified and supported the County's decision to require the fitness-for-duty evaluations. While Capen's fitness-for-duty evaluations were no doubt stressful, deeply personal, and consequential to him, he has not shown that his ability to refuse these evaluations was protected by the Constitution. Capen is therefore unable to demonstrate that Defendants violated his constitutional rights, defeating his claim under 42 U.S.C. § 1983."); ***Benning v. Commissioner, Georgia Department of Corrections***, 71 F.4th 1324, 1329-33 & n.2 (11th Cir. 2023), *cert. denied sub nom Benning v. Oliver*, No. 23-664 (U.S. Apr. 29, 2024) ("We hold that Mr. Benning had a protected liberty interest in his outgoing emails, and as a result he was entitled to notice and other procedural safeguards when the three emails to his sister were intercepted and withheld. But we agree with the district court that Ms. Edgar and Ms. Patterson are entitled to qualified immunity on Mr. Benning's due process claims for damages because the law to that effect was not clearly established in September and October of 2017.[2] **[fn.2:** We address the merits of the due process claims because, as explained later, Mr. Benning's requests for declaratory relief as to those claims are not barred by qualified immunity.**]** . . . . This case. . . involves the censoring of emails rather than physical letters. So, like the district court, we must decide whether emails are the equivalent of physical letters for purposes of a liberty interest. We conclude that under [*Procunier v.*]*Martinez* Mr. Benning had a protected liberty interest, grounded in the First Amendment, in the emails he generated and sought to send to his sister. . . . From the perspective of the GDC, emails are the functional equivalent of letters written or typed on paper. And we can think of no persuasive reason why prison officials should not be required to provide notice and other procedural safeguards when they intercept or otherwise censor emails sent by inmates. . . .As a result, whether Mr. Benning had a free-standing constitutional or statutory right to use the GDC email system does not affect or resolve the procedural due process question under *Martinez*. In any event, it is the First Amendment—and not state law—which creates a liberty interest here. . . . Mr. Benning had a protected First Amendment liberty interest in his outgoing emails, and a reasonable jury could find that he was not provided any notice of the interceptions or of his right to challenge the decisions."); ***Desper v. Clarke***, 1 F.4th 236, 246-47 (4th Cir. 2021) ("With respect to Desper's invocation of a liberty interest protected by the Due Process Clause, Desper relies upon case law defining a parent's interest in 'the companionship, care, custody and management of his or her children.'. . But cases such as *Lassiter* considered the parent-child relationship outside of the prison context, and Desper does not, as a duly incarcerated person, have the same liberty interest as one who is not incarcerated. . . By its very nature, prison restricts an incarcerated father's interactions with his children. And restrictions placed on registered sex offenders — especially those whose offenses involved minor victims — may be all the more austere. . . We therefore doubt that Desper has any protectable interest in visiting with a minor child. . . . Our review of Operating Procedure 851.1

leads us to conclude that its provisions do not confer a liberty interest on any inmate. First, it lacks the necessary substantive predicates that guide official discretion, as it treats visitation as 'a privilege' and establishes as a default policy for sex offenders that they 'will *not* be allowed to visit with any minor *until* granted a sex offender visitation *exemption*.'. . Moreover, the Operating Procedure does not specify 'substantive predicates' in granting an exemption from the default policy, nor does it mandate an exemption in defined circumstances. In short, the Operating Procedure does not give a reasonable inmate an objective expectation that he would *be entitled* to visitation 'absent the occurrence of one of the listed conditions.'. .Thus, we conclude that Desper has not plausibly alleged a procedural violation of the Due Process Clause as the process he received was adequate for any protectable liberty interest he may have had."); ***Hurd v. District of Columbia***, 864 F.3d 671, 682-83 (D.C. Cir. 2017) ("A prisoner who is released from prison early does in certain circumstances have a protected liberty interest entitling him to some form of process before re-incarceration, and the facts as plausibly pleaded here show such an interest. The Due Process Clause may itself confer a procedurally protected liberty interest on someone living openly in society for years after what, unbeknownst to him, was his premature release from prison. The Due Process Clause protects liberty, U.S. Const. amend. V, XIV, and 'freedom from bodily restraint' is at the very core of that protected interest. . . The freedom of a person to conduct his life physically unconfined by the government is among the most fundamental of constitutional liberty interests. The Supreme Court has repeatedly held that in at least some circumstances, a person who is in fact free of physical confinement—even if that freedom is lawfully revocable—has a liberty interest that entitles him to constitutional due process before he is re-incarcerated. . . . When a person lives in society at large for years, goes through a transition that, by all appearances, marks the formal end of the last stage of his sentence, and only then faces re-incarceration on the ground that he was prematurely released, the prospect of re-incarceration has implications both for him and the other individuals in his life as substantial as those of the parolee in *Morrissey*. Hurd alleges facts that support a liberty interest crystallized sufficiently by the close of the period of supervision to entitle him to some kind of process before re-incarceration."); ***Steele v. Cicchi***, 855 F.3d 494, 502-03 (3d Cir. 2017) ("There is no dispute between the parties that Steele had a constitutionally protected liberty interest in exercising his bail option, once bail had been set, sufficient to trigger substantive due process protection. We agree. Such a right emanates from the liberties 'at the heart' of the Due Process Clause: the freedom 'from government custody, detention, or other forms of physical restraint' prior to any determination of guilt. . . .Other Circuits acknowledge that substantive due process protection of this liberty interest attaches once arrestees are deemed eligible for release on bail. [collecting cases] Accordingly, we conclude that Steele had a protected liberty interest in exercising his bail option once his bail was set. Having established that his asserted liberty interest is protected by substantive due process, Steele must also show that 'the government's deprivation of that protected interest shocks the conscience.'. . . We cannot say that Defendants' actions here amount to even deliberate indifference. . . . At bottom, we cannot agree with Steele's argument that in the specific circumstances of this case substantive due process required Defendants to provide Steele with unlimited, non-legal telephone privileges during his time in administrative segregation so that he could attempt to find a co-signer for his bail and exercise his bail option. . . Defendants' limitation of Steele's phone privileges did not

'shock the conscience,' and therefore, Steele's claim that Defendants violated his due process right to exercise his bail option fails."); ***Renchenski v. Williams***, 622 F.3d 315, 327 (3d Cir. 2010) (agreeing with the Eleventh and Fifth Circuits that "labeling a prisoner a sex offender and forcing him or her to submit to intensive therapy triggers a liberty interest"); ***Kirby v. James***, 195 F.3d 1285, 1292 (11th Cir. 1999) (holding that "the stigmatizing effect of being classified as a sex offender constitutes a deprivation of liberty under the Due Process Clause."); ***Coleman v. Dretke***, 395 F.3d 216, 222, 223 (5th Cir. 2004) (same). *But see* ***Powell v. Weiss***, 757 F.3d 338, 343, 346 (3d Cir. 2014) (inmate had no "independent due process nor a state-created liberty interest in his revoked prerelease status" and "anticipated transfer to a community correctional center."); ***Chappell v. Mandeville***, 706 F.3d 1052, 1063 (9th Cir. 2013) ("An investigative contraband watch is the type of condition of confinement that is ordinarily contemplated by the sentence imposed. Only the most extreme changes in the conditions of confinement have been found to directly invoke the protections of the Due Process Clause, such as involuntary commitment to a mental institution, *see Vitek v. Jones*, 445 U.S. 480, 493–94 (1980), or the forced administration of psychotropic drugs, *Washington v. Harper*, 494 U.S. 210, 221–22 (1990). Since a temporary contraband watch does not rise to this level, Chappell cannot directly claim a liberty interest under the Due Process Clause of the Fourteenth Amendment."); ***Overton v. Bazzetta***, 123 S. Ct. 2162, 2170 (2003) ("[W]ithdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline . . . is not a dramatic departure from accepted standards for conditions of confinement."); ***Bazzetta v. McGinnis***, 430 F.3d 795, 802, 803 (6th Cir. 2005) ("We extrapolate from *Overton* and *Sandin* that the substance abuse regulation is neither a 'dramatic departure,' nor an 'atypical and significant hardship' in relation to the ordinary incidents of prison life. Thus, although the issue was not directly before the *Overton* Court, Court precedent and dictum has signaled against our finding a liberty interest on the face of the substance abuse regulation. . . . As detailed above, the *Overton* Court subsequently foreclosed a facial procedural due process challenge under the standard set forth in *Sandin*. The Court's decision in *Overton* does not preclude individual prisoners from challenging a *particular* application of the substance abuse regulation on First Amendment, Eighth Amendment or Fourteenth Amendment grounds but such '[a]n individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, ... [does] not support the ruling ... that the entire regulation is invalid.'. . . We know of no circuit court that has found an implicit due process right to prison visitation. In fact, the *Sandin* decision perpetuated the Court's general resistance to directly reading the Due Process Clause without support from a positive source of law, absent evidence of a 'grievous loss.' Although the substance abuse regulation at issue here is 'severe,' . . . we decline to hold that, on its face, it rises to the level of egregious conduct necessary to implicate the implicit guarantees of the Due Process Clause.").

See also ***Jones v. Cummings***, 998 F.3d 782, 788-89 (7th Cir. 2021) ("It is common ground by now that when defendants Koester and Kopp filed the untimely amendment, they violated Indiana law. Jones, however, is asserting that this state-law problem led to the deprivation of his Fourteenth Amendment right to due process of law. But a failure to follow state law does not automatically trigger a federal constitutional due-process violation. Indeed, the state-law consequences of the action are largely beside the point. What matters is the content of the

plaintiff's argument. Often a state-law problem has no federal implications at all, though in some cases there can be overlapping violations. For example, criminal defendants are entitled to advance notice of the charges they face in order to prepare for trial. . . An untimely amendment made so close to the start of trial that it prejudices a defendant's ability to prepare for trial might simultaneously violate state law and the defendant's federal due-process rights. But Koester and Kopp made their untimely amendment on October 27, 2005, about eight months before Jones's trial began on June 12, 2006[.] . . Jones has never alleged the amendment prejudiced his ability to prepare for trial or in any other way affected the fundamental fairness of the procedures the state used. We need not delve into the question whether eight months was long enough to allow Jones to prepare, though the fact that the default rule under the Speedy Trial Act, 18 U.S.C. § 3161, calls for an indictment within 30 days of arrest and trial 70 days later strongly suggests that there is no generic problem with eight months. . . The only claim Jones makes is that the prosecutors violated state law and that our finding of a constitutional violation in *Jones III* proves the point. But Jones has received his remedy for the ineffectiveness of counsel, and he has not linked the underlying state-law violation to any other federal constitutional right. The district court thus could have dismissed on this ground as well, had it reached the merits."); ***James v. Pfister***, 708 F. App'x 876, ___ (7th Cir. 2017) ("Because we are remanding this case, we add two observations concerning James's claim that he was denied due process at his disciplinary hearing. First, as the district court observed, James cannot use § 1983 to enforce Department of Corrections regulations and policies. . . Neither can he assert a liberty interest arising from the procedures adopted by the parties in *Rasho* or from the Illinois statute and administrative directive which, James says, resulted from that case. . . Even if these sources might have created liberty interests for inmates suffering from serious mental illness, those state-created interests would not necessarily be protected by the Due Process Clause of the Fourteenth Amendment. . . Mentally ill inmates are not constitutionally guaranteed heightened procedural protections, so any state-created liberty interest for mentally ill inmates is subject to the Due Process Clause only if it passes the test in *Sandin*. James does not argue that the extra safeguards provided for mentally ill inmates are meant to protect them from atypical or significant hardships as compared to normal prison life. Rather, he argues essentially that § 5/3-2-2 and Directive 05.12.2013 constitute promises by the state to treat mentally ill inmates differently. But there is no constitutional dimension to these promises. . . Furthermore, although the parties in *Rasho* have reached agreement on many issues, the case is ongoing. Any concerns James has regarding decisions in *Rasho* should be directed to class counsel in that case. Second, we note that much of James's due process claim focuses on the allegation that he wasn't told about another inmate's confession to the conduct he allegedly committed. For disciplinary hearings resulting in lost good time, we have held that *Brady v. Maryland*, 373 U.S. 83 (1963), applies and, with some exceptions, requires that exculpatory evidence be disclosed to the inmate. . . Whether *Brady* also would apply as part of the informal procedures sometimes required before subjecting an inmate to harsh segregation without also subjecting the inmate to a loss of good time is a question that, as far as we can tell, no court has considered. This question, if pursued by James on remand, can be addressed by the parties and the district court in the first instance."); ***Steele v. Cicchi***, 855 F.3d 494, 508-09 (3d Cir. 2017) ("The focus of Steele's procedural due process challenge circles back to Defendants' asserted reasons for transferring Steele to administrative

segregation. He argues that he was transferred for disciplinary reasons, and, therefore, due process protections required MCACC officials to provide him with a written statement of the evidence and charges against him, which he did not receive. . . For the reasons already noted, however, we agree with the District Court that the summary judgment record in this case shows that Steele's transfer was for institutional security reasons rather than for discipline or punishment. Steele was administratively separated from the general MCACC population pending further investigation into his conduct and Speedy's activities within the MCACC. Therefore, he was due the level of process outlined in *Hewitt*. . .Steele also contends throughout his briefing that Defendants violated the Due Process Clause by failing to follow the procedures outlined in the Manual. Even if we were to find that the parties' actions implicated certain procedures set forth in the Manual, there is no standalone protected liberty interest in those procedures. . . . [A] valid due process claim will not automatically follow from Defendants' failure to abide by the Manual's procedural requirements. Further, where a plaintiff establishes a state-created liberty interest, a court must determine the level of process due by drawing from federal constitutional law, not from state laws, regulations, or policies. . . So here, the MCACC Manual does not dictate what level of process will pass constitutional muster. Accordingly, this argument fails."); ***Jenner v. Nikolas***, 828 F.3d 713, 716-17 (8th Cir. 2016) ("[D]espite the fact that Jenner has a statutory right to a parole hearing, that right is not a protected liberty interest. The existence of a state-mandated procedural requirement does not, in and of itself, create a constitutionally protected liberty interest. . . .Accordingly, Jenner does not have a protected liberty interest in her statutory right to a parole hearing. . . .The process of providing an unbiased and impartial tribunal does not exist in a vacuum, it exists to afford due process when due process is required to protect a liberty interest. Providing an unbiased and impartial tribunal *itself* is not a liberty interest protected by due process. . . .That the Board is statutorily required to provide a hearing does not change its procedural nature. Because Jenner's statutory right to a parole hearing is not a protected liberty interest, there is no interest for process to protect in this case."); ***Jordan v. Fisher***, 823 F.3d 805, 811-12 (5th Cir. 2016) (as revised) ("Plaintiffs argue that they have a liberty interest created by state law, specifically § 99–19–51, and that it prevents the state from executing them using any drugs other than 'an ultra short-acting barbiturate or other similar drug' as the first drug in a three-drug cocktail. However, even if the revised lethal injection protocol does not conform to § 99–19–51, 'a mere error of state law is not a denial of due process.'. . Plaintiffs contend that § 99–19–51 creates a liberty interest because it places 'substantive limitations on official discretion.' *Olim v. Wakinekona,* 461 U.S. 238, 249 (1989); *accord Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 462 (1989); *Hewitt v. Helms,* 459 U.S. 460, 471 (1983) (state created liberty interest in prison regulations characterized by 'repeated use of explicitly mandatory language'). The Supreme Court, however, later expressly rejected the 'substantive limitations' test used in *Olim, Hewitt,* and *Thompson,* reasoning that it 'create[d] disincentives for States to codify prison management procedures' and 'led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone.' *Sandin,* 515 U.S. at 482; *accord Wilkinson,* 545 U.S. at 222–23 (recognizing *Sandin's* rejection of the *Hewitt–Olim* standard). Instead, the Court now relies on *Sandin's* test to determine whether a state law or procedure gives rise to a liberty interest, asking whether the state's proposed deviation from policy 'imposes atypical and significant hardship on the inmate in relation

to the ordinary incidents of prison life.'. . Therefore, in order to establish a liberty interest arising from § 99–19–51, Plaintiffs must show that execution with pentobarbital or midazolam would 'impose atypical and significant hardship' on them beyond the ordinary for those facing execution. . . The Court has recognized such hardship in a very small number of cases generally related to extensive solitary confinement or imprisonment beyond the term permitted by state law. *See, e.g., Wilkinson v. Austin,* 545 U.S. 209 (2005) (prisoners had a liberty interest in the state's decision to confine them in a supermax facility with highly restrictive solitary confinement conditions); *Hicks v. Oklahoma,* 447 U.S. 343 (1980) (prisoner had liberty interest in serving only ten years in prison rather than the forty years he was sentenced to under a habitual offender statute subsequently held to be unconstitutional); *Vitek v. Jones,* 445 U.S. 480, 491 (1980) (prisoner had liberty interest in remaining in prison rather than a mental hospital); *Washington v. Harper,* 494 U.S. 210, 221 (1990) (prisoner had liberty interest in avoiding involuntary administration of antipsychotic medication). Here, however, Mississippi's statutory requirements and the associated lethal injection protocol are not 'atypical ... in relation to the ordinary' in comparison with other states' execution protocols. The three-drug protocol and the particular drugs Mississippi proposes to use (midazolam, a paralytic, and potassium chloride) are typical for those states that use lethal injection and were recently upheld in the face of a constitutional challenge. *Glossip v. Gross,* 135 S.Ct. 2726, 2735 (2015) (describing Oklahoma's three-drug lethal injection protocol as midazolam, a paralytic, and potassium chloride). Because Plaintiffs have failed to demonstrate Mississippi's intent to 'impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,'. . . they have not established that the state's revised protocol invades a protected liberty interest. Even if § 99–19–51 were to create a liberty interest, the right it creates would be subject only to procedural protection. State law is not a source of liberty interests that are substantively protected by the Fourteenth Amendment; rather, it gives rise to interests that are promised procedural protections by the Fourteenth Amendment. . . . Our sister circuit has concluded that state post-conviction relief petitions satisfy a prisoner's right to seek proper enforcement of a state's method-of-execution law. *Pavatt v. Jones,* 627 F.3d 1336, 1341 (10th Cir.2010). We agree. Mississippi provides an adequate forum for the vindication of Plaintiffs' rights that arise from state law. Mississippi's post-conviction relief statute explicitly empowers prisoners to challenge their sentence as 'imposed in violation of the ... Constitution or laws of Mississippi.' Miss.Code Ann. § 99–39–5(1). If Plaintiffs wish to protest that Mississippi's revised lethal injection protocol is an unlawful deviation from Mississippi's laws, Mississippi's courts are the appropriate venue for their suit."); ***Bell v. McAdory***, 820 F.3d 880, 884 (7th Cir. 2016) ("[W[e see no reason for the district judge to give a second thought to Bell's argument that Rushville's (asserted) failure to give him the benefit of procedures established by state law creates a problem under § 1983. Although the Due Process Clause sometimes requires procedures, as a matter of federal law, when state statutes and regulations define substantive entitlements, it does not treat state procedural requirements as property interests in their own right. See *Hewitt v. Helms,* 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983); *Olim v. Wakinekona,* 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); *Sandin v. Conner,* 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).").

In ***Young v. Harper***, 117 S. Ct. 1148, 1150 (1997), a unanimous Court held that Oklahoma's Preparole Conditional Supervision Program, "a program employed by the State of Oklahoma to reduce the overcrowding of its prisons[,] was sufficiently like parole that a person in the program was entitled to the procedural protections set forth in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) before he could be removed from it." *See also* ***Victory v. Pataki***, 814 F.3d 47, 60-62 (2d Cir. 2016) ("Unlike a mere applicant for parole, a New York inmate who has been granted an open parole release date has a legitimate expectancy of release that is grounded in New York's regulatory scheme. We therefore conclude that a New York 'parole grantee has a protectable liberty interest that entitles him to due process in the [Board of Parole's] parole rescission hearings.'. .While Defendants do not dispute that Victory was a parole grantee, they assert that he did not have a protectable liberty interest because New York regulations confer more discretion on the Board of Parole to rescind a prior grant of parole status than did the federal regulations at issue in *Green.* This argument is without merit. . . .Because the Board *must* reinstate a parole grantee's prior release status unless there is substantial evidence of significant new information that forms a basis for rescission, a New York parole grantee possesses a liberty interest protected by the Due Process Clause."); ***Anderson v. Ricore,*** 317 F.3d 194, 200-02 (2d Cir. 2003) ("*Sandin'*s reliance on *Wolff,* which found an important liberty interest in the retention of good time credits, and its earlier citation with approval of *Morrissey*, a parole revocation case, negate any suggestion that *Sandin*'s particularized test should be applied outside the intra-prison disciplinary context. Because Anderson, like the petitioners in *Morrissey* and the plaintiffs in *Tracy*, lived outside the prison, a comparison to the ordinary conditions of prison life is inappropriate.. *Morrissey* itself established that once the State has given an inmate the freedom to live outside an institution, it cannot take that right away without according the inmate procedural due process. . . . [T]he lack of relevance *Sandin* has to work release and similar programs became even more apparent . . . when the Supreme Court decided *Young.* Relying almost exclusively on *Morrissey* and without employing a *Sandin* analysis, the *Young* court held that plaintiff had a liberty interest in Oklahoma's pre-parole program, which is quite similar to New York's work release program. . . Although *Young* had not been decided when New York revoked Anderson's work release status and thus does not enter into the qualified immunity analysis, it graphically demonstrates why defendants acted unreasonably in comparing the apples of revoking a work release program with the oranges of an intra-prison disciplinary transfer."); ***Blair-Bey v. Quick***, 151 F.3d 1036, 1047 n.9 (D.C. Cir. 1998) ("In *Sandin v. Conner* . . . the Supreme Court adjusted the *Hewitt* analysis in considering a prisoner's challenge of his placement in disciplinary segregation. In *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C.Cir.1996), we found that *Sandin* only alters the liberty-interest analysis applicable to claims relating to 'the day-to-day management of prisons,' and that it does not apply to parole-related claims."); ***Lynch v. Hubbard***, 47 F. Supp.2d 125, 128,129 (D. Mass. 1999) ("[T]he Court of Appeals for this circuit has employed the *Sandin* mode of analysis to hold that an inmate does not have a liberty interest in being given an expected, but not mandated, parole hearing, *see Hamm v. Latessa*, 72 F.3d 947, 956 (1st Cir.1995), nor in the loss of work-release privileges. *See Dominique v. Weld*, 73 F.3d 1156, 1161 (1st Cir.1996). It may always have been difficult, but post-*Sandin* it is impossible to conceive how making no change in a prisoner's incarcerated status could deprive him of liberty. His original sentence

deprived him of liberty. . . The revocation of parole and reincarceration also would deprive him of liberty. *See Morrissey v. Brewer*, 408 U.S. 471 (1972). But the interest that a confined prisoner has in the possibility of being released earlier than the expiration of his sentence is of a quality substantially different from the interest a paroled prisoner at liberty has in not being reconfined. . . . A decision to deny parole, where the grant or denial of parole is subject to the broad discretion of the executive, is not a withdrawal of something that the inmate has, but merely of something he hopes to have.").

See also ***Persechini v. Callaway***, 651 F.3d 802, 808 (8th Cir. 2011) ("Persechini's failure to successfully complete the treatment program and, more importantly, the ensuing execution of his fifteen-year sentence were nonetheless consequences 'within the sentence [initially] imposed.' Thus, like a Bureau of Prisons decision to deny a sentence reduction after an inmate successfully completes its drug treatment program, we conclude that program termination did not confer a liberty interest because it 'mean[t] only that [Persechini] will serve the remainder of his original sentence under typical circumstances.' *Richardson v. Joslin*, 501 F.3d 415, 419-20 (5th Cir.2007). The adverse consequences of the Program Review Committee's decision to terminate Persechini from the treatment program, whether considered separately or in the aggregate, were insufficient to confer a liberty interest for due process purposes. Therefore, we need not consider whether the Program Review Committee's procedures were constitutionally adequate.").